[Cite as *Merkl v. Seibert*, 2009-Ohio-5473.]

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

EILEEN M. MERKL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MARY JO BOVARD,	:	APPEAL NOS. C-080973 C-081033
	:	TRIAL NOS. A-0600088 A-0709414
Plaintiff-Appellant/ Cross-Appellee,	:	*D E C I S I O N.*
	:	
vs.	:	
JOSEPH SEIBERT, M.D.,	:	
Defendant-Appellee/ Cross-Appellant.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 16, 2009

John H. Metz, for Plaintiff-Appellant/Cross-Appellee,

Lindhorst & Dreidame, *Michael F. Lyon*, and *Bradley D. McPeek*, for Defendants-Appellees/Cross-Appellants.

Please note: This case has been removed from the accelerated calendar.

SYLVIA SIEVE HENDON, Presiding Judge.

{¶1} Plaintiff-appellant/cross-appellee, Eileen M. Merkl, appeals the judgment of the trial court entered on a jury's verdict in favor of defendant-appellee/cross-appellant, Joseph Seibert, M.D. In his cross-appeal, Seibert challenges the trial court's denial of his Civ.R. 50 motions for a directed verdict.

{¶2} Merkl filed this medical malpractice action against Seibert after the death of her adult daughter, Mary Jo Bovard, due to shock resulting from a post-operative hemorrhage.

{¶3} On January 4, 2005, Bovard had undergone lower-back surgery at Mercy Franciscan Hospital Western Hills. The surgery was performed by Dr. Jaideep Chunduri.

{¶4} The following morning, Bovard was examined by Chunduri and by Seibert, a family-medicine physician who was covering hospital duties for Bovard's primary-care physician. According to Seibert, Bovard's vital signs were stable at that time. Her heart rate was slightly elevated, and she complained of tenderness in her left lower quadrant. Seibert thought that Bovard might have post-operative bleeding, but Chunduri assured him that she had simply sustained an expected amount of blood loss for the procedure that he had performed.

{¶5} Seibert told Chunduri that they should obtain a CT scan to rule out an abdominal bleed. Chunduri was "somewhat dismissive" of the possibility of such a complication, but he told Seibert to go ahead with the scan if he wanted to.

{¶6} Seibert consulted with cardiologist Dr. Freidoon Ghazi. After Ghazi had examined Bovard, he and Seibert agreed that they should rule out the possibility of her

having a pulmonary embolism or an abdominal bleed. So Seibert ordered the appropriate CT scans at about 8:15 a.m.

{¶7} Seibert left the hospital around 8:30 a.m. and went to his office. His office sustained a power outage, so he drove home after seeing his morning patients. At about 1:00 p.m., Seibert's office manager contacted him and said that he was to call the hospital about Bovard.

{¶8} When Seibert called the hospital, he learned that the hospital staff had been calling Chunduri for two and a half hours, and that they were concerned that Chunduri was not giving them sufficient orders to properly care for Bovard. Seibert learned that Bovard's condition had deteriorated throughout the morning. Her blood pressure had dropped to a threatening level, and her urine output had decreased. Seibert felt that Bovard had gone "from a stable patient in the morning to an unstable patient threatening going [sic] into shock from low blood pressure."

{¶9} At 1:30 p.m., Seibert gave a nurse various orders by telephone, including orders for a "stat" CT scan of the abdomen and a "stat" CT scan of the chest. Seibert called Chunduri and told him that his patient was unstable and that he should call the vascular surgeons. Seibert told Chunduri that he was headed back to the hospital and that Chunduri needed to do the same.

{¶10} Arriving at the hospital at about 2:30 p.m., Seibert first went to the radiology department, expecting to find Bovard there. She was not there, so he went to the intensive-care unit and found her there. Seibert and a vascular surgeon escorted Bovard to the radiology department.

{¶11} The CT scans were completed at 3:11 p.m. and showed that Bovard had a "moderate to large retroperitoneal hemorrhage" that appeared to be inactive. At that point, the vascular-surgery unit took responsibility for Bovard.

{¶12} Seibert returned to see Bovard in the intensive-care unit. At that point, she had improved significantly and was stable. Seibert left the hospital at 4:00 p.m.

{¶13} At 4:55 p.m., Bovard's heart stopped. The vascular surgeons operated on her and successfully repaired a hole in her aorta. But Bovard died later that night from shock resulting from the perforation of the aorta that she had sustained as a complication of the lumbar orthopedic surgery.

