[Cite as *Harper v. Lefkowitz*, 2010-Ohio-6527.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Fred C. Harper,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1090
v.	:	(C.P.C. No. 07CVA02-2613)
Michael S. Lefkowitz, M.D. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
Fred C. Harper,	:	
Plaintiff-Appellant,	:	
		No. 09AP-1116
v.	:	(C.P.C. No. 07CVA02-2613)
Michael S. Lefkowitz, M.D. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 30, 2010

Leeseberg & Valentine, Gerald S. Leeseberg, and *Susie L. Hahn*, for Fred C. Harper.

Lane, Alton & Horst, *LLC*, *Gregory D. Rankin*, and *Ray S. Pantle*, for Michael S. Lefkowitz, M.D., and Orthopaedic & Sports Medicine Center, Inc.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Michael S. Lefkowitz, M.D., and Orthopaedic & Sports Medicine Center, Inc. (collectively referred to as "Dr. Lefkowitz"), defendants-appellants in case No. 09AP-1090,

appeal from a judgment of the Franklin County Court of Common Pleas, in which the trial court granted the motion for judgment notwithstanding the verdict ("JNOV") and motion for new trial, filed by Fred C. Harper, plaintiff-appellant in case No. 09AP-1116. Harper also appeals from the trial court's judgment granting his motion for JNOV and motion for new trial, as well as the court's denial of his pre-trial motion in limine.

{¶2} On November 17, 2003, Dr. Lefkowitz performed a hemiarthroplasty on Harper's shoulder. Generally, Dr. Lefkowitz was to replace Harper's humeral head with a prosthetic head ("implant"). The implant consists of a head attached to a metal shaft that is placed inside the humerus to anchor the implant. Dr. Lefkowitz first removed the humeral head and then reamed the canal of the humerus. Dr. Lefkowitz then inserted a cement restrictor ("restrictor"), which is used to prevent cement from flowing beyond the end of the reamed canal. The restrictor is inserted by using a calibrated inserter rod that is then unscrewed from the restrictor when the restrictor reaches the appropriate depth in the reamed canal. Dr. Lefkowitz then poured cement into the canal. When Dr. Lefkowitz attempted to place the implant, it would not seat. Dr. Lefkowitz then used a flexible reamer to remove any cement and ream out the center of the restrictor. He was then able to seat the implant. Post surgery, Dr. Lefkowitz discovered he had perforated the humeral bone during the reaming procedure, and cement had leaked through the bone and adhered to a nerve. The heat generated from the curing cement damaged the nerve.

{¶3} On February 22, 2007, Harper filed a medical malpractice action against Dr. Lefkowitz and his professional corporation, Orthopaedic & Sports Medicine Center, Inc., seeking damages for pain and loss of use of his right arm and hand. A jury trial commenced on February 19, 2009, before which the court ruled on several pre-trial

motions in limine. On February 26, 2009, the jury found in favor of Dr. Lefkowitz. On March 30, 2009, Harper filed a motion for JNOV and a motion for new trial, both of which the trial court granted on October 22, 2009. Both parties have filed appeals of the trial court's judgment. Dr. Lefkowitz asserts the following assignments of error in case No. 09AP-1090:

> [I.] THE TRIAL COURT ERRED WHEN IT REVERSED THE JURY VERDICT IN FAVOR OF DEFENDANTS AND SUSTAINED PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL.
>
> [II.] THE TRIAL COURT ERRED WHEN IT PRECLUDED DEFENDANTS' MEDICAL EXPERT, RICHARD FISCHER, M.D., FROM RENDERING AN OPINION AS TO THE POSSIBLE EXPLANATIONS FOR WHY THE IMPLANT WOULD NOT PROPERLY SEAT.
>
> [III.] THE TRIAL COURT ERRED WHEN IT ALLOWED PLAINTIFF TO USE DUPLICATIVE TESTIMONY REGARDING THE STANDARD OF CARE FROM MULTIPLE EXPERTS FROM THE SAME SPECIALTY.
>
> [IV.] THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW DEFENDANTS TO PLAY A VIDEO DEMONSTRATION OF THE SAME PROCEDURE THAT WAS PERFORMED ON PLAINTIFF.
>
> [V.] THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW DEFENDANTS TO INTRODUCE EVIDENCE OF SOCIAL SECURITY DISABILITY PAYMENTS RECEIVED BY PLAINTIFF AS A RESULT OF HIS INJURY, PURSUANT TO OHIO REVISED CODE SECTION 2323.41.

