[Cite as *Robertson v. Mt. Carmel E. Hosp.*, 2011-Ohio-2043.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Marjory A. Robertson,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-931 (C.P.C. No. 07CVA-04-5348)
Mount Carmel East Hospital,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 28, 2011

Raymond L. Eichenberger, for appellant.

Carpenter Lipps & Leland LLP, Theodore M. Munsell and Christopher T. Kennedy, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Marjory A. Robertson ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas granting a directed verdict pursuant to Civ.R. 50 in favor of appellee, Mount Carmel East Hospital ("appellee" or "Mount Carmel"). For the reasons that follow, we affirm that judgment.

{¶2} In November 2003, appellant was a 60-year-old obese female, who was admitted to Mount Carmel to undergo elective surgery for a total knee replacement. During the period of her hospitalization, pressure ulcers, which are also known as decubitus ulcers and which are commonly referred to in layman's terms as "bedsores,"

began to appear in appellant's buttocks region. Following her release from the hospital, appellant continued to be plagued by unresolved pressure ulcers and sought continuing treatment with a wound care specialist. As a result, appellant filed a medical malpractice action against Mount Carmel, alleging the hospital was negligent in providing post-surgical care. Appellant further alleged she was entitled to payment for her medical expenses and pain and suffering, as well as lost wages.

{¶3} During the discovery phase of this case, the depositions of several witnesses were taken, including those of appellant's experts, Denise York, R.N. ("Nurse York"), and Aletha W. Tippett, M.D. ("Dr. Tippett"). After these depositions were completed, neither expert requested to supplement their testimony with additional information or opinions.

{¶4} The trial deposition of Nurse York was taken just a few days prior to trial, which was scheduled to begin on August 24, 2009. Following Nurse York's trial deposition, Mount Carmel filed a motion in limine to exclude Nurse York's trial deposition or, alternatively, to exclude newly disclosed opinions to prevent "trial by ambush." Mount Carmel also moved to exclude Nurse York's causation opinions, arguing she was not qualified to provide expert causation testimony. Additionally, appellee had previously filed a motion to exclude the testimony of Dr. Tippett, asserting Dr. Tippett could not identify a breach of the standard of care or provide a causal connection between any alleged breach by Mount Carmel and appellant's injuries, and thus her testimony was irrelevant. Appellant opposed both motions. Trial was delayed until August 26, 2009.

{¶5} The testimony and evidence provided to the jury at trial established the following relevant facts.

{¶6} On November 3, 2003, appellant underwent a total knee replacement in the operating room at Mount Carmel. After the operation, appellant was sent to the post-anesthesia care unit. Shortly thereafter, appellant was admitted to the orthopedic surgical floor where a skin risk assessment was performed. Appellant was given a score of six, based upon Mount Carmel's skin risk assessment scale.

{¶7} In November 2003, the skin risk assessment scale used by Mount Carmel was a scale developed by one of its enterostomal therapists, who was a certified wound, ostomy and continence nurse, based upon several scales used within the pressure ulcer community. Mount Carmel's policy required that a skin risk assessment be completed and scored every 24 hours. Mount Carmel's skin risk assessment scale had seven risk categories: activity/mobility, elimination, mental status, skin integrity, diet intake, age, and disease process. Depending upon the risk score, certain interventions could be used to decrease the risk of pressure ulcers, such as applying an anti-shearing pad to the patient's bed, using a skin care product to help keep the skin moist, and encouraging the patient to turn every one-to-two hours. Under this scale, implementation of the highest level of pressure ulcer prevention measures were not enacted until the patient scored higher than ten.

{¶8} Between November 3 and 7, 2003, the staff at Mount Carmel assessed appellant's skin on numerous occasions. During that time period, appellant's skin risk assessment scores ranged from five to eight. Several nurses employed by Mount Carmel testified that they were unaware that obese and/or immobile patients were at a higher risk for developing pressure ulcers. Interventions which were added included the use of skin

products when needed, a wheelchair cushion, an anti-shearing pad, a Soft Care overlay mattress, and turning the patient every two hours.

