[Cite as *Nist v. Mitchell*, 2015-Ohio-4032.]

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

BRANDON NIST, et al.	C.A. No. 27160
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RICHARD MITCHELL, D.O., et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2010 12 8237

DECISION AND JOURNAL ENTRY

Dated: September 30, 2015

HENSAL, Presiding Judge.

{¶1} Plaintiffs-Appellants, Brandon Nist, Elizabeth Nist, and Steven Nist, appeal from the judgments of the Summit County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} On October 19, 1996, Mrs. Nist went into labor with her first child, Brandon. She was admitted to Akron City Hospital at 9:00 a.m. at the direction of her treating obstetrician, Appellee, Dr. Richard Mitchell, after her water broke earlier that morning. When Mrs. Nist presented to the hospital, she was in active labor although the baby was "unengaged" in her pelvis and at the minus three station. To be "unengaged" means that the widest part of the baby's head has not passed through the rim of the mother's pelvis on his descent down the birth canal. Some medical professionals use a progressive scale from minus three to plus three to describe the baby's station and progress down the birth canal to delivery. A minus three

indicates that the baby is high up in the mother's pelvis while a plus three indicates that the baby is ready to be delivered.[1]

{¶3} During the first stage of her labor, Mrs. Nist was cared for by the hospital medical residents and nurses although Dr. Mitchell testified that he was on-call at the hospital on that day and stopped in her room to greet her.[2] At 3:40 p.m., Mrs. Nist entered the second stage of labor and was ready to start pushing. She pushed for approximately one and one-half hours without making any progress in bringing the baby down the birth canal and closer to delivery.

{¶4} At 5:10 p.m., Dr. Mitchell examined Mrs. Nist and determined that the baby was in an occiput posterior ("OP") position. A baby can position himself in various ways during childbirth. The most common position is occiput anterior ("OA") which occurs when the baby presents with his head down and his face facing his mother's back. The OP position occurs when the baby's face is facing his mother's abdomen. This is also commonly called the "sunny-side up" position. Dr. Mitchell testified that approximately 10 percent of his deliveries involved a baby in the OP position. One of the Appellants' medical experts, Dr. Borow, testified that the OP position only occurs in five percent of all deliveries. According to Dr. Borow, babies who descend the birth canal in the OP position are "notoriously known to be more difficult to deliver" because they require an additional two centimeters in order to navigate their mother's bony pelvis due to the placement of their head. Dr. Borow further testified that babies born in the OP

[1] One of the Appellants' medical experts, Dr. Lawrence Borow, testified that, in 1988, an organization recommended that doctors should use a progressive scale from minus five to plus five to measure the baby's progress. Appellants do not argue that Dr. Mitchell's use of a three-point scale, in and of itself, violated the requisite standard of care.

[2] Because Dr. Mitchell did not have an independent recollection of Mrs. Nist's delivery, he testified based on what his customs and practices were in 1996.

position have a greater risk for caput (soft tissue swelling), molding (where the bones of the skull overlap), and birth trauma.

{¶5} At the 5:10 p.m. examination, Dr. Mitchell also determined that the baby was still at the minus three station despite the fact that a first-year medical resident performed an earlier examination and wrote that the baby was at the zero station. Dr. Mitchell testified that he believed the resident misjudged the baby's station due to the presence of caput and molding. By feeling for a suture line, which is where two bones in the head meet, or an ear, according to Dr. Mitchell, one can accurately determine the baby's position despite caput and molding.

{¶6} As a result of this examination, Dr. Mitchell performed a manual rotation of the baby to an OA position. He testified that he would have remained in Mrs. Nist's hospital room for approximately 10 to 15 minutes to monitor the baby's reaction to the procedure and continue to monitor the progression of labor over the next 30 minutes to determine if the baby was making progress in his descent. If the baby had not made any progress in his descent as a result of the rotation, Dr. Mitchell would have then recommended a Caesarean Section ("C-section"). According to Dr. Mitchell, however, he re-examined Mrs. Nist at 5:50 p.m. and determined that the baby had descended further. Due to the progress the baby made in moving down the birth canal, he decided to continue monitoring Mrs. Nist to see if she could deliver vaginally.

