[Cite as *Speers v. Tri-County Dermatology, Inc.*, 2001-Ohio-1380]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	**JUDGES:**
SUSAN D. SPEERS	:	**Hon. Julie A. Edwards, P.J.**
	:	**Hon. William B. Hoffman, J.**
Plaintiff-Appellee	:	**Hon. John F. Boggins, J.**
	:	
-vs-	:	
	:	**Case No. 2000CA00293**
TRI-COUNTY DERMATOLOGY, INC., ET AL.	:	
	:	
	:	**O P I N I O N**
Defendant-Appellants		

CHARACTER OF PROCEEDING: **Appeal from the Stark County Court of Common Pleas, Case No. 99CV02765**

JUDGMENT: **Affirmed**

DATE OF JUDGMENT ENTRY: **September 24, 2001**

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
LEE E. PLAKAS CHRISTOPHER M. HURYN 110 Central Plaza South, Ste. 454 Canton, Ohio 44702	THOMAS A. TREADON STACY A. RAGON 222 South Main Street Akron, Ohio 44308

Hoffman, J.

Defendants-appellant Tri-County Dermatology, Inc. ("Tri-County") and Schield M. Wikas, D.O. appeal the July 13, 2000, and August 21, 2000 Judgment Entries of the Stark County Court of Common Pleas which entered judgment in favor of plaintiff-appellee Susan D. Speers on her medical malpractice claim in the amount of $977,000, and which denied appellants a new trial and granted appellee prejudgment interest, respectively.

STATEMENT OF THE FACTS AND CASE

In January, 1997, appellee consulted Dr. Wikas regarding cosmetic laser resurfacing to eliminate lines and creases around her mouth. Dr. Wikas was one of the owners of Tri-County. Dr. Wikas' medical records show Dr. Wikas informed appellee of the risks of scarring, hyperpigmentation (over-pigmentation), and redness. Those same records do not show Dr. Wikas advised appellee of the risk of hypopigmentation (under-pigmentation/whiteness). Dr. Wikas claims he advised appellee of the risk of hypopigmentation verbally. Appellee denies this claim.

Appellee consented to proceed with the procedure which was performed on March 13, 1997, at the Aultman Center for One Day Surgery. Appellee experienced scarring and hypopigmentation as a result of the procedure. Thereafter, appellee began corrective laser treatments with Dr. Mark Foglietti, a plastic surgeon.

On September 28, 1998, appellee filed a medical malpractice action against Tri-County, Dr. Wikas, and Aultman Ambulatory Services, Inc. ("Aultman"). In her complaint, appellee alleged Dr. Wikas negligently performed the laser resurfacing procedure on her upper lip and chin, causing her injury. Specifically, appellee claimed Dr. Wikas and the Aultman laser technician used an improper scan time, a

claim admitted by appellee's expert, Dr. Poitras, to be based upon speculation. Appellee later asserted Dr. Wikas failed to set the laser used, the Sharplan SilkLaser, to the appropriate wattage, an assertion discredited by appellee's second expert, Dr. Nestor. Appellee was not permitted to utilize Dr. Nestor because of failure to timely identify him as her expert. After appellee deposed appellants' expert, Dr. Siegle, appellee voluntarily dismissed her complaint on November 12, 1997.

Appellee refiled her complaint on December 6, 1999. Appellee named Dr. Nestor, and not Dr. Poitras, as her expert witness. In her refiled complaint, appellee asserted Dr. Wikas' treatment fell below the accepted standard of care in three ways: 1) by using the SilkTouch mode instead of the FeatherTouch mode; 2) by failing to obtain adequate training for the SilkLaser device; and 3) by using an improper technique. Appellee also claimed Dr. Wikas failed to inform her of all the risks of the procedure, specifically hypopigmentation; failed to inform her he had never before used the Sharplan SilkLaser; and failed to inform her another laser device could have been used. Appellee claimed she would not have consented to undergo the procedure if she had been advised of these risks. Appellee withdrew her claim the Aultman laser technologist was negligent, but asserted a negligent credentialing claim against Aultman for granting laser privileges to Dr. Wikas.

