ORIGINAL

IN THE SUPREME COURT OF OHIO

ROBERT N. WHITE, et al.	)	
	)	
Appellees,	)	CASE NO. 10-0988
	)	
-vs-	)	
	)	On Appeal from the Tenth District
WARREN H. LEIMBACH, II, M.D.	)	Court of Appeals
	)	
Appellant.	)	
	)	

MERIT BRIEF OF APPELLANT WARREN H. LEIMBACH, II, M.D.

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I. STATEMENT OF THE FACTS

A. Background

This appeal arises out of a medical malpractice lawsuit which proceeded to trial on a single cause of action of lack of informed consent, arising out of a neurosurgery procedure. (Supp. 007; R. 28, Brief of Appellant at p.2) This lawsuit was initially filed on April 24, 2000 in the Franklin County Court of Common Pleas by Plaintiffs-Appellees Mr. Robert White, and his wife, Mrs. Mary White ("Appellee" or "Mr. White"). (Supp. 007; R. 28, Brief of Appellant at p.2) The below lawsuit arose out of two back surgeries performed on Mr. White by Defendant-Appellant Dr. Warren H. Leimbach, II ("Dr. Leimbach"). (Supp. 006-007; Appx. 004-005) These surgeries were performed approximately seven months apart in 1998. (R. 28, Brief of Appellant at p.1) Mr. White was in severe pain prior to both surgeries and attempted to treat conservatively prior to both surgeries. (Tr. 197, 200, 205) The alleged absence of informed consent is only at issue as to the second surgery. The surgeries were both laminectomy surgeries to relieve back pain at the L5-S1 region. (R. 28, Brief of Appellant at p.7)

After having been voluntarily dismissed without prejudice, the below lawsuit was re-filed on April 7, 2003. (R. 28, Brief of Appellant at p.2) Trial started on June 22, 2009 and lasted through June 25, 2009. (Supp. 007)

B. The Specifics of Appellees' Claim

There is no dispute that Mr. White experienced relief of his symptoms after the first surgery. The second surgery was necessitated by a fall which occurred about five months after the first surgery that Mr. White had at Cedar Point Amusement Park. (Supp. 006; Appx. 004, Tr. 498-499, 569, 676-677) Appellees do not dispute that Dr. Leimbach met the standard of care as to both surgeries and that Mr. White provided

informed consent for the first surgery. Mr. White's sole theory of liability advanced at trial was that he should have been informed that laminectomy surgery "re-dos" have a slightly lower success rate than the initial procedure. (Supp. 10; Appx. 26) This theory of liability was supported at trial only by anecdotal statements made by Mr. White's attorney concerning a 20-year-old study. (Tr. 544, 609-610, 646, 664) No expert or medical practitioner of any kind testified to the relevance or accuracy of this study. Both of Dr. Leimbach's expert witnesses questioned the relevance and/or continued usefulness of this study. (Tr. 544, 609-610)

C. Mr. White Merely Presented Fact Testimony Concerning his Medical Condition at the Time of Trial – Not Expert Testimony Going to the Elements of Informed Consent

It is not disputed that Mr. White offered no expert witness testimony at trial. Mr. White did call his own pain management doctor as a witness, Dr. Bruce Massau, but Dr. Massau made no pretensions of possessing the qualifications to testify as an expert as to the informed consent claim. (Tr. 353-355, 371, 362-363, 387)

D. Dr. Leimbach Put Forth Appropriate Expert Testimony

At trial, Dr. Leimbach presented the expert testimony of two distinguished neurosurgeons, both of whom who were affiliated with The Ohio State University Medical Center at the time of trial, Dr. Michael Miner and Dr. Gary Rea. (Supp. 016-022; Appx. 014-020) As discussed in considerable detail herein, both of these experts testified that Dr. Leimbach appropriately disclosed all known material risks and that the proximate cause of Mr. White's condition was not any known risk that Dr. Leimbach failed to disclose.

Dr. Leimbach did not himself provide expert testimony at trial, but rather testified as a fact witness. In the eleven year interval between the time of Mr. White's injuries and trial, Dr. Leimbach had suffered a stroke, and had ceased the active practice of medicine in his specialty of neurosurgery. (Tr. 78) This stroke placed significant limitations on Dr. Leimbach's cognitive functioning. Thus, at the time of trial, Dr. Leimbach was not qualified to provide expert testimony. Even though the parties agreed at trial that Dr. Leimbach was not testifying as an expert at trial, the court of appeals stated that his testimony could be considered as expert testimony because "he was a licensed physician when his office notes and hospital records were developed."[1] (Supp. 015, Appx. 013)

E. The Trial Court Granted a Directed Verdict in Dr. Leimbach's Favor

Subsequent to the close of all evidence, the trial court granted a directed verdict in favor of Dr. Leimbach. The trial court stated as follows 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 *Nickel* requirements. For that reason, as I mentioned, the motion is sustained. Thank you.
>
> (Tr. 702; Supp. 003; Appx. 050)

On June 30, 2009, the trial court issued a Judgment Entry confirming judgment in favor of Dr. Leimbach, stating in part:

> ***

[1] Dr. Leimbach could not testify as an expert witness for the additional reason that he was not currently licensed to practice medicine, as required under Evid.R. 601(D).

> 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.

(Supp. 001; Appx. 048)

F. The Appeal to the Tenth District

Thereafter an appeal was perfected by Mr. and Mrs. White[2] to the Tenth District Court of Appeals. (R. 14) A divided Tenth District Court of Appeals issued its Decision on April 20, 2010, reversing the directed verdict entered by the trial court and remanding the case to the trial court for further proceedings. (R. 39; Supp. 004; Appx. 021) See, *White v. Leimbach*, 10th App. No. 09AP-674, 2010-Ohio-1726. The court of appeals' decision was only joined by one judge. (Supp. 016; Appx. 032) A second judge concurred in judgment only. The dissenting judge authored a lengthy dissenting opinion. (Supp. 024-030; Appx. 014-020)

The plurality decision held that, as a matter of law, expert testimony was not required to support a claim for lack of informed consent in Ohio. Id. at ¶6, 17-19. The court of appeals further found that lawsuits alleging lack of informed consent are not medical malpractice claims. *White v. Leimbach*, supra, 2010-Ohio-1726 at¶ 6, 19. The court of appeals distinguished this Court's opinion finding to the contrary in *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673 (and to some extent its progeny, *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 477 N.E.2d 1145) by characterizing portions of the opinion as non-controlling dicta. Id. at ¶ 17.

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[2] Mrs. White's claim was for loss of consortium only.

On June 4, 2010, Dr. Leimbach filed a Memorandum in Support of Jurisdiction, and Notice of Appeal with this Court. (R. 45; Appx. 001; Supp. 032) This Court exercised its discretionary jurisdiction to hear this appeal on September 29, 2010.

