[Cite as *Cox v. MetroHealth Med. Ctr. Bd. of Trustees*, 2015-Ohio-2950.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101673

JOSEPH COX, ET AL.

PLAINTIFFS-APPELLANTS

vs.

METROHEALTH MEDICAL CENTER BOARD OF TRUSTEES

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-08-656202

BEFORE: Kilbane, J., Celebrezze, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 23, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Plaintiffs-appellants, Joseph Cox ("Joseph"), a minor, and Mariann Cox ("Mariann"), appeal the trial court's judgment, rendered after the jury's verdict in their second trial, in favor of defendant-appellee, MetroHealth Medical Center Board of Trustees ("Metro"), on their medical malpractice claims.

{¶2} This appeal arises from a remand by this court in *Cox v. MetroHealth Med. Ctr. Bd. of Trustees*, 2012-Ohio-2383, 971 N.E.2d 1026 (8th Dist.), *discretionary appeal not allowed,* 133 Ohio St.3d 1490, 2012-Ohio-5459, 978 N.E.2d 910 ("*Cox I*"). The facts giving rise to both appeals are as follows.

{¶3} In April 2008, Joseph and his mother, Mariann (collectively referred to as "appellants"), filed a medical malpractice complaint against Metro, alleging that Metro, through its agents and employees, was negligent in the care it provided to Joseph hours after his birth in 1988. In their amended complaint filed in April 2011, appellants alleged that Metro's negligence caused severe bruising to Joseph's back, shoulder, and head, as well as bleeding in his brain. They further alleged that as a direct and proximate result of the negligence, Joseph sustained severe and permanent injuries, including significant cognitive and neurologic deficits. The matter proceeded to a jury trial in April 2011.

{¶4} At the conclusion of this trial, the jury rendered a verdict through the issuance of three separate jury interrogatories and a general verdict form. In the first

interrogatory, the jury found that Metro deviated from the standard of care and treatment of Joseph. In the second interrogatory, the jurors identified the specific acts or omissions constituting the deviation from the standard of care as follows:

> Standard of care was not met because it is a reasonable expectation to have a nurse or physician available while in the care of a hospital. Lack of record keeping or training, employee records, and employee responsibilities were not properly or accurately retained.

{¶5} In responding to the third interrogatory, six of the eight jurors answered "no" to the following: "if you found by a preponderance of the evidence that Metro deviated from the standard of care, do you find by a preponderance of the evidence that any such deviation proximately caused injury to Joseph Cox." The same six jurors signed the general verdict form in favor of Metro.

{¶6} Appellants appealed from this jury verdict to this court in *Cox I*. On appeal, appellants raised six assignments of error challenging the admission of certain portions of trial testimony by defense expert Dr. Joseph Volpe, M.D. ("Dr. Volpe"), the trial court's foreseeability and proximate jury instructions, the court's refusal to allow proximate cause opinions and rebuttal testimony from plaintiff expert Dr. Matt Likavec, M.D. ("Dr. Likavec"), and the trial court's decision to allow defense expert Dr. Richard Martin, M.D. ("Dr. Martin") to change his opinion. We reversed and remanded for a new trial finding that appellants should have been permitted to call Dr. Likavec in rebuttal and Dr. Martin should not have been allowed to change his opinion without submitting a supplemental report in violation of Civ.R. 26 and Loc.R. 21.1. *Id.*, 2012-Ohio-2383, 971 N.E.2d 1026, ¶ 35, 48. We further found that the trial court did not abuse its discretion

in admitting certain portions of Dr. Volpe's testimony, and the trial court properly instructed the jury on foreseeability and proximate cause. *Id.* at ¶ 54, 59, 66, and 70.

{¶7} Following our remand, the matter proceeded to a second jury trial in April 2014. The following evidence was established at the second trial.

{¶8} Joseph was born around midnight on October 20, 1988 at MetroHealth Hospital ("MetroHealth"). At approximately 11:00 a.m., when Joseph was 11 hours old, Cheryl Switzer, R.N. ("Switzer") conducted a newborn assessment. She noted on Joseph's chart that his skin was normal, and his head and neck were normal. However, she also noted the existence of a cephalohematoma (temporary swelling) and bruising on Joseph's head.

{¶9} After giving birth to Joseph, Mariann was moved to a regular hospital room. Joseph was brought to her room and placed in a bassinet beside her bed. Shortly thereafter, Mariann laid him down on her bed to change his diaper. She noticed that Joseph was "blue." Mariann picked up Joseph and handed him to a woman in the hall, whom she assumed was a MetroHealth nurse. This woman, who has never been identified, but Metro believes her to be a nurse's aide, took him down the hall to the nursery. About a minute later, another hospital employee emerged from the nursery and told Mariann that Joseph was fine. At that time, no one informed her that the unidentified nurse's aide administered back blows to Joseph.

