

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

PAMELA J. WITZMANN, et al.	:	
	:	Appellate Case No. 23352
Plaintiff-Appellants	:	
	:	Trial Court Case No. 05-CV-4086
v.	:	
	:	
JEFFREY S. ADAM, M.D., et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellees	:	
	:	

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OPINION

Rendered on the 28th day of January, 2011.

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DWIGHT D. BRANNON, Atty. Reg. #0021657, Brannon & Associates, 130 West Second Street, Suite 900, Dayton, Ohio 45402
Attorney for Plaintiff-Appellants

JOHN B. WELCH, Atty. Reg. #0055337, KAREN L. CLOUSE, Atty. Reg. #0037294, and GREGORY B. FOLIANO, Atty. Reg. #0047239, Arnold, Todaro & Welch, 580 Lincoln Park Boulevard, Suite 222, Dayton, Ohio 45429
Attorneys for Defendant-Appellees

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BROGAN, J.

{¶ 1} Plaintiff-appellant Pamela J. Witzmann¹ appeals a jury verdict for

¹Pamela’s husband, Bernhard Witzmann, is also a plaintiff, but his claims are not (directly) the subject of this appeal.

defendant-appellee Dr. Jeffrey S. Adam² on her claim for medical malpractice. During a left thyroid lobectomy (partial thyroidectomy) that Adam performed on Witzmann he unknowingly injured her left recurrent laryngeal nerve. This nerve controls the left vocal cord and was injured so severely that Witzmann's left vocal cord is paretic, damaging her voice. Adam admits all this. But he maintains that he did not injure the nerve negligently. The expert witnesses for both sides agreed that the relevant standard of care requires a surgeon to protect the recurrent laryngeal nerve as much as possible. Where the experts parted ways was on the question of whether Adam's conduct conformed to this standard, that is, whether Adam adequately protected the nerve. The jury returned a verdict for Adam, finding, by way of interrogatory, that he was not negligent. We will affirm.

I

{¶ 2} In 2003, Witzmann's family physician discovered a mass on the left lobe of her thyroid. The physician referred Witzmann to Adam. The results of a biopsy could not rule out cancer, so Adam recommended to Witzmann that he remove the entire left lobe. Witzmann agreed, and, on January 12, 2004, Adam performed a surgical procedure known as a left thyroid lobectomy. The left recurrent laryngeal nerve runs near the left lobe, and it is important that the surgeon protect this nerve during the procedure. This nerve helps control the left vocal cord; severance will paralyze it. Several times during the procedure Adam identified the left recurrent laryngeal nerve and traced its path. When he finished, Adam believed that

²Adam's practice, Dayton Head & Neck Surgeons, Inc., is also a defendant.

the procedure went routinely.

{¶ 3} Four days after surgery, however, Witzmann could barely speak above a whisper. Adam examined her larynx and found that, while it was moving slightly, the range of movement was far from normal. Two weeks later, Adam noted that Witzmann's left vocal cord appeared paretic. Three weeks later, Witzmann's voice was still hoarse, her left vocal cord still paretic. To get a better sense of the problem, Adam sent Witzmann to have a videostroboscopy performed. This procedure is used to test the structure and movement of the vocal cords. The results of the videostroboscopy confirmed little movement in the left vocal cord.

{¶ 4} Witzmann was frustrated. She was a principal at a public middle-school, and half a voice seriously hampered her ability to do her job. So Witzmann returned to her family physician who referred her to a specialist at the Cleveland Clinic. On April 14, 2004, Witzmann met with the specialist, and he ordered a laryngeal electromyography (EMG), a test that gives information about the muscles that control the vocal cords. The EMG results showed some but very little electrical activity in the left vocal cord, suggesting that, while the recurrent laryngeal nerve had been severely injured, it had not been severed completely. The consensus, however, was that her left vocal cord was permanently paralyzed. The specialist believed that vocal-cord medialization (pushing the paralyzed vocal cord toward the middle) might help her voice. Witzmann first tried an injection that temporarily medialized her left vocal cord. This restored much of her voice. The specialist told Witzmann about two permanent medialization procedures: reinnervation and thoroplasty. As Witzmann understood it, reinnervation would

attempt to medialize the paralyzed vocal cord by bulking up the muscles and thereby increasing the tension on the cord. The hope was that reinnervation will also give at least some control over some aspects of the voice. In thyroplasty a silicon implant would be inserted to medialize the vocal cord.