The case proceeded to jury trial. Appellee presented testimony from her experts, John Fisher, Sc. D., and Dr. Nestor. On the fourth day of trial and after appellee had rested her case, Aultman disclosed (for the first time) records regarding Dr. Wikas' prior use of the Sharplan SilkLaser. Aultman then entered into

a settlement agreement with appellee and was dismissed from the case.

Appellants offered the testimony of their expert, Dr. Siegle, who testified Dr. Wikas met the requisite standard of care, and Dr. Wikas fully informed appellee of the material risks of the procedure. Following the presentation of evidence, closing arguments, and the court's instruction, the jury found in favor of appellants on appellee's medical malpractice claim, but found, by a 7-1 margin, in favor of appellee on her lack of informed consent claim. More specifically, the jurors found in Jury Interrogatory No. 2, Dr. Wikas was negligent because "Dr. Wikas failed to disclose to and discuss with Susan Speers the likeliness of hypopigmentation, his lack of training and experience on the Sharplan Silktouch [sic] Laser and the choice of equipment for the laser resurfacing procedure." The jury awarded appellee $977,000 in damages.

The trial court entered judgment on the jury's verdict via Judgment Entry filed July 13, 2000. Appellants filed motions for a new trial and for remitter, and requested a set-off from the jury's verdict in the amount of the settlement between appellee and Aultman. Appellee filed a motion for prejudgment interest. Via Judgment Entry filed August 21, 2000, the trial court denied appellants' motions for new trial and remitter; granted appellants' set-off request in the amount of $75,000; and granted appellee's motion for prejudgment interest. It is from these judgment entries appellants prosecute this appeal assigning as error:

1. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE, IN FORM OF MEDICAL RECORDS, OF AN ADDITIONAL PROCEDURE PERFORMED BY DR. WIKAS PRIOR TO APPELLEE'S LASER RESURFACING PROCEDURE IN

MARCH 1997 USING THE SHARPLAN SILKLASER.

2. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PRECLUDING APPELLANTS' [SIC] FROM CROSS-EXAMINING APPELLEE'S EXPERT, DR. NESTOR, REGARDING PRIOR THEORIES ESPOUSED BY APPELLEE AND HER FORMER EXPERT, DR. POITRAS.

3. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PRECLUDING APPELLANTS' [SIC] FROM QUESTIONING APPELLEE REGARDING THE DETAILS OF HER PAST SURGICAL PROCEDURES GIVEN HER TESTIMONY THAT SHE WOULD NOT HAVE CONSENTED TO THE LASER RESURFACING PROCEDURE HAD SHE BEEN INFORMED OF THE RISK OF HYPOPIGMENTATION AND DR. WIKAS' ALLEGED LACK OF EXPERIENCE.

4. THE TRIAL COURT COMMITTED PLAIN ERROR IN SUBMITTING APPELLEE'S PROPOSED INTERROGATORIES TO THE JURY AS THEY WERE IMPROPER AND RESULTED IN DUPLICATIVE DAMAGES IN APPELLEE'S BEHALF.

5. THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS CONTRARY TO LAW.

6. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL DUE TO ERRORS AND IRREGULARITIES IN THE PROCEEDINGS IN THIS CASE AND DUE TO THE FACT THAT THE JURY'S VERDICT WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND IS CONTRARY TO LAW.

7. R.C. 1343.03 IS UNCONSTITUTIONAL.

8. THE TRIAL COURT ERRED IN AWARDING APPELLEE PREJUDGMENT INTEREST.

Additional facts and procedural issues will be discussed within each assignment of error as needed.

I

In their first assignment of error, appellants contend the trial court abused its discretion in excluding medical records

which established Dr. Wikas had performed a laser resurfacing procedure using the Sharplan SilkLaser prior to appellee's procedure. Appellants submit appellee "built her whole case" on the theory Dr. Wikas had never used the Sharplan SilkLaser before appellee's procedure on March 13, 1997;[1] therefore, such evidence was relevant.

