

ORIGINAL

Case No. 2009-1715

**In the Supreme Court of Ohio**

APPEAL FROM THE COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY, OHIO  
CASE NO. 01-08-65

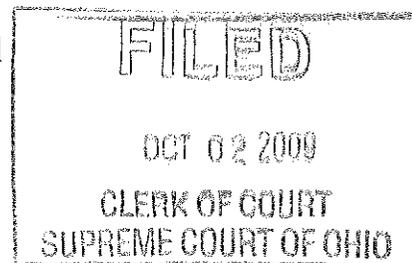
JEFFREY GEESAMAN, et al  
*Plaintiffs-Appellees*

v.

ST. RITA'S MEDICAL CENTER, et al  
*Defendant-Appellees*

and

JOHN COX, D.O.  
*Defendant-Appellant*



**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT  
LIMA RADIOLOGY ASSOCIATES, INC.**

Wayne E. Waite (0008352)  
FREUND, FREEZE & ARNOLD  
1800 One Dayton Centre  
1 South Main Street  
Dayton, OH 45402  
(937) 222-2424 phone  
(937-425-0207 fax  
[wwaite@ffalaw.com](mailto:wwaite@ffalaw.com)

*Attorney for Defendant-Appellant  
Lima Radiology Associates, Inc.*

Dennis P. Mulvihill (0063996)  
Gregory S. Scott (0067255)  
LOWE EKLUND WAKEFIELD &  
MULVIHILL CO., L.P.A.  
610 Skylight Office Tower  
1660 West 2<sup>nd</sup> Street  
Cleveland, OH 44113-1454  
(216) 781-2600 Phone  
(216) 781-2610 Fax  
[dmulvihill@lewm.com](mailto:dmulvihill@lewm.com)  
[gscott@lewm.com](mailto:gscott@lewm.com)

*Attorneys for Plaintiffs-Appellees*

Irene C. Keyse-Walker (0013143)  
TUCKER ELLIS & WEST LLP  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, OH 44115-1414  
(216) 592-5000 Phone  
(216) 592-5009 Fax  
[Ikeyse-walker@tuckerellis.com](mailto:Ikeyse-walker@tuckerellis.com)

*Attorney for Defendant-Appellant  
John Cox, D.O.*

Patrick K. Adkinson (0016980)  
ADKINSON LAW OFFICE  
4244 Indian Ripple Road, Suite 150  
Dayton, OH 45440  
(937) 43109660 Phone  
(937) 228-0944 Fax  
[Pka.adklaw@bizwoh.rr.com](mailto:Pka.adklaw@bizwoh.rr.com)

*Additional Counsel for Defendant-  
Appellant John Cox, D.O.*

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST .....	1
II. STATEMENT OF THE CASE AND FACTS .....	2
III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW .....	5
Proposition of Law No. 1 .....	5
Appellate jurisdiction for review does not include the ability to affirm, modify, or reverse a judgment in favor of a defendant when there was no finding by trial judge or jury as to that defendant's liability on the basis of respondeat superior and no assignment of error was asserted relative to that defendant.	
IV. CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

**APPENDIX**

**Appx. Page**

Opinion of the Allen County Court of Appeals (Aug. 10, 2009) .....	1
Judgment Entry of the Allen County Court of Appeals (Aug. 10, 2009) .....	31

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

This case involves one of the most basic questions of appellate jurisdiction necessary to all cases which are appealed: Does an appellate court have jurisdiction to remand a claim based on respondeat superior when there has been no evidence submitted supportive of a respondeat superior claim, no finding by judge or jury relative to a respondeat superior claim, and consequently, no final appealable order or assignment of error regarding a respondeat superior claim? In the interest of consistency and predictability of the judiciary, the answer should be no.

It is noted in the opinion written by the Third District Court of Appeals that there was no finding against Defendant-Appellant, Lima Radiology Associates, Inc. ("LRA"), and its decision applies to Dr. John Cox only. (App. Op. at ¶ 12, fn. 2, Appx. 6). The court of appeals remanded the cause of action as against Dr. Cox only. (App. Op. at ¶ 63, Appx. 30). The Third District erred, however, when it did not explicitly decline jurisdiction as to LRA on the respondeat superior claim, and also when it did not clarify that no cause was remanded as against LRA.

In several instances throughout its opinion, the Third District stated that its decision applied only to Dr. Cox, and inferred that the judgment in favor of LRA remained undisturbed. The court wrote the following,

Based on all of the foregoing, the judgment of the trial court in favor of Dr. Almudallal is affirmed, the judgment of Dr. Cox is reversed, and the cause remanded to the trial court for further proceedings consistent with this opinion. (App. Op. at ¶ 63, Appx. 30).

The Complaint names Lima Radiology Associates (LRA) under the doctrine of respondeat superior as the employer of Dr. Cox or that Dr. Cox was an owner of LRA. The judgment entry on the jury's verdict indicates that LRA was dismissed pursuant to the verdict. However, LRA's involvement was not mentioned during trial nor was there any finding by the jury in regards to LRA. Rather, all parties acted as if the case were solely against Dr. Cox and Dr. Almudallal. (App. Op. at ¶ 12, fn. 2, Appx. 6).

Therefore, this assignment of error does not apply to the verdict rendered in favor of Dr. Almudallal, and we address this issue only as it applies to Dr. Cox. (App. Op. at ¶ 19, Appx. 10).

[W]e address this issue only as it applies to Dr. Cox. (App. Op. at ¶ 45, Appx. 23).

The Third District should have explicitly stated that no cause was remanded against LRA. Two reasons support this Court's review of the Third District's decision. First, a court of appeals only has jurisdiction to review and modify, affirm, or reverse final appealable orders. Because Plaintiffs-Appellees entirely failed to prove that LRA was liable for the negligence of Dr. Cox on a theory of respondeat superior, and because there was no finding by judge or jury regarding LRA's potential vicarious liability, there was no final appealable order over which the Third District maintained jurisdiction to reverse and remand. Second, a court of appeals should not be permitted to review errors not properly set forth in the appellant's brief. Plaintiffs-Appellees did not cite any error for the Third District's review regarding the judgment in favor of LRA. Instead, Plaintiffs-Appellees proceeded at the appellate level just as they did in the trial court—as if the case were just against Drs. Cox and Almudallal without any mention of LRA in their brief. (App. Op. at ¶ 12, fn. 2, Appx. 6).

This Court should grant jurisdiction to hear this case and confirm the decision of the Third District reversed and remanded the case only as to Dr. Cox and not LRA. A decision from this Court will clarify the parameters of appellate jurisdiction when a court of appeals reviews a case in which there is no finding by judge or jury against a defendant and no assignment of error relative to that defendant.

## **II. STATEMENT OF THE CASE AND FACTS**

On March 31, 2005, Plaintiff-Appellee, Jeffrey Geesaman, presented to the emergency department of St. Rita's Medical Center. Mr. Geesaman, who had a history of obesity, poorly

controlled hypertension, smoking, and alcohol consumption, complained of dizziness, balance issues, slurred speech, problems with his vision, and vomiting. The emergency medicine physician suspected a stroke or transient ischemic attack and contacted neurologist, Dr. Ali Almodallal. After discussion, Mr. Geesaman was admitted to the internal medicine department and Dr. Almodallal was to provide a neurological consult. Mr. Geesaman was placed on a number of different medications, including aspirin.

