BIRDIE WATKINS, ET AL., PLAINTIFFS-APPELLEES v. THE CLEVELAND CLINIC FOUNDATION, ET AL., DEFENDANTS-APPELLANTS

NO. 72838

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

130 Ohio App. 3d 262; 719 N.E.2d 1052; 1998 Ohio App. LEXIS 5406

November 12, 1998, Date of Announcement of Decision

PRIOR HISTORY: [***1]

CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas, Case No. CV-301267.

DISPOSITION:

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART.

COUNSEL: For Plaintiffs-appellees: Charles Kampinski & Christopher Mellino, Charles Kampinski Co., L.P.A., Cleveland, Ohio.

For Defendants-appellants: John V. Jackson, II, Roetzel & Andress, Cleveland, Ohio; Steven J. Hupp & Edward E. Taber, Bonezzi, Switzer, Murphy & Polito, Cleveland, Ohio; David A. Kutik, Jones, Day, Reavis & Pogue, Cleveland, Ohio; & Douglas G. Leak, Mansour, Gavin, Gerlack & Manos, Cleveland, Ohio.

JUDGES: JAMES D. SWEENEY, JUDGE, KENNETH A. ROCCO, P.J., and MICHAEL J. CORRIGAN, J., CONCUR.

OPINIONBY: JAMES D. SWEENEY

OPINION: [*268] [**1057]

JOURNAL ENTRY AND OPINION

SWEENEY, JAMES D., J.:

Defendant-appellant Cleveland Clinic Foundation appeals from the jury verdict in favor of plaintiffs-appellees Mrs. Birdie Watkins, by and through her guardian (and [*269] son), Mr. David Pollard, and her husband, Mr. Thomas Watkins. n1 For the reasons adduced below, we affirm in part and reverse in part, and vacate the award of punitive damages.

n1 Mr. and Mrs. Watkins are African-Americans. (R. 125.)

[***2]

A review of the record on appeal indicates that in April of 1995, Birdie Watkins, a sixty-year-old woman, went to the appellant complaining of a sinus infection. Mrs. Watkins was referred to Dr. Isaac Eliachar, an attending surgeon in appellant's Ear, Nose and Throat ("ENT") Department, who noted no infection being present, but did diagnose a deviated septum in the patient's nose and advised that a surgical procedure known as "septoplasty" be performed. When asked by the patient whether he would be performing the procedure, Dr. Eliachar stated that he did not operate alone. The doctor testified that he advised the patient on May 4, 1995, of the risks and benefits of the surgery and that he would operate with the participation and assistance of medical residents. (R. 397, 401.) It is uncontested that the appellant's billing records referred to Dr. Eliachar as the surgeon of record. Further, the patient did not sign a written consent form. (R. 403-404.)

May 5, 1995, was the date of the surgery. On that date, Dr. Eliachar was scheduled to perform four elective surgeries in two adjoining operating rooms that morning. n2 The anesthesiologist was Dr. Marc Popovich, who was also involved [***3] in more than one surgery at the time and, like Dr. Eliachar, moved between operating rooms during the patient's procedure. The nurse anesthetist, who assisted Dr. Popovich in Dr. Popovich's absence, was Dennis Woods, R.N. The Chief Resident of the ENT Department, Dr. Marc Guay, performed the surgery on Mrs. Watkins. Dr. Eliachar, who was listed in the operation records and discharge summary as the performing surgeon, allegedly supervised periodically the work of Dr. Guay as Dr. E1iachar moved between the adjoining operating rooms. (R. 389-390, 408.)

n2 Dr. Eliachar testified that it is normal procedure for surgeons at the Cleveland Clinic, and elsewhere, to schedule multiple operations on a particular morning, even though the surgeon could not physically perform all the surgical operations. (R. 385.) However, Dr. Eliachar now personally performs the operations on his patients. (R. 402-403.)

Dr. Guay testified that he first met the patient on the day of the surgery in the preop holding area minutes prior to [***4] the patient being transported into the operating room. (R. 431.) This witness also testified that Dr. Eliachar assigned the surgery to him and that Dr. Eliachar did not even scrub up that morning. Dr. Guay, upon meeting the patient, told the patient that he "would be operating on her with Dr. Eliachar." (P. 433, italicization added.) Dr. Guay did not explain to the patient what he meant by that phrase. Dr. Guay did not know the extubation parameters for a patient. (P. 434-435.)

[*270] During the operation, which began at 7:30 a.m. and ended at 11:10 a.m., the patient was under a general anesthesia and was intubated n3 by the nurse anesthetist to assure normal breathing. According to Dr. Popovich, he did not inform the patient that a nurse anesthetist would perform the intubation/extubation and did not indicate that he, the anesthesiologist, would not be present throughout the operation. The septoplasty procedure was uneventful. According to Dr. Eliachar, it was the surgeon's ultimate responsibility to ensure that the patient maintained an adequate airway [**1058] during and after the operation. (R. 375.) Yet, Dr. Eliachar could not recall whether he was present when the patient was extubated. He [***5] believed the nurse anesthetist extubated the patient. (R. 394-395.) Dr. Popovich was not present for the extubation and did not evaluate the patient between the operating room and the post-anesthesia care unit ("PACU"). (R. 440-441.) The nurse anesthetist stated that the patient was extubated at approximately 10:30 a.m. (R. 411-412) in the operating room and then he and Dr. Guay transported the patient to the PACU. At the time the nurse anesthetist transported the patient to the PACU at 10:35 a.m., her heart rate was 85 beats per minute according to nurse Woods' records. (R. 414.) Yet, the nurse's notes from PACU indicate that at 10:35 a.m., when the patient was admitted to the PACU, the patient's heart rate was 50 beats per minute. (P. 415.) The nurse anesthetist's records also indicate that the patient was awake and responsive when he transported her to the PACU, yet the PACU records indicate that the patient was unresponsive, emitting a large amount of clear urine and not moving. (R. 414, 424, 426.) At 10:40 a.m., the nurse anesthetist's records indicate that the patient's heart rate was 78 to 80 beats per minute, while the PACU nurse's record states 30 beats per minute, which lower [***6] amount is admittedly life threatening according to the nurse anesthetist. (R. 416-417.) When the heart rate hit 30 beats per minute, the nurse anesthetist recalls that resuscitative measures were begun on the patient. The patient was given cardiopulmonary resuscitation ("CPR") and was reintubated at 10:50 a.m. (P. 419.)

n3 Intubation is the act of placing an endotracheal tube down a patient's throat to provide a clear airway. (R. 439.)

