[Cite as *Hounchell v. Durrani*, 2023-Ohio-2501.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

RITA HOUNCHELL,	:	APPEAL NO. C-220021 TRIAL NO. A-1706559
and	:	*O P I N I O N.*
RICKY HOUNCHELL,	:	
Plaintiffs-Appellees,	:	
vs.	:	
ABUBAKAR ATIQ DURRANI, M.D.,	:	
and	:	
CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: July 21, 2023

Robert A. Winter Jr., *James F. Maus* and *Benjamin M. Maraan II*, for Plaintiffs-Appellees,

Taft Stettinius & Hollister LLP, Aaron M. Herzig, Russell S. Sayre, Philip D. Williamson, Anna M. Greve and *Jada M. Colon*, for Defendants-Appellants.

KINSLEY, Judge.

{¶1} Defendants-appellants Abubakar Atiq Durrani, M.D., and the Center for Advanced Spine Technologies, Inc., ("CAST") appeal from the trial court's judgment, following a jury trial, awarding plaintiffs-appellees Rita and Ricky Hounchell $569,321.04 in compensatory and punitive damages on their claims for negligence, fraudulent misrepresentation, failure to obtain informed consent, and loss of consortium, as well as attorney fees and prejudgment interest.

{¶2} In two assignments of error, Durrani and CAST (collectively referred to as "defendants") argue that the trial court erred in denying their motion for judgment notwithstanding the verdict, a new trial, or remittitur, and that the trial court erred in granting the Hounchells' motion for prejudgment interest and attorney fees.

{¶3} For the reasons that follow, we hold that the trial court erred in admitting evidence at trial concerning the revocation of Durrani's medical licenses and other lawsuits filed against Durrani and in instructing the jury on Durrani's absence from trial. Because these errors were prejudicial and impacted the outcome of the trial, the trial court erred in denying defendants' motion for a new trial on these grounds.

I. Factual and Procedural Background

{¶4} Rita Hounchell is a former patient of Durrani. She has suffered back pain off and on dating back to 1990. Hounchell first sought treatment from Durrani in August of 2012. On the intake form that she filled out during that visit, Hounchell explained that she suffered low back pain that generated to her left side and occasionally down the front of her legs. She indicated on the form that her pain worsened when sitting, standing, walking, and bending forward and that she required

assistance when performing household chores, including lifting and cooking. She additionally indicated that she was currently on disability for a bipolar disorder and, with respect to her medical history, stated that she suffered from high blood pressure, thyroid disease, osteoporosis, anxiety, and depression.

{¶5} Following Hounchell's initial visit with Durrani, he recommended that she receive epidural steroid injections, engage in physical therapy, and obtain an MRI. Hounchell received one injection, but it caused her extreme pain and she elected not to receive any further injections. Hounchell also attended a physical therapy session, but it likewise caused her pain and she did not engage in any future sessions.

{¶6} Hounchell obtained the MRI, which Durrani reviewed during a follow-up visit. After examining the MRI, Durrani opined that Hounchell suffered degeneration at her L5-S1 vertebrae, advanced facet arthropathy, spondylolisthesis (malalignment of her spine), bilateral foraminal stenosis, neurogenic claudication, radicular pain in the L5 distribution, and lateral recess stenosis. Durrani scheduled surgery for Hounchell after this visit. On November 14, 2012, Durrani performed a transforaminal lateral interbody fusion on Hounchell with posterior spinal instrumentation and fusion at her L5-S1 vertebrae. This surgery involved fusing Hounchell's spine in two locations, removing the disc between the L5-S1 vertebrae, and inserting a fusion cage and posterior screws.

{¶7} Following the surgery, Hounchell continued to experience back pain, although the pain was much less when managed with medication. Hounchell attended two post-operative appointments with Durrani. At the time of her nine-month post-surgery appointment, Durrani was no longer in business, so Hounchell instead treated with Dr. Smail, who recommended physical therapy to treat her ongoing pain.

{¶8} Rita and Ricky Hounchell filed the complaint that is the subject of this action against defendants on December 7, 2017, asserting various claims including negligence, failure to obtain informed consent, battery, fraudulent misrepresentation, and loss of consortium.[1] The complaint additionally asserted claims against West Chester Hospital, LLC, and UC Health, but the Hounchells reached a settlement with those parties and they were dismissed from the action.

A. Trial Testimony

{¶9} At trial, Hounchell testified that, while she suffered off and on back pain prior to the surgery performed by Durrani, her ability to enjoy life was good and that her purpose in meeting with Durrani was to determine what options she had to relieve the back pain. According to Hounchell, Durrani stated at her initial consultation that she was "looking at surgery" and that without a surgery she would become paralyzed. Durrani again warned Hounchell on her follow-up appointment that she faced paralysis unless she underwent surgery. Hounchell testified that Durrani told her the surgery involved replacing a disc and that she was unaware he intended to fuse her spine.

{¶10} Prior to the surgery, a nurse presented Hounchell with a consent form. According to Hounchell, neither the contents of the form nor the nature of the surgery were explained to her before she signed the form. Nor had Hounchell been informed of her precise preoperative diagnosis.

