ORIGINAL

IN THE SUPREME COURT OF OHIO

07-2192

DONOVAN COX, Appellant, -vs.- CARDIOVASCULAR CONSULTANTS, INC., *et al.*, Appellees.	))))))))))	On Appeal from the Stark County Court of Appeals, Fifth Appellate District Court of Appeals Case No. 2006 CA 00389, 2007-Ohio-5468

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, DONOVAN COX

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

With this case, the Court is presented the opportunity to clarify Ohio Rule of Civil Procedure 51 in order to accomplish two things: 1) to permit courts to issue jury instructions that would fend off misconceptions about the evidence that the jurors are likely to have; and 2) to clarify that trial courts should not make their decisions *before* trial as to the jury instructions they will issue.

Donovan Cox' case concerns a cardiac catheterization procedure that went horribly wrong. Cox' medical negligence lawsuit hinged on whether the cardiologist supervising the procedure was negligent when he failed to call a halt to the procedure in time to prevent the injury that Cox suffered.

During discovery, Cox learned that the person physically injecting dye during the catheterization procedure was a radiological technician acting under Dr. Malosky's direction and under his control. Furthermore, all of the expert doctors and Dr. Malosky himself opined that regardless of this fact, Dr. Malosky was the person responsible for the procedure and any the acts of the radiological technician. Based on this information, which was contained in the depositions filed with the trial court long before trial, Cox' counsel asked the court to issue the standard Ohio Jury Instruction clarifying that if the jurors believed the technician was negligent, her negligence must be attributed to Dr. Malosky. At the final pretrial conference, the trial court declined to give the requested instruction, and instructed Cox' counsel that the court would not admit any evidence of negligence by the technician.

Nevertheless, it was adduced in trial testimony offered by the defendant that the radiological technician was the person with actual physical control, not Dr. Malosky. Therefore,

it was entirely reasonable for the jurors to determine that the procedure was negligently conducted but affix blame for Cox' injuries on the technician, and not on Malosky. Cox' counsel objected to the court's decision to exclude his requested jury instruction, to no avail.

Civil Rule 51 allows courts to require parties to submit proposed jury instructions well before trial, but it does not specify that a trial court can issue instructions to fend off juror misconceptions and it does not specify how early in the proceedings a trial court can decide what instructions are supported by the evidence. Civ.R. 51 states:

"(A) Instructions; error; record. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record.

"On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury." Civ.R. 51(A).

In this case, the trial court determined what jury instructions it would issue prior to trial, and restricted the plaintiff's evidence accordingly. This decision was affirmed on appeal with

the appellate court determining that since no evidence of negligence by the radiology technician was specifically offered at trial, the instruction was not necessary. This creates an unacceptable situation in which a trial court sculpts the case, regardless of the actual evidence and Plaintiff is left in an impossible situation, a "catch 22" per say, in which the plaintiff is unable to offer evidence at trial and then ruled against at the appellate level because the evidence was not offered.

STATEMENT OF THE CASE AND FACTS

On December 15, 2004, Donovan Cox walked into Canton's Aultman Hospital, complaining of chest pain. The next day, after undergoing an arterial catheterization procedure performed by Dr. Malosky of Cardiovascular Consultants, Cox was left a paraplegic.

The procedure itself involves the injection of dye into the coronary artery. As agreed by all experts and the defendant, the standard of care dictates that if a "dissection bubble" forms during the injection of dye, the injection must be immediately aborted. In this case, the dye was not injected by Dr. Malosky, but by a radiography technician acting under his direction and control. The procedure is viewed in real time on a fluoroscope, and recorded on a "cine." The "cine" record clearly showed that a dissection bubble had formed and through the continuous injection of dye eventually burst causing a complete aortic dissection.

What happened to Cox was this: During the catheterization procedure, at least four inches of the internal layers of Cox's aorta, including his entire aortic arch – the main blood vessel through which all of the oxygen-laden blood leaves the heart for every other part of the body – dissected or peeled apart, requiring immediate surgical repair. It was undisputed at trial that Cox's paralysis was a consequence of the emergency surgery to repair his aorta, and that but for the aortic dissection, Cox would not have required the surgery.

