IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CAROL HOOVER, as Administatrix Of the Estate of JUSTIN HOOVER, Deceased,	:	
Plaintiff	:	
vs.	:	**NO. 17-0303**
MUNCY VALLEY HOSPITAL; UPMC SUSQUEHANNA; PERRY DOAN, DO; MARK BEYER, DO; and EMCARE, INC.,	:	
Defendants	:	**CIVIL ACTION - LAW**

O P I N I O N

I. Factual and Procedural History

On February 26, 2016, Justin Hoover, deceased, presented to the Muncy Valley Hospital emergency department complaining of abdominal pain, nausea and vomiting. Mr. Hoover had a past medical history of diabetes mellitus. While in the emergency department, Mr. Hoover was treated by Dr. Perry Doan, Dr. Mark Beyer, and several nurses including Lisa Stubbs, RN. Laboratory results revealed that Justin had a while blood cell count of 17.68, sodium of 132, chloride of 96, carbon dioxide of 20, anion gap of 20, glucose of 343, lipase of 415, and bilirubin of 1.2 which, according to Plaintiff's experts, are indicators of diabetic ketoacidosis ("DKA"). Despite this, Mr. Hoover was discharged home without further treatment. The following day, Mr. Hoover presented to his primary care physician who, due to Mr. Hoover's appearance, complaints, and lab results, called an ambulance to take Mr. Hoover to the Williamsport Regional Hospital where he passed away approximately two and one half hours later. The

clinical impression was cardiac arrest secondary to ventricular fibrillation with type II diabetic ketoacidosis without coma.

As a result of his death, this medical professional liability action was initiated by Complaint on April 7, 2017 against Muncy Valley Hospital, UPMC Susquehanna, Perry Doan, DO, and Mark Beyer, DO. Plaintiff filed an Amended Complaint on May 3, 2017 and a Second Amended Complaint on June 12, 2017. The Complaint is based on Muncy Valley Hospital and its employees/agents' failure to diagnose and treat Mr. Hoover's diabetic ketoacidosis. It includes a negligence claim against Drs. Mark Beyer and Perry Doan as well as EmCare, Inc., Muncy Valley Hospital, and UPMC Susquehanna. Plaintiff asserted a vicarious liability claim and the parties stipulated that that claim is limited to Dr. Beyer, Dr. Doan, Cristy Harding, RN, Janai Arbogast, RN, Pammy Mosteller, RN, and Lisa Stubbs, RN, as set forth in the Court's September 15, 2017 Order. Plaintiff also asserted a corporate negligence count against Muncy Valley Hospital and UPMC Susquehanna.

A Scheduling Order was issued on September 25, 2017, which states that Plaintiff's expert reports are due to Defendant on January 4, 2019. By agreement of all parties, two Amended Scheduling Orders were issued. The last Scheduling Order issued states that Plaintiff's expert reports were due to Defendants on November 1, 2019 and rebuttal reports were due on January 15, 2019. No other requests for extension of time were filed by any party. Trial is scheduled for the first week of July.

Defendants, Muncy Valley Hospital and UPMC Susquehanna, filed a Motion for Partial Summary Judgment on December 19, 2019 arguing that

Plaintiff has failed to produce evidence, including expert testimony, to establish a claim for corporate negligence and also failed to produce any evidence at all to establish a claim for vicarious liability against the hospital defendants as it relates to nursing care. Plaintiff responded on January 13, 2020 addressing and defending the corporate negligence claim but admitting that she does not intend to pursue a vicarious liability claim regarding nursing care. *See Plaintiff's Brief in Response at ¶¶ 15-30*. Moving Defendants filed a Reply Brief on February 11, 2020 and argument was held on February 11, 2020. Plaintiff filed a Reply Brief on February 21, 2020, re-asserting her nursing negligence claim, and including a supplemental report dated February 20, 2020 authored by Dr. N. Stuart Harris.

