[Cite as *Jeffrey v. Marietta Mem. Hosp.*, 2013-Ohio-1055.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Larry Jeffrey,	:	
Plaintiff-Appellant/ [Cross-Appellee],	:	
	:	Nos. 11AP-492
v.		and 11AP-502
	:	(C.P.C. No. 06CVA-04-4508)
Marietta Memorial Hospital et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees/ [Cross-Appellants].	:	
	:	

D E C I S I O N

Rendered on March 21, 2013

Chamberlain Law Firm Co., LPA, and *Henry W. Chamberlain*, for Larry Jeffrey.

Roetzel & Andress LPA, *Thomas A. Dillon*, and *Jessica L. Davis*, for Marietta Memorial Hospital.

Arnold Todaro & Welch Co., LPA, *Maryellen C. Spirito*, *Gerald J. Todaro* and *Kevin Popham*, for John Tugaoen, M.D. and Mid-Ohio Cardiology and Vascular Consultants, Inc.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant/cross-appellee, Larry Jeffrey ("plaintiff"), individually and as the administrator of the estate of Amanda Jeffrey, appeals from judgments of the Franklin County Court of Common Pleas denying his motion for prejudgment interest,

denying his motion for judgment notwithstanding the verdict ("JNOV"), and granting summary judgment in favor of defendants-appellees, Dr. John Tugaoen and MidOhio Cardiology and Vascular Consultants, Inc. (collectively "Dr. Tugaoen"). Defendant-appellee/cross-appellant, Marietta Memorial Hospital ("Marietta"), cross-appeals from a judgment of the Franklin County Court of Common Pleas denying Marietta's motion for JNOV, or, alternatively, for new trial. Because (1) the trial court did not err in denying either plaintiff's motion for JNOV or Marietta's motion for JNOV, or, alternatively, for new trial, (2) the trial court's corrected judgment entry was a nullity, as the trial court could not sua sponte reopen and modify its final, appealable order awarding Dr. Tugaoen summary judgment, and (3) the trial court did not err in denying plaintiff's motion for prejudgment interest, we affirm the judgments of the Franklin County Court of Common Pleas.

I. FACTS & PROCEDURAL HISTORY

{¶ 2} On April 3, 2006, plaintiff filed a complaint sounding in medical malpractice and wrongful death against Marietta, Dr. Maria Galupo, Dr. Warren Cooper, Marietta Gynecological Associates, Inc., Riverside Methodist Hospital ("Riverside"), Dr. Leanne Strack, Dr. Mark Antonchak, and Dr. Tugaoen. The facts giving rise to the complaint occurred in April 2005 when Amanda Jeffrey, a 29-year-old wife and mother of three, died following a laproscopy surgery performed by Dr. Galupo.

{¶ 3} Dr. Galupo, a member of Marietta Gynecological Associates, Inc., was Amanda Jeffrey's primary care obstetrician in 2005. Mrs. Jeffrey informed her obstetrician that she had been experiencing frequent abdominal pain. Dr. Galupo determined Mrs. Jeffrey's pain was the result of a large amount of scar tissue built-up inside Mrs. Jeffrey's abdomen, resulting from two cesarean section deliveries and a hysterectomy, and a two centimeter cyst on Mrs. Jeffrey's left ovary. When non-invasive options did not relieve Mrs. Jeffrey's pain, Dr. Galupo and Mrs. Jeffrey began discussing surgical options to remove the adhesions and left ovary. Dr. Galupo presented Mrs. Jeffrey with two surgical options: a laparotomy surgery, requiring a large incision across the abdomen and at least a three night stay in the hospital, or a laparoscopy surgery, a minimally invasive surgery which typically allows the patient to return home the same

day. Because Mrs. Jeffrey did not want to take time off from work, she decided to have the laproscopy surgery.

{¶ 4} Dr. Galupo performed the surgery at Marietta on the morning of April 4, 2005. Dr. Galupo cut away the scar tissue using plasma kinetic forceps, an "electrosurgical-type instrument" which can "cut and cauterize all in one move." (Tr. 668, 2032.) After three hours of cutting away extensive adhesions, Dr. Galupo discovered that the ovary was stuck to the side of the pelvic wall and the bladder. Dr. Galupo decided she could not safely remove the ovary as planned and ended the surgery. In her post-operative notes, Dr. Galupo stated that "[d]ue to the extensive amount of adhesions as well as concern of use of the plasma kinetic forceps close to the bowel, the patient will be observed overnight." (Plaintiff's exhibit No. 1, 6.)

{¶ 5} Following the surgery, Mrs. Jeffrey appeared to be doing well. Her heart rate and respiratory rate were normal, she did not have a fever, and her abdomen appeared soft with no signs of infection. Over the next two days, however, Mrs. Jeffrey's condition steadily deteriorated.

{¶ 6} During the afternoon of April 4, Mrs. Jeffrey's heart rate rose from 88 beats per minute to over 100 beats per minute and she began experiencing abdominal pain. During the early morning hours of April 5, Mrs. Jeffrey became nauseous and tests revealed her white blood cell count was well above normal limits. Throughout April 5, Mrs. Jeffrey's heart rate continued to increase, she continued vomiting, and she continued to experience abdominal pain. At 3:00 p.m. on April 5th, Mrs. Jeffrey's respiratory rate increased to 24 breaths per minute, well above a normal respiratory rate.

{¶ 7} During the early morning hours of April 6 Mrs. Jeffrey was nauseous and her bowel sounds were hypoactive. Dr. Cooper, Dr. Galupo's associate at Marietta Gynecological Associates, Inc., took over for Mrs. Jeffrey's care. When Dr. Cooper arrived at 6:30 a.m., he noted Mrs. Jeffrey had a stable tachycardic or fast heart rate. Based on Mrs. Jeffrey's elevated white blood cell count, Dr. Cooper was concerned Mrs. Jeffrey had developed an ileus, a paralysis of the intestines which can result after surgery near the bowel. Dr. Cooper ordered an abdominal x-ray known as a KUB exam, to determine whether Mrs. Jeffrey had an ileus.

{¶ 8} By 8:30 a.m. on April 6, Mrs. Jeffrey was experiencing abdominal pain which she rated at nine out of ten and could not eat. At 10:15 a.m. the nurses called Dr. Cooper to inform him of the patient's situation: Mrs. Jeffrey's heart rate was in the 140s, her respiratory rate was 26 breaths per minute, she had decreased oxygen saturation, a distended abdomen, shallow breathing, and nausea. Dr. Cooper reordered the KUB exam stat, as the hospital employees had not performed the KUB Dr. Cooper ordered on his morning rounds.

{¶ 9} By noon on April 6, Mrs. Jeffrey's heart rate was 174 beats per minute, her respiratory rate was 36 breaths per minute, and she had a fever of 100.7. Mrs. Jeffrey was vomiting brown liquid every five minutes. At 12:45 p.m., Dr. Cooper arrived to examine Mrs. Jeffrey; her heart rate was up to 176 beats per minute and she was complaining of chest pain on her right side. Based on her elevated heart and respiratory rates, and chest pain, Dr. Cooper was concerned Mrs. Jeffrey had a pulmonary embolus, a blood clot which develops when a patient lies flat for surgery. The clot will typically develop in the legs, migrate to the lungs, and kill the patient. To detect a pulmonary embolus, Dr. Cooper ordered a VQ scan, a test which requires the patient to inhale "a radioactive isotope" while radiologists "simultaneously * * * give an injection of an isotope" and take a picture of the lungs. (Tr. 564.) The nurses took the patient to radiology at 12:55 p.m. to have the VQ scan performed. The individuals in the radiology department could not perform the VQ scan, however, because Mrs. Jeffrey was vomiting and could not lie still.

