

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Mario Jarvis, Administrator of the Estate of Loddy Jarvis, Deceased,	:	
	:	
Plaintiff-Appellant,	:	No. 14AP-578
	:	(C.P.C. No. 11CV-8898)
v.	:	
	:	(REGULAR CALENDAR)
Farhana Hasan, M.D.,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on May 12, 2015

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*Malek & Malek, LLC, and James Malek, for appellant.*

*Reminger Co., LPA, Warren Enders, and Whitney Cole, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, Mario Jarvis, administrator of the estate of Loddy Jarvis ("the administrator"), appeals from a judgment of the Franklin County Court of Common Pleas in favor of defendant-appellee, Farhana Hasan, M.D. For the reasons that follow, we affirm.

**I. Facts and Procedural History**

{¶ 2} On August 25, 2007, Loddy Jarvis ("Jarvis") drove herself to America's Urgent Care of New Albany, Ohio ("America's Urgent Care" or "the urgent care"), a stand-alone urgent care facility, seeking medical care and treatment. Upon Jarvis' arrival at America's Urgent Care at 9:36 a.m., she interacted with patient relations specialist

Samantha Pate for the purpose of checking in to the facility. Jarvis "looked tired" to Pate, and Jarvis' "eyes were a little bit glazed over." (Tr. Vol. II, 233.)

{¶ 3} Jarvis completed the necessary paperwork as part of her registration at the urgent care. As part of this process, Jarvis correctly provided her name, address, phone number, date of birth, social security number, employer's name, emergency contact phone number, and primary care physician name. Jarvis also provided her driver's license, insurance card, and credit card for payment and processing. Regarding her medical and social histories, Jarvis completed a form disclosing that she had a history of gastrointestinal problems, that she took the drug Dipentum, and that she did not use tobacco, alcohol, or coffee. Additionally, Jarvis signed a form stating that she had been presented with a copy of a privacy practices notice regarding how her health information could be used and disclosed. After the administrative intake process was completed at approximately 9:45 a.m., Pate took Jarvis' chart to a medical assistant, Brian Elkins, who then called Jarvis back to an examination room.

{¶ 4} At 10:00 a.m., Jarvis was taken to the "crash trauma room," which is the urgent care's designated "acute care room" for patients who require immediate attention by a physician. (Tr. Vol. I, 79.) Jarvis' vital signs were obtained and documented by Elkins shortly after Jarvis was placed in the examination room. When Elkins recorded Jarvis' vital signs, Jarvis' temperature was 96.0 degrees, her pulse was 88 beats per minute, her respirations were 14 breaths per minute, and her oxygen saturation was 88 percent. Jarvis' systolic and diastolic blood pressure was initially undetectable, but was soon determined to be 82 over 50. Elkins also noted that Jarvis complained of vomiting for three days, and that Jarvis had "slurred speech." (Tr. Vol. II, 155.)

{¶ 5} After the vital signs of Jarvis were taken and recorded, Dr. Hasan entered the examination room to evaluate Jarvis. Upon entering the room, Dr. Hasan reviewed Jarvis' chart and noticed that she had "sunken eyes," "cold and clammy skin," and was "ill appearing." (Tr. Vol. I, 82-83.) In addition to indicating a three-day history of vomiting, Jarvis indicated to Dr. Hasan that she had been experiencing "crampy abdominal pain." (Tr. Vol. I, 84.) Based on Dr. Hasan's review of Jarvis' vital signs, Dr. Hasan was concerned that Jarvis was dehydrated, that her blood pressure of 82 over 50 was too low, and that she had an electrolyte imbalance. Dr. Hasan knew that dehydration and

electrolyte imbalance can lead to life-threatening conditions such as heart arrhythmia or renal failure. Jarvis' report of vomiting caused Dr. Hasan to be concerned that Jarvis had an infection or bowel obstruction. As part of her initial evaluation of Jarvis, Dr. Hasan also recognized that the reported oxygen saturation level was low. Dr. Hasan knew that dehydration, low blood pressure, and low oxygen saturation can each potentially alter a person's mental status. "[W]ithin a few minutes of entering the room," Dr. Hasan knew that Jarvis "needed to go to the hospital emergency room \* \* \* immediately" because the urgent care did not have the necessary equipment to properly treat Jarvis. (Tr. Vol. I, 86-87.)

{¶ 6} Despite Dr. Hasan expressing her view that Jarvis needed to go to an emergency room immediately, Jarvis refused to be transferred as recommended. Although Jarvis refused to be transferred to an emergency room, she did not refuse any treatment ordered by Dr. Hasan during her time at the urgent care. During Jarvis' time at the urgent care, saline fluid was administered into her body intravenously, she received medication for pain and nausea symptoms, she consented to a drawing of a sample of her blood, she provided a urine sample, and she sat for an acute abdominal series of x-rays. The abdominal images revealed a "small bowel obstruction." (Tr. Vol. III, 514.) The blood was sent to an off-site laboratory, and the results of the blood testing were not completed until the day after Jarvis' passing.

{¶ 7} Ultimately, after Jarvis was at the urgent care for nearly seven hours, but before she left, she signed three documents. Jarvis signed a document providing "discharge instructions" and a "doctor referral." (Joint Exhibits No. 1A.) The "doctor referral" advised Jarvis to "[f]ollow-up with E[R] now." (Joint Exhibits No. 1A.) Jarvis also signed a printout of a WebMD article obtained from the Internet, which provided a topic overview of the digestive disorder of "bowel obstruction." (Joint Exhibits No. 1A.) Lastly, Jarvis signed an "against medical advice" form document. (Joint Exhibits No. 1C.) The against medical advice document indicates that Jarvis was advised to go to the emergency room for treatment for "fluid and electrolyte management," that Jarvis was informed of the consequences of not adhering to this advice, and that Jarvis "still refuse[d] to go." (Joint Exhibits No. 1C.)

{¶ 8} Shortly before leaving the urgent care, Jarvis stopped at a computer terminal in the lobby of the facility and completed a brief survey about her visit. The survey requested a rating of the patient's overall visit as an "A," "B," "C," "D," or "F," with regards to "registration," "nurse/medical assistant," "doctor," and "wait time." (Joint Exhibits No. 10.) The survey also asked whether the patient would refer America's Urgent Care to a friend or family member. In completing the survey, Jarvis assigned an "A" to each category or person, and she indicated that she would refer America's Urgent Care to a friend or family member. Immediately after completing the survey, Jarvis walked out of the urgent care.

{¶ 9} Approximately 20 minutes after Jarvis exited the urgent care, she was found unresponsive in her automobile in the parking lot. The staff of America's Urgent Care unsuccessfully attempted to resuscitate Jarvis by performing CPR on her. Within minutes, an emergency squad arrived and Jarvis was transported to Mount Carmel St. Ann's Hospital. Jarvis exhibited no signs of life on the way to the hospital and was pronounced dead at the hospital at 5:34 p.m.

{¶ 10} On July 20, 2011, the administrator initiated this wrongful death action in the Franklin County Court of Common Pleas. The case was tried to a jury, commencing on November 12, 2013 and concluding on November 18, 2013. Multiple witnesses testified for each side, including Robert Stuart, M.D., on behalf of the administrator, and Norman Schneiderman, M.D., and William Schirmer, M.D., on behalf of Dr. Hasan. Upon presentation of all the evidence, the jury rendered a verdict in favor of Dr. Hasan. Accordingly, on December 10, 2013, the trial court entered judgment in favor of Dr. Hasan. At 11:30 a.m., on December 13, 2013, the administrator filed a motion for a new trial pursuant to Civ.R. 59 with the trial court. At 2:52 p.m., on December 13, 2013, the administrator filed a notice of appeal with the trial court. Because the filing of the motion for a new trial preceded the filing of the notice of appeal, the trial court retained jurisdiction to decide the new trial motion because the judgment was not final. *Amare v. Chellena Food Express, Inc.*, 10th Dist. No. 07AP-495, 2008-Ohio-65. Accordingly, on March 6, 2014, this court sua sponte dismissed the appeal. *Jarvis v. Hasan*, 10th Dist. No. 13AP-1043 (March 6, 2014) (Judgment Entry of Dismissal).

{¶ 11} On June 23, 2014, the trial court filed a decision and entry denying the administrator's motion for a new trial. In moving for a new trial, the administrator argued that various rulings of the trial court prevented him from receiving a fair trial. In support, the administrator cited the trial court's rulings relating to the inclusion and exclusion of certain evidence, the trial court's denial of the administrator's counsel's requests to declare certain witnesses as hostile witnesses, the trial court's rulings relating to jury interrogatories and instructions, the trial court's "general demeanor toward the Plaintiff and/or counsel for the Plaintiff," and "[a]ny and all other ruling[s] which were adversely decided against the Plaintiff." (Plaintiff's Motion for a New Trial, 8.) The administrator presented arguments relating to the evidentiary rulings, but did not set forth arguments in support of the other claimed bases for an unfair trial. The trial court addressed each of the administrator's claimed bases for an unfair trial, and it found none of them to be persuasive.

{¶ 12} On July 21, 2014, the administrator refiled his notice of appeal.

## **II. Assignments of Error**

{¶ 13} The administrator asserts the following assignments of error for our review:

[1.] The Trial Judge abused his discretion by denying Plaintiff's motion for a new trial.

[2.] The Trial Judge abused his discretion by substantially limiting the testimony of Plaintiff's expert, Dr. Stuart, through his incorrect use of the Physical Facts Rule.

