NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0941

NEWTON M. HARRIS

VERSUS

ST. TAMMANY PARISH HOSPITAL SERVICE DISTRICT NO. 1 AND
E.J. FIELDING FUNERAL HOME, INC.

C/W

VGW b/x

NUMBER 2011 CA 0942

NEWTON M. HARRIS, INDIVIDUALLY AND ON BEHALF OF THE
ESTATE OF SUZANNE HALKETT HARRIS

VERSUS

ST. TAMMANY PARISH HOSPITAL SERVICE DISTRICT NO. 1,
MICHAEL IVERSON, MD AND JAMES WATTLER, CRNAA

Judgment Rendered: DEC 2 9 2011

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany,
State of Louisiana
Docket Number 2010-12773 C/W 2007-13187
The Honorable Raymond S. Childress, Judge Presiding

Parker, J. concurs in the result. b/x

Guidry, J. concurs in the result

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WHIPPLE, J.

These consolidated matters are before us on appeal by plaintiff, Newton M. Harris, from judgments of the trial court rendered in conformity with a jury's verdict in favor of defendants. For the following reasons, we affirm the judgment in suit number 2010-12773 and affirm in part, vacate in part, amend in part and render the judgment in suit number 2007-13187.

FACTS AND PROCEDURAL HISTORY

Plaintiff's wife, Suzanne Harris, was employed by St. Tammany Parish Hospital ("STPH") as a nurse in the Intensive Care Coronary Care Unit ("CCU"). Mrs. Harris was diagnosed with a condition called mitral stenosis, which developed as a result of years of suffering from rheumatic heart disease. Mrs. Harris initially underwent a procedure to correct her mitral stenosis by a balloon angioplasty of her mitral valve. Although this procedure improved her condition for a while, it eventually failed. Thereafter, in need of more definitive treatment, Mrs. Harris elected to have a mitral valve replacement. Mrs. Harris chose cardiothoracic surgeon Dr. John Breaux to perform this procedure at STPH as she was professionally acquainted with Dr. Breaux and thought she would receive the best care at STPH where she was employed and was personally acquainted with the staff.

Mrs. Harris' mitral valve replacement surgery was scheduled to commence at 7:00 a.m. on August 22, 2006. Dr. Breaux performed the procedure as scheduled, and after the surgery was completed, he called plaintiff at home where he was waiting and advised him that he was pleased with the way it went and that Mrs. Harris was in stable condition. The surgery was completed at approximately 11:06 a.m. After the surgery, at 11:26 a.m., Mrs. Harris was transported from the operating room on the second floor of the hospital to CCU on the fourth floor and was accompanied by Certified Registered Nurse Anesthetist ("CRNA") James

Wattler, who had been assigned to her case.[1] During the transport, Wattler noticed that Mrs. Harris' heart rate began to increase, so he administered a drug called Brevibloc, which was a beta blocker, to slow her heart rate.[2] Shortly thereafter, Mrs. Harris began to "crash" and a "code blue" alarm was sounded. Dr. Breaux was called back to CCU for a code status. When he arrived in CCU, he found Mrs. Harris with an extremely unstable critical low pulse and low blood pressure. Dr. Breaux took a quick inventory of what had transpired, joined Dr. Michael Iverson, the anesthesiologist assigned to her case, CRNA Wattler, and other medical personnel and began to initiate extreme resuscitative efforts. Although resuscitative efforts continued for several hours, they were unsuccessful and Mrs. Harris was eventually pronounced dead at approximately 5:40 p.m. that afternoon.

Dr. Breaux testified that he ordered that an autopsy be performed on Mrs. Harris' body in order to determine the exact cause of death. He gave this order to the nurse supervisor in CCU at the time of Mrs. Harris' death. Plaintiff also testified that he asked for an autopsy and made the request while walking out of CCU after his wife was pronounced dead. Plaintiff's friend, Charles Jacobs, who was present at STPH that day to support and comfort plaintiff, heard plaintiff make this request. Rachel Rappolo, a house supervisor at STPH, was present when Dr. Breaux met with plaintiff immediately after Mrs. Harris died, and heard Dr. Breaux explain to plaintiff that an autopsy is typically performed in these types of cases.

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[1]These times were recorded as the "Procedure End" and "Departure" times on the "Nursing Intraop Record."

[2]CRNA Wattler initially testified that he administered **20** milligrams of Brevibloc, although a nurse charted in Mrs. Harris' medical records that Wattler administered **50** milligrams of Brevibloc. At trial, Wattler maintained that he administered 20 milligrams of Brevibloc, but revealed that he administered the drug from a single-use vial 100 milligram vial of Brevibloc on the medication cart that had already been used. In attempting to explain this significant discrepancy, Wattler stated that he believed that some of the drug had already been taken from the vial and that he then took 20 milligrams from the same vial. Thus, he reasoned, when the nurse looked at the half-empty vial and saw 50 milligrams left, she charted that Wattler had administered 50 milligrams to Mrs. Harris.

Reverend Keith Stokes Snyder, the STPH primary death and trauma chaplain, provided patient support for plaintiff when Mrs. Harris died. Rev. Snyder testified that in connection with his duties as the STPH chaplain, he contacted the coroner's office to report Mrs. Harris's post-surgery death. He explained that a nurse would have spoken directly to the coroner's investigator concerning the cause of death. Rev. Synder also contacted E. J. Fielding Funeral Home ("Fielding"), where he understood plaintiff wanted Mrs. Harris' funeral services performed, to pick up Mrs. Harris' body from the hospital. Rev. Snyder testified that he was not notified that an autopsy had been ordered in this case. He testified that if an autopsy had been requested or ordered, the funeral home would not have been called.

When plaintiff went to Fielding to make arrangements for Mrs. Harris' funeral services a couple of days after her death, embalming services were requested as they were required to allow a viewing of her body. Plaintiff testified, however, that at the time he requested these services, he was under the impression that an autopsy of her body had already been performed by the coroner. Plaintiff subsequently discovered a couple of days after Mrs. Harris' death that an autopsy had not been performed prior to the embalming of his wife's body. Upon this discovery, plaintiff, who was understandably distraught and disturbed, made several phone calls to employees of STPH to try to find out how this could have happened. Plaintiff's calls were routed to Ms. Rappolo, who contacted Dr. Breaux and advised of the situation. Dr. Breaux ordered that an autopsy nonetheless be performed on Mrs. Harris' body even though it had already been embalmed. Dr. Breaux testified that he was also shocked and angered when he found out that the body had not been sent to the coroner for autopsy as he had originally ordered, and that STPH had instead sent the body directly to the funeral home.

An original death certificate was issued, which listed Mrs. Harris' cause of death as "Acute Heart Failure." Notably however, at some point after Mrs. Harris' death, an Adverse Drug Reaction Form was anonymously completed by STPH indicating that CRNA Wattler had administered 50 milligrams of Brevibloc to Mrs. Harris and that the drug reaction was "severe." Given this information, the coroner's office thereafter revised Mrs. Harris' death certificate to indicate that the cause of death was "undetermined."

