

[Cite as *Hampton v. St. Michael Hosp.*, 2003-Ohio-1828.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 81009

SHIRLEY KIDD HAMPTON,
ADMINISTRATRIX OF THE ESTATE
OF JOE E. HAMPTON,

Plaintiff-Appellant/
Cross-Appellee

vs.

SAINT MICHAEL HOSPITAL, ET
AL.,

Defendants-Appellees/
Cross-Appellants

DATE OF ANNOUNCEMENT
OF DECISION

APRIL 10, 2003

CHARACTER OF PROCEEDING

Civil appeal from
Common Pleas Court
Case No. CV-413364

JUDGMENT

AFFIRMED

DATE OF JOURNALIZATION

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ANNE L. KILBANE, P.J.:

{¶1} This is an appeal from a jury verdict, following trial before Judge William J. Coyne, in favor of appellees St. Michael's Hospital, PHS Emergency Medical Services, Inc. and Belai Damtew, M.D. on the medical malpractice and spoliation of evidence claims of appellant Shirley Kidd Hampton, administratrix of the estate of Joe Hampton, deceased. She asserts on appeal that the verdict was against the manifest weight of the evidence; the verdict was the result of the prejudicial misconduct of defense counsel; it was error to deny her post-trial motions for a new trial, JNOV and mistrial; it was error to prevent her expert from rendering an opinion on whether evidence spoliation occurred; and, it was error to admit Hampton's prior medical records into evidence. We affirm.

{¶2} From the record we glean the following: On August 12, 2000, Hampton, age fifty-one years, consulted with Dr. Abdul Abbass, an ear, nose and throat specialist, with complaints of a burning pain in his throat. Dr. Abbass examined him, noted an inflammation in his throat and Hampton's assertion that his throat

burned with more intensity when he exerted himself, and rendered a diagnosis of gastroesophageal reflux disease ("GERD") or possible bacterial infection. Dr. Abbass also noted that Hampton was slightly short of breath, but attributed this symptom to the fact that he had been a heavy smoker for over thirty years, and prescribed medication for the GERD and antibiotics to treat an infection of the throat or nose.

{¶3} On August 17, 2000, at approximately 11:00 a.m., Theresa Tillet, Ms. Hampton's daughter, drove Hampton to St. Michael's Hospital because he complained of a sudden onset of severe mid-chest pain and shortness of breath. Upon arrival, he was rushed to the "cardiac room" of the E.R., connected to various diagnostic machines, and given aspirin and a nitroglycerin pill. Nurse LeAnn Townley's notes reveal that Hampton claimed he had been experiencing severe pain in his chest radiating up through his throat and jaw for over an hour and she noted he was sweating, had shortness of breath and complained of nausea. After taking the nitroglycerin pill, his pain was immediately and substantially alleviated, although it did not totally resolve.

{¶4} Blood tests revealed a high-normal level of the cardiac enzyme troponin. Elevated levels of troponin may indicate a cardiac episode but, typically, such levels do not appear until about three hours after a myocardial infarction, or "heart attack."

{¶5} Although it is disputed in what order the medication was administered, approximately one half hour after admission, Hampton was given a second nitroglycerin pill and a "GI cocktail," a mixture of liquid Maalox and prescription drugs, to treat a GERD episode. The medical chart reveals that the GI cocktail was given shortly before the nitroglycerin, but Nurse Angela Brown Mitchell specifically remembered that she asked Nurse Reece Lewis to mix the GI cocktail after the second nitroglycerin pill had been given.

{¶6} Dr. Alex R. Santiago, a resident in the ER, also took a history from Hampton. Although he noted that Hampton complained of "burning" pain in his mid-chest/sternum area that was radiating to his throat or jaw, shortness of breath and nausea, he claimed he did not observe shortness of breath or sweating, and that Hampton was calmly and cooperatively responding to his questions. Dr. Santiago testified that any time a patient presents with complaints of chest pain, a differential diagnosis of angina or a heart attack is possible, but he believed Hampton's symptoms were much more consistent with a diagnosis of GERD and, after consultation with and instruction by Dr. Dantew, his supervisor and the treating physician, he wrote a differential diagnosis of GERD on Hampton's chart. He then prepared standard discharge instructions for a patient suffering from that condition, gave them to a nurse to give to Hampton before he left the hospital, and had no further contact with the patient.

