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

PATRICK STEPHENSON,	:	APPEAL NOS. C-220020 C-220036
Plaintiff-Appellee/Cross-Appellant,	:	TRIAL NO. A-1706544
	:	
vs.	:	*O P I N I O N.*
ABUBAKAR ATIQ DURRANI, M.D.,	:	
and	:	
CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.,	:	
Defendants-Appellants/Cross-Appellees.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: July 21, 2023

Robert A. Winter, Jr., *James F. Maus* and *Benjamin M. Maraan, II,* for Plaintiff-Appellee/Cross-Appellant,

Taft Stettinius & Hollister LLP, Russell S. Sayre, Aaron M. Herzig, Philip D. Williamson, Anna M. Greve, David C. Roper, Lindhorst & Dreidame Co., L.P.A., Michael F. Lyon, James F. Brockman and *Paul J. Vollman* for Defendants-Appellants/Cross-Appellees.

BERGERON, Judge.

{¶1} This medical malpractice case brought by plaintiff-appellee/cross-appellant Patrick Stephenson involves allegations of medical negligence relating to four separate back surgeries performed by Dr. Abubakar Durrani. Mr. Stephenson subsequently filed suit against defendants-appellants/cross-appellees Dr. Durrani and the Center for Advanced Spine Technologies, Inc., ("CAST") (collectively, "Defendants"), along with other defendants not parties to this appeal. The case proceeded to a jury trial, which returned verdicts in favor of Mr. Stephenson, concluding that Dr. Durrani was negligent in his care and treatment, failed to acquire informed consent, committed battery, and made fraudulent misrepresentations to Mr. Stephenson. Our review of the trial record demonstrates that the trial court abused its discretion in various evidentiary and trial-related rulings that, when viewed collectively, we cannot consider harmless. We accordingly must reverse the judgment and remand this matter for a new trial.

I.

{¶2} Ejected from a car in an automobile accident at 12 years old, Mr. Stephenson (now approximately 54) has suffered lingering back pain ever since—in addition to lower back pain, he experienced pain across his buttocks, the middle of his back, up his shoulder and neck, and numbness and tingling down his legs and into his toes. In March 2010, after his pain became next to unbearable—he characterized his lower back pain close to a 10 on a 10-point scale—one of his doctors referred him to Dr. Durrani. During this referral meeting, Dr. Durrani assured Mr. Stephenson that he would "fix" him, insisting that he needed to undergo various surgeries, including a cervical neck surgery, otherwise his head would "come off" in a car accident. Mr.

Stephenson, with an EMT background, initially dismissed Dr. Durrani's statement as nonsense. But Dr. Durrani doubled down, emphasizing, "if you're in an accident[,] you're going to end up with a broken neck and you're going to end up paralyzed."

{¶3} After this admonition, Mr. Stephenson agreed to Dr. Durrani's treatment plan. Dr. Durrani performed an initial surgery in August 2010 at West Chester Hospital—an L4-L5, L5-S1 AxiaLif surgery—which apparently eliminated the numbness and tingling in his legs, and the pain down his buttocks. However, the pain in his lower back remained, and he claims that the surgery caused him to suffer new pain in his mid-back and pain in his ribs. As a result, in March 2011, Dr. Durrani performed a second surgery at West Chester Hospital—a C5-C6 fusion—that apparently relieved his arm and shoulder pain and relieved a pinched nerve.

{¶4} In May 2011, Dr. Durrani performed a third surgery—a T7-T10 instrumental fusion. Mr. Stephenson claims that after this surgery, he began to experience new pain on his right side that he had never before encountered. He began to suffer from new and different back pain as well. To address these issues, Dr. Durrani performed a final fourth surgery in November 2012 on Mr. Stephenson—a foraminotomy and hemilaminectomy from C5-C7. Although this surgery apparently resolved his mid-back pain, Mr. Stephenson is presently unable to work and cannot walk, and he believes that each surgery performed by Dr. Durrani was medically unnecessary, improperly performed, and lacked his informed consent.

{¶5} Mr. Stephenson initially brought his lawsuit with other former patients of Dr. Durrani in August 2016. After the court severed his case from the others, and after he settled with other defendants, Mr. Stephenson pursued claims against Dr. Durrani for negligence, battery, lack of informed consent, intentional infliction of

emotional distress, fraud, and spoliation of evidence. Against CAST, Mr. Stephenson asserted claims for vicarious liability, negligent hiring, retention and supervision, spoliation of evidence, fraud, and violation of the Ohio Consumer Sales Practices Act.

{¶6} A jury trial for this case began in February 2020. After a week and a half long trial, the jury found Dr. Durrani and CAST acted with actual malice or aggravated or egregious fraud towards Mr. Stephenson, were negligent in their care and treatment of him, failed to acquire his informed consent, committed battery against him, and fraudulently misled him. The jury awarded Mr. Stephenson $820,014 in total damages, including $262,509 for past medical expenses, $525,018 in punitive damages, and attorney's fees. The trial court reduced the punitive damages to $350,000, pursuant to R.C. 2315.21(D)(2)(b), and applied a set-off of $87,378, reflecting the settlement that Mr. Stephenson received from the other defendants, lowering his damages award to $732,635. The trial court also granted prejudgment interest in the amount of $65,540 upon finding that Defendants failed to undertake a good faith effort to settle the case. This appeal and cross-appeal followed shortly thereafter.

II.

{¶7} In their first assignment of error, Defendants insist that Mr. Stephenson's claims related to the first three surgeries are time-barred. Generally, in Ohio, medical malpractice claims are subject to a four-year statute of repose. R.C. 2503.113(C); *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶ 13. Mr. Stephenson's surgeries took place in August 2010, March 28, 2011, May 4, 2011, and November 7, 2012, and he commenced this action on August 15, 2016, more than four years after the first three surgeries.

{¶8} Defendants acknowledge, as they must, that Mr. Stephenson's claims against Dr. Durrani are tolled based on the absent defendant statute because he fled to Pakistan in 2013. *See Elliot v. Durrani*, 2021-Ohio-3055, 178 N.E.3d 977, ¶ 43 (1st Dist.) ("Because Durrani fled the country in December 2013, less than four years after [plaintiff's] surgery, the statute of repose is tolled and does not bar [plaintiff's] claims against Durrani."), *aff'd,* Slip Opinion No. 2022-Ohio-4190, ¶ 25. *See also* R.C. 2305.15(A) ("When a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action * * * does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought."). Since the absent defendant statute applies to the claims against Dr. Durrani based on the Supreme Court's ruling in *Elliot*, these claims are therefore not time-barred pursuant to R.C. 2305.15(A). We accordingly reject Defendants' statute of repose argument with respect to Dr. Durrani.

