

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0988

ROBERT N. WHITE, et al.

Plaintiffs/Appellees,

-vs-

WARREN H. LEIMBACH, II, M.D.

Defendant/Appellant.

On Appeal from the Franklin County  
Court of Appeals, Tenth Appellate  
District

Court of Appeals  
Case No. 09 AP 000674

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT WARREN H. LEIMBACH, II, M.D.

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**A. Proposition of Law No. 1 ..... 9**

A Plaintiff must present expert testimony as to all of the elements of a claim for lack of informed consent arising out of the performance of a medical procedure, including expert testimony as to what the claimed undisclosed material risks are, and, if disputed, as to whether those risks did in fact materialize.

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Where a patient seeks a second opinion prior to undergoing a medical procedure, and where in the course of receiving the second opinion the patient is fully informed of all material risks and dangers associated with the procedure, the patient may not maintain a claim of lack of informed consent against his medical provider because the patient’s decision to proceed, despite full knowledge of the material risks involved, establishes that the patient’s decision was knowing, voluntary and fully-informed.

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2010-Ohio-1726, Decision**

***White v. Leimbach*, 10<sup>th</sup> App. No. 09AP00067,.....APPX000018  
Judgment Entry**

**I. STATEMENT OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST.**

This case is of public and great general interest because the plurality decision below represents a significant deviation from prior case law on the issue of whether expert testimony is required to support all of the elements of a lack of informed consent claim, where such claim arises out of the performance of a medical procedure. The plurality opinion below not only expressly held that expert testimony was not required to support a lack of informed consent claim, it went so far as to say that such a requirement has never existed under Ohio law.

Specifically, the plurality opinion below took the position, vis-à-vis a claim for lack of informed consent relating to a surgical procedure, that there is no “bright-line rule requiring per se medical expert testimony in every such case.” *White v. Leimbach*, 10<sup>th</sup> App. No. 09AP-674, 2010-Ohio-1726, at ¶ 17. The court reached its conclusion that expert testimony is not required by rejecting prior decisions to the contrary as purportedly premised on “a fleeting mention” of informed consent by this Court in *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. The court of appeals stated that this “fleeting” reference was “merely dicta” and, in any event, was not controlling.

Failure to obtain informed consent by a physician is considered a deviation from the standard of care, for which expert testimony is needed, as is the case with other types of medical malpractice claims. Regardless of the historical basis for the requirement of expert testimony, as previously determined not only by other state appellate courts, but also by other Tenth District decisions, it is clear that the decision below has now created a divergence of authority on this issue, which will inevitably lead to uncertainty and confusion. This is so because the court of appeals not only refused to

find that expert testimony was required under the facts of this case, it denied that any such requirement has ever existed, and suggested that contrary decisions were based on a misinterpretation and/or misapplication of case law from this Court.

The court of appeals decision creates an artificial distinction between different types of medical liability claims, and if left undisturbed, will encourage the filing of lack of informed consent claims in other types of medical malpractice lawsuits as a method of evading the requirement of expert testimony. The court of appeals' rejection of existing case law on this precise issue, as not "controlling" requires remediation by this Court.

The court of appeals made it a point to twice describe the nature of this lawsuit as follows, "this is not a medical malpractice case, nor is it a negligence case per se." See, *White v. Leimbach*, 2010-Ohio-1726, at ¶s 6, 19. The court of appeals was correct in stating that this was not a "negligence case per se", but it was not correct in saying that this lawsuit is "not a medical malpractice cases." This is a critical distinction which may largely explain the court of appeals refusal to recognize the need for expert testimony in a lack of informed consent claim.

Other decisions from Ohio appellate courts have recognized that lack of informed consent cases, such as the one tried below, are "medical malpractice cases" although they raise different issues than medical malpractice claims where it is alleged that the actual medical care provided was substandard. See e.g., *Maglosky v. Kest*, 8<sup>th</sup> App. No. 85382, 2005-Ohio-5133; *West v. Cleveland Clinic Foundation*, (June 15, 2000), Cuyahoga App. No. 77183. The distinction made by the court of appeals is one without a difference because medical "negligence case(s)" and lack of informed consent cases are two sides of the same coin.

Based on this recognition that lack of informed consent cases are a subspecies of medical malpractice cases, Ohio courts have required expert testimony in lack of informed consent cases on “what the claimed undisclosed material risks and dangers associated with a surgical procedure are, and if disputed, whether those particular undisclosed risks did in fact materialize and cause the patient’s injuries.” See, *Fernandez v. Ohio St. Pain Control Center*, 10<sup>th</sup> App. No. 03AP-1018, 2004-Ohio-6713, at ¶ 15. This expert testimony prerequisite is based on the identical rationale used for requiring expert testimony in medical negligence cases, (i.e.) “these issues are beyond the knowledge of the lay person and require expert testimony.” See e.g., *Valerius v. Freeman* (October 19, 1994), Hamilton App. No. C-930658.

The court of appeals justified its opinion on the alternative basis that even if expert testimony was required, that the plaintiffs at trial would have been exempt from such a requirement under the facts of this case because “[e]ven if controlling case law existed that requires expert testimony in lack of informed consent cases, there is no reason why the exception(s) in *Bruni* would not similarly apply.” *White v. Leimbach*, 2010-Ohio-1726, at ¶ 19.

The *Bruni* exception referenced above pertains to “situations when a jury would be capable of understanding the issues without expert testimony.” *Id.* at ¶ 18. Thus, the decision below also stands for the proposition that expert testimony is generally not required, and specifically is not required, where the disputed medical issues presented in a lack of informed consent claim are not beyond the knowledge of a lay person. In this case the Whites challenged a neurosurgeon’s disclosure of the known risks and material dangers of complex medical procedure (laminectomy) without the benefit of expert testimony. Conversely, Dr. Leimbach presented two eminently qualified experts,

who each testified at trial that all known material risks were disclosed, and that no undisclosed risk either occurred or caused injury to the patient. In the light of these facts, the court of appeals' holding that a directed verdict was not appropriate because questions relating to the known material risks and/or dangers of a second laminectomy are within the understanding of an ordinary laymen represents extremely unsound public policy.

The facts and experience necessary to refute the opinions of the former Chairman of the Department of Neurosurgery at the Ohio State University Medical Center, as well as a second distinguished neurosurgeon affiliated with that institution, are not within the purview of the ordinary lay person. There is simply no good reason for not requiring expert testimony under such circumstances.

