[Cite as *Beranek v. Shope*, 2020-Ohio-7024.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

ROBIN BERANEK et al.,

Plaintiffs-Appellants,

v.

JAMES SHOPE, M.D.,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0011

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 18 CV 431

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Geoffrey C. Brown, *Atty. James B. Stoneking,* Bordas & Bordas, PLLC, 1358 National Road, Wheeling, West Virginia 26003 for Plaintiffs-Appellants and

Atty. Melvin J. Davis, *Atty. David H. Krause, Atty. Jackie M. Jewell,* Reminger Co., L.P.A., 200 Civic Center Drive, Suite 800, Columbus, Ohio 43215 for Defendant-Appellee.

Dated: December 31, 2020

Robb, J.

{¶1} Plaintiffs-Appellants Robin and Eddy Beranek appeal the jury verdict rendered in favor of Defendant-Appellee James Shope, M.D., in Belmont County Common Pleas Court. Multiple issues are raised in this appeal. First, Appellants assert the trial court erred by allowing Appellee to proceed with a mitigation of damages defense. Next, they contend the trial court erred in allowing the surgical consent forms to be admitted into evidence when there was not an informed consent claim. Lastly, they argue the trial court erred in failing to include two jury instructions – one on a negligent healthcare provider being responsible for any subsequent malpractice committed by another healthcare provider, and one on an 'alternative cause' theory where the defendant must present competent expert witness testimony that such alternative cause was the true cause by a preponderance of the evidence.

{¶2} For the reasons expressed below, all four assignments of error lack merit. The jury specifically found that Appellee did not breach the standard of care. Thus, the first, third and fourth arguments are meritless because they address causation and damages. The finding by the jury that Appellee did not breach the standard of care renders any error harmless. As to the consent forms, they were used to show the standard of care that multiple surgeries might be needed. At most, this amounted to harmless error. The jury verdict is affirmed.

Statement of the Case

{¶3} Robin Beranek was diagnosed with breast cancer in 2017. She received bilateral mastectomies and immediate breast reconstruction in April 2017. The breast reconstruction surgery was performed by Appellee. The immediate reconstruction surgery consisted of placing expanders and filling the expanders. The expanders were filled over a couple of months and, in November 2017, Appellee operated on Appellant Robin Beranek again. He removed the expanders and replaced them with implants.

{¶4} The implants migrated laterally, and Appellant was unhappy with their placement. She saw Appellee on December 13, 2017, and he recommended a sling

procedure to move the implants to a more central location. After that appointment, Appellee left his place of employment and began working at another hospital.

{¶5} Appellant Robin Beranek sought treatment at Ohio State University Medical Center (OSUMC) to correct the lateral migration of the implants. She first went there in February 2018. The medical notes from OSUMC noted that her implants were "very laterally displaced on the lateral chest wall."

{¶6} In order to correct the lateral placement, Appellant Robin Beranek chose to undergo a reconstructive surgery called Deep Inferior Epigastric Perforator (DIEP). The DIEP procedure consists of taking skin and fat from the abdominal region and making breasts from that tissue. Tr. 653. To keep the tissue alive, blood vessels are left intact and then reattached to the blood vessels in the chest. Tr. 654. This procedure results in the removal of a rib on each side. Tr. 654. Hernias and fat necrosis are risks of the DIEP procedure. Appellant Robin Beranek developed both. She ultimately had multiple surgeries to create the breast tissue and to address the complications from the surgeries.

{¶7} Appellants filed a medical malpractice complaint against Appellee on November 7, 2018 asserting he was negligent and breached the standard of care. Appellants asserted Robin has suffered physical pain and mental and emotional anguish. Appellee filed an answer. 11/30/18 Answer.

