IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 9, 2009 Session

ROBIN FARLEY, ET AL. v. OAK RIDGE MEDICAL IMAGING, P.C., ET AL.

Appeal from the Circuit Court for Anderson County
No. A7LA0455 Donald R. Elledge, Judge

No. E2008-01731-COA-R3-CV - Filed August 13, 2009

This is an appeal from a judgment entered on a jury verdict in the amount of $2,780,000[1] in a medical malpractice action based upon a failure to detect and report an abnormality on a mammogram. Robin Farley ("the Patient") and her husband, Dennis Farley ("the Husband"), are the plaintiffs in this action; they are referred to collectively in this opinion as "the Plaintiffs." Dr. James Rouse and his employer, Oak Ridge Medical Imaging, P.C., dba Oak Ridge Breast Center, P.C. ("the Breast Center"), are the defendants, referenced collectively as "the Defendants." The Patient reported to the Breast Center on November 15, 2001, for a mammogram. Dr. Rouse read the mammogram and reported his findings as normal. In 2004, the Patient noticed an indentation in her right breast. Follow-up care revealed stage IV incurable breast cancer. According to the Plaintiffs, the cancer was present in 2001, and was treatable and curable had it been properly detected and reported. The Defendants conceded very little and alleged, as an affirmative defense, that the Patient knew that repeat mammograms were needed but failed to come back until it was too late. The case was tried to a jury over four consecutive days. The jury began deliberations on a Friday and resumed and announced its verdict on the following Monday. It found the Defendants negligent, but apportioned 20% of the fault to the Plaintiffs, apparently based upon the Patient's failure to have a timely follow-up mammogram. The Defendants appeal, raising a host of issues. We affirm.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Andree Sophia Blumstein and Mark Smith, Nashville, Tennessee, and James H. London and Jamie Ballinger Holden, Knoxville, Tennessee, for the appellants, James Rouse, M.D., and Oak Ridge Medical Imaging, P.C.

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[1] The jury found that the total damages were $3,475,000. The lesser figure stated here reflects the 20% reduction for the fault of the Patient.

William D. Vines, III, Ronald C. Koksal and E. Riley Anderson, Knoxville, Tennessee, and Wendall K. Hall, Clinton, Tennessee, for the appellees, Robin Farley and Dennis Farley.

OPINION

I.

The Patient turned 35 in 2001. In that year, she had a routine screening mammogram performed at the Breast Center in Oak Ridge. Dr. Rouse read the films and stated the following "findings" and "impression" in his report, dictated November 16, 2001, for the examination conducted November 15, 2001:

> MAMMOGRAM FINDINGS:
>
> The following views were obtained: bilateral craniocaudal; and bilateral mediolateral oblique
>
> The breasts are heterogeneously dense. This may lower the sensitivity of mammography.
>
> No masses, significant calcifications, or other abnormalities are seen.
>
> IMPRESSION:
>
> Findings are benign-negative. No radiographic abnormality is seen. Films interpreted with R2 comparison.
>
> Follow-up mammogram in 1 year is recommended.

(Capitalization in original.)

The Patient acknowledged at trial that she received a copy of Dr. Rouse's report through the mail. Apparently, this was sent to her by her Chattanooga OB/GYN approximately two weeks after the mammogram was done. She stated that she did not have the follow-up because she knew annual mammograms were not recommended for persons in her age group. The Defendants contend that they sent the Patient additional notices to have a follow-up mammogram in the form of one letter dated November 16, 2001, and three letters in 2002, dated November 5, November 20 and December 9. The 2001 letter advised that not all breast cancer is detected by mammogram and other screening was recommended, including follow-up in one year. The 2002 letters are all accurately described as reminders. By affidavit, the Patient denied receiving the 2002 letters and the Plaintiffs moved in limine to exclude any proof related to the letters. The trial court excluded any "testimony concerning correspondence allegedly sent to Robin Farley by Oak Ridge Breast Center." The basis for the court's ruling was not explicitly stated, but the motion was based on the proposition that the Defendants could not show that the letters were actually mailed.

In early 2004, the Patient noticed an indentation in her right breast during a routine self-examination, as well as some pain in the movement of her right arm. She made an appointment with her obstetrician/gynecologist in May 2004, and reported for a mammogram on June 1, 2004. She was diagnosed with a malignancy. It was later determined that the malignancy had spread to her liver. By the time of the trial, the cancer was described as incurable and terminal.

Between the time of the diagnosis in 2004 and the trial, the Patient had been treated with hormone therapy and chemotherapy. She testified to experiencing serious sickness including nausea, loss of energy, and hair loss. Rather than weight loss, she experienced weight gain to the time of trial. Reasonable and necessary medical expenses through trial were $64,426.96. The treating oncologist, Dr. Susan Huntsinger, estimated the Patient's life span after trial to be approximately one year, with an additional $50,000 to $100,000 in expenses. According to the medical proof, the Patient will need additional chemotherapy with resultant toxicity and loss of appetite. She will eventually weaken to the point of needing hospice care and will likely expire in a comatose state. Given the difference between her predicted life span, and statistical life tables, the Plaintiffs' economist estimated probable lost earning capacity at $1,141,479.

Dr. Rouse maintained that his actions met the applicable standard of care in all respects. In retrospect, however, he conceded at trial that the 2001 films contain a cluster of calcifications that he would now describe as suspicious. Again in retrospect, he would describe the films as highly suspicious for malignancy. In 2001, Dr. Rouse was utilizing a device called an "R2" checker, which is a computer device that flags suspicious areas on films with a red triangle. The R2 checker would probably have marked the cluster on Robin Farley's film. Dr. Rouse either didn't see the cluster, even with the marker, or didn't think it "had progressed to the point where it needed immediate attention."

Given that the appeal challenges the qualifications of the Plaintiffs' three medical experts, as well as a limitation imposed by the court upon one of the Defendants' experts, we will provide an introduction and an overview of the subject matter addressed by the various experts. The Defendants objected both at trial and in limine to the competence and qualifications of all three of the Plaintiffs' medical experts.

Dr. Gilda Cardenosa was a standard of care expert who testified on behalf of the Plaintiffs at trial. She specializes in mammography and has contributed to three textbooks that are widely used in teaching medical residents. Her curriculum vitae ("CV") was introduced as an exhibit. In 2001 and at the time of trial, she was licensed to practice in the state of North Carolina. She claimed familiarity with the standard of care in Reidville, North Carolina. She testified that Reidville is a similar community to Oak Ridge.

Dr. Cardenosa reviewed the 2001 mammography and the 2004 films. Dr. Cardenosa saw on the 2001 films a "cluster of calcifications . . . requiring additional evaluation." They were the earliest signs of breast cancer. According to Dr. Cardenosa, the calcifications were obvious and easily seen. According to her, had they been detected and reported, the Patient's chances of recovery would have been 90%. By 2004, with the spread of the cancer to the liver, the Patient's chances were about 5%. Thus, Dr. Cardenosa testified that Dr. Rouse fell below the applicable

standard of care in reporting no abnormality and no significant calcifications. Conversely, it was not within the standard of care to have a person of the Patient's age report back for an annual mammogram following films read as being within normal range.

Dr. Henry J Krebs, III, also testified for the Plaintiffs as a standard of care expert. His CV was not introduced as an exhibit and he did not explicitly state where he was practicing in 2001. He did testify that, in 2001, Duluth, Dublin and Decatur Georgia were similar in characteristics to Oak Ridge. Upon review of the 2001 films, Dr. Krebs saw a cluster of linear calcifications such as "typically occur in early cancers." It fell below the standard of care, according to Dr. Krebs, for Dr. Rouse to fail to report the calcifications as requiring further work-up and evaluation. At the time of the 2001 films, Dr. Krebs placed Robin Farley's chances of survival at greater than 50%.

