[Cite as *Peffer v. Cleveland Clinic Found.*, 2011-Ohio-450.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94356

JASON PEFFER, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CLEVELAND CLINIC FOUNDATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-496855

BEFORE: Celebrezze, J., Kilbane, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 3, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellants, Jason Peffer and his mother, Lynne Baker, appeal from a jury verdict in favor of appellees, Dr. K.V. Gopalakrishna ("Dr. Gopal"); Dr. Gopal's employer, I.D. Consultants, Inc.; and the Cleveland Clinic Foundation ("the Clinic"), in a medical malpractice action. After a thorough review of the record and apposite law, we affirm.

{¶ 2} In July 1997, Jason Peffer was an 11-month-old child with a history of ear infections who had been suffering from diarrhea, high fever, irritability, and crying. Dr. George Seikel, Jason's pediatrician, recommended he be admitted to Fairview General Hospital ("Fairview"). On July 23, 1997, Dr. Gopal, an infectious disease specialist at Fairview, was called for consultation. A spinal tap and computerized tomography ("CT") scan were ordered. The CT scan images were interpreted by staff radiologist Dr. Fachtna Carey on July 23. Dr. Carey's report, which was received by Dr. Gopal on July 24, stated:

{¶ 3} "Unenhanced and enhanced images of the brain demonstrate no acute bleed, midline shift or hydrocephalus, though the right lateral ventricle is slightly larger than the left. There is prominent enhancement in the region of the vein of Galen and straight sinus, which is probably within normal limits. No discrete abscess is seen and aeration of the visualized paranasal sinuses and mastoid regions is within normal limits.

{¶ 4} "There is suggestion of subtle hypodensity over the medial aspect of the temporal lobes, particularly on the left; this is of uncertain significance,

but I cannot exclude medial temporal lobe inflammatory process, especially on the left. If clinically indicated, follow-up MRI may be helpful.

{¶ 5} "Impression: No discrete, focal abnormality identified.

{¶ 6} "Cannot exclude subtle abnormality in medial temporal lobes, esp. on left. See above discussion."

{¶ 7} Dr. Seikel received these results on July 23 and noted in Jason's chart, "CT head normal." Dr. Gopal testified that he reviewed the CT study with another radiologist; he did not order a magnetic resonance imaging ("MRI") study. Dr. Gopal believed Jason was suffering from viral meningitis and prescribed a course of treatment for that condition. He testified that the symptoms Jason manifested did not fit the traditional presentation of encephalopathy.[1]

{¶ 8} On July 24, Jason was transferred to the Clinic by ambulance. Once there, Dr. Camille Sabella, a pediatric infectious disease specialist, oversaw Jason's care. Dr. Sabella received the CT scan images taken of Jason at Fairview and had them independently reviewed by a staff radiologist or neuroradiologist at the Clinic. Jason's medical chart documents this informal consultation and notes, "CT head reviewed with neuroradiology → normal[,]" but does not name the consulting doctor. No official analysis was done of the CT study at the Clinic.

[1] Meningitis describes an inflammation of the meninges surrounding the brain, while encephalitis describes inflammation in the brain itself. Tr. 260.

{¶ 9} Jason's condition was improving at the Clinic, but on July 28, an electroencephalography ("EEG") test was performed and showed irregular activity in the left hemisphere of Jason's brain. An MRI was ordered, which showed an abnormality in the left temporal lobe. Jason was diagnosed with herpes simplex encephalitis ("HSE"),[2] and treatment began for this disease on July 30, 1997. As a result of HSE, Jason suffered significant damage to his brain. He has numerous physical and psychological impairments that require 24-hour care. He must reside in a structured environment or risk injury to himself and others.

{¶ 10} Appellants filed suit on March 19, 2003, alleging that the delay in diagnosis and treatment resulted in significantly more neural impairment than otherwise would have occurred if Jason had been properly diagnosed on July 23, or July 24, 1997. A trial commenced on June 6, 2007, which resulted in a finding for appellees. This court reversed that determination and ordered a new trial based on improper jury instructions in *Peffer v. Cleveland Clinic Found.*, 177 Ohio App.3d 403, 2008-Ohio-3688, 894 N.E.2d 1273 ("*Peffer I*"). A second trial commenced on November 13, 2009 and resulted in a finding in favor of appellees. Appellants now appeal claiming six errors.[3]

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[2]HSE affects one out of every 750,000 to one out of every 1,500,000 children in the U.S. Tr. 1033. It causes necrosis or death of cells in the brain.

