[Cite as *Toth v. The Oberlin Clinic*, 2002-Ohio-2211.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

RICHARD TOTH, etc.	C.A. No. 01CA007891
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
THE OBERLIN CLINIC, INC., et al.	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellees	CASE No. 99CV124271

DECISION AND JOURNAL ENTRY

Dated: May 8, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

{¶1} Appellant Richard P. Toth has appealed from a judgment entered in the Lorain County Court of Common Pleas pursuant to a jury verdict in favor of Appellees Oberlin Clinic, Inc. ("Clinic") and Wilma Jeanne McKibben, M.D., and from an order denying Appellant's motion to set aside the verdict and/or motion for a new trial. This Court affirms.

I

{¶2} Rosemarie Toth ("Decedent") was a patient under the care and treatment of Dr. McKibben, who at all times during her treatment of Decedent was an employee of the Clinic. Dr. McKibben identified a condition known as polymyalgia rheumatica ("PMR") as the possible cause of Decedent's symptoms. Based on this diagnosis, Dr. McKibben treated Decedent with the steroid Prednisone.

{¶3} Decedent's health thereafter began to deteriorate. A surgical procedure necessitated by Decedent's bowel condition was followed by a staph infection, which precipitated Decedent's death in June 1996.

{¶4} Appellant, administrator of Decedent's estate, filed this medical malpractice action against Dr. McKibben and the Clinic. After dismissing his original complaint pursuant to Civ.R. 41(A), Appellant filed a second complaint against the same defendants alleging that Dr. McKibben breached the standard of care in her diagnosis and treatment of Decedent, proximately causing Decedent's injuries and death. The case was tried before a jury, which returned a verdict in favor of Appellees. Appellant moved the trial court to set aside the verdict and judgment and/or for a new trial. The trial court denied the motion. Appellant has timely appealed, asserting five assignments of error which this Court has rearranged to facilitate review.

I

{¶5} Assignment of Error Number One

{¶6} The trial court erred when it allowed into evidence, over objections, expert opinions of facts pertinent to issues in the case which were not expressed upon probability or actuality.

{¶7} Assignment of Error Number Two

{¶8} The trial court erred when it allowed into evidence, over objections, expert opinions which established a subjective standard of care.

{¶9} In his first assignment of error, Appellant has argued that the trial court erred in admitting into evidence expert testimony that was not qualified as being based upon a reasonable degree of medical probability. Specifically, Appellant has contended that the testimony of Appellees' experts with respect to the applicable standard of care was properly admissible only if stated in terms of a reasonable degree of medical probability. In his second assignment of error, Appellant has averred that the expert testimony produced by Appellees did not set forth the standard of care of the community of physicians practicing internal medicine when presented with a patient such as Decedent. Rather, Appellant has asserted, Appellees' experts established a subjective standard of care based on their own experiences.

{¶10} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion is more than an error of judgment; it instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio

St.3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶11} In order to establish medical malpractice, a plaintiff must show by a preponderance of the evidence that a physician acted or failed to act in a manner that a physician of ordinary skill, care, and diligence would have acted or failed to act under like or similar conditions or circumstances, and that such acts or failures to act were the direct and proximate cause of the plaintiff's injury. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, paragraph one of the syllabus. Proof of the recognized standard of care in the medical community must be established by expert testimony. Id. at 131-132. Likewise, a physician's conformity with or departure from the recognized standard of care is ordinarily determined from expert medical testimony, unless the physician's lack of care or skill is "so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it." Id. at 130. Furthermore, expert testimony with respect to proximate cause must be stated in terms of probability. *Stinson v. England* (1994), 69 Ohio St.3d 451, paragraph one of the syllabus; *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 369.

{¶12} In the case sub judice, both parties presented expert testimony regarding the applicable standard of care and Dr. McKibben's conformity or nonconformity therewith. Appellant has argued that the testimony presented by

Appellees' experts was erroneously admitted because their opinions were not expressed in terms of probability. Appellees, on the other hand, have contended that only expert opinions on *causation* in medical malpractice actions, and not on the standard of care, must be expressed to a reasonable degree of medical probability.

{¶13} This Court has previously stated that "there is no requirement that an expert opinion on the appropriate standard of care must be stated in terms of probability." *Proctor v. Patel*, 9th Dist. No. 3173-M, 2002-Ohio-1381 at ¶14; see, also, *Paul v. Metrohealth St. Luke's Med. Ctr.* (Oct. 22, 1998), 8th Dist. No. 71195, 1998 Ohio App. LEXIS 4964, at *36-37. The necessity for stating in terms of probability expert testimony regarding causation, but not the standard of care, is clear from a comparison of these two elements of a medical malpractice claim. Expert testimony with respect to proximate cause must be based on probability because numerous causes, including but not limited to a physician's negligence, may have contributed to a plaintiff's injury. An opinion based on probability is necessary to express whether the injury was more likely than not caused by the physician's breach of the standard of care.

