[Cite as *Lips v. Univ. of Cincinnati College of Medicine*, 2013-Ohio-1205.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gail P. Lips, Individually, and as Administratrix of the Estate of James A. Lips,	:	
Plaintiff-Appellant,	:	No. 12AP-374 (Ct.Cl. No. 2009-01115)
v.	:	(REGULAR CALENDAR)
University of Cincinnati College of Medicine,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 28, 2013

Shea, Coffey & Hartmann, Joseph W. Shea III and *Shirley A. Coffey*, for appellant.

Michael DeWine, Attorney General, and *Brian M. Kneafsey, Jr.*, for appellee.

APPEAL from the Court of Claims of Ohio

DORRIAN, J.

{¶ 1} In this medical malpractice and wrongful-death case, plaintiff-appellant, Gail Lips ("appellant"), appeals from a judgment entered by the Court of Claims of Ohio finding that defendant-appellee, University of Cincinnati College of Medicine ("hospital"), was not liable for the death of her husband, James Alan Lips ("Lips") at the age of 69. The court found that the greater weight of the evidence supported its conclusion that the hospital's employee, Robert Bracken, M.D. ("Dr. Bracken"), met all applicable standards of care in his treatment of Lips. The court further found that appellant failed to prove that the course of treatment provided to Lips was the proximate cause of his death.

{¶ 2} Appellant raises a single assignment of error, as follows:

> The trial court erred by excluding the testimony of plaintiff's rebuttal witness.

{¶ 3} For the following reasons, we affirm.

I. Facts and Procedural History

Medical History

{¶ 4} In the fall of 2007, Lips received a diagnosis of prostate cancer and began exploring treatment options. He chose Dr. Bracken to perform robotic-assisted laparoscopic surgery to remove his prostate and associated lymph nodes. Dr. Bracken and other hospital staff performed the surgery on December 31, 2007. Lips died on the evening of January 6, 2008.

{¶ 5} Appellant and Lips expected the surgery to take approximately two to two-and-one-half hours. The surgery, however, lasted approximately eight hours. The operation involves slanting the patient with the head towards the floor at approximately 30-percent angulation (the "steep Trendelenburg position") and inflating the abdomen with carbon dioxide ("insufflation") to provide the surgeons better access and visualization of the surgical field. Use of this position is typical in laparoscopic abdominal surgery.

{¶ 6} During the surgery, which Dr. Bracken characterized as "difficult" (Tr. 270), Dr. Bracken performed an anastomosis to join the bladder to the urethra after removal of the prostate. He attempted the procedure two times in order to minimize incontinence after surgery and to ensure the best possible outcome for his patient. He testified that the anastomosis was satisfactory after the second attempt, although urine leakage occurred, necessitating the insertion of a drain.

{¶ 7} After surgery, Lips experienced pain, a distended abdomen, and ileus, i.e., delayed resumption of normal bowel function. He remained in the hospital after the surgery because of the ileus and because urine was leaking into his abdominal cavity—a circumstance that is known to occur after a prostatectomy and normally resolves on its own.

{¶ 8} During the first few days after the surgery, Lips's condition appeared to be improving. His bowel resumed functioning, and he began walking in the hospital. But he

became nauseous late in the evening of January 4. Nausea and vomiting continued into the morning of January 5, prompting hospital staff to insert a nasogastric tube to drain stomach content. Lips also underwent a CAT scan.

{¶ 9} At approximately 5:30 p.m. on January 5, Lips suffered respiratory arrest after having developed a fever and shortness of breath. Hospital staff transferred Lips to the intensive care unit ("ICU"), intubated him, and put him on a ventilator to assist him in breathing.

{¶ 10} Lips's primary physician in the ICU was intensivist, Timothy A. Pritts, M.D., Ph.D ("Dr. Pritts"). Dr. Pritts concluded that Lips was in shock but was unsure of the cause. He suspected that Lips had suffered either a pulmonary embolism, a heart attack, or septic shock. Of those suspected causes, Dr. Pritts initially believed septic shock to be least likely, as the medical records demonstrated that Lips had previously been progressing satisfactorily, and Dr. Pritts considered the respiratory failure to be an "acute onset event." When an echocardiogram failed to disclose a pulmonary embolism, Dr. Pritts changed his working diagnosis to septic shock. He prescribed administration of broad-spectrum antibiotics, intravenous ("IV") fluids to address fluid depletion and increase Lips's blood pressure, steroids, and pain and sedation medications.

{¶ 11} On the morning of January 6, Dr. Pritts performed a surgical procedure to relieve abnormally high pressure in Lips's abdomen—a condition known as abdominal compartment syndrome ("ACS"). ACS sometimes develops when an individual receives large amounts of intravenous fluids. If the pressure is not relieved, it may interfere with perfusion of the abdominal organs and tissues, i.e., delivery of oxygenated blood, which may cause organ deterioration and breathing problems. During the surgery, Dr. Pritts observed Lips's bowel and characterized it as appearing "pink and well perfused," i.e. well-supplied with blood, and he did not observe any injury to the bowel.