[3.] The Trial Judge abused his discretion by preventing Plaintiff's expert from testifying as to the standard of care required of an urgent care physician when a patient lacks mental clarity.

[4.] The Trial Judge abused his discretion when he permitted a general surgeon, with no experience working in an urgent care center, to testify as an expert on the standard of care required of an urgent care physician.

[5.] The Trial Judge abused his discretion when he permitted both Defense experts to base their expert opinions, in part, on deposition testimony which was not admitted into evidence.

[6.] The Trial Judge abused his discretion when he permitted the cumulative testimony of Defendant's two separate expert witnesses, who both repeatedly testified upon the same issues.

[7.] The Trial Judge abused his discretion when he refused to allow Plaintiff to call a rebuttal witness following the testimony of Defendant's expert witnesses.

[8.] The Trial Judge abused his discretion when he refused to allow counsel for Plaintiff to cross examine Defendant's coworker.

[9.] The Trial Judge abused his discretion by quickly ruling on Defendant's motion, without allowing Plaintiff proper or adequate time to prepare a response.

[10.] The Trial Judge abused his discretion by creating numerous irregularities in the trial proceedings that were unfairly prejudicial to the Plaintiff.

[11.] The Trial Judge abused his discretion by committing a number of errors, whose cumulative effect rose to a level of prejudice towards the Plaintiff.

### **III. Discussion**

{¶ 14} For ease of discussion, we will address the administrator's assignments of error out of order, and, to the extent appropriate, we will collectively address related assignments of error.

#### **A. Eighth Assignment of Error – Hostile Witness Request**

{¶ 15} By his eighth assignment of error, the administrator argues the trial court abused its discretion in denying his counsel's request to treat, as a hostile witness, Samantha Pate, the patient relations specialist who administratively processed Jarvis upon her arrival at the urgent care. Even though the administrator's counsel called Pate as a witness at trial, the administrator argues his counsel should have been permitted to impeach the witness with a prior statement because his counsel was surprised by her testimony, and because the testimony was damaging to the administrator's case.

{¶ 16} Evid.R. 607(A) provides, in pertinent part, that the "credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a

showing of surprise and affirmative damage." This rule requires " 'a showing of surprise and affirmative damage' " before the court may declare a witness hostile. *State v. Holmes*, 30 Ohio St.3d 20, 23 (1987), quoting Evid.R. 607. Surprise can be shown if the testimony is "materially inconsistent" with the prior written or oral statements and counsel "did not have reason to believe that the witness would recant when called to testify." *Id.*, citing *State v. Duffy*, 134 Ohio St. 16 (1938). Affirmative damage occurs when a party's own witness testifies to facts that contradict, deny, or harm the party's position. *State v. Lewis*, 75 Ohio App.3d 689, 697 (4th Dist.1991). Thus, Evid.R. 607(A) addresses circumstances involving a witness "who surprises the calling party at trial by turning against him while testifying," also known as a "hostile witness." *State v. Darkenwald*, 8th Dist. No. 83440, 2004-Ohio-2693, ¶ 15. Whether to declare a witness as hostile, and allow the calling party to impeach the witness, is a decision within the broad, sound discretion of the trial court. *State v. Banks*, 10th Dist. No. 01AP-1179, 2002-Ohio-3341, ¶ 44.

{¶ 17} At trial, the administrator's counsel asked Pate whether she asked Jarvis to complete paperwork, and Pate answered in the affirmative. The administrator's counsel then asked Pate: "Do you remember if she had any difficulty completing that paperwork?" Pate answered: "No. She completed it all." (Tr. Vol. II, 233.) The administrator's counsel then made reference to a specific page of Pate's deposition transcript in an apparent attempt to impeach Pate based on prior testimony. Dr. Hasan's counsel objected, asserting that the administrator's counsel could not impeach the witness. The administrator's counsel requested that Pate be considered a hostile witness, and the trial court denied the request.

{¶ 18} Unable to make reference to specific testimony from Pate's deposition in an attempt to impeach Pate, the administrator's counsel continued to ask Pate questions about Jarvis registering at the urgent care, including Jarvis' ability to complete the registration paperwork. The administrator's counsel asked Pate if she remembered having to "explain things to her more than once?" Pate answered: "I did." (Tr. Vol. II, 235.) Pate was then asked: "And was that something that was unusual?" Pate answered: "Not at all." (Tr. Vol. II, 235.) Pate could not recall exactly what she had to explain multiple times to Jarvis. The administrator's counsel asked Pate whether she could

remember if she had to explain the emergency contact information request more than once. Pate answered: "No. I believe what I had to let her know a few times, because there were so many different pages that a patient had to sign at the time in the office of where she needed to initial or sign and fill out. That was always a problem because the paperwork is so detailed and long. So they filled it out all at once." (Tr. Vol. II, 235-36.)

{¶ 19} During Pate's deposition, she testified, in part, as follows:

Q. Okay. Samantha, what do you recall of the day's events on that August day when Ms. Jarvis presented to the facility?

A. I remember when she walked in, I didn't have anybody at my desk so I -- she walked right up to my desk and I started registration. You could tell by looking at her that she just seemed ill of some sort.

Q. And what made you say that?

A. She seemed weak. Her eyes were a little big [sic] glazed over. She looked very tired. She wasn't moving very fast. I remember having to explain things to her a few times because she wasn't comprehending what I was asking her to do as far as the paperwork.

Q. Okay. Were you able to eventually explain what to do?

A. Yes, I was.

(Pate Deposition, 22-23.)

{¶ 20} According to the administrator, Pate's deposition testimony indicated that Jarvis "had trouble filling out basic paperwork," and that this testimony supported his case against Dr. Hasan. (Administrator's Brief, 47.) The administrator further asserts that, at trial, "Ms. Pate stated that Ms. Jarvis did not have any difficulty filling out basic paperwork." (Administrator's Brief, 48.) Thus, the administrator reasons that his counsel should have been permitted to impeach Pate with her prior statement because Pate's testimony at trial was surprising and did not support his case in the way the deposition testimony supported it.

{¶ 21} We find that Pate's trial testimony was not materially inconsistent with her deposition testimony, and thus the requirements necessary to establish Pate as a hostile

witness under Evid.R. 607(A) were not met. At her deposition, Pate testified that she had to explain things more than once to Jarvis in order for Jarvis to understand how to properly complete the registration paperwork. At trial, Pate initially testified that she did not remember Jarvis having difficulty completing the registration paperwork, adding that "[Jarvis] completed it all." (Tr. Vol. II, 233.) Subsequent to making this statement, however, Pate further discussed her interactions with Jarvis, and Pate clarified that she did have to explain things more than once to Jarvis in order for her to complete the registration paperwork. Thus, while Pate initially testified that she did not remember Jarvis having difficulty completing the paperwork, she clarified her statement through more developed testimony that was consistent with her deposition testimony. In comparing Pate's deposition testimony with her trial testimony on the issue of Jarvis' ability to complete the registration paperwork, we find no material inconsistency that would have required the trial court to permit the administrator's counsel to treat Pate as a hostile witness under Evid.R. 607(A) and thus attempt to impeach her with a prior statement.

{¶ 22} Therefore, we overrule the administrator's eighth assignment of error.

**B. Fourth Assignment of Error – Testimony of Dr. Schirmer regarding Standard of Care**

{¶ 23} By his fourth assignment of error, the administrator asserts the trial court abused its discretion by allowing Dr. Schirmer to testify regarding the proper standard of care for a physician at an urgent care facility.

{¶ 24} In order to establish medical negligence, a plaintiff must show the injury (1) "was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances," and (2) that the injury "was the direct and proximate result of such doing or failing to do some one or more of such particular things." *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976), paragraph one of the syllabus. Proof of the recognized standards of the medical community must be provided through expert testimony. *Id.* at 131-32.

{¶ 25} Evid.R. 702(B) provides that a witness may testify as an expert when the witness qualifies as an expert by "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." *State v. Roush*, 10th Dist. No. 12AP-201, 2013-Ohio-3162, ¶ 44. Further, "[t]he individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its fact-finding function." *Elkins v. Veolia Transp., Inc.*, 10th Dist. No. 10AP-203, 2010-Ohio-5209, ¶ 36, quoting *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 116. Trial courts have broad discretion to determine the admissibility of expert testimony, subject to review only for abuse of discretion. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 16, citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

{¶ 26} Dr. Schirmer is a board certified general surgeon with extensive experience dealing with gastrointestinal problems. Dr. Schirmer examines on average approximately 40 patients a week in the clinical office setting, and he also regularly performs endoscopic and surgical procedures. Additionally, Dr. Schirmer regularly rotates on-call responsibilities for general surgical emergency room coverage. Thus, Dr. Schirmer has significant emergency room experience, and he frequently examines patients in the clinical office setting. Dr. Schirmer also testified to his understanding of the similarities between an urgent care facility and his private practice, specifically noting that he typically examines a series of patients in the clinical office setting. Dr. Schirmer testified that he examines patients referred from primary care physicians and from "the emergency room for evaluation of a variety of complaints, the most common of which is abdominal pain." (Tr. Vol. IV, 719.) Dr. Schirmer also testified to his experience dealing with patients who present at his office but need to go to an emergency room or be admitted at a hospital, stating "I will have patients come in the office and in my evaluation it is clear to me that [the] patient should not be going home." (Tr. Vol. IV, 721.) Moreover, Dr. Schirmer expressly testified that, considering the similarities between an urgent care facility practice and his office-based practice, he was capable of providing an intelligent opinion about the appropriate standard of care at the urgent care on August 25, 2007.

