



TABLE OF CONTENTS:

	<u>Page</u>
STATEMENT OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	3
<b><u>Proposition of Law 1 and 2:</u></b> .....	3
<p>The tort of lack of informed consent requires the jury to decide if a “reasonable person,” knowing all the material risks, would have chosen to go ahead with the medical procedure. By abandoning the “reasonable person” standard for the “individual patient” standard, a physician becomes an insurer against a material risk that may not be avoided, even if the therapy is done within the standard of care.</p>	
<p>Authorities:</p>	
<p><i>Desgraise v. St. Vincent Charity Hosp.</i> (1989), 64 Ohio App.3d 91, 580 N.E.2d 818.....</p>	
	5
<p><i>Nickell v. Gonzalez</i> (1985) 17 Ohio At.2d 136, 477 N.E.2d 1145.....</p>	
	3
<p><i>Valerius v. Freeman</i>, 1994 Ohio App. Lexis 4682 (1<sup>st</sup> Dist. Oct. 19, 1994), unreported.....</p>	
	4
<b><u>Proposition of Law 3, 4, and 5:</u></b> .....	6
<p>Where a trial court and court of appeals found no error in the conduct of a trial, there can be no bases for a finding of cumulative error.</p>	
<b><u>Proposition of Law 6:</u></b> .....	6
<p>Substantive portions of a learned treatise may not be used for impeachment purposes if the expert is unaware of the treatise’s existence or its contents. However, the fact that the expert is not familiar with the treatise may be brought out during cross examination to impact his overall credibility.</p>	
<p>Authorities:</p>	
<p><i>Beard v. Meridia Huron Hosp.</i> (2005), 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323.....</p>	
	6
<p>Evidence Rule 706.....</p>	
	6

**Proposition of Law 7:**..... 7

Lower courts must follow binding precedent from the Ohio Supreme Court.

**Proposition of Law 8:**..... 8

In a medical malpractice case, experts must testify in terms of probabilities not mere possibilities.

Authorities:

*Pang v. Minch* (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313.....9  
*State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126.....8  
*Stinson v. England* (1994), 69 Ohio St.3d 45,  
633N.E.2d532.....8

**Proposition of Law 9:**..... 8

It is the job of the court to instruct the jury on the law, not a party's counsel.

Authorities:

Civil Rule 51..... 9

**Proposition of Law 10:**..... 9

An expert witness who bases his opinion in part on his review of professional literature encountered throughout his career is not required to search the archives and locate specific literature that supports his opinion in order to comply with a subpoena duces tecum.

Authorities:

*Beard v. Meridia Huron Hosp.* (2005), 106 Ohio St.3d 237,  
2005-Ohio-4787, 834 N.E.2d 323.....10  
*State v. Aldridge* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500..... 10

**Proposition of Law 11:**..... 10

An expert is not required to have performed the same surgery at issue to be qualified to testify as to its performance if he demonstrates that he has sufficient knowledge of the standards and procedure for performing the surgery.

Authorities:

*Alexander v. Mt. Carmel Med. Ctr.* (1978), 56 Ohio St.2d 155,  
383 N.E.2d 564..... 10

*Beard v. Meridia Huron Hosp.* (2005), 106 Ohio St.3d 237,  
2005-Ohio-4787, 834 N.E.2d 323.....12

**Proposition of Law 12:**..... 12

Differences between an expert’s testimony at deposition and trial are appropriate for cross-examination and go to the expert’s credibility.

**Proposition of Law 13:**..... 13

The sua sponte excusal of a potential juror by the trial court is not unfairly prejudicial to a party because it does not cause the seating of a biased juror and therefore does not taint the jury’s impartiality.

