[Cite as *Ramadan v. MetroHealth Med. Ctr.*, 2011-Ohio-67.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93981

MAI RAMADAN

PLAINTIFF-APPELLANT

vs.

METROHEALTH MEDICAL CENTER

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-633440

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 13, 2011

ATTORNEYS FOR APPELLANT

Jorge Luis Pla, Esq.
Lila D. Raslan, Esq.
Raslan & Pla, LLC
1701 East 12th Street, Suite 3GW
Reserve Square Building
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

Deirdre G. Henry, Esq.
John L. Antel, Esq.
Shawn W. Maestle, Esq.
Weston Hurd
The Tower at Erieview
1301 East Ninth Street, Suite 1900
Cleveland, Ohio 44114-1862

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant Mai Ramadan[1] ("plaintiff") appeals the jury verdict in favor of defendant-appellee MetroHealth Medical Center ("MetroHealth") in this medical malpractice case. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On December 24, 2003, plaintiff and her husband Suhail Ramadan ("Ramadan") were arguing when he poured gasoline on her and set her on fire. Plaintiff sustained severe burns on more than 90 percent of her body and was in a

[1]Plaintiff filed suit individually, and as the administratrix of the deceased's estate, against MetroHealth, two named doctors, and various unnamed doctors and/or healthcare providers. Before trial, plaintiff dismissed all defendants except MetroHealth.

coma until July of 2004. She lost both of her hands, was blinded in her left eye, and is permanently disfigured. Ramadan was also injured in the fire, sustaining burns on approximately 25 percent of his body.

{¶ 3} On January 12, 2004, at 7:48 a.m., Ramadan underwent general anesthesia for a skin graft at MetroHealth. The surgery began at 8:19 a.m. Sometime around 8:40 a.m., the anesthesiologist, Dr. Cooper, noted an abnormal reading from the capnometer, a machine that measures the carbon dioxide being exhaled from the body. Specifically, there was a decrease in Ramadan's carbon dioxide levels, which may have indicated "a leak in the system somewhere."

{¶ 4} Surgery was stopped. Ramadan was turned back to the supine position so Dr. Cooper could check Ramadan's endotracheal tube. Dr. Cooper found no leaks. After confirming that Ramadan's carbon dioxide levels were back to normal, Ramadan was turned onto his stomach, and surgery proceeded. Between 8:45 a.m. and 8:50 a.m., Dr. Cooper exited the operating room and left Dr. Moy, the resident anesthesiologist, in charge of monitoring Ramadan's anesthetics.

{¶ 5} Starting at approximately 9:00 a.m., Ramadan's heart rate began to increase and his blood pressure began to decrease. According to the anesthesia record, by 9:15 a.m. Ramadan had no documented heart rate, blood pressure, or oxygen and carbon dioxide levels.

{¶ 6} Between 9:15 a.m. and 9:20 a.m., Dr. Moy called Dr. Cooper back into the operating room. According to Ramadan's medical records, surgery was

stopped somewhere between 9:20 and 9:23 a.m., and Dr. Cooper began performing CPR almost immediately after re-entering the operating room. However, this was unsuccessful, and Ramadan was pronounced dead at 9:44 a.m.

{¶ 7} On August 21, 2007, plaintiff filed suit against MetroHealth for medical malpractice/wrongful death and loss of consortium. The case was tried before a jury from April 27 through May 6, 2009. On May 7, 2009, the jury returned a verdict in favor of MetroHealth.

{¶ 8} Plaintiff appeals and raises seven assignments of error for our review. In addition, MetroHealth cross-appeals and raises one assignment of error for our review. We first address plaintiff's arguments, taken out of order when appropriate.

{¶ 9} "I. The trial court erred and clearly abused its discretion in allowing evidence of the circumstances and events which caused Mai Ramadan's and Suhail Ramadan's burn injuries to be presented at trial."

{¶ 10} Plaintiff argues that evidence of the Ramadans' volatile relationship and the cause of the fire is irrelevant to her medical malpractice claim, and in the alternative, if this evidence is relevant, it is more prejudicial than probative. Plaintiff argues, under either circumstance, this evidence was improperly admitted at trial.

{¶ 11} MetroHealth, on the other hand, argues that plaintiff's loss of consortium claim opened the door to the admissibility of evidence regarding the companionship and care Ramadan would have provided to plaintiff had he lived.

{¶ 12} The decision whether to admit or exclude evidence is subject to review under an abuse-of-discretion standard, and absent a clear showing that the court abused its discretion in a manner that materially prejudices a party, we will not disturb an evidentiary ruling. See *State v. Lyles* (1989), 42 Ohio St.3d 98, 99, 537 N.E.2d 221; *Weiner, Orkin, Abbate & Suit Co., L.P.A. v. Nutter* (1992), 84 Ohio App.3d 582, 589, 617 N.E.2d 756. An abuse of discretion connotes more than an error in law or judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. When applying the abuse-of-discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶ 13} Generally, relevant evidence is admissible at trial. To be relevant, evidence must have "any tendency to make the existence of any fact that is of consequence to the determination of that action more probable or less probable * * *." Evid.R. 401. "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403.

