

IN THE SUPREME COURT OF OHIO

Loretta Schelling, : Supreme Court No. 2007-2202
 :
 Plaintiff/Appellee, : On Appeal from the Williams
 : County Court of Appeals, Sixth
 v. : Appellate District
 :
 Community Hospitals of :
 Williams County, :
 :
 Defendant/Appellant.

MERIT BRIEF OF APPELLEE LORETTA SCHELLING

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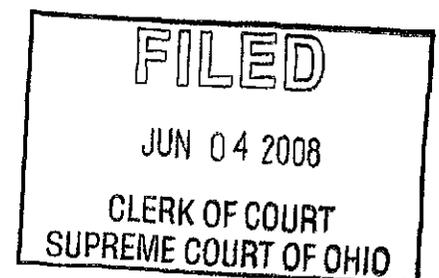


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SUPPLEMENTAL STATEMENT OF FACTS

Appellee Loretta Schelling originally filed this suit on February 10, 2005 alleging negligence on behalf of Dr. Stephen Humphrey and Community Hospitals of Williams County (hereinafter "Community Hospital"). The original complaint stemmed from injuries Ms. Schelling sustained as the result of surgeries performed by Dr. Humphrey on January 23, 2003 and February 20, 2003 at Community Hospital. Subsequently, Appellee filed an amended complaint more specifically advancing a claim of medical malpractice against Dr. Humphrey and a claim of negligent credentialing against Community Hospital.

At the time relevant to this matter, Dr. Humphrey was a physician licensed by the State of Ohio and the practice of Podiatry in Bryan, Ohio. Dr. Humphrey had staff privileges at Community Hospital, which permitted him, among other things, to perform surgeries at that institution. Dr. Humphrey performed tarsal tunnel releases on each of Ms. Schelling's heels in early 2003. As the result of the two surgeries, Ms. Schelling now suffers permanent nerve damage to both feet and is no longer able to work.

Community Hospital had notice as early as October 2001 that Dr. Humphrey was suffering from a psychiatric condition that impaired his ability to think and act rationally and impaired his ability to practice medicine. In October 2001, Dr. Humphrey admitted to stealing tools and equipment worth several hundred dollars from the hospital after he was presented with video surveillance showing him carrying the items to a nearby parked truck. *See*, Bryan Police Report of Stephen H. Humphrey, Incident Report from Oct. 7, 2001 (Attached to Appellant's Brief in Support of Appeal as Composite Exhibit B). The hospital agreed not to press charges against Dr. Humphrey if he sought psychiatric treatment for his mental condition, paid restitution, and provided the hospital with a monetary donation. *Id.* Dr. Humphrey retained his

staff credentials at Community Hospital despite his actions without further oversight or inquiry into his competence to continue practicing medicine.

Dr. Humphrey's police record shows that the theft of the hospital's tools was only the first documented incident in a series of irrational acts that grew markedly more bizarre as time went on. See generally, *Id.* Despite Dr. Humphrey's unusual behavior and the hospital's acknowledgment and notice of his mental problems, the hospital continued to credential Dr. Humphrey and permit him hospital privileges. Had the hospital revoked Dr. Humphrey's credentials or refused to renew them, Dr. Humphrey would not have been able to perform the surgeries on the Plaintiff that ultimately left her with permanent injuries.

Particularly pertinent to this action are the circumstances surrounding Dr. Humphrey filing for bankruptcy after Ms. Schelling filed suit. Due to this filing, the proceedings in the underlying action were stayed until Dr. Humphrey's estate was fully distributed. Due to Dr. Humphrey's status in bankruptcy, Ms. Schelling was faced with negotiating a paltry settlement or risk receiving nothing at all. Due to lacking a better alternative, Ms. Schelling dismissed Dr. Humphrey from suit without prejudice after she settled her claim with the trustee.

Once Dr. Humphrey was dismissed, Community Hospital filed a motion to dismiss for failure to state a claim pursuant to Civil Rule 12(b)(6). The trial court granted this motion, reasoning that Ms. Schelling was unable to proceed in her negligent credentialing claim against the hospital because she had voluntarily dismissed Dr. Humphrey without obtaining an admission of liability or a finding of negligence.

Ms. Schelling appealed this dismissal to the Sixth District Court of Appeals. The Court reversed the decision of the trial court. The Sixth District reasoned that the trial court erred in requiring a finding of negligence, specifically explaining that a finding of negligence is not a

legal prerequisite that must be determined before a court can entertain a claim for negligent credentialing. See, *Schelling v. Humphrey* (Oct. 12, 2007), 6th Dist. No. WM-07-001.

Furthermore, the Court held that a determination of a staff physician's negligence as an element of negligent credentialing against an employee "does not interpose a legal requirement to name the staff physician as a defendant and prove the negligence claim in the same complaint. They are separate causes of action." *Id.* at 6 (citing *Dicks*, 4th Dist. No. 95-CA-2350).

Community Hospitals appealed and this Court accepted jurisdiction on March 12, 2008.

ARGUMENT

Proposition of Law:

Negligent credentialing confers a duty upon hospitals separate from the duty a physician owes to its patients and therefore can exist in the absence of a prior adjudication or stipulation to negligence.

Appellant proposes that a plaintiff cannot proceed on a negligent credentialing claim against a hospital in the absence of a prior direct finding, either by adjudication, admission, or stipulation, that the plaintiff's injury was caused by the negligence of the physician who is the subject of the negligent credentialing claim.¹ This proposition is not only contrary to well-established Ohio law but also unprecedented throughout the United States. Stare decisis is patently applicable in this instance because this Court is to "abide by it in order to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry." *State v. Simpkins* (2007), 117 Ohio St.3d 420, n. 2. For well over a decade, Ohio law has clearly recognized that a claim of negligent credentialing may go forward and a court may entertain the claim without a previous adjudication as to a medical professional's alleged negligence. *Browning v. Burt* (1993), 66 Ohio St.3d 544, 563. A claim for negligent

¹ It is important to note that Appellant's Memorandum in Support of Jurisdiction did not include "admission" as a proper means of going forward with a claim for negligent credentialing. This is the first time that this specific argument has been presented to this Court.

credentialing is legally and factually separate from a claim of negligence against a treating physician. *Id.*

In *Browning*, this Court explained the difference between medical malpractice and negligent credentialing as follows:

Negligent credentialing claims arise out of the *hospital's* failure to satisfy its independent duty to grant and continue staff privileges only to competent physicians. *** While the acts or omissions of a hospital in granting and/or continuing staff privileges to an incompetent physician *may* ultimately lead to an act of medical malpractice by incompetent physician, the physician's ultimate act of medical malpractice is factually and legally severable and distinct from the hospital's acts or omissions in negligently credentialing him or her with staff membership or professional privileges.

Id. at 557 (emphasis in original).

At issue in *Browning* was specifically whether a negligent credentialing claim had been brought within the requisite statute of limitations. This Court held that a claim for negligent credentialing was subject to the general two-year statute of limitation established in R.C. 2305.10. In stressing the inherent differences between negligent credentialing and physician negligence, this Court noted: "The general duty imposed upon hospitals to grant and continue staff privileges only to competent physicians was identified in *Albain [v. Flower Hospital]*, as an independent duty of care owed *directly* to those admitted to the hospital." *Id.* at 555 (emphasis in original).

[Negligent credentialing] claims are not claims for medical malpractice and, thus, the medical malpractice line of cases... do not apply. A hospital does not practice medicine and is incapable of committing malpractice. [internal citations omitted] Further, Plaintiffs' claims against hospital have nothing to do with any issue concerning derivative liability of the hospital for the acts of its agents or employee-physicians. * * * [Plaintiffs'] negligent credentialing claims against [the hospital] are independent claims asserted directly against [the hospital] for the *hospital's* own acts or omissions in granting and/or continuing the staff privileges of the doctor(s).

Id. at 556 (emphasis in the original).

The law in this state in regards to negligent credentialing is clear and unequivocal. The *Browning* decision clarified *Albain v. Flower Hospital* (1990), 50 Ohio St.3d 251, in which this Court first recognized negligent credentialing as its own distinct tort. It is well-established law that a hospital has the duty to only grant and continue staff privileges to competent physicians. *Id.* at 257-58. This Court further explained that “a plaintiff must demonstrate that but for the hospital’s lack of care in selecting the physician, the physician would not have been granted staff privileges and the plaintiff would not have been injured.” *Id.* at 258. As such, Appellee wholeheartedly agrees with the Ohio Hospital Association that *Albain* has never been overruled. (See, Memorandum of Amicus Curiae, Ohio Hospital Association at 1). If it had, then its progeny, such as *Browning*, could never have established that in Ohio, a hospital cannot shirk this great responsibility and duty owed to the general public.

The entrenchment of this tort in Ohio was further evidenced by the Fourth District Court in *Dicks v. U.S. Health Corp.* (1996) in which it held that while a patient must prove that she suffered injury at the hands of a negligently credentialed doctor, she need not join the doctor in the lawsuit. 4th Dist. No. 95-CA-2350, 1996 WL 263239, *4. The *Dicks* Court based its holding on precedent established in *Albain* and *Browning*. Specifically, the Court rejected the hospital’s argument that *Browning* required a finding of actual medical malpractice before a court could even entertain a cause of action for negligent credentialing.

The decision in *Dicks*, and thereby the decisions in *Albain* and *Browning*, are specifically on point to the case *sub judice*. Here, the Appellant’s attempt to distinguish *Dicks*, deeming it inapplicable, was easily rebuked by the Court of Appeals. *Schelling*, 6th Dist. WM-07-001 at ¶16. Appellant argued that *Dicks* was distinguishable because the doctor admitted negligence,

while in the case at hand there was no such admission. *Id.*² The Sixth District Court addressed this argument by explaining that in *Dicks*, the Fourth District Court never made any actual finding of negligence, exactly as seen here. *Id.* The Doctor, before being dismissed from the case, simply admitted to certain acts during a deposition, at no point in time did he admit negligence or did the Court find he was negligent. *Id.* Despite Appellant's contention, at no point in time did the doctor "acknowledge through his deposition testimony that he violated the standard of care." (Merit Brief of Appellant at 12). *Dicks* is factually and legally analogous to the case at hand.

Appellant continues to attempt to create ambiguity and disagreement among the District Courts of this State without any basis for this argument. (See, Merit Brief of Appellant at 12). After failing to distinguish *Dicks*, Appellant turned its attention to *Davis v. Immediate Medical Services, Inc.* (Dec. 15, 1995) 5th Dist. No. 94 CA 0253, 1995 WL 809478 (judgment affirmed in part, reversed in part on other grounds, 80 Ohio St.3d 10, reconsideration denied, 80 Ohio St.3d 1449 and *Ratliff v. Morehead* (May 19, 1998), 4th Dist. No. 97-CA- 2505, 1998 WL 254031.

First turning its attention to *Davis*, Appellant construes the Fifth District Court of Appeals' holding as to support the contention that a negligent credentialing claim does not become ripe until and if medical negligence is found. (Merit Brief of the Appellant at 12). However, in *Davis*, the Court was asked to determine whether the trial court erred in bifurcating the medical malpractice claim from the negligent credentialing claim. In fact, whether the patient's claim for negligent credentialing could survive summary judgment was never an issue before the court, by and large because the doctors alleged to have been negligent were still

² Regardless of the Sixth District Court's clarification as to *Dicks*' precedential impact, Appellant has continued this assertion in its Merit Brief submitted to this Court.

named defendants. In the subsequent appeal, this Court overruled the Fifth District on several issues, but did not address the intermediate court's unfounded statement regarding negligent credentialing because, as the Court specifically noted, it was not raised as an issue on appeal. *Davis*, 80 Ohio St.3d at n.2.

Further, Appellant then contends that the Fourth District Court "backtracked a bit" from its holding in *Dicks* when it stated that "in order to prove negligent credentialing, [patients] must prove the underlying medical malpractice claim against [the physician]." Merit Brief of Appellant at 12 (quoting, *Ratliff v. Morehead*). When not presented with a previous determination on the merits of a doctor's negligence, a plaintiff must prove a case within a case and show that but for a hospital negligently credentialing a doctor she would not have sustained injury.

However, the facts of *Ratliff* render it inapplicable. Here, the merits of the medical malpractice claim have never been analyzed. Before the trial court was a motion to dismiss predicated on Civ. R. 12(b)(6). The very nature of that motion requires the court to look only at the pleadings and assume the nonmovant's factual allegations to be true. In *Ratliff*, the court specifically noted that no evidence was presented to the trial court beyond the face of the complaint itself, and therefore summary judgment was appropriate. Clearly Appellants cannot rely on *Ratliff* as the merits of Appellee's claim have never been assessed.

