No. 2006-1247

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NOS. 04-85286, 04-85574 and 04-85605
(Consolidated)

MARK A. McLEOD, Guardian for the Estate of Walter Hollins,
Appellee,

v.

MT. SINAI MEDICAL CENTER,

and

RONALD JORDAN, M.D. and
NORTHEAST OHIO NEIGHBORHOOD HEALTH SERVICES, INC.
f/k/a HOUGH-NORWOOD

Appellants.

MERIT BRIEF OF APPELLANT MT. SINAI MEDICAL CENTER

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I. STATEMENT OF THE FACTS

This action arises from the birth of Walter Hollins at the former Mt. Sinai Hospital in Cleveland, Ohio, in 1987. Walter was diagnosed with intra-uterine growth retardation ("IUGR"), evidenced by a very small head and severely underdeveloped brain ("microcephaly" – Hollins' head was smaller than 97% of other babies), a short umbilical cord, fused joints, a grossly underweight placenta, and birth asphyxia (oxygen deprivation symptoms present at birth).[1] IUGR is caused by placental insufficiency. (Supp. (Vol. 3) 2463, 2604, 2609, Tr. 1680, 1821, 1826.) The placenta acts as the "fetal lung." (Supp. (Vol. 3) 2622, Tr. 1839.) When the placenta is too small, the fetus will adapt as long as it can and once the placenta is exhausted, stop growing. (Supp. (Vol. 3) 2605, Tr. 1822.) As a result of IUGR, Hollins was born with cerebral palsy and severe mental retardation. (Supp. (Vol. 4) 2828, Tr. at 2040.)

Ten years after Walter's birth, guardian Mark McLeod ("plaintiff") filed a medical malpractice suit against Mt. Sinai Medical Center ("Mt. Sinai"), obstetrician Ronald Jordan, M.D., and Dr. Jordan's employer, Northeast Ohio Health Services, Inc. ("NOHS"). Plaintiff asserted that Hollins' cerebral palsy and mental retardation were not caused by IUGR, but were the alleged result of Dr. Jordan's purported 90-minute "delay" in the performance of a Cesarean section ("C-section") at Mt. Sinai. (E.g., Supp. (Vol. 2) 1293, Tr. 524.) He further alleged that Mt. Sinai nurses and non-party, anesthesiologist

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[1] Supp. (Vol. 3) 2463, 2604, 2609, 2619, 2649-2650, 2677, 2677, 2685; Supp. (Vol. 4) 2715, 2800, 2808-2811, 2811, 2814-1815, Tr. 1680, 1821, 1826, 1836, 1865-1866, 1893, 1901, 1929, 2012, 2020-2023, 2023, 2026-2027.)

Bechara Hatoum, M.D. were negligent by not overruling Dr. Jordan's orders. (E.g., Supp. (Vol. 2) 1414-1417, 1420, Tr. 643-646, 649.) Plaintiff thereafter voluntarily dismissed the action, and re-filed it on October 16, 2002. (Supp. (Vol. 1) 43.) A jury trial began on May 5, 2004. (Supp. (Vol. 2) 770, Tr. 5.)

A. A Trial Permeated with Counsel Misconduct.

From voir dire through closing argument, Mr. Geoffrey Fieger, a Michigan attorney appearing pro hac vice on behalf of plaintiff, engaged in a deliberate, continuous course of misconduct that "helped him achieve a clearly unjustified verdict." (Appx. 87, Tr. Op., at 8.)[2]

The "themes" for Mr. Fieger's misconduct were established in voir dire. These included: 1) improperly accusing potential jurors of bias, thereby planting the seed in their minds that a verdict for the defense could only be the result of bias;[3] and 2) after the

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[2] Page limitations preclude a recitation of all the incidents of counsel misconduct supporting the trial judge's new trial order in this case – "to recite all such incidents [of misconduct] would result in a restatement of the entire record of proceedings." *Badalamenti v. Beaumont Hosp.* (Mich.App. 1999), 602 N.W.2d 854, 861, n.4 (citation and internal punctuation omitted) (referring to similar misconduct, by the same attorney who represented plaintiff in the trial of this case). Appellants have therefore included the entire transcript in the Joint Supplement.

[3] See Supp. (Vol. 2) 792, Tr. 27 ("let [the potential jurors] answer the questions rather than convincing them that [they] would be unfair ***"); Supp. (Vol. 2) 861-862, Tr. 96-97 (stop "trying to talk these folks into a bias *** they haven't expressed"); Supp. (Vol. 2) 890-891, Tr. 125-126 ("because you don't like his answers doesn't mean you don't have to accept them"); Supp. (Vol. 2) 891-892, Tr. 126-127 ("once again, you're asking him to prove a negative. *** I'm tired of you arguing with these people and how they should feel"); Supp. (Vol. 2) 1015-1018, Tr. 248-251 ("we don't know what Mrs. Rainey's feelings are. I don't want to confuse the 29 other juror's feelings. You are

trial judge sustained an objection to a blatantly improper question (Supp. (Vol. 2) 867, Tr. 102), proceeding to repeat the improper question (Supp. (Vol. 2) 904, Tr. 139).

Mr. Fieger's opening statement was comprised of raw appeals to passion and prejudice,[4] theories of liability that had never been asserted previously[5] and wholly unsupported allegations that defendants engaged in a "cover up" evidenced by "missing," delayed, and "untrue" records.[6]

During witness testimony, Mr. Fieger's main stratagem was to disrupt the defense case with constant "speaking" objections[7] and conduct cross-examinations that distorted witness testimony[8] and ignored undisputed facts – a "trial technique which was designed to manipulate and mislead the jury." (Appx. 88, Tr. Op. 9.)

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getting way too deep"); Supp. (Vol. 2) 863, 840, 849-853, 972-973, 1009-1010, Tr. 71, 75, 84-88, 205-206, 242-243.

[4] See Supp. (Vol. 2) 1132-1133, Tr. 363-364 ("most 17-year-olds will be applying to college. They would be getting ready for the senior prom. They would have their driver's license and maybe their first and second job" (defense counsel's objection is overruled)); Supp. (Vol. 2) 1132, Tr. 367 ("he suffers frustration, rejection. He's not a bla[n]k slate. He's not a piece of meat" (defense counsel's objection is overruled)).

[5] See Supp. (Vol. 2) 1182-1183, Tr. 413-414 (objection overruled; request to approach bench denied).

[6] Supp. (Vol. 2) 1152, Tr. 383 (objection overruled); Supp. (Vol. 2) 1173-1174, Tr. 404-405 (objection sustained); Supp. (Vol. 2) 1176-1177, Tr. 407-408 (objection overruled).

[7] Appx. 87-88, Tr. Op. 8-9.

[8] The appellate dissent provides several examples, at Appx. 40-45, 47-50, 53, 54-60, 61-65.

The disregard of court rulings that began in voir dire, persisted throughout the trial. When the court sustained a defense objection, Mr. Fieger simply repeated (thereby highlighting) the improper question.[9] Mr. Fieger ignored the trial court's instructions to "sit down," "stop shouting," and "stop making speeches",[10] as well as an in-chambers tutorial on the proper method of presenting objections (Supp. Vol. 3) 1888-1889, Tr. 1113-1114.) Recognizing a trial spinning out of control, the trial judge went "on the record" regarding Mr. Fieger's repeated misconduct, concluding "[w]e will try to go ahead and finish this case as best we can." (Supp. (Vol. 4) 2693-2695, Tr. 1907-1909.) The misconduct continued unabated. After sustaining three objections to the same improper question, the trial court correctly characterized Mr. Fieger's misconduct as "outrageous." (Supp. (Vol. 4) 2901-2903, Tr. 2113-2115.)

Mr. Fieger utilized his own witnesses to inject improper and highly prejudicial evidence into the trial. He elicited unsupported future care costs from his economist that were double and triple the figures in the economist's pretrial report. (Supp. (Vol. 3) 2302-2303, Tr. 1521-1522.) Then he injected attorney fees into evidence:

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[9] E.g., Supp. (Vol. 3) 1909, 2017-2024, 2501-2506, 2588; Supp. (Vol. 4) 2879-2880, Tr. 1134, 1240-1247, 1718-1723, 1805, 2091-2092.

[10] E.g., Supp. (Vol. 2) 1249, 1499, 1505, 1681-1682; Supp. (Vol. 3) 1789, 1796-1797, 1877, 2219-2220, 2588, 2593-2594, 2647; Supp. (Vol. 4) 2728, 2879-2880, Tr. 480, 728, 734, 908-909; 1014, 1021-1022, 1112, 1440-1441, 1805, 1810-1811, 1863, 1942, 2091-2092.

> Okay. By the way, also, none of your amount of money necessary to provide for this child included the costs that would be necessitated by the legal representation of Walter, do they?

(Supp. (Vol. 3) 2327-2328, Tr. 1546-1547.)

Mr. Fieger's closing argument capitalized on all of the preceding misconduct. He reprised his voir dire insinuations that a defense verdict could only be the product of juror bias, comparing this "poor, terribly injured African-American" with "the powerful corporation defendants [and] doctors who did this to him," exhorting the jury not to decide the case on "whether somebody is black or white" (Supp. (Vol. 4) 2948-2949, Tr. 2158-2159), and arguing:

> There are prejudices that exist in the world. *** There's prejudice which exists which cause people to *** ignore an avalanche of evidence and that's why you're questioned so closely *** during voir dire, to see what type of attitudes you bring here to this courtroom, to see if Walter can at least stand on equal footing with these defendants ***.
>
> * * *
>
> If you want to have biases, if you want to refuse to accept common sense, if you want to refuse to accept medical records, then you should have never been sitting in this jury to begin with.

(Supp. (Vol. 4) 2954, 3002, Tr. 2164, 2212.) Although plaintiff's spoliation claim was directed out at the close of his case-in-chief, Mr. Fieger repeatedly accused defendants of "shenanigans" and "cover-ups," relating to "missing" and "altered" medical records.[11]

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[11] E.g., Supp. (Vol. 4) 2963, 2969, 2970, 2994, 2999-3000, 3014, Tr. 2173, 2179, 2180, 2204, 2209-2210, 2224.

He viciously attacked opposing counsel and witnesses, calling defendants' neonatologist "a man who works in a laboratory with pigs *** who has said it's alright to drink a bottle of Jack Daniels and go into the OR *** and who *** voluntarily cites Nazi literature in support of his position in this case ***" (Supp. (Vol. 4) 3098-3099, Tr. 2308-2309), told the jury that all defense witnesses were willing "to say anything *** under oath, to prevaricate, to dissemble, to deny an innocent child justice" (Supp. (Vol. 4) 2995-2996, Tr. 2205-2206), and claimed that defense counsel "will misrepresent what witnesses have said" because "it's a game to them *** It's about money. How much money they save." (Supp. (Vol. 4) 3093, 3103, Tr. 2303, 2313.)

Rather than arguing the medical issues, Mr. Fieger urged the jury to "give a voice to the poor and justice for the oppressed," decried the "kind of effort and kind of money that was spent by the defendants on this case to deny this child justice," made repeated Biblical allusions, and "pole vaulted" over the "fine line between zealous advocacy and tainting a jury" (Appx. 76, App. Op. (dissent) 45) by assuming the voice of Walter in the womb.[12]

Finally, although plaintiff presented *no* medical evidence to support the necessity for 24-hour RN or LPN care for Walter Hollins, and even though defense counsel had not retained a life care planner or economist in reliance on plaintiff's pretrial reports setting forth $6.5 million as the maximum cost for all future care needs, Mr. Fieger argued to the

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[12] Supp. (Vol. 4) 2957-2958, 2961, 2962, 2965, 2971, 2976, 2980, 2985, 2989, 3000, 3015, 2998, 2950, 2951, 2970, 2948-2949, Tr. 2167-2168, 2171, 2172, 2175, 2181, 2186, 2190, 2195, 2199, 2110, 2225, 2208, 2160, 2161, 2180, 2158-2159.

jury that they *must* award $14.3 million for future care because "there's no other evidence" on the issue. (Supp. (Vol. 4) 3013, 3017, Tr. 2223, 2227.) Mr. Fieger then asked for a total economic damage verdict of $17,272,285 (including future lost wages) and $17,500,000 in non-economic damages. (Supp. (Vol. 4) 3018, 3020, Tr. 2228, 2230.)

B. The Trial Court Gives a "Too Long Deferred Recognition"[13] of Defendants' Right to a Fair Trial by Ordering a New Trial.

In a split (6-2) verdict, the jury found Mt. Sinai liable. (Supp. (Vol. 1) 149, R. 442.) They awarded $15 million in economic damages and, reflecting Mr. Fieger's request for equal non-economic damages, $15 million in non-economic damages. (Supp. (Vol. 1) 150, R. 442.) Mt. Sinai moved for judgment notwithstanding the verdict because, as a matter of law:

- Plaintiff's experts were not qualified to render opinions regarding the nursing standard of care;
- Mt. Sinai's nurses had no duty to countermand Dr. Jordan's orders regarding the timing of the C-section;
- Any failure to "second guess" Dr. Jordan did not proximately cause injury to plaintiff; and
- Mt. Sinai could not be liable for any negligence on the part of Dr. Hatoum.

(Supp. (Vol. 1) 222, R. 465.) Mt. Sinai also filed a Motion for New Trial, based on:

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[13] *Cleveland, Painesville & Eastern R.R. v. Pritschau* (1904), 69 Ohio St. 438, 447.

- counsel misconduct in closing argument and in injecting attorney fees into evidence;
- surprise testimony on economic damages;
- an excessive verdict that was the result of passion and prejudice inflamed by incompetent evidence and counsel misconduct;
- a prejudicial publicity during jury deliberations;
- the manifest weight of the evidence; and
- multiple legal errors.

(Supp. (Vol. 1) 242, R. 466.) In the alternative, Mt. Sinai sought a remittitur of approximately 75-80% of the grossly excessive, $30 million damage award. (Supp. (Vol. 1) 285, R. 466.)

In addition to its own post-trial motions, NOHS filed a motion to revoke Mr. Fieger's pro hac vice status, based (among other grounds) on his disregard for court rulings, deliberate violation of a motion in limine, misrepresentations of the evidence, improper closing arguments, and approaching Dr. Jordan "to suggest that he 'sue his bozo attorney for malpractice.'" (Supp. (Vol. 1) 163, R. 458.)

The trial court granted the defendants' motions for new trial and found "all other pending motions" to be "moot." (Appx. 92, Tr. Op. 13.) The trial court determined that a new trial was necessitated by:

- Irregularity in the proceedings by which an aggrieved party was prevented from having a fair trial;
- Misconduct of the prevailing party's counsel; and

- Excessive damages, appearing to have been given under the influence of passion or prejudice.

(Appx. 82-91, Tr. Op. 3-12.) The trial court also recommended that Mr. Fieger not be accorded pro hac vice status for the retrial of the matter. (Appx. 91-92, Tr. Op. 12-13.)

The trial court observed that even *with* Mr. Fieger's disruptive conduct, improper attacks on witnesses and counsel, deliberate injections of improper evidence, and blatant appeals to passion and prejudice, the jury found the liability issues to be a "close call," as represented by their split verdict. (Appx. 81, Tr. Op. 2.) The trial court further observed that other grounds raised in the defendants' motions, "especially with respect to the issues of negligence and proximate cause," had "much merit." (Appx. 92, Tr. Op. 13.) The 13-page decision did not address defendants' additional arguments, however, because the three bases discussed "more than justifies the conclusion that a new trial must be granted." (Id.)

Following entry of the trial court's new trial order, plaintiff proceeded to ask the judge originally assigned to the case to "vacate" the order under Civ.R. 60(B). (Appx. 77-79, R. 536.) Unlike the trial judge, the originally assigned judge neither observed the trial nor reviewed the 2,400-page trial transcript (compare Appx. 77 (¶ 1), R. 536 and Appx. 81 (¶ 3), Tr. Op. 2). She nevertheless granted the facially improper motion. (Appx. 79, R. 536.) Appeals and cross-appeals followed.

C. A Split Panel Applies an Incorrect Standard of Review to the New Trial Order, Reverses and Remands for "Remittitur" Proceedings.

On appeal, plaintiff claimed that the new trial order constituted an abuse of discretion because the trial judge admitted that plaintiff had presented an "extremely strong case." (See, e.g., Appx. 78, R. 536.) As defendants pointed out in their briefing in the Court of Appeals, the trial judge's comment was not only irrelevant, but also completely taken out of context.[14] At the close of plaintiff's case, the trial court dismissed plaintiff's spoliation claim, explaining:

> There's no evidence of willful destruction of evidence to support plaintiff's case or destruction of documents or damages proximately caused by the defendant's acts.
>
> The plaintiff put on an extremely strong case certainly in terms of comparing cases of negligence, which is going to go to the jury which you can argue forcibly but we are not going to clutter that up with additional violations of spoliation which is improper and certainly not supported by evidence.

(Supp. (Vol. 3) 2418, Tr. 1637.) Thus, the trial court stated that plaintiff's evidence of "negligence" was "extremely strong" in comparison to *his wholly absent evidence* of spoliation. The trial judge could not compare plaintiff's evidence to defendants', given that the defendants had not yet begun their case. Moreover, the trial court referred only to "negligence," not the key proximate cause issue. In fact, the defendants subsequently presented their own "extremely strong" evidence on negligence and proximate cause, as evidenced by the split verdict and the trial court's post-trial conclusion that defendants'

[14] Undaunted, plaintiff repeated the misleading argument three times in his opposing memorandum filed with this Court. (See Mem. Opp. Juris. at 1, 4, 6).

arguments regarding the manifest weight of the evidence "have much merit." (Appx. 92, Tr. Op. 13.)

The Eighth District Court of Appeals unanimously reversed the spurious 60(B) order. (Appx. 17, 32, App. Op. 8, 1 (dissent).) In addition, all three panel members agreed that the $30 million verdict was excessive, and the product of incompetent evidence. (Appx. 22-23, 34-38, App. Op. 13-14, 3-7 (dissent).) But the majority concluded that the excessive verdict was not the product of passion and prejudice, that no counsel misconduct had occurred, and that the new trial order constituted an abuse of discretion. (Appx. 20-23, App. Op. 11-14.) It reversed and remanded for a "remittitur," and rulings on motions mooted by the new trial order. (Appx. 31, App. Op. 22.) Judge Karpinski – who reviewed the entire 2,400-page transcript (Appx. 39, App. Op. (dissent) 8) – dissented in a 45-page opinion supporting the trial judge's conclusion that the defendants were entitled to a new trial free of improper evidence and counsel misconduct. (Appx. 32-76.)

II. LAW AND ARGUMENT

Proposition of Law No. 1

> **When a trial court orders a new trial based on the prevailing party's counsel's misconduct, or excessive damages which appear to be the product of juror passion and prejudice, appellate review of the "cold record" should accord particular deference to the trial court's superior view of the effect of the misconduct on the fairness of the proceedings and the impartiality of the jurors, and affirm if reasonable persons could differ as to the propriety of the action taken by the trial court.**

The appellate majority correctly enunciated the general standard of review for a new trial order based on counsel misconduct and juror passion and prejudice – "abuse of discretion." (Appx. 18-19, App. Op. 9-10.) It also accurately defined "abuse of discretion" as "more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable." (Id.) But the majority then abandoned the proper standard. Instead, it applied a "presumption of correctness" to the findings *of the jury*, and pursued an irrelevant inquiry into whether some "competent, credible evidence" in the record supported the jury's finding of liability.

The majority's error springs from an aberrational line of cases that ignore this Court's seminal decision on the proper standard of review (*Rohde v. Farmer* (1970), 23 Ohio St.2d 82), and a gap in this Court's jurisprudence on the nature and scope of deference to be accorded a trial court's conclusion that counsel misconduct, and/or juror passion and prejudice, has tainted the competent evidence and jury verdict.

A. The Majority Applied an Incorrect Standard of Review to the Trial Judge's Order Granting a New Trial.

The majority reversed the trial court's new trial order on the grounds that:

> [S]o long as the verdict is supported by substantial competent, credible evidence, the jury verdict is presumed to be correct and the trial court must refrain from granting a new trial.

(Appx. 19, App. Op. 10.) As explained below, that standard applies to: 1) appeals from bench trial judgments (not appeals from orders granting or denying motions for a new trial following a jury verdict); and 2) appeals based on the manifest weight of the evidence (not appeals from a trial judge's conclusion that counsel misconduct and juror passion and prejudice mandate a new trial free from such influences). That standard is inapplicable here because it fails to accord the trial judge's findings a presumption of correctness, and applies an irrelevant "weight" analysis.

1. The majority improperly applied a "presumption of correctness" to the jury verdict instead of the trial judge's findings.

A trial judge's findings of fact, whether made at the conclusion of a bench trial, or in an order granting a new trial, are accorded a "presumption of correctness." *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80 (a "presumption of correctness" applies to the judgment of a trial court entered at the conclusion of a bench trial); *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 92, 94 (when a trial court has concluded, "as a matter of fact," that a jury verdict is against the manifest weight of the evidence, a reviewing court "should view the evidence favorably to the trial court's action rather than the jury's verdict").

In this case, the majority relies on *Schlundt v. Wank* (Apr. 17, 1997), 8th Dist. No. 70978, as support for its standard of review. (Appx. 19, App. Op. 10.) *Schlundt,* in turn, cites *Verbon v. Pennese* (1982), 7 Ohio App.3d 182. *Verbon* states (emphasis added) that "[a] judgment may not be vacated on the ground that a verdict is against the weight of the evidence **except as a matter of law**." *Verbon*, 7 Ohio App.3d at 183, citing *Dyer v. Hastings* (1950), 87 Ohio App. 1477. That is precisely the rule this Court *rejected* in *Rohde*; *Rohde* holds that the *Dyer* standard applies to directed verdict motions. When a trial court concludes "**as a matter of fact**" that a verdict is against the manifest weight of the evidence, it has a "duty" to set it aside and grant a new trial. *Rohde*, 23 Ohio St.2d at 92 (emphasis added).

2. A "competent, credible evidence" standard does not apply to new trial orders; even if it did, it would not apply to new trial orders based on the "taint" – rather than the "weight" – of the evidence.

The appellate majority's second fundamental error was its application of a "competent, credible evidence" standard of review to a new trial order citing counsel misconduct that inflamed juror passion and prejudice. The "competent, credible evidence" standard of review applies to *manifest weight* appeals from *bench trial* judgments. See *C.E. Morris v. Foley Const.* (1978), 54 Ohio St.2d 79, syllabus (a judgment entered *following a trial to the court* "will not be reversed by a reviewing court as being against the manifest weight of the evidence" if it is "supported by some competent, credible evidence going to all the essential elements of the case"); *Seasons Coal*, 10 Ohio St.3d at 80 (so long as a trial court's judgment following a bench trial is

supported by some competent, credible evidence, reviewing courts should reject a claim on appeal that the judgment is against the manifest weight of the evidence).

But when a case is tried to a jury, and the appealed order is the trial judge's conclusion that the jury verdict is contrary to the manifest weight of the evidence, "the rule that a verdict will not be set aside when supported by substantial but conflicting evidence has no application." *Dinneen v. Finch* (Idaho, 1979), 603 P.2d 575, 581. A different standard applies because the trial judge ruling on a new trial motion is exercising an independent and distinct duty "to guard against miscarriages of justice which sometimes occur at the hands of juries.'" *Rohde*, 23 Ohio St.2d at 92, quoting *Holland v. Brown* (Utah 1964), 394 P.2d 77, 79. Accord *Osler v. City of Lorain* (1986), 28 Ohio St.3d 345, 351 (trial court has "wide discretion" in determining whether verdict is against the manifest weight of the evidence because "the court must ensure, in its supervisory capacity, against a miscarriage of justice").

Rohde explains that the trial judge presented with a "manifest weight" challenge to a jury verdict "must review the evidence and pass on the credibility of the witnesses *** in the *** restricted sense of whether it appears to the trial court that a manifest injustice has been done." 23 Ohio St.2d at 92. *Even though* "some competent, credible evidence" may support the jury verdict, the trial court has "a duty" to vacate a verdict contrary to the "weight" of the competent, credible evidence. (Id.)

Even if it had some relevance to new trial orders,[15] the "competent, credible evidence" standard could have no application to new trial orders setting aside verdicts that are tainted by misconduct, passion or prejudice. The issue in the latter situation is not whether the record contains some competent, credible evidence supporting a verdict, or even whether the "weight" of the evidence supports the verdict. The issue is whether the competent, credible evidence was *tainted* by counsel misconduct and appeals to juror passion and prejudice.

The presence of competent, substantial evidence is irrelevant when the appellate court is reviewing a new trial granted on the basis of misconduct, because the "acid of the improper argument" has the effect of "eat[ing] away" the factual evidence of record. *Benson v. Heritage Inn, Inc.* (Mont. 1998), 971 P.2d 1227, 1231 (citation omitted). Thus, "[w]hen a party's right to a fair trial has been materially impaired by improper jury argument, the fact of the imperfect trial transcends the substantial but conflicting evidence that supports a jury verdict." Id. (citations omitted). Therefore, a trial court

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[15] Some appellate courts have cited the "competent, credible evidence" standard of *C.E. Morris* and *Seasons Coal* when a trial court has *denied* a motion for new trial that challenged the manifest weight of the evidence. See, e.g., *Bryan-Wollmann v. Domonko* (2006), 167 Ohio App.3d 261, 264 (citing *C.E. Morris* for the proposition that "[w]here a motion for a new trial is denied, there must be competent, credible evidence in the record to support the jury's verdict"); *Ochletree v. Trumbull Mem. Hosp.*, 11th Dist. No. 2005-T-0015, 2006-Ohio-1006 at ¶ 33 (the proper standard of reviewing a trial court's denial of a motion for new trial based on the manifest weight of the evidence, must, under *C.E. Morris* and *Seasons Coal* "examine the entire record to determine if the verdict is supported by some competent, credible evidence"). The proper standard for reviewing orders denying motions for new trial based on the manifest weight of the evidence is beyond the scope of this appeal.

need not "weigh" the evidence and credibility of witnesses before granting a new trial based on counsel misconduct that tainted the jury verdict. See, e.g., *Anderson v. Botelho* (R.I. 2001), 787 A.2d 468, 471 (a trial judge's duty to comment on the weight of the evidence and assess witness credibility in any order granting a new trial does not apply when a trial judge has concluded that improper argument "tainted the jury verdict").

B. When Reviewing a Trial Judge's Conclusion that Attorney Misconduct and/or Juror Passion and Prejudice Mandate a New Trial Free from such Influences, Courts of Appeal Should Reverse Only If the Prevailing Party Establishes from the Record a Plain and Palpable Abuse of Discretion.

This Court has held that the same deference accorded trial court findings on "manifest weight" inquiries also applies to a determination under Civ.R. 59(D) that cumulative "aberrations, both procedural and substantive," mandate a new trial "free from such influences." *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 320-321. This Court's recent jurisprudence has not, however, addressed the proper standard reviewing courts should apply to new trials ordered pursuant to Civ.R. 59(A)(2) (misconduct) and/or 59(A)(4) (excessive or inadequate damages that appear to have been given under the influence of passion or prejudice); the majority's application of an improper and irrelevant standard in this case illustrates the need for this Court to do so. To determine the standard of review that *should* apply, this Court should consider the standard applied to analogous proceedings and the effect of trial judges' independent duty to ensure the integrity of proceedings before them, as well as practical and policy considerations.

