[Cite as *White v. Leimbach*, 2010-Ohio-1726.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert N. White et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-674 (C.P.C. No. 03CVA-04-3969)
Warren H. Leimbach, II, M.D.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 20, 2010

Cooper & Elliott, LLC, Charles H. Cooper, Jr. and *Rex H. Elliott*, for appellants.

Reminger Co., LPA, and *Martin T. Galvin*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Dr. Warren H. Leimbach, II, performed a laminectomy/discectomy (back surgery) on appellant, Robert N. White, in March 1998, and again a few months later, after Mr. White slipped and re-injured the same disc. Prior to the second surgery, Dr. Leimbach allegedly failed to disclose the significant additional risks associated with performing the exact same surgery again—that the existing scar tissue from the old surgery would likely complicate the procedure, and the likelihood of lasting pain would be much greater after a second surgery relative to a first procedure. The second surgery left

Mr. White with permanent, chronic pain, which requires him to take heavy narcotic medications, and he alleges that had he known about the known risks associated with the second surgery he would not have chosen to proceed with it. Mr. White ultimately filed suit against Dr. Leimbach in April 2000, but the case was delayed for several years. Trial finally began in June 2009, and at the close of evidence, Dr. Leimbach made a motion for a directed verdict, which the trial court granted.

{¶2} The relevant evidence at trial revealed the following: (a) Dr. Leimbach knew that the second surgery carried a much greater risk of a poor outcome than the first; (b) based on the documentary evidence and the testimony of Mr. White and his wife—who were both present at all medical appointments—Dr. Leimbach did *not* mention the greater risk(s) associated with the second surgery; (c) Mr. White's condition was significantly worse after the second surgery; and (d) the second surgery was the most likely cause of Mr. White's deteriorated condition. At issue here, is whether this evidence, viewed under the proper standard, was sufficient to create a question of fact for the jury. We answer that question in the affirmative, and accordingly we reverse the decision of the trial court.

{¶3} Mr. and Mrs. White assign a single error for our consideration:

> THE TRIAL COURT ERRED WHEN IT GRANTED A DIRECTED VERDICT IN FAVOR OF DEFENDANT AT THE CLOSE OF ALL THE EVIDENCE.

{¶4} Motions for directed verdict are governed by Civ.R. 50(A)(4), which requires a trial court to construe all evidence most strongly in favor of the nonmoving party, and after doing so, determine whether the evidence dictates that the only reasonable conclusion able to be drawn therefrom is adverse to the nonmoving party. See *Goodyear*

Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St.3d 512, 514, 2002-Ohio-2842; *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69. This "reasonable minds" test requires the trial court to discern only whether there exists *any* evidence of substantive probative value that favors the position of the nonmoving party. Id. When deciding a directed verdict motion, the trial court's decision should not involve weighing of the evidence or evaluating the credibility of witnesses; rather, its determination is a question of law: Was there sufficient material evidence at trial to create a factual question for the jury? *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 686–87. "A motion for a directed verdict raises a question of law because it examines the materiality of the evidence, as opposed to the conclusions to be drawn from the evidence." *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119–20, 1996-Ohio-85, citing *Ruta* at 68–69. Accordingly, our review of a trial court's ruling on a motion for directed verdict is de novo. *McConnell*, supra.

{¶5} The tort of lack of informed consent is established when: (1) a physician fails to disclose and discuss material risks or dangers that are inherently associated with a proposed medical treatment or procedure; and (2) the undisclosed risk or danger actually materializes, and is the proximate cause of the patient's injury; if (3) a reasonable person would have declined the treatment or procedure in the event that the physician had properly apprised them of the potential risks involved. *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, syllabus.

{¶6} This is not a medical malpractice case, nor is it a negligence case per se. The tort of lack of informed consent emanates from the common law tort of battery, which is an unconsented, offensive touching. See, e.g., *Anderson v. St. Francis-St. George*

Hosp., Inc. (1996), 77 Ohio St.3d 82, 84; cf. *Canterbury v. Spence* (C.A.D.C. 1972), 464 F.2d 772, 782–83 ("It is the settled rule that therapy not authorized by the patient may amount to a tort—a common law battery—by the physician."); W.E. Shipley, Annotation, *Liability of Physician or Surgeon for Extending Operation or Treatment Beyond that Expressly Authorized* (1957), 56 A.L.R.2d 695, Section 2.