Without case law to support its argument, Appellant has turned to a plethora of policy arguments – invoking idealistic edicts of fairness and justice. However, when the entire picture is taken into consideration and both sides of the story told, it is clear that not only is Appellant's contention wrong, but it is also contrary to public policy sentiments followed by the vast majority of this country.

Appellant contends that unless this Court intervenes, the lower court's ruling will force hospitals to foot the bill for non-employee doctors. (See, Merit Brief of Appellant at 7). This, Appellant argues, is "an undue burden on Ohio hospitals to defend against malpractice claims against physicians who have no stake in the outcome and no duty to cooperate or even participate in the defense of the case." *Id.* at 7-8. However, this argument certainly is not supported by Appellant's very own statement of facts in this case. "[T]he trial court record clearly establishes that Dr. Humphrey specifically denied that he violated the standard of care or was negligent in his treatment of Ms. Schelling." *Id.* at 3. Therefore, common sense dictates that if Dr. Humphrey continues to deny negligence surely Appellant's attempt to paint a picture of disinterest and a lack of cooperation is not nearly as bleak as they would like us to believe.

In fact, Appellant's entire argument seems to be based on a naïve assumption that once a physician has settled or been removed from the case he will wash his hands of the matter completely. Surely this Court does not believe that a doctor, whose entire livelihood and occupation is based upon his reputation, would make no attempt to defend or help the hospital defend his good name. What seems much more likely is exactly as the factual circumstances *sub judice* suggest. The trustee handling Dr. Humphrey's bankruptcy estate settled this claim without a stipulation to negligence because he has no right to do so considering he did not perform the surgeries. Appellant itself asserts that even after being dismissed from this lawsuit Dr. Humphrey has vehemently denied any wrongdoing. Appellant's description of a hospital's burden certainly does not describe their own.

However, even in the highly unlikely scenario that a doctor would completely refuse to aid a hospital in defending against a claim for negligent credentialing based on their fitness to practice medicine, they possess legal remedies to aid in their defense. Civ. R. 45 outlines the

ability of a party to subpoena a witness. If a hospital suspects an allegedly negligent doctor is uncooperative, the state of Ohio allows that doctor to be subject to subpoena. Legal avenues exist to protect a defendant in this hypothetical situation.

What cannot be ignored are the ramifications of Appellant's proposition of law which is essentially the equivalent to the abrogation of negligent credentialing. Regardless of Appellant's attempt to mitigate the damage that their proposition would have, the result would be devastating.

The tort of negligent credentialing first gained recognition by this Court in *Albain v. Flower Hospital*, supra. This Court definitively stated that a hospital has a duty only to grant and to continue staff privileges to competent physicians. 50 Ohio St.3d at 257-58. A few years later, this Court reiterated the importance of this duty in *Browning v. Burt* when it held that negligently credentialing a doctor is not medical malpractice and therefore is legally and factually severable from a physician's acts or omissions. Appellant's assertions will result in the nullification of this important cause of action by rendering it essentially toothless.

Requiring a prior finding, admission or stipulation to negligence by the alleged physician would abolish negligent credentialing, for all intents and purposes. It is readily apparent how this Court and certainly the citizens of this State rely on this cause of action in order to protect them from hospitals being given cart blanche to turn a blind eye to the actions of those who practice medicine within its walls. It is not good policy for those who seek medical attention and in no way protects the interest of the citizens of Ohio.

Courts across this State have generally protected hospitals in situations such as this by bifurcating the negligent credentialing claim from the malpractice claim. As evidenced by the trial court in this case, courts have separated these two claims in part due to this Court's assertion

that these two cases are separate and distinct claims. Here, Appellant moved for, and was granted, a bifurcation of claims. The question then must be asked, if these claims are not separate and distinct, thereby necessitating a dismissal without a prior determination of physician negligence, how can these claims be bifurcated so readily?

The simple fact is that the rights of hospitals are more than protected in such claims. The burden is shouldered exclusively by plaintiffs, the very people for whom the hospitals have a mandated duty to protect. This Atlas-like weight forced upon the backs of plaintiffs was not enough, so hospitals have continued to run away from responsibility by attempting to render the only tort which holds them accountable a nullity. Simply considering the logistical and financial consequences of a holding in favor of Appellant's proposition results in the equivalent of giving hospitals absolute free reign to credential whomever they choose without any consequence. Surely this Court can see through Appellant's attempt to mitigate away the true damage that the abrogation of negligent credentialing will do to the well-being of this State.

Further, Appellant erroneously relies upon foreign jurisdictions for its assertion that it is a necessity to establish physician negligence prior to recognizing a claim for negligent credentialing. (See, Merit Brief of Appellant at 12). In fact, in establishing a rule of law as restrictive as that which Appellant proposes is almost unparalleled across this country.

At least 28 different states currently recognize the tort of negligent credentialing,³ and at least three additional states recognize the broader theory of corporate negligence even though

³ See, *Domingo v. Doe*, 985 F. Supp. 1241 (D. Haw. 1997); *Crumley v. Mem'l Hosp., Inc.*, 509 F. Supp. 531 (E.D. Tenn. 1978); *Humana Med. Corp. of Ala v. Traffanstedt*, 597 So. 2d 667 (Ala. 1992); *Fletcher v. S. Peninsula Hosp.*, 71 P.3d 833 (Alaska 2003); *Tuscon Med. Ctr., Inc. v. Misevch*, 113 Ariz. 34 (Ariz. 1976); *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332 (Cal. Ct. App. 1982); *Kitto v. Gilbert*, 39 Colo. App. 374 (Colo. Ct. App. 1977); *Insigna v. LaBella*, 543 So. 2d 209 (Fla. 1989); *Mitchell County Hosp. Auth. V. Joiner*, 229 Ga. 140 (Ga. 1972); *May v. Wood River Twp. Hosp.* 257 Ill. App. 3d 969 (Ill. App. Ct. 1994); *Winona Mem'l Hosp. Ltd. P'ship v. Kuester*, 737 N.E.2d 543 (Ind. Ct. App. 2000); *Ferguson v. Gonyaw*, 64 Mich. App. 685 (Mich Ct. App. 1976); *Larson v. Wasemiller*, 738 N.W.2d 300 (Minn. 2007); *Taylor v. Singing River Hosp. Sys.*, 704 So. 2d 75 (Miss. 1997); *Corleto v. Shore Mem'l Hosp.*, 350 A.2d 534 (N.J. 1975); *Diaz v. Feil*, 118 N.M. 385 (N.M. Ct. App. 1994);

they have not specifically identified negligent credentialing.⁴ Perhaps even more notable is the fact that only two courts that have considered the claim of negligent credentialing have refused to accept it as a cause of action.⁵

Appellant contends that there is a great deal of “confusion” amongst these various courts as to whether a claim for negligent credentialing can be asserted without a previous determination as to the physician’s negligence. However, case law supports no such contention. More specifically, the cases in which Appellant cites to actually support the proposition of law which this Court has already promulgated: “[i]f the physician is determined to be not negligent in trial for medical malpractice, there can be no negligent credentialing claim against the hospital.” *Hirons v. Scheffey*, 76 S.W.3d 486, 489 (Tx. App. 2002); see also, *Trichel v. Claire*, 427 So.2d 1227, 1233 (La. App. 1983); Merit Brief of Appellant at 12.

Each case Appellant has cited to includes a prior determination on the merits that the physician was not negligent. The facts of this case do not support Appellant’s contention that a negligent credentialing cause of action against the hospital cannot even be entertained without a prior finding of physician negligence. Here, there was no prior determination as to whether Dr. Humphrey was negligent. As such, Appellant’s case law is inapplicable to the case at hand. What is actually required is some underlying negligent act on behalf of the physician. However, as in this case, there has been no determination as to Dr. Humphrey’s negligence and, therefore,

Sledziewski v. Cioffi, 137 A.D.2d 186 (N.Y. App. Div. 1988); *Blanton v. Moses H. Cone Mem’l Hosp.*, 319 N.C. 372 (N.C. 1987); *Albain*, 50 Ohio St.3d 251; *Strubhart v. Perry Mem’l Hosp. Trust Auth.*, 1995 OK 10 (Okla. 1995); *Welsh v. Bulger*, 548 Pa. 504 (Pa. 1997); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456 (R.I. 1993); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541 (Tex. 2004); *Wheeler v. Cent Vt. Med Ctr., Inc.*, 155 Vt. 85 (Vt 1990); *Pedroza v. Bryant*, 101 Wn.2d 226 (Wash. 1984); *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492 (W. Va. 1986); *Johnson v. Misericordia Cmty. Hosp.*, 99 Wis. 2d 708 (Wis. 1981); *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987).

⁴ See, *Gridley v. Johnson*, 476 S.W.2d 475 (Mo. 1972); *Benedict v. St. Luke’s Hosp.*, 365 N.W.2d 499 (N.D. 1985); *Simmons v. Toumey Reg. Med. Ctr.*, 498 S.E.2d 408 (S.C. Ct. App. 1998).

⁵ See, *Svindland v. A.I. Dupont Hosp. for Children of Nemours Found.*, No. 05-0417, 2006 WL 3209953 (E.D. Pa. Nov. 3, 2006)(applying Delaware state law); *McVay v. Rich*, 255 Kan. 371 (Kan. 1994).

a trial court cannot dismiss the negligent credentialing claim until that determination is made. *Humana Medical Corp. of Alabama v. Traffanstedt*, 597 So.2d 667, 669 (Ala. 1992).

Appellant has drawn this Court's attention to three cases in support of its proposition: *Hirons v. Scheffey*, 76 S.W.3d 486; *Trichel v. Claire*, 427 So.2d 1227; *Torres v. Kennecott Cooper Corporation*, 15 Ariz. App. 272 (Ariz. 1971). In *Hirons*, the Fourteenth Appellate District Court of Texas granted summary judgment in favor of the defendant hospital because the jury had found the defendant doctor to not be negligent. The court noted that if "the physician is not negligent, there is no negligent credentialing claim against the hospital." *Id.* at 489.

Next, in *Trichel*, after an extensive factual and legal analysis, the Second Circuit Court of Appeals of Louisiana found no negligence on the part of the physician who performed the operation. After analyzing the merits of the patient's claim, the patient had failed to support her claim against the physician. In turn, the court made note, just as Ohio courts have, that if a patient fails to show negligence on behalf of a treating physician they cannot prove the elements necessary to sustain a negligent credentialing claim. *Trichel*, 427 So.2d at 1233.

Finally, the Court of Appeals of Arizona has held that when a claim against a treating physician has been dismissed with prejudice the related claim against the hospital for negligent credentialing is collaterally estopped. *Torres*, 15 Ariz.App. 272. *Torres* is clearly not analogous to the case at hand in that here, Appellant freely admits that when Appellee dismissed Dr. Humphrey from this lawsuit it was done under the auspices of a dismissal without prejudice. See, Merit Brief of Appellant at 14. The difference is clear because "the order of dismissal with prejudice entered against [the subject physician] operated as an adjudication that he was not negligent in the treatment of plaintiff, and this adjudication operates to relieve the master [hospital] from any liability which may have evolved therefrom under the doctrine of respondeat

superior.” *Id.* at 274. Further, the *Torres* Court dealt with the issue of respondeat superior, which this Court has clearly stated is inapplicable to the facts at bar due to the separate and distinct tort of negligent credentialing. A hospital's granting of staff privileges to an independent private physician, which the hospital may later revoke under its review procedures, does not establish the requisite level of authority or control over such physician to justify imposing liability against the hospital under the doctrine of respondeat superior. *Albain*, 50 Ohio St.3d at 256. Clearly, not only is the issue presented in *Torres* inapplicable to the case at hand, the existence of an adjudication on the merits renders it moot to the issues actually before this Court.

In reality, case law from other states actually supports Appellee's proposition of law, the Sixth District Court's holding and this Court's precedent that the tort of negligent credentialing is a separate and distinct tort from an underlying medical malpractice claim and, as such, can be pursued in the absence of a previous adjudication or stipulation to negligence.

In Wisconsin for instance, a patient is only required to show that the hospital had not exercised reasonable care in determining whether the surgeon was competent. *Johnson v. Misericordia Cmty. Hosp.*, 99 Wis. 2d 708 (Wis. 1981). In *Johnson* the plaintiff settled with the allegedly negligent physician and the question of whether he was negligent in the manner in which he performed the operation remained an issue at trial, as it was incumbent upon the plaintiff to prove that the physician was negligent in this respect to establish a causal relation between the hospital's alleged negligence in granting surgical privileges and the patient's injuries. *Id.* at 710-11. Without a prior adjudication as to the physician's negligence, the Supreme Court of Wisconsin simply required that the patient prove a case within a case and present the requisite evidence as to his negligence at the negligent credentialing trial. The jury subsequently found in favor of the patient on the issue of the doctor's negligence. Then, after

reviewing the evidence consisting of misrepresentations that could have been discovered upon reasonable investigation by the hospital, the Court concluded that there was ample support for the jury's conclusion that a hospital acting with reasonable care would not have extended privileges to the surgeon. *Id.* at 744-45.