{¶ 10} Dr. Cooper called Dr. Lee, a pulmonologist and intensivist, and explained Mrs. Jeffrey's condition to him. Dr. Lee recommended that Dr. Cooper transfer Mrs. Jeffrey to the pulmonary intensive care unit ("PICU") and order antibiotics for her. Dr. Cooper placed an order for antibiotics at 1:50 p.m. When Mrs. Jeffrey arrived in the PICU, Dr. Yu, Dr. Lee's partner, took over her care. The nurses in the PICU noted that Mrs. Jeffrey's lungs sounded clear, her heart was racing, and her lower extremities appeared swollen. At 4:00 p.m. Marietta transferred Mrs. Jeffrey to their intensive care unit ("ICU").

{¶ 11} Mrs. Jeffrey arrived in the ICU with a heart rate of 160, a temperature of 102.4, and a respiratory rate in the 30s. Due to Mrs. Jeffrey's heart rate, Dr. Yu ordered a

consultation with Dr. Tugaoen, a cardiologist. Dr. Tugaoen saw Mrs. Jeffrey at 4:45 p.m., noting on his consultation note that the patient appeared septic. Dr. Tugaoen ordered that Mrs. Jeffrey be transferred by life flight to Riverside's ICU.

{¶ 12} Mrs. Jeffrey arrived at Riverside at 7:00 p.m. on April 6. Dr. Strack, a second-year resident working in Riverside's ICU, examined Mrs. Jeffrey at 9:00 p.m. and ordered a spiral CT to determine if Mrs. Jeffrey had a pulmonary embolus. Dr. Strack's superior, Dr. Preston, ordered an abdominal CAT scan, to determine whether Mrs. Jeffrey had a hole in her intestine, known as a perforated viscus. The CAT scan report showed air and fluid in Mrs. Jeffrey's abdomen, and stated the findings indicated a concern for a perforated viscus.

{¶ 13} At 7:00 a.m. on April 7, the attending physician caring for Mrs. Jeffrey called for a surgical consult. Dr. Pomerants performed the surgery that morning. He found two segments of the bowel were "completely denuded of the mesentery for 10 to 12-centimeters and [that] the bowel itself had died." (Tr. 271.) Mrs. Jeffrey was pronounced dead at 7:35 p.m. on April 9, 2005. The official cause of death was multisystem organ failure, resulting from sepsis as a result of the bowel injury. Dr. Galupo admitted her operation damaged Mrs. Jeffrey's bowel and "began a series of events that ultimately led to Amanda Jeffrey's demise." (Tr. 664.)

{¶ 14} Dr. Paul Marik, an intensivist called by plaintiff, explained that sepsis is a common disease resulting from the presence of bacteria in body tissue. A patient with sepsis will exhibit systemic signs including increased temperature, heart rate, respiratory rate, and white blood cell count. To treat sepsis, a patient must receive antibiotics and fluids immediately as "each incremental hours of delay in giving antibiotics * * * increase[s] * * * the risk of dying." (Tr. 534.) Mrs. Jeffrey never received antibiotics while at Marietta. A physician must also identify the source of the sepsis and eradicate it, as antibiotics alone could not save a septic patient. Dr. Marik opined that, if Mrs. Jeffrey was properly treated for sepsis on April 5, 2005 when she began to exhibit systemic signs, "the likely probability overwhelmingly is that * * * she would have survived." (Tr. 548.)

{¶ 15} Prior to trial, the court issued a decision granting Dr. Tugaoen's motion for summary judgment. Plaintiff settled out of court with Riverside and its employees, Drs.

Strack and Antonchak, and the court approved an entry dismissing the Riverside defendants with prejudice. The matter proceeded to trial on April 20, 2009 against the remaining defendants: Marietta, Drs. Galupo and Cooper.

{¶ 16} On May 8, 2009, the jury returned general verdicts in favor of plaintiff and against the remaining defendants. Pursuant to the defendants' request, the court also submitted interrogatories to the jury. In the interrogatories the jury found the total damages to be $2 million and apportioned liability as follows: Marietta 15 percent, Dr. Galupo 10 percent, Dr. Cooper 15 percent, and Riverside 60 percent. On August 13, 2009 the court issued the final judgment entry, consistent with the jury's interrogatory responses, finding Marietta liable for $300,000, Dr. Galupo liable for $200,000, and Dr. Cooper liable for $300,000 of the total damages award.

{¶ 17} On August 25, 2009, plaintiff filed a Civ.R. 50(B) motion for JNOV, alleging that the evidence did not support the jury's apportionment of 60 percent liability to Riverside. On August 25, 2009 plaintiff also filed a motion for prejudgment interest, pursuant to R.C. 1343.03, alleging that defendants failed to negotiate in good faith. On August 27, 2009 Marietta filed its motion for JNOV, or, alternatively, for new trial. Marietta alleged the jury's reasons for finding Marietta breached the standard of care were not supported by the evidence.

{¶ 18} The trial court denied plaintiff's motion for JNOV, denied Marietta's motion for JNOV, or, alternatively, for new trial and, following an April 8, 2011 hearing, denied plaintiff's motion for prejudgment interest.

II. ASSIGNMENTS OF ERROR

{¶ 19} Plaintiff appeals, assigning the following errors:

> 1. THE LOWER COURT ERRED IN GRANTING APPELLEES', JOHN F. TUGAOEN, M.D. AND MID-OHIO CARDIOLOGY VASCULAR CONSULTANTS, INC'S MOTION FOR SUMMARY JUDGMENT;
>
> 2. THE LOWER COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT;

> 3. THE LOWER COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR PREJUDGMENT INTEREST AGAINST APPELLEE, MARIETTA MEMORIAL HOSPITAL.

{¶ 20} Marietta cross-appeals, assigning the following error:

> The Trial Court erred in denying Defendant-Appellant's Motion for Judgment Notwithstanding the Verdict, or, Alternatively, for New Trial.

{¶ 21} For ease of discussion, we address Marietta's cross-appeal first, and plaintiff's assignments of error out of order.

III. MARIETTA'S CROSS-APPEAL—JNOV OR NEW TRIAL

{¶ 22} Marietta's cross-appeal asserts the trial court erred in denying Marietta's motion for JNOV, or, alternatively, for new trial. Marietta alleges the evidence was insufficient to support the jury's conclusion that Marietta breached the applicable standard of care.

{¶ 23} A Civ.R. 50(B) motion for JNOV "is used to determine only one issue: whether the evidence is totally insufficient to support the verdict." *Harper v. Lefkowitz*, 10th Dist. No. 09AP-1090, 2010-Ohio-6527, ¶ 8, citing *McLeod v. Mt. Sinai Med. Ctr.*, 166 Ohio App.3d 647, 2006-Ohio-2206 (8th Dist.), reversed on other grounds, 116 Ohio St.3d 139, 2007-Ohio-5587. Neither the weight of the evidence nor the credibility of the witnesses is a proper consideration for the court. *Id.*, citing *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275 (1976); *Osler v. Lorain*, 28 Ohio St.3d 345, 347 (1986). If there is evidence to support the non-moving party's side so that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Id.*, citing *Osler*.

{¶ 24} A motion for JNOV does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence. *Environmental Network Corp. v. Goodman Weiss Miller, LLP*, 119 Ohio St.3d 209, 2008-Ohio-3833, ¶ 22, quoting *O'Day v. Webb*, 29 Ohio St.2d 215 (1972), paragraph three of the syllabus. Because the motion presents a question of law, it requires a de novo review. *Id.* at ¶ 23, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995).

