[Cite as *Stephenson v. Upper Valley Family Care, Inc.*, 2010-Ohio-4390.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

CHARLOTTE STEPHENSON	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2009 CA 38
v.	:	T.C. NO. 05 CV 683
UPPER VALLEY FAMILY CARE, INC. et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellees	:	
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O P I N I O N

Rendered on the 17th day of September, 2010.

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FROELICH, J.

{¶ 1} Derek Stephenson was awarded judgment in the amount of $225,000 after a re-trial on the issue of damages for his medical malpractice claims against Drs. Richard Plumb, D.O. and Craig A. Critchley, D.O. and their employer Upper Valley Family Care, Inc., a medical

corporation (collectively, "Defendants"). Stephenson's primary contention on appeal is that the trial court erred in permitting Defendants to present evidence during the retrial that their breach of the standard of care did not cause him to suffer any reduced life expectancy.

{¶ 2} For the following reasons, the trial court's judgment will be reversed in part, and the matter will be remanded for a new trial on Stephenson's loss of life expectancy. The second jury's findings that Defendants caused past pain and suffering and mental anguish in the amount of $150,000, and future pain and suffering and mental anguish in the amount of $75,000, which were not challenged on appeal, are affirmed.

I

{¶ 3} We previously set forth the underlying facts and the procedural history leading to the first appeal in this case as follows:

{¶ 4} "Plaintiff, Derek Stephenson, was born on July 27, 1991. Within one month following his release from the hospital where he was born, Derek began to experience severe respiratory problems. His parents brought Derek to Defendant, Upper Valley Family Care, Inc. ('UVFC') for diagnosis and treatment by its physician-employees. Then and over the following eleven years, multiple UVFC physicians treated Derek for a variety of ailments they diagnosed, such as sinusitis, bronchitis, rhinitis and asthma. During that time Derek had a total of sixty-three office visits at UVFC and one hospitalization. Fifteen telephone calls concerning him were also made to UVFC by his parents. Of these contacts, fifty-eight involved respiratory problems.

{¶ 5} "None of the efforts made by UVFC physicians resolved Derek's respiratory problems, which included coughing, wheezing, congestion, lung impairments and related

complaints. It was not until October 1, 2001 that UVFC's family-practice physicians referred Derek to a specialist in ear, nose and throat ailments, who in turn referred Derek to an allergist. The allergist recommended a test to determine whether Derek suffers from cystic fibrosis. The test was performed, and its results revealed that Derek suffers from cystic fibrosis.

{¶ 6} "Cystic fibrosis is a progressive lung disease that typically is fatal when the victim is a young adult. There is no cure, but its symptoms may be alleviated by treatment. The form of cystic fibrosis from which Derek suffers is a milder form and more difficult to diagnose.

{¶ 7} "Derek and his parents commenced an action against UVFC and its physicians who had treated him on claims for relief alleging medical malpractice for their failure to diagnose and treat his cystic fibrosis condition over the more than ten-year period in which they had treated him for other respiratory illnesses. The case was tried to a jury, which returned verdicts in favor of Derek and against two UVFC physicians, Drs. Plumb and Critchley, in the amounts of $100,000 as and for compensatory damages and $300,000 as and for punitive damages. The trial court entered corresponding judgments against those physicians and UVFC. No other UVFC physicians who had treated Derek were found liable, and no damages were awarded to Derek's parents.[1]

{¶ 8} "The Defendants filed a motion for judgment notwithstanding the verdict on the punitive damages award. The trial court granted that motion and vacated the award. Because of that order, the trial court also vacated its judgment for attorney fees in the amount of $120,000 it had ordered on a verdict of the jury.

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[1]Stephenson's brother also brought a claim for loss of consortium. As with his parents, the jury awarded no damages to him on this claim.