{¶14} Merkl brought this action against Seibert, alleging that his failure to order the CT scans "stat" on the morning of January 5 had proximately caused Bovard's death.

Alleged Misconduct by the Defense

{¶15} In her first and second assignments of error, Merkl argues that the trial court erred by permitting misconduct by defense counsel and the defendant, and by not granting a new trial in light of their improper conduct.

{¶16} Merkl directs us to instances throughout the trial where, she alleges, the defendant or his counsel engaged in improper conduct. But Merkl failed to object to much of the alleged misconduct below, thereby depriving the trial court of an opportunity to take corrective action. So we review those instances only for plain error, a doctrine that is rarely applied in civil appeals.[1] At several other points, the trial court sustained Merkl's objections to the challenged conduct, so she cannot predicate error on the court's actions in those respects.[2]

[1] See *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401, 679 N.E.2d 1099.
[2] See *Bowden v. Annenberg*, 1st Dist. No. C-040499, 2005-Ohio-6515, ¶19.

A. Opening Statement

{¶17} Merkl argues that, during opening statement, defense counsel referred to Seibert as "this good physician," in an improper attempt to influence the jury. Not only did Merkl fail to object to the reference, but it was defense counsel who brought to the trial court's attention his mistake in characterizing Seibert in that manner. Plaintiff's counsel explicitly agreed to the trial court's remedy, which was an admonition to the jury to disregard defense counsel's personal characterization of his client. Consequently, we find no error by the trial court in its handling of the matter.

B. Closing Argument

{¶18} Merkl also contends that defense counsel improperly commented in closing argument that Seibert's actions in treating Bovard were not those of someone who felt guilty. But defense counsel was specifically responding to plaintiff's counsel's assertions that Seibert "[had run] back and was heroic, yeah, because [he] didn't do what [he] should have done at 8:00 that morning." We cannot say that defense counsel's statements were an improper response to this assertion or that they improperly injected a criminal standard into a civil matter. We hold that defense counsel operated within the bounds of the wide latitude that he was afforded during closing argument.

C. Cross-Examination of Yaffe

{¶19} Next, Merkl contends that, during the cross-examination of her expert witness, Dr. Michael Yaffe, defense counsel insinuated facts that were not in evidence. At one point, counsel asked Yaffe whether he had reviewed any protocols from the hospital relative to the definition of the term "stat." Counsel did not imply that any such

documents existed. Instead, he was attempting to ascertain the basis for Yaffe's testimony about the meaning of the term "stat" at that hospital.

{¶20} Merkl also contends that defense counsel "load[ed] most questions with many unproven alleged facts." She specifically directs us to an exchange between defense counsel and Yaffe about a request by Chunduri for a particular consultation. However, it is clear from the record that defense counsel was properly cross-examining Yaffe directly from Bovard's medical records, which had been admitted into evidence.

{¶21} Merkl contends that defense counsel was disrespectful toward Yaffe during cross-examination. At several points, counsel interrupted Yaffe's responses or directed him to answer the question. The trial court sustained Merkl's objections to the conduct and even went so far as to admonish defense counsel and Yaffe in front of the jury. We are convinced that the trial court responded appropriately to counsel's conduct during the cross-examination so that no prejudice to Merkl resulted.

{¶22} Accordingly, we hold that the trial court did not abuse its discretion in monitoring the cross-examination.[3]

E. Examination of Bovard's Friend

{¶23} Merkl argues that defense counsel improperly made a "speaking" objection during her attorney's redirect examination of Bovard's friend about notes that the friend had written during Bovard's hospital stay. Defense counsel stated, "Objection. This is not appropriate redirect. We've never seen these notes. They've never ever been produced by [c]ounsel."

[3] See *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218, 222, 436 N.E.2d 1008.

{¶24} The trial court immediately ordered counsel to approach the bench. The matter was quickly resolved when defense counsel acknowledged to the court that he had been mistaken and that the plaintiff had previously provided the witness's notes. Merkl's attorney continued his examination of the witness about her notes. And on recross-examination, defense counsel immediately apologized to the witness and explained to her that he had been at fault in not realizing that he already had the notes. We fail to see any prejudice to Merkl resulting from the event.

