[Cite as *Monroe v. Youssef*, 2012-Ohio-6122.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CHARLES MONROE, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
- vs -	:	**CASE NO. 2009-T-0012**
MONA A. YOUSSEF, M.D.,	:	
Defendant,	:	
FORUM HEALTH, d.b.a. TRUMBULL MEMORIAL HOSPITAL, et al.,	:	
Defendants-Appellees.		

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 07 CV 2107.

Judgment: Affirmed.

Laurel A. Matthews, Matthews & Assoc. Co., LPA, 4471 Buckeye Lane, Dayton, OH 45440 (For Plaintiffs-Appellants).

Marshall D. Buck, Comstock, Springer & Wilson, 100 Federal Plaza East, Suite 926, Youngstown, OH 44503-1811 (For Defendants-Appellees).

THOMAS R. WRIGHT, J.

{¶1} Appellants, Charles and Joan Monroe, appeal from the judgment of the Trumbull County Court of Common Pleas denying their motions for a new trial, for judgment notwithstanding the verdict ("JNOV"), and for leave to amend their complaint to add spoliation claims. Appellants do not take issue with the trial court's decision

denying their motion for JNOV. The majority of appellants' arguments challenge the trial court's decision denying their motion for a new trial and motion to amend their complaint.

{¶2} Fifty-five-year-old Charles had a history of extensive smoking, severe sleep apnea, and chronic severe low back pain. On October 1, 2006, he complained of chest pains and went to the emergency room at Trumbull Memorial Hospital ("TMH"). He underwent triple bypass surgery on October 11, 2006, and was discharged on October 16, 2006. The next day, Charles suffered a stroke at home.

{¶3} In 2007, Charles and his wife, Joan Monroe, filed a complaint for medical negligence against defendant Mona Youssef, M.D. ("Dr. Youssef"), and appellees, Forum Health, d.b.a. TMH, Andrei Gursky, M.D. ("Dr. Gursky"), and Pyongsoon Yoon, M.D., c/o The Yoon Group ("Dr. Yoon"), and the Yoon Group, Heart Lung & Vascular Specialists.[1] Appellants' complaint alleged that medical negligence proximately caused pain, suffering, and permanent injury to Charles, and included claims for lost wages and future earning capacity, as well as other economic and non-economic injury. Appellants alleged that as a direct and proximate result of the negligence, they incurred significant hospital and medical expenses. Also, Joan alleged she lost the services, companionship, and consortium of her husband. Appellees filed separate answers denying any negligence.

{¶4} Following extensive discovery, a jury trial commenced in November 2008. The evidence revealed that when Charles first came to the emergency room at TMH on October 1, 2006 complaining of chest pain, his cardiac enzymes were tested and it was

1. The Yoon Group is a fictitious name used solely for purposes of identifying the practice in the community and is not a corporate entity.

determined that he had sustained a myocardial infarction. Charles was admitted to TMH and referred to Dr. Youssef, a cardiologist with TMH. The next day, Dr. Youssef ordered several medications to treat Charles' heart, including Plavix, an anti-platelet drug. Due to Charles' severe back pain, he was unable to undergo a cardiac catheterization procedure until October 9, 2006. As a result of that procedure, Dr. Youssef found significant narrowing of Charles' left main coronary artery and requested a cardiac surgery consultation as soon as possible for an urgent coronary artery bypass surgery. The catheterization report revealed that Charles had 75% distal stenosis of the left main coronary artery and 85% proximal stenosis of the left anterior descending coronary artery.

{¶5} Subsequent to the catheterization, Dr. Youssef ordered a transthoracic echocardiogram ("TTE"), also known as a "bubble study," due to elevated pressures in the right side of Charles' heart. Dr. Youssef was concerned that a "shunt," a channel of blood flow through a hole, might be causing those elevated pressures. Dr. Youssef was satisfied that the results of the TTE were negative.

{¶6} Pursuant to Dr. Youssef's referral, Dr. Gursky, a cardiac surgeon with The Yoon Group, met with appellants on October 9, 2006. Following the consultation, Dr. Gursky spoke with Dr. Yoon, chief of cardiothoracic surgery at TMH, and together they decided that Charles should have surgery on October 11, 2006. Physician testimony revealed that the farther one gets from the date of the last dose of Plavix, the less risk there is of bleeding as a result of surgery, and that the traditional wait time between the patient's discontinuation of Plavix is 5-7 days. Dr. Gursky waited 48 hours for the Plavix to wear off before operating. Dr. Gursky testified that he advised Charles that because

of the timing of the surgery, there was an increased risk of post-operative bleeding. He testified that he explained to Charles the risks, benefits, and alternatives to having surgery.

{¶7} At the beginning of the surgery, Dr. Rickie Monroe ("Dr. Monroe"), an anesthesiologist with TMH, placed a probe in Charles' esophagus to allow the other doctors to perform an intra-operative transesophageal electrocardiogram ("TEE"). The doctors in the operating room observed a small, left to right jet, or flow of blood, through a one millimeter patent foramen ovale ("PFO"), which is a type of atrial septum defect ("ASD"). An ASD enables blood flow between the left and right atria of the heart via the interatrial septum. Dr. Yoon and Dr. Gursky believed this PFO was an insignificant finding and determined the planned operation should not be changed. According to Dr. Yoon, 25 percent of the general population has a PFO and lives without incident or knowledge of it.

