[Cite as *Stewart v. Nazir*, 2010-Ohio-6346.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

GEORGIA L. STEWART, et al.	:	
	:	Appellate Case No. 23806
Plaintiff-Appellant	:	
	:	Trial Court Case No. 07-CV-9564
v.	:	
	:	
RAJA NAZIR, M.D.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 23rd day of December, 2010.

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FAIN, J.

{¶ 1} Plaintiffs-appellants Georgia Stewart, Georgia Stewart as administrator for the Estate of Tracy Stewart and as legal guardian for Trevon Stewart, and Trevon Stewart, appeal from a judgment in favor of defendant-appellee Raja Nazir, M.D.[1]

[1]For purposes of convenience, appellants will be referred to collectively as the Stewarts and the appellee will be referred to as Dr. Nazir.

The Stewarts contend that the trial court committed plain error by allowing defense counsel to use a peremptory challenge to remove the only African-American juror from the jury panel without inquiring as to the motive for removal. The Stewarts also maintain that the trial court prejudicially erred by allowing Dr. George Nicholas, a pathologist, to testify on issues to which the doctor admitted having no expertise. Finally, the Stewarts contend that the trial court prejudicially erred by allowing Dr. Nazir to frame questions based upon Tracy Stewart's unsubstantiated drug abuse.

{¶ 2} We conclude that the Stewarts' failure to object to the peremptory challenge waived all but plain error regarding the removal of an African-American juror from the panel. A review of the record indicates that no plain error exists. We also conclude that the trial court did not err in allowing Dr. Nichols to testify about various issues. The areas in question are within Dr. Nichols' expertise, and are topics about which the Stewarts' own witness testified. Both witnesses are pathologists with similar credentials.

{¶ 3} Finally, we conclude that the trial court did not err in admitting evidence of Tracy Stewart's alleged cocaine abuse. The evidence is relevant to Stewart's cause of death and the prejudicial nature of the evidence does not outweigh its probative value.

{¶ 4} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} In October 2003, Tracy Stewart came to the emergency room at Miami Valley Hospital complaining of pain consistent with heart pain. She also had

elevated enzymes, suggestive of a heart attack. At the time, Stewart's primary physician was Dr. Robinson, who was part of Primed Physicians. Dr. Nazir was an interventional cardiologist with Primed, and was called to the emergency room to treat Stewart.

{¶ 6} Dr. Nazir performed a physical exam and took a history. Among other things, Dr. Nazir asked Stewart if she had any history of illegal drug usage, which Stewart denied. Dr. Nazir prescribed a Heparin drip, which is a blood thinner, and Lopressor, which is a beta blocker. Stewart had already been given aspirin, and Nitroglycerin, which dilates the arteries and reduces the load on the heart. If Dr. Nazir had known that Stewart had used cocaine, he would not have prescribed a beta blocker, because cocaine counteracts the effects of beta blockers. Beta blockers can also potentiate the effect of cocaine.

{¶ 7} Based on the history and examination, Dr. Nazir concluded that Stewart needed cardiac catheterization. Dr. Nazir began the procedure in the catheterization laboratory around 11:09 a.m. Also present were a circulating nurse, a scrub technician, and a person located in an adjacent room behind a glass wall. This latter individual watched the same monitors as Dr. Nazir did, and recorded events as they occurred.

{¶ 8} Dr. Nazir administered the first dye around 11:19 a.m., and Stewart did not exhibit an allergic reaction. During the procedure, Dr. Nazir discovered that Stewart's left coronary artery, called the circumflex, was totally blocked. Dr. Nazir used a balloon to open this artery at around 12:08 p.m., and placed a stent, which is a metal scaffold-like device that keeps the artery open. After the stent was

deployed, Stewart complained of itching and hives, which are consistent with a minor allergic reaction. In contrast, a severe anaphylactic reaction is characterized by a drop in blood pressure and/or major lung involvement. Stewart's blood pressure and oxygen saturation were appropriate, and Dr. Nazir asked the circulator to listen to Stewart's lungs, to make sure there was no constriction. The circulator reported that Stewart's lungs were clear, that her respirations were unlabored, and that her breathing was regular.

{¶ 9} The normal procedure for a mild allergic reaction is administration of Benadryl, which blocks histamine, the substance that causes itching. Dr. Nazir administered Benadryl, and gave Stewart a steroid, which also stops itching. He did not administer intravenous epinephrine, which is used to treat severe anaphylactic reactions.