{¶ 9} "Derek moved for a new trial on the award of compensatory damages, arguing that $100,000 is insufficient. The trial court granted the motion, which it made conditional on the Defendants' agreement to an additur the court ordered increasing the award to $350,000. The Defendants declined to agree to the additur.

{¶ 10} "Finally, with respect to the award of compensatory damages, the trial court denied Derek's motion for prejudgment interest.

{¶ 11} "Derek filed a timely notice of appeal. The two Defendant physicians and UVFC filed a timely notice of cross-appeal." (Footnote added.) *Stephenson v. Upper Valley Family Care, Inc*., Miami App. No. 07CA12, 2008-Ohio-2899, ¶2-9.

{¶ 12} Addressing Stephenson's assignments of error, we affirmed the trial court's granting of judgment notwithstanding the verdict with respect to punitive damages, the court's vacation of its award of attorney's fees, and the court's decision not to enter judgment against the other defendant-physicians who had treated Stephenson. Id. We further held that Stephenson's entitlement to pre-judgment interest must "await determination of compensatory damages by the jury in the new trial the court ordered." Id. at ¶58.

{¶ 13} In their cross-appeal, Defendants claimed that the trial court erred in granting Stephenson's motion for additur conditioned on its acceptance by Defendants. We resolved this issue, stating:

{¶ 14} "The trial court's order does not implicate or concern the issue of liability, which was determined in Plaintiff's favor. The order concerns only the amount of compensatory damages Plaintiff is due. The compensation awarded to one who is injured in person by the wrongful and unlawful act of another must be at least equivalent to, and should in all cases be

commensurate with, the loss or injury actually sustained. *Ott v. Schneiter* (1936), 56 Ohio App. 359, 10 N.E.2d 947. Compensatory damages in a personal injury action include compensation for actual medical expenses, future medical expenses, past and future pain and suffering, disability, disfigurement, loss of enjoyment of life, and special damages. *Fantozzi v. Sandusky Cement Products Col.,* 64 Ohio St.3d 601, 597 N.E.2d 474, 1992-Ohio-138. Recovery for permanent injuries or for a lasting impairment to health are likewise proper elements of compensatory damages. *Farley v. Ohio Department of Rehabilitation and Correction* (1998), 128 Ohio App.3d 137, 713 N.E.2d 1142.

{¶ 15} "Whether Derek suffered any longer-term or permanent injury as a proximate result of Defendants' conduct was a hotly contested issue. Defendants' experts opined he had not. The views of Plaintiff's expert, Dr. Nussbaum, opined that the deleterious results of a lack of treatment of Derek's cystic fibrosis during the ten years he was in the Defendants' care will increase 'geometrically' in future years. (T. Vol.II, p. 472-3).

{¶ 16} "During the years of his care by Defendants, Derek endured numerous and debilitating symptoms of his cystic fibrosis condition which were not resolved. He had over fifty visits to Defendants' offices. These events were no doubt an important part of the first ten years of his life.

{¶ 17} "On this record, and giving deference to the trial court's ability to actually see and hear the evidence presented, we cannot find that the court abused its discretion when it found the jury's compensatory damages award of only $100,000 is not sustained by the weight of the evidence, and on that finding ordered a new trial pursuant to Civ.R. 59(A)(6). We agree that a new trial on that issue is warranted.

{¶ 18} "Defendants' cross-assignment of error is overruled." *Stephenson* at ¶76-80.

{¶ 19} Upon remand to the trial court, Stephenson filed various motions in limine seeking to preclude Defendants from presenting evidence that they did not proximately cause certain injuries to him. The trial court summarized these motions and ruled on them as follows:

{¶ 20} "Plaintiffs assert that the jury in the first trial determined that the physicians should have diagnosed Derek Stephenson's condition before he was one year old. Therefore, they contend that Defendants should be precluded from introducing any evidence that Derek has and will suffer no damages from the untimely diagnosis. There was no jury interrogatory as to this issue. This motion is overruled.

