

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Tammy Kinn, Executrix and Surviving
Spouse of the Estate of Gregory Kinn,
Deceased, and in her Individual Capacity

Court of Appeals No. L-12-1215

Trial Court No. CI0200908520

Appellant

v.

HCR ManorCare, et al.

DECISION AND JUDGMENT

Appellees

Decided: September 20, 2013

* * * * *

Dennis E. Murray, Sr. and Donna J. Evans, for appellant.

Robert M. Anspach, Cori D. Catignani, Mark D. Meeks, Elizabeth D.
Wilfong, Thomas D. Warren and Gretchen L. Lange, for appellees.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Tammy Kinn, as executrix and surviving spouse of the estate of her late husband, Gregory Kinn, and in her individual capacity, appeals the judgment of

the Lucas County Court of Common Pleas, granting appellees', HCR ManorCare and Heartland Hospice Services, LLC, motion for summary judgment on appellant's claims for breach of contract, negligent hiring, training, and retaining, infliction of emotional distress, breach of duty and trust, and wrongful death. Additionally, appellant appeals the jury's verdict in favor of appellees on her negligence claim.

A. Facts and Procedural Background

{¶ 2} Sometime during the summer of 2007, Gregory was diagnosed with terminal esophageal cancer. He was initially treated for the disease using conventional cancer treatment administered by his oncologist, Dr. Ahmed Ghany, in conjunction with his primary care physician, Dr. Douglas Hoy. During this time, appellant was Gregory's primary caregiver. The treatments Gregory received were effective in prolonging his life for two years, despite the fact that the survival rate for patients with esophageal cancer is only six months. After being treated by Drs. Ghany and Hoy for two years, Gregory's disease progressed to the point where conventional cancer treatment would no longer be effective. Wanting to be comfortable during the last days of his life, Gregory sought the services of Heartland Hospice Services. He began receiving Heartland's home hospice care on August 13, 2009.

{¶ 3} While under Heartland's care, Gregory's primary concern was comfort and symptom control, and, more specifically, pain management. At the time he was admitted, Gregory rated his pain at a level between 8 and 10 on a 10-point scale. Heartland immediately began administering pain medications in order to bring Gregory some level

of relief. After making several adjustments to the pain medication regimen, including the addition of morphine, Heartland was able to bring Gregory's pain level down to a 2. However, Gregory's pain levels did not remain under control, ultimately spiking the next day and remaining around 8. At the time of Gregory's admission, Heartland ordered a "comfort pack" that contained a variety of drugs designed to reduce pain and anxiety. The comfort pack did not arrive until after Gregory's death. Further, Heartland ordered a morphine pump to be delivered from out-of-state in order to provide more consistent pain relief to Gregory. Like the comfort pack, the morphine pump did not arrive in time to be useful. Unfortunately, Gregory passed away on August 15, 2009, two days after being admitted into Heartland's care.

{¶ 4} On December 1, 2009, appellant filed a complaint against Heartland and its parent company, HCR ManorCare, alleging multiple claims including breach of contract, negligent hiring, training, and retaining, infliction of emotional distress, breach of duty and trust, and negligence. Appellant proceeded to hire Dr. Lewis Hays, a medical director for All Care Hospice located in Lynn, Massachusetts, to assist with the litigation as an expert witness. After receiving Dr. Hays' report regarding the level of care provided by Heartland, appellant amended her complaint to include a claim for wrongful death. The wrongful death claim was premised on Dr. Hays' opinion that Heartland's failure to provide adequate palliative care shortened Gregory's life.

{¶ 5} Following extensive discovery by both parties, appellees moved for summary judgment as to all of appellant's claims contained in the original complaint. On

June 24, 2011, the trial court granted appellees' motion as to all claims except the negligence claim. Nine months later, appellees filed a second motion for summary judgment, seeking to have appellant's wrongful death claim dismissed. The trial court granted appellees' motion based on its finding that Dr. Hays' expert opinion regarding causation lacked reliability under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

{¶ 6} Finally, a six-day jury trial began on appellant's negligence claim on June 25, 2012. The jury concluded that Heartland was not negligent and returned its verdict in favor of appellees. Appellant's timely appeal followed.

B. Assignments of Error

{¶ 7} On appeal, appellant assigns the following errors for our review:

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN, ON SUMMARY JUDGMENT, IT DISMISSED PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DEATH.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN, ON SUMMARY JUDGMENT, IT DISMISSED PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF CONTRACT.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT DISMISSED HCR MANORCARE.

FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF'S COMPLAINTS DID NOT SUFFICIENTLY PLEAD A BASIS FOR PUNITIVE DAMAGE.

FIFTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT PRECLUDED PLAINTIFF'S EXPERT, DR. LEWIS HAYS, FROM TESTIFYING REGARDING HIS OPINION ON VARIOUS ASPECTS OF THE CARE PROVIDED BY THE DEFENDANT.

SIXTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT PRECLUDED PLAINTIFF'S EXPERT, DR. LEWIS HAYS, FROM MAKING ANY MENTION IN HIS TESTIMONY TO RELEVANT STATE AND FEDERAL STATUTES, REGULATIONS OR STANDARDS APPLICABLE TO HOSPICES.

SEVENTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTIONS WHICH CHARACTERIZED THE CASE STRICTLY AS MEDICAL MALPRACTICE.

EIGHTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN PRECLUDING THE PRESENTATION OF ANY EVIDENCE PERTAINING TO THE DISCIPLINARY ACTIONS TAKEN BY HEARTLAND RESULTING FROM THE FAILURE OF CARE PROVIDED TO GREGORY AND TAMMY KINN.

NINTH ASSIGNMENT OF ERROR: THE TRIAL COURT
ERRED WHEN IT REFUSED TO ALLOW PLAINTIFF’S EXPERT, DR.
LEWIS HAYS, TO BE PRESENT IN THE COURTROOM TO HEAR
THE TESTIMONY OF PLAINTIFF’S WITNESSES THAT WOULD BE
OF RELEVANCE TO HIS OPINION.

TENTH ASSIGNMENT OF ERROR: THE TRIAL COURT
ERRED IN ADMITTING DEFENDANT’S EXHIBIT YYYY.

ELEVENTH ASSIGNMENT OF ERROR: THE TRIAL COURT
ERRED IN ALLOWING THE USE OF PREVIOUSLY UNIDENTIFIED
DOCUMENTS BY DEFENDANT IN CROSS-EXAMINATION OF
PLAINTIFF THAT WERE NOT AUTHENTICATED AND WERE NOT
DISCLOSED PRIOR TO TRIAL.

II. Analysis

A. The trial court properly dismissed appellant’s cause of action for wrongful death.

{¶ 8} In her first assignment of error, appellant argues that the trial court
erroneously granted appellees’ motion for summary judgment with respect to her claim
for wrongful death.

{¶ 9} We review summary judgment rulings de novo, applying the same standard
as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241

(1996); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 10} In its judgment entry granting appellees’ motion for summary judgment on appellant’s wrongful death claim, the trial court concluded that appellant “failed to offer an admissible expert opinion as to causation.” The court noted that Dr. Hays’ opinion as to causation was unreliable under Evid.R. 702(C) because it was based on a medical study that was not sufficiently related to the case sub judice. Further, the court rejected appellant’s efforts to establish the reliability of Dr. Hays’ opinion by reference to “additional medical literature,” which was never entered into evidence. Finally, the court rejected appellant’s argument that her testimony, based on 27 years of marriage, sufficiently established the causal connection between the palliative care provided by Heartland and the shortening of Gregory’s life.

{¶ 11} Evid.R. 702 provides that a witness may testify as an expert if all of the following apply:

(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;

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

(C) The witness’ testimony is based on reliable scientific, technical, or other specialized information.

{¶ 12} Here, the parties acknowledge that Dr. Hays is a qualified expert with respect to hospice care. Further, there is no dispute that Dr. Hays’ testimony relates to matters beyond the knowledge or experience possessed by lay persons. Thus, the issue is whether the testimony is reliable under Evid.R. 702(C).

{¶ 13} “A trial court’s role in determining whether an expert’s testimony is admissible under Evid.R. 702(C) focuses on whether the opinion is based upon scientifically valid principles, not whether the expert’s conclusions are correct or whether the testimony satisfies the proponent’s burden of proof at trial.” *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 687 N.E.2d 735 (1998), paragraph one of the syllabus. “In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance.” *Id.* at 611.

{¶ 14} Discretion in determining the admissibility of expert testimony generally lies with the trial court. *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 9. Absent an abuse of discretion, the trial court’s decision will be upheld. *Id.* An abuse of discretion “implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 15} At the hearing on appellees’ motion for partial summary judgment, appellant argued that Dr. Hays’ opinion that Gregory’s life was shortened by Heartland’s failure to provide adequate palliative treatment was reliable. Appellant stated that the opinion was based on Dr. Hays’ extensive experience in the hospice setting, as well as “a whole host of studies.” On the contrary, appellees noted the lack of scientific literature supporting Dr. Hays’ opinion in arguing for its exclusion under Evid.R. 702(C). They stated that “there is no scientific literature to support any connection between prolongation of life with hospice care.”

{¶ 16} Indeed, the only scientific study specifically cited by Dr. Hays was a study published in the New England Journal of Medicine entitled “Early Palliative Care for Patients with Metastatic Non-Small-Cell Lung Cancer.” This study, which was conducted at Massachusetts General Hospital, concluded the following:

Among patients with metastatic non-small-cell lung cancer, early palliative care led to significant improvements in both quality of life and mood. As compared with patients receiving standard care, patients

receiving early palliative care had less aggressive care at the end of life, but longer survival.

{¶ 17} In reviewing the findings of the study, the trial court determined that “[t]here is no ‘fit’ between the circumstances of Gregory’s hospice care and those examined in the study * * *. Consequently, this leads to fatal Evid.R. 702 flaws.” We agree.

{¶ 18} By its very terms, the study was limited to patients that were diagnosed with non-small-cell lung cancer. Gregory had esophageal cancer that metastasized into his bones. Further, the study tested the impact of *early* palliative care on the prolongation of the patient’s life. Gregory passed away only two days after his admission into Heartland’s care. While we are cognizant of the latitude given to experts in the application of scientific studies to new sets of facts, we conclude that, in this case, “there is simply too great an analytical gap between the data and the opinion proffered.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *see also Valentine*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683 at ¶ 18 (“Although scientists certainly may draw inferences from a body of work, trial courts must ensure that any such extrapolation accords with scientific principles and methods.”) A straightforward reading of the Massachusetts General study demonstrates that it is patently inapplicable to the facts of this case. The study demands this conclusion by cautioning:

Several limitations of the study deserve mention. It was performed at a single, tertiary care site with a specialized group of thoracic oncology providers and palliative care clinicians, *thereby limiting generalization of the results to other care settings or patients with other types of cancer.* (Emphasis added.)