---

[1]**Appellants' Brief at 5, citing Tr., Vol. IV at pg. 23. However, we note Jury Interrogatory No. 2, *supra*, reflects the jury did not limit its finding of negligence just to Dr. Wikas' lack of experience using the Sharplan laser.**

In support of their position, appellants refer to Dr. Wikas' pretrial deposition, during which he testified he believed he had performed one other procedure using the Sharplan laser prior to appellee's procedure.[2] However, Aultman did not have a record of that procedure, and Dr. Wikas did not maintain a log of his procedures. When asked later in his deposition how many surgeries he had performed using the Sharplan laser subsequent to appellee's procedure, Dr. Wikas responded, "None other that I can recall."[3] When next asked "So hers is the only one?," Dr. Wikas responded "As far as I know."[4] On cross-examination at trial, Dr. Wikas testified appellee's procedure was his first using the Sharplan laser.[5]

After appellee rested her case on the fourth day of trial, Aultman produced records which showed Dr. Wikas performed a procedure using the SilkLaser on another patient on March 5, 1997, eight days before appellee's procedure. Upon learning the other patient's name from Aultman's counsel, Dr. Wikas was able to locate his own medical records which confirmed he had utilized the

---

[2]February 23, 1999 Wikas depo. at 13.

[3]*Id.* at 19.

[4]*Id.*

[5]Tr., Vol. II at 261, 287.

Sharplan SilkLaser on an occasion prior to appellee's procedure.

The trial court took under advisement the potential for sanctions against Aultman.[6] Thereafter, Aultman entered into a settlement agreement with appellee.

---

[6]**Tr., Vol. IV at 22.**

Appellants sought to introduce Dr. Wikas' medical records of the other patient's procedure despite the fact the records had not been previously disclosed. During the proffer of the newly found records, Dr. Wikas justified his failure to produce the records, explaining because he did not maintain a log of procedures he performed, he would have been required to search through several thousand individual medical records to determine whether he had used the Sharplan laser before performing appellee's surgery. Although he attempted to locate his records by calling Aultman and instructing his office staff to search his records, such search proved unsuccessful. It was only after Aultman provided his other patient's name that he was able to locate his records for that patient and confirm he had used the Sharplan laser on at least one previous occasion.[7] However, upon questioning by the trial court, Dr. Wikas testified his office staff should have found the records.[8]

In a January 10, 2000 Judgment Entry, the trial court had ordered the parties to supplement discovery. Therein, the trial court warned, "If supplementation is not made in a timely fashion, the court will prohibit . . . the introduction of evidence on the issues that were not timely supplemented, absent a showing of good cause." In denying appellants' use of Dr. Wikas' proffered medical records of the other patient, the trial court stated:

> But the doctor still has an obligation, if he thinks that he did a prior procedure, to find his own record on it because every physician that does a surgery has a copy of an operative report in whatever office note they may have in their own records.

---

[7]Tr., Vol. IV at 283-298.

[8]Tr., Vol. IV at 298.

> They have an obligation to know their own records and be able to find their own records. When they don't do that, then they take the consequences of not finding those when asked for. They asked numerous times for them. They have not provided them. They have to bear the brunt of the repercussions here when they don't do that.[9]

We agree with the trial court's assessment, and find the trial court did not abuse its discretion in excluding Dr. Wikas' medical records concerning the other patient.

Appellant's first assignment of error is overruled.

II

[9] **Tr., Vol. V at 52-53.**

Herein, appellants assert they were "substantially hindered" in their ability to defend as a result of the trial court's restriction of their cross-examination of Dr. Nestor relative to Dr. Poitras' opinions and Dr. Nestor's disagreement with those opinions.[10]

In her first complaint, appellee identified Dr. Poitras as her expert. Dr. Poitras opined, in his statement of April 6, 1998, Dr. Wikas' treatment of appellee fell below the accepted standard of care because he (Dr. Wikas) failed to set the SilkLaser to the appropriate scan type. Dr. Poitras later opined in an affidavit Dr. Wikas failed to set the SilkLaser to the appropriate wattage.

