[Cite as *Ellinger v. Ho,* 2010-Ohio-553.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Shelley R. Ellinger et al.,	:	
Plaintiffs-Appellants,	:	
		No. 08AP-1079
v.	:	(C.P.C. No. 06CVA04-5131)
George T. Ho, M.D. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 18, 2010

Phillip L. Harmon, for appellants.

Arnold Todaro & Welch Co., LPA, *Karen L. Clouse, Gregory B. Foliano* and *Patrick F. Smith*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiffs-appellants, Shelley R. Ellinger and Barbara Butterbaugh, appeal from a judgment in favor of defendants-appellees, George T. Ho and Urological Associates, Inc. For the following reasons, we affirm.

{¶2} In late 2004, Pearl Ernest Butterbaugh began experiencing difficulty urinating. His primary physician referred him to Dr. Robert Lewis, a urologist. While performing a cystoscopy to view the inside of Butterbaugh's urethra and bladder, Lewis discovered "a large, abnormal-appearing ball of tissue" that obstructed the urethra.

(Lewis' December 16, 2004 operative report.) Lewis then operated on Butterbaugh to remove the abnormal tissue. During this operation—called a transurethral resection of the prostate—Lewis also removed tissue samples from the bladder and prostate. Subsequent pathological testing of the removed tissue showed that it contained transitional cell carcinoma. To determine if the cancer had metastasized, Lewis ordered CAT scans of Butterbaugh's chest, abdomen, and pelvis, as well as a bone scan.

{¶3} Lewis believed that if Butterbaugh's cancer had not spread, the only procedure that could cure him was a radical cystoprostatectomy—surgery to remove the bladder, prostate, and seminal vesicles. However, that surgery would be exceptionally difficult because Butterbaugh previously had received radiation therapy to his pelvis and abdomen to treat testicular cancer. Radiation causes bands of scar tissue to form, which adhere organs and tissues to other internal surfaces. The adhesions and other side effects of radiation would complicate the surgery. Consequently, Lewis referred Butterbaugh to Ho, a urologist with more experience treating urinary tract malignancies.

{¶4} Ho received the results from the CAT and bone scans, which showed no signs that the cancer had metastasized to another part of Butterbaugh's body. He then performed a cystoscopy and a transurethral resection of Butterbaugh's bladder to determine the extent, exact location, and origin of the cancer. During that surgery, Ho observed a polypoid growth emanating from the neck of the bladder and protruding into the prostatic urethra, the urinary canal that begins at the neck of the bladder and runs through the prostate. Ho removed tissue samples from the neck of the bladder and the polypoid growth. Pathological testing of those tissue samples indicated that Butterbaugh's cancer had invaded the muscle wall of the bladder, but not the prostate. At

that point, Ho diagnosed Butterbaugh with stage T3 poorly differentiated transitional cell carcinoma of the bladder.

{¶5} Physicians assign a stage to cancer based upon the extent of the cancer. The standardized staging system used for bladder cancer includes five stages: Ta, T1, T2, T3, and T4. As the stage increases, the progression of the cancer advances. In stage T3, cancer cells have proliferated throughout the bladder. In stage T4, cancer cells have proliferated to a structure adjacent to the bladder, such as the prostate.

{¶6} There are two types of stages: the clinical stage and the pathologic stage. Physicians arrive at a clinical stage based on all available information obtained prior to surgery to remove the cancer. In the case at bar, Ho premised his clinical staging of Butterbaugh's tumor on the results from the CAT and bone scans, the cystoscopies, and the transurethral resections. Pathologists determine the pathologic staging using information gained through examination of the cancer on a microscopic level. Pathologic staging is more accurate than clinical staging because a pathologist can achieve a closer and more thorough examination of the cancerous tumor after its removal from the body.

{¶7} Physicians also evaluate the grade of a patient's cancer, labeling cancer cells well differentiated, moderately differentiated, or poorly differentiated. A poorly differentiated bladder cancer cell no longer looks like a normal bladder cell. Poorly differentiated cancers are typically more aggressive and have a high propensity to spread.

{¶8} Given Butterbaugh's diagnosis, Ho told Butterbaugh that he had a very aggressive cancer with a very poor prognosis. Although the CAT and bone scans had not shown the spread of cancer beyond the pelvic region, Ho explained that there were

"very high odds" that the cancer had metastasized, but on the undetectable, microscopic level. (Tr. 1236.) Ho also told Butterbaugh that the only potentially curative treatment was a radical cystoprostatectomy, which Butterbaugh would have great difficulty tolerating. Ho emphasized that the surgery would be difficult and carry a high degree of risk because Butterbaugh had previously received radiation treatment in his pelvic region. According to Ho:

> My question to [Butterbaugh] [was]: Are you willing to tolerate that kind of price for a potentially relatively small chance at a cure? * * *
>
> Mr. Butterbaugh, unequivocally said, "If I have any chance of a cure, I want the cure."

(Tr. 1215.)

{¶9} Butterbaugh and his family (his wife, Barbara Butterbaugh, and daughter, Ellinger) asked whether chemotherapy would be appropriate to treat Butterbaugh's cancer. At trial, Ho testified that he told them that Butterbaugh did not qualify for chemotherapy because he had poor renal function. Also, Ho explained that a three-month course of chemotherapy, which would weaken Butterbaugh, could prevent him from undergoing surgery. In contrast to Ho's recollection of this conversation, both Ellinger and Barbara Butterbaugh only recalled Ho saying that chemotherapy was not an option.

{¶10} On February 7, 2005, Ho performed the radical cystoprostatectomy. After surgery, Ho sent Butterbaugh's bladder, seminal vesicles, and prostate to the pathology lab for testing. Dr. David Bryant, a pathologist, microscopically examined segments of the organs and determined that the cancerous tumor had originated in the neck of the

bladder and extensively invaded the prostate and seminal vesicles. Because the cancer had penetrated the prostate, Bryant staged Butterbaugh's bladder cancer at the T4 level.

{¶11} While Butterbaugh was recovering from surgery, Ho told Butterbaugh and his family that "whatever cancer was present appeared to have been successfully removed." (Tr. 1024.) For the next five months, Ho continued to monitor Butterbaugh for recurrence of cancer. In July 2005, an MRI showed a large, soft-tissue mass located in front of the base of Butterbaugh's spine. The MRI also showed that multiple lymph nodes near the area of the mass were enlarged and causing the displacement of the inferior vena cava, a major blood vessel that carries blood from the lower half of the body to the heart.