{¶4} Harper asserts the following assignments of error in case No. 09AP-1116:

> I. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A NEW TRIAL ON ALL ISSUES, RATHER THAN LIMITING THE NEW TRIAL TO THE ISSUE OF DAMAGES ONLY.

> II. THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING PLAINTIFF-APPELLANT'S MOTION IN *LIMINE*, AND BY PERMITTING APPELLEES TO ARGUE THAT PLAINTIFF-APPELLANT DID NOT UNDERGO AN ADDITIONAL SURGICAL PROCEDURE, THEREBY FAILING TO MITIGATE HIS DAMAGES.

{¶5} Dr. Lefkowitz argues in his first assignment of error that the trial court erred when it reversed the jury verdict in favor of him and sustained Harper's motion for JNOV and motion for a new trial. Civ.R. 59, which governs motions for new trial, states, in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> * * *
>
> (6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;
>
> (7) The judgment is contrary to law[.]

{¶6} Because a trial court has broad discretion in determining whether a jury verdict is against the manifest weight of the evidence, *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 351, a trial court's ruling on a motion for a new trial based upon the weight of the evidence will not be reversed absent an abuse of discretion. *Antal v. Olde Worlde Products, Inc.* (1984), 9 Ohio St.3d 144, 145. Moreover, when a jury's award is supported by some competent, credible evidence going to the essential elements of the case, that award will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. In the area of damages in a personal injury case, neither a reviewing court nor a trial court can substitute its judgment for that of the jury. *Litchfield v. Morris* (1985), 25 Ohio App.3d 42,

44. A trial court's ruling on a motion for a new trial premised upon Civ.R. 59(A)(7), however, presents questions of law reviewed de novo. *O'Day v. Webb* (1972), 29 Ohio St.2d 215; *Ferguson v. Dyer*, 149 Ohio App.3d 380, 2002-Ohio-1442, ¶10, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, paragraph two of the syllabus.

{¶7} Civ.R. 50(B) governs motions for judgment notwithstanding the verdict and provides:

> Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

{¶8} When ruling on a motion for judgment notwithstanding the verdict, a trial court applies the same test as in reviewing a motion for a directed verdict. *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127. A motion for judgment notwithstanding the verdict is used to determine only one issue: whether the evidence is totally insufficient to support the verdict. *McLeod v. Mt. Sinai Med. Ctr.*, 166 Ohio App.3d 647, 2006-Ohio-2206, reversed on other grounds, 116 Ohio St.3d 139. Neither the weight of the evidence nor the credibility of the witnesses is a proper consideration for the court. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275; *Osler* at 347. In other words, if there is evidence to support the non-moving party's side so that

reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Osler*. Appellate review of a ruling on a motion for judgment notwithstanding the verdict is de novo. *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, ¶14.

{¶9} In the present case, Harper argued that the jury's verdict was improper because the trial testimony and evidence was undisputed that Dr. Lefkowitz's conduct fell below the standard of care, in that the doctor placed the restrictor at an inadequate depth in the canal to accommodate the implant. In granting Harper's motion for JNOV and new trial, the trial court stated that it was undisputed that the restrictor did not reach its intended depth, and the only dispute was whether the doctor was negligent in his insertion of the restrictor because it did not reach its proper depth. The trial court found that Dr. Lefkowitz's negligent act was when he failed to place the restrictor at the proper depth, thereby necessitating the use of the reamer, which then resulted in his perforation of the humeral bone. The court concluded that, although the direct injury to Harper occurred when the reamer was used, and such use may not have been negligent, the use of the reamer was an intermediate act that did not displace the original error in measurement as the act of negligence.

{¶10} Dr. Lefkowitz contends herein that, contrary to the trial court's determination, it was not undisputed that the restrictor failed to reach its intended depth. Rather, Dr. Lefkowitz asserts, it was undisputed that the implant did not properly seat, but why it did not properly seat was in dispute. Dr. Lefkowitz maintains he never admitted he fell below the standard of care, and he did not attribute the fact that the implant would not properly seat to a failure on his part to place the cement restrictor at the proper depth. He

also contends his expert witness, Dr. Richard Fischer, never testified that Dr. Lefkowitz failed to place the cement restrictor at the appropriate depth.