On July 2, 2007, plaintiff filed a general negligence suit against STPH and Fielding,[3] which was assigned civil docket number 2007-13187. Therein, plaintiff alleged that STPH was negligent in: (1) failing to preserve the body for the coroner's office to undertake an autopsy as ordered and failing to protect the body prior to and for autopsy as directed; (2) allowing the body to be released to the funeral home, despite outstanding orders for an autopsy from both the surgeon and decedent's husband; (3) failing to convey information to the funeral home in relation to the autopsy so that the body would not be embalmed and failing to notify the funeral home as to the autopsy; (4) failing to follow the directions of the family member of Suzanne Halkett Harris, including the directive that an autopsy be performed and that the body be released to the coroner; (5) contributing to the spoliation and/or destruction of evidence, including toxicology screen, blood work and other post-mortem diagnostic testing, which would have been undertaken and would have disclosed the cause of death had STPH not released the body to Fielding; and (6) releasing the body when STPH knew or should have known that doing so would have prevented toxicology and/or other post-mortem medical diagnostic measures to be undertaken, which could have led to a precise

[3]In his petition, plaintiff alleged that Fielding was responsible for the acts and omissions of its employees under a theory of general negligence. However, at the close of plaintiff's case at trial, Fielding moved for a directed verdict, which was unopposed by plaintiff and was granted by the trial court. Plaintiff does not challenge the dismissal of Fielding in his appeal.

determination of the cause of death. Plaintiff alleged that as a result of the actions and/or omissions of STPH, plaintiff alleged that he suffered significant emotional pain and suffering, severe emotional devastation, mental anguish, distress, loss of enjoyment of life, and the permanent inability to ascertain what caused or contributed to the untimely death of his wife. Plaintiff further alleged that the actions of STPH have impaired his ability to prove his civil claim against STPH for medical malpractice in connection with the death of his wife due to the intentional and/or reckless and/or negligent spoliation/destruction of evidence.

On April 27, 2010, plaintiff, individually and on behalf of the Estate of Suzanne Halkett Harris, filed a medical malpractice suit against STPH, Dr. Michael Iverson,[4] and CRNA James Wattler,[5] which was assigned civil docket number 2010-12773.[6] Therein, plaintiff alleged: (1) that Mrs. Harris was negligently administered inappropriate and/or excessive medication by STPH employees, including, but not limited to CRNA Wattler; (2) that this medication error caused and/or contributed to Mrs. Harris' subsequent onset of cardiac arrest, and thus her death was a direct result of the defendants' negligence; (3) that STPH failed to exercise that degree of care expected of a hospital providing operative, cardiac, and/or emergency services in its care and treatment of Mrs. Harris, and its negligence in failing to meet that standard caused and/or contributed to the damages complained of by plaintiff; and (4) that Wattler failed to exercise that degree of professional skill and care expected of nurse

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[4]Prior to trial, Dr. Iverson was dismissed as a defendant in this litigation by summary judgment dated July 13, 2010.

[5]During the course of the trial, STPH and plaintiff stipulated that CRNA Wattler was an employee of STPH and that CRNA Wattler was acting within the course and scope of his employment with STPH at all times relevant to this litigation.

[6]On April 7, 2010, a Medical Review Panel Opinion issued, finding therein that medical malpractice defendants Dr. Iverson and CRNA Wattler acted appropriately in the care of Mrs. Harris, but that STPH "did not appropriately send patient to the coroner for autopsy."

anesthetists in his care and treatment of Mrs. Harris and that his negligence in failing to meet that standard caused and/or contributed to the damages complained of by plaintiff. Plaintiff asserted a survival action and wrongful death action as a result of the defendants' alleged conduct, as well as a claim for spoliation against STPH and its employees, including, but not limited to, Wattler, for the negligent, reckless, and intentional release of Mrs. Harris' body with the intent of destroying evidence that would have been disclosed by toxicology procured in an autopsy prior to its embalming. Plaintiff further alleged that STPH was responsible for the intentional infliction of emotional distress upon him for failing to protect and properly preserve his wife's body for autopsy and for directing her body to the funeral home in direct contravention of the attending physician's orders and the hospital's own procedure for the post-mortem handling of a patient's remains.

Plaintiff filed a motion to consolidate the negligence suit against remaining defendants, STPH and Fielding, with the medical malpractice suit against remaining defendants, STPH and CRNA Wattler, which was granted by the trial court on May 18, 2010. The matter then proceeded to trial before a jury on August 16 - 20, 2010.

On the evening of August 19, 2010, at the conclusion of the presentation of evidence and closing arguments, the court and counsel discussed the jury charges and instructions outside the presence of the jury. At this time, counsel for plaintiff objected to the jury instructions and the jury verdict interrogatories on the basis that the trial court failed to include a charge or interrogatory with regard to plaintiff's general negligence claims against STPH asserted pursuant to LSA-C.C. art. 2315. Counsel for plaintiff requested that the trial court allow her the opportunity to take an emergency writ on the issue, which the trial court denied. The jury was then charged and retired to deliberate. Importantly, before the trial

court sent the jury verdict form to the jurors in the deliberation room, counsel for plaintiff again objected to several inconsistencies in the form, including, specifically, the trial court's failure to include an interrogatory to address the allegations of negligence and malpractice by STPH. The trial court again noted the objection by plaintiff's counsel, but refused to revise the jury verdict form before sending it to the jurors.

After jury deliberations commenced, the jury submitted three pages with questions to the trial judge. The first page stated: "Clarify Question #1 – Does it mean, Jame[s] Wattler did provide the standard of care?" The second page stated: "is the first question grammatically correct?" And, the third page stated: "How can you tell the difference between single use dose or multiple use dose? Are they color coded? What is usual time frame after death for body to go to coroner? Where was the Adverse Drug Reaction Form obtained? How was the Adverse Drug Reaction Form obtained?"

The trial court seated the jury to attempt to address its questions. The trial court offered to send the jury instructions back with the jury, but advised the jury the court could not answer the question on the third page because the jury was not supposed to let the court know anything about what it might be considering in its deliberations. However, in response to the first two questions from the jury, the trial court "clarified" the stipulation by the parties that Wattler was an employee of STPH who was acting in the course and scope of his employment at all pertinent times herein, which, the court explained, meant that STPH would be responsible for his actions.

In an attempt to satisfy plaintiff's earlier objections, the trial court further explained to the jury, "So I guess this could have expanded it to say James Wattler, CRNA and St. Tammany Parish Hospital – since they are his employer – in the treatment of Mrs. Harris." Thus, although the jury verdict form only

questioned whether **Wattler** committed malpractice, the trial court nonetheless instructed the jury that "the plaintiff has to establish what the standard of care is for **the doctor**, or **the hospital**, or **the hospital employee** that they claim committed the malpractice, okay?" (Emphasis added.)

The trial court then returned the jury to deliberations, noting: "At this point in time, it might be clear as mud at 9:00 o'clock at night. But hopefully, that will aid you in coming to some conclusion." Shortly thereafter, the trial court recognized that it had been a long day for the jurors and decided to dismiss the jury for the night and to continue deliberations in the morning. At that point, the following colloquy occurred between plaintiff's counsel and the trial court:

> [Plaintiff's counsel]:
>
> Your Honor, I have absolutely no problem with that. However, does this give us an opportunity to straighten out the Jury Instructions that have needed to be corrected and have never been established as controlling the course of this case?
>
> I mean, they have been thrown together haphazardly. They're incorrect. We've adamantly objected to them.
>
> I've even asked to take a writ. I think that this would be a great opportunity for us to examine the law and get our instructions straight and –
>
> THE COURT:
>
> I'm not doing this. I mean, I came in here and proposed a change of Number 6 and that wasn't sufficient. So, we're not going to worry about it; okay.
>
> So I'm not doing it for this purpose. I'm doing it for the purpose of these Jurors who I think that we, you know, may be just putting too much on them at this late hour.
>
> I think they need to have an opportunity to just step away from this and come back with a fresh brain tomorrow.