{¶ 27} After reviewing Dr. Schirmer's qualifications and experience, we find the trial court did not abuse its discretion by allowing Dr. Schirmer to present expert

testimony as to the proper standard of care for a physician at an urgent care facility. Dr. Schirmer's testimony indicated his extensive experience in the clinical office and emergency room settings. Dr. Schirmer examines patients in the office setting often after they are referred to him by another physician or an emergency room. Thus, the referred patients may not have previously presented to Dr. Schirmer prior to being examined by him regarding a specific problem. He periodically examines patients in the office setting who should immediately go to an emergency room or be admitted to a hospital. Additionally, Dr. Schirmer regularly provides general surgery coverage in the emergency room setting. Although Dr. Schirmer has not practiced at an urgent care facility, his testimony indicated his understanding of the characteristics of an urgent care facility and the similarities between such a facility with his clinical office setting. Therefore, it was not an abuse of discretion for the trial court to allow Dr. Schirmer to testify as an expert regarding the standard of care of a physician at an urgent care facility.

{¶ 28} Accordingly, the administrator's fourth assignment of error is overruled.

**C. Fifth Assignment of Error – Testimony Based on Depositions not Admitted into Evidence**

{¶ 29} By his fifth assignment of error, the administrator asserts the trial court abused its discretion by permitting Dr. Hasan's experts, Drs. Schirmer and Schneiderman, to base their opinions in part on testimony that was not admitted into evidence.

{¶ 30} "Experts have the knowledge, training and experience to enlighten the jury concerning the facts and their opinion regarding the facts." *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 102 (1992), citing *McKay Machine Co. v. Rodman*, 11 Ohio St.2d 77 (1967). Evid.R. 703 provides that the "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." *See also* Evid.R. 705 (providing "[t]he expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise"). Thus, the facts underlying an expert's opinion must be either part of the expert's personal knowledge or admitted into evidence

at the hearing or trial. *Frazier v. Ohio State Univ. Hosp.*, 10th Dist. No. 95API06-774 (Dec. 19, 1995).

{¶ 31} The purpose of Evid.R. 703 is "to insure that the trier of the facts is aware of the facts upon which the opinion rests, so that in the event the trier of the facts rejects these facts as not having been established by the evidence, it will then be warranted in rejecting the opinion also." *Mayhorn v. Pavey*, 8 Ohio App.3d 189, 191 (10th Dist.1982). Evid.R. 703 is satisfied "[w]here an expert bases his opinion, in whole or in major part, on facts or data perceived by him." *State v. Solomon*, 59 Ohio St.3d 124 (1991), paragraph one of the syllabus. Thus, the challenging party bears the burden of demonstrating that the expert principally relied on facts not admitted into evidence and not perceived by the expert. *Havanec v. Havanec*, 10th Dist. No. 08AP-465, 2008-Ohio-6966, ¶ 15. Furthermore, no error occurs when an expert relies on facts set forth in a deposition not admitted into evidence, when those facts are otherwise admitted into evidence by trial testimony of the deposition witness. See *Williams v. Reynolds Rd. Surgical Ctr., Ltd.*, 6th Dist. No. L-02-1144, 2004-Ohio-1645 (finding no error when expert witness relied on deposition testimony of witness who provided substantially the same testimony at trial).

{¶ 32} The administrator argues that Dr. Hasan's experts, Drs. Schirmer and Schneiderman, improperly based their opinions on facts they did not perceive and were not entered into evidence. In support of this argument, the administrator asserts that neither Dr. Schirmer nor Dr. Schneiderman examined Jarvis, and that both relied on deposition testimony of witnesses in rendering their opinions. The administrator is correct that neither Dr. Schirmer nor Dr. Schneiderman examined Jarvis, and that both testified that they relied, at least in part, on the deposition testimony of witnesses in rendering their opinions. However, the administrator's arguments are unavailing for the following reasons.

{¶ 33} The administrator did not object to the testimony of Drs. Schirmer or Schneiderman on the basis that their testimony was impermissibly based on facts not admitted into evidence. "[T]o preserve an error for appellate review, Evid.R. 103(A)(1) contemplates that a party will make a timely objection to the admission of evidence and state the specific ground of the objection if it is not otherwise apparent from the context of the testimony." *Barnett v. Thornton*, 10th Dist. No. 01AP-951, 2002-Ohio-3332, at ¶ 20.

"Failure to timely advise a trial court of possible error, by objection or otherwise," results in a waiver of the issue for purposes of appeal, unless plain error is demonstrated. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997). In the civil context, an appellate court only applies the plain error doctrine in "extremely rare cases" when the asserted error "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Id.* at 121, 123. Thus, the administrator has waived all but plain error as to the error alleged by his fifth assignment of error.

{¶ 34} An inherent precondition to applying the plain error doctrine is there first must be error, or a "deviation from a legal rule." *See, e.g., In re C.C.*, 10th Dist. No. 04AP-883, 2005-Ohio-5163, ¶ 27. Here, the administrator has not demonstrated any error. Although the administrator argues that Dr. Hasan's experts improperly relied on deposition testimony of the urgent care employees, he fails to address the fact that the urgent care employees testified at trial. Thus, while the administrator asserts in a conclusory manner that Dr. Hasan's experts based their testimony on facts not admitted into evidence, the administrator does not identify facts testified to by witnesses in depositions that were not admitted into evidence. Moreover, in support of his fifth assignment of error, the administrator does not argue the trial testimony of these witnesses was substantially different than their deposition testimony. We note that, in support of his eighth assignment of error, the administrator alleges that Pate's trial testimony was inconsistent with her deposition testimony regarding the circumstances surrounding Jarvis' completion of the urgent care registration paperwork. But as we explained regarding that assignment of error, Pate's trial testimony was not materially inconsistent with her deposition testimony. In sum, the administrator fails to demonstrate that Dr. Hasan's experts impermissibly relied on facts not admitted into evidence.

{¶ 35} Therefore, the administrator's fifth assignment of error is overruled.

#### **D. Sixth Assignment of Error – Testimony on Same Issues**

{¶ 36} By his sixth assignment of error, the administrator asserts the trial court abused its discretion in allowing Dr. Hasan's experts, Drs. Schirmer and Schneiderman, to testify on the same issues. The administrator argues that, pursuant to Evid.R. 403(B), the

trial court should have excluded testimony of the second physician to testify on behalf of Dr. Hasan. The administrator argues it was unfair for the trial court to permit Dr. Hasan's experts to provide cumulative testimony on the issues of Jarvis' mental clarity at the time of her stay at the urgent care and whether Dr. Hasan deviated from the standard of care when the trial court restricted the testimony of the administrator's expert, Dr. Stuart, on those issues.

{¶ 37} Evid.R. 403(B) provides that relevant evidence is not admissible if its probative value is substantially outweighed by consideration of undue delay or needless presentation of cumulative evidence. Thus, a trial court has the discretion to exclude expert testimony where the testimony would not assist the trier of fact. *Bostic v. Connor*, 37 Ohio St.3d 144 (1988), paragraph three of the syllabus; see *State v. Campbell*, 69 Ohio St.3d 38, 51 (1994) ("Evid.R. 403(B) does not require exclusion of cumulative evidence. The court has discretion to admit or exclude it.").

{¶ 38} As set forth above, Dr. Schirmer testified regarding his background and experience, including his focus on diagnosing and treating abdominal issues. Dr. Schirmer testified that, generally, a physician provides his or her best advice to a patient, but ultimately, the patient is free to accept or reject the advice. There are circumstances when a patient's "psychological competency" is at issue, and a treating physician must "make a judgment regarding the patient's level of competency," such as when the patient has "some mental deficit" like mental retardation. (Tr. Vol. IV, 735.) Dr. Schirmer testified that a physician must act in a patient's best interest when the patient is facing a medical emergency and is medically or mentally unable to make a rational choice as to his or her own treatment. Dr. Schirmer further testified that physicians frequently determine the psychological competency of patients in providing care.

{¶ 39} Dr. Schirmer was asked whether there was anything in Jarvis' medical chart from the urgent care that would cause him to conclude that she was "somehow unable to comprehend or understand medical advice." Dr. Schirmer answered: "No, there is not." (Tr. Vol. IV, 743.) Dr. Schirmer further stated: "[M]y opinion is there is really nothing at all that I can find in this patient's history \* \* \* the interaction she had with the doctors [sic], nothing about her biochemical profile or her vital signs, there's really nothing that I can see that would suggest this woman does not have the capacity to make a decision."

(Tr. Vol. IV, 755.) However, Dr. Schirmer was also asked if "an ER doctor who never laid eyes on the patient, who did not evaluate the patient, [would] likely have trouble determining remotely from another site if the patient was completely and totally unable to understand any advice for seven hours straight? Would that be a different concept?" Dr. Schirmer answered: "That is impossible. Any judgment \* \* \* for someone to come in here and say they understood the patient's level of competence based on what is in this record without a personal discussion or interaction with the patient is all pure speculation." (Tr. Vol. IV, 792.)

{¶ 40} Dr. Schirmer opined that Dr. Hasan met the standard of care as to her treatment and care of Jarvis. According to Dr. Schirmer, Dr. Hasan "went above and beyond what is required as a minimum" for a reasonably prudent physician in the same or similar circumstances. (Tr. Vol. IV, 763.)