{¶10} Barbara Dean, R.N. ("Dean") was the charge nurse for the nursery at MetroHealth that afternoon. The nurse's aide who gave Joseph the back blows advised

Dean that Joseph turned blue, and she delivered back blows for several seconds. Dean recorded this incident in Joseph's chart. Dean acknowledged that applying too much force through back blows could possibly injure a baby. Dean testified that the nurse's aides were responsible for feeding the babies and housekeeping duties. The nurse's aides were expected to call for more experienced help whenever there was a problem.

{¶11} Ruth Rama ("Rama"), a retired MetroHealth nurse's aide testified about the responsibilities of a nurse's aide at MetroHealth. She testified that nurse's aides generally assist with the feeding, bathing, and cleaning of the babies. She further testified that:

> [APPELLANTS' COUNSEL]: [I]f back blows or something were to be given, it was the nurse's responsibility to do back blows, not a nurse's aide?
>
> [RAMA]: The nurses, yeah.
> * * *
>
> [APPELLANTS' COUNSEL]: And you said before that the aides weren't trained to do that, right?
>
> [RAMA]: That year.
>
> [APPELLANTS' COUNSEL]: All right. And the nurse's aide in 1988, should have known, if they needed help with a baby for a blue spell or something like that, to call out to a doctor or nurse to get that, right?
>
> [RAMA]: Yes.
>
> * * *
>
> [APPELLANTS' COUNSEL]: * * * Am I correct that as a nurse's aide, * * * back in 1988, you were not trained to give back blows —
>
> [RAMA]: No.

> [APPELLANTS' COUNSEL]: — right? That would be under any circumstances? You weren't trained to give them, correct?
>
> [RAMA]: Yes, not only — similarly you could help a baby, anybody could give back blows if there's an emergency. * * * In an emergency situation, if you found a baby blue, I mean turning blue, you could do something to, you know, stop the baby, help the baby.
>
> [APPELLANTS' COUNSEL]: Okay. [I]f you were in the middle of the afternoon, there would be nurses on the unit with you, right?
>
> [RAMA]: Just always nurses in the nursery.
>
> [APPELLANTS' COUNSEL]: Always around. So you're not trained to do it, but there are nurses around in an emergency situation?
>
> [RAMA]: In an emergency, emergency situation, if you found a baby blue, I mean turning blue, you could do something to, you know, stop the baby, help the baby.
>
> [APPELLANTS' COUNSEL]: Let me rephrase it this way. Regardless of an emergency situation, you weren't trained specifically to give blows as an aide, correct?
>
> [RAMA]: Correct.

{¶12} Nancy Wright-Esber, R.N. ("Wright-Esber"), a nurse practitioner, testified that she has worked at MetroHealth for 30 years. She examined Joseph after his blue episode. She testified that she conducted an exam of Joseph with all his clothes off. She testified that his vitals were stable and his color was "pink." He appeared alert and active. His front fontanel was soft and flat. Approximately an hour later, Joseph began showing jitteriness and twitching. On the morning of October 21, 1988, Joseph suffered a major seizure and was placed on a ventilator. Joseph was then transferred to MetroHealth's Neonatal Intensive Care Unit ("NICU"). A complete assessment of Joseph revealed that the back of his head was bruised. MetroHealth nurse Nancy Palmer,

R.N. ("Palmer") testified that there was a sizable bruise on the "whole back" of Joseph's head. She later denied that she ever described or charted the bruise as being on the "whole back" of Joseph's head. In addition, his fontanel was now full and bulging. Joseph was later diagnosed with a brain injury caused by an intraventricular hemorrhage.

{¶13} At the second trial, appellants argued that the administration of back blows caused the intraventricular hemorrhage. As it did in the first trial, Metro argued at this trial that the intraventricular hemorrhage was caused by a vein thrombosis (blood clot), which was unrelated to the back blows. Metro additionally argued that Joseph's bruising existed before any back blows were administered and the blue episode justified the administration of back blows.

{¶14} Dr. Robert Lerer, M.D. ("Dr. Lerer"), associate clinical professor of pediatrics at Children's Hospital in Cincinnati and University of Cincinnati College of Medicine, testified for the appellants. Dr. Lerer testified that Joseph sustained trauma from the slaps to his back, and this trauma eventually led to the hemorrhage in Joseph's brain.

{¶15} Dr. Likavec, a neurosurgeon at MetroHealth, testified that he treated Joseph in the NICU at MetroHealth.[1] He acknowledged that it would never be appropriate for a healthcare provider "to deliver back blows to a child so vigorously that it causes bruises on the child[.]" He stated that such practices would be below the standard of care. Dr.

