[Cite as *Westfall v. Aultman Hosp.*, 2017-Ohio-1250.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JIMMY WESTFALL, ADMINISTRATOR OF THE ESTATE OF JESSICA ANNE MCKENNA, DECEASED	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellant	:	
-vs-	:	
	:	Case No. 2015CA00223
AULTMAN HOSPITAL, ET AL.	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2014CV02052

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: March 23, 2017

APPEARANCES:

For Plaintiff-Appellant:

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Delaney, J.

{¶1} Plaintiff-Appellant Jimmy Westfall, Administrator of the Estate of Jessica Anne McKenna, Deceased, appeals the November 20, 2015 judgment entry of the Stark County Court of Common Pleas journalizing a jury verdict in favor of Defendants-Appellees Teri Teel Weber, P.A., Thomas Kinney, M.D., Brad Goldman, M.D., Canton Aultman Emergency Room Physicians, Inc., Chitra Ganta, M.D., Jose Lizcano-Perez, M.D., and Aultman Hospital.

FACTS AND PROCEDURAL HISTORY

McKenna Visits Aultman Hospital ER on January 24, 2011

{¶2} On January 24, 2011, Jessica McKenna presented to the Emergency Room of Defendant-Appellee Aultman Hospital, located in Canton, Ohio. She came to the Emergency Room because she had been suffering from nausea, vomiting, and diarrhea for some time and her symptoms were not resolving. At the time of her admission to the Emergency Room, McKenna was 18 years old and weighed 85 pounds. She had recently given birth to her daughter on December 7, 2010.

{¶3} After being seen by the triage nurse, McKenna was placed in a room and examined by Defendant-Appellee Teri Teel Weber, a Physician's Assistant employed by Defendant-Appellee Canton Aultman Emergency Physicians, Inc. P.A. Weber gave McKenna a physical exam and took her history. During P.A. Weber's examination, McKenna complained of nausea, vomiting, cough, fatigue, epigastric pain, and shortness of breath. P.A. Weber found McKenna's blood pressure, respiratory rate, lung sounds, and heart sounds to be normal. She observed that McKenna's heart rate was elevated. P.A. Weber ordered blood work and a urine sample. While the blood work was pending,

McKenna was administered intravenous fluids and an intravenous medication to reduce her nausea.

{¶4} The blood test results were within normal limits. McKenna's glucose level and one liver enzyme were minimally elevated. The urine sample did not show severe dehydration.

{¶5} McKenna was next examined by Defendant-Appellee Dr. Todd Kinney, an employee of Canton Aultman Emergency Physicians, Inc. Dr. Kinney reviewed P.A. Weber's notes and conducted his own physical examination of McKenna. To Dr. Kinney, McKenna reported the same symptoms of nausea, vomiting, and diarrhea. She did not tell Dr. Kinney she had shortness of breath. Dr. Kinney reviewed the results of her blood work. He found her blood pressure, respiratory rate, lung sounds, and heart sounds to be normal.

{¶6} After receiving fluids, McKenna's heart rate slowed to within normal limits. McKenna reported feeling better. P.A. Weber and Dr. Kenney diagnosed McKenna with gastroenteritis and McKenna was discharged with orders to follow up with her family physician within the next two days.

McKenna Returns to Aultman ER on January 31, 2011

{¶7} McKenna returned to the Aultman Hospital Emergency Room on January 31, 2011. She was examined by Defendant-Appellee Dr. Brad Goldman, an employee of Canton Aultman Emergency Physicians, Inc. McKenna's chief complaint to Dr. Goldman was continued vomiting and diarrhea, chest pain, and shortness of breath. Dr. Goldman observed that McKenna looked sick.

{¶8} His examination discovered that McKenna's heart rate was elevated, but her respiration rate and blood oxygen were within normal limits. He felt her blood pressure was lower than normal. He listened to her lungs and did not hear any abnormal sounds that might indicate fluid in her lungs. He did not hear any abnormalities when he listened to her heart. Based on her elevated heart rate and low blood pressure, coupled with her persistent vomiting and diarrhea, Dr. Goldman administered two liters of I.V. fluids for dehydration. He also ordered laboratory studies. The results of the blood work reviewed by Dr. Goldman showed McKenna was slightly dehydrated.

{¶9} Based on McKenna's recent pregnancy and her symptoms, Dr. Goldman was concerned McKenna could be suffering from a pulmonary embolism. He ordered a CT scan of her chest. The CT scan was read by Dr. Allen Rovner, a radiologist with Aultman Hospital. The CT scan showed McKenna's entire lung. Dr. Rovner did not observe any fluid in McKenna's lungs. He also did not observe indications of a pulmonary embolism. In his report of the CT scan, Dr. Rovner identified that McKenna's heart appeared moderately enlarged and there was an enlargement of the left ventricle. He also observed a small pericardial effusion, which is fluid around the heart.

McKenna is admitted to Aultman Hospital on February 1, 2011

{¶10} Dr. Goldman made the decision to admit McKenna to Aultman Hospital. His admitting diagnosis was based on her intractable vomiting and diarrhea and on the cardiac findings in the CT scan. In order to admit McKenna to the hospital, Dr. Goldman worked with third-year resident, Defendant-Appellee Dr. Jose F. Lizcano-Perez, and first-year resident, Defendant-Appellee Dr. Chitra Ganta, both employees of the Canton Medical Education Foundation. Drs. Lizcano-Perez and Ganta were rotating with general

medicine services. The attending physician on-call that night was Dr. Kevin Hill. As attending physician, Dr. Hill supervised the care provided by Drs. Lizcano-Perez and Ganta; however, Dr. Hill was not at Aultman Hospital on January 31, 2011.

{¶11} Both resident doctors conducted an initial assessment and evaluation of McKenna. Among McKenna's previous symptoms of vomiting and diarrhea, the doctors observed her heart rate was elevated and she had shortness of breath upon exertion. She complained of mild epigastric pain. Dr. Lizcano-Perez found trace lower extremity edema. Neither doctor, however, observed signs of heart failure. Dr. Lizcano-Perez felt her mildly enlarged heart was a normal condition due to her recent pregnancy where a pregnant woman's heart enlarges to compensate for the increased blood volume. The doctors ordered more blood work. McKenna was admitted to the general medicine floor of the hospital at 12:00 a.m. on February 1, 2011.

{¶12} At 3:40 a.m., the resident doctors received the results of McKenna's blood work. One of the tests showed McKenna's liver enzymes were significantly elevated. Based on this result, the resident doctors ordered an abdominal ultrasound, hepatitis panel, and toxin screen. The results of the test were not available until after the end of the resident doctors' shift at 6:00 or 7:00 a.m.

{¶13} After McKenna's admission to the general medicine floor of the hospital, Drs. Lizcano-Perez and Ganta did not examine McKenna again. Dr. Lizcano-Perez or Dr. Ganta contacted Dr. Kevin Hill by telephone on January 31, 2011 or February 1, 2011 to review their findings. Dr. Hill signed off on Dr. Ganta's orders written on January 31, 2011.

{¶14} At 7:00 a.m., McKenna was taken from her room for some testing. When she returned, around 9:00 a.m., she and her fiancée discussed leaving Aultman Hospital

to check on the baby and go to another local hospital for treatment. After discussion with the doctors and her family, McKenna decided to stay at Aultman Hospital. At 10:00 a.m., McKenna's blood oxygen level dropped to 70% and she was moved to the intensive care unit. A Code Blue was called for McKenna at 2:20 p.m. The hospital performed an echocardiogram and discovered the left and right ventricles of her heart were severely dysfunctional. The hospital discovered her hemoglobin levels were low and at 2:24 p.m., the hospital started a blood transfusion for McKenna. From 2:24 p.m. to 3:25 p.m., McKenna received eight units of blood. Even with the blood transfusion, McKenna's hemoglobin levels did not return to normal levels. The hospital connected her to an extracorporeal membrane oxygenator to provide oxygen to her blood. At 3:11 p.m., the hospital conducted an x-ray of her abdomen and it showed fluid in her abdomen. At 3:25 p.m., McKenna was examined and found to have no brain function.

