[Cite as *Brown v. Martin*, 2015-Ohio-503.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBIN BROWN, ET AL.	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
ELWOOD R. MARTIN, M.D., ET AL.	:	Case No. 14-CA-31
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2010CV1340
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	February 9, 2015

APPEARANCES:

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Farmer, J.

{¶1} On December 29, 2009, appellant, Robin Brown, entered Fairfield Medical Center with abdominal pain. Her treating physician was Michelle Graham, M.D. During appellant's hospitalization, she developed a deep vein thrombosis (blood clot) in her right leg. Dr. Graham placed appellant on Lovenox.

{¶2} On January 2, 2010, Dr. Graham's partner, Sarah Alley, M.D., who was covering for Dr. Graham, discontinued the Lovenox and sought to install an IVC filter. Dr. Alley spoke to Elwood Martin, M.D., a general surgeon, about installing the filter. Dr. Martin did not install IVC filters, but his partner, Scott Johnson, M.D., did. However, Dr. Johnson was on vacation and would not return for several days.

{¶3} On January 4, 2010, Dr. Johnson spoke to appellant about installation of the IVC filter. Appellant was considering the procedure. Later that evening, appellant suffered a pulmonary embolism and subsequently a stroke. Appellant was left permanently disabled.

{¶4} On October 27, 2010, appellant, together with her husband, John Brown, filed a complaint against Drs. Graham, Martin, and Johnson, and their respective corporations, alleging medical malpractice. An amended complaint was filed on June 10, 2011 to add Dr. Alley. A jury trial commenced on March 11, 2014. The jury found in favor of all appellees.

{¶5} Appellants filed an appeal and assigned the following errors:

I

{¶6} "THE TRIAL COURT ERRED IN ALLOWING THE DEFENSE 6 PEREMPTORY CHALLENGES, WHILE ONLY ALLOWING 3 TO PLAINTIFFS."

II

{¶7} "THE PLAINTIFFS WERE FORCED TO UTILIZE A PEREMPTORY CHALLENGE ON A PATIENT OF A DEFENDANT-PHYSICIAN."

III

{¶8} "THE DEFENDANTS WERE PERMITTED TO CALL THEIR EXPERTS DURING PLAINTIFFS' CASE IN CHIEF."

IV

{¶9} "THE COURT REFUSED TO SUBMIT PROPER JURY INTERROGATORIES IN VIOLATION OF CIV.R.49."

{¶10} Appellees Graham, Alley, and their corporation filed a cross-appeal and assigned the following error:

CROSS-ASSIGNMENT OF ERROR I

{¶11} "IF PLAINTIFF-APPELLANTS ARE SUCCESSFUL IN THEIR APPEAL, DEFENDANTS-APPELLEES ARGUE IT WAS IMPROPER FOR THE LOWER COURT TO REJECT THE INCLUSION OF THE 'SAME JUROR' RULE AS IT APPLIES TO JURY INTERROGATORIES."

I

{¶12} Appellants claim the trial court erred in granting appellees six peremptory challenges, three to Martin, Johnson, and their corporation and three to Graham, Alley, and their corporation, while limiting appellants to three peremptory challenges. We disagree.

{¶13} Civ.R. 47 governs jurors. Subsection (C) states the following:

(C) Challenges to prospective jurors. In addition to challenges for cause provided by law, each party peremptorily may challenge three prospective jurors. If the interests of multiple litigants are essentially the same, "each party" shall mean "each side."

Peremptory challenges shall be exercised alternately, with the first challenge exercised by the plaintiff. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties or sides, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused.

Nothing in this rule shall limit the court's discretion to allow challenges to be made outside the hearing of prospective jurors.