{¶7} Dr. Damtew, in a physician's note completed two days later, recorded that Hampton complained of burning mid chest/throat pain, that the pain described was not a pressure-sensation, and that Hampton had no shortness of breath, sweating or nausea. He claimed that Hampton had indicated he had been given a recent diagnosis of GERD, that he was taking antibiotics and Prevacid to treat the persistent burning pain in his throat and/or jaw and, after drinking the GI cocktail, his pain had completely resolved. He claimed he advised Hampton to stay in the hospital for a twenty-three hour observation, but Hampton wanted to leave and declined. While Dr. Damtew's note stated that Hampton had disconnected himself from his heart monitor and was "walking around," that is not documented anywhere else in the chart. Indeed, it was contended that had Hampton manually disconnected himself from the monitor, an "alarm" on the device would have sounded and it would have been noticed.

{¶8} Dr. Damtew wrote a notation on the chart that he had advised Hampton of the "small" risks he would be taking if he left the hospital, but he refused to stay. Although it is a standard practice at St. Michael's to ask a patient being discharged "against medical advice" to endorse a form acknowledging such decision, Hampton was not given such a form.

{¶9} Hampton, Ms. Hampton and her sister left the hospital about 1:30 p.m, approximately two and one-half hours after admission. Ms. Hampton claimed that he continued to complain

of pain in his chest and/or throat that worsened when he was in a prone position. At around 11 p.m., after Hampton had gone to sleep, Ms. Hampton discovered he was not breathing, she called for an ambulance, and Hampton was subsequently pronounced dead at Metrohealth Medical Center.

{¶10} Hampton's estate brought a medical malpractice/wrongful death complaint against St. Michael's Hospital, PHS Emergency Medical Services, and Drs. Santiago, Abbass, and Damtew¹ and the trial commenced on October 10, 2001.

{¶11} Dr. Joel Kahn testified that Dr. Damtew's evaluation and treatment of Hampton's fell below the recognized standard of care in the medical community. He claimed that Hampton's electrocardiogram indicated that he was having a cardiac episode when he was admitted; that the information entered in the medical records by Nurse Townley and Dr. Santiago, such as shortness of breath, sweating, nausea, and pain radiating from the middle chest region to the jaw, were classic symptoms of a cardiac problem. Moreover, he found that Hampton's immediate decrease in pain after taking the first dose of nitroglycerin was another strong indicator that a decrease in blood flow to the heart was the cause of Hampton's symptoms and that, if the medical chart was correct and the second nitroglycerin pill was given after the GI cocktail,

¹Dr. Damtew was employed by PHS Emergency Medical Services, and St. Michael's was a provider of medical services in its own right, as well as being the employer of Dr. Santiago.

it was strong evidence that Dr. Damtew's physician note was inconsistent with the treatment plan because, had the GI cocktail resolved all of Hampton's chest pain, further treatment with nitroglycerin would not have been necessary. Dr. Kahn also claimed that Dr. Damtew had violated the standard of care in failing to secure a written acknowledgment of the fact that Hampton was leaving the hospital against medical advice.

{¶12} Dr. Henry Smoak, III, on behalf of the defense, countered that Dr. Damtew's treatment of Hampton was sound medical practice. He found that the electrocardiogram was not sufficiently abnormal enough to indicate the presence of a cardiac event and that, as diagnostic tools, such printouts are notoriously unreliable and routinely ignored. He stated, given Hampton's history, that a burning sensation in the xiphisternal region, at the tip of the breastbone, radiating into the throat and/or jaw is completely consistent with a diagnosis of GERD, and that a diagnosis of GERD was also consistent with Dr. Damtew's history of Hampton's symptoms in the E.R., which did not include sweating or shortness of breath. He further testified that, if Dr. Damtew's note was correct, the GI cocktail was administered after the second nitroglycerin pill, and had Hampton's pain in fact, completely resolved, it would have been appropriate to allow him to leave the hospital.