When court opened the next morning, on August 20, 2010, counsel for plaintiff again objected to the legal inadequacies of the jury verdict form and

requested that the trial court submit the jury interrogatories prepared by plaintiff's counsel, noting that the jury form submitted by STPH and utilized by the trial court had not been reviewed or approved by plaintiff's counsel before it was submitted to the jury. Specifically, plaintiff's counsel argued, as follows:

> There's a lot of legal inadequacies on this form.
>
> Your Honor knows that this matter was consolidated with another matter and that I deferred [to] that consolidation and agreed to it because I was given the impression that I'd be able to put all of my theories before the Jury.
>
> And the verdict sheet transpired so quickly, it was not reviewed, legally, against the pleadings. And as a result, I feel that it is totally erroneous.
>
> And I would ask that, at this point, it be revised to reflect the causes of action that we stated and approved in trying this case for four days and in handling this case for more than four years, it occurred to me that it's very challenging and it's just not fair that all of the facts and all of the causes of action didn't get to my Jury here and that that failure of law will definitely, adversely impact the verdict.
>
> Your Honor, the hospital has always been a defendant and has always been named in this matter for negligence. The only thing that's included on this sheet was James Wattler; that's the only thing.
>
> There is significant evidence that plays before this Jury about hospital misconduct, about not following the rules, about negligence, per se.

The trial court refused to submit plaintiff's proposed interrogatories to the jury and advised plaintiff's counsel that she could proffer the proposed jury verdict interrogatories. Plaintiff's counsel objected to the trial court's ruling, and again requested to seek review of the trial court's ruling, to no avail.[7]

After deliberating, the jury completed the jury verdict interrogatories, returning a verdict, as follows:

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[7]Counsel for plaintiff contends in her brief that the "trial court judge pressured" and "adamantly urged" plaintiff to consolidate his cases after previously denying a rule to consolidate filed by the defense. Counsel for plaintiff stated that her greatest fear of consolidating was losing the integrity of the independent claims set out in both cases.

JURY VERDICT INTERROGATORIES

1. Did Mr. Harris prove by a preponderance of the evidence the standard of care applicable to James Wattler CRNA in his treatment of Mrs. Harris?

   Yes _√_____ No _____

   If you answered "Yes", proceed to the next interrogatory. If you answered "No", skip ahead directly to Interrogatory No. 5.

2. Did Mr. Harris prove by a preponderance of the evidence that James Wattler CRNA breached that standard of care in his treatment of Mrs. Harris?

   Yes _____ No __√___

   If you answered "Yes", proceed to the next Interrogatory. If you answered "No", skip ahead directly to Interrogatory No. 5.

3. Did Mr. Harris prove by a preponderance of the evidence that a breach in the standard of care on the part of James Wattler CRNA caused Mrs. Harris' death?

   Yes _____ No __√___

   If you answered "Yes", proceed to the next interrogatory. If you answered "No", skip ahead directly to Interrogatory No. 5.

4. What amount, if any, will reasonably compensate Mr. Harris for his wrongful death action?

   $_____

5. Did Mr. Harris prove by a preponderance of evidence that an employee of St. Tammany Parish Hospital intentionally destroyed evidence?

   Yes _____ No __√____

   If you answered "Yes", proceed to the next interrogatory. If you answered "No", skip ahead directly to end of this form, have the foreperson sign the form and inform the bailiff that you have reached your verdict.

6. Did Mr. Harris prove by a preponderance of the evidence that an intentional destruction of evidence by an employee of St. Tammany Parish Hospital prevented Mr. Harris from proving his allegations of medical malpractice against St. Tammany Parish Hospital?

   Yes _____ No _____

If you answered "Yes", proceed to the next interrogatory. If you answered "No", skip ahead directly to end of this form, have the foreperson sign the form and inform the bailiff that you have reached your verdict.

7. What amount, if any, will reasonably compensate Mr. Harris for his spoliation action?

$ _____

Have your foreperson sign and date this form and advise the bailiff that you have reached a verdict.

Cynthia Trygg [signed]
FOREPERSON

August 20, 2010

After the verdict form was read, the jury was polled and the verdict was unanimous. Plaintiff then moved for a JNOV, which was denied by the trial court.

Two separate judgments dismissing plaintiff's claims with prejudice were signed by the trial court on September 3, 2010.[8] A judgment citing the jury's negative response when asked if an employee of STPH intentionally destroyed evidence was filed in the general negligence suit record. A judgment citing the jury's negative response when asked if CRNA Wattler breached the standard of care in his treatment of Mrs. Harris was filed in the medical malpractice suit record.

On September 13, 2010, plaintiff filed a motion for new trial, which was denied by the trial court after a hearing, by judgment dated November 30, 2010.

[8]The jurisprudence recognizes the propriety of the consolidation of cases for convenience and to avoid the multiplicity of suits. See Marcotte v. Travelers Insurance Company, 236 So. 2d 587, 589 (La. App. 1st Cir. 1970), affirmed, 258 La. 989, 249 So. 2d 105 (La. 1971). The consolidation does not merge the actions unless the records clearly reflect an intention to do so. Thus, the propriety of rendering separate judgments in favor of and/or against only the particular named parties in each suit is not at issue. See Louviere v. Louviere, 2001-0089 (La. App. 1st Cir. 6/5/02), 839 So. 2d 57, 74-75, writs denied, 2002-1848, 2002-1868, 2002-1877, 2002-1878, & 2002-1879 (La. 10/25/02), 827 So. 2d 1151-1152.

Plaintiff then filed a petition for devolutive appeal from the November 30, 2010 judgment denying his motion for new trial.

Plaintiff appeals from the judgments of the trial court contending that the trial court erred by:

1.) incorrectly charging the jury on the applicable law and utilizing a verdict form which omitted several legally valid causes of action that had been raised by the pleadings in the consolidated records of this matter;

2.) not including all of plaintiff's causes of action against STPH on the verdict form and in failing to include on the verdict form a specific determination as to the negligence of STPH based on principles established pursuant to the Louisiana Medical Malpractice Act;

3.) not including for determination plaintiff's negligence claim against STPH and its employees as it related to their care and handling of the patient's body after her untimely death;

4.) not including for determination plaintiff's negligence claim against STPH and its employees in disposing of the vial of the drug suspected as the culprit in the patient's death and disposing of her blood through the misdirection of her body to a funeral home to be embalmed;

5.) not including for determination plaintiff's claim based on negligent infliction of emotional distress pursuant to Louisiana Civil Code article 2315 as it relates to the hospital's failure to procure an autopsy; and

6.) failing to recognize that the jury was manifestly erroneous in determining that plaintiff did not prove by a simple preponderance of the evidence that STPH's employee, James Wattler, CRNA, breached the standard of care in his failure to administer the appropriate dosage of the medication and his failure to chart the administration of medication; as well as the jury's failure to find him

responsible for causation pursuant to the applicable legal standard of preponderance of the evidence.

DISCUSSION

Motion to Dismiss

At the outset, we will address a motion to dismiss plaintiff's appeal filed by STPH. In its motion to dismiss, STPH contends that plaintiff filed the instant appeal from the November 30, 2010 judgment of the trial court denying his motion for new trial, which STPH contends is a non-appealable interlocutory judgment.