{¶11} The testimony at trial pertinent to this issue was as follows. Dr. Lefkowitz testified at trial that he did not use the reamer to push the restrictor down further. Rather, he used the reamer to remove a couple of millimeters of what was blocking the implant from "going down," or seating properly. In retrospect, he believed cement was blocking the implant. He testified that he did not think it was "likely" that the restrictor detached from the inserter rod prior to its intended depth and was blocking the implant because there was nothing obstructing the canal that would have forced the rod off the restrictor, and he also did not believe the inserter rod had been cross-threaded with the restrictor. He said if the rod was cross-threaded, it would have been a mistake on his part. Dr. Lefkowitz read from his deposition taken in February 2005 ("first deposition"), in which he said that the restrictor was not inserted to the appropriate depth and the root cause of the problem was the restrictor not being placed to an adequate depth. He also said in that first deposition that the only plausible explanation he had for the restrictor not being able to be placed to an appropriate depth was that he incorrectly calibrated the depth at which he needed to place it. Dr. Lefkowitz then testified that, in his deposition taken in May 2007 ("second deposition"), he "clarified" that he believed a plug of cement had prematurely hardened slightly below where the implant stem was trying to go, and the cement had blocked the implant from going down. He testified that he believed this cement plug theory immediately after the surgery and conveyed it in his post-operative note dictation.

{¶12} However, Dr. Lefkowitz clearly admitted in his trial testimony that he used the reamer to drill into the restrictor to make a doughnut cavity so there would be more

room for the implant to fit into the cement restrictor. He also admitted that there would be no reason to drill a hole into the restrictor if it were down low enough because it would not be preventing the implant from seating. He agreed that if he had placed the restrictor at the proper depth, which is two centimeters deeper than the length of the implant stem, there would have been no need to drill out the restrictor because the implant would never touch the restrictor. He said he did not experience any premature hardening of the cement the second time he prepared it, and he had prepared it the same way as the first batch. He opined he did not fall below the standard of care in performing the surgery.

{¶13} Dr. Lefkowitz later testified he did not believe he mis-calibrated in placing the restrictor because he had never mis-calibrated a restrictor before, and his procedure had always been sufficient to prevent that in the past. He admitted that, in his first deposition, the cement was still "liquidy" and he did not think the obstruction was the cement. He said in his first deposition that the only thing he could think of that would have obstructed the implant was the restrictor. He said in his first deposition that he was pretty sure that it was the restrictor that was obstructing the implant because it would be the only thing inside the canal. He also said in his first deposition that he was trying to hollow out the restrictor so he could get the implant down.

{¶14} Dr. Lefkowitz then testified other possible reasons as to why the implant would not properly seat were that the restrictor could easily tilt or tip and not set at the desired depth or when he pulled out the insertion rod, it was not fully unscrewed, and it pulled up the restrictor. He testified that, in his second deposition, he clarified that an additional possibility was that a cement plug had prematurely hardened in the canal, thereby preventing the implant from seating. He admitted that he never mentioned the

possibility of the restrictor tilting or tipping or pulling the restrictor out a little by accident until that day's testimony and never mentioned these possibilities in either deposition. He had no proof the cement had prematurely hardened. Dr. Lefkowitz said that neither Dr. William S. Smith nor Dr. C. Alexander Moskwa, Jr., read his second deposition.

{¶15} Dr. William Smith testified he had never heard of a restrictor prematurely detaching from the inserter rod without unscrewing it, and it would be impossible. He opined that Dr. Lefkowitz fell below the standard of care when he failed to place the restrictor far enough down the reamed shaft. He also opined, based upon the x-rays taken, that it was the restrictor that was obstructing Dr. Lefkowitz's effort to implant the stem:

> Q. Do you have an opinion as to whether or not the cement restrictor that was obstructing Dr. Lefkowitz's effort to implant the final stem during the surgery on Mr. Harper?
>
> A. Yes, I do have an opinion that that's what was the cause of it.