{¶ 12} Approximately four hours later, Lips experienced a recurrence of ACS, and Dr. Pritts again performed surgery to relieve the pressure. During the second surgery, Dr. Pritts noted that the bowel initially appeared "dusky" but "pinked up" during the procedure. Dr. Pritts saw no evidence of bowel ischemia in either surgery. Nor did he observe peritonitis or peritoneal inflammation.

{¶ 13} Lips died later during the evening of January 6. The subsequent autopsy revealed bowel necrosis (death of bowel tissue). In fact, the pathologist who conducted the autopsy reported that the immediate cause of death was non-occlusive mesenteric ischemia, which led to ischemic enterocolitis. The pathologist described the major finding of the autopsy as "ischemic enterocolitis involving the small intestine and the right and partial transverse colon." (Joint Exhibit A, at 477.) In layman's terms, the pathologist believed that the immediate cause of Lips's death was lack of blood flow and oxygen to the bowel leading to inflammation and breakdown of the inner lining of the bowel and, ultimately, death of the bowel.

Procedural History

{¶ 14} On January 6, 2009, appellant initiated this action in the Court of Claims by filing a complaint in her individual capacity and as administratrix of her husband's estate. The hospital answered, and discovery and other proceedings ensued.

{¶ 15} On March 5, 2010, the court scheduled a status conference. In its entry, it advised the parties of "Additional Trial Requirements and Information," including information regarding pretrial statements, as follows:

> Pretrial statements shall be filed and served within seven days of the scheduled pretrial. The statements shall include, where appropriate, a list of exhibits which are to be introduced into evidence, copies of available opinions of expert witnesses, and the names of the witnesses expected to testify at trial.

{¶ 16} On April 16, 2010, appellant filed an initial pretrial statement. She identified her expert as Michael Mathers, M.D. ("Dr. Mathers"), a board-certified urologist, and attached an expert report Dr. Mathers had prepared.

{¶ 17} On January 27, 2011, the court issued a scheduling order setting the case for trial on November 14 through 17, 2011. The court ordered appellant to "furnish [the hospital] with the names of expert witnesses and a copy of their reports on or before May 16, 2011." The court ordered the hospital to provide the names of its expert witnesses and a copy of their reports by June 14, 2011.

{¶ 18} The hospital thereafter filed a disclosure of its expert witnesses, including four of Lips's treating physicians, and three other experts, Drs. Ronney Abaza, Thomas Parker, and Mark Stovsky. The hospital attached expert witness reports prepared by the

three latter doctors. On October 4, 2011, the hospital filed a notice of deposition of appellant's expert, Dr. Mathers.

{¶ 19} On October 12, 2011, approximately one month prior to the scheduled trial date, appellant filed a second pretrial statement and identified Dr. Mathers as her expert witness, as well as an additional physician, George Nichols, M.D. ("Dr. Nichols"). Appellant did not provide a written expert report from Dr. Nichols.

{¶ 20} On October 25, 2011, the hospital filed a motion in limine seeking the exclusion of Dr. Nichols as an expert witness based on appellant's noncompliance with C.C.R. 7(E). That Court of Claims rule requires parties to submit and exchange within timeframes established by the court written reports of all expert witnesses they intend to call. The hospital observed that its counsel had first received notice on October 14, 2011 that appellant contemplated calling Dr. Nichols as an expert witness. It asserted that it would be prejudiced by the calling of Dr. Nichols.

{¶ 21} In response, appellant argued that it had informally advised the hospital in October 2009, through a letter sent both by regular mail and e-mail, that appellant would "not be calling Dr. Nichols in our case-in-chief, but may use him in rebuttal, depending on your experts' testimony." (Nov. 3, 2011 Memorandum in Opposition, Exhibit B, at 3.) Appellant further asserted that, under Ohio law as established in *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408 (1994), she had an absolute right to call rebuttal witnesses. She further contended that this absolute right was "not subject to prior witness disclosure per rules of Court." (Memorandum, at 3.)

{¶ 22} On November 10, 2011, the court granted the hospital's motion in limine, thereby excluding Dr. Nichols from testifying at trial.

Appellant's theory of negligence

{¶ 23} At trial, appellant asserted that Dr. Bracken had failed to meet the standard of care required of him in two ways: (1) by allowing the surgery to continue over an unreasonably long period of time while Lips was subjected to unduly high insufflation pressure, and (2) by failing to appropriately manage Lips's postoperative care, including sanctioning the infusion of excessive amounts of IV fluid. Appellant claimed that Dr. Bracken should have either discontinued the laparoscopic surgery and converted the operation to a traditional open-surgical procedure, or reduced the insufflation pressure

during the laparoscopic procedure, rather than allowing the pressure to continue during the lengthy surgery. Appellant further contends that these failures constituted breaches of the applicable standard of care and proximately caused Lips's death.