Authorities:

*Beck v. Matthews* (1990), 53 Ohio St.3d 161, 559 N.E.2d 1301.....13

*State v. Sanders* (2001), 92 Ohio St.3d 245, 2001 Ohio 189, 750 N.E.2d 90.....13

CONCLUSION..... 14

CERTIFICATE OF SERVICE..... 15

**I. STATEMENT OF WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF  
PUBLIC OR GREAT GENERAL INTEREST:**

The precedent this Appellant wishes to disturb has been well-settled for over 23 years; it involves the holding in *Nickell v. Gonzalez*, (1985), 17 OhioSt.3d 136, 477 N.E.2d 1145. In *Nickell*, this Court firmly established that to find a lack of informed consent, the jury must find that a physician failed to disclose a material risk, the material risk occurred, and a reasonable person in the position of the plaintiff would have decided against a therapy if the material risks had been disclosed. The third element turns on what a reasonable person would do under the circumstances, not what the actual plaintiff proposes he or she would have done. The rule protects against the obvious: allowing a recovery based upon a self-serving declaration by a plaintiff that they would have declined the medical therapy even when a reasonable person under the circumstances would have accepted the risk.

Appellant wants to change the rule. She proposes that the standard should be that of the individual patient. By accepting Appellant's position, the tort of lack of informed consent is converted into 2 elements: a failure of a physician to disclose a material risk and a finding that the material risk did in fact occur. Material risks are risks that are inherent to a certain medical procedure. The fact that a material risk comes to fruition does not equal negligent care by the physician. However, by adopting the individual patient standard, a physician is required to be an insurer to the patient against risks that sometimes cannot be avoided, even under the most perfect execution of care.

Under Appellant's proposition of law, "reasonable" is traded for "unreasonable." It encourages the scenario – as was found in this case – that even when a physician is found by the jury to have conducted the procedure within the standard of care, the physician can still be found liable for damages based on a back-door theory of lack of informed consent. It effectively lowers the bar

of proof and gives a plaintiff a second bite at the apple if they fail under the traditional theory of medical malpractice. For example, in the instant case, the jury found that Dr. Lohr conducted the biopsy within the standard of care. Under Appellant's emasculation of *Nickell*, she would still have been able to collect damages for her injuries since the jury found that Dr. Lohr did not disclose a material risk of the procedure and the undisclosed risk occurred. The full force of *Nickell* wisely avoids this result.

Appellant next launches into a kitchen-sink strategy and offers no less than 12 more propositions of law, each one previously rejected as baseless by the trial court and the First District Court of Appeals. Appellant repeatedly takes the record out of context in order to fashion arguments that give the false appearance that the experienced trial court judge made error after error after error. As the First District deftly determined, each "error" was no error at all, but only empty decries from a plaintiff who refuses to accept that the jury weighed the evidence and reached a verdict in favor of Dr. Lohr.

Indeed there is no substantial constitutional question in this case, nor is there a question of public and great general interest. There is only a plaintiff, who had her day in court, who received a fair trial, and who simply lost. This Court should decline to extend jurisdiction.

## II. STATEMENT OF THE CASE AND FACTS:

**A. Procedural Posture:** See Plaintiff-Appellant Brief.

**B. Statement of Facts:** This is a medical malpractice case. Appellant had an enlarged lymph node on the left side of her neck that had been present for nine months to a year.<sup>1</sup> She was concerned it was cancerous.<sup>2</sup> Her family doctor referred her to general surgeon, Dr. Lohr, to be evaluated for a

---

<sup>1</sup> (T.p. 265, 430).

<sup>2</sup> (T.p. 269, 578).

biopsy.<sup>3</sup> Appellant wanted a guarantee that the nodule did not contain cancer.<sup>4</sup> Dr. Lohr discussed the risks of the surgery with the Appellant.<sup>5</sup> It was agreed that a biopsy would be performed on April 6, 1999.<sup>6</sup> After surgery was completed, Appellant returned for follow-up care and was released back to her family physician on May 10, 1999.<sup>7</sup> Almost four months after surgery, she returned to Dr. Lohr, and it was first determined that her shoulder muscle had atrophied due to nerve damage.<sup>8</sup>

The case was tried before a jury. The jury found that Dr. Lohr performed the biopsy within the standard of care. On the claim of lack of informed consent, the jury found that Dr. Lohr failed to disclose a material risk of the biopsy and the material risk, in fact, occurred. However, the jury decided that a reasonable patient would have gone ahead with the biopsy under the circumstances and accepted the material risk.

