IN THE CIRCUIT COURT FOR SUMNER COUNTY, TENNESSEE

DEBBIE ANN BOLTON, surviving child Of Decedent RUTH CLARA SUMMERS

Plaintiffs,

v.

CASE NO. 83 CC1 2020 CV 613
JURY DEMAND

GALLATIN CENTER FOR REHABILTIATION & HEALING, LLC

Defendant.

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff's Motion for New Trial should be denied, and the unanimous verdict of the jury approved by the Court in its role as thirteenth juror. The weight of the evidence preponderates in favor of the jury's verdict. The jury was properly instructed on their duties as jurors, were attentive throughout the proceeding, and took time and care in their deliberations. The Court should be satisfied with the jury's verdict. It is fair and just.

I. The Trial Court as the Thirteenth Juror

Under Rule 59.07 of the Tennessee Rules of Civil Procedure, "[a] new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury for any of the reasons for which new trials have heretofore been granted." Tenn. R. Civ. P. 59.07. "Where the motion for a new trial asserts that the verdict was contrary to the weight of the evidence it is the duty of the trial judge to weigh the evidence and determine whether it preponderates *against* the verdict, and if so, to grant a new trial." *James E. Strates Shows, Inc. v. Jakobik*, 554 S.W.2d 613, 615 (Tenn. 1977). Appellate Courts attach great weight to the fact that

the trial court, "'having seen and heard the witnesses testify, and having submitted the case to a jury known to himself, has stamped the verdict with his approval by refusing to grant a new trial.'" *Sherlin v. Roberson*, 551 S.W.2d 700, 702 (Tenn. Ct. App. 1976) (quoting *Tenn. C. & R.R. v. Roddy*, 5 S.W. 286 (Tenn. 1886).

Plaintiff cites repeatedly to the very recent Tennessee Supreme Court case *Fam. Trust Servs. LLC v. Green Wise Homes LLC*, 2024 Tenn. LEXIS 284 (Tenn. July 10, 2024) in support of her motion. *Fam. Trust* offers nothing new. It simply reiterates the essential role of the trial judge as thirteenth juror.

II. The Evidence At Trial Fully Supports The Jury's Verdict

A. Plaintiff failed to meet her burden of proof on causation and instead sought to have the jury speculate based on unreliable opinions and fact witness testimony lacking credibility.

Plaintiff argues that a new trial must be granted because the jury's verdict is contrary to the weight of the evidence. Her argument relies heavily on characterization of Defendant's experts' opinion testimony as "speculative," but she presents no evidence from the record that supports that characterization. She points to the rebuttal testimony of Plaintiff's infectious disease physician, Dr. Blass, that it was speculative to opine that an asymptomatic resident, visitor, or state surveyor infected Ms. Summers. What the proof actually established was that it was even more speculative for the Plaintiff to point the finger at 5, and then just 2, staff members as the source of Ms. Summers' infection when there were 161 residents and staff members who tested positive for COVID-19, many of whom were asymptomatic. Recall also that Dr. Fridkin testified without challenge that other sources of Ms. Summers' infection included asymptomatic or presymptomatic residents and staff who were positive sometime in March 2020 but who tested negative by the time the National Guard performed testing on all staff and residents.

In point in fact, Dr. Blass's rebuttal testimony was the final nail in the coffin that was Plaintiff's case. Plaintiff, via her experts, maintained throughout the trial that the source of Ms. Summers' COVID-19 infection was one or all of 5 specifically named employees or former employees of Gallatin Center. Then, on rebuttal, Dr. Blass for the first time reduced the list of likely culprits from 5 to 2. Astoundingly, the 2 who remained on the list never provided care to Clara Summers. One was a housekeeper, Diego Lugo, and the other was the activities director, Amanda Gilbert. Bumped from the list were a nurse, a nurse aide, and a physical therapist.

Even more devastating to Plaintiff's case was her own expert's concession on cross-examination wherein Dr. Tepper testified that he was unable to identify to a reasonable degree of medical certainty who actually infected Ms. Summers with the virus.[1]

An important point established through expert proof at trial was that exposure to a COVID positive individual does not necessarily lead to infection. Here is Dr. Fridkin's trial testimony on the subject:

Q. · · Okay. · And to go -- revisit one other point. Exposure does not equal infection; is that what you told before?

A. · · ·Right.

Q. · · You would have to speculate whether a person who exposed Ms. Summers to the COVID virus actually infected her?

A. · · ·Correct.

Q. · · · We have no way of knowing, do we?

A. · · · ·Correct [2]

Therefore, as a threshold matter, the jury was being asked by Plaintiff to speculate that Mr. Lugo and/or Ms. Gilbert not only exposed Ms. Summers to the virus that causes COVID-19

[1] The relevant portion of the trial transcript is attached hereto as Exhibit A.
[2] The relevant portion of the trial transcript is attached hereto as Exhibit B.

but that one or both of them infected her with the virus. Because neither Mr. Lugo nor Ms. Gilbert actually provided care to Ms. Summers, the supposed evidence that either or both were in close contact with Ms. Summers during any time relevant to this lawsuit must be carefully scrutinized.

In the case of Mr. Lugo, the only testimony that he was in close contact with Ms. Summers came from one of Plaintiff's two combination fact witness/nurse experts, Kay Holmes. The proof at trial established that Ms. Holmes worked a total of 4 days in March 2020 (March 1, 2, 8 & 21). Ms. Holmes testified that while working on a completely different unit on March 21, 2020, she personally observed Mr. Lugo have a conversation with Ms. Summers lasting some 5 to 7 minutes. That is the sum total of the proof regarding Mr. Lugo's claimed connection to Ms. Summers.