II. Summary Judgment Standard

Pursuant to the Pennsylvania Rules of Civil Procedure, the court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or where the record contains insufficient evidence of facts to make out a prima facie cause of action. Pa.R.C.P. 1035.2. The purpose of summary judgment is to eliminate cases, or portions of cases, prior to trial where a party cannot make out a claim after relevant discovery has been completed. *Kurian ex rel. Kurian v. Anisman*, 851 A.2d 152, 158 (Pa. Super. 2004). "In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Jones v. SEPTA,* 772 A.2d 435, 438 (Pa. 2001). If the right to summary judgment is not clear and free

from doubt, then the court cannot grant such judgment. *Marks v. Tasman,* 589 A.2d 205, 206 (Pa. 1991).

However, "if, at the conclusion of discovery, the plaintiff fails to produce expert medical opinion addressing the elements of [her] cause of action within a reasonable degree of medical certainty, [s]he has failed to establish a prima facie case and may not proceed to trial." *Miller v. Sacred Heart Hosp.*, 753 A.2d 829, 833 (Pa. Super. 2000).

III. Supplemental Expert Reports After Discovery Deadlines

In response to Defendants' Motion for Summary Judgment, Plaintiff has provided a supplemental report of Dr. Harris dated February 20, 2020 – almost three months after Plaintiff's expert report deadline. Because of this fact, the Court is required to first examine whether or not it is appropriate to consider this report under the circumstances.

Rule 1042.32 states: "**Until a deadline set by the court for the production of expert reports has passed** or unless the court has precluded such production, a party may serve additional and supplemental expert reports **without leave of court**. These reports may introduce new theories of liability or causation or new defenses, and may be prepared by other experts." Pa.R.C.P. 1042.32 (emphasis added).

Rule 1035.3(c) (regarding responses to a motion for summary judgment) states that "the court may rule upon the motion for judgment or permit affidavits to be obtained, depositions to be taken **or other discovery to be had or to make such other order as it is just**." Pa.R.C.P. 1035(c) (emphasis added).

"The trial court should consider the following factors when determining whether or not to preclude a witness from testifying for failure to comply with a discovery order:

(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified,

(2) the ability of that party to cure the prejudice,

(3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of cases in the court,

(4) bad faith of [sic] willfulness in failing to comply with the court's order.

Jacobs v. Chatwani, 922 A.2d 950, 961–62 (Pa. Super. 2007).

"In the absence of bad faith or willful disobedience of the rules, the most significant considerations are the importance of the witness' testimony and the prejudice, if any, to the party against whom the witness will testify. Further, we note that [t]o preclude the testimony of a witness is a drastic sanction, and it should be done only where the facts of the case make it necessary." *Id*.

It is within the trial court's discretion to preclude testimony as a sanction. *Dion v. Graduate Hosp. of Univ. of Pennsylvania*, 520 A.2d 876, 882 (Pa. Super. 1987). "Although preclusion which leads to dismissal through summary judgment is a drastic measure, said sanction may be imposed when a party refuses to comply with a court order, as per Pa.R.C.P. 4019." *Kurian ex rel v. Anisman, et al.*, 2003 WL 25429258 (C.P. Philadelphia July 22, 2003), *citing Green Construction Company v. Penn DOT,* 643 A.2d 1129, 1139 (Pa.Cmwlth. 1994).

This case is comparable to the *Kurian v. Anisman* case. In *Kurian*, a medical malpractice action, the Plaintiff was given a deadline to submit expert

reports which was extended two times. *Kurian*, 851 A.2d at 153-54. Upon expiration of the last deadline set and having received no expert report from Plaintiff, Defendants filed Motions for Summary Judgment. *Id.* at 154. Plaintiff timely filed responses and attached with the responses an expert report, which purported to establish a *prime facie* case. *Id.* The trial court did not consider the report and granted the motions. *Id.* The Superior Court affirmed, stating that "[i]f the trial judge did, in fact, use Rule 4003.5 to preclude [Plaintiff's expert's] testimony, it did so on its own. As stated above, we agree that this is permissible under the rule and within the judge's discretion." *Id.* at 154 and 161. Plaintiff argued on appeal that the Rules of Civil Procedure allow supplementation of the record in response to a motion for summary judgment. *Id.* at 157. The Court, disagreeing, held that, "when a party makes a timely response to a summary judgment motion and attempts to supplement the record with otherwise untimely expert reports, the court may, on its own motion, determine whether this is allowed under Rule 4003.5(b).[1] In so doing, however, the court must apply the long-standing prejudice standard found in the caselaw [sic] construing Rule 4003.5(b)." *Id.* at 159-60. Prejudice to the moving Defendants is discussed in more detail below.