{¶9} The analysis differs, however, regarding the claims against CAST. In *Elliot*, we specifically held, based on our interpretation of the plain language of the absent defendant statute, "[T]he tolling provision in R.C. 2305.15(A) applies only to claims against Durrani and not to claims against CAST." *Elliot* at ¶ 50. Mr. Stephenson tries to circumvent this holding in two ways.

{¶10} First, he argues waiver, claiming that Defendants only broached this point in their answer to his amended complaint. *See Setters v. Durrani*, 2020-Ohio-6859, 164 N.E.3d 1159, ¶ 58 (1st Dist.) ("*Setters I*") ("Appellants cannot avail

themselves of the protection of the [affirmative defense] when they made no real effort to pursue the defense. Thus, despite the fact that they briefly raised it in their answer, appellants waived the defense."); *Adams v. Durrani*, 2022-Ohio-60, 183 N.E.3d 560, ¶ 97 (1st Dist.), quoting *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 162 Ohio St.3d 400, 2020-Ohio-5482, 165 N.E.3d 1167, ¶ 53-55, and *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 53 ("Recently, the Ohio Supreme Court held that even if an affirmative defense is raised in an answer to the complaint, it is waived 'when a litigant supplies no argument "regarding whether the relevant case law applied to the facts of the case, justifies a decision in the litigants favor." ' ").

{¶11} But in addition to their answer, Defendants raised the statute of repose issue in their opposition to the motion for leave to file the second amended complaint, providing relevant legal authorities and analysis supporting their position. This briefing represented a legitimate effort to pursue the statute of repose defense, and not a mere conclusory assertion that the affirmative defense should apply. *See Setters I* at ¶ 57, quoting *Garcia v. O'Rourke*, 4th Dist. Gallia No. 04CA7, 2005-Ohio-1034, ¶ 19 (" 'An unspecific and unsupported allegation * * * without further affirmative action to prosecute the raised defense, does not provide the trial court with information necessary to adjudicate the claimed defense. Thus, a mere conclusory allegation results in a waiver of the defense.' "). The trial court rejected this argument, and based on the record at hand, we conclude that Defendants appropriately preserved the statute of repose defense for purposes of this appeal.

{¶12} Second, turning to the merits, Mr. Stephenson highlights that the Ohio secretary of state administratively cancelled CAST in April 2014 for "failure to

maintain agent," and that this court did not consider in *Elliot* whether CAST was "out of state, absconded, or concealed," for purposes of R.C. 2305.15, by virtue of the administrative termination. Although it is true that we did not specifically consider this point in *Elliot,* Mr. Stephenson fails to develop any argument as to why the administrative termination commands a different result under R.C. 2305.15(A).

{¶13} Unlike Dr. Durrani, who fled the country, CAST stayed put. We see no evidence that it left the state, absconded, or concealed itself. To be sure, CAST's articles of incorporation were "cancelled" for lack of a statutory agent under R.C. 1701.07(N). ("Upon the failure of a corporation to appoint another agent or to file a statement of change of address of an agent * * * [u]nless the default is cured within thirty days after the mailing by the secretary of state of the notice * * * the articles of the corporation shall be canceled * * *."). But this does not mean that the record of CAST would vanish from the secretary of state's website or that CAST would cease to exist as a corporation. *See* R.C. 1701.07(N) ("The secretary of state shall make a notation of the cancellation on the secretary of state's records."); R.C. 1701.88(A) ("[W]hen the articles of a corporation have been canceled * * * *it shall continue as a corporation* for a period of five years from the * * * cancellation.") (Emphasis added.). Nor does cancellation mean that CAST cannot not be served. *See* R.C. 1701.07(H) (If "the corporation has failed to maintain an agent * * * then service of process * * * may be initiated by delivering to the secretary of state * * * copies of such process * * * ."). Based on the statutory framework provided for Ohio corporations, we see nothing in Mr. Stephenson's argument to suggest that we should reach a different result than in *Elliot*.

{¶14} Therefore, with respect to the statute of repose: (1) the statute does not bar any of the claims from Mr. Stephenson's four surgeries against Dr. Durrani; but (2) the statute bars claims against CAST for the first three surgeries, but not the final surgery (which was less than four years before Mr. Stephenson commenced this action). We accordingly overrule Defendants' first assignment in error in part and sustain it in part. Given that we are remanding this cause for a new trial, upon retrial, the case against CAST should be limited to claims pertaining to the fourth surgery.

III.

{¶15} The second assignment of error implicates a variety of evidentiary and related issues that arose during trial, which Defendants claim entitle them to a new trial. "A court may grant a motion for a new trial for, among other things, an irregularity in the proceedings of the court, if the judgment is not sustained by the weight of the evidence, or any reason 'for good cause shown.' " *Adams*, 2022-Ohio-60, 183 N.E.3d 560, at ¶ 20, quoting Civ.R. 59(A). Upon a trial court's denial of a motion for a new trial, "we 'construe the evidence in a light favorable to the trial court's action,' " while applying an abuse of discretion standard of review. *Id.*, quoting *Kreller Group, Inc. v. WFS Fin., Inc.*, 155 Ohio App.3d 14, 2003-Ohio-5393, 798 N.E.2d 1179, ¶ 30 (1st Dist.).

{¶16} "An abuse of discretion connotes more than a mere error of judgment; rather, 'it implies that the court's attitude is arbitrary, unreasonable, or unconscionable.' " *Hayes v. Durrani*, 1st Dist. Hamilton No. C-190617, 2021-Ohio-725, ¶ 8, quoting *Boolchand v. Boolchand*, 1st Dist. Hamilton Nos. C-200111 and C-200120, 2020-Ohio-6951, ¶ 9. An abuse of discretion occurs when "a court exercis[es] its judgment, in an unwarranted way, in regard to a matter over which it has

discretionary authority." *Johnson v. Abdullah,* 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35.

{¶17} We find error in some, but not all, of Defendants' claims, but we address all such matters to provide guidance for the retrial. After our discussion of the specific arguments delineated below, we turn to a consideration of harmless error.

A.

{¶18} Defendants initially seize upon an ex parte contact between Mr. Stephenson and one of the jurors, insisting that the court should have ordered a mistrial. During a break on the third day of trial, counsel for Defendants noticed Mr. Stephenson chatting with one of the jurors. When confronted about the encounter, Mr. Stephenson replied that he commented to the juror, who was apparently stretching his back, that being at court involved "a lot of sitting."

{¶19} After the trial court admonished Mr. Stephenson, it proceeded to ask defense counsel how they wished to proceed, leading to the following dialogue:

> Defense Counsel: I'd like to declare a mistrial. I don't know how that can be repaired.
>
> The Court: Let me say this: I think you're going to the extreme. Based upon what you observed and what [Mr. Stephenson] said, at a maximum, the only thing that could be done would be to inquire of this one juror to determine whether or not what was said to him and what was not said to him and proceed from there. I certainly think requesting a mistrial is extreme at this point, unless more than one juror was spoken to, and unless more than what he said was said to them.