(Tr. Vol. 1, 228.) Dr. Smith noted that the x-rays showed that the restrictor was placed about one-half inch too shallow. He testified that he knew this because the x-rays showed the cement ended about one-half inch above the end tip of the implant, and the reason the cement ended in that place was because the restrictor plugged the reamed canal and stopped it from going any further. Dr. Smith testified that if a surgeon misplaces a cement restrictor at an inadequate depth, it is the fault of the surgeon.

{¶16} Dr. Moskwa testified he agreed with most everything said in Dr. Lefkowitz's first deposition testimony, including that the depth of the cement restrictor was inadequate. He believed the restrictor was obstructing the shaft because Dr. Lefkowitz failed to place it at the appropriate depth.

{¶17} Dr. Raymond Kobus testified that, based upon the x-rays, the cement inside the humerus canal stopped about two centimeters short of the end of the implant.

{¶18} Dr. Richard Fischer testified that, to remedy the inability of the implant to seat fully, Dr. Lefkowitz decided to ream out part of the restrictor. When Dr. Fischer was asked to assume that Dr. Lefkowitz "believed" he placed the restrictor at the appropriate depth, he opined that this met the standard of care; however, he later testified that the restrictor must actually be deployed to the appropriate depth to comply with the standard of care. Dr. Fischer testified that the failure to place the restrictor to the appropriate depth is an operative error that is below the standard of care. Dr. Fischer further testified that, if Dr. Lefkowitz had placed the cement restrictor at the appropriate depth and discovered it, none of the later actions would have taken place. Dr. Fischer reiterated several times that the reason Dr. Lefkowitz used the reamer was to ream the restrictor.

{¶19} As explained above, in the present case, Dr. Lefkowitz contends that it was not undisputed that the cement restrictor failed to reach its intended depth, he never admitted he fell below the standard of care, he did not attribute the fact that the implant would not properly seat to a failure on his part to place the cement restrictor at the proper depth, and Dr. Fischer never testified Dr. Lefkowitz failed to place the cement restrictor at the appropriate depth.

{¶20} Initially, the testimony was clear that the failure to place a cement restrictor at the proper depth to accommodate an implant is below the standard of care. Dr. Smith testified that, when a surgeon misplaces a cement restrictor at an inadequate depth, it is the fault of the surgeon and below the standard of care. Likewise, Dr. Fischer testified that a cement restrictor must be deployed to the appropriate depth to comply with the

standard of care, and failure to place the restrictor to the appropriate depth is an operative error that is below the standard of care. There was no other testimony disputing these opinions. Thus, if Dr. Lefkowitz failed to place the restrictor at the proper depth, he fell below the standard of care.

{¶21} On that issue, Harper argues that it was undisputed that the x-rays showed the cement restrictor was not placed far enough down the shaft of the humerus to accommodate the implant. We agree. Dr. Smith testified that the x-rays showed it was the restrictor that was obstructing Dr. Lefkowitz's effort to implant the stem. Dr. Smith explained that the x-rays showed that the cement ended about one-half inch above the bottom tip of the implant, and the cement ended in this location because the cement restrictor stopped it from flowing any further. Although the cement restrictor was not visible on the x-ray because it is radiolucent, he knew it was there because there was a clearly demarcated void at that location and the cement stopped at that precise location. Dr. Kobus likewise testified that the x-rays showed that the cement inside the canal stopped about two centimeters short of the end of the implant. No evidence was presented by Dr. Lefkowitz to dispute this testimony and radiographic evidence, and none of Dr. Lefkowitz's experts offered any other interpretation of the x-rays. Thus, there was no evidence presented to refute that the x-ray images showed that the tip of the implant extended beyond the cement restrictor one to two centimeters. Therefore, the evidence presented at trial affirmatively demonstrated the cement restrictor was at a depth too shallow to accommodate the implant.