Ms. Holmes' credibility was closely observed by the jury, and they clearly found it to be lacking. Why? At a minimum because: 1) She admitted to having worked on a case previously with Plaintiff's counsel in which she was a whistleblower against another nursing home at which she was employed; 2) She admitted to contacting Plaintiff's counsel and volunteering her services in this case; 3) She admitted to recruiting her old friend Kris Brooks to also work for Plaintiff's counsel in the cases against Gallatin Center; 4) She offered a ridiculous story at trial that she was sick on the morning of March 21 but came to work anyway to be screened to "make a record" and with no expectation that she would be put to work; 5) She claimed to have been forced to work sick that day by some unidentified supervisor on the phone; 6) She claimed she was refused a mask despite feeling sick; 7) She claimed the weekend supervisor, Sara Beth Pryor, LPN, refused to allow her to go to her car to retrieve a mask and told her she would be fired if she wore a mask; 8) She claimed to have taken notes while watching the facility being evacuated while sick at home and that those notes specifically included mention of Mr. Lugo having contact with Ms. Summers on the last day Ms. Holmes worked. However, Ms. Holmes could not produce any such notes; 9)

She admitted to sending an email (introduced as a trial exhibit) to the mayor of Sumner County on March 31, 2020 claiming management at Gallatin Center were liars and pleading with the mayor to not allow Gallatin Center to reopen; 10) She admitted to sending a Facebook message to the Gallatin Center administrator the very next day (April 1, 2020) asking for her job back while she was already working for Plaintiff's counsel; 11) She returned to work at Gallatin Center in 2022 and never once mentioned to anyone that she was working for Plaintiff's counsel on the numerous cases pending against Gallatin Center stemming from the COVID outbreak; 12) She attended almost every day of trial after she testified and she sat with Plaintiff's family; and 13) She admitted during her rebuttal testimony that she was a biased witness and that she wanted plaintiff to prevail. Any one of the foregoing was sufficient for the jury—"the sole and exclusive judges of the credibility or believability of the witnesses who have testified in the case"—to deem Ms. Holmes untruthful. See, T.P.I. Civil 2.20.

There are 14 listed questions in T.P.I. Civil 2.20 for the jury to consider in judging the credibility of witnesses. Those include: 7) Was the witness making an honest effort to tell the truth, or did the witness evade questions?" 8) "Did the witness have any interest in the outcome of the case?"; 9) "Did the witness have any motive, bias or prejudice that would influence the witness' testimony?"; 10) "How reasonable was the witness' testimony when you consider all of the evidence in the case?"; and 11) "Was the witness' testimony contradicted by what that witness has said or done at another time, by the testimony of other witnesses, or by other evidence?". There is simply no way the jury could have considered these questions and deemed Ms. Holmes to be credible. In its role as fact-finder, it is the duty and prerogative of the jury to assess the credibility of the witnesses. *Roach v. Dixie Gas Co.*, 371 S.W.3d 127, 151 (Tenn. Ct. App. 2011).

To further illustrate the depth of Ms. Holmes' credibility problems, we cannot forget that her testimony about being forced by Nurse Sarah Beth Pryor to work sick and without a mask on March 21 was directly contradicted by Ms. Pryor, a former employee. Ms. Pryor told the jury that she would have never allowed Ms. Holmes to work sick and maskless on March 21, 2020 or any other day during the pandemic because, amongst other reasons, Ms. Pryor's own mother was a resident on the very unit on which Ms. Holmes was working that day. The Court should also recall staff member Freda Keen, who was Ms. Holmes' screener on March 21, testifying that she had specific recall of Ms. Holmes insisting on working that day despite positive answers on her screening sheet. Ms. Keen explained that this event stood out to her because she had never before encountered an employee who claimed to be ill but nevertheless insisted on working. That is why Ms. Keen remembered Ms. Pryor being called from the floor to interview Ms. Holmes that day.

The only testimony that implicated Amanda Gilbert came from Plaintiff's other combination fact witness/nurse expert, Kris Brooks, LPN (now RN). The jury also clearly did not find Ms. Brooks credible, and their conclusion was justified. Ms. Brooks: 1) Admitted to being a terminated for violating facility policy and that she had lingering hurt feelings over the termination; 2) Admitted to being recruited to work for the Plaintiff by her old friend Kay Holmes; 3) Testified about personally encountering physical therapist Lourdez Lanas "sick as a dog" at the nurses station on Thursday March 19, 2020 and complaining that she was being forced to work sick. However, timesheets reflected Ms. Lanas didn't even work on Thursday March 19, 2020. Rather, her last day at work was confirmed by timesheets to be Wednesday March 18, 2020 and that she was in the building less than a half hour and left because she was not feeling well. Ms. Lanas testified she did not see a single patient that morning and was never at the nurses station. She also testified that Ms. Summers, a hospice patient, was not even on her patient list. Ms. Lanas testified

she was off work at Gallatin Center from March 18 until mid-April 2020 due to COVID.; 4) Ms. Brooks testified that Amanda Gilbert, as activities director, routinely escorted residents to the communal dining room despite CMS mandating no communal dining or communal activities as of March 13, 2020. The Court may recall Plaintiff's counsel telling the jury during opening statements that they would hear from Ms. Gilbert. That never happened.

It should also be remembered that Ms. Holmes' and Ms. Brooks' testimony that there were no masks to be found at Gallatin Center from March 1 to March 21, 2020 was totally debunked by a parade of current and former Gallatin Center employees, some of whom testified they wore masks during those dates.

In sum, for the jury to conclude that either Mr. Lugo or Ms. Gilbert infected Ms. Summers required them to believe the testimony of Kay Holmes and Kris Brooks. The jury clearly did not believe either of them. It also required the jury to speculate whether exposure equaled infection.

B. Defense experts offered no speculative opinions and Defendant did not seek to have the jury speculate to reach its verdict.

Plaintiff argues that neither of Defendant's experts, Dr. Fridkin nor Dr. Boger, identified the specific person who infected Ms. Summers. For this reason, she asserts, Dr. Blass testified that the defense experts' opinions on inevitability of Ms. Summers' infection were speculative. For the same reason, she argues that Defendant failed to even present a viable alternative to Plaintiff's medical chain of causation and that the defense theory on causation was premised on conjecture.