{¶11} Hounchell testified that her pain lessened following the surgery, but that she attributed the diminishing pain to her use of Percocet, as she experienced

[1] The Hounchells' complaint was originally filed in Butler County, but that suit was dismissed, and the Hounchells filed suit in Hamilton County.

constant pain once she stopped taking pain medication. According to Hounchell, her ability to enjoy life was negatively impacted following the surgery. Her ability to perform household chores decreased, she was often unable to walk up the stairs or lift many items, she struggled to dress herself, she was unable to attend church as frequently as before the surgery because she cannot sit in the pews, and she needed to shower instead of bathe.

{¶12} Ricky Hounchell offered testimony concerning the impact of Hounchell's surgery on their relationship. He explained that Hounchell could not travel like she was able to before the surgery, struggled with housework, and was no longer intimate with him.

{¶13} The Hounchells presented expert testimony from three witnesses in support of their claims. Dr. Keith Wilkey, an orthopedic spine surgeon, testified that Durrani lied to Hounchell about what was reflected on her MRI, exaggerated her diagnoses, and performed an unnecessary surgery on her. Wilkey stated that, contrary to Durrani's assertion, Hounchell would not have become paralyzed in the absence of surgery. According to Wilkey, Hounchell did not have foraminal stenosis, lumbar spinal stenosis or lumbar spondylolisthesis, neurogenic claudication, or radicular pain in the L_5 distribution, and she suffered mild—rather than advanced—facet arthropathy.

{¶14} Wilkey testified that Hounchell had degenerative disc disease and should have been treated with anti-inflammatory medication, steroid injections, and supportive pain management. Wilkey additionally opined that the informed consent form given to Hounchell should not have abbreviated the surgery she was to undergo. Instead, Wilkey believed the form should have specifically stated that she was to have

a transforaminal interbody fusion and a posterior spinal fusion rather than listing TLIP and PSF. He also testified that Hounchell would need future medical treatment and explained what that treatment would be.

{¶15} Dr. Stephen Bloomfield, a neurosurgeon, likewise testified that Durrani misrepresented the findings on Hounchell's MRI, recommended an unnecessary surgery, and failed to obtain informed consent for the surgery performed. Bloomfield agreed with Durrani's preoperative diagnosis that Hounchell suffered from degeneration at her L5-S1 vertebrae. But he testified that she suffered mild, rather than advanced, facet arthropathy, and that she did not have a malalignment of the spine, bilateral foraminal stenosis, neurogenic claudication, radicular pain in the L5 distribution, or lateral recess stenosis.

{¶16} With respect to the consent form for the surgery that was provided to Hounchell, Bloomfield took issue with the form's use of abbreviations for the type of surgery to be performed. Bloomfield additionally testified that Durrani's surgery exacerbated Hounchell's pre-existing condition and resulted in the need for future medical care.

{¶17} Dr. Saini, a neuroradiologist, was the third expert witness to testify on behalf of the Hounchells. Saini testified that Durrani's reading of Hounchell's MRI was outside of the standard of care and that Durrani greatly exaggerated the findings on the MRI to justify the surgery performed. According to Saini, the MRI showed no spondylolisthesis, central or foraminal stenosis, or radicular pain, and only showed mild facet arthropathy. As to the consent form provided to Hounchell, Saini opined that the form should not have used abbreviations for the surgery to be performed and should have specifically listed the risks, benefits, pros, and cons of the procedure.

{¶18} The Hounchells additionally played a recording of what the parties refer to as a "collage" of testimony from Durrani taken from several video depositions and spliced together. This collage video generally consisted of questions on a variety of topics, including Durrani's role as the director of spine surgery and as an attending orthopedic surgeon, the education he received in Pakistan and his family ties to that country, prior lawsuits filed against Durrani, the revocation of his medical licenses and suspension of his privileges to practice medicine, whether various statements on his resume and on his application for a medical license were truthful, whether papers that he had submitted had to be withdrawn because the information he submitted was false, and his practices as a surgeon, including the frequency of recommending surgery to patients on their first visit. The collage did not contain any questions regarding the surgery performed on Hounchell.

{¶19} The defendants presented expert testimony from three witnesses. The first to testify was diagnostic and interventional radiologist Dr. Myron Marx. Marx testified that Durrani's reading of Hounchell's MRI film met the standard of care and that the findings described by Durrani were present on the MRI. He specifically opined that the MRI showed that Hounchell suffered from foraminal stenosis, central canal stenosis, mild spondylolisthesis, lateral recess stenosis, and facet arthropathy.

{¶20} Dr. Paul Kaloostian, a neurosurgeon, also testified that Durrani did not breach any standard of care and acted within an appropriate medical necessity when performing surgery on Hounchell. Kaloostian opined that Durrani's performance of a transforaminal interbody fusion with posterior spinal instrumentation was medically indicated and appropriate because Hounchell's MRI showed lumbar spinal stenosis with spondylolisthesis, neurogenic claudication, radicular pain in the L5 distribution,

anterolisthesis of the L5 vertebrae on the S1 vertebrae, central stenosis, and lateral recess stenosis. He stated that the surgery significantly improved the quality of Hounchell's life and that there was no indication that Hounchell would need future surgery.

