[Cite as *Sellers v. Knox Community Hosp.*, 2016-Ohio-8566.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT SELLERS

Plaintiff-Appellant

-vs-

KNOX COMMUNITY HOSPITAL, et al.

Defendants-Appellees

JUDGES:
Hon. John W. Wise, P. J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 16 CA 12

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 14PM01-0035
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 28, 2016

APPEARANCES:

For Plaintiff-Appellant

KATHY DOUGHERTY
LAMKIN, VAN EMAN, TRIMBLE
& DOUGHERTY, LLC
500 South Front Street
Suite 200
Columbus, Ohio 43215

For Defendant-Appellee Knox

FREDERICK A. SEWARDS
POLING LAW
300 East Broad Street, 3rd Floor
Columbus, Ohio 43215

For Defendant-Appellee Sanders

MITCHELL M. TALLAN
GALLAGER, GAMS, PRYOR, TALLAN
& LITTRELL, LLP
471 East Broad Street, 19th Floor
Columbus, Ohio 43215

Wise, P. J.

{¶1} Plaintiff-Appellant Robert Sellers appeals the decision of the Knox County Court of Common Pleas granting Defendants-Appellees' Knox Community Hospital and Jamie Sanders, R.N.'s motion for a directed verdict, entering judgment in favor of Defendants-Appellees and against Plaintiff-Appellant.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 31, 2013, at approximately 1:00 a.m., twenty-one year old Plaintiff-Appellant, Robert Sellers, sustained a "both-bone fracture" of his right forearm, as a result of a fall. (T. at 861). Mr. Sellers was taken to the Knox Community Hospital (KCH) where, approximately eight hours later when a surgeon was available, Mr. Sellers underwent surgery by Dr. Kenneth Doolittle, which involved use of a plate and screws to secure Mr. Sellers' fractured radius and ulna. Surgery was completed at 11:00 a.m. (Tr. 534-36).

{¶3} Following surgery, Appellant was transferred to the post-anesthesia care unit ("PACU") for immediate recovery and was thereafter transferred, as an ambulatory care post-operative patient, to the sixth floor for further recovery prior to discharge. Normally, post-operative ambulatory care patients are transferred from the PACU to the ambulatory surgery center for recovery prior to discharge, but the ambulatory surgery center recovery area was closed, as this was Easter Sunday.

{¶4} While in recovery on the sixth floor, Appellant was cared for by Nurses Kathryn Wolfe and Defendant-Appellee Jamie Sanders.

{¶5} Kathryn Wolfe, the first nurse who took care of Mr. Sellers, noted that he had some numbness in his operative arm. (T. at 633). She re-assessed him 30 minutes

later and still found numbness. (T. at 636). Mr. Sellers also noticed he could not move his thumb. (T. at 865).

{¶6} When the next nurse, Defendant-Appellee Jamie Sanders, started caring for him, Mr. Sellers' pain level went up. Sanders gave him two tablets of Norco, a narcotic pain medication. (T. at 845). When the Norco did not ease the pain, Sanders documented he administered six intravenous (IV) injections of Dilaudid. (T. at 847-49).

{¶7} Sanders discharged Mr. Sellers at 11:10 p.m.

{¶8} After being discharged, Mr. Sellers continued to experience pain and an inability to move his thumb. (T. at 870). After calling Dr. Doolittle's office about his continued inability to move his thumb, Mr. Sellers arrived at Dr. Doolittle's office on April 1st at approximately 12:00 noon. (T. at 540). Dr. Doolittle made a diagnosis of compartment syndrome. (T. at 543-46).