{¶ 14} Loss of consortium is a "loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations." Black's Law Dictionary (7th Ed. 1999) 958. To prove a loss of consortium claim, a plaintiff must first prove the underlying tort, which in this case is a claim for wrongful death. See, *Bowen v. Kil-Kare, Inc*. (1992), 63 Ohio St.3d 84,

585 N.E.2d 384. "Once that is shown, the complaining spouse must show damages proximately caused by the negligent act * * *." *Urban v. Goodyear Tire & Rubber Co.* (Dec. 7, 2000), Cuyahoga App. Nos. 77162, 77776, and 76703.

{¶ 15} Loss of consortium damages deriving from a wrongful death are authorized in Ohio by R.C. 2125.02(B)(3). A surviving spouse is "rebuttably presumed to have suffered damages by reason of the wrongful death * * *." R.C. 2125.02(A)(1). In *Giley v. Huron Regional Urgent Care Ctr.* (April 19, 1990), Cuyahoga App. No. 56863, this court held that the plaintiff's "claim of loss of consortium obviously is rebuttable by evidence dealing with her spousal relationship. The door was open for rebuttal by reason of the very nature of [her] cause of action." See, also, *DeVine v. Blanchard Valley Med. Assoc., Inc.* (1999), 103 Ohio Misc.2d 40, 45, 725 N.E.2d 366 (holding that in a loss of consortium claim under R.C. 2125.02, "[t]he defendants would be free to explore the parties' relationship and knowledge of the decedent's condition, along with other relevant facts, to dispute any claim for damages raised by the plaintiff"); *Miller v. Marrocco* (1989), 63 Ohio App.3d 293, 298, 578 N.E.2d 834 (holding that "[t]he defendant was properly permitted to present evidence in mitigation of damages" in a wrongful death action).

{¶ 16} In the instant case, plaintiff argues that evidence of the circumstances that caused the fire and resulting injuries is irrelevant to plaintiff's medical malpractice claim. Although plaintiff is correct, this does not end our analysis of whether this evidence was properly admitted at trial, because plaintiff did not limit

her case to a claim of medical negligence. Plaintiff chose to also pursue a claim for loss of consortium, which required proof of damages.

{¶ 17} Plaintiff testified that, before the fire incident, Ramadan made all the decisions in their marriage and paid for everything. It is undisputed that plaintiff suffered serious, permanent injuries from the fire. As part of her case-in-chief, plaintiff played a "day-in-the-life" video for the jury, depicting her injuries and the resulting difficulties she has performing daily tasks. Plaintiff also presented evidence from an expert economist that it would cost between $1,468,684 and $2,192,000 for a nurse's aide to help her for the remainder of Ramadan's life expectancy.

{¶ 18} Accordingly, evidence regarding plaintiff's relationship with Ramadan is relevant to rebut her claim for loss of his "companionship, cooperation, aid, and affection." Tragically, this evidence included that Ramadan abused plaintiff, ultimately setting her on fire. The presumption that plaintiff was damaged by the loss of her husband — specifically, that Ramadan will not provide her with the help she requires as a result of her injuries caused by the fire — is subject to rebuttal evidence by MetroHealth. R.C. 2125.02(A)(1). Having determined the evidence is relevant, we now turn to whether this is outweighed by its prejudicial effect.

{¶ 19} During voir dire, the court stated the following to prospective jurors: " * * * this is a medical malpractice, wrongful death case. I guarantee that during the course of trial there are going to be things that come to your attention that are going to arouse sympathy, that may arouse bias, may arouse prejudice, one way or

the other. You can't decide this case based upon sympathy or bias or prejudice. You have to come in here cold and decide this case based upon the evidence presented, and decide it with your head, not with your heart."

{¶ 20} The court addressed this issue again before plaintiff's "day-in-the-life" video was played for the jury: "Folks, you cannot decide this case based upon sympathy or bias or prejudice. * * * We can't try a case in a vacuum. * * * [I]n the event you make a finding as it relates to negligence and * * * proximate cause, * * * then you [must] go on to consider, depending upon proof, damages. There are specific instructions as to what you may consider damage wise. I am giving the parties purposely wide latitude to present information to you, but I am going to call [upon you] at the appropriate time to strictly follow the Court's instructions concerning what may be considered in this case."

{¶ 21} In its instructions to the jury, the court explained the elements of medical malpractice plaintiff must prove to succeed in this case. The court further instructed the jury as follows: "A patient who injures himself is entitled to subsequent, non-negligent medical treatment. If a health care provider renders negligent medical care, regardless of the event that triggered the need for medical treatment, the plaintiff is entitled to an undiminished recovery in an action for damages proximately caused by that negligent medical treatment. That means, basically, and it's no secret, the parties are aware of the fact that Suhail Ramadan created a problem for himself, that does not relieve a caregiver from exercising ordinary care."

