[Cite as *Johnson v. Stachel*, 2020-Ohio-3015.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RUSSELL JOHNSON Plaintiff-Appellee/Cross-Appellant -vs- DAVID CRAIG STACHEL, M.D. Defendant-Appellant/Cross-Appellee	JUDGES: Hon. William B. Hoffman, P.J. Hon. W. Scott Gwin, J. Hon. Patricia A. Delaney, J. Case No. 2019CA00123 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Stark County Court of Common Pleas, Case No. 2017-CV-02075
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 15, 2020

APPEARANCES:

For Plaintiff-Appellee/Cross-Appellant	For Defendant-Appellant/Cross-Appellee
RHONDA BAKER DEBEVEC The Debevec Law Firm, LLC 700 W. Saint Clair – Suite #214 Cleveland, Ohio 44113	STEPHEN P. GRIFFIN 4051 Whipple Avenue – Suite #201 Canton, Ohio 44718 MICHAEL J. KAHLENBERG 3570 Executive Drive – Suite #216 Uniontown, Ohio 44685

Hoffman, P.J.

{¶1} Appellant/Cross-Appellee David Craig Stachel, M.D. ("Stachel") appeals the judgment entered by the Stark County Common Pleas Court awarding Appellee/Cross-Appellant Russell Johnson ("Johnson") damages in the amount of $501,742.15 on his claim for medical malpractice.

STATEMENT OF THE FACTS AND CASE

{¶2} Johnson was admitted to a nursing home in December of 2012, after suffering a stroke. The stroke initially left Johnson's left side flaccid, with no function. Stachel served as Johnson's attending physician from December of 2012, until August of 2014. Stachel ordered physical and occupational therapy for Johnson. Although Johnson regained some muscle tone from rehabilitation, he plateaued in February of 2013, and was transferred to long-term care. He was able to walk in a supervised setting, and transfer from his wheelchair with moderate assistance.

{¶3} On March 23, 2013, Johnson fell at the nursing home, but was not injured. Johnson fell again on August 28, 2013, this time sustaining a hip fracture. Stachel was notified Johnson developed significant hip pain, and Stachel ordered an x-ray. Advised by the radiologist the x-ray was negative for a hip fracture, Stachel attributed the continuing pain in Johnson's hip to a soft tissue injury. Johnson's condition deteriorated to the point where he was unable to transfer from his wheelchair without the assistance of a sit-to-stand apparatus. By the third day after the fall, Johnson was unable to bear weight and was complaining of hip pain at a level of 10 out of 10, which was communicated to Stachel.

{¶4} Stachel did not evaluate Johnson's condition until September 11, 2013, which was Johnson's next scheduled visit. Despite Stachel's awareness of Johnson's repeated complaints of hip pain and functional decline, Stachel did not examine Johnson's

left leg or hip. Stachel next saw Johnson on September 27, 2013, and again failed to examine Johnson's hip.

{¶5} On October 14, 2013, Stachel diagnosed Johnson with a blood clot and prescribed Coumadin, a blood thinner, to treat the clot. Several weeks later, Johnson suffered a complication from the medication, and was transferred to the emergency room. Johnson was found catatonic in the dining room of the rehabilitation facility on November 8, 2013, and was re-admitted to the hospital.

{¶6} During the November 2013 hospital admission, Johnson was diagnosed with a left hip fracture. According to the orthopedic surgeon who treated Johnson, had the fracture been diagnosed two months earlier, a hip replacement could have addressed the fracture and provided enhanced stability to bear weight for transfers. However, when the surgeon first examined Johnson, his leg was chronically shortened and his left hip was unstable. Due to the delay in diagnosing the fracture, his treatment options were changed, and Johnson required complete removal of his hip joint, rendering the hip non-weight-bearing.

{¶7} On February 5, 2015, Johnson filed a complaint against three sets of defendants: the nursing home defendants, Altercare of Ohio, Inc. and Altercare of Louisville Center for Rehabilitation ("Altercare"); the radiologist defendants Gillermo Zaldivar, M.D. and Radiology Services of Stark and Summit Co., LLC ("RSSS"), and Stachel. He alleged three negligence claims in the complaint: failure to prevent the fall by Altercare and Stachel, failure to timely diagnosis the fracture by all three sets of defendants, and violation of the nursing home Bill of Rights by Altercare. Johnson settled all claims against Altercare and RSSS.

{¶8} Before trial on the claims against Stachel, the parties agreed to a stipulated dismissal which provided in pertinent part:

> Now come the Parties, by and through counsel, and pursuant to Civ. R. 41(A)(1)(b), herein stipulate to dismiss Plaintiff's complaint other than upon the merits and without prejudice preserving the Plaintiff's right to re-file his complaint within one year. The Parties further stipulate that this dismissal shall not adversely impact Plaintiff's subsequent ability to file a voluntary dismissal pursuant to Civ. R. 41(A)(1)(a) and to then re-file his complaint within one-year pursuant to R.C. §2305.19(A).

{¶9} Stipulation, October 18, 2016.

{¶10} Johnson refiled his complaint on October 16, 2017, alleging negligence by Stachel in failing to develop a fall policy related to the care of Johnson by Altercare, and negligence in failing to timely diagnose the hip fracture following the August 28, 2013 fall.

{¶11} Stachel filed a motion to dismiss the refiled complaint on the basis it was filed outside the four-year time limitation of the statute of repose. The trial court denied the motion, finding the savings statute applied, and the refiled complaint related back to the original filing for purposes of application of the statute of repose.

{¶12} The case proceeded to jury trial in the Stark County Common Pleas Court. The jury returned a verdict in favor of Stachel on the claim for negligence related to the failure to formulate a fall policy, and in favor of Johnson on the claim for negligence based on the delayed diagnosis. The jury awarded Johnson damages in the amount of

$636,000.00, apportioned as $98,000.00 for past economic damages, and $538,000.00 for noneconomic loss damages, past and future. The trial court entered judgment on the verdict on October 29, 2018.

{¶13} Stachel filed a motion seeking to setoff the settlements with Altercare and RSSS against the jury's verdict pursuant to R.C. 2307.28(A) in the amount of $225,000. The trial court entered a partial setoff in the amount of $134,257.85 on April 1, 2019. Stachel also filed a motion for new trial and for judgment notwithstanding the verdict ("JNOV"), which were overruled by the trial court on February 6, 2019. Johnson filed a motion for prejudgment interest on November 7, 2018, which he withdrew on August 7, 2019. On August 9, 2019, Stachel filed a motion for a nunc pro tunc judgment based on the amount of noneconomic damages exceeding the high cap on such damages. On the same date, Stachel filed the instant notice of appeal. Johnson filed a notice of cross-appeal on August 19, 2019.