{¶7} After allowing Mrs. Nist to continue to push, Dr. Mitchell was called to her room to deliver the baby at 7:02 p.m. He used a vacuum to assist in delivering the baby as Mrs. Nist was exhausted after pushing for a total of three hours and 15 minutes. A vacuum delivery entails placing a suction cup on the baby's skull and using a pump to create suction to pull the baby the rest of the way down the birth canal. Dr. Mitchell also directed a medical resident to apply fundal pressure as Mrs. Nist was unable to effectively push due to her exhaustion. Fundal

pressure entails someone forcibly pushing the top part of the uterus, called the fundus, to mimic the mother's expulsive force in pushing during a contraction. With one pull of the vacuum, the baby was brought down the birth canal to a plus three station where Dr. Mitchell cut a longer episiotomy to allow him to be delivered at 7:16 p.m. Dr. Mitchell's delivery note indicated that Brandon was born in the OP position.

{¶8} The nurses noted that Brandon had bruising and an abrasion on his forehead and scalp. He also had low blood sugar. A CT scan performed several days after Brandon's birth revealed that he suffered a skull fracture during his birth. Specifically, he was diagnosed with a depressed fracture of the left parietal bone. At its deepest, Nathan's skull was depressed approximately five to 10 millimeters. The scan indicated an area of hyperdensity in Brandon's brain which, according to one of the Appellants' experts, indicates a pooling of blood. Mass effect, or pressure on the brain, was also noted. Despite this diagnosis, Brandon was not prescribed any treatment and was discharged from the hospital on October 21, 1996.

{¶9} Mrs. Nist testified that Brandon developed normally until he was approximately 15 months old when his language failed to progress. Brandon was diagnosed with learning and speech disorders that the Appellants argued renders him permanently disabled. Appellants' experts opined that his present conditions were caused by his skull fracture. They theorize that, at the time of delivery, the baby had yet to clear his mother's bony ischial spines as his true station was concealed by the caput and molding. The ischial spines are the narrowest part of the mother's pelvis. Accordingly, his skull was fractured as he was forcibly delivered via the vacuum and fundal pressure. Appellees dispute this theory. Their experts maintain that the injury occurred during the first stage of labor when the baby's unengaged skull repeatedly pushed against his mother's uterus during contractions. Appellees further argue that Nathan's

conditions are hereditary and point to the fact that his sister also had difficulty with speech and reading.

{¶10} Mr. and Mrs. Nist, individually and on behalf of Brandon, sued Dr. Mitchell, his employer, Paragon Health Assoc., Inc. ("Paragon"), and Summa Health System. The complaint asserted claims for medical malpractice, loss of consortium, lack of informed consent, and that Civil Rule 10 was unconstitutional.[3] Prior to trial, Appellants and Summa Health System reached a settlement and the suit against them was dismissed. The matter then proceeded to a multi-week jury trial against the remaining parties, Dr. Mitchell and Paragon. Appellants dismissed their informed consent claim part way through trial. The jury found, by a preponderance of the evidence, that Dr. Mitchell did not deviate from the standard of care in his care and treatment of Brandon and rendered a verdict in favor of the Appellees.

{¶11} Appellants appeal from the trial court's denial of their request to remove a juror who was accused of misconduct and the inclusion of different methods and customary practices jury instructions. Appellants raise two assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL JUDGE ABUSED HIS DISCRETION, TO PLAINTIFF-APPELLANTS' CONSIDERABLE DETRIMENT, BY REFUSING TO IMMEDIATELY REMOVE A JUROR WHO HAD CONDUCTED HER OWN RESEARCH IN VIOLATION OF THE COURT'S INSTRUCTIONS.

{¶12} In their first assignment of error, the Appellants argue that the trial court erred when it refused to dismiss a juror who allegedly looked up the definition of certain medical

[3] It appears from the record that Appellants did not pursue the unconstitutionality claim at all during the pendency of the case. The trial court, however, resolved the claim in its final judgment entry when it granted judgment in favor of the defendants "on all issues herein."

terms. Appellants also argue that the trial court further erred when it refused their request to voir dire the entire panel to ascertain whether anyone else heard the juror state that she had looked up the terms. We disagree.