[3]Appellants' assignments of error are contained in the appendix to this Opinion.

Law and Analysis

Hearsay

{¶ 11} Appellants first argue that the trial judge abused her discretion by allowing the defense to introduce, directly and indirectly, hearsay opinions about the "normal" interpretation of the CT scan.[4]

{¶ 12} It is well established that pursuant to Evid.R. 104, the introduction of evidence at trial falls within the sound discretion of the trial court. *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026; *State v. Sibert* (1994), 98 Ohio App.3d 412, 648 N.E.2d 861. This assignment of error involves the trial court's decision to limit or exclude evidence. The standard for such a determination is well defined in Ohio. "The admission or exclusion of evidence rests within the sound discretion of the trial court." *State v. Jacks* (1989), 63 Ohio App.3d 200, 207, 578 N.E.2d 512. Therefore, "[a]n appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion." *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. A reviewing court should not substitute its judgment for that of the trial court. See, generally, *State v.*

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[4]Appellees argue that many of the errors that are raised herein were previously raised in *Peffer I* and, because this court found them moot, we are not free to address them because they are barred by the law of the case doctrine. Errors not addressed by an appellate court because they are found to be moot are not rulings on the merits and do not preclude this court from addressing them in the instant appeal. App.R. 12(A)(1)(c).

Jenkins (1984), 15 Ohio St.3d 164, 473 N.E.2d 264; *Finnerty*, supra, at 107-108.

{¶ 13} An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 14} Appellants claim that Dr. Gopal's testimony regarding the consultation with an unknown radiologist at Fairview was admitted in error. Jason's medical chart from Fairview includes an entry by Dr. Seikel noting that the CT study was normal. The records from the Clinic also include an entry authored by Dr. Sabella documenting a consultation with an unnamed neuroradiologist that resulted in the conclusion that the CT study taken at Fairview was normal.

{¶ 15} The general hearsay rule found in Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶ 16} The testimony introduced by Dr. Gopal does not amount to hearsay. Dr. Gopal was called by appellants in their case-in-chief as if on cross-examination when he was questioned about Dr. Carey's report and the CT scan results. Dr. Gopal stated, "My concern was that [Dr. Carey] was reading 'subtle suggestions' and 'normal' and 'if clinically indicated.' So there was [sic] a lot of words used. I wanted to make sure what is he telling me. What is he trying to convey to me. And that's the reason I went and

looked at the brain scan. Yes, I'm not a radiologist. That's the reason I went to another radiologist to look." Tr. 565.

{¶ 17} Appellants' counsel followed up a few questions later asking, "Okay. Now, it's your claim, Doctor, that you decided to try to track down Dr. Carey that morning on the 24th, and you were not successful and you sought out another radiologist, true?" Tr. 566. Dr. Gopal answered affirmatively. He never testified on cross-examination what the other doctor told him. Later in the trial, on direct examination, Dr. Gopal did attempt to state that this other radiologist corroborated his findings, but appellants objected and the trial court sustained the objection.

{¶ 18} This line of questioning was used to explain the actions Dr. Gopal took and why he did not order a follow-up MRI. It was not offered for the truth of the matter asserted. See *State v. Price* (1992), 80 Ohio App.3d 108, 110, 608 N.E.2d 1088; *State v. Smith*, Cuyahoga App. No. 91715, 2010-Ohio-1655, ¶32. Dr. Gopal's trial testimony did not include hearsay regarding an unknown physician's interpretation of the CT images.

{¶ 19} In regard to the unknown neuroradiologist at the Clinic, appellants could not present a claim against the Clinic but for the actions of this unknown person. Their entire case rested on an unnamed neuroradiologist reading the CT scan images as normal and this allegedly falling below the applicable standard of care.

{¶ 20} The entire theory of this claim requires appellees to discuss and explain this alleged failure. This invites the introduction of hearsay testimony, which appellants did in opening statements, direct and cross-examination of witnesses, and closing statements. This invited error should not be the basis for overruling the determination of the jury in this case.

{¶ 21} "The 'invited error doctrine' prohibits a party from raising an error on appeal which she herself invited or induced the trial court to make." *Gray v. Cuyahoga Cty. Dept. of Children & Family Svcs.* (Apr. 20, 2000), Cuyahoga App. Nos. 75984 and 75985, citing *State ex rel. Fowler v. Smith*, 68 Ohio St.3d 357, 359, 1994-Ohio-302, 626 N.E.2d 950; *Ctr. Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 313, 511 N.E.2d 106.