1. The proper standard should accord a presumption of correctness to the trial court's findings.

The first element of an appropriate standard of review should be a presumption that the trial court's findings regarding the nature and effect of the misconduct are correct. See *Baptist Med. Ctr. Montclair v. Whitfield* (Ala.), __ So.2d __, 2006 WL 1046472 at *4 (Appx. 93, 97) (the exercise of discretion in the resolution of a new trial motion "carries with it a presumption of correctness"). *Memorial Hosp. of South Bend, Inc. v. Scott* (Ind. 1973), 300 N.E.2d 50, 53 (appellate courts do not review new trial orders to determine whether "the trial court's ruling is incorrect"; rather, "the trial court's action in granting a new trial is given a strong presumption of correctness"); *Bailey v. Lloyd* (Fla. 1953), 62 So.2d 56 ("the granting or denying of a motion for a new trial rests in the sound judicial discretion of the trial judge and a presumption of correctness attaches to his order").

As this Court held in *Rohde*, a reviewing court must defer to trial court fact-findings under Civ.R. 59(A)(6) (manifest weight of the evidence) because the trial court has: 1) a superior vantage point of the proceedings; and 2) an independent duty to prevent a miscarriage of justice. 23 Ohio St.2d at 93-94. In *Jenkins*, this Court applied the same standard, for the same reasons, to a new trial order issued pursuant to Civ.R. 59(D),[16] that "accented the conduct of trial counsel," and "determined that cumulatively, the aberrations, both procedural and substantive, that pervade this record mandated a new

[16] Civ.R. 59(D) gives the trial court broad authority to: 1) order a new trial "of its own initiative *** for any reason for which it might have granted a new trial on motion," and 2) grant a new trial motion "for a reason not stated in the party's motion."

trial free from such influences." 67 Ohio St.2d at 320-321. *At least* the same deference should be accorded trial court findings that a verdict has been tainted by counsel misconduct that inflamed juror passion and prejudice.

First, the trial judge has by far the superior vantage point, vis-à-vis a reviewing court, of the effect of misconduct on the jury. See, e.g., *Jenkins*, at 320 (trial courts are in a superior position to observe "the surrounding circumstances and atmosphere" of trial). While the "cold record" on appeal may reflect factual evidence and procedural errors, it cannot communicate the emotionally surcharged atmosphere created by inflammatory argument and pervasive counsel misconduct. See, e.g., *Christopher v. Florida* (C.A.11, 2006), 449 F.3d 360, 368:

> [R]eview of the cold record on appeal is not the same thing as being at the trial and observing the subtleties of tone and of demeanor for not just the speaker, but the listeners. The trial judge has the advantage; and given that the realities of a trial involve imponderables, Rule 59 (even in the light of Rule 61) is intended to allow that advantage to act for substantial justice.

Accord *Motorola, Inc. v. Interdigital Technology Corp.* (Fed.Cir. 1997), 121 F.3d 1461, 1467 ("questions of misconduct often involve the tone and tenor of advocacy, rather than the literal words of the advocate. In such instances, a cold printed record cannot fully convey the aspects of conduct that a trial court might find egregious. Thus, this court is careful to avoid substituting its assessment of facts for those of the judge who experienced them first hand"); *City of Cleveland v. Peter Kiewit Sons Co.* (C.A.6, 1980), 624 F.2d 749, 756 (citation omitted) ("the trial court is in a far better position to measure

the effect of an improper question on the jury than an appellate court which reviews only the cold record"); *Whiting v. Westray* (C.A.7, 2002), 294 F.3d 943, 944 ("given the district judge's familiarity with *** the effect of the evidence and any improprieties on the jury – not to mention the slim hope that any of these factors can be accurately portrayed in an appellate record – our resolution of this question is necessarily deferential"); *Williams v. Volkswagenwerk Aktiengesellschaft* (Cal.App. 1986), 226 Cal.Rptr. 306, 320 n.19:

> It is the trial judge who is at the best vantage point to surveil the grenades, the darts, the slings and arrows of outrageous forensic conduct, rather than the reviewer who, with the delayed, deliberate detachment of a coroner, examines the cold body of the record only after the warm life of trial has expired and its rattlings have ceased.

At a minimum, the trial judge's findings of prejudicial misconduct should not be reversed without a review of the entire transcript. See, e.g., *Lopez v. Josephson* (Mont. 2001), 30 P.3d 326, ¶ 36 ("Unless one reads the transcript from beginning to end, it is difficult to grasp just how ubiquitous and egregious the conduct of plaintiffs' counsel was"); *Van Iderstine Co. v. RGJ Contracting Co., Inc.* (C.A.2, 1973), 480 F.2d 454, __ ("ordinarily, when a lawyer's misconduct is called to our attention, our reviewing task is made difficult because the cold trial transcript does not permit us easily to capture the mood of the trial. The pages of this record, however, virtually sizzle with misbehavior"). Here, only the dissent undertook that effort. (Appx. 39-40, App. Op. (dissent) 8-9.)

Second, the independent duty of trial judges to maintain the integrity of trial proceedings extends to the prevention and correction of counsel misconduct that taints the evidence. See *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, 351 ("the judge who presides over a cause is not a mere umpire; *** [i]t is his duty in the executive control of the trial to see that counsel do not create an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice cannot be accomplished"); *C.A. King & Co. v. Horton* (1927), 116 Ohio St. 205, 211:

> Counsel *** have a mistaken notion as to the true function to be discharged by the judge in presiding over a jury trial. The judge is not a mere sergeant at arms to preserve order in the courtroom. His chief function is to prevent injustice being done between the parties, and, as a corollary thereto, to see that justice is actually administered. *** The public has an interest in the orderly trial of litigation ***.

Accord *Royal Indem. Co. v. J.C. Penney Co., Inc.* (1986), 27 Ohio St.3d 31, syllabus at paragraph one (investing in trial courts the discretion to "revoke the *pro hac vice* admission of an attorney who has engaged in egregious misconduct which could taint or diminish the integrity of future proceedings").

The "correction" function is exercised through mistrial and new trial orders, and is incorporated into Civ.R. 59. See Civ.R. 59(A)(2), (4), 59(D), Appx. 103-104; *Jenkins*, 67 Ohio St.2d at 320 (a trial judge's power to grant a new trial is "necessary to fulfill his function of maintaining general supervision over litigation"); *Pesek v. Univ. Neurologists Assn., Inc.* (2000), 87 Ohio St.3d 495, 502 (internal punctuation and citations omitted)

("if there is room for doubt, whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party").

While courts award new trials when a verdict is against the manifest weight of the evidence to "guard against miscarriages of justice which sometimes occur at the hands of juries" (*Rohde*, 23 Ohio St.2d at 93 (cite omitted)), courts award new trials for counsel misconduct that has inflamed juror passions and prejudices to protect the fundamental integrity of the entire process. That distinction suggests that the highest deference should be accorded trial court findings that deliberate counsel misconduct deprived the losing party of a fair trial.

2. Only "plain and palpable" abuses of discretion warrant the reversal of new trials mandated by counsel misconduct and juror passion and prejudice.

In addition to according a presumption of correctness to a trial judge's post-trial factual findings, reviewing courts should accord the utmost deference to a trial judge's conclusion that aberrations, irregularities, or improper influences have deprived the losing party of a fair trial, mandating "a new trial of the issues free from such influences." *Jenkins*, 67 Ohio St.2d at 320. See *In re Ohio Turnpike Comm'n v. Ellis* (1955), 164 Ohio St.3d 377 (a trial court's conclusion regarding the effect of improper remarks should be affirmed absent a "deliberate" abuse of discretion "plainly" indicated in the record). Accord *Dinneen*, 603 P.2d at 580 (new trial motions based upon inadequate or excessive damages that are the product of juror passion and prejudice "place the whole

responsibility on a trial court which court, not this, is the proper court to make [such] a determination ***"); *Yeske v. Avon Old Farms School, Inc.* (Conn. App. 1984), 470 A.2d 705, 712 (it is "singularly the trial court's function" to assess whether misconduct of counsel was prejudicial); *Baptist Med. Ctr. Montclair v. Whitfield*, __ So.2d __ at *4 (Appx. 98) (appellate court review of new trials granted on the basis of improper, prejudicial, and inflammatory argument is "limited" and requires proof that "some legal right is abused and the record plainly and palpably shows the trial judge to be in error"). Such a standard is consistent with the trial judge's superior vantage point of, and independent duty to protect the integrity of, trial proceedings.

Further, orders *granting* new trials merit greater deference than orders *denying* new trial motions. See *Malone v. Courtyard by Marriott* (1996), 74 Ohio St.3d 440, 448 (internal punctuation and citations omitted):

> It is *** important to note that the order of a new trial does not terminate a case; instead, it simply grants a *new* trial. Unlike directed verdicts and judgments notwithstanding the verdict, an order for a new trial does not dispose of litigation ***.

See, also, *Carlew v. Wright* (Ark. 2004), 148 S.W.3d 237, 240 ("a showing of abuse of discretion is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail").[17] New trial orders do not bar

[17] Accord *Melcher v. Melcher* (Ariz. 1983), 669 P.2d 987, 989; *Krolick, D.O. v. Monroe* (Fla. App. 2005), 909 So.2d 910, 913; *Stallworth v. Boron, M.D.* (Haw. 2002), 54 P.3d 923, 941; *Louisville Mem. Gardens, Inc. v. Cmmwlth. of Ky. Dept. of Highways* (Ky. 1979), 586 S.W.2d 716, 717; *Anderson v. Kohler* (Mo. App. 2005), 170 S.W.3d 19, 23; *Parsons v. Parsons* (Okla. App. 2003), 70 P.3d 887, ¶ 6; *Vanover v. Kansas City Life Ins.*

plaintiffs from recovery; they simply require the plaintiff to prove his or her case without the taint of misconduct, unsupported ambush evidence, or other improper influences.

In addition, a deferential standard recognizes that every misconduct case is different; each must "be decided in light of the peculiar facts and circumstances involved, and the atmosphere created ***" (*Baptist Med. Ctr.*, *5 (Appx. 99)). It would be impossible to catalogue every argument or disruptive behavior that, under every circumstance, requires a grant (or denial) of a new trial motion. According broad deference to the findings of the trial judge – the judge invested with the unqualified duty to ensure the integrity and fairness of the proceedings – is workable as well as good law and policy.

Finally, reviewing courts should reserve their most deferential standard for orders granting new trials on the basis of repeated, deliberate counsel misconduct intended to achieve an unjustified verdict. Refusals to comply with court rulings and admonitions, deliberate manipulations of the evidence, injections of blatantly improper evidence, and unrelenting personal attacks have no place in our system of justice. See, e.g., *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, 349-350 ("The proper role of the attorney at the trial table is not that of a contestant seeking to prevail at any cost but that of an officer of the court, whose duty is to aid in the administration of justice and assist in surrounding the trial with an air conducive to an impartial verdict"); *Disciplinary*

Co. (N.D. 1996), 553 N.W.2d 192, 195; *Henry v. Henry* (S.D. 2000), 604 N.W.2d 285, 289; *Palmer v. Jensen* (Wash. 1997), 937 P.2d 597, 599.

Counsel v. Mills (2001), 93 Ohio St.3d 407, 408 ("Respect for the law and obedience to the orders and judgments of the tribunals by which it is enforced lies at the very foundation of our society").

The facts of this case amply illustrate the need for deference to the trial court's assessment of the effect of persistent counsel misconduct on the jury. A "cold record" cannot communicate the individual or collective effects of shouting, interruptions, derision, bullying, disruptive and disrespectful conduct from voir dire through verdict. A "cold record" cannot reflect the surcharged atmosphere of a closing argument based on melodramatic pleas from the womb and vicious, personal attacks on counsel and witnesses. If trial courts are to carry out their independent duty to protect the integrity of jury trials, this Court must establish a standard of review that accords the proper deference to such determinations.

Proposition No. 2:

> **The plaintiff in a personal injury action is entitled to recover future medical expenses that are reasonably certain and necessary.**

Standing alone, the prejudice caused by the trial court's erroneous admission of incompetent economic evidence required affirmance of the trial court's new trial order. All three members of the appellate panel agreed that the $30 million jury verdict was excessive and the product of incompetent evidence. See Appx. 22-23, App. Op. 13-14:

> In this case, the record reflects that expert testimony was introduced that was based on "assumptions" and went beyond the calculations provided in the expert reports. *** It also appears that the jury's award of non-economic damages was influenced by the amount of the economic award, both awards being $15,000,000.

An excess award induced by incompetent evidence is the product of passion and prejudice. See *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, syllabus at paragraph three (emphasis added) (the factors a trial court considers when determining whether an excessive verdict was the result of passion and prejudice are):

> *** whether the record discloses that the excessive damages were induced by **(a) admission of incompetent evidence**, (b) by misconduct on the part of the court or counsel, or (c) by any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should be awarded.

The majority's reversal of the new trial order is therefore contrary to its own findings.

A. <u>The Trial Court Admitted Incompetent Evidence that Induced an Excessive, $30 Million Verdict.</u>

In any personal injury action, "[t]he burden of proving the existence and amount of future damages with a reasonable degree of certainty is on the plaintiff." *Fouty v. Ohio Dep't of Youth Servs.*, 10th Dist. No. 05AP-119, 2006-Ohio-2957, at ¶ 34 (citation omitted). Accord *Broadstone v. Quillen* (2005), 162 Ohio App.3d 632, at ¶ 19 ("[i]n order to recover future damages, *** the plaintiff must prove by sufficient evidence that he or she is 'reasonably certain to incur such damages in the future'" (citation omitted)). Where, as here, the nature of future care requires medical expert testimony, plaintiff must

present such testimony to support future damages. *Tully v. Mahoning Exp. Co., Inc.* (1954), 161 Ohio St. 457, 460-461; *Powell v. Montgomery* (1971), 27 Ohio App.2d 112, 120.

Expert medical testimony is also required "concerning the necessity for providing [a] specific type" of future care. *St. Clair v. County of Grant* (N.M. App. 1990), 797 P.2d 993, 1003. Applying that rule, the *St. Clair* court held that "it is improper to award an hourly amount for nursing services equivalent to that normally received by a registered nurse or LPN, unless there is expert medical testimony concerning the necessity for providing that specific type of care." Id. Accord *Jordan v. Elex, Inc.* (1992), 82 Ohio App.3d 222, 230-231 (affirming exclusion of economist's testimony that was not supported by competent medical testimony).

In this case, plaintiff's first witness at trial was pediatrician Ronald Gabriel, M.D. Dr. Gabriel's pretrial report did not attempt to predict any of the costs associated with custodial care. Those costs were calculated by plaintiff's "life care" expert witness, George Cyphers, based on information from Walter Hollins' medical providers (Supp. (Vol. 1) 470, 471, R. 498, Mt. Sinai Reply, Exhs. J, G-11, G-12). Plaintiff's economist, Harvey Rosen, calculated the amount of money necessary to fund the care of Cyphers' life care plan. (Supp. (Vol. 1) 474-697, R. 498, Reply, Exhs. K-O.)

But at trial, Mr. Fieger asked Dr. Gabriel about Walter Hollins' prognosis "assuming the very best care money can buy." (Supp. (Vol. 2) 1332, Tr. 563.) Defense counsel's objection was overruled. (Id.) Mr. Fieger then asked his economist to

"assume" 24-hour RN and LPN care for Walter and calculate the amount of money needed to provide such care. (Supp. (Vol. 3) 2300-2302, Tr. 1519-1521.) Defense counsel's objections were again overruled, and the economist testified to $14,295,993 in future care costs. (Supp. (Vol. 3) 2301-2302, Tr. 1520-1521.)

The trial court correctly concluded that it erred when it allowed plaintiff's economist to testify regarding the costs of providing 24-hour LPN and RN lifetime care for Walter Hollins. (Appx. 82-83, Tr. Op. 3-4.) It should have sustained defendants' objections when "Dr. Rosen was about to give testimony on estimates as to the costs of care which were not covered in his report ***." (Appx. 83, Tr. Op. 4.) This was not only "ambush" testimony, it was also incompetent: "No one testified that Walter will ever need the care of a Registered Nurse or Licensed Practical Nurse." (Id.)

The trial court was also correct in concluding that the incompetent testimony resulted in a grossly excessive verdict. Had the trial judge sustained the defendants' objections, "the jury would not have heard very damaging testimony and medically unsupported figures which were presented by surprise" (id.). The jury not only awarded $15 million in economic damages, but the "very damaging testimony" tied directly into the amount of non-economic damages the jury awarded. That is, "when called upon to award non-economic damages, the jury simply matched the $15,000,000 it had already awarded for economic damages, as Mr. Fieger had essentially asked them to do." (Appx. 86, Tr. Op. 7.)

Further, Mr. Fieger enhanced the prejudice caused by the incompetent evidence when he: 1) urged the jury to ignore the law and return an award based on "the best care available"; and 2) argued that because defendants did not rebut his incompetent, ambush evidence, the jury "must" award $14.3 million for Walter Hollins' future economic damages.

Mr. Fieger introduced "the best care available" concept in both witness testimony (Supp. (Vol. 2) 1332, Tr. 563 (eliciting testimony on the "very best care money can buy")) and closing argument (Supp. (Vol. 4) 3009, Tr. 2219 ("Now they owe him access to the best care available ***. He needs the best care you can offer him from RNs or LPNs. He deserves the best"); Supp. (Vol. 4) 3012-3013, Tr. 2222-2223 ("He deserves the best medical care ***. Now they owe him that and more"); Supp. (Vol. 4) 3017, Tr. 2227 ("[T]he medical care requires life-long for an RN home attendance care *** as [the economist] indicated, $14,295,993")). He argued the "Golden Rule" to further induce jurors to ignore their duty to award only reasonably necessary damages. (See Supp. (Vol. 4) 2950, 2956, Tr. 2160, 2166 ("Whatever you do to the least of my brothers, that you do unto me").

Evidence and argument on "the best care money can buy," like Golden Rule argument, improperly appeal "to the economic fears and passions of a jury ***." *Velocity Express Mid-Atlantic, Inc. v. Hugen* (Va. 2003), 585 S.E.2d 557, 563-564. The *Velocity* court ordered a new trial after plaintiff argued that the jury should not award 24-hour LPN *or* 24-hour nurse's aide care (as recommended, respectively, by the plaintiff

and defense experts), but should award *both*, because "that is what the world's richest people would have." Id. The Virginia Supreme Court explained that the law "only requires that a jury award plaintiff compensatory damages that will fairly compensate him for his injuries proximately caused by defendant's negligence." Id. at 564. Not only did counsel appeal to jurors' economic fears by arguing "irrelevant economic considerations," but his "Golden Rule" argument enhanced the prejudice. Id. at 563-565.

This case presents a much clearer case of prejudicial misconduct than *Velocity*. In *Velocity*, the plaintiff presented medical testimony that LPN care was medically necessary. Here, the plaintiff was permitted to inject costs that were two and three times the costs presented in pre-trial reports, and without one shred of evidence that RNs or LPNs were medically necessary for Walter Hollins' future care.

Mr. Fieger further inflamed the jury by arguing:

> [T]he defendants have not presented a scintilla of evidence. If the defendants' attorneys stand up here and dispute any of the evidence here, they are making it up because they had an opportunity to present witnesses who said this isn't what he needs ***. They've utterly and completely failed to do that. Why? Because this is an absolute truism. This is what it is. There is no evidence other than the evidence we've presented. There is no other evidence on what it will take to care for Walter ***.
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> * * *
>
> [T]he medical care requires lifelong for an RN home attendant care *** as Dr. Rosen indicated, $14,295,993.

(Supp. (Vol. 4) 3013, 3017, Tr. 2223, 2227.) As noted in the appellate dissent, defendants "did not hire an independent economic expert or life care planner because they did not

disagree with the report of Mr. Fieger's experts and relied on the limitation of costs those reports described." (Appx. 36, App. Op. (dissent) 5.) In light of Mr. Fieger's knowledge that plaintiff's pretrial discovery limited future care costs to a maximum of $6.5 million, his argument that defendants "had an opportunity to present witnesses" to dispute the $14.3 million, but could not find any, "implied an untruth." *Bender v. Adelson* (N.J. 2006), 901 A.2d 907, 920 (ordering a new trial in medical malpractice case because plaintiff's counsel's implications in closing argument that defendants "could not find" a cardiologist to testify, knowing that defendants' cardiologist were barred from testifying for procedural reasons, "implied an untruth").

B. The Majority's Remand for "Remittitur" Proceedings Conflicts with Its Own Findings of Tainted, Excessive Awards.

As noted, the appellate majority agreed that the trial judge admitted incompetent evidence of $14.3 million in future care costs, and that the incompetent evidence induced an award of excessive economic and non-economic damages. (Appx. 22-23, App. Op. 13-14.) That conclusion requires affirmance of the new trial order, not a "remand" for "consideration of the motion for remittitur." (Id.) "When damages awarded are excessive and appear to have been given under the influence of passion or prejudice, the only recourse is the granting of a new trial, since the prejudice resulting cannot be corrected by remittitur." *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, paragraph four of the syllabus. See, also, *Schendel v. Bradford* (1922), 106 Ohio St. 387, 394-395:

> If the verdict was given under the influence of passion or prejudice, neither the trial court nor a reviewing court could require a remittitur. In that event no power exists in either but to reverse unconditionally.

An "unconditional" new trial is required because "a verdict induced by passion and prejudice is not a verdict and, hence, there is nothing to reduce." *Spearman v. Meyers* (1968), 15 Ohio App.2d 9, 11. The rationale expressed in *Spearman* that there is no verdict to "reduce" is well illustrated here. The appellate majority appears to support remittitur on the grounds that defendants purportedly failed to "contest liability" in the appeal (Appx. 19, 23, App. Op. 10, 14). That conclusion is mystifying. The very trial court opinion that defendants sought to have affirmed awarded a new trial on *all* issues, after holding that the expert testimony was "diametrically opposed"; that the "liability issues were particularly difficult" due to the passage of time and events; that the jury had a "difficult duty" in determining negligence and proximate cause and "decided those issues by a vote of 6-2"; that the jury verdict was "clearly a 'close call'"; and that a technique "designed to manipulate and mislead the jury" throughout the trial is what allowed Mr. Fieger to "achieve a clearly unjustified verdict." (Appx. 81, 87-88, 92, Tr. Op. 2, 8-9, 13.) See, also, Appx. 39-65, App. Op. (dissent) 8-34, dissecting Mr. Fieger's improper questioning of witnesses so as to confuse and mislead the jury.

Because the jury's excessive verdict was based upon improperly admitted evidence and misconduct that tainted the competent evidence, the majority decision should be reversed and the trial court's new trial order reinstated.

Proposition of Law No. 3

> **Counsel misconduct supporting a new trial awarded under Civ.R. 59(A)(2) or Civ. R. 59(A)(4) includes, but is not limited to, repeated failures to comply with court rulings and admonitions, gross mischaracterizations of testimony during witness examinations, disparagement of opposing counsel, parties, and witnesses, deliberate injections of inadmissible, irrelevant matters calculated to inflame and prejudice the jury, and closing argument that refers to excluded claims or evidence, belittles opposing counsel, parties and witnesses, exhorts the jury with scriptural commands, focuses on economic disparity, appeals to racial bias or ethnic unity, and seeks to persuade the jury to fictionalize the claims and act out of a sense of drama rather than reality.**

Although the record would certainly have supported such a finding, the appellate panel in this case was not asked to determine whether Mr. Fieger's misconduct in the trial of this matter was so gross and pervasive that a *denial* of a new trial motion must be reversed. Rather, the plaintiff sought to reverse the *grant* of a new trial by the trial judge who observed the entire trial, and who determined that Mr. Fieger's "misleading, unprofessional, and frequently outrageous" misconduct led to a "clearly unjustified verdict." (Appx. 88, Tr. Op. 9.)

Application of the proper standard of review to those findings and conclusion is dispositive of this appeal. The scope and breadth of misconduct in this case, however, presents an opportunity for this Court to provide guidance to the bench and bar on a wide variety of inherently prejudicial counsel misconduct. Mt. Sinai will therefore itemize some of the types of counsel misconduct, in addition to those already discussed, that permeated the proceedings below.

A. Misconduct in the From of Misleading Manipulations of Medical Terms and Unsupported Theories.

"The major issues" in this case were: "(1) when and why was the baby injured, and (2) was its condition due to any negligence on the part of any defendant?" (Appx. 80, Tr. Op. 1.) Both issues were dependent upon expert medical testimony. Mr. Fieger's misconduct during the medical testimony, and its effect on the jury, are summarized at pages 2 and 8-9 of Judge Lawther's opinion (Appx. 81, 87-88):

> All parties produced experts who were experienced witnesses, but whose opinions were diametrically opposed. The jury had the difficult duty of deciding the questions of negligence and proximate cause with respect to the Doctor and nurses, and decided those issues by a vote of 6 to 2. This was clearly a "close call," and depended upon which medical witnesses the jury chose to believe.
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> * * *
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> During cross-examination of his witnesses, [Mr. Fieger's] trial technique included constant interruption of opposing counsel without bothering to object and obtain a ruling. *** This kind of courtroom conduct persisted throughout the trial ***. It was quite obvious that Mr. Fieger's goal was to convey to the jury his own idea of what the witness should be saying, thus testifying for the witness, rather than making a genuine and valid objection to the question.
>
> * * *
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> A reading of the whole record discloses in detail his trial technique which was designed to manipulate and mislead the jury ***.

The appellate dissenting opinion cites numerous specific examples of Mr. Fieger's manipulations of the testimony and misstating of medical terms. He simply ignored the repeated testimony that under Mt. Sinai protocol, an "emergency" C-section connotes

"unscheduled," while "stat" or "crash" means immediate (Appx. 40-45, 47-48, 62-63, App. Op. (dissent) 9-14, 16-17, 31-32.) He insisted that "fetal distress" means "near death" notwithstanding overwhelming testimony regarding medical ambiguity of the term. (Appx. 40, 46-47, 51, 53-54, 60, 63-64, App. Op. (dissent) 9, 15-16, 20, 22-23, 29, 32-33.) He denigrated a critical report of the cord blood gases as "[t]hese things that look like shopping center receipts," and "the things you get from a drug store." (Appx. 64, App. Op. (dissent) 33; Supp. (Vol. 3) 2161, Tr. 1384.)

Several courts have recognized that such manipulative and misleading techniques are particularly prejudicial when complex medical issues determine the outcome of trial. In *Willey v. Ketterer* (C.A.1, 1989), 869 F.2d 648, for example, the court reversed a *denial* of a new trial motion because one of the causation theories presented in a "delayed C-section" case was never supported by expert testimony. In *Willey*, defense counsel "engaged in a subtle shell-game on the phrases 'seizure disorder' and 'motor deficit,' blurring the significance of these technical words for court and jury" to cloud the fact that defense experts "never provided the nexus" to tie the cerebral palsy to heredity. Id. at 651. The court of appeals rejected defendants' argument that the misconduct was "harmless" because other causation theories supported the verdict:

> [W]hen an elephant has passed through the courtroom one does not need a forceful reminder. Unfamiliar, multi-syllabic, medical terms may raise puzzling concepts, particularly when it is emphasized, as defendants were careful to do, that they are questionable, anyway.