{¶ 19} In addition to the Massachusetts General study, appellant argues that Dr. Hays' opinion is reliable based on his "lengthy professional experiences." Evid.R. 702(C) does not explicitly require an expert to rely on specific medical literature in establishing the reliability of his or her testimony. In fact, we recently held that a doctor's experience, without further supporting medical literature, may form the foundation for a reliable expert opinion. *Theis v. Lane*, 6th Dist. Wood No. WD-12-047, 2013-Ohio-729. However, we were careful to limit that proposition to cases in which the scientific theory upon which the opinion rests is not a novel one requiring a *Daubert* analysis. *Id.* at ¶ 14-16.

{¶ 20} Here, Dr. Hays' opinion is based upon a novel theory. Establishing a causal link between the death of a terminally-ill patient and the provision of palliative care at the end of the patient's life seems tenuous at best. Indeed, we are not aware of any other cases in which a hospice provider has been held liable on a wrongful death claim based on its failure to control the patient's pain during the last several days of the patient's life.

{¶ 21} This case is markedly different from the facts at issue in *Theis*, which involved an expert’s testimony regarding a surgeon’s failure to timely detect a perforation in the patient’s bowel following a laparoscopic ventral hernia repair. *Id.* at ¶ 3. In that case, the expert testified that “there are certain signs and symptoms that should lead a surgeon to suspect that a perforation has occurred and tests that should be performed to determine whether symptoms experienced by the patient, in fact, resulted from a perforation.” *Id.* at ¶ 16. Given the difference between the case sub judice and the experience-based testimony establishing the standard of care applicable to the performance of a routine hernia surgery at issue in *Theis*, we conclude that *Theis* is inapposite.

{¶ 22} Because the singular study upon which Dr. Hays based his testimony was inapplicable to the case sub judice, the trial court’s determination that the testimony was unreliable under Evid.R. 702(C) does not constitute an abuse of discretion.

{¶ 23} Next, appellant argues that the trial court erred in granting appellees’ motion in limine, which sought to preclude her from introducing “additional medical literature” to assist her in opposing appellees’ motion for summary judgment. Specifically, appellant asserts that the trial court engaged in an impermissible weighing of the evidence by excluding the literature. We find appellant’s argument unpersuasive.

{¶ 24} Decisions involving the admissibility of evidence are reviewed for an abuse of discretion. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 122. Likewise, we review a trial court’s decision granting a motion in limine for an

abuse of discretion. *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶ 22, citing *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 526, 639 N.E.2d 771 (1994).

{¶ 25} As noted by the court below, the Massachusetts General study was the only study specifically cited by Dr. Hays during his deposition and in his report. While Dr. Hays testified that he relied upon additional literature, he was unable to provide the names of the studies he relied upon when asked to do so on cross examination. Further, appellant failed to produce such literature during discovery despite appellees' specific request asking for "a complete bibliography of books, treatises, articles, and other works [Dr. Hays] regards as authoritative on any subject on which he plans on testifying." Ultimately, the trial court concluded that the additional literature was inadmissible because there was no evidence that Dr. Hays actually relied upon it in forming his opinion. We cannot say the trial court's decision with respect to the additional literature constituted an improper weighing of the evidence. Further, the trial court's decision was not unreasonable, arbitrary, or unconscionable.

{¶ 26} Finally, appellant argues that the trial court abused its discretion in refusing to allow her to supply the requisite testimony as to causation. Specifically, appellant contends that she should have been allowed to testify as a layperson under Evid.R. 701 based on her observations of Gregory during the time he was under Heartland's care.

{¶ 27} Ordinarily, Ohio law requires a plaintiff in a loss-of-chance wrongful death action premised on medical malpractice to present expert medical testimony showing that

the health care provider's negligent act or omission increased the risk of harm to the plaintiff. *Roberts v. Ohio Permanente Med. Group, Inc.*, 76 Ohio St.3d 483, 488, 668 N.E.2d 480 (1996). "Expert testimony is not mandated, however, if the matter is within the common knowledge of lay persons." *Herman v. Metrohealth Med. Center*, 8th Dist. Cuyahoga No. 81789, 2003-Ohio-1174, ¶ 12, fn. 2.

{¶ 28} Here, the question of causation is clearly not a matter within the common knowledge of lay persons. Apart from an in-depth knowledge of current medical scholarship on the issue, which a lay person would not possess, one would be ill-equipped to determine whether a hospice provider's allegedly negligent administration of palliative care to a terminally-ill patient is a direct and proximate cause of that patient's death. Thus, the element of causation must be established using expert medical testimony. Since appellant lacks the qualifications to testify as a medical expert, the trial court did not abuse its discretion in precluding appellant from testifying as to causation.

{¶ 29} Having concluded that the trial court's exclusion of Dr. Hays' testimony on reliability grounds was proper, and in the absence of any other admissible expert testimony as to causation, we conclude that the trial court did not err in granting appellees' motion for summary judgment as to appellant's claim for wrongful death. Accordingly, appellant's first assignment of error is not well-taken.