{¶21} Kaloostian additionally testified that Durrani obtained valid informed consent for the surgery from Hounchell. He explained that using initials to abbreviate the name of a surgery was not a breach of the standard of care and that allowing a nurse to administer the informed consent form was also within the standard of care.

{¶22} The last expert witness to testify for the defendants was neurological surgeon Dr. James Killeffer. Killeffer testified that Durrani did not fabricate any findings on Hounchell's MRI and that, based on those findings, it was reasonable to recommend a transforaminal interbody fusion. He also opined that Durrani carried out the surgery with the care and skill of a reasonably competent and prudent surgeon.

B. Jury Interrogatories

{¶23} At the close of trial, the jury returned interrogatories finding that Durrani was negligent in his treatment of Hounchell, that Durrani failed to acquire informed consent from Hounchell, and that Durrani fraudulently misrepresented the necessity of the surgery. It additionally found in favor of Ricky Hounchell on the loss-of-consortium claim but found in favor of defendants on the claim for battery.

{¶24} The jury awarded Hounchell $98,321.04 in past medical expenses, $16,000 for future medical expenses, $25,000 for past pain and suffering, and $75,000 for future pain and suffering. It awarded $5,000 to Ricky Hounchell for the loss-of-consortium claim. The jury additionally found that Durrani acted with malice

or aggravated or egregious fraud by performing an unnecessary surgery for monetary gain, and it awarded Hounchell $750,000 in punitive damages.

C. Post-Trial Motions

{¶25} Post-trial, the Hounchells filed a motion for prejudgment interest, but then later filed a notice stating that this motion was withdrawn. The trial court subsequently ruled that the Hounchells' attempted withdrawal of the motion was a nullity and reinstated the motion.

{¶26} The defendants filed a motion for a set-off pursuant to R.C. 2307.28 based on the Hounchells' settlement with West Chester Hospital, LLC, and UC Health. The defendants also filed a motion for judgment notwithstanding the verdict, and/or for a new trial, and/or for a remittitur. In this motion, the defendants raised multiple arguments, including the following: that the Hounchells lacked standing to assert a claim for past medical expenses because Hounchell's health insurer was the real party in interest and was never joined in the action; that the trial court admitted inflammatory and inadmissible evidence, including evidence about the revocation of Durrani's medical licenses in Ohio and Kentucky, multiple malpractice suits filed against Durrani, and Durrani's failure to attend trial; that the verdict was against the manifest weight of the evidence because the evidence did not establish that Durrani aggravated any pre-existing condition of Hounchell's; that the trial court erred in issuing an instruction concerning Durrani's failure to attend trial; and that the award of punitive damages must be reduced.

{¶27} The trial court overruled the defendants' motion for judgment notwithstanding the verdict, new trial, or remittitur in all respects except for the argument concerning punitive damages. It held that the award of punitive damages

must be capped at $350,000 pursuant to R.C. 2315.21(D)(2)(b). The trial court granted the Hounchells' motion for prejudgment interest and awarded them $16,000. In this same entry, the trial court noted that defendants' counsel represented to the court at a hearing on an earlier date that defendants had not moved for a set-off and that the court had awarded "zero setoff."

{¶28} The trial court issued a final, appealable judgment entry awarding Hounchell $214,321.04 in compensatory damages, awarding Ricky Hounchell $5,000 on his loss-of-consortium claim, and awarding the Hounchells $350,000 in punitive damages, $72,414 in attorney fees, and $16,000 in prejudgment interest. Defendants appealed.

II. Motion for Judgment Notwithstanding the Verdict, New trial, or Remittitur

{¶29} In their first assignment of error, defendants argue that the trial court erred in denying the motion for judgment notwithstanding the verdict. In this assignment of error, they challenge the trial court's admission of evidence regarding Durrani's license revocation and suspension of medical privileges, admission of evidence of other lawsuits filed against Durrani, and the allowance of references by counsel to Durrani's absence from trial. Coupled with this latter argument is defendants' contention that the trial court erred in instructing the jury on Durrani's absence from trial. Defendants additionally argue that there was insufficient evidence to find that Durrani aggravated a pre-existing health condition, that Hounchell lacked standing to seek past medical damages, and that the jury's award of future damages was not supported by the weight of the evidence.