{¶ 10} Dr. Nazir then continued with the catheterization process, because a large side branch of the circumflex artery was also about 90% blocked. After Dr. Nazir ballooned the large side branch, there was a sudden blood pressure collapse. Stewart was placed on 100% oxygen, was given more fluids, and was given dopamine, which is a blood pressure support medication. Dr. Nazir observed from the catheterization pictures that the main artery, the LAD, which had been normal-looking, had gone into severe spasm, and there was no flow in the circumflex, where the stent had been placed. Two or three minutes later, Stewart was in full-blown cardiac arrest. A code was called, and additional personnel came to help. Stewart's blood pressure stabilized for a certain period of time, but she was not considered a candidate for surgery. The code process was continued, but was

unsuccessful, and Stewart was pronounced dead at 1:35 p.m.

{¶ 11} An autopsy revealed that Stewart had suffered a prior myocardial infarction (heart attack) in the same area of the fresh myocardial infarction. The autopsy also revealed the presence of cocaine metabolites, which indicated that Stewart had used cocaine at some point before coming to the hospital. The coroner (Dr. Lehman) opined that the underlying cause of death was heart disease, and that the immediate cause of death was an anaphylactic reaction. Dr. Lehman based this opinion on the allergic reaction to the contrast dye, and the presence of elevated levels of Tryptase, which was revealed on autopsy.

{¶ 12} The Stewarts presented testimony from a medical expert (Dr. Matican), who stated that Dr. Nazir fell below accepted standards of care by failing to recognize the progression from a minor allergic reaction to a severe anaphylactic reaction, and by continuing to perform the procedure rather than administering epinephrine and large amounts of fluid to counter the allergic reaction.

{¶ 13} Dr. Nazir presented testimony from a forensic pathologist, Dr. Nichols, who testified about the cause of death. Dr. Nichols stated that the high level of Tryptase found in Stewart was not the result of an anaphylactic reaction, but resulted from the death of mast cells in the diseased portion of Stewart's heart. Dr. Nichols further indicated that measuring Tryptase directly from the cardiac area, many hours after death, as was done by Dr. Lehman, is not reliable enough to diagnose anaphylactic shock. Dr. Nichols stated that the cause of Stewart's death was cardiogenic shock, resulting from acute myocardial infarct due to coronary artery disease. Dr. Nicholas also said that contributing causes of death were Stewart's

cocaine usage, her diet, including the formation of obesity, and her high blood pressure.

{¶ 14} In addition, Dr. Nazir presented testimony from Dr. Magorien, who stated that Dr. Nazir did not deviate from accepted standards of care. Dr. Magorien concluded that Dr. Nazir acted appropriately in not administering epinephrine between 12:15 and 12:34 p.m., and in proceeding to fix the large branch coming off the circumflex. Dr. Magorien testified that giving the patient epinephrine after a mild allergic reaction would be contraindicated, as it would place stress on the heart.

{¶ 15} After hearing the evidence, the jury found in favor of Dr. Nazir. The jury also answered "No" to the following interrogatory:

{¶ 16} "Do you find, by a preponderance of the evidence, that Raja Nazir, M.D. was negligent, that is that he failed to act as a physician of ordinary care, skill and diligence in his speciality would have acted in the same or similar circumstances?"

{¶ 17} The Stewarts subsequently filed a motion for judgment notwithstanding the verdict, or for a new trial, raising for the first time the lack of an African-American juror. After the trial court overruled the motion, the Stewarts timely appealed.

I

{¶ 18} The Stewarts' First Assignment of Error is as follows:

{¶ 19} "THE TRIAL COURT COMMITTED PLAIN ERROR BY PERMITTING DEFENDANT'S COUNSEL TO UTILIZE A PEREMPTORY CHALLENGE TO REMOVE THE ONLY AFRICAN-AMERICAN JURIST FROM THE PANEL WITHOUT INQUIRING AS TO MOTIVE FOR REMOVAL."

{¶ 20} Under this assignment of error, the Stewarts contend that the trial court committed plain error by allowing defense counsel to use a peremptory challenge to remove the only African-American juror from the panel, without inquiring as to counsel's motive for removal. The Stewarts acknowledge that they failed to raise this issue during voir dire. They argue, however, that the trial court, as gatekeeper of the proceedings, has a duty to act to ensure a fair and impartial jury.