II. ARGUMENT IN SUPPORT OF PROPOSITION 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.

A. The General Requirement of Expert Testimony in Medical Malpractice Cases

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; *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367.

In a negligence action involving the professional skill and judgment of a [medical provider], expert testimony must be presented to establish the prevailing standard of care, a breach of that standard, and that the negligence, if any, was the proximate cause of the patient's injury. See, *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, paragraph one of the syllabus. There was absolutely no expert testimony at trial that Dr. Leimbach proximately caused any injury to Mr. White. Thus, even if the trial court found evidence that known, material risks were not discussed, Dr. White would still have been entitled to a directed verdict.

Where a plaintiff has failed to offer expert medical testimony to prove that the injury was proximately caused by the deviation from the standard of care, a directed

verdict for the defense is proper. *Schwimmer v. Bowsher* (1993), Franklin App. No. 92AP-1140, discretionary appeal denied, 67 Ohio St.3d 1411. Certainly, no such testimony was offered below.

B. The Specific Requirement of Expert Testimony in Informed Consent Medical Malpractice Claims

Although the court of appeals below rejected the notion of a bright-line requirement of expert testimony in lack of informed consent cases, other Ohio 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*, 10th App. No. 03AP-1018, 2004-Ohio-6713; See also, *Hillman v. Kosnik*, 10th Dist. No. 07AP-942, 2008-Ohio-6303, at ¶10.

C. The Decision Below Misconstrued the Evidence/Testimony in the Record

The decision below rested on four factual predicates, each one of which was belied by the testimony at trial, and none of which are supported by a careful analysis of the trial testimony. Specifically, the court of appeals stated that:

> The relevant evidence at trial revealed all of the following: (a) Dr. Leimbach knew that the second surgery carried a much grater 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 risks) 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. (emphasis sic.)
>
> *White v. Leimbach*, supra, at ¶2; (Supp. 007; Appx. 005)

Even if the evidence supported the first three of these purported factual findings, Dr. Leimbach still would have been entitled to a directed verdict in the absence of competent and credible evidence supporting the fourth finding, i.e., "that the second surgery was the most likely cause of Mr. White's deteriorated condition." There is simply no evidence anywhere in the record which supports this contention that Mr. White's post-surgical condition was "caused" by the second surgery, much less evidence that this second surgery was "the most likely cause" of Mr. White's deteriorated condition. In fact both of Dr. Leimbach's experts testified unequivocally that just the opposite was true, i.e. that Mr. White's condition was caused by his fall at Cedar Point and/or a tethered nerve root ending, and that his condition would have been essentially unchanged with or without the surgery. (Tr. 498-500, 529, 569, 617-619, 626)

Furthermore, it is simply not the case that Dr. Leimbach (or anyone else) "knew that the second surgery carried a much greater risk of a poor outcome than the first." The only evidence at trial on this point was that the percentage of success rates were relatively similar for both surgeries, and that the dated study showing a marginal different in success rates of "redo" laminectomies was of questionable relevance both because of the sudden onset of the new injury and the very positive results obtained from the first surgery. (Tr. 502, 514, 544, 610)

It is also not true that Dr. Leimbach failed to disclose the enhanced risk of the second surgery. Indeed Dr. Leimbach stated that there was some concern on his part that scar tissue would be aggravated and that he was "sure" that he discussed this potential with the Mr. and Mrs. White. (Tr. 222) Dr. Leimbach also testified that at this

time he mentioned the slightly elevated risk of a second surgery due to the presence of this scar tissue. (Tr. 221-222)

Both Mr. and Mrs. White admitted that they discussed the subject of scar tissue with Dr. Leimbach prior to the second surgery, although in retrospect it is clear that they misunderstood the import of this conversation. (Tr. 258, 407-408) For his part, Mr. White admitted to not being a good listener and said he probably only heard half of what was communicated to him. (Tr. 282, 299, 399) Mr. and Mrs. White each also testified that they understood prior to surgery "that there were no guarantees" that Mr. White's symptoms would be alleviated by the second surgery. (Tr. 290, 311, 422)

The fact that both Mr. and Mrs. White conceded that there was a discussion of scar tissue, which discussion they misunderstood, underscores the fatal weaknesses of their claims. This is so because the unsupported assertion that some sort of scar tissue aggravation (or causalgia) caused Mr. White's injuries is the central premise of the court of appeals' decision. Yet, there was no expert testimony sufficient to support the conclusion either that 1) the potential for scar tissue aggravation was not sufficiently discussed in advance of the second surgery, or 2) that but for the second surgery Mr. White would have been in better physical condition.

Finally, it is simply not the case that "Mr. White's condition was significantly worse after the second surgery." Again this finding by the court of appeals is the exact opposite of the testimony of both of Dr. Leimbach's expert witnesses. (Tr. 507, 617)

D. Dr. Michael Miner Testified in a Dual Capacity as Both an Expert and as a Fact Witness Based on His Own Examination and Conversation with Mr. White

Importantly, Dr. Miner also testified that he fully and appropriately disclosed all material risks of the second surgery to Mr. White, in the course of providing a second opinion as the efficacy of the intended second surgery.[3] (Supp. 018, Appx. 041, Tr. 597, 603, 607, 662) The court of appeals referenced this testimony but concluded that it merely should have been considered by the jury in weighing the evidence, "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, at ¶24.

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* (1976), 46 Ohio St.2d 127, 136. (emphasis sic.)

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. After being fully informed of risks posed by the second surgery by a renowned neurosurgeon, Mr. White elected to proceed. Truly then, the issue of what Mr. White would have done had Dr. Leimbach provided additional or different information is purely hypothetical.

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[3] Dr. Miner testified as both a fact witness and expert witness at trial.

Nobody faulted Dr. Miner's discussion of known material risks with the Mr. White in advance of the second surgery. There was no suggestion that Mr. White 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.

Dr. Bruce Massau, Mr. White's pain management physician provided general testimony as to the severity of Mr. White's symptoms and his continued course of treatment. In regard to the treatment of Mr. White by Dr. Leimbach, Dr. Massau stated that he had no opinions to offer, and that the surgical procedures performed by Dr. Leimbach were beyond his expertise. Specifically, Dr. Massau testified to all of the following:

- "I don't have any idea what Dr. Leimbach did with this patient." (Tr. 387);
- That Mr. White's physical condition post surgery was likely exacerbated and/or caused by the treatment Mr. White received from another pain management doctor that he treated with post-surgery but prior to seeing Dr. Massau (Tr. 353-355, 371);
- That his practice was "totally different" from Dr. Leimbach's. (Tr. 362); and
- "I don't understand the standard of care for neurosurgeons." (Tr. 363)

Thus, there was testimony at trial from a physician specializing in pain management, who is infinitely more versed in issues involving back and neck pain than the average layman and who personally provided comprehensive medical care and treatment to Mr. White, that he had "no idea" what the relevant standard of care was or

whether the standard of care was met. Yet, the plurality opinion below concluded that "a jury would be capable of understanding these issues without expert testimony." (Supp. 014; Appx. 012) The illogic of the plurality's conclusion in this respect is self-evident.