{¶14} It is from the judgments of the trial court entering judgment on the verdict of the jury, reducing the award by a partial setoff of the settlements, and denying Stachel's motions for new trial and JNOV Stachel prosecutes this appeal, assigning as error:

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS UNDER THE APPLICABLE STATUTE OF REPOSE.

II. THE TRIAL COURT ERRED IN FAILING TO ORDER A COMPLETE SETOFF OF ALL AMOUNTS PAID BY ALTERCARE UNDER R.C. §2307.28(A).

III. THE TRIAL COURT ERRED IN ADMITTING PLAINTIFF'S CLAIMED MEDICAL BILLS.

IV. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT AND GRANT JNOV IN FAVOR OF DEFENDANT AS TO PLAINTIFF'S CLAIM FOR ECONOMIC LOSS DAMAGES.

V. THE TRIAL COURT ERRED IN FAILING TO GRANT JNOV REGARDING APPLICATION OF THE "LOW CAP" ON ECONOMIC LOSS DAMAGES OF R.C. §2323.43(A)(2).

VI. THE TRIAL COURT ERRED IN AWARDING NONECONOMIC LOSS DAMAGES IN EXCESS OF THE "HIGH CAP" OF R.C. §2323.43(A)(3).

VII. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL DUE TO THE IRREGULARITIES AND UNFAIRNESS OF THE PROCEEDINGS RELATIVE TO EXPERT WITNESS DISCOVERY AND TESTIMONY AT TRIAL.

{¶15} Johnson assigns the following errors on cross-appeal:

I. TRIAL COURT ERRED BY REDUCING THE VERDICT AGAINST CROSS-APPELLEE.

II. THE TRIAL COURT'S DENIAL OF CROSS-APPELLANT'S MOTION FOR ATTORNEY FEES WAS ERROR GIVEN THE EGREGIOUS AND PERSISTENT PATTERN OF MISCONDUCT CULMINATING IN

CROSS-APPELLEE'S COUNSEL THREATENING DISBARMENT OF CROSS-APPELLANT'S COUNSEL DURING THE FINAL PRETRIAL IF HE PREVAILED AT TRIAL.

{¶16} Johnson assigns the following conditional assignments of error on cross-appeal:

I. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING CROSS-APPELLEE TO PROCEED WITH THREE DUPLICATIVE EXPERTS WITHIN INTERNAL MEDICINE.

II. THE TRIAL COURT ERRED IN PERMITTING CROSS-APPELLEE TO NOT DISCLOSE WHETHER HE WAS SEEKING APPORTIONMENT UNTIL THE CLOSE OF EVIDENCE AND CONSTITUTED TRIAL BY AMBUSH.

III. ALLOWING DR. FEIGHAN TO CRITICIZE DR. GLASS'S INITIAL ATTEMPT TO DO AN [SIC] HIP REPLACEMENT WAS ERROR SINCE HE ADMITTED HER ATTEMPT DID NOT CAUSE ANY LONG-TERM HARM TO THE PATIENT AND IT WAS APPROPRIATE TO OFFER THIS SURGICAL OPTION TO THE PATIENT.

IV. THE TRIAL COURT ABUSED ITS' [SIC] DISCRETION BY PERMITTING THE CROSS-EXAMINATION OF DR. GLASS ABOUT HER AGE

V. TO IMPROPERLY SUGGEST HER RELATIVE YOUTH MADE HER LESS QUALIFIED THAN COLLEAGUES RATHER THAN ON HER RELEVANT EXPERIENCE.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING CROSS-EXAMINATION OF PLAINTIFF'S STANDARD-OF-CARE EXPERT REGARDING PAST LAWSUITS WHICH HAD NO NEXUS OR RELEVANCY TO THE CASE NOR TO THE EXPERT'S POTENTIAL BIAS.

VII. ALLOWING CROSS-APPELLEE TO ADMIT A SUMMARY OF MEDICAL BILLS WITHOUT SUPPORTING DOCUMENTATION WAS AN ABUSE OF DISCRETION.

I.

{¶17} In his first assignment of error, Stachel argues the court erred in overruling his motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted, pursuant to Civ. R 12(B)(1) and (6), based on the expiration of the statute of repose prior to its filing.

{¶18} Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Milhoan v. E. Local School Dist. Bd. of Edn.,* 157 Ohio App.3d 716, 813 N.E.2d 692, 2004–Ohio–3243, ¶10 (4th Dist. Meigs); *State ex rel. Bush v. Spurlock,* 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). We review an appeal of a dismissal for lack of subject-

matter jurisdiction under Civ.R. 12(B)(1) de novo. *Moore v. Franklin Cty. Children Servs*., 10th Dist. Franklin No. 06AP–951, 2007–Ohio–4128, ¶15. A trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526 (1976), paragraph one of the syllabus.

{¶19} When reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, our standard of review is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.,* 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992), *citing Assn. for the Defense of the Washington Local School Dist. v. Kiger,* 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989). In considering a motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 680 N.E.2d 985 (1997). Rather, the trial court may review only the complaint and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover*. O'Brien v. Univ. Community Tenants Union, Inc.,* 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶20} Stachel argues the trial court should have dismissed the instant action pursuant to either Civ. R. 12(B)(1) or (6) because the complaint was filed outside the four-year statute of repose for medical malpractice actions. Statutes of repose and statutes of limitation have distinct applications*. Antoon v. Cleveland Clinic Found.,* 148 Ohio St.3d

483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 11. "Both share a common goal of limiting the time for which a putative wrongdoer must be prepared to defend a claim." *Id*. A statute of limitations establishes "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Id*., quoting Black's Law Dictionary 1636 (10th Ed.2014). A statute of repose bars "any suit that is brought after a specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." *Id*.

{¶21} 2305.113(C) sets forth a four year statute of repose for bringing a medical malpractice action in Ohio:

> (C) Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply:
>
> (1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
>
> (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

{¶22} While it is undisputed the instant action was filed outside this four year time frame, the trial court applied the savings statute, R.C. 2305.19(A), and found the action related back to the first complaint filed by Johnson one year earlier:

> In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

{¶23} Where the savings statute applies, "the date for filing the new action relates back to the filing date for the preceding action for limitations purposes." *Frysinger v. Leech*, 32 Ohio St.3d 38, 42, 512 N.E.2d 337, 341 (1987). The Ohio Supreme Court has held the savings statute is a remedial statute, and therefore "should be given a liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure." *Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co*., 171 Ohio St. 82, 85, 167 N.E.2d 774 (1960). *See also, Greulich v. Monnin*, 142 Ohio St. 113, 116, 50 N.E.2d 310 (1943) (holding likewise a savings statute should be liberally construed so as not to deny a litigant the right to commence a new action after a previous one has failed otherwise than upon

the merits); *Kinney v. Ohio Dept. of Adm. Svcs.*, 30 Ohio App.3d 123, 126, 507 N.E.2d 402 (10th Dist. Franklin1986) (describing the policy considerations for liberally construing the savings statute to apply to a statute of limitations).

