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.*

## REPLY BRIEF OF APPELLANT MT. SINAI MEDICAL CENTER


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## I. FACTUAL REBUTTAL

The primary issues in this appeal are: 1) the proper standard of review for orders granting a new trial pursuant to Civ. R. 59(A)(2) and (4); 2) whether evidence of reasonably necessary future medical care must be supported by medical testimony and disclosed in discovery; and 3) whether the Trial Court abused its discretion when it determined that Plaintiff's counsel "pole vaulted" the "fine line between zealous advocacy and tainting a jury." (Appx. 76, App. Op. (dissent) 45.) Rather than address these issues, Plaintiff has focused on three incorrect and irrelevant arguments, summarized as "pivotal points" in the first paragraph of Plaintiff's Opposing Brief ("Opp. Br.") at 1.

The first bullet point is Plaintiff's claim that Mt. Sinai had some obligation to file a cross-appeal or cross-assignment of error in the Court of Appeals "on the issue of liability." Mt. Sinai could not file a cross-appeal from the order granting a new trial; it was the prevailing party. "A party to a civil lawsuit has no standing to cross-appeal a final judgment in its favor." *Hellman v. Motorists Mut. Ins. Co.* (2003), 153 Ohio App.3d 405, 413, ¶ 24. Mt. Sinai's Motion for New Trial requested a new trial on all issues – liability and damages. Judge Lawther granted a new trial on all issues – liability and damages – due to errors and pervasive misconduct that tainted the evidence. Thus, Mt. Sinai not only prevailed on the judgment, but as to the specific "issue of liability."

Further, there was no "error" in Judge Lawther's order relating to "the issue of liability" for Mt. Sinai to assert in a cross-assignment of error. The Trial Court correctly

concluded that Mt. Sinai's manifest weight of the evidence arguments were moot because misconduct and errors of law required a new trial. Having ordered a new trial based on tainted evidence, it would have been premature for the Trial Court to consider the "weight" of untainted negligence and proximate cause evidence. See, e.g., *In re Kangas*, 11th Dist. No. 2006-A-00110, 2006-Ohio-3433, ¶ 56 (it would be "premature" to address allegation that finding was against the manifest weight of the evidence, "as the same is moot in light of the remand"). Alternatively, in the event of a reversal, the appellate court can remand for further consideration of mooted issues. See, e.g., *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 124 (reversing and remanding for consideration of new trial arguments rendered moot in the appellate decision). As Plaintiff notes (Opp. Br. at 4), that is exactly what Mt. Sinai asked the Eighth District to do.

Equally incorrect is Plaintiff's second "pivotal point" – that Mt. Sinai "stipulated and/or elected not to object to $12,637,339 in economic damages." As is apparent from Plaintiff's later discussion (Opp. Br. at 11-12), Mt. Sinai stipulated to "Exhibit 13 as revised and Exhibit 14" – *not* to $12,637,339 in economic damages. Those exhibits were Plaintiff's updated life care plans. The life plans do *not* calculate economic damages – i.e., the fund of money required to implement the plan. To the contrary, they expressly caution that such calculations are to be performed by an economist. (See note at bottom of pages 470-471 in Supp. (Vol. 1).)[1] Economist Rosen performed the necessary calculation for the life plan and did not (like Plaintiff) use an incorrect formula or double-

[1] "Supp." refers to the Joint Supplement.

count medical expenses. Rosen's report stated that $6,501,443 was required to fund *all* future care expenses related to the life planner's home care "Option A," and $4,390,892 would fund *all* future care expenses related to the life planner's institutional care "Option B." (Supp. (Vol. 1) 664). Even adding the approximately $1.4 million to $3 million in alleged future wages (Supp. (Vol. 1) 563) provides a maximum award far below the $15 million awarded by the jury.

And Plaintiff's third "pivotal point" – that ex parte contact allegedly renders the new trial order "void ab initio" – is not an issue before this Court and finds no support in the record. What Plaintiff refers to as "ex parte contact" consisted of: 1) trial counsel carrying out their duty to inform the Trial Court, on the first day of jury deliberations, that prejudicial publicity had appeared on the front page of the morning newspaper; and 2) the Court's caution to jurors to disregard what they had read. (See Appx. 90-91, Tr. Op. 11-12):[2]

> 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

[2] "Appx." refers to the Appendix to Mt. Sinai's Opening Brief.