The Plaintiffs' third medical expert, Dr. Harry H. Bear, was identified in pre-trial disclosures as both a standard of care and causation expert. In his deposition taken by the Defendants, however, Dr. Bear admitted not knowing the standard of care for radiologists. Therefore, in the video deposition taken by the Plaintiffs, they did not seek to elicit standard of care testimony. His CV was published to the jury as evidence in the case. As of the time of the November 2001 mammogram read by Dr. Rouse, Dr. Bear stated there was an abnormality present that was "either a Stage 0 or 1 breast cancer." According to Dr. Bear, "[h]er odds of being cured, depending on whether she was a Stage 0 or Stage 1, [were] approximately 90 percent." By June 2004, with the spread of the cancer to her liver, Robin Farley had stage 4 breast cancer. Her chances of survival, according to expert Bear, were "Zero." The Defendants cross-examined Dr. Bear at length concerning his reading of the 2001 films, and permitted those portions of his video to be played before the jury.

The Defendants' proof consisted of their cross-examination of witnesses called by the Plaintiffs, including the defendant Dr. Rouse, and their own direct examination of two local standard of care experts. Dr. Westerfield is a board certified radiologist, who was "semi-retired" at the time of trial. He practiced approximately 30 years at the Holston Valley Medical Center in the Kingsport area of Sullivan County. Dr. Westerfield and his group opened the first breast center in Tennessee. Dr. Westerfield testified without objection that Sullivan County and Anderson County are similar communities. Dr. Westerfield testified that he was familiar with the standard of care in Sullivan County. Dr. Westerfield described any calcification as diffuse, and testified there was nothing in the 2001 mammogram indicative of cancer. It was Dr. Westerfield's opinion that Dr. Rouse not only met, but exceeded, the standard of care when he suggested the annual follow-up.

Dr. John Niethammer, a board certified radiologist with an active practice in Blount County, also testified for the Defendants. He was accepted as a qualified expert without objection. Dr. Niethammer agreed there were calcifications in the right breast shown by the 2001 films. However, Dr. Niethammer testified that, even now knowing that the Patient had cancer in her right breast in 2004, the 2001 films were not suspicious for cancer.

The Defendants identified an additional witness, Dr. Stone Mitchell, whom they chose not to call as a witness at trial. Dr. Mitchell was described in the Defendants' disclosures as a

surgeon practicing in Oak Ridge with "extensive experience with the surgical treatment of breast cancer." The summary of his anticipated testimony, according to pre-trial disclosures, was as follows:

> Based upon his review of pertinent case materials, along with his education and professional experience, Dr. Mitchell is expected to testify, at trial, that Robin Farley's November 2001 baseline mammogram appeared normal and that the standard of care did not require that she undergo a biopsy or further evaluation of her right breast at that time. Dr. Mitchell is further expected to testify that no doctor could determine, within a reasonable degree of medical certainty, when Mrs. Farley's breast cancer began and the rate at which it had grown until her diagnosis. Accordingly, Dr. Mitchell will testify that no doctor can determine, within a reasonable degree of medical certainty, when and whether intervention could have changed Mrs. Farley's outcome.

In a discovery deposition taken by the Plaintiffs, Dr. Mitchell admitted that he was not a radiologist and was not qualified to testify as to the standard of care for radiologists. Nevertheless, Dr. Mitchell testified that he was qualified to interpret mammograms and would be testifying, if allowed, as to what he saw on the 2001 and 2004 films. It is Dr. Mitchell's practice, in fact, to do his own reading of a patient's films. Based on his reading of the 2001 films, Dr. Mitchell testified that they were normal films with no cluster of calcifications. It was Dr. Mitchell's opinion that nothing Dr. Rouse did or failed to do caused any harm to the Patient. Even if the Patient had been sent to Dr. Mitchell for follow-up in 2001, he would not have done a biopsy.

The Plaintiffs moved to exclude Dr. Mitchell's testimony on the ground that the Defendants were trying to "backdoor" standard of care testimony which the doctor had admitted he was not qualified to give. The Defendants responded that as a surgeon that treated most of the breast cancers in Anderson County, Dr. Mitchell was qualified to read the films and that his testimony was critical to the defense.

The trial court's disposition was by bench ruling without a written order. Before trial, the court ruled that Dr. Mitchell could not testify. The court viewed Dr. Mitchell's testimony as "back door . . . testimony as to whether or not Dr. Rouse read this mammogram correctly . . . ." Accordingly, the court ruled that Dr. Mitchell could not testify. The ruling was revisited numerous times as the case progressed through trial. The court's ultimate ruling was that Dr. Mitchell could not testify as to his interpretation of what he saw on the films, but could be asked "exactly the same line of questions" that were asked of Dr. Bear. In light of the limitations imposed, the Defendants did not call Dr. Mitchell at trial. Instead, the Defendants made an offer of proof that included the discovery deposition taken by the Plaintiffs and the following statement attributed to Dr. Mitchell:

> He has described the team approach to treating cancer patients such as we have heard from Dr. Dudrick here today, and other experts called on behalf of the plaintiffs, that the radiologist initially diagnosis [sic] through the mammogram technique that there may be a problem with the breast,

> and that Dr. Mitchell, as the surgeon, takes a look at the mammograms, takes a look at all the medical records, may even talk to the radiologist and decide whether or not to proceed with a biopsy or surgery for the breast cancer.

After the jury's verdict was reduced to judgment, the Defendants filed a timely motion for new trial in which they presented all the issues now raised on this appeal. The Defendants strenuously argued that it was error to exclude the "reminder" letters. The Defendants argued that the letters were especially important as shown by the fact the jury had asked during its deliberations whether the Patient had received any such reminders. The trial court's transcript of the hearing on the motion for new trial is the only indication in the record as to the trial court's rationale for excluding testimony about the letters. First, the court observed that the letters only existed by way of recreations from a computer file rather than a signed hard copy of the purported correspondence. Further, there was no testimony under oath to establish that the images on a computer file were mailed. Specifically, the court stated:

> I found then and I find today that there cannot be proof produced – any competent evidence to meet the legal standard required to prove that there actually were any of these four letters mailed to [the Patient]. [The Patient] denies receiving them. The only thing she received – and she admitted it to the jury and she admitted she decided not to follow it up – was when she got the report [dated November 15, 2001, but dictated the 16th of that month], and she testified . . . she got that [report] from her own doctor, not Dr. Rouse.

An additional argument for a new trial was made on the basis of statements volunteered by a potential juror, Ms. Yarborough, during voir dire. In response to what the Defendants describe as "pretty standard questions," the juror responded, "They, [*i.e.*, the Breast Center], read mine kind of wrong one time, so I'm prejudiced right now for [the Plaintiffs]." Ms. Yarborough was quickly excused. The Defendants moved for a mistrial. The trial court denied the motion. The remaining jurors responded to questions from counsel and the court as to whether each prospective juror could ignore Ms. Yarborough's statement and remain fair and impartial. After argument of counsel and a lengthy discussion in the hearing on the motion for new trial, the court stated:

> I think that I can't ignore the sworn testimony of the jurors who acknowledged - well, I'll read exactly what I said - "If you heard any statement that would cause you in any way to feel that you could not be fair and impartial to either side, I need you to raise your hand right now," and no one raised their hand. . . . We have to assume the jurors testified truthfully under oath . . . . So I will deny that motion.

The trial court denied the motion for new trial in its entirety. This appeal followed.

II.

The issues as stated by the Defendants, and taken verbatim from their brief, are:

> Whether the trial court clearly erred in allowing Plaintiffs' medical expert witnesses to testify in this medial malpractice action, even though none of them satisfied the locality rule or the licensure rule as required by Tenn. Code Ann. § 29-26-115?
>
> Whether the trial court clearly erred in not declaring a mistrial after a prospective juror had irremediably tainted the entire jury pool during voir dire by asserting as true that one of the Defendants had committed the same negligence in her case as was claimed by Plaintiffs in this case?
>
> Whether the trial court abused its discretion in excluding four notices sent by Defendant to Plaintiff informing her of the need for follow-up breast cancer screening when Plaintiff's own choice not to seek follow-up screening was material to the issues of Defendants' alleged negligence and Plaintiffs' comparative fault?
>
> Whether the trial court abused its discretion in excluding the testimony of Defendants' medical expert on the issue of causation, even though it allowed Plaintiffs' similarly situated expert to testify, thereby precluding Defendants from presenting a complete defense?
>
> Whether, even if none of the above grounds were alone sufficient to warrant a new trail, the combination or cumulative effect of the errors warrants a new trial?
>
> Whether, as an alternative to a new trial, a suggestion of remittitur is warranted to ameliorate the jury's award, which is excessive in light of the evidence and which was the result of passion, prejudice, or caprice on the part of the jury?