{¶ 25} Marietta alternatively sought a new trial, alleging the weight of the evidence did not support the jury's interrogatory response. A motion for a new trial, pursuant to Civ.R. 59(A)(6), tests whether the judgment is sustained by the weight of the evidence. A judgment is not against the manifest weight of the evidence if there is competent, credible evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. When presented with a Civ.R. 59 motion, the trial court is afforded wide discretion in determining whether the jury's verdict is against the manifest weight of the evidence. *Osler* at 351.

{¶ 26} To succeed on a medical malpractice claim, a plaintiff must establish the following: (1) the standard of care within the medical community, (2) the defendant's breach of that standard of care, and (3) proximate cause between the breach and the plaintiff's injuries. *Korreckt v. Ohio Health*, 10th Dist. No. 10AP-819, 2011-Ohio-3082, ¶ 11, citing *Adams v. Kurz*, 10th Dist. No. 09AP-1081, 2010-Ohio-2776, ¶ 11; *Williams v. Lo*, 10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶ 11. Expert testimony is required to establish the actions of the physician fell below the standard of care and that the breach caused the plaintiff's injuries. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130-31 (1976).

{¶ 27} Marietta alleged in its motion that the jury's response to interrogatory No. 2 was legally insufficient to support the verdict. Interrogatory No. 2 asked the jury to state in what respect Marietta's employees deviated from the appropriate standard of care. The jury responded: "Standard of care was deviated when there were conflicting reports on the KUB from the radiologist, and free air was not communicated to Dr. Cooper. It also was not communicated that the VQ scan was unsuccessful and alternatives were not suggested." The trial court denied Marietta's motion, noting the "most prominent criticism" of Marietta "was the lack of communication by the caregivers; that is, the nurses and staff." (Decision Overruling Marietta's Motion for JNOV or New Trial, 2.)

{¶ 28} Civ.R. 49(B) allows for the use of interrogatories in conjunction with the general verdict. "The essential purpose to be served by [jury] interrogatories is to test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial." *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.*, 28 Ohio St.3d

333, 336-37 (1986), citing *Davison v. Flowers*, 123 Ohio St. 89 (1930). "Jury interrogatories also test the jury's factual determinations and express the jury's true intentions." *Reeves v. Healy*, 192 Ohio App.3d 769, 2011-Ohio-1487, ¶ 30 (10th Dist.), citing *Hamm v. Smith*, 6th Dist. No. E-98-026 (Dec. 18, 1998), citing *Phillips v. Dayton Power & Light Co.*, 111 Ohio App.3d 433 (2d Dist.1996). If the jury's answers to the interrogatories are inconsistent with the general verdict, the court may enter judgment in accordance with the interrogatories, return the jury for further deliberations, or order a new trial. *Shoemaker v. Crawford*, 78 Ohio App.3d 53, 60 (10th Dist.1991); Civ.R. 49(B).

{¶ 29} "A failure to enter a timely objection at a time when the jury has not yet been discharged has been held to be a waiver to any inconsistent answer." (Citations omitted.) *Cooper v. Metal Sales Mfg. Corp.*, 104 Ohio App.3d 34, 42 (11th Dist.1995). Objections to interrogatories must be raised while the jury is still impaneled because at that time "the court has the full range of choices before it." *Shoemaker* at 61, citing *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207 (1982).

{¶ 30} After the trial court read the jury's responses to the interrogatories and verdicts into the record, the court asked counsel if there was any reason the jury should not be discharged. Finding no reason, the court discharged the jury. Marietta did not object to the jury's response to interrogatory No. 2. Because Marietta waited until the jury was discharged to argue that the jury's response to interrogatory No. 2 was insufficient, "the best option, that of having the jury clarify its position, became unavailable to the judge." *Cooper* at 42, citing *Shaffer v. Maier*, 68 Ohio St.3d 416 (1994).

{¶ 31} In *Cooper*, the defendant filed a motion for JNOV alleging the evidence was insufficient to support the jury's interrogatory response finding the defendant liable for intentional infliction of emotional distress. *Id.* at 40-41. The court concluded the jury's interrogatory response was potentially insufficient to support the general verdict. *Id.* at 45. However, because the defendant failed to object to the jury's interrogatory response while the jury was impaneled, the court concluded any prejudice "due to any insufficiency [the court] might have found to [interrogatory] answer number three was waived." *Id.* The court concluded that other evidence in the record, not listed in the jury's response to

the interrogatory, supported the jury's general verdict in favor of the plaintiff and, accordingly, the trial judge did not err in denying the defendant's motion for JNOV. *Id.*

{¶ 32} Regarding the KUB exam, Marietta contends there is no expert testimony in the record stating that the failure to communicate the findings of the KUB was a deviation from the applicable standard of care. Plaintiff "concedes the confusion over the KUB was not a focus of his experts." (Cross-appellee's brief, 10, fn.1.) Because Marietta failed to object to the jury's response to interrogatory No. 2 while the jury was impaneled, Marietta waived its objection to the interrogatory response. *Cooper* at 41-42; *Shoemaker* at 61. Accordingly, as long as sufficient evidence in the record supports the jury's general verdict finding Marietta liable, the trial court did not err in denying Marietta's motion for JNOV or new trial. *Cooper* at 45. Because we conclude sufficient evidence supports the jury's conclusion that Marietta deviated from the applicable standard of care by failing to communicate the results of the VQ scan, sufficient evidence thus supports the general verdict finding Marietta liable. As such, we need not discuss whether the record also supports the jury's conclusion regarding the KUB exam. *Id*.

A. VQ Scan

{¶ 33} Marietta contends there was insufficient evidence to support the jury's conclusion that Marietta's employees failed to communicate that the VQ scan was unsuccessful and suggest alternatives. Specifically, Marietta asserts that the results of the VQ scan were communicated to Dr. Yu and, in response, Dr. Yu ordered the administration of Lovenox until the VQ scan could be performed.

{¶ 34} Dr. Jeffrey Snow, a colorectal surgeon called by plaintiff, stated that Mrs. Jeffrey "went down for the VQ scan, she threw up, couldn't lay flat and they sent her back," there did not "seem like there was any communication with the physicians and none of the physicians acknowledge[d] that they knew * * * that the patient was not able to tolerate that VQ scan." (Tr. 326.) Dr. Timothy Pritchard, called by defendants, admitted there was "nothing in the record that a nurse or somebody from radiology or a doctor ever talked about what happened with the VQ scan." (Tr. 1473.) Dr. Marik noted there was "no documentation in the chart as to the reasons that it wasn't done or any alternative tests or solutions." (Tr. 604.)

{¶ 35} Dr. Marik stated that in "every other hospital, [if] the patient cannot have a test there will be a note written in the chart" stating that the radiologists could not perform the test and the "recommendations." (Tr. 604-05.) Thus, Dr. Marik explained "[t]he standard would be to document in the chart why the test couldn't be done and to suggest alternatives." (Tr. 605.) "The alternative would be to stick a nasogastric tube down, empty the stomach." (Tr. 327.) The radiologist could also shorten the exam by performing only the "profusion part of the scan." (Tr. 604.)

{¶ 36} Dr. Snow opined that Marietta deviated from the standard of care "if it failed not to report [the failure of the VQ scan] back to the physicians to get further direction on what to do." (Tr. 328.) Dr. Marik similarly testified that Marietta deviated from the standard of care because "the VQ scan wasn't done and there was really no documentation or communication with any of the physicians that it wasn't done and then what the next step should be." (Tr. 577.)

{¶ 37} Nurse Donna Winland, a nurse employed by Marietta and called by plaintiff, admitted it would be the duty and responsibility of the nursing staff on shift to report in the chart what happened in radiology regarding the VQ scan. Nurse Winland further admitted there was nothing in Mrs. Jeffrey's chart regarding what happened with the VQ scan. Dr. Marik stated "there was no documentation by the nursing staff as to why the VQ scan wasn't done which is the standard of care in every single hospital." (Tr. 597.)