{¶ 5} While she was considering her options, on August 4, 2004, Witzmann was evaluated by Dr. Arick Forrest for the State Teachers Retirement System (STRS), of which she was a member. Dr. Forrest performed an independent evaluation of Witzmann for the STRS to make a disability determination. It was Dr. Forrest's opinion that her voice would not return and that Witzmann was permanently disabled. He discussed Witzmann's voice-improvement options with her, telling Witzmann that thyroplasty could restore her voice to near-normal function, allowing her to return to work.

{¶ 6} But Witzmann chose reinnervation, with the understanding that if it did not work thyroplasty was still an option. The specialist at the Cleveland Clinic performed the reinnervation procedure in September 2004. While digging through a bed of scar tissue in the area where the thyroidectomy had been performed, the specialist found a "free-floating end" of the left recurrent laryngeal nerve. Ultimately, reinnervation proved unsuccessful. Witzmann has not pursued thyroplasty. She explained at trial, "I don't want to continue to have surgeries over and over again. I'm sorry. I don't want to continue to have surgeries over and over again. I have had enough surgery." (Tr. 663).

{¶ 7} On May 18, 2005, Witzmann filed suit against Adam for medical malpractice. In March 2009 the case was tried to a jury. Witzmann presented three

expert witnesses—two board-certified otolaryngologists and a board-certified general surgeon—who testified that by failing to adequately protect the recurrent laryngeal nerve, cutting it as a consequence, Adam failed to conform the standard of care. Adam, too, presented three expert witnesses—himself and two other board-certified otolaryngologists, Dr. Darryl Willett and Dr. Charles Cummings. Adam admitted that he severely injured the nerve, though he did not know how. But Adam maintained that he did not do so negligently. Dr. Cummings testified that injury occurs to the recurrent laryngeal nerve in 1% of cases even when there is no hemorrhaging, overwhelming cancer, or large tumor. Dr. Cummings said that Adam saw the nerve in its entire cervical course, which, to Dr. Cummings, meant that he could see it from the lowest portion up to the suspensory ligament, where the nerve dives into the cricothyroid muscle. Dr. Cummings testified that the recurrent laryngeal nerve cannot be seen where it passes through the suspensory ligament into the larynx. This is the area where the nerve is most vulnerable. Dr. Cummings also testified that it was his opinion that Adam did not sever the nerve during the thyroidectomy. This opinion was based on the results of the videostroboscopy, which showed some movement of the left vocal cord, and the results of the EMG, which showed some electrical activity along the nerve. These results, Dr. Cummings testified, are inconsistent with a severed nerve. Dr. Cummings testified that there was no evidence that Adam saw the nerve and “recklessly” cut it. It was Dr. Cummings’s opinion that by identifying the nerve and following its course as far as he could Adam’s conduct conformed to the standard of care. Likewise, Dr. Willett testified that he found no evidence of malpractice. He noted too that the recurrent laryngeal nerve dives under the

cricothyroid muscle and another bunch of laryngeal nerves, where it can be injured if it is not visible. Dr. Willett also did not believe that Adam severed the nerve because of the slight movement of the left vocal cord seen by Adam. The experts both testified to the high rate of success that thyroplasty has in cases like Witzmann's in restoring a patient's voice.

{¶ 8} Defense counsel told the trial court that it anticipated calling Dr. Forrest as a witness. Over plaintiffs' counsel's objections, the court allowed the parties to refer to Dr. Forrest's disability evaluation and treatment recommendation during trial. Dr. Forrest's records were included in the package of materials given to both Witzmann's and Adam's experts, each of whom acknowledged receipt and review. For reasons unstated, though, Adam was not able to secure Dr. Forrest's appearance to testify.

{¶ 9} After the close of all evidence, Witzmann moved for a directed verdict on the issue of negligence. The trial court overruled the motion, and the case went to the jury. The jury returned a general verdict in favor of Adam and found (by way of interrogatory) that he was not negligent.

{¶ 10} Witzmann appealed.

II

{¶ 11} Witzmann presents twelve assignments of error, which we will address out of order:

FIRST ASSIGNMENT OF ERROR

{¶ 12} “The Trial Court erred by failing to grant Plaintiffs’ Motion for Directed Verdict.”

SECOND ASSIGNMENT OF ERROR

{¶ 13} “The jury’s verdict was against the manifest weight of the evidence.”

THIRD ASSIGNMENT OF ERROR

{¶ 14} “The Trial Court erred by (1) overruling Plaintiffs’ Motion in Limine which would have barred the introduction of ‘failure to mitigate’ testimony and evidence and (2) granting Defendants’ Motion to Amend Their Complaint to add the affirmative defense of ‘failure to mitigate,’ and other issues precluded by law.”