{¶12} At that time, Dr. E. Bradley Pewitt, a urologist in Ho's practice group, was treating Butterbaugh because Ho was out of town. Concerned that the mass signaled the return of Butterbaugh's cancer, Pewitt consulted with a colorectal surgeon and asked whether he could biopsy the mass to ascertain whether it was cancerous. In the colorectal surgeon's opinion, the location of the mass made a biopsy unsafe. Pewitt also consulted with Dr. Ralph Roach, a medical oncologist, and requested that Roach evaluate Butterbaugh to determine whether he was a candidate for chemotherapy. Roach concluded that Butterbaugh's performance status, or general well-being, was poor—he suffered from renal and abdominal wall infection, he had severe renal insufficiency, he was anemic, and he had a history of diabetes and high blood pressure. Given Butterbaugh's condition, Roach ruled him out as a candidate for chemotherapy.

{¶13} Over the next three months, Butterbaugh's health continued to deteriorate. The mass discovered in July 2005 began expanding, a sign that it was most likely

malignant. However, the location of the mass and Butterbaugh's poor condition made any treatment of the recurrent bladder cancer impossible.

{¶14} Butterbaugh died on October 6, 2005. As stated on Butterbaugh's death certificate, the immediate cause of his death was malignant arrhythmia, an irregular heart rhythm. The arrhythmia was a consequence of hyperkalemia, an elevated level of potassium. The accumulation of potassium was a result of renal failure, which occurred because the cancerous mass compressed and obstructed the inferior vena cava.

{¶15} On April 17, 2006, Barbara Butterbaugh and Ellinger, acting individually and as executrix of Butterbaugh's estate, filed a survivorship and wrongful death action against Ho and his practice group. The complaint alleged that Ho committed medical malpractice in his care and treatment of Butterbaugh, and that Ho did not obtain Butterbaugh's informed consent before operating on him on February 7, 2005.

{¶16} A jury trial commenced on July 28, 2008. In large part, plaintiffs attempted to prove that Butterbaugh would have benefited from neoadjuvant (pre-operative) chemotherapy, and that Ho breached the standard of care when he failed to inform Butterbaugh about neoadjuvant chemotherapy and/or incorporate neoadjuvant chemotherapy into his treatment plan.

{¶17} Plaintiffs first presented the testimony of Roach, the medical oncologist who evaluated Butterbaugh in July 2005. Roach testified that, after reviewing Butterbaugh's medical records, he had concluded that Butterbaugh would have been a candidate for neoadjuvant chemotherapy prior to the February 7, 2005 surgery. Moreover, Roach opined that neoadjuvant chemotherapy would have improved Butterbaugh's outlook for survival. Roach based his opinion on a study conducted by the Southwest Oncology

Group ("SWOG") that compared two groups of patients, all of whom had advanced bladder cancer (i.e., stage T2, T3, or T4). The first group underwent cystectomy[1] alone, while the second group first underwent a four-drug chemotherapy regimen prior to cystectomy. The five-year survival rate[2] of the first group was 42 percent, but that rate improved to 57 percent for the second group. The median survival of patients in the first group was 46 months, while the median survival of patients in the second group was 77 months. Moreover, Roach testified that, as demonstrated in the SWOG study and other studies, approximately 30 percent of patients receiving neoadjuvant chemotherapy achieve complete remission of the cancerous tumor prior to surgery, while another 40 percent show partial reduction of the cancerous tumor prior to surgery.

{¶18} Dr. Dudley Danoff, plaintiffs' second expert witness, testified that Ho deviated from the standard of care when: (1) he failed to fully inform Butterbaugh of the therapeutic and potentially curative option of neoadjuvant chemotherapy, (2) he failed to fully inform Butterbaugh that the "surgery only" treatment plan carried a significantly greater risk of complications and death than a treatment plan that included both neoadjuvant chemotherapy and surgery, and (3) he executed the "surgery only" treatment plan rather than the optimal treatment plan of neoadjuvant chemotherapy followed by surgery. In Danoff's opinion, neoadjuvant chemotherapy might have reduced the size of the cancerous tumor, making surgery to remove the tumor easier. Danoff also opined that Butterbaugh probably would have survived "many, many, many months more, if not years" if his treatment had included neoadjuvant chemotherapy. (Tr. 613.)

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[1] A cystectomy is the surgical removal of the bladder.

[2] A five-year survival rate indicates the percentage of patients in a study who are alive for five years after diagnosis.

{¶19} To rebut Roach and Danoff's testimony, defendants presented the testimony of their own expert witness, Dr. Michael Droller. Droller testified that the standard of care did not require Ho to administer neoadjuvant chemotherapy to Butterbaugh. According to Droller, the accepted standard for the treatment of advanced bladder cancer mandates a radical cystoprostatectomy, while neoadjuvant chemotherapy remains only an investigational approach. Moreover, in Droller's opinion, treatment with neoadjuvant chemotherapy carried major risk, but no benefit, to Butterbaugh. Droller explained that, before the February 7, 2005 surgery, Butterbaugh had limited reserves to compensate for the stress chemotherapy would put on his body—his kidney function was compromised; he had diabetes, high blood pressure, and some vascular disease; and the previous radiation treatment had adversely affected his ability to produce the white blood cells necessary to support his immune system. Butterbaugh's only chance for a cure was a radical cystoprostatectomy. However, the toll chemotherapy would have taken on Butterbaugh might have weakened him so much that he could not have withstood surgery. Alternatively, the delay in surgery may have allowed the cancer to metastasize to another part of Butterbaugh's body, converting a potentially curable cancer into an incurable cancer.

{¶20} Although the SWOG study suggested that patients with advanced bladder cancer could benefit from neoadjuvant chemotherapy, Droller criticized the study itself. Droller pointed out that the study selected only those patients with a high performance status, who because of their better overall function could cope better with chemotherapy. Also, SWOG terminated the study prematurely, leading to difficulty in assessing the results. Finally, Droller noted that Butterbaugh could not receive the same full dose of

chemotherapy given to the study participants because of his kidney problems. A lower dose of chemotherapy would be less effective and, thus, Butterbaugh could not expect a response on par with the study participants' responses.

