

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

JOHN BOWDEN, Personal	:	APPEAL NO. C-040499
Representative of the Estate of		TRIAL NO. A-0202992
DOROTHY E. BOWDEN, Individually	:	
and on Behalf of Next of Kin,		<i>OPINION.</i>
	:	
Plaintiff-Appellant,		
	:	
vs.		
	:	
ALAN JON ANNENBERG, M.D.,		
	:	
CRANLEY SURGICAL		
ASSOCIATION, INC.,	:	
	:	
and		
	:	
MERCY HOSPITAL ANDERSON,		
	:	
Defendants-Appellees.		

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 9, 2005

The Lawrence Firm, Richard D. Lawrence, and Patrick J. Beirne, for Plaintiff-Appellant,

Triona & Lockemeyer, LTD, and James Triona, for Defendants-Appellees Alan Jon Annenberg, M.D., and Cranley Surgical Associates, Inc.,

Kohnen & Patton, LLP, and Karen A. Carroll, for Defendant-Appellee Mercy Hospital Anderson.

We have sua sponte removed this cause from the accelerated calendar.

GORMAN, Presiding Judge.

{¶1} Plaintiff-appellant John Bowden, individually and as the administrator of the estate of Dorothy Bowden, his mother, appeals the judgment of the trial court entered on a jury's verdict in favor of the defendants in his wrongful-death, medical-malpractice action. Defendants-appellees are vascular surgeon Alan Jon Annenberg, M.D., his employer, Cranley Surgical Associates, Inc., and Mercy Hospital Anderson, the employer of surgical nurse Beverly Smith, R.N.

{¶2} In his six assignments of error, Bowden argues that (1) the jury's verdict was influenced by the improper remarks of Dr. Annenberg's trial counsel, (2) the trial court erred in denying his request for an instruction on *res ipsa loquitur*; and (3) in four instances, the trial court abused its discretion in failing to maintain orderly proceedings and in determining the mode and scope of interrogating witnesses at trial. Because Dr. Annenberg's trial counsel's comments were supported by the evidence and were not an attack on opposing counsel, because Bowden was not entitled to the requested instruction, and because the trial court did not abuse its discretion, we affirm

Facts

{¶3} Dorothy Bowden, age sixty-six, was admitted to Mercy Hospital Anderson in September 1998 for lumbar spinal-fusion surgery to relieve long-standing back pain. The surgeon who was to conduct the fusion procedure selected an anterior approach through Mrs. Bowden's abdomen. Because the approach to the spine required negotiating complex vascular structures, the portion of the surgery to expose the spine was conducted by Dr. Annenberg, a vascular surgeon.

{¶4} After forty-five minutes, Dr. Annenberg perforated Mrs. Bowden's iliolumbar vein with a right angle clamp, near the junction with the common iliac vein. To control bleeding into the abdomen during the attempt to repair this perforation, Dr. Annenberg compressed the surrounding vasculature with sponge sticks—surgical clamps holding gauze pads used to press on a blood vessel to maintain a dry operative field and to stop bleeding. The sponge sticks were applied by Dr. Annenberg and maintained in place by nurse Smith and other members of the surgical team.

{¶5} The repair efforts in the blood-filled surgical field caused injury to and bleeding from additional vessels. Dr. Annenberg testified that, during a transfer of one sponge stick from his grasp to nurse Smith's, the sponge stick slipped about two millimeters. The slipped sponge stick tore additional veins, including the sacral vein.

{¶6} After about three hours, Dr. Annenberg and the surgical team completed repairs to the common iliac, the internal iliac, and the iliolumbar veins. Their attention then shifted to uncontrolled bleeding into the pelvis from the internal iliac-vein tributaries and from the sacral vein. After being avulsed, torn in two, by sponge-stick traction on the internal iliac vein, the sacral vein retracted into an opening in the spine. The surgical team was unable to reach the retracted vein to repair it directly. Instead, they packed the pelvis with sponges to put pressure on the bleeding vein. The packing, however, did not stop the bleeding, and Mrs. Bowden died of blood loss several hours later.