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[1]Dr. Likavec's testimony, which consists of two depositions, was presented to the jury during appellants' case-in-chief.

Likavec testified that Joseph sustained a germinal matrix bleed, which most likely occurred prior to any medullary thrombosis. Dr. Likavec stated it was possible that the germinal matrix could have ruptured at or about the time of the back blows. He agreed with Dr. Volpe, who testified for Metro, that an increase in cerebral blood flow or blood pressure could induce a germinal matrix hemorrhage. When asked by appellants' counsel if a germinal matrix bleed could be caused "[i]f a child was bruised from force," Dr. Likavec responded "if they're bruised bad enough, sure [and] [i]f you had an awful heavy-handed back blower." Dr. Likavec opined as to the proximate cause of Joseph's brain damage as follows:

> [APPELLANTS' COUNSEL]: I want you to assume for me that the back blows that were delivered by the nursing assistant caused a large bruise on the back of Joey's head, his back and his shoulder, it was described as covering the — almost the entire area by the nurse that recorded the NICU assessment, and the question that I have is, under that assumption, is it more likely than not that that was the cause of Joey's germinal matrix bleed?
>
> [DR. LIKAVEC]: Assuming severe back blows and severe bleeding, that more likely than not that could be the cause of it.

{¶16} Appellants also called Dr. Orlando Carter Snead, M.D. ("Dr. Snead"), head of neurology at the Hospital for Sick Children in Toronto. He testified that Joseph sustained damage to his germinal matrix, which is an extremely fragile portion of a baby's brain. Dr. Snead testified that the back blows to Joseph's back caused an increase in his heart rate and blood pressure, which caused bleeding in his brain. He further testified that Joseph suffered a germinal matrix hemorrhage, which ruptured and

expanded into his brain. Dr. Snead opined that Joseph would have been neurologically normal if he had not received the back blows from the unidentified nurse's aide.

{¶17} In its defense, Metro called Dr. Martin, M.D., professor of pediatrics at Case Western Reserve University; Dr. Max Wiznitzer, M.D. ("Dr. Wiznitzer"), a pediatric neurologist at Rainbow Babies & Children's Hospital; Dr. Robert Zimmerman, M.D. ("Dr. Zimmerman"), a pediatric neuroradiologist from Children's Hospital in Philadelphia; and Dr. Volpe, a professor of pediatric medicine at Harvard Medical School.

{¶18} Dr. Martin testified Joseph had a blood clot, which caused a brain bleed. This brain bleed caused a seizure, which manifested itself as a blue spell. Dr. Wiznitzer testified that Joseph was born with a blood clotting disorder (coagulopathy), which caused a venous thrombosis (blood clot) and produced the hemorrhage. He further testified that the back blows did not cause Joseph's brain hemorrhage. Dr. Zimmerman reviewed the imaging studies and concluded that a pre-existing coagulopathic state was responsible for Joseph's brain injury. Dr. Zimmerman did not see any evidence of trauma from the back blows or any excessive force. Dr. Martin also attributed the hemorrhage to the possible coagulopathy. Dr. Volpe testified that he observed clots in the medullar veins in Joseph's CT and ultrasound scans. He testified that these clots can cause the capillaries and veins to burst. He did not believe that the back blows caused the hemorrhage. Dr. Martin and Dr. Wiznitzer also explained that the clot caused the

blood to back up and rupture into the ventricle and that the clot precipitated the chain of events that led to Joseph's brain injury.

{¶19} At the conclusion of the trial, seven jurors answered "no" to the following two interrogatories: 1. "Did Plaintiffs establish more likely than not that the nurse's aide failed to comply with the standard of care by not calling for help when Joey Cox was noted to be having a blue spell?" 2. "Did Plaintiffs establish more likely than not that the nurse's aide failed to comply with the Standard of Care in the manner in which she responded to Joey's Blue Spell?" The same seven jurors then signed a general verdict form in favor of Metro. Based on these findings, the trial court entered a verdict in Metro's favor.

{¶20} Thereafter, on May 19, 2014, appellants filed a motion for new trial, arguing that defense expert Dr. Wiznitzer violated the separation of witnesses order by reviewing Dr. Volpe's trial deposition before testifying, which he then falsely denied during cross-examination. Metro opposed, sought to strike the arguments that appellants raised, and demanded sanctions against appellants' counsel. On June 19, 2014, the trial court denied appellants' motion for new trial and overruled Metro's motion to strike and motion for sanctions.

{¶21} Appellants now appeal, raising the following four assignments of error for review.

Assignment of Error One

> The trial judge abused her discretion by permitting the introduction of unqualified and incompetent testimony to the effect that the standard of care allowed nurses aides to resuscitate newborns.