{¶22} Furthermore, all of the witnesses, including Dr. Lefkowitz and his own expert, Dr. Fischer, testified that Dr. Lefkowitz reamed a "doughnut," or hole, in the

restrictor to make the implant seat properly. Dr. Lefkowitz stated in his testimony that he used the reamer to drill into the restrictor to make a doughnut cavity so there would be more room for the implant to fit into the cement restrictor. He also admitted that there would be no reason to drill a hole into the restrictor if it were down low enough because it would not be preventing the implant from seating. He agreed that, if he had placed the restrictor at the proper depth, which is two centimeters deeper than the length of the implant stem, there would have been no need to drill out the restrictor because the implant would never touch the restrictor. Likewise, Dr. Fischer testified that, to remedy the inability of the implant to seat fully, Dr. Lefkowitz reamed out part of the restrictor, and he reiterated several times throughout his testimony that the reason Dr. Lefkowitz used the reamer was to ream the restrictor. These admissions by Drs. Lefkowitz and Fischer support Harper's premise that it was the misplaced restrictor that was preventing the implant from seating at the proper depth.

{¶23} Dr. Lefkowitz presented other possibilities as to why the restrictor would not fully seat, including that a plug of cement had prematurely hardened slightly below where the stem was trying to go, the restrictor tilted, and when he pulled out the insertion rod it pulled up the restrictor because it was not fully unscrewed. Eventually, Dr. Lefkowitz seemed to discount all of these alternative explanations, except for the prematurely hardened cement plug theory. He testified that he did not think it was "likely" that the cement restrictor detached from the inserter rod prior to its intended depth and was blocking the implant, and he clearly admitted he did not believe that this had happened here because there was nothing obstructing the canal that would have forced the rod off the restrictor. He also said he did not believe the inserter rod had been cross-threaded

with the restrictor. Dr. Smith agreed and said it would have been impossible for the restrictor to spontaneously detach from the inserter rod because it takes six revolutions to unscrew the rod. However, even if there did exist a plug of prematurely hardened cement, this does not explain away the fact that the restrictor was still placed too shallow. Dr. Lefkowitz's contention throughout trial was that there existed a cement plug *above* the restrictor. If there was a cement plug above the restrictor, and this was the only obstruction keeping the implant from seating, there would have been no need to ream a hole in the restrictor, which would have been below the hypothetical cement plug. As explained above, Drs. Lefkowitz and Fischer both testified that Dr. Lefkowitz reamed a "doughnut" or hole in the restrictor in order to accommodate the implant. Thus, whether there was a plug of prematurely hardened cement above the restrictor is immaterial and an illogical alternative theory, given the x-rays and testimony.

{¶24} Dr. Lefkowitz also contends the trial court erred when it precluded his testimony as to alternative causes for the failure of the implant to properly seat. Dr. Lefkowitz asserts that, apparently, the trial court disregarded his testimony as to the various alternative explanations for why the implant would not seat because he did not express them in terms of probability. The trial court did not make this finding in its decision granting the motions for JNOV and new trial. Rather, the trial court found that Dr. Lefkowitz admitted he had no knowledge that any of the alternative reasons regarding why the implant would not seat actually occurred; thus, it was mere speculation as to the probability of those reasons occurring. The trial court's ruling, in this respect, seemed to be a comment on the weight to be given this testimony and its credibility due to the speculative nature of the alternative reasons rather than an evidentiary ruling that it was

not based upon a reasonable degree of medical probability. Dr. Lefkowitz cannot expect to thwart a motion for JNOV and new trial based upon speculative testimony without other supporting factual evidence tending to demonstrate the reliability of that testimony. Without any indication as to how likely any of these alternative situations were likely to have occurred and with no factual basis underlying any of these alternative theories, this testimony was of no aid to a trier of fact.

{¶25} Dr. Lefkowitz further argues that, even if the restrictor failed to reach its intended depth, such failure was not the proximate cause of Harper's radial nerve injury. Dr. Lefkowitz asserts that the injury was caused by cement leaking through the perforation in the humeral bone, and the perforation did not occur during the deployment of the cement restrictor. We disagree with Dr. Lefkowitz's contention and adopt the trial court's analysis of this issue. Although the injury was actually caused by the reamer perforating the bone and not the misplaced restrictor, and Dr. Lefkowitz may have used the reamer in a non-negligent manner, Dr. Lefkowitz is still responsible for any damages resulting from the original act of negligence, which was his failure to place the restrictor at the proper depth.