The following day, Dr. Almodallal ordered an MRI of Mr. Geesaman's brain, among other tests. The MRI was read by Defendant-Appellant, Dr. John Cox, a neuroradiologist. Because the diffusion weighted images did not appear when Dr. Cox accessed Mr. Geesaman's MRI on the computer, Dr. Cox did not review those images and concluded that the MRI was normal. Accordingly, Dr. Almodallal ruled out a stroke and discharged Mr. Geesaman from his neurological care with instructions to follow up with him for additional testing to determine other possible conditions for Mr. Geesaman's symptoms. Dr. Almodallal testified he told Mr. Geesaman to continue taking aspirin every day. Mr. Geesaman, however, testified Dr. Almodallal never gave this instruction. Mr. Geesaman was discharged from the hospital on April 2, 2005.

On April 5, 2005, Mr. Geesaman returned to the emergency room with increased symptoms and was diagnosed with having a stroke. At this time, a review of the first MRI revealed that Mr. Geesaman had an earlier stroke. Mr. and Mrs. Geesaman filed a complaint for medical malpractice against Dr. Almodallal, Dr. Cox, and his employer, LRA (among others). As against LRA, Plaintiffs-Appellees pled a cause of action under the doctrine of respondeat superior.

During discovery, Dr. Cox admitted that he breached the standard of care by failing to review the diffusion weighted images of the first MRI. At trial, Plaintiffs-Appellees argued that three additional days of aspirin would, more likely than not, have prevented the April 5, 2005 stroke. Defendants, on the other hand, argued that aspirin therapy would have been ineffective and further, even if the first stroke had been identified, Mr. Geesaman would have more likely than not suffered the second stroke.

As for Plaintiffs-Appellees' respondeat superior claim, no evidence was submitted at trial to support this claim. Plaintiffs-Appellees never came forward with evidence that Dr. Cox was employed by LRA and was working in his scope of that employment when he read the results of the first MRI. Only one question was posed during trial which related to Dr. Cox's employment with LRA. Appellees' counsel asked, "Okay. Now, in 2005 when Jeff Geesaman was at the Hospital you worked for Lima Radiological Associates; Correct?" Dr. Cox replied, "Correct." Appellees never submitted as evidence any pleadings, discovery responses, or other documents to support their respondeat superior claim. There was no stipulation of fact or judicial finding on this issue. In all aspects, Appellees proceeded as if this case was solely against Dr. Cox and Dr. Almudallal.

The jury rendered a unanimous verdict in favor of Dr. Cox and Dr. Almudallal. It found no negligence on the part of Dr. Almudallal, and additionally that Dr. Cox's admitted negligence did not proximately cause Appellee's injury. There was no finding by judge or jury relative to LRA,. On August 10, 2009, the Third District reversed and remanded only as against Dr. Cox. Dr. Cox filed a timely motion for reconsideration and LRA filed a timely motion for clarification/reconsideration. Dr. Cox also filed a motion to certify a conflict. These motions are currently pending before the Third District.

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

#### Proposition of Law

**Appellate jurisdiction for review does not include the ability to affirm, modify, or reverse a judgment in favor of a defendant when there was no finding by trial judge or jury as to that defendant's liability on the basis of respondeat superior and no assignment of error was asserted relative to that defendant.**

The Third District erred when it did not explicitly decline jurisdiction as to LRA and failed to clarify that the cause reversed and remanded as to Dr. Cox did not include any cause against LRA. The Third District could not have properly reviewed and remanded an issue relative to LRA's potential liability under respondeat superior because (1) there was no final order or judgment on that issue, and (2) this issue was not raised in Plaintiffs-Appellees' assignments of error as required by App.R. 16. While the Third District reiterated that its decision applied only to Dr. Cox and there was no finding by the jury regarding LRA, it should be further clarified that the Third District did not remand a cause against LRA. A remand as to LRA would be beyond the Court's jurisdiction.

First, under Ohio constitutional and statutory law, courts of appeals shall have such jurisdiction "to review and affirm, modify, or reverse *judgments or final orders* of the courts of record inferior to the court of appeals within the district . . . ." Article IV, Section 3(B)(2), Ohio Constitution, R.C. §2502.02 (emphasis added). In other words, if there is no final and appealable judgment or order, then an appellate court has no jurisdiction to review the matter. *Kouns v. Pemberton* (Ohio App. 4 Dist. 1992), 84 Ohio App.3d 499, 501(citations omitted).

In this case, there was no judgment or final order of the trial court concerning whether LRA could be vicariously liable for Dr. Cox under a theory of respondeat superior. Therefore, the Third District did not have jurisdiction to review that issue. As pointed out, "[t]he judgment entry on the jury's verdict indicates that LRA was dismissed pursuant to the verdict. However,

*LRA's involvement was not mentioned during the trial nor was there a finding by the jury in regards to LRA.*" (App. Op. at ¶ 12, fn. 2, Appx. 6) (emphasis added).

Appellees had the burden of proving every essential fact necessary to create vicarious liability. *Lashur v. East Ohio Gas Co.* (Ohio App. 8 Dist. 1928), 31 Ohio App. 161, 165. This requires proof of two elements. Appellees were required to first adduce evidence of the relationship of master and servant. *Vencill v. Cornwell* (Ohio App. 10 Dist. 1956), 103 Ohio App. 217, 219. Second, Appellees were required to prove that the employee was acting within the scope of employment, under the control of the employer, or under the express or implied authorization from the employer. *Id.* Whether an employee is acting within the scope of employment is generally a question of fact to be determined by the jury. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 330.

In this case, neither judge nor jury made any finding as to the required elements of respondeat superior. Accordingly, while there is a trial court entry dismissing LRA, that judgment did not make a finding or ruling on LRA's potential vicarious or respondeat superior liability. Without a judgment or final order on the respondeat superior question, the Third District did not have jurisdiction to review that issue pursuant to Ohio constitutional and statutory law. The judgment entry on the jury's verdict with regards to LRA remains undisturbed.

Second, Plaintiffs-Appellees failed to assign as error any mistake concerning the trial court's judgment in favor of LRA. As such, the Third District did not have jurisdiction to review and affirm, modify or reverse the judgment.

Specifically, Plaintiffs-Appellees only made the following Assignments of Error:

- I. The trial court erred when it excluded Appellants' loss-of-chance theory of recovery from trial.