{¶ 22} Appellants argue that the trial court overruled their motion in limine to exclude this information, but this does not excuse appellants' decision to bring this out in opening statements and trial testimony before any reference to such information had been introduced by appellees.

{¶ 23} Additionally, several exceptions to the general hearsay rule exist, including the business records exception found in Evid.R. 803(6), which states that a business record is "[a] memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the

regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodial or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." See, also, R.C. 2317.40.

{¶ 24} The Tenth District, in *Hytha v. Schwendeman* (1974), 40 Ohio App.2d 478, 320 N.E.2d 312, at the syllabus, set forth instructive guidelines it used to determine when a diagnosis contained within medical records could be admitted under R.C. 2317.40.[5]

{¶ 25} However, the Fourth District has previously held that a review of a CT study is a factual finding. *Lambert v. Goodyear Tire & Rubber Co.* (1992), 79 Ohio App.3d 15, 24, 606 N.E.2d 983. The *Lambert* court found the *Hytha* factors to be an inappropriate guide to determine the admissibility of such information found within medical records. Here, the notations in the Fairview and Clinic charts were made by Dr. Seikel and Dr. Sabella, respectively. These were factual determinations as test results, not medical diagnoses. Their trustworthiness is bolstered by the fact that they were

[5]These include: "(1) The record must have been a systematic entry kept in the records of the hospital or physician and made in the regular course of business; (2) The diagnosis must have been the result of well-known and accepted objective testing and examining practices and procedures which are not of such a technical nature as to require cross-examination; (3) The diagnosis must not have rested solely upon the subjective complaints of the patient; (4) The diagnosis must have been made by a qualified person; (5) The evidence sought to be introduced must be competent and relevant; (6) If the use of the record is for the purpose of proving the truth of matter asserted at trial, it must be the product of the party seeking its admission; (7) It must be properly authenticated."

made at the time of treatment and were documented in the normal course of caring for Jason. Also, Jason's medical records were submitted to the court as a joint exhibit without objection at the time of submission. While appellants did file a motion in limine to exclude these references, they did not object when the records were jointly submitted at trial. In fact, appellants introduced this information and the opinions of unknown experts in opening arguments, during questioning, and in closing.

{¶ 26} Appellees brought this issue to the fore at closing arguments when counsel for the Clinic invoked the opinions of these unknown specialists and stated that "[s]omebody told Dr. Seikel it was a normal CT scan[,]" and "[Dr. Sabella] talked with this other radiologist or neuroradiologist. They said it was normal."

{¶ 27} These are references to testimony introduced at trial although with inferences drawn from that testimony. "A [party] may freely comment in closing argument on what the evidence has shown and what reasonable inferences the [party] believes may be drawn therefrom." *State v. Clay*, 181 Ohio App.3d 563, 2009-Ohio-1235, 910 N.E.2d 14, ¶47. Further, the opening and closing statements are not evidence. *State v. Spaqi* (Feb. 27, 1997), Cuyahoga App. No. 69851. The judge instructed the jury as such, and the jury is presumed to follow the proper instructions of the trial court. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032. We cannot

say that the trial court abused its discretion in allowing these comments to be made in closing arguments because the inference can be drawn from the medical records and testimony given in this case.

{¶ 28} Appellants also claim that the expert opinion of Dr. Mary Edwards Brown was introduced without her testifying at trial. The name and opinion of Dr. Brown came up when the Clinic's attorney asked appellants' expert witness, Dr. Patrick Barnes, to relay his understanding of the opinions of Dr. Brown and Dr. Robert Zimmerman. Dr. Barnes testified what he understood Dr. Brown's opinion to be regarding this case. Dr. Zimmerman's video trial deposition, played for the jury, mirrored Dr. Brown's opinion. The Ohio Supreme Court has held that the erroneous admission of inadmissable hearsay that is cumulative to properly admitted testimony constitutes harmless error. *State v. Williams* (1988), 38 Ohio St.3d 346, 528 N.E.2d 910. Dr. Barnes's understanding of Dr. Brown's and Dr. Zimmerman's opinions was that they were the same. Because Dr. Brown's opinion mirrored that of Dr. Zimmerman, and Dr. Zimmerman's video-taped trial deposition was played for the jury, Dr. Brown's expert opinion was cumulative testimony and amounts to harmless error. See *Zappola v. Leibinger*, Cuyahoga App. Nos. 86038 and 86102, 2006-Ohio-2207, ¶108-110.