F. Motion for a New Trial

{¶25} Merkl moved for a new trial based upon the challenged conduct. Civ.R. 59(A)(2) authorizes a trial court to grant a new trial based upon the misconduct of the jury, the prevailing party, or counsel.[4] We will not reverse a trial court's denial of a motion for a new trial on these grounds absent an abuse of discretion.[5]

{¶26} The Ohio Supreme Court has held that where competent, credible evidence exists to support the trial court's finding of misconduct by counsel, an order granting a new trial is not an abuse of discretion and should remain undisturbed.[6] The corollary is that where a trial court's finding that the outcome of the trial was not affected by counsel's conduct is supported by the trial record, its order denying a new trial is not an abuse of discretion. On review, "appellate courts should defer to trial judges, who witnessed the trial firsthand and relied upon more than a cold record to justify a decision."[7]

[4] *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, ¶38.
[5] Id. at ¶35.
[6] Id. at ¶36.
[7] Id.

{¶27} In this case, in denying Merkl's motion for a new trial, the trial court explicitly found that the jury had not been "under the influence of any passion and [had not been] improperly inflamed or stampeded into a verdict." In light of the court's tight rein on the trial proceedings, we cannot say that the court abused its discretion by denying Merkl's motion for a new trial based upon the conduct of the defense.

G. Motion for a Mistrial

{¶28} Merkl also contends that Seibert's conduct at several points during his direct examination was improper. At one point, the court instructed Seibert to listen to defense counsel's question and to respond to it. Merkl directs us to two other portions of Seibert's testimony, but does not specifically allege any error that occurred. Nor did Merkl raise objections to the testimony at trial. We have reviewed the testimony and conclude that no error, plain or otherwise, occurred in its admission.

{¶29} Merkl next argues that, during the trial, while counsel and the trial court were in the court's chambers, Seibert "walked over [and] hugged the decedent's mother right in front of the jury." Merkl moved for a mistrial.

{¶30} In considering Merkl's motion, the court stated, "It's the Court's understanding, after conferring further with the bailiff, that the conversation appeared to have been begun by Mrs. Merkl, that Dr. Seibert then moved over next to Mrs. Merkl and continued briefly the conversation in reasonably low tones, that at some point he did place his arm around her and she was heard by the bailiff, who was sitting near her, to say something to the effect that that was my pride and joy as the bailiff was breaking up the conversation.

{¶31} "I advised both sides to this. If either side wants, I can voir dire the jurors as to what was heard on that matter * * * [or] simply advise the jury to disregard any

communications that they may have heard, but I'll take [c]ounsel's opinion on that score."

{¶32} When plaintiff's counsel indicated that he was not sure whether a simple instruction to the jury would suffice, he stated, "[T]o be very candid with the [c]ourt, I don't know if it's sufficient until the jury comes back and says, gee, isn't Mr. Seibert a nice guy."

{¶33} The trial court then took the extraordinary step of conducting a voir dire of each juror individually as to whether any of them had observed the contact between the parties and whether the contact had influenced them in any way. After the voir dire, the court stated, "I've voir dired the jury. I don't see any problem at all, especially in light of their body language, the number of jurors who don't know what I'm talking about. The others view it also entirely incidental, seems to me."

{¶34} The court asked if there was any further action that counsel felt was warranted, and neither counsel indicated that that was the case. The court then instructed the jury panel, "I just spoke with you all individually. I'll ask you to put the subject of our brief conversation out of your minds and not to discuss it with each other or anyone else until after the conclusion of this case."

{¶35} The trial court's actions in handling the episode were commendable. In light of the trial court's supported findings and counsel's failure to pursue further remedies at trial, we hold that the court did not abuse its discretion in denying Merkl's motions for a mistrial and for a new trial on the basis of the conduct of the defendant and defense counsel. Consequently, we overrule the first and second assignments of error.

Verdict Based Upon False Testimony

{¶36} In her third assignment of error, Merkl argues that the trial court erred by failing to grant a new trial where it appeared that the jury's verdict had been based upon false testimony. We review the denial of such a motion for a new trial for an abuse of discretion.[8] Unless the trial court's decision was unreasonable, arbitrary, or unconscionable, we will not disturb it on appeal.[9]

{¶37} Generally, juries are charged with determining whether a witness is telling the truth or is mistaken.[10] But "in the event that a jury does not detect and disregard false testimony, the trial court and the [c]ourt of [a]ppeals each has a clear duty to grant a new trial on the weight of the evidence where it appears probable that a verdict is based upon false testimony."[11] So where a motion for a new trial is predicated upon a claim that the verdict was based upon false testimony, the movant must establish that a witness testified falsely at trial and that the verdict was based on the false testimony.[12]

{¶38} First, Merkl contends that Seibert testified falsely that he had ordered a CT scan to rule out a pulmonary embolism, when he otherwise testified that he did not believe Bovard to be suffering from the complication at the time. But Seibert explained that he and Ghazi had discussed the possibility of an embolism, and that they had decided to have the test done out of an abundance of caution.