E. Ohio's Informed Consent Doctrine

In *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 477 N.E.2d 1145, at syllabus, this Court articulated the standard and the necessary evidentiary showing for the tort of lack of informed consent as follows:

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

See also, *Boyer v. Ohio State Univ. Med. Ctr.*, 10th App. No. 07AP-742, 2008-Ohio-2278, holding that the trial court correctly determined that plaintiff did not offer competent evidence of lack of informed consent where record demonstrated that plaintiff was informed of the risks and benefits of her procedure.; See also, *Roeder v. Coleman* (April 26, 1994), 10th App. No. 93AP-889, holding that the failure of a plaintiff to establish any one of the three elements required by *Nickell* is fatal to his or her claim.

1. Expert Testimony is Required in Medical Malpractice Lack of Informed Consent Cases

In a lack of informed consent case, "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*, 10th App. No. 03AP-1018, 2004-Ohio-6713; *Valerius v. Freeman* (Oct. 19, 1994), Hamilton App. No. C-930658. Expert testimony is necessary in informed consent cases precisely because the issues presented (e.g., what known material risks would a reasonable practitioner disclose and whether such risks ever materialized) are beyond the knowledge of the lay person and can only be appropriately discussed at trial through the testimony of qualified experts.

Mr. White simply and indisputably failed to meet his burden in this regard, mandating a directed verdict in Dr. Leimbach's favor. Recognizing this deficiency, the court of appeals did away with the requirement of expert testimony all together, characterizing an informed consent claim not as a medical malpractice claim, but as a claim more akin to the common law tort of battery. *White v. Leimbach*, supra at ¶6.

2. Neither the Testimony of Dr. Massau nor Dr. Leimbach was Requisite Expert Testimony to Support an informed Consent Claim

Mr. White simply ignored the requirement of expert testimony on issues of significant risks of the second surgery, whether the risks materialized, and what information should have been disclosed. Dr. Massau did not even attempt to provide testimony in this respect. Dr. Leimbach testified only as a fact witness. Because of his present medical condition, Dr. Leimbach is unable to read and had to have assistance

from his attorneys in regarding to questioning. The parties agreed that Dr. Leimbach was not an expert witness at trial. *White v. Leimbach*, supra, at ¶29, Judge French dissenting. Even if Dr. Leimbach were considered an expert, his testimony was that Mr. White was fully informed of all significant risks and that no such risk ever materialized.

3. Subjective Patient Testimony is Not Sufficient to Satisfy the Third Prong of the *Nickell* test

The *Nickell* decision also instructs that a patient's hindsight is not determinative of the issue of whether he/she would have consented to a procedure if given additional information, but rather that a "reasonable-patient" standard is to be used in this regard:

> Thus the issue to be ascertained is whether the j.n.o.v. was appropriate in view of the entire record and whether there was a basis for the jury, under the reasonable-person standard, to reach its conclusion in favor of appellee. The patient's hindsight (i.e., testimony as to her hypothetical response to the undisclosed information), while relevant, is not determinative. See, *Sard v. Hardy* (1977), 281 Md. 432, 450, 379 A.2d 1014, 1025.
>
> *Nickell*, 17 Ohio St.3d at 139.

There is absolutely no basis in the record to conclude that a reasonable person would have refused consent to the second surgery (but not the first), given that the risks of such a surgery were only minimally higher than those of the first surgery. Dr. Rea testified that "with a man this miserable" he would operate "every time." (Tr. 548) This unrebutted testimony certainly established not only the reasonableness of the procedure, but also the overwhelming likelihood that the proverbial reasonable person would have consented to the second surgery after appropriate disclosure of the pertinent risks.

4. Physicians are Not Required to Disclose Any and All Conceivable Risk of a Procedure

In *Bedel v. Univ. of Cincinnati Hosp.* (1995), 107 Ohio App.3d 420, the Tenth District Court of Appeals 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 by a patient to 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. (emphasis added.)

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 completely do so that the law requires expert testimony in this area. Jurors are not considered competent to make these determinations. Nor are non-physician litigants or their attorneys.

In *Kester v. Brakel*, 10th App. No. 06AP-253, 2007-Ohio-495, at ¶30-31, the Tenth District determined as follows in relation to the requirements of demonstrating an issue of fact on a claim based on the theory of lack of informed consent:

> The law of informed consent has never required that the physician fully inform the patient of all potential risks. *Bedel v. Univ. of Cincinnati Hosp.* (1995), 107 Ohio App.3d 420, 427. **Therefore, expert medical testimony is required to prove what a reasonable medical practitioner would have disclosed to his patient about the risks incident to the proposed treatment in order to support an informed consent claim.** *Bader* (sic) *v. McGregor*, Franklin App. No. 03AP-167, 2004-Ohio-4036, discretionary appeal allowed, 104 Ohio St.3d 1459, 2005-Ohio-204, discretionary appeal dismissed as improvidently allowed, 107 Ohio St.3d 1210. Accord, *Maglosky v. Kest*, Cuyahoga App. No. 85382, 2005- Ohio-5133, at ¶ 34, and cases cited therein.

> Appellants do not point to portions of the transcript that demonstrate expert testimony on what a reasonable medical practitioner would have disclosed to his patient about the risks of the proposed medical therapy. Therefore, although appellants failed to plead a cause of action for the tort of informed consent, had they properly included that cause of action in their complaint, a directed verdict for the defense would have been appropriate.

Mr. White did not have an expert, he did not establish the occurrence of a material risk subsequent to the second surgery, he did not establish proximate cause, and he did not establish that a reasonable person would have refused consent under the circumstances presented. Thus, the trial court's directed verdict was appropriate under the circumstances. Clearly, the trial court simply applied precedent from this court to reach its decision, whereas the court of appeals plainly ignored precedent from this Court, from the Tenth District, and from elsewhere.

5. The Court of Appeals Erred in its Determination that an Informed Consent Claim is not a Medical Malpractice Claim

A lack of informed consent claim such as the one prosecuted by Mr. White below is indisputably a "medical claim," contrary to the conclusion of the plurality opinion at paragraphs 6, 19. *White v. Leimbach*, supra, 2010-Ohio-1726. 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.

With its decision in *Nickell v. Gonzalez*, supra, this Court 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. Prior to the decision below, there was a virtual consensus amongst the various appellate jurisdictions that claims of lack of informed consent were 1) medical malpractice claims, and 2) subject to the expert testimony requirements which govern all medical malpractice claims. Additional case authority to this effect is discussed infra.