III.

A.

We begin with the battle of the experts that continues into this appeal. The Defendants argue that none of the Plaintiffs' medical experts should have been allowed to testify, but that their expert, Dr. Stone Mitchell, should have been allowed to testify. The Plaintiffs argue that defense expert Mitchell was not qualified to give the testimony he proposed to give, but that all of the Plaintiffs' experts were qualified. The various arguments cover so much ground and are built upon so many layers of propositions that the only way we can make sense of it all is to, first, outline the various arguments made; second, examine the applicable standard of review and the law that has developed as to that issue; and, finally, process each argument according to the facts and law applicable to this case.

The Defendants challenge the qualifications of the Plaintiffs' experts, Cardenosa, Krebs and Bear. They argue that each expert is a "big city" doctor, none of whom established "the

requisite personal knowledge of the standard of care in Oak Ridge or in a similar community." An integral part of the Defendants' disqualification argument is that "[d]erivative knowledge is not enough; the statute demands personal, first-hand knowledge, based on the expert's practicing in the community or a similar community." (Underlining in original.) They *cite* ***Eckler v. Allen***, 231 S.W.3d 379, 386-87 (Tenn. Ct. App. 2006)).

As to Dr. Cardenosa, the Defendants say that reading mammograms "from [not in] Reidsville," North Carolina, which was her comparable or similar community, could not possibly have given her personal knowledge of the standard of care in Reidsville. The Defendants contend that a doctor sitting in Dr. Cardenosa's office in Greensboro would continue on with the Greensboro standard of care rather than consciously switching to the Reidsville standard for Reidsville films. The Defendants also argue that Dr. Cardenosa testified to a "national standard of care" and that is the only substance undergirding her expert testimony. The Plaintiffs argue that the Defendants are trying to split hairs and that, in addition to reading films from Reidsville, Dr. Cardenosa's testimony establishes a practice in Reidsville by testimony that "her partners rotated through there and her group covered the mammography in Reidsville." In their reply, the Defendants counter that having partners rotate through a town does not establish personal knowledge.

As to Dr. Krebs, the Defendants argue he practices in the "big" city of Atlanta , Georgia, rather than a community shown to be similar to Oak Ridge. It is the Defendants' position that without testimony he practiced in the alleged similar communities of Duluth, Decatur and Dublin, Georgia, Dr. Krebs did not and could not establish the similarity required to testify. Dr. Krebs acknowledged the existence of a national standard of care, which the defendants contend is the only basis for his standard of care testimony when the conclusory statements about the other communities are stripped away. The Plaintiffs counter that an expert need not have actually practiced in the community to have the knowledge needed to testify and that Dr. Krebs demonstrated his knowledge on the stand.

Dr. Bear, is challenged by the Defendants for his admitted lack of familiarity with the standard of care for a radiologist. The Plaintiffs argue that they elicited only causation testimony from Dr. Bear and no standard of care testimony. The Plaintiffs further argue that the standard of care testimony came on cross-examination and is of the Defendants' own making. Additionally, the Plaintiffs argue that notwithstanding dicta in the cases, a causation expert need not establish familiarity with the standard of care. The Defendants counter that the substance of his testimony shows that Dr. Bear read the 2001 films and based his opinions on that reading. Further, the Defendants argue that testimony about a "missed diagnosis" and an "abnormality" that was "overlooked" and the like is camouflaged standard of care testimony. The Defendants argue also that even causation experts must establish familiarity with the standard of care in the same or similar community to be qualified to testify on causation.

Interestingly, the Defendants continue to maintain that Dr. Stone Mitchell, who admitted not being familiar with the standard of care, should nevertheless have been allowed to give causation testimony, including that he read the 2001 films and saw no abnormality. The Defendants argue this was pure causation testimony which was vital to their case. The argument is that Dr. Mitchell always reads the films, not as a radiologist, but as a surgeon who is the

"quarterback" of the treatment team, and that, in the absence of seeing an abnormality, Dr. Mitchell could not and would not have done even a biopsy, much less treatment.

The final layer of argument is that none of the Plaintiffs' "big" city doctors put proof before the jury that they were practicing in a state contiguous to Tennessee in the year preceding the November 2001 report. The Plaintiffs counter that the CV of both Dr. Bear and Dr. Cardenosa were introduced as evidence and that the CVs establish practice in a contiguous state in the relevant time frame. As to Dr. Krebs, the Plaintiffs argue that "Defendants' counsel acknowledged on the record that Dr. Krebs was practicing in Decatur, Georgia in 2001" and, citing multiple pages in the transcript, "[t]he substance of his entire testimony was that he was licensed and practiced radiology in both Duluth and Decatur, Georgia during the relevant time period." The Defendants reply that nothing in the cited references support the argument and that the CVs show only snapshots at certain dates which leave open the possibility that the experts left the practice for a time. *See* ***Kenyon v. Handal***, 122 S.W.3d 743, 761 (Tenn. Ct. App. 2003).

B.

A trial court is assigned the task of determining the qualifications and competency of experts to testify by Tenn. R. Evid. 104(b) ("Preliminary questions concerning the qualification of a person to be a witness ... or the admissibility of evidence shall be determined by the court . . . ."). Stated a little differently, "[q]uestions regarding the qualifications, admissibility, relevancy, and competency of expert testimony are matters left within the broad discretion of the trial court." ***State v. Stevens***, 78 S.W.3d 817, 832 (Tenn. 2002). We are directed to find an abuse of discretion when it appears that the trial court applied an incorrect legal standard, or reached a decision that is against logic or reasoning that caused an injustice to the party complaining. ***Eldridge v. Eldridge,*** 42 S.W.3d 82, 85 (Tenn. 2001).

C.

1.

The beginning point for the legal standards of a medical expert's qualifications is Tenn. Code Ann. § 29-26-115, which states in relevant part:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided in subsection (b):
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the [defendant] practices or in a similar community at the time the alleged injury or wrongful action occurred;
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.
> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established

> by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or speciality which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or speciality in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred.

Tenn. Code Ann. § 29-26-115 (2000).

It is abundantly clear that the three elements listed in subsection (a) of the statute must be proven by the testimony of a qualified expert. ***Williams v. Baptist Memorial Hosp***., 193 S.W.3d 545, 553 (Tenn. 2006). It is also clear that an expert on causation must satisfy the contiguous state requirement. ***Payne v. Caldwell***, 796 S.W.2d 142, 143 (Tenn. 1990). The points of contention in this case – which are initially less than clear – are, (1) whether, and if so, the extent to which the medical expert's knowledge of the matters set out in subdivision (a) (1) must be "personal" knowledge , (2) whether an expert licensed in a contiguous state in the relevant time frame must also know the standard of care in a comparable community in order to qualify as a causation expert, and (3) the extent to which the contiguous state requirement can be established to the trial judge's satisfaction through material not admitted or admissible into evidence.[2] Only after answering these questions can we analyze the trial court's handling of the various experts at issue in this appeal.

2.

As previously mentioned, the Defendants rely on ***Eckler***, 231 S.W.3d at 386 for the proposition that the expert claiming familiarity with the standard of care in a similar community must demonstrate that familiarity through personal knowledge. The Plaintiffs do not directly challenge ***Eckler*** as authority, but argue that "some knowledge" is all that is needed and cite the following cases as demonstrative of "the type of testimony required to demonstrate the familiarity in a similar community required by the locality rule": ***Taylor v. Jackson-Madison County General Hospital Dist***., 231 S.W.3d 361 (Tenn. Ct. App. 2006); ***Bravo v. Sumner Regional Health Systems***, Inc. 148 S.W.3d 357 (Tenn. Ct. App. 2003); **Stovall v. Clarke**, 113 S.W.3d 715, 719 (Tenn. 2003); ***Wilson v. Patterson***, 73 S.W.3d 95 (Tenn. Ct. App. 2001); ***Ledford v. Moskowitz***, 742 S.W.2d 645 (Tenn. Ct. App. 1987). It would appear that the parties put us into the realm of the "tedious exercise of hair-splitting" to see how the testimony in the present case compares to the testimony of doctors that have been found qualified and disqualified in the various cases cited. *See* ***Carpenter v. Klepper***, 205 S.W.3d 474, 484 (Tenn. Ct. App. 2006).