{¶9} On the afternoon of November 7, 2003, Susie Moore ("Nurse Moore"), an ostomy nurse, was consulted to examine appellant based on a reported rash. Upon examining appellant's skin, Nurse Moore noticed appellant had stage two pressure ulcers on her buttocks region. At that time, Nurse Moore made various treatment orders, including the use of a First Step mattress. However, the mattress was not placed on appellant's bed for three days.

{¶10} Hospital records dated November 10, 2003 reflected that appellant's pressure ulcers were much improved. Appellant was then discharged from Mount Carmel on November 11, 2003 and sent home, where the condition of her pressure ulcers worsened. Appellant was referred to a wound care specialist, who treated her through March 2004. Appellant was eventually released to return to her position at an apartment rental office by both her wound care doctor as well as her orthopedic surgeon.

{¶11} During the course of the trial, the trial court determined it would limit the testimony to be provided by Nurse York via her trial deposition. As a result, the trial court refused to allow testimony from Nurse York as to proximate cause and also eliminated the parts of her testimony referencing a validated skin risk assessment scale known as the Braden scale and any testimony opining that the Mount Carmel skin risk assessment scale violated the standard of care. In addition, the trial court refused to allow testimony from Nurse York regarding the standard of care with respect to the use of a First Step mattress.

{¶12} The edited transcript of Nurse York's testimony on direct was read to the jury and appellee waived the reading of cross-examination. Her admitted testimony provided a description of pressure ulcers and described a nurse's obligation to evaluate patients for pressure ulcers. Nurse York opined that obese and/or immobile persons, such as appellant, were at higher risk of developing pressure ulcers. Nurse York testified as to the skin risk assessment scores contained in appellant's records using Mount Carmel's skin risk assessment scale. She testified that in November 2003, Mount Carmel was not using the Braden scale to assess skin risk and pressure ulcer risks. Nurse York also testified that, despite the discovery of stage two pressure ulcers on November 7, 2003, appellant's skin risk assessment score the following day was only a nine, which meant her score using the Mount Carmel scale did not require implementation of the highest level of pressure ulcer prevention measures.

{¶13} The trial court also restricted the testimony of Dr. Tippett. The trial court declined to permit testimony from Dr. Tippett with respect to the application of the Braden scale and her opinions regarding use of the Braden scale. Additionally, the trial court prohibited testimony from Dr. Tippett as to the standard of care for skin risk assessments in 2003, and whether the standard of care was violated by Mount Carmel as a result of its usage of its own unvalidated skin risk assessment scale.

{¶14} In her testimony before the jury, Dr. Tippett explained how pressure ulcers occur. Dr. Tippett testified that pressure ulcers do not occur starting from the skin downward, but instead occur from the bone and work their way outward to the skin, so that the last thing that is actually observed is the injury to the skin. Dr. Tippett identified the types of patients who are at a higher risk of developing pressure ulcers, which

included obese and immobile patients. She also testified as to the types of interventions used to help prevent the occurrence of pressure ulcers in high risk patients. Additionally, Dr. Tippett was permitted to identify the two validated, nationally recognized pressure ulcer assessment scales used in 2003 — the Braden scale and the Norton scale.

{¶15} When asked to identify the standard of care as to when the first skin risk assessment should be performed on a patient who is undergoing surgery in the operating room, Dr. Tippett opined it should be performed after the patient comes out of the operating room. Furthermore, when asked if she had an opinion, based upon a reasonable degree of medical certainty, as to what caused appellant's pressure ulcers, Dr. Tippett opined that the pressure ulcers were caused by unrelieved pressure because appellant lacked the mobility or activity to relieve the pressure herself, without extra help. However, Dr. Tippett testified appellant's pressure ulcer injury could have occurred during the surgery and post-recovery period, but not appeared on the skin for several days.

{¶16} On cross-examination, Dr. Tippett acknowledged that the pressure that occurred during the length of time in which the appellant was lying on the operating room table subjected her to deep tissue injury and that such an injury would not result in visible injury to the skin for three or four days. (Tr. 216-17.) Dr. Tippett agreed that "the die was cast" or "set" when appellant left the post-anesthesia care unit. (Tr. 217.)

