

**IN THE SUPREME COURT OF OHIO**

Peter L. Moran, Administrator of the  
Estate of Richard L. Elzay, Deceased,

Appellee

v.

Mercy St. Vincent Medical Center and  
Kristen M. Tennant, R.N.,

Appellants

) Supreme Court Case No. 2013-0198

)

)

)

)

) On Appeal from the Lucas County

) Court of Appeals,

) Sixth Appellate District

)

) Court of Appeals

) Case No. L-11-1281

On Appeal from Lucas County  
Court of Common Pleas  
Case No. CIO200907447

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**APPELLEE PETER L. MORAN, ESQ., ADMINISTRATOR OF THE ESTATE OF  
RICHARD L. ELZAY, DECEASED'S MEMORANDUM IN OPPOSITION TO  
APPELLANTS' MOTION TO STAY EXECUTION OF JUDGMENT PENDING  
APPEAL**

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Kyle A. Silvers (0067654)  
SHINDLER, NEFF, HOLMES,  
WORLINE & MOHLER, LLP.  
300 Madison Avenue, Suite 1200  
Toledo, Ohio 43604  
(419) 243-6281  
FAX: (419) 243-0129  
[ksilvers@snhslaw.com](mailto:ksilvers@snhslaw.com)  
Attorney for Appellee

James E. Brazeau (0016887)  
Timothy D. Krugh (0016900)  
Jason M. Van Dam (0081202)  
ROBISON, CURPHEY & O'CONNELL, LLC.  
Ninth Floor, Four Seagate  
(419) 249-7900  
FAX (419) 249-7911  
[jbrazeau@rcolaw.com](mailto:jbrazeau@rcolaw.com)  
[tkrugh@rcolaw.com](mailto:tkrugh@rcolaw.com)  
[jvandam@rcolaw.com](mailto:jvandam@rcolaw.com)  
Attorneys for Appellants

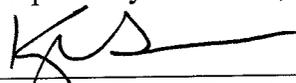
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**FILED**  
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CLERK OF COURT  
SUPREME COURT OF OHIO

Pursuant to S. Ct. Practice R. 4.01, Appellee Peter L. Moran, Administrator of the Estate of Richard L. Elzay, Deceased (Appellee) respectfully moves this Court for an Order denying Appellants' Motion to Stay the Enforcement of the unanimous Judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-11-1281 on January 25, 2013 (Judgment Entry).

Despite Appellants' October 28, 2011 Motion in the Lucas County Court of Common Pleas arguing that they be afforded a stay of the final judgment without posting bond, the Trial Court, via a November 18, 2011 Judgment Entry, granted the stay upon condition of them posting a bond at that time in the amount of \$601,130.08. Appellants posted that bond, which is now inadequate pursuant to R.C. § 2505.09. Appellee therefore respectfully requests that Appellants' Motion to Stay Enforcement be denied, or in the alternative, that they be ordered to post bond in a sum that is not less than the cumulative total for all claims covered by the final order, judgment, or decree *and interest* involved. (*Emphasis added*). Appellee attaches a Memorandum in Opposition for this Court's consideration.

Respectfully submitted,

  
\_\_\_\_\_  
Kyle A. Silvers, Esq. (0067654)  
SHINDLER, NEFF, HOLMES,  
WORLINE & MOHLER, LLP.  
300 Madison Ave., Suite 1200  
Toledo, OH 43604  
Counsel for Appellee  
Peter L. Moran, Administrator of  
The Estate of Richard L. Elzay,  
Deceased

## MEMORANDUM IN OPPOSITION

### I. BRIEF STATEMENT OF THE FACTS

This is a medical malpractice and wrongful death case arising out of the death of Richard Elzay (Mr. Elzay), who was admitted on November 26, 2008, to Appellant Mercy St. Vincent Medical Center (MSVMC) for unstable angina, an uncomplicated diagnosis for which he was expected to be hospitalized for a few days. Instead, per his Death Certificate, Mr. Elzay died a month later from Endocarditis, due to Sepsis and secondary to a wound infection at the site of an IV in his right arm which, as Plaintiff proved at Trial, was negligently handled by Appellant Kristen Tennant, R.N. (Tennant), who failed to adhere to the standard of care and take the necessary steps to prevent infection at the site.

The matter proceeded to Trial on June 27, 2011.

On June 30, 2011, the jury unanimously found that Appellant Tennant was negligent in her care of Mr. Elzay and also found that her negligence was the direct and proximate cause of his death. The jury also awarded \$600,000.00 in compensatory damages. Subsequently, the Court also awarded Appellee's costs of \$1,130.08.

The Trial Court issued its Judgment Entry accepting the jury's unanimous verdict plus interest and costs, on October 17, 2011. *See* Judgment Entry attached as Exhibit 1.

Appellants then filed their Notice of Appeal and moved the Trial Court to stay enforcement of the judgment entries, arguing that, in light of their "undeniable ties to the local community, no bond or other security is necessary to ensure Appellee's interest (sic) are protected during this appeal." *See* October 28, 2011 Motion for Stay of Execution attached as Exhibit 2. The Trial Court disagreed, and ordered that, pursuant to Civil Rule 62(B), Appellants'

Motion for Stay would be granted subject to Appellants posting a bond in the amount of \$601,130.08. See November 18, 2011 Judgment Entry attached as Exhibit 3.

Appellants posted the bond.

The case proceeded to the Sixth District Court of Appeals, which unanimously affirmed the judgment of the Trial Court in its January 25, 2013 Decision and Judgment. See Decision and Judgment attached as Exhibit 4.

Appellants have now appealed to this Court, and again seek a Motion to Stay Enforcement of the nearly two-year-old Judgment.

## II. LAW AND ANALYSIS

As Appellants concede, pursuant to Civ. R. 62(B), “when an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond \*\*\*.” At the time Appellants sought the initial stay in the Trial Court in 2011, the amount of the judgment, \$601,130.08, was adequate.

However, a year and a half and two appeals later, such an amount is clearly inadequate pursuant to R.C. §2505.09, which provides that “an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree *and interest* involved except that the bond shall not exceed fifty million dollars excluding interest and costs, as directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken.” (*Emphasis added*)

Since the June 2, 2004, revision to R.C. §5703.47, the legal rate of interest has been a floating rate tied to the tax commissioner's rate. The below table summarizes the tax commissioner's rate for each year relative to this case:

Calendar Year	Annual Rate
2011	4.0%
2012	3.0%
2013	3.0%

Applied to this matter, through February 4, 2013, the date of the filing of this Memorandum, the judgment plus interest totals \$625,899.92. The below table summarizes the calculation.

Period	Amount	Rate	Notes
2011	\$ 5,006.67	4%	Pro-rated for 76 days
2012	\$18,033.90	3%	Yearly
2013	\$ 1,729.27	3%	Pro-rated for 35 days
Subtotal:	<b>\$24,769.84</b>		
Plus Judgment	\$601,130.08		
Total:	<b>\$625,899.92</b>		

Appellants now assert that they will appeal "several dispositive issues that arose during various stages of this case, including summary judgment and post-trial," despite having presented only two assignments of error to the Court of Appeals, both of which the Court found not well-taken.

In light of Appellants' ongoing dissatisfaction with the jury verdict and Court rulings, as well as their attempt to introduce new issues for appeal to this Court, this matter, if heard, is likely to take some number of months. For the purposes of this argument, Appellee suggests that the appeal process could take an additional year. Interest will continue to accrue during this

period of time. Assuming that the appeal rate remains at 3 percent for 2014, and calculated from the date of filing this Memorandum, an additional \$18,034.00 will accrue to the judgment. Added to the \$625,899.92, the total is \$643,933.92.

Accordingly, the Court should set the bond rate at an amount of at least \$650,000.00.

### III. CONCLUSION

Appellants resisted posting bond in the Trial Court until ordered to do so. They now again seek to Stay Enforcement of the Judgment, but have not proposed posting bond in compliance with R.C. § 2505.09. As such, the bond posted is significantly less than the cumulative total for all claims covered by the final judgment and interest, which continues to accrue. Therefore, to protect Appellee's interest, adhere to the provisions of R.C. § 2505.09, and protect the status quo, Appellee respectfully requests that Appellants' Motion for Stay of Execution be denied, or alternatively, that the Court order that an adequate bond be posted.

Respectfully submitted,

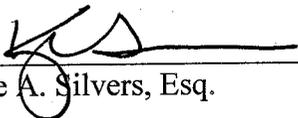


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Kyle A. Silvers, Esq. (0067654)  
SHINDLER, NEFF, HOLMES,  
WORLINE & MOHLER, LLP.  
300 Madison Ave., Suite 1200  
Toledo, OH 43604  
Counsel for Appellee  
Peter L. Moran, Administrator of  
The Estate of Richard L. Elzay,  
Deceased

CERTIFICATE OF SERVICE

The foregoing Memorandum in Opposition was mailed this 4 day of February, 2013, to , James E. Brazeau, Timothy D. Krugh, James E. Brazeau, and Jason Van Dam, Robison, Curphey & O'Connell, LLC., Four Seagate, Ninth Floor, Toledo, OH 43604.

  
\_\_\_\_\_  
Kyle A. Silvers, Esq.



FILED  
LUCAS COUNTY

SCANNED  
**THIS IS A FINAL  
APPEALABLE ORDER**

2011 OCT 17 A 10 35  
IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

COMMON PLEAS COURT  
BERNIE QUINTER  
CLERK OF COURTS

PETER L. MORAN, ESQ., Administrator of the Estate of Richard Elzay, Deceased,  
Plaintiff, \* Case No. CI 2009 7447

Judgment Entry

vs.

Judge Charles S. Wittenberg  
By Assignment

MERCY ST. VINCENT MEDICAL CENTER,  
et al.  
Defendants.