{¶7} In *Nickell*, the plaintiff-patient suffered from a partial paralysis of the arm after undergoing a procedure to relieve thoracic outlet syndrome. The case went all the way to verdict, and the jury found in favor of the defendant-physician. Id. -at 137. The trial court, however, granted the plaintiffs' judgment notwithstanding the verdict ("JNOV") motion, and ordered a new trial on the issue of damages. The jury awarded $0 damages, and the plaintiffs appealed. After reviewing the record, the First District Court of Appeals found that the trial court erroneously granted plaintiff's JNOV motion. The Supreme Court of Ohio affirmed that decision, and in doing so, set forth the prevailing law concerning the tort of lack of informed consent. Ante, ¶5.

{¶8} *Nickell*'s usefulness in our review of this case is two-fold: In addition to providing the applicable and controlling law for the issues herein, its circumstances are also similar to this case because of the trial court in *Nickell* having granted a JNOV motion, while in this case the trial court granted the defendant's motion for a directed verdict. See, e.g., *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679, 1998-Ohio-602; *Ayers v. Woodard* (1957), 166 Ohio St. 138 (holding that the standard for granting a JNOV motion is the same as the one used to sustain a motion for directed verdict).

{¶9} Another key component from *Nickell* that applies to our review of this case was the physician's testimony, in which he denied failing to disclose information regarding material risks or dangers of the procedure to the patient. *Nickell* at 137. In this case, the only evidence regarding whether Dr. Leimbach discussed or disclosed the material risks associated with Mr. White's second back surgery came from Mr. and Mrs. White. (Tr. 250–52; 405–06.) Both of them were present when Dr. Leimbach recommended the second back surgery, and both spouses' testimony was consistent—that Dr. Leimbach referred to the second surgery, quite simply, as a "re-do." Id. According to the Whites, the doctor made no mention of the likely presence of scar tissue, its impact or consequences on the success rate of second surgeries, and the doctor did not disclose any additional risks to them prior to recommending or performing the second surgery. See Id. Mrs. White in fact testified that she specifically asked Dr. Leimbach about whether there were any risks associated with the second surgery, to which she stated that Dr. Leimbach's response was "minimal." (Tr. 406.) Thus, the Whites both testified that Dr. Leimbach did not disclose any additional risks associated with the second surgery, and Dr. Leimbach did not refute that testimony.

{¶10} Dr. Leimbach's office notes tend to corroborate the Whites' testimony, because the office notes fail to mention any disclosure of the additional risks associated with the second surgery to Mr. White. In the month prior to Mr. White's first surgery, Dr. Leimbach dictated the following notes, on February 23, 1998: "I have just seen Robert White in my office. * * * He wants to proceed with a surgical approach. We will get that scheduled as soon as possible. *We went over at length what surgery is all about and he*

wants to proceed with it." (Plaintiff's exhibit No. 1, at 3.) (Emphasis added.) ("office notes"). Prior to performing the second surgery, Dr. Leimbach stated that:

> Mr. White did indeed herniate a disk * * *. Vital signs today noted a blood pressure of 104/64, pulse of 72, respirations of 20 and temperature of 97.3.
>
> *We talked at length today*. The best thing would be to proceed with re-exploration and take the disk out. He is amenable to this. We will schedule that in two weeks at his convenience.

(Plaintiff's exhibit No. 11, at 2.) (Emphasis added.)

{¶11} Although neither example contains specific language that outlines Dr. Leimbach's discussion of risks per se, it is clear from the context in the first example ("and he wants to proceed with it") that the subject of the lengthy discussion was related to pros and cons of having the surgery and the timing of such surgery.

{¶12} The inferences drawn from the office notes are confirmed by the hospital pre-procedure forms, in which on March 10, 1998 Dr. Leimbach signed his name and checked the "yes" box indicating that he had received Mr. White's informed consent. (Plaintiff's exhibit No. 9.) But on the form completed prior to the second surgery, Dr. Leimbach did not indicate that he received Mr. White's informed consent. (Plaintiff's exhibit No. 17.)

{¶13} This exact same finding is duplicated in the hospital's operative reports. In the report from the first surgery, the notations indicate as follows: "The risks of the procedure were explained to the patient, and he requested the procedure after the failure of conservative care." (Plaintiff's exhibit No. 10.) There is no similar notation in the operative report from the second surgery. (Plaintiff's exhibit No. 18.)