It is well settled in this circuit that an appeal of a denial of a motion for new trial will be considered as an appeal of the judgment on the merits when it is clear from the appellant's brief that the appeal was intended to be on the merits. Nelson v. Teachers' Retirement System of Louisiana, 2010-1190 (La. App. 1st Cir. 2/11/11), 57 So. 3d 587, 589 n.2; Carpenter v. Hannan, 2001-0467 (La. App. 1st Cir. 3/28/02), 818 So. 2d 226, 228-229, writ denied, 2002-1707 (La. 10/25/02), 827 So. 2d 1153; Reno v. Perkins Engines, Inc., 98-1686 (La. App. 1st Cir. 9/24/99), 754 So. 2d 1032, 1033, writ denied, 99-3058 (La. 1/7/00), 752 So. 2d 863.

In his appellate brief, plaintiff sets forth the six assignments of error stated above. A cursory reading of those assignments of error demonstrates that plaintiff intended to appeal the merits of the judgments dismissing his claims against defendants on the merits. Thus, we will treat the appeal as appropriately taken from the judgment on the merits. Accordingly, the motion to dismiss the appeal, filed by STPH, is hereby denied.

Jury Instructions and Verdict Form

(Assignments of Error Numbers One through Five)

In the first five assignments of error, plaintiff challenges the jury instructions and verdict form used herein contending that the trial court incorrectly charged the jury on the applicable law and utilized an incomplete (and, therefore, inadequate) verdict form, which omitted several legally valid causes of action that had been raised by the pleadings and the evidence presented at trial in the consolidated records of this matter.

Specifically, plaintiff contends that the jury verdict form failed to include a specific determination as to: (1) plaintiff's claims of medical malpractice against STPH based on the Louisiana Medical Malpractice Act; (2) plaintiff's claims of negligence against STPH and its employees based on their care and handling of Mrs. Harris' body after her untimely death by disposing of her blood through the misdirection of her body to a funeral home to be embalmed; and (3) plaintiff's claims of negligent infliction of emotional distress pursuant to Louisiana Civil Code article 2315 for STPH's failure to procure an autopsy.

Jury Charges/Instructions

Louisiana Code of Civil Procedure article 1792(B) requires that a trial court instruct jurors on the law applicable to the cause submitted to them. The trial court is responsible for reducing the possibility of confusing the jury and, thus, is vested with the right generally to exercise its discretion in deciding what law is applicable and what law is inappropriate. Adams v. Rhodia, Inc., 2007-2110 (La. 5/21/08), 983 So. 2d 798, 804; Baxter v. Sonat Offshore Drilling, Inc., 98-1054 (La. App. 1st Cir. 5/14/99), 734 So. 2d 901, 906. While the sufficiency of a jury charge must be determined in light of the charge as a whole, Everett v. State Farm Fire & Casualty Insurance Company, 2009-1699 (La. App. 1st Cir. 3/26/10), 37 So. 2d 456, 461, the charge nonetheless must

correctly state the law and be based on evidence adduced at trial. Baxter v. Sonat Drilling, Inc., 734 So. 2d at 906.

Ordinarily, factual findings of the jury are accorded great weight and may not be disturbed by the appellate court in the absence of manifest error. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). However, when the jury verdict is based on instructions that are faulty in a critical regard, the verdict is tainted and not entitled to a presumption of regularity. Dupuy v. Rodriguez, 620 So. 2d 397, 399 (La. App. 1st Cir.), writ denied, 629 So. 2d 352 (La. 1993). Adequate jury instructions are those that fairly and reasonably point out the issues and provide correct principles of law for the jury to apply to those issues. Everett v. State Farm Fire & Casualty Insurance Company, 37 So. 2d at 461. If the trial court omits an applicable, essential legal principle, its instruction does not adequately set forth the issues to be decided by the jury and may constitute reversible error. Adams v. Rhodia, Inc., 983 So. 2d at 804. Correlative to the trial court's duty to charge the jury as to the law applicable in a case is a responsibility to require that the jury receives only the correct law. Melancon v. Sunshine Construction, Inc., 97-1167 (La. App. 1st Cir. 5/15/98), 712 So. 2d 1011, 1016.

Thus, while the trial court is not required to give the precise instruction submitted by either party, the court nonetheless must give instructions which properly reflect the law applicable in light of the facts of the partCCUlar case. McCrea v. Petroleum, Inc., 96-1962 (La. App. 1st Cir. 12/29/97), 705 So. 2d 787, 791. A charge to the jury, even if it correctly states the law, must be based on evidence adduced in the case. Accordingly, a trial judge is not required to give a charge unless the facts support the giving of the charge. Stated differently, adequate instructions are those instructions which fairly and reasonably point up the issues presented by the pleadings and evidence and

provide correct principles of law for the jury's application thereto. McCrea v. Petroleum, Inc., 705 So. 2d at 791. "When the reviewing court finds that an erroneous jury instruction probably contributed to the verdict, the verdict must be set aside on appeal. The reviewing court must then conduct an independent investigation of the facts from the record before it and render judgment on the merits." Dupuy v. Rodriguez, 620 So. 2d at 399 (citations omitted).

Jury Verdict Form

Under the guidelines of LSA-C.C.P. art. 1812, the trial court is given wide discretion in determining and framing questions to be posed as special jury interrogatories, and absent some abuse of that discretion, a reviewing court will not set aside those determinations. See Schram v. Chaisson, 2003-2307 (La. App. 1st Cir. 9/17/04), 888 So. 2d 247, 251. Louisiana Code of Civil Procedure article 1812 addresses jury verdict forms and instructions, providing in pertinent part as follows:

> A. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event, the court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence, or may use any other appropriate method of submitting the issues and requiring the written findings thereon. The court shall give to the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its findings upon each issue. **If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue omitted unless, before the jury retires, he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding, or if it fails to do so, it shall be presumed to have made a finding in accord with the judgment on the special verdict.** [Emphasis added.]

Moreover, as set forth in LSA-C.C.P. art. 1812B:

> B. The court shall inform the parties within a reasonable time prior to their argument to the jury of the special verdict form and instructions it intends to submit to the jury and **the parties shall**

> **be given a reasonable opportunity to make objections.** [Emphasis added].

In reviewing a jury verdict form, this court employs a manifest error, abuse of discretion standard of review. Townes v. Liberty Mutual Insurance Company, 2009-2110 (La. App. 1st Cir. 5/7/10), 41 So. 3d 520, 527. The verdict form may not be set aside unless the form is so inadequate that the jury is precluded from reaching a verdict based on correct law and facts. Ford v. Beam Radiator, Inc., 96-2787 (La. App. 1st Cir. 2/20/98), 708 So. 2d 1158, 1160. Jury interrogatories must fairly and reasonably point out the issues to guide the jury in reaching an appropriate verdict. Townes v. Liberty Mutual Insurance Company, 41 So. 3d at 527. If the verdict form does not adequately set forth the issues to be decided by the jury (i.e., omits an applicable essential legal principle or is misleading and confusing), such interrogatories may constitute reversible error. Abney v. Smith, 2009-0794 (La. App. 1st Cir. 2/8/10), 35 So. 3d 279, 283, writ denied, 2010-0547 (La. 5/7/10), 34 So. 3d 864.