Further, in *Rule by Rule v. Lutheran Hospitals & Homes Soc. of America*, 835 F.2d 1250 (8th Cir. 1987)(applying Nebraska law), the Court entertained both the medical malpractice and negligent credentialing claims at the same trial. Defendant hospital contended, similar to Appellants here, that jury instructions as to both torts relegated them to the status of absolute insurer of any malpractice committed by the physician regardless of whether their actions were causally related to the patient's injuries. *Id.* at 1253. The Court disagreed with the hospital's arguments and approved of the trial court's instructions which required the jury to find both that the hospital had been negligent in credentialing the physician, and that the physician had committed malpractice in his treatment of a mother in labor. *Id.* *Rule* is instructive in that it is exactly how negligent credentialing claims are supposed to be structured, regardless of whether or not the physician is still a named defendant. A plaintiff must still bear the burden of showing that his injuries were caused by a physician's negligence in addition to showing that a hospital was negligent in granting privileges.

Finally, as correctly pointed out by Appellant's referenced case law, it is only after a determination on the merits that a doctor was not negligent that it is proper for a court to not hear a claim for negligent credentialing. The reasoning is obvious. A patient, in order to succeed on a claim of negligent credentialing, must prove a doctor's negligence. If that issue is already determined, a key element cannot be proven in the cause of action against the hospital.

In *Wolfington v. Wilson N. Jones Mem'l Hosp.*, No. 05-98-00498-CV, 2000 WL 1230764 (Tex. Ct. App. Aug. 31, 2000), the plaintiff represented the estate of a patient who died while admitted to the defendant hospital. Before trial, the plaintiff settled its case against the allegedly negligent physician without a stipulation to negligence. However, just as the Sixth District Court of Appeals required of the trial court below, there was a separate jury trial on the issue of the physician's negligence before the jury could find the hospital liable under negligent credentialing. The jury found that the treating physician's negligence, if any, did not cause the patient's death and the trial court entered judgment in favor of the Hospital based on the jury verdict. *Id.* at *1. The Texas Court of Appeals affirmed. Even in light of all the challenges that Appellant so passionately opines to exist, the hospital was able to prove that after the doctor had settled without stipulating to negligence it was not liable for negligently credentialing this physician because no negligence existed in his treatment. (See, Merit Brief of Appellant, generally).

In all, the only confusion seems to lie in Appellant's dogged reliance upon Chief Justice Moyer's dissent in *Browning*. Appellant contends that the Chief Justice took issue with the majority's failure to consider or articulate definitive law in its decision. (See, Merit Brief of Appellant at 10-11). "That is, *Albain* requires that the underlying malpractice of the physician be proven before the plaintiff can recover damages against the hospital for its own negligence. Without any underlying harm to the hospital's patient through medical malpractice, an action against the hospital for negligent credentialing will never arise." *Browning*, 66 Ohio St.3d at 566 (Moyer, C.J., dissenting).

This language appears to simply be a clarification of the rule of law already established throughout this Brief. That is, in order to succeed on a claim that a hospital negligently

credentialed a physician, the plaintiff will be required to show that his injuries were first the result of negligence on the part of that physician. Simply because a physician is no longer a defendant in a case does not mean that the plaintiff cannot prove that the doctor was negligent. In fact, just as seen *Wolfington*, it is entirely possible for a hospital to defend such a claim, no matter what Appellant leads this Court to believe.

In that very same dissent, Chief Justice Moyer recognized that the two torts are distinct causes of action, which logic would dictate could be tried separately. "Although medical malpractice claims against the doctor and negligent credentialing claims against the hospital are separate causes of action, with separate and distinct duties owed to a singular class of individuals, both causes of action fail without proof that the physician's failure to abide by ordinary standards of care proximately caused the patient's harm." *Browning*, 66 Ohio St.3d at 566.

Nothing in the cases which Appellant presents supports its conclusions or proposition of law. These cases state that there must be, at some point, a finding of negligence on the part of the physician before the elements of a claim for negligent credentialing can be proven. Here, Appellant has attempted to dismiss this case on the premise that Appellee failed to state a claim upon which relief can be granted. If no court has made any determination as to Dr. Humphrey's negligence, this claim cannot be dismissed.

Beyond a total lack of precedent, nationally or within Ohio, Appellant's proposition of law cannot be followed because it would come at the cost of several policy considerations. The most important of which is the disastrous effect it would have on judicial economy and a plaintiff's willingness to settle.

It seems almost axiomatic that this Court has recognized a desire to encourage settlements between parties in the interest of judicial economy. In regards to statutes which award prejudgment interest, this Court stated that “[t]he statute was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting.” *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658. “[I]n the larger sense, litigation should be a last resort for the resolution of disputes, and that the judiciary should encourage parties to settle their disputes short of litigation, where such is a feasible alternative.” *Zimmie v. Calfee, Halter and Griswold* (1989), 43 Ohio St.3d 54, 60 (Sweeney, J., dissenting).

Appellant’s proposition of law, if well-taken, will put plaintiffs injured as the result of physician negligence in an untenable position. They will be forced to decide whether to settle with a doctor and risk losing their negligent credentialing claim or to go to trial against both defendants expending great resources and occupation of the court’s time. Settlements are to be encouraged by trial courts, but it is difficult to imagine a plaintiff voluntarily settling with a physician knowing that the result would be the dismissal of their negligent credentialing claim against the hospital.

Appellee anticipates that Appellant will assert that settlements will not be affected because Plaintiffs have the opportunity to request a stipulation or admission to negligence. As discussed *supra*, what doctor will be willing to simply admit to negligent acts? A doctor’s livelihood is contingent upon their good-standing and reputation within their community. It is unreasonable to expect that a doctor would admit to negligence to aid a plaintiff in her pursuit against a hospital. Not only do they rely on their reputation for their livelihood, but they also

need the hospital to credential them in order to gain access to practice in that hospital. It seems illogical to expect a hospital to take too kindly to a physician admitting to negligence and therefore opening them up to liability through a negligent credentialing claim.

Similarly, Appellant's Brief is replete with references to the hardships hospitals will endure due to a doctor's unwillingness to aid in defending against a claim for negligent credentialing. Again, as discussed above, not only does Dr. Humphrey continue to deny any liability but doctors in general have an occupational and economic reason to defend against these allegations even after settling their own claims. Appellant's argument that fairness dictates their proposition is simply not supported by logic or the evidence.

All of this adds up to plaintiffs and doctors being placed in the indefensible position of having little ability to settle their claims. Courts have long encouraged settlement as a means of preserving judicial economy. Appellant's proposition would relegate this proposition as an objective of the past.

Additionally, Appellant off-handedly, without any reference to case law, asserts that a voluntary dismissal without stipulation to negligence is an adjudication in favor of Dr. Humphrey, thereby precluding this negligent credentialing claim. (See, Merit Brief of Appellant at 15). However, "a *dismissal without prejudice* is an adjudication *otherwise than on the merits*." *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 225 (emphasis in original). Appellant's own statement of facts establishes that Ms. Schelling voluntarily dismissed her suit against Dr. Humphrey. (See, Merit Brief of Appellant at 3). Using Appellant's own facts, it is clear that their attempt to create an adjudication on the merits is completely without substantiation.

Ms. Schelling is exactly the type of plaintiff the tort of negligent credentialing is designed to protect. As discussed, Dr. Humphrey filed for bankruptcy while this case was pending. Ms.

Schelling was faced with the decision to settle with the trustee of the bankruptcy estate for a minimal sum or collect nothing. Ms. Schelling had no choice but to settle her claim against Dr. Humphrey or get nothing when his estate was distributed. Barring Ms. Schelling's claim simply because she settled with Dr. Humphrey without being able to procure a stipulation to negligence is simply not what the tort of negligent credentialing was created to accomplish. Ample evidence pertaining to Dr. Humphrey's criminal tendencies and fragile mental state has been verified as part of the record in this case. The Sixth District Court of Appeals remanded this case to the trial court for an adjudication on the merits as to whether Appellant negligently credentialed Dr. Humphrey in light of this evidence. In the interest of fairness, this Court must not be wiled away by Appellant's attempt to distract from the real purpose behind the tort of negligent credentialing. There is an independent duty "imposed upon hospitals to grant and continue staff privileges only to competent physicians... owed *directly* to those admitted to the hospital." *Browning*, 66 Ohio St.3d at 555 (emphasis in original). Appellant's proposition of law is equivalent to the complete and utter abolition of this precedent.

Appellant has painted a picture which depicts a hospital suddenly becoming an insurer for the acts of all physicians. (See, Merit Brief of Appellant at 9). However, the language in *Albain* clearly depicts a much different analysis, one which requires a trial court to look at the merits of the negligent credentialing claim separate from the medical malpractice claim.

A physician's negligence does not automatically mean that the hospital is liable, and does not raise a presumption that the hospital was negligent in granting the physician staff privileges. * * * [O]nce a competent and careful physician has been granted staff privileges, the hospital will not thereafter be liable unless it had reason to know that the act of malpractice would most likely take place. That is, where a previously competent physician with staff privileges develops a pattern of incompetence, which the hospital should become aware of through its peer review process, the hospital must stand ready to answer for its retention of such physician.

Albain, 50 Ohio St.3d at 258-59 (emphasis added).

Ms. Schelling is not proposing a dramatic change in Ohio law. Appellee simply wishes for trial courts to enforce the law as delineated by *Albain*, *Browning* and their progeny. That is, examine the merits of each negligent credentialing claim regardless of whether the physician is still a named defendant to the lawsuit. This all starts with determining whether that doctor was negligent. This is a prime example of a case within a case and no matter what Appellant contends it is not novel to Ohio law. If a determination is made on the merits that a physician's actions were not below the requisite level of care owed, then a negligent credentialing claim cannot succeed. These are not the facts before this Court. Dr. Humphrey was voluntarily dismissed without prejudice and, as such, the issue of his negligence remains to be litigated as part of Ms. Schelling's claim against the hospital for negligent credentialing.

CONCLUSION

Hospitals are the gatekeepers to the well-being of patients within their walls. If hospitals are allowed to hide behind a futile negligent credentialing claim, which would be the result of Appellant's proposition of law, they will use it as an impenetrable shield against any liability for its decisions. Patients will be placed in greater danger because there will be no oversight to ensure hospitals fulfill their duty to their patients.

It has been Ohio law for well over a decade that hospitals owe a duty to its patients to only credential competent physicians. This duty is legally and factually distinct from the underlying medical malpractice claim. As such, the allegedly negligent physician is not required to be a named defendant. Therefore, if the circumstances dictate, a plaintiff will be required to prove both that their injuries were caused by a physician's negligence and she would not have been injured but for the hospital's own independent negligence. The merits of a medical

malpractice claim must be examined, but this determination does not need to be made before a court can entertain a negligent credentialing claim altogether.

Fairness and this Court's interest in judicial economy and the settlement of claims dictates such a holding. Case law across the nation and within Ohio, supports this proposition. In fact, as seen, Appellant was unable to provide a single negligent credentialing case in which a court has refused to hear a claim against the hospital without a prior finding or adjudication on the merits as to the physician's negligence.

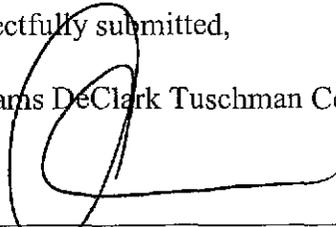
When a patient enters a hospital, she does so blindly. She must have faith that the hospital has fulfilled its duty to credential only competent physicians. Patients cannot check references, job histories, training and education. They have blind faith that the hospital has exercised reasonable care when granting credentials and privileges to physicians who practice medicine at their hospital. To hold that a prior adjudication is necessary before a patient has stated a claim for which relief can be granted is the equivalent to the abolition of this highly important tort.

Appellee Loretta Schelling respectfully requests that this Court affirm the Sixth District Court of Appeals and find that negligent credentialing is a separate and distinct tort from a claim for medical malpractice, thereby allowing this claim to go forward without a prior adjudication as to Dr. Humphrey's negligence.

Respectfully submitted,

Williams DeClark Tuschman Co., L.P.A.

