COURT OF APPEALS, STATE OF COLORADO Court Address: 101 West Colfax Avenue, Suite 800, Denver, Colorado 80202 Appeal from the Arapahoe County District Court, The Honorable Charles M. Pratt Case No: 08-CV-431, Division 404, **Plaintiff-Appellant:** MICHELLE L. MEDINA v. **Defendants-Appellees:** KAREN K. DARRICAU, M.D. AND FORREST BRENT KEELER, M.D.	**σCOURT USE ONLYσ** Case Number: 09-CA-2243
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DEFENDANT-APPELLEE, KAREN DARRICAU, M.D.'S ANSWER BRIEF	

Appeal from Arapahoe County District Court
Case No: 08-CV-431
Honorable Charles M. Pratt

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

_X_ It contains 9396 words.

____ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

___ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. ___, p. ____), not to an entire document, where the issue was raised and ruled on.

_X_ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/ Deanne C. McClung

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II. STATEMENT OF THE CASE

On or about February 25, 2008, Plaintiff filed her Complaint. (Record CD pp. 2-6.) In that Complaint, Plaintiff asserted two separate claims for relief against Dr. Darricau, a negligence claim and a *res ipsa loquitur* claim. On or about

March 18, 2008, Dr. Darricau filed a Motion to Dismiss Plaintiff's claim of *res ipsa loquitur*. (Record CD pp. 23-27.) That Motion was granted by the Court. (Record CD pp. 45-47.) Defendant Dr. Darricau filed her Answer on May 2, 2008. (Record CD pp. 48-51.) She filed an Amended Answer on May 6, 2008. (Record CD pp. 52-56.)

On or about January 13, 2009, Plaintiff filed her Expert Witness Disclosures. (Record CD pp. 244-45.) Plaintiff's sole expert witness, pursuant to C.R.C.P. 26(a)(2), was Joseph Ronaghan, M.D., a general surgeon from Greenville, Texas. Dr. Ronaghan's opinions regarding Dr. Darricau's negligence were two-fold. First, he asserted that the retention of the surgical sponge represented a deviation in the standard of care. Second, he opined that the post-operative care and treatment was negligent, representing a negligent delay in diagnosis. (Record CD pp. 2443 and 1830.) Dr. Darricau disclosed her expert witnesses on February 11, 2009. (Record CD pp. 307-330.)

This case went to trial on June 15-22, 2009. (Transcript CD 6/15-22/2009.) During this six-day trial, the jury heard extensive evidence regarding the surgical care and treatment provided by Dr. Darricau and Dr. Keeler and the surgical procedures that occurred on September 1, 2006. (Transcript CD 6/16/2009 at 11:10-162:13, 6/17/2009 at 5:13-134:13, 6/18/2009 at 145:15-202:18, 6/19/2009 at

89:19-125:11, 6/19/2009 at 171:10-222:25, 6/19/2009 at 227:1-236:24.) The jury also heard testimony from witnesses regarding the sponge count process and the responsibilities of the hospital nurses in this process. (Transcript CD 6/15/2009 at 82:5-141:9, 6/19/2009 at 33:8-82:21.) The jury also heard evidence regarding the care and treatment Dr. Darricau provided in the post-operative period, the subsequent surgery performed by Dr. Darricau on December 13, 2006 and Dr. Darricau's care and treatment thereafter. (Transcript CD 6/18/2009 at 145:15-202:18, 6/19/2009 at 89:19-125:11.) The jury heard testimony regarding Ms. Medina's claimed damages, her post-operative course and post-operative infections. After the close of Plaintiff's evidence, counsel for Dr. Darricau and counsel for Dr. Keeler made directed verdict motions, which the Court took into consideration. (Transcript CD 6/19/09 at 129:13-166:15.) The Defendants also made directed verdict motions on damages. (Transcript CD 6/19/09 at 243:13-244:23.) The Plaintiff did not make any motions for directed verdict after the close of Defendants' evidence.

On June 22, 2009, the Trial Court granted Dr. Keeler's Motion for Directed Verdict, but denied Dr. Darricau's directed verdict motions. (Transcript CD 6/22/09 at 3:4-20:11.) Therefore, the case against Dr. Darricau went to the jury. At the conclusion of the evidence, the jury returned a verdict in Defendant

Dr. Darricau's favor, finding no negligence and no causation. (Record CD pp. 2066.) The Court entered judgment in favor of Dr. Darricau on that same date. (Record CD at pp. 1161 and 2222-23.) The Court also awarded Dr. Darricau's costs. (Record CD pp. 2230-2231.)

On July 21, 2009, Plaintiff filed her Motion for Judgment Notwithstanding Verdict and/or For New Trial. (Record CD pp. 1209-23.) That Motion was denied by application of C.R.C.P. 59(j). Plaintiff then filed her Notice of Appeal on October 28, 2009. (Record CD pp. 1421-28.) Plaintiff's Opening Brief argues essentially the same issues set forth in her unsuccessful JNOV Motion.

III. STATEMENT OF FACTS

In her Complaint, Plaintiff Michelle Medina averred that Karen Darricau, M.D. and Brent Keeler, M.D. were negligent in the surgical care and treatment provided to her. (Record CD pp. 2-6.) Plaintiff's claims against Dr. Darricau stem from a September 1, 2006 surgical procedure in which Dr. Darricau removed three superficial endometriomas from Ms. Medina's previous C-section scar line. (Record CD pp. 1794-95.) When Ms. Medina's right lateral incision developed recurring superficial infections, in the months following the initial surgery, Dr. Darricau elected to perform a second, exploratory surgery at the site of that incision. (Record CD pp. 1806-7.) She identified and excised a small mass of

inflammatory tissue, which was later found to contain a small piece of gauze, also referred to as a surgical sponge. (Record CD pp. 1808.) Both surgeries took place at The Medical Center of Aurora (TMCA).

The finding of the retained sponge was a surprise to Dr. Darricau and Dr. Keeler. (Transcript CD 6/17/09 at 124:21-125:7; 6/16/09 at 147:8-148:5.) At the end of the procedure, it was reported to the surgeons that the sponge count was correct. TMCA has a policy regarding sponge counts, requiring counts to be performed by hospital staff. The initial count was performed by hospital nurse, Brent Boynton, and scrub tech, Jessie Velasquez, at a time prior to when the procedure was performed and before either surgeon was present in the O.R. Prior to closure of a surgical wound, Dr. Darricau thoroughly inspects it for foreign objects. (Transcript CD 6/17/09 at 76:25-77:18.) At the end of the surgery, Boynton and Velasquez performed a second sponge count which was found to be correct. (6/15/09 at 133:21-134:5 .) At the closure of the skin, a third count was performed and was again found to be correct. (Transcript CD 6/15/09 at 133:24-134:8.) The correct counts were relayed to Dr. Darricau and Dr. Keeler. (Transcript CD 6/17/09 at 107:6-108:9; 6/16/09 at 147:19-148:5.)

Thereafter, Plaintiff asserted a claim against TMCA. Plaintiff settled her claim with TMCA. (Record CD pp. 1872-73.) Then Plaintiff filed her Complaint against the Defendant-surgeons.