{¶14} In *LeFort v. Century 21-Maitland Realty Co.,* 32 Ohio St.3d 121, 125 (1987), the Supreme Court of Ohio set forth the status of peremptory challenges vis-á-vis Civ.R. 47(C) as follows:

Chakeres v. Merchants & Mechanics Federal S. & L. Assn. (1962), 117 Ohio App. 351, 24 O.O.2d 131, 192 N.E.2d 323, summarizes the

current status of the law with respect to peremptory challenges in civil cases. *Chakeres* provides at 355, 24 O.O.2d at 133, 192 N.E.2d at 326:

"Under statutes which allow a specific number of challenges to 'each party,' the majority view is that those who have identical interests or defenses are to be considered as one party and therefore only collectively entitled to the number of challenges allowed to one party by the statute.***However, if the interests of the parties defendant are essentially different or antagonistic, each litigant is ordinarily deemed a party within the contemplation of the statute and entitled to the full number of peremptory challenges.***"

This court, in *Nieves v. Kietlinski* (1970), 22 Ohio St.2d 139, 51 O.O.2d 216, 258 N.E.2d 454, adopted the *Chakeres* rule and found that multiple plaintiffs who filed a common complaint, relied upon a singular statement of facts, and employed the same attorney to represent them could properly be considered a single party for the purposes of determining the proper number of peremptory challenges.

{¶15} The task under this rule of law is to evaluate the nature and defenses of each defendant-group. This involves a general review of the status of the litigation prior to trial.

{¶16} We note appellees Graham, Alley, and their corporation filed a motion that plaintiffs and each of the separately named defendants be entitled to three peremptory challenges on March 11, 2014, the morning of trial. There is no written response which

we find not to be problematic as the transcript reflects the positions of each defendant-group as stated by their respective counsel (March 11, 2014 T. at 12-14):

> THE COURT: Just so I can be clear about what you're arguing. I think I understand from your previous comments off the record in chambers, you're not requesting that each party, in terms of three peremptory challenges, say, for example, for Dr. Graham, three peremptory challenges for Dr. Alley, three peremptory challenges for each of the other Defendants be allowed.
>
> MR. POLING: No, we're not suggesting that. We may never get a jury. And I think that Dr. Graham and Alley's interests are similar, as is Fairfield Medical Associates, their employer, and there's not going to be any issue on agency with respect to that employer.
>
> And I think that our interests are divergent from Mr. Todaro's client's interests. He represents general surgeons. We represent family practitioners. They've done a residency program that we haven't done. Their specialty is different. They have different standards of care. He has a different attorney. Drs. Martin and Johnson have a different attorney with Mr. Todaro. They have a separate insurance. He has a separate expert. There's no doubt that his interest is separate and apart. Mr. Todaro could win; we could lose. We could lose and he could win.
>
> ***
>
> MR. TODARO: Just briefly, Your Honor.

> There's a civil rule regarding divergence of interest, but just to make the record clear. The Plaintiff's theories here are - - some overlap, but there are some different theories against the family practice physicians versus the surgeons. So diversity is not only in terms of their practice and their specialty, the specialty of their practice and training, but also in terms of a difference in the allegations of negligence that have been leveled against the Defendants. There's some diversity there too.

{¶17} Under the template of *LeFort,* we must examine whether the two separate defendant-groups had "essentially different or antagonistic" interests.

{¶18} In their respective answers to the complaint and amended complaint, each defendant-group claimed any negligence was the result of a third party over which they had no control, as well as contributory negligence. Each defendant-group had separate trial counsel, filed separate pre-trial statements and jury instructions, and named separate experts. In only one instance did appellees Graham, Alley, and their corporation join with appellees, Martin, Johnson, and their corporation in a motion to partially exclude the testimony of Dr. Phillip Factor (motions filed March 3 and 11, 2014). Otherwise, appellees Martin, Johnson, and their corporation had filed a separate motion on March 7, 2014 to exclude opinion testimony of appellants' expert, Dr. Chitra Venkatasubramanian, and appellees Graham, Alley, and their corporation filed motions on March 11, 2014 to exclude testimony of appellants' experts, William Burke. Ph.D. and David Boyd, Ph.D.