By


Chad M. Tuschman (0074534)
Attorney for Appellant

PROOF OF SERVICE

This is to certify that a copy of the foregoing *Merit Brief of Appellee Loretta Schelling* was mailed by Ordinary U.S. Mail this 3rd day of June, 2008 to:

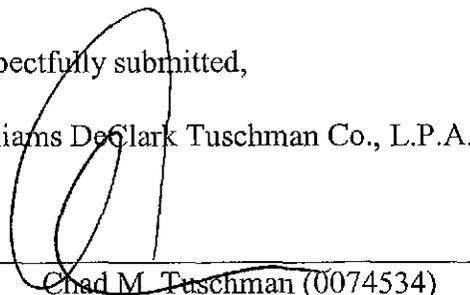
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Respectfully submitted,

Williams DeClark Tuschman Co., L.P.A.

By

A handwritten signature in black ink, appearing to read "Chad M. Tuschman", is written over a horizontal line. The signature is stylized and somewhat cursive.

Chad M. Tuschman (0074534)

Attorney for Appellant

APPENDIX NO. 1

¶

Dicks v. U.S. Health Corp. of Southern Ohio
Ohio App. 4 Dist., 1996.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Scioto
County.

Pamela DICKS, et al. Plaintiffs-Appellants,
v.

U.S. HEALTH CORPORATION
No. 95 CA 2350.

May 10, 1996.

COUNSEL FOR APPELLANT: John K. Fitch, 199
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43215-5299

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DECISION AND JUDGMENT ENTRY

ABELE, P.J.

*1 This is an appeal from a summary judgment entered by the Scioto County Common Pleas Court against Pamela Dicks and her husband, plaintiffs below and appellants herein, and in favor of U.S. Health Corporation of Southern Ohio, defendant below and appellee herein.

Appellant assigns the following errors:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE AND IN DISMISSING APPELLANTS' NEGLIGENT CREDENTIALING CLAIM ON THE BASIS OF *BROWNING V BURT* (1993), 66 OHIO ST.3D 544. SINCE THE TRIAL COURT REJECTED

THE MAJORITY OPINION IN *BROWNING*, IGNORED R.C. SECTION 2307.32(F)(1), AND IMPROPERLY RELIED UPON A DISSENTING OPINION IN *BROWNING* AS A BASIS FOR ITS DISMISSAL OF APPELLANTS' NEGLIGENT CREDENTIALING CLAIM."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE APPELLEE AND IN DISMISSING APPELLANTS' NEGLIGENCE CLAIM BASED UPON THE DOCTRINE OF RESPONDEAT SUPERIOR, SINCE THE CLAIM WAS PROPERLY AND TIMELY FILED, IN APPELLANTS' ORIGINAL SUIT, AND THE R.C. SECTION 2305.19 WAS PROPERLY INVOKED TO EXTEND THE STATUTE OF LIMITATIONS."

In her brief on appeal, appellant recites facts that we describe in this paragraph and in the following three paragraphs. On June 3, 1991, Dr. Shabbir Haider removed appellant's gallbladder at appellee's hospital. Dr. Haider removed the gallbladder by a new surgical procedure known as laparoscopic cholecystectomy.

Appellee did not require Dr. Haider to have experience with laparoscopic cholecystectomy before performing the procedure. Dr. Haider performed his first laparoscopic cholecystectomy on Emily Bradshaw in September 1990. During the procedure, Dr. Haider punctured Bradshaw's common bile duct. Bradshaw died as a result.

Appellant notes that sixteen days after Dr. Haider performed the laparoscopic cholecystectomy on her, she was admitted to Ohio State University Hospital. On June 20, 1991, Dr. Michael Townsend performed surgery on appellant and reported in pertinent part as follows:

"After careful dissection down to what would be the neck of the gallbladder, we discovered a large

number of hemoclips in the region of what we felt would be the common hepatic duct. We then began removing these clips one at a time as we attempted to visualize the anatomy. The area was suctioned dry and any possible ductal structures were examined for bile production. We eventually identified two openings with bile production, each one 3 mm and perhaps 4 mm maximum on the right side, which we felt were the right and left hepatic ducts. These were probed with a lacrimal probe and were found to extend into the liver as expected, verifying that they were indeed hepatic ducts. It was clear at this point that there was a large amount of destruction of the common hepatic duct and that these were the remaining ductal structures.”

During a deposition, Dr. Haider testified that he believed he placed a surgical clip over appellant's common bile duct. Dr. Haider also testified that it was not the standard of care to clip the common bile ducts.

*2 On January 30, 1992, appellant filed a malpractice action against Dr. Haider and his corporation. On November 12, 1992, after giving appellee notice pursuant to R.C. 2305.11(B), appellant filed an action against appellee. On May 17, 1993, the trial court consolidated the two actions. On August 9, 1993, appellant filed a second amended complaint in the consolidated action. The second amended complaint stated in pertinent part as follows:

“7. Plaintiffs further state that the hospital, *acting by and through its employees, agents and staff physician committees, was negligent and fell below the standard of care* in that:

(a) it granted privileges to Dr. Haider to perform the laparoscopic cholecystectomy, and he was inadequately trained and incompetent to perform said surgery;

(b) continued, and/or failed to revoke, Dr. Haider's privileges to perform the laparoscopic cholecystectomy; and

(c) *was otherwise negligent.*”

(Emphasis added.)

On November 3, 1993, appellant voluntarily dismissed the claims against appellee pursuant to Civ.R. 41. On November 9, 1993, appellant settled her claims against Dr. Haider and his corporation for \$150,000. The release specified that it did not release “any other person, firm or corporation.”

Appellee disagrees with the statement of facts in appellant's brief. Appellee, however, contends that the facts are not at issue in this appeal.

The record transmitted on appeal reveals that appellant commenced the instant action against appellee on October 18, 1994. In the complaint, appellant alleged that appellee is liable for Dr. Haider's negligence under the doctrine of respondeat superior. Appellant further alleged that appellee was negligent in granting privileges to Dr. Haider to perform the laparoscopic cholecystectomy when he was inadequately trained to perform that procedure, and was negligent in continuing and/or failing to revoke those privileges.^{FN1}

^{FN1} In *Albain v. Flower Hospital* (1990), 50 Ohio St.3d 251, 553 N.E.2d 1038, paragraph two of the syllabus, the court described the negligent credentialing cause of action as follows:

“In regard to staff privileges, a hospital has a direct duty to grant and to continue such privileges only to competent physicians. A hospital is not an insurer of the skills of private physicians to whom staff privileges have been granted. In order to recover for a breach of this duty, a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have

been injured.”

On October 27, 1994, appellee filed a “motion to dismiss or in the alternative motion for summary judgment.” In an attached memorandum, appellee stated that: (1) the complaint fails to state a claim upon which relief can be granted; (2) appellant failed to join a necessary party, Dr. Haider, to this action; and (3) the original action against appellee did not include a respondeat superior claim and thus R.C. 2305.19, the savings statute, does not extend the statute of limitations with respect to appellant’s respondeat superior claim against appellee.

With respect to the negligent credentialing claim, appellee argued that because appellant had released Dr. Haider from liability, appellant will be unable to prove Dr. Haider was negligent and thus will be unable to prove that appellee negligently credentialed Dr. Haider. Appellee acknowledged that *Browning v. Burt* (1993), 66 Ohio St.3d 544, 613 N.E.2d 993, certiorari denied *sub nom. St. Elizabeth Med. Ctr. v Browning* (1994), 510 U.S. 1111, 114 S.Ct. 1054, 127 L.Ed.2d 375, held that negligent credentialing is a claim separate and distinct from a medical malpractice claim, but appellee quoted the dissenting portion of Chief Justice Moyer’s concurring and dissenting opinion for the proposition that the underlying malpractice claim must be proven before the plaintiff can recover damages against the hospital for negligent credentialing. We note that appellee erroneously characterized Justice Moyer’s opinion as a concurring opinion.

*3 On November 29, 1994, appellant filed a memorandum contra appellee’s “motion to dismiss or in the alternative motion for summary judgment.” In the memorandum contra, appellant argued that under the current liberal rules of pleading, the second amended complaint in the prior action sufficiently alleged that appellee is liable for Dr. Haider’s medical malpractice under the doctrine of respondeat superior. Appellant further argued that because the majority opinion in *Browning* held that a negligent credentialing claim against a hospital is “factually and legally severable and distinct” from

a medical malpractice claim against the hospital’s doctor, appellant may bring an action against appellee without Dr. Haider being present in the action. Lastly, appellant argued that pursuant to R.C. 2307.32(F)(1), the release of one tortfeasor does not release another tortfeasor who is liable for the same injury.

On December 6, 1994, appellee filed a reply brief. In the reply, appellee argued that appellant’s arguments on the facts are premature. Appellee asserted that its motion is not based upon the facts, but rather upon legal issues including the statute of limitations, the savings statute, and the elements of the tort of negligent credentialing. Appellee once again emphasized that before a plaintiff can recover against a hospital for negligent credentialing, the plaintiff must prove that the credentialed doctor committed malpractice.

On March 28, 1995, the trial court entered judgment in pertinent part as follows:

“The Court finds that the Plaintiff herein originally brought this suit against defendant Shabbir Haider, M.D., Shabbir Haider, M.D., Inc. and U.S. Health Corporation of Southern Ohio d/b/a Southern Ohio Medical Center (SOMC) in case number 92-CI-425 filed in this Court. * * *

* * *

This Court finds that on the face of the complaint the [statute] of limitations has run concerning the claim against SOMC based on the doctrine of respondeat superior and since it was not in the original suit summary judgment should be granted. This Court finds that the plaintiffs’ attempt to refile the within claim on negligent credentialing should also be dismissed pursuant to *Browning v. Burt* (1993), 66 Ohio St.3d 544, and for reasons (*sic*) and that the Court further finds that summary judgment is proper in the within cause.”

Appellant filed a timely notice of appeal from the trial court’s March 28, 1995 judgment entry.

I

In her first assignment of error, appellant contends the trial court erred by granting summary judgment to appellee on the negligent credentialing claim. Appellant raises two arguments in support of this assignment of error.

First, appellant argues that although the dissenting portion of Justice Moyer's concurring and dissenting opinion in *Browning v. Burt* (1993), 66 Ohio St.3d 544, 613 N.E.2d 993, certiorari denied *sub nom. St. Elizabeth Med. Ctr. v Browning* (1994), 510 U.S. , 114 S.Ct. 1054, 127 L.Ed.2d 375, supports the trial court's summary judgment on the negligent credentialing claim, the majority opinion in *Browning* does not. In *Browning*, the court addressed the narrow issue of whether a negligent credentialing claim falls under the one-year medical malpractice statute of limitations, R.C. 2305.11(B)(1), or the two-year general negligence bodily injury statute of limitations, R.C. 2305.10. The *Browning* court, when deciding that negligent credentialing claims fall under the latter statute, wrote in pertinent part as follows:

*4 "While the acts or omissions of a hospital in granting and/or continuing staff privileges to an incompetent physician may ultimately lead to an act of medical malpractice by the incompetent physician, the physician's ultimate act of medical malpractice is factually and legally severable and distinct from the hospital's acts or omissions in negligently credentialing him or her with staff membership or professional privileges."

(Emphasis added.)

Id., 66 Ohio St.3d at 557, 613 N.E.2d at 1004. Thus, the *Browning* court emphasized the physician's malpractice is factually and legally severable from the hospital's negligent credentialing of the physician. Appellant argues that because the two claims are legally severable, the fact that he has settled the medical malpractice claim does preclude the negligent credentialing claim.

Appellee, in response, argues that in order to succeed on the negligent credentialing claim, appellant must prove that Dr. Haider committed medical malpractice. Appellee cites from the majority opinion in *Browning* in pertinent part as follows:

"The theory of hospital liability at issue in these cases was discussed at some length in *Albain v. Flower Hosp.* (1990), 50 Ohio St.3d 251, 257-260, 553 N.E.2d 1038, 1044-1047. In *Albain*, paragraph two of the syllabus, this court held that:

'In regard to staff privileges, a hospital has a direct duty to grant and to continue such privileges only to competent physicians. * * * In order to recover for a breach of this duty, a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have been injured.'

(Emphasis added.)

Id., 66 Ohio St.3d at 555, 613 N.E.2d at 1002. Appellee argues that in order to prove Dr. Haider committed medical malpractice, appellant must join Dr. Haider in the lawsuit. Appellee further argues that because appellant's settlement with Dr. Haider precludes her from bringing a medical malpractice claim against him, appellant will be unable to prove her negligent credentialing claim.