Assignment of Error Two

> The trial judge's refusal to order a new trial as a result of a violation of an order for a separation of witnesses qualifies as an abuse of discretion.

Assignment of Error Three

> A further abuse of discretion was committed when the trial judge irreparably impaired [appellants'] case by furnishing a legally erroneous foreseeability charge that was not justified by the evidence.

Assignment of Error Four

> The jury's finding that the unidentified nurse's aide fully complied with the governing standard of care was contrary to the manifest weight of evidence.

Testimony of Wright-Esber

{¶22} In the first assignment of error, appellants argue the trial court abused its discretion when it allowed Wright-Esber to furnish opinion testimony based upon Rama's testimony that nurse's aides should administer back blows in emergency situations.

{¶23} We recognize that "[a] trial court has broad discretion in admitting evidence. Absent an abuse of that discretion and a showing of material prejudice, a trial court's ruling on the admissibility of evidence will be upheld." *Fackelman v. Micronix*, 8th Dist. Cuyahoga No. 98320, 2012-Ohio-5513, ¶ 17, citing *State v. Martin*, 19 Ohio St.3d 122, 483 N.E.2d 1157 (1985).

{¶24} In the instant case, Wright-Esber testified that the nurse's aides were supposed to seek help if they had a concern about an infant. Metro's counsel asked Wright-Esber if it was appropriate for nurse's aides to deliver back blows to provide stimulation to an infant who has turned blue. Appellants' counsel objected to this question, and the trial court immediately sustained the objection. Not long thereafter, Metro's counsel asked Wright-Esber the following on redirect examination:

> [METRO'S COUNSEL]: [Appellants' counsel] asked you about Ruth Rama's testimony.
>
> [WRIGHT-ESBER]: Correct.
>
> [METRO'S COUNSEL]: Did you hear Ruth Rama say that in the case of an emergency, the nursing assistant can given back blows?
>
> [APPELLANTS' COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [WRIGHT-ESBER]: Yes.
>
> [METRO'S COUNSEL]: Do you agree with that?
>
> [WRIGHT-ESBER]: Absolutely. They must stimulate that baby. It's the first thing they should do.

{¶25} Appellants argue that their objection should have been sustained because Rama repeatedly testified that in 1988 the nurse's aides were not trained to provide medical care to an infant with a blue spell. By overruling their objection, appellants maintain the trial court allowed Wright-Esber to interject an opinion that had previously been held to be inadmissible. They further maintain that this error denied them their fundamental right to a fair trial.

{¶26} In the instant case, Rama testified that nurse's aides were not trained to give back blows, but could give back blows in an emergency situation, such as a "blue baby." Specifically, she stated:

> [APPELLANTS' COUNSEL]: * * * Am I correct that as a nurse's aide, * * * back in 1988, you were not trained to give back blows —
>
> [RAMA]: No.
>
> [APPELLANTS' COUNSEL]: — right? That would be under any circumstances? You weren't trained to give them, correct?
>
> [RAMA]: Yes, not only — similarly you could help a baby, anybody could give back blows if there's an emergency. * * * In an emergency, emergency situation, if you found a baby blue, I mean turning blue, you could do something to, you know, stop the baby, help the baby.
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> [APPELLANTS' COUNSEL]: Okay. But if a nurse's aide, if you were in the middle of the afternoon, there would be nurses on the unit with you, right?
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> [RAMA]: Just always nurses in the nursery.
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> [APPELLANTS' COUNSEL]: Always around. So you're not trained to do it, but there are nurses around in an emergency situation?
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> [RAMA]: In an emergency, emergency situation, if you found a baby blue, I mean turning blue, you could do something to, you know, stop the baby, help the baby.
>
> [APPELLANTS' COUNSEL]: Let me rephrase it this way. Regardless of an emergency situation, you weren't trained specifically to give blows as an aide, correct?
>
> [RAMA]: Correct.

{¶27} In addition to Rama's testimony, several witnesses testified that a "blue baby" could constitute an emergency situation. Dr. Lerer, Dr. Snead, and Nurses

Switzer, Dean, and Wright-Esber all agreed that a "blue baby" could potentially be a life-threatening condition. Moreover, Dr. Lerer, Dr. Martin, and Nurses Switzer and Dean additionally testified, without objection by appellants, regarding the appropriateness of the aide's administration of back blows in Joseph's situation.

{¶28} Thus, based on the foregoing, we cannot conclude the trial court abused its discretion in allowing Wright-Esber's testimony as to the appropriateness of the aide's administration of back blows.

{¶29} Accordingly, the first assignment of error is overruled.

