

IN THE SUPREME COURT OF OHIO

GARY TISDALE and TAMMY TISDALE

09-0147

Plaintiffs-Appellees

On Appeal From The Lucas County Court of Appeals, Sixth Appellate District

v

Court of Appeals Case
No. L 07-1300

TOLEDO SURGICAL SPECIALISTS,
INC., and THE TOLEDO HOSPITAL,

Defendants-Appellants.

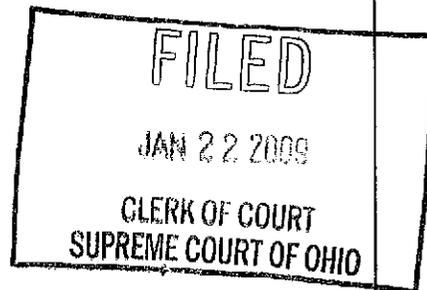
**MEMORANDUM IN SUPPORT OF JURISDICTION BY
DEFENDANT-APPELLANT THE TOLEDO HOSPITAL**

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

This cause presents two issues of critical import to civil litigation practice in Ohio Courts, that are of public or great general interest.

First, it is of public or great general interest whether the alleged erroneous denial of a litigant's challenge for cause of a juror will without more be presumed so prejudicial as to require reversal and a new trial, notwithstanding that the challenged juror was later excused upon the litigant's use of a peremptory challenge, and the litigant received a fair trial before an unbiased jury.

This Court has not addressed this issue in a civil case. The Court of Appeals has come to opposite conclusions in civil cases, with one Court concluding that being "forced" to use a peremptory was automatically reversible error where all peremptories were used, without any showing of prejudice, *McGarry v. Horlacher*, 149 Ohio App.3d 33, 2002-Ohio-316, and another Court applying a harmless error analysis to claimed error in denying a challenge for cause where the objectionable juror was excused peremptorily, *Hinkle v. Cleveland Clinic Found.*, 8th District 159 Ohio App.3d 351, 2004-Ohio-6853.

In the criminal context, this Court has followed federal precedent in adopting a harmless error rule as to constitutional error, *State v. Broom* (1988), 40 Ohio St.3d 277. In *Broom*, the Court followed *Ross v. Oklahoma* (1988), 487 U.S. 81 (1988), to hold that in order to state a constitutional violation, the defendant must use all of his peremptory challenges and demonstrate that one of the jurors seated was unsuccessfully challenged for cause and was not impartial. However, in evaluating a claim of error under state law, this Court held that an erroneous overruling of a challenge for cause is prejudicial and requires reversal in a criminal case if the accused eliminates the challenged venireman with a peremptory challenge and exhausts his

peremptory challenges before the full jury is seated. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, citing *State v. Tyler* (1990), 50 Ohio St.3d. 24, 30-31, 553 N.E.2d 576.

The better rule, which defendant submits should be endorsed by this Court at least in the civil context which it has not yet addressed, is that adopted by the federal courts in *U.S. v. Martinez-Salazar* (2000), 528 U.S. 304. In *Martinez-Salazar* the Court held that a litigant's exercise of peremptory challenges under the Federal Rules is not denied or impaired where the litigant chooses to use a peremptory challenge to remove a juror whom they believe should have been removed for cause. The Court reasoned that this voluntary election does not result in the loss of a challenge but, rather is a use in line with a principal reason for peremptories: to help secure a trial by an impartial jury. Moreover, the immediate choice of either standing on the objection or using a peremptory challenge to effect an instantaneous cure of the error, comports with the reality of the jury selection process, with challenges for cause and rulings upon them made quickly and under pressure, and in which counsel as well as the court must be prepared to decide, often between shades of gray, "by the minute." *U.S. v. Martinez-Salazar, supra*, p. 316.

The federal rule set forth in *U.S. v. Martinez-Salazar* (2000), 528 U.S. 304, is consistent with harmless error principles fundamental to the Ohio appellate process and the realities of litigation in this State. *McGarry v. Horlacher*, 149 Ohio App.3d 33, 2002-Ohio-316, relied upon by the Court of Appeals here, is fundamentally inconsistent with those realities, and Civ. R. 61. The limited resources of the Courts of this State should not be drained by unnecessary re-trials where a litigant has not demonstrated actual or even a real potential for prejudice, and was able to use all the peremptory challenges to which he was entitled by Civ. R. 47. The deliberations of the citizens of this State who sit as jurors should not be lightly disregarded based upon error which is rendered harmless by the seating of a fair and impartial jury.

The applicability of this harmless error analysis is even more compelling in the context of a civil jury trial, where the jury verdict need not be unanimous. As contrasted with a criminal trial, in which the verdict must be unanimous, where only three quarters of the jury may produce the ultimate verdict, the potential for prejudice is even more remote.