B. The trial court properly dismissed appellant's breach of contract claim.

{¶ 30} In appellant's second assignment of error, she argues that the trial court erroneously dismissed her breach of contract claim. She contends that the trial court incorrectly concluded that the contract between the parties was limited to the express terms of the admission agreement executed by Gregory at the time of admission. Appellant argues that state and federal regulations governing Heartland as a hospice facility were part of the agreement, as were other "printed materials" given to the Kinns.

{¶ 31} Notably, this court has previously held that a breach of contract claim involving a physician-patient relationship is incorporated into a claim for medical malpractice. *Griffin v. Sloan*, 6th Dist. Lucas No. L-94-159, 1995 WL 370720, *2 (June 23, 1995), citing *Burnside v. Leimbach*, 71 Ohio App.3d 399, 404, 594 N.E.2d 60 (10th Dist.1991) ("Under Ohio law, a claim for medical malpractice includes any claim arising out of the alleged professional misconduct of the physician, whether such claim is founded in negligence or breach of the employment contract."); *Robb v. Community Mut. Ins. Co.*, 63 Ohio App.3d 803, 805, 580 N.E.2d 451 (1st Dist.1989). In *Sloan*, we determined that the trial court properly excluded the plaintiff's breach of contract claim where the plaintiff claimed injuries as a result of medical treatment provided by the defendant. Specifically, we stated: "Since no cause of action for breach of contract, involving treatment by a physician, exists separate from a medical malpractice claim, the trial court properly excluded any jury instructions or interrogatories relating to appellant's claim for breach of contract." *Id.*

{¶ 32} Here, as in *Sloan*, appellant’s claim for breach of contract was properly dismissed by the trial court. Appellant’s breach of contract is based on the same conduct that forms the basis for her negligence claim, namely the alleged inadequate medical care provided to Gregory. Pursuant to our holding in *Sloan*, appellant’s breach of contract claim was subsumed by her negligence claim, which proceeded to trial. Thus, the trial court did not err in dismissing the breach of contract claim.

{¶ 33} Accordingly, appellant’s second assignment of error is not well-taken.

C. The trial court did not err in dismissing HCR ManorCare.

{¶ 34} In her third assignment of error, appellant argues that the trial court erred when it dismissed HCR ManorCare. She contends that the evidence presented demonstrates that HCR ManorCare was a participant in Gregory’s care.

{¶ 35} In order to hold a corporation liable for the torts of its subsidiary, “it must appear that the subsidiary was operated as a ‘mere instrumentality’ of the parent corporation.” *Nemeth v. J.C. Baxter Co., Inc.*, 6th Dist. Wood No. WD-81-54, 1982 WL 6256, *5 (Feb. 5, 1982), citing *Taylor v. Standard Gas & Electric Co.*, 96 F.2d 693 (10th Cir.1938), *rev’d on other grounds*, 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669 (1939); *American Trading & Pro. Corp. v. Fischbach & Moore, Inc.*, 311 F.Supp. 412 (N.D.Ill.1970). “This rule is rarely applied, and only under special circumstances, for it runs contrary to the principal of corporate limited liability.” *Id.*

{¶ 36} Ohio law requires plaintiffs to meet a demanding standard with respect to claims made against a parent corporation for the liabilities of its subsidiary. In order to succeed on such a claim, a plaintiff must establish that

(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 289, 617 N.E.2d 1075 (1993).

{¶ 37} On summary judgment, appellees submitted the affidavit of Amy Moreno, an administrator at Heartland, stating that HCR ManorCare is a separate legal entity from Heartland and had no involvement in Gregory's care. Further, Moreno testified that HCR ManorCare was not a party to any of the agreements entered into between Gregory and Heartland.

{¶ 38} In response, appellant argued, as she does here, that HCR ManorCare is a proper party based upon several documents used by Heartland, which seem to reference the two entities interchangeably. She points to the following documents in support of her argument: (1) a job description for a Heartland nurse that requires all nurses to comply with conditions set forth in the HCR ManorCare employee handbook; (2) Heartland's

hospice admission forms that bear an HCR ManorCare copyright at the bottom of the pages; (3) the Heartland Hospice Admission Guidebook, which directs customers to call a hotline operated by HCR ManorCare with questions or concerns; and (4) a Heartland brochure listing the “Heartland Family” (which includes HCR ManorCare) on the back cover.

{¶ 39} Here, appellant failed to introduce evidence that Heartland was controlled by HCR ManorCare to the extent that it had no separate existence of its own. Further, she failed to offer any evidence suggesting that HCR ManorCare’s control over Heartland was exercised in an effort to defraud her. At best, the above-referenced documents demonstrate that HCR ManorCare exerted *some* control over Heartland’s operations. However, “mere control over a corporation is not in itself a sufficient basis for shareholder liability.” *Id.*

{¶ 40} Accordingly, appellant’s third assignment of error is not well-taken.