In Adams v. Rhodia, Inc., 983 So. 2d at 804-805 (citations omitted), the Louisiana Supreme Court set forth the following guidelines to consider in reversing a jury verdict due to erroneous jury instructions:

> Louisiana jurisprudence is well established that an appellate court must exercise great restraint before it reverses a jury verdict because of erroneous jury instructions. Trial courts are given broad discretion in formulating jury instructions and a trial court judgment should not be reversed so long as the charge correctly states the substance of the law. The rule of law requiring an appellate court to exercise great restraint before upsetting a jury verdict is based, in part, on respect for the jury determination rendered by citizens chosen from the community who serve a valuable role in the judicial system. We assume a jury will not disregard its sworn duty and be improperly motivated. We assume a jury will render a decision based on the evidence and the totality of the instructions provided by the judge.
>
> However, when a jury is erroneously instructed and the error probably contributed to the verdict, an appellate court must set aside the verdict. In the assessment of an alleged erroneous jury instruction, it is the duty of the reviewing court to assess such

> impropriety in light of the entire jury charge to determine if the charges adequately provide the correct principles of law as applied to the issues framed in the pleadings and the evidence and whether the charges adequately guided the jury in its deliberation. Ultimately, the determinative question is whether the jury instructions misled the jury to the extent that it was prevented from dispensing justice.
>
> Determining whether an erroneous jury instruction has been given requires a comparison of the degree of error with the jury instructions as a whole and the circumstances of the case.
>
> Because the adequacy of jury instruction must be determined in the light of jury instructions as a whole, when small portions of the instructions are isolated from the context and are erroneous, error is not necessarily prejudicial. Furthermore, the manifest error standard for appellate review may not be ignored unless the jury charges were so incorrect or so inadequate as to preclude the jury from reaching a verdict based on the law and facts. Thus, on appellate review of a jury trial the mere discovery of an error in the judge's instructions does not of itself justify the appellate court conducting the equivalent of a trial *de novo,* without first measuring the gravity or degree of error and considering the instructions as a whole and the circumstances of the case.

Here, the trial court charged the jury with instructions on two separate claims: (1) spoliation of evidence; and (2) medical malpractice of Wattler. As to the allegations of malpractice by Wattler, the jury verdict interrogatories set forth above asked the jury if the standard of care applicable to Wattler was proven (Question #1), if the standard of care as to Wattler was breached (Question #2), if Wattler's breach led to Mrs. Harris' death (Question #3), and the amount of damages attributable to his breach (Question #4). As to the spoliation of evidence allegations, the jury verdict interrogatories asked if an employee of STPH intentionally destroyed evidence (Question #5), and if the intentional destruction of evidence by an employee of STPH prevented plaintiff from proving his allegations of medical malpractice against STPH (Question #6).

On appeal, plaintiff contends that his actions and claims against defendant, STPH, sounding in medical malpractice and general negligence, were improperly omitted in their entirety from the jury charges and verdict form. Plaintiff further

contends that despite the above noted allegations set forth in his petitions, and for which evidence was adduced at trial, nowhere in the charges, and more importantly, nowhere on the special verdict interrogatories, was there any indication made to the jury that it had the option of finding that STPH had breached the standard of care, independent of Wattler's omissions, or the option of finding STPH liable in general negligence.[9]

After careful review of the record herein, we are constrained to agree. Notably absent from the jury charges and jury verdict interrogatories are instructions relative to: (1) whether STPH breached the standard of care applicable to plaintiff's claim based on malpractice; (2) whether STPH's conduct was intentional or otherwise actionable as a derogation of the duty owed under LSA-C.C. art. 2315 based on negligence; and (3) whether STPH breached a duty applicable to plaintiff's claim based on negligent infliction of emotional distress. Thus, despite the numerous objections by plaintiff's attorney prior to the submission of the jury verdict interrogatories herein, the jury was never given the option of rendering a finding as to any of the above claims, which were pled and tried to the jury herein. To that extent, we find the jury verdict form submitted to the jury herein was inadequate.

Accordingly, we find that the trial court erred in dispatching a verdict interrogatory form to the jury that does not adequately set forth the entirety of the issues pled and tried herein to be decided by the jury and that omits essential legal principles as to the defendant, STPH. Likewise, to the extent that the trial court failed to charge the jury as to the omitted claims, we find it erred. Although we

[9]In her brief on appeal, counsel for plaintiff explains that although the trial court had previously indicated that it would meet with the counsel for the parties on the evening of August 19th to discuss jury charges and the jury verdict form, when the defense rested its case at approximately 4:00 p.m. on August 19th, rather than dismissing the jury and meeting with counsel as originally planned, the trial court abruptly decided that counsel should give their closing arguments and that the case would be submitted to the jury that night.

find no error in the jury instructions and verdict form concerning those claims that were presented to the jury for consideration,[10] (a finding of which would have required us to determine whether the jury instructions misled the jury to such an extent that the jurors were prevented from dispensing justice, see Wooley v. Lucksinger, 2009-0571 (La. 4/1/11), 61 So. 3d 507, 574,) because we nonetheless find that the jury instructions and jury verdict form were deficient or inadequate, given the omission of certain claims that were not presented to the jury for adjudication, in the interest of judicial economy and because we have the entire record before us, we are required to conduct a *de novo* review of the claims not presented for consideration by the jury.[11]

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[10]For ease of discussion, prior to our discussion of plaintiff's claims of malpractice against STPH, we address plaintiff's sixth assignment of error challenging the jury's finding in relation to plaintiff's medical malpractice claims against CRNA Wattler, i.e., that CRNA Wattler did not breach the applicable standard of care in his treatment of Mrs. Harris. After thorough review of the evidence and expert and lay testimony set forth before the jury, and mindful of the manifest error standard of review applicable in medical malpractice cases, see Landry v. Leonard J. Chabert Medical Center, 2002-1559 (La. App. 1st Cir. 5/14/03), 858 So. 2d 454, 462, writs denied, 2003-1748, 2003-1752 (La. 10/17/03), 855 So. 2d 761, despite the troubling nature of Wattler's actions, we are unable to say the jury erred in its determination that Wattler did not breach the established standard of care.

In support of their finding that Wattler did not breach the established standard of care, the expert anesthesiologists' medical testimony established that the administration of 20 milligrams or 50 milligrams of Brevibloc were acceptable dosages in this case. Although Dr. Breaux testified that he thought the administration of 50 milligrams of Brevibloc was "way too much," we cannot disturb the jury's reasonable evaluation of credibility and reasonable inferences of fact on review when there is conflict in the testimony. Landry v. Leonard J. Chabert Medical Center, 858 So. 2d at 462-463. Moreover, expert anesthesiologist Dr. Mack Thomas' medical testimony established that Wattler's multiple usage of a "single-use vial" of Brevibloc, although not recommended, did not breach the established standard of care, while Dr. Iverson, also an expert in anesthesiology, testified that it was inappropriate to use a vial of Brevibloc that was designated for single patient dosage if it had already been used and considered such a breach of the standard of care. Again, the jury was presented with conflicting opinions and made evaluations of testimony, which we cannot disturb on appeal, if reasonably supported by evidence in the record, in the absence of manifest error.

Thus, we find no merit to this assignment of error.

[11]When an appellate court finds that a reversible legal error or clear error of material fact was made in the trial court, it is required, whenever possible, to review the case *de novo* from the entire record and render a judgment on the merits. Norfolk Southern Corporation v. California Union Insurance Company, 2002-0369 (La. App. 1st Cir. 9/12/03), 859 So. 2d 167, 188, writ denied, 2003-2742 (La. 12/19/03), 861 So. 2d 579, citing Ferrell v. Fireman's Fund Insurance Company, 94-1252 (La. 2/20/95), 650 So. 2d 742, 745.

