IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MEGAN HANNA, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PETRA MIETTA FRY,	:	APPEAL NO. C-150034 TRIAL NO. A-1105335
and,	:	*JUDGMENT ENTRY.*
NICHOLAS FRY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF PETRA MIETTA FRY, A MINOR,	:	
Plaintiffs-Appellants,	:	
vs.	:	
REMI AKUA LAWRENCE-HYLTON, M.D.,	:	
and	:	
ANDERSON HILLS PEDIATRICS, INC.	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiffs-appellants Megan Hanna and Nicholas Fry filed suit alleging medical malpractice on the part of defendants-appellants Remi Akua Lawrence-Hylton, M.D., and Anderson Hills Pediatrics, Inc., in connection with the death of their daughter, Petra Mietta Fry. Petra died from a bacterial infection. After a trial, the jury concluded that Lawrence-Hylton had not acted negligently, and the trial court entered judgment for her and her practice group.

In their first assignment of error, Hanna and Fry claim that the trial court erred when it failed to grant their motion for a judgment notwithstanding the verdict

or their motion for a new trial. A motion for a judgment notwithstanding the verdict tests the legal sufficiency of a claim or defense and presents a question of law. *Siuda v. Howard*, 1st Dist. Hamilton Nos. C-000656 and C-00068, 2002-Ohio-2292, ¶ 102. The standard of review for the denial of a judgment notwithstanding the verdict is de novo. *Lally v. Thresiamma,* 1st Dist. Hamilton No. C-100602, 2011-Ohio-3681, ¶ 5, citing *Merkl v. Seibert*, 1st Dist. Hamilton Nos. C-080973 and C-081033, 2009-Ohio-5473, ¶52. The decision to grant a new trial based, as here, on a claim that the verdict was against the manifest weight of the evidence is within the trial court's discretion. *Weber v. Kinnen*, 1st Dist. Hamilton No. C-100801, 2011-Ohio-6718, ¶ 13. Therefore, a trial court's ruling on such a motion will not be overturned absent a finding that it had abused its discretion. *Id.*, citing *Rohde v. Farmer*, 23 Ohio St.2d 82, 262 N.E.2d 685 (1970), paragraph one of the syllabus.

In this case, Lawrence-Hylton testified that Petra Fry was brought to her office with complaints of a fever and a history of vomiting, diarrhea, and a mild cough. She was properly hydrated, and her temperature was 101.8 at the time of the appointment. She had a runny nose and a rash. She attended day care, a common source for viral infections. Lawrence-Hylton testified that none of Petra's symptoms had indicated a bacterial infection. In fact, the types of symptoms with which she presented all but ruled-out such a diagnosis.

This testimony was corroborated by the testimony of Dr. Stanford Shulman, a board-certified specialist in pediatric infectious diseases. He testified that

> [A]ll those symptoms, all those complaints that she had are all viral-type complaints. Those are the things physicians are trained to look for to say this is a patient who has a viral illness. Patients that don't have vomiting, diarrhea and runny nose and cough you may think more about—and rash—may begin to think more about a bacterial infection

> perhaps, but all of these things point a hundred percent, 99 percent, towards a viral illness without a doubt.

He also testified that it was likely that the bacterial infection developed secondarily—after Petra left Lawrence-Hylton's office. He noted that this would be consistent with Petra's parents developing similar symptoms after the office visit. He also noted that the discharge instructions properly informed the parents to return if conditions did not improve in a couple days.

Experts who testified for Hanna and Fry suggested several explanations for how Lawrence-Hylton failed to follow the proper standard of care. They argued that the temperature Petra had the morning of the office visit should have been adjusted upward by one to two degrees because she had taken Tylenol earlier, but each expert for Lawrence-Hylton testified that there is no such protocol. Additionally, a plaintiffs' expert testified that Petra's condition should have been treated as a "fever without focus," which would have allowed for treatment for bacterial as well as viral syndromes. But the defense experts noted that the plaintiffs' expert had made that determination based on an outdated model for fever without focus, and that the fever-without-focus diagnosis is only appropriate when the patient presents with no other additional symptoms such as rash, diarrhea, cough, runny nose, or vomiting.

Plaintiffs' experts also stated that Lawrence-Hylton should have performed additional blood work and given antibiotics prophylactically. But the defense experts testified that additional blood work and antibiotics were not indicated in this case. In fact, Dr. Gerald Sturgeon, a pediatrician with over 46 years of experience, testified that giving Petra antibiotics could have made her symptoms worse. He also said that the prophylactic administration of antibiotics is generally discouraged in medicine, because it contributes to the spread of antibiotic-resistant bacterial strains.

In this case, plaintiffs and defendants presented expert testimony regarding the standard of care. Hanna and Fry attempted to show that Lawrence-Hylton did

not meet that standard, while defense testimony indicated that she had. On this record, we cannot say that the trial court erred when it denied the motions for judgment notwithstanding the verdict and for a new trial. We overrule the first assignment of error.

In their second assignment of error, Hanna and Fry claim that the trial court abused its discretion during the jury-selection process by improperly limiting voir dire of perspective jurors who were seated. In one instance, Hanna and Fry were not permitted to question a juror who was confused about the burden of proof. The judge told counsel that he thought counsel was unfairly putting jurors on the spot, and the juror said that she could follow the law. In another instance, a juror had written on the questionnaire that he didn't think that he could be a good juror. But that was because he had not been a juror before and did not understand the process, and he ultimately said that he could follow the law. Limiting further questioning in these cases was not an abuse of discretion

Finally, Hanna and Fry claim that a prospective juror should have been removed for cause when she said that doctors should not be sued for "mistakes." But counsel opened the door for this statement when he asked the juror, "How do you feel about that, the idea that we all can make mistakes, * * * do you think that the doctor should be given the benefit of the doubt [when] it was just a misdiagnosis?" The juror said, "If he was doing his best and he wasn't—he didn't do it intentionally and then misdiagnosis that, you know, I wouldn't find him at fault for that." But then the juror was asked what his answer would be if he was told that the mistake was actionable, and he said he would follow the law. On this record, it was not an abuse of discretion to fail to strike the juror for cause. We overrule the second assignment of error.

In the third assignment of error, Hanna and Fry claim that the trial court abused its discretion when it refused to give a curative instruction for a question

asked by defense counsel about an "edited" 911 recording. During the cross-examination of Hanna about her call to 911, defense counsel asked, "So, you're not aware of the fact that this tape we just heard had been edited?" She answered, "No." Hanna and Fry objected to the question and later sought a curative instruction, which the trial court denied.

On this record, any error in the failure to give a curative instruction in this case was harmless. The trial court said, "The question will be stricken. We don't know about anything being edited. Are you going to show evidence that something was edited?" Defense counsel said that he intended to do so, but the trial court told him to move on. This was the only reference to an "edited" 911 recording that the jury heard, and the 911 recording was not discussed by either side in closing argument. Since this evidence had so little bearing on the case, any error regarding the failure to give a curative instruction was harmless. *See Luri v. Republic Servs.* 8th Dist. Cuyahoga No. 100539, 2014-Ohio-3817, ¶ 9 (holding that it is neither prudent nor appropriate to order a trial court to remedy an error that does not affect the outcome of the case). We overrule the third assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., FISCHER and **MOCK, JJ.**

To the clerk:

Enter upon the journal of the court on December 30, 2015
per order of the court _____.
Presiding Judge