### III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW:

**Proposition of Law 1 and 2: The tort of lack of informed consent requires the jury to decide if a “reasonable person,” knowing all the material risks, would have chosen to go ahead with the medical procedure. By abandoning the “reasonable person” standard for the “individual patient” standard, a physician becomes an insurer against a material risk that may not be avoided, even if the therapy is done within the standard of care.**

Appellant asks this court to change the “reasonable person” standard to that of the individual plaintiff/patient. This Court has set forth the elements of lack of informed consent in *Nickell v. Gonzalez*:

The tort of lack of informed consent is established when:

---

<sup>3</sup> (T.p. 430).

<sup>4</sup> (T.p. 579).

<sup>5</sup> (T.p. 589).

<sup>6</sup> Medical record: Joint exhibits, 1 & 2.

<sup>7</sup> (T.p. 607-610).

<sup>8</sup> (T.p. 611).

- (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 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.<sup>9</sup>

The First District Court of Appeals in *Valerius v. Freeman*, noted:

In applying the third part of the *Nickell* test, the jury must decide whether a reasonable person in the patient's position, not the individual patient, would have foregone the treatment given the undisclosed information.<sup>10</sup>

In the instant case, the trial court properly instructed the jury on applying the "reasonable person" standard.<sup>11</sup> The "reasonable person" standard provides a more reliable and equitable means of determining whether or not a particular material risk would have outweighed the benefits of going forward with a therapy.

Appellant claims that her cause of action for informed consent was denied because the test set forth by this Court is faulty requiring a objective "reasonable person" standard rather than a subjective "individual patient" standard. The problem created with a subjective standard is it converts the physician into an insurer against material risks that occur during the natural course of a properly performed medical procedure. It eliminates the third element of the tort because all plaintiffs will state they would not have gone forward with the procedure or else they would defeat their own claim. Further, by changing from an objective to a subjective standard, the tort of informed consent is dramatically expanded and allows for plaintiffs to collect damages based on

---

<sup>9</sup> *Nickell, supra.*

<sup>10</sup> *Valerius v. Freeman*, 1994 Ohio App. Lexis 4682 (1<sup>st</sup> Dist. Oct. 19, 1994), unreported, (emphasis added) relying upon *Desgraves v. St. Vincent Charity Hosp.* (1989), 64 Ohio App.3d 91, 97, 580 N.E.2d 818.

<sup>11</sup> (T.p. 864-865).

individual quirks and irrationalities rather than on the more prudent approach of requiring reasonableness in a plaintiff's decision making.

In the instant case, the jury heard testimony that Appellant had an enlarged lymph node that had been present on her neck for about a year.<sup>12</sup> She was nervous about the nodule and was concerned it was cancerous.<sup>13</sup> The only way to prove 100% that a lymph node is not cancer is by doing a biopsy and looking at the tissue under a microscope.<sup>14</sup> Appellant's expert, Dr. Snow, testified that it is acceptable for a physician to do a biopsy of a nodule because the patient is nervous about it.<sup>15</sup> Appellant testified that most people would want to know for sure if something was cancer or not.<sup>16</sup>

Based on the evidence, the jury found that a reasonable person would go ahead with the biopsy even if there was a chance the spinal accessory nerve could be damaged. This is an issue of fact based on competent evidence. Despite this, Appellant argues that she would have declined the procedure, despite the fact that the only means of guaranteeing that the nodule was not cancerous was to obtain the biopsy. The jury did not buy Appellant's argument and returned a verdict for Dr. Lohr.

The jury also found that injury to the spinal accessory nerve was not below the standard of care. By changing the informed consent standard from objective to subjective, Dr. Lohr is placed in the position of paying damages to a plaintiff for doing a procedure within the standard of care that a reasonable person would have consented to, even if all material risks had been disclosed. This kind of a potential result is wisely avoided by the current position of this Court. Any argument to change the Court's position should be rejected.