During his deposition Dr. Poitras admitted his initial opinion regarding inappropriate scan time was based on speculation. Dr. Poitras did not opine Dr. Wikas failed to inform appellee of the risks of the procedure. Appellee later voluntarily dismissed her complaint. Appellee identified Dr. Nestor as her expert in her refiled complaint. Dr. Nestor opined Dr. Wikas' treatment of appellee fell below the accepted standard of care in three ways: 1) by using the SilkTouch mode instead of the FeatherTouch mode; 2) by failing to obtain adequate training for the SilkLaser device; and 3) by using an improper technique. During his deposition, Dr. Nestor testified he reviewed Dr. Poitras' statement, affidavit, and deposition, and disagreed with Dr. Poitras' conclusions.

Subsequent to the refiling of her complaint, appellee moved the trial court to order all discovery previously conducted in her initial complaint be consolidated with and considered part of her

---

[10] **Appellants' Brief at 10.**

refiled complaint. The trial court granted appellee's motion and, as a result, Dr. Poitras' statement, affidavit, and deposition are part of this Court's record.

Prior to trial, appellants filed a motion for a ruling to determine whether they could question Dr. Nestor about Dr. Poitras' statement, affidavit, and deposition testimony. The trial court denied their request.[11] Appellants assert this ruling precluded them from conducting a proper cross-examination of Dr. Nestor to demonstrate how appellee's theory of the case "vacillated"[12] over the years and appellee had not even pursued the lack of informed consent claim in her initial complaint. Appellants assert because Dr. Nestor reviewed Dr. Poitras' statement, affidavit, and deposition along with other material before reaching his opinions, they were the proper subject for cross-examination. Appellee responds appellants failed to proffer for the record the specific questions they wanted Dr. Nestor to answer concerning Dr. Poitras' opinions.[13] We note appellants have failed to reference in their brief where in the record they attempted to question Dr. Nestor during his trial testimony about Dr. Poitras' opinions.[14]

---

[11]Tr., Vol. I at 25.

[12]Appellant's Brief at 11.

[13]Appellants were not required to proffer the answers to those unasked questions because the answers would have been elicited upon cross-examination of Dr. Nestor. *See,* Evid. R. 103(A)(2).

[14]App. R. 16(A)(7) provides the appellant's brief shall include citations to the parts of the record upon which appellant relies with respect to each of the assignments of error presented for review.

Appellants assert the fact Dr. Poitras' statement, affidavit, and deposition were filed as part of the record together with the trial court's pretrial ruling on their request is sufficient to preserve the claimed error. We disagree.

The trial court's determination of appellants' motion for ruling was functionally equivalent to the granting of a motion *in limine*.

An order granting or denying a motion *in limine* is a tentative, interlocutory, precautionary ruling about an evidentiary issue that is anticipated.[15] An appellate court need not review the propriety of such an order unless the claimed error is preserved by timely objection on issues actually reached during the trial.[16]

In announcing its ruling *in limine*, the trial court stated, in part:

> Now, having said that, there has been some banter here that possibly the expert [Dr. Nestor] may have relied on either his [Dr. Poitras'] report or affidavit or something like that. And I will permit you, if you want, outside the hearing of the jury, to inquire of that before the witness takes the stand in front of the jury. And depending on that ruling that may or may not make it part of the case.

Despite the trial court's offer of further consideration, appellants did not proffer specific questions to Dr. Nestor

---

[15] ***State v. French*** **(1995), 72 Ohio St.3d 446, 450.**

[16] ***See: State v. Amburgey*** **(1993), 86 Ohio App.3d 635;** ***State v. Leslie*** **(1984), 14 Ohio App.3d 343;** ***State v. Brown*** **(1988), 38 Ohio St.3d 305.**

concerning Dr. Poitras' opinions during trial.[17]

We conclude appellants have not preserved the alleged error for appellate review. The filing of Dr. Poitras' statement, affidavit, and deposition of the record does not satisfy appellants' obligation to proffer the questions they desired to ask Dr. Nestor during his cross-examination at trial.

Accordingly, appellants' second assignment of error is overruled.