To this extent, we find merit to plaintiff's first five assignments of error. As such, we now conduct a *de novo* review of plaintiff's claims against STPH that were not submitted for adjudication by the jury.

Medical Malpractice of STPH

The first claims we address *de novo* are plaintiff's claims of malpractice against STPH.[12] In a medical malpractice action against a hospital, the plaintiff must prove that the hospital caused the injury when it breached its duty. Cangelosi v. Our Lady of the Lake Regional Medical Center, 564 So. 2d 654, 661 (La. 1989). Otherwise stated, the plaintiff must prove, as in any negligence action, that the defendant owed the plaintiff a duty to protect against the risk involved, that the defendant breached that duty, that the plaintiff suffered an injury, and that the defendant's actions were a substantial cause in fact of the injury. Gordon v. Willis Knight Medical Center, 27,044 (La. App. 2nd Cir. 6/21/95), 661 So. 2d 991, 997 writs denied, 95-2776, 95-2783 (La. 1/26/96), 666 So. 2d 679.

Expert testimony is generally required to establish the applicable standard of care and whether that standard of care was breached, except where the negligence is so obvious that a lay person can infer negligence without the guidance of expert testimony. Pfiffner v. Correa, 94-0924, 94-0963, 94-0992 (La. 10/17/94), 643 So. 2d 1228, 1233-1234; Williams v. Our Lady of the Lake Hospital, Inc., 2009-0267 (La. App. 1st Cir. 9/11/09), 22 So. 3d 997, 999.

Plaintiff claims that STPH breached the established standard of care for healthcare providers by failing to document the administration of Brevibloc in violation of its own policy. Kerry Milton, the Chief Nursing Officer at STPH,

[12]To the extent that plaintiff argues in its malpractice claim against STPH that STPH erred in failing to send Mrs. Harris' body for autopsy, we note that the Medical Malpractice Act was not intended to encompass negligent acts toward a deceased person inasmuch as a corpse is not considered a "patient" under the MMA. Gayden v. Tenet Healthsystem Memorial Medical Center, Inc., 2004-0807 (La. App. 4th Cir. 12/15/04), 891 So. 2d 734, 736-737.

testified that the medication guideline of STPH requires that every medication administered at STPH is supposed to be documented by the person administering it. She testified that if an employee failed to document or chart the administration of a medication, such conduct was a violation of the medication administration policy.

Wattler candidly admitted that although he did not personally document in Mrs. Harris' chart that he administered the drug, he stated that he told the CCU receiving nurse to document that he had administered **20** milligrams of Brevibloc in her chart. He denied telling her to chart 50 milligrams of the drug. Wattler admitted he failed to note the administration of Brevibloc in the anesthesia record and acknowledged that the drug accordingly was not included in the anesthesia charges sheet. Although the receiving nurse documented **50** milligrams of Brevibloc in the receiving record, plaintiff also contends STPH breached the duty owed because STPH failed to document both the administration of Brevibloc and the amount administered in the anesthesia record, the medical administration record, the hospital bill, and the patient's medical record.

Plaintiff further notes that the coding summary herein lists "iatrogenic hypotension" as having occurred. Dr. Breaux defined "hypotension" as low blood pressure and "iatrogenic" meaning someone caused it. Plaintiff contends that, considering the administration of Brevibloc, STPH's coding summary alone shows error on the part of the hospital. Plaintiff further contends that the coding summary, combined with STPH's abject failure to document the administration of Brevibloc and the amount administered in the anesthesia record, the medical administration record, the hospital bill, and the patient's medical record, constitute a breach in the standard of care imposed upon STPH.[13]

[13]As set forth above, contrary to Wattler's testimony, Mrs. Harris' critical care CCU record indicated that **50** milligrams of Brevibloc were administered to Mrs. Harris.

On review of the evidence and testimony herein, we agree with plaintiff that STPH breached the established standard of care in its failure to document the administration of Brevibloc. However, even though we find that the evidence established that STPH breached a duty owed to plaintiff, we are unable to find that this breach of STPH's duty to adequately or accurately chart the medication administered caused Mrs. Harris to suffer injury or that STPH's breach of the duty to chart the administration of medication was a substantial cause in fact of Mrs. Harris' injury. Thus, absent a showing that this error caused her death, there can be no recovery on this basis, as plaintiff has not made the requirement showing harm or causation-in-fact.

Considering our above noted affirmation of the jury's finding with reference to the medical malpractice claims against Wattler in using the drug Brevibloc to slow Mrs. Harris' heart rate, we likewise find no merit to plaintiff's claim that STPH was liable in malpractice to plaintiff merely based on its coding summary notation that "iatrogenic hypotension" had occurred, when the expert testimony showed that "iatrogenic hypotension" is the intended purpose of the drug.

General Negligence of STPH

Plaintiff contends STPH is liable to plaintiff under LSA-C.C. art. 2315 general negligence principles for its failure to procure an autopsy of Mrs. Harris' body and as part of his claim for negligent spoliation of evidence.

Our jurisprudence has recognized two causes of action for spoliation of evidence, one based on an intentional act and the other under a negligence theory.[14] See Paradise v. Al Copeland Investments, Inc., 2009-0315 (La. App. 1st Cir. 9/14/09), 22 So. 3d 1018, 1027; McCleary v. Terrebonne Parish

[14]As set forth above, plaintiff's claim for intentional spoliation by STPH was considered by the jury and rejected. This finding has not been challenged on appeal.

Consolidated Government, 2009-2208 (La. App. 1st Cir. 9/30/10) (unpublished opinion), writ denied, 2010-2807 (La. 2/11/11), 56 So. 3d 1003.[15] The obligation or duty to preserve evidence arises from the foreseeability of the need for the evidence in the future. Dennis v. Wiley, 2009-0236 (La. App. 1st Cir. 9/11/09), 22 So. 3d 189, 195, writ denied, 2009-2222 (La. 12/18/09), 23 So. 3d 949; Robertson v. Frank's Super Value Foods, Inc., 2008-592 (La. App. 5th Cir. 1/13/09), 7 So. 3d 669, 675, n. 3. Thus, the pertinent question raised in negligent spoliation cases is helpful in this situation: "[d]id the defendant have a duty to preserve the evidence *for the plaintiff,* whether arising from a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence?" Longwell v. Jefferson Parish Hospital Service District No. 1, 2007-0259 (La. App. 5th Cir. 10/16/07), 970 So. 2d 1100, 1104-1105, writ denied, 2007-2223 (La. 1/25/08), 973 So. 2d 756. (Emphasis added). If so, then the plaintiff has a claim for the defendant's breach of this duty. If not, the plaintiff has no remedy. Longwell v. Jefferson Parish Hospital Service District No. 1, 970 So. 2d at 1105; Dennis v. Wiley, 22 So. 3d at 195-196. Where a suit has not been filed and there is no evidence that a party knew a suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply. Quinn v. RISO Investments, Inc., 2003-0903 (La. App. 4th Cir. 3/3/04), 869 So. 2d 922, 926-927, writ denied, 2004-0987 (La. 6/18/04), 876 So. 2d 808. Moreover, under an intentional or negligent theory of spoliation, the presumption does not apply if the failure to produce the evidence is adequately explained. Paradise v. Al Copeland Investments, Inc., 22 So. 3d at 1027.