The burden of proof rested solely with the Plaintiff. Consistent with Tennessee law, the jury was instructed that negligence cannot be presumed simply based on the existence of an injury. Defendant had no affirmative burden to offer viable alternative theories for Ms. Summers' infection. See *Roache v. Dixie Gas Co.*, 371 S.W.3d 127, 148 (Tenn. Ct. App. 2011) ("The [Plaintiffs] at all times had the burden to establish causation between the Defendants' negligence

and their injuries; the Defendants were not required to establish an alternative cause in order to avoid liability.") Citing *Miller v. Choo Choo Partners, L.P.*, 73 S.W.3d 897, 901-02 (Tenn. Ct. App. 2002).

Even absent having a burden to disprove Plaintiff's causation theories, Dr. Fridkin testified to a reasonable degree of medical certainty that the failure of staff to wear masks at Gallatin Center sooner than they did was not the cause Clara Summers death and he explained the basis for his opinion.[3] Dr. Fridkin testified to a reasonable degree of medical certainty that negligent screening was not the cause of Ms. Summers' infection and he explained the basis for his opinion.[4] Dr. Fridkin testified to a reasonable degree of medical certainty that the source of Ms. Summers COVID-19 infection could not be isolated to the 5 individuals identified by Plaintiff, and he explained the basis for his opinion.[5] These opinions were hardly speculative. Plaintiff ultimately agreed with his opinion concerning 3 of the 5 individuals in question. Dr. Fridkin, instead, established that it was plaintiff's experts' causation opinions that were speculative.

Dr. Boger offered the same causation opinions as Dr. Fridkin and also specifically testified that no actions or inactions on the part of Gallatin Center staff caused otherwise avoidable harm to Ms. Summers. He also opined that Gallatin Center complied with the recognized standard of acceptable professional practice. He too rendered all opinions to a reasonable degree of medical certainty. Dr. Boger's opinions were also not speculative.

Plaintiff's entire basis for a new trial boils down to the fact that the defense did not identify the specific person who infected Ms. Summers. Plaintiff had the burden of proving a theory of causation and a causal chain between the defendant's misconduct and the complained of harm,

---

[3] The relevant portion of the trial transcript is attached hereto as Exhibit C.
[4] The relevant portion of the trial transcript is attached hereto as Exhibit D.
[5] The relevant portion of the trial transcript is attached hereto as Exhibit E.

through the testimony of fact witnesses and the opinion testimony of her experts. Plaintiff failed to meet her burden and Plaintiff's evidence was effectively rebutted by Defendant's fact witnesses and its experts' opinions. Again, it was not the Defendant's burden to identify the source of Ms. Summers' infection.

An expert's opinion as to a chain of causation can be considered speculative if it contains too many contingencies and is the "equivalent of a domino theory of causation." *Franklin-Mansuo v. AMISUB (SFH), Inc.*, No. W2016-01623-COA-R3-CV, 2017 Tenn. App. LEXIS 599, at *14 (Ct. App. Sep. 6, 2017). The qualifications, experience and expertise of Defendant's experts were established at trial and will not be repeated here, nor is an exhaustive recounting of the peer reviewed research authored by and/or relied upon by them necessary. It is in the record of the trial. An expert's opinion based on research and expertise, that alternative and more likely causal chains exist than the one presented by Plaintiff, is evidence, not conjecture. An example of conjecture would be testimony that perfect screening and flawless masking would have prevented Ms. Summers' infection. That is why Dr. Blass candidly conceded at trial that importation of the virus into Gallatin Center was inevitable.[6] Dr. Tepper made the same concession.[7] The conclusion that an event would not have occurred absent negligence, because it would have been less likely under perfect circumstances, requires speculation. A plaintiff must show more than the mere possibility to sustain the burden of proof. *White v. Methodist Hosp. S.*, 844 S.W.2d 642 (Tenn. Ct. App. 1992).

It is also notable that Plaintiff admitted in response to Defendant's request for admissions that "Individuals could become infected with the Coronavirus in March 2020 despite taking all available government mandated or recommended precautions." (RFA 99) It was also admitted that "Individuals could become infected with the Coronavirus in March 2020 in the absence of

[6] The relevant portion of the trial transcript is attached hereto as Exhibit F.
[7] The relevant portion of the trial transcript is attached hereto as Exhibit G.

negligence or deviation from the recognized standard of acceptable practice by health care providers." (RFA 100) These binding admissions undermined Plaintiff's causation arguments.

In contrast to Plaintiff's infectious disease expert (Blass) and internal medicine expert (Tepper), Dr. Fridkin testified based on peer-reviewed research, performed by himself and others, of the high number of asymptomatic carriers who could not be identified through symptom-based screening in the absence of rapid testing. He testified that the risk of transmission when the infection source is wearing a mask is still greater than 50%. Plaintiff's pulmonologist, Dr. Salzman, conceded that the journal article he considered authoritative only showed an efficacy rate for masks of 54%. Dr. Fridkin testified that authoritative research data indicates that the combined use of masking and screening had very limited impact on transmission rates in nursing homes prior to the availability of rapid testing and vaccines. All such opinions were rendered to a reasonable degree of medical certainty. Those expert opinions substantially assisted the jury. Dr. Blass's incessant references to condoms, pregnancy, and genital herpes did not.

C. The jury's verdict is consistent with Tennessee law.

Plaintiff argues that a finding of negligence without a finding of causation was contrary to the evidence. It should be abundantly clear to the Court for the myriad reasons set forth above and below that the evidence preponderates in favor of the jury's verdict. The Tennessee Supreme Court acknowledged long ago that "proximate causation is the ultimate issue in negligence cases[,]" and that "proof of negligence without proof of causation is nothing." *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991)).; *King v. Anderson Cty.*, 419 S.W.3d 232, 246 (Tenn. 2013). That is at most what the jury found here.