{¶17} Outside the presence of the jury, appellant proffered testimony regarding the nationally recognized, validated skin risk assessment scales known as the Norton scale and the Braden scale, focusing mainly on the Braden scale. Dr. Tippett analyzed the skin risk assessment scale used by appellee and compared and contrasted that scale

with the Braden scale. Dr. Tippett proffered that the Mount Carmel scale was not adequate and did not meet the standard of care as a validated scale.

{¶18} Dr. Tippett also conducted a skin risk assessment, outside the presence of the jury, using appellant's medical records and information based upon the Braden scale and ultimately classified appellant as "high risk." When asked if she had an opinion, to a reasonable degree of medical certainty, as to whether use of the Braden scale would have prevented appellant's pressure ulcers, Dr. Tippett proffered she did have an opinion, but that she could not answer the question "the way it is being asked, because I don't know that, that that would happen." (Tr. 269.) Dr. Tippett explained use of the Braden scale would have produced a better assessment of appellant's risk, but she could not answer yes or no as to whether use of the Braden scale would have prevented the pressure ulcers.

{¶19} At the close of appellant's case, Mount Carmel moved for a directed verdict pursuant to Civ.R. 50. Specifically, appellee first moved for a partial directed verdict seeking dismissal of the claims for loss of income.[1] The trial court granted that motion. Appellee then moved for a directed verdict seeking dismissal of the entire matter, arguing appellant failed to produce evidence of a breach of the standard of care and failed to establish that Mount Carmel's alleged negligence was the proximate cause of appellant's injury. The trial court granted that motion as well. Because it determined appellant had failed to offer evidence of negligence, proximate cause, and/or actual damages, the trial

[1] Appellant's brief appears to focus on the trial court's dismissal of her claim on the grounds that she failed to establish the elements of a breach of the standard of care and proximate cause. None of her assignments of error address the trial court's issuance of a directed verdict on the issue of lost wages and lost income. As a result, we shall focus our discussion and analysis upon the elements addressing the standard of care and proximate cause and the trial court's decision to grant a directed verdict based upon its finding she failed to establish those elements.

court directed a verdict in favor of Mount Carmel. As a result, the case and all claims against Mount Carmel were dismissed with prejudice.

{¶20} Appellant filed a timely appeal and now raises the following three assignments of error for our review:

> I. THE TRIAL JUDGE ERRED AS A MATTER OF LAW IN DIRECTING A VERDICT IN FAVOR OF THE DEFENDANT FOR PLAINTIFF FAILING TO MEET HER BURDEN OF PROOF AS TO EVIDENCE OF STANDARD OF CARE AND PROXIMATE CAUSATION OF PLAINTIFF'S INJURIES.
>
> II. THE TRIAL JUDGE ERRED AS A MATTER OF LAW IN REFUSING TO PERMIT EVIDENCE AT TRIAL CONCERNING THE BRADEN SCALE FOR ASSESSING PRESSURE ULCER RISK, AS A RELEVANT EXAMPLE OF A VALIDATED AND ACCURATE PRESSURE ULCER SKIN RISK ASSESSMENT SCALE AND AS AN EXAMPLE OF THE STANDARD OF CARE.
>
> III. THE TRIAL JUDGE ERRED AS A MATTER OF LAW IN EXCLUDING PORTIONS OF TRIAL TESTIMONY OF EXPERT WITNESS REGISTERED NURSE DENISE YORK AND EXPERT WITNESS DR. ALETHA TIPPETT IN REGARD TO THE BRADEN PRESSURE ULCER PREVENTION SCALE AND BY [LABELING] TESTIMONY FROM EACH WITNESS AS A NEW THEORY OF LIABILITY DISCLOSED FOR THE FIRST TIME AT TRIAL.

{¶21} The issues addressed in appellant's three assignments of error are interrelated. Therefore, we shall address her assignments of error jointly.

