FILED
LORAIN COUNTY

2024 DEC 27 P 2:59

COURT OF COMMON PLEAS
TOM ORLANDO

To the Clerk: THIS IS A FINAL APPEALABLE ORDER. Please serve upon all parties not in default for failure to appear; Notice of the Judgment and its date or entry upon the Journal

# LORAIN COUNTY COURT OF COMMON PLEAS
## LORAIN COUNTY, OHIO
## JOURNAL ENTRY
## Hon. D. Chris Cook, Judge

Date Dec. 27, 2024 Case No. 21CV202837

JENNIFER GARCIA
Plaintiff

Matt Dooley
Plaintiff's Attorney

VS

JAMES K. MATHESON, D.O., *et al.*
Defendants

Erin Hess
Defendant's Attorney

This matter is before the Court on Plaintiff's Motion for a New Trial, filed November 4, 2024; Defendants' Brief in Opposition, filed December 2, 2024; and Plaintiff's Reply, filed December 16, 2024.

**The Motion for a New Trial is not well-taken and hereby DENIED.**

**THIS IS A FINAL, APPEALABLE ORDER.** *State ex rel. Board of State Teachers Ret. Sys., v. David, Judge, et al.*, 2007-2205, ¶ 48, as an underlying final, appealable order exists.

IT IS SO ORDERED. See Judgment Entry.

**JUDGE** D. CHRIS COOK

cc: Dooley, Esq.
Hess, Esq.

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## I. INTRODUCTION

This matter is before the Court on Plaintiff's Motion for a New Trial, filed November 4, 2024; Defendants' Brief in Opposition, filed December 2, 2024; and Plaintiff's Reply, filed December 16, 2024.

## II. PROCEDURAL HISTORY

On September 30, 2024, the Court commenced day one of a five-day jury trial.

On October 8, 2024, the jury returned verdicts in favor of Defendants. On the same day, the Court entered judgment in favor of Defendants, taxed costs to Plaintiff, and designated its Order as a final appealable order.

On November 5, 2024, the Plaintiff filed a motion for a new trial, and the Court entered an Order setting a briefing schedule for Plaintiff's motion and noted that, pursuant to App. R. 4(B)(2)(b), the time in which to file a notice of appeal begins to run when the Court enters an order resolving the last pending post-judgment motion, which herein, is Plaintiff's motion for a new trial.

This matter is now ripe for disposition.

## III. ABBREVIATED STATEMENT OF PERTINENT FACTS

Based upon the evidence established at trial and presented by the parties in their respective briefs, the substantive facts of this case are not in material dispute.

Defendant, Dr. James K. Matheson ("Dr. Matheson"), was Plaintiff, Jennifer Garcia's ("Garcia"), treating physician for many years. He delivered her child and attended to her gynecological needs both before and after the child's birth.

A number of years before Dr. Matheson began caring for Garcia, she had her right ovary removed in a procedure known as an oophorectomy. Garcia continued to treat with Matheson thereafter and eventually underwent a surgical procedure to treat additional gynecological issues. It is undisputed that prior to this procedure, Garcia was very specific that she did not want her last remaining ovary removed.

Garcia testified that she received Dr. Matheson's assurance that he would not remove the ovary. Dr. Matheson testified that he would do everything possible to save the ovary, but that he did not, and never would, guarantee that the ovary would not need to come out.

During the surgical procedure, Dr. Matheson discovered significant medical issues present and determined that due to the ovary being encased in a large tumor, it had to be taken out. Despite acknowledging Garcia's wishes to retain the ovary, Dr. Matheson testified that he exercised his medical judgment that it had to be removed.

Significantly, the removal of Garcia's last remaining ovary forced her into surgical menopause, also know as iatrogenic menopause, years before she likely would have begun natural menopause.