{¶24} The Ohio Supreme Court explicitly reserved judgment on the issue of whether the savings statute applied to the statute of repose in *Antoon v. Cleveland Clinic Found.,* 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974. The United States District Court for the Southern District of Ohio was presented with this question, and held Ohio's savings statute does apply despite the expiration of the statute of repose. *Atwood v. UC Health,* S.D.Ohio No. 1:16CV593, 2018 WL 3956766 (August 17, 2018). Relying on *Atwood*, the Court of Appeals for the First District held Ohio's savings statute, properly invoked, allows actions to survive beyond expiration of the medical malpractice statute of repose. *Wilson v. Durrani*, 1st Dist. Hamilton No. C-180194, 2019-Ohio-3880, ¶ 3, *appeal allowed,* 157 Ohio St.3d 1562, 2020-Ohio-313, 138 N.E.3d 1152, ¶ 3 (2020).

{¶25} Prior to *Wilson,* only one appellate court in Ohio had addressed the application of the savings statute to medical claims in light of the statute of repose. *Wade v. Reynolds,* 34 Ohio App.3d 61, 517 N.E.2d 227 (10th Dist. Franklin 1986), involved an earlier version of the statute of repose, which applied to medical claims "regardless of legal disability and notwithstanding section 2305.16 of the Revised Code." In *Wade*, the plaintiff timely filed her complaint for medical malpractice in 1980. The complaint was dismissed for reasons other than failure upon the merits on March 21, 1984, and was refiled on March 21, 1985. The Tenth District Court of Appeals determined because the statute of repose contained enumerated exceptions which did not include the savings statute, the savings statute did not apply to save the plaintiff's claim. *Id.* at 62, 517 N.E.2d 227.

{¶26} In examining *Wade,* both *Atwood* and *Wilson* were unpersuaded by this reasoning, finding the enumerated exceptions say little about legislative intent. While the statute of repose for products liability claims includes an enumerated exception for the savings statute, the savings statute itself includes an enumerated exception for probate claims. *Wilson, supra,* ¶29, *citing Atwood, supra,* at *7. "In other words, just as the legislature could have included the saving statute as an exception in the statute of repose, the legislature could have included the statute of repose as an exception in the saving statute—but unfortunately, it did neither." *Id.* We likewise find the argument regarding legislative intent as expressed by the enumerated exceptions unpersuasive, as it cuts both ways.

{¶27} *Wilson* focused primarily on the policy behind the medical malpractice statute of repose:

> While legislative intent is indeterminate, the policy considerations are not. As Judge Barrett noted in *Atwood*, the Ohio Supreme Court has explained that "the General Assembly made a policy decision to grant Ohio medical providers the right to be free from litigation based on alleged acts of medical negligence occurring outside a specified time period." *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, at ¶ 21. The medical malpractice statute of repose gives "medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation." Id. at ¶ 19.

"Forcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns, including the risk that evidence is unavailable through the death or unknown whereabouts of witnesses, the possibility that pertinent documents were not retained, the likelihood that evidence would be untrustworthy due to faded memories, the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time, the risk that the medical providers' financial circumstances may have changed—i.e., that practitioners have retired and no longer carry liability insurance, the possibility that a practitioner's insurer has become insolvent, and the risk that the institutional medical provider may have closed."

Id. at ¶ 19-20. Thus, the two goals of the statute of repose are "to eliminate indefinite potential liability and to give defendants greater certainty and predictability." *Hinkle by Hinkle*, 85 F.3d at 303.

These policy considerations are not at odds with those of the saving statute. As discussed above, the saving statute is given a liberal construction to permit the decision of cases upon their merits rather than technicalities. Since the saving statute is only available to plaintiffs who timely commenced their claims, the statute is compatible with the first goal of the statute of repose—at most, extending the statute of repose by one year. With regard to the second goal, certainty and predictability are only affected where the defendant is unaware that the first action was filed. *Id*.

> "Where the defendant knows that plaintiff has brought an action, usually from receiving service, he must be presumed to understand that a procedural defect in the action may cause a delay of up to one year pursuant to the savings statute. In such a case, his level of certainty and predictability is no less than in any other litigated matter, and the purpose of the statute of repose is still realized."

{¶28} *Id*. at ¶¶ 30-31.

{¶29} The *Wilson* court found the policy considerations favored application of the savings statute to the statute of repose. The appeals involved the same plaintiffs suing the same defendants for almost identical causes of action in complaints that were voluntarily dismissed in one jurisdiction and filed in another jurisdiction in five days' time in one case, and 15 in days' time in the other case. *Id.* at ¶32. Restricting indefinite liability was barely a consideration of the defendants, who knew they were being sued in a timely-filed action in another county. *Id.* The defendants knew the plaintiffs brought actions against them, as they were evidently served the complaints and had engaged in discovery in the actions maintained in Butler County. *Id.*

{¶30} In the instant case, we likewise conclude policy considerations weigh in favor of application of the savings statute. The case was initially filed against Stachel on February 5, 2015, inside the four year limitation of the statute of repose. After Johnson settled with Altercare and RSSS, the case was set for trial against Stachel on November 7, 2016.

{¶31} On October 17, 2016, the parties had a telephonic status conference with the trial court to discuss outstanding discovery issues. The parties inquired about whether the court would be amenable to granting a continuance of the trial date, but were unable to find a mutually agreeable date within a reasonable time frame. The parties accordingly agreed to a stipulated dismissal of the case:

> Now come the Parties, by and through counsel, and pursuant to Civ. R. 41(A)(1)(b), herein stipulate to dismiss Plaintiff's complaint other than upon the merits and without prejudice preserving the Plaintiff's right to re-file his complaint *within one year*. The Parties further stipulate that this dismissal shall not adversely impact Plaintiff's subsequent ability to file a voluntary dismissal pursuant to Civ. R. 41(A)(1)(a) and to then re-file his complaint *within one-year* pursuant to R.C. §2305.19(A).

{¶32} Stipulation, October 18, 2016, emphasis added.