Defense Counsel: Well, let's move on with the trial. We'll move on with the trial.

The Court: This is the bite of the apple. You bite it or you don't at this point. Because I know from this point forward Mr. Stephenson sees a juror he's going to run the other way.

Mr. Stephenson: Yes, sir.

The Court: The only other thing I would say, by bringing a juror in and asking questions of the juror, you certainly highlight that to that juror at a minimum, and probably to other jurors because they will know that he's been called in.

Defense Counsel: Right. Well let's proceed with the trial, without voir diring the jury.

The Court: Without voir diring the juror, which the Court will accept that the admonishment given to Mr. Stephenson at this point satisfies everything and there's no request for a mistrial or either dismissing a juror, correct?

Defense Counsel: Correct.

The Court: Very good. We'll proceed.

{¶20} We apply an abuse of discretion standard of review for the denial of a mistrial. *State v. Johnson*, 4th Dist. Ross No. 16CA3579, 2017-Ohio-7257, ¶ 11.

{¶21} Defendants claim prejudice by this encounter because Mr. Stephenson's comment about the challenges of sitting for extended periods of time previewed his own testimony (about his difficulties in sitting), which represented an attempt to improperly influence the outcome of the case. *See Fehrenbach v. O'Malley*, 164 Ohio

App.3d 80, 2005-Ohio-5554, 841 N.E.2d 350, ¶ 23 (1st Dist.) (a medical malpractice verdict cannot come out of "an atmosphere surcharged with passion or prejudice"); *Haukedahl v. St. Luke's Hosp.*, 6th Dist. Lucas No. L-92-011, 1993 Ohio App. LEXIS 5718, 7 (Dec. 3, 1993) (holding that the trial court should have granted a mistrial in a medical malpractice case involving two defendants when they assisted a juror who lost consciousness during opening statements).

{¶22} We see two problems with Defendants' arguments. First, the transcript reflects that they withdrew their request for a mistrial. As the court summarized matters, it interpreted defense counsel's earlier answers as withdrawing a mistrial request and it specifically asked, "[t]here's no request for a mistrial or either dismissing a juror, correct?" Defense counsel answered, "Correct." This strikes us as a withdrawal of the motion, which would preclude featuring it as a basis for appeal.

{¶23} Regardless, while we can certainly appreciate the possibility of prejudice arising from Mr. Stephenson's impermissible encounter with the juror, Defendants specifically rejected measures offered to them to establish prejudice. "Typically, any private communication or contact between a juror and another person, especially a person connected with one of the parties to the litigation, concerning a matter before the jury constitutes juror misconduct and is presumptively prejudicial." *State v. Clark*, 7th Dist. Mahoning No. 20 MA 0133, 2021-Ohio-4294, ¶ 18, citing *State v. Mack*, 8th Dist. Cuyahoga No. 93091, 2010-Ohio-1420, ¶ 16, and *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), syllabus. This "presumption of prejudice, however, is not conclusive." *Clark* at ¶ 19.

{¶24} Defense counsel was offered the opportunity to: (1) question Mr. Stephenson under oath about the matter; (2) voir dire the juror in order to learn his

account and to ascertain whether he shared the matter with other jurors; and (3) voir dire the entire jury. Defendants took none of these measures, and thus they failed to develop an adequate record that would enable us to find sufficient prejudice to warrant a mistrial.

{¶25} The *Mack* court emphasized that, after having determined that the allegations of juror misconduct had merit, "the trial court should have then allowed [defendant] to present evidence of prejudice." *Mack* at ¶ 32-33. " 'The trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, *in a hearing with all interested parties permitted to participate.*' " (Emphasis added.) *Id.* at ¶ 34, quoting *Remmer* at 229.

{¶26} The trial court provided the options to defense counsel, found lacking in *Mack*, that would have enabled them to develop a record of prejudice. Without that record, we cannot conclude that the trial court abused its discretion in denying the mistrial request (assuming that it was not withdrawn).

B.

{¶27} Defendants next challenge the testimony of Dr. Zeeshan Tayeb—a physician who worked with Dr. Durrani at CAST—as inadmissible habit evidence under Evid.R. 406. ("Evidence of the habit of a person * * * 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."). We review evidentiary decisions of a trial court for an abuse of discretion. *State v. White*, 2d Dist. Montgomery No. 26093, 2015-Ohio-3512, ¶ 36.

{¶28} Dr. Tayeb worked with Dr. Durrani and testified that he heard, "here and there," that Dr. Durrani would tell patients things like "their heads would fall off" or "they would be paralyzed" if they declined to undergo the surgeries he recommended. But when asked if he personally heard Dr. Durrani convey anything along these lines, Dr. Tayeb answered:

> I only shadowed him for the first couple weeks so I was not in the room when those exact statements were said. However, having seen many of his patients during the workup for the surgery or right before surgery or even after surgery, the ones that, whether they were successful or not, when they would come back and say this, I heard the same statements over and over again, that led me believe that obviously these statements were being made.

{¶29} The trial court admitted Dr. Tayeb's testimony as habit evidence under Evid.R. 406. On appeal, Defendants challenge this ruling, primarily for two reasons. First, they maintain that Dr. Tayeb lacked the requisite personal knowledge to testify

as to Dr. Durrani's purported habit because he never witnessed it and instead relayed second-hand accounts. Second, they contend that Dr. Durrani's diagnostic communications with his patients cannot be considered a habit and the testimony fails to establish an adequate foundation under Evid.R. 406. *See Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, ¶ 26-28 (8th Dist.) (demonstrating that a habit is a routine response to the same stimulus, such as "locking the door of a house or traveling home from work by the same route every day").

{¶30} With respect to personal knowledge, generally "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 223, 631 N.E.2d 150 (1994). But "personal knowledge" does not necessarily require the witness to physically see the event in question. " 'Personal knowledge' is '[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' " *United States Bank Natl. Assn. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶ 13, quoting *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 26, and *Black's Law Dictionary* 875 (7th Ed.1999). "A trial court has wide discretion in determining whether a witness has sufficient personal knowledge to testify * * * [and] [a]n appellate court will not disturb such a determination absent an abuse of discretion." *Id.*

{¶31} It is important to emphasize that Dr. Tayeb was treating the same patients as Dr. Durrani, and that he certainly observed their experiences as they came to him and sought treatment. He possesses personal knowledge of what those patients

told him in the course of treating them. Defendants do not point to any authority that mandates that a witness must personally observe a habit in order to testify about that habit. On the state of this record, we believe the trial court did not abuse its discretion in finding that Dr. Tayeb possessed adequate knowledge about his patients and their encounters with Dr. Durrani.