{¶21} Pewitt seconded Droller's opinion that Ho did not breach the standard of care in rejecting neoadjuvant chemotherapy as a treatment option for Butterbaugh. Pewitt explained that the urological community is still debating the appropriateness of treating advanced bladder cancer with neoadjuvant chemotherapy; it has not yet become the standard of care. Moreover, in Pewitt's opinion, Butterbaugh's health precluded him from undergoing neoadjuvant chemotherapy. Citing Butterbaugh's compromised kidney function and immune system, Pewitt stated that he did not have the reserves to tolerate chemotherapy.

{¶22} Ho also characterized neoadjuvant chemotherapy as an investigational approach to treating advanced bladder cancer. Additionally, Ho opined that, given the state of Butterbaugh's health and the aggressiveness of his cancer, the risks inherent in administering neoadjuvant chemotherapy outweighed any potential benefit Butterbaugh might derive from that treatment.

{¶23} As an additional matter, plaintiffs sought to prove that Ho committed medical malpractice when he erroneously staged Butterbaugh's cancer at the T3 level during the clinical stage. Danoff, plaintiffs' expert witness, testified that Ho deviated from the standard of care when he failed to adequately stage, diagnose, and/or evaluate the extent of the spread of Butterbaugh's cancer. Danoff opined that because Butterbaugh's bladder cancer had invaded the prostatic urethra, it had spread into an adjacent organ.

Therefore, under the bladder cancer staging system, Ho should have concluded that Butterbaugh's bladder cancer was a T4 cancer, not a T3 cancer.

{¶24} Droller, defendants' expert witness, agreed with Danoff on this point. Droller conceded that, because Ho knew prior to the February 7, 2005 surgery that Butterbaugh's cancer involved the prostate, Ho wrongly staged the cancer at level T3. Droller also admitted that the error in staging violated the standard of care. However, Droller emphasized that Ho's error did not harm Butterbaugh because treatment for both T3 and T4 stage bladder cancers is the same—radical cystoprostatectomy.

{¶25} Ho contended that both Danoff and Droller were wrong. When Ho performed the cystoscopy and transurethral resection of Butterbaugh's bladder, he observed polypoid growths protruding from the bladder neck into the prostatic urethra. Ho removed those growths and forwarded them to the pathology lab for analysis. The pathology results showed that the cancerous tumor had grown down the prostatic urethra, but it had not penetrated prostate tissue. Because the tumor had not invaded the prostate, Ho staged it as a T3—not T4—tumor.

{¶26} After an eight-day trial, the jury returned a verdict in defendants' favor. In response to a jury interrogatory, the jury indicated that it found that Ho had not breached the standard of care in his care and treatment of Butterbaugh.

{¶27} Plaintiffs filed three post-verdict motions: a motion to amend the complaint to conform to the evidence, a motion for judgment notwithstanding the verdict, and a motion for a new trial. The trial court denied all three motions. Plaintiffs then moved for reconsideration of the trial court's denial of their motions for judgment notwithstanding the verdict and new trial. The trial court also denied that motion. On November 12, 2008, the

trial court entered judgment for defendants. Plaintiffs now appeal from that judgment, and they assign the following errors:

> [1.] The trial court prejudicially erred and abused its discretion when it [o]verruled Plaintiff's Motion for Ruling to Exclude All Opinion Testimony of Defendants' Expert Witness (Dr. Droller) On Cause of Death and On Chemotherapy.
>
> [2.] The trial court prejudicially erred and abused its discretion when it [e]xcluded admissible evidence that Dr. Ho deviated from the universal medical standard of care to be truthful.
>
> [3.] The trial court prejudicially erred and abused its discretion when it [r]efused to use the jury instructions or jury interrogatories proposed by Plaintiffs.
>
> [4.] The trial court prejudicially erred and abused its discretion when it [r]efused to require the jury to resume deliberations to answer a jury interrogatory on the issue of informed consent after the jury rendered its verdict on medical negligence but before it had been released from service.
>
> [5.] The trial court prejudicially erred and abused its discretion when it [o]verruled Plaintiff's Motion For [sic] Motion to Amend Complaint to Conform to the Evidence, Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Motion for Reconsideration.
>
> [6.] The trial court erred as a matter of law when it [p]ermitted counsel for the defense to cite various learned treatises despite the fact that counsel [did not] disclose[ ] any intention to rely upon any learned treatises before trial.
>
> [7.] The jury's verdict was contrary to the manifest weight of the evidence because [t]he verdict in favor of Defendants-Appellees finding no medical negligence was contrary to the "physical facts rule" on the issue of negligent staging of the tumor before and after surgery.
>
> [8.] The jury's verdict was contrary to the manifest weight of the evidence because [t]he verdict in favor of Defendants-Appellees finding no medical negligence was unfounded given the undisputed fact that the defense offered no expert testimony to rebut Plaintiff's expert testimony that Dr. Ho

> violated the standard of care to advise a patient of all potentially therapeutic treatment options including, in this case, chemotherapy.

{¶28} By plaintiffs' first assignment of error, they argue that the trial court erred in allowing Droller, defendants' expert witness, to testify regarding the use of chemotherapy for the treatment of advanced bladder cancer and the appropriateness of that treatment for Butterbaugh. Preliminarily, we note that plaintiffs' first assignment of error also challenges the trial court's decision to admit Droller's testimony regarding the cause of Butterbaugh's death. Plaintiffs, however, fail to support that challenge with any argument. An appellant must demonstrate each assigned error through an argument supported by citations to legal authority and facts in the record. App.R. 16(A)(7); *Cross v. Ohio Adult Parole Auth. Chief*, 10th Dist. No. 09AP-364, 2009-Ohio-5027, ¶3. If an appellant neglects to advance such an argument, a court of appeals may disregard the assignment of error. App.R. 12(A)(2); *Bond v. Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶16-17. Because plaintiffs' brief does not contain any argument that the trial court erred in allowing Droller's testimony about Butterbaugh's cause of death, we will disregard their first assignment of error to the extent that it challenges that ruling.