{¶13} Pamela Tapp-Chapple, the hospital's administrator charged with ensuring that patient medical records are complete,

stated that it was a breach of hospital policy for a doctor to fail to secure from a patient a signed, written acknowledgment that he was leaving the hospital against medical advice. It was the practice that a doctor's transcribed note be sent to him for review and signature and, if a doctor failed to sign his dictated note, it could result in the revocation of his admitting privileges.

{¶14} Vickie Willard, a handwriting expert, testified that certain features of Hampton's medical chart suggested that it had been revised at a point after April 17th. She stated that it was obvious that the two-page discharge instructions form, eventually completed by Dr. Santiago, had initially been in the back of the chart because pressure from writing on pages on top of it reached the carbonized first page of the discharge instruction form and caused some of the writing to faintly appear on the second page copy of the form retained in the chart. She stated that none of Dr. Damtew's note about Hampton being requested to stay in the hospital overnight and declining to do so, appeared on that copy but agreed, during cross-examination, that if the instruction form had been removed from the chart before Dr. Damtew wrote his note and, as Dr. Damtew contended, when Hampton was leaving, no document falsification would have taken place.

{¶15} At the conclusion of all testimony, Ms. Hampton argued that medical records from Hampton's prior admissions to various hospitals, for conditions not related to the events of

this case, were irrelevant, highly prejudicial, and should not be given to the jury. The defense countered that the records, which contained information about Hampton's alleged alcoholism or prior conduct in leaving hospitals against medical advice, should be admitted. The judge ruled that, while the records had been used extensively during trial and were admissible, any reference to Hampton arriving at a hospital with a "girlfriend," as opposed to a wife, should be redacted as an issue outside the scope of the jury's determinations.²

{¶16} The jury returned a unanimous verdict in favor of Dr. Abbass, and six of the eight jurors returned verdicts in favor of all remaining defendants. Answering a special interrogatory, the jury found that neither Dr. Damtew or Dr. Santiago had violated the applicable medical standard of care in diagnosing and treating Hampton. The judge denied Ms. Hampton's post-trial motion for a new trial or, in the alternative, for JNOV.

{¶17} When Ms. Hampton learned that Hampton's prior medical records submitted to the jury had not redacted references to her as a "girlfriend," she moved for a mistrial and attached affidavits from the two dissenting jurors averring that references in the records to Hampton's "girlfriend" had confused the jury and lessened its estimation of Ms. Hampton's credibility. The order denying the motion stated that Ms. Hampton's lawyer had

²When the defense challenged the marital status of the decedent, the judge found the couple had been married by act of common law.

affirmatively stated that he had reviewed the redactions and approved them before the records were actually given to the jury and, therefore, could not now complain that redactions had not been done.

{¶18} Ms. Hampton's appeal does not involve any errors involving Dr. Abbass because she settled and dismissed her claims against him. She asserts six assignments of error, which we discuss in an order permitting the most logical disposition of the case.³

I

{¶19} In her second assignment of error, Ms. Hampton challenges the denial of her post-trial motion for a new trial, or in the alternative, for a JNOV. "The standard for granting a motion for judgment notwithstanding the verdict or in the alternative for a new trial pursuant to Civ.R. 50(B) is the same as that for granting a motion for a directed verdict pursuant to Civ.R. 50(A)."⁴ In determining whether to direct a verdict, the judge does not engage in a weighing of the evidence, nor does he evaluate the credibility of witnesses.⁵ Rather, the judge is confronted solely with a question of law: Was there sufficient

³The remaining defendants perfected a cross appeal on whether Hampton and Ms. Hampton were married, in the event we sustained any of her assignments of error.