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2 The Plaintiffs submitted, pursuant to an announcement at oral argument, a citation to supplemental authority stating that the qualifications of their experts were proven to the court through the Plaintiffs' memorandum of law in opposition to the Defendants' motions in limine, and the sworn testimony attached thereto. The Defendants' objected to the citation on the grounds, among others, that such material could not be considered because it was not admitted into evidence at trial. Since all of the material is in the record, we will address the arguments on the merits in due course.

In ***Eckler***, Dr. Huang attempted to qualify himself by surveying physicians who practiced the defendant's specialty in the defendant's home community of Memphis. 231 S.W.3d at 386. His ultimate goal was to establish the standard of care for Memphis, and to testify that the defendant doctor fell below that standard. The ***Eckler*** court phrased the particular issue as "whether knowledge obtained by surveying physicians who practice in the specialized field in the defendant's community is sufficient under the statute, or whether the statute demands personal, firsthand knowledge." ***Id***. The court held that since Dr. Huang did not establish personal, firsthand knowledge of the standard of care in Memphis, nor that Memphis was similar to a community about which he had personal knowledge, he was not qualified to testify. ***Id***. at 387.

We do not believe ***Eckler*** went so far as to hold that the bridge of similarity from the community where the expert practices to the community where the defendant doctor practices, must all be built on personal, firsthand knowledge. There is just too much authority to the contrary that was not even discussed in ***Eckler***. For example, in ***Taylor***, 231 S.W.2d at 361, Dr. Harkrider testified for the plaintiffs only by deposition. He gave the expected responses to questions from plaintiffs' counsel to the effect that the defendant deviated from the standard of care. Dr, Harkrider practiced emergency medicine in Dunwoody Medical Center in Atlanta, Georgia and at Northeast Georgia Medical Center located in Gainesville, Georgia, about 40 miles away from Atlanta. On cross examination, he admitted that he knew nothing about Jackson, Tennessee, the community where the alleged malpractice happened. Dr. Harkrider testified simply that he would expect the skill level in Jackson to be the same "that I would see here at Dunwoody Medical Center, at Northeast Georgia Medical Center." The trial court, however, allowed counsel to rehabilitate Dr. Harkrider through an exhibit that set forth a demographic and medical resource comparison of Gainesville and Jackson. ***Id.*** at 369. The information in the exhibit came from sources such as the phone books for the respective communities, the chambers of commerce for the communities, and information available from or concerning the hospitals in the respective communities. ***Id***. at 368. Dr. Harkrider was found to be qualified.

Similarly, in ***Bravo***, 148 S.W.3d at 357, the challenged expert, Dr. Engel, was licensed to practice in Georgia, but not in Tennessee. Dr. Engel had left behind the obstetrics part of his practice in 1993 to focus on gynecology. ***Id***. at 360. The alleged obstetrics malpractice occurred in 2000. ***Id.*** The trial court granted summary judgment on the basis that having left the practice of obstetrics in 1993, Dr. Engel was not qualified to testify about the standard of care for an obstetrician in 2000. This court reversed holding that Dr. Engel was both competent to testify and qualified. The proof that qualified the Georgia doctor under the "locality rule" was as follows:

> First, Dr. Engel sets forth statistical information about Gallatin and compares Gallatin to Rome and Columbus, Georgia, and describes information indicating that those communities are similar to Gallatin. He then sets out the basis for his familiarity with the standard of care in those communities, stating that he receives gynecological and fertility referrals from physicians in those communities, that he has reviewed medical records from hospitals from those communities, and that he has attended

> seminars and conferences that have familiarized him with the applicable standard of care in those communities.

Id. at 369. Notably, none of these sources were first hand information.

In ***Stovall***, 113 S.W.3d at 715, the Supreme Court considered the question of whether Dr. Urhig, an internal medicine specialist in Missouri, was qualified to testify about the standard of care in Franklin, Tennessee, the community of the alleged malpractice. The Court held that he was. ***Id.*** at 723. Dr. Urhig testified that Franklin was similar to Marshall, Missouri, based on his review of demographic information for Franklin and the medical facilities in and around Franklin. Further, he had reviewed "over 20 charts from the state of Tennessee in order to render an opinion as to whether or not malpractice had occurred" and had testified in 3 Tennessee cases. ***Id.*** at 719. Based on all this information, Dr. Urhig testified that the standard of care "would be exactly the same in all 50 states, possibly with the exception of some very primitive areas." ***Id.*** Nevertheless, Dr. Urhig stated that he applied the local standard and not a blanket national standard. ***Id.*** at 723. The disclaimer of reliance on a national standard and "some underlying basis for his testimony" of familiarity with the Franklin standard was enough to distinguish Dr. Urhig from the doctor in ***Robinson v LeCorps***, 83 S.W.3d 718, 725 (Tenn. 2002), who failed to relate the reasons why the community where he practiced was similar to the community of the alleged malpractice and the national community.

In ***Wilson***, 73 S.W.3d at 105 (Tenn. Ct. App. 2001), "meager" testimony of similarities between Lexington, Kentucky, where the expert claimed to practice, and Memphis, where the alleged malpractice occurred, plus familiarity with the Memphis standard of care based on involvement in cases as an expert, were enough to qualify the expert.

In ***Ledford***, 742 S.W.2d at 645, a neurologist with a practice in Atlanta was allowed to testify against a psychiatrist with a practice in Cleveland, Tennessee. ***Id.*** at 646-47. The link between the Atlanta practice and the Cleveland community was "familiarity with the standard of care in small towns all over Georgia" from accepting referrals and interacting with the referring doctors. ***Id.*** at 648. The neurologist also claimed familiarity "with the standard of care in . . . Cleveland in a broad sense," from seeing patient records, though he had never been to Cleveland. ***Id.*** This was enough to create a "material issue of fact on the standard of acceptable psychiatric practice in similar communities to" the defendant's community. ***Id.*** at 649.

Finally, we consider ***Travis v. Ferraraccio***, No. M2003-00916-COA-R3-CV, 2005 WL 2277589 (Tenn. Ct. App., filed Sept. 19, 2005). The challenged expert was Dr. Abrams, a neurologist with a practice in Kansas City Missouri. ***Id.*** at *9. The community of the alleged malpractice was Clarksville, Tennessee. ***Id.*** In his deposition, Dr. Abram could not identify a community in Missouri similar to Clarksville, but said that his opinion was based upon "a national minimum standard." ***Id.*** Later, Dr. Abram supplied an affidavit that identified St. Joseph, Missouri, as a community similar to Clarksville. His familiarity with the St. Joseph standard was "because of the many patient referrals he had received from St. Joseph and his attendance at meetings and seminars where he discussed the practice of medicine in St. Joseph with physicians from there." ***Id.*** at *12. This was enough to "connect the dots" between the two standards.

Based on the above review, we conclude that the holding in ***Eckler*** cannot be extrapolated to require that an expert's comparison of a standard of care in a community in a contiguous state to a standard of care in the community of the alleged malpractice be made solely on the basis of personal knowledge. If the expert is otherwise qualified, it is enough if he or she is actually practicing in some community in a contiguous state, and "connects the dots" between the standard in that community and the community where the alleged malpractice occurred. The fact that the dots must traverse from the community of practice through the similar community to the community of the alleged malpractice, such as from Kansas City, Missouri, through St. Joseph, Missouri, to Clarksville, Tennessee, will not defeat the connection. Referrals from and interaction with medical providers in neighboring communities, combined with "a comparison of information such as the size, location, and presence [or absence] of teaching hospitals in the two communities" should suffice. *See* ***Travis***, 2005 WL 2277589 at *11 (*citing* ***Roberts v. Bicknell***, 73 S.W.3d 106, 114 (Tenn. Ct. App. 2001)).