{¶ 21} "Secondly, the Plaintiffs say that the Court should not allow any evidence that contradicts the jury's previous findings. We do know the jury found some negligence of the remaining Defendants at some unknown time and manner and some unspecified harm. It is unknown what harm the jury found or when the jury found that the harm began. Therefore, such issues are not precluded by the law of the case.

{¶ 22} "Expert testimony that Derek was not damaged in any way is admissible to be considered with all of the other evidence in arriving at the jury's verdict on damages. The Court will likely instruct the jury that they must find some harm, but the amount of harm will be within their province. The Plaintiffs' motion is overruled.

{¶ 23} "Thirdly, the Plaintiffs say that the experts called by the Defendants should not be allowed to testify that the evidence of this case is insufficient to allow a conclusion by a reasonable medical certainty that Derek was harmed by a delayed diagnosis. Therefore, Plaintiffs contend that Dr. Boat, Dr. Weinberger, and Dr. Davidson should not be permitted to

testify. Such testimony is competent and admissible. The Plaintiffs' motion is overruled.

{¶ 24} "Fourthly, the Plaintiffs' motion to exclude the testimony of any current or dismissed Defendants as to damages is moot because Defendants do not intend to testify. If they do decide to testify, the Court will assess the admissibility of their testimony in relation to the applicable issues arising during the trial.

{¶ 25} "Fifthly, the Court overrules the Plaintiffs' motion to exclude the expert witnesses called by the Defendants under the missing evidence doctrine or the physical facts rule. Those doctrines are not applicable here.

{¶ 26} "Finally, the Court overrules the Plaintiffs' motion to shift the burden of proof on reduced life expectancy caused by an untimely diagnosis, to Defendants. Loss of Derek's life expectancy as a proximate cause of Defendants' negligence is an element of damages which must be proved by Plaintiffs."

{¶ 27} The second trial on damages was held on June 23 to 29, 2009. Stephenson presented several experts to testify regarding his expected life expectancy. Dr. Eliezer Nussbaum testified (via a transcript of his testimony from the first trial) that Stephenson's life expectancy had been decreased "by ten years or even more" due to Stephenson's lack of early treatment. Dr. Gary Mueller opined that Stephenson suffered a loss of life expectancy of between eight and twelve years due to delayed treatment. (Tr. Vol. I, at 196-197.)

{¶ 28} Defendants presented the expert testimony of Dr. Miles Weinberger and Dr. Thomas Boat. With respect to reduced life expectancy, Dr. Weinberger testified that Stephenson's "life expectancy will not be affected by the timing of the diagnosis" and that the timing of his diagnosis "has not had a likely long term effect on his clinical course, quality of

life, or duration of life." (Tr. Vol. III, at 558.) Dr. Boat's testimony from the first trial was read to the jury; he also opined that, "[g]iven [Stephenson's] genotype and his mild phenotype there's nothing in the literature in my experience that would suggest that he would live longer had he been diagnosed earlier." He stated: "It is my testimony that there is no way that you can say within any degree of certainty or probability that he would have been better off if he had been diagnosed earlier." (Id. at 716.)

{¶ 29} At the conclusion of the evidence, the court instructed the jury that the prior jury had determined that Drs. Plumb and Critchley and Upper Valley Family Care "were negligent, that they deviated from the reasonable and acceptable standards of care by their failure to timely diagnose Derek Stephenson's cystic fibrosis" and that "the negligence proximately caused damage" to Stephenson. The court further instructed, in part:

{¶ 30} "The previous jury did not specify the date or dates that the negligence occurred, nor did the jury determine what damages were caused by such negligence. You must award damages, but the extent of the damages are solely left to you. You shall determine the amount of damages.

{¶ 31} "Therefore, the issue which is in controversy and which you, as a Jury, must decide in this case is what damages were proximately caused to Derek Stephenson by the negligence of such Defendants.