Expert Opinion Not Previously Disclosed

{¶ 29} Appellants next argue that the trial court erred in allowing a defense expert to render a standard-of-care opinion that had not been

disclosed in a Loc.R. 21.1 compliant report, even though he had previously disclaimed any intention of doing so.

{¶ 30} As discussed above, the introduction of evidence at trial falls within the sound discretion of the trial court. Generally, expert opinions must be disclosed in an expert report prior to trial and elicited from the expert at trial. Loc.R. 21.1. This is to prevent surprise at trial and to give the opposing party an opportunity to properly cross-examine the expert. Loc.R. 21.1 provides for the exchange of expert reports prior to trial, and Civ.R. 26(E) imposes a continuing duty to update those reports should the expected scope or opinion of the expert testimony change. *Vaught v. Cleveland Clinic Found.*, 98 Ohio St.3d 485, 2003-Ohio-2181, 787 N.E.2d 631, ¶14-21.

{¶ 31} Appellants argue that Dr. Zimmerman's trial testimony exceeded the scope of his pretrial expert report. Dr. Zimmerman's report was filed on February 11, 2002, wherein he stated that Jason's July 23, 1997 CT scan was "within normal limits." When asked about Jason's CT study by appellees, he stated that reading it as normal was appropriate. While indirectly advancing a standard-of-care opinion, this comports with his pretrial report. Further, Dr. Zimmerman testified similarly in *Peffer I*. His testimony here cannot come as a surprise to appellants since they had previously heard it and understood what he was going to say. Appellants also had additional opportunity to prepare to cross-examine Dr. Zimmerman since he said similar

things in his 2004 discovery deposition. See *Roetenberger v. Christ Hosp.*, 163 Ohio App.3d 555, 2005-Ohio-5205, 839 N.E.2d 441, ¶18. Therefore, the trial court did not abuse its discretion in allowing Dr. Zimmerman to state that reading the CT scan as normal was appropriate.

Directed Verdict

{¶ 32} Appellants claim that the trial judge erred as a matter of law in denying their motion for directed verdict against the Clinic with respect to the unnamed neuroradiologist's violation of the standard of care.

{¶ 33} Civ.R. 50(A), which sets forth the grounds upon which a motion for directed verdict may be granted, states:

{¶ 34} "(A) Motion for directed verdict.

{¶ 35} "(1) When made. A motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence.

{¶ 36} "(2) When not granted. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.

{¶ 37} "(3) Grounds. A motion for a directed verdict shall state the specific grounds therefor.

{¶ 38} "(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶ 39} A motion for directed verdict is to be granted when, construing the evidence most strongly in favor of the party opposing the motion, the trial court finds that reasonable minds could come to only one conclusion and that conclusion is adverse to such party. Civ.R. 50(A)(4); *Crawford v. Halkovics* (1982), 1 Ohio St.3d 184, 438 N.E.2d 890; *The Limited Stores, Inc. v. Pan Am. World Airways, Inc.*, 65 Ohio St.3d 66, 1992-Ohio-116, 600 N.E.2d 1027.

{¶ 40} A directed verdict is appropriate where the party opposing it has failed to adduce any evidence on the essential elements of this claim. *Cooper v. Grace Baptist Church* (1992), 81 Ohio App.3d 728, 734, 612 N.E.2d 357. The issue to be determined involves a test of the legal sufficiency of the evidence to allow the case to proceed to the jury, and it constitutes a question of law, not one of fact. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695, 586 N.E.2d 141; *Vosgerichian v. Mancini Shah & Assoc.* (Feb. 29, 1996), Cuyahoga App. Nos. 68931 and 68943. Accordingly, the courts are testing the legal sufficiency of the evidence rather than its weight or the credibility of

the witnesses. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68-69, 430 N.E.2d 935.

{¶ 41} Since a directed verdict presents a question of law, an appellate court conducts a de novo review of the lower court's judgment. *Howell v. Dayton Power & Light Co.* (1995), 102 Ohio App.3d 6, 13, 656 N.E.2d 957; *Keeton v. Telemedia Co. of S. Ohio* (1994), 98 Ohio App.3d 405, 409, 648 N.E.2d 856.