{¶ 38} Marietta contends that plaintiff's experts merely relied on the absence of any direct evidence in the hospital record to support their theory that Marietta deviated from the standard of care by failing to communicate the results of the VQ scan to a physician. Drs. Snow's and Marik's testimony, that the nurses breached the applicable standard of care by failing to communicate the results of the VQ scan to a physician, was credible, competent evidence, which the jury could rely on to determine Marietta breached the standard of care. Moreover, Nurse Winland and Dr. Snow stated it was the absence of direct evidence, i.e., a notation on the patient's chart regarding why the VQ scan could not be performed, which also constituted a deviation from the standard of care.

{¶ 39} Marietta contends that Dr. Yu's consultation note presents reliable evidence that the nurses did communicate the failed VQ scan to Dr. Yu. Dr. Yu's consultation note,

dictated at 4:43 p.m. on April 6, states, "[e]mpirically we will put her on Lovenox 80 mg * * * until a VQ scan is performed." (Plaintiff's exhibit No. 2.) Nurse Sue McDonald, another nurse employed by Marietta but called by defendants, stated that Dr. Yu was aware of what happened with the VQ scan, as he "document[ed] that in his consultation note." (Tr. 1973.) Nurse McDonald stated that, in response to his knowledge regarding the VQ scan, Dr. Yu wrote an order for Lovenox, a blood thinner.

{¶ 40} In denying Marietta's motion for JNOV, or, alternatively, for new trial, the trial court concluded that Dr. Yu's consultation note merely indicated "that Dr. Yu wanted a VQ scan to be performed," but not "that any prior attempt was communicated to him, or that he knew the VQ scan was unsuccessfully attempted." (Decision Overruling Marietta's Motion for JNOV or New Trial, 4.) We agree with the trial court's conclusion. Dr. Yu's consultation note indicates only that Dr. Yu prescribed Lovenox until a VQ scan could be performed, the note does not indicate that Dr. Yu knew the VQ scan had failed, or that it was even attempted. In contrast, Dr. Snow, Dr. Marik, and even Dr. Pritchard testified there was no communication from a member of Marietta's staff to a physician regarding the failed VQ scan.

{¶ 41} Marietta lastly contends the jury's conclusion that Marietta breached the standard of care by failing to suggest an alternative to the VQ scan is legally insufficient, as R.C. 4723.151(A) prohibits a nurse from making a medical diagnosis, prescribing medical measures, or otherwise practicing any branch of medicine or surgery. R.C. 4723.151(A), however, does not prohibit a nurse from *suggesting* an alternative to a physician. Dr. Marik testified that "the standard of care * * * is that if a test is ordered in the hospital record then there needs to be an explanation why it wasn't done and an alternative." (Tr. 607.)

{¶ 42} Accordingly, sufficient, competent, credible evidence supported the jury's conclusion that Marietta deviated from the standard of care when its employees did not communicate that the VQ scan was unsuccessful and did not suggest alternatives. As such, sufficient, competent, credible evidence in the record supports the jury's general verdict finding Marietta liable. The trial court did not err in denying Marietta's motion for JNOV, or, alternatively, for new trial.

{¶ 43} Based on the foregoing, Marietta's sole assignment of error on cross-appeal is overruled.

IV. PLAINTIFF'S SECOND ASSIGNMENT OF ERROR—JNOV

{¶ 44} Plaintiff's second assignment of error asserts the trial court erred in denying plaintiff's motion for JNOV. Plaintiff's motion asserted the evidence was insufficient to support the jury's interrogatory response finding Riverside 60 percent responsible for Mrs. Jeffrey's death. Specifically, plaintiff contends that "[n]one of the experts testified to a reasonable degree of medical probability that the negligence of Riverside (or any of its employees) was a proximate cause of the death of Amanda Jeffrey." (Appellant's brief, 13.) Plaintiff does not assert that the experts at trial failed to opine on Riverside's standard of care or breach. Plaintiff asserts only that the record contains no evidence on the issue of causation.

{¶ 45} Plaintiff also did not object to the jury's interrogatory response apportioning liability while the jury was impaneled. Accordingly, plaintiff waived his objection to the interrogatory response. *See Shoemaker* at 61; *Cooper* at 41-42. Notwithstanding the waiver issue, we find sufficient evidence supports the jury's conclusion that Riverside proximately caused Mrs. Jeffrey's death.

{¶ 46} "Proximate cause" can be established " 'where an original act is wrongful or negligent and, in a natural and continuous sequence, produces a result [that] would not have taken place without the act.' " *Stuller v. Price*, 10th Dist. No. 03AP-66, 2004-Ohio-4416, ¶ 69, quoting *Whiting v. Ohio Dept. of Mental Health*, 141 Ohio App.3d 198, 202-03 (10th Dist.2001). A plaintiff in a medical malpractice case "must prove causation through medical expert testimony in terms of probability to establish that the injury was, more likely than not, caused by the defendant's negligence." *Roberts v. Ohio Permanente Med. Group, Inc.*, 76 Ohio St.3d 483, 485 (1996), citing *Shumaker v. Oliver B. Cannon & Sons, Inc.*, 28 Ohio St.3d 367 (1986).

{¶ 47} "An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." *Stinson v. England*, 69 Ohio St.3d 451 (1994), paragraph one of the syllabus, following *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St.2d 242, 253 (1971). *See also Miller v. Paulson*, 97 Ohio App.3d 217, 222 (10th

Dist.1994), quoting *Cooper* at 253-54 (finding " '[p]robability' is defined as 'more likely than not' "). The expression of probability "is a condition precedent to the admissibility of expert opinion regarding causation" and, thus "relates to the competence of such evidence and not its weight." *Stinson* at 455. "In a medical malpractice action premised on a failure to properly diagnose or treat a medical condition which results in a patient's death, the proper standard of proof on the issue of causation is whether with proper diagnosis and treatment the patient *probably* would have survived." (Emphasis sic.). *Miller* at 222, citing *Cooper* at 253-54.

{¶ 48} Plaintiff contends that, in order for the jury to conclude that Riverside was liable, an expert had to opine that Riverside's negligence proximately caused Mrs. Jeffrey's death "to a reasonable degree of medical probability." (Appellant's brief, 14.) While it is true that "expert testimony regarding causation must be expressed in terms of probability, not possibility[,]" no " 'magic words' are required, the expert's testimony, when viewed in its entirety, must [simply] equate to an expression of probability." *Davis v. Ryan*, 10th Dist. No. 11AP-198, 2012-Ohio-324, ¶ 14, quoting *Rhodes v. Firestone Tire & Rubber Co.*, 10th Dist. No. 08AP-314, 2008-Ohio-4898, ¶ 11, citing *Stinson* at paragraph one of the syllabus. *See also Ochletree v. Trumbull Mem. Hosp.*, 11th Dist. No. 2005-T-0015, 2006-Ohio-1006, ¶ 43 (noting "there is no requirement that an expert utter any 'magic language;' *i.e.* that his opinion was within the reasonable degree of certainty"). (Emphasis sic.) *Compare Stuller* at ¶ 76 (expert testimony finding it was "extremely unlikely" that a ventilator problem contributed to the patient's maladies was "tantamount to an opinion that the cause advanced by plaintiffs was not the probable cause").