IV. SUMMARY OF ARGUMENT

Plaintiff had a full and fair opportunity to present evidence regarding her claims at trial. At the conclusion of the case, the jury found Dr. Darricau not negligent and found no causation. The evidence, viewed in the light most favorable to Dr. Darricau, supported the jury's verdict regarding both negligence and causation. Therefore, Plaintiff was not entitled to a Judgment Notwithstanding Verdict and the Court did not err in not granting Plaintiff's Motion.

The Trial Court properly instructed the jury in this matter. The jury instructions given were reasonable and appropriate in light of the evidence and issues presented during the course of trial. The Trial Court also appropriately permitted Defendant Dr. Darricau to amend her Answer to add the defense of release.

Finally, as the jury was appropriately informed of the fact of settlement with The Medical Center of Aurora and its employees under *Greenemeier,* evidence of the redacted settlement documents presented to the jury and later removed from

the jury's consideration did not prejudice the Plaintiff . Therefore, Defendant Dr. Darricau respectfully requests that Plaintiff's Appeal be denied.

V. ARGUMENT

A. THE TRIAL COURT APPROPRIATELY DENIED PLAINTIFF'S C.R.C.P. 59 MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND/OR FOR NEW TRIAL

1. Standard of Review; Preservation

Defendant Dr. Darricau does not disagree with Plaintiff's statement that the standard of review for a Judgment Notwithstanding Verdict (JNOV) motion is a reasonableness standard, but supplements that statement as follows:

A motion for JNOV should only be granted if the evidence, viewed in the light most favorable to the non-moving party, is such that no reasonable person could reach the same conclusion as the jury. *Western Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570, 578 (Colo.App. 2006). In considering the evidence, the Court must draw every legitimate inference in favor of the party opposing the motion for judgment notwithstanding verdict. *Nelson v. Hammon*, 802 P.2d 452, 454 (Colo. 1990).

Pursuant to C.R.C.P. 59(e), Plaintiff bears the burden of proving either insufficiency of evidence as a matter of law or that no genuine issue of any material fact exists and that she is entitled to judgment as a matter of law. In

addressing a JNOV motion, the Trial Court should not evaluate the evidence as would an additional juror, but rather the Court must review the facts and inferences in a light which most favorably supports the jury's verdict. *Voight v. Colo. Mountain Club*, 819 P.2d 1088, 1091 (Colo.App. 1991). The Court may not consider the weight of the evidence nor the credibility of the witnesses. *Wesley v. United Svcs Auto. Ass'n*, 694 P.2d 855, 857 (Colo.App. 1984).

2. <u>The Evidence Supported the Jury's Verdict that Dr. Darricau was not Negligent</u>.

To establish negligence in a medical malpractice case, the plaintiff must generally prove, by competent expert testimony, that the defendant-physician departed from the applicable standard of care required of a physician in the defendant's own specialty. *Miller v. Van Newkirk*, 628 P.2d 143, 145 (Colo.App. 1980); *Teiken v. Reynolds*, 904 P.2d 1387, 1389 (Colo.App. 1995). The mere fact that an injury has occurred is not evidence of negligence on the part of the physician. *Adams v. Leidholdt*, 38 Colo. App. 463, 563 P.2d 15, 19 (1976). To be competent, the expert testimony must be from "a licensed physician who is knowledgeable concerning the standard of care in the medical specialty of the defending physician." *Bilawsky v. Faseehudin*, 916 P.2d 586, 589 (Colo.App. 1995); C.R.S. § 13-64-401.

The only exception to this rule requiring competent expert medical testimony is the doctrine of *res ipsa loquitur* . "*Res ipsa loquitur* is a rule of evidence which defines the circumstances under which a presumption of negligence will arise." *Spoor v. Serota*, 852 P.2d 1292, 11295 (Colo.App. 1992). The presumption arises when some unexplained event creates a *prima facie* case of negligence. *Id.* If it cannot be inferred that the injury normally does not occur without negligence, expert testimony on that issue is necessary before *res ipsa loquitur* can be applied. *Miller*, 628 P.2d at 146.

Plaintiff argues that she was entitled to a JNOV because the doctrine of *res ipsa loquitur* shifted the burden of proof to the Defendant-physicians and "neither defendant established how the sponge was left inside Medina…was not surgeon negligence." *See* Plaintiff's Opening Brief at p. 22. Plaintiff cites *Ochoa v. Vered*, 212 P.3d 963 (Colo.App. 2009) in support of her argument. However, pursuant to C.R.E. 301, a presumption does not shift the burden of proof to the party against whom it is directed. The Court in *Ochoa* recognized the tension between C.R.E. 301 and *res ipsa loquitur* and held that the Court did not abuse its discretion by giving a *res ipsa loquitur* instruction in that case. *Id. a*t 970. Clearly, the issue of whether the doctrine of *res ipsa loquitur* is excepted from the operation of C.R.E.

301 is not settled. Nevertheless, the Trial Court gave a *res ipsa* instruction in this case. (Record CD p. 2013.)

At trial, Dr. Darricau presented substantial evidence that she was, in fact, not negligent with respect to the retained sponge. The evidence presented at trial, when viewed in the light most favorable to Dr. Darricau as the non-moving party, supported the jury's verdict.

Evidence was presented by all parties as to the process of the sponge count. The jury learned from TMCA nurse, Brent Boynton, R.N., that TMCA requires its circulating nurse and scrub tech to perform a series of sponge counts in each and every surgery. That policy was admitted into evidence as Exhibit N. (Record CD pp. 1863-64.) That policy requires TMCA circulating nurse and scrub tech to perform an initial count of sponges before the beginning of the case. This initial count occurs at a time when neither the physician nor the patient is in the room. (Transcript CD 6/18/09 at 167:4-17.) Mr. Boynton testified that it is the role of the nurse and scrub tech to initiate counts. (Transcript CD 6/15/09 at 116:7-25.)

Mr. Boynton also testified that the TMCA Operating Room Counts Policy requires a second count be performed at the end of the procedure but before the skin incision is closed or sutured. A third count is then performed at the time of skin closure. Mr. Boynton testified that the physician does not take part in the

count process, unless the nurse reports that the count is **incorrect.** If the count is incorrect, then the physician will take steps to assist in locating the missing sponge. However, Mr. Boynton testified that if the count is reported as being correct, the physicians rely upon that count. In this case, Mr. Boynton testified that he performed three sponge counts with scrub tech, Jessie Velasquez and the counts were correct. (Transcript CD 6/15/09 at 111:6-134:11.)

The jury also heard similar testimony through both Defendant-physicians, Dr. Darricau's expert surgeon, Ruediger Bracht, M.D., and expert nurse, Lynn Hiatt, R.N. (Transcript CD 6/18/09 at 146:4-202:17; 6/19/09 at 33:18-82:20.) Plaintiff's own expert surgeon also agreed that he relies upon the hospital circulating nurse and scrub tech to perform sponge counts. (Transcript CD 6/16/09 at 268:17-275:4.)