> should have been no conversation between the Court and jury off the record.

When trial counsel becomes aware of prejudicial newspaper publications, he or she *must* promptly "initiate *** [a] request to make *** inquiry of the jury," or waive the right to request a new trial based on such publication. *Diener v. White Consol. Indus., Inc.* (1968), 15 Ohio App.2d 172, 181. And "when a trial court learns of an improper outside communication with a juror, it *must* hold a hearing to determine whether the communication biased the juror." *State v. Phillips* (1995), 74 Ohio St.3d 72, 88 (emphasis added). Trial counsel could not effectively blunt the prejudicial effect of the newspaper article unless precautions were taken *before* the jury began its deliberations. The fact that Plaintiff's counsel had not yet arrived at court did not convert an obligation to inform the Court into prohibited "ex parte" contact. And although the trial judge should have made a record of his caution to the jury, he was understandably concerned that they not begin deliberating without a cautionary instruction is understandable.

Nor is the issue before this Court. All three appellate judges concluded that the irregularity did not support a new trial. (Appx. 20, 32, App. Op. 11, (dissent) 1.) Mt. Sinai did not appeal that ruling. Nor has Plaintiff explained how an irregularity that is too inconsequential to warrant a new trial, may nevertheless render a new trial granted on other grounds "void."

The remainder of Plaintiff's lengthy Introduction and Factual Statement (Opp. Br. at 1-21) is equally flawed:

- As predicted (see Mt. Sinai's Opening Brief at 10-11), Plaintiff continues to mischaracterize the context of Judge Lawther's mention of three words – "extremely strong case" – when he *dismissed* Plaintiff's wholly unsupported spoliation claim. (See Opp. Br. at 2 (and again at pp. 16, 22).)

- Typical of many contradictions throughout his Brief, Plaintiff argues on page 2 that the "thrust" of the new trial order was that "there was no competent or credible evidence to support the jury's finding of fact regarding damages" while, on the very next page, states that the new trial order was based "only" on attorney misconduct, passion and prejudice and irregularity, and "did not" include manifest weight of the evidence.

- Plaintiff's claims at pages 6-7 that Defendants "failed to make a record regarding most, if not all, of the issues they now raise," is not only incorrect, but also ignores the fact that this appeal arises from the *grant* of a new trial, based on the Trial Court's conclusion that it had committed error.

- At pages 8-9, Plaintiff claims that Defendants have "refused to accept responsibility" and mounted "desperate attempts to find error where none occurred," while ignoring that all Mt. Sinai seeks is a *fair* trial, as ordered by the trial judge.

- At pages 10-17, Plaintiff invokes the "abuse of discretion" standard as a license to launch personal attacks against the trial judge who had "the integrity to recognize the need for a new trial and order[ed] one" (Appx. 76, App. Op. (dissent) 45). Plaintiff's misuse of the standard of review proves the need for this Court to clarify how the abuse of discretion standard is properly applied to an order granting a new trial based on attorney misconduct that inflames juror passion and prejudice.

- At pages 18-19, Plaintiff defends his counsel's improper injection of attorneys' fees into evidence on the grounds that after enduring Michigan counsel's rebuke that it should "not give a knee-jerk reaction to something it hasn't heard of," the Trial Court accepted counsel's representation that *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657 (which counsel claimed to have "shepardized") expressly permits such evidence. (Supp. (Vol. 3) 2333, 2435; Supp. (Vol. 4) 2692-2693; Tr. 1552, 1652, 1906-1907). Had Mr. Fieger actually shepardized the *Digital* decision, he

> would have discovered that this Court overruled that portion of *Digital* conferring a right to a jury determination of attorneys' fees. See *Maynard v. Eaton Corp.*, 3rd Dist. No. 9-03-48, 2004-Ohio-3025 (explaining that as a result of the partial overruling of *Digital* in *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 557, a trial court may decide upon proper motion to submit attorneys' fees to the jury, but that does not mean that a plaintiff can unilaterally inject the issue into his case-in-chief).