{¶8} Following discovery, Appellants filed a motion in limine seeking to prevent Appellee from introducing the surgical consent forms into evidence at trial. 2/12/20 Motion in Limine. Appellants asserted they had not pled an informed consent claim, and as such, it would be inappropriate to allow the forms to be admitted. 2/12/20 Motion. Appellants also argued Appellee should be prevented from arguing Appellants failed to mitigate their damages. 2/12/20 Motion. They asserted that the defense experts agreed that the operation Appellant Robin Beranek undertook to correct the lateral migration of the implants was reasonable. 2/12/20 Motion. Therefore, Appellee should not be permitted to argue her reasonable decision constituted a failure to mitigate. 2/12/20 Motion.

{¶9} A telephonic hearing was conducted on the in limine issues. To the extent that Appellants could not consent to negligence, the trial court sustained the in limine motion concerning the surgical consent forms. As to mitigation of damages, the trial court

overruled the motion. The trial court indicated the testimony had to be developed at trial in order for it to make a fair ruling. 2/14/20 J.E.

{¶10} Thereafter, a jury trial began. The testimony mostly centered on whether Appellee violated the standard of care. An expert for Appellants, Dr. John Perrotti, testified the pockets for the implants were developed too far laterally resulting in a violation of the standard of care. Tr. 359. The expert explained lateral migration of the implants does not necessarily mean the surgeon deviated from the standard of care. Tr. 378. However, in this instance, the magnitude of lateral migration was severe and indicated a violation of the standard of care. Tr. 379. The expert testified both the sling procedure and the DIEP procedure were reasonable options to correct the lateral displacement. Tr. 375, 384.

{¶11} Appellee testified on his own behalf. He disagreed with Appellants' expert that he breached the standard of care. Tr. 560. He asserted there are a variety of reasons for lateral migration, and lateral migration to the extent it occurred in this instance does not mean he breached the standard of care. Tr. 563. Appellee also had an expert, Dr. Jeffrey Ascherman, testify. Dr. Ascherman did not agree with Dr. Perrotti that Appellee over dissected bilaterally. Tr. 644. He further testified the standard of care was met. Tr. 670. He also explained he did not agree with the statement by OSUMC that the implants were "very laterally displaced" onto the lateral chest wall. Tr. 683. He indicated the word "very" implies the displacement was significant, which he contends it was not. Tr. 683. He explained the pictures of Robin Beranek showed she was able to wear a bra; if the implants "were out on the side, she wouldn't have been able to do that." Tr. 683.

{¶12} During trial, Appellants renewed the in limine motion. The trial court did not alter its pretrial rulings on the motion in limine.

{¶13} The jury rendered a verdict for Appellee. In response to the first jury interrogatory, the jury answered Appellee did not violate the standard of care in the medical care and treatment of Appellant Robin Beranek. 2/26/20 Jury Verdict Form.

{¶14} Appellants then filed a motion for a new trial, which was denied. 4/3/20 J.E. Appellants timely appealed the jury verdict.

First Assignment of Error

"The trial court erred by allowing the defendant below to proceed with an improper mitigation of damages defense. This error includes the trial court's denial of the Appellants' motion in limine, the trial court's denial of the Appellants' directed verdict motions on the issue, and the trial court's decision to instruct the jury on the issue."

{¶15} Appellants assert the trial court allowed Appellee to proceed with an improper mitigation of damages defense. They find fault with the trial court's ruling on the motion in limine regarding this issue, the denial of the directed verdict on this issue, and the jury instruction. Appellants frame the question presented as whether Appellee could pursue a mitigation of damages defense when it is undisputed that it was a reasonable choice for Appellant Robin Beranek to have the DIEP procedure. Appellants assert Appellee conceded that she followed the reasonable advice of her physicians at OSUMC. Thus, Appellee cannot proceed with a defense of mitigation of damages when he conceded Appellant Robin Beranek acted reasonably.

{¶16} Appellee responds asserting Appellants' arguments are meritless because if there was any error regarding the pursuit of the mitigation of damages defense, then the error was harmless. The jury concluded Appellee did not breach the standard of care. The issue of damages is a post liability issue and, thus, the finding that Appellee was not liable renders any error harmless and moot.