{¶7} At trial, the jury heard the testimony of Dr. Annenberg, Bowden's two expert witnesses, the defendants' four expert witnesses, and Bowden's rebuttal expert witness. The issue of liability depended solely on the differing expert opinions about the proper techniques to stop the bleeding and to manage the hemorrhaging. All the expert

witnesses agreed that Dr. Annenberg's initial laceration of the common iliac vein with the right angle clamp was not the result of negligence. Through his expert witnesses, Bowden argued that Dr. Annenberg's or Smith's negligent handling of the sponge sticks during the repair efforts resulted in subsequent injury to the additional blood vessels, and that Dr. Annenberg was negligent in failing to control the resulting bleeding, especially the bleeding into Mrs. Bowden's pelvis.

{¶8} Dr. Annenberg's and Mercy Hospital's expert witnesses testified that injury to the additional blood vessels due to movement of the sponge sticks in a blood-filled surgical field was not negligent, and that the retraction of the sacral vein into the spine precluded further repair of that vessel. The jury also heard testimony from Bowden's expert witnesses, as well as Dr. Annenberg's and Mercy Hospital's experts, that employing sponge sticks to stop bleeding in this case was not a deviation from the standard of care, that sponge sticks could move and slip in the absence of negligence, and that sponge-stick movement, in and of itself, did not represent a deviation from the standard of care.

{¶9} After receiving the testimony of more than a dozen witnesses and 22 exhibits in a 10-day trial, the jury returned a defense verdict.

The Remarks of Counsel

{¶10} Bowden first argues that during voir dire, opening statement, cross-examination, and closing argument, Dr. Annenberg's defense counsel persisted in a course of "inflammatory remarks designed to arouse the jurors' passion." Bowden contends that a calculated pattern of misconduct by Dr. Annenberg's trial counsel improperly influenced the jury's verdict.

Opening Statement

{¶11} In response to perceived inaccuracies in Bowden’s opening statement, Mr. Triona, Dr. Annenberg’s counsel, stated, “Unlike you and I, the risk entailed in [Dr. Annenberg’s] job can mean sometimes despite his best efforts in what he’s trained to do his patient can die.

{¶12} “We don’t face that in our jobs. We don’t face the potential of coming in a courtroom and being accused of killing someone yet being accused of killing someone when they distort the facts of the case.

{¶13} “And that’s where I was, Your Honor. I’m trying to curb my anger over what I just heard because a good portion of that is not in this case.

{¶14} “I heard that repeated sponge stick injuries are below the standard of care. They’ve known for nearly five years that the transcription of the op notes and death summary that said sponge sticks were used in the pelvis was incorrect. The sponge sticks weren’t there and they know from their own expert witness that the sponge sticks in the pelvis never came up at any time.”

{¶15} The trial court appropriately instructed the jury that an opening statement was not evidence, and that it was intended only to advise the jury what counsel expected the evidence to show. See *State v. Smith* (1992), 84 Ohio App.3d 647, 662, 617 N.E.2d 1160; see, also, *Capeheart v. O'Brien*, 1st Dist. No. C-040223, 2005-Ohio-3033, at ¶6. “But counsel must be afforded wide latitude during opening statement and is allowed fair comment on the facts to be presented at trial.” *Capeheart v. O'Brien* at ¶7, citing *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, at ¶157;

see, also, *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 84 N.E.2d 912, paragraph two of the syllabus

{¶16} When the trial court perceived that counsel’s statement deviated from comment on what the evidence would show and became argumentative by rebutting Bowden’s contentions, it properly intervened.

{¶17} “THE COURT: I think Mr. Lawrence is going to interject an objection and I think he’s absolutely correct. You’re arguing instead of giving your case, what you’re going to show. You’re arguing now.