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict, and the Court having accepted the verdict of the jury,

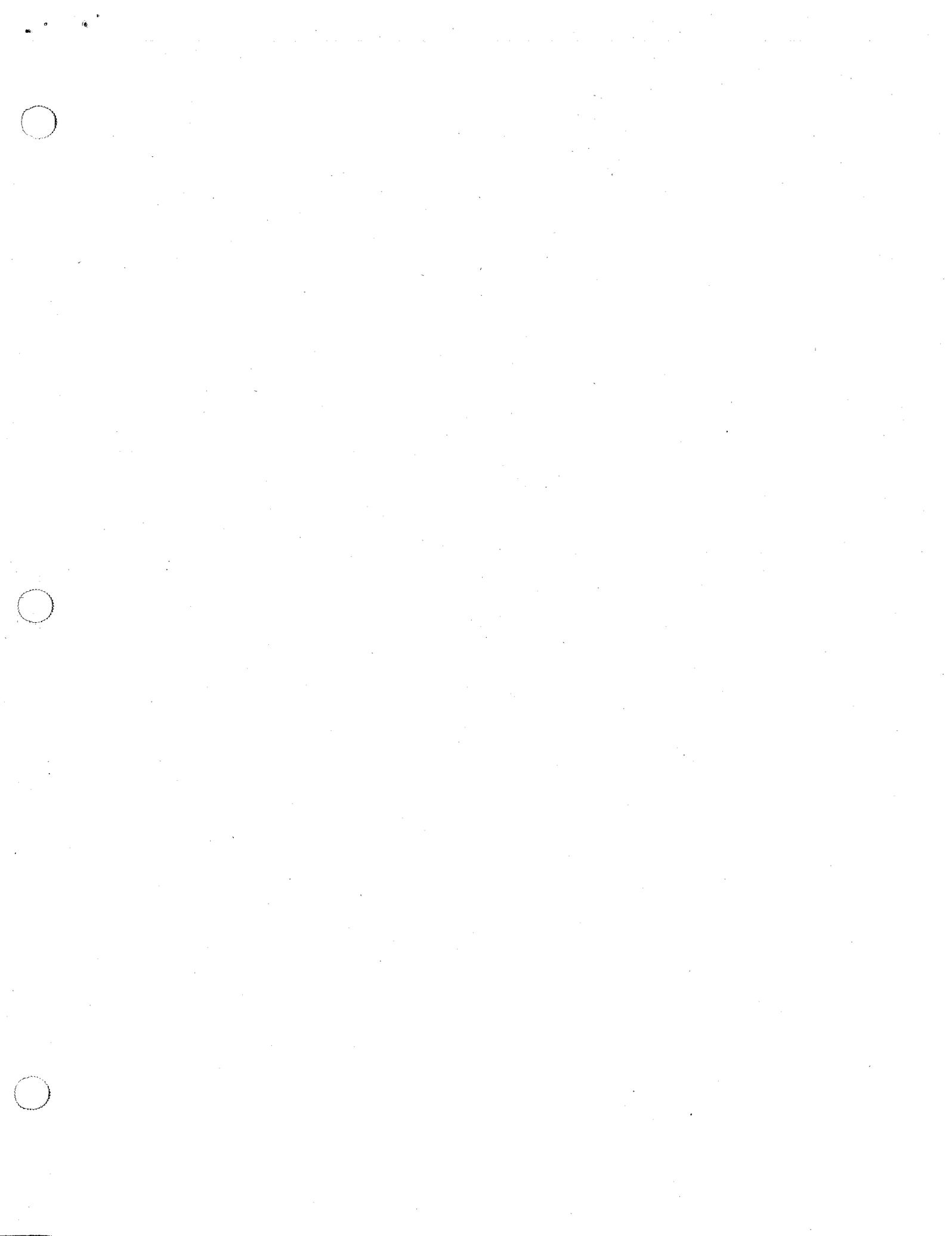
It is therefore ORDERED, ADJUDGED and DECREED that judgment in the amount of Six Hundred Thousand Dollars and No Cents (\$600,000.00) be entered in favor of plaintiff Peter L. Moran, Esq., Administrator of the Estate of Richard Elzay, deceased, and against defendants Mercy St. Vincent Medical Center and Kristen Tennant, RN, jointly and severally, plus statutory interest from the date of judgment and his costs of this action.

THIS IS A FINAL AND APPEALABLE ORDER

10/14/11  
Date

Charles Wittenberg  
Judge Charles S. Wittenberg  
By Assignment

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COMMON PLEAS COURT  
BERNIE GUILTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

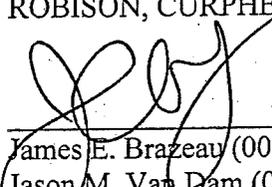
Peter L. Moran, Esq., Administrator of the Estate of Richard L. Elzay, Deceased,	)	Case No.: CI0200907447
	)	Judge James D. Jensen
Plaintiff/Appellee,	)	<b>MOTION FOR STAY OF EXECUTION OF JUDGMENT</b>
v.	)	
	)	James E. Brazeau (0016887)
	)	Jason M. Van Dam (0081202)
Mercy St. Vincent Medical Center and Kristen M. Tennant, R.N.,	)	Robison, Curphey & O'Connell, LLC
	)	Ninth Floor, Four SeaGate Toledo, Ohio 43604
Defendants/Appellants.	)	(419) 249-7900 (419) 249-7911 – facsimile
	)	jbrazeau@rcolaw.com jvandam@rcolaw.com
	)	Attorneys for Defendants/Appellants

Pursuant to Civ.R. 62(B) and App.R. 7(A), Defendants-Appellants Mercy St. Vincent Medical Center and Kristen M. Tennant, R.N. (“Appellants”) move this Court for an order staying any attempt by Appellee to execute this Court’s October 14, 2011 final judgment pending resolution of Appellants’ appeal to the Sixth District Court of Appeals. Furthermore, in light of the financial solvency of Appellants’ insurer and Mercy St. Vincent Medical Center’s undeniable ties to the local community, no bond or other security is necessary to ensure Appellee’s interest are protected during this appeal.

Alternatively, if this Court conditions stay upon the filing of some amount of security, Appellants request that this Court permit them to deposit that amount in cash (not to exceed \$601,130.08) in lieu of filing a supersedeas bond or other surety. In support of this Motion, Appellants attached a Memorandum in Support and proposed Order for this Court's consideration and convenience.

Respectfully submitted,

ROBISON, CURPHEY & O'CONNELL



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James E. Brazeau (0016887)  
Jason M. Van Dam (0081202)  
Robison, Curphey & O'Connell, LLC  
Ninth Floor, Four SeaGate  
Toledo, Ohio 43604

Attorneys for Defendants/Appellants

### MEMORANDUM IN SUPPORT

#### A. Brief Statement of Facts

This case arises out of Appellee's claim that Appellants wrongfully caused the death of Mr. Elzay. On June 27, 2011, this case was tried to a jury and, on June 30, 2011, that jury returned a verdict in favor of Appellee and against Appellants in the amount of \$600,000.00. On September 9, 2011, this Court granted Plaintiff's motion to tax costs in the amount of \$1,130.08. On October 14, 2011, this Court also granted Appellee's Motion for Attorney Fees, and entered final judgment in this case accordingly.<sup>1</sup> This Court denied Appellee's request for prejudgment interest.

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<sup>1</sup> Appellants fully intend, and are in the process of, satisfying that judgment for attorney fees.

In light of several disputed – but dispositive – issues that arose during the course of this case, Appellants fully intend to appeal that final judgment to the Sixth District Court of Appeals and will ask the Sixth District to enter judgment as a matter of law in their favor or, alternatively, for a new trial before this Court. However, to preserve the status quo until the Sixth District has had an opportunity to hear and decide those issues, Appellants ask this Court to stay execution of that judgment.

## B. Law and Analysis

### 1. Appellants are entitled to a stay of judgment.

Pursuant to Civ.R. 62(B), “[w]hen an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an *adequate* supersedeas bond. \*\*\*.” (Emphasis added.) Similarly, App.R. 7(A) provides that an “[a]pplication for a stay of the judgment or order of a trial court pending appeal, or for the determination of the amount of and the approval of a supersedeas bond, must ordinarily be made in the first instance in the trial court.” Granting a stay of execution is within this Court’s sound discretion. *Buckles v. Buckles* (1988), 46 Ohio App.3d 118, 121.

The purpose of these Rules is to preserve the status quo during an appeal. In this case, Appellants are appealing several dispositive issues that arose during various stages of this case, including summary judgment, directed verdict, and post-trial. Should the Sixth District find Appellants’ position on *any one* of those issues persuasive, it could either enter judgment as a matter of law in Appellants’ favor or remand the case back to this Court for a new trial. In either situation, the jury’s entire verdict would be voided. To avoid the unnecessary prejudice that they would incur if the judgment was executed upon prior to this appellate review,

Appellants request that this Court impose a stay on execution of that judgment pending the Sixth District's consideration of that appeal.

No bond or other security is necessary to protect Appellee's interests.

Although Civ.R. 62(B) indicates that an appellant obtains a stay by giving an "adequate supersedeas bond," Ohio courts conclude that – in certain circumstances – an "adequate" bond can be no bond at all. In *Irvine v. Akron Beacon Journal*, 147 Ohio App.3d 428, 2002-Ohio-2204, at ¶19, the trial court stayed judgment for the plaintiffs without requiring the defendants to post any bond. Specifically, the trial court reasoned "that the [p]laintiffs are adequately secured by the [d]efendant's solvency and well-established ties to Akron, Ohio and that, therefore, the [d]efendants are not required to post a bond at this time." *Id.* at ¶109.

On appeal, the Ninth District affirmed that order, concluding that the trial court had the discretion to stay execution without requiring a bond. According to the Ninth District, "[a]n 'adequate supersedeas bond' could reasonably be construed to mean *no bond at all*, if the trial court felt that none was necessary, as in this case." (Emphasis added.) *Id.* at ¶108. In *Irvine*, the defendant's solvency and ties to the local community were enough for the trial court to find that the defendant had available means to satisfy the judgment *and* sufficient local ties to show that it would not be leaving to try and avoid that judgment. Finding no abuse of the trial court's sound discretion here, the Ninth District properly affirmed the trial court's reasoning. *Id.* at ¶109, *appeal not allowed* (2002), 96 Ohio St.3d 1491, 774 N.E.2d 765.<sup>2</sup>

*Irvine* is no anomaly either. See, e.g., *Barton ex rel. Barton v. Hackett* (Jan. 7, 2004), Franklin County Court of Common Pleas Case No. 01CVA02-2098, 2004 WL 3964432,

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<sup>2</sup> In fact, a further stay without bond was granted by the Supreme Court of Ohio during the pendency of its review of the Ninth District's decision. See *Irvine v. Akron Beacon Journal* (2002), 96 Ohio St.3d 1473, 768 N.E.2d 1181.

attached as Exhibit A (granting stay without bond because defendant insurer was solvent and had well-established ties to the local area, “and that defendants thus will be able to pay the judgment in full in the event their appeals are unsuccessful.”); *Whitlatch & Co. v. Stern* (Aug. 19, 1992), 9th Dist. No. 15345, 1992 WL 205071, attached as Exhibit B (“under appropriate circumstances, the trial court may exercise its discretion and stay the execution of judgment without requiring the appellant to post a supersedeas bond.”); *Bibb v. Home S. & L. Co.* (1989), 63 Ohio App.3d 751, 752 (“Determining the *need for the bond* and its amount are discretionary matters which will not be overturned by the appellate court absent a showing of an abuse of discretion.”) (emphasis added.)<sup>3</sup>

Like *Irvine*, Appellants’ insurer – Catholic Healthcare Partners – has more than adequate solvency such that Appellee’s interest in this Court’s final judgment award is secured pending Appellants’ appeal to the Sixth District. (See Consolidated Financial Statements of Catholic Health Partners, attached as Exhibit C.) Moreover, there can be no doubt that Mercy St. Vincent Medical Center has well-established and entrenched ties to the local community, and would never contemplate severing those ties simply to avoid this judgment (should affirmance be the ultimate disposition of Appellants’ appeal). In short, neither Mercy St. Vincent Medical Center nor its insurer are the type of transient operation that cannot be trusted to pay its liabilities. Therefore, there is no need for a bond or other security to ensure that Appellee’s rights are protected and that Appellants will stay in the community pending their appeal.