FOURTH ASSIGNMENT OF ERROR

{¶ 15} “The Trial Court erred in failing to exercise control over the litigation.”

FIFTH ASSIGNMENT OF ERROR

{¶ 16} “The Trial Court erred by allowing Defendant to Cross-Examine an Expert Witness as an expert on legal issues.”

SIXTH ASSIGNMENT OF ERROR

{¶ 17} “The Trial Court erred by allowing use of hearsay, consisting of Dr. Forrest’s Medical records and report, during opening statement and at trial.”

SEVENTH ASSIGNMENT OF ERROR

{¶ 18} “The Trial Court erred by allowing expert opinion testimony as to causation, including diagnoses and alternative causes, in terms of possibility, not probability.”

EIGHTH ASSIGNMENT OF ERROR

{¶ 19} “The Trial Court erred by failing to give proper requested jury

instructions, and giving erroneous jury instructions.”

NINTH ASSIGNMENT OF ERROR

{¶ 20} “The trial court erred in allowing testimony of a physician regarding habit and routine without independent foundation to support its introduction.”

TENTH ASSIGNMENT OF ERROR

{¶ 21} “The Trial Court erred by failing to treat the claim of ‘complication of surgery’ as an affirmative defense.”

ELEVENTH ASSIGNMENT OF ERROR

{¶ 22} “The Trial Court erred by allowing testimony regarding liability from Dr. Charles Cummings despite his deposition testimony that he spends only 30% of his time in active practice.”

TWELFTH ASSIGNMENT OF ERROR

{¶ 23} “The Trial Court erred by overruling Plaintiffs’ motion to Declare the Medical Malpractice Acts, and related acts and sections of the Ohio Revised Code, unconstitutional.”

A. The Testimony of Dr. Charles Cummings

{¶ 24} We begin with the eleventh assignment of error. Witzmann argues that Dr. Cummings was not competent under Evid.R. 601 to testify on the issue of Adam’s liability. This rule provides that a physician is not competent to testify on the issue of liability in a claim arising out of another physician’s treatment of a patient “unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an

accredited school.” Evid.R. 601(D). Witzmann contends that Dr. Cummings does not spend at least half of his professional time in clinical practice or teaching.

{¶ 25} Witzmann failed to preserve this claimed error for appeal. We are unable to find in the transcript where Witzmann objected to Dr. Cummings’s testimony at trial. While Witzmann did file a motion in limine before trial that asked the court to exclude his testimony, “the ruling on a motion *in limine* does not preserve the record on appeal.” *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, at ¶35 (Citations omitted.). “[A]n appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached during the trial.” *Id.* We therefore decline to address this error.

{¶ 26} But even if Witzmann had properly preserved this claimed error, we likely would have overruled it. There is no evidence that Dr. Cummings is a hired gun or a professional expert who lacks clinical experience. Dr. Cummings testified that he is asked to review medical issues in medical liability cases eight-to-ten times a year, which he does for both defending physicians and injured patients. Such work plainly comprises a small part of Dr. Cummings’s activities. And Dr. Cummings plainly has the experience and background to judge whether Adam violated the standard of care. Dr. Cummings has been at Johns Hopkins University for the past 15 years, and has held a variety of positions there. In 2003, Dr. Cummings retired as the chair of the Department of Otolaryngology Head and Neck Surgery. Currently, he is the Executive Medical Director for Johns Hopkins International, which, according to Dr. Cummings, is the outreach arm of Johns Hopkins Medicine. He also holds the title of Distinguished Service Professor. Dr. Cummings practices at Johns Hopkins, seeing

patients and performing surgeries there weekly. On the date he was deposed, November 2006, Dr. Cummings said that he had performed 20 - 30 surgeries on thyroid glands that year. Since he earned his medical degree in 1961, Dr. Cummings testified that he had performed over 1,000 surgeries in the area of the recurrent laryngeal nerve. In addition to practicing, Dr. Cummings writes in the area of otolaryngology and head and neck surgery. He has published well over 100 articles on the subject and has written two textbooks, *Atlas of Laryngeal Surgery* and *Otolaryngology - Head and Neck Surgery*, a comprehensive multi-volume, multi-edition text.

{¶ 27} The eleventh assignment of error is overruled.

B. Overruling Witzmann's Motion for Directed Verdict

{¶ 28} In the first assignment of error Witzmann contends that the trial court should have sustained her motion for directed verdict. Accordingly, we must determine whether the trial court should have directed a verdict for Witzmann on the issue of negligence.