{¶ 21} In *Hicks v. Westinghouse Materials Co.,* 78 Ohio St.3d 95, 1997-Ohio-227, the Supreme Court of Ohio discussed the constitutional analysis required by *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, for deciding if a peremptory challenge is racially motivated. The Supreme Court of Ohio noted that:

{¶ 22} "First, a party opposing a peremptory challenge must demonstrate a prima-facie case of racial discrimination in the use of the strike. * * * To establish a prima-facie case, a litigant must show he or she is a member of a cognizable racial group and that the peremptory challenge will remove a member of the litigant's race from the venire. The peremptory-challenge opponent is entitled to rely on the fact that the strike is an inherently 'discriminating' device, permitting ' " 'those to discriminate who are of a mind to discriminate.' " ' * * * The litigant must then show an inference or inferences of racial discrimination by the striking party. The trial court should consider all relevant circumstances in determining whether a prima-facie case exists, including statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against minority venire members is present. * * *

{¶ 23} "Assuming a prima-facie case exists, the striking party must then articulate a race-neutral explanation 'related to the particular case to be tried.' * * * A simple affirmation of general good faith will not suffice. However, the explanation 'need not rise to the level justifying exercise of a challenge for cause.' The critical issue is whether discriminatory intent is inherent in counsel's explanation for use of the strike; intent is present if the explanation is merely a pretext for exclusion on the basis of race. * * *

{¶ 24} "Last, the trial court must determine whether the party opposing the peremptory strike has proved purposeful discrimination. * * * It is at this stage that the persuasiveness, and credibility, of the justification offered by the striking party becomes relevant. * * * The critical question, which the trial judge must resolve, is whether counsel's race-neutral explanation should be believed." 78 Ohio St.3d at 98-99 (internal citations omitted).

{¶ 25} If a party fails to raise this issue at trial, the issue is waived, except for plain error. *State v. Ballew ,* 76 Ohio St.3d 244, 253, 1996-Ohio-81. Accord *State v. Jennings*, Franklin App. Nos. 09AP-70, 09AP-75, 2009-Ohio-6840, ¶ 27, *State v. Lowery,* 160 Ohio App.3d 138, 2005-Ohio-1181, ¶ 28, and *State v. McGuire* (Sept. 23, 1988), Montgomery App. No. 10224. The reason for application of waiver is that failure to object deprives the opposing party of the ability to provide a race-neutral explanation for the peremptory challenge. 76 Ohio St.3d at 253.

{¶ 26} The plain-error doctrine is not favored in appeals of civil cases, "and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the

basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401.

{¶ 27} No such circumstances exist in the case before us. The Stewarts' failure to object deprived opposing counsel of the opportunity to offer a race-neutral explanation for the strike, and nothing distinguishes these circumstances from any other case in which trial counsel has failed to object to a peremptory challenge.

{¶ 28} The Stewarts argue that trial judges have a duty to intervene and ensure fair and impartial trials. While trial judges are responsible for supervising trial proceedings, adopting a blanket obligation imposes an unreasonable burden on trial courts that is not warranted by the case law. If the Supreme Court of the United States or the Supreme Court of Ohio intended to impose that burden, these courts would not require parties to oppose a peremptory challenge and to establish a prima facie case; instead, the courts would impose the necessity of holding a *Batson* inquiry every time jurors of a constitutionally cognizable group are removed.

{¶ 29} Furthermore, in the absence of a *Batson* objection, there is no way to determine whether the party adverse to the party exercising the peremptory challenge is opposed to its exercise. For all the trial and appellate courts would know, that party might be breathing a sigh of relief that the other party had used one of its peremptory challenges to excuse a potential juror whom both parties regard as unsuitable, thereby permitting the first party to save its peremptory challenge to deploy against some other potential juror.

{¶ 30} We have routinely required the opposing party to timely object to the

use of peremptory challenges. In *State v. Brooks* (June 4, 1987), Montgomery App. No. 9190, 1987 WL 12231, we noted that:

{¶ 31} "We find appellant's objection to the prosecutor's use of peremptory challenges to have been untimely, in light of the fact that the jury had been sworn. At that point in the progression of the trial, it was too late to enable the court to notice and correct any error. At the very latest, the issue should have been raised before the jury was sworn. Moreover, we consider the better approach is to render an objection contemporaneous with the exercise of a peremptory challenge. The requirement of a contemporaneous objection is based upon practical necessity and basic fairness in the operation of a judicial system. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." 1987 WL 12231, * 5.