{¶22} In order to prevail on a claim for medical malpractice, a plaintiff must demonstrate three elements: (1) the existence of a standard of care within the medical community; (2) the defendant's breach of that standard in failing to provide treatment in conformity with that standard; and (3) proximate cause between the medical negligence and the injury. *Adams v. Kurz*, 10th Dist. No. 09AP-1081, 2010-Ohio-2776, ¶11; *Williams v. Lo*, 10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶11; *Campbell v. Ohio State*

Univ. Med. Ctr., 10th Dist. No. 04AP-96, 2004-Ohio-6072, ¶10; *Ayers v. Demas* (Mar. 28, 1996), 10th Dist. No. 95APE10-1296; *Promen v. Ward* (1990), 70 Ohio App.3d 560, 563. Failure to establish any of these elements is fatal to a medical malpractice claim. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 130-31.

{¶23} Expert testimony is generally required to prove the elements of medical malpractice whenever those elements are beyond the common knowledge and understanding of the jury. *Williams* at ¶11; *Campbell* at ¶10, citing *Clark v. Doe* (1997), 119 Ohio App.3d 296, 307.

{¶24} Appellant's case advances the position that, had her risk for developing pressure ulcers been assessed using a recognized and validated assessment scale such as the Braden scale, rather than appellee's own inaccurate, unvalidated scale, she would have been labeled high risk from the beginning of her hospitalization and extra interventions would have been implemented to prevent and/or treat her pressure ulcers. But for this failure, appellant argues she would not have sustained injuries, or at a minimum, the severity of such injuries would have been reduced.

{¶25} Appellant's arguments can be summarized as follows: (1) the trial court improperly prevented her from introducing testimony about the standard of care by excluding references to the Braden scale, since customary methods and practices are highly probative to determining standard of care; (2) the proffered and/or excluded expert testimony regarding the Braden scale did not amount to a new theory of liability, but instead was a "nuance" on the same subject matter for which the experts previously provided testimony, since appellee's counsel had inquired about the Braden scale during discovery depositions; (3) as a result, the trial court erred in refusing to allow her expert

nurse to testify about the Braden scale, a nationally recognized, validated skin risk assessment scale, and to opine that Mount Carmel's skin risk assessment scale did not meet the standard of care; (4) the trial court should have permitted her expert nurse to testify as to the issue of proximate cause, based on current caselaw; and (5) the trial court erred in finding Dr. Tippett's testimony regarding the Braden scale to be "irrelevant" and in refusing to allow testimony discussing the Braden scale and comparing it to Mount Carmel's skin risk assessment scale.

{¶26} Appellee disputes any error and argues: (1) Nurse York was not qualified to testify on the issue of proximate cause, as she is not authorized to practice medicine; (2) Nurse York's opinions regarding the Braden scale were properly excluded because she did not disclose those opinions during discovery, pursuant to Civ.R. 26(B)(5), and failed to supplement her opinions pursuant to Civ.R. 26(E); (3) the portions of Dr. Tippett's testimony regarding the Braden scale which were excluded were not relevant because Dr. Tippett could not establish a breach of the standard of care and/or a causal link, and thus, they were properly excluded; and (4) Dr. Tippett could not state to a reasonable degree of medical certainty that the failure to use a validated skin risk assessment scale more likely than not proximately caused appellant's pressure ulcers.

{¶27} The admission or exclusion of evidence is a matter which is solely within the discretion of the trial court, and because the trial judge is in a significantly better position to determine whether testimony is relevant or irrelevant, a trial court's decision will be reversed only upon a showing of an abuse of discretion. See *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66; *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs*., 92 Ohio St.3d 529, 533, 2001-Ohio-1276; *Banford v. Aldrich Chem. Co*., Inc., 126 Ohio St.3d 210,

2010-Ohio-2470, ¶38, citing *Renfro v. Black* (1990), 52 Ohio St.3d 27, 31. An abuse of discretion constitutes more than an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. It means the court's attitude is unreasonable, arbitrary or unconscionable. Id. Furthermore, "[t]he determination of the admissibility of expert testimony is within the discretion of the trial court." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶9. That determination will not be disturbed absent an abuse of discretion. *Lautenschlager v. MidOhio Cardiology and Vascular Consultants, Inc*., 10th Dist. No. 07AP-308, 2008-Ohio-3692, ¶6, citing *Valentine* at ¶9.