Id. at 652. See, also, *Geler v. Akawie* (N.J.Super. 2003), 818 A.2d 402, 406 (holding that the trial court should have granted a new trial on all issues where, among other misconduct, plaintiff's counsel "consistently misrepresented" the testimony of the defendant physicians "regarding their standard office procedure").

Here, Mr. Fieger engaged in a not-at-all subtle shell-game on the phrases "emergency" and "fetal distress," blurring the significance of the technical words and repeatedly inserting lay interpretations of "emergency" and "distress" as the "elephant in the room" of this complex medical case. Also, like the counsel in *Willey*, Mr. Fieger presented a theory of causation – that Walter Hollins' injuries were caused by the administration of a "miniscule" amount of Pitocin – which was never supported by expert testimony. (See Appx. 56-57, App. Op. (dissent) 25-26.) Plaintiff's unsupported "Pitocin" theory was mentioned for the first time in opening statement. (Supp. (Vol. 2) 1882-1183, Tr. 413-414.) After the trial judge erroneously overruled defendants' objections (id.), Mr. Fieger capitalized on the error by stating that administering Pitocin was like "holding a child underwater" and:

> At that point, you're holding the baby literally, figuratively underwater. *** [Y]ou never should have given Pitocin in the first place ever. *** [T]his is suffocating a child.

(Supp. (Vol. 2) 1215, Tr. 446.) See, also, closing argument (Supp. (Vol. 4) 2974, Tr. 2184) ("The Pitocin *** suffocates little Walter even more"). The trial judge correctly held that such improper manipulations of medical terms and theories mandated a new trial.

B. Misconduct in the Form of Disruptive Behavior and Refusals to Comply with Trial Court Rulings and Admonitions.

Mr. Fieger's "speaking" objections, repeated refusals to comply with court admonitions, and other disruptive behavior further ensured that the jury would not be allowed to hear a cohesive presentation of the complex medical facts that caused Walter Hollins' injuries.

Mr. Fieger simply refused to make proper objections, conduct that continued after in-court and in-chambers admonitions.[18] He also refused to comply with court orders sustaining a defense objection – Mr. Fieger simply repeated (thereby highlighting) the improper question.[19] See, also, Supp. (Vol. 3) 2327-2328, 2333, 2435, Tr. 1546-1547,

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[18] See, e.g., Supp. (Vol. 2) 1491, Tr. 720 ("Excuse me, objection, the chart doesn't reflect arterial blood gas of 7.15. He made that up. Judge, it's one thing to ask a question –"); Supp. (Vol. 2) 1499, Tr. 728 ("Wait a minute, judge, he knows very well she has three reports and that's even, you know –"); Supp. (Vol. 2) 1505, Tr. 734 ("This affidavit has nothing to do with anything"); Supp. (Vol. 2) 1681-1682, Tr. 908-909 ("Who said – where did he come up with that, judge?"); Supp. (Vol. 3) 1796-1797, Tr. 1021-1022 ("Excuse me. This is all made up. This is conversation that he denies ever took place. Now he's literally written a script, Judge"); Supp. (Vol. 3) 1887, Tr. 1112 ("MR. FIEGER: Excuse me. That's not – THE COURT: Don't shout at me"); Supp. (Vol. 3) 1950-1951, Tr. 1173-1174 (instructing Mr. Fieger in chambers on how objections are to be made "henceforth"); Supp. (Vol. 3) 2126-2128, Tr. 1349-1351 ("Who cares? He's not going to testify against her. What does she have to do with the case? *** Wait a second. He sequestered witnesses, judge. He's not allowed to –"); Supp. (Vol. 3) 2203, Tr. 1424 (arguing court ruling); Supp. (Vol. 3) 2219-2220, Tr. 1440-1441 ("Don't argue with me. The objection is sustained"); Supp. (Vol. 4) 2693-2694, Tr. 1907-1908 (in chambers, the trial judge goes "on the record" regarding Mr. Fieger's misconduct in improperly making objections and "shouting" at sidebars "so the jury could hear what you're saying").

[19] See, e.g., Supp. (Vol. 2) 867, Tr. 102 (objection sustained); Supp. (Vol. 2) 904, Tr. 139 (repeating the question); Supp. (Vol. 3) 1909, 2017-2024, 2501-2506, 2564-1566, 2588; Supp. (Vol. 4) 2807-2808, Tr. 1134, 1240-1247, 1718-1723, 1781-1783, 1805, 2091-1092.

1552, 1652 (after Mr. Fieger injected attorney fees into evidence and defense objections are sustained, Mr. Fieger asserts in chambers that "I have never seen a case in 25 years of practice that said a jury may not consider the cost of legal representation" when considering the "net amount of money" his client would receive; asks the trial court not to "give a knee-jerk reaction to something it hasn't heard of"; and, the next day, claims that he had been "falsely accused" and insists, based on case law that does not support his claim, that the trial judge "instruct the jury that I did nothing wrong yesterday").

Even when counsel's refusal to comply with court rulings does not result in the introduction of incompetent evidence, the inferences created may mandate a new trial. See, e.g., *Lopez v. Josephson* (Mont. 2001), 30 P.3d 326, ¶ 34-35:

> The repeated asking of questions clearly intended to keep the assumption of damaging facts which cannot be proven before the jury, in order to impress upon their minds the probability of the existence of the assumed facts upon which the questions are based, constitutes gross misconduct.
>
> * * *
>
> Although the District Court, in understandable frustration, repeatedly admonished plaintiffs' counsel *** plaintiffs' counsel blithely proceeded to do what he knew he should not. *** While the District Court did a yeoman's job in cautioning the jury, our review of the record leads us to conclude that the misconduct of plaintiffs' counsel was so pervasive so as to compel reversal.

Id., ¶ 34-35. Here, as in *Lopez*, the appellate court should have affirmed the trial judge's correct exercise of his "overriding duty" to grant a new trial "where the misconduct of counsel prevents the opposing litigant from having a fair trial on the merits." Id. at ¶ 35.

The trial judge was an "aggrieved observer of continued improprieties which he thought himself powerless to suppress." *Cleveland, Painesville & Eastern R.R. v. Pritschau* (1904), 69 Ohio St. 438, 446-447. See, e.g., Supp. (Vol. 4) 2695, Tr. 1909 ("We will try to go ahead and finish this case as best we can"). His grant of defendants' new trial motions represented "a too long deferred recognition of the rights of the plaintiff in error" (*Pritschau* at 447), and should be affirmed.

C. Misconduct in Closing Argument.

Mr. Fieger's grossly improper closing argument included misrepresentations of the evidence, appeals to economic fears, disparagement of opposing experts and counsel, and unrelenting inflammatory appeals to emotion.

Despite the trial court's unequivocal ruling that plaintiff's spoliation allegations are "improper and certainly not supported by evidence" (Supp. (Vol. 3) 2418, Tr. at 1637), defendants' alleged "cover up" became a keystone of Mr. Fieger's closing argument. See, e.g., Supp. (Vol. 4) 2999-3000, Tr. 2209-2210:

> We're missing an order from an ultrasound from Dr. Jordan. We're missing the ultrasound report. We're missing the fetal monitor strips from Dr. Jordan. We are missing the documentation of when Regina arrived at the Mt. Sinai Hospital. We're missing the fetal monitor strip that the doctors said showed a flat line. We are missing other parts of the record. We are missing policies and procedures which absolutely require what every single doctor testified was a standard of care and would have showed you at Mt. Sinai. We're missing the results of the non-stress test that they say they did when Regina came to the hospital. They tried to alter the discharge summary six months after the baby was diagnosed and released from the hospital. How did they get

> missing? Why? Who would try to change the discharge summary six months in violation of the law?

See, also, Supp. (Vol. 4) 2963, Tr. 2173 ("[A]fter this suit was started, records started going"); Supp. (Vol. 4) 2969, Tr. 2179 ("They started the cover up"); Supp. (Vol. 4) 2070, Tr. 2180 ("Cover ups really do happen when people say oh, my god, you know what? We brain damaged a little baby"); Supp. (Vol. 4) 2994, Tr. 2204 ("The cover up hadn't started" in 1987); Supp. (Vol. 4) 3014, Tr. 2224 ("They let Regina in fact believe for years that this injury was an act of God and then, as I have demonstrated to you, they tried to cover it up"); Supp. (Vol. 4) 2969, Tr. 2179 ("Six months after they wrote birth asphyxia they started the cover up and crossed it out to try to begin to change the records"); Supp. (Vol. 4) 2070, Tr. 2180 (accusing defendants of "cover ups" and "shenanigans"). As this Court held in *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, a new trial is required when counsel improperly argues an issued that had been directed out by the court.

Further, Mr. Fieger repeatedly violated this Court's admonition in *Pesek v. Univ. Neurologists Ass'n*, 87 Ohio St.3d 495, that counsel must refrain from abusive comments directed at opposing counsel and an opposing party's expert witness. See, e.g., Supp. (Vol. 4) 2956, Tr. 2166 ("Who are you going to believe? Me or your lying eyes?"); Supp. (Vol. 4) 2978, Tr. 2188 ("Do you understand the extent of the prevarication?"); Supp. (Vol. 4) 2964, Tr. 2174 ("The prevarications that have been told in this case"); Supp. (Vol. 4) 2982-2983, Tr. 2192-2193 ("What does that tell you about what's going on here and about the false stories that have been spun? Oh, what a tangled web we

weave when first we practice to deceive"); Supp. (Vol. 4) 3003, Tr. 2213 ("They will misrepresent what witnesses have said"); Supp. (Vol. 4) 2995-2996, Tr. 2205-2206 ("How dare they? *** and all they offer were witnesses willing to say anything at different times under oath to prevaricate, to dissemble, to deny an innocent child justice"); Supp. (Vol. 4) 3093, Tr. 2303 ("Mr. Groedel [trial counsel for Mt. Sinai] says, we did nothing wrong. *** It's a game to him *** Mr. Groedel and Mr. Farchione [trial counsel for Dr. Jordan] get to go back to their offices and to go back to their families. *** It's a game to them, and it's a game to them about one and one thing only. They don't give a darn about this. It's about money. *** Nothing is going to happen to them. Nobody is going to be punished" (objection overruled)); Supp. (Vol. 4) 3094, Tr. 2304 ("It's about money. How much money they save"); Supp. (Vol. 4) 3098-3099, Tr. 2308-2309 ("Dr. Nowicki, a man who works in a laboratory with pigs who's lied and admits it under oath about why he got let go of his job, who has said it's all right to drink a bottle of Jack Daniels and go into the OR and doesn't hurt a baby and who *** voluntarily cites Nazi literature in support of his position in this case").

And contrary to this Court's rulings in *Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391, 399-400 (condemning arguments that refer to the poverty of one party or the wealth of another), Mr. Fieger told the jury in closing that they were questioned during voir dire "to see if Walter can at least stand on any equal footing with these defendants" (Supp. (Vol. 4) 2954, Tr. 2164), exhorted them to "give a voice to the poor and justice for the oppressed" (Supp. (Vol. 4) 3000, 3015, Tr. 2210, 2225), and argued "I

went over the kind of effort and kind of money that was spent by the defendants in this case to deny this child justice" (Supp. (Vol. 4) 2998, Tr. 2208).

Other jurisdictions have recognized the impropriety of counsel argument that includes "an invocation of divine authority to direct a jury's verdict" (*Sandoval v. Calderon* (C.A.9, 2000), 241 F.3d 765, 779); argument intended to "persuade[] the jury to fictionalize the claims herein and act out of the sense of drama rather than reality" (*Fineman v. Armstrong World Indus., Inc.* (D.N.J. 1991), 774 F.Supp. 266, 269-270); or "melodramatic argument" that "does not help the jury decide their case but instead taints their perception to one focused on emotion rather than law and fact" (*Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa* (Iowa App. 1995), 541 N.W.2d 904, 908) or that appeals to ethnic unity and racial prejudice (*Texas Employers' Ins. Ass'n v. Guerero* (Tex. App. 1990), 800 S.W.2d 859). See, also, *Geler v. Atawie*, supra, 818 A.2d at 420-422 (ordering a new trial where counsel's closing argument "misstated material elements of the evidence," engaged in "wholesale disparagement through an unrestricted deluge of epithets," and made ""[u]nfair and prejudicial appeals to emotion through [the] use of charged images"). Mr. Fieger's closing argument did all of that:

- **Utilizing charged images to inflame juror emotions** – "I am standing here as the voice of Walter. Walter is a baby in his mother's womb waiting to be born. Doctors, nurses, I'm suffocating. Please help me be born" (Supp. (Vol. 4) 2957-2958, Tr. 2167-2168); "I am suffocating. Help me be born" (Supp. (Vol. 4) 2961, Tr. 2171); "Dr. Jordan, help me be born" (Supp. (Vol. 4) 2965, Tr. 2175); "oh, please, help me. Help me be born. I'm drowning" (Supp. (Vol. 4) 2971, Tr. 2181); "please, please, Dr. Jordan, please, nurses, please help me be born" (Supp. (Vol. 4) 2976, Tr. 2186); "please, please help me be born" (Supp. (Vol. 4) 2980, Tr. 2190); "I'm dying.

Please save me" (Supp. (Vol. 4) 2985, Tr. 2195); "mommy, grandma, someone, please save me. I'm dying. Please help me" (Supp. (Vol. 4) 2985, Tr. 2195); "please, please nurses, I'm a little baby. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me, please help me to be born" (Supp. (Vol. 4) 2989, Tr. 2199).

- **Religious commands** – "Scripture tells us through Isaiah that we must give a voice to the poor and justice to the oppressed" (Supp. (Vol. 4) 2950, Tr. 2160); "whatever you do for the least of my brothers, that you do unto me" (id.); "Walter is depending upon you and God for justice" (Supp. (Vol. 4) 2951, Tr. 2161); "from today until God takes Walter into his kingdom, Walter will suffer in the way and manner which he is now" (Supp. (Vol. 4) 2965, Tr. 2175); "this is a sin only you can rectify" (Supp. (Vol. 4) 2970, Tr. 2180); "I cite scripture not as a means to appeal to emotion but as an appeal to truth as to justice and doing what's right" (Supp. (Vol. 4) 3099, Tr. 2309).

- **Appealing to racial bias and ethnic unity** – compares this "poor, terribly injured African-American" with "the powerful corporation defendants, doctors who did this to him" (Supp. (Vol. 4) 2948-2949, Tr. 2158-2159); "there's prejudice which exists which cause people to do things they might otherwise not do or ignore an avalanche of evidence and that's why you're questioned so closely *** to see what type of attitudes you bring here to this courtroom" (Supp. (Vol. 4) 2954, Tr. 2164); "if you want to have biases *** then you should have never been sitting in this jury to begin with" (Supp. (Vol. 4) 3002, Tr. 2212); "and they could also claim that Walter would never have gotten beyond high school. I don't believe it *** why? Because his mother didn't go to college? Because he's an African-American male?" (Supp. (Vol. 4) 3018, Tr. 2228).

Mr. Fieger's home state has considered many of the specific types of misconduct that permeated this trial. See, e.g., *Powell v. St. John Hosp.* (Mich.App. 2000), 614 N.W.2d 666 (admonishing Mr. Fieger for "gratuitously insert[ing]" the issue of race into a medical malpractice action and for accusing witnesses of "fabricating" their testimony and "making up" what they were saying); *Badalamenti v. Beaumont Hosp.-Troy*

(Mich.App. 1999), 602 N.W.2d 854 (ordering a new trial and holding that Mr. Fieger's accusations that defendants "abandoned" the plaintiff and "destroyed, altered, or suppressed evidence," were unfounded and injected for the purpose of "divert[ing] the jurors' attention from the merits of the case and to inflame the passions of the jury"); *Gilbert v. DaimlerChrysler Corp.* (Mich. 2004), 685 N.W.2d 391, 403-404 (ordering a new trial based on Mr. Fieger's "deliberate[]" attempt to "provoke the jury by supplanting law, fact and reason with prejudice, misleading arguments and ad hominem attacks against defendant based on its corporate status" as well as a reference to Nazi Germany that was "a naked appeal to the passion and prejudice and an attempt to divert the jury from the facts and law relevant to the case" and noting that "[o]verreaching, prejudice-baiting rhetoric appears to be a calculated, routine feature of counsel's trial strategy"). This history of admonitions and reversals further supports the trial judge's finding that Mr. Fieger's trial technique was intended to (and did) "manipulate and mislead the jury" (Appx. 88, Tr. Op. 9). Accord *Geler*, 818 A.2d at 420 (citation omitted) (where counsel had 25 years of trial experience, misconduct had "patent symptoms of a consciously unfair tactic").

The appellate majority's conclusion of "no misconduct" is based on findings that are unsupported and contrary to the record, irrelevant, and/or insufficient to support a finding that the new trial order constituted an abuse of discretion – i.e., that "[t]he defense did not contest liability in this appeal" and "much of the evidence was unrebutted"; that "defense counsel did not even object to the claimed improper comments in plaintiff's

closing" and Mr. Fieger's misconduct was not sufficiently "gross and abusive" to require the court to intervene sua sponte"; and that "the defense made its own questionable comments in the proceedings." (Appx. 20-21, App. Op. 11-12.)

The majority's suggestion that Mt. Sinai had some type of obligation to cross-appeal on "liability" ignores the fact that Mt. Sinai moved for a new trial on liability and damages and was awarded a new trial on liability and damages. It had no reason to cross-appeal on "liability," no basis to cross-appeal on liability, and no standing to appeal on an issue as to which it prevailed in the court below. The suggestion that "much of the evidence was unrebutted" ignores the 2,400-page transcript, the 6-2 jury verdict, and the 13-page new trial order.

The majority's suggestion that defendants somehow waived their right to a fair trial, free from the taint of counsel misconduct, is unsupported by fact or law. The transcript is littered with objections throughout the proceedings. By engaging in pervasive and gross misconduct, and repeatedly disobeying court orders, Mr. Fieger placed the defense in an impossible position. When defendants' objections were erroneously overruled, Mr. Fieger capitalized on the erroneous ruling; when their objections were sustained, Mr. Fieger simply ignored the Court ruling. Either way, the inflammatory misconduct or argument was enhanced for the jury.

Finally, as the majority acknowledged, "where gross and abusive conduct occurs, the trial judge is "sua sponte bound" to intervene, even absent an objection. Appx. 21, App. Op. 12, quoting *Pesek,* 87 Ohio St. 3d at 301. See also, *Jones v. Macedonia-*

Northfield Banking Co. (1937), 132 Ohio St. 341, 351 ("The judge who presides over a cause is not a mere umpire; he may not sit by and allow the grosses injustice to be perpetrated without interference"). Moreover, the law requires a new trial for intentional, inherently prejudicial misconduct, even when an objection has been sustained and a cautionary instruction given. See *Toledo St. L. & W. R. Co. v. Burr & Geakle* (1910), 82 Ohio St. 129, 135 (counsel's reference to settlement offer in closing argument was "manifestly" injected to suggest that the defendant had admitted liability: "The poison had been injected, and [the curative instruction] was not, in our judgment, a sufficient antidote"); *Anderson v. Botelho* (R.I. 2001), 787 A.2d at 471 ("[t]here are bells that cannot be unrung").

The policy and core principles condemning the varied forms of counsel misconduct in cases issued by this Court, federal courts, and other state courts are all premised on the necessity for preserving the integrity of a fair trial process. The majority's conclusion that Judge Lawther abused his discretion when he carried out his duty to protect that process, following his observation of the effect on the conduct of the jury and review of the 2,400-page transcript, is contrary to the universal law in Ohio and other states.

Proposition of Law No. 4

> **In an action in which a patient seeks to hold a hospital vicariously liable for the negligence of an independent contractor physician under the doctrine of agency by estoppel, if the underlying liability of the independent contractor is extinguished, the hospital's secondary liability is likewise distinguished. (*Comer v. Risko* (2005), 106 Ohio St.3d 185, followed)**

The Court of Appeals erroneously denied Mt. Sinai's cross-appeal, which sought to limit evidence asserted against Mt. Sinai at the retrial to allegations of nursing negligence.

Although Dr. Bechara Hatoum (an anesthesiologist), and his professional association (Cleveland Anesthesia Group, Inc.) were named defendants in plaintiff's original Complaint, he did not name either in the Complaint he re-filed in 2002. (See, generally, Supp. (Vol. 1) 144, 145, R. 20.) Because the re-filed Complaint maintained its allegations of negligence by Dr. Hatoum (Supp. (Vol. 1) 129-132, ¶ 29-35), Mt. Sinai sought and obtained an order from the trial court directing plaintiff "to comply with" Ohio Civ.R. 19.1, Ohio's mandatory joinder rule. (Supp. (Vol. 1) 45, R. 17.) Plaintiff thereafter filed a "Notice of Compliance" that refused to join Dr. Hatoum as a party. (Supp. (Vol. 1) 144). Thereafter, Mt. Sinai repeatedly objected to plaintiff's characterization of Dr. Hatoum, an independent contractor and non-party, as an "agent" of Mt. Sinai. See Supp. (Vol. 1) 46, 65, R. 23, R. 150 (summary judgment motions); Supp. (Vol. 3) 2423, Tr. 1642; Supp. (Vol. 4) 2934-2937, Tr. 2146-2149 (motions for directed verdict); Supp. (Vol. 1) 235-239, Mt. Sinai Mot. for JNOV 14-18.

When the trial court denied Mt. Sinai's JNOV motion on the grounds that it was rendered "moot" by its new trial order (Appx. 92, Tr. Op. 13), Mt. Sinai cross-appealed, urging the Court of Appeals to hold that the retrial should be limited to claims of alleged nursing negligence. The Court of Appeals misconceived the issue raised (see Appx. 25, App. Op. 16) (assuming Mt. Sinai sought a complete dismissal) and this Court's decision in *Comer v. Risko* (2005), 106 Ohio St.3d 185 (Appx. 27-28, App. Op. 18-19).

In *Comer*, this Court distinguished "actual agency" relationships (i.e., employer/employee, master/servant) from "fictional agency" relationships, which arise only upon a showing of induced reliance on ostensible agency. Id. at 189. All agency relationships impose only "derivative" liability; fictional agency relationships impose an additional layer of derivation because they arise only upon the resolution of fact issues. Based on the derivative nature of fictional agency, this Court firmly rejected the appellate court's conclusion that a plaintiff may pursue a vicarious liability claim against a hospital "even if it has not named the independent contractor tortfeasor as a party and/or a claim against the tortfeasor is not viable" (*Clark v. Risko*, 5th Dist. No. 03CA14, 2003-Ohio-7272, ¶ 20).

Here, plaintiff filed suit against Dr. Hatoum, voluntarily dismissed the suit, and intentionally omitted him from the re-filed action, even after the trial court ordered him to do so. Until and unless a jury concluded that a "fictional agency" relationship existed, plaintiff had no basis for offering evidence against Mt. Sinai based upon the conduct of a *non-party*, independent contractor. As a result of this deliberate trial strategy, plaintiff

had no legal basis upon which to present evidence of Dr. Hatoum's alleged negligence, much less argue that Mt. Sinai was vicariously liable for such alleged negligence through a fictional agency relationship. The trial court therefore erred in failing to direct a verdict or judgment notwithstanding the verdict in favor of Mt. Sinai and the appellate court erred by failed to grant Mt. Sinai's cross-appeal.

III. CONCLUSION

For all of the reasons set forth above, Mt. Sinai respectfully requests that this Court reverse the majority decision, and remand for new trial on all issues. Mt. Sinai further requests that this Court specify that plaintiff's claims against Mt. Sinai are limited to claims of "actual" agency – i.e., the alleged negligence of its employed nurses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 1st day of December, 2006, by U.S. Mail, postage prepaid, upon the following:

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No. 06-1247

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NOS. 04-85286, 04-85574 and 04-85605
(Consolidated)

MARK A. McLEOD, Guardian for the Estate of Walter Hollins,
Appellee,

v.

MT. SINAI MEDICAL CENTER,
Appellant,

and

RONALD JORDAN, M.D. and
NORTHEAST OHIO NEIGHBORHOOD HEALTH SERVICES, INC.
f/k/a HOUGH-NORWOOD
Defendants

NOTICE OF APPEAL OF APPELLANT MT. SINAI MEDICAL CENTER

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NOTICE OF APPEAL OF APPELLANT MT. SINAI MEDICAL CENTER

Appellant Mt. Sinai Medical Center hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case Nos. 04-85286, 04-85574 and 04-85605 (consolidated) on May 15, 2006.

This case is one of public and great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 28th day of June, 2006, by U.S. Mail, postage prepaid, upon the following:

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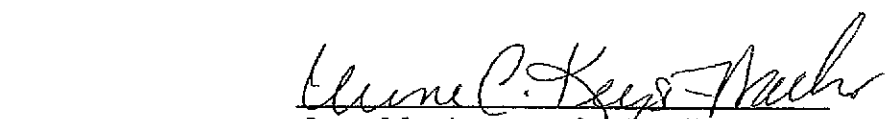

One of the Attorneys for Appellant Mt. Sinai Medical Center

IN THE SUPREME COURT OF OHIO

Marc McLeod, Guardian of the Estate of Walter Hollins, **Appellee,** **v.** **Mt. Sinai Medical Center, et al.,** **Appellants.**	Case No. 06-1247 **On Appeal From the Cuyahoga County Court Of Appeals, Eighth Appellate District** **Court of Appeals Case No. 85286**

NOTICE OF APPEAL OF APPELLANTS NORTHEAST OHIO NEIGHBORHOOD HEALTH SERVICES, INC. AND RONALD JORDAN, M.D.

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NOTICE OF APPEAL

Appellants Northeast Ohio Neighborhood Health Services, Inc., and Ronald Jordan, M.D., (collectively, "appellants") hereby give notice of appeal to the Ohio Supreme Court from the decision of the Court of Appeals, Eighth District, County of Cuyahoga, in *Marc McLeod, Guardian of the Estate of Walter Hollins v. Mt. Sinai Medical Center, et al.*, Court of Appeals Case No. 85286, announced on May 4, 2006 and journalized May 15, 2006.

Appellants submit (i) that the case involves both a substantial constitutional question and issues of public or great general interest and (ii) that the decision of the Court of Appeals should be reversed.