{¶17} In the reply brief, Appellants argue the error is not harmless because of the pervasive damage done by letting the mitigation of damages argument proceed throughout the trial. They assert the mitigation defense clearly impacted the jury's decision making process on liability.

{¶18} As stated above, Appellants assert this issue pertains to the denial of their motion for directed verdict, the jury instruction, and the denial of the motion in limine regarding the admission of evidence. The trial court did allow evidence of mitigation in respect to the sling procedure being less involved than the DIEP procedure. It did deny the motion for directed verdict on the issue of mitigation of damages. The trial court also instructed on mitigation:

> The defendant claims that plaintiff failed to mitigate her damages. If the defendant proves by greater weight of the evidence that the plaintiff did not

> make reasonable efforts under the facts and circumstances in evidence to lessen damages caused by the defendant's negligence, you should not allow damages that could have been avoided by reasonable efforts to avoid loss. The plaintiff, however, is not required to take measures that would involve undue risk, burden or humiliation.
>
> The nature of the injury is such as to render medical or surgical treatment reasonable necessary. It is the duty of the person injured to use ordinary and reasonable diligence to secure the medical or surgical aid. In deciding whether a duty exists to undergo surgical treatment to correct a condition, you may consider the degree of risk involved to the plaintiff in such a procedure and the advice and recommendation of the plaintiff's treating doctor and/or surgeon.

Tr. 753-754.

{¶19} The standards of review for the above encompass a de novo standard of review and an abuse of discretion standard of review. 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 reasonable minds could come to only one conclusion and that conclusion is adverse to the party opposing the motion. Civ.R. 50(A)(4); *Crawford v. Halkovics*, 1 Ohio St.3d 184, 185-186, 438 N.E.2d 890 (1982). Our review of the trial court's ruling on a motion for a directed verdict is de novo. *Groob v. KeyBank,* 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 14. As for jury instructions, a trial court is obligated to provide a jury with instructions that reflect a correct and complete statement of the law. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 649 N.E.2d 1219 (1995). A determination as to which jury instructions are proper is a matter left to the sound discretion of the trial court and, thus, the trial court's formulation of instructions is upheld absent an abuse of discretion. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989); *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). In evaluating whether the court acted unreasonably, unconscionably, or arbitrarily, as required in an abuse of discretion review, we consider the jury instructions as a whole. *State v. Jalowiec*, 91 Ohio St.3d 220, 231, 744 N.E.2d 163 (2001). As to the motion in limine, decisions

involving the admissibility of evidence and decisions granting or denying a motion in limine are reviewed under an abuse of discretion standard of review. *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶ 22. An abuse of discretion means "an attitude that is unreasonable, arbitrary or unconscionable." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991).

{¶20} Consequently, we now turn to the issue of whether the trial court erred/abused its discretion regarding the defense of mitigation of damages. "Liability based on the alleged negligence of a medical professional requires proof of four elements: (1) a duty running from the defendant to the plaintiff, (2) a breach of that duty by the defendant, (3) damages suffered by the plaintiff, and (4) a proximate causal relationship between the breach of duty and the damages." *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc.*, 108 Ohio St.3d 494, 2006-Ohio-942, 844 N.E.2d 1160, ¶ 13. Mitigation of damages is "an affirmative defense and the burden of proof on that issue resides upon the employer responsible for the wrongful discharge." *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, ¶ 46, citing *State ex rel. Martin v. Columbus, Dept. of Health*, 58 Ohio St.2d 261, 389 N.E.2d 1123 (1979), paragraph three of the syllabus.

{¶21} The Tenth Appellate District has explained:

> Ohio cases, however, generally use the term "mitigation" and invoke the concept of avoidable consequences to address the affirmative defense that the plaintiff failed to minimize loss *after* the tort occurred, when this defense is raised by the tortfeasor at trial: Mitigation of damages (or avoidable consequences) means that "'one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of *reasonable effort* or expenditure after the commission of the tort.'" (Emphasis added.) *Johnson v. Univ. Hosps. of Cleveland*, 44 Ohio St.3d 49, 57, 540 N.E.2d 1370 (1989), quoting 4 Restatement of the Law 2d,

> Torts, Section 918(1) at 500 (1979). "Thus, mitigation refers to actions taken after the commission of a tort, by which a party reduces the damages flowing from the tort." *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 297, 741 N.E.2d 155 (2d Dist.2000).