⁴*Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 678.

⁵*Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 67-68.

material evidence presented at trial on this issue to create a factual question for the jury?⁶ In construing the evidence most strongly in favor of the nonmoving party, the judge must give the nonmoving party the benefit of all reasonable inferences that may be drawn from the evidence.⁷ When considering a motion for directed verdict, he must determine not whether one version of the facts presented is more persuasive than another.⁸ Rather, he must determine whether the trier of fact could reach only one result under the theories of law presented in the complaint.⁹ When the record contains substantial competent evidence favoring the nonmoving party so that reasonable minds might reach different conclusions, he must deny the motion.¹⁰

{¶20} In this case, there was evidence that Hampton came to the hospital exhibiting symptoms of an acute cardiac event. The contemporaneously constructed medical chart compiled largely by Nurse Townley and Dr. Santiago provide evidence that he complained he had mid-chest pain radiating to his jaw, was sweating, nauseous and short of breath, and his pain level

⁶Id., citing *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 445.

⁷*Broz v. Winland* (1994), 68 Ohio St.3d 521, 526; *Blair v. Goff-Kirby Co.* (1976), 49 Ohio St.2d 5, 10.

⁸*Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284.

⁹Id.

significantly decreased after taking the first nitroglycerin pill.

Ms. Hampton's experts opined that these symptoms, combined with a suspicious EKG, which purportedly showed evidence of cardiac trauma, and nonspecific high-normal ranges of troponin, pointed forcefully to a diagnosis of heart attack or angina. The medical chart lists that the second nitroglycerin pill was given subsequent to the GI cocktail, and was circumstantial evidence that the second nitroglycerin treatment was necessary because Hampton's pain was not abated by earlier treatment, and Ms. Hampton confirmed that Hampton's pain was present upon discharge and throughout the rest of the day.

{¶21} Further, there was evidence that if Dr. Damtew had made a valid diagnosis of GERD, his advice to Hampton to remain in the hospital would not have been given, there was no written evidence that Hampton acknowledged he was leaving against Dr. Damtew's medical advice, and there was evidence that he did leave the hospital with lingering chest pain. Ms. Hampton alleged a breach of the applicable medical standard of care in Dr. Damtew's diagnosis and treatment of Hampton on these facts.

{¶22} The defense, however, presented evidence that Hampton's main symptom upon presentment at the hospital was a burning pain in his chest and throat. Drs. Damtew and Santiago each disputed the assertion that, when he arrived at the ER,

¹⁰*Ramage v. Cent. Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 109.

Hampton was sweating and short of breath. Further, both Dr. Damtew and his expert testified that the EKG printout was useless as a diagnostic tool. Dr. Santiago testified that he and Dr. Damtew conferred over the proper differential diagnosis of Hampton's condition and decided he was suffering with GERD, for which he had been treated only five days before.

{¶23} While Ms. Hampton placed great emphasis on Dr. Santiago's discharge instruction to Hampton that he should return to the hospital if his condition "worsens," an instruction implying that his symptoms had not completely resolved, Dr. Santiago stated it was a standard discharge instruction for a person suffering from GERD. Nurse Brown testified unambiguously that the chart was partially inaccurate because the GI cocktail was given after the second nitroglycerin pill, which sequence of events supported Dr. Damtew's assertion that the GI cocktail was the treatment that had effectively resolved Hampton's chest discomfort. Finally, Ms. Hampton's testimony that, after his release from the hospital, Hampton experienced more discomfort lying down than he did when sitting upright, was the defense expert's basis for claiming that Hampton's complaint was a classic symptom of GERD as opposed to a heart problem.