{¶14} Although Dr. Leimbach did testify that he obtained Mr. White's informed consent prior to performing the second surgery, the doctor did acknowledge the risks associated with a second laminectomy/discectomy, and testified to his understanding that they are significantly higher with a "re-do" than they are with the same procedure when it is performed for the first time. (Tr. 204–06.)

{¶15} Perhaps the trial court agreed with the Whites insofar as Dr. Leimbach failed to obtain Mr. White's informed consent prior to the second surgery, because in its decision, the court stated: "[T]here just hasn't been sufficient testimony to meet the second element of [*Nickell*]." (Tr. 702.) The second element in *Nickell* is limited to whether the undisclosed risks actually materialized, and caused injury to the patient. See *Nickell* at 136. The trial court did not find a lack of evidence about a failure of informed consent.

{¶16} The evidence before the trial court was more than sufficient to create a question of fact for the jury; in fact, Dr. Leimbach's office notes from two weeks after the surgery were sufficient to establish the second prong of *Nickell*:

> Robert indeed still has a lot of pain in the leg even after the second surgery. I was very disappointed with the second surgery because when I got in there I really found no herniated disk. Everything was flush on the floor of the canal[,] and there is a lot of scar tissue[,] which I had to dissect off the root [*sic*] and it did not surprise me he still has a lot of pain and throbbing that leg and a lot of burning pain in the foot there. * * * *That is what I was afraid of with the scar tissue and the second operation and we just made it worse*. * * *

(Plaintiff's exhibit No. 11, at 3.) (Emphasis added.)

{¶17} Counsel for Dr. Leimbach tries to address the issues here by directing the court's attention to questions about which physicians were qualified as experts. Counsel

argues that since Mr. White knew that there were "no guarantees" with the second surgery, the trial court's ruling should be affirmed. Whether or not Dr. Leimbach made guarantees to Mr. White is irrelevant, because White is not alleging that the results of the second surgery were less than he had hoped for—his claim is based on the fact that the second surgery made his condition worse, and had he known that this was a real possibility, he would not have chosen to have the surgery in the first place. Counsel for appellee's reliance on *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, is misplaced, because that case was a medical negligence case. Its fleeting mention of informed consent was merely dicta. See Id., (citing *Canterbury* at 782–83); cf. *Nickell* at 138. Moreover, even if *Bruni* were controlling, it would not be dispositive of this case because it does not set forth a bright-line rule requiring per se medical expert testimony in every such case:

> The issue as to whether the physician and surgeon has proceeded in the treatment of a patient with the requisite standard of care and skill must *ordinarily* be determined from the testimony of medical experts. 41 American Jurisprudence, Physicians & Surgeons, Section 129; 81 A.L.R.2d 590, 601. It should be noted that there is an exception to that rule in cases where the nature of the case is such that the lack of skill or care of the physician and surgeon is so apparent as to be *within* the *comprehension of laymen* and requires only common knowledge and experience to understand and judge it, and *in such case expert testimony is not necessary*. See Hubach v. Cole (1938), 133 Ohio St. 137, 12 N.E.2d 183, and, generally, Morgan v. Sheppard (1963), Ohio App., 188 N.E.2d 808[.]

Bruni at 130 (Emphasis added.)

{¶18} *Bruni* stands for the proposition that medical expert testimony is *ordinarily* required to prove whether a physician's care did not meet the minimum standard—in medical negligence cases. And in addition to qualifying the rule by inserting *ordinarily* in

the syllabus, the *Bruni* court also carved out a specific exception to the rule, which eliminates the expert testimony requirement altogether in situations when a jury would be capable of understanding the issues without expert testimony. Id; see also *Dawson v. St. Elizabeth Hosp. Med. Ctr.* (Oct. 7, 1998), 7th Dist. No. 97 C.A. 53, 1998 WL 775008, *4.