- Overruled as moot. (App. Op. ¶ 35, Appx. 18.)
- II. The trial court erred when it refused to charge the jury on the loss-of-chance theory of recovery.
- Sustained only as to Dr. Cox. (App. Op. ¶¶ 19, 34, Appx. 10, 18.)
- III. The trial court erred when it charged the jury on appellant Jeffrey Geesaman's comparative negligence.
- Overruled as moot. (App. Op. ¶ 36, Appx. 19.)
- IV. The trial court erred when it admitted evidence of appellant Jeffrey Geesaman's prior drug use.
- Overruled. (App. Op. ¶ 43, Appx. 22)
- V. The trial court erred when it admitted Dr. Lanzeri's deposition into evidence at trial.
- Overruled as to Dr. Cox. (App. Op. ¶¶ 44, 54, Appx. 23, 27.)
- VI. The trial court erred when it admitted testimony from Dr. Preston in contravention of its own order regarding two MRIs taken of Jeffrey Geesaman's brain.
- Sustained only as to Dr. Cox. (App. Op. ¶ 61, Appx. 30.)

Ohio Rule of Appellate Procedure 16 is mandatory, and provides that the appellant shall include in his brief: "argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." (emphasis added). The appellate rules establish mandatory guidelines for an appeal. *See e.g. Mariano v. Boren's Wallboard*, Trumbull App. No. 3948, Sept. 16, 1988, unreported, 1988 WL 96638 at \*1. The failure to comply with these criteria provides the grounds for dismissal of an appeal. *Id.* (citing *In Shore v. Chester* (Ohio App. 10 Dist. 1974), 40 Ohio App.2d 412). Here, if Plaintiffs-

Appellees sought to appeal the judgment in favor of LRA (which it does not appear they did). Plaintiffs-Appellees entirely failed to comply with App.R. 16. Such a failure should be fatal to any potential appeal as to the judgment in favor of LRA. *Id.*

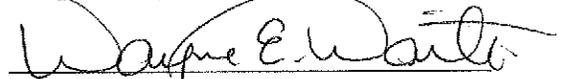
Moreover, it is well-settled that if an issue is not assigned as error in an appellant's brief, then the issue is not properly before the court of appeals. *See State v. Gore*, Lucas App. No. L-05-1242, 2006 Ohio 5622, ¶ 15 (disregarding sentencing issue raised in defendant's reply brief because issue not raised in assignment of error). *See, also, Akron v. Wendell* (Ohio App. 9 Dist. 1990), 70 Ohio App.3d 35, 46 (“[W]e need not address these issues as they are not separately set forth as assignments of error.”); *Dublin v. Clark*, Franklin App. No. 05AP-431, 2005-Ohio5926, at fn. 2 (declining to consider issue raised by appellant that was not raised in an assignment of error); *Hoffman v. CHSHO, Inc.*, Clermont App. No. CA2004-09-072, 2005-Ohio-3909, at fn.1 (disregarding alleged error stated in footnote of appellate brief because error not raised in assignment of error).

There is no dispute that Plaintiffs-Appellees failed to assign as error to the Third District anything concerning the trial court's judgment in favor of LRA. Plaintiffs-Appellees never argued that LRA was liable for the alleged negligence of Dr. Cox on a theory of respondeat superior, or any other legal theory. Plaintiffs-Appellees entirely failed to cite to a single authority or statute to challenge the binding judgment that stands in favor of LRA dismissing it from this action. Likewise, although Plaintiffs-Appellees filed a broad Notice of Appeal of the verdict in favor of all Defendants (including LRA), they failed to cite to a single part of the record to particularly support any grounds for appeal of the judgment in favor of LRA. Because Plaintiffs-Appellees failed to assign as error any mistake concerning the judgment in favor of LRA, the Third District did not have jurisdiction to review and remand that judgment.

**IV. CONCLUSION**

Appellant Lima Radiology Associates, Inc. respectfully requests this Court accept jurisdiction so that the important issue may be reviewed on the merits.

Respectfully submitted,



Wayne E. Waite (0008352)  
FREUND, FREEZE & ARNOLD  
1800 One Dayton Centre  
1 South Main Street  
Dayton, OH 45402-2017  
Phone: (937) 222-2424  
Fax: (937) 425-0207  
[wwaite@ffalaw.com](mailto:wwaite@ffalaw.com)  
*Attorney for Defendant-Appellant,  
Lima Radiology Associates, Inc.*

**CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing was served this 2nd day of October, 2009, by U. S. Mail, postage prepaid, upon the following:

Dennis P. Mulvihill  
Gregory S. Scott  
Lowe Eklund Wakefield &  
Mulvihill Co., L.P.A.  
610 Skylight Office Tower  
1660 West 2<sup>nd</sup> Street  
Cleveland, OH 44113-1454  
*Attorneys for Plaintiffs-Appellees*

Patrick K. Adkinson  
Adkinson Law Office  
4244 Indian Ripple Road, Suite 150  
Dayton, OH 45440  
*Attorney for Defendant-Appellant,  
John Cox, D.O.*

Irene C. Keyse-Walker  
Tucker Ellis & West LLP  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, OH 44115-1414  
*Attorney for Defendant-Appellant,  
John Cox, D.O.*



Wayne E. Waite (0008352)

COURT OF APPEALS  
FILED

2009 AUG 10 PM 12: 53

GRACE C. STALEY-BUTNEY  
CLERK OF COURTS  
ALLEN COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY

---

JEFFREY GEESAMAN, ET AL.,

PLAINTIFFS-APPELLANTS,

CASE NO. 1-08-65

v.

ST. RITA'S MEDICAL CENTER, ET AL.,

OPINION

DEFENDANTS-APPELLEES.

---

Appeal from Allen County Common Pleas Court  
Trial Court No. CV2006 0914

Judgment Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Decision: August 10, 2009

---

APPEARANCES:

*Dennis P. Mulvihill* for Appellants

*James F. Nooney* for Appellee, Ali Almudallal, M.D.

*Patrick K. Adkinson* for Appellees, John Cox, M.D. and  
Lima Radiology

SHAW, J.

{¶1} Plaintiffs-appellants Jeffrey and Lori Geesaman appeal the October 1, 2008 judgment of the Common Pleas Court of Allen County, Ohio, entering a judgment for the defendants-appellees, Dr. John Cox, Lima Radiology Associates, and Dr. Ali Almudallal, and dismissing the Geesamans' complaint following a jury verdict in favor of the appellees.

{¶2} The facts relevant to this appeal are as follows. On March 31, 2005, Jeffrey Geesaman went to the emergency room at St. Rita's Medical Center where he saw Dr. Gary Beasley. Mr. Geesaman reported that he was experiencing dizziness, balance issues, slurred speech, problems with his vision, and had vomited three times throughout the day. His blood pressure was taken at the time, and it was 171/111 and later reached 184/117. His weight was 280 pounds, and he was 6' 1" tall. Mr. Geesaman also provided a history to medical personnel, which included poorly controlled hypertension, smoking, and alcohol consumption. Mr. Geesaman further stated that he quit smoking and consuming alcohol a number of years prior. In addition, he reported that his mother had a stroke at age forty-five.

{¶3} Dr. Beasley conducted a physical exam of Mr. Geesaman in order to determine the cause of his symptoms and found no signs of trauma to his head. Dr. Beasley did not have Mr. Geesaman stand up or walk because of his size and complaints of dizziness and balance problems. Mr. Geesaman was placed on a

heart monitor, and a chest x-ray and CT scan of his head were taken, as well as other tests. The chest x-ray and physical examination were negative for any cardiac problems. The CT scan did not show any kind of bleed or tumor that could explain the symptoms. However, Mr. Geesaman's sugar level was elevated at 224.