{¶8} Dr. Gursky proceeded to perform triple coronary artery bypass surgery on Charles. Later in the day, Charles developed bleeding complications, requiring a second procedure. Appellants' own cardiothoracic surgery expert, Dr. Andrew Wechsler ("Dr. Wechsler"), testified that the bypass surgery was done "adequately," that Dr. Gursky "did the right thing" by performing the second procedure, and that Dr. Gursky "did a good job" in the second procedure.

{¶9} On October 16, 2006, Charles was discharged from TMH. The next day, Charles suffered a stroke at home and returned to the emergency room at TMH. Appellants' cardiology expert, Dr. Steven Anton ("Dr. Anton"), testified that Charles' stroke was caused by a "paradoxical emboli," i.e., something unexpected, not usual.

Dr. Yoon testified that Charles suffered a "cryptogenic" stroke, meaning "we have no idea what it is" and that there could have been "multiple factors" that caused it.

{¶10} On October 19, 2006, eight days after Charles' bypass surgery, Dr. Gursky dictated his operative report. Dr. Gursky's report indicated that he intended to wait 72 hours after the discontinuation of Plavix before performing the bypass surgery. However, he only waited slightly less than 48 hours, the time that elapsed between his initial consultation with Charles on October 9, 2006, and the date of the surgery, October 11, 2006. Further, contrary to the observations of Dr. Yoon, Dr. Monroe, and Dr. Gursky himself during Charles' bypass surgery, Dr. Gursky's report also indicated that when the PFO was discovered, there was "no shunt." Nearly two years later, in November, 2008, Charles had a full TEE study and an MRI at the Cleveland Clinic. Both of those studies showed that he had two holes in his heart. Charles was scheduled for surgery to repair those holes.

{¶11} During trial, appellants' experts, Dr. Anton, Dr. Wechsler, and Dr. John Conomy, a neurologist whose practice involves the treatment of stroke victims, testified that in their opinions, appellees were negligent in some manner in their treatment of Charles and that those negligent failures caused his stroke. However, our discussion of the physician testimony will be limited solely to the portions that are germane to our analysis of the issues set forth in appellants' assignments of error.

{¶12} Dr. Anton testified that Charles had significant, severe stenosis that required surgery "sooner than later" and that if surgery had not been performed, it could have lead to a fatal event. Dr. Wechsler testified that Charles' heart catheterization demonstrated a "severe disease of his coronary arteries" and that "he did have a critical

stenosis, no argument * * *." Dr. Youssef, the cardiologist who referred Charles to the Yoon Group, testified that the need for surgery was "urgent" due to Charles' left main coronary artery disease, stating specifically that "time is muscle * * * if it closes, literally the patient can die." Dr. Yoon testified that "if something happens to the left main it will kill you" and that it is called the "widow maker." Dr. John Mack ("Dr. Mack"), appellees' expert and a cardiothoracic surgeon, testified that Charles' left main stenosis was considered a "critical" stenosis under the category of an urgent operation as defined by professional standards. He further testified that if the left main coronary artery is blocked off completely, most people do not survive. Additionally, he testified that the need for urgent bypass surgery supercedes the need to discontinue Plavix or be concerned about hemorrhage.

{¶13} After the conclusion of the proceedings on November 21, 2008, the court took a 10-day recess for the Thanksgiving holiday. The court reconvened on December 1, 2008. On that day, appellees called Dr. Yoon on direct examination as their last witness. Appellants were not present that day due to Charles' admission to the Cleveland Clinic for his previously scheduled surgery to repair the holes in his heart. Dr. Yoon testified regarding Exhibit E, a magnified still photograph of Charles' left main coronary artery that had been reproduced from a DVD of Charles' cardiac catheterization that was performed by Dr. Youssef on October 9, 2006. Dr. Yoon testified that in his own "guesstimate," without the aid of special measuring instruments, he believed that Exhibit E showed a 90-95% stenosis at the origin of Charles' left main coronary artery.

{¶14} Appellants objected to the admission of Exhibit E and moved to strike Dr. Yoon's testimony regarding Exhibit E. The basis of appellants' objection and motion to strike was that Exhibit E was allegedly a false and misleading depiction of Charles' left main artery because Dr. Yoon's testimony regarding the degree of stenosis was contradictory to the testimony of the other experts. Appellants further alleged that Exhibit E had never been produced in discovery. Appellants also argued that Dr. Yoon was not qualified to deliver an expert opinion. Moreover, appellants contended that Exhibit E was not properly authenticated by someone from the TMH catheterization lab, and that it did not contain proper information identifying it as depicting Charles' anatomy, i.e. name, date, time taken, medical record number, image number, or any other information regarding its source.

{¶15} In response to appellants' motion to strike, the court ordered Dr. Yoon to obtain the disk of Charles' cardiac catheterization study from TMH during a recess in order to show the court where the photograph was taken from on TMH's disk. The court requested the disk to verify that the anatomy shown on Exhibit E was identical to the anatomy shown on Charles' cardiac catheterization performed by Dr. Youssef.