{¶15} No autopsy was conducted on McKenna. The death certificate completed by a doctor with Aultman Hospital stated McKenna's cause of death was postpartum cardiomyopathy. Postpartum or peripartum cardiomyopathy is a rare form of heart failure seen in pregnant women.

Medical Malpractice Action

{¶16} Plaintiff-Appellant Jimmy Westfall, Administrator of the Estate of Jessica Ann McKenna, Deceased ("Administrator") originally filed his complaint for medical negligence in Cuyahoga County. The case was transferred to the Stark County Court of Common Pleas on July 12, 2013. Administrator voluntarily dismissed the complaint on September 12, 2013.

{¶17} Administrator refiled the complaint on September 4, 2014 naming the Defendants-Appellees discussed in the medical history above. Administrator's complaint included claims for survivorship and wrongful death, but the survivorship claim was dismissed as time-barred. Discovery and expert reports were exchanged.

{¶18} The case was tried before a jury for six days beginning on November 9, 2015. Administrator argued Defendants-Appellees fell below the reasonable standard of care by their failure to diagnose and treat McKenna's postpartum cardiomyopathy, causing her death. On November 19, 2015, the jury returned a verdict for all Defendants-Appellees. The trial court journalized the verdict on November 20, 2015 and it is from this judgment entry Administrator now appeals.

ASSIGNMENTS OF ERROR

{¶19} Administrator raises seven Assignments of Error:

{¶20} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PERMITTING DEFENDANTS-APPELLEES, OVER OBJECTION FROM PLAINTIFF-APPELLANT, TO PRESENT SURPRISE EXPERT TESTIMONY FROM TWO WITNESSES, IDENTIFIED BY DEFENDANTS-APPELLEES AS FACT WITNESSES, AFTER DEFENDANTS-APPELLEES NEVER PREVIOUSLY IDENTIFIED SAID WITNESSES AS EXPERTS AND FAILED TO PROVIDE PLAINTIFF-APPELLANT WITH EXPERT REPORTS, BOTH OF WHICH WERE REQUIRED BY COURT ORDER.

{¶21} "II. AFTER PERMITTING SURPRISE EXPERT TESTIMONY FROM DEFENDANTS' FACT WITNESS, KEVIN HILL, M.D., WITHOUT IDENTIFICATION AS AN EXPERT OR A REPORT, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR

BY LIMITING PLAINTIFF'S CROSS-EXAMINATION OF DR. HILL TO A SPECIFIC DATE OF TREATMENT OF PLAINTIFF'S DECEDENT.

{¶22} "III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO ALLOW PLAINTIFF-APPELLANT TO INTRODUCE DEPOSITION TESTIMONY OF MARK RICHARD BIBLER, M.D., AS REBUTTAL TESTIMONY ON MATTERS WHICH WERE FIRST ADDRESSED IN DEFENDANTS-APPELLEES' CASE-IN-CHIEF.

{¶23} "IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING PLAINTIFF-APPELLANT'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR NO. 3, WHEN QUESTIONING OF THAT JUROR REVEALED BIAS REGARDING THE PREPONDERANCE OF THE EVIDENCE STANDARD AND THEREFORE PLAINTIFF-APPELLANT WAS FORCED TO USE A PEREMPTORY CHALLENGE TO DISMISS THAT JUROR, WHICH RESULTED IN PLAINTIFF-APPELLANT HAVING FEWER PEREMPTORY CHALLENGES THAN THE LAW PROVIDES.

{¶24} "V. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING 'THE ALIGNED DEFENDANTS' TO EACH EXERCISE THREE PEREMPTORY CHALLENGES.

{¶25} "VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUSTAINING THE OBJECTION OF DEFENDANTS-APPELLEES AND REFUSING TO PERMIT PLAINTIFF-APPELLANT TO INTRODUCE THE DAUGHTER OF PLAINTIFF-APPELLANT'S DECEDENT TO THE JURY IN ORDER TO PROVE, ON THE RECORD, THE EXISTENCE OF THE PRIMARY WRONGFUL DEATH BENEFICIARY.

{¶26} "VII. THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY INSTRUCTING THE JURY TO SPECULATE AS TO WHY THE TRIAL COURT SUSTAINED OBJECTIONS AND WHAT THE ANSWERS TO A QUESTION MIGHT HAVE BEEN HAD THE QUESTION BEEN ALLOWED TO BE ANSWERED."

ANALYSIS

{¶27} For ease of analysis, we discuss Administrator's Assignments of Error out of order. The order of the Assignments of Error will follow the chronological order of the alleged errors as they occurred during the trial.

VI. Appearance of Decedent's Child at Trial

{¶28} On November 6, 2015, Administrator filed a motion for clarification about the trial court's position on permitting McKenna's child to be present at trial. Administrator raised the issue again before the start of jury selection and requested the trial court permit McKenna's child to be present at trial or to allow the child be introduced to the jury. (Vol. I, 9). Administrator argued the child was entitled to be present as a beneficiary, in addition to McKenna's parents, in the wrongful death action. Defendants-Appellees objected to the child's presence at trial or the child's introduction to the jury. The child was not going to be a witness subject to cross-examination. (Vol I., 9).

{¶29} The trial court denied Administrator's request to bring the child into court. The court permitted Administrator to introduce the child by picture or video without sound, or the child's father could speak about the child during his testimony. (Vol. I., 11).

{¶30} Prior to the testimony of Jimmy Westfall, the father of McKenna's child and McKenna's fiancée, Administrator requested the trial court explain to the jury that the trial

court would not permit the child to be present in the courtroom. (Vol. IV, 7). The trial court agreed and stated to the jury:

> THE COURT: Additionally, the next witness that you're going to hear from is Jimmy Westfall who is [the child's] father. Now, [the child] is the child of Jessica McKenna. She is four years old. Out of respect for her age and to avoid any unnecessary trauma for having to bring her into this courtroom, she has been excused by the Court; so the testimony that you will hear about her will come to you through Mr. Westfall. Okay? Is that satisfactory?
>
> MR. DEMSEY: Right, and no inference, of course.
>
> THE COURT: And no inference is to be drawn by the fact that she is not here. I have excluded her essentially from being here. Okay?

(Vol. IV, 10-11).

{¶31} Administrator argues the trial court erred when it would not allow him to introduce McKenna's child, the primary beneficiary of the wrongful death action, to the jury. We disagree.

{¶32} "A party in a civil case is entitled to be in the courtroom, both personally and by counsel, at all stages of the trial." *Long v. Maxwell Co*., 118 Ohio App.134, 136, 183 N.E.2d 423 (2nd Dist.1962). In this case, however, McKenna's child is not a party to the action – the child is a beneficiary interested in a judgment against the Defendants-Appellees pursuant to R.C. 2125.02. A wrongful death action is brought in the name of the personal representative for the decedent for the benefit of the surviving spouse, children, parents, and next of kin of decedent. R.C. 2152.02(A)(1). The personal representative is required to prove the existence of statutory beneficiaries at the time of

trial in order to recover damages in a wrongful death action. *Id*.; *Mansour v. Woo*, 7th Dist. Ashtabula No. 2011-A-0038, 2012-Ohio-1883, ¶ 7. Administrator contends that by not permitting McKenna's child to be introduced to the jury to demonstrate active proof of her existence, the trial court prevented Administrator from meeting one of the essential elements of a wrongful death cause of action.

{¶33} It has been held that it is within the trial court's discretion to permit a beneficiary, especially a child, to be present in the courtroom during a wrongful death action. *Long* at 136-137; *See also State v. Levy*, 8th Dist. No. 83114, 2004-Ohio-4489, ¶ 45-46. In order to determine whether the trial court abused its discretion, we may examine the circumstances under which the trial court made the decision. *Long* at 137.