{¶ 22} We find that the probative value of this evidence outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury. Evidence regarding the circumstances of plaintiff's and Ramadan's burn injuries is relevant to plaintiff's loss of consortium claim and associated damages. Given this, coupled with the limiting instructions to the jury, we find that the court did not abuse its discretion by admitting this evidence into trial, and plaintiff's first assignment of error is overruled.

{¶ 23} In plaintiff's second assignment of error, she argues as follows:

{¶ 24} "II. The trial court abused its discretion and allowed the grossest injustice to be perpetuated by permitting counsel for the defendant to create an atmosphere surcharged with passion and prejudice."

{¶ 25} Plaintiff argues that defense counsel improperly aroused the jury's prejudices by repeatedly portraying Ramadan and plaintiff in a negative light. Specifically, plaintiff alleges that defense counsel emphasized Ramadan's abuse and implied that plaintiff wanted MetroHealth to pay for her injuries caused by this abuse. Plaintiff alleges that the jury was influenced by these issues rather than evidence relating to whether MetroHealth was negligent.

{¶ 26} MetroHealth argues that plaintiff did not object to defense counsel's voir dire or opening statement, thereby waiving any error in these portions of the proceedings. However, our review of the record shows that plaintiff sufficiently objected to the "burn evidence" before and during voir dire. In response, the court stated, "You don't have to object to every question. Just object one time and it will

be ongoing. I have no problem with that." Plaintiff's counsel renewed this objection before the first witness was called. Therefore, plaintiff properly preserved this issue for review on appeal.

{¶ 27} Opening and closing statements are not evidence. Rather, opening arguments allow counsel latitude to express to the jury what he or she expects the evidence presented during trial will show. See *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229. In closing arguments, counsel may comment on the evidence presented and "may make inferences and deductions therefrom * * *." *Cusumano v. Pepsi-Cola Bottling Co.* (1967), 9 Ohio App.2d 105, 122, 223 N.E.2d 477. "Remarks that are not supported or warranted by the evidence and which are calculated to arouse passion or prejudice or are designed to misrepresent that evidence to the extent that there is a substantial likelihood that the jury may be misled may constitute prejudicial error." *Acceleration Life Assur. Co. v. Walsh* (June 4, 1987), Cuyahoga App. No. 52266.

{¶ 28} As to the scope of counsel's questioning during voir dire, the Ohio Supreme Court has held, "the questions propounded must be so framed as to enable counsel to ascertain rather than arouse passion or prejudice." *Dowd-Feder v. Truesdell* (1936), 130 Ohio St. 530, 533, 200 N.E. 762. "All questions in the voir dire examination must be propounded in good faith. The character and scope of such questions cannot become standardized, but must be controlled by the court in the exercise of its sound discretion, the court having for its purpose the securing to every litigant an unbiased jury." Id. at syllabus, ¶3.

{¶ 29} In the instant case, plaintiff alleges that the following remarks, among others, by MetroHealth's counsel were improper:

Voir Dire

{¶ 30} "Mai Ramadan will tell you under oath that her husband set her on fire."

{¶ 31} "[Plaintiff] went to MetroHealth Medical Center. Her life was saved."

{¶ 32} "The uncommon part of this malpractice case is that the physical injuries, which Mai Ramadan has, were not caused by MetroHealth Medical Center."

Opening Statement

{¶ 33} "* * * [A]s it relates to the request for this nurse aide care and other care, I think you need to listen to the evidence in this case and decide whether or not you believe that had Suhail Ramadan not died in the course of that anesthesia, that he would [have] walked out that hospital, after setting his wife on fire, he would have been working, would not have had to respond to the justice system for what he did, and that he would have stayed with his wife, who he, unfortunately, set afire, he would have stayed with his wife and provided these services. That is the major component of what they are seeking in this case. As said in voir dire, you need to listen to the relationship. You can't assume that this is something he would have done. You have to judge based on the evidence of their relationship and how it evolved and what happened."

Closing Statement

{¶ 34} "They indicated that [Ramadan] provided for [plaintiff], he paid for her food, he loved her, he did all of these things, but, well, ladies and gentlemen, all of that changed on December 24th in this case, and the reason it changed on December 24th, ladies and gentlemen, is that this gentleman set his wife on fire. * * * The Plaintiff is coming to you to ask you today for fees, these millions of dollars, for what her husband did to her. * * * They are asking you to believe that this man, who not long into the marriage, hit his wife to the point where she said she was bleeding, she was cut. That's not appropriate. Things went down hill after that. And everything changed on December 24th, 2003. Everything changed in a tragic way. What this man did to his wife tells you what he would have done had he walked away from MetroHealth Medical Center. * * * Would she have gone back to him and been comfortable living in the same house with a man that set her on fire? That is unbelievable. * * * Then they're asking you to believe that Suhail Ramadan, who stood there and set his wife on fire and had no remorse, was going to go back to his wife, going to continue to live at his home, going to continue to go to work and work hard to make money to take care of this woman, this wife who he set on fire, he was going to continue to work to pay for the care, when ladies and gentlemen, he tried to kill her. That's another unbelievable leap of faith that you must take in order to say that she should be entitled to all this money that they want you to give."

