

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.	)	

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

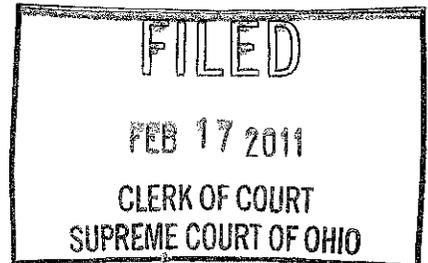
**MARTIN T. GALVIN (0063624)**  
 (Counsel of Record)  
**BRIAN T. GANNON (0077442)**  
**BRIAN D. SULLIVAN (0063536)**  
 REMINGER CO., L.P.A.  
 1400 Midland Building  
 101 Prospect Avenue, West  
 Cleveland, Ohio 44115-1093  
 Phone: (216) 687-1311  
 Fax: (216) 687-1841  
 Email: mgalvin@reminger.com  
 bgannon@reminger.com  
 bsullivan@reminger.com

CHARLES H. COOPER, JR. (0037295)  
 (Counsel of Record)  
 REX H. ELLIOTT (0054054)  
 COOPER & ELLIOTT, LLC  
 2175 Riverside Drive  
 Columbus, Ohio 43221  
 Tele: (614) 481-6000  
 Fax: (614) 481-6001

*Counsel for Appellees  
Robert N. White and Mary White*

*Counsel for Appellant  
Warren H. Leimbach, II, M.D.*

BRET C. PERRY (0073488)  
 (Counsel of Record)  
 BONEZZI SWITZER MURPHY POLITO &  
 HUPP CO LPA  
 1300 East 9<sup>th</sup> Street, Suite 1950  
 Cleveland, Ohio 44114  
 Main Phone: 216-875-2767  
 Facsimile: 216-875-1570  
 E-mail: Bperry@bsmph.com



*Attorneys for Amicus Curiae the Academy of  
Medicine of Cleveland & Northern Ohio*

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## **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.

### **I. Introduction**

The need for expert testimony in informed consent/medical malpractice cases is highlighted by Appellees' misleading habit of referring to the second surgery performed on Mr. White as a "re-do." The term was used approximately 84 times in the Brief of Appellees (almost always in quotes), even though it is not relevant to this case. Dr. Leimbach's experts were clear on this point and Appellees offered no expert testimony in rebuttal. Thus, the hypothetical questions asked of Dr. Leimbach and Dr. Leimbach's experts concerning "re-do" surgeries were irrelevant to Appellees' burden of proof at trial below, as well as to their burden of advancing competent expert testimony. Without competent expert testimony, medical vernacular such as a "re-do" of a laminectomy surgery is subject to distortion by attorneys and lay witnesses, which is precisely why discussion of such matters at trial is best left to experts.

### **II. Law and Argument**

#### **A. *Appellees Have Misstated Numerous Crucial Facts***

As thoroughly demonstrated in the Merit Brief of Appellant, and just as thoroughly glossed over in the Merit Brief of Appellees, Mr. White's second surgery was not a "re-do." Mr. White's first surgery was successful. Indeed, Appellees themselves state at page 1 of their Brief that Mr. White "healed perfectly from the first surgery." Thus, there was never a need to re-do the first surgery.

A “re-do” is a second surgery after a first unsuccessful surgery, basically a second try. (Tr. 503, 606-610) A second surgery precipitated by a new distinct injury, after outstanding results have been obtained from the first surgery, is a totally different procedure than is a “re-do.” Id. It is exactly the sort of spinning of medical literature and proximate causation testimony by non-medical professionals (e.g. attorneys) that underscores the need for expert testimony in lack of informed consent/medical malpractice cases.

The statistics and literature from a 1989 medical journal article pertaining to “re-dos” referenced extensively by counsel for Mr. White at trial below are simply irrelevant. (See Brief of Appellees, p. 10) Both defense experts testified that the article was not relevant because the second surgery was not a “re-do” of a failed surgery. (Tr. 503, 514-515, 610)

Dr. Gary Rea testified:

But within that category, this category of patients, none of those patients had the same history as Mr. White. All of those people had had surgery. Then over the course of somewhere between two and 12 months after the surgery, they got slowly worse.