{¶13} We must first address the applicable standard of review. While Appellants' assignment of error states that the trial court abused its discretion in refusing to dismiss the contested juror, the substance of their argument suggests that the trial court erred as a matter of law in its application of the correct legal standard concerning juror misconduct. Their argument is premised on their contention that "prejudice is presumed from a credible allegation of juror misconduct and must be rebutted by the party opposing the request for removal." *See State v. Spencer*, 118 Ohio App.3d 871, 873 (8th Dist.1997), citing *State v. Phillips*, 74 Ohio St.3d 72, 88 (1995). The trial court, however, determined that the allegation of juror misconduct was unfounded. Accordingly, we review the trial court's actions for an abuse of discretion. *See State v. Gunnell*, 132 Ohio St. 3d 442, 2012-Ohio-3236, ¶ 29. We "will not reverse the trial court unless it has handled the alleged juror misconduct * * * in an 'unreasonable, arbitrary, or unconscionable' manner." *State v. Hessler*, 90 Ohio St.3d 108, 116 (2000), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). This Court may not substitute its judgment for that of the trial court when applying the abuse of discretion standard. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶14} In the present case, the trial court warned the jurors on numerous occasions throughout the trial not to perform any independent research. At some point in the trial, alternate juror number nine informed the court's bailiff that he overheard juror number five remark that

she had researched the terms "OP" and "AP"[4] on her computer. On October 7, 2013, after several days of trial, the court inquired of juror number five outside the presence of the rest of the jurors concerning the alleged remark. The exchange occurred as follows:

> COURT: We received information that you indicated to one or more of the jurors that you had looked up some medical definitions in the computer. Does that sound familiar?
>
> JUROR: No, I didn't.
>
> COURT: So you haven't - -
>
> JUROR: I don't remember saying that to anyone.
>
> COURT: Okay. Maybe somebody overheard it and didn't get the story right, but have you been getting on the computer looking up any information?
>
> JUROR: No, no, I have not.

The parties' attorneys were given an opportunity to ask the juror follow–up questions, which both sides declined to do.

{¶15} There was no additional discussion on the record about the alleged juror misconduct until three days later, on October 10, 2013, when the trial court inquired of juror number nine regarding his allegations. According to juror number nine, juror number five was sitting in front of him in the jury room when she made the remark. He testified that, at the time he overheard her, she was "mumbling" and "not talking to anybody." Juror number nine was uncertain of the exact date this incident occurred, but believed it happened early in the trial. Juror number nine was unconcerned about the comment until he realized that it could indicate she was researching other topics concerning the trial. Accordingly, he sought legal advice from

[4] It is unclear from the record whether the reference to "AP" is a typographical error or whether juror number nine really meant "OA," or occiput anterior, since that term was consistently used throughout the trial.

an attorney at his church who advised him to inform the court about what he witnessed. When asked whether any of the other jurors may have also overheard the comment, juror number nine testified: "I can't say for sure whether or not she was talking to just anyone or just in general * * * when she came in. She was standing and I was sitting down, so there probably could have been some others that overheard it. But I'm not really certain. I really am not certain." All of the attorneys were given the opportunity to ask juror number nine any additional questions.

{¶16} The next day, on October 11, 2013, Appellants argued that juror number five should be removed because juror number nine was more credible than juror number five. Appellees opposed the request. The trial court denied Appellants' request "for the reason we're not sure she did it and it seems pretty harmless if she did[.]"

{¶17} On October 15, 2013, the Appellants filed a written motion to exclude juror number five. Appellees filed a written response opposing the request. The trial court deferred its decision on the motion until after closing arguments as it wanted to review the submitted briefs. Appellants also proposed that, if the trial court was not going to immediately dismiss juror number five, it should voir dire the entire jury individually to determine if anyone else heard the alleged comments. The trial court reiterated its position that the matter was deferred until after closing arguments.