{¶32} But that does not necessarily mean that Dr. Durrani's behavior constitutes a habit, at least based on the record presented to this court. " 'A habit is defined as a person's regular practice of meeting a particular kind of situation with a specific type of responsive conduct.' " *State v. Rexrode*, 10th Dist. Franklin No. 17AP-873, 2018-Ohio-3634, ¶ 15, quoting *Mulford-Jacobs v. Good Samaritan Hosp.*, 1st Dist. Hamilton No. C-950634, 1996 Ohio App. LEXIS 5210, 6 (Nov. 20, 1996).

{¶33} "To be admissible as evidence of habit, the occurrence of the stimulus and the responsive behavior must occur frequently enough to constitute a pattern. * * * A sufficient foundation must be provided for the admission of habit evidence." *Id.*, citing *Mulford-Jacobs* at 6, and *Cannell v. Rhodes*, 31 Ohio App.3d 183, 185, 509 N.E.2d 963 (8th Dist.1986). " '[T]o lay the proper foundation [for evidence of habit], 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.' " *Witzmann v. Adam*, 2d Dist. Montgomery No. 23352, 2011-Ohio-379, ¶ 78, quoting *Brokamp v. Mercy Hosp. Anderson*, 132 Ohio App.3d 850, 865, 726 N.E.2d 594 (1st Dist.1999).

{¶34} Here, we do not see a proper foundation established to demonstrate evidence of habit under Evid.R. 406. First, Dr. Tayeb's testimony is remarkably vague about the frequencies of the occurrences of these comments. He first says he heard such matters "here and there," and later seems to expand that to "over and over again."

We have no idea whether this means five examples or fifty. While we do not believe a precise number must be shown, here the record fails to demonstrate that "the responsive behavior [occurred] frequently enough to constitute a pattern." *See Rexrode* at ¶ 15. Second, and related, Dr. Tayeb's testimony does not identify any particular stimulus that evoked the alleged habitual response. Yes, these patients were seeking treatment from Dr. Durrani. But what did they say that triggered the automatic response? This is where Dr. Tayeb's apparent lack of knowledge regarding the details of the encounters renders it an uphill battle to establish a sufficient foundation. Third, a habit should be reflexive and nearly automatic. We do not know, from Dr. Tayeb's testimony, whether Dr. Durrani always, typically, or just sometimes offered the warning about heads falling off and the like. And this dovetails with the prior point as well because we do not know what the patients conveyed to him.

{¶35} To illustrate the deficiencies in Dr. Tayeb's testimony, consider *Dazley v. Mercy St. Vincent Med. Ctr.*, 6th Dist. Lucas No. L-17-1304, 2018-Ohio-2433. In *Dazley*, a defendant doctor allegedly failed to relay concern of a patient's cardiac shock to a consulting physician. *Id.* at ¶ 14. While the defendant doctor initially testified that he did not recall what he said to the consulting physician, he offered the following testimony:

> I speak to 20, 30 people a day and tell the story of what's going on with the patient. If you look under my chief complaint, that's usually how I start the conversation, and tell them, "Gentleman such and such an age presents with" the complaint he's here with. I would tell something about the hospital course there. I would discuss vital signs. I would discuss our diagnostic findings, including EKGs, vital signs. And then

> it's always catered to the specialist. If I was talking to the pulmonary specialist, I'd tell him about the vent settings; whereas cardiology, I discuss more about the EKGs and the past history here, which was quite significant.

Id. at ¶ 20.

{¶36} The *Dazley* court found that the defendant doctor's testimony as to his habit of communicating with a specialist could be considered habit evidence under Evid.R. 406. *Id.* at ¶ 42. "[Defendant doctor] testified that he has conversations with consulting physicians * * * 20-30 times per day, and he always conducts the conversations the same way. He communicates the patient's chief complaint, age, hospital course, vital signs, and diagnostic findings, including EKGs, and then tailors the rest of the information depending on the specialist he is consulting." *Id.* Such specificity and precision are noticeably wanting here concerning Dr. Tayeb's testimony.

{¶37} On the record before us, the court abused its discretion in admitting Dr. Tayeb's testimony without a sufficient foundation of Dr. Durrani's alleged habitual response for the purposes of Evid.R. 406. We do not mean to say that Dr. Tayeb necessarily cannot establish a proper foundation under Evid.R. 406, but his testimony at trial certainly fell short. If Mr. Stephenson seeks to offer additional testimony from Dr. Tayeb at retrial, the trial court should require a sufficient foundation consistent with the law and the analysis above.

C.

{¶38} Next, Dr. Durrani and CAST argue that Mr. Stephenson's counsel impermissibly raised Dr. Durrani's medical license revocations multiple times, which this court has already found to be inadmissible. In *Setters I*, 2020-Ohio-6859, 164 N.E.3d 1158, at ¶ 19-21, we held: "[T]he mere fact that Durrani's medical licenses were revoked is not probative of his truthfulness. * * * [T]he admission of such evidence * * * did little more than prejudice the minds of the jurors. * * * Because the evidence could influence the case on an improper basis, we find that the trial court abused its discretion in admitting evidence of Durrani's medical licenses being revoked under Evid.R. 403." While Mr. Stephenson insists that the introduction of this evidence remained relevant for the purpose of impeaching Dr. Durrani since his credibility was at issue, this court in *Setters I* rejected that position. *See id.* at ¶ 19.

{¶39} Defendants highlight the following times when Mr. Stephenson's counsel brought up license revocations: during opening statements, when cross-examining two of Defendants' witnesses separately, and during closing arguments. These instances are essentially akin to the examples in *Setters I*, where the point emerged three times. *See id.* at ¶ 24. In *Setters I*, however, we found the error harmless given that it was "mentioned only three times throughout the nearly month-long trial" and in light of "the significance of the other evidence, the limited nature of the disclosure, and the otherwise lengthy impeachment of Durrani's credibility." *Id.* at ¶ 24, 26.

{¶40} But unlike in *Setters I*, the license revocation point in this case emerged much more frequently, as we discuss in Part D below. As explained therein and in Part

H, we cannot conclude that the admission of evidence of Dr. Durrani's medical license revocations is harmless on this record.

D.

{¶41} Defendants attack the playing of excerpts of various depositions of Dr. Durrani (which the parties call the "collage") as irrelevant, highly prejudicial, and violative of several evidentiary rules.[1] They also emphasize that the collage does not discuss Mr. Stephenson's case or treatment at all; instead, it covers an array of topics spanning Dr. Durrani's Pakistani heritage, unrelated malpractice lawsuits, medical license revocations, and resume inflation. The collage appears to consist of cut and pasted excerpts from various Durrani depositions that were played before the jury. While we see nothing inherently wrong in utilizing excerpts from various depositions to play before a jury, they must ultimately be presented in a manner that establishes the admissibility of the evidence. Based on the excerpts contained in the collage we reviewed, and how they were presented before the trial court, we conclude that multiple aspects of it are inadmissible for the reasons described below.