Dr. Popovich testified that it would have been preferable for the patient to have been awake and responsive when extubated (R. 443.) and if the patient was not awake and responsive, it would have been inappropriate to extubate the patient. According to the anesthesia record, Dr. Popovich stated that the patient was in trouble at the time she was admitted to the PACU. (P. 447.)

Dr. Howard Tucker, a board certified neurologist and plaintiffs' expert witness n4, testified that the patient, who is in a persistent vegetative state but otherwise healthy, is unable to communicate [***7] or care for herself, has no cognitive or conscious awareness, and requires full-time care. The patient does have a feeding [*271] tube, which allows a liquid diet directly to the stomach, and a tracheostomy to permit a direct airway for the patient through her windpipe. It was his medical opinion that the patient had the probability for a full-life expectancy. (R. 491.)

n4 Dr. Tucker is also a licensed attorney in the State of Ohio, but does not practice law. (P. 485.)

Mr. George Cyphers, a certified rehabilitation counselor, testified on behalf of plaintiffs as to the life-care plan developed for the patient which details the medications and health care supplies, equipment and services, and their attendant costs, which will be needed over the patient's lifetime.

Mr. John Burke, who holds a doctorate in economics, testified for the plaintiffs regarding financial losses of the patient experienced as a result of the patient's injury. The witness calculated the patient's statistical life expectancy from the date of [***8] the injury as 22.8 years, to an age of 80.1 years old. Wage loss from her employment as an autoworker at General Motors was calculated at a present value of $ 299,360. (R. 563.) The amount needed to medically maintain the patient in her home was calculated as $ 5,511,870. Mr. Burke ex-

pressed various concerns with defendant's economic expert's (Mr. Morbach) report, including: (1) the forecast estimation of the inflation rate over time, which Mr. Burke stated no one could do with any certainty; (2) the use of higher risk investments as a basis for an annual interest rate to calculate the present value of money for annuity purposes n5; (3) the fact that Mr. Morbach is not an economist; (4) the fact that Mr. Morbach's analysis utilized a ten year time span rather than Mr. Burke's 22.8 year time span, the effect of which would be to lessen the amount arrived at.

n5 This factor is important because with a higher rate of return in the equation, the present value of the amount is decreased.

[**1059] Mr. Watkins, the patient's [***9] husband, testified that Dr. Eliachar told him that he, the surgeon, had performed the operation. Mr. Watkins also detailed the personal life he enjoyed with his wife and family and the effect of the injury on the family.

Ms. Melanice Watkins, the patient's daughter, testified that as of the date of the trial in June of 1997, her mother's medical bills totaled $ 555,551.81. Ms. Watkins also testified as to the effect of her mother's condition on the family.

The defense case consisted of the testimony of five witnesses. Dr. Donald Mann, a board certified neurologist, testified as a defense expert. Dr. Mann's medical opinion was that Mrs. Watkins' life expectancy was five to ten years (R. 755, 757-759, 762), but in rare cases such patients can live thirty to forty years (R. 771). Dr. Mann, who did not examine Mrs. Watkins, further opined that patients in a persistent vegetative state demonstrate movement but such movement is merely an autonomic reflex and not the product of will or a thinking brain. (P. 756, 762.) The witness also stated that it was his experience that no patient in a persistent vegetative state has been successfully treated in the home, which is what Mrs. Watkins' [***10] family wishes to do. (R. 761.)

[*272] The second witness for the defense was Dr. Guay who generally reiterated his earlier testimony. In addition, Dr. Guay stated that he personally informed Mrs. Watkins during preop that he would be operating on her that day (R. 802-803), but did not tell her that Dr. Eliachar would not be performing any of the surgery on her (R. 821). On cross-examination, the witness stated that he told Mrs. Watkins that he would be performing the surgery with Dr. Eliachar. (P. 822.) The witness also stated that Dr. Eliachar was present in the operating room overseeing the procedure. Dr. Guay denied being involved in the extubation of Mrs. Watkins, but did assist nurse Woods in transporting the patient from the operating room to the PACU. Dr. Guay noticed no problems with the patient when they arrived at the PACU, and left that area shortly after delivering the patient. According to this witness, there is no signed consent form by Mrs. Watkins in the hospital records. (R. 821.)

The third defense witness was Ms. Latressa Albert, the daughter of Mrs. Watkins, whose deposition was read into evidence. Ms. Albert testified that she spoke with Dr. Eliachar the night after [***11] the surgery and Dr. Eliachar did not specifically state at that time that he did the surgery.

The fourth defense witness was Mr. Thomas Watkins, who generally reiterated his earlier testimony adding that the family had incurred a debt balance of $ 27,129.12 owed to MedBridge, a care facility which provided services to Mrs. Watkins.

The fifth defense witness was Mr. Timothy Morbach, an investment professional at the brokerage firm of Kidder, Peabody & Company specializing in structured settlements involving injured persons and estates. Mr. Morbach reviewed the life care plan prepared by plaintiffs and came to the conclusion that an annuity of $ 1,165,154 (present value) would cover in-home care for five years of life expectancy, or $ 1,813,396 (present value) for in-home care for ten years of life expectancy. (R. 855.) If the patient were cared for in a nursing home facility, an annuity of $ 388,156 (present value) would cover a life expectancy of five years, or $ 610,013 (present value) for a life expectancy of ten years. (R. 855-856.) These figures, which only cover the cost of medical care for Mrs. Watkins, would start in 1997 and would not cover Mrs. Watkins from the time [***12] in 1995 when she entered her persistent vegetative state. (R. 856.) The witness also stated that he utilized various inflation factors and that recognizing inflation was proper in his industry. On cross-examination, the witness stated that the annuity was premised on a women of 62 and 78 years of age at present. (R. 879-881.) Further on cross-examination, the witness stated that for a twenty-year life expectancy, the amount needed to fund the life care plan of Mrs. Watkins over that twenty-year period would total $ 8,009,679 (R. 887) which would be discounted to a present value of $ 4,548,974 (R. 889).