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<sup>3</sup> Pursuant to R.C. 2505.09, “[e]xcept as provided in section 2505.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts, an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee \*\*\*.” (Emphasis added.) To the extent that R.C. 2505.09 can be read to *require* a supersedeas bond before a stay can be imposed, that interpretation conflicts with Civ.R. 62(B), and should therefore be disregarded. See, e.g., Section 5(B), Art. IV, Ohio Constitution (“All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”)

3. Alternatively, Appellants request that they be allowed to deposit cash as security.

Even if this Court requires Appellants to provide security while this appeal is pending, Appellants request this Court's permission to deposit cash in an amount that this Court finds will adequately secure Appellee's interest on appeal (but not to exceed \$601,130.08). Notwithstanding R.C. 2505.09, a supersedeas bond is not required in all circumstances. R.C. 2505.11 allows other security to be deposited instead of a bond:

A conveyance of property may be ordered by a court instead of a supersedeas bond in connection with an appeal, and, if a conveyance of property is so ordered, the conveyance may be executed and deposited with the clerk of the court in which the final order, judgment, or decree was rendered, \*\*\* to abide the judgment of the reviewing court.

According to the Sixth District, cash constitutes a "conveyance of property" under the statute. See *Demery v. Baluk*, 6th Dist. No. E-11-0272011-Ohio-3231, at ¶7 (granting requested stay of judgment pending appeal, and holding that "[p]ursuant to 2505.11, either cash or bond may be filed with the clerk to secure the stay."); see, also, *McKenzie v. Neville* (1939), 63 Ohio App. 420, 422 (granting requested stay with cash deposit instead of bond, concluding that "[c]ash in hand affords even more certain protection than a bond.")

As *McKenzie* recognized, cash is more protection for Appellee than a supersedeas bond, and as *Demery* recognizes, cash is clearly appropriate security to support a stay. In any event, should Appellants fail on appeal, they do not see how Appellee would be prejudiced by the deposit of some amount of cash instead of the posting of some amount by bond. In either situation, Appellee's rights are fully protected pending the appeal.

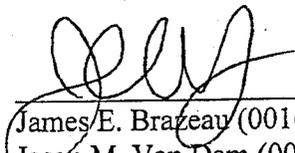
**C. Conclusion**

To preserve the status quo pending appeal, Appellants request that this Court issue a stay of execution of judgment pending appellate review by the Sixth District.

Furthermore, in light of Appellants' financial solvency and close ties to the local community, Appellants request a stay without the need for any security. If, however, this Court requires such security, Appellants further request that this Court allow them to deposit cash, as opposed to a bond, in an amount that this Court finds sufficient to secure that judgment.

Respectfully submitted,

ROBISON, CURPHEY & O'CONNELL



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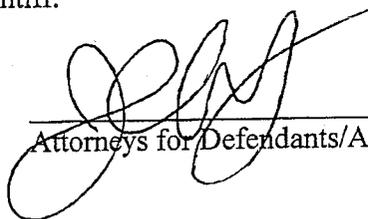
James E. Brazeau (0016887)  
Jason M. Van Dam (0081202)  
Robison, Curphey & O'Connell, LLC  
Ninth Floor, Four SeaGate  
Toledo, Ohio 43604

Attorneys for Defendants/Appellants

**CERTIFICATE OF SERVICE**

Toledo, OH  
October 28, 2011

This is to give notice that the foregoing was served this day, via ordinary mail, to:  
Kyle A. Silvers, Esq. Shindler, Neff, Holmes, Schlageter & Mohler, LLP, 300 Madison Ave.,  
Suite 1200, Toledo, OH 43604, Attorneys for Plaintiff.



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Attorneys for Defendants/Appellants

2004 WL 3964432

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES  
FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Common Pleas of Ohio, Franklin County.

Sara BARTON, A Minor by Lori Barton,  
Her Mother, ETC., et. al. Plaintiffs,

v.

Kevin HACKETT, M.D. et al. Defendants.

No. 01CVA02-2098. Decided Jan. 7, 2004.

Attorneys and Law Firms

Stephen D. Jones (0018066), Eric S. Bravo (0048564),  
Roetzel & Andress, Columbus, Ohio, for Defendants Kevin  
J. Hackett, M.D. and Physicians for Women's Health, Inc.

John K. Fitch, for Plaintiffs.

Opinion

**JUDGMENT ENTRY GRANTING MOTION OF  
DEFENDANTS FOR STAY OF EXECUTION OF  
JUDGMENT PENDING APPEAL (WITHOUT BOND)**

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HOGAN, J.

\*1 This matter is before the court upon the Motion of Defendants Kevin Hackett, M.D. and Physicians for Women's Health, Inc. for Stay of Execution of this court's November 25, 2003 Judgment Entry, pending disposition of defendants' appeal to Ohio Tenth District Court of Appeals.

The court finds that defendants' insurer, OHIC Insurance Company, is solvent and has well-established ties to the Columbus, Ohio, area, and that defendants thus will be able to pay the judgment in full in the event their appeals are unsuccessful. For these reasons, the court finds that no bond is necessary to secure the judgment and thus finds defendants' motion well-taken and the motion is hereby GRANTED.

IT IS HEREBY ORDERED that pursuant to Civil Rule 62(B), this court's Judgment Entry of November 25, 2003 shall immediately be stayed pending appeal, without the necessity of the posting of a bond or other security and that no execution or any enforcement proceedings shall lie from such Judgment Entry.

IT IS SO ORDERED.

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1992 WL 205071

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES  
FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Ninth District, Summit County.

WHITLATCH & COMPANY, Plaintiff-Appellee,

v.

Curt E. STERN, et al., Defendant-Appellant.

No. 15345. Aug. 19, 1992.

Appeal from Judgment Entered in the Common Pleas Court  
County of Summit, Case No. 90 07 2269.

**Attorneys and Law Firms**

Mark C. Pirozzi, Twinsburg, for plaintiff-appellee.

John E. Duda, Cleveland, for defendant-appellant.

**Opinion**

**DECISION AND JOURNAL ENTRY**

\*1 This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, Presiding Judge.

This cause comes before the court on appeal of defendants, Curt and Hildegard Stern, [SSN] jury verdict rendered in favor of plaintiff-appellee Whitlatch & Co. (Whitlatch) on Whitlatch's complaint for breach of contract.

In August 1988, the Sterns contracted with Whitlatch for the construction of a condominium home at a cost of \$128,956. Pursuant to the contract, the condominium was to be completed by May 1, 1989, and the sale was to have closed on May 10, 1989. On the closing date, the Sterns and representatives of Whitlatch met at the condominium to conduct an inspection of the unit, during which the Sterns were to note any aspects of the construction that were uncompleted or unsatisfactory. As the Sterns conducted their inspection, they completed a "Walk-Through Inspection Report", on which they listed eight items with which they

were not "fully satisfied", and, therefore, required repair or completion. Mr. Stern also noted on the report: "Plus all other matters which would be disclosed by living in the premises."

Due to the Sterns' numerous complaints, the parties met again on May 11, 1989, and executed an Acceptance of Possession Agreement, whereby the Sterns were given possession of the condominium in exchange for authorizing the release of all but \$3,000 of the purchase funds held in escrow. The remaining \$3,000 was to be released to Whitlatch only upon written authorization from the Sterns. The Agreement did not specify on what basis the Sterns would provide the written authorization.

Despite continued attempts by Whitlatch and its subcontractors to complete and/or repair various aspects of the condominium, the Sterns were not satisfied with the performance, and refused to release the \$3,000 remaining in escrow. Accordingly, on March 7, 1990, Whitlatch filed a complaint for breach of contract against the Sterns in the Municipal Court of Cuyahoga Falls, maintaining that all required work had been satisfactorily completed, and seeking the release of the escrow funds. The Sterns responded with a motion to dismiss for lack of jurisdiction, alleging that they were residents of Florida and not subject to the personal jurisdiction of the municipal court. Following a hearing before the referee, the motion was overruled and the Sterns were ordered to respond to the complaint.

The Sterns responded with a denial of the complaint, and a compulsory counterclaim and cross-claim for breach of contract and slander of title. The Sterns sought \$888,000 in damages. In June 1990, as a result of the Sterns' claims, the case was removed to the Summit County Court of Common Pleas. On December 5, 1990, the Sterns voluntarily dismissed their counterclaim and cross-claim without prejudice. A jury trial on Whitlatch's complaint was begun on August 5, 1991, and, on August 21, 1991, a jury verdict was rendered in favor of Whitlatch in the amount of \$3,000.

\*2 The Sterns now appeal, and raise nineteen assignments of error.

**Assignment of Error I**

"The trial court erred in having Judge William Victor try this case in light of R.C. 2701.03."

After the case was transferred from the Municipal Court of Cuyahoga Falls to the Summit County Court of Common

Pleas, the case was assigned to Judge James Williams. Due to their displeasure with Judge Williams' decision to refer the case to arbitration, the appellants filed an affidavit of bias and disqualification, pursuant to R.C. 2701.03, with the Supreme Court of Ohio. Thereafter, Judge Williams also requested that the case be assigned to another judge, citing as reasons therefor an *ex parte* visit by the appellants, as well as the appellants' filing of the affidavit.

The case was subsequently assigned to Judge William Victor. On December 3, 1990, Supreme Court of Ohio Chief Justice Thomas Moyer denied the affidavit of disqualification. However, the case was not returned to Judge Williams, and Judge Victor presided over all subsequent proceedings.

Appellants now argue that it was error to permit Judge Victor to try the case because there was no finding that Judge Williams was biased. We note that it was the appellants who sought the removal of Judge Williams; therefore, the appellants cannot now complain that they were prejudiced by having obtained the relief which they sought. A party may not take advantage of any alleged error which that party has induced. *State v. Woodruff* (1983), 10 Ohio App.3d 326, 327. More importantly, the transcript of the December 17, 1990 pre-trial hearing indicates that, when Judge Victor suggested that the case be returned to Judge Williams, the appellants specifically waived any objections to the case remaining with Judge Victor. Accordingly, appellants have waived review of any alleged error arising from the re-assignment.

Appellant's first assignment of error is overruled.

#### Assignment of Error II

"The trial court erred in denying the defendants-appellant Sterns' motion to quash services and to dismiss the complaint."

The appellants contend that because they are residents of Florida, they cannot be subject to suit within the state of Ohio. Accordingly, the appellants argue that the trial court erred by refusing to quash the service made upon them by certified mail. We disagree.

