IN THE SUPREME COURT OF OHIO

Mark McLeod, Guardian of the Estate of Walter Hollins, **Appellee,** **v.** **Northeast Ohio Neighborhood Health Services, Inc., Ronald Jordan, M.D., and Mt. Sinai Medical Center,** **Appellants.**	**Case No. 06-1247** **On Appeal From the Cuyahoga County Court Of Appeals, Eighth Appellate District** **Court of Appeals Case No. 85286**

MERIT BRIEF OF APPELLANTS NORTHEAST OHIO NEIGHBORHOOD HEALTH SERVICES, INC. AND RONALD JORDAN, M.D.

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

RULES

INTRODUCTION

This appeal involves the largest medical malpractice verdict in the history of Ohio – $30 million, with Plaintiff seeking an additional $50 million in prejudgment interest. The trial judge recognized that this record-breaking verdict was flawed. He exercised his discretion to order a new trial because (1) the jury's award was excessive, influenced by passion and prejudice, and based on erroneously admitted evidence; and (2) Plaintiff's counsel, Geoffrey Fieger, poisoned the trial with his flagrant misconduct. In the words of the judge who presided over this three-week trial, Mr. Fieger's conduct was "misleading, unprofessional, and frequently outrageous."

The Court of Appeals unanimously found the amount of damages awarded to be "manifestly excessive," although the majority remanded for the trial court to consider only remittitur, instead of respecting the trial court's discretionary decision to order a new trial. Misapplying the standard of review, Judge Celebrezze wrote for the Court of Appeals majority that the trial judge had abused his discretion in ordering a new trial on all issues because "some credible evidence" supported the jury's verdict. Although the majority agreed "that plaintiff's attorney does not appear to be the most likeable person," it did not find "that his conduct rises to the level to justify the granting of a new trial."

Judge Karpinski's 45-page dissent explained that she would have affirmed the new trial order based on both "excessive damages and attorney misconduct." (Appx. 28.) She found (as did the majority) that Plaintiff "ambushed" Defendants with damages testimony that went beyond the Plaintiff's actual medical needs. (Appx. 33.) "The trial court [was] correct in concluding that these errors led to the jury awarding excessive damages" justifying a new trial. (Appx. 34.)

Judge Karpinski also would have affirmed the trial court's order granting a new trial because, among other things, "[e]xcerpts from the transcript demonstrate [Mr. Fieger's]

egregious behavior and contradictory and argumentative questioning." (Appx. 36.) For 25 pages, Judge Karpinski analyzed Mr. Fieger's "manipulative trial techniques," concluding that "the small portion of the transcript [she had] presented is representative of the entire 2,400 pages and clearly demonstrates that the misconduct of plaintiff's counsel was so outrageous that the trial judge properly granted a new trial." (Appx. 61.)

Judge Karpinski then analyzed Mr. Fieger's closing argument. She found that, "[e]ven if the record had shown a model trial up until closing argument, Fieger's closing argument alone is sufficient to justify a new trial." (Appx. 61.) For twelve pages, she detailed examples of flagrant misconduct in Mr. Fieger's closing argument. She concluded that "[e]very good attorney walks a fine line between zealous advocacy and tainting a jury. Mr. Fieger pole vaulted over that line early in this case and never retreated." (Appx. 72.)

This Court should reverse the Court of Appeals decision to require only remittitur, and not a new trial. And this Court should reverse the Court of Appeals decision to undo the trial court's grant of a new trial. When the judge who presides over a trial decides that attorney misconduct requires ordering a new trial, that decision is entitled to the utmost deference. To hold otherwise undercuts the proper authority of trial judges to control proceedings over which they are presiding and threatens the dignity of every courtroom in Ohio.

STATEMENT OF FACTS

A. The Case

This medical malpractice action arises from the birth of Walter Hollins, who suffers from cerebral palsy, at the former Mt. Sinai Hospital in Cleveland in 1987. Plaintiff's Complaint, filed in 1998, alleged medical negligence by Dr. Ronald Jordan, who performed Mr. Hollins' Cesarean-section birth, and Dr. Jordan's employer, Northeast Ohio Neighborhood Health Services, Inc., a non-profit group of neighborhood health centers known for most of its 39-year history as the Hough-Norwood Clinics ("Neighborhood Health Services"). (R.1, Complaint; Jt. Supp. 2349, Tr. 1568.) The Complaint also alleged negligence by agents and employees of the former Mt. Sinai Hospital, where the birth occurred. (R.1, Complaint.) Mark McLeod, an attorney, filed the Complaint as Guardian of the Estate of Walter Hollins ("Plaintiff").

The case was originally assigned to Cuyahoga County Common Pleas Judge Lillian Greene. She transferred the case to the Administrative Judge, who assigned it to Visiting Judge Robert Lawther for trial. (R.414, 415.) The trial was marred, from voir dire through closing argument, by an escalating course of misconduct by Plaintiff's counsel, Geoffrey Fieger. Mr. Fieger's misconduct was unabated despite defense counsel's many objections and the Trial Court's repeated admonitions.

On May 24, 2004, the jury returned a verdict against Dr. Jordan, Neighborhood Health Services, and Mt. Sinai ("Defendants") for $30 million – $15 million in economic damages and an additional $15 million in non-economic damages. (R.442.) This was reportedly the largest verdict in Cuyahoga County history and the largest medical malpractice award in Ohio. See, e.g., Court sides with woman, The Plain Dealer, Apr. 4, 2006.

Defendants filed motions for a new trial that challenged the jury's verdict on many grounds. (R.464 (Jt. Supp. 178-221), 466 (Jt. Supp. 242-287), 477 (Jt. Supp. 288-89).) Judge

Lawther granted those motions and ordered a new trial, finding that (1) the jury's award was excessive and was influenced by passion and prejudice and based on erroneously admitted evidence, (2) Plaintiff's counsel, Mr. Fieger, committed misconduct throughout the trial that affected its outcome, and (3) the Trial Court's own errors caused irregularities in the proceedings that prevented a fair trial. (R.504, Judgment Entry at 3-12, Appx. 75-84.)

Judge Lawther noted that the jury's duty to decide questions of negligence and proximate cause was "difficult" (as evidenced by their 6 to 2 vote), and that, based upon the evidence, "[t]his was clearly a 'close call.'" (Id. at 2, Appx. 74.) Judge Lawther also observed that "Defense Counsel in their motion briefs have set forth many other grounds in support of their request for a new trial, especially with respect to the issues of negligence and proximate cause, and some of those arguments have much merit." (Id. at 13, Appx. 85.) Judge Lawther, however, did "not attempt to deal with all of the issues raised by the parties" because the selected grounds he discussed in his order "more than justif[y] the conclusion that a new trial must be granted." (Id.)[1]

[1] After Judge Lawther ordered the new trial, Plaintiff filed a "Motion for Relief From Order Pursuant to Civil Rule 60(B)" in the Common Pleas Court (R.505) and an Affidavit of Disqualification against Judge Lawther in this Court (R.506). Recognizing the importance of Plaintiff not only actually receiving a fair hearing on his 60(B) motion, but *believing* he has received a fair hearing, Judge Lawther voluntarily recused himself from ruling on the motion. (R.526). The file was returned to Judge Lillian Greene. (Id.)

Plaintiff's Rule 60(B) motion did not raise new issues that had occurred outside trial, but instead rehashed arguments that Plaintiff had previously made to Judge Lawther. Judge Green erroneously granted the Rule 60(B) motion, but the Court of Appeals unanimously reversed, holding that Plaintiff's Rule 60(B) motion was "an improper attempt at an appeal." (Majority App. Op. at 8, Appx. 13; Dissent App. Op. at 1, Appx. 28.) Because Judge Greene's order on the Rule 60(B) motion has been reversed, and Plaintiff has not appealed that reversal, the propriety of Judge Lawther's order granting a new trial is the focus of this appeal.

B. Walter Hollins' Condition

Walter Hollins suffers from cerebral palsy and severe mental retardation. Plaintiff claimed that Mr. Hollins' condition was caused by an acute lack of oxygen during a 90-minute "delay" in his Cesarean-section delivery. (E.g., Jt. Supp. 1293, Tr. 524.) Defendants, however, presented proof that Mr. Hollins' condition resulted not from any negligence but from long-term placental insufficiency, which caused chronic oxygen deprivation and retarded growth throughout the course of the pregnancy.

Regina Harris, Mr. Hollins' mother, was seen by Dr. Jordan at Neighborhood Health Services during her pregnancy. (Jt. Supp. 2358, Tr. 1577.) During an examination, Dr. Jordan observed that the fetus appeared to be undersized for Ms. Harris's stage of pregnancy. (Jt. Supp. 2463-64, Tr. 1680-81.) During an examination the following week, Dr. Jordan ordered a "non-stress test," which involves comparing the resting fetal heart rate to the moving fetal heart rate. (Jt. Supp. 2047-48, Tr. 1270-71; Jt. Supp. 2463, Tr. 1680; Jt. Supp. 2465-69, Tr. 1682-86; Jt. Supp. 2472-73, Tr. 1689-90.) The test was "non-reactive," which means that the fetus was not showing accelerations of its heart rate. (E.g., Jt. Supp. 1840, Tr. 1065; Jt. Supp. 2473, Tr. 1690.) Dr. Jordan therefore referred Ms. Harris to Mt. Sinai Medical Center for further examination the same day (Jt. Supp. 2361-62, Tr. 1580-81), including an "Oxytocin Challenge Test." (Jt. Supp. 2474-75, Tr. 1691-92; Jt. Supp. 2478, Tr. 1695.) This test involved temporarily inducing contractions while the fetus's heart rate was being monitored, to determine how the fetus would tolerate natural labor. (E.g., Jt. Supp. 1839, Tr. 1064; Jt. Supp. 2478-79, Tr. 1695-96; Jt. Supp. 2483-84, Tr. 1700-01; Jt. Supp. 2859, Tr. 2071.)

The Oxytocin Challenge Test was administered at Mt. Sinai. (Jt. Supp. 2478-79, Tr. 1695-96.) The fetal heart rate decreased after each induced contraction. (Jt. Supp. 1399-1400, Tr. 628-29; Jt. Supp. 1402, Tr. 631; Jt. Supp. 2486, Tr. 1703.) The contraction-inducing

medicine (called "Oxytocin" or "Pitocin") was discontinued after twelve to fifteen minutes. (Jt. Supp. 2486, Tr. 1703.) The medicine quickly wore off, and Ms. Harris's contractions became less frequent and soon stopped altogether. (Jt. Supp. 2487-88, Tr. 1704-05.)

Because the decreased fetal heart rate following the induced contractions indicated that Walter Hollins would not tolerate natural labor contractions well, Dr. Jordan ordered an "emergency" Cesarean-section delivery. (Jt. Supp. 2037, Tr. 1260; Jt. Supp. 2040, Tr. 1263; Jt. Supp. 2489, Tr. 1706; Jt. Supp. 2491, Tr. 1708.) Dr. Jordan and the Mt. Sinai witnesses testified that the term "emergency" merely referred to a Cesarean-section delivery that had not been previously scheduled. (Jt. Supp. 1793, Tr. 1018; Jt. Supp. 1803-04, Tr. 1028-29; Jt. Supp. 1810, Tr. 1035; Jt. Supp. 1859, Tr. 1084; Jt. Supp. 1862-63, Tr. 1087-88; Jt. Supp. 1878, Tr. 1103, Jt. Supp. 1881, Tr. 1106; Jt. Supp. 1889, Tr. 1114; Jt. Supp. 2032-33, Tr. 1255-56; Jt. Supp. 2035-36, Tr. 1258-59; Jt. Supp. 2491, Tr. 1708.) A procedure that needed to be done immediately in a life-threatening situation would be called a "crash" or "stat" procedure. (E.g., Jt. Supp. 1761, Tr. 986; Jt. Supp. 1859, Tr. 1084; Jt. Supp. 1861-63, Tr. 1086-88; see, also, Jt. Supp. 2224, Tr. 1445.)

This was not a "crash" C-section. Witnesses, including Plaintiff's own experts, testified that there was no indication that Ms. Harris was in labor or that Walter Hollins was at imminent risk of being put under the stress of labor. (E.g., Jt. Supp. 1489, Tr. 718; Jt. Supp. 1822, Tr. 1047; see, also, e.g., Jt. Supp. 2485, Tr. 1702; Jt. Supp. 2491-92, Tr. 1708-09; Jt. Supp. 2856, Tr. 2068.)

Ms. Harris was taken to the operating room, where the fetal heart rate continued to be monitored. (Jt, Supp. 2870-72, Tr. 2082-84.) It always measured within the normal range. (Id.) Within about an hour, Ms. Harris's Cesarean-section began. (Jt. Supp. 2579, Tr. 1796; Jt. Supp.

2870, Tr. 2082.) Walter Hollins was delivered fifteen minutes after the first incision was made. (Jt Supp. 2580, Tr. 1797.)

Plaintiff's witnesses asserted that the term "birth asphyxia" in Mr. Hollins' medical records proved that a delay in Mr. Hollins' delivery caused his condition. (Jt. Supp. 1295-96, Tr. 526-27; Jt. Supp. 1455-56, Tr. 684-85; Jt. Supp. 1604-05, Tr. 831-32.) Defendants' witnesses explained that "birth asphyxia" meant only that symptoms of oxygen deprivation were present at birth – not that the birth process itself caused oxygen deprivation. (Jt. Supp. 2649-50, Tr. 1865-66; Jt. Supp. 2677, Tr. 1893.)

Expert witnesses testified that Hollins' classic presentation of symmetrical intra-uterine growth retardation ("IUGR") and a severely small and underdeveloped brain (Hollins' head was smaller than 97 percent of other babies (Jt. Supp. 2463, Tr. 1680; Jt. Supp. 2609, Tr. 1826)) prove that his condition resulted from a chronic process that began many weeks before his birth. (Jt. Supp. 2614-17, Tr. 1831-34; Jt. Supp. 2807-09, Tr. 2019-21.)[2] Walter Hollins weighed only four pounds, five ounces when he was born. (Jt. Supp. 1396, Tr. 625.)

Dr. Mark Collin, Director of the Neonatal Critical Care Center at MetroHealth Medical Center, testified that Hollins' symmetrical IUGR was consistent with placental insufficiency, "based on the very small size of the placenta" (Jt. Supp. 2604, Tr. 1821), which acts as the "fetal lung." (Jt. Supp. 2622, Tr. 1839.) The cause of placental insufficiency is unknown; the fetus will adapt as long as it can and, once the oxygen in the placenta is exhausted, the fetus will stop growing. (Jt. Supp. 2605, Tr. 1822.) The injuries associated with Hollins' microcephaly (or small brain) would not be apparent on an ultrasound, CAT scan, or MRI. (Jt. Supp. 2617, Tr. 1834.) Moreover, the umbilical cord lengthens with fetal movement; the short umbilical cord in

[2] Plaintiff's experts agreed that Mr. Hollins experienced symmetrical IUGR. (E.g., Jt. Supp. 1489, Tr. 718; Jt. Supp. 1664, Tr. 891; Jt. Supp. 2130, Tr. 1353.)

this case is therefore consistent with IUGR caused by placental insufficiency. (Jt. Supp. 2619, Tr. 1836; Jt. Supp. 2685, Tr. 1901.)[3]

Philip Nowicki, M.D., board certified in pediatrics, neonatology, and perinatal medicine, agreed that Hollins had placental insufficiency (the placenta was 335 grams when it should have been about 500 grams) (Jt. Supp. 2800, Tr. 2012) and microcephaly. (Jt. Supp. 2808-11, Tr. 2020-23.) According to Dr. Nowicki, Mr. Hollins' fused joints showed that "he was not moving under normal circumstances during fetal development." (Jt. Supp. 2811, Tr. 2023.) Examinations of the umbilical cord revealed conditions that occur only "when the baby has been in a very bad environment for a sustained period of time." (Jt. Supp. 2814-15, Tr. 2026-27.)

Plaintiff's experts conceded that Hollins was awake and alert earlier after delivery than would be expected from an acute event, such as the last-minute oxygen deprivation that Plaintiff alleged. (Jt. Supp. 1676, Tr. 903.)

C. Damages Evidence

Plaintiff's "life care" witness, George Cyphers, submitted five "life care plan" reports opining about Walter Hollins' lifetime needs for medical care, therapy, housing, and transportation. (See R.498, Mt. Sinai's Reply in Support of Post-Trial Motions ("Reply") at Exh. J, Jt. Supp. 438-73.) Cyphers' final pretrial life care plan report included alternative scenarios for Mr. Hollins' long-term care. (Id., Jan. 16, 2004 Update at G-11 to G-12, Jt. Supp. 470-71.) Cyphers' "Option A" provided for 24-hour attendant home care for Hollins. (Id.) Cyphers' "Option B" provided for 24-hour institutional care. (Id. at G-12, Jt. Supp. 471.)

Plaintiff's economist, Harvey Rosen, produced four reports regarding how much money would be needed to fund all of the care in Cyphers' life care plan. (See R.498, Reply, at Exh. K,

[3] Plaintiff's expert agreed that Hollins had an abnormally short umbilical cord. (E.g., Jt. Supp. 1668, Tr. 895.)

Jt. Supp. 475-683.) Rosen's final pretrial report for medical care included alternative present value totals for all of Mr. Hollins' future medical care, therapy, housing, and transportation needs of $6,501,443 (based on Cyphers' home care "Option A") and $4,390,892 (based on Cyphers' institutional care "Option B"). (Jt. Supp. 675.) Defendants deposed Cyphers and Rosen after they had submitted their final reports (R.498, Reply, at 5-9, Jt. Supp. 294-98 & Exhs. M-O, Jt. Supp. 688-97), and, relying on those reports and depositions, chose not to retain a life care planner or economist.

Plaintiff's first witness at trial was pediatric neurologist Ronald Gabriel. Dr. Gabriel had submitted an expert report opining about Hollins' "rehabilitation needs, prognosis, and longevity." (R.498, Reply, at Exh. H, Jt. Supp. 416-25.) Dr. Gabriel opined that Hollins required "full custodial care throughout his life." (Jt. Supp. 425.) Dr. Gabriel's report did not attempt to estimate any of the costs associated with this "custodial care." (Id.) At trial, Plaintiff's counsel asked Dr. Gabriel about Mr. Hollins' prognosis, "[a]ssuming the very best care money can buy." (Jt. Supp. 1332, Tr. 563.) The trial court overruled a defense objection to this question. (Id.) Dr. Gabriel then testified that the costs of future medical care – including 24-hour, "one-on-one" care at $15 to $25 an hour, occupational therapy at $125 to $200 an hour, four to six surgeries at about $20,000 each, and medications at about $1,000 a month – would be over $120,000 per year. (Jt. Supp. 1335-37, Tr. 566-68.) Defendants objected to this testimony, but the Trial Court did not rule. (Jt. Supp. 1337, Tr. 568.) Dr. Gabriel testified on cross-examination that he had reviewed the "life care plan" prepared by Cyphers – which called for $18 per hour attended care (Option A) and less expensive institutional care (Option B) – and that Cyphers' plan was "appropriate in terms of [Hollins'] needs." (Id.)

Even though Cyphers' life care plans fixed a precise dollar amount for Mr. Hollins' attendant home care ($18 per hour), Plaintiff's counsel asked Cyphers "to consider that care would be provided to Walter on a continuum between [$]15-$25 per hour." (Jt. Supp. 1715-16, Tr. 942-43.) Judge Lawther *sustained* the Defendants' objection and instructed that Cyphers was "limited to the report that he's already provided . . . ." (Jt. Supp. 1716, Tr. 943.) After Judge Lawther limited Cyphers' testimony to the four corners of Cyphers' report, Plaintiff's counsel asked Cyphers about the different types of care generally "available." (Jt. Supp. 1716-17, Tr. 943-44.) Cyphers testified that the types of care that "can be provided" include health aides at around $18 per hour, Licensed Practical Nurses ("LPNs") at $30 to $32 per hour, and Registered Nurses ("RNs") at $45 per hour. (Id.) On cross-examination, Cyphers confirmed that he had consulted with Mr. Hollins' treating pediatrician and Dr. Gabriel to prepare his life care plans, and neither doctor had recommended LPN or RN care for Hollins. (Jt. Supp. 1722, Tr. 949; Jt. Supp. 1733-36, Tr. 960-63.)

Despite Cyphers' concession that no physician had recommended LPN or RN care for Mr. Hollins, Plaintiff's counsel asked his economist, Dr. Rosen, to "assume" 24-hour LPN and RN care and to inflate the fund necessary for Hollins' future care accordingly. (Jt. Supp. 2300-02, Tr. 1519-21.) The Trial Court overruled Defendants' objections and motion to strike. (Jt. Supp. 2301-02, Tr. 1520-21.) As a result, even though no witness testified that LPN or RN case was necessary, or even appropriate, for Walter Hollins, Rosen was allowed to give his opinion, found nowhere in his pretrial reports, that $14,295,993 – triple the "Option B" estimate of his final report and more than double the "Option A" estimate – would be needed to provide lifetime care for Mr. Hollins. (Jt. Supp. 2302-03, Tr. 1521-22.) Defense counsel proffered the basis for their objection outside the jury's presence. (Jt. Supp. 2337-38, Tr. 1556-57.)

D. Mr. Fieger's Trial Conduct

A comprehensive recitation of Mr. Fieger's misconduct at trial is not possible given the Court's page limits. Judge Karpinski detailed much of this conduct on pages 8 through 45 of her dissent. (Appx. 35-72.) The following overview offers another glimpse at the sweep of Mr. Fieger's conduct.

On the first day of trial, Mr. Fieger asked one juror what verdict that juror had reached in previous juror service; the Trial Court sustained a defense objection. (Jt. Supp. 867, Tr. 102.) Fieger ignored the Trial Court's ruling and soon repeated the improper question to another prospective juror. (Jt. Supp. 904, Tr. 139.) The Trial Court sustained another objection when Fieger told the jury that "while they're all dealing with it, the insurance companies are making the money." (Jt. Supp. 973, Tr. 206.) The Trial Court admonished Fieger for making speeches and asking "trick question[s]" during voir dire. (Jt. Supp. 857-58, Tr. 92-93; Jt. Supp. 861-62, Tr. 96-97; Jt. Supp. 890-93, Tr. 125-28.) During Mr. Fieger's opening statement, Defendants objected to counsel's argument and his references to evidence excluded in limine. (Jt. Supp. 1132-33, Tr. 363-64; Jt. Supp. 1136, Tr. 367; Jt. Supp. 1152, Tr. 383; Jt. Supp. 1173-74, Tr. 404-05; Jt. Supp. 1176-77, Tr. 407-08; Jt. Supp. 1182, Tr. 413.) All but one objection (Jt. Supp. 1173-74, Tr. 404-05) were overruled.

Mr. Fieger's witness examinations were similarly improper. For example, despite calling a pediatric neurologist (Jt. Supp. 1265, Tr. 496), an obstetrician (Jt. Supp. 1377, Tr. 606), and a neonatologist (Jt. Supp 1562-63, Tr. 789-90) as witnesses, Mr. Fieger asked this question of an *anesthesiologist*: "in terms of your opinions and conclusions in this case, does there appear to be a bad effect on the child as a result of the failure to do the C section in a timely manner?" (Jt. Supp. 2219, Tr. 1440.) The Trial Court sustained defense counsel's objections. (Jt. Supp. 2219-20, Tr. 1440-41.) Fieger, however, then snuck in the back door what the Trial Court barred from

the front door. He asked the anesthesiologist: "Based on the condition of this child at birth, have you *previously* opined or given an opinion as to whether the delay caused damage at the time of birth?" (Jt. Supp. 2221, Tr. 1442 (emphasis added).) Over defense counsel's objection (id.), the Trial Court permitted the anesthesiologist to state his opinion that lack of oxygen *in utero* caused Mr. Hollins' brain damage. (Jt. Supp. 2222, Tr. at 1443.)

Mr. Fieger's entire cross-examination of Dr. Philip Nowicki, M.D., board certified in pediatrics, neonatology, and perinatal medicine, was intimidating, insulting, and belittling. (Jt. Supp. 2829-43, Tr. 2041-55.) In five pages of Mr. Fieger's cross-examination of Dr. Jordan, the Trial Court sustained five defense objections. (Jt. Supp. 2501-06, Tr. 1718-23.) Mr. Fieger repeatedly violated Trial Court rulings sustaining objections to his questions by repeating those questions almost immediately:

> Q. Well, did you ask the people who retained you or somebody at [Mt.] Sinai Hospital why it wasn't where it was supposed to be?
>
> A. I didn't ask.
>
> Q. Why didn't you? Didn't you want to know?
>
> MR. GROEDEL: Objection.
>
> THE COURT: Sustained.
>
> Q. Why wouldn't you want to know what they did wrong?
>
> MR. GROEDEL: Objection.
>
> THE COURT: Sustained. . . . .

(Jt. Supp. 2878-79, Tr. 2091-92.)

The trial transcript is littered with the Trial Court's admonitions to Mr. Fieger to sit down, stop shouting, stop interrupting, stop arguing rulings, and stop making speeches to the jury. (E.g., Jt. Supp. 1499, Tr. 728 ("Quit making a speech to the jury."); Jt. Supp. 1505, Tr. 734

("Sit down, please."); Jt. Supp. 1681-82, Tr. 908-09 ("That's an objection?" "Sit down, please."); Jt. Supp. 1716, Tr. 943 ("Didn't I just sustain the objection over here?"); Jt. Supp. 1789, Tr. 1014 ("Sit down, please."); Jt. Supp. 1796-97, Tr. 1021-22 ("If this is an objection, the objection is overruled. Have a seat, please."); Jt. Supp. 1887-88, Tr. 1112-13 ("Don't shout at me. I'm overruling the objection."); Jt. Supp. 2219-20, Tr. 1440-41 ("Don't argue with me. The objection is sustained."); Jt. Supp. 2327-28, Tr. 1546-47 ("Objection sustained. Come on. You know better than that."); Jt. Supp. 2502, Tr. 1719 ("You are arguing with the witness. This isn't final argument, Mr. Fieger."); Jt. Supp. 2530, Tr. 1747 ("Objection is sustained. That's argumentative."); Jt. Supp. 2547, Tr. 1764 ("Is that a question or final argument?"); Jt. Supp. 2588, Tr. 1805 ("I'm aware that he's making a speech. Let's ask a question." "Ask questions, counsel, instead of making speeches."); Jt. Supp. 2594, Tr. 1811 ("That's not a question. That's a speech."); Jt. Supp. 2617, Tr. 1834 ("Would you sit down, please."); Jt. Supp. 2649, Tr. 1865 ("You can't testify for him."); Jt. Supp. 2654, Tr. 1870 ("Don't be cute."); Jt. Supp. 2724, Tr. 1938 ("Objection is sustained. That's outrageous."); Jt. Supp. 2728, Tr. 1942 ("Objection sustained. That wasn't a question. That was a speech."); Jt. Supp. 2878, Tr. 2090 ("That's argument."); Jt. Supp. 2879-80, Tr. 2091-92 ("Don't be so cute. Ask your questions, will you?"); Jt. Supp. 2893, Tr. 2105 ("You are testifying for the witness."); Jt. Supp. 2903, Tr. 2115 ("Hold it. That's outrageous conduct." "That's outrageous.").)

The Trial Court tried in-chambers admonitions with all counsel present (Jt. Supp. 1950-51, Tr. 1173-74; Jt. Supp. 2595, Tr. 1812), but to no avail. The Trial Court admonished counsel in open court, to no avail (e.g., Jt. Supp. 2647, Tr. 1863 ("Keep your voice down. . . . Hold it. I want you to act like gentlemen in the time that remains. Okay? Would you do that please?")). The Court went "on the record" deploring Mr. Fieger's conduct, again instructing him on the

proper way to make objections. (Jt. Supp. 2693-94, Tr. 1907-08.) The Court expressed the "hope" that "future side bars will be carried on where you won't be shouting so the jury could hear what you're saying," noting "Mr. Fieger's tone of voice is extremely loud, which is very difficult to control." (Jt. Supp. 2694, Tr. 1908.) The Trial Court even recognized the futility of continued admonitions. (See Jt. Supp. 2695, Tr. 1909 ("[we] will try to go ahead and finish this case as best we can").)

Mr. Fieger's trial misconduct culminated with his closing argument, which appealed to the jury's emotional, religious, economic, and racial sympathies and biases, and referred to a claim that had been dismissed on directed verdict. The misconduct included:

- **Persuading the jury to fictionalize the claims and act out of a sense of drama rather than reality:**

  - "I am standing here as the voice for Walter. Walter is a baby in his mother's womb waiting to be born. Doctors, nurses, I'm suffocating. Please help me be born."
  - "I am suffocating. Help me be born."
  - "Dr. Jordan, help me be born."
  - "Oh, please, help me. Help me be born. I'm drowning."
  - "Please, please, Dr. Jordan, please, nurses, please help me be born."
  - "Please, please help me be born."
  - "I'm dying. Please save me."
  - "Mommy, grandma, someone, please save me. I'm dying. Please help me."
  - "Please, please nurses, I'm a little baby. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me. Please help me to be born."

(Jt. Supp. 2957-58, Tr. 2167-68; Jt. Supp. 2961, Tr. 2171; Jt. Supp. 2962, Tr. 2172; Jt. Supp. 2965, Tr. 2175; Jt. Supp. 2971, Tr. 2181; Jt. Supp. 2976, Tr. 2186; Jt. Supp. 2980, Tr. 2190; Jt. Supp. 2985, Tr. 2195; Jt. Supp. 2989, Tr. 2199);

- **Using religious commands**:

  - "Scripture tells us through Isaiah that we must give a voice to the poor and justice for the oppressed;" "Whatever you do to the least of my brothers, that you do unto me."

  - "Walter is depending upon you and God for justice;"

  - "But how this doctor and this hospital . . . can continue to do this in this courtroom is a sin only you can rectify."

  - "And God help them all" (referring to Defendants);

  - "I cite scripture not as a means to appeal to emotion but as an appeal to truth as to justice and doing what's right."

(Jt. Supp. 2950, Tr. 2160; Jt. Supp. 2951, Tr. 2161; Jt. Supp. 2970, Tr. 2180; Jt. Supp. 2996, Tr. 2206; Jt. Supp. 3099, Tr. 2309);

- **Appealing to racial bias and ethnic unity**:

  - comparing this "poor, terribly injured African American" with "the powerful corporation defendants, doctors who did this to him."

  - "There's prejudice which exists which cause people to do things they might otherwise not do or ignore an avalanche of evidence and that's why you were questioned so closely . . . to see what type of attitudes you bring here to this courtroom"; "If you want to have biases . . . then you should have never been sitting in this jury to begin with."

  - "And they could also claim that Walter would never have gotten beyond high school. I don't believe it. . . . Why? Because his mother didn't go to college? Because he's an African American male?"

(Jt. Supp. 2948-49, Tr. 2158-59; Jt. Supp. 2954, Tr. 2164; Jt. Supp. 3002, Tr. 2212; Jt. Supp. 3018, Tr. 2228);

- **Belittling opposing counsel, parties and witnesses and accusing them of lying:**

  - "Who are you going to believe? Me or your lying eyes?"

  - referring to "the prevarications that have been told in this case;"

  - "Do you understand the extent of the prevarication?"

- "How in the world could they do that to Walter? What does that tell you about what's going on here and about the false stories that have been spun? Oh, what a tangled web we weave when first we practice to deceive."

- "[H]ow dare they? . . . And all they offer were witnesses willing to say anything at different times under oath to prevaricate, to dissemble, to deny an innocent child justice."

- "They will misrepresent what witnesses have said."

- "Mr. Groedel [trial counsel for Mt. Sinai] says, we did nothing wrong. . . . It's a game to him. . . . Mr. Groedel and Mr. Farchione [trial counsel for Neighborhood Health Services and Dr. Jordan] get to go back to their offices and they get to go back to their families. . . . It's a game to them, and it's a game to them about one and one thing only. They don't give a darn about this. It's about money. . . . Nothing is going to happen to them. Nobody is going to be punished."

- "Dr. Nowicki, a man who works in a laboratory with pigs who's lied and admits it under oath about why he got let go of his job, who has said it's all right to drink a bottle of Jack Daniels and go into the OR as long as he doesn't hurt a baby and who . . . voluntarily cites Nazi literature in support of his position in this case."

(Jt. Supp. 2956, Tr. 2166; Jt. Supp. 2964, Tr. 2174; Jt. Supp. 2978, Tr. 2188; Jt. Supp. 2982-83, Tr. 2192-93; Jt. Supp. 2995-96, Tr. 2205-06; Jt. Supp. 3003, Tr. 2213; Jt. Supp. 3093, Tr. 2303; Jt. Supp. 3094, Tr. 2304; Jt. Supp. 3098-99, Tr. 2308-09);

- **Focusing on economic disparity**:

  - arguing that jurors were questioned during voir dire "to see if Walter can at least stand on an equal footing with these defendants;"

  - "I went over the kind of effort and the kind of money that was spent by the defendants in this case to deny this child justice."

  - "Give a voice to the poor and justice, for the oppressed."

  - "You are going to give a voice to the poor and justice to the oppressed."

(Jt. Supp. 2954, Tr. 2164; Jt. Supp. 2998, Tr. 2208; Jt. Supp. 3000, Tr. 2210; Jt. Supp. 3015, Tr. 2225); and

- **Referring to the dismissed spoliation claim**:

  - "After Walter was born brain damaged, after this suit was started, records started going."

  - "Coverups really do happen when people say oh, my God, you know what? We brain damaged a little baby."

  - "They let Regina in fact believe for years that this injury was an act of God and then, as I have demonstrated to you, they tried to cover it up."

  - "six months after they wrote birth asphyxia they started the coverup and crossed it out to try to begin to change the records;"

  - referring to defendants' alleged "cover ups" and "shenanigans."

(Jt. Supp. 2963, Tr. 2173; Jt. Supp. 2969, Tr. 2179; Jt. Supp. 2970, Tr. 2180; Jt. Supp. 2994, Tr. 2204; Jt. Supp. 3014, Tr. 2224.)

E. The Post-Trial Proceedings

Judge Lawther, who presided over the trial, granted Defendants' motions for a new trial on two independent grounds that are at issue here: (1) the jury's award was excessive, influenced by passion and prejudice, and based on erroneously admitted evidence, and (2) Mr. Fieger committed misconduct throughout the trial that improperly influenced its outcome. (R.504, Judgment Entry at 3-11, Appx. 75-83.)[4]

[4] Judge Lawther also based his new trial order on the alternate ground of irregularities in the proceedings. (Id. at 11-12, Appx. 83-84.) "[J]ust before the jury was to deliberate," an article quoting Mr. Fieger about the case appeared in the Cleveland Plain Dealer newspaper. (Id. at 11, Appx. 83.) "The article mentioned that Mr. Fieger was asking the jury to award $35,000,000, and that 'if he got only half that much, it would be the highest damage award in county history.'" (Id.) Upon Judge Lawther's inquiry, three jurors acknowledged reading the article. (Id.) Judge Lawther, however, rejected defense counsel's request to conduct a voir dire examination of these jurors. In the new trial order, Judge Lawther "acknowledge[d] that failure to permit a voir dire examination of the jury prevented defense counsel from determining if any juror had been influenced to the extent that he or she was no longer eligible to serve." (Id. at 11-12, Appx. 83-84.) "In addition," he concluded, "there should have been no conversation between the Court and jury off the record." (Id. at 84.)

1. The Jury Awarded Excessive Damages Influenced By Passion And Prejudice And Based On Improper Evidence.

a. Excessive Economic Damages

Judge Lawther's first ground for granting a new trial was the improperly admitted evidence regarding Plaintiff's economic damages. Judge Lawther realized that Plaintiff's economist "had submitted his most recent expert report to Plaintiff in January, 2004 calculating the cost of home health care aids and other medical, therapy, and ancillary expenses for Walter [Hollins] over the period of his life expectancy to be between $4,303,088 and $6,413,639." (Id. at 3, Appx. 75.) "During his testimony at trial, however," the economist "was asked by Mr. Fieger, what the cost would be for [Licensed Professional Nurse] care and [Registered Nurse] care, although the life care plan devised by [Plaintiff's] life care expert . . . did not recommend such level of care, nor had [the economist's] report prior to trial contained any information on the costs of higher degrees of care." (Id. at 3-4, Appx. 75-76.)

"Defense attorneys all objected . . . ." (Id. at 4, Appx. 76.) "However, the Court overruled the objections and failed to call a sidebar conference on the record." (Id.) "That would have disclosed that [the economist] was about to give testimony on estimates as to the cost of care which were not covered in his report, and to put a figure on the level of care that no doctor or other expert had recommended." (Id.) Judge Lawther found "[t]his was error, and had there been a sidebar conference the objections would have been sustained, and the jury would not have heard very damaging testimony and medically unsupported figures which were presented

(continued...)

All three members of the Court of Appeals, however, rejected this irregularity as a ground for ordering a new trial. Defendants have not appealed from that portion of the appellate court's decision.

by surprise." (Id.) This error permitted Plaintiff's economist "to approximately triple the amount contained in his January report." (Id.)

b. **Excessive Non-Economic Damages**

After considering the evidence presented at trial, Judge Lawther held that "[t]he award of $15,000,000 for non-economic damages in this case is so out-of-line and unjustified that it must have been the result of passion and prejudice." (Id. at 6, Appx. 78.) He noted that "[t]here is no evidence that Walter [Hollins] suffers regular, continuing pain." (Id.) "Without taking lightly his physical disability, and with full realization that his illness is a tragedy, the [Trial] Court . . . reviewed in detail the testimony given by family members and caregivers." (Id. at 7, Appx. 79.) After reviewing this testimony, and based on his first-hand observation of the trial, Judge Lawther concluded that, "when called upon to award non-economic damages, the jury simply matched the $15,000,000 it had already awarded for economic damages, as Mr. Fieger had essentially asked them to." (Id.) "Returning a verdict of $15,000,000 for non-economic loss shows that the jury simply lost its way, and ignored the Court's charge on the law. This amount is clearly excessive and can be remedied only by a new trial." (Id. at 8, Appx. 80.)

2. **Mr. Fieger's Misconduct**

After determining that no rational basis existed for the jury's non-economic damage award, Judge Lawther explained how the jury was lead astray: Mr. Fieger's "appeal to the jury's natural sympathy through passion and prejudice." (Id. at 10, Appx. 82.) Judge Lawther concluded that Fieger's "theatrical" and "overbearing" trial conduct "helped him achieve a clearly unjustified verdict." (Id. at 8, Appx. 80.)