{¶ 49} Plaintiff's experts were all critical of the amount of time it took the Riverside doctors to evaluate Mrs. Jeffrey and bring her into surgery. Dr. Snow criticized Riverside for not performing the CAT scan of Mrs. Jeffrey's abdomen until 3:00 a.m. on April 7, when Mrs. Jeffrey had arrived at Riverside at 7:00 p.m. on April 6. Dr. Marik criticized Riverside for waiting five hours after the doctors ordered the CAT scan and spiral CT to actually perform those tests. Dr. Michael Baggish "found it was a deviation from the standard of care for that much time to have elapsed before those tests were performed." (Tr. 994.)

{¶ 50} Dr. Snow criticized Riverside for not calling for a surgical consult in a timely fashion. While the CAT scan report indicating that Mrs. Jeffrey had a perforated viscus was available at 4:30 a.m. on April 7, Riverside waited almost three more hours before calling for the surgical consult. Dr. Snow stated it would be malpractice for a doctor to not immediately call for a surgical consult upon receiving a CAT scan report stating a concern for a perforated viscus. Drs. Marik and Baggish were also critical of Riverside's inaction after the results of the CAT scan were available.

{¶ 51} On cross-examination, defense counsel asked Dr. Marik to affirm portions of his deposition testimony. Dr. Marik admitted that, when Mrs. Jeffrey arrived at Riverside from Marietta, she had "probably around" a "20 to 30 percent" chance of dying. (Tr. 635.) Dr. Marik also confirmed his belief that, if Riverside had performed the surgery to remove Mrs. Jeffrey's deteriorating bowel "by midnight," Mrs. Jeffrey "would have survived." (Tr. 642.)

{¶ 52} Dr. Marik's testimony is tantamount to an opinion that, had Riverside performed surgery by midnight, Mrs. Jeffrey probably would have survived. As such, his testimony is sufficient to establish proximate cause. Although other evidence in the record tended to negate Dr. Marik's testimony, specifically Dr. Baggish testified Mrs. Jeffrey would not have survived even if Riverside performed the surgery by midnight, such contrary evidence affects only the weight of Dr. Marik's testimony, and is not a proper consideration for this court. *Posin* at 275. Because sufficient evidence supports the jury's finding that Riverside's negligence proximately caused Mrs. Jeffrey's death, the trial court did not err in denying plaintiff's motion for JNOV.

{¶ 53} Based on the foregoing, plaintiff's second assignment of error is overruled.

V. PLAINTIFF'S FIRST ASSIGNMENT OF ERROR—SUMMARY JUDGMENT

{¶ 54} Plaintiff's first assignment of error contends the trial court erred in granting Dr. Tugaoen's motion for summary judgment. For the reasons that follow, we are unable to reach the merits of this assignment of error.

{¶ 55} On June 5, 2008 the trial court issued a decision sustaining Dr. Tugaoen's motion for summary judgment. The court concluded that plaintiff's expert, a general and colorectal surgeon, was not qualified to opine on the standard of care of a cardiologist as

there were no "overlapping boundaries" between the two doctors' specialties. (Summary Judgment Decision, 4.) The court instructed Dr. Tugaoen's counsel to submit an appropriate entry per the local rule.

{¶ 56} The record contains a judgment entry sustaining Dr. Tugaoen's motion for summary judgment and finding "no just reason for delay." While the trial judge signed and dated the entry, the entry does not contain a common pleas court file-stamp indicating that the document was filed with the clerk. However, the certified common pleas court clerk's case history indicates that the judgment entry, recorded as document No. 153, was filed with the clerk on June 24, 2008. (R. at 153.)

{¶ 57} On August 11, 2008, the court filed a "Corrected Judgment Entry" noting that "[o]n June 24, 2008 this Court caused an Entry to be filed in this case that granted Summary Judgment to Defendants John Tugaoen, M.D." (Corrected Judgment Entry, 1.) The court explained that, on July 2, 2008, plaintiff's counsel and Dr. Tugaoen's counsel engaged in a conference call with the court, the gist of which related to whether it was the court's intention to make the June 24, 2008 order final and appealable. The court noted that, as there were multiple other defendants involved in the case, and trial as to those defendants was set for September 2008, the court did not "desire to have the trial date in this case * * * affected by any possible appeal of the causes of action involving Dr. Tugaoen." (Corrected Judgment Entry, 2.) The court amended the entry, removing the Civ.R. 54(B) language.

{¶ 58} Plaintiff's notice of appeal indicates that plaintiff is appealing the trial court's August 11, 2008 corrected judgment entry. Because the trial court's June 24, 2008 judgment entry was a final appealable order, however, the corrected judgment entry is a nullity.

{¶ 59} Initially, we must address the absence of a common pleas court file-stamp on the June 24, 2008 judgment entry. "A court of record speaks only through its journal entries," and a judgment is effective only when entered by the clerk upon the journal. *Gaskins v. Shiplevy*, 76 Ohio St.3d 380, 382 (1996), citing *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158 (1995); Civ.R. 58(A). "All judgment entries * * * must be file-stamped on the date they are filed." *In re Hopple*, 13 Ohio App.3d 54 (6th Dist.1983), paragraph

three of the syllabus. The Supreme Court of Ohio has succinctly noted that, where a judgment entry has not been "file-stamped by the trial court clerk, neither the appellate court nor [the Supreme Court] ha[ve] subject-matter jurisdiction to reach the merits of [the] case." *State v. Domers*, 61 Ohio St.3d 592 (1991).

{¶ 60} *Domers*, however, did not address other means, besides a file-stamp, which may evidence journalization. Judgment entries must be file-stamped because "[i]t is impossible for an appellate court, on its own, to determine whether an appeal is timely filed, if the judgment entry from which the appeal is being prosecuted bears no file stamp or if certified proof of the date of journalization is not forthcoming." *In re Hopple* at 55. In *In re Hopple*, the court noted that in the absence of a file-stamp "certified proof of journalization consists of proof by reference to a certified copy of the trial court clerk's docket sheet on which the dates of judgment entries are normally entered and kept." *Id.* at 55, fn.1.

{¶ 61} In *Tallmadge v. McCoy*, 96 Ohio App.3d 604 (9th Dist.1994), the entry on appeal did not bear a file-stamp, but the court, acknowledging *Domers*, concluded the appeal before it should not be dismissed. Noting *In re Hopple*, the *Tallmadge* court stated it was " satisfied that the certified record of the Municipal Court of Cuyahoga Falls, indicating that the court's decision was filed with the clerk and journalized in the transcript of docket and journal entries on February 17, 1994," served as evidence of journalization in the absence of a file-stamp. *Tallmadge* at 606-07. *See also Toledo v. Fogel*, 20 Ohio App.3d 146, 149 (6th Dist.1985) (finding that the "critical date" is the date of filing, which is "usually, though not exclusively, evidenced by a file-stamp date on the face of the document"). *Compare Klein v. Streicher*, 93 Ohio St.3d 446, 447 (2001), citing *Domers* (Cook, J., dissenting) (noting the majority accepted the appeal for review, yet the trial court judgment entry at issue "show[ed] no file stamp by the trial court clerk").

{¶ 62} Although the June 2008 judgment entry does not bear a common pleas court file-stamp, it does bear the certified record sequence No. 153. In the record certification, the clerk of the common pleas court certified that the record before us "is a true copy of the docket and journal entries filed in the trial court," and that the pleadings in the record, numbered consecutively from 1 to 397, were the original or certified copies

of the pleadings filed in the action. The certified record sequence number appearing on the June 2008 judgment entry indicates, by reference to the case history of the certified record, that the judgment entry was filed with the clerk for journalization on June 24, 2008. Accordingly, we find the judgment entry was properly journalized on June 24, 2008.