[15]Pursuant to LSA-C.C.P. art. 2168, unpublished opinions of the supreme court and courts of appeal may now be cited as authority.

Moreover, in Louisiana, courts have adopted a duty-risk analysis in determining whether to impose liability under the general negligence principles of LSA-C.C. art. 2315. Bridgefield Casualty Insurance Company v. J.E.S., Inc., 2009-0725, 2009-0726 (La. App. 1st Cir. 10/23/09), 29 So. 3d 570, 573. For liability to attach under a duty-risk analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard of care; (2) the defendant's conduct failed to conform to the appropriate standard; (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages. Cusimano v. Wal-Mart Stores, Inc., 2004-0248 (La. App. 1st Cir. 2/11/05), 906 So. 2d 484, 486-487. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. Bellanger v. Webre, 2010-0720 (La. App. 1st Cir. 5/6/11), 65 So. 3d 201, 207, writ denied, 2011-1171 (La. 9/16/11), 69 So. 3d 1149.

As set forth above, Dr. Breaux testified that he ordered that an autopsy be performed on Mrs. Harris' body in order to determine the exact cause of death. He gave this order to the nurse supervisor in CCU at the time of Mrs. Harris' death. Consistent with this order, the evidence showed that Mrs. Harris' STPH Coding Summary bears the following notation for Discharge Status, "Surgical death within 48 hours post surgery, Autopsy." Further, plaintiff specifically requested an autopsy while walking out of CCU after his wife was pronounced dead. Plaintiff's friend, Charles Jacobs, witnessed this request. Moreover, STPH House Supervisor Rachel Rappolo acknowledged that she heard Dr. Breaux explain to plaintiff that a coroner-mandated autopsy is typically performed in these types of cases where a patient dies within 24 hours of being admitted to the hospital.

STPH's Chief Nursing Officer, Kerry Milton, testified that STPH's policy provides that if an autopsy is requested by the treating physician or spouse, the coroner's office is to be contacted. Milton stated, "The first thing we do is to notify the coroner of all of this; that's our first action taken." Milton further testified that if a doctor orders or a spouse requests an autopsy, it is STPH's job to facilitate that happening. Pertinent to the facts of this case, STPH's written policy concerning autopsies provides, in pertinent part, as follows:

> The St. Tammany Parish Hospital Medical Staff will attempt to obtain autopsies in deaths that meet the following categories:
>
> 1. All deaths in which an autopsy may help to explain unknown and unanticipated medical complications to the attending physician.
>
> * * *
>
> 5. All deaths in which iatrogenic injury or medical error is suspected as a major contributing cause of the patient's death.

Dr. Michael D. Difatta, a forensic pathologist employed by the St. Tammany Parish Coroner's Office who is charged with making a determination as to which cases require an autopsy, was accepted by the trial court as an expert in forensic pathology. Dr. Difatta reviewed the report dated August 26, 2006, that was generated by the forensic death investigator on duty, Michael Rodrigue, who received the call from STPH concerning Mrs. Harris' death. Rodrigue's report indicated that Mrs. Harris had a mitral valve replacement procedure and had been transferred to CCU, after which she became unresponsive. Rodrigue testified that he received a call from a nurse named "Robin" at STPH, who informed him that Mrs. Harris' primary diagnosis was cardiac arrhythmia. Rodrigue was not advised that Dr. Breaux had requested an autopsy in this case or that plaintiff had requested an autopsy. In conducting his investigation, Rodrigue was also not advised that there was a question as to the amount of medication administered to Mrs. Harris and that the medication had been administered from a vial where the

cap had been removed. Thus, he was unable to report this information to Dr. Difatta.

Dr. Difatta testified that employees in the Coroner's Office rely on the information provided to them by the hospital in making the determination as to whether an autopsy is required. Thus, they expect the information that they are given to be complete. Dr. Difatta was aware that Dr. Breaux had requested an autopsy in this case on the date of death, but his office did not received approval from STPH to conduct the autopsy until August 24, 2006, at which time, unbeknownst to him, STPH had already released the body to the funeral home, where it had been embalmed. Dr. Difatta testified that had he been told or notified that an adverse drug reaction form had been filed in this case, the case would qualify as an unexpected, unusual death, and by law he would have been required to bring the case in for autopsy. Once Dr. Difatta learned that STPH had completed the adverse drug reaction form three years later in 2008, the coroner's office had the death certificate amended to state the cause of death as "undetermined."

Notwithstanding the above, STPH's chaplain, Reverend Keith Stokes Snyder, candidly testified that he was never made aware of or notified regarding any orders or requests for an autopsy and that he personally contacted Fielding to pick up Mrs. Harris' body from the hospital. Thus, despite the attending physician's order and requests for an autopsy herein, the autopsy was not facilitated by STPH, in violation of STPH's policy.

The Medical Review Panel Opinion noted in its findings that the "Hospital did not appropriately send patient to the coroner for autopsy." On *de novo* review, we agree. We must now determine whether STPH's failure to send Mrs. Harris' body for autopsy, in violation of its own policy, amounts to a breach of

duty under a theory of general negligence or under the theory of negligent spoliation.

Here, STPH has provided no explanation whatsoever, as to why its procedures were not followed and why the body was not sent for autopsy as both ordered and requested. See Paradise v. Al Copeland Investments, Inc., 22 So. 3d at 1027. However, on the claim for damages arising from a negligent spoliation theory of recovery, plaintiff has failed to show that STPH had a duty to preserve the evidence for plaintiff that arose from either a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence. See Longwell v. Jefferson Parish Hospital Service District No. 1, 970 So. 2d at 1104-1105. At the time STPH called the funeral home to retrieve Mrs. Harris' body, no suit had been filed and plaintiff failed to show or produce evidence that a party knew a suit would be filed. Thus, we do not find that the theory of spoliation of evidence applies herein. See McCleary v. Terrebonne Parish Consolidated Government citing Quinn v. RISO Investments, Inc., 869 So. 2d at 926-927.

Nonetheless, under general negligence principles, we find that STPH had a duty of care to plaintiff in the handling of the body. Specifically, we agree that STPH owed a duty to comply with plaintiff's wishes and the attending physician's order for an autopsy. STPH owed a duty to plaintiff to see that the body was sent for autopsy as ordered and pursuant to its own policies. Clearly, STPH blatantly breached that duty. Thus, we will now discuss whether plaintiff is entitled to damages for the injuries, if any, suffered by him as a result of this breach of duty by STPH.

Negligent Infliction of Emotional Distress

The jurisprudence recognizes that a claim for negligent infliction of emotional distress is viable, even if unaccompanied by physical injury. Barrino v.

East Baton Rouge Parish School Board, 96-1824 (La. App. 1st Cir. 6/20/97), 697 So. 2d 27, 33. Any recovery for mental anguish tort damages must be based on LSA-C.C. art. 2315, which provides, in pertinent part, that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The duty-risk analysis is used to assist our courts in determining whether one may recover under article 2315. Norred v. Radisson Hotel Corporation, 95-0748 (La. App. 1st Cir. 12/15/95), 665 So. 2d 753, 759. However, this recovery is limited to cases involving the "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." Barrino v. East Baton Rouge Parish School Board, 697 So. 2d at 34 (quoting Moresi v. State, Department of Wildlife and Fisheries, 567 So. 2d 1081, 1096 (La. 1990)). Having determined herein that STPH breached its duty to send Mrs. Harris' body to the coroner's office for an autopsy as ordered, and after considering the record herein, we find plaintiff has established a valid claim for recovery for emotional distress damages resulting from this breach.