{¶ 35} After reviewing the record, we conclude that these statements were supported by or related to evidence presented at trial. Furthermore, defense

counsel did not comment on the incompetence of plaintiff's evidence or the integrity of her witnesses, nor did defense counsel improperly attack plaintiff's counsel, all of which are impermissible during opening and closing statements. See, e.g., *Neal v. Johnson*, Cuyahoga App. No. 83124, 2004-Ohio-743, ¶8.

{¶ 36} The facts in this case are both dramatic and tragic. However, it does not necessarily follow that prejudice influenced the outcome. Plaintiff chose to include a claim for loss of consortium within her case, and with that choice, unpleasant, sensational evidence became admissible. It was not error for the court to allow defense counsel to comment on this evidence. Additionally, as discussed infra, the jury's verdict in favor of MetroHealth was supported by competent, credible evidence that was presented at trial. Accordingly, plaintiff's second assignment of error is overruled.

{¶ 37} In plaintiff's sixth assignment of error, she argues the following:

{¶ 38} VI. "The jury verdict should be reversed because it was against the manifest weight of the evidence."

{¶ 39} Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578. In addition, we give deference to the jury's findings, because a jury "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these

observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 40} To succeed on a medical malpractice claim, a plaintiff must prove that the medical treatment rendered by defendant fell below the recognized standard of care, and this negligence proximately caused injury to the patient. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131-132, 346 N.E.2d 673. Ordinarily, the plaintiff must show the standard of care, any deviation therefrom, and causation "through medical expert testimony in terms of probability to establish that the injury was, more likely than not, caused by the defendant's negligence." *Roberts v. Ohio Permanente Med. Group, Inc.* (1996), 76 Ohio St.3d 483, 485, 668 N.E.2d 480. See, also, *Rogoff v. King* (1993), 91 Ohio App.3d 738, 632 N.E.2d 977.

{¶ 41} In the instant case, plaintiff presented evidence regarding the following standards of care for anesthesiologists:[2]

- An anesthesiologist should properly complete a pre-op evaluation before the induction of anesthesia;
- A resident anesthesiologist cannot practice independently; rather she is under the supervision of her attending anesthesiologist;

[2] On appeal, plaintiff cites to "Plaintiff's Exhibit 1," which is alleged to be the policies and procedures manual of MetroHealth's anesthesia department. However, that exhibit was not admitted into evidence and is not part of the record on appeal; therefore, we may not take it into consideration in reviewing this case. *State v. Morgan* (1998), 129 Ohio St.3d 838, 842, 719 N.E.2d 102 (holding that "[i]t is axiomatic that a court of appeals is bound by the record before it and may not consider facts extraneous to the record"). The medical standards of care were not otherwise easily identifiable within the record. Therefore, the standards referred to in this opinion are piecemeal, taken from trial

- An attending anesthesiologist must be present for the patient's intubation, the induction of anesthesia, and the extubation, as well as a "position change" of the patient;
- At other times during anesthesia, an attending anesthesiologist may leave the operating room as long as he remains in the area and immediately available;
- A resident anesthesiologist can administer anesthesia care without her attending anesthesiologist, but she should immediately notify her attending anesthesiologist of problems or unusual events;
- If there is a problem during anesthesia, the first thing an anesthesiologist should do is check the patient; and
- An anesthesiologist should be able to diagnose in a timely fashion if the endotracheal tube is improperly positioned.

{¶ 42} We now review whether the jury's determination that MetroHealth's treatment of Ramadan on January 12, 2004 did not fall below each of these standards and is against the manifest weight of the evidence.

{¶ 43} Plaintiff asserts that Dr. Moy's documentation of Ramadan's pre-op anesthesia evaluation fell below the standard of care. However, plaintiff's expert conceded at trial that this was irrelevant to Ramadan's death: "As poor as the [pre-op anesthesia] documentation is in this case * * * [it was] not the cause of Mr.

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testimony.

Ramadan's death. That is to say you could be showing me a blank anesthesia record, [and I] wouldn't hold that record as a proximate cause."

{¶ 44} The remaining allegations of negligence center around events in the operating room when Ramadan was under anesthesia.

{¶ 45} Plaintiff does not allege that MetroHealth deviated from the standard of care until after surgery was started the second time and Dr. Cooper left the room. Plaintiff alleges that Ramadan's endotracheal tube became dislodged at some point during the surgery, resulting in oxygen deprivation, which ultimately led to his death. Plaintiff's expert, Dr. Dauber, testified that Dr. Moy's failure to timely diagnose this fell below the standard of care: "Basically the tube wasn't in the right place, the fact that it wasn't in the right place was missed, it lead to a state where there wasn't enough breathing going on, enough elimination of carbon dioxide in a patient who was compromised for a variety of reasons. * * * Dr. Cooper was not called in in a timely fashion. Perhaps he could have rescued Mr. Ramadan in a more timely diagnosis on resuscitation efforts * * *."