The jury found for plaintiffs on the fraud and battery claims before it and [**1060] awarded compensatory damages to Mrs. Watkins in the amount of $ 9,660,000. n6 (R. 1008.) The [*273] jury also awarded damages to Mr. Watkins, the husband of Mrs. Watkins, on his claim of loss of consortium in the amount of $ 1,300,000.

n6 The defendant stipulated to negligence in the action and the jury was informed of this fact.

Thereafter, [***13] the court heard testimony offered by Mr. Kevin P. Roberts, the treasurer for The Cleveland Clinic Foundation, a not-for-profit organization, relative to the issue of punitive damages. In 1996, the defendant had total net assets in the amount of $ 766,076,000, an increase of approximately one hundred million dollars from 1995. Actual cash on hand at the end of 1996 was $ 17,985,000 from income from operations in the amount of $ 19,406,000. The total excess of revenues over expenses for 1996 was $ 57,708,000. At the close of this testimony and subsequent to closing arguments, the jury awarded punitive damages in the amount of $ 3,500,000. Thus, the total damage award was $ 14,460,000.

Defendant-appellant presents nine assignments of error.

I

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DISALLOWING ONE OF THE CLEVELAND CLINIC'S PEREMPTORY CHALLENGES BASED UPON AN UNSUPPORTABLE CLAIM OF RACIAL DISCRIMINATION."

The standard of review for a claim of excluding jurors through the use of peremptory challenges based upon racial motivation was originally set forth in *Batson v. Kentucky (1986), 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69.* The *Batson* test was recently [***14] applied to a civil case in *Hicks v. Westinghouse Materials Co. (1997), 78 Ohio St. 3d 95, 676 N.E.2d 872,* cert. denied in *139 L. Ed. 2d 104, 118 S. Ct. 159.* In *Hicks,* at 98-99, the court stated:

> The United States Supreme Court set forth in *Batson* the test to be used in determining whether a peremptory strike is racially motivated. First, a party opposing a peremptory challenge must demonstrate a prima-facie case of racial discrimination in the use of the strike. *Id. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87.* To establish a prima-facie case, a litigant must show he or she is a member of a cognizable racial group and that the peremptory challenge will remove a member of the litigant's race from the venire. The peremptory-challenge opponent is entitled to rely on the fact that the strike is an inherently "discriminating" device, permitting """those to discriminate who are of a mind to discriminate.""" *State v. Hernandez (1992), 63 Ohio St. 3d 577, 582, 589 N.E.2d 1310, 1313,* certiorari denied (1992), *506 U.S. 898, 113 S. Ct. 279, 121 L. Ed. 2d 206.* The litigant must then show an inference or inferences of racial discrimination by the striking party. The trial [***15] court should consider all relevant circumstances in determining whether a prima-facie case exists, including statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against minority venire members is present. See *Batson at 96-97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88.*
>
> [*274] Assuming a prima-facie case exists, the striking party must then articulate a race-neutral explanation "related to the particular case to be tried." *Id. at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88.* A simple affirmation of general good faith will not suffice. However, the explanation "need not rise to the level justifying exercise of a challenge for cause." *Id. at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88.* The critical issue is whether discriminatory intent is inherent in counsel's explanation for use of the strike; intent is present if the explanation is merely a pretext for exclusion on the basis of race. *Hernandez v. New York (1991), 500 U.S. 352, 363, 111 S. Ct. 1859, 1868, 114 L. Ed. 2d 395, 408.*
>
> Last, the trial court must determine whether the party opposing the peremptory [**1061] strike has proved purposeful discrimination. [***16] *Purkett v. Elem (1995), 514 U.S. 765, 766-767, 115 S. Ct. 1769, 1770, 131 L. Ed. 2d 834, 839.* It is at this stage that the persuasiveness, and credibility, of the justification offered by the striking party becomes relevant. *Id. at 768, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839.* The critical question, which the trial judge must resolve, is whether counsel's race-neutral explanation should be believed. *Hernandez v. New York, 500 U.S. at 365, 111 S. Ct. at 1869, 114 L. Ed. 2d at 409.*

The final element of the standard enunciated in *Hicks,* to-wit, the issue of credibility, was further expounded upon by that court at page 102 of the opinion:

> Review of a *Batson* claim largely hinges on issues of credibility. Accordingly, we ordinarily defer to the findings of the trial court. See *Batson at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 89, fn. 21*. Whether a party intended to racially discriminate in challenging potential jurors is a question of fact, and in the absence of clear error, we will not reverse the trial court's determination. *Hernandez v. New York, 500 U.S. at 369, 111 S. Ct. at 1871, 114 L. Ed. 2d at 412; State v. Hernandez, 63 Ohio St. 3d at 583,* [***17] *589 N.E.2d at 1314.* Trial judges, in supervising voir dire, are best equipped to resolve discrimination claims in jury selection, because those issues turn largely on evaluations of credibility. See *Batson at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 89, fn. 21*.

The venire pool before the trial court contained three prospective jurors who happened to be African-American, namely: juror number 5, Mr. Carl Cunningham, who had been employed as an insurance agent for eight years in the past, had some minor medical training involving advanced first aid and life saving techniques while employed as a fireman, and had been pleased to have successful arthroscopic surgery performed on his knees at the defendant hospital; juror number 9, Mrs. Myrtle Patton, is employed by defendant as a receptionist in the surgery department and who knows many of the actors who would testify in the case and who are likewise employed by the defendant; and, juror number 11, Mrs. Vera Jackson, who is employed by defendant as a unit secretary, but did not know any of the persons expected to be [*275] called to testify in the case. Prior to jurors 9 and 11 being placed in the jury box for voir dire, the defendant asked [***18] the court in an *in camera* hearing to excuse these two jurors for cause without further questioning solely because these two jurors are employed by the defendant. (R. 122-123, 126-127.) See *R.C. 2313.42(E)*. These two jurors were questioned by the trial court and counsel and were then dismissed for cause upon the request of the defendant. (R. 145-146, 150.)

