

ORIGINAL

No. 12-2134

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE NO. 25632

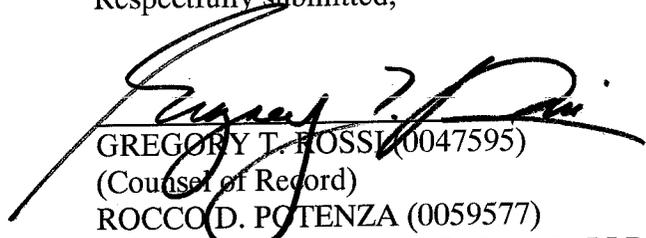
SETH NILES CROMER, Minor Child, Deceased, et al.  
Plaintiffs-Appellees,

v.

CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON,  
Defendant-Appellant.

MEMORANDUM IN SUPPORT OF  
JURISDICTION OF DEFENDANT-APPELLANT  
CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON

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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR  
GREAT GENERAL INTEREST**

This case is of great public and general interest because the Ninth District Court of Appeals has removed foreseeability from a jury's consideration in medical malpractice actions. Foreseeability is one of the most longstanding and deeply rooted principles in negligence law. By so holding, the Ninth District prohibits trial courts from giving appropriate guidance to jurors on how they are to go about assessing whether a medical-defendant has acted negligently – i.e. whether the defendant has failed to act reasonably under the same or similar circumstances. Such a decision, result-oriented to be sure, runs contrary to long standing tort law principles, is inconsistent with this Court's precedents, and directly conflicts with position of the First, Sixth and Eighth District Courts of Appeals.

By ignoring fundamental principles of negligence law, specifically foreseeability pertaining to evaluation of the standard of care, the Ninth District has erroneously redefined the elements of a medical malpractice case in Ohio. The trial court's jury instruction was consistent with this Court's previous decisions regarding foreseeability, the Second and Third Restatement of Torts, and OJI. It has undoubtedly been given to countless juries in the State of Ohio in medical malpractice cases. If permitted to stand, this decision will result in uncertainty throughout Ohio as to the proper manner in which to instruct a jury in medical malpractice cases. This Court should review the Ninth District's legally and logically flawed decision to confirm that foreseeability is necessary in determining whether a healthcare provider's actions met the standard of care.

Furthermore, this Court should review this decision since the court of appeals applied an improper standard for determining whether an allegedly erroneous instruction warrants reversal. It is necessary for this Court to provide guidance as to the appropriate deference to be given a

jury verdict and to deter the appellate court and other courts from creating and relying upon legally unsound reasons to interfere with the sanctity of the jury system.

Finally, this case is also of public and great general interest because the Ninth District has eviscerated Evid.R. 601 (D). Plaintiff's expert admitted that she spent less than 50% of her time in the active clinical practice and that the majority of her time was spent performing administrative duties. Yet, the Ninth District found that by including her administrative time, she was qualified to address standard of care.

The issues presented herein have implication far beyond the parties in this case. Resolution and clarification of the issues will guarantee all litigants in Ohio with equitable treatment. Accordingly, it is incredibly important to litigants throughout the state of Ohio for this Court to accept this case for review.

### **STATEMENT OF THE CASE AND FACTS**

This is a medical malpractice action arising out of the heartbreaking death of 5 year old Seth Cromer. Seth passed away on January 14, 2007 despite receiving all appropriate care during a 5 hour stay at Children's Hospital Medical Center of Akron ("Children's") Emergency Room and Pediatric Intensive Care Unit. After 7 days of testimony and argument from both sides, the jury rendered a verdict in favor of Children's and its employed nurses and physicians, finding that the care delivered to Seth was reasonable, in compliance with the standard of care and not negligent.

As the issues in this Memorandum go beyond the specific facts of this case, only a brief summation of the facts will be set out in this statement. In January 2007, Seth had been ill for several days with what was thought to be an ear infection. His condition progressively worsened and his parents brought him to Children's emergency room at approximately 10:45 p.m. on

January 13, 2007. While in the emergency room, Seth's care was managed by Brett Luxmore, D.O., the attending emergency room physician. Based on his evaluation, Dr. Luxmore concluded that Seth was likely experiencing septic shock, resulting in low blood pressure and dehydration. Dr. Luxmore ordered antibiotics, fluids, and epinephrine. While Seth was still very ill, his condition improved to the point where his blood pressure returned to a normal range and he became much more responsive.