A. Standard of Review

{¶30} Civ.R. 50 governs motions for judgment notwithstanding the verdict. *Adams v. Durrani*, 2022-Ohio-60, 183 N.E.3d 560, ¶ 19 (1st Dist.). We review the trial court's ruling on such a motion de novo and must construe the evidence in the light most favorable to the nonmoving party and only grant the motion if reasonable minds could come to but one conclusion which is in favor of the moving party. *Id.*

{¶31} A motion for a new trial is governed by Civ.R. 59. *Id.* at ¶ 20. "A court may grant a motion for a new trial for, among other things, an irregularity in the proceedings of the court, if the judgment is not sustained by the weight of the evidence, or any reason 'for good cause shown.' " *Id.*, quoting Civ.R. 59(A). We review a trial court's ruling on a motion for a new trial for an abuse of discretion, and we must construe the evidence in favor of the trial court's ruling, rather than in favor of the original jury's verdict. *Id.*

B. Evidentiary Errors

{¶32} We first consider defendants' arguments that the trial court erred in denying their motion for a new trial based on evidentiary errors committed by the trial court, specifically the trial court's admission of evidence concerning Durrani's license revocations and privileges suspensions, prior lawsuits against Durrani, and Durrani's absence at trial. Defendants argue that this evidence was admitted in violation of Evid.R. 403(A) and 404(B).

{¶33} Evid.R. 403(A) provides that evidence, even if relevant, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Evid.R. 404(B), in turn, provides that evidence of other crimes, wrongs, or acts is

inadmissible when used to prove a person's character and show action in conformity therewith.

{¶34} A trial court has broad discretion regarding the admission of evidence, and, absent an abuse of discretion and proof of material prejudice, we will not reverse a trial court's ruling on an evidentiary issue. *Hayes v. Durrani*, 1st Dist. Hamilton No. C-190617, 2021-Ohio-725, ¶ 13, quoting *State v. Lavender*, 2019-Ohio-5352, 141 N.E.3d 1000, ¶ 9 (1st Dist.).

1. License Revocations

{¶35} Defendants challenge the trial court's admission of evidence concerning the revocation of Durrani's medical licenses in Ohio and Kentucky and the suspension of his medical privileges at various hospitals. This evidence was admitted through a variety of sources at trial and was emphasized during the Hounchells' opening statement.

{¶36} The trial court admitted evidence of Durrani's license revocations and the suspension of his medical privileges based on its finding that "[i]t has to do with his credibility. It has to do with his credibility when he testifies as a treating physician." The court elaborated, stating "it's prejudicial to some extent, but I think it's probative of his honesty and veracity and his qualifications, his capability."

{¶37} During the cross-examination of defense expert Dr. Killeffer, counsel for the Hounchells asked questions concerning Killeffer's knowledge of whether Durrani currently practiced medicine, including asking him "[d]o you know if he even has a medical license?"

{¶38} Evidence regarding the revocation of Durrani's medical licenses was also contained in the collage of Durrani's video depositions that was played for the

jury. Defendants challenge the following questions concerning Durrani's license revocations, as well as the suspension of his privileges to practice medicine, that were asked of him in the collage:

> Isn't it true that on March 12, 2014, your medical licenses was [sic] permanently revoked by the State of Ohio?
>
> Isn't it true in April 2014 your Kentucky medical license was revoked?
>
> Isn't it true that at Children's Hospital you've had your privileges suspended for not getting your operative reports dictated timely?
>
> And did you have your privileges suspended from time to time at West Chester UC Health also, correct?
>
> And isn't it true that you had your privileges suspended at Journey Lite?
>
> And isn't it true that before you left the United States Medicare suspended you as a medical provider?
>
> Isn't it true that before you left the United States Anthem suspended you as a medical provider?

{¶39} During opening statements, counsel for the Hounchells highlighted the significance of this evidence by telling the jury that "[Durrani's] Ohio and Kentucky licenses to practice medicine were later suspended and then revoked."

{¶40} Defendants argue on appeal that not only was this evidence irrelevant, but that it was far more unfairly prejudicial than probative because the license revocations and suspension of privileges were in no manner related to Durrani's treatment of Hounchell and occurred after the surgery performed on Hounchell.

{¶41} This court considered a similar challenge to the admission of evidence about the revocation of Durrani's medical licenses in *Setters v. Durrani*, 2020-Ohio-

6859, 164 N.E.3d 1159 (1st Dist.). In *Setters*, we held that admission of medical license revocations due to an unrelated instance of misconduct and not "attributable to the competency, knowledge, or skill possessed by Durrani during the time he performed surgery on Setters" was not probative of the ultimate issue of negligence in the case. *Id.* at ¶ 18.

{¶42} In addition to finding that the evidence was of minimal relevance, we recognized in *Setters* that "[i]n a medical-malpractice case, evidence that a defendant-doctor's medical license was revoked is by its very nature prejudicial" because "[i]t predisposes the jury to find that the doctor acted outside acceptable bounds of competence." *Id.* at ¶ 20. We ultimately held in *Setters* that the trial court abused its discretion in admitting evidence of the license revocation because such evidence allowed the jury to improperly infer that Durrani was not credible and that his conduct must have been substandard. *Id.* at ¶ 21.

{¶43} Hounchell's lawsuit against defendants argued that Durrani misrepresented the findings of her medical imaging and performed an unnecessary surgery on her without obtaining informed consent. The evidence admitted at trial concerning the revocation of Durrani's medical licenses in Ohio and Kentucky and the suspension of his privileges by various hospitals and health care providers was not tied in any way to the surgery performed on Hounchell and did not further Hounchell's theory of the case.