{¶28} First, we shall address the issue of the trial court's exclusion of Nurse York's testimony on the issue of proximate cause. Appellant asserts there is Ohio case law to support her position that a nurse can provide expert testimony in a medical malpractice action on the issue of causation. Specifically, appellant cites to *Berdyck v. Shinde*, 66 Ohio St.3d 573, 1993-Ohio-183, and *Ramage v. Central Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 1992-Ohio-109. However, it is readily apparent that the trial court properly excluded testimony from Nurse York with respect to proximate cause.

{¶29} We disagree with appellant's characterization that the cases cited above support the position that a nurse is qualified to testify as to medical causation when the underlying action relates to the actions of the nursing staff. Appellant's characterization of those cases misconstrues the court's findings and "reads into" the cases something that is not there and is not supported in law.

{¶30} R.C. 4723.151(A) states nurses are prohibited from providing a medical diagnosis or practicing medicine or surgery or any of its branches. Additionally, at least one Ohio appellate district has previously determined that testimony from an expert nurse

on issues of proximate cause is inadmissible. See *Hager v. Fairview Gen. Hosp*., 8th Dist. No. 83266, 2004-Ohio-3959, ¶10 (trial court did not err in prohibiting nurse from testifying as to the cause of the injuries); *Keck v. Metrohealth Med. Ctr.*, 8th Dist. No. 89526, 2008-Ohio-801, ¶5 (a certified nurse practitioner is not qualified to testify regarding the proximate cause of a patient's bedsores).

{¶31} Next, we address the argument that the trial court improperly excluded the testimony of Nurse York with respect to the Braden scale because such testimony did not constitute newly disclosed opinions. We also address the related argument made with respect to Dr. Tippett's proffered testimony, along with the argument that testimony on the Braden scale was relevant to the issue of whether Mount Carmel's pressure ulcer risk assessment scale violated the standard of care, and such testimony should have been admitted.

{¶32} Civ.R. 26 governs discovery issues. Specifically, Civ.R. 26(B)(5) states that a party may discover facts known or opinions held by an expert retained by another party in preparation for trial. Additionally, pursuant to Civ.R. 26(E)(1)(b), a party is under a duty to supplement his or her responses with respect to any question directly addressed to "the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify."

{¶33} "A trial court has broad discretion when imposing discovery sanctions. A reviewing court shall review these rulings only for an abuse of discretion." *Nakoff v. Fairview Gen. Hosp*., 75 Ohio St.3d 254, 1996-Ohio-159, syllabus. Expert testimony can be excluded as a sanction for violating Civ.R. 26(E)(1)(b). *Shumaker v. Oliver B. Cannon & Sons, Inc*. (1986), 28 Ohio St.3d 367, 370; *Huffman v. Hair Surgeon, Inc*. (1985), 19

Ohio St.3d 83, 84; *Tritt v. Judd's Moving & Storage, Inc*. (1990), 62 Ohio App.3d 206, 211; *Waste Mgt. of Ohio, Inc. v. Mid-America Tire, Inc*. (1996), 113 Ohio App.3d 529. Absent an abuse of discretion and material prejudice to the affected party, a reviewing court should be slow to interfere with the trial court's ruling. *Walker v. Holland* (1997), 117 Ohio App.3d 775, 790-91, citing *State v. Withers* (1975), 44 Ohio St.2d 53, 55; and *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164.

{¶34} The purpose of this discovery rule is to eliminate surprise. *Shumaker* at 370. The duty to supplement regarding expert testimony is necessary because preparation for effective cross-examination is particularly compelling when it involves expert testimony. Id. "[T]he introduction of a new theory that has not been disclosed prior to trial 'smacks of ambush'[.]" *O'Connor v. The Cleveland Clinic Found.*, 161 Ohio App.3d 43, 2005-Ohio-2328, ¶20.

{¶35} Appellant argues Nurse York's unedited testimony regarding the Braden scale did not constitute newly disclosed opinions, but instead constituted nuances in her expert opinions. Citing to *Tritt*, appellant argues Civ.R. 26 does not require a party to give notice as to each and every nuance of an expert's opinion. Appellant argues appellee has been fully aware of the subject matter and of appellant's theories of liability for quite some time. Appellant further argues Dr. Tippett's proffered testimony regarding the Braden scale should have been admitted, since such testimony was relevant to the standard of care and Dr. Tippett had previously referenced use of a validated pressure risk assessment scale in her discovery deposition.