{¶ 42} Appellants argue that their expert, Dr. Barnes, was the only person to render an opinion on whether the unknown radiologist at the Clinic violated the appropriate standard of care. As such, the trial court should have granted summary judgment in their favor. Contradicting this, Dr. David Urion, a pediatric neurologist, testified that upon reading the July 23, 1997 CT scan, it appeared normal. Dr. Zimmerman also found the CT scan to be normal. Appellants argue that Dr. Urion is not a radiologist, and therefore he was unqualified to give such an opinion. However, "[t]he competency of an expert is left to the sound discretion of the trial court." *Roetenberger* at ¶19, citing *Scott v. Yates*, 71 Ohio St.3d 219, 221, 1994-Ohio-462, 643 N.E.2d 105. This goes to the weight of the evidence and does not lead to the conclusion that no other expert opinion regarding standard of care was elicited at trial.

{¶ 43} Evidence also exists in the record to indicate that even if the unnamed neuroradiologist at the Clinic had informed Dr. Sabella that there

was something on the CT scan that caused concern, Dr. Sabella would not have ordered an MRI because Jason did not present with symptoms indicative of HSE. He was continuing to improve, even to the point where he was about to be discharged. Jason's symptoms, as documented in his medical records, did not evidence a persistent worsening condition usually seen in infants with HSE. Therefore, a directed verdict against the Clinic was inappropriate based on the evidence. It was appropriate for liability to be determined by the jury rather than as a matter of law by the trial court.

Improper Jury Instruction

{¶ 44} Appellants next take issue with the jury instructions given in this trial, claiming that the trial judge erred as a matter of law in furnishing a misleading jury charge that equated foreseeability with proximate cause and required a finding of probability.

{¶ 45} Generally, a trial court should give requested instructions "if they are correct statements of the law applicable to the facts of the case." *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828. However, jury instructions must be viewed in their totality. *Margroff v. Cornwell Quality Tools, Inc.* (1991), 81 Ohio App.3d 174, 177, 610 N.E.2d 1006. If the totality of the instructions clearly and fairly expresses the law, a reviewing court should not reverse a judgment based upon an error in a portion of a charge. Id. "A strong presumption exists in favor of the propriety of jury instructions." *Schnipke v. Safe-Turf Installation Group,*

LLC, Allen App. No. 1-10-07, 2010-Ohio-4173, ¶30, citing *Burns v. Prudential Sec., Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550, 857 N.E.2d 621, ¶41.

{¶ 46} Instructions that, in their totality, are sufficiently clear to permit a jury to comprehend the relevant law will not cause a reversal upon appeal. *Margroff* at 177. "And while an inadequate jury instruction that misleads the jury constitutes reversible error, 'misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party.'" *Clements v. Lima Mem. Hosp.*, Allen App. No. 1-09-24, 2010-Ohio- 602, ¶73, quoting *Haller v. Goodyear Tire & Rubber Co.*, Summit App. Nos. 20669 and 20670, 2002-Ohio-3187, ¶19, quoting *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410, 629 N.E.2d 500.

{¶ 47} Appellants claim that the jury instructions were confusing and prejudicial because they included an additional element of foreseeability.

{¶ 48} In this case, the trial court instructed the jury that negligence "is a failure to use reasonable skill, care and diligence. Reasonable skill, care and diligence is the skill, care and diligence that a reasonably careful person would use under the same or similar circumstances. * * * A party who seeks to recover for injury and/or damages must prove not only that the other party was negligent but also that such negligence was a proximate or direct cause of injury and/or damages."

{¶ 49} The court went on to explain that "[p]roximate cause is an act or a failure to act which in the natural and continuous sequence directly produces the injury and/or physical harm without which it would have not occurred. Cause occurs when the injury and/or physical harm is the natural and foreseeable result of the act or failure to act."

{¶ 50} The court also noted appellants' burden, stating that "[t]he plaintiff must prove to you by the greater weight of the evidence, that one, one or both of the defendants was [sic] negligent; two, that one or both defendants' negligence proximately caused plaintiff's injuries; and three, that plaintiffs were damaged by the negligence of one or both of the defendants.

{¶ 51} "* * *

{¶ 52} "In deciding whether reasonable skill, care or diligence are used, you will consider whether either or both the defendants ought to have foreseen under the circumstances that the natural and probable result of an act or failure to act would cause some injury or damage.

