

IN THE SUPREME COURT OF OHIO

AMY PETERS

Plaintiffs-Appellant

-vs-

JOANN LOHR, M.D.,
And
THE CRANLEY GROUP, INC.

Defendants-Appellees

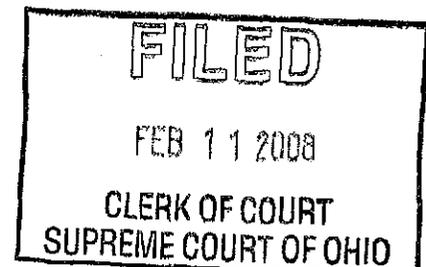
08-0320

On appeal from the Hamilton County
Appeal No. C -0600230
Trial No. Case No. A-0302797

APPELLANT'S MEMORANDUM
IN SUPPORT OF JURISDICTION

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The tort of lack of informed consent is established when:

(a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;

(b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and

c) *the plaintiff* would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.

[Argued together]

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A civil case will be reserved if the cumulative effect of legal errors deprives a litigant of the constitutional right to a fair trial. (*State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1256).

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WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST

I. TRIAL COURT

This case presents several critical issues for this Court's determination. In 1985 this Court issued its decision in *Nickell v. Gonzalez*, (1985), 17 Ohio St.3d 136, 477 N.E.2d 1145, setting forth the elements of "informed consent." In the past 23 years the decision has proven to have a fundamental flaw. This case with this jury's specific findings presents this Court with the precise opportunity to correct and refine *Nickell*.

The root premise is the concept, fundamental in American jurisprudence, that "every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." (*Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92, 93 (1914).

However, the *Nickell* case defeated this basic principle by adding the requirement that a patient must also prove that:

(c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy. [emphasis added]

In this case the jury found that the plaintiff proved all other elements of lack of informed consent (i.e. the physician failed to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy; that the unrevealed risks and dangers which should have been disclosed by the physician actually materialize; and was the proximate cause of the injury to the patient). However, the jury, being instructed to look to a "reasonable person" standard, denied plaintiff her informed consent claim.

In “informed consent” the “reasonable person” aspect should only come into play as to the extent to which the physician must disclose the risks. Whether the risk is a “material risk” which a reasonable person would consider important in making a decision whether to undergo the treatment/procedure As noted in Bedel v. Univ. of Cincinnati Hosp. (1995), 107 Ohio App.3d 420:

“In *Nickell*, the court stated that one of the dilemmas in applying this test is the question of how far a doctor must go in establishing whether a potential danger, no matter how unlikely, is sufficiently material to require disclosure. To make this determination, the reasonable patient standard is used: a risk is material when a reasonable person, in what the physician knows or should know to be the patient's condition, would be likely to attach significance to the risk or risks in deciding whether or not to have the proposed treatment.”

It is completely irrelevant whether some “reasonable person” thinks of YOUR surgery. To require a patient to prove that a “reasonable person” would have decided to forego the procedure/surgery is an irrelevant, insurmountable and unfair burden.

Here even the trial agreed that this requirement defeats the purpose of the claim and the appellate court stated it was “bound, however, as an intermediary court, until the Ohio Supreme Court tells us otherwise, to apply the objective reasonable-person standard set forth in *Nickell*.” Clearly the lower courts see the problem and are looking to this Court to correct this inequity. This short-coming needs to be addressed and fixed to provide Ohio patients with their full rights in accessing proper medical care.

This case also provides this court with a first impression in interpreting and defining O.R.C. §2317.54. The Ohio Legislature in addressing medical consent forms passed O.R.C. §2317.54 which clearly states that “no evidence shall be admissible to

impeach, modify, or limit the authorization for performance of the procedure or procedures set forth in such written consent.” Here although there was a written consent form, the trial court permitted the defendant (over repeated objection) to opine as to what other things were told to the patient other than what was on the written form. The legislature did not say that this statute only applies to one side. If the lower courts permit defendants to admit parol evidence, in violation of the statute, to alter the consent forms it denies all parties a fair trial. This refusal to apply § 2317.54 has been a repeated problem in Hamilton County and is particularly unjust when involving wrongful death claims. When your client is dead and there is only the consent form, to permit the physicians (in contravention of the statute) to come in and expand and extrapolate upon what is written is a field day to tell the jury whatever they want without limitation. (Counsel has raised this very issue repeatedly: e.g. Joiner v. Simon, 2007-Ohio-425; Werden v. Children's Hosp. Med. Ctr., 2006-Ohio-4600).

Another reason this case is of great public importance is to restore trust in our legal system. The public's confidence in our courts is directly proportional to the injustice permitted by the lower courts. Here once again, a retired visiting judge has frustrated an even fair chance at justice. The Ohio Supreme Court has repeatedly heralded the importance of “stare decisis” so that we know what the law is. If the lower courts are permitted at their “discretion” to ignore this Court's holdings, disregarding caselaw and statutes, it undermines our entire legal system. It turns a trial into a mere guessing game where the entire case turns on the whim of any one particular judge on a particular day. That is not the aim of our system of justice.

Here the retired visiting judge committed numerous fundamental errors, including but not limited to:

- in violation of **Evid. Rule 706** refused to permit counsel to cross-exam defense experts on recognized authoritative medical journals in violation of Evid. R. 706;
- completely ignored and refused to apply this court's decision of *Stinson v. England*, (1994), 69 Ohio St.3d 45, 633 N.E.2d 532 and permitted defense experts to testify to "possibilities";
- ignored *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, and *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607 (permitted defense to claim causation was "possibly" due to scar tissue although neither expert had ever seen it clinically and could not produce ANY medical or scientific literature to support their theory); - permitted defense expert to testify that defendant met the standard of care even though the expert does not perform the kind of surgery at issue; could not describe the anatomical location of the surgery; did not know where the incision had been made; was not aware that plaintiff had two (2) EMG's performed post-surgery; did not know what medical records he had received; but was permitted to testify that defendant met the standard of care as to informed consent even though he had read nothing but some medical records and had not even read plaintiff's deposition testimony.
- completely ignored this Court's decisions of *Ede v. Atrium S. OB-GYN, Inc.*, (1994), 71 Ohio St.3d 124, 642 N.E.2d 365) and *Davis v. Immediate Med. Serv.*, (1997), 80 Ohio St.3d 10, 684 N.E.2d 292, and forbade plaintiff's counsel to inquire as to defense expert's "commonality of insurance"; the court summarily stating: "I'm not going to let you have it."
- *sua sponte* forbid plaintiff's attorney from discussing the jury instructions with the jury in closing argument;
- *sua sponte* struck a juror during *voir dire* because she said gave "controversial" answers;
- permitted defense in closing to comment on witnesses that were not called.
- permitted defense expert who testified he could not determine "causation" with probability at deposition to testify at trial as to "probability" after the defense attorney suggested (after the depo) that he "lean" his testimony.
- permitted defense expert to claim that their opinions were supported by the medical literature after they failed at their discovery depositions (or at any time) to produce any such literature (which plaintiff requested *duces tecum*).

While the appeals court, in affirming, shuffled-off ten assignments of error as matters of "discretion", the Ohio Supreme Court has, in the criminal context the

cumulative effect of errors deprives a litigant of the constitutional right to a fair trial. This case presents this Court with the opportunity to give the same protection to civil litigants.

II. APPELLATE ERROR

Most cases do not present the opportunity to impact appellate court procedural or processing issues. However, here there are several very disturbing rulings by this appeals court that should be addressed by this Court in its supervisory role to the lower courts.

This appeals court, **after one year and nine and one-half months at the appeals level**, the appellate court again merely brushes off at least ten (10) assignments of error as just trial court “discretion” and affirms and apparently the record was not read.