Judge Lawther focused on three types of misconduct at trial by Mr. Fieger. First, he observed that, "[d]uring cross-examination of his witnesses, [Fieger's] trial technique included constant interruption of opposing counsel without bothering to object and obtain a ruling." (Id.

(providing examples).) "It was quite obvious" to Judge Lawther "that Mr. Fieger's goal was to convey to the jury his own idea of what the witness should be saying, thus testifying for the witness, rather than making a genuine and valid objection to the question." (Id. at 9, Appx. 81.)

Second, Judge Lawther observed that Mr. Fieger's "trial technique . . . was designed to manipulate and mislead the jury." (Id.) This included "referring to some of Defendants' witnesses as 'prevaricators' engaging in 'false stories and cover-ups'." (Id.) Mr. Fieger "repeatedly referred to Defendants as 'corporate clients' with 'phony defenses.'" (Id.) "His entire approach to the case in open court," according to Judge Lawther, "was misleading, unprofessional, and frequently outrageous, and did not constitute proper advocacy." (Id.)

Finally, Judge Lawther observed that, "[d]uring final argument, Mr. Fieger employed the kind of theatrics best left to movies and television." (Id. at 10, Appx. 82.)[5] "At one point during final argument, he placed his hand on Mr. Hollins' shoulder and addressed Hollins as follows:

> I'm sorry. I couldn't help you, Walter. I couldn't stop you from drowning. But I will be his voice. I will help him get justice now. Whatever you do for the least of these my brothers, that you do unto me."

(Id.) Judge Lawther concluded that, "Since Walter was unable to understand what was being said, it can be assumed that the attorney's 'message', adopting the words of Jesus Christ, was simply to appeal to the passion and prejudice of the jury." (Id.) Judge Lawther noted "that at least five times during closing argument, Mr. Fieger went far beyond the bounds of theatrical license . . . ." (Id.)

[5] The reaction was the same at the appellate level. In Judge Karpinski's words: "This passionately presented fiction [by Mr. Fieger in closing argument] is akin to the razzle-dazzle tactic of attorney Billy Flynn in the film *Chicago*." (Dissent App. Op. at 45, Appx. 72.)

F. The Court Of Appeals Proceeding

The appellate judges unanimously agreed that the jury's award of damages – $15 million economic and $15 million non-economic damages – was excessive. "[T]he record reflects that expert testimony was introduced that was based on 'assumptions' and went beyond the calculations provided in the expert reports." (Majority App. Op. at 13, Appx. 18.) "It also appear[ed]" to all three judges "that the jury's award of noneconomic damages was influenced by the amount of the economic award, both awards being $15,000,000." (Id. at 13-14, Appx. 18-19; Dissent App. Op. at 1, Appx. 28.) Two judges concluded, however, that the excessive damages could be remedied by mere remittitur. (Majority App. Op. at 13-14, Appx. 18-19.) They therefore voted to reverse Judge Lawther's decision to order a new trial on the ground of excessive damages.

The same two judges also voted to reverse Judge Lawther's decision to order a new trial based on Mr. Fieger's misconduct. Writing for the majority, Judge Celebrezze reasoned that "so long as the jury verdict is supported by substantial, competent, credible evidence, the jury verdict is presumed to be correct and the trial court must refrain from granting a new trial." (Id. at 10, Appx. 15.) Applying that standard, the majority found substantial evidence to support the verdict here, and thus concluded that the trial court's decision to order a new trial was an abuse of discretion. (Id.) Regarding Mr. Fieger's misconduct, Judge Celebrezze wrote that, "[W]hile the remarks by counsel may have been questionable, they were not so outrageous as to warrant a new trial." (Id. at 12, Appx. 17.)

In sharp contrast, Judge Karpinski's 45-page dissent explained that she would have affirmed the new trial order based on "excessive damages *and* attorney misconduct." (Dissent App. Op. at 1, Appx. 28 (emphasis added).) She found that Plaintiff "ambushed" Defendants with damages testimony that went beyond Hollins' actual medical needs. (Id. at 6, Appx. 33.)

"The trial court [was] correct in concluding that these errors led to the jury awarding excessive damages" justifying a new trial. (Id. at 7, Appx. 34.)

Judge Karpinski also found that "[e]xcerpts from the transcript demonstrate [Fieger's] egregious behavior and contradictory and argumentative questioning." (Id. at 9, Appx. 36.) For 25 breathtaking pages, Judge Karpinski analyzed Mr. Fieger's "manipulative trial techniques," concluding that "the small portion of the transcript [she had] presented is representative of the entire 2,400 pages and clearly demonstrates that the misconduct of plaintiff's counsel was so outrageous that the trial judge properly granted a new trial." (Id. at 34, Appx. 61.)

Judge Karpinski then analyzed Mr. Fieger's closing argument. She found that, "[e]ven if the record had shown a model trial up until closing argument, Fieger's closing argument alone is sufficient to justify a new trial." (Id.) For twelve pages, she detailed repeated examples of flagrant misconduct in Mr. Fieger's argument. Judge Karpinski concluded that "[e]very good attorney walks a fine line between zealous advocacy and tainting a jury. Mr. Fieger pole vaulted over that line early in this case and never retreated." (Id. at 45, Appx. 72.)

STANDARD OF REVIEW

"'Where a trial court is authorized to grant a new trial for a reason which requires the exercise of a sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court.'" *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321 (quoting *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, paragraph one of the syllabus). "'[A] reviewing court should view the evidence favorably to the trial court's action rather than to the jury's verdict." Id. at 322 (brackets in original) (quoting *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 320). "'The predicate for that rule springs, in part, from the principle that the discretion of the trial judge in granting a new trial may be supported by his having determined from the surrounding circumstances and atmosphere of the trial that the jury's verdict resulted in manifest injustice.'" Id. (quoting *Jenkins*, 67 Ohio St. 2d at 320).

LAW AND ARGUMENT

Proposition of Law No. 1: When counsel for the prevailing party appeals to religious, racial, and economic prejudices and deliberately misleads the jury by misstating witness testimony and suggesting events having no factual basis, a trial judge does not abuse his discretion by ordering a new trial.

A. Judge Lawther Properly Granted A New Trial Based On The Misconduct Of Plaintiff's Counsel, Geoffrey Fieger.

A judge can properly order a new trial based on "[m]isconduct of the . . . prevailing party." Civ.R. 59(A)(2). Judge Lawther's decision ordering a new trial contains a sampling of Mr. Fieger's misconduct that "helped [Fieger] achieve a clearly unjustified verdict." (R.504, Judgment Entry at 8, Appx. 80.) In the Court of Appeals, Judge Karpinski's 45-page dissent laid out that misconduct in even more graphic detail. (Dissent App. Op. at 1-45, Appx. 28-72.) Both judges, however, stressed that Mr. Fieger's pervasive conduct cannot be appreciated without reviewing the entire 2,400 page trial transcript. (R.504, Judgment Entry at 9, Appx. 81 (noting that Judge Lawther's examples "are but a sampling of the conduct displayed by Plaintiff's

counsel throughout the entire three week trial"); Dissent App. Op. at 8-9, Appx. 35-36 ("A review of the entire 2,400-page transcript compels agreement with the [trial] court's description.").) Judge Lawther correctly concluded, based on his personal observation of the trial – and Judge Karpinski correctly concluded, based on her review of the entire transcript – that Mr. Fieger's misconduct not only influenced the jury to award excessive damages, but also so fundamentally tainted the fairness of the process as to require a new trial.

Over the years, courts have recognized many forms of misconduct that encourage juries to ignore facts and decide cases instead based upon emotion and bias. Abusive comments directed at opposing counsel and an opposing party's expert witness during closing argument, for example, "should not be permitted by any court." *Pesek v. Univ. Neurologists Assn.* (2000), 87 Ohio St.3d 495, 500. Similarly, closing arguments that refer to the poverty of one party or the wealth of another are "'highly improper'" and "tend to incite the rendition of verdicts which are excessive as a result of passion or prejudice." *Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391, 399, 400-01. So, too, for improper and offensive personal remarks, such as those accusing opposing parties of relying on a "'framed-up story'" and referring to Pontius Pilate and Judas. *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, 347-48. Accord, e.g., *Sandoval v. Calderon* (C.A. 9 2000), 241 F.3d 765, 779 (finding reversible error where counsel's argument contains "an invocation of divine authority to direct a jury's verdict"). Courts also agree that arguments that have "undoubtedly persuaded the jury to fictionalize the claims herein and act out of a sense of drama rather than reality" require new trials. *Fineman v. Armstrong World Indus., Inc.* (D.N.J. 1991), 774 F. Supp. 266, 270; accord *Rosenberger Ents., Inc. v. Ins. Serv. Corp. of Iowa* (Iowa App. 1995), 541 N.W.2d 904, 908 (condemning "melodramatic argument" that "does not help the jury decide their case but instead taints their perception to one

focused on emotion rather than law and fact"). Likewise, appeals to ethnic unity and racial prejudice have been universally condemned and held to be grounds for retrial. E.g., *Tex. Employers' Ins. Assn. v. Guerrero* (Tex. App. 1990), 800 S.W.2d 859. Mr. Fieger used all of these improper techniques, and more, from the first day of voir dire through closing argument.

As early as 1904, this Court deplored the use of similar tactics and refused to sustain the resulting verdict. In *Cleveland, Painesville & Eastern RR. v. Pritschau* (1904), 69 Ohio St. 438, this Court gave examples of flip, sarcastic, and insulting comments by counsel during cross-examination (id. at 441-43) and the trial court's unsuccessful admonitions to restrain that misconduct. Id. at 443-44. The Court criticized counsel's habit of "ma[king] statements purporting to present facts . . . followed by questions, not for the purpose of eliciting such facts as were in the knowledge of the witnesses, but to mislead the jury as to the facts in evidence . . . ." Id. at 445. The trial judge, "a grieved observer of continued improprieties which he thought himself powerless to suppress" (id. at 446), was nevertheless required to do so:

> If the court had sustained the motion for a new trial it would have been a too long deferred recognition of the rights of the plaintiff in error . . . .

Id. at 447.

Here, Mr. Fieger engaged in the same type of misconduct that this Court has condemned for 100 years. (See, e.g., Jt. Supp. 1499, Tr. 728 ("Quit making a speech to the jury."); Jt. Supp. 2502, Tr. 1719 ("You are arguing with the witness. This isn't final argument."); Jt. Supp. 2588, Tr. 1805 ("I'm aware that he's making a speech. Let's ask a question." "Ask questions, counsel, instead of making speeches."); Jt. Supp. 2594, Tr. 1811 ("That's not a question. That's a speech."); Jt. Supp. 2728, Tr. 1942 ("Objection sustained. That wasn't a question. That was a speech."); Jt. Supp. 2878, Tr. 2090 ("That's argument."); Jt. Supp. 2893, Tr. 2105 ("You are testifying for the witness.").) Judge Lawther properly gave "deferred recognition" of

Defendants' rights when he ordered a new trial. That decision was not an abuse of discretion, and it should be affirmed.

Plaintiff cannot excuse Mr. Fieger's shocking behavior as "zealous advocacy." Ohio law is crystal clear that "[t]he proper role of the attorney at the trial table is not that of a contestant seeking to prevail at any cost but that of an officer of the court, whose duty is to aid in the administration of justice and assist in surrounding the trial with an air conducive to an impartial verdict." *Jones*, 132 Ohio St. at 349-50. Mr. Fieger's conduct crossed this line and mandates a new trial.[6]

B. Defendants Did Not Waive Mr. Fieger's Misconduct As A Ground For A New Trial.

In reversing the new trial order, the Court of Appeals majority asserts that "defense counsel did not even object to the claimed improper comments in plaintiff's closing." (Majority App. Op. at 11, Appx. 16.) Although Mr. Fieger's closing argument contains perhaps his most

[6] Because Mr. Fieger has repeatedly been admonished for virtually identical misconduct in the past, he can claim neither ignorance nor heat of the moment. See *Powell v. St. John Hosp.* (Mich. App. 2000), 614 N.W.2d 666 (admonishing Mr. Fieger for "gratuitously insert[ing]" the issue of race into a medical malpractice action and for accusing witnesses of "fabricating" their testimony and "making up" what they were saying); *Badalamenti v. Wm. Beaumont Hosp.-Troy* (Mich. App. 1999), 602 N.W.2d 854 (Mr. Fieger's accusations that defendants "neglected" and "abandoned" the plaintiff and "destroyed, altered, or suppressed evidence," were unfounded and injected for the purpose of "divert[ing] the jurors' attention from the merits of the case and to inflame the passions of the jury"); *Gilbert v. Daimler Chrysler Corp.* (Mich. 2004), 685 N.W.2d 391, 403-04, 406 (Mr. Fieger "deliberately tried to provoke the jury by supplanting law, fact, and reason with prejudice, misleading arguments, and *ad hominem* attacks against defendant based on its corporate status;" his reference to Nazi Germany was "a naked appeal to passion and prejudice and an attempt to divert the jury from the facts and the law relevant to this case;" "[o]verreaching, prejudice-baiting rhetoric appears to be a calculated, routine feature of counsel's trial strategy"). Locally, Mr. Fieger's trial strategy led him to withdraw (in lieu of a hearing on a motion to revoke his pro hac vice status), and to an eventual mistrial, in the courtroom of Judge Nancy Margaret Russo, just five months after Judge Lawther ordered a new trial in this case. (See Order, *Wills v. Dillards, Inc.* (Jan. 31, 2005), Cuyahoga Cty. C.P. No. CV-03-499877, Jt. Supp. 767.) Mr. Fieger's misconduct in that case mirrors what he did here, including "Fieger's comments in front of the court that other lawyers, witnesses and jurors are all liars; general unprofessional conduct, with numerous instances recorded on the record, including previous admonishments." (Id.)

concentrated collection of misconduct, there are more than enough instances of misconduct during voir dire, opening statement, and witness examinations, which the majority apparently did not consider, to justify Judge Lawther's discretionary decision to order a new trial. Indeed, Judge Karpinski wrote 27 pages detailing Mr. Fieger's misconduct before she even reached his closing argument. (Dissent App. Op. at 8-34, Appx. 35-61.) That discussion, and a review of the transcript from those portions of the trial, confirm that defense counsel repeatedly objected to Mr. Fieger's misconduct.

Judge Lawther did not sustain objections lightly. For example, he overruled all but one of defense counsel's many objections during Mr. Fieger's opening statement. (Jt. Supp. 1133, Tr. 364; Jt. Supp. 1136, Tr. 367; Jt. Supp. 1146, Tr. 377; Jt. Supp. 1152, Tr. 383; Jt. Supp. 1173-74, Tr. 404-05; Jt. Supp. 1176-77, Tr. 407-08; Jt. Supp. 1182, Tr. 413.) Judge Lawther, however, later acknowledged that he had permitted Fieger "practically [to give] closing argument in opening." (Jt. Supp. 1207, Tr. 438.) That alone could justify ordering a new trial.

In any event, this Court has repeatedly held that, even absent an objection, the trial judge has an affirmative duty to intervene to stop misconduct as flagrant and pervasive as Mr. Fieger's. "It is the duty of the trial judge to repress unwarranted charges of a scurrilous character and gratuitous personal attacks against a party to a suit in cross-examination and in argument to the jury . . . . Failure of the judge so to do constitutes prejudicial error." *Plas v. Holmes Constr. Co.* (1952), 157 Ohio St. 95, paragraph 3 of the syllabus. See, also, e.g., *Pritschau*, 69 Ohio St. 438, paragraph 1 of the syllabus ("[I]t is the duty of the trial judge to prevent such misconduct on the part of counsel toward witnesses as tends to the suppression of the truth, all declarations of fact by counsel during the introduction of evidence, the repetition of incompetent questions to which objections have been sustained, and all comments upon the evidence until the time for argument

has arrived."); *Macedonia-Northfield Banking*, 132 Ohio St. at 351 ("The conduct of plaintiff's counsel was reprehensible and inexcusable, and, unrebuked as it was, constituted reversible error regardless of the lack of objection."); accord, e.g., *Stephen's Jewelry, Inc. v. Admiral Ins. Co.* (1989), 63 Ohio App.3d 213, 219 (reversing judgment entered on jury's verdict due to plaintiff's counsel's improper argument despite defendants' failure to object); *Shapiro v. Kilgore Cleaning & Storage Co.* (1959), 108 Ohio App. 402, 406-07 ("[I]t may be laid down as law, and not merely discretionary, that where the counsel grossly abuses his privilege to the manifest prejudice of the opposite party, it is the *duty* of the judge to stop him then and there.") (emphasis in original, internal quotation marks omitted).

Equally unavailing is the appellate majority's assertion, without citation, that "defense counsel made its own questionable comments in the proceedings, including personal attacks." (Majority App. Op. at 11-12, Appx. 16-17.) It has never been the law of Ohio that two wrongs make a right. Moreover, there were not two wrongs here; this Court's review of the record will show that defense counsel behaved properly. In any event, even if all counsel misbehaved, that circumstance would *support* Judge Lawther's grant of a new trial:

> Whenever there is violent contention between counsel, the jurors are led to take sides because it is human to do so, the result being, that passion and prejudice find easy lodgment in their minds and vitiate their verdict. . . . It is not a sufficient excuse to say that there was provocation, and that opposing counsel were guilty of the same offense. If theirs had been the verdict and that were found to be true, theirs would be the reversal.

Columbus Ry. v. Connor (1905), 6 Ohio C.C. (N.S.) 361, 369-70; see, also, *Love v. Wolf* (Cal. App. 1964), 226 Cal. App.2d 378, 391-92 (emphasis in original) ("We could be more critical of instances of [defense counsel's] impropriety if the overall picture were not so patently one in which defense counsel, unprotected by the judge presiding, were left to parry the thrusts of plaintiff's attorney as best they could.").

From the start of voir dire to the last breath of closing argument, Mr. Fieger blatantly manipulated and fictionalized the evidence, harangued the witnesses, and played upon the jury's sympathies and biases. Judge Lawther presided over the trial and saw first-hand the effect of Mr. Fieger's misconduct on the jury and the verdict it reached. Judge Lawther concluded that this behavior unfairly tainted the jury's verdict and caused the jury to decide the case based on passion and prejudice rather than the facts. Judge Lawther exercised his discretion to hold that Defendants were entitled to a new trial. Judge Lawther was plainly right; this Court should reverse the Court of Appeals' ruling reversing the new trial order.

Proposition of Law No. 2: Where a trial court orders a new trial based on attorney misconduct and excessive damages influenced by passion or prejudice, appellate review focuses not on the existence of evidence to support the liability verdict, but on whether the trial court's finding of misconduct and passion or prejudice was an abuse of discretion, an inquiry that requires deferring to the judge who actually tried the case.

Judge Lawther's grant of a new trial is reviewed on appeal only for abuse of discretion. *Mannion*, 91 Ohio St.3d at 321. The appellate majority mistakenly applied the wrong standard of review to its consideration of the new trial order.

Judge Lawther ordered a new trial due to *counsel's misconduct* and the jury's *passion and prejudice*. The Court of Appeals majority, however, applied the standard for determining whether a new trial should be granted because a verdict is *against the weight of the evidence*. The former grounds are reviewed on appeal much more deferentially than the latter. An appellate court reviews a new trial order based on the verdict being against the weight of the evidence only to determine whether "some competent, credible evidence" supported the jury verdict. See, e.g., *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus ("Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court *as being against the manifest weight of the*

evidence.") (emphasis added).[7] That mistaken standard is the one the appellate majority applied here. According to the majority, "so long as the verdict is supported by substantial competent, credible evidence, the jury verdict is presumed to be correct and the trial court must refrain from granting a new trial." (Majority App. Op. at 10, Appx. 15.) The Court then applied this standard:

> This Court finds that the jury verdict in this case was supported by substantial competent, credible evidence; thus, we find error in the trial court's decision to order a new trial.
>
> * * * *
>
> Thus again, there was sufficient evidence to support the jury's verdict.

(Id. at 10, 12, Appx. 15, 17.) Based on this mistaken standard of review, the Court of Appeals majority reversed the trial court order, which had granted a new trial for counsel's misconduct and the jury's passion and prejudice.

The standard of review searching for "some credible evidence" does *not* apply where the grounds for new trial are attorney misconduct and passion or prejudice of the jury under Civil Rule 59(A)(2) or (4). Where misconduct or passion or prejudice are present, it is not a *lack* of evidence to support the verdict, but rather the jury's inability to *weigh* the evidence fairly that mandates a new trial. In the words of a sister state supreme court, "[W]here it appears that one of the parties was prevented from receiving a fair trial by improper argument in summation, the question of whether substantial evidence supports the verdict in spite of the oral argument does not arise," because "[t]he acid of the improper argument" has the effect of "[e]at[ing] away" the record evidence. *Benson v. Heritage Inn, Inc.* (Mont. 1998), 971 P.2d 1227, 1231. Accordingly, a proper appellate analysis considers not whether the verdict had evidentiary support, but

[7] Indeed, the standard applied by the Court of Appeals may apply only to manifest weight appeals from *bench trial* judgments. (See Merit Brief of Mt. Sinai Medical Center at 14 to 15.)

whether the trial court abused its discretion in assessing counsel's misconduct and the jury's passion or prejudice that may have prevented the jury from basing its verdict solely on the admitted evidence. See, e.g., *Larrissey v. Norwalk Truck Lines, Inc.* (1951), 155 Ohio St. 207, 222 (question of passion or prejudice is "solely one for the exercise of the discretion of the trial court"). As this Court has explained, an "abuse of discretion" in the context of sustaining a motion for a new trial "connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." *Steiner v. Custer* (1940), 137 Ohio St. 448, paragraph 2 of the syllabus.

Although briefly mentioning an abuse of discretion standard, the Court of Appeals majority nowhere actually applied that standard or explained why the trial judge's finding of misconduct and passion or prejudice was "unreasonable, arbitrary, or unconscionable." Instead, the Court of Appeals' reasoning turned entirely on its repeated conclusions that the liability verdict was supported by competent evidence. (Majority App. Op. at 10, 12, Appx. 15, 17.)

The majority thus focused on an inappropriate question and gave insufficient respect to the conclusions of the judge who actually tried the case. This Court has explained that "the *trial judge* [is] in the best position to determine whether the award . . . was . . . influenced by passion and prejudice." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 655 (emphasis in original). On review of a new trial order, the record is viewed in favor of the trial court's action because the trial judge personally observed "the surrounding circumstances and atmosphere of the trial." *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 94. "[I]f 'there is room for doubt, whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party'" at trial. *Pesek v. Univ. Neurologists Assn.* (2000), 87 Ohio St.3d 495, 502 (quoting *Warder, Bushnell & Glessner Co. v.*

Jacobs (1898), 58 Ohio St. 77, 85). The existence of "some credible evidence" supporting the verdict is entirely irrelevant.

Here, Judge Lawther sat through the entire three-week trial. He heard and saw the opening statements, witness examinations, objections, and closing arguments exactly as the jury heard and saw them. In the end, he determined that Mr. Fieger's misconduct had inflamed the jury's passions and prejudices and caused them to render "a clearly unjustified verdict." (R.504, Judgment Entry at 8, Appx 80.) There is simply too much support in the record for Judge Lawther's determination for a reviewing court to find his decision "unreasonable, arbitrary, or unconscionable." If there is so much as a question whether the verdict was tainted, this Court's precedent requires resolving that question in favor of Defendants and deferring to Judge Lawther's judgment. This Court should reverse the Court of Appeals' ruling that set aside the new trial order.

Proposition of Law No. 3: When the jury renders an excessive verdict after hearing surprise testimony suggesting damages exceeding those supported by plaintiff's expert reports, and after a trial and closing argument pervaded by attacks on the defendants and appeals to religion, race and economics, a trial judge does not abuse his discretion by concluding that the verdict is influenced by passion or prejudice requiring a new trial rather than remittitur.

A. The Jury Awarded Excessive Damages Under The Influence Of Passion And Prejudice.

A trial judge may order a new trial where the jury awards "[e]xcessive . . . damages, appearing to have been given under the influence of passion or prejudice." Civ.R. 59(A)(4). "In determining whether passion or prejudice influenced a jury's award, a reviewing court must consider the amount of the award and whether the damages were induced by (1) incompetent evidence, (2) misconduct by the court or counsel at trial, or (3) any other action at trial that may reasonably be said to have swayed the jury." *Shelton v. Greater Cleveland Reg'l Transit Auth.* (1989), 65 Ohio App.3d 665, 682. Judge Lawther correctly determined that all three of these

factors were present at trial and influenced the jury's award of both economic and non-economic damages.

When reviewing an order granting a new trial on the ground of excessive damages motivated by sympathy or prejudice, the reviewing court examines "the evidence favorably to the trial court's action, rather than to the original jury verdict." *Krejci v. Halak* (1986), 34 Ohio App.3d 1, 4. The Court of Appeals affirmed the trial court on this issue and ordered remand for the trial court to consider remittitur, a holding Plaintiff has not challenged. The Court of Appeals majority erred, however, by not requiring a new trial. When a damage award is tainted by lawyer misconduct and jury passion and prejudice, that error cannot be corrected through a judge's later unilateral remittitur. Rather, the court must conduct a new trial to permit an untainted jury to consider the evidence fairly.

1. <u>The Trial Court Erroneously Admitted Incompetent Economic Damages.</u>

Judge Lawther held that he erred in allowing Plaintiff's economist to testify about the cost to provide 24-hour LPN and RN care for Walter Hollins. (R.504, Judgment Entry at 3-4, Appx. 75-76.) Judge Lawther acknowledged that he erroneously overruled the Defendants' objections when "Dr. Rosen was about to give testimony on estimates as to the cost of care which were not covered in his report, and to put a figure on the level of care that no doctor or other expert had recommended." (Id. at 4, Appx. 76.) "No witness testified that Walter will ever need the care of a Registered Nurse or Licensed Practical Nurse." (Id.) Judge Lawther correctly observed that, if he had sustained the Defendants' objection, "the jury would not have heard very damaging testimony and medically unsupported figures which were presented by surprise" (id.) and that tie directly to the amount of economic damages the jury awarded. The Court of Appeals unanimously affirmed that holding, and Plaintiff has not appealed.

Plaintiff's economist, Dr. Rosen, develops formulas for calculating the amount of a fund needed to cover a specified cost of service over time; he can "plug that opinion into any number . . . relative to the medical care and costs in this case and come up with an end figure with regard to costs over a life expectancy . . . ." (Jt. Supp. 2287, Tr. 1506.) In this case, the "medical care and costs" that he "plug[ged] in" were provided by the life care planner, George Cyphers. (Jt. Supp. 2302-03, Tr. 1521 -22.)

Cyphers prepared a care plan for Hollins, after consulting with Plaintiff's other expert witnesses and Hollins' own treating doctor, that did not require RN or LPN care. (Appx. 438-73.) On cross-examination, Cyphers confirmed that 24-hour RN or LPN care for Walter Hollins was "never discussed," much less recommended, by his physicians:

> Q. [A]t any time when you had discussions or communications with Dr. Gabriel or Dr. Wiznitzer, did they say Walter Hollins needed 24-hour RN care or LPN care?
>
> A. No. There was no discussion of that at all.
>
> * * * *
>
> Q. And they knew they were discussing that with you for your development of a life care plan in this case?
>
> A. Yes.

(Jt. Supp. 1735-36, Tr. 962-63.) Plaintiff's medical experts agreed that the $18 per hour attended care that Cyphers' life care plan called for was "appropriate in terms of [Hollins'] needs." (Jt. Supp. 1337, Tr. 568.)

Absent testimony from any witness that Hollins required RN or LPN care, Dr. Rosen's calculation of $14,295,993 for 24-hour LPN and RN care for Hollins – an amount remarkably close to the $15,000,000 the jury awarded – lacked the requisite foundation. Courts from across this state and others agree that unsupported economic damages awarded in medical cases cannot

stand. See, e.g., *Cahill v. Anderson* (June 22, 2000), 10th Dist. No. 99AP-785, 2000 WL 796573, at *3 (setting aside judgment awarding medical costs to plaintiff where "no expert testimony was presented to indicate . . . that the treatment was necessary") (Appx. 91-93); *Jordan v. Elex, Inc.* (1992), 82 Ohio App.3d 222, 230-31 (affirming exclusion of economist's testimony that was not supported by competent medical testimony). Accord *St. Clair v. County of Grant* (N.M. Ct. App. 1990), 797 P.2d 993, 1003 ("[I]t is improper to award an hourly amount for nursing services equivalent to that normally received by a registered nurse or LPN, unless there is expert medical testimony concerning the necessity for providing that specific type of care.").

The jury's economic damages not only include costs that no witness said were medically necessary; they also were based on surprise testimony not previously disclosed as required by court rules. Ohio Civil Rule 26(E) and Cuyahoga County Common Pleas Court Local Rule 21.1(B) required Plaintiff to disclose any changes to his expert witnesses' expected trial testimony. Here, none of the life care plan reports submitted by George Cyphers included LPN or RN care for Mr. Hollins. None of the reports by Dr. Rosen included an opinion regarding the costs required to provide Hollins with lifetime, 24-hour LPN or RN care. Rosen's "new" opinion offered at trial that doubled or tripled the economic damages stated in Rosen's final expert report therefore should have been excluded. *Walker v. Holland* (1997), 117 Ohio App.3d 775, 786-87 (holding that expert medical opinion developed over weekend before trial testimony was not a mere "nuance" of prior deposition testimony and was properly excluded).

The improperly admitted surprise evidence at trial, which doubled or tripled the claimed economic damages, severely prejudiced Defendants. Defendants had relied on Plaintiff's experts' pretrial reports and depositions in deciding it was not necessary to retain their own life

care planner or economist. See *Wimmers v. Camacho* (July 27, 1993), 2d Dist. No. 13272, 1993 WL 295081, at *7 (expert testimony was properly excluded; had defendants been informed of the plaintiff's expert's opinion in a timely fashion, they "may well have sought an additional expert for themselves to testify") (Appx. 94-109). This prejudice was enhanced by Plaintiff's counsel's closing argument to the jury that it *must* award $14,295,993 for future care because Defendants had offered no contrary evidence:

> [T]he defendants have not presented a scintilla of evidence. If the defendants' attorneys stand up here and dispute any of the evidence here, they are making it up because they had an opportunity to present witnesses who said this isn't what he needs. . . . [T]hey've utterly and completely failed to do that. Why? Because this is an absolute truism. This is what it is. There is no evidence other than the evidence we've presented. There's no other evidence on what it will take to care for Walter . . . .

(Jt. Supp. 3013, Tr. 2223.)

Plaintiff's economist calculated Walter Hollins' lifetime care expenses based on care that no medical expert said was needed and that was not included in any expert's pretrial report (including his own). Judge Lawther properly concluded that his failure to sustain Defendants' objections to that testimony constituted prejudicial error requiring a new trial. That conclusion was not an abuse of discretion.

2. Defendants Preserved The Error By Objecting Appropriately.

Defense counsel objected when Dr. Gabriel testified about previously undisclosed costs for care theoretically available to Walter Hollins. (Jt. Supp. 1337, Tr. 568.) The Trial Court, however, did not rule on the objection, which became moot when Dr. Gabriel promptly qualified that testimony by confirming that the life care plan prepared by Cyphers – which did not call for Mr. Hollins to receive this available care – was "appropriate in terms of [Hollins'] needs." (Id.) Defense counsel objected again when Plaintiff asked Cyphers to make new calculations based

upon Dr. Gabriel's trial testimony of attended care at $15 to $25 an hour. The Trial Court *sustained* this objection because these costs were not found in Cyphers' report. (Jt. Supp. 1715-16, Tr. 942-43):

> Q. Doctor, were you also asked to consider the testimony that had actually been given in court?
>
> A. Yes.
>
> Q. What were you asked to consider with regard to that?
>
> A. I was asked to consider that care would be provided to Walter on a continuum between 15 and $25 per hour.
>
> Q. What was your understanding of where that evidence had been provided to the court and jury?
>
> A. I was informed that that's what Dr. Gabriel suggested.
>
> MR. LONGBRAKE: Objection, your Honor.
>
> THE COURT: Sustained.
>
> Q. In fact, but that is what Dr. Gabriel –
>
> THE COURT: Didn't I just sustain the objection over here?
>
> MR. FIEGER: This is the testimony in trial, Judge. He's acting as if we're – did I try this case a year ago? Nobody tried the case.
>
> THE COURT: You are limited to the report he's already provided you. Go ahead, please.

Plaintiff's counsel then shifted to asking Cyphers what different levels of care are theoretically "available," and Cyphers testified as to what levels "can be provided" – not what levels were necessary or recommended for Mr. Hollins. (Jt. Supp. 1716-17, Tr. 943-44.) Defendants did not need to object to that testimony to preserve their objections to any testimony or verdict that assumed Walter Hollins actually *needs* 24-hour LPN or RN care, or that such care was actually recommended by his physicians.

When Plaintiff's counsel asked the economist, Rosen, to calculate the future cost of Hollins' care based on 24-hour LPN and RN care, Defendants vigorously objected and moved to strike the evidence. (Jt. Supp. 2301-02, Tr. 1520-21.) The Trial Court overruled the objections and motion to strike. (Id.) This objected-to testimony putting Hollins' future medical care expenses at nearly $15,000,000 is the very testimony that Judge Lawther held should have been excluded and contributed to the jury's excessive damages. (R.504, Judgment Entry at 3-5, Appx. 75-77.) The Court of Appeals unanimously *affirmed* that decision.

3. Mr. Fieger Inflamed The Jury Based On The Inadmissible Evidence Of Economic Damages.

Judge Lawther correctly concluded that the $15 million award for economic damages was the product of passion and prejudice. Plaintiff's counsel repeatedly argued that Walter Hollins was entitled not to the type of care supported by medical evidence but to the "best possible" and "very best" care: "[N]ow they owe him access to the best care available . . . . He needs the best care you can offer him from RN's or LPN's. He deserves the best." (Jt. Supp. 3009, Tr. 2219; see, also, e.g., Jt. Supp. 3017, Tr. 2227 ("As testified to by the life care planner, by the needs specified by doctors which you heard on the stand, the medical care requires lifelong for an RN home attendant care . . . as Dr. Rosen indicated, $14,295,993."); Jt. Supp. 1332, Tr. 563 (objection overruled); Jt. Supp. 1633, Tr. 860; Jt. Supp. 1717-18, Tr. 944-45; Jt. Supp. 2338-39, Tr. 1557-58; Jt. Supp. 3012-13, Tr. 2222-23.)

Arguing that a jury should award "the very best" care instead of medically necessary care taints the resulting award with passion and prejudice and requires a new trial. For example, in *Velocity Express Mid-Atlantic, Inc. v. Hugen* (Va. 2003), 585 S.E.2d 557, the plaintiff argued that the jury should not award 24-hour LPN *or* nurse's aide care (as recommended, respectively, by the plaintiff's and defense experts), but should award *both*, because that is what the world's

richest people would have. This closing argument was held to be improper, requiring a new trial, because it "asked the jury to award damages to the plaintiff so that he could afford the same quality of medical care and treatment that the world's richest individuals might purchase for themselves. The law . . . , however, only requires that a jury award plaintiff compensatory damages that will fairly compensate him for his injuries proximately caused by defendant's negligence." Id. at 564. Arguing for the very best care money can buy is improper because it appeals "to the economic fears and passions of a jury" and is based on "irrelevant economic considerations." *Id.* at 563-64.

Here, the prejudice is even more apparent: Plaintiff's own life-care planner admitted that *no physician* ever recommended 24-hour RN or LPN care. Mr. Fieger nevertheless repeatedly argued to the jury that Walter Hollins "deserves" and "needs" the "best possible care," and that the "best possible care" is RN and LPN care.

Moreover, in *Velocity*, the prejudice was further enhanced by counsel's improper "Golden Rule" argument – "[I]f you were responsible for someone, who would you want there?" 585 S.E.2d at 562, 564-65. Mr. Fieger made a similar argument here: "Whatever you do to the least of my brothers, that you do unto me." (Jt. Supp. 2950, Tr. 2160; see, also, Jt. Supp. 3006, Tr. 2216 ("We will all some day stand naked before the Lord. Whatever you do to the least of my brothers, that you do unto me.").) This improper argument based on inadmissible evidence relating to economic damages inflamed the jury.

4. Counsel's Misconduct Also Inflamed The Jury To Award Excessive Non-Economic Damages.

Judge Lawther correctly held that the jury's award of non-economic damages was excessive, resulting from passion and prejudice. The inherently subjective nature of non-economic damages does not remove them from judicial oversight, especially when the verdict is

tainted by passion and prejudice. See, e.g., *Keller v. Monarch Rubber Co.* (1941), 35 Ohio L.Abs. 380, 381 ("When the court found that the verdict was based largely upon sympathy for the plaintiff, it found that the verdict had been rendered as a result of prejudice. . . . The presence and influence of passion or prejudice, in producing the excess, vitiates the verdict in toto[.]"). To the contrary, the subjective nature of such damages – and their inherent susceptibility to inflation by the jury's passion and prejudice – requires the utmost deference to a trial court's determination, based on directly observing the trial, that the jury's non-economic damage award was improperly influenced by attorney misconduct.

The type of conscientious analysis performed by Judge Lawther ensures the fair operation of our system of civil justice. Judge Lawther carefully considered the evidence regarding Walter Hollins' physical, mental, and emotional condition. This included evidence introduced by Plaintiff that (1) Walter Hollins has the mental capacity of a one-year-old (Jt. Supp. 1581, Tr. 808); (2) he is "hardly ever sad and he's bubbly, and if you feed him, he will really be a good boy for you" (Jt. Supp. 2249, Tr. 1470); (3) although the beginning of his life was uncomfortable, "he doesn't cry anymore" (Jt. Supp. 2346, Tr. 1565); (4) he has a "great personality these days. He's silly. He's always laughing, always hungry" (id.); and (5) he interacts with other children "pretty well." (Jt. Supp. 2353, Tr. 1572.) Judge Lawther observed that "[t]here was no evidence that Walter suffers regular, continuing pain." (R.504, Judgment Entry at 6, Appx. 78.)

