[Cite as *Withers v. Mercy Hosp. of Fairfield,* 2010-Ohio-6431.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

SHIRLEY WITHERS, Executrix of the Estate of Gary Lee Withers,	:	
	:	CASE NO. CA2010-02-033
Plaintiff-Appellant,	:	O P I N I O N
	:	12/29/2010
- vs -	:	
	:	
MERCY HOSPITAL OF FAIRFIELD, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV07-05-1837

Goodson & Company, Ltd., Brett C. Goodson and Stephanie Day, 110 East Eighth Street, Suite 200, Cincinnati, Ohio 45202-2132, for plaintiff-appellant

Rendigs, Fry, Kiely & Dennis, LLP, Karen Carroll, PNC Center, 201 East Fifth Street, Suite 800, Cincinnati, Ohio 45202 for defendants-appellees, Mercy Hospital of Fairfield, S. Seeger, R.N. and M. Natale, R.N.

Jack C. McGowan, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant, Seshendra Chirumamilla, M.D., and defendant B. Williams CRNA

POWELL, J.

{¶1} Plaintiff-appellant, Shirley Withers, Executrix of the Estate of Gary Lee Withers, decedent, appeals from a judgment of the Butler County Common Pleas

Court entered in favor of defendants-appellees, Mercy Hospital of Fairfield, Shari Seeger, R.N., Mary Natale, R.N., and Seshendra Chirumamilla, M.D., following a jury trial on appellant's medical malpractice/wrongful death claim. We reverse.

{¶2} On May 15, 2006, decedent underwent emergency abdominal surgery at Mercy Hospital. Following the surgery, decedent was taken to the post anesthesia care unit. Decedent's physicians, including his anesthesiologist, Dr. Chirumamilla, decided to keep him anesthetized and on a ventilator overnight. However, decedent soon developed complications during his stay in the PACU, and he never regained consciousness. Decedent died on May 20, 2006.

{¶3} On May 11, 2007, appellant, who is decedent's widow and the executrix of his estate, brought a medical malpractice/wrongful death claim against appellees in the Butler County Common Pleas Court, alleging that decedent's death was caused by appellees' failure to ensure that he was adequately ventilated while he was in the PACU. In December 2009, a trial was held on appellant's claim. The jury returned a verdict in favor of appellees, and the trial court entered judgment for them, accordingly.

{¶4} Appellant now appeals, raising seven assignments of error, which we shall address in an order of our choosing.

{¶5} Assignment of Error No. 5:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT ALLOWED EVIDENCE OF MR. WITHERS' SMOKING, ALLEGED NONCOMPLIANCE WITH HIS HEALTH CARE PROVIDERS, AND HIS BEING OVERWEIGHT AS PROXIMATELY CAUSING HIS DEATH."

{¶7} Appellant argues the trial court abused its discretion by admitting

evidence of decedent's smoking and obesity to show that decedent's own conduct proximately caused his death. We find this argument unpersuasive.

{¶8} The decision whether to admit relevant evidence is within a trial court's sound discretion, and the trial court's decision will not be reversed absent an abuse thereof. *Kelley v. Ryan,* Warren App. No CA2009-07-104, 2010-Ohio-1514, ¶12. A trial court abuses its discretion only if its decision is unreasonable, arbitrary or unconscionable. Id.

{¶9} Appellant presented testimony from Dr. Richard M. Watkins, M.D., an anesthesiologist, who testified that decedent's death was caused by appellees' failure to ensure that decedent received adequate ventilation during his stay in the hospital's PACU. Dr. Watkins acknowledged that decedent had been a three-pack per day cigarette smoker and had a history of heart problems, but testified that decedent had "stable coronary disease" at the time of his abdominal surgery. In response, Appellees presented testimony from several experts, including Dr. Steven J. Lewis, M.D., who testified that, as a result of decedent's severe coronary artery disease and chronic lung disease, both of which, according to Dr. Lewis, were caused by decedent's smoking, the stress of the emergency abdominal surgery was too great for decedent's body to withstand, thus precipitating his myocardial ischemia (i.e., decedent's heart became deprived of oxygenated blood) and eventual death. Appellees also used decedent's history of smoking and obesity to mitigate any economic loss that appellant claimed she would suffer as a result of decedent's death. Because appellees used the evidence of decedent's history of smoking and obesity for relevant purposes, the trial court did not abuse its discretion in admitting that evidence.