{¶18} “MR. TRIONA: I apologize, Your Honor.”

{¶19} Defense counsel continued his opening statement without further objection. The trial court’s admonishment of defense counsel, on its own initiative, and in the presence of the jury, cured any potential for prejudice. Bowden did not request the court to strike the remarks, ask for a curative instruction, or move for a mistrial. Error cannot be predicated on objections that have been sustained by the trial court. See *State v. Austin* (Dec. 17, 1986), 1st Dist. No. C-860148; see, also, *State v. Davie*, 80 Ohio St.3d 311, 1997-Ohio-341, 686 N.E.2d 245, at ¶98; *State v. Ware*, 8th Dist. No. 82644, 2004-Ohio-1791, at ¶18.

Lottery Tickets, Crystal Balls and Clairvoyance

{¶20} Perhaps encouraged by the recent trend to reverse defense jury verdicts in medical-malpractice cases on the basis of defense counsel’s use of taboo phrases, Bowden next argues that Mr. Triona’s references throughout the trial to lottery tickets, clairvoyance, and crystal balls so inflamed the passions of the jury as to deny him a fair trial.

{¶21} Bowden contends that the misconduct began in voir dire when Mr. Triona asked prospective jurors, “Any of you willing to spend \$50,000 on a lottery ticket, or to win \$50,000?” He continued, “Would you spend \$50,000 on the lottery ticket if you knew the winning numbers before the drawing? Would we all do that? Wouldn’t that be a great world?”

{¶22} Bowden argues that the remarks continued during the cross-examination of one of his two expert witnesses, general surgeon Stuart Battle, M.D. Mr. Triona continued,

{¶23} “Wouldn’t it be great to be clairvoyant in your business?” T.p. 700.

{¶24} “I mean, it would be particularly great in buying lottery tickets?” T.p. 700.

{¶25} “And you mention you’re not clairvoyant. You do not have a crystal ball?” T.p. 727.

{¶26} “Nothing in the records that you reviewed suggests that Alan Annenberg has a crystal ball, does it?” T.p. 727.

{¶27} “Really, though, in this case you reviewed it with a crystal ball, didn’t you, when you had those records?” T.p. 727.

{¶28} “Certainly if it was done in that manner, would you allow you to be sitting up here and be cross-examined knowing the outcome and having the advantage of a crystal ball?” T.p. 713.

Closing Argument

{¶29} The remarks continued in Mr. Triona’s closing argument: “What did Dr. Battle have when he looked at the treatment of Mrs. Bowden that Alan Annenberg didn’t have? He had a crystal ball. You all could go get yourself nearly three million dollars if

you had a crystal ball because you could buy a lottery ticket knowing what the winning numbers are, or, as Dr. Battle said, it would be great to play the stock market. What was his crystal ball? He knew before he saw the record that Mrs. Bowden was going to die? [T.p. 1481]* * * [Dr. Safa, Bowden's second expert witness,] too, knew Mrs. Bowden had died before he saw these medical records. And I gave you all a break. I didn't get through all those questions I went through with Dr. Battle about the advantages of a crystal ball." T.p. 1494.

Discussion

{¶30} Bowden argues that the quoted references to lottery tickets, clairvoyance, and crystal balls, in the context of a ten-day jury trial, recorded in over 1300 pages of trial transcript, convinced the jury that Bowden's expert witnesses "had no foundation for their opinions, but instead used some type of magic to formulate their opinions." Appellant's Brief at 5-6.

{¶31} Bowden, however, only objected to the winning-lottery-ticket reference in voir dire. He failed to object during the cross-examination of Dr. Battle or during closing argument. To support reversal of a judgment on the ground of misconduct of counsel and improper closing argument to a jury, a proper and timely objection must be made to the claimed improper remarks so that the trial court may take proper action. See *Snyder v. Stanford* (1968), 15 Ohio St.2d 31, 238 N.E.2d 563, paragraph one of the syllabus; see, also, *Cincinnati v. Banks* (2001), 143 Ohio App.3d 272, 294, 757 N.E.2d 1205. Otherwise, a party waives all but plain error. "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously

affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, syllabus.