The jury also heard testimony from Dr. Darricau and Dr. Ruediger Bracht that Dr. Darricau's care and treatment of the Plaintiff was reasonable and appropriate. They testified that her performance of the September 1, 2006 surgery was appropriate and performed in a reasonable manner. (Transcript CD 6/18/09 at 160:13-18 and 6/17/09 at 72:9-86:25.) The jury heard testimony that a surgeon must necessarily rely on the sponge count process, rather than his or her own memory of where the sponge may have been placed, or even on a visual inspection

of the surgical field. (Transcript CD 6/18/09 at 161:23-170:19 and 6/17/09 at 74:20-78:23.)

Dr. Darricau and Dr. Bracht also testified that Dr. Darricau's post-operative care and treatment and subsequent surgery were reasonable and met the standard of care. (Transcript CD 6/18/09 at 146:4-202:17 and 6/17/09 at 87:1-127:17.)

Therefore, even if Plaintiff's contention is correct that based upon the application of *res ipsa loquitur*, the burden shifted to Dr. Darricau to prove she was not negligent, Dr. Darricau clearly met that burden. Dr. Darricau presented significant and substantial evidence that her care was, at all times, reasonable and appropriate. (Transcript CD 6/17/2009 at 5:13-134:13, 6/18/2009 at 145:15-202:18, 6/19/2009 at 33:8-82:21, 6/19/2009 at 89:19-125:11.) Based upon the evidence presented at trial, a reasonable person could reach the same conclusion as the jury and find Dr. Darricau was not negligent, and that the sponge was retained absent surgeon negligence. Therefore, Plaintiff's Motion for Judgment Notwithstanding Verdict was properly denied.

3. Application of Captain of the Ship Doctrine did not Entitle Plaintiff to a Judgment Notwithstanding Verdict under the Circumstances of this Case.

Plaintiff next argues that under *Ochoa,* 212 P.3d at 969, Dr. Darricau had a "non-delegable duty to remove sponges" and could not shift blame to the hospital

staff. Plaintiff's arguments are based upon the application of the doctrine of Captain of the Ship. The Captain of the Ship doctrine imposes vicarious liability on a surgeon for the negligence of hospital employees under the surgeon's control and supervision during surgery. *Id.; Beadles v. Metayka*, 135 Colo. 366, 311 P.2d 711, 714 (1957).

In *Ochoa*, the Colorado Court of Appeals held that the Captain of the Ship doctrine is governing law.[1] However under Colorado law, the Captain of the Ship doctrine is **only** applicable "during surgery" when the "surgeon assumes supervision and direction of the operating room." *Ochoa* at 966*; Krane v. Saint Anthony Hosp. Sys.*, 738 P.2d 75, 76-77 (Colo.App. 1987); *Beadles* at 713. It is not applicable to situations outside of the time in which the surgeon has entered the operating room and has assumed supervision and direction. *See Adams v. Leidholdt*, 195 Colo. 450, 579 P.2d at 618, 620(1978)(surgeon not liable for nursing negligence which occurred in post-operative period and outside presence of surgeon); B*ernardi v. Community Hospital Assn.* 443 P.2d 708, 715 (Colo.

[1] The Captain of the Ship doctrine has been widely criticized and rejected by numerous other jurisdictions. See e.g. Harris v. Miller, 438 S.E.2d 731 (N.C. 1994); Lewis v. Physicians Ins. Co., 627 N.W.2d 484 (Wis. 2001); Thomas v. Raleigh Hosp., 358 S.E.2d 222 (W.Va 1987). Throughout trial in this matter, the undersigned counsel objected to application of the Captain of the Ship doctrine in this case.

1968)(physician not vicariously liable for negligent injection of antibiotics by nurse in post-operative period).

Plaintiff asserts that "*Ochoa* has determined that surgeons have a non-delegable duty to remove sponges in the first instance" and quotes *Ochoa* as holding "a surgeon cannot delegate responsibility for removing sponges from a patient's body." However, *Ochoa* makes no such holding. *See Ochoa* at 969. Rather, *Ochoa* cites *Fields v. Yusuf*, 144 Cal.App.4th 1381, 51 Cal.Rpter.3d 277 (Cal.Ct.App. 2006) in support of its holding that under the facts of the case, Dr. Vered had exclusive control of the sponge. However, it did not expressly adopt the parenthetical quote from *Fields* which Plaintiff cites. Therefore, the quote is merely dicta and not the law in Colorado. Instead, *Ochoa* held that under the facts and circumstances of that case, the surgeon, Dr. Vered, was in charge of the surgery and presumably could direct the nurses and, therefore, he had exclusive control of the sponge. *Ochoa* further held that trial court did not abuse its discretion in applying *res ipsa loquitur*.

The question of whether a physician has assumed supervision and direction is a question of fact for the jury. *Young v. Carpenter*, 694 P.2d 861, 863 (Colo.App. 1984). It is not a question of law. *Id.* In this case, the jury was presented with facts that the negligent acts of the nursing staff in failing to properly

perform a sponge count in this case may have occurred with the initial sponge count. Therefore, all subsequent sponge counts would be incorrect. The jury heard facts that showed the first sponge count occurred at a time in which Dr. Darricau was not present and had not yet assumed supervision and control of the nurses. There was no evidence presented proving that the purportedly negligent sponge count occurred at a time when Dr. Darricau was "in control" of the operating room. Therefore, the jury could reasonably determine that the Captain of the Ship doctrine was inapplicable to this case and that Dr. Darricau was not vicariously liable for the negligent acts of the nurses in performing the sponge counts. Therefore, when viewed in the light most favorable to Dr. Darricau, Plaintiff's Motion for Judgment Notwithstanding Verdict was appropriately denied.

4. Jury Verdict of No Causation Renders Harmless any Perceived Error Regarding Negligence.

Plaintiff bears the burden under Colorado law of establishing all elements of her claim. *Oliver v. Amity Mut. Irrigation Co.*, 994 P.2d 495, 994 (Colo.App. 1999). Even if the Court were to accept Plaintiff's argument that the application of *res ipsa loquitur* required this Court to enter a Judgment Notwithstanding Verdict, such an error is utterly harmless in light of the fact that the jury found no causation.

See Dunlap v. Long, 902 P.2d 446, 447 (Colo.App. 1995); *Pinell v. McCrary*, 849 P.2d 848, 851 (Colo.App. 1992).

5. Plaintiff is not Entitled to a Judgment Notwithstanding Verdict, as she Failed to Meet her Burden to Establish Causation.

Plaintiff bears the burden to establish that the damages were proximately caused by the negligent acts complained of. *Bruckman v. Pena*, 487 P.2d 566, 568 (Colo.App. 1971); *Stumps v. Gates*, 777 F. Supp. 808, 824, *aff'd* 986 F.2d 1429 (D. Colo. 1991); CJI-Civ. 4th 9:2; CJI-Civ. 4th 3:1. To prove causation in a negligence case, a plaintiff must prove, by a preponderance of the evidence, *i.e.*, "more likely than not", that the injury would not have occurred but for the defendant's alleged negligent conduct. *See Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714, 719 (Colo. 987) (stating that, for liability to be imposed, Colorado law requires the existence of a causative link between a plaintiff's injuries and the defendant's negligence to be established by "such facts and circumstances as would indicate with reasonable probability" that causation exists).