The plurality opinion below took pains to state at least twice that "this is not a medical malpractice case," instead characterizing this lawsuit as asserting a common law battery claim. *White v. Leimbach*, supra, 2010-Ohio-1726, at ¶6, 19. Yet, courts across the state have expressly determined to the contrary, (i.e.) that lack of informed consent claims are included within the ambit of medical malpractice claims.

a. *Maglosky v. Kest*

In *Maglosky v. Kest*, 8th 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.)

b. *Turner v. Cleveland Clinic*

In *Turner v. Cleveland Clinic,* 2002-Ohio-4790, 8th Appellate No. 80949, the Eighth District Court of Appeals also discussed the precise issues presented by the present appeal. In *Turner*, as in the present case, a directed verdict was entered for the defendants in a medical malpractice case arising out of a neurological surgery, based on the failure to elicit expert testimony in support of a claim for lack of informed consent. The court stated in this regard:

> 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. University Hospitals of Cleveland* (Mar. 11, 1993), Cuyahoga App. No. 61791, citing *Ware v. Richey*, 14 Ohio App.3d 3, 7, 469 N.E.2d 899. (Internal citations omitted)
>
> ***

> Therefore, **because a claim for lack of informed consent is a medical claim,** "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 ***."*West*, supra, citing *Bedel v. Univ. OB/GYN Assoc., Inc.,* supra. In short, the plaintiff has the burden of proving--through expert testimony---the standard of care. (Emphasis added.)
>
> Because appellants did not elicit any expert testimony from Dr. Chyatte regarding the recognized standard of care in the medical community about what risks of the surgery should have been disclosed, appellants failed to set forth a prima facie claim of lack of informed consent. Therefore, the trial court did not err in granting appellee's motion for a directed verdict.
>
> Id. at ¶25, 35-36.

An additional parallel between the *Turner* case and the present case is that the plaintiff in *Turner* also attempted to use the testimony of the physician-defendant to argue that the postoperative condition complained of was caused by the occurrence of an inherent risk of the procedure performed. Id. at ¶29. The *Turner* court rejected this analysis and held that properly qualified expert testimony as to the appropriate standard of care is nevertheless necessary in order to determine which material risk a reasonable practitioner would have disclosed. Id. at ¶36. The *Turner* court acknowledged the somewhat divergent standards of *Bruni v. Tatsumi*. Specifically, the *Turner* court determined that, pursuant to this Court's precedent in *Nickell*, the appropriate standard is whether a *"reasonable person"* would have chosen not to have the treatment had the material risks been disclosed: (Emphasis sic.)

> First, the passage from *Nickell* quoted by appellants does not address whether expert testimony is required to establish a claim for lack of informed consent. Rather, it addresses the standard adopted by the Supreme Court of Ohio for determining when a particular risk or danger is material. In *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673, the Supreme Court of Ohio gave a

> rudimentary description of the tort of lack of informed consent and seemed to suggest that the standard for deciding such claims was whether the *patient himself* would have rejected the proposed course of treatment if the undisclosed risk had been disclosed to him. In *Nickell*, however, the Ohio Supreme Court adopted a *reasonable person* standard, stating that a risk is material if a *reasonable person* in the patient's position would have chosen not to have the treatment had the material risks been disclosed. Thus, *Nickell* makes clear that the test is objective, rather than subjective. *Valerius v. Freeman* (Oct. 19, 1994), Hamilton App. No. C-930658. (Internal citations omitted) (Emphasis sic.)
>
> Id. at ¶32.

Additionally, the *Turner* court also addressed the issue of a patient attempting to satisfy the expert testimony requirement for a medical malpractice/lack of informed consent claim by way of cross-examination of a physician-defendant. The *Turner* court expressly determined that the required evidentiary threshold could not be met in this fashion, without first qualifying the defendant as an expert:

> Appellants' argument is logically inconsistent. Appellants admit they need expert testimony to satisfy the *Nickell* test and claim that such expert testimony came from Dr. Chyatte, but then argue that they were not required to qualify him as an expert. We fail to understand how Dr. Chyatte could be competent to testify as an expert without being qualified under the rule. We agree with appellants that expert testimony in a lack of informed consent case can be elicited from the defendant-doctor. *Ware*, supra at 7. **Without any demonstration that the witness is qualified as an expert, however, the testimony is not competent, expert testimony**. Even assuming, for the sake of argument, that appellants were not required to qualify Dr. Chyatte under Evid.R. 601(D) because his testimony did not relate to liability, it is still readily apparent that appellants failed to qualify Dr. Chyatte as an expert witness. Evid.R. 702 provides that "a witness may testify as an expert if *** the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony ***." Here, appellants elicited no testimony whatsoever from Dr. Chyatte regarding his education, training, skill or experience. Moreover, although any doctor licensed to practice medicine is competent to testify on medical issues, *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 591

> N.E.2d 762, appellants failed to demonstrate that Dr. Chyatte was currently licensed to practice medicine in Ohio or in any other state. Accordingly, appellants failed to establish that Dr. Chyatte was qualified to render expert testimony. (emphasis added.)
>
> Moreover, Dr. Chyatte failed to render any opinion regarding Mr. Turner's injuries to a reasonable degree of medical probability. An expert opinion is competent only if it is held to a reasonable degree of scientific certainty. *State v. Benner* (1988), 40 Ohio St.3d 301, 313, 533 N.E.2d 701. In this context, "reasonable certainty" means "probability." Id. Thus, an expert must state his or her opinion in terms of probability, meaning that he or she must express that there is a greater than fifty percent likelihood that a certain act or failure to act caused a given result. *Stinson v. England* (1994), 69 Ohio St.3d 451, 455, 633 N.E.2d 532.
>
> Id. at ¶43-44

c. *Hillman v. Kosnik*

In *Hillman v. Kosnik*, supra, 10th App. No. 07AP-942, 2008-Ohio-6303, the Tenth District determined that in another case involving lack of informed consent prior to the performance of a neurological operation, expert testimony regarding the elements must be offered to prove the claim:

> In a claim for medical malpractice, a plaintiff must show the existence of a standard of care within the medical community, breach of that standard by the defendant, and proximate cause between the breach of that standard and the injuries suffered by the plaintiff. *Williams v. Lo*, Franklin App. No. 07AP-949, 2008 Ohio 2804. When the elements of a medical malpractice claim are beyond the common knowledge and understanding of the trier of fact, expert testimony regarding the elements must be offered to prove the claim. *Campbell v. Ohio State Univ. Med. Ctr.*, Franklin App. No. 04AP-96, 2004 Ohio 6072. When a moving party has offered expert testimony in support of a motion for summary judgment, the non-moving party must submit contrary expert testimony to survive the motion, unless the standard of care is so obvious that a non-expert can reasonably evaluate the conduct in question. Id.
>
> In order to prevail on a claim of lack of informed consent, a plaintiff must show: (1) the physician failed to disclose to and