{¶ 32} The Stewarts suggest that *Brooks* is distinguishable because it is a criminal case, not civil, and because the challenges in *Brooks* were made in chambers rather than at side bar, where action is quick and dynamic. We reject these distinctions. *Batson* applies to both civil and criminal cases. In fact, *Hicks* is a civil case. See 78 Ohio St.3d 95. Furthermore, in *Brook*s, the peremptory challenges were made in open court during jury selection. 1987 WL 12231, * 4. After the jury had been sworn, counsel did object in chambers to the composition of the jury. We concluded that this was too late, because the jury had already been sworn. Id. at * 5.

{¶ 33} The Stewarts also distinguish *Brooks*, because the trial judge in *Brooks* asked counsel, after the exercise of peremptory challenges, whether counsel was

satisfied with the jury. Counsel for the Stewarts states that he has no recollection of having been asked by the trial court if he was satisfied with the jury. *Brooks* does not rely on that point, however. In *Brooks*, we simply noted that counsel waited to make a *Batson* argument until after he had expressed satisfaction with the jury and the jurors were sworn. Id. at *4-5. We found the objection untimely, because the jury had already been sworn. We did not impose a requirement on trial courts to ask counsel if they are satisfied with the jury.

{¶ 34} In any event, by passing on his opportunity to exercise his last peremptory challenge, counsel for the Stewarts expressed satisfaction with the jury. See Excerpt of Trial Court Proceedings on July 13, 2009, p. 7, attached as Exhibit A attached to the brief of Dr. Nazir.[2]

{¶ 35} The Stewarts' First Assignment of Error is overruled.

{¶ 36} II

{¶ 37} The Stewarts' Second Assignment of Error is as follows:

{¶ 38} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PLAINTIFFS BY PERMITTING DR. GEORGE NICHOLS TO TESTIFY AS AN EXPERT ON SEMINAL ISSUES TO WHICH HE READILY ADMITTED HAVING NO

[2]We refer to the parts of the transcript that Dr. Nazir has appended to his brief, because the Stewarts failed to comply with App. R. 9(A). This rule states that "When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs." The CD-ROMs of the trial have been filed, but the Stewarts did not append any portions of the brief. Therefore, we rely upon what has been transcribed and appended to Dr. Nazir's brief.

EXPERTISE."

{¶ 39} Under this assignment of error, the Stewarts contend that the trial court erred in allowing a defense expert, Dr. Nichols, to testify on issues involving toxicology and cardiology, when he allegedly has no experience in these areas.

{¶ 40} The Stewarts filed a motion in limine prior to trial, asking the court to prohibit Dr. Nichols from testifying at trial, because Dr. Nichols allegedly admitted during his deposition that he lacked the specialization, experience, and credentials in the areas for which he had been asked to render opinions. Dr. Nazir notes that the trial court overruled the motion to exclude Dr. Nichols during an in-chambers hearing that was held on the record on July 13, 2009. Neither side has appended written transcripts of the hearing to their brief, and the trial court did not file a written decision on this issue.

{¶ 41} We mentioned earlier that the Stewarts have failed to comply with App. R. 9(A), which requires counsel to append appropriate written portions of the videotape record to their brief. In addition to omitting the parts of the transcript that pertain to the peremptory challenge, the Stewarts have also failed to append any portions of their objection to the testimony of Dr. Nichols to their brief, nor have they appended any portions of his testimony.

{¶ 42} The appellant has the duty "to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review. App.R. 9(B) and 10(A) * * * ." *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. " When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has

nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 200.

{¶ 43} Dr. Nazir has included the full portion of Dr. Nichols's direct examination as an appendix to his brief. Therefore, we have considered that part of the testimony to decide if the trial court properly overruled objections to Dr. Nichols's testimony.