III

[17]**Given our finding appellants failed to properly preserve this issue for appellate review, it is unnecessary to address whether appellee could have withdrawn Dr. Poitras' as a witness or whether the trial court's ruling was an abuse of discretion under *Davis v. Immediate Med. Serv. Inc.* (1977), 88 Ohio St.3d 10.**

In their third assignment of error, appellants claim the trial court abused its discretion in precluding cross-examination of appellee regarding details of her past surgical procedures. Appellants acknowledge they were permitted to ask whether appellee had undergone prior plastic surgeries.[18]

Appellants claim prejudice as a result of the trial court's denying them the opportunity to question appellee concerning the specifics of her approximately eight prior elective cosmetic procedures and her understanding of the attendant risks, including death and disfigurement. Appellants argue the fact appellee consented to these prior procedures despite the attendant risks is relevant in assessing the credibility of her testimony she would not have consented to the procedure performed by Dr. Wikas had she known of the risk of hypopigmentation and his lack of experience with the SilkLaser.

As was the case in appellants' second assignment of error, appellants fail to reference where in the record they asked appellee specific questions concerning her past procedures and where the trial court ruled such testimony inadmissable. We agree with appellee, appellants have not preserved this claimed error for appellate review because they failed to proffer, at trial, the questions they claim they had a right to ask.

[18] **Appellant's Brief at 13.**

Assuming, *arguendo*, the alleged error had been properly preserved for the record, we would, nevertheless, overrule appellants' third assignment of error on its merits. Our review of the record reveals the trial court permitted questioning of appellee concerning her prior cosmetic surgeries and her knowledge of some of the attendant risks, including the fact many of her procedures were performed while she was under general anesthesia.[19]

Evid. R. 403(A) provides:

> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

We find the trial court's pretrial ruling precluding cross-examination about the particular areas of appellee's body upon which the prior cosmetic procedures were performed was not an abuse of discretion pursuant to Evid. R. 403.

Appellants' third assignment of error is overruled.

IV

[19] Tr., Vol. V at 55-56, 60. We note appellants' counsel during closing argued anesthesia posed the potential for death as a risk. Tr., Vol. V at 243.

Herein, appellants contend the jury awarded duplicative damages and such constitutes plain error. Specifically, appellants argue the jury's response to Subsections 3 and 5 of Jury Interrogatories No. 4 and 5 are duplicative of each other as both request compensation for mental or emotional damages. Appellants further assert Subsections 3 and 5 of Jury Interrogatories No. 4 and 5 are not separately compensable damages but rather are duplicative of Subsections 1 and 2 of those same two jury interrogatories.[20] Accordingly, appellants argue the jury's award should be reduced by $500,000.

Appellants neither objected to appellee's proposed interrogatories nor specifically objected after the trial court charged the jury; therefore, their argument is premised upon the trial court's having committed plain error. The plain error doctrine permits correction of judicial proceedings when error is clearly apparent on the face of the record and is prejudicial to the appellant.[21] The doctrine may be

---

[20]Jury Interrogatory No. 4 reflects past damages, whereas Jury Interrogatory No. 5 reflects future damages. The language used to identify the type of damages the subsections of each interrogatory is identical, but the jury's awards thereunder differ in most respects.

Subsection 3 request damages for "THE EFFECT OF THE INJURY UPON PHYSICAL AND EMOTIONAL HEALTH." Subsection 5 requests damages for "MENTAL SUFFERING AND ANGUISH." Subsection 1 requests damages for "THE NATURE AND EXTENT OF INJURY." Subsection 2 requests damages for "THE PAIN, SUFFERING AND DISCOMFORT EXPERIENCED."

In Jury Interrogatory No. 4, the jury awarded appellee $200,000 in response to Subsection 3; $100,000 in response to Subsection 5; $60,000 in response to Subsection 1; and $100,000 in response to Subsection 2. In Jury Interrogatory No. 5, the jury awarded appellee $100,000 in response to Subsection 3; $100,000 in response to Subsection 5; $10,000 in response to Subsection 1; and $50,000 in response to Subsection 2.