Instead, the central question was whether Dr. Malosky breached the standard of care by failing to halt the procedure in time to prevent the catastrophic level of Cox's aortic dissection. At his medical negligence trial that began November 27, 2006, in Stark County Common Pleas Court, Cox presented the expert testimony of Dr. Marc Cohen, who opined that Dr. Malosky breached the standard of care. Specifically, he testified that the injection of dye was not stopped

immediately upon the formation of the dissection "bubble" as required under the standard of care proximately causing Mr. Cox injuries. In turn, Dr. Malosky and Defendant's experts agreed that the injection must be stopped immediately. However, the doctor and his experts disagreed with each other and Plaintiff's expert as to whether the injection was stopped in a timely fashion, if at all. In fact defense expert, Dr. George, testified he did not believe the injection was stopped in a timely fashion. After nearly four days of testimony, the jury returned a verdict for the defendants.

Prior to trial, the parties each submitted proposed jury instructions to the court, which issued its own proposed instructions during the days leading up to jury selection. Among the instructions Cox requested was a charge that a doctor is responsible for the negligent acts of his or her agents, stemming from undisputed deposition testimony that Lori Wyler, an agent of Dr. Malosky, was the person who actually physically injected the dye during Cox's catheterization, under Malosky's direction and control. The requested instruction, Plaintiff's Request No. 12, read as follows:

> EMPLOYEES AND AGENTS NEGLIGENCE
>
> A physician is responsible for the acts of a radiography technician when he/she is employed by the physician, or when the physician has the right to control and direct that person's actions. If you find by the greater weight of the evidence that such radiography technician was under the control and direction of the physician and that such person was negligent, you shall find that the physician was negligent.
>
> 2. Although an employee, such as a radiography technician, may be on a hospitals payroll, the hospital may surrender its right to control and direct the performance of the technician for the time being, giving such control and direction to the physician. The right to direct and control must be knowingly passed to the physician. If you find by the greater weight of the evidence that the physician had the right to control the employee's performance and the right to direct the manner of the performance, then the act of the employee is the act of the physician. If you further find by the greater weight of the evidence that the

> employee was negligent in the scope of the task assigned by the physician, then you shall find that the physician was negligent.
>
> Source: 1 Ohio Jury Instructions § 331.09

On November 22, 2006, five days before the trial began, the court declined to issue Cox's requested instruction, to which Cox's counsel objected twice during the course of the proceedings. This was despite the fact that testimony concerning control was also adduced during the trial. Furthermore, based on its decision not to issue Cox's requested instruction, the court barred Cox from presenting evidence that Wyler might have been negligent.

The jury issued a verdict for Malosky. Cox appealed, squarely addressing the trial court's decision not to issue his instruction, and also addressing in his brief the trial court's timing of its decision on jury instructions.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law 1:
A requested jury instruction should be given if it is a correct statement of the law applicable to the facts of the case, and if reasonable minds might reach an erroneous conclusion in the absence of the instruction.

In this case, Cox was materially prejudiced when the trial court refused to issue his requested instruction on Wyler's agency. Once they were told that Wyler was the person with her finger on the dye injection trigger, it was highly probable that the jurors decided that Cox was suing the wrong person – that Wyler, not Malosky, was legally responsible for Cox's injuries. Given the fact that Wyler was acting entirely under Malosky's direction and control, this conclusion is not supportable under Ohio law, as the jury instruction Cox requested would have illustrated for the jurors.

This Court has not spoken directly to how a court should instruct a jury to avoid such a situation; most cases concerning jury instructions look at whether they are correct statements of the law, whether they are applicable to the facts of the case, and whether reasonable minds might reach the conclusion sought by the specific instructions. See, e.g., *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828; *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 55-57, 57 Ohio Op.2d 213, 275 N.E.2d 340 (affirmative defense not supported by evidence adduced; therefore, instruction on it would be misleading and erroneous); *Fehrenbach v. O'Malley*, 164 Ohio App.3d 80, 2005-Ohio-5554, ¶ 41, 841 N.E.2d 350. This case asks the Court to clarify how a trial court may issue an instruction when reasonable minds might reach a conclusion that is legally erroneous *without* the specific instruction.