{¶ 44} As an initial matter, we note that the Stewarts did not ask the trial court to conduct an analysis or hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc*. (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. The Stewarts' primary objections, at least as revealed in their pre-trial motion in limine, are that Dr. Nichols lacked the training, education, and experience to offer opinions on the standard of care to be used by a cardiologist or on toxicology. The Stewarts also contended in their motion that Dr. Nichols's opinions on the cause of death were speculative and were not based on a reasonable degree of probability.

{¶ 45} Evid. R. 702 provides that:

{¶ 46} "A witness may testify as an expert if all of the following apply:

{¶ 47} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶ 48} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶ 49} "(C) The witness' testimony is based on reliable scientific, technical, or

other specialized information."

{¶ 50} According to the Supreme Court of Ohio:

{¶ 51} "The determination of the admissibility of expert testimony is within the discretion of the trial court. Evid.R. 104(A). Such decisions will not be disturbed absent abuse of discretion. * * * 'Abuse of discretion' suggests unreasonableness, arbitrariness, or unconscionability. Without those elements, it is not the role of this court to substitute its judgment for that of the trial court." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561 ¶ 9 (citations omitted).

{¶ 52} We find no abuse of discretion in the admission of Dr. Nichols's testimony. Dr. Nichols is an expert in anatomic pathology, which is the study of organs, structures, tissues, and cells of the body, and how they relate to disease or to health. He is also an expert in clinical pathology, which is the study of human biologic fluids. Dr. Nichols was board-certified in anatomic and forensic pathology, and served as the chief medical examiner of the Commonwealth of Kentucky for approximately twenty years. During that time, he conducted around 10,000 autopsies. Dr. Nichols indicated that he is not an expert in the standard of care and what should have been done in the Stewart case. He stated that he is an expert in causation, and that he was asked to determine the cause of Stewart's death.

{¶ 53} Dr. Nichols concluded, within a reasonable degree of forensic probability, that Stewart's death was caused as the result of an acute myocardial infarct. The terminal mechanism of her death was cardiogenic shock, resulting from an acute myocardial infarct, contributed to by cocaine usage, Stewart's diet, including the formation of obesity, and high blood pressure. Dr. Nichols also

rejected the plaintiffs' theory that an anaphylactic reaction was the cause of death. Dr. Nichols agreed that Stewart had an allergic reaction, and that an anaphylactic reaction (as opposed to a mild allergic reaction) can cause a sudden catastrophic outcome. He stated, however, that there was insufficient evidence from a structural and biological standpoint to conclude that the shock to Stewart's system resulted from anaphylactic shock. In this regard, Dr. Nichols did not find evidence of laryngeal edema, nor did he find a special type of white blood cell that is associated with allergic reactions in the lungs and airways, as he had found in other cases where anaphylaxis was the cause of death. Dr. Nichols also concluded that the coroner's reliance on a high level of Tryptase as a sign of anaphylaxis was not reliable, because the tissue samples were taken directly from the cardiac area, as opposed to a remote area, and were taken many hours after death. Dr. Nichols stated that high levels of Tryptase occur in cases where the confirmed cause of death is sudden cardiac death, asphyxiation, and other events that have nothing to do with anaphylaxis.

{¶ 54} The Stewarts contend that because Dr. Nichols is not a toxicologist, it was unreasonable for him to render opinions about cocaine metabolites or to offer an analysis of Tryptase that contradicts the testimony of the Stewarts' expert, Dr. Martinelli, who is apparently a board-certified expert in toxicology.

{¶ 55} Dr. Martinelli's testimony was not appended to the Stewarts' brief, so it is not properly before us, in compliance with App. R. 9(A). Furthermore, experts can, and do, differ in their opinions. Dr. Nichols testified that Tryptase is not a toxicology test and that clinical pathology, his speciality, includes Tryptase. The trial

court was entitled, in its discretion, to consider this evidence and to conclude that Dr. Nichols was qualified to testify about Tryptase. We also note that Dr. Lehnam, who performed Stewart's autopsy and was presented as the Stewarts' witness, testified about cocaine and its effect on the heart, as well as Tryptase. See Excerpt of Trial Court Proceedings on July 16, 2009, pp. 12-15, 17, 30–32, and 36-41, appended as Exhibit C to the brief of Dr. Nazir. The fact that both Dr. Nichols and Dr. Lehman are pathologists undermines the Stewarts' claim that Dr. Nichols was not qualified to testify.

{¶ 56} Accordingly, the trial court did not abuse its discretion in admitting the testimony of Dr. Nichols. The Second Assignment of Error is overruled.