{¶ 29} Civil Rule 50 provides the "strict standard" for granting a directed verdict, *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 109: "When a motion for a directed verdict has been properly 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 any 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 * * *." Civ.R. 50(A)(4). "By

the same token, if there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied.” *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 115, quoted in *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 438.

{¶ 30} Our review of the record shows that on the issue of his negligence Adam presented substantial competent evidence on which reasonable minds could differ.

{¶ 31} “The law imposes a duty of ‘good practice’ on physicians * * * and a physician’s breach of that duty in the physician’s care and treatment of a patient constitutes actionable negligence, or malpractice, for which the physician is liable in damages for injuries and losses suffered by the patient which proximately result from the breach.” *Straley v. Garg*, Clark App. No. 06CA0107, 2007-Ohio-2367, at ¶13, citing *Berdyck v. Shinde* (1993), 66 Ohio St.3d 573, 579. “In order to prevail on a claim for relief for malpractice, a plaintiff must prove, by a preponderance of the evidence, that the defendant physician’s acts or omissions fell below the particular standard of conduct that the physician’s duty of good practice imposes.” *Straley*, at ¶14. An expert witness is required. *Ramage*, at 102 (saying that “[i]t is well settled in Ohio that in order to prevail in a medical malpractice claim, a plaintiff must demonstrate through expert testimony that, among other things, the treatment provided did not meet the prevailing standard of care”). “[T]he required expert witness must testify that the defendant failed to do some particular thing or things that a physician of ordinary skill, care, and diligence would have done under like or

similar circumstances in order to satisfy the physician's duty of care, and that the injuries or losses complained of were a direct and proximate result of that failure." *Straley*, at ¶15, citing *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131-132.

{¶ 32} Witzmann's medical negligence theory at trial was that Adam failed to conform to the standard of care when he failed to adequately protect her recurrent laryngeal nerve from severance. In support, Witzmann's experts testified that an otolaryngologist of ordinary skill, care, and diligence would not have cut the nerve. The applicable standard of care, according to Witzmann's experts, provides that during a thyroidectomy like Witzmann's, one that involved no excessive bleeding, malignant tumors, or other unusual circumstances, the recurrent laryngeal nerve must be protected so as to avoid cutting it. Cutting the nerve in this situation is conclusive evidence that the surgeon failed to adequately protect it and is a violation of the standard of care.

{¶ 33} Adam's experts disagreed. In particular, Dr. Cummings testified that medical studies show that there is a 1% chance that this nerve will be injured severely enough to cause paresis of the vocal cord, even when all due care is taken to protect it. When asked if, in his opinion, a surgeon performing a thyroidectomy who identifies the nerve and makes every attempt to protect it yet still injures the nerve can be considered to have conformed to the standard of care, Dr. Cummings answered yes. When asked how this is possible, how a surgeon can make every effort to protect the nerve but still injure it, Dr. Cummings explained: "We only see where the nerve is until it comes up to the suspensory ligament, which is an anatomical structure which holds the thyroid [] against the trachea, and then it dives

into the tissue. And you can protect the nerve all the way up to there, but you can't protect it when it penetrates the muscle as it gets into the larynx; and that's usually the area where there is some trauma to cause the injury." (Tr. 995). Witzmann's experts conceded that the recurrent laryngeal nerve is particularly vulnerable in the area described by Dr. Cummings. It was Dr. Cummings's opinion that Adam's conduct conformed to the standard of care. Based on his review of the records and Adam's operative notes, Dr. Cummings opined, "I think he did everything correctly. He did the procedure appropriately. He identified the nerve and observed it throughout its course. He was doing the right operation for the right indications. And I don't see any deviation from the standard of care." (Tr. 1010). Dr. Willett testified similarly.

{¶ 34} Here, the only real issue is whether Adam was negligent. Adam admits that, during the thyroidectomy procedure, he did something that caused severe injury to Witzmann's recurrent laryngeal nerve, which damaged Witzmann's voice. But injury does not prove negligence. The only question is: whatever it was that Adam did or failed to do during the thyroidectomy that resulted in the injury, was it something that an otolaryngologist of ordinary skill, care, and diligence might do (or not do) in a similar circumstance? In other words, was Adam's conduct that of a reasonable otolaryngologist performing a thyroidectomy?