Following this initial treatment, Seth was transferred to the pediatric intensive care unit where he came under the care of Richard Wendorf, M.D., the pediatric intensive care attending. Dr. Wendorf, among other things, placed a central line for central venous access and an arterial line which provided for sophisticated second by second monitoring of Seth's hemodynamic status.

At trial, Plaintiff asserted various theories of negligence against Children's, some of which were supported by Plaintiff's sole expert, Dr. Margaret Parker, and some that were not. During her testimony at trial, Dr. Parker, an intensive care physician from New York who is the chairperson of her department, admitted that she spent the majority of her professional time performing administrative duties. She further admitted that she spent less than 50% of her time engaged in activities qualifying as active clinical practice.

In any event, Dr. Parker's principle criticism in this case of both Dr. Luxmore and Dr. Wendorf is that they should have intubated Seth sooner. Intubation is a procedure done with sedation in which a breathing tube is inserted through the trachea to assist a patient's breathing. It is an invasive procedure with its own risks. The upshot of Dr. Parker's position was that given the findings present in Seth, Drs. Luxmore and Wendorf should have appreciated that the risk to

Seth of cardiopulmonary decline and arrest without intubation was sufficiently high to warrant intubation.

Children's not only presented testimony from Dr. Luxmore and Dr. Wendorf to explain their care and treatment, they also presented testimony from two experts, Robert Kennedy, M.D. (pediatric emergency medicine) and Douglas Willson, M.D. (pediatric critical care medicine). Dr. Kennedy explained that Dr. Luxmore's decision not to intubate was reasonable under the circumstances. He explained given that Seth's condition was showing signs of improvement with the treatment administered compared to the potential risks of intubation, including the very distinct possibility of causing a deterioration in Seth's condition, intubation was not called for. Dr. Kennedy also testified that the standard of care was met. Dr. Willson, Children's second expert, explained to the jury that Dr. Wendorf's decision to place the central and arterial lines first was appropriate and met the standard of care. This was especially true with respect to the arterial line because the intubation procedure can cause a rapid deterioration of the patient's blood pressure and heart rate. By having second to second monitoring, Dr. Wendorf would have the appropriate information available to immediately respond should Seth's condition worsen.

At the conclusion of the evidence, the trial court delivered instructions to the jury that included comprehensive instructions on the standard of care that spanned 23 paragraphs. The court's instructions included the following three paragraphs on foreseeability:

I will now discuss foreseeability. In deciding whether ordinary care was used, you will consider whether the defendant should have foreseen under the attending circumstances that the natural and probable result of an act or failure to act would cause Seth Cromer's death.

The test for foreseeability is not whether the defendant should have foreseen the death of Seth Cromer precisely as it happened. The test is whether under all the circumstances a reasonably cautious, careful, prudent person would have anticipated that death was likely to result to someone from the act or failure to act.

If the defendant by the use of ordinary care should have foreseen the death and should not have acted, or if they did act, should have taken precautions to avoid the result, the performance of the act or the failure to act to take such precautions is negligence.

After approximately four hours of deliberation, the jury returned a verdict in favor of Children's, concluding that the care provided to Seth was appropriate and not negligent. After carefully considering all of the evidence, listening to the details of the testimony and observing the witnesses' demeanor, the jurors, being in the best position to assess the credibility of the witnesses, concluded that Children's position was more credible.

In its ruling, the Ninth District Court of Appeals invalidated the jury's assessment of the evidence and findings. The court, in a startling decision, dramatically altering fundamental concepts of negligence law, concluded that foreseeability should never be a part of a jury's consideration in medical malpractice cases and that it was *reversible* error to have so instructed the jury. The Court did so without considering whether the jury charge as a whole fairly described the applicable law or whether the error was so egregious as to have probably resulted in an erroneous verdict. As this case implicates significant issues applicable both specifically to medical malpractice cases and generally to all trials conducted in the state of Ohio it is imperative for this Court to accept jurisdiction.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1: Foreseeability is a vital and important factor for a jury to consider in determining whether a medical defendant has acted as a reasonably prudent medical provider under the same or similar circumstances. Thus, a trial court should instruct jurors in medical malpractice cases on the issue of foreseeability.**

It is rudimentary that in order to establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom. *Di Gildo v. Caponi*, 18 Ohio St.2d 125, 247 N.E.2d 732 (1969). A medical malpractice action is nothing

more than an ordinary negligence claim against a medical professional. *Kurzner v. Sanders*, 89 Ohio App.3d 674, 627 N.E.2d 564 (1st Dist. 1993). See also *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449, 455 (1988) (“the same three elements must be shown to establish a negligence action generally, including a survivorship action predicated upon ordinary negligence or medical malpractice.”).