{¶32} Here, none of Dr. Annenberg’s references in cross-examination or closing argument called into question the basic integrity of the judicial system. Bowden nonetheless, relying on the Ohio Supreme Court’s decision in *Pesek v. Univ. Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 501-502, 2000-Ohio-483, 721 N.E.2d 1011, contends that the trial court was required to intervene sua sponte to admonish counsel and to take curative action to nullify the effects of Mr. Triona’s improper questions and comments.

{¶33} Trial counsel must refrain from unwarranted attacks on opposing counsel, the opposing party, and its witnesses. See *id.*; see, also, *Roetenberger v. Christ Hosp.*, 1st Dist. No. C-040009, 2005-Ohio-5205, at ¶9; *Fehrenbach v. O’Malley*, 1st Dist. No. C-040128, 2005-Ohio-5554, at ¶22; *Furnier v. Drury*, 1st Dist. No. C-030067, 2004-Ohio-7362. Bowden makes no claim that Mr. Triona disparaged his counsel or his role in the proceedings, or attacked Bowden or his family.

{¶34} Rather, Bowden argues that Mr. Triona’s comments undermined the credibility of his expert witnesses. But in medical-malpractice trials, expert testimony is essential to prove negligence and causation. See *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673. The ultimate question is whose expert does the jury believe? Therefore, we have held that the limitations of an expert’s opinion are an appropriate subject for cross-examination and comment. See *Clark v. Doe* (1997), 119 Ohio App.3d 296, 306, 695 N.E.2d 276. But “the permissible bounds of fair argument are not unlimited.” *Id.*

{¶35} The danger that *Pesek* seeks to prevent arises where there is a question “whether the verdict was rendered *upon the evidence*, or may have been influenced by improper remarks of counsel.” *Pesek v. Univ. Neurologists Assn., Inc.*, 87 Ohio St.3d at 501, 2000-Ohio-483, 721 N.E.2d 1011 (internal quotations omitted and emphasis added). “Remarks or arguments that are *not supported by the evidence* and are designed to arouse passion or prejudice to the extent that there is a substantial likelihood that the jury may be misled are improper.” *Roetenberger v. Christ Hosp.* at ¶9 (emphasis added). “The law is unambiguous: ‘When argument spills into disparagement *not based on any evidence*, it is improper.’ ” *Fehrenbach v. O'Malley* at ¶25, quoting *Clark v. Doe*, 119 Ohio App.3d at 307, 695 N.E.2d 276 (emphasis added). Where, however, counsel’s argument is based upon the evidence admitted at trial and highlights legitimate limitations in the testimony of an opponent’s expert witnesses, the argument is not improper. See *Roetenberger v. Christ Hosp.* at ¶9; see, also, *Capeheart v. O'Brien* at ¶7. The trial court’s duty to sua sponte intervene does not arise where counsel’s arguments are warranted by the evidence. See *Fehrenbach v. O'Malley* at ¶25.

{¶36} Here, the first reference to clairvoyance was made not by Mr. Triona, but by Bowden’s own expert, Dr. Battle. In response to a question about his recollection of the time of injury, Dr. Battle answered, “I think I said around that time – Mr. Triona, I don’t pretend to be clairvoyant. * * * You by necessity have to estimate when things happen.”