{¶33} Johnson refiled the action within one year, on October 16, 2017. Not only was Stachel aware of the complaint within the four year statute of repose, he had participated in discovery, prepared for trial, and affirmatively agreed to allow Johnson to refile his complaint within one year pursuant to the savings statute. Clearly in the instant case the policy considerations weigh in favor of application of the savings statute to Johnson's complaint.[1] We find the trial court did not err in applying the savings statute, and overruling Stachel's motion to dismiss the complaint pursuant to Civ. R. 12(B)(1) and (6).

[1]Johnson argues Stachel is equitably estopped from raising the statute of repose defense by his agreement to apply the savings statute. The trial court expressly stated it need not reach this issue, and

{¶34} The first assignment of error is overruled.

II., Cross-Appeal I.

{¶35} We address Stachel's second assignment of error together with Johnson's first assignment of error on cross-appeal, as both claim error in the trial court's application of setoff.

{¶36} The trial court set off the entire $112,500 settlement with RSSS and $21,757.85 of the Altercare settlement against the verdict of the jury pursuant to R.C. 2307.28:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons for the **same injury or loss** to person or property or the same wrongful death, both of the following apply:
>
> (A) The release or covenant does not discharge any of the other tortfeasors from liability for the injury, loss, or wrongful death unless its terms otherwise provide, but it reduces the claim against the other tortfeasors to the extent of the greater of any amount stipulated by the release or the covenant or the amount of the consideration paid for it, except that the reduction of the claim against the other tortfeasors shall not apply in any case in which the reduction results in the plaintiff recovering less than the total amount of the plaintiff's compensatory damages awarded by the trier of fact and except that in any case in which the reduction does not apply

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Johnson has not raised this issue by way of conditional cross assignment of error. We therefore decline to address this argument.

> the plaintiff shall not recover more than the total amount of the plaintiff's compensatory damages awarded by the trier of fact.
>
> (B) The release or covenant discharges the person to whom it is given from all liability for contribution to any other tortfeasor. (Emphasis added).

{¶37} Johnson first argues Stachel was not entitled to set off any of the settlement proceeds from RSSS and Altercare because Stachel failed to seek apportionment of liability among himself and the other settling defendants, Altercare and RSSS, from the jury.

{¶38} There is nothing in the plain language of R.C. 2307.28 which requires the jury to apportion fault. We agree with the trial court the legislative history of the statute also suggests a finding of apportionment by the jury is not required. Older versions of the setoff statute required the defendant to establish the settling party was "liable in tort" to the plaintiff, but this is no longer a requirement for setoff under the current version of R.C. 2307.28. *See Fidelholtz v. Peller,* 81 Ohio St.3d 197, 1998-Ohio-462, 690 N.E.2d 502. We also note R.C. 2307.29 specifically states the setoff statute does not apply when apportionment is sought:

> No provision of sections 2307.25 to 2307.28 of the Revised Code applies to a tort claim to the extent that sections 2307.22 to 2307.24 or sections 2315.32 to 2315.36 of the Revised Code make a party against whom a judgment is entered liable to the plaintiff only for the proportionate share of that party as described in those sections.

{¶39} We find the trial court did not err in finding Stachel was not barred from seeking setoff because of his failure to seek to submit the issue of apportionment to the jury by way of the "empty chair" defense.

{¶40} Stachel argues the settlement with Altercare was for the same injury or loss, as Johnson's original complaint against Altercare named Altercare in the cause of action for failure to diagnose the broken hip. Stachel emphasizes Johnson continued to complain of ongoing pain in his hip not only to Stachel, but also to a nurse employed by Altercare. Stachel argues the injury is one and the same, from the fall which caused the broken hip through the subsequent failure to properly diagnose the fracture.

{¶41} Johnson argues the court erred in setting off the settlement with RSSS because the negligence of RSSS was the failure to diagnose the injury at the single point in time in which the x-ray was improperly read, while Stachel's negligence began from that point extending through the three month time period in which he continued to fail to properly diagnose the hip fracture. Johnson also argues the court erred in setting off the portion of the Altercare settlement specifically paid for medical bills, as such a finding is inconsistent with the court's finding the Altercare settlement was for a different injury or loss.

{¶42} Pursuant to the language of R.C. 2307.28, Stachel has the burden of proof to demonstrate the settlement agreements executed by RSSS and Altercare were "for the same injury or loss to person or property" as the matter against him that proceeded to trial. *Kritzwiser v. Bonetzky*, 3rd Dist. Logan No. 8-07-24, 2008-Ohio-4952, ¶ 28.

{¶43} We find the trial court did not err in finding the settlement executed between Johnson and Altercare was not for the same injury or loss as the breach of duty to diagnose

claim on which Stachel was found liable at trial, with the exception of that portion of the Altercare settlement expressly delineated as payment of medical bills.

{¶44} The claims originally filed against Altercare were for negligence in allowing Johnson to fall, failure to diagnose, and breach of the nursing home bill of rights. We agree with the trial court the type of pain and suffering experienced from a fall resulting in a broken hip is different in nature, kind, and duration from the type of suffering experienced from a delay in diagnosis of three months, resulting in a different long-term outcome for Johnson than if the hip had been timely diagnosed.

{¶45} While originally Altercare was named as a defendant for failure to diagnose the broken hip, the claim against the nursing home was different in nature than the failure to diagnose claim against RSSS and Stachel. The failure to diagnose claims against RSSS were for medical malpractice: the failure of a medical doctor to properly diagnose the injury. In contrast, the claims against Altercare regarding the diagnoses were of necessity claims of nursing negligence, in particular, the failure to provide the supervision of Johnson at the time of his fall, as had been ordered. Accepted standards of nursing practice also include a duty to keep the attending physician informed of a patient's condition so as to permit the physician to make a proper diagnosis of and devise a plan of treatment for the patient. *Berdyck v. Shinde*, 66 Ohio St.3d 573, 1993-Ohio-183, 613 N.E.2d 1014 (1993). Nurses, however, are prohibited from "medical diagnosis, prescription of medical measures, and the practice of medicine or surgery." *Cobbin v. Cleveland Clinic Found.,* 8th Dist. Cuyahoga No. 107852, 2019-Ohio-3659, ¶15; R.C. 4723.1251. The claim for nursing negligence regarding Johnson's injury is not for the same injury or loss as the failure of the doctors who failed to properly diagnose the injury, as the nursing home was prohibited from

diagnosing the broken hip, and had only a duty to provide information to Stachel regarding Johnson's condition. We find the trial court did not err in concluding the settlement with Altercare, with the exception of the specific payment of medical bills, was for a different injury or loss than the injury or loss resulting from Stachel's negligence.