> discuss with the patient the material risks and dangers inherently and potentially involved with the proposed treatment, (2) the undisclosed risks actually materialize and are the proximate cause of injury to the plaintiff, and (3) a reasonable person in the patient's position would have decided against the proposed treatment if the risks had been properly disclosed. *Fernandez v. Ohio State Pain Control Ctr.*, Franklin App. No. 03AP-1018, 2004 Ohio 6713. Expert testimony is required to establish what the material risks associated with a procedure are, and whether those risks actually materialized and proximately caused the plaintiff's injuries, as those issues are beyond the knowledge of a lay person. Id.
>
> Id. at ¶9-10

In *Hillman*, based on the plaintiff's failure to provide an expert affidavit in opposition to a motion for summary judgment, the trial court granted summary judgment on the lack of informed consent claim, and the grant of summary judgment was affirmed by the court of appeals. Id. at ¶11. In the present case, the trial court certainly could have resolved the case by way of motion for summary judgment, but chose instead rather to deny the motion for summary judgment and give Mr. White the opportunity to establish his claim at trial. It was only after the close of all evidence that the trial court concluded that a directed verdict was mandated because of Mr. White's failure to meet all the elements of the *Nickell* standard.

d. *Tutt v. Ahmad*

In *Tutt v. Ahmad* (December 28, 1998), 2nd App. No. C.A. 17284, the Second District also affirmed the entry of summary judgment where the plaintiff failed to provide expert testimony in support of her claim of lack of informed consent. The court of appeals stated as follows:

> Whether Dr. Ahmad acted appropriately in recommending and implanting the ICD into Tutt was certainly not a matter within the common knowledge and understanding of laypersons. In his affidavit supporting summary judgment, Dr. Ahmad stated that he

was a medical doctor specializing in cardiology, board certified in clinical cardiac electrophysiology, and licensed to practice medicine in Ohio. He indicated that he devoted over fifty percent of his professional time in the active clinical practice of cardiology and cardiac electrophysiology and that he was familiar with the accepted standards of care in cardiology and cardiac electrophysiology. He explained that, from June 9, 1995 to January 1996, he had evaluated, cared for, and treated Tutt "for a history of heart palpitations, tachycardia, and an incident of near syncope, among other things."

***

The trial court was correct in determining that Tutt was required but failed to present the expert testimony on the standard of care, that Dr. Ahmad had breached that standard, and that his negligence was the proximate cause of her injuries. As the trial court pointed out, Dr. Ploss's statement that he would not have implanted an ICD in Tutt did not rise to the level of an expert opinion on whether Dr. Ahmad had committed medical malpractice. Thus, Dr. Ploss's affidavit did not set forth specific facts showing a genuine factual dispute on Tutt's claim of medical malpractice, and Dr. Ahmad was entitled to summary judgment on this claim. (Emphasis added.)

***

Tutt further insists that Dr. Ahmad performed the ICD implantation without obtaining her informed consent to the procedure. Dr. Ahmad's affidavit, however, provided his expert opinion that he did inform Tutt of the material risks of the procedure prior to surgery and that his treatment and care did not cause her any injuries. Tutt submitted no expert testimony on her lack of informed consent claim. Nor did Tutt's affidavit refute Dr. Ahmad's affidavit that he had "advised the patient of all the material risks of the treatment."

***

Generally, the plaintiff has the burden of proving **by expert medical evidence** what a reasonable medical practitioner of the same discipline, practicing in the same or similar communities under the same or similar circumstances, would have disclosed to his patient about the risks incident to a proposed treatment, and of proving that the physician departed from that standard. Proof of the recognized standards of the medical community must be provided

through expert testimony. citing *Nickell*, supra, 17 Ohio St.3d at 139. (Emphasis added.)

****

In this case, Dr. Ahmad provided his sworn expert opinion that he had disclosed to Tutt all material risks incident to the ICD implantation (which Tutt did not refute), and that his care and treatment of her did not cause her any injuries. Tutt failed to present expert testimony on what a reasonable medical practitioner in Dr. Ahmad's position would have disclosed about the risks incident to the procedure. She also neglected to provide an opinion from a competent medical expert that Dr. Ahmad had departed from the accepted standards of care and that his alleged failure to disclose to her the material risks was the proximate cause of her injuries. Thus, no genuine issues on the tort of lack of informed consent remained for trial.

e. *McElfresh v. Farrall*

Yet another case requiring expert testimony in support of medical malpractice/lack of informed consent claim is *McElfresh v. Farrall* (March 9, 1990), 2nd App. No. 2602. The Second District held in *McElfresh* as follows on this issue:

The question of whether or not Dr. Farrall explained alternative procedures to the plaintiff is a disputed fact. The narrow issue before us is whether this disputed fact is material.

***

In order to counter Dr. Farrall's motion and affidavit statement that he explained the risks, McElfresh was required to show not only that the risks were not explained but, in addition, that the risks actually materialized and were the proximate cause of his injuries. **Proof of proximate causation, under the facts before us, requires expert testimony**. *Bruni* v. *Tatsumi* (1976), 46 Ohio St. 2d 127. McElfresh has not offered that evidence, **but asserts proximate causation on his own opinion**. He has thus failed to meet his burden under Civ. R. 56. (Emphasis added.)

f. *Nichols v. Stelzer*

In *Nichols v. Stelzer* (May 21, 1985), 10th App. No. 84AP-431, the appellate court stated that generally, under Ohio law, lack of informed consent claims cannot be premised on a failure to disclose the likelihood that risks to a procedure will occur in terms of a percentage:

> Plaintiffs argue in support of the seventh proposed instruction that a physician is under a duty to disclose not only the existence of risks in the proposed procedure, but also the likelihood that such risk will occur, in terms of a percentage. While to some patients, such disclosure may be desirable, it is not required under the law of informed consent in Ohio, which requires only the disclosure of the existence of risks which a reasonable physician expects would influence the decision of a reasonable patient.

In the present case, Mr. White's entire theory of lack of informed consent rested on the failure to disclose the purported slightly increased percentage likelihood that the procedure would be ineffective, based on a 20 year old study which was a survey of results at a time when laminectomy procedures were far less refined. (See e.g. Tr. 544, 609-610) Thus, even if expert testimony was not required to support this claim, Dr. Leimbach would nevertheless have been entitled to a directed verdict based on the nebulous theory of liability. This is so because it would not have been reasonable for Dr. Leimbach to discuss alleged risks based on studies that did not pertain to this particular patient.

g. *Pierce v. Goldman*

In *Pierce v. Goldman* (May 17, 1989), 1st App. No. C-880320, the First District concluded that a doctor was entitled to summary judgment in a malpractice action where lack of informed consent was alleged, because the patient failed to submit an

expert opinion countering the doctor's claims that the warnings given to the patient met the applicable standards:

> As a general rule, a plaintiff has the burden of proving by expert medical evidence what a reasonable medical practitioner of the same school practicing in the same or similar communities under the same or similar circumstances would have disclosed to his patient about the risks incident to a proposed treatment, and of proving that the physician departed from that standard. *Carroll v. Cook* (Aug. 3, 1977), Hamilton App. No. C-76265, unreported.
>
> Proof of the recognized standards of the medical community must be provided through expert testimony. *Bruni v. Tatsumi* (1976), 46 Ohio St. 2d 127, 346 N.E.2d 673; *Thomas v. Mantanguihan* (June 30, 1982), Hamilton App. No. C-810776, unreported.