{¶ 63} We next must determine whether the June 24, 2008 entry was a final appealable order. *See Ohio Dev. Co. v. Ellis*, 2d Dist. No. 13428 (Aug. 30, 1993) (in the absence of a final appealable order, "orders of a trial court are interlocutory, and may be reconsidered by the trial court upon proper motion or upon its own motion"). An order of a court is "a final, appealable order only if the requirements of both Civ.R. 54(B), if applicable, and R.C. 2505.02 are met." *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88 (1989). R.C. 2505.02(B)(1) defines various final orders, including "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." The summary judgment award in favor of Dr. Tugaoen affected a substantial right, plaintiff's potential recovery against Dr. Tugaoen. The entry determined plaintiff's action as against Dr. Tugaoen and, since no claims remained pending against Dr. Tugaoen, plaintiff was prevented from obtaining a judgment against Dr. Tugaoen. Accordingly, the June 24, 2008 judgment entry was a final order pursuant to R.C. 2505.02(B)(1). *See Norcold, Inc. v. Gateway Supply Co.*, 3d Dist. No. 17-05-11, 2006-Ohio-6919, ¶ 36.

{¶ 64} Civ.R. 54(B) provides that "when multiple parties are involved" in an action "the court may enter final judgment as to one or more but fewer than all of the * * * parties only upon an express determination that there is no just reason for delay." The June 24, 2008 order entered final judgment as to fewer than all of the parties to the action, and included the Civ.R. 54(B) "no just reason for delay" certification. Plaintiff notes that, despite the inclusion of Civ.R. 54(B) language, an "order must still survive the scrutiny of a Civ.R. 54(B) analysis." (Appellant's supplemental brief, 4.) Although the "no just reason for delay language" is not a "mystical incantation which transforms a nonfinal order into a final appealable order," the language can "transform a final order into a final

appealable order." *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354 (1993), citing *Chef Italiano*.

{¶ 65} "For purposes of Civ.R. 54(B) certification, in deciding that there is no just reason for delay, the trial judge makes what is essentially a factual determination—whether an interlocutory appeal is consistent with the interests of sound judicial administration." *Wisintainer* at paragraph one of the syllabus. The trial court's determination that an immediate appeal will best serve the interests of judicial economy "is entitled to the same presumption of correctness that [the trial court] is accorded regarding other factual findings. An appellate court should not substitute its judgment for that of the trial court where some competent and credible evidence supports the trial court's factual findings." *Id.* at 355, citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77 (1984). "Where the record indicates that the interests of sound judicial administration could be served by a finding of 'no just reason for delay,' the trial court's certification determination must stand." *Id.* at paragraph two of the syllabus.

{¶ 66} Trial courts "should avoid a mechanical application of the Civ.R. 54(B) language." *Id.* at 355. Thus, "the presumption of correctness that normally attaches to the trial court's finding of 'no just reason for delay' for an immediate appeal does not apply where the judgment entry indicates the trial court acted reflexively and employed the language as boilerplate." *Dywidag Sys. Internatl., USA v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-270, 2010-Ohio-3211, ¶ 29, quoting *Mackey v. Pilarczyk*, 1st Dist. No. C-940845 (Sept. 27, 1995). Even absent the presumption of correctness, a review of the record indicates that the trial court's Civ.R. 54(B) certification on the June 24, 2008 entry best served the interests of sound judicial administration.

{¶ 67} In *Wisintainer*, the Supreme Court found that an immediate appeal of an entry of summary judgment in favor of some, but not all, defendants was the "only possible way to achieve the most efficient and straightforward trial, one with all the parties present with an ability to present evidence against each other." *Id.* at 356. The court concluded that the very "possibility of the case being tried twice, both times with 'empty chairs,' " was enough "to demonstrate that the trial court reasonably found that there was 'no just reason for delay' for appellants' appeal." *Id.* "More important than the

avoidance of piecemeal appeals is the avoidance of piecemeal trials. It conserves expense for the parties and clarifies liability issues for jurors when cases are tried without 'empty chairs.' " *Id*. at 355.

{¶ 68} A successful appeal from the trial court's summary judgment award in June 2008 would potentially have resulted in the most efficient trial possible, one with all of the parties present. Plaintiff's trial against Marietta, and Drs. Galupo and Cooper required extensive medical expert testimony and lasted for over two weeks. Dr. Tugaoen was an empty chair at that trial. If plaintiff were successful in his current appeal of the summary judgment award, plaintiff could theoretically proceed to trial solely against Dr. Tugaoen while all of the other defendants remained "empty chairs." As the court in *Wisintainer* indicated, this possibility alone is enough to demonstrate the judicial economy of the trial court's Civ.R. 54(B) designation on the June 24, 2008 entry. Because the record indicates that the interests of sound judicial administration were best served by a finding of no just reason for delay, the trial court's certification determination must stand. The June 24, 2008 judgment entry was both final and appealable.

{¶ 69} A trial court has "no authority *sua sponte* to reopen and amend a final judgment." (Emphasis sic.) *Kemper Securities, Inc. v. Schultz*, 111 Ohio App.3d 621, 625 (10th Dist.1996). *See also Anderson v. Consumer Portfolio Servs., Inc.*, 10th Dist. No. 12AP-339, 2012-Ohio-4380, ¶ 7 ("[o]ther than a judgment that is void ab initio for lack of jurisdiction, a court has no authority to vacate or modify its final orders other than as set forth under Civ.R. 60(B)"); *GMAC, L.L.C. v. Greene*, 10th Dist. No. 08AP-295, 2008-Ohio-4461, ¶ 19. Once an order " 'has been journalized by a trial court as a final appealable order, that order cannot be modified or vacated except as provided under Civ.R. 50(B) (motion notwithstanding the verdict), Civ.R. 59 (motion for a new trial), or Civ.R. 60(B) (motion for relief from judgment).' " *Jurasek v. Gould Electronics, Inc.*, 11th Dist. No. 2001-L-007, 2002-Ohio-6260, ¶ 15, quoting *Krumheuer v. Flowers & Versagi Ct. Reporters*, 8th Dist. No. 72431 (Nov. 6, 1997). *See also Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 380 (1981).

{¶ 70} Thus, "[w]hen the trial court awards summary judgment to a party, the judgment is final and can only be vacated upon the losing party's motion to vacate in

conformity with Civ.R. 60(B)." *Levin v. George Fraam & Sons, Inc.*, 65 Ohio App.3d 841, 848 (9th Dist.1990). Civ.R. 60(B) provides for the correction of substantive mistakes only upon motion from a party. *See Lakhi v. Healthcare Choices & Consultants, LLC*, 10th Dist. No. 06AP-806, 2007-Ohio-4127, ¶ 35. Neither party filed a Civ.R. 60(B) motion to vacate the trial court's June 24, 2008 judgment entry. Accordingly, the trial court lacked authority to amend the judgment entry following the July 2, 2008 conference call. *See State ex rel. Boardwalk Shopping Ctr., Inc. v. Ct. of Appeals for Cuyahoga Cty.*, 56 Ohio St.3d 33, 35-36 (1990) (finding the trial court could not vacate a summary judgment award after a party "explained" to the court that another party committed fraud because "[n]o Civil Rule authorizes 'explaining' matters to a trial court and persuading it to vacate a judgment").

{¶ 71} Plaintiff contends the trial court could amend the June 24, 2008 judgment entry pursuant to Civ.R. 60(A). Civ.R. 60(A) provides that a court, on its own, may correct "[c]lerical mistakes in judgments, orders or other parts of the record and errors arising from oversight or omission." Plaintiff asserts that the "reference to the 'appealable' language was a clerical mistake" which the court could correct pursuant to Civ.R. 60(A), because the court explained in the corrected judgment entry "that it was not the intention of the court to create a final appealable order." (Appellant's supplemental brief, 6.) There was no indication in the corrected judgment entry that the court was altering a clerical mistake pursuant to Civ.R. 60(A).