{¶14} Unlike causation, however, the standard of care and the physician's deviation from or conformity with the standard need not be differentiated from other contributing influences on the basis of probability. The expert simply articulates the standard of care, and opines that the physician's conduct either

conformed with or deviated from that standard. Qualifying expert testimony concerning the standard of care as being expressed to a reasonable degree of medical probability does not clarify (and may even obfuscate) the objectivity of the standard and the culpability of the physician's conduct. Accordingly, the trial court did not err in admitting Appellees' expert testimony regarding the standard of care, when that testimony was not based on a reasonable degree of medical probability.

{¶15} In addition, Appellant has argued that Appellees' experts testified as to what they themselves did or would have done during the course of their respective practices, rather than what the community of physicians practicing internal medicine would probably have done when presented with a patient such as Decedent. This Court's review of the record, however, shows that the testimony of Appellees' experts regarding the standard of care and Dr. McKibben's compliance with the standard overwhelmingly addressed the appropriateness of treatment of patients such as Decedent by the pertinent medical community. The few references cited by Appellant in which Appellees' experts briefly referred to their own experiences did not transform the standard of care from an objective to a subjective standard. Appellant's first and second assignments of error are without merit.

{¶16} Assignment of Error Number Five

{¶17} The trial court erred when it denied the Appellant's motion to set aside the verdict and judgment and/or for a new trial.

{¶18} In his fifth assignment of error, Appellant has argued that the trial court erred in denying his post-trial motion to set aside the verdict and judgment and/or for a new trial. Appellant has contended that the trial court erred by failing: 1) to set aside the verdict and judgment for Appellees, 2) to enter judgment for Appellant on the issue of Dr. McKibben's breach of the standard of care, and 3) to order a new trial solely on the issues of proximate cause and damages.

{¶19} Our standard of review for a trial court's denial of a motion for judgment notwithstanding the verdict is the same as that applicable to a motion for a directed verdict. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275.

> **{¶20}** Motions for directed verdict test the legal sufficiency of evidence, not its weight or the credibility of witnesses. As a result, our review of the lower court judgment is *de novo*. Further, in evaluating whether directed verdicts are merited, courts decide if "'there exists any evidence of substantial probative value in support of [the claims of the party against whom the motion is directed]. *** A motion for a directed verdict raises a question of law because it examines the materiality of the evidence, as opposed to the conclusions to be drawn from the evidence.'" *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119-120.

(Citations omitted.) *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 257-258, appeal not allowed (2000), 90 Ohio St.3d 1472. Where there is substantial, competent evidence upon which reasonable minds may reach different

conclusions, the motion must be denied. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347.

{¶21} Civ.R. 59(A) provides:

> **{¶22}** A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
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> **{¶23}** (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;
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> ***
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> **{¶24}** (6) The judgment is not sustained by the weight of the evidence; ***
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> **{¶25}** (7) The judgment is contrary to law;
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> ***
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> **{¶26}** (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application[.]

{¶27} This Court reviews a trial court's ruling on a motion for new trial under an abuse of discretion standard. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, paragraph one of the syllabus. "'[A]buse of discretion,' in relation to the [disposition] of a motion for new trial[,] implies an unreasonable, arbitrary or unconscionable attitude upon the part of the court." *Poske v. Mergl* (1959), 169 Ohio St. 70, 75.

{¶28} Appellant has maintained that the admission of testimony presented by the expert witnesses for Appellees entitled Appellant to judgment notwithstanding the verdict on the issue of Dr. McKibben's breach of the standard

of care, and/or a new trial. In particular, Appellant has contended that Appellees' experts failed to adduce competent and admissible testimony with respect to the standard of care and Dr. McKibben's compliance with the standard. Appellant has contested the competency of Appellee's expert testimony in this regard on two bases: 1) the testimony was not based on probability, and 2) the testimony did not establish an objective standard of care.[1] Accordingly, Appellant has argued, the trial court should have granted his motion to set aside the verdict, entered judgment in favor of Appellant on the issue of Dr. McKibben's breach of the standard of care, and granted a new trial solely on the issue of proximate cause and damages.