{¶34} In this case, the circumstances supported the trial court's decision to exclude the child from the courtroom. The child was six-weeks-old when McKenna died. At the time of trial, the child was four-years-old. At this young age, her presence could offer no special aid to the proper trial of the wrongful death action. The jury was fully informed of her existence through witness testimony. *See Long* at 137. On behalf of the Administrator, the child's father. The mother of McKenna and the father of McKenna testified at trial. The father of the child is raising the child. McKenna's father and mother have a relationship with the child. All three witnesses testified about the child, showed pictures of the child, and testified about McKenna's relationship with the child.

{¶35} The trial court instructed the jury that it was the decision of the trial court to exclude the child from the courtroom due to her young age. The trial court further instructed the jury that it should make no inference as to why the child was not present in the courtroom.

{¶36} We find the trial court's decision to exclude the child from the courtroom was not an abuse of discretion. Through witness testimony, Administrator demonstrated McKenna's child and McKenna's parents were McKenna's beneficiaries pursuant to R.C. 2501.02.

{¶37} Administrator's sixth Assignment of Error is overruled.

V. Peremptory Challenges

{¶38} Administrator claims the trial court erred in granting Defendants-Appellees six peremptory challenges: three to Dr. Kinney, P.A. Weber, Dr. Goldman, and Canton Aultman Emergency Physicians, Inc.; and three to Dr. Lizcano-Perez, Dr. Ganta, and Aultman Hospital. Administrator contends the interests of all Defendants-Appellees were essentially the same, so Defendants-Appellees were only entitled to three peremptory challenges.

{¶39} Civ.R. 47 governs jurors. Subsection (C) states the following:

> **(C) Challenges to prospective jurors.** In addition to challenges for cause provided by law, each party peremptorily may challenge three prospective jurors. If the interests of multiple litigants are essentially the same, "each party" shall mean "each side."
>
> Peremptory challenges shall be exercised alternately, with the first challenge exercised by the plaintiff. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties or sides, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

> A prospective juror peremptorily challenged by either party shall be excused.
>
> Nothing in this rule shall limit the court's discretion to allow challenges to be made outside the hearing of prospective jurors.

{¶40} In *Brown v. Martin*, 5th Dist. Fairfield No. 14-CA-31, 2015-Ohio-503, we analyzed a similar argument as to the number of peremptory challenges in a medical malpractice action where there were multiple defendant doctors. We reviewed the status of peremptory challenges vis-à-vis Civ.R. 47(C) as set forth by the Ohio Supreme Court in *LeFort v. Century 21–Maitland Realty Co*., 32 Ohio St.3d 121, 125, 512 N.E.2d 640 (1987):

> *Chakeres v. Merchants & Mechanics Federal S. & L. Assn*. (1962), 117 Ohio App. 351, 24 O.O.2d 131, 192 N.E.2d 323, summarizes the current status of the law with respect to peremptory challenges in civil cases. *Chakeres* provides at 355, 24 O.O.2d at 133, 192 N.E.2d at 326:
>
> > "Under statutes which allow a specific number of challenges to 'each party,' the majority view is that those who have identical interests or defenses are to be considered as one party and therefore only collectively entitled to the number of challenges allowed to one party by the statute. * * * However, if the interests of the parties defendant are essentially different or antagonistic, each litigant is ordinarily deemed a party within the contemplation of the statute and entitled to the full number of peremptory challenges. * * * "

> This court, in *Nieves v. Kietlinski* (1970), 22 Ohio St.2d 139, 51 O.O.2d 216, 258 N.E.2d 454, adopted the *Chakeres* rule and found that multiple plaintiffs who filed a common complaint, relied upon a singular statement of facts, and employed the same attorney to represent them could properly be considered a single party for the purposes of determining the proper number of peremptory challenges.

Brown, ¶¶ 13-15.

{¶41} The task under this rule of law is to evaluate the nature and defenses of each defendant-group. This involves a general review of the status of the litigation prior to trial. In this case, there are two defendant-groups: (1) the emergency room physicians and physician's assistant who treated McKenna in the Aultman Emergency Department and (2) the resident physicians who admitted McKenna to Aultman Hospital.

{¶42} On November 9, 2015, the trial court and counsel discussed the jury selection process. The trial court addressed counsel as to the challenges for cause and peremptory challenges:

> THE COURT: The parties will be given an unlimited number of challenges for cause; three peremptory challenges per side. And just let me identify for the record that the Court finds that the Canton Aultman Emergency Physician parties are not necessarily aligned with, for lack of a better term, the Aultman defendants. And the Court will give each set of defendants three peremptories.

(Vol. I, 23-24). Administrator objected to each defendant-group receiving three peremptories each:

> MR. DEMSEY: * * * I do believe they are aligned. They are partners in the same law office; every motion is virtually identical, with exception of changing the names of the parties. I believe that they have the same insurance or insurance representative. There seems to be an alignment there. I'm not sure exactly what it is.

(Vol. I, 24-25). Counsel for the defendant-group emergency room physicians and counsel for the defendant-group resident physicians and Aultman Hospital responded:

> MR. MILLIGAN: Yeah. These, these physicians took care of this patient at different times and there are different medical issues as to each and I believe their interests are different and having separate peremptories are proper.
>
> MR. PUSATERI: Yes, Your Honor. And Dr. Ganta and Dr. Lizcano were working for the Canton Medical Education Foundation at the time, which served and provided residents for Aultman Hospital and Mercy. I mean, it's a separate entity from the other defendants.

(Vol. I, 25).

{¶43} The trial court did not change its ruling after hearing the arguments of counsel. (Vol. I, 26).

{¶44} We examine whether the two separate defendant-groups had "essentially different or antagonistic" interests under the guidelines of *LeFort. Brown*, 2015-Ohio-503, ¶ 17.

{¶45} Separate trial counsel represented each defendant-group, but the attorneys were from the same law firm. Each defendant-group filed separate answers, pre-trial

statements, proposed jury instructions, and proposed jury interrogatories. The parties filed an agreed statement of the case, which was signed by counsel representing each defendant-group, but was unsigned by the counsel for Administrator. The defendant-groups also filed a Joint Index of Exhibits for Trial on November 5, 2015. The Joint Index of Exhibits included McKenna's emergency room and admission records, her OB/GYN records, the CT scan, and McKenna's school records. At trial, Defendants-Appellees and Administrator both referred to McKenna's emergency room records, admission records, and CT scan as evidence in the case.

{¶46} We review the expert witnesses identified by each defendant-group and the expert's testimony at trial to determine whether the interests of the defendant-groups were essentially different. Dr. Kinney, P.A. Weber, and Dr. Goldman identified their expert witnesses as David A. Talan, M.D. and Emil R. Hayek, M.D. Dr. Talan is a board-certified specialist in internal medicine, emergency medicine, and infectious diseases. (Vol. VI, 16). He was previously employed as the chief of the emergency department at a ULCA Medical Center. (Vol. VI, 17). Dr. Talan testified only to the standard of care as to the care and treatment of McKenna by Dr. Kinney, P.A. Weber, and Dr. Goldman on January 24, 2011 and January 31, 2011. Dr. Hayak is a board-certified cardiologist. (Vol. V, 144). Dr. Hayek testified it was his opinion within a reasonable degree of medical probability that McKenna did not have heart failure on January 24, 2011 or January 31, 2011. (Vol. V, 176). Counsel for the emergency room physicians did question Dr. Hayak as to his opinion on McKenna's cause of death. Dr. Hayak responded it was his opinion that McKenna died from massive blood loss and not from peripartum cardiomyopathy;

therefore, she was not in heart failure on January 24, 2011 and January 31, 2011. (Vol. V, 214, 273).

{¶47} Dr. Lizcano-Perez, Dr. Ganta, and Aultman Hospital identified their expert witnesses as Mark. R. Bibler, M.D. and Paul J. Grant, M.D. Dr. Grant and Dr. Bibler are hospitalists. Dr. Grant explained a hospitalist is a physician whose patients come through the emergency department and are admitted to the hospital. (Vol. VI, 127). The common training background of a hospitalist is in internal medicine or pediatrics. (Vol. VI, 127). Dr. Grant testified whether Drs. Lizcano-Perez and Ganta met the standard of care when they took over the care of McKenna upon her admission to Aultman Hospital.