{¶ 35} Before it can be determined whether a physician failed to conform to the standard of care, the relevant standard of care must first be established. Here, the relevant standard concerns a left thyroid lobectomy procedure vis-à-vis the left recurrent laryngeal nerve. The experts agreed that the nerve should be protected—no

expert testified that a surgeon may disregard the nerve. The experts also agreed that the protection afforded the nerve is not absolute, that is, in certain situations severe injury to the nerve is accepted as unavoidable. Witzmann's and Adam's experts conceded that cutting the nerve may be unavoidable if there is excessive bleeding or a large tumor. The relevant standard of care, then, is not the subject of the experts' dispute. Rather, the dispute concerns the second element of the negligence test: whether Adam conformed to the standard of care.

{¶ 36} The dispute concerns whether Adam adequately protected the recurrent laryngeal nerve. It was Witzmann's experts' opinion that he did not. They believed that when there are no complications a surgeon of ordinary skill, care, and diligence can always avoid cutting the nerve. Conversely, Dr. Cummings cited medical studies showing that even in the absence of complications severe injury to the nerve occurs in a small number of cases. He described how a surgeon might injure the nerve in the area where it is most vulnerable near the suspensory ligament, even though the surgeon had identified it and traced its path. Dr. Cummings therefore opined that a surgeon of ordinary skill, care, and diligence could severely injure the nerve even though his conduct conformed to the standard of care. It was Dr. Cummings's opinion that this is what happened during Witzmann's thyroidectomy.

{¶ 37} Dr. Cummings's testimony alone is substantial, probative evidence that supports Adam's defense that he did not breach the standard of care and was not negligent. Therefore the trial court properly overruled Witzmann's motion for a directed verdict.

{¶ 38} The first assignment of error is overruled.

C. The Jury's Verdict Versus the Weight of the Evidence

{¶ 39} Witzmann contends in the second assignment of error that the jury's verdict is against the manifest weight of the evidence.

{¶ 40} The civil manifest-weight standard is this: "a judgment supported by 'some competent, credible evidence going to all the essential elements of the case' must be affirmed." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶26, quoting *C.E.Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. Despite its name, under the civil manifest-weight standard a reviewing court does not consider the weight that any particular piece of evidence should be given. See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, at ¶50 (saying that "[i]t is not the reviewing court's function to reweigh the evidence on appeal"), citing *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, at ¶39. Accordingly, "the fact that evidence exists on both sides of an issue does not justify reversal." *Ohio Consumers'*, at ¶50.

{¶ 41} In our competency discussion, we summarized Dr. Cummings's extensive background in the field of otolaryngology. Above, in our directed-verdict discussion, we reviewed Dr. Cummings's pertinent testimony on the question of Adam's negligence. Dr. Cummings's testimony is competent, credible evidence that alone supports the jury's verdict. The jury was also free to believe Dr. Willett's testimony on the negligence issue. The second assignment is likewise Overruled.

D. Admitting Evidence on the Issue of Witzmann's Alleged Failure to Mitigate her Damages

{¶ 42} The failure-to-mitigate evidence to which Witzmann objects concerns her decision so far not to undergo medialization laryngoplasty, a procedure that could restore much of her voice. The third, fourth, and sixth assignments of error all relate to the admission of such evidence, and we will address them together.

{¶ 43} The failure-to-mitigate issue is moot. The issue concerns the amount of damages that a plaintiff may recover from a liable defendant. The jury, however, determined that Adam was not negligent and, therefore, not liable to Witzmann for damages. The evidence on this issue is therefore completely immaterial to the jury's verdict.

{¶ 44} Witzmann also alleges in the fourth assignment of error that Adam's counsel violated a court order prohibiting the deposition of Dr. Forrest. Witzmann filed a motion for discovery sanctions, but the trial court never ruled on it.³ She contends that the trial court should have imposed sanctions for violating the court order.

{¶ 45} Disobedience of a court order is the definition of contempt of court. *Denovchek v. Board of Trumbull County Com'rs* (1988), 36 Ohio St.3d 14, 15. And "[c]ourts may punish disobedience of their orders" with sanctions. *State ex rel. Bitter*

³Since the trial court did not expressly rule on the motion for sanctions, we will consider it to have impliedly overruled the motion. See *Maust v. Palmer* (1994), 94 Ohio App.3d 764, 769 (Citation omitted.).

v. Missig (1995), 72 Ohio St.3d 249, 252 (Citation omitted.). But “[a]bsent a showing of prejudice to the party making the contempt motion, contempt is essentially a matter between the court and the person who disobeys a court order.” *Denovchek*, at 17 (holding “that there is no right of appeal from the dismissal of a contempt motion when the party making the motion is not prejudiced by the dismissal”). “[S]ince the primary interest involved in a contempt proceeding is the authority and proper functioning of the court, great reliance should be placed upon the discretion of the [court].” *Id.* (Citation omitted.). “The court that issued the order sought to be enforced is in the best position to determine if that order has been disobeyed.” *Id.* Therefore, “absent an abuse of discretion, an appellate court will not disturb a trial court’s contempt determination.” *Bank One Trust Co., N.A. v. Scherer*, 176 Ohio App. 3d 694, 2008-Ohio-2952, at ¶39.