{¶42} The trial court justified the admission of the collage by highlighting the impracticality of taking fact-specific depositions in the 500 some odd malpractice cases pending against Dr. Durrani. The trial court suggested that Dr. Durrani forged a "catch-22 of his own creation" by failing to appear at the trials, thus providing the jury with a very limited opportunity to assess his credibility. The court further relied on the fact that other judges in cases against Dr. Durrani admitted the collage and, in its eyes, the probative value was not substantially outweighed by the danger of unfair

[1] Initially, there was some confusion on appeal concerning which version of the "collage" was played in this trial. After a request from this court, the parties stipulated to the version and transcript of the collage played at trial, which forms the basis of our analysis herein.

prejudice. *See* Evid.R. 403. Beyond those conclusions, the trial court did not offer any analysis evaluating the collage under Evid.R. 403.

{¶43} The collage implicates a number of different evidentiary decisions, which we review for an abuse of discretion. *See White*, 2d Dist. Montgomery No. 26093, 2015-Ohio-3512, at ¶ 36. Overall, while certain aspects of the collage may be admissible (and potentially other aspects could have been admissible if presented in conformity with the Rules of Evidence), the aspects challenged on appeal are rife with prejudicial and inadmissible testimony, compelling us to find error.

1.

{¶44} First, the collage dwells on Dr. Durrani's license revocations (in a much more exhaustive manner than in *Setters I*), which, as explained in detail above, is inadmissible. Building on the improper discussion of license revocations, the collage broadens the aperture to link that conduct to Dr. Durrani's suspensions from Medicare and Anthem as a medical provider, and his suspended privileges from various Cincinnati medical facilities and hospitals. The suspensions flowed, understandably, from his license revocations.

{¶45} All of these events occurred *after* Dr. Durrani provided care to Mr. Stephenson, and they are all in the same vein. As we explained in *Setters I*: "[E]vidence that a defendant-doctor's medical license was revoked is by its very nature prejudicial. It predisposes the jury to find that the doctor acted outside acceptable bounds of competence." *Setters I*, 2020-Ohio-6859, 164 N.E.3d 1159, at ¶ 20. At every turn in the collage, counsel questioned Dr. Durrani on issues relating to his license revocations, magnifying the prejudicial impact.

{¶46} Despite having his licenses revoked for reasons unrelated to his competency as a surgeon—as we discussed in *Setters I*, "the revocations centered on his signing blank prescriptions," *id.* at ¶ 18—the dogged manner of counsel questioning Dr. Durrani about his revocations in the collage (unrelated to his care of Mr. Stephenson) was designed to lead the jury to draw negative conclusions about his abilities as a surgeon. Tying his license revocations to his suspensions as a medical provider and to suspended privileges from an array of hospitals only exacerbated the prejudicial impact. For these reasons, we find that the trial court abused its discretion in allowing the questioning about Dr. Durrani's license revocations and suspended privileges in the collage.

2.

{¶47} Second, the collage served as a vehicle to introduce evidence of other malpractice claims against Dr. Durrani. Under Evid.R. 403(A), "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Applying that standard, Ohio courts tend to recognize that "absent a finding of malpractice, evidence of the existence of a prior medical malpractice case is properly excluded, as unfairly prejudicial." *House v. Swann*, 6th Dist. Lucas No. L-09-1232, 2010-Ohio-4704, ¶ 52, citing *McGarry v. Horlacher*, 149 Ohio App.3d 33, 2002-Ohio-3161, 775 N.E.2d 865, ¶ 43 (2d Dist.). Here, we see no basis for allowing the jury to consider other malpractice claims against Dr. Durrani.

{¶48} In the collage, counsel questioned Dr. Durrani about at least five lawsuits against him from other plaintiffs alleging medical malpractice. Without any context for the lawsuits (such as whether they were pending, what the claims involved,

and whether any court had made any findings), the consideration of these malpractice suits likely sowed confusion in the jury, thus rendering their admission highly prejudicial against Dr. Durrani. *See D'Amore v. Cardwell*, 6th Dist. Lucas No. L-06-1342, 2008-Ohio-1559, ¶ 97 ("In our view the trial court was within its discretion to exclude the evidence of two other pending malpractice claims [against defendant] * * * under Evid.R. 403(A). There had been no finding of professional negligence against [defendant] in either of the other claims. Consideration of other negligence claims, that remain to be proven, would have been highly prejudicial to [defendant] in this action and risked confusion of the issues for the jury in an already complicated case.").

{¶49} The risk for confusion and prejudice is further pronounced here because certain excerpts from the collage discuss medical diagnoses of unnamed patients ("you planned on performing lumbar surgeries, correct?"). The jury thus learned about the existence of malpractice suits, some of the details of treatment of certain unnamed patients that did not relate to Mr. Stephenson's care (and may, or may not, have been related to the malpractice suits), questions about medical bills to "six patients" (again unclear as to whether that relates to the malpractice claims), questions about Dr. Durrani's care in the "Kenny Wilson case" (different than the five malpractice cases and unclear of the relevance of the questions), and that Dr. Durrani allegedly failed to disclose the existence of the malpractice suits to certain licensing authorities.

{¶50} We fail to see how any of this can withstand scrutiny under Evid.R. 403 based on how this testimony emerged in the collage. The jury received no context for any of these other cases, there was no effort to show any correlation to Mr. Stephenson's case, and presenting snippets from multiple malpractice suits seems only to reinforce the point that Dr. Durrani is an incapable doctor. The testimony

certainly would have confused the jury, and the prejudicial impact is self-evident. Based on how these questions emerged in the collage, we also fail to see any real probative value. While questions pertaining to the alleged failure to disclose the malpractice suits could bear on Dr. Durrani's credibility, the questions and answers contained in the collage do not actually substantiate that he misled any licensing authorities. As we consider how these malpractice suits and issues emerged in the collage, and what the jury heard about them, we are convinced that the trial court abused its discretion in allowing the questioning about the malpractice lawsuits against Dr. Durrani in the collage.

3.

{¶51} Next, the collage presents various forms of bad acts of Dr. Durrani, which implicates Evid.R. 404(B)(1): "Evidence of any other crime, wrong, or act is not admissible to prove the person's character in order to show that on a particular occasion the person acted in accordance with the character." But such character evidence can still be admissible if offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Evid.R. 404(B)(2). In such circumstances, "the court must evaluate whether the evidence is relevant *to the particular purpose* for which it is offered." (Emphasis sic.) *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 26, citing *State v. Curry*, 43 Ohio St.2d 66, 73, 330 N.E.2d 720 (1975).

{¶52} The collage explores accusations that Dr. Durrani was charged criminally for first-degree misdemeanor assault (the charge was apparently dismissed), discusses an instance when a law firm sued him for nonpayment of fees, and walks through myriad examples of resume inflation or exaggeration.