Plaintiff argues that the "uncontradicted evidence here also established the sponge left inside Medina was definitely the cause of her infection." Plaintiff's Opening Brief at pp. 24-25. Yet, Plaintiff has cited nothing in the records to provide a causative link between Dr. Darricau's negligence and claimed damages.

The burden is on the appellant to provide a record justifying reversal and, absent such a record, the Court of Appeals presumes regularity of the District Court proceedings. *Alessi v. Houge*, 689 P.2d 649, 650 (Colo.App. 1984).

At the close of the evidence in this case, the jury found no causation. When viewing the evidence in the light most favorable to the non-moving party, a reasonable person could reach the same conclusion as the jury. While Plaintiff presented substantial evidence regarding her injuries and damages, she presented no evidence that Dr. Darricau's negligence was the cause of her claimed injuries. Therefore, Plaintiff failed in her burden to provide causation. On the other hand, Dr. Darricau presented evidence through her own testimony, as well as the testimony of Dr. Bracht, that there was no negligence on her part which was the proximate cause of Plaintiff's claimed injuries. The expert testimony that this injury occurred without negligence by the surgeon supports the jury verdict of no causation.

"The findings of the trier of fact must be accepted on review unless they are so clearly erroneous as not to find support in the record." *Machol v. Sancetta,* 924 P.2d 1197, 1199 (Colo.App. 1996). If the jury finds that plaintiff failed in her burden on any one of the elements of a *prima facie* case of negligence, then the defendant must prevail. CJI-Civ. 4th 9:2. At trial, the jury found no causation.

Viewing the evidence in the light most favorable to Dr. Darricau, Plaintiff's Motion for JNOV on the issue of causation was properly denied.

B. THE TRIAL COURT DID NOT ERR WITH REGARD TO THE JURY INSTRUCTIONS BECAUSE THE INSTRUCTIONS GIVEN WERE ACCURATE STATEMENTS OF THE LAW, AND THE COURT'S DECISIONS WERE NOT MANIFESTLY ARBITRARY, UNREASONABLE, OR UNFAIR.

1. Standard of Review; Preservation

In compliance with C.A.R. 28(k), Defendant Darricau does not disagree that the appropriate standard of review regarding jury instructions is that individual instructions are reviewed for abuse of discretion, but supplements that statement as follows:

Trial courts have discretion to determine the form of the jury instructions. *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1195 (Colo.App. 2009). Absent a showing that the trial court abused its discretion, its decision of what instructions to give will not be overturned. *Id.* A trial court's ruling on jury instructions is an abuse of discretion only when its decision is "manifestly arbitrary, unreasonable, or unfair." *Id., citing Hock v. N.Y. Life Ins. Co.,* 876 P.2d 1242, 1251 (Colo. 1994). Where the jury instructions, as a whole, are comprehensive, correct and fair, possible technical errors to segregated portions are not grounds for reversal. *Denver City Tramway Co. v Brumley*, 51 Colo. 251, 116 P. 1051 (1911).

Pursuant to C.R.C.P. 51, a party is required to object to alleged errors in the instructions before they are given to the jury. Only grounds specified in an objection shall be considered on appeal. *Harris Group,* 209 P.3d at 1195. All other objections are considered waived. *Id.; Robinson v. City and County of Denver,* 30 P.3d 677 (Colo.App. 2000). Even if the trial court's instruction is found to be erroneous, the erroneous instruction is only reversible when it prejudices a party's substantial rights, or if the jury would have probably decided the case differently if the correct instruction had been given. *Harris Group,* 209 P.3d at 1195. Therefore, a harmless error standard is applied to a properly preserved jury instruction. *Waneka v. Clyncke,* 134 P.3d 492 (Colo.App. 2005) *aff'd* 105 P.3d 1072 (Colo. 2007).

Plaintiff failed to provide a statement regarding Preservation as required under C.A.R. 28(k), failed to properly cite the instructions objected to in her brief, and failed to properly preserve her objections to the jury instructions at trial under C.R.C.P. 51.

2. Jury Instructions Regarding Burden of Proof and *Res Ipsa Loquitur* were Properly Given and Caused No Prejudice to Plaintiff.

As discussed above, the Court in this case determined that *res ipsa loquitur* was applicable and instructed the jury accordingly, with Instruction 10. (Record

CD p. 2013.) The Court, over Defendant's objections, also gave instructions relating to burden of proof and the Captain of the Ship doctrine. (Record CD Instructions Nos. 3, 9, 13, 14, 15, 16, 22, 30, p. 2006, 2012, 2016-2019, 2025, 2033). These instructions, when taken as a whole with the remaining instructions given, accurately state the law applicable to this case, and were appropriately given.

Plaintiff asserts that her tendered and rejected Instruction 1, based upon 3:1/9:17, *Ochoa,* and *Mudd v. Dorr*, 574 P.2d 97 (Colo.App. 1997), should have been given. Plaintiff failed to make a record when tendering that instruction to the Trial Court. (Transcript CD at 6/22/09 at 66:13-22). Therefore, she has waived any objections to the Court's failure to give that instruction.

Plaintiff's tendered and rejected Instruction 1 misstated the law in Colorado as discussed above. This non-stock instruction was also difficult to understand as worded, as it was worded in the negative, making it difficult to comprehend. This instruction would have clearly created confusion for the jury and was not properly tendered. Rather, the Trial Court gave Instruction 10, which is more clearly worded. By giving Instruction 10, the Trial Court has precluded any prejudice which could have occurred by the refusal of Plaintiff's tendered and rejected Instruction 1.

Plaintiff argues that the Court erred in giving Instruction 3, claiming that this instruction, given in combination with Instruction 10, created confusion. However, Plaintiff ignores the fact that her claims of negligence against Dr. Darricau were not limited to the retention of the sponge. Plaintiff also presented evidence through her expert surgeon, Dr. Ronaghan, that Dr. Darricau was negligent in her post-operative care and treatment of the recurring incision infections which occurred in the post-operative period and in failing to perform a radiology study such as an x-ray or ultrasound earlier, thereby creating a delay in diagnosis. (Transcript CD at 6/16/09 249:9-254:7.) These separate and distinct claims of negligence by Dr. Darricau warranted that Instruction 3 and Instruction 10 be given.

3. The Court Properly Rejected Plaintiff's *Ochoa* Instruction which Misstated Law.

Plaintiff next asserts that the Trial Court failed to give an instruction she tendered based upon *Ochoa*. However, Plaintiff failed to make a record when tendering that instruction to the Trial Court. (Transcript CD 6/22/09 at 66:13-22.) Therefore, she has waived any objections to the Trial Court's failure to give that instruction.

Plaintiff argues that her tendered and rejected Instruction 5, which stated "Under the law, surgeons cannot delegate responsibility for removing surgical

sponges from a patient's body" should have been given. However, as discussed above, this proposed instruction is based upon dicta, and not Colorado law. Had the Trial Court given the proposed incorrect *Ochoa* instruction, error would have clearly occurred.

Plaintiff cannot show that the jury would have decided differently had this instruction not been given. Therefore, no reversible error exists. *Harris Group*, 209 P.3d at 1195. Plaintiff is not entitled to a new trial with respect to her tendered and rejected Instruction 5.