One of the appellate issues was the failure of defense witnesses to comply with a *duces tecum* in their discovery depositions. In order to assure that the appeals court had both defense experts’ discovery depositions, appellant moved to file the discovery depositions (Dr. Rea and Dr. Kirkpatrick) with the appellate court to complete the record. Arbitrarily, the appeals court denied appellant’s motion to complete the record and then in its affirming opinion stated: “[But] neither doctor’s deposition had been filed with the trial court, so there is nothing in the record” to avoid ruling on that issue.” However, when one reads the record plaintiff did file Dr. Rea’s deposition with the trial court on January 30, 2006. After almost two years to peruse the record, the litigants deserve a court that actually reads the record.

For an appellate court to clearly not read the record and additionally “arbitrarily” deny a party the opportunity to complete the record is demonstrable of the capriciousness of the court and is contrary to basic philosophy to decide cases on the merits (not

technicalities). This quality of “appellate review” is fundamental to fairness and this Court should use this case as an example that litigants deserve quality at all levels of our judiciary.

II. STATEMENT OF THE CASE

A. PROCEDURAL POSTURE

This is a medical/surgical negligence case which was tried before a visiting judge and resulted in a defense verdict. Appellants moved for New Trial/JNOV which was denied. The appeals court (after pending for almost two years) affirmed.

B. FACTUAL BASIS: This is a medical negligence action involving the erroneous cutting of the spinal accessory nerve during a simple lymph node biopsy with resulting nerve and muscle atrophy of plaintiff’s upper back and shoulder. Her shoulder and back “wing-out” and is visually deformed with one shoulder prominently lower and drooping. Plaintiff has worked at United Parcel Service (UPS) her entire career and must move and try to lift boxes. She now needs assistance from her co-workers to do her daily job given her upper arm/shoulder nerve damage. The nerve cannot be repaired and is permanent.

Amy Peters was a 37 year-old lady whose family doctor noticed a small superficial node in the front part of her neck at the shoulder. He referred her to defendant surgeon, Lohr who determined on her first visit to undertake a “cervical lymph node biopsy.” Defendant Lohr performed the biopsy on April 6, 2001. She erroneously noted in her operative report that during the procedure she identified the “phrenic nerve.” There was no mention of the spinal accessory nerve (which is the correct name of the nerve in that area of the neck/shoulder area). [The phrenic nerve is located in the middle of the neck, no where near the spinal accessory nerve {hereinafter “SAN”}].

Appellant patient produced two experts witnesses and medical literature that showed that injury to the spinal accessory nerve during this simple procedure is “a preventable occurrence’ and is clearly negligence to cause such injury. The injury is permanent and produces a physical deformity in a visually drooping shoulder and inability to use her dominant arm in everyday life and work.

Defendant contended through two experts that she did not injure the nerve but that “scar tissue” is to blame even though neither could produce one medical text or journal that ever found such happening.

ARGUMENT

PROPOSITION OF LAW NO. 1

Every human being of adult years and sound mind has a right to determine what shall be done with his own body.

PROPOSITION OF LAW NO. 2

The tort of lack of informed consent is established when:

- (a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;**
- (b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and**
- c) *the plaintiff* would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.**

The tort of lack of informed consent, based upon battery, is set forth in the sentinel cases: *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92,

93 (1914) and *Canterbury v. Spence.*, 464 F.2d 772 (D.C. Cir. 1972). The *Canterbury* court stated:

"28] The root premise is the concept, fundamental in American jurisprudence, that **"every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ."** (*Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92, 93 (1914). See also *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093, 1104 (1960), clarified, 187 Kan. 186, 354 P.2d 670 (1960); *W. Prosser, Torts* § 18 at 102 (3d ed. 1964); *Restatement of Torts* § 49 (1934). True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. (Citations omitted)

What is key to this tort is the "individual's" right to determine their fate.

In 1985 the Ohio Supreme Court in *Nickell v. Gonzalez*, 17 Ohio St.3d 136, 477 N.E.2d 1145, stated: "The tort of lack of informed consent is established when:

- (a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;
- (b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and
- (c) **a reasonable person** in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy."
[emphasis added]

This case is a perfect example of why *Nickell's* "(c)" is clearly wrong. In this case the jury found that in favor of plaintiff as to section (a) and (b) [that she did not give informed consent and it was the cause of plaintiff's injuries]; but found that "a reasonable person" would have undergone the procedure anyway. This completely deprives a patient/plaintiff from THEIR right to decide what happens to their body.

The proper standard is not whether some fictitious "reasonable person" wants to undergo the procedure; it is whether THIS PATIENT does. Each person has personal fears which must be taken into account. A case from some years ago demonstrates this shortcoming. A family member had suffered a stroke and for years the entire family was weighed down by having to care for this individual. Another family member was to undergo a cardiac catheterization and was not told that it carries a 5% risk of stroke. To an "reasonable person" a 5% might be reasonable to risk. However, to this woman who had seen and lived the suffering of the consequences of a stroke of her husband would not have undergone the procedure given her personal experience. However, under Ohio law, the jury was not permitted to take into consideration HER view of the risks. A five percent risk in a vacuum is meaningless. *Nickell* defeats the very purpose of the cause of action.

Here all four experts (even defense) agreed that the patient should have been told of the risk of damage to the spinal accessory nerve. In *Nickell* the court expressed its concern as to the "reasonable patient." But that was in the context of trying to determine what risks are to be considered "material" and how far a doctor must go in explaining possible material risks.

"One of the great dilemmas in applying this test is the question of how far a doctor must go in establishing whether a potential danger, albeit improbably remote, is sufficiently material to require disclosure. To this end the reasonable patient standard is utilized."

Somehow this concern morphed in *Nickell* into an element of informed consent which completely defeats the tort itself. This inequity needs to be corrected and this case

with the jury's findings herein is the perfect case to return this basic right back to each individual.

PROPOSITION OF LAW NO. 3

When the trial court and the appeals court misapplies the law commits numerous cumulative errors and denies the basic fundamental right to a fair trial the case should be reversed and the parties given a new trial.

PROPOSITION OF LAW NO. 4

Civil litigants deserve the same constitutional protections as do criminal defendants in our legal system.

PROPOSITION OF LAW NO. 5

A civil case will be reserved if the cumulative effect of legal errors deprives a litigant of the constitutional right to a fair trial. (*State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1256).

The Court in *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1256 held:

"In our view, the cumulative effect of these witnesses' hearsay testimony was prejudicial. Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *Id.* at 196-197, 31 OBR at 395, 509 N.E.2d at 1261."

This case provides the opportunity to apply that same "evidentiary analysis" within the civil context and pronounce that civil litigants at least have the same standard. Why should non-criminal, tax-paying citizens be given a lesser standard of fairness?

PROPOSITION OF LAW NO. 6

It is error for a court to limit cross-examination of an adverse witness only to those portions of an authoritative text which that witness will acknowledge.

Cross-examination is a fundamental right. (*Kent v. State* (1884), 42 Ohio St.426. A party has a right to a full and fair cross-examination of a witness in all matters material to the issue (*Burt v. State*, (1872), 23 Ohio St. 394. It is essential to a fair trial. Here the trial court foreclosed plaintiff from utilizing Evid. R. 706 (Learned Treatises for

Impeachment). The rule permits use of such for cross-examination if the material is “established as reliable authority 1) by the testimony or admission of THE witness; 2) by OTHER EXPERT testimony or 3) by judicial notice.”