The rights and responsibilities of litigants disputing a trial court's ruling on a challenge for cause and the consequences of the trial court's decision denying a challenge for cause should be clarified by the Court for bench and bar.

Second, it is of great or public interest that the Court of Appeals remain true to the letter and spirit of decisions by this Court sharply limiting appellate court interference with trial court decisions regarding a challenge for cause of a juror based upon alleged bias. This Court has required that the appellant demonstrate an "abuse of discretion"-- that the trial court's "attitude is arbitrary, unreasonable, or unconscionable." *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 559 NE2d 1301.

Trial courts have been vested with discretion in subjectively evaluating the fairness of jurors seated for trial. Appellate courts should not interfere with that discretion where, as here, the appellate court sees in a dry transcript answers on voir dire which appear "inconsistent" to that Court, but which the trial court was satisfied demonstrated a fair juror. A trial court's subjective resolution of "inconsistencies" in a prospective juror's statements cannot equate to an attitude which is "arbitrary, unreasonable, or unconscionable."

STATEMENT OF THE CASE AND FACTS

Plaintiffs initially filed this medical malpractice case naming numerous defendants, including Jonathan Wright, M.D., a surgeon, Toledo Surgical Specialists, Inc., Dr. Wright's employer, and Ashraf Banoub, M.D., an anesthesiologist and employee of Anesthesiology Consultants of Toledo, and this defendant, The Toledo Hospital.

Plaintiffs claimed that defendants committed malpractice in failing to ensure external pneumatic cuffs ("EPC cuffs") were used after surgery to prevent blood clots from forming in Mr. Tisdale's legs (known as deep vein thrombosis, or "DVT") after surgery. Plaintiffs claimed that clots did form, causing a pulmonary embolism (clots blocking the pulmonary arteries), which resulted in permanent brain damage to Mr. Tisdale. (Opening statement, Tr. 3/26/07, pp. 170-172).

Prior to trial, plaintiff dismissed Dr. Banoub and Anesthesiology Consultants of Toledo. During voir dire, plaintiffs unsuccessfully challenged one of the potential jurors for cause, Ms. Demain (hereinafter, as referred to by the Court of Appeals in its opinion, "Ms. D."). (Tr. 3/26/07, p. 153) When the challenge for cause was denied, plaintiffs exercised the first of their three peremptory challenge to excuse Ms. D. (Id., p. 155), and the remaining challenges on two other jurors (Bechtel and Runch) (Id. pp. 156-157), and one alternate, Breymaier (Id, p. 157) Plaintiffs' counsel did not unsuccessfully challenge any juror for cause other than Ms. D., and did not express any dissatisfaction with the jury as finally seated.

One or two days into trial, plaintiffs dismissed former codefendants, surgeon Dr. Wright and his employer, Toledo Surgical Specialists, Inc. The jury of eight returned a verdict of no cause for action against The Toledo Hospital, with eight jurors finding negligence but seven of the eight finding no proximate cause. (Verdict form)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Where a litigant elects to use a peremptory challenge to remove a juror whom they believe should have been removed for cause, and thus cures such an error by exercising a peremptory challenge, he has not been deprived of any rule-based or constitutional right upon an adverse verdict by a jury on which no biased juror sat.

Proposition of Law No. 2: To be entitled to a new trial because of error in the denial of a challenge for cause of a potential juror who was then excused by the litigant's use of a peremptory challenge, the litigant must both have exhausted all of his peremptory challenges and demonstrate that one of the jurors seated was not impartial.

Proposition of Law No. 3: Unless a juror is challenged for cause, he is presumed impartial.

This Court should endorse the analysis of the United States Supreme Court in *U.S. v. Martinez-Salazar* (2000), 528 U.S. 304, and reject the rule applied by the Court of Appeals here, that “[t]he erroneous denial of a challenge for cause may be prejudicial because it forces a party to use a peremptory challenge on a prospective juror who should have been excused for cause, giving that party fewer peremptories than the law provides.” *Tisdale v. The Toledo Hospital*, 2008-Ohio-6539, ¶ 36, quoting *McGarry v. Horlacher*, 149 Ohio App.3d 33, 2002-Ohio-316, ¶ 14. As urged by defendant below, the error found on appeal here in the denial of a challenge for cause should be held harmless under Civ. R. 61, where plaintiffs elected to excuse the allegedly biased potential juror, Ms. D., by peremptory challenge, and the jury as constituted was not asserted or shown by plaintiffs to be impartial.

In Ohio, as in the federal system, the concept of a peremptory challenge is a creature of rule or statute, and is not required by the constitution. *U.S. v. Martinez-Salazar* (2000), 528 U.S. 304, 311, *State v. Johnson*, 2006-Ohio-4540, ¶ 19.