Notwithstanding the oversimplification of the medicine underlying this case in the plurality opinion below, this lawsuit presented complicated medical issues relating to a neurosurgeon's performance of a laminectomy procedure. The litigation persisted for nine years and plaintiffs still had no expert evidence of any kind at trial. Prior to trial, plaintiffs were forced to concede their inability to find an expert to criticize the medical care provided.

As a matter of public policy, the tort of lack of informed consent should not become a "loophole" for plaintiffs to utilize when they cannot meet the evidentiary burden necessary to establish a more traditional medical malpractice claim. The opinion below will almost certainly lead to creative pleading, it will encourage attorneys to include a claim for lack of informed consent in medical malpractice lawsuit where such a claim is not otherwise warranted, and it will seriously erode the progress made

in reducing frivolous lawsuits achieved by the adoption of Civ.R. 10(D)(2), which requires affidavits of merit at the time of the filing of any “medical claim.”

Heretofore, it has never been the case that a cause of action for lack of informed consent could be used to evade the requirements for prosecuting a medical malpractice/negligence case, because both causes of action were subject to equally rigorous expert testimony requirements. The court of appeals has now rejected the existence of a “bright-line rule requiring expert testimony” for lack of informed consent cases and has suggested that no “controlling case law” has ever “existed in lack of informed consent cases” that required expert testimony on any of the elements of this cause of action. It follows that if no expert testimony is required to prevail on a lack of informed consent claim, then no affidavit of merit can be required in support of such claim at the time of filing.

If the court of appeals was correct in its belief that there is a dearth of existing controlling authority on this subject, then an even more compelling case is made as to why this Court should accept jurisdiction to reconcile the holding below with case law reaching a different conclusion, as well as to provide sorely needed guidance to courts and practitioners.

The *Bruni* exception applied by the court of appeals is self-evidently equally applicable to all medical malpractice cases, and will lead to similar undesirable results. Therefore, it is important that jurisdiction be accepted and that this Court clarify whether expert testimony is required in lack of informed consent cases, and further clarify what “exceptions” (if any) apply to this requirement.

## II. STATEMENT OF THE CASE AND FACTS.

Plaintiff-Appellee Robert White had two back surgeries in 1998. These surgeries were performed by Defendant-Appellant, Dr. Warren Leimbach. The first of these surgeries occurred in spring of 1998, after which Mr. White admits he felt completely relieved from back pain. Approximately five months after the first surgery, Mr. White injured himself running in a parking lot near Cedar Point in Sandusky. After sustaining this injury, Mr. White was in constant pain for the next thirty plus days, necessitating a second surgery, on October 23, 1998. Mr. White's back pain was not relieved by the second surgery, which result certainly was within the realm of potential outcomes, as Mr. White admits he was aware. Prior to this second surgery, Mr. White testified that he already was in constant "excruciating" pain which he rated a 10 on a scale of 1-10.

Prior to both surgeries, Mr. White was also seen by Dr. Michael Miner, who at the time, was the head of Neurosurgery at the Ohio State University Medical Center. Dr. Miner's function was to provide a second opinion. Dr. Miner testified at trial that prior to both surgeries he fully apprised Mr. White of the known material risks of the procedure, and that he also explained the likelihood that Mr. White would obtain relief. Additionally, as to both surgeries, Dr. Miner agreed that they were appropriate and necessary given Mr. White's symptoms, complaints, history, and his presentation.

Mr. White and his spouse filed suit against Dr. Leimbach on April 24, 2000. The case was voluntarily dismissed once. Trial started June 22, 2009 and lasted through June 25, 2009.

Mr. White proceeded to trial with no expert testimony. Mr. White's treating pain management doctor, who admitted having no knowledge of the standard of care for neurosurgeons, testified as a fact witness. Dr. Massau did not opine that Mr. White's

present symptoms were caused by the second surgery, nor did he speak to the issue of lack of informed consent in any manner.

Mr. White presented no testimony, expert or otherwise, from any physician whose expertise would even arguably overlap with that of Dr. Leimbach. Mr. White did not allege at trial that the second surgery performed by Dr. Leimbach was done in a substandard fashion, or even that Dr. Leimbach did not meet the applicable surgical standard of care. These issues were each conceded.

At trial, Dr. Leimbach offered expert testimony from two distinguished neurosurgeons to the effect that Mr. White's second surgery was reasonable and appropriate under the circumstances, that Mr. White's condition was not worsened by the surgery, and that the injuries complained of by Mr. White were caused by his fall at Cedar Point, not by the second laminectomy (Tr. 494, 498-499, 569, 605, 612, 666.)

Dr. Gary Rea testified that there were no material risks of surgery that were not disclosed to Mr. White, that Mr. White was an excellent surgical candidate, that no known risks or dangers of Mr. White's laminectomy ever materialized, and that Mr. White was not injured by way of being operated on the second time. (See, e.g., Tr. 498-500, 529, 569.) Dr. Rea described the actual surgical procedure performed as "just what I would have done." (Tr. 498.)

Dr. Michael Miner, in addition to testifying as an expert at trial, was also a fact witness, based on his examinations of Mr. White prior to both surgeries. Dr. Miner testified unequivocally that he discussed the risks, as well as the potential benefits of each procedure with Mr. White in advance of each surgery. (Tr. 597, 602, 607, 662.) Dr. Miner also testified that Mr. White was an excellent candidate for surgery based on the sudden nature of the injury sustained, which increased the chances that surgery

would be successful vis-à-vis other laminectomy “re-dos.” (Tr. 602, 606, 609-610, 663.) Dr. Miner further testified that the second surgery was the “right thing to do” and that it was performed appropriately. (Tr. 612, 619, 666.)

Contrary to the suggestion in the plurality opinion below, Dr. Leimbach did discuss potential scar tissue issues with both Mr. and Mrs. White prior to the second surgery. (Tr. 258, 407-408.) Unfortunately, both the Whites did not understand Dr. Leimbach’s explanation and mistakenly believed that topic being discussed related to scarring of the surgical incision, rather than the scar tissue which may have formed at the site of the irritation, at L-5 – S-1 of the spine.

At the close of all evidence, Dr. Leimbach moved for a directed verdict, based on Mr. White’s failure to establish the three elements of an informed consent lawsuit outlined in *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136. This motion was granted. The trial court stated the following in sustaining the motion for directed verdict:

But attorneys can’t make facts. And the fact of the situation is that there just hasn’t been sufficient testimony to meet the second element of the *Nickell* requirements. For that reason, as I mentioned, the motion is sustained. Thank you. (Tr. 702.)