Civ.R. 4.3 provides that service by certified mail may be made upon persons who are non-residents of Ohio, where the claim that is the subject of the complaint arose from the non-resident's transacting of any business within the state, or from the having of an interest in, using, or possessing real property within the state. Civ.R. 4.3(A)(1) and (6).

Whitlatch's claim for breach of contract arose out of the following facts. Appellants negotiated and contracted within Ohio, with an Ohio corporation, for the sale of a condominium to be constructed in Ohio. Following construction, the appellants entered into further negotiations and executed the escrow release agreement, with the same Ohio corporation, in the state of Ohio. The appellants reside in the Ohio condominium for approximately six months of each year, and repeatedly met with Whitlatch's employees at that address to conduct further inspections and negotiations concerning the release of the escrow funds.

\*3 Based upon these facts, we find that the appellants' transacting of business in Ohio concerning their Ohio real property subjected them to the trial court's exercise of personal jurisdiction, pursuant to Ohio's long-arm statute. Civ.R. 4.3. We further find on these facts that the appellants purposely established sufficient, meaningful, minimum contacts in Ohio, and, therefore, find that the trial court's exercise of jurisdiction did not violate the appellants' right to due process, or "fair warning" that their conduct could render them liable to suit within the state of Ohio. See *International Shoe, Co. v. Washington* (1945), 326 U.S. 310; *Burger King Co. v. Rudzewicz* (1985), 471 U.S. 462, 472.

Appellants' second assignment of error is overruled.

#### Assignment of Error III

"The trial court erred in denying the defendants-appellant Sterns' motion for summary judgment."

Appellants contend that the trial court erred by denying their motion for summary judgment. We disagree.

Summary judgment is appropriate only where, *inter alia*, "no genuine issue as to any material fact remains to be litigated." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327; Civ.R. 56. A dispute is "material" if the facts involved have the potential to affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

It is apparent from the record that the parties disputed whether Whitlatch had satisfactorily complied with the terms of the contract and escrow release agreement so as to trigger the appellants' duty to authorize the release of the escrow funds. Because these material facts remained in dispute, the trial court did not err by denying the appellants' motion for summary judgment.

The appellants' third assignment of error is overruled.

#### Assignment of Error IV

"The trial court erred in failing to rule on 1) defendants-appellant Sterns' motion to compel production of documents; 2) Sterns' motion to compel answers to interrogatories; 3) Sterns' motion for a protective order and 4) Sterns' motion to compel Whitlatch's president to appear at his scheduled deposition."

On July 26, 1991, the appellants filed three discovery motions seeking the production of documents, production of interrogatory answers, and a protective order to prohibit the deposition of appellants' expert witness. On August 7, 1991, the appellants filed a motion to compel the attendance of Whitlatch's president at deposition. The record does not indicate any disposition of these motions, and the appellants claim that the trial court erred by failing to rule upon these motions.

We may presume from the trial court's failure to rule upon the motions that the trial court overruled the motions. *Newman v. Al Castrucci Ford Sales, Inc.* (1988), 54 Ohio App.3d 166, 169. Accordingly, we focus our inquiry on whether the denial of these motions constituted reversible error.

Orders affecting discovery are within the discretion of the trial court, and will not be reversed on appeal absent an abuse of that discretion. *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55. In addition, any alleged errors arising from the trial court's rulings must be disregarded unless they affect a substantial right of a party. See Civ.R. 61. We find no error requiring reversal arising from the presumed denials of appellants' motions.

\*4 Although the parties were ordered to produce documents and respond to interrogatories by January 22, 1990, appellants' motions to compel were not filed until July 26, 1991, just ten days prior to trial. Given this eleventh-hour request, despite a year of discovery and numerous pretrial conferences, we find no abuse of discretion in the trial court's denial of these motions. Furthermore, we note that Whitlatch did provide extensive discovery to the appellants and did file responses to the appellants interrogatories, albeit not to the appellants' satisfaction.

As for the trial court's denial of the appellants' motion for protective order, we note that the expert witness, on whose behalf the protective order was sought, never testified at trial.

Therefore, appellants cannot allege any prejudice arising from the denial of said motions.

Finally, we find no abuse of discretion in the trial court's denial of appellants' motion to compel the attendance of Whitlatch's president, William Whitlatch, at deposition. We note that this issue was first raised on July 29, 1991, the date upon which trial was originally scheduled to begin. On that date, in response to the appellants' oral request to compel William Whitlatch's attendance, the trial court informed the appellants: "Discovery is over in this case. You have had months and months to take all the depositions that you wished." We further note that any difficulty in obtaining this deposition was occasioned by appellant Curt Stern's insistence on appearing as his own and his wife's counsel, despite the appearance entered by other counsel, and conducting and interrupting depositions in an abusive and hostile manner, prompting Whitlatch to prematurely conclude at least one deposition and to file motions for protective orders. Given the extremely uncooperative manner of appellants as to *all* aspects of discovery in this case, the late notice of deposition, and the trial court's earlier denial of an identical oral motion, we find no abuse of discretion in the denial of appellants' August 7, 1991, motion to compel attendance.

Appellants' fourth assignment of error is overruled.

#### Assignment of Error V

"The trial court erred by instructing the jury that the issue was whether the Sterns' conduct was 'reasonable', thus introducing a negligence standard into this contract case."

Appellants contend that by instructing the jury as follows, the trial court erroneously introduced a negligence standard into the case:

\*\*\*

"Now, the question that you must determine is this, first of all, were there defects in the construction? And if so, were those defects corrected? The testimony shows that some defects were corrected. The Plaintiff claims that all defects were corrected. The Sterns claim that while some defects were corrected properly, that others were not corrected to their satisfaction.

"One who performs work under a contract, contracting the obligation to do work upon the owner's satisfaction, is entitled to recover as against the claim of

dissatisfaction if the work that was done was such that a reasonable person under the same or similar circumstances would have been satisfied with that work.

\*5 " \* \* \* ." (Emphasis added.)

The use of a "reasonable person" standard is not reserved only to actions sounding in negligence. It is an appropriate definition wherever an objective, rather than subjective, means of evaluating actions is required, as was the case when evaluating whether the appellants were "fully satisfied" with the repairs undertaken by Whitlatch, as required by the Walk-Through Inspection Report.

Appellants' fifth assignment of error is overruled.

#### Assignment of Error VII

"The trial court erred in advising the jury in effect that the Sterns' expert, Yoe, was some kind of 'criminal' by telling the jury, in an excited manner, to 'disregard' all of Yoe's testimony and hostilely [sic] ordering the witness Yoe to wait outside the courtroom in chambers for an unstated purpose."

Due to the appellants' failure to timely disclose their intentions to call architect Richard Yoe as an expert witness, the trial court granted Whitlatch's motion *in limine* to exclude Yoe's opinion testimony. However, the trial court did permit the appellants to call Yoe as a lay witness to testify as to conditions he observed in the appellants' condominium.

Despite numerous warnings (given outside the hearing of the jury), Yoe persisted in attempting to offer his opinions as to the condominium's condition, as well as attempting to testify as to the results of some tests he had performed. When Yoe offered an opinion as to whether Whitlatch had installed the correct size of closet doors, the following exchange occurred:

" \* \* \* "

"THE WITNESS: The size of the opening appeared to be 1 inch larger than would be needed for that particular door.

"THE COURT: That may go out and you may step down from the witness stand.

"[Plaintiff's Counsel]: Objection, ask that the answer be stricken.

"THE COURT: You're excused and I want you to wait out there, please.

"That's the extent of this witness, Mr. Duda.

" \* \* \* "

"Ladies and gentlemen of the jury, I want to instruct you now, tell you that you are to completely disregard all of the testimony that Mr. Yoe gave here.

"Any question about that?"

" \* \* \* "

Appellants do not challenge the exclusion of Yoe's testimony, but argue that the manner in which the trial court excused Yoe from the stand indicated to the jury that Yoe was an "incompetent witness and a criminal", thereby prejudicing the appellants' defense. We do not agree.

We find nothing in the above quoted exchange that may have indicated to the jury anything other than a refusal to permit the introduction of previously excluded testimony. Nor do we agree that the judge's comments were those of a "hot head" designed to "publicly and maliciously" embarrass the appellants or the witness. The record indicates that all cautionary instructions and admonishments concerning the scope of Yoe's testimony were carefully conducted outside the presence and/or hearing of the jurors. Finally, the record indicates that any negative perception of Yoe was caused, not by the trial court's actions, but by defense counsel's failure to adequately instruct Yoe as to the limits of his testimony, as ordered by the trial court.

\*6 Appellant's seventh assignment of error is overruled.

#### Assignment of Error VI

"The trial court erred in excluding testimony by Hildegard Stern that was clearly admissible under 701 of the Rules of Evidence."

Following the exclusion of Yoe's testimony, Hildegard Stern attempted to testify that she observed Yoe push up the garage's roof, and that she saw the roof move up easily. Whitlatch objected to the question, contending that the appellants were attempting to introduce Yoe's excluded testimony through Mrs. Stern. The trial court sustained the objection. Appellants now argue that the trial court erred by excluding Mrs. Stern's testimony concerning her own observations of Yoe's actions.

We agree. Mrs. Stern possessed the requisite personal knowledge of Yoe's actions, having had observed the matter herself. Evid.R. 602. Moreover, the testimony was relevant to the issue of whether the condominium had been constructed in a workmanlike manner. Evid.R. 401. Accordingly, the trial court erred by excluding this relevant testimony. Evid.R. 402. However, even if the exclusion was error, it was harmless beyond a reasonable doubt.

Mrs. Stern and her son, Peter, both testified that the roof was not nailed securely to the supporting trusses. In addition, the appellants introduced photographs purporting to show that the roof was improperly attached. Accordingly, Mrs. Stern's testimony as to Yoe's actions would have been merely cumulative on the issue. Therefore, the exclusion of the testimony did not impact the appellants' ability to present their defense. "A final judgment may not be disturbed due to the exclusion of evidence unless a substantial right of a party is affected." *State ex rel. Avellone v. Bd. of Commrs. of Lake Cty.* (1989), 45 Ohio St.3d 58, 62.

The appellants' sixth assignment of error is overruled.

#### Assignments of Error

"VIII. The trial court erred by letting plaintiff-appellee Whitlatch vary the clear and unambiguous contract terms by introducing 'warranty' and by admitting an 'owners manual' both not present in the contract."

"XVII. The trial court erred in admitting into evidence Whitlatch's Exhibit 18, the limited two year warranty."

Appellants' eighth and seventeenth assigned errors raise the same issue, and we will discuss them together.