Plaintiff’s counsel, knowing that defense would not recognize the materials as “authoritative,” asked plaintiff’s experts to qualify medical literature as “authoritative.” Dr. Snow (one of plaintiff’s expert surgeon witnesses) was specifically asked about the *Journal of Plastic and Reconstructive Surgery* and he testified that it was reliable and authoritative. When plaintiff’s counsel attempted to cross-exam defense witnesses using that very journal the court refused to permit plaintiff to do so. The court said: “forget about the journal.” This journal article was critical in that it stated that “iatrogenic spinal accessory nerve injury is a complication that remains wholly preventable.” (emphasis added).

The import of making Evid. R. 706 a special evidence rule regarding authoritative text is to use such a powerful vehicle to discredit an expert who is disagreeing with something IN WRITING in an authoritative book. When this critical weapon is removed from counsel’s armamentarium in such technical cases, it deprives a litigant of one of the most efficacious tools and denies a fair trial. Particularly when in this situation the precise contested issue is addressed in a professional authoritative journal!

Additionally here, the appeals court apparently does not understand Evid. R. 706 or did not read the record. Judge Sundermann, writing for the appeals court, wrote:

“While plaintiff’s counsel was permitted under Evid. R. 706 to impeach Dr. Kirkpatrick [defense’s expert] on the fact that he was unfamiliar with the journal [Journal of Plastic and Reconstructive Surgery], counsel was not permitted to ask Dr. Kirkpatrick substantive questions about the journal’s contents after Dr. Kirkpatrick had testified that he was unfamiliar with the journal and that he had not relied upon it to form his

opinions in the case. Consequently, we cannot conclude that the trial court abused its discretion in prohibiting plaintiff's counsel from cross-examing him about the substance of the test." [p.10 of opinion].

Obviously, either the appeals court did not read the record or did not understand Evid. R. 706. Clearly both courts missed the tremendous significance of having an authoritative text that said in black and white that the injury suffered by plaintiff is "wholly preventable" if the surgeon just uses ordinary care.

PROPOSITION OF LAW NO. 7

Lower courts do not have the "discretion" to ignore pronouncements of law from the Supreme Court.

PROPOSITION OF LAW NO. 8

The case of *Stinson v. England* requires all experts (both plaintiff and defense) to testify in terms of "probabilities" not "possibilities" to be admissible.

The Ohio Supreme Court in *Stinson v. England*,(1994), 69 Ohio St.3d 45, 633 N.E.2d 532 held in syllabus #1:

"Consequently, expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue."

Here the trial court repeatedly permitted (over objection) defense to "suggest" mere possibilities of what the cause of plaintiff's symptoms. Rea testified stating "can be's" and "could have's".

PROPOSITION OF LAW NO. 9

As long as counsel does not mis-state the law, it is reversal error for a trial court to foreclose counsel from discussing Jury Instructions with the jury during closing argument.

During closing argument the court, *sua sponte*, stopped plaintiff from going through the Jury Instructions with the jury. This was shocking in that the Jury Instructions are key to the jury understanding how the law applies to the fact. Counsel is afforded wide latitude during closing argument. (See *Pesek v. Univ. Neurologists Assn.*, 87 Ohio st.3d 495, 501, 2000-Ohio-483, 721 N.E.2d 1011). With a trial court, *sua sponte*, admonishing plaintiff's counsel not to address the Jury Instructions prevented plaintiff from obtaining a fair trial.

PROPOSITION OF LAW NO. 10

A witness who refuses to comply with a document request (“*duces tecum*”) to supply any documents on which they rely for their opinions may not at trial claim that their opinions are “supported by the literature.”

The trial court permitted defense to elicit opinions that were not previously disclosed in discovery. Furthermore, both defense experts were served with notices of deposition *duces tecum* requesting they bring with them all billings and any and all medical literature upon which their opinions were based. Both defense experts ignored the *duces tecum* and brought nothing in either regard thereby foreclosing plaintiff from placing financial bias before the jury. More importantly the court permitted the defense to tell the jury that their opinions were supported by “the medical literature.” The court after objection stated: “You can generally say the literature, but we’re not going to go into what the medical literature is.” Dr. Kirkpatrick admitted that he did no literature search or research on this case, and brought no literature per the *duces tecum* yet claimed that “the literature” supported his opinion. (Civil Rule 26 and 37).

PROPOSITION OF LAW NO. 11

An expert witness must not only express opinions within “probability” but the factual basis of the case at issue must be within the witness’ knowledge and based upon scientific evidence.

Neither defense witness had ever experienced scar tissue around a spinal accessory nerve and they could not cite any medical literature where it had ever even been reported. Such testimony should not have been permitted per *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). Where there is no scientific basis for an expert's opinion the trial court must act as a gatekeeper. These experts' opinions were nothing but science fiction fantasy and should not have been given to the jury to speculate upon.

PROPOSITION OF LAW NO. 12

The courts will not approve the conduct of an attorney who has failed to supplement his expert's opinion [pursuant to Civil Rule 26(e)] prior to trial, when the expert changes his opinions after said attorney coaches the witness, post-deposition to "lean" in a different direction when he testifies at trial.

The court in *Jones v. Murphy* (1984), 12 Ohio St.3d 84, 86, 12 OBR 73, 75, 465 N.E.2d 444, 446, stated with respect to the purposes behind the Civil Rules is to "eliminate surprise."

Most disturbing was the conduct of counsel regarding the testimony of Dr. Kirkpatrick. During deposition Dr. Kirkpatrick testified that he could not determine the cause of plaintiff's injury with probability. In his opinion it was 50-50. Having obtained this concession and knowing that such opinion is not admissible under *Stinson*, plaintiff was surprised and prejudiced when this witness testified to "probabilities" at trial. When asked about the discrepancy, he stated:

A. That is what I said in my deposition. Subsequently I've had conversations with Mr. Lockemeyer that if I were to lean slightly one way or the other, I would lean towards a traction injury or a bruise on the nerve as a cause for that, but it's only slightly higher.

Q. But in your deposition it was 50/50?

A. Correct. [T.p. 749-750]

Coaching a witness is one thing, it is another to have a witness, after deposition, change his opinion. This conduct frustrates the entire discovery process, makes a joke of our justice system and should not be approved by this court (as apparently it was by the appeals court). We attorneys are required to attend “ethics” and “professionalism” CLE courses. If the courts take no action in situations like this, then such courses are mere lip-service and a waste of time.

PROPOSITION OF LAW NO. 13

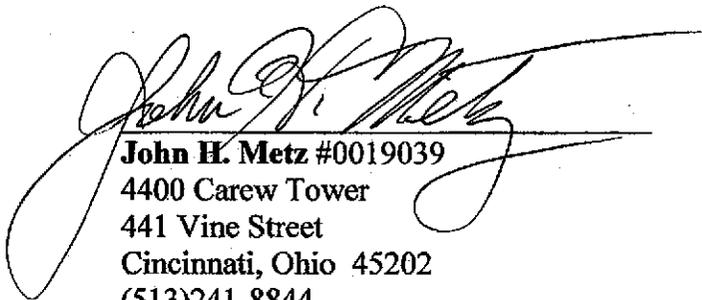
It is error for a trial court to *sua sponte* strike a prospective juror based solely upon the court's personal feeling that the witness' answers were “controversial.”

The trial court *sua sponte* struck prospective juror Johnson because the court thought her answers were “controversial.” Juror Johnson answered questions in a forthright manner and had experiences that pale in comparison to other jurors who are routinely “rehabilitated” when they merely parrot that they can “be far and follow the law.” (compare: Gurley v. Nemer, 2004-Ohio-5169).

When a trial judge interjects their personal feelings, without objection, into *voir dire* this destroys the jury process and denies litigants their right to a trial by jury.