The trial court issued the following Judgment Entry on June 30, 2009.

Specifically, the Court finds that reasonable minds could come to one conclusion based upon the evidence submitted and that conclusion was adverse to Plaintiff’s burden to establish the determinative issue that the alleged failure of Defendant to advise the Plaintiff of the risks that subsequently materialized were the proximate cause of Plaintiffs’ injury.

In an Opinion journalized on April 20, 2010, a divided Tenth District Court of Appeals reversed the trial court’s grant of a directed verdict. In so doing, the court of appeals expressly and repeatedly stated that there was “no bright-line rule” requiring expert testimony in lack of informed consent cases, and also concluded that there was

no “controlling” case law to the contrary in Ohio. The opinion of the court was solely that of the writing judge. A second member of the panel concurred in judgment only. Judge French authored a lengthy and vigorous dissent taking issue with the lack of expert testimony in support of the plaintiffs’ claims at trial.

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

#### PROPOSITION OF LAW NO. 1.

**A Plaintiff must present expert testimony as to all of the elements of a claim for lack of informed consent arising out of the performance of a medical procedure, including expert testimony as to what the claimed undisclosed material risks are, and, if disputed, as to whether those risks did in fact materialize.**

Although the court of appeals rejected the notion of a bright-line requirement of expert testimony, other courts have held that “expert testimony is required to establish what the claimed undisclosed material risks and dangers associated with a surgical procedure are, and if disputed, whether those particular undisclosed risks did in fact materialize and cause the patient's injuries.” *Fernandez v. Ohio State Pain Control Center*, 10<sup>th</sup> App. No. 03AP-1018, 2004-Ohio-6713; See also, *Hillman v. Kosnik*, 10<sup>th</sup> Dist. No. 07AP-942, 2008-Ohio-6303, at ¶ 10.

In *Bedel v. Univ. of Cincinnati Hosp.* (1995), 107 Ohio App.3d 420, the court discussed the underlying public policy concerns of the tort of lack of informed consent as well as the amount of information that is required to be disclosed to a patient by a physician as follows:

The doctrine of informed consent is based on the theory that every competent human being has a right to determine what shall be done with his or her own body. *Siegel v. Mt. Sinai Hosp.* (1978), 62 Ohio App.2d 12, 16 O.O.3d 54, 403 N.E.2d 202. The law of informed consent has never required that the physician, prior to administering the treatment, fully inform the patient of all the

potential risks. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 17 O.O.3d 98, 407 N.E.2d 490.

It is precisely because the law does not require that a patient be informed of “all risks” and because it would never be possible for any physician to do so, that expert testimony has traditionally been required. Jurors have never been considered competent to make these determinations. Nor have non-physician litigants or their attorneys.

A lack of informed consent claim such as the one prosecuted by the Whites below is indisputably a “medical claim.” As such, this sort of claim must be buttressed by expert testimony in order to survive a directed verdict motion at trial. There can be little doubt from reading Civ.R. 10(D)(2) that the sole claim at trial (lack of informed consent) was a “medical claim” as presently defined by Civ.R. 10, and that it would have required an affidavit of merit had the injury occurred after the 2005 amendments to Civ.R. 10.

It is clear from a reading of both the plurality and dissenting opinions that this is an area in need of guidance and clarification from this Court. When this Court issued *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, it provided clarification on the elements of a claim for lack of informed consent, but it did not address the need for expert testimony to support such a claim, although the Plaintiff in that case did present expert testimony in support of her claim. *Id.* at 137-138.

Because the standards of the medical community are not common knowledge, the general rule is that the plaintiff must prove causation through expert medical testimony. *Roberts v. Ohio Permanente Medical Group, Inc.* (1996), 76 Ohio St.3d 483. This proposition of law is equally applicable to a lack of informed consent cause of action brought subsequent to neurosurgery as it is to any other medical liability claim.

Other courts have held that expert testimony is needed to support a lack of informed consent claims, and in so doing, have appropriately concluded that a lack of informed consent claim arising out a surgical procedure is a medical malpractice claim, albeit not a medical negligence claim.

In *Maglosky v. Kest*, 8<sup>th</sup> App. No. 85382, 2005-Ohio-5133, the Eighth District determined that expert testimony is an indispensable requirement in proving the tort of lack of informed consent:

This court has repeatedly held that "medical expert testimony is necessary to establish the significant risks which would have been disclosed to support the plaintiff's claim since the probability and magnitude of those risks is a matter of medical judgment beyond the knowledge of the lay person." *Harris v. Ali* (May 27, 1999), Cuyahoga App. No. 73432, citing *Ratcliffe v. Univ. Hosp. of Cleveland* (Mar. 11, 1993), Cuyahoga App. No. 61791, citing *Ware v. Richey*, 14 Ohio App.3d 3, 7, 469 N.E.2d 899.

In *West v. Cleveland Clinic Found.* (June 15, 2000), Cuyahoga App. No. 77183, the plaintiffs argued that they did not need expert testimony to prove their claims for medical malpractice and lack of informed consent. This court disagreed, finding that expert testimony is required **in all actions for medical malpractice, including those alleging lack of informed consent**. We specifically stated:

"In order to prevail on a claim for lack of informed consent, medical expert testimony is necessary to establish the significant risks which would have been disclosed to support the plaintiff's claim since the probability and magnitude of those risks is a matter of medical judgment beyond the knowledge of the lay person." *Id.*, citing *Ratcliffe*, *supra*.

We noted further that "generally, the plaintiff has the burden of proving by expert medical evidence what a reasonable medical practitioner \* \* \* would have disclosed to his patient about the risks incident to a proposed treatment, and of proving that the physician departed from that standard." *Id.*, quoting, *Bedel v. Univ. of Cincinnati Hosp.* (1995, Franklin Cty.), 107 Ohio App.3d 420. Therefore, we concluded, **"it is clear that medical malpractice**

**claims, including those of lack of informed consent, require expert testimony."** Id. (emphasis added.)

The plurality opinion below took pains to state at least twice that "this is not a medical malpractice case." *White v. Leimbach*, supra, 2010-Ohio-1726 at ¶s 6, 19. Numerous courts have expressly determined to the contrary, (i.e.) that lack of informed consent claims are included within the ambit of medical malpractice claims. Perhaps, this is the source of confusion which has led to such different pronouncements from different appellate courts on what should be a very straight-forward issue. There can be no question that the plurality opinion's pronouncement that no bright-line expert requirement exists was based on a good faith, albeit flawed, survey of existing case law. This fact underscores the need for this Court to accept jurisdiction to elucidate upon and clarify this important issue. Otherwise, the confusion already evidenced by the divergence in the plurality and dissenting opinions will be compounded as trial courts and appellate courts alike look to the court of appeals decision below for guidance.