{¶ 41} Dr. Schneiderman testified in pertinent part as follows. Dr. Schneiderman is board certified in emergency medicine. He has served as the medical director of an urgent care center in the past, and served shifts at urgent care centers. But Dr. Schneiderman's primary job is to work as an emergency room physician. Urgent care centers frequently contact the emergency department at the Miami Valley Hospital, where Dr. Schneiderman is employed, requesting to transfer a patient to the emergency department. Before a patient can be transferred, however, the patient must consent to the transfer "because you can't force a patient to go from the urgent care to the emergency department." (Tr. Vol. IV, 619.) "[W]hile an urgent care is a hybrid in between an emergency department and a private office, it is much closer to the private office in attitude and capability." (Tr. Vol. IV, 621.)

{¶ 42} Dr. Schneiderman has treated patients who refuse a particular treatment or otherwise do not follow medical advice, and he finds it "very frustrating" because the physician understands what is in the patient's best interest. (Tr. Vol. IV, 630.) Dr. Schneiderman testified that an urgent care physician must act in a patient's best interests when the patient is facing a life-threatening medical emergency and is medically or mentally unable to make a rational choice as to his or her own treatment. At the time of making a healthcare treatment decision, a patient must have the capacity to understand his or her health situation. For a patient to properly refuse treatment, the treating

physician must ensure the patient obtains all relevant information. Dr. Schneiderman opined that Jarvis was fully advised of the risks associated with not following Dr. Hasan's advice.

{¶ 43} Dr. Schneiderman was asked: "Was there anything about this patient's initial presentation as recorded on her initial vital signs which would in any manner lead you to believe that when the doctor, Dr. Hasan spoke to her early on, that she wouldn't be able to comprehend the advice of the physician?" He answered in part: "Nothing leads me to believe that she wouldn't be able to understand any of the things that were told to her, and that is true going through her entire stay there." (Tr. Vol. IV, 639.) Dr. Schneiderman also stated: "[P]eople who have the capacity to understand what is going on, and [Jarvis] did, have the right to refuse. They have the right to do what they want to do. It is a free country." (Tr. Vol. IV, 660-61.) Dr. Schneiderman found nothing in the record to demonstrate Jarvis presented with an altered mental status.

{¶ 44} Dr. Schneiderman opined that Dr. Hasan met the standard of care, adding that the care provided by Dr. Hasan was "above and beyond the standard of care. I think her care was excellent." (Tr. Vol. IV, 706.) Dr. Schneiderman also opined that Jarvis' conduct fell below the standard of care when Jarvis, "who had the capacity to understand what was going on \* \* \* decided on her own to reject [medical] advice and left the premises of the urgent care." (Tr. Vol. IV, 662.)

{¶ 45} The testimonies of Drs. Schirmer and Schneiderman were not merely recitations of each other's respective opinion. Jarvis had a gastrointestinal problem when she presented to the urgent care, and Dr. Schirmer's background includes extensive experience dealing with gastrointestinal conditions. Dr. Schneiderman testified regarding his extensive experience and knowledge regarding emergency medicine. That both testified that Dr. Hasan met the standard of care did not necessitate the exclusion of testimony. Both provided distinct information and perspectives pertinent to Jarvis' medical condition and the trier of fact's resolution of the ultimate issues of fact. Therefore, we find no abuse of discretion by the trial court in allowing Dr. Hasan to present the testimony of both Drs. Schirmer and Schneiderman.

{¶ 46} Accordingly, the administrator's sixth assignment of error is overruled.

**E. Second, Third, Seventh, and Ninth Assignments of Error – Exclusion of Testimony of Administrator's Expert, Dr. Stuart**

{¶ 47} The administrator's second assignment of error alleges the trial court incorrectly applied the physical facts rule to limit the testimony of Dr. Stuart. The administrator's third assignment of error alleges the trial court erroneously prevented Dr. Stuart from testifying as to the standard of care required of an urgent care physician when a patient lacks mental clarity. The administrator's seventh assignment of error alleges the trial court abused its discretion in not permitting the administrator to call Dr. Stuart as a rebuttal witness after Dr. Hasan's experts testified. And the administrator's ninth assignment of error alleges the trial court abused its discretion by not providing the administrator with adequate time to respond to Dr. Hasan's motion to strike and exclude evidence. Because they each relate to the exclusion of testimony of Dr. Stuart, we will address together the administrator's second, third, seventh, and ninth assignments of error. For organizational and clarity purposes, however, we will address these four assignments of error out of order.

**1. Ninth Assignment of Error – Timing of Ruling on Motion to Strike or Exclude**

{¶ 48} The administrator argues the trial court failed to provide adequate time for the administrator to prepare a response to Dr. Hasan's motion to strike and exclude the opinion testimony of Dr. Stuart. According to the administrator, the trial court violated Loc.R. 21.01 of the Franklin County Court of Common Pleas, General Division. Loc.R. 21.01 provides, in pertinent part, as follows: "All motions shall be accompanied by a brief stating the grounds and citing the authorities relied upon. The opposing counsel or a party shall serve any answer brief on or before the 14th day after the date of service as set forth on the certificate of service attached to the served copy of the motion." The administrator argues he was not provided adequate time to prepare a response to Dr. Hasan's motion to strike and exclude the opinion testimony of Dr. Stuart. Dr. Hasan characterizes the motion to strike and exclude as a "motion in limine," and argues the trial court was not required to give the administrator 14 days to respond to the motion.

{¶ 49} On the morning of the third day of trial, November 14, 2013, Dr. Hasan filed her motion to strike and exclude the opinion testimony of the administrator's expert, Dr.

Stuart. The motion was hand delivered to the administrator's counsel. Dr. Hasan, pursuant to Evid.R. 702, requested an order striking and excluding the testimony of Dr. Stuart on the issue of the competency of Jarvis on grounds the testimony on that issue was unreliable and would not assist the trier of fact. Dr. Hasan argued that Dr. Stuart's testimony was "wholly inconsistent with the physical facts, not reliable, and outside the scope of his expertise." (Defendant's Motion to Strike, 4.) Dr. Hasan's motion relied, in significant part, on specific evidence that was presented on the first two days of the trial.

{¶ 50} On November 7, 2013, one week before the filing of the motion to strike and exclude, Dr. Stuart sat for a videotaped trial deposition. The administrator's counsel directly examined Dr. Stuart, and then Dr. Hasan's counsel cross-examined Dr. Stuart. Various objections were made by counsel for both sides, preserving issues for ruling by the trial court at the appropriate time. Dr. Stuart's trial deposition was filed with the trial court on November 8, 2013. The trial court ruled on the objections prior to the playing of Dr. Stuart's videotaped deposition at trial, and provided its rulings to counsel. The rulings on the objections were the subject of discussion on the morning of November 14, 2013. The administrator's counsel objected to some of the rulings of the trial court relating to the videotaped trial deposition of Dr. Stuart. The rulings of the trial court on the objections made during the videotaped trial deposition of Dr. Stuart were submitted into the record as the administrator's proffered exhibit No. 13.

{¶ 51} After the discussion regarding the court's rulings on the objections that were made during the videotaped trial deposition of Dr. Stuart, the issue of Dr. Hasan's Evid.R. 702 motion to strike and exclude was raised. The trial court and the administrator's counsel indicated that they first saw the motion minutes before the discussion regarding the motion. The trial court permitted the parties to present arguments regarding the motion. Counsel for Dr. Hasan presented arguments in support of the motion, and the trial court asked the administrator's counsel to respond. The administrator's counsel noted that he had not "had a lot of time to prepare a response." (Tr. Vol. III, 439.) Nonetheless, the administrator's counsel proceeded to present his arguments as to why Dr. Hasan's motion lacked merit.

{¶ 52} After the parties debated the evidentiary motion, the trial court indicated that it was granting the motion, noting in particular its view that Dr. Stuart was not

qualified to give an opinion that Jarvis was mentally incompetent during her time at urgent care. The trial court indicated that its ruling would not result in all of Dr. Stuart's testimony being excluded, only those portions involving Dr. Stuart opining on Jarvis' mental capacity.

{¶ 53} Based on the trial court's ruling on the evidentiary motion, Dr. Hasan's counsel provided a document to the court and opposing counsel setting forth the portions of Dr. Stuart's deposition that were subject to the trial court's ruling on the motion. The suggested changes were apparently applied, with the redactions made to Dr. Stuart's videotaped deposition in preparation for it being played for the jury. Before the redacted deposition was played for the jury, the administrator's counsel reiterated that he "had very little time to respond to this motion in a very thoughtful manner \* \* \* [s]o I just didn't have an opportunity as much as I would like to provide a very thorough and accurate and detailed response." (Tr. Vol. III, 473.) The administrator's counsel indicated his intent to proffer the suggested changes into the record as "Exhibit No. 15." (Tr. Vol. III, 474.) The record contains other proffered exhibits of the administrator, but it does not contain a proffered exhibit No. 15.

{¶ 54} While the administrator's appellate merit brief suggests the trial court violated Loc.R. 21 by not providing the administrator 14 days to file a written response to the motion to strike and exclude, the administrator's reply brief clarifies that it is not his position that he should have been given 14 days to file a written response to the evidentiary motion. The administrator, citing *Haney v. Barringer*, 7th Dist. No. 06 MA 141, 2007-Ohio-7214, argues "both the rule and justice require that *adequate* time be given to prepare a response." (Emphasis sic.) (Administrator's Reply Brief, 19.) The administrator does not, however, identify what amount of time would have been adequate under the circumstances, or, alternatively, what steps the trial court should have taken before resolving the motion.

