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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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**1190463**

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**Jackson Hospital & Clinic, Inc.**

v.

**Cameron Murphy**

**Appeal from Montgomery Circuit Court  
(CV-13-900248)**

SHAW, Justice.

Jackson Hospital & Clinic, Inc. ("Jackson Hospital"), a defendant in this medical-malpractice action, appeals from the denial of its postjudgment motion seeking a judgment as a matter of law or, in the

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alternative, a new trial following the entry of a judgment on a jury verdict against Jackson Hospital and in favor of the plaintiff, Cameron Murphy. We reverse and remand.

### Facts and Procedural History

In February 2011, Murphy, after experiencing back pain, was referred for treatment to Dr. Margaret Vereb, a board-certified urologist employed by Jackson Hospital. Dr. Vereb determined that Murphy had kidney stones and recommended a ureteroscopy procedure to remove the stones. During that procedure, Dr. Vereb used, among other surgical instruments, a glidewire<sup>1</sup> to establish the correct surgical path to Murphy's kidneys through his urinary tract. Dr. Vereb then used a laser to break the kidney stones into smaller fragments for removal. Following

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<sup>1</sup>The record also refers to this device as a "guidewire." It appears that the technical term for the device is "guidewire" but that "Glidewire" is a brand name for a particular guidewire. For purposes of this opinion, we have chosen to use the term "glidewire," which was used extensively throughout the record. According to the materials before us, a glidewire is a thin, flexible, hydrophilic-coated wire approximately one and one-half meters in length that is used to establish a path through the urinary tract to the kidneys to allow a urologist to safely use other instruments to detect, break up, and remove kidney stones.

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an apparently uneventful period of recovery, the surgery was deemed successful, and Murphy was released. During a postoperative evaluation two days later, it was reported that Murphy had been experiencing pain, but he was assured that such symptoms were normal. Murphy was prescribed pain medication and discharged.

In June 2011, however, Murphy experienced painful urination and blood in his urine. An X-ray performed at that time revealed that a piece of the glidewire used during the ureteroscopy procedure remained lodged in Murphy's bladder. Upon seeking treatment from another urologist, a 5.6 centimeter glidewire fragment was removed from Murphy's bladder.

Murphy subsequently sued both Dr. Vereb and Jackson Hospital alleging claims under the Alabama Medical Liability Act ("the AMLA").<sup>2</sup> See §§ 6-5-480 et seq. and 6-5-540 et seq., Ala. Code 1975. Murphy's complaint included claims of negligence and wantonness (as to Jackson Hospital, both directly and based on a theory of vicarious liability) and sought compensatory and punitive damages.

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<sup>2</sup>Another defendant, Urology Professionals of Alabama, was also named in Murphy's complaint but was subsequently dismissed.

In answer to Murphy's complaint, both Dr. Vereb and Jackson Hospital denied the allegations against them. Ensuing discovery and related pretrial filings reveal that it was apparently undisputed that "the only logical explanation for [the] retained glidewire fragment [in Murphy's bladder was] that the glidewire [Dr. Vereb used during Murphy's ureteroscopy procedure] was defective."

During pretrial proceedings, Murphy's counsel conceded that, for purposes of trial, Murphy was pursuing, as to Jackson Hospital, only a vicarious-liability claim based on the conduct of Dr. Vereb. Later, however, while the parties were covering stipulations in regard to the contents of the joint pretrial motion in limine of Jackson Hospital and Dr. Vereb, the following occurred:

"[Counsel for Jackson Hospital]: Number 20 relates to any independent allegations against Jackson Hospital. And I understand we're in agreement on that.

"[Murphy's counsel]: Correct.

"[Counsel for Jackson Hospital]: Because there are none. And then 21, Your Honor, is simply moving to preclude [Murphy] from trying to make any argument that [Jackson Hospital] has any independent liability under product liability doctrine.