D. The Weight of the Evidence Preponderates in Favor of the Jury's Verdict

Defendant rebutted Plaintiff's evidence and even while not being legally required to do so, provided a viable alternative to Plaintiff's chain of causation. Defendant's experts relied on scholarly research and the actual facts of the case and testified that it was much more likely that Ms. Summers was infected by one of the numerous asymptomatic staff or residents to whom she was exposed at Gallatin Center rather than a facility housekeeper and the activity director.

On a motion for a new trial, "'for the evidence to preponderate against [the fact-finder's] finding of fact, it must support another finding of fact with greater convincing effect.'" *Buckley v. Elephant Sanctuary in Tenn., Inc.*, 639 S.W.3d 38, 60 (Tenn. Ct. App. 2021) (quoting *Spann v. Am. Exp. Travel Related Servs. Co.*, 224 S.W.3d 698, 707 (Tenn. Ct. App. 2006). The evidence presented by Plaintiff at trial does not support Plaintiff's chain of causation with greater convincing effect.

All Plaintiff's experts conceded at trial that asymptomatic and presymptomatic infected persons can transmit the virus. Even Plaintiff's pulmonology expert, Dr. Salzman, conceded that asymptomatic and presymptomatic carriers were determined to be responsible for at least 50% of all COVID-19 infections. On that point, Dr. Salzman and Dr. Fridkin agreed.

Plaintiff also offered evidence that it was Ms. Summers' habit to sit in the hallway visiting with her friends and stopping people passing by to engage them in lengthy conversations, and that people tended to get close to speak with her because she was hard of hearing. One cannot offer that evidence and nonetheless try to falsely suppress the number of likely sources of Ms. Summers' infection.

The evidence of the high number of COVID-19 cases amongst residents and staff, and of the high number of those who were asymptomatic, combined with the absence of countervailing

evidence from the Plaintiff that any of these individuals were symptomatic when in contact with Ms. Summers, shows that there were far more asymptomatic residents, staff or other persons in the Gallatin Center besides the 5 (later 2) staff members upon whom Plaintiff attempted to build her chain of causation.

E. Conclusion

The jury was attentive throughout the trial, and they obviously took their duties seriously. They rendered a just and fair verdict after a lengthy trial. The evidence strongly preponderates in favor of the jury's verdict. Defendant knows that the Court takes its duty as 13th juror just as seriously as did the jury. The Court had the same opportunity to hear and see the evidence and assess the credibility of the witnesses. The Court should arrive at the same conclusion as did the jury. There is no legal or factual basis for the Court to be dissatisfied with the jury's verdict. The jury got it right.

The jury verdict should be left undisturbed. Accordingly, Plaintiff's motion for new trial should be DENIED.

Respectfully submitted,

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

s/Howard B. Hayden

HOWARD HAYDEN, #10986
LENA MORGAN, #35457
5050 Poplar Avenue, Suite 1430
Memphis, Tennessee 38157
(901) 312-1640/(901) 312-1639 fax
Howard.Hayden@qpwblaw.com
Lena.Morgan@qpwblaw.com

Attorneys for Defendant. Gallatin Center for Rehabilitation and Healing, LLC

SHEELEY, LLP

s/ Andrew Sheeley by H. Hayden w/ perm

Andrew T. Sheeley, NY #4270575 *pro hac vice*
100 Wall Street, 19th Floor
New York, NY 10005
(646) 893-2273
Sheeley@sheeleyllp.com

Co-Counsel for Defendant, Gallatin Center for Rehabilitation and Healing, LLC

CERTIFICATE OF SERVICE

This is to certify that, on the 14 August 2024, a true and correct copy of the foregoing document has been served in the manner of service indicated on the counsel of record listed below:

Dulin Kelly, Esq.
Clint Kelly, Esq.
The Kelly Firm
629 East Main Street
Hendersonville, TN 37075

☐ By U.S. Mail, first-class postage prepaid.

☐ By facsimile.

☐ By the Court's electronic filing system pursuant to Rule 46A.

☐ By e-mail in Adobe PDF format with confirmation sent pursuant to Tenn. R. Civ. P. 5.02(2).

☐ By hand delivery.

☒ By e-mail per agreement of counsel.

☐ By third party express delivery carrier, i.e., Federal Express, for overnight delivery

s/ Howard B. Hayden

HOWARD B. HAYDEN

A I only know the homes that I go to. I don't know what everybody else is doing, except for Gallatin, and I know in the St. Louis area it was a major problem. Was it in 100 percent of the facilities? A whole bunch of nursing facilities, also assisted living facilities. And every place I went, it was there.

Q And you're not suggesting to this jury that there haven't been breakouts of COVID in other nursing homes across the country, correct?

A No, I'm not suggesting that.

Q You're not suggesting there haven't been breakouts of COVID in nursing homes in Tennessee, are you?

A No. There have been breakouts of COVID in nursing homes in Tennessee.

Q Just a couple more questions: You cannot say within a reasonable degree of medical certainty who infected Ms. Summers with COVID 19, correct?

A No, I can't.

ATTORNEY SHEELEY: Thank you.

THE COURT: Thank you, Mr. Sheeley.

Redirect, Mr. Kelly?

REDIRECT EXAMINATION BY ATTORNEY C. KELLY:

Q But you can say it was one of those

149

County is a 78 bed facility. I want you to assume that every single one of those rooms is a private room. What relevance does that have, if any, in trying to compare the number of self-reported positive cases versus Gallatin Center?

A. So nursing home at that size, the number of staff is less. So the daily frequency of infected asymptomatic staff/person coming into the center is fewer than it would be at Gallatin. That's one thing. If that were to occur and there was transmission, an asymptomatic visitor or asymptomatic healthcare worker or any of the providers that come around and come in transmitted the virus to a resident, that infection is likely to -- more likely than not to sort of stay with that resident. Or I should say, the likelihood of infecting other residents or that resident infecting other staff may decrease a little bit because they're roommate. So the way the care is provided with rooms of multiple is slightly different. So the size of the outbreak would probably be smaller. That's what I'm trying to get at.