{¶24} Dr. Damtew testified that he gave Hampton advice to stay in the hospital as a precaution, that he contemporaneously noted it on Hampton's record, and he had written only one note on the chart. Nurse Lewis testified that he saw Dr. Damtew writing

on Hampton's chart as he and Ms. Hampton were leaving. This testimony lent credence to the doctor's claim that Hampton left the hospital against medical advice despite the lack of a form signed by Hampton to acknowledge it. From his evaluation of the case, Dr. Smoak testified that Dr. Damtew did comply with the recognized standard of care in diagnosing, treating, and releasing Hampton.

{¶25} While there were inconsistencies in the respective histories taken by Nurse Townley and Dr. Santiago versus Dr. Damtew's dictated history memorialized after Hampton's death, he was cross-examined at great length over whether he had falsified the information to cover his purported negligence, and he steadfastly maintained that his dictation reflected his observations, findings, and the history that Hampton gave him. In addition, Dr. Santiago also qualified the history he wrote in Hampton's medical chart by stating that he did not observe some of Hampton's asserted symptoms, such as shortness of breath or sweating, although he wrote them down because that was the information Hampton relayed to him.

{¶26} It is clear that the resolution of Ms. Hampton's wrongful death and spoliation claims depended on whose witnesses the jury found to be more credible and that, if the jury believed the theory the defense presented, a verdict for the defense would have been proper. It was no error to deny the motion for JNOV. This assignment of error has no merit.

II

{¶27} Ms. Hampton contends that the verdicts in favor of the defendants were against the manifest weight of the evidence. Challenges to civil verdicts based on the weight of the evidence are proper under Civ.R. 59(A)(6) and granting a new trial under Civ.R. 59 as an alternative to judgment notwithstanding the verdict is a matter left to the judge's discretion.¹¹ A judge's decision is given considerable deference,¹² and he must be mindful that "a jury verdict cannot be set aside lightly;" therefore, a decision to deny a motion for a new trial will be affirmed when it is supported by competent, credible evidence.¹³ The weight of the evidence and the credibility of the witnesses are matters primarily for the jury to assess.¹⁴

{¶28} As we held in disposing of the assignment of error challenging the order denying Ms. Hampton's motion for JNOV, we find that sufficient evidence was presented to the jury to permit a verdict either assigning liability to, or absolving, Dr. Damtew, St. Michael's and PHS Emergency Medical Services, Inc., on her

¹¹*Highfield v. Liberty Christian Academy* (1987), 34 Ohio App.3d 311.

¹²*Gutosky v. Gallagher* (Dec. 12, 2002), Cuyahoga App. No. 81377, [2002-Ohio-6846](#), citing *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 320, 423 N.E.2d 856.

¹³*Id.*, citing *Gedetsis v. Anthony Allega Cement Contractors, Inc.* (Sept. 23, 1993), Cuyahoga App. No. 64954, *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, headnote one.

¹⁴*Antal v. Olde Worlde Products, Inc.* (1984), 9 Ohio St.3d 144.

claims. The resolution of the case depended upon who the jury thought more credible. Despite Ms. Hampton's argument to the contrary, we think it possible that Dr. Damtew could have been believed by the jury, who observed his demeanor while he testified, considering the corroborative testimony supplied by other caregivers at St. Michael's. Considering solely the paper record before us, we are unable to resolve the credibility of the respective experts, and must give due deference to the judge's discretion in denying the motion for a new trial based on the weight of the evidence. This assignment of error has no merit.

III

{¶29} Ms. Hampton next challenges the denial of a new trial. This motion was based upon trial irregularity or defense misconduct, under Civ.R. 59(A)(1) and (2), as, contrary to the judge's order, defense counsel failed to redact Hampton's earlier medical records to remove references to her as a "girlfriend." While she has also asserted, in a separate assignment of error, that the failure to grant her a "mistrial" is also rooted in the defense's misconduct in failing to redact Hampton's medical records, the scant legal authority we uncovered regarding the procedural propriety of such a motion discloses that "[w]hile the granting or denying of a mistrial rests within the sound discretion of the trial court, *** this rule of law appears to apply almost exclusively to criminal cases. Although several courts have proclaimed that the misconduct of counsel, because of

its influence on the jury, may be grounds for a mistrial in a civil action, *** a review of the Ohio Civil Rules fails to offer any authority which empowers a court to grant a mistrial in a civil case."¹⁵ Judges have treated a motion for a mistrial in a civil cases as a motion for a new trial under Civ.R. 59,¹⁶ and we do so here.