D. The trial court did not err in refusing to allow appellant to amend her complaint to include punitive damages.

{¶ 41} In her fourth assignment of error, appellant argues that the trial court erred in holding that her complaint did not sufficiently plead a basis for punitive damages. However, appellant’s argument fails to recognize the well-settled principle that “an award for actual damages is a prerequisite to the award of punitive damages.” *Preston v. All Vinyl Fences and Decks, Inc.*, 11th Dist. Trumbull No. 2008-T-0015, 2008-Ohio-6997, ¶ 44, citing *Richard v. Hunter*, 151 Ohio St. 185, 187, 85 N.E.2d 109 (1949); *see also*

R.C. 2315.21(B). Even assuming, arguendo, that appellant's complaint contained allegations sufficient to support a claim for punitive damages, any such claim would have been unsuccessful as a matter of law since she was not awarded actual damages. Thus, any error arising from the trial court's decision refusing the amendment of the complaint to include a claim for punitive damages was harmless. Civ.R. 61.

{¶ 42} Accordingly, appellant's fourth assignment of error is not well-taken.

E. The trial court's order granting appellees' motion in limine is not subject to appellate review.

{¶ 43} In her fifth assignment of error, appellant argues that the trial court erroneously granted appellees' motion in limine, precluding Dr. Hays from testifying that the Kinn family was "in crisis," and that Heartland failed to conduct a thorough intake assessment on Gregory and provided inadequate education to the Kinn family. In response, appellees assert that any error regarding the trial court's decision on the motion in limine was not properly preserved for appellate review. Further, appellees note that the restricted evidence was actually admitted at trial despite the trial court's ruling on the motion in limine. In any event, appellees contend that the trial court's decision on the motion in limine was correct in light of the lack of evidentiary support for Hays' opinion.

{¶ 44} "A ruling on a motion in limine reflects the court's anticipated treatment of an evidentiary issue at trial and is a tentative, interlocutory, precautionary ruling." *Orbit Electronics, Inc. v. Helm Instrument Co., Inc.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91, ¶ 17 (8th Dist.), citing *Algood v. Smith*, 8th Dist. Cuyahoga Nos. 76121

and 76122, 2000 WL 426554 (Apr. 20, 2000). Finality does not attach to the court's ruling until the trial court makes its final determination as to the admissibility of the evidence at trial. *State v. Grubb*, 28 Ohio St.3d 199, 202, 503 N.E.2d 142 (1986). Thus, the initial ruling on a motion in limine does not preserve the record on appeal and an appellate court will not rule on the propriety of a motion in limine unless the introduction of the evidence is also made during trial and a final ruling is obtained. *Gable v. Vill. of Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, ¶ 34.

{¶ 45} Here, the record is clear that Hays actually testified at trial that the family was in crisis, despite the court's ruling on the motion in limine. Indeed, in opposing appellees' motion for directed verdict, appellant's counsel noted: "On this issue of family in crisis, that was a ruling on a motion in limine. Those are tentative rulings. At the time of the trial there was no objection to that testimony. * * * That testimony came in."

{¶ 46} Appellant's argument lacks merit, especially considering the fact that she utilized Hays' testimony in opposing the directed verdict. Nonetheless, she now seeks to assign error to the proceedings below on the basis that the evidence was restricted on a motion in limine. In light of appellant's acknowledgement that the contested testimony was admitted at trial, we need not address the propriety of the court's ruling on the motion in limine. *Grubb* at 202.

{¶ 47} Accordingly, appellant's fifth assignment of error is not well-taken.

F. The trial court did not abuse its discretion when it prohibited Dr. Hays from testifying concerning various statutes and regulations.

{¶ 48} In her sixth assignment of error, appellant argues that the trial court abused its discretion by limiting Hays' testimony regarding various state and federal statutes and regulations. Specifically, appellant argues that Hays' testimony should not have been excluded under Evid.R. 403(A) because it was probative of the standard of care imposed on hospice providers. Without such testimony, appellant asserts that Hays was unable to adequately explain the relevant standard of care.

{¶ 49} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). It is well-established that when examining admissibility issues, such as the disputed testimony before us, a reviewing court may not reverse the trial court absent an abuse of discretion. *State v. Easter*, 75 Ohio App.3d 22, 26, 598 N.E.2d 845 (4th Dist.1991).

{¶ 50} Under Evid.R. 403(A), a trial court must exclude relevant testimony "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶ 51} Appellees argue that the testimony was properly excluded due to its likelihood of confusing the jury. We agree. In his deposition testimony, Hays acknowledged that Heartland *complied* with all applicable statutes and regulations. Notwithstanding appellees' compliance with the statutes and regulations, Hays testified at

trial that appellees provided sub-standard care. Allowing Hays to use the statutes and regulations to explain the standard of care would have misled the jury by inviting them to conclude that the applicable statutes and regulations were actually violated despite Hays' statement to the contrary. Further, the probative value of Hays' testimony regarding the statutes and regulations would have been minimal at best in light of his acknowledgement that the statutes and regulations were not violated. Thus, we conclude that the trial court did not abuse its discretion in limiting Hays' use of the statutes and regulations to explain the relevant standard of care.

{¶ 52} Accordingly, appellant's sixth assignment of error is not well-taken.

G. Appellant's claim for negligence was properly submitted to the jury as a "medical claim."

{¶ 53} In her seventh assignment of error, appellant argues that the trial court provided the jury with erroneous instructions by disregarding the non-medical components of the case and characterizing it as a medical malpractice case.

{¶ 54} "A charge to the jury should be a plain, distinct and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced."

Marshall v. Gibson, 19 Ohio St.3d 10, 12, 482 N.E.2d 583 (1985). The trial court is vested with broad discretion in fashioning the language of the charge and its determination as to the propriety of the instructions will not be disturbed absent an abuse of that discretion. *Garbers v. Rachwal*, 6th Dist. Lucas No. L-06-1212, 2007-Ohio-4903, ¶ 19.

{¶ 55} In discussing the proposed jury instructions before charging the jury, appellant's counsel raised the following objection:

On page 21 we object to the restriction that the plaintiff must prove evidence by medical witnesses as compared to witnesses who are competent to testify. I understand that we must provide expert testimony as to the standards and as to the violation of standards, but I don't believe that we have a duty to prove our burden strictly on the basis of medical witnesses. I think you are entitled to claim – to provide testimony to sustain our burden to include medical witnesses and lay witnesses as to what took place, and that also, Your Honor, I object, these are not simply medical claims.

{¶ 56} The trial court noted appellant's objection, and proceeded to inform the jury on the law with respect to "medical negligence." While appellant argues that the trial court characterized the case as strictly a medical malpractice case, the instructions do not bear her argument out. Although the phrase medical malpractice was used throughout the instructions, the trial court specifically stated that "this is a medical negligence action." The court then instructed the jury on the standard for negligence, including the requirement that, in this case, expert medical testimony would be required to establish the appropriate standard of care and provide his opinions with respect to whether appellees deviated from that standard of care. Specifically, the court stated:

Under the law, in order to prove negligence in this case, what we call malpractice, plaintiff must show by a preponderance of the evidence, and you, the jury, must find that defendant did some particular thing or things that medical personnel, nursing assistants, nurses and doctors/medical directors, using ordinary care, or excuse me, using ordinary skill, care and diligence would not have done under the same or similar circumstances, or in the alternative, that the defendant failed or omitted to do some particular thing or things that medical personnel, nursing assistants, nurses and doctors/medical directors using ordinary care and skill and diligence would have done under the same or similar circumstances.

{¶ 57} Unsatisfied with the foregoing instructions, appellant now argues that the trial court artificially narrowed the scope of her claims by styling them as medical malpractice claims. Citing Hays’ testimony concerning the “interdisciplinary nature of hospice care,” appellant notes that Heartland was obligated to provide non-medical care to both her and Gregory. In failing to do so, appellant argues that Heartland was negligent and that the jury should be permitted to consider the non-medical components of Heartland’s services in arriving at its decision regarding liability under the negligence claim. Thus, appellant contends, the trial court should not have styled her negligence claim as a medical claim. We disagree.

{¶ 58} R.C. 2305.113(E)(3) provides, in pertinent part, the following definition of a medical claim:

(3) “Medical claim” means any claim that is asserted in any civil action against a physician, * * * against any employee or agent of a physician, * * * or against a licensed practical nurse, registered nurse, advanced practice registered nurse, * * * and that arises out of the medical diagnosis, care, or treatment of any person.

{¶ 59} Upon review of appellant’s amended complaint, it is clear that her claim for negligence fits within the broad definition of a “medical claim” under R.C. 2305.113(E)(3). Unquestionably, appellant’s negligence claim is founded upon Heartland’s provision of palliative treatment to Gregory through its physicians and nurses. In support of her argument, appellant cites Heartland’s failure to provide her with proper education or support during Gregory’s last days as examples of non-medical claims. While those facts may have been offered into evidence at trial, they merely provide background into the claim contained in appellant’s amended complaint that Heartland provided inadequate provision of pain medication to Gregory. Understood in its proper context, appellant’s negligence claim, as set forth in her complaint, stems from Heartland’s “medical diagnosis, care, or treatment” of Gregory.

{¶ 60} Moreover, as appellees note in their appellate brief, appellant fails to identify any testimony or evidence that the jury was unable to consider. Indeed, the “non-medical components” of appellant’s negligence claim were thoroughly explained during Hays’ testimony. Further, the jury instructions did not restrict the jury’s consideration of that testimony.

{¶ 61} For the foregoing reasons, we conclude that the trial court did not abuse its discretion when it provided the jury with instructions that styled appellant's negligence claim as a medical claim. Accordingly, appellant's seventh assignment of error is not well-taken.

H. The trial court did not abuse its discretion in precluding appellant from presenting confidential information derived from a peer review committee.

{¶ 62} In her eighth assignment of error, appellant argues that the trial court erred in precluding the presentation of evidence relating to disciplinary actions taken by Heartland stemming from the care provided to the Kinns.

{¶ 63} At trial, appellant attempted to elicit testimony from a former Heartland nurse, Deborah Wilt, concerning her reasons for resigning from Heartland following an investigation into her job performance by Heartland's peer review committee. However, due to a prior ruling in favor of appellees on a motion in limine, the trial court sustained appellees' objection and refused to allow Wilt to provide her reasoning for resigning. In the motion in limine, appellees sought to exclude all documents and testimony that Heartland presented or produced to its peer review committee, including a complaint filed by appellant's mother regarding Gregory's care, arguing that they were confidential under R.C. 2305.252. Wilt testified that she recorded the complaint, including a patient concern log and a patient concern report, and left it on her supervisor's desk for further consideration. She also forwarded the complaint to Heartland's director of professional services, Shirley Below.

{¶ 64} The trial court held that the documents were protected from disclosure under the peer review confidentiality provisions embodied in R.C. 2305.252. The court found, based on the unchallenged testimony of appellees' administrator, Amy Moreno, that Heartland maintained a peer review committee that receives, reviews, and investigates patient complaints and, if necessary, issues disciplinary action. Further, the court found that the complaint was covered under the terms of the statute and, thus, was protected from disclosure.

{¶ 65} We review the trial court's decision concerning the admissibility of evidence for an abuse of discretion. *Easter, supra*, 75 Ohio App.3d at 26, 598 N.E.2d 845. R.C. 2305.252, which addresses the confidentiality of peer review committee proceedings and records, provides:

Proceedings and records within the scope of a peer review committee of a health care entity shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider * * * arising out of matters that are the subject of evaluation and review by the peer review committee. No individual who attends a meeting of a peer review committee * * * or provides information to a peer review committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the peer review committee or as to any finding, recommendation, evaluation,

opinion, or other action of the committee or a member thereof. * * * An individual who testifies before a peer review committee * * * or provides information to a peer review committee shall not be prevented from testifying as to matters within the individual's knowledge, but the individual cannot be asked about the individual's testimony before the peer review committee, information the individual provided to the peer review committee, or any opinion the individual formed as a result of the peer review committee's activities.

{¶ 66} R.C. 2305.252 “manifests the legislature’s clear intent to provide a complete shield to the discovery of any information used in the course of a peer review committee’s proceedings.” *Tenan v. Huston*, 165 Ohio App.3d 185, 2006-Ohio-131, 845 N.E.2d 549, ¶ 23 (11th Dist.).

{¶ 67} In the present case, appellant argues that the trial court should not have shielded the patient concern log and the patient concern report from disclosure under R.C. 2305.252. While she does not contest the existence of Heartland’s peer review committee, appellant argues that the documents were admissible because Wilt “did not appear or testify before any peer review committee.” We disagree.

{¶ 68} Whether Wilt testified before the peer review committee is irrelevant to the legal question regarding the confidential nature of the patient concern log and the patient concern report. Having been generated for the purpose of evaluation and review by the peer review committee in its investigation of the complaint, these documents are clearly

protected under R.C. 2305.252. Thus, the trial court did not abuse its discretion in excluding the documents.

{¶ 69} However, our determination that the patient concern log and the patient concern report were protected under the statute does not end the analysis. Two days after appellant's mother filed her complaint with Wilt, Below called Wilt into her office to discuss the complaint with her. Ultimately, the peer review committee determined that Wilt failed to perform her job responsibilities with regard to her care for the Kinns. Consequently, Wilt's employment was terminated. Wilt proceeded to appeal Below's termination decision to the next level of the peer review committee. Before that appeal was resolved, Wilt was given the option of resigning in lieu of termination with the added incentive that she would be permitted to maintain benefits for a period of time. She elected to resign instead of allowing the appeal to run its course, reasoning that if she "tried to fight it * * * it would be a termination right then and they wouldn't try to help [her] anymore."

{¶ 70} At trial, appellant was precluded from presenting Wilt's testimony as to her reasons for resigning. Outside the presence of the jury, Wilt stated that she resigned due to Heartland's refusal to initiate continuous care for Gregory. Heartland objected, arguing that it would be forced to introduce evidence from the peer review committee hearing in order to rebut Wilt's testimony. In so doing, Heartland would be required to waive its right to keep the peer review proceedings confidential. The trial court agreed, and Wilt was not permitted to provide her reasons for resigning.

{¶ 71} Appellant now argues that the trial court improperly excluded Wilt's testimony regarding her reasons for resigning, contending that R.C. 2305.252 does not apply to such testimony. Having thoroughly reviewed the record, we conclude that the trial court properly excluded Wilt's testimony, especially since the proffered testimony clearly contradicted her prior testimony given at her deposition. Indeed, she previously testified that her resignation stemmed from her decision to receive ongoing medical benefits promised to her by the peer review committee in lieu of termination following the peer review committee's determination that she failed to fulfill her job responsibilities in caring for Gregory. In order to rebut Wilt's statement that she resigned due to Heartland's failure to provide adequate care to Gregory, appellees would have to open the door to confidential matters that fall within the scope of the peer review committee investigation. In light of the protections afforded appellees under R.C. 2305.252, we see no reason to find that the trial court abused its discretion in excluding the testimony.

{¶ 72} Accordingly, appellant's eighth assignment of error is not well-taken.

I. The trial court's ruling excluding Dr. Hays from the courtroom was not an abuse of discretion.

{¶ 73} In her ninth assignment of error, appellant argues that the trial court improperly excluded Dr. Hays from the courtroom, despite her request that he be permitted to remain in the courtroom in order to "hear the testimony of witnesses and to use such testimony as a part of the basis for his expert opinion, as well as to assist counsel during the presentation of the case."

{¶ 74} Concerning the separation of witnesses, Evid.R. 615 provides in pertinent part:

(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.

* * *

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

* * *

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause;

* * *.

{¶ 75} In the case sub judice, appellant argues that the trial court abused its discretion when it excluded Hays from the courtroom during the presentation of evidence. Appellees respond by arguing that the trial court never actually ordered Hays' exclusion from the courtroom. Indeed, we have reviewed the record before us and found no indication that the trial court excluded Hays. However, even assuming Hays was excluded, we cannot say that the trial court erred in ordering his exclusion. Under Evid.R. 615, the trial court was required to order Hays' exclusion unless appellant demonstrated that his presence was essential to the presentation of her cause. Appellant

failed to make such a showing. Thus, even if appellant were correct in asserting that Hays was excluded, we find no error in such exclusion.

{¶ 76} Accordingly, appellant's ninth assignment of error is not well-taken.

J. The trial court's admission of exhibit YYYY was harmless.

{¶ 77} In her tenth assignment of error, appellant argues that the trial court erred in admitting appellees' exhibit YYYY over her objection. Exhibit YYYY was a timeline that summarized appellees' version of the events that took place while Gregory was under appellees' care. Appellant contends that it should have been excluded under Evid.R. 1006, which provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

{¶ 78} Appellant argues that the timeline should have been excluded under Evid.R. 1006 because the records summarized by the timeline were not "voluminous." Further, she asserts that the timeline contains numerous inaccuracies. While we disagree with appellant's reasoning, we conclude that the trial court erred in admitting the timeline under Evid.R. 1006.

{¶ 79} Under Evid.R. 1006, a distinction must be made between summaries admitted as evidence and those used merely as “pedagogical devices which organize or aid the jury’s examination of testimony or documents which are themselves admitted into evidence.” *Gomez v. Great Lakes Steel Div., Natl. Steel Corp.*, 803 F.2d 250, 257 (6th Cir.1986), citing *United States v. Scales*, 594 F.2d 558, 563-64 (1979); J. Weinstein and M. Berger, *Weinstein’s Evidence*, ¶ 1006[1]-[07] (1986). While Evid.R. 1006 provides for the general admission of summaries into evidence, it does not provide for the admission of pedagogical devices, which “are more akin to argument than evidence.” J. Weinstein and M. Berger, *supra*, at ¶ 1006[07]. Consequently, the pedagogical device “should not be allowed into the jury room without consent of all the parties.” *United States v. Munar*, 419 Fed.Appx. 600, 608 (6th Cir.2011). “Generally, such a summary is, and should be, accompanied by a limiting instruction which informs the jury of the summary’s purpose and that it does not itself constitute evidence.” *Gomez* at 257-58. However, even with a limiting instruction, “the better practice is to allow the exhibit to be used only as a demonstrative adjunct to testimony, and not to allow the chart to be formally admitted into evidence and thus go to the jury room.” *United States v. Gazie*, 6th Cir. Nos. 83-1851, 83-1852, 83-1860, 1986 WL 16498, *7 (Feb. 26, 1986).

{¶ 80} Thus, in order to determine the admissibility of the timeline, we must first examine whether it was a summary device under Evid.R. 1006 or a pedagogical device. In resolving this issue, the Sixth Circuit has stated:

We understand the term “pedagogical device” to mean an illustrative aid such as information presented on a * * * chart * * * that (1) is used to summarize * * * evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary’s proponent. *United States v. Bray*, 139 F.3d 1104, 1111-12 (6th Cir.1998).

{¶ 81} In the present case, the timeline is properly labeled a pedagogical device. It was created and used to summarize deposition testimony and documents that were independently entered into evidence. Further, the selection of events to be placed on the timeline, as well as the language chosen to describe the events, reflects appellees’ theory of the case. Rather than a benign summary of voluminous information that was not admitted into evidence, the timeline represents a pedagogical device used to advance appellees’ case. Thus, the trial court erred in admitting it under Evid.R. 1006.

{¶ 82} We conclude, however, that the error was harmless. As already noted, the evidence upon which the timeline was based was independently admitted into evidence without objection. Consequently, the timeline would have had little or no effect on appellant.

{¶ 83} Accordingly, appellant’s tenth assignment of error is not well-taken.

K. The trial court did not abuse its discretion when it permitted appellees to cross-examine appellant using contents from Gregory’s personnel file.

{¶ 84} In her final assignment of error, appellant argues that the trial court erred in allowing appellees to use “previously unidentified documents” to cross-examine her. During the trial, appellant was asked whether Gregory had a history of alcohol or substance abuse. She responded that Gregory never had any such issues. On cross-examination, appellees began asking appellant questions about a letter that was addressed to Gregory’s employer from Firelands Counseling & Recovery Services. In the letter, Gregory’s employer was informed that Gregory “was seen at Firelands Counseling and Recovery Services * * * for personal reasons.” Without objection, appellees proceeded to question appellant regarding the contents of that letter in an effort to discredit her testimony that Gregory had never used drugs. It was not until appellees moved for the admission of the exhibit that appellant objected. Ultimately, the court determined that the letter was inadmissible.

{¶ 85} Appellant now argues that the trial court should not have allowed appellees to use the letter during its cross-examination. Notably, appellant failed to raise this issue in the trial court. We have previously stated that failure to raise an issue in the trial court results in a waiver of the right to raise that issue on appeal. *Lantz v. Franklin Park Mall Mgt. Corp.*, 6th Dist. Lucas No. L-99-1131, 2000 WL 145127, *3 (Feb. 11, 2000).

Because appellant failed to object to appellees’ use of the letter in the trial court, we need not consider this issue on appeal.

{¶ 86} Accordingly, appellant's eleventh assignment of error is not well-taken.

III. Conclusion

{¶ 87} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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