{¶ 72} "Civ.R. 60(A) permits a trial court, in its discretion, to correct clerical mistakes that are apparent on the record but does not authorize a trial court to make substantive changes in judgments." *Rowell v. Smith*, 186 Ohio App.3d 717, 2010-Ohio-260, ¶ 15 (10th Dist.), quoting *Atwater v. Delaine*, 155 Ohio App.3d 93, 2003-Ohio-5501, ¶ 11 (8th Dist.). "The term 'clerical mistake' refers to a mistake or omission, mechanical in nature and apparent on the record which does not involve a legal decision or judgment." *State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 100 (1996). The chief distinction between clerical mistakes and substantive mistakes, for Civ.R. 60(A) purposes, is that " 'the former consists of "blunders in execution" whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in

making its original determination, or because, on second thought, it has decided to exercise its discretion in a different manner.' " *Brewer v. Brewer*, 10th Dist. No. 09AP-146, 2010-Ohio-1319, ¶ 13, quoting *Wardeh v. Altabchi,* 158 Ohio App.3d 325, 2004-Ohio-4423, ¶ 10 (10th Dist.), quoting *Kuehn v. Kuehn,* 55 Ohio App.3d 245, 247 (12th Dist.1988) (noting that "[i]n *Wardeh,* the Civ.R. 60 movant conceded that by deleting a paragraph from a civil protection order, the order was substantively changed"). *See also Thurston v. Thurston,* 10th Dist. No. 02AP-555, 2002-Ohio-6746, ¶ 14, quoting *Chrisman v. Chrisman* 12th Dist. No. CA97-10-109 (Feb. 8, 1999) (noting that " 'Civ.R. 60(A) is not the appropriate vehicle for questions requiring juridical decision on the basis of the record' ").

{¶ 73} The Civ.R. 54(B) designation was not an error apparent on the record of the June 24, 2008 entry. Following the July 2, 2008 conference call with the parties, the court indicated it conducted further research and concluded it "did not desire to have the trial date * * * affected by any possible appeal," and determined it "should not have included the Civ.R. 54(B) language that was placed at the end of that June 24, 2008 Entry." (Corrected Judgment Entry, 2.) Thus, it is apparent that, following the conference call with the parties, the court changed its mind regarding the inclusion of the no just delay language in the June 24, 2008 order. The court's removal of the Civ.R. 54(B) language from the June 24, 2008 entry constituted a substantive change and not merely the correction of a clerical mistake. Moreover, the trial court's action of changing a final appealable order to a final order would appear to circumvent the jurisdictional time limitations of App.R. 4(A). *Compare Ohio Dept. of Commerce v. NCM Plumbing*, 9th Dist. No. 21878, 2004-Ohio-4322, ¶ 22, citing *Donofrio v. Amerisure Ins. Co.,* 67 Ohio App.3d 272, 274 (8th Dist.1990) (noting that, permitting a court to change an order several months after the order was originally filed would permit the trial court to "circumvent the jurisdictional time limits of App.R. 4 which require a notice of appeal in a civil case to be filed with the clerk of the trial court within 30 days of the date of entry of the judgment or order appealed from").

{¶ 74} Because the trial court could not sua sponte reopen and substantively modify the June 24, 2008 entry, the corrected judgment entry was a nullity. *See Fraley v*

Columbus Mobility Specialists, Inc., 10th Dist. No. 04AP-712, 2005-Ohio-361, ¶ 9 (because the trial court's amendment to a final judgment " was not clerical, but involved a matter of substance," the trial court "lacked jurisdiction to vacate" the entry and the "court's subsequent entry * * * was a nullity"). As plaintiff designated the corrected judgment entry in its notice of appeal, we cannot address the merits of plaintiff's first assignment of error. *Bradley ex rel. Estate of Bradley v. Univ. Hosps. of Cleveland, Inc.*, 8th Dist. No. 79104 (Dec. 27, 2001), citing *In re: Adkisson*, 8th Dist. No. 76327 (Aug. 3, 2000) (stating "[i]t is well established that a court of appeals lacks subject matter jurisdiction to review judgments or orders not designated in a proper notice of appeal").

{¶ 75} Moreover, we could not entertain plaintiff's appeal on this assignment of error as coming from the trial court's June 24, 2008 judgment entry, as that order was a final appealable order. Pursuant to App.R. 4(A), "[a] party shall file [a] notice of appeal * * * within thirty days of the * * * entry of the judgment or order appealed." Failure to comply with App.R. 4(A) is a jurisdictional defect. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, ¶ 17. Because plaintiff did not appeal the June 24, 2008 entry within 30 days, plaintiff no longer has opportunity to appeal from that judgment.

{¶ 76} Based on the foregoing, plaintiff's first assignment of error is overruled.

VI. PLAINTIFF'S THIRD ASSIGNMENT OF ERROR—PREJUDGMENT INTEREST

{¶ 77} Plaintiff's third assignment of error asserts the lower court erred in denying plaintiff's motion for prejudgment interest against Marietta. Pursuant to R.C. 1343.03(C)(1), a trial court may grant a civil litigant's motion for prejudgment interest where the court determines, following a hearing, "that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

{¶ 78} A party has not "failed to make a good faith effort to settle the case" under R.C. 1343.03(C) if he has: (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. *Kalain v. Smith*, 25 Ohio St.3d 157 (1986),

syllabus. The parties do not assert any issue regarding discovery or delay in the proceedings.

{¶ 79} Where a party has a "good faith, objectively reasonable belief that he has no liability," however, "he need not make a monetary settlement offer." *Id.* at syllabus. Whether a party has a good faith, objectively reasonable belief of no liability must be "strictly construed so as to carry out the purposes of R.C. 1343.03(C)." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 659 (1994). "A party may have 'failed to make a good faith effort to settle' even when he has not acted in bad faith." *Kalain* at 159, quoting *Mills v. Dayton*, 21 Ohio App.3d 208 (2d Dist.1985).

{¶ 80} A trial court has wide discretion in deciding whether to award prejudgment interest based upon the evidence of the parties' settlement efforts. *LeMaster v. Huntington Natl. Bank*, 107 Ohio App.3d 639, 642 (10th Dist.1995). A trial court's denial of a motion for prejudgment interest will not be reversed absent a showing that the court abused its discretion. *Id.*

{¶ 81} At the prejudgment interest hearing Marietta's trial counsel, Tom Dillon, Marietta's general counsel, Paul Westbrock, and Marietta's insurance representative, Eric Schneider, all testified that Marietta did not grant its consent to settle the case. Mr. Dillon believed there was only a ten percent chance of a plaintiff's verdict against Marietta. Mr. Schneider's claim evaluation report, dated February 17, 2009, indicated that the insurance company estimated the total recoverable damages in the case would be $2,649,600, and that there was a 12 percent chance of a plaintiff's verdict against Marietta.

{¶ 82} The claim evaluation report provided a synopsis of the events which lead to Mrs. Jeffrey's death, a summary of plaintiff's expert's opinions, a summary of Marietta's expert's opinions, and an understanding of the allegations against Marietta. The report indicated that Dr. Galupo would be a target at trial, as she performed the surgery, that Dr. Cooper would be another target, as he did not properly assess Mrs. Jeffrey's deteriorating condition, and that Riverside would be another target, based on their delay in bringing the patient to surgery. The insurance company placed $31,795 on reserve in case the jury returned an adverse verdict.

{¶ 83} Although the insurance company placed $31,795 on reserve, Mr. Schneider indicated he would not have settled the case for that amount because he did not believe Marietta should settle a defensible case, i.e., a case with a greater than 50 percent chance of succeeding at trial. Mr. Westbrock determined Marietta should not settle the case, as Marietta's staff complied with the applicable standard of care.