{¶ 55} It is well-established that the control of the docket and consideration of motions by the trial court rests within the sound discretion of the court. *Catudal v. Catudal*, 10th Dist. No. 12AP-951, 2013-Ohio-2748, ¶ 26. The Rules of Civil Procedure and local rules operate to limit that discretion. See *Lucas v. Gee*, 104 Ohio App.3d 423, 429 (10th Dist.1995) ("The control of the docket and consideration of motions by the trial

court rests within the trial court's sound discretion and in accordance with the Rules of Civil Procedure." ). Ordinarily, a party in the Franklin County Court of Common Pleas has 14 days to serve a responsive brief to a motion, pursuant to Loc.R. 21. Also, Civ.R. 6(C) provides that there must be 7 days between the filing of a motion and a hearing on that motion, unless a different time is fixed by the Civil Rules of Procedure or by order of the court. In *Haney*, the court held it was an abuse of discretion for the trial court not to follow its local rules regarding response times for a party to file an opposing motion. *See id.*, ¶ 19-29. However, as recognized by the administrator, it would be unreasonable to mandate the time frame set forth in Loc.R. 21 as to a formal written evidentiary motion filed in the midst of trial. In such a circumstance, the trial court must exercise its discretion and weigh the competing interests of ensuring that the trial continue expeditiously, and providing time for the nonmoving party to consider the motion and to develop a response.

{¶ 56} Based on our review of the record, we conclude the trial court did not abuse its discretion by resolving the evidentiary motion on the same day it was filed. The trial court provided each side an opportunity to present arguments for and against the motion. The record indicates that Dr. Hasan's counsel identified testimony of Dr. Stuart that was subject to the court's ruling on the evidentiary motion, and that the court and the administrator's counsel were given those suggestions. The administrator's counsel generally objected to the suggested redaction of the testimony, but he did not object on the basis that the redacted portions were not consistent with the court's ruling on the evidentiary motion. Moreover, while the administrator's counsel repeatedly complained to the trial court regarding the timing of the motion, he did not request any type of delay in the proceedings to allow additional time to prepare a response. That the administrator would have liked to have had more time to respond to the evidentiary motion does not demonstrate an abuse of discretion by the trial court.

{¶ 57} For these reasons, we overrule the administrator's ninth assignment of error.

## **2. Second and Third Assignments of Error – Application of Physical Facts Rule and Limitation of Testimony of Administrator's Expert**

{¶ 58} Both the administrator's second and third assignments of error challenge the trial court's decision to exclude certain testimony of Dr. Stuart.

### **a. Physical Facts Rule**

{¶ 59} The administrator's second assignment of error focuses on the physical facts rule. The physical facts rule is an exception to the axiom that the credibility of witnesses is a matter for the jury. *See McDonald v. Ford Motor Co.*, 42 Ohio St.2d 8, 11 (1975). Under the physical facts rule, "neither a court nor jury can give probative value to any testimony positively contradicted by the physical facts." *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶ 75, citing *McDonald* at 12. For example, "[w]here a witness testifies that he looked and listened at a railroad crossing, but neither saw nor heard a train approaching, and the only reasonable conclusion upon the evidence is that there is no doubt that had he looked he must have seen the train, the witness's testimony cannot be considered credible." *McDonald* at 12, citing *Detroit, Toledo & Ironton Rd. Co. v. Rohrs*, 114 Ohio St. 493 (1926). Conceptually, this rule finds its foundation in the idea that "eye-witnesses' testimony, essential though it may be, is fundamentally 'soft' evidence, subject to human failings of perception, memory and rectitude." *Id.* at 12.

{¶ 60} " 'The palpable untruthfulness' of plaintiff's testimony requiring a trial court to take a case from the jury under the physical facts rule 'must be (1) inherent in the rejected testimony, so that it contradicts itself, or (2) irreconcilable with facts of which, under recognized rules, the court takes judicial knowledge, or (3) is obviously inconsistent with, contradicted by, undisputed physical facts.' " *Id.* at 12-13, quoting *Duling v. Burnett*, 22 Tenn.App. 522 (1938). Stated differently, " '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.* at 12, quoting *Connor v. Jones*, 115 Ind.App. 660, 670 (1945). These "formulations" strike "a balance between, on the one hand, the common sense notion that physical facts and evidence can be so conclusive and demonstrative that no reasonable person could accept the truth of contrary testimony, and, on the other hand, the need for

courts to be wary of treating a party's theory of a case as 'fact,' when a different theory is also possible in the case." *McDonald* at 13. In essence, for testimony to be excluded on the basis of the physical facts rule, the testimony must be unbelievable on its face, upon applying the laws of nature.

{¶ 61} In ruling on the motion for a new trial, the trial court applied the physical facts rule to justify its exclusion of some of the testimony of Dr. Stuart. The trial court noted that there have been two cases in this court where the issue of the physical facts rule was raised but not applied in the medical negligence context *Ellinger; McNeilan v. The Ohio State Univ. Med. Ctr.*, 10th Dist. No. 10AP-472, 2011-Ohio-678. In *Ellinger*, the plaintiffs argued that certain evidence should not have been given probative value because the evidence was positively contradicted by the physical facts. *Id.* at ¶ 74-76. This court disagreed with the plaintiffs, finding that the physical facts rule did not apply to require the court to disregard the challenged testimony. *Id.* at ¶ 77. In *McNeilan*, the plaintiff argued that the physical facts rule required the rejection of the testimony of the defendant's expert witness. *Id.* at ¶ 26. The testimony in *McNeilan* demonstrated general agreement as to the facts related to the patient's condition prior to discharge from the hospital, including the levels of the patient's vital signs, such as the patient's oxygen saturation level. *Id.* at ¶ 28. But, the witnesses disagreed as to the significance of the agreed upon facts. *Id.* This court resolved that the physical facts rule did not apply because the challenged testimony was not positively contradicted by the physical facts. *Id.* at ¶ 28. In neither *Ellinger* nor *McNeilan* did this court express a view, or even suggest, that the physical facts rule could never apply in the medical negligence context; instead, the decisions reflected the court's view that the rule did not apply in those cases.

{¶ 62} Here, the trial court also noted the experts did not disagree over physical facts such as oxygen saturation, weight, or even the diagnosis. The disagreement was over Jarvis' mental clarity. The trial court further noted that Dr. Hasan had argued that because Jarvis had acted sensibly throughout her visit, gave an accurate medical history, communicated her symptoms, and took an exit survey, she had to be able to think clearly. The trial court resolved that "[w]hile ordinarily where testimony conflicts, the credibility of witnesses is a matter for the jury." The testimony of Dr. Stuart "was clearly in conflict with the laws of nature." (June 23, 2014 Decision and Entry, 6.) The court added, "Dr.

Stuart's testimony regarding Ms. Jarvis' mental status was not credible and should not have been submitted to the jury even though Dr. Schneiderman's testimony was." (June 23, 2014 Decision and Entry, 6.) Thus, the trial court resolved that it appropriately excluded "Dr. Stuart's opinion that Ms. Jarvis was incapable of understanding Dr. Hasan's advice." (June 23, 2014 Decision and Entry, 7.)

{¶ 63} The administrator argues that the application of the physical facts rule was inappropriate under the facts of this case because the facts that the trial court relied upon in deciding to apply the physical facts were neither physical nor undisputed. The administrator further argues that the excluded testimony did not contradict physical facts, but constituted an alternative interpretation of the physical facts. Lastly, the administrator argues that the physical facts rule has no potential application in the medical negligence context.

{¶ 64} Conversely, Dr. Hasan argues that the evidence discrediting Dr. Stuart's excluded testimony was both physical and undisputed, that the excluded testimony contradicted the undisputed physical evidence, and that courts are not precluded from applying the physical facts rule in the medical negligence context. Dr. Hasan argues that the following undisputed evidence constitutes physical facts: Jarvis drove herself to the urgent care, accurately completed the registration paperwork, provided an accurate medical history to the urgent care staff, including identifying the name and dosage of the prescription drug she was taking, provided a urine sample upon request, sat for a series of x-ray imaging, and completed a patient survey prior to leaving the urgent care. According to Dr. Hasan, these undisputed facts are "irrefutably inconsistent" with an individual who is "completely incompetent to make rational decisions regarding his or her medical treatment for an entire period of seven hours." (Dr. Hasan's Brief, 18.)

{¶ 65} We disagree with the administrator's contention that the physical facts rule cannot apply in the medical negligence context. As the Supreme Court of Ohio has noted, the "physical facts rule has been applied in a myriad of cases and factual circumstances." *McDonald* at 13. As discussed above, in *Ellinger* and *McNeilan*, this court did not find or even suggest that the physical facts rule cannot be applicable in the medical negligence context. Instead, this court determined that, based on the particular facts of those cases, the rule was inapplicable. While our review of Ohio case law does not reveal any case in

which the physical facts rule was applied to exclude testimony in a medical negligence case, there is nothing inherent in the physical facts rule that would preclude its application in the medical negligence context. In the final analysis, however, the physical facts rule should be applied with caution because it constitutes a very narrow exception to the rule that disputed issues of fact are resolved by the trier of fact. *Granat v. Schoepski*, 272 F.2d 814, 815 (9th Cir.1959) ("The 'physical facts' rule is restricted to those situation[s] in which the testimony of the witnesses relied upon was virtually impossible on the uncontradicted physical facts.").