{¶29} In the only argument supporting their first assignment of error, plaintiffs contend that Droller was unqualified to provide an expert opinion regarding chemotherapy because he admitted that he did not prescribe systemic chemotherapy. We disagree.

{¶30} Pursuant to Evid.R. 702, a witness may testify as an expert if the witness and his or her testimony satisfy three criteria. The second criterion requires that the witness be "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(B). Notably,

Evid.R. 702(B) does not require that the witness be the best witness on the subject or demonstrate complete knowledge of the field in question. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶54; *Scott v. Yates*, 71 Ohio St.3d 219, 221, 1994-Ohio-462; *Leichtamer v. Am. Motors Corp.* (1981), 67 Ohio St.2d 456, 474. See also *Young-Hatten v. Taylor*, 10th Dist. No. 08AP-511, 2009-Ohio-1185, ¶32-33; *Lautenschlager v. MidOhio Cardiology and Vascular Consultants, Inc.*, 10th Dist. No. 07AP-308, 2008-Ohio-3692, ¶12, 26. Rather, the rule only requires that the witness demonstrate some knowledge on a particular subject superior to that possessed by an ordinary juror. *Scott* at 221; *Nationwide Mut. Ins. Co. v. Icon Health and Fitness, Inc.*, 10th Dist. No. 04AP-855, 2005-Ohio-2638, ¶8. The trial court has discretion to determine whether a witness is competent to testify as an expert, and an appellate court will not reverse that decision absent an abuse of discretion. *Scott* at 221; *Leichtamer* at 474.

{¶31} Here, Droller testified that he is a board-certified urologist, and that he has been practicing medicine for 39 years. He received his undergraduate and medical degrees from Harvard University. After completing residencies in both surgery and urology, Droller joined the faculty of Johns Hopkins University. While serving on the faculty of Johns Hopkins, Droller conducted research in the field of urologic oncology. He left Johns Hopkins to assume the chairmanship of Mount Sinai School of Medicine. Droller participated in the peer review of the SWOG study prior to its publication in the New England Journal of Medicine.

{¶32} Droller explained that he does not prescribe systemic chemotherapy because he does "not feel qualified to manage the assessment of side effects [and] complications associated with systemic treatment." (Tr. 787.) Although Droller refrains

from administering systemic chemotherapy, as a urologist, Droller has "fundamental experience" with all aspects of the care and treatment of bladder cancer. (Tr. 856.) As Droller testified, "[b]ladder cancer is recognized as a disease in which the urologist is the primary physician to evaluate and decide on treatment." (Tr. 707.) In order to perform this role, urologists such as Droller necessarily have to possess knowledge, experience, and education regarding the risks and benefits of chemotherapy. While a medical oncologist might have more knowledge, experience, and education regarding chemotherapy than a urologist, the existence of a more qualified witness does not preclude a lesser qualified witness from testifying. Here, defendants demonstrated that Droller's knowledge of chemotherapy surpassed an ordinary juror's knowledge, thus qualifying him to testify as an expert witness on that subject under Evid.R. 702(B). We therefore conclude that the trial court did not abuse its discretion in allowing Droller to present expert testimony on chemotherapy. Accordingly, we overrule plaintiffs' first assignment of error.

{¶33} By plaintiffs' second assignment of error, they argue that the trial court erred in excluding from evidence a portion of a medical record wherein Pewitt recounted a conversation with a nurse in which she repeated what she overheard Ho telling Butterbaugh. Because plaintiffs did not proffer the excluded portion of the medical record into evidence, they waived this alleged error.

{¶34} Pursuant to Evid.R. 103(A),

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> * * *

> (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. * * *

Thus, absent a proffer or questioning that makes the substance of the excluded evidence apparent, a party cannot argue before an appellate court that the trial court erred in the exclusion of evidence. *State v. Gilmore* (1986), 28 Ohio St.3d 190, 191-92 (modifying *State v. Hipkins* (1982), 69 Ohio St.2d 80). In other words, if the complaining party does not proffer the excluded evidence or the substance of that evidence is not apparent from the questioning of the witness, then appellate courts deem any error arising from the exclusion of the evidence waived. *Hilliard v. First Indus., L.P.*, 165 Ohio App.3d 335, 2005-Ohio-6469, ¶41.

{¶35} Moreover, beyond the dictates of Evid.R. 103(A)(2), a practical problem arises when a trial court excludes documentary evidence and the complaining party fails to proffer that evidence. Absent a proffer, the appellate court lacks access to the excluded document and, thus, the appellate court cannot evaluate it to determine whether the trial court's decision to exclude it prejudiced the complaining party. See *Joyce-Couch v. DeSilva* (1991), 77 Ohio App.3d 278, 292 ("An offer of proof serves the purpose of assisting an appellate tribunal in determining whether the lower court's exclusion of certain evidence was prejudicial to 'a substantial right' of the complaining party."). See also *Lambert v. Wilkinson*, 11th Dist. No. 2007-A-0032, 2008-Ohio-2915, ¶106-07 (deeming any error in excluding documentary evidence waived because the complaining party could not demonstrate its prejudicial effect).

{¶36} In the case at bar, plaintiffs failed to proffer an unexpurgated version of the medical record at issue. Accordingly, we conclude that plaintiffs waived any error arising

from the exclusion of a portion of that document, and we overrule plaintiffs' second assignment of error.

{¶37} By plaintiffs' third assignment of error, they argue that the trial court erred when it refused to give the jury instructions and interrogatories they proposed. We disagree.

{¶38} In the case at bar, plaintiffs requested that the trial court instruct the jury that:

> To prove the common law tort of lack of informed consent, the plaintiffs must prove by the greater weight of the evidence that:
>
> (A) Prior to surgery on February 7, 2005, the defendant, Dr. Ho, failed to disclose to and discuss with Mr. Butterbaugh the material risk of death by metastatic spread of bladder cancer inherently and potentially involved with any decision by Mr. Butterbaugh *not* to be treated with neoadjuvant, adjuvant, or perioperative chemotherapy before or after surgery; and,
>
> (B) the material risk of death by metastatic spread of bladder cancer that should have been disclosed by the defendant Dr. Ho actually occurred and was a direct cause of injury and death to Mr. Butterbaugh; and,
>
> (C) a reasonable person in Mr. Butterbaugh's position would have decided to be treated with neoadjuvant, adjuvant, or perioperative chemotherapy before or after surgery on February 7, 2005 if the material risk of death by metastatic spread of bladder cancer had been disclosed to him prior to surgery on February 7, 2005.