Q. Of all of the five people that you were questioned about by Mr. Kelly, how many did you -- did you determine were -- well, let's back up.

I want you to assume those five people include an activities director, whose name does not appear

150

anywhere in Ms. Summers' chart. It includes a housekeeper, whose name does not appear anywhere in Ms. Summers' chart. I want you to assume that it includes a physical therapist, whose name does not appear anywhere in Ms. Summers' chart. This is all from March 2020, by the way.

A. Uh-huh.

Q. Okay. I want you to assume that the only two documented people of the five -- the only two people who are documented as having any contact with Ms. Summers are a nurse and a nurse aid.

A. Uh-huh.

Q. Do those facts -- are those facts relevant to your opinions as to the reliability of plaintiff's expert pointing the finger at any of those five people?

A. Yes. And, you know, I base that again on just understanding the duration of interaction with different types of healthcare workers and residents. And I'm very familiar with that because of this study we did at the emerging infection program where we went into nursing homes, 25 different nursing homes around the country to measure how long nurses worked with residents, nursing aids worked with residents, physical therapists work with residents. We watched housekeepers come in, how quickly they were in and out of rooms. So that's

151

quantified. That's published and that's used for modelers -- mathematical modelers to figure out how stuff's transmitted. That's why we did the study.

And so by seeing that nurse and nurse aid in the -- in the healthcare record, I assumed how long they had spent time with her. And that makes a big difference. The duration of time that a susceptible individual is exposed to a, you know, concentration of infectious material really matters in the infection risk. So I think those people would be the ones I would focus on. And I think the activities director or the activities person and the housekeeper are likely to be much more transient interactions, based on my experience.

Q. Okay. And to go -- revisit one other point. Exposure does not equal infection; is that what you told us before?

A. Right.

Q. You would have to speculate whether a person who exposed Ms. Summers to the COVID virus actually infected her?

A. Correct.

Q. We have no way of knowing, do we?

A. Correct.

Q. As far as that box of forms that I've just shown you, you're in no way sitting up there excusing --

152

what you describe as a period lapse of screening protocol, are you?

A. No. It's under -- it's understandable that it's not. You know, it's unfortunate. No, I'm not excusing it at all. Not at all.

Q. Okay. You've heard testimony that Gallatin Center had a policy in place that individuals, employees who did not receive the flu vaccine had to wear a mask even before March of 2020; are you aware of that?

A. I am aware of that.

Q. And in case Mr. Kelly -- and I hear rumbling back there, if I asked it incorrectly, I want you to assume that that was the case. As you sit here, Doctor --

A. For which individuals? Who are you clarifying was wearing a mask?

Q. No. I'm assuming you to assume that individuals who did not have the flu vaccine --

A. Yeah.

Q. -- were required to wear a mask at the nursing home as of March of 2020.

A. Okay.

Q. Okay. As you sit here today, do you have no idea if Diego Lugo was vaccinated for the flu, do you?

A. I do not.

Q. You have no idea if Melissa Gilbert -- if

33

drops down to a 90 percent reduction. So that would have been -- if you can keep a mask on a resident, that would have been a substantial reduction of risk.

Q. Are you aware if nursing home residents can be forced to wear masks in the nursing home?

A. They can't, no. Can't be forced. I mean, I've talked with residents, I've encouraged them -- some of them like to. I mean, I gave in-services on SARS COV-2 where the residency counsel, where the residents have some control over what's going on in the facility. You know, the representative residents contribute to this and the director of nursing participates in them and tries to educate what's coming down the pipe, this is what the virus is. And some of them really wanted to be proactive and many -- probably a third, if not, just in no condition to be able to keep the mask on. We wanted to be able communicate with them and, you know, feeding. It's just not really something most residents can reliably do.

Q. What about a resident like Clara Summers who had terminal end-stage COPD?

A. Well, that would be a problem. Anybody that's got underlying lung disease, it's very difficult to just put a mask on and expect them to keep it on. In fact, this concept of universal masking doesn't come without risks. It's easy to say, everyone should wear a

34

mask, but if you're telling every healthcare worker to wear a mask, some of them have underlying lung conditions. You know, they may have asthma, they may have COPD. And you cannot keep a tight-fitting mask on your face for a whole shift. And that's what was really being asked.

And for residents, it's the same thing -- you know, the way that we advised our residents at Bud Terrace was, if you're leaving your room, please try to put a mask on. You know, some of the residents are perfectly able to do that. But if you have underlying lung conditions, it's gets very uncomfortable very fast.

And I can speak to that from reviewing her medical record and seeing how many treatments she needed for coughing and she seemed to refuse them periodically. Seems that she had a recurrent need for medication for her COPD and reactive airways. I saw that in the chart in the weeks leading up to the infection.

Q. Doctor, I want you to assume, please, that there's been testimony that the failure of stuff to wear masks at Gallatin Center sooner than they did caused Clara Summers' death; do you agree or disagree with that opinion?

A. I disagree with that being a causal argument.

Q. Why?

A. Well, as I try to literate, I think mask use

35

by healthcare workers that are asymptomatic or presymptomatic, doesn't eliminate the risk of transmission to a patient. There's other things that go into the risk as well. There's just not the presence of it, it's the duration of contact as well as the concentration. The third is the viability of the bug itself and how long it survives outside the body. So the concentration may have been reduced, and I think they stopped the procedure masks that I saw that were in use, that that's probably about 40 percent.

Q. Okay. You talked about the potential issues regarding the wearing of masks by staff workers with asthma or respiratory conditions. You just told us about that, correct?

A. Yes.

Q. What about -- what about the risk, if any, of development of other infections as a result of using a mask?

A. So the use of masks has been mostly promoted and studied and healthcare as it relates to healthcare workers. Part of our mission as healthcare epidemiologists is to promote healthcare worker safety and promote patient safety. We don't ignore the healthcare workers. We focus on the patients a lot, but we also focus on healthcare worker safety. So there's risks to

36

being a healthcare workers. You are at risk for contracting infections from the patients you're caring about. So a lot of effort at CDC, as well as other federal, agencies is to protect healthcare workers.

So there's been a lot of work around what needs to be done for healthcare workers to be able to safely wear mask. So historically prior to the pandemic, there's particular types of infections that patients may have that required health workers to wear a protective mask, a face mask. Usually these are N-95's. And in order for a hospital to -- or a healthcare institution to have healthcare workers wear N-95's, they're supposed to go through a FIT testing program, which means everybody gets instruction on how to put the band on, make sure it's the right size for their face. They're not supposed to have facial hairs. So you would probably need a shave around or get a special fitting on that goes around the ears. You too. You too. And so that's -- that is an effort that why -- hospitals have a respiratory FIT testing program to be able to fit all their health workers with these type masks.

During the outbreak sort of settling, like with SARS COV-1, people were over masking because there was a little fear going on. A lot of mask use going on. And we couldn't figure out why some healthcare workers

45

infected, that we would care for and manage with the proper PPE and the proper gear.

So when we had availability to test either daily or weekly or either twice a week, we were able to identify and keep on top of new infections that were occurring, keep the outbreak small. So maybe a visitor or a Hospice worker or infected healthcare worker came in and did transmit the virus, despite a mask, to a resident, that we were testing twice a month -- I'm sorry, twice a week or daily, which is what nursing homes were doing later in 2020, we wanted to identify a resident and be able to isolate them and move them away and be able to contain the outbreak. So serial testing became a really good tool that in addition to masking, in addition -- we still did screening, was the most effective tool that we got as we progressed in the pandemic.

The way I'll illustrate it is, I'm very proud because we worked really hard in the state of Georgia and the health department and a doctoral student to publish a paper to all the nursing homes in Georgia. And, you know, this data all the information was publically available on the nursing home COVID infection data. And she looked at the -- or we looked at the size and duration of the outbreaks from the start. And they're big. And if you had like a graph about the size and duration of the

46

outbreak being high and if they're small, you go down on this graph over time. The size and duration of the outbreak is fairly large and it says fairly level over time. And we get to the point of universal masking and it doesn't really budge. And then we get to the point where there's serial available to rapid test and it really comes down. And this is a graph with a reproductive member, but just the size and duration of the outbreak.

Until we get to vaccination, it doesn't drop down to where public health people really wanted, like -- which was almost to zero. Like that was a game changer. But it was, you know, barely changing with universal masking and then we had the available of rapid testing and that's when it started to come down and then it really came down after vaccination.

So I think that's evidence that the tools we had in March, the active screening, which was a flawed strategy. Even if perfectly implemented, and we have evidence of that with the VA in Seattle and other nursing homes, including our nursing home, universal masking I think decreases the size and duration of the outbreaks, but it doesn't eliminate them. Serial testing I think really helped.

Q. Does it reduce the size and duration of the outbreak by less than half?

47

A. Serial testing definitely reduces the size of a outbreak. And it's not just serial testing. It's ramping up the testing, depending on how much COVID activity is in your community. So as COVID activity comes up in your community as it comes up, the nursing homes are now instructed to start testing once a week, once a day, every day, depending on how high it is. So they go parallel what's going on and the testing practice.

Q. Right. And I was not referring to the availability of rapid testing as far as my percentages. Talking about before rapid testing was available to nursing homes, did the wearing of masks and symptom-based screening reduce the risk of introducing the virus into the nurse home by less than half?

A. No. No. I think I -- I base my opinion on several of the data. And I'm sorry I talk for so long, but I really -- this is what I've been doing. I reviewed the literature to try to really quantify this for you. I mean, I know as an infection preventionist, an expert in infection prevention and working in nursing homes as much as I've done, that universal masking did not have a big impact, but that's not enough. I feel like I needed to come here and try to quantify it. That's what epidemiologists do, we try to quantify risk. And I felt like using words like substantially and remarkably, that's

48

what we put into the news, but I felt like you all needed an honest estimate with some precision. And that's why I looked at it from both sort of that population level as well as that experimental level to saying the source, the healthcare worker, is wearing a procedure mask and what's the reduction risk, and I think it's about 40 percent.

Q. Okay. I want you to assume, Doctor, there's been testimony from plaintiff's experts that the -- the negligent screening -- symptom-based screening of staff at Gallatin Center was the cause of Ms. Summers' death; do you agree or disagree with that?

A. I disagree with that being the cause.

Q. Is that for the reasonings we already explained? I don't want to beat a dead horse --

A. Yes. I think I saw -- or I read the testimony of inadequately performed screening or incomplete screening. And as I said, I think even if the screening was done perfectly, that virus would have been imported into the nursing home and transmission would have occurred.

Q. Was it inevitable?

A. I do think it was inevitable at that time early in the pandemic. Almost no nursing home were spared. Almost any nursing home that were in counties that had substantial rises in incidents of COVID during

49

that March to April time frame, of which Sumner County was one of them, it was going to be imported. You know, there's probably 300-plus staff that work at that nursing home and just the statistics alone, based on what the -- and I looked it up, what the COVID incidents rate was in Sumner County during that month leading up to Ms. Summers' infection. And it was slightly higher than in the county I worked in, about by a week or so. Any county that -- any time the population in the community has a lot of infection, health workers are at risk from getting infection from home, from the community. That's what we figured out. Most of the healthcare workers infections at the nursing workers were getting were from their experience outside of the hospital and outside of the healthcare setting.

Q. Did -- Dr. Fridkin, did the facility's acceptance of new admissions to the facility of patients who had been discharged from hospitals in March 2020 cause Ms. Summers' death?

A. My -- I'm going to answer no. I reviewed the documents that outline what some infection control practices were at this nursing home, at Gallatin Center. And their new admissions during that time period could be sort of quantized and watched to make sure they don't mix with the rest of the residents. There's a safe to way to

50

handle new admissions in nursing homes. But the ability to stop admissions into a nursing home is very difficult because it stops the flow of caring for patients in the referring hospital. And they run out of beds and so it's a cascading event. There's a relationship between postacute care and acute care that there's safe way to manage patients coming into the long-term care setting. Even if you're not sure they're infected before we had the test, you can manage them by putting them in a temporary type of isolation or handle them a particular way.

And so, no, I don't think continuing to take admissions during March caused Ms. Summers' death. And again, I think it's much more likely, more reasonable than not that an asymptomatic individual brought the virus into the nursing home. And I don't know if that was a healthcare worker, if that was a visitor, if that was other providers that come in that, you know, podiatrist or behavioral health individuals, you know, but it happened and there was a spread or outbreak there and there was probably -- that occurred, despite the screening process. And would have occurred despite a perfect screening process.

Q. All right. The -- I want you to assume that the plaintiff's have isolated five individuals at Gallatin Center, who were the most likely source of Ms. Summers'

51

COVID infection. Okay? I want you to further assume one of them was a housekeeper whose name never appears in Ms. Summers' chart. I want you to assume there's a nurse who is -- there's been testimony, was witnessed administering medication to Ms. Summers on March 21st -- March 21, 2020, while not wearing a mask.

MR. C. KELLY: Your Honor, may I approach for a minute?

THE COURT: You may.

(The following is a bench conference:)

MR. C. KELLY: There is no testimony that Nurse Willen was observed on March 21st providing care to Ruth Summers. That's an error and it's been repeated twice in this case.

MR. HAYDEN: Maybe I'm -- enlighten me --

MR. C. KELLY: Nurse Holmes never testified that she saw Ms. Willen or Nurse Willen providing care on the 21st.

MR. HAYDEN: Tell me what I'm doing wrong and I'll straighten it out.

MR. C. KELLY: You're asking him to assume --

MR. HAYDEN: I'll straighten it out.

MR. C. KELLY: Sure. I think it's fair

52

to say, assume that providers were providing care, by tying it to the 21st is wrong. It didn't happen that day.

MR. HAYDEN: Okay. I got it.

THE COURT: All right. You're good.

(End of bench conference.)

BY MR. HAYDEN:

Q. I'm going to shorthand and change my question a little bit. I want you to assume that there's been testimony that a housekeeper -- a certain housekeeper was the source of Ms. Summers' COVID infection. Okay? I want you to assume there's been testimony that there were caregivers who were documented in the chart as having provided care to Ms. Summers in March 2020 who subsequently tested positive for COVID in late March of 2020. I want you to assume that another individual, who was singled out as being a likely source of Ms. Summers' COVID infection in March of 2020, was the activities director. I want you to assume that -- well, we've already talked medication. We've got two nurses, two medication aids. I want you to assume that -- just assume the medication aids administered medications to Ms. Summers without wearing a mask in March of 2020. I also want you to assume that a last individual who has been singled out is a physical therapist who tested positive for COVID-19 on March 21 and her testimony was her last

49

that March to April time frame, of which Sumner County was one of them, it was going to be impacted. You know, there's probably 300-plus staff that work at that nursing home and just the statistics alone, based on what the -- and I looked it up, what the COVID incidents rate was in Sumner County during that month leading up to Ms. Summers' infection. And it was slightly higher than in the county I worked in, about by a week or so. Any county that -- any time the population in the community has a lot of infection, health workers are at risk from getting infection from home, from the community. That's what we figured out. Most of the healthcare workers infections at the nursing workers were getting more from their experience outside of the hospital and outside of the healthcare setting.

Q. And -- Dr. Fridkin, did the facility's acceptance of new admissions to the facility of patients who had been discharged from hospitals in March 2020 cause Ms. Summers' death?

A. My -- I'm going to answer no. I reviewed the documents that outline what some infection control practices were at this nursing home, at Gallatin Center. And their new admissions during that time period could be sort of quantized and watched to make sure they don't mix with the rest of the residents. There's a safe to way to handle new admissions in nursing homes. But the ability to stop admissions into a nursing home is very difficult because it stops the flow of caring for patients in the referring hospital. And they run out of beds and so it's a cascading event. There's a relationship between postacute care and acute care that there's safe way to manage patients coming into the long-term care setting. Even if you're not sure they're infected before we had the test, you can manage them by putting them in a temporary type of isolation or handle them a particular way.

And so, no, I don't think continuing to take admissions during March caused Ms. Summers' death. And again, I think it's much more likely, more reasonable than not that an asymptomatic individual brought the virus into the nursing home. And I don't know if that was a healthcare worker, if that was a visitor, if that was other providers that come in that, you know, podiatrist or behavioral health individuals, you know, but it happened and there was a spread or outbreak there and there was probably -- that occurred, despite the screening process. And would have occurred despite a perfect screening process.

Q. All right. The -- I want you to assume that the plaintiff's have isolated five individuals at Gallatin Center, who were the most likely source of Ms. Summers' COVID infection. Okay? I want you to further assume one of them was a housekeeper whose name never appears in Ms. Summers' chart. I want you to assume there's a nurse who is -- there's been testimony, was witnessed administering medication to Ms. Summers on March 21st -- March 21, 2020, while not wearing a mask.

MR. C. KELLY: Your Honor, may I approach for a minute?

THE COURT: You may.

(The following is a bench conference.)

MR. C. KELLY: There is no testimony that Nurse Witten was observed on March 21st providing care to Ruth Summers. That's an error and it's been repeated twice in this case.

MR. HAYDEN: Maybe I'm -- enlighten me --

MR. C. KELLY: Nurse Holmes never testified that she saw Ms. Witten or Nurse Witten providing care on the 21st.

MR. HAYDEN: Tell me what I'm doing wrong and I'll straighten it out.

MR. C. KELLY: You're asking him to assume --

MR. HAYDEN: I'll straighten it out.

MR. C. KELLY: Sure. I think it's fair to say, assume that providers were providing care, by lying it to the 21st is wrong. It didn't happen that day.

MR. HAYDEN: Okay. I got it.