Judge Lawther correctly observed that "[a]ny jury would have difficulty in fairly and accurately awarding money damages for the[ ] elements of [Mr. Hollins'] cerebral palsy." (Id.) "Returning a verdict of $15,000,000 for non-economic loss[, however,] shows that the jury simply lost its way, and ignored the Court's charge on the law." (Id. at 8, Appx. 80.)

Here, the jury appears to have simply doubled the award of economic damages (which itself was the product of trial court error), without regard to the evidence. (See Id. at 7, Appx. 79.) That award is arbitrary. Judge Lawther noted that "an award of $3,000,000, for example, invested at 5%, would produce $150,000 per year without any reduction in principal. Such income should be sufficient to provide wonderful facilities for [Walter Hollins'] comfort and for recreational opportunities, over and above the medical and custodial care provided by the economic damage portion of the verdict." (See id.)

Judge Lawther's analysis is the very same endorsed by this Court in *Jones v. Macedonia-Northfield Banking Co.* There, the Court analyzed the size of the annuity that the plaintiff could obtain with the verdict amount, concluding that "[t]his annual income, properly husbanded[,] would be large enough to enable [plaintiff] to live through life without work and rear an averaged sized family. It must strike the reasonable mind that the amount of the verdict is grossly out of proportion to the loss actually sustained." 132 Ohio St. at 352.

An excessive verdict "coupled with [ ] repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice . . . ." *Guccione v. Hustler Magazine, Inc.* (Oct. 8, 1991), 10th Dist. No. 80-AP375, 1981 WL 3516, at *20 (Appx. 110-25). Here, the closing argument by Plaintiff's counsel, Geoffrey Fieger, standing alone, amply supports Judge Lawther's conclusion that the excessive, arbitrary award was the result of passion and prejudice.

"'The sole purpose of closing argument is to assist the jury in analyzing, evaluating and applying the evidence.'" *State v. Merrill* (1984), 22 Ohio App.3d 119, 124 (quoting *United States v. Dorr* (C.A. 5 1981), 636 F.2d 117, 120). The jury's verdict is to be based on "its application of the law as instructed by the court to [the] evidence presented . . . ." *State v. Jones*,

8th Dist. No. 80737, 2002-Ohio-6045 at ¶ 100. Judge Lawther correctly held that Plaintiff's counsel's misconduct improperly influenced the jury and "achieve[d] a clearly unjustified verdict." (R.504, Judgment Entry at 8, Appx. 80); see, also, id. at 9, Appx. 81 ("his trial technique . . . was designed to manipulate and mislead the jury"); id. at 10, Appx. 82 ("the attorney's 'message' . . . was simply to appeal to the passion and prejudice of the jury").) The tainted verdict mandated a new trial by both Rule (Civ.R. 59(A)) and common law (*Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391 (excessive verdict tainted by passion and prejudice can be cured only by granting a new trial)).

B. Remittitur Is Not An Appropriate Remedy.

The Court of Appeals majority agreed with the trial court that the jury's damage award was excessive, but concluded that this error could be corrected by remittitur. Although remittitur can be a proper judicial tool, it is appropriate only where "the verdict is not influenced by passion or prejudice . . . ." See, e.g., *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77. Where an excessive verdict was "rendered under the influence of passion and prejudice, [the Court] has no alternative except to set it aside and grant a new trial." *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, 290. Where a verdict is given under the influence of passion or prejudice, the law will not "substitute the opinion of the court" on consideration of remittitur "for that of the twelve triers provided by the constitution" in a new trial. *Pendleton St. RR. v. Rahmann* (1872), 22 Ohio St. 446, 449; see also 90 Ohio Jur. 3d (2005) 321, Trial § 641 (a verdict influenced by passion or prejudice "is not the verdict of an impartial jury, to which the parties are entitled, but that of a perverse jury, and hence, in law, no verdict").

Given the importance of ensuring the constitutionally guaranteed jury determination, courts must vigilantly strike down verdicts influenced by passion or prejudice. "[I]f there is room for doubt, whether the verdict was rendered upon the evidence, or may have been

influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party." *Pesek*, 86 Ohio St. 3d at 502 (internal quotation marks omitted). In *Book*, where the plaintiff's liability was a "close question," as evidenced by the jury's "10 to 2 vote," the Court held that, "[i]n a case where the factual questions to be determined are so apparently in near equipoise the incidents of a trial which tend to arouse passion or prejudice should be closely scrutinized." 154 Ohio St. at 403.

Here, as in *Book*, liability was hotly contested, with the closeness of the evidence illustrated by the jury's 6 to 2 vote. Yet rather than viewing that as a reason to closely scrutinize potential passion or prejudice, the Court of Appeals majority somehow took the view that, because Defendants did not "challenge in this appeal . . . the jury's finding of liability," remittitur would adequately cure the excessive damages. (See Majority App. Op. at 10, 12, 14, Appx. 15, 17, 19.) This reasoning was flawed. Judge Lawther *granted* Defendants' new trial motion (on liability and damages), and the appellate court was ruling on *Plaintiff's* appeal seeking to *reverse* that ruling. Defendants had no standing (and no reason) to appeal the new trial order. See, e.g., *In re Guardianship of Love* (1969), 19 Ohio St.2d 111, 113 ("[I]n Ohio . . . an appeal lies only on behalf of a party aggrieved. Such party must . . . ha[ve] been prejudiced by the judgment of the lower court.").

Moreover, Defendants plainly did put liability at issue, not only by raising the issues of misconduct and passion or prejudice on which the trial court relied, but also by advancing a weight-of-the-evidence argument in their new trial motion in the trial court. In ordering new trial, Judge Lawther agreed that the grounds Defendants raised in their new trial motion relating specifically to liability "have merit," "especially with respect to the issues of negligence and proximate cause." (R.504, Judgment Entry at 13, Appx. 85.) Judge Lawther simply did "not

attempt to deal with all of the issues raised by the parties" because the grounds he discussed in his order "more than justif[y] the conclusion that a new trial must be granted." (Id.) On appeal, Defendants emphasized the diametrically opposed evidence and the closeness of the jury's liability verdict (see Dissent App. Op. at 7, Appx. 34), and expressly urged that if the Court of Appeals did not affirm Judge Lawther's new trial order "on the grounds discussed therein, then it should remand this case so the Trial Court can fully consider those additional grounds," which included liability issues. (Id. at 8, Appx. 35.) The majority's view that remittitur was appropriate because liability was not at issue was thus mistaken, as the dissent recognized. (Id. at 7-8, Appx. 34-35.)

Nor is the use of remittitur in this case consistent with this Court's precedents. This Court has instructed that "to determine whether an excessive verdict" was influenced by passion or prejudice, it is the "duty of a reviewing court . . . to ascertain whether the record discloses that the excessive damages returned were induced by (a) admission of incompetent evidence, or (b) by misconduct on the part of the court or counsel, or (c) whether the record discloses any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should be awarded." *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, 569.

The *Fromson* standard provides overwhelming support for the trial judge's finding of passion or prejudice, based both on the admission of incompetent evidence and misconduct by counsel. As even the Court of Appeals majority recognized, "expert testimony was introduced that was based on 'assumptions' and went beyond the calculations provided in the expert reports." (Majority App. Op. at 13, Appx. 18.) Plaintiff's counsel was allowed to ask witnesses about the "very best care money can buy" rather than medically necessary care, and witnesses

were allowed to testify regarding the high cost of RN and LPN care that no witness had deemed medically necessary. That testimony tripled the costs for lifetime care contained in Plaintiff's expert reports. (R.504, Judgment Entry at 4, Appx. 76.) The new trial order explained that admission of the testimony "was error," and if it had been excluded, "the jury would not have heard very damaging testimony and medically unsupported figures which were presented by surprise." (Id.)

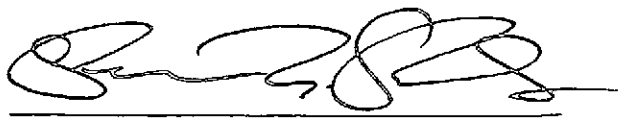
The cause of Walter Hollins' injuries was sharply disputed. Expert witnesses presented "diametrically opposed" opinions regarding that cause. The only judge to sit through the trial noted that the jury's task to determine causation was "difficult," and that, based upon the evidence, "[t]his was clearly a 'close call.'" (Id. at 2, Appx. 74.) The jury confirmed this assessment with its split vote. This Court's settled authority requires that, if there is even a question whether the jury's verdict – either in finding liability or awarding damages – was influenced by passion or prejudice, a new trial must be held. Remittitur cannot be used in these circumstances to try to mitigate the harm done to Defendants and the integrity of the judicial process. The Court should reverse the Court of Appeals' ruling and reinstate the new trial order.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals' majority and reinstate the Trial Court's order granting a new trial.

DATED: December 1, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellants Northeast Ohio Neighborhood Health Services, Inc. and Ronald Jordan, M.D. was served by ordinary U.S. mail, postage prepaid, upon Jack Beam, Esq., BEAM & RAYMOND ASSOCIATES, 2770 Arapaho Road, Suite 132, PMB 135, Lafayette, Colorado 80026, Andrew S. Muth, Esq., MUTH & SHAPERO, L.C., Society Bank Building, 301 W. Michigan Avenue, Suite 302, Ypsilanti, Michigan 48197, Geoffrey Fieger, Esq., FIEGER FIEGER KENNEY & JOHNSON, 19390 W. Ten Mile Road, Southfield, Michigan 48075, and Sandra J. Rosenthal, Esq., 75 Public Square, Suite 1300, Cleveland, Ohio 44113, attorneys for plaintiff-appellee, upon Irene C. Keyse-Walker, Esq., TUCKER ELLIS & WEST LLP, 925 Euclid Avenue, Suite 1150, Cleveland, Ohio 44115 and Marc W. Groedel, Esq., and Marilena DiSilvio, Esq., REMINGER & REMINGER CO., L.P.A., 1400 Midland Building, 101 Prospect Avenue, W., Cleveland, Ohio 44115, attorneys for Mt. Sinai Medical Center, upon Lori Fuhrer, Esq., KEGLER BROWN HILL & RITTER, Capitol Square, Suite 1800, 65 East State Street, Columbus, Ohio 43215-2494, attorney for *amicus curiae* Ohio Association for Community Health Centers, and upon Anne Marie Sferra, Esq., BRICKER & ECKLER LLP, 100 South Third Street, Columbus, Ohio 43215, attorney for *amici curiae* Ohio Hospital Association, Ohio State Medical Association, and American Medical Association, on this 1st day of December, 2006.

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IN THE SUPREME COURT OF OHIO

Marc McLeod, Guardian of the Estate of Walter Hollins, **Appellee,** **v.** **Mt. Sinai Medical Center, et al.,** **Appellants.**	**Case No. 06-1247** **On Appeal From the Cuyahoga County Court Of Appeals, Eighth Appellate District** **Court of Appeals Case No. 85286**

NOTICE OF APPEAL OF APPELLANTS NORTHEAST OHIO NEIGHBORHOOD HEALTH SERVICES, INC. AND RONALD JORDAN, M.D.

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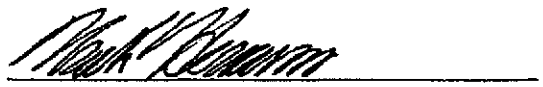
NOTICE OF APPEAL

Appellants Northeast Ohio Neighborhood Health Services, Inc., and Ronald Jordan, M.D., (collectively, "appellants") hereby give notice of appeal to the Ohio Supreme Court from the decision of the Court of Appeals, Eighth District, County of Cuyahoga, in *Marc McLeod, Guardian of the Estate of Walter Hollins v. Mt. Sinai Medical Center, et al.*, Court of Appeals Case No. 85286, announced on May 4, 2006 and journalized May 15, 2006.

Appellants submit (i) that the case involves both a substantial constitutional question and issues of public or great general interest and (ii) that the decision of the Court of Appeals should be reversed.

Dated: June 29, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Appellants Northeast Ohio Neighborhood Health Services, Inc. and Ronald Jordan, M.D. was served by ordinary U.S. mail, postage prepaid, upon Jack Beam, Esq., BEAM & RAYMOND ASSOCIATES, 2770 Arapaho Road, Suite 132, PMB 135, Lafayette, Colorado 80026, Andrew S. Muth, Esq., MUTH & SHAPERO, L.C., Society Bank Building, 301 W. Michigan Avenue, Suite 302, Ypsilanti, Michigan 48197, Geoffrey Fieger, Esq., FIEGER FIEGER KENNEY & JOHNSON, 19390 W. Ten Mile Road, Southfield, Michigan 48075, and Sandra J. Rosenthal, Esq., 75 Public Square, Suite 1300, Cleveland, Ohio 44113, attorneys for plaintiff-appellee, and upon Irene C. Keyse-Walker, Esq., TUCKER ELLIS & WEST LLP, 925 Euclid Avenue, Suite 1150, Cleveland, Ohio 44115 and Marc W. Groedel, Esq., and Marilena DiSilvio, Esq., REMINGER & REMINGER CO., L.P.A., 1400 Midland Building, 101 Prospect Avenue, W., Cleveland, Ohio 44115, attorneys for Mt. Sinai Medical Center, on this 29th day of June, 2006.

ONE OF THE ATTORNEYS FOR APPELLANTS

MAY 15 2006

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

Nos. 85286, 85574 and 85605

MARK A. McLEOD, GUARDIAN, ETC. Plaintiff-appellant and cross-appellee	:	JOURNAL ENTRY
	:	AND
vs.	:	OPINION
MT. SINAI MEDICAL CENTER, ET AL. Defendants-appellees and cross-appellants	:	
DATE OF ANNOUNCEMENT OF DECISION	:	MAY 4, 2006
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court Case No. CV-484240
JUDGMENT	:	AFFIRMED IN PART, VACATED IN PART, REVERSED AND REMANDED IN PART.
DATE OF JOURNALIZATION	:	MAY 15 2006

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FRANK D. CELEBREZZE, JR., P.J.:

Plaintiff-appellant/cross-appellee, Mark A. McLeod (hereafter "plaintiff" or "McLeod"), Guardian of the Estate of Walter Hollins, initiates this appeal to reinstate the original jury verdict and award in this medical malpractice lawsuit. After a thorough review of the record and the arguments of the parties, we ultimately reverse the trial court's order granting a new trial and remand the matter for consideration of remittitur of damages and prejudgment interest.

This medical malpractice action stems from the events surrounding the birth of Walter Hollins (hereafter "Hollins"). On January 29, 1987, Hollins was born via Cesarean section at the former Mt. Sinai Hospital in Cleveland. Hollins, an intra-uterine growth retarded ("IUGR") baby, was born with the lifelong debilitating condition of cerebral palsy and severe retardation. At the time of Hollins' birth, a Cesarean section was ordered because of fetal distress. Once the procedure was ordered, it took approximately two hours to deliver baby Hollins. The record also indicates that Hollins experienced some degree of asphyxia at birth.

In 1998, plaintiff filed suit alleging medically negligent prenatal and postnatal care resulting in Hollins' condition. The complaint was specifically brought against Dr. Ronald Jordan, the physician who performed the Cesarean section, and his employer,

Northeast Ohio Neighborhood Health Services, Inc. The complaint also included co-defendant Mt. Sinai Hospital, the facility where the Cesarean section took place. In addition, the complaint included a claim of spoliation of medical records.

The case was originally assigned to the regular common pleas docket, but was eventually reassigned to a visiting judge. A jury trial began on May 4, 2004 with causation of Hollins' infirmities at the core of the contested issues. While plaintiff maintained that Hollins' condition was a direct result of medical malpractice, the defense attributed causation to placental insufficiency throughout Hollins' development in utero and through no fault of medical treatment.

On May 24, 2004, the jury returned a verdict for the plaintiff and entered an award of $30 million -- $15 million in economic damages and $15 million in noneconomic damages.

In response, the defense filed motions for judgment notwithstanding the verdict ("JNOV"), for a new trial or, in the alternative, for remittitur. In August 2004, the trial court granted defendants' motion for a new trial. On September 8, 2004, plaintiff filed an affidavit of disqualification of the visiting judge, followed by a Civ.R. 60(B) motion for relief from order. The visiting judge subsequently recused himself.

On September 20, 2004, a hearing was held before a newly assigned common pleas judge on plaintiff's Civ.R. 60(B) motion for

relief. Prior to any ruling, plaintiff filed an appeal challenging the granting of a new trial (Cuy. App. No. 85286). Cross-appeals were also made. This court remanded the matter for a ruling on the pending Civ.R. 60(B) motion for relief. On November 19, 2004, the lower court granted plaintiff's motion for relief and ordered the jury verdict and award to be reinstated.

Defendants subsequently filed notices of appeal from the granting of plaintiff's Civ.R. 60(B) motion for relief (Cuy. App. Nos. 85574 and 85605). All three appeals (Cuy. App. No. 85286 by plaintiff and Cuy. App. Nos. 85574 and 85605 by defendants) have been consolidated and will be disposed of by this opinion.[1]

There are two main issues in this appeal: (1) should the lower court have granted plaintiff's Civ.R. 60(B) motion for relief; and, if not, (2) should the trial court's order for a new trial be upheld. The remaining issues to be addressed include: (1) Mt. Sinai's cross-appeal of the trial court's denial of their motions for directed verdict and JNOV; (2) the directed verdict against plaintiff's claims of spoliation and/or punitive damages; and (3) plaintiff's motion for prejudgment interest. We will address each issue accordingly.

THE GRANTING OF PLAINTIFF'S RULE 60(B) MOTION

Civil Rule 60(B) reads in pertinent part:

---

[1] See Appendix A for the specific assignments of error cited in the appeal and cross-appeals.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: *** (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; *** or (5) any other reason justifying relief from the judgment."

To prevail on a motion under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

In granting the Civ.R. 60(B) motion for relief, the lower court articulated its fundamental disagreement with the trial court's granting of a new trial. The lower court argued that the trial court improperly imposed its opinion over the findings of the jury in ordering a new trial. Therefore, the lower court took the opportunity to overrule the order for a new trial by granting plaintiff's Civ.R. 60(B) motion for relief. Ordinarily "a motion for relief from judgment under Civ.R. 60(B) is discretionary with the trial court; and, in the absence of a clear showing of abuse of

discretion, the trial court's decision should not be disturbed on appeal." *Wiley v. National Garages, Inc.* (1984), 22 Ohio App.3d 57.

However, this court has further held that a Civ.R. 60(B) motion may not be used as a substitute for a direct appeal. *Manigault v. Ford Motor Corp.* (1999), 134 Ohio App.3d 402, 731 N.E.2d 236; citing *Doe v. Trumbull Cty. Children Svcs. Bd.* (1986), 28 Ohio St.3d 128, 502 N.E.2d 605; *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 63, 558 N.E.2d 1178; *Justice v. Lutheran Social Services of Central Ohio* (1992), 79 Ohio App.3d 439, 442, 607 N.E.2d 537. "*** Civ.R. 60(B) is not a viable means to attack legal errors made by a trial court; rather, it permits a court to grant relief when the factual circumstances relating to a judgment are shown to be materially different from the circumstances at the time of the judgment. See, *Kay v. Marc Glassman Inc.* (Feb. 1, 1995), Summit App. No. 16726, unreported ***. Civ.R. 60(B) relief *** thus cannot be used to challenge the correctness of the trial court's decision on the merits." *Anderson v. Garrick* (1995), Cuy. App. No. 68244., pp. 13-14.

Our review now becomes de novo: "Although the trial court's ruling on a Civ.R. 60(B) motion is usually subject to an abuse of discretion standard of review, we conclude that overruling a Civ. R. 60(B) motion for the reason that it is improperly used as a

substitute for appeal presents an issue of law." *Ford Motor Credit Co. v. Cunningham*, Montgomery Cty. No. 20341, 2004-Ohio-6226.

We find plaintiff's Rule 60(B) motion for relief in this case to be an improper attempt at an appeal. A comparison of the arguments raised by plaintiffs in opposition to the motion for a new trial and those made in support of the motion for 60(B) relief shows that they are nearly identical. This illustrates that a direct appeal was the appropriate forum to reassert plaintiff's contentions rather than a motion for relief. Furthermore, the lower court's granting of Civ.R. 60(B) relief was based upon a determination that the order for a new trial was incorrect on the merits. The opinion and order granting Civ.R. 60(B) relief is completely void of any citation to extraordinary circumstances that would justify the granting of Civ.R. 60(B) relief. We, therefore, vacate the granting of plaintiff's Civ.R. 60(B) motion.

THE GRANTING OF DEFENSE'S MOTION FOR NEW TRIAL

With the lower court's order for relief vacated, we now turn to the trial court's order for a new trial, which stated:

"Civil Rule 59(A) permits the granting of a new trial upon various grounds, including the following, which do apply in this case:

"Irregularity in the proceedings *** by which an aggrieved party was prevented from having a fair trial.

"Misconduct of the jury or prevailing party.

"Accident or surprise which ordinarily prudence could not have guarded against.

"Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

"Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

"In addition, a new trial may also be granted in the sound discretion of the court for good cause shown.

"The Court believes that the major grounds for relief set forth by Defendants are (1) the award of excessive damages given under the influence of passion and prejudice, (2) the misconduct of Plaintiff's counsel throughout the trial, and (3) irregularity in the proceedings which prevented a fair trial." (Journal Entry and Opinion on Defendants' Motions for New Trial, JNOV, or Remittitur, p. 3.)

Through its journal entry, the trial court attempts to explain its reasons for granting a new trial, finding that the award was excessive and due to a passion influenced jury; that plaintiff's trial attorney displayed continuous misconduct throughout the trial; and that there was irregularity in the proceedings due to the court's handling of a newspaper article that potentially could have influenced the jury.

A reviewing court may reverse a trial court if it abused its discretion in ordering a new trial. *Antal v. Olde Worlde Products*

(1984), 9 Ohio St.3d 144, 145. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. The high abuse of discretion standard defers to the trial court because the trial court's ruling may require an evaluation of witness credibility which is not apparent from the trial transcript and record. *Schlundt v. Wank* (April 17, 1997), Cuyahoga App. No. 70978. However, so long as the verdict is supported by substantial competent, credible evidence, the jury verdict is presumed to be correct and the trial court must refrain from granting a new trial. Id.

This court finds that the jury verdict in this case was supported by substantial competent, credible evidence; thus, we find error in the trial court's decision to order a new trial. The defense did not contest liability in this appeal, focusing instead on the amount of damages awarded. No assignment of error was raised with respect to liability on cross-appeal. In proving economic damages, plaintiff presented expert testimony giving differing estimates of health care that could be calculated to a range of total damages. The figure for noneconomic damages is also debatable. Thus, while the damage award may be the subject of debate, the record substantially supports plaintiff's argument that the trial court abused its discretion in granting a new trial by

impairing the traditional function of the jury, substituting its own opinion in place of the jury, and traveling outside of the record to substitute its own opinions when it could find no proper support in the record. (See Brief of Plaintiff-Appellant, p. 16.)

The trial court cites to irregularities in the proceedings in justifying its ruling; however, the flaws cited by the trial court in making its determination do not support the order of a new trial. While the trial court engaged in an ex parte discussion with defense counsel about a Plain Dealer newspaper article and engaged in ex parte communications with the jury, these irregularities were not even objected to by the plaintiff. To grant a new trial on this basis would be to reward a claimed error that was initiated by defense counsel. Moreover, there is no reasonable basis to conclude that these irregularities had a prejudicial effect on the outcome of the trial.

The trial court also claimed that the conduct by plaintiff's counsel was improper and inflammatory and thus warranted a new trial. There is nothing that prohibits counsel from being zealous in their representation. Further, trial counsel should be accorded wide latitude in opening and closing arguments. *Presley v. Hammack*, Jefferson App. No. 02 JE 28, 2003-Ohio-3280. Here, defense counsel did not even object to the claimed improper comments in plaintiff's closing. In addition, defense counsel made

its own questionable comments in the proceedings, including personal attacks.

Only "where gross and abusive conduct occurs, is the trial court sua sponte bound to correct the prejudicial effect of counsel's misconduct." *Pesek v. University Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 501, 2000-Ohio-483. Moreover, counsel's behavior has to be of such a reprehensible and heinous nature that it constitutes prejudice before a court can reverse a judgment because of the behavior. *Hunt v. Crossroads Psychiatric & Psychological Ctr.* (Dec. 6, 2001), Cuyahoga App. No. 79120, citing *Kubiszak v. Rini's Supermarket* (1991), 77 Ohio App.3d 679, 688.

In this case, while the remarks by counsel may have been questionable, they were not so outrageous as to warrant a new trial. Again, there was sufficient evidence to support the jury's verdict. Much of the evidence was not rebutted. Further, there is no challenge in this appeal to the jury's finding of liability. Under these circumstances, we find it to be an abuse of discretion to grant a new trial.

It does appear, however, that the jury's damages award is subject to remittitur. Granting a remittitur is different from granting a new trial. When a damages award is manifestly excessive, but not the result of passion or prejudice, a court has the inherent authority to remit the award to an amount supported by the weight of the evidence. *Wrightman v. Consol. Rail Corp.*, 86

Ohio St.3d 431, 444, 1999-Ohio-119. Four criteria are necessary for a court to order a remittitur: "(1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages." *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, citing *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, paragraph three of the syllabus. Remittitur plays an important role in judicial economy by encouraging an end to litigation rather than a new trial. While an appellate court has the power to order a remittitur, the trial court is in the best position to determine whether a damages award is excessive. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 654-655. If the prevailing party refuses to accept the remittitur, then the court must order a new trial. *Burke v. Athens* (1997), 123 Ohio App.3d 98, 102.

In this case, the record reflects that expert testimony was introduced that was based on "assumptions" and went beyond the calculations provided in the expert reports. Plaintiff does not contest that the maximum amount of economic damages stipulated and admitted into evidence was $12,637,339. Defense counsel raises several objections to the amount of the economic damages award. It also appears that the jury's award of noneconomic damages was influenced by the amount of the economic award, both awards being

$15,000,000. Accordingly, we remand the matter to the trial court for a consideration of the motion for remittitur.

The dissenting opinion takes exception with our ruling on this assignment of error. While it agrees that granting a new trial is not warranted by the cited irregularities, the dissent argues that the trial court's order should be granted because of the excessive damage award and plaintiff's attorney's misconduct. While we agree that plaintiff's attorney does not appear in the transcript to be the most likeable person, we do not find that his conduct rises to the level to justify the granting of a new trial.

In the end, though, the jury -- the body that our system of justice entrusts as the finder of fact -- heard all the evidence and arguments and found the defendants professionally negligent. We find nothing in the record that would lead us to hold that finding to be a product of passion or prejudice.

As to the dissent's concern of excessive damages, any such concern will be best addressed in this court's remand for remittitur. Again, liability was not the focus of the defense's appeal before this court. Their arguments were specific to the amount of damages awarded. Therefore, we find that any concern as to excessive damages will adequately be addressed through remittitur.

MT. SINAI'S CROSS-APPEAL

Mt. Sinai was named a codefendant in this action because of alleged negligence by the hospital's employees and/or agents. Dr. Hatoum, the agent specified in this appeal, was an independent contractor anesthesiologist on staff at Mt. Sinai the day of Hollins' birth. The jury ultimately found Mt. Sinai liable to plaintiff. Mt. Sinai now cross-appeals the denial of their motions for directed verdict and JNOV arguing that Dr. Hatoum was an independent contractor, thus, the hospital cannot be rendered vicariously liable.

"The applicable standard of review to appellate challenges to the overruling of motions for judgment notwithstanding the verdict is identical to that applicable to motions for a directed verdict." *Posin v. ABC Motor Court Hotel* (1976), 45 Ohio St.2d 271, 344 N.E.2d 334; *McKenney v. Hillside Dairy Corp.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291. Such review is de novo. *Goodyear Tire & Rubber v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835.

A motion for a judgment notwithstanding the verdict tests the legal sufficiency of the evidence. *Brooks v. Brost Foundry Co.* (May 3, 1991), Cuyahoga App. No. 58065. "'A review of the trial court's denial of appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict requires a preliminary analysis of the components of the action ***.' *Shore*,

Shirley & Co. v. Kelley (1988), 40 Ohio App.3d 10, 13, 531 N.E.2d 333, 337." *Star Bank Natl. Assn. v. Cirrocumulus Ltd. Partnership* (1997), 121 Ohio App.3d 731, 742-43, 700 N.E.2d 918, citing *McKenney v. Hillside Dairy Co.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291 [***21] and *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511.

A motion for judgment notwithstanding the verdict, as well as directed verdict, should be denied if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. *Posin*, supra at 275. "Conversely, the motion should be granted where the evidence is legally insufficient to support the verdict." Id.

In *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 539 N.E.2d 1114, the court wrote in pertinent part: "The test for granting a directed verdict or judgment n.o.v. is whether the movant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the non-movant." Id. at 172.

Regardless of claims made concerning Dr. Hatoum, it is clear that Mt. Sinai's motions were properly denied. In general, an employer is vicariously liable for the torts of its employees. *Clark v. Southview Hospital* (1994), 68 Ohio St.3d 435. In its case against Mt. Sinai, plaintiff cites to negligence on the part of the nursing staff and other staff members, apart from Dr. Hatoum, that

resulted in plaintiff's injuries. Furthermore, in finding Mt. Sinai liable, the jury gave the following answer to the pertinent interrogatory:

"Mt. Sinai staff did not expedite an urgent C-section, did not properly monitor the fetus during a critical time. As a result of the delay neurological damage occurred."

This finding clearly demonstrates that the issue of Mt. Sinai's liability includes its employees and that reasonable minds can come to differing conclusions as to their liability. Thus, Mt. Sinai should not have been dismissed from this litigation pursuant to either directed verdict or JNOV.

As to Mt. Sinai's liability for the actions of Dr. Hatoum, the law of vicarious liability controls. The traditional test for determining a hospital's vicarious liability in this situation is stated in *Clark*, supra:

"A hospital may be held liable under the doctrine of agency by estoppel for the negligence of independent medical practitioners practicing in the hospital if it holds itself out to the public as a provider of medical services and in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care. Unless the patient merely viewed the hospital as the situs where her physician would treat her, she had a right to assume and expect that the treatment was being rendered through

hospital employees and that any negligence associated therewith would render the hospital liable.

"In considering the doctrine of agency by estoppel as applied to hospitals, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems ***." Id.

Mt. Sinai's appeal emphasizes that the plaintiff did not specifically name Dr. Hatoum in his amended complaint, nor was he joined after the trial court's entry requiring the joinder of necessary parties under Civ.R. 19. The Ohio Supreme Court has recently held that because agency by estoppel is a derivative claim of vicarious liability, there can be no viable claim against a hospital for agency by estoppel based on the alleged negligence of an independent-contractor physician as to whom the statute of limitations has expired. *Comer v. Risko* (2005), 106 Ohio St.3d 185. Mt. Sinai now argues that *Comer* requires this court to sustain their appeal. We disagree.

Credible arguments were presented by both parties as to whether plaintiff triggered the doctrine of agency by estoppel by looking to the hospital for treatment. Since reasonable minds could still differ as to a conclusion, it is the duty of the court to send the issue to the jury. *Fraysure v. A-Best Prods. Co.*,

Cuyahoga App. No. 83017, 2003-Ohio-6882. Mt. Sinai's motions for directed verdict and JNOV were properly denied; therefore, we affirm the trial court on this issue.

SPOLIATION AND/OR PUNITIVE DAMAGES

At the close of plaintiff's case, the trial court ruled in favor of the defense on the motion for directed verdict on the claim of spoliation, which involved missing medical records. A motion for directed verdict is to be granted when, construing the evidence most strongly in favor of the party opposing the motion, the trial court finds that reasonable minds could come to only one conclusion, and that conclusion is adverse to such party. Civ.R. 50(A)(4); *Crawford v. Halkovics* (1982), 1 Ohio St.3d 184; *The Limited Stores, Inc. v. Pan American World Airways, Inc.* (1992), 65 Ohio St.3d 66.

A directed verdict is appropriate where the party opposing it has failed to adduce any evidence on the essential elements of this claim. *Cooper v. Grace Baptist Church* (1992), 81 Ohio App.3d 728, 734. The issue to be determined involves a test of the legal sufficiency of the evidence to allow the case to proceed to the jury, and it constitutes a question of law, not one of fact. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695; *Vosgerichian v. Mancini Shah & Associates, et al.* (Feb. 29, 1996), Cuyahoga App. Nos. 68931 and 68943. Accordingly, the courts are testing the legal sufficiency of the evidence rather than its weight or the

credibility of the witnesses. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68-69.

Since a directed verdict presents a question of law, an appellate court conducts a de novo review of the lower's court judgment. *Howell v. Dayton Power and Light Co.* (1995), 102 Ohio App.3d 6, 13; *Keeton v. Telemedia Co. of S. Ohio* (1994), 98 Ohio App.3d 1405, 1409.

The spoliation claim alleged misconduct regarding certain missing medical records. "[T]he elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge by the defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) actual disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts ***." *Smith v. Howard Johnson Co.*, 67 Ohio St.3d 28, 29, 1993-Ohio-229.

Plaintiff has offered no evidence that any of the records at issue were missing because of "willful destruction *** designed to disrupt the plaintiff's case." Plaintiff's argument is based on innuendo claiming the records were missing "without explanation." Nowhere in plaintiff's argument is there any evidence of willful destruction by the defense. Furthermore, the records at issue were of Hollins' birth in 1987, 11 years before a suit was ever filed. Mt. Sinai Medical Center has since closed, which event clearly had

a negative effect on any record keeping. Plaintiff cannot maintain this claim, and we affirm the trial court's directed verdict.

PREJUDGMENT INTEREST

Finally, when the trial court granted the motion for a new trial, plaintiff's motion for prejudgment interest was held to be moot. In reversing the order for new trial, we now also reverse the ruling, finding the motion for prejudgment interest to be moot. As we remand this matter for consideration of remittitur, we also direct the trial court to make appropriate determinations in consideration of plaintiff's motion for prejudgment interest.

This court hereby vacates the lower court's granting of plaintiff's Civ.R. 60(B) motion for relief. We further affirm the trial court's denials of Mt. Sinai's motions for directed verdict and judgment notwithstanding the verdict, and affirm the trial court's directed verdict in favor of the defense on the claim of spoliation. However, we reverse the trial court's order for a new trial and remand the matter for consideration of the motion for remittitur of damages and plaintiff's motion for prejudgment interest.

Judgment affirmed in part, vacated in part, reversed in part and remanded.

This cause is affirmed in part, vacated in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Frank D. Celebrezze, Jr.

FRANK D. CELEBREZZE, JR
PRESIDING JUDGE

SEAN C. GALLAGHER, J., CONCURS;

DIANE KARPINSKI, J., CONCURS IN PART AND DISSENTS IN PART (SEE ATTACHED SEPARATE OPINION.)

FILED AND JOURNALIZED
PER APP R. 22(E)

MAY 15 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAY 4 - 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

[illegible] FOR ALL PARTIES-COSTS TAXED

VOL 0612 PG 0606

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85286, 85574 AND 85605

MARK A. McLEOD, GUARDIAN, ETC.	:	
Plaintiff-appellant and cross-appellee	:	DISSENTING
v.	:	OPINION
MT. SINAI MEDICAL CENTER, ET AL.	:	
Defendants-appellees and cross-appellants	:	

DATE: MAY 4, 2006

KARPINSKI, J., DISSENTING:

I concur in part and respectfully dissent in part with the majority opinion. I disagree with the majority solely on the issue of whether the order for a new trial should be vacated. I agree that a new trial is not warranted solely by the "irregularity in the proceedings" the court partially relied on, that is, the court's failure to voir dire the jury after it spoke to several jury members about a newspaper article discussing the case. I find that the court's remaining reasons, however, justify an order for a new trial, that is, excessive damages and attorney misconduct.

A trial court's decision granting a new trial is reviewed under the abuse of discretion standard. The majority relies on

Schlundt v. Wank (Apr. 17, 1997), Cuyahoga App. No. 70978, 1997 Ohio App. LEXIS 1517. In *Schlundt*, the trial court had not provided any reasons for its decision to grant a new trial. In contrast, the court in the case at bar issued a detailed thirteen-page judgment entry explaining its reasoning. The Twelfth Appellate District has emphasized the abuse of discretion standard, especially regarding questions of fact:

> "Where a trial court is authorized to grant a new trial for a reason which requires the exercise of a sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court." *Antal v. Olde Worlde Products, Inc.* (1984), 9 Ohio St.3d 144, 145, 459 N.E.2d 223, quoting *Rohde*, supra, at paragraph one of the syllabus. Moreover, when the trial court's decision concerns questions of fact, the generally accepted rule is that a **reviewing court "should view the evidence favorably to the trial court's action rather than to the jury's verdict ***."** *Rohde*, supra, at 94.

Tobler v. Hannon (1995), 105 Ohio App.3d 128, 130, emphasis added.

I believe the record demonstrates the trial judge did not abuse his discretion in granting a new trial.

The granting of a new trial is governed by Civ.R. 59, which states in pertinent part:

> (A) Grounds. --A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> (1) **Irregularity in the proceedings of** the court, jury, magistrate, or **prevailing party**, or any order of the court or magistrate, or abuse of discretion, **by which an aggrieved party was prevented from having a fair trial**;
>
> (2) **Misconduct of** the jury or **prevailing party**;

> ***
>
> (4) **Excessive** or inadequate **damages, appearing to have been given under the influence of passion or prejudice;**
>
> ***
>
> (9) **Error of law** occurring at the trial and **brought to the attention of the trial court** by the party making the application.
>
> In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.
>
> When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.
>
> (Emphasis added.)

In its order, the trial court listed three reasons for granting a new trial: an excessive award of damages given under the influence of passion and prejudice; the misconduct of plaintiff's counsel through the duration of the trial; and irregularity in the proceedings which prevented a fair trial. Because I agree with the majority that the alleged irregularity concerning the newspaper article does not justify a new trial, I will restrict my discussion to the first two reasons, each adequate in its own right to justify a new trial.

EXCESSIVE DAMAGES

In its judgment entry granting a new trial, the court points to the testimony of the economic expert, Harvey Rosen, Ph.D. An expert's testimony is limited by Loc.R. 21.1(B), which states in pertinent part: "[a]n expert will not be permitted to testify or

provide opinions on issues not raised in his report." The purpose of limiting experts to the opinions contained in their reports is to prevent unfair "ambush" of the other side. *O'Connor v. Cleveland Clinic Found.* (2005), 161 Ohio App.3d 43, ¶18, citing *Shumaker v. Oliver B. Cannon & Sons, Inc* . (1986), 28 Ohio St.3d 367, 370-371.

Harvey Rosen's expert report had estimated that the expenses for Walter for the duration of his life expectancy would be between $4,303,088 and $6,413,639. This estimate was based, in part, on the wages of a home health care aide, a person trained to be an assistant to help Walter twenty-four hours a day with his activities of daily living, including eating, hygiene care, and transfer from chair to bed and back.

At trial, however, the court erroneously allowed Harvey Rosen to testify to the cost of providing Walter with round the clock care by a Registered Nurse. Nowhere during the trial, however, did plaintiff present **any** evidence that Walter would need or benefit from twenty-four hour care by an R.N., as opposed to care by a trained home health aide. Defense counsel objected to this testimony, but, as it admits in its judgment entry, the court erred in failing to sustain those objections or to hold a side bar to discuss them. As a result of this admitted error by the trial court, Harvey Rosen testified to an amount of money three times the actual amount contained in his report. Permitting this expert to

testify to sums which were neither contained in his report nor ever justified by any evidence was a grave abuse of discretion on the part of the trial court. As defendants explained in their appellate brief, they did not hire an independent economic expert or life care planner because they did not disagree with the reports of Mr. Fieger's experts and relied on the limitation of costs those reports described. Thus the jury was left with a cost inflated beyond what the evidence justified and, more importantly, without any expert testimony to attack its excessiveness.[2]

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[2] Nor was Harvey Rosen the only expert who was permitted to testify inappropriately. Several of plaintiff's expert witnesses testified, despite defendants' objections, to opinions outside their areas of expertise, areas for which they had not been qualified as experts.

This inappropriate use of experts, although objected to by defense counsel, was permitted throughout plaintiff's case in chief. For example, a maternal-fetal medicine expert was permitted to testify about the standard of care for nurses, even though she admitted on cross-examination that she usually encourages attorneys to retain a nursing expert to testify on the nursing standards. The neonatologist was permitted to testify concerning the standard of the obstetrician as well as clinical signs, like the amount of amniotic fluid and its effect on fetal hypoxia. He admitted on cross examination that he did not have enough knowledge to comment on this area. Defense counsel also objected that the neonatologist examined Walter for the first time on the morning of trial yet was permitted to testify about Walter's condition.

Dr. Gabriel, an expert in pediatric neurology, was permitted to testify about obstetrical matters, even though he admitted he was not an obstetrician, when he testified about the definition of "fetal distress." The court overruled a defense objection. (Tr. 517-18.) He was also permitted to testify to the appropriateness of removing a fetal monitor from the mother. When defense counsel objected, noting that the question pertained to the standard of care (by the nurses and obstetrician), an area outside the pediatric neurologist's expertise, the trial court permitted the doctor to answer the question. (Tr. 551.) The pediatric

(continued...)

Even more disturbing is the testimony of Dr. Gabriel, a pediatric neurologist, concerning the cost of care that Walter would need throughout his life. Despite multiple objections upon which the court failed to rule, the witness proceeded to testify with specific monetary figures for various types of care. (Tr. 566.) This testimony was clearly outside the scope of the pediatric neurologist's area of expertise, and again was prejudicial to defendant's case because the testimony reinforced the economic expert's inflated economic figures. The defendants did not present an economic expert or a life care planner in their case in chief because they did not disagree with the reports of plaintiff's experts. They were ambushed, therefore, when the court permitted testimony that exceeded the amounts contained in Harvey Rosen's report and, in the case of Dr. Gabriel, was not within the expert's area of expertise at all.

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[2](...continued)
neurologist responded that there was no medical reason for removing the fetal monitor from the mother prior to the Cesarean section. This testimony enhanced the credibility of plaintiff's theory that defendants had failed to monitor the mother properly. Although on cross-examination Dr. Gabriel admitted that he was not qualified to testify to the standard of care, the opinion was already before the jury. (Tr. 577-78.) Similarly, the neuroradiologist testified that he would leave it to the other experts to pinpoint the time at which Walter's brain injury occurred. Mr. Fieger nonetheless asked him, over defense objection, whether he agreed with the reports of the other experts. The neuroradiologist stated that he had no disagreement with the other experts' reports.

Plaintiff's obstetrical expert was permitted to testify concerning the nursing standard of care. And the plaintiff's anesthesia expert was permitted to testify concerning the obstetrical standard of care.

The trial court is correct in concluding that these errors led to the jury awarding excessive damages.

LIABILITY

Much of defendant's discussion of specific parts of the trial, although subsumed under the category of attorney misconduct, go to the question of liability.

I note the majority states that "the defense did not contest liability in this appeal, focusing instead on the amount of damages awarded." (Majority Opinion at 11.) Although it is true that defendants predominantly focused on the damages award in their appellate brief, it is inaccurate to say they did not contest liability. Defendants did indeed raise the liability issue, both in their statement of issues and in their discussion in their brief. In their statement of issues, they noted that "[t]he medical experts were diametrically opposed and the jury verdict was split on liability." (At xii.)

More specifically, in their statement of facts, defendants dispute the underlying liability issue. For three pages they discuss the evidence presented by their expert witnesses that Walter's injuries occurred in a time period well before birth. Those experts, defendants' report, explained that Walter's brain injury resulted from "placental insufficiency, which caused chronic oxygen deprivation and retarded growth throughout the course of the pregnancy." (Defendants' Appellate Brief at 4.) Defendants argue,

therefore, that Walter's Intrauterine Growth Retardation and microcephaly, which started many weeks before birth and was a result of the placental insufficiency, was the primary cause of Walter's brain damage. Defendants further explain that the experts testified that "[t]he injuries associated with [Walter's] microcephaly would not be evidenced on an ultrasound, CAT scan, or MRI." (Defendants' Appellate Brief at 4.)

Defendants again referred to these liability issues when discussing the remedy. They argued that "Judge Lawther noted that other new trial grounds asserted by Defendants, 'especially with respect to the issues of negligence and proximate cause,' have merit." (Appellant's brief at 38.) After this discussion of liability issue, defendants expressly requested that if this court did not agree with the order for a new trial because of attorney misconduct, "it should remand this case so the Trial Court can fully consider those additional grounds." Id. at 38.

MISCONDUCT OF PLAINTIFF'S COUNSEL

A second reason the trial court points to in its judgment entry granting a new trial is the behavior of plaintiff's counsel, Mr. Fieger. The court notes Mr. Fieger's "theatrical and discourteous demeanor throughout the trial," his failure to follow court procedure in entering objections, and his "trial technique which was designed to manipulate and mislead the jury." A review of the entire 2,400-page transcript compels agreement with the

court's description. Excerpts from the transcript demonstrate counsel's egregious behavior and contradictory and argumentative questioning. One example of his manipulative trial technique was his misleading restatement of witnesses' testimony in his follow up questions. This technique was especially discernable when he discussed several key phrases: "emergency cesarean section" and "fetal distress."

Several experts testified that the term "fetal distress" is ambiguous and vague, because it can cover a wide range of conditions, from life threatening, requiring immediate cesarean delivery, to merely significant heart rate changes, requiring close observation and expedient, but not immediate, Cesarean delivery. Despite the agreement on the dual meaning of the term, Mr. Fieger persisted in choosing only one meaning: a fetus near death, "practically dead," as he often said during the trial.

Mr. Fieger also took liberties with the definitions of "emergency." In answering his questions, all who had worked on the case were in accord in explaining that there were two categories of C section: scheduled and emergency. An emergency Cesarean section simply means one which was not previously scheduled. The witnesses explained that there was a significant difference between an ordinary emergency case and a "stat" or "crash" case. In an ordinary "emergency" C section, the doctor determines the mother would not be able to safely deliver the child vaginally and

therefore would have to be delivered by C section before she went into labor. A "stat" or "crash" case, on the other hand, according to the testimony of all the non-expert witnesses, as well as most of the expert witnesses, required immediate delivery, without sterile precautions, within fifteen minutes to one-half hour.

Mr. Fieger questioned the witnesses who had been present for Walter's C section about their care of the mother before delivery. Both Dr. Jordan and the nurses testified that after assessing the mother's and fetus's capacity for vaginal delivery, **before** she was in labor, they determined she would need to be delivered by Cesarean section. They based this assessment on several tests which monitored the baby's heart rate in response to various situations: with the mother at rest, with the mother repositioned to relieve pressure on her vena cava and therefore to increase blood flow to the placenta, and with the mother receiving minimal doses of Pitocin, a test that gives very small doses of a drug which stimulates the uterus to contract. All these tests showed that the baby's heart rate was within the normal range without stress; the tests also showed that any stress, such as a contraction, caused potentially dangerous changes in its heart rate. The tests also further showed that the baby's heart rate did not vary to the degree that a normal baby's would.

It is undisputed that the baby was "intrauterine growth retarded" (IUGR), meaning that in dealing with the stress of vaginal delivery it would not have the reserves of a normal sized baby. All the staff members of Mt. Sinai, including Dr. Jordan, the obstetrician who delivered Walter, agreed on the conditions of the mother and the baby, as well as on the meaning of the terms they used. They agreed that the baby needed to be delivered within the day, but not necessarily within the hour. All the witnesses in this case were forced to draw their conclusions from the medical chart. The staff members who cared for the mother and Walter all concurred as to the terminology, methodology, and procedures in use at Mt. Sinai in 1987. This agreement was highlighted by the agreement of all the defense fact witnesses that they had no specific memory of this particular birth, which had occurred seventeen years earlier. Nonetheless, despite this consistency in their testimony, Mr. Fieger persisted in mischaracterizing their answers in misleading ways.

For example, when responding to a question asking why he did not rush to the operating room to give anesthesia for the Cesarean section, the anesthesiologist explained that the case must not have been urgent. The staff "would have told me we need to do a stat C section and I would have gone and *** behaved differently" with a stat section. (Tr. 990.) He further tried to explain the system the hospital had in place for notifying the necessary personnel for

an unscheduled C section: "[w]hen we receive a page, we call back and they would have told me it is a stat C section or it is not a stat C section ***." Interrupting, Mr. Fieger asked him who had told him that. When the anesthesiologist answered that he did not remember whom he had spoken to or the specific conversation, Mr. Fieger responded, "[a]re you telling us that you're making up what you don't remember?" (Tr. 990.) The trial court overruled a defense objection.

Earlier, when the anesthesiologist testified that he did not recall that the baby in the case at bar was in distress, Mr. Fieger responded, "that's why, as far as you were concerned here, you just took your time in an emergency." (Tr. 989.) Although the trial court sustained a defense objection to this misleading summary, it gave no curative instruction to the jury.

Mr. Fieger also focused on the loss of time from use of an epidural anesthesia instead of a general anesthesia. When the anesthesiologist tried to explain why he had given the mother an epidural anesthesia, the anesthesia of choice in Cesarean sections, Mr. Fieger accused him of taking too much time to anesthetize the mother. It was not disputed that administering an epidural adds a significant amount of time to the anesthesia time, up to twenty minutes. The anesthesiologist explained that it was up to the obstetrician to decide when the baby was in distress and,

therefore, required immediate delivery and the use of general anesthesia.

Ignoring the limited role of the anesthesiologist in obstetrical matters, Mr. Fieger responded, "So if nobody tells you how important it is and how much that baby is at risk, you do the one that [sic] would take longer and therefore possibly hurt a baby who's suffocating, right, if nobody tells you?" (Tr. 993.) Mr. Fieger proceeded to bully the witness, asking "[w]hy in light of the fact that you knew it was an emergency, why wouldn't you ask somebody what's the emergency here, what's the problem that we're doing this emergency C section? Why wouldn't you ask?" The doctor answered that, when the case is presented to him, "[t]he information is given to us that we have to take the baby out right away or not and that's enough information." (Tr. 994.) Mr. Fieger responded saying, "I didn't ask that. That wasn't my question. My question, you indicated already nobody told you. My question to you is why didn't you ask?" When the doctor told him he did not remember, Mr. Fieger said: "So nobody told you, You didn't ask and you used the longest acting anesthetic that you could use, right?"

Defense counsel objected at this point, saying, "[o]bjection. That's not what he said." (Tr. 995.) The court, however, permitted Mr. Fieger to continue. He said: "Sure. You didn't ask anybody whether time was of the essence. Nobody told you so between the general and the epidural, you used the longer acting anesthetic?" Again, defense counsel objected and explained, "[h]e

didn't say that there was no discussion about whether time was of the essence." The court did not sustain the objection. The doctor stated, "I used the safest anesthetic for the mother at that time." (Tr. 995.)

When the anesthesiologist tried to explain that the department had an established system for determining the urgency of an unscheduled or emergency C section, Mr. Fieger continuously misstated the answers and refused to accept the answers for what they were. Instead, implying the anesthesiologist had more authority over the obstetrical decisions than the evidence indicated, Mr. Fieger attacked the witness, both in the interchange just described as well as throughout his cross examination.

Similarly, when questioning one of the nurses who cared for the mother in the labor and delivery, Mr. Fieger used the same technique. The nurse tried to explain the difference between an emergency Cesarean section and a stat one: "a stat C section is done immediately. Emergency means it's not scheduled." (Tr. 1084.) She repeatedly clarified for Mr. Fieger that the department at that time used the word "stat" for an emergency Cesarean section in which the baby had to be delivered immediately and emergency for an unscheduled one. Nonetheless, Mr. Fieger persisted in accusing the nurse of wasting valuable time and implying that she had ignored hospital policy in delaying the delivery.

Refusing to accept a staff member's explanations of the definition of the term "fetal distress," Mr. Fieger purposely confused the meaning of "emergency" and "fetal distress." Despite her attempt to explain that there are varying levels of fetal distress, Mr. Fieger questioned the first nurse, "[a]re you saying at Sinai Hospital [sic] *** it was the regular practice of Sinai Hospital and you saw this regularly that *** when little babies were in fetal distress, you regularly saw doctors call emergency C sections, but you didn't consider it an emergency that had to be done right away for fetal distress?" She tried to clarify what the doctor meant by an emergency: "A stat C section is when we got a flat line crash, baby is bradycardia[3] with a crash." Mr. Fieger also challenged this nurse's interpretation of the fetal heart monitor strips[4]. She tried to explain the difference between this baby's lowered reactivity, as indicated by the fetal monitor strip she had seen, and a total flat line reading. She was discussing the strips she had read when Mr. Fieger abruptly asked, "[w]ould there be any reason why doctors would make up a story about a child?"[5] (Tr. 1088.)

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[3]Bradycardia is a low heart rate.

[4]Fetal monitor strips provide a read out of the fetus' cardiac activity, similar to an EKG for adults.

[5]Dr. Jordan's office notes had indicated a flat line reactivity reading. This nurse had never seen Dr. Jordan's office notes or the strip in question.

Despite the nurse's explanation that the chart did not reflect that Walter's delivery was ordered as a "stat" C section, Mr. Fieger again asked her the same loaded question: "was it the regular practice there for physicians and the hospital not to do stat C sections on babies in fetal distress?" The nurse again tried to clarify the difference between a stat C section and an emergency one. Nonetheless, Mr. Fieger persisted in misstating the testimony and ignoring the copious testimony explaining the differences between "stat" and "emergency."

Mr. Fieger continued to use the same tactics when questioning the second nurse. He again asked, "I want to know, tell the court and the jury when a baby is in fetal distress, an emergency C section is called, tell me the rule and regulation of that hospital or any nursing facility that says it's all right to just sit around and wait for a couple of hours." (Tr. 1104.) The trial court overruled defense counsel's objection that the question was argumentative. Later Mr. Fieger asked this second nurse, "[d]id you put two and two together at that time and say, I was looking at a baby who was born severely asphyxiated and I know because I was here that the mother waited two hours for an emergency C section?" Defense counsel objected, saying that the nurse had already testified that she did not remember this delivery at all. Mr. Fieger also asked this nurse, "[o]kay. There was nothing here other than the nurses and doctors not getting this mother into the

operating room and operating on her. There was nothing that prevented either you or the doctors from getting her a C section, was there, an unusual event, or the electricity went off or something like that?" Defense counsel objected to "the implication that nurses are responsible for doing the C section." Mr. Fieger responded, "[e]xcuse me. Judge, that's not --" (Tr. 1112.) The court told him, "[d]on't shout at me. I'm overruling the objection. Go ahead." (Tr. 1113.)

Later in the questioning of this nurse, Mr. Fieger speculated that perhaps the doctor had not been present and had been in a car accident or asleep and that it was the nurse's job to find him. She responded by saying that the time frame for the delivery was not unusual. "We don't rush everybody who's having an emergency C section into the delivery room. There's things to prepare. When they [C sections] are done in a few minutes, it's like if the heart stopped or --" Mr. Fieger interrupted the nurse at this point, saying, "[y]ou keep telling us it's not unusual." The court ordered him to "[l]et her finish." (Tr. 1125.) She then explained that certain preparations are necessary for the protection of the mother and child. Mr. Fieger nonetheless continued to ask her whether it was a regular occurrence "[t]o wait two hours for an emergency C section." (Tr. 1126.) She told him that she could not remember any other specific cases.

He then questioned whether she was not able to remember whether any other case took two hours to begin "because that would be so unusual and unacceptable that other than this case, it never happened, did it?" (Tr. 1126.) A defense objection was again overruled, despite counsel's technique of using a quotation to comment improperly on her truthfulness.

Next, Mr. Fieger attempted to argue with the nurse about what role she had played in the C section: he told her she scrubbed; she told him she circulated; he again told her she scrubbed; she again told him she circulated. (Tr. 1133.)

Continuing to impugn the integrity of the witness by mischaracterizing the facts, Mr. Fieger asked this second nurse, "[a]ssuming that the baby was born virtually dead, it had to be resuscitated, were you just prepared to sit there and wait until that baby died?" (Tr. 1134.) The trial court sustained the two defense objections. It did not, however, give any curative instruction to the jury.

This second nurse tried to explain that if the staff moved too quickly in a case like this mother's, it would put the mother and child at risk of infection and other complications. (Tr. 1145.) On cross-examination, defense counsel asked this second nurse whether this mother would have been the only woman in the labor and delivery unit. She responded that there probably were other mothers there at the time. Defense counsel then asked, "if this

was indeed something that needed to be done in ten minutes or less, then she would be treated as if she was the only patient?" (Tr. 1146.) Before the nurse could respond, Mr. Fieger interjected, "[e]xcuse me. We're talking about --." The court stated, "one at a time." Mr. Fieger said, "Objection. He's asking her to be the doctor now." In a most revealing observation, the court told him, "That's what you were doing for the last hour." In this comment, the trial judge quite correctly characterized the error that ran throughout cross-examination by plaintiff's counsel. Mr. Fieger responded, "[h]e kept objecting. I would love to ask her these questions. Objection." (Tr. 1147.) Similar instances of Mr. Fieger arguing with the judge or ignoring the authority of the court pervaded the trial.

Mr. Fieger asked the doctor "[w]hen you said emergency C section, it's your claim here at your trial that you didn't really mean emergency? That's a yes or no? You didn't really mean emergency?" The doctor responded, "[t]hat's not a yes or no answer, I will give you an answer if you would like one." (Tr. 1255.) The court then told the doctor, "[y]ou give the answer you want to give." (Tr. 1256.) The doctor then repeated the explanation the nurses and anesthesiologist had given earlier: "We use the term emergency loosely, all of us use it, and it simply means the patient was not scheduled in advance to have a C section.

So without being scheduled, it was emergent.[6] It does not mean that we automatically are going to run down the hall at top speed. And it was a poor use of the term and it should not have been used that way." (Tr. 1256.)

Mr. Fieger then discussed the pediatrician that Dr. Jordan had requested be in the room for the delivery. In another loaded question, at least purportedly a question, Mr. Fieger referred to the pediatrician as "[t]he pediatrician who you called in to help because you knew the baby had been asphyxiated because you waited so long." Dr. Jordan responded, "that's ridiculous." (Tr. 1261.) The pediatrician had noted on the chart that the baby was in fetal distress. When Mr. Fieger questioned Dr. Jordan about that note, Dr. Jordan explained: "He may have heard there was some decels[7] and decided there was fetal distress." (Tr. 1261.) Dr. Jordan then clarified he did not consider the baby's heart rate as shown on the fetal monitor strip to be fetal distress. Ignoring the copious previous testimony explaining the ambiguity of the term "fetal distress," Mr. Fieger asked Dr. Jordan why the nurses would have obtained a consent form from the mother indicating fetal distress as the reason for the C section.

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[6] "Emergent" as used by medical personnel is synonymous to "emergency."

[7] "Decels" is an abbreviation for "deceleration of the baby's heart rate."

Another area Mr. Fieger focused on was Dr. Jordan's location between the time he ordered the C section and the time the skin incision was made. Dr. Jordan repeatedly stated that he did not remember this specific particular case, but that he probably was on the labor and delivery unit, although he was not "standing hovering over the patient." (Tr. 1279-1280.) The doctor affirmed that in his years of practice he had never left the hospital after he had arranged for an unscheduled C section. Mr. Fieger nonetheless continued, throughout the trial and into closing argument, to claim implicitly and explicitly that Dr. Jordan had abandoned the patient.

During the defense case in chief, Mr. Fieger continued to question Dr. Jordan about his alleged dawdling. Mr. Fieger "restated" Dr. Jordan's explanation as "[y]ou are saying emergency C section doesn't mean emergency C section and fetal distress doesn't mean fetal distress." Defense counsel interjected, "Objection. He's arguing with the witness. The tone of his voice, it's getting ridiculous." The court responded, "I'm aware that he's making a speech. Let's ask a question." (Tr. 1805.) Mr. Fieger then said, "But anybody else besides you who is trained in OB knows that fetal distress means fetal distress and emergency C section means emergency C section." (Tr. 1805.) The court asked him whether he had any questions to ask and warned: "Ask questions, counsel, instead of making speeches." (Tr. 1805.)

Despite this warning, Mr. Fieger continued to make speeches throughout the trial.

The defense experts received the same treatment. Mr. Fieger's attempts to impeach the credibility of one doctor, Dr. DiPalma, on the standard of care included the statement: "Well, in all fairness, to you nothing is a breach of the standard of care. That's why you're here, right?" Defense counsel objected, and the court stated, "Objection is sustained. That's outrageous. Next question." (Tr. 1938.) Despite the court's strong rebuke, Mr. Fieger later returned to this claim in his closing argument when he again denigrated the defense expert witnesses' credibility and integrity.

When he asked the same witness about the standard of care for a child in fetal distress, the witness said: "You have used the term fetal distress which I honestly have a difficult time defining." (Tr. 1939.) The witness had previously testified that "fetal distress" is an ambiguous term which covers a broad spectrum of conditions, some immediately life threatening and some not. Mr. Fieger then asked him, "[h]ow could you offer testimony in this case where [fetal distress is] written by doctors all over this chart and you don't understand [fetal distress]?" (Tr. 1939.) Again, plaintiff's counsel improperly characterized the expert's sophisticated awareness of a word's multiple meaning as failing to understand the word.

When Mr. Fieger asked this doctor about whether a nonreactive stress test signals fetal distress, the witness answered, "[t]he baby can be asleep and not react." Mr. Fieger responded, "I'm not asking you to make excuses. I'm just asking you to agree that the --" Defense counsel interrupted with an objection, and the court replied, "[o]bjection sustained. That wasn't a question. That was a speech. What was your question?" (Tr. 1942.) Mr. Fieger told the court, "I'm asking the witness to answer the questions, not answer some other questions. My question is very simple." (Tr. 1942.) The court was correct. Plaintiff's counsel was again misleading the jury by his improper comment inaccurately describing the answer as "making excuses."

The primary point of contention in this case was the cause of Walter's brain damage. This expert witness, who is a maternal-fetal medicine specialist, explained why he believed that Walter's brain damage occurred weeks or months prior to his birth. The meaning of "birth asphyxia" was extensively discussed. The expert indicated that birth asphyxia meant that the child was deprived of oxygen at some point between conception and birth. In an effort to discredit this expert on cross-examination, Mr. Fieger responded to the expert's opinion with, "[w]ell, so it's your position that you know better, even though you don't take care of babies, than the pediatricians at Rainbow Babies Hospital who actually cared for him? You know better, correct?" (Tr. 1949.) Again, Mr. Fieger

used the same technique of improperly attacking a professional opinion by attributing the professional disagreement to a flaw in the witness, here, allegedly a sense of superiority. His response to the expert also ignored that this expert specializes in the exact area on which he was testifying, whereas pediatricians specialize not in this area, but rather in treating the baby **after** it is born.

Another area of disagreement between the two parties' experts concerned Walter's multiorgan failure and the significance of when it manifested itself. When this witness testified that multiorgan involvement did not show up at delivery, but that it did show up later, Mr. Fieger, implying that the expert had changed his testimony, said, "you said the infant exhibited no evidence of multiorgan system involvement in the neonatal period. [You] most certainly did." In an attempt to discredit the expert, Mr. Fieger again abused technical words by giving them meanings they did not have.[8] And again he was improperly commenting on the testimony.

This expert had testified that it was his opinion that Walter's brain damage had happened during the pregnancy and not during the birth, although he noted that, with the baby in the mother's uterus, it was impossible to determine exactly when the damage had occurred. When Mr. Fieger asked what evidence existed

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[8]The witness clarified that the multiorgan involvement occurred later than the neonatal period.

that the brain damage occurred during the pregnancy and not during the birth, the expert answered, "[t]here is no evidence in the record." In responding, Mr. Fieger again improperly commented on the answer: "So you are making it up." (Tr. 1956.)

The doctor and nurses who cared for Walter's mother during her pregnancy all testified that Pitocin had been administered to her as a test to determine how well the baby would tolerate a vaginal delivery. All had testified that the amount of Pitocin used in the test was minimal compared to the amount that would be used to induce or strengthen a mother's labor. Mr. Fieger asked this defense fetal-maternal health expert witness about the administration of Pitocin in a pregnancy when the fetus is showing the type of heart rate changes that this child was experiencing. This expert had published a paper saying that the use of Pitocin, a drug which causes uterine contractions, in a mother in active labor whose fetus showed this certain type of heart rate, was dangerous. Mr. Fieger tried to imply that the Pitocin test was malpractice.[9] The witness explained that his paper was discussing the use of Pitocin for a mother who was already in active labor, not for one who was not yet in labor. He further explained that the use of Pitocin for the patient in the case at bar was appropriate, because the mother was given a very low dose, she was not in active

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[9]In the Pitocin test, a minuscule amount of Pitocin is given for the very purpose of assessing the response of the fetal heart rate prior to active labor.

labor, and the test was stopped as soon as the information needed was obtained. (Tr. 1962.) Mr. Fieger responded, "I'm sorry. You've testified repeatedly in this state under oath that you never give it to a baby in fetal distress." The court asked: "Is that a question?" Mr. Fieger then continued to question the witness about his former testimony, but never showed him the purported testimony, despite the witness's request to see what he was quoting from. Inaccurately describing the evidence, Mr. Fieger then said to the witness, "[f]or instance, in this case, all the evidence shows [the brain damage] happened in the hours before birth, 100 percent of the evidence, and zero shows it happened before. And you are unwilling to accept that; isn't that true?" The court only asked: "is that a question?" and never noted the impossibility of being asked to verify such an imprecise statement and such a bewildering use of the word "before." (Tr. 1964.) Mr. Fieger's question - "isn't that true?" - at the end did not transform what was yet another example of his misleading comments on testimony and evidence.

Other defense expert witnesses received the same treatment. When asking the defense neonatology expert if he has testified for the defense law firm before, Mr. Fieger stated, "I guess you are in their Rolodex, right, for people that they need if one of their clients is getting sued and they need somebody to come up and say that the baby's injury happened way before the doctor committed

malpractice, you're on their Rolodex, right?" (Tr. 2042-2043.) The doctor responded that Mr. Fieger's statement was "a gross misrepresentation" and that he "resent[ed] it very much." (Tr. 2043.) Astonishingly, no objection or comment from the court occurred, perhaps from a sense of hopeless exasperation.

Nor was the nursing expert spared Mr. Fieger's treatment. He asked the defense nursing expert, who testified about the standard of care required of nurses, whether it was below the standard of care for the nurses to not document the time the patient arrived on the unit. She responded, "[i]t was below the standard of care as far as documentation. I don't believe it affected the care she received." Mr. Fieger said, "[t]hat's not for you to decide, ma'am. That's for the jury to decide." After an objection, which the court overruled, Mr. Fieger stated, "Again, I don't want you to editorialize. If you can give me your answers, okay?" Defense counsel again objected, and Mr. Fieger said, "I object to a witness editorializing for the same reason you did." This time the court told him, "You ask the question. If you don't like the answer, that's too bad. Next question." (Tr. 2090-2091.) However, Mr. Fieger's earlier editorial comment sharply attacking the nurse's ability to prioritize elements in the standard of care was allowed to remain.

Mr. Fieger then proceeded to inquire of the nursing expert witness why she had not asked the attorney who retained her about

the documentation as to the time the patient arrived at the hospital. She responded that she had reviewed the records and noted the arrival time was not documented. He asked her, 'Well, did you ask the people who retained you or somebody at Sinai Hospital [sic] why it wasn't where it was supposed to be?" She said, "I didn't ask." He challenged her, "[w]hy didn't you? Didn't you want to know?" A defense objection was sustained. However, Mr. Fieger continued to ask, "Why wouldn't you want to know what they did wrong?" The court, again sustaining defense counsel's objection, warned: "She didn't say she didn't want to know. Don't be so cute. Ask your questions, will you?" (Tr. 2091-2092.) At this point – two thousand pages into the trial – "cute" is an understatement. Mr. Fieger's repeated improper questions were designed to mislead the jury by improperly discrediting a witness. He continued to use the same technique: implying in his questions the staff was indifferent, despite there being no basis for it in the evidence.

Mr. Fieger then inquired into the nursing expert witness's previous times serving as an expert witness, saying, "[y]ou apparently have been retained by [defense counsel's] law firm on three or four other occasions to testify that nurses did nothing wrong, correct? *** And you've always concluded for [defense attorney] that they did nothing wrong, right?" She answered, "I may have had a case I didn't want to defend." When he asked her

which case that was, she said she did not know. He said, "[w]ell, then please don't make up things." (Tr. at 2092.) He again improperly inferred fabrication from the word "may."

Mr. Fieger also inquired of the nursing expert about fetal distress. When he asked what she thought was the appropriate response to fetal distress, she responded that "[f]etal distress is a fairly ambiguous term." (Tr. 2096.) He asked her, "You know that fetal distress under ACOG and other organizations that it's now become a medical nursing emergency that nurses must react to, isn't that true?" Her response was, "Well, you don't want to take it out of context. I mean, I said fetal distress is a fairly ambiguous term. And this baby did have distress, yes, and it was in chronic distress. It was not acute." Mr. Fieger told her, "That's not for you to decide. You are not the -" The court interrupted him here; "Wait, wait. You asked her a question. Now you got it. *** You can't have it both ways." (Tr. 2097.)

Mr. Fieger continued to be dissatisfied with this witness's answers. When she testified that this record showed "decreased" variability, not "absent" variability, Mr. Fieger said, "No. You don't have a right to make a medical diagnosis. The doctor said there was absent variability. Didn't you read that record? Absent variability written by Dr. Jordan." Defense counsel interjected, "That's not referring to fetal distress." Mr. Fieger responded, "Oh my God, Judge, that's - - - please." The court said, "You are

testifying for the witness. So why don't all of us - - " Mr. Fieger interrupted the judge, saying, "[t]his is cross-examination," and proceeded to question the witness. This excerpt clearly demonstrates the misconduct of plaintiff's counsel, who at this point appears uncontrollable.

This expert was certified in inpatient obstetrical nursing with a special qualification on electronic fetal monitoring, which included the very strips she was testifying about. The witness said that the strip did not show "flat line." Mr. Fieger asked her about the pediatricians who charted that the baby was flat line, and she responded that they had not interpreted the strip correctly. Ignoring her special expertise, he chided her in the form of a question: "So you are here telling us what's appropriate for pediatricians?" (Tr. 2111.) She pointed out that pediatricians "don't interpret or analyze fetal monitor strips." (Tr. 2112.)

Turning to Dr. Jordan's notes about a strip taken at his office and described as a flat line- a strip not preserved in the record- Mr. Fieger said: "we have to assume that one existed if they said it existed." She again explained that pediatricians who are not trained in the appropriate analysis would misinterpret it. In a question mischaracterizing her explanation as assuming the strip in the record "exists, but the other one doesn't," he asked why she made such an assumption. When she answered, "I don't

assume that," he then again improperly commented on her testimony: "Well that's all you've been doing." (Tr. 1113-1115.) The defense objected and the court remonstrated Mr. Fieger, saying, "[h]old it. That's outrageous conduct. *** That's outrageous conduct. You can criticize her out in the hall later if you want to. Not in here." (Tr. 2115.) This stern rebuke had no effect, however, on Mr. Fieger's questions or behavior.

Mr. Fieger went on to question this expert also about the term "emergency." He said, "[w]ell, I thought you tried to suggest to the jury that in 1987 somehow the word emergency doesn't mean emergency to a nurse. And so an emergency C section for fetal distress really wasn't an emergency. Did you try to suggest that?" She explained that there were two boxes on the preprinted nursing forms: scheduled and emergency. When he began discussing ACOG standards, she asked him where he was getting his information. (Tr. 2123.) After looking at the book he was consulting, she pointed out that he was looking at the wrong set of standards: instead of looking at the standards for women who are not yet in labor, he was looking at the standards that apply to women who are in the process of giving birth and in active labor. (Tr. 2124.) Mr. Fieger responded: "If a mother isn't in labor but the nurses know the baby is in distress, the policies don't apply?" (Tr. 2125.) The expert answered, "I'm trying to tell you the difference that it says there. You know, you were trying to make me say something that I

didn't want to say." (Tr. 2125.) Indeed, the witness understood what plaintiff's counsel was attempting throughout the trial.

After the nurse expert explained that the nurses caring for Walter's mother had removed the monitor when they took her to the operating room, he asked her "[t]hat's their job to make sure that if the surgeon isn't there, they protect that little baby who could be suffocating, isn't it?" (Tr. 2126.) She pointed out that the chart reflected that the nurses had regularly monitored the fetal heart rate. This nurse expert apparently had testified in a previous case, however, that when a fetus is in serious trouble, the nurses must hunt down the doctor with the vigilance of a pit bull. Mr. Fieger used this prior testimony to ask the nurse expert about the nurse's responsibility for finding a doctor "after an emergency C section is called for a baby in fetal distress for two hours fulfilling their obligation to being the pit bull for that little baby's health?" An objection was sustained because the question relied on facts that were not in evidence. (Tr. 2135.) The image of a vigilant pit bull that remained, however, could help to explain the jury verdict.

On recross, Mr. Fieger continued to ask her about her testimony on direct concerning the fetal strips. She said, "fetal distress [is] very ambiguous. There are gradations of fetal distress. That's why ACOG has said that we try not to use that term because its so ambiguous." Again improperly commenting, Mr.

Fieger responded, "You had no problem answering it when you were answering Dr. Jordan's attorney." Instead of striking the comment, the court said to him, "Do you have another question?" (Tr. 2141.)

Mr. Fieger's argumentative comments were not limited to his questioning of defense witnesses. One of the documents in evidence was the report of the cord blood gases[10] recorded immediately after delivery. These cord blood gases were processed on a small machine, which printed out a report onto a small slip of paper. The staff in the operating room, where the machine is located, then handwrote on the slip when they were obtained. When he was questioning his own expert on the baby's cord blood gases, Mr. Fieger belittled this evidence by referring to the slips as "[t]hese things that look like shopping center receipts, that the word cord blood is written in." (Tr. 1384.) Both defense counsel objected, and Mr. Fieger defended his description, saying, "[t]hat's what it - - that's only for the record, Judge. Look at them. They look like the things you get from a drug store." The court responded, "[y]ou can argue that when the time comes. That's not an appropriate question." (Tr. 1384.)

At another point in the trial, when questioning his plaintiff's expert witness, Mr. Fieger asked him, do "you wait two

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[10]A report of cord blood gases is an analysis of the pH of the blood found in the umbilical cord of the baby. This pH tells the doctors important information about the status of the baby at that specific point in time.

hours to do surgery on a baby that's suffocating? That's called malpractice, isn't it?" The court sustained a defense objection, but made no curative instruction. (Tr. 1466.)

Another example of Mr. Fieger's unacceptable tactics was a question he asked his economic expert: "[b]y the way, none of your amount of money necessary to provide for this child included the costs that would be necessitated by the legal representation of Walter, do they?" (Tr. 1547.) The court sustained the objection, and later gave the court a curative instruction.

I believe that the small portion of the transcript I have just presented is representative of the entire 2,400 pages and clearly demonstrates that the misconduct of plaintiff's counsel was so outrageous that the trial judge properly granted a new trial.

CLOSING ARGUMENT

Even if the record had shown a model trial up until closing argument, Mr. Fieger's closing argument alone is sufficient to justify a new trial. He began by telling the jury that "it's really kind of amazing, ladies and gentlemen, that we have a justice system that allows the poor, terribly injured African American to stand on equal footing with powerful corporation defendants, doctors who did this to him and seek justice." (Tr. 2158-2159.) He then informed the jury that the doctors and hospital defendants in this case "have used those [corporate]

resources *** to deny him justice to this day for 17 years."[11] (Tr. 2160.) "Scripture tells us through Isaiah that we must give voice to the poor and justice to the oppressed. I've come here to be a voice for Walter. Whatever you do to the least of my brother, that you do unto me."[12] (Tr. 2160.) He then told the jury that "Walter is depending upon you and God for justice, and your verdict will be the only justice that he ever gets." (Tr. 2161.)

Mr. Fieger emphasized that the evidence for his case is overwhelming, "an avalanche" of evidence. "There isn't any evidence to counter this except what the defendants manufactured in this case." (Tr. 2165.) His use of the word "manufactured" implicitly tied together a long line of improper comments throughout the trial attacking, without basis, the integrity of defendant's witnesses.

The following excerpts from Mr. Fieger's closing argument suffice alone in demonstrating the need for a new trial:

"I am standing here as the voice of Walter. Walter is a baby in his mother's womb waiting to be born. Doctors, nurses, I'm suffocating. Please help me be born." (Tr. 2167-2168.) (This

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[11] This case was first filed on April 21, 1998, six years before the trial. Plaintiff dismissed it and later refiled it on October 16, 2002. Trial began on May 4, 2004. The actual case at bar took less than two years to go to trial.

[12] Referencing the economic disparity between the parties is usually considered grounds for mistrial. See *Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391, 399-400.

ploy is an offensive, raw appeal to the passions of the jurors and is employed throughout closing argument.)[13]

"IUGR babies are always born without damage and develop normally if the right precautions are taken by the doctors and nurses." (Tr. 2168.) Those precautions are the same today as they were in 1987. (Evidence at trial showed that this statement is false.)

"Nobody in medicine - - and that's why they couldn't find doctors who would come in here and testify against any of the records because nobody in medicine in the face of fetal distress and an emergency C section be [sic] called would ever say it's okay to wait two hours while a little baby suffered asphyxia and suffered brain damage." (Tr. 2170.) (Defense experts testified extensively to the contrary.)

Mr. Fieger then accused the doctors of refusing to take responsibility for their actions. "And [Walter] bears no responsibility. I am suffocating. Help me be born." (Tr. 2171.)

"They knew Walter was IUGR. They knew that he was high risk. They knew that Walter was in trouble. At the defendant Jordan's office when he did the nonstress test that's missing now, he knew

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[13] *Rosenberger Enters., Inc. v. Ins. Serv. Corp. Of Iowa* (Iowa App. 1995), 541 N.W.2d 904, 908, granting new trial when improper attorney conduct during closing caused prejudice to opposing party: ("Such melodramatic argument" that "does not help the jury decide their case but instead taints their perception to one focused on emotion rather than law and fact."

Walter was in trouble. Dr. Jordan, help me be born." (Tr. 2171-2172.)

"They ask you now to incomprehensibly leave every single one of your common senses at the door and believe that a young 17-year-old woman can walk into a hospital, take a wheelchair, wheel around the hallways looking for labor and delivery without anyone checking her in or recording when she arrived, without anyone asking her about reimbursement questions." (Tr. 2174.) (The testimony was that no one, including the mother, remembered how she arrived at the labor and delivery unit. The chart indicated that she arrived in a wheelchair.)

"The issue of when [the mother] arrived at the hospital is relevant to show how long they first waited to do anything for a baby that was in trouble, that was recognized to be in trouble, and that needed to be taken out immediately. And it was at least an hour. They waited a whole critical hour before 6:45 while little Walter was being suffocated. Oh, please help me. Help me be born. I'm drowning. Every minute counts. Every second counts." (Tr. 2174-2175.)

Mr. Fieger said that his closing argument was shorter than "this period of time that that little baby was suffocating." (Tr. 2175.) "And they didn't start monitoring for another hour. Every minute, ladies and gentlemen - - I can't stress it to you enough. This is an emergency." Mr. Fieger then proceeded to draw upon his

previous mischaracterizations of testimony by using the word "emergency." "If you see a little baby in the bottom of a swimming pool and you stand there and look and you have a responsibility because you are the lifeguard and you don't go in and you walk away for hours, you are negligent. ***

"They didn't even start monitoring for another hour. Every minute, every second counted for Walter. Please - - I give him a voice - - someone please help me." (Tr. 2179.)

Mr. Fieger also stated in his closing argument that the defense case was a coverup of a "sin." He told the jury "*** how this doctor and this hospital *** can continue to do this in this courtroom is a sin only you can rectify." (Tr. 2180.)

Mr. Fieger then proceeded: "What we know is when the fetal monitor was attached, it immediately, immediately showed that Walter was in trouble and needed to be delivered. Dr. Jordan, please, nurses, please help me be born." (Tr. 2181.) (Defendants' experts had refuted this conclusion when they testified that the child was in no immediate danger, although he would not be able to tolerate a vaginal delivery.)

Again, "[t]he standard of care demands that when you have a high risk pregnancy and an IUGR and a mother that's showing spontaneous contractions and late decelerations who you know already has no variability or late variability and no reactivity, every bell and whistle in medicine goes off and says that baby is

asphyxiating, that baby is suffocating, get that baby out of the bottom of that pool. Get that child out." (Tr. 2182.)

"They know what the standard of care is to do with an IUGR baby who has late decelerations in the face or spontaneous contractions, who has little reactivity, who has little variability. Get that baby out that baby is suffocating. Please, help me be born." (Tr. 2182-2183.)

"It's a code blue in the obstetrical unit. Emergency C section, fetal distress. Emergency C section, fetal distress. Emergency C section, fetal distress. That's code blue. That's as bad as it gets. Every deceleraration was weakening Walter, but instead the defendant Jordan orders Pitocin and makes things worse. I'm suffocating. Please, please help me be born." (Tr. 2183.)

Again distorting the testimony about Pitocin, Mr. Fieger also told the jury that "Jordan ordered the use of the drug [Pitocin] that would cause little Walter to suffocate even more." (Tr. 2184.) "The [Pitocin] test was not just a waste of time. It made the onset of irreversible brain damage come much sooner." (Tr. 2184.) (There was no evidence to support the claim that the Pitocin test had any effect on Walter's brain damage at all.)

"They ordered an emergency C section for fetal distress. They got a consent signed by mom for an emergency C section for fetal distress. Every minute counted. Please, help me be born. *** Please don't wait. Please, for God's sake, help him." (Tr. 2185.)

"A precious hour later they wheeled [mom] at 8:25 into the operating room and left her there. Please, please help me be born." (Tr. 2186.) (The evidence showed that the mother was cared for continuously in the operating room by both nurses and anesthesia personnel.)

In talking about the defense case, Mr. Fieger asked the jury: "Do you understand what's going on here? Do you understand the extent of the prevarication? Do you understand what they have done to that child for 17 years? Do you know why not one defense witness picked up these [x-rays]?" At this point, defense counsel objected, saying they did not have the burden of proof. The objection was sustained. Mr. Fieger continued, "They couldn't find an anesthesiologist." Defense counsel again objected. The court overruled the objection, despite the lack of evidence that defense counsel could not find, much less had even looked for, an anesthesia expert. (Tr. 2189.) "Thank you. They couldn't find anybody except somebody in their Rolodex. Where was Dr. Jordan? Where were the nurses? Where was the anesthesiologist? Where was the resident? I'm dying. Please save me." (Tr. 2190.)

Beginning by implicitly denigrating the integrity of the defense's expert witnesses, Mr. Fieger concludes by suggesting, with no basis whatsoever, widespread deception. "The best they could do is look in their Rolodex and call Dr. Nowicki. How could they do that to Walter? What does that tell you about what's going

on here and about the false stories they have spun? Oh what a tangled web we weave when first we practice to deceive." (Tr. 2192-2193.)[14] He also continued to appeal to the passions of the jury: "Mommy, grandma, someone please save me. I'm dying. Please help me." (Tr. 2194-2195.)

"Every single one of the nurses had a responsibility, responsibility to Walter. Walter was their patient. And when that C section didn't happen after 15 minutes and Dr. Jordan isn't there, they had a responsibility to do something. *** They are not allowed to sit there. They are not potted plants. They had to go through the chain of command. They had to get it done as soon as possible because they are independent health care professionals who have an absolute responsibility to their patients. And nobody can blame anybody else and say it was his job. It's his job. Please, please nurses, I'm a little baby. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me. Please help me to be born." (Tr. 2198-2199.) Following is another appeal to passion and prejudice: "I'm sorry. I couldn't help you, Walter. I couldn't stop you from drowning. But I will be his voice. I will help him get justice now. Whatever you do to the least of my brothers, that you do unto me." (Tr. 2202.)

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[14]An attack on the integrity of the defense counsel or parties is grounds for mistrial: *Pesek v. University Neurologists Ass'n* (2000), 87 Ohio St.3d 495.

After saying that the defendants were trying to cover up their malpractice by claiming the baby had been injured prior to the birthing process, Mr. Fieger said, "[l]adies and gentlemen, how dare they? They can't deny Walter was born nearly dead with birth asphyxia because every single doctor who was there said it and wrote it down and wrote it down under oath and didn't come into this courtroom and refute the records." Mr. Fieger again misrepresented the evidence by describing Walter as "nearly dead." He continued, saying "I know that the court and these attorneys. did not like the way I treated some of the witnesses." (Tr. 2205.) In this statement, plaintiff's counsel insulted the court by improperly implying that the court's admonitions were a result of merely "not liking" his manner.

Again, Mr. Fieger improperly described the defense: "By the way, they also have to convince you that all of their witnesses who contradict each other are credible and right. They have to convince you that day is night and night is day. And they have to make you complicit [sic] in this injustice and believe that their people complied."[15] (He failed to show any contradiction between

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[15]A similarly improper style was criticized in another medical case, in which the Supreme Court of Ohio observed: "Counsel for appellees made various assertions and drew many inferences that were simply not warranted by the evidence. *** Appellees' counsel could have zealously represented his clients without resorting to these abusive tactics. Instead, counsel for appellees transcended the bounds of acceptable closing argument, creating an atmosphere [*502] 'surcharged with passion or prejudice.'" *Pesek* v. (continued...)

the defense witnesses.)

For six more pages, Mr. Fieger continued to cloak himself as the minister of God or to pretend to become the voice of Walter.[16] In the process, Mr. Fieger boldly misstated the evidence concerning damages: "As testified to by the life care planner, by the needs specified by doctors which you heard on the stand, the medical care requires for an R.N. home attendant care [sic] along with a myriad of other requirements which are listed in a health care plan table for which will be in evidence, a total, as Dr. Rosen indicated, $14,295,993." (Tr. 2227.) (As noted earlier in this dissent, none of the witnesses testified that Walter **required care** from an R.N.; he needed only a trained assistant, similar to a nurse's aide.)

Mr. Fieger's closing argument contains many more examples of similar statements designed to inflame the passions of the jury. The excerpts I cite by themselves adequately support my conclusion that the trial judge was correct in ruling that a new trial was in

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[15](...continued)
University Neurologists Ass'n, 87 Ohio St.3d 495, quoting, *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, 351, 8 O.O. 1108, 112-113, 7 N.E.2d 544, 549. The Court went on to say, "the principle that if 'there is room for doubt, whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party.'" Id. at 502, quoting *Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 85.

[16]Such a claim to the religious entitlement for judgment on a party's behalf has been repeatedly found to be grounds for a mistrial. See *Sandoval v. Calderon* (9th Cir. 2000), 241 F.3d 765, 779.

order. However, to demonstrate the extent of his outrageous melodrama, I feel obliged to relate Mr. Fieger's final words:

"I think Walter, if he could speak to you, might finally say this about all that's gone on: The day will come when my body will lie upon a white sheet tucked under the four covers [sic] of a mattress located in a hospital busily occupied with the living and the dying, and at a certain hospital a doctor will determine that my brain has ceased to function and that for all purposes, my life has stopped. When that happens, don't attempt to instill artificial life into my body by the use of machines and don't call this my death bed. Let this be called the bed of life and use whatever is usable to help others lead what you call lives. Give my sight to a man who's never seen a sun rise, a baby's face or the love in the eyes of a woman. And give my heart to a person whose only heart has caused nothing but endless days of pain. Give my blood to a teenager who is pulled from the wreckage of a car so that he might live to see his grandchildren play. Give my kidneys to one who depends upon a plan to exist. Take my bones, every nerve and muscle in my body to find a way to make a crippled child walk. Explore every corner of my brain. Take my cells if necessary and let them grow so that some day a voiceless boy will shout at the crack of a bat and a deaf girl might hear the sound of rain against her window. Burn what's left. Scatter my ashes to the window [sic] to help the flowers grow and if you must bury

something, let it be my faults and my weaknesses and all of my prejudices against my fellow man. Give my sin to the devil and give my soul to God and if by chance you remember me, do it with a kind word or a kind thought to somebody who needs you. And if you do all that I have asked, I will live forever." (Tr. 2231-2232.) This passionately presented fiction is akin to the razzle-dazzle tactic of attorney Billy Flynn in the film *Chicago*.

Every good attorney walks a fine line between zealous advocacy and tainting a jury. Mr. Fieger pole vaulted over that line early in this case and never retreated. I commend the trial court for having the integrity to recognize the need for a new trial and ordering one. I would affirm the order of the trial court in ordering a new trial.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARK A. MCLEOD, Guardian for The Estate of Walter Hollins	)	CASE NO: 484240
Plaintiff	)	JUDGE ROBERT M. LAWTHER
vs.	)	
MT. SINAI MEDICAL CENTER, Et al.	)	JOURNAL ENTRY AND OPINION ON DEFENDANTS' MOTIONS FOR NEW TRIAL, JNOV, OR REMITTITUR
Defendants	)	

Walter Hollins was born at Mt. Sinai Hospital in 1987, and life-flighted to University Hospital. Through his guardian he filed suit against Mt. Sinai Medical Center, University Hospital, Dr. Vernon Jordan, and the North East Ohio Neighborhood Health Services, alleging negligent pre-natal and post-natal care resulting in his condition of cerebral palsy and severe retardation. University Hospital entered into a settlement agreement with Plaintiff prior to trial, and the case proceeded for a three week period against the remaining defendants.

Walter Hollins was an IUGR baby (intra uterine growth retarded, meaning "small"), and this fact was known to Dr. Jordan during the mother's pregnancy. Upon examination in about the 39th week of pregnancy, the mother was sent to Mt. Sinai Hospital for testing by Dr. Jordan who later determined that a Caesarean Section delivery was advisable. He met her there and delivered the baby about two hours later.

The major issues of the case were (1) when and why was the baby injured, and (2) was its condition due to any negligence on the part of any defendant? Plaintiff claims that a delivery one hour earlier would have resulted in the birth of a normal child, and that Dr. Jordan who had examined the Mother at Mt. Sinai two hours earlier should have delivered the child sooner, Plaintiff also claims that Mt. Sinai is liable because the nurses in the OB

Dept. did not take action to somehow effect an earlier delivery. Defendants claim, however, that the injuries occurred before the mother was admitted to Mt. Sinai and that Dr. Jordan delivered the child at a time that was reasonable and proper under the circumstances.

The jury returned a verdict for Plaintiff in the sum of Fifteen Million Dollars ($15,000,000) for past and future economic damages, and Fifteen Million Dollars ($15,000,000) for past and future non-economic damages.

Defendants filed motions for Judgment Notwithstanding the Verdict, for New Trial, or in the alternative, for Remittitur, citing a number of grounds including irregularity of the proceedings, misconduct of Plaintiff's counsel, surprise, the award of excessive damages, judgment not sustained by the weight of the evidence, and errors of law. The verdict is the highest ever returned in Cuyahoga County, and reportedly the highest medical malpractice verdict in the State of Ohio.

The Court has reviewed the voluminous motions and briefs filed by all parties, and the entire 2400 page record, and has determined that **the Defendants' Motion for New Trial must be granted.**

All parties produced experts who were experienced witnesses, but whose opinions were diametrically opposed. The jury had the difficult duty of deciding the questions of negligence and proximate cause with respect to the Doctor and nurses, and decided those issues by a vote of 6 to 2. This was clearly a "close call", and depended upon which medical witnesses the jury chose to believe.

The liability issues were particularly difficult because Mt Sinai closed its doors several years ago, and some of the records from 17 years prior could not be found. Plaintiff filed a claim for spoliation of records which the Court dismissed at the close of Plaintiff's case for lack of evidence.

Civil Rule 59 (A) permits the granting of a new trial upon various grounds, including the following, which do apply in this case:

> Irregularity in the proceedings....by which an aggrieved party was prevented from having a fair trial.
>
> Misconduct of the jury or prevailing party.
>
> Accident or surprise which ordinary prudence could not have guarded against.
>
> Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
>
> Error of law occurring at the trial and brought to attention of the trial court by the party making the application.
>
> In addition, a new trial may also be granted in the sound discretion of the court for good cause shown.

The Court believes that the major grounds for relief set forth by Defendants are (1) the award of excessive damages given under the influence of passion and prejudice, (2) the misconduct of Plaintiff's counsel throughout the trial, and (3) irregularity in the proceedings which prevented a fair trial.

Excessive economic damages

Economic damages were presented through the testimony of Dr. Harvey Rosen, one of Cleveland's well-known economists. Unknown to the Court he had submitted his most recent expert report to Plaintiff in January, 2004 calculating the cost of home health care aides and other medical, therapy, and ancillary expenses for Walter over the period of his life expectancy to be between $4,303,088 and $6,413,639. During his testimony at trial, however, (R-1522) he was asked by Mr. Fieger what the cost would be for LPN care and RN care, although the life care plan devised by their life care expert, Mr. Cyphers, did not recommend such level of care, nor had Dr. Rosen's report prior to trial contained any

information on the costs of higher degrees of care. Defense attorneys all objected on the grounds of surprise, and Rule 21(B):

> "A party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel...unless good cause is shown, all supplemental reports must be supplied no later than thirty days prior to trial. The report of an expert must reflect his opinions as to each issue on which the expert will testify. An expert will not be permitted to testify or provide opinions on issues not raised in his report."

However, the Court overruled the objections and failed to call a sidebar conference on the record. That would have disclosed that Dr. Rosen was about to give testimony on estimates as to the cost of care which were not covered in his report, and to put a figure on the level of care that no doctor or other expert had recommended. No witness testified that Walter will ever need the care of a Registered Nurse or Licensed Practical Nurse. Only Plaintiff's counsel gave the opinion that such care was necessary.

This was error, and had their been a sidebar conference the objections would have been sustained, and the jury would not have heard very damaging testimony and medically unsupported figures which were presented by surprise.

Accordingly, Dr. Rosen then testified (R-1533) that the lifetime care including physical therapy with an LPN would cost $13,042,026, and with an RN these costs would be $14,042,993. These figures amounted to approximately triple the amount contained in his January report This testimony violated Rule 21 (B) and the case law interpreting same. *Jones vs. Murphy. (1984), 12 Ohio St. 3d 84; Paugh & Farmer Inc. vs. Monorah Home for Jewish Aged (1984) 15 Ohio St. 3d 44;* See also Civil Rule 26 (B) (4) and *Walker vs. Holland (1997) 117 Ohio App 3rd 775, and Guerrieri vs. Allstate Ins. Co (1999) 1999 WL 684 714*

This surprise testimony no doubt had a very strong influence on the jury in assessing economic damages of $15,000,000, and it should be noted that there was no medical basis for this testimony (R. 564, 566, 858-59)

Furthermore, evidence demonstrated that the total cost of Walter's care for the past 17 years was only $107,000. In addition, Dr. Gabriel, plaintiff's damage expert, estimated that the cost of care in the future would be in the neighborhood of $120,000 per year.

Counsel for Mt. Sinai have presented at Tab P in their brief a summary of 80 malpractice verdicts in Ohio during the past 15 years, including the prior record verdict in Cuyahoga County in 1999 in the sum of $17,000,000 for an infant whose injuries are remarkably similar to Walter's but also necessitated the need for lifelong kidney transplants. The other 79 cases listed resulted in verdicts in the range of $500,000 to several million, with Cuyahoga County showing several in the 10 to 15 million dollar range. While this chart does not serve to *prove* Defendants' claim of excessive damages in this case, it does help to focus attention on Defendants' argument that Plaintiff's violation of Rule 21(B) persuaded the jury to give an outrageous verdict. See Roberts vs. Mutual Mfg & Supply Co.(1984) 16 Ohio App 3d 324 which held that "a jury should be confined to such damages as are reasonably certain to follow from the injury complained of."

There may be a future case in Ohio in which the Plaintiff is severely injured, facing a lifetime of constant pain and disability, permanently bedridden; deprived of a large income enjoyed before the malpractice, with a family he can no longer support and facing daily exorbitant costs of special medical care. In such a case a verdict in the amount of $30,000,000 or more might well be justified. **In the opinion of this Court, the evidence herein does not show that <u>this</u> is such a case.** See *Cox vs. Oliver Machinery Co (1987) 41 Ohio App 3d 28 and Fromson & Davis Co vs. Reider (1934) 127 Ohio St. 564.*

Excessive non-economic damages

The $15,000,000 verdict for "non-economic" damages is even more difficult to understand and to justify. The Court's charge on such damages was standard OJI:

> "Non-economic loss means harm or loss not normally measured in money, including but not limited to pain and suffering, physical disability, disfigurement and interference with the normal activities of life."

Plaintiff's Counsel's description of these damages to the jury was very brief, and referred (R-2226) to Walter's suffering, pain, loss of independence, fright, disability, and disfigurement.

Any jury would have difficulty in fairly and accurately awarding money damages for these elements of cerebral palsy. No one would ever willingly endure such disability, partly mental and partly physical. So what method can be employed to fix a figure which represents **fair compensation** without being punitive against a defendant whose possible negligence may have contributed to the condition? The method can not be just that the Plaintiff's attorney asked for $17,500.000, as Plaintiff's counsel did in this case. If a jury simply awards the figure requested, there would be no need for trials.

Some of the factors frequently discussed by juries in such cases include the need for new housing (a home on one floor in this case), wheelchair access, a van equipped for access by the handicapped, special bathing facilities, and funds which although not mentioned in the law, help the caregivers take care of the plaintiff with greater convenience and safety. **The award of $15,000,000 for non-economic damages in this case is so out-of-line and unjustified that it must have been the result of passion and prejudice.**

There was no evidence that Walter suffers regular, continuing pain. The only testimony of possible conscious pain and suffering was his mother's comment that during physical therapy, he might "wince" in a manner which appeared to signify pain. He has the expected disabilities associated with cerebral palsy, but does not seem to know that he is different from

other children. Without taking lightly his physical disability, and with full realization that his illness is a tragedy, the Court has reviewed in detail the testimony given by family members and caregivers.

Dr. Gabriel:

> "Walter is a very interesting youngster. He's beautifully cared for....He has many abilities to bond, to appreciate what's going on around him. I believe his intelligence is considerably higher than we will ever be able to test.....Walter benefits from close personal relationships....You can see that in the way he relates to this mother and even to strangers. Once he's warmed up to a stranger, he makes eye contact, he laughs easily."

Walter's Grandmother (R.-1474)

> "Walter loves water. He can stay in the water all day. Even when you give him a bath he doesn't want to come out. At school he loves to swim.....When he sees me he's all bubbly and happy and likes grandma. If he could talk, that's what he would say.....He's absolutely a ladies man. Now, you may not think he knows very much. He knows that. He is a man. He really likes the ladies and he responds. I think that's really great."

Regina Harris, Walter's mother: (R-1567)

> (showing photo) He's horseback riding. It's a field trip from school. These activities help him. Now that he's older and he's more aware of things, he can be stimulated. He likes to go outside and feel the sun shine and the air, just like every body else....(R-1572) He interacts with other children pretty well. He laughs, and has own little way of playing with them. (R-1573) He responds to acts of kindness. He does give hugs and kisses on command if he feels like it. He also knows if he's getting scolded."

It appears that when called upon to award non-economic damages, the jury simply matched the $15,000,000 it had already awarded for economic damages, as Mr. Fieger had essentially asked them to do. From the standpoint of fairness and common sense, however, consideration should have been given to the kind of facts which juries often consider. The Court notes that an award of $3,000,000, for example, invested at 5%, would produce $150,000 per year without any reduction in principal. Such income should be sufficient to provide wonderful facilities for his comfort and for recreational opportunities, over and above the medical and custodial care provided by the economic damage portion of the verdict.

Returning a verdict of $15,000,000 for non-economic loss shows that the jury simply lost its way, and ignored the Court's charge on the law. This amount is clearly excessive and can be remedied only by a new trial.

Misconduct of Plaintiff's Counsel

Some lawyers believe that conducting a trial in a theatrical way, being overbearing, discourteous, and rude, is the key to success. A complete reading of the record in this case will demonstrate that Mr. Fieger, from Detroit, Michigan, apparently holds that opinion. In this case, that approach seems to have helped him achieve a clearly unjustified verdict.

Counsel was the attorney for the famous Dr. Kevorkian, and frequently appears on Fox TV. His theatrical and discourteous demeanor throughout the trial seemed to emulate TV trials in which lawyers can do and say whatever comes to mind. During cross examination of his witnesses, his trial technique included constant interruption of opposing counsel without bothering to object and obtain a ruling. A few examples follow:

> Page 720
> Mr. Fieger: "Excuse me. The chart doesn't reflect arterial blood gas of 7.15. He made that up Judge, it's one thing to ask a question—"
>
> Page 728
> Mr. Fieger. "Wait a minute Judge, she knows very well she has three reports and that's not even, you know—"
> Mr. Groedel: "Why is he telling the witness what to say?"
> The Court: "I have no idea."
>
> Page 1021
> Mr. Fieger: "Excuse me, this is all made up. This is conversation that he denies that ever took place. Now he's literally written a script, Judge."

This kind of courtroom conduct persisted throughout the trial, until the Court finally called a conference on the record in chambers (Page 2051) and explained the situation one more time:

> "The major problem of this case has been Mr. Fieger's insistence in jumping up and without using the word "objection" saying, (things like) 'Judge, what is he trying to do' in a whiny, disturbing tone of voice which I don't know how that has appeal to the jury, but

it turned me off and looking at the jury, that was the impression I got, since the time was late.

(To Mr. Fieger) "In case you are not familiar with the rules of civil procedure in Ohio, I will be happy to share them with you. They require you to cite objections, and if the Court feels a side bar is necessary to discuss the grounds for the objection, if I don't understand your objection, we'll have a side bar."

"I will insist on the balance of this trial proper procedure be followed. If you have an objection, get up and say "objection". If I don't know the grounds, I will give you a chance to give me the grounds. If I overrule the objection, that's the end of it, and then you sit down. That's the only way we will conduct this trial on an orderly basis."

It was quite obvious that Mr. Fieger's goal was to convey to the jury his own idea of what the witness should be saying, thus testifying for the witness, rather then making a genuine and valid objection to the question.

The above examples are but a sampling of the conduct displayed by Plaintiff's counsel throughout the entire three week trial. A reading of the whole record discloses in detail his trial technique which was designed to manipulate and mislead the jury, including referring to some of Defendants' witnesses as "prevaricators" engaging in "false stories and cover-ups". He frequently referred to defendants as "corporate clients" with "phony defenses". His entire approach to this case in open court was misleading, unprofessional, and frequently outrageous, and did not constitute proper advocacy. See *Powell vs. St. John Hospital (2000) 241 Mich App 64.*

As an example, Mt. Sinai, which ceased its existence several years ago, did not have evidence of the exact time of the Mother's admission. The first timed notation in her chart was from the OB dept. Mr. Fieger then chose to suggest that "she got herself in a wheelchair and wheeled herself down to labor and delivery". Although that did not happen, the suggestion was repeated several times, so that the jury may have believed it to be true.

Page 2174 (Mr. Fieger)

> "When is the last time anyone walked into a hospital, took a wheelchair, and started wandering around the halls without somebody checking you in and verifying your ability to pay?"

Plaintiff's brief (page 11) states that the allegations of misconduct occurred outside the presence of the jury, but that is not the case, as set forth above. Plaintiff also excuses Mr. Fieger's conduct as being acceptable in showing "ability, enthusiasm, and zealous advocacy". The Court finds, however, that his conduct far exceeded such permissible attributes. During final argument, Mr.Fieger employed the kind of theatrics best left to movies and television. At one point during final argument, he placed his hand on Walter's shoulder and addressed the child as follows:

> "I'm sorry. I couldn't help you, Walter. I couldn't stop you from drowning. But I will be his voice. I will help him get justice now. Whatever you do to the least of these my brothers, that you do unto me."

Since Walter was unable to understand what was being said, it can be assumed that the attorney's "message", adopting the words of Jesus Christ, was simply to appeal to the passion and prejudice of the jury.

In addition, the record reflects that at least five times during final argument, Mr. Fieger went far beyond the bounds of theatrical license with the following kind of performance:

Page 2199

> "Please, please nurses. I'm a little baby. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me. Please help me to be born."

This is just another example of Plaintiff's efforts to appeal to the jury's natural sympathy through passion and prejudice.

Defendant's brief quotes *Baldalamenti vs. Wiliam Beaumont Hospital-Troy* (1999) 237 Mich. App. 278 in which Mr. Fieger employed the same tactics apparent in the instant case, and held in Syllabus 17:

> "While a lawyer is expected to advocate his client's cause vigorously, parties are entitled to a fair trial on the merits of the case uninfluenced by appeals to passion or prejudice, and as long as attorneys will resort to such methods, unjustifiable either in law or ethics, courts have no alternative but to set the verdicts aside."

Note, also, another case which has received much publicity since the Michigan Supreme Court, on July 22, 2004, reversed a $21,000,000 sexual harassment verdict obtained by Mr. Fieger. *Gilbert vs. Daimler-Chrysler Corp. Case No. 122457.* The Court found that Mr. Fieger engaged in a "sustained and deliberate effort to divert the jury's attention from the facts and the law" resulting in a verdict which "unmistakably reflects passion rather than reason, and prejudice rather than impartiality." The Court also criticized Mr. Fieger for his ad hominem attacks against the Defendant based on its corporate status (Gilbert at page 25).

Irregularity in the proceedings

Defendants complain about the Court's failure to conduct a voir dire examination of the jury following publication of a front page Plain Dealer article which appeared just before the jury was to deliberate. The article mentioned that Mr. Fieger was asking the jury to award $35,000,000, and that "if he got only half that much, it would be the highest damage award in county history." The Court was concerned about the effect of the article on the jury, and in an attempt to avoid overemphasizing the matter asked the jury in the hall, before court commenced, if any jurors had seen the article. Three acknowledged that they had done so. The court merely told them to disregard what they had read.

When Defense counsel then requested a voir dire examination of the jury before deliberation, the Court declined so as not to give the article undue importance. The court now acknowledges that failure to permit a voir dire examination of the jury prevented defense

counsel from determining if any juror had been influenced to the extent that he or she was no longer eligible to serve. In addition, there should have been no conversation between the Court and jury off the record. *Sweet vs. Clare Mar Camp, Inc*, 38 Ohio App. 3rd 6.

It is entirely possible that having read the Plain Dealer article, some jurors may have found that the **opportunity to return the record verdict in this County** was irresistible. Defense Counsel should have had the opportunity to explore that question.

Another blatantly improper instance of misconduct occurred near the end of Dr. Rosen's testimony:

> "O.K. By the way, also, none of your amount of money necessary to provide child included the costs that would be necessitated by the legal representation of Walter, do they?"

Upon objection, the Court took Counsel into chambers and made clear that such question was totally improper since it raised the matter of attorney fees in the minds of the jurors. A precautionary instruction was then given, but there was no way to undo the harm that had already been done. Obviously, legal expenses are not recoverable in the absence of punitive damages, and are never the subject of the economist's report. Plaintiff's counsel makes the excuse that punitive damages were prayed for, so the question was proper. The subject does not arise, however, **unless the jury is charged on punitive damages, and later awards them**, and then the matter of attorney fees can be considered. In this case, however, the Court granted Defendant's Rule 50 motion with respect to punitive damages at the close of Plaintiff's case.

Pro hac vice status of Mr. Fieger

Prior to the trial, and after the verdict, Defendants Ronald Jordan M.D, and Northeast Ohio Neighborhood Health Services, Inc. filed a motion to revoke the Pro Hac Vice status of Mr. Fieger. Following the trial, the Court was reluctant to grant the motion in the belief that Mr.

Fieger should have the opportunity to defend the verdict and his trial conduct in the Appellate process. In the event of a re-trial of this case, however, it is the recommendation of this Court that the trial judge assigned give careful consideration to such a motion, and review *Reaves et al vs. MetroHealth Medical Center,* Cuyahoga CCP Case No. CV-043-535855 (2004).

Defense Counsel in their motion briefs have set forth many other grounds in support of their request for a new trial, especially with respect to the issues of negligence and proximate cause, and some of those arguments have much merit. The Court will not attempt to deal with all of the issues raised by all parties, however, and believes that the above discussion more than justifies the conclusion that a new trial must be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions of all Defendants for a New Trial be granted, and that, accordingly all other pending motions are rendered moot.

Robert M. Lawther, Judge

Date: August 23, 2004

A copy of the foregoing Opinion and Journal Entry was mailed this 23rd day of August, 2004, to all counsel of record.

Robert M. Lawther, Judge

CivR 26. General provisions governing discovery.

(A) Policy; discovery methods. It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.

Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency of use of these methods is not limited.

(B) Scope of discovery. Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure subject to comment or admissible in evidence at trial.

(3) Trial preparation: materials. Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefore. A statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without showing good cause. A statement of a party is (a) a written statement signed or otherwise adopted or approved by the party, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded.

(4) Trial preparation: experts.

(a) Subject to the provisions of subdivision (B)(4)(b) of this rule and Rule 35(B), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.

(b) As an alternative or in addition to obtaining discovery under subdivision (B)(4)(a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefore is restricted to those previously given to the other party or those to be given on direct examination at trial.

(c) The court may require that the party seeking discovery under subdivision (B)(4)(b) of this rule pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under subdivision (B)(4)(a) of this rule, may require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

(C) Protective orders. Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery. The provisions of Civ. R. 37 (A)(4) apply to the award of expenses incurred in relation to the motion.

Before any person moves for a protective order under this rule, that person shall make a reasonable effort to resolve the matter through discussion with the attorney or unrepresented party seeking discovery. A motion for a protective order shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

(D) Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not

operate to delay any other party's discovery.

(E) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of persons having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify.

(2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

HISTORY: Amended, 7-1-94

CivR 59. New trials.

(A) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has

been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

(B) Time for motion. A motion for a new trial shall be served not later than fourteen days after the entry of judgment.

(C) Time for serving affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty-one days either by the court for good cause shown or by the parties by written stipulation. The court may permit supplemental and reply affidavits.

(D) On initiative of court. Not later than fourteen days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party.

The court may also grant a motion for a new trial, timely served by a party, for a reason not stated in the party's motion. In such case the court shall give the parties notice and an opportunity to be heard on the matter. The court shall specify the grounds for new trial in the order.

HISTORY: Amended, eff 7-1-96

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, Tenth District, Franklin County.

Patrick D. CAHILL, et al., Plaintiffs-Appellees,

v.

Michael A. ANDERSON, Defendant-Appellant.

No. 99AP-785.

June 22, 2000.

APPEAL from the Franklin County Court of Common Pleas.

Maguire & Schneider LLP, and Keith W. Schneider , for appellees.

Gibson & Robbins-Penniman, and J. Miles Gibson, for appellant.

OPINION

KENNEDY.

*1 Appellant, Michael A. Anderson, appeals from a decision of the Franklin County Court of Common Pleas awarding appellee, Patrick D. Cahill, $25,000 in damages in a personal injury action.

The parties were involved in a traffic accident on April 28, 1995. Appellee was turning left at the intersection of Kenny Road and McCoy Road in Upper Arlington, Ohio, when appellant also attempted to make a left turn to go around appellee. Appellee stopped his car in the road, and appellant's car struck appellee's car in the rear. Appellee exited his car and approached appellant, and an altercation took place. Appellant struck appellee in the head several times with a large flashlight. Appellee fell to the ground, was bleeding from the head, and suffered a momentary loss of consciousness. He was transported to the hospital where he required stitches and an overnight stay. Appellee suffered head pain and was given pain medication. He was unable to work in his concrete business for two weeks after the incident.

Appellee, his wife and children filed a complaint on April 16, 1996, against appellant alleging negligence, assault, loss of consortium and infliction of emotional distress, and seeking over one million dollars in damages. Appellant failed to file an answer, and appellee moved for a default judgment on June 13, 1996. The trial court granted the default judgment motion in a decision filed June 28, 1996, and set the matter for a damages hearing. Appellant filed a motion to set aside the default judgment, but the trial court denied this motion. The damages hearing was continued numerous times. After a bench trial, the trial court issued a decision on June 11, 1999, awarding appellee $25,000 in damages. Appellant filed a timely notice of appeal.

On appeal, appellant raises four assignments of error:

Assignment Of Error No. 1:
WHERE THE TRIAL COURT FINDS THAT THERE IS NO CREDIBLE TESTIMONY TO SUPPORT CLAIMS FOR ANY LOST WAGES OR OTHER COMPENSATION, IT MAY NOT ENTER JUDGMENT AGAINST A DEFENDANT FOR LOSS OF WAGES.

Assignment Of Error No. 2:
WHERE THE TRIAL COURT HAS REFUSED TO ADMIT ANY EVIDENCE OF MEDICAL BILLS, IT MAY NOT ENTER JUDGMENT AGAINST THE DEFENDANT FOR ANY UNPAID MEDICAL BILLS.

Assignment Of Error No. 3:
WHERE THE PLAINTIFF HAS FAILED TO PRESENT EXPERT TESTIMONY ON THE ISSUE OF THE PROXIMATE CAUSE BETWEEN THE CONDUCT OF THE DEFENDANT AND ANY INJURY, NO DAMAGES FOR THE INJURY OR PAIN AND SUFFERING THEREFROM MAY BE AWARDED.

Assignment Of Error No. 4:
THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE SINCE THE PLAINTIFF'S TESTIMONY HAS BEEN FOUND TO BE NOT CREDIBLE BY THE COURT, THE COURT MAY NOT RELY ON THE SAME TESTIMONY TO GRANT AN AWARD OF DAMAGES FOR ANY DAMAGES BASED ON THEIR [*sic*] TESTIMONY.

We address appellant's four assignments of error

together. Essentially, appellant argues that the trial court erred by awarding appellee damages and that the damages award is against the manifest weight of the evidence. We agree.

The Supreme Court of Ohio has held that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. Thus, this court cannot reverse the damages award if there is competent, credible evidence in the record supporting the award.

*2 In its decision, the trial court found that appellant inflicted appellee's injuries and was not justified in doing so. The trial court found that:

> No credible testimony was submitted to the court to establish the claims for loss of consortium, the loss of children's consortium, or for any lost wages or other compensation. It appears the matter of the hospital bills has been settled between Community Mutual and defendant; therefore, the court considers the other incidental bills of plaintiff and his pain and suffering.

However, the trial court's damages award appears to be inconsistent with its findings. Despite finding no credible testimony supporting lost wages *or other compensation*, finding that the hospital bills were settled, and indicating that it would only consider incidental expenses and pain and suffering, the trial court held that, "[f]or the expenses of repairs to his automobile, those medical expenses not covered by the settlement and loss of wages and inconvenience during the 2-week recovery period, and for the pain and suffering, this court finds in favor of the plaintiff in the amount of $25,000." The trial court did not specify what portion of the damages award was attributed to each of the bases for recovery.

Appellant argues that the trial court erred by awarding damages for lost wages since it found no credible testimony supporting this claim, that it erred in awarding the cost of medical bills since it excluded all evidence of medical bills, and that it erred by awarding damages for pain and suffering since appellee failed to present expert testimony regarding proximate cause between appellant's conduct and appellee's injuries. Appellee counters by arguing that the damages award was based on appellee's incidental expenses and pain and suffering, that an award of damages for pain and suffering is within the discretion of the trial court and does not require expert testimony to establish, and that there was evidence presented supporting the award.

In *Corwin v. St. Anthony Med. Ctr.* (1992), 80 Ohio App.3d 836, 840-841, 610 N.E.2d 1155, this court discussed what a party must prove to be awarded damages in a tort action:

> In a tort action, the measure of damages is normally that which will compensate and make whole the injured party. *Pryor v. Weber* (1970), 23 Ohio St.2d 104, 52 O.O.2d 395, 263 N.E.2d 235. Where the permanency of an injury is obvious, such as the loss of an arm, leg or other member, the jury may draw its own conclusions as to the measure of damages; however, where an injury is not obvious, there must be expert evidence as to the damage sustained, the probability of future pain and suffering or the permanency of the injury. See *Roberts v. Mut. Mfg. & Supply Co.* (1984), 16 Ohio App.3d 324, 325, 16 OBR 355, 357, 475 N.E.2d 797, 799, citing *Cusumano v. Pepsi-Cola Bottling Co.* (1967), 9 Ohio App.2d 105, 120, 38 O.O.2d 132, 142, 223 N.E.2d 477, 487; and *Day v. Gulley* (1963), 175 Ohio St. 83, 86, 23 O.O.2d 382, 384, 191 N.E.2d 732, 734. In any event, "[t]he damages that result from an alleged wrong must be shown with reasonable certainty, and cannot be based upon mere speculation or conjecture." *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 17, 19 OBR 71, 82, 482 N.E.2d 955, 967; *Swartz v. Steele* (1974), 42 Ohio App.2d 1, 5, 71 O.O.2d 46, 48, 325 N.E.2d 910, 913.
>
> Additionally, this court has held that, "[i]n order for the medical bills to be the subject of compensatory damages, plaintiffs were required to establish a causal connection between defendant's negligence and the expenses, and expert testimony was required to establish the necessity of the treatment which resulted in the billings." *Muncy v. Jones* (Jan. 19, 1984), Franklin App. No. 83AP-562, unreported.

*3 The trial court found, based on the testimony, that appellant caused appellee's injuries. Appellant admitted to striking appellee on the head with a flashlight. There was testimony from appellee and his wife that he suffered pain requiring pain

medication, that he had difficulty sleeping, that he incurred medical expenses, and that he was not being treated for any other condition except these injuries. However, no expert testimony was presented to indicate the diagnosis, the extent of appellee's injuries, the permanence of the injury, any future repercussions, such as future pain and suffering, or that the treatment was necessary. Additionally, the trial court excluded from evidence all of appellee's medical bills, and no evidence was presented indicating what bills were not covered by the settlement. Thus, there was no evidence in the record that could serve as the basis of an award of medical bills to appellee.

With regard to lost wages, the trial court specifically found that no credible testimony was presented to establish a claim "for any lost wages or other compensation." However, the trial court awarded damages for "loss of wages and inconvenience during the 2-week recovery period." Although appellee testified that his business lost between $650,000 and $800,000 due to his injuries, he indicated on cross-examination that his annual income was between $35,000 and $70,000. Without any credible evidence, the award of damages for lost wages was speculative.

The trial court also awarded appellee damages for pain and suffering. This court has recognized that an award of damages for pain and suffering is usually within the province of the trier of fact because there is no objective standard to determine the amount, unless the amount is so excessive that it appears to have been the result of passion or prejudice, or where it is manifestly against the weight of the evidence. *Carter v. Simpson* (1984), 16 Ohio App.3d 420, 423, 476 N.E.2d 705. Both appellee and his wife testified to the extent of the pain and suffering that appellee experienced after his injuries, and this testimony was sufficient for the trial court to award damages for pain and suffering. However, the trial court's award must be limited to the two-week period described in the testimony, given that appellee failed to produce any expert testimony that he would continue to experience any pain or lingering effects from his injuries in the future. Because the trial court failed to delineate what portion of the damages award was for appellee's pain and suffering for the two-week period before he returned to work, this court lacks a reasonable basis to review the award in light of the evidence presented.

The only other basis for recovery for which there was any credible evidence in the record was the incidental expense of $328 for appellee's car repairs. Although the trial court excluded the actual bill for the repairs, appellee testified that he spent $328 to repair his car. This amount was undisputed by appellant and, as such, was sufficient evidence for an award in that amount.

*4 We find that the record is lacking competent, credible evidence that would support the damages award; thus, appellee failed to meet his burden of proving damages. Therefore, we conclude that the trial court's award of damages is against the manifest weight of the evidence. Consequently, appellant's four assignments of error are sustained, and the decision of the trial court is reversed and remanded for further proceedings consistent with this opinion.

Judgment reversed and case remanded.

DESHLER and LAZARUS, JJ., concur.

Not Reported in N.E.2d, 2000 WL 796573 (Ohio App. 10 Dist.)

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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, Second District, Montgomery County.
Edna WIMMERS, Administratrix of the Estate of Thomas E. Wimmers, Deceased Plaintiff-Appellant
v.
Daniel G. CAMACHO, M.D. and Orthopedic and Hand Surgeons Defendants-Appellees
No. 13272.

July 27, 1993.

OPINION

YOUNG.

*1 Edna Wimmers, administratrix of the estate of her son, Thomas E. Wimmers, appeals from a judgment resulting from a jury verdict which found against her and in favor of Dr. Daniel Camacho and his professional corporation, Orthopedic and Hand Surgeons, Inc., in a suit involving a wrongful death by medical negligence claim. Mrs. Wimmers claims, among other things, that the trial court committed reversible error when it *excluded* a portion of one of her witness's expert testimony and when it *failed to exclude* certain expert testimony placed into evidence on behalf of Dr. Camacho and Orthopedic and Hand Surgeons, Inc.

I.

On March 6, 1987, Ron Wimmers and members of his family, including Tommy Wimmers, were riding in an automobile on Woodman Drive in Dayton, Montgomery County, Ohio. (Tr. 67.) While crossing the northbound lane of traffic, their car was struck. All four passengers were taken to St. Elizabeth Medical Center. (Tr. 83, 67.) Three of the passengers (Ron Wimmers, his wife and daughter) received relatively minor injuries and were treated and shortly released. (Tr. 70.) Tommy Wimmers, however, sustained a broken left femur. (Tr. 98.)

Appellant, having been notified of the accident late that night, chose to have Dr. Camacho handle Tommy Wimmer's surgery because he had performed hand surgery on her previously. (Tr. 503.)

Upon examining Tommy Wimmers, Dr. Camacho determined that he had suffered a "nasty," comminuted fracture which required surgery on an "urgent" basis. (Tr. 98.) Dr. Camacho also discovered that Tommy Wimmers was thirty-one years old, was mentally retarded, and suffered from severe kyphoscoliosis (curvature of the spine). (Tr. 96-8, 104.)

Before performing surgery on Tommy Wimmer's fractured femur, Dr. Camacho consulted Dr. Frank Seiler, an anesthesiologist, to assess Tommy Wimmer's increased risk for respiratory complications during or after the surgery as a result of his kyphoscoliosis. (Tr. 104, 109-115.) Specifically, Dr. Camacho asked Dr. Seiler if he could proceed with the surgery that day (Saturday, March 7, 1987.) (Tr. 110.)

Although Dr. Seiler agreed that Tommy Wimmers was at an increased risk for respiratory complications, he told Dr. Camacho that it was okay to proceed with the semi-emergency surgery. (Tr. 111.) Dr. Seiler took several special precautions in preparing Tommy Wimmers for surgery, including having the two nurse anesthetists who actually administered the anesthetic to Wimmers monitor him more closely than normal during the surgery. (Tr. 671-2.) However, Dr. Camacho conceded that he never discussed with Dr. Seiler any extra precautions that might have been advisable to take in the postoperative period. (T. 114.)

Complications developed during the surgery itself. Dr. Camacho had originally planned to repair the fractured left femur with a so-called Grosse-Kempf locking nail. (Tr. 120.) However, the first nail he tried was defective. (Tr. 125.) He next tried to use a Grosse-Kempf nail that was designed for use on a broken right femur. That too failed. (Tr. 127.) Dr. Camacho then tried a smaller nail but was afraid that it would break. (Tr. 128.)

*2 After the failure with the smaller Grosse-Kempf nail, Camacho switched to a "Kuntscher nail" to

repair the fracture. (Tr. 129.) The complications with finding the "proper nail" prolonged the surgery by an hour to an hour and a half. (Tr. 130.)

Following surgery, Tommy Wimmers was sent to the recovery room. While there, Dr. Camacho placed his leg in traction. (Tr. 149.) Camacho noted that Wimmers was responding to the pain of having his leg placed in traction. (Tr. 149.) The recovery room nurse noted that Tommy Wimmers' respirations were deep and full and he aroused easily upon hearing his name. (Tr. 196.)

After staying the minimum requirement of one hour in the recovery room, the nurse determined that it was suitable under the hospital's protocol to transfer Tommy Wimmers to the general medical/surgical floor. (Tr. 211.) The recovery room nurse cleared this decision with Karen Reigelsperger, one of the nurse anesthetists who had administered the anesthetic to Wimmers during the surgery. (Tr. 211, 674.)

Tommy Wimmers was transferred to the floor at approximately 6:00 p.m. At 8:05 p.m., a floor nurse, Anna M. Patrick, noted that Tommy Wimmers was "not awakening properly." (Tr. 718.) At 8:20 p.m., Nurse Patrick called the anesthesia department. Karen Reigelsperger came to check on Tommy Wimmers. (Tr. 722-3.) Ms. Reigelsperger gave Wimmers three separate shots of Narcan, an anesthetic reversal agent at 8:30 p.m., 9:30 p.m., and 9:40 p.m. (Tr. 723- 4.) At approximately 10:00 p.m., Ms. Reigelsperger called Dr. Camacho at his home. (Tr. 724.)

Upon receiving the call, and Ms. Reigelsperger's assessment, Dr. Camacho surmised that Tommy Wimmers was suffering from a respiratory problem. (Tr. 783.) In response to this, Dr. Camacho called Dr. James Graham, a pulmonary specialist. *Id.* Dr. Graham called the hospital and ordered a chest x-ray and an arterial blood gases test to be performed immediately. (Tr. 727.)

Upon arriving at Tommy Wimmers room, Dr. Graham took off his coat and ordered everyone out of the room "STAT." (Tr. 512.) Wimmers was reintubated and sent to the intensive care unit. (Tr. 513.) Five days later, the Wimmers family asked the hospital to terminate Tommy's life support system. (Tr. 515.) On March 13, 1987, Tommy Wimmers died as a result of acute respiratory distress caused by fat embolization syndrome. (Tr. 293.)

On March 6, 1989, Mrs. Wimmers (appellant) filed a wrongful death by medical negligence action as a result of the death of her son Tommy Wimmers (appellant's decedent) against St. Elizabeth Medical Center (hereinafter, hospital), its employee-nurses, Dr. Daniel Camacho and Orthopedic and Hand Surgeons, Inc. (appellees), Dr. Francis Seiler, and Karen Reigelsperger, C.R.N.A. Appellant also brought a products liability claim against Pfizer, Inc., Pfizer Hospital Products, Inc. Howmedico, Inc. and their sales representative, William B. Rike, for the defective Grosse-Kempf nail.

***3** The case was originally set for trial on March 18, 1991, but was delayed due to Dr. Camacho's need for surgery. Trial was reset for January 6, 1992. During this delay, settlement was reached between appellant and all of the party defendants save Dr. Camacho and Orthopedic and Hand Surgeons, Inc.

The trial, which began January 6, 1992, lasted for seven days and ended with a jury verdict in favor of Dr. Camacho and Orthopedic and Hand Surgeons. (Tr. 884.) This case is now properly before us on appeal. Appellant assigns the following errors:

1.THE TRIAL COURT PREJUDICIALLY ERRED TO THE DETRIMENT OF THE PLAINTIFF/ APPELLANT BY EXCLUDING THE EXPERT OPINION OF PLAINTIFF'S EXPERT, DR. JAMES GADEK, FOR THE ALLEGED FAILURE OF PLAINTIFF TO SEASONABLY SUPPLEMENT DISCOVERY PURSUANT TO OHIO RULES OF CIVIL PROCEDURE, RULE 26(E)(1)(b).

2.THE COURT PREJUDICIALLY ERRED TO THE DETRIMENT OF THE PLAINTIFF/ APPELLANT BY PERMITTING THE EXPERT OPINION TESTIMONY OF DR. FRANCIS SEILER AND THE NEWLY FORMULATED OPINION TESTIMONY OF DR. HOWARD NEARMAN.

3.THE TRIAL COURT PREJUDICIALLY ERRED TO THE DETRIMENT OF THE PLAINTIFF BY FAILING TO GIVE A REQUESTED JURY INSTRUCTION PURSUANT TO OHIO JURY INSTRUCTIONS § 331.06(1).

4.THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ACTIONS DEPRIVED THE PLAINTIFF OF A FAIR TRIAL.

II.

In her first assignment of error, appellant contends that the trial court committed reversible error by excluding at trial a portion of expert testimony from Dr. James E. Gadek, who was testifying on her behalf.

During the appellant's case-in-chief, Dr. Gadek testified that Dr. Camacho failed to meet a reasonable standard of care when he devised a postoperative plan that did not include "intensive surveillance of respiratory function, [for] 24 hours at least [following the surgery]. (Tr. 250.) Appellees' counsel objected to this testimony and asked for a sidebar conference. (Tr. 251.)

After a brief, off the record discussion with counsel for both parties, the trial court called a lunchtime recess for the jury which left the courtroom at 12:00 noon. The trial judge and both parties' counsel conferenced from 12:00 noon to 12:15 p.m. At 12:15 p.m., the conference temporarily concluded and both parties went to do additional research. (Tr. 257.) At 1:30 p.m. the in-chambers conference reconvened until 2:00 p.m. (Tr. 272.)

During both of these in-chamber conferences which were held on the record, counsel for both parties were able to quote at length from Dr. Gadek's deposition as well as cite case law in support of their respective positions. (Tr. 252-271.)

In support of their position, appellees' counsel argued that he was unfairly surprised by Dr. Gadek's allegedly new testimony stating that Dr. Camacho had a duty to make sure that Tommy Wimmers was closely monitored for 24 hours after surgery. Appellees' counsel insisted that Dr. Gadek never made that specific criticism of Dr. Camacho during his deposition of December 11, 1990, nor did appellant file a supplemental response indicating that her expert had formed a new opinion about the case as required by *Long v. Isakov* (1989), 58 Ohio App.3d 46 and Civ.R. 26(E)(1)(b). (Tr. 252.) Civ.R. 26(E)(1)(b) states in pertinent part:

> *4 A party is under a duty seasonably to supplement his response with respect to any question directly addressed to * * * the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify.

Furthermore, appellees' counsel also cited, among others, *Jackson v. Booth Memorial Hosp.* (1988), 47 Ohio App.3d 176, *Jones v. Murphy* (1984), 12 Ohio St.3d 84, and *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, as standing for the proposition that a trial court may exclude new opinion testimony from one side's expert that unfairly surprises or "ambushes" the other side pursuant to Civ.R. 37(B)(2)(b). (Tr. 258.)

In *Huffman, supra,* at 85, fn. 3, the court stated that "Civ.R. 37(B)(2)(b) provides that the court may sanction a party [who fails to comply with Civ.R. 26(E)(1)(b)'s duty to seasonably supplement his responses to questions concerning the subject matter of his experts' opinions] by entering '[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence * * *.' "

In response to this argument appellant's counsel quoted extensively from Dr. Gadek's deposition in an attempt to show that the appellees could not have been surprised by Dr. Gadek's opinion concerning the need for Dr. Camacho to order a 24-hour observation period. (Tr. 254-6, 260-2.) Appellees' counsel also quoted from Dr. Gadek's deposition to buttress his argument that Dr. Gadek had never made that specific criticism of Dr. Camacho (Tr. 264-7.)

After both sides had concluded making their arguments, the trial court stated as follows:

> THE COURT: The Court, after having heard the arguments will exclude the opinion with regard to the 24 hour observation. I don't think, from what I have heard here, that that was anything that was formally attributed to the defendant. It might have been to others, it doesn't apply to him. I will order that that part be stricken and let the rest stand. I don't have any problem with the blood gas situation [Dr. Camacho's failure to order blood gases testing for appellant's decedent postoperatively to monitor his respiratory condition] that's in there. I think he's added to with regard to Dr. Camacho, what he indicated were his shortcomings in the deposition. I don't

think that's quite fair [to allow the testimony concerning the 24 hour observation period]. (Tr. 268-9.) The trial court proceeded to strike Dr. Gadek's opinion testimony about Dr. Camacho's failure to order a 24 hour period of close observation and instructed the jury to disregard it. (Tr. 272.)

On appeal, the appellant claims that the trial court was "sandbagged" by appellees' counsel's claims of unfair surprise with regards to Dr. Gadek's testimony. (Appellant's brief at 9.)

As appellant herself notes, it is axiomatic that:
The trial court has broad discretion in the admission and exclusion of evidence and unless it clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere.
*5 *State v. Withers* (1975), 44 Ohio St.2d 53, 55, quoting *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. Therefore, in order for appellant to prevail, she must show that the trial court abused its broad discretion in excluding Dr. Gadek's testimony concerning the 24-hour observation period.

It has been held that
the term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable * * * (citations omitted)
[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias (citations omitted).
Huffman, supra, at 87.

In an attempt to show that the trial court abused its discretion in the present case in excluding Dr. Gadek's opinion on the 24-hour observation period, appellant first points to the same excerpts from Dr. Gadek's deposition that were read to the trial court when this issue first arose. (Appellant's brief at 9-10; Tr. 260-262.) Read in context, the deposition shows that Dr. Gadek made it clear that it was his opinion that *Dr. Seiler,* the anesthesiologist with whom Dr. Camacho consulted with prior to operating on appellant's decedent, breached standards of care when he failed to devise a postoperative plan which included monitoring of his arterial blood gases as an index for appellant's decedent's respiratory status during the first twelve to twenty-four hours after surgery. (Gadek's Deposition December 11, 1990, hereinafter Gadek D. 25, 32.)

Further it is clear that under questioning from appellees' counsel, Dr. Gadek plainly indicated that once Dr. Seiler failed to order the blood gases tests then Dr. Camacho should have ordered them. (Gadek D. 82).

However, nowhere in the deposition does Dr. Gadek *specifically* say that Dr. Camacho breached a standard of care by not ordering a twenty-four hour postoperative period of observation in either the intensive care unit or the recovery room. Dr. Gadek does say in his deposition that his feeling was that "the patient was put at severe risk when they made the decision to step him down from one level of care to another at a time when his respiratory problem was getting worse." (Gadek D. 86.) He also stated that there would have been earlier intervention for appellant's decedent's respiratory distress had he been sent to the intensive care unit. (Gadek D. 84-5.)

Nevertheless, as the trial court observed as to Dr. Gadek's claim at trial that Dr. Camacho should have ordered appellant's decedent to be closely monitored for twenty-four hours, Dr. Gadek never placed that duty squarely on Dr. Camacho *during his deposition* (Tr. 269) even though he was given ample opportunity to do so by appellees counsel. (Gadek D. 127-8.)

*6 Next, appellant points to *Tritt v. Judd's Moving and Storage, Inc.* (1990), 62 Ohio App.3d 206, 211-212, which states:
Civ.R. 26(E)(1)(b) mandates supplementation of the *subject matter* on which an expert witness is expected to testify. [Cite omitted.] By its terms, the rule does not require a party to give notice as to each and every nuance of an expert's opinion. [Emphasis ours.]

Appellant argues that Dr. Gadek had consistently made clear in his deposition that Dr. Camacho failed to adequately monitor appellant's decedent postoperatively. Hence, his opinion that Dr. Camacho had a duty to order a twenty-four hour period of intensive surveillance of appellant's decedent was merely a "nuance" that appellant was not required to reveal to appellees under Civ.R. 26(E)(1)(b).

The trial court heard this argument and was not impressed with it. (Tr. 270- 1.) Neither are we. Dr. Gadek's testimony concerning the need to order a twenty-four hour observation period referred to this measure as a standard of care expected of a reasonable physician treating a patient in the condition of appellant's decedent. (Tr. 249-50.) This kind of testimony cannot be fairly referred to as a "nuance".

Appellant also points to appellees' opening argument as support for her claim that appellees could not have been surprised or ambushed by Gadek's testimony concerning the twenty-four hour period of intensive care. During opening argument, appellees' counsel stated as follows:

> Dr. Camacho may order a patient to go to the intensive care if there is an orthopedic problem. For instance, if the patient were bleeding excessively, if the patient had, if he had to operate around an artery and they wanted to have a closer monitoring on the circulation or the sensation thereafter, but those would be orthopedic reasons for him, as an orthopedic surgeon, to be, for the patient to be discharged to an intensive care unit.
>
> * * *
>
> Well, we believe, under these circumstances in the recovery room, that there was no duty for Dr. Camacho to have ordered this patient to the intensive care unit or to have suggested that to the anesthesiologist to write such an order * * *. You will hear the testimony of the head of the Surgical Intensive at Case Western Reserve Medical School, Dr. [Howard] Nearman, and you will hear his testimony that under these circumstances there was absolutely no obligation or duty for an orthopedic surgeon to have referred the patient to an intensive care unit.
>
> (Tr. 49, 57-9.)

Appellant's counsel insists that the above quoted portions from appellees' counsel's opening argument show that he was not surprised by Dr. Gadek's opinion that Dr. Camacho should have ordered a twenty-four hour period of intensive surveillance for appellant's decedent. Appellant contends that it also shows that appellees' counsel had its own expert (Dr. Nearman) to counter Gadek's opinion.

However, there is one fact omitted by appellants. In addition to Dr. Gadek, the appellants also retained another expert witness to testify concerning Dr. Camacho's alleged negligence. This witness was Dr. Richard Park, who was deposed by counsel for the original party defendants, including appellees' counsel, on November 8, 1990. In that deposition, Dr. Park indicated that he believed Dr. Camacho should have sent appellant's decedent to the intensive care unit. (Park's Deposition November 8, 19090, hereinafter Parks D. 71-6.) This was what appellees' counsel was referring to in his opening statement, and, in fact, Dr. Park did testify to this at trial. (Tr. 376-85.)

*7 Appellees' counsel had three expert witnesses (Dr. Nearman, Dr. Clark Hopson, and Dr. Seiler) to counter the expected testimony of Dr. Park on the issue of whether Camacho had a duty to send appellant's decedent from the recovery room to the intensive care unit. Dr. Park testified that Dr. Camacho had a duty to send appellant's decedent to the intensive care unit (*Id.*) while Drs. Nearman, Hopson, and Seiler all testified that he did not. (Tr. 579, 636, 685.)

Thus it is clear that appellees were not surprised that *one* of appellant's experts (Dr. Park) would testify that Dr. Camacho had a duty to send appellant's decedent from the recovery room to the intensive care unit rather than the floor. To rebut this testimony, they lined up expert testimony from three different witnesses to counter testimony that they expected from *one* (but not two) of appellant's experts.

From the circumstances set out above we are unwilling to conclude that the trial court abused its discretion in excluding the portion of Dr. Gadek's testimony in question. First, the trial court had a basis for applying legal sanctions for appellant's failure to supplement the subject matter of Dr. Gadek's expert opinion as they were required to do by Civ.R. 26(E)(1)(b).

Second, the judge could have applied a less severe sanction such as granting appellees a continuance or permitting appellees to voir dire Gadek as to his opinion. We believe that the trial court had the discretion to exclude the opinion concerning the 24-hour monitoring period altogether pursuant to Civ.R. 37(B)(2)(b) at this late stage in the proceedings. Appellees' counsel were able to prepare carefully for their cross examination of Dr. Park and his opinion about the need for ICU monitoring but were not able to do so for Dr. Gadek. Further, had appellees known that Dr. Gadek as well as Dr. Park was going to testify that appellant's decedent should have been sent to ICU by Dr. Camacho, then appellees may well have sought an additional expert for themselves to testify that such action was not required of a reasonable physician in Dr. Camacho's circumstances.

Furthermore, we do not believe that appellant was materially prejudiced by the exclusion of Dr. Gadek's testimony that Dr. Camacho breached a standard of care by failing to order that appellant's decedent be closely monitored for 24 hours. Dr. Gadek was allowed to testify over appellees' counsel's objection that Dr. Camacho's failures in the postoperative management of the patient directly and proximately caused appellant's decedent's death. (T. 295.) He further testified that Dr. Camacho's failure to order blood gases to assess the respiratory condition of appellant's decedent was a breach of care, as was his failure to anticipate the complications that led to appellant's decedent's death. (Tr. 295-297.) Finally, Dr. Gadek was permitted to testify that earlier intervention would have allowed appellant to survive. *Id.*

*8 In addition to Dr. Gadek's opinion, Dr. Park testified at length on behalf of the appellants that Dr. Camacho had a duty to send appellant's decedent from the recovery room to the intensive care unit. (Tr. 376-85.) Although appellant's case may have been helped somewhat if both Dr. Gadek and Dr. Park had testified to the need for ICU monitoring, the fact remains that this theory of liability was presented to the jury in this case for their consideration. We are reluctant to find that appellant has been materially prejudiced by the exclusion of testimony when that testimony tends to be cumulative in effect to other testimony that was admitted into evidence. See *Perkins v. Ohio Dept. of Transp.* (1989), 65 Ohio App.3d 487, 497.

Because we find that the trial court did not abuse its discretion in excluding a portion of appellant's expert testimony, and appellant suffered no material prejudice from the exclusion in any event, we hold that appellant's first assignment of error is overruled.

III.

For her second assignment of error, appellant presents two claims. First, appellant asserts that the trial court committed reversible error when it refused to exclude a portion of testimony from Dr. Howard Nearman, one of appellees' expert witnesses. Second, appellant argues that the trial court also committed reversible error when it refused to exclude the expert opinion testimony of Dr. Francis Seiler, another of appellees' expert witnesses.

A.

Dr. Nearman

On direct examination from appellees' counsel, Dr. Nearman testified that in his opinion, Dr. Camacho followed acceptable standards of care as an orthopedic surgeon in treating appellant's decedent. (Tr. 559.) As part of his expert testimony, he also stated that the postoperative orthopedic orders written by Dr. Camacho for appellant's decedent met acceptable standards of care. (Tr. 580.) When he was asked by appellees' counsel "[i]s there anything else that you would have expected an orthopedic surgeon to order", Dr. Nearman replied "[n]o, not particularly." *Id.*

During cross-examination, the following exchange occurred between appellant's counsel and Dr. Nearman concerning the above-mentioned postoperative orders:

Q. [By appellant's counsel] Now on these postoperative orders, Dr. Nearman, do you see anything that says, call immediately if patient show signs of respiratory problems or respiratory distress?
A. No, ma'am, they're not on there.
Q. Is there anything on there that says take respirations more often with this patient than every two to four or four to six hours?
A. No.
Q. Is there anything on there at all that says to call the doctor for anything, other than check circulation of the fingers or toes?
A. No., ma'am not written on there.

(Tr. 604.) The obvious implication that appellant's counsel was making with this line of questioning was that, contrary to Dr. Nearman's opinion stated on direct examination, Dr. Camacho's postoperative orders were insufficient to meet a reasonable standard of care.

*9 On redirect examination, appellees' counsel asked Dr. Nearman the following questions in order to rehabilitate him on the issue of the sufficiency of the postoperative orders:

Q. [By appellees' counsel] Now, in any event, from your experience, do you have experience working with recovery room nurses and also floor nurses?
A. Yes, sir
Q. And from your experience from working with floor nurses, is there a reasonable expectation on behalf of a physician, whether it be you or an orthopedic surgeon, that if there is a chance [*sic*, change] in the patient's condition as to respiratory problems, labored respirations, increasing pulse, that a nurse has sufficient education and experience and training to call you to tell you about -
(Tr. 612.)

At this point in the dialogue, appellant's counsel raised an objection without explanation which the trial court overruled. (Tr. 612-3.) Dr. Nearman answered the immediate question above as follows:

A. Yes, I think that, you know, the nurse is a health care professional and this is something that a nurse, he or she is trained to do. If the patient is not doing what the nurse expects, he or she has the obligation to call the responsible physician and say something's out of whack here.
(Tr. 613.) At this point appellant's counsel asked to approach the bench. *Id.*

At the sidebar conference that followed, appellant's counsel complained that Dr. Nearman was offering opinions regarding whether or not the care provided by the floor nurses or the nurse anesthetist met acceptable standards. Appellant's counsel insisted that this was unfair because Dr. Nearman had stated in his deposition that he planned to give an opinion *only* as to whether or not *Dr. Camacho's* performance met a reasonable standard of care, and not on whether the performance of any other health care provider (*i.e.*, nurses) met a reasonable standard of care. (Tr. 613-4.)

Appellees' counsel countered by saying that he was only trying to ascertain whether a physician in Dr. Camacho's position should spell out in detail all of the circumstances in which the nurses should call him with regards to his patient's condition or whether or not it was acceptable practice for such a physician to expect that the nurses would notify him if such circumstances occurred (i.e., the patient develops labored respiration, etc.) *Id.* The trial court overruled appellant's counsel's objection. (Tr. 615.)

Continuing with the redirect, appellees' counsel asked Dr. Nearman the following question:

Q. Doctor, as a physician or as an anesthesiologist or a surgeon, regardless of the orders that have been issued, would it be your expectation that a floor nurse or a recovery nurse would call you if there was some change in the patient's condition, i.e. respiratory distress, increased pulse rate or something of a significant nature?
A. Yes.
MS. STOCKLIN [appellant's counsel]: Renew the objection.
THE COURT: The Court would overrule the objection.
*10 A. Yes. It would be my expectation--we don't write, call me if this occurs, you'd have a list as long as your sleeve, call me if certain type things occur. There are certain things, in taking care of patients, that are just health care professionals, whether it be a nurse or physician, should know these things and if there are certain, obvious things that happen, something happens that's adverse, then a physician should be called.
MS. STOCKLIN: Objection, move to strike.
THE COURT: The Court will overrule the objection.
(Tr. 615-6.)

On appeal, appellant points out that Dr. Nearman stated twice in his deposition that he did not intend to give an opinion as to whether or not anyone besides Dr. Camacho complied with reasonable and ordinary standards of care. (Nearman's deposition, February 6, 1991, hereinafter Nearman D. 23-4, 32.) Further Dr. Nearman stated at his deposition that he did not have enough facts to state an opinion on the question of whether or not the actions of the nursing staff, including the nurse anesthetist, failed to meet a proper standard of care by failing to call Dr. Camacho sooner than 10:00 p.m. on the

Saturday night that appellant's decedent began having severe respiratory problems. (Nearman D. 68-9.)

Appellant claims that because of the above statements made at his deposition, Dr. Nearman's testimony quoted above amounted to an unfair surprise and should have been excluded by the trial court as it had done with a portion of her expert witness's (Dr. Gadek's) testimony. Citing the same cases that appellees' counsel had used to successfully argue for the exclusion of Dr. Gadek's testimony (*Huffman, supra, Jackson, supra*), appellant argues that the trial court abused its discretion by not excluding the above-quoted portions of Dr. Nearman's testimony on redirect. We disagree.

As appellees point out, the complained of testimony was not directed towards establishing a standard of care owed yet breached by the particular nurses involved in the incident. Rather, Dr. Nearman's testimony on redirect was designed to rebut the implication created during cross examination that Dr. Camacho's postoperative orders were insufficient to meet a reasonable standard of care expected of a physician when fashioning such orders.

Appellees' counsel elicited from Dr. Nearman expert opinion testimony that Dr. Camacho did not deviate from acceptable standards of care when he failed to provide the nurses with a more specific set of orders that outlined in detail the circumstances in which he was to be called. (Tr. 612, 616.) Dr. Nearman stated that it was reasonable for a physician in Dr. Camacho's position to rely on the nursing staff to call him given certain changes in his patient's conditions.

Dr. Nearman made clear at his deposition that he intended to testify that it was his opinion that Dr. Camacho's actions postoperatively were appropriate. (Nearman D. 33.) Furthermore, appellees' counsel stated for the record what opinions he intended to solicit from Dr. Nearman:

> ***11** * * * I intend to solicit from him opinions as to any deviations, alleged deviations on behalf of Dr. Camacho as to the discharge from the recovery room and his duties pertaining to the care of the patient in the recovery room and allegations made by any of your allegations that he so deviated by not instructing, not sending his patient to the intensive care or getting a blood gas study or things like that of him on this patient.
> Those are the areas that I expect Dr. Nearman to testify on.
> (Nearman D. 33.)

As such, we do not believe that appellant could have been unfairly surprised by Nearman's testimony concern*ing the acceptability of Dr. Camacho's postoperative orders. Therefore, this claim in the second assignment of error is overruled.

B.

Dr. Seiler

Appellant also claims that it was reversible error for the trial court to permit Dr. Seiler to give expert testimony on behalf of the appellees because appellees' counsel did not reveal his intention to use Dr. Seiler as an expert on behalf of appellees until after the discovery cutoff date listed in the amended pretrial order.

As stated before, Dr. Seiler was the anesthesiologist consulted by Dr. Camacho preoperatively to assess appellant's decedent's increased risk for respiratory complications during surgery in light of his kyphoscoliosis and resulting reduced lung capacity. (Tr. 104, 109-115.) Dr. Seiler was one of the originally named party defendants who settled out of court before trial began. (Appellant's brief at 1.) On September 28, 1990, and while he was still a defendant in the case, Dr. Seiler was deposed by appellant's counsel. At this time, Dr. Seiler's attorney, Ted Jenks, told appellant's counsel that he planned to use Dr. Seiler as an expert witness testifying on his own behalf at trial. (Tr. 688.)

On October 12, 1990, appellees' counsel sent to appellant's counsel a letter in which he reserved the right to call as an expert witness on appellees' behalf any other expert named by any of the other party defendants who were still involved in the lawsuit at that time. (Appellant's brief at 21, and Exhibit B attached to the brief; Tr. 688.)

On May 24, 1990, the trial court had filed an amended pretrial order which stated in relevant part as follows:

> *IMPORTANT NOTE:
> PLEASE NOTE THE COURT HAS CHANGED THE PERPETUATION DEADLINE.
> *DISCOVERY:*

All discovery shall be completed thirty days before the trial date set below. The deadline for perpetuation depositions shall be fourteen days prior to trial for plaintiff(s) and seven days prior to trial for defendant(s). *These cutoff dates are inflexible and and [sic] may be modified only by the Court upon a filing of a motion showing good cause.*
UNDER NO CIRCUMSTANCES WILL THE TAKING OF PERPETUATION TESTIMONY WITHIN THIRTY DAYS OF THE TRIAL DATE CAUSE THE TRIAL DATE TO BE CONTINUED.
Counsel for the plaintiff is ordered to reveal to opposing counsel the name of any expert witness expected to be called at trial no later than June 30, 1990. Counsel for the defendants are ordered to reveal to opposing counsel the name of any expert witness expected to be called at trial no later than October 1, 1990.

***12** (Docket # 59.) Also in this Amended Pretrial Order, the trial court stated that the case was set for a jury trial during the week of March 18, 1991. *Id.* This trial date was later extended to January 6, 1992. (Appellant's brief at 1.)

Appellant argues that since counsel did not reveal any intention to call Dr. Seiler as an expert witness until eleven days after the discovery cutoff date of October 1, 1990, and indeed never specifically identified Dr. Seiler by name as an expert witness to be called on appellees' behalf, then the trial court should have excluded his expert testimony at trial. Appellant insists that this is especially so in light of the trial court's language in the Amended Pretrial Order that states: "[t]hese cutoff dates are inflexible and and[sic] may be modified only by the Court upon a filing of a motion showing good cause." As such appellant contends that the trial court abused its discretion by failing to exclude Dr. Seiler's testimony that was prejudicial to appellant to such an extent that it constituted reversible error. We disagree.

First, when read in context, the language in the Amended Pretrial Order that states "[t]hese cutoff dates are inflexible ... and may be modified only ... upon ... [a showing of] good cause," seems to apply *only* to the cutoff dates that (1) all discovery was to be completed thirty days before the trial date and (2) the deadline for perpetuation deposition. If the trial court had intended for this "inflexible cutoff date" rule to apply to the orders calling for the naming of expert witnesses by each side before a certain date, it seems to us that it would have written that rule at the end of those orders.

Assuming arguendo that the trial court meant for the "inflexible cutoff date" language to apply to *all* discovery deadlines set in the Amended Pretrial Order, including the one calling for the naming of defendants' [now appellees'] experts expected to be called at trial, we still do not believe that the trial court abused its discretion in admitting Dr. Seiler's testimony. This court has recently addressed such a situation in *Swedlund v. Swedlund* (June 3, 1992), Montgomery App. No. 12796, unreported.

In *Swedlund,* a referee filed an agreed pretrial order which required the parties to exchange witness lists fourteen days prior to trial and which contained the warning that "[a]ny witness not so listed will be excluded from testifying save for good cause shown." *Id.* at 2. Only seven days prior to trial, the plaintiff advised defendant of an expert she intended to call at trial. *Id.* The referee refused defendants' motion to exclude plaintiff's expert from testifying and this court found that ruling to be neither an abuse of discretion nor prejudicial to defendant in that case. *Id.*

Furthermore, in *Montgomery v. Zacher* (Sept. 24, 1991), Franklin App. No. 91AP-55, unreported, an appeals court upheld a trial court's refusal to exclude testimony by a defendant's expert witness even though the defendant conceded that he had never identified through supplemental responses to plaintiff's interrogatories the expert witness that he intended to call at trial. *Id.* at 6.

***13** The *Montgomery* court noted that plaintiff admitted to having notice of defendant's intent to use their expert witness nearly six months before trial. *Id.* The court also pointed out that excluding testimony pursuant to Civ.R. 37(B)(2)(b) as a sanction for violating a discovery order "is permissive, rather than mandatory, and within the discretion of the trial court." *Id.* at 7. Finally, the appellate court stated that the complaining party had "ample time prior to trial to bring this violation to the court's attention and to seek less severe corrective measures. *Id.* at 8.

In the present case, appellant's counsel knew for

more than fourteen months before the trial was held that appellees might call one of the other defendant's expert witnesses to testify as an expert on their behalf. Yet appellant made no attempt to bring this matter to the trial court's attention before the trial had started so that the court could have applied a less severe sanction such as imposing on the appellees the costs of retaking Dr. Seiler's deposition as an alternative sanction for their untimeliness. See, *Id.* at 7-8.

Furthermore, assuming arguendo that the trial court's failure to exclude Dr. Seiler's expert testimony concerning Dr. Camacho's performance did constitute an abuse of discretion we still are not willing to label it reversible error because we are not convinced that appellant was materially prejudiced by the admission of that testimony. See *Withers, supra,* at 55.

In his testimony at trial regarding Dr. Camacho's performance, Dr. Seiler said he felt that the treatment given to appellant's decedent by Dr. Camacho was "reasonable and proper." (Tr. 690.) He testified that the basis for his opinion was that "the patient did well until he returned to the floor. (Tr. 691.) He further stated that Dr. Camacho had no duty to consult him further about appellant's decedent's postoperative management in the recovery room, to order arterial blood gases, or to send appellant's decedent from the recovery room to the intensive care unit instead of the floor. (Tr. 691-3.) Finally, Dr. Seiler stated that he was in charge of the patient's postoperative management when appellant's decedent was in the recovery room and that he, Dr. Seiler, would have sent appellant's decedent to the ICU from the recovery room if he felt that was necessary. (Tr. 693-4.)

It is hard to see from reading Dr. Seiler's deposition, how appellant could be surprised by Dr. Seiler's opinion concerning Dr. Camacho. Dr. Seiler made it clear in his deposition that he could have, if he thought it was indicated, sent decedent from the recovery room to the intensive care unit as well as order arterial blood gases testing to be done postoperatively in the recovery room. (Tr. 61, 64.) Dr. Seiler felt neither precaution was necessary. *Id.* Therefore, it could not have come as a surprise to appellant that Dr. Seiler found no fault with Dr. Camacho for not ordering these precautions either.

*14 Furthermore, we note that appellant's counsel cross examined this witness in a thorough manner and thus did not appear to be "ambushed" by Dr. Seiler's expert testimony, or unprepared to challenge it. (Tr. 695-704.)

Finally, all of Dr. Seiler's expert testimony was similar to the testimony given by appellees' two other experts, Drs. Nearman and Hopson. Both Nearman and Hopson testified that Dr. Camacho breached no standard of care by failing to send appellant's decedent to ICU or by failing to order arterial blood gases testing. (Tr. 576, 580, 631, 636.) Further, both testified that appellant's decedent was under the care of Dr. Seiler when he was in the recovery room. (Tr. 556, 631, 632.) Although appellees' case may have been helped somewhat by Dr. Seiler's testimony which reinforced the opinions of Nearman and Hopson, and, conversely, appellant's case harmed to the same degree, we are reluctant to predicate a reversal on the wrongful admission or exclusion of evidence that tends to be cumulative in effect. See *Perkins, supra,* at 497.

Therefore we conclude that the trial court did not abuse its discretion in admitting the expert opinion testimony of Dr. Seiler. We also find that no material prejudice accrued to appellant as a result of that testimony.

Finding neither of appellant's claims to be well taken, we hold that appellant's second assignment of error is overruled.

IV.

In her third assignment of error appellant claims that the trial court erred by failing to give the following jury instruction:

"A physician is responsible for the acts of a nurse or nurses when the physician has the right to control the performance of that nurse's services and the right to direct the manner in which those services are performed. The negligence of such nurses is the negligence of the physician. If you find by the greater weight of the evidence that a nurse or nurses were negligent you may find that the physician was negligent."

Ohio Jury Instructions § 331.06(1). The trial court permitted appellant's counsel to make an objection on the record to its refusal to give this instruction to the jury in order to preserve this issue

for appeal. (Tr. 816.)

In *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, the Supreme Court stated as follows:

> It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 75 O.O.2d 331, 348 N.E.2d 135. However, the corollary of this maxim is also true. [Footnote omitted.] "Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction." Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed.1991) 860, Section 36:2. See, also *Feterle v. Huetmer* (1971), 28 Ohio St.2d 54, 57 O.O.2d 213, 275 N.E. 2d 340, at the syllabus: "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a [n] * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction.

***15** Thus, it is our task in regard to this assignment of error to determine whether the record contains evidence from which reasonable minds might reach the conclusion that (1) a nurse or nurses involved in the case were negligent and (2) that Dr. Camacho had the right to control the performance of that nurse's services and the right to direct the manner in which those services are performed.

In *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 103-104, the Supreme Court held that

> [w]here the alleged negligence involves the professional skill and judgment of a nurse, expert testimony must be presented to establish the prevailing standard of care, a breach of that standard, and that the nurse's negligence, if any, was the proximate cause of the patient's injury.

It is indisputable that, during her case-in-chief, appellant presented no expert testimony on the duty, breach, and causation elements on this claim of nursing negligence. Instead she seeks to rely on a portion of the expert testimony of one of appellees' experts, Dr. Nearman (the admission of which they objected to at trial and from which they appealed in their second assignment of error), testimony from the appellant herself, and the testimony of Anna M. Patrick, one of the floor nurses in the case. Appellant insists that collectively, this testimony provided sufficient evidence so that reasonable minds could have found that a nurse or nurses involved in the case were negligent, thus satisfying the first prong of their respondeat superior claim. We disagree.

As to Dr. Nearman's testimony that allegedly provided evidence of the floor nurse's negligence in caring for appellant's decedent, we note again that the thrust of that portion of Dr. Nearman's testimony was that the postoperative orders written by Dr. Camacho met acceptable standards of care even though they did not specify the circumstances under which the floor nurses should notify him (i.e. "upon noticing labored respirations, call me", etc.). Dr. Nearman testified that such specificity was not necessary because nurses are trained to seek help in those circumstances without being instructed to do so. (Tr. 613, 616.)

Dr. Nearman never testified that the nurses breached any standard of care that they may have owed to appellant's decedent. As such he could give no evidence on the issue of proximate cause. Thus appellant cannot use Dr. Nearman's testimony to establish that there was sufficient evidence of nursing negligence to give the jury the requested instruction on imputing nursing negligence to Dr. Camacho.

As to the testimony from appellant herself that the nurses seemed to be ignoring her when she requested that the nurses get some help because her son (the decedent) did not appear to be recovering, this too is insufficient to establish the negligence of the nursing staff.

In *Ramage, supra,* at 103 the plaintiff tried to argue that:

> the alleged negligence of the nurses in th[e] case occurred merely in their observation and reporting of the decedent's condition to the doctor and that this involves matters within the common knowledge and experience of the jurors [and thus did not need to be established by expert opinion testimony].

***16** The court rejected this argument because the allegations in the complaint were improper

diagnosis, treatment, and care and, thus, expert testimony was required to establish negligence. *Id.*

Appellant, in the present case, is attempting to make the same argument here, to-wit: that the nurses were negligent in not diagnosing the appellant's decedent's deteriorating condition soon enough and calling for help. As this issue involved the "professional skill and judgment of a nurse" *expert* testimony had to be presented on the matter. Therefore, appellant's own testimony could not have provided the jury with sufficient evidence from which it could reasonably conclude that a nurse or nurses were negligent.

Finally, appellant points to the testimony of Nurse Patrick, one of the floor nurses who observed appellant's decedent after he had been brought in from the recovery room. Nurse Patrick testified that she took no vital signs of appellant after 8:20 p.m. on the Saturday night that appellant began to develop severe respiratory complications following his surgery. (Tr. 720.) Nurse Patrick stated that Dr. Camacho had ordered that postoperative vital signs be taken. *Id.*

The implication that appellant wishes us to draw from Nurse Patrick's above-quoted testimony is that she owed a duty to take appellant's decedent's vital signs after 8:20 p.m. and that she breached that duty. However, even if we were to assume that Nurse Patrick breached a reasonable standard of care by not taking appellant's vital signs after 8:20 p.m., there still was no evidence that this "breach of duty" proximately caused appellant's decedent's death. Also, appellant omits the fact that at 8:20 p.m. on the night in question, Nurse Patrick called the anesthesia department which sent Karen Reigelsperger, the nurse anesthetist to deal with the problem. Furthermore, Nurse Patrick testified that appellant's decedent's vital signs were stable at 8:20 p.m. (Tr. 718), and indicated that Ms. Reigelsperger arrived at approximately 8:30 p.m. to begin to try to revive the patient with Narcan. (Tr. 723.)

Therefore, we conclude that there is not sufficient evidence in the record from which a reasonable jury could conclude by a preponderance of the evidence that the nurses involved in this case were negligent in treating appellant's decedent. As a result we need not reach the issue of whether or not Dr. Camacho had the requisite amount of "control [over] the performance of the nurse's services and the right to direct the manner in which those services were performed" as a result of the postoperative orders he wrote. (Appellant's brief at 24, quoting Ohio Jury Instruction Section 331.06(1).)

We find that the trial court did not err in refusing to give the jury the requested jury instruction which would have imputed the negligence of the nurses to Dr. Camacho. Consequently, appellant's third assignment of error is overruled.

V.

In her fourth and final assignment of error, appellant contends the "cumulative effect" of a number of the trial court's evidentiary rulings and some of the statements it made in those rulings deprived appellant of a fair trial. Appellant asserts in her reply to appellees' brief that:

> ***17** even though each of the trial court's specific actions, taken alone, would not have ultimately served to unfairly prejudice [appellant] at the trial herein, the accumulative affect [sic, cumulative effect] of the trial court's actions throughout the trial, deprived the [appellant] of a fair and impartial day in court.

(Appellant's reply brief at 9.) We disagree.

First, appellant adopts the arguments made in her first two assignments of error and argues that the imposition of sanctions against appellant for Dr. Gadek's surprise testimony coupled with the trial court's failure to impose sanctions for what appellant alleges was the surprise testimony of Drs. Nearman and Seiler tilted "the scales of justice" unfairly in appellees' favor. (Appellant's brief at 29.) Because we have discussed these issues at length elsewhere in this opinion, we see no need to discuss them again here except to say that we find in each instance that the trial court did not abuse its discretion and the appellant was not materially prejudiced by the ruling.

This argument is followed by a series of complaints about rulings and statements made by the trial judge throughout the course of the proceedings. Perhaps the one most deserving of discussion is appellant's claim that the trial court improperly curtailed her trial counsel's attempts to rehabilitate her expert witness, Dr. Park, after he had been cross-examined by appellees' counsel.

On direct examination appellant's counsel elicited from Dr. Park the opinion that appellant's decedent's aspiration and resulting respiratory distress probably would not have occurred had appellant's decedent been transferred from the recovery room to the ICU. (Tr. 383.)

Under cross-examination, appellees' counsel asked Dr. Park if appellant's decedent's coughing which was noted at 8:20 p.m. on the night he developed serious trouble could have occurred just as much in the ICU:

Q. And therefore that cough, resulting in the aspiration, that could have occurred in the intensive care unit.
A. That was the beginning of the aspiration, yeah.
Q. And--
A. Or at least the first evidence of aspiration.
Q. And that could have occurred just as much in the intensive care.
A. It could have occurred in the intensive care.
Q. It could have occurred just as much. Now with aspiration, am I not correct, Doctor, that it's not so much the volume of it, but what happens is that with aspiration, its like you seed either bacteria or a chemical reaction there.
A. Exactly
Q. It's a seeding, is it not?
A. Right.
Q. And that seeding develops later on over a period of time causing pneumonia--
A. Um-hum.
Q. Adult respiratory distress syndrome.
A. Um-hum.
Q. All right, and that could have occurred with that initial cough, that seeding of the aspiration, right?
A. Could have; that's a possibility.

* * *

Q. And we don't know whether at that point his fate might already have been sealed with that aspiration?
***18** A. My feeling is that it was not.
Q. Your feeling is, but we don't know, do we?
A. Right, my medical opinion.
Q. We don't know one way or another, but already with that one cough that could have occurred in the intensive care unit is that he may have aspirated enough that his fate may already have been sealed with subsequential, sequential pneumonia and so forth.
A. Um-hum.

(Tr. 412-3.)

On redirect examination, appellant's counsel tried to ask Dr. Park if he had an opinion within a reasonable degree of medical certainty whether or not aspiration probably would have occurred if appellant's decedent had been in ICU. At this point, appellees' counsel objected to the question on the grounds that it had been asked and answered on direct. (Tr. 421.) Indeed, it had been (Tr. 383), and the trial court sustained the objection, saying:

I think one time through it is enough; the Court would sustain the objection. We could plow this ground over and over and over and not accomplish anything.

(Tr. 421.) Appellant suggests that this ruling prejudiced her and permitted appellees' counsel to state during closing argument that appellant's counsel made no attempt to rehabilitate their witness. (Tr. 853.)

Nevertheless, appellant's counsel *was able* to rehabilitate her witness on the issue as to what "planted the seeds" of the aspiration that caused appellant's Adult Respiratory Distress Syndrome (ARDS):

Q. Mr. Gibson [appellant's counsel] also asked you on cross examination if [appellant's decedent] could have planted the seeds of pneumonia or aspiration early on in the evening, is that correct?
A. I think that's right.
Q. And he indicated you had testified about that on your deposition.
A. Yes.
Q. Do you recall that?
A. Yes.

* * *

Q. And, in fact, you were asked on your deposition by Mr. Gibson, by the time--page 94--By the time the patient was reintubated, he could already have planted some seeds of bacteria and could have caused ARDS.
A. Yes.
Q. What was your answer?
A. Could have. That's a possibility.
Q. And the question then was, good possibility, isn't it. And what was your response?
A. I said, no, a fair possibility.
Q. Do you have an opinion to a reasonable, medical certainty as to whether the aspiration would have occurred early that planted the seeds of

ARDS if it had been caught?
A. I feel that--no, it could not have resulted in or the probability would be very little or none. The longer the aspiration went on, the more possible the problem became or the more plausible the problem became of aspiration pneumonia. * * *
(Tr. 421-422.)

Thus, as the above portions of the transcript indicate, appellant's counsel was given an opportunity to rehabilitate her expert witness and she took advantage of it. Furthermore, "[t]he control of redirect examination is committed to the discretion of the trial judge and a reversal upon that ground can be predicated upon nothing less than a clear abuse thereof." *State v. Wilson* (1972), 30 Ohio St.2d 199, 204. Since appellant's question that was objected to and sustained had in fact been "asked and answered" and since appellant was given ample room to rehabilitate her witness, we do not feel that the trial court committed any

*19 "clear abuse" of his discretion.

Appellant also claims the trial court erred when it refused to allow testimony relating to the loss sustained by family members as a result of appellant's decedent's death. (Tr. 443, 494.) However, the jury found that Dr. Camacho was *not liable* for *any* damages that appellant or her family members may have suffered as a result of appellant's decedent's death. (Tr. 884.) Therefore, reversible error cannot be predicted on the trial court's rulings related to the admissibility of evidence pertaining to damages.

Appellant also points to the following exchange as evidence of the trial court's unfairness which occurred after the trial court had sustained appellee's objection to the admission of certain evidence and after the trial court gave both sides an opportunity to argue the matter:
MR. GREGER [appellant's co-counsel]: Further to that your Honor--
THE COURT: I have ruled on it and we don't need any more argument
MR. GREGER: Why is it, when you sustain an objection to a question, why is Mr. Gibson [appellees' counsel] permitted then to argue with the Court and Plaintiff's counsel is not?
THE COURT: Well that may have happened. When it does happen on something I may be making a wrong decision on, I would appreciate counsel pointing out the errors of my ways. If I have not made an error, I don't see any reason to do it. I think there's discretion in the admission of these exhibits, that I have never permitted. You may proceed. And I will not permit counsel to argue with me. You understand that?
MR. GREGER: I do, your Honor, I simply wanted to be fair.
THE COURT: You're doing it right now. Let's be on with it.
(Tr. 654.)

We simply fail to see how this could have caused material prejudice to appellant's case. It is certainly within the trial court's discretion to accept further argument on a ruling or to cut it off. Further in this instance, appellant does not appeal the judge's ruling. It appears that appellant is merely suggesting that this is an example of the judge's unfairness in this case. We reject appellant's claim that the trial court's above-quoted statements were unfair or improper.

The same is true for appellant's complaint that the trial court should have at least permitted appellant's counsel to argue further over appellees' objection, which was sustained by the court, to certain testimony from one of appellant's experts. (Tr. 279.) Appellant does not demonstrate any error in the trial court's ruling nor does she argue how the exclusion of this testimony prejudiced their case in any way. She simply seems to suggest it as an example of the trial court's partiality. Again, we reject this claim.

Appellant also contends that the trial court made no efforts "to dispel the impression that there had been an agreement between [appellees'] counsel and the bench on the rulings made to [appellant's] objections." (Appellant's brief at 31.) Appellant is referring to the following statement made by appellees' counsel immediately before he cross examined one of appellant's experts:
*20 MR. GIBSON: Thank you your Honor. I'll try to be as expeditious as I can. If you'll just answer the questions as simply as you can and then I'll try to ask them as simply as I can and *the judge has agreed* if I could go as quickly as I can, you'll overrule every objection.
(Tr. 305, emphasis by appellant). The trial court

responded as follows:

THE COURT: *Well, I'll take that under advisement.*

Id., (emphasis added.) By its very terms, the trial court indicated that it *had not agreed* to overrule appellant's objections. Right before appellees' counsel had made his statement about going "as quickly as he [could]," the trial court had indicated that the time was getting late and that the jury might not get dismissed until 5:00 p.m. (Tr. 304-5.) The court asked the jury to state whether or not they had a problem with that and none of them apparently did. *Id.*

Thus appellees' counsel's remarks merely stated his intention to proceed with his cross-examination of appellant's expert as expeditiously as possible. However, the court did not agree to overrule automatically any of appellant's objection in return. He merely indicated that he would consider the time in his conduct of the proceedings.

Furthermore we note that appellant raised no objection to this statement at the time nor has appellant given any evidence that she was prejudiced by this statement.

In conclusion we feel that the trial court acted within its discretion with regard to each complaint raised by appellant in her fourth assignment of error.

Accordingly, appellant's fourth assignment of error is overruled.

Having overruled all of appellant's assignments of error we hold that the judgment of the trial court is *affirmed.*

* * *

GRADY, P.J., and WOLFF, J., concur.

GRADY, P.J., concurring:

The trial court erred when it construed Civ.R. 26(B)(4)(b) to require the plaintiff to supplement the deposition testimony of Dr. Gadek. I hold this view for several reasons.

First, the supplementation requirement logically applied to the parties' own interrogatory response stating the identity of his expert and the subject matter on which he expects the expert to testify, which is required by Civ.R. 26(B)(4)(b), not to the testimony of the witness himself.

Second, the requirement runs only to the *subject matter* of the expert's testimony; that is, the issues the expert would prove or dispute. In contrast to Fed.Civ.R.P. 26, Ohio's Civ.R. 26 makes no requirement to report the *substance* of the witness's expected testimony. Here, there was arguably some variation in the substance. On deposition, Dr. Gadek opined that the Defendant had some responsibility to follow his patient's respiratory functions postoperatively beyond "his consults and his own evaluation." At trial, Dr. Gadek opined that the Defendant should have ordered "intensive surveillance of respiratory function for twenty four hours after surgery." Nevertheless, the statements concern the same subject matter; the standard of conduct required under these circumstances to satisfy the Defendant's duty of care. Because there was no change in the subject matter, Civ.R. 26(E)(1) imposed no duty on the plaintiff to supplement her earlier statement concerning that subject matter.

***21** Third, Civ.R. 26(E) imposes a duty to supplement the discovery statement of a witness only when a party who offers that witness knows or later learns that the statement is "incorrect". See, section (E)(2). Dr. Gadek's deposition statement is not made incorrect by his trial testimony. The latter is only more specific. Any difference between the two is chargeable not to the Plaintiff but to the Defendant, who has an opportunity in deposition to explore the issue in order to learn of these matters. The Defendant didn't do so. He can't show prejudice or undue surprise from his own omissions.

Nevertheless, I believe that the record fails to demonstrate reversible error. The Plaintiff was able to introduce opinion evidence, through Dr. Gadek, that the Defendant's failure to devise and execute a plan for postoperative care was a proximate cause of the patient's death. The jury obviously rejected that evidence. There is no reason to believe that the jurors would find to the contrary if told what a proper plan would entail. Therefore, the first assignment of error is properly overruled.

While I agree with Judge Young that any error was harmless, I have written separately because I am concerned that the concept of "subject matter" in Civ.R. 26 not be misconstrued to include *substance*. The drafters purposely omitted that application, which is an express part of the Federal Rule. I believe we should not read it in.

In this same vein, but in connection with the second assignment of error, it appears that Civ.R. 26(E)(1) required the Defendant to do more than he did with respect to the testimony of Dr. Seiler. The first statement by the Defendant identifying his expert witnesses did not include Dr. Seiler. Later, counsel for the Defendant stated by letter that he reserved the right to call any other expert identified by any other party. This supplemental statement might satisfy the identification requirement of Civ.R. 26(E)(1), but it doesn't state what the *subject matter* of any of these expert's testimony would be, which is also expressly required.

As a party, Dr. Seiler had stated that he would appear as an expert witness on his *own* behalf. That does not encompass the issue of the negligence of the Defendant, Dr Camacho, to which Dr. Seiler later testified. However, I find no abuse of discretion. When Plaintiff received the defective supplemental response concerning other experts she did not seek to compel a statement of the subject matter to which they would testify. The trial court could reasonably find this to be a waiver of the error concerned, notwithstanding the surprise that resulted.

* * *

FINAL ENTRY

* * *

Pursuant to the opinion of this court rendered on the _____ day of July, 1993, the judgment of the trial court is *affirmed*.

Not Reported in N.E.2d, 1993 WL 295081 (Ohio App. 2 Dist.)

END OF DOCUMENT

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

Court of Appeals of Ohio, Tenth District, Franklin County.

Robert C. Guccione, Plaintiff-Appellee

v.

Hustler Magazine, Inc., et al., Defendants-Appellants.

No. 80AP-375.

October 8, 1981.

GRUTMAN, SCHAFRANN & MILLER, MR. NORMAN ROY GRUTMAN, MR. JEFFREY H. DAICHMAN, of Counsel, 505 Park Avenue, New York, New York 10022, and VORYS, SATER, SEYMOUR & PEASE, MR. HERBERT R. BROWN, MR. C. WILLIAM O'NEILL and MR. DUKE W. THOMAS, of Counsel, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216, For Plaintiff-Appellee.

BROWNFIELD, BOWEN, BALLY & STURTZ, MR. C. WILLIAM BROWNFIELD, MR. LYMAN BROWNFIELD, MR. LAURENCE E. STURTZ, MR. GEORGE R. McCANN, of Counsel, 140 East Town Street, Columbus, Ohio 43215, For Defendants-Appellants.

DECISION

WHITESIDE, J.

***1** Defendants appeal from a judgment of the Franklin County Court of Common Pleas and raise twenty assignments of error, as follows:

"1. Plaintiff was erroneously permitted to testify that he feared future publications featuring other members of his family.

"2. The trial court committed error in permitting plaintiff to read to the jury the transcript of deposition of the defendant Flynt as upon cross-examination only, and in letting be read clearly irrelevant and highly prejudicial and inflammatory portions thereof.

"3. The trial court committed plain error in excluding objective evidence sought and/or obtained upon cross-examination of the plaintiff, and exhibits offered by the defendants which established substantive defenses to the plaintiff's claims, and demonstrated a diminution or total absence of damage to the plaintiff or entitlement to a punitive award.

"4. The trial court erred in admitting highly prejudicial and irrelevant evidence related to defendant Larry Flynt's alleged character.

"5. The trial court erred in permitting the plaintiff's testimony concerning the alleged injury to his son Nicholas to go to the jury on the basis that such testimony was highly inflammatory, emotional and prejudicial; was in direct conflict with the plaintiff's deposition testimony, and was based in part on evidence to which the defendant had been denied access by the trial court.

"6. Misconduct of plaintiff's co-counsel throughout the trial prejudiced the jury, prejudicially interfered with the ability of the court to control the proceedings, and denied defendants their constitutional right of cross-examination.

"7. The verdicts of the jury rendered against defendant Flynt in libel and statutory invasion of privacy are contrary to the manifest weight of the evidence.

"8. The trial court abused its discretion when it refused to allow the defendants to present expert testimony on the topics of humor and satire.

"9. The trial court erred in overruling defendant Flynt's motions to dismiss made in open court at the close of plaintiff's case-in-chief and at the close of trial.

"10. The trial court erred in refusing to grant defendant's motion for mistrial made at closing argument of plaintiff's counsel.

"11. The trial court erred in directing a verdict against Hustler for violation of Section 51, N.Y.C.R.L. and in permitting an award to be based upon proof of alleged damage other than 'publicity value.'

"12. The trial court erred in submitting to the jury the question of determining whether or not the publication at issue constituted libel per se, and then defining 'actual malice' as publishing falsely, 'fabricated' material which was the 'product of the defendant's imagination.'

"13. The trial court erred in instructing the jury that defendant Flynt could be found personally liable in damages to the plaintiff under the theory of invasion of privacy merely upon alleged evidence that he had 'resumed control' of Hustler Magazine, Inc., following his near-fatal shooting, before publication of the June, 1979, issue of

Hustler.
*2 "14. The trial court erred in refusing to charge the jury that evidence of allegedly defamatory statements other than those actually sued upon, is not admissible to aggravate or enhance damages, contrary to the written request to court for charge to jury filed by the defendants.
"15. The trial court erred in permitting the jury to award the plaintiff attorney fees based upon insufficient and improper evidence.
"16. The failure of the trial court to give cautionary instructions or a charge to the jury with respect to the weight of the Flynt deposition and his live testimony on cross-examination constitutes reversible error.
"17. The jury verdicts were fatally inconsistent and defective.
"18. The trial court erred in denying a new trial on defendants' post-trial motions based on the verdicts of an impassioned and prejudiced jury while remitting a $26,000,000 punitive verdict against Larry Flynt to $2,000,000 and an $11,000,000 punitive verdict against Hustler, Inc. to $850,000.
"19. The trial court erred when it overruled defendant's motions for new trial, mistrial and judgment N.O.V.
"20. It was an abuse of discretion for the court prior to trial to rule that no further continuances of trial would be granted for the reason of the ill health of defendant Larry Flynt, which resulted in material prejudice to his defense."

At the outset, there are two procedural matters raised by plaintiff. First, plaintiff has filed a motion to dismiss the appeal, or alternatively to strike defendants-appellants' brief or portions thereof, upon the ground that matters outside the record on appeal are mentioned. We find no merit to that motion. While it is true that there are allusions in defendants-appellants' brief to matters not part of the record on appeal, this court determines the appeal solely upon the record, not upon the statement of facts or upon any materials attached to the briefs of the parties. This court has thoroughly examined the record on appeal, consisting of a transcript of proceedings more than 2,000 pages long and numerous exhibits and filings, and confines consideration to those matters which have been certified by the clerk of the trial court as constituting part of the record on appeal, including the transcript of proceedings and exhibits thereto. See App. R. 9(A). The motion to dismiss is overruled.

The second procedural issue raised by plaintiff is an objection to a panel change and motion for appropriate relief, which is supported by an affidavit of one of the Ohio counsel for plaintiff. Alleged in the affidavit is that one of the jueges sitting on the day in question elected not to sit on this case, and another judge of the court was substituted for him. The affidavit alleges that the reason the judge elected not to sit was because someone talked with the presiding judge of this court and raised some questions concerning some possible contact between the recusing judge and the trial judge. Included in the affidavit is a statement that to the best of plaintiff's counsel's knowledge, no one representing plaintiff made any such ex parte contact with the presiding judge of this court, who was not a member of the panel hearing this case, and plaintiff's counsel suggests in his memorandum that such a contact must have been made by counsel for defendants.

*3 Counsel for defendants has filed a memorandum opposing such motion, to which also is attached an affidavit stating that they had no knowledge of the change of panel or of plaintiff's objection until the actual calling of the case for oral argument, and further stating that none of the counsel for defendants at any time asked the presiding judge of this court, or any other person, to convey to the recusing judge that he should withdraw from the panel. Defendants' counsel indicates no objection to having the recusing judge sit as a member of the panel in this case, nor any objection to the panel who actually heard the case hearing the matter. In short, it appears that one judge of this court recused himself voluntarily because of an apparently unfounded rumor he heard. Of course, no party is entitled to a panel of judges of this court of his own choosing. It is not uncommon for a judge of this court for personal reasons to "trade" with another judge assignments on a particular day or with respect to a particular case, usually for the personal convenience of the judges involved. No impropriety has been suggested by either affidavit filed on the part of any judge of this court. The members of the panel deciding this case know of no reason why they should not sit as members of the panel. No affidavits of prejudice or disqualification have been filed by any party. Accordingly, plaintiff's objection to the panel change is overruled.

By his second amended complaint, plaintiff Robert Guccione seeks compensatory and punitive damages against defendants Flynt and Hustler Magazine with respect to publications in Hustler Magazine in May 1976, February 1979 and June 1979, upon both a claim of libel and a claim of invasion of privacy.

The trial court found that the libel claim with respect to the May 1976 issue of Hustler was not commenced within the applicable one-year statute of limitations, R. C. 2305.11, having been published some 13 months prior to commencement of this action. With respect to the invasion-of-privacy claim as to the May 1976 issue of Hustler, the trial court found that the substantive law of New York is to be applied and that the claim also was barred by the one-year limitation. Having made Civ. R. 54(B) findings, the dismissal of the second count (the claim of invasion of privacy by the May 1976 issue of Hustler) was appealed to this court, resulting in an affirmance of the trial court by the unreported decision in Guccione v. Hustler Magazine, No. 80AP-204, rendered September 30, 1980 (1980 Decisions, page 3104).

In the meantime, the case proceeded to trial upon the remaining counts of the complaint relating to the February and June 1979 issues of Hustler. At the conclusion of his case, plaintiff voluntarily withdrew, or dismissed, his claims (counts three and four of the second amended complaint) as to the February 1979 issue of Hustler. The trial proceeded solely upon the two claims with respect to the June 1979 issue of Hustler, one for libel and the other for invasion of privacy. In regard to this invasion-of-privacy claim, the trial court also applied New York substantive law, as to which no party has objected. As noted above, the trial produced a voluminous record, including a transcript of proceedings of more than 2,000 pages and numerous exhibits.

*4 Although not readily apparent from reading the record, the case was submitted to the jury solely upon the claims of libel and invasion of privacy with respect to the June 1979 issue of Hustler Magazine, in which plaintiff was depicted engaged in an act of buggery, with the caption, "Bob Guccione Discovers Vaseline," which defendants contend is a somewhat oblique reference to a photographic technique used by plaintiff. A photograph of the head of plaintiff taken from a photograph purchased from U.P.I. for $50 was superimposed on the man performing buggery so as to represent plaintiff Guccione.

The trial court directed a verdict in favor of plaintiff with respect to the invasion-of-privacy claim under New York law as to defendant Hustler Magazine and submitted this claim to the jury upon the issue of compensatory and punitive damages and upon the issue of whether defendant Flynt knew that no consent had been obtained from plaintiff Guccione to use his photograph. The trial court also submitted the libel claim with respect to the same publication to the jury for determination of whether it was libelous under the circumstances since plaintiff, like defendant Flynt, is a national figure as a publisher of a pornographic magazine, having made many appearances and given many interviews.

The verdict forms were somewhat unusual, the basic form dealing only with the issue of liability, with the jury returning a verdict in favor of plaintiff and against both defendants with respect to both the libel and invasion-of-privacy claims by separate verdicts. With respect to damages, two verdict forms were submitted, one with respect to defendant Hustler, Inc., and the other with respect to defendant Flynt. Each form inquired separately with respect to invasion of privacy and libel by a "yes" or "no" answer, asking the jury to answer with respect to each claim whether it found (1) nominal damages, (2) compensatory damages, (3) punitive damages and (4) reasonable attorney fees. With respect to defendant Hustler, the jury gave affirmative responses with respect to compensatory and punitive damages and attorney fees upon the invasion-of-privacy claim and as to punitive damages upon the libel claim. The converse was true with respect to defendant Flynt, the jury indicating that it found compensatory and punitive damages and reasonable attorney fees with respect to the libel claim as against defendant Flynt but only punitive damages as to the invasion-of-privacy claim. The jury then returned a monetary verdict in the amount of $1,150,000 as compensatory damages and $11,000,000 as punitive damages as against defendant Hustler, Inc., and $2,150,000 compensatory damages and $26,000,000 punitive damages as against defendant Flynt. The verdict indicated in each instance that $150,000 of the compensatory damages was for attorney fees.

Upon receiving the verdict, the trial court immediately reduced the verdict against Flynt to $1,150,000 for compensatory damages, so that it would be consistent with the verdict against defendant Hustler, Inc., as to which counsel for plaintiff consented, and counsel for defendants imposed no objection. Judgment was entered accordingly.

*5 Both defendants filed a motion for new trial and for judgment notwithstanding the verdict. The trial court conditionally sustained the motion for new trial, finding the amount of punitive damages to be excessive, subject to a remittitur ordered by the court reducing the punitive damages against defendant Hustler, Inc., to $850,000 as to the invasion-of-privacy claim and $1.00 as to the libel claim, and reducing the punitive damages as against defendant Flynt to $2,000,000 on the libel claim and $1.00 on the invasion-of-privacy claim. Plaintiff accepted the remittitur and has filed no notice of appeal or cross-appeal and no assignments of error herein. Defendants, on the other hand, have both appealed.

By the first assignment of error, defendants contend that the trial court erred in allowing evidence of plaintiff's fears as to possible publications concerning other members of his family. Specifically, defendants contend prejudicial error in admitting the following testimony of plaintiff (Tr. 545- 546):

"I was very much aware of my public figure status, and since this was one link in a long chain of similar experiences with Hustler Magazine, I worried very much what the next step would be. Would it be a picture of my daughter, who was then 18 years old, would it be my mother appearing in the centerfold. All of this was possible as it had already been demonstrated to us.

"As a public figure, I felt there may be an argument as to how much privacy I was entitled to as an individual. But what concerned me most profoundly at the time was to what extent was the privacy of my mother, my father -

"MR. STURTZ: Object, Your Honor.

"THE WITNESS: - my children, my friends and my colleagues, the people I work with, the woman I love.

"THE COURT: Just a moment.

"THE WITNESS: To what extent was their privacy also surrendered.

"THE COURT: Just a moment. There has been an objection lodged."

The trial court overruled the objection upon the basis that plaintiff's thought processes were admissible. Shortly thereafter, when asked to "characterize the intensity of the feelings that you had," plaintiff testified (Tr. 547-548):

"I can't describe how hurt I was, because as I say something like that involved not only me but my children, particularly. I had four young boys and a little young daughter, three of whom were then in school, the two daughters were too young to go, I'm sorry, three of my five children were still in school and I know how evil school children can be without realizing that they are being evil.

"MR. STURTZ: Continuing objection.

"THE WITNESS: And I had no idea of how this man could be stopped."

That such a blatant appeal to the passion and prejudice of the jury is inadmissible is readily apparent. The prejudicial effect is manifested by the jury verdict.

Plaintiff contends that this testimony was admissible because the mental suffering of the defamed person is a proper element to be considered in awarding compensatory damages for the libel. However, the above-quoted testimony of plaintiff did not relate to plaintiff Guccione's fear of impaired relationship with his family because of the libel but, rather, related to his claimed fear of possible future libels against members of his family. Basically, the type of mental distress or suffering to be considered in determining compensatory damages for libel is shame or humiliation. Plaintiff's testimony relates to anger, not shame or humiliation. Plaintiff further relies upon the following quotation from 34 Ohio Jurisprudence 2d 274, Libel and Slander, Section 111:

6 " * *it is generally held that in all cases of defamation where the plaintiff is entitled to recover damages for mental suffering, his own testimony as to his suffering is admissible. Evidence as to whether the plaintiff in an action for libel and slander is married and has children or other relatives is held to be admissible as an important factor on the question of recovery for the mental anguish suffered by him. But the general rule seems to be that neither the grief experienced by the members of the plaintiff's family on reading an

alleged libelous article regarding him, nor the influence of such grief on the plaintiff's mind, is an element of damages recoverable in his action for the defamation."

If applied herein, plaintiff's testimony would be precluded since he is testifying as to his fear of possible future libels against members of his family. Even assuming that a libeled party may testify as to his apprehension of shame and humiliation heaped upon members of his family because of the libelous publication involved, such a principle would not support the admission of the testimony above quoted. The first assignment of error is well taken.

By the second assignment of error, defendants first contend that the trial court erred in permitting plaintiff to read defendant Flynt's deposition as upon cross-examination only. Civ. R. 32(A) provides for the use of depositions at trial, and in pertinent part reads:

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

"* * *

"(2) The deposition of a party * * * may be used by an adverse party for any purpose."

Accordingly, plaintiff Guccione was entitled to read at trial all or any part of defendant Flynt's deposition limited only by the requirement that the part read must contain evidence which would be admissible if presented for the first time at trial.

Defendants also contend that the portion of defendant Flynt's deposition read at trial included much inadmissible evidence. The fourth assignment of error raises a similar issue and will be considered in conjunction with the second.

Unfortunately, the record is replete with inadmissible, inflammatory testimony. This is true with respect to the deposition of defendant Flynt. The cross-examination was permitted to drift far afield from any legitimate issue concerning the libel claim, damages in connection therewith or credibility of the witness. Rather, the examination was designed, and accomplished its purpose, of depicting defendant Flynt as an evil person who was wont to make malicious, libelous attacks not just upon plaintiff but upon many other public and private persons. This unnecessarily resulted in the introduction into evidence of many grossly vulgar exhibits which cannot be described other than filth. Unfortunately, this trend continued during the cross-examination of plaintiff by defendants' counsel, and much of the evidence admitted over strenuous objections by plaintiff's counsel likewise should have been excluded.

*7 The basic problem with the evidence admitted during the cross-examination of defendant Flynt was that it was designed to create passion and prejudice in the jury against defendant Flynt and Hustler Magazine. While at the time in question the claim with respect to the February 1979 issue of Hustler had not been withdrawn, there is much detailed evidence concerning many other publications with references to plaintiff, one of his publications, or his mistress. Past libels by defendants of plaintiff Guccione may be admissible as having a bearing upon the issue of actual or express malice. Cross-examination with respect to such past libels, however, should be limited to the fact of publication and whether they were contended to be truthful statements. While it is appropriate cross-examination to inquire into the state of mind of the publisher at the time of publication of the libel upon which the claim is predicated, a more limited inquiry is appropriate with respect to alleged past libels of the plaintiff by defendants, which are admissible as bearing only upon the issue of malice. Otherwise, despite cautionary instructions, the jury is apt to become confused as to the basis upon which damages are to be predicated, and passion and prejudice is apt to be created. To some degree, plaintiff may proceed upon such examination at his own peril, with a resultant defective verdict (influenced by passion and prejudice) if the plaintiff goes too far with the cross-examination.

With respect to publications concerning other persons, whether or not libelous, the evidence was inadmissible. Some of the evidence was contained in the deposition and some was elicited during the examination of defendant Flynt at trial. Unfortunately, there was no objection to some of the inadmissible evidence. Clearly, evidence concerning alleged attacks upon public figures such

as George Wallace, Gerald Ford, Nelson Rockefeller, Henry Kissinger, Jackie Onassis and Ruth Stapleton Carter were inadmissible, as was extensive cross-examination concerning prior interviews that defendant Flynt had given. While some of this may have been admissible had defendant Flynt's character been in issue, it was not. Rather, the issue was whether defendant Flynt acted with actual or express malice in connection with the depiction of plaintiff in the June 1979 issue of Hustler Magazine. As the case finally emerged, this was the sole issue upon which any of the extraneous evidence could conceivably be admissible.

There was no attempt to utilize prior statements of defendant Flynt for impeachment purposes, there being no indication of any inconsistency between his testimony at trial and his prior statements. Attacking the character of the witness is not a proper method of impeachment. Although cross-examination as to specific instances of conduct is permissible if clearly probative as to the truthfulness or untruthfulness of the witness, general attacks upon the character of the witness are not permissible. See Evid. R. 608(B). The cross-examination in this case of defendant Flynt was clearly designed to attack his character in general, not merely his credibility. As the trial court has already found, the improper cross-examination had its prejudicial effect through a greatly inflated verdict. The second and fourth assignments of error are well taken to the extent that the trial court overruled objections as to inquiry concerning (1) defendant Flynt's attitudes generally, (2) libelous attacks on persons other than plaintiff Guccione himself, (3) defendant Flynt's character generally and (4) statements which defendant Flynt made during prior interviews, unless the same constituted either an admission or a statement directly inconsistent with testimony at trial. As we have previously noted, defendant Flynt's character was not an issue, and most of this evidence bore solely upon the issue of his character. Specificity as to specific questions we feel to be unnecessary, it being sufficient to note that upon retrial the trial court should limit inquiry in accordance with Evid. R. 403, 404 and 608.

*8 By the third assignment of error, defendants contend that the trial court committed error in excluding evidence concerning plaintiff, consisting in part of articles written about plaintiff, as well as some questions asked upon cross-examination of plaintiff.

Unfortunately, it is somewhat difficult in this case "to separate the wheat from the chaff." Defendants' cross-examination of plaintiff is so replete with inadmissible evidence, which the trial court admitted over objection, that it is difficult to find any prejudicial error in any exclusion of evidence.

There was no effort to show the truth of the matters asserted in the publications involved, although there was extensive cross-examination concerning defendants' photographic technique, coupled with the vaseline reference in the cartoon published in the June 1979 issue of Hustler. There was also some effort, quite properly, to show that plaintiff Guccione also is the publisher of pornographic literature, although not as vulgar or vile as defendants' publications. The trial court has discretion to exclude evidence when it becomes cumulative. Some of the excluded evidence would merely have been cumulative. Clearly, if plaintiff Guccione is the publisher of a magazine, he is responsible for its contents regardless of whether he has actual knowledge thereof. Much of plaintiff's testimony was devoted to whether he had actual knowledge of a specific issue of one of the magazines of which he is the publisher; whereas, it is sufficient for the purpose involved to show that he is the publisher. A publisher is presumed to have knowledge of the general type of publication that is involved, although he may delegate to others determination as to specific content to be included in a given issue. Therefore, the trial court did not err in excluding material in publications published by plaintiff since at best it would be cumulative, and since it would appear that if any error were involved it was by admitting too much rather than too little.

Defendants also contend that the trial court improperly excluded newspaper and magazine articles containing purported statements by, or interviews with, plaintiff. Since damages for libel may be predicated upon injury to reputation, it is appropriate for the defendants to demonstrate that, although the publication is libelous, it has caused little injury to the reputation of the plaintiff. A knowingly false, malicious and libelous statement that one has committed an armed robbery would

cause little damage to the reputation of a felon who has been convicted of several armed robberies in the recent past. Therefore, it would be appropriate to show that, although the particular statement was false and malicious, it was consistent with the reputation of the libeled person. Ordinarily, evidence of specific acts of misconduct is not admissible as having a bearing upon reputation. See Annotation 130 A.L.R. 854; Fisher v. Patterson (1846), 14 Ohio 418. C.f. Evid. R. 405(B).

***9** In a libel action, however, as noted above, the reputation of the plaintiff is an issue. R. C. 2739.02 provides that: "Any mitigating circumstances may be proved to reduce damages." Reputation, however, is not proved by showing that others in the past have slandered or libeled the plaintiff in the same manner as defendants. See Fowler v. Chichester (1874), 26 Ohio St. 9.

Reputations of persons are predicated upon information available to those who know them or of them. With respect to public figures, reputations are largely predicated upon that which has been published by the news media and in magazines and other publications concerning the public figure. Thus, it would be incorrect to hold that no newspaper or magazine article concerning a public-figure plaintiff in a libel action is admissible. If properly proved and relevant to the issues, such a newspaper or magazine article may have an important bearing upon the issue of reputation of the plaintiff. Such an article may not be deemed proof of acts of specific conduct but, rather, evidence of the general reputation of the plaintiff. While plaintiff contends that such newspaper and magazine articles should be excluded as hearsay, admission of them as bearing upon reputation is not for the truth of the statements involved but, rather, for the fact that the statements have been made and constitute the basis for the general impression of the reputation of the public figure. As provided by Evid. R. 803(20), evidence as to the reputation of a person's character in the community is not excluded by the hearsay rule.

Nevertheless, we find no prejudicial error under the circumstances of this case. Extensive cross-examination of plaintiff was permitted. The jury could not be unaware that plaintiff was a public figure because of his engaging in the business of publishing pornographic literature and being an advocate that there should be no limitation upon what may be published. Further evidence would have been cumulative at best. In addition, none of the evidence bore directly upon plaintiff's reputation with respect to engaging in the type of conduct depicted in the June 1979 issue of Hustler. Although plaintiff readily admitted that he gave interviews concerning his sexual activities, he expressly denied engaging in the type of sexual activity depicted and professed to be greatly offended and angered by the publication. Even a person who permits his life to be an "open book" may be as offended as one who does not, with respect to the publication of false statements concerning his life or lifestyle. We find no prejudicial error, and the third assignment of error is not well taken.

The fifth assignment of error relates to plaintiff's testimony concerning statements by and reactions of his 14-year-old son in connection with the June 1979 issue of Hustler. When asked as to the circumstances of his first learning of the defamatory picture in the June 1979 issue of Hustler, plaintiff responded (Tr. 543): "When my 14-year-old son, with his face bloodied and two broken fingers, handed it to me, told me he had been beaten up by his classmates, his father had been called a queer." Clearly, this is inadmissible hearsay testimony. Nor were the circumstances of his learning of the libel particularly pertinent to the case. However, no objection was interposed by defendants at this point. A few questions later, plaintiff stated that he feared that the publication might be damaging to his business, at which point an objection was interposed, and it was stipulated "that no claim is being made in this lawsuit to recover any damages for business loss." Then followed the testimony which was the subject of the first assignment of error.

***10** Defendants further contend that the testimony was inconsistent with, or not revealed in, plaintiff Guccione's deposition, and bore upon matters as to which discovery was denied. Defendants improperly characterized the testimony as perjured since the record reflects no basis for such a characterization, although the record does reflect unnecessarily that defendants have filed a motion pursuant to Civ. R. 60(B) predicated, at least in part, upon a claim that the testimony was false.

Nevertheless, having failed to make any timely objection to the question or answer, even though clearly inadmissible hearsay, defendants cannot raise the issue of admissibility of the evidence on appeal. The testimony was admitted without objection even though inadmissible. The fifth assignment of error is not well taken.

By the sixth assignment of error, defendants contend that misconduct of plaintiff's out-of-state co-counsel so interfered with their right of cross-examination of plaintiff Guccione that they should be entitled to a new trial. We find no error in this regard. Plaintiff's out-of-state co-counsel did make numerous interruptions during defendants' cross-examination of plaintiff Guccione by interposing objections, many of which should have been sustained. While it is apparent from the record that plaintiff's New York co-counsel is somewhat bombastic and conducts a vigorous prosecution of his case, we find no basis for this assignment of error in the record. If anything, the trial court permitted defendants much greater latitude in cross-examination of plaintiff than was appropriate. Although there is no cross-appeal or cross-assignments of error, it is apparent from the record that the trial court should have sustained, rather than overruled, many of the objections interposed by plaintiff's New York co-counsel. We find no misconduct on his part apparent from the face of the record, although, as we shall discuss later, he may have been somewhat overzealous in his prosecution of this case, resulting in a verdict influenced by passion and prejudice. The sixth assignment of error is not well taken.

The seventh and ninth assignments of error are interrelated, the seventh contending that the verdicts are against the manifest weight of the evidence, and the ninth contending that the trial court erred in overruling a motion to dismiss with respect to defendant Flynt. This assignment of error must be separately considered with respect to the claims of invasion of privacy and libel. Interestingly, plaintiff in his brief makes no direct reference to the invasion-of-privacy claim, and the jury awarded no compensatory damages against defendant Flynt with respect thereto.

A review of the record reveals no evidence whatsoever supporting the invasion-of-privacy claim as against defendant Flynt.

As noted previously, New York substantive law applies to the invasion-of-privacy claim. Under New York law, there is no common law right of privacy giving rise to an action for invasion of privacy. Rather, the right of privacy is controlled by statute, giving a "person whose name, portrait or picture is used * * * for advertising purposes or for the purposes of trade without the written consent first obtained" a right to maintain an action to enjoin future use of his name, and in addition a right to recover damages "for any injury sustained by reason of such use." In addition, exemplary damages may be awarded "if the defendant shall have knowingly used such person's name, portrait or picture." Under such a provision, the nature of the statement or the manner in which the person's name, portrait or picture is used is immaterial to there being a right of action.

*11 Although defendants incorrectly indicate that plaintiff's burden of proof is by clear and convincing evidence, nevertheless, plaintiff produced no evidence from which it reasonably could be inferred that defendant Flynt had any connection with the June 1979 publication other than as publisher of Hustler. There is no evidence of direct involvement with respect to this particular publication, either by use of plaintiff's name or the obtaining of the photograph and use thereof, although there was evidence that three years previously defendant Flynt had considerable direct involvement with respect to the May 1976 issue of Hustler. In the meantime, defendant Flynt had been injured by an assasin's bullet, and, according to his testimony, had never resumed the same type of direct involvement in publication of Hustler as he had previously. Even if the trier of the fact does not believe Flynt, at best, the evidence is then in equipoise. Construing the evidence most strongly in favor of plaintiff, reasonable minds could only conclude that defendant Flynt was not personally responsible for any invasion of plaintiff's privacy in violation of the New York statute that may have been committed by Hustler, Inc. His position as publisher and chairman of the board of Hustler does not make him responsible for an invasion of privacy in violation of the New York statute of which he has no personal involvement.

On the other hand, defendant Flynt's position as the publisher and chairman of the board of Hustler makes him individually liable for a libel printed in

Hustler, even if he had no actual knowledge of the libel prior to its publication. Goudy v. Dayton Newspapers, Inc. (1967), 14 Ohio App. 2d 207. The rule is well stated in 50 American Jurisprudence 2d 859, Libel and Slander, Section 336:

"An editor or manager of a newspaper, who has active charge and control of its management, conduct, and policy, generally is held to be equally liable with the owner for the publication therein of a libelous article. On the theory that it is his duty to know and control the contents of the paper, it is held that he cannot evade responsibility by abandoning his duties to employees, so that it is immaterial whether or not he knew the contents of the publication. * * *"

Since defendant Flynt admits he was publisher and chairman of the board of Hustler at the time in question, he is responsible for the libel of plaintiff in the June 1979 issue of Hustler, whether or not defendant Flynt had knowledge thereof prior to publication. In addition, there is ample circumstantial evidence that the publication in the June 1979 issue of Hustler was a continuation of a policy previously established by defendant Flynt when he was president, as well as publisher and chairman of the board, of Hustler.

Accordingly, the seventh and ninth assignments of error are well taken with respect to plaintiff's claim of invasion of privacy but are not well taken with respect to defendants' claim of libel.

*12 By the eighth assignment of error, defendants contend that the trial court abused its discretion in excluding expert testimony on the topics of humor and satire. We find no abuse of discretion. While defendants' defense was that the July 1979 publication directed at plaintiff was intended as satire, such an intent does not render the statement any less libelous. The defense that what would otherwise be libelous was satire or spoken in jest is available only if the defendants prove that it is manifestly clear from the language employed and pictures used that together they could in no respect be regarded as an attack upon the reputation or business of the person named or depicted. See Goudy, supra, and Annotation 77 A.L.R. 612. The necessity of expert testimony to define satire negates the existence of the manifest clarity necessary for the defense of jest or satire. It must appear obvious to the average reader that jest or satire, rather than an attack upon the reputation of the person involved, is intended for there to be a viable defense that the libel was published as a jest or satire. The eighth assignment of error is not well taken.

By the tenth assignment of error, defendants contend that the trial court erred in overruling their motion for mistrial during closing argument of plaintiff's counsel. We find no abuse of discretion on the part of the trial court in overruling the motion for mistrial. While the argument objected to was an appeal to the passion and prejudice of the jury, at that point it conceivably could have been cured by a cautionary instruction. In any event, the motion came at the end of a very lengthy trial, at which point it was still possible that a verdict favorable to defendants would be returned by the jury, despite the tenor of the argument by plaintiff's counsel. Accordingly, the tenth assignment of error is not well taken.

By the eleventh assignment of error, defendants contend that the trial court erred in directing a verdict against defendant Hustler upon the invasion-of-privacy claim predicated upon New York law. Alternatively, defendant Hustler contends that an award of damages upon such claim should not be other than "publicity value" under the circumstances of this case.

A claim under the New York statute was proved. That statute prohibits use of the name or photograph of a person without his written consent for advertising or trade purposes. It is undisputed that defendant Hustler did not have the written consent of plaintiff to use either his name or his photograph.

Defendant Hustler further contends that no independent damages other than the price that should be paid for use of the photograph have been proved. We agree. While plaintiff had both a claim for invasion of privacy under the New York law, and one for libel, there is a certain overlapping of the alleged injuries. No separate and distinct injury was proved with respect to the invasion-of-privacy claim (other than not being paid for use of the photograph), the gravamen of all the evidence being damages flowing from defamation. For such injury, plaintiff is entitled to a single recovery, even assuming that he may pursue separate theories for that recovery. He has, however, sustained a single injury. Accordingly, compensatory damages with

respect to the invasion-of-privacy claim should have been limited to the compensation that plaintiff should have been paid for use of his photograph. The only evidence in this regard was that defendants paid $50 to obtain the photograph for use. Plaintiff adduced no evidence of a greater value for use of his photograph. In fact, plaintiff Guccione himself testified that he had no objection to publication of his photograph, or apparently use of his name, so long as it was used respectfully, stating (Tr. 857-858):

***13** "Q. And so if it is a perfectly respectable picture, as far as you are concerned then others may publish your picture; is that your testimony?
"A. If it is a respectable picture employed in a respectable context, I have no objection.
"Q. So it is the picture and the contents that you are concerned about?
"A. Yes. The same concern anyone would have."

In short, plaintiff Guccione was not concerned with the unauthorized use of his photograph or name but, rather, with the defamation connected with such use. The eleventh assignment of error is well taken to the extent indicated.

By the twelfth assignment of error, defendants contend that the trial court erred in submitting to the jury the issue of whether the publication was libel per se and erred in defining actual malice in this respect.

The trial court defined actual malice differently with respect to a determination of whether there is actionable libel, than with respect to a determination of whether punitive damages will be appropriate. With respect to punitive damages, the trial court used the term personal or express malice, rather than actual malice. With respect to the determination of whether there is actionable libel, the trial court essentially defined actual malice similarly to many definitions of constructive malice. However, it did in part conform to the usuage of the term "actual malice" as a prerequisite to a libel action by a public official in New York Times v. Sullivan (1964), 376 U.S. 254, 84 S.Ct. 710, and St. Amant v. Thompson (1968), 390 U.S. 727, 88 S.Ct. 1323. In New York Times, the Supreme Court at page 279 defined actual malice as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." In St. Amant, rather than concentrating on "actual malice," the Supreme Court emphasized a badfaith test, that is whether the publication was made in good faith or bad faith but applying the same definition. The trial court expanded upon the definitions in New York Times and St. Amant, arguably in some respects more favorable to defendants and in some respects more favorable to plaintiff than justified. Nevertheless, we find no prejudicial error for two reasons.

First, defendants did not interpose an express objection to the charge and, therefore, are precluded from raising the issue on appeal by Civ. R. 51(A).

Secondly, the claim is predicated solely upon one publication, that of the June 1979 issue of Hustler depicting plaintiff engaging in an act of buggery with another man. Defendants at no time made any effort to even suggest that plaintiff in fact ever engaged in any such act. Rather, as noted above, defendants' defense was that this was satire, even though the actual act depicted was untrue. Construing the evidence most strongly in favor of defendants, reasonable minds could only conclude that defendants published this picture in the June 1979 issue of Hustler with reckless disregard for its truth or falsity, if not with actual knowledge of its falsity.

***14** There has been no contention made by defendants that plaintiff at any time engaged in conduct of the type depicted in the June 1979 issue of Hustler. The only reasonable inference from the evidence is that defendants had no basis whatsoever for even thinking it possible that plaintiff might have engaged in such conduct. While it is difficult to conceive of any reasonable basis for a contention that defendants did not know of the falsity of the implication from the June 1979 issue of Hustler with respect to plaintiff, no reasonable contention can be made but that the picture of plaintiff engaged in such conduct was published with reckless disregard of whether it was false or true.

While defendants contend that the picture was intended as satire, the innocent satire is so subtle that it escaped plaintiff, escaped the trial court, escaped the jury and escapes this court. To the average person viewing the picture in question, it is quite clear that it is intended to portray plaintiff Guccione engaging in an act of buggery, with no implication other than that he engages in such an

act, despite the caption which might have a double meaning to those engaged in certain types of photography. The fact that the satire, with a resultant understanding that no libel is intended, might be apparent to a limited number of readers having special knowledge does not render the publication any less libelous when it is given general circulation. While Hustler does not have general circulation, being limited to a small subculture (evidence of circulation figures indicates a circulation of less than 2 percent of the general population of this country), there is no evidence from which it reasonably could be concluded that more than a few members of this subculture would understand that the publication did not intend to suggest that plaintiff engaged in the type of activity depicted.

In addition, we conclude that the publication constitutes libel per se, rather than libel per quod, since no reasonable conclusion could be reached other than that the publication was intended to injure plaintiff's reputation or to bring him into public contempt. Accordingly, as we have indicated, even if there be error in the court's charge on actual malice, it is not prejudicial since the publication as a matter of law constitutes libel per se under all applicable definitions. The twelfth assignment of error is not well taken.

The thirteenth assignment of error raises a similar issue to that raised in the seventh and ninth assignments of error, contending it to be improper to find defendant Flynt personally liable on the invasion-of-privacy claim under the evidence adduced and is well taken for the same reasons stated with respect to those assignments of error.

The fourteenth assignment of error relates to the trial court's charge. Defendants had requested an instruction to the effect that other publications regarding plaintiff Guccione are not admissible to aggravate or enhance damages. The trial court did not give this requested instruction, which was slightly inaccurate since it dealt with the issue of admissibility of evidence, rather than use to be made of that evidence by the jury. The trial court instead instructed the jury (Tr. 2007):

15 " * *These other examples of publications are not the basis for Plaintiff's claims of libel which you are considering, nor are the other exhibits admitted during the course of trial. These Plaintiff's Exhibits were admitted for, among other things, to support Plaintiff's contention that they furnish proof of either actual or expressed malice or ill will or hatred toward the Plaintiff on the part of the Defendants."

While there may be some merit to defendants' contention that such instruction fails to limit the jury's consideration of the evidence and raises a possibility that the jury predicated its determination of the amount of damages upon such other evidence rather than limiting it to the publication upon which plaintiff's case is based, defendants did not call the matter to the trial court's attention at the conclusion of the charge and, thus, are precluded by Civ. R. 51(A) from contending error in this respect. Therefore, the fourteenth assignment of error is not well taken.

By the fifteenth assignment of error, defendants contend that the trial court erred in permitting the jury to award attorney fees based upon insufficient and improper evidence. We find no merit to this contention. The evidence concerning attorney fees was admitted by stipulation. While defendants reserved the right to object to the admissibility of the evidence, they offered no evidence of their own as to the reasonableness of the attorney fees so stipulated. Rather, defendants stipulated if called as witnesses two of plaintiff's counsel would testify that the fees were reasonable and necessary. Accordingly, there is no merit to this assignment of error, and it is, therefore, not well taken.

By the sixteenth assignment of error, defendants contend that the trial court erred in failing to give a cautionary instruction with respect to the reading of the deposition of defendant Flynt during plaintiff's case. The record fails to reflect any objection interposed by defendants with respect to the failure to give such a cautionary instruction, nor any requests for same. Accordingly, defendants may not properly raise this issue on appeal. See Civ. R. 51(A). The sixteenth assignment of error is not well taken.

By the seventeenth assignment of error, defendants contend that the jury verdicts are hopelessly inconsistent and defective. We agree. Plaintiff on the other hand contends that the verdict taken as a whole is appropriate, although conceding some difficulty in reconciling the parts, which plaintiff

characterizes as an effort by the jury to avoid aggregating compensatory damages for both libel and invasion of privacy.

A somewhat unusual form of jury verdict was utilized in this case as to which no objection has been interposed by any party, so that any error in the utilization of these particular forms with respect to ascertainment of damages has been waived by the parties.

The verdict forms with respect to damages inquired separately with respect to each defendant, and with respect to each the claim for invasion of privacy and the claim for libel as to whether the jury found: (1) nominal damages, (2) compensatory damages, (3) punitive damages and (4) attorney fees, specifically calling for a "yes" or "no" answer with respect to each. It was further printed on the form that: "A Plaintiff may not collect twice for compensatory damages proximately caused by the same act." It was not clarified to the jury, however, that the act constituting the invasion of privacy was the same as the act constituting the libel. In fact, the two acts are different and separable, although they may cause a single injury. Rather, the verdict form went on to state: "Therefore, you may award compensatory damages, if any, only for the total damage caused whether or not one or both defendants may have been liable therefor." This apparently caused considerable confusion for the jury. As to defendant Hustler the jury indicated with respect to the invasion-of-privacy claim that it did not find nominal damages but did find (1) compensatory damages, (2) punitive damages and (3) attorney fees. At the same time with respect to Hustler, the jury gave a negative response with respect to the claim for libel to all questions except that of punitive damages, indicating that it found punitive damages as to both invasion of privacy and libel consistent with the statement on the verdict form that: "However, you, in your discretion, may award punitive damages separately if you decide to award any such punitive damages." Based thereupon, the jury returned a verdict in the amount of $1,150,000 in compensatory damages against defendant Hustler, which in accordance with the jury form was solely compensatory damages for invasion of privacy.

*16 The converse was true with respect to defendant Flynt. The jury indicated that it found no nominal or compensatory damages or attorney fees with respect to the invasion-of-privacy claim as against defendant Flynt but did find punitive damages. With respect to the libel claim as against defendant Flynt, the jury found no nominal damages but did indicate that it found compensatory and punitive damages, as well as attorney fees. Consistent therewith, the jury returned a verdict against defendant Flynt in the amount of $2,150,000 as compensatory damages. The compensatory damages clearly were intended to be upon the libel claim with respect to defendant Flynt and the invasion-of-privacy claim with respect to defendant Hustler, for a total compensatory damage verdict of $3,150,000. (Pursuant to the instructions the $150,000 found as attorney fees was added to the compensatory damages.) In addition, the jury found punitive damages upon both the invasion-of-privacy and libel claims as against defendant Flynt in the amount of $26,000,000 and as against defendant Hustler in the amount of $11,000,000. The jury obviously did not understand the instruction properly given by the trial court that it would be improper for the jury to return punitive damages as to any claim unless it first found compensatory damages with respect to that claim.

In this case, the jury awarded punitive damages as against defendant Flynt with respect to the invasion-of-privacy claim, even though the jury found no nominal or compensatory damages with respect to that claim as against him. Likewise, the jury awarded punitive damages upon the libel claim as against defendant Hustler, even though it awarded no nominal or compensatory damages with respect to that claim against it. Obviously, the jury did not understand the further instruction by the court contained on the verdict forms that:

"The Court would point out again that although you may award punitive damages in your discretion as to either or both defendants, based upon the separate conduct of each of them, you may only award compensatory damages for the total damages allegedly caused, whether or not one or both of the defendants may be held liable therefor."

As expressly stated in the first paragraph of the syllabus of Richard v. Hunter (1949), 151 Ohio St. 185: "Exemplary or punitive damages may not be awarded in the absence of proof of actual damages." That case holds that, where a verdict expressly makes no award for compensatory damages, a verdict for punitive damages is defective and does

not authorize a judgment in favor of the plaintiff.

The trial court upon receiving the verdict attempted to correct the error by reducing the verdict for compensatory damages to $1,150,000 total (including attorney fees) but jointly against defendants. This reduction was inconsistent with the apparent intent of the jury; however, no party objected but all acquiesced, and the jurors, when advised of the change and polled, each indicated that it was his verdict. This further indicates a misunderstanding on the part of the jurors as to their function.

*17 As noted previously, defendants did not make timely objection before the jury was discharged as to the patent inconsistencies in the verdict. Rather, the defendants acquiesced in the trial court's first effort to correct the defective verdict by reducing the award of compensatory damages, although they have objected to the trial court's second effort in awarding nominal damages where the jury found none, and reducing the punitive damage award on that claim to $1.00. Whether the trial court's efforts cured the defects of the verdict is a matter for consideration in connection with another assignment of error. With respect to the seventeenth assignment of error, however, we find that it is not well taken since no timely objection was made to the receipt of a defective verdict form at a time when it could be corrected by the trial court, and, thus, defendants may not predicate error solely upon the receipt of the defective verdict, although such defective verdict may be a consideration in determining whether or not defendants are entitled to a new trial because of an excessive verdict.

This is the issue raised by the eighteenth assignment of error. The trial court found the verdict greatly excessive with respect to punitive damages and ordered a remittitur. With respect to defendant Hustler, the trial court found that the verdict for punitive damages must be reduced to only 7.7 percent of the amount originally awarded, down to $850,000 from $11,,000,000, with respect to defendant Flynt, the trial court made a similar recession, reducing the punitive damage award to approximately 7.7 percere of the amount awarded by the jury from $26,000,000 to $2,000,000. In other words, in each instance the trial court found that the ?? awarded by the jury was approximately 13 times that which could reasonably be awarded. No appeal has been taken, and no objection raised with respect to the trial court's finding that the jury verdict with respect to punitive damages was excessive to the extent found or that the maximum verdict for punitive damages that could be reasonably found by any reasonable trier of the facts would be $2,000,000 with respect to defendant Flynt and $850,000 with respect to defendant Hustler. Accordingly, we must accept these findings upon appeal. Thus, upon this appeal, we must start with the assumption that the jury verdict with respect to punitive damages was some 13 times greater than reasonably could be awarded upon the evidence involved.

Although ?? action and involving compensatory rather than punitive damages, the Supreme Court in Larrissey v. Norwalk Truck Lines (1951), 155 Ohio st. 207, noted that, where a verdict is so excessive as to have been given under the influence of passion or prejudice, it must be set aside and a new trial granted, a remittitur being inappropriate. In this case, however, the court noted in the fifth paragraph of the syllabus that: "The amount of a verdict is not of itself conclusive of the fact of passion or prejudice upon the part of the jury. * * *" Predicated upon this finding, as well as a finding of no indication of passion or prejudice from errors in the charge or conduct of counsel, the Supreme Court affirmed the action of the trial court ordering a remittitur to 35 percent of the original judgment. Likewise, in Chester Park v. Shulte (1929), 120 Ohio St. 273, a remittitur of 50 percent of the original judgment was affirmed, the Supreme Court stating in the second paragraph of the syllabus that:
*18 "If a trial court in an action for unliquidated damages finds that the verdict is excessive and that it was rendered under the influence of passion or prejudice, it has no alternative except to set it aside and grant a new trial."

Subsequently, in Fromson & Davis Co. v. Reider (1984), 127 Ohio St. 564, the Supreme Court stated in the second paragraph of the syllabus that:
"A remittitur amounting to fifty per cent of the verdict does not furnish conclusive proof that excessive damages were 'given under the influence of passion or prejudice.' (Paragraph 4 of Section 11576, General Code.)"

In addition, however, the Supreme Court set forth in the third paragraph of the syllabus a rule for

determining whether an excessive verdict is influenced by passion and prejudice as follows:

"In order to determine whether excessive damages were so influenced, a reviewing court should consider, not only the amount of damages returned and the disparity between the verdict and remittitur where one has been entered, but it also becomes the duty of such court to ascertain whether the record discloses that the excessive damages were induced by (a) admission of incompetent evidence, (b) by misconduct on the part of the court or counsel, or (c) by any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should be awarded."

In Cleveland Ry. Co. v. Crooks (1935), 130 Ohio St. Job, the Supreme Court ordered a new trial where lower courts had ordered a remittitur to one-third of the original verdict, stating at page 256 of the per curiam opinion:

"* * * It is difficult to see how otherwise than from the influence of passion or prejudice a jury could in any case return a verdict practically three times as much as found by the Court of Appeals to have been supported by the evidence. * * *"

The Supreme Court found it unnecessary to determine whether such a reduction furnished conclusive proof that the excessive damages were given under the influence of passion or prejudice "for the reason that the record clearly discloses such improper statements of counsel," as to mislead the jury into returning an excessive verdict. The amount of the verdict is not conclusive of passion and prejudice (although the greater the excess the greater the probabilty of passion and prejudice), but, instead, the record must be closely scrutinized to see whether there are factors appealing to the sympathy of the jury, such as inadmissible evidence, erroneous instructions or improper conduct or argument appealing to the passion and prejudice of the jury. See Book v. Erskine & Sons (1951), 154 Ohio St. 391, and Hudock v. Youngstown Municipal Ry. Co. (1956), 164 Ohio St. 493.

Examining the record reveals the following factors tending to appeal to the passion and prejudice of the jury: (1) evidence of apparent libel and invasion of privacy of persons other than plaintiff; (2) the efforts during cross-examination of defendant Flynt to depict him as an evil person; (3) the hearsay evidence as to plaintiff Guccione's son being attacked as a result of the libelous publication; (4) outbursts of plaintiff Guccione during cross-examination tending to appeal to the passion and prejudice of the jury; (5) defendants' cross-examination of plaintiff Guccione in such a manner as conceivably could have prejudiced the jury against defendants; (6) the failure of the trial court to instruct the jury upon request that evidence of other alleged defamatory statements could not be considered in determining damages, and limiting consideration of such evidence to the issue of malice; and (7) the closing argument of plaintiff's counsel which was the subject of the motion for mistrial.

***19** Many of these appeals to the passion and prejudice of the jury have been discussed in connection with other assignments of error. In addition, a portion of the closing argument of plaintiff's counsel clearly reveals an appeal to passion and prejudice (Tr. 1915-1916):

"The law, you will learn, says that it is not Mr. Guccione's need which is relevant, but the necessity, the imperative crying necessity to put an end and stop to this kind of calumny.

"What would stop Larry Flynt? The lawyers letter? He paid it no mind. The lawsuit, which was originally commenced, he laughed at. * * *

"* * *

"Ladies and gentlemen, this man knows nothing except that he will go on doing what he willfully wants to do unless you stop him, and the only way in which he can be stopped, and that is in his pocketbook. Those are why punitive damages are essential.

"If you award a verdict against Larry Flynt of several hundred thousand dollars above the several hundred thousand dollars of lawyers' fees already expended to make Mr. Guccione whole, do you think that would stop Larry Flynt, a man who has a cash flow that he admits that is more than a million-and-a-half dollars a week? Now, these are sums, I know, astronomical, and outside of the experience of almost all of you, all of us, but that is the reality of the bloated Larry Flynt, a man heaped up on his own ill-gotten success. A modest verdict, he will rear back and roar at you, and will have gotten away with it, and what will happen next month or the month after to Mr. Guccione, to his mother, to Ms. Keeton, to his children, to President Carter?

"* * *
"* * *To anyone whom he may elect to vent his spiteful, vicious ire upon. That is the focus. How do you stop that man? How do you stop him. I have calculated from the figures which the Flynt organization provided to us that of the magazines which were involved in the publications of the specific evils against Mr. Guccione, Mr. Flynt probably made over $10 million, and I could ask you rationally, as a matter of punitive damages, to stop Mr. Flynt by making him pay back the money that he made on this vile pile of swill."

Plaintiff's counsel then proceeded to argue other publications than the one sued upon in an apparent effort to connect punitive damages to these publications as well. There were two references concerning financial standing from the foregoing quoted argument which were also inappropriate. Plaintiff's counsel referred to cash flow as having some bearing upon damages. However, any connection between cash flow and profit or net worth is purely speculative since a company with a large cash flow may in actuality operate at a loss or even be bankrupt. Likewise, the proceeds from sales of an issue of a magazine are gross income, not profit as intimated by plaintiff's counsel. The accuracy of the amount stated is not readily apparent from the record.

More important, however, is the fact that this was a designed appeal to the jury to award an amount of punitive damages that would stop defendant Flynt from continuing to operate in the manner he had previously operated with respect to publishing comments concerning people and publishing photographs of them without their consent. See comments of plaintiff's counsel (Tr. 1400- 1401). From the totality of the evidence in this case, as well as from the implications of the argument of plaintiff's counsel, the only clear and certain method of deterring and stopping defendant Flynt is to put him out of business. From the totality of the record, this is exactly what the jury attempted to do; that is, put defendant Flynt and defendant Hustler out of business by awarding an amount of punitive damages so great that they no longer could continue to publish such vile magazines. The trial court recognized this in ordering the remittitur, commenting that the purpose of punitive damages is to punish, not to destroy. Where a jury awards punitive damages with the intent of destroying a person or a corporation, rather than merely punishing them for a specific intentionally wrongful and malicious act, the jury has operated under passion and prejudice.

*20 From the totality of this record, it is apparent that plaintiff throughout the trial attempted to appeal to the passion and prejudice of the jury in an effort to enhance the amount of damages to be awarded. Had plaintiff not been successful in this endeavor, there would have been no error. However, under the circumstances of this case, plaintiff was overly successful in his endeavor to appeal to the passion and prejudice of the jury and succeeded in having the jury return a verdict 13 times the amount which the trial court found to be reasonable. This enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice, and, accordingly, a new trial must be ordered upon the issue of damages.

While the trial court did not order a remittitur of the compensatory damages, when the verdict was returned, the trial court reduced the verdict from $3,000,000 total compensatory damages to $1,000,000. Considering the verdict as originally returned by the jury, the compensatory damage portion thereof was also influenced by passion and prejudice, as well as confusion on the part of the jury. There is no conceivable basis upon which the jury could properly return a verdict of $1,000,000 in compensatory damages for invasion of privacy or $2,000,000 in compensatory damages for the libel, unless they were influenced by the appeals for passion and prejudice for consideration not only of injuries to plaintiff by the one publication but by other publications and to injuries to other persons as well, including plaintiff's family. We need not determine at this time whether the $1,000,000 compensatory damages to which the trial court reduced the verdict is excessive since no issue has been raised with respect thereto. Nevertheless, because the grossly excessive verdict was influenced by passion and prejudice, there must be a new trial on the issue of damages, both compensatory and punitive. The eighteenth assignment of error is well taken.

The nineteenth assignment of error is essentially a repetition of other assignments of error. For the

reasons noted above, the trial court did not err in overruling defendants' motions for mistrial and judgment n.o.v., nor defendants' motion for new trial with respect to liability. However, the trial court did err in overruling defendants' motion for new trial with respect to the issue of damages. To this limited extent, the nineteenth assignment of error is well taken.

By the twentieth assignment of error, defendants contend that the trial court erred in refusing to grant a continuance because of the ill health of defendant Flynt. We find no merit to this contention. There is no demonstration of any abuse of discretion on the part of the trial court in denying the continuance. The trial had been long delayed, and there was no indication that there would be any time in the future which would be more propitious for trial from the standpoint of defendant Flynt's health. Defendant Flynt is not entitled to an indefinite continuance because of ill health. Also, defendants did not demonstrate any prejudice to his defense resulting from the denial of any further continuances. In addition, we find no indication that defendants at any time sought to have the trial separated so that it would proceed against defendant Hustler but not against defendant Flynt, if this would have been feasible from the court's standpoint, and not be prejudicial to plaintiff. In short, we find no abuse of discretion. The twentieth assignment of error is not well taken.

***21** For the foregoing reasons, the third, fifth, sixth, eighth, tenth, twelfth, fourteenth, fifteenth, sixteenth, seventeenth and twentieth assignments of error are overruled; the first, thirteenth, and eighteenth assignments of error are sustained; the second, fourth and eleventh assignments of error are sustained in part to the extent indicated; and the seventh, ninth and nineteenth assignments of error are overruled in part and sustained in part as indicated; and the judgment of the Franklin County Court of Common Pleas is affirmed with respect to the issue of liability but is reversed with respect to the issue of damages; and this cause is remanded to that court for a new trial upon the issue of damages.

Judgment reversed in part and affirmed in part and cause remanded.

REILLY and NORRIS, JJ., concur.

Not Reported in N.E.2d, 1981 WL 3516 (Ohio App. 10 Dist.), 7 Media L. Rep. 2077

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