{¶19} In resolving this assignment of error, we are left with the docketed entries and the filed depositions of appellants' experts wherein both defendant-groups cross-examined the experts. As noted in the deposition of Dr. Venkatasubramanian, there were specific references to the lack of interplay between Dr. Martin and Dr. Alley as to who said what, who told whom what, and who was to perform the IVC filter procedure. Venkatasubramanian depo. at 64-68.

{¶20} The depositions established that clear, distinct defenses were raised between the two defendant-groups as noted by the trial court (March 11, 2014 T. at 18-19):

> The Court considers from what it has been made aware of, as far as the pleadings and an overview of the evidence to be presented in this matter from conference with the counsel in chambers, that there are two groups of Defendants in this matter, as the Court has previously outlined, being group number one, Elwood Martin, Scott Johnson and Lancaster Surgical Associates and the second group, of course, beings Drs. Graham, Alley, and Fairfield Medical Associates.
>
> Each group of Defendants has different counsel. Each group of Defendants filed separate answers, separate defenses. The interests of the parties are surely separate. Each Defendant is looking out for their - - group of Defendants, rather, is looking out for their own interest in terms of being found not liable for the claims of the Plaintiffs.

> One group of Defendants is surgeons. One group is family practice. There is enough divergence here in terms of the defenses and the interests in this matter that the Court deems each of these groups of Defendants to be parties, and will, therefore, grant each group of Defendants three peremptory challenges. Plaintiff has three peremptory challenges.

{¶21} Upon review, we cannot find the trial court erred in giving each defendant-group three peremptory challenges. Without a trial transcript, there is no evidence for purposes of our review that six peremptory challenges were used.

{¶22} Assignment of Error I is denied.

II

{¶23} Appellants claim the trial court erred in not excluding Juror No. 455 for cause as the juror was prejudiced given the fact he had been a patient of appellee Johnson and had done some work at his home. We disagree.

{¶24} R.C. 2313.17 governs examination of jurors, causes for challenge. Subsection (B)(9) states: "The following are good causes for challenge to any person called as a juror: That the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court."

{¶25} In *Berk v. Matthews,* 53 Ohio St.3d 161 (1990), syllabus, the Supreme Court of Ohio held the following: "The determination of whether a prospective juror should be disqualified for cause pursuant to R.C. 2313.42(J) [now R.C. 2313.17] is a

discretionary function of the trial court. Such determination will not be reversed on appeal absent an abuse of discretion.***" The *Berk* court at 169 noted the trial court "had the opportunity to observe the demeanor of the prospective juror and evaluate firsthand the sincerity of her responses to questions."

{¶26} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶27} In this case, Juror No. 455 explained to the trial court that appellee Johnson had performed two colonoscopies on him, the last one a year before the trial. March 11, 2014 T. at 4-5. The juror was not currently appellee Johnson's patient, but stated he would probably return to him for another check-up at some point. *Id*. at 4-5, 7-8.

{¶28} The juror also admitted to doing some landscaping work at appellee Johnson's home for another person, not appellee Johnson directly. *Id*. at 5, 8. The juror did not have any contract with appellee Johnson at the time. *Id*. at 8-9.

{¶29} The juror affirmed that his prior association with appellee Johnson would not affect his ability to impartially decide the case, and he would be able to put his experiences aside and decide the case on the facts, testimony, and evidence presented. *Id*. at 5-6.

{¶30} The trial court overruled appellants' motion to excuse Juror No. 455 for cause. *Id*. at 21. The record does not reflect that appellants peremptorily challenged Juror No. 455 or that appellants used all of their assigned preemptory challenges.

{¶31} Upon review, we find the record does not affirmatively support appellants' argument of a prejudicial juror.

{¶32} Assignment of Error II is denied.

III

{¶33} Appellants claim the trial court erred in permitting appellees to call expert witnesses during their case-in-chief. We disagree.