{¶44} In fact, in addition to failing to correlate the license revocations and privileges suspensions to Hounchell, Hounchell failed to provide any context at all for why Durrani's medical licenses or hospital privileges were supposedly suspended. The collage essentially contained a series of questions asked of Durrani regarding whether

the license revocations and privileges suspensions had occurred without allowing Durrani to elaborate on the reasons behind them. In one limited instance, counsel for Hounchell did ask Durrani if his privileges had been suspended for his failure to timely dictate operative reports, but that was completely unrelated to the surgery performed on Hounchell. In the absence of this context, the questions by the Hounchells' counsel regarding Durrani's license revocations and privileges suspensions contributed very little probative value to the Evid.R. 403(A) weighing equation.

{¶45} On the other hand, as in *Setters*, "the danger of unfair prejudice is readily apparent in this case." *See Setters*, 2020-Ohio-6859, 164 N.E.3d 1159, at ¶ 21. The suspension and revocation evidence was used by the Hounchells' counsel to encourage the jury to determine that because Durrani had his licenses revoked and privileges suspended on other occasions, he necessarily must be an incompetent surgeon who performed an unnecessary surgery on Hounchell. Another concern recognized by *Setters* is also present in this case—where each side presented competing expert testimony, the credibility of Durrani became paramount. *Id*. This evidence thus "allowed the jury to improperly infer that Durrani was not credible and that his conduct must have been substandard." *Id*. As a result, the prejudice that resulted from admitting the suspension and revocation evidence outweighed the scant probative value it offered the jury.

{¶46} In an attempt to overcome this result, the Hounchells argue that this evidence was admissible pursuant to Evid.R. 608, which provides that:

> (A) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer

> only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (B) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

{¶47} We are not persuaded by the Hounchells' argument. Notably, the evidence concerning the revocation of Durrani's medical licenses and the suspension of his privileges was not probative of his character for untruthfulness. At no point did the Hounchells present evidence that Durrani lied about having his medical licenses suspended or his hospital privileges revoked. In fact, when asked in his video deposition whether those actions had occurred, he admitted that in fact they had. Thus, unlike other topics in the collage, the evidence was not introduced to show that Durrani misrepresented or was otherwise deceptive about the revocations and suspensions, but rather simply to show the fact that those decisions occurred. This

evidence alone therefore fails to address Durrani's character for truthfulness under Evid.R. 608(A).

{¶48} The Hounchells imply that Durrani's medical licenses and hospital privileges were revoked on the basis of other unspecified falsehoods and that that underlying misconduct is admissible as evidence of untruthful character. The problem with this approach is twofold. First, the Hounchells offered no actual evidence of the basis for the suspensions and revocations. While their counsel did question Durrani about a number of other accusations against Durrani, including omissions on his license applications, Durrani largely denied the accusations or explained their occurrence, and at no point were these questions tied to the rationale for the suspension and revocation decisions. Second, the Hounchells were barred from presenting extrinsic evidence regarding specific instances of untruthfulness on Durrani's license applications under Evid.R. 608(B). Thus, even had the Hounchells attempted to prove that Durrani lost his medical license because he disingenuously omitted unflattering information from his application by submitting either the application itself or the decision revoking his license on the basis of the faulty application, neither of those pieces of evidence would have been admissible. *See* Evid.R. 608(B). Left with only Durrani's testimony, which did not concede any untruthfulness, the Hounchells cannot rely upon Evid.R. 608 as a basis for admitting the suspension and revocation testimony.

{¶49} In sum, there was no valid evidentiary basis for admitting evidence that Durrani's medical licenses were revoked and that his hospital privileges were suspended. This evidence was of minimal to no relevance and any probative value was substantially outweighed by the danger of unfair prejudice. *See* Evid.R. 403(A).;

Setters, 2020-Ohio-6859, 164 N.E.3d 1159, at ¶ 21. It was not admissible as evidence of character for untruthfulness under Evid.R. 608 because it reflected no deception or falsehoods. As a result, we hold that the trial court abused its discretion in admitting the suspension and revocation evidence.

2. Other Lawsuits Filed Against Durrani

{¶50} Defendants next challenge the trial court's admission of evidence of other lawsuits filed against Durrani. The challenged evidence was contained in the collage of Durrani's testimony and included the following questions:

> And you were a party to a criminal complaint in Mason Municipal Court in Warren County for a misdemeanor first-degree assault that ultimately got dismissed; correct?
>
> And isn't it true in your application to the Kentucky and Ohio Medical Boards in 2010 you never admitted in the application you had been sued for medical malpractice?
>
> Well, the application that you signed under oath said there were no lawsuits pending. And, as a matter of fact, there were multiple suits pending, weren't there?
>
> Well, on October 16th, 2000, Tracy Newton sued you, didn't she?
>
> And on April 12, 2002, Casey Flume sued you; correct?
>
> August 16, 2002, there was a suit by James Johnson?
>
> On February 28th, 2003, you were sued by Robert Farrell?
>
> On April 11, 2003, Robert Hughes sued you, didn't he?
>
> And you know that all five of those suits were in Hamilton County, Cincinnati, Ohio?