{¶ 66} Even though the physical facts rule may apply in the medical negligence context, it does not apply under the facts of this case. For the physical facts rule to apply to mandate exclusion of certain testimony, the undisputed physical facts must affirmatively, and conclusively, demonstrate the incredulity of that testimony, which is not the case here. The undisputed physical facts in this case include the registration paperwork completed by Jarvis, the x-ray imagery, and the patient survey documents. These undisputed physical facts do not necessarily lead to an incontrovertible conclusion regarding Jarvis' mental condition. The fundamental flaw in applying the physical facts rule here is that the physical facts do not positively prove the mental status of Jarvis, whatever the precise nature of that status might have been. Thus, we find the trial court erroneously applied the physical facts rule in this case. But, for the reasons discussed below, this error did not constitute prejudicial error.

**b. Limitation of Testimony of Administrator's Expert Based on Evid.R. 702**

{¶ 67} By his third assignment of error, the administrator argues the trial court erred in deeming Dr. Stuart unqualified under Evid.R. 702 to opine as to the standard of care for the treatment of Jarvis based on Jarvis' lack of mental clarity.

{¶ 68} Based on the trial court's decision to grant Dr. Hasan's request to exclude certain testimony of Dr. Stuart, substantial portions of Dr. Stuart's videotaped trial deposition were redacted before counsel played the deposition for the jury. The testimony of Dr. Stuart that was excluded from the evidence included the following:

Q. Doctor, do you have an opinion within a reasonable degree of medical probability as to whether or not Loddy Jarvis was mentally unstable on or around the time when her vitals were first recorded at the Urgent Care facility?

A. Yes, I do.

Q. And what is that opinion, Doctor?

A. I believe she was definitely mentally unstable. She had slurred speech and she was clammy and she was in shock. And we know that shock affects a number of organ systems. We saw the clamminess, we saw the low blood pressure, and that will also affect the brain; and then the slurred speech upon presentation indicates that she was not mentally competent; she was mentally compromised when she presented to the Urgent Care.

Q. Doctor, do you have an opinion within a reasonable degree of medical probability as to whether or not Loddy Jarvis was mentally capable -- medically capable of making a rational choice as to her treatment options on or around the time when her vitals were first recorded at the Urgent Care facility?

A. Yes, I do. I don't believe she was mentally capable of making a medical decision, and we run into this all the time. This is tough, but she was -- you know, the slurred speech, she's in shock, we can't -- and the best comparison is someone who's intoxicated on alcohol, and they may say, "I'm okay, I'm okay," or they want you to do something and you have to act on their best behalf, and I do believe that she was not competent at the time she presented.

Q. Doctor, do you have an opinion within a reasonable degree of medical probability as to whether or not Loddy Jarvis was mentally unstable on or around the time her blood was drawn for testing at the Urgent Care facility, that being approximately 12:50 p.m.?

A. Sure. I do have an opinion, and once again, we have substantiation that she has severe metabolic disturbance. As we talked about before, there were a number of laboratories that can affect her mental status. She was a small petite lady and she's got severe metabolic disturbance. We talked about potassium, calcium, metabolic acidosis. They can all affect mentation. And they were -- I believe that she was not competent. I believe that those things affected her like they affect others, and I believe that she was not competent to make good medical decisions at that point.

**Q. Doctor, do you have an opinion within a reasonable degree of medical probability as to whether or not Loddy Jarvis was medically capable of making a rational choice as to her medical treatment on or around the time her blood was drawn 12:50 p.m. at the America's Urgent Care facility?**

**A. I do have an opinion, and I do not feel that she was competent to make that decision for the reasons we talked about.**

**\* \* \***

**Q. Doctor, do you have an opinion within a reasonable degree of medical probability as to whether or not Loddy Jarvis was mentally unstable on or around the time Loddy was provided with the Web M.D. article titled "Digestive Disorders, Health Center, Bowell Obstruction, Topic Overview" at the Urgent Care facility?**

**A. I do, and I don't believe she was competent, because now we also add in that she was given narcotics and the Phenergan in addition to the metabolic disturbances, and the situation was compounded even more. We know that patients that have gotten narcotics, even if they feel they're okay and appear to be okay, we know that it has adverse effects on their mentation and they basically need to be treated in that regard.**

**\* \* \***

**Q. Doctor, do you have an opinion within a reasonable degree of medical probability as to whether or not Loddy Jarvis was mentally unstable on or around the time that she signed that form titled Urgent Care Release Form, Patient Voluntary Refusal of Care Against Medical Advice?**

**A. I do have an opinion, and once again, we're still in the time frame that the medications are still acting on her; and also the metabolic disturbance we know has actually gotten worse, more likely than not it's gotten worse by I.V. fluids. So the problem continues to compound, and I do feel that she was not medically stable to interpret that article well enough and was not medically competent or mentally competent to review that accurately.**

(Stuart Deposition, 74-81.) In response to the question "what if anything does the standard of care require an Urgent Care physician -- of an Urgent Care physician when a patient presents to a freestanding Urgent Care facility who is mentally unable to make rational decisions," Dr. Stuart answered in part:

But your duty is, is to not let them act on their own behalf because they are not competent and so they are not making good decisions and they may be at risk if they do something like signing out against advice and leave. They really do not understand the ramifications of leaving even if they have been told a number of things might happen, such as you might die. They may not be able to comprehend it as accurately as they should.

Thereafter, the following exchange occurred:

Q. Doctor, what if anything does the standard of care require of an Urgent Care physician when a patient is medically unable to make a rational decision, who has been diagnosed with a condition that requires immediate transfer to the hospital or emergency room for possible admission, which is to leave the freestanding Urgent Care facility and go home?

A. Well, it requires that you intervene on their behalf, and that can be staff trying to convince, it might even require security or police, but the point is if they're trying to leave in an unsafe condition you have to intervene on their behalf, and so it goes up the continuum. You try to get them to agree, but if they have to be physically restrained because they are a danger to themselves [sic] and others, then it does occasionally go up to that extent, and it's happened many a times. But they cannot act on their own behalf because they are not competent to make that decision.

\* \* \*

Q. What other areas do you believe that Dr. Hasan's treatment fell below the accepted standard of care for an Urgent Care physician?

A. Well, Dr. Hasan failed to act on behalf of the patient knowing, she should have known, that this patient was mentally compromised by her medical condition, and the fact that she presented in shock. There was no additional vital signs to determine whether she was still in shock or not. We

know from her x-rays that she had a bowel obstruction. It's more probable than not she would not improve clinically, and then she was given medications which caused sedation and Dr. Hasan allowed her to be discharged while those medications were still affecting the patient, compromising her ability to make decisions in regard to her discharge and releasing her in an unsafe fashion because of those medications.

\* \* \*

Q. Doctor, is there any indication that at any point in time Loddy Jarvis was, based just on the vital signs that you have read in the chart itself that were available to Dr. Hasan, that Loddy Jarvis was mentally capable of making rational decisions?

\* \* \*

A. I believe that the evidence does not indicate at any point that she was medically competent, and in fact, the data that's on the chart would indicate that it was just the opposite.

\* \* \*

Q. Can you explain why you feel that the treatment fell below the standard of care, and please provide your conclusions within a reasonable degree of medical probability.

A. Sure. It is my opinion that when this patient left the Urgent Care, there was opportunity to stop her; and Dr. Hasan should have known that she was not, this patient was not competent to leave. So her obligation, which she did not meet, and therefore fell below the standard of care, was to stop this patient because she was not able to make a rational decision about her own leaving, and I do feel that is demonstrated in the clinical scenario that we have reviewed.

\* \* \*

Q. So you think that she walked out of the treatment room on her own, into the lobby, was asked to look at this screen, said she would stand there and answer five questions in an intelligent, at least a manner consistent with all of them having the highest scores, and then said thank you and walked out the door on her own power, all of which is manifest to Dr.

Stuart of complete incompetence and inability to understand what's going on? Is that your position?

\* \* \*

A. Yes, it is.

(Stuart Deposition, 83-90, 146.)

{¶ 69} The administrator's third assignment of error presents the issue of whether the trial court erred in excluding some of Dr. Stuart's testimony on the basis of Dr. Stuart's deemed lack of qualification to testify regarding the competency of Jarvis. It is not necessary, however, to resolve this particular issue. Even assuming it was error for the trial court to exclude some of Dr. Stuart's testimony relating to Jarvis' competency, the trial court's exclusion of that evidence did not constitute prejudicial error.

**c. Administrator's Failure to Demonstrate Prejudice**

{¶ 70} Error in the admission or exclusion of evidence is grounds for reversal only where substantial rights of the complaining party were affected or substantial justice appears not to have been done. *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶ 73; see Civ.R. 61 ("[n]o error in \* \* \* any ruling or order or in anything done \* \* \* by the court \* \* \* is ground for \* \* \* disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice"); 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."). To show an evidentiary ruling has affected a substantial right, the party must demonstrate that the alleged error impacted the final determination of the case. *Lips v. Univ. of Cincinnati College of Medicine*, 10th Dist. No. 12AP-374, 2013-Ohio-1205, ¶ 49, citing *Campbell v. Johnson*, 87 Ohio App.3d 543, 551 (2d Dist.1993).

{¶ 71} Despite the trial court's decision to exclude some of Dr. Stuart's testimony on the issues of Jarvis' mental clarity and Dr. Hasan's adherence to the standard of care, substantial testimony of Dr. Stuart on these issues was presented to the jury for its consideration.