"There's never been any kind of product liability claim ever pled or whispered in this case. And, clearly, it would be improper to get into that. The case is governed by the [AMLA], and, clearly, they would have had to have pled a product claim against the hospital many, many, many moons ago, and it's never been done; so I think we're in agreement on that.

"[Murphy's counsel]: Judge, we're in agreement except to the extent that there are some concerns from [Murphy's] side that perhaps [Jackson Hospital] will try to utilize an empty-chair defense and say things like, well, it was just a bad tool and they should have sued the product company that made it.

"And I think that what's good for the goose is good for the gander. They shouldn't be able to sit here and assert that we can't say anything related to that and then simultaneously have any witnesses arguing that this is a product liability case.

"....

"[Counsel for Jackson Hospital]: Well, that's attempting to assert a product liability claim against [Jackson Hospital] which purchased this wire from an independent manufacturer and provided it in a closed packet.

"....

"... [T]he fact is there's been no product claim, no claim ever filed against [Jackson Hospital] claiming that it's [Jackson Hospital's] fault for providing this wire, for providing a defective product for use in this surgery.

"If they were going to make such a claim, under the [AMLA] they would have to plead it with detail and specificity

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as is required by Section 6-5-551[, Ala. Code 1975]. That's a whole separate type of claim which they have never once made, never once whispered anything about in this case. ..."

During opening statements, Murphy's counsel informed the jurors that "this [was] not a case about a defective product" but was, instead, "[a] case about a defective doctor" and stated that, "when a doctor leaves a foreign object in somebody's body and that foreign object causes damage, that's medical malpractice." Both Dr. Vereb's counsel and counsel for Jackson Hospital, in turn, informed the jury that Dr. Vereb had utilized appropriate medical implements in the proper manner during the ureteroscopy procedure but that the glidewire she had used failed because it was inherently defective.

Subsequently, during his case-in-chief, Murphy presented testimony from, among others, Dr. Vereb. Dr. Vereb's testimony established that she had been employed by Jackson Hospital at the time she treated Murphy. She further acknowledged that the glidewire had broken inside Murphy's body and that it was, thus, undisputed "that a foreign object was inside his body after the [ureteroscopy procedure]." Dr. Vereb indicated that she had received the glidewire from Jackson Hospital, which, she explained,

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had obtained it from a third-party manufacturer. Dr. Vereb testified that she touches each portion of the glidewire during insertion and that, while conducting the ureteroscopy procedure, she had felt no breakages or sharp edges on the glidewire. She further indicated that it is unnecessary for a physician to inspect a glidewire upon removal from a patient's body. Dr. Vereb testified that such a breakage had never before occurred during her medical career, that nothing she did during the ureteroscopy procedure could have caused the glidewire to fragment, and that the only possible explanation as to why the glidewire broke was that "[t]his particular wire had to have been defective."

Murphy also presented testimony from urologist Dr. William Duncan, who Murphy tendered as an expert witness. In addition to offering other opinions regarding the treatment administered to Murphy by Dr. Vereb, Dr. Duncan testified that the wire fragment should have been detected by Dr. Vereb through the use of imaging tools at the time of Murphy's ureteroscopy procedure or at his postoperative appointment two days later and that the failure to do so constituted a breach of the applicable standard of care. Dr. Duncan further indicated that, although

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he had not personally experienced a glidewire breaking during a ureteroscopy procedure, he was aware of reported cases in which a glidewire utilized during a ureteroscopy procedure had broken.

Dr. Duncan conceded, however, that the provision of glidiwires to physicians by a hospital is standard procedure and noted that the standard of care does not require the utilizing physician to either visually inspect or measure the glidewire either before surgery or upon removal. More specifically, during Dr. Duncan's testimony, the following exchange occurred between Dr. Duncan and counsel for Dr. Vereb:

"[Dr. Vereb's counsel]: Would you agree with me that the glidewire in question, there's nothing wrong with choosing that type of wire in this procedure?

"[Dr. Duncan]: No.

"[Dr. Vereb's counsel]: Nothing wrong with it; correct?