h. *Badger v. McGregor*

In *Badger v. McGregor*, supra, 10th App. No. 03AP-167, 2004-Ohio-4036, discretionary appeal accepted 104 Ohio St. 3d 1459, discretionary appeal dismissed as being improvidently granted, 107 Ohio St. 3d 1210, the Tenth District held that the denial of motion for new trial and judgment notwithstanding the verdict was error precisely because the lack of informed consent claim was not proven by way of expert testimony of that defendant-physician's actions fell below the standard care. The dissent to this Court's opinion dismissing the appeal in *Badger* as being improvidently granted reached a similar conclusion as did the plurality opinion below concerning the purported lack of a requirement of expert testimony in informed consent cases. These two opinions (the court of appeals below and the dissent from this Court's decision to dismiss the discretionary appeal in *Badger*) are at odds with almost all, if not all, other Ohio case authority on this issue.

F. The Court of Appeals' Conclusion that Mr. White Presented Sufficient Expert Evidence is Completely at Odds with the Record

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. *White*, supra, at ¶17-19. Two distinguished neurosurgeons testified as defense experts at trial. Dr. Gary Rea and Dr. Michael Miner both testified without reservation that no material risk of this surgery ever occurred. (Tr. 498-500, 529, 569, 617) They each testified that Mr. White was no worse off after the surgery than before the surgery. (Tr. 498, 500, 529, 619) They each testified that surgery was dictated by the circumstances of the case, and that that the surgery was performed competently. (Tr. 498, 612, 619, 666) They each testified that Mr. White was fully informed of the relevant risks and/or that no non-disclosed risk ever materialized. (Tr. 507, 607) Finally, Dr. Rea and Dr. Miner each testified that the proximate cause of Mr. White's injuries was a fall in Sandusky. (Tr. 498-499, 469, 508, 626, 663-666) As the trial court aptly noted in its ruling on the Motion for Directed Verdict, this evidence was "unrebutted". (Supp. 001; Appx. 048) 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 lack of an average layman's ability to appreciate this issue was demonstrated at trial when Mr. White's 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. (Tr. 502, 514) Importantly, the first surgery went very well and a second surgery was only required because Mr. White fell at Cedar Point. This fact is not disputed. These details unique to this patient and to the procedure at issue 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 Mr. White's 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)

This testimony, which irrefutably demonstrated that counsel was trying to resuscitate a dormant case by putting forth selective data from a dated study, and presenting the results completely out of context, is yet another practical example of how and why these sort of complex medical issues are not 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. As referenced earlier herein, even Mr. White's treating physician frankly admitted he lacked sufficient knowledge to reach conclusions concerning a neurologist's standard of care. In light of such a frank concession, the trial court was certainly correct to require expert testimony in support of each element of the *Nickell* standard for informed consent.

Dr. Leimbach offered abundant expert testimony from distinguished neurosurgeons demonstrating affirmatively that Mr. White's second surgery was called for and 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 while running through the parking lot, and not by the surgery performed by Dr. Leimbach and that Mr. White's post-surgical condition was not caused by the manifestation of any undisclosed, but known, material risk. (Tr. 494, 498-499, 569, 605, 612, 666)

It is a worthwhile endeavor to extensively recount the testimony of these two experts because the plurality decision below so completely misapprehended the nature of the evidence on multiple issues.

a. Dr. Gary Rea

Dr. Rea is a renowned, frequently published, board certified, neurosurgeon who is affiliated with the Ohio State University Medical Center. (Tr. 448) Dr. 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 physical therapy would have been of no value to Mr. White after his second fall, 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. Rea further testified, to a reasonable degree of medical certainty, that the proximate cause of Mr. White's pain was his fall in Sandusky and a tethered nerve root, not the second surgery performed by Dr. Leimbach ("[i]t was a clear cut, S1 radiculopathy after the fall at Cedar Point.") (Tr. 498-499, 569) Dr. Rea estimated that the chances of the second surgery alleviating Mr. White's symptoms were nearly as high, if not equal to, Mr. White's chances going into the first surgery, and that the difference in risks between the two surgeries was "minimal." (Tr. 502, 514)

Dr. Rea stated that there was no evidence in Mr. White's records that he had ever had causalgia or that he was ever treated for causalgia, and that even if this condition existed, it would have been caused by the fall and not the surgery, and that he had never had a patient develop causalgia subsequent to a microdiscectomy surgery. (Tr. 505-506) Dr. Rea testified that Mr. White's theory that he was injured by unnecessary aggravation of scar tissue was inconsistent with his description of his symptoms and inconsistent with the specific onset of these symptoms. (Tr. 529, See also, Tr. 654) Dr.

Rea testified that Mr. White's condition, including his pain and suffering, was unaffected by the surgery, opining that "I don't think the surgery changed anything" and that Mr. White would be in the identical condition today if the surgery had never been performed. (Tr. 507) Dr. Rea said in conjunction with the decision to operate a second time "I would have operated on him every time, with a man this miserable." (Tr. 548)

b. Dr. Michael Miner

Dr. Michael Miner was the chief of neurosurgery at Ohio State Medical Center for 13 years from 1989-2002, has published four books and approximately 135 articles in his field, and is a renowned lecturer nationally and internationally. (Tr. 593-594) Dr. Miner is board certified in neurosurgery. (Tr. 591) Dr. Miner provided expert testimony nearly identical to that of Dr. Rea in all material respects. He also testified as a fact witness based on the fact that he had examined Mr. White prior to both surgeries because of a policy implemented by Mr. White's insurer requiring a second opinion for these surgeries.

Dr. Miner testified unequivocally that the he discussed the risks, as well as the benefits of each surgery with Mr. White in advance of each surgery. (Tr. 597, 602, 607, 662) Dr. Miner also believed that Mr. White was an excellent candidate for surgery and stated that his beliefs in this regard were based on the sudden nature of the injury sustained by Mr. White, which elevated the chances that surgery would be successful vis-à-vis other laminectomy "redos." (Tr. 602, 606, 609-610, 663) Dr. Miner testified that the second surgery was the "right thing to do" and that it was performed appropriately. (Tr. 612, 619, 666) Dr. Miner testified that the longer the second surgery was put off the greater the chance was that the surgery would not be a success. (Tr. 663)

Dr. Miner also believed that the literature presented by Appellees' counsel was not necessarily relevant to the case, because of factors unique to Mr. White, such as a very successful prior surgery and the sudden onset of his symptoms. (Tr. 610) Dr. Miner stated that the second surgery could not have been accomplished without encountering some scar tissue and that Dr. Leimbach was not negligent in this regard. (Tr. 611)

Dr. Miner testified that the risks of the second surgery "were essentially the same" as the risks presented by the first surgery. (Tr. 607) Dr. Miner testified that he discussed all the known, material risks presented by the surgeries performed with Mr. White. Dr. Miner reviewed these risks at trial and concluded that "I am not aware of any of those risks occurring after either of the surgeries." (Tr. 617)

c. The Court of Appeals' Decision Cannot be Squared with the Trial Testimony of Dr. Leimbach's Expert Witnesses

The plurality opinion somehow reached the following determination on the issue of an occurrence of a material risk:

> In this case, it is abundantly clear from the testimony of several physicians – including the actual physician 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." *White v. Leimbach*, supra, at ¶19.