{¶9} Registered Nurse Barbara Levin provided a definition of "compartment syndrome":

> Compartment syndrome is an increase in pressure within a closed or a confined space, and what happens is that the pressure starts increasing so much that it then starts compressing on the vasculature, and there are a variety of reasons that it happens. You can -- it can happen from external reasons, meaning if there's a compression dressing or a cast. For example, when somebody has surgery, you may have some swelling afterwards. And if you are in a confined space, the swelling doesn't have too many places to go. There's not room for expansion, so then it starts compressing internally and starts squeezing down on the vasculature. There's also internal

> reasons for compartment syndrome. That could have to do with, for an example, bleeding. If you are bleeding inside, that's taking up extra space and causing swelling as well. (T. 414-415).

{¶10} Because the swelling interferes with blood flow and reduces oxygen to the muscle, muscle death can result. (T. at 417).

{¶11} Dr. Doolittle performed a fasciotomy to release the pressure in the compartments of Mr. Sellers' arm at 1:00 p.m. on April 1st. (T. at 547). Appellant was admitted to Appellee KCH and remained at KCH from April 1-12, 2013. During this time, Dr. Doolittle performed additional procedures, known as debridements, on Mr. Sellers' arm to remove dead, necrotic muscle tissue. These procedures were performed on 04/02/2013, 04/04/2013, 04/7/2013 and 04/08/2013. (T. at 562).

{¶12} Additionally, on July 13, 2103, Mr. Sellers underwent surgery by Dr. Klinefelter at the Ohio State Wexner Medical Center. (T. at 563, 570-71). Dr. Klinefelter's surgery was an attempt to restore some function to Mr. Sellers' hand.

{¶13} Mr. Sellers alleges that the four debridement surgeries performed by Dr. Doolittle and the surgery by Dr. Klinefelter were related to the negligence of Knox County Hospital and Jamie Sanders, R.N.

{¶14} On January 27, 2014, Plaintiff-Appellant Robert Sellers filed a medical malpractice complaint in the Knox County Common Pleas Court against Defendants-Appellees Knox Community Hospital and Jamie Sanders, R.N. Plaintiff-Appellant alleged that the KCH nursing staff inappropriately cared for him during his recovery on the sixth floor by failing to recognize and diagnose a developing compartment syndrome and timely take appropriate measures.

{¶15} On March 5, 2014, Appellee Knox Community Hospital filed an answer to the complaint.

{¶16} On March 7, 2014, Appellee Sanders filed his answer.

{¶17} On April 12, 2016, the case came on for jury trial in the Knox County Common Pleas Court. At the close of Plaintiff-Appellant's case, the trial court sustained a defense motion to exclude the trial testimony of Plaintiff's expert, James Nappi, M.D., on the grounds that Dr. Nappi's opinions on proximate causation and damages were previously undisclosed expert opinions that he had not expressed during his discovery deposition. (T. at 994).

{¶18} The defense thereupon moved the trial court for directed verdict and argued that Plaintiff-Appellant had not presented qualified expert testimony on the issue of proximate cause since the trial court had stricken Dr. Nappi's testimony as it related to the damages resulting from the delay in diagnosis. (T. at 994).

{¶19} The trial court sustained the motion for directed verdict, and entered judgment in favor of the Defendants-Appellees and against Plaintiff-Appellant. This decision was journalized by Judgment Entry filed April 26, 2016.

{¶20} Plaintiff-Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶21} "I. THE TRIAL COURT ERRED BY EXCLUDING THE TESTIMONY OF PLAINTIFF-APPELLANT'S MEDICAL EXPERT ON THE GROUNDS THAT THE EXPERT HAD NOT PREVIOUSLY EXPRESSED THOSE OPINIONS.

{¶22} "II. THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICT IN FAVOR OF THE DEFENDANTS-APPELLEES AND AGAINST PLAINTIFF-APPELLANT WHEN REASONABLE MINDS COULD NOT COME TO THAT CONCLUSION.

{¶23} "III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS-APPELLEES' MOTION IN LIMINE TO EXCLUDE QUESTIONING ON USE OF NARCOTICS BY HOSPITAL NURSES AND MOTION TO PROHIBIT PLAINTIFF FROM INTRODUCING TESTIMONY REGARDING THE METHOD OF MEDICATION ADMINISTRATION AND WASTING BY NURSE SANDERS AND PREVENTING PLAINTIFFS-APPELLANTS FROM INTRODUCING SUCH EVIDENCE.