{¶16} While the court was in recess, an administrator with TMH, Judy Zalar ("Zalar"), brought the disk into the courtroom, subsequently labeled as Court's Exhibit 1, along with a TMH computer capable of opening the disc. Zalar testified that she approached Janile Housel ("Housel"), the catheterization lab technician at TMH, gave her Charles' date of birth and medical record number, and stood right beside Housel while Housel retrieved the video of Charles' heart catheterization from TMH's computer. Furthermore, Zalar presented to the trial court a form signed by the nursing vice

president at TMH, Candy Smith, verifying that the information contained on Court's Exhibit 1 was a true and accurate copy of Charles' catheterization. Zalar testified that Smith was present with her when she witnessed the retrieval from the computer and was also with her when she left TMH with the disk in her hand.

{¶17} The court then conducted an in camera inspection. Dr. Yoon was given an opportunity to review Court's Exhibit 1. Dr. Yoon testified that he reproduced the actual picture labeled as Exhibit E from the TMH computer, which is the same computer that produced Court's Exhibit 1. Specifically, Dr. Yoon testified as follows:

{¶18} "THE COURT: All right. Now, Dr. Yoon, you've seen that disk that they've brought in, is that correct?

{¶19} "DR. YOON: Yes, I have.

{¶20} "THE COURT: And were you able to reproduce the actual picture that's been labeled –

{¶21} "ATTORNEY BUCK (Appellees' counsel): E, Exhibit E.

{¶22} "THE COURT: - - Exhibit E from that disk?

{¶23} "DR. YOON: Not from the particular disk but from the computer at the hospital, which is the same disk.

{¶24} "THE COURT: But you were able to reproduce that?

{¶25} "DR. YOON: Correct.

{¶26} "THE COURT: And, Mr. Buck, that is the same or you gave a copy of that disk to Ms. Matthews in discovery, is that correct?

{¶27} "ATTORNEY BUCK: Yes, we did, Your Honor.

{¶28} " * * *

{¶29} "THE COURT: Okay. The motion to strike is denied. I believe that there is a sufficient foundation above and beyond the foundation that was laid in court in front of [the] jury, which I think is sufficient, and that would be that a photograph is an accurate depiction of what Dr. Yoon retrieved from the records of Charles Monroe. Now, so I made my ruling. This will be Court's Exhibit 1 to show further authenticity relative to Defense Exhibit E."

{¶30} The copy of the disk that appellees' counsel gave to appellants' counsel was introduced into evidence as Plaintiff's Exhibit 72 at appellants' counsel's own request.

{¶31} As will be discussed further below, although it is not a matter of record, it is noted in the trial court's judgment entry and explained by appellants in their merit brief that on December 2, 2008, during a bench conference that took place shortly after the close of the evidence, appellants advanced an oral motion to amend their complaint to include claims for spoliation of evidence and punitive damages. Appellants' motion was denied.

{¶32} After charging the jury, the trial judge announced that he was required to attend a judicial conference for the next three or four days, and appointed a magistrate to preside over jury deliberations in his absence with the consent of both parties' counsel. The jury returned verdicts in favor of appellees. While the jury found that Dr. Gursky was negligent, it concluded that his negligence did not directly or proximately cause injury or damage to Charles. The court entered judgment on the verdict on December 8, 2008.

{¶33} Thereafter, appellants filed motions for a new trial and for JNOV. In a judgment entry dated February 6, 2009, the court denied those motions and also denied appellants' oral motion for leave to amend their complaint pursuant to Civ.R. 15(B) to add claims for spoliation and punitive damages. Appellants filed a motion for reconsideration, which was denied. This timely appeal followed. Pursuant to appellants' own motion, the portion of the appeal that was against Dr. Youssef was dismissed and she is not a named party to this appeal.

{¶34} Appellants raise the following assignments of error for our review:

{¶35} "[1.] A. The trial court committed prejudicial error when it admitted a digitally altered photograph (JPEG Image) demonstrating 90-95% stenosis at the origin of the left main coronary artery into evidence, on the last day of trial, that had not been produced in discovery, and allowed defendant-appellee Yoon to falsely represent to the jury that it was an accurate depiction that he had taken directly from plaintiff-appellant Charles Monroe's cardiac catheterization study on the hospital's computer system.

{¶36} "B. The trial court committed prejudicial error when it admitted the DVD disc into evidence that it caused to be made on the last day of trial, which was never viewed by the jury in the course of trial, upon the false representation by appellee's counsel that appellants had previously been given an identical DVD in discovery, after defendant Yoon had expressly admitted that when he viewed the DVD he was unable to locate the image depicted in defendants' Exhibit 'E' on it and the jury was subsequently permitted to view the DVD during their deliberations.

{¶37} "C. Appellants motion for new trial with additional claims for spoliation and punitive damages against defendants Yoon and TMH and motion for reconsideration of

the court's denial of plaintiffs' motion for new trial with additional claims for spoliation and punitive damages against defendants Yoon and TMH brought reversible error of law to the attention of the trial court that required the grant of a new trial to appellants on the issues of proximate cause and damages with additional claims for spoliation and punitive damages.

{¶38} "D. The trial court's refusal to grant the plaintiffs' leave pursuant to Civ.R. 15(B) to amend their complaint to add spoliation claims and so instruct the jury was an abuse of discretion.

{¶39} "[2.] The trial court's failure to timely instruct the jury to disregard appellee's counsel's accusations of fraud and tampering with evidence against appellants' attorney and her expert witness and issue a curative instruction; its decision to give the jury a week's vacation and then admit highly prejudicial new evidence and expert testimony against appellants on the last day of trial; and the last minute verbal stipulation worked by the court leaving a magistrate to preside over jury deliberations in order to attend a judicial seminar were an abuse of discretion and introduced substantive and procedural irregularity into the proceedings such that appellants were prevented from having a fair trial."