{¶18} After closing arguments, a separate issue was brought to the trial court's attention when one of the jurors indicated that he was scheduled to leave for vacation in less than two days. The trial court indicated that it would continue to delay its ruling on Appellants' motion to remove juror number five pending additional information on the vacationing-juror issue. The judge indicated that "[t]he greatest concern might be whether we have enough jurors, not the other concerns."

{¶19} The following day, the trial court overruled the motion to exclude juror number five "for the reasons that I already put on the record. I'm also concerned we might not have enough jurors * * *." The judge further indicated that "[i]t wasn't very serious misconduct and we are not even sure it's true." Appellants next renewed their request to question all of the jurors concerning whether or not they overheard juror number five's alleged comments or whether she had discussed her alleged research with anyone else. The trial court again denied the request. The judge stated that "the juror you're giving a lot of credibility to said that he overheard her and she wasn't talking to anybody, she was kind of mumbling to herself. * * * Because I think it would draw more attention to it than solve anything." The Appellants properly preserved their objection to the court's ruling on the record.

{¶20} When analyzing a case of alleged juror misconduct, the trial court must first determine whether the misconduct actually occurred. *State v. Thomas*, 9th Dist. Summit No. 26893, 2014-Ohio-2920, ¶ 33. The court may rely on a juror's testimony when making that determination. *See State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 114. "The [United States] Supreme Court clearly teaches that hearings on the issue * * * 'will frequently turn upon testimony of the juror in question' * * *.'" *Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, at ¶ 30, quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982), fn. 7. "The trial court [is] entitled to believe or disbelieve all or part of the [jurors'] statements * * *" in determining whether there was juror misconduct. *State v. Morris*, 9th Dist. Summit No. 25519, 2011-Ohio-6594, ¶ 32. *See also State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus ("[T]he credibility of the witnesses are primarily for the trier of the facts."). Further, the trial judge is in the best position to ascertain the nature of the alleged jury misconduct and to fashion the appropriate

remedy if the conduct did occur. *State v. Wharton*, 9th Dist. Summit No. 23300, 2007-Ohio-1817, ¶ 25.

{¶21} Under the facts of this case, we cannot conclude that the trial court abused its discretion in refusing to remove juror number five from the panel. The issue was one of credibility which is within the province of the trial court judge who sits in the best position to make such a determination. While juror number nine was certain he identified the correct offending juror, juror number five denied both that she made the statement and that she conducted any independent research. There was, therefore, no definitive evidence that juror misconduct occurred. The judge stated as much when he indicated that he was not certain the allegation was true. While Appellants suggest that the judge minimized the seriousness of the allegation, such an argument belies the fact that the judge was not convinced the misconduct occurred. Further, while both parties discuss whether it was necessary for the Appellants to prove they were prejudiced as a result of the trial court's refusal to remove juror number five, it is not necessary for this Court to make such a determination as the trial court was not convinced that misconduct had occurred. *Thomas*, 2014-Ohio-2920, at ¶ 33.

{¶22} We further conclude that the trial court did not abuse its discretion in refusing to voir dire the entire jury about the issue. As discussed above, the trial court found that the allegation of juror misconduct was unsubstantiated. Accordingly, the trial court's concern that it would draw unnecessary attention was valid. Accordingly, Appellants' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE JURORS WERE MISLED AS TO THE ACTUAL REQUIREMENTS OF OHIO LAW, AND RENDERED AN INDEFENSIBLE VERDICT, AS A RESULT OF THE TRIAL COURT'S FAILURE TO FURNISH PROPER INSTRUCTIONS.

{¶23} Appellants argue in their second assignment of error that the trial court erred in giving the jury instructions on different methods and customary practices. We disagree.

{¶24} Ohio Civil Rule 51(A) states that:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record.
>
> On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

{¶25} Appellees submitted proposed jury instructions that included instructions on both different methods and customary methods. Appellants objected to both instructions on the basis that Dr. Mitchell's usage of the vacuum and fundal pressure violated the standard of care. Appellees argued that both instructions were proper as the Appellants presented evidence that Dr. Mitchell should have recommended and performed a different method (i.e. a C-section) during Brandon's delivery. The trial court agreed with the Appellees and instructed the jury on both different and customary methods.