{¶37} Every other question or comment by Mr. Triona was made to highlight the difference between the retrospective evaluation of the medical records by Bowden’s experts and the prospective evaluation by Dr. Annenberg, during the surgery, and by his expert witness Dr. Klamer. Dr. Klamer testified that he reviewed the case from separate “packets”

of records sent to him in sequence by Mr. Triona. The first packet contained redacted records that did not reveal the outcome of the surgical procedure. Like Dr. Annenberg, Dr. Klamer was evaluating Mrs. Bowden's medical condition prospectively. Each of Bowden's experts, however, knew of the fatal consequences of the surgery not only before offering an opinion, but also before reviewing the medical records. As noted in his closing argument, Mr. Triona's analogies to crystal balls, clairvoyance, and the advantage of knowing winning lottery-ticket numbers in advance served to highlight the extent of knowledge of the experts when they formed their opinions about negligence and causation.

{¶38} Comment upon matters in evidence that identifies the basis of an expert's testimony and that assists the jury to weigh and to evaluate the credibility of that testimony is a hallmark of effective litigation. See Lilly, *An Introduction to the Law of Evidence* (2 Ed.1987), 491-492, Section 12.3; see, also, *Clark v. Doe*, 119 Ohio App.3d at 306, 695 N.E.2d 276. Since counsel's comments in voir dire, opening statement, cross-examination, and closing argument were based upon the evidence, and since they served to highlight for the jury legitimate limitations in the testimony of Bowden's expert witnesses, they were not improper. Thus, they were not subject to the trial court's sua sponte review under *Pesek*.

{¶39} The scope of voir dire, cross-examination, and closing argument are, in the first instance, within the discretion of the trial court. See Evid.R. 611; see, also, *Brokamp v. Mercy Hosp.* (1999), 132 Ohio App.3d 850, 862, 868, 726 N.E.2d 594. Here, an experienced trial judge, having heard all the testimony, did not abuse his discretion. The first assignment of error is overruled.

The Res-Ipsa-Loquitur Instruction

{¶40} In his second assignment of error, Bowden asserts that the trial court erred by failing to instruct the jury on the applicable law regarding res ipsa loquitur. Bowden's complaint alleged negligence on the part of Dr. Annenberg and Mercy Hospital. In the trial court, Bowden relied upon the evidentiary doctrine of res ipsa loquitur as one means of demonstrating the alleged negligence.

{¶41} The doctrine of res ipsa loquitur is a rule of evidence that permits a plaintiff to prove negligence circumstantially upon showing that (1) the instrumentality that caused the harm was in the exclusive control of the defendants, and (2) the event that caused the harm was not of the type that would normally occur in the absence of the defendants' negligence. See *Wiley v. Gibson* (1990), 70 Ohio App.3d 463, 465, 591 N.E.2d 382; see, also, *Merritt v. Deaconess Hosp.* (Sept. 7, 1976), 1st Dist. No. C-750343. While the doctrine may be appropriate in medical-malpractice cases, see *Mahan v. Bethesda Hosp., Inc.* (1992), 84 Ohio App.3d 520, 617 N.E.2d 714, a res-ipsa-loquitur instruction cannot be based solely on unsuccessful treatment. See *Oberlin v. Friedman* (1965), 5 Ohio St.2d 1, 8, 213 N.E.2d 168.

{¶42} The applicability of res ipsa loquitur must be determined by the trial court on a case-by-case basis. See *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 171, 406 N.E.2d 1385. Whether the plaintiff has offered sufficient evidence to warrant application of the doctrine is a question of law. See *Hake v. Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 67, 262 N.E.2d 703. The trial court's decision is subject to de novo review on appeal. See *id.*

{¶43} Mrs. Bowden’s surgery involved multiple successive injuries to her vascular system. It was the culmination of these injuries that ultimately resulted in her death. At issue in the trial was whether the sponge-stick slippage that caused Mrs. Bowden’s vascular injuries was an event that could have occurred in the absence of negligence, and whether Dr. Annenberg or Smith misused the sponge sticks. Bowden contended that Dr. Annenberg or Smith negligently used the sponge sticks to compress and control the bleeding from the initial tear, thereby causing additional injury to her vascular system.