(Emphasis sic.)

{¶39} The trial court recognized that it needed to give the jury an instruction on the tort of lack of informed consent. However, the trial court balked at giving plaintiffs' instruction because it integrated plaintiffs' theory of their case into the elements of the tort.

The trial court instead decided to give the jury a more neutral instruction based upon the Ohio Jury Instructions.

{¶40} Generally, a trial court should give a requested jury instruction if it is a correct statement of the law applicable to the facts of the case and reasonable minds might reach the conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591. Whether a jury instruction correctly states the law is a question of law that an appellate court reviews de novo. *Myer v. Chieffo*, 180 Ohio App.3d 78, 2008-Ohio-6603, ¶29.

{¶41} The doctrine of informed consent arose from the belief that every person has a right to determine what shall be done with his or her body. *Wheeler v. Wise* (1999), 133 Ohio App.3d 564, 572. To preserve that right, whenever a physician proposes to perform a treatment upon a patient, the physician must inform the patient about the material risks and dangers associated with the proposed treatment. Id. Ohio law permits recovery for a physician's failure to obtain informed consent when a plaintiff proves that:

> (a) [t]he physician fail[ed] to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;
>
> (b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize[d] and [were] the proximate cause of the injury to the patient; and
>
> (c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment had been disclosed to him or her prior to the therapy.

Nickell v. Gonzalez (1985), 17 Ohio St.3d 136, 139.

{¶42} Here, the jury instruction plaintiffs proposed so warped the tort of lack of informed consent that it would have allowed recovery for conduct that is not actionable. Pursuant to plaintiffs' jury instruction, a jury could find Ho liable because he did not tell Butterbaugh about a risk that could arise if Butterbaugh did not undergo chemotherapy; a treatment that Ho never recommended. Thus, in plaintiffs' version of the tort of lack of informed consent, a physician could be liable if he failed to inform his patient about the risks of *not* submitting to a treatment that the physician did *not* propose to perform. However, the law of informed consent does not require a physician to educate his or her patients generally on medical matters. *Turner v. Children's Hosp.*, *Inc.* (1991), 76 Ohio App.3d 541, 554. The physician's duty to inform only extends to "the material risks and dangers inherently and potentially involved with respect to the proposed therapy." *Nickell* at 139. Because plaintiffs' requested jury instruction expanded the scope of the tort of lack of informed consent beyond that duty, it incorrectly stated the law. We conclude, therefore, that the trial court did not err in refusing to give the instruction plaintiffs requested to the jury.

{¶43} Plaintiffs next argue that the trial court erred in failing to submit to the jury the proposed interrogatory that corresponded with their jury instruction on lack of informed consent. Again, we disagree.

{¶44} Plaintiffs' requested jury interrogatory asked:

> Did Plaintiffs prove by the greater weight of the evidence that:
>
> (A) Prior to surgery on February 7, 2005, the defendant, Dr. Ho, failed to disclose to and discuss with Mr. Butterbaugh the material risk of death by metastatic spread of bladder cancer inherently and potentially involved with any decision by Mr. Butterbaugh *not* to be treated with neoadjuvant, adjuvant, or perioperative chemotherapy before or after surgery; and,

> (B) the material risk of death by metastatic spread of bladder cancer that should have been disclosed by the defendant Dr. Ho actually occurred and was a direct cause of injury and death to Mr. Butterbaugh; and,
>
> (C) a reasonable person in Mr. Butterbaugh's position would have decided to be treated with neoadjuvant, adjuvant, or perioperative chemotherapy before or after surgery on February 7, 2005 if the material risk of death by metastatic spread of bladder cancer had been disclosed to him prior to surgery on February 7, 2005?

(Emphasis sic.)

The trial court did not give this, or any other, interrogatory to the jury to test the jury's verdict on the lack of informed consent claim.

{¶45} Pursuant to Civ.R. 49(B), "[t]he court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument." Although Civ.R. 49(B) requires the submission of jury interrogatories upon a party's request, that rule does not reduce the trial court to " 'a mere conduit who must submit all interrogatories counsel may propose.' " *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 107, 1992-Ohio-109 (quoting *Ragone v. Vitali & Beltrami, Jr., Inc.* (1975), 42 Ohio St.2d 161, 165). Rather, a trial court retains discretion to reject interrogatories that are inappropriate in form or content. *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St.3d 611, 613, 1994-Ohio-326; *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.* (1986), 28 Ohio St.3d 333, 336. A jury interrogatory must test the jury's thinking on ultimate and determinative issues. *Freeman* at 613; *Ramage* at 107; *Cincinnati Riverfront Coliseum* at 337. A jury interrogatory fulfills this function if it "will lead to 'findings of such a character as will test the correctness of the general verdict returned and enable the court to determine as a matter of law whether

such verdict shall stand.' " *Freeman* at 613-14 (quoting *Bradley v. Mansfield Rapid Transit, Inc.* (1950), 154 Ohio St. 154, 160).

{¶46} Plaintiffs drafted their interrogatory with the intent that the jury's answer would reveal its resolution of the lack of informed consent claim. However, the factual matters the jury would have had to decide to answer the interrogatory would not have actually determined defendants' liability for lack of informed consent. As we explained above, under the law of informed consent, Ho could not be liable for his failure to inform Butterbaugh regarding the risks of not undergoing a treatment that Ho did not propose. Accordingly, the requested jury interrogatory did not test an ultimate and determinative issue, and thus, the trial court did not err in rejecting it.

{¶47} In sum, we conclude that the trial court did not err in declining to give the requested jury instruction and interrogatory regarding lack of informed consent. Therefore, we overrule plaintiffs' third assignment of error.

{¶48} By plaintiffs' fourth assignment of error, they argue that the trial court erred in refusing to order the jury to resume deliberations to answer a jury interrogatory on the lack of informed consent claim after the jury rendered its verdict. We disagree.