We agree with appellant that the negligent credentialing claim is "factually and legally severable and distinct" from the medical malpractice claim. *Browning, supra*, 66 Ohio St.3d at 557, 613 N.E.2d at 1004. Although appellant, in order to collect damages for negligent credentialing, must prove that she suffered injury at the hands of a negligently credentialed doctor, appellant need not join the doctor in the lawsuit against the hospital. Appellant may prove the negligence of the doctor without the doctor being present in the action. Indeed, in *Browning*, one of the two doctors was not present during the resolution of the negligent credentialing

cause of action.^{FN2}

FN2. At footnote 10, the *Browning* court noted that "the malpractice of Dr. Burt has been established in both cases by virtue of the default judgments entered against him * * *."

In her second argument under this assignment of error, appellant contends that the trial court, when granting appellee's motion for summary judgment, ignored R.C. 2307.32(F)(1). The statute provides in pertinent part as follows:

*5 (F) When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury or loss to person or property or the same wrongful death, the following apply:

(1) The release or covenant does not discharge any of the other tortfeasors from liability for injury, loss, or wrongful death unless its terms otherwise provide, but it reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater;

(2) The release or covenant discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

In *Niemann v. Post Industries, Inc.* (1991), 68 Ohio App.3d 392, 396, 588 N.E.2d 301, 303, the court wrote that although under common law the release of one joint tortfeasor operated to release all joint tortfeasors, R.C. 2307.31 and 2307.32 has changed the common law. See, also, *Dickson v. Pandya* (1984), 21 Ohio App.3d 10, 11, 486 N.E.2d 111, 112. A release of one joint tortfeasor no longer operates to release all joint tortfeasors.

We agree with appellant that both appellee and Dr. Haider can be held liable for her injuries, and therefore they are joint tortfeasors. We note that in *Ziegler v. Wendel Poultry Services, Inc.* (1993), 67 Ohio St.3d 10, 18, 615 N.E.2d 1022, 1030, the court re-

cognized that there does not have to be a determination of liability for a settling defendant to be considered a tortfeasor within the meaning of R.C. 2307.32. Thus, pursuant to R.C. 2307.32(F)(1), the release of Dr. Haider does not discharge appellee from liability. We additionally note that the release of Dr. Haider specifically stated that it did not discharge appellee from liability.

Summary judgment is appropriate when the movant demonstrates: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, 617 N.E.2d 1123, 1126; *Bostic v. Comer* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881, 884; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47. The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801.

When reviewing a summary judgment, an appellate court must independently review the record to determine if summary judgment was appropriate. An appellate court need not defer to the trial court's decision in summary judgment cases. See, *Morchead v. Conley* (1991), 75 Ohio App.3d 409, 599 N.E.2d 786.

*6 In the case *sub judice*, we have reviewed the applicable law and find that the trial court incorrectly decided the motion. Thus, we reverse the trial court's summary judgment and remand this case for further proceedings consistent with this opinion.

Accordingly, based upon the foregoing reasons, we sustain appellant's first assignment of error.

II

In her second assignment of error, appellant asserts that the trial court erred by granting summary judgment to appellee on the respondeat superior claim. In support of this assignment of error, appellant argues that the respondeat superior claim was included in the first action and thus the R.C. 2305.19 savings statute extended by one year the statute of limitations time period for bringing that claim. Appellee, in response, argues that the respondeat superior action was not included in the first action, and thus the R.C. 2305.19 savings statute does not extend the statute of limitations time period for bringing that claim.

R.C. 2305.19 provides in pertinent part as follows:

In an action commenced * * * if the plaintiff fails otherwise than upon the merits, and the time limited (*sic*) for the commencement of that action at the date of * * * failure has expired, the plaintiff * * * may commence a new action within one year after such date. * * *

We note that on November 3, 1993, appellant voluntarily dismissed her claims against appellee from the first action. Appellant commenced the instant action against appellee on October 18, 1994, within the R.C. 2305.19 one-year statute of limitations extension period.

In *Carrier v. Weishelmer Companies, Inc.* (Feb. 22, 1986), Franklin App. No. 95APE04-488, unreported, the court noted that when resolving R.C. 2305.19 questions, we must determine whether the complaint in the first complaint gave the defendant fair notice of the claims in the second complaint. The *Carrier* court wrote in pertinent part as follows:

* * * The question to answer when determining whether the allegations of an amended petition relate back to the original petition is whether the facts alleged in the first complaint fairly apprised defendant of the claims in the amended complaint. * * *

The “fairly apprised” test described in *Carrier* matches the “fair notice” test enunciated by courts interpreting Civ.R. 8(A). Under the Ohio Rules of Civil Procedure, plaintiffs need no longer follow technical rules of pleading. Civ.R. 8(A) provides that a complaint shall set forth “a short and plain statement of the claim showing that the party is entitled to relief.”

In *Morris v. Children's Hospital Medical Center* (1991), 73 Ohio App.3d 437, 597 N.E.2d 1110, although the plaintiff alleged that her injury resulted from the negligence of the defendant hospital and its agents, the plaintiff failed to plead all the elements of a claim pursuant to the doctrine of respondeat superior. The court, citing Civ.R. 8(A) and the principle that pleadings must be liberally construed, held that the complaint sufficiently alleged a cause of action under the doctrine of respondeat superior. The court wrote in pertinent part as follows:

*7 * * * The plaintiffs, in alleging in their complaint that Melissa Morris's injury resulted from negligent conduct on the part of the ‘defendants and their agents,’ did not plead with specificity the elements of a claim sounding in respondeat superior. However, ‘cause-of-action’ pleading, in which the plaintiff is required to allege the existence of the respective elements of the theory of recovery upon which he relies, was abandoned by the adoption in 1970 of the Ohio Rules of Civil Procedure. *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 455 N.E.2d 1344 --- *

* * * Civ.R. 8(A) thus introduces the concept of ‘claim-for-relief’ or ‘notice’ pleading, which serves ‘to simplify pleadings to a “short and plain statement of the claim” and to simplify statements of relief demanded * * * to the end that the adverse party will receive fair notice of the claim and an opportunity to prepare his response thereto.’ *Fancher, supra*, at 83, 455 N.E.2d at 1348. Civ.R. 8(F) requires that pleadings be ‘construed as to do substantial justice,’ and to that end, pleadings must be construed liberally to serve the substantial merits of the action. *McDonald v. Bernard* (1982), 1 Ohio

Sl.3d 85, 438 N.E.2d 410; see, also, Civ.R. 1(B). *
* * *

Id. 73 Ohio App.3d at 442-443, 597 N.E.2d at 1113. The *Morris* court quoted with approval from 5 Wright & Miller, Federal Practice & Procedure: Civil (1969), at 120-123, Section 1216, in pertinent part as follows:

" * * * [T]he complaint * * * need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial."

We find that although appellant's second amended complaint in the first action did not state with specificity all the elements of a claim sounding in respondeat superior, that complaint gave appellee fair notice of appellant's respondeat superior claim against appellee. The second amended complaint, after alleging that Dr. Haider committed medical malpractice against appellant at appellee's hospital, alleged that appellee, "acting by and through its employees, agents and staff physician committees," was "negligent and fell below the standard of care" with respect to Dr. Haider's credentials and "was otherwise negligent." A reasonable attorney reading the second amended complaint could easily conclude that the "other negligence" included negligence under the doctrine of respondeat superior.

In conclusion, we find that both the first action and the case *sub judice* involve a claim against appellee sounding in respondeat superior. Therefore, we find that R.C. 2307.19 gave appellant one year from the time she dismissed appellee from the first action to file her respondeat superior claim against appellee in the case *sub judice*.

*8 Accordingly, based upon the foregoing reasons,

we sustain appellant's second assignment of error.

JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and cause remanded for further proceedings consistent with our opinion. It is further ordered that appellants recover of appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

STEPHENSON and KLINE, JJ., concur in judgment & opinion.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 12, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Ohio App. 4 Dist., 1996.
Dicks v. U.S. Health Corp. of Southern Ohio
Not Reported in N.E.2d, 1996 WL 263239 (Ohio App. 4 Dist.)

END OF DOCUMENT

APPENDIX NO. 2

Not Reported in N.E.2d

Not Reported in N.E.2d, 1995 WL 809478 (Ohio App. 5 Dist.)

(Cite as: Not Reported in N.E.2d, 1995 WL 809478 (Ohio App. 5 Dist.))

▷

Davis v. Immediate Medical Services, Inc.

Ohio App. 5 Dist., 1995.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark
County.

Evelyn DAVIS, Administratrix of the Estate of Al-
bert Davis Plaintiff-Appellant,

v.

IMMEDIATE MEDICAL SERVICES, INC., et al.,
Defendants-Appellees.

No. 94 CA 0253.

Dec. 12, 1995.

Civil appeals from the Court of Common Pleas.

Lee E. Plakas, Christopher M. Hury, Canton, OH.

Mark D. Frasure, Canton, OH.

Janis L. Small, R. Mark Jones, Cleveland, OH.

Gary A. Banas, Marlene C. Gebauer, Canton, OH.

John A. Simon, John S. Polito, Cleveland, OH.

GWIN, P. J.

*1 On April 26, 1991, Albert Davis died as a result of a ruptured appendix. On November 9, 1992, appellant, Evelyn Davis, Administratrix of the Estate of Albert Davis, filed a wrongful death and medical malpractice action against appellees Immediate Medical Services, Inc. (hereinafter "IMS"), Barbara Guarnieri, M.D., E.M. Care of Alliance, Inc. (hereinafter "E.M. Care"), William Eichner, M.D. and Alliance Community Hospital (hereinafter "Hospital").

Appellant also filed her complaint against Geno Serri, M.D., Andres Lao and Edward Mitchell, all of whom were dismissed from the case with prejudice and therefore are not a part of this appeal.

On April 23, 1993, appellant filed a first amended

complaint adding appellees Alliance Immediate Care, Inc. (hereinafter "AIC"), William H. Fiegenschuh, M.D. and William H. Fiegenschuh, M.D., Inc. The amended complaint alleged claims of medical negligence and wrongful death. It also alleged a negligent credentialing claim against appellee Hospital for granting and continuing surgical staff privileges to appellee Fiegenschuh.

On May 17, 1994, appellee Fiegenschuh filed a motion to bifurcate trial of the negligent credentialing claim from the medical malpractice and wrongful death claims. By judgment entry dated May 20, 1994, said motion was granted.

On May 19, 1994, appellant filed a default judgment against appellee AIC for failure to file an answer or any other responsive pleading. The trial court denied appellant's motion for default judgment on May 23, 1994, finding excusable neglect on the part of appellee AIC in not filing a timely answer. On same date, appellee AIC filed an answer to the first amended complaint. However, the answer was erroneously titled "Answer of Defendant, Immediate Medical Care, Inc." No such corporation was a defendant in the lawsuit. Three weeks after the answer was filed, appellant again moved for default judgment. Appellee AIC's counsel moved that he be allowed to substitute the correct name. No formal ruling was made on the motions; the trial court denied appellant's motion for default judgment *sub silentio* upon entering a defense verdict for appellee AIC.

On May 20, 1994, appellant entered into a partial settlement and agreement (hereinafter "Mary Carter agreement") not to execute with Dr. Serri and appellees Eichner, E.M. Care and Hospital which provided, in part, Dr. Daniel Guyton, an expert witness identified on behalf of appellees Eichner and E.M. Care, would testify at trial in accordance with his written report that appellee Fiegenschuh violated the applicable standard of care and proximately caused the decedent's death. The agreement

also provided appellant waived any right to collect in excess of \$24,900 from appellee Eichner if a verdict was rendered against him over said amount. The agreement specified if a verdict was entered against Dr. Scritti and/or appellees E.M. Care or Hospital over \$487,500, it would be considered null, void and unenforceable.

*2 A jury trial commenced on May 23, 1994. On June 13, 1994, the jury returned a verdict in favor of appellant and against appellee Eichner in the amount of \$643,000. The jury found in favor of the remaining appellees. On June 16, 1994, the trial court entered judgment consistent with the jury's verdict.

On July 7, 1994, appellee Hospital filed a motion for summary judgment on the bifurcated negligent credentialing claim. On July 15, 1994, appellant filed a notice of appeal from the June 16, 1994 judgment entry. On August 8, 1994, the trial court granted summary judgment in favor of appellee Hospital on appellant's negligent credentialing claim. On August 17, 1994, this court dismissed appellant's appeal for lack of a final appealable order. Thereafter, appellant filed a second notice of appeal from the June 16, 1994 judgment entry on August 30, 1994. On November 4, 1994, appellee Eichner filed a motion to enforce the settlement agreement. By judgment entry dated December 16, 1994, the trial court delayed ruling on said motion pending appeal. This matter is now before this court for consideration.