CONCLUSION: This disheartening odyssey for this young lady is a disgrace to the legal system. This pilgrimage has at last place itself before this court in her final hope for justice. How can citizens have any faith or trust in our courts when this is the ordinary course of business in Hamilton County? We deserve better! This is why this case involves a substantial constitutional question and is of public and great general interest and should be accepted by this court to uphold the standard of quality in our courts.

Respectfully submitted,



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metzlegal@aol.com
Attorney for Plaintiff/Appellant

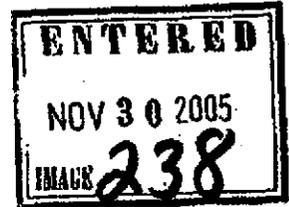
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon David S. Lockemeyer, Triona, Calderhead & Lockemeyer, 2021 Auburn Avenue, Cincinnati, Ohio 45219 by ordinary U.S. Mail, postage prepaid, this 9th day of February, 2008.



D66264173

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

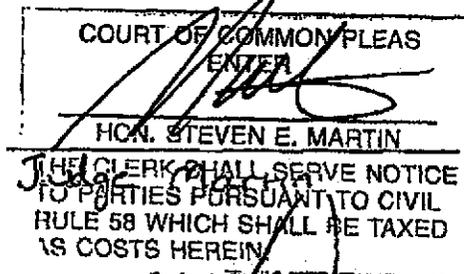


AMY PETERS : Case No. A0302797
 Plaintiff, : (Judge Martin)
 -vs- :
JUDGMENT ENTRY
 JOANN M. LOHR, M.D., et al. :
 Defendants :

This matter came on for trial October 31, 2005 with the parties presenting their evidence. The jury answered the appropriate interrogatories on both the issues of standard of care and informed consent. The jury then entered a verdict in favor of Defendants Joann Lohr, M.D. and The Cranley Surgical Associates, Inc.

This court therefore enters judgment in favor of Defendants Joann Lohr, M.D. and The Cranley Surgical Associates, Inc. with costs assessed to plaintiff. This is a final appealable order as to all claims and there being no just reason for delay.

IT IS SO ORDERED.



REVIEWED AND ACCEPTED:

John Metz (per telephone)
 John Metz
11/18/05

David S. Lockmeyer
 David S. Lockmeyer

ENTERED
FEB 13 2008

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

AMY PETERS : Case No. A0302797

Plaintiff, : (Judge Martin)

-vs-

JUDGMENT ENTRY

JOANN M. LOHR, M.D., et al. :

Defendants :

This matter came on for hearing on January 31, 2006 with the parties presenting their evidence. Upon written motions and oral arguments of counsel for plaintiffs and defendants, this Court finds that Plaintiffs' Motion for New Trial is overruled and Plaintiff's Motion JNOV is not well taken and is overruled.

This is a final appealable order as to all claims and there being no just reason for delay.

IT IS SO ORDERED.

ENTERED
FEB 10 2006
FRED J. CARTOLANO, Judge

Judge Cartolano

COURT OF COMMON PLEAS
ENTERED
HON. FRED J. CARTOLANO
THE CLERK SHALL SERVE NOTICE
TO PARTIES PURSUANT TO CIVIL
RULE 58 WHICH SHALL BE TAXED
AS COSTS HEREIN.


D67184459

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

AMY PETERS

Plaintiff

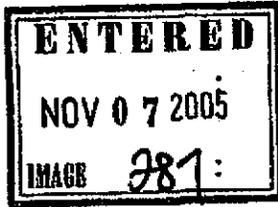
vs.

JOANN LOHR, M.D.
and
CRANLEY SURGICAL
ASSOCIATES, INC.

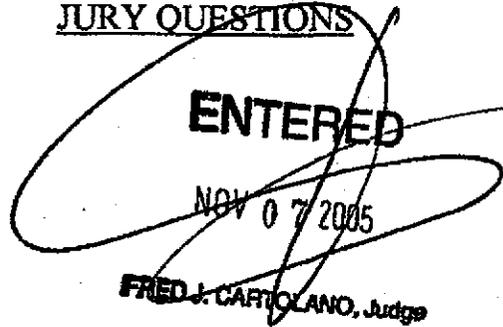
Defendants

Case No. A0302797

(Judge Cartolano)
(Sitting by Assignment)



JURY QUESTIONS



1. Do you find, by the greater weight of the evidence, that Defendant, Dr. Joann Lohr, was negligent in the care and treatment rendered to Amy Peters?

Yes _____ No (check one)

- | | | | |
|---|-------------------------------|---|-------------------------|
| 1 | <u>Richard W. Bauer</u> | 5 | <u>[Signature]</u> |
| 2 | <u>Fred Kessler</u> | 6 | <u>Phil on Powell</u> |
| 3 | <u>Shelley Fischer</u> | 7 | <u>Matthew L. Smith</u> |
| 4 | <u>Michael B. [Signature]</u> | 8 | _____ |

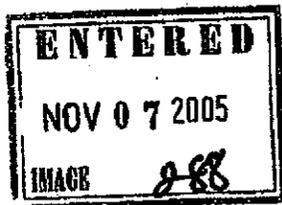
If at least six (6) of you answer "no," then do not answer Questions 2 and 3 but go to Question 4. If at least six (6) of you answer "yes," proceed to Question 2.



2. Since you found Defendant, Dr. Joann Lohr, to be negligent, state below what was done or not done in the care and treatment of Amy Peters that was negligence

1 _____	5 _____
2 _____	6 _____
3 _____	7 _____
4 _____	8. _____

At least six (6) of you must answer this question. If six (6) of you do, proceed to Question 3.

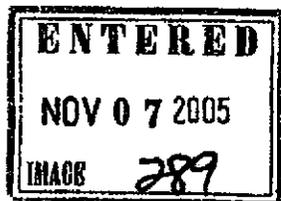


3. Was the Defendant Dr. Joann Lohr's negligence a proximate cause of the injury to Amy Peters?

Yes _____ No _____ (check one)

1 _____	5 _____
2 _____	6 _____
3 _____	7 _____
4 _____	8 _____

If at least six (6) of you answer "yes," then answer Question 4. If at least six (6) of you answer "no," then answer Question 4



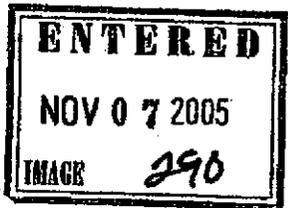
21

4. Do you find, by the greater weight of the evidence, that Amy Peters was not fully informed of the material medical risks and dangers inherently and potentially related to the proposed biopsy?

Yes V No _____ (check one)

1	<u>Richard W. Bauer</u>	5	<u>[Signature]</u>
2	<u>Fred Kessler</u>	6	<u>James Nussbaker</u>
3	<u>Shelley Fisher</u>	7	<u>Chas M. Powell Jr.</u>
4	<u>Michael B. Marshall</u>	8	<u>Matthew G. [Signature]</u>

If at least six (6) of you answer "no," then do not answer any more questions but go to Instruction 9. If at least six (6) of you answer "yes," proceed to Question 5.

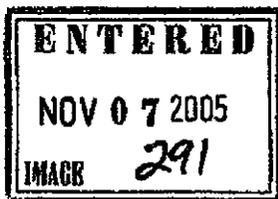


5. Since you found the material risks and dangers of biopsy were not fully disclosed to Amy Peters, state below what significant information was not disclosed

Amy Peters was generally informed of risks by Dr. Lohr, but not fully informed of the potential severity or probability of permanent damage to the spinal accessory nerve.

- | | | | |
|---|---------------------|---|----------------------------|
| 1 | Richard W. Bauer | 5 | Matthew Stangor |
| 2 | Fred Kessler | 6 | James Nephew |
| 3 | Shelley Archer | 7 | Chris M. Procell, Jr. |
| 4 | Michael B. Marshall | 8 | Matthew Stangor |

At least six (6) of you must answer this question. If six (6) of you do, proceed to Question 6.