{¶ 46} Witzmann fails to convince us that the trial court abused its discretion by not holding Adam or counsel in contempt and sanctioning them, so we will defer to the trial court’s decision in the matter. Moreover, the evidence provided by Dr. Forrest concerns the failure-to-mitigate issue, which we determined above is moot.

{¶ 47} Finally, Witzmann contends in the fourth assignment of error that the trial court allowed “surprise” testimony from Adam and Dr. Cummings in violation of Civil Rule 26.

{¶ 48} Civil Rule 26 provides that “[a] party is under a duty seasonably to supplement his response with respect to any question directly addressed to * * * 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)(b).

{¶ 49} With respect to Dr. Cummings's testimony, Witzmann contends that she was surprised by his direct-examination testimony about the complications and success rates of reinnervation surgery. We need go no further: this testimony concerns the failure-to-mitigate issue, which is moot.

{¶ 50} Concerning Adam's testimony, we first address Witzmann's insistence that Adam admitted during his deposition that he severed her recurrent laryngeal nerve. At his deposition, Adam testified:

{¶ 51} "Q * * * I guess my question to you is—is your position that you did not sever this nerve?

{¶ 52} "A That's not my position.

{¶ 53} "Q Okay. Your position is you don't know if you have severed the nerve?

{¶ 54} "A My position is I damaged the nerve.

{¶ 55} "Q Okay.

{¶ 56} "A The nature of that damage, I'm not sure.

{¶ 57} "Q Okay. But you would agree that it can include severance?

{¶ 58} "A Yes, I do."

(Adam's depo., p.28). The most Adam admitted to here was that it was *possible* that he severed the nerve. Adam later stated that he knew of no other time that the nerve could have been severed other than during the thyroidectomy that he performed. At trial, Adam testified that after reviewing the Cleveland Clinic's records his belief concerning what happened to the nerve changed somewhat. Adam said, "I think that it is probable that he [the specialist] added to the damage of the nerve—yes. I think

it's probable that he completed the transection, completed the damage that was done during my surgery." (Tr. 368). Witzmann contends that Adam failed to supplement his deposition responses with this new belief.

{¶ 59} Adam's testimony was, at worst, cumulative evidence. Dr. Cummings also testified that it was his opinion that, while Adam severely damaged the nerve, the nerve was actually severed during the reinnervation procedure. We therefore see no prejudice to Witzmann from the testimony's admission. See Evid.R. 103(A).

{¶ 60} The third, fourth, and sixth assignments of error are overruled.

E. The Cross Examination of an Expert on Legal Issues

{¶ 61} One of Witzmann's medical experts was Eugene Stevenson. In addition to being a doctor of medicine, Dr. Stevenson is also a doctor of laws, having earned a law degree, though never practicing law. Adam's counsel questioned Dr. Stevenson on the legal concepts of burden of proof, standard of care, and negligence. Adam argues that the purpose of the questions was to test his medical opinions and ensure that Dr. Stevenson was not holding Adam to his (Stevenson's) personal standard of care, that Dr. Stevenson understood the standard to be applied under the law, and that he understood that the burden of proof did not rest with Adam to prove that he was not negligent. Witzmann contends in the fifth assignment of error that this was improper because expert witnesses may not testify on questions of law. Adam responds that Dr. Stevenson was not cross-examined on questions of law, as he was not asked to instruct the jury on the law or render any legal opinion.

{¶ 62} "Expert opinion testimony is allowed for the purpose of aiding and

assisting the jury in understanding the evidence presented and in arriving at a correct determination of the litigated issues.” *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 19, citing *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77. An expert witness is not permitted to give an opinion relating to the law, and a trial court that allows such an opinion abuses its discretion. See *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, at ¶21 (saying that a trial court abuses its discretion when it allows an expert witness to interpret for the jury what a statute requires); see, also, *Reynolds v. City of Oakwood* (1987), 38 Ohio App.3d 125, 130 (saying that a witness may not instruct the jury on what the applicable law is in a particular circumstance), citing *Warnock v. Youngstown Bag & Burlap Co.* (App.1932), 14 Ohio Law Abs. 85, 87; *Wagenheim*, at 19 (saying that “an expert’s interpretation of the law should not be permitted, as that is within the sole province of the court”), citing *State v. Walsh* (1979), 66 Ohio App.2d 85, 100. An opinion on the existence and breach of a duty is an opinion relating to the law. See *Wagenheim*, at 19 (holding that an expert’s testimony on the existence and breach of a duty owed by an accountant to his client is not permitted).