{¶48} Upon review, we find the filings and the expert testimony from the defendant-groups was overall looking out for each group's own interests. Each defendant-group presented a standard of care based on their specialty area, emergency medicine or hospitalist. We do note, however, counsel for the emergency room defendant-group twice asked whether *all* doctors met the standard of care. (Vol. V, 194, 217). We find two questions out of eight volumes of testimony does not undermine the trial court's determination the two defendant-groups were not aligned and entitled to six peremptory challenges.

{¶49} Administrator's fifth Assignment of Error is overruled.

IV. Dismissal of Juror No. 3 for Cause

{¶50} In his fourth Assignment of Error, Administrator contends the trial court committed prejudicial error when it denied Administrator's challenge for cause of Juror No. 3. We disagree.

{¶51} During voir dire, the trial court instructed the potential jurors on the law as it applied to the case:

> THE COURT: Is there anyone who would not be able to accept the law as given to you by the Court and apply it to the facts as you find them to be? * * * All right. Now, the Court will instruct you as to the degree of proof required to prove the issues in this case. Is there any one of you that cannot follow the instructions of the Court in this respect?

(Vol. I, 65-67). No juror responded to the trial court's inquiry. (Vol. I, 230). The trial court then began questioning the jurors based on their ability to follow the law. Later during voir dire, counsel for Administrator asked the jury pool:

> MR. GOULD: * * * As we talked about earlier about medical malpractice suits, some people just think they should never happen. Some people on one side of the aisle think physicians should be completely immune and never be sued; on the other side of the aisle people think the opposite, that they need to be held accountable. And there is a spectrum. I'm not saying that one person is all the way down here and you have to be all the way down here. There is a big spectrum. * * * But I'm curious as to where each of the jurors sit on that spectrum. * * * Ah, Juror Number 3, what about you on that pendulum? Where do you believe you sit?
>
> JUROR NO. 3: Probably the same. Neutral.
>
> MR. GOULD: Neutral.
>
> JUROR NO. 3: Depending what the circumstances are, the evidence and stuff.

* * *

MR. GOULD: Do you believe that if the fact pattern shows that a physician did not adhere to the standard of care, ah, and someone passed away because of it that they should be held accountable?

JUROR NO. 3: Yes.

MR. GOULD: But it needs to be proven to you, right?

JUROR NO. 3: Yes.

MR. GOULD: For the evidence?

JUROR NO. 3: I'm, I'm engineering, black or white for me.

MR. GOULD: Exactly. And that brings us to a next topic that I'd like to discuss with people as well, um, and it's called the preponderance of the evidence. In real life, in situations such as this, ah, engineering is a science, we have a correct answer, an incorrect answer and they're very clear. * * * What we have to prove is to a preponderance of the evidence, or more likely than not, simply the evidence outweighs to our favor that the physicians deviated from the accepted standard of care and caused Jessica McKenna's death. * * * Do you believe that things in a courtroom, regardless of the standard, need to be black and white?

JUROR NO. 3: Yes.

MR. GOULD: Okay. So what you're telling me is that if the Judge instructed you to make a decision based on simply more likely than not, you would want it to be more higher of a standard, a certainty that someone did something wrong?

JUROR NO. 3: Yes.

(Vol. I, 155-161).

{¶52} Counsel for Administrator challenged Juror No. 3 for cause because the juror stated he could not hold himself to the standard instructed by the trial court and he would hold Administrator to a higher standard. (Vol. I, 229). Both counsel for Defendants-Appellees disagreed with the challenge for cause as to Juror No. 3. (Vol. I, 229-230). Counsel argued Juror No. 3 did not specifically state he could not follow the trial court's instructions on the burden of proof. (Vol. I, 230). The trial court stated, "* * * I can ask them the follow-up question. I don't recall them saying that they cannot follow the Court's instruction as it relates to the burden of proof. I mean, I specifically asked that question." (Vol. I, 230). The trial court then questioned Juror No. 3 and three other jurors as to their ability to follow the trial court's instructions as to the burden of proof:

> THE COURT: You were asked questions about the burden of proof in this case, and that it was the preponderance of the evidence. Your questions indicated that you would require more than what the law required of you. And that somewhat contradicts the question that I asked earlier in that would all of you be willing to follow the Court's instruction of law as it relates to the burden of proof. Everyone said that they could. * * * But in this case if I were to instruct you that the burden of proof was preponderance of the evidence, no matter what more you may have wanted, would each of you being willing to follow the Court's instruction of law in that regard? Juror Number 3.

JUROR NO. 3: I would be uncomfortable, uncomfortable with it, but I would follow the law, yes.

THE COURT: Okay. So even though you were, you would be personally uncomfortable with it –

JUROR NO. 3: Yes.

THE COURT: -- you would put that personal feeling aside and follow the law as gave it to you?

JUROR NO. 3: Yes.

(Vol. I, 232-234). The trial court rejected Administrator's challenge to Juror No. 3 for cause. (Vol. I, 234). Administrator noted his objection in the record that the trial court's rehabilitation was not enough and the juror's prior answers spoke for themselves. (Vol. I, 232). Administrator used a peremptory challenge to dismiss Juror No. 3.

{¶53} Administrator contends the trial court committed prejudicial error when it overruled his challenge for cause as to Juror No. 3. Pursuant to R.C. 2313.17(B)(9), good cause exists for the removal of a prospective juror when the juror discloses by his or her answers that he or she cannot be a fair and impartial juror or will not follow the law as given by the court. Administrator argues Juror No. 3 disclosed by his answers that he would not follow the law as to the burden of proof, which forced Administrator to use one of his peremptory challenges.

{¶54} The standard of review concerning whether a prospective juror should be disqualified for cause is abuse of discretion. *Stoner v. Stires*, 5th Dist. Stark No. 94-CA-290, 1995 WL 507648, *2 (Apr. 24, 1995) citing *Berk v. Matthews*, 53 Ohio St.3d 161, 559 N.E.2d 1301 (1990), syllabus. Pursuant to this standard, we will reverse the trial

court's decision only upon a finding that the trial court acted arbitrarily, unreasonably or unconscionably. *Id*. If a prospective juror has been challenged for cause, the trial court should excuse the juror if the court has any doubt as to the juror's being entirely unbiased. R.C. 2313.17(D).

{¶55} In support of his argument the trial court committed prejudicial error when it overruled his challenge to Juror No. 3 for cause, Administrator refers this court to *Klem v. Consolidated Rail Corp*., 191 Ohio App.3d 690, 2010-Ohio-3330, 947 N.E.2d 687 (6th Dist.). In *Klem*, the appellant argued the trial court committed prejudicial error when it failed to dismiss two jurors for cause during voir dire. The jurors in *Klem* were asked whether they could follow the Federal Employers Liability Act, which had abolished the assumption of the risk. *Id*. at ¶ 89. During voir dire, two jurors expressed a belief to appellant's counsel that the appellant-employee had assumed the risk of injury. *Id*. When asked if the two jurors could set aside the concept of the assumption of the risk, the jurors were equivocal in their answers:

> A review of the transcript from the jury voir dire reveals that McCullough and Poston had difficulty setting aside the concept of assumption of the risk. McCullough's responses fluctuate from "There's other things," "That's difficult," and "I don't think it is good law necessarily," to "Probably," when asked whether it would make Klem's case harder to prove. Similarly, Poston's answers range from "You work there for a long time, you know what you're doing," "I think I can," "Probably, yes," to "I think I could, yeah."

Klem, 2010-Ohio-3330 at ¶ 10.

{¶56} The Sixth District Court of Appeals reviewed the transcript and found that appellee's counsel attempted to rehabilitate the two jurors, but his questions did not specifically address whether the jurors could set aside their belief that the appellant-employee had assumed the risk of injury. *Id*. at ¶ 147. The court of appeals also noted the trial court did not ask any questions of the two jurors designed to elicit definitive answers. *Id*. at ¶ 154.