Expert Testimony—Appellant's Case-in-Chief

{¶ 24} In support of her theory of professional negligence, appellant called her expert, urologist Dr. Mathers. He testified that Lips's bowel ischemia originated at the time of the surgery and that the ischemia caused a slow deterioration of the bowel over the next six days. Dr. Mathers opined that insufflation of Lips's abdomen and the positioning of Lips's body in the steep Trendelenburg position for a period of approximately six hours detrimentally affected Lips's circulation and that this detrimental effect grew worse the longer Lips was in the inverted position. It was his opinion that the surgery caused damage to the bowel, from which Lips never recovered and ultimately contributed to the development of ACS. He described ACS as a condition where increased pressure in the abdomen causes blood vessels to become compressed, which limits their ability to carry oxygenated blood, which causes tissue damage, including damage to the lining of the bowel. He believed that the length of surgery, combined with the amount of insufflation pressure, justified the conclusion that the surgeon had not met the applicable standard of care in performing the operation. He also believed that Dr. Bracken should have converted the operation from a laparoscopic procedure to an open-surgical procedure at some point "way before six hours." (Tr. 214.) On cross-examination, Dr. Mathers acknowledged that he had never performed a robotic-assisted prostatectomy, although he had performed "several hundred" open prostatectomies in his career.

{¶ 25} Dr. Mathers further referenced the fact that Lips's white blood cell count increased after surgery and testified that, to the extent other experts believed that Lips had suffered septic shock resulting in cardiac collapse, any septic shock would have originated from intestinal malfunction beginning on December 31, the day of surgery. He opined that Dr. Bracken failed to meet the required standard of care during the early postoperative period in light of Lips's ileus and elevated white blood cell count. He also observed that Lips had been administered large amounts of IV fluids on the day of surgery and the first postoperative day. He contended that Dr. Bracken should have been concerned with Lips's condition and the results of laboratory reports received during the

first few days after surgery and should have consulted with other physicians by the second or third postoperative day, rather than taking a "watchful waiting" approach. (Tr. 198.) He testified that Dr. Bracken should have consulted a general surgeon sooner, who could have relieved the excess pressure associated with the ACS at an earlier point in time.

Expert Testimony—Hospital's Defense

{¶ 26} In presenting its defense, the hospital first called Dr. Bracken. He testified that neither he nor the other surgeon participating in the surgery, James F. Donovan Jr., M.D. ("Dr. Donovan"), believed it was in Lips's best interest to convert the robotic-assisted operation to an open-surgical procedure. Dr. Bracken testified that the length of the operation, the amount of insufflation pressure used, and the amount of fluids administered to Lips all fell within the standard of care. He testified that, in his experience, patients who experience bowel death survive for only two or three days—not five or six days. Dr. Bracken believed that Lips "died very suddenly and unexpectedly probably because of sepsis." (Tr. 307.)

{¶ 27} The court accepted as evidence a videotaped deposition of Dr. Pritts, the intensivist in the ICU. Dr. Pritts also testified that the ischemia of Lips's bowel probably began within 24 to 48 hours prior to his death. He based this conclusion on his clinical experience that ischemia of the mucosa (inner layers) of the bowel likely progresses to transmural necrosis (death through the entire thickness of the bowel) after approximately 24 hours or so. Accordingly, had the ischemia begun earlier than one to two days before he operated to relieve the ACS, Dr. Pritts believed he would have seen evidence of bowel necrosis during the surgeries he performed on January 6.

{¶ 28} Dr. Pritts did not believe that Lips suffered ACS prior to being admitted to the ICU on January 5. Dr. Pritts testified that he believed the cause of Lips's death from bowel necrosis was cardiac collapse, most likely due to septic shock. He also believed that the ACS resulted from the hospital's attempt to resuscitate him by providing IV fluids in the ICU after the respiratory arrest.

{¶ 29} The hospital called Dr. Donovan to testify both as an expert witness and because he had assisted in Lips's surgery. Dr. Donovan was experienced in laparoscopic urological surgery. He testified that the degree of Lips's insufflation pressure was consistent with that regularly used in laparoscopic surgery and did not create a risk of

ischemic injury to a patient, even when sustained for an extended period of time. His postoperative notes indicated no known complications from the surgery. He testified that there was no reason to convert the surgery to an open procedure. He acknowledged that the surgery took longer than average but stated that Dr. Bracken had met the applicable standard of care in performing the surgery.

{¶ 30} Thomas J. Parker, M.D. ("Dr. Parker"), an internist and crucial care physician, testified as an expert for the hospital. Having reviewed the records, Dr. Parker opined that Lips's postoperative care was appropriate and consistent with the standard of care. He acknowledged that the CAT scan revealed a distended bowel, consistent with Lips's ileus, but did not believe that the CAT scan disclosed any abnormalities necessitating a surgical consult. Nor did he believe that the hospital's management of Lips's fluids led to his ischemic bowel. He testified that the fact that Dr. Pritts observed no signs of ischemic bowel when surgically relieving the ACS-related pressure meant that the ischemia at that point was in its early stages.