Dated: June 27, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Appellants Northeast Ohio Neighborhood Health Services, Inc. and Ronald Jordan, M.D. was served by ordinary U.S. mail, postage prepaid, upon Jack Beam, Esq., BEAM & RAYMOND ASSOCIATES, 2770 Arapaho Road, Suite 132, PMB 135, Lafayette, Colorado 80026, Andrew S. Muth, Esq., MUTH & SHAPERO, L.C., Society Bank Building, 301 W. Michigan Avenue, Suite 302, Ypsilanti, Michigan 48197, Geoffrey Fieger, Esq., FIEGER FIEGER KENNEY & JOHNSON, 19390 W. Ten Mile Road, Southfield, Michigan 48075, and Sandra J. Rosenthal, Esq., 75 Public Square, Suite 1300, Cleveland, Ohio 44113, attorneys for plaintiff-appellee, and upon Irene C. Keyse-Walker, Esq., TUCKER ELLIS & WEST LLP, 925 Euclid Avenue, Suite 1150, Cleveland, Ohio 44115 and Marc W. Groedel, Esq., and Marilena DiSilvio, Esq., REMINGER & REMINGER CO., L.P.A., 1400 Midland Building, 101 Prospect Avenue, W., Cleveland, Ohio 44115, attorneys for Mt. Sinai Medical Center, on this 29th day of June, 2006.

ONE OF THE ATTORNEYS FOR APPELLANTS

MAY 15 2006

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

Nos. 85286, 85574 and 85605

MARK A. McLEOD, GUARDIAN, ETC. Plaintiff-appellant and cross-appellee	:	JOURNAL ENTRY
	:	AND
vs.	:	OPINION
MT. SINAI MEDICAL CENTER, ET AL. Defendants-appellees and cross-appellants	:	
DATE OF ANNOUNCEMENT OF DECISION	:	MAY 4, 2006
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court Case No. CV-484240
JUDGMENT	:	AFFIRMED IN PART, VACATED IN PART, REVERSED AND REMANDED IN PART.
DATE OF JOURNALIZATION	:	MAY 15 2006

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FRANK D. CELEBREZZE, JR., P.J.:

Plaintiff-appellant/cross-appellee, Mark A. McLeod (hereafter "plaintiff" or "McLeod"), Guardian of the Estate of Walter Hollins, initiates this appeal to reinstate the original jury verdict and award in this medical malpractice lawsuit. After a thorough review of the record and the arguments of the parties, we ultimately reverse the trial court's order granting a new trial and remand the matter for consideration of remittitur of damages and prejudgment interest.

This medical malpractice action stems from the events surrounding the birth of Walter Hollins (hereafter "Hollins"). On January 29, 1987, Hollins was born via Cesarean section at the former Mt. Sinai Hospital in Cleveland. Hollins, an intra-uterine growth retarded ("IUGR") baby, was born with the lifelong debilitating condition of cerebral palsy and severe retardation. At the time of Hollins' birth, a Cesarean section was ordered because of fetal distress. Once the procedure was ordered, it took approximately two hours to deliver baby Hollins. The record also indicates that Hollins experienced some degree of asphyxia at birth.

In 1998, plaintiff filed suit alleging medically negligent prenatal and postnatal care resulting in Hollins' condition. The complaint was specifically brought against Dr. Ronald Jordan, the physician who performed the Cesarean section, and his employer,

Northeast Ohio Neighborhood Health Services, Inc. The complaint also included co-defendant Mt. Sinai Hospital, the facility where the Cesarean section took place. In addition, the complaint included a claim of spoliation of medical records.

The case was originally assigned to the regular common pleas docket, but was eventually reassigned to a visiting judge. A jury trial began on May 4, 2004 with causation of Hollins' infirmities at the core of the contested issues. While plaintiff maintained that Hollins' condition was a direct result of medical malpractice, the defense attributed causation to placental insufficiency throughout Hollins' development in utero and through no fault of medical treatment.

On May 24, 2004, the jury returned a verdict for the plaintiff and entered an award of $30 million -- $15 million in economic damages and $15 million in noneconomic damages.

In response, the defense filed motions for judgment notwithstanding the verdict ("JNOV"), for a new trial or, in the alternative, for remittitur. In August 2004, the trial court granted defendants' motion for a new trial. On September 8, 2004, plaintiff filed an affidavit of disqualification of the visiting judge, followed by a Civ.R. 60(B) motion for relief from order. The visiting judge subsequently recused himself.

On September 20, 2004, a hearing was held before a newly assigned common pleas judge on plaintiff's Civ.R. 60(B) motion for

relief. Prior to any ruling, plaintiff filed an appeal challenging the granting of a new trial (Cuy. App. No. 85286). Cross-appeals were also made. This court remanded the matter for a ruling on the pending Civ.R. 60(B) motion for relief. On November 19, 2004, the lower court granted plaintiff's motion for relief and ordered the jury verdict and award to be reinstated.

Defendants subsequently filed notices of appeal from the granting of plaintiff's Civ.R. 60(B) motion for relief (Cuy. App. Nos. 85574 and 85605). All three appeals (Cuy. App. No. 85286 by plaintiff and Cuy. App. Nos. 85574 and 85605 by defendants) have been consolidated and will be disposed of by this opinion.[1]

There are two main issues in this appeal: (1) should the lower court have granted plaintiff's Civ.R. 60(B) motion for relief; and, if not, (2) should the trial court's order for a new trial be upheld. The remaining issues to be addressed include: (1) Mt. Sinai's cross-appeal of the trial court's denial of their motions for directed verdict and JNOV; (2) the directed verdict against plaintiff's claims of spoliation and/or punitive damages; and (3) plaintiff's motion for prejudgment interest. We will address each issue accordingly.

THE GRANTING OF PLAINTIFF'S RULE 60(B) MOTION

Civil Rule 60(B) reads in pertinent part:

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[1] See Appendix A for the specific assignments of error cited in the appeal and cross-appeals.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: *** (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; *** or (5) any other reason justifying relief from the judgment."

To prevail on a motion under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

In granting the Civ.R. 60(B) motion for relief, the lower court articulated its fundamental disagreement with the trial court's granting of a new trial. The lower court argued that the trial court improperly imposed its opinion over the findings of the jury in ordering a new trial. Therefore, the lower court took the opportunity to overrule the order for a new trial by granting plaintiff's Civ.R. 60(B) motion for relief. Ordinarily "a motion for relief from judgment under Civ.R. 60(B) is discretionary with the trial court; and, in the absence of a clear showing of abuse of

discretion, the trial court's decision should not be disturbed on appeal." *Wiley v. National Garages, Inc.* (1984), 22 Ohio App.3d 57.

However, this court has further held that a Civ.R. 60(B) motion may not be used as a substitute for a direct appeal. *Manigault v. Ford Motor Corp.* (1999), 134 Ohio App.3d 402, 731 N.E.2d 236; citing *Doe v. Trumbull Cty. Children Svcs. Bd.* (1986), 28 Ohio St.3d 128, 502 N.E.2d 605; *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 63, 558 N.E.2d 1178; *Justice v. Lutheran Social Services of Central Ohio* (1992), 79 Ohio App.3d 439, 442, 607 N.E.2d 537. "*** Civ.R. 60(B) is not a viable means to attack legal errors made by a trial court; rather, it permits a court to grant relief when the factual circumstances relating to a judgment are shown to be materially different from the circumstances at the time of the judgment. See, *Kay v. Marc Glassman Inc.* (Feb. 1, 1995), Summit App. No. 16726, unreported ***. Civ.R. 60(B) relief *** thus cannot be used to challenge the correctness of the trial court's decision on the merits." *Anderson v. Garrick* (1995), Cuy. App. No. 68244., pp. 13-14.

Our review now becomes de novo: "Although the trial court's ruling on a Civ.R. 60(B) motion is usually subject to an abuse of discretion standard of review, we conclude that overruling a Civ. R. 60(B) motion for the reason that it is improperly used as a

substitute for appeal presents an issue of law." *Ford Motor Credit Co. v. Cunningham*, Montgomery Cty. No. 20341, 2004-Ohio-6226.

We find plaintiff's Rule 60(B) motion for relief in this case to be an improper attempt at an appeal. A comparison of the arguments raised by plaintiffs in opposition to the motion for a new trial and those made in support of the motion for 60(B) relief shows that they are nearly identical. This illustrates that a direct appeal was the appropriate forum to reassert plaintiff's contentions rather than a motion for relief. Furthermore, the lower court's granting of Civ.R. 60(B) relief was based upon a determination that the order for a new trial was incorrect on the merits. The opinion and order granting Civ.R. 60(B) relief is completely void of any citation to extraordinary circumstances that would justify the granting of Civ.R. 60(B) relief. We, therefore, vacate the granting of plaintiff's Civ.R. 60(B) motion.

THE GRANTING OF DEFENSE'S MOTION FOR NEW TRIAL

With the lower court's order for relief vacated, we now turn to the trial court's order for a new trial, which stated:

"Civil Rule 59(A) permits the granting of a new trial upon various grounds, including the following, which do apply in this case:

"Irregularity in the proceedings *** by which an aggrieved party was prevented from having a fair trial.

"Misconduct of the jury or prevailing party.

"Accident or surprise which ordinarily prudence could not have guarded against.

"Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

"Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

"In addition, a new trial may also be granted in the sound discretion of the court for good cause shown.

"The Court believes that the major grounds for relief set forth by Defendants are (1) the award of excessive damages given under the influence of passion and prejudice, (2) the misconduct of Plaintiff's counsel throughout the trial, and (3) irregularity in the proceedings which prevented a fair trial." (Journal Entry and Opinion on Defendants' Motions for New Trial, JNOV, or Remittitur, p. 3.)

Through its journal entry, the trial court attempts to explain its reasons for granting a new trial, finding that the award was excessive and due to a passion influenced jury; that plaintiff's trial attorney displayed continuous misconduct throughout the trial; and that there was irregularity in the proceedings due to the court's handling of a newspaper article that potentially could have influenced the jury.

A reviewing court may reverse a trial court if it abused its discretion in ordering a new trial. *Antal v. Olde Worlde Products*

(1984), 9 Ohio St.3d 144, 145. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. The high abuse of discretion standard defers to the trial court because the trial court's ruling may require an evaluation of witness credibility which is not apparent from the trial transcript and record. *Schlundt v. Wank* (April 17, 1997), Cuyahoga App. No. 70978. However, so long as the verdict is supported by substantial competent, credible evidence, the jury verdict is presumed to be correct and the trial court must refrain from granting a new trial. Id.

This court finds that the jury verdict in this case was supported by substantial competent, credible evidence; thus, we find error in the trial court's decision to order a new trial. The defense did not contest liability in this appeal, focusing instead on the amount of damages awarded. No assignment of error was raised with respect to liability on cross-appeal. In proving economic damages, plaintiff presented expert testimony giving differing estimates of health care that could be calculated to a range of total damages. The figure for noneconomic damages is also debatable. Thus, while the damage award may be the subject of debate, the record substantially supports plaintiff's argument that the trial court abused its discretion in granting a new trial by

impairing the traditional function of the jury, substituting its own opinion in place of the jury, and traveling outside of the record to substitute its own opinions when it could find no proper support in the record. (See Brief of Plaintiff-Appellant, p. 16.)

The trial court cites to irregularities in the proceedings in justifying its ruling; however, the flaws cited by the trial court in making its determination do not support the order of a new trial. While the trial court engaged in an ex parte discussion with defense counsel about a Plain Dealer newspaper article and engaged in ex parte communications with the jury, these irregularities were not even objected to by the plaintiff. To grant a new trial on this basis would be to reward a claimed error that was initiated by defense counsel. Moreover, there is no reasonable basis to conclude that these irregularities had a prejudicial effect on the outcome of the trial.

The trial court also claimed that the conduct by plaintiff's counsel was improper and inflammatory and thus warranted a new trial. There is nothing that prohibits counsel from being zealous in their representation. Further, trial counsel should be accorded wide latitude in opening and closing arguments. *Presley v. Hammack*, Jefferson App. No. 02 JE 28, 2003-Ohio-3280. Here, defense counsel did not even object to the claimed improper comments in plaintiff's closing. In addition, defense counsel made

its own questionable comments in the proceedings, including personal attacks.

Only "where gross and abusive conduct occurs, is the trial court sua sponte bound to correct the prejudicial effect of counsel's misconduct." *Pesek v. University Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 501, 2000-Ohio-483. Moreover, counsel's behavior has to be of such a reprehensible and heinous nature that it constitutes prejudice before a court can reverse a judgment because of the behavior. *Hunt v. Crossroads Psychiatric & Psychological Ctr.* (Dec. 6, 2001), Cuyahoga App. No. 79120, citing *Kubiszak v. Rini's Supermarket* (1991), 77 Ohio App.3d 679, 688.

In this case, while the remarks by counsel may have been questionable, they were not so outrageous as to warrant a new trial. Again, there was sufficient evidence to support the jury's verdict. Much of the evidence was not rebutted. Further, there is no challenge in this appeal to the jury's finding of liability. Under these circumstances, we find it to be an abuse of discretion to grant a new trial.

It does appear, however, that the jury's damages award is subject to remittitur. Granting a remittitur is different from granting a new trial. When a damages award is manifestly excessive, but not the result of passion or prejudice, a court has the inherent authority to remit the award to an amount supported by the weight of the evidence. *Wrightman v. Consol. Rail Corp.*, 86

Ohio St.3d 431, 444, 1999-Ohio-119. Four criteria are necessary for a court to order a remittitur: "(1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages." *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, citing *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, paragraph three of the syllabus. Remittitur plays an important role in judicial economy by encouraging an end to litigation rather than a new trial. While an appellate court has the power to order a remittitur, the trial court is in the best position to determine whether a damages award is excessive. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 654-655. If the prevailing party refuses to accept the remittitur, then the court must order a new trial. *Burke v. Athens* (1997), 123 Ohio App.3d 98, 102.

In this case, the record reflects that expert testimony was introduced that was based on "assumptions" and went beyond the calculations provided in the expert reports. Plaintiff does not contest that the maximum amount of economic damages stipulated and admitted into evidence was $12,637,339. Defense counsel raises several objections to the amount of the economic damages award. It also appears that the jury's award of noneconomic damages was influenced by the amount of the economic award, both awards being

$15,000,000. Accordingly, we remand the matter to the trial court for a consideration of the motion for remittitur.

The dissenting opinion takes exception with our ruling on this assignment of error. While it agrees that granting a new trial is not warranted by the cited irregularities, the dissent argues that the trial court's order should be granted because of the excessive damage award and plaintiff's attorney's misconduct. While we agree that plaintiff's attorney does not appear in the transcript to be the most likeable person, we do not find that his conduct rises to the level to justify the granting of a new trial.

In the end, though, the jury -- the body that our system of justice entrusts as the finder of fact -- heard all the evidence and arguments and found the defendants professionally negligent. We find nothing in the record that would lead us to hold that finding to be a product of passion or prejudice.

As to the dissent's concern of excessive damages, any such concern will be best addressed in this court's remand for remittitur. Again, liability was not the focus of the defense's appeal before this court. Their arguments were specific to the amount of damages awarded. Therefore, we find that any concern as to excessive damages will adequately be addressed through remittitur.

MT. SINAI'S CROSS-APPEAL

Mt. Sinai was named a codefendant in this action because of alleged negligence by the hospital's employees and/or agents. Dr. Hatoum, the agent specified in this appeal, was an independent contractor anesthesiologist on staff at Mt. Sinai the day of Hollins' birth. The jury ultimately found Mt. Sinai liable to plaintiff. Mt. Sinai now cross-appeals the denial of their motions for directed verdict and JNOV arguing that Dr. Hatoum was an independent contractor, thus, the hospital cannot be rendered vicariously liable.

"The applicable standard of review to appellate challenges to the overruling of motions for judgment notwithstanding the verdict is identical to that applicable to motions for a directed verdict." *Posin v. ABC Motor Court Hotel* (1976), 45 Ohio St.2d 271, 344 N.E.2d 334; *McKenney v. Hillside Dairy Corp.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291. Such review is de novo. *Goodyear Tire & Rubber v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835.

A motion for a judgment notwithstanding the verdict tests the legal sufficiency of the evidence. *Brooks v. Brost Foundry Co.* (May 3, 1991), Cuyahoga App. No. 58065. "'A review of the trial court's denial of appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict requires a preliminary analysis of the components of the action ***.' *Shore,*

Shirley & Co. v. Kelley (1988), 40 Ohio App.3d 10, 13, 531 N.E.2d 333, 337." *Star Bank Natl. Assn. v. Cirrocumulus Ltd. Partnership* (1997), 121 Ohio App.3d 731, 742-43, 700 N.E.2d 918, citing *McKenney v. Hillside Dairy Co.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291 [***21] and *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511.

A motion for judgment notwithstanding the verdict, as well as directed verdict, should be denied if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. *Posin*, supra at 275. "Conversely, the motion should be granted where the evidence is legally insufficient to support the verdict." Id.

In *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 539 N.E.2d 1114, the court wrote in pertinent part: "The test for granting a directed verdict or judgment n.o.v. is whether the movant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the non-movant." Id. at 172.

Regardless of claims made concerning Dr. Hatoum, it is clear that Mt. Sinai's motions were properly denied. In general, an employer is vicariously liable for the torts of its employees. *Clark v. Southview Hospital* (1994), 68 Ohio St.3d 435. In its case against Mt. Sinai, plaintiff cites to negligence on the part of the nursing staff and other staff members, apart from Dr. Hatoum, that

resulted in plaintiff's injuries. Furthermore, in finding Mt. Sinai liable, the jury gave the following answer to the pertinent interrogatory:

"Mt. Sinai staff did not expedite an urgent C-section, did not properly monitor the fetus during a critical time. As a result of the delay neurological damage occurred."

This finding clearly demonstrates that the issue of Mt. Sinai's liability includes its employees and that reasonable minds can come to differing conclusions as to their liability. Thus, Mt. Sinai should not have been dismissed from this litigation pursuant to either directed verdict or JNOV.

As to Mt. Sinai's liability for the actions of Dr. Hatoum, the law of vicarious liability controls. The traditional test for determining a hospital's vicarious liability in this situation is stated in *Clark*, supra:

"A hospital may be held liable under the doctrine of agency by estoppel for the negligence of independent medical practitioners practicing in the hospital if it holds itself out to the public as a provider of medical services and in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care. Unless the patient merely viewed the hospital as the situs where her physician would treat her, she had a right to assume and expect that the treatment was being rendered through

hospital employees and that any negligence associated therewith would render the hospital liable.

"In considering the doctrine of agency by estoppel as applied to hospitals, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems ***." Id.

Mt. Sinai's appeal emphasizes that the plaintiff did not specifically name Dr. Hatoum in his amended complaint, nor was he joined after the trial court's entry requiring the joinder of necessary parties under Civ.R. 19. The Ohio Supreme Court has recently held that because agency by estoppel is a derivative claim of vicarious liability, there can be no viable claim against a hospital for agency by estoppel based on the alleged negligence of an independent-contractor physician as to whom the statute of limitations has expired. *Comer v. Risko* (2005), 106 Ohio St.3d 185. Mt. Sinai now argues that *Comer* requires this court to sustain their appeal. We disagree.

Credible arguments were presented by both parties as to whether plaintiff triggered the doctrine of agency by estoppel by looking to the hospital for treatment. Since reasonable minds could still differ as to a conclusion, it is the duty of the court to send the issue to the jury. *Fraysure v. A-Best Prods. Co.*,

Cuyahoga App. No. 83017, 2003-Ohio-6882. Mt. Sinai's motions for directed verdict and JNOV were properly denied; therefore, we affirm the trial court on this issue.

SPOLIATION AND/OR PUNITIVE DAMAGES

At the close of plaintiff's case, the trial court ruled in favor of the defense on the motion for directed verdict on the claim of spoliation, which involved missing medical records. A motion for directed verdict is to be granted when, construing the evidence most strongly in favor of the party opposing the motion, the trial court finds that reasonable minds could come to only one conclusion, and that conclusion is adverse to such party. Civ.R. 50(A)(4); *Crawford v. Halkovics* (1982), 1 Ohio St.3d 184; *The Limited Stores, Inc. v. Pan American World Airways, Inc.* (1992), 65 Ohio St.3d 66.

A directed verdict is appropriate where the party opposing it has failed to adduce any evidence on the essential elements of this claim. *Cooper v. Grace Baptist Church* (1992), 81 Ohio App.3d 728, 734. The issue to be determined involves a test of the legal sufficiency of the evidence to allow the case to proceed to the jury, and it constitutes a question of law, not one of fact. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695; *Vosgerichian v. Mancini Shah & Associates, et al.* (Feb. 29, 1996), Cuyahoga App. Nos. 68931 and 68943. Accordingly, the courts are testing the legal sufficiency of the evidence rather than its weight or the

credibility of the witnesses. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68-69.

Since a directed verdict presents a question of law, an appellate court conducts a de novo review of the lower's court judgment. *Howell v. Dayton Power and Light Co.* (1995), 102 Ohio App.3d 6, 13; *Keeton v. Telemedia Co. of S. Ohio* (1994), 98 Ohio App.3d 1405, 1409.

The spoliation claim alleged misconduct regarding certain missing medical records. "[T]he elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge by the defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) actual disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts ***." *Smith v. Howard Johnson Co.*, 67 Ohio St.3d 28, 29, 1993-Ohio-229.

Plaintiff has offered no evidence that any of the records at issue were missing because of "willful destruction *** designed to disrupt the plaintiff's case." Plaintiff's argument is based on innuendo claiming the records were missing "without explanation." Nowhere in plaintiff's argument is there any evidence of willful destruction by the defense. Furthermore, the records at issue were of Hollins' birth in 1987, 11 years before a suit was ever filed. Mt. Sinai Medical Center has since closed, which event clearly had

a negative effect on any record keeping. Plaintiff cannot maintain this claim, and we affirm the trial court's directed verdict.

PREJUDGMENT INTEREST

Finally, when the trial court granted the motion for a new trial, plaintiff's motion for prejudgment interest was held to be moot. In reversing the order for new trial, we now also reverse the ruling, finding the motion for prejudgment interest to be moot. As we remand this matter for consideration of remittitur, we also direct the trial court to make appropriate determinations in consideration of plaintiff's motion for prejudgment interest.

This court hereby vacates the lower court's granting of plaintiff's Civ.R. 60(B) motion for relief. We further affirm the trial court's denials of Mt. Sinai's motions for directed verdict and judgment notwithstanding the verdict, and affirm the trial court's directed verdict in favor of the defense on the claim of spoliation. However, we reverse the trial court's order for a new trial and remand the matter for consideration of the motion for remittitur of damages and plaintiff's motion for prejudgment interest.

Judgment affirmed in part, vacated in part, reversed in part and remanded.

This cause is affirmed in part, vacated in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

SEAN C. GALLAGHER, J., CONCURS;

DIANE KARPINSKI, J., CONCURS IN PART AND DISSENTS IN PART (SEE ATTACHED SEPARATE OPINION.)

FILED AND JOURNALIZED
PER APP R

MAY 15 2006

CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAY 4 – 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B); 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

FOR ALL PARTIES-COSTS TAXED

80612 80606

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85286, 85574 AND 85605

MARK A. McLEOD, GUARDIAN, ETC.	:	
Plaintiff-appellant and cross-appellee	:	DISSENTING
v.	:	OPINION
MT. SINAI MEDICAL CENTER, ET AL.	:	
Defendants-appellees and cross-appellants	:	

DATE: MAY 4, 2006

KARPINSKI, J., DISSENTING:

I concur in part and respectfully dissent in part with the majority opinion. I disagree with the majority solely on the issue of whether the order for a new trial should be vacated. I agree that a new trial is not warranted solely by the "irregularity in the proceedings" the court partially relied on, that is, the court's failure to voir dire the jury after it spoke to several jury members about a newspaper article discussing the case. I find that the court's remaining reasons, however, justify an order for a new trial, that is, excessive damages and attorney misconduct.

A trial court's decision granting a new trial is reviewed under the abuse of discretion standard. The majority relies on

Schlundt v. Wank (Apr. 17, 1997), Cuyahoga App. No. 70978, 1997 Ohio App. LEXIS 1517. In *Schlundt*, the trial court had not provided any reasons for its decision to grant a new trial. In contrast, the court in the case at bar issued a detailed thirteen-page judgment entry explaining its reasoning. The Twelfth Appellate District has emphasized the abuse of discretion standard, especially regarding questions of fact:

> "Where a trial court is authorized to grant a new trial for a reason which requires the exercise of a sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court." *Antal v. Olde Worlde Products, Inc.* (1984), 9 Ohio St.3d 144, 145, 459 N.E.2d 223, quoting *Rohde*, supra, at paragraph one of the syllabus. Moreover, when the trial court's decision concerns questions of fact, the generally accepted rule is that a reviewing court "**should view the evidence favorably to the trial court's action rather than to the jury's verdict** ***." *Rohde*, supra, at 94.

Tobler v. Hannon (1995), 105 Ohio App.3d 128, 130, emphasis added.

I believe the record demonstrates the trial judge did not abuse his discretion in granting a new trial.

The granting of a new trial is governed by Civ.R. 59, which states in pertinent part:

> (A) Grounds. --A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> (1) **Irregularity in the proceedings** of the court, jury, magistrate, or **prevailing party**, or any order of the court or magistrate, or abuse of discretion, **by which an aggrieved party was prevented from having a fair trial;**
>
> (2) **Misconduct** of the jury or prevailing party;

***

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

***

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

(Emphasis added.)

In its order, the trial court listed three reasons for granting a new trial: an excessive award of damages given under the influence of passion and prejudice; the misconduct of plaintiff's counsel through the duration of the trial; and irregularity in the proceedings which prevented a fair trial. Because I agree with the majority that the alleged irregularity concerning the newspaper article does not justify a new trial, I will restrict my discussion to the first two reasons, each adequate in its own right to justify a new trial.

EXCESSIVE DAMAGES

In its judgment entry granting a new trial, the court points to the testimony of the economic expert, Harvey Rosen, Ph.D. An expert's testimony is limited by Loc.R. 21.1(B), which states in pertinent part: "[a]n expert will not be permitted to testify or

provide opinions on issues not raised in his report." The purpose of limiting experts to the opinions contained in their reports is to prevent unfair "ambush" of the other side. *O'Connor v. Cleveland Clinic Found.* (2005), 161 Ohio App.3d 43, ¶18, citing *Shumaker v. Oliver B. Cannon & Sons, Inc* . (1986), 28 Ohio St.3d 367, 370-371.

Harvey Rosen's expert report had estimated that the expenses for Walter for the duration of his life expectancy would be between $4,303,088 and $6,413,639. This estimate was based, in part, on the wages of a home health care aide, a person trained to be an assistant to help Walter twenty-four hours a day with his activities of daily living, including eating, hygiene care, and transfer from chair to bed and back.

At trial, however, the court erroneously allowed Harvey Rosen to testify to the cost of providing Walter with round the clock care by a Registered Nurse. Nowhere during the trial, however, did plaintiff present any evidence that Walter would need or benefit from twenty-four hour care by an R.N., as opposed to care by a trained home health aide. Defense counsel objected to this testimony, but, as it admits in its judgment entry, the court erred in failing to sustain those objections or to hold a side bar to discuss them. As a result of this admitted error by the trial court, Harvey Rosen testified to an amount of money three times the actual amount contained in his report. Permitting this expert to

testify to sums which were neither contained in his report nor ever justified by any evidence was a grave abuse of discretion on the part of the trial court. As defendants explained in their appellate brief, they did not hire an independent economic expert or life care planner because they did not disagree with the reports of Mr. Fieger's experts and relied on the limitation of costs those reports described. Thus the jury was left with a cost inflated beyond what the evidence justified and, more importantly, without any expert testimony to attack its excessiveness.[2]

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[2] Nor was Harvey Rosen the only expert who was permitted to testify inappropriately. Several of plaintiff's expert witnesses testified, despite defendants' objections, to opinions outside their areas of expertise, areas for which they had not been qualified as experts.