## II. ARGUMENT REBUTTAL

Plaintiff merges several propositions of law into a single, rambling argument. To the extent possible, Mt. Sinai will extract those arguments relevant to the propositions of law accepted by this Court.

### A. The Appellate Majority Applied an Incorrect "Abuse of Discretion" Standard to Judge Lawther's New Trial Order.

Plaintiff's misapprehension of the critical "standard of review" issue before this Court is best illustrated in footnote 14, page 21, of his Opposing Brief:

> Defendant Mt. Sinai in its Memorandum in Support of Jurisdiction disingenuously stated that the standard of review for rulings made apropos to Civil Rules 59(2) and (4) was an issue of first impression. Defendants have not proposed such an argument since this Court has accepted review of the case.

Mt. Sinai's Opening Brief did, in fact, present this Court with the issue of first impression set forth in its Supporting Memorandum. See Mt. Sinai's Opening Brief at 17:

> 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 it 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.

Plaintiff assumes that use of the moniker "abuse of discretion" provides sufficient guidance to appellate courts reviewing trial court rulings on new trial motions. The errors of the majority in this case prove Plaintiff wrong. The application of the "abuse of discretion" standard to review a new trial ordered on the grounds of counsel misconduct that *tainted* the evidence, is different in kind and scope from the application of the "abuse of discretion" standard to review a new trial ordered on the grounds of the "manifest weight" of *untainted* evidence. A higher level of discretion should apply to the former, because such findings cannot be fully assessed through a review of the "cold record," and because they derive from a trial judge's duty to protect the integrity of the jury system from improper influences.

At a minimum, this Court should reject the appellate majority's application of a "presumption of correctness" to the tainted jury verdict (Appx. 19, App. Op. 10), narrow focus on the presence of some evidence supporting liability, and reversal without reviewing the entire transcript (compare Appx. 39-40, App. Op. (dissent) 8-9). And this Court should firmly reject Plaintiff's standard – which appears to consist wholly of launching personal attacks against the trial judge.

In fashioning the scope and nature of the correct application of the abuse of discretion standard to new trial orders based on attorney misconduct that inflamed juror passion and prejudice, this Court can draw from cases in Ohio and elsewhere that establish the following principles:

- A presumption of correctness is to be accorded *a trial court's findings* regarding the nature and effect of the misconduct;[3]

- The presence of some competent, substantial evidence of record supporting the verdict *is irrelevant* because the "acid" of the improper conduct has the effect of "eat[ing] away the factual evidence of record;[4] and

- A "plain and palpable" abuse of discretion standard should apply because: 1) the trial judge is in a far superior position to judge the effect of improper questions and argument vis-à-vis appellate courts reviewing a cold transcript;[5] 2) trial judges have an independent duty to maintain the integrity of trial proceedings;[6] and 3) orders that grant new trials – and thereby do not dispose of the litigation – merit greater deference than orders denying new trial motions.[7]

Applying these standards to the order below requires reinstatement of the Trial Court's new trial order.

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[3] See citations on page 18 of Mt. Sinai's Opening Brief, and *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314 (applying a presumption of correctness to a trial judge's new trial finding under the general authority of Civ.R. 59(D)).

[4] *Benson v. Heritage Inn, Inc.* (Mont. 1998), 971 P.2d 1227, 1231. See, also, *Anderson v. Botelho* (R.I. 2001), 787 A.2d 468, 471 (it is the taint, not the weight of the evidence that is at issue when reviewing the grant of a new trial based on counsel misconduct).

[5] E.g., *Jenkins* at 320 (trial courts are in a superior position to observe "the surrounding circumstances and atmosphere" of trial) and cases cited at pp. 19-20 of Mt. Sinai's Opening Brief.

[6] E.g., *Jones v. Macedonia-Northfield Baking Co.* (1937), 132 Ohio St. 341, 351 (it is the trial judge's "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"); *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).

[7] *Malone v. Courtyard by Marriott* (1996), 74 Ohio St.3d 440, 448.