The defendant's first peremptory challenge was exercised against juror number 6, Mrs. Papp, who was a Caucasian psychiatric nurse and whose aunt had experienced a bad result during a surgery performed at defendant's hospital, but also expressed her belief that she could perform as a juror fairly and without bias. Mrs. Papp was excused because of her medical background, not for her relative's bad experience at the defendant's hospital.

Defendant's second peremptory challenge was exercised against juror number 5, Mr. Cunningham. (R. 279.) When pressed by the court, the reason expressed by defendant for striking this juror was that Mr. Cunningham had training in medicine and that defense counsel had bad experience with nurses and individuals with medical training in medical malpractice cases. (P. 281.) Over the strenuous objection [***19] of the defense, the trial court overruled this peremptory challenge, essentially finding that the putatively race-neutral reasons provided by defendant for the peremptory challenge were merely a pretext:

> ". . . that your reason for peremptoring him otherwise is not appropriate. That it's not applicable to circumstances of his education and background.
>
> * * *
>
> "They [the reasons for the peremptory] are inappropriate, and I'm also establishing for the record, I would indicate [**1062] the pattern being your insistence that your own employees, you know, be removed and their race as well. You know if you want that on the record, there it is. And that is the pattern that I'm finding. That's the end of the argument." [explanation added] (R. 283-284.)

In the case *sub judice*, the first prong of the *Hicks* standard, that of a prima facie case of racial discrimination, was satisfied. Defendant had excused two of the three African-American members of the venire prior to exercising the peremptory challenge on the sole remaining black juror, Mr. Cunningham. The inference of racial discrimination by the defendant in striking Mr. Cunningham from the venire is drawn from the fact that [***20] while he was struck on the basis of his medical experience, two other jurors, numbers 4 and 18, had equal or significantly more medical training than Mr. Cunningham, yet were seated on the jury. Furthermore, the fact that the defendant used its first peremptory challenge to strike Mrs. Papp, who also had significantly greater medical training than Mr. Cunningham, is of little note. As the trial court surmised from judging the credibility and intent of the parties and counsel, [*276] the true problem defendant had with Mrs. Papp was that she had a relative who experienced a bad result from surgery at the defendant's hospital which left Mrs. Papp with feeling she described as "inevitable" (R. 63), which fact necessitated the defendant to seek, and receive, permission to voir dire Mrs. Papp on that issue in chambers and out of the presence of the venire. The only way for defendant to overcome the potential of Mrs. Papp from being seated on the jury was to exercise a peremptory chal-

lenge on her. The trial court could properly conclude that the race-neutral explanation for the challenge to Mr. Cunningham advanced by defendant was a ruse. Absent clear error, we must defer to the trial court's determination [***21] of purposeful discrimination. *Hicks, supra, 78 Ohio St. 3d at 102.*

The first assignment of error is overruled.

II

"THE TRIAL COURT ERRED BY COMMUNICATING WITH AND INSTRUCTING THE JURY WITHOUT NOTIFYING COUNSEL AND ALLOWING THEM TO PARTICIPATE."

The communications presented to the trial court by the jury, and their respective responses by the court, are as follows:

> First question I'm reading here just by the fact it's on top, "Can the jury consider pain and suffering for Mr. Watkins?" Signed Mary Ann Shipman. Dated 6/10/97. The judge's response to that in the judge's writing, the date, "No, not in the legal sense. Only consider his loss of her care, comfort, companionship and service." Signed by Judge Pokorny.
>
> The next one is, "Do all eight jurors sign the form or just the majority which agree?" Signed by Mrs. Shipman. 6/10/97 is the judge's answer, "Only those who agree should sign." Signed by Judge Pokorny.
>
> Next question, "Definition of fraud states intent to mislead. Intent is not mentioned in the interrogatories. Should it be taken into consideration in the answers to the interrogatories?" Signed Mary Ann Shipman. Judge's response dated 6/10/97 says, "Yes." The [***22] judge's signature.
>
> Next one is, "May we have legal definition of consortium?" Mary Ann Shipman. Says over on the back is the response dated 6/10/97, "Consortium is the care, comfort, companionship and services provided by Birdie Watkins to her spouse Thomas Watkins." Signed by the judge.
>
> The last one is, "Can we answer yes to all three interrogatories on fraud and no to the fraud verdict?" Signed Mary Ann Shipman. Dated 6/10/97. Judge's response, "The answers to interrogatories must be consistent with verdict." Judge Pokorny. (R. 1004-1005.)

[*277] [**1063] Although these communications were ex parte n7, the responses by the trial court, when viewed in their entirety, were correct statements of the law, were consistent with the jury instructions, or otherwise properly supplemented the jury instructions (on the issue of considering "intent"). Thus, there was no demonstrable prejudice to the defendant. Absent prejudice, the claimed error is not reversible. See *Berk v. Matthews (1990), 53 Ohio St. 3d 161, 169, 559 N.E.2d 1301.*

n7 *Ex parte* communications to the jury by the trial court are anathema and should not be countenanced except in times of extraordinary pressing necessity.

[***23]

The second assignment of error is overruled.

III

"THE TRIAL COURT ERRED BY DENYING THE CLEVELAND CLINIC'S MOTIONS FOR A DIRECTED VERDICT ON PLAINTIFF'S FRAUD CLAIM AND BY FAILING TO REQUIRE THE JURY TO MAKE FINDINGS REGARDING ALL OF THE ELEMENTS OF FRAUD."