{¶49} Immediately before closing arguments, the trial court and the parties reviewed each side's proposed jury instructions and plaintiffs' requested jury interrogatories. After a lengthy discussion, the trial court rejected both plaintiffs' and defendants' proposed jury instructions and told the parties that it would draft instructions based on the Ohio Jury Instructions during the lunch break. In the course of revising plaintiffs' jury interrogatories to mirror the more generic jury instructions, the trial court omitted a jury interrogatory on the lack of informed consent claim. When court

reconvened, the trial court presented the parties with the instructions and the general verdict and interrogatory forms that it intended to give the jury. The trial court then asked whether counsel had anything to say with regards to the jury instructions or the general verdict and interrogatory forms. Neither party objected to the modified jury interrogatories.

{¶50} After the jury returned with a verdict for defendants, plaintiffs' counsel asked, "[w]as there a verdict or interrogatory rendered on the informed consent?" (Tr. Vol. IX, at 4.) The trial court replied that the jury had answered the interrogatories that the parties had approved, and it dismissed the jury.

{¶51} On appeal, plaintiffs now argue that, in response to their counsel's question, the trial court should have given the jury an interrogatory on the lack of informed consent claim and ordered the jury back into deliberations to answer that interrogatory. In support of their argument, plaintiffs rely solely upon Civ.R. 49(B). That rule permits a trial court to "return the jury for further consideration of its answers [to the interrogatories] and verdict" if one or more of the answers is inconsistent with the general verdict. In this case, however, the general verdict and the interrogatory the jury answered (on plaintiffs' negligence claim) were consistent. Thus, Civ.R. 49(B) does not apply.

{¶52} Moreover, if plaintiffs had wanted a jury interrogatory regarding their lack of informed consent claim, then they had to raise their objection to the absence of such an interrogatory when the trial court gave them the opportunity. By failing to object at that point, plaintiffs waived any error associated with the lack of a jury interrogatory on informed consent. *Schmidt v. Koval*, 7th Dist. No. 00-C.A.-239, 2002-Ohio-1558, ¶38; *Bardonaro v. Gen. Motors Corp.* (Aug. 4, 2000), 2d Dist. No. 18063; *Yackel v. Kay*

(1994), 95 Ohio App.3d 472, 481. Accordingly, we overrule plaintiffs' fourth assignment of error.

{¶53} By plaintiffs' fifth assignment of error, they argue that the trial court erred in denying their motion for a judgment notwithstanding the verdict, motion for a new trial, and motion to amend the complaint to conform to the evidence adduced at trial. We will first review the trial court's ruling on plaintiffs' motion for judgment notwithstanding the verdict.

{¶54} The standard for a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B) is the same as the standard for a motion for directed verdict pursuant to Civ.R. 50(A). *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, ¶28. That standard requires a trial court to grant either motion if "the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." Civ.R. 50(A)(4). See also *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, ¶23 (when deciding a motion for a judgment notwithstanding the verdict, a court "must test whether the evidence, construed most strongly in favor of [the nonmoving party], is legally sufficient to sustain the verdict"). Although this standard requires a court to review and consider the evidence, a motion for judgment notwithstanding the verdict presents a question of law because a court must examine the sufficiency of the evidence, not weigh the evidence or try the credibility of the witnesses. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679-80, 1998-Ohio-602. See also *Malone v. Courtyard by Marriott Ltd. Partnership*, 74

Ohio St.3d 440, 445, 1996-Ohio-311 ("[T]he court is confronted solely with a question of law: Was there sufficient material evidence presented at trial on this issue to create a factual question for the jury?"). As a motion for judgment notwithstanding the verdict presents a question of law, an appellate court applies the de novo standard of review. *Environmental Network Corp.* at ¶23.

{¶55} Here, plaintiffs argue that they are entitled to a judgment notwithstanding the verdict because the evidence demonstrates that Ho committed medical negligence when he wrongly staged Butterbaugh's bladder cancer at the clinical stage. We disagree.

{¶56} In order to establish medical negligence, a plaintiff must prove four elements: (1) a duty running from the defendant to the plaintiff, (2) a breach of that duty by the defendant, (3) damages suffered by the plaintiff, and (4) a proximate cause relationship between the breach of duty and the damages. *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc.*, 108 Ohio St.3d 494, 2006-Ohio-942, ¶17. We conclude that plaintiffs failed to prove that the evidence adduced at trial required reasonable minds to decide these four elements in their favor.

{¶57} First, although both Danoff and Droller testified that Ho violated the standard of care when he failed to stage Butterbaugh's cancer at the T4 level, Ho disagreed. According to Ho, Butterbaugh suffered from T3 bladder cancer. Ho explained that, while the cancerous tumor had protruded into the prostatic urethra, it had not invaded the prostate. Multiple witnesses testified that bladder cancer advances to the T4 stage only when it invades an adjacent organ, like the prostate. Therefore, construing the evidence in defendants' favor, reasonable minds could disagree on whether Ho deviated from the standard of care in his staging of Butterbaugh's bladder cancer.

{¶58} Second, reasonable minds could also disagree regarding whether a faulty staging of Butterbaugh's cancer proximately caused any injury. Danoff, Droller, Pewitt, and Ho all concurred that a radical cystoprostatectomy was the standard treatment for both T3 and T4 bladder cancers. Thus, because Ho would have provided the same treatment for a T4 bladder cancer as a T3 bladder cancer, reasonable minds could conclude that neither Butterbaugh nor his survivors could suffer any injury as a result of the alleged misdiagnosis.

{¶59} In sum, reasonable minds could find against plaintiffs on multiple elements of their medical negligence claim. Thus, the trial court did not err in denying plaintiffs a judgment notwithstanding the verdict.

{¶60} We next turn to plaintiffs' argument that the trial court erred in denying their motion for a new trial. Plaintiffs challenge the trial court's ruling on two grounds: (1) Civ.R. 59(A)(6) entitles them to a new trial because they established that the judgment on the medical negligence claim was not sustained by the weight of the evidence, and (2) Civ.R. 59(A)(1) entitles them to a new trial because the trial court's failure to order the jury back into deliberations to consider an informed consent interrogatory prevented them from having a fair trial.[3] We find both arguments unavailing.