## B. The Trial Court's Erroneous Admission of Unsupported, Undisclosed Economic Testimony Cannot be Corrected by Remittitur.

In its second proposition of law, Mt. Sinai pointed out that: 1) all three members of the appellate panel agreed that the $30 million verdict was both excessive and the product of incompetent evidence (Appx. 21-23; App. Op. 12-14); 2) an excessive award induced by incompetent evidence can only be corrected with a new trial (*Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, paragraph three of the syllabus); and 3) the majority therefore erred when it substituted "remittitur" for the trial judge's new trial order. (See Mt. Sinai's Opening Brief at 25-26.)

Plaintiff agrees the appellate court found the award to be manifestly excessive and induced by incompetent evidence. (Opp. Br. at 40-41.) Plaintiff does not (and cannot) claim that he offered *any* medical testimony that Walter Hollins needs, or will need, 24-hour care from an RN or LPN. Instead, Plaintiff asks this Court to abandon a reasonable necessity standard for medical care and adopt a "best care money can buy" evidentiary standard. (See Opp. Br. at 40.)

This Court should decline Plaintiff's invitation. Requiring medical evidence to show reasonably necessary future care serves several fundamental purposes. The rule is consistent with the prohibition against speculative damages: "[T]he damages that result from an alleged wrong must be shown with reasonable certainty, and cannot be based upon mere speculation or conjecture ***." *Kahn v. CVS Pharmacy, Inc.* (2006), 165 Ohio App.3d 420, 426, ¶ 25 (citation omitted). And it is consistent with the goals of our

civil jury system to provide impartial verdicts based on rational assessments of competent evidence. See *Velocity Express Mid-Atlantic, Inc. v. Hughen* (Va. 2003), 585 S.E.2d 557, 563-564 (reversing verdict where plaintiff appealed "to the economic fears and passions" of the jury by arguing that they should award an amount sufficient to employ 24-hour nursing care because that is what the "world's richest people" would have).

Plaintiff's one-sentence support of the remittitur order (Opp. Br. at 41), raises more questions than it answers. As this Court noted in *Duracote Corp. v. Goodyear Tire & Rubber Co.* (1983), 2 Ohio St.3d 160, 162 (quoting 6A Moore's Federal Practice 59-208, ¶ 59.08[7], emphasis omitted), remittitur is proper when "'the effect of the error can be reasonably approximated to a definite portion of the amount of the verdict,'" such that the appellate court "'may condition its affirmance on the plaintiff remitting that amount of the verdict which is apparently traceable to the error below.'" The tainted verdict in this case fails that test in several respects.

First, the excessive verdict is not only the product of incompetent evidence, but is also tainted by gross and pervasive attorney misconduct affecting liability and damages. Second, the incompetent evidence tainted both the economic and non-economic damage awards. As the Trial Court and a unanimous appellate panel concluded, the jury arbitrarily "matched" its non-economic award to the excessive economic award. (Appx. 86, Tr. Op. 7, and Appx. 22-23, App. Op. 13-14.) Third, the proper economic evidence gave the jury a choice – a maximum of approximately $4.4 million for institutional care, or $6.5 million for home care, as well as a wide range of possible lost wages. A

remittitur would have to speculate as to which of these options an unimpassioned jury would choose. Because the record does not permit the deduction of an amount traceable to the error, remittitur is an improper remedy.

A fourth reason precludes remittitur – Mt. Sinai did not retain a damages expert in reliance on the pretrial reports and depositions of Plaintiff's experts. Plaintiff now seeks to defend the excessive jury verdict based upon the following conclusory statement on page 27 of his Opposing Brief (emphasis in original):

> Contrary to the Trial Court's assertion, the outcome of the trial was not a "close call." (P.Appx. 81, Tr. Op. 2). Defendants failed to present ***any*** evidence rebutting Plaintiff's damages evidence.

The first sentence ignores the fact that even with the taint of counsel misconduct, only six of the eight jurors found that Mt. Sinai was negligent (Supp. (Vol. 1) 151-152); only six found that any negligence by Mt. Sinai proximately caused Plaintiff's injuries (id. at 153); and only six agreed on the damage award (id. at 150). Reasonable minds could *only* agree with Judge Lawther's conclusions that not only was Plaintiff's verdict a "close call," but that the deciding factor was counsel misconduct and a trial technique "designed to manipulate and mislead the jury," which "helped him achieve a clearly unjustified verdict." (Appx. 81, Tr. Op. 87-88.)