As part of Garcia's post-surgical care, she sought treatment from a number of physicians and OBGYN's to care for her early onset, surgically-induced menopause. She underwent a number of different treatment modalities with different physicians in order to correct the hormonal deficit caused by the loss of her last ovary. Garcia testified that none of these treatments truly addressed her health issues and that even at the time of the trial, she was still trying to find a suitable treatment protocol.

Important for our purposes herein, Garcia treated with Dr. Habibeh Gitiforooz ("Dr. G"), an OBGYN, sometime in 2021. Garcia's treatment with Dr. G did not last long, and ended sometime in early 2022. (TP-1.) Thereafter, after having little success with other physicians who attempted to treat Garcia with hormone replacement therapy ("HRT"), she went back to Dr. G in March of 2024, and treated with her up to and including the time of the trial. (TP-2.)[1]

[1] TP-1 and TP-2 refer hereinafter to "Treatment Period 1" (2021-2022) and "Treatment Period 2" (March, 2024 to present.)

## IV. ANALYSIS

### PLAINTIFF'S MOTION FOR A NEW TRIAL

The sole issue for determination is Garcia's motion for a new trial. As discussed *infra*, the motion for a new trial is not well-taken.

In arguing for a new trial, Garcia urges that the Court erred in prohibiting testimony from one of her experts, Dr. G, relative to her treatment of Garcia during the time period 2021-2022 (TP-1) and after March 2024 (TP-2).

Defendants counter that Garcia stopped treating with Dr. G after a short period of time in 2022, that Garcia never identified Dr. G as an expert trial witness, nor did Dr. G produce an expert report, and that Garcia never supplemented Dr. G's records until days before the trial date, far past discovery cutoff. Importantly, Defendants urge that Dr. G's testimony only went to damages and, as no liability was found on behalf of Defendants, the exclusion of Dr. G's testimony, if error, is nevertheless harmless.

This Court agrees with Defendants.

### STANDARD OF REVIEW

CIV. R. 59(A)

Both parties correctly cite to Civ. R. 59(A) in arguing their respective positions as to why this Court should, or should not, grant a new trial. Judge Stevenson of the Ninth District Court of Appeals recently stated,

> The standard of review for a trial court's ruling on a motion for new trial under Civ.R. 59(A) depends on the grounds for the motion. *Jackovic v. Webb*, 2013-Ohio-2520, (9th Dist.), ¶ 17. "For motions brought under Civ.R. 59(A)(1)-(6) and (8), a trial court's ruling 'is reviewed for * * * abuse of discretion,' whereas for motions brought under Civ.R. 59(A)(7) and (9), a trial court's ruling 'is reviewed de novo.' * * *

*Gallagher, et al. v. Fast, et al.*, 2024-Ohio-1003, (9th Dist.), ¶ 16.

Here, Garcia posits her argument for a new trial on two prongs of Civ. R. 59(A). First, Civ. R. 59(A)(1), which reads,

> 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.

**CIV. R. 59(A)(1)**

Judge Shaffer of the Ninth District discussed the standard of review for a trial court when considering a motion for a new trial under Civ. R. 59(A)(1),

> "Among the reasons listed in Civ.R. 59(A), a new trial is warranted upon a finding of sufficient prejudicial error; that which prevents a fair trial." *Telxon Corp. v. Smart Media of Delaware, Inc.*, 2005-Ohio-4931, (9th Dist.), ¶ 14. Civ. R. 59(A)(1) permits a new trial based on an "* * * abuse of discretion, by which an aggrieved party was prevented from having a fair trial[.]" We review a trial court's granting of a new trial pursuant to Civ.R. 59(A)(1) for an abuse of discretion. *Texlon Corp.* at ¶ 13.

*Marquez v. Jackson,* 2018-Ohio-346, ¶ 24.

**DISCUSSION**

At the outset, it cannot be lost on the parties, as it is certainly not lost on this Court, that the thrust of the controversy raised by Garcia's motion for a new trial, despite all of the moving pieces and arguments advanced, is really nothing more complicated than a ruling on the admission, or exclusion, of evidence.