The peremptory challenge is part of our common-law heritage. . . . We have long recognized the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial jury. See, e.g., *Swain v. Alabama*, 380 U.S. 202, 212-213, 218-219 (1965); *Pointer v. United States*, 151 U.S. 396, 408 (1894). But we have long recognized, as well, that such challenges are auxiliary; unlike the right to an

impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. *Ross*, 487 U.S., at 88; see *Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges."). [*U.S. v. Martinez-Salazar*, *supra*, p. 311]

Plaintiffs here exercised all the peremptory challenges to which they were entitled by Civ. R. 47, excusing three jurors, including Ms. D, whom plaintiffs had unsuccessfully challenged for cause. That an appellate court later determined that Ms. D should have been excused for cause does not establish that plaintiffs did not receive the number of peremptory challenges which state law provides, nor is it a basis for a new trial, as plaintiff received a trial before a fair jury.

In *State v. Broom* (1988), 40 Ohio St.3d 277, this Court cited and followed the Supreme Court's analysis in *Ross v. Oklahoma* (1988), 487 U.S. 81 (1988), in holding that an erroneous denial of a challenge for cause was not a basis for reversal as constitutional error in a criminal case, where that juror was excused peremptorily, and defendant did not demonstrate that one of the jurors seated was not impartial.

In *Ross v. Oklahoma* (1988), 487 U.S._____, 101 288 L. Ed. 2d 80, 108 S. Ct. 2273, the Supreme Court further explained that any claim that the jury was not impartial is not focused on the juror excused by the exercise of the peremptory challenge, but rather is focused on the jurors who ultimately sat. Therefore, in order to state a constitutional violation in this situation, the defendant must use all of his peremptory challenges and demonstrate that one of the jurors seated was not impartial. Unless a juror is challenged for cause, he is presumed to be impartial. Even if the court erred in denying the appellant's motion, appellant has not been denied a right to an impartial jury, nor has he been deprived of his right to due process in this context by being "forced" to use a peremptory challenge. [*State v. Broom* (1988), 40 Ohio St.3d 277, 287-289]

Consistent with *Broom*, this Court should now endorse the analysis of the U.S. Supreme Court in *U.S. v. Martinez-Salazar* (2000), 528 U.S. 304, in the context here of an alleged violation of state procedural rules entitling a party to a certain number of peremptory challenges.

In *U.S. v. Martinez-Salazar, supra*, p. 307, the Court held that where defendant elects to use a peremptory challenge to remove a juror who should have been removed for cause, and thus “to cure such an error by exercising a peremptory challenge,” “he has not been deprived of any rule-based or constitutional right” upon conviction by a jury “on which no biased juror sat.” The Court in *Martinez-Salazar, supra*, p. 306, rejected the contention that the trial court’s “for-cause mistake compelled the defendant to challenge the biased juror peremptorily, thereby reducing his allotment of peremptory challenges by one,” reasoning:

A hard choice is not the same as no choice. Martinez-Salazar, together with his codefendant, received and exercised 11 peremptory challenges (10 for the petit jury, 1 in selecting an alternate juror). That is all he is entitled to under the Rule.

After objecting to the District Court's denial of his for cause challenge, Martinez-Salazar had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a challenge to remove Gilbert because he did not want Gilbert to sit on his jury. This was Martinez-Salazar's choice. (fn3) The District Court did not demand - and Rule 24(b) did not require - that Martinez-Salazar use a peremptory challenge curatively.

In choosing to remove Gilbert rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury. [*U.S. v. Martinez-Salazar, supra*, p. 306, emphasis added]

So too here, the plaintiffs elected to use the first of their three peremptory challenges to excuse Ms. D, rather than choosing the option of letting Ms. D sit on the jury and, upon an adverse verdict, appealing. To paraphrase the Court in *Martinez-Salazar*, the trial court did not demand, and Civ. R. 47 did not require, that plaintiffs use a peremptory challenge curatively.

Admittedly, this Court has recently stated that an erroneous overruling of a challenge for cause is prejudicial and requires reversal in a criminal case if the accused eliminates the challenged venireman with a peremptory challenge and exhausts his peremptory challenges before the full jury is seated. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, citing *State v.*

Tyler (1990), 50 Ohio St.3d. 24, 30-31, 553 N.E.2d 576. This conclusion, however, is inconsistent with *Broom*, *Martinez-Salazar* and Civ. R. 61, and should not be followed in this civil action

The conclusion in *Martinez-Salazar* is consistent with, and defendant would submit compelled by, the principle fundamental to appellate review embodied in the harmless error rule, Civ. R. 61. In a civil case such as this, an error in denying a challenge for cause and forcing a party to use a peremptory challenge should not be deemed to require reversal, unless the appellant can establish prejudice. Ohio law is clear that error which is harmless or not shown to be prejudicial is not a basis for reversal. Civ. R. 61. A finding that a trial court committed error does not of a necessity require reversal unless such error is prejudicial to the complaining party. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 164-165, 407 N.E.2d 490, 494. The error must affect substantial rights of the complaining party, or substantial justice must not have been done. Civ. R. 61, *O'Brien, supra*.