"[Dr. Duncan]: Correct.

"[Dr. Vereb's counsel]: Okay. When you were practicing, the hospitals that you were using where you had privileges to do this type of procedure, wouldn't you agree with me that the glidiwires that you used were ordered by the hospital, purchased from a manufacturer, and they were there in the [operating room] just like what happened in this case?

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"[Dr. Duncan]: Yes.

"[Dr. Vereb's counsel]: And there's nothing wrong with that, is there?

"[Dr. Duncan]: No.

"[Dr. Vereb's counsel]: But the glidewires, they come in the packages and they're not open, are they?

"[Dr. Duncan]: No.

"[Dr. Vereb's counsel]: You have to open them in the [operating room]; right?

"[Dr. Duncan]: Correct.

"[Dr. Vereb's counsel]: Why?

"[Dr. Duncan]: Because it's a sterile product.

"[Dr. Vereb's counsel]: It's sterile. You don't want to go out and inspect these or do some sort of quality control measures prior to an operation; right?

"[Dr. Duncan]: No.

"[Dr. Vereb's counsel]: That's not how it works, is it?

"[Dr. Duncan]: Some -- no.

"[Dr. Vereb's counsel]: I'm correct about that right?

"[Dr. Duncan]: Yes.

[Dr. Vereb's counsel]: And you don't take it out and measure it before or after you use it, do you?

"[Dr. Duncan]: No, sir.

"[Dr. Vereb's counsel]: And you told us in your deposition that you rely on the manufacturer to deliver a good, non-defective glidewire when you were ... doing these procedures back before 2015.

"[Dr. Duncan]: Yes.

"[Dr. Vereb's counsel]: The standard of care does not require a surgeon to perform some sort of testing on glidewire prior to surgery; right?

"[Dr. Duncan]: No.

"[Dr. Vereb's counsel]: Or measure it?

"[Dr. Duncan]: No."

(Emphasis added.)

Upon the conclusion of the presentation of Murphy's evidence, Dr. Vereb and Jackson Hospital each separately moved for a judgment as a matter of law in their favor. More specifically, among its other stated grounds, Jackson Hospital contended that Murphy had "failed to prove ... that any employee or agent of Jackson Hospital failed to exercise such reasonable care, skill and diligence as used by similarly situated health

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care providers" and that he also "ha[d] not proven ... that any employee or agent of [Jackson Hospital] breached any applicable standard of care" as the AMLA requires.

Jackson Hospital further moved that a judgment as a matter of law be entered in its favor as to any claim other than the claim of vicarious liability asserted against it based on the alleged actions and omissions of Dr. Vereb because, it contended, the parties had stipulated during the discussion of the parties' pretrial motions in limine that Murphy was pursuing only a vicarious-liability claim against Jackson Hospital. Murphy's counsel responded as follows:

"[W]e agreed in motions in limine that we weren't going to get into Alabama Pattern Jury Instruction 25.13, the duty of a hospital for a defective instrument, but the problem I have here is that [Jackson Hospital] took a position that they're standing with [Dr. Vereb] and they're taking a position at this point in time of being one in the same, I believe. And I feel like it's incredibly unfair for the defendant hospital who provided the tool to the doctor to use to say this wasn't the doctor's negligence but also you shouldn't be able to say that we're responsible because we provided the defective product.

"And I know there was some question of whether that may have been alleged in the complaint or not. And I've gone through and I've reviewed the complaint, and I believe that the

complaint has sufficiently preserved the duty of a hospital for a defective instrument."

At that time, Murphy's counsel pointed the trial court to "Paragraph 50, Section E," of Murphy's complaint, which included a claim against Jackson Hospital for "failing to properly assess and identify all surgical items used in plaintiff's procedure," which language, Murphy's counsel argued, amounted to a "pleading that would have invoked the duty of the hospital for a defective instrument and equipment."