{¶ 31} Dr. Parker pointed out that Lips had a rising white blood cell count and a cough beginning on January 4. That, along with the results of a chest x-ray taken on January 5, and the fact that Lips developed problems breathing, which led to use of a ventilator, convinced him that Lips had developed pneumonia. He believed that Lips's breathing problems, and the need for a ventilator, were the result of the development of pneumonia. He concluded that Lips died "from severe sepsis due to the left lower lobe pneumonia." (Tr. 416.) He opined that Lips's ischemic bowel was caused when the sepsis from the pneumonia caused Lips's heart to begin to fail, causing his cardiac output and blood pressure to drop. He testified that Lips's decline in cardiac output began at the time of the second surgery to relieve the ACS pressure. He testified that the ischemic bowel did not exist prior to Lips's transfer to the ICU but continued to develop throughout the afternoon of January 6. Parker further believed that, had Lips's ischemic enterocolitis begun during the December 31 surgery, necrosis of the bowel would have occurred by at least January 1 or 2.

{¶ 32} The hospital's final expert witness was Ronney Abaza, M.D. ("Dr. Abaza"), a urologist at The Ohio State University Medical Center, who has performed approximately 2,000 robotic-assisted prostatectomy surgeries during his career. He testified that he

takes an average of two to two-and-one-half hours to perform that surgery, but that his colleagues average four to six hours. He testified that the length of time of Lips's surgery was within the standard of care. He further opined that his review of Lips's medical records disclosed nothing causing him to believe that Dr. Bracken should have converted the robotic-assisted surgery to an open surgery. Dr. Abaza further described the anastomosis performed by Dr. Bracken as "challenging," and testified that Dr. Bracken had perfomed the anastomosis "to the best of [his] ability and the way that any surgeon would under these circumstances." (Tr. 480.) He opined that placing a drain for the urine was "absolutely appropriate" and that he had never known a urine leak similar to Lips's to not heal on its own. He testified that, from his review of the record, Dr. Bracken's postoperative care met the required standard of care and that two days after surgery Lips was "improving" and "behaving as [he, Dr. Bracken] would expect someone after this procedure with a urine leak." (Tr. 481.) He saw nothing inappropriate as to Lips's fluid management. He testified that, in his opinion, the length of time of Lips's surgery did not cause the bowel ischemia as "[i]t wouldn't have been possible for him to live with that condition for four or five days." (Tr. 485.) He described bowel ischemia as "a life threatening condition immediately" (Tr. 486), and described a person with bowel ischemia as being "deathly ill." (Tr. 489.) He believed that Lips developed a urine infection, probably due to the urine leaking into his abdomen, sometime prior to the time that hospital staff recorded a fever on January 5 and that the infection caused his blood pressure to drop, leading to the ischemic bowel.

{¶ 33} At the close of the hospital's case, the trial court provided an opportunity for appellant to present rebuttal testimony. Appellant called no witnesses on rebuttal. Instead, appellant proffered the testimony of Dr. Nichols. Appellant advised the court that, had Dr. Nichols testified, he would not have made "any opinions concerning negligence but only the field of pathology and causation." (Tr. 534.) Dr. Nichols would have agreed that the cause of death was ischemic enterocolitis but would have testified that Lips "did not die of sepsis." (Tr. 535.) He would have testified that Lips did not have pneumonia, peritonitis, a lethal bacterial infection, bacteremia, or a urinary tract infection the week prior to his death. He would have further testified that Lips's bowel became necrotic earlier than 24 hours prior to his death. The proffer did not reflect Dr. Nichols'

opinion as to how much earlier than the 24-hour period prior to his death Lips's bowel deterioration might have begun.

{¶ 34} The Court of Claims entered judgment for the hospital. It stated in a written decision that it had found the testimony of the hospital's experts more persuasive than that of appellant's experts. The court observed that several experts concluded that neither the robotic-assisted surgery, nor the extent of insufflation pressure during the surgery, caused the bowel ischemia. The court concluded that the "greater weight of the evidence shows that Dr. Bracken met all applicable standards of care" in treating Lips, and that "[appellant] failed to establish that the course of treatment provided to [Lips] was the proximate cause of this death." (Mar. 26, 2012 Decision, at 11.)

II. Analysis

{¶ 35} Appellant posits in her sole assignment of error that the trial court committed reversible error in refusing to allow her to call Dr. Nichols as a rebuttal witness. In support of her argument, she cites the decision of the Supreme Court of Ohio in *Phung*, supra, and this court's decision in *Brothers v. Morrone-O'Keefe Dev. Co.*, 10th Dist. No. 05AP-161, 2006-Ohio-1160.