---

<sup>12</sup> (T.p. 265, 267, 430, 484).

<sup>13</sup> (T.p. 269, 478, 578).

<sup>14</sup> (T.p. 397).

<sup>15</sup> (T.p. 396).

<sup>16</sup> (T.p. 481).

**Proposition of Law 3, 4, 5: Where a trial court and court of appeals found no error in the conduct of a trial, there can be no bases for the finding of cumulative error.**

Appellant did not argue “cumulative error” to the trial court or to the First District Court of Appeals. While she did cite no less than 14 assignments of error to the appellate court, the First District found them all to be without merit. Appellant now attempts to condense the previously raised assignments of error to fashion a new argument that “cumulative error” denied her a fair trial.

Appellant relies solely upon *State v. DeMarco* to sustain her argument that cumulative error occurred in this case. *DeMarco* dealt with the cumulative effect of hearsay errors; that when analyzed singly, did not rise to the level of prejudicial error. The distinguishing factor in this case is that absolutely no error was even predicated on hearsay and no error on any other basis was found for *DeMarco* to even remotely apply. Each and every claimed error that Appellant lists in her Statement of Great General or Public Interest was examined in full context by the First District and found to be meritless or feckless. As such, Appellant cannot claim cumulative error where no error has been found in the first place. Further, Appellant previously failed to raise “cumulative error” with the trial court or the First District as a basis for overturning the verdict in this case, and this Court should decline to hear her complaints now.

**Proposition of Law 6: Substantive portions of a learned treatise may not be used for impeachment purposes if the expert is unaware of the treatise’s existence or its contents. However, the fact that the expert is not familiar with the treatise may be brought out during cross examination to impact his overall credibility.**

This Court in *Beard v. Meridia Huron Hosp.* held:

In Ohio, learned treatises may be used for impeachment purposes. Evid. R. 706. Evid. R. 706 provides that learned treaties may be used to show that an expert is 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.<sup>17</sup>

In the instant case, Defense expert Dr. Kirkpatrick was asked by Appellant's counsel if he was familiar with the Journal of Plastic and Reconstructive Surgery.<sup>18</sup> He responded, "I've heard of it."<sup>19</sup> Appellant's counsel then tried to ask substantive questions about the contents of the journal and the trial court sustained Defense Counsel's objection.<sup>20</sup> While Appellant's counsel was permitted under Evid. R. 706 to impeach Dr. Kirkpatrick on the fact that he was unfamiliar with the journal, he was not permitted to ask substantive questions about its contents. The contents of a treatise can only be used to impeach a witness who relies on it in forming his opinion or if he acknowledges it as authoritative. While Appellant laments that she was unable to cross examine Dr. Kirkpatrick about the sentence in the journal stating that spinal accessory nerve complications are "wholly preventable," she was able to stress this point during her own expert witness's direct testimony.

The trial court and court of appeals followed this Court's guidance in *Beard v. Meridia Huron Hosp.* The alternative proposed by the Appellant is a waste of time since the expert already acknowledged he does not know the text and does not recognize it as authoritative. The only purpose achieved is a "piling on" effect that offers no further aid to the jury.

**Proposition of Law 7: Lower courts must follow binding precedent from the Ohio Supreme Court.**

Appellant seems to propose that the trial court and/or court of appeals did not follow this Court's precedent in the adjudication of this case. However, no evidence or explanation is given in Appellant's brief to support any finding of error for lack of following binding precedent.

---

<sup>17</sup> *Beard v. Meridia Huron Hosp.* (2005), 106 Ohio St.3d 237, 2005 Ohio 4787, 834 N.E.2d. 323.

<sup>18</sup> (T.p. 739).

<sup>19</sup> *Id.*

<sup>20</sup> (T.p. 739-740).

Therefore, the Court should not offer jurisdiction to hear argument on a matter that Appellant fails to support.