{¶30} We find no abuse of discretion in denying a new trial on this ground for several reasons. There was no proof that the misconduct complained of was an intentional act. Although the defense attorneys may have inadvertently introduced partially unredacted medical records, Ms. Hampton's lawyer did not ensure that they had been redacted, but instead, affirmatively represented to the judge, prior to the records being submitted to the jury, that he was satisfied with them. Finally, it is plain from the answers to special interrogatories accompanying the general verdict forms that the jury determined that Ms. Hampton had not shown by a preponderance of the evidence that any defendant breached a recognized standard of care. The jury, therefore, never reached the issue of damages, which would be the only issue for which Hampton's marital status could have any relevance.

¹⁵*Settles v. Overpeck Trucking Co.* (Aug. 26, 1991), Butler App. No. CA09-05-094, citations omitted; see also *Wills v. Boyd* (Nov. 20, 1980) Montgomery App. No. 6755.

¹⁶*Id.*

{¶31} Although in affidavits, the two non-concurring jurors aver that the reference in some past medical records to Hampton's "girlfriend" may have arguably confused them about Ms. Hampton's status and may have affected their assessment of her credibility, she provides no causal link between the jury's evaluation of her credibility and of the credibility of those witnesses who provided medically operative facts or opinions. Accordingly, this assignment of error is overruled.

IV

{¶32} While again contending she merits a new trial because of the submission of unredacted medical records, Ms. Hampton also argues that Dr. Abbass's lawyer made unfairly prejudicial remarks about her medical experts. We disagree.

{¶33} In *Pesek v. University Neurologists Assn., Inc.*,¹⁷ the Ohio Supreme Court stated:

{¶34} "We acknowledge that counsel should be afforded great latitude in closing argument, *** and that the determination of whether the bounds of permissible argument have been exceeded is, in the first instance, a discretionary function to be performed by the trial court ***. Therefore, the trial court's determination will not be reversed absent an abuse of discretion. *** However, 'where *gross* and *abusive* conduct occurs, the trial court is bound, *sua sponte*, to correct the prejudicial effect of counsel's misconduct.' (Emphasis sic.)

{¶35} "***

{¶36} "Counsel for appellees made various assertions and drew many inferences that were simply not warranted by the evidence. To attack counsel for appellant and appellant's expert witness was inexcusable, unprincipled, and clearly outside the scope of final argument. Appellees' counsel could have zealously represented his clients without resorting to these abusive tactics. Instead, counsel for appellees transcended the bounds of acceptable closing argument, creating an atmosphere 'surcharged with passion or prejudice.' ***

{¶37} "Accordingly, we conclude that regardless of the fact that counsel for appellant did not object to each contested comment, the conduct of appellees' counsel during his closing argument constituted reversible misconduct. In reaching our conclusion that a new trial is warranted, we are guided by the principle that if 'there is room for doubt, whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party.'"¹⁸

{¶38} In this case, Dr. Abbass' defense attorney, at closing argument, made the following statements:

¹⁷ (2000), 87 Ohio St.3d 495.

¹⁸Id. at 501-502 (internal citations omitted; emphasis retained in original).

{¶39} "*** [T]hese experts, they got up on this stand and they said to you, it doesn't matter what Dr. Abbass has to say. It doesn't matter because we're going to base it on our interpretation of the chart. When they get paid, and they come into a legal proceeding, all sense of reasonableness is gone.

{¶40} "And we all know these types of people. We've all met them throughout our lives. They're the type of people who have an opinion about everything. They're always right. They never concede a point. They will bend facts when you confront them with facts or they'll ignore facts when you confront them with facts, all in the blind pursuit of trying to prove to you that they know better than you and me.