{¶ 36} In *Phung* the plaintiff asserted an intentional infliction of emotional distress claim against his former employer. After Phung presented his case-in-chief, the defense called an expert witness who testified that Phung had experienced delusional thinking before being employed by the defendant. Phung then sought to call two lay witnesses—his sister and his wife—to rebut the defense expert's factual assertion that Phung's delusional thinking predated his employment by the defendant.

{¶ 37} The employer objected on two grounds. First, the employer argued that the testimony would be cumulative to testimony presented in Phung's case-in-chief and was therefore inappropriate rebuttal testimony. Second, the employer argued that the two witnesses should be excluded because Phung had not identified them on his witness list.

{¶ 38} The Supreme Court of Ohio rejected both arguments. The court first held that "Phung should have been entitled to present non-delusional, rebuttal witnesses *to contest the truth of the facts* on which [appellant's expert] relied." (Emphasis added.) *Phung* at 410. The court noted that Phung proposed to call the two witnesses "to *rebut*

the factual basis for [the expert's] theory of an alternate cause" of Phung's delusional condition. (Emphasis added.) *Id.*

{¶ 39} In a statement relied upon by appellant in the case before us, the court then observed that "[a] party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief." *Id.* The trial court's refusal to allow Phung to call the two witnesses constituted an abuse of discretion, as Phung had a right to "present their testimony to the extent it rebutted [the defense expert's] testimony." *Id.* The court further rejected the argument that the trial court could properly disallow the two witnesses because they were not identified on a witness list, finding that circumstance to be "immaterial." *Id.* We note that the court's opinion does not disclose whether the alleged duty in *Phung* to identify all proposed witnesses in a witness list was the result of a local rule, a discovery obligation, a court order, or something else.

{¶ 40} In *Brothers,* we observed that "the admission of rebuttal testimony is a matter within the trial court's discretion, and a decision admitting or excluding such testimony will not be reversed absent an abuse of that discretion * * * [h]owever, a trial court's discretion over the admission of rebuttal testimony is not absolute." (Citation omitted.) *Brothers* at ¶ 6. Quoting *Phung*, we further observed that " '[a] party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in chief.' " *Brothers* at ¶ 6. We concluded that: "[A] party possesses an unconditional right to present rebuttal testimony if: (1) the evidence is not cumulative; (2) the evidence would not be appropriate for the party's case-in-chief; and (3) the evidence is first addressed in the opponent's case-in-chief." *Id.*

{¶ 41} In the case before us, the hospital contends that the trial court appropriately excluded Dr. Nichols as a rebuttal witness in view of appellant's failure to comply with C.C.R. 7, which provides in relevant part:

> **(E) Expert Witnesses**. Each trial attorney shall exchange with all other trial attorneys, in advance of the trial, written reports of medical and expert witnesses expected to testify. The parties shall submit expert reports in accordance with the schedule established by the court.

> *A party may not call an expert witness to testify unless a written report has been procured from said witness.* It is the trial attorney's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each such report adequately sets forth the expert's opinion. *However, unless good cause is shown, all supplemental reports must be supplied no later than thirty days prior to trial.* The report of an expert must reflect his opinions as to each issue on which the expert will testify. An expert will not be permitted to testify or provide opinions on issues not raised in his report.
>
> *All experts must submit reports.* If a party is unable to obtain a written report from an expert, counsel for the party must demonstrate that a good faith effort was made to obtain the report and must advise the court and opposing counsel of the name and address of the expert, the subject of the expert's expertise together with his qualifications and a detailed summary of his testimony. * * * The court may exclude testimony of the expert if good cause is not demonstrated.
>
> **(F) Failure to Comply**. The sanctions stated in Civil Rule 37(B)(23) may be assessed for failure to timely comply with this rule.

(Emphasis added.)

{¶ 42} C.C.R. 7(E) thus expressly provides that "[a] party may not call an expert witness to testify unless a written report has been procured from said witness" and that "[a]ll experts must submit reports." The hospital correctly observes that the rule makes no exception to these provisions for instances where a plaintiff intends to call an expert witness to present rebuttal testimony.

{¶ 43} In contrast, in opposing the hospital's motion in limine before the Court of Claims, appellant asserted that, in *Phung,* a unanimous decision, the court opined that "rebuttal testimony trumped any rule of procedure requiring its listing." (Nov. 3, 2011 Memorandum in Opposition, at 3.) Before us, appellant similarly argues that, pursuant to *Phung,* she had an "unconditional right" to call Dr. Nichols for rebuttal purposes, irrespective of C.C.R. 7(E). Appellant thus implicitly posits that her "unconditional right" to call rebuttal witnesses excused her from the timing obligation imposed by the trial court's scheduling order of January 27, 2011, which ordered appellant not only to identify her expert witnesses but also to provide opposing counsel with a copy of a written report

from each proposed expert witness by May 16, 2011. She does not argue that she was surprised at trial by the opinions of the hospital's experts that the cause of Lips's death was infection or septic shock.