Columbia Gas Transm., LLC v. Ohio Valley Coal Co., 2019-Ohio-1004, 126 N.E.3d 1203, ¶ 36 *(*10th Dist.), *rev'd on other grounds,* _ Ohio St. 3d __, 2020-Ohio-6787, __ N.E.3d __.

{¶22} The key language in the above is that the failure to mitigate damages defense is utilized to argue the plaintiff failed to minimize loss **after the tort occurred**. This would limit the amount of damages a defendant would owe for the breach of the duty. Here, as Appellee suggests, any error regarding mitigation of damages is harmless because the jury specifically found there was no breach of the standard of care. Thus, the jury never reached the issue of damages since no tort was committed.

{¶23} The Fourth Appellate District has explained in a similar situation:

> Here, we find that the trial court's reference to mitigation of damages is mere surplusage. As a result, we need not determine whether the mitigation-of-damages issue was tried by the implied consent of the parties. "It is well settled that an injured party has a 'duty to mitigate its damages and may not recover those damages which it could have reasonably avoided.'" *GRW Industries, Ltd. v. Bernstein,* 11th Dist. No.2010–L–110, 2011–Ohio–4885, ¶ 35, quoting *S & D Mechanical Contrs., Inc. v. Enting Water Conditioning Sys., Inc.,* 71 Ohio App.3d 228, 238, 593 N.E.2d 354 (2d. Dist.1991). Therefore, a party must actually be injured before the law imposes a duty to mitigate. *See generally Marion Family YMCA v. Hensel,* 178 Ohio App.3d 140, 2008–Ohio–4413, 897 N.E.2d 184, ¶ 13 (3d Dist.) ("Having found that [the appellant] did not breach the contract, the question of mitigation of damages is moot."); *Shumar v. Kopinsky,* 8th Dist. No. 78875, 2001 WL 995219, *1 (Aug. 30, 2001) ("It is a general principle of law that a plaintiff who is injured by the tort of another has a duty to mitigate[.]"); *Sholiton Industries, Inc. v. Wright State Univ.,* 2d Dist. No. 95–CA–101, 1996 WL

> 531587, *5 (Sept. 20, 1996) ("A party to a contract that has been breached by the other party has a duty to mitigate its damages."). But here, the trial court found that Cogan performed the repairs in a workmanlike manner. *See generally Bertsch v. Lee's Granite, L.L.C.,* 6th Dist., No. E–09–021, 2009–Ohio–6261, ¶ 17 ("A 'workmanlike manner' has been defined as the way work has been customarily done in the community."). The trial court also found that Cogan (1) did not breach a contract, (2) did not breach any type of warranty, and (3) did not act willfully, recklessly, or outrageously. Simply put, the trial court found that Boyd was not injured by Cogan's actions. Therefore, Boyd had no damages to mitigate, and the reference to mitigation of damages is superfluous to the trial court's decision.

Boyd v. Cogan, 4th Dist. Scioto No. 11CA3424, 2012-Ohio-1604, ¶ 11.

{¶24} Appellants acknowledge the crux of Appellee's failure to mitigate defense was **even if Appellee was negligent**, his negligence should be excused or limited because Appellant Robin Beranek failed to exercise reasonable care in lessening her damages. Thus, they admit that mitigation of damages was his alternative argument. In reviewing the case law, physicians in medical malpractice claims are permitted and often assert alternative theories. For instance, they assert the standard of care was met and alternatively assert if the standard of care was not met, there is a valid affirmative defense. *E.g. Hoke v. Miami Valley Hosp.*, 2d Dist. Montgomery No. 28462, 2020-Ohio-3387, ¶ 40-41 (It was argued the injury resulting from the surgery was a recognized complication of surgery, and this argument was asserted to have caused the jury to believe the defendants could not be liable even if they failed to meet the standard of care. Expert witnesses for both sides made clear a "complication of surgery" may occur with a surgeon operating within or outside of the applicable standard of care. Similar to the case at hand, in *Hoke* there was testimony regarding the standard of care and breach.).