The second sentence ignores the fact that Defendants did not retain an independent economic expert or life care planner to rebut Plaintiff's damages evidence "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.) When the Trial Court

erroneously permitted Plaintiff's economist to deviate from those reports, "the jury was left with a cost inflated beyond what the evidence justified and, more importantly, without any expert testimony to attack its excessiveness." (Id.) Such errors cannot be corrected by remittitur.

### C. The Trial Court and Appellate Dissent Were Correct – Ohio Courts Will Not Tolerate Pervasive Misconduct that Inflames the Passions and Prejudices of the Jury.

Plaintiff summarizes the multiple forms of pervasive misconduct by his trial counsel as follows:

> What Mr. Fieger did, and what Defendants object to, is point out that Defendants' position at trial and the testimony of their witnesses did not make sense and lacked any semblance of credibility.

(Opp. Br. at 29). The record shows otherwise.

Appellate counsel claims that "Mr. Fieger never personally attacked Defense Counsel in front of the jury." (Id.) That statement simply cannot square with Plaintiff's rebuttal argument (to which counsel knew there could be no response) that:

> Mr. Groedel [Mt. Sinai's trial counsel] and Mr. Farchione [NOHS' trial counsel] get to go back to their offices and they get 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. *** It's about money. *** [T]hey're not in trouble. Nothing is going to happen to them. Nobody is going to be punished.
>
> MR. FARCHIONE: Objection, your Honor.
>
> MR. FIEGER: They just don't want justice.
>
> THE COURT: Overruled. I've given lots of latitude in final argument.

> MR. FIEGER: They don't want justice. It's about money. How much money they save, five or six million.

(Supp. (Vol. 4) 3093-3094).[8]

At pages 30-31 of his Opposing Brief, Plaintiff claims that closing argument on the dismissed spoliation claim was proper because:

> The evidence that important medical records were missing and that some were altered was directly relevant to the issue of Defendants' credibility.

To the contrary, there was *no* evidence that "important" medical records were missing or altered, as the Trial Court made clear to counsel at the close of Plaintiff's case. (Supp. (Vol. 3) 2418, Tr. 1637). Further, Plaintiff cannot rely on the general rule that counsel may challenge witness credibility in closing argument – the rule does not apply to excluded evidence. *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 347-348 (reversing and remanding for new trial where counsel commented on evidence which had been declared inadmissible) Accord *Dillon v. Bundy* (1991), 72 Ohio App.3d 767, 772 (the "wide latitude" accorded counsel in closing argument is "subject to the restriction that it is impermissible to comment on incompetent, inadmissible or improper evidence which is patently harmful").

And when the improper "credibility" argument is directed at essential issues in the case, a new trial is required. See *Drake*, 15 Ohio St.3d at 348 ("counsel's closing

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[8] The excerpt illustrates why defense counsel did not object to every instance of misconduct. When they did object, the objection was overruled and the improper remark repeated.

argument is not directed at the credibility of any appellees' witnesses but rather at the central issue in the case *** [f]or that reason, we find such closing argument to be improper"). Accord *Badalamenti v. Beaumont Hosp.-Troy* (Mich. App. 1999), 602 N.W.2d 854, 860 (ordering new trial based on (in addition to other misconduct) Mr. Fieger's accusations in closing argument that defendants "destroyed, altered, or suppressed evidence"). Here, as in *Drake* and *Badalamenti*, Plaintiff's counsel directed his "cover up" allegations to the essential issues of the case. See, e.g., Supp. (Vol. 4) 2969-2970, Tr. 2179-2180 ("Cover ups really do happen when people say oh, my God, you know what? We brain damaged a little baby" *** Six months after they wrote birth asphyxia they started the cover up and crossed it out to try to begin to change the record").