The standard of review for an argument addressing the granting of a motion for a directed verdict was recently stated by this court in *Harris v. Mt. Sinai Medical Center, 1998 Ohio App. LEXIS 2341*, *12-13 (May 28, 1998), Cuyahoga App. No. 72668, unreported, *1998 WL 274507:*

> *Civ.R. 50(A)(4)* establishes the procedure for a court to follow in granting a directed verdict:
>
> > When a motion for a directed verdict has properly been made, and the trial court, after construing the evidence most strongly in

> favor of the party against whom the motion is directed, finds that upon a determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.
>
> It is the duty of the court to submit an issue to the jury if there is sufficient evidence to permit reasonable minds to reach [***24] different conclusions on that issue; conversely, the court must withhold an issue from the jury when there is not sufficient evidence presented relating to the issue to permit reasonable minds to reach different conclusions. See *O'Day v. Webb (1972), 29 Ohio St. 2d 215, 280 N.E.2d 896.*

In order to prevail upon a claim of fraud, a plaintiff must show all of the following elements:

> "(a) a representation or, where there is a duty to disclose, concealment of a fact,
>
> "(b) which is material to the transaction at hand,
>
> [*278] "(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
>
> "(d) with the intent of misleading another into relying upon it,
>
> "(e) justifiable reliance upon the representation or concealment, and
>
> "(f) a resulting injury proximately caused by the reliance."

Burr v. Bd. of Cty. Commrs. of Stark Cty. (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101, paragraph two of the syllabus, citing *Cohen v. Lamko, Inc. (1984), 10 Ohio St. 3d 167, 462 N.E.2d 407.*

When seeking money damages, a plaintiff is required to plead and prove these elements by a preponderance [***25] of the evidence. *Household Fin. Corp. v. Altenberg (1966), 5 Ohio St. 2d 190, 214 N.E.2d 667,* syllabus. Fraud is never presumed, but must instead be affirmatively proved. *Beneficial Fin. Co. v. Smith (1968), 15 Ohio App. 2d 208, 210, 240 N.E.2d 106.*

In the case *sub judice,* there was evidence presented which demonstrated the following: (1) that Dr. Eliachar represented to Mrs. Watkins that he would be operating on her, albeit with assistance, after Mrs. Watkins specifically asked Dr. Eliachar whether he would be performing the surgery; (2) that Dr. Eliachar performed none of [**1064] the actual operation on Mrs. Watkins (a fact which was not disclosed to Mrs. Watkins prior to the surgery), instead merely making casual and intermittent supervision of the procedure; (3) that Dr. Eliachar, at the time of making the representation to the patient, knew that he was scheduled to perform simultaneous surgeries on the date of the operation in issue; (4) that Dr. Eliachar, as the performing surgeon of record, had the responsibility to monitor the patient throughout the entire operation, including post-operation procedures on his patient, and admittedly knew the extubation parameters and would [***26] have prevented Mrs. Watkins' premature extubation had he been the surgeon in the operating room at the time; (5) that Dr. Eliachar did not return to the operating room prior to the premature extubation of the patient in that same operating room; (6) that it was not the responsibility of Dr. Guay to supervise the extubation of the patient; and, (7) the premature extubation caused the injury to the patient. Based on this evidence, the elements of fraud were demonstrated and the trial court did not err in denying the motion for directed verdict on that issue.

As to the appellant's argument that the court erred in its jury interrogatories relative to the issue of fraud, the record reflects that there was no timely objection by defendant-appellant. Accordingly, such error is waived for appellate purposes. *Schade v. Carnegie Body Co. (1982), 70 Ohio St. 2d 207, 436 N.E.2d 1001.*

The third assignment of error is overruled.

[*279] IV

> "THE TRIAL COURT ERRED BY DENYING THE CLEVELAND CLINIC'S MOTIONS FOP A DIRECTED VERDICT ON PLAINTIFF'S BATTERY CLAIM AND BY GIVING IMPROPER INSTRUCTIONS ON BATTERY."

The court in *Allore v. Flower Hospital, 121 Ohio App. 3d 229, 235-36, 699 N.E.2d 560 (1997),* [***27]

1997 WL 362465, at 5, states the following with respect to the tort of Battery in a medical setting:

> In *Anderson v. St. Francis-St. George Hosp. (1992), 83 Ohio App. 3d 221, 225, 614 N.E.2d 841,* the First District Court of Appeals set forth the law controlling the disposition of this assignment of error:
>
> "Concerning the substantive law of this dispute, the rule is that a person commits a battery when he unlawfully strikes or touches another. *Green v. Drungold (1950), 60 Ohio L. Abs. 445, 447, 101 N.E.2d 906, 908.* In a medical setting, when a physician treats a person without consent, the doctor has committed a battery. *Leach v. Shapiro (1984), 13 Ohio App. 3d 393, 395, 13 Ohio B. Rep. 477, 479, 469 N.E.2d 1047, 1051.* Moreover, under the doctrine of respondeat superior, any person who controls the physician in a principal-agent relationship is liable for unlawful acts by the physician that are within the scope of that relationship. *Klema v. St. Elizabeth's Hosp. (1960), 170 Ohio St. 519, 527, 11 Ohio Op. 2d 326, 330, 166 N.E.2d 765, 771.* * * *"

See, also, *Vignal v. Cleveland Clinic Foundation, 1996 Ohio App. LEXIS 4194,* *8-9 (September 26, 1996), Cuyahoga App. No. 69603, [***28] unreported, *1996 WL 547945, at 3.*

A battery claim, which constitutes an intentional, nonconsensual touching, requires that causation and damages also be shown. *Anderson v. St. Francis-St. George Hosp. (1996), 77 Ohio St. 3d 82, 84, 671 N.E.2d 225,* citing *Love v. Port Clinton (1988), 37 Ohio St. 3d 98, 524 N.E.2d 166.*

In the case before us, in addition to the seven factors set forth in the previous assignment, it is beyond doubt that Dr. Eliachar controlled the actions of Dr. Guay through his assignment of the procedure to Dr. Guay and the supervision of Dr. Guay. Also, there was testimony from Dr. Guay that he informed Mrs. Watkins prior to being transported into the operating room that he would be performing the operation, yet there is no corroboration of consent to Dr. Guay by the patient in the medical record; thus, consent is a question for the trier of fact. This putatively unconsentual touching by Dr. Guay, which is [**1065] attributable to Dr. Eliachar, and then the defendant hospital, which permitted Dr. Eliachar to not be present at the time of the premature extubation of the patient in the operating room, caused the injury and resulting damages to the patient.

These facts [***29] demonstrate a prima facie cause of action for battery sufficient to be placed into the hands of the jury.