Motion for a New Trial

{¶30} In the second assignment of error, appellants argue that the trial court should have granted their motion for a new trial because Metro violated the separation of witnesses order when its witness, Dr. Wiznitzer, testified at trial that he did not previously review Dr. Volpe's trial testimony. Appellants did not discover "this error" until after trial, which was when they reviewed Dr. Wiznitzer's testimony.

{¶31} We review a trial court's decision on a motion for a new trial, pursuant to Civ.R. 59, for an abuse of discretion. *Zappola v. Rock Capital Sound Corp.*, 8th Dist. Cuyahoga No. 100055, 2014-Ohio-2261, ¶ 65, citing *Rybak v. Main Sail, LLC*, 8th Dist. Cuyahoga No. 96899, 2012-Ohio-2298, citing *McWreath v. Ross*, 179 Ohio App.3d 227, 2008-Ohio-5855, 901 N.E.2d 289 (11th Dist.).

{¶32} Under Civ.R. 59(A), a new trial may be granted upon any of the following grounds:

> (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> * * *
>
> (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.
>
> In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

{¶33} In support of their argument, appellants cite to two violations of the separation of witnesses order, one of which was remedied at the trial court. The first violation occurred when Dr. Zimmerman testified in response to the testimony of Dr. Patrick D. Barnes, M.D. ("Dr. Barnes") that there was nothing in the films he reviewed that was inconsistent with the view that the most likely cause of Joseph's brain hemorrhage was the back blows. During Dr. Zimmerman's testimony, he stated that he was in possession of the exhibits Dr. Barnes utilized. A sidebar was then conducted, during which Metro's counsel stated Dr. Zimmerman was not apprised of any of Dr. Barnes's testimony. After a lengthy discussion, the trial court determined that Metro violated the separation of witnesses order.[2] The jury was then advised that those exhibits

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[2]Metro raises a cross-assignment of error in which it argues the trial court erred in this finding. We note that Metro did not file a notice of appeal from the judgment of the trial court. R.C. 2505.22 provides in relevant part that: "[i]n connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order,

were provided to Dr. Zimmerman by defense counsel in violation of a separation of witnesses order.

{¶34} The second violation, which appellants raised in their motion for a new trial, concerns the trial testimony of Dr. Wiznitzer regarding Dr. Volpe. Appellants maintain that Dr. Wiznitzer "falsely testified at trial when he claimed he had not previously reviewed the trial (evidentiary) deposition of [Metro's] fellow expert witness, [Volpe]." During trial, Dr. Volpe's videotaped deposition was presented to the jury. Dr. Volpe acknowledged that he personally did not review Joseph's chart. He based his opinions on the CT scans, ultrasound scan, and reports of the other experts.

{¶35} Appellants claim of the violation of the separation of witnesses occurred when Dr. Wiznitzer testified with respect Dr. Volpe's understanding of Joseph's situation. Dr. Wiznitzer testified to the following on redirect examination:

> [METRO'S COUNSEL:] And if — I don't know if you reviewed [Dr. Volpe's] deposition lately, but are you aware that he had full breadth and knowledge of the clinical facts of this case?

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judgment, or decree is reversed in whole or in part." Such assignments of error raised by appellees who have not filed a notice of appeal may only be "'used by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sword to destroy or modify that judgment.'" *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 32, quoting *Parton v. Weilnau*, 169 Ohio St. 145, 171, 158 N.E.2d 719 (1959).

Here, Metro's argument is raised as an attempt to modify the trial court's ruling. This argument is more of a "sword" used by Metro to change the judgment of the trial court, and not the "shield" anticipated in *Parton* and *Glidden*. Accordingly, because Metro failed to properly file a notice of cross-appeal, this court cannot address its cross-assignment of error. *See Colonial Life & Acc. v. Leitch*, 9th Dist. Summit No. 24263, 2008-Ohio-6616, ¶ 16-19.

> [DR. WIZNITZER:] Oh, yes, yeah. According to the deposition, he knew all the facts of the case, the key points, he knew about the episode, the cyanotic — blue spell, let's call it a blue spell, that the baby had, that was followed by the jitteriness and evolving seizures. He knew that all.

{¶36} Dr. Wiznitzer testified on cross-examination that he did not review Dr. Volpe's trial deposition. Therefore, appellants claim that the only way Dr. Wiznitzer could have known that Dr. Volpe appreciated the "jitteriness and evolving seizures" was to review Dr. Volpe's trial deposition testimony, which would have been a violation of the separation of witnesses order.

{¶37} Appellants brought to the court's attention two instances where they believed Metro violated the separation of witnesses order. After much discussion, the trial court agreed with the appellants in the first instance. The court, however, did not find a violation in the second instance. We agree with the trial court's decision.