This inappropriate use of experts, although objected to by defense counsel, was permitted throughout plaintiff's case in chief. For example, a maternal-fetal medicine expert was permitted to testify about the standard of care for nurses, even though she admitted on cross-examination that she usually encourages attorneys to retain a nursing expert to testify on the nursing standards. The neonatologist was permitted to testify concerning the standard of the obstetrician as well as clinical signs, like the amount of amniotic fluid and its effect on fetal hypoxia. He admitted on cross examination that he did not have enough knowledge to comment on this area. Defense counsel also objected that the neonatologist examined Walter for the first time on the morning of trial yet was permitted to testify about Walter's condition.

Dr. Gabriel, an expert in pediatric neurology, was permitted to testify about obstetrical matters, even though he admitted he was not an obstetrician, when he testified about the definition of "fetal distress." The court overruled a defense objection. (Tr. 517-18.) He was also permitted to testify to the appropriateness of removing a fetal monitor from the mother. When defense counsel objected, noting that the question pertained to the standard of care (by the nurses and obstetrician), an area outside the pediatric neurologist's expertise, the trial court permitted the doctor to answer the question. (Tr. 551.) The pediatric

(continued...)

Even more disturbing is the testimony of Dr. Gabriel, a pediatric neurologist, concerning the cost of care that Walter would need throughout his life. Despite multiple objections upon which the court failed to rule, the witness proceeded to testify with specific monetary figures for various types of care. (Tr. 566.) This testimony was clearly outside the scope of the pediatric neurologist's area of expertise, and again was prejudicial to defendant's case because the testimony reinforced the economic expert's inflated economic figures. The defendants did not present an economic expert or a life care planner in their case in chief because they did not disagree with the reports of plaintiff's experts. They were ambushed, therefore, when the court permitted testimony that exceeded the amounts contained in Harvey Rosen's report and, in the case of Dr. Gabriel, was not within the expert's area of expertise at all.

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[2](...continued)
neurologist responded that there was no medical reason for removing the fetal monitor from the mother prior to the Cesarean section. This testimony enhanced the credibility of plaintiff's theory that defendants had failed to monitor the mother properly. Although on cross-examination Dr. Gabriel admitted that he was not qualified to testify to the standard of care, the opinion was already before the jury. (Tr. 577-78.) Similarly, the neuroradiologist testified that he would leave it to the other experts to pinpoint the time at which Walter's brain injury occurred. Mr. Fieger nonetheless asked him, over defense objection, whether he agreed with the reports of the other experts. The neuroradiologist stated that he had no disagreement with the other experts' reports.

Plaintiff's obstetrical expert was permitted to testify concerning the nursing standard of care. And the plaintiff's anesthesia expert was permitted to testify concerning the obstetrical standard of care.

The trial court is correct in concluding that these errors led to the jury awarding excessive damages.

LIABILITY

Much of defendant's discussion of specific parts of the trial, although subsumed under the category of attorney misconduct, go to the question of liability.

I note the majority states that "the defense did not contest liability in this appeal, focusing instead on the amount of damages awarded." (Majority Opinion at 11.) Although it is true that defendants predominantly focused on the damages award in their appellate brief, it is inaccurate to say they did not contest liability. Defendants did indeed raise the liability issue, both in their statement of issues and in their discussion in their brief. In their statement of issues, they noted that "[t]he medical experts were diametrically opposed and the jury verdict was split on liability." (At xii.)

More specifically, in their statement of facts, defendants dispute the underlying liability issue. For three pages they discuss the evidence presented by their expert witnesses that Walter's injuries occurred in a time period well before birth. Those experts, defendants' report, explained that Walter's brain injury resulted from "placental insufficiency, which caused chronic oxygen deprivation and retarded growth throughout the course of the pregnancy." (Defendants' Appellate Brief at 4.) Defendants argue,

therefcre, that Walter's Intrauterine Growth Retardation and microcephaly, which started many weeks before birth and was a result of the placental insufficiency, was the primary cause of Walter's brain damage. Defendants further explain that the experts testified that "[t]he injuries associated with [Walter's] microcephaly would not be evidenced on an ultrasound, CAT scan, or MRI." (Defendants' Appellate Brief at 4.)

Defendants again referred to these liability issues when discussing the remedy. They argued that "Judge Lawther noted that other new trial grounds asserted by Defendants, 'especially with respect to the issues of negligence and proximate cause,' have merit." (Appellant's brief at 38.) After this discussion of liability issue, defendants expressly requested that if this court did not agree with the order for a new trial because of attorney misconduct, "it should remand this case so the Trial Court can fully consider those additional grounds." Id. at 38.

MISCONDUCT OF PLAINTIFF'S COUNSEL

A second reason the trial court points to in its judgment entry granting a new trial is the behavior of plaintiff's counsel, Mr. Fieger. The court notes Mr. Fieger's "theatrical and discourteous demeanor throughout the trial," his failure to follow court procedure in entering objections, and his "trial technique which was designed to manipulate and mislead the jury." A review of the entire 2,400-page transcript compels agreement with the

court's description. Excerpts from the transcript demonstrate counsel's egregious behavior and contradictory and argumentative questioning. One example of his manipulative trial technique was his misleading restatement of witnesses' testimony in his follow up questions. This technique was especially discernable when he discussed several key phrases: "emergency cesarean section" and "fetal distress."

Several experts testified that the term "fetal distress" is ambiguous and vague, because it can cover a wide range of conditions, from life threatening, requiring immediate cesarean delivery, to merely significant heart rate changes, requiring close observation and expedient, but not immediate, Cesarean delivery. Despite the agreement on the dual meaning of the term, Mr. Fieger persisted in choosing only one meaning: a fetus near death, "practically dead," as he often said during the trial.

Mr. Fieger also took liberties with the definitions of "emergency." In answering his questions, all who had worked on the case were in accord in explaining that there were two categories of C section: scheduled and emergency. An emergency Cesarean section simply means one which was not previously scheduled. The witnesses explained that there was a significant difference between an ordinary emergency case and a "stat" or "crash" case. In an ordinary "emergency" C section, the doctor determines the mother would not be able to safely deliver the child vaginally and

therefore would have to be delivered by C section before she went into labor. A "stat" or "crash" case, on the other hand, according to the testimony of all the non-expert witnesses, as well as most of the expert witnesses, required immediate delivery, without sterile precautions, within fifteen minutes to one-half hour.

Mr. Fieger questioned the witnesses who had been present for Walter's C section about their care of the mother before delivery. Both Dr. Jordan and the nurses testified that after assessing the mother's and fetus's capacity for vaginal delivery, before she was in labor, they determined she would need to be delivered by Cesarean section. They based this assessment on several tests which monitored the baby's heart rate in response to various situations: with the mother at rest, with the mother repositioned to relieve pressure on her vena cava and therefore to increase blood flow to the placenta, and with the mother receiving minimal doses of Pitocin, a test that gives very small doses of a drug which stimulates the uterus to contract. All these tests showed that the baby's heart rate was within the normal range without stress; the tests also showed that any stress, such as a contraction, caused potentially dangerous changes in its heart rate. The tests also further showed that the baby's heart rate did not vary to the degree that a normal baby's would.

It is undisputed that the baby was "intrauterine growth retarded" (IUGR), meaning that in dealing with the stress of vaginal delivery it would not have the reserves of a normal sized baby. All the staff members of Mt. Sinai, including Dr. Jordan, the obstetrician who delivered Walter, agreed on the conditions of the mother and the baby, as well as on the meaning of the terms they used. They agreed that the baby needed to be delivered within the day, but not necessarily within the hour. All the witnesses in this case were forced to draw their conclusions from the medical chart. The staff members who cared for the mother and Walter all concurred as to the terminology, methodology, and procedures in use at Mt. Sinai in 1987. This agreement was highlighted by the agreement of all the defense fact witnesses that they had no specific memory of this particular birth, which had occurred seventeen years earlier. Nonetheless, despite this consistency in their testimony, Mr. Fieger persisted in mischaracterizing their answers in misleading ways.

For example, when responding to a question asking why he did not rush to the operating room to give anesthesia for the Cesarean section, the anesthesiologist explained that the case must not have been urgent. The staff "would have told me we need to do a stat C section and I would have gone and *** behaved differently" with a stat section. (Tr. 990.) He further tried to explain the system the hospital had in place for notifying the necessary personnel for

an unscheduled C section: "[w]hen we receive a page, we call back and they would have told me it is a stat C section or it is not a stat C section ***." Interrupting, Mr. Fieger asked him who had told him that. When the anesthesiologist answered that he did not remember whom he had spoken to or the specific conversation, Mr. Fieger responded, "[a]re you telling us that you're making up what you don't remember?" (Tr. 990.) The trial court overruled a defense objection.

Earlier, when the anesthesiologist testified that he did not recall that the baby in the case at bar was in distress, Mr. Fieger responded, "that's why, as far as you were concerned here, you just took your time in an emergency." (Tr. 989.) Although the trial court sustained a defense objection to this misleading summary, it gave no curative instruction to the jury.

Mr. Fieger also focused on the loss of time from use of an epidural anesthesia instead of a general anesthesia. When the anesthesiologist tried to explain why he had given the mother an epidural anesthesia, the anesthesia of choice in Cesarean sections, Mr. Fieger accused him of taking too much time to anesthetize the mother. It was not disputed that administering an epidural adds a significant amount of time to the anesthesia time, up to twenty minutes. The anesthesiologist explained that it was up to the obstetrician to decide when the baby was in distress and,

therefore, required immediate delivery and the use of general anesthesia.

Ignoring the limited role of the anesthesiologist in obstetrical matters, Mr. Fieger responded, "So if nobody tells you how important it is and how much that baby is at risk, you do the one that [sic] would take longer and therefore possibly hurt a baby who's suffocating, right, if nobody tells you?" (Tr. 993.) Mr. Fieger proceeded to bully the witness, asking "[w]hy in light of the fact that you knew it was an emergency, why wouldn't you ask somebody what's the emergency here, what's the problem that we're doing this emergency C section? Why wouldn't you ask?" The doctor answered that, when the case is presented to him, "[t]he information is given to us that we have to take the baby out right away or not and that's enough information." (Tr. 994.) Mr. Fieger responded saying, "I didn't ask that. That wasn't my question. My question, you indicated already nobody told you. My question to you is why didn't you ask?" When the doctor told him he did not remember, Mr. Fieger said: "So nobody told you, You didn't ask and you used the longest acting anesthetic that you could use, right?"

Defense counsel objected at this point, saying, "[o]bjection. That's not what he said." (Tr. 995.) The court, however, permitted Mr. Fieger to continue. He said: "Sure. You didn't ask anybody whether time was of the essence. Nobody told you so between the general and the epidural, you used the longer acting anesthetic?" Again, defense counsel objected and explained, "[h]e

didn't say that there was no discussion about whether time was of the essence." The court did not sustain the objection. The doctor stated, "I used the safest anesthetic for the mother at that time." (Tr. 995.)

When the anesthesiologist tried to explain that the department had an established system for determining the urgency of an unscheduled or emergency C section, Mr. Fieger continuously misstated the answers and refused to accept the answers for what they were. Instead, implying the anesthesiologist had more authority over the obstetrical decisions than the evidence indicated, Mr. Fieger attacked the witness, both in the interchange just described as well as throughout his cross examination.

Similarly, when questioning one of the nurses who cared for the mother in the labor and delivery, Mr. Fieger used the same technique. The nurse tried to explain the difference between an emergency Cesarean section and a stat one: "a stat C section is done immediately. Emergency means it's not scheduled." (Tr. 1084.) She repeatedly clarified for Mr. Fieger that the department at that time used the word "stat" for an emergency Cesarean section in which the baby had to be delivered immediately and emergency for an unscheduled one. Nonetheless, Mr. Fieger persisted in accusing the nurse of wasting valuable time and implying that she had ignored hospital policy in delaying the delivery.

Refusing to accept a staff member's explanations of the definition of the term "fetal distress," Mr. Fieger purposely confused the meaning of "emergency" and "fetal distress." Despite her attempt to explain that there are varying levels of fetal distress, Mr. Fieger questioned the first nurse, "[a]re you saying at Sinai Hospital [sic] *** it was the regular practice of Sinai Hospital and you saw this regularly that *** when little babies were in fetal distress, you regularly saw doctors call emergency C sections, but you didn't consider it an emergency that had to be done right away for fetal distress?" She tried to clarify what the doctor meant by an emergency: "A stat C section is when we got a flat line crash, baby is bradycardia[3] with a crash." Mr. Fieger also challenged this nurse's interpretation of the fetal heart monitor strips[4]. She tried to explain the difference between this baby's lowered reactivity, as indicated by the fetal monitor strip she had seen, and a total flat line reading. She was discussing the strips she had read when Mr. Fieger abruptly asked, "[w]ould there be any reason why doctors would make up a story about a child?"[5] (Tr. 1088.)

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[3]Bradycardia is a low heart rate.

[4]Fetal monitor strips provide a read out of the fetus' cardiac activity, similar to an EKG for adults.

[5]Dr. Jordan's office notes had indicated a flat line reactivity reading. This nurse had never seen Dr. Jordan's office notes or the strip in question.

Despite the nurse's explanation that the chart did not reflect that Walter's delivery was ordered as a "stat" C section, Mr. Fieger again asked her the same loaded question: "was it the regular practice there for physicians and the hospital not to do stat C sections on babies in fetal distress?" The nurse again tried to clarify the difference between a stat C section and an emergency one. Nonetheless, Mr. Fieger persisted in misstating the testimony and ignoring the copious testimony explaining the differences between "stat" and "emergency."

Mr. Fieger continued to use the same tactics when questioning the second nurse. He again asked, "I want to know, tell the court and the jury when a baby is in fetal distress, an emergency C section is called, tell me the rule and regulation of that hospital or any nursing facility that says it's all right to just sit around and wait for a couple of hours." (Tr. 1104.) The trial court overruled defense counsel's objection that the question was argumentative. Later Mr. Fieger asked this second nurse, "[d]id you put two and two together at that time and say, I was looking at a baby who was born severely asphyxiated and I know because I was here that the mother waited two hours for an emergency C section?" Defense counsel objected, saying that the nurse had already testified that she did not remember this delivery at all. Mr. Fieger also asked this nurse, "[o]kay. There was nothing here other than the nurses and doctors not getting this mother into the

operating room and operating on her. There was nothing that prevented either you or the doctors from getting her a C section, was there, an unusual event, or the electricity went off or something like that?" Defense counsel objected to "the implication that nurses are responsible for doing the C section." Mr. Fieger responded, "[e]xcuse me. Judge, that's not --" (Tr. 1112.) The court told him, "[d]on't shout at me. I'm overruling the objection. Go ahead." (Tr. 1113.)

Later in the questioning of this nurse, Mr. Fieger speculated that perhaps the doctor had not been present and had been in a car accident or asleep and that it was the nurse's job to find him. She responded by saying that the time frame for the delivery was not unusual. "We don't rush everybody who's having an emergency C section into the delivery room. There's things to prepare. When they [C sections] are done in a few minutes, it's like if the heart stopped or --" Mr. Fieger interrupted the nurse at this point, saying, "[y]ou keep telling us it's not unusual." The court ordered him to "[l]et her finish." (Tr. 1125.) She then explained that certain preparations are necessary for the protection of the mother and child. Mr. Fieger nonetheless continued to ask her whether it was a regular occurrence "[t]o wait two hours for an emergency C section." (Tr. 1126.) She told him that she could not remember any other specific cases.

He then questioned whether she was not able to remember whether any other case took two hours to begin "because that would be so unusual and unacceptable that other than this case, it never happened, did it?" (Tr. 1126.) A defense objection was again overruled, despite counsel's technique of using a quotation to comment improperly on her truthfulness.

Next, Mr. Fieger attempted to argue with the nurse about what role she had played in the C section: he told her she scrubbed; she told him she circulated; he again told her she scrubbed; she again told him she circulated. (Tr. 1133.)

Continuing to impugn the integrity of the witness by mischaracterizing the facts, Mr. Fieger asked this second nurse, "[a]ssuming that the baby was born virtually dead, it had to be resuscitated, were you just prepared to sit there and wait until that baby died?" (Tr. 1134.) The trial court sustained the two defense objections. It did not, however, give any curative instruction to the jury.

This second nurse tried to explain that if the staff moved too quickly in a case like this mother's, it would put the mother and child at risk of infection and other complications. (Tr. 1145.) On cross-examination, defense counsel asked this second nurse whether this mother would have been the only woman in the labor and delivery unit. She responded that there probably were other mothers there at the time. Defense counsel then asked, "if this

was indeed something that needed to be done in ten minutes or less, then she would be treated as if she was the only patient?" (Tr. 1146.) Before the nurse could respond, Mr. Fieger interjected, "[e]xcuse me. We're talking about --." The court stated, "one at a time." Mr. Fieger said, "Objection. He's asking her to be the doctor now." In a most revealing observation, the court told him, "That's what you were doing for the last hour." In this comment, the trial judge quite correctly characterized the error that ran throughout cross-examination by plaintiff's counsel. Mr. Fieger responded, "[h]e kept objecting. I would love to ask her these questions. Objection." (Tr. 1147.) Similar instances of Mr. Fieger arguing with the judge or ignoring the authority of the court pervaded the trial.

Mr. Fieger asked the doctor "[w]hen you said emergency C section, it's your claim here at your trial that you didn't really mean emergency? That's a yes or no? You didn't really mean emergency?" The doctor responded, "[t]hat's not a yes or no answer, I will give you an answer if you would like one." (Tr. 1255.) The court then told the doctor, "[y]ou give the answer you want to give." (Tr. 1256.) The doctor then repeated the explanation the nurses and anesthesiologist had given earlier: "We use the term emergency loosely, all of us use it, and it simply means the patient was not scheduled in advance to have a C section.

So without being scheduled, it was emergent.[6] It does not mean that we automatically are going to run down the hall at top speed. And it was a poor use of the term and it should not have been used that way." (Tr. 1256.)

Mr. Fieger then discussed the pediatrician that Dr. Jordan had requested be in the room for the delivery. In another loaded question, at least purportedly a question, Mr. Fieger referred to the pediatrician as "[t]he pediatrician who you called in to help because you knew the baby had been asphyxiated because you waited so long." Dr. Jordan responded, "that's ridiculous." (Tr. 1261.) The pediatrician had noted on the chart that the baby was in fetal distress. When Mr. Fieger questioned Dr. Jordan about that note, Dr. Jordan explained: "He may have heard there was some decels[7] and decided there was fetal distress." (Tr. 1261.) Dr. Jordan then clarified he did not consider the baby's heart rate as shown on the fetal monitor strip to be fetal distress. Ignoring the copious previous testimony explaining the ambiguity of the term "fetal distress," Mr. Fieger asked Dr. Jordan why the nurses would have obtained a consent form from the mother indicating fetal distress as the reason for the C section.

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[6] "Emergent" as used by medical personnel is synonymous to "emergency."

[7] "Decels" is an abbreviation for "deceleration of the baby's heart rate."

Another area Mr. Fieger focused on was Dr. Jordan's location between the time he ordered the C section and the time the skin incision was made. Dr. Jordan repeatedly stated that he did not remember this specific particular case, but that he probably was on the labor and delivery unit, although he was not "standing hovering over the patient." (Tr. 1279-1280.) The doctor affirmed that in his years of practice he had never left the hospital after he had arranged for an unscheduled C section. Mr. Fieger nonetheless continued, throughout the trial and into closing argument, to claim implicitly and explicitly that Dr. Jordan had abandoned the patient.

During the defense case in chief, Mr. Fieger continued to question Dr. Jordan about his alleged dawdling. Mr. Fieger "restated" Dr. Jordan's explanation as "[y]ou are saying emergency C section doesn't mean emergency C section and fetal distress doesn't mean fetal distress." Defense counsel interjected, "Objection. He's arguing with the witness. The tone of his voice, it's getting ridiculous." The court responded, "I'm aware that he's making a speech. Let's ask a question." (Tr. 1805.) Mr. Fieger then said, "But anybody else besides you who is trained in OB knows that fetal distress means fetal distress and emergency C section means emergency C section." (Tr. 1805.) The court asked him whether he had any questions to ask and warned: "Ask questions, counsel, instead of making speeches." (Tr. 1805.)

Despite this warning, Mr. Fieger continued to make speeches throughout the trial.

The defense experts received the same treatment. Mr. Fieger's attempts to impeach the credibility of one doctor, Dr. DiPalma, on the standard of care included the statement: "Well, in all fairness, to you nothing is a breach of the standard of care. That's why you're here, right?" Defense counsel objected, and the court stated, "Objection is sustained. That's outrageous. Next question." (Tr. 1938.) Despite the court's strong rebuke, Mr. Fieger later returned to this claim in his closing argument when he again denigrated the defense expert witnesses' credibility and integrity.

When he asked the same witness about the standard of care for a child in fetal distress, the witness said: "You have used the term fetal distress which I honestly have a difficult time defining." (Tr. 1939.) The witness had previously testified that "fetal distress" is an ambiguous term which covers a broad spectrum of conditions, some immediately life threatening and some not. Mr. Fieger then asked him, "[h]ow could you offer testimony in this case where [fetal distress is] written by doctors all over this chart and you don't understand [fetal distress]?" (Tr. 1939.) Again, plaintiff's counsel improperly characterized the expert's sophisticated awareness of a word's multiple meaning as failing to understand the word.

When Mr. Fieger asked this doctor about whether a nonreactive stress test signals fetal distress, the witness answered, "[t]he baby can be asleep and not react." Mr. Fieger responded, "I'm not asking you to make excuses. I'm just asking you to agree that the --" Defense counsel interrupted with an objection, and the court replied, "[o]bjection sustained. That wasn't a question. That was a speech. What was your question?" (Tr. 1942.) Mr. Fieger told the court, "I'm asking the witness to answer the questions, not answer some other questions. My question is very simple." (Tr. 1942.) The court was correct. Plaintiff's counsel was again misleading the jury by his improper comment inaccurately describing the answer as "making excuses."

The primary point of contention in this case was the cause of Walter's brain damage. This expert witness, who is a maternal-fetal medicine specialist, explained why he believed that Walter's brain damage occurred weeks or months prior to his birth. The meaning of "birth asphyxia" was extensively discussed. The expert indicated that birth asphyxia meant that the child was deprived of oxygen at some point between conception and birth. In an effort to discredit this expert on cross-examination, Mr. Fieger responded to the expert's opinion with, "[w]ell, so it's your position that you know better, even though you don't take care of babies, than the pediatricians at Rainbow Babies Hospital who actually cared for him? You know better, correct?" (Tr. 1949.) Again, Mr. Fieger

used the same technique of improperly attacking a professional opinion by attributing the professional disagreement to a flaw in the witness, here, allegedly a sense of superiority. His response to the expert also ignored that this expert specializes in the exact area on which he was testifying, whereas pediatricians specialize not in this area, but rather in treating the baby after it is born.

Another area of disagreement between the two parties' experts concerned Walter's multiorgan failure and the significance of when it manifested itself. When this witness testified that multiorgan involvement did not show up at delivery, but that it did show up later, Mr. Fieger, implying that the expert had changed his testimony, said, "you said the infant exhibited no evidence of multiorgan system involvement in the neonatal period. [You] most certainly did." In an attempt to discredit the expert, Mr. Fieger again abused technical words by giving them meanings they did not have.[9] And again he was improperly commenting on the testimony.

This expert had testified that it was his opinion that Walter's brain damage had happened during the pregnancy and not during the birth, although he noted that, with the baby in the mother's uterus, it was impossible to determine exactly when the damage had occurred. When Mr. Fieger asked what evidence existed

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[9]The witness clarified that the multiorgan involvement occurred later than the neonatal period.

that the brain damage occurred during the pregnancy and not during the birth, the expert answered, "[t]here is no evidence in the record." In responding, Mr. Fieger again improperly commented on the answer: "So you are making it up." (Tr. 1956.)

The doctor and nurses who cared for Walter's mother during her pregnancy all testified that Pitocin had been administered to her as a test to determine how well the baby would tolerate a vaginal delivery. All had testified that the amount of Pitocin used in the test was minimal compared to the amount that would be used to induce or strengthen a mother's labor. Mr. Fieger asked this defense fetal-maternal health expert witness about the administration of Pitocin in a pregnancy when the fetus is showing the type of heart rate changes that this child was experiencing. This expert had published a paper saying that the use of Pitocin, a drug which causes uterine contractions, in a mother in active labor whose fetus showed this certain type of heart rate, was dangerous. Mr. Fieger tried to imply that the Pitocin test was malpractice.[9] The witness explained that his paper was discussing the use of Pitocin for a mother who was already in active labor, not for one who was not yet in labor. He further explained that the use of Pitocin for the patient in the case at bar was appropriate, because the mother was given a very low dose, she was not in active

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[9]In the Pitocin test, a minuscule amount of Pitocin is given for the very purpose of assessing the response of the fetal heart rate prior to active labor.

labor, and the test was stopped as soon as the information needed was obtained. (Tr. 1962.) Mr. Fieger responded, "I'm sorry. You've testified repeatedly in this state under oath that you never give it to a baby in fetal distress." The court asked: "Is that a question?" Mr. Fieger then continued to question the witness about his former testimony, but never showed him the purported testimony, despite the witness's request to see what he was quoting from. Inaccurately describing the evidence, Mr. Fieger then said to the witness, "[f]or instance, in this case, all the evidence shows [the brain damage] happened in the hours before birth, 100 percent of the evidence, and zero shows it happened before. And you are unwilling to accept that; isn't that true?" The court only asked: "is that a question?" and never noted the impossibility of being asked to verify such an imprecise statement and such a bewildering use of the word "before." (Tr. 1964.) Mr. Fieger's question - "isn't that true?" - at the end did not transform what was yet another example of his misleading comments on testimony and evidence.

Other defense expert witnesses received the same treatment. When asking the defense neonatology expert if he has testified for the defense law firm before, Mr. Fieger stated, "I guess you are in their Rolodex, right, for people that they need if one of their clients is getting sued and they need somebody to come up and say that the baby's injury happened way before the doctor committed

malpractice, you're on their Rolodex, right?" (Tr. 2042-2043.) The doctor responded that Mr. Fieger's statement was "a gross misrepresentation" and that he "resent[ed] it very much." (Tr. 2043.) Astonishingly, no objection or comment from the court occurred, perhaps from a sense of hopeless exasperation.