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Mr. White, on the other hand, did not get slowly worse at all. He got rapidly worse. (Tr. 503-504)

Dr. Rea further testified that the literature referenced by Mr. White’s counsel was irrelevant for the addition reason that 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)

Likewise, Dr. Michael Miner testified that surgical success numbers have improved markedly since the time of the article cited by counsel, and testified that Mr. White's situation was not comparable to that of the typical test subject in the article 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) Dr. Miner testified as follows in this respect:

The reason that I don't think that applies so much in this man's case is that he had a good outcome. Fairly quickly after that surgery he fell and had an identifiable cause for a new problem or the same problem at the same level, but **it was a new problem for him**. And -- and I would expect -- I think it is reasonable to expect that he would have a high probability of a good out -- another good outcome. (Tr. 610)

Again, this testimony was un rebutted. Yet, Appellees argue almost exclusively that no expert testimony was required because the enhanced risks of a "re-do" surgery are easily appreciated by a jury. In fact, the second surgery showed that the suspected herniated disk problem might not have even existed and that Mr. White's pain was due to some other factor. (See Brief of Appellee at p. 15) This merely underscores the distinctness of the second injury from the first and also may explain why the results were not as good. Yet, these facts have no relevancy to a lack of informed consent claim.

Twice in their Brief, Appellees cite to the same portion of Dr. Miner's cross-examination for the proposition that Dr. Miner "confirmed" that the risk of a poor outcome increases with a re-do surgery. (See Brief of Appellees at p. 4-5, Tr. 644) Dr. Miner merely testified in this regard that "in general," the hypothetical posed concerning "re-dos" was accurate and that "the relief of pain is much less," again answering generally, but not expressing an opinion on the actual surgical procedure

performed on Mr. White. (Tr. 644-645) Yet, Dr. Miner never testified that this was not the case with Mr. White and Dr. Miner's expert testimony on this subject was that the risks of Mr. White's second surgery, under this specific fact pattern, were not significantly enhanced from the first surgery. (Tr. 606-610)

Appellees place a great deal of emphasis on the claim that Mr. White was not in extreme pain prior to the second surgery, and they even claim that he was doing well treating conservatively with Percocet. This misstatement is made at least eight or nine times in the Merit Brief of Appellees. It is simply incorrect that Mr. White was not experiencing extreme and unbearable pain prior to the second surgery. Any expert retained by Appellees would have been constrained to base his opinions on these medical records, not Mr. White's recollections.

Dr. Rea testified that "I would have operated on him every time, with a man this miserable." (Tr. 548) Mr. White and Mrs. White each described Mr. White's pre-surgical pain in October, 1998 as "excruciating," and a "10 out of 10." (Tr. 263, 293, 301-302, 413) Mr. White described the pain he was experiencing as "constant," "throbbing," "stabbing," "burning," and "unremitting," all sensations that he claimed at trial did not exist until after the second surgery. (See e.g., Tr. 301-302, 304, 452, 606, 666.) Dr. Miner testified that Mr. White told him his pain was "unremitting" since the time of his fall. (Tr. 666) Dr. Rea described the actual surgical procedure performed as "just what I would have done" based on Mr. White's condition and failure to show any response to more conservative treatment. (Tr. 498) Although Mr. White has alternately blamed this paper trail on physicians or opposing attorneys, the fact remains that all objective evidence indicates he was in severe pain prior to the second surgery.

Also, prior to the second surgery, Mr. White required a cane to get around, and he had filled out a disability benefits application indicating that he became disabled on the same day he fell at Cedar Point. (Tr. 305, 307) Mr. White no longer required use of a cane at the time of trial. (Tr. 286) This is relevant to the issue of whether Mr. White's condition worsened subsequent to the second surgery, which is another area for which Appellees presented no expert testimony.