{¶25} Admittedly, in this case there was testimony regarding mitigation of damages. However, the jury instruction and interrogatory both were clear regarding the standard of care. The interrogatory did not include any statement about mitigation of damages. Consequently, the record does not support the suggestion that the minimal testimony on mitigation of damages and the separate instruction on it impacted the jury's

no breach of the standard of care finding. Any error in instructing on mitigation of damages was, at most, harmless error.

{¶26} For all the above reasons, under both standards of review, this assignment of error lacks merits. Any error regarding mitigation of damages was harmless since the jury concluded Appellee did not breach the standard of care and thus, never reached the issue of damages.

Second Assignment of Error

"The trial court erred by admitting surgical consent forms into evidence despite the fact that the Appellants were not pursuing an informed consent claim. This error includes the trial court's denial of the Appellants' motion in limine and the Appellants' evidentiary objections on the issue."

{¶27} Appellants argue the trial court erred when it allowed the admission of the surgical consent forms when there was not a separate claim of lack of informed consent. Appellants rely on the *Waller* case from the Eleventh Appellate District to support their position.

{¶28} Appellee contends *Waller* is distinguishable, the forms were never referenced as an affirmative defense to negligence, there were no jury instructions on informed consent, and it was made very clear to the jury throughout the trial the forms were not being used to show she consented to negligence.

{¶29} As stated above, we review the admissibility of evidence under an abuse of discretion standard of review. "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby*, 58 Ohio St.3d at 271.

{¶30} In *Waller*, the trial court referred to informed consent as an affirmative defense, permitted appellee to question appellant about informed consent, permitted appellee to talk about informed consent on direct examination, discussed informed consent during closing arguments, and permitted one of the interrogatories to ask whether informed consent was a valid waiver of the rights of the appellant. *Waller v. Aggarwal*, 116 Ohio App.3d 355, 688 N.E.2d 274 (11th Dist.1996). The action brought against Appellee in *Waller* was a negligence claim; it was not a "battery for a nonconsensual procedure" claim. *Id*. On appeal, the court found the admission of evidence on informed

consent and the references to informed consent carried a great potential of confusion for the jury. *Id*. at 275 (finding plain error).

{¶31} When comparing the *Waller* court's summarization of how informed consent was discussed and utilized in that trial and the record in the case before this court, it becomes apparent *Waller* is distinguishable factually. In the case at hand, the trial court, the attorneys, and even witnesses indicated no one consents to negligence or medical malpractice. Tr. 241-242, 519-520, 663-664, 671, 787. Also, informed consent was not referenced as an affirmative defense and there was no interrogatory on informed consent. In *Waller*, the appellate court indicated the informed consent interrogatory caused confusion. It explained:

> With regard to the jury interrogatory, it is clear that the language employed demonstrates the confusion of the issues. The fact that appellant consented to the procedure and was informed of its risks did not result in a "waiver of her rights." It did not grant consent for the procedure to be performed negligently, and it did not waive appellant's right to recourse in the event the procedure was performed negligently. Thus, interrogatory number five was clearly erroneous.

Waller, 116 Ohio App.3d at 358.

{¶32} Here, we do not have that issue. The instructions and statements were clear; the issue the jury was charged with deciding was whether there was a breach of the standard of care and the amount of damages.

{¶33} Appellee indicates the consent forms were only relevant to rebut Appellant Robin Beranek's testimony implying she was not aware she could need additional surgeries. In reviewing Appellant Robin Beranek's testimony, she implies she was not aware she could need additional surgeries. The informed consent forms' language Appellee focused on was the additional surgeries language. Appellee's expert testified reconstruction typically requires three surgeries to achieve the desired result.