Under these guidelines, we hold that Dr. Cardenosa was qualified notwithstanding her arguably tenuous connection to the similar community of Reidsville. Though her practice is apparently based in Greensboro, she reads mammograms from Reidsville. This is analogous to accepting referrals from a community. The Plaintiffs argue Dr. Cardenosa's testimony that her group "covers" the mammography in Reidsville shows that she practices there. We are more inclined to read her testimony the way the Defendants suggest, *i.e.*, her partners do most or all of the "covering", but we are inclined to believe that being involved in a practice with doctors that actually perform services is just as likely to impart information as attending seminars and accepting referrals and staying up through literature. Also, Dr. Cardenosa testified to factors that she used in comparing the communities of Reidsville and Oak Ridge and Greensboro. She looked at similar populations, proximity of each to a larger city (Knoxville and Greensboro), and proximity to a teaching hospital. She also testified to similarity of equipment used in the communities and medical guidelines followed in each community. Dr. Cardenosa was asked to elaborate more on the factors that determine the standard of care in a given community, but the Defendants objected and counsel moved to a new line of questions. The fact that Dr. Cardenosa also expressed belief in a national standard did not defeat her qualification since she also acknowledged adherence to the "community" standard. *See* ***Stovall***, 113 S.W.3d at 723. She did not end her testimony with vague conclusory statements, but proceeded to connect the dots. Accordingly, we find no error in the trial court's ruling that Dr. Cardenosa established knowledge of the standard of care in a similar community sufficient to testify.

Dr. Krebs is a closer call, but we believe he also established familiarity with the standard of care in communities similar to Oak Ridge. Dr. Krebs' practice is centered in Atlanta but includes "some of the smaller towns surrounding Atlanta." Dr. Krebs testified of familiarity with the standard of care in Duluth, Dublin, and Decatur Georgia. Dr. Krebs testified that he has read mammograms from Duluth. As to Dublin, Dr. Krebs testified that he has privileges in the hospital in the town of 17,000. Dr. Krebs testified that he "formally practice[s]" in Decatur, a town of 25,000. Based on comparison of various factors including, community size, medical facilities, medical specialities, literature and training available, and annual inspections, he testified that, in 2001, the communities of Duluth, Dublin and Decatur were "very similar' to

Oak Ridge. We hold that notwithstanding his mention of a national standard, this testimony was enough to establish familiarity with the standard of care in a similar community.

3.

We move now to the question of whether a medical causation expert must also establish familiarity with the standard a care to be qualified. The Defendants rely on ***Payne v. Caldwell***, 796 S.W.2d 142 (Tenn. 1990), for the proposition that a causation expert must establish familiarity with the standard of care. The actual holding in ***Payne*** was that "the element of proximate cause is included [in Tenn. Code Ann. § 29-26-115(a)] and witnesses, to be competent to testify on the issue, must meet the licensing and geographical requirements of [Tenn. Code Ann. § 29-26-115 (b)]." ***Payne***, 796 S.W.2d at 143. It is not the holding that the Defendants rely on, but rather language used by the court in rejecting the policy argument that it did not make logical sense to require a causation expert to be from a contiguous state. "[W]e see nothing unusual or illogical in the inclusion of all three elements in the limitations on competency of witnesses set forth in Section (b). The proof of each element in a medical malpractice action is so entwined that it is difficult, if not impossible, for a witness to testify on the issue of causation without commenting, either expressly or tacitly, on the standard of care or whether or not it was breached."

Fortunately, we are not the first panel to have considered the impact of ***Payne*** on a "causation only" expert. In ***Russell v. Pakkala***, No. 02A01-9703-CV-00053, 1998 WL 10212 (Tenn. Ct. App., filed Jan 14, 1998), the testimony of Dr. Raymond Hawkins was at issue. This Court quoted the language from ***Payne*** that the Defendants rely on but noted, "[t]he Court's holding, however, was limited to requiring witnesses testifying on causation to meet the requirements of Section (b) [of the statute]." ***Russell,*** 1998 WL 10212 at n.1. The ***Russell*** court's analysis was as follows'

> However, under Tennessee Code Annotated § 29-26-115 (a)(3), there is no requirement that the medical expert be familiar with the standard for acceptable medical practice in the relevant community in order to testify as to causation. Regarding causation, the statute states:
>
> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> * * *
>
> (3) as a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.
>
> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a) unless he was licensed to practice in the state or a contiguous bordering state a

> profession or speciality which would make his expert testimony relevant to the issues in the case and had practiced
> this profession or speciality in one of these states during the year preceding the date that the alleged injury or wrongful act occurred.
> Tenn. Code Ann. § 29-26-115(a)(3) and (b) (1980 & Supp. 1997).
>
> The medical expert "must meet the licensing and geographic requirements of Section (b)" in order to be competent to testify as to causation. ***Payne v. Caldwell***, 796 S.W.2d 142, 143 (Tenn. 1990). Dr. Hawkins testified that he was licensed to practice medicine in Tennessee and that he had practiced in Tennessee as a general surgeon for over twenty years. Thus, under the statute he was competent to testify to establish causation under subsection (a)(3), but not negligence under subsections (a)(1) and (2).

Id. at 5. We agree completely with the approach taken in ***Russell***. The quoted language from ***Payne*** concerning the "entwined" nature of causation and standard of care testimony is true enough, but should not be read to impose requirements not imposed by the language of the statute. This is especially true given that ***Payne*** based its holding on the "clarity" of the statute. 796 S.W.2d at 143. We hold that a causation expert who does not testify on the standard of care is not required to establish familiarity with the standard of care.

4.

a.

Before moving to the question of whether the Plaintiffs' experts met the licensing and geographical requirements, we will deal with the question of whether Dr. Bear crossed the line into standard of care testimony and the somewhat related question of whether the trial court was in error in holding that the Defendants' expert, Dr. Mitchell, could not comment on his reading of the mammograms. Both Dr. Bear and Dr. Mitchell admitted that they did know the standard of care for radiologists, and, therefore, disqualified themselves as standard of care experts.

As the Plaintiffs point out, Dr. Bear's testimony came before the jury by way of a video deposition. The only testimony that explicitly told the jury Dr. Bear reviewed and interpreted the actual 2001 films came in through the Defendants' cross-examination of Dr. Bear. In the transcript of Dr. Bear's testimony, marked as Exhibit 18 for identification, pages 43 though 47 were filled with defense questions to Dr. Bear about reading mammograms including the Patient's 2001 mammogram. While the Defendants tried to exclude Dr. Bear's testimony in its entirety, there is no indication that after the trial court refused to exclude Dr. Bear, the Defendants tried to minimize the damage. It appears that the Defendants made a conscious, strategic decision to allow their cross-examination to play in its entirety. Even though the trial resulted in a verdict against the Defendants, we cannot, in hindsight, say that decision was a bad one. But, we will not now second guess that decision and grant relief based on some alleged error that resulted from the Defendants' questions. *See* Tenn. R. App. P 36 (a).

If we are to grant relief, it must be based on error that the Plaintiffs created rather than the Defendants. Accordingly, focusing on the testimony that is said to cross the line into standard of care, we will look to the testimony of Dr. Bear elicited on direct by the Plaintiffs' counsel.

> Q And have you actually reviewed the medical information regarding Robin Farley?
>
> A Yes, I have.
>
> * * *
>
> Q The medical records that you have seen regarding Robin Farley, do those include the records . . . of all the physicians there in Tennessee that have treated her, Dr. Huntsinger, Dudrick, and others?
>
> A Yes.
>
> Q As well as Dr. Brown, who was her regular obstetrician/gynecologist?
>
> A Yes. I reviewed all their records.
>
> Q And have you also seen the mammogram report done by the various physicians, the one in 2004 and the one in 2001, the report of the radiologist?
>
> A Yes, I have.
>
> Q Have you read the deposition of Dr. Rouse, who was the doctor at the breast center down there in Oak Ridge, Tennessee?
>
> A I did.
>
> Q Did you read the deposition of Dr. Cardenosa, a radiologist here?
>
> A Yes, I did.
>
> * * *
>
> Q Okay. Now, let me ask you to go straight to Robin Farley. Based upon the medical information that you have reviewed and your own expertise in this area, did Robin Farley have a tumor on November 15, 2001, when she underwent a screening mammogram . . . at the breast center in Oak Ridge, Tennessee.
>
> Ms. Jones: I'm going to object to leading.
>
> By Mr. Vines:

Q Doctor, what, if any, condition did Robin Farley have when she was at the breast center and got a screening mammogram in 2001?

A She had an abnormality that almost certainly represented a cancer in its early stage.

* * *

Q What, at that time, was the stage of the tumor that she had? Or how would you describe it as a doctor?