This case is also distinguishable from *Gerrow v. John Royle & Sons*, 813 A.2d 778 (Pa. 2002). In Gerrow, a products liability case, the trial judge set Plaintiff's expert report deadline for January 4th. *Id.* at 137. The judge later denied the parties stipulation to extend the deadlines. *Id.* Due to the parties'

[1] Rule 4003.5(b) states: "An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances

unsuccessful motion to extend the deadlines, Defendant filed its motion for summary judgment for failure to establish a *prima facie* case, but had no objection to the Plaintiffs continuing their efforts to obtain expert reports. *Id.* Plaintiffs filed a timely response along with several expert reports but the trial judge refused to consider them because they were untimely. *Id.* The trial court was later reversed by the Superior Court. *Id.* at 138. The Superior Court stated that "Rule 1035.3(c) offers the trial court certain discretionary latitude when dealing with these matters [supplementation of the record]." *Id.* at 146 (Cappy, J., concurring and dissenting). Justice Nigro, in his dissenting opinion, further states that "permissible 'supplementation' under Rule 1035.3(b) after discovery has ended must be limited to materials that the supplementing party was not previously obligated to provide to its opponent . . . ." *Id.* at 150 (Nigro, J., dissenting).

The primary consideration under circumstances such as these is whether the Defendants will be prejudiced. In *Gerrow*, the Defendants had absolutely no prejudice from the Plaintiff's late expert report submissions, especially considering the fact that they had no objection to continued discovery and the only reason they filed their motion for summary judgment was because the deadline for dispositive motions was approaching and they feared the judge would similarly not accept a late motion. The same cannot be said here. Pursuant to the Amended Scheduling Order, Plaintiff was to submit her expert reports to Defendants by November 1, 2019. Despite this, Plaintiff submitted a supplemental expert report on February 20, 2020 in response to Defendants'

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beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief." Pa.R.C.P. No. 4003.5(b).

Motion. The deadlines had already been extended twice and there is no evidence that Plaintiff sought any additional extensions to file additional or supplemental expert reports. It should be noted that a jury trial has been set for July 6th through 10th of 2020.

The Court recognizes that it *may* allow other discovery to be had prior to deciding a motion for summary judgment pursuant to Pa.R.C.P. 1035(c). However, the Rule also states that the order allowing additional discovery must be *just*. Pa.R.C.P. 1035(c) ("the court may . . . make such other order as it is just"). For the reasons set forth below, considering Dr. Harris' supplemental report is not only unjust under these circumstances, it is highly prejudicial to the moving Defendants.

First, Plaintiff failed to request an extension of the deadlines or seek leave of Court to file a supplemental report after the discovery deadline has passed. Rule 1024.32 states that a party may submit a supplemental report without leave of court **so long as it is before the deadline set by the court**. Pa.R.C.P. 1024.32 (emphasis added). If Plaintiff wished to submit a supplemental report, she was required to either ask for an extension or seek leave of court.

Second, Dr. Harris' supplemental report attempts to add two additional theories of liability, one of which was previously waived by the Plaintiff. In the *Kurian* case, the Plaintiff failed to even identify the expert until after the discovery deadline ran. While Plaintiff had previously identified Dr. Harris as an expert, the circumstances here are similar. Dr. Harris' "supplemental" report adds two completely new theories of liability, which is no different than identifying a completely new expert. Vicarious liability on the basis of nursing negligence and

corporate liability are not theories which Dr. Harris or any other expert had established before Dr. Harris' February 2020 report. If Plaintiff's Counsel was under the impression that these theories were sufficiently proven, then they would not have felt the need to submit a supplemental report. Further, Dr. Harris' expert opinion is something that the Plaintiff was previously required to provide to Defendants. The Court does not intend to preclude Dr. Harris' entire testimony, just his testimony regarding those theories liability that are the subject of Defendants' Motion for Summary Judgment – vicarious liability related to nursing negligence and corporate negligence.