At trial, the court permitted William Whitlatch to testify concerning a two-year warranty, "covering repair or replacement of any defects and/or deficiencies in workmanship or materials", that Whitlatch claimed was encompassed in the construction contract. The trial court also permitted the appellee to introduce into evidence a copy of this warranty (contained within the condominium's "owners manual"). The appellants argue that the only relevant warranty was that contained in the construction contract, whereby Whitlatch agreed to construct the condominium in a workmanlike manner.

Even if the admission of the two-year warranty was error, we fail to find any resulting prejudice. Whitlatch never contended

that the two-year warranty altered its duty to construct the condominium in a workmanlike manner. Furthermore, the appellants admit that the two-year warranty was merely "superfluous and extraneous" Finally, the time limitation contained in the two-year warranty could not have impacted upon the jury's verdict, as neither Whitlatch nor the Sterns claimed that any defects arose after two years.

\*7 Appellants' eighth and seventeenth assignments of error are overruled.

#### Assignment of Error IX

"The trial court erred in permitting plaintiff-appellee Whitlatch's expert, Green, to express opinions of law."

The appellants argue that the trial court erred by permitting Whitlatch's expert witness, Kenneth Green, to testify as to whether Whitlatch or the appellants' condominium association was responsible for outside maintenance, such as replacing weather stripping on the appellants' outside garage door. Assuming, *arguendo*, that Green was unqualified to offer an opinion as to the condominium association's duties, we find no error in the admission of this testimony. Both William Whitlatch and Hildegard Stern testified that the condominium association was responsible for the repair and maintenance of the outside of the condominium. Therefore, Green's testimony was merely cumulative, and appellants cannot claim that Green's testimony prejudiced their case, thereby requiring reversal. See *State ex rel. Avalon v. Bd. of Commrs. of Lake Cty.*, *supra*.

Appellant's ninth assignment of error is overruled.

#### Assignments of Error

"X. The trial court erred in permitting references to an 'offer in compromise' which is excluded by Evidence Rule 408 and in failing to grant defendants-appellant Sterns' motion for mistrial, or in the alternative, to instruct the jury to disregard certain testimony.

"XIX. The trial court erred in failing to instruct the jury to disregard testimony which was introduced as an offer of compromise."

Appellants argue that, on two occasions, the trial erred by permitting the appellee to make references to an offer of compromise, in violation of Evid.R. 408. The appellants also contend that the trial court erred by subsequently failing

to grant the appellants' motion for a mistrial or to instruct the jury to disregard the testimony concerning the offer of compromise.

The record indicates that the trial court did not permit the introduction of such evidence, but sustained each of the appellants' objections on the subject, and refused to admit into evidence a letter purporting to contain the offer of compromise. In addition, contrary to appellants' assertions, the record indicates that upon each reference to the offer, the trial court struck the testimony and/or instructed the jury to ignore the reference.

Finally, we find no error in the trial court's denial of appellant's motion for a mistrial. A trial court *may* order a mistrial where some intervening error prejudicially affects the merits of the case and the substantive rights of one or both of the parties. *State v. Glaros* (1960), 170 Ohio St. 471, 478. Due to the trial court's superior vantage in assessing any prejudice to the parties, the decision to grant a mistrial rests within the sound discretion of the trial court, and will not be reversed on appeal absent an abuse of that discretion. *State v. Brown* (1988), 38 Ohio St.3d 305, 312. We find no abuse of discretion in the trial court's apparent conclusion that, in the course of a one-week trial, two stricken references to offers of compromise did not materially prejudice either party.

\*8 Appellants' tenth and nineteenth assignments of error are overruled.

#### Assignment of Error XI

"The trial court erred by permitting Whitlatch in its closing argument to comment on evidence not admitted, the failure to Curt E. Stern to testify and Sterns' failure to provide an expert witness."

During closing arguments, appellants objected to the following statements, contending that Whitlatch's counsel improperly commented upon evidence that had not been admitted:

[Plaintiff's Counsel] " \* \* \* There is only one portion of this home where there's any problem with the stucco and that is as you stand and look at the front door, from the garage door on the right-hand corner there's an obvious movement of the stucco away from the home. Our testimony, our evidence was that something struck the side of that frame -

[Defense Counsel] "Objection.

"THE COURT: You may proceed and you will remember Mr. Pirozzi's statements are not evidence and you will not consider them as such.

[Plaintiff's Counsel] "-that there was something that struck the side of that frame to cause that stucco to separate. \* \* \*.

"Why did Whitlatch & Co. use two-coat [stucco] application, his testimony was that this two-coat application is less likely to crack in this climate, that was the reason given and the testimony is that was installed on the outside of the Sterns' home was satisfactory to the City because *it was an adequate alternative use and it was a better use* \* \* \* [.]" (Emphasis added.)

our review of the record indicates that the remarks made by Whitlatch's counsel constituted proper comment upon the evidence adduced at trial. See *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 347.

As to whether the evidence showed that some object had hit the garage, Hildegard Stern testified that a garbage can had struck the garage. As for counsel's comments regarding the two-coat stucco system, Twinsburg's building inspector Robert Rodie testified that the system met code requirements and was an adequate alternative to the three-coat stucco system. In addition, Lee Lavoie, who installed the stucco for Whitlatch, testified that the two-coat system was preferable to the other because it tended to crack less. Accordingly, appellants' argument is not well taken.

Appellants next contend that the trial court committed prejudicial error when it permitted Whitlatch's counsel to comment upon the failure of Curt Stern to testify, as well as permitting comment upon the failure of the appellant to present expert testimony on the issue of whether the condominium was constructed in a workmanlike manner. We disagree.

"It is axiomatic that great latitude is afforded counsel in the presentation of closing argument to the jury. \* \* \* Included within the bounds of permissible argument are references to the uncontradicted nature of the evidence presented by the advocate." *Pang v. Minch* (1990), 53 Ohio St.3d 186, 194, citations omitted. Moreover, the failure of the defendant in a civil action to testify may properly be commented upon to the jury. See *Smith v. Lautensleger* (1968), 15 Ohio App.2d 212.

\*9 Appellants' eleventh assignment of error is overruled.

### Assignment of Error XII

"The trial court erred in charging defendants-appellant Sterns with \$480.00 for jury fees because it clearly violates the 'open courts' provision of the Ohio Constitution."

Upon entry of judgment in favor of Whitlatch, the trial court taxed the appellants, as costs, \$480 in jury fees. Appellants now contend that such action violated Section 16, Article I of the Constitution of Ohio, which provides that:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The trial court's action was taken pursuant to R.C. 2335.28(A):

"(A) Except as provided in division (B) and (E) of this section, in any civil action in a court of common pleas in which a jury is sworn, the fees of the jurors sworn shall be taxed as costs unless the court determines that the payment of the fees by a party against whom they are proposed to be taxed would cause significant financial hardship to that party or would not be in the interest of justice."

While no court has addressed the constitutionality of this statute, the Supreme Court of Ohio has considered the constitutionality of former, analogous G.C. 1579-61:

"Section 1579-61, General Code, \* \* \* providing that in all civil actions and proceedings the cost of summoning jurors and the fees of jurors shall be taxed as part of the costs \* \* \* is constitutional and valid."

*Miller v. Eagle* (1917), 96 Ohio St. 106, syllabus; See, also, *Walters v. Griffith* (1974), 38 Ohio St.2d 132.

Appellant's twelfth assignment of error is overruled.

### Assignment of Error XIII

"The trial court erred in requiring the defendants-appellant Sterns to put up a bond when the \$3,000.00 in dispute was being held by an escrow agent selected by Whitlatch."

Appellants contend that the trial court erred by requiring a \$6,000 supersedeas bond to be posted in order to effectuate a stay of execution pending appeal, when the amount of the

judgment, \$3,000, was already held in escrow. However, Whitlatch contends that the posting of a bond is mandated by statute.

App.R. 7(B) states that a stay of execution "may" be conditioned upon the filing of a bond in the trial court. R.C. 2505.09 conflicts with the apparent discretion authorized by App.R. 7(B), and instead requires the posting of a bond. However, Section 5(B), Article IV of the Ohio Constitution requires us to resolve this conflict in favor of the appellate rules: "All laws in conflict with [rules promulgated by the Supreme Court] shall be of no further force or effect after such rules have taken effect." See, also, *Lomas & Nettleton Co. v. Warren* (June 29, 1990), Geauga App. No. 89-G-1519, unreported. Accordingly, under appropriate circumstances, the trial court may exercise its discretion and stay the execution of judgment without requiring the appellant to post a supersedeas bond. *Id.*

\*10 Where, as here, the amount in controversy is held in escrow so that the absence of a bond cannot affect the substantive rights of either party, a trial court abuses its discretion by requiring an appellant to post a supersedeas bond.

Appellants' thirteenth assignment of error is well taken.

### Assignments of Error

"XIV. The trial court erred in not entering judgment for the Sterns notwithstanding the verdict."

"XV. The court erred in overruling Sterns' motion for a directed verdict at the close of Whitlatch's counsel's opening statement."

"XVI. The trial court erred in overruling Sterns' motion for a directed verdict at the close of plaintiff Whitlatch's case."

Because the same test is used to review a motion for directed verdict and a motion for judgment notwithstanding the verdict, we will address appellants' fourteenth, fifteenth, and sixteenth assignments of error together. Appellants contend that the trial court erred by overruling their motions for directed verdict, made at the end of Whitlatch's opening argument and at the close of the plaintiff's case. Appellants also argue that the trial court erred by overruling their motion for judgment notwithstanding the verdict. We disagree with both arguments.

"The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. *Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions.*"

*Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347, citing and following *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275. Construing the evidence most strongly in favor of Whitlatch, we find the jury could reach different conclusions on the basis of the evidence adduced at trial. Furthermore, contrary to appellant's assertions, there was sufficient evidence from which the jury could reasonably find that Whitlatch had constructed the condominium in a workmanlike manner, and had complied with the terms of the escrow agreement, so as to require the appellants to order the release of the escrow funds.

Although the appellants put forth numerous complaints regarding unworkmanlike construction, building code violations, breach of contract, and untimely repairs, most of this evidence was contradicted at trial. Pursuant to *Osler v. Lorain, supra*, we find no error in the trial court's refusal to reevaluate the witness' credibility or to substitute its judgment (as to the weight of the evidence) for that of the jurors. The only uncontradicted evidence regarding a code violation involved Whitlatch's failure to install a ground fault interrupter electrical outlet in the kitchen until two weeks prior to trial. We find no error in the jury's apparent conclusion that this one code violation did not

support a finding that the condominium was constructed in an unworkmanlike manner.

\*11 Based on this evidence, the jury could reasonably reach different conclusions as to whether Whitlatch was entitled to the release of the escrow funds, and the trial court did not err by denying the appellants' motions for a directed verdict and judgment notwithstanding the verdict. Appellants' fourteenth, fifteenth and sixteenth assignments of error are overruled.

#### Assignment of Error XVIII

"The trial court erred in failing to grant defendants-appellant Sterns' motion to strike the testimony of Green."