{¶26} "Proximate causation" has been described as " 'some reasonable connection between the act or omission of the defendant and the damage the plaintiff has suffered.' " *Marsh v. Heartland Behavioral Health Ctr.*, 10th Dist. No. 09AP-630, 2010-Ohio-1380, ¶40, quoting Prosser, Law of Torts (5 ed.1984) 263, Section 41. " '[T]he mere fact that the intervention of a responsible human being can be traced between the defendant's alleged wrongful act and the injury complained of does not absolve him upon the ground of lack of proximate cause, if the injury ensued in the ordinary course of

events, and if the intervening cause was set in motion by the defendant.' " *Mudrich v. Standard Oil Co.* (1950), 153 Ohio St. 31, 38, quoting *Mouse v. Central Sav. & Trust Co.*, 120 Ohio St. 599, syllabus. Furthermore,

> [T]he general rule is that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary course of events, though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated to produce the injurious results. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and every intermediate result is to be considered in law as the proximate result of the first wrongful cause. The question always is: Was there any unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Id., quoting *Mouse* at 606. (Internal quotations omitted.)

{¶27} In addition, "[w]hether an intervening act breaks the causal connection between negligence and injury depends upon whether that intervening cause was reasonably foreseeable by the one who was guilty of the negligence. If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to some one." Id. at

39, citing *Neff Lumber Co. v. First Natl. Bank of St. Clairsville, Admr*. (1930), 122 Ohio St. 302, 309.

{¶28} In the present case, any non-negligent use of the reamer was an intervening cause; however, the use of the reamer was set into motion by the original negligent act, i.e., the failure to place the restrictor at the appropriate depth, and Dr. Lefkowitz is responsible for all natural consequences arising from that original wrongful act. On this point, Dr. Fischer testified that, if Dr. Lefkowitz had placed the cement restrictor at the appropriate depth or had discovered it was at an inappropriate depth, none of the later remedial actions would have been necessary. Therefore, we concur with the trial court's conclusion that Harper's injury was the natural consequence of Dr. Lefkowitz's negligent failure to place the restrictor at the proper depth, and Dr. Lefkowitz's failure, in this respect, was the proximate cause of Harper's injury.

{¶29} For all the forgoing reasons, we find the trial court did not err when it granted Harper's motion for JNOV based upon a finding that Dr. Lefkowitz failed to place the cement restrictor at the appropriate depth inside the humeral shaft to accommodate the entire length of the implant. Therefore, Dr. Lefkowitz's first assignment of error is overruled.

{¶30} Dr. Lefkowitz argues in his second assignment of error that the trial court erred when it precluded his medical expert, Dr. Fischer, from rendering an opinion as to the possible reasons for why the implant would not properly seat because he could not state his opinion to a reasonable degree of medical probability. A trial court's ruling as to the admission or exclusion of expert testimony is within its broad discretion and will not be disturbed absent an abuse of discretion. *Biro v. Biro*, 11th Dist. No. 2006-L-068, 2007-

Ohio-3191, ¶28, citing *State v. Armstrong*, 11th Dist. No. 2001-T-0120, 2004-Ohio-5635, ¶52, citing *State v. Tomlin* (1992), 63 Ohio St.3d 724, 728.

{¶31} Here, Dr. Lefkowitz asserts that, contrary to the court's ruling, Dr. Fischer's testimony did not need to be couched in terms of probability because it went to the standard of care and not causation. However, even if we were to assume arguendo the trial court erred when it excluded Dr. Fischer's testimony on alternative causes, any error would have been harmless insofar as the granting of the JNOV and new trial motions were concerned. Outside the presence of the jury, the trial court asked Dr. Fischer what his possible explanations were for the implant not properly seating, and Dr. Fischer gave the following theories: (1) Dr. Lefkowitz erred in his measurement and the restrictor did not reach its proper depth; (2) Dr. Lefkowitz broke the restrictor when he was placing it; (3) a cement mass had prematurely hardened, preventing the restrictor from going further down the shaft; and (4) a piece of bone or other material fell down after the cement restrictor was placed. None of these theories controvert the x-ray images that show the bottom tip of the implant extending one to two centimeters beyond the cement and restrictor. In addition, we have already addressed the logical flaw with the theory of a prematurely hardening cement plug. Likewise, any theory that a piece of bone or other material fell down on top of the restrictor after it was placed suffers from the same logical defect as the cement plug theory. In addition, even if the restrictor broke, Dr. Fischer testified the failure of a doctor to place the restrictor at the proper depth is below the standard of care, not to mention, Dr. Fischer readily admitted that he had absolutely no evidence that the restrictor had broken in this case; additionally, Dr. Smith testified he had never heard of the inserter rod perforating the restrictor upon insertion, and, in fact, it