{¶ 46} Plaintiff next claims that MetroHealth's expert, Dr. Bonnell, testified that "from 9:00 to 9:20 a.m. the physicians defendant hospital failed to diagnose Mr. Ramadan was suffering irregularities in his blood pressure, heart rate and respiratory rate." However, that is not what Dr. Bonnell testified to at trial. Dr. Bonnell stated that an anesthesiologist would not be expected to diagnose an acute fat embolism as being *the cause* of Ramadan's problems during that time frame. "I would hope that she would recognize that the blood pressure is

dropping. Whether she thinks it's a problem or not is up to her, and I doubt very much that she would even consider a fat embolism."

{¶ 47} Plaintiff argues that she presented an abundance of evidence to show that Ramadan suffered oxygen deprivation from approximately 9:00 to 9:20 a.m., that he had low or no vital signs after 9:10 a.m.,[3] and that he was either dying or dead by the time CPR was started. However, this evidence, by itself, does not show that MetroHealth's treatment of Ramadan fell below the standard of care. Plaintiff's contentions become twofold: first, that MetroHealth caused Ramadan's oxygen deprivation by dislodging his endotracheal tube; and second, that Dr. Moy should have diagnosed that Ramadan's tube moved, called Dr. Cooper sooner, and checked Ramadan's airway before recycling the blood pressure cuff.

{¶ 48} There is conflicting evidence in the record whether MetroHealth caused Ramadan's tube to move. Specifically, Ramadan's medical records contain a physician's progress note that states Ramadan was initially intubated at 22 cm. This note was written, dated, and signed by Dr. Cooper. There is another progress note, which states that, after Ramadan's tube was checked for leaks and he was put back onto his stomach, "tube position at 20 cm." Although it is undisputed that this note is in Dr. Cooper's handwriting, it is not dated and it is not signed. Typed at the top of this form is the following: "Each note must be dated

[3] The evidence in the record is conflicting as to whether Ramadan had "no discernable" vital signs starting at 9:10 a.m. or at 9:15 a.m.

and signed." Dr. Cooper testified that he has no recollection of writing this unsigned note, and that the information about the tube being at 20 cm is incorrect.

{¶ 49} Additionally, Dr. Moy and Dr. Cooper testified that neither of them moved or repositioned Ramadan's endotracheal tube after his initial intubation. Furthermore, MetroHealth's experts testified that nothing in Ramadan's medical records indicated that his tube was repositioned or dislodged. Given this, there is ample evidence in the record from which the jury could conclude that MetroHealth was not negligent regarding Ramadan's tube positioning.

{¶ 50} Plaintiff's second allegation that things went wrong in the operating room concerns Dr. Moy's actions, or failure to act, after 9:10 or 9:15 a.m. Specifically, plaintiff argues as follows: "Incredibly, by her own admission, she breached protocol by inspecting the blood pressure cuff for machine malfunction instead of vigilantly examining Mr. Ramadan, calling for her attending and notifying the surgeon." However, this is not what Dr. Moy testified. Dr. Moy did not admit that she "breached protocol." She testified that, at 9:15 a.m., Ramadan "had a heart rate. He had end-tidal CO2. The only thing I didn't have was a systolic over diastolic [blood] pressure. I recycled the cuff, which is a normal thing to do. I gave him a dose of Neo-Synephrine, I recycled and called Nurse Quinn to ask Dr. Cooper to come back."

{¶ 51} Plaintiff presented the testimony of seven doctors, in addition to Dr. Moy, and two nurses concerning the events in the operating room on January 12, 2004. Additionally, various medical records documenting these events were

admitted into evidence, including notes from surgeons, anesthesiologists, and nurses. Following is a summary of the pertinent evidence:

{¶ 52} Expert anesthesiologist Dr. Benhacene testified that she reviewed Ramadan's medical records and the deposition transcripts of Drs. Cooper, Moy, Yowler, Skitsky, and Neeley, and nurses Quinn and Savinell, all of whom were in the operating room that morning. Dr. Benhacene testified that she would have done many things differently concerning Ramadan's anesthesia. However, on cross-examination, Dr. Benhacene testified that none of these things fell below an accepted standard of care.[4]

{¶ 53} Dr. Yowler, the surgeon who performed Ramadan's skin graft that morning, testified about what happened in the operating room. Because he was performing the surgery, and not watching the clock, he could not recall the exact times certain events occurred. His testimony about specific time frames was based on Ramadan's medical records. Dr. Yowler agreed that the records showed that Ramadan's vital signs were anywhere from problematic to non-existent from 9:10 to 9:20 a.m., that "code" was called at 9:20 a.m., CPR began at 9:23 a.m., and by that time, Ramadan was "brain dead." Dr. Yowler stated that: "I can't prove it, but I know we didn't sit there for 13 minutes not doing

[4] Notwithstanding the pre-op anesthesia evaluation forms, which, although the evidence suggests they were not filled out properly, did not contribute to Ramadan's death.

anything. But you are right, those are the times that are recorded. That's all I can say. Those are the times that are recorded, sir."