THE COURT: All right. You're good.

(End of bench conference.)

BY MR. HAYDEN:

Q. I'm going to shorthand and change my question a little bit. I want you to assume that there's been testimony that a housekeeper -- a certain housekeeper was the source of Ms. Summers' COVID infection. Okay? I want you to assume there's been testimony that there were caregivers who were documented in the chart as having provided care to Ms. Summers in March 2020 who subsequently tested positive for COVID in late March of 2020. I want you to assume that another individual, who was singled out as being a likely source of Ms. Summers' COVID infection in March of 2020, was the activities director. I want you to assume that -- well, we've already talked medication. We've got two nurses, two medication aids. I want you to assume that -- just assume the medication aids administered medications to Ms. Summers without wearing a mask in March of 2020. I also want you to assume that a last individual who has been singled out is a physical therapist who tested positive for COVID-19 on March 21 and her testimony was her last

53

day at work was March 18, and her testimony further was that she did not wear -- I'm sorry, that she did wear mask throughout March of 2020 because she had not had the flu vaccine and was required to do that. Do you have an opinion whether the cause of Ms. Summers' COVID infection can be isolated to any of those people?

A. No, you can't.

Q. Why not?

A. We want to. I wanted to also in Bud Terrace. Without knowing -- because so many -- for every -- for every symptomatic individual who got tested, there was an asymptomatic infectious individual who's not being tested. So these individuals, the therapist or this other individual -- and these assumptions are a little hard to keep track of, but --

Q. Thanks.

A. It doesn't matter. I think that -- it's not that it doesn't matter. It matters. But without information on the daily status of both -- of all the caregivers and all the visitors and all the residents that surrounded Ms. Summers, we can't identify the chain of contagion. This virus spread rapidly and from asymptomatic and presymptomatic individuals. We'd like to know what the chain of contagion is. We'd like to know who the first person was the bring it in, but the fact is

54

the first person to bring it is was likely never tested and was asymptomatic. And those test that were done -- I did review the list of tests that was done. I think it was on the 29th, the National Guard testing on the 28th, those results came back, that list of individuals, some of those individuals, there are some individuals that are not on those list that likely were positive and their test came back negative because these tests only stayed positive for five to ten days. In fact, nursing home staff, only about eight percent are still test negative at day ten. And nursing home residents maybe about 20 percent are still test positive on day ten. And we know that from the research that we're currently doing with nursing home public response network because we're going in and testing residents and staff every day after they are exposed to COVID.

Q. So to put that in lay terms, are you saying that individual employees who tested negative in March -- the tail end of March 2020 could have also been sources of Ms. Summers' and everyone else's infections?

A. Yeah. I believe there's likely -- I could calculate the proportion, but there's a significant proportion of individuals that may have test positive then test negative. Again, an outbreak occurred there. And as unfortunate as it is, testing based on symptoms only is

55

inadequate to define the chain on contagion in the SARS COVID outbreak. I think when we'd be able to do that possibly was before there was any importation into the U.S. And we still had every case being traced back to an international traveler and then seeing what happened in their family as it was reported in.

But once we had some established -- once we had cases in the community -- and I can tell you, I have a graph here. You know, March 17th, you know, ten per 100,000. March 19th, 20 to every 100,000. It was increasing in Sumner County, right around that time during that incubation period for Ms. Summers.

MR. HOWARD: Your Honor, I don't have that much more, but I know we've been doing for quite a while, so I wanted to be mindful. So I didn't know if you want me to keep going or if you want to take a break.

THE COURT: Not so much me, but I think probably our jury needs one. So why don't we take a break and start again at 10:45.

MR. HAYDEN: Thank you, Your Honor.

(The jury exits the courtroom.)

(A brief break took place.)

(The jury enters the courtroom.)

THE COURT: Okay. We're going to pick up. Mr. Hayden?

56

MR. HAYDEN: Thank you, Your Honor.

BY MR. C. KELLY:

Q. Couple of housekeeping measures, Dr. Fridkin, that I don't want to forget about. Number one, were you practicing medicine in Georgia for one year before the events we're here to talk about today?

A. Yes.

Q. And have you been continuously licensed in Georgia since that date forward?

A. Yes, sir.

Q. In fact, what date were you licensed to practice medicine in Georgia?

A. 1995 and been continuous since then.

Q. My other housekeeping questions is, have all the opinions you've rendered thus far in response to my questions been rendered to a reasonable degree of medical certainty?

A. Absolutely.

Q. Just a few more. What's surveillance bias?

A. It's a phenomenon when early in an outbreak or whenever public health epidemiologists are looking at event, infectious or noninfectious, you start looking for it and you actively perform tests to identify cases, to identify events or infections. Because you're testing for them, you're finding them. If you are only using data

25 Q True or false, Dr. Blass, it was

1 inevitable that COVID 19 was going to get into the

134

2 Gallatin Center?

3 A I think that COVID 19 found its way into

4 every walk of life throughout our entire existence

5 including Gallatin Center.

6 Q As much as --

7 A The answer is yes.

8 Q Right. The answer is yes. It's

9 inevitable it was going to get in. That's what you

10 told me when I took your deposition?

11 A I'm staying true to it, as well.

Q Okay. If the testimony is that they were wearing masks when they had close contact with Ms. Summers, would your opinion change as it relates to those five individuals, one or all of them, causing the virus to make its way to Ms. Summers, would your opinion change?

A No.

Q So even if they were wearing masks, those are the culprits?

A To the best of my knowledge, yes.

Q That's all I can ask.

Isn't it true, Doctor, that even with perfect symptom-based screening the virus can make its way into a skilled nursing facility?

A Sure.

Q Okay. Isn't it true that with perfect screening and masking, the virus can make its way into a skilled nursing facility?

A Yes.

Q Okay. So essentially, it's inevitable that the virus will make its way into a skilled nursing facility, correct?

A I would think so.

Q You don't know any nursing home in the world that has not had COVID as a problem, correct?