IV

{¶ 57} The Stewarts' Third Assignment of Error is as follows:

{¶ 58} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PLAINTIFFS BY PERMITTING DEFENDANT TO RAISE QUESTIONS ABOUT TRACY STEWART'S UNSUBSTANTIATED PRIOR DRUG USE WHEN SUCH EVIDENCE [SIC] PROBATIVE VALUE WAS OUTWEIGHED BY THE PREJUDICIAL IMPACT ON THE JURY."

{¶ 59} Under this assignment of error, the Stewarts contend that the trial court erred in allowing Dr. Nazir to raise questions about Tracy Stewart's prior drug abuse, because the probative value of this evidence was outweighed by its prejudicial impact on the jury. In this regard, the Stewarts point to testimony from Dr. Martinelli, a toxicologist, who allegedly stated that cocaine did not contribute to Stewart's chest

pain on the date of her death. The Stewarts note that Dr. Nazir did not allege cocaine use as an affirmative defense, and they claim to have been "surprised" in that regard by defense counsel's statements about cocaine in the pretrial statement. Finally, the Stewarts maintain that evidence of Stewart's prior drug use was intended to paint Stewart as a drug abuser, unworthy of seeking damages in a medical malpractice case.

{¶ 60} We note again that the Stewarts failed to append Dr. Martinelli's testimony to their brief, in violation of App. R. 9(A). Dr. Nazir did append various parts of the trial testimony to his brief, and we will consider that evidence in assessing the Stewarts' contentions.

{¶ 61} Evid. R. 403(A) provides that "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." "A trial court has broad discretion in determining whether to admit or exclude evidence. Absent an abuse of discretion that materially prejudices a party, the trial court's decision will stand." *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66.

{¶ 62} After reviewing the evidence, we find no abuse of discretion. We note that Dr. Nazir raised the affirmative defense of Stewart's contributory negligence in his answer, as required by Civ. R. 8(C). "The reason for requiring affirmative defenses to be pleaded is to avoid surprise at the trial." *Chandler v. General Motors Acceptance Corp*. (1980), 68 Ohio App.2d 30, 31 (citation omitted). There is no evidence of surprise in the case before us, and counsel's profession of surprise over the reference to cocaine in Dr. Nazir's pretrial statement is disingenuous.

{¶ 63} Dr. Nazir's pretrial statement was filed on June 30, 2009, shortly before trial. Interrogatories answered by Dr. Nazir in May 2008, indicate that Stewart's cocaine use would be an issue in the case. Specifically, Dr. Nazir's answer to interrogatory 10 states that:

{¶ 64} "Dr. Magorien and Dr. Buckley also each have expert opinions on the cause of death in this case, that being acute myocardial infarction secondary to severe coronary artery disease, hypertensive disease, and cocaine abuse." Interrogatory Answers of Dr. Nazir, p.4, attached as Exhibit A to Plaintiff's Motion in Limine to Exclude Dr. Susan Songer as a Fact Witness on Behalf of Defendant.

{¶ 65} Thus, the Stewarts and their counsel were aware as early as May 2008 that evidence of cocaine use would be offered at trial. The issue of Stewart's alleged cocaine use and its connection to her death was also discussed during Dr. Magorien's deposition, taken in March 2009, and during Dr. Nichols's deposition, taken in early May 2009. See Margorien Deposition, pp. 33-35, and Nichols Deposition, pp. 79-80, 89-94. Therefore, counsel for the Stewarts knew well before the pre-trial statement that alleged cocaine use would be raised at trial.

{¶ 66} The evidence admitted at trial includes a positive result for cocaine when Stewart's blood was tested in June 2002, and the presence of cocaine metabolites in her blood when she was tested at the Miami Valley Hospital emergency room on the day of her death in October 2003. The evidence at trial indicates that use of cocaine can cause an acceleration of coronary artery disease, can cause acute myocardial infarctions, and can cause an enlarged or diseased left ventricle. Excerpt of Trial Court Proceedings on July 15, 2009, p. 131, appended as

Exhibit B to the brief of Dr. Nazir (testimony of Plaintiffs' witness, Dr. Matican, on cross-examination). The evidence also indicates that Stewart had an old myocardial infarction, as well as damage in the area of the acute myocardial infarction. She additionally had an enlarged or diseased left ventricle. Dr. Lehman, also a plaintiffs' witness, stated that he could not rule out the fact that Stewart's cocaine use was a contributing factor in her acute myocardial infarction. Excerpt of Trial Court Proceedings on July 16, 2009, p. 13, appended as Exhibit C to the brief of Dr. Nazir.