4. <u>The Court Properly Instructed the Jury Regarding Vicarious Liability and Captain of the Ship.</u>

Plaintiff asserts that the Trial Court failed to give her tendered and rejected Instruction 4 regarding vicarious liability. However, Plaintiff failed to make a record when tendering that instruction to the Trial Court. (Transcript CD 6/22/09 at 66:13-22.) Therefore, she has waived any objections to the Trial Court's failure to give that instruction.

Plaintiff's tendered and rejected Instruction 4 is based upon the Captain of the Ship Doctrine. However, Plaintiff's Instruction 4, is a misstatement of the case law and evidence presented in this case. The Captain of the Ship Doctrine, a form of vicarious liability, is **<u>only</u>** applicable "during surgery" when the "surgeon assumes supervision and direction of the operating room." *Ochoa*, 212 P.3d at

966*; Krane*, 738 P.2d at 76-77 ; *Beadles*, 311 P.2d at 713-14. Based upon the evidence in this case as discussed above, it would be improper to instruct the jury that the nurse and scrub tech were under Dr. Darricau's control at the time of the purported negligence in this case. Plaintiff presented no evidence when the negligent count occurred. Clearly, if the nurse and scrub tech were negligent in their initial count, a count done at a time before Dr. Darricau assumed control of the operating room, then Captain of the Ship would not apply.

Plaintiff also objects to Instructions 13, 14 and 22, which all relate to the Captain of the Ship doctrine or vicarious liability. (Record CD pp. 2016, 2017 and 2025.) However, consistent with Colorado law, Instructions 13, 14 and 22 clearly set forth Colorado law that the Captain of the Ship could not be applicable during times Dr. Darricau had not assumed supervision and direction of the operating room. Hence, Instructions 13, 14 and 22 were properly given and any proposed instruction regarding vicarious liability, which misstates Colorado law, was properly rejected.

In light of the claims presented in this case, the instructions given to the jury were appropriate and did not prejudice the Plaintiff. Therefore, Plaintiff is not entitled to a new trial with respect to instructions given regarding burden of proof, *res ipsa loquitur*, Captain of the Ship, and vicarious liability.

5. Jury Instructions Regarding Comparative and Nonparty Negligence were Proper and Caused No Prejudice to Plaintiff.

Plaintiff argues that instructions relating to Dr. Darricau's affirmative defense of the comparative negligence of the Plaintiff and nonparty designation of The Medical Center of Aurora and its employees were given in error. As an initial matter, Plaintiff has failed to identify which instructions she is objecting to and failed to preserve the record with respect to those instructions and has therefore waived any objections thereto.

Plaintiff initially asserts that "there was no evidence Medina in any way contributed to the sponge being left inside her during the September 1, 2006 surgery." *See* Plaintiff's Opening Brief at p. 30. However, Plaintiff again ignores the fact that she asserted two separate negligence theories against Dr. Darricau in this matter. She is also fully aware that the Court ruled that the comparative negligence related to Plaintiff's negligent failure to follow her wound care instructions, a valid defense to Plaintiff's claim that Dr. Darricau was negligent in the care and treatment of her recurrent post-operative incision infections. (Transcript CD 6/22/09 at 51:21-54:1.)

Based upon evidence presented through the Plaintiff and her own witnesses, the jury could have concluded that Plaintiff was comparatively negligent in failing to comply with reasonable and appropriate wound care instructions, thus causing

some of her own claimed damages. Instructions 20 and 21 were appropriately given. (Record CD pp. 2024-25.)

Plaintiff next complains that an instruction regarding nonparty negligence of The Medical Center of Aurora was given. However, an instruction on nonparty negligence is proper in light of the facts and evidence, which was presented at length throughout the trial. Defendant Dr. Darricau properly designated The Medical Center of Aurora and its agents or employees as nonparties at fault. (Record CD at p. 68-70.) Evidence was presented at trial that the hospital nurse and scrub tech were responsible for performing the sponge counts. The negligence of the nurse and scrub tech in failing to do a proper sponge count was therefore reasonably considered by the jury, especially since the initial sponge count occurred at a time when Dr. Darricau had not assumed supervision and control of the operating room. An instruction based upon the defense of the negligence of nonparties, The Medical Center of Aurora and its employees, was appropriately given. Plaintiff is not entitled to a new trial with respect to instructions relating to comparative and nonparty negligence.

6. Jury Instructions Regarding Standard of Care and Expert Testimony were Appropriate and Caused No Prejudice to Plaintiff.

Plaintiff argues that Instruction 18, relating to standard of care testimony, was given in error. Defendant asserts that Plaintiff failed to preserve this objection at the time of trial. Although Plaintiff's counsel cites a portion of the record where she discussed this Instruction based upon *Spoor v. Serota*, 852 P.2d 1292 (Colo.App. 1992), Plaintiff clearly failed to preserve the objections set forth in her Opening Brief. Therefore, Plaintiff has waived her objections thereto.

Even if Plaintiff had properly preserved her objections to this instruction on the grounds that the instruction was an incorrect statement of law, Plaintiff's arguments must fail. Plaintiff has ignored the fact that she asserted two separate negligence theories against Dr. Darricau in this matter. Plaintiff asserted a claim that Dr. Darricau was negligent with respect to the retained sponge, but she also asserted a second claim that Dr. Darricau was negligent in the post-operative care she provided to the Plaintiff, resulting in a delay removing the sponge. There can be no question that Instruction 18 was appropriate in light of that second claim.

Plaintiff argues that under *Mudd* "a jury can conclude that the leaving of a sponge in a surgical patient constitutes surgeon negligence and a breach of the

standard of care without the aid of expert testimony." *See* Plaintiff's Opening Brief at p. 31. However, if a court determines that the evidentiary rule of r*es ipsa loquitur* applies, a plaintiff will only be relieved of having to present expert medical testimony to prove that the defendants owed a duty of care to the plaintiff and breached that duty. *Mudd*, 574 P.2d at 99. Even though Plaintiff no longer bore that burden of proof, she still presented expert testimony regarding the standard of care through her expert surgeon, Dr. Ronaghan. This is not a case where Plaintiff relied upon *res ipsa loquitur* and did not present any expert opinion testimony.

Defendants presented evidence of the standard of care through their own experts. At the conclusion of the evidence, the jury found in Dr. Darricau's favor on all of Plaintiff's negligence-based claims. Under the circumstances of this case, Instruction 18 was appropriately given and caused no prejudice to the Plaintiff. Plaintiff cannot show that the jury would have decided differently had this instruction not been given. Plaintiff is not entitled to a new trial with respect to Instruction 18.

7. <u>The Jury Instructions were Proper</u>.

The Trial Court did not abuse its discretion in declining to give the instructions requested by the Plaintiff and in giving the instructions complained of

here. The instructions that were given properly informed the jury of the law, as discussed in this Brief. When the jury instructions properly inform the jury of the law, there is no abuse of discretion and no reversible error. Therefore, the jury's verdict and the Court's entry of judgment in this case should be affirmed.

C. THE TRIAL COURT APPROPRIATELY PERMITTED DEFENDANTS TO AMEND THEIR ANSWERS.

1. Standard of Review; Preservation

Defendant Dr. Darricau agrees that the appropriate standard of review for amendment of pleadings is abuse of discretion. She does not agree that under the facts and circumstances of this case, at the time the leave to amend was granted, the amendment was futile. Therefore, she disagrees that a *de novo* standard of review applies.