{¶40} Under parts A and B of their first assignment of error, appellants argue that the trial court erred in admitting into evidence Exhibit E and Dr. Yoon's testimony that was reliant upon Exhibit E. They further argue that the trial court abused its discretion in admitting into evidence the disk identified as Court's Exhibit 1.

{¶41} Specifically, in their brief, appellant's pose the following litany of arguments. Appellants claim Exhibit E was never produced in discovery; that Exhibit E

was not properly authenticated because it did not contain any identifying marks that would permit the conclusion that it came from Charles' catheterization; that Dr. Yoon was not a "witness with personal knowledge" as required by Evid.R. 901(A); that even if Exhibit E had been properly authenticated, it was inadmissible because it did not meet the dictates of the "business records" rule pursuant to Evid.R. 803(6) and was misleading under Evid.R. 403; that Dr. Yoon was allowed to falsely represent to the jury that Exhibit E was an accurate depiction that he had taken directly from Charles' cardiac catheterization study on TMH's computer system; that Exhibit E was a digitally altered, magnified image which did not contain any means by which appellants' counsel could locate it on her copy of the original catheterization study and thus effectively cross-examine Dr. Yoon; that Dr. Yoon was allowed to use Exhibit E to give a new expert opinion on proximate cause that differed substantially from the other physician testimony because Dr. Yoon testified that Charles had 90-95% critical left main coronary artery stenosis, as opposed to 75-85% as testified to by appellants' experts; that there was adequate time and it was not too dangerous to do either a diagnostic TEE or an MRI prior to Charles' bypass surgery; that Dr. Yoon had allegedly never been identified as an expert or produced an expert report; that Dr. Yoon expressly admitted that when he viewed the DVD he was unable to locate the image depicted in Exhibit E; that Court's Exhibit 1 was substantially different from the original disk tendered to appellants' counsel in discovery; and finally, that the admission into evidence of both Exhibit E and Court's Exhibit 1 prejudicially influenced the jury's verdict on proximate cause and constituted an error of law that substantially prejudiced appellants' right to a fair trial. In sum, appellants argue that they were "ambushed" on the last day of trial.

{¶42} The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be reversed on appeal unless there was an abuse of discretion. *Kent v. Atkinson*, 11th Dist. No. 2010-P-0084, 2011-Ohio-6204, ¶42. With respect to photographic evidence, under Evid.R. 403 and 611(A), the admission is left to the trial court's discretion. *Cherovsky v. St. Luke's Hosp*., 8th Dist. No. 68326, 1995 Ohio App. LEXIS 5530 , *33 (Dec. 14, 1995). Unlike Crim.R. 16(B), which requires a prosecutor to disclose photographs to be used as exhibits at trial, there is no comparable civil rule requiring such mandatory disclosure over every exhibit or photograph. Civ.R. 26 allows attorneys in civil matters a degree of privacy in preparation of their cases, and materials prepared for use at trial are only required to be disclosed upon a showing of "good cause." Civ.R. 26(A) and (B)(3).

{¶43} First, in the instant case, appellant did not file a motion requesting the trial court to compel appellees to provide discovery of trial preparation materials nor did they make any attempt to establish good cause why appellees' trial preparation materials should have been disclosed. Civ.R. 26(B)(3).

{¶44} Second, while appellants claim Exhibit E was not properly authenticated, and therefore inadmissible for the reasons outlined above, this court disagrees that authentication by Dr. Yoon was even necessary based on the evidence that had already been admitted and that was properly before the trial court.

{¶45} As stated, while the court was in recess, TMH administrator Zalar brought the disk into the courtroom, subsequently labeled as Court's Exhibit 1, along with a computer capable of opening the disk. Zalar testified she was present throughout the retrieval of the data and verified that the information contained on Court's Exhibit 1 was

a true and accurate copy of Charles' catheterization. In response to the Court's inquiry, Dr. Yoon testified that he produced Exhibit E from the original catheterization on TMH's computer, the same computer from which Court's Exhibit 1 was produced. As previously noted, appellees' counsel told the Court that he gave a copy of the disk produced from TMH's computer to appellant's counsel during discovery, which at her own request was introduced into evidence as Plaintiff's Exhibit 72. Thus, since Court's Exhibit 1 and Plaintiff's Exhibit 72 were produced from the same computer, and since Exhibit E was also produced from that same computer, Exhibit E was nothing more than a still photo of what had already been admitted into evidence by appellants themselves and needed no further authentication. In sum, the trial court connected all the dots.

{¶46} Appellants argue that Court's Exhibit 1 and Plaintiff's Exhibit 72 are different because Plaintiff's Exhibit 72 does not contain the same graphics and identifying information as Court's Exhibit 1 and the disk on TMH's computer. However, the presence or absence of identifying material on the disks is not the salient issue. What is clear from the record before the trial court is that the contents of Court's Exhibit 1 and Plaintiff's Exhibit 72 were the same. They both contained moving images of Charles' original heart catheterization that was taken at TMH on October 9, 2006. Based on this conclusion, we need not address appellants' argument regarding whether or not Exhibit E falls under the business records rule set forth in Evid.R. 803(6).