Dr. Rea 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 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 actual 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)

At page 11 of their Merit Brief, Appellees misstate that Dr. Bruce Massau, Mr. White's pain management treating physician, was an "expert" witness at trial. This was

simply not the case, as was demonstrated in the Brief of Appellant by way of repeated reference to Dr. Massau's own trial testimony. (See Tr. 363; Brief of Appellant at p. 10) Notably, Dr. Massau also confirmed that Mr. White was "doing well" under his treatment which provided another example of Mr. White's testimony being inconsistent with his recorded medical history. (Tr. 350)

Appellees admit, at pages 11-12 of their Brief, that Dr. Leimbach and the Whites extensively discussed the issue of scar tissue prior to the second surgery, and that Dr. Leimbach stated that removing the scar tissue might make it come back even worse. Thus, Appellees' theory of the case, which was that the issue of scar tissue presented by a "re-do" surgery was never discussed, is demonstratively inaccurate.

An example of Appellees' flawed reasoning is found at page 30 of their Merit Brief. Therein, Appellees posit that:

When, as here, (a) a patient has some low back pain (that is of the same quality as the pain that was completely eliminated by a first surgery, and that is relieved by medicine and heat), (b) the patient is not informed that there is a substantial risk that a second surgery will result in a poor outcome, (c) patient proceeds with surgery, and (d) the patient wakes up from the second surgery with an intense and permanent pain that did not exist before the surgery, the jury can find proximate cause.

This supposition ignores that Dr. Leimbach presented expert testimony that Mr. White's pain was not of the "same quality" as the pain successfully eliminated by the first surgery, that the pain was caused by a distinct intervening event, and that the patient's condition post-surgery (from a clinical perspective) was not worse than his condition prior to surgery. The fact that Mr. White injured his back twice does not mean that the injuries were identical. For example, Dr. Miner testified that the injury at Cedar

Point was a “new problem for [Mr. White]. (Tr. 610) This reality was explained by Dr. Leimbach’s experts at trial but is still ignored by Appellees.

Another suggestion made by Appellees in their Brief is that Mr. White suffered from causalgia or “causalgia symptoms” subsequent to the second surgery. However, Mr. White has never been diagnosed with causalgia, not even by Dr. Massau. Further, the foot pain that Mr. White claimed to have experienced for the first time after the second surgery is replete in his medical records prior to the surgery. (Tr. 304, 448)

**B. *Appellees’ Brief Fails to Appreciate the Import of the Court of Appeals Decision***

Appellees essentially ignore the fact that the court of appeals plurality opinion expressly held that expert testimony was not required in a lack of informed consent case, and that a lack of informed consent case arising from a medical procedure is not a medical malpractice case.<sup>1</sup> *White v. Leimbach*, 10<sup>th</sup> App. No. 09AP-674, 2010-Ohio-1726 ¶6, 19. Although Appellees minimize the import of this holding, they implicitly recognize that it is a major deviation from existing Ohio law, as they made little or no effort to distinguish the facts of this case from the holdings of the multitude of Ohio decisions discussed in the Merit Brief of Appellant.

Although Appellees may wish that the plurality opinion decided the case based on a highly selective recitation of facts similar to their own Statement of Facts, that was simply not the case. The court of appeals opinion below did indeed ignore and/or minimize precedent from this Court requiring expert testimony in lack of informed consent cases, and it is at odds with case authority from appellate jurisdictions

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<sup>1</sup> For example, at page 2 of their Brief, Appellees claim that “[t]he courts below merely addressed whether the Whites produced sufficient evidence of proximate cause under the second part of the *Nickell* test.”

throughout the state, as well as from within the Tenth District. This decision, if left undisturbed, would constitute new law, and would result in a weakening of important public policy requiring competent expert testimony in medical malpractice lawsuits that discourages the filing of non-meritorious cases as well as prevents fraud and abuse. To allow the decision below to remain undisturbed would also partially negate Civ.R. 10(D).

**C. *Appellees' Focus on Dr. Leimbach's Surgical Notes is Irrelevant***

Repeatedly throughout their Brief, Appellees quote Dr. Leimbach's surgical notes in which he stated that he was afraid of scar tissue, and the second operation just made it worse. Appellees apparently believe that the mere recognition of a potentially non-optimal outcome, which was a known risk and/or complication of the surgery, is equivalent to a prima facie case of lack of informed consent/medical malpractice.