This Court has repeatedly held that foreseeability is one of the most important considerations in determining whether a defendant’s actions were negligent and that it is appropriate to provide instructions to the jury on foreseeability. However, using faulty logic, the Ninth District Court of Appeals concluded that foreseeability is totally irrelevant in determining whether a medical defendant is negligent and that any instruction on foreseeability in a medical malpractice action constitutes reversible error.

The following excerpt sets forth the Ninth District’s logic:

“[T]he duty of the physician is established simply by the existence of a physician-patient relationship, not by questions of foreseeability.” *Oiler v. Willke*, 95 Ohio App.3d 404, 409, 642 N.E.2d 667 (4th Dist.1994). “[P]hysicians are said to owe patients a legal duty to use recognized standards of professional knowledge and skill.” *Ryne v. Garvey*, 87 Ohio App.3d 145, 155, 621 N.E.2d 1320 (2d Dist. 1993). A plaintiff proves a breach of duty by showing that the physician failed to act in accordance with those established norms. *Id.* Consequently, evidence that the physician could have foreseen the patient’s injury is irrelevant because “[f]oreseeability is not determinative of a physician’s legal duties.” *Id.* at 154–155, 621 N.E.2d 1320.

There is no doubt, pursuant to this Court's decisions, foreseeability is a factor in determining whether or not a duty of care exists. *Meniffee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 472 N.E.2d 707, (1984). However, simply because foreseeability is relevant to the determination of duty, does not mean that it is irrelevant to the issue of whether a defendant breached the duty of care. To the contrary, foreseeability has always been a fundamental consideration for the jury in assessing whether a defendant’s actions were negligent.

In 1893, this Court, in *Lakeshore & M.S. Ry. Co. v. Murphy*, 50 Ohio St. 135, 33 N.E. 403, clearly held that a standard of care instruction that included foreseeability was properly submitted to the jury. In rejecting the appellant's challenge to the instruction regarding foreseeability, the Court explained:

Whether if, under the circumstances of this case, a rule providing for warning was necessary, and by the exercise of reasonable care on the part of the company that necessity could have been foreseen, it was the duty of the company to prescribe such rule. Whether it ought to have so provided or not was a question for the jury.

*Id.* at paragraph two of the syllabus.

Fault is found [by the defendant] also with what the court said as to ordinary care, and especially with the statement that "no general rule can be given as to what in law constitutes ordinary care." The court added this: "A general definition of 'ordinary care' is such care and vigilance as a person of ordinary prudence and *foresight* would usually exercise under the same or similar circumstances." Taken as a whole, we see no valid objection to this part of the charge.

*Id.* at 144.

The reason foreseeability is an important factor for a jury's determination is that it goes to the assessment of the reasonableness of the defendant's actions under the same or similar circumstances. In other words, whether one has acted as a reasonably prudent person depends on the foreseeable risks involved in the conduct. In *Thompson v. Ohio Fuel Gas Co.*, 9 Ohio St.2d 116, 224 N.E.2d 131, this Court explained this importance as follows:

In determining in any given case whether a defendant exercised that care which an ordinarily and reasonably prudent man would have exercised under the same or similar circumstances, *one of the most important of the circumstances* is 'the potential danger apparently involved.' *Schwer, Admx., v. New York, Chicago & St. Louis Rd. Co.*, 161 Ohio St. 15, 21, 117 N.E.2d 696, 43 A.L.R.2d 606.

The danger here, as evidenced by the seriousness of the occurrence itself, was great. The remaining question was whether it was apparent. *That is to say, should the defendant have foreseen this danger?*

*Id.* at 119 (emphasis added).

The fundamental nature of foreseeability's role was noted by this Court in *Weaver v. Columbus, S. & H. Ry. Co.*, 76 Ohio St. 164, 176, 81 N.E. 180 (1907), where this Court stated: "*the elementary rule [is] that the degree of care to be exercised is determined by the danger to be apprehended.*" *Id.* (emphasis added).

In *DiGildo, supra*, this Court again upheld the propriety of a jury charge on foreseeability in a negligence action:

Appellant contends further that the following instruction to the jury was erroneous: 'the test is whether in light of all of the attending circumstances, all of them, a reasonably prudent person *would have anticipated* the injury was likely to result to someone from the performance of the act in question.'