{¶26} "A trial court must give jury instructions that correctly and completely state the law." *Auer v. Paliath*, 140 Ohio St.3d 276, 2014-Ohio-3632, ¶ 12, quoting *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 32. Requested instructions should be given if they correctly state the law as applied to the facts in the case and if reasonable minds might reach the

conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991). "An inadequate jury instruction that misleads the jury constitutes reversible error." *Auer* at ¶ 12, quoting *Groob* at ¶ 32.

{¶27} The giving of jury instructions is within the trial court's sound discretion. *Van Scyoc v. Huba*, 9th Dist. Summit No. 22637, 2005-Ohio-6322, ¶ 6. This Court reviews the trial court's decision under an abuse of discretion standard. *Id*. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

Different Methods Instruction

{¶28} The jury in this case was provided with the following instruction:

> Although other physicians might have used a method of diagnosis, treatment, or procedure different from that used by Dr. Mitchell, this circumstance will not by itself prove that Dr. Mitchell was negligent. You shall decide whether the diagnosis, treatment or procedure used by Dr. Mitchell in this case was in accordance with the required standard of care.

The Ohio Supreme Court has held that "[i]n medical malpractice cases, the 'different methods' charge to the jury is appropriate only if there is evidence that more than one method of diagnosis or treatment is acceptable for a particular medical condition." *Pesek v. Univ. Neurologist Assn., Inc.*, 87 Ohio St.3d 495 (2000), syllabus. The purpose of such an instruction is to inform the jury that, because alternative methods can be used, the selection of one method over another is not, per se, negligence. *Id*. at 498. "The instruction is grounded 'on the principle that juries, with their limited medical knowledge, should not be forced to decide which of two acceptable treatments should have been performed by a defendant physician.'" *Id*., quoting Dailey, *The Two Schools of Thought and Informed Consent Doctrines in Pennsylvania: A Model for Integration*, 98 Dickinson L.Rev. 713 (1994).

{¶29} A significant amount of evidence was presented at trial regarding whether Dr. Mitchell had violated the standard of care. The primary dispute in this case centered on the position of Brandon's head when Dr. Mitchell applied the vacuum and fundal pressure. Appellants' experts opined that Dr. Mitchell must have misjudged the position of Brandon's head because the injuries Brandon sustained would have been unlikely to have been present if Dr. Mitchell's records were correct. The parties agreed that, if Brandon was in the position alleged by Appellants' experts that the vacuum and fundal pressure would have been inappropriate.

{¶30} If Appellants had limited their theory of negligence to Dr. Mitchell misdiagnosing Brandon's position or attempting a vacuum-assisted delivery based upon this misdiagnosed position, it is likely that the different methods instruction would have been inappropriate. Appellants, however, also presented evidence that the mere application of fundal pressure fell below the standard of care. Dr. Jelsem testified that fundal pressure should not have been applied in conjunction with the vacuum, listing it as one of the examples of how Dr. Mitchell's care fell below the proper standard. Dr. Jelsem's testimony about the fundal pressure was contradicted by Dr. Belfort, however, who testified that the use of fundal pressure in conjunction with the vacuum was reasonable and that "there's medical evidence to show that fundal pressure is perfectly accepted by institutional review boards, that there are studies that have been done * * * on the use of fundal pressure with vacuum extractors and have been approved by ethical committees and institutional review boards." Although this dispute was secondary to the primary dispute—the positioning of Brandon's head—it, nevertheless, was presented by Appellants as a factor in assessing Dr. Mitchell's negligence.

{¶31} In *Branch v. Cleveland Clinic Found.*, 134 Ohio St.3d 114, 2012-Ohio-5345, the Supreme Court upheld a trial court's decision to give the jury a different-methods instruction. *Id*. at ¶ 29. The parties in *Branch* disputed the best method of performing brain surgery. "In fact, the parties' experts raised a number of questions regarding how different planning and procedures could have prevented the stroke, all of which required the jury to determine whether another medical approach would have been preferable." *Id*. at ¶ 27. Similarly, in this case, the jury was presented with two different theories regarding the use of fundal pressure. Accordingly, the trial court did not err in providing the jury with a different methods instruction.