{¶34} If the trial court erred in admitting the forms, any error would amount to harmless error. Nothing in the record suggests the jury was led astray by the forms. While there are references to the informed consent form, the forms were not a prevalent

focal point of the testimony. As stated above, the majority of the testimony concerned the standard of care and whether that standard of care was breached; the testimony focused on the creation of the pockets for the implants. This case, in simple terms, was a battle of the experts. It was a credibility issue of which expert the jury believed. Appellants' expert testified there was a breach of the standard of care. Appellee and his expert testified there was not a breach of the standard of care. The instructions to the jury and the interrogatory clearly indicated that was the issue, not the consent forms. Even if the forms should not have been admitted, any error would have amounted to harmless error considering there was evidence proving Appellee did not breach the standard of care and the jury specifically made that finding.

{¶35} For the above stated reasons *Waller* is distinguishable, and if the trial court erred in admitting the forms, then that error was at most harmless error. This assignment of error is meritless.

Third Assignment of Error

"The trial court erred by refusing to instruct the jury on the Syl. Pt. 6, *Berdyck v. Shide*, 66 Ohio St.3d 573, 613 N.E.2d 1014 (1993), which stands for the proposition that a negligent healthcare provider is responsible for any subsequent malpractice committed by another healthcare provider."

{¶36} This assignment of error addresses the trial court's denial of a jury instruction on *Berdyck*. As stated above, the determination of the instruction to include in a jury instruction is a matter left to the sound discretion of the trial court. *Wolons*, 44 Ohio St.3d at 68; *Guster*, 66 Ohio St.2d at 271.

{¶37} Appellants requested an instruction Appellee would be responsible for any negligence that occurred at OSUMC; they requested an intervening and superseding causation instruction. Appellants argue Appellee's deviation from the standard of care in creating the pockets too far laterally required Appellant Robin Beranek to undergo another surgery. According to them, Appellee's negligence caused Robin to undergo another procedure and what occurred at OSUMC is connected to Appellee's performance in the earlier procedure. They contend throughout the trial Appellee insinuated the physicians at OSUMC recommended and performed an unnecessarily risky and complicated surgery. The intervening and superseding instruction was warranted and would have

"blunt[ed] the effects" of Appellee's insinuation. Appellants cite the Ohio Supreme Court decision in *Berdyck* to support their position.

{¶38} Appellee asserts, similar to the first assignment of error, this assignment of error is meritless because the jury specifically found Appellee was not negligent; any error in denying the request for an intervening and superseding causation instruction was harmless. Additionally, Appellee argues the evidence did not warrant the instruction.

{¶39} In *Berdyck*, the Ohio Supreme Court held:

> The intervening negligence of an attending physician does not absolve a hospital of its prior negligence if both co-operated in proximately causing an injury to the patient and no break occurred in the chain of causation between the hospital's negligence and the resulting injury. In order to break the chain, the intervening negligence of the physician must be disconnected from the negligence of the hospital and must be of itself an efficient, independent, and self-producing cause of the patient's injury.

Berdyck v. Shinde, 66 Ohio St.3d 573, 613 N.E.2d 1014 (1993), paragraph six of the syllabus.

{¶40} In that case, the physician and hospital were sued. The physician stipulated he deviated from the standard of care, but he asserted he was not the sole proximate cause of the injury. *Id*. at 584. The Ohio Supreme Court, agreeing with the court of appeals, concluded the hospital was not entitled to summary judgment on the issue of liability. It explained:

> The intervention of a responsible human agency between a wrongful act and an injury does not absolve a defendant from liability if that defendant's prior negligence and the negligence of the intervening agency co-operated in proximately causing the injury. If the original negligence continues to the time of the injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate, concurring cause for which full liability may be imposed. "Concurrent negligence consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury."