{¶29} This Court has already determined that the trial court did not abuse its discretion in admitting into evidence the testimony by Appellees' experts, with respect to the applicable standard of care, where that testimony was not expressed in terms of probability. Given our disposition of Appellant's first and second assignments of error, we cannot conclude that the trial court erred in denying Appellant's motion to set aside the verdict and enter judgment in his favor, or

[1] Appellant has conceded that the expert testimony presented by Appellees on the issue of proximate cause was competent and admissible, because it was expressed in terms of probability. Based on the jury's responses to interrogatories, however, Appellant has maintained that the jury never reached the issue of proximate cause because it did not find that Dr. McKibben breached the standard of care.

abused its discretion in denying Appellant's motion for a new trial. Appellant's fifth assignment of error is without merit.

{¶30} Assignment of Error Number Three

> **{¶31} The trial court erred when it did not allow the Appellant to rehabilitate his expert witness by reference to the same learned treatise used by the Appellees to impeach the witness.**

{¶32} In his third assignment of error, Appellant has argued that the trial court erred in not allowing Appellant to rehabilitate his expert witness by reading from a learned treatise. Appellant has contended that once Appellees impeached Appellant's expert by reading from the treatise during cross examination, the trial court's prohibition of Appellant's use of the treatise on redirect examination constituted an abuse of discretion.

{¶33} Prior to the adoption of Evid.R. 706, which became effective July 1, 1998, the use of learned treatises at trial was governed by rules developed under the common law. *Freshwater v. Scheidt* (1999), 86 Ohio St.3d 260, 267. In Ohio, the common law rule was that "textbooks and other learned treatises are considered hearsay, may not be used as substantive evidence, and are specifically limited to impeachment purposes only."[2] *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 110, citing Gianelli, Ohio Evidence Manual

[2] The Ohio Rules of Evidence differ in this respect from the federal rules, which allow treatises to be used as substantive evidence as an exception to the

(1989), Section 702.06, Author's Comment. Evid.R. 706 codified Ohio's common law rule allowing use of learned treatises for the limited purpose of impeachment. *Freshwater*, 86 Ohio St.3d at 267 fn. 2.

{¶34} A significant aspect of Appellant's malpractice claim against Appellees concerned the quantity of Prednisone that Dr. McKibben prescribed to Decedent. Appellant's contention at trial was that Dr. McKibben prescribed excessive amounts of Prednisone to Decedent over an extended period of time, which resulted in Decedent's severe injuries and ultimate death.

{¶35} In support of this claim, Appellant presented the expert testimony of Dr. Baraf. Dr. Baraf testified that a diagnosis of PMR could only properly be made after observing a patient's quick and dramatic amelioration of muscle pain in response to initial dosages of between ten and twenty milligrams of Prednisone per day. Dr. Baraf testified that after an initial diagnosis of PMR had been made, the dosage of Prednisone should be reduced to approximately five milligrams per day.

{¶36} During Appellees' cross examination of Dr. Baraf, counsel for Appellees read from Klippel's Medical Textbook that the recommended initial dosage for PMR was between ten and one hundred milligrams of Prednisone per day. On redirect examination, Appellant wanted to rehabilitate Dr. Baraf by reading a passage from Klippel's explaining that the recommended initial dosage

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hearsay rule. See Fed.Evid.R. 803(18); *Stinson v. England* (1994), 69 Ohio St.3d 451, paragraph two of the syllabus.

of Prednisone for a diagnosis of PMR was between ten and twenty milligrams per day. The trial court prohibited Appellant's use of Klippel's for this purpose, stating that the treatise could only be used to impeach the witness.

{¶37} Appellant has acknowledged that there is no Ohio authority supporting the use of a learned treatise on redirect examination to rehabilitate a witness that was impeached with the treatise. Appellant has instead analogized to the situation where a witness is impeached with a prior inconsistent written statement. Appellant has asserted that in that circumstance, portions of the prior inconsistent written statement that are consistent with the witness' trial testimony, or explain any apparent inconsistencies, can be used to rehabilitate the witness.

{¶38} This Court is unpersuaded by Appellant's creative analogy. The law in Ohio is clear that learned treatises are hearsay, and as such are inadmissible as substantive evidence. Consequently, the use of statements in treatises is limited to purposes of impeachment where the expert either relied on the treatise in reaching his opinion, or the treatise is established as reliable authority by admission or testimony of the witness or other expert, or by judicial notice. Evid.R. 706.

{¶39} The record indicates that Appellant tried to rehabilitate his impeached expert by questioning Dr. Baraf on redirect and eliciting an explanation of his prior testimony in light of the passage from Klippel's read by Appellees. On redirect, Dr. Baraf explained that much of the medical literature discusses PMR and other conditions together. Dr. Baraf explained that the diagnostic value

of an initial dosage of between ten and twenty milligrams of Prednisone consists in the patient's dramatic amelioration of symptoms in response to the low dosage. Dr. Baraf further testified that a dosage of between ten and one hundred milligrams of Prednisone also would relieve many of the symptoms of PMR; the higher dosage, however, would also alleviate numerous other acute pains not associated with PMR. In other words, the diagnostic value of the prescription would decrease in proportion to the increase in dosage, because symptoms caused by non-PMR conditions would also respond to the higher dosage.