Jurors are not required to know the law when they enter the courtroom; instead, "Instructions are as essential to an intelligent and orderly trial as they are to a fair and impartial

verdict. Therefore, an instruction is generally defined as information transmitted by the court to the jury." 1 O.J.I. § 1.20. "A court in considering the propriety of any jury instruction must always bear in mind that the purpose of the jury instruction is to clarify the issues and the jury's position in the case. It must be remembered that juries are composed of ordinary men on the street, not trained grammarians, and that fine distinctions in the meaning of words or phrases are not ordinarily recognized by the average layman." *Bahm v. Pittsburgh & L.E. R. Co.* (1966), 6 Ohio St.2d 192, 194, 35 Ohio Op.2d 307, 217 N.E.2d 217. This is especially true when jurors must consider unfamiliar legal concepts.

As a general rule, the standard of review appellate courts apply to questions concerning jury instructions is "whether the judge's refusal to instruct [on the requested issue] was an abuse of discretion under the facts and circumstances of the case." *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 Ohio Op.3d 169, 404 N.E.2d 144 and citing *State v. Weaver* (1988), 38 Ohio St.3d 160, 527 N.E.2d 805. To constitute an abuse of discretion, the trial court's decision must appear to be unreasonable, arbitrary or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.2d 217, 219.

To do that, a court considers the jury charges as a whole, and determines whether the charges the trial court gave misled the jury in a manner materially affecting the party's substantial rights, keeping in mind that a jury instruction is proper "if it correctly states the law and if it applies in light of the evidence adduced in the case." *Murphy*, 61 Ohio St.3d at 591; see also *Kokitka v. Ford Motor Co.* (1995), 73 Ohio St.3d 889; *Viox v. Weinberg*, 169 Ohio App.3d 79, 2006-Ohio-5075, ¶ 17, 861N.E.2d 909.

This case did not involve competing versions of proposed jury instructions on the same issue. Instead, the trial court excluded an instruction on a legal issue altogether, one that was nearly verbatim from Ohio Jury Instructions. Without this instruction, and in the face of testimony that Malosky's assistant was immediately involved in Cox's procedure, the jury was likely confused and did not understand that Malosky was responsible for the negligence of his radiography technician. It is entirely probable that the jury found that the radiology technician was negligent because she did not abort the injection when instructed, and, without the proper instruction, failed to attribute that negligence to Dr. Malosky. The trial court's failure to give that instruction was an abuse of discretion, meriting reversal and a new trial.

When an appeals court reviews a case to determine whether the evidence supported a particular jury instruction, the reviewing court must determine whether the trial record contains evidence from which reasonable minds could reach the conclusion that is sought by the instruction. *Murphy*, 61 Ohio St.3d 591; *Viox*, supra at id. This cannot be done in a piecemeal fashion; the requested instruction must be reviewed within the context of the entire charge. See, e.g., *State v. Hardy* (1971), 28 Ohio St.2d 89, 276 N.E.2d 247, and *State v. Price* (1979), 60 Ohio St.2d 136, 389 N.E.2d 772.

In this case, the trial court's exclusion of an entire legal issue from its jury instructions, when there was law and evidence to support it and the legal issue was critical to the jury's comprehension of this case, meriting reversal and a new trial.

Proposition of Law 2:
A trial court abuses its discretion when it decides which instructions it will give to the jury before any testimony is taken or any evidence is admitted.

Civil Rule 51 does not specify when a trial court shall decide which instructions it will issue to the jury, but *Murphy* and following cases imply that it should be at some point after the court has had the opportunity to hear the evidence. After all, an instruction is proper if it "correctly states the law and *** applies in light of the evidence *adduced* in the case." *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828; *Viox v. Weinberg*, 169 Ohio App.3d 79, 2006-Ohio-5075, ¶ 17, 861 N.E.2d 909; *Fehrenbach v. O'Malley*, 164 Ohio App.3d 80, 2005-Ohio-5554, ¶ 41, 841 N.E.2d 350. "Adduce" is a verb defined as "To present, bring forward, offer, introduce. Used particularly with reference to evidence." *Black's Law Dictionary* 38 (6th ed. 1990).