> *Garbe v. Halloran* (1948), 150 Ohio St. 476, 38 O.O. 325, 83 N.E.2d 217, paragraph one of the syllabus.
>
> In order to relieve a party of liability, a break in the chain of causation must take place. A break will occur when there intervenes between an agency creating a hazard and an injury resulting therefrom another conscious and responsible agency which could or should have eliminated the hazard. *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 323, 58 O.O. 119, 130 N.E.2d 824, paragraph one of the syllabus; *Thrash v. U–Drive–It Co.* (1953), 158 Ohio St. 465, 49 O.O. 402, 110 N.E.2d 419, paragraph two of the syllabus. However, the intervening cause must be disconnected from the negligence of the first person and must be of itself an efficient, independent, and self-producing cause of the injury.
>
> Thus, we hold that the intervening negligence of an attending physician does not absolve a hospital of its prior negligence if both co-operated in proximately causing an injury to the patient and no break occurred in the chain of causation between the hospital's negligence and the resulting injury. In order to break the chain, the intervening negligence of the physician must be disconnected from the negligence of the hospital and must be of itself an efficient, independent, and self-producing cause of the patient's injury.

Id. at 584-585.

{¶41} Considering the above law and the evidence offered at trial, we agree with Appellee that an instruction on intervening and superseding causation was not warranted. Appellee did not render an opinion on whether the physicians at OSUMC deviated from the standard of care in performing the DIEP procedure. Likewise, none of the experts rendered an opinion on whether the physicians at OSUMC deviated from the standard of care. Rather, the testimony elicited concerned whether Appellee did something to cause the complications (fat necrosis and hernias) that arose from the DIEP procedure. Tr. 429-431. Appellants' expert testified nothing Appellee did or failed to do caused those complications. Tr. 429-431. Appellee's expert agreed with Appellants' expert that nothing

Appellee did caused the fat necrosis and hernia because that was from "a totally different procedure." Tr. 661. Thus, at trial, there was no evidence of negligence on the part of OSUMC; there was no testimony or evidence of how or if those physicians at OSUMC deviated from the standard of care. The only information the testimony and evidence established is the DIEP procedure resulted in a hernia and fat necrosis. There is no evidence to indicate those results, per se, indicate a deviation from the standard of care. Had there been evidence of intervening negligence, an instruction would have been warranted. However, there was not. We agree with Appellee that an instruction on intervening and superseding causation was not warranted.

{¶42} If the evidence had warranted an instruction on intervening and superseding negligence, then any error was harmless. Appellants' arguments under this assignment of error fail for similar reasons as to why the first assignment of error fails. The jury specifically found no breach and thus, no negligence on the part of Appellee. Therefore, the issue of intervening negligence not absolving the prior negligence is not reached because there was no prior negligence. Or, in other words, the issue of proximate cause is not reached until a breach is found. Accordingly, any error regarding an instruction on proximate cause is harmless and/or moot. *See Clark v. Doe*, 119 Ohio App.3d 296, 301–02, 695 N.E.2d 276 (1st Dist.1997) (The trial court instructed on intervening and superseding causes despite the fact that there was no evidence of superseding or intervening negligence warranting the instruction. However, because the jury answered the interrogatory finding no breach, any error was harmless.); *Lapinski v. LaBeau*, 6th Dist. Lucas No. L 91-393, 1992 WL 277843 (Oct. 9, 1992) ("The issue of whether an intervening act breaks the causal connection between an act of negligence and resulting injury is necessarily predicated upon a finding of negligence on the part of a defendant." If there is no finding of negligence, the intervening act issue is moot.)

{¶43} This assignment of error lacks merit for the above stated reasons.

Fourth Assignment of Error

"The trial court erred in refusing to instruct the jury on Syl. Pt. 1, *Stinson v. England*, 69 Ohio St.3d 451 (1994), which holds that where a defendant seeks to pursue an 'alternative cause' theory, the defendant must present competent expert witness

testimony that such alternative cause was the true cause by a preponderance of the evidence."

{¶44} This assignment of error addresses the trial court's decision to deny Appellants' request for a jury instruction on "alternative cause." As stated above, we review the jury instruction for an abuse of discretion. *Wolons*, 44 Ohio St.3d at 68; *Guster*, 66 Ohio St.2d at 271.