In truth, Dr. Leimbach's note is merely a candid and appropriate documentation of his surgical findings. Dr. Miner gave expert testimony that the removal of some scar tissue was a required part of the operation. (Tr. 611-612) Documentation of the presence of scar tissue in no way establishes liability. This is not a medical malpractice negligence case, and the issue of deviation from standard of care in the performance of the surgery was not plead. Thus, the fact that the outcome was less than ideal does not create an issue of fact for a jury without evidence that a known material risk was not disclosed and that a reasonable person in Mr. White's position would not have consented to the procedure had additional known material risks been disclosed to him or her.

Further, Dr. Rea provided unrebutted medical expert testimony that scar tissue aggravation was not consistent with the sudden onset of pain experienced by Mr. White

after surgery. (Tr. 529)

**D. Discussion of the Relevant “Standard of Care” in this Appeal is Appropriate**

Appellees fault Appellant for improperly “injecting” standard of care language in their Brief, and note that the same “mistake” was made at trial. (See Brief of Appellee at p. 25) In fact, there is nothing improper about “injecting” standard of care language into this appeal. An informed consent case presents issues of standard of care, (i.e.), the standard of care is what a reasonable physician would have disclosed under the circumstances. This exact concept has been explained by numerous appellate courts throughout the state, including *Hillman v. Kosnik*, 10<sup>th</sup> Dist. No. 07AP-942, 2008-Ohio-6303; *Maglosky v. Kest*, 8<sup>th</sup> App. No. 85382, 2005-Ohio-5133; *McElfresh v. Farrall* (March 9, 1990), 2<sup>nd</sup> App. No. 2602; *Pierce v. Goldman* (May 17, 1989), 1<sup>st</sup> App. No. C-880320; *Turner v. Cleveland Clinic*, 8<sup>th</sup> App. No. 80949, 2002-Ohio-4790; and *Tutt v. Ahmad* (December 28, 1998), 2<sup>nd</sup> App. No. C.A. 17284. Thus, Appellants were not “mistaken,” either at trial or on appeal, in discussing the standard of care for obtaining appropriate informed consent for a laminectomy surgery, such as the one at issue in this case.

**E. Appellees Stretch the Holding of *Nickell v. Gonzalez***

Appellees also make the interesting claim that standard of care expert testimony is “unnecessary” and that jurors are “entrusted with the role of determining whether risk is material ‘and therefore required to be disclosed’.” (Brief of Appellees at p. 25) The case citation used in advancing this proposition is *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 139. Although the plurality opinion below seemed to agree with this contention, it is clearly at odds with almost all Ohio precedent on this issue. This

assertion that an ordinary layman possesses sufficient knowledge and/or experience to determine whether a risk of neurosurgery is material is misplaced.

The relevant portion of *Nickell* merely concluded that “a jury was properly instructed that a risk is material when a reasonable person would likely attach significance to the risk in deciding whether or not to forgo the proposed treatment.” *Id.* at p. 179. This cite from *Nickell* should not be interpreted as a holding that expert testimony is “unnecessary” on the issue of whether risk is material and therefore required to be disclosed, nor should it be viewed as support for the proposition that a plaintiff need not present expert testimony on this issue of whether a mere potential risk is in fact “material,” as *Nickell* did not deal with the requirement of expert testimony.

Appellees next cite to case law from the D.C. Appellate Circuit from 1972 in support of their argument that “issues typically involved in nondisclosure cases do not reside peculiarly within the medical domain.” *Canterbury v. Spence*, 464 F.2d 772, 792<sup>2</sup> (Brief of Appellees at p. 26.) The import of this federal case to the present appeal is minimal, given the large volume of controlling Ohio jurisprudence. The same is true of the case law from Maine and New Jersey cited by Appellees, although a close reading of those cases reveals that none of them proposed to eliminate the need for expert testimony all together as did the plurality opinion below.

Appellees concede at page 26 of their Brief that “expert testimony is typically required to assist the jury in understanding the nature and magnitude of the risks inherent in a procedure so that the jury can decide which risks are ‘material’.” Appellees’ concession in this regard is at odds with the plurality opinion below, which

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<sup>2</sup> *Canterbury* was also relied on by the plurality opinion below.

made no such distinction.