Third, as stated above, the Court has discretion to determine what supplemental materials will be accepted and what materials will not. It also has the option to, on its own motion, issue sanctions against the defaulting party. Here, forcing Defendants to file a Motion for Sanctions pursuant to Pa.R.C.P. 4019 to preclude the supplemental report inappropriately shifts the burden to the party filing the Motion for Summary Judgment. The Court deems requiring the Defendants to file such a motion as unnecessary form over substance.

Fourth, Defendants are prejudiced by the timing of this report and the ability to cure the prejudice is virtually nil. "Most prejudice can be cured with trial delay" or an award of attorney's fees. *Kurian*, 851 A.2d at 160. However, the Court must also consider the effect that a delay would have on the "just and speedy resolution of cases in our overburdened court system." *Id.* The only way to remedy the prejudice here is to extend the trial dates to allow Defendants' experts an opportunity for their experts to respond to these new theories. This

would ultimately bring disruption to the order and efficiency of the judicial system by requiring the trial date to be postponed again.

Finally, if the Courts allow a party to file a supplemental report no matter what the circumstances, no party would ever file a motion for summary judgment. Again, the purpose of summary judgment is to weed out the cases which parties cannot establish a claim. Here, Defendants pointed out two defects in Plaintiff's claims. Plaintiff then took that information and used it to her advantage to cure the exact defects that Defendants pointed out. To allow this would act as a deterrent for future motions and give the non-moving party an unfair advantage.

For these reasons, the facts of this case make preclusion of Dr. Harris' supplemental report necessary and, therefore, the Court will not consider it for purposes of deciding this Motion for Partial Summary Judgment.

IV. Nursing Negligence

Defendants argue that none of Plaintiff's three experts sufficiently refer "to any nursing standard of care or any breach of any member of the Muncy Valley Hospital nursing staff." *Defendants' Brief in Support of Motion, Page 7.* "Because the negligence of a physician [or, in this case, nurse] encompasses matters not within the ordinary knowledge and experience of laypersons[,] a medical malpractice plaintiff must present expert testimony **to establish the applicable standard of care**, **the deviation from that standard**, causation and the extent of the injury." *Grossman v. Barke*, 868 A.2d 561, 566 (Pa. Super. 2005) (emphasis added).

The only references to nursing staff negligence in Plaintiff's original three expert reports were the following:

- "No significant mention of the relevance of Mr. Hoover's marked tachycardia in the setting of his other symptoms is made by MVH ED staff, nor its telling evidence of the dangerous etiology lurking behind the patient's presenting complaint. His continued and obviously abnormal vital signs – that continued despite interval IV fluids and worsened at the time of his fatal discharge home were ignored at the patient's peril. This was a breach of the standard of care." *Dr. Harris Report at page 15.*
- The vital sign abnormalities were noted by nursing staff and brought to the attention of the attending physician (by RN Stubbs) immediately prior to discharge. Dr. Harris Report, page 16.
- "Decedent's [death] in the day following his discharge due to unrecognized and untreated DKA resulted from the failures of his ED care team (Drs. Doan and Meyer and MVH staff) . . . ." *Dr. Harris Report at page 17.*

In response to the Defendants' summary judgment motion, the Plaintiff conceded that she was not pursuing a vicarious liability claim for the negligence of the all nurses. *Plaintiff's Brief in Response at page 25*. Now, after argument of the Defendants' motion, the Plaintiff asserts a vicarious liability claim for the negligence of Lisa Stubbs, RN.