2. The Trial Court did not Abuse Its Discretion in Permitting Defendants to Amend Their Answers to Add the Affirmative Defense of Release.

Pursuant to C.R.C.P. 15(a), leave to amend pleadings shall be freely given when justice requires. It is within the Court's discretion to grant leave to amend a pleading. *Polk v. Dist. Ct.*, 849 P.2d 23, 25 (Colo. 1993). A motion to amend is entitled to a lenient examination by the Court. *Id.* The Court must assess a motion to amend in light of the totality of the circumstances and balance the need to amend with the effect of the amendment on the other parties. *Id.* at 26.

Plaintiff initially argues that the Court erred in allowing the Defendants to amend their Answers to add the defense of Release, because under C.R.S. § 13-50.5-105(1)(a), settlement of claims against one joint tortfeasor does not release claims against another tortfeasor. However, Defendants did not contend that the General Release between Plaintiff and the hospital released them from any direct liability for their own negligence. (Record CD pp. 298-306.) Rather, the affirmative defense of Release related to Plaintiff's claims of *respondeat superior* for the negligence of the hospital staff. Therefore, the provisions of C.R.S. § 13-50.5-105(1)(a) are inapplicable. *Ochoa*, 212 P.3d at 971.

Plaintiff also argues that the defense of Release for her *respondeat superior* claims was futile, relying on *Ochoa* and cases cited therein, *Colorado Compensation Auth. v. Jones*, 131 P.3d 1074, (Colo.App. 2005) and *Dworak v. Olson Constr. Co.*, 191 Colo. 161, 551 P.2d 198 (1976). The Court in *Ochoa* elected to follow *Jones*, as the plaintiffs in both cases expressly reserved the right to sue the employer when resolving the case against the employee. The Court stated the "language in the settlement agreement evincing an intent to preserve claims against Dr. Vered should be given effect." *Ochoa* at 968.

Here, it is undisputed that the final General Release document that Plaintiff executed in this case failed to reserve her rights to sue the Defendant-physicians.

(Record CD pp. 1872-73.) An unconditional release of an employee that does not reserve the releasor's right to proceed against the employer is a release of the employer based upon a theory of vicarious liability. *See* Restatements (Second) of Agency § 217A (1958). *See also Arnold v. Colo. State Hosp.*, 910 P.2d 104, 107-8 (Colo.App. 1995). Although the Court in *Ochoa* declined to follow *Arnold,* it is still good law in Colorado.

Plaintiff has not shown that she has been harmed by the Court's grant of leave to amend the answer. The grant or denial of a leave to amend an answer is not reversible when there has been no prejudice shown. *Browns v. Lutin,* 16 Colo. App 263, 64 P. 674, 674 (1901); *Denver Consol. Tramway Co. v. Riley,* 14 Colo. App. 132, 59 P. 476, 477 (1899).

Ultimately, the Release was removed from the jury's consideration and the jury was instructed to disregard that evidence. (Transcript CD 6/22/09 at 82:7-17.) It is presumed that a jury follows the Court's instructions. *People v. Bass,* 155 P.3d 547, 552 (Colo.App 2006); *People v. Sandoval,* 709 P.2d 90, 92 (Colo.App 1985). No jury instruction was given to Defendant's affirmative defense of Release, and the jury did not consider that affirmative defense. As Plaintiff has failed to show any prejudice by the Court's Order permitting Defendants to add the affirmative defense of Release, the judgment should not be overturned.

D. EVIDENCE PRESENTED TO THE JURY AT TRIAL REGARDING SETTLEMENT DOES NOT ENTITLE PLAINTIFF TO A NEW TRIAL.

1. Standard of Review; Preservation

Defendant Dr. Darricau agrees that the appropriate standard of review for admission of evidence is abuse of discretion. *See Hall v. Frankel*, 190 P.3d 852, 858 (Colo.App. 2008) *cert. denied*. The trial court's ruling will not be overturned unless it is manifestly arbitrary, unreasonable, or unfair. *Id.*

Defendant Dr. Darricau asserts that although Plaintiff included a statement regarding Preservation, as required under C.A.R. 28(k), Plaintiff failed to make an objection contemporaneous to the admission of the settlement document at trial.

2. Plaintiff Failed to Make a Contemporaneous Objection to the Admission of the Settlement Documents.

To preserve an objection to admission of evidence at trial, a timely objection must appear on the trial court record, stating a specific ground for objecting. *American Family Mutual Ins. Co. v. Dewitt*, 216 P.3d 60, 65 (Colo.App. 2008). Error may not be predicated upon a ruling which admits or excludes evidence unless ... a timely objection or motion to strike appears of record, stating the specific ground of objection." C.R.E. 103(a)(1). Requiring a specific objection fulfills two important goals: judges can rule upon the objection in an informed and intelligent way; and opposing counsel can propose alternatives that address the

concerns raised by the objection. *Hart v. Schwab*, 990 P.2d 1131, 1135 (Colo.App. 1999). As Plaintiff failed to make a timely and specific objection to the admission of Exhibit M, Plaintiff cannot now appeal the admission of that document.

3. Evidence Regarding Settlement with The Medical Center of Aurora and its Agents was Admissible under *Greenemeier* and Caused No Prejudice to Plaintiff.

During discovery in this matter, the Defendants were made aware that, prior to filing this action, Plaintiff asserted and settled a claim against The Medical Center of Aurora and its agents, servants, employees, successors and assigns relating to the same set of facts relevant to this case, *i.e.*, the retention of the surgical sponge in the September 1, 2006 surgery at TMCA. (Record CD pp. 1872-73.) On or about May 14, 2008, Defendant Dr. Darricau filed a Designation of Nonparties at Fault, naming as nonparties The Medical Center of Aurora, by and through its employees and agents, including but not limited to Brent Boynton, R.N. and Jessie Velasquez. (Record CD pp. 68-70.)

Plaintiff avers that permitting evidence of settlement was immaterial and prejudicial. However, in *Greenemeier v. Spencer*, 719 P.2d 710 (Colo. 1986), the Colorado Supreme Court adopted a rule requiring trial courts to bring to the jurors attention the fact of settlement between a settling party and plaintiffs. *Landsberg v. Hutsell*, 837 P.2d 205, 209 (Colo.App. 1992). The rationale for this rule was to

make the jury "aware that whatever verdict they return will be apportioned among defendants and settling parties pursuant to the requirements of the law." *Id* .at 209.

Since the decision in *Greenemeier*, the Colorado General Assembly adopted C.R.S. § 13-21-111.5, which limits a defendant's liability to that percentage caused by his own negligence or fault. While this legislation diminished the compelling problems which prompted the *Greenemeier* decision, it has not extinguished them. *Landsberg*, 837 P.2d at 209. The purpose of our current statutory scheme "is to provide injury victims full compensation, not excess compensation." *Weeks v. City of Colorado Springs*, 928 P.2d 1346, 1349 (Colo.App. 1996). A plaintiff cannot recover twice for the same injury and, therefore, to the extent that Plaintiff in this case cannot separate or distinguish the damages caused by each alleged tortfeasor, a duplicative recovery cannot be allowed. *See Coleman v. United Fire and Cas. Co.*, 767 P.2d 761, 764 (Colo.App. 1988).