{¶4} After reviewing the various tests and conducting his own examination, Dr. Beasley was concerned that Mr. Geesaman might have had a stroke or was experiencing a transient ischemic attack ("TIA"). As a result, Dr. Beasley, who is an emergency medicine physician, contacted neurologist, Dr. Ali Almodallal, to discuss the case and his concerns. After discussing the case, the decision was made to have Mr. Geesaman admitted to internal medicine and Dr. Almodallal would provide a neurological consult.

{¶5} That evening, Mr. Geesaman was admitted to the hospital and placed on a number of different medications, including aspirin. The following day, Dr. Almodallal ordered several tests for Mr. Geesaman, including magnetic resonance imaging ("MRI") of his brain, in order to determine if he had a stroke. An MRI of the brain involves the taking of hundreds of images in various sequences, including diffusion weighted images. The MRI was reviewed by Dr. John Cox, a neuroradiologist. Dr. Cox concluded that the MRI was normal and wrote that conclusion in his report. After reading the conclusion of Dr. Cox, as well as the results of the other tests, Dr. Almodallal ruled out a stroke.

{¶6} Mr. Geesaman's condition seemed to improve, and Dr. Almudallal determined that his neurological problems were possibly caused by either a complicated migraine or labyrinthitis, an inflammation in the inner ear. Therefore, Dr. Almudallal discharged Mr. Geesaman from his neurological care. Prior to discharging Mr. Geesaman from neurology, Dr. Almudallal spoke with him and his wife about his conclusions and decided to see him on an outpatient basis to provide additional workup for these possible conditions. In addition, Dr. Almudallal testified that he told Mr. Geesaman to continue taking aspirin every day. However, the Geesamans testified that he never gave that instruction.

{¶7} Mr. Geesaman remained in the hospital for another day because of other issues, including his hypertension and his newly discovered diabetes, which were being treated by the internal medicine physicians. On April 2, 2005, Mr. Geesaman was discharged from the hospital. Prior to that discharge, he was given discharge instructions and five prescriptions, neither of which involved him taking aspirin. Upon leaving the hospital, Mr. Geesaman did not take any additional aspirin.

{¶8} For the next three days, Mr. Geesaman seemed to be improving. However, on April 5, 2005, Mr. Geesaman returned to St. Rita's emergency room. This time he and his wife reported that his slurred speech had increased, he was off balance, had difficulty walking, was confused, had right sided weakness, loss of appetite, and was very tired. Once again, Mr. Geesaman was admitted to the

hospital, and another MRI of his brain was ordered in addition to other tests. Included in the other tests was a magnetic resonance angiogram ("MRA"). An MRA uses a magnetic field to provide pictures of blood vessels inside the body. In this case, the MRA was utilized to determine if any abnormalities in Mr. Geesaman's vessels, such as a blood clot, existed that could explain his symptoms.

{¶9} This second MRI revealed that Mr. Geesaman had suffered a stroke. In addition, the doctors treating Mr. Geesaman realized that his first MRI had shown that he had a stroke. In fact, two to three infarcts, dead tissue caused by a stroke, were visible in the April 1, 2005 MRI. However, those infarcts went unnoticed because Dr. Cox failed to view the diffusion weighted images of the MRI. Diffusion weighted images are helpful to identify an area of acute ischemia in the brain, i.e. a restriction in blood supply, which would indicate a recent stroke. In this case, these images showed damage to the portions of the brain located in the back of the head, known as the pons and the cerebellum. Problems in these parts of the brain were consistent with the symptoms Mr. Geesaman was experiencing when he came to the hospital the first time.

{¶10} Mr. Geesaman remained in the hospital until April 13, 2005, when he was transferred to the rehabilitation facility at St. Rita's. He remained in rehabilitation until he was discharged to his home on May 11, 2005. As a result of the strokes, he suffered brain damage, leaving him permanently disabled and unable to care for himself.

{¶11} The Geesamans filed a complaint for medical malpractice and loss of consortium against Dr. Almudallal, Dr. Cox, and several others on September 13, 2006. The case proceeded through the discovery phase with the parties deposing several doctors on behalf of each and various parties being dismissed. Among those deposed was Dr. Charles Lanzieri, a neuroradiologist. Dr. Lanzieri was listed as an expert witness for the Geesamans.

{¶12} During discovery, Dr. Cox admitted that he breached the standard of care by failing to review the diffusion weighted images of the MRI.<sup>1</sup> Ultimately, the case proceeded to trial against Dr. Almudallal, Dr. Cox, and Lima Radiology Associates.<sup>2</sup> Prior to the trial, the Geesamans filed a motion in limine, asking the court to exclude any evidence of Mr. Geesaman's prior drug and alcohol usage. The court overruled this motion. Additionally, Dr. Cox filed a motion in limine, requesting that the Geesamans not be permitted to introduce any evidence or make any argument to the jury as to loss of a less-than-even chance of recovery. The trial court granted this request and ordered that the Geesamans were "foreclosed from bringing forth any evidence with a focus on Loss of Chance."

---

<sup>1</sup> The parties dispute the reason for Dr. Cox's breach of duty. Dr. Cox maintained that the images did not appear when he accessed Mr. Geesaman's MRI in the computer due to some problem with the system. However, witnesses for the plaintiffs testified that the system was working properly and the images were available for review when Dr. Cox accessed Mr. Geesaman's MRI. In any event, Dr. Cox admitted that he should have reviewed these images and that his failure to recognize that the images were not available and to examine them prior to determining the MRI was normal was a breach of the standard of care.

<sup>2</sup> The complaint names Lima Radiology Associates ("LRA") under the doctrine of respondeat superior as the employer of Dr. Cox or that Dr. Cox was the owner of LRA. The judgment entry on the jury's verdict indicates that LRA was dismissed pursuant to the verdict. However, LRA's involvement was not mentioned during the trial nor was there a finding by the jury in regards to LRA. Rather, all parties acted as if the case were solely against Dr. Cox and Dr. Almudallal.

That analysis found that patients who were treated with aspirin had an 8.3% chance of having another stroke, whereas patients who were not treated had a 10% chance of having another stroke. These numbers correlated to a 17% relative risk reduction for a second stroke in patients who were treated with aspirin and an absolute risk reduction of 1.7%.

{¶16} At the conclusion of all the evidence, the trial court provided the jury with instructions, interrogatories, and verdict forms. Included in the instructions was an instruction about comparative negligence. After deliberations, the jury answered the necessary interrogatories and returned verdicts in favor of Dr. Almudallal and Dr. Cox. Specifically, the jury found that Dr. Almudallal was not negligent. It also found that Dr. Cox's negligence, which was conceded at trial, did not proximately cause injury to Mr. Geesaman. In accordance with these verdicts, the trial court rendered judgment in favor of the doctors and dismissed the Geesamans' complaint.