Finally, the Trial Court specifically rejected Plaintiff's claim that his improper argument was simply "zealous advocacy." See Appx. 89, Tr. Op. 10 ("The court finds *** that his conduct far exceeded such permissible attributes"). Indeed, if the litany of misconduct recited in the Trial Court's order (Appx. 87-90, Tr. Op. 8-11), the appellate dissent (Appx. 39-76, App. Op. (dissent) 8-45), Defendants' Opening Briefs (e.g., Mt. Sinai Opening Br. at 2-7, 36-43), and permeating the entire trial transcript (Supp. (Vols. 2-4)) constitutes "zealous advocacy," then there are *no* bounds on prejudicial misconduct in Ohio, because this case has them all.

Plaintiff's suggestion at page 32 that Defendants "opened the door" to gross appeals to passion and prejudice by co-defense counsel's single mention of "mother

nature and God" compares apples and oranges. Equally devoid of merit is Plaintiff's claim at pages 20, 31-32 and 38-39 that his counsel was provoked into misconduct. Even if true (and it is not), two wrongs do not make a right. See, e.g., *Columbus Ry. v. Connor* (1905), 6 Ohio C.C. (n.s.) 361, 369-370:

> Whenever there is violent contention between counsel, the jurors are led to take sides because it is human to do so, the result being that passion and prejudice find easy lodgement in their minds and vitiates their verdict. *** It is not a sufficient excuse to say that there was provocation, and that opposing counsel were guilty of the same offense. If theirs had been the verdict and that were found to be true, theirs would be the reversal.

See, also, *Love v. Wolf* (Cal. App. 1964), 226 Cal.App.2d 378, 391-92 (emphasis in original) ("We could be more critical of instances of *their* impropriety if the over-all picture were not so patently one in which defense counsel, unprotected by the judge presiding, were left to parry the thrust of plaintiff's attorney as best they could").

Finally, Plaintiff insists that a new trial was precluded by defense counsel's failure to object to each and every instance of misconduct. (Opp. Br. at 6, 33). That argument fails on several grounds. First, trial courts have an independent duty to protect the integrity of the trial process, even in the absence of an objection:

> It is the duty of the trial judge to repress unwarranted charges of a scurrilous character and gratuitous personal attacks against a party to a suit in cross-examination and in argument to the jury; and the trial judge should interpose and not only admonish offending counsel and prevent further improper and prejudicial cross-examination and argument to the jury based thereon but should also promptly instruct the jury relative thereto. Failure of the judge so to do constitutes prejudicial error.

*Plas v. Holmes Constr. Co.* (1952), 157 Ohio St. 95, paragraph three of the syllabus.

Second, having failed to interject, the Trial Court has an obligation to grant a new trial when a review of the transcript demonstrates that misconduct inflamed the jury, even in the absence of a Rule 59 motion. *Cleveland, Painesville & Eastern R.R. v. Pritschau* (1904), 69 Ohio St. 438, 447 (trial court's grant of a new trial was "a too long deferred recognition" of misconduct); Civ.R. 59(D) (a court can grant a new trial "of its own initiative"). Attorneys thus cannot "waive" a trial court's independent duty to protect the integrity of the jury system.

Third, the relative scarcity of objections is wholly understandable. Trial counsel for the Defendants learned early on that their objections would be promptly overruled, which simply encouraged Mr. Fieger to repeat the improper question or argument.[9] In fact, as noted by the dissenting judge (Appx. 52-65, App. Op. (dissent) 21-34), Mr. Fieger's misconduct continued whether or not there were objections and whether or not the objections were sustained. All of this would have been apparent to the trial judge, who reviewed the entire 2,400-page transcript before ruling on the motion for new trial. (Appx. 81, Tr. Op. 2.)

[9] In opening statement alone, defense counsel's objections were overruled four times. (Supp. (Vol. 2) 1132-1133, 1136, 1151, 1176, Tr. 363-364, 367, 382-383, 407.) The only objection sustained was to Mr. Fieger's blatant violation of an in limine order. (See Supp. (Vol. 2) 1173, Tr. 404).