The fact that this is a complex medical malpractice action does not impact the Court's evidentiary determinations, and to be sure, this Court, like all trial courts, is afforded significant latitude when ruling on evidentiary issues.

In a recent medical malpractice case brought against a physician-gynecologist for negligently delivering a baby, the Ninth District upheld numerous evidentiary decisions made by the trial court, including the decision to exclude two of the plaintiff's experts. In the 102-paragraph decision, the Ninth District, on at least four occasions, reiterated the trial's court role in being the evidentiary gatekeeper. For example,

> The trial court enjoys broad discretion regarding the admission or exclusion of evidence, and this Court will not overturn the trial court's ruling absent an abuse of discretion and a showing of material prejudice. * * * **The judgment of the trial court will be reversed only if the reviewing court finds that the trial court clearly abused its discretion by excluding the proffered evidence, and that the exclusion materially prejudiced the complaining party.** * * * "Material prejudice occurs when, after weighing the prejudicial effect of the errors, we are unable to find that without the errors the fact finder would probably have reached the same decision." * * *

*Ellis, et al. v. Fortner, M.D., et al.*, 2021-Ohio-1049, (9th Dist.), ¶ 25, Callahan concurring in part and dissenting in part, emphasis added.

And later, again sustaining the trial court's evidentiary rulings, the *Ellis* court stated,

> "A decision to admit or exclude evidence will be upheld absent an abuse of discretion." * * * "Even in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice." *Id.* "**Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected** * * *." Evid.R. 103(A).

*Ellis, et al., supra,* at ¶ 37, emphasis added.

In the case at bar, recall that Garcia treated on two occasions with Dr. G. The first treatment period was of short duration, in 2021-2022, TP-1. The second treatment period began in March of 2024, and continued through trial, TP-2. Dr. Matheson was aware that Garcia treated with Dr. G and he had her medical records from TP-1.

But, Dr. Matheson *was not* aware that Garcia had gone back to Dr. G and began treating with her again, TP-2. And, Dr. Matheson did not have any of Dr. G's medical records or bills from TP-2.

In addressing this matter, this Court attempted to find a middle ground that did not entirely exclude any mention or evidence that Garcia had treated with Dr. G, both during TP-1 and TP-2, against admitting her records and testimony that clearly were surprising, prejudicial, and untimely provided to Dr. Matheson for TP-2.

This Court engaged with counsel for Garcia on this issue thus,

> THE COURT: So Mr. Dooley or Mr. Gambala, how do – to me there's a point, if there – if she treated August, September with her physician, maybe, maybe I could see the records coming in because she has - - she's going to continue to treat as some point. You can't – you can't continually update medical records to the day of trial and except the Plaintiff – the Defendant to be prepared.

> But on the other hand, if she started treating in May, that's – we're talking months ago. **How come they weren't given notice that she's got a new doctor that you intend on calling**? Or not a new doctor, but she's revisiting this doctor. **How do we avoid any prejudice or unfair surprise of the Defendants by the introduction of medical records that they weren't provided prior to a week ago?**[2]

Axiomatic in this exchange is the implication that it was Garcia's duty to timely supplement discovery with the evidence she intended to introduce at trial. After all, the fact the Garcia identified Dr. G as an expert and provided her medical records for the treatment period in 2021-2022, TP-1, *does not* account for the fact that Garcia went back to Dr. G for treatment two years later.

Garcia argues that because Dr. Matheson was aware of Dr. G as an identified witness and could have obtained her medical records with the authorizations that were provided or depose Dr. G, that is enough – but it is not.

Recall that Garcia testified that she had completed treating with Dr. G in 2022 and provided her medical records for that treatment TP-1. But Garcia never advised Dr. Matheson that she had begun treating anew with Dr. G, nor did Garcia provide Dr. Matheson with any records related to TP-2 until days before trial. As such, for Garcia to argue that Dr. Matheson should have somehow known or inquired as to Garcia's treatment with Dr. G a second time is both unreasonable and improvidently shifts the burden of production and supplementation from Garcia to Dr. Matheson.