{¶41} "Those are the type of people that I refer to as legends in their own mind, and that's exactly what Plaintiff's experts were.

{¶42} "***

{¶43} "That says a lot about the character of these experts who have come in. It says a lot about the lack of credibility of these people who would come in with the attitude that this physician is guilty until proven innocent."

{¶44} In the first instance, it must be noted that this attorney made the remarks at issue in the context of specifically advocating the cause of Dr. Abbass, who is not a party to this appeal. His argument, taken as a whole, was that Ms. Hampton's experts were not evaluating the care of Dr. Abbass based on all of

the circumstances of *his* role in initially diagnosing Hampton with either GERD or an infection in his throat, and that her experts refused to give any credence to physical symptoms Hampton exhibited on April 12th: that the back of his throat was red and his throat, overall, was swollen, which would indicate a likelihood of GERD as a suitable diagnosis. In addition, Dr. Abbass's lawyer argued that it was unreasonable for her experts to give no credence to the fact that Dr. Abbass attributed Hampton's slight heavy breathing to Hampton's lifelong heavy smoking, a symptom of a chronic pulmonary disorder for which Hampton had been diagnosed years earlier. In this context, it cannot be said that these comments created an atmosphere "surcharged with passion or prejudice," which the Supreme Court's remarks in *Pesek*, *supra*, were specifically meant to discourage, and were not directed to the claims against Drs. Damtew and Santiago. This assignment of error is without merit.

V

{¶45} Ms. Hampton complains it was error to exclude her expert's opinion about whether Dr. Damtew had dictated a truthful note in detailing his findings and diagnosis after Hampton had passed away. Dr. Charles Pollack attempted to testify that the inconsistencies between the medical chart generated by the nurses and Dr. Santiago, and the dictated note of Dr. Damtew, supported his professional opinion the dictated note had been fabricated after-the-fact to conceal Dr. Damtew's medical negligence.

{¶46} According to Evid.R. 702(A), an expert witness' testimony must either "relate[] to matters beyond the knowledge or experience possessed by the lay person or dispel[] a misconception common among lay persons." Expert opinion testimony is admissible as to an ultimate fact if the determination of such ultimate fact requires the application of expert knowledge not within the common knowledge of the jury.¹⁹ An expert witness "may not express an opinion upon matters as to which the jury is capable of forming a competent conclusion."²⁰ An expert improperly usurps the function and role of the jury when the expert testifies regarding the credibility of witnesses who testify at a trial.²¹

{¶47} A judge's decision to exclude evidence is not grounds for reversal unless the record clearly demonstrates an abuse of discretion in so ruling and that the complaining party has suffered a material prejudice.²² An abuse of discretion implies that the judge's attitude was unreasonable, arbitrary, or unconscionable.²³

¹⁹*State Auto. Mutual Ins. Co. v. Chrysler Corp.* (1973), 36 Ohio St.2d 151, 162.

²⁰*Burens v. Indus. Comm.* (1955), 162 Ohio St. 549, paragraph two of the syllabus.

²¹*Rasalan v. TJX Operating Cos., Inc.* (1998), 129 Ohio App.3d 364, 375.

²²*Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164.

²³*Tracy v. Merrell-Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152.

{¶48} Ms. Hampton relies on *Higginbotham v. Perez*,²⁴ for the proposition that an expert in a medical malpractice case may render an opinion regarding an operative note dictated after a defendant-physician may have been put on notice of a potential malpractice claim. Such reliance is misplaced. In *Higginbotham*, a plaintiff's medical expert was asked when a post-operative note was dictated, amidst the backdrop of a fact scenario indicating that a defendant-doctor may have dictated the note after he realized he had negligently performed a procedure. The court held it was error to prohibit questioning about the procedures used in operative note dictation and about customary time frames associated with such note production because these topics were within the specialized knowledge of physicians. *Higginbotham*'s expert was not asked for his opinion about the factual veracity of the contents of the note and, as such, does not speak to the issue here.