Although the challenge for cause of Ms. D. was denied, plaintiffs' use of the first of their three peremptory challenges to excuse Ms. D. cured that error, rendering the ruling on the challenge for cause itself harmless. The only question remaining is whether plaintiffs' election to use their peremptory challenge to avoid a biased jury, rather than waiting for appeal, was itself error affecting the substantial rights of plaintiffs, requiring reversal. That voluntary election, in light of the impartial jury which tried this case, compels the conclusion that the answer is no, and that substantial justice was done here.

Furthermore, to establish reversible error, plaintiffs must have demonstrated that the jurors who actually sat were not impartial. There was no suggestion by plaintiffs' counsel in the trial court, either at voir dire or in moving for a new trial, that counsel was not satisfied with the jurors who actually sat. While plaintiffs in their brief on appeal suggested for the first time that

if counsel had an additional peremptory, he would have used it on another juror who was a nurse, Juror Carter, plaintiffs' counsel never challenged Ms. Carter for cause, nor voiced any discomfort with her sitting on the jury. Indeed, Juror Carter's answers during voir dire do not reflect any possible prejudice against plaintiffs. (Tr. 3/26/07, pp. 9-10, 45-46, 83-84, 104-105) As this Court declared in *Broom, supra*, [u]nless a juror is challenged for cause, he is presumed to be impartial."

Finally, the verdict form reflects the vote for defendant here was of seven out of eight jurors, so Juror Carter's vote was not outcome-determinative, as only six votes (three fourths) was required. Civ. R. 48. Indeed, the rule in *Martinez-Salazar* is even more appropriate in a civil setting such as this where unanimity of jury is not required, such that exhaustion of peremptory challenges cannot be presumed prejudicial. In contrast, in a criminal action, the vote of every juror is determinative, so that there is at least some potential for prejudice where an objectionable juror upon whom the appellant was unable to exercise a peremptory challenge remains on the jury.

Accordingly, prejudicial error warranting a new trial did not exist in this case.

Proposition of Law No. 4: A trial court's decision under R.C. 2313.42(J) is reviewed for an abuse of discretion and must be affirmed unless the trial court's attitude is arbitrary, unreasonable, or unconscionable.

Proposition of Law No. 5: Where a prospective juror upon questioning ultimately declares she can be fair, and the trial court finds this credible so as to deny a challenge for cause under R.C. 2313.42(J), the Court of Appeals may not find an abuse of discretion by the trial court because the juror gave "inconsistent" answers.

Where a juror is challenged under R.C. 2313.42(J) on the ground that "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," *Id.*, the evaluation of the challenge is within the discretion of the trial court.

Berk v. Matthews (1990), 53 Ohio St.3d 161, 559 NE2d 1301. R.C. 2313.42(J) requires the

trial court to make a subjective determination about potential juror's fairness and impartiality. *Hall v. Banc One Management Corp*, 114 Ohio St.3d 484, 2007-Ohio-4640, ¶ 1. A trial court's decision under R.C. 2313.42(J) is reviewed for an abuse of discretion; "the trial court's determination must be affirmed absent a finding by the appellate court that the trial court's attitude is arbitrary, unreasonable, or unconscionable." *Berk v. Matthews, supra* at 169.

In its opinion in this matter, after quoting an incomplete part of the questioning of Ms. D., *Tisdale v. The Toledo Hospital*, 2008-Ohio-6539, ¶¶ 10--34, the Court of Appeals stated that "a review of the transcript from the jury voir dire reveals that Ms. D.'s responses are inconsistent," with regard to her ability to be impartial. *Tisdale v. The Toledo Hospital*, ¶ 50. The Court then went on to declare: "Although the trial court tried to rehabilitate Ms. D., lingering doubts exist regarding whether she could be entirely unbiased given Ms. D.'s own sense of a conflict of interest and extensive contacts with the remaining defendants and witnesses." *Tisdale*, ¶50. The Court of Appeals then concluded:

In light of the uncertainty that remained regarding Ms. D.'s own assessment of her ability to be entirely unbiased and that numerous potential jurors remained available for voir dire questioning, we find that the lower court was unreasonable and abused its discretion in denying appellants' motion to excuse Ms. D. from the jury for cause. The first assignment of error is therefore well-taken. [*Tisdale* ¶50]

Such "lingering doubts," and "uncertainty," however, were those only of the Court of Appeals, and not of the trial court which made the subjective determination that Ms. D. could be fair in denying the challenge for cause. Indeed, the Court of Appeals in its opinion omits in the colloquy it quotes Ms. D.'s further answer, which revealed that the "inconsistency" in her answers ultimately resolved in favor of her ability and commitment to be fair. The Court of Appeals quoted the following:

MR. WEINBERGER:

With respect to the fact that he's your boss, wouldn't that influence the way in which you would judge his conduct in this case, his testimony, his orders, whatever?