On this point, in addition to this Court's pre-trial discovery orders and Local Rules, the Ohio Rules of Civil Procedure are clear,

> A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of person having knowledge of discoverable matters, and (b) **the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify.**

Civ. R. 26(E)(1), emphasis added.

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[2] Transcript of Proceedings, 9/30/24, Page 24, Lines 10-25, emphasis added.

To that end, Garcia had an affirmative duty to supplement her discovery provided to Dr. Matheson with the information that she had returned to Dr. G for treatment and Garcia had a duty to supplement Dr. G's medical records for the second period of treatment, TP-2, well in advance of the trial. That she did so days before the trial was to begin is simply too little, too late.

Also keep in mind that Dr. Matheson sent Garcia a letter on March 15, 2024, addressing discovery. In that letter, Dr. Matheson's counsel writes,

> "We also need to get updated medical records from the following:"
> **Dr. Habibeh Gitiforooz**[3]

Clearly, Garcia had an affirmative obligation to *timely* advise Dr. Matheson that she had re-engaged treatment with Dr. G. Any other interpretation of this obligation would distort the purpose of the Civil Rules, which is to avoid ambush or surprise and the attendant prejudice it can cause. And, keep in mind, despite the late disclosure, this Court nevertheless allowed Garcia to testify that she was treating with Dr. G and the Court allowed Dr. G's medical bills to be admitted, even for TP-2.

When ruling on significant evidentiary issues, like the exclusion of a party's expert witness, this Court is cognitive of the impact such a decision may have on the party's ability to prosecute or defend the case. In most situations, like the one at hand, this Court attempts to find a middle ground that allows some controverted evidence to be admitted, while excluding the most untimely or prejudicial evidence.

Such was done here.

This Court excluded the testimony and medical records of Dr. G for the second treatment period because Garcia never advised Dr. Matheson that she had re-engaged Dr. G's services. But, this Court did allow Garcia herself to testify that she was currently treating with Dr. G and the Court allowed the introduction of Dr. G's medical bills for TP-2.

This Court makes one additional observation.

At the hearing on this matter before the start of trial, Garcia *did not* press this Court to allow Dr. G to testify as to TP-1, but focused her argument and attention to Dr. G's proposed testimony relative to TP-2.

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[3] See Exhibit 2, attached to, and filed contemporaneously with, Defendant's BIO. Emphasis added.

The following exchange is illuminative,

> MR. DOOLEY: [Garcia] recently went back to Dr. Gitiforooz to try experimenting with pellet therapy again. **That's what we're talking about. We're talking about that more recent time period, including all the way up to September 18th**, when she only had her second – not lengthy course, but second injection . . . and she's going to testify about that to the jury . . . **But what's really important is what she's paying for this treatment** . . . That's not a big surprise, it's not prejudicial. I don't think it's going to influence their experts' opinions at all.[4]

While this Court did exclude Dr. G's testimony relative to TP-2, it overruled Dr. Matheson's motion *in limine* in part and allowed Garcia to testify to that which she argued was "really important," to wit: what she was paying for Dr. G's treatment.

As such, this Court submits that it did not abuse its discretion in this regard and the decision to exclude Dr. G's testimony did not affect any of Garcia's substantial rights.

**Civ. R. 59(A)(9)**

Garcia posits her second argument for a new trial on Civ. R. 59(A)(9), which reads,

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

While there is not much guidance from the courts of appeals relative to a Civ. R. 59(A)(9) evaluation, Judge Hensal of the Ninth District gives some direction, to wit:

> The Bowermans also argue that the trial court incorrectly denied their motion for new trial under Civil Rule 59(A)(9). That rule provides that "[a] new trial may be granted * * * upon any of the following grounds: * * * [e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application." "This Court reviews a motion for new trial that is made on the basis that the trial court made an error of law de novo." *Jackovic*, 2013-Ohio-2520, (9th Dist.) at ¶ 19.