{¶ 54} Nurse Quinn testified that she remembered hearing the pulse oximeter's pitch change, indicating that Ramadan's oxygen saturation dropped from 100 percent to 98 percent. However, her testimony is ambiguous as to when this occurred.

{¶ 55} Nurse Savinell testified that he could not recall the specific time frame of events, because "[t]hings happened so fast" and "there was panic in the room."

{¶ 56} Dr. Cooper testified that, as he was taking a break, he was paged on the "overhead," and it took him about 15 seconds to get back into Ramadan's operating room. Ramadan was still lying on his stomach. Dr. Moy told him there was an issue with the blood pressure cuff, and Ramadan's end-tidal CO2 had changed. "At that point, my first concern was the airway. The airway is first and then we deal with everything else. I took — as she was talking to me, I went over, took him off [the] ventilator and started squeezing the bag to confirm that everything with his ventilation and oxygenation was okay. * * * When I came back into the room, he had a heart rate and he had a pulse oximeter and he had end-tidal CO2. He had all three of those when I walked into the room. * * * As I was bagging him, his heart rate decreased and his end-tidal CO2 decreased. At that point I knew we were in trouble, and I said the patient was arresting. * * * [H]e was dying or pretty much dead by the time I figured out what was going on. As I was bagging him, it went down. I was flabbergasted that something happened

that fast while I was standing there. He had reached a point of no return before I walked in the room."

{¶ 57} Surgical resident Dr. Neeley testified that he recalled Dr. Moy state during surgery that Ramadan's heart rate and blood pressure became dangerously low. "[W]e stopped our procedure, their attending [Dr. Cooper] came into the room and shortly after that [Ramadan] was put back in the supine position on his bed. * * * [C]hest compressions were being done and then he expired."

{¶ 58} Dr. Skitzki, who was a resident in the burn and pediatric surgery unit at MetroHealth at the time Ramadan was being treated there, testified that he met with Ramadan before the surgery, and that "[h]is prognosis would be that he would most likely recover from his burns and leave the burn unit."

{¶ 59} Dr. Sidhu was the chair of MetroHealth's anesthesiology department at the time Ramadan was being treated there. He confirmed the standard of care that as soon as a resident anesthesiologist determines that a patient does not have a heart rate or blood pressure, she should call her attending anesthesiologist back into the operating room.

{¶ 60} We now turn to the defense's case-in-chief. MetroHealth's evidence suggested that there was no deviation from the standard of care and MetroHealth did not cause Ramadan's death.

{¶ 61} MetroHealth's expert anesthesiologist, Dr. Siegler, testified that the standard of care required Dr. Moy to call Dr. Cooper back into the operating room at 9:15 a.m., when she knew there was a problem. Dr. Siegler further testified that

the events that happened in the operating room were "extremely distressing and very, very dramatic." In light of this, the time frame within which Dr. Moy called Dr. Cooper back into the room was within the standard of care.

{¶ 62} "We would like to think that medical science is so different that the very split second we identify something that we're concerned about that immediately CPR starts and code is put in place. The reality of the situation is events develop, people need to be called into the room, patients need to be turned and such. This was an entirely typical intraoperative * * * response to a catastrophic event. It doesn't appear, from my reading of the chart, there was any inappropriate delay. They did the best they could in a timely fashion for this poor gentleman." Asked if the outcome would have been different had Dr. Cooper been called one or two minutes earlier, Dr. Siegler responded, "From what I believe happened to this gentleman, I don't believe it would have made any difference at all."

{¶ 63} Additionally, Dr. Siegler testified that it was "pure speculation" that Ramadan "self-extubated and he somehow pushed the tube out of his airway with his tongue."

{¶ 64} MetroHealth's expert pathologist Dr. Bonnell opined that acute fat emboli syndrome caused Ramadan's death. Specifically, Dr. Bonnell testified that, in his opinion, there was no evidence in Ramadan's medical records that his endotracheal tube "came out" or that this was the cause of his death. Dr. Bonnell testified that, "with great probability," during Ramadan's skin graft, fat globules got

into the blood stream and affected the blood flow to the rest of the body, ultimately causing Ramadan's death. Dr. Bonnell further testified that this is extremely rare and difficult to diagnose and treat. Dr. Bonnell stated that "an experienced anesthesiologist would probably miss it * * *."

{¶ 65} Taking this testimony into consideration, we conclude that there is competent, credible evidence to support a jury verdict in favor of MetroHealth on plaintiff's medical malpractice claim, and we will not disturb the jury's determination. Plaintiff's sixth assignment of error is overruled.

{¶ 66} Plaintiff's third assignment of error states as follows:

{¶ 67} "III. The trial court committed prejudicial error in prohibiting Frank P. Miller, III, M.D. to present rebuttal expert testimony on proximate cause of death countering the erroneous testimony of defendant's expert witness Harry J. Bonnell, M.D., who testified that Mr. Ramadan's death was proximately caused by fat emboli."