{¶45} Appellants assert Appellee pursued an "alternative cause" theory for the injuries, but did not present competent expert witness testimony that the "alternative cause" was the true cause in terms of probability. Appellants argue Appellee's alternative causes were the negligence of the doctors at OSUMC, the negligence of the doctors who performed the mastectomies, and Appellant Robin Beranek's smoking. Appellants requested an alternative cause instruction in conformity with the Ohio Supreme Court decision in *Stinson*. The trial court denied the request.

{¶46} Appellee counters arguing the issue is harmless error and/or moot because the jury determined Appellee did not breach the standard of care. Appellee asserts the principle of law in *Stinson* addresses causation, not breach. Without a breach of the standard of care, any error regarding causation is harmless. Additionally, under *Stinson* there are situations where an expert's opinion is properly admissible even if it is not stated in terms of probability. Appellant contends this was one of those situations.

{¶47} In *Stinson*, defendant's expert testified there were three possible causes for injuries sustained and indicated the one cause that the expert deemed to be the "most likely" cause for the injuries. *Stinson v. England*, 69 Ohio St.3d 451, 633 N.E.2d 532 (1994). The injured party argued the testimony of the expert was "incompetent" because he did not testify to probabilities. *Id*. The Ohio Supreme Court did not find merit with that argument, but did conclude, "[E]xpert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue." *Id*. at 456. The reason the Court did not find merit with the argument even though the expert did not testify in probabilities was one of the three causes the expert indicated were potential causes of the injury was the plaintiff's theory. *Id*. at 456-457. Therefore, when

the expert testified one cause was the most likely cause, he was testifying the probability of that cause was higher than the one espoused by the plaintiff:

> The significance of the testimony, therefore, was in its ascription of likelihood not to the alternative cause but to the cause espoused by appellants [plaintiffs]. If the most likely cause among alternatives, including the theory of appellants [plaintiffs], has a probability of less than fifty percent, *a fortiori* appellants' theory would be even less likely. If the most likely alternative had a probability greater than fifty percent, it follows that the less likely option could not have a probability of fifty percent.

Id.

{¶48} As such, when an expert controverts a fact propounded by the other side, the option is properly admissible even if it is not stated in terms of probability. *Silver v. Jewish Home of Cincinnati*, 190 Ohio App.3d 549, 2010-Ohio-5314, 943 N.E.2d 577, ¶ 73 (12th Dist.), citing *Stinson* at 457.

{¶49} It is important to note this issue of alternative causes is not reached unless there is a finding of a breach of the standard of care. As stated under the third assignment of error, causation cannot be determined until there is a breach. Here, the jury specifically held Appellee did not breach the standard of care. Therefore, even if an instruction would have been warranted, then any error in failing to give it amounted to harmless error and this assignment of error lacks merit. *Jackson v. Sunforest OB-GYN Assoc., Inc.*, 6th Dist. Lucas No. L-06-1354, 2008-Ohio-480, ¶ 69. ("Moreover, because the jury did not reach the issue of causation, any error which may possibly have occurred in allowing Dr. Cetrulo to testify to possible alternative causes of appellant's injury had no prejudicial effect and must be, therefore, harmless error.).

{¶50} However, even when considering the merits of whether the instruction should have been given, the argument still fails. There was no testimony that another doctor was negligent and alternatively caused the injury. Neither Appellee nor his expert offered any causes as to why Appellant Robin Beranek's implants migrated laterally. The testimony instead revealed that sometimes this happens and it does not amount to a breach of the standard of care. Likewise, her smoking was not offered as a cause for her implants migrating laterally. Neither Appellee nor his expert offered testimony that

smoking was the alternative cause of the lateral migration. Consequently, there was no basis for the *Stinson* instruction.

{¶51} This assignment of error lacks merit.

Conclusion

{¶52} All four assignments of error lack merit. The jury verdict is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.