A . . . [B]ased on the appearance and the absence of a palpable mass on clinical examination she was either a Stage 0 or 1 breast cancer.

Q Okay. And if you'll take the other pen so we can read it very well and tell us . . . in November of '01, at the time of that mammogram, what was her percentage chance of being cured of that cancer?

A Her odds of being cured, depending on whether she was Stage 0 or Stage 1, was approximately 90 percent.

* * *

Q What did she, in June of 2004, what did she have?

A So she had, based on the presence of spread of her cancer to the liver, had what we classify as Stage 4 breast cancer.

* * *

Q . . . [I]n 2004, what . . . was her chance of survival?

A Zero.

* * *

Q . . . Now is there anything in that [2001] mammogram report that would show any suspicious activity for the possibility of cancer?

A No. The impression on this mammogram is that it is benign/negative and also adds that "no radiographic abnormality is seen," which would be what we would call "stone cold normal."

The Defendants attempt to make much of the fact that Dr. Bear was initially disclosed as a standard of care witness, and that he did actually review the 2001 films. Similarly, the

Defendants have taken the liberty of quoting numerous snippets from the disclosure as if it were Dr. Bear's testimony. None of these things need concern us if the testimony put before the jury did not cross the line. Dr. Bear did not comment to the jury on the standard of care. Neither did he explicitly tell the jury, until asked on cross-examination, that he based his opinions on a review of the 2001 films. The trial court struggled with the issue on numerous occasions. On the final occasion, the court was considering whether Dr. Bear's testimony had opened the door for Dr. Mitchell to testify about his reading of the 2001 films. The court remarked that the questions on direct were carefully crafted and "in looking at this question by question and word for word" counsel had avoided the standard of care issue. The questions on direct were crafted to avoid telling the jury what Dr. Bear thought of the 2001 films and to allow him to base his testimony on the report and what Dr. Cardenosa and Dr. Rouse said in their depositions, among other things. The court ruled that Dr. Mitchell could be asked the same line of questions, and , in fact, the exact same questions as Dr. Bear, but could not "review the mammograms and say in his opinion that he doesn't see a cancer on the 2001 films." We agree with the trial court, and we hold that Dr. Bear did not cross the forbidden line into standard of care testimony.

b.

We now turn to whether the trial court erred in its ruling as to Dr. Mitchell. Most of the Defendants' argument repeats and regurgitates the belief that Dr. Bear was erroneously allowed to give standard of care testimony. We have dealt with that issue and will not repeat our disposition. We do note, however, that there is an element of improper bootstrapping inherent in the argument. The Defendants quote their own counsel's cross-examination of Dr. Bear hoping to convince this Court that they should have been allowed to call Dr. Mitchell to neutralize the same testimony. We cannot endorse such an approach for obvious reasons.

One portion of the Defendants' argument that we agree with is the statement in their reply brief that "the trial court ruled that Dr. Mitchell would be limited to giving causation opinions that were not based on or informed by his reading of the mammogram." Their initial brief was directed at persuading us that Dr. Mitchell was excluded, but he clearly was not. In light of the limitations imposed, the Defendants did not call Dr. Mitchell live. Instead, the Defendants made an offer of proof that consisted of a short oral statement of counsel and the transcript of Dr. Mitchell's deposition taken by the Plaintiffs' counsel. Nothing in that offer and nothing in the briefs on appeal inform this court why Dr. Mitchell could not have testified within the limitations imposed by the trial court. In fact, we note that the court even went so far as to outline possible questions and expected answers at one point, inviting the Defendants to call Dr. Mitchell to the stand. If the only way Dr. Mitchell was willing or able to testify, was by indirectly talking about the standard of care, then it is best that he did not testify.

To conclude the point, we agree with the trial court that for Dr. Mitchell to take the stand and testify that he reviewed the 2001 mammogram and read it as normal, with no indicators of cancer, was to indirectly comment on the standard of care. Accordingly, we hold that the trial court did not abuse its discretion in so limiting the scope of Dr. Mitchell's testimony.

5.

a.

The final issue we must resolve with regard to the experts is whether the Plaintiffs proved their experts were practicing in a contiguous state in the year preceding November 2001. The primary argument made is that even though the Plaintiffs' experts testified that they were licensed and practicing in a contiguous state at the time of trial and may have testified about the date they were first licensed, they did not rule out the possibility that they may have left practice for a time. *See* ***Kenyon***, 122 S.W.3d at 761.

b.

We disagree as to Dr. Cardenosa. Her CV was introduced as trial exhibit 1 for consideration by the jury. It certainly supports the inference that her licensure in the state of North Carolina beginning in the year 2000 was continuous through trial. However, any possible lapse is eliminated by her affirmative answer to the question: "Now, back in 2001, were you Medical Director of the Breast Center of Greensboro, North Carolina?" Accordingly, we hold that Dr. Cardenosa satisfied the licensure requirement.

c.

We also disagree as to Dr. Bear. As previously noted, his CV was also made a trial exhibit. It indicates licensure in Virginia in 1977, and repeated board certifications at intervals approaching the trial date. It also indicates that from 1992 to the present, Dr. Bear was the medical director of a breast center in Virginia. However, any doubt as to Dr. Bear's status in 2001 is eliminated by the transcript of the testimony played to the jury. Pages 41, 45, 46, 48 and 49 of the transcript all reflect testimony concerning the nature and location of Dr. Bear's medical practice in 2001. Accordingly, Dr. Bear satisfied the licensure requirement.

d.

We next consider whether Dr. Krebs demonstrated that he was licensed in the contiguous state of Georgia in the year before November 2001. If we were limited to the testimony that was put before the jury it would be a close question. We cannot find that Dr. Krebs' CV was introduced as evidence. Dr. Krebs testified that he was, at the time of trial, licensed and practicing in Atlanta, Georgia, and that he had worked in the "smaller towns surrounding Atlanta." He also testified, as previously discussed, that based on information he had "gathered," those communities were similar to Oak Ridge in 2001. These bits and pieces do not eliminate the possibility that he was not practicing in Georgia in 2001. The Plaintiffs argue that the Defendants conceded practice in Georgia in 2001 with the following objection: "But the time period is 2001, and I have heard no testimony from this witness practicing in 2001 was in Duluth, when he was in Decatur, I haven't heard any of those things." We are not inclined to construe this as an admission from counsel who was doing his best to challenge the competency of the witness. In our own review, we have noted that at one point Dr. Krebs testified that in 2001 he was charging $145 for mammograms compared to $160 by Dr. Rouse and the Breast Center.

The Defendants filed a motion in limine challenging the testimony of Dr. Krebs and the Plaintiffs' other experts. The Plaintiffs submitted deposition excerpts and affidavits from all their experts. Dr. Krebs stated, in paragraph 2 of his affidavit: "I practice the specialty of radiology in Decatur, Georgia, where I have practiced for approximately 14 years." The Defendants argue that the Plaintiffs can take no comfort from proof that was not admitted into evidence. The Defendants rely on ***State v. Cooper***, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987), but their reliance is misplaced. ***Cooper*** involved a document, the contents and authenticity of which were in question. ***Id.*** at 131. The present case involves sworn testimony used by the trial court in determining the competency or qualification of a witness. It could not be clearer that in making rulings as to "the qualification of a person to be a witness . . . the court is not bound by the rules of evidence . . . ." Tenn. R. Evid. 104(a). The advisory commission comment to Rule 104 makes it clear that certain foundation requirements can be supplied by "hearsay." With his affidavit in the record to establish that Dr. Krebs was practicing in a contiguous state in 2001, we believe it would have been error to exclude his testimony. Accordingly, we hold there was no violation of the licensure requirement as to Dr. Krebs.

6.

Before moving to the other issues explicitly stated in the Defendants' brief, we recognize that the Defendants contend they were entitled to a directed verdict. The principal argument is that none of the Plaintiffs' experts were qualified, therefore they did not make out a prima facie case. We have already rejected that argument. In the conclusion of their directed verdict argument, the Defendants suggest, in a single paragraph, "yet another reason that a directed verdict should have been entered." The other reason is that the Patient denied that Dr. Rouse was her doctor. The Defendants argue that absent a doctor-patient relationship, there can be no claim for medical malpractice. The law, and not the characterization of an ill patient, determines whether a doctor-patient relationship exists.