**Proposition of Law 8: In a medical malpractice case, experts must testify in terms of probabilities not mere possibilities.**

A trial court's decision to admit or exclude evidence will be upheld absent an abuse of discretion. "Even in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice."<sup>21</sup>

Appellant argues that the trial court improperly allowed Defense experts, Dr. Lohr, Dr. Rea, and Dr. Kirkpatrick, to testify to "possibilities" rather than "probabilities." In support of her argument, snippets of testimony are waved before the Court as proof. However, when reading the testimony in context, it is clear that each expert's testimony was predicated upon an agreement that they would give their opinions to a reasonable degree of medical probability.<sup>22</sup> The First District Court of Appeals saw through Appellant's argument and stated:

[W]hen 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.<sup>23</sup>

This being the case, no basis exists to support Appellant's claimed error and this Court should decline to grant jurisdiction.

**Proposition of Law 9: It is the job of the court to instruct the jury on the law, not a party's counsel.**

The determination of whether the bounds of permissible argument have been exceeded is a discretionary function of the trial court and will not be reversed absent an abuse of discretion.<sup>24</sup>

"Even in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse

---

<sup>21</sup> *Pang v. Minch* (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313, *Beard, supra*.

<sup>22</sup> (I.p. 619, 651, 705).

<sup>23</sup> First District Opinion, Paragraph 34.

<sup>24</sup> *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126.

affected the substantial rights of the adverse party or is inconsistent with substantial justice.”<sup>25</sup> Civil Rule 51 establishes that the trial court is charged with instructing the jury on the law. “A presumption always exists that the jury has followed the instructions given to it by the trial court.”<sup>26</sup>

Appellant was “shocked” that the trial court did not allow her to instruct the jury on the law during closing argument because “the Jury Instructions are key to the jury understanding how the law applies to the fact.”<sup>27</sup> However, as Civil Rule 51 advises, it is the trial court’s job to instruct the jury on the law, not counsel. Further, the trial court upheld its duty and fully instructed the jury on the law at the end of closing argument and the jury followed those instructions.<sup>28</sup>

**Proposition of Law 10: An expert witness who bases his opinion in part on his review of professional literature encountered throughout his career is not required to search the archives and locate specific literature that supports his opinion in order to comply with a subpoena duces tecum.**

Appellant argues that the trial court erred by allowing Defense witnesses to ignore the rules of discovery by failing to bring billing records and medical literature to their depositions. If a deponent does not comply with a subpoena *duces tecum*, a motion to compel can be filed. No motion to compel was filed in this case. Additionally, Appellant was still able to establish financial bias by asking Defense experts how much they charged for their participation in the case.<sup>29</sup> Counsel was also permitted to impeach the experts’ credibility by informing the jury that they had not complied with the subpoena.<sup>30</sup> Further, neither Dr. Kirkpatrick nor Dr. Rea based their opinions in this case on any specific literature; therefore, the request to produce literature is moot.<sup>31</sup>

---

<sup>25</sup> *Beard, supra.*

<sup>26</sup> *Pang, supra.*

<sup>27</sup> Appellants Brief, p. 13.

<sup>28</sup> (T.p. 855-886).

<sup>29</sup> (T.p. 688, 749, 759-760).

<sup>30</sup> (T.p. 689, 749).

<sup>31</sup> (T.p. 675, 721, 739).

Next, Appellant argues that the court erred by allowing Dr. Kirkpatrick to testify that the medical literature generally supported his opinion.<sup>32</sup> This Court in *Beard, supra.* stated:

There is a difference between a witness's referring to specific statements in professional literature as substantive evidence and an *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 latter 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.<sup>33</sup>

Based on the law, the trial court did not abuse its discretion by allowing this testimony.

Finally, Appellant alludes that the trial court allowed testimony by Dr. Lohr and Dr. Rea that was not previously revealed through deposition and was thus, "unfair surprise." A party may not argue matters that are not contained in the record.<sup>34</sup> Neither Dr. Lohr's nor Dr. Rea's deposition was filed with the court nor is there anything in the record to suggest that their testimony was inconsistent. Further, if such a discrepancy existed, Appellant's counsel could have exploited the opportunity and cross-examined the witnesses to test their credibility. No such cross-examination occurred.<sup>35</sup>

**Proposition of Law 11: An expert is not required to have performed the same surgery at issue to be qualified to testify as to its performance if he demonstrates that he has sufficient knowledge of the standards and procedure for performing the surgery.**

Where the fields of medicine overlap, a witness may qualify as an expert, even though he does not practice in the same specialty as the defendant.<sup>36</sup> The test is whether a particular witness

---

<sup>32</sup> (T.p. 721).