In this case, the trial court determined the jury instructions after evidence had been adduced for pretrial discovery and motion purposes, but *before* any evidence had been adduced at trial. Issuing jury instructions at that point – and limiting the evidence that the court would hear to fit these instructions – should be an abuse of discretion.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellant requests that this court accept jurisdiction so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served via regular U.S. Mail on this 21st day of November, 2007, upon the following:

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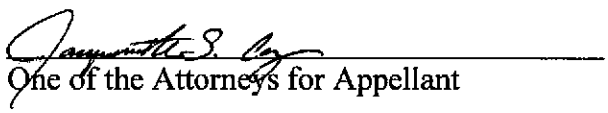

One of the Attorneys for Appellant

APPENDIX

NANCY S. REINBOLD
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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DONOVAN COX

Plaintiff-Appellant

-vs-

CARDIOVASCULAR CONSULTANTS, INC., et al.

Defendants-Appellees

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 2006 CA 00389

OPINION

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 2005 CV 04294

JUDGMENT: Affirmed

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DATE OF JUDGMENT ENTRY:

A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By ..... Deputy
Date 10-9-07

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Wise, J.

{¶1} Appellant Donovan Cox appeals December 1, 2006, judgment of the Court of Common Pleas of Stark County, Ohio, entered on a jury verdict in favor of Appellees Cardiovascular Consultants, Inc. and Steven A. Malosky, M.D.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts in this case are as follows:

{¶3} On December 15, 2004, Appellant Donovan Cox was brought to the Aultman Hospital emergency department via ambulance complaining of severe chest pain and shortness of breath. (T. Vol. III, at 694-698). Appellant had a history of heart disease and had previously had stents placed in several coronary arteries. Id. Appellant was seen in the emergency department by his treating cardiologist, Dr. Paloski. Id. Dr. Paloski was feeling ill that day and was preparing to go home. Therefore, he asked his partner, Dr. Steven Malosky, to take over Appellant's care. Dr. Malosky agreed. Id.

{¶4} After speaking with Appellant and reviewing the results of an EKG that was performed, Dr. Malosky concluded that Appellant was having a heart attack. Id. Specifically, Dr. Malosky believed Appellant's right coronary artery was completely blocked at the site of a previously placed stent. Id. Consequently, he recommended that Appellant undergo an angiogram and angioplasty to visualize the heart and, if necessary, remove the blockage. (T. Vol. III at 704). An angiogram and angioplasty are performed under fluoroscope (x-ray). (T. Vol. III at 707). The physician utilizes the fluoroscope and injected contrast dye to visualize the heart and its surrounding arteries. (Id.). Appellant consented and was immediately taken to the cardiac catheterization laboratory. (T. Vol. III at 703-704).

{¶5} In the cardiac catheterization lab, Dr. Malosky performed an angiogram and confirmed that Appellant's right coronary artery had indeed become 100% occluded at the site of the previously placed stent. (T. Vol. III at 709-710). Therefore, Dr. Malosky attempted to pass a guidewire through the occlusion in order to inflate a small balloon to clear the blockage. (T. Vol. III at 719-724). Despite multiple attempts over a ten to fifteen minute time frame, Dr. Malosky was unable to pass the wire through the hardened blockage and elected to switch wires in order to try to traverse the blockage. (T. Vol. III at 734). At that time, Dr. Malosky noticed that Appellant's right coronary artery had dissected. (T. Vol. III at 744). He then instructed the radiology technician who was assisting him in the procedure, Lori Wyler, to stop injecting the contrast dye that was being used in the procedure. Id. One to one and one-half seconds passed between the time Dr. Malosky noticed the dissection and the time the dye stopped. (T. Vol. III at 744, 750). The dissection propagated from the right coronary artery into the ascending aorta. (T. Vol. III at 751).

{¶6} Dr. Malosky immediately contacted a cardiothoracic surgeon, Dr. Novoa, who took Appellant to the operating room to repair the aortic dissection. (T. Vol. III at 758-760). Dr. Novoa successfully repaired the aortic dissection and bypassed the blockage in the right coronary artery. In order to do so, Dr. Novoa briefly clamped the aorta. The clamping of the aorta resulted in nerve damage. Following the surgery, Appellant was partially paralyzed below the waist and incontinent. (T. Vol. III at 528-529).

{¶7} Appellant continued to treat with Dr. Malosky after he was discharged from the hospital. (T. Vol. III at 587-88). Dr. Malosky assisted Appellant in obtaining home health care and consultations with specialists. Id.