{¶39} Merkl further contends that Seibert testified falsely with respect to a certain nursing note, but the record reflects that the trial court immediately sustained a

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[8] *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224, 649 N.E.2d 1219.
[9] See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.
[10] *Tanzi v. New York Cent. RR. Co.* (1951), 155 Ohio St. 149, 153, 98 N.E.2d 39.
[11] Id.
[12] See *Ward-Sugar v. Collins*, 8th Dist. No. 87546, 2006-Ohio-5589, ¶4, citing *Tanzi*, supra.

defense motion to strike the question and the testimony. Merkl also argues that Seibert testified falsely with respect to the opinions of other doctors. But the trial court immediately instructed the jury to disregard Seibert's statement.

{¶40} Because Merkl has failed to demonstrate that any of Seibert's testimony was false, we hold that the trial court did not abuse its discretion in denying her motion for a new trial. The third assignment of error is overruled.

Evidentiary Rulings

{¶41} In her fourth assignment of error, Merkl argues that the trial court erred by admitting improper evidence and by excluding admissible evidence. The admission of evidence generally lies within the trial court's broad discretion. A reviewing court should not disturb evidentiary rulings absent an abuse of discretion that has materially prejudiced a party.[13]

{¶42} First, Merkl argues that the trial court erred by sustaining defense objections to her questions to Bovard's friend regarding Merkl's physical condition and Merkl's feelings about medical care. Given that Merkl herself testified about these matters, the excluded testimony would simply have been cumulative in nature.

{¶43} Merkl contends that the court erred by permitting Ghazi to testify at trial to contradict his prior deposition testimony. During the plaintiff's case-in-chief, Ghazi's discovery deposition was read into evidence. Then, during the defendant's case, Ghazi testified live in court. But Merkl has failed to identify where in the record this alleged error is reflected.[14]

[13] *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶20.
[14] See App.R. 12(A)(2).

{¶44} Merkl also argues that Ghazi should not have been permitted to testify for the defense with respect to matters that were not the subject of his discovery deposition. Specifically, she notes that, until trial, Ghazi had not discussed Bovard's stability on the morning of January 5, 2005. Apparently, Merkl premises her argument on Ghazi's testimony being opinion evidence. But this premise is incorrect.

{¶45} At trial, Ghazi testified that, in his opinion, Bovard was stable "from a cardiac standpoint and from a hemodynamic standpoint. That means she was not in cardiogenic shock, which means that her blood pressure had been very low, her pulse very high, and she was being distressed. I did not find her in any acute distress. Her blood pressure was very stable. She was – she was not in significant pain or she did not have any trouble breathing at that time, so from a cardiac standpoint she was stable." Even though Ghazi's response was phrased in terms of an opinion, it is clear from the context that the testimony was based on his firsthand knowledge of Bovard's condition.

{¶46} Merkl also argues that the trial court erred by allowing Dr. Ralph Peeler, a defense expert witness, to contradict his deposition testimony when he testified at trial with respect to the timing of a CT scan. But the testimony, which was elicited by Merkl during cross-examination, was not challenged at trial, so the trial court had no chance to correct any potential error. If anything, Merkl's attempt to impeach Peeler on the matter fell flat because Peeler's trial testimony did not contradict his deposition testimony on that issue.

{¶47} Because the trial court properly exercised its discretion in ruling on the challenged evidentiary matters, we overrule the fourth assignment of error.

Jury Instruction

{¶48} In her fifth assignment of error, Merkl argues that the trial court erred by giving the jury a "different methods" instruction where the evidence did not support such an instruction. Not only did Merkl fail to object to the court's instruction,[15] but she collaborated with the court and defense counsel on its wording and specifically agreed to the instruction as given. Merkl cannot take advantage of an error that she invited or induced the court to make.[16] Consequently, we overrule the assignment of error.