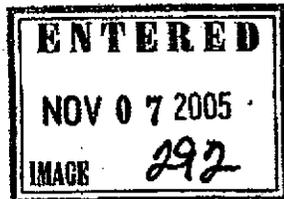
23

6 Since you found the material risks of the biopsy were not fully disclosed to Amy Peters, do you find, by the greater weight of the evidence, that the undisclosed risks and dangers did in fact happen?

Yes No _____ (check one)

1	<u>Richard W Bauer</u>	5	<u>[Signature]</u>
2	<u>Fred Kessler</u>	6	<u>Jennifer D. [Signature]</u>
3	<u>Shelley Fischer</u>	7	<u>Chris M. [Signature]</u>
4	<u>Michael [Signature]</u>	8	<u>Matthew [Signature]</u>

If at least six (6) of you answer "no," then do not answer Questions 7 and 8 but go to Instruction 9. If at least six (6) of you answer "yes," proceed to Question 7



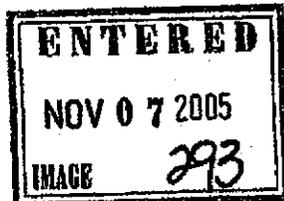
24

7. Do you find, by the greater weight of the evidence, that the undisclosed risks and dangers that did in fact happen, are a proximate cause of Amy Peter's injury?

Yes No (check one)

1	<u>Richard W. Bauer</u>	5	<u>[Signature]</u>
2	<u>Ed Keeler</u>	6	<u>James Nuebel</u>
3	<u>Shelly Fisher</u>	7	<u>Chas M. Powell</u>
4	<u>Michael [Signature]</u>	8	<u>Matthew [Signature]</u>

If at least six (6) of you answer "yes," then answer Question 8. If at least six (6) of you answer "no," do not answer Question 8 but go to Instruction 9.



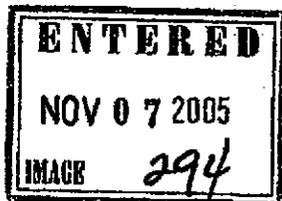
25

8 Do you find, by the greater weight of the evidence, that a reasonable person undergoing the biopsy in question would have decided against the biopsy if the material risks and dangers inherent would have been disclosed before the biopsy?

Yes _____ No _____ (check one)

1	<u>Richard W. Bauer</u>	5	<u>[Signature]</u>
2	<u>Fred Kessler</u>	6	<u>Chas M. Borker</u>
3	<u>Shelley Fisher</u>	7	<u>[Signature]</u>
4	<u>Michael [Signature]</u>	8	_____

If at least six (6) of you answer "no," then go to Instruction 9. If at least six (6) of you answer "yes," proceed to Instruction 9.



26

YES

9a If you have answered Question 1 "no" and Question 4 "no," do not go any further and use Verdict Form II.

9b If you answered "no" to Question 3 AND if you answered "no" to Question 6, or 7 or ~~8~~, use Verdict Form II.

9c If you have answered "yes" to Questions 1 and 3 and answered Instruction 2, and/or if you answered "yes" to Questions 4, ^y6, ^y7, and ^N8 and answered Instruction 5, then go to Question 10

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NOV 07 2005
295

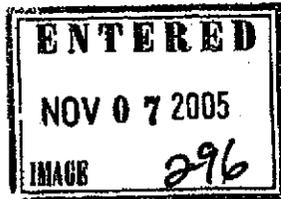
27

10. What is the total amount of money which will fairly compensate the Plaintiff, Amy Peters, for the claimed losses?

\$ _____

1 _____	5 _____
2 _____	6 _____
3 _____	7 _____
4 _____	8 _____

If at least six (6) of you answer this question, use Verdict Form I and insert the amount in that verdict form.



28

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

AMY PETERS,

Plaintiff

Case No. A-0302797

[Judge Steve Martin]

[**Judge Fred Cartolano]

JOANN M. LOHR, M.D., et al.

Defendants

COPY FILED
CLERK OF COURTS
HAMILTON COUNTY

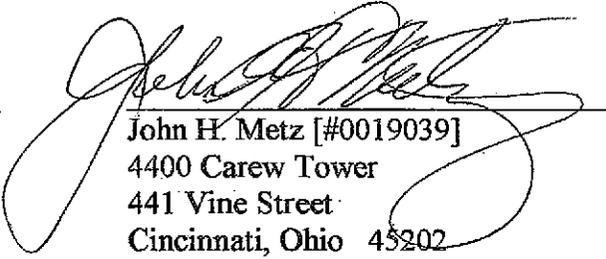
JAN 30 2006

GREGORY HARTMANN
COMMON PLEAS COURTS

NOTICE OF FILING OF DEPOSITION OF DR. REA

Now comes plaintiff, by and through counsel, and hereby gives Notice of the filing of the discovery deposition of defense expert, Dr. Rea in the matter herein.

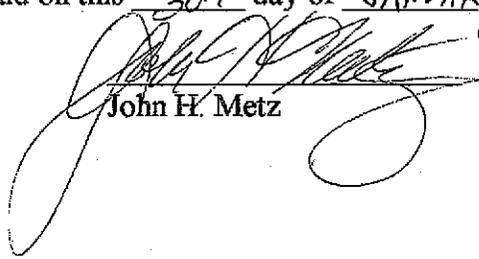
Respectfully submitted,



John H. Metz [#0019039]
4400 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 241-8844
Fax: (513) 241-6090
Attorney for Plaintiffs

Proof of Service

I hereby certify that a copy of the foregoing was served upon all counsel of record by ordinary U.S. Mail, postage prepaid on this 30th day of JANUARY, 2006.



John H. Metz

29

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

AMY PETERS,

APPEAL NO. C-060230
TRIAL NO. A-0302797

Appellant,

vs.

ENTRY OVERRULING MOTION
TO COMPLETE RECORD

JOANN LOHR, M.D., et al.,

Appellees.

This cause came on to be considered upon the motion of the appellant to complete the record and upon the memorandum in opposition.

The Court finds that the motion is not well taken and is overruled.

To The Clerk:

Enter upon the Journal of the Court on MAY 16 2007 per order of the Court.

By: _____

[Signature]
Presiding Judge

(Copies sent to all counsel)

30

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

AMY PETERS,	:	APPEAL NO. C-060230
Plaintiff-Appellant,	:	TRIAL NO. A-0302797
vs.	:	<i>DECISION.</i>
JOANN LOHR, M.D.,	:	
and	:	
CRANLEY SURGICAL ASSOCIATES, INC.,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 28, 2007

John Metz, for Plaintiff-Appellant,

David S. Lockemeyer, Stephanie P. Franckewitz, and Triona, Calderhead & Lockemeyer, for Defendants-Appellees.

Please note: This case has been removed from the accelerated calendar.

SUNDERMANN, Judge.

{¶1} Plaintiff-appellant Amy Peters filed a medical-malpractice action against defendants-appellees Dr. Joann Lohr, a general and vascular surgeon, and her employer, Cranley Surgical Associates, Inc. Peters sought to recover damages based on (1) Dr. Lohr's alleged negligence in failing to warn her about the possible risks involved in a biopsy of a lymph node on the left side of her neck, (2) Dr. Lohr's alleged negligence in performing the biopsy, and (3) Dr. Lohr's alleged negligence in failing to advise her of the "true nature of the damage" allegedly caused during the biopsy. Peters alleged that Lohr had damaged her spinal-accessory nerve during the operation, causing muscle atrophy in her shoulder and upper back, and impairing her ability to perform her work as a clerk at the United Parcel Service.