MS. D.: I would say no, but then human nature, I don't know.
[Tr., p. 80, quoted in *Tisdale v. Toledo Hospital*, 2008-Ohio-6539, ¶ 34, emphasis added]

The transcript of that exchange between Ms. D.in and plaintiffs' counsel continued, however:

MR. WEINBERGER: Well -

MS. D.: I would say no.

MR. WEINBERGER: Well, I mean that's the whole point of the question.

MS. D.: Right. I say no I would not, you know, just go along with him because he is my boss, believe every word he says. [Tr., p. 81, emphasis added]

Just as inconsistencies in a witness's testimony are for the trier of fact and not an appellate court to resolve, so too should inconsistencies in a potential juror's answers be for the trial court to resolve subjectively, based upon first-hand observation of the juror's demeanor and testimony. A trial court's subjective resolution of "inconsistencies" in a prospective juror's statements cannot properly be held by an appellate court to constitute an attitude which is "arbitrary, unreasonable, or unconscionable," required before a trial court may be found to have abused its discretion. *Berk v. Matthew, supra*.

The Court of Appeals' statement that the trial judge "tried to rehabilitate" Ms. D., *Tisdale*, ¶50, is not a fair characterization of the colloquy between the trial court, counsel and the juror. The trial judge was appropriately inquiring into Ms. D.'s background, feelings and impressions in order to make his own subjective determination in accord with the dictate of this Court in *Hall* and *Berk*. At the time, the trial court was in the position, not shared by the Court of Appeals, of hearing and seeing the potential juror's responses and demeanor. The

Court of Appeals failed to apply the proper standard and to accord deference to the trial court's superior position to evaluate the juror's credibility and potential for bias.

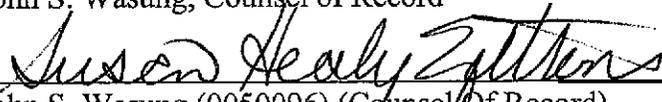
CONCLUSION

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

Respectfully submitted,

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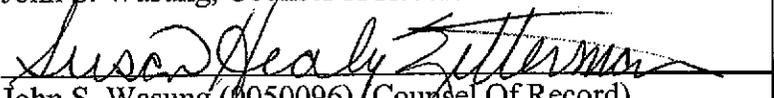
Dated: January 21, 2009

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served via regular U.S. Mail on the 21st. day of , 2009, on the following parties: Peter H. Weinberger, Spangenberg, Shibley & Liber LLP, 1900 East Ninth Street, Suite 2400, Cleveland, Ohio 44114, David W. Goldense, David W. Goldense, Co., L.P.A., Terminal Tower, 50 Public Square, Suite 920, Cleveland, Ohio 44113 and Stephen B. Pershing, Center For Constitutional Litigation, PC, 777 6th Street, N.W., Suite 520, Washington, D.C. 20001-3723.

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Dated: January 21, 2009

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Gary Tisdale, et al.

Court of Appeals No. L-07-1300

Appellants

Trial Court No. CI020030427

v.

Toledo Surgical Specialists, Inc., et al.

DECISION AND JUDGMENT

Appellee

Decided: DEC 12 2008

* * * * *

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and David W. Goldense, for appellants.

John S. Wasung, Susan Healy Zitterman, and Anne M. Brossia, for
appellee The Toledo Hospital.

* * * * *

PIETRYKOWSKI, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas in a medical malpractice action in which the court denied the motion for a new trial filed by plaintiffs-appellants Gary and Tammy Tisdale following a jury verdict in favor

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of defendant-appellee The Toledo Hospital. Appellants now challenge the denial of their motion for a new trial, as well as the underlying verdict, as follows:

{¶ 2} "I. Assignment of Error No. 1: The trial court impermissibly refused to excuse a juror who should have been dismissed for cause.

{¶ 3} "II. Assignment of Error No. 2: By refusing to allocate peremptory jury challenges equally between plaintiffs and defendants, the trial court compromised the plaintiffs' right of peremptory challenge in violation of Ohio constitutional guarantees of jury trial, equal protection, and due process."