The trial court's charge here was a correct statement of the law of foreseeability as announced in *Neff Lumber Co. v. First National Bank*, 122 Ohio St. 302, 171 N.E. 327, and followed in *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 39, 90 N.E.2d 859, 863: 'It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone.' See, also, *Miller v. B. & O. Southwestern Rd. Co.*, 78 Ohio St. 309, 325, 85 N.E. 499, 18 L.R.A., N.S., 949; *Gedeon v. East Ohio Gas Co.*, 128 Ohio St. 335, 190 N.E. 924.

*Id.* at 130 (emphasis added).

In *Delta Fuels, Inc. v. Consol. Environmental Servs., Inc.*, 969 N.E.2d 800 (6th Dist. 2012), the Sixth District Court of Appeals explained the significance of foreseeability:

There is also a calculus of what constitutes a reasonable risk that dictates the degree of caution an individual is bound to exercise. This involves a balance between the probability that an untoward event will occur, the gravity of the harm that will result and the burden of taking adequate precaution to prevent the harm. *Benlehr v. Shell Oil Co.*, 62 Ohio App.2d 1, 9, 402 N.E.2d 1203 (1st Dist.1978), Keeton, *Prosser and Keeton on Torts*, Section 31, 171 (5th Ed. 1984), 1 Dobbs, Hayden and Bublick, *The Law of Torts, supra*, at 501.

*Id.* at 806.

It must be remembered that a medical malpractice action is nothing more than a negligence case involving professionals. *Kurzner, supra; Littleton, supra*. Simply stated, the

only difference is that a layperson cannot determine what a reasonable professional would do under the same or similar circumstances since the layperson does not have the specialized training of the professional. However, the ultimate issue that the jury must decide is the same as in any other negligence case – whether the defendant failed to act as would a reasonably prudent person under the same or similar circumstances. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976) paragraph one of the syllabus. According to the above decisions, clearly foreseeability of harm is not only an acceptable consideration for the jury, it is “elemental” and “one of the most important” considerations for determining the issue of negligence. *Weaver, supra; Thompson, supra*.

Physicians are called upon on a daily basis to make choices between competing courses of action. In deciding, a physician must take into consideration the potential risks involved with each course of action. Whether a given course of action is in fact negligent or a deviation from the standard of care will necessarily involve questions as to the foreseeable risks of harm, including the likelihood of harm occurring in choosing one course of action over another, as well as the foreseeable magnitude of harm posed by either choice.<sup>1</sup> This is precisely the scenario Dr. Luxmore and Dr. Wendorf faced in this case.

This Court’s position is consistent with the treatment of foreseeability both by commentators and both the 2nd and 3rd Restatement of Torts. Recently, David G. Owen, Carolina Distinguished Professor of Law, University of South Carolina, wrote an extensive

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<sup>1</sup> For a person’s actions to be wrongful, the person must have had a choice between alternative courses of action, and also must have chosen, by some standard, incorrectly. . . . Foreseeability thus is bound up, inextricably, in both notions of wrongfulness and how far responsibility for wrongfulness should extend. Owen, *Figuring Foreseeability*, 44 Wake Forest L. Rev. 1277, 1280 (2009).

article regarding foreseeability in the law of negligence. Professor Owen's comments on the relevancy of foreseeability to the issue of breach are particularly instructive on the issue:

Among the five elements of which negligence is comprised, most agree that foreseeability is implicated significantly in three: duty, breach, and proximate cause. Breach and proximate cause may be the most important. . .

The *Restatement (Second) of Torts* defines negligent conduct as "an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another." This standard is explained as whether "a reasonable man should have expected that" his conduct "might cause harm to persons" like the plaintiff. The *Second Restatement* further provides: "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." While this standard of *what a reasonable man should expect or recognize* embraces the idea of foreseeable risk, the *Restatement (Third) of Torts* locates foreseeability more prominently at the heart of negligence, defining negligence in section 3 explicitly in terms of foreseeable risk:

A person acts negligently if the person does not exercise reasonable care under all the circumstances. ***Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.***

Owen, DG, *Figuring Foreseeability*, 44 Wake Forest L. Rev. 1277, 1290-1292 (2009).