{¶2} After a five-day trial, the jury returned a general verdict in favor of Dr. Lohr and Cranley Surgical Associates on all claims. Peters moved for judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial, both of which were denied by the trial court. Peters now contests the jury verdict and the trial court's denial of her post-trial motions. She raises fourteen assignments of error for our review. Finding none of the assignments to be meritorious, we affirm the judgment of the trial court.

Denial of JNOV on Lack-of-Informed-Consent Claim

{¶3} In her first assignment of error, Peters argues that the trial court erred to her prejudice in failing to grant a JNOV on her lack-of-informed-consent claim.

{¶4} The decision to grant or deny a Civ.R. 50 motion for JNOV is reviewed de novo.¹ A JNOV is proper if, upon viewing the evidence in a light most favorable to the non-moving party, reasonable minds could come to but one conclusion, that being in favor of the moving party.² “Neither the weight of the evidence nor the credibility of the witnesses is for the court’s determination in ruling upon” the motion.³

{¶5} In *Nickell v. Gonzalez*, the Ohio Supreme Court set forth the elements for a lack-of-informed-consent claim.⁴ The court held that a party lacks informed consent under the following circumstances:

{¶6} “(a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;

{¶7} “(b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and

{¶8} “(c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.”⁵

{¶9} This court has held, furthermore, that “in applying the third part of the *Nickell* test, the jury must decide whether a reasonable person in the patient’s

¹ *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶4.

² Civ.R. 50(A)(4) and (B); *Goodyear*, supra, at ¶3.

³ *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334.

⁴ (1985), 17 Ohio St.3d 136, 477 N.E.2d 1145, syllabus.

⁵ *Id.* at 139, quoted in *Werden v. Children’s Hospital*, 1st Dist. No. C-040889, 2006-Ohio-4600, at ¶134-¶137.

position, not the individual patient, would have foregone the treatment given the undisclosed information.”⁶

{¶10} Here, the trial court properly instructed the jury on applying the “reasonable person” standard. The jury, furthermore, heard testimony that Peters had an enlarged lymph node that had been present on her neck for approximately nine months to one year; that she was concerned about the nodule being cancerous; and that she was informed that the only way to positively establish that the lymph node was not cancerous was to undergo the biopsy surgery. One of Peters’s own expert witnesses, Dr. Snow, even testified that it was perfectly acceptable for a physician to biopsy a nodule to assuage a patient’s concerns. Peters herself testified that most people would have wanted to know with certainty if something was cancerous.

{¶11} The jury found that while Peters had not been fully informed of the material medical risks and dangers inherently and potentially related to the proposed biopsy, and that she had not been informed of “the potential severity or probability of permanent damage to the spinal accessory nerve, that a reasonable person would have gone ahead with the biopsy even if there was a risk that the spinal accessory nerve could be damaged during the procedure.”

{¶12} Peters argues that the jury’s findings presented the “perfect example” of why the reasonable-person standard set forth in paragraph (c) of the syllabus in *Nickell* is wrong. She argues that the more appropriate standard is that of the “individual patient.” We are bound, however, as an intermediary court, until the

⁶ *Valerius v. Freeman* (Oct. 19, 1994), 1st Dist. No. C-930658; see, also, *Turner v. Cleveland Clinic Found.*, 8th Dist. No. 80949, 2002-Ohio-4790, at ¶32.

Ohio Supreme Court tells us otherwise, to apply the objective reasonable-person standard set forth in *Nickell*.⁷ Furthermore, because this was an issue of fact for the jury to determine, and the record reveals that there was competent evidence to support the jury's finding, we cannot conclude that the trial court erred in denying Peter's motion for a JNOV. We, therefore, overrule her first assignment of error.

Defense Counsel's Remarks in Closing Argument

{¶13} In her second, third, and fourth assignments of error, Peters raises arguments related to defense counsel's conduct during closing argument. For ease of discussion, we address them together since the same standard of review applies.

{¶14} Counsel is afforded great latitude during closing argument. Counsel, however, "must refrain from making arguments not supported by the evidence and must avoid inappropriate and offensive remarks concerning opposing counsel and witnesses. * * * 'When argument spills into disparagement not based on any evidence, it is improper.' * * * And when the misconduct of defense counsel undermines the fair and impartial administration of justice, a new trial is warranted."⁸

{¶15} In her second assignment of error, Peters argues that the trial court erred to her prejudice in permitting unprofessional and improper closing argument by defense counsel, and that this denied her a fair trial. She contends that the following comments by defense counsel regarding her expert witness

⁷ See, e.g., *Johnson v. Microsoft Corp.*, 156 Ohio App.3d 249, 2004-Ohio-761, 805 N.E.2d 179, at ¶11 (internal citations omitted).

⁸ *Werden*, supra, at ¶157.

were improper: “So Mr. Metz got these two physicians from this professional witness organization that matches up doctors and attorneys, both from the same group”; “Dr. Kravitz. This is the doctor who lost his privileges to do surgery at the hospital. He got up there and said it’s all political, all the other things were going on. But the fact remains, a hospital that he practiced at for years and years and years said to him you can’t practice here, your privileges are revoked”; “Well who do you want to believe a physician like Dr. Snow and Dr. Kravitz who have hundreds and hundreds of reviews and 99.9 percent of them are for the plaintiff, or do you want to believe someone like Joann Lohr and Dr. Kirkpatrick, who what I like to say, they’re in the trenches every day, doing surgery, trying to help people?”

{¶16} Peters’s counsel did not object to any of these comments. We, therefore, review them only for plain error.⁹ In our view, counsel’s comments, were based upon the evidence presented at trial.¹⁰ We, therefore, find her argument about these comments meritless.

{¶17} Peters also argues that defense counsel committed misconduct during closing argument when he stated, “There are several questions that I thought about over the last few days that I would like Mr. Metz to get up here and answer these because I think these are important. And I think if he doesn’t answer these questions, you ought to think to yourself, why doesn’t he want the jury to know this information.”

⁹ *Bowden v. Annenberg*, 1st Dist. No. C-040409, 2005-Ohio-6515, at ¶31.

¹⁰ *Id.* at ¶34.

{¶18} While this comment was improper in that it implied that Peters's counsel was trying to keep information from the jury, Peters did not object. We cannot say that this comment was so prejudicial as to deny her a fair trial. Consequently, we overrule her second assignment of error.

Golden Rule

{¶19} In her third assignment of error, Peters contends that the trial court erred in failing to sustain her objection to defense counsel's use of a "golden rule" argument during his closing statement. Peters maintains that defense counsel violated the "golden rule" by the telling the jury that "when you walk in the shoes of the doctor at the time – that is the way you have to look at it as an expert."

{¶20} "A 'golden rule' argument exists where counsel appeals to the jury to abandon their position of impartiality by placing themselves in the place of one of the parties. * * * Courts have further determined that while the golden rule argument is no longer per se prejudicial so as to warrant a new trial, this type of argument remains objectionable."¹¹

{¶21} Viewing defense counsel's comments in the context of his entire closing argument, we are not persuaded that they violated the golden rule or that they unduly prejudiced Peters. Defense counsel was merely referring to the fact that one of the defense experts, Dr. Kirkpatrick, had reviewed the medical information prospectively, just as Dr. Lohr had done when she was treating Peters. Defense counsel then argued that the jury should afford Dr. Kirkpatrick's testimony more weight than the testimony of the plaintiff's experts, who had

¹¹ *Hunt v. Crossroads Psychiatric & Psychological Ctr.* (Dec. 6, 2001), 8th Dist. No. 79120 (internal citations omitted); see, also, *Lykins v. Miami Valley Hospital*, 157 Ohio App.3d 291, 2004-Ohio-2732, 811 N.E.2d 124, at ¶31.

reviewed the evidence retrospectively. We, therefore, overrule the third assignment of error.