{¶17} The Geesamans now appeal, asserting six assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT EXCLUDED APPELLANTS' LOSS-OF-CHANCE THEORY OF RECOVERY FROM TRIAL.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED WHEN IT REFUSED TO CHARGE THE JURY ON THE LOSS-OF-CHANCE THEORY OF RECOVERY.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED WHEN IT CHARGED THE JURY ON APPELLANT JEFFREY GEESAMAN'S COMPARATIVE NEGLIGENCE.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF APPELLANT JEFFREY GEESAMAN'S PRIOR DRUG USE.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED WHEN IT ADMITTED DR. LANZIERI'S DEPOSITION INTO EVIDENCE AT TRIAL.

ASSIGNMENT OF ERROR NO. 6

THE TRIAL COURT ERRED WHEN IT ADMITTED TESTIMONY FROM DR. PRESTON IN CONTRAVENTION OF ITS OWN ORDER REGARDING TWO MRIS TAKEN OF JEFFREY GEESAMAN'S BRAIN.

{¶18} For ease of discussion, we elect to address the assignments of error out of order.

*Second Assignment of Error*

{¶19} In their second assignment of error, the Geesamans maintain that the trial court erred when it failed to instruct the jury on the issue of loss-of-chance. Initially, we note that this assignment of error involves the causation element of a medical malpractice action, not issues of duty and a breach thereof, i.e. negligence. The jury found that Dr. Almudallal was not negligent and,

accordingly, never proceeded to the causation inquiry. Therefore, this assignment of error does not apply to the verdict rendered in favor of Dr. Almdallal, and we address this issue only as it applies to Dr. Cox.

{¶20} In general, requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction. *Murphy v. Carrolton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E. 2d 828. “In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] ... instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction.” *Id.*, citing *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 275 N.E.2d 340 at syllabus. In reviewing the sufficiency of jury instructions given by a trial court, the proper standard of review for an appellate court is whether the trial court’s refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. The term “abuse of discretion” implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶21} Here, the issue is whether the evidence warranted an instruction on loss-of-chance. The loss-of-chance theory, more appropriately referred to as “loss of a less-than-even chance,” was first recognized as a method of recovery in a

medical malpractice action in Ohio in 1996. See *Roberts v. Ohio Permanente Medical Group, Inc.*, 76 Ohio St.3d 483, 668 N.E.2d 480, 1996-Ohio-375. The plaintiff in *Roberts* was the executor of the estate of a patient who died from lung cancer. *Id.* at 484. The defendants failed to diagnose and properly treat the patient's lung cancer for seventeen months. *Id.* The plaintiff presented evidence that the decedent would have had a 28% percent chance of survival had proper and timely care been rendered but that the defendants' negligence decreased that chance of survival to zero. *Id.* After reviewing the loss-of-chance theory and Ohio's prior treatment of this theory, the Court held:

**In order to maintain an action for loss of a less-than-even chance of recovery or survival, the plaintiff must present expert medical testimony showing that the health care provider's negligent act or omission increased the risk of harm to the plaintiff. It then becomes a jury question as to whether the defendant's negligence was a cause of the plaintiff's injury or death. Once that burden is met, the trier of fact may then assess the degree to which the plaintiff's chances of recovery or survival have been decreased and calculate the appropriate measure of damages. The plaintiff is not required to establish the lost chance of recovery or survival in an exact percentage in order for the matter to be submitted to the jury.**

*Id.* at 488, 668 N.E.2d at 484. In so holding, the Ohio Supreme Court expressly overruled its prior holding in *Cooper v. Sisters of Charity of Cincinnati, Inc.* (1971), 27 Ohio St.2d 242, 251-252, 272 N.E.2d 97. *Id.*

{¶22} In *Cooper*, the decedent, a sixteen-year-old boy, was struck by a truck while riding a bicycle and hit his head. *Cooper*, 27 Ohio St.2d 242. The

emergency room physician failed to conduct a proper examination, thus missing his skull fracture and swelling of the tissues in the back of his head. *Id.* at 243-245. The doctor sent him home, and the boy died early the next morning from his injuries. *Id.*

{¶23} The executor of the boy's estate brought suit and presented two experts. *Id.* at 245-248. One doctor, who performed the decedent's autopsy, stated that it was difficult to ascertain with any degree of certainty whether the decedent would have survived or died with proper treatment. *Id.* at 247. The other doctor testified that proper diagnosis and surgery would have placed the boy's chances for survival around 50%. *Id.* The trial court granted the defendants a directed verdict, finding that the plaintiff failed to establish proximate cause between the defendants' negligence and the boy's death. *Id.* at 248-249. In affirming this decision, the Supreme Court of Ohio rejected the loss-of-chance theory and only permitted recovery in a medical malpractice action under a traditional proximate cause standard, i.e. when the plaintiff could prove that the negligence of the tortfeasor was more probably than not the proximate cause of the death and/or injury of the patient. *Id.* at syllabus.

{¶24} In *Roberts*, the Court re-examined the loss-of-chance theory and the views expressed in *Cooper*. *Roberts*, 76 Ohio St.3d at 487. The Court then found that it could "no longer condone this view" and overruled *Cooper*. *Id.* at 488. In explaining its decision, the Court stated: "Rarely does the law present so clear an

opportunity to correct an unfair situation as does this case before us. The time has come to discard the traditionally harsh view we previously followed[.]” *Id.* The Court also declared that “[a] patient who seeks medical assistance from a professional caregiver has the right to expect proper care and should be compensated for any injury caused by the caregiver’s negligence which has reduced his or her chance of survival.” *Id.* The Court went on to discuss the advancements seen in the medical field and the importance of early intervention and held that “a health care provider should not be insulated from liability where there is expert medical testimony showing that he or she reduced the patient’s chances of survival.” *Id.*

{¶25} During the trial in this case, the Geesamans presented the testimony of Dr. David Thaler, who concluded that Mr. Geesaman’s second, more devastating stroke and its attendant injuries more likely than not could have been avoided but for the errors made in failing to identify the first stroke and treating him properly. Dr. Almudallal testified as upon cross-examination that Mr. Geesaman’s chances of avoiding that second stroke were 25-33% if he had been properly treated after his first stroke. Dr. Kirshner, in testifying for Dr. Cox, acknowledged that some studies have shown that with proper treatment, such as the use of aspirin, there is a 13-20% chance to avoid a second stroke. Lastly, Dr. Preston, in testifying for Dr. Almudallal, stated that a meta-analysis of thirteen

different studies involving stroke treatment with aspirin demonstrated a 17% relative risk reduction and 1.7 absolute risk reduction for having a second stroke.

{¶26} On these facts, the evidence before the jury was sufficient that reasonable minds might reach the conclusion sought by a loss of less-than-even chance of recovery instruction. This evidence was introduced initially by the Geesamans through the use of cross-examination of Dr. Almudallal in their case-in-chief and was further brought about during the presentation of expert witnesses for the respective defenses. Although Dr. Thaler provided testimony to establish proximate causation, witnesses for the two defendant doctors and Dr. Almudallal himself provided the evidence which warranted a loss of less-than-even chance instruction.