[*280] The appellant next argues in this assignment that the jury instructions relative to battery were inaccurate and misleading. The charge given by the court relative to battery, states:

> With respect to the next count, battery, a battery is an intentional unconsented contact with another. A surgical operation on the body of a person is a technical battery unless the patient consented to it.
>
> The plaintiff Birdie Watkins has brought this action alleging that consent was not given to the defendant Cleveland Clinic to perform the surgery in the manner in which it occurred.
>
> The defendant denies a battery occurred. In order for the plaintiff to prevail, you must find that the following facts have been proven by a greater weight of the evidence, that Birdie Watkins was not told that Dr. Eliachar would not be performing the surgery upon her on May 5, 1995, and that Dr. Eliachar did not perform the surgery in the manner you find he expressed he would to Birdie Watkins.
>
> You must determine under the facts as you find them whether the surgery performed constituted an intentional [***30] and unconsented contact in light of what Mrs. Watkins was told by Cleveland Clinic employees regarding the performance of the surgery.

> It is no defense to a battery claim that the surgery was performed skillfully. If you find that the plaintiff has proved the elements of battery by a greater weight of the evidence, your verdict must be for the plaintiff on that issue.
>
> If you find that the plaintiff has failed to prove the evidence by the greater weight of the evidence, your verdict must be for the defendant on the issue of battery.
>
> Finally, with respect to the damages in the case, the issue here is what would be fair compensation for the plaintiff's injuries and damages? You will determine from the preponderance of the evidence an amount of money that will reasonably compensate the plaintiff for the actual injuries sustained. (P. 984-986.)

The defendant's proposed instructions relative to battery stated:

> PROPOSED JURY INSTRUCTION NO. 1
>
> 219.02 Battery
>
> 1. BATTERY. Battery is intentional, unconsented, contact with another.
>
> [*281] PROPOSED JURY INSTRUCTION NO. 13
>
> 11.10 Proximate cause
>
> 1. SEPARATE ISSUE. A party who seeks to recover for [fraud or battery] [***31] must prove not only that the other party [committed fraud and/or battery], but also that such fraud and/or battery was a proximate or direct cause of injury.
>
> 2. DEFINED. Proximate cause is an act or failure to act which in the natural and continuous sequence directly produces the injury, and without which it would not have occurred. Cause occurs when the injury is the natural and foreseeable result of the act or failure to act.

The defendant's first proposed jury instruction was given virtually verbatim by the trial court in its instructions to the jury. As to the term "cause," the court instructed the jury that "Cause means the natural and probable consequences of the act. An injury is caused when it happens in the natural and continuous sequence of events and without which [**1066] it would not have occurred." (R. 984.) This charge is not misleading as it tracks the defendant's proposed charge on "cause."

While it is true that the court did not address proximate cause in its charge on battery, the effect of any error on the damage award is entirely speculative since the award was not apportioned between the separate causes of action, but was given in a general award. Without this [***32] predicate of prejudice, the error can be deemed to be harmless.

Appellant next argues that the trial court erred in not instructing the jury that it "had to find that Dr. Guay's intentional contact with Mrs. Watkins was without her consent," and that battery could be shown if "Dr. Eliachar did not perform the surgery in the manner you find he expressed he would to Birdie Watkins." See appellant's brief at 24-25. We conclude that these instructions, when viewed in the context of the overall charge given by the court, adequately informed the jury of its obligations relative to the claim for battery.

The fourth assignment of error is overruled.

V

> "THE TRIAL COURT ERRED BY DENYING THE CLEVELAND CLINIC'S MOTIONS FOR A DIRECTED VERDICT ON PLAINTIFF'S CLAIM FOR DAMAGES FOR PAIN AND SUFFERING AND BY INSTRUCTING THE JURY ON PRESENT AND FUTURE PAIN AND SUFFERING AND 'HEDONIC' DAMAGES."

[*282] In this assignment, appellant argues that pain and suffering and hedonic losses attributable to Mrs. Watkins should not have been permitted because she was not able to experience same due to her permanently unconscious state.

While defendant's medical expert (Dr. Mann) opined that Mrs. Watkins [***33] did not have brain function apart from basic autonomic responses, plaintiffs' medical expert (Dr. Tucker) stated, when referring to patients in persistent vegetative state, that "we don't know what their thought processes are" because such patients cannot verbalize and that such patients "cannot formulate ideas as far as we know." (R. 454-455.) This is not to say, conclusively, that such patients cannot feel pain or suffer as a result of their physical condition. This view is buttressed by the videotape of Mrs. Watkins, which was played for the jury to demonstrate the home care needs of the patient, which showed Mrs. Watkins wincing and

flinching, displaying obvious discomfort, as her tracheostomy tube was being cleaned. Finally, during the cross-examination of Melanice Watkins by the defendant, defense counsel asked the witness whether she had any further thought on her mother's consciousness and ability to feel pain, and whether any other professional had discussed the matter with her since her mother left the hospital. (R. 693-694.) The defense having opened the door, Ms. Watkins, on re-direct examination, responded by telling of statements attributable to an Erie, Pennsylvania [***34] neurologist, who treated Mrs. Watkins while she was staying at a facility there. That physician allegedly told Ms. Watkins that the patient "very well probably does hear and she is aware, but the brain has been so damaged and is too weak that it can't send signals out to respond . . ." (R. 699-700.) Given these conflicting viewpoints, the matter was a question of fact for the jury to resolve, assessing the weight to such opinions as it deemed appropriate.

As to future pain and suffering, it is undeniable that Mrs. Watkins is in a permanent vegetative state. Her condition will not change over her life expectancy. It is reasonably certain to also conclude that her damages will also likely continue during that life expectancy. Thus, the jury charge on this issue was proper. *Patton v. Cleveland (1994), 95 Ohio App. 3d 21, 30, 641 N.E.2d 1126.* Even were we to assume that such an instruction on future pain and suffering was error, the failure of the verdict to attribute the damages awarded between present and future pain and suffering precludes recognizing prejudice to the defendant [**1067] and resulting error. Cf. *Sentinel Consumer Prod. v. Mills, Hall, Walborn & Assoc., Inc. (1996), 110* [***35] *Ohio App. 3d 211, 673 N.E.2d 967.*

The fifth assignment of error is overruled.