{¶ 72} In non-redacted portions of Dr. Stuart's videotaped deposition played at trial, Dr. Stuart testified extensively about Jarvis' mental clarity during her time at the

urgent care and how certain factors would have impacted her mental clarity, such as the amount of oxygen her brain was receiving. Dr. Stuart testified regarding the importance of oxygen for the brain's functionality. Dr. Stuart explained that oxygen is the "fuel" for the brain, and if the brain is oxygen deficient then it can cause sedation, confusion, and mental status changes involving "not acting right and not thinking right." (Tr. Vol. III, 494-95.) Dr. Stuart further explained that oxygen saturation can reach up to 100 percent, but is usually in the high 90s. According to Dr. Stuart, a reading of oxygen saturation in the low 90s constitutes a problem, and a reading under 90 percent constitutes an emergency situation. "[U]nder 90 you start getting mental status changes and these are truly emergencies where you have to take a look very carefully what's going on, but clearly can cause mental status changes." (Tr. Vol. III, 494.) Dr. Stuart was specifically asked whether an oxygen saturation level of 88 percent, which was the oxygen saturation level of Jarvis recorded at the urgent care, would have an impact on a person's ability to make rational decisions, and he answered as follows:

Sure. This patient has slurred speech and has low oxygen level. That means that they are by definition not thinking correctly. This is the type of patient that -- another example that people can relate to is someone comes in severely intoxicated on alcohol or drugs. That affects their brain. Low oxygen and low blood pressure affects the brain. This patient is, by definition, not thinking clearly. This is where a transfer needs to be initiated because they have acute medical problems and you cannot -- that patient, you cannot rely on that patient making sound decisions. They have to go and we'll sort it out later.

(Tr. Vol. III, 505.) Dr. Stuart also noted that Jarvis received a dosage of the narcotic Nubain, which has the effect of "cloud[ing]" a person's "mental faculties," resulting in a person not exhibiting "good judgment." (Tr. Vol. III, 510-11.) Additionally, Jarvis received the anti-nausea medication Phenergan, which, according to Dr. Stuart, "also has sedating effects." (Tr. Vol. III, 512.)

{¶ 73} Dr. Stuart testified that Jarvis was in "shock" based on the records of the urgent care, including Jarvis' initial presentation as "a patient who had sunken eyes, decreased skin turgor, was cold and clammy, and described as having an undetectable

blood pressure." (Tr. Vol. III, 501-02.) Dr. Stuart was asked what an undetectable blood pressure indicated, and he answered:

Well, that, along with the other things that I've described, this patient is in shock and we've got a major problem. This is the point where an ambulance should be called and we're going to get this lady out of here because she's in trouble. And this is one of those types of situations where you don't monkey around. Acute heart attack, something like this, this patient is toxic, and you don't know where this is going to go, and there is no guarantee she's going to get better at all. So you really want her in a place and get her to a place where she can be cared for acutely.

(Tr. Vol. III, 502.)

{¶ 74} In addition to addressing Jarvis' mental status, Dr. Stuart testified regarding the standard of care for a physician when a patient cannot make a rational decision as to his or her own care. Dr. Stuart was asked whether it is important for an urgent care physician to pay attention to objective data such as a patient's vital signs. He answered as follows:

Oh, absolutely. You know, some patients say, "I'm okay, I'm okay," when you know they're not okay, and we get that all the time. Patients think they're okay, think they're okay, but they're not. And you have to act in the best interest of the patient, and when there's parameters like this where you know they are not okay no matter what they say, and when you have patients by these number of parameters that there is compromise to her brain and her functioning, you have to act accordingly to protect her safety, regardless of what she says. And it's a tough cookie, but the point is you have to protect her and she cannot make rational decisions when her oxygen level is low, she comes in with slurred speech, and she's in shock.

(Tr. Vol. III, 505-06.) Also addressing the standard of care, the following testimony of Dr. Stuart was presented to the jury:

Q. Doctor, do you occasionally see folks that come into your Urgent Care that are just not mentally capable \* \* \* to make a rational decision?

A. Yes. We deal with that many, many times in the emergency department. We also see it occasionally in Urgent Care and it's a tough one. It has to be handled correctly.

Q. [B]ased upon your review of the objective data and the chart from America's Urgent Care for Loddy Jarvis \* \* \* have you formed an opinion within a reasonable degree of medical probability as to whether Dr. Hasan conformed to the standard of care expected of a physician of reasonable skill, care, and diligence under like or similar conditions or circumstances?

A. Yes. I have formed an opinion.

Q. And, Doctor, what is that opinion?

A. My opinion is she did not conform to the standard of care; that the way that she handled this patient fell below the standard of care and it could have been handled much differently; and I believe more probably than not that this patient would have survived if it had been handled differently.

(Tr. Vol. III, 499-500.)

{¶ 75} Dr. Stuart was asked what the standard of care requires in circumstances involving a patient with the vital signs demonstrated by Jarvis when she presented at the urgent care. Dr. Stuart answered, "I would call an ambulance and tell the patient we have an acute emergency and that they need to go to the hospital. Like a patient with a heart attack, there are times where you don't have lots of conversation. The ambulance needs to be called, and the patient needs to go to the hospital." (Tr. Vol. III, 504.)

{¶ 76} Dr. Stuart further elaborated regarding why, in his opinion, Dr. Hasan's conduct fell below the standard of care:

Q. Doctor, what if anything does the standard of care require an Urgent Care physician -- of an Urgent Care physician when a patient presents to a freestanding Urgent Care facility who is mentally unable to make rational decisions?

A. It requires that you act in their behalf; and it depends. You have a continuum of possibilities. It depends on how acutely sick the patient is. If the patient is acutely toxic like this patient, you call the ambulance and you transfer them. And then if the patient continues to be frustrated or whatever,

you'll sort that out that you've done the right thing for the patient.

If the patient -- the other possibility in more minor type of situations is that you could get their primary care physicians involved who may have a good relationship with them; you can get family members involved to try to convince the patient that they need to go.

Q. Doctor, based on your review of the chart from America's Urgent Care, the records from Columbus Division of Fire, the chart from St. Ann's Hospital August 25th, 2007, the chart from Jeffrey Sams, and the chart from Cathy Greiwe and the acute abdominal series, do you have an opinion -- and your education, training, and experience, do you have an opinion within a reasonable degree of medical probability as to in what ways Dr. Hasan's treatment fell below the accepted standard of care for an Urgent Care physician similarly situated?

A. Yes, I do. Yes, I do.

Q. And what is that opinion? Can you specifically describe exactly how you believe her care and treatment fell below the accepted standards of care.

A. Yes. She failed to rapidly transfer a patient who was in acute distress, who was acutely ill, who needed to be at a facility immediately due to being in shock that could properly handle this patient in terms of additional studies and possible surgical consultation. And by not transferring [her] quickly, the patient's condition deteriorated.

(Tr. Vol. III, 535-37.) Lastly, on cross-examination, Dr. Hasan's counsel asked Dr. Stuart the following question: "Doctor, you have given these opinions about this patient not being competent at any point while she was at the Urgent Care Center for 7 plus hours, correct?" Dr. Stuart answered: "Correct." (Tr. Vol. IV, 587.)

{¶ 77} Based on the evidence presented to the jury, we resolve that any error of the trial court relating to the exclusion of testimony of Dr. Stuart does not require a reversal of the trial court's judgment. The exclusion of some of the testimony of Dr. Stuart did not affect the administrator's substantial rights nor did the exclusion prevent substantial justice. The administrator argues he did not receive a fair trial because he was not able to

present evidence that the standard of care required Dr. Hasan to have Jarvis transported to an emergency room without her consent, considering Jarvis' mental status and inability to make rational decisions. But the administrator's argument that he was prejudiced by the exclusion of certain testimony of Dr. Stuart essentially ignores the testimony of Dr. Stuart that was submitted to the jury.

{¶ 78} Even though the trial court excluded some of the testimony of Dr. Stuart detailing his opinion as to Jarvis' competency during her time at the urgent care, other testimony of Dr. Stuart, indicating his view that Jarvis was not competent to make a rational decision regarding her care, was presented to the jury. In the portions of Dr. Stuart's videotaped deposition played for the jury, Dr. Stuart testified extensively about Jarvis' mental status, why he believed her mental capacity prevented her from being able to make a rational decision regarding whether to be transferred to an emergency room, and how, in his view, Dr. Hasan deviated from the standard of care. That testimony included Dr. Stuart's opinion that Jarvis' vital signs, particularly her low oxygen saturation level, and evidence of slurred speech, demonstrated her brain was not functioning sufficiently to make a rational decision regarding whether to consent to being transferred to an emergency room. And Dr. Stuart explained to the jury that, by not transferring Jarvis to an emergency room, even without consent from Jarvis, Dr. Hasan's conduct fell below the standard of care. Thus, the jury was fully informed of Dr. Stuart's opinion that Jarvis' mental capacity was diminished to such a degree that it prevented her from being able to make a rational decision, and that Dr. Hasan did not meet the standard of care because she should have sent Jarvis to an emergency room even without Jarvis providing consent.