Assignments of Error are as follows:

I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR DEFAULT JUDGMENT AGAINST APPELLEE ALLIANCE IMMEDIATE CARE, INC., EVEN THOUGH SAID APPELLEE NEVER FILED ANY ANSWER OR OTHER RESPONSIVE PLEADING IN THE TRIAL COURT.

II

THE TRIAL COURT ERRED BY EXCLUDING PROBATIVE, RELEVANT EVIDENCE RELATING TO THE COMMONALITY OF INSURANCE, BUSINESS, AND CONTRACTUAL INTERESTS BETWEEN THE APPELLEES AND THEIR EXPERT WITNESSES, AND BETWEEN THE APPELLEES THEMSELVES.

III

THE TRIAL COURT ERRED DISREGARDING THE FACT THAT THE APPELLEES' INTERESTS WERE ESSENTIALLY THE SAME AND BY GRANTING TO THE APPELLEES COLLECTIVELY TWICE THE AMOUNT OF PEREMPTORY CHALLENGES GRANTED TO THE APPELLANT.

IV

THE TRIAL COURT ERRED BY PREVENTING THE APPELLANT FROM CHALLENGING THE CREDIBILITY OF APPELLEE FIEGENSCHUH'S OPINIONS AND TESTIMONY WITH EVIDENCE OF ALCOHOL ABUSE, CONTINUING TREATMENT FOR ALCOHOLISM, AND SURGICAL STAFF PRIVILEGE REVOCATION.

V

THE TRIAL COURT ERRED BY BIFURCATING THE APPELLANT'S CLAIMS SO AS TO TRY THE ISSUE OF MEDICAL NEGLIGENCE BEFORE THE ISSUE OF NEGLIGENT CREDENTIALING.

VI

THE TRIAL COURT ERRED IN SUBMITTING INCORRECT AND MISLEADING INSTRUCTIONS TO THE JURY RELATING TO THE

STANDARD OF CARE FOR APPELLEE IMMEDIATE MEDICAL SERVICES, INC. AND APPELLEE GUARNIERI.

I

Appellant claims the trial court erred in failing to grant her motion for default judgment for failure to file an answer or other responsive pleading against appellee AIC. Appellant perfected her motion for default in a motion for directed verdict, by objecting to the verdict form for appellee AIC and in her motion for judgment notwithstanding the verdict. All of these motions and objections were overruled by the trial court.

Appellee AIC was not named as a party defendant until the amended complaint filed on April 23, 1993. Appellee AIC's counsel claimed he failed to receive notice of said complaint. In the original complaint, appellee Guarnieri, an employee of appellee AIC, was served and did timely answer. The theory of liability against AIC was the negligence of appellee Guarnieri and therefore *respondeat superior*. At trial, appellee AIC's counsel also represented appellee Guarnieri.

*3 On May 19, 1994, appellant applied for default judgment against appellee AIC and brought the matter to the trial court's attention. Appellee AIC's counsel offered to testify concerning the issue of excusable neglect under Civ.R. 60(B), and presumably the other requirements of said rule. The trial court granted leave to file an answer. Vol. I T. at 59. An answer was filed on May 23, 1994, the first day of trial, although the answer did not name appellee AIC but Immediate Medical Care, Inc., a party not named in the lawsuit. The answer was in the form of a general denial.

We find AIC was clearly in default and the trial court abused its discretion in overruling the motion for a default judgment. As the Supreme Court noted in *Miller v. Lin* (1980) 62 Ohio St.2d 209 where a defendant fails to comply even substantially with

the Rules of Civil Procedure, the plaintiff who has complied has a right to have its motion heard and decided before the cause proceeds to trial. Miller at 214.

We conclude the trial court should have granted default judgment against AIC, rather than submitting the issue to the jury. The subsequent fact that the jury found in favor of appellee Guarnieri does not "cure" the error, but may be pertinent to a subsequent Civ. R. 60(B) motion.

The first assignment of error is sustained.

II

Appellant's second Assignment of Error attacks the trial court's ruling on two evidentiary issues. First, she cites us to *Ede v. Atrium South Oh-Gyn, Inc.* (1994), 71 Ohio St.3d 124, decided after this case was tried. Appellant claims the trial court unlawfully limited her cross-examination of an expert, Dr. Bruce Janiak. Secondly, appellant claims the trial court erred in denying the admission of plaintiff's exhibits 25, 28 and 39, evidence concerning the interlocking corporate relations of appellees. We agree in part.

Generally, rulings on evidence are within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. The Supreme Court of Ohio has held:

In a medical malpractice action, evidence of a commonality of insurance interests between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause. (Evid.R.411, applied.)

Syllabus by the court.

In *Ede*, both the defendant physician and the physician testifying as a medical expert on his behalf were insured by the same insurance company, Physicians' Mutual Insurance (PIE). Here, by con-

trast, Dr. Janiak was called as an expert witness on the standard of emergency medicine physicians for appellee Guarnieri, an emergency medicine physician. Dr. Janiak was insured by PIE, but appellee Guarnieri was not. Dr. Serri and appellees E.M. Care and Eichner were insured by PIE. Dr. Serri and appellee E.M. Care were emergency medicine providers; appellee Eichner was not. Dr. Serri was employed by E.M. Care.

The trial court ruled on this issue after conducting a voir dire of Dr. Janiak. The ruling of the trial court was conditional in nature. That is, if the expert testified solely as to appellee Guarnieri's care and not the care of a PIE insured, appellant could not get into the issue of commonality of insurance interests (Vol. VII T. at 19-20), but could develop the issue of Dr. Janiak's attorney/client relationship with the PIE law firm if the door was opened. Vol. VII T. at 20.

*4 Dr. Janiak was the very first defense expert to testify and as we will address at greater length in Assignment of Error III, antagonistic defenses were present among the appellee doctors. Dr. Janiak testified for appellee Guarnieri, an emergency medicine physician and the first physician in the chain to treat the decedent. Dr. Janiak testified as an expert in the field of emergency medicine (Vol. VII T. at 31-47), as to appellee Guarnieri's standard of care as a board certified physician (Vol. VII T. at 33).

Ede requires the court to permit appellant to inquire about the commonality of insurance interest among Dr. Janiak, Dr. Serri, Dr. Eichner, and E.M. Care. However, given the fact that Dr. Serri, a PIE insured, was voluntarily dismissed with prejudice (Notice of Voluntary Dismissal with Prejudice dated May 25, 1995), and appellee Eichner, also a PIE insured, was not an emergency medicine physician and was found to be totally negligent and was assessed a \$643,000 jury verdict, we find said error to be harmless as to these two individuals:

Rule 61. Harmless error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

As to appellee E.M. Care, we find given the language of the May 20, 1994 Mary Carter agreement, appellee E.M. Care is the only party remaining where the hold harmless agreement does not apply:

It is agreed that Plaintiff will file a Notice of Dismissal dismissing Serri from the case on the condition that prior to said dismissal, an appropriate representative of EMCA stipulates that at all times relevant to the issues in the case, Serri was employed by EMCA and was rendering treatment to decedent Albert Davis within the course and scope of Serri's employment responsibilities to EMCA, and with the further stipulation by PIE that the dismissal of Serri will not invalidate the insurance coverage provided by PIE to EMCA.

The matter is reversed for new trial against appellee E.M. Care.

Appellant's second evidentiary challenge is to the denial of plaintiff's exhibits 25, 28 and 39. Exhibit 39 purports to establish a contractual relationship between appellees Hospital and E.M. Care (the emergency room at appellee Hospital) which includes a mutual cooperation agreement in defense of lawsuits. Vol. VIII T. at 116. The trial court denied admission of plaintiff's exhibit 39 because it was not in effect at the time of decedent's treatment. Vol. X T. at 21-22. Plaintiff's exhibit 38, which was in existence at the time of decedent's treatment, was admitted. Vol. IX T. at 35; Vol. X T. at 22. Plaintiff's exhibit 25 was a brochure of ap-

pellee E.M. Care. The trial court ruled said exhibit had not been properly identified nor was it in existence during decedent's treatment. Vol. IX T. at 20-21. Appellant's counsel does not deny these facts, but argues a witness agreed to what the brochure said so it should have been admitted. Vol IX T. at 19-20. Plaintiff's exhibit 28 was a contract between Health Alliance, Inc. and Dr. Reuben Nepomuceno. Vol. IX T. at 23. Neither of these parties were parties to the case nor witnesses. The trial court denied admission for lack of proper foundation. Vol. X T. at 21.

*5 As previously stated, the admission or exclusion of evidence rests within the sound discretion of the trial court. *Sage*. Absent a finding the trial court's decision was unreasonable, arbitrary or unconscionable, this court will affirm the decision.

Although there was much discussion relative to the relevancy of the exhibits (testimony on the proffered reason [to show mutual support] was given), we concur proper identification was not made and plaintiff's exhibit 39 came into existence after decedent's treatment. We find no error in the trial court's denial of admitting plaintiff's exhibits 25, 28 and 39.

Assignment of Error II is sustained in part and denied in part.

III

Appellant claims the trial court abused its discretion in granting appellees collectively six preemptory challenges and appellant only three preemptory challenges. We disagree.

Civ.R. 47(B) governs challenges to the jury. Specifically, said rule states in addition to challenges for cause "each party preemptorily may challenge three jurors. If the interests of multiple litigants are essentially the same, 'each party' shall mean 'each side.'" A determination of whether or not the interests of multiple litigants are the same is a matter left to the discretion of the trial court. Furthermore,

the Supreme Court of Ohio has defined "interests" as follows:

... if the interests of the parties defendant are essentially different or antagonistic, each litigant is ordinarily deemed a party within the contemplation of the statute and entitled to the full number of preemptory challenges.

Chakeres v. Merchants & Mechanics Federal S. & L. Assn. (1962), 117 Ohio App. 351, 355, *cited with approval* in *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 125.

Appellees were represented by two different law firms and two different insurance carriers, P.I.E. and P.I.C.O. Vol. I T. at 80-81. The one set of appellees, Eichner and E.M. Care, entered into a Mary Carter agreement. Part of said agreement provided that one of the two appellees would call an expert, Dr. Guyton, who would testify Dr. Fiegenschuh breached the standard of care as opposed to either of them.

This agreement taken at face value substantiates the trial court's determination of antagonistic interests between the parties. Based on this agreement alone, the trial court was justified in granting the six preemptory challenges to the two sets of appellees.

Assignment of Error III is overruled.

IV

Appellant claims the trial court improperly denied her the ability to cross-examine appellee Fiegenschuh and challenge his credibility by denying her the opportunity to question him on his alcoholism, treatment and lack of surgical privileges. We disagree.

This matter was a subject of a motion *in limine*. The trial court conditionally ruled said areas were inadmissible since the credentialing claim had been bifurcated from the other claims. The trial court further stated:

*6 * * *Initially it is the court's impression that unless counsel present independent evidence that the doctor was under the influence at the time of his evaluations, that that type of information would generally not be admissible.

If they have independent evidence of his being under the influence or his being impaired, then there is something to that, then the Court wants to know about it and we will deal with it.

But no, it would not.

However, it has already come to the Court's attention there will be potential issues of opening the door.

If this gentleman testifies to some degree and whatever degree as an expert and his credibility becomes the issue before the Court, then those issues may well become, ah, at issue in this court and they may be allowed in.

I'm going to suggest to counsel and everybody here present that before we hit that spot, if the door's apparently been or suggested it's opened, that we do approach the bench on that and that the Court will review that thing. And if the Court has determined it has been, then Mr. Plakas is going to get some room and start swinging on those issues.

That's going to be up-and I'm not going to say what really does or doesn't open the door because we're not at that point.

The issue is if there is foundation to show that individual was under the influence at that time and that is why a diagnosis was missed, sure, that's relevant. But we have to have an indication of prior problems, but once that foundation is hit, that opens the door and everything is up for everyone to review. I don't know what that is going.

So the initial ruling is no, at this point there will not be, quote, any opening statements or things

that suggest alcoholism until such time that it is, that that issue becomes a relevant and independently shown situation.

Vol. I T. at 29-31.

Appellant's counsel argued said issues could become relevant in many ways and that he could not enumerate them all. Vol. I T. at 321. With that comment, the trial court once again set forth the procedure: if one of the issues is about to be explored, approach the bench and the trial court will entertain arguments.

For our review, we must determine if appellee Fiegenschuh ever became an expert and whether the procedure outlined by the trial court was properly followed.

Appellant claims she followed the trial court's mandate. Appellant argues she attempted to broach an issue as follows:

Q.Sounds like you do a lot of hospital surgeries, doctor?

A.Yes.

Q.And doctor, how many hospital surgeries have you done in 1994?

MR. FRASURE: Your Honor, I object. This is related to 1993.