The provisions of the Health Care Availability Act also support giving a *Greenemeier* instruction in this lawsuit involving the allegations of negligent care and treatment by The Medical Center of Aurora and its employees. Whenever a plaintiff enters into a settlement in a case asserting medical negligence, the statutory caps as set forth in the Health Care Availability Act, C.R.S. § 13-64-101, *et seq.* must be applied to any sums awarded by the jury as well as any

amounts obtained through settlement with other defendants. *See Garhart ex rel. Tinsman v. Columbia/HealthOne, L.L.C.*, 95 P.3d 571, 590-91(Colo. 2004). Thus, under the rationale set forth in *Greenemeier* and followed in *Landsberg*, it was appropriate for the jury to be informed of the settlement with The Medical Center of Aurora in this case.

The jury was given a *Greenemeier* instruction at trial. *See* Jury Instruction 28. (Record CD p. 2031.) In her Opening Brief, Plaintiff makes no assertion that a *Greenemeier* instruction was inappropriately given, nor can she, as it is the law in Colorado.

Therefore, evidence which merely sets forth the fact of settlement, *i.e.*, the settlement agreement, caused no prejudice to the Plaintiff. The jury would have been informed of the fact of settlement, even in the absence of the introduction of the settlement agreement as evidence. Therefore, admission of the settlement agreement is harmless, even when ultimately withdrawn from the jury's consideration. *See Burt v. Beautiful Savior Lutheran Church of Broomfield*, 809 P.2d 1064, 1070 (Colo.App. 1990).

4. Evidence Regarding the Settlement Agreement was Admissible to Show the Fact of Settlement and was Relevant to a Factual Question of Plaintiff's Intent with Respect to Release.

On or about February 26, 2009, Defendants Dr. Darricau and Dr. Keeler filed a joint Motion for Partial Summary Judgment. In part, Defendants argued that Plaintiff had released TMCA employees without reserving her rights to proceed against the surgeons for vicarious liability under the Captain of the Ship doctrine and, therefore, Plaintiff should not be able to proceed on a theory of vicarious liability. (Record CD pp. 345-381.) Plaintiff then filed a Cross-Motion for Partial Summary Judgment on March 16, 2009 arguing that summary judgment should be granted in her favor regarding the Defendants' affirmative defense of Release. (Record CD pp. 447-450.) Defendants argued that a genuine issue of material fact existed as to whether Plaintiff intended to reserve her rights to release only TMCA nurses or whether she also intended to release the surgeons by failing to expressly reserve her rights against them in the final General Release. (Record CD pp. 462-480 and 481-511.)

In an Order dated May 20, 2009, this Court held that "factual questions remained regarding the application of the release" and denied Summary Judgment Motions filed by all parties. (Record CD pp. 2126-2130.)

At trial, Defendants sought to present evidence regarding Plaintiff's intent with respect to release of her claims. Therefore, Plaintiff was cross-examined regarding the language of the final Release and Settlement Agreement, Defendants' Trial Exhibit M.[2] (Record CD pp. 1872-73.) Specifically, she was questioned regarding information that the Release did not expressly reserve her right to sue the Defendant-physicians.

Plaintiff then presented evidence regarding her intent with respect to release of her claims by introducing the Agreement to Settlement drafted by the Judicial Arbiter Group at the time of mediation, Plaintiff's Trial Exhibit 47.[3] (Record CD pp. 1844-45.) Plaintiff provided evidence in her own favor and had full and fair opportunity to discuss both documents. Plaintiff testified that she only intended to release TMCA and its employees.

After the conclusion of Defendants' case, the Court held that the issue regarding Plaintiff's intent with respect to release of her claims was uncontroverted. Thereafter, the Court withdrew Defendants' Trial Exhibit M and Plaintiff's Trial Exhibit 47 from the jury's consideration. The Court also instructed the jury to disregard those exhibits. (Transcript CD 6/22/09 at 82:7-17.)

2 The amount of settlement was redacted from this document.

3 The amount of settlement was redacted from this document.

Plaintiff now argues that Defendants' Trial Exhibit M and Plaintiff's Trial Exhibit 47 should never have been admitted as evidence under C.R.E. 401, 402 and 403. Defendants' Trial Exhibit M was relevant and admissible with respect to Plaintiff's intent and Dr. Darricau asserts that based upon the Plaintiff's testimony, the jury could have clearly determined Plaintiff did not specifically intend to reserve the right to sue the physicians and, as an issue of fact, should have proceeded to the jury for determination. However, the **fact** of settlement clearly remained relevant and admissible under *Greenemeier*. Therefore, admission of the documents did not prejudice the Plaintiff. *See Burt*, 809 P.2d at 1070 (no prejudice as result of evidence introduced and ultimately withdrawn from jury's consideration).

Therefore, there was no abuse of discretion by the Trial Court in admitting the evidence of the Release.

E. THIS COURT SHOULD NOT CONSIDER ISSUES RAISED BY PLAINTIFF REGARDING MEDICAL BILLS.

1. Standard of Review; Preservation

In compliance with C.A.R. 28(k), Defendant Darricau agrees that the appropriate standard of review regarding admission of evidence is abuse of discretion.

2. The Trial Court's Ruling was Harmless Error.

Plaintiff has not asserted that the Trial Court's admission of both the amount of medical bills and amounts actually paid as evidence of her damages was reversible error. She does not claim she is entitled to a new trial due to the admission of that evidence. She does not even claim she was prejudiced by the Trial Court ruling in this regard, nor can she, as the Trial Court's decision to admit both amounts is harmless error.

At trial, the jury found that Plaintiff had suffered damages but found no negligence and no causation. As the jury returned Verdict Form A, they did not need to reach a determination of the amount of damages or type of damages suffered by Plaintiff. *See Gray v. Houlton*, 671 P.2d 443, 444 (Colo.App. 1983) (holding that because the jury found no liability on defendants' part, the issue of damages became irrelevant and moot and any potential error was harmless). *See also Dunlap v. Long*, 902 P.2d 446, 448 (Colo.App. 1995)("[s]everal Colorado decisions stand for the proposition that a jury determination that a defendant is not liable renders harmless any error that might have occurred with respect to the issue of plaintiff's alleged damages.") (citations omitted). Harmless error does not require reversal. *See Martin v. Minnard*, 862 P.2d 1014, 1018 (Colo.App. 1993). For an error to require reversal, it must have had some effect on the proceeding

that prejudiced the appealing party. *Poudre Valley Rural Elec. Ass'n. v. City of Loveland*, 807 P.2d 547, 557 (Colo. 1991).

3. This Court should not Render Advisory Opinion Regarding Potential Future Rulings of a Trial Court.

As noted above, Plaintiff does not claim that the Trial Court's evidentiary rulings resulted in reversible error and does not seek a new trial on these grounds. Rather, Plaintiff seeks a ruling from this Court barring evidence of the amount of medical bills actually paid "on a new trial." However, since there has been no ruling that a new trial is warranted, such a ruling would be merely an advisory opinion, speculating on what evidence may or may not be presented in the future.