{¶47} Regarding appellants' claim that Dr. Yoon was not identified as an expert or qualified to testify as one, we disagree. First, appellants filed interrogatories directed to the Yoon Group, Heart, Lung & Vascular Specialists. Interrogatory No. 10 requested that appellees identify all experts they intended to have testify at trial. Appellees

answered: "*Pyongsoo Yoon, M.D*.; Andrei Gursky, M.D.; others may be named in accordance with this Court's scheduling order." (Emphasis added). Thus, appellants were put on notice early in the case that appellees intended to call Dr. Yoon as an expert at trial.

{¶48} Furthermore, appellants clearly had knowledge of Dr. Yoon's involvement in this case because he was a named defendant. Although appellants took Dr. Yoon's deposition prior to trial, they did not ask him whether he thought Charles, in particular, had critical stenosis or ask his opinion as to the percentage of stenosis, but rather, posed a hypothetical. Moreover, while Dr. Yoon's "guesstimate" at trial of the amount of Charles' stenosis was above what the other experts and physician testimony revealed, the net effect was consistent, i.e., that Charles had severe stenosis. Therefore, appellants should not have been surprised that Dr. Yoon was called as an expert, or by his testimony regarding the level of Charles' stenosis.

{¶49} Additionally, treating physicians in malpractice cases are permitted to render expert opinions at trial. *Moore v. Grandview Hosp.*, 25 Ohio St.3d 194, 196-198 (1986); *Datchuk v. Pollard*, 11th Dist. No. 99-T-0049, 2000 Ohio App. LEXIS 3544, *8-10 (Aug. 4, 2000). "[C]ourts have used Evid.R. 701 to permit treating physicians to render opinions based upon their personal observations and perceptions." *Williams v. Reynolds Rd. Surgical Ctr., Ltd.,* 6th Dist. No. L-02-1144, 2004-Ohio-1645, *6-7, citing *Gannett v. Booher*, 12 Ohio App.3d 49, 52 (6th Dist.1983) (whether testifying as an expert or lay witness, treating physician was properly permitted to give opinion testimony based on his personal observations and perceptions). Evid.R. 701 also allows expert testimony on anything observed or otherwise admitted. There is no abuse

of discretion unless the testimony results in "surprise," i.e., when a complaining party is unaware of the identity of the other party's expert, the subject of his expertise, and the general nature of his testimony. *Williams, supra,* at *8.

{¶50} Appellants were clearly aware that Dr. Yoon was one of Charles' treating physicians and that he had been identified as an expert during discovery. Through Dr. Yoon's deposition and trial testimony, appellants were aware of the subject of his expertise. Appellants also had the opportunity during his pretrial deposition to discern the general nature of his trial testimony. Accordingly, Dr. Yoon was properly permitted to give opinion testimony based on his personal observations and perceptions. *Williams, supra,* at *8; *Gannet*, *supra,* at 52.

{¶51} Next, we turn to appellants' argument that Exhibit E and Dr. Yoon's testimony regarding Exhibit E was false. Appellants contend that no other experts who testified in the case ever suggested that Charles had 90-95% stenosis in his left main coronary artery, or that a pre-surgery TEE and/or an MRI were too dangerous and that there was no time to do either study. Appellants claim that the undisputed evidence and testimony of all the experts for both sides was that there was no critical stenosis or need for emergency surgery. Appellants also rest their argument on the fact that the November 24, 2008 catheterization study conducted at the Cleveland Clinic showed only mild stenosis.

{¶52} As previously outlined in the recitation of facts, every physician involved in the case, whether testifying as an expert or as a physician involved in the care of Charles, testified that Charles had severe coronary artery stenosis that required urgent surgical intervention. Appellants' suggestion to the contrary is wholly unsupported by

the evidence. The fact that Dr. Yoon simply had a difference of opinion as to the degree of Charles' stenosis, as depicted by Exhibit E, does not make Exhibit E false, misleading, or an altered document. Rather, it simply makes Dr. Yoon's testimony as to the degree of the stenosis a matter of weight and credibility for the jury to consider. Furthermore, as previously noted, Dr. Yoon was simply offering a "guesstimate," without the aid of calipers or cylinders that would have given him a more precise measurement of the degree of stenosis. His opinion was not offered as a definitive number. Moreover, appellants could have asked the court for a continuance in order to consult with their experts regarding Exhibit E or to recall them on rebuttal in order to impeach Dr. Yoon's testimony. However, they did not do so.

{¶53} Under part C of their first assignment of error, appellants allege their motion for a new trial with additional claims for spoliation and punitive damages against appellees should have been granted. Appellants contend that the trial court erred in ruling that they failed to meet the factors set forth in *Sheen v. Kubiak*, 131 Ohio St. 52, paragraph three of the syllabus (1936), which addresses the factors constituting newly-discovered evidence under Civ.R. 59(A)(8). Specifically, appellants maintain that the trial court erred in resting its decision on the determination that with due diligence, the November 24, 2008, Cleveland Clinic Catheterization Study, conducted during the 10-day trial recess and which showed that Charles only had mild stenosis, was available during the close of trial and prior to appellants' opportunity to cross-examine Dr. Yoon. Further, appellants argue that even if they had instantaneous access to the Cleveland Clinic Catheterization Study at the time in question, they did not have enough time to prepare an effective cross-examination, even with the exercise of due diligence.

{¶54} Civ.R. 59(A)(8) states that a new trial may be granted if the moving party presents "[n]ewly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial[.]" Pursuant to *Sheen, supra*, at paragraph three of the syllabus, in order to prevail on a motion for a new trial based on newly discovered evidence, a movant must show:

{¶55} "(1) the new evidence must be such as will probably change the result if a new trial is granted, (2) it must have been discovered since the trial, (3) it must be such as could not in the exercise of due diligence have been discovered before the trial, (4) it must be material to the issues, (5) it must not be merely cumulative to former evidence, and (6) it must not merely impeach or contradict the former evidence."

{¶56} We review a trial court's judgment on a Civ.R. 59 motion for a new trial under an abuse of discretion standard. *D.A.N. Joint Venture III, L.P. v. Med-XS Solutions, Inc.,* 11th Dist. No. 2011-L-056, 2012-Ohio-980, ¶32. The term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶57} As explained in *Beechler,* when an appellate court is reviewing a pure issue of law, "the mere fact that the reviewing court would decide the issue differently is enough to find error (Of course, not all errors are reversible. Some are harmless; others

are not preserved for appellate review)." *Beechler* at ¶67. "'(I)n reviewing a motion for a new trial we do so with deference to the trial court's decision, recognizing that "the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial."'" *D.A.N., supra,* at ¶32, citing *Lanzone v. Zart*, 11th Dist. No. 2007-L-073, 2008-Ohio-1496, ¶67, quoting *Malone v. Courtyard by Marriott L.P.*, 74 Ohio St.3d 440, 448 (1996).

{¶58} It appears from their motion for a new trial that appellants seek to use the 2008 Cleveland Clinic study to impeach or contradict Dr. Yoon's opinion testimony regarding Exhibit E, which was based on the 2006 TMH catheterization. Per *Sheen*, *supra*, impeaching or contradicting trial testimony is not permitted grounds for a new trial, and appellants cannot be granted a new trial on the basis of newly discovered evidence.

{¶59} Regarding this issue, we note that attached to appellants' motion for a new trial, inter alia, are the affidavits of Dr. Anton, Dr. Wechsler, and Dr. Gaetano Paone, a cardiac surgeon. All three affidavits appear to be identical, other than the affiants' personal information, and make the same statements nearly verbatim regarding their summarization and opinion of the evidence. All three physicians stated that they viewed the 2006 TMH catheterization study, the 2008 Cleveland Clinic catheterization study, and compared the two studies. All three physicians maintained that they reviewed the portion of Dr. Yoon's testimony regarding Exhibit E. However, all three acknowledge they never actually viewed Exhibit E. Finally, all three were of the following opinion:

{¶60} "If the photograph at issue really does demonstrate a 90-95% stenosis in a left main coronary artery, to a reasonable degree of medical probability, the photograph is from someone else's heart as opposed to Charles Monroe's." In the next paragraph of their affidavits, they each state that the "catheterization done last month in Cleveland clearly demonstrates[2] that Mr. Monroe's left main coronary artery is without significant stenosis."

{¶61} Thus, the only thing appellants show through those affidavits is that Dr. Yoon's testimony regarding Exhibit E, which relied upon the 2006 TMH cardiac catheterization study, was contradictory to their experts' newly acquired study performed in November, 2008, more than two years after the study and photograph described by Dr. Yoon.

{¶62} During that two-year time frame, Charles underwent revascularization of his coronary arteries at TMH, had a stroke, and received medication therapy. The new study merely showed that Charles' heart was healthier in 2008 than it was when he first went to TMH in 2006. None of the affidavits or other submissions attached to appellants' motion for a new trial state that such a significant improvement in the degree of stenosis over a two year time frame was odd, unexpected, impossible, or would otherwise mean that the Cleveland Clinic Study constituted "new evidence" as to the condition of Charles' heart at the time of surgery.

{¶63} Furthermore, all three affiants stated in their affidavits that "if" Exhibit E really does represent a 90-95% stenosis, as opposed to their opinions that the stenosis was 75-85%, Exhibit E cannot be a still photograph from Charles' 2006 catheterization.

2. Dr. Paone used slightly different words in part, stating "* * * last month at the Cleveland Clinic demonstrates * * *."

However, none of the three affiants concluded that Dr. Yoon's 90-95% "guesstimate" was right. Accordingly, the underlying component of this conditional opinion remains unfulfilled and the conclusion that Exhibit E does not depict Charles' heart has not been established. Moreover, all three affiants stated that they had never viewed Exhibit E. Stated otherwise, having never viewed Exhibit E, none of the three affiants formulated an informed opinion as to whether they agreed with Dr. Yoon. Additionally, as previously noted, Dr. Yoon offered a "guesstimate" of 90-95% while Dr. Anton and Dr. Wechsler's estimate was 75-85%. Nonetheless, they all agreed that the degree of stenosis was severe, which was the critical factor in determining whether or not Charles needed emergency bypass surgery.

{¶64} In addition, Dr. Yoon testified about Charles' 90-95% stenosis on December 1, 2008, over a week after the Cleveland Clinic's November 24, 2008 study. Thus, the Cleveland Clinic catheterization study was available during the trial and prior to appellants' opportunity to cross-examine Dr. Yoon. Appellants offered no explanation why they could not have obtained, with due diligence, the Cleveland Clinic study prior to Dr. Yoon's cross-examination. Also, as previously noted, appellants could have asked the court for a continuance in order to have enough time to formulate a thorough cross-examination of Dr. Yoon. Moreover, appellants do not argue that the 2008 Cleveland Clinic catheterization study has the potential to change the result of the case if a new trial would be granted.

{¶65} Part C of appellants' first assignment of error is without merit. The trial court did not err in denying appellants' motion for a new trial based on newly-discovered evidence.

{¶66} Under part D of their first assignment of error, appellants argue the trial court abused its discretion in failing to grant them leave to amend their complaint pursuant to Civ.R. 15(B) to assert new claims for spoliation of evidence against TMH and Dr. Yoon.

{¶67} Civ.R. 15(B) deals with amendments to pleadings to allow them to conform to the evidence presented in civil proceedings. Civ.R. 15(B) provides that an amendment can be made at any time, even after judgment and is to be liberally construed in an effort to decide cases on their merits. *Hall v. Bunn*, 11 Ohio St.3d 118, 121 (1984). Nonetheless, courts may deny motions to amend where there is a showing of bad faith, undue delay, or undue prejudice to an opposing party. *Mitchell v. Lemmie,* 2nd Dist. No. 21511, 2007-Ohio-5757, ¶75; *see e.g., Turner v. Cent. Local School Dist.,* 85 Ohio St.3d 95, 99 (1999)(Ohio Supreme Court found that the trial court abused its discretion in allowing defendant's motion to amend its answer after a trial date was set and over two years after the litigation had commenced.) The grant or denial of leave to amend a pleading is discretionary and will not be reversed on appeal absent a showing that the trial court abused its discretion. *State ex rel. Askew v. Goldhart*, 75 Ohio St.3d 608, 610 (1996).

{¶68} As stated, the basis of appellants' motion to amend their complaint was spoliation of evidence. "Spoliation" means "the intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document." Black's Law Dictionary, (8 Ed.Rev.2004) 1437. To establish a claim for spoliation of evidence, appellants would have been required to prove the following: "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable,

(3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29 (1993).

{¶69} Appellants allege that a spoliation claim arose during the cross-examination of Dr. Yoon, appellants' first witness in their case in chief, regarding misstatements and omissions in Dr. Gursky's operative dictations. Appellants assert that during the dictation of the operative note, Dr. Gursky intended to deceive the reader and cover up his negligent conduct in: (1) operating before the 72 hours he claimed in his report, after which Charles suffered a hemorrhage; and (2) hiding the fact that he failed to repair a shunt in Charles' heart after observing it on the TEE by dictating that there was "no shunt" after he learned of Charles' post-operative stroke. Appellants argue that based on this evidence alone, they were entitled to amend their pleadings, and that by the same analysis, they were entitled to amend their pleadings with respect to Exhibit E, which was introduced into evidence on the last day of trial.

{¶70} As previously noted, appellants explain in their merit brief that their counsel advanced an oral motion to amend their complaint at a bench conference on December 2, 2008 to include claims for spoliation of evidence and punitive damages. Although the precise timing of appellants' motion is not clear from either the record or from the description contained in appellants' brief, the motion was apparently made on December 2, 2008, after the close of evidence and on the same day that closing arguments were delivered and the jury was charged. According to appellants, their counsel thought the bench conference was on the record. However, for some reason, that motion does not appear in the transcript of proceedings and is not a matter of

record. We do, however, know such a motion was advanced due to the trial court's judgment entry overruling the motion.

{¶71} As this court has previously stated:

{¶72} "An appealing party has an obligation to exemplify his or her asserted errors by reference to the record. *City of Niles v. Yeager*, 11th Dist. No. 2004-T-0004, 2004 Ohio 6698, at P9. This obligation is met when a party files the pertinent transcript, a narrative statement of the evidence as provided by App.R. 9(C), or an agreed statement of the record as set forth under App.R. 9(D). Id." *State v. Rendina*, 11th Dist. No. 2008-L-165, 2009-Ohio-1434, ¶30.

{¶73} In this case, because appellants did not file a transcript of the December 2, 2008 bench conference or an acceptable alternative under either App.R. 9(C) or (D), this court must presume regularity in the trial court's proceedings on the matter. Under the circumstances, we do not know what appellants argued in favor of their motion and if or what appellees argued in opposition. Further, we do not have a record as to the trial court's rationale in denying the motion. Accordingly, due to the lack of an appropriate record, appellants are unable to demonstrate the alleged error.

{¶74} Alternatively, our review of the pretrial deposition testimony taken by appellants reveals that the information allegedly supporting their claim for spoliation was available to them prior to trial. On that point, first, appellants take issue with the fact that Dr. Gursky dictated in his operative report that he intended to wait 72 hours after discontinuation of Plavix prior to operating on Charles, when in fact, he waited only slightly less than 48 hours. We note that during Dr. Gursky's deposition, taken on November 13, 2007, one year prior to trial, appellants' counsel questioned him at length

as to his rationale for the decision to wait less than 72 hours as well as the reason why his dictation did not reflect the actual 48 hour time frame between his initial consultation with Charles and the bypass surgery.

{¶75} Appellants also take issue with the fact that Dr. Gursky's operative report, dictated eight days after Charles' bypass surgery and after Charles returned to the emergency room having suffered a stroke, indicates that there was "no shunt" when, in fact, a shunt was observed by every physician present during Charles' surgery. Again, we note that Dr. Yoon testified in his deposition, taken on February 21, 2008, nine months prior to trial, that all three doctors who were in the operating room during Charles' surgery, i.e., Dr. Gursky, Dr. Yoon himself, and Dr. Monroe, the anesthesiologist, saw the PFO in Charles' atrial septum and the "jet," or shunting of blood flow, through the PFO. Thus, it is clear from the record that appellants knew many months before trial that Dr. Gursky's operative report contained information that apparently contradicted what was unequivocally observed during Charles' surgery.