{¶ 44} We note that it appears from the record that the parties informally agreed to an extension of the June 14, 2011 deadline for the hospital to provide its written expert reports and that appellant's counsel asserted difficulty in providing a written report from its proposed "rebuttal expert" until after it knew the expert opinions of the hospital's experts. We have found nothing in the record, however, to indicate that appellant's counsel sought leave pursuant to C.C.R. 7(E) asserting good cause to file an additional expert witness report after receiving the hospital's expert witness reports on July 27, 2011.

{¶ 45} The parties have thus clearly presented the issue of whether the Court of Claims necessarily abuses its discretion in refusing to allow rebuttal opinion testimony from an expert where the proponent has not complied with C.C.R. 7(E).

{¶ 46} We have recognized that C.C.R. 7(E) imposes responsibilities relative to expert witnesses and that a trial court may impose sanctions for noncompliance with the rule. *Thompson v. Ohio State Univ. Hosps.*, 10th Dist. No. 06AP-1117, 2007-Ohio-4668, ¶ 33. We review the imposition of sanctions for noncompliance pursuant to an abuse-of-discretion standard of review. *Id.* Moreover, this court has held that the Court of Claims may, in the exercise of sound discretion, exclude evidence of an expert witness's opinion where that opinion was not disclosed in an expert report as required by C.C.R. 7(E). *Gordon v. Ohio State Univ.*, 10th Dist. No. 10AP-1058, 2011-Ohio-5057, ¶ 87. In neither *Thompson* nor *Gordon*, however, does it appear that the proffered expert opinion was proffered in the rebuttal phase of a trial.

{¶ 47} The Eighth District Court of Appeals has, however, held that the Supreme Court of Ohio's decision in *Phung* does not preclude enforcement of Loc.R. 21.1 of the Court of Common Pleas of Cuyahoga County, General Division.[1] As does C.C.R. 7(E),

[1] Loc.R. 21.1 provides in part, as follows:

> (A) Since Ohio Civil Rule 16 authorizes the Court to require counsel to exchange the reports of medical and expert witnesses expected to be called by each party, each counsel shall exchange with all other counsel written reports of medical and non-party expert witnesses expected to testify in advance of the trial. * * *

Loc.R. 21.1 also requires exchange of written expert witness reports and provides that a nonparty expert witness may not testify unless a written expert's report has been provided to opposing counsel. In *Jarvis v. Witter*, 8th Dist. No. 84128, 2004-Ohio-6628, the court held that Loc.R. 21.1 may be enforced even where the expert is called to provide rebuttal testimony. *Id.* at ¶ 59-60 ("Witter did not file a rebuttal or supplemental [expert's] report after the expert reports submitted by [the opposing parties]; therefore, Witter's expert was not permitted to testify as a rebuttal witness. Thus the trial court did not abuse its discretion in denying Witter the opportunity to call his expert as a rebuttal witness.") Subsequent to its decision in *Jarvis*, the same court described the primary purpose of Loc.R. 21.1 as being avoidance of prejudicial surprise. *Blandford v. A-Best Prods. Co.*, 8th Dist. No. 85710, 2006-Ohio-1332.

{¶ 48} We find it unlikely that the Supreme Court of Ohio in *Phung* meant to establish an absolute rule that a plaintiff in a civil case may completely disregard a trial court's local rules and orders concerning the presentation of expert evidence simply because the plaintiff purports to "reserve" the witness for possible rebuttal purposes, and regardless of whether the plaintiff is surprised by the evidence first produced by the defendant at trial, or whether that evidence concerns expert witness opinions as opposed to testimony concerning facts.

{¶ 49} In the case at bar, however, we have fully reviewed the record and conclude that we need not finally determine the issue presented by appellant's assignment of error.

> (B) A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. It is counsel's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the non-party expert's opinion. However, unless good cause is shown, all supplemental reports must be supplied no later than thirty (30) days prior to trial. The report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report.
>
> (C) All non-party experts must submit reports. If a party is unable to obtain a written report from a non-party expert, counsel for the party must demonstrate that a good faith effort was made to obtain the report and must advise the Court and opposing counsel of the name and address of the expert the subject of the expert's expertise together with his qualifications and a detailed summary of his testimony.

An evidentiary ruling by a trial court may not be the basis of a claim of error unless the person claiming that error can establish that a substantial right has been affected. Evid.R. 103. In order to establish that a substantial right has been affected, one must show that the alleged error affected the final determination of the case. *Campbell v. Johnson*, 87 Ohio App.3d 543, 551 (2d Dist.1993) (error, if any, in excluding testimony of an expert witness was harmless where proponent could not demonstrate that the exclusion affected the final outcome of the case). *Accord Hilliard v. First Indus., L.P.*, 165 Ohio App.3d 335, 350, 2005-Ohio-6469 (10th Dist.2005), ¶ 41, citing *Campbell* ("If the party claiming error is unable to establish that the trial court's ruling affects a substantial right, the error is deemed harmless."); *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶ 34-35.