{¶ 4} On August 4, 2003, appellants filed a lawsuit asserting claims of medical negligence and loss of consortium against Toledo Surgical Specialists, Inc., Dr. Jonathan D. Wright, The Toledo Hospital, Anesthesiology Consultants of Toledo, Inc., Dr. Ashraf Banoub, and several other defendants who are no longer relevant to this case. Appellants' claims originated out of the care that Gary Tisdale received after a hernia operation performed by Dr. Wright at The Toledo Hospital on August 5, 2002, and during which Dr. Banoub was the anesthesiologist. Although both Drs. Wright and Banoub ordered the use of external leg cuffs on Gary Tisdale's legs to prevent blood clots from forming (a condition known as deep vein thrombosis or DVT), a clot nevertheless formed and traveled to Gary's lungs causing a pulmonary embolism and resulting in brain damage and blindness. The Tisdales alleged that the cuffs were never put into place by the nursing staff of The Toledo Hospital and that Gary's injuries resulted from this oversight.

{¶ 5} Prior to trial, appellants voluntarily dismissed Dr. Banoub and Anesthesiology Consultants of Toledo as defendants in the case. Dr. Banoub, however, remained on the witness list. Then, two days after the start of the trial, appellants stipulated to the dismissal with prejudice of all claims against Dr. Wright and Toledo Surgical Specialists, Inc. The Toledo Hospital remained the only defendant for the duration of the trial. At the conclusion of the trial, the jury found in favor of The Toledo Hospital and against appellants. In answering interrogatories, however, the jury concluded that while The Toledo Hospital was negligent, its negligence was not a proximate cause of Gary Tisdale's injuries.

{¶ 6} Thereafter, appellants filed a motion for a new trial in which they asserted that they had been denied a fair trial during the jury selection process. Relevant to the issues now before us on appeal, appellants asserted that the court denied them their right to a fair and impartial jury by refusing to grant them the same number of peremptory challenges as the combined defendants and by refusing to grant their challenge for cause to remove juror number five, Ms. D., from the panel. Because the trial court denied their challenge for cause, appellants were forced to use one of their three peremptory challenges to remove Ms. D. from the jury panel.

{¶ 7} In an opinion and judgment entry of August 14, 2007, the lower court denied the motion for a new trial. In pertinent part, the court concluded that because the defenses of Dr. Wright and his employer, Toledo Surgical Specialists, Inc., were distinct

from those of The Toledo Hospital, the defendants were entitled to a combined total of six peremptory challenges and appellants were entitled to three. On the issue of appellants' challenge for cause to remove Ms. D. from the jury panel, the court determined that despite her employment history, the voir dire demonstrated that she could have been a fair and impartial juror. Appellants now challenge the trial court's denial of their motion for a new trial, as well as the underlying verdict, on appeal.

{¶ 8} In their first assignment of error, appellants challenge the trial court's denial of their request to remove juror Ms. D. for cause. Appellants challenged Ms. D. for cause, asserting that she had an interest in the case, her relationship to the defendant hospital was tantamount to being an employee or agent of the hospital, and that she admitted she could not be an impartial juror. This challenge was based on Ms. D.'s responses to questioning during voir dire. Ms. D. revealed that she is a nurse anesthetist and that although she is not employed by The Toledo Hospital, she has worked there for 30 years and has worked with Dr. Wright. Initially, Ms. D. stated that she believed she could be fair and impartial and could set aside any previous opinions she may have had regarding Dr. Wright and base her opinion solely on what she heard from the witness stand. Subsequently, however, she revealed that her employer is Anesthesiology Consultants of Toledo, the group that also employs Dr. Banoub. Anesthesiology Consultants of Toledo and Dr. Banoub had both been named defendants in this case and, although both had been dismissed, Dr. Banoub was still on the witness list as he had

administered the anesthesia to Gary Tisdale during the operation at issue. The court then questioned Ms. D. as follows:

{¶ 9} "THE COURT: Let me ask the ultimate question. This is what we are going to – as to whether you can listen to all the evidence regardless of whether you may have been acquainted or had some working relationship to any individual that may – that may be called – and I use that – if you make the assumption that after you have listened to all of the evidence that was presented and you and your fellow jurors and the recognizant numbers decided that yes, the Toledo Hospital was negligent, yes, Dr. Wright was negligent, and that you would be responsible for returning verdicts against those folk accordingly, knowing that you had to go back to the work place where you would see some of these individuals and some would know that – let's make the assumption that they all know about it and you – would that fact and that appreciation, would that adversely effect your ability to be able to consider the evidence and to be able to render verdicts based on that evidence despite the fact that you may be acquainted in some fashion with individuals from one of the entities that is involved here?