{¶53} It should go without saying that a criminal charge (with no conviction) for a first-degree misdemeanor should not have been admitted based on the record at hand. *See State v. Young*, 9th Dist. Lorain No. 16CA011045, 2018-Ohio-2797, ¶ 20 ("Evid.R. 609(A) provides that a party may impeach, or attack the credibility of, a witness with evidence that the witness has been *convicted* of a crime under certain circumstances. There is no provision for impeachment with evidence that the witness has merely been *charged* with a crime.") (Emphasis added.). The charge for assault found its way into several different forms of questioning in the collage (such as when counsel asked why it wasn't disclosed to various licensing boards), inflicting significant prejudice on the defense. Counsel drilled home the point during the collage, referencing the "criminal charges" in repeated questions to Dr. Durrani.

{¶54} A charge for assault falls into the bucket of "[e]vidence of any other crime, wrong, or act" under Evid.R. 404(B)(1). Mr. Stephenson insists that the charge is probative of Dr. Durrani's credibility, but he offers no adequate Evid.R. 404(B)(2) exception that would pave the way for admission of this criminal charge. *See Havely v. Franklin Cty.*, 10th Dist. Franklin No. 07AP-1077, 2008-Ohio-4889, ¶ 35 (in an assault and battery suit, "[e]vidence that [defendant] had been disciplined for an altercation with a coworker would be inadmissible * * *. [Defendant]'s altercation with a person other than [plaintiff] is not admissible to prove that [defendant] acted similarly with [plaintiff] and does not fall into any of the exceptions enumerated in Evid.R. 404(B).").

{¶55} Mr. Stephenson's counsel suggested at oral arguments before this court that some of the character evidence in the collage could be admitted to prove an absence of mistake under Evid.R. 404(B)(2). But the absence of mistake exception

only applies when a defending party claims that his wrong or crime was done mistakenly, which opens the door for the other side to provide evidence of previous wrongs or crimes to demonstrate that the defendant did *not* act mistakenly. *See Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, at ¶ 52-54 (the prosecution offered evidence of defendant's prior sexual assault to rebut defendant's assertion that he mistakenly thought victim had consented). Dr. Durrani never claimed mistake in connection with Mr. Stephenson's treatment, so we fail to see how such an exception might apply here.

{¶56} Next, the collage highlights an instance where a law firm sued Dr. Durrani for the nonpayment of legal fees. According to counsel, a local firm represented Dr. Durrani in connection with a patent and subsequently initiated a lawsuit to collect delinquent legal fees from him. This appears to be a run-of-the-mill contractual dispute between client and lawyer, and the record discloses none of the details or context of the case. Based on the limited excerpts relating to this case, it is not apparent under what basis this evidence has any bearing on Mr. Stephenson's case or regarding Dr. Durrani's competence as a surgeon. To the extent that Mr. Stephenson offers it as probative of credibility (for allegedly failing to disclose the existence of this suit in certain applications), he failed to establish that this, in fact, occurred (because Dr. Durrani didn't recall the suit). As a result, this irrelevant and prejudicial questioning (suggesting he must be a bad guy because he didn't pay his lawyers) should not have been admitted at trial.

{¶57} Finally, the collage covers, in sometimes excruciating detail, various allegations of resume inflation by Dr. Durrani. Under Evid.R. 608(B), "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the

witness's character for truthfulness * * * may not be proved by extrinsic evidence[;] [t]hey may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination[.]" Mr. Stephenson insists that these examples bore on Dr. Durrani's credibility and thus served as appropriate bases for impeachment.

{¶58} Ohio courts have recognized that, in some circumstances, evidence that a person fabricated details on a resume may be a permissible basis for impeachment under Evid.R. 608(B). *See State v. McKinnon*, 4th Dist. Ross No. 90-CA-1744, 1992 Ohio App. LEXIS 3124, 21 (June 10, 1992) (the state may "properly inquire as to whether [a defendant] made false statements on a * * * job application"); *State v. Reeves*, 8th Dist. Cuyahoga No. 58204, 1991 Ohio App. LEXIS 1065, 7 (Mar. 14, 1991) ("The record reveals that the defendant told his employer he had been absent from work to attend his son's funeral when, in fact, his son was still alive. This is clearly probative of the defendant's propensity for truthfulness * * *.").

{¶59} But this is not a blanket rule—in order for past resume misconduct to be admissible, it must be (1) not proven by extrinsic evidence, but only inquired into, and (2) "*clearly* probative of truthfulness or untruthfulness[.]" (Emphasis added.) *Lowder v. Domingo*, 5th Dist. Stark No. 2016CA00043, 2017-Ohio-1241, ¶ 32, quoting Evid.R. 608(B).

{¶60} "Effective cross-examination demands that some allowance be made for going into matters of this kind. But, because the potential for abuse is high, through unfair prejudice, confusion of issues, and misleading of the jury, safeguards are erected in the form of requiring that the instances inquired into must be clearly probative of truthfulness or untruthfulness." *State v. Williams*, 1 Ohio App. 3d 156,

157, 440 N.E.2d 65 (10th Dist.1981); *see State vs. Rutledge*, 2d. Dist. Montgomery No. 7830, 1983 Ohio App. LEXIS 12154, 8 (Apr. 12, 1983) ("[T]he rule requires a high degree of probative value of instances of prior conduct as to the truthfulness of the witness exist before the Trial Court, in the exercise of its discretion, will allow such cross-examination.")

{¶61} This effectively requires us to consider Evid.R. 403(A) as we weigh the admissibility of the alleged improper conduct. *See State v. Ellis*, 2d Dist. Montgomery No. 24003, 2011-Ohio-2967, ¶ 15, quoting Evid.R. 403(A) ("Yet, even if such character evidence is admissible, Evidence Rule 403 requires the court to exclude it 'if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.' "); *State v. McDuffie*, 3d Dist. Marion No. 9-19-82, 2020-Ohio-5466, ¶ 14, quoting Evid.R. 403(A) ("Notwithstanding the permissibility of * * * an attack on a witness' credibility under Evid.R. 608(B), Evid.R. 403(A) would mandate exclusion of this type of relevant-character evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.' ").

{¶62} In this case, the resume inflation explored by counsel during the collage traversed across a range of accusations. For instance, counsel accused Dr. Durrani of, among other things, leaving a particular internship off his resume, claiming to hold four patents when the actual number might be two, having an academic paper pulled for potential research fabrication, falsely claiming to be a consultant for a particular medical device manufacturer, claiming to have Army training but it "was only in relationship to the Pakistani Army," and falsely claiming to have participated in a

particular spinal deformity study group. Counsel left no stone unturned in the effort to scour Dr. Durrani's resume, leading to some truly head-scratching exchanges:

Q: Were you the editor of the board of the Spine Journal?

A: Did I make that claim too?

Q: No, but your attorney alluded to it.