> Isn't it true in 2009 a law firm that represented Children's Hospital and West Chester, Dinsmore & Shohl, had done work for you and sued you for fees for work you owed them on a patent case?
>
> You don't recall being sued by Dinsmore & Shohl for unpaid legal fees?

{¶51} The evidence regarding other lawsuits filed against Durrani by individual plaintiffs was not related in any way to the surgery performed on Hounchell. No evidence was introduced about the nature of the lawsuits, including whether they involved allegations that Durrani performed a medically unnecessary surgery or failed to obtain informed consent, the issues present in the case at bar. And the questions regarding the nonmedical lawsuit filed against Durrani by a law firm for unpaid bills served no purpose other than to encourage the jury to infer that Durrani was irresponsible and failed to pay his bills. Perhaps even more troubling was the question regarding the dismissed charge of misdemeanor assault. First, the charge was just an allegation, was ultimately dismissed, and did not result in a conviction. Second, whether Durrani had been previously charged with misdemeanor assault was entirely irrelevant to the case at hand and served no purpose other than to enflame the jury's opinion of Durrani and insinuate that he was a violent man.

{¶52} Defendants timely objected to the admission of the collage, including these statements regarding prior lawsuits against Durrani.

A. Evid.R. 404(B) Analysis

{¶53} On appeal, defendants argue that this evidence should have been excluded under Evid.R. 404(B). As set forth above, Evid.R. 404(B) provides that "[e]vidence of any other crime, wrong or act is not admissible to prove the person's character in order to show that on a particular occasion the person acted in accordance

with the character." This type of evidence is known as propensity evidence because it tends to show that the defendant committed the accused wrongdoing on the basis of his previous wrongful acts. *See State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 21.

{¶54} Although evidence of other acts is inadmissible to show a defendant's propensity, it is admissible under Evid.R. 404(B)(2) to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Courts analyzing the admissibility of evidence under this rule must make two inquiries. First, the court must analyze the relevance of the evidence for the purpose for which it is offered under Evid.R. 404(B)(2). *Id.* at ¶ 26. Then, the court must weigh the probative value of the evidence against the prejudice of its admission under Evid.R. 403(A). *Id.* at ¶ 29.

{¶55} Beginning with the first of these inquiries, the Hounchells make no argument that the evidence of other lawsuits filed against Durrani was admissible for any of the permissible purposes identified in Evid.R. 404(B)(2). Rather, they contend that Durrani's credibility was at issue, and the allegation that Durrani failed to disclose prior lawsuits on his applications to the Ohio and Kentucky medical boards was relevant to the jury's assessment of Durrani's credibility. But the credibility, veracity, believability, or character of a witness is not a valid basis for admitting evidence that a witness engaged in prior wrongful behavior under Evid.R. 404(B). To the contrary, such an inference looks exactly like the propensity suggestion that Evid.R. 404(B) forbids by inviting the jury to infer that Durrani lied to Hounchell about the need for surgery since he supposedly lied about prior malpractice lawsuits on his license applications.

{¶56} If the lack of a permissible purpose were not enough, we also find that the prejudicial impact of this evidence outweighed its very limited probative value. As with the evidence of Durrani's license revocations and hospital privileges suspensions, the prior malpractice lawsuits were not explained to the jury nor related in any manner to the surgery performed on Hounchell. The evidence therefore had little to no probative value on the question of Durrani's malpractice with regard to Hounchell. Rather, the evidence was introduced for the prejudicial purpose of asking the jury to infer that (1) because Durrani had been charged with malpractice in the past, he must have committed malpractice against Hounchell and (2) because Durrani had been dishonest in the past, he necessarily must have been dishonest when informing Hounchell about the findings on her medical images and about the medical necessity of surgery. The Hounchells' counsel emphasized these points about Durrani's dishonesty in closing arguments, stating "You saw the generalities that he talked about in the video. And he is less than credible. He doesn't tell the truth." Counsel further stated, "And it's hard to believe that if you were sued that many times for malpractice long ago that when you're applying for the most important thing that you will have in your work life, your license to practice medicine, that you play fast and loose with the truth." On balance, this evidence served only to paint Durrani in a negative light and offered little in the way of facts regarding Hounchell's treatment.

B. Evid.R. 608 Analysis

{¶57} The Hounchells again argue that this evidence concerning prior lawsuits against Durrani was admissible pursuant to Evid.R. 608. There are two problems with the Hounchells' argument. First, Evid.R. 608(B) permits counsel to cross-examine a witness about specific instances of conduct that are clearly probative of truthfulness

or untruthfulness. The record is unclear as to whether Durrani was being cross-examined in the collage.[2] But even if he was, a further problem with the Hounchells' reliance on Evid.R. 608 as a basis for admitting the portions of the collage dealing with prior lawsuits is that Durrani's answers to the attorneys' questions did not reveal any evidence about his truthfulness or untruthfulness.