{¶10} Appellant has cited *Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc.,* 182 Ohio App.3d 768, 2009-Ohio-2460. However, that case is readily distinguishable from this one. *Segedy* involved the issue of comparative or contributory negligence. In that case, the jury found that a surgeon proximately caused Christina Segedy's death by taking too long to complete a surgical procedure and by transferring her from the operating room before she was stable. However, the jury also found that Segedy was negligent for smoking and failing to follow her physician's advice, and therefore assigned 22 percent comparative negligence to her. The trial court reduced Segedy's damages award by that amount. The court of appeals reversed the jury's decision to reduce Segedy's award for her alleged comparative negligence, finding that the evidence did not support a finding that Segedy had been comparatively negligent. As stated in *Segedy* at ¶61-62:

{¶11} "To prove the affirmative defense of contributory negligence, the defendant must prove that the plaintiff breached a duty, proximately causing her own injury. Thus, the plaintiff's own 'want of ordinary care *** [must have] combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred.' *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, 226 ***. In medical-negligence cases, 'such negligence must be contemporaneous with the malpractice of the physician.' *Lambert v. Shearer* (1992), 84 Ohio App.3d 266, 284 ***; see, also, *Viox v. Weinberg,* 169 Ohio App.3d 79, 2006-Ohio-5075 *** at ¶12-14 (in missed-diagnosis case, patient's failure to follow doctor's advice to have a second chest x-ray in year following defendant doctor's negligent reading of first x-ray was not contemporaneous with defendant's negligence). Therefore, 'it is improper to suggest

*** that the negligent conduct of the patient prior to coming under the care of the defendant physician could serve to constitute [contributory patient] negligence.' *Lambert,* 84 Ohio App.3d at 284 *** (physician could not base contributory-negligence defense on patient's 30-year history of smoking, because physician accepted the patient for treatment 'as he was')."

{¶12} At the close of evidence in this case, the trial court instructed the jury that while they had heard evidence that decedent "had a history of smoking and being overweight[,]" they were "prohibited from considering whether or not [decedent] contributed to *** or was at fault in *** causing his medical condition and death by smoking or being overweight before coming under the care of the [appellees]." Thus, unlike *Segedy*, the question of contributory or comparative negligence was not at issue in this case.

{¶13} As a result, appellant's fifth assignment of error is overruled.

{¶14} Assignment of Error No. 1:

{¶15} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO GIVE THE PROPER STANDARD OF CARE JURY INSTRUCTION."

{¶16} Appellant argues the trial court committed reversible error by failing to properly instruct the jury on the standards of care applicable to Dr. Chirumamilla and Nurses Seeger and Natale. We agree.

{¶17} "When considering the appropriateness of a jury instruction, or when a specific jury instruction is in dispute, a reviewing court must examine the instructions as a whole. [*Enderle v. Zettler,* Butler App. No. CA2005-11-484, 2006-Ohio-4326,] ¶36; *Coyne* [*v. Stapleton,* Clermont App. No. CA2006-10-080, 2007-Ohio-6170,] ¶25.

'If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled.' *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410, citing *Ohio Farmers Ins. Co. v. Cochran* (1922), 104 Ohio St. 427. 'Moreover, misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party.' *Wozniak* at 410." *Silver v. Jewish Home of Cincinnati,* Warren App. No. CA2010-02-015, 2010-Ohio-5314, ¶81.

{¶18} The trial court issued the following instruction to the jury regarding the standard of care Dr. Chirumamilla owed to decedent:

{¶19} "The existence of a physician/patient relationship places on the physician a duty to act as would a physician of ordinary skill, care and diligence under like or similar conditions or circumstances. This is known as the standard of care.

{¶20} "The standard of care is to do those things which a reasonably careful physician would do and to refrain from doing those things which a reasonably careful physician would not do.

{¶21} "A specialist is a physician who holds himself out as a [sic] specially trained, skilled and qualified in a particular branch of medicine or surgery. The standard of care for a physician is that of a reasonable specialist practicing medicine in that same specialty regardless of where he practices.

{¶22} "The required standard of care is the same throughout the United States. A specialist in any one branch has the same standard of care as all other

specialists in that branch. Dr. Chirumamilla holds himself out to be a specialist in anesthesiology. *You must determine the standard of professional learning, skill and care required of Dr. Chirumamilla only from the opinions of the various physicians and experts, including the defendant himself, who testified as expert witnesses in this case as to such a standard.*

{¶23} *"You must not attempt to determine the standard of care or skill from any personal knowledge, experience or by any other means.* Although some other physician might have used a method of treatment different from that used by Dr. Chirumamilla in providing [decedent's] post-operative care, this circumstance does not, by itself, prove that Dr. Chirumamilla was negligent.

{¶24} "The mere fact that another physician may or may not have used an alternative method of treatment is not by itself proof of negligence. You are to decide whether the medical care provided by Dr. Chirumamilla to [decedent] was reasonable and in accordance with the standard of care required of an anesthesiologist.

{¶25} "If you find by the greater weight of the evidence that Dr. Chirumamilla failed to meet the applicable standard of care in his treatment of [decedent], then you may find that Dr. Chirumamilla was negligent.

{¶26} "On the other hand, if you find by the greater weight of the evidence that Dr. Chirumamilla acted within the applicable standard of care in his treatment of [decedent], then you may not find that Dr. Chirumamilla was negligent." (Emphasis added.)

{¶27} The trial court issued similar instructions to the jury regarding the standard of care that Nurses Seeger and Natale owed to decedent.

{¶28} The trial court's instructions to the jury on the standard of care that Dr.

Chirumamilla and Nurses Seeger and Natale owed to decedent closely track the standard-of-care instructions for physicians and nurses that are recommended in Ohio Jury Instructions (2010) CV 417.01, 277-280, but deviated from them in one significant respect by including the language, "You must determine the standard of professional learning, skill and care required of Dr. Chirumamilla *only* from the opinions of the various physicians and experts, including [Dr. Chirumamilla] himself, who testified as expert witnesses in this case as to such a standard[,]" and "You must not attempt to determine the standard of care or skill from any personal knowledge, experience *or by any other means.*" (Emphasis added.) This same language was used in the standard-of-care instruction pertaining to Nurses Seeger and Natale.

{¶29} Appellant argues the trial court erred by instructing the jury that they "may *only* consider expert testimony" in determining whether Dr. Chirumamilla or Nurses Seeger and Natale breached the standard of care they owed to decedent and "nothing else[.]" She asserts that this instruction is "not the Ohio jury instruction or a correct statement of the law[,]" and that, according to this instruction, "the jury was not allowed to consider the medical records, admissions made to the family by the parties, or any other admissible evidence that came in during the trial on the issue of the standard of care." She concludes by asserting that "it is more probable than not the jury was misled by the standard of care instructions."

{¶30} Initially, as appellees point out, the trial court did *not* instruct the jury that they may only consider expert testimony in determining whether Dr. Chirumamilla or Nurses Seeger and Natale *breached* the standard of care, as appellant alleges, but rather, the jury must determine the standard of care only from the opinions of the various experts who testified as to such standard, including Dr.

Chirumamilla himself. However, we agree with appellant that the trial court's instruction probably misled the jury and that appellant's substantial rights were prejudicially affected as a result. *Silver,* 2010-Ohio-5314 at ¶81; and *Wozniak*, 90 Ohio App.3d at 410.

{¶31} Appellees argue the portion of the trial court's standard-of-care instruction being challenged by appellant "accurately reflects the means by which medical malpractice must be established under [Ohio] law." In support, appellees cite *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 130-131, in which the court stated that "[f]ailure to establish the recognized standards of the medical community has been fatal to the presentation of a prima facie case of malpractice" and that "[p]roof of the recognized standards must necessarily be provided through expert testimony." However, when the disputed portion of the trial court's standard-of-care instruction is examined in context, we believe it is probable, and not just possible, that the jury interpreted that portion of the instruction as requiring them to determine *both* the standard of care, as well as the question of whether the standard of care was breached *only* from the opinions of the various experts who testified as to that standard.

{¶32} The trial court instructed the jury that, in order to find Dr. Chirumamilla, Nurse Seeger or Nurse Natale negligent, they had to find that the physician or nurses had "failed to meet the required standard of care." The trial court then defined the term "standard of care" as a physician's "duty to act as would a physician of ordinary skill, care and diligence under like or similar conditions or circumstances" and "to do those things which a reasonably careful physician would do and to refrain from doing those things which a reasonably careful physician would not do." Shortly thereafter,

the trial court instructed the jury, "You must determine the standard of professional learning, skill and care required of Dr. Chirumamilla *only* from the opinions of the various physicians and experts, including [Dr. Chirumamilla] himself, who testified as expert witnesses in this case as to such a standard[,]" and "You must not attempt to determine the standard of care or skill from any personal knowledge, experience *or by any other means.*" The trial court issued a similar instruction regarding Nurses Seeger and Natale.

{¶33} While appellees assert that there is a difference between "determining the standard of care" and "determining whether the standard of care was breached," we do not believe that the average juror would have understood that subtle distinction. Instead, we believe that the jury probably interpreted this instruction just as appellant suggests, i.e., that the jury was limited to considering *only expert testimony* in determining whether Dr. Chirumamilla or Nurses Seeger and Natale breached the standard of care they owed to decedent, and "nothing else."

{¶34} The "nothing else" that the jury probably failed to consider because of the trial court's erroneous instruction included such things as "the medical records, admissions made to the family by the parties, or any other admissible evidence that came in during the trial on the issue of the standard of care." The medical records included Dr. Chirumamilla's note on the night in question, in which he stated that decedent was not "ventilating adequately." The admissions made to the family by the parties included a statement made by an unidentified nurse at the hospital to decedent's sister, Faye Brock, in which the nurse told Brock that decedent's breathing tube had become dislodged and that decedent went without oxygen for 15 minutes. It should be noted that appellees mounted a vigorous defense to the

evidence presented by appellant, but the medical records and the parties' admissions were relevant to the issue of whether Dr. Chirumamilla and Nurses Seeger and Natale breached the standard of care they owed to decedent, and we believe it is probable that the portion of the instruction in question prevented the jurors from considering them. As a result, we conclude that appellant's substantial rights were prejudicially affected thereby. *Silver*, 2010-Ohio-5314 at ¶81; and *Wozniak*, 90 Ohio App.3d at 410.

{¶35} Consequently, appellant's first assignment of error is sustained.

{¶36} Assignment of Error No. 6:

{¶37} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO GIVE THE SUSCEPTIBILITY TO INJURY JURY INSTRUCTION."

{¶38} Appellant argues the trial court abused its discretion by not giving the jury a "susceptibility to injury" instruction similar to the one set forth in *Fetterle v. Huettner* (1971), 28 Ohio St.2d 54, fn. 2.[1] Appellant also argues the last sentence of the trial court's "Medical History" instruction, which the trial court gave to the jury in lieu of her requested susceptibility-to-injury instruction, "completely cancels" the first part of the medical history instruction.

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1. **{¶a}** *Fetterle,* fn. 2, states in pertinent part:

{¶b} "It is the law of the State of Ohio as far as damages are concerned, that a defendant who negligently inflicts injury on another, takes the party injured as he finds him and is liable for the actual injury and damage suffered directly from defendant's negligence.

{¶c} "If you find that the plaintiff, William Feterle, had a predisposition which made him more susceptible to injury, nevertheless [sic] a negligent wrongdoer is liable for the actual injury and actual lack of recovery, if any, which the plaintiff, William Feterle, sustained as a direct result of defendant's negligence.

{¶d} "It is no defense that some other person of greater strength, or constitution, or emotional makeup might have been injured less, or injured differently, or recovered faster or better."

{¶39} Appellant requested that the trial court issue the following instruction to the jury:

{¶40} "You should bear in mind that it is the law of Ohio that persons who negligently inflict injury on another take the party injured as they find them. As a result, a negligent Defendant is liable for the actual injury and damage suffered directly from the negligence. Therefore, if you find that [decedent] had a predisposition, which made him more susceptible to injury; [sic] nevertheless, the Defendants are liable for the actual injury and lack of recovery which [decedent] sustained as a direct result of the Defendants' negligence. It is no defense that some other person of greater strength, or constitution, or emotional make-up might have been injured less, or injured differently, or recovered faster or better."

{¶41} The trial court characterized appellant's proposed susceptibility-to-injury instruction as one "dealing with the eggshell theory[,]" and declined to issue it to the jury because it was "not appropriate," "unfair," and not "an accurate portrayal of the law in a case such as this[.]" The trial court chose, instead, to issue an instruction to the jury entitled "Medical History," which the trial court believed adequately addressed appellant's concerns, since the instruction included a phrase similar to the one contained in appellant's proposed susceptibility-to-injury instruction, namely, that "Medical Providers such as [appellees] accept a patient for treatment as the medical providers find the patient." The trial court's medical history instruction, which was issued to the jury, states:

{¶42} "You have heard evidence that [decedent] had a history of smoking and being overweight. You are instructed that [decedent] had a history of smoking and being overweight. You are instructed that you are prohibited from considering

whether [decedent] contributed to (or was at fault in causing) his medical condition and death by smoking or being overweight before coming under the care of the Defendants. You must consider in this case only whether the Defendants failed to meet the required standard of care and whether that failure, if any, was a proximate cause of [decedent's] death. Medical Providers like [appellees] accept a patient for treatment as the medical providers find the patient. *Evidence of* [*decedent's*] *medical history or history of smoking or being overweight may be considered by you as it relates to the state of* [*decedent's*] *health at the time treatment was provided to* [*decedent*] *and what impact, if any, his health played in his death and the alleged negligence of the Defendant.*" (Emphasis added.)

{¶43} Appellant first argues the trial court abused its discretion by not issuing the susceptibility-to-injury instruction that she requested. Appellant's purpose in requesting this instruction was to counter the testimony of appellees' experts who testified that one of the causes of decedent's death was his poor physical health. In particular, appellant notes that one of appellees' experts, Dr. Steven Lisco, M.D., testified that decedent's "real problem" was "his lack of coronary reserve" and that "in plain English, his heart was such a time bomb from a vascular or blood supply standpoint[.]" However, this is not a proper reason for issuing a susceptibility-to-injury or "eggshell" instruction to the jury.

{¶44} As stated in *Boroff v. Meijer Stores LTD. Partnership,* Franklin App. No. 06AP-1150, 2007-Ohio-1495, ¶13:

{¶45} "Th[e] colloquialism [that a defendant takes a plaintiff as he finds him] is often referred to as the 'thin-skull plaintiff,' and although it is alive and well, it has no application in this case. See Restatement of the Law 3d, Torts (2005) Section 31.

The 'thin-skull' or 'eggshell' plaintiff theory has no bearing on duty or causation – it applies only to the extent that when a tortfeasor proximately caused the plaintiff's damages, the tortfeasor is liable for any superfluous damages resulting from the plaintiff's abnormal frailty or pre-existing condition. See id. *In other words, a thin-skull plaintiff does not increase the defendant's duty owed.*" (Emphasis added.)

{¶46} Appellant's purpose in requesting the susceptibility-to-injury or "eggshell" plaintiff instruction was to counter appellees' argument that decedent's death was caused in large measure by his pre-existing health problems rather than appellees' alleged negligence. However, as stated in *Boroff* at ¶13, the "eggshell" or "thin-skull" plaintiff theory "has no bearing on duty or causation," but rather, applies only to the issue of *damages.* Moreover, the instruction in *Feterle,* 28 Ohio St.2d at 57, fn. 2, upon which appellant modeled her instruction, begins by stating, "It is the law of the State of Ohio *as far as damages are concerned* ***." (Emphasis added.) Thus, the susceptibility-to-injury or "eggshell" or "thin-skull" plaintiff instruction requested by appellant applies to the issue of damages rather than causation, and therefore the trial court did not abuse its discretion by refusing to issue it to the jury.

{¶47} Appellant also argues the last sentence of the trial court's medical history instruction "completely cancels" the first part of the instruction.