{¶ 84} Every time plaintiff's counsel, Henry Chamberlain, approached Marietta about settling the case, Mr. Dillon gave "the same response," Marietta would not consent to settle the case. (Prejudgment Interest Hearing Tr. 77.) On February 27, 2009, Mr. Chamberlain sent an email to Mr. Dillon indicating that all parties who were willing to engage in meaningful settlement discussions were welcome to attend an upcoming mediation. However, because Marietta had been clear that it had "no desire to talk about settling this case," Mr. Chamberlain asked Mr. Dillon not to attend the mediation, stating Mr. Dillon's presence would be "counterproductive to the goals of the meeting." (Prejudgment Interest Defendant's exhibit D.) Mr. Dillon agreed not to attend the mediation.

{¶ 85} On March 3, 2009, Mr. Chamberlain sent a letter to all defendants indicating that the plaintiff's global demand was $6 million, and confirming that Marietta would not participate in the mediation. Mr. Chamberlain testified that Marietta's no consent stance effectively chilled plaintiff's incentive to tender an individualized demand to Marietta.

{¶ 86} Concerning Marietta's refusal to grant consent, the court framed the issue before it as whether "the law require[s] a plaintiff to perform an otherwise useless act (i.e. to make an [sic] demand to a defendant that/who is clearly not interested in paying anything)?" (Prejudgment Interest Decision, 6.) Relying on *LeMaster*, the trial court concluded that the law does require such an act by the plaintiff in order to "start the ball rolling." (Prejudgment Interest Decision, 6.) The court concluded that a global demand on all defendants could not take the place of an individualized demand given to a specific defendant.

{¶ 87} As evidenced by Mr. Schneider's claim evaluation report, Marietta rationally evaluated its risks and potential liability, and perceived that Drs. Galupo and Cooper, and

Riverside would cumulatively carry the greater weight of liability in the case. Mr. Schneider estimated Marietta's exposure to a plaintiff's verdict would be 12 percent of a potential $2,649,600 award, and Mr. Dillon similarly believed Marietta's potential exposure to a plaintiff's verdict was ten percent. The jury ultimately found Marietta liable for 15 percent of a $2 million jury verdict. *Compare Black v. Bell*, 20 Ohio App.3d 84, 88 (8th Dist.1984) (finding that "the proximity of one party's settlement offer to the ultimate verdict is conceivably some circumstantial evidence of the reasonableness of that party's evaluation").

{¶ 88} Because plaintiff failed to tender a reasonable settlement offer to Marietta, however, we need not consider whether Marietta was further justified in failing to make a settlement offer. *See Wagner v. Marietta Area Health Care, Inc.*, 4th Dist. No. 00CA17 (Mar. 16, 2001) (explaining that in assessing the risk of potential civil liability "it would seem reasonable that one must evaluate both the likelihood of the event occurring, i.e. its probability, and its impact if it should happen, i.e. its magnitude," accordingly a party should treat events with a low probability but a high magnitude differently than events with a low probability and a low magnitude).

{¶ 89} "A plaintiff's primary obligation, in consideration of entitlement to prejudgment interest, relates back in time in any litigation to a plaintiff's burden to evaluate and make a considered settlement demand upon a defendant." *LeMaster* at 644. A party seeking an award of prejudgment interest must " 'present evidence of a written (or something equally persuasive) offer to settle that was reasonable' " considering various factors, including the type of case, the injuries involved, the applicable law, the defenses available, and the " 'nature, scope and frequency of efforts to settle.' " *Id.*, quoting *Moskovitz* at 659. Plaintiff's conduct, other than an actual settlement offer, cannot satisfy R.C. 1343.03(C)'s requirement that the plaintiff "make a good faith effort to settle," because an "opposing party could not be in a position to intelligently respond to overtures relating to settlement unless a specific figure was known and the specific figure was based upon an objective evaluation of the case relating to both liability and damages." *Id.* Even where a defendant is "dilatory as far as their litigation practices," such conduct, "standing

alone, does not entitle a party to prejudgment interest in the absence of the latter's failure to tender a written settlement demand." *Id.* at 645.

{¶ 90} If, following a plaintiff's initial settlement demand, a defendant states a position "of 'no offer and no settlement in such unmistakably rigid terms[,]' * * * that plaintiff's presentation of any reduced demand would [be] 'a vain act' " a plaintiff is relieved from any further obligation to negotiate. *Galayda v. Lake Hosp. Sys., Inc.,* 71 Ohio St.3d 421, 429 (1994). *Compare Wagner v. Midwestern Indem. Co.,* 83 Ohio St.3d 287, 293 (1998) (where, following plaintiffs submission of their proof-of-loss claims, the insurance company's attorney informed plaintiffs " 'we're not paying you one thin dime,' " the trial court did not abuse its discretion "in determining that any further attempt by the Wagners to settle would have been in vain"). Thus, a trial court correctly awards prejudgment interest where "a defendant 'just says no' despite a plaintiff's presentation of credible medical evidence that the defendant physician fell short of the standard of professional care required of him, * * * the plaintiff has suffered injuries, and when the causation of those injuries is arguably attributable to the defendant's conduct." *Galayda* at 293.

{¶ 91} While *Galayda* and *Wagner* stand for the proposition that "a plaintiff need not continue settlement efforts where it is clear that to do so would be a vain act," those holdings "do not relieve a plaintiff from making an initial settlement demand merely because counsel feels that the case is not likely to settle." *Garcia v. Cleveland Clinic*, 8th Dist. No. 77011 (Aug. 31, 2000). In *Garcia*, the plaintiff never presented the defendant with a formal settlement demand "because he had been given the clear indication by two different attorneys who represented the [defendant] * * * that the [defendant] would defend the case and go to trial." *Id.* Counsel for the defendant based their belief that the case was defensible on "reviews from medical/legal review committees and peer review committees within the [defendant] hospital." *Id.* The court found the defendant's position a "far cry from the level of obstinacy and intransigentness seen in the fact patterns present in Wagner and Galayda." *Id.* The *Garcia* court concluded that, under such circumstances, "to hold that the [plaintiff] had no duty to present any evidence of an offer

to settle would render nearly meaningless the requirement of R.C. 1343.03(C) that a party seeking prejudgment interest did not fail to make a good faith effort to settle the case." *Id.*

{¶ 92} Plaintiff's failure to tender a specific settlement demand to Marietta, and "start the ball rolling," now precludes plaintiff from establishing that he made a good faith effort to settle the case. While Marietta's refusal to grant consent to settle understandably chilled plaintiff's incentive to negotiate with Marietta, for purposes of prejudgment interest plaintiff was required to at least provide Marietta with an individualized settlement offer supported by credible medical evidence. If, following such an offer, Marietta continued to adhere to its strict no consent stance, plaintiff would then have been relieved from any duty to attempt to negotiate with Marietta. *See Galayda* at 293; *Galmish v. Cicchini*, 90 Ohio St.3d 22, 34 (2000) (where the plaintiff made a reasonable initial settlement demand, which defendants did not respond to, the plaintiff "was not obligated to negotiate against herself by unilaterally reducing her offer to settle"). However, plaintiff's $6 million global demand, made after plaintiff specifically asked Marietta not to attend the mediation, could not satisfy plaintiff's obligation to tender to Marietta a settlement demand containing a specific figure based on an objective evaluation of the case. *LeMaster*.

{¶ 93} The trial court did not abuse its discretion in denying plaintiff's motion for prejudgment interest. Based on the foregoing, the plaintiff's third assignment of error is overruled.

{¶ 94} Having overruled plaintiff's three assignments of error and Marietta's sole cross-assignment of error, we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

SADLER and DORRIAN, JJ., concur.