The court of appeals' statement that a directed verdict would have been improper "even if" there were a bright-line requirement of expert testimony in lack of informed consent claims simply does not withstand scrutiny. Two distinguished neurosurgeons testified as defense experts at trial. Dr. Rea and Dr. Miner both testified without reservation that no material risk of this surgery ever occurred. They each testified that Mr. White was no worse off after the surgery than before the surgery. They each testified that surgery was dictated by the circumstances of the case, and that that the surgery was performed competently. They each testified that Mr. White was fully informed of the relevant risks. Finally, Dr. Rea and Dr. Miner each testified that the proximate cause of Mr. White's injuries was a fall in Sandusky. As the trial court aptly

noted in its ruling on the Motion for Directed Verdict, this evidence was “unrebutted”. This unchallenged expert testimony was also summarized in the dissenting opinion below at paragraphs 30-33.

In light of this testimony, it is illogical to suggest that the jury was free to reach contrary conclusions as to 1) the nature of the known risks of the surgical procedure, 2) whether such risks materialized, and 3) whether such materialized risks caused Mr. White’s injury. A good example of the potential for confusion on this issue was demonstrated at trial when the plaintiffs’ counsel kept referring to the surgery as a “re-do” and then referenced extremely dated literature to the effect that re-do laminectomies have a higher complication rate. Both defense experts testified that the study was not relevant because the second surgery was not a “re-do” of a failed surgery. Importantly, the first surgery went very well and a second surgery was only required because Mr. White fell at Cedar Point. These facts distinguished Mr. White from a typical “re-do” patient, who undergoes a second surgery because the first was not effective.

Dr. Rea also testified that the numbers from the literature referenced by plaintiffs’ counsel without benefit of expert assistance are no longer valid, as the test sample consisted entirely of patients whose symptoms were dissimilar to Mr. White’s:

A. What I am saying is that your article does not support him being in that group, because that group had a slow onset of their worsening. **Clinically, there is no question he would not have fit into that group.** I am sorry. (Tr. 544.)

Clearly, these are not issues remotely within the experience or understanding of an ordinary juror.

Likewise, Dr. Miner testified that surgical success numbers have improved markedly since the time of the study cited by counsel, and testified that Mr. White's situation was not comparable to that of the typical test subject because he had an identifiable cause for a new problem (the fall), and because he had an excellent result after the first surgery. (Tr. 609-610.)

To suggest, as did the court of appeals, that the average layman has the knowledge and experience to reach the complete opposite conclusion as Dr. Rea and Dr. Miner, without the benefit of opposing expert testimony strains credulity and sets a dangerous precedent for all medical malpractice lawsuits.

### **PROPOSITION OF LAW NO. 2**

**Where a patient seeks a second opinion prior to undergoing a medical procedure, and where in the course of receiving the second opinion the patient is fully informed of all material risks and dangers associated with the procedure, the patient may not maintain a claim of lack of informed consent against his medical provider because the patient's decision to proceed, despite full knowledge of the material risks involved, establishes that the patient's decision was knowing, voluntary and fully-informed.**

In a lack of informed consent case, "\*\*\*\*causality **only** exists when the disclosure of a significant risk incidental to treatment **would** have resulted in the patient's refusal of treatment." *Collins v. Ohio State Univ. College of Dentistry*, (June 27, 1996), 10th App. No. 96API02-192, citing *Bruni v. Tatsumi*, supra, 46 Ohio St.2d at 136. (emphasis sic.)

In this case Dr. Miner testified without contradiction that he had personally informed Mr. White of all of the known, material risks of the second surgery. The plurality opinion accepted that this had occurred but concluded that "Dr. Miner's testimony was capable of being considered by the jury, but did not erase the contrary

evidence of lack of informed consent from Dr. Leimbach for purposes of Civ.R. 50(A).”  
*White v. Leimbach*, supra, 2010-Ohio-1726 at ¶ 24.

In point of fact, Dr. Miner’s unchallenged testimony should have been given the legal effect of precluding recovery on the claim for lack of informed consent, because it established that additional disclosure by Dr. Leimbach would absolutely not have resulted in the patient’s refusal of treatment.

Nobody faulted Dr. Miner’s discussion of known material risks with the Whites in advance of the second surgery. There was no suggestion that the Whites considered Dr. Miner less trustworthy or less qualified than Dr. Leimbach. Accordingly, the fact that Mr. White proceeded with surgery despite full knowledge of all material risks, establishes that he was unable to meet his evidentiary burden as to the causality element of a lack of informed consent claim as a matter of law.

#### **IV. CONCLUSION**

This Court should exercise its discretionary jurisdiction to hear this appeal in order to establish a bright-line rule that expert testimony is required in lack of informed consent cases, contrary to the holding of the court of appeals below.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction* was sent by regular U.S. mail on this 4<sup>th</sup> day of June, 2010 to:

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**APPENDIX**

*White v. Leimbach*, 10<sup>th</sup> App. No. 09AP000674, .....APPX000001  
2010-Ohio-1726, Decision

*White v. Leimbach*, 10<sup>th</sup> App. No. 09AP000674, Judgment Entry .....APPX0000018

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Robert N. White et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-674 (C.P.C. No. 03CVA-04-3969)
Warren H. Leimbach, II, M.D.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on April 20, 2010

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*Cooper & Elliott, LLC, Charles H. Cooper, Jr. and Rex H. Elliott, for appellants.*

*Reminger Co., LPA, and Martin T. Galvin, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Dr. Warren H. Leimbach, II, performed a laminectomy/discectomy (back surgery) on appellant, Robert N. White, in March 1998, and again a few months later, after Mr. White slipped and re-injured the same disc. Prior to the second surgery, Dr. Leimbach allegedly failed to disclose the significant additional risks associated with performing the exact same surgery again—that the existing scar tissue from the old surgery would likely complicate the procedure, and the likelihood of lasting pain would be much greater after a second surgery relative to a first procedure. The second surgery left

Mr. White with permanent, chronic pain, which requires him to take heavy narcotic medications, and he alleges that had he known about the known risks associated with the second surgery he would not have chosen to proceed with it. Mr. White ultimately filed suit against Dr. Leimbach in April 2000, but the case was delayed for several years. Trial finally began in June 2009, and at the close of evidence, Dr. Leimbach made a motion for a directed verdict, which the trial court granted.