THE COURT: Okay

MR. FRASURE: Excuse me.1991.

MR. BANAS: 91.

MR. FRASURE: So now we're jumping to 1994. I fail to see the relevance of this.

THE COURT: I'll sustain the objection.

Vol. IV T. at 95-96.

We find this exchange did not follow the trial court's dictates as stated twice to counsel, nor was a

proffer made or sidebar requested therefore, we find the matter has not been perfected for appeal.

*7 Assignment of Error IV is overruled.

V

Appellant claims the trial court erred in bifurcating appellant's claims forcing appellant to try the issue of medical negligence before the issue of negligent credentialing. We disagree.

Civ.R. 42(B) states as follows:

RULE 42. Consolidation; separate trials

(B) Separate trials. The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims or third-party claims, or issues, always preserving inviolate the right to trial by jury.

The standard of review is an abuse of discretion. *Heidbreder v. Northampton Township Trustees* (1979), 64 Ohio App.2d 95. Absent a finding the trial court's decision was unreasonable, arbitrary or unconscionable, this court will affirm the decision.

Although it may be argued judicial economy dictates a joint trial, the matter *sub judice* did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of appellee Fiegenschuh.

As was pointed out by the trial court, the issue of undue prejudice was present when the main thrust of appellant's claim against appellee Hospital centered on appellee Fiegenschuh's alleged alcohol abuse. Why raise the specter of an appeal issue or undue prejudice and bias if it can be avoided by the bifurcation of the issues? We note the complicated fact pattern and the number of practitioners and

providers involved was sufficiently confusing for any jury to handle alone without the extra issue. We find no abuse of discretion by the trial court.

Assignment of Error V is overruled.

VI

Appellant claims the trial court's jury instructions on the standard of care for appellees IMS and Guarnieri were wrong and misleading. We disagree.

The trial court has discretionary authority in its duty to instruct on the law as it pertains to the case. *State v. Nelson* (1973), 36 Ohio St.2d 79. Absent a finding the trial court's decision was unreasonable, arbitrary or unconscionable, this court will affirm the decision.

The instructions at issue are as follows:

* * *An immediate care facility has the same duty to act for the protection and safety of its patients as an immediate care facility of ordinary care, skill and diligence that offers the same type of services and the same or similar locality under like or similar conditions, taking into consideration the special services or skills offered by the immediate care facility and a patient's known physical condition, mental capacity and the ability to care for himself.* * *The plaintiff claims that Immediate Medical Services, Inc. is liable for the negligence of Doctor Guarnieri on April 9, 1991. Before you may consider this you must first find Doctor Guarnieri was negligent in her care and treatment of plaintiff decedent Albert Davis and that Doctor Guarnieri's her negligence was a proximate cause of the injury to or the death of Albert Davis. Thus, if you find that Doctor Guarnieri was not negligent or that her negligence was not a proximate cause of any injury to or the death of Albert Davis, you must return a verdict in favor of Immediate Medical Services, Inc. as to this claim.

*8 Vol. II T, at 184-185.

Appellant claims by inserting "immediate medical facility" instead of hospital was error, and appellee Guarnieri's instruction was not specialty specific. Jury instructions are not to be read in a vacuum, but must be read in the context of all the other instructions given by the trial court. The trial court gave a complete description of the standard of care for all the appellee doctors. Vol. XI T. at 180-182. Particularly, the trial court spoke to the specialties involved by stating: "I charge you that each physician in this case held himself or herself out as a specialist. Doctor Barbara Guarnieri and Doctor William Eichner in family practice medicine. Doctor Geno Serri in emergency medicine and Doctor William Fiegenschuh as a general surgeon." Vol. XI T. at 182. We find no error in the jury instructions *sub judice*.

Assignment of Error VI is overruled.

The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part and reversed in part.

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed in part and reversed in part. This cause is remanded to the trial court with instructions to enter default judgment against appellee AIC, for new trial against appellee E.M. Care, and for further proceedings in accord with law.

Ohio App. 5 Dist., 1995.

Davis v. Immediate Medical Services, Inc.

Not Reported in N.E.2d, 1995 WL 809478 (Ohio App. 5 Dist.)

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APPENDIX NO. 3

Ⓜ

Ratliff v. Morehead

Ohio App. 4 Dist., 1998.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Scioto County.

Robert L. RATLIFF, et al., Plaintiffs-Appellants,
v.

Raymond A. MOREHEAD, M.D., et al., Defendants-Appellees.
No. 97CA2505.

May 19, 1998.

William K. Shaw, Jr., Portsmouth, Ohio, for Appellants.

Bannon, Howland & Dever Co., L.P.A., Robert E. Dever and Steven M. Willard, Portsmouth, Ohio, for Appellees.

DECISION AND JUDGMENT ENTRY

HARSHA, J.

*1 Robert and Mary Lou Ratliff appeal the grant of summary judgment to appellees Raymond Morehead, M.D., and U.S. Health Corporation of Southern Ohio Medical Center ("U.S. Health"). Appellants assert the following assignments of error:

ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' DISCOVERY OF RELEVANT, ADMISSIBLE EVIDENCE AS PREVIOUSLY ORDERED BY THIS COURT."

ASSIGNMENT OF ERROR NUMBER TWO

"THE TRIAL COURT ERRED IN FAILING TO ORDER PRODUCTION OF THE REQUESTED

DOCUMENTS FOR AN *IN CAMERA* INSPECTION AND PRESERVATION FOR THE RECORD ON APPEAL."

ASSIGNMENT OF ERROR NUMBER THREE

"THE TRIAL COURT ERRED IN GRANTING DEFENDANT, U.S. HEALTH CORPORATION OF SOUTHERN OHIO'S, MOTION FOR SUMMARY JUDGMENT."

ASSIGNMENT OF ERROR NUMBER FOUR

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT, MOREHEAD."

On September 7, 1990, Dr. Morehead performed a vascular surgery procedure identified as a "right femoral popliteal bypass" on Mr. Ratliff. Prior to surgery, Morehead had told Ratliff that he would use the saphenous vein from his lower right leg in the operation. After the operation, Morehead told Ratliff that he had used the vein, while later it was discovered that Morehead had used Gortex, a man-made material, instead of the vein. Ratliff was left with some scarring, including a scar from his ankle to his knee, apparently from Morehead's search for a useable vein.

The operation failed in less than a month. Ratliff had a second femoral popliteal bypass performed by a different surgeon. That procedure also failed. A third doctor performed a different type of surgery that appeared to be somewhat successful.

Ratliff sued Morehead under a theory of medical malpractice and a lack of informed consent and sued U.S. Health under a theory of negligent credentialing of Morehead. Both defendants were granted a protective order and summary judgment, which the plaintiff appealed. We consolidated that matter with another appeal and in *Kalb v. Morehead* (1995), 100 Ohio App.3d 696, 654 N.E.2d 1039, we reversed and remanded the trial court's

grant of summary judgment and the overbroad protective order so that the trial court could individually rule on the appellants' discovery requests prior to determining whether summary judgment was proper. On remand, the trial court denied each of the discovery requests and again granted summary judgment to the appellees. The Ratliffs now appeal the trial court's grant of summary judgments and another protective order.

Initially, we must determine whether the trial court's judgment entry is a final appealable order. It is well established that an appellate court does not have jurisdiction to review an order that is not final and appealable. See Section 3(B)(2) Article IV of the Ohio Constitution; *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266; *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381. When an action includes multiple claims or parties and an order disposes of fewer than all of the claims or rights and liabilities of fewer than all of the parties without certifying under Civ.R. 54(B) that there is no just cause for delay, the order is not final and appealable. *Nobel, supra*; *Jarett v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77, 486 N.E.2d 99. We must *sua sponte* dismiss an appeal that is not from a final appealable order. *Whitaker-Merrell v. Gempel Co.* (1972), 29 Ohio St.2d 184, 280 N.E.2d 922.

*2 In this case, the judgment entry failed to expressly dispose of Mrs. Ratliff's claim for loss of consortium. However, it is implicit in the trial court's order that these claims were rejected because of their derivative nature. See by analogy, *State ex rel. Wright v. Ohio Adult Parole Authority* (1996), 75 Ohio St.3d 82, 87, 661 N.E.2d 728. That is, without proof of the underlying negligence of Dr. Morehead, the loss of consortium can not be actionable as a matter of law. While it would have been preferable for the trial court to have expressly rejected these claims, given their implicit rejection we believe judicial economy mandates that we proceed with a disposition of the merits. *Id.* Accord-

ingly, we believe we have jurisdiction to consider this appeal.

For the sake of clarity, we deal with appellants' assignments of error out of order. We first address the part of appellants' fourth assignment of error that deals with the grant of summary judgment on the issue of Morehead's alleged medical malpractice.

In their fourth assignment of error, the appellants allege that the trial court erred in granting summary judgment in favor of Morehead. The appellate review of a summary judgment is conducted under a *de novo* standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 654 N.E.2d 1327. We review the judgment independently and without deference to the trial court's decision. *Midwest Specialties, Inc. v. Firestone Co.* (1985), 42 Ohio App.3d 6, 536 N.E.2d 411. Summary judgment is proper only when the party moving for summary judgment demonstrates (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come but to one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C), *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 677 N.E.2d 343.

The burden of showing that no genuine issue exists as to any material fact falls upon the party moving for a summary judgment. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798. A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production, and for which the moving party has met its initial burden. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

Appellants argue that Morehead's motion for summary judgment was not supported by competent or admissible evidence. While it is true that "moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion

that the nonmoving party has no evidence to prove its case," the burden is not as exacting as appellants argue. *Id.* at 293,662 N.E.2d 264. Rather, the moving party's burden is "to specifically point to some evidence of the type listed in Civ.R. 56 which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.* at 293,662 N.E.2d 264. Furthermore, Civ.R. 56 specifically states that a party may "move with or without supporting affidavits for a summary judgment." Therefore, we find no merit in appellants' argument that the trial court erred in granting a summary judgment because Morehead's motion was not supported by competent or admissible evidence. Once appellees filed the motion for summary judgment and asserted an absence of evidence to support appellants' claims, it was incumbent for appellants to produce the evidence necessary to prevent a summary judgment.

*3 Appellants argue that appellees' expert, Dr. Vincent, was not competent to give expert testimony in support of appellees' motion for summary judgment. Dr. Vincent testified that Morehead's care of Ratliff did not fall below the standard of care. Appellants assert that under Evid.R. 601(D), Dr. Vincent is not competent to render expert opinions because he did not explicitly state during the videotaped deposition that he devotes at least one half of his professional time to the active clinical practice of medicine or that he is licensed to practice in Ohio. See Evid.R. 601(D). Appellants did not object to Vincent's competency as an expert witness during the videotaped deposition which was intended for use at trial. Therefore, they waived any objection to his competence because the ground for objection "might have been obviated or removed if presented" during the deposition. Civ.R. 32(D)(3)(a).

The law imposes a duty upon physicians to employ the degree of skill, care and diligence that a physician or surgeon within the same medical specialty would employ in like circumstances. *Berdyck v. Schinde* (1993), 66 Ohio St.3d 573, 613 N.E.2d

1014; *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673. "Medical malpractice" results when that duty is breached and the breach proximately causes injury to the patient. *Id.* The plaintiff must present expert testimony on the issue of proximate cause when the causal connection between the negligence and the injury is beyond the common knowledge and understanding of the jury. *Berdyck; Bruni; Nichols v. Hunzel* (1996), 110 Ohio App.3d 591, 674 N.E.2d 1237. Unless the expert expresses his or her opinion in terms of probability, the testimony will be excluded as speculative. *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 504 N.E.2d 44.

Appellants have failed to put forth competent evidence on the issue of proximate cause. Appellants direct us to portions of a deposition given by Dr. Newmark and an affidavit by Dr. Procter as creating a genuine issue of material fact sufficient to prevent summary judgment on the issue of proximate cause. Dr. Newmark testified to a reasonable degree of medical certainty that Morehead had breached the standard of care, but was unable to testify to a reasonable degree of medical certainty that this breach of duty proximately caused injury to the appellants.^{FNI}

FNI. Dr. Newmark testified at his deposition:

Q. So-I-I guess I'm not really being technical enough for you, but I'm saying that he, you're saying, would not have had to do that procedure [the third surgery] had either of the first two surgeons done the proper procedure in the first two surgeries; is that-

A. Per-perhaps. That's correct.

Q. But you cannot say that to a reasonable degree of medical certainty, can you?

A. I can, because hopefully the first-one

of the first two would have been done.