Nor was the nursing expert spared Mr. Fieger's treatment. He asked the defense nursing expert, who testified about the standard of care required of nurses, whether it was below the standard of care for the nurses to not document the time the patient arrived on the unit. She responded, "[i]t was below the standard of care as far as documentation. I don't believe it affected the care she received." Mr. Fieger said, "[t]hat's not for you to decide, ma'am. That's for the jury to decide." After an objection, which the court overruled, Mr. Fieger stated, "Again, I don't want you to editorialize. If you can give me your answers, okay?" Defense counsel again objected, and Mr. Fieger said, "I object to a witness editorializing for the same reason you did." This time the court told him, "You ask the question. If you don't like the answer, that's too bad. Next question." (Tr. 2090-2091.) However, Mr. Fieger's earlier editorial comment sharply attacking the nurse's ability to prioritize elements in the standard of care was allowed to remain.

Mr. Fieger then proceeded to inquire of the nursing expert witness why she had not asked the attorney who retained her about

the documentation as to the time the patient arrived at the hospital. She responded that she had reviewed the records and noted the arrival time was not documented. He asked her, 'Well, did you ask the people who retained you or somebody at Sinai Hospital [sic] why it wasn't where it was supposed to be?" She said, "I didn't ask." He challenged her, "[w]hy didn't you? Didn't you want to know?" A defense objection was sustained. However, Mr. Fieger continued to ask, "Why wouldn't you want to know what they did wrong?" The court, again sustaining defense counsel's objection, warned: "She didn't say she didn't want to know. Don't be so cute. Ask your questions, will you?" (Tr. 2091-2092.) At this point — two thousand pages into the trial — "cute" is an understatement. Mr. Fieger's repeated improper questions were designed to mislead the jury by improperly discrediting a witness. He continued to use the same technique: implying in his questions the staff was indifferent, despite there being no basis for it in the evidence.

Mr. Fieger then inquired into the nursing expert witness's previous times serving as an expert witness, saying, "[y]ou apparently have been retained by [defense counsel's] law firm on three or four other occasions to testify that nurses did nothing wrong, correct? *** And you've always concluded for [defense attorney] that they did nothing wrong, right?" She answered, "I may have had a case I didn't want to defend." When he asked her

which case that was, she said she did not know. He said, "[w]ell, then please don't make up things." (Tr. at 2092.) He again improperly inferred fabrication from the word "may."

Mr. Fieger also inquired of the nursing expert about fetal distress. When he asked what she thought was the appropriate response to fetal distress, she responded that "[f]etal distress is a fairly ambiguous term." (Tr. 2096.) He asked her, "You know that fetal distress under ACOG and other organizations that it's now become a medical nursing emergency that nurses must react to, isn't that true?" Her response was, "Well, you don't want to take it out of context. I mean, I said fetal distress is a fairly ambiguous term. And this baby did have distress, yes, and it was in chronic distress. It was not acute." Mr. Fieger told her, "That's not for you to decide. You are not the -" The court interrupted him here; "Wait, wait. You asked her a question. Now you got it. *** You can't have it both ways." (Tr. 2097.)

Mr. Fieger continued to be dissatisfied with this witness's answers. When she testified that this record showed "decreased" variability, not "absent" variability, Mr. Fieger said, "No. You don't have a right to make a medical diagnosis. The doctor said there was absent variability. Didn't you read that record? Absent variability written by Dr. Jordan." Defense counsel interjected, "That's not referring to fetal distress." Mr. Fieger responded, "Oh my God, Judge, that's - - - please." The court said, "You are

testifying for the witness. So why don't all of us - - " Mr. Fieger interrupted the judge, saying, "[t]his is cross-examination," and proceeded to question the witness. This excerpt clearly demonstrates the misconduct of plaintiff's counsel, who at this point appears uncontrollable.

This expert was certified in inpatient obstetrical nursing with a special qualification on electronic fetal monitoring, which included the very strips she was testifying about. The witness said that the strip did not show "flat line." Mr. Fieger asked her about the pediatricians who charted that the baby was flat line, and she responded that they had not interpreted the strip correctly. Ignoring her special expertise, he chided her in the form of a question: "So you are here telling us what's appropriate for pediatricians?" (Tr. 2111.) She pointed out that pediatricians "don't interpret or analyze fetal monitor strips." (Tr. 2112.)

Turning to Dr. Jordan's notes about a strip taken at his office and described as a flat line- a strip not preserved in the record- Mr. Fieger said: "we have to assume that one existed if they said it existed." She again explained that pediatricians who are not trained in the appropriate analysis would misinterpret it. In a question mischaracterizing her explanation as assuming the strip in the record "exists, but the other one doesn't," he asked why she made such an assumption. When she answered, "I don't

assume that," he then again improperly commented on her testimony: "Well that's all you've been doing." (Tr. 1113-1115.) The defense objected and the court remonstrated Mr. Fieger, saying, "[h]old it. That's outrageous conduct. *** That's outrageous conduct. You can criticize her out in the hall later if you want to. Not in here." (Tr. 2115.) This stern rebuke had no effect, however, on Mr. Fieger's questions or behavior.

Mr. Fieger went on to question this expert also about the term "emergency." He said, "[w]ell, I thought you tried to suggest to the jury that in 1987 somehow the word emergency doesn't mean emergency to a nurse. And so an emergency C section for fetal distress really wasn't an emergency. Did you try to suggest that?" She explained that there were two boxes on the preprinted nursing forms: scheduled and emergency. When he began discussing ACOG standards, she asked him where he was getting his information. (Tr. 2123.) After looking at the book he was consulting, she pointed out that he was looking at the wrong set of standards: instead of looking at the standards for women who are not yet in labor, he was looking at the standards that apply to women who are in the process of giving birth and in active labor. (Tr. 2124.) Mr. Fieger responded: "If a mother isn't in labor but the nurses know the baby is in distress, the policies don't apply?" (Tr. 2125.) The expert answered, "I'm trying to tell you the difference that it says there. You know, you were trying to make me say something that I

didn't want to say." (Tr. 2125.) Indeed, the witness understood what plaintiff's counsel was attempting throughout the trial.

After the nurse expert explained that the nurses caring for Walter's mother had removed the monitor when they took her to the operating room, he asked her "[t]hat's their job to make sure that if the surgeon isn't there, they protect that little baby who could be suffocating, isn't it?" (Tr. 2126.) She pointed out that the chart reflected that the nurses had regularly monitored the fetal heart rate. This nurse expert apparently had testified in a previous case, however, that when a fetus is in serious trouble, the nurses must hunt down the doctor with the vigilance of a pit bull. Mr. Fieger used this prior testimony to ask the nurse expert about the nurse's responsibility for finding a doctor "after an emergency C section is called for a baby in fetal distress for two hours fulfilling their obligation to being the pit bull for that little baby's health?" An objection was sustained because the question relied on facts that were not in evidence. (Tr. 2135.) The image of a vigilant pit bull that remained, however, could help to explain the jury verdict.

On recross, Mr. Fieger continued to ask her about her testimony on direct concerning the fetal strips. She said, "fetal distress [is] very ambiguous. There are gradations of fetal distress. That's why ACOG has said that we try not to use that term because its so ambiguous." Again improperly commenting, Mr.

Fieger responded, "You had no problem answering it when you were answering Dr. Jordan's attorney." Instead of striking the comment, the court said to him, "Do you have another question?" (Tr. 2141.)

Mr. Fieger's argumentative comments were not limited to his questioning of defense witnesses. One of the documents in evidence was the report of the cord blood gases[10] recorded immediately after delivery. These cord blood gases were processed on a small machine, which printed out a report onto a small slip of paper. The staff in the operating room, where the machine is located, then handwrote on the slip when they were obtained. When he was questioning his own expert on the baby's cord blood gases, Mr. Fieger belittled this evidence by referring to the slips as "[t]hese things that look like shopping center receipts, that the word cord blood is written in." (Tr. 1384.) Both defense counsel objected, and Mr. Fieger defended his description, saying, "[t]hat's what it - - that's only for the record, Judge. Look at them. They look like the things you get from a drug store." The court responded, "[y]ou can argue that when the time comes. That's not an appropriate question." (Tr. 1384.)

At another point in the trial, when questioning his plaintiff's expert witness, Mr. Fieger asked him, do "you wait two

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[10]A report of cord blood gases is an analysis of the pH of the blood found in the umbilical cord of the baby. This pH tells the doctors important information about the status of the baby at that specific point in time.

hours to do surgery on a baby that's suffocating? That's called malpractice, isn't it?" The court sustained a defense objection, but made no curative instruction. (Tr. 1466.)

Another example of Mr. Fieger's unacceptable tactics was a question he asked his economic expert: "[b]y the way, none of your amount of money necessary to provide for this child included the costs that would be necessitated by the legal representation of Walter, do they?" (Tr. 1547.) The court sustained the objection, and later gave the court a curative instruction.

I believe that the small portion of the transcript I have just presented is representative of the entire 2,400 pages and clearly demonstrates that the misconduct of plaintiff's counsel was so outrageous that the trial judge properly granted a new trial.

CLOSING ARGUMENT

Even if the record had shown a model trial up until closing argument, Mr. Fieger's closing argument alone is sufficient to justify a new trial. He began by telling the jury that "it's really kind of amazing, ladies and gentlemen, that we have a justice system that allows the poor, terribly injured African American to stand on equal footing with powerful corporation defendants, doctors who did this to him and seek justice." (Tr. 2158-2159.) He then informed the jury that the doctors and hospital defendants in this case "have used those [corporate]

resources *** to deny him justice to this day for 17 years."[11] (Tr. 2160.) "Scripture tells us through Isaiah that we must give voice to the poor and justice to the oppressed. I've come here to be a voice for Walter. Whatever you do to the least of my brother, that you do unto me."[12] (Tr. 2160.) He then told the jury that "Walter is depending upon you and God for justice, and your verdict will be the only justice that he ever gets." (Tr. 2161.)

Mr. Fieger emphasized that the evidence for his case is overwhelming, "an avalanche" of evidence. "There isn't any evidence to counter this except what the defendants manufactured in this case." (Tr. 2165.) His use of the word "manufactured" implicitly tied together a long line of improper comments throughout the trial attacking, without basis, the integrity of defendant's witnesses.

The following excerpts from Mr. Fieger's closing argument suffice alone in demonstrating the need for a new trial:

"I am standing here as the voice of Walter. Walter is a baby in his mother's womb waiting to be born. Doctors, nurses, I'm suffocating. Please help me be born.". (Tr. 2167-2168.) (This

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[11] This case was first filed on April 21, 1998, six years before the trial. Plaintiff dismissed it and later refiled it on October 16, 2002. Trial began on May 4, 2004. The actual case at bar took less than two years to go to trial.

[12] Referencing the economic disparity between the parties is usually considered grounds for mistrial. See *Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391, 399-400.

ploy is an offensive, raw appeal to the passions of the jurors and is employed throughout closing argument.)[13]

"IUGR babies are always born without damage and develop normally if the right precautions are taken by the doctors and nurses." (Tr. 2168.) Those precautions are the same today as they were in 1987. (Evidence at trial showed that this statement is false.)

"Nobody in medicine - - and that's why they couldn't find doctors who would come in here and testify against any of the records because nobody in medicine in the face of fetal distress and an emergency C section be [sic] called would ever say it's okay to wait two hours while a little baby suffered asphyxia and suffered brain damage." (Tr. 2170.) (Defense experts testified extensively to the contrary.)

Mr. Fieger then accused the doctors of refusing to take responsibility for their actions. "And [Walter] bears no responsibility. I am suffocating. Help me be born." (Tr. 2171.)

"They knew Walter was IUGR. They knew that he was high risk. They knew that Walter was in trouble. At the defendant Jordan's office when he did the nonstress test that's missing now, he knew

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[13]*Rosenberger Enters., Inc. v. Ins. Serv. Corp. Of Iowa* (Iowa App. 1995), 541 N.W.2d 904, 908, granting new trial when improper attorney conduct during closing caused prejudice to opposing party: ("Such melodramatic argument" that "does not help the jury decide their case but instead taints their perception to one focused on emotion rather than law and fact."

Walter was in trouble. Dr. Jordan, help me be born." (Tr. 2171-2172.)

"They ask you now to incomprehensibly leave every single one of your common senses at the door and believe that a young 17-year-old woman can walk into a hospital, take a wheelchair, wheel around the hallways looking for labor and delivery without anyone checking her in or recording when she arrived, without anyone asking her about reimbursement questions." (Tr. 2174.) (The testimony was that no one, including the mother, remembered how she arrived at the labor and delivery unit. The chart indicated that she arrived in a wheelchair.)

"The issue of when [the mother] arrived at the hospital is relevant to show how long they first waited to do anything for a baby that was in trouble, that was recognized to be in trouble, and that needed to be taken out immediately. And it was at least an hour. They waited a whole critical hour before 6:45 while little Walter was being suffocated. Oh, please help me. Help me be born. I'm drowning. Every minute counts. Every second counts." (Tr. 2174-2175.)

Mr. Fieger said that his closing argument was shorter than "this period of time that that little baby was suffocating." (Tr. 2175.) "And they didn't start monitoring for another hour. Every minute, ladies and gentlemen - - I can't stress it to you enough. This is an emergency." Mr. Fieger then proceeded to draw upon his

previous mischaracterizations of testimony by using the word "emergency." "If you see a little baby in the bottom of a swimming pool and you stand there and look and you have a responsibility because you are the lifeguard and you don't go in and you walk away for hours, you are negligent. ***

"They didn't even start monitoring for another hour. Every minute, every second counted for Walter. Please - - I give him a voice - - someone please help me." (Tr. 2179.)

Mr. Fieger also stated in his closing argument that the defense case was a coverup of a "sin." He told the jury "*** how this doctor and this hospital *** can continue to do this in this courtroom is a sin only you can rectify." (Tr. 2180.)

Mr. Fieger then proceeded: "What we know is when the fetal monitor was attached, it immediately, immediately showed that Walter was in trouble and needed to be delivered. Dr. Jordan, please, nurses, please help me be born." (Tr. 2181.) (Defendants' experts had refuted this conclusion when they testified that the child was in no immediate danger, although he would not be able to tolerate a vaginal delivery.)

Again, "[t]he standard of care demands that when you have a high risk pregnancy and an IUGR and a mother that's showing spontaneous contractions and late decelerations who you know already has no variability or late variability and no reactivity, every bell and whistle in medicine goes off and says that baby is

asphyxiating, that baby is suffocating, get that baby out of the bottom of that pool. Get that child out." (Tr. 2182.)

"They know what the standard of care is to do with an IUGR baby who has late decelerations in the face or spontaneous contractions, who has little reactivity, who has little variability. Get that baby out that baby is suffocating. Please, help me be born." (Tr. 2182-2183.)

"It's a code blue in the obstetrical unit. Emergency C section, fetal distress. Emergency C section, fetal distress. Emergency C section, fetal distress. That's code blue. That's as bad as it gets. Every deceleraration was weakening Walter, but instead the defendant Jordan orders Pitocin and makes things worse. I'm suffocating. Please, please help me be born." (Tr. 2183.)

Again distorting the testimony about Pitocin, Mr. Fieger also told the jury that "Jordan ordered the use of the drug [Pitocin] that would cause little Walter to suffocate even more." (Tr. 2184.) "The [Pitocin] test was not just a waste of time. It made the onset of irreversible brain damage come much sooner." (Tr. 2184.) (There was no evidence to support the claim that the Pitocin test had any effect on Walter's brain damage at all.)

"They ordered an emergency C section for fetal distress. They got a consent signed by mom for an emergency C section for fetal distress. Every minute counted. Please, help me be born. *** Please don't wait. Please, for God's sake, help him." (Tr. 2185.)

"A precious hour later they wheeled [mom] at 8:25 into the operating room and left her there. Please, please help me be born." (Tr. 2186.) (The evidence showed that the mother was cared for continuously in the operating room by both nurses and anesthesia personnel.)

In talking about the defense case, Mr. Fieger asked the jury: "Do you understand what's going on here? Do you understand the extent of the prevarication? Do you understand what they have done to that child for 17 years? Do you know why not one defense witness picked up these [x-rays]?" At this point, defense counsel objected, saying they did not have the burden of proof. The objection was sustained. Mr. Fieger continued, "They couldn't find an anesthesiologist." Defense counsel again objected. The court overruled the objection, despite the lack of evidence that defense counsel could not find, much less had even looked for, an anesthesia expert. (Tr. 2189.) "Thank you. They couldn't find anybody except somebody in their Rolodex. Where was Dr. Jordan? Where were the nurses? Where was the anesthesiologist? Where was the resident? I'm dying. Please save me." (Tr. 2190.)

Beginning by implicitly denigrating the integrity of the defense's expert witnesses, Mr. Fieger concludes by suggesting, with no basis whatsoever, widespread deception. "The best they could do is look in their Rolodex and call Dr. Nowicki. How could they do that to Walter? What does that tell you about what's going

on here and about the false stories they have spun? Oh what a tangled web we weave when first we practice to deceive." (Tr. 2192-2193.)[14] He also continued to appeal to the passions of the jury: "Mommy, grandma, someone please save me. I'm dying. Please help me." (Tr. 2194-2195.)

"Every single one of the nurses had a responsibility, responsibility to Walter. Walter was their patient. And when that C section didn't happen after 15 minutes and Dr. Jordan isn't there, they had a responsibility to do something. *** They are not allowed to sit there. They are not potted plants. They had to go through the chain of command. They had to get it done as soon as possible because they are independent health care professionals who have an absolute responsibility to their patients. And nobody can blame anybody else and say it was his job. It's his job. Please, please nurses, I'm a little baby. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me. Please help me to be born." (Tr. 2198-2199.) Following is another appeal to passion and prejudice: "I'm sorry. I couldn't help you, Walter. I couldn't stop you from drowning. But I will be his voice. I will help him get justice now. Whatever you do to the least of my brothers, that you do unto me." (Tr. 2202.)

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[14]An attack on the integrity of the defense counsel or parties is grounds for mistrial: *Pesek v. University Neurologists Ass'n* (2000), 87 Ohio St.3d 495.

After saying that the defendants were trying to cover up their malpractice by claiming the baby had been injured prior to the birthing process, Mr. Fieger said, "[l]adies and gentlemen, how dare they? They can't deny Walter was born nearly dead with birth asphyxia because every single doctor who was there said it and wrote it down and wrote it down under oath and didn't come into this courtroom and refute the records." Mr. Fieger again misrepresented the evidence by describing Walter as "nearly dead." He continued, saying "I know that the court and these attorneys did not like the way I treated some of the witnesses." (Tr. 2205.) In this statement, plaintiff's counsel insulted the court by improperly implying that the court's admonitions were a result of merely "not liking" his manner.

Again, Mr. Fieger improperly described the defense: "By the way, they also have to convince you that all of their witnesses who contradict each other are credible and right. They have to convince you that day is night and night is day. And they have to make you complicit [sic] in this injustice and believe that their people complied."[15] (He failed to show any contradiction between

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[15]A similarly improper style was criticized in another medical case, in which the Supreme Court of Ohio observed: "Counsel for appellees made various assertions and drew many inferences that were simply not warranted by the evidence. *** Appellees' counsel could have zealously represented his clients without resorting to these abusive tactics. Instead, counsel for appellees transcended the bounds of acceptable closing argument, creating an atmosphere [*502] 'surcharged with passion or prejudice.'" *Pesek v.* (continued...)

the defense witnesses.)

For six more pages, Mr. Fieger continued to cloak himself as the minister of God or to pretend to become the voice of Walter.[16] In the process, Mr. Fieger boldly misstated the evidence concerning damages: "As testified to by the life care planner, by the needs specified by doctors which you heard on the stand, the medical care requires for an R.N. home attendant care [sic] along with a myriad of other requirements which are listed in a health care plan table for which will be in evidence, a total, as Dr. Rosen indicated, $14,295,993." (Tr. 2227.) (As noted earlier in this dissent, none of the witnesses testified that Walter required care from an R.N.; he needed only a trained assistant, similar to a nurse's aide.)

Mr. Fieger's closing argument contains many more examples of similar statements designed to inflame the passions of the jury. The excerpts I cite by themselves adequately support my conclusion that the trial judge was correct in ruling that a new trial was in

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[15](...continued)
University Neurologists Ass'n, 87 Ohio St.3d 495, quoting, *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, 351, 8 O.O. 1108, 112-113, 7 N.E.2d 544, 549. The Court went on to say, "the principle that if 'there is room for doubt, whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party.'" Id. at 502, quoting *Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 85.

[16]Such a claim to the religious entitlement for judgment on a party's behalf has been repeatedly found to be grounds for a mistrial. See *Sandoval v. Calderon* (9th Cir. 2000), 241 F.3d 765, 779.

order. However, to demonstrate the extent of his outrageous melodrama, I feel obliged to relate Mr. Fieger's final words:

"I think Walter, if he could speak to you, might finally say this about all that's gone on: The day will come when my body will lie upon a white sheet tucked under the four covers [sic] of a mattress located in a hospital busily occupied with the living and the dying, and at a certain hospital a doctor will determine that my brain has ceased to function and that for all purposes, my life has stopped. When that happens, don't attempt to instill artificial life into my body by the use of machines and don't call this my death bed. Let this be called the bed of life and use whatever is usable to help others lead what you call lives. Give my sight to a man who's never seen a sun rise, a baby's face or the love in the eyes of a woman. And give my heart to a person whose only heart has caused nothing but endless days of pain. Give my blood to a teenager who is pulled from the wreckage of a car so that he might live to see his grandchildren play. Give my kidneys to one who depends upon a plan to exist. Take my bones, every nerve and muscle in my body to find a way to make a crippled child walk. Explore every corner of my brain. Take my cells if necessary and let them grow so that some day a voiceless boy will shout at the crack of a bat and a deaf girl might hear the sound of rain against her window. Burn what's left. Scatter my ashes to the window [sic] to help the flowers grow and if you must bury

something, let it be my faults and my weaknesses and all of my prejudices against my fellow man. Give my sin to the devil and give my soul to God and if by chance you remember me, do it with a kind word or a kind thought to somebody who needs you. And if you do all that I have asked, I will live forever." (Tr. 2231-2232.) This passionately presented fiction is akin to the razzle-dazzle tactic of attorney Billy Flynn in the film *Chicago*.

Every good attorney walks a fine line between zealous advocacy and tainting a jury. Mr. Fieger pole vaulted over that line early in this case and never retreated. I commend the trial court for having the integrity to recognize the need for a new trial and ordering one. I would affirm the order of the trial court in ordering a new trial.

In The Court of Common Pleas
Cuyahoga County, Ohio

FILED

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GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

31347014

Case No. CV-484240

Mark A. McLeod,
Plaintiff

Judge Lillian J. Greene

-VS-

Opinion and Order

Mt. Sinai Hospital Medical Center, Inc., et al.,
Defendants

This cause came on to be heard after remand from the Court of Appeals on a Civil Rule 60 (B) Motion, filed by Plaintiff, seeking relief from the order issued by the visiting trial judge, which granted the Defendants' Motion For New Trial. This court has reviewed the motion, opposing briefs and other relevant documents and considered the arguments of counsel and the law and renders the following opinion:

In this country, every person has an inviolate constitutional right to a trial by a jury. Every person has a right to their "day in court"; the right to a jury, selected following voir dire which weeds out prejudice, bias or conflicts, to hear and decide their case. "It is well-settled that the right to trial by jury cannot be invaded or violated by either legislative act or judicial order". Zoppo v. Homestead Inc. Co. (1994), 71 Ohio St. 3d 552.

In the instant case, the issues were submitted to a jury, selected by all the parties. There was evidence presented at trial as to each material issue raised. After a three (3) week trial, during which time the jury was presented with a great deal of conflicting evidence, they proceeded to determine the factual issues, which is their province. In accordance with the laws of this state, the jury determined the amount of recovery by its verdict. See O.R.C. 2315.07. The court, like all others, is not privy to what jurors discuss in deliberations nor privy to why they arrive at their findings and awards. It should not be the priority of the court to impair this traditional function. Unless acts or conduct occurred at trial which materially affected the substantial rights of the losing party, a new trial is not warranted.

This court recognizes that jurors are hard-working, decent, honest people who sacrifice time from work, their families and personal pursuits to serve as independent, fair and impartial triers of fact. They are the integral part of the

justice system and should not be told that they are dispensable and that theirs is an exercise in futility. If there were not sufficient evidence on each issue of negligence, proximate cause and damages, on which reasonable minds could differ, then the case should not have been submitted to the jury.

The trial court obviously disagreed with the amount of the award and opined that $3 million dollars, invested properly, would be sufficient to take care of this injured Plaintiff, even though no such evidence was introduced at trial. The mere fact that the court's opinion differs from that of the jury does not warrant setting aside a verdict. Substantial evidence was presented by the Plaintiff to support the jury verdict (or, in the words of the trial court, plaintiff put on "an extremely strong case...which you can argue forcibly") as contrasted with little evidence to support an opposite verdict award. Pearson v. Cleveland Acceptance Corp. (1969), 17 Ohio App. 2d 239 and Gates v. Strong(1966), 14 Ohio App. 2d 126. (The Plaintiff is an eighteen (18) year old who has never walked, talked, gone to the bathroom on his own, danced, dated, attended school and will never have a family of his own.)

When the court speaks to the issue of excessive damages, the law on the issue should take precedence. Case law on the issue has consistently held that an excessive damage award must be "shocking to sound judgment and a sense of fairness". Cleveland Ry. Co. v. O'Reilly, 16 Ohio App. 132 (Ohio App. 8th Dist.). It is also not the size of the verdict per se that affords proof of passion or prejudice. Pearson, supra. One's individual opinion concerning the relative worth of an injured victim is not a substitute for our legal process. Gates, supra.

Further, this court notes nothing egregious in Plaintiff's counsel's conduct such as to warrant a new trial. The fact that an attorney is difficult to deal with or control does not rise to the level of misconduct that would affect the substantial rights of Defendants and, therefore, entitle them to a new trial. The evidentiary record and not the "non-evidentiary commentary" by counsel controls. Fischer v. Dairy Mart Convenience Stores, Inc. (1991), 77 Ohio App. 3d 543, 553. In addition, counsel has great latitude in presenting a closing argument within permissible bounds. Pang v. Minch, (1990), 53 Ohio St. 3d 186.

None of the arguments relied on rise to the level of affecting a substantial right of the Defendants. Errors in the admission of evidence is not ground for reversal unless substantial rights of the complaining party were affected. Petti v. Perna (1993), 86 Ohio App. 3d 508. See also Ohio Civil Rule 61. Issues of admissibility of evidence are properly assignments of error in the Court of Appeals, particularly when no objection is made at trial.

The issue regarding the Plain Dealer Newspaper article was created by the defense alone. Therefore, the aggrieved party as to that claimed irregularity would be the Plaintiff. As this incident did not prejudice the jury on the main issue in the case, that of negligence, it fails to support the granting of a new trial.

As argued, a Motion For Relief Pursuant to Civil Rule 60 (B) is not a substitute for an appeal; likewise, a Motion For a New Trial should not be a substitute for an appeal.

Every jury award that is higher than previous awards is a "record verdict". The "future case" in Ohio referred to is the instant case wherein the jury, duly empaneled and sworn, rendered their verdict for Plaintiff on May 23, 2004. There is recourse if one disagrees with a jury verdict: an appeal of right.