{¶ 32} "***

{¶ 33} "You will note that the Plaintiff, Derek Stephenson, also claims that his life expectancy has been reduced. You may award damages for any time of life that you find Derek Stephenson has lost due to the Defendants' failure to diagnose his cystic fibrosis. As to such

claim, no damages can be found except that which is reasonably certain to exist as a proximate result of the negligence."

{¶ 34} The jury was instructed on proximate cause over Stephenson's objections.

{¶ 35} The court provided the jury with a verdict form and four interrogatories.[2] Through interrogatories, the jury found that Defendants caused (1) past pain and suffering and mental anguish in the amount of $150,000, and (2) future pain and suffering and mental anguish in the amount of $75,000, for a total award of $225,000. The jury further concluded that Stephenson had, "more probably than not, suffered a decreased life expectancy of 0 years," and it left blank the interrogatory asking it to quantify the amount of damages suffered by Stephenson as a result of his decreased life expectancy.

{¶ 36} Stephenson moved for judgment notwithstanding the verdict and for a new trial solely on damages for loss of life expectancy and future damages. The trial court overruled these motions. The court subsequently entered a final judgment in favor of Stephenson and against Defendants for $225,000.

{¶ 37} Stephenson appeals from the judgment, raising three assignments of error.

II

{¶ 38} Stephenson's first assignment of error states:

{¶ 39} "THE TRIAL COURT ERRED IN ALLOWING DEFENDANTS TO TRY THE ISSUE OF PROXIMATE CAUSE AND IN ALLOWING THE ISSUE TO BE SUBMITTED

[2]Stephenson originally proposed six interrogatories asking the jury to determine: (1) past damages, (2) future damages for loss of life expectancy, (3) the number of years of decreased life expectancy, (4) damages for loss of life expectancy, (5) past pain and suffering and mental anguish, and (6) future pain and suffering and mental anguish.

TO THE JURY."

{¶ 40} Stephenson claims that the trial court should not have permitted Defendants to present evidence on proximate cause, because that issue had previously been decided in the first trial. He states that, because no special interrogatories were presented in the first trial to test the type of damages which formed the basis for the award, the trial court was required to presume that the jury found proximate cause for all categories of damages, i.e., pain and suffering and mental anguish, past and future medical expenses, and loss of life expectancy. Stephenson claims that, as a result, the law of the case should have precluded re-litigation of proximate cause. Stephenson further argues that, because proximate cause had already been established, the trial court should not have permitted Defendants to present expert testimony on proximate cause or to instruct the jury on that subject.

{¶ 41} In short, Stephenson claims that the second jury should have been instructed that the first jury had already determined that Defendants caused each type of damage claimed by him (pain and suffering, mental anguish, past and future medical expenses, and loss of life expectancy) and that the jury must award some compensation for each category of damages.

{¶ 42} We begin by reviewing the jury's findings at the conclusion of the first trial. The first jury was presented with two types of claims – medical malpractice against Defendants and the other physicians who cared for Stephenson, and loss of consortium claims by Stephenson's mother, father, and brother. Stephenson argued that he had suffered pain and suffering, mental anguish, and loss of life expectancy and earning capacity.

{¶ 43} Civ.R. 49(A) requires the use of a general verdict, by which the jury finds generally in favor of the prevailing party. When requested before argument by a party, the court

must also submit written interrogatories to the jury. Civ.R. 49(B). "The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law." Id.

{¶ 44} In the first trial, the jury was given a general verdict form and several interrogatories to complete during their deliberations. The interrogatories asked the jury (1) whether any or all defendants had failed to comply with the standard of care; (2) if so, which defendants had breached that duty; (3) whether those defendants were "a proximate cause of Plaintiff Derek Stephenson's claimed injuries;" (4) the amount of damages sustained by Stephenson; and (5) the amount of damages sustained by Stephenson's family on their respective loss of consortium claims.