> In light of the increasing complexity of the health care system, in which patients routinely are diagnosed by pathologists or radiologists or other consulting physicians who might not ever see the patient face-to-face, it is simply unrealistic to apply a narrow definition of the physician-patient relationship in determining whether such a relationship exists for purposes of a medical malpractice case. . . . [A] physician-patient relationship may be implied when a physician affirmatively undertakes to diagnose and/or treat a person, or affirmatively participates in such diagnosis and/or treatment.

Kelly v. Middle Tenn. Emergency Physicians, 133 S.W.3d 587, 596 (Tenn. 2004) (footnote omitted). There is no doubt Dr. Rouse affirmatively participated in the care of the Patient. Accordingly, we reject the suggestion the trial court was obligated to grant a directed verdict based on absence of a doctor-patient relationship.

IV.

A.

The Defendants next argue that they should have been granted a new trial on several grounds. They argue that each point represents harmful error, and that even if one error was harmless alone, the cumulative effect of multiple errors was harmful.

B.

We first address the issue of the statements volunteered by potential juror Yarborough. Upon stating that she was good friends with an employee of the Breast Center, Ms. Yarborough was asked whether that relationship would create any discomfort for her in rendering a verdict. She responded:

> No, but I want to tell you about a bad experience that I had there, and that probably will mess me up. They read mine kind of wrong one time, so I'm a little bit prejudiced right now for [the Plaintiffs].

Before she could be excused, Ms. Yarborough also volunteered that she was "just trying to be honest" and "just answering the truth." The Defendants immediately moved for a mistrial arguing that the panel had been tainted. The court denied the oral motion for a mistrial and instructed counsel to explore the issue of whether the jurors had been influenced by Ms. Yarborough. Counsel for the Plaintiffs' began:

> Now, I address this to all of the jurors. There was a juror just a moment ago that made some statements about her visit to the Breast Center. I'm going to ask each of you, would that cause you to be biased or prejudiced in any way in deciding this case on the law and the facts as you hear from this stand? Anything this lady said, would that bother you in any way? I'm going to ask each of you if you agree that you shouldn't let that prejudice you, would you hold your hand up there and say that won't bother me in any way?

All jurors raised their hand except juror Benjamin. Then, juror Benjamin was asked directly if he would disregard Ms. Yarborough's statement and not let it prejudice him. Mr. Benjamin raised his hand. Before moving on, the court made one final inquiry:

> Ladies and gentlemen, as I have consistently said during the course of this voir dire, it is of utmost importance that you be fair and impartial to both sides. If you had heard any statement that would cause you in any way to feel that you could not be fair or impartial to either side in this case, I need you to raise your hand right now.

No panel member raised a hand.

A trial court's refusal to grant a mistrial on the basis of alleged juror bias will not be reversed absent a clear showing of abuse of discretion. ***Danmole v. Wright***, 933 S.W.2d 484, 487 (Tenn. Ct. App. 1996); ***Kunk v, Howell***, 289 S.W.2d 874, 878 (Tenn. Ct. App. 1956). The

trial court has "wide discretion" in determining the qualifications of jurors, both before and after comments by other members of the panel. ***Danmole***, 933 S.W.2d at 487. This is because the trial judge has the opportunity to observe the jurors' demeanor and credibility. ***State v. Forbes***, 918 S.W.2d 431, 451 (Tenn. Crim. App. 1995). Even if an error occurs during voir dire, the error is harmless if the panel that actually hears the proof and decides the case is fair and impartial. ***Danmole***, 933 S.W.2d at 487.

The Defendants insist that the statements of Ms. Yarborough were sworn testimony so directly related to the merits of the case that prejudice must be assumed despite the testimony of the remaining members that they could be impartial. Defendants rely almost exclusively on ***Paschal v. United States***, 306 F.2d 398 (5th Cir. 1962). A potential juror in ***Paschal*** stated on voir dire that the defendant, accused of passing counterfeit money, had passed counterfeit bills at the bank where the juror worked. ***Id***. at 399, 402. The juror was excused, and the defendant was convicted by panel members that heard the excused juror. The conviction was reversed on appeal because of the statement of the juror. Of course, federal criminal cases are not controlling on this court.

The Plaintiffs cite ***State v. Brown***, 795 S.W.2d 689, 696 (Tenn. Crim. App. 1990), where a robbery conviction was affirmed despite a potential juror's statements about what employees of the robbed pharmacy told his son. The juror was excused for cause, and the issue on appeal concerned prejudice to the rest of the panel. ***Id***. "Comments from a prospective juror in response to questions from defense counsel during voir dire that indicate his possession of information inculpating the defendants is not grounds for a mistrial absent evidence showing that the jury which heard the case was prejudiced or biased by the statements of the prospective juror." ***Id.***

The Plaintiffs also rely on ***Graves v. State***, 489 S.W.2d 74, 81 (Tenn. Crim. App. 1972). In ***Graves***, a potential juror frankly expressed his belief that the defendant was guilty in the presence of other panel members. The court held that opinions expressed by one potential juror will not require a mistrial unless "it appears that the expression so influenced [the remaining jurors] that they shared the preconceived opinion." ***Id.***

Since the record before us reflects that the jury, in the trial court's evaluation, remained impartial, we find ***Graves*** and ***Brown*** more persuasive and on point than the federal criminal case decided under federal law. We note that Ms. Yarborough did not identify the doctor that did her mammogram, whereas the juror in ***Paschal*** spoke specifically about the defendant accused of the crime. Perhaps, if Ms. Yarborough stated that Dr. Rouse misread her mammogram, this might have been a closer call. Once Ms. Yarborough was excused, the court was left with a panel that had heard one stray statement about one misread mammogram at a facility that undoubtedly does thousands of mammograms a year. It is almost inconceivable to expect the jury to believe there had never been a mistake or a misread mammogram at the facility. The question in the case was one of medical negligence, put to a jury sworn to follow the law and decide the case on the proof. That jury satisfied the trial court that it remained impartial despite the statements of Ms. Yarborough. We hold that the trial court did not abuse its discretion in declining to grant a mistrial.

C.

The next issue before us is whether the trial court abused its discretion in excluding the four reminder letters, one in 2001 and three in 2002. The parties devote pages of their briefs arguing collateral issues such as whether the Patient specifically denied receiving the 2001 letter, whether the Patient's records were confused with another, and the like. The Defendants vehemently argue that exclusion of the letters could not have been harmless given the jury's question about whether the Patient was sent reminders. We believe the dispositive issue is the issue addressed by the trial court, that is, whether the Defendants presented prima facie proof from the appropriate witness to establish that the computer version of the letters was deposited in the mail. We agree with the trial court that they did not.

The heart of the matter is whether the Defendants came forward with enough proof to require putting the issue of mailing before the jury. As the proponent of the alleged notice, the burden was on the Defendants to prove receipt. ***U.S. Life Title Ins.v. Dept. of Commerce***, 770 S.W.2d 537, 542 (Tenn. Ct. App. 1988) Receipt may be presumed from competent proof of mailing without return. ***Id.*** The offer of proof of mailing was done through an employee of the Breast Center. The most that the Breast Center employee, Blattner, could say was that all mailings are deposited at the "hospital" with the expectation that they would be mailed, and that the hospital bills the separate entity, the Breast Center, for mailings. Blattner knew that during her tenure with the Breast Center some correspondence had been sent out by the hospital, because she has taken calls from some patients who have received correspondence mailed by the hospital. There was no bill specific to the 2001 and 2002 letters. Rather, the hospital sends one bill for all mailings in the month. The letters were supposedly mailed by the "hospital," and not the Breast Center. The employee at the hospital charged with mailing was not called as a witness. We are not told why no hospital employee was called.