{¶ 67} Dr. Matican, a witness for the Stewarts, acknowledged that part of the protocol is to ask patients if they have used illegal drugs. Dr. Matican stated that he would not want to give a patient a beta blocker if he knew the patient had chest pain and that it could have resulted from cocaine. Dr. Matican also stated that a beta blocker can enhance the bad things that cocaine or rising metabolites can do to a patient. Excerpt of Trial Court Proceedings on July 15, 2009, pp. 118-19, appended as Exhibit B to the brief of Dr. Nazir.

{¶ 68} Defense witnesses also testified about these facts, and causally connected the cocaine use to Stewart's death. Under the circumstances, the testimony was relevant to the cause of Stewart's death and her contribution to the conditions that resulted in her death. Therefore, the trial court did not abuse its discretion in admitting evidence of Stewart's prior positive drug test and the fact that cocaine metabolites were present in Stewart's body on the day of her death.

{¶ 69} The Stewarts also challenge questions asked of witnesses regarding what effect drug abuse would have on Tracy Stewart's two-year old son, Trevon Stewart, and what effect cocaine use by Stewart would have had on Trevon while he

was in utereo. Again, the Stewarts have not complied with App. R. 9(A), by appending written portions of the record that support their assertions.

{¶ 70} Dr. Nazir has appended the testimony of Dr. Williams, a psychologist who testified on behalf of the Stewarts. Dr. Williams stated that Trevon suffers from a dysthmic disorder, which exhibits itself in hyperactivity and impulsivity. He also diagnosed Trevon as having Attention Deficit Hyperactive Disorder. Dr. Williams stated that he was told by Trevon's grandmother, Georgia Stewart, that Trevon did not have these problems before his mother passed away. Excerpt of Trial Court Proceedings on July 16, 2009, p. 52, appended as Exhibit D to the brief of Dr. Nazir. This is incorrect – the record is replete with evidence that Trevon had similar behavior prior to his mother's death.

{¶ 71} Dr. Williams also testified, on cross-examination, that risk factors like being in a single parent home where the parent has financial and emotional difficulties, and perhaps drug abuse, could put a child at risk for emotional well-being, attention deficit disorder, personality disorders, and many other things. Id. at p. 72. The Stewarts did not object to this testimony.

{¶ 72} Dr. Williams was asked if he recalled seeing the following indications in psychological records that he had been given and had reviewed: a self-report by Georgia Stewart of emotional problems that Tracy had during her labor or during pregnancy; or whether there was cocaine use during the pregnancy. Williams was allowed to answer, over objection, and stated that he could not recall seeing the information. Id. at 73. Williams then said that he probably did look at this information, even though he might not remember that at the present time. Id. at 74.

Williams was then questioned briefly about whether patients exposed to cocaine in utereo could have symptoms of hyperactivity, impulsivity, lack or control, or behavioral problems. Id. at 74-75.

{¶ 73} Given the evidence in the record of drug abuse, the trial court did not abuse its discretion in admitting limited testimony on the issue of whether Trevon Stewart's psychological problems resulted from difficult conditions surrounding his birth and upbringing, including his mother's possible use of cocaine, as opposed to the death of his mother.

{¶ 74} Furthermore, even if the trial court erred in allowing limited questions about the potential effect of cocaine on hyperactivity, the error does not rise to the level of reversible error. "In order for there to be reversible error, there must be prejudice to the appellant." *Hoskins v. Simones,* 173 Ohio App.3d 186, 2007-Ohio-4084, ¶ 21 (citations omitted). The record the Stewarts have provided is very limited, and it is impossible to tell what effect these limited questions may have had on the jury. Furthermore, the evidence in question relates to potential damages for the alleged malpractice. The jury concluded, however, that Dr. Nazir was not negligent, and never reached the issue of damages.

{¶ 75} The Third Assignment of Error is overruled.

V

{¶ 76} All of the Stewarts' assignments of error having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

DONOVAN, P.J., and FROELICH, J., concur.

Copies mailed to:

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