**F. *There Was Never a Concession from Dr. Leimbach or Any Defense Expert that Material Risks Which Should Have Been Disclosed Were Not Disclosed***

Any implication in the Brief of Appellees that Dr. Leimbach “admitted” that material risks that should have been disclosed were not disclosed is inaccurate and represents a distortion of Dr. Leimbach’s actual trial testimony. This statement was made in conjunction with Appellees’ incredulous suggestion that liability was somehow “admitted” at trial. A careful analysis of the bullet-point citations to the record in support of this proposition found at pages 28-29 of Brief of Appellees shows that no such concession was ever made.

Dr. Leimbach did not testify that Percocet and heat were “relieving” Mr. White’s pain prior to the second surgery. He confirmed that the medical records showed that Percocet and hot showers “made the pain better.” (Tr. 199) Temporarily feeling better is far different than being cured or “relieved” of pain. Dr. Leimbach did not admit the second operation “made Mr. White worse.” He stated that he was concerned that the second operation might have made the scar tissue worse. This is another important distinction. Dr. Leimbach testified that if Mr. White had in fact developed causalgia, it would have been treatable. (Tr. 215) Dr. Leimbach did not concede that the second surgery was a “re-do” of the first. He merely stated (on multiple occasions) that it was “in the same place” as the first. (Tr. 203-204) Dr. Leimbach also confirmed that conservative treatment was attempted prior to Mr. White deciding on surgery. (Tr. 199)

What Dr. Leimbach actually testified to is that he was “sure” that he discussed the specific risks posed by the second surgery with Mr. White, “Yes, I am sure I did.” (Tr.

222) Dr. Leimbach explained that there was no record of this conversation in Mr. White's admission paperwork because the conversation happened "long before he comes into the hospital." (Tr. 223) Dr. Leimbach testified that in his practice, it was both "routine" and "automatic" to fully discuss a procedure with the patient prior to proceeding. (Tr. 221)

Appellees also fault Appellant for pointing out that at the time of trial that Dr. Leimbach was not qualified to provide expert testimony. (Brief of Appellees at p. 31) This was not some novel argument conjured up by Appellant, but rather a direct response to the plurality opinion below, which concluded that "even if" expert testimony was required in a lack of informed consent/medical malpractice case, that such requirement would have been satisfied by the testimony of Dr. Leimbach. (See Opinion and Order, *White v. Leimbach*, 10<sup>th</sup> App. No. 09AP-674, 2010-Ohio-1726 at ¶19) This issue was also discussed extensively in the dissenting opinion below. *Id.* at ¶29.

Foremost as to this contention, the parties agreed that Dr. Leimbach was not an expert witness at trial. *Id.* at ¶29, Judge French dissenting. Appellees never raised this issue at trial, nor was any objection to Dr. Leimbach's limited witness capacity preserved for appeal.

The statement in the Brief of Appellees at page 31 that "moreover, Dr. Leimbach was a board-certified neurosurgeon" is misleading at best. Dr. Leimbach was not a board-certified neurosurgeon at the time of trial. The trial took place 11 years after the surgery at issue. Thus, there is no relevance to Dr. Leimbach's prior board-certification to his expert status at trial.

Contrary to Appellees' hyperbole, Dr. Leimbach made no effort to "disqualify himself under Evid.R. 601." (See Brief of Appellees, p. 31) Rather, Appellant's Merit Brief merely pointed out the deficiencies of the plurality opinion's finding in this regard. Any objections to Dr. Leimbach's witness capacity limitations have long since been waived. When Appellees state that "an argument similar to Appellant's was rejected by the Second District Court of Appeals in *Crosswhite v. Desai* (1989) 64 Ohio App.3d 170, they are actually faulting the reasoning of the plurality opinion below, not of Appellant.

In his dissenting opinion below, Judge French stated:

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 [v. England]* (1994) 69 Ohio St. 3d 451, 455, it was not admissible as expert testimony for the purpose of proving proximate cause and meeting the second *Nickell* factor. *White v. Leimbach* supra at ¶29.

Appellees also repeatedly claim that Dr. Rea testified that Mr. White's claimed "raw, burning pain" was "most likely" caused by surgery. (See e.g. Brief of Appellees at p. 17) In fact, Dr. Rea said the pain could be from a host of other issues, but that the surgery "is the most likely cause."<sup>3</sup> Saying that surgery was the most likely cause of a large number of potential causes is nowhere near saying that the surgery caused the new

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<sup>3</sup> The quoted words are actually from a question by counsel to Dr. Rea, not from Dr. Rea himself.

pain to a reasonable degree of medical certainty, nor is it even testimony as to a 50% likelihood of proximate causation. Thus, the purported "concessions" of Dr. Rea in this respect are illusory.