VI

> "THE TRIAL COURT ERRED BY REFUSING TO GIVE THE CLEVELAND CLINIC'S PROPOSED JURY INSTRUCTION ON THE COST OF AN ANNUITY."

[*283] In discussing the instructions to be given to the jury, the following colloquy occurred between defense counsel and the trial court before the commencement of closing arguments:

> MR. JACKSON: Judge, one additional, you are going to charge the jury on the cost of annuity under the statute, 2317.62?
>
> THE COURT: No. I'm only going to tell them whatever amount of money they deem appropriate has to be present value. That's all that the law requires. (R. 916.) n8

n8 *R.C. 2317.62*, titled "Definitions; party may present evidence of annuity's cost regarding issue of recoverable future damages," provides at paragraph (B):

> (B) Subject to division (A)(3)(b)(ii) of *section 2125.02 of the Revised Code* and consistent with the Rules of Evidence, any party to a tort action may present evidence of the cost of an annuity in connection with any issue of recoverable future damages. If that evidence is presented, the trier of fact may consider that evidence in determining the future damages suffered by reason of an injury or loss to person or property that is a subject of the tort action. If that evidence is presented, the present value in dollars of any annuity is its cost.

[***36]

The defendant's proposed instruction relative to the cost of an annuity, which was found in Ohio Jury Instructions at 23.09, stated:

PROPOSED JURY INSTRUCTION NO. 4

> 23.09 Tort actions based on claims for future damages; cost of annuity
>
> You have heard evidence about the cost of an annuity in connection with the award of future damages, if any. One method of determining the present value of future damages is the cost of an annuity. You may consider that evidence in making your decisions about the amount of future damages and give it such weight as you think proper.

The record reflects that, pursuant to *R.C. 2317.62(B)*, the cost of all annuities was expressed

through the economic testimony of both parties in terms of present value. The parties argued the present value of the annuities in their respective closing arguments. The record also reflects that the charge given by the court instructed the jury that when considering damages to decide upon an amount which would reasonably and fairly compensate the plaintiffs. (R. 981-982, 986.) After the court instructed the jury, the court asked the parties if they had any problems with the charge. The defense, which did suggest [***37] several objections to the charge as given, did not with particularity or specificity express an objection as to informing the jury that the cost of an annuity must be represented by its present value. This represents a waiver of that argument on appeal. *Schade, supra.* Even if it were not considered as waived, we conclude that the overall charge, when viewed against the evidence, the arguments of counsel to the jury and the amount of the award for Mrs. Watkins, adequately expressed the pertinent law to the jury. *State v. Price (1979), 60 Ohio St. 2d 136, 398 N.E.2d 772,* paragraph four of the syllabus. Also, since the damage award for Mrs. Watkins is not apportioned between the different elements of her overall [*284] damage award (to-wit, wage loss, pain and suffering, current and future medical expenses, etc.), we are unable, based upon the overall award, to conclude that the jury was confused by the charge given so as to not apply the present value of an annuity as its cost in determining the damage award for future medical care.

The sixth assignment of error is overruled.

VII

"THE TRIAL COURT ERRED BY DENYING THE CLEVELAND CLINIC'S MOTIONS FOR A DIRECTED [**1068] VERDICT ON PLAINTIFF'S [***38] CLAIM FOR PUNITIVE DAMAGES."

In this assignment, appellant argues that the issue of punitive damages was improperly permitted to go to the jury because there was no demonstration of "actual malice."

In *Malone v. Courtyard by Marriott (1996), 74 Ohio St. 3d 440, 445-446, 659 N.E.2d 1242,* a case which determined whether the granting of a directed verdict on the issue of punitive damages was proper, the court stated:

The law of Ohio is clear on when punitive damages may be awarded:

> "Punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless *both* of the following apply:
>
> "(1) The actions or omissions of that defendant demonstrate malice * * *, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate; [and]
>
> "(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section." (Emphasis added.) *R.C. 2315.21(B).*

Thus, as a threshold matter, Malone and Meador were obligated to present evidence of malice on the part of Marriott before their [***39] claim for punitive damages could proceed to the jury.

Our case law defines "malice" as (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis *sic.*) *Preston v. Murty 32 Ohio St. 3d 334, 512 N.E.2d 1174,* syllabus. * * *.

* * *

* * *. As Chief Justice Moyer noted in *Preston,* an award of punitive damages based on conscious disregard malice requires "a positive element of conscious wrongdoing * * *. This element has been termed conscious, deliberate or intentional. It requires the party to possess knowledge of the harm that [*285] might be caused by his behavior." *Preston, 32 Ohio St. 3d at 335, 512 N.E.2d at 1176.*

The first type of malice articulated in *Preston v. Murty, supra,* is not at issue in the present case. As to the second type of malice enunciated in *Preston,* we note that the positive element of conscious wrongdoing was not demonstrated by the evidence. The medical evidence was that it was common practice at the defendant's hospital for interns to assist [***40] in surgical operations and be supervised by more senior surgeons. Dr. Eliachar had done this numbers of time in his practice as a surgeon. The septoplasty procedure was an uncomplicated

and relatively unsophisticated procedure. The operation on Mrs. Watkins, up to the extubation of the patient, was unremarkable. Dr. Guay had performed in excess of 1,200 surgical procedures during his tenure at the defendant's hospital and Dr. Eliachar had no knowledge of any incompetence in Dr. Guay's abilities as a surgeon, or Dr. Popovich's abilities as an anesthesiologist, or nurse Woods' abilities as a nurse anesthetist. In short, there was no demonstration that Dr. Eliachar was aware that his action in not performing the actual surgery on Mrs. Watkins and overseeing the extubation of the patient had a great probability of causing substantial harm. Accordingly, the trial court erred in permitting the jury to consider the issue of punitive damages. Therefore, that part of the damage award is reversed and vacated.

The seventh assignment of error is affirmed.

VIII

"THE JURY VERDICT SHOULD BE REVERSED BECAUSE IT WAS BASED ON PASSION AND PREJUDICE."