{¶ 53} "* * *

{¶ 54} "If a defendant, by the use of reasonable skill, care or diligence should have foreseen some injury or damage and should not have acted, or if he did act, should have taken precautions to avoid the result, then the performance of the act or failure to take such precautions would be negligence."

{¶ 55} Appellants argue that foreseeability was not an issue. However, several experts testified that Jason did not present with symptoms consistent with encephalopathy. Dr. Carey's CT scan report, the linchpin of appellants' case, indicated that an MRI may be helpful "if clinically indicated." This case of medical diagnosis of a rare disease, which did not present itself in the classical manner, warranted such an instruction.

{¶ 56} In another medical malpractice case involving alleged misdiagnosis, the Sixth District found that a foreseeability instruction patterned after model Ohio jury instructions was not given in error. *Miller v. Defiance Regional Med. Ctr.*, Lucas App. No. L-06-1111, 2007-Ohio-7101, ¶52. In *Fowerbaugh v. Univ. Hosp.* (1997), 118 Ohio App.3d 402, 692 N.E.2d 1091, this court held that a foreseeability instruction was appropriate regarding a specialist's duty to communicate findings regarding a patient's care. The claim here is similar — that the unknown neuroradiologist inaccurately interpreted Jason's CT study breaching the standard of care. The Third District also recently upheld the use of a foreseeability instruction in a medical malpractice case. *Clements*, supra. These cases contradict appellants' arguments that a foreseeability instruction is not warranted in medical malpractice cases.

{¶ 57} Appellants in *Gerke v. Norwalk Clinic, Inc.*, Huron App. No. H-05-009, 2006-Ohio-5621, advanced a similar argument as appellants here — that foreseeability was improperly included in the jury instructions. The

jury in *Gerke* found the doctor was not negligent as stated in an interrogatory. Id. at ¶57. The jury was never required to consider proximate cause because of that determination. The jury in the present case answered an interrogatory finding that Dr. Gopal and the Clinic did not fall below the applicable standard of care. Therefore, the jury was not required to consider the proximate cause section of the instruction. The proximate cause section and its included foreseeability instruction was not prejudicial to appellants, and therefore should not result in reversal.

{¶ 58} Viewing the instructions that the jury considered, we find that they accurately reflect the law in the case and were sufficiently clear to allow the jury to reach a proper conclusion. While foreseeability is an element of a breach of the duty of care, the trial court incorrectly included this as an element of proximate cause. However, the jury decided the case before reaching a determination on the issue of proximate cause.

Improper Remarks

{¶ 59} Appellants also claim they were denied a fair trial when the proceedings were skewed by defense counsels' incendiary closing argument. Appellants complain that remarks referring to their trial counsel during closing arguments were an attempt to prejudice the jury and should result in a new trial.

{¶ 60} Counsel should be allowed wide latitude in closing arguments. *State v. Champion* (1924), 109 Ohio St. 281, 289, 142 N.E. 141. However,

"[i]t is the duty of counsel to refrain from challenging the honor or reputation of a witness, party, or opposing counsel unless warranted by the evidence." *Jones v. Macedonia- Northfield Banking Co.* (1937), 132 Ohio St. 341, 7 N.E.2d 544, paragraph one of the syllabus. "Abusive comments directed at opposing counsel, the opposing party, and the opposing party's witnesses should not be permitted." *Roetenberger* at ¶9, citing *Pesek v. Univ. Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 2000-Ohio-483, 721 N.E.2d 1011. Trial judges control the permissible bounds of argument in their court rooms, and those determinations will not be overturned absent an abuse of discretion unless such conduct constitutes gross and abusive breaches of counsel's duty. *Pesek* at 495. "Appellate courts ordinarily decline to reverse a trial court's judgment because of counsel's misconduct in argument unless (a) the argument injects non-record evidence or encourages irrational inferences, such as appeals to prejudice or juror self-interest or emotion, (b) the argument was likely to have a significant effect on jury deliberations, and (c) the trial court failed to sustain an objection or take other requested curative action when the argument was in process. *State v. Perry*, Cuyahoga App. No. 84397, 2005-Ohio-27, ¶58, citing *State v. Maddox* (Nov. 4, 1982), Cuyahoga App. Nos. 44600 and 44608, ¶9-10.