The Court agrees that the three expert reports submitted by Plaintiff are entirely devoid of any opinions identifying a nursing standard of care or a

deviation by Nurse Stubbs from that standard of care. While Dr. Harris' supplemental report appears to cure any defects pointed out by the Defendants, the Court has already determined that Dr. Harris' supplemental report will not be considered. Therefore, finding that Plaintiff has failed to make out a prima facie case of negligence on the part of Nurse Stubbs, Plaintiff's vicarious liability claim regarding nursing negligence must be dismissed.

V. Corporate Negligence

Defendants next argue that Plaintiff failed to produce sufficient expert testimony to establish a cause of action for corporate negligence. First, they state while the experts make "passing" references to corporate negligence, they do not specifically identify the Defendants' standard of care and breach of duty as it relates to the above duties. Second, Defendants assert that there is no evidence that the hospital Defendants knew or should have known about any deviations from a standard of care. In other words, they had no notice.

In her Complaint, Plaintiff claims the theory of corporate negligence under *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991). "Pennsylvania recognizes the doctrine of corporate negligence as a basis for hospital liability separate from the liability of the practitioners who actually have rendered medical care to a patient." *Rauch v. Mike-Mayer*, 783 A.2d 815, 826–27 (Pa. Super. 2001). The doctrine creates a non-delegable duty on a hospital to uphold a proper standard of care to patients. *Id.* A hospital can be held directly liable if it fails to uphold one of the following duties:

1. a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment[2];

2. a duty to select and retain only competent physicians;

3. a duty to oversee all persons who practice medicine within its walls as to patient care; and

4. a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.

Thompson, 591 A.2d at 707–08. It is well settled that, in order to present a *prima facie* case of corporate negligence, the following elements must be proven:

1. The hospital acted in deviation from the standard of care;

2. The hospital had actual or constructive notice of the defects or procedures which created the harm; and

3. The conduct was a substantial factor in bringing about the harm.

Id.

Unless a hospital's negligence is obvious, an expert is required to establish the first and third elements. *Id.*

Plaintiff's original expert reports state the following regarding the hospital's alleged failure to have in place rules and policies regarding DKA:

- "**6) Failure of MVH to have policies and procedures in place for treatment of diabetes and diabetic ketoacidosis**. This failure contributed to the risk of fundamental understanding by Dr. Doan and Dr. Beyer regarding DKA and was a factual cause of Mr. Hoover's death." *Dr. Harris Report, page 17.*

[2] Plaintiff initially included this duty as part of her claim but later agreed to strike it from the Complaint.

- "The Muncy Valley Hospital did not have adequate policies and procedures in place for the diagnosis and treatment of diabetic ketoacidosis, which was a deviation from the standard of care." *Dr. Ladenson Report, page 3.*

Plaintiff's original expert reports state the following regarding the hospital's alleged failure to select and train competent physicians:

- "7. **Failure of Dr. Doan and Dr. Beyer to possess a basic understanding of DKA.** These physicians had an abjectly flawed understanding regarding the presentation of DKA, interpretation of lab results, and treatment for DKA. As a result, they missed this easy diagnosis and discharged Mr. Hoover with instructions to rest at home for the next 24 hours if symptoms were severe." *Dr. Harris Report, page 17.*
- "It is clear from the deposition testimony of these physicians that they lack basic understanding of this disease process, its clinical and laboratory presentation, and treatment required by the standard of care." *Dr. Ladenson Report, page 3.*
- "The Muncy Valley Hospital failed to retain physicians with requisite knowledge and skill in diagnosis and treatment of diabetic ketoacidosis, which was a deviation from the standard of care." *Dr. Ladenson Report, Page 3.*
- Dr. Williams lays out several pieces of knowledge that Dr. Doan and Dr. Beyer should have had that, according to their deposition, they did not. *Dr. Williams Report, pages 5-6.*

The following general opinions were also offered:

- "MVH was negligent in failing to retain competent physicians and failing to have in place policies and procedures for the treatment of diabetes and DKA, which increased the risk of harm to Mr. Hoover." *Dr. Harris Report, page 19.*
- "Muncy Valley Hospital failed to have policies and procedures regarding treatment of diabetes and DKA and failed to retain emergency medicine physicians competent in diagnosis and treatment of DKA which was a deviation from the standard of care that increased the risk of harm to Mr. Hoover." *Dr. Williams Report, page 6-7.*