{¶27} Nevertheless, Dr. Cox maintains that the loss of less-than-even chance theory should not be forced upon the defense because the Geesamans proceeded under a proximate cause theory of their case in their complaint. In support, Dr. Cox relies upon another Ohio Supreme Court case, *McMullen v. Ohio State Univ. Hospitals*, 88 Ohio St.3d 332, 725 N.E.2d 1117, 2000-Ohio-342. In *McMullen*, the plaintiff's decedent suffered from cancer, had a bone marrow transplant, and later returned to the hospital with high fevers and a possible viral infection. *Id.* at 333. The decedent's lungs had fluid buildup and she experienced shortness of breath, leading to the placement of an endotracheal ("ET") tube through her mouth and throat in order to maintain her oxygenation level. *Id.*

Three days later, on October 14, 1990, her oxygen saturation level dropped to a critical point, and when other efforts failed to improve this level, the nurses removed her ET tube. *Id.* It took the responding doctors several different attempts in excess of twenty minutes before the ET tube was successfully re-established. *Id.* During this time, the decedent's oxygen saturation level fell below that consistent with life, causing the decedent irreversible damage to her brain, lungs, and heart. *Id.* She died seven days later. *Id.*

{¶28} During a trial to the court, the plaintiff presented evidence that this event was the direct cause of all the underlying causes of the decedent's death. *McMullen*, 88 Ohio St.3d at 334. The defendants presented evidence that prior to the October 14, 1990 incident, the decedent's chances of survival were less than fifty percent given her overall condition and that she would have died within thirty days, notwithstanding the events on October 14<sup>th</sup>. *Id.* at 335.

{¶29} The trial court found that the decedent had a chance of surviving prior to October 14, 1990, but that the negligent medical treatment decreased her chance of survival to zero. *Id.* The court found in favor of the decedent's estate but then conducted a trial on the issue of damages and applied the formula for the calculation of damages based upon a lost chance of survival rather than a total amount of damages. *Id.*

{¶30} The Supreme Court found that the trial court should never have proceeded to assess damages under a loss of chance theory given the trial court's

conclusion that the cause of death was the October 14, 1990 anoxic or hypoxic event, attributed solely to the defendants' negligence. *Id.* at 337. Specifically, the Court held that it "never intended to force this theory on a plaintiff who could otherwise prove that specific negligent acts of the defendant caused the ultimate harm."

{¶31} Further, the Court noted that a review of the many cases on loss of less-than-even chance revealed a particular factual situation involved:

**the plaintiff or the plaintiff's decedent [was] already suffering from some injury, condition, or disease when a medical provider negligently diagnoses the condition, fails to render proper aid, or provides treatment that actually aggravates the condition. As a result, the underlying condition is allowed to progress, or is hastened, to the point where its inevitable consequences become manifest.**

*Id.* The Court then found that the case before it was different in that the ultimate harm was directly caused by the defendants' negligence rather than by their negligence combining with the decedent's pre-existing condition. *Id.* at 341. Thus, the Court concluded that the trial court should not have applied the loss of less-than-even chance theory.

{¶32} The situation before us is akin to the cases reviewed by the Supreme Court in *McMullen*, wherein a medical provider's negligence combined with Mr. Geesaman's pre-existing condition to lead to the injury, rather than the actual facts of *McMullen*. The holding in *McMullen* was designed to prevent a tortfeasor from escaping full liability when the person the tortfeasor negligently injured happened

to also suffer from some pre-existing condition. However, in this case, no one alleged that Dr. Cox did something to directly cause Mr. Geesaman to have a stroke, but instead, that he failed to recognize the first stroke, which led to a lack of proper treatment to prevent the second stroke.

{¶33} Once again, the entire premise of the loss of less-than-even chance of recovery/survival is that doctors and other medical personnel should not be allowed to benefit from the uncertainty of recovery/survival that their negligence has created. See *Roberts*, 76 Ohio St.3d at 486-487. Moreover, “[w]hen those preexisting conditions have not absolutely preordained an adverse outcome, however, the chance of avoiding it should be appropriately compensated even if that chance is not better than even.” *Roberts*, 76 Ohio St.3d at 487, quoting King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences* (1981), 90 Yale L.J. 1353, 1354.

{¶34} For these reasons, the jury should have been instructed on the loss of less-than-even chance theory of recovery. Although the Geesamans presented testimony that Mr. Geesaman’s chance to avoid the second stroke and resultant injuries was more probable than not with proper diagnosis and treatment, other evidence could have led a reasonable juror to conclude that Mr. Geesaman had a less-than-even chance to avoid the second stroke and resultant injuries. Therefore, if the jury did not find proximate cause, the evidence warranted instructing them to consider loss of chance, not as a fallback position for the Geesamans, as Dr. Cox

asserts, but based upon the evidence before it. Thus, the trial court abused its discretion in unreasonably refusing to instruct the jury on this issue when the evidence clearly supported it. For these reasons, the second assignment of error is sustained.

*First Assignment of Error*

{¶35} The Geesamans assert in their first assignment of error that the trial court erred in excluding the loss of less-than-even chance of recovery during their case-in-chief. Although we fail to find any legal obstacle in Ohio law for the Geesamans to have pursued both the traditional notion of proximate causation and the relaxed causation standard of loss of less-than-even chance, especially in light of the Supreme Court's decision in *Roberts* to expressly overrule *Cooper*, we need not decide this issue here given the actual development of the evidence at trial, which clearly warranted the requested jury instruction on loss of less-than-even chance in any event as discussed in the determination of the second assignment of error. Therefore, the first assignment of error is moot and, consequently, overruled.

*Third Assignment of Error*

{¶36} In their third assignment of error, the Geesamans contend that the trial court abused its discretion when it gave the jury an instruction on comparative negligence. The jury was given eight interrogatories by the trial court at the conclusion of its instructions. The fourth and fifth interrogatories addressed the

issue of comparative negligence. However, the jury was to answer these interrogatories only if it found Dr. Almudallal negligent and that his negligence proximately caused injury to Mr. Geesaman or if it found Dr. Cox's admitted negligence proximately caused injury to Mr. Geesaman. Because the jury did not find Dr. Almudallal negligent and did not find that Dr. Cox's negligence proximately caused injury to Mr. Geesaman, the issue of whether Mr. Geesaman was comparatively negligent was never reached. Therefore, this assignment of error is moot and, consequently, overruled.

*Fourth Assignment of Error*

{¶37} The Geesamans next maintain that the trial court erred in permitting evidence of Mr. Geesaman's prior drug use to be introduced at trial. In reviewing this assignment of error, we first note that "[t]he admission of evidence is generally within the sound discretion of the trial court, and a reviewing court may reverse only upon the showing of an abuse of that discretion." *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299, 587 N.E.2d 290. As previously noted, the term "abuse of discretion" connotes a judgment that is rendered with an unreasonable, arbitrary, or unconscionable attitude. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

{¶38} In the case sub judice, the medical records of Mr. Geesaman included a reference to prior drug use. One such reference was included in a letter to Dr. Stephen Sandy, Mr. Geesaman's primary physician, from Matthew P.

Ziccardi, Psy.D. Dr. Ziccardi conducted a neuropsychological consult on Mr. Geesaman on June 7, 2005, and wrote a letter to Dr. Sandy regarding his examination, impression, and recommendations. Included in this letter was the following statement: "His medical and psychiatric histories are notable for an extensive history of polysubstance abuse, including alcohol, barbiturates, injected drugs, and inhalants."