{¶48} The first part of the medical history instruction closely tracks the language of the "Freedom from Negligence Instruction" set forth in Ohio Jury Instructions, Civ. Medical Negligence, 279. This part of the instruction told the jurors that they were *prohibited from considering* whether decedent contributed to or was at fault in causing his medical condition and death by smoking or being overweight before coming under appellees' care, and instead, were required to consider only

whether appellees failed to meet the requisite standard of care and, if so, whether the failure proximately caused decedent's death.

{¶49} However, the last sentence of the medical history instruction informed the jurors that they *could consider* evidence of decedent's medical history and his history of smoking and being overweight as it related to (1) the state of decedent's health at the time appellees provided medical treatment for him, and (2) "*what impact, if any, his health played in his death and the alleged negligence of [appellees*]." We agree with appellant that the two parts of the trial court's medical history instruction were confusing and that it is probable, and not just possible, that the jury was misled by this instruction and that a substantial right of appellant was prejudicially affected thereby. *Silver*, 2010-Ohio-5314 at ¶81; and *Wozniak*, 90 Ohio App.3d at 410.

{¶50} The trial court was trying to communicate to the jury two valid points of law with this instruction: The first was that the jury was prohibited from considering whether decedent contributed to or was at fault in causing his medical condition and death by smoking or being overweight before coming under appellees' care, see *Segedy,* 2009-Ohio-2460 at ¶61-62, and, instead, was required to consider only whether appellees failed to meet the required standard of care and, if not, whether that failure proximately caused decedent's death. The second was that the jury was permitted to consider decedent's history of smoking and being overweight as it related to the state of his health at the time he presented for treatment and what impact, if any, his health played in his death and appellees' alleged negligence. As we have stated in response to appellant's fifth assignment of error, it was appropriate for appellees to have their experts discuss the effects that decedent's history of

smoking, being overweight, and failing to exercise had on his death.

{¶51} However, the medical history instruction contains language that, on the one hand, instructs the jury that they "are prohibited from considering whether [decedent] contributed to (or was at fault in causing) his medical condition and death by smoking or being overweight before coming under the care of [appellees]," while on the other hand, instructs the jury that "[e]vidence of [decedent's] medical history or history of smoking or being overweight may be considered by you as it relates to *** what impact, if any, his health played in his death and the alleged negligence of the Defendants." The trial court put these seemingly disparate instructions together without recognizing that, when considered together, the instructions were bound to confuse the average juror. As a result, we conclude that the trial court abused its discretion by instructing the jury that "[e]vidence of [decedent's] medical history or history of smoking or being overweight may be considered by you as it relates to *** what impact, if any, his health played in his death and the alleged negligence of [appellees]" without explaining to the jury how this portion of the instruction differed from the first portion of the instruction.

{¶52} Accordingly, appellant's sixth assignment of error is sustained to the extent indicated.

{¶53} We need not rule on appellant's second, third, fourth and seventh assignments of error, which are set forth in the appendix to this opinion, because they have been rendered moot by our disposition of appellant's first and sixth assignments of error. See App.R. 12(A)(1)(c).

{¶54} The trial court's judgment is reversed, and this cause is remanded for further proceedings consistent with this opinion.

YOUNG, P.J., and RINGLAND, J., concur.

Appendix

{¶55} Appellant's second, third, fourth and seventh assignments of error state:

{¶56} Assignment of Error No. 2:

{¶57} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT LIMITED THE TESTIMONY OF APPELLANT'S MEDICAL EXPERT, DR. WATKINS."

{¶58} Assignment of Error No. 3:

{¶59} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT ALLOWED PREVIOUSLY UNDISCLOSED DEFENSE EXPERT OPINIONS OF DRS. LEWIS, LISCO, AND PIEMONTE."

{¶60} Assignment of Error No. 4:

{¶61} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT UNEQUALLY APPLIED THE RULES AND COURT'S SCHEDULING ORDER BETWEEN THE PARTIES."

{¶62} Assignment of Error 7:

{¶63} "THE TRIAL COURT'S CUMULATIVE ERROR [sic] DEPRIVED APPELLANT OF A FAIR TRIAL."