{¶57} The *Klem* court stated:

> When a juror equivocates or gives contradictory answers, "it is for the trial court to determine which answer reflects the juror's true state of mind." *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, ¶ 66; *State v. Webb* (1994), 70 Ohio St.3d 325, 339, 638 N.E.2d 1023; *State v. Jones* (2001), 91 Ohio St.3d 335, 339, 744 N.E.2d 1163. However, the trial judge need not accept the last answer elicited by counsel as the prospective juror's definitive word. See *State v. White* (1999), 85 Ohio St.3d 433, 439, 709 N.E.2d 140, citing *State v. Scott* (1986), 26 Ohio St.3d 92, 97–98, 26 OBR 79, 497 N.E.2d 55.

Klem at ¶ 153. In this case and unlike *Klem*, the trial court questioned Juror No. 3 on his ability to follow the law as to the burden of proof, regardless of his comfort level with the preponderance of the evidence standard. (Vol. I, 232-234). Pursuant to the trial court's questioning, Juror No. 3 answered twice definitely and affirmatively he could follow the law. (Vol. I, 234). "As long as a trial court is satisfied, following additional questioning of the prospective juror, that the juror can be fair and impartial and follow the law as instructed, the court need not remove that juror for cause." *Giusti v. Felten*, 9th Dist.

Summit Nos. 26611, 26695, 2014-Ohio-3115, ¶ 7 citing *Gurley v. Nemer*, 9th Dist. Summit No. 21965, 2004-Ohio-5169, ¶ 6, citing *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶58} The trial court was satisfied with the definitive and affirmative answers of Juror No. 3 after the court's additional questioning that he would follow the law as instructed. The record supports the trial court's decision to overrule the challenge for cause to Juror No. 3 and the decision was not an abuse of discretion.

{¶59} Administrator's fourth Assignment of Error is overruled.

I. Surprise Expert Witness

{¶60} Administrator argues in his first Assignment of Error that the trial court committed prejudicial error when it permitted Defendants-Appellees to present the surprise expert witness testimony of Dr. Kevin Hill and Dr. Allen Rovner during Defendants-Appellees' case-in-chief.

{¶61} On August 21, 2015, Dr. Lizcano-Perez, Dr. Ganta, and Aultman Hospital filed their expert witness identification. The parties identified Dr. Mark Bibler and Dr. Paul Grant as the experts who may be used at trial. Expert reports from Dr. Bibler and Dr. Grant were provided to the parties. The expert witness identification further stated, "Furthermore, the defendants reserve the right to use any expert witness identified by a party regardless of whether they remain a party in this case, and reserve the right to use as expert witness any of the treating physicians of Jessica Ann McKenna."

{¶62} Dr. Kinney, Dr. Goldman, P.A. Weber, and Canton Aultman Emergency Physicians, Inc. filed their expert witness identification on August 21, 2015. The parties identified Dr. David Talan and Dr. Emil Hayek as the experts who may be used at trial.

Expert reports from Dr. Talan and Dr. Hayek were provided to the parties. The expert witness identification further stated, “Furthermore, the defendants reserve the right to use any expert witness identified by a party regardless of whether they remain a party in this case, and reserve the right to use as expert witness any of the treating physicians of Jessica Ann McKenna.”

Dr. Hill

{¶63} Dr. Kevin Hill was identified in Defendants-Appellees’ trial brief as a fact witness who would testify regarding the care provided to McKenna and his interactions with the resident physicians. Administrator took his deposition on July 21, 2015.

{¶64} Dr. Hill was called to testify in Defendants-Appellees’ case-in-chief. On January 31, 2011, Dr. Lizcano-Perez was a third-year resident and Dr. Ganta was a first-year resident employed by the Canton Medical Education Foundation. On that date, Dr. Kevin Hill and Dr. Robert Sabota worked together in a private medical practice, but also acted as attending physicians who supervised residents at Aultman Hospital. (Vol. VI, 266). Dr. Hill was the attending physician on-call on the night of January 31, 2011. (Vol. VI, 270). When a patient is admitted to Aultman Hospital, they are assigned doctors. (Vol. VI, 282). The resident physicians examine and evaluate the patient using their independent medical skills before the resident calls the attending physician. (Vol. VI, 282). In the morning, the attending physician meets with the resident physicians and discusses the patients, and then they decide which patient they will see later in the day. (Vol. VI, 287).

{¶65} Late on January 31, 2011 or early on February 1, 2011, Dr. Hill had a telephone discussion with either Dr. Lizcano-Perez or Dr. Ganta regarding the care of

McKenna. (Vol. VI., 271). Dr. Hill did not remember the details of the conversation, but testified generally a resident physician and attending physician will discuss the patient history, patient complaints, physical examination, laboratory studies, and the resident's opinion as to diagnosis and further treatment. (Vol. VI, 272). Dr. Hill signed the January 31, 2011 orders of Dr. Ganta on February 1, 2011. (Vol. VI, 271). Dr. Hill did not modify Dr. Ganta's orders for McKenna. (Vol. VI, 282-283).

{¶66} Dr. Hill never personally examined or saw McKenna. (Vol. VI, 289). When Dr. Hill arrived at the hospital, McKenna had already been moved to the intensive care unit and was no longer under Dr. Hill's care as the attending physician in the general medicine unit. (Vol. VI, 287-289). Dr. Hill was never at the hospital with Dr. Lizcano-Perez or Dr. Ganta at the time they cared for McKenna. (Vol. VI, 289).

{¶67} Counsel for Dr. Lizcano-Perez, Dr. Ganta, and Aultman Hospital asked if Dr. Hill had reviewed the medical records generated from January 31, 2011 to February 1, 2011. (Vol. VI, 274). Dr. Hill answered he had reviewed the medical records. (Vol. VI, 274). Dr. Hill was next asked:

> MR. PUSATERI: And did you find any reason for Dr. Lizcano and Dr. Ganta to bring in a cardiologist on the night of January 31, early morning of February 1?
>
> DR. HILL: I didn't feel that it was indicated.
>
> * * *
>
> MR. PUSATERI: Did you see any reason for them to try to get an echocardiogram ordered on the night of January 31, February 1?
>
> DR. HILL: That night I didn't see that it was indicated.

> MR. PUSATERI: And today you have the advantage of looking back and looking at the whole record. Is your opinion any different today than it was then when you spoke to them?

(Vol. VI, 274-275). Administrator objected, arguing the question elicited an expert opinion about whether the tests were in order and Dr. Hill was never identified as an expert witness or issued an expert report. (Vol. VI, 276). Mr. Pusateri argued Dr. Hill was deposed. Mr. Pusateri asked Dr. Hill his opinion as a treating physician and his review of McKenna's records. (Vol. VI, 277-278). The trial court overruled Administrator's objection. (Vol. VI, 278).

{¶68} Mr. Pusateri resumed questioning Dr. Hill:

> MR. PUSATERI: Okay. Doctor, now back to that question. So after having viewed all the records today, and the records I mean are from the January 31 and February 1 visit to the hospital by Jessica McKenna, does that change your mind in any way about not bringing in a cardiologist later, late at night?
>
> DR. HILL: I am not sure exactly what you're getting at.
>
> MR. PUSATERI: My point is if you reviewed all the records now, today, would your conversation with Dr. Lizcano and Dr. Ganta have changed knowing what you know today?
>
> DR. HILL: I guess this is what I think you want to know from me so I'll … If we had consulted the cardiologist whenever she came in at 12 o'clock and if we would have gotten the echo, I don't think it would have changed her outcome of what happened to her.

(Vol. VI, 278-278). Administrator objected and the trial court overruled the objection.

{¶69} Administrator contends the trial court abused its discretion when it allowed Dr. Hill to testify as to his opinion whether Dr. Lizcano-Perez and Dr. Ganta should have consulted a cardiologist or ordered cardiac testing. Administrator argues Defendants-Appellees failed to identify Dr. Hill as an expert witness or provide an expert report pursuant to Civ.R. 26, causing Administrator to be surprised and ambushed by his testimony at trial.