{¶2} The relevant evidence at trial revealed the following: (a) Dr. Leimbach knew that the second surgery carried a much greater risk of a poor outcome than the first; (b) based on the documentary evidence and the testimony of Mr. White and his wife—who were both present at all medical appointments—Dr. Leimbach did *not* mention the greater risk(s) associated with the second surgery; (c) Mr. White's condition was significantly worse after the second surgery; and (d) the second surgery was the most likely cause of Mr. White's deteriorated condition. At issue here, is whether this evidence, viewed under the proper standard, was sufficient to create a question of fact for the jury. We answer that question in the affirmative, and accordingly we reverse the decision of the trial court.

{¶3} Mr. and Mrs. White assign a single error for our consideration:

THE TRIAL COURT ERRED WHEN IT GRANTED A  
DIRECTED VERDICT IN FAVOR OF DEFENDANT AT THE  
CLOSE OF ALL THE EVIDENCE.

{¶4} Motions for directed verdict are governed by Civ.R. 50(A)(4), which requires a trial court to construe all evidence most strongly in favor of the nonmoving party, and after doing so, determine whether the evidence dictates that the only reasonable conclusion able to be drawn therefrom is adverse to the nonmoving party. See *Goodyear*

*Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 514, 2002-Ohio-2842; *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69. This "reasonable minds" test requires the trial court to discern only whether there exists any evidence of substantive probative value that favors the position of the nonmoving party. *Id.* When deciding a directed verdict motion, the trial court's decision should not involve weighing of the evidence or evaluating the credibility of witnesses; rather, its determination is a question of law: Was there sufficient material evidence at trial to create a factual question for the jury? *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 686-87. "A motion for a directed verdict raises a question of law because it examines the materiality of the evidence, as opposed to the conclusions to be drawn from the evidence." *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119-20, 1996-Ohio-85, citing *Ruta* at 68-69. Accordingly, our review of a trial court's ruling on a motion for directed verdict is de novo. *McConnell*, supra.

{¶5} The tort of lack of informed consent is established when: (1) a physician fails to disclose and discuss material risks or dangers that are inherently associated with a proposed medical treatment or procedure; and (2) the undisclosed risk or danger actually materializes, and is the proximate cause of the patient's injury; if (3) a reasonable person would have declined the treatment or procedure in the event that the physician had properly apprised them of the potential risks involved. *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, syllabus.

{¶6} This is not a medical malpractice case, nor is it a negligence case per se. The tort of lack of informed consent emanates from the common law tort of battery, which is an unconsented, offensive touching. See, e.g., *Anderson v. St. Francis-St. George*

*Hosp., Inc.* (1996), 77 Ohio St.3d 82, 84; cf. *Canterbury v. Spence* (C.A.D.C. 1972), 464 F.2d 772, 782–83 ("It is the settled rule that therapy not authorized by the patient may amount to a tort—a common law battery—by the physician."); W.E. Shipley, Annotation, *Liability of Physician or Surgeon for Extending Operation or Treatment Beyond that Expressly Authorized* (1957), 56 A.L.R.2d 695, Section 2.

{¶7} In *Nickell*, the plaintiff-patient suffered from a partial paralysis of the arm after undergoing a procedure to relieve thoracic outlet syndrome. The case went all the way to verdict, and the jury found in favor of the defendant-physician. *Id.* -at 137. The trial court, however, granted the plaintiffs' judgment notwithstanding the verdict ("JNOV") motion, and ordered a new trial on the issue of damages. The jury awarded \$0 damages, and the plaintiffs appealed. After reviewing the record, the First District Court of Appeals found that the trial court erroneously granted plaintiff's JNOV motion. The Supreme Court of Ohio affirmed that decision, and in doing so, set forth the prevailing law concerning the tort of lack of informed consent. Ante, ¶5.

{¶8} *Nickell's* usefulness in our review of this case is two-fold: In addition to providing the applicable and controlling law for the issues herein, its circumstances are also similar to this case because of the trial court in *Nickell* having granted a JNOV motion, while in this case the trial court granted the defendant's motion for a directed verdict. See, e.g., *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679, 1998-Ohio-602; *Ayers v. Woodard* (1957), 166 Ohio St. 138 (holding that the standard for granting a JNOV motion is the same as the one used to sustain a motion for directed verdict).

{¶9} Another key component from *Nickell* that applies to our review of this case was the physician's testimony, in which he denied failing to disclose information regarding material risks or dangers of the procedure to the patient. *Nickell* at 137. In this case, the only evidence regarding whether Dr. Leimbach discussed or disclosed the material risks associated with Mr. White's second back surgery came from Mr. and Mrs. White. (Tr. 250-52; 405-06.) Both of them were present when Dr. Leimbach recommended the second back surgery, and both spouses' testimony was consistent—that Dr. Leimbach referred to the second surgery, quite simply, as a "re-do." *Id.* According to the Whites, the doctor made no mention of the likely presence of scar tissue, its impact or consequences on the success rate of second surgeries, and the doctor did not disclose any additional risks to them prior to recommending or performing the second surgery. See *Id.* Mrs. White in fact testified that she specifically asked Dr. Leimbach about whether there were any risks associated with the second surgery, to which she stated that Dr. Leimbach's response was "minimal." (Tr. 406.) Thus, the Whites both testified that Dr. Leimbach did not disclose any additional risks associated with the second surgery, and Dr. Leimbach did not refute that testimony.

{¶10} Dr. Leimbach's office notes tend to corroborate the Whites' testimony, because the office notes fail to mention any disclosure of the additional risks associated with the second surgery to Mr. White. In the month prior to Mr. White's first surgery, Dr. Leimbach dictated the following notes, on February 23, 1998: "I have just seen Robert White in my office. \* \* \* He wants to proceed with a surgical approach. We will get that scheduled as soon as possible. *We went over at length what surgery is all about and he*

wants to proceed with it." (Plaintiff's exhibit No. 1, at 3.) (Emphasis added.) ("office notes"). Prior to performing the second surgery, Dr. Leimbach stated that:

Mr. White did indeed herniate a disk \* \* \*. Vital signs today noted a blood pressure of 104/64, pulse of 72, respirations of 20 and temperature of 97.3.