Appellants argue that the trial court erred by refusing to strike the testimony of Whitlatch's expert witness Kenneth Green on the grounds that Whitlatch did not provide an entirely accurate employment history of Green during discovery. Whitlatch had informed appellants that Green was an employee of a company when, in fact, Green was the company president. In addition, the employer's address that had been provided to the appellants was incorrect.

The appellants admit that they did not attempt to contact Green at the incorrect address, nor did the misinformation make them unable to contact Green. Moreover, we perceive no prejudice to appellants arising from any misstatement concerning Green's employment status with a previous employer. Accordingly, we find no error in the trial court's denial of appellants' motion to strike Green's testimony, and the appellants' 18th assignment of error is overruled.

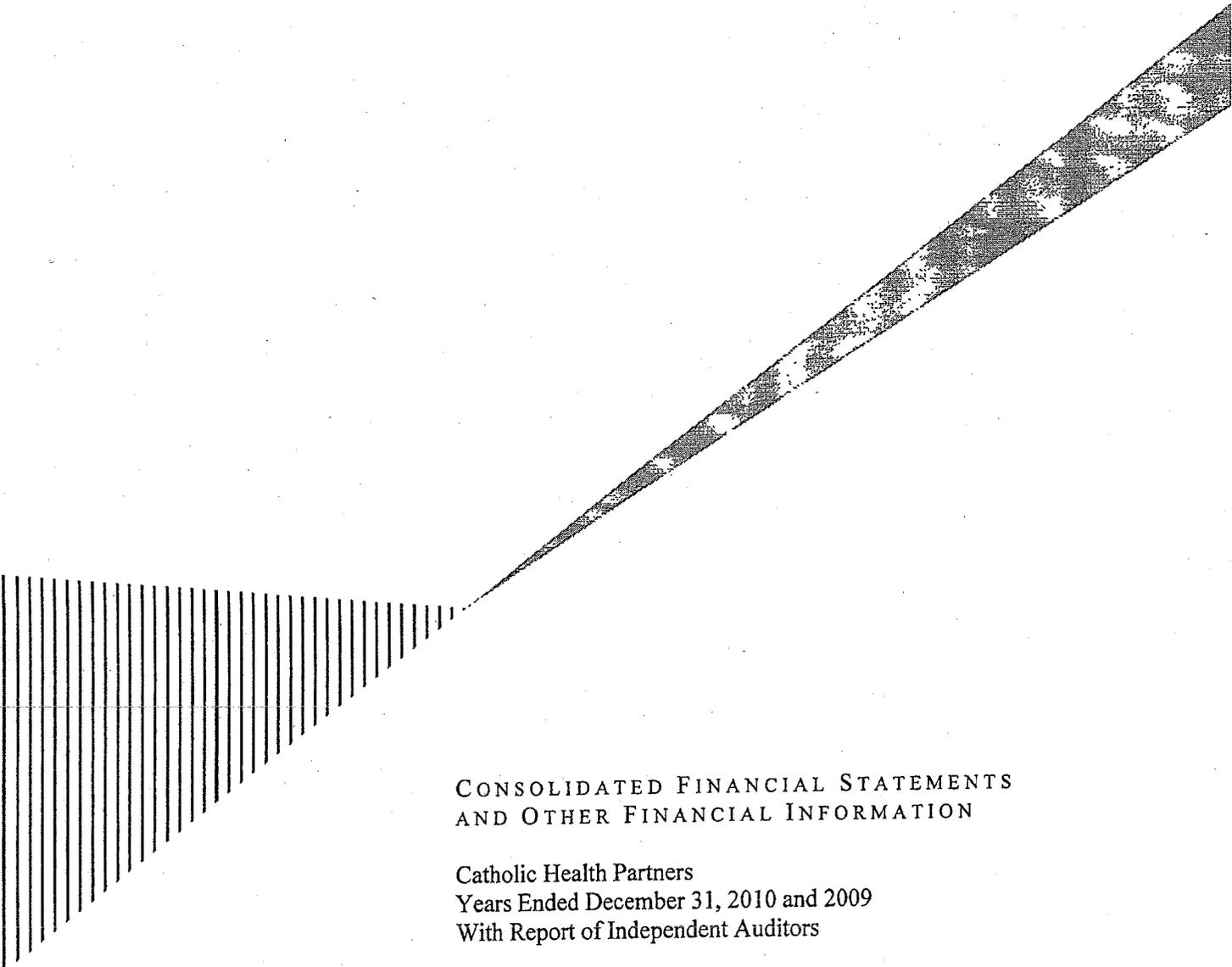
The judgment of the trial court is reversed as to the posting of a supersedes bond, and affirmed in all other respects.

CACIOPPO and COOK, JJ., concur.

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CONSOLIDATED FINANCIAL STATEMENTS  
AND OTHER FINANCIAL INFORMATION

Catholic Health Partners  
Years Ended December 31, 2010 and 2009  
With Report of Independent Auditors

Ernst & Young LLP

 **ERNST & YOUNG**

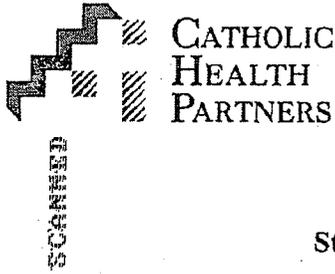
2010

Catholic Health Partners  
Consolidated Financial Statements  
and Other Financial Information

December 31, 2010 and 2009

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615 Elsinore Place,  
Cincinnati, Ohio  
45202

P 513.639.2800  
F 513.639.2700

## Statement of Management Responsibility

The accompanying consolidated financial statements of Catholic Health Partners (the Company) for the years ended December 31, 2010 and 2009 were prepared by the Company's management in conformity with generally accepted accounting principles appropriate in the circumstances.

Management of the Company is responsible for the integrity and objectivity of the consolidated financial statements, which are presented using the accrual basis of accounting and, accordingly, include some amounts based on judgments and estimates. The accounting procedures and related system of internal control are designed to ensure the books and records reflect the transactions of the Company in accordance with established policies and procedures as implemented by qualified personnel. The system of internal control over financial reporting, including safeguarding of assets against unauthorized acquisition, use or disposition, is designed to provide reasonable assurance to the Company's Management and Board of Trustees regarding the preparation of reliable published consolidated financial statements and such asset safeguarding. Even effective internal control, no matter how well designed, has inherent limitations – including the possibility of the circumvention or overriding of controls – and, therefore, can provide only reasonable assurance with respect to consolidated financial statement preparation. Further, because of changes in conditions, internal control effectiveness may vary over time.

The Board of Trustees of the Company, through its Finance Committees, reviews the financial and accounting operations of the Company, including the review and discussion of periodic consolidated financial statements, the evaluation and adoption of budgets. The Board of Trustees of the Company, through its Audit and Corporate Responsibility Committee reviews the accuracy and integrity of financial reporting processes, oversees compliance and auditing functions and reviews the basis of the audit engagement and reports of independent auditors.

Ernst & Young LLP, independent auditors, have audited the consolidated financial statements of the Company for the years ended in December 31, 2010 and 2009, and their report thereon is included herein. The independent auditors meet with members of the Audit and Corporate Responsibility Committee of the Board of Trustees of the Company, in the absence of Management personnel, to discuss the results of their audit and are afforded the opportunity to present their comments with respect to the adequacy of internal control and the quality of the financial reporting of the Company as it relates to their audit.

Michael D. Connelly  
President & CEO

James R. Gravell  
Sr. Vice President & Chief Financial  
Officer

William J. Kusnierz  
Vice President - System Controller

April 20, 2011



Ernst & Young LLP  
1900 Scripps Center  
312 Walnut Street  
Cincinnati, OH 45202  
Tel: +1 513 612 1400  
Fax: +1 513 612 1730  
www.ey.com

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## Report of Independent Auditors

The Board of Trustees  
Catholic Health Partners

We have audited the accompanying consolidated balance sheets of Catholic Health Partners (the Company) as of December 31, 2010 and 2009, and the related consolidated statements of operations and changes in net assets, and cash flows for the years then ended. These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with auditing standards generally accepted in the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. We were not engaged to perform an audit of the Company's internal control over financial reporting. Our audits included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the consolidated financial position of Catholic Health Partners at December 31, 2010 and 2009, and the consolidated results of their operations and changes in net assets, and their cash flows for the years then ended in conformity with U.S. generally accepted accounting principles.

Our audit was conducted for the purpose of forming an opinion on the financial statements taken as a whole. The unaudited community benefit information in Note K is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such information has not been subjected to the auditing procedures applied in the audit of the financial statements, and, accordingly, we do not express any assurances on such information.

*Ernst & Young LLP*

April 20, 2011

SCANNED

Catholic Health Partners  
Consolidated Balance Sheets

	December 31	
	2010	2009
	<i>(In Thousands)</i>	
<b>Assets</b>		
Current assets:		
Cash and cash equivalents	\$ 295,824	\$ 287,359
Investments	76,551	63,594
Funds held by trustees	108,730	17,116
Total cash and investments	481,105	368,069
Net patient accounts, less allowance for doubtful receivables of \$173,768 (2010) and \$169,532 (2009)	479,016	414,913
Other receivables	35,689	40,892
Assets whose use is limited under securities lending arrangements	110,658	164,233
Estimated net receivables from third-party payors	12,064	-
Inventories	77,093	71,243
Prepaid expenses and other current assets	44,357	46,370
Assets held for sale	59,411	53,074
Total current assets	1,299,393	1,158,794
Assets whose use is limited:		
Board designated funds	1,560,330	1,231,411
Trustee-held assets and funds for self-insurance liabilities	225,697	251,176
Securities on loan under securities lending arrangements	121,119	170,459
Restricted for interest rate swap agreements collateral requirements	18,179	8,895
Total assets whose use is limited	1,925,325	1,661,941
Property and equipment, net	2,161,517	2,016,647
Postretirement assets	42,719	37,347
Other long-term assets	177,548	136,227
Total assets	\$ 5,606,502	\$ 5,010,956

S S S S S

	December 31	
	2010	2009
	<i>(In Thousands)</i>	
<b>Liabilities and net assets</b>		
Current liabilities:		
Accounts payable	\$ 236,416	\$ 198,640
Salaries and related liabilities	173,622	163,748
Estimated net payables to third-party payors	—	15,135
Accrued interest	23,542	20,977
Current portion of long-term debt	62,786	51,520
Payable under securities lending arrangements	110,658	165,078
Other current liabilities	67,902	75,094
Total current liabilities	<u>674,926</u>	<u>690,192</u>
Long-term debt, net of current portion	2,076,437	1,760,507
Interest rate swap agreements liability	62,201	46,854
Postretirement liabilities	174,935	161,881
Self-insurance liabilities	168,794	182,893
Other long-term liabilities	217,478	203,670
Total liabilities	<u>3,374,771</u>	<u>3,045,997</u>
Net assets:		
Unrestricted	2,009,826	1,776,518
Temporarily restricted	74,338	62,544
Permanently restricted	68,734	55,051
Total net assets excluding noncontrolling interest	<u>2,152,898</u>	<u>1,894,113</u>
Noncontrolling interest	78,833	70,846
Total net assets	<u>2,231,731</u>	<u>1,964,959</u>
Total liabilities and net assets	<u>\$ 5,606,502</u>	<u>\$ 5,010,956</u>