{¶19} We have already noted that this is not a medical malpractice case, and it does not sound in negligence. Appellee cites this court's decision in *Fernandez v. Ohio State Pain Control Ctr.*, 10th Dist. No. 03AP-1018, 2004-Ohio-6713, for the proposition that *Nickell* also requires expert testimony to prove the existence of any undisclosed material risks and dangers that are typically associated with a surgical procedure. See Id. at ¶15 (quoting *Valerius v. Freeman* (Oct. 19, 1994), 1st Dist. No. C-930658). On the facts of this case, however, our decision in *Fernandez* is inapposite. In this case, it is abundantly clear from the testimony of several physicians—including the actual surgeon who performed the procedure—that the undisclosed material risks and dangers associated with undergoing a second laminectomy/discectomy include the presence of scar tissue, and the likelihood of making the existing pain worse. Even if controlling case law existed that requires expert testimony in lack of informed consent cases, there is no reason why the exception(s) in *Bruni* would not similarly apply. Regardless, the record is replete with evidence that Mr. White's condition was made worse because of the second surgery, and the presence of scar tissue.

{¶20} The only physician who seemed to testify inconsistently with this common viewpoint was Dr. Gary Rea, the defense expert who never treated Mr. White, or had the benefit of examining him, either before or after the second surgery. (Tr. 508.) Dr. Rea gave direct testimony to the jury, and then just 15 to 20 minutes into his cross-

examination, the trial judge dismissed the jury for the afternoon: "It can't happen. We have time constraints as regards to the jury's time." (Tr. 525.) Once the jury was excused on June 24, 2009, they would never *see* Dr. Rea again. Plaintiff's counsel was allowed to continue his cross-examination, but the jury was not able to see its effect or gauge Dr. Rea's demeanor during cross-examination. (Tr. 563–90.)

{¶21} Experts routinely testify via video deposition, or using some other out-of-court medium. However, it is highly irregular for any witness to give live testimony on direct-examination, and then fail to afford opposing counsel with the opportunity for live presentation or cross-examination.

{¶22} Regardless of which party's counsel, if any, qualified each individual physician as an expert to the trial court, our review of the trial transcript and record reveals that each is an expert in his own right. The unfortunate fact that Dr. Leimbach suffered a stroke between the time he performed the surgery on Mr. White and the time he testified at trial does not change the fact that he was a licensed physician when his office notes and hospital records were developed.

{¶23} As noted earlier, Civ.R. 50(A)(4) requires that when a directed verdict is sought, evidence must be construed most strongly in favor of the nonmoving party, including all inferences drawn therefrom. If, after doing so, there is any doubt as to which side is supported by that evidence, the trial court must deny the motion. Given Dr. Leimbach's office notes alone, there is sufficient evidence to create enough doubt as to whether the undisclosed risks of the second surgery actually materialized and caused Mr. White additional pain.

{¶24} Counsel for Dr. Leimbach also argues that another physician—Dr. Michael Miner, who gave the Whites a second opinion prior to them proceeding with the second surgery—informed the Whites about the additional risks associated with the second surgery. (See Appellee's Brief, at 6.) Dr. Miner's testimony was capable of being considered by the jury, but did not erase the contrary evidence of lack of informed consent from Dr. Leimbach for purposes of Civ.R. 50(A).

{¶25} We find that the evidence was sufficient to withstand Dr. Leimbach's directed verdict motion, and we accordingly sustain the sole assignment of error. Having sustained the assignment of error, we vacate the judgment of the Franklin County Court of Common Pleas, and remand this case to the trial court for further appropriate proceedings.

Judgment vacated and remanded
for further proceedings.

SADLER, J., concurs in judgment only.
FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶26} I respectfully dissent. I agree with the majority that questions of fact remain as to the first *Nickell* factor, which asks whether material risks of the second surgery were disclosed to Mr. White. I disagree, however, that questions remain as to the second *Nickell* factor, which asks whether the undisclosed risks materialized and caused injury to Mr. White. Because Mr. White cannot meet all three prongs of the *Nickell* test, in my view, a directed verdict was proper.

{¶27} In a case involving a claim of lack of informed consent, expert testimony is required to establish what the material risks were, whether they materialized, and whether they proximately caused the injury at issue. *Hillman v. Kosnik*, 10th Dist. No. 07AP-942, 2008-Ohio-6303, ¶10, citing *Fernandez v. Ohio State Pain Control Ctr.*, 10th Dist. No. 03AP-1018, 2004-Ohio-6713. "In Ohio, the admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability." *Stinson v. England*, 69 Ohio St.3d 451, 455, 1994-Ohio-35. An "event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." Id.