Defense Counsel's Comments on Failure to Call Witnesses

{¶22} In her fourth assignment of error, Peters argues that the trial court erred to her prejudice by permitting defense counsel in closing argument to allude to witnesses who had not been called during the trial.

{¶23} Generally, a party may not comment upon an opponent's failure to call a witness who is not under the opponent's control or who is equally available to the parties.¹² The danger from such comments is that the jury will presume the testimony would have been unfavorable to the non-calling party.¹³ Nevertheless, counsel may argue about the evidence and all reasonable inferences from it.¹⁴

{¶24} During the trial, Peters's counsel had relied on medical records from several physicians, who had seen or treated Peters after her August 1999 appointment with Dr. Lohr to establish the facts of her claims. During closing argument, plaintiff's counsel referred to the records of these physicians, stating, "Dr. Woo [a neurologist who had treated Peters] doesn't have a dog in this fight," and in reference to Peters's primary care physician, Dr. McCarren, "What does he have to win or lose in this case?" None of these fact witnesses were called to testify at trial, yet Peters's counsel argued that their notes in the medical records supported Peters's testimony that she had been experiencing severe pain since the biopsy procedure.

¹² See, e.g., *United States v. Iredia* (C.A.5, 1989), 866 F.2d 114, 117.

¹³ *Werden*, supra, at ¶61.

¹⁴ See *Smith v. Sass, Friedmann & Assocs., Inc.* (Feb. 5, 2004), 8th Dist. No. 81953, 2004-Ohio-494, at ¶26.

{¶25} Defense counsel was merely responding to Peters's argument by pointing out that Dr. Lohr's medical records contradicted Peters's testimony, and that Peters had presented the only testimony concerning the duration of her pain. Furthermore, the trial court instructed the jury, following the objection by Peters's counsel, that defense counsel's comments were not evidence. Consequently, we cannot conclude that the trial court committed error when it permitted defense counsel to refer in closing argument to the failure of these witnesses to testify. We, therefore, overrule the fourth assignment of error.

Matters Consigned to the Trial Court's Discretion

{¶26} In her remaining ten assignments of error, Peters raises a number of evidentiary issues. "To succeed on these assignments of error, [Peters] must demonstrate that, in making its decisions, the trial court exhibited an attitude that was 'unreasonable, arbitrary, or unconscionable.' * * * In applying this standard, a reviewing court 'is not free to substitute its judgment for that of the trial judge.' * * * Rather, if a trial court's exercise of its discretion exhibits a sound reasoning process that would support its decision, a reviewing court will not disturb that determination."¹⁵

Cross-Examination of Defense Experts

{¶27} In her fifth assignment of error, Peters argues that the trial court erred to her prejudice by refusing to permit her, during cross-examination of a defense expert witness, to use a learned treatise for impeachment purposes.

{¶28} "In Ohio, learned treatises may be used for impeachment purposes. Evid.R. 706 provides that learned treatises may be used to show that an expert is

¹⁵ *Bowden*, supra, at ¶49 (internal citations omitted).

unaware of their existence or unfamiliar with their contents. * * * Additionally, the contents of a treatise may be used to impeach the credibility of a witness who relied on the treatise in forming his or her opinion, or who acknowledges the authoritative nature of the treatise.”¹⁶

{¶29} During cross-examination, plaintiff’s counsel asked Dr. Kirkpatrick if he was familiar with the Journal of Plastic and Reconstructive Surgery. Dr. Kirkpatrick responded, “I’ve heard of it.” Plaintiff’s counsel then tried to ask Dr. Kirkpatrick substantive questions about the contents of the journal. When defense counsel objected, the trial court sustained the objection.

{¶30} While plaintiff’s counsel was permitted under Evid.R. 706 to impeach Dr. Kirkpatrick on the fact that he was unfamiliar with the journal, counsel was not permitted to ask Dr. Kirkpatrick substantive questions about the journal’s contents after Dr. Kirkpatrick had testified that he was unfamiliar with the journal and that he had not relied upon it to form his opinions in the case. Consequently, we cannot conclude that the trial court abused its discretion in prohibiting plaintiff’s counsel from cross-examining him about the substance of the text. As a result, we overrule the fifth assignment of error.

Testimony on Professional Censure

{¶31} In her sixth assignment of error, Peters argues that the trial court erred by prohibiting plaintiff’s counsel from eliciting testimony concerning professional medical organizations’ retribution against her expert witness, Dr. Kravitz, when defense counsel had attacked Dr. Kravitz’s motives for testifying

¹⁶ *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 240, 2005-Ohio-4787, 834 N.E.2d 323, fn.1.

during cross-examination. But the record reveals that, contrary to plaintiff's argument, Dr. Kravitz testified during redirect that "just by being here I risk censure of the American College of Surgeons."

{¶32} While Peters's counsel was not allowed to explore the issue any further during his redirect examination of Dr. Kravitz, Dr. Kravitz's prior statement on this issue was before the jury. Moreover, during recross-examination by defense counsel, Dr. Kravitz testified that the American College of Surgeons was "trying to dissuade physicians from doing plaintiff's expert witness work." Peters's counsel referred to Dr. Kravitz's testimony in her closing statement, stating that both her expert witnesses had risked professional censure by testifying at trial. Consequently, we find Peters's sixth assignment of error feckless.

Expert Testimony about Possibilities

{¶33} In her seventh assignment of error, Peters argues that the trial court erred to her prejudice by permitting defense counsel to repeatedly place "possibilities" before the jury as evidence. In support of her argument, she relies upon the Ohio Supreme Court's decision in *Stinson v. England*,¹⁷ in which the court held in part, "[E]xpert opinion regarding a causative event, including alternate causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue."

{¶34} Peters maintains that the trial court improperly allowed the defense experts, Dr. Lohr, Dr. Kirkpatrick, and Dr. Rea, to testify about "possibilities"

¹⁷ 69 Ohio St.3d 451, 456, 1994-Ohio-35, 633 N.E.2d 532.

rather than probabilities. She refers to selected portions of their testimony in her brief. But when reading their testimony in context, we are confident that each expert's testimony was appropriately predicated upon an agreement with defense counsel that he would give his opinion to a reasonable degree of medical probability. We, therefore, overrule her seventh assignment of error.

Qualifications of Dr. Rea

{¶35} In her eighth assignment of error, Peters argues that the trial court erred in permitting Dr. Rea to provide expert testimony when (1) he did not perform the type of surgery that Dr. Lohr had performed, and (2) he did not have a sufficient factual foundation to render his opinion.

{¶36} "Where 'fields of medicine overlap and more than one type of specialist may perform the treatment, a witness may qualify as an expert even though he does not practice the same specialty as the defendant.' The test of admissibility is whether a particular witness offered as an expert will aid the trier of fact in the search for the truth, not whether the expert witness is the best witness on the subject."¹⁸

{¶37} Peters first argues that Dr. Rea, a neurosurgeon, was unqualified to give opinion testimony concerning the operative procedure involved here because he had no personal experience in performing such an operation. The fact that Dr. Rea had never performed a biopsy on a lymph node would only have had a bearing on the weight and credibility to be given to his testimony, but it would not have rendered him incompetent under the law to express an opinion as an

¹⁸ *King v. LaKamp* (1988), 50 Ohio App.3d 84, 85, 533 N.E.2d 701, quoting *Alexander v. Mt. Caramel Med. Ctr.* (1978), 56 Ohio St.2d 155, 158, 383 N.E.2d 564.

expert in this case, particularly in view of his medical training and professed knowledge of the standard and procedure for such an operation through study and knowledge.¹⁹ Consequently, we cannot conclude the trial court abused its discretion in permitting Dr. Rea to testify regarding the biopsy procedure.