Customary Practice Instruction

{¶32} The jury in this case was provided with the following instruction:

> The customary or routine method of diagnosis, treatment, or procedure may be considered by you along with all of the other facts and circumstances in evidence. Although a particular method may be customary, usual or routine, this circumstance will not by itself prove that * * * method to be within the standard of care. You shall decide whether the method of diagnosis, treatment, or procedure used by Dr. Mitchell was in accordance with the required standard of care.

Appellants argue that this instruction is not a correct statement of the law on the applicable standard of care in a medical negligence case.

{¶33} The instruction in this case mirrors the instruction found in *Ohio Jury Instructions*, CV Section 417.01(5) (Rev. Aug. 11, 2010). "[T]he instructions found in the Ohio Jury Instructions are not mandatory, [but] 'are recommended instructions based primarily upon case law and statutes[.]'" *State v. Howard*, 9th Dist. Summit No. 26897, 2014-Ohio-1334, ¶ 20, quoting *State v. Armstrong*, 9th Dist. Summit No. 24479, 2009-Ohio-5941, ¶ 13.

{¶34} The comment to Section 417.01(5) includes a citation to the Ohio Supreme Court case of *Ault v. Hall*, 119 Ohio St. 422 (1926). The *Ault* case involved a medical malpractice

action against a surgeon for leaving a sponge in his patient. The surgeon argued in part that he was not liable because it was common custom and practice to rely upon the "sponge nurse" to correctly account for every sponge that was used during the procedure. *Ault* at 425. The court recognized that,

> [w]ith rare exceptions the courts are quite uniform in declaring that conformity to a practice or usage is regarded as matter proper for the consideration of the jury in determining whether or not sufficient care has been exercised in a particular case. * * * The overwhelming weight of authority supports the general rule that customary methods or conduct do not furnish a test which is conclusive, or fix a standard. * * * Custom will not justify a negligent act or exonerate from a charge of negligence.

Id. at 437.

{¶35} The seminal case of *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976) provides that,

> [i]n evaluating the conduct of a physician * * * charged with malpractice, the test is whether the physician, in the performance of his service, either did some particular thing or things that physicians * * *, in that medical community, of ordinary skill, care and diligence would not have done under the same or similar circumstances, or failed or omitted to do some particular thing or things which physicians * * * of ordinary skill, care and diligence would have done under the same or similar circumstances. He is required to exercise the average degree of skill, care and diligence exercised by members of the same medical specialty community in similar situations.

Bruni at 129-130. Further, "[t]he standard of care for a physician * * * of a board certified * * * specialty should be that of a reasonable specialist practicing medicine * * * in that same specialty * * *." *Id*. at paragraph two of the syllabus.

{¶36} In the present case, the trial court instructed the jury on the standard of care as follows:

> The existence of a physician/patient relationship places on the physician the duty to act as a physician of reasonable skill, care, diligence would have acted under like or similar conditions or circumstances. This is known as the standard of care. The standard of care is to do those things which a reasonably careful physician would do and refrain from doing those things which a reasonably careful physician would not do. * * * The standard of care for a physician in the practice

> of a specialty is that of a reasonable specialist practicing medicine exercising reasonable skill, care, and diligence under like and similar circumstances * * *. A specialist in any branch has the same standard of care as all other specialists in that branch.

{¶37} Appellants argue that *Promen v. Ward*, 70 Ohio App.3d 560 (10th Dist.1990) supports their contention that the jury instruction in this case was an improper characterization of the appropriate standard of care. Despite the fact that the surgeon in *Promen* admittedly operated on the wrong ruptured disk in the plaintiff's back, the jury returned a defense verdict. The trial court's only instruction on the standard of care was

> [T]hat the law recognizes that there may be different opinions and methods of rendering medical care in a particular situation. The law does not favor one recognized method or procedure to the exclusion of others. If, therefore, you find by a preponderance of the evidence that the care rendered to [the plaintiff] by [the surgeon] was in accord with a recognized practice, the following of such recognized method of (sic) practice does not constitute negligence or malpractice even though another physician may believe that a different procedure or method is preferable.