{¶44} But the evidence showed that employing sponge sticks to stop blood flow in this procedure was not a deviation from the standard of care, that sponge sticks moved and slipped in the absence of negligence, and that sponge-stick movement, in and of itself, did not represent a deviation from the standard of care. Bowden’s own expert witnesses admitted that some of the vascular injuries could have occurred even if Dr. Annenberg and Smith had acted in accordance with the standard of care, as sponge sticks could slip in the absence of negligence.

{¶45} Res ipsa loquitur cannot be applied where there are multiple sources of injury, only one of which satisfies the doctrine’s threshold requirements. In *Jennings Buick v. Cincinnati*, the Ohio Supreme Court noted that a plaintiff had presented evidence through expert testimony that a water-main break had probably been caused by the improper backfilling technique of the defendant city. On cross-examination, the plaintiff’s expert admitted that it was equally as probable that the water-main break was due to other causes not related to negligence. The supreme court held that a res-ipsa-loquitur instruction should not have been given, as “there was evidence presented to the

trier of the facts which would have allowed the jury to find that one or another potential cause of the injury not attributable to the negligence of the [defendant] was equally as probable as was a cause attributable to the negligence of the [defendant].” *Jennings Buick, Inc. v. Cincinnati*, 63 Ohio St.2d at 174, 406 N.E.2d 1385.

{¶46} “Where it has been shown by the evidence adduced that there are two equally efficient and probable causes of the injury, one of which is not attributable to the negligence of the defendant, the rule of *res ipsa loquitur* does not apply.” *Id.* at 171, 406 N.E.2d 1385; see, also, *Golden v. Wirts*, 3d Dist. No. 1-02-24, 2003-Ohio-522, at ¶24.

{¶47} As the record contains evidence of more than one equally efficient and probable cause of Dorothy Bowden’s vascular injuries, at least one of which would not have been attributable to the negligence of Dr. Annenberg and Smith, an instruction on *res ipsa loquitur* was not appropriate. The second assignment of error is overruled.

Matters Consigned to the Trial Court’s Discretion

{¶48} In his four remaining assignments of error, Bowden argues that the jury’s verdict must be reversed because the trial court abused its discretion in failing to maintain orderly proceedings, to determine the mode and scope of interrogating witnesses, and to evaluate a juror’s professed ability to be fair and impartial.

{¶49} To succeed on these assignments of error, Bowden must demonstrate that, in making its decisions, the trial court exhibited an attitude that was “unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. In applying this standard, a reviewing court “is not free to substitute its judgment for that of the trial judge.” *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301. Rather, if a trial court’s exercise of its discretion exhibits a sound reasoning

process that would support its decision, a reviewing court will not disturb that determination. See *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

Remarks to Bowden's Expert

{¶50} Bowden's third assignment of error, in which he contends that the trial court demonstrated partiality against his expert witness Stuart Battle, M.D., when it "reprimanded" him during his testimony, is overruled. The trial court simply instructed Dr. Battle to speak up and not to turn his back on the court reporter when Dr. Battle left the witness stand and approached a video monitor to highlight matters for the jury. We are unable to discern any error in the trial court's statements. The trial court retains the responsibility to ensure orderly proceedings in the trial. See, e.g, Evid.R. 611. It is difficult to appreciate how the trial court erred when it attempted to ensure that the court reporter could make an accurate record of the proceedings. See R.C. 2301.20.

Cross-Examination of Defense Experts

{¶51} Bowden's fourth assignment of error, in which he argues that the trial court erred in finding sufficient adversity between Dr. Annenberg's and Mercy Hospital's interests to permit them to cross-examine each other's expert witnesses, is also overruled. "A party is entitled to cross-examine another party's witness, whether on the same side of the case or not, if some significant adversity exists between the two." *Turner v. Providence Hosp.* (Oct. 1, 1980), 1st Dist. No. C-790350. This decision over the mode and scope of interrogating witnesses, under Evid.R. 611, is consigned to the sound discretion of the trial court. See *id.*; see, also, *Costell v. Toledo Hosp.* (1992), 82 Ohio App.3d 393, 402, 612 N.E.2d 487.