This opinion then proceeds to state that "the only physician who seemed to testify inconsistently with this common viewpoint was Dr. Gary Rea." Id. at ¶20. The implication is therefore that Dr. Miner was one of "several physicians"[4] who testified

[4] Even if Dr. Leimbach and Dr. Miner had testified consistently with the court of appeals' description, the court of appeals would have been mistaken in its reference to a common view point share by "several physicians." The only other explanation is that the court of appeals was including Mr. White's pain management physician, Dr. Massau, in this group, despite Dr.

that there was a "likelihood" of the second surgery worsening Mr. White's condition, that Mr. White's condition was in fact worsened, and that this "likelihood" was not appropriately discussed. Dr. Miner's testimony to the contrary has already been discussed extensively herein. Notably, the dissent below did an excellent job of dissecting this testimony, and demonstrating that Dr. Miner did not make any of the concessions indirectly attributed to him by the plurality opinion. The dissenting opinion addressed this issue as follows, complete with cites to the trial transcript:

> 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.
>
> 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.)
>
> 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

---

Massau's express testimony that he was not providing expert testimony critical of Dr. Leimbach and that he had "no idea" as to what information should or should not have been disclosed.

> 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.
>
> Id. at ¶30-32.

Thus, the court of appeals' contention that Mr. White may have met the requirement of expert testimony (assuming that such a requirement exists) through the testimony of Dr. Miner is not supported by the record. Indeed, this assertion is overwhelming belied by the record.

The dissenting opinion also pointed out that plurality opinion's attempt to qualify Dr. Leimbach as an expert, despite his own medical infirmity at the time of trial, was misguided and not supported by the record as "[t]he parties agree that Dr. Leimbach testified as a fact witness, not an expert, at trial." Id. at ¶29. Also, it is not disputed that at the time of a trial, Dr. Leimbach was not qualified to testify as an expert witness pursuant to Evid.R. 601(D) as he was not currently licensed to practice medicine.

G. Appellees' Improper Use of Medical Literature

In lieu of expert testimony, Appellees' counsel used a twenty-year-old study to cross-examine Dr. Leimbach and the two defense experts. This dated (1989) study, which tracked results for 92 patients, predicted that a first lumbar laminectomy surgery would be successful around 92% of the time, while a second procedure might be successful around 81% of the time. (Tr. 646, 664) These numbers only deal with percentages of successful results, as defined by providing relief of symptoms. The study is not relevant to the occurrence of known, material risks in surgery, and thus is not relevant to Mr. White's sole assignment of error. No author of this study was called to testify and no expert believed that this article was authoritative, or even current.

It is not enough for a plaintiff's counsel to read from a random study, in order to satisfy the expert evidentiary threshold required for a claim alleging lack of informed consent. Rather, an actual expert must testify to these facts and figures and appropriately explain the study and put it in proper context for the jury. This was clearly not done at trial below and the figures tossed around in the Brief of Appellant are of no import to this appeal. Furthermore, these figures, such as they are, are very close to the testimony of Dr. Rea and Dr. Miner, who both testified that the risks from the second surgery were only minimally greater than those from the first surgery.

Dr. Rea testified that the numbers from this article are no longer valid, and that the test sample consisted entirely of patients who did not have symptoms, similar 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)

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

The court of appeals apparently was impressed by this study as evidenced by its statement that the "relevant evidence revealed" that Dr. Leimbach "knew that the second surgery carried a "much greater risk of poor outcome that the first." *White v. Leimbach*, supra, at ¶2. There is no conceivable basis to be found in the Record for such a statement, other than the study cited by counsel. As aptly noted by the trial court in

granting the Motion for Directed Verdict, "attorneys can't make facts. " (Supp. 003; Appx. 050) The "facts" that the court of appeals premised its decision upon were indeed a creation of attorneys, not of any fact witness or expert witness.

H. There Was Never a Manifestation of a Material Risk of a Second Surgery

There is simply no evidence that any known material risk of this surgery ever materialized. Thus, even if the trial courts accepted that these risks were not discussed, a directed verdict was still required. Appellee did not even attempt to offer evidence on this issue at trial. Mr. White's theory at trial and throughout the appellate process has been that the non-resolution of his medical condition, and his continued pain and suffering, is itself an undisclosed material risk.

Appellee's inability to secure the services of an expert despite having over ten years to do so speaks volumes as to the weaknesses of his case. 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, as did Dr. Leimbach. 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 literally "unrebutted". Dr. Massau, the pain management osteopath called by Mr. White, was not qualified to testify in these areas, and did not even try to do so. In fact, Dr. Massau went so far as to admit "I don't have any idea what Dr. Leimbach did

with this patient." (Tr. 387) Dr. Massau's testimony that Mr. White was still experiencing a lot of pain at the time of trial is irrelevant to the occurrence of an undisclosed material risk.

I. Any Error in Permitting Portions of Dr. Rea's Testimony to be Shown Via Videotape was Harmless

At paragraphs 20-21, the plurality opinion below discussed the fact that Dr. Rea testified as a defense expert by way of live testimony on direct examination and for part of his cross-examination, but then his cross-examination was continued by way of videotape. The plurality opinion stated that this process was "highly irregular," but it does not appear that the court's determination in this respect was relevant to the ultimate disposition of the appeal. Id. Nevertheless, should this Court find in favor of Dr. Leimbach in its resolution of Proposition of Law No. 1, the Court should also make clear in its decision that any potential error in regard to the manner in which Dr. Rea's testimony was conveyed to the jury was harmless, and would not be independent grounds for a reversal of the trial court's directed verdict and remand for a new trial.