{¶ 63} Here, while Dr. Stevenson gave opinions relating to the law of malpractice, Witzmann fails to show that she was prejudiced by them. Opinions relating to the law are generally prejudicial if they are incorrect. See *Kraynak*, at ¶21 (expert witness incorrectly interpreted a statute); *Wagenheim*, at 19 (expert witness was wrong on the duty owed by an accountant regarding confidential information). After reviewing his testimony, we find that Dr. Stevenson’s opinions on medical malpractice law were not incorrect, nor did they conflict with the trial court’s

instructions on the law given later to the jury. Therefore, any error in the admission of this improper testimony was harmless. See Evid.R. 103(A).

{¶ 64} The fifth assignment of error is overruled.

F. Admitting Testimony from Adam’s Experts on Causation in Terms of Possibility Rather Than Probability

{¶ 65} Witzmann asserts that Adam presented two theories of causation at trial. One theory was that the nerve was severed by the Cleveland Clinic specialist during the reinnervation procedure. The other theory was that the injury was a “recognized complication,” which Witzmann says means that the injury to her nerve was caused by something other than malpractice. Witzmann contends in the seventh assignment of error that Adam’s expert witnesses presented these alternatives only as *possible* causes, not as *probable*. For this reason, argues Witzmann, the testimony on both theories should have been excluded under *Stinson v. England* (1994), 69 Ohio St.3d 451, at paragraph one of the syllabus (holding that “[t]he admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability”).

{¶ 66} We do not agree that Adam presented these ideas as alternative theories of causation. Adam admits that he severely injured Witzmann’s recurrent laryngeal nerve. He admits that this injury caused damage to her voice, for which she sought damages. The idea of a “recognized complication” refers to the expert testimony that it is recognized that severe non-negligent injury to that nerve occurs in

a small percentage of cases. Causation is not the issue here, negligence is. Whether Adam was the one who completely severed the nerve is not relevant to that issue.

{¶ 67} The seventh assignment of error is overruled.

G. The Treatment of Adam’s Complication-of-Surgery Defense

{¶ 68} Witzmann contends in the tenth assignment of error that the trial court should have treated Adam’s complication-of-surgery defense as an affirmative defense that Adam had the burden to prove.

{¶ 69} An affirmative defense, we have said, is “[a]ny defensive matter in the nature of a confession and avoidance.” *Wurts v. Gregg* (Jan. 28, 2000), Montgomery App. No. 17682. That is, “[i]t admits for pleading purposes only that the plaintiff has a claim (the ‘confession’) but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the ‘avoidance’).” *Wurts*. Adam’s defense of “complication of surgery” was not an affirmative defense. It was a defensive matter, to be sure, but not in the nature of a confession and avoidance. Adam did not admit that Witzmann had a claim for medical malpractice or that he was negligent.

{¶ 70} Rather, Adam’s argument, and the evidence supporting it, rebuts the negligence element of Witzmann’s medical-malpractice claim. Witzmann had the burden to prove that Adam negligently injured her nerve. Adam contended that, while he injured her nerve, he had conformed to the relevant standard of care. Witzmann’s injury, he contended, was simply one of the risks (potential complications) associated with the procedure. The defense that the injury was the result of a “complication of surgery,” then, simply suggests that Adam was not negligent.

{¶ 71} The tenth assignment of error is overruled.

H. The Jury Instructions

{¶ 72} Witzmann contends in the eighth assignment of error that the trial court should have given certain jury instructions and should not have given others.

{¶ 73} “A trial court’s failure to give a proposed jury instruction is reversible error if the defendant demonstrates that the trial court abused its discretion, and that the defendant was prejudiced by the court’s refusal to give the proposed instruction.” *Walker v. Conrad*, Montgomery App. No. 19704, 2004-Ohio-259, at ¶20, citing *Jaworowski v. Med. Radiation Consultants* (1991), 71 Ohio App.3d 320, 327.