{¶ 10} "MS. D[.]: It just seems like it's going to become a conflict of interest, you know, when – I don't think I would feel any differently going back to work in my setting.

{¶ 11} "THE COURT: Yes.

{¶ 12} "MS. D[.]: But I just feel in discussion here that it's a conflict of interest if, you know, one of my bosses is called, not that I would, you know, weigh – say definitely

he is 100 percent right, you know, he still – because it's not in my field per se, you know? It's totally a different field, but I just kind of sense, you know, a conflict of interest here."

{¶ 13} Appellants' counsel then continued the voir dire of Ms. D.:

{¶ 14} "MR. WEINBERGER: And when you talk about the conflict of interest that you have, it's a conflict because after all – and, you know, I mean I certainly understand your situation having spent 30 years at Toledo Hospital working in the operating room, that it would be difficult for you to not believe the witnesses that are brought on behalf of the hospital because you have worked with many of them over the years, right?

{¶ 15} "MS. D[.]: Probably so.

{¶ 16} "MR. WEINBERGER: So as you now search your mind, Mrs. D[.], do you believe that you really, shouldn't serve on the jury because of these issues?

{¶ 17} "MS. D[.]: Probably so."

{¶ 18} Appellants' counsel then moved to exclude Ms. D. from the venire. The court denied the motion and the questioning continued as follows:

{¶ 19} "THE COURT: The Court understands the issues that have been presented, but the ultimate question as you are already forewarned about these potential kinds of issues, whether you could set aside any of the experiences and the knowledge as a result of the work that you do, set that aside and listen to the evidence that is presented, and in discussion with your fellow jurors be confined to just that evidence as presented and

render verdicts accordingly applying instructions of law that the Court would give.

Would you be able to do that?

{¶ 20} "MS. D[.]: I believe I can do that, listen to the testimony. I know that my experience – you know, I have been through a lot of cases, you know, where many – perhaps the same type of, you know, case, but I would, you know, hope that I would be able to just, you know, do my job, listen to it and not favor one side or the other.

{¶ 21} "* * *

{¶ 22} "MR. WEINBERGER: So the – again, because of what you said about the fact that you believe that you have a conflict of interest and because of the fact that you have this wealth of experience, wouldn't it be difficult for you to decide this case without regard to your own personal experiences in the operating room?

{¶ 23} "MS. D[.]: I guess I feel my personal experiences in the operating room in this – at least – I mean I feel I have the background knowledge to kind of see what is right and what is wrong with the knowledge that I have of, you know, what is going to be presented.

{¶ 24} "* * *

{¶ 25} "MR. WEINBERGER: Wouldn't it be difficult for you to set aside what you know about that and judge this case without regard to what your own personal knowledge is?

{¶ 26} "MS. D[.]: I don't believe so.

{¶ 27} "MR. WEINBERGER: When you indicated before that you have a - you feel that you are in a conflict what do you mean?

{¶ 28} "MS. D[.]: Well, I guess that was pretty much when you -- as far as Dr. Banoub, you know, testifying, whatever, I mean he is my boss, one of my bosses. That's not to say that we all feel the same way, all have the same ideas. I mean I guess that pretty much is conflict of interest since he is in my specific field.

{¶ 29} "MR. WEINBERGER: And because of that conflict of interest and the possibility that he is not only going to be a witness in this case but there are orders that he wrote in this case, would you have difficulty judging his conduct without regard to the fact that you know him, and that you have had experiences with him?

{¶ 30} "MS. D[.]: No.

{¶ 31} "MR. WEINBERGER: Well --

{¶ 32} "MS. D[.]: I mean -- I know it sounds -- yeah. As far as his conduct I mean that whether -- I guess it intimidates me a little bit that, you know, he is my boss and that, but whether you -- if he gave a wrong -- it's not I would agree with exactly what he says or everything he says.

{¶ 33} "MR. WEINBERGER: With respect to the fact that he is your boss, wouldn't that influence the way in which you would judge his conduct in this case, his testimony, his orders, whatever?

{¶ 34} "MS. D[.]: I would say no, but then human nature. I don't know."

{¶ 35} Ms. D. then responded that if she participated in a verdict for appellants, she did not believe she would be criticized for that upon her return to work. Subsequently, appellants challenged Ms. D. for cause, but the court overruled the challenge. As a result, appellants were forced to exercise one of their peremptory challenges to remove Ms. D. from the jury.