For all of the aforementioned reasons, this court grants Plaintiff's Motion For Relief From Order Pursuant to Civil Rule 60(B) and, hereby, reinstates the jury verdict entered on May 23, 2004.

IT IS SO ORDERED.

Judge Lillian J. Greene

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARK A. MCLEOD, Guardian for The Estate of Walter Hollins	)	CASE NO: 484240
Plaintiff	)	JUDGE ROBERT M. LAWTHER
vs.	)	
MT. SINAI MEDICAL CENTER, Et al.	)	JOURNAL ENTRY AND OPINION ON DEFENDANTS' MOTIONS FOR NEW TRIAL, JNOV, OR REMITTITUR
Defendants	)	

Walter Hollins was born at Mt. Sinai Hospital in 1987, and life-flighted to University Hospital. Through his guardian he filed suit against Mt. Sinai Medical Center, University Hospital, Dr. Vernon Jordan, and the North East Ohio Neighborhood Health Services, alleging negligent pre-natal and post-natal care resulting in his condition of cerebral palsy and severe retardation. University Hospital entered into a settlement agreement with Plaintiff prior to trial, and the case proceeded for a three week period against the remaining defendants.

Walter Hollins was an IUGR baby (intra uterine growth retarded, meaning "small"), and this fact was known to Dr. Jordan during the mother's pregnancy. Upon examination in about the 39th week of pregnancy, the mother was sent to Mt. Sinai Hospital for testing by Dr. Jordan who later determined that a Caesarean Section delivery was advisable. He met her there and delivered the baby about two hours later.

The major issues of the case were (1) when and why was the baby injured, and (2) was its condition due to any negligence on the part of any defendant? Plaintiff claims that a delivery one hour earlier would have resulted in the birth of a normal child, and that Dr. Jordan who had examined the Mother at Mt. Sinai two hours earlier should have delivered the child sooner, Plaintiff also claims that Mt. Sinai is liable because the nurses in the OB

Dept. did not take action to somehow effect an earlier delivery. Defendants claim, however, that the injuries occurred before the mother was admitted to Mt. Sinai and that Dr. Jordan delivered the child at a time that was reasonable and proper under the circumstances.

The jury returned a verdict for Plaintiff in the sum of Fifteen Million Dollars ($15,000,000) for past and future economic damages, and Fifteen Million Dollars ($15,000,000) for past and future non-economic damages.

Defendants filed motions for Judgment Notwithstanding the Verdict, for New Trial, or in the alternative, for Remittitur, citing a number of grounds including irregularity of the proceedings, misconduct of Plaintiff's counsel, surprise, the award of excessive damages, judgment not sustained by the weight of the evidence, and errors of law. The verdict is the highest ever returned in Cuyahoga County, and reportedly the highest medical malpractice verdict in the State of Ohio.

The Court has reviewed the voluminous motions and briefs filed by all parties, and the entire 2400 page record, and has determined that **the Defendants' Motion for New Trial must be granted.**

All parties produced experts who were experienced witnesses, but whose opinions were diametrically opposed. The jury had the difficult duty of deciding the questions of negligence and proximate cause with respect to the Doctor and nurses, and decided those issues by a vote of 6 to 2. This was clearly a "close call", and depended upon which medical witnesses the jury chose to believe.

The liability issues were particularly difficult because Mt Sinai closed its doors several years ago, and some of the records from 17 years prior could not be found. Plaintiff filed a claim for spoliation of records which the Court dismissed at the close of Plaintiff's case for lack of evidence.

Civil Rule 59 (A) permits the granting of a new trial upon various grounds, including the following, which do apply in this case:

> Irregularity in the proceedings....by which an aggrieved party was prevented from having a fair trial.
>
> Misconduct of the jury or prevailing party.
>
> Accident or surprise which ordinary prudence could not have guarded against.
>
> Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
>
> Error of law occurring at the trial and brought to attention of the trial court by the party making the application.
>
> In addition, a new trial may also be granted in the sound discretion of the court for good cause shown.

The Court believes that the major grounds for relief set forth by Defendants are (1) the award of excessive damages given under the influence of passion and prejudice, (2) the misconduct of Plaintiff's counsel throughout the trial, and (3) irregularity in the proceedings which prevented a fair trial.

Excessive economic damages

Economic damages were presented through the testimony of Dr. Harvey Rosen, one of Cleveland's well-known economists. Unknown to the Court he had submitted his most recent expert report to Plaintiff in January, 2004 calculating the cost of home health care aides and other medical, therapy, and ancillary expenses for Walter over the period of his life expectancy to be between $4,303,088 and $6,413,639. During his testimony at trial, however, (R-1522) he was asked by Mr. Fieger what the cost would be for LPN care and RN care, although the life care plan devised by their life care expert, Mr. Cyphers, did not recommend such level of care, nor had Dr. Rosen's report prior to trial contained any

information on the costs of higher degrees of care. Defense attorneys all objected on the grounds of surprise, and Rule 21(B):

> "A party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel...unless good cause is shown, all supplemental reports must be supplied no later than thirty days prior to trial. The report of an expert must reflect his opinions as to each issue on which the expert will testify. An expert will not be permitted to testify or provide opinions on issues not raised in his report."

However, the Court overruled the objections and failed to call a sidebar conference on the record. That would have disclosed that Dr. Rosen was about to give testimony on estimates as to the cost of care which were not covered in his report, and to put a figure on the level of care that no doctor or other expert had recommended. No witness testified that Walter will ever need the care of a Registered Nurse or Licensed Practical Nurse. Only Plaintiff's counsel gave the opinion that such care was necessary.

This was error, and had their been a sidebar conference the objections would have been sustained, and the jury would not have heard very damaging testimony and medically unsupported figures which were presented by surprise.

Accordingly, Dr. Rosen then testified (R-1533) that the lifetime care including physical therapy with an LPN would cost $13,042,026, and with an RN these costs would be $14,042,993. These figures amounted to approximately triple the amount contained in his January report This testimony violated Rule 21 (B) and the case law interpreting same. *Jones vs. Murphy, (1984), 12 Ohio St. 3d 84; Paugh & Farmer Inc. vs. Monorah Home for Jewish Aged (1984) 15 Ohio St. 3d 44;* See also Civil Rule 26 (B) (4) and *Walker vs. Holland (1997) 117 Ohio App 3rd 775, and Guerrieri vs. Allstate Ins. Co (1999) 1999 WL 684 714*

This surprise testimony no doubt had a very strong influence on the jury in assessing economic damages of $15,000,000, and it should be noted that there was no medical basis for this testimony (R. 564, 566, 858-59)

Furthermore, evidence demonstrated that the total cost of Walter's care for the past 17 years was only $107,000. In addition, Dr. Gabriel, plaintiff's damage expert, estimated that the cost of care in the future would be in the neighborhood of $120,000 per year.

Counsel for Mt. Sinai have presented at Tab P in their brief a summary of 80 malpractice verdicts in Ohio during the past 15 years, including the prior record verdict in Cuyahoga County in 1999 in the sum of $17,000,000 for an infant whose injuries are remarkably similar to Walter's but also necessitated the need for lifelong kidney transplants. The other 79 cases listed resulted in verdicts in the range of $500,000 to several million, with Cuyahoga County showing several in the 10 to 15 million dollar range. While this chart does not serve to *prove* Defendants' claim of excessive damages in this case, it does help to focus attention on Defendants' argument that Plaintiff's violation of Rule 21(B) persuaded the jury to give an outrageous verdict. See Roberts vs. Mutual Mfg & Supply Co.(1984) 16 Ohio App 3d 324 which held that "a jury should be confined to such damages as are reasonably certain to follow from the injury complained of."

There may be a future case in Ohio in which the Plaintiff is severely injured, facing a lifetime of constant pain and disability, permanently bedridden; deprived of a large income enjoyed before the malpractice, with a family he can no longer support and facing daily exorbitant costs of special medical care. In such a case a verdict in the amount of $30,000,000 or more might well be justified. **In the opinion of this Court, the evidence herein does not show that <u>this</u> is such a case.** See *Cox vs. Oliver Machinery Co (1987) 41 Ohio App 3d 28 and Fromson & Davis Co vs. Reider (1934) 127 Ohio St. 564.*

Excessive non-economic damages

The $15,000,000 verdict for "non-economic" damages is even more difficult to understand and to justify. The Court's charge on such damages was standard OJI:

> "Non-economic loss means harm or loss not normally measured in money, including but not limited to pain and suffering, physical disability, disfigurement and interference with the normal activities of life."

Plaintiff's Counsel's description of these damages to the jury was very brief, and referred (R-2226) to Walter's suffering, pain, loss of independence, fright, disability, and disfigurement.

Any jury would have difficulty in fairly and accurately awarding money damages for these elements of cerebral palsy. No one would ever willingly endure such disability, partly mental and partly physical. So what method can be employed to fix a figure which represents **fair compensation** without being punitive against a defendant whose possible negligence may have contributed to the condition? The method can not be just that the Plaintiff's attorney asked for $17,500.000, as Plaintiff's counsel did in this case. If a jury simply awards the figure requested, there would be no need for trials.

Some of the factors frequently discussed by juries in such cases include the need for new housing (a home on one floor in this case), wheelchair access, a van equipped for access by the handicapped, special bathing facilities, and funds which although not mentioned in the law, help the caregivers take care of the plaintiff with greater convenience and safety. **The award of $15,000,000 for non-economic damages in this case is so out-of-line and unjustified that it must have been the result of passion and prejudice.**

There was no evidence that Walter suffers regular, continuing pain. The only testimony of possible conscious pain and suffering was his mother's comment that during physical therapy, he might "wince" in a manner which appeared to signify pain. He has the expected disabilities associated with cerebral palsy, but does not seem to know that he is different from

other children. Without taking lightly his physical disability, and with full realization that his illness is a tragedy, the Court has reviewed in detail the testimony given by family members and caregivers.

Dr. Gabriel:

"Walter is a very interesting youngster. He's beautifully cared for....He has many abilities to bond, to appreciate what's going on around him. I believe his intelligence is considerably higher than we will ever be able to test.....Walter benefits from close personal relationships....You can see that in the way he relates to this mother and even to strangers. Once he's warmed up to a stranger, he makes eye contact, he laughs easily."

Walter's Grandmother (R.-1474)

"Walter loves water. He can stay in the water all day. Even when you give him a bath he doesn't want to come out. At school he loves to swim.....When he sees me he's all bubbly and happy and likes grandma. If he could talk, that's what he would say.....He's absolutely a ladies man. Now, you may not think he knows very much. He knows that. He is a man. He really likes the ladies and he responds. I think that's really great."

Regina Harris, Walter's mother: (R-1567)

(showing photo) He's horseback riding. It's a field trip from school. These activities help him. Now that he's older and he's more aware of things, he can be stimulated. He likes to go outside and feel the sun shine and the air, just like every body else....(R-1572) He interacts with other children pretty well. He laughs, and has own little way of playing with them. (R-1573) He responds to acts of kindness. He does give hugs and kisses on command if he feels like it. He also knows if he's getting scolded."

It appears that when called upon to award non-economic damages, the jury simply matched the $15,000,000 it had already awarded for economic damages, as Mr. Fieger had essentially asked them to do. From the standpoint of fairness and common sense, however, consideration should have been given to the kind of facts which juries often consider. The Court notes that an award of $3,000,000, for example, invested at 5%, would produce $150,000 per year without any reduction in principal. Such income should be sufficient to provide wonderful facilities for his comfort and for recreational opportunities, over and above the medical and custodial care provided by the economic damage portion of the verdict.

Returning a verdict of $15,000,000 for non-economic loss shows that the jury simply lost its way, and ignored the Court's charge on the law. This amount is clearly excessive and can be remedied only by a new trial.

Misconduct of Plaintiff's Counsel

Some lawyers believe that conducting a trial in a theatrical way, being overbearing, discourteous, and rude, is the key to success. A complete reading of the record in this case will demonstrate that Mr. Fieger, from Detroit, Michigan, apparently holds that opinion. In this case, that approach seems to have helped him achieve a clearly unjustified verdict.

Counsel was the attorney for the famous Dr. Kevorkian, and frequently appears on Fox TV. His theatrical and discourteous demeanor throughout the trial seemed to emulate TV trials in which lawyers can do and say whatever comes to mind. During cross examination of his witnesses, his trial technique included constant interruption of opposing counsel without bothering to object and obtain a ruling. A few examples follow:

> Page 720
> Mr. Fieger: "Excuse me. The chart doesn't reflect arterial blood gas of 7.15. He made that up Judge, it's one thing to ask a question---"
>
> Page 728
> Mr. Fieger. "Wait a minute Judge, she knows very well she has three reports and that's not even, you know---"
> Mr. Groedel: "Why is he telling the witness what to say?"
> The Court: "I have no idea."
>
> Page 1021
> Mr. Fieger: "Excuse me, this is all made up. This is conversation that he denies that ever took place. Now he's literally written a script, Judge."

This kind of courtroom conduct persisted throughout the trial, until the Court finally called a conference on the record in chambers (Page 2051) and explained the situation one more time:

> "The major problem of this case has been Mr. Fieger's insistence in jumping up and without using the word "objection" saying, (things like) 'Judge, what is he trying to do' in a whiny, disturbing tone of voice which I don't know how that has appeal to the jury, but

it turned me off and looking at the jury, that was the impression I got, since the time was late.

(To Mr. Fieger) "In case you are not familiar with the rules of civil procedure in Ohio, I will be happy to share them with you. They require you to cite objections, and if the Court feels a side bar is necessary to discuss the grounds for the objection, if I don't understand your objection, we'll have a side bar."

"I will insist on the balance of this trial proper procedure be followed. If you have an objection, get up and say "objection". If I don't know the grounds, I will give you a chance to give me the grounds. If I overrule the objection, that's the end of it, and then you sit down. That's the only way we will conduct this trial on an orderly basis."

It was quite obvious that Mr. Fieger's goal was to convey to the jury his own idea of what the witness should be saying, thus testifying for the witness, rather then making a genuine and valid objection to the question.

The above examples are but a sampling of the conduct displayed by Plaintiff's counsel throughout the entire three week trial. A reading of the whole record discloses in detail his trial technique which was designed to manipulate and mislead the jury, including referring to some of Defendants' witnesses as "prevaricators" engaging in "false stories and cover-ups". He frequently referred to defendants as "corporate clients" with "phony defenses". His entire approach to this case in open court was misleading, unprofessional, and frequently outrageous, and did not constitute proper advocacy. See *Powell vs. St. John Hospital (2000) 241 Mich App 64.*

As an example, Mt. Sinai, which ceased its existence several years ago, did not have evidence of the exact time of the Mother's admission. The first timed notation in her chart was from the OB dept. Mr. Fieger then chose to suggest that "she got herself in a wheelchair and wheeled herself down to labor and delivery". Although that did not happen, the suggestion was repeated several times, so that the jury may have believed it to be true.

Page 2174 (Mr. Fieger)

"When is the last time anyone walked into a hospital, took a wheelchair, and started wandering around the halls without somebody checking you in and verifying your ability to pay?"

Plaintiff's brief (page 11) states that the allegations of misconduct occurred outside the presence of the jury, but that is not the case, as set forth above. Plaintiff also excuses Mr. Fieger's conduct as being acceptable in showing "ability, enthusiasm, and zealous advocacy". The Court finds, however, that his conduct far exceeded such permissible attributes. During final argument, Mr.Fieger employed the kind of theatrics best left to movies and television. At one point during final argument, he placed his hand on Walter's shoulder and addressed the child as follows:

"I'm sorry. I couldn't help you, Walter. I couldn't stop you from drowning. But I will be his voice. I will help him get justice now. Whatever you do to the least of these my brothers, that you do unto me."

Since Walter was unable to understand what was being said, it can be assumed that the attorney's "message", adopting the words of Jesus Christ, was simply to appeal to the passion and prejudice of the jury.

In addition, the record reflects that at least five times during final argument, Mr. Fieger went far beyond the bounds of theatrical license with the following kind of performance:

Page 2199

"Please, please nurses. I'm a little baby. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me. Please help me to be born."

This is just another example of Plaintiff's efforts to appeal to the jury's natural sympathy through passion and prejudice.

Defendant's brief quotes *Baldalamenti vs. William Beaumont Hospital-Troy* (1999) 237 Mich. App. 278 in which Mr. Fieger employed the same tactics apparent in the instant case, and held in Syllabus 17:

> "While a lawyer is expected to advocate his client's cause vigorously, parties are entitled to a fair trial on the merits of the case uninfluenced by appeals to passion or prejudice, and as long as attorneys will resort to such methods, unjustifiable either in law or ethics, courts have no alternative but to set the verdicts aside."

Note, also, another case which has received much publicity since the Michigan Supreme Court, on July 22, 2004, reversed a $21,000,000 sexual harassment verdict obtained by Mr. Fieger. *Gilbert vs. Daimler-Chrysler Corp. Case No. 122457.* The Court found that Mr. Fieger engaged in a "sustained and deliberate effort to divert the jury's attention from the facts and the law" resulting in a verdict which "unmistakably reflects passion rather than reason, and prejudice rather than impartiality." The Court also criticized Mr. Fieger for his ad hominem attacks against the Defendant based on its corporate status (Gilbert at page 25).

Irregularity in the proceedings

Defendants complain about the Court's failure to conduct a voir dire examination of the jury following publication of a front page Plain Dealer article which appeared just before the jury was to deliberate. The article mentioned that Mr. Fieger was asking the jury to award $35,000,000, and that "if he got only half that much, it would be the highest damage award in county history." The Court was concerned about the effect of the article on the jury, and in an attempt to avoid overemphasizing the matter asked the jury in the hall, before court commenced, if any jurors had seen the article. Three acknowledged that they had done so. The court merely told them to disregard what they had read.

When Defense counsel then requested a voir dire examination of the jury before deliberation, the Court declined so as not to give the article undue importance. The court now acknowledges that failure to permit a voir dire examination of the jury prevented defense

counsel from determining if any juror had been influenced to the extent that he or she was no longer eligible to serve. In addition, there should have been no conversation between the Court and jury off the record. *Sweet vs. Clare Mar Camp, Inc*, 38 Ohio App. 3rd 6.

It is entirely possible that having read the Plain Dealer article, some jurors may have found that the **opportunity to return the record verdict in this County** was irresistible. Defense Counsel should have had the opportunity to explore that question.

Another blatantly improper instance of misconduct occurred near the end of Dr. Rosen's testimony:

> "O.K. By the way, also, none of your amount of money necessary to provide child included the costs that would be necessitated by the legal representation of Walter, do they?"

Upon objection, the Court took Counsel into chambers and made clear that such question was totally improper since it raised the matter of attorney fees in the minds of the jurors. A precautionary instruction was then given, but there was no way to undo the harm that had already been done. Obviously, legal expenses are not recoverable in the absence of punitive damages, and are never the subject of the economist's report. Plaintiff's counsel makes the excuse that punitive damages were prayed for, so the question was proper. The subject does not arise, however, **unless the jury is charged on punitive damages, and later awards them**, and then the matter of attorney fees can be considered. In this case, however, the Court granted Defendant's Rule 50 motion with respect to punitive damages at the close of Plaintiff's case.

Pro hac vice status of Mr. Fieger

Prior to the trial, and after the verdict, Defendants Ronald Jordan M.D, and Northeast Ohio Neighborhood Health Services, Inc. filed a motion to revoke the Pro Hac Vice status of Mr. Fieger. Following the trial, the Court was reluctant to grant the motion in the belief that Mr.

Fieger should have the opportunity to defend the verdict and his trial conduct in the Appellate process. In the event of a re-trial of this case, however, it is the recommendation of this Court that the trial judge assigned give careful consideration to such a motion, and review *Reaves et al vs. MetroHealth Medical Center,* Cuyahoga CCP Case No. CV-043-535855 (2004).

Defense Counsel in their motion briefs have set forth many other grounds in support of their request for a new trial, especially with respect to the issues of negligence and proximate cause, and some of those arguments have much merit. The Court will not attempt to deal with all of the issues raised by all parties, however, and believes that the above discussion more than justifies the conclusion that a new trial must be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions of all Defendants for a New Trial be granted, and that, accordingly all other pending motions are rendered moot.

Robert M. Lawther, Judge

Date: August 23, 2004

A copy of the foregoing Opinion and Journal Entry was mailed this 23rd day of August, 2004, to all counsel of record.

Robert M. Lawther, Judge

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Baptist Medical Center Montclair v. WhitfieldAla.,2006.Only the Westlaw citation is currently available.
NOT YET RELEASED FOR PUBLICATION.
Supreme Court of Alabama.
BAPTIST MEDICAL CENTER MONTCLAIR
v.
Barbara T. WHITFIELD, as administratrix of the estate of Thelbert D. Whitfield, deceased.
1041472.

April 21, 2006.

Background: Wife of patient who suffered complication and died following gall bladder surgery brought medical-malpractice action against surgeon's practice group and hospital, and voluntarily dismissed practice group the day before trial. After the jury returned a verdict for hospital, the Jefferson Circuit Court, No. CV-02-5264,Houston Brown, J., granted plaintiff's motion for a new trial, and hospital appealed.

Holding: The Supreme Court, See, J., held that trial court did not abuse its discretion by granting patient's wife a new trial, on ground that arguments by hospital's counsel, that wife dismissed surgeon's practice in return for surgeon's testimony, were grossly improper and highly prejudicial.

Affirmed.

[1] Appeal and Error 30 867(2)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k867 On Appeal from Decision on Motion for New Trial or After Grant of New Trial
30k867(2) k. Appeal from Order Granting New Trial. Most Cited Cases
When a trial court grants a motion for a new trial on grounds other than a finding that the verdict is against the great weight or preponderance of the evidence, Supreme Court's review is limited.

[2] New Trial 275 6

275 New Trial
275I Nature and Scope of Remedy
275k6 k. Discretion of Court. Most Cited Cases
A ruling on a motion for a new trial rests within the sound discretion of the trial judge.

[3] Appeal and Error 30 933(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k933 Order Granting or Refusing New Trial
30k933(1) k. In General. Most Cited Cases

Appeal and Error 30 977(3)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k976 New Trial or Rehearing
30k977 In General
30k977(3) k. Grant of New Trial in General. Most Cited Cases
The exercise by a trial court of its discretion to grant a motion for a new trial carries with it a presumption of correctness, which will not be disturbed by on appeal unless some legal right is abused and the record plainly and palpably shows the trial court to be in error.

[4] Appeal and Error 30 867(2)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k867 On Appeal from Decision on Motion for New Trial or After Grant of New Trial
30k867(2) k. Appeal from Order Granting New Trial. Most Cited Cases
Supreme Court will reverse a trial court's grant of a new trial on the basis of improper closing argument by counsel only if it is shown that, in so doing, the

trial court abused the legal rights of the party represented by such counsel and its decision was plainly and palpably wrong.

[5] New Trial 275 ⚿29

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k29 k. Conduct of Counsel. Most Cited Cases
Trial court did not abuse its discretion, in medical-malpractice action brought by wife of patient who died following gall bladder surgery, by granting wife's motion for new trial due to improper remarks made in closing argument by hospital's counsel, which wife did not object to, on ground that remarks were grossly improper and highly prejudicial; hospital's counsel stated that patient's wife had dismissed surgeon's practice group as a defendant in return for surgeon's testimony, counsel also stated that surgeon's practice group was dismissed because it was easier for jury to return a large verdict against hospital, a corporation, as it had more money, statements attributed to wife improper arguments that wife could not make, and statements were not based on a reasonable inference from the evidence, as surgeon's deposition testimony, made when practice group was still a defendant, and surgeon's trial testimony were consistent.

[6] New Trial 275 ⚿31

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k31 k. Necessity of Objection. Most Cited Cases
When a party objects to improper argument and the trial court sustains the objection, in order to obtain a new trial on the basis of the improper argument, generally it is necessary that the party request a curative instruction from the trial court.

[7] Appeal and Error 30 ⚿207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k207 k. Arguments and Conduct of Counsel. Most Cited Cases
Generally, the objecting party's failure to seek a curative instruction to an improper argument indicates satisfaction with the ruling, and that party cannot later complain of the trial court's failure to do what it was not asked to do.

[8] New Trial 275 ⚿31

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k31 k. Necessity of Objection. Most Cited Cases
Generally, unless there is an objection and it is overruled, improper argument of counsel is not ground for new trial.

[9] New Trial 275 ⚿31

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k31 k. Necessity of Objection. Most Cited Cases
A new trial may be granted based on improper argument of counsel, even where no objection to the statement was made, where it can be shown that counsel's remarks were so grossly improper and highly prejudicial as to be beyond corrective action by the trial court.

[10] New Trial 275 ⚿31

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k31 k. Necessity of Objection. Most Cited Cases
Where the party seeking a new trial does not object to allegedly improper argument by opposing counsel, opposing counsel's statements can still serve as the basis for a new trial if, in the trial court's opinion, those statements are grossly improper and highly prejudicial.

[11] New Trial 275 ⚿31

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or

Witnesses
275k31 k. Necessity of Objection. Most Cited Cases
Whether argument of counsel is grossly improper or highly prejudicial, such that a new trial can be granted even though opposing counsel did not object to the argument, is a fact-specific inquiry.

[12] Trial 388 ⚿111

388 Trial
388V Arguments and Conduct of Counsel
388k111 k. Scope and Effect of Summing Up. Most Cited Cases
Although it is not without bounds, the trial court has great latitude in ruling on the propriety of an attorney's closing argument, as the trial court is present at the time the argument is made.

[13] New Trial 275 ⚿29

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k29 k. Conduct of Counsel. Most Cited Cases
Fact that patient's wife's attorney, in medical-malpractice action brought after patient died following complications from gall bladder surgery, raised during direct examination of surgeon issue of whether surgeon made a deal with wife pursuant to which claims against surgeon's practice group were dismissed in return for surgeon's favorable testimony, did not prohibit trial court from evaluating, for purposes of wife's motion for a new trial, whether the remarks by hospital's counsel in closing argument, that there was such a deal, were grossly improper and highly prejudicial in light of the peculiar facts and circumstances involved and the atmosphere created; wife's attorney questioned surgeon regarding the allegations after hospital's counsel raised allegations in opening statement.

[14] Appeal and Error 30 ⚿933(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k933 Order Granting or Refusing New Trial
30k933(1) k. In General. Most Cited Cases
In reviewing whether counsel's statements constituted improper arguments, in an appeal of an order granting a new trial, Supreme Court accords a presumption of correctness to the trial court's findings.

[15] Appeal and Error 30 ⚿925(3)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k925 Conduct of Trial or Hearing, and Rulings in General
30k925(3) k. Arguments of Counsel. Most Cited Cases
In passing on the question of ineradicable bias from improper arguments by counsel, much should be left to the enlightened judgment of the trial court, with the usual presumptions in favor of the ruling made to that end.

Mark W. Lee, Dorothy A. Powell, and James A. Wyatt III of Parsons, Lee & Juliano, P.C., Birmingham, for appellant.
Shay Samples and Bruce J. McLee of Hare, Wynn, Newell & Newton, LLP, Birmingham, for appellee.
SEE, Justice.
*1 Baptist Medical Center Montclair appeals from the trial court's grant of a new trial following the return of a jury verdict in its favor. We affirm.