{¶ 79} Based on the foregoing, we resolve that, even though the trial court should not have applied the physical facts rule to justify the exclusion of testimony of Dr. Stuart, and even assuming the trial court erred by excluding certain testimony of Dr. Stuart on the basis of Evid.R. 702, the administrator fails to demonstrate that the trial court committed an evidentiary error impacting the final determination of the case. The jury reached its conclusion that Dr. Hasan did not breach the standard of care after hearing a presentation of the evidence that included extensive testimony presented by both sides regarding Jarvis' mental clarity and the ultimate issue of whether Dr. Hasan breached the

standard of care. Accordingly, we overrule the administrator's second and third assignments of error.

### **3. Seventh Assignment of Error – Refusal to Permit Recalling of the Administrator's Expert**

{¶ 80} The administrator argues the trial court abused its discretion when it did not allow him to recall his expert, Dr. Stuart, to provide rebuttal testimony to the testimony of Dr. Hasan's expert witnesses, Drs. Schneiderman and Schirmer. Rebuttal testimony is testimony that is "given to explain, refute, or disprove new facts introduced into evidence by the adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence." *State v. McNeill*, 83 Ohio St.3d 438, 446 (1998). Generally, the admission of rebuttal testimony is a matter within the trial court's discretion, and a decision admitting or excluding such testimony will not be reversed absent an abuse of that discretion. *Steffy v. Blevins*, 10th Dist. No. 02AP-1278, 2003-Ohio-6443, ¶ 23. A trial court's discretion is not absolute, however, as a party possesses an unconditional right to present rebuttal testimony if: (1) the evidence is not cumulative; (2) the evidence would not be appropriate for the party's case-in-chief; and (3) the evidence is first addressed in the opponent's case-in-chief. *Brothers v. Morrone-O'Keefe Dev. Co.*, 10th Dist. No. 05AP-161, 2006-Ohio-1160, ¶ 6.

{¶ 81} Upon the conclusion of Dr. Hasan's case in defense, the administrator's counsel sought to have the trial court permit him to read to the jury the portions of Dr. Stuart's videotaped trial deposition that had been redacted and not played for the jury. The administrator's counsel argued that because Dr. Hasan's experts testified as to Jarvis' competency, then the redacted portions of Dr. Stuart's testimony should be played for the jury because they also related to that issue. The trial court denied the request.

{¶ 82} On appeal, the administrator argues the rebuttal testimony was offered to rebut the testimony of Dr. Hasan's experts regarding the mental state of Jarvis and the standard of care relating to her treatment in view of that mental state. The administrator contends these issues were not addressed in his case-in-chief and he should have been permitted to rebut the testimony of Dr. Hasan's experts on these issues. We find these arguments to be unpersuasive. As outlined above in reference to the administrator's third assignment of error, the administrator did present evidence in his case-in-chief as to the

issues of Jarvis' mental clarity and the applicable standard of care. Thus, these issues were not first presented in Dr. Hasan's case-in-chief. Moreover, the administrator's counsel's request to read the previously redacted testimony into evidence was essentially a request for the trial court to reconsider its earlier decision to exclude parts of Dr. Stuart's testimony. For the reasons discussed in reference to the administrator's second and third assignments of error, the trial court's decision to exclude portions of Dr. Stuart's testimony was not reversible error.

{¶ 83} Accordingly, we overrule the administrator's seventh assignment of error.

**F. First, Tenth, and Eleventh Assignments of Error – Alleged Irregularities in Trial Court Proceedings and Denial of Motion for New Trial**

{¶ 84} The administrator's first assignment of error alleges the trial court abused its discretion by denying his motion for a new trial. By the administrator's tenth assignment of error, he argues the trial court's rulings and other actions created irregularities in the proceedings that resulted in an unfair trial. The administrator's eleventh assignment of error alleges the cumulative effect of errors committed by the trial court resulted in an unfair trial. For ease of discussion, we will address the administrator's first, tenth, and eleventh assignments of error together.

{¶ 85} The administrator's first assignment of error directly implicates Civ.R. 59(A). Civ.R. 59(A)(1) provides, in pertinent part, that a new trial may be granted due to "[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 addition to the grounds for a new trial enumerated in Civ.R. 59(A), this rule contains a catch-all, as it provides that "a new trial may also be granted in the sound discretion of the court for good cause shown."

{¶ 86} As a general matter, Civ.R. 59 does not require the trial court to grant a new trial, but allows the court discretion to decide whether a new trial is appropriate. *Alderman v. Alderman*, 10th Dist. No. 10AP-1037, 2011-Ohio-3928, ¶ 11. An appellate court will not reverse a decision whether to grant a new trial absent an abuse of discretion. *Thomas v. Columbia Sussex Corp.*, 10th Dist. No. 10AP-93, 2011-Ohio-17, ¶ 16. " '[A litigant] is entitled to a fair trial but not a perfect one, for there are no perfect trials.' "

*Grundy v. Dhillon*, 120 Ohio St.3d 415, 2008-Ohio-6324, ¶ 30, quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).

{¶ 87} The administrator does not separately set forth arguments directly addressing his first assignment of error. Instead, it appears the administrator relies on the arguments set forth in support of his other assignments of error to demonstrate the trial court abused its discretion in denying his motion for a new trial. Thus, we construe the administrator's first assignment of error as incorporating the administrator's other assignments of error alleging specific errors in the trial court proceedings. For the reasons expressed in response to the other assignments of error alleging specific errors in the trial court proceedings, the administrator's first assignment of error is overruled.

{¶ 88} In support of his tenth assignment of error, the administrator argues the trial court created "irregularities" in the trial proceedings: (1) by granting Dr. Hasan's evidentiary motion regarding the testimony of Dr. Stuart; (2) by ruling on the evidentiary motion "too quickly"; (3) by not reviewing the testimony for content before ruling on the evidentiary motion; (4) by allowing Dr. Hasan's counsel to redact Dr. Stuart's testimony as it "saw fit"; (5) by allowing Dr. Hasan's experts, but not the administrator's expert, to testify as to the mental clarity of Jarvis; (6) by not declaring Pate to be a hostile witness during her examination by the administrator's counsel; (7) by not submitting the administrator's requested interrogatories to the jury; and (8) by submitting Dr. Hasan's suggested instructions to the jury. (Administrator's Brief, 51-55.)

{¶ 89} A number of the alleged "irregularities" set forth in support of the administrator's tenth assignment of error are the subject of other assignments of error. For the reasons already discussed, the court finds the administrator's arguments relating to those issues to be unpersuasive. The other bases for the administrator's tenth assignment of error are also unpersuasive. While the administrator suggests error regarding the jury instructions and interrogatories, he does not set forth any viable argument as to why the trial court committed any error in this regard. Instead, the administrator essentially argues the trial court committed error by ruling against the administrator and for Dr. Hasan. Absent any explanation or argument as to why the trial court committed error as to the jury instructions and interrogatories, the administrator's bald assertions are unavailing. *See, e.g., Bank of New York v. Barclay*, 10th Dist. No.

04AP-48, 2004-Ohio-4555, ¶ 9 (noting that unsupported assignments of error and undeveloped arguments normally cannot form the basis for reversing a trial court's judgment).

{¶ 90} The administrator also contends the trial court created irregularities in connection with the procedure the trial court applied relating to the redaction of Dr. Stuart's deposition testimony. According to the administrator, Dr. Hasan's counsel unilaterally dictated what testimony of Dr. Stuart was redacted based on the trial court's ruling on the evidentiary motion. At trial, however, the administrator did not challenge the suggested redactions as being inconsistent with the trial court's ruling. Moreover, for the reasons discussed above in reference to the administrator's second and third assignments of error, the administrator has failed to show that the exclusion of evidence, pursuant to the granting of the evidentiary motion, impacted the final determination of the case so as to require a reversal of the trial court's judgment in favor of Dr. Hasan. Accordingly, the administrator's tenth assignment of error is overruled.

{¶ 91} In support of his eleventh assignment of error, the administrator argues that, even if errors of the trial court were harmless in isolation, their cumulative effect was to create prejudice toward the administrator. The administrator asserts the trial court's "numerous errors compiled to create a bias[ed], lopsided presentation of the case to the jury." (Administrator's Brief, 56.)

{¶ 92} Under the cumulative error doctrine, a judgment may be reversed if the cumulative effect of multiple errors deprives a defendant of his constitutional rights even though, individually, the errors may not rise to the level of prejudicial error or cause for reversal. *See State v. Garner*, 74 Ohio St.3d 49, 64 (1995). This court has repeatedly noted that the cumulative error doctrine is not typically employed in civil cases. *See, e.g., Stanley v. The Ohio State Univ. Med. Ctr.*, 10th Dist. No. 12AP-999, 2013-Ohio-5140, ¶ 124. Consistent with this principle, its application here is not warranted. We have rejected the majority of errors argued by the administrator. While we have found the trial court committed error by applying the physical facts rule, that error was not prejudicial. We further found that, even assuming the trial court erroneously ruled that Dr. Stuart was not qualified to testify as to Jarvis' mental state, the error similarly was not prejudicial. Our determination of a lack of prejudice as to both of these alleged errors was based on

the fact that extensive testimony of Dr. Stuart, related to Jarvis' mental state and the standard of care, was presented to the jury. Thus, the effect of the exclusion of some of the testimony of Dr. Stuart on the issues of Jarvis' mental state and the standard of care did not amount to prejudicial error such that the administrator was deprived of a fair trial.

{¶ 93} For these reasons, we overrule the administrator's eleventh assignment of error.

#### **IV. Conclusion**

{¶ 94} Having overruled each of the administrator's eleven assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., & TYACK, J., concur.

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