Accordingly, there can be no doubt that, contrary to the Ninth District's opinion, foreseeability is an indispensable factor to be considered by a jury in determining the issue of breach – i.e. whether the defendant acted negligently.

In the last five years, excluding the present case, six other appellate decisions have been issued in which the propriety of the foreseeability instruction in medical malpractice cases has been challenged (four in the last one and one half years). In each of these cases, the Court upheld the propriety of the foreseeability instruction. *Cox v. MetroHealth Med. Ctr. Bd. Of*

*Trustees*, 2012-Ohio-2383, 971 N.E.2d 1026 (8th Dist. 2012); *Ratliff v. Mikol*, 8th Dist. No. 94930, 2011-Ohio-2147; *Peffer v. Cleveland Clinic Found.*, 8th Dist. No. 94356, 2011-Ohio-450; *Clements v. Lima Memorial Hosp.*, 3rd Dist. No. 1-09-24, 2010-Ohio-602; *Joiner v. Simon*, 1st Dist. No. C-050718, 2007-Ohio-425; *Miller v. Defiance Regional Med. Ctr.*, 6th Dist. No. L-06-1111, 2007-Ohio-7101.

In *Ratliff, supra*, the Eighth District Court of Appeals rejected the precise argument adopted by the Ninth District in the present case, stating:

Moreover, [plaintiff's] only argument as to whether the trial court should have omitted the foreseeability instruction altogether is ***that since foreseeability is a factor for duty, an issue of law for the court, the jury should not be charged with foreseeability.*** The parties presented dueling evidence on the standard of care. It was in the province of the trier of fact to determine whether, based on the evidence presented, the standard of care owed to Baker included performing an emergency Caesarean section, as Baker argued. We therefore cannot say that the trial court erred in including or with regard to the language of the foreseeability instruction. We agree with Dr. Mikol that the foreseeability instruction given is a correct statement of law, is required by the issues of the case, and is clear in setting out the general rule. (emphasis added).

Similarly, in *Peffer, supra*, the court held: “these cases contradict appellant’s arguments that a foreseeability instruction is not warranted in medical malpractice cases.” In *Miller, supra*, the Sixth District Court Appeals held: “[o]ur reading of the court’s instruction on foreseeability reveals that it is patterned, almost word for word, on the language set forth in 1 Ohio Jury Instructions Sections 1.99 and 7.13. Therefore, we find that the common pleas court did not abuse its discretion in giving this particular foreseeability instruction.”

It is also important to note that the foreseeability instruction has been part of standard OJI instructions since the inception of these instructions more than 50 years ago. See *Ohio Jury Instructions*, 7.13 (1963); *Ohio Jury Instructions*, 401.07 (2010). While Ohio Jury Instructions are not binding law, they are a consensus of Ohio jurists on certain issues commonly presented in

certain types of action. Thus, this instruction has been given to juries considering whether a defendant's actions have been negligent, including medical defendants, in countless negligence actions.

Despite the repeated acknowledgement from the above noted courts of appeals as to the propriety of the foreseeability instruction, plaintiffs have not been deterred from challenging the instruction as evidenced by the challenge in this case. Because the Ninth District has issued a ruling directly in conflict with these decisions, it is necessary that this Court take this opportunity to make clear that an instruction on foreseeability is appropriate in medical malpractice actions.

**Proposition of Law No. 2: A verdict may not be reversed for a claimed error in the jury instructions where the jury instruction, as a whole, properly explained the applicable law, and where there has been no demonstration that the jury was *probably* misled by the allegedly erroneous instruction.**

If the general charge, considered as a whole, is not prejudicial to the objecting party, no reversible error results from a misstatement or ambiguity in a portion thereof. *Flynn v. Sharon Steel Corp.*, 142 Ohio St. 145, 50 N.E.2d 319 (1943), paragraph six of the syllabus. It is not enough that an erroneous instruction possibly misled the jury. Rather, it must be clear that the alleged erroneous instruction, when taken as a whole, probably misled the jury to an incorrect result. *Ohio Farmers Ins. Co. v. Cochran*, 104 Ohio St. 427, 428, 135 N.E. 537 (1922).

Thus, only an egregious error that leaves little doubt that the outcome was indeed erroneously arrived at warrants a reversal. As this Court explained in *Centrello v. Basky*, 164 Ohio St. 41, 52-53, 128 N.E.2d 80 (1955) (citations omitted):

Conceding that the quoted portion of the charge is subject to criticism in that the latter part tended to modify and weaken the special charge referred to, is it of such a pernicious, misleading and confusing character as to warrant the setting aside of the jury's verdict and the reversal of the trial court's judgment? We do not think so. . . . it was not, upon a consideration of the entire record and an examination of the general charge as a whole, as grievous or consequential as either the Court of Appeals or the plaintiff regarded it.