{¶38} A review of the record reveals that while Dr. Volpe did not personally read Joseph's medical chart, he still had extensive knowledge of Joseph's situation. At his discovery deposition, he testified that he reviewed the expert reports of Dr. Martin, Dr. Wiznitzer, and Dr. Likavec, which all detailed Joseph's symptoms, including jitteriness and seizures. Dr. Martin's report indicated that Joseph was jittery at 2:00 p.m. on October 20, 1988, and at 2:00 a.m. on October 21, 1988, Joseph was in the NICU and was exhibiting seizures and jitteriness. Dr. Wiznitzer's report indicated that Joseph was jittery after his blue spell and experienced seizures "x 2-5 min apart." Dr. Likavec indicated that after Jospeh's blue spell, he had more "difficulty with jitteriness, seizures, low glucose." Because Dr. Volpe had a broad understanding of Joseph's situation and

reviewed multiple expert reports independently referencing Joseph's jitteriness and seizures, we cannot say that Dr. Wiznitzer had information that he otherwise would not have known. Therefore, the trial court did not abuse its discretion when it denied appellants' motion for a new trial.

{¶39} Accordingly, the second assignment of error is overruled.

Jury Instructions

{¶40} In the third assignment of error, appellants argue that the trial court irreparably impaired their case when it read a legally erroneous foreseeability instruction to the jury.

{¶41} As we stated in *Cox I*, the giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal unless the record demonstrates an abuse of discretion. *Id.*, 2012-Ohio-2383, 971 N.E.2d 1026, ¶ 62, citing *Prejean v. Euclid Bd. of Edn.*, 119 Ohio App.3d 793, 804-805, 696 N.E.2d 606 (8th Dist.1997), citing *State v. Wolons*, 44 Ohio St.3d 64, 541 N.E.2d 443 (1989). "An inadequate jury instruction that misleads the jury constitutes reversible error." (Citations omitted.) *Groob v. KeyBank*, 108 Ohio St.3d 348, 355, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 32.

{¶42} In *Cox I*, the trial court instructed the jury as follows:

> So, in determining whether ordinary care was used, you must consider whether [MetroHealth's] nursing assistant should have foreseen, under the attending circumstances, that the natural and probable result of an act or omission on her part would cause some injury to the plaintiff.

> The test[ ] for foreseeability is not whether the nursing assistant should have foreseen the injury in its precise form, but whether in light of all the circumstances, the reasonable prudent person would have anticipated that an injury was likely to result to someone from their acts or omissions.

Id. at ¶ 64. Appellants argued that the use of the word "likely" in the foreseeability charge created a heightened and unfair burden for them to establish the duty element of their medical malpractice claim. *Id.* at ¶ 66. Noting that this court has previously rejected this argument, we found the jury instruction proper. *Id.*

{¶43} In the instant case, the appellants again challenge the trial court's jury instruction on foreseeability. Over the appellants' objection, the trial court read the following instruction to the jury:

> In determining whether ordinary care was used, you must consider whether MetroHealth's nursing assistant should have foreseen under the attending circumstances that the natural and probable result of an act or omission on her part would cause some injury to [Joseph].
>
> The test[ ] for foreseeability is not whether the nursing assistant should have foreseen the injury in its precise form, but whether in light of all the circumstances, the reasonable, prudent person would have anticipated that an injury was likely to result to someone from their acts or omissions.

{¶44} Appellants' objection was based on *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 2012-Ohio-5154, 985 N.E.2d 548 (9th Dist.) ("*Cromer I*"), a Ninth District Court of Appeals case that had ordered a new trial as a result of an improper foreseeability jury instruction. In *Cromer*, the Cromers brought a medical malpractice action against Children's Hospital Medical Center of Akron, alleging that their son Seth's death was caused by the negligence of multiple hospital employees. Seth was admitted into the emergency room one week after being treated for an ear infection. He was

transferred to the pediatric intensive care unit (PICU) a few hours later where he was intubated. Seth's condition improved for a few hours, but then his blood pressure dropped and he went into cardiac arrest. He died soon after.

{¶45} The Cromers' expert agreed that the interventions and treatment that the emergency room and PICU physicians had ordered were appropriate. However, the expert did not agree that the timing of the intubation was appropriate. The hospital's expert, on the other hand, opined that the benefit of intubation at the time Seth was in the PICU outweighed the risk that he would not survive the process of intubation.

{¶46} After the close of evidence, the hospital requested an instruction on the foreseeability of harm, using language from the general negligence provisions of the Ohio Jury Instructions. The Cromers objected to the instruction, arguing that an instruction to the jury on foreseeability is required only in a regular negligence claim and is not part of the Ohio Jury Instructions for medical negligence. The Cromers further argued that the instruction was not supported by the evidence, because there was no testimony that the doctors did not know that the failure to appropriately treat a patient in shock could lead to death. The trial court overruled the objection and instructed the jury on the elements of negligence as they applied to the hospital and its employees. The court also gave an instruction on foreseeability as follows:

> In deciding whether ordinary care was used, you will consider whether the defendant should have foreseen under the attending circumstances that the natural and probable result of an act or failure to act would cause Seth Cromer's death.