{¶36} In reviewing the discovery deposition transcript of Nurse York, we note that Nurse York did not address or assess appellant's case using the Braden scale. Counsel

for appellee actually raised the issue of the Braden scale. In response to a question from appellee's counsel about scoring a patient's skin risk assessment, Nurse York stated her score would depend upon the scale she was using. At that point, counsel for appellee asked about the Braden scale and inquired into the impact that a rash would have on a patient's skin risk assessment score using that scale. Nurse York responded that she did not know, she would have to look at the Braden scale, and she did not have a copy of the scale at her deposition.

{¶37} Nurse York's unedited trial testimony, on the other hand, provided significant detail about the Braden scale. In the unedited version of her trial deposition, Nurse York also provided a skin risk assessment score for appellant using the Braden scale and opined that the failure to utilize the Braden scale in assessing appellant's skin risk was a violation of the standard of care.

{¶38} In Dr. Tippett's discovery deposition, she testified that Mount Carmel *may* have violated the standard of care if the standard in 2003 required the use of a validated skin risk assessment system. However, she was uncertain as to whether the standard of care at that time required the use of a validated system. With respect to causation, Dr. Tippett testified appellant's pressure ulcer injuries developed as a result of a deep tissue injury that occurred as a result of unrelated pressure during the two and one-half hour operation in the operating room and immediately post-operation for several days. Dr. Tippet further acknowledged that the die was cast for appellant by the time she left the post-anesthesia care unit.

{¶39} In her trial deposition however, Dr. Tippett attempted to opine that Mount Carmel's skin risk assessment scale was inadequate for predicting and preventing

pressure ulcers and violated the standard of care. The trial court refused to allow such testimony, most likely because it advanced an opinion not set forth in her discovery deposition and not supplemented before trial. However, appellant proffered this testimony outside the presence of the jury. Additionally, Dr. Tippett attempted to proffer testimony as to causation. The relevant portions of that proffered testimony revealed the following:

> [APPELLANT'S COUNSEL]: Doctor, I would ask you if you have an opinion based on reasonable medical certainty, that if the Braden skin risk assessment scale had been used on [appellant] in November of 2003 at the times that we mentioned on the Braden assessments that have been filled out, would [appellant] have incurred pressure ulcers while she was in the hospital?
>
> [DR. TIPPETT]: Possibly not. As I - -
>
> [APPELLANT'S COUNSEL]: First I am asking you if you have an opinion?
>
> [DR. TIPPETT]: Oh, sorry. I have an opinion.
>
> [APPELLEE'S COUNSEL]: I am going to object. * * *
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> * * *
>
> [APPELLANT'S COUNSEL]: Now, Doctor, using the first Braden skin risk assessment that you filled out * * * which was when [appellant] first hit her room * * * do you have an opinion based on reasonable medical certainty as to whether or not, if Mount Carmel had been using a Braden skin risk assessment system in November of 2003, would [appellant's] pressure ulcers have been prevented?
>
> * * *
>
> [DR. TIPPETT]: Opinion is they possibly could have been prevented or lessened.
>
> [APPELLANT'S COUNSEL]: Now, possibly doesn't fit the bill here, Doctor. * * *

> [APPELLEE'S COUNSEL]: Object.
>
> * * *
>
> [APPELLANT'S COUNSEL]: * * * Would the Braden scale, *when she hit her room after surgery* on November 3, 2003, under reasonable medical certainty, have prevented [appellant's] pressure ulcers? (Emphasis added.)
>
> * * *
>
> [APPELLANT'S COUNSEL]: * * * Do you have an opinion?
>
> [DR. TIPPETT]: Actually - - I guess no.
>
> [APPELLANT'S COUNSEL]: First off, do you have an opinion?
>
> * * *
>
> [DR. TIPPETT]: My opinion is that, I can't answer that the way it is being asked, because I don't know that, that that would happen.
>
> I know that using the Braden would have better assessed the risk. Whether it would have prevented the ulcer, I don't know. Likely, yes; but, I also testified earlier how deep tissue occurs in the O. R. And the die is already cast, as [appellee's counsel] said.
>
> So whether it would have been prevented, it possibly could have been prevented.
>
> [APPELLANT'S COUNSEL]: Okay. But with reasonable medical certainty, once more, would it have been prevented?
>
> [DR. TIPPETT]: Reasonable certainty, probably; but I can't say yes or no.