[4] Transcript of Proceedings, 9/30/24, Pages 25-26, Lines 19--25, 1-9, emphasis added.

*Bowerman, et al. v. Taylor, M.D., et al.*, 2019-Ohio-511, (9th Dist.), ¶ 10.

**DISCUSSION**

In analyzing Garcia's argument relative to this prong of Civ. R. 59(A), the first question one might ask is what is an "error of law?" Clearly, Garcia brought this matter to the attention of the trial court when she responded in opposition to Dr. Matheson's motion *in limine* to exclude testimony about Dr. G's treatment of Garcia during TP-2.

Thus, the sole inquiry here is whether or not this Court's decision to exclude Dr. G's testimony relative to TP-2 was an "error of law."

We know that the standard of review for a court of error correction is different here, it is a *de novo* review where the court of appeals need not give any weight to this Court's findings, but reviews this Court's decision anew.

But does a trial court make an error of law when erroneously ruling on an evidentiary issue? And if so, what of it?

That appears to be the conundrum.

After all, whether a reviewing court analyzes the evidentiary decision this Court made to exclude Dr. G's testimony under an abuse of discretion standard or *de novo*, it is really the same analysis. That is, was this Court correct, or incorrect, to exclude her testimony?

There is some case law out there that discusses what, in fact, an "error of law" is, though admittedly, how helpful those cases are remains in doubt.

For example, an Eigth District Court of Appeals case distinguished between an abuse of discretion and error of law and seems to say that an error of law is a *lesser* error than an abuse of discretion.

> This court finds no merit in Smalley's argument that the trial court's decision to deny his motion for a protective order was an abuse of discretion. To constitute an abuse of discretion, **the ruling must be more than legal error**; it must be unreasonable, arbitrary, or unconscionable. * * *

*Smalley v. Friedman, Damiano & Smith*, 2007-Ohio-2646, (8th Dist.), ¶ 20.


As such, at least according to this case's analysis, a trial court can issue a legally erroneous evidentiary ruling that does not constitute an abuse of discretion. In such a situation, it would appear that a reviewing court would have to sustain the trial court's ruling.

It must be then, *a priori,* that if a reviewing court determined that this Court's decision to exclude Dr. G's testimony was not an abuse of discretion, then it logically follows that whether it committed an error of law is of no accord.

In a similar vein, the Ninth District Court of Appeals reached what appears to be a consistent conclusion in a divorce case. The Ninth District noted,

> Under these circumstances, there is no basis to conclude that the trial court's contempt ruling was "unreasonable, arbitrary or unconscionable." * * * Therefore, we find that the trial court did not abuse its discretion in finding Husband in contempt.
>
> We conclude that the trial court's finding of contempt **was neither an error of law nor an abuse of discretion.** On this basis, Husband's third assignment of error is overruled.

*Alverez v. Alverez,* 2016-Ohio-3432, (9th Dist.), ¶'s 32-33, emphasis added.

And notably, the Supreme Court of Ohio has also directed this conclusion,

> To constitute an abuse of discretion, the decision of the trial court **must be more than an error of law or judgment**; it must result from an attitude that is "unreasonable, arbitrary or unconscionable." * * *.

*In re H.W.,* 2007-Ohio-2879, ¶ 8, emphasis added.

How much any of this aids this Court, or the court of appeals, in evaluating Garcia's motion for a new trial under Civ. R. 59(A)(9) is up for debate. Regardless, there is an important factor in the calculus that this Court finds most compelling.

DR. G'S TESTIMONY WENT TO DAMAGES, NOT NEGLIGENCE OR PROXIMATE CAUSE – THUS, EVEN IF THIS COURT INCORRECTLY EXCLUDED HER TESTIMONY, IT IS OF NO ACCORD

In her motion for a new trial, Garcia argues that, "[Dr. G's] testimony would not only bear on the damage element of Ms. Garcia's claims, **but also on Defendant's duty and breach.**[5]

This position, however, is not supported by the record, the procedural posture of the case, or the current status of negligence jurisprudence in the State of Ohio.