{¶52} Despite cooperating to exercise their peremptory challenges, Dr. Annenberg and Mercy Hospital retained separate counsel, had separate liability-insurance carriers, filed separate pleadings, made separate motions, and defended against separate theories of liability advanced by Bowden. Dr. Annenberg and Mercy Hospital had adverse interests sufficient to entitle each to the right of cross-examination of the other's witnesses. See *Bernal v. Lindholm* (1999), 133 Ohio App.3d 163, 174-176, 727 N.E.2d 145.

Juror Acquaintance with a Witness

{¶53} In his fifth assignment of error, Bowden contends that the trial court improperly denied his motion to exclude a juror. Bowden argues that the prospective juror should have been excused for cause because, during voir dire, the prospective juror stated that Dr. Fegelman, one of Mercy Hospital's expert witnesses, had performed a catheterization procedure on him during a hospitalization for cancer eight years earlier.

{¶54} A juror's acquaintance with a witness is not one of the specific challenges for cause listed under R.C. 2313.42. But R.C. 2313.42(J) contemplates the removal of a prospective juror for good cause when "he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." A juror's acquaintance with a witness does not necessarily affect the juror's impartiality where the juror demonstrates to the trial court's satisfaction that he can be impartial. See *McQueen v. Goldey* (1984), 20 Ohio App.3d 41, 45, 484 N.E.2d 712. The trial court has wide discretion in determining a juror's ability to be impartial. See *State v. Nields*, 93 Ohio St.3d 6, 20-21, 2001-Ohio-1291, 752 N.E.2d 859.

{¶55} Here, the prospective juror stated that he could be fair and impartial in deciding this case. When asked by Bowden’s trial counsel whether he would “tilt” toward Dr. Fegelman, the prospective juror responded that he would not because the trial involved a different procedure from his catheterization, and because he had no knowledge of what Dr. Fegelman’s testimony would be. Accordingly, Bowden’s motion to exclude this juror for cause was properly denied and will not be disturbed on appeal. See *State v. Tyler* (1990), 50 Ohio St.3d 24, 31, 553 N.E.2d 576, 587. The assignment of error is overruled.

Rebuttal Testimony

{¶56} In his final assignment of error, Bowden claims that the trial court erred in excluding some testimony of anesthesiologist Dr. McClary offered to rebut surgeon Dr. Fegelman’s testimony about the frequency of sponge-stick slips and to expound on the importance of Mrs. Bowden’s blood-gas levels.

{¶57} Contrary to Bowden’s assertion, R.C. 2315.01(D) does not grant an absolute right to present rebuttal testimony. The statute merely describes the regular order in which evidence and argument shall be presented at trial. A party does have a right to present rebuttal testimony, however, if the testimony would not be appropriate for one’s case-in-chief, and if the testimony is first addressed in an opponent’s case-in-chief. See *Phung v. Waste Mgmt., Inc.* (1994), 71 Ohio St.3d 408, 410, 644 N.E.2d 286. Determining what evidence is admissible as proper rebuttal evidence, however, lies within the trial court’s discretion. See *State v. McNeill*, 83 Ohio St.3d 438, 446, 1998-Ohio-293, 700 N.E.2d 596.

{¶58} The primary focus of Bowden's claims was that Dr. Annenberg's negligence resulted in a sponge-stick injury to Mrs. Bowden. If Dr. McClary were to testify on the frequency of sponge-stick injuries, he could have been called in Bowden's case-in-chief. Dr. McClary was afforded considerable latitude to testify about Mrs. Bowden's respiratory and metabolic acidosis and their implications for her clinical status. Therefore, the trial court did not abuse its discretion in limiting Dr. McClary's rebuttal testimony. The sixth assignment of error is overruled.

{¶59} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

SUNDERMANN and HENDON, JJ., concur.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Opinion.