{¶ 61} To some of the allegedly inappropriate comments, appellants failed to raise an objection. To these, appellants have waived all but plain error. To constitute plain error, the error must be obvious on the record,

palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 62} Appellants complain that counsel for the Clinic referred to appellants' attorney by name no less than 38 times during closing arguments. We review this claim for plain error since appellants failed to object to these references. Reference by name of an attorney rather than the name of the client is not grounds for a new trial. The instances where counsel's name was mentioned largely dealt with the way this attorney presented evidence. Counsel for the Clinic argued that appellants' trial counsel consistently mischaracterized the evidence. The Clinic's trial counsel stated that when appellants' counsel had experts read and interpret Dr. Carey's report, he did not have them read the section stating "if clinically indicated follow-up MRI may be helpful." Appellants' counsel also pointed out places in Jason's medical records where symptoms consistent with HSE could be found. However, appellees argued in closing arguments that these were taken out of

context and mischaracterized. These were comments on the evidence and the nature of the symptoms indicative of HSE. Defense counsel did not disparage the witnesses appellants called or personally attack appellants' counsel.

{¶ 63} In the case of *Thamann v. Bartish*, 167 Ohio App.3d 620, 2006-Ohio-3346, 856 N.E.2d 301, the First District remanded a case for a new trial based on inappropriate remarks that poisoned the entire proceedings. That court found "defense counsel consciously engaged throughout the trial in a pattern of misconduct that was designed to inflame the jury's passion and prejudice." Id. at ¶8. A pattern of inflammatory remarks persisted throughout the trial, attacking the witnesses and opposing counsel, and sought sympathy for the defendant. Id. at ¶41. The court ordered a new trial finding this was a pervasive tactical decision to "arouse the jury's passion and prejudice by repeatedly making improper remarks about the plaintiff, his counsel, and their expert witnesses. Defense counsel insinuated throughout his cross-examination of the plaintiff's witnesses that the witnesses and plaintiff's counsel were playing games. In his closing argument, he repeatedly told the jury that they had engaged in lies, manipulations, and half-truths in order to manipulate the jury into awarding the plaintiff a big verdict." Id. at ¶45.

{¶ 64} In the present case, the closing arguments of the appellees do mention appellants' counsel by name, but do not attack him to the extent seen

in *Thamann*. Also, many of these comments were made in response to statements made by appellants' counsel during his closing arguments. This court has previously held that comments made in direct response to arguments advanced by opposing counsel should not stand as a grounds for reversal. *Tewksbury v. Cacciacarro* (1957), 78 Ohio Law Abs. 193, 150 N.E.2d 504. See, also, *State v. Washington* (Dec. 24, 1987), Cuyahoga App. No. 53270.

{¶ 65} Counsel for Dr. Gopal did appeal to the jury's passions by stating, "Dr. Gopal does not deserve to be branded with a guilty verdict for the rest of his career." This statement was objected to, so we review it for an abuse of discretion. Of all the comments pointed to by appellants as prejudicial and improper, this one is troubling. However, this plea does not give rise to reversible error. "'[A] judgment will not be reversed on the grounds of misconduct in closing arguments unless the circumstances are of such reprehensible and heinous nature as to constitute prejudice.'" *Hinkle v. Cleveland Clinic Found.,*159 Ohio App.3d 351, 2004-Ohio-6853, 823 N.E.2d 945, ¶67, quoting *Hitson v. Cleveland* (Dec. 13, 1990), Cuyahoga App. No. 57741, citing *Plavcan v. Longo* (July 3, 1980), Cuyahoga App. No. 39964.

{¶ 66} This statement made by Dr. Gopal's attorney during closing arguments has no place in a civil trial, and we strongly caution against the advancement of similar comments in the future. The trial court should also

have sustained the timely objection to this statement.[6] However, this limited appeal to the sympathy of the jury and its misleading reference to a guilty verdict was not pervasive or overwhelming. In *Roetenberger*, supra, the First District summarized inappropriate statements of defense counsel: "Defense counsel made various assertions and drew inferences that were not supported by any evidence. Defense counsel painted Roetenberger, his counsel, and his witnesses as greedy, empty-hearted people without souls who were manipulating the lawsuit and 'branding' a good doctor all for the sake of money. Defense counsel went so far as to warn the jury that a verdict in favor of Roetenberger would 'affirm' that type of 'behavior in an American court.'" Id. at ¶11.