(Tr. 265-70.)

{¶40} As stated above, the standard of review with respect to the trial court's admission or exclusion of evidence is an abuse of discretion. Upon reviewing the record

and all transcripts and depositions provided to us, we cannot find the trial court abused its discretion in excluding Nurse York's references to the Braden scale with respect to the standard of care, given the fact that Nurse York did not establish during her discovery deposition that the Braden scale was the standard of care to be used in predicting and preventing appellant's pressure ulcers. Appellee's counsel's mere reference to the Braden scale during her discovery deposition, without further analysis or discussion, did not satisfy appellant's obligation to disclose the subject matter of her expert testimony, particularly when Nurse York's discovery deposition testimony seemed to be primarily focused upon the theory that the nurses failed to conduct a thorough skin assessment and discover a wound that should have been apparent a day or so before it was actually discovered.

{¶41} As to Dr. Tippett, she too failed to supplement her discovery deposition testimony, in which she tip-toed around the issue of whether or not there was a breach of the standard of care and whether use of a validated skin risk assessment scale, such as the Braden scale, was required to meet the standard of care. While she did reference and make some use of the Braden scale, she declined to state that failure to use the Braden scale was a breach of the standard of care. Exclusion of her efforts to testify on this issue at trial was not an abuse of discretion.

{¶42} With respect to the relevancy issue, appellant appears to argue that the trial court should have permitted testimony regarding the Braden scale because it is relevant as an example of an accurate, validated skin risk assessment scale and as an example of the standard of care. Appellant further argues that customary methods and practices are highly relevant in determining the standard of care, and therefore they are valid issues of

fact which should be considered by the jury. Appellant argues the trial court effectively ruled that appellant could not present the standard of care when it excluded any references to the Braden scale.

{¶43} Here, however, no standard of care was actually established or identified (i.e., the standard of care requires the use of a validated skin risk assessment scale such as the Braden scale) during trial and no evidence was introduced demonstrating that appellant's injuries would not have occurred but for a breach of that standard of care. Evidence regarding the details of the Braden scale did not constitute relevant evidence when appellant did not establish that, in order to properly predict and prevent pressure ulcers, a hospital must utilize the Braden scale.

{¶44} While evidence of customary usage of the Braden scale in the prediction and prevention of pressure ulcers might be an example of what the standard of care requires, appellant did not establish that the standard of care required the use of a validated pressure ulcer risk assessment scale, due to her failure to supplement the opinions she provided via the discovery depositions of her experts. Moreover, Dr. Tippett's failure to testify as to a causal link between appellant's injury and the failure to use a validated skin risk assessment scale means further testimony regarding the Braden scale was not relevant. See generally, *Lambert v. MetroHealth Med. Ctr.*, 2d Dist. No. 19784, 2007-Ohio-83, ¶11 (exclusion of expert testimony was not an abuse of discretion where it was not established how an alleged negligent act related to the alleged inability to diagnose/treat). Thus, the trial court did not abuse its discretion in prohibiting testimony from Dr. Tippett on this issue.

{¶45} Pursuant to Civ.R. 50(A)(1), a party may move for a directed verdict upon the opening statement of an opponent, at the close of an opponent's evidence or at the close of all the evidence. Civ.R. 50(A)(4) provides as follows:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶46} Appellate review of the trial court's ruling on a motion for directed verdict is de novo. *Stuller v. Price*, 10th Dist. No. 03AP-66, 2004-Ohio-4416, ¶64. In addressing a directed verdict motion, it is well-established that the trial court cannot consider either the weight of the evidence or the credibility of the witnesses. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284; *Stuller* at ¶66; *Brennan v. Doe* (Mar. 24, 1988), 10th Dist. No. 87AP-753. Therefore, " 'if there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied.' " *Strother* at 284, quoting *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 115.