[21]*Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223.

invoked to remedy a manifest miscarriage of justice that "would have a material adverse affect on the character and public confidence in judicial proceedings."[22]

In its written instructions, which were provided to the jury during deliberations, the trial court specifically informed the jury "to be cautious in [its] consideration of the damages not to overlap or duplicate the amounts of [its] award which would result in double damages."[23] The trial court also verbally cautioned the jury twice not to duplicate their award of damages.[24] The jury is presumed to follow the instructions of the court.[25]

---

[22]***Id.***

[23]**Jury Instructions at 20.**

[24]**Tr., Vol. V at 259, 272.**

[25]***State v. Loza* (1994), 71 Ohio St.3d 61, 75.**

Given the fact the jury's award under Subsections 1, 2, 3, and 5 of Jury Interrogatories Nos. 4 and 5 are not identical,[26] and given the trial court's repeated instruction not to award duplicative damages, we conclude any error in the jury's calculation of damages is not clearly apparent and the damages awarded did not result in a manifest miscarriage of justice.

Appellants' fourth assignment of error is overruled.

V

In their fifth assignment of error, appellants assert the jury's verdict was against the manifest weight of the evidence and contrary to law.

We are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment.[27] Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence.[28]

---

[26]Only the jury's award under Subsection 5 in Jury Interrogatory Nos. 4 and 5 are identical.

[27] *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758, unreported.

[28]*C.E. Morris Co. v. Foley Construction* (1978), 54 Ohio St.2d 279.

First, appellants claim the jury's finding Dr. Wikas did not inform appellee of the risk of hypopigmentation is against the manifest weight of the evidence. Appellants claim Dr. Wikas' testimony he orally informed appellee of the risk is more credible than appellee's testimony that he did not so inform her.[29] We find this credibility call within the province of the jury and do not find the resolution of it against the manifest weight of the evidence.

Next, appellants assert the jury's finding Dr. Wikas failure to inform appellee of his training or experience in using the Sharplan SilkLaser is insufficient, as a matter of law, to support a claim for lack of informed consent. Appellants assert a physician's alleged lack of experience is not a risk inherent in the procedure at issue, nor does the alleged lack of experience "materialize" as required by the Ohio Supreme Court in *Nickell v. Gonzalez.*[30]

Dr. Wikas himself agreed appellee had the right to know the extent of his experience with the SilkLaser; the extent of his training thereon; and the fact he had no preceptorship, or course training on the apparatus.[31]

---

[29]Dr. Wikas' written informed consent form failed to indentifiy hypopigmentation as a potential risk.

[30]*Nickell v. Gonzalez* (1985), 71 Ohio St.3d 136, at syllabus.

[31]Tr., Vol. II at 251-253.

Appellee's expert, Dr. Fisher, stated the Sharplan SilkLaser has a number of features which make the laser susceptible to the characteristics of the physician operating it. Dr. Fisher testified the Sharplan laser requires a higher degree of skill and experience on the part of the physician than the skill and experience required in other carbon dioxide lasers.[32] Dr. Fisher explained a physician using the Sharplan SilkLaser who is inexperienced with the handling of the laser's hand-piece, can cause refocusing or overlap of the laser beam, which would result in an increased risk of burning the skin. Dr. Fisher opined appellee's injuries were caused by Dr. Wikas' refocusing and overlapping of the beam.[33] We agree with appellee the risk of Dr. Wikas' lack of training and experience did materialize.

Appellee's expert, Dr. Nestor, opined Dr. Wikas breached the standard of care for informed consent by not providing appellee with choices of the laser to be used, and by not advising her of his lack of training and experience with the Sharplan SilkLaser.[34]

Based upon the foregoing, we find the jury's verdict was neither against the manifest weight of the evidence nor contrary to law.

Appellants' fifth assignment of error is overruled.

VI

Appellants argue the errors alleged to have been committed in Assignments of Error II, III, IV, and V demonstrate a manifest miscarriage of justice occurred during the trial, and entitled them to a new trial under Civ. R. 59. Having found no merit to

---

[32]Tr., Vol. II at 343.

[33]Tr., Vol. II at 358-361.

each of appellants' individualized assignments of error, *supra*, we conclude the trial court did not abuse its discretion in denying appellants' motion for a new trial.

Appellants' sixth assignment of error is overruled.

VII

Appellants assert R.C. 1343.03, Ohio's prejudgment interest statute, is unconstitutional. Appellants fail to identify where in the record such argument was presented to the trial court. Counsel for appellants candidly conceded at oral argument this claim of unconstitutionally was not raised in the trial court.