{¶ 36} Appellants now assert that they were prejudiced by the lower court's denial of their challenge for cause. The denial prejudiced them, they contend, because they were required to use a peremptory challenge to prevent Ms. D. from being seated on the jury and, therefore, were deprived of the opportunity to use a peremptory challenge to remove Ms. C. from the venire. Ms. C. had previously worked as a nurse at The Toledo Hospital and was ultimately seated on the jury. In support of their argument, appellants cite *McGarry v. Horlacher*, 149 Ohio App.3d 33, 38, 2002-Ohio-3161, ¶ 14, in which the court held that "[t]he erroneous denial of a challenge for cause may be prejudicial because it forces a party to use a peremptory challenge on a prospective juror who should have been excused for cause, giving that party fewer peremptories than the law provides."

{¶ 37} Juror challenges are controlled by two statutes, R.C. 2313.42 and 2313.43. R.C. 2313.42 provides in relevant part:

{¶ 38} "The following are good causes for challenge to any person called as a juror:

{¶ 39} ** * *

{¶ 40} "(B) That he has an interest in the cause:

{¶ 41} "* * *

{¶ 42} "(E) That he is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;

{¶ 43} "* * *

{¶ 44} "(I) That 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.

{¶ 45} "Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court."

{¶ 46} R.C. 2313.43 then provides:

{¶ 47} "In addition to the causes listed under section 2313.42 of the Revised Code, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render him at the time an unsuitable juror. The validity of such challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased."

{¶ 48} As we stated in *Parusel v. Ewry*, 6th Dist. No. L-02-1402, 2004-Ohio-404, ¶ 36-37, two standards have emerged from these statutes. "The 'good causes' for juror challenge enumerated in R.C. 2313.42(A)-(I), if proven, per se disqualify a prospective

juror from service. The issue on appeal for decisions concerning these challenges is whether the weight of the evidence presented to the court supports its determination that an R.C. 2313.42(A)-(I) cause has or has not been proven. R.C. 2313.42(J) and 2313.43, to which it is related, are reviewed on an abuse of discretion standard. The trial court's determination must be affirmed absent a finding by the appellate court that the trial court's attitude is arbitrary, unreasonable, or unconscionable." *Id.* citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶ 49} In the present case, appellants challenged Ms. D. for cause under R.C. 2313.42(B) and (E), and under R.C. 2313.42(J) and 2313.43. Appellants, however, provided no incontrovertible evidence that Ms. D. had an interest in the case or was in fact an employee, agent or steward of The Toledo Hospital or Dr. Wright. That is, although Ms. D. worked at The Toledo Hospital for 30 years, she was not an employee, agent or steward of the hospital.

{¶ 50} Our focus, therefore, falls to appellants' arguments pursuant to R.C. 2313.42(J) and 2313.43 that Ms. D. disclosed by her answers that she could not be a fair and impartial juror or entirely unbiased. A review of the transcript from the jury voir dire reveals that Ms. D.'s responses are inconsistent. They fluctuate from "I believe I can be, you know, fair and impartial" to "I just kind of sense, you know, a conflict of interest here" and "I guess it intimidates me a little bit that, you know, he is my boss and that" (referring to Dr. Banoub, her employer, as a potential witness). Although the trial court

tried to rehabilitate Ms. D., lingering doubts exist regarding whether she could be *entirely* unbiased given Ms. D.'s own sense of a conflict of interest and extensive contacts with the remaining defendants and witnesses. As a juror, Ms. D. would have been required to judge the credibility of people she had worked with for many years, including, possibly, her immediate boss. See *McGarry*, supra ¶ 23 ("[I]t is axiomatic that [plaintiff] was entitled to jurors who were free from personal relationships with [defendant], and we are somewhat baffled by the trial court's determination not to excuse [juror] for cause in light of the information presented during voir dire about her relationship with [defendant].")

{¶ 51} In light of the uncertainty that remained regarding Ms. D.'s own assessment of her ability to be entirely unbiased and that numerous potential jurors remained available for voir dire questioning, we find that the lower court was unreasonable and abused its discretion in denying appellants' motion to excuse Ms. D. from the jury for cause. The first assignment of error is therefore well-taken.

{¶ 52} In their second assignment of error, appellants challenge the trial court's order giving them only three peremptory challenges while the defendants were allowed a total of six peremptory challenges. Appellants assert that this discrepancy violated their constitutional rights to due process and equal protection.

{¶ 53} Because The Toledo Hospital is the only remaining defendant in the case, this will not be an issue should the case again go to trial upon remand. Accordingly, we need not address the second assignment of error and find it moot.

{¶ 54} On consideration whereof, the court finds that substantial justice has not been done the parties complaining and the judgment of the Lucas County Court of Common Pleas is reversed. This case is remanded to that court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

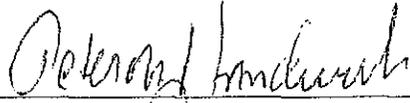
JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, P.J.

Thomas J. Osowik, J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.