Q. What?

A. And it would have worked, yes.

Q. But can you say to a reasonable degree of medical certainty that the third surgery would not have had to occur?

A. I can't answer that in all honesty.

* * *

Q. Well, doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not those [violations of the standard of care by Morehead] caused Mr. Ratliff to have to undergo the second surgery?

MR. DEVER: Objection

A. I really can't do that because of what he did.

Q. What who did?

A. What Doctor Morehead did.

Q. Now, what do you mean what Doctor Morehead did?

A. Because what he did may have worked even though it was not the best of care, and if it had worked he would have never had the second surgery.

Q. And it didn't work?

A. Right.

Q. So as a result he had to have a second surgery?

A. But I can say because he did what he did, it caused him to need the second surgery, exactly. Do you see what I'm saying? Had he done the most ideal thing, then perhaps no other surgery

would have been needed.

A. Second or Third?

Q. Right.

* * *

Q. So you're saying that-that-and if-if he had done what you would call the standard of care, right the things that you've said would be the standard of care, those may or may not have worked too, right?

A. Correct.

Q. So what you're saying is that Mr. Ratliff's problems may or may not be the the proximate result of whatever happened. I mean, it may or may not have caused that, his problem?

A. I think that's a reasonable assumption.

* * *

Q. Doctor do you have an opinion to a reasonable agree (*sic*) of medical certainty that if the standard of care had been followed in all instances with respect to Mr. Ratliff, what the result would have been?

MR. DEVER: I object * * *.

MR. SHAW: You can object all you want. Answer the question.

MR. DEVER: But I think he has already answered it, that he cannot say that.

A. Do-do you want to state the question again?

Q. Could you read back the last question?

(Question read.)

A. I would say I really can't answer the

question, because I can't predict the result, unless you know, you're-you're the one doing it and you see what you have done. You know whether it should be good or not. However, as Mr. Dever said, other factors do come into play that may occlude even a well-done procedure, and all I can say is in medicine we try to do the best thing first in hopes that bad results will be avoided and a good result will prevail, period. I don't know how else to answer the question.

(Newmark's deposition, 40, 61-2,65,68-9)

Appellants argue that the standard of "reasonable degree of medical certainty" is not the required standard for medical opinions under Ohio law, rather a "reasonable degree of medical probability" is the correct standard. The appellants contend that asking Dr. Newmark to express his opinions to a reasonable degree of medical certainty improperly imputed a higher standard. Courts have equated the phrase "reasonable degree of medical certainty" with the term "probable," that is, whether it was more likely than not caused by negligence. See *Shumaker; Ohio v. King* (June 30, 1997), Washington App. No. 96-CA-39, unreported; *Stone v. Riffe* (Feb. 25, 1997) Scioto App. No. 96-CA-2408, unreported; *Zabrask v. Cleveland* (Mar. 10, 1983), Cuyahoga App. No. 44989, unreported. Further, we view the medical expert's response in light of the question asked and determine whether the response was more than mere conjecture or speculation. *Bentley*. After a thorough review of Dr. Newmark's testimony, it is clear that while he gave opinions to a reasonable degree of medical certainty as to Morehead's alleged breaches of duty, he did not express an opinion as to the causation of any of Ratliff's injuries to a reasonable degree of medical certainty or probability. Accordingly, Dr. Newmark's deposition fails to create a genuine issue of material fact as to the issue of causation.

*4 Next, appellants point to the affidavit of Dr.

Procter as creating a genuine issue of material fact.^{FN2}Dr. Procter's affidavit reads as follows:

FN2. Dr. Procter was not identified as an expert until his affidavit was attached to the appellants' brief in opposition to summary judgment. Appellees filed a timely objection to the use of Procter's affidavit on the grounds that the time for naming expert witnesses had passed and that Dr. Procter was not competent to give expert testimony. Appellees' objection avoided the application of waiver to this issue.

1. I am a physician, licensed to practice medicine and surgery in the Commonwealth of Kentucky and the State of Ohio.
2. I currently devote one hundred percent (100%) of my professional time to the direct care of patients in the clinical practice of medicine.

* * *

6. It is further my opinion to a reasonable degree of medical probability, that the negligence of the Defendant, Raymond A. Morehead, M.D., directly and proximately caused Plaintiff, Robert Ratliff, injury and damage in that he now has a permanent scar from his knee to his ankle which was totally unnecessary and the femoral popliteal bypass graph occluded causing symptoms of claudication to reoccur, with resultant pain and suffering and requiring additional surgery to bypass the stenosis in the femoral artery.

7. It is my opinion to a reasonable degree of medical probability, that but for the negligence of the Defendant, Raymond A. Morehead, M.D., the Plaintiff would not have had to undergo the second and third surgical procedures performed at Grant Medical Center by Dr. Satiani and Dr. Vaccaro.

While this court has previously recognized that normally a licensed medical doctor is competent to testify on general medical questions, see *Finnegan*

v. Yammou (Aug. 8, 1990), Highland App. No. 715, unreported, this case involves a specialized area of medicine, vascular surgery. The mere fact that a physician is of a different medical specialty than the defendant physician, does not prevent his or her testimony as an expert. *Alexander v. Mt. Carmel Medical Center* (1978), 56 Ohio St.2d 155, 383 N.E.2d 564; *Ishler v. Miller* (1978), 56 Ohio St.2d 447, 384 N.E.2d 296 (a witness from a different school or specialty may qualify as an expert by demonstrating sufficient knowledge of the defendant's specialty), but an expert witness must have sufficient knowledge, skill, experience, training and education in the subject matter of his or her testimony to satisfy Evid.R. 702. See *Steele v. Burton* (1994), 93 Ohio App.3d 717, 639 N.E.2d 861 (nonspecialist is qualified to testify as a medical expert when he is familiar with procedure used by specialist); 31A American Jurisprudence 2d (1989), Expert and Opinion Evidence §§ 217-8. This does not mean that a physician, simply by virtue of a medical license, is qualified to testify in a medical malpractice action against a medical specialist, especially as to subject matter peculiarly and exclusively within the realm of that specialty. See *Alexander v. Mt. Carmel Medical Center* (1978), 56 Ohio St.2d 155, 383 N.E.2d 564 (witness must demonstrate familiarity with standards of school or specialty of defendant physician sufficient to enable the witness to testify as to the conformity of those standards with defendant's conduct); *Bruni, supra*; *Willett v. Rowekamp* (1938), 134 Ohio St. 285, 16 N.E.2d 457; Annotation (1970), 31 ALR 3d 1163. A mere showing that the physician is licensed does not always satisfy the requirement that the witness be "qualified by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702.

*5 In this case, a vascular surgery is at issue. It is not apparent from the face of Dr. Procter's affidavit that he is competent to testify as to issues surrounding the vascular surgery Morehead performed. There is no mention of Dr. Procter's knowledge, skill, expertise, training or education in vascular

surgery in the affidavit or record.

In order to consider an affidavit for purposes of summary judgment, the affidavit "shall show affirmatively that the affiant is competent to testify to the matters stated therein." Civ.R. 56. We cannot consider the affidavit of Dr. Procter because his affidavit fails to show affirmatively that he is competent to testify as to the matters stated in his affidavit.

After viewing the evidence in the light most favorable to appellants, reasonable minds can come but to one conclusion: that without competent expert testimony establishing a causal link between any negligence on the part of Morehead and the appellants' injuries, that negligence did not proximately cause appellants' injuries. The lack of a genuine issue of material fact as to proximate cause, a required element in medical malpractice, entitled Morehead to summary judgment as a matter of law on the medical malpractice claim. Accordingly, we overrule that portion of appellants' fourth assignment of error dealing with the medical malpractice claim.

In their fourth assignment of error, appellants also contend that the trial court erred in granting summary judgment on their claim of lack of informed consent. Our standard of review has already been noted above.

In *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 477 N.E.2d 1145, syllabus, the Supreme Court defined the tort of lack of informed consent as when:

(a) the physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;

(b) the unrevealed risks and dangers which should have been discussed by the physician actually materialize and are the proximate cause of the injury to the patient; and

(c) a reasonable person in the position of the patient

would have decided against the therapy had the material risks and dangers inherent and incidental to the treatment been disclosed to him or her prior to the therapy.”^{FN3}

FN3. Appellants set forth this element as “the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment be disclosed to him prior to therapy.” While this was the standard articulated in *Bruni*, the Supreme Court of Ohio later changed the standard to what a reasonable person in the patient's situation would have done. See *Nickell*.

In order to prevail on a claim for lack of informed consent, medical expert testimony is normally necessary to establish the material risks because the probability and magnitude of those risks is a matter of medical judgment beyond the knowledge of the lay person. *Ratliff v. University Hospitals of Cleveland* (Mar. 11, 1993), Cuyahoga App. No. 61791, unreported.

Appellants argue that the written consent forms signed by Mr. Ratliff were fraudulently obtained in that Morehead held himself out as a trained and competent vascular surgeon when he had not completed the required education and was impaired during that portion he did complete. The appellants also contend that Mr. Ratliff consented to a saphenous vein being utilized in the surgery, rather than the Gortex which was actually used.

*6 While the doctrine of informed consent focuses upon the duty of a physician to explain a procedure to a patient and warn the patient of any material risks or dangers inherent in the proposed and alternative therapies, it is possible for informed consent to be vitiated by fraud or deceit. See *Perna v. Pirozzi* (N.J.1983), 92 N.J. 446, 457 A.2d 431 (patient who had consented to surgery by one surgeon, but was actually operated on by another had action for medical malpractice as to the former and

battery as to the latter because patient had right to determine who performed surgery).

Although Ratliff states in his affidavit that he relied on the fact that Morehead had privileges at Scioto Memorial and his assumption that Scioto Memorial would not allow an incompetent surgeon to perform specialized surgeries in determining whether to have Morehead perform the surgery, the record is devoid of any Civ.R. 56 materials that *Morehead* fraudulently represented his qualifications to Mr. Ratliff. Without this evidence, Morehead is entitled to summary judgment on this theory of lack of informed consent.

Appellants have presented absolutely no Civ.R. 56(C) materials that show that the risks and dangers which should have been disclosed were “material risks.” Expert testimony is necessary to establish the existence and identity of “material risks.” *Ratliff*, *supra*. Appellants have also failed to put forth any Civ.R. 56 materials that show the unrevealed risks and dangers which should have been disclosed (Morehead's education or use of Gortex) were the proximate cause of any injury to the appellants.

Viewing the evidence in the light most favorable to appellants, no genuine issue of material fact exists as to proximate cause, which is an essential element in informed consent. Therefore, Morehead is entitled to a summary judgment on the issue of informed consent as a matter of law. Accordingly, we overrule the remainder of appellants' fourth assignment of error.

In their third assignment of error, appellants argue that the trial court erred in granting summary judgment to U.S. Health. Appellants contend that U.S. Health negligently granted Morehead privileges at the hospital.

In reviewing the tort of negligent credentialing the Supreme Court stated:

“a hospital has a direct duty to grant and to contin-

ue such privileges only to competent physicians. A hospital is not an insurer of the skills of private physicians to whom staff privileges have been granted. In order to recover for a breach of this duty, a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or the retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have been injured.”

Albain v. Flower Hospital (1990), 50 Ohio St.3d 251, 553 N.E.2d 1038.^{FN4} Further, in order to prove negligent credentialing, the appellants must prove the underlying medical malpractice claim against Morehead. *Dicks v. U.S. Health Corp. of Southern Ohio* (May 10, 1996), Scioto App. No. 95CA2350, unreported. We have found no error in the grant of summary judgment for Morehead. Reasonable minds could come but to one conclusion: there was no underlying medical malpractice by Morehead that proximately caused injury to the appellants; therefore, summary judgment in favor of U.S. Health was proper. Accordingly, we overrule appellants' third assignment of error.

FN4. While the fourth paragraph of the syllabus of *Albain* was overruled in *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 628 N.E.2d 46, this ruling affected only the portions of *Albain* dealing with the doctrine of agency by estoppel for the negligence of independent medical practitioners. *Clark* did not affect the remainder of *Albain*.

*7 Appellants' first and second assignments of error are rendered moot because we have found no error in the grant of summary judgment to U.S. Health. See App.R. 12(A)(1)(c). We note that the discovery requests at issue all deal with the credentialing of Morehead, not the causation of appellants' injuries.

In sum, we have overruled appellants' third and fourth assignments of error and found appellants' first and second assignments of error moot. Accord-

ingly we affirm the grant of summary judgment to Morehead and U.S. Health.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellees recover of Appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

STEPHENSON, P.J. & ABELE, J., concur in judgment & opinion.

Ohio App. 4 Dist., 1998.

Ratliff v. Morehead

Not Reported in N.E.2d, 1998 WL 254031 (Ohio App. 4 Dist.)

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