{¶8} On December 13, 2005, Appellant filed this medical malpractice action alleging that Steven A. Malosky, M.D. and Cardiovascular Consultants, Inc. negligently caused Appellant's aorta to dissect and rupture during a cardiac catheterization procedure performed at Aultman Hospital on December 15, 2004. The Complaint further alleged that Dr. Malosky's negligence proximately caused Appellant to experience pain and suffering, including partial paralysis and incontinence. Id. Dr. Malosky and his professional corporation ("Appellees") timely filed an Answer denying Appellant's allegations. (February 15, 2006 Answer).

{¶9} Neither Lori Wyler nor Aultman Hospital were named as defendants in said Complaint.

{¶10} Prior to trial, the parties each submitted proposed jury instructions to the trial court, which issued its own proposed instructions during the days leading up to jury selection. Among the instructions Appellant Cox requested was a charge that a doctor is responsible for the negligent acts of his or her agents.

{¶11} The trial court held a lengthy oral hearing regarding Appellant's Proposed Jury Instructions and other pretrial motions on November 21, 2006. After considering the respective arguments of counsel, the trial court chose not to instruct the jury in that regard. (November 22, 2006 Judgment Entry).

{¶12} On November 27, 2006, a jury trial commenced in this matter. At trial, Appellant presented the testimony of family and friends, Dr. Cohen, and an economist.

(T. Vol. I at 3). Appellees presented the testimony of Dr. Malosky and two expert witnesses, Dr. Barry George and Dr. Donald Wayne. Id. Appellant did not call Ms. Wyler as a witness, nor did he present her deposition testimony to the jury. Likewise, Appellant did not present any evidence or expert testimony that Ms. Wyler had deviated from the standard of care. After four days of trial and approximately three hours of deliberation, the jury returned a 7-1 verdict in favor of Appellees. (December 1, 2006 General Verdict in Favor of Defendants; Judgment Entry on Verdict).

{¶13} Appellant now assigns the following errors for review:

ASSIGNMENTS OF ERROR

{¶14} "I. THE TRIAL COURT ABUSED ITS DISCRETION, MERITING A NEW TRIAL, WHEN CONTRARY TO CONTROLLING LAW AND THE EVIDENCE, IT DECLINED TO INSTRUCT THE JURY IN COX'S MEDICAL NEGLIGENCE CASE THAT A PHYSICIAN IS RESPONSIBLE FOR THE ACTS OF A RADIOGRAPHY TECHNICIAN WHEN THE PHYSICIAN HAS THE RIGHT TO CONTROL AND DIRECT THAT PERSON'S ACTIONS, TO COX'S MATERIAL PREJUDICE.

{¶15} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE DEFENDANT AND DEFENDANT'S EXPERT WITNESSES TO GIVE LENGTHY UNRESPONSIVE TESTIMONY IN NARRATIVE FORM, OVER COX'S OBJECTIONS, AND TO COX'S MATERIAL PREJUDICE."

I.

{¶16} In his first assignment of error, Appellant argues that the trial court erred in not giving a jury instruction stating that a doctor is responsible for the negligent acts of his or her agents. We disagree.

{¶17} Generally, a party is entitled to the inclusion of requested jury instructions in the court's charge to the jury " 'if they are a correct statement of the law applicable to the facts in the case * * *.' " *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, quoting *Markus & Palmer, Trial Handbook for Ohio Lawyers* (3 Ed.1991) 860, Section 36.2. In reviewing a record to decide the presence of sufficient evidence to warrant the giving of a requested instruction, an appellate court should determine whether there is evidence from which reasonable minds might reach the conclusion sought by the instruction. The decision to include a particular jury instruction is a matter within the sound discretion of the trial court. Thus, we will not reverse the trial court's decision absent an abuse of discretion. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶18} In the case sub judice, Appellant requested the following instruction be given to the jury:

{¶19} "EMPLOYEES AND AGENTS NEGLIGENCE

{¶20} "A physician is responsible for the acts of a radiography technician when he/she is employed by the physician, or when the physician has the right to control and direct that person's actions. If you find by the greater weight of the evidence that such radiography technician was under the control and direction of the physician and that such person was negligent, you shall find that the physician was negligent.