*See notes to consolidated financial statements.*

Catholic Health Partners

Consolidated Statements of Operations and  
Changes in Net Assets

	Year Ended December 31	
	2010	2009
	<i>(In Thousands)</i>	
<b>Unrestricted revenue</b>		
Net patient service revenue	\$ 4,066,545	\$ 3,776,043
Other revenue, net	139,892	140,862
	<u>4,206,437</u>	<u>3,916,905</u>
<b>Expenses</b>		
Salaries and wages	1,584,220	1,482,380
Employee benefits	385,810	352,625
Supplies	727,299	675,763
Purchased services	465,229	411,215
Bad debts	238,203	236,940
Utilities	80,036	80,017
Rent	89,429	79,322
Medical professional fees	97,386	87,327
Insurance	15,851	48,572
Interest	77,534	73,639
Depreciation and amortization	250,972	245,039
Other	92,362	59,803
	<u>4,104,331</u>	<u>3,832,642</u>
Excess of revenue over expenses before other income (loss)	102,106	84,263
Other income (loss):		
Loss on extinguishment of debt, net	(5,447)	-
Realized and unrealized interest rate swap agreements (loss) income	(30,691)	52,167
Other expenses related to long-lived assets	(20,754)	(21,588)
Foundation net operating activity	(8,242)	(2,828)
Other, primarily investment income	181,610	244,331
Excess of revenue over expenses	<u>218,582</u>	<u>356,345</u>

*(Continued on next page)*

Catholic Health Partners

Consolidated Statements of Operations and  
Changes in Net Assets (continued)

	Year Ended December 31	
	2010	2009
	<u>(In Thousands)</u>	
Excess of revenue over expenses	\$ 218,582	\$ 356,345
Changes in net assets:		
Gain on discontinued operations	10,342	9,031
Change in net unrealized gains on restricted investments	2,437	8,194
Restricted contributions	21,034	15,226
Net assets released from restrictions for operating activities	(12,666)	(11,064)
Change in plan assets and benefit obligations of postretirement plans	(3,619)	(30,409)
Transfer of restricted net assets under business combination	21,373	-
Other changes, net	9,289	3,675
Change in net assets	<u>266,772</u>	<u>350,998</u>
Net assets at beginning of year	1,964,959	1,613,961
Net assets at end of year	<u>\$ 2,231,731</u>	<u>\$ 1,964,959</u>

*See notes to consolidated financial statements.*

Catholic Health Partners

Consolidated Statements of Cash Flows

1104-1246881

	Year Ended December 31,	
	2010	2009
	<i>(In Thousands)</i>	
<b>Operating activities</b>		
Increase in net assets	\$ 266,772	\$ 350,998
Adjustments to reconcile increase in net assets to net cash provided by operating activities:		
Provision for bad debts	238,203	236,940
Depreciation and amortization	256,660	251,229
Unrealized loss (income) on interest rate swap agreements	16,201	(64,724)
Loss on extinguishment of debt	5,447	-
Impairment of long-lived assets	2,901	15,550
Change in net unrealized gains on investments	(66,174)	(187,098)
Equity income from alternative investments	(143,888)	(32,925)
Change in plan assets and benefit obligations of postretirement plans	3,619	30,409
Transfer of restricted net assets under business combination	(21,373)	-
Restricted contributions	21,034	15,226
Cash (used in) provided by changes in operating assets and liabilities:		
Net patient accounts	(300,028)	(205,002)
Other current assets	(11,833)	(11,581)
Investments and assets whose use is limited	(72,601)	25,715
Assets whose use is limited under securities lending arrangements	53,575	(35,819)
Other assets	(1,109)	(8,897)
Current liabilities	(12,209)	(14,928)
Other long-term liabilities	(9,733)	59,748
Net cash provided by operating activities	<u>225,464</u>	<u>424,841</u>
<b>Investing activities</b>		
Additions to property and equipment, net	(241,047)	(226,911)
Purchases of alternative investments, net	(62,696)	(107,638)
Acquisition of The Jewish Hospital of Cincinnati, Ohio	(127,296)	-
Proceeds from sale of subsidiary	659	619
Net cash used in investing activities	<u>(430,380)</u>	<u>(333,930)</u>
<b>Financing activities</b>		
Principal payments of long-term debt	(48,194)	(53,485)
Refunding of long-term debt	(353,555)	-
Proceeds from issuance and reissuance of long-term debt	697,270	-
Draws on line of credit	266,365	-
Payments on line of credit	(266,365)	-
Cost of long-term debt issuance	(6,686)	-
Restricted contributions	(21,034)	(15,226)
(Decrease) increase in payable under securities lending arrangements	(54,420)	29,204
Net cash provided by (used in) financing activities	<u>213,381</u>	<u>(39,507)</u>
Increase in cash and cash equivalents	8,465	51,404
Cash and cash equivalents at beginning of year	287,359	235,955
Cash and cash equivalents at end of year	<u>\$ 295,824</u>	<u>\$ 287,359</u>

See notes to consolidated financial statements.

FILED  
LUCAS COUNTY  
IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO  
2011 NOV 18 A 9:42

PETER L. MORAN, ESQ., Administrator  
of the Estate of Richard Elzy, Deceased  
Plaintiff,

Case No. CI 2009 7447

Judgment Entry

vs.

Judge Charles S. Wittenberg  
By Assignment

MERCY ST. VINCENT MEDICAL CENTER,  
et al,  
Defendants.

This matter is before the Court upon defendants' motion for stay of execution of judgment pending disposition of defendants' appeal to the Sixth District Court of Appeals. Upon consideration of defendants' motion and plaintiff's memorandum in opposition, the Court finds that the motion for stay will be granted upon condition of defendants posting a bond.

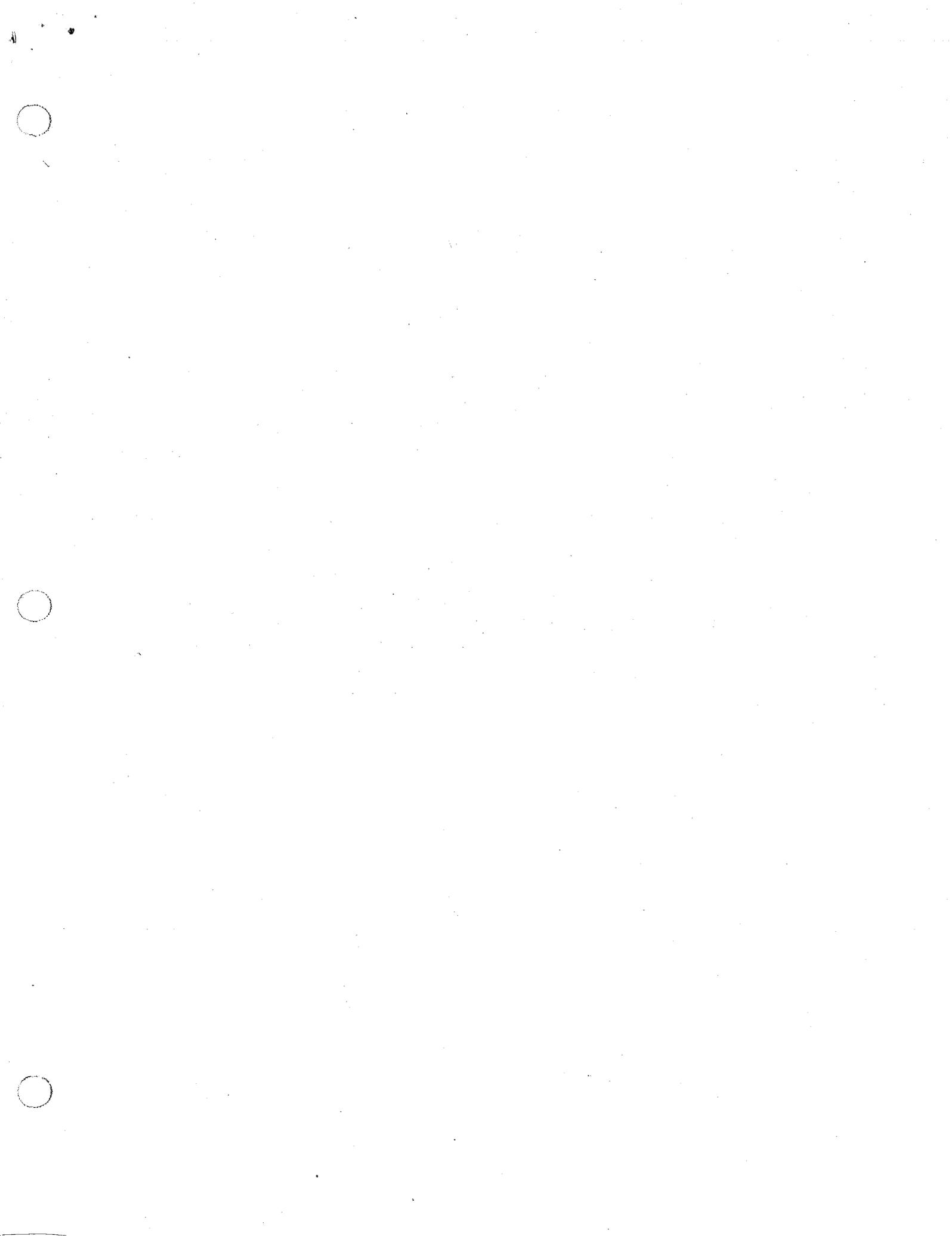
It is ORDERED that pursuant to Civil Rule 62(B), this Court's Judgment Entry filed on October 17, 2011 shall be stayed pending appeal conditioned upon the filing by defendants of either cash in the amount of \$601,130.08 or sufficient surety or other security of such amount. It is further ORDERED that no execution or any enforcement proceedings shall lie from such Judgment Entry.

E-JOURNALIZED

NOV 21 2011

11/16/11  
Date

Charles Wittenberg  
Judge Charles S. Wittenberg  
By Assignment



FILED  
LUCAS COUNTY  
IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

2011 NOV 18 A 9:42

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NOV 21 2011

11/16/11  
Date

Charles S. Wittenberg  
Judge Charles S. Wittenberg  
By Assignment



FILED  
COURT OF APPEALS  
2013 JAN 25 A 8:12  
COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

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

Peter L. Moran, Esq., Administrator of  
the Estate of Richard L. Elzay, Deceased

Appellee/Cross-Appellant

Court of Appeals No. L-11-1281

Trial Court No. CI0200907447

v.

Mercy St. Vincent Medical Center, et al.

Appellants/Cross-Appellees

**DECISION AND JUDGMENT**

Decided:

JAN 25 2013

\* \* \* \* \*

Kyle A. Silvers, for appellee/cross-appellant.

Timothy D. Krugh, James E. Brazeau and Jason M. Van Dam,  
for appellants/cross-appellees.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which denied appellants' motion for summary judgment in the underlying medical malpractice and wrongful death suit, resulting in the case proceeding to trial. Following jury trial, a verdict in favor of appellee was rendered. Appellants' subsequent Civ.R. 59

**E-JOURNALIZED**

JAN 25 2013

motion for a new trial was denied. This appeal ensued. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants, Mercy St. Vincent Medical Center and Kristen Tennant (“Mercy” and “Tennant”), set forth the following two assignments of error:

The trial court erred in denying summary judgment to appellants because Dr. Sobel’s causation testimony was not inconsistent or contradictory as a matter of law.

The trial court erred in excluding two rebuttal witnesses because their testimony was not cumulative and it would not have unduly delayed the trial.

{¶ 3} The following facts are relevant to this appeal. On November 26, 2008, Richard Elzay (“decedent”) was admitted to Mercy suffering from angina. A brief hospital stay to treat the condition was anticipated. Upon admission, an IV was placed in decedent’s right arm. The utilization of the IV was routine under the circumstances. Several days later, decedent notified Tennant, the Mercy nurse responsible for his care at that time, that the IV cap had fallen onto the floor. Rather than fully replace the potentially compromised IV with a new IV, Tennant swabbed the affected area, replaced the fallen cap, and left the original IV in place.

{¶ 4} Subsequent to this incident, decedent developed a critical wound infection at the site of the right arm IV. Decedent developed sepsis, endocarditis, and passed away several weeks later from complications caused by the infection. A medical malpractice

and wrongful death action was subsequently filed against appellants, alleging that deviations in the standard of IV care proximately caused decedent's infection and death.

{¶ 5} Following several years of litigation in the matter, appellants filed for summary judgment. In support, appellants submitted the affidavit of nonparty expert witness Dr. Sobel. Dr. Sobel specifically swore in the affidavit, in relevant part, "It is my opinion to a reasonable medical probability that Kristen M. Tennant, R.N.'s nursing care and treatment of Mr. Elzay was not a proximate cause of any of the injuries alleged in plaintiff's complaint or amended complaint, including Mr. Elzay's death." However, in direct contrast to the affidavit proclamation on causation, during his prior deposition testimony regarding whether Tennant erred in replacing the IV cap rather than removing and replacing the entire affected IV, Dr. Sobel conversely testified, "Do I think it could have contributed to -- do I think that replacing the cap could have caused it? It could have caused it."

{¶ 6} Faced with a motion for summary judgment on behalf of Mercy and Tennant supported by a nonparty expert witness affidavit contradicting earlier deposition testimony of that expert on causation, the trial court concluded it would be improper to grant summary judgment under these facts and circumstances. On January 18, 2011, the trial court held, in relevant part, in denying summary judgment, "The court finds that the affidavit of Dr. Sobel and the deposition testimony implicitly create a question of credibility with respect to Dr. Sobel's testimony, and, therefore, it would be inappropriate to grant summary judgment on that issue."

{¶ 7} Summary judgment was denied and no voluntary settlement was reached.

On June 27, 2011, the case proceeded to trial. On June 28, 2011, appellants requested permission to call three previously undisclosed rebuttal witnesses. These witnesses were all Mercy nurses who had provided care to decedent during his hospitalization. However, none of these rebuttal witnesses possessed any recollection of the decedent or any recollection of the care they provided to decedent. Accordingly, the trial court permitted the live testimony of one of the three witnesses and denied the live testimony of the other two witnesses. The trial court concluded that allowing the live testimony of each of these three similarly situated witnesses would have been cumulative resulting in unnecessary delay. In addition, notably, the records of the care provided to decedent by the additional two witnesses who were not permitted to furnish live testimony were already in possession of the jury and available to them.

{¶ 8} On June 30, 2011, the jury unanimously found Tennant and Mercy negligent in the care of decedent. The jury further concluded that this negligence proximately caused his death. Based upon these holdings, the jury awarded \$600,000 in compensatory damages to appellee. On July 15, 2011, appellants filed a Civ.R. 59 motion for new trial alleging reversible prejudice in the denial of live testimony from two of the three nurse rebuttal witnesses. On September 1, 2011, the motion was denied. The trial court emphasized that none of the rebuttal witnesses, the one permitted to testify or the two not permitted to testify, possessed any actual recollection of decedent or of the care that they provided to him. Accordingly, the trial court held that the denial of such

testimony could not have constituted prejudice to appellants so as to have prevented appellants from having a fair trial. This appeal ensued.

{¶ 9} In the first assignment of error, appellants assert that the trial court erred in denying their motion for summary judgment. In support, appellants contend that Dr. Sobel did not testify inconsistent with his affidavit. Rather, appellants assert, Dr. Sobel merely, “conceded the obvious.” We do not concur.

{¶ 10} The transcript of the deposition testimony clearly reflects Dr. Sobel’s substantive concerns regarding the standard of IV care tendered to decedent by Tennant. Dr. Sobel stated at one point regarding the IV care, “You know, as a Monday quarterback would, oh, of course you better replace it.” It was not replaced.

{¶ 11} Upon further questioning, Dr. Sobel significantly conceded, “I’m not sure what I would have done. Do I think it could have contributed to-- do I think that replacing the cap could have caused it? It could have caused it.”

{¶ 12} Despite his prior deposition testimony reflecting causation concerns and equivocation by Dr. Sobel with respect to Tennant’s standard of IV care, Dr. Sobel subsequently unequivocally attested his affidavit, “It is my opinion to a reasonable medical probability that Kristen M. Tennant, R.N.’s nursing care and treatment of Mr. Elzay was not a proximate cause of any of the injuries alleged in plaintiff’s complaint or amended complaint, including Mr. Elzay’s death.” This sweeping conclusion forecloses proximate cause attributable to the care provided by Tennant. It is clearly and fundamentally incongruous with Dr. Sobel’s prior deposition testimony. In his

deposition, Dr. Sobel clearly conceded that Tennant's standard of IV care of the decedent could have caused the adverse outcome.

{¶ 13} We are guided in our consideration of the merits of appellants' first assignment of error by the recent, highly relevant Supreme Court of Ohio case of *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913. In its consideration of the propriety of summary judgment when a nonparty medical malpractice expert witness gives deposition testimony that is inconsistent with a subsequent summary judgment affidavit of that witness, the court stated in pertinent part, "If an affidavit of a movant for summary judgment is inconsistent with the movant's former deposition testimony, summary judgment may not be granted in the movant's favor." Consistent with this principle, the court similarly held that an affidavit in support of a nonmoving party inconsistent with prior testimony likewise cannot be construed as creating a genuine issue of material fact so as to prevent summary judgment in favor of the moving party. *Pettiford*, ¶ 38.

{¶ 14} We find that the pertinent principles set forth in *Pettiford* are controlling in this case. We find that the causation deposition testimony of Dr. Sobel was clearly and materially inconsistent with his subsequent affidavit in support of summary judgment. As such, summary judgment could not be granted to appellants. The denial of summary judgment was proper. Wherefore, we find appellants' first assignment of error not well-taken.

{¶ 15} In appellants' second assignment of error, they maintain that the trial court abused its discretion in denying their Civ.R. 59 motion for a new trial. In support, appellants rely upon Ohio caselaw upholding the principle that a party is prejudiced when a trial court refuses to permit the calling of rebuttal witnesses who are the only witnesses with the knowledge and capability of testifying about the relevant events at issue. *Phung v. Waste Mgt.*, 71 Ohio St.3d 408, 644 N.E.2d 286 (1994). In addition, a party may be found to have been prejudiced by a trial court's refusal to permit the calling of rebuttal witnesses with the knowledge necessary to furnish testimony that directly rebuts the opponent's witnesses. *Klem v. Consolidated Rail Corp.*, 191 Ohio App.3d 690, 2010-Ohio-3330, 947 N.E.2d 687 (6th Dist.).

{¶ 16} We do not concur in appellants' contention that the trial court's disputed decision to permit the calling of only one of three analogous rebuttal witnesses is comparable to or controlled by the above-cited cases. In contrast to the scenarios facing the court in *Phung* and *Klem*, none of the three rebuttal witnesses in the instant case had any recollection of the decedent, the dates in question, or any recollection of IV care furnished to the decedent. As such, we are not persuaded that these witnesses actually possessed any requisite knowledge so as to furnish substantive testimony capable of rebutting the opposing party's witnesses.

{¶ 17} Our review of a trial court's disputed judgment on a Civ.R. 59 motion for a new trial is conducted pursuant to the abuse of discretion standard. An abuse of discretion connotes more than a mere error of law or judgment. It mandates

demonstration that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1985).

{¶ 18} In applying these controlling principles to this case, we find no objective or persuasive evidence in support of the notion that the trial court's determination to allow only one of the three proposed rebuttal witnesses to testify was in any way arbitrary, unreasonable or unconscionable. The record clearly reflects that these witnesses possessed no actual recollection of decedent, of the care they provided to him, or of any of the specific events relevant to this case. Accordingly, the trial court acted well within its discretion in permitting only one of these three similarly situated witnesses to give live testimony. We find appellants' second assignment of error not well-taken.

{¶ 19} Lastly, we will consider appellee/cross appellant's assertion on cross-appeal that the trial court erred in denying the motion for prejudgment interest against appellants.

{¶ 20} In order to warrant an award of prejudgment interest, R.C. 1343.03 requires sufficient evidence to demonstrate that the party against whom prejudgment interest is sought failed to act in good faith.

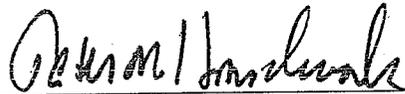
{¶ 21} We find that rejections of demands submitted by appellee during litigation and appellants' decision to not submit settlement offers to appellee may reflect stringent tactical positions, but it does not constitute objective evidence of a failure to act in good faith in the course of this case so as to justify an award of prejudgment interest. We find appellee/cross appellant's assignment of error on cross-appeal not well-taken.

{¶ 22} Wherefore, we find substantial justice has been done in this matter. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants and appellee are ordered to pay equal shares of the cost of this appeal pursuant to App.R. 24.

Judgment affirmed.

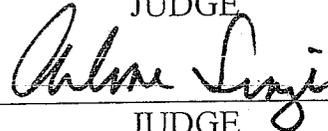
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.



JUDGE

Arlene Singer, P.J.



JUDGE

Thomas J. Osowik, J.  
CONCUR.



JUDGE

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