{¶ 50} In a professional negligence case such as this, the plaintiff must establish "(1) the standard of care within the medical community; (2) the defendant's breach of that standard of care; and (3) proximate cause between the breach and the plaintiff's injuries." *Gordon* at ¶ 66, citing *Adams v. Kurz*, 10th Dist. No. 09AP-108, 2010-Ohio-2776, ¶ 11. The legal standard in evaluating whether a physician or surgeon has breached the applicable standard of care, as set forth by the Supreme Court of Ohio, is:

> "* * * whether the physician, in the performance of his service either did some particular thing or things that physicians and surgeons, in that medical community, of ordinary skill, care and diligence, would not have done under the same or similar circumstances, or failed or omitted to do some particular thing or things which physicians and surgeons of ordinary skill, care and diligence would have done under the same or similar circumstances. He is required to exercise the average degree of skill, care and diligence exercised by members of the same medical specialty community in similar situations."

Gordon at ¶ 66, quoting *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 129-30 (1976).

{¶ 51} In *Gordon*, we reiterated that, in a medical malpractice case, a plaintiff bears the burden of presenting sufficient evidence to allow the fact finder to conclude that the defendant breached the standard of care. *Gordon* at ¶ 77. We further recognized that "whether the defendant has employed the requisite care must be determined from the testimony of experts" and that a medical malpractice trial may produce a "battle of the experts." *Id.* In such a case, it is "within the province of the trier of fact to weigh the medical testimony and to resolve the conflicting opinions." *Id.* Where competent,

credible evidence exists which, if believed, would support a trial court's finding that a physician has not breached the accepted standard of care in treating a patient, this court will not disturb that finding as being against the manifest weight of the evidence. *Id.*

{¶ 52} In the case before us, the hospital argues that Dr. Nichols' proffered rebuttal testimony could not have impacted the trial court's conclusion that the hospital, through its employee Dr. Bracken, had met the applicable standard of care in treating Lips. It contends, therefore, that the trial court's refusal to allow Dr. Nichols to testify on rebuttal would not have changed its ultimate finding that Dr. Bracken met all applicable standards of care, rendering its ruling excluding Dr. Nichols harmless at best. It contends that the court's finding on lack of breach of the standard of care was dispositive of the issue of negligence and precluded entry of judgment in appellant's favor regardless of the cause of Lips's death. We agree.

{¶ 53} Significantly, in proffering Dr. Nichols' testimony, appellant's counsel specifically observed that Dr. Nichols would not have expressed "any opinions concerning negligence but only the field of pathology and causation." (Tr. 534.) Appellant's proffer confirms that Dr. Nichols would not have testified concerning the issue of whether Dr. Bracken had deviated from the applicable standard of care within the medical community. Rather, the proffer was relevant only to the factual question of the cause of Lips's death. That is, had Dr. Nichols presented the proffered testimony, the court would have had before it evidence contradicting the theories that Lips contracted pneumonia, peritonitis, a bacterial infection, bacteremia, or a urinary tract infection, but nothing to rebut the testimony of the defense experts that Dr. Bracken's conduct in both performing the surgery and in his postoperative treatment of Lips was within the appropriate standard of care. As revealed by the proffer, Dr. Nichols would not have opined that Dr. Bracken did something that a physician and surgeon in the medical community, of ordinary skill, care and diligence, would not have done, or that he failed to do something a physician and surgeon in the medical community, of ordinary skill, care and diligence, would have done. Accordingly, his testimony would not have changed the trial court's ultimate determination that Dr. Bracken did not breach the applicable standard of care.

{¶ 54} We reached a similar conclusion in *Gordon*. In that case, we held that the Court of Claims' exclusion of expert testimony concerning deviation from the standard of

care was harmless where the trial court ultimately concluded that the plaintiff had failed to prove the element of proximate cause. *Gordon* at ¶ 88. The instant case and *Gordon* differ in that the excluded testimony in *Gordon* dealt with proximate cause, and the excluded testimony in the instant case dealt with standard of care. But the underlying principle is applicable to both. That principle is that, when the plaintiff fails to prove both the element of breach of the standard of care and the element of proximate cause, evidentiary error is harmless where the evidentiary error is relevant to just one of those two elements of professional negligence.

{¶ 55} Appellant additionally argues that the "cause of death in a medical malpractice case is critical "and that Dr. Nichols' proffered rebuttal testimony that Lips did not die of infection and sepsis was "interrelated with the standard of care." (Appellant's reply brief at 4-5.) She argues that the proffered testimony as to cause of death "could have changed the judge's understanding and opinion regarding the standard of care" (reply brief at 6), implying that the fact finder might have found Dr. Nichols' testimony as to cause of death to be more credible than appellee's experts, leading the fact finder to focus during its deliberations on the other potential causes of death expressed by the other experts, including appellant's expert. That is, by narrowing the factual question of the cause of Lips's death to non-infectious causes, the trial court might have differently evaluated the question of whether Dr. Bracken either did something he should not have done, or failed to do something he should have done, in violation of the standard of care. In addition, appellant argues that, had Dr. Nichols been permitted to rebut the opinions of the hospital's experts as to cause of death, the fact finder might also have found the other opinions expressed by the hospital's experts to be less credible, including their opinions that Dr. Bracken acted in conformance with the required standard of care.