{¶70} We first note Defendants-Appellees do not argue Dr. Hill was not an expert witness. As such, our analysis is limited to the law as it applies to the admission of expert testimony, as opposed to testimony from a fact or occurrence witness.

Discovery Standard of Review

{¶71} Civ.R. 26(E)(1)(b) requires a party to seasonably supplement his response to a request for discovery with the identify of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify. The purpose of Civ.R. 26(E)(1)(b) is to prevent "trial by ambush." *Waste Mgt. of Ohio, Inc. v. Mid-America Tire, Inc*. 113 Ohio App.3d 529, 533, 681 N.E.2d 492 (2nd Dist.1996). Although Civ.R. 26(E)(1)(b) requires supplementation of the subject matter on which an expert is expected to testify, it does not require a party to give an opposing party notice of every nuance of an expert's opinion. *Metro. Life Ins. Co. v. Tomchik*, 134 Ohio App.3d 765, 781, 732 N.E.2d 430 (7th Dist.1999) citing *Waste Mgt. of Ohio, Inc. v. Mid–America Tire, Inc*., 113 Ohio App.3d 529, 533, 681 N.E.2d 492 (2nd Dist.1996). Rather, the purpose of the rule is met where, upon the unveiling of a contention, the opposing party is given a reasonable opportunity to prepare to defend against it. *Id*.

{¶72} The trial court has broad discretion to impose sanctions for violations of discovery rules, and this court will not reverse sanctions absent an abuse of that discretion. *Masten v. Masten*, 5th Dist. Fairfield No. 16-CA-4, 2016-Ohio-5738, ¶ 15 citing *Rankin v. Willow Park Convalescent Home*, 99 Ohio App.3d 110, 112, 649 N.E.2d 1320, 1321 (8th Dist.1994). The trial court has discretion to grant corrective orders and may ultimately exclude expert testimony when the party calling the expert has failed to supplement a discovery response. *Sellers v. Knox Community Hosp.*, 5th Dist. Knox No. 16 CA 12, 2016-Ohio-8566, -- N.E.3d --, ¶¶ 34-35 citing *Paugh and Farmer, Inc. v. Menorah Home for the Jewish Aged*, 15 Ohio St.3d 44, 45, 472 N.E.2d 704 (1984); *Jones v. Murphy*, 12 Ohio St.3d 84, 465 N.E.2d 444 (1984), at syllabus. The existence and effect of prejudice resulting from noncompliance with the disclosure rule is of primary concern. *Huffman v. Hair Surgeon, Inc*. (1985), 19 Ohio St.3d 83, 85, 482 N.E.2d 1248.

{¶73} Our standard of review is whether the trial court abused its discretion in permitting the expert testimony. *Leichtamer v. American Motors Corp*., 67 Ohio St.2d 456, 473–74, 424 N.E.2d 568 (1981). Abuse of discretion in this setting implies that the error resulted in the material prejudice to the opposing party. *Vargo v. Travelers Ins. Co*., 34 Ohio St.3d 27, 32, 516 N.E.2d 226 (1987) citing Civ.R. 61, R.C. 2309.59, and *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 358–59, 91 N.E.2d 690 (1950).

Treating Physician

{¶74} Defendants-Appellees argue they identified Dr. Hill as an expert witness in the August 21, 2015 expert witness disclosure. The expert witness identification stated, “Furthermore, the defendants reserve the right to use any expert witness identified by a party regardless of whether they remain a party in this case, and reserve the right to use

as expert witness any of the treating physicians of Jessica Ann McKenna." The record in this case establishes Dr. Hill was a treating physician of McKenna. Dr. Hill was the attending physician on-call on January 31, 2011 and February 1, 2011. As the attending physician on-call, Dr. Hill supervised the resident physicians on duty that night, Dr. Lizcano-Perez and Dr. Ganta. One of the residents contacted Dr. Hill by telephone and discussed their examination and evaluation of McKenna. Dr. Hill signed off on Dr. Ganta's orders for McKenna on February 1, 2011. Dr. Pearson, Administrator's expert, testified the attending physician is ultimately responsible for the care of the patient. (Vol. 4, 246).

Prejudice

{¶75} We next determine whether allowing Dr. Hill testify as to his opinion that it was not necessary for Dr. Lizcano-Perez and Dr. Ganta to consult a cardiologist or order cardiac testing because McKenna was not exhibiting signs of heart failure caused material prejudice to Administrator. Administrator's central causation theory was McKenna was exhibiting signs of heart failure on January 24, 2011, January 31, 2011, and February 1, 2011. We find that based on the entirety of the record, Administrator was not ambushed by Dr. Hill's opinion testimony.

{¶76} In order to determine if Administrator was surprised by Dr. Hill's opinion testimony, we first review Dr. Hill's deposition taken by Administrator on July 21, 2015. At the deposition, Dr. Hill testified as follows:

> Q. Would you have had a differential diagnosis postpartum cardiomyopathy when all of this information would have been conveyed to you in the early morning hours of February 1?

A. It would be considered, but it would be very unlikely given that she has no symptoms of heart failure.

Q. Okay. Is there something you can do to rule it in or rule it out?

A. You can do a cardiac echo to evaluate the heart function.

Q. Okay. That was never ordered; right?

A. Not at this point.

Q. Do you know if the standard of care calls for a cardiac echo to evaluate the heart function if you have a secondary or differential diagnosis, even if remote, a problem such as that?

* * *

A. It would be indicated, but again, with her not exhibiting features of congestive heart failure, I'm not going to order it at – in the middle of the night. You know, it would be something that would have been discussed – my expectation would have been to discuss that on rounds and have ordered it during the daytime hours.

(Dr. Hill Depo., 63-64).

{¶77} Dr. Hill further testified during his deposition:

Q. * * * Is it outside the standard of care not to have done an immediate cardiac workup or requested cardiac testing, given that it could have been postpartum cardiomyopathy?

* * *

A. Again, it doesn't appear that the main issue at this point in time is a cardiac issue. It appears that she's dehydrated and that she has issues

> related to her nausea and vomiting and diarrhea rather than to cardiac problems.

(Dr. Hill Depo., 73).

{¶78} Dr. Hill's opinion testimony at trial was no different from his deposition testimony that the resident doctors did not fall below the standard of care when they did not order cardiac testing because McKenna was not exhibiting signs of heart failure on January 31, 2011 or February 1, 2011.

{¶79} Administrator refers this court to *Vaught v. Cleveland Clinic Found*., 98 Ohio St.3d 485, 2003-Ohio-2181, 787 N.E.2d 631, where the Supreme Court found the trial court did not abuse its discretion in prohibiting a defendant doctor from testifying as an expert witness on his own behalf. In violation of a Local Rule, the defendant doctor failed to file an expert report. The Court found the trial court did not abuse its discretion in prohibiting the defendant doctor's expert testimony as a discovery sanction because he failed to comply with the discovery rules. *Id*. at ¶ 21. Further, because the defendant doctor was not identified as an expert, the plaintiff did not ask questions typically asked of expert witnesses. *Id*. at ¶ 22. In the present case, Defendants-Appellees informed Administrator in their expert witness disclosure they reserved the right to call any treating physician as an expert witness. Dr. Hill was a treating physician of McKenna on January 24, 2011 and February 1, 2011. Further, Dr. Hill's deposition shows Administrator asked Dr. Hill his opinion of whether Dr. Lizcano-Perez and Dr. Grant fell below the standard of care when they did not order cardiac testing. Dr. Hill's opinion as to the standard of care did not change from his deposition to trial.

{¶80} We next look at the trial record to determine if Administrator was ambushed by Dr. Hill's opinion testimony. Dr. Hill's opinion testimony that McKenna was not in heart failure on January 31, 2011 or February 1, 2011 was consistent with the testimony of Defendants-Appellees and Defendants-Appellees' expert witnesses.