Jackson Hospital disputed that the above-quoted language from Murphy's complaint was sufficient under the AMLA or included a claim that it had furnished defective instruments or equipment. Upon the conclusion of the discussion, however, the trial court denied Jackson Hospital's motion for a judgment as a matter of law and stated its intention to instruct the jury on the potential liability of the hospital.

Thereafter, in rebuttal to Murphy's case, Jackson Hospital presented testimony from its own expert witness, Dr. Vincent Michael Bivins, who is a urologist. Based upon his own review of the applicable documentation, Dr. Bivins opined that the retention of a portion of the

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glidewire in Murphy's body "was not" caused "by anything that anybody at Jackson Hospital did or didn't do." He concurred with Dr. Vereb's conclusions that she had performed in accordance with the required standard of care in all respects and that "the only reasonable explanation is that [the glidewire] was a defective [glide]wire." After testifying about the available types of glidewires and their specific uses during surgery, Dr. Bivins further indicated that the glidewire was a necessary component in a ureteroscopy procedure and that the particular type of glidewire Dr. Vereb had used was appropriate for use during Murphy's procedure. As to the process by which a surgeon obtains a glidewire, Dr. Bivins explained as follows:

"[Counsel for Jackson Hospital]: How do you, as a surgeon practicing at the different hospitals where you practice, how do go about getting a glidewire in order to use it in a case?

"[Dr. Bivins]: So I ask for it and --

"....

" -- the circulator will get the glidewire that comes prepackaged steriley from the manufacturer. The wire is then opened by the circulator and given to the surgical tech

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sterilely. And the surgical tech then feeds me the wire ... which I then ... feed ... through the scope.

"[Counsel for Jackson Hospital]: So does the hospital obtain this from the manufacturer?

"[Dr. Bivins]: Yes.

"[Counsel for Jackson Hospital]: And then you said it's brought to the [operating room] sterilely in a closed, sealed package?

"[Dr. Bivins]: Correct.

"[Counsel for Jackson Hospital]: Never opened before it gets to the [operating room]?

"[Dr. Bivins]: No, sir.

"[Counsel for Jackson Hospital]: Then the staff then hands it off to you --

"[Dr. Bivins]: Correct.

"[Counsel for Jackson Hospital]: -- after opening the package?

"[Dr. Bivins]: Correct. And I feed it up the scope into the kidney.

"[Counsel for Jackson Hospital]: Is it customary practice for the surgeon or anyone else at the hospital to conduct any kind of formal inspection of the wire before or after it's used?

"[Dr. Bivins]: No.

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"[Counsel for Jackson Hospital]: Why not?

[Dr. Bivins]: Typically we rely upon the manufacturer to give us a reliable, functional, without-defect wire or any other equipment.

"[Counsel for Jackson Hospital]: Does the surgeon or anyone else at the hospital measure the wire before or after it's used?

"[Dr. Bivins]: Never.

"[Counsel for Jackson Hospital]: Is that the standard of care?

"[Dr. Bivins]: That's not the standard of care.

"[Counsel for Jackson Hospital]: Okay. And when the wire is taken out of the package and then handed to you, does it go through the hands of the scrub tech or nurse?

"[Dr. Bivins]: Yeah. It has to. It goes through the hands of the scrub tech and then they ... give it to me.

"[Counsel for Jackson Hospital]: And do you have an opportunity and does the scrub tech have an opportunity to see it and feel it?

"[Dr. Bivins]: Yeah. They'll see it and feel it and hand it to me and then I'll look at it and feel it.

"[Counsel for Jackson Hospital]: Okay. And if there is any obvious defect or problem with it, do you expect to see that?

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[Dr. Bivins]: If it's obviously [sic] enough for me to see it, yes.

"[Counsel for Jackson Hospital]: And if there's an obvious problem with it, would you use the wire?

"[Dr. Bivins]: Throw it away.

"[Counsel for Jackson Hospital]: This process that we just outlined for how you obtain a glidewire to use in a procedure like this, is that consistent with how you understand it was used in this case?

[Dr. Bivins]: Correct. That is consistent with how I understood it was used in this case.