Plaintiff testified that after his wife's surgery, he received a phone call from Dr. Breaux informing him that all had gone well and that Mrs. Harris was in "great shape" and that he could come to the hospital to see her. When he arrived at the hospital ten minutes later, he was told that the doctor would speak to him shortly, although it turned out to be a couple of hours. Plaintiff called his friend, Max Jacobs, to come to the hospital to sit with him, as he learned the hospital had called a "code blue" and that something had gone terribly wrong. Plaintiff stated that after he was informed that his wife had died, he requested an autopsy and "wanted some answers." He did not understand how the surgery could have gone so well, and then she suddenly died. In the days following her death, plaintiff contacted the nurses at STPH whom he thought were his wife's friends, STHP,

and the coroner's office, "looking for answers" and trying to find out what had happened. He stated that no one returned his phone calls or wanted to talk to him and that it was like they were under a "gag order."

Plaintiff was eventually advised by the coroner's office that Mrs. Harris' body had been embalmed before it reached the coroner's office for autopsy, which would taint the evidence of autopsy. When plaintiff discovered this, he became very disturbed, distressed and angry, as he could not understand how a mistake of this magnitude could possibly happen. Given STPH's silence and lack of cooperation and the fact that he could get no answers as to what had happened to his wife, plaintiff began to believe that a "cover up" took place. Plaintiff explained that after STPH completed an adverse drug reaction form, that he learned of three years after her death, plaintiff again became very distressed as he believed this conduct confirmed what he had suspected all along.

Plaintiff's testimony poignantly demonstrated his overwhelming emotional loss as a result of his wife's death and his inability to resolve what had caused her death, given the negligent actions of STPH which precluded an autopsy to resolve these questions. He testified that he and Suzanne were "soul mates" and were inseparable, doing everything together. After her death, plaintiff began seeing a therapist for his grief and depression, as his mental condition was not improving. Plaintiff has become a "hermit" and does not get out much. At the time of trial, he was not any better emotionally since her death four years ago. Plaintiff explained that he is unable to stop dwelling on the unanswered questions surrounding his wife's death.

Dr. Susan Andrews, a clinical neuropsychologist who was accepted by the trial court as an expert in clinical psychology, also testified. Dr. Andrews began treating plaintiff for depression in April of 2007 and had been treating him for three years as of the time of trial. When plaintiff first appeared for treatment, he

was not sleeping at night, crying most of the day, isolating himself, not seeing any of his old friends, staying home, and rarely getting out for anything. Dr. Andrews diagnosed him as suffering from major depression at that time. She saw him in therapy every two weeks and at the time of trial, was still seeing him. Over the course of time, she determined that he was not getting much better and that he needed medication. Plaintiff's primary physician recommended a low-dose anti-depressant medication that he took for a while, but discontinued use of it because plaintiff did not feel like it was helping.

Dr. Andrews testified that plaintiff's grief is so overwhelming that he is barely functioning. She recognized that he was very much in love with his wife, and that he often told her that when he lost Suzanne, he lost his reason for living. Dr. Andrews specifically testified that the circumstances of not knowing what happened to his wife and all of the mystery that shrouds her death has made it difficult for plaintiff to get any type of emotional closure after all of these years. The circumstances surrounding her death cause him to constantly search in his mind as to what happened and why. She noted that plaintiff felt hurt and mistreated by the actions of STPH, and testified that he is still extremely upset that STPH did not effectuate the autopsy as ordered. She testified that plaintiff is frustrated and angry and "wants to know the truth" both for himself and for his wife. Dr. Andrews testified that although plaintiff is making some progress, he is certainly progressing much more slowly in the stages of grief than most people do. At the time of trial, Dr. Andrews' bill for therapy and treatment services rendered to plaintiff was $12,675.00.

Charles Jacobs, who had been a close personal friend of plaintiff for twenty-seven years as of the time of trial, testified that he was with plaintiff at STPH for two to three hours on the day his wife died. Mr. Jacobs was with plaintiff when he requested the autopsy. Mr. Jacobs stated that plaintiff was vocal

and adamant about wanting one. Mr. Jacobs spent that night with plaintiff trying to console him about his wife's death. He testified that since his wife's death, life has been unbelievably terrible for plaintiff. Mr. Jacobs has tried to console plaintiff and help him move on, but he has been unsuccessful. Mr. Jacobs testified that plaintiff and his wife were "soul mates" and that they were very happy together. Plaintiff continues to talk about her almost every time Mr. Jacobs sees him. Like plaintiff, Mr. Jacobs does not understand how the autopsy did not take place.

Considering the underlying facts of this case, and the particularly egregious loss to plaintiff herein in light of the actions and omissions of STPH, we find that STPH is liable to plaintiff in damages, and thus hereby award plaintiff damages in the amount of $35,000.00 for STPH's negligent infliction of emotional distress. See generally LeJeune v. Rayne Branch Hospital, 556 So. 2d 559 (La. 1990). We further award plaintiff $12,675.00, representing the expenses incurred for psychological treatment and therapy received from Dr. Andrews through trial.

CONCLUSION

As to the trial court's September 3, 2010 judgment of dismissal with prejudice of plaintiff's medical malpractice claims in trial court docket No. 2010-12773, dismissing plaintiff's malpractice claims against Dr. Iverson and CRNA Wattler (STPH under a theory of respondeat superior), although we find the trial court erred in not allowing the jury to consider plaintiff's malpractice claims against STPH independent of Wattler's actions, given our findings on *de novo* review that plaintiff could not prevail on these claims, we affirm the judgment inasmuch as it dismisses the "civil action," including plaintiff's medical malpractice claims against Wattler and plaintiff's medical malpractice claims against STPH, with prejudice.

As to the trial court's September 3, 2010 judgment dismissing plaintiff's entire civil action with prejudice in the negligence suit bearing trial court docket No. 2007-13187, we hereby vacate in part, based on our finding that trial court erred in not allowing the jury to consider plaintiff's claims against STPH in negligent spoliation, general negligence, and for negligent infliction of emotional distress. However, to the extent that the judgment dismisses Fielding from these proceedings in accordance with the trial court's grant of a directed verdict and dismisses plaintiff's intentional spoliation claims against STPH in accordance with the jury's verdict, we affirm. After a *de novo* review, we hereby amend the September 3, 2010 judgment in accordance with our holding that plaintiff has established that STPH was negligent and breached its duty owed plaintiff. Accordingly, judgment is hereby rendered in favor of plaintiff and against STPH in the amount of $35,000.00 for general damages for negligent infliction of emotional distress, together with $12,675.00 in medical damages for the costs of therapy with Dr. Andrews. Judgment is further rendered to dismiss, with prejudice, plaintiff's claims against STPH for negligent spoliaton.

Accordingly, for the reasons set forth above, the September 3, 2010 judgment of the trial court in the medical malpractice suit is affirmed (No. 2010-12773). The September 3, 2010 judgment of the trial court in the negligence suit is vacated in part, affirmed in part, and rendered (No. 2007-13187).

The motion to dismiss appeal filed by STPH is denied at its costs.

All costs of this appeal are assessed to the Defendant/Appellee, St. Tammany Parish Hospital.

JUDGMENT AFFIRMED IN SUIT NUMBER 2010-12773; JUDGMENT AFFIRMED IN PART, VACATED IN PART, AMENDED IN PART, AND RENDERED IN SUIT NUMBER 2007-13187.