{¶ 68} In the instant case, plaintiff filed two expert medical reports with the court on May 9, 2008. Both experts, anesthesiologists Dr. Benhacene and Dr. Dauber, opined that Ramadan's endotracheal tube became dislodged during surgery, and the failure of MetroHealth's anesthesiologists to properly diagnose and treat this caused Ramadan's death. Plaintiff did not identify Cuyahoga County Coroner, Dr. Miller, who performed Ramadan's autopsy, as an expert witness.

{¶ 69} In August of 2008, plaintiff received a copy of the report by MetroHealth's expert anesthesiologist, Dr. Bonnell, which concluded that Ramadan

died of acute fat emboli syndrome. On September 19, 2008, plaintiff filed an affidavit from Dr. Miller contradicting Dr. Bonnell's opinion. However, the discovery cut-off date had already passed. After objection by MetroHealth, the court prohibited Dr. Miller from testifying as an expert witness on behalf of plaintiff. Subsequently, the court allowed plaintiff to call Dr. Miller to testify at trial as a fact witness.

{¶ 70} On appeal, plaintiff argues that Dr. Miller should have been allowed to testify as an expert witness to rebut MetroHealth's expert witness's testimony regarding the cause of death.

{¶ 71} MetroHealth argues that this issue was not properly preserved for appeal because plaintiff failed to proffer this testimony, and a substantive determination on its admissibility cannot be made. Furthermore, MetroHealth argues that plaintiff failed to identify Dr. Miller as an expert witness within the discovery time frame set by the court.

{¶ 72} In *State v. Grubb* (1986), 28 Ohio St.3d 199, 503 N.E.2d 142, paragraph two of the syllabus, the Ohio Supreme Court stated that, "[a]t trial it is incumbent upon a [party], who has been temporarily restricted from introducing evidence by virtue of a motion *in limine*, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." We initially note that prior to Dr. Miller's testimony as a fact witness, plaintiff's counsel made a proffer, thus preserving this issue for appeal.

Additionally, it was briefed extensively in the trial court, and supported by affidavit, that Dr. Miller would testify that, to a "reasonable degree of medical probability," fat emobli was not the cause of Ramadan's death.

{¶ 73} "The party with the burden of proof on an issue must present proof in that party's case in chief and can present evidence in rebuttal only to answer a new matter introduced by his adversary." *Hinkle v. Cleveland Clinic Found*., 159 Ohio App.3d 351, 2004-Ohio-6853, 823 N.E.2d 945, ¶60 (citing *Cities Serv. Oil Co. v. Burkett* (1964), 176 Ohio St. 449, 200 N.E.2d 314).

{¶ 74} A careful review of the record reveals that plaintiff was not entitled to present evidence to rebut MetroHealth's fat emboli theory because plaintiff repeatedly introduced this matter in her case-in-chief. First, plaintiff's counsel asked one of her expert witnesses, Dr. Benhacene, to explain the following: "Tell the jury what is fat emboli?" Dr. Benhacene explained fat emboli in detail and testified as to why, in her opinion, this was not the cause of Ramadan's death.

{¶ 75} Plaintiff's counsel posed a similar question to her second medical expert, Dr. Dauber: "Now, you know that the Defendants are claiming this was a precipitous drop, that it was caused by fat emboli in this case. What is fat emboli, Doctor?" Again, Dr. Dauber testified in detail about fat emboli. Plaintiff's counsel then asked: "Based on your review of the coroner's report, the pathology in this case and the blood gas on the anesthesia room record, to a reasonable degree of medical certainty, did Mr. Ramadan precipitously expire, as the defense is saying, because of the fat emboli?" Dr. Dauber responded, "No."

{¶ 76} A third example of plaintiff raising the issue of fat emboli during her case-in-chief occurred during direct examination of Dr. Moy. Plaintiff's counsel questioned Dr. Moy extensively about fat emboli as a possible cause of Ramadan's death. Dr. Moy answered the questions in general, but repeatedly stated that she was not a pathologist nor an expert in this particular topic. Plaintiff's counsel ended their discussion of fat emboli with the following: "Well, now that we know what didn't kill Mr. Ramadan, let's talk about what did."

{¶ 77} In addition to presenting contrary evidence to MetroHealth's fat emboli defense through her own expert and fact witnesses, plaintiff cross-examined MetroHealth's expert witnesses regarding this issue. A party may rely on cross-examination of the opposing party's expert to rebut evidence. *State v. Thompson* (1987), 33 Ohio St.3d 1, 11, 514 N.E.2d 407.

{¶ 78} Furthermore, the court allowed Dr. Miller to testify as a fact witness for plaintiff. Dr. Miller stated that he found no evidence of fat emboli during Ramadan's autopsy, which included microscopic slides of Ramadan's organs that MetroHealth's expert witness Dr. Bonnell used to make his cause of death determination.