### D. Evidence Relating to Dr. Hatoum Should Be Excluded at the Re-Trial.

In response to Mt. Sinai's fourth proposition of law, Plaintiff states that the *Comer* argument is "moot," because "[t]he jury found that Mt. Sinai was liable *** for the negligence of the nurses" and "[t]here was no [jury] finding of negligence on the part of independent contractor anesthesiologist, Dr. Hatoum." (Opp. Br. at 41.) Mt. Sinai asks this Court to confirm that because Plaintiff concedes that a jury found no negligence on the part of Dr. Hatoum, principles of res judicata preclude Plaintiff's presentation of any evidence at the retrial of this matter relating to allegedly negligent acts or omissions by Dr. Hatoum.

## III. CONCLUSION

The appellate majority erred when it failed to account a presumption of correctness to the Trial Court's findings that:

- The jury had "the difficult duty" of deciding a case that "was clearly a close call"; it was counsel's "theatrical *** overbearing, discourteous" conduct, including "testifying for the witness" and other techniques "designed to manipulate and mislead the jury," that "helped him achieve a clearly unjustified verdict";

- Had it agreed to the side bar conference requested by defense counsel during Dr. Rosen's testimony, the Trial Court would have prevented testimony of costs "which were not covered" in the economist's updated report, and which were based on a "level of care that no doctor or other expert had recommended"; as a result of that error, Dr. Rosen testified to figures that "amounted to approximately triple the amount contained" in his report, testimony that "had a very strong influence on the jury ***;

- The evidence in this case does not support a $30 million verdict; the award of $15 million for non-economic damages is "so out-of-line" with the evidence "that it must have been the result of passion and prejudice;" "it appears that *** the jury simply matched the excessive $15,000,000 it had already awarded for economic damages ***"; and "the jury simply lost its way, and ignored the Court's charge on the law"; and

- Counsel's misconduct, including closing argument, "far exceeded" the "permissible attributes" of zealous advocacy; counsel repeatedly appealed to "the jury's natural sympathy through passion and prejudice," including "adopting the words of Jesus Christ" and straying "far beyond the bounds of theatrical license."

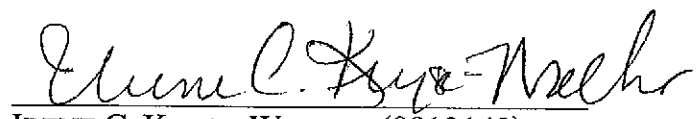
(Appx. 81, 83, 84, 85, 86, 87, 88, 89; Tr. Op. 2, 4, 5, 6, 7, 8, 9, 10.) These findings of errors and misconduct that tainted the evidence presented to the jury, require a new trial. Indeed, the majority's agreement with the Trial Court's conclusion that erroneously admitted future care costs were: 1) based on a level of care unsupported by any medical or other expert testimony; and 2) triple the costs disclosed in discovery, require a new trial standing alone. Further, if the appellate majority had followed this Court's admonition 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" (*Pesek v. Univ. Neurologists Assn., Inc.* (2000), 87 Ohio St.3d 495, 502), it would not have substituted an unworkable "remittitur" for the trial judge's new trial order.

In addition to errors in the standard of review and proper remedy, Mt. Sinai respectfully urges this Court to correct the appellate majority's inexplicable conclusion that the gross and persistent misconduct touched upon in the Trial Court decision, and set out in more detail in the 45-page appellate dissent, "may have been questionable," but

does not support the Trial Court's new trial order. (Appx. 21, App. Op. 12.) Condonation of such conduct does a grave disservice to the bench, the bar, the clients they represent, and the system they are sworn to uphold.

For all of these reasons, as set forth more fully above and in Mt. Sinai's Opening Brief, Mt. Sinai respectfully requests entry of a judgment: 1) reversing the majority decision of the Court of Appeals; 2) reinstating the Trial Court's new trial order; and 3) confirming that all allegations relating to any alleged medical negligence on the part of Dr. Bechara Hatoum have been fully and finally resolved in the doctor's favor.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 1st day of March, 2007, by U.S. Mail, postage prepaid, upon the following:

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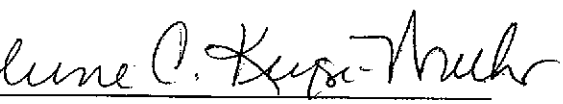

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