First, recall the pre-trial exchange above that the Court had with Garcia's counsel when he argued *contra* Dr. Matheson's motion *in limine* to exclude Dr. G's TP-2 testimony and records. Garcia argued that the primary reason she wanted to present Dr. G's testimony, what was, "really important," was not Dr. G's treatment of Garcia, but what she was paying for the treatment.

And this is exactly what the Court allowed Garcia to testify about.

Second, as conceded by Garcia, Dr. G did not submit an expert report pursuant to Civ. R. 26(B)(7)(b), thus, she never intended to offer an *opinion* on any issue, let alone on duty, breach, causation, and/or proximate cause.

Instead, Garcia submitted Dr. G's medical records pursuant to Civ. R. 26(B)(7)(d), the "Healthcare Provider" exception. These records, ostensibly[6], would contain information about the *treatment* that Dr. G provided to Garcia, but not *opinions* as to negligence. As such, even if this Court allowed Dr. G to testify, her testimony would be limited to her treatment of Garcia, not her opinion of Dr. Matheson's care of Garcia.

In her reply brief, Garcia again posits that she wanted to call Dr. G to testify to more than her treatment of Garcia, but also as to her opinion as to Dr. Matheson's care; ". . . the jury would not have entered a verdict for Defendants had they heard from [Dr. G] and reviewed her medical records. Without this evidence, **the jury could not properly assess whether Dr. Matheson conformed to the standard of care . . .**"[7]

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[5] See Plaintiff's motion for a new trial, Page 9, emphasis added.

[6] As this Court was not privy to Dr. G's medical records, the Court cannot say for sure what they contained. It stands to reason, however, that like most healthcare provider medical records, they contain information about diagnosis, treatment, prognosis, etc., not opinions of the quality of care the patient received from other providers.

[7] See Plaintiff's reply in support of motion for a new trial, Page 3.

But again, while Dr. G was identified as an expert witness, she did not provide an expert report outlining her opinions on any issues. Instead, she provided her treatment records from TP-1, and wanted to testify about *treatment* for TP-2. As there is no reason to believe that Dr. G's treatment records harbored opinions, she would not have been able to testify about the standard of care.

In support of her position that Dr. G should have been able to not only testify about medical treatment that was not disclosed until days before trial, but also as to causation, Garcia cites this Court to the dissent of an Eighth District Court of Appeals case that candidly, is not on point and is completely unhelpful.[8]

Next, Garcia cites the Court to a Ninth District Case involving a theft offense that occurred from a home while it was listed for sale.[9] Again, with all respect to Garcia, absolutely nothing about this case is relevant, nor does it stand for the proposition that in a medical malpractice action, the plaintiff's purported damages are relevant to the issue of liability.

Interestingly, in her rebuttal brief, Garcia notes that, ". . . [Dr. G] treated Ms. Garcia's surgical menopause and would have explained to the jury **her first-hand experience with the medical significance and severity of Ms. Garcia's suffering.**" (Emphasis added.)

Had the fact that Garcia re-engaged Dr. G's services been made known to Dr. Matheson and had Garcia timely provided Dr. G's medical records for TP-2, this Court most surely would have allowed Dr. G to testify as to "her first-hand experience with the medical significance and severity of Ms. Garcia's suffering."

But that is it.

This Court *would not* have allowed Dr. G to testify further, outside of her medical records or as to the standard of care.

Nevertheless, in both her motion for a new trial and reply brief, Garcia urges that Dr. G should have been allowed to testify as to Garcia's injuries, ". . . for the jury to consider in determining whether Dr. Matheson's conduct was reasonable."[10]

But such is not the status of law in Ohio.