{¶76} Based on the foregoing, it is abundantly clear that appellants possessed the necessary information to bring a motion to amend their complaint well before trial. As recited above, we recognize that a trial court has discretion to liberally allow for the amendment of pleadings when there is prima facie support for the new matters to be pleaded. However, appellants' decision to wait until the trial had essentially concluded to bring their motion when, in fact, they had notice many months prior to trial of the facts and evidence allegedly supporting their spoliation claim constitutes "undue delay." *Mitchell*, *supra,* at ¶75; *Turner*, *supra*, at 99.

{¶77} Finally, we turn to appellants' last argument that they should have been allowed to amend their pleadings regarding Exhibit E, which was introduced on the last day of trial. Appellants argue that Exhibit E constitutes highly prejudicial, false evidence that was not what appellees' purported it to be, i.e., a depiction of Charles' heart. Appellants further contend that Exhibit E had been digitally altered and magnified so that Dr. Yoon could simply "eyeball" his measurement of the level of stenosis without measuring instruments, thus introducing a "new expert opinion" as to the proximate cause of Charles' injuries which contradicted the testimony of the other experts. This court previously addressed the issue of Exhibit E at length in its discussion under parts A, B, and C of this assignment of error. Accordingly, there is no need to further address this argument. Suffice it to say, it has no merit.

{¶78} The trial court did not abuse its discretion in denying appellants' motion for leave to amend their complaint. Part D of appellants' first assignment of error is without merit and is overruled.

{¶79} In their second assignment of error, appellants contend the trial court abused its discretion in failing to grant their motion for new trial pursuant to Civ.R. 59(A)(9). Civ.R. 59(A)(9) states that a new trial may be granted due to an "[e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application." As stated previously, we review a trial court's judgment on a Civ.R. 59 motion for a new trial under an abuse of discretion standard. *D.A.N., supra,* at ¶32.

{¶80} Appellants allege the court failed to timely instruct the jury to disregard appellees' counsel's accusations of fraud and tampering with evidence against appellants' attorney and one of appellants' expert witnesses, and to issue a curative

instruction regarding the same. They further assert the court erred in giving the jury a week's vacation, which allegedly prejudiced their case because the jurors' memories would have faded during that time frame. Moreover, appellants maintain the court erred in permitting a magistrate to preside over jury deliberations.

{¶81} Specifically, appellants argue that a new trial should have been granted due to appellees' counsel's inquiry regarding alleged alterations on a document that appellants' counsel presented as evidence during the testimony of Dr. Anton. Apparently, appellees' attorney thought a handwritten note on the document was in Dr. Gursky's handwriting and that appellants' attorney attempted to hide the note with yellow tape. Appellants' counsel admitted that she marked the exhibit, made a handwritten note on the document herself, and put a piece of correction tape over the note before giving it to Dr. Anton. The trial court gave a curative instruction to the jury that the cross-examination of Dr. Anton by appellees' counsel pertaining to the handwritten message on the document and the resulting comments were to be stricken from their consideration as evidence. All counsel agreed to the stipulation. Accordingly, we fail to see how the trial court abused its discretion in the handling of this matter.

{¶82} Regarding the week-long recess, the record reveals that Dr. Youssef's counsel had a previously-planned family vacation during the Thanksgiving holiday, which he brought to the court's attention prior to trial. During the trial and after discussing the matter with all counsel, the judge addressed the jury and stated that everyone was in agreement to have a week-long recess during Thanksgiving. Appellants' counsel consented to the recess and did not object.

{¶83} The failure to object at the trial court level constitutes a waiver of the issue on appeal. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 32 (2000). Furthermore, contrary to appellants' assertions that the jurors' memories of the case would fade due to the recess, the trial judge allowed the jurors to take notes during the trial in order to refresh their recollections, if necessary. Thus, we do not see how the recess constituted error or prejudiced appellants' case.

{¶84} With respect to the magistrate presiding over jury deliberations, appellants allege there was no written consent. Civ.R. 53(C)(1)(c) states that in order to assist courts, magistrates are authorized "[u]pon unanimous written consent of the parties, [to] preside over the trial of any case that will be tried to a jury[.]" Here, the record establishes the trial judge told the parties it was necessary for him to attend a mandatory seminar and be gone from the court for several days. Both parties stipulated on the record that the trial judge would preside through final jury instructions, and that the magistrate would preside over jury deliberations, answer jury interrogatories, and take the verdict. The magistrate performed only the tasks that appellants' counsel stipulated on the record that he would be permitted to carry out. The magistrate did not preside over the jury trial itself, but merely assisted the court during jury deliberations as agreed. Moreover, appellants' counsel did not raise an objection or request that another trial judge oversee jury deliberations. Therefore, that failure together with her stipulation on the record waived any error in the magistrate's handling of those matters. Accordingly, we disagree with appellants that they were prejudiced or that the trial court erred in allowing the magistrate to preside over a small portion of the proceedings.

{¶85} Appellants' second assignment of error is without merit.

{¶86} For the foregoing reasons, appellants' assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.