{¶ 74} Witzmann contends that the trial court should have instructed the jury that if it found Adam negligent it should also find him liable for any injury that resulted from subsequent medical care. Since the jury found that Adam was not negligent, though, had such an instruction been given the jury never would have considered it. Witzmann also contends that the trial court should have instructed the jury that Adam had the burden to prove the affirmative defense that Witzmann’s injury was the result of a “recognized complication” of surgery. We note first that, contrary to Witzmann’s assertion, the trial court did not give the jury any instruction regarding “complication of surgery.” The court used this term only once in its instructions, when it described Adam’s position in the case: “Defendant Dr. Adam is denying any negligence and denying that his care and treatment proximately caused all of Plaintiff Mrs. Witzmann’s alleged injuries and damages. Dr. Adam claims that Mrs. Witzmann suffered a legitimate, well-recognized complication of thyroidectomy surgery * * *.”

(Tr. 1315). Such an instruction would not have been proper because, as we explained above, “recognized complication” here was not an affirmative defense.

{¶ 75} The jury instructions given by the trial court to which Witzmann objected relate to liability for subsequent injury, to the amount of damages a plaintiff may recover for malpractice, and to a plaintiff’s mitigation of damages. Since the damages issue was not reached by the jury, all of these instructions were at worst harmless.

{¶ 76} The trial court did not abuse its discretion. The eighth assignment of error is overruled.

I. Admitting Testimony from Adam on His Habit and Routine

{¶ 77} Adam testified that he always warns patients pre-operatively that there is a risk of injury to the recurrent laryngeal nerve during a thyroidectomy procedure. Adam also told the jury that never in over 460 surgeries has he injured a patient’s recurrent laryngeal nerve. Witzmann contends in the ninth assignment of error that none of this testimony should have been admitted under Evidence Rule 406 because it lacked an appropriate foundation. Adam contends that the rule does not require that a foundation be laid.

{¶ 78} Evidence Rule 406 provides that “[e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.” “The rationale for the admission of evidence pursuant to Evid.R. 406 is that habitual acts may become semi-automatic and may tend to prove one acted in

the particular case in the same manner.” *Bradley v. Farmers New World Life Ins. Co.* (1996), 112 Ohio App.3d 696, 708, quoting *Cardinal v. Family Foot Care Centers, Inc.* (1987), 40 Ohio App.3d 181. Evidence of habit does require a foundation. See *Brokamp v. Mercy Hosp. Anderson* (1999), 132 Ohio App.3d 850, 865, citing *Bollinger, Inc. v. Mayerson* (1996), 116 Ohio App.3d 702, 715 (saying that “[t]o lay the proper foundation, the proponent of the evidence must show that routine in fact exists and that the stimulus for the habitual response occurred on the particular occasion”).

{¶ 79} Here, Adam’s testimony that he always gives this warning to his patients concerns Witzmann’s claim for lack of informed consent. Witzmann testified that Adam did not warn her of this risk. This claim was ultimately not presented to the jury, because Witzmann admitted that even if she had been told of the risk of injury to this nerve she still would have undergone the procedure. This testimony had nothing to do with the jury’s verdict, and its admission was at most harmless error.

{¶ 80} Adam’s testimony that he had never damaged the recurrent laryngeal nerve prior to Mrs. Witzmann’s surgery was offered in evidence by her attorney during Dr. Adam’s cross-examination at the beginning of the trial. (Tr. 349.) Appellant can hardly complain of its admission now. This evidence was inadmissible as habit evidence under Evid.R. 406 and was irrelevant. In any event, all the physicians testified this type of injury rarely occurs. The admissibility of this testimony if offered as habit testimony was harmless error.

{¶ 81} The ninth assignment of error is overruled.

J. Overruling Witzmann’s Motion to Declare Ohio’s Medical Malpractice Act Unconstitutional

{¶ 82} In the twelfth assignment of error Witzmann contends that the Medical Malpractice Act and other related acts and statutes are unconstitutional. The acts and statutes cited by Witzmann relate to the amount of damages that a medical-malpractice victim may recover. Since Adam was found not negligent, he was not liable for any damages. Therefore the cited acts and statutes do not apply in this case, and we decline to determine their constitutionality.

{¶ 83} The twelfth assignment of error is overruled.

III

{¶ 84} We have overruled each assignment of error presented. The judgment of the trial court is Affirmed.

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GRADY, P.J., and FROELICH, J., concur.

Copies mailed to:

- Dwight D. Brannon
- John B. Welch
- Karen L. Clouse
- Gregory Foliano
- Hon. Frances E. McGee