<sup>33</sup> *Beard, supra.* at 240.

<sup>34</sup> *State v. Aldridge* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500.

<sup>35</sup> (T.p. 628-642, 666-691).

<sup>36</sup> *Alexander v. Mt. Carmel Med. Ctr.* (1978), 56 Ohio St.2d 155, 157, 383 N.E.2d 564.

will aid the trier of fact in the search for the truth.<sup>37</sup> The admission of expert testimony is within the broad discretion of the trial court and will not be disturbed absent an abuse of discretion.<sup>38</sup>

Appellant argues that the trial court should not have allowed Dr. Rea, a neurosurgeon, to testify whether Dr. Lohr, a general surgeon, met the standard of care. Dr. Rea was primarily a causation expert.<sup>39</sup> However, since he has extensive experience operating on nerves, he was appropriately asked whether nerve injuries that occur during surgery equal a departure from the standard of care.<sup>40</sup> As a surgeon he was asked about the proper protocol required concerning follow-up care with a patient after surgery.<sup>41</sup> He was also asked what the standard of care required if a nerve injury was diagnosed and the patient needed to follow-up with a neurologist, a nerve specialist.<sup>42</sup> These are all questions that overlap specialties and apply to surgeons in general; thus, the trial court did not abuse its discretion by allowing the testimony.

Appellant argues that testimony regarding “scarring or fibrosis” of the nerve, as a probable cause of injury, should have been excluded as “science fiction fantasy.” First, Appellant made no objection to the testimony during trial.<sup>43</sup> Second, all three experts testified that they either knew that scarring could happen or that they had personally experienced it in their practice.<sup>44</sup>

Finally, Appellant argues that the “scarring or fibrosis” testimony should have been excluded because the experts could not cite to specific literature to support their opinions. Each Defense expert testified that the medical literature in general supported their opinions. As stated above, this

---

<sup>37</sup> *Id.* at 159.

<sup>38</sup> *Id.* at 158.

<sup>39</sup> (T.p. 648-661).

<sup>40</sup> (T.p. 653, 660).

<sup>41</sup> (T.p. 663).

<sup>42</sup> (T.p. 664, 683-685).

<sup>43</sup> (T.p. 739).

<sup>44</sup> (T.p. 632, 657-659, 721, 758).

Court in *Beard, supra*. held that this type of testimony is permissible.<sup>45</sup> Based on the law, the trial court did not abuse its discretion by allowing this testimony.

**Proposition of Law 12: Differences between an expert's testimony at deposition and trial are appropriate for cross-examination and go to the expert's credibility.**

Appellant argues that it was prejudicial for Dr. Kirkpatrick to testify differently at trial than he did during his deposition. On direct testimony, Dr. Kirkpatrick opined that the significance of Appellant's symptoms not occurring until months after the surgery meant that it likely resulted from a traction/bruise injury or scarring around the nerve.<sup>46</sup> Later, during cross-examination, Appellant's counsel attempted to impeach Dr. Kirkpatrick by pointing out that in his deposition he testified that both causes were equally possible. Dr. Kirkpatrick never testified on direct examination that a traction/bruise injury was more probable than scarring. However, during cross-examination he stated that after being asked by Defense counsel if he were to lean one way or the other between the two causes, he would lean slightly to a traction/bruise injury.