---

[34]Tr., Vol. III at 36-37, 189.

Generally, an appellate court will not consider an issue regarding the constitutionality of a statute when the issue was not raised in the trial court.[35]

Appellants' seventh assignment of error is overruled.

VIII

In their last assignment of error, appellants argue the trial court's granting of appellee's motion for prejudgment interest was "clear error."[36]

Our standard of review of this claim is whether the trial court abused its discretion in granting appellee's motion for prejudgment interest. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment.[37] We must look at the totality of the circumstances in the case sub judice and determine whether the trial court acted unreasonably, arbitrarily or unconscionably. Further, in order to have an "abuse" in reaching such determination, the result must be so

---

[35]*State v. Awan* (1986), 22 Ohio St.3d 120, syllabus ("Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue * * *.").

[36]Appellants' Brief at 25.

[37]*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

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.[38]

---

[38] ***Huffman v. Hair Surgeon, Inc.*** **91985), 19 Ohio St.3d 83, 87 (Citation omitted).**

In *Galayda v. Lake Hosp. Sys., Inc.*[39], the Ohio Supreme Court stated:

> A trial court does not abuse it discretion in awarding prejudgment interest when, as here, a defendant "just says no" despite a plaintiff's presentation of credible medical evidence that the defendant physician fell short of the standard of professional care required of him, when it is clear that the plaintiff has suffered injuries, and when the causation of those injuries is arguably attributable to the defendant's conduct.[40]

However, the Ohio Supreme Court has previously recognized a standard for awarding prejudgment interest does not require parties in all civil cases to make monetary settlement offers.[41]

In *Moskovitz v. Mt. Sinai Med. Ctr.*[42], the Ohio Supreme Court set forth four factors to be considered in determining whether the requesting party is entitled to prejudgment interest. They are:

> 1. Whether the party against whom the request is made fully cooperated in discovery proceedings,
>
> 2. Whether the party rationally evaluated his risk and potential liability,

---

[39] *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St.3d 429.

[40] *Id.* at 429.

[41] *Kalain v. Smith* (1986), 25 Ohio St.3d 157, at 160.

[42] *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638.

> **3. Whether the party did not attempt to unnecessarily delay the proceedings, and**
>
> **4. Whether that party made a good faith monetary settlement offer or responded in good faith to an offer from the other party.[43]**

Appellants claim appellee unnecessarily delayed the proceeding in this case because she chose to dismiss her first action one business day before trial. Appellants assert such behavior does not display good faith on appellee's part. In contrast, appellants assert they acted in good faith. Appellants note Dr. Wikas opined he met the standard of care in his treatment of appellee. Moreover, appellants' expert witness, Dr. Seigle, also opined Dr. Wikas met the standard of care.

---

[43] ***Id.* at 658.**

Appellants point out, by way of comparison, appellee's theory of the case "constantly fluctuated."[44] Appellants note appellee's lack of informed consent claim was not raised until a few months before trial. Appellants contend appellee's lack of consent claim was vulnerable because: 1) Dr. Wikas testified all the risks of the procedure were explained, including hypopigmentation; 2) appellee had numerous previous plastic surgeries which rendered her testimony she would not have consented to the procedure had she known of the risk of hypopigmentation and Dr. Wikas' lack of experience with the Sharplan SilkLaser incredible; and 3) appellee's expert, Dr. Nestor, was not credible based upon his prior testimony in another similar case.

Appellants argue all the above provided them an objectively reasonable, good faith belief appellee's case was completely defensible. Appellants conclude their argument by opining ". . . plaintiff's lawyers and trial court's routinely use the threat of prejudgment interest to squeeze settlement monies out of defendants who genuinely have an objectively reasonable, good faith belief in the defensibility in the

---

[44]Appellants' Brief at 27.

case."[45]

---

[45] ***Id.* at 29.**

Appellees counter it was undisputed appellee suffered permanent injuries as a result of the procedure. Appellee notes Dr. Wikas admitted he failed to advise appellee of his training and experience with the SilkLaser even though he agreed his patients have the right to know that information.[46]

Appellee contests the "objectivity" of Dr. Wikas' claim he informed her of the risk of hypopigmentation when his written consent form did not do so and appellee testified he did not verbally do so.