*We talked at length today.* The best thing would be to proceed with re-exploration and take the disk out. He is amenable to this. We will schedule that in two weeks at his convenience.

(Plaintiff's exhibit No. 11, at 2.) (Emphasis added.)

{¶11} Although neither example contains specific language that outlines Dr. Leimbach's discussion of risks per se, it is clear from the context in the first example ("and he wants to proceed with it") that the subject of the lengthy discussion was related to pros and cons of having the surgery and the timing of such surgery.

{¶12} The inferences drawn from the office notes are confirmed by the hospital pre-procedure forms, in which on March 10, 1998 Dr. Leimbach signed his name and checked the "yes" box indicating that he had received Mr. White's informed consent. (Plaintiff's exhibit No. 9.) But on the form completed prior to the second surgery, Dr. Leimbach did not indicate that he received Mr. White's informed consent. (Plaintiff's exhibit No. 17.)

{¶13} This exact same finding is duplicated in the hospital's operative reports. In the report from the first surgery, the notations indicate as follows: "The risks of the procedure were explained to the patient, and he requested the procedure after the failure of conservative care." (Plaintiff's exhibit No. 10.) There is no similar notation in the operative report from the second surgery. (Plaintiff's exhibit No. 18.)

{¶14} Although Dr. Leimbach did testify that he obtained Mr. White's informed consent prior to performing the second surgery, the doctor did acknowledge the risks associated with a second laminectomy/discectomy, and testified to his understanding that they are significantly higher with a "re-do" than they are with the same procedure when it is performed for the first time. (Tr. 204-06.)

{¶15} Perhaps the trial court agreed with the Whites insofar as Dr. Leimbach failed to obtain Mr. White's informed consent prior to the second surgery, because in its decision, the court stated: "[T]here just hasn't been sufficient testimony to meet the second element of [*Nickell*]." (Tr. 702.) The second element in *Nickell* is limited to whether the undisclosed risks actually materialized, and caused injury to the patient. See *Nickell* at 136. The trial court did not find a lack of evidence about a failure of informed consent.

{¶16} The evidence before the trial court was more than sufficient to create a question of fact for the jury; in fact, Dr. Leimbach's office notes from two weeks after the surgery were sufficient to establish the second prong of *Nickell*:

Robert indeed still has a lot of pain in the leg even after the second surgery. I was very disappointed with the second surgery because when I got in there I really found no herniated disk. Everything was flush on the floor of the canal[,] and there is a lot of scar tissue[,] which I had to dissect off the root [*sic*] and it did not surprise me he still has a lot of pain and throbbing that leg and a lot of burning pain in the foot there. \* \* \* *That is what I was afraid of with the scar tissue and the second operation and we just made it worse.* \* \* \*

(Plaintiff's exhibit No. 11, at 3.) (Emphasis added.)

{¶17} Counsel for Dr. Leimbach tries to address the issues here by directing the court's attention to questions about which physicians were qualified as experts. Counsel

argues that since Mr. White knew that there were "no guarantees" with the second surgery, the trial court's ruling should be affirmed. Whether or not Dr. Leimbach made guarantees to Mr. White is irrelevant, because White is not alleging that the results of the second surgery were less than he had hoped for—his claim is based on the fact that the second surgery made his condition worse, and had he known that this was a real possibility, he would not have chosen to have the surgery in the first place. Counsel for appellee's reliance on *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, is misplaced, because that case was a medical negligence case. Its fleeting mention of informed consent was merely dicta. See *Id.*, (citing *Canterbury* at 782–83); cf. *Nickell* at 138. Moreover, even if *Bruni* were controlling, it would not be dispositive of this case because it does not set forth a bright-line rule requiring per se medical expert testimony in every such case:

The issue as to whether the physician and surgeon has proceeded in the treatment of a patient with the requisite standard of care and skill must *ordinarily* be determined from the testimony of medical experts. 41 American Jurisprudence, Physicians & Surgeons, Section 129; 81 A.L.R.2d 590, 601. It should be noted that there is an exception to that rule in cases where the nature of the case is such that the lack of skill or care of the physician and surgeon is so apparent as to be *within the comprehension of laymen* and requires only common knowledge and experience to understand and judge it, and *in such case expert testimony is not necessary*. See Hubach v. Cole (1938), 133 Ohio St. 137, 12 N.E.2d 183, and, generally, Morgan v. Sheppard (1963), Ohio App., 188 N.E.2d 808[.]

*Bruni* at 130 (Emphasis added.)

{¶18} *Bruni* stands for the proposition that medical expert testimony is *ordinarily* required to prove whether a physician's care did not meet the minimum standard—in medical negligence cases. And in addition to qualifying the rule by inserting *ordinarily* in

the syllabus, the *Bruni* court also carved out a specific exception to the rule, which eliminates the expert testimony requirement altogether in situations when a jury would be capable of understanding the issues without expert testimony. *Id.*; see also *Dawson v. St. Elizabeth Hosp. Med. Ctr.* (Oct. 7, 1998), 7th Dist. No. 97 C.A. 53, 1998 WL 775008, \*4.

{¶19} We have already noted that this is not a medical malpractice case, and it does not sound in negligence. Appellee cites this court's decision in *Fernandez v. Ohio State Pain Control Ctr.*, 10th Dist. No. 03AP-1018, 2004-Ohio-6713, for the proposition that *Nickell* also requires expert testimony to prove the existence of any undisclosed material risks and dangers that are typically associated with a surgical procedure. See *Id.* at ¶15 (quoting *Valerius v. Freeman* (Oct. 19, 1994), 1st Dist. No. C-930658). On the facts of this case, however, our decision in *Fernandez* is inapposite. In this case, it is abundantly clear from the testimony of several physicians—including the actual surgeon who performed the procedure—that the undisclosed material risks and dangers associated with undergoing a second laminectomy/discectomy include the presence of scar tissue, and the likelihood of making the existing pain worse. Even if controlling case law existed that requires expert testimony in lack of informed consent cases, there is no reason why the exception(s) in *Bruni* would not similarly apply. Regardless, the record is replete with evidence that Mr. White's condition was made worse because of the second surgery, and the presence of scar tissue.