{¶ 45} After finding, through the interrogatories, that Drs. Plumb and Critchley had failed to comply with the standard of care, the jury answered Jury Interrogatory No. 3 affirmatively, thus finding that these doctors had proximately caused Stephenson's "claimed injuries." In Jury Interrogatory No. 4, the jury found that Stephenson's damages were $100,000. (Through Jury Interrogatories Nos. 5-7, the jury awarded $0 to Stephenson's parents and brother on their loss of consortium claims.) Jury Interrogatory No. 3 did not ask the jury to break down the "claimed injuries" into specific categories, nor did Jury Interrogatory No. 4. ask the jury to quantify the amount it was awarding for each injury.

{¶ 46} In light of the general verdict and interrogatories from the first trial, Stephenson claims that Defendants should have been precluded from arguing proximate cause at the second trial, and, specifically, that Stephenson was required to prove that Defendants proximately caused loss of life expectancy. He further asserts that the trial court erred in permitting

Defendants to present expert testimony regarding proximate cause. Stephenson relies on *Harper v. Henry* (1959), 110 Ohio App. 233, and *Berisford v. Sells* (1975), 43 Ohio St.2d 205, both of which discuss the two-issue rule, and the law of the case doctrine.

{¶ 47} The two-issue rule derives from the Supreme Court's holding in *Sites v. Haverstick* (1873), 23 Ohio St. 626, and "has been defined variously depending upon the context of its application." *Hampel v. Food Ingredients Specialties, Inc*., 89 Ohio St.3d 169, 2000-Ohio-128. The Supreme Court has defined the two-issue rule as follows:

{¶ 48} "[The two-issue] rule as generally applied is that, where there are two causes of action, or two defenses, thereby raising separate and distinct issues, and a general verdict has been returned, and the mental processes of the jury have not been tested by special interrogatories to indicate which of the issues was resolved in favor of the successful party, it will be presumed that all issues were so determined; and that, where a single determinative issue has been tried free from error, error in presenting another issue will be disregarded." Id., quoting *H.E. Culbertson Co. v. Warden* (1931), 123 Ohio St. 297, 303. See, also, *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 460-61, 1999-Ohio-307.

{¶ 49} This case before us does not present the question of whether a verdict may be sustained even though there was error as to one or more issues, and Stephenson conceded at oral argument that the two-issue rule does not apply to this case. However, we agree with the general principle that Stephenson was asserting when he cited to *Harper* and *Berisford*, namely that a general verdict which is not tested by interrogatories is presumed to be a finding, either in favor of the plaintiff or defendant, upon all of the issues raised. See *Mid-Ohio Mechanical v. Eisenmann Corp.*, Guernsey App. Nos. 07 CA 35, 08 CA 12, 2009-Ohio-5804, ¶80, citing *Nott*

v. Homan (1992), 84 Ohio App.3d 372, 378.

{¶ 50} "[W]here there is only a general verdict with no interrogatories, a reviewing court is authorized to infer that the jury found on all issues in favor of the successful and against the unsuccessful party." Id. The parties are "in the best position to have corrected the indeterminate nature of the general verdict at the trial court level," and where they choose not to do so, the appellate court will not speculate as to the particular damages compensated by the jury award. *Nott*, 84 Ohio App.3d at 378.

{¶ 51} Considering that the first jury entered a general verdict in Stephenson's favor in the amount of $100,00 and specifically found that Defendants had proximately caused Stephenson's "claimed injuries," we presume, in the absence of additional interrogatories, that the jury found that Stephenson had proven, by the preponderance of the evidence, each of the injuries that he claimed. In particular, we presume that the first jury's verdict is a funding that Stephenson, to some extent, suffered an injury of loss of life expectancy. Moreover, because the jury was not asked to specify what award amount was meant to compensate for which alleged injury, i.e., past and future pain and suffering, mental anguish, or loss of life expectancy and earning capacity, we must presume that the jury awarded some amount for each injury, consistent with Jury Interrogatory No. 3.