Under Tenn. R. Evid. 602, which requires personal knowledge rather than assumptions, a witness from the hospital who could either say that he or she deposited the letters in the mail, or could describe the hospital's routine practice for sending out correspondence, was needed in addition to witness Blattner. Tenn. R. Evid. 406, argued by the Defendants, does not require a different result. The Defendants contend that with their offer of proof they "established that it was the routine practice of the Breast Center to prepare and mail notices to patients." The chief problem is that the Breast Center left the mailing to the hospital and did not take the next step of showing that the hospital mailed the letters. The Breast Center only established that it left the letters with the hospital for mailing. If we were to accept the Defendants' proof as prima facie proof of mailing, then any person or entity could make proof of mailing by testimony to the effect, "I left it with someone dependable and expected her to mail it." It is evident from the context of Rule 406 that the habit or routine practice proven must be the habit or the practice of the mailer, and not some person once removed from the mailer.

All of the cases cited by the parties are consistent with our approach. In ***W.E.Richmond & Co. v. Security Nat'l. Bank***, 64 S.W.2d 863, 869-70 (Tenn. Ct. App. 1933), the case relied on by the Defendants, the witness as to mailing was the party's bookkeeper, Mr. Mashburn. Mr. Mashburn testified that he, himself, prepared the document at issue and mailed it. ***Id***. at 869. The court did not require any more detail of Mr. Mashburn, reasoning, instead, that the opponent

of the evidence could cross-examine as to the details. ***Id***. at 870. The difference in the present case is that the Plaintiffs did explore the details in a deposition and learned that neither witness Blattner, nor her employer, did the mailing.

The Defendants also cite ***U.S. Life Title***, 770 S.W.2d at 537, but that case convinces us we could not hold in favor of the Defendants. The issue in ***U.S. Life Title*** was whether the Tennessee Commissioner of Commerce and Insurance had provided written notice of rule making to subject insurance companies. ***Id.*** at 541. The Commissioner attempted to show mailing through a secretary who prepared the notices. ***Id.*** at 542. The court held that the secretary's testimony did not make out prima facie proof of mailing:

> Notwithstanding the secretary's inexperience, no one in the department checked her work. She kept no documentary evidence in the form of copies of transmittal letters, return receipts, registration cards, or master mailing lists to show to whom the notices were sent. The secretary did not affix postage to the letters and did not mail them herself. Her testimony is insufficient to support a presumption that the letters were mailed in the usual course of the department's business because such an inference requires testimony from a witness who has direct, personal knowledge that the notices were handled in the usual course of business.

Id. at 542. Given that witness Blattner did not work for the hospital, we believe ***U.S. Life Title*** is on point. Accordingly, we hold that the trial court did not err in excluding testimony about the 2001 and 2002 letters that were allegedly sent to the Patient.

D.

The Defendants also assert that the cumulative effect of the errors during trial requires us to grant a new trial, even if the errors individually were harmless. Since we did not find errors in the trial court's rulings, we need not labor with the "cumulative effect" argument.

V.

The final issue we must address is whether we should suggest a remittitur to cure an excessive or capricious verdict. We begin by noting that this argument appears to be based – again – primarily on the premise that the challenges we have already addressed need to be corrected. Specifically, the Defendants state that a remittitur is an alternative to a new trial. Having rejected numerous challenges, we will not revisit those issues as a basis for correcting the amount of the verdict.

The Defendants seem to suggest we are free to reshape the verdict if we simply think it is too large. The standard of review for cases like this convince us otherwise:

> Appellate courts review a trial court's decision regarding remittitur under the standard of review set forth in *Tennessee Rules of Appellate Procedure 13(d)*, presuming the court's finding to be correct unless the evidence

> preponderates otherwise. ***Coffey*** [***v. Fayette Tubular Prods.***, 929 S.W.2d 326, 331 (Tenn. 1996)]. Appellate courts may suggest a remittitur where the trial court has not. ***Id.*** However, our authority is "more circumscribed" than that of the trial court. ***Id.*** Where the trial court, in its role as thirteenth juror, has approved a jury verdict, that verdict will not be disturbed where there is any material evidence to support it. ***Id.*** n.2. We must, therefore, review the evidence in this case to determine whether material evidence supports a finding that the jury award is within the range of reasonableness and not excessive.

Dunn v. Davis, No. W2006-00251-COA-R3-CV, 2007 WL 674652 at *9 (Tenn. Ct. App, W.S., filed March 6, 2007)

Before examining the record for material evidence it is appropriate to address the three arguments that the Defendants advance as theories why the verdict is beyond the realm of reasonableness. First, the Defendants contend that the Plaintiffs' counsel invited a passionate verdict with the following argument: "There will never, ever be in this courtroom, a worse injury and a bigger case. Never. This is as bad as it gets. . . . This should be the largest verdict." Counsel also argued that the largest verdict to date for the county would be "good for the community." Apparently no objection was made to the argument. Also, the jury was given the standard instructions that it must base its verdict on the evidence and that statements of counsel are not evidence. While we would prefer not to see these kinds of arguments, we cannot say that such isolated comments in the context of a week long trial were likely to inflame the jury.

The Defendants also argue that the "Medical Expense" instruction deviated from pattern instructions and included other elements of damage[3], thereby inviting the jury to make double awards. Presumably, the defendants would have us half the award. The Plaintiffs present several acceptable answers to this argument. The pattern instructions are not mandatory. ***Cortazzo v. Blackburn***, 912 S.W.2d 735, 740 (Tenn Ct. App. 1995). A perfect charge is not expected. It is enough if the charge as a whole conveys the law. ***In re Estate of Elam***, 738 S.W.2d 169, 174 (Tenn. 1987). The jury in the present case was instructed, "You may not duplicate damages for any element by also including the same loss or harm in another element of damages." As a whole, then, the instructions told the jury what it had to find to award medical expenses and that it could not award other elements of damages as part of the medical expenses and then award them again in response to another part of the charge.

Finally, the Defendants argue that the award for future lost earnings "fails to take into account that Plaintiff will have no living expenses past mid-2009," when she is expected to die. The Plaintiffs counter that the law has not required a deduction for living expenses or consumption outside the context of wrongful death. *See* ***Wallace v. Church***, 642 S.W.2d 141 (Tenn. 1982). The Defendants furnish no reply. We take the absence of a reply from the Defendants to this argument to mean (1) they, like us, are not aware of cases to refute the argument, and (2) they are not looking to expand the law of consortium in wrongful death cases

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[3] The actual wording quoted by the Defendants is: "Robin Farley may recover reasonable and necessary expenses for medical care and services, physical pain and suffering, mental and emotional pain and suffering, loss of enjoyment of life, and the value of the ability to earn money that is reasonably certain to be lost in the future."

to personal injury cases. The plaintiffs also point out that the burden of proving the deduction is typically placed upon the party asking for the deduction. *See* ***Hutton v. City of Savannah***, 968 S.W.2d 808, 813 (Tenn. Ct. App. 1997). The Defendants did not introduce proof of the deduction they seek. Thus, there was no error in a verdict that did not deduct unproven post-2009 living expenses from the lost earning capacity.

Accordingly, we will consider whether there is material evidence to support a finding that reasonable compensation for the Plaintiffs' injuries and damages is $3,475,000. We begin with the proposition that there is no mathematical formula to answer the question. ***Thrailkill v. Patterson***, 879 S.W.2d 836, 841 (Tenn. 1994). The law recognizes that it is the trier of fact's "special province" to make these kinds of determinations. ***Id.*** at 843. The most competent person, other than the jury, to assess the amount of the verdict is the trial judge. ***Id.*** at 841. Judge Elledge expressly approved this verdict, including the amount. In doing so, he commended the hard word and attention of this particular jury. Also, he noted that the proven special damages, to which the Defendants offered no counter proof, were well in excess of a million dollars. The proof contained considerable detail of the various forms of treatment the Patient has experienced and will experience. She has had chemotherapy and hormone therapy that has made her sick and weak and caused her to lose her hair. There was medical proof that her condition will only get worse as she nears the point of death. The award included compensation to the husband who will more and more lose the companionship of his wife until she expires, again, according to the medical testimony, in a comatose state. We, agree with the trial judge that the jury was "well within reason in returning the verdict that [it] did, considering all the issues in this case." Accordingly, we decline to suggest a remittitur.

VI.

The judgment of the trial court is affirmed. Cost on appeal are taxed to the appellants Oak Ridge Medical Imaging, P.C. dba Oak Ridge Breast Center, P.C., and James Rouse, M.D. The case is remanded, pursuant to applicable law, for enforcement of the judgment and collection of costs assessed below.

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CHARLES D. SUSANO, JR., JUDGE