would be impossible. Therefore, because none of these possible reasons for the implant's inability to properly seat would have affected the outcome of the trial court's decision granting Harper's motion for JNOV and new trial, we find any error was harmless and not prejudicial. For these reasons, we overrule Dr. Lefkowitz's second assignment of error.

{¶32} Dr. Lefkowitz argues in his third assignment of error that the trial court erred when it allowed Harper to use duplicative testimony regarding the standard of care from multiple experts from the same specialty. Evid.R. 403(B) provides that relevant evidence is not admissible if its probative value is substantially outweighed by consideration of undue delay or needless presentation of cumulative evidence. Furthermore, a trial court has the discretion to exclude expert testimony where the testimony would not assist the trier of fact. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, paragraph three of the syllabus. Again, we note that the decision of whether or not to admit evidence rests within the sound discretion of the trial court, and we will not disturb that decision absent an abuse of that discretion.

{¶33} Here, Dr. Lefkowitz contends that Drs. Moskwa and Smith both provided testimony as to the appropriate standard of care for an orthopedic surgeon, and there was no probative value to having two equally qualified experts testify about the same issue. However, it is axiomatic that an appellant, in order to secure reversal of a judgment against him, must not only show some error, but must also show that that error was prejudicial to him. *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110. Here, Dr. Lefkowitz has failed to show any prejudicial effect of the trial court's ruling. Indeed, the jury found in favor of Dr. Lefkowitz, thereby rendering any error non-prejudicial for purposes of the trial. Even if the trial court did err in this respect, apparently the danger of presenting

cumulative evidence did not manifest. Therefore, we overrule Dr. Lefkowitz's third assignment of error.

{¶34} Dr. Lefkowitz argues in his fourth assignment of error that the trial court erred when it refused to allow him to play a video demonstration of the same procedure that he performed on Harper. At trial, Dr. Lefkowitz sought to play a narrated video showing him performing a hemiarthroplasty on a cadaver arm. The trial court granted Harper's motion in limine and prohibited Dr. Lefkowitz from playing the video during trial. Again, the decision of whether or not to admit evidence rests within the sound discretion of the trial court. Here, however, Dr. Lefkowitz cannot show any prejudicial impact, given the jury found in Dr. Lefkowitz's favor at trial. Dr. Lefkowitz also does not argue that the video would have aided his defense of Harper's motions for JNOV and new trial, related to any of the issues pertinent to those motions, or rebutted any of the conclusions reached by the trial court in the granting of such motions. Therefore, because we fail to see any prejudicial impact in the trial court's refusal to allow him to play the video demonstration, under these circumstances, we must overrule Dr. Lefkowitz's fourth assignment of error.

{¶35} Dr. Lefkowitz argues in his fifth assignment of error that the trial court erred when it refused to allow him to introduce evidence of social security disability payments received by Harper as a result of his injury pursuant to R.C. 2323.41. Dr. Lefkowitz admits that he is not asking the court to reverse the jury verdict, as the verdict was in his favor. Dr. Lefkowitz asserts that his argument is not about looking back at what the court should have done during the first trial, but looking forward to what the trial court should do upon retrial. However, this court addresses only controversies that seek a correct disposition of

the matter on appeal. To address this issue would result in an advisory opinion, which this court is loathe to do. See *Cascioli v. Cent. Mut. Ins. Co.* (1983), 4 Ohio St.3d 179, 183. See also *Barhorst v. Heitkamp* (Mar. 3, 1982), 3d Dist. No. 17-81-15 (any conclusions we would make on the issues raised by this assignment would be in the nature of advisory opinions and would tend to invade the province of the trial judge sitting in retrial of the facts). Therefore, we decline to issue an opinion on an issue that does not affect the case before us. Dr. Lefkowitz's fifth assignment of error is overruled.