**G. *Dr. Miner's Pre-Operative Conversations with Mr. White are Highly Relevant***

Finally, Appellees argue unpersuasively that whether Dr. Michael Miner (who testified as both an expert and fact witness) discussed the risks of the "re-do" surgery in the course of providing a second opinion is irrelevant to this appeal. The relevancy of Dr. Miner's conceded discussions with Mr. White is that it establishes that Mr. White would have in fact consented to the second surgery had all known risks been disclosed to him in advance by Dr. Leimbach. This testimony was also exceedingly relevant to whether a "reasonable person" would have consented to surgery had all known material risks been disclosed. Despite being told the known risks of the procedure by Dr. Miner, Mr. White nevertheless voluntarily consented to the second surgery. (Tr. 309-311)

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), 10<sup>th</sup> App. No. 96API02-192. (emphasis sic.)

Dr. Miner 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 to the efficacy of the intended surgery. (Tr. 597, 603, 607, 662) Dr. Miner stated that his discussion with the Appellees was no different than it would have been if he was the treating physician. (Tr. 603) Dr. Miner's relevant testimony as to his discussion of the risks of surgery with Mr. and Mrs. White was as follows:

Q. All right. Doctor, on October 14, 1998, did you also discuss the risks of this surgery -- this second surgery with Mr. White?

A. That would have been my custom.

Q. And what risks would you go over with Mr. White?

A. Pretty much the same risks as before, that -- that the risks are -- include -- what I always say include hemorrhage, infection, injury to the nerve --

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Q. Doctor, with respect to the risks that you discussed during -- for the second operation, are they essentially the same risks that you were discussing with Mr. White at the time of his first operation?

A. Yes.

Q. Now, these risks that you have talked about not only with Mr. White, but are these the same type of risks that you would talk about with all patients who are undergoing back surgery of this nature?

A. Yes, pretty much. We would talk about that. And then, in addition, we would discuss outcome if you don't have those risks. Because it is important for people to understand that if you don't have any complications, that doesn't mean everything will be perfect. But if you have one of those complications, it's pretty clear that everything won't be perfect.

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Q. So, in other words, we are talking about -- in both of the visits you talk about the likelihood of success or the hopeful expectations of the surgery.

A. Yes.  
(Tr. 606-610)

Dr. Miner confirmed that he discussed the risks, as well as the benefits of the second surgery with Mr. White. (Tr. 596-597, 602, 607, 662) Appellees' statement that Dr.

Miner did not discuss such risks is based entirely on his lack of an independent recollection of his pre-surgical appointment with the Whites.

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 of these known, material risks presented by both surgeries with Mr. White.

Dr. Miner stated in this respect:

Q. Dr. Miner, in addition to what Dr. Leimbach would have discussed with the patient as we have talked earlier in the deposition, would you have gone over those material risks with the patient when you did your second opinion evaluation in October of 1998?

A. Yes. I would have treated Mr. White as though I was going to do the surgery and -- and handled him in that -- that manner, which means we would have talked about indications, how to do the operation, risks and expectations. (Tr. 616)

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)

Despite Appellees' new claim that Mr. White "adamantly denied" that Dr. Miner discussed the risk of this surgery with him, Mr. White conceded at trial that he did not even recall that he was seen by Dr. Miner prior to the second surgery. (Tr. 282) Also, it should be noted again that Mr. White conceded that he has a very faulty memory and that he recalls only about one-half of relevant events.<sup>4</sup> (Tr. 299-300)

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<sup>4</sup> Mr. White tried to qualify this concession at trial by calling it a "joke." (Tr. 300)

**H. *The Consensus Expert Testimony at Trial was That All Material Risks Were Disclosed to Mr. White, and That Mr. White's Present Condition Was Not Proximately Caused by His Second Surgery***

As discussed in considerable detail herein, both of Appellant's 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.