{¶63} As best we can tell from our review of the transcript, Dr. Durrani denied virtually all of the allegations of resume inflation except for those that he didn't recall. This situation thus contrasts with a scenario where the witness admits to the act of dishonesty. *See State v. Finkes*, 10th Dist. Franklin No. 01AP-310, 2002-Ohio-1439, ¶ 50, citing *State v. Coleman*, 5th Dist. Delaware No. 91-CA-34, 1992 Ohio App. LEXIS 4040, 6 (July 31, 1992) ("[D]efendant admitted that she did not pay applicable employment taxes. Failing to report income or to pay taxes for employees is evidence of dishonesty. Accordingly, questions regarding defendant's alleged tax violations were clearly probative of her credibility [under Evid.R. 608(B)].").

{¶64} While Mr. Stephenson did pursue a fraud claim against Dr. Durrani, the accusations pervading the collage did not relate to any misrepresentations made to Mr. Stephenson. The accusations of resume inflation in the collage offer little, if any, probative evidence of Dr. Durrani's truthfulness. Much to the contrary, they seem designed to create confusion and inflict needless prejudice. We can certainly imagine, in an appropriate case, why resume inflation would be acceptable to explore at trial. But in this case, the approach was akin to counsel testifying, injecting sundry accusations that shed no light on the issues germane to the jury's ultimate liability determination. At the end of the day, the issues swirling around Dr. Durrani's resume

did not prove "clearly probative" of his truthfulness. *Lowder*, 5th Dist. Stark No. 2016CA00043, 2017-Ohio-1241, at ¶ 32, quoting Evid.R. 608(B).

{¶65} We do not hold that all aspects of the collage are inadmissible; instead, we highlight the main problematic areas above. Certain aspects, standing alone, might have withstood review under an abuse of discretion. But collectively, the overall impact of the collage requires us to find that the trial court abused its discretion in connection with the collage's admission in this case.

E.

{¶66} Next, Defendants contend that Dr. Wilkey, a fellow spine surgeon, was allowed to testify at length and attack Dr. Durrani's character in an inflammatory manner. During his testimony, he frequently characterized Dr. Durrani's conduct as fraudulent, a fabrication, or something of similar effect. Defendants protest that such testimony had nothing to do with medical evidence and allowed the jury to punish Dr. Durrani based on his character as opposed to the care he provided to Mr. Stephenson, essentially framing an Evid.R. 403 argument.

{¶67} This court largely addressed this argument in *Adams*, 2022-Ohio-60, 183 N.E.3d 560, at ¶ 35-38. In *Adams*, we found no abuse of discretion in admitting Dr. Wilkey's testimony, even where he repeatedly testified that Dr. Durrani lied, because his testimony related to plaintiff's claim that Dr. Durrani fraudulently misrepresented the nature of her condition and the necessity of surgery, particularly given the lack of consistent objections. *Id.* at ¶ 38-39.

{¶68} While defense counsel in this case did object to Dr. Wilkey's testimony prior to it being played in front of the jury on multiple occasions, similar to *Adams*, a premise of Mr. Stephenson's claims against Dr. Durrani centered on fraudulent

misrepresentation. Therefore, Dr. Wilkey's testimony that Dr. Durrani acted in a fraudulent manner related to a claim before the jury.

{¶69} Additionally, we emphasize that the trial court declined to admit some of the more objectionable aspects of Dr. Wilkey's testimony—it excluded his testimony about Dr. Durrani violating the law, of Dr. Durrani performing a "hack job," and that Dr. Durrani "hoodwinked" Mr. Stephenson. As we explained in *Adams*, we do not condone "ad hominem attacks" by a witness at trial. *Id.* But the court here conformed to *Adams* as it relates to Dr. Wilkey's testimony by excluding aspects that drifted over the line. We accordingly conclude that it did not abuse its discretion in this regard.

F.

{¶70} Next, Dr. Durrani and CAST highlight the testimony of Dr. Ranjiv Saini, a radiologist, claiming that his testimony strayed well beyond the scope of his expertise under Evid.R. 702. This question is also largely answered by *Adams*.

{¶71} Under Evid.R. 702, an expert witness must generally possess specialized training, knowledge, or skill "regarding the subject matter of the testimony." Evid.R. 702(B). In *Adams*, we held that Dr. Saini specifically demonstrated knowledge of the standard used by surgeons in reviewing diagnostic images and arriving at a decision to perform surgery, as he worked closely with and trained other orthopedic surgeons. *Adams*, 2022-Ohio-60, 183 N.E.3d 560, at ¶ 55, citing *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 160, 383 N.E.2d 564 (1978) (where the "fields of medicine overlap and more than one type of specialist may perform the treatment, a witness may qualify as an expert even though he does not practice the same specialty as the defendant"). This court further explained that Dr. Saini's testimony "related only to [Dr. Durrani's] reading of diagnostic images and whether those images indicated that

surgery was necessary"—"[h]e specifically rebutted [Dr.] Durrani's conclusions and justifications for the surgeries." *Id.* at ¶ 57. Because this court concluded that the standard of care in reading diagnostic images is the same between surgeons and radiologists, we held that Dr. Saini was qualified to opine on Dr. Durrani's standard of care in reviewing diagnostic images and ordering surgery based on those images. *Id.* This court also found Dr. Saini "qualified to opine on the issue of informed consent." *Id.* at ¶ 60. Dr. Saini testified that he performs some procedures on patients, saying, "[n]o matter what it is, there's a basic thing that you have to do, and that is, you have to explain to the patient what they're getting themselves into. You have to mention the risks, complications, rewards of doing the procedure." Because informed consent is a standard practice across all doctors, Dr. Saini was qualified to testify on such matters. *Id.*

{¶72} While acknowledging our holding in *Adams*, Defendants maintain that the trial court exceeded this court's holding by allowing Dr. Saini to "render surgical standard of care opinions" and "clinical evaluations and quality of surgeries" as it pertains to Dr. Durrani. We are not persuaded. To the contrary, Dr. Saini's testimony here in many ways parallels the testimony he offered in *Adams*. While Defendants argued that Dr. Saini could not testify as to seeking consent for a spinal fusion, as we held in *Adams*, informed consent is a standard practice across all doctors. Further, Dr. Saini testified that Dr. Durrani exaggerated the MRI findings and impressions to justify the surgery. While Defendants insist that he could not testify as to a "surgical opinion," we also held in *Adams* that Dr. Saini could testify as to Dr. Durrani's reading of medical images and how it may relate to justifying surgery.

{¶73} Defendants are correct that certain aspects of Dr. Saini's testimony strayed beyond his area of expertise, but the trial court properly intervened and prohibited this testimony from being shown to the jury. The trial court struck his testimony about how a surgeon should be dictating surgical notes, about his explanation of an allograft or a bone graft—both surgical procedures—and testifying that "absolutely nobody" operates on certain bulges in the vertebral discs in the spine. Further, the trial court prevented certain improper questioning of Dr. Saini, such as asking him, "Do you ask the jury to trust in your findings?" Because the trial court allowed Dr. Saini to testify within the bounds of *Adams*, while also appropriately striking improper testimony, we see no abuse of discretion.