{¶28} Here, Mr. White contends that he presented expert testimony that the high risk of an unfavorable outcome from the second surgery was not disclosed, that the unfavorable outcome did occur, and that the unfavorable outcome caused his injuries, which include severe chronic pain and swelling and discoloration in his leg. In support, he does not offer his own expert's testimony. Rather, he points to the following three sources: (1) Dr. Leimbach's office note; (2) Dr. Miner's testimony; and (3) Dr. Rea's cross-examination.

{¶29} First, Dr. Leimbach's office notes do not constitute expert testimony. The parties agree that Dr. Leimbach testified as a fact witness, not an expert, at trial. In one post-operative office note, which Mr. White submitted as Exhibit 11, Dr. Leimbach stated that he was "very disappointed" with the second surgery because he found no herniated disk, but did find extensive scar tissue, which he had to dissect. (October 29, 1998 Office Note.) He noted: "That is what I was afraid of with the scar tissue and the second operation and we just made it worse." While certainly evidence that the second surgery

made some aspect of Mr. White's condition worse, the note was not an expression of an opinion by an expert that there is a greater than 50 percent likelihood that the second surgery produced Mr. White's injuries. Therefore, under *Stinson*, it was not admissible as expert testimony for the purpose of proving proximate cause and meeting the second *Nickell* factor.

{¶30} Second, Dr. Miner, while an expert, did not testify that the second surgery caused Mr. White's injuries. Dr. Miner testified that he saw Mr. White in October 1998, and, as was his custom, he would have disclosed the risks associated with the second surgery. Defense counsel asked Dr. Miner whether any of the material risks of the second surgery occurred, and Dr. Miner replied, "I am not aware of any of those risks occurring after either of the surgeries." (Vol. IV Tr. 617.) Dr. Miner also stated that the second surgery did not make the pain worse. (Vol. IV Tr. 619.) When asked whether "in all medical probability, more likely than not," Mr. White would be in pain even without the second surgery, Dr. Miner stated: "Yes." (Vol. IV Tr. 626.) At the end of his direct testimony, Dr. Miner confirmed that his opinions were to a reasonable degree of medical probability and were based on his education, training, and experience, his review of the medical records, and his two examinations of Mr. White.

{¶31} Mr. White notes that, on cross-examination, Dr. Miner testified that his symptoms, which are classic symptoms of causalgia, did not exist before the second surgery and that these symptoms can occur after nerve injury. Dr. Miner agreed with counsel's assumed symptoms and agreed that, given such symptoms, Dr. Leimbach's concern about causalgia would have been justified. Dr. Miner also agreed that Mr. White's severe foot pain shortly after surgery was an indication of nerve damage.

Although Dr. Miner agreed that the foot pain could not be attributed to the fall in August 1998, Dr. Miner indicated that the fall "set him up for this whole terrible outcome that he has had." (Vol. IV Tr. 656.)

{¶32} At no time did Dr. Miner testify that the second surgery caused Mr. White's injuries. On cross-examination, he agreed that Mr. White showed signs of causalgia and nerve damage, but he never stated that, in his medical opinion, the second surgery was the likely cause of these or other injuries, nor did he recant or contradict his earlier opinions. Therefore, Dr. Miner's testimony on cross-examination was not expert testimony that the second surgery was the proximate cause of Mr. White's injuries.

{¶33} Third, Dr. Rea testified that the second surgery did not cause Mr. White's injuries. He stated that, in his opinion, the second surgery did not change anything and that, even if the second surgery had not been performed, Mr. White's condition would be the same. (Vol. III Tr. 507.) He also stated that Mr. White's fall in August 1998 was the cause of his injuries. (Vol. III Tr. 508.)

{¶34} Nevertheless, Mr. White points to the following dialogue during Dr. Rea's cross-examination.

> Q. Doctor, we have very different pain immediately after the October surgery, true?
>
> A. We do have some difference, yes.
>
> Q. That difference cannot simply be attributed to the fall and the tethering, true?
>
> A. True.
>
> Q. That difference has to have occurred somehow, correct?
>
> A. Correct.

> Q. The only event that really takes place between the time of the fall in August, and the time Mr. White wakes up out of anesthesia with that raw pain in his foot, the only event that occurs is the surgery, true?
>
> A. That's correct.
>
> Q. So, it is fair to attribute that raw burning pain to the surgery, is it not?
>
> A. It could be. It could also be a combination of just continued pain from the issue. But, yes, it could be from the surgery.
>
> Q. That is the most likely cause, true, because we didn't have that symptomatology prior to the surgery?
>
> A. Correct.