"[Counsel for Jackson Hospital]: And how it was obtained in this case?

"[Dr. Bivins]: And how it was obtained in this case.

"[Counsel for Jackson Hospital]: Is that how it happens in every hospital where you've practiced?

"[Dr. Bivins]: Yes, sir.

"[Counsel for Jackson Hospital]: Is that the usual, customary, and standard practice?

"[Dr. Bivins]: That is the usual, customary standard of practice.

"[Counsel for Jackson Hospital]: Is that a reasonable practice?

"[Dr. Bivins]: That is a very reasonable practice."

(Emphasis added.) He further explained: "Murphy did have that retained wire, but I don't think it was because [Jackson Hospital] or Dr. Vereb did not meet the standard of care, and so I still contend that that wire was there because it was a defective wire and that was the cause."

After the presentation of all the parties' evidence, Jackson Hospital renewed its previous motion seeking a judgment as a matter of law in its favor. The trial court denied the renewed motion and proceeded to instruct the jury on, among other principles, the potential liability of Jackson Hospital. The trial court also provided the following instruction on Murphy's defective-equipment claim against Jackson Hospital:

"When a hospital provides instruments or equipment for use in the treatment of patients, a hospital must use that level of reasonable care, skill, and diligence as other hospitals use to see that the instruments and equipment are reasonably fit for the normal purposes and uses for which they are intended and furnished.

"The standard of care for a hospital is that level of reasonable care, skill, and diligence as other similarly-situated hospitals usually follow in the same or similar circumstances."

(Emphasis added.)

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Thereafter, the jury returned a verdict in favor of Murphy and against Jackson Hospital, awarding Murphy \$100,000 in compensatory damages. The trial court subsequently entered a judgment consistent with the jury's verdict, which specifically provided that "[j]udgment is entered in favor of Dr. Margaret Vereb."

Jackson Hospital filed a postjudgment motion renewing its prior request for a judgment as a matter of law in its favor or, in the alternative, requesting a new trial. In that motion, Jackson Hospital argued, among other grounds, that the trial court had erred by allowing Murphy to advance during trial a claim that Jackson Hospital had negligently furnished Dr. Vereb with a defective medical instrument and by instructing the jury on that claim when, Jackson Hospital maintained, Murphy's complaint failed to plead such a claim. It further argued, that because the testimony at trial failed to support a claim against it for negligently furnishing the glidewire, the trial court had erred in submitting the claim to the jury. The trial court denied Jackson Hospital's motion in all respects. Jackson Hospital appeals.

Standard of Review

" When reviewing a ruling on a motion for a [judgment as a matter of law ('JML')], this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992)."

Waddell & Reed, Inc. v. United Invs. Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003).

### Discussion

On appeal, among its other arguments, Jackson Hospital argues that the trial court erred by allowing Murphy to pursue a defective-equipment claim at trial. Jackson Hospital further argues, as it also did below, that,

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in advancing that claim, Murphy nonetheless failed to present testimony "establishing the applicable standard of care for furnishing medical instruments [and/or] ... that Jackson Hospital failed to meet the standard of care with respect to furnishing the glidewire at issue in this case." Jackson Hospital's brief at p. 31. According to Jackson Hospital, because Murphy failed to present sufficient evidence demonstrating that, by providing the glidewire that Dr. Vereb used during Murphy's procedure, Jackson Hospital breached the applicable standard of care, the trial court erred by denying its motion for a judgment as a matter of law and submitting Murphy's claim against it to the jury. See HealthSouth Rehab. Hosp. of Gadsden, LLC v. Honts, 276 So. 3d 185, 193 (Ala. 2018) ("'A judgment as a matter of law is proper ... where there is a complete absence of proof on a material issue ....') (citations omitted)). We agree.<sup>3</sup>

This Court has previously concluded that a claim that a hospital has provided defective equipment during the course of medical treatment

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<sup>3</sup>Because of the dispositive nature of this issue, we pretermit discussion of the remaining issues Jackson Hospital raises on appeal.