{¶36} Harper argues in his first assignment of error that the trial court abused its discretion when it ordered a new trial on all issues, rather than limiting the new trial to the issue of damages only. A new trial may be granted on all or part of the issues. Civ.R 59(A). Harper asserts that the issues of negligence and causation were indisputable as a matter of law and to allow those issues to be re-litigated in a new trial would give Dr. Lefkowitz an unfair opportunity to repackage his defense. We agree. In *Mast v. Doctor's Hosp. N.* (1976), 46 Ohio St.2d 539, the Supreme Court of Ohio held that "App.R. 12(D), in conjunction with Civ.R. 42(B), authorizes a Court of Appeals to order the retrial of only those issues, claims or defenses the original trial of which resulted in prejudicial error, and to allow issues tried free from error to stand." Id. at 541. New trials on the issue of damages only are granted when liability is uncontested, clear, affirmatively established or supported by the weight of the evidence. *Couture v. Toledo Clinic, Inc.*, 6th Dist. No. L-07-1277, 2008-Ohio-5632, ¶33, citing *Iames v. Murphy* (1995), 106 Ohio App.3d 627, 633. See also *Stojkovic v. Avery & Thress, M.D., Inc.* (May 28, 1999), 1st Dist. No. C-970279, citing *Mast* and *Iames* (when liability is not an issue and liability is clear and affirmatively established, a new trial on damages only is proper); *Boldt v. Kramer* (May 14, 1999), 1st

Dist. No. C-980235 (where the issue of liability is clear, the cause may be remanded for a determination of damages only).

{¶37} In the present case, we have found above that the trial court's determination to grant JNOV and a new trial because Dr. Lefkowitz failed to place the restrictor at an adequate depth was proper. We first found Drs. Smith and Fischer provided uncontroverted testimony that the failure to place a restrictor at the proper depth to accommodate an implant is below the standard of care. We then concluded Dr. Lefkowitz failed to present any evidence at trial to explain the conclusive radiographic evidence showing he placed the restrictor too high in the humeral canal to allow the implant to seat. Harper having presented the testimonies of Drs. Smith and Kobus and the x-rays in support of this issue, and Dr. Lefkowitz having presented no evidence or testimony to refute the radiographic evidence and the interpretations thereof by Drs. Smith and Kobus, Harper affirmatively established that Dr. Lefkowitz breached his duty to place the restrictor at the proper depth. With regard to proximate cause, we concluded above that, although the immediate cause of Harper's injury was cement leaking onto the radial nerve through a perforation Dr. Lefkowitz reamed in Harper's humeral bone, and that intermediate action may have been performed non-negligently, the original cause of the injury was Dr. Lefkowitz's negligent failure to deploy the restrictor to the proper depth. Therefore, we found Dr. Lefkowitz was responsible for any damage flowing and resulting from the original act of negligence.

{¶38} Accordingly, having granted a judgment notwithstanding the verdict, the trial court determined the evidence at trial proved the elements of duty, breach, and causation. On appeal, we have confirmed that the trial court's ruling on these issues was free from

error; thus, we should allow them to stand. See *Mast* at 541. To allow Dr. Lefkowitz to relitigate the issue of liability when he failed to present any evidence to controvert the trial court's findings on this issue at the first trial would be unfairly prejudicial to Harper. Finding no error in the trial court's determination that Dr. Lefkowitz breached the standard of care and that breach proximately caused Harper's injury, we remand the instant cause for a new trial on the issue of damages only. Therefore, Harper's first assignment of error is sustained.

{¶39} In his second assignment of error, Harper argues that the trial court abused its discretion when it denied his motion in limine and permitted Dr. Lefkowitz to argue that Harper did not undergo an additional surgical procedure, thereby failing to mitigate his damages. However, as we have remanded the matter for a retrial on damages only, any determination of this issue would be premature. We decline to render an advisory opinion and usurp the trial court's authority in this respect. Therefore, Harper's second assignment of error is overruled.

{¶40} Accordingly, Dr. Lefkowitz's five assignments of error are overruled, Harper's first assignment of error is sustained, Harper's second assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part. This cause is remanded to that court for a hearing as to damages only, and other proceedings consistent with this decision.

Judgment affirmed in part and reversed in part; cause remanded.

BRYANT and McGRATH, JJ., concur.

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