Jury Deliberations

{¶49} In her sixth assignment of error, Merkl argues that the trial court erred by entering judgment for the defendant and by denying a new trial where the jury did not follow the court's instructions. She refers to a remark made by a juror "that apparently was not picked-up [sic] by the court reporter." Clearly, we cannot review a statement that is not in the record.

{¶50} Merkl also contends that the jury failed to "fully deliberate meaningfully" because the jury's deliberations lasted only 25 minutes. There is no prescribed time that a jury must deliberate. And "[b]rief deliberation, by itself, does not show that the jury failed to give full, conscientious[,] or impartial consideration to the evidence."[17] We find no abuse of discretion by the trial court in denying the motion for a new trial on this basis. We overrule the sixth assignment of error.

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[15] Civ.R. 51(A).
[16] See *Lester v. Leuck* (1943), 142 Ohio St. 91, 50 N.E.2d 145, paragraph one of the syllabus; see, also, *Siuda v. Howard*, 1st Dist. Nos. C-000656 and C-000687, 2002-Ohio-2292, ¶73.
[17] *Val Decker Packing Co. v. Treon* (1950), 88 Ohio App. 479, 97 N.E.2d 696; see, also, *Wilburn v. Eastman Kodak Co.* (C.A.2, 1999), 180 F.3d 475, 476.

Denial of Motions for JNOV and for a New Trial

{¶51} In her seventh and final assignment of error, Merkl argues that the trial court erred by denying her motion for judgment notwithstanding the verdict or for a new trial because the verdict was not supported by the evidence. She argues that the court's ruling was erroneous because the evidence was that Seibert had departed from the standard of care in failing to order the CT scan for Bovard "stat."

A. Denial of the Motion for JNOV

{¶52} Our review of a ruling on a JNOV motion is de novo.[18] In ruling on a JNOV motion, a trial court must construe the evidence most strongly in favor of the party against whom the motion is made and determine whether reasonable minds could have reached a conclusion in favor of the nonmoving party.[19] If reasonable minds could have reached different conclusions, the motion must be denied.[20]

{¶53} In this case, Merkl's expert Yaffe opined that Seibert had departed from the standard of care by failing to order the CT scan "stat," because Bovard was unstable at the time. As a result of Seibert's actions, Yaffe testified, appropriate intervention had been delayed.

{¶54} On the other hand, Seibert testified that there was no need for him to order Bovard's CT scan "stat" because she was stable when he saw her at 8:15 a.m., and because she had been stable the night before as well. In addition, treating physician Ghazi testified that when he examined Bovard at that time, she was stable.

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[18] See *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 205.
[19] *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334.
[20] Id.

And defense expert Peeler agreed that, given Bovard's stability, the standard of care did not require Seibert to make a "stat" order.

{¶55} Upon our review of the record, we conclude that reasonable minds could have differed as to whether Seibert had adhered to the standard of care when he did not order Bovard's CT scan "stat."

B. Denial of Motion for a New Trial

{¶56} The denial of a motion for a new trial pursuant to Civ.R. 59(A) is committed to the trial court's sound discretion and will not be reversed on appeal absent an abuse of discretion.[21]

{¶57} "In ruling on a motion for new trial upon the basis of a claim that the judgment 'is not sustained by sufficient evidence,' the court must weigh the evidence and pass upon the credibility of the witnesses, not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury but in the more restricted sense of whether it appears to the trial court that manifest injustice has been done and that the verdict is against the manifest weight of the evidence."[22]

{¶58} Here, the trial court specifically determined that a manifest injustice had not occurred and that the verdict was not against the weight of the evidence. Because the record supports this conclusion, we find no abuse of discretion by the trial court in overruling the motion for a new trial based upon the sufficiency of the evidence. We overrule the seventh assignment of error.

[21] *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685, paragraph one of the syllabus.
[22] Id. at paragraph three of the syllabus.

Seibert's Cross-Appeal

{¶59} In his cross-appeal, Seibert assigns as error the trial court's denial of his motions for a directed verdict. By overruling each of Merkl's assignments of error, we must affirm the judgment entered in Seibert's favor. Our consideration of his assignment of error would afford him no further relief. Accordingly, the issue relating to the motions for a directed verdict is moot.[23]

{¶60} Accordingly, we affirm the judgment of the trial court.

Judgment affirmed.

SUNDERMANN and **CUNNINGHAM, JJ.,** concur.

Please Note:

The court has recorded its own entry this date.

[23] See *Iglodi v. Tolentino*, 8th Dist. No. 88264, 2007-Ohio-1982.