In this assignment, appellant argues [***41] that plaintiffs' counsel, attorney Charles [**1069] Kampinski, appealed to the passion and prejudice of the jury through a number of alleged mischaracterizations of the evidence and/or inflammatory statements to the jury.

In determining whether passion or prejudice affected a jury's damage award to the point of necessitating a new trial, a reviewing court must consider the amount of the award and whether the damages were induced by (1) incompetent evidence, (2) misconduct by the court or counsel at trial, or (3) any other action at trial which may reasonably be said to have swayed the jury. *Shelton v. Greater Cleveland Regional Transit Auth. (1989), 65 Ohio App. 3d 665, 682, 584 N.E.2d 1323, 1334; Loudy v. Faries (1985), 22 Ohio App. 3d 17, 19, 22 Ohio B. Rep. 52, 54, 488 N.E.2d 235, 237.*

In light of the evidence presented and the severity of the injuries sustained by plaintiffs, the amount of the award, viewed independently, was supported by that evidence and does not shock the conscience.

[*286] Turning to the remaining three criteria set forth in *Shelton,* we note that the first example of alleged misconduct by plaintiffs' counsel was the use of an allegedly outdated American Medical Association [***42] ("AMA") ethical opinion which identified the action of a surgeon of record, in permitting an operation to be performed by another surgeon without the knowledge and consent of the patient, to be termed "ghost surgery." It was alleged that the more recent edition did not expressly use the term "ghost surgery." n9 Whether the term was in the proper edition or not, it is an accurate description for the actions at issue, thus there was no error in counsel phrasing it as such before the jury. Further, it is asserted that plaintiffs' counsel misled the jury during closing argument by telling the jury (R. 923-926) that the AMA ethical opinion prohibits such actions by surgeons and that such actions are illegal, i.e., a criminal offense. (R. 926.) The record indicates that there was no objection by the defense to this line of commentary. Accordingly, error therein was waived for appellate purposes. n10

n9 The failure to use this precise term was fundamentally the only difference between the two editions.

n10 Plain error is not argued by the appellant as to this issue.

[***43]

The second example purports to demonstrate that plaintiffs' counsel misled the jury by stating in closing argument that Mrs. Watkins' medical bills to date total $ 555,000 while the actual medical bills offered into evidence total approximately $ 360,000. While this is a technically true statement of the physical substantiation of the medical bills, the record reflects that Melanice Watkins testified that the total amount of the medical bills was approximately $ 550,000, and the parties argued in closing concerning the reasons for the missing documentation representing the difference between $ 360,000 and $ 550,000. The jury was free to assess the evidence and determine the amount of the medical expenses up to trial. Certainly, this $ 190,000 difference cannot be accurately assessed as being awarded or not given the lack of apportionment in the award to Mrs. Watkins. Whether the jury was misled on this point is not demonstrated.

The third example of an appeal to inflame the passion of the jury was plaintiffs showing the videotape of Mrs. Watkins, in which the patient is seen exhibiting a painful reflex during the suctioning of her airway. The images depicted in this videotape [***44] were relevant to demonstrate that Mrs. Watkins could experience pain and suffering and corroborated the plaintiffs' testimony in that regard. Thus, its introduction was not error.

The fourth example of alleged incitement of the jury were the remarks of plaintiffs' counsel during closing argument concerning (1) no inclination exhibited by the defendant to accept responsibility for payment of the damages and (2) counsel's [**1070] opinion that defendant will hold the verdict in the same contempt that they exhibit for the truth: [*287]

> The defendants have shown absolutely no inclination no *(sic)* accept responsibility regarding the payment of the damages.
>
> MR. JACKSON: Objection, your Honor.
>
> THE COURT: Overruled.
>
> MR. KAMPINSKI: And, therefore, I have to assume that will continue. My guess is they will hold your verdict in the same contempt that they've shown for the truth.
>
> MR. JACKSON: Objection, your Honor.
>
> THE COURT: Sustained. Disregard the last comment. Go ahead. * * * (R. 938.)

First, the comment regarding accepting "responsibility regarding payment of the damages" is a proper comment considering that defendant is fighting the claims advanced by plaintiffs at [***45] trial. It can be inferred from this posture that defendant, in litigating these claims, is not accepting responsibility, as seen through the eyes of the plaintiffs, to accept an allegedly good faith claim for relief. As to the second comment, the court promptly gave a curative instruction to the jury to disregard it, thereby minimizing to the greatest extent possible prejudice to the defendant. Further, taking the proceedings in their totality, it cannot be said that the verdict was impacted to any great extent on this lone comment.

The fifth example of an incitement of the jury's passion allegedly occurred near the conclusion of plaintiffs' rebuttal closing argument, when counsel stated the following without objection by the defendant:

> "If you are inflamed, it's because the facts inflame you. It inflamed me. But I'm not here asking you to punish these people. * * *" (R. 971-972.)

The failure to timely object waives error at the appellate level. Even had there been an objection raised, we do not consider this comment to be error, but a fair comment on the evidence. To prohibit jurors, and counsel, not to have strong feelings in a case such as this is asking the impossible [***46] considering the uncomplicated nature of the medical procedure which led up to the injury and the tragically severe injuries that followed. Much of the sting of this comment was displaced and placed in perspective when plaintiffs' counsel tempered his comment by asking that the jury not act out of a sense of punishing the defendant, but to "compensate these people for their loss." (R. 972.)

The eighth assignment of error is overruled.

IX

> "THE CUMULATIVE EFFECT OF THE ERRORS BELOW REQUIRES REVERSAL."

[*288] Based on the determinations of the previous assignments of error, this assignment is overruled.

Judgment affirmed in part and reversed in part, punitive damage award vacated.

This cause is affirmed in part and reversed in part.

The court finds there were reasonable grounds for this appeal. It is, therefore, considered that said appellant(s) and appellee(s) each pay one-half of the costs herein.

It is ordered that a special mandate be sent to said 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.*

Exceptions.

KENNETH A. ROCCO, P.J., and

MICHAEL [***47] J. CORRIGAN, J., CONCUR.

JAMES D. SWEENEY

JUDGE

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. 27*. 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).