{¶47} As previously stated above, in order to prevail on her claim, appellant is required to demonstrate that her pressure ulcers were proximately caused by medical care or treatment that fell below the recognized standard of care. Failure to prove that the recognized standard was not met, and/or failure to prove that the failure to meet that standard proximately caused the injury, is fatal to her claim. See *Kester v. Brakel*, 10th Dist. No. 06AP-253, 2007-Ohio-495, ¶26.

{¶48} "Proximate cause" can be established " 'where an original act is wrongful or negligent and, in a natural and continuous sequence, produces a result [that] would not have taken place without the act.' " *Stuller* at ¶69, quoting *Whiting v. Ohio Dept. of Mental Health* (2001), 141 Ohio App.3d 198, 202-03. A plaintiff must present evidence upon which the trier of fact can reasonably determine " 'it is more likely than not that the negligence of a defendant was the direct or proximate cause of plaintiff's injury.' " Id., quoting *Whiting* at 203. " '[W]here no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the jury (to decide), and, as a matter of law, judgment must be given for the defendant.' " Id. at ¶70, quoting *Engle v. Salisbury Twp*., 4th Dist. No. 03CA11, 2004-Ohio-2029, ¶27.

{¶49} At trial, appellant failed to successfully introduce evidence on the standard of care. In addition, Dr. Tippett's trial testimony as presented to the jury failed to establish that the failure to use the Braden scale proximately caused appellant's injuries. Instead, Dr. Tippett opined that the pressure ulcers developed during the operation and/or immediately after the operation in the post-anesthesia recovery unit, rather than as a result of the use of an unvalidated skin risk assessment scale and/or negligent nursing care on the orthopedic floor. Therefore, any criticisms regarding the skin risk assessment scale used by Mount Carmel, the failure to immediately provide a First Step mattress, or the nurses' lack of knowledge regarding the classes of patients who are predisposed to develop pressure ulcers, is irrelevant because "the die was cast" when appellant left the operating room.

{¶50} Furthermore, there was never any testimony presented at trial (or even proffered) that alternative measures should have been implemented during the course of appellant's actual surgery or recovery in the post-anesthesia unit in order to reduce the risk of the development of pressure ulcers. And, Dr. Tippett testified that the standard of care for performing a skin risk assessment required that such an assessment be done after surgery when the patient was admitted and taken to his or her room, not prior to surgery.

{¶51} Finally, to the extent appellant argues that the testimony of the nurses employed by Mount Carmel could be utilized and construed to establish the elements of her claim, we reject that assertion as well. Again, as nurses, those witnesses were not competent to testify here as to the issue of proximate cause, and even in construing their testimony in a light which is most favorable to appellant, the trial court's decision to direct the verdict was not improper.

{¶52} Even when construing all of the evidence most strongly in favor of appellant, as we are required to do, and even if we consider all of the evidence, including the unedited testimony and the proffered testimony, it is very apparent that appellant failed to establish the elements of her medical malpractice claim.

{¶53} If we consider the unedited testimony of Nurse York, as well as the proffered testimony of Dr. Tippett, appellant could arguably establish the standard of care and that a breach of that standard of care occurred, although such evidence is rather tenuous. However, appellant would still not be able to establish the element of proximate cause.

{¶54} "[T]he admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability." *Stinson v. England*, 69 Ohio St.3d 451, 454, 1994-Ohio-35. "An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." Id., paragraph one of the syllabus.

{¶55} In her proffered testimony, portions of which we have set forth in paragraph 40, Dr. Tippett initially opined that while use of the Braden scale would have better assessed the risk, she could only say that use of that scale could have "possibly" prevented the pressure ulcers. It was only upon further repeated urging that she opined it "probably" could have prevented the pressure ulcers, but she went on to state she could not "say yes or no." (Tr. 270.) She also testified that the "die was cast" when appellant left the operating room. This is not sufficient to establish proximate cause. See *Stuller*; and *Stinson*. Thus, we find the trial court acted properly in directing the verdict in favor of Mount Carmel.

{¶56} Based upon the foregoing, we overrule appellant's first, second, and third assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.

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