> The test for foreseeability is not whether the defendant should have foreseen the death of Seth Cromer precisely as it happened. The test is whether under all the circumstances a reasonably cautious, careful, prudent person would have anticipated that death was likely to result to someone from the act or failure to act.
>
> If the defendant by the use of ordinary care should have foreseen the death and should not have acted, or if they did act, should have taken precautions to avoid the result, the performance of the act or the failure to act to take such precautions is negligence.

Cromer v. Children's Hosp. Med. Ctr. of Akron, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 39 ("*Cromer II*").

{¶47} After the jury completed its deliberations, the trial court entered judgment in favor of the hospital. The Cromers moved for a new trial, which the trial court denied. The Cromers then appealed, arguing that the trial court committed reversible error by including an instruction on foreseeability when it instructed the jury on the hospital's standard of care. The Ninth District Court of Appeals found merit in the Cromers' jury-instruction argument and reversed. The court found that the question of foreseeability of harm was irrelevant to a determination of a medical professional's standard of care. *Cromer I*, 2012-Ohio-5154, 985 N.E.2d 548, ¶ 27. The *Cromer I* court held that a physician's duty is established by the physician-patient relationship alone with no consideration of foreseeability. *Id.* at ¶ 24. The court concluded that the trial court's instruction on the foreseeability of the risk of harm during medical treatment constituted an incorrect statement of law that required reversal. *Id.*

{¶48} The hospital appealed to the Ohio Supreme Court to determine the propriety of including a foreseeability instruction when instructing a jury on the standard of care for

medical professionals. *Cromer II* at ¶ 1. The court noted that "[f]oreseeability is generally relevant to a determination of whether a physician has exercised reasonable care in understanding or determining the existence of a risk of harm associated with a particular course of treatment." *Id.* at ¶ 2; paragraph one of the syllabus. "[A]nd a correct, general statement of the law regarding the standard of care or the breach of that standard includes the element of foreseeability." *Id.* at ¶ 28; paragraph one of the syllabus.

{¶49} The *Cromer II* court then looked at the factual propriety of including a foreseeablility instruction and the propriety of jury instructions as a whole. The court held that

> in the context of an established physician-patient relationship, consideration of foreseeability is unnecessary to the determination whether the patient is someone to whom the physician owes a duty of care. But the issue of foreseeability is relevant to a physician's standard of care in treating a particular patient, and separate consideration of the foreseeability of harm is appropriate if there is a question for the jury regarding whether the physician knew or should have known that a chosen course of treatment involved a risk of harm.

Id. at ¶ 44.

{¶50} The court found that

> [t]here was no question for the jury in this case regarding the foreseeability of the risk of harm because the medical professionals were aware that their chosen chronology of treatment of Seth's shock carried with it some risk of harm. Thus, the instruction regarding the foreseeability of harm was not necessary in light of the facts and arguments presented in this case.

Id. at ¶ 34.

{¶51} Having determined that the foreseeability jury instruction was unnecessary, the court then considered the effect of the instruction on the Cromers' case. *Id.* The *Cromer II* court noted that

> the appellate court's determination of error in this case was based not on particular word choices in the trial court's foreseeability instruction, but on the inclusion of the concept of foreseeability, as a whole, in jury instructions on medical negligence. And by requiring reversal based on the trial court's mere inclusion of a foreseeability instruction, the appellate court erroneously presumed that the error was prejudicial[ ] instead of determining whether there was a clear indication on the face of the record that the instruction prejudiced the Cromers' substantial rights.

Id. at ¶ 41, citing *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 461-462, 1999-Ohio-309, 709 N.E.2d 162. The court concluded that "the record in this case does not establish that the unneeded jury instruction on foreseeability prejudiced the Cromers' substantial rights, and the appellate court's reversal was not justified." *Id.* at ¶ 44.

{¶52} In the instant case, appellants argue the foreseeability instruction was unsupported by the evidence and should have never been furnished. They maintain the foreseeability instruction would only have been justified if a witness claimed the nurse's aide had no reason to believe the back blows could cause Joseph's injuries. We disagree for the reasons previously set forth in *Cox I,* in which we found the exact jury instruction proper, and in light of *Cromer II*.