{¶38} Peters next argues that Dr. Rea lacked a sufficient factual foundation to render his opinions at trial. While Dr. Rea did have difficulty remembering certain aspects of Peters's care during the trial, plaintiff's counsel vigorously highlighted the weaknesses in his testimony during her cross-examination and during closing argument. The impact of those weaknesses in his testimony were ultimately for the trier of fact to weigh. Consequently, we overrule the eighth assignment of error.

Defendant's Testimony about Other Spinal-Accessory-Nerve Injuries

{¶39} In her ninth assignment of error, Peters argues that the trial court erred to her prejudice by allowing Dr. Lohr to testify that she had never had a spinal-accessory-nerve injury in other lymph-node biopsies.

{¶40} The trial court found that this testimony was relevant to Peters's lack-of-informed-consent claim. If this injury had previously occurred in Dr. Lohr's practice, then she would have been on notice that it was a possible risk of the procedure. Thus, the jury could have considered this testimony to determine that Dr. Lohr had failed to disclose to Peters the risk of a spinal-accessory-nerve injury because the doctor had not previously dealt with such an injury.

¹⁹ See *Alexander*, supra, at 157.

{¶41} We further fail to see how this testimony prejudiced Peters when the jury ultimately found in the interrogatories that Dr. Lohr had failed to disclose this risk to Peters. Consequently, we overrule her tenth assignment of error.

Comments on Jury Instructions During Closing Argument

{¶42} In her tenth assignment of error, Peters argues that the trial court erred to her prejudice by refusing to allow her counsel to read the jury instructions during his closing argument.

{¶43} As we have already noted, the scope of the parties' closing arguments is within the sound discretion of the trial court.²⁰ An appellate court, therefore, will not interfere with a limitation on closing argument unless it is clear that the complaining party was denied a fair trial.²¹ It is the province of the trial court, moreover, and not counsel, to instruct the jury on the law in a given case.²²

{¶44} Here, the trial court did prevent Peters's counsel from reading the jury instructions during closing argument. Counsel, however, was permitted to tell the jurors that they would receive two packets of jury instructions—one for informed consent and one for medical negligence—and to direct the jurors to all the evidence presented during the trial that, counsel believed, established the elements of Peters's claims. Consequently, we cannot conclude that the trial court's actions resulted in an abuse of discretion or denied Peters a fair trial.²³ We, therefore, overrule her tenth assignment of error.

Cross-Examination on Commonality of Insurance

²⁰ *Pang v. Minch* (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313, paragraph two of the syllabus.

²¹ *Byrd v. Baltimore* (1966), 10 Ohio App.2d 187, 195, 227 N.E.2d 252.

²² Civ.R. 51(A).

²³ *Waldecker v. Pfefferie*, 6th Dist. No. E-02-002, 2002-Ohio-6187, at ¶32-¶34.

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{¶45} In her eleventh assignment of error, Peters argues that the trial court erred to her prejudice by refusing to permit her counsel to cross-examine defense witnesses on the commonality of insurance.

{¶46} “The scope of cross-examination of a medical expert on questions of the expert’s bias and pecuniary interest and the admissibility of evidence relating thereto are matters that rest within the sound discretion of the trial court.”²⁴ Thus, absent an abuse of discretion, a trial court’s ruling will be upheld.²⁵ “[A]n expert witness having the same malpractice insurer as another defendant is subject to inquiry concerning bias if the witness testifies favorably for that defendant.”²⁶

{¶47} Here, plaintiff’s counsel wanted to cross-examine a defense expert witness on the commonality of his medical-malpractice insurance with Dr. Lohr. The trial court, however, denied the cross-examination because the expert’s current malpractice insurance was not through the same company as Dr. Lohr’s. We cannot say that the trial court abused its discretion by disallowing the cross-examination where there was no current commonality of insurance between the defendant and one of the defendant’s expert witnesses, and where the trial court concluded that the risk of prejudice from allowing such testimony substantially outweighed the probative value of such testimony.²⁷

²⁴ *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218, 224, 436 N.E.2d 1008.

²⁵ *Id.* at 222.

²⁶ *Davis v. Immediate Med. Serv.* (1997), 80 Ohio St.3d 10, 684 N.E.2d 292, paragraph two of the syllabus; see, also *Fehrenbach v. O’Malley*, 164 Ohio App.3d 80, 2005-Ohio-5554, 841 N.E.2d 350, at ¶137.

²⁷ Evid.R. 403; see, also, *Bernal v. Lindholm* (1999), 133 Ohio App.3d 163, 172-173, 727 N.E.2d 145.

{¶52} Peters next argues that the trial court erred by allowing the expert witnesses to ignore the rules of discovery by failing to produce their billing records or certain medical literature at their depositions. We fail to see how the testimony prejudiced Peters, when Peters's counsel was permitted to impeach the experts' credibility by cross-examining them on their failure to comply with the deposition subpoenas. Counsel was also able to establish the experts' financial bias by asking them on cross-examination how much they had charged for their participation in the case. Both doctors testified, furthermore, that they had not relied on any specific literature when rendering their opinions, so Peters cannot demonstrate that their failure to produce any literature at their depositions was prejudicial to her case.

{¶53} Peters next contends that the trial court erred in allowing Dr. Kirkpatrick to testify that the medical literature generally supported his opinion. But as the Ohio Supreme Court clarified in *Beard v. Meridia Huron Hosp.*, "There is a difference between a witness's referring to specific statements in professional literature as substantive evidence and expert witness's referring to the literature as being part of the basis for that expert's opinion. While the former reference would be inadmissible hearsay, numerous courts in Ohio have held that the later reference is admissible. We agree with the decisions in those cases. * * * Because experts are permitted to base their opinions on their education, including their review of professional literature, training, and experience, it follows that experts are also permitted to testify regarding that information."³⁰

³⁰ *Beard*, supra, at 240.

Consequently, we cannot conclude that the trial court abused its discretion in permitting this testimony.

{¶54} Finally, Peters argues that defense expert testimony about “scarring or fibrosis” of the nerve as a probable cause of her injury was nothing but “science fiction fantasy.” Peters, however, never objected to this testimony at trial. All three defense experts, moreover, testified that they either knew scarring or fibrosis could happen or had personally experienced it in their practices. Consequently, we find this argument without merit. We, therefore, overrule the thirteenth assignment of error.

Striking Juror for Cause

{¶55} In her fourteenth assignment of error, Peters argues that the trial court erred in sua sponte striking a juror for cause. The juror stated in voir dire that she had had several bad experiences with physicians. When asked by the trial court whether she would carry those bad experiences into trial, she responded, “I pray I won’t.” She also said that physicians “should know the body more than what they know.” After listening to several other “controversial” answers by the juror, the trial court dismissed her for cause, stating on the record its concern that both sides receive a fair trial.

{¶56} The trial court had the opportunity to observe the demeanor of the prospective juror and to evaluate the sincerity of her responses to the questions. Its decision to exclude her, therefore, is entitled to deference by this court.³¹ Furthermore, the Ohio Supreme Court has held that “an erroneous excusal cannot cause the seating of a biased juror and therefore, does not taint the jury’s

³¹ *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

impartiality.”³² Thus, even if we were to assume arguendo that the trial court had erred in dismissing the juror, Peters could demonstrate no prejudice from the her dismissal. Accordingly, we overrule the fourteenth assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

PAINTER, P.J., and HILDEBRANDT, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

³² *State v. Sanders*, 92 Ohio St.3d 245, 249, 2001-Ohio-189, 750 N.E.2d 90.

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