{¶21} "2. Although an employee, such as a radiography technician, may be on a hospital's payroll, the hospital may surrender its right to control and direct the

performance of the technician for the time being, giving such control and direction to the physician. The right to direct and control must be knowingly passed to the physician. If you find by the greater weight of the evidence that the physician had the right to control the employee's performance and the right to direct the manner of the performance, then the act of the employee is the act of the physician. If you further find by the greater weight of the evidence that the employee was negligent in the scope of the task assigned by the physician, then you shall find that the physician was negligent." 1 Ohio Jury Instructions § 331.09.

{¶22} Upon review of the record, we find that there was no evidence or expert testimony presented at trial that the radiology technician in this case deviated from the standard of care or was otherwise negligent. She was not named as a defendant in this action; she was not called to testify as a witness; nor was her deposition testimony presented to the jury.

{¶23} Based on the lack of any evidence of negligence on the part of the radiology technician, we find that the trial court did not abuse its discretion in refusing to give the above instruction to the jury.

{¶24} Appellant's first assignment of error is overruled.

II.

{¶25} In his second assignment of error, Appellant argues that the trial court erred in allowing Appellee to testify in narrative form. We disagree.

{¶26} Pursuant to Evid.R. 611(A), a trial court may impose reasonable restrictions upon the interrogation of witnesses where warranted. *State v. Ross* (1999), 135 Ohio App.3d 262, 275, 733 N.E.2d 659. A ruling or order by the court affecting the

conduct of a trial will not be reversed unless the complaining party demonstrates a prejudicial abuse of discretion. *Holm v. Smilowitz* (1992), 83 Ohio App.3d 757, 771-772, 615 N.E.2d 1047. The term "abuse of discretion" connotes more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶27} A review of the transcript reveals that Dr. Malosky's testimony began on page 641 of the transcript and continued to page 730, wherein the trial court recessed the trial for a lunch break. At that time Appellant's counsel first objected to Dr. Malosky's narrative testimony.

{¶28} A party who fails to object at trial waives error on appeal relative to that testimony unless there was plain error. *State v. Ballew* (1996), 76 Ohio St.3d 244, 251, 667 N.E.2d 369. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894.

{¶29} After the recess, Dr. Malosky resumed testimony, as contained in the transcript from pages 733 through 766. During that time, counsel for Appellant raised three separate objections. The first objection, found on page 736, was related to a reference regarding the death of actor John Ritter and was sustained by the trial court. The second objection was overruled and counsel for Appellee volunteered to rephrase the form of his question prior to a ruling on the third objection. These objections, however, were not premised on Dr. Malosky testifying in narrative form. During such

testimony, counsel for Appellee did ask questions of Dr. Malosky and there were very few stretches of narrative testimony.

{¶30} Upon review, we find that Dr. Malosky testified as to his personal memory of the events. His testimony also included an explanation of what a cardiac catheterization procedure was, as well as an explanation of cardiology and the subject anatomy.

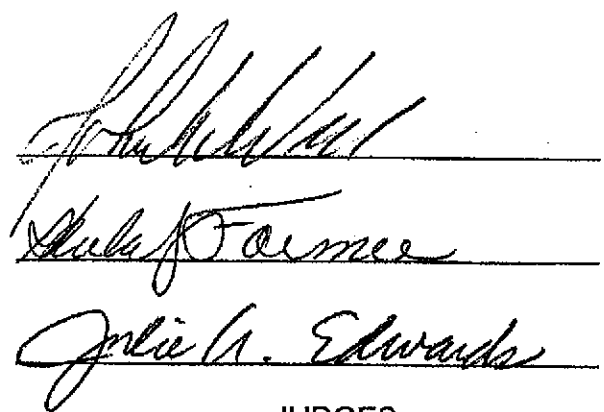
{¶31} While we find that at points in the testimony, Dr. Malosky did continue on at length, Appellant did not object.

{¶32} Upon review, and in light of the entire trial record, we are not persuaded that the trial court's actions in allowing Dr. Malosky's testimony under the circumstances constituted an abuse of discretion or negatively affected the fairness of the trial or that the outcome of the trial would have otherwise been different.

{¶33} Appellant's second assignment of error is overruled.

{¶34} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.
Farmer, P. J. and
Edwards, J., concur.



JUDGES

JWW/d 919

NANCY S. REINBOLD
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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DONOVAN COX	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
CARDIOVASCULAR CONSULTANTS, INC., et al.	:	
Defendants-Appellees	:	Case No. 2006 CA 00389

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellants.

JUDGES