{¶58} While counsel asked Durrani questions about whether lawsuits had been filed against him and whether he failed to disclose the lawsuits in his applications to practice medicine, Durrani in large part answered that he could not recall or did not know. The Hounchells therefore failed to establish that the prior conduct upon which they sought to impeach Durrani's credibility in fact occurred and that he knowingly omitted that information from his applications. It is imperative to recognize that the questions asked by the attorneys in the collage are not actual evidence for the jury to consider. Given the manner in which Durrani answered counsel's questions regarding prior lawsuits, which was essentially to provide no answer, there is a strong likelihood that the jury treated counsel's questions as evidence in and of itself. In addition to not being clearly probative of Durrani's character for truthfulness or untruthfulness, these questions were unduly prejudicial and misleading, inviting the jury to believe that they in fact occurred, even though Durrani made no such acknowledgement.

{¶59} This opinion is not meant to forestall questioning on topics such as prior lawsuits filed against a witness or a witness lying on applications and resumes to establish the witness's character for truthfulness or untruthfulness. To the contrary, we acknowledge that evidence supporting these topics could at times be admissible on

[2] We note that R.C. 2317.07 permits a party to be examined in a deposition, at the instance of the opposing party, as if on cross-examination. We have no evidence that that procedure was invoked here. Our opinion as to the applicability of Evid.R. 608 is limited to the evidence as it was presented below, not the way in which evidence could be presented in some future case.

cross-examination for such a purpose if properly grounded in the Rules of Evidence. Rather, it was the manner in which the questions were asked in this case, coupled with the witness's failure to admit to the allegations, that resulted in the inadmissibility of the evidence.

{¶60} We therefore hold that the trial court abused its discretion in admitting evidence regarding other lawsuits filed against Durrani, as the evidence was admitted in violation of Evid.R. 403(A), 404(B), and 608.

3. Durrani's Absence

a. Evidentiary Objections

{¶61} We next consider the defendants' argument that the trial court erred in permitting the Hounchells' counsel to make comments and ask questions concerning Durrani's absence from trial. Defendants contend that the repeated references to the fact that Durrani was in Pakistan, rather than present at trial, resulted in the trial being tinged with racial animosity and xenophobia.

{¶62} Defendants first direct us to the following comment made during voir dire: "[Dr. Durrani] lives in Pakistan. He will not be here at the trial—attending the trial." However, contrary to defendants' assertion, this comment was made by defense counsel, rather than the Hounchells' counsel, when counsel was introducing himself to the potential jurors. We find no error in this statement, as it was offered by defendants themselves.

{¶63} Defendants next take issue with the statement by the Hounchells' counsel in closing argument that "Dr. Durrani is from Pakistan. Dr. Durrani was educated in Pakistan. And Dr. Durrani chose to close his office, go back to Pakistan,

and not participate in the facts and circumstances of the case." No objection was raised in response to these comments, so any potential error was waived. *See Adams*, 2022-Ohio-60, 183 N.E.3d 560, at ¶ 39.

{¶64} The last comment that the defendants challenge is a question asked of Durrani in the collage concerning the date that he left the United States to return to Pakistan. As set forth above, defendants objected at trial to admission of the collage, so their challenges to individual questions asked in the collage were not waived. Still, we find no error in this question. As defense counsel pointed out to the jury during voir dire, Durrani no longer lived in the United States, but instead resided in Pakistan. The challenged question simply asked Durrani when he had returned to Pakistan—it correlated with defense counsel's statement during voir dire and did not insinuate that Durrani had left the United States for a nefarious purpose. We have previously rejected the argument that comments limited to the fact of Durrani's absence and its impact on the legal proceedings constitute error and do so again now. *See Pierce v. Durrani*, 2015-Ohio-2835, 35 N.E.3d 594, ¶ 19 (1st Dist.).

b. Jury Instruction

{¶65} Under this argument, defendants additionally contend that the trial court erred in instructing the jury on Durrani's absence from trial. The trial court instructed the jury that:

> You are allowed to consider as part of your deliberation the fact that Dr. Durrani did not attend the trial and testify to specific facts about this case in his defense. ***And you may make whatever inference and conclusions you choose to from that fact.***

(Emphasis added.) Defendants objected to the trial court's inclusion of this instruction. We review a trial court's decision granting or denying a proposed jury instruction for an abuse of discretion. *State v. Houston*, 1st Dist. Hamilton No. C-190598, 2020-Ohio-5421, ¶ 34.

{¶66} In overruling defendants' objection to this instruction, the trial court relied on *Smith v. Lautenslager*, 15 Ohio App.2d 212, 240 N.E.2d 109 (1st Dist. 1968), a case concerning the failure of a defendant in a bastardy case to testify. In *Lautenslager,* the plaintiffs' counsel commented during closing arguments on the defendant's failure to testify, and the trial court instructed the jury to disregard counsel's comment. *Id.* at 212-213. On appeal, this court recognized that a bastardy proceeding was a civil action, and we held that "the failure of a defendant to testify in a bastardy proceeding may be the subject of comment to the jury." *Id.* at 213-214. Referring to *Lautenslager*, the trial court explained that "the First District said that it was appropriate to draw inferences from the fact that [the defendant] did not show up to testify."