{¶20} The only physician who seemed to testify inconsistently with this common viewpoint was Dr. Gary Rea, the defense expert who never treated Mr. White, or had the benefit of examining him, either before or after the second surgery. (Tr. 508.) Dr. Rea gave direct testimony to the jury, and then just 15 to 20 minutes into his cross-

examination, the trial judge dismissed the jury for the afternoon: "It can't happen. We have time constraints as regards to the jury's time." (Tr. 525.) Once the jury was excused on June 24, 2009, they would never see Dr. Rea again. Plaintiff's counsel was allowed to continue his cross-examination, but the jury was not able to see its effect or gauge Dr. Rea's demeanor during cross-examination. (Tr. 563–90.)

{¶21} Experts routinely testify via video deposition, or using some other out-of-court medium. However, it is highly irregular for any witness to give live testimony on direct-examination, and then fail to afford opposing counsel with the opportunity for live presentation or cross-examination.

{¶22} Regardless of which party's counsel, if any, qualified each individual physician as an expert to the trial court, our review of the trial transcript and record reveals that each is an expert in his own right. The unfortunate fact that Dr. Leimbach suffered a stroke between the time he performed the surgery on Mr. White and the time he testified at trial does not change the fact that he was a licensed physician when his office notes and hospital records were developed.

{¶23} As noted earlier, Civ.R. 50(A)(4) requires that when a directed verdict is sought, evidence must be construed most strongly in favor of the nonmoving party, including all inferences drawn therefrom. If, after doing so, there is any doubt as to which side is supported by that evidence, the trial court must deny the motion. Given Dr. Leimbach's office notes alone, there is sufficient evidence to create enough doubt as to whether the undisclosed risks of the second surgery actually materialized and caused Mr. White additional pain.

{¶24} Counsel for Dr. Leimbach also argues that another physician—Dr. Michael Miner, who gave the Whites a second opinion prior to them proceeding with the second surgery—informed the Whites about the additional risks associated with the second surgery. (See Appellee's Brief, at 6.) Dr. Miner's testimony was capable of being considered by the jury, but did not erase the contrary evidence of lack of informed consent from Dr. Leimbach for purposes of Civ.R. 50(A).

{¶25} We find that the evidence was sufficient to withstand Dr. Leimbach's directed verdict motion, and we accordingly sustain the sole assignment of error. Having sustained the assignment of error, we vacate the judgment of the Franklin County Court of Common Pleas, and remand this case to the trial court for further appropriate proceedings.

*Judgment vacated and remanded  
for further proceedings.*

SADLER, J., concurs in judgment only.  
FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶26} I respectfully dissent. I agree with the majority that questions of fact remain as to the first *Nickell* factor, which asks whether material risks of the second surgery were disclosed to Mr. White. I disagree, however, that questions remain as to the second *Nickell* factor, which asks whether the undisclosed risks materialized and caused injury to Mr. White. Because Mr. White cannot meet all three prongs of the *Nickell* test, in my view, a directed verdict was proper.

{¶27} In a case involving a claim of lack of informed consent, expert testimony is required to establish what the material risks were, whether they materialized, and whether they proximately caused the injury at issue. *Hillman v. Kosnik*, 10th Dist. No. 07AP-942, 2008-Ohio-6303, ¶10, citing *Fernandez v. Ohio State Pain Control Ctr.*, 10th Dist. No. 03AP-1018, 2004-Ohio-6713. "In Ohio, the admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability." *Stinson v. England*, 69 Ohio St.3d 451, 455, 1994-Ohio-35. An "event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." *Id.*

{¶28} Here, Mr. White contends that he presented expert testimony that the high risk of an unfavorable outcome from the second surgery was not disclosed, that the unfavorable outcome did occur, and that the unfavorable outcome caused his injuries, which include severe chronic pain and swelling and discoloration in his leg. In support, he does not offer his own expert's testimony. Rather, he points to the following three sources: (1) Dr. Leimbach's office note; (2) Dr. Miner's testimony; and (3) Dr. Rea's cross-examination.

{¶29} First, Dr. Leimbach's office notes do not constitute expert testimony. The parties agree that Dr. Leimbach testified as a fact witness, not an expert, at trial. In one post-operative office note, which Mr. White submitted as Exhibit 11, Dr. Leimbach stated that he was "very disappointed" with the second surgery because he found no herniated disk, but did find extensive scar tissue, which he had to dissect. (October 29, 1998 Office Note.) He noted: "That is what I was afraid of with the scar tissue and the second operation and we just made it worse." While certainly evidence that the second surgery

made some aspect of Mr. White's condition worse, the note was not an expression of an opinion by an expert that there is a greater than 50 percent likelihood that the second surgery produced Mr. White's injuries. Therefore, under *Stinson*, it was not admissible as expert testimony for the purpose of proving proximate cause and meeting the second *Nickell* factor.

{¶30} Second, Dr. Miner, while an expert, did not testify that the second surgery caused Mr. White's injuries. Dr. Miner testified that he saw Mr. White in October 1998, and, as was his custom, he would have disclosed the risks associated with the second surgery. Defense counsel asked Dr. Miner whether any of the material risks of the second surgery occurred, and Dr. Miner replied, "I am not aware of any of those risks occurring after either of the surgeries." (Vol. IV Tr. 617.) Dr. Miner also stated that the second surgery did not make the pain worse. (Vol. IV Tr. 619.) When asked whether "in all medical probability, more likely than not," Mr. White would be in pain even without the second surgery, Dr. Miner stated: "Yes." (Vol. IV Tr. 626.) At the end of his direct testimony, Dr. Miner confirmed that his opinions were to a reasonable degree of medical probability and were based on his education, training, and experience, his review of the medical records, and his two examinations of Mr. White.

{¶31} Mr. White notes that, on cross-examination, Dr. Miner testified that his symptoms, which are classic symptoms of causalgia, did not exist before the second surgery and that these symptoms can occur after nerve injury. Dr. Miner agreed with counsel's assumed symptoms and agreed that, given such symptoms, Dr. Leimbach's concern about causalgia would have been justified. Dr. Miner also agreed that Mr. White's severe foot pain shortly after surgery was an indication of nerve damage.

Although Dr. Miner agreed that the foot pain could not be attributed to the fall in August 1998, Dr. Miner indicated that the fall "set him up for this whole terrible outcome that he has had." (Vol. IV Tr. 656.)