{¶81} Accordingly, we find the trial court did not abuse its discretion when it overruled Administrator's objection to Dr. Hill's opinion testimony that cardiac testing was not warranted on January 31, 2011 or February 1, 2011. Administrator did not suffer material prejudice by the admission of the testimony.

Dr. Rovner

{¶82} Dr. Rovner was identified in Defendants-Appellees' trial brief as a fact witness who would testify regarding the interpretation of the imaging done during McKenna's case. On January 31, 2011, a CT scan of McKenna's chest was completed to rule out a pulmonary embolism. The CT scan was read by Dr. Allen Rovner, a radiologist with Aultman Hospital.

{¶83} Prior to Dr. Kinney, Dr. Goldman, and P.A. Weber calling Dr. Rovner to testify, Administrator objected and asked the trial court to preclude Defendants-Appellees from attempting to secure expert opinions from the witness. (Vol. VII, 4-5). Counsel for Dr. Kinney, Dr. Goldman, and P.A. Weber responded it was not his intention to ask Dr. Rovner whether McKenna had heart failure. (Vol. VII, 6). He would ask Dr. Rovner, however, to explain a CT scan, what it is capable of showing, and what Dr. Rovner observed in the CT scan. (Vol. VII, 6). The trial court ruled Dr. Rovner could testify to what he found in the CT scan, such as fluid. (Vol. VII, 7). Counsel for Administrator agreed with

defense counsel that Dr. Rovner would not be asked about heart failure and the meaning of fluid in the lungs. (Vol. VII, 8).

{¶84} Dr. Rovner was asked:

MR. MILLIGAN: * * * would a CT scan like this, if there were fluid in the lungs, if there was fluid backed up into the lungs, would that be shown in the CT scan of this type?

DR. ROVNER: Yes.

MR. MILLIGAN: Okay. Is it – can you describe for us in what detail? Is it sensitive? Is it just gross observations or –

(Vol. VII, 22-23). Dr. Rovner then proceeded to explain what air in the lung looks like in a CT scan. After Dr. Rovner's explanation, counsel stated he had pulled an image off the internet of a CT scan with fluid in the lungs. Administrator objected on the basis that Dr. Rovner was testifying beyond his findings and beginning to give expert opinion testimony, especially if he was asked to interpret a CT scan from the internet. (Vol. VII, 25). Defense counsel agreed not to use the CT scan from the internet. (Vol. VII, 28). Dr. Rovner's remaining testimony was whether the January 31, 2011 CT scan showed fluid in McKenna's lung. Using McKenna's CT scan, Dr. Rovner verbally explained what fluid in the lung would look like and the CT scan did not show fluid in McKenna's lung. (Vol. VII, 30).

{¶85} Our review of Dr. Rovner's testimony finds there was no implication that Dr. Rovner testified as an expert witness. Defense counsel conceded to Administrator's objections to any expert opinion testimony. We find Administrator suffered no material prejudice from Dr. Rovner's testimony.

{¶86} Administrator's first Assignment of Error is overruled.

II. Limit the Scope of Administrator's Cross-Examination of Dr. Hill

{¶87} Administrator argues in his second Assignment of Error that the trial court committed prejudicial error when it limited Administrator's cross-examination of Dr. Hill to the events of January 31, 2011 and February 1, 2011.

{¶88} During cross-examination, Administrator asked Dr. Hill, "Okay. And I think you would agree with me that to send someone home without determining their cause of shortness of breath is a deviation from the accepted standards of care?" (Vol. VI, 294). After discussing shortness of breath, counsel asked again, "To simply have a patient who comes in and says who's complaining of shortness of breath and says that they feel shortness of breath, you don't ask any of those questions; that, you would agree, is a deviation from the accepted standard of care?" (Vol. VI, 295-296). Defense counsel objected on the basis that Administrator was asking about a standard of care for January 24, 2011, the events of which Dr. Hill was not involved. (Vol. VI, 296). Administrator responded that Dr. Hill was permitted on direct examination to give his opinion to the cause of death. (Vol. VI, 297). The trial court sustained the objection and limited Dr. Hill's cross-examination to events on January 31, 2011 when he provided care. (Vol. VI, 297).

{¶89} Generally, the trial court has broad discretion in imposing limits on the scope of cross-examination. *State v. Green*, 66 Ohio St.3d 141, 147, 609 N.E.2d 1253 (1993); *State v. Cobb*, 81 Ohio App.3d 179, 183, 610 N.E.2d 1009 (9th Dist.1991). An appellate court will not interfere with a trial court's decision about the scope of cross-examination absent an abuse of discretion. *State v. Gaver*, 5th Dist. Stark No. 2015CA00204, 2016-Ohio-7055, ¶ 39.

{¶90} In this case, we find no abuse of discretion for the trial court to limit the scope of Dr. Hill's cross-examination to events of January 31, 2011. On direct examination, Dr. Hill was asked, "And today you have the advantage of looking back and looking at the whole record. Is your opinion any different today than it was then when you spoke to them?" Dr. Hills responded, "I guess this is what I think you want to know from me so I'll … If we had consulted the cardiologist whenever she came in at 12 o'clock and if we would have gotten the echo, I don't think it would have changed her outcome of what happened to her." His response shows he gave his opinion only to the events that occurred on January 31, 2011.

{¶91} Administrator's second Assignment of Error is overruled.

III. Rebuttal Testimony from Defense Expert Witness

{¶92} At the close of the Defendants-Appellees' case, Administrator stated he intended to call Dr. Mark Bibler as a rebuttal witness. (Vol. VII, 129). Dr. Bibler was identified by Dr. Lizcano-Perez, Dr. Ganta, and Aultman Hospital as an expert witness for the hospitalist standard of care, but Defendants-Appellees did not call him to testify. The Administrator's basis for calling Dr. Bibler was to rebut the testimony of Dr. Rovner as to McKenna's CT scan. During Dr. Rovner's testimony, Defendants-Appellees used McKenna's CT scan to show there was no fluid in McKenna's lung on January 31, 2011. The jury observed the CT scan for the first time during Dr. Rovner's testimony.

{¶93} Defendants-Appellees objected on multiple grounds. First, Defendants-Appellees argued the use of a defense expert as Administrator's rebuttal witness was improper and prejudicial. Second, Defendants-Appellees contended Administrator failed to demonstrate he had a need for rebuttal testimony. (Vol. VII, 129-132).

{¶94} The trial court reviewed Dr. Bibler's deposition testimony in camera. (Vol. VII, 158). Upon review, the trial court found Dr. Bibler's testimony was not proper rebuttal evidence intended to explain, repel, counteract, or disprove facts given in evidence by the adverse party. (Vol. VII, 158). The trial court determined Dr. Bibler's testimony did not present issues raised for the first time in Defendants-Appellees' case-in-chief. Rather, Dr. Bibler's testimony involved matters discussed during Administrator's case-in-chief. (Vol. VII, 159). Finally, the trial court determined the prejudice of allowing an expert retained by the defense to testify against the defense would outweigh any probative value gained by the testimony. (Vol. VII, 159-160). The trial court overruled Administrator's request to present Dr. Bibler as a rebuttal witness, but allowed Administrator to proffer the testimony for the record. (Vol. VII, 160).

{¶95} Administrator argues in his third Assignment of Error that the trial court's refusal to allow him to present the testimony of Dr. Bibler as a rebuttal witness was prejudicial.