In the Plaintiff's response to the Motion for Summary Judgment and at argument, the Plaintiff asserted that the original expert reports, specifically including the above passages, supported her claims for corporate negligence under the second and fourth duties of *Thompson*. However, all three of the expert opinions simply state that the hospital failed to have policies and procedures in place for the treating of DKA and that the hospital failed to retain competent physicians. However, they in no way identify the standard of care or offer opinions on how the hospital had actual or constructive notice of the alleged breaches. There is no other information or opinions provided to support the claim that the hospital somehow should have known of the doctors' alleged incompetence. Further, there is no explanation as to what the standard of care is as it relates to policies regarding DKA or what a "reasonable hospital's" policy

regarding DKA would have included. Plaintiff, therefore, has not established a *prima facie* case regarding her corporate negligence claim.

If the Court were to consider Dr. Harris' supplemental expert for support for the second and fourth *Thompson* duties, Plaintiff's corporate negligence claim still fails. "To prevail in a claim for corporate negligence against a hospital . . . a plaintiff must establish that the medical entity violated one of the four non-delegable duties outlined in *Thompson* . . . ." *Welsh v. Bulger*, 698 A.2d 581, 585 (Pa. 1997). As stated above, it is critical that Plaintiff present expert testimony that identifies exactly what the standard of care is. *Grossman*, 868 A.2d at 566. Only then can the finder of fact examine whether the Defendants' conduct fell below that standard. *Toogood v. Owen J. Rogal*, 824 Pa.2d 1140 (PA. 2003). This will then give the jury a basis to determine whether there was a breach of that standard. Plaintiff must also show that the hospital had actual or constructive knowledge of the breach of one of the duties. *Welsh*, 698 A.2d at 585. The notice requirement is what distinguishes a corporate liability claim from a vicarious liability claim and thus is essential. *Edwards v. Brandywine Hosp.*, 652 A.2d 1382, 1386 (Pa.Super. 1995).

We will begin with the second duty under *Thompson* – failure to select and retain only competent physicians. Plaintiff argues that the hospital was put on notice of Dr. Beyer's alleged incompetence. Dr. Harris, in his supplemental report, states that the hospital should have known about Dr. Beyer's deficient patient care and knowledge of DKA. *Dr. Harris Supplemental Report at page 2*. To support this, Dr. Harris states that Dr. Beyer has served as President of the Medical Staff for a total of five years and has served on the hospital medical

board for over 10 years. *Dr. Harris Supplemental Report at pages 2-3*. He has worked at MVH for 25 years, holds high office, and is "intimately involved with the functioning of the hospital." *Dr. Harris Supplemental Report at page 3*. These facts do not prove notice, however. If anything, they support the fact that the hospital would have no reason to know of Dr. Beyer's alleged incompetence.

Dr. Harris also states that, during his deposition, Dr. Beyer described several mistaken beliefs about DKA and that this shows that the hospital should have known of Dr. Beyer's incompetency. He points to several of Dr. Beyer's alleged misconceptions about DKA. For example, Dr. Harris states that DKA is common in all diabetic patients but Dr. Beyer was adamant during his deposition that it is very uncommon in patients with Type 2 diabetes; Dr. Harris states that DKA may be present when blood glucose is elevated to 250 to above and Dr. Beyer testified that blood glucose levels in DKA are in the range of 600-1200; Dr. Harris states that abdominal pain is a sign of DKA and Dr. Beyer says it is not. *Dr. Harris' Supplemental Report, pages 3-4*.