{¶46} The medical bills presented to the settling defendants were also presented to the jury in the instant case, and the jury essentially awarded the full amount of medical bills requested by Johnson as damages against Stachel. We find the trial court did not err in concluding the consideration paid by Altercare for Johnson's medical bills was for the same loss as that which the jury awarded in economic damages against Stachel. To hold otherwise would allow double recovery for the same medical bills.

{¶47} We do not find this setoff to be inconsistent with the trial court's finding the remainder of the Altercare settlement was not for the same injury or loss, as the remainder of the settlement was not specifically delineated as economic damages. While the payment of medical bills as part of the Altercare settlement may have been from a different injury than the injury incurred from Stachel's failure to diagnose, the statutory language uses injury *or* loss in the disjunctive. Altercare's payment for medical bills was clearly for the same loss as a portion of the economic damages awarded against Stachel, and therefore the trial court did not err in ordering these damages to be set off against the jury's verdict.

{¶48} We also find the trial court did not err in finding the settlement with RSSS was for the same injury or loss, and accordingly applying setoff to the entirety of the RSSS settlement. The negligence of Stachel in failing to diagnose the hip fracture subsequent

to the negligence of RSSS in misreading the x-ray would not necessarily extinguish, negate or cut off the negligence of RSSS:

> The intervention of a responsible human agency between a wrongful act and an injury does not absolve a defendant from liability if that defendant's prior negligence and the negligence of the intervening agency co-operated in proximately causing the injury. If the original negligence continues to the time of the injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate, concurring cause for which full liability may be imposed. "Concurrent negligence consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury." *Garbe v. Halloran* (1948), 150 Ohio St. 476, 38 O.O. 325, 83 N.E.2d 217, paragraph one of the syllabus.

{¶49} *Berdyck v. Shinde*, 66 Ohio St.3d 573, 584-85, 1993-Ohio-183, 613 N.E.2d 1014, 1024 (1993).

{¶50} We agree with the trial court the failure of RSSS to diagnose Johnson's fractured hip cooperated with Stachel's failure to diagnose the fractured hip. RSSS's failure in the first instance continued, and substantially contributed to Stachel's negligence, as Stachel relied on the misreading of the x-ray in failing to further examine Johnson and assess the injury. The fact Stachel would rely on RSSS's erroneous finding of no fracture was foreseeable, and Stachel's negligence was set in motion by the original negligence of

RSSS. RSSS and Stachel were concurrently negligent. There was no break in causation between the negligence of RSSS and Stachel, and therefore the jury's award was based on the same injury or loss as Johnson's settlement with RSSS. Further, Johnson's original theory of liability against RSSS sought to hold RSSS responsible for the entirety of the consequences of the failure to diagnosis the fractured hip, and not merely for any injuries suffered at the exact point in time RSSS read the x-ray.

{¶51} Finally, Johnson argues pursuant to R.C. 2307.29, Stachel should not be able to setoff non-economic damages. R.C. 2307.29 provides:

> No provision of sections 2307.25 to 2307.28 of the Revised Code applies to a tort claim to the extent that sections 2307.22 to 2307.24 or sections 2315.32 to 2315.36 of the Revised Code make a party against whom a judgment is entered liable to the plaintiff only for the proportionate share of that party as described in those sections.

{¶52} Johnson argues R.C. 2307.22(C) states a party can only be held liable for his "proportionate share" of noneconomic damages, and therefore if Stachel is entitled to any setoff, it would only apply to the economic award.

{¶53} R.C. 2307.22(C) applies "[i]n a tort action in which the trier of fact determines that two or more persons proximately caused the same injury or loss to person or property." In the instant case, the trier of fact did not determine whether two or more persons proximately caused the same injury. It only determined Stachel proximately

caused injury to Johnson. Therefore R.C. 2307.22(C) is inapplicable, and R.C. 2307.29 does not prohibit the application of R.C. 2307.28 to the judgment in the instant case.

{¶54} Stachel's second assignment of error is overruled. Johnson's first assignment of error on cross-appeal is overruled.

III.

{¶55} In his third assignment of error, Stachel argues the trial court erred in admitting evidence of Johnson's medical bills because no evidence was presented the bills were proximately caused by Stachel's negligence, and further because Johnson was not the real party in interest.

{¶56} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.,* 58 Ohio St. 3d 269, 271, 559 N.E.2d 1056 (1991). The term "abuse of discretion" implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142 (1983).

{¶57} Stachel first argues Johnson failed to present evidence his medical bills were proximately caused by Stachel's negligence. Stachel relies on *Guiliani v. Shehata*, 1st Dist. No. C-130837, 2014-Ohio-4240, 19 N.E.3d 971, *Guiliani* was a medical malpractice action for failure to diagnose colon cancer. The trial court had excluded medical bills from evidence. On appeal, the court of appeals found no abuse of discretion:

> Based upon our review of the record, we cannot say the trial court abused its discretion in denying the admission of these medical bills. In this

> complex medical case, Guiliani needed an expert to make the causal connection between Dr. Shehata's negligence and Guiliani's treatment at M.D. Anderson. The evidence showed he required a major operation regardless of whether Dr. Shehata was negligent. Under these circumstances, Guiliani could not claim all the costs from the September 2010 surgery when he would also have had significant costs if the cancer had been discovered in September 2009. As a result, we overrule Guiliani's second assignment of error.

{¶58} *Id.* at ¶ 28.

{¶59} Stachel argues the case at bar is indistinguishable from *Guiliani,* because there was no testimony the medical bills were proximately caused by Stachel's negligent failure to diagnose the injury.

{¶60} We find *Guiliani* distinguishable from this case. First, the Court of Appeals for the Second District was faced with the issue of whether the trial court abused its discretion in *excluding* the evidence, rather than *admitting* the evidence. Second, the claim in *Guiliani* was solely one for negligence in failure to diagnose the plaintiff's colon cancer. In the instant case, at the time the trial court admitted the medical bills, an independent claim Stachel was negligent for failing to develop a fall prevention plan was pending, and ultimately submitted to the jury. Stachel cannot rely on the jury's ultimate finding of negligence based solely on the failure to diagnose the fracture, to retroactively claim the trial court erred in admitting evidence of medical bills related to the claim of negligence for failing to develop a fall prevention plan.