Facts

Dr. Scott Pennington admitted Thelbert Whitfield to Baptist Medical Center Montclair ("BMC"); Thelbert was suffering from gallstones and jaundice. Dr. Pennington is BMC's chairman of general surgery.

On January 15, 2001, Dr. Pennington removed Thelbert's gallbladder. Thelbert was discharged following the procedure, but he experienced problems and was rehospitalized on January 21, 2001. On January 26, 2001, Dr. Pennington discovered that Thelbert had a leak in his gastrointestinal tract. Upon investigation, Dr. Pennington discovered that Thelbert's bile duct was leaking; Dr. Pennington drained and repaired the leak. On January 29, 2001, Thelbert appeared to have developed an "upper gastrointestinal bleed." Dr. Pennington gave Thelbert an infusion of blood and placed him in BMC's surgical-intensive-care unit. Dr. Leonard Ou-Tim, a gastroenterologist at BMC, performed an endoscopy on Thelbert but was unable

to locate the source of the bleed.

Julie Davis, a registered nurse, was Thelbert's primary nurse on January 29, 2001, having begun her shift at 7:00 p.m. At approximately 7:30 p.m., Thelbert experienced a bloody bowel movement while he was lying on his bed. Davis reported the bloody bowel movement to the surgeon on call who, in response, instructed her to infuse Thelbert with two units of blood. At approximately 10:50 p.m., around the time the first unit of blood was fully transfused, Davis evaluated Thelbert and found his condition to be stable. Davis left the room to chart her assessment and order a second unit of blood for Thelbert. Soon after Davis left Thelbert's room, the monitor alarm in Thelbert's room was activated. Davis returned immediately to find that Thelbert had gotten out of his bed unassisted, had pulled out his intravenous tubes, and was sitting on a trash can while experiencing a bloody bowel movement. Davis and another nurse assisted Thelbert back into his bed. As they got him to his bed, Thelbert became unresponsive. Davis called for assistance, and the responding team attempted to resuscitate Thelbert. The resuscitation efforts were unsuccessful; Thelbert died shortly thereafter.

Dr. Kim Parker performed the autopsy on Thelbert. During the autopsy, the source of his gastrointestinal bleed was identified for the first time. Dr. Parker determined that Thelbert suffered from a Dieulafoy's malformation, also known as a Dieulafoy's lesion-a condition in which a lesion in an artery of the gastrointestinal tract causes gastrointestinal bleeding. Dr. Parker concluded from the autopsy that Thelbert had died from a massive gastrointestinal bleed. Dr. Pennington conferred with Dr. Parker shortly after the autopsy was completed and agreed with Dr. Parker's findings. On February 5, 2001, Dr. Pennington signed Thelbert's death certificate, noting "GI hemorrhage due to (or as a consequence of) Dieulafoy's lesion duodenum" as his cause of death.

*2 On August 30, 2002, Barbara Whitfield, Thelbert's wife, as the administratrix and personal representative of Thelbert's estate, sued BMC, Montclair Surgical Associates, P.C. (Dr. Pennington's practice group), and Birmingham Gastroenterology Associates, P.C., asserting claims of negligence relating to Thelbert's death. On March 7, 2005, the day before trial, Whitfield voluntarily dismissed Montclair Surgical Associates, P.C., and Birmingham Gastroenterology Associates, P.C., from the action, leaving BMC as the only defendant.

In his opening statement, counsel for BMC implied that Whitfield had agreed to dismiss the charges against Montclair Surgical Associates on the condition that Dr. Pennington change his testimony so that it would be damaging to BMC. BMC's counsel also suggested that Whitfield made the deal because it was easier for the jury to return a large verdict against a corporation like BMC rather than a group of doctors. BMC's counsel stated:
"March 7th, 2005-yesterday-the deal was consummated. [Whitfield] dismissed it. Why would [Whitfield] do that? Why would [Whitfield] do that? Because if [Whitfield] could have some testimony against the nurse, because we're suing a hospital-bricks and mortar. It's easier for you twelve people-thirteen people, I'm sorry-to bring a verdict back against bricks and mortar."

Whitfield's attorney objected to the statement and the trial judge sustained his objection. No curative instruction was requested or given.

The trial court heard from a number of witnesses; however, only Dr. Pennington's testimony is relevant to this appeal. Dr. Pennington testified at trial as a witness for Whitfield. During direct examination, Whitfield's counsel instructed Dr. Pennington to read portions of the transcript of his deposition taken on April 28, 2004. In his deposition, Dr. Pennington opined that Thelbert's death was caused by his getting out of bed unassisted, resulting in a drop in blood pressure and heart rate, which in turn caused a cardiac arrest or arrhythmia from which he could not be resuscitated. At trial, Dr. Pennington testified to the same cause of death. Dr. Pennington also stated at trial that he stood by the theory he had advanced in his deposition as to Thelbert's cause of death. In response to BMC's suggestion during the trial that his opinion as to Thelbert's cause of death changed after he executed Thelbert's death certificate, Dr. Pennington explained that his opinion of Thelbert's cause of death had not changed from the time he executed Whitfield's death certificate to the time of his deposition and then his trial testimony. When Whitfield's counsel asked him to explain why he wrote "GI hemorrhage due to (or as a consequence of) Dieulafoy's lesion duodenum" as the cause of death on Thelbert's death certificate rather than cardiac arrest, Pennington stated:
"I think it's a problem of semantics. In other words, it's a problem of language. What I meant in the death certificate is that indeed the underlying cause of Mr. Whitfield's death was the GI bleed, in the sense that we've talked about. The GI bleed set him up for this scenario, a scenario that unfortunately led to his

death. The GI bleed created the low blood pressure, relative hypovolemia, despite his being transfused and despite the fact he was stable in a recumbent position. When he-the best that we can put the picture together, when he got up and sat on the trash can, his blood pressure may have become low, he may have underperfused his coronary arteries and may have had a heart attack. We don't know exactly what happened, but that's the best explanation I have. Now, on the coroner's report that I have to fill out, what I put is the underlying cause of his death. The most proximate cause of his death-and we can quibble about what 'proximate' or 'immediate' means-would be the GI hemorrhage, because that's what led to everything else. It's like a cascade of events. And the cause of GI hemorrhage, which we only discovered at pathology after autopsy, was the Dieulafoy's lesion, the bleeding lesion in the duodenum."

***3** During direct examination of Dr. Pennington, Whitfield's counsel also addressed the remarks by BMC's counsel in his opening statement concerning a deal between Dr. Pennington and Whitfield:
"[Whitfield's counsel]: There has been a direct statement made to these ladies and gentlemen of the jury that we made a deal, we made a deal to either get you to give this testimony or to come to court today. So, sir, let me just ask you straight up: Have we made a deal?
"[Dr. Pennington]: No, sir.
"[Whitfield's counsel]: Has anybody promised you anything to give the deposition, sworn testimony you gave in April 2004?
"[Dr. Pennington]: No, sir.
"[Whitfield's counsel]: Has anybody promised you anything to come to court and give the testimony you gave today?
"[Dr. Pennington]: No, sir."

In closing arguments, BMC's counsel again stated that Whitfield had made a deal with Dr. Pennington pursuant to which the charges against his practice group would be dismissed in exchange for his testimony against BMC because, counsel stated, the jury was more likely to return a large verdict against a corporation like BMC rather than a group of doctors. BMC's counsel made the following statement during his closing argument:
"The deal was made, the deal was done. And the deal was consummated March 7, 2005. You come here, and you just follow that testimony so we can hang this nurse out to dry. And then you'll be dismissed from this case. Do you know why? Let me tell you why. Because it's easier for you folks to bring a verdict back-$7.5 million-against a hospital, a corporation, than it is a doctor. That is why it was done. That, to me, is insulting to you. It's insulting to you, that you would be swayed by that. But that was the deal that was cut in this case. It may be the seedy side of what goes on, but that's what happened."

Whitfield's counsel did not object.

The jury returned a verdict in favor of BMC, and the trial court entered a judgment on the verdict. Whitfield moved for a new trial. After a hearing, the trial court granted Whitfield's motion for a new trial. The trial court stated in its order granting a new trial:
"This Court finds that those arguments presented in [BMC's] closing argument were improper, prejudicial, inflammatory, and could not reasonably be cured by instruction of this Court and that as a result of their cumulative effect, the verdict returned by the jury was a product of passion, prejudice, bias and sympathy in favor of [BMC] and against [Whitfield]."

The trial court explained:"By arguing that some sort of 'deal' had been 'cut' between counsel for [Whitfield] and one of the previously named Defendants herein, together with the argument that 'It may be the seedy side of what goes on,' taken *in toto* with all the facts and circumstances presented at trial, [Whitfield] was prejudiced beyond any curative instruction by this Court."

BMC appeals the trial court's grant of a new trial.

Standard of Review

***4** [1][2][3] The trial court granted Whitfield's motion for a new trial on the basis that the closing argument by BMC's counsel contained improper, prejudicial, and inflammatory arguments. When the court grants a motion for a new trial on grounds other than a finding that the verdict is against the great weight or preponderance of the evidence, this Court's review is limited.
" 'It is well established that a ruling on a motion for a new trial rests within the sound discretion of the trial judge. The exercise of that discretion carries with it a presumption of correctness, which will not be disturbed by this Court unless some legal right is abused and the record plainly and palpably shows the trial judge to be in error.' "

Curtis v. Faulkner Univ., 575 So.2d 1064, 1065-66 (Ala.1991) (quoting *Kane v. Edward J. Woerner & Sons, Inc.*, 543 So.2d 693, 694 (Ala.1989), quoting in turn *Hill v. Sherwood*, 488 So.2d 1357, 1359 (1986)).

Analysis

[4][5] This Court will reverse the trial court's grant of a new trial on the basis of improper closing argument by counsel only if it is shown that, in so doing, the trial court abused BMC's legal rights and its decision was plainly and palpably wrong. *Curtis*, 575 So.2d at 1065-66. BMC does not allege in its brief to this Court that the trial court encroached on any of its legal rights in granting Whitfield's motion for a new trial. BMC argues that the trial court's decision was plainly and palpably wrong. However, under our standard of review, we cannot agree. Therefore, we must affirm the trial court's order granting Whitfield a new trial.

BMC's counsel in this case made statements regarding an alleged deal between Whitfield and Dr. Pennington during both his opening statement and his closing argument. The trial court based its award of a new trial on statements by BMC's counsel in closing argument, noting that the closing argument, "taken *in toto* with all the facts and circumstances presented at trial" resulted in prejudice to the plaintiff that was beyond any curative instruction. Thus, we will first address the improper argument in the opening statement.

[6][7] BMC's counsel stated in his opening statement that Whitfield had made a deal with Dr. Pennington pursuant to which Dr. Pennington's practice group would be dismissed from the case in return for his testimony against BMC. Whitfield's attorney objected to that statement, and the trial court sustained his objection. When a party objects to improper argument and the trial court sustains the objection, in order to obtain a new trial on the basis of the improper argument, it is necessary that the party request a curative instruction from the trial court. *See Southern Life & Health Ins. Co. v. Smith*, 518 So.2d 77, 81 (Ala.1987), *Walker v. Asbestos Abatement Servs., Inc.*, 639 So.2d 513, 514 (Ala.1994) (citing *Calvert & Marsh Coal Co. v. Pass*, 393 So.2d 955 (Ala.1981)). In this case, Whitfield's attorney did not request a curative instruction after the trial court sustained his objection. Generally, the objecting party's failure to seek a curative instruction "indicates satisfaction with the ruling; that party cannot later complain of the trial court's failure to do what it was not asked to do." *Walker*, 639 So.2d at 515. Nevertheless, this Court has also noted that "[b]ecause there was no admonition from the trial court, the influence of this improper argument was not eradicated from the minds of the jury." *Otis Elevator Co. v. Stallworth*, 474 So.2d 82, 84 (Ala.1985). Therefore, even though the trial court sustained Whitfield's objection and no corrective action was requested or taken, the trial court could have considered the opening statement by BMC's counsel in evaluating the cumulative effect of counsel's remarks and whether, in the context of the trial, those remarks were grossly improper and highly prejudicial.

*5 [8][9][10] The trial court granted Whitfield's motion for a new trial on the basis of the reference by BMC's counsel in his closing argument to an alleged deal between Dr. Pennington and BMC. Generally, unless there is an objection and it is overruled, "improper argument of counsel is not ground for new trial." *Southern Life & Health*, 518 So.2d at 81 (citing *Alabama Power Co. v. Henderson*, 342 So.2d 323, 327 (Ala.1976), and *Hill v. Sherwood*, 488 So.2d 1357, 1359 (Ala.1986)). However, there is an exception to the requirement that an objection must have been overruled in order for improper argument of counsel to serve as the basis for a new trial. A new trial may be granted based on improper argument of counsel, even where no objection to the statement was made, "where it can be shown that counsel's remarks were so grossly improper and highly prejudicial as to be beyond corrective action by the trial court." *Southern Life & Health*, 518 So.2d at 81. Thus, where the party seeking a new trial does not object to allegedly improper argument by opposing counsel, opposing counsel's statements can still serve as the basis for a new trial if, in the trial court's opinion, those statements are "grossly improper and highly prejudicial." *Southern Life & Health*, 518 So.2d at 81. In this case, Whitfield did not object to any part of the closing argument by BMC's counsel. Thus, counsel's remarks during closing argument can form the basis for a new trial only if the trial court properly concluded that the remarks were grossly improper and highly prejudicial. We proceed to consider whether the trial court plainly and palpably erred in reaching that conclusion.

[11][12][13] Whether argument of counsel is grossly improper or highly prejudicial is a fact-specific inquiry. This Court has explained:
"There is no hard and fast rule as to when a remark made by counsel in closing argument is deemed to be so grossly improper and highly prejudicial as to be

ineradicable from the minds of the jurors, notwithstanding a timely admonition from the trial judge. Each case must be decided in light of the peculiar facts and circumstances involved, and the atmosphere created, in the trial of each particular case."

Hill, 488 So.2d at 1359. Moreover, although it is not without bounds, "the trial court has great latitude in ruling on the propriety of an attorney's ... closing argument." *Hayden v. Elam,* 739 So.2d 1088, 1093 (Ala.1999) (citing *Prescott v. Martin,* 331 So.2d 240 (Ala.1976)).[FN1] The facts and circumstances in this case indicate that, under the applicable standard of review, the trial court's grant of Whitfield's motion for a new trial does not warrant a reversal because BMC has failed to show that the trial court's decision constituted plain and palpable error. *Curtis,* 575 So.2d at 1065-66.

The remarks by BMC's counsel during closing argument indicated that Dr. Pennington and Whitfield had made a "deal"-Whitfield would drop her claims against Dr. Pennington's practice group if Dr. Pennington would provide negative testimony against BMC.[FN2] BMC's counsel further stated that Whitfield dismissed Dr. Pennington's practice group as a defendant because Whitfield wanted to concentrate her efforts on her claims against BMC, because "it's easier for [the jury] to bring a verdict back-$7.5 million-against a hospital, a corporation, than it is a doctor." BMC's counsel argued that Whitfield wanted to focus on recovering from BMC, a corporation, which had more money than Dr. Pennington's practice group.[FN3]

*6 This Court has found similar arguments pertaining to the corporate nature of an entity and its resources to be grossly improper and highly prejudicial. In *Otis Elevator,* this Court found the following argument by counsel for the plaintiff to be an improper comment on the wealth of the defendant: " 'The same company that can afford to hire [an expert witness from New York] to come in and testify for Otis and against a hundred people who have been hurt on Otis elevators in the last four years, that's the company that's going to have to pay this judgment.' " 474 So.2d at 83. This Court held the following remark in *Allison v. Acton-Etheridge Coal Co.,* 289 Ala. 443, 446, 268 So.2d 725, 727 (1972), to be highly prejudicial: " 'It's a great thing, folks, to be a very wealthy man and to be able to go out here and hire two law firms with four lawyers.' " Plaintiff's counsel in *Southern Life & Health* stated the following with regard to the defendant corporation: " 'A corporation ... is a legal entity ..., but it's not a human being. It has no conscience. The only way you can punish a corporation is through monetary damages.' " 518 So.2d at 80. This Court noted that plaintiff's counsel's argument "was improper, highly prejudicial, and irrelevant to the issues." *Southern Life & Health,* 518 So.2d at 81.[FN4]

This Court also affirmed the trial court's grant of a motion for a new trial grounded on improper argument in a negligence action against multiple defendants, some of whom were individuals and one of which was a car dealership. *Taylor v. Brownell-O'Hear Pontiac Co.,* 265 Ala. 468, 91 So.2d 828 (1957). Commenting on the dismissal of Ritchie, one of the individual defendants, plaintiff's counsel stated in his closing argument that " '[w]e have also dismissed as to Mr. Ritchie. We don't want to penalize Mr. Ritchie. We are after somebody that can pay,' " referring to the car dealership. *Taylor,* 265 Ala. at 469, 91 So.2d at 828. The Court concluded that such remarks "were ... well calculated to influence the amount of the jury's verdict." *Taylor,* 265 Ala. at 469, 91 So.2d at 829. Similarly, in *American Ry. Express Co. v. Reid,* 216 Ala. 479, 113 So. 507 (1927), this Court found the following to constitute improper argument by counsel:

" ' "We are asking simply for justice which this boy is entitled to. And we are going to insist that he is entitled to some good round sum. It doesn't make any difference to the American Express Company, this defendant. What difference does it make to them what your verdict in this case is?" ' "

216 Ala. at 484, 113 So. at 510.

In the case before us, by alluding to the relative financial resources of BMC and the fact that BMC is a corporation, BMC's counsel essentially attributed to Whitfield improper arguments and made statements similarly calculated to prejudice the jury against Whitfield. Thus, we cannot conclude that the trial court's finding that the arguments of BMC's counsel were grossly improper and highly prejudicial is plainly and palpably wrong.

*7 In addition, the arguments by BMC's counsel were not based on a reasonable inference from the evidence presented at trial. This Court has noted that "counsel may comment on all proper inferences to be drawn from the evidence and may draw conclusions by way of argument based on the evidence." *Salser v. K.I.W.I., S.A.,* 591 So.2d 454, 457 (Ala.1991). BMC argues that its remarks concerning the change in Dr. Pennington's opinion as to Thelbert's cause of

death were similar to the statements made by defense counsel in *Seaboard Coast Line R.R. v. Moore*, 479 So.2d 1131 (Ala.1985). In *Seaboard*, this Court found that defense counsel's implication in closing argument that the plaintiff had persuaded a witness to change his testimony did not constitute error because there was testimony that the witness's trial testimony was inconsistent with the version of the events he had presented to the defendant before trial. *Seaboard*, 479 So.2d at 1136. The facts in this case are distinguishable from those in *Seaboard*, however, because Dr. Pennington's deposition testimony and subsequent trial testimony were consistent; thus, the rationale of *Seaboard* does not apply.

The argument by BMC's counsel that Dr. Pennington had entered into some sort of a "deal" with Whitfield pursuant to which he would provide testimony against BMC in exchange for his practice group's being dismissed from the action is not a proper inference that can be drawn from the evidence. BMC's counsel stated in closing arguments that Whitfield's "deal" with Dr. Pennington to change his testimony so that it would be damaging to BMC was "consummated" on March 7, 2005, the day before trial was set to begin. However, evidence presented by Whitfield at trial showed that Dr. Pennington's trial testimony as to the cause of Whitfield's death did not change and that his trial testimony was consistent with the statements he had made in his deposition in April 2004, when his group was still a defendant in the litigation. BMC does not provide evidence to the contrary.[FN5] Dr. Pennington testified at trial that Thelbert's "getting up out of bed, pulling out of his lines, having his blood pressure drop, the heart rate drop, getting in the trash can, and having this bowel movement-those probably led to the arrest, the cardiac arrest at that time." After providing that testimony, Dr. Pennington read the following exchange directly from the transcript of his deposition:

"[Whitfield's counsel]: Dr. Pennington, looking at the totality of the circumstances, isn't it probable that getting up out of bed, pulling the NG tube out, pulling the I.V. line out, that those were probably related to the [cardiac] arrest?

"[Dr. Pennington]: Yes.

"[Whitfield's counsel]: Okay. Why would that be true?

"[Dr. Pennington]: Well, because of the relative-I presume, the relative hypovolemia, the underlying coronary artery disease, assuming the upright position, having a bowel movement, all of those could have combined to lower the perfusion, limit the perfusion of his heart, and caused a fatal arrhythmia or heart attack."

*8 Dr. Pennington's testimony at trial as to the cause of Thelbert's death was consistent with his deposition testimony. The evidence does not support the inference that Whitfield's dismissal of Dr. Pennington's group from the action on the eve of trial was motivated by a desire to secure damaging testimony against BMC from Dr. Pennington-Whitfield did not need Dr. Pennington's trial testimony because she had already obtained damaging statements against BMC from Dr. Pennington during his deposition, and she could have introduced his deposition testimony into evidence if Dr. Pennington had testified differently at trial.

[14] In reviewing whether BMC's counsel's statements constitute improper arguments, we accord a presumption of correctness to the trial court's findings. *Salser*, 591 So.2d at 457. We cannot conclude that the trial court was plainly and palpably wrong in granting Whitfield's motion for a new trial because the statements by BMC's counsel regarding the corporate nature of BMC constitutes improper argument and his reference to Whitfield's alleged "deal" to obtain Dr. Pennington's testimony against BMC was not a reasonable inference based on the evidence presented at trial.

[15] The standard of review applicable to the trial court's grant of a motion for a new trial on the basis of improper argument by counsel requires us to affirm the trial court's ruling " 'unless some legal right is abused and the record plainly and palpably shows the trial judge to be in error.' " *Curtis*, 575 So.2d at 1066 (quoting *Kane*, 543 So.2d at 694). BMC does not demonstrate that any of its legal rights were abused, and the record does not support a finding that the trial court was plainly and palpably wrong in finding defense counsel's remarks in closing arguments improper and in granting Whitfield's motion for a new trial on that ground. As we have stated before, "since the trial court is present at the time when the argument is made, the trial court has great latitude in ruling on the propriety of counsel's arguments.... In particular, in passing on the question of ineradicable bias much should be left to the enlightened judgment of the trial court, with the usual presumptions in favor of the ruling made to that end." *Calvert & Marsh Coal Co.*, 393 So.2d at 959 (citing *Alabama Power Co. v. Bowers*, 252 Ala. 49, 39 So.2d 402 (1949), and *Pacific Mut. Life Ins. Co. v. Green*, 232 Ala. 50, 166 So. 696 (1936)). In light of the presumption of correctness accorded to the trial court's ruling on a motion for a new trial and based

on the facts and circumstances in this case, we cannot find that the trial court committed plain and palpable error.

Conclusion

BMC does not demonstrate that the trial court's grant of Whitfield's motion for a new trial encroached upon any of BMC's legal rights and that its ruling is plainly and palpably in error. Therefore, the trial court's judgment is affirmed.

AFFIRMED.

NABERS, C.J., and HARWOOD, STUART, and BOLIN, JJ., concur.

FN1. We note that during direct examination of Dr. Pennington, Whitfield's attorney voluntarily raised the issue of the purported "deal," asking Dr. Pennington whether BMC's allegations were true and whether he had received anything in return for his testimony at trial, to which Dr. Pennington responded that the allegations were not true. Whitfield's attorney made that statement in response to the opening statement by BMC's counsel and in anticipation of cross-examination. The fact that Whitfield's attorney raised the issue of the deal during direct examination does not prohibit the trial court from evaluating whether the remarks by BMC's counsel were grossly improper and highly prejudicial "in light of the peculiar facts and circumstances involved, and the atmosphere created, in the trial of each particular case." *Hill,* 488 So.2d at 1359.

FN2. The closing argument by BMC's counsel misstates the nature of Whitfield's claims against Dr. Pennington by implying that Whitfield had made a deal to dismiss Dr. Pennington as an individual defendant from the case. Dr. Pennington was never named an individual defendant in this case; Whitfield sued Dr. Pennington's practice group, not Dr. Pennington individually.

FN3. We note that Dr. Pennington's practice group, Montclair Surgical Associates, P.C., is also a corporation. BMC's counsel misstated that Whitfield's claims against Dr. Pennington were brought against him in his individual capacity, when, in fact, her claims were brought against Montclair Surgical Associates, P.C.

FN4. The defendant's objection to the argument was sustained, but its motion for a new trial, grounded in part on improper argument, was denied. This Court found that the trial court's denial of the motion for a new trial was not unjust and plainly erroneous because the trial court had sustained the defendant's objection to plaintiff's counsel's improper argument and offered to give the jury curative instructions. 518 So.2d at 81-82. However, it noted that an adverse ruling on the defendant's objection "would have required us to reverse and remand." 518 So.2d at 81.

FN5. BMC's arguments of inconsistency focus on the alleged change in Dr. Pennington's opinion as to Thelbert's cause of death from the time he signed Thelbert's death certificate to the time he was deposed. BMC does not argue that Dr. Pennington's deposition testimony is inconsistent with his trial testimony.

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CivR 19.1. Compulsory joinder.

(A) Persons to be joined. A person who is subject to service of process shall be joined as a party in the action, except as provided in division (B) of this rule, if the person has an interest in or a claim arising out of the following situations:

(1) Personal injury or property damage to the person or property of the decedent which survives the decedent's death and a claim for wrongful death to the same decedent if caused by the same wrongful act;

(2) Personal injury or property damage to a husband or wife and a claim of the spouse for loss of consortium or expenses or property damage if caused by the same wrongful act;

(3) Personal injury or property damage to a minor and a claim of the parent or guardian of the minor for loss of consortium or expenses or property damage if caused by the same wrongful act;

(4) Personal injury or property damage to an employee or agent and a claim of the employer or principal for property damage if caused by the same wrongful act.

If he has not been so joined, the court, subject to subdivision (B) hereof, shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H). If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. In the event that such joinder causes the relief sought to exceed the jurisdiction of the court, the court shall certify the proceedings in the action to the court of common pleas.

(B) Exception to compulsory joinder. If a party to the action or a person described in subdivision (A) shows good cause why that person should not be joined, the court shall proceed without requiring joinder.

(C) Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (A)(1), (2), (3), or (4) hereof who are not joined, and the reasons why they are not joined.

(D) Exception to class actions. This rule is subject to the provisions of Rule 23.

HISTORY: Amended, eff 7-1-96

CivR 59. New trials.

(A) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

(B) Time for motion. A motion for a new trial shall be served not later than fourteen days after the entry of judgment.

(C) Time for serving affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty-one days either by the court for good cause shown or by the parties by written stipulation. The court may permit supplemental and reply affidavits.

(D) On initiative of court. Not later than fourteen days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party.

The court may also grant a motion for a new trial, timely served by a party, for a reason not stated in the party's motion. In such case the court shall give the parties notice and an opportunity to be heard on the matter. The court shall specify the grounds for new trial in the order.

HISTORY: Amended, eff 7-1-96

CivR 60. Relief from judgment or order.

(A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.