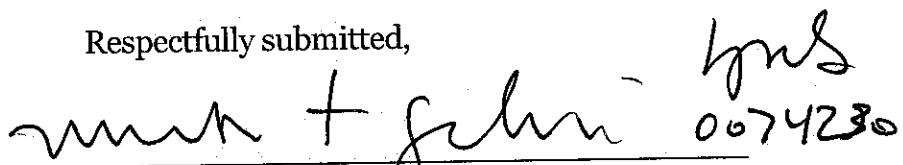
III. CONCLUSION

The plurality opinion below represents an aberration from a long line of well-reasoned cases requiring expert testimony in lack of informed consent claims, dating to this Court's release of *Bruni* more than 34 years ago. The holdings that lack of informed consent claims are not medical malpractice claims, and that such claims are not subject to the requirement of expert testimony, represents extremely unsound public policy and, if left undisturbed, would constitute highly undesirable precedent. This Court has never shown any inclination to treat lack of informed consent cases differently from other medical malpractice cases, or to create a separate classification for such cases, separate

and apart from medical malpractice jurisprudence. If Dr. Leimbach had truly deviated from the standard of care, Mr. White could have obtained expert testimony to this effect with no additional effort than seen in any other medical malpractice action. There is simply no good legal reason or policy justification for creating the arbitrary classifications that were created by the plurality opinion.

Accordingly, this Court should reverse the Opinion of the Tenth District Court of Appeals, and reinstate the directed verdict that was entered by the Franklin County Court of Common Pleas subsequent to the conclusion of all evidence at trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail on this 3rd day of January, 2011.

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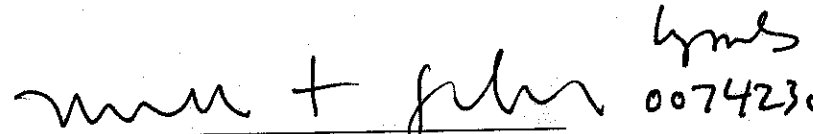

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APPENDIX

Description	Appendix Page No.
Notice of Appeal to Ohio Supreme Court of Appellant Warren H. Leimbach, II, M.D. – June 4, 2010	1
Tenth District Court of Appeals Decision – April 20, 2010	22
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IN THE SUPREME COURT OF OHIO

ROBERT N. WHITE, et al. Plaintiffs/Appellees, -vs- WARREN H. LEIMBACH, II, M.D. Defendant/Appellants.	)	10-0988 CASE NO. On Appeal from the Tenth District Court of Appeals Case No. 09 AP 000674

NOTICE OF APPEAL OF APPELLANT
WARREN H. LEIMBACH, II, M.D.

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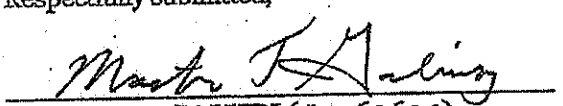
FILED
JUN 04 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant, Warren Leimbach, II, M.D. hereby gives notice of his appeal to the Supreme Court of Ohio from the Judgment of the Court of Appeals for the Tenth Appellate District, Franklin, Ohio (Case No. 09 AP 000674), journalized on April 20, 2010.

This case presents questions of public and great general interest.

A true and complete copy of the Decision and Journal Entry of the Court of Appeals from which this notice of appeal is taken are attached hereto, marked as Exhibits "A" and "B", and are incorporated herein.

Respectfully submitted,



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[Cite as *White v. Leimbach*, 2010-Ohio-1726.]

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.	:	

D E C I S I O N

Rendered on April 20, 2010

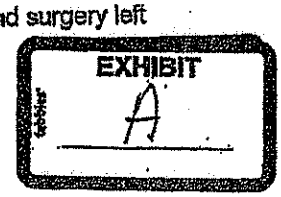
Cooper & Elliott, LLC, Charles H. Cooper, Jr. and *Rex H. Elliott*, for appellants.

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

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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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. 08CVA-04-3989)
Warren H. Leimbach, II, M.D.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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: _____
Judge G. Gary Tyack, P.J.

EXHIBIT
B

20681 - I79

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2010 APR 20 PM 1:49
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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.	:	

D E C I S I O N

Rendered on April 20, 2010

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

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

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.

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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.)

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{¶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.)

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(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

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{¶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.

{¶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.

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E0037 - E70

20681 - J77

FILED
COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO 2010 APR 20 PM 1:51

TENTH APPELLATE DISTRICT CLERK OF COURTS

Robert N. White et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-874 (C.P.C. No. 09CVA-04-3989)
Warren H. Leimbach, II, M.D.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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.

FILED
COURT OF APPEALS
2010 MAY 17 PM 1:56
CLERK OF COURTS-CV

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

By: Judge G. Gary Tyack, P.J.

E0037 - E71

THE STATE OF OHIO
Franklin County, ss

I, MARYELLEN O'SHAUGHNESSY, Clerk OF THE COURT OF APPEALS WITHIN AND FOR SAID COUNTY, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL

Judgment Entry

NOW ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID COURT THIS 07 DAY OF May A.D. 20 10

MARYELLEN O'SHAUGHNESSY, Clerk

By _____ Deputy

20632 - D76

D9088 - R7

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

FINAL APPEALABLE ORDER

ROBERT N. WHITE, ET AL.,	:	
Plaintiffs,	:	CASE NO. 03CVA04-3969
v.	:	JUDGE BESSEY
WARREN H. LEIMBACH, II, M.D.,	:	
Defendant.	:	

TERMINATION NO. 5
BY:

FINAL JUDGMENT ENTRY DISMISSING PLAINTIFFS' COMPLAINT

At the close of the Defendant's presentation of evidence, and without rebuttal on behalf of Plaintiffs, the Court sustains Defendant's motion for a directed verdict pursuant to Civ. R. 50 (A) (1) and (4)

Specifically, the Court finds that reasonable minds could come to but 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.

Judgment for Defendant. Each party to pay one-half of the costs. There is no just cause for delay

IT IS SO ORDERED

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2004 JUN 30 PM 4:19
CLERK OF COURTS

John P. Bessey
JOHN P. BESSEY, JUDGE

(2)

20632 - D77

D908B - R8

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Attorney for Defendant

Patrick Smith, Esq.
psmith@arnoldlaw.net
Counsel for Defendant

Any attorney or party *pro se* whose e-mail address is noted above has received this document electronically. The original will be filed within 24 hours of the time noted on the e-mail transmittal message

1 - - -
2 THE COURT: Back on the record. The motion
3 of the defendant for the dismisssal of the case is
4 sustained. And in sustaining this motion and
5 dismissing this cases it is in no way any
6 reflection on the legitimacy of the suffering that
7 has been experienced by Mr. White and his family.
8 And it is no reflection on the efforts that have
9 been made by counsel for the plaintiff in doing an
10 adequate job in representing their clients.
11 But attorneys can't make facts. And the
12 fact of the situation is that there just hasn't
13 been sufficient testimony to meet the second
14 element of the Nickel requirements. For that
15 reason, as I mentioned, the motion is sustained.
16 Thank you.
17 MR. SMITH: Thank you, Your Honor.
18 MR. COOPER: Thank you, Your Honor.
19 - - -
20 Thereupon, the following proffer was made
21 by Mr. Cooper regarding the court's ruling on the
22 testimony of Dr. Michael Miner:
23 MR. COOPER: On a break during trial, and
24 before the recorded testimony of Dr. Michael Miner
25 was played to the jury, plaintiffs' counsel