{¶61} In his videotaped trial deposition, Dr. Theodore Homa testified Stachel's negligence was a proximate cause of Johnson's fracture not being diagnosed until November of 2013. Homa Depo. 70. He testified the harm Johnson suffered as a result of the delay in diagnosis was proximately caused by Stachel's negligence. *Id.* He testified Stachel's negligence in developing a fall prevention plan was a proximate cause of his fall, and the damages flowing from the fall. *Id.* at 71. He testified once the fall occurred, Johnson was going to require some sort of surgery to repair it, but more therapies and interventions were required than Johnson would have needed had the hip fracture been diagnosed within a few weeks. *Id.* He testified he had reviewed the medical bills, and found them reasonable and appropriate, and the medical treatment received for the fracture and complications from the fracture to be appropriate and necessary. *Id.* at 72-73. Based on the totality of Dr. Homa's testimony, we find the trial court did not abuse its discretion in finding sufficient demonstration the bills were proximately caused by Stachel's negligence and admitting the medical bills.

{¶62} Stachel further argues Johnson was not the real party in interest because his medical bills were paid by Medicare and others. A "real party in interest" has been defined as "* * * one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e., one who is directly benefitted or injured by the outcome of the case." *Shealy v. Campbell*, 20 Ohio St.3d 23, 24, 485 N.E.2d 701, 702 (1985). If an insurer has paid only part of a claim, both the insurer and the insured have substantive rights against the tortfeasor which qualify them as real parties in interest. *Cleveland Paint & Color Co. v. Bauer Mfg. Co.,* 155 Ohio St. 17, 24-25, 97 N.E.2d 545 (1951). The Court of Appeals for the Second District has found a trial court errs in excluding

medical expenses from the jury's consideration on the basis they were paid by the plaintiff's insurer. *See Curp v. Stone,* 2nd Dist. Montgomery No. 14805, 1996 WL 65248 (Feb. 16, 1996); *Banford v. State Farm Ins. Co*., 2nd Dist. Montgomery No. 18464, 2001 WL 703858.

{¶63} There is no evidence in the instant case all of the medical bills submitted to the jury were paid by Medicare and/or other insurers. In a single interrogatory answer in the prior action, Johnson stated medical bills had been paid "in part" by Medicare and another insurer. Stachel has not demonstrated Johnson was not the real party in interest.

{¶64} Stachel further argues Medicare was not joined as a party. Medicare has sole discretion on whether or not to join litigation, and cannot be involuntarily joined. 42 CFR 411.26(b).

{¶65} We find the trial court did not abuse its discretion in admitting the medical bills over Stachel's objection Johnson was not the real party in interest.

{¶66} The third assignment of error is overruled.

IV.

{¶67} Stachel argues the trial court erred in overruling his motions for directed verdict and JNOV on the basis the evidence did not support a finding the medical bills were proximately caused by his negligence and Johnson was not the real party in interest, as set forth in his third assignment of error above.

{¶68} The standard of review for a ruling on a motion for judgment notwithstanding the verdict is the same one applicable to a motion for directed verdict. *Posin v. A.B.C. Motor Court Hotel*, 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 344 N.E.2d 334 (1976). A motion for directed verdict or judgment notwithstanding the verdict is to be granted when, construing the evidence most strongly in favor of the party opposing the motion, the trial court finds

reasonable minds could come to only one conclusion and that conclusion is adverse to the party opposing the motion. Civ.R. 50(A)(4); *Crawford v. Halkovics*, 1 Ohio St.3d 184, 185-186, 1 OBR 213 (1982). Our review of the trial court's disposition is de novo. *Midwest Energy Consultants, L.L.C. v. Util. Pipeline, Ltd.,* 5th Dist. Stark No. 2006CA00048, 2006-Ohio-6232, ¶46.

{¶69} We find no error in the trial court's judgment overruling Stachel's motion for directed verdict for the reasons set forth in our discussion of the third assignment of error.

{¶70} In his motion for judgment notwithstanding the verdict, Stachel did not argue the damage award included medical bills for damages proximately caused by Johnson's claim he (Stachel) was negligent for failing to promulgate a fall policy for Johnson, which claim was ultimately rejected by the jury. Stachel did not address the award of full damages to distinguish between the two claims of negligence by way of jury interrogatory or by raising the issue before the jury was discharged. Nor did Stachel raise the issue in his motion for JNOV. Rather, he continued to maintain the judgment for economic damages should be reduced to $0 because of Johnson's failure to prove his negligence was the proximate cause of any of the medical bills incurred by Johnson, and he further argued Johnson was not the real party in interest. Accordingly, we find the trial court did not err in overruling Stachel's motion for JNOV for the reasons set forth in our discussion of his third assignment of error.

{¶71} The fourth assignment of error is overruled.

V.

{¶72} In his fifth assignment of error, Stachel argues the trial court erred in failing to direct a verdict and grant JNOV on the "high cap" economic damage finding by the jury.

In interrogatory number 4, the jury found as a result of Stachel's negligence, Johnson incurred a permanent and substantial physical deformity, loss of use of limb, or permanent functional physical injury which permanently prevented Johnson from being able to care for himself. Stachel argues this finding is not supported by evidence in the record.

{¶73} Our standard of review of the trial court's decision on Stachel's motion for directed verdict and JNOV is set forth in our discussion of Assignment of Error 4.

{¶74} R.C. 2323.43(A) provides:

> (A) In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property, all of the following apply:
>
> (1) There shall not be any limitation on compensatory damages that represent the economic loss of the person who is awarded the damages in the civil action.
>
> (2) Except as otherwise provided in division (A)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a civil action under this section to recover damages for injury, death, or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of three hundred fifty thousand dollars for each plaintiff or a maximum of five hundred thousand dollars for each occurrence.

(3) The amount recoverable for noneconomic loss in a civil action under this section may exceed the amount described in division (A)(2) of this section but shall not exceed five hundred thousand dollars for each plaintiff or one million dollars for each occurrence if the noneconomic losses of the plaintiff are for either of the following:

(a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

(b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.

{¶75} Stachel argues to constitute a "permanent and substantial physical deformity," the injury must be both profound and visible, citing *Bransteter v. Moore,* N.D. Ohio No. 3:09 CV2, 2009 WL 152317. He argues there is no appreciable difference when observing Johnson today than in the days before the fracture, as his healed hip fracture is not visible and he remains wheelchair bound and dependent on others for his care, as he had been before the fall. Stachel argues there is no evidence of loss of use of a limb, as Johnson was already paralyzed due to a stroke unrelated to the fracture. Stachel argues Johnson's difficulty using his left leg is no different now than after he plateaued in physical therapy before the hip fracture. He also argues there is no evidence of a permanent functional injury which prevents Johnson from being able to independently care for himself, as he was going to be a lifetime resident of a nursing home, dependent upon others for his care, with or without the hip fracture.