A court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe, or to decide a matter based on speculative, hypothetical or contingent set of facts, or on the mere possibility of a future controversy. *County Road Users Ass'n v. Board of County Com'rs of County of Archuleta*, 987 P.2d 861, 864 (Colo.App. 1998). See also *Burcham v. Burcham*, 1 P.3d 756, 757 (Colo.App. 2000). This Court should therefore deny Plaintiff's request for consideration of an issue that is speculative of a future issue that may not even arise.

4. The Reasonable Value of Medical Expenses is an Issue for the Trier of Fact to Determine.

The amount of damages is generally a question of fact, the resolution of which is vested in the finder of fact. *Great Western Sugar Co. v. Northern Natural Gas Co.*, 661 P.2d 684, 696 (Colo.App. 1982). The proper measure of damages is the amount which shall make the injured party whole. *Harsh v. Cure Feeders, L.L.C.*, 116 P.3d 1286, 1284 (Colo.App. 2005). Plaintiffs are only entitled to recover damages that will reasonably compensate them for their *actual* losses. *Great West Food Packers, Inc. v. Longmont Foods Co., Inc.*, 636 P.2d 1331, 1333 (Colo.App. 1981).

Plaintiff argues that the Trial Court's ruling that both amounts paid and amounts billed were admissible at trial constituted reversible error under *Cosgrove v. Wal-Mart Stores, Inc.*, 2010 WL 2521744 (Colo.App. 2010). However, the *Cosgrove* case was not ruled upon by the Court of Appeals until June, 2010, and therefore, could not have been considered by the trial court.

Plaintiff also cited *Trucker v. Volunteers of Am.*, 211 P.3d 708 (Colo.App. 2008) and another Court of Appeals unpublished decision, *Steidinger v. Hilton*, Colorado Court of Appeals, No. 07CA0847, August 28, 2008, in support of the contention that the Trial Court should not reduce the damages award by amounts actually paid by the Plaintiff's health insurer. However, neither case precluded the

Defendants from presenting evidence of the amounts **actually paid** to the health care providers as evidence of the reasonable value of the medical expenses.

The correct measure of compensation for medical expenses is the necessary and reasonable value of the services rendered. *Palmer Park Gardens, Inc. v. Potter*, 162 Colo. 178, 425 P.2d 268 (1967); *Steiger v. Burroughs*, 878 P.2d 131 (Colo.App. 1994). The amount of medical expenses actually paid is clearly evidence of their reasonable value. *Palmer Park*, 425 P.2d at 272; *Steiger*, 878 P.2d at 131. Therefore, it was not an abuse of discretion for the Court to admit both amounts billed and amounts paid.

F. THE TRIAL COURT APPROPRIATELY AWARDED COSTS TO DR. DARRICAU AS THE PREVAILING PARTY.

1. Standard of Review; Preservation

Plaintiff failed to include a statement regarding the Standard for Appellate Review of an award of costs as required under C.A.R. 28(k).

2. Plaintiff Presented No Argument in Support of Her Contention that Costs were Improperly Awarded.

Plaintiff's Brief is devoid of any argument or authority for her contention that the Trial Court improperly awarded costs to Dr. Darricau. When an appellant fails to present an issue without supporting argument or authority, the Court of Appeals may refuse to consider that issue. *Mitchell v. Ryder*, 20 P.3d 1229, 1234

(Colo.App. 2000), *reh'g denied and cert. granted*. Failure of the appellant to provide supporting authority for contentions of error asserted on appeal will result in affirmation of judgment. *Beil v. Alcott*, 876 P.2d 60, 64 (Colo.App. 1993), *cert. denied*.

C.R.C.P. 54(d) specifically mandates that "costs shall be allowed as a matter of course to the prevailing party." C.R.S. § 13-16-105 also provides authority for the award of costs, stating that when a plaintiff has a verdict passed against her, "then the defendant shall have judgment to recover costs against the plaintiff." Costs which are recoverable are outlined in C.R.S. § 13-16-122 and expounded on by Colorado case law. The award of costs is within the sound discretion of the trial court. *Mullins v. Kessler*, 83 P.3d 1203 (Colo.App. 2003). However, C.R.C.P. 54(d) establishes the presumption that the costs are to be awarded and some reason must appear for penalizing the prevailing party if costs are to be denied. *True Temper Corp. v. CF&I Steel Corp.*, 601 F.2d 495 (10th Cir. 1979).

As the prevailing party, pursuant to C.R.C.P. 54(d), Dr. Darricau was entitled to an award of costs. Defendant Dr. Darricau submitted her bill of costs on July 14, 2009. (Record CD pp. 2230-31.) (Record CD pp. 1306-14.) Plaintiff filed her objection to those costs. The Trial Court appropriately considered Plaintiff's objections and ruled on the costs in an Order dated October 31, 2009.

(Record CD pp. 2230-31.) Plaintiff cannot complain about the Trial Court's award of costs simply because she was unsuccessful at trial.

While the Trial Court awarded costs to Dr. Darricau, Plaintiff has never paid them. Plaintiff filed bankruptcy on or about December 23, 2009. *See In re Michelle Medina*, U.S. Bankruptcy Court No 09-37347-HRT (D.Colo.). She moved the Court to require the trustee to abandon the personal injury claim. *See* Plaintiff –Appellant's Response in Opposition to Defendant –Appellee, Karen Darricau, M.D.'s Motion to Dismiss and Exhibits thereto. (Record CD pp. 1485-1508.) She was granted a discharge in bankruptcy on April 15, 2010. *See In re Michelle Medina*, U.S. Bankruptcy Court No 09-37347-HRT (D.Colo.). As Plaintiff has not paid any of the costs awarded to Dr. Darricau, and will never be required to pay those costs due to her bankruptcy discharge, she has suffered no prejudice, and her arguments regarding the award of costs is moot.

VI. CONCLUSION

The evidence, viewed in the light most favorable to Dr. Darricau, supported the jury's verdict regarding both negligence and causation. Therefore, Plaintiff was not entitled to a judgment notwithstanding verdict and Plaintiff's Motion was properly denied. The jury instructions given in this case were reasonable and appropriate, in light of the evidence and issues presented during the course of trial.

The Trial Court properly instructed the jury. The Trial Court also appropriately permitted Defendant Dr. Darricau to amend her Answer. Finally, as the jury was appropriately informed of the fact of settlement with The Medical Center of Aurora and its employees under *Greenemeier*, evidence of the redacted settlement documents presented to the jury, and later removed from the jury's consideration, did not prejudice the Plaintiff . Therefore, Defendant Dr. Darricau respectfully requests that Plaintiff's Appeal be denied.

SIGNED AND DATED at Denver, Colorado this 29th day of September, 2010.

COOPER & CLOUGH, P.C.

s/ Deanne C. McClung

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 29th day of September, 2010 a true and correct copy of the foregoing **DEFENDANT-APPELLEE, KAREN DARRICAU, M.D.'S ANSWER BRIEF** was hand delivered as well as electronically filed with the Court of Appeals, and served electronically on the following parties via LexisNexis:

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