{¶24} "IV. THE TRIAL COURT ERRED IN JURY SELECTION BY ALLOWING EACH DEFENDANT THREE PEREMPTORY CHALLENGES WHEN THE INTERESTS OF THE DEFENDANTS WERE ALIGNED."

I.

{¶25} In his First Assignment of Error, Appellant argues the trial court erred in excluding the testimony of Appellant's medical expert. We disagree.

{¶26} The trial court below sustained Appellees' motion to exclude the testimony of Appellant's hand expert on the grounds that he did not disclose or discuss his opinion testimony on causation during his discovery deposition.

{¶27} In preparation for trial, Appellees took the depositions of all of the witnesses identified by Appellant including his expert hand surgeon, Dr. James Nappi. During said deposition, Appellees inquired as to the opinions Dr. Nappi would be offering at trial. At the end of the deposition, Appellees asked Dr. Nappi if he had been asked to give an opinion on anything which had been discussed during the course of the deposition and

he answered "I don't believe so". Appellant's counsel also answered in the negative. Counsel for Appellees then asked Dr. Nappi to let his counsel know if he is "asked to address any other issues that we haven't discussed today or should you develop any new or different opinions or modifications of any of your testimony of your opinions" so that his counsel could notify Appellees of same.

{¶28} At trial, over objection, Dr. Nappi gave his opinion on whether the compartment syndrome would have been diagnosed earlier had Dr. Doolittle been consulted, when the compartment syndrome could have been diagnosed, what treatment Appellant would have had to undergo had his compartment syndrome been diagnosed earlier, what injuries would have occurred and what injuries could have been avoided had the compartment syndrome been diagnosed earlier, and whether Appellant would have had to undergo the four surgeries to repair the damage caused by the compartment syndrome.

{¶29} Counsel for Appellees later moved to strike the above testimony on the grounds that Dr. Nappi had not previously disclosed these opinions and had failed to offer any opinions that a delay in diagnosis was the proximate cause of any of Appellant's injuries. Appellees also moved for a directed verdict on the same grounds. The trial court granted said motions.

{¶30} Appellant herein argues that Appellees controlled the deposition of Dr. Nappi and never directly asked Dr. Nappi his opinion as to proximate cause, delay in diagnosis of compartment syndrome or permanent damage/injury as it related to such delay.

{¶31} Civ.R. 26(E) requires a party to "seasonably supplement" his response to a request for discovery in only three very specific circumstances: first, with the identity and location of persons having knowledge of discoverable matters; secondly, with the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify; and thirdly, if the party knows or learns that an earlier response is incorrect.

{¶32} The staff notes to Civ.R. 26(E) state:

> . . . the continuing duty theory is not alien to Ohio practice and is a necessary part of the liberal discovery philosophy of the Ohio rules. It will lessen the nuisance of multiple and belated sets of interrogatories and will require continuing trial preparation . . .

{¶33} Civ.R. 26(A) states that the policy of the rules governing discovery is "to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases." The record demonstrates that the trial court was very much aware of the potential for error here, and attempted to limit the testimony.

{¶34} The trial court has discretion to grant corrective orders, including continuance, and may ultimately exclude expert testimony when the party calling the expert has failed to supplement a discovery response. *E.g., Paugh and Farmer, Inc. v. Menorah Home for the Jewish Aged* (1984), 15 Ohio St.3d 44, 45, 472 N.E.2d 704; *Jones v. Murphy* (1984), 12 Ohio St.3d 84, 465 N.E.2d 444, at syllabus. The existence and effect

of prejudice resulting from noncompliance with the disclosure rule is of primary concern. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 85, 482 N.E.2d 1248.

{¶35} Our standard of review is whether the trial court abused its discretion in excluding the expert testimony. *Leichtamer v. American Motors Corp.* (1981), 67 Ohio St.2d 456, 473-74. Abuse of discretion in this setting implies that the error resulted in the material prejudice to the opposing party. *Vargo v. Traveler's Ins. Co.* (1987), 34 Ohio St.3d 27, 32 citing Civ.R. 61, R.C. §2309.59, and *Hallworth v. Republic Steel Corp.* (1950), 153 Ohio St. 349, 358-59.

{¶36} Upon review of the record in this matter, we find that the trial court did not err in striking Dr. Nappi's opinion testimony. Dr. Nappi did not provide an opinion as to a delay in diagnosis being the proximate cause of Appellant's injuries during his deposition. Upon inquiry, at the close of his deposition, both Dr. Nappi and Appellant's counsel stated that he not been asked to give any opinions other than those testified to during the deposition. Further, at no time subsequent to his deposition did he update his opinions.

{¶37} While Appellant argues that his Complaint and Pretrial statement allege that Appellant suffered injury as a proximate cause of Appellees' negligence, such assertions do not amount to evidence.

{¶38} Appellant's First Assignment of Error is overruled.

II.

{¶39} In his Second Assignment of Error, Appellant argues the trial court erred in granting a directed verdict in this case. We disagree.

{¶40} A trial court's decision on a motion for directed verdict presents a question of law, which an appellate court reviews de novo. *White v. Leimbach,* 131 Ohio St.3d 21,

2011–Ohio–6238, 959 N.E.2d 1033, ¶ 22; *Groob v. Keybank,* 108 Ohio St.3d 348, 2006–Ohio–1189, 843 N.E.2d 1170; *O'Day v. Webb,* 29 Ohio St.2d 215, 280 N.E.2d 896 (1972), paragraph three of the syllabus ("[a] motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence"). "A motion for a directed verdict assesses the sufficiency of the evidence, not the weight of the evidence or the credibility of the witnesses." (Citations omitted.) *Dennison v. Lake Cty. Commrs.,* 11th Dist. Lake No. 2013–L–067, 2014–Ohio–4294, ¶ 52.

{¶41} Civil Rule 50 provides for a motion for directed verdict, which may be made at the opening statement of the opponent, at the close of the opponent's evidence, or at the close of all the evidence. Upon receiving the motion, the trial court must construe the evidence most strongly in favor of the party against whom the motion is directed. Civil Rule 50(A)(4). If the trial court finds on any determinative issue that reasonable minds could come but to one conclusion on the evidence submitted, then the court shall sustain the motion and direct the verdict as to that issue. A directed verdict is appropriate where a plaintiff fails to present evidence from which reasonable minds could find in plaintiff's favor. *See Hargrove v. Tanner,* 66 Ohio App.3d 693, 586 N.E.2d 141 (9th Dist.1990).

{¶42} Appellant argues that the testimony of Dr. Nappi and Dr. Doolittle created a disputed issue regarding causation which, pursuant to Civ.R. 50, must be resolved by the jury.

{¶43} This Court has already found that Dr. Nappi's testimony was properly excluded. Dr. Doolittle was not asked to give an expert opinion and did not give an opinion as to proximate cause. The only other expert witness called was Nurse Barbara Levin,

who was competent to testify as to whether the nurses in this case met the appropriate nursing standard of case. Appellant is not arguing that her testimony should have been considered when weighing the evidence as to element of causation.

{¶44} Upon review, we find that the trial court did not err in granting a directed verdict in this matter based on the lack of expert medical testimony as to causation.

{¶45} Appellant's Second Assignment of Error is overruled.

III.

{¶46} In his Third Assignment of Error, Appellant argues that the trial court erred in granting Appellees' *motion in limine* and motion to prohibit certain testimony. We disagree.

{¶47} Prior to trial, Appellees filed two *motions in limine* regarding medication issues which were granted by the trial court. *See Defendants' Motion in Limine to Prohibit Plaintiff from Introducing Testimony Regarding the Method of Medication Administration and Wasting by Nurse Sanders* and *Motion in Limine of Defendant Knox Community Hospital to Exclude Questioning on Use of Narcotics by Hospital Nurses.* The first motion prohibited Appellant from introducing, referring to, or in any way making reference to the method in which Appellee Nurse Sanders handled Appellant's pain control medication, Dilaudid. The second motion prohibited Appellant from any and all questioning, argument, or innuendo regarding the use of narcotics by hospital nurses.

{¶48} Specifically, Appellant wanted to be able to question Nurse Sanders as to how much Dilaudid was administered to Appellant and how much was unaccounted for at the time of his discharge.

{¶49} Evid.R. 402 provides that relevant evidence is generally admissible, but irrelevant evidence is inadmissible. Under Evid.R. 403, relevant evidence may be excluded on the grounds of prejudice, confusion, or undue delay, and provides as follows:

> (A) Exclusion mandatory. 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.
>
> (B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

{¶50} In reaching a decision involving admissibility under Evid.R. 403(A), a trial court must engage in a balancing test to ascertain whether the probative value of the offered evidence outweighs its prejudicial effect. *State v. Steele,* 10th Dist. Franklin No. 95APA01–124, 1995 Ohio App. LEXIS 4086, 1995 WL 559930 (Sept. 21, 1995). In order for the evidence to be deemed inadmissible, its probative value must be minimal and its prejudicial effect great. *State v. Morales,* 32 Ohio St.3d 252, 258, 513 N.E.2d 267 (1987). But although generally "all evidence presented by a prosecutor is prejudicial, * * * not all evidence *unfairly* prejudices a defendant." (Emphasis added.) *State v. Skatzes,* 104 Ohio St.3d 195, 2004–Ohio–6391, 819 N.E.2d 215, ¶ 107.

{¶51} Furthermore, relevant evidence that is challenged as having probative value that is substantially outweighed by its prejudicial effects should be viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect to the party opposing its admission. *State v. Maurer,* 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984).

{¶52} Appellant argues that Nurse Sander's actions in caring for Appellant were relevant as to the issue of standard of care and proximate cause, as well as credibility.

{¶53} We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *State v. Conway,* 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 62, citing *State v. Issa,* 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001). Thus, our inquiry is limited to determining whether the trial court acted unreasonably, arbitrarily or unconscionably in deciding the evidentiary issues. *State v. Barnes,* 94 Ohio St.3d 21, 23, 2002–Ohio–68, 759 N.E.2d 1240.

{¶54} Upon review, we find that the manner in which Nurse Sanders handled Appellant's medication was not relevant to Appellant's theory of the case that a delay in diagnosis of compartment syndrome proximately caused his injuries. We do not find that evidence as to how Nurse Sanders disposed of any unused medication is proximately related to Appellant's injuries.

{¶55} Based on the foregoing, we do not find the trial court abused its discretion in precluding the introduction as to the manner in which Nurse Sanders handled the Dilaudid in this case.

{¶56} Appellant does not make any specific argument as to the granting of *Motion in Limine* to Exclude Questioning on the Use of Narcotics by Hospital Nurses. We will therefore not address same other than to say that we find no support in the record for this line of questioning.

{¶57} Appellant's Third Assignment of Error is overruled.

IV.

{¶58} In his Fourth Assignment of Error, Appellant argues the trial court erred in allowing three peremptory challenges to each defendant during jury selection. We disagree.

{¶59} Civ.R. 47(C) provides: "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.' * * *"

{¶60} This matter did not go to the jury for a determination on the merits rendering this assignment of error moot. Consequently, we need not reach the merits of this assigned error.

{¶61} Appellant's Fourth Assignment of Error is overruled.

{¶62} For the foregoing reasons, the judgment of the Court of Common Pleas of Knox County, Ohio, is hereby affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 1216