{¶76} We find *Bransteter* distinguishable from the instant case. *Bransteter* dealt with the issue of under what circumstances physical scarring could rise to the level of a "permanent and substantial physical deformity." We agree with the trial court:

> Plaintiff presented uncontested evidence that he suffers from permanent shortening of one leg and also that his hip joint was surgically removed due to Defendant's delayed diagnosis of his hip fracture. Such evidence is sufficient to constitute a permanent and substantial physical deformity. The Court is unpersuaded by Defendant's analogies to cases that hold scarring must be visibly severe in order to qualify as a "substantial physical deformity." Plaintiff's injury is not merely aesthetic or superficial – it is a structural change to his skeletal system. The complete removal of a joint is not insubstantial merely because it is not visible to the human eye.

{¶77} Judgment, February 6, 2019.

{¶78} Further, Dr. Ericka Glass, the orthopedic surgeon who treated Johnson, testified had the fracture been diagnosed two months earlier, a hip replacement could have addressed the fracture and provided enhanced stability to bear weight for transfers. However, when the surgeon first examined Johnson, his leg was chronically shortened and his left hip was unstable. Due to the delay in diagnosing the fracture, his treatment options were changed, and Johnson required complete removal of his hip joint, rendering the hip non-weight-bearing.

{¶79} We find the trial court did not err in overruling Stachel's motions for directed verdict and JNOV on the basis the jury's answer to interrogatory number four was not supported by the evidence. The fifth assignment of error is overruled.

VI.

{¶80} In his sixth assignment of error, Stachel argues the trial court erred in failing to reduce the noneconomic damage award of $538,000 to the cap of $500,000, prior to applying the setoff.

{¶81} In *Guilianni v. Shehata, supra*, the trial court reduced the verdict based on the jury's apportionment of comparative fault prior to applying the damage cap set forth in R.C. 2323.43, cited above. The Court of Appeals for the First District agreed. The court first looked at the language in R.C. 2323.43(B):

> (B) If a trial is conducted in a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property and a plaintiff prevails with respect to that claim, the court in a nonjury trial shall make findings of fact, and the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following:
>
> (1) The total compensatory damages recoverable by the plaintiff;
>
> (2) The portion of the total compensatory damages that represents damages for economic loss;
>
> (3) The portion of the total compensatory damages that represents damages for noneconomic loss.

{¶82} The defendant's argument in *Guiliani* focused on the definition of "recoverable" damages in R.C. 2323.43(B)(1). If the court applies the comparative negligence calculation after applying the cap, the practical result would be to read "capped" damages into the language "recoverable damages" as set forth in R.C. 2323.43(B)(1). However, R.C. 2323.43(D)(2) specifically prohibits the court from instructing the jury with respect to the statutory limit on noneconomic damages, and no party, lawyer, or witness may notify the jury of the limit. Therefore, it would be inconsistent with the substance of R.C. 2323.43(B)(3) to define "recoverable" damages as capped damages. *Guiliani v. Shehata*, 1st Dist. No. C-130837, 2014-Ohio-4240, 19 N.E.3d 971, ¶38. Moreover, if the legislature had intended the comparative-negligence statute to apply after the damage-cap statute, it could have explicitly provided such in the damage-cap statute. *Id.* The court further took note the same conclusion was reached by the Tenth District Court of Appeals regarding the punitive damage cap, as well as courts in California, Maine, and Massachusetts. *Id.* at ¶39, *citing Faieta v. World Harvest Church,* 10th Dist. Franklin No. 08AP–527, 2008-Ohio-6959; *McAdory v. Rogers*, 215 Cal.App.3d 1273, 264 Cal. Rptr. 71 (Cal.Ct.App.1989); *Atkins v. Strayhorn*, 223 Cal.App.3d 1380, 273 Cal.Rptr. 231 (Cal.Ct.App.1990); *Brown v. Crown Equip. Corp.,* 2008 ME 186, 960 A.2d 1188, ¶ 25 (Me.2008); *Rodriguez v. Cambridge Housing Auth*., 59 Mass. App. Ct. 127, 795 N.E.2d 1 (Mass.App.Ct.2003).

{¶83} We see no reason to distinguish between application of the comparative negligence statute and application of statutory setoff with regards to the order in which the cap is applied. As in a case where the jury is asked to apportion comparative negligence, in a case where setoff is applied, the jury is prohibited from knowing about the limitation on

damages, and reading R.C. 2323.43(B)(1) to define "recoverable damages" to include only capped damages would be inconsistent with the substance of the statute. Therefore, we find the court did not err in reducing the jury's verdict for noneconomic damages by the statutory setoff before applying the cap.

{¶84} In the instant case, while $21,757.85 of the setoff attributable to the Altercare settlement was clearly for economic damages, the record does not affirmatively demonstrate whether the $112,500 settlement with RSSS was economic or noneconomic. Absent a contrary showing in the record, we presume regularity in the trial court's proceedings. *See, e.g., Brookridge Party Ctr., Inc. v. Fisher Foods, Inc.,* 12 Ohio App.3d 130, 137, 468 N.E.2d 63, 72 (8th Dist. Cuyahoga 1983). The jury entered a finding of $538,000 in noneconomic damages. Subtracting $112,500 for the settlement setoff, the award of noneconomic damages is $425,500. This figure is below the $500,000 limitation on noneconomic damages. The jury found Johnson was entitled to $98,000 in economic damages. Applying the setoff of $21,757.85 of economic damages leaves an award of $76,242.15 for economic damages. The total award of damages is therefore $501,742.15, the amount of the judgment entered by the trial court. We find no error in the trial court's judgment.

{¶85} The sixth assignment of error is overruled.

VII.

{¶86} In his seventh assignment of error, Stachel argues the trial court erred in overruling his motion for new trial on the basis the court erred in prohibiting his expert from testifying on matters outside his expert report.

{¶87} The standard of appellate review on a motion for new trial is abuse of discretion. *E.g., Heropulos v. Phar*es, 5th Dist. Stark No. 2000CA00061, 2000 WL 1275579, *2. In order to find an abuse of discretion, we must find the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶88} In overruling Stachel's motion for new trial, the trial court stated:

> Defendant claims that he was unfairly prohibited from eliciting Dr. Feighan's opinion "that Plaintiff's surgical procedure and recovery would not have been any different if his hip fracture had been diagnosed earlier." During Dr. Feighan's testimony, counsel asked: "let's say he underwent surgery in September, would your procedure choice be the same for Russell Johnson?" The Court excluded this testimony on grounds that it was beyond the scope of the opinions disclosed in Dr. Feighan's report. This one question was the sole objection sustained during Dr. Feighan's direct examination. Despite the Court sustaining an objection to that single question, Dr. Feighan continued to testify – without objection – that a hip replacement would not have been a good option for Plaintiff because of his prior stroke and seizures. Dr. Feighan also testified that Plaintiff "would probably have a similar outcome" regardless of the time of diagnosis because of his previous medical issues. Regardless of this Court's ruling in sustaining an objection to one question posed by Defendant's counsel, Defendant was able to solicit the testimony he now argues he was

precluded from presenting. Any minimal limitation placed on Dr. Feighan's testimony did not prevent Defendant from having a fair trial.