{¶32} At no time did Dr. Miner testify that the second surgery caused Mr. White's injuries. On cross-examination, he agreed that Mr. White showed signs of causalgia and nerve damage, but he never stated that, in his medical opinion, the second surgery was the likely cause of these or other injuries, nor did he recant or contradict his earlier opinions. Therefore, Dr. Miner's testimony on cross-examination was not expert testimony that the second surgery was the proximate cause of Mr. White's injuries.

{¶33} Third, Dr. Rea testified that the second surgery did not cause Mr. White's injuries. He stated that, in his opinion, the second surgery did not change anything and that, even if the second surgery had not been performed, Mr. White's condition would be the same. (Vol. III Tr. 507.) He also stated that Mr. White's fall in August 1998 was the cause of his injuries. (Vol. III Tr. 508.)

{¶34} Nevertheless, Mr. White points to the following dialogue during Dr. Rea's cross-examination.

Q. Doctor, we have very different pain immediately after the October surgery, true?

A. We do have some difference, yes.

Q. That difference cannot simply be attributed to the fall and the tethering, true?

A. True.

Q. That difference has to have occurred somehow, correct?

A. Correct.

Q. The only event that really takes place between the time of the fall in August, and the time Mr. White wakes up out of anesthesia with that raw pain in his foot, the only event that occurs is the surgery, true?

A. That's correct.

Q. So, it is fair to attribute that raw burning pain to the surgery, is it not?

A. It could be. It could also be a combination of just continued pain from the issue. But, yes, it could be from the surgery.

Q. That is the most likely cause, true, because we didn't have that symptomatology prior to the surgery?

A. Correct.

(Vol. III Tr. 532.)

{¶35} Mr. White points to this last statement, which he interprets as Dr. Rea's agreement that the surgery was the "most likely cause" of his severe foot pain, as expert testimony in support of his claim that the second surgery caused his injuries. When questioned further about the foot pain, however, Dr. Rea stated that Mr. White also had severe foot pain prior to the surgery. He did not recant his earlier testimony that the second surgery did not cause Mr. White's injuries. For example, during this same cross-examination, Dr. Rea stated that "the tethering and the fall together, those are the two things that are most likely to have caused all of his pain." (Vol. III Tr. 530.) Mr. White's counsel asked: "You are talking about the pain that also postdated the October surgery?" (Vol. III Tr. 530.) Dr. Rea answered: "Yes, the long term pain." (Vol. III Tr. 530.)

{¶36} Dr. Rea had also been asked on direct examination, in terms of "the ongoing problems that Mr. White is experiencing, is the cause of those problems the fall or is the cause of these problems the surgery?" (Vol. III Tr. 507-08.) Dr. Rea answered:

"I think, in terms of if you look at the overall picture before the surgery, and the overall picture after the surgery now, I think it is because of the fall." (Vol. III Tr. 508.) Whether Dr. Rea misspoke, misheard the question or answered a hypothetical situation when he later said, "correct," in response to Mr. White's counsel's question, he did not change or recant his expert opinion that the second surgery did not cause Mr. White's injuries.

{¶37} Ohio appellate courts, including this one, have stated that erosion of an expert's opinion " 'due to effective cross-examination does not negate that opinion; rather it only goes to weight and credibility.'" *Heath v. Teich*, 10th Dist. No. 03AP-1100, 2004-Ohio-3389, ¶14, quoting *Galletti v. Burns Internatl.* (1991), 74 Ohio App.3d 680, 684 (Christley, P.J., concurring). "Thus, the party moving for a directed verdict must show that the testimony was resolved in its favor by a direct contradiction, negation, or recantation of the testimony given by the witness on direct examination." *Heath* at ¶14. If the moving party does not show a direct contradiction, negation or recantation of the testimony, "the testimony given on cross-examination only arouses speculation regarding the witness's testimony on direct and leaves a question of fact for the jury to determine. \* \* \* In other words, 'subsequent recantations of certainty on cross-examination do not destroy the admissibility of the testimony, but act as impeachments of the expert's credibility.'" *Id.*, quoting *Galletti* at 685-86 (Ford, J., concurring). Accord *Segedy v. Cardiothoracic and Vascular Surgery of Akron, Inc.*, 182 Ohio App.3d 768, 2009-Ohio-2460, ¶18 (stating that any conflict between an expert doctor's answers on direct examination and answers on cross-examination "may have affected the weight and credibility of his opinions, but did not, alone, serve to recant his prior testimony"); *Lanzone v. Zart*, 11th Dist. No. 2007-L-073, 2008-Ohio-1496, ¶63 (rejecting the appellant's attempt to "selectively choose

portions" of experts' testimony and concluding that, "when read in its entirety, [the experts'] testimony, albeit tested by effective cross-examination, is not tantamount to a recantation").

{¶38} Here, Dr. Rea's testimony on direct examination, offered on behalf of Dr. Leimbach, the defendant, was sufficient to establish a prima facie case as a matter of law that something other than the second surgery caused Mr. White's injuries. Dr. Rea's agreement with one statement by Mr. White's counsel that the surgery was the most likely cause of Mr. White's post-operative foot pain, standing alone, did not negate Dr. Rea's expert opinion that the second surgery had no impact on Mr. White; rather, that statement, if it has any impact at all, goes to the weight and credibility to be afforded Dr. Rea's opinion.

{¶39} Mr. White offers no precedent for his assertion that an isolated, inconsistent statement by a defendant's expert on cross-examination, standing alone, creates a prima facie case for proximate cause on behalf of the plaintiff. While he may have weakened the veracity of the testimony of Dr. Leimbach's experts, Mr. White offered no expert testimony that the second surgery was the proximate cause of his injuries. Because Mr. White failed to meet the second *Nickell* factor, in my view, a directed verdict on behalf of Dr. Leimbach was proper. The majority having reached a different conclusion, I respectfully dissent.

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FILED  
COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT  
APR 20 PM 1:51  
CLERK OF COURTS

Robert N. White et al., :

Plaintiffs-Appellants, :

v. :

Warren H. Leimbach, II, M.D., :

Defendant-Appellee. :

No. 09AP-674  
(C.P.C. No. 03CVA-04-3989)

(REGULAR CALENDAR)

DDE

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on April 20, 2010, the sole assignment of error is sustained. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision. Costs shall be assessed against appellee.

TYACK, P.J., & SADLER, J.

By: *G. Gaby Tyack*  
Judge G. Gaby Tyack, P.J.