{¶40} Based on the foregoing, Appellant tried to rehabilitate the impeached Dr. Baraf on redirect examination, by attempting to reconcile his testimony with the passage from Klippel's read by Appellees. The jury was free to believe all, part, or none of this testimony. *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470. Under the Ohio Rules of Evidence, however, Appellant was not entitled to read from the treatise on redirect as part of his rehabilitation of Dr. Baraf. Accordingly, the trial court did not err in prohibiting Appellant from reading from the treatise. Appellant's third assignment of error is not well taken.

{¶41} Assignment of Error Number Four

{¶42} The trial court erred when it instructed the jury that a physician is not liable for an honest error or mistake in judgment.

{¶43} In his fourth assignment of error, Appellant has argued that the trial court erred in giving its instruction to the jury. Appellant has averred that the

instruction given by the trial court changed the standard of care applicable to Dr. McKibben from an objective to a subjective standard.

{¶44} The precise language of a jury instruction is within the discretion of the trial court. *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 690. When reviewing jury instructions:

> **{¶45}** [A]n appellate court reviews the instructions as a whole. If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been mislead. Moreover, 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.

(Citations omitted.) *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410.

{¶46} The standard of care applicable in a medical malpractice action was set forth by the Ohio Supreme Court in *Bruni*, supra. In *Bruni*, the court stated:

> **{¶47}** Under Ohio law, as it has developed, in order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct result of such doing or failing to do some one or more of such particular things.

Id. at 131. The foregoing standard is "generally considered to be objective, rather than subjective, applying equally to all physicians under like or similar conditions

or circumstances." *Riley v. Northeast Family Health Care* (Apr. 9, 1997), 9th Dist. No. 17814, at 5-6, appeal not allowed (1997), 79 Ohio St.3d 1483.

{¶48} As part of its instruction to the jury in the case sub judice, the trial court stated: "A physician is not liable for what is commonly called an honest error or mistake in judgment unless he was negligent, as I have defined that term for you." Appellant has contended that this portion of the instruction prejudicially undermined the objectivity of the standard of care — i.e., the standard of care owed to a patient such as Decedent by the community of physicians practicing internal medicine. Appellant has asserted that the trial court's instruction to the jury "also validated, ratified, and/or emphasized the trial court's earlier errors" in admitting Appellees' expert testimony regarding the standard of care which was not based upon probability, and which also changed the standard of care to a subjective one.[3] Appellant has thus urged us to follow the result reached in *Kurzner v. Sanders* (1993), 89 Ohio App.3d 674, wherein it was held that a trial court's instruction that the defendant physician was not liable for "an honest error or mistake in judgment" in the absence of negligence or a departure from the standard of care constituted reversible error.

{¶49} This Court has previously held that "in the context of a jury charge which comports with the *Bruni* standard, we do not find that a reference to

[3] See this Court's discussion of Appellant's first and second assignments of error, supra.

'judgment' necessarily distorts the instruction as a whole that it does not clearly and fairly express the applicable law." *Riley*, supra at 12. *Riley* relied on numerous precedents which determined that language concerning "judgment" in a jury instruction, when considered together with a proper *Bruni* charge, does not constitute prejudicial error. See, e.g., *Yeager v. Riverside Methodist Hosp.* (1985), 24 Ohio App.3d 54, 56; *Faber v. Syed* (July 7, 1994), 8th Dist. No. 65359, 1994 Ohio App. LEXIS 2976; *Akers v. Levitt* (Jan. 27, 1992), 2nd Dist. No. 12471, 1992 Ohio App. LEXIS 300. In *Riley*, we distinguished *Kurzner* because the *Kurzner* opinion gave no indication as to whether or not the charge to the jury contained the *Bruni* standard of care.

{¶50} In the instant case, Appellant has not contended that the trial court failed to give the proper *Bruni* charge regarding the applicable standard of care. In fact, the record reveals that the trial court gave to the jury a verbatim *Bruni* charge. Taking into consideration the instruction as a whole, this Court concludes that the instruction fairly and correctly states the law applicable to the evidence presented at trial. Appellant's fourth assignment of error is without merit.

III

{¶51} Appellant's assignments of error are overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

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

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

BETH WHITMORE
FOR THE COURT

SLABY, P. J.
CARR, J.
CONCUR

APPEARANCES:

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