{¶89} Judgment, February 6, 2019.

{¶90} Upon our review of the transcript, we find no abuse of discretion in the trial court's judgment overruling Stachel's motion for new trial on this basis. While Dr. Feighan was prohibited from directly saying Johnson's surgery options would not have been any different had he undergone surgery in September, the substance of his admitted testimony conveyed this opinion.

{¶91} The seventh assignment of error is overruled.

Cross-Appeal II.

{¶92} In his second assignment of error on cross-appeal, Johnson argues the trial court's decision denying his motion for attorney fees was against the manifest weight of the evidence, based on counsel for Stachel filing frivolous pleadings, defending the case in a manner designed to increase litigation costs, and intimidating counsel for Johnson by threatening future fees and revocation of her law license.

{¶93} Both parties in the instant case filed motions for attorney fees, and they agreed to submit the issue to the trial court without an evidentiary hearing.

{¶94} Pursuant to R.C. 2323.51(B)(1), "at any time not more than thirty days after the entry of final judgment in a civil action * * *, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with a civil action * * *." The award may be made "against a party, the party's counsel of record, or both." R.C. 2323.51(B)(4).

{¶95} "Conduct" includes "[t]he filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, * * * or the taking of any other action in connection with a civil action[.]" R.C. 2323.51(A)(1)(a).

{¶96} "Frivolous conduct" is defined as conduct of a party to a civil action which satisfies any of the following:

> (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (ii)It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii)The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (iv)The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶97} R.C. 2323.51(A)(2)(a)(i) through (iv).

{¶98} "Frivolous conduct is not proved merely by winning a legal battle or by proving that a party's factual assertions were incorrect." *Harris v. Rossi*, 11th Dist. Trumbull No. 2016-T-0014, 2016-Ohio-7163, ¶ 18. "A party is not frivolous merely because a claim is not well-grounded in fact. * * * [R.C. 2323.51] was designed to chill egregious, overzealous, unjustifiable, and frivolous action. * * * [A] claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim." *Ohio Power Co. v. Ogle*, 4th Dist. Hocking No. 12CA14, 2013–Ohio–1745, ¶ 29–30 (Citation omitted).

{¶99} R.C. 2323.51 uses an objective standard in determining whether sanctions may be imposed for frivolous conduct. *Kester v. Rogers*, 11th Dist. Lake Nos. 93–L–056 and 93–L–072, *10 (May 6, 1994). Thus, a finding of frivolous conduct under R.C. 2323.51 is decided without inquiry as to what the individual knew or believed, and instead asks whether a reasonable lawyer would have brought the action in light of existing law. *Omerza v. Bryant & Stratton*, 11th Dist. Lake No. 2006–L–147, 2007–Ohio–5216, ¶ 15 (Citation omitted).

{¶100} "Whether particular conduct is frivolous may be either a factual or a legal determination. * * * A trial court's factual finding that a party's conduct was [or was not] frivolous will not be disturbed where the record contains competent, credible evidence to support the court's determination. * * * In contrast, whether a pleading is warranted under existing law or can be supported by a good-faith argument for an extension, modification, or reversal of existing law is a question of law, which is reviewed de novo." *Swartz v. Hendrix*, 2nd Dist. Darke No. 2010-CA-18, 2011-Ohio-3422, ¶ 22, citing *Foland* v. *Englewood*, 2nd Dist. Montgomery No. 22940, 2010-Ohio-1905, ¶ 32.

{¶101} Both parties also sought sanctions pursuant to Civ. R. 11. Civ.R. 11 governs the signing of motions, pleadings and other documents and states, in pertinent part:

> Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number, facsimile number, if any, and business e-mail address, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. A party who is not represented by an attorney may further state a facsimile number or e-mail address for service by electronic means under Civ.R. 5(B)(2)(f). Except when otherwise specifically provided by these rules, pleadings, as defined by Civ.R. 7(A), need not be verified or accompanied by affidavit. The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate

> action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

{¶102} In ruling on a motion for sanctions made pursuant to Civ.R. 11, a court "must consider whether the attorney signing the document (1) has read the pleading, (2) harbors good grounds to support it to the best of his or her knowledge, information, and belief, and (3) did not file it for purposes of delay." *Ceol v. Zion Indus. Inc*), 81 Ohio App.3d 286, 290, 610 N.E.2d 1076 (9th Dist. Lorain 1992). Civ.R. 11 expressly requires the conduct of the attorney or pro se party must be willful; mere negligence is insufficient. *Riston v. Butler*, 149 Ohio App.3d 390, 777 N.E.2d 857, 2002–Ohio–2308, at ¶ 9 (2002).

{¶103} In denying the competing motions for sanctions and attorney fees, the trial court stated:

> Merely because a parties' legal position ultimately proves unsuccessful does not render such conduct frivolous. In each of the instances discussed by the parties, some positions were certainly better supported than others. Additionally, the tenor of this case has been contentious, and at times has not reflected the level of civility the Court expects. Nevertheless, the Court does not find that any of the enumerated conduct on either side is so egregious as to warrant sanctions. Both parties' request for sanctions pursuant to R.C. 2323.51 and Civ. R. 11 is therefore denied.

{¶104} Judgment, March 6, 2020.

{¶105} We find no abuse of discretion or legal error in the trial court's conclusion. In his brief, Johnson points to numerous pleadings, actions, and comments made by counsel for Stachel which he claims justify the imposition of sanctions. In defending this assignment of error, Stachel likewise points to actions by counsel for Johnson which he maintains precipitated his actions. We will not discuss individually the numerous examples of alleged misconduct asserted by both parties in their briefs. Although some positions taken by Stachel were better supported legally and factually than others, the mere fact he was ultimately unsuccessful does not render the conduct frivolous under the statute. Further, while the trial court is correct the tenor of the case was contentious, the accusations of improper conduct were made on both sides, and we find no abuse of discretion or legal error in the trial court's finding neither side's conduct required sanctions to be imposed.

{¶106} The second assignment of error on cross-appeal is overruled.

{¶107} Johnson's conditional cross-assignments of error all address error made in the trial, and we find they are rendered moot by the fact we have overruled all of Stachel's assignments of error which would have required a new trial.

{¶108} The judgment of the Stark County Common Pleas Court is affirmed.

By: Hoffman, P.J.
Gwin, J. and
Delaney, J. concur