{¶61} Pursuant to Civ.R. 59(A)(6), a trial court may order a new trial on all or part of the issues if "[t]he judgment is not sustained by the weight of the evidence." When presented with a motion premised on Civ.R. 59(A)(6), a trial court must weigh the evidence and consider the credibility of the witnesses to determine whether the manifest

[3] On appeal, plaintiffs failed to designate any Civ.R. 59(A) ground as a basis for their latter argument. However, in their motion for a new trial, they quoted language from Civ.R. 59(A)(1), so we will review their argument pursuant to that provision.

weight of the evidence supports the judgment. *Salvatore v. Findley*, 10th Dist. No. 07AP-793, 2008-Ohio-3294, ¶24; *Berge v. Columbus Comm. Cable Access* (1999), 136 Ohio App.3d 281, 319. An appellate court reviews such a determination under an abuse of discretion standard. *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, ¶39; *Malone* at 448.

{¶62} Here, the trial court rejected plaintiffs' argument that the weight of the evidence militated for a judgment in their favor on their claim that Ho acted negligently when he staged Butterbaugh's bladder cancer at the T3 level. The trial court determined that the evidence proved that Ho met the standard of care in his care and treatment of Butterbaugh. On appeal, plaintiffs fail to explain why this ruling constitutes an abuse of discretion. Our review of the record reveals that it contains competent, credible evidence that Ho properly staged Butterbaugh's bladder cancer. Accordingly, we conclude that the trial court did not abuse its discretion in refusing to grant plaintiffs a new trial based on Civ.R. 59(A)(6).

{¶63} Pursuant to Civ.R. 59(A)(1), a trial court may grant a new trial on all or part of the issues if the moving party demonstrates "[i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial." In the context of a motion for a new trial, an "irregularity" is " 'a departure from the due, orderly and established mode of proceeding therein, where a party, with no fault on his part, has been deprived of some right or benefit otherwise available to him.' " *Meyer v. Srivastava* (2001), 141 Ohio App.3d 662, 667 (quoting *Sherwin-Williams Co. v. Globe Rutgers Fire Ins. Co.* (1912), 20 Ohio C.C. (N.S.) 151, 154, 31 Ohio C.D. 248). See also

Wright v. Suzuki Motors Corp., 4th Dist. No. 03CA2, 2005-Ohio-3494, ¶115. Whether to grant or deny a motion for a new trial on the ground set forth in Civ.R. 59(A)(1) is a decision committed to the trial court's sound discretion, and an appellate court will not reverse such a ruling absent an abuse of discretion. *Harris* at ¶39; *Vermeer of S. Ohio, Inc. v. Argo Constr. Co., Inc.* (2001), 144 Ohio App.3d 271, 275-76; *Streb v. AMF Bowling Centers, Inc.* (Apr. 30, 1998), 10th Dist. No. 97APE06-752.

{¶64} Here, plaintiffs argue that the trial court erred in denying them a new trial because "the verdict was inconsistent with the non-existent jury interrogatory on the tort claim of lack of informed consent." (Appellants' brief, at 29.) This argument is nonsensical. A nonexistent answer to an unasked interrogatory cannot possibly contradict the general verdict. Interpreting plaintiffs' argument broadly, we presume that they contend that the trial court departed from the due, orderly, and established mode of proceeding in its handling of plaintiffs' counsel's belated realization that an interrogatory on informed consent did not go to the jury. However, as we concluded with respect to plaintiffs' fourth assignment of error, the trial court's management of the situation did not constitute error. Accordingly, we conclude that the trial court did not abuse its discretion in refusing to grant plaintiffs a new trial based on Civ.R. 59(A)(1).

{¶65} Finally, we turn to plaintiffs' contention that the trial court erred in denying their motion to amend the complaint to conform to the evidence adduced at trial. Pursuant to Civ.R. 15(B):

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues

> may be made upon motion of any party at any time, even after judgment.

An appellate court reviews a trial court's ruling on a Civ.R. 15(B) motion for abuse of discretion. *Spisak v. McDole* (1984), 15 Ohio St.3d 62, 63.

{¶66} Here, plaintiffs sought amendment to specifically plead additional theories underlying their claims for medical negligence and lack of informed consent. Plaintiffs claimed that they introduced the evidence necessary to support each theory at trial. The trial court denied plaintiffs' motion, finding that amendment would prejudice defendants because it would allow plaintiffs to argue on appeal that the jury instructions and interrogatories did not correspond with the amended complaint. Because plaintiffs wanted to clarify their theories of the case, not add claims, we are uncertain how amendment would have given plaintiffs grounds on which to appeal the jury instructions and interrogatories. The trial court ensured that content of the jury instructions and interrogatories turned upon the law relating to the claims asserted, not the theories plaintiffs advanced to support their claims.

{¶67} Nevertheless, we find plaintiffs' assertion of error unavailing. Where a party fails to demonstrate that prejudice arose from the denial of a motion to amend the pleadings to conform to the evidence, an appellate court will not disturb the trial court's decision. *Cole v. Cole*, 11th Dist. No. 2006-A-0079, 2007-Ohio-6929, ¶18; *Margala v. Berzo*, 11th Dist. No. 2003-T-0155, 2005-Ohio-2265, ¶15. See also *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶17 ("A reviewing court will not disturb a judgment unless the error contained within is materially prejudicial to the complaining party."). Here, plaintiffs do not state how the trial court's denial of their motion to amend prejudiced them, and we cannot identify any prejudice either. Therefore, we conclude

that, if the trial court abused its discretion in denying plaintiffs' motion, that abuse of discretion only amounted to harmless error.

{¶68} In sum, we find no basis on which to the reverse the trial court's rulings on plaintiffs' motion for a judgment notwithstanding the verdict, motion for a new trial, or motion to amend the complaint to conform to the evidence. Accordingly, we overrule plaintiffs' fifth assignment of error.

{¶69} By plaintiffs' sixth assignment of error, they argue that the trial court erred in allowing defense counsel to use various learned treatises to question witnesses, even though defense counsel had not disclosed an intention to rely upon those learned treatises prior to trial. We disagree.