{¶53} As the *Cromer II* court stated, "the issue of foreseeability of harm, if factually relevant in a medical-negligence case, would have to be considered in the context of 'recognized standards * * * provided through expert testimony,' just like any other element of a medical-negligence claim." *Id.* at ¶ 40, quoting *Bruni v. Tatsumi*, 46

Ohio St.2d 127, 131-132, 346 N.E.2d 673 (1976). "Foreseeability of harm is relevant to a physician's standard of care, and a correct, general statement of the law regarding the standard of care or the breach of that standard includes the element of foreseeability." *Id.* at paragraph one of the syllabus.

{¶54} Here, there is a factual dispute as to whether the back blows caused Joseph's injuries and whether Metro knew or should have known of the risk of harm. The crux of appellants' argument was that the administration of back blows by the nurse's aide caused Joseph intraventricular hemorrhage. Metro argued that the intraventricular hemorrhage was caused by a vein thrombosis (blood clot), which was unrelated to the back blows, Joseph's bruising existed before any back blows were administered, and the blue episode justified the administration of back blows. Whereas in *Cromer II*, the treating physicians admitted to having knowledge of the risks of delaying intubation and weighed them against the benefits of performing other precautionary measures prior to intubation. Thus, there was no question for the jury in *Cromer II* regarding the foreseeability of the risk of harm because the treating physicians were aware that their chosen chronology of treatment of Seth's shock carried with it some risk of harm.

{¶55} Therefore, based on the facts and arguments presented in the instant case, we find the foreseeability jury instruction was proper.

{¶56} Accordingly, third assignment of error is overruled.

Manifest Weight of the Evidence

{¶57} In the fourth assignment of error, appellants argue the jury's finding that the unidentified nurse's aide complied with the standard of care is against the manifest weight of the evidence.

{¶58} In *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17, the Ohio Supreme Court held that the standard of review for manifest weight of the evidence set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, applies in civil as well as criminal cases. In *Thompkins*, the Ohio Supreme Court described manifest weight of the evidence as follows:

> Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief."

(Emphasis omitted.) *Id.* at 387, quoting *Black's Law Dictionary* 1594 (6th Ed.1990).

{¶59} In assessing whether a jury's verdict is against the manifest weight of the evidence, we examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a new trial ordered. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶60} Moreover, we are guided by a presumption that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d

1273 (1984). This presumption arises because the trier of fact had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id.* Thus, judgments supported by competent, credible evidence going to all the material elements of a case must not be reversed as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. "[T]o the extent that the evidence is susceptible to more than one interpretation," we will "construe it consistently with the jury's verdict." *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318, ¶ 22 (8th Dist.), citing *Ross v. Ross*, 64 Ohio St.2d 203, 414 N.E.2d 426 (1980).

{¶61} Appellants argue that the jury lost its way when it found that the nurse's aide had fully complied with the standard of care even though MetroHealth's nurses testified that the aides were trained and expected to summon help whenever they experienced a problem, such as a blue spell. They further argue that Metro failed to present any evidence that the standard of care in 1988 allowed nurse's aides to administer back blows when an infant is in distress.

{¶62} However, the jury, as trier of fact, was in the best position to judge the credibility of witnesses and resolved any conflicts in the evidence. Nurses Switzer, Dean, and Wright-Esber all agreed that a "blue baby" could potentially be a life-threatening condition and stimulation such as back blows is appropriate. Nurse's Aide Rama testified while nurse's aides were not trained to give back blows, in an

emergency situation, such as a blue spell, it is appropriate to give back blows to help the baby. Additionally, Dr. Lerer, Dr. Snead, and Dr. Martin testified regarding the appropriateness of the nurse's aide's administration of back blows in Joseph's situation.

{¶63} Dr. Martin testified that Joseph had a blood clot, which caused his brain to bleed. This brain bleed caused a seizure, which manifested itself as a blue spell. Dr. Wiznitzer testified that Joseph was born with a blood clotting disorder that caused a blood clot and produced the hemorrhage. He further testified the back blows did not cause Joseph's brain hemorrhage. Dr. Volpe testified that he observed clots in the medullar veins in Joseph's CT and ultrasound scans, which caused the capillaries and veins to burst. Dr. Martin and Dr. Wiznitzer also explained that the clot caused the blood to back-up and rupture into the ventricle, and that the clot precipitated the chain of events that led to Joseph's brain injury.

{¶64} As unfortunate as the appellants' situation is, we are faced with two separate jury trials that both resulted in verdicts for Metro. Even after the issues from the first trial were remedied, the second jury also chose to find in Metro's favor. As a result, we do not find that the jury's verdict is against the manifest weight of the evidence.

{¶65} Therefore, the fourth assignment of error is overruled.

{¶66} Judgment is affirmed.

It is ordered that appellee recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the 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.

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MARY EILEEN KILBANE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
ANITA LASTER MAYS, J., CONCUR