Finally, appellee notes her complaint was filed three weeks after her voluntary dismissal without prejudice which is a plaintiff's right under Civ. R. 41(A). The case proceeded to trial seven months after it was refiled. Appellee argues any delay in the proceedings was due to Dr. Wikas' not knowing which laser he had used on appellee.

In its judgment entry granting appellee prejudgment interest, the trial court reasoned:

---

[46]Tr., Vol. II at 251-255.

The key to the motion for prejudgment interest sits firmly in whether the defendant rationally evaluated the risks and potential liability by looking objectively at the facts and law. This Court feels that the defendant did not, prior to trial or during trial, rationally evaluate the risks and potential verdict exposure in this matter. The severity of the damages in this case, along with the quality of the witnesses presented, should have lead to a rational evaluation of a high potential for an adverse verdict. Plaintiff continually expressed a willingness to enter into settlement discussions throughout the pretrial stages of the case as well as during the actual trial of the matter. The defendants consistently refused to negotiate. This, despite what this Court views as an unrealistic evaluation as to the potential outcome in this matter. Further, during trial the liability issue became even more firm as it relates to the defendant's exposure. The Court, on numerous occasions during the trial, made inquiries of defense counsel, based upon the trial testimony, as to whether the defendant would be willing to, enter into settlement negotiations. The Court was consistently told that this was a case that would be defended to the end. This Court feels that such a position was not objectively rational when evaluating the risks and potential exposure. The defendants' position did not constitute good faith under the statutory mandate. The defendants, continued failure to make a good faith effort to settle this matter as required by law, warrants the granting of prejudgment interest. * * * *Moskovitz* clearly sets out that the burden of establishing a right to prejudgment interest shall be borne by the moving party. There is no doubt in this matter that the plaintiff has complied with the mandates of the Statute as it relates to the plaintiff's duty to attempt to negotiate a good faith settlement. Throughout the course of this matter, the plaintiff has consistently been receptive to the potential for settlement of this case. This occurred both in written correspondence and in oral communications to the Court and to defense counsel throughout the pretrial proceedings and during the course of the trial. In fact, the plaintiff was receptive to settlement even during the trial. Plaintiff did settle with the other defendant midway during the trial process. Throughout the course of this matter, the defendant consistently indicated that no settlement offer would be made. This position was steadfastly maintained at all pretrial levels and throughout the course of the trial. The defense maintained a "defend to the end" posture. The true question in this matter becomes whether the

> **defendant rationally and reasonably evaluated its potential liability and exposure. There is no legal requirement that a defendant make a settlement offer in every case. If appropriate evaluation of all relevant factors would lead to a good faith belief that liability did not exist and that a verdict would not be rendered against the defendant, the defendant would not be in violation of the good-faith standard by refusing to extend a settlement offer.[47]**

Upon consideration of appellants' and appellee's arguments and the trial court's analysis as contained in its judgment entry, we do not find the trial court's decision constituted an abuse of discretion.

Appellants' eighth assignment of error is overruled.

The judgments of the Stark County Court of Common Pleas are affirmed.

By: Hoffman, J.

Edwards, P.J. and

Boggins, J. concur

____

____

____

JUDGES

---

[47] **August 21, 2000 Judgment Entry at 2-3, unpaginated.**

[Cite as *Speers v. Tri-County Dermatology, Inc.*, 2001-Ohio-1380]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

SUSAN D. SPEERS	:	
	:	
Plaintiff-Appellee	:	
	:	**JUDGMENT ENTRY**
-vs-	:	
	:	
TRI-COUNTY DERMATOLOGY, INC., ET AL.	:	
	:	
	:	**CASE NO. 2000CA00293**
Defendants-Appellants		

For the reasons stated in our accompanying Memorandum-Opinion, the July 13, 2000, and August 21, 2000 Judgment Entries of the Stark County Court of Common Pleas are affirmed. Costs assessed to appellants.

____

____

____

JUDGES