{¶ 56} The fact remains, however, that it was appellant's burden to establish that Dr. Bracken violated the required standard of care, and appellant relied exclusively on Dr. Mather's testimony to meet that burden. Dr. Nichols' testimony, if accepted, would have rebutted the expert opinions of some of the hospital's experts as to cause of death. But that circumstance would not have rebutted the hospital's experts as to the separate element of standard of care. Moreover, the hospital was not required to prove the

negative premise that Dr. Bracken did not violate the standard of care. Rather, appellant was required to prove that Dr. Bracken did violate the standard of care.

{¶ 57} In addition, Dr. Nichols' proffered testimony was similarly unlikely to have affected the trial court's conclusion that appellant had failed to prove the proximate cause element of professional negligence; i.e., that the hospital's alleged failure to appropriately care for Lips caused his death. None of the medical experts disagreed with the autopsy's ultimate conclusion that Lips died as a result of non-occlusive mesenteric ischemia, which led to ischemic enterocolitis, i.e., death of bowel tissue. The primary question upon which the experts differed was the question of what caused Lips's bowel to become necrotic. Indeed, the autopsy itself observed that "[t]he physiopathological mechanisms causing non-occlusive mesenteric ischemia are controversial." (Joint Exhibit A.) Only appellant's expert testified that the ischemia resulted from a circumstance of the December 31 surgery by Dr. Bracken. He further testified that the development of bowel ischemia commenced at that time. In contrast, all of the hospital's experts testified that the cause was not related to the surgery itself and that the bowel ischemia developed no earlier than 24 to 48 hours prior to Lips's death on January 6, i.e., several days after the surgery.

{¶ 58} One of the hospital's experts, Dr. Parker, believed that the cause of ischemia was that Lips developed pneumonia, leading to sepsis, loss of adequate heart function, deprivation of adequate oxygenated blood to the colon, and ischemia. Another hospital expert, Dr. Abaza, suspected a urine infection. Dr. Pritts also suspected that sepsis led to Lips's death. But, even had Dr. Nichols presented the proffered testimony and the trial court had accepted his testimony that Lips did not die as the result of infection, that conclusion would not logically have mandated acceptance of appellant's theory that Lips died as the result of the circumstances surrounding the December 31 surgery or Dr. Bracken's supervision of Lips's postoperative care. The fact that Dr. Nichols' testimony may have cast doubt on the theory that death originated in infection, as hypothesized by the hospital's experts, does not mandate the conclusion that Dr. Mather's hypotheses as to cause of death were correct. That is, even had the trial court believed that Lips did not die of infection, it would not have been compelled to find that appellant's theory of the cause of death, i.e., prolonged surgery and fluid overload, was valid. The court could just as

logically have concluded that neither appellant nor the hospital had satisfactorily established the cause of the ischemia and Lips's resulting death.

{¶ 59} Notably, the trial court did not opine that it accepted the hospital's theories as to cause of death. Rather, it ultimately concluded that appellant had failed to prove that "the course of treatment provided to [Lips] was the proximate cause of his death." (Mar. 26, 2012 Decision, at 11.) That is, the trial court did not make an express determination as to what caused the bowel ischemia but only that appellant had failed to prove its theory of that cause. It was the appellant's burden to prove both breach of the applicable standard of care and that the breach caused Lips's death. The trial court could not have entered judgment in favor of appellant in the absence of a determination of proximate causation. Our review of the record leads us to believe that the cause of Lips's death was indeed unproven and perhaps unprovable.

{¶ 60} We therefore reject appellant's conclusion that, in this case, "[h]ad Dr. Nichols been able to testify as to the absence of infection prior to Mr. Lips' death, it is highly likely that the court would have rendered a decision in favor of [appellant]." (Appellant's brief, at 8.) Under all the circumstances, we find that the trial court's refusal to allow Dr. Nichols to testify may be characterized at most as harmless error.

III. Conclusion

{¶ 61} In the case before us, the trial court expressly found that "[t]he greater weight of the evidence shows that Dr. Bracken met all applicable standards of care" in treating Lips." (Decision, at 11.) Nothing in Dr. Nichols' proffered testimony would have impacted that finding. Accordingly, the trial court's exclusion of Dr. Nichols as a witness did not affect the ultimate disposition of appellant's professional negligence claim, nor did it affect a substantial right of appellant. Assuming, arguendo, that the court's refusal to allow Dr. Nichols to testify was error, that error was harmless.

{¶ 62} For the foregoing reasons, appellant's sole assignment of error is overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

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