{¶67} While perhaps a distinction without a difference, we first note that while *Lautenslager* involved the failure of a defendant who had attended trial to testify, the case at bar involves the defendant's failure to attend the trial at all. Second, contrary to the trial court's representation, we never stated in *Lautenslager* that it was appropriate to draw inferences from the failure of a defendant in a civil case to testify. Rather, this court held that counsel may *comment* on a defendant's failure to testify—not ask the trier of fact to draw inferences based on it.

{¶68} While we have not previously considered the appropriateness of this exact jury instruction, this court has previously considered, and found no error in,

counsel's comments on a defendant's—specifically Durrani's—failure to attend trial. *See Pierce*, 2015-Ohio-2835, 35 N.E.3d 594, at ¶ 19 (holding that counsel's comments about Durrani's absence were generally made in response to arguments by Durrani's counsel and in the context of not being able to cross-examine Durrani, and that they were, for the most part, a fair commentary on the evidence).

{¶69} With that background in mind, we find that the jury instruction provided in this case went beyond recognizing that Durrani was absent from trial. The instruction invited the jury "to make whatever inference and conclusions" it desired from Durrani's failure to attend trial, including ones precluded by law. By giving the jury the ability to draw *any* inference or conclusion, the jury was permitted to draw both impermissible and negative inferences. The conclusions allowed by the instruction, but prohibited by law, would include the inference that Durrani was absent from trial because he had been negligent in his treatment of Hounchell or an assumption of liability based on racial prejudice against Arab-Americans. In other words, it allowed the jury to infer that Durrani was absent because of a consciousness of guilt or because of implicit biases against those of Pakistani descent, both of which are impermissible.[3]

{¶70} Because this instruction was so broadly worded that it allowed the jury to draw impermissible inferences from Durrani's absence, we hold that the trial court abused its discretion in providing the instruction.

[3] We have no reason to believe the jury in this case acted out of racial animus or any proscribed motive. The problem is with the trial court's instruction, not the jury's verdict.

4. Harmless Error Analysis

{¶71} Having determined that the trial court erred in admitting evidence of Durrani's license revocations and privileges suspensions, in admitting evidence concerning other lawsuits filed against Durrani, and in instructing the jury on Durrani's absence at trial, we must now consider the impact of these errors on the trial. "An improper evidentiary ruling constitutes reversible error only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice." *Setters*, 2020-Ohio-6859, 164 N.E.3d 1159, at ¶ 22, quoting *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 35. In considering whether a party's substantial rights were affected, we must consider whether the trier of fact would have reached the same conclusion had the errors not occurred. *Id.*

{¶72} In the context of the provision of a jury instruction, "[a]n unnecessary, ambiguous, or even affirmatively erroneous portion of a jury charge does not inevitably constitute reversible error." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 35. Rather, "[i]f there is no inherent prejudice in the inclusion of a particular jury instruction, prejudice must be affirmatively shown on the face of the record, and it cannot be presumed." *Id.*

{¶73} Considering all other evidence presented in this case, we cannot find that the error resulting from these evidentiary rulings was harmless. First, the record contained evidence that Hounchell had obtained relief post-surgery and that her quality of life had improved. Second, the record contains competing expert testimony as to whether Durrani exaggerated the findings on Hounchell's medical images and recommended an unnecessary surgery and whether Durrani obtained informed

consent from Hounchell prior to performing surgery. With this competing expert testimony, the jury was likely to consider the credibility of Durrani when rendering its verdicts. *See Setters* at ¶ 21. The improper evidentiary rulings concerning the license revocations, suspensions of privileges, and prior lawsuits against Durrani directly impacted the jury's assessment of his credibility. We cannot say that the outcome of the trial would have been the same but for these errors.

{¶74} And while, standing on its own, the instruction inviting the jury to draw any inference from Durrani's absence at trial might have had less impact, on this record we find that the instruction compounded the resulting error from the erroneous evidentiary rulings and was therefore prejudicial. *See Cromer* at ¶ 35. The improper attacks on Durrani's credibility by these evidentiary rulings encouraged the jury, when considering the provided jury instruction on Durrani's absence, to draw impermissible or negative inferences regarding Durrani's absence from trial, including that he was absent because of a consciousness of guilt.

{¶75} Because these evidentiary rulings and the provision of the jury instruction on Durrani's absence were erroneous and were not harmless, we find that the trial court abused its discretion in failing to grant defendants' motion for a new trial on the basis of these errors. The first assignment of error is accordingly sustained. Our ruling on these issues renders moot both the defendants' remaining arguments under the first assignment of error and the second assignment of error in which defendants argue that the trial court erred in granting the Hounchells' motions for prejudgment interest and attorney fees.

Conclusion

{¶76} For the reasons set forth in this opinion, the trial court's judgment denying defendants' motion for a new trial is reversed. This cause is remanded for proceedings consistent with the law and this opinion.

Judgment reversed and cause remanded.

CROUSE, P.J., and **BERGERON, J.**, concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.