{¶70} Initially, we note that a large portion of the argument supporting this assignment of error focuses on plaintiffs' contention that the trial court erred in precluding Danoff, their expert witness, from referring to scholarly articles that he relied on to reach his expert opinion. Plaintiffs, however, failed to assign any error regarding the exclusion of this evidence. Pursuant to App.R. 12(A)(1)(b), appellate courts "determine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16." Thus, this court rules on assignments of error only, and will not address mere arguments. *In the Matter of the Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶5. Because plaintiffs have not assigned any error related to the exclusion of the scholarly articles that Danoff relied on, we will not address that argument. See *Guernsey v. Milano Sports Enterprises, L.L.C.*, 177 Ohio App.3d 314, 2008-Ohio-2420, ¶40 (refusing to address contentions in the argument section of the brief that did not fall under an assignment of error).

{¶71} In the portion of the argument that corresponds with their assignment of error, plaintiffs appear to be asserting that defendants committed a discovery violation by not disclosing the articles, textbooks, and guidelines they intended to question witnesses about. Plaintiffs apparently believe that the trial court should have sanctioned defendants by prohibiting them from citing to the undisclosed medical literature. Civ.R. 37(B)(2)(b) states that a trial court may prohibit a party from introducing designated matters into evidence as a sanction for failing to obey an order to provide or permit discovery. *Bd. of Clark Cty. Commrs. v. Newberry*, 2d Dist. No. 2002-CA-15, 2002-Ohio-6087, ¶15; *Marion v. Brandes* (Aug. 1, 2000), 10th Dist. No. 99AP-1153. Here, however, defendants never contravened the discovery rules, much less disobeyed an order to compel. Consequently, we conclude that the trial court did not err in overruling plaintiffs' objections to the extent that plaintiffs based those objections on defendants' purported discovery violation.

{¶72} Next, plaintiffs argue that the trial court erred in allowing questioning about the articles, textbooks, and guidelines because the trial court did not first ascertain that they were reliable as required in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, and *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 119 S.Ct. 1167. In both *Daubert* and *Kumho Tire*, the United States Supreme Court held that, under Fed.R.Civ.P. 702, expert testimony is admissible only if it is reliable and relevant. *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795; *Kumho Tire*, 526 U.S. at 147, 119 S.Ct. at 1174. To determine the reliability of scientific testimony, a district court must assess whether the reasoning or methodology underlying the expert's testimony is scientifically valid. *Daubert*, 509 U.S. at 592-93, 113 S.Ct. at 2796. See also *Kumho*

Tire, 526 U.S. at 152, 119 S.Ct. at 1176 (requiring a trial court to ensure that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"). The Supreme Court of Ohio adopted this "gatekeeper" role for Ohio trial courts in *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 1998-Ohio-178. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶24.

{¶73} Plaintiffs misunderstand the import of *Daubert* and *Kumho Tire*. Courts apply the standard articulated in those cases to determine whether to admit an expert's opinion testimony, not whether to allow questioning about articles, textbooks, and/or guidelines on the subject of the expert's opinion. Nothing in *Daubert* and *Kumho Tire* addresses the admissibility of medical literature. Accordingly, as plaintiffs have not asserted any basis for finding error, we overrule plaintiffs' sixth assignment of error.

{¶74} By plaintiffs' seventh assignment of error, they argue that, after discounting the testimony that contravenes the physical facts rule, the judgment is contrary to the manifest weight of the evidence. We find this argument unavailing.

{¶75} According to the physical facts rule, neither a court nor jury can give probative value to any testimony positively contradicted by the physical facts. *McDonald v. Ford Motor Co.* (1975), 42 Ohio St.2d 8, 12. In other words, " 'the testimony of a witness which is opposed to the laws of nature, or which is clearly in conflict with principles established by the laws of science, is of no probative value and a jury is not permitted to rest its verdict thereon.' " Id., quoting *Connor v. Jones* (1945), 115 Ind.App. 660, 670.

{¶76} Here, plaintiffs argue that Ho's testimony that he properly staged Butterbaugh's bladder cancer contradicts a physical fact. Plaintiffs, however, fail to identify the specific physical fact at issue, and instead, refer broadly to the "undisputed medical evidence upon which [Bryant] based his testimony." (Appellants' brief, at 34.) Bryant testified regarding his analysis of slides containing segments of Butterbaugh's removed organs. After reviewing those slides, Bryant determined that the cancer had invaded Butterbaugh's prostate, thus leading Bryant to diagnose Butterbaugh at the pathologic stage with T4 bladder cancer.

{¶77} Notably, Ho and Bryant staged Butterbaugh's cancer at different times, using different information. Ho diagnosed Butterbaugh at the clinical stage, while Bryant diagnosed him at the pathologic stage. According to Ho, based on the information available at the clinical stage, he properly evaluated Butterbaugh's cancer as a T3 bladder cancer. Although post-surgery pathological testing showed that the cancer had invaded the prostate, Ho did not know that when he conducted the clinical staging. Thus, the post-surgery results of pathological testing do not contradict Ho's testimony that, given what he knew prior to surgery, the correct clinical stage diagnosis was T3 bladder cancer. Accordingly, we conclude that the physical facts rule does not require us to disregard Ho's testimony, and we overrule plaintiffs' seventh assignment of error.

{¶78} By plaintiffs' eighth assignment of error, they argue that the manifest weight of the evidence does not support the judgment on the medical negligence claim. Plaintiffs assert that Ho breached the standard of care because he failed to advise Butterbaugh of all potentially therapeutic treatment options, including chemotherapy. We disagree.

{¶79} Judgments supported by some competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81. If the evidence is susceptible to more than one interpretation, we must construe it consistently with the trial court's judgment. *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d. 581, 584, 1995-Ohio-289.

{¶80} In the case at bar, plaintiffs assert that the evidence demonstrates that Ho failed to advise Butterbaugh about chemotherapy, and this omission violated the standard of care. Contrary to plaintiffs' contention, Ho testified that he did speak with Butterbaugh about chemotherapy. Ho explained to Butterbaugh why chemotherapy would not benefit him. Both Pewitt and Droller concurred with Ho's opinion that neoadjuvant chemotherapy was not appropriate for Butterbaugh due to his poor condition and medical history. Moreover, Droller also testified that nothing Ho did in the treatment of Butterbaugh fell below the standard of care. Given this testimony, we conclude that competent, credible evidence supports the judgment on the medical negligence claim. Accordingly, we overrule plaintiffs' eighth assignment of error.

{¶81} For the foregoing reasons, we overrule plaintiffs' first through eighth assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and McGRATH, JJ., concur.