Appellant argues that Defense counsel's conduct was "disturbing," although she made no objection at trial. Appellant further laments that she was surprised and prejudiced by the testimony, yet she was fully able to take advantage of this "difference" and use it as impeachment of Dr. Kirkpatrick's credibility. This is wholly appropriate when examining witnesses and allows the jury to properly weigh and compare testimony. Additionally, no unfair prejudice could have resulted from the testimony because neither cause, either traction or scarring, supported Appellant's theory of injury. Further, Dr. Rea, a neurosurgeon, was Dr. Lohr's primary causation expert and testified to a probability that the mechanism of injury of the Appellant's spinal accessory nerve was scarring.<sup>47</sup>

---

<sup>45</sup> *Beard, supra*. at 240.

<sup>46</sup> (T.p. 719, 720).

<sup>47</sup> (T.p. 648-697).

**Proposition of Law 13: The sua sponte excusal of a potential juror by the trial court is not unfairly prejudicial to a party because it does not cause the seating of a biased juror and therefore does not taint the jury's impartiality.**

This Court has stated:

R.C. 2313.42 contemplates that 'good cause' exists for removal of a prospective juror when 'he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.' A prospective juror who has been challenged for cause should be excused 'if the court has any doubt as to the juror's being entirely unbiased.'

Because the trial court has the opportunity to observe the demeanor of the prospective juror and evaluate firsthand the sincerity of the responses to the questions, the trial court's position should be given great significance by a reviewing court.<sup>48</sup> Additionally, this Court has found:

[A]n erroneous excusal for cause \* \* \* is not cognizable error, since a party has no right to have any particular person sit on the jury. Unlike an erroneous denial of a challenge for cause, an erroneous excusal cannot cause the seating of a biased juror and therefore does not taint the jury's impartiality.<sup>49</sup>

In the instant case, Juror Johnson testified that she had had several bad experiences with physicians.<sup>50</sup> When asked whether she would carry those bad experiences into the trial, she stated, "I pray I won't."<sup>51</sup> She also testified that physicians "should know the body more than what they do know."<sup>52</sup> Taking the testimony as a whole, the trial court concluded that her answers were so controversial that both sides would not receive a fair trial.<sup>53</sup> Further, even if the juror was excused erroneously, it is not cognizable error because the excusal cannot cause the seating of a biased juror.

---

<sup>48</sup> *Beck v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

<sup>49</sup> *State v. Sanders* (2001), 92 Ohio St.3d 245, 2001 Ohio 189, 750 N.E.2d 90.

<sup>50</sup> (T.p. 150-152).

<sup>51</sup> (T.p. 153).

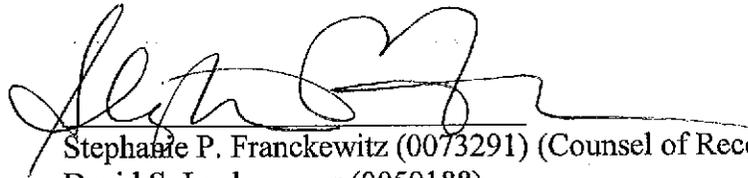
<sup>52</sup> (T.p. 156).

<sup>53</sup> (T.p. 158).

#### IV. CONCLUSION

Appellant received a fair trial in this case. The experienced trial court judge did not abuse its discretion on any matter and the jury's verdict should not be disturbed. The goals of any trial are for the substantial rights of the parties to be upheld and for substantial justice to be done. Both goals were accomplished in this case. Appellee's therefore request that this Court deny discretionary jurisdiction in this case.

Respectfully submitted,



Stephanie P. Franckewitz (0073291) (Counsel of Record)  
David S. Lockemeyer (0059188)  
Triona, Calderhead & Lockemeyer, LLC  
2021 Auburn Avenue  
Cincinnati, Ohio 45219  
(513) 576-1060 Fax: (513) 576-8792  
Attorney for Defendants-Appellees  
[dlockemeyer@tcl-law.net](mailto:dlockemeyer@tcl-law.net)  
[sfranckewitz@tcl-law.net](mailto:sfranckewitz@tcl-law.net)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been sent by ordinary U.S. mail this 10<sup>th</sup> day of March, 2008 upon the following:

John H. Metz  
4400 Carew Tower  
441 Vine Street  
Cincinnati, Ohio 45202-4119

  
Stephanie P. Franckewitz