{¶34} With no transcript for our review, we are left with appellees' concession that Dr. Hockenberry and Dr. Tapson were permitted to testify on March 17, 2014 out of order to accommodate their personal and professional schedules given the extended length of the trial. *See,* Appellees Martin and Johnson's Brief at 11-12; Appellees Graham and Alley's Brief at 4, 10-11.

{¶35} Appellants argue this exception to the presentation of evidence disrupted the flow of their case and made them cross-examine the witnesses out of order.

{¶36} The trial court's March 20, 2012 pretrial order indicated the estimated length of the trial was four to five days. It is noted in appellants' pretrial statement filed March 7, 2012 that their case-in-chief "will take 4 days." The out of order exception was made on the sixth day of trial while the trial was still on appellants' case-in-chief.

{¶37} It is axiomatic that a trial court judge "possesses inherent power to regulate court proceedings." *Holm v. Smilowitz,* 83 Ohio App.3d 757, 771 (4th Dist.1992). *See also, Cox v. Cardiovascular Consultants,* 5th Dist. Stark No. 2006 CA 00389, 2007-Ohio-5468; Evid.R. 611. "A ruling or order by the court affecting the conduct of trial will not be reversed unless the complaining party demonstrates a prejudicial abuse of discretion." *Holm* at 771-772; *Blakemore, supra.* The fact that the

trial court accommodated two medical professionals who were not parties was not an abuse of discretion.

{¶38} As for appellants' argument that they were forced to prepare cross-examinations of the two defense experts during their case-in-chief, appellants presented their experts via trial video depositions and therefore there was no need for them to prepare direct, cross, and redirect for them.

{¶39} Further, appellees actually could have been prejudiced by the early presentation of their evidence because their experts might not have had the opportunity to respond to all of appellants' evidence.

{¶40} Upon review, we do not find a prejudicial abuse of discretion in permitting the out of order testimony.

{¶41} Assignment of Error III is denied.

IV

{¶42} Appellants claim the trial court erred in not giving their proposed interrogatories to the jury. We disagree.

{¶43} Appellants and appellees Martin and Johnson filed proposed jury interrogatories (March 7 and 10, 2014). Appellants' proposed jury interrogatories are attached to their brief as Appendix A. The trial court submitted to the jury the interrogatories proposed by appellees Martin and Johnson.

{¶44} Civ.R. 49 governs verdicts, interrogatories. Subsection (B) states the following in pertinent part:

(B) General verdict accompanied by answer to interrogatories

> The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.
>
> The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

{¶45} Appellants argue the trial court had a mandatory duty to submit their proposed interrogatories. We do not read Civ.R. 49(B) to be mandatory, but discretionary. It is mandatory if the interrogatories are "in the form that the court approves."

{¶46} It is uncontested that the standard Ohio Jury Instructions mirror the case law and are proper in form and content. However, appellants' interrogatories do not state the appropriate "duty." The use of "reasonable" as opposed to "standard of care" language is not consistent with *Bruni v. Tatsumi,* 46 Ohio St.2d 127 (1976). The true

use of interrogatories is to test the general verdict and not as a forum for parties to re-litigate the ultimate issues.

{¶47} The general verdicts and interrogatories were filed in this case on March 21, 2015. The verdict forms found in favor of each appellee, and the interrogatories found each appellee was not negligent in his/her care and treatment of appellant, Robin Brown.

{¶48} In reading appellants' proposed interrogatories, we find them to be confusing by first framing the fact issue of "reasonable" in the negative and then proceeding with a proximate cause question in the affirmative.

{¶49} Upon review, we find no error by the trial court in denying repetitive interrogatories that were confusing and at times misleading to the jury. Appellants can demonstrate no prejudice, except that they lost given the general verdicts and the interrogatories answered.

{¶50} Assignment of Error IV is denied.

{¶51} The cross-assignment of error is moot.

{¶52} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Hoffman, J. concur.

SGF/sg