{¶ 52} If Defendants had wanted an interrogatory detailing the injuries found to have been proximately caused, they were obligated to request such an interrogatory at the appropriate time and to object to any failure by the trial court to provide such interrogatory to the jury. See *Ellinger v. Ho*, Franklin App. No. 08AP-1079, 2010-Ohio-553, ¶52; *Nott*, supra; *Bardonaro v. General Motors Corp*. (Aug. 4, 2000), Montgomery App. No. 18063. Defendants did neither.

{¶ 53} Stephenson asserts that the law of the case doctrine therefore required the second jury to be instructed that the first jury had found that Defendants caused Stephenson to suffer loss of life expectancy. The law of the case doctrine "holds that the decision of the reviewing court in a case remains the law of that case on the questions of law involved for all subsequent proceedings at the trial and appellate levels. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, ***. The doctrine functions to compel trial courts to follow the mandates of reviewing courts. *Thatcher v. Sowards* (2001), 143 Ohio App.3d 137, 140-141, ***." *Hardy v. Hardy*, Montgomery App. No. 22964, 2010-Ohio-561, ¶8. "The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Thatcher*, 143 Ohio App.3d 141.

{¶ 54} We agree with Stephenson that Defendants could not relitigate whether they had caused loss of life expectancy. Because the first jury determined that Defendants proximately caused Stephenson's "claimed injuries," which included loss of life expectancy, that finding was binding on the parties for any subsequent proceeding.

{¶ 55} The sole issue at the second trial should have been the amount of damages that Stephenson was entitled to receive. With respect to loss of life expectancy, Defendants could have argued – and may upon a future retrial on damages for loss of life expectancy – that the loss of life expectancy was minimal. However, Defendants were not permitted to argue or to present expert testimony, as they did at the retrial on damages, that Stephenson suffered *no* loss of life expectancy.

{¶ 56} In the same vein, the trial court was required to instruct the second jury that the first jury had found that Stephenson had incurred pain and suffering, mental anguish, and loss of

life expectancy. Moreover, the court was required to instruct the second jury that it must award some damages for each of those injuries. The amounts, however, need not have been substantial.

{¶ 57} Accordingly, this case must be remanded for a new trial on damages for loss of life expectancy only. At such trial, the jury should be informed that a prior jury had found that Defendants were negligent and had proximately caused past and future pain and suffering and mental anguish, as well as loss of life expectancy. The court should instruct the jury that Stephenson has been awarded $150,000 for past pain and suffering and mental anguish and $75,000 for future pain and suffering and mental anguish and that, in awarding damages for loss of life expectancy, the jury should not duplicate that compensation.

{¶ 58} The trial court correctly held that the burden remains with Stephenson to establish the amount of damages for loss of life expectancy. Defendants may obviously cross-examine Stephenson's witnesses and call witnesses of their own, but may not present evidence suggesting that there is *no* loss of life expectancy or that Stephenson is not due *any* compensation for such loss.

{¶ 59} The first assignment of error is sustained.

III

{¶ 60} Stephenson's second and third assignments of error state:

{¶ 61} "THE FAILURE TO AWARD DAMAGES FOR LOSS OF LIFE EXPECTANCY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 62} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT UNDER CIV.R. 60(B)."

{¶ 63} In light of our disposition of Stephenson's first assignment of error, the second and third assignments of error are overruled as moot.

IV

{¶ 64} The trial court's judgment will be reversed in part, and the matter will be remanded for a new trial on damages for Stephenson's loss of life expectancy only.

{¶ 65} The second jury's findings that Defendants caused past pain and suffering and mental anguish in the amount of $150,000, and future pain and suffering and mental anguish in the amount of $75,000, which were not challenged on appeal, are affirmed.

{¶ 66} We note that the issue of Stephenson's entitlement to pre-judgment interest remains pending.

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BROGAN, J. and GRADY, J., concur.

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