While Dr. Harris lists out all of these alleged misconceptions, Plaintiff fails to produce any evidence to show why the hospital should have known of this lack of knowledge on Dr. Beyer's part. Should have there been an examination of Dr. Beyer when the hospital hired him to determine if he had the requisite knowledge? Should there have been a periodic evaluation for Dr. Beyer on his knowledge of the signs and symptoms of DKA? Should there have been training either when Dr. Beyer was first hired or during the course of employment which taught the doctors and nurses about DKA specifically? In other words, the Plaintiff has failed to aver what duties the hospital had when hiring, retaining, or

supervising its staff. Plaintiff further fails to point to anything evidencing a past issue where Dr. Beyer prematurely discharged a patient with DKA or otherwise mistreated a patient with DKA. Dr. Harris' opinions, if accepted as true, only support Dr. Beyer's own negligence and the court is left guessing what the industry standards are and what a "reasonable hospital" would do in the hiring, training, and retaining process or, if there was a breach of the standard, that the hospital was put on notice. For these reasons, this claim still fails for failure to identify the standard of care and for lack of notice.

We next address Plaintiff's claim that the hospital failed to formulate, adopt, and enforce adequate rules and policies to ensure quality care for patients, the fourth duty of *Thompson*. Defendants admitted in an Answer to Interrogatory that it had no policies or procedures in place regarding DKA. Dr. Harris opines that a policy regarding DKA is very common and would typically address:

> basic diagnostic and treatment considerations. Diagnostic considerations may be as simple as a quick definition of what DKA is; a description of what labs might be drawn (*e.g.,* STAT Chem 7, Ca, Mg, Phos, VBG, beta-hydroxybutyrate, urine analysis, CBC, venous blood gas, EKG); a consideration of steps to rule out common precipitants of DKA (*e.g.,* Infection, Infarction, Infant (pregnancy), Indiscretion (cocaine, ethanol), Insulin lack (non-adherence or inappropriate dosage)); a description of suggested first steps of empiric treatment (IV state and 2-4 liters of IVF of normal saline unless directly contraindicated); very careful monitoring with repeated labs . . . with special attention being directed to potassium levels and repletion; and a description of ways to judge severity of DKA (typically using blood glucose > 250), degree of serum acidosis, serum bicarbonate levels, [and] presence of serum or urine ketones . . . ."
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> *Dr. Harris Supplemental Report, pages 4-5*.

What Dr. Harris describes is not a policy, but more along the lines of what a medical student might find in a textbook. A policy that would be more appropriate would be, for example, a chart directing medical staff that "If X happens, then do Y" or "if the lab results show A, the next step to take is B." Other than the opinion that DKA policies are very common and that "medical walk-in facilities and other low-acuity facilities typically employ rudimentary diabetic treatment protocols (*e.g.,* a simple sliding scale insulin policy in which recommended doses of insulin are given for each range of blood glucose evaluations) and considerations," there is nothing to identify what the industry norm is and whether a reasonable hospital would have a DKA policy. *Dr. Harris Supplemental Report at page 5*. For example, is an emergency room required to have a policy in place for every condition? At argument, Plaintiff conceded that an emergency room would not have a policy for every condition but failed to establish that an emergency room would have one on DKA.

The jury must know the standard of care and, if there is doubt as to what that standard is, then it is impossible for them to determine whether Defendants' actions fell below that standard. For this reason, this claim fails for failure to identify the standard of care.

While Plaintiff, in the original expert reports, argued that only the second and fourth duties of *Thompson* applied in this case, the Plaintiff attempted to raise a new theory under the third duty in Dr. Harris' supplemental report. As the Court stated above, the inclusion of a new theory of liability in a supplemental expert report after the deadlines unfairly prejudices Defendants. Therefore, the

Court will not address the merits of whether this new theory satisfies the third *Thompson* duty.

ORDER

AND NOW, this **13rd** day of **March, 2020**, upon consideration of Defendant, Muncy Valley Hospital and UPMC Susquehanna's Motion for Summary Judgment and the Responses and Briefs thereto, it is hereby Ordered that Defendants' Motion for Summary Judgment is **GRANTED.** Plaintiff's claims for vicarious liability based upon nursing negligence and corporate negligence are hereby dismissed with prejudice.

BY THE COURT,

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Hon. Ryan M. Tira, Judge

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