{¶39} Prior to trial, the Geesamans filed a motion in limine to exclude any reference to prior drug use by Mr. Geesaman. The trial court overruled this motion, stating that

**It's common knowledge the effect of these particular items. \* \* \*  
You don't start with, okay, he had a stroke. It has to do with  
everything; if there is any link or how a person conducted their  
life. It didn't start at that event. And if a person had taken  
drugs once or twice that's one thing. But if they've taken it for a  
number of times over a number of years the court believes that it  
does have probative value and it is not prejudicial and would  
allow reference to the same.**

After this ruling, counsel for Dr. Cox commented in opening statement that Mr. Geesaman had a fairly lengthy history of substance abuse. In response, Lori Geesaman testified that she had known her husband since 1992, that they were married in 1996, and that she had never known him to have taken any illegal drugs.

{¶40} The trial court admitted the letter from Dr. Ziccardi as a part of Dr. Almudallal's Exhibit A.<sup>3</sup> During closing statements, counsel for Dr. Almudallal placed several items on a screen in his discussion of damages to show the jurors regarding Mr. Geesaman's failure to follow through with medical advice, the number of risk factors that he had and ignored, and his overall failure to attend to his own health. In these images, he included the letter from Dr. Ziccardi. He directed the jurors' attention to a portion of the letter, which he highlighted, involving Mr. Geesaman's denial of any cognitive or emotional changes related to his stroke. However, immediately preceding this sentence was the sentence concerning Mr. Geesaman's history of polysubstance abuse, which was also underlined.

{¶41} Evidence Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided[.]" Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Relevant evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403.

---

<sup>3</sup> Although the Geesamans did not object to the admission of this exhibit as a whole, they did object to any references to prior drug usage, preserving this issue for appeal.

{¶42} Here, there was no evidence that any drug use, if shown, was relevant to the issues before the jury. There was no testimony showing any causal connection between Mr. Geesaman's drug use, his stroke, and the resultant damages. Thus, this topic did not have any tendency to make the existence of any fact of consequence more or less probable. Moreover, even assuming arguendo that there was some relevance to past drug use, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and of misleading the juror. In fact, the trial court's own statement, noted above, evidences these problems as it appears to have been misled by the evidence of prior drug use and confused as to the issue. Thus, the trial court should not have allowed this evidence and abused its discretion in so doing.

{¶43} However, while the trial court erred in admitting evidence of prior drug use, we cannot find that the trial court's decision, given the limited nature and reference to this evidence by the parties, affected the outcome of the trial so as to rise to the level of reversible error. Therefore, this assignment of error is overruled.

*Fifth Assignment of Error*

{¶44} The Geesamans assert in their fifth assignment of error that the trial court erred when it admitted the deposition of Dr. Charles Lanzieri, a neuroradiologist, into evidence during the trial. As an initial matter, we note that the testimony of Dr. Lanzieri involved the standard of care of radiologists and

causation. Given the jury's finding that Dr. Almudallal was not negligent, this assignment of error does not apply to the verdict rendered in favor of him. Thus, we address this issue only as it applies to Dr. Cox.

{¶45} During the discovery phase of this case, the Geesamans listed Dr. Lanzieri as one of their experts. As a result, a deposition of Dr. Lanzieri was conducted on June 23, 2008, and all counsel present questioned Dr. Lanzieri to varying degrees.<sup>4</sup> At trial, the Geesamans elected not to present Dr. Lanzieri as a witness in their case-in-chief. However, counsel for Dr. Cox introduced the deposition of Dr. Lanzieri during the presentation of Dr. Cox's case. The Geesamans objected to the use of the deposition for a number of reasons. The trial court overruled these objections, and the deposition in its entirety was then read into the record.

{¶46} The use of depositions at trial is governed by Civ.R. 32. This rule states, in relevant part:

*At the trial \* \* \* any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition \* \* \* in accordance with any one of the following provisions \* \* \**

**The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: \* \* \* (e) that the witness is an attending physician or medical expert, although**

---

<sup>4</sup> At this point in the litigation, St. Rita's Medical Center was a defendant. Counsel for the hospital was present at Dr. Lanzieri's deposition and also questioned him. The hospital was later dismissed prior to trial.

residing within the county in which the action is heard \* \* \* or (g) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Civ.R. 32(A)(3). In cases involving medical malpractice, a person giving expert testimony on the issue of liability must be licensed to practice medicine by the licensing authority of any state and devote at least fifty percent of his/her professional time to active clinical practice in his/her licensed field or to teaching it at an accredited school. Evid.R. 601(D).

{¶47} In this case, Dr. Lanzieri qualified as a medical expert in radiology. Therefore, Civ.R. 32(A)(3) was satisfied. Further, he was a professor of radiology and neurosurgery at University Hospitals of Cleveland/Case Western Reserve University School of Medicine at the time of his deposition in June of 2008. Additionally, when he was deposed, he had recently stepped down as chairman of the department of radiology and resumed being a full-time radiologist. Thus, he was competent to testify pursuant to Evid.R. 601(D).

{¶48} However, our analysis does not end there. Rather, Civ.R. 32 only permits the use of depositions "so far as admissible under the rules of evidence." Civ.R. 32(A). That rule also provides that "[t]he introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or

impeaching the deponent makes the deponent the witness of the party introducing the deposition[.]” Civ.R. 32(C).

{¶49} Evidence Rule 611 governs the mode and order of interrogation and presentation of evidence. Included in this rule is that “[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony.” Evid.R. 611(C). However, despite this limitation, “[t]he allowing or refusing of leading questions in the examination of a witness must very largely be subject to the control of the court, in the exercise of a sound discretion.” *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 111, 592 N.E.2d 828, quoting *Seley v. G.D. Searle & Co.* (1981), 67 Ohio St.2d 192, 204, 423 N.E.2d 831. In addition, the Rules of Evidence provide that “[c]ross-examination shall be permitted on all relevant matters and matters affecting credibility.” Evid.R. 611(B).

{¶50} A trial court’s ruling on these issues will stand absent an abuse of discretion. *Lambert v. Shearer* (1992), 84 Ohio App.3d 266, 275, 616 N.E.2d 965. As previously stated, an abuse of discretion “connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

{¶51} In the case sub judice, the Geesamans assert that Dr. Cox made Dr. Lanzieri his witness when Dr. Cox introduced the deposition at trial. Thus, they maintain that leading questions by counsel for Dr. Cox should not have been

permitted at the trial. They further contend that by allowing this deposition to be introduced, the trial court denied them the right to cross-examine Dr. Lanzieri pursuant to Evid.R. 611(B).

{¶52} A review of Dr. Cox's counsel's examination of Dr. Lanzieri during the deposition indicates that he asked many leading questions in attempting to discover the facts upon which Dr. Lanzieri based his opinions. By doing so, he was clearly cross-examining Dr. Lanzieri, who at the time of the deposition was not Dr. Cox's witness. The problem arose when Dr. Cox subsequently decided to present the deposition of Dr. Lanzieri in effect as his own witness in Dr. Cox's case-in-chief.