(Vol. III Tr. 532.)

{¶35} Mr. White points to this last statement, which he interprets as Dr. Rea's agreement that the surgery was the "most likely cause" of his severe foot pain, as expert testimony in support of his claim that the second surgery caused his injuries. When questioned further about the foot pain, however, Dr. Rea stated that Mr. White also had severe foot pain prior to the surgery. He did not recant his earlier testimony that the second surgery did not cause Mr. White's injuries. For example, during this same cross-examination, Dr. Rea stated that "the tethering and the fall together, those are the two things that are most likely to have caused all of his pain." (Vol. III Tr. 530.) Mr. White's counsel asked: "You are talking about the pain that also postdated the October surgery?" (Vol. III Tr. 530.) Dr. Rea answered: "Yes, the long term pain." (Vol. III Tr. 530.)

{¶36} Dr. Rea had also been asked on direct examination, in terms of "the ongoing problems that Mr. White is experiencing, is the cause of those problems the fall or is the cause of these problems the surgery?" (Vol. III Tr. 507-08.) Dr. Rea answered:

"I think, in terms of if you look at the overall picture before the surgery, and the overall picture after the surgery now, I think it is because of the fall." (Vol. III Tr. 508.) Whether Dr. Rea misspoke, misheard the question or answered a hypothetical situation when he later said, "correct," in response to Mr. White's counsel's question, he did not change or recant his expert opinion that the second surgery did not cause Mr. White's injuries.

{¶37} Ohio appellate courts, including this one, have stated that erosion of an expert's opinion " 'due to effective cross-examination does not negate that opinion; rather it only goes to weight and credibility.' " *Heath v. Teich*, 10th Dist. No. 03AP-1100, 2004-Ohio-3389, ¶14, quoting *Galletti v. Burns Internatl.* (1991), 74 Ohio App.3d 680, 684 (Christley, P.J., concurring). "Thus, the party moving for a directed verdict must show that the testimony was resolved in its favor by a direct contradiction, negation, or recantation of the testimony given by the witness on direct examination." *Heath* at ¶14. If the moving party does not show a direct contradiction, negation or recantation of the testimony, "the testimony given on cross-examination only arouses speculation regarding the witness's testimony on direct and leaves a question of fact for the jury to determine. * * * In other words, 'subsequent recantations of certainty on cross-examination do not destroy the admissibility of the testimony, but act as impeachments of the expert's credibility.' " Id., quoting *Galletti* at 685-86 (Ford, J., concurring). Accord *Segedy v. Cardiothoracic and Vascular Surgery of Akron, Inc.*, 182 Ohio App.3d 768, 2009-Ohio-2460, ¶18 (stating that any conflict between an expert doctor's answers on direct examination and answers on cross-examination "may have affected the weight and credibility of his opinions, but did not, alone, serve to recant his prior testimony"); *Lanzone v. Zart*, 11th Dist. No. 2007-L-073, 2008-Ohio-1496, ¶63 (rejecting the appellant's attempt to "selectively choose

portions" of experts' testimony and concluding that, "when read in its entirety, [the experts'] testimony, albeit tested by effective cross-examination, is not tantamount to a recantation").

{¶38} Here, Dr. Rea's testimony on direct examination, offered on behalf of Dr. Leimbach, the defendant, was sufficient to establish a prima facie case as a matter of law that something other than the second surgery caused Mr. White's injuries. Dr. Rea's agreement with one statement by Mr. White's counsel that the surgery was the most likely cause of Mr. White's post-operative foot pain, standing alone, did not negate Dr. Rea's expert opinion that the second surgery had no impact on Mr. White; rather, that statement, if it has any impact at all, goes to the weight and credibility to be afforded Dr. Rea's opinion.

{¶39} Mr. White offers no precedent for his assertion that an isolated, inconsistent statement by a defendant's expert on cross-examination, standing alone, creates a prima facie case for proximate cause on behalf of the plaintiff. While he may have weakened the veracity of the testimony of Dr. Leimbach's experts, Mr. White offered no expert testimony that the second surgery was the proximate cause of his injuries. Because Mr. White failed to meet the second *Nickell* factor, in my view, a directed verdict on behalf of Dr. Leimbach was proper. The majority having reached a different conclusion, I respectfully dissent.