{¶96} Generally, decisions regarding the admissibility of evidence are within the broad discretion of the trial court. *McManaway v. Fairfield Med. Ctr.*, 5th Dist. Fairfield No. 05 CA 34, 2006-Ohio-1915, ¶ 22 citing *Beard v. Meridia Huron Hosp.,* 106 Ohio St.3d 237, 834 N.E.2d 323, 2005–Ohio–4787, at ¶ 20, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126. A decision to admit or exclude evidence will be upheld absent an abuse of discretion. *Id*. The Tenth District Court of Appeals analyzed rebuttal testimony and its proper application in *Brothers v. Morrone-O'Keefe Dev. Co*., 10th Dist. Franklin No. 05AP-161, 2006-Ohio-1160, ¶ 6:

> Rebuttal testimony is testimony that is "given to explain, refute, or disprove new facts introduced into evidence by the adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence." *State v. McNeill* (1998), 83 Ohio St.3d 438, 446, 700 N.E.2d 596. Generally, the admission of rebuttal testimony is a matter within the trial court's discretion, and a decision admitting or excluding such testimony will not be reversed absent an abuse of that discretion. Id.; *Steffy v. Blevins,* Franklin App. No. 02AP-1278, 2003-Ohio-6443, at ¶ 23. However, a trial court's discretion over the admission of rebuttal testimony is not absolute. Rather, "[a] party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief." *Phung v. Waste Mgt., Inc.* (1994), 71 Ohio St.3d 408, 410, 644 N.E.2d 286. Thus, a party possesses an unconditional right to present rebuttal testimony if: (1) the evidence is not cumulative; (2) the evidence would not be appropriate for the party's case-in-chief; and (3) the evidence is first addressed in the opponent's case-in-chief. *Lucas, Prendergast, Albright, Gibson, & Newman v. Zschach* (Sept. 12, 1996), Franklin App. No. 95APE12-1663; *Lawson v. Bd. of Edn. of the Columbus City School Dist.* (Aug. 1, 1996), Franklin App. No. 95APE11-1505.

{¶97} With those guidelines, we review Dr. Bibler's proffered testimony to determine if the trial court abused its discretion when it found it was not proper rebuttal testimony. Administrator's central causation theory was McKenna was in heart failure on

January 24, 2011, January 31, 2011, and February 1, 2011. Defendants-Appellees and expert witnesses for all parties testified that signs and symptoms of heart failure include shortness of breath, fluid in the lungs, unusual heart sounds, and edema in the legs. Administrator argued McKenna complained of shortness of breath, which Defendants-Appellees failed to recognize as a sign or symptom of postpartum cardiomyopathy.

{¶98} During Dr. Rovner's testimony, the January 31, 2011 CT scan was displayed to the jury for the first time. Administrator argues he was surprised by the display of the January 31, 2011 CT scan during Dr. Rovner's testimony and Dr. Rovner's testimony that the CT scan showed there was no fluid in McKenna's lung. Dr. Bibler testified in his deposition that in the early stages of heart failure, there probably would not be fluid in the lungs because the heart is still pumping well enough to prevent fluid backing up into the lungs. (Vol. VII, 187-188). Dr. Bibler also testified a patient could have shortness of breath without having fluid in the lungs in the early stages of heart failure. (Vol. 7, 190). Administrator contends Dr. Bibler's rebuttal testimony was necessary to rebut the new physical evidence presented in the CT scan.

{¶99} Dr. Rovner presented the CT scan during his testimony and explained the CT scan showed there was no fluid in McKenna's lung on January 31, 2011. The January 31, 2011 CT scan, while not displayed to the jury, was discussed during Administrator's case-in-chief multiple times. Dr. Jennifer Pearson, Administrator's emergency medicine expert, testified on cross-examination a CT scan can show fluid in the lung and the January 31, 2011 CT scan showed no fluid in McKenna's lung. (Vol. IV, 241). She also testified that McKenna did not have to have fluid in her lungs to have shortness of breath. (Vol. IV, 205). Dr. Jeffrey Garrett, Administrator's cardiology expert, testified he examined

the January 31, 2011 CT scan and it showed there was no fluid in McKenna's lung. (Vol. IV, 274, 340-341).

{¶100} Upon review of the record, we find the visual display of the January 31, 2011 CT scan was not "new evidence" addressed for the first time in the Defendants-Appellees' case-in-chief. The January 31, 2011 CT scan was reviewed by Administrator's experts and they testified in Administrator's case-in-chief as to their observations that the CT scan did not show any fluid in McKenna's lung. There was further testimony that shortness of breath can occur without fluid in the lungs because McKenna's heart was weak.

{¶101} We find the trial court did not abuse its discretion when it determined Dr. Bibler's testimony was not admissible as rebuttal testimony.

{¶102} Administrator's third Assignment of Error is overruled.

VII. Jury Instructions

{¶103} In his final Assignment of Error, Administrator contends the trial court committed plain and prejudicial error when it allegedly omitted one word while verbally instructing the jury. We disagree.

{¶104} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Pettit v. Hughes,* 177 Ohio App.3d 344, 2008–Ohio–3780, 894 N.E.2d 738 (5th Dist.). In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). Jury instructions must be reviewed as a whole. *State v. Coleman,* 37 Ohio St.3d 286, 525 N.E.2d 792

(1988). Whether the jury instructions correctly state the law is a question of law, which we review de novo. *Murphy v. Carrollton Mfg. Co.,* 61 Ohio St.3d 585, 575 N.E.2d 828 (1991).

{¶105} Prior to opening statements, the trial court provided the jury with the following preliminary instructions:

> If a question is asked and the objection to the question is sustained, you will then not hear the answer and you must not speculate as to what the answer might have been or as to the reason for the objection.

(Vol. II, 289).

{¶106} The trial court read aloud the jury instructions at the close of the case:

> You must speculate as to why the Court sustained certain objections to questions or what the answer to a question might have been had the question been allowed to have been answered. You must not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

(Vol. VIII, 20). The trial court verbally omitted one word of the jury instructions and should have stated, "you must *not* speculate." The trial court provided the jury with the correct written instructions to use during their deliberations.

{¶107} Civ.R. 51, provides:

> (A) Instructions; error; record
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * *

> 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.

{¶108} It is well-established that a party may not assign as error on appeal "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." Civ.R. 51(A). *See also Galmish v. Cicchini,* 90 Ohio St.3d 22, 32, 2000–Ohio–7, 734 N.E.2d 782. Moreover, it is well-settled that failure to object at the trial court level to a complained of error results in a waiver of that error on appeal. *Id.*

{¶109} Administrator did not object to the jury instructions and therefore argues the trial court committed plain error. However, we find the plain error doctrine is usually only applied in the criminal context where a defendant's failure to object to an allegedly erroneous jury instruction affects the defendant's substantial rights. *See* Crim.R. 52(B).

{¶110} As noted by this Court in *Kell v. Russo,* 5th Dist. Stark No.2011 CA 00082, 2012–Ohio–1286, ¶¶ 30–31:

> In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial

process itself. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, at paragraph one of the syllabus.

In *Goldfuss,* the Court explained that the doctrine shall only be applied in extremely unusual circumstances where the error complained of, if left uncorrected, would have a material adverse effect on the character of and public confidence in judicial proceedings. *Id.* at 121, 679 N.E.2d 1099. The Court concluded that the public's confidence is rarely upset merely by forcing civil litigants to live with the errors they themselves or the attorney chosen by them committed at trial. *Id.* at 121–122, 679 N.E.2d 1099.

{¶111} Upon review of the record, we find no indication of plain error in the instant case. The trial court verbally omitted one word of the jury instructions and the jury was provided a correct written copy of the jury instructions to guide them during their deliberations. Any error does not rise to the level expressed in *Goldfuss, supra.*

{¶112} Based on the foregoing, Administrator's seventh Assignment of Error is overruled.

CONCLUSION

{¶113} The seven Assignments of Error raised by Plaintiff-Appellant Jimmy Westfall, Administrator of the Estate of Jessica Anne McKenna, Deceased are overruled.

{¶114} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.,

Hoffman, P.J. and

Wise, J., concur.

Hoffman, P.J., concurring

{¶115} I concur in the majority's thorough and well reasoned analysis and disposition of Appellant's seven assignments of error.

{¶116} I write separately only to note my continuing disagreement with the proposition all decisions to admit or exclude evidence are subject to an abuse of discretion standard of review.[1] That being said, I do agree that standard applies to the trial court's decision to exclude the testimony of Dr. Mark Bibler as a rebuttal witness for Appellant.

_____

HON. WILLIAM B. HOFFMAN

[1] See Majority Opinion at ¶96.