{¶53} In this particular deposition, however, Dr. Lanzieri was repeatedly allowed to elaborate on his answers, often times providing great detail and in depth explanations. In addition, many questions were also asked by counsel for the two other remaining defendants, Dr. Almudallal and St. Rita's Medical Center, both of whom also permitted Dr. Lanzieri to expound upon his responses. Accordingly, on the record before this Court, we cannot conclude that the trial court acted in an unreasonable, arbitrary, or unconscionable manner in permitting the use of the deposition at trial or that any prejudice resulted therefrom based upon the use of leading questions.

{¶54} As to the contention that the Geesamans had no opportunity to cross-examine Dr. Lanzieri, this assertion is without merit. During the deposition of Dr.

Lanzieri, counsel for the Geesamans did ask questions of him. Although we note that counsel for Dr. Almodallal objected to the Geesamans questioning their own witness at the deposition, counsel for the Geesamans stated: "I disagree, obviously. It's a witness, and anybody can ask questions." Counsel then proceeded to ask questions of Dr. Lanzieri. Thus, the Geesamans did have an opportunity to question the witness, including through the use of their own leading questions. Furthermore, Dr. Lanzieri was a listed witness for the Geesamans. As such, their counsel had ample opportunity to fully discover the opinion(s) of Dr. Lanzieri prior to the deposition and to fully question him on those at the deposition if he so chose. Therefore, the fifth assignment of error is overruled.

*Sixth Assignment of Error*

{¶55} In their sixth assignment of error, the Geesamans assert that the trial court erred when it permitted Dr. David Preston, the neurologist who testified on behalf of Dr. Almodallal, to render an opinion concerning two MRI's taken of Mr. Geesaman during his rehabilitation on April 15, 2005, and April 25, 2005.

{¶56} During the presentation of Dr. Almodallal's defense, counsel for the doctor called Dr. Preston to the stand. Prior to his testimony, the Geesamans' attorney made an oral motion in limine, requesting that Dr. Preston not be permitted to testify about the aforementioned MRI's. These two MRI's showed additional infarcts in Mr. Geesaman's brain.

{¶57} Counsel's concern was that Dr. Preston would use those images to show that Mr. Geesaman was suffering additional strokes despite proper medical intervention since the April 5, 2005 stroke, thus bolstering the defense theory that nothing would have prevented the second stroke. They maintained that the problem with this sort of testimony was that during his deposition, taken a number of months before trial, Dr. Preston did not recall those images and rendered no opinions based on those images. Therefore, any testimony concerning those MRI's in support of Dr. Preston's opinions on causation was a surprise and would be unfairly prejudicial.

{¶58} The trial court agreed with the Geesamans and informed counsel for Dr. Almudallal that he could not elicit any testimony from Dr. Preston that involved those two MRI's. Counsel for Dr. Almudallal followed this decision and did not elicit any such testimony. However, during cross-examination by counsel for Dr. Cox, counsel proposed hypothetical questions to Dr. Preston using those two MRI's. Specifically, counsel for Dr. Cox asked him to assume that two other doctors testified that an MRI on April 15<sup>th</sup> and on April 25<sup>th</sup> revealed new infarcts, both occurring several days after Mr. Geesaman was readmitted to the hospital and started on aspirin and other medications/treatments. He then asked Dr. Preston if this would indicate that the medication was not working to defeat Mr. Geesaman's atherosclerotic disease, which was causing his strokes. Over the repeated objections by the Geesamans, Dr. Preston was permitted to answer. He answered

that the subsequent strokes did indicate that the medicine was not working at that point.

{¶59} The Rules of Civil Procedure allow the discovery of opinions of experts retained by the opposing party. See Civ.R. 26(B)(5). This Court has previously noted that the purpose of this rule is “to prevent surprise when dealing with expert witnesses.” *Vance v. Marion Gen. Hosp.*, 165 Ohio App.3d 615, 847 N.E.2d 1229, 2006-Ohio-146, at ¶ 12, citing *Vaught v. The Cleveland Clinic Foundation* (Sept. 6, 2001), 8<sup>th</sup> Dist. No. 79026, 2001 WL 1034705, at \*3. Moreover, “[a] litigant is not only entitled to know an opposing expert’s opinion on a matter, but the basis for that opinion as well \* \* \* so that opposing counsel may make adequate trial preparations.” *Vaught*, 8<sup>th</sup> Dist. No. 79026, 2001 WL 1034705, at \*3.

{¶60} Here, the opinion rendered by Dr. Preston that evidence of new infarcts in the April 15<sup>th</sup> and April 25<sup>th</sup> MRI’s would indicate that the medication was not working to defeat Mr. Geesaman’s atherosclerotic disease, which was causing his strokes, was an opinion not previously disclosed during his deposition. Because Dr. Preston did not recall those images and offered no opinion regarding anything seen on those images, counsel for the Geesamans did not have the opportunity to adequately prepare for this portion of Dr. Preston’s testimony. This is true regardless of who asked the questions.

{¶61} Although this would not be regarded as a direct discovery violation by counsel for Dr. Cox, who did not call Dr. Preston to the stand, it nonetheless amounts to unfair surprise and defeats the spirit of the discovery rules, particularly in light of the fact that counsel for Dr. Cox was present at the taking of the deposition of Dr. Preston and during the argument and ruling on the motion in limine. For these reasons, the sixth assignment of error is well taken as to Dr. Cox.

{¶62} However, the subject-matter of this assignment of error involves the issue of causation, not standard of care. As previously noted, given the jury's finding that Dr. Almudallal was not negligent, this assignment of error does not affect the verdict in favor of Dr. Almudallal and is overruled as to him.

{¶63} Based on all of the foregoing, the judgment of the trial court in favor of Dr. Almudallal is affirmed, the judgment in favor of Dr. Cox is reversed, and the cause remanded to the trial court for further proceedings consistent with this opinion.

*Judgment Affirmed in Part,  
Reversed in Part, and  
Cause Remanded*

ROGERS and BROGAN, J.J., concur.

(2<sup>nd</sup> District Court of Appeals Judge James Austin Brogan, sitting by Assignment)

/jlr

IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY

COURT OF APPEALS  
FILED

2009 AUG 10 PM 12:53

CELA C. STALEY-DUNN  
CLERK OF COURTS  
ALLEN COUNTY, OHIO

JEFFREY GEESAMAN, ET AL.,

PLAINTIFFS-APPELLANTS,

CASE NO. 1-08-65

v.

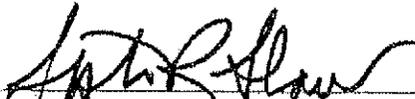
ST. RITA'S MEDICAL CENTER, ET AL.,

JUDGMENT  
ENTRY

DEFENDANTS-APPELLEES.

For the reasons stated in the opinion of this Court, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs assessed equally between Appellants and Appellees for which judgment is hereby rendered. The cause is hereby remanded to the trial court for further proceedings and for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

  
\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_  
JUDGES

DATED: August 10, 2009