G.

{¶74} Next, Defendants challenge portions of counsel's closing argument as highly inflammatory and improper. In addition to the discussion of the collage and the license revocations, Defendants highlight that Mr. Stephenson's counsel accused Defendants of calling him "racist" for emphasizing Dr. Durrani's nationality, and for telling the jury that "it's [Dr. Durrani's] head that should roll with your decision."

{¶75} Defendants, however, failed to object to any of these comments in closing arguments. *See Kassay v. Niederst Mgmt.*, 2018-Ohio-2057, 113 N.E.3d 1038, ¶ 47 (8th Dist.), citing *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209, 436 N.E.2d 1001 (1982) ("In this case, the defendants did not object to [plaintiff's] counsel's remarks during his closing argument. * * * Failing to raise an objection waives all but plain error.").

{¶76} In certain instances, misconduct can be so egregious and warrant a new trial "regardless of the fact that * * * counsel did not object to most of the improper

comments, because the trial court had a duty to intervene sua sponte and admonish counsel and to correct the prejudicial effect of the misconduct." *Fehrenbach*, 164 Ohio App.3d 80, 2005-Ohio-5554, 841 N.E.2d 350, at ¶ 23, citing *Pesek v. Univ. Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 501, 721 N.E.2d 1011 (1999). In *Fehrenbach*, this court found that a new trial was warranted because defense counsel *repeatedly* resorted to improper remarks, including making inflammatory comments to the jurors concerning their role, improperly implying that the plaintiffs had filed their malpractice claim late, misstating the law, and accusing plaintiffs of manipulation amongst numerous other inflammatory comments. *Id.* at ¶ 25. Especially in light of the lack of objections, we cannot find that the sparse comments from closing arguments highlighted by Defendants in this appeal warrant a new trial.

H.

{¶77} After reviewing the alleged errors at trial, we conclude that Dr. Tayeb's testimony, the license revocation points, and aspects of the collage discussed above all constituted errors. We must now evaluate whether those errors are harmless or warrant a new trial.

{¶78} " 'An improper evidentiary ruling constitutes reversible error only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice.' " *Setters I*, 2020-Ohio-6859, 164 N.E.3d 1159, at ¶ 22, quoting *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 35. "In determining whether substantial justice has been done, a reviewing court must weigh the prejudicial effect of the errors and determine whether the trier of fact would have reached the same conclusion had the errors not occurred." *Id.*, citing *O'Brien v. Angley*, 63 Ohio St.2d 159, 164-165, 407 N.E.2d 490 (1980).

Given that multiple errors occurred here, we must consider the cumulative effect of these errors.

{¶79} Here, these trial-based evidentiary errors are in many respects interrelated, shifting the jury's attention away from the issue of medical malpractice and towards improper character issues concerning Dr. Durrani. Nor need we speculate on that point, as it emerged in vivid detail during closing arguments by plaintiff's counsel, as they reinforced everything that emerged from the collage. Counsel emphasized the license revocation point: "And what did Dr. Durrani tell you? Well, he told you that he—his licenses were revoked; and that he said that his Medicare/Medicaid licenses were revoked and that once he didn't have a license to practice medicine the rest of them all got revoked because what could he do with them anyway?"

{¶80} Then counsel reminded the jury of the other malpractice cases: "[W]hen I'm reading him a list of medical malpractice cases against him over a certain period of time, and he says he doesn't know anything about them, is that credible?"

{¶81} And about the lawsuit brought by the law firm: "And what about the fact when he's asked if he was involved in any civil action that wasn't related to malpractice. He can't remember, one of the largest law firms in Ohio suing him * * *. It's not credible." They cycled through all of these points, drawing out the prejudicial impact of the evidence that should have been inadmissible.

{¶82} With respect to Dr. Tayeb's testimony that Dr. Durrani habitually told his patients their heads would fall off, as a means for coercing the patients to acquiesce to the surgeries, the jury specifically highlighted the "head will fall off" quote in their answer to certain interrogatories. Furthermore, this testimony also received

prominent attention during plaintiff's closing argument: "And then Dr. Tayeb comes in—and remember, you're going to consider the deposition as if he was sitting here. And he tells you that he heard it, and that it was said, and it was said multiple times and it was concerning, and it coerced patients."

{¶83} With the prejudicial impact largely self-evident, we must evaluate the significance of these errors against the remaining trial record. As we have explained above, the liability issues were hotly contested in this close case. Mr. Stephenson came to Dr. Durrani with significant pre-existing injuries resulting from the automobile accident he suffered as a child, and, notably, he acknowledged that the surgeries *improved* some of his pain. Recalling his first surgery, Mr. Stephenson testified that "the numbness and tingling in my legs had gone away, along with the pain radiating down my legs" and that his leg pain "was pretty much completely gone." He related similar improvements after the second surgery, which alleviated his arm and shoulder pain and radiculopathy and numbness. The fourth surgery relieved Mr. Stephenson's mid-back pain and remaining radiculopathy. He further confirmed that he was "very satisfied" with Dr. Durrani's treatment of his lower back pain.

{¶84} To be sure, Mr. Stephenson offered evidence that some of his pain had not improved, and in some instances had deteriorated, and his experts supported these conclusions. But we have an individual with nearly life-long chronic back pain who acknowledges that Dr. Durrani achieved certain successes with his medical care. This renders the evidentiary record a much closer call on Dr. Durrani's liability than in some other cases that we have seen. *See Setters I*, 2020-Ohio-6859, 164 N.E.3d 1159, at ¶ 25-26.

{¶85} Therefore, the three errors, taken together in the present case, cannot be dismissed as harmless—they were highly prejudicial, and we question whether the jury would have reached the same conclusion but for these errors in Mr. Stephenson's case. *See id.* at ¶ 22. Defendants are accordingly entitled to a new trial in which the jury can consider the case afresh, without the prejudicial evidence that intruded into the first trial. The second assignment of error is sustained.

IV.

{¶86} In their third and final assignment of error, Defendants argue that the trial court committed numerous errors with respect to damages. But because we sustain Defendants' first assignments of error in part and their second assignment of error and conclude that a new trial is warranted, any consideration of damages in their third assignment of error is moot.

{¶87} Mr. Stephenson pursues a cross-assignment of error—that the trial court erred in granting Defendants a set-off against the judgment entered in his favor. Similar to Defendants' third assignment of error, because a new trial is warranted, the cross-assignment of error is also moot since it pertains to damages awarded by the trial court.

* * *

{¶88} In light of the foregoing analysis, we sustain in part Defendants' first assignment of error, sustain their second assignment of error, and determine that the third assignment of error and the cross-assignment of error are moot and we therefore do not address them. We remand this case for a new trial consistent with this opinion and the law.

Judgment reversed and cause remanded.

CROUSE, P.J., and **KINSLEY, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.