Promen at 565. The appellate court concluded that this instruction did not accurately reflect the law on the standard of care "[a]s the [trial] court's instruction simply contrasted negligence with conformity to a recognized practice, without qualification, it was misleading and constitutes reversible error." *Id*. The Tenth District agreed, however, that the jury is permitted to consider customary practices as evidence of the standard of care although it is not conclusive on the ultimate issue of whether the doctor was negligent. *Id*.

{¶38} We note that the instruction in *Promen* is different than the customary practices instruction in this case in that it incorporates elements of both the customary and different methods instructions. Also, unlike *Promen*, the instruction in this case was not the only instruction concerning the standard of care. Appellants do not suggest that the separate standard of care instruction given to the jury was an inaccurate recitation of the law.

{¶39} The holding in *Ault* indicates that, although customary or routine methods may be considered, such methods are not, in and of themselves, determinative of whether the physician complied with the standard of care. *Ault*, 119 Ohio St. 422 at syllabus. Accordingly, the trial court did not abuse its discretion in furnishing the challenged instruction as it was a correct statement of the law. This is especially so because, unlike the trial court in *Promen*, the court in this case furnished a separate instruction on the standard of care. Their second assignment of error is overruled.

III.

{¶40} Appellants' assignments of error are overruled. The judgments of the Summit County Court of Common Pleas are affirmed.

Judgment affirmed.

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 Summit, 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
CONCURS.

CARR, J.
DISSENTING.

{¶41} I do not agree that a different methods instruction was appropriate in this case because there was no evidence before the jury that the standard of care encompassed two alternate and acceptable methods of delivering Mrs. Nist's baby. As in most medical malpractice cases, the parties presented competing expert testimony, which did not warrant a different methods instruction.

{¶42} The Ohio Supreme Court has emphasized that a different methods jury instruction should be given in a medical malpractice case "*only* if there is evidence that more than one method of diagnosis or treatment is *acceptable* for a particular medical condition." (Emphasis added.) *Pesek v. Univ. Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 498 (2000). This instruction is grounded "on the principle that juries, with their limited medical knowledge, should not be forced to decide which of two *acceptable* treatments should have been performed by a defendant physician." (Emphasis added.) *Id.* Its purpose is to avoid confusing the jury in situations in which the evidence establishes that the physician's selection of one acceptable method instead of another does not, in and of itself, constitute a breach of the standard of care. *Id.* That was not the situation in this case because, although the jury heard evidence about two

methods of delivery, no expert testified that both alternative methods fell within the standard of care.

{¶43} The primary dispute in this case was whether Dr. Mitchell correctly recognized the position and condition of Mrs. Nist's baby as the baby progressed down the birth canal. It was because the medical experts disagreed about those facts that they disagreed about the appropriate standard of care. The role of the jury was to resolve those disputes to determine the appropriate standard of care. By instructing the jury that Dr. Mitchell's choice of delivery method, in and of itself, did not constitute a breach of the standard of care, the trial court misled the jury and usurped its role as the trier of fact. *See Kowalski v. Marymount Hosp., Inc.*, 8th Dist. Cuyahoga No. 87571, 2007-Ohio-828, ¶ 25.

{¶44} Because the alternate methods instruction "'probably misled the jury in a matter substantially affecting the complaining party's substantial rights,' a new trial is warranted." *Kowalski* at ¶ 25, quoting *Becker v. Lake Cty. Mem. Hosp. W.*, 53 Ohio St.3d 202, 208 (1990); *See also Pesek*, 87 Ohio St.3d at 498. For this reason, I respectfully dissent. I would sustain Mrs. Nist's second assignment of error and reverse the trial court's judgment.

APPEARANCES:

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PAUL W. FLOWERS, Attorney at Law, for Appellants.

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