{¶ 67} In the present case, the isolated appeal made by Dr. Gopal's attorney does not taint the jury as clearly was the case in *Roetenberger*. Based on the evidence presented, as explained above, and after reviewing closing arguments and the jury instructions as a whole, we find there is little likelihood that the jury verdict would have been different. In light of the evidence presented, this assignment of error is overruled.

Manifest Weight

{¶ 68} Finally, appellants argue that the verdict for appellees is against the manifest weight of the evidence. It is well established that when some competent,

[6] The trial court did advise the jury that this was not a criminal case, but only in the context of jury unanimity. Tr. 1616.

credible evidence exists to support the judgement rendered by the trial court, an appellate court may not overturn that decision unless it is against the manifest weight of the evidence. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. The knowledge a trial court gains through observing the witnesses and the parties in any proceeding (i.e., observing their demeanor, gestures and voice inflections and using these observations in weighing the credibility of the proffered testimony) cannot be conveyed to a reviewing court by a printed record. *In re Satterwhite*, Cuyahoga App. No. 77071, 2001-Ohio-4137, citing *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13, 106 N.E.2d 772. In this regard, the reviewing court in such proceedings should be guided by the presumption that the trial court's findings were indeed correct. *Seasons Coal Co.*, supra. As the Ohio Supreme Court has stated, "it is for the trial court to resolve disputes of fact and weigh the testimony and credibility of the witnesses." *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178.

{¶ 69} The verdict in favor of the appellees is not against the manifest weight of the evidence in this case. Testimony was adduced that showed that Jason did not present with symptoms consistent with HSE. His fever was waxing and waning; he had no seizures or focal abnormalities;[7] he was eating, walking, and at times, playful and happy. These are not consistent with the classic symptoms of HSE — persistent

[7]There was a staring event that occurred at 5:30 a.m. on July 23, 1997, but this was of an unknown nature. Appellants claim it was a seizure, but several experts, including some called by appellants, stated they could not determine what this event was. The medical records indicate Jason appeared normal 30 minutes after the event was over.

lethargy, irritability, and fever; lack of orientation, and seizures. Since Dr. Carey's CT interpretation advised only that follow-up MRI may be helpful "if clinically indicated," the fact that it was not clinically indicated leads to the conclusion that Dr. Gopal did not fall below the applicable standard of care in his treatment of Jason.

{¶ 70} The manifest weight of the evidence also does not dictate that this court reverse the jury's determination in favor of the Clinic. Witnesses testified that reading Jason's CT study as normal was appropriate. While appellants' experts opined the opposite, conflicting expert testimony does not allow this court to conclude that the jury lost its way in finding for the Clinic. Dr. Stephen Pelton, appellants' expert witness, testified that Dr. Carey's interpretation of the CT scan was correct. Dr. Carey's report only advised that there was a subtle suggestion of hypodensity. While he testified that a neuroradiologist at the Clinic should have advised Dr. Sabella to order an MRI, other experts disagreed. Dr. Carey's report also does not comport with that conclusion. Dr. Sabella, the person responsible for ordering an MRI, indicated that one was not indicated based on Jason's symptoms. His medical records indicated his fever was steadily improving, he was alert, eating well, and playful, with interspersed periods of crying and lethargy.

{¶ 71} The jury did not clearly lose its way in finding for Dr. Gopal and the Clinic.

Judgment affirmed.

It is ordered that appellees recover from appellants 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, J., CONCURS;
MARY EILEEN KILBANE, A.J., DISSENTS

APPENDIX A

Appellants' assignments of error:

I. "The trial judge abused her discretion by allowing the defense to introduce, directly and indirectly, hearsay opinions about the 'normal' interpretation of the CT scan."

II. "A further abuse of discretion was committed when the trial judge permitted a defense expert to render a standard of care opinion which had not been disclosed in a Rule 21.1 compliant report and even though he had previously disclaimed any intention of doing so."

III. "The trial judge erred, as a matter of law, in denying plaintiff-appellants' motion for directed verdict against defendant-appellee, Cleveland Clinic Foundation, with respect to the unnamed neuroradiologist's violation of the standard of care."

IV. "The trial judge erred, as a matter of law, in furnishing a misleading jury charge which equated foreseeability with proximate cause and required a finding of probability."

V. "Plaintiffs were denied their fundamental right to a fair trial when the proceedings were skewed by defense counsels' incendiary closing remarks."

VI. “The jury’s defense verdict was contrary to the manifest weight of the evidence.”