{¶49} Although Dr. Pollack purported to have specialized knowledge regarding medical diagnoses and treatment relative to the care Hampton received at St. Michael's, he did not purport to be a general expert in human honesty; indeed, from the above case law and our discussion of the first and second assignments of error, it is apparent that it is within the jury's unique province to assess the credibility of witnesses, whether or not

²⁴ (Sept. 6, 1994), Franklin App. No. 93APE12-1711.

those witnesses may be testifying as to specialized information a juror would not ordinarily know.

{¶50} In *Smith v. Howard Johnson Co.*,²⁵ the court delineated the elements of evidence spoliation:

{¶51} "[T]he elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts."

{¶52} The determination of whether Dr. Damtew's dictated note was accurate or contained false information to help conceal his liability for medical malpractice does not involve any medically-oriented knowledge and is not limited to a medical malpractice context; the resolution of any claim plainly rests upon the introduction of evidence for jury evaluation of credibility and weight, much like any other case. Dr. Pollack had no professional expertise to lend to the issue of whether or not the note was accurate, although he did testify at length about whether the conclusions contained therein were medically supported. This assignment of error has no merit.

VI

²⁵ (1993), 67 Ohio St.3d 28.

{¶53} Finally, Ms. Hampton submits it was error to overrule her motion in limine through which she attempted to exclude Hampton's prior hospitalization records because they had no probative value and would serve to inflame and prejudice the jury.

{¶54} The admission or exclusion of evidence rests generally within the sound discretion of the judge, and a reviewing court may reverse the decision only upon the showing of an abuse of that discretion.²⁶ Irrelevant evidence is not admissible,²⁷ and under Evid.R. 403(A), 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."

{¶55} "Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word 'unfair.' Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to

²⁶See *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 437, *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299.

²⁷See Evid.R. 402.

punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect."²⁸

{¶56} Ms. Hampton contended that Dr. Abbass wrongly attributed Hampton's slight breathing difficulty on April 12th to a progression of chronic obstructive pulmonary disease, or "COPD."

Dr. Kahn opined that the pain Hampton was feeling in his throat that day, combined with the slight shortness of breath, sufficient enough for Dr. Abbass to notice and remark upon it, should have been an obvious indicator that Hampton was having cardiac difficulty, and not GERD or a throat infection. Hampton's medical records were admitted, in part, to bolster Dr. Abbass's claim that his impression was correct, as a certain Dr. Shaw, a cardiologist, had also diagnosed Hampton with COPD in 1998. The records also documented incidents in which Hampton had insisted on leaving hospitals against medical advice, which countered Ms. Hampton's statements that he did not.

{¶57} Dr. Harvey Rosen, an economist, had testified that, had Hampton lived to the age of 77 or 78 years, an average life expectancy, and been employed full-time until a normal retirement age, he could have earned various amounts of money and contributed to the Hampton household in other ways, quantifiable as a dollar figure.

²⁸Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3.

{¶58} The defense submitted Hampton's past medical records and used them, particularly during cross-examination of Dr. Rosen and in closing argument, to document that Hampton had a significant history of alcoholism, unemployment and personal behavioral and health problems, such as a suicide attempt, hypertension, a myocardial infarction, and a significant smoking habit that could affect his willingness or ability to work or to live out his full statistical life span. In addition, the defense argued that Hampton's drinking problem, emotional instability and need for detoxification certainly had an impact on any value the jury might place on Ms. Hampton's claim for loss of his consortium. The information contained in Hampton's past medical records, therefore, was relevant and admissible. To say that the evidence was unfairly prejudicial because it was unfavorable is a logical leap we are unwilling to make. This assignment of error is not well taken.

{¶59} The cross appeal is moot.

Judgment affirmed.

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DIANE KARPINSKI, J. And

TIMOTHY E. MCMONAGLE, J. CONCUR

ANNE L. KILBANE
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).