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[8] *Cox v. MetroHealth*, 2012-Ohio-2383, (8th Dist.).
[9] *Wheatley v. Howard Hanna*, 2015-Ohio-2196, (9th Dist.).
[10] See Plaintiff's reply in support of motion for a new trial, Page 3.


In Ohio, liability and damages are separate and distinct legal concepts. In a medical malpractice case, a medical provider must breach the standard of care and the breach must be the proximate cause of damages. It logically follows, then, if there is no breach of the standard of care or the breach was not the proximate cause of damages, then there is no liability on the part of the provider and the plaintiff's damages, if any, are irrelevant.

Put another way, regardless of the extent or severity of a plaintiff's damages (or injuries) in any negligence case, let alone a medical malpractice action, they have nothing to do with liability.

The Supreme Court of Ohio recognized this concept when upholding a trial court's decision to "trifurcate" a jury trial in a tort case. Relying on Civ. R. 42(B), the court in a wrongful death case ordered the issues of liability, damages, and punitive damages tried separately. The high court noted,

> By separate orders, the trial court "trifurcated" the issues of liability, compensatory damages, and punitive damages. Plaintiffs-appellants argue that "[t]he language of Civ.R. 42(B) clearly places the burden on the moving party to demonstrate that it will suffer prejudice if a request for a separate trial is not granted."
>
> The entries by the trial court indicate that it was concerned with convenience and judicial economy. Civ.R. 42(B) allows the trial court to order separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."

*Estates of Morgan v. Fairfield Family Counseling Ctr.,* 1997-Ohio-194, 316.

Obviously, the purpose of separating the issues of liability and damages flows from the understanding that if no liability is found, damages are irrelevant and the case is over.

The Ninth District has ruled similarly in a negligence case where an employee negligently discharged a firearm at the driver of a fleeing vehicle seriously and permanently injuring him. The court said,

> Defendant says the trial court prejudicially erred in failing to order separate trials pursuant to Civ.R. 42(B) on the issues of liability and damages. Separate trials were necessary, defendant claims, because of the seriousness of Jonathan's injuries. Benko argues, in effect, that passion and prejudice aroused by the doctor's testimony, as well as the demonstrative evidence of exhibiting Jonathan, influenced the jury's decision on liability. **We concur in the defendant's**

**observation that Jonathan sustained horrible injuries. We also note that the case involves very real issues of fact pertaining to the question of liability.** However, bifurcated trials are within the discretion of the trial judge. We have no way of determining whether the doctor's testimony describing the injuries and the demonstrative evidence involving the boy influenced the jury's decision on liability. We find no abuse of discretion.

*Heidbreder v. Northampton Tp. Trustees*, 64 Ohio App. 2d 95, (9th Dist. 1979).

Again, this case, and dozens of others, not to mention Civ. R 42(B) and common sense, all recognize the separate and distinct nature of liability and damages in a negligence action.

Regardless, this Court declines Garcia's invitation to create *interstitial* law by conflating the relationship of liability and damages based upon the seriousness or severity of her injuries.

While Garcia clearly brought to this Court's attention what she perceived as an error of law by excluding Dr. G's testimony relative to TP-2, the fact remains that Garcia failed to inform Dr. Matheson that she re-engaged Dr. G to treat her surgical menopause, and Garcia failed to timely provide Dr. G's medical records for TP-2.

As such, this Court cannot say that it committed an error of law, let alone abused its discretion, when it excluded Dr. G's testimony.

## V. CONCLUSION

Based upon the foregoing, this Court finds, as a matter of law, pursuant to Civ.R. 59(A)(1) & (9), that this Court did not abuse its discretion by denying Plaintiff's expert, Dr. G, from testifying at trial because that decision, even if error, did not prevent Garcia from having a fair trial, nor did this Court commit an error of law in making said evidentiary ruling.

JUDGE D. CHRIS COOK

# THIS IS A FINAL APPEALABLE ORDER