In fact, both of Dr. Leimbach's experts testified unequivocally 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)

The only evidence at trial dealing with second surgeries was that the percentage of success rates were relatively similar for both surgeries, and that the dated study showing a marginal difference in success rates of "re-do" 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 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)

Finally, it is simply not the case that "Mr. White's condition was significantly worse after the second surgery." *White v. Leimbach* supra at ¶2. 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) Nor is it self-evident that any deterioration of Mr. White's physical condition at the time of trial was proximately caused by the second surgery.

Mr. White's own pain management physician, Dr. Massau, testified 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. 350, 353-355, 371) Dr. Massau also testified that Mr. White's pain at the time of trial was merely "intermittent" and that Mr. White was doing "very well" at the time of trial. *Id.*

Dr. Rea testified that "with a man this miserable" he would operate "every time." (Tr. 548) Dr. Rea and Dr. 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 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) As the trial court aptly noted in its ruling on the Motion for Directed Verdict, this evidence was "unrebutted". (Supp. 001; Appx. 048) This testimony was also summarized by the dissent at paragraphs 30-33.

**I. *The Dissenting Opinion Properly Captured Dr. Miner's Trial Testimony***

The dissenting opinion addressed the issue of Dr. Miner's alleged concession as follows:

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.

Id. at ¶30-32.

The dissenting opinion's conclusions in this regard are clearly correct. Dr. Miner's responses to counsel's questions on cross-examination do not come close to constituting sufficient expert testimony in order to have relieved Appellees of their reciprocal obligation to provide expert testimony. The medical issues present in this case are complex, and Dr. Miner did his best to fully explain these complex issues while being cross-examined. Yet, it is inaccurate to suggest that Dr. Miner ever testified that Mr. White suffered causalgia, nerve damage, or any similar malady as a result of the second surgery performed by Dr. Leimbach. Dr. Miner and Dr. Rea both agreed there were other proximate causes for Mr. White's post-surgical condition, primarily his fall at Cedar Point.

### **III. Conclusion**

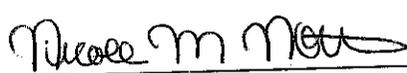
Dr. Leimbach offered abundant expert testimony at trial from distinguished neurosurgeons affirmatively demonstrating that Mr. White's second surgery was reasonable and appropriate under the circumstances, that Mr. White's condition was not worsened by the surgery, and that the injuries complained of by Mr. White were caused by his fall while running through the parking lot and not by the surgery performed by Dr. Leimbach. The un rebutted expert testimony in the record is 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)

Appellees have failed to provide any meaningful rationale for why the proposition of law accepted for review by this Court should not be adopted. Appellees have also not presented a compelling public policy rationale as to why the expert testimony requirement for medical malpractice cases should not apply to lack of informed consent medical malpractice cases.

The trial court clearly got it right when it granted a directed verdict in favor of Dr. Leimbach. The opinion of the court of appeals reversing the trial court represents a deviation from established Ohio law and will constitute bad precedent and bad public policy if left undisturbed. Accordingly, the decision of the Tenth District Court of Appeals should be reversed.

Respectfully submitted,

 (00801029) for MTG

**MARTIN T. GALVIN (0063624)**

REMINGER CO., L.P.A.

1400 Midland Building

101 Prospect Avenue, West

Cleveland, Ohio 44115

(216) 687-1311

Fax: (216) 687-1841

Email: [mgalvin@reminger.com](mailto:mgalvin@reminger.com)

*Attorney for Appellant*

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

**CERTIFICATE OF SERVICE**

A copy of the foregoing document was sent by regular U.S. mail on this 17<sup>th</sup> day of

February, 2011 to the following:

Charles H. Cooper, Jr.  
Rex H. Elliott  
Cooper & Elliott, LLC  
2175 Riverside Drive  
Columbus, Ohio 43221

***Counsel for Appellees***

Bret C. Perry  
Bonezzi Switzer Murphy Polito &  
Hupp Co. LPA  
1300 East 9<sup>th</sup> Street, Suite 1950  
Cleveland, Ohio 44114

***Counsel for Amicus Curiae the  
Academy of Medicine of Cleveland  
& Northern Ohio***

Nicole M. Galvin (0082/29) for M.T.G.  
MARTIN T. GALVIN (0063624)