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sought from the medical provider is a claim governed by the provisions of the AMLA. See Mobile Infirmary v. Delchamps, 642 So. 2d 954, 957 (Ala. 1994). Thus, even assuming, as Murphy argues, that a claim related to Jackson Hospital's provision of defective equipment was adequately pleaded in Murphy's complaint, to successfully prove that claim and recover against Jackson Hospital, Murphy was required to demonstrate that Jackson Hospital, in connection with the furnishing of that equipment, breached the applicable standard of care. See § 6-5-548(a), Ala. Code 1975 ("In any action for injury or damages ... against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case."). See also, e.g., Anderson v. Alabama Reference Lab'ys. 778 So. 2d 806, 811 (Ala. 2000), and Allred v. Shirley, 598 So. 2d 1347, 1350 (Ala. 1992). The AMLA defines "[s]tandard of care" as "that level of such reasonable care, skill, and diligence as other similarly situated health care providers in the same

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general line of practice, ordinarily have and exercise in like cases." § 6-5-542(2), Ala. Code 1975. It defines "[a] breach of the standard of care" as "the failure by a health care provider to comply with the standard of care ...." Id.

Here, Murphy presented the testimony of Dr. Duncan, who explained that the applicable standard of care with regard to the provision of glidewires permits reliance on the supplying manufacturer to provide a functional, defect-free glidewire. Dr. Duncan's testimony also established that the standard of care does not require visual inspection, testing, or measurement of the glidewire either before use or upon removal of the glidewire following surgery. Specifically, he indicated that "there's nothing wrong with" a hospital's purchasing a glidewire from a manufacturer and placing the unopened glidewire in the operating room for physician use. In fact, he conceded that a physician "[has] to open [the glidewire] in the [operating room] ... [b]ecause it's a sterile product" and that not only would preoperation quality-control measures therefore not be recommended, but, more importantly, the standard of care does not require them. Thus, Dr. Duncan's testimony indicated that the actions

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of Dr. Vereb were consistent with the customary standard of care -- a position that was confirmed by the subsequent testimony of Dr. Bivins during Jackson Hospital's case in rebuttal. Dr. Duncan did not testify that Jackson Hospital was required, with regard to the provision of the unopened glidewire, to undertake more responsibility than Dr. Vereb or that, in failing to do so, its actions were inconsistent with any standard of care.

In the present case, Jackson Hospital was found to be liable based on its having furnished a defective medical instrument for Dr. Vereb's use on Murphy.<sup>4</sup> The undisputed evidence, however, indicated that no action of Jackson Hospital in furnishing the glidewire failed to comport with the actions required of other similarly situated health-care providers or was in any way substandard. More specifically, the evidence in no way suggested that Jackson Hospital negligently failed to assess the glidewire before it was provided to Dr. Vereb.

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<sup>4</sup>Contrary to Murphy's assertions on appeal, because, as reflected in the judgment entered on the jury's verdict, the jury returned a verdict in favor of Dr. Vereb on all counts, the jury logically must have relied on the defective-equipment claim to return a verdict against Jackson Hospital.

Because Murphy presented no evidence -- in the form of expert testimony or otherwise -- that Jackson Hospital breached the applicable standard of care in any manner, Murphy failed to present evidence substantiating an essential element of his defective-equipment claim against Jackson Hospital, and therefore the jury's verdict on that claim is unsupported. See Honts, *supra*. Accordingly, Jackson Hospital was entitled to a judgment as a matter of law in its favor.

Based on the foregoing, the trial court erred in denying Jackson Hospital's motion for a judgment as a matter of law as to Murphy's defective-equipment claim -- the sole possible basis of its judgment against Jackson Hospital.<sup>5</sup> Therefore, the judgment entered on the jury's verdict against Jackson Hospital is hereby reversed.

REVERSED AND REMANDED.

Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur.

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<sup>5</sup>See note 4, *supra*.