{¶ 79} Additionally, it is undisputed that plaintiff did not identify Dr. Miller as an expert witness, nor did she procure a written report from Dr. Miller in compliance with the expert report deadline. Evid. R. 702, Civ. R. 26(E). Plaintiff had an opportunity to submit supplemental reports from her two expert witnesses, which could have addressed Dr. Bonnell's opinions. Under Loc.R. 21.1(B), "[i]t is

counsel's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the non-party expert's opinion. * * * [A]ll supplemental reports must be supplied no later than thirty (30) days prior to trial." Plaintiff failed to file supplemental expert reports addressing the fat emboli issue.

{¶ 80} Plaintiff's argument that she had an unconditional right to rebut the "out-of-thin-air testimony of defendant's eleventh-hour pathologist" is not well taken. Dr. Bonnell was not an "eleventh-hour" expert witness; in fact, he was identified and his report was sent to plaintiff's counsel within the court's deadlines. Plaintiff had ample opportunity to address Dr. Bonnell's opinions and did, in fact, do so. Accordingly, the court did not abuse its discretion in limiting the testimony of Dr. Miller, and plaintiff's third assignment of error is overruled.

{¶ 81} Plaintiff's fourth and fifth assignments of error state as follows:

{¶ 82} "IV. The trial court abused its discretion by prohibiting Burke, Rosen & Associates from presenting expert testimony on Suhail Ramadan's loss of earning capacity to the jury."

{¶ 83} "V. The trial court erred in prohibiting the testimony of William Vaughan and it limited the testimony of Stephanie C. Jones in support of plaintiff's claim of economic damages."

{¶ 84} Given our disposition of plaintiff's sixth assignment of error — that the jury verdict in favor of MetroHealth was not against the manifest weight of the evidence — we need not address assignments of error four and five. App.R.

12(A)(1)(c). Plaintiff's fourth and fifth assignments of error relate to economic damages, which is a moot issue absent findings of negligence and causation. See, e.g., *Hester v. Dwivedi* (2000), 89 Ohio St.3d 575, 583, 733 N.E.2d 1161 (holding that the "law of negligence does not hold a defendant liable for damages that the defendant did not cause"); *Morenz v. Progressive Cas. Ins. Co.*, Cuyahoga App. No. 79979, 2002-Ohio-2569 (finding the issue of damages moot after concluding that the plaintiff failed to meet the burden of proof regarding an invasion of privacy claim).

{¶ 85} Accordingly, plaintiff's fourth and fifth assignments of error are overruled.

{¶ 86} In plaintiff's seventh and final assignment of error, she argues that:

{¶ 87} VII. "The trial court abused its discretion and committed error in failing to grant plaintiff's motion for judgment notwithstanding the verdict or, in the alternative[,] for a new trial."

{¶ 88} Pursuant to App.R. 16(A)(7), plaintiff's brief must cite to parts of the record on which she relies to support her argument that the court erred in denying her motions for judgment notwithstanding the verdict and for a new trial. Additionally, plaintiff's argument must be supported by legal authority. Id. See, also, App.R. 12(A)(2). Plaintiff fails to meet these burdens in her seventh assignment of error.

{¶ 89} Nonetheless, in the interest of justice, we review the denial of a motion for judgment notwithstanding the verdict under the following standard: "The

evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions." *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334. See, also, Civ. R. 50(B).

{¶ 90} As discussed in our analysis of plaintiff's sixth assignment of error, MetroHealth put forth sufficient evidence to support its side of this case; therefore, it was not error for the court to deny plaintiff's motion. *McKenney v. Hillside Dairy Co.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291 (holding that a "motion for a judgment notwithstanding the verdict pursuant to Civ.R. 50(B) tests the legal sufficiency of the evidence").

{¶ 91} A motion for a new trial is governed by Civ.R. 59, which lists nine grounds upon which a court may grant a new trial, in addition to the catch-all ground of "good cause shown." Civ.R. 59(A)(1) - (9). Plaintiff makes no reference to Civ.R. 59 on appeal and does not argue why the court allegedly erred, other than to say "the jury chose to ignore the fact[s]." We will not guess at plaintiff's reasoning, and instead overrule this assignment of error under the authority of App.R. 12(A)(2).

{¶ 92} MetroHealth's sole cross-assignment of error states as follows:

{¶ 93} "The Nurse Aid Services for Mai Ramadan are Not a Proper Component of Damages Under O.R.C. 2125.02."

{¶ 94} Damages were not awarded in the instant case, rendering this issue advisory in nature and this cross assignment of error moot. See *Egan v. Natl. Distillers & Chem. Corp*. (1986), 25 Ohio St.3d 176, 495 N.E.2d 904, at syllabus (concluding that "[w]here the grant of summary judgment favorable to a defendant neither considers nor awards damages, an issue pertaining to damage setoffs raised by the defendant-appellant for the first time on appeal to the Supreme Court will not be entertained because it is not a justiciable issue. Any opinion the court might express regarding such setoffs to damages not actually awarded would be purely advisory, and it is well-settled that this court will not indulge in advisory opinions"). See, also, App.R. 12(A)(1)(c).

{¶ 95} MetroHealth's cross assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR