MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Zainab Abbas, M.D., Morgan Mittler, R.N.,
and Methodist Hospital,
Appellants

v.

Hetep Bilal "Franklyn" Neter-Nu,
Appellee

June 11, 2024

Court of Appeals Case No.
23A-CT-438

Appeal from the Lake Superior Court

The Honorable Bruce D. Parent, Judge

Trial Court Cause No.
45D11-1809-CT-541

Memorandum Decision by Judge Brown
Judges Riley and Foley concur.

Brown, Judge.

[1] Zainab Abbas, M.D., Morgan Mittler, R.N., and Methodist Hospital (collectively, "Defendants") appeal the judgment against them in this medical malpractice action. Finding the trial court erred in instructing the jury and that there were other cumulative errors, we reverse and remand.

Facts and Procedural History

[2] On July 27, 2015, Hetep Bilal "Franklyn" Neter-Nu was taken to the emergency room at Methodist Hospital in Gary for nausea and vomiting and was administered fluids and medications. Morgan Mittler, R.N., ("Nurse Mittler") was a member of the team responsible for Neter-Nu's care. Nurse Mittler checked on Neter-Nu and noticed an IV was out of his arm and fluids were pooling on the floor. At approximately 5:13 p.m., Nurse Mittler placed an IV in Neter-Nu's right foot. Neter-Nu complained of pain to his right foot, and the IV was removed at 12:30 a.m. or 4:34 a.m. on July 28, 2015.[1]

[3] Later on July 28 and again on July 29, Neter-Nu complained of right foot pain, and Dr. Clive Alonzo ordered an x-ray. The x-ray was "negative for fx or soft

[1] One entry in the medical records indicates the removal occurred at 12:30 a.m. and another entry indicates the removal occurred at 4:34 a.m.

tissue swelling," and a heat pack was applied. Exhibits Volume 13 at 34. A physical therapist evaluated Neter-Nu and reported that he complained of increased pain in his right foot and toes, he experienced a burning sensation in the foot, he did not place any weight on the foot, and he did not have movement in his right toes. A nurse's note on July 30 stated: "Assessment of anterior right foot of patient intact with slight ecchymosis. Ecchymosis not outside of demarcation area. Foot is warm and dry, and tender to touch. Warm compression given by tech and nurse pm. Circulation Movement Sensation present. No reports of numbness to right foot or toes. Pedal pulses strong and present." *Id*. at 49.

[4] On July 30, Dr. Abbas discharged Neter-Nu. The discharge summary stated: "Right foot swelling. 2/2 iv infiltration. Swelling much better today, able to move toes, no evidence of infection, Xray negative, pt instructed to take NSAIDS prn for a short duration." *Id*. at 29. Progress notes for a physical exam by Dr. Abbas on that date stated: "Extremities: No tenderness, No cyanosis, No clubbing. RLE mildly swollen, able to move toes, slight numbness 2/2 left foot, pulses 2+ dorsal and pedal both sides." *Id*. at 28. The discharge instructions stated: "Activities as tolerated. Use crutches when ambulating. Keep right leg elevated when in bed." Exhibits Volume 11 at 79. The instructions also stated: "Any signs and symptoms of infection, go to nearby hospital. *If symptoms persist or become worse, return to emergency room*." *Id*. Neter-Nu was transported to the bus station and rode a bus for about sixteen hours from Gary to Sioux City, Iowa, where his truck had been taken by his

employer. Neter-Nu arrived in Sioux City on Friday, July 31, and checked into a hotel where he stayed until Monday.

[5] On Monday, August 3, Neter-Nu went to Siouxland Community Health Center where examination showed "[t]oes are black," "unable to feel right pedal pulse, left pedal pulse strong," "[t]here is hyperpigmentation of right lower extremity around big toe and all other toes to that foot," and "[s]ome Erythema in lower extremity with very cold extremity." Exhibits Volume 13 at 178-180. Neter-Nu was directed to the emergency room. He went to Mercy Medical Center where an arterial ultrasound showed no flow in several of the digits of his right foot. A vascular surgeon "did a Doppler of his foot" and "he had an evident demarcation line along the dorsum of this foot and his first two toes were actually cold and white" and he was "unable to move the distal right extremity." Transcript Volume 13 at 187. He underwent an arterial angiogram which showed "no vessels amenable currently for revascularization." *Id*. at 183. He was referred to the University of Nebraska Medical Center for a second opinion. Neter-Nu underwent a below the knee amputation of his right leg on August 19, 2015.

[6] Neter-Nu filed a proposed complaint with the Indiana Department of Insurance, and a medical review panel unanimously found the evidence did not support the conclusion that Defendants failed to meet the applicable standard of care as charged in the complaint. Neter-Nu filed a complaint with the trial court against Dr. Abbas, Dr. Alonzo, Nurse Mittler, and Methodist Hospital alleging that he underwent the amputation of his right leg due to the damage

caused by Nurse Mittler's placement of the IV catheter. Dr. Alonzo was later dismissed from the case.

[7] The court held a jury trial. Defendants' counsel proposed an "intervening cause" jury instruction, which the court refused. Transcript Volume 9 at 130. After the evidence closed, Defendants' counsel moved for judgment on the evidence pursuant to Ind. Trial Rule 50 arguing there was no evidence supporting Methodist Hospital's liability except for its vicarious liability based on the conduct of Dr. Abbas and Nurse Mittler. He argued that Neter-Nu's expert witnesses were clear that their opinions related only to Dr. Abbas and Nurse Mittler and no others. The court denied the motion. Defendants' counsel objected to Final Instructions Nos. 8, 10, and 18, arguing they allowed the jury to find Methodist Hospital vicariously liable based on the actions of persons other than Dr. Abbas and Nurse Mittler. Final Instruction Nos. 8, 10, and 18 were given to the jury.

[8] The jury returned a verdict against Defendants in the amount of $11 million.[2] Defendants requested that the verdict be reduced to the statutory maximum of $1,250,000, and Neter-Nu requested prejudgment interest. The court ordered Defendants to pay prejudgment interest of $79,993.40 and entered judgment against them in the amount of $1,329,993.40. Neter-Nu filed a motion to

[2] The verdict form signed by the jury foreperson was titled "Verdict Form A" and stated: "We, the jury, decide in favor of . . . Neter-Nu, and against the Defendants, Zainab Abbas, M.D., Morgan Mittler, R.N., and Methodist Hospital, and decide the Plaintiff's damages are $11,000,000." Appellants' Appendix Volume 2 at 29.

correct error, which the court denied, and Defendants filed a motion to correct error, which was deemed denied.

Discussion

[9] Defendants assert reversal is required and argue that the trial court erred in denying their motion for judgment on the evidence under Ind. Trial Rule 50, in giving jury instructions which were not supported by the evidence, and in refusing certain proposed instructions. They also assert the court erred in limiting their ability to reference admitted medical records and in not allowing certain cross-examination. Neter-Nu maintains each of Defendants' claimed errors is without merit.

[10] The elements of a medical malpractice claim are (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; and (3) that the breach proximately caused the plaintiff's injuries. *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). Health care providers must exercise that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class acting under the same or similar circumstances. *Overshiner v. Hendricks Reg'l Health*, 119 N.E.3d 1124, 1131-1132 (Ind. Ct. App. 2019) (citations omitted).

[11] A medical malpractice plaintiff is ordinarily required to present expert opinion that a defendant health care provider's conduct fell below the applicable standard of care. *Chi Yun Ho v. Frye*, 880 N.E.2d 1192, 1201 (Ind. 2008). Medical negligence is thus not generally a conclusion that may be reached by a

jury without such an expert opinion among the evidence presented. *Id*. Such expert opinion takes on the character of an evidentiary fact in medical malpractice cases. *Id*.; *see also Simmons v. Egwu*, 662 N.E.2d 657, 658 (Ind. Ct. App. 1996) (generally, in medical malpractice actions, expert opinion is required "as to the existence and scope of the standard of care which is imposed upon physicians and as to whether particular acts or omissions measure up to the standard of care"), *trans. denied*. In addition to vicarious liability for tortious acts committed by persons acting within the scope of their employment, a hospital may be directly liable under a theory of negligent training, supervision, and retention. *See Cmty. Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 377 (Ind. 2022).

A. *Defendants' Motion for Judgment on the Evidence*

[12] We first address Defendants' motion for judgment on the evidence in which they argued there was no evidence supporting Methodist Hospital's liability except for its vicarious liability based on the conduct of Dr. Abbas and Nurse Mittler. Ind. Trial Rule 50(A) provides:

> Where all or some of the issues in a case tried before a jury . . . are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. . . .

The purpose of a motion for judgment on the evidence is to test the sufficiency of the evidence presented by the non-movant. *Purcell v. Old Nat'l Bank*, 972 N.E.2d 835, 839 (Ind. 2012).

[13] In support of Defendants' motion for judgment on the evidence, Defendants' counsel referred to Ind. Code § 34-18-14-3(d)[3] and argued:

> It's a section of the Medical Malpractice Act that deals with how many hits, if you will, the patient can recover. We have three Defendants here. There are two named Defendants, of course, Dr. Abbas and Nurse Mittler. And then there is Methodist Hospital, a corporate entity which of course cannot practice medicine. The only basis for any – or the only legal basis for liability against Methodist [Hospital] is by way of the conduct or the actions of either Nurse Mittler or Dr. Abbas.
>
> . . . . I was thorough with each one of their experts in pressing them on whether or not they had any opinions about anybody else other than who they were stating opinions against, which was Dr. Abbas with regard to the two physician witnesses and Nurse Mittler with regard to Nurse [Lisa] Stringer, their nursing expert.

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[3] Ind. Code § 34-18-14-3(d) provides:

> If a health care provider . . . is adjudicated liable solely by reason of the conduct of another health care provider who is an officer, agent, or employee of the health care provider acting in the course and scope of employment . . . , the total amount that shall be paid to the claimant on behalf of the officer, agent, or employee and the health care provider by the health care provider or its insurer is the following:
>
> (1) Two hundred fifty thousand dollars ($250,000) for an act of malpractice that occurs:
>
> (A) after June 30, 1999; and
>
> (B) before July 1, 2017.
>
> * * * * *
>
> The balance of an adjudicated amount to which the claimant is entitled shall be paid by other liable health care providers or the patient's compensation fund, or both.

> And they were clear, they didn't offer any opinions whatsoever against anyone else. . . .
>
> [T]he motion . . . under Trial Rule 50 and pursuant to the statute which makes clear you can only recover from a healthcare provider whose conduct was at issue, is to narrow the issue, which Trial Rule 50 allows. It's on all or part of the claim. The part of the claim is any vicarious liability related to – because we have a jury instruction on vicarious liability – that's why – remember we took under advisement . . . and you were going to take those couple of words out if you agree with me about any other healthcare providers. There is no evidence to support any theory of vicarious or direct against any other healthcare provider.

Transcript Volume 9 at 190-191. Neter-Nu's counsel argued there was evidence of independent liability on the part of Methodist Hospital and referred to testimony regarding nurses relaying information to doctors and proper training. The court denied Defendants' motion. Counsel for Defendants stated "for point of clarification . . . the jury will be able to decide because you feel there is enough evidence, the question will be given to them whether anyone other than Dr. Abbas and Nurse Mittler were negligent and caused the injury," and the court stated "I think they can consider it." *Id*. at 193.

We note that Neter-Nu's complaint did not raise, and the court did not instruct the jury on the elements of, a direct claim against Methodist Hospital for negligent training, supervision, or retention.[4]

[14] In support of his malpractice claims, Neter-Nu presented expert testimony from Dr. Ahmet Gurbuz, Lisa Stringer, R.N. ("Nurse Stringer"), and Dr. Eric Tripp. Dr. Gurbuz presented his opinion that Dr. Abbas failed to identify and treat Neter-Nu's acute limb ischemia. On cross-examination, Dr. Gurbuz testified:

> Q. You don't have any opinion that Nurse Mittler was negligent here, do you?
>
> A. I think those opinions have been said by other people. I will not get into that.
>
> Q. That's all I'm saying. You don't have an opinion that Nurse Mittler – that anything she did or didn't do in this case in her treatment was negligent and caused this patient to lose his leg, fair?
>
> A. I will not comment on Nurse Mittler, no.
>
> Q. So, you don't have any opinions there?
>
> A. Correct.
>
> Q. Do you have any opinions about anyone else at Methodist Hospital other than Dr. Abbas, that somehow one of them, the nurse practitioner or other nurses – Dr. Venkat, the gastroenterologist, Dr. Alonzo, the other hospitalist; any

[4] The preliminary instructions stated Neter-Nu claimed that Dr. Abbas, Nurse Mittler, and Methodist Hospital "negligently failed to diagnose and treat [his] right foot arterial injury during his July 2015 hospitalization." Appellants' Appendix Volume 4 at 57.

opinions that any of them were negligent that they breached the standard of care in this case?

A. I don't.

* * * * *

Q. . . . . The only opinion you have – opinions as far as breaches of the standard of care – negligence by the doctor are against Dr. Abbas?

A. Correct.

Q. And the only opinions you have about why this gentleman lost his leg – that's the connection, that causation, it's Dr. Abbas' failures, as you see them, that you believe led to or caused this gentleman to lose his leg, right?

A. Failure to diagnose acute limb ischemia, yes.

Transcript Volume 4 at 167-168.

[15] Nurse Stringer testified that she had formed an opinion regarding whether Nurse Mittler complied with the standard of care when she attempted a foot IV placement on Neter-Nu. She testified:

> [M]y opinion is that Nurse Mittler breached the standard of care when she failed to identify that she had a deficit in IV placement. Whether it be identifying another site in the arm and[/]or having never received training on how to access the foot. She failed to reach out to a person that had more expertise in the area than what she had so that they could evaluate the situation and help her with potential next steps. Should those next steps have resulted in the IV in the foot, she failed to call the physician prior to doing the actual procedure and then she failed to document so that we had a baseline of care.

Transcript Volume 3 at 118.

[16] Dr. Tripp testified that, in his opinion, Dr. Abbas did not appropriately investigate Neter-Nu's right foot symptoms and pain and that her diagnosis of IV infiltration was not reasonable and did not explain Neter-Nu's symptoms. When asked if, in his opinion, it was reasonable for Nurse Mittler to attempt an IV foot placement given her level of experience with such placement, Dr. Tripp testified "I'm not an expert in nursing procedures" and "I don't think I can directly comment on that." Transcript Volume 5 at 53. On cross-examination, when asked "[y]ou don't have any opinions about Dr. Alonzo – you thought he was negligent, right," Dr. Tripp replied "No." *Id*. at 76.

[17] The expert opinion testimony presented by Neter-Nu related to the existence and scope of the standard of care imposed on Dr. Abbas and Nurse Mittler and whether their acts or omissions satisfied the standard of care. The witnesses did not offer opinion as to whether other persons' conduct fell below the applicable standard of care. Because the evidence was insufficient to support imposing liability on Methodist Hospital based on the acts or omissions of persons other than Dr. Abbas and Nurse Mittler, the trial court was required to withdraw that issue from the jury. Accordingly, the trial court erred in denying Defendants' limited motion under Trial Rule 50.

B. *Final Jury Instruction Nos. 8, 10, and 18*

[18] After ruling on Defendants' Trial Rule 50 motion, the trial court turned to the final jury instructions. Defendants objected to Final Instruction Nos. 8, 10, and 18. Final Instruction No. 8 provided:

> [Neter-Nu] claims that Zainab Abbas, M.D., Morgan Mittler, R.N., and Methodist Hospital, were negligent. To recover on this claim, Mr. Neter-Nu must prove by the greater weight of the evidence that:
>
> 1. Zainab Abbas, M.D., Morgan Mittler, R.N., and/or Methodist Hospital, failed to exercise reasonable care when they provided medical care to Plaintiff;
>
> 2. Zainab Abbas, M.D., Morgan Mittler, R.N., and/or Methodist Hospital's act or failure to act was negligent; and
>
> 3. Zainab Abbas, M.D., Morgan Mittler, R.N., and/or Methodist Hospital's act or failure to act was a responsible cause of the damages alleged by Mr. Neter-Nu; and
>
> 4. Plaintiff suffered damages as result of the injuries.
>
> Zainab Abbas, M.D., Morgan Mittler, R.N., and Methodist Hospital, deny Plaintiff's claims, and have no burden to disprove the Plaintiff's claims.

Appellants' Appendix Volume 4 at 86. The court asked Defendants' counsel if he had any objection to the "and/or" language in subparagraphs 1, 2, and 3, and counsel replied affirmatively and argued "I do think that the Abbas, Mittler and/or Methodist suggests that there is some alternative basis for liability against Methodist even if the jury were to find in favor of Abbas and Mittler" and "I don't think that instruction with and/or is supported by the evidence as

there is, in my view, no evidence to support a claim against anyone other than Abbas and Mittler." Transcript Volume 9 at 194-195.

[19] Final Instruction No. 10 provided:

> A hospital is liable for the negligent act of its employees if the employees were acting within the scope of their employment, if the act is a responsible cause of injury to the plaintiff.
>
> Defendant Methodist Hospital concedes that Nurse Morgan Mittler, Dr. Zainab Abbas *and any other doctors, nurses, or medical providers who treated Mr. Neter-Nu* at Methodist Hospital were acting as their agents and employees at the time of Mr. Neter-Nu's treatment.

Appellants' Appendix Volume 4 at 88 (emphasis added). Defendants' counsel argued the emphasized language was not supported by the evidence and should not have been included.

[20] Final Instruction No. 18 provided:

> If you decide that Zainab Abbas, M.D., Morgan Mittler, RN, *or any other Methodist Hospital employee or agent* were medically negligent, and that their negligence was a responsible cause of the same injury, then regardless of their degree of negligence, they are jointly liable for the entire amount of Franklyn Neter-Nu's damages, and you must return a verdict against all negligent defendants in single amount for the total damages. Do not consider the amount that any individual defendant will pay toward your verdict. Franklyn Neter-Nu will not collect more than the total amount of your verdict.

Id. at 96 (emphasis added). Defendants' counsel argued the emphasized language was not supported by the evidence.

[21] Together, Final Instruction Nos. 8, 10, and 18 allowed the jury to determine that employees or agents of Methodist Hospital, other than Dr. Abbas and Nurse Mittler, were medically negligent and that those employees or agents' negligence was a responsible cause of Neter-Nu's injury. Having found the evidence was insufficient to support imposing liability on Methodist Hospital based on the acts or omissions of persons other than Dr. Abbas and Nurse Mittler and that the trial court erred in not granting Defendants' limited Trial Rule 50 motion and in not withdrawing the issue from the jury, we conclude that the evidence did not support giving Final Instruction Nos. 8, 10, and 18 as written.

C. *Intervening Cause Proposed Jury Instruction*

[22] In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction (1) correctly stated the law, (2) was supported by the evidence in the record, and (3) was covered in substance by other instructions. *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 893 (Ind. 2002), *reh'g denied*. We will reverse on the last two issues only when the instructions amount to an abuse of discretion, and when an instruction is challenged as an incorrect statement of the law, appellate review of the ruling is de novo. *Id*. at 893-894.

[23] The trial court refused Defendants' proposed "intervening cause" instruction, which provided:

> Sometimes an unrelated event breaks the connection between a defendant's negligent action and the injury a plaintiff claims to have suffered. If this event was not reasonably foreseeable, it is called an "intervening cause."
>
> When an intervening cause breaks the connection between a defendant's negligent act and a plaintiff's injury, a defendant's negligent act is no longer a "responsible cause" of that plaintiff's injury.

Appellants' Appendix Volume 4 at 36. Defendants' counsel argued there was an eighty-seven-hour period between Neter-Nu leaving Methodist Hospital and arriving at urgent care in Iowa and that Neter-Nu must prove the causal connection between the IV and the loss of his leg.

[24] Under the doctrine of superseding causation, a chain of causation may be broken if an independent agency intervenes between the defendant's negligence and the resulting injury. *Wilson v. Lawless*, 64 N.E.3d 838, 848 (Ind. Ct. App. 2016), *trans. denied*. The key to determining whether an intervening agency has broken the original chain of causation is to determine whether, under the circumstances, it was reasonably foreseeable that the agency would intervene in such a way as to cause the resulting injury. *Id*. (citing *Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 14 (Ind. 1982) (the action of someone or something other than the alleged tortfeasor that affects the chain of causation is an intervening cause; it becomes a superseding cause breaking the chain of causation if it was not foreseeable)). When assessing foreseeability in the context of proximate cause, courts evaluate the particular circumstances of an incident after the incident occurs. *Id*.

[25] The record shows that Neter-Nu rode a bus for approximately sixteen hours from Gary to Sioux City, Iowa, and that, upon arrival on July 31, 2015, he stayed at a hotel until August 3, when he sought treatment. The jury heard evidence that the condition of Neter-Nu's foot worsened significantly between those dates.

[26] During direct examination of Dr. Jeffrey Jim, the following exchange occurred:

> Q. . . . . Was there a change in the patient's condition between the time he presented to urgent care, the emergency room, and then Mercy Hospital, and the time that he had left Methodist Hospital?
>
> A. Yeah, I think there was sort of a different look and different presentation.
>
> Q. . . . . In your view, when Mr. Neter-Nu presented to Mercy Hospital, or to the urgent care, the ER, and then to the hospital all that same day, had his condition changed from what was noted and what we went over very briefly . . . at Methodist Hospital on . . . July 30th?
>
> A. Yeah, it's a different foot.
>
> * * * * *
>
> Q. . . . . You'd agree . . . that Mr. Neter-Nu had an occluded artery by way of this arteriogram on August 4th, right?
>
> A. Yes.
>
> Q. Okay. Do you have an opinion with regard to whether or not that occlusion was present back here at the time the patient was still at Methodist Hospital?

A. I think that's what we talked about earlier. It was not present.

Transcript Volume 8 at 77-78, 88. During redirect examination, the following exchange occurred:

Q. . . . to get to that point of what we see on August 3rd, that is, having the complete occlusion cutting off all the blood flow down to the great toe, and second toe, that, that could take six to eight hours for that to manifest and look like this, right?

A. Yeah, no, acute limb ischemia is – people understand what heart attack is, right? Now, we're trying to translate stroke to stroke attack. So, we are very horrible at trying to teach other people this is a limb attack. When you have, you know, loss of blood flow, you don't – when you have chest pain, you don't wait around because it's got to be very quickly. So, what we're trying to teach people is, this happens very quickly. A lot of times, six to eight hours is all you've got. Sometimes, less.

Id. at 154-155.

[27] Pattern jury instructions are given preferential treatment, and the preferred practice is to use the pattern instructions. *Harrison v. State*, 32 N.E.3d 240, 252 n.5 (Ind. Ct. App. 2015), *trans. denied*. Defendants' proposed instruction followed Indiana Pattern Jury Instruction No. 303. The jury should have been permitted to consider the evidence regarding the rate and severity of the worsening condition of Neter-Nu's foot and whether his failure to seek treatment earlier under the circumstances was reasonably foreseeable. Because the proposed instruction was supported by evidence in the record, we find the

court abused its discretion in refusing to give the instruction to the jury. *Cf. Wilson*, 64 N.E.3d at 850 ("There was no evidence presented that, even had the urinoma been discovered in January when Mindy brought Tyler to see Dr. Kosten, Tyler still would have lost the kidney. In other words, evidence was not presented showing that the delay until January 22, 2009 was a cause sine qua non of the injury. Accordingly, we conclude that Mindy's failure to immediately bring Tyler to see a doctor after he developed flank pain, instead waiting for a few weeks to do so, did not constitute an intervening cause of Tyler's injury.").[5]

D. *Reference to Medical Records*

[28] Defendants argue the trial court erred in not permitting them to refer to admitted medical records, including information in those records regarding Neter-Nu's history of pulling out IVs, while questioning witnesses. Neter-Nu argues the court permitted Defendants to present evidence that he lost two IVs

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[5] Defendants also proposed a "hindsight" instruction which stated:

> You, the jury, are to determine whether Zainab Abbas, M.D., Morgan Mittler, and Methodist Hospital exercised reasonable care when treating . . . Neter-Nu in light of the conditions as shown by the evidence to have actually existed when [Defendants] rendered care to [Neter-Nu]. This determination should not be based on hindsight.

Appellants' Appendix Volume 4 at 45. We note that the jury was instructed that, "[i]n providing health care to a patient, a physician and/or nurse must use the degree of care and skill that a reasonable careful, skillful, and prudent physician and/or nurse would use *under the same or similar circumstances*," *id*. at 89 (emphasis added), and conclude that any error in refusing Defendants' proposed hindsight instruction was harmless. *See Carter v. Robinson*, 977 N.E.2d 448, 458 (Ind. Ct. App. 2012) (finding no error in not reading instruction that "[t]his determination should not be based on hindsight" and any error was harmless where another instruction provided, "[i]n providing health care to a patient, a family practitioner must use the degree of care and skill that a reasonably careful, skillful, and prudent family practitioner would use *under the same or similar circumstances*"), *trans. denied*.

at Methodist Hospital before Nurse Mittler placed the foot IV and properly excluded unfairly prejudicial evidence pertaining to other hospitalizations.

[29] On cross-examination, Neter-Nu indicated that he did not believe that he pulled out two IVs while he was at Methodist Hospital. While trial judges retain wide latitude to impose reasonable limits on the cross-examination of witnesses based on concerns about, among other things, interrogation that is only marginally relevant, *see Kubsch v. State*, 784 N.E.2d 905, 925 (Ind. 2003), we find the trial court abused its discretion to the extent it did not permit Defendants' counsel to refer to the admitted medical records in cross-examining Neter-Nu and challenging his credibility. *See* Ind. Evidence Rule 607 ("Any party . . . may attack the witness's credibility."); Evidence Rule 611(b) ("Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility."). Given the medical records were admitted into evidence, we conclude the court should have permitted Defendants to refer to them in eliciting testimony from the witnesses.

E. *Cross-Examination of Dr. Tripp*

[30] Defendants also argue the trial court erred in not allowing them to cross-examine Dr. Tripp regarding comments he made in an email related to Neter-Nu's symptoms. They argue they should have been permitted to use the email to refresh Dr. Tripp's recollection and for impeachment purposes. Neter-Nu argues Defendants failed to lay a foundation to refresh the witness's recollection and any error was harmless.

[31] Ind. Evidence Rule 612(a) provides, "[i]f, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." The Indiana Supreme Court has held:

> Although Evidence Rule 612(a) clearly envisions the use of writings to refresh a witness's memory, it "does not address the method by which the witness's memory may be refreshed." 13 Robert Lowell Miller, Jr., INDIANA PRACTICE § 612.101, at 225 (2d ed. 1995). We agree with Judge Miller that a "simple colloquy" is all that is required under Rule 612:
>
> > The witness must first state that he does not recall the information sought by the questioner. The witness should be directed to examine the writing, and be asked whether that examination has refreshed his memory. If the witness answers negatively, the examiner must find another route to extracting the testimony or cease the line of questioning.
>
> *Id.* at 226 (internal citation omitted).

Thompson v. State, 728 N.E.2d 155, 160 (Ind. 2000), *reh'g denied*.

[32] During cross-examination of Dr. Tripp, Defendants' counsel referred to an exhibit, stated it was marked "C" for identification, and asked "[w]hile we were over here with the white noise on, doctor, did you have a chance to look at Exhibit 'C'," and Dr. Tripp replied "[y]es, I did look through it." Transcript Volume 5 at 96. Defendants' counsel asked "[a]nd you remember this exhibit, right," and Dr. Tripp answered: "Yeah, it's been a while though." *Id*. Defendants' counsel stated "this is an exhibit to your deposition . . . produced to me as some of the evidence that I asked for in terms of communications

between you and the lawyers who hired you. Do you remember that," Dr. Tripp responded affirmatively. *Id*. at 96-97. Defendants' counsel asked "[t]his email goes for an entire page and another half page where you're talking about your affidavit and making some suggestions for changes that you wanted to have, right," and Dr. Tripp answered "[y]es." *Id*. at 97. Neter-Nu's counsel objected and mentioned relevance and hearsay. Defendants' counsel indicated that he wished to refresh the witness's recollection. The following exchange occurred:

> The Court: . . . Here's the thing, if you want to refresh his recollection with it, I don't have a problem but has he expressed that he doesn't remember this?
>
> [Defendants' Counsel]: No. I gave it to him Judge, in advance, to try to avoid some of this in order to have – let him have it in front of him to move things along as counsel keeps talking about. If he remembers these things then –
>
> The Court: Then let's just start with asking him. Let's start with asking.
>
> * * * * *
>
> [Plaintiff's Counsel]: I would just add, your Honor, if he hasn't said that he doesn't remember anything then there's no recollection to refresh.
>
> The Court: And I agree with that. . . .
>
> Q. Dr. Tripp, with regard to your initial opinions that you formulated that were captured in an affidavit and sent to you for comments, you sent comments back to the lawyers with some ideas or some suggestions on things you thought you

needed to have amended before you signed that affidavit expressing your opinions, correct?

A. Yes.

Q. One of the things do you recall telling the lawyers were that other than severe pain –

[Plaintiff's Counsel]: Objection, your Honor.

The Court: This is exactly what we talked about. You can ask him about . . . .

[Defendants' Counsel]: I'm asking him if he recalls it.

[Plaintiff's Counsel]: He's just reading from it.

* * * * *

[Defendants' Counsel]: When I ask him, do you remember, and he says yes then it's over, then I don't have to refresh. If he says, no –

The Court: He just said that. He just said he remembered.

[Defendants' Counsel]: . . . I didn't finish the question, so he didn't say yes to that.

The Court: But, you're trying to get into the substance of the document, and I think that's inappropriate.

[Defendants' Counsel]: I'm asking if he remembers. . . . He remembers an email exchange going back and forth about his affidavit and then I'm asking him about the changes he wanted and he can either remember them or not. And if doesn't remember them, I'll refer him to the – refresh his recollection.

The Court: So, what you're doing is putting in the substance of the email, which I don't think is appropriate.

Id. at 98-100. The court sustained the objection.

[33] The court later stated that it had sustained the objection on relevance grounds and asked for Defendants' offer of proof. Defendants' counsel submitted the email authored by Dr. Tripp in June 2018 regarding Neter-Nu's symptoms, summarized statements in the email, and argued:

> So, I want to make that offer of proof that had I been allowed to refresh his memory, he would have agreed that . . . he noted here that other than the severe pain, there were not any other consistent signs of a severe injury. He would have noted that discoloration going distally into the toes would have been more damning to the defense and more supportive of his opinions, but that was not there. And he would have acknowledged, thirdly, that discoloration is a very common finding with simple venous extravasation so it would not by itself herald the serious event.
>
> . . . . I think it was relevant evidence. I think the way I went about trying to elicit that testimony by refreshing his recollection was perfectly appropriate. I think the objection was made for obvious reasons, Judge. This hurts this expert. This undercuts – takes the legs out from under three major points he made throughout his testimony on direct. . . .
>
> * * * * *
>
> . . . . I think he's a critical witness. He's the only hospitalist who will testify on behalf of the Plaintiff. . . . He is the lone wolf saying that . . . Dr. Abbas committed malpractice here and I was . . . prejudiced. I was prevented from cross examining him on three points by way of refreshing his memory about those three points as set forth in his direct communication with Plaintiff's lawyers.

Id. at 137-139.

[34] The issues in this case included what symptoms Neter-Nu presented with and when those symptoms appeared. When Defendants' counsel asked Dr. Tripp if he remembered the email exhibit, Dr. Tripp answered: "Yeah, it's been a while though." *Id*. at 96. Dr. Tripp agreed that the email was one and one-half pages in length and contained his comments regarding his affidavit. While Dr. Tripp indicated that he sent comments to the lawyers "with some ideas or some suggestions," *id*. at 99, we find that the court did not permit Defendants' counsel to specifically ask Dr. Tripp whether he recalled the content of his comments or the information in his email. *See* *Thompson*, 728 N.E.2d at 160 ("The witness must first state that he does not recall the information sought by the questioner."). On remand, the court should be mindful to follow the procedure approved by the Indiana Supreme Court.

[35] In light of our conclusions that the trial court erred in denying Defendants' motion for judgment on the evidence under Ind. Trial Rule 50; that the evidence did not support giving Final Instruction Nos. 8, 10, and 18 as written; that the court abused its discretion in refusing to instruct the jury on intervening cause as requested; that the court abused its discretion in not permitting Defendants to refer to the admitted medical records while questioning witnesses; and that the court erred in not permitting Defendants' counsel to question Dr. Tripp as discussed above, and finding that the cumulative errors were not harmless, we reverse and remand for a new trial.

[36] For the foregoing reasons, we reverse and remand.[6]

[37] Reversed and remanded.

Riley, J., and Foley, J., concur.

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[6] Neter-Nu raises an issue on cross-appeal regarding the calculation of prejudgment interest. As we reverse, we do not reach this issue.