Of course, every litigant is entitled to a fair and properly conducted trial, and serious errors committed during the progress of a trial should be noticed and acted upon by a reviewing court, but, where it is apparent that the errors complained of are not so flagrant or important as to have patently influenced the result of the trial, a reviewing court should be slow to interfere.

In the present case, it is clear that the Ninth District ignored this mandate. Instead, the court essentially held any instruction that is an incorrect statement of law constitutes reversible error.

Even, assuming *arguendo*, the trial court had erred in giving this instruction, there is no doubt that when taken as a whole the charge given by the trial court in the 23 paragraphs of explanation on the issue of negligence fairly set forth the appropriate charge. In its charge to the jury, the trial court defined the standard of care for physicians as follows:

I will now define for you the standard of care that applies to a physician. The existence of a physician-patient relationship placed upon the physician the duty to act as a physician of reasonable skill, care and diligence under like or similar conditions or circumstances. This is known as the standard of care. The standard of care is to do those things which a reasonably careful physician would do, and to refrain from doing those things which a reasonably careful physician would not do. The required standard of care is the same throughout the United States.

This particular charge was in form and substance repeated at least three times (once for physicians, once for nurses and once for the hospital). Finally, the court did not overemphasize foreseeability. The court described it as a factor to be “considered.”

The Ninth District’s decision clearly ignored the requirements set out by this Court as to the type of error that warrants reversal. As a result, it creates precedent that permits other courts of appeals to substitute their judgment for the jury simply by finding any error in an instruction irrespective of whether the error was sufficiently egregious such that it probably led the jury to an incorrect result.

**Proposition of Law No. 3: In determining whether an expert witness devotes more than 50% of her time to the active clinical practice of medicine pursuant to Evid. R. 601(D), a court may not consider administrative time.**

At trial, Plaintiff's only standard of care expert, Dr. Parker, was permitted to testify that Children's Hospital deviated from the standard of care despite her clear and unequivocal testimony that she devoted less than 50% of her professional time to the active clinical practice of medicine. She further confirmed that the majority of her time was spent performing administrative duties as chairwoman of her department. Her testimony should have been stricken and a directed verdict rendered in favor of Children's Hospital. Plaintiffs were given the benefit of an expert who did not qualify under Ohio law. The jury was permitted to consider this testimony and still rendered a verdict against Plaintiffs, in favor of Children's Hospital.

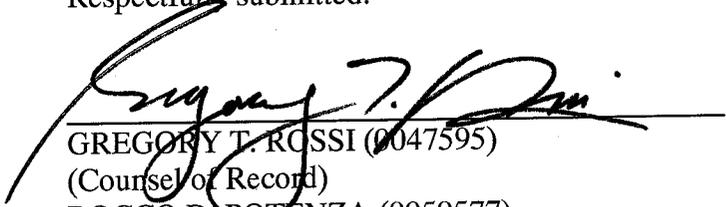
Under Evid.R. 601(D), a physician cannot serve as an expert and criticize the clinical care of other physicians unless the purported expert spends at least half of his or her own professional time caring for patients or serving as an educational instructor. In *Celmer v. Rodgers*, 114 Ohio St.3d 221, 871 N.E.2d 557 (2007), this Court found that an expert's qualifications are to be measured at the time of trial. A physician who does not meet the "active clinical practice" requirement at the time of trial may not testify on the issue of liability. *Id.*

Despite Dr. Parker's admissions, the Ninth District concluded that Dr. Parker's "administrative" time qualified as "active clinical practice" because of her oversight duties, "even though she did not explain her oversight duties in detail." In short, the Ninth District chose to substitute its own definition of competence for that of Ohio Rule of Evidence 601(D). This Court should accept jurisdiction over this case in order to clarify that administrative duties of this nature should not be included as part of the active clinical practice of medicine.

## CONCLUSION

The Ninth District's decision in this case prohibits juries from considering one of the most basic and fundamental tenants of negligence, foreseeability. Not only is this position contrary to this Court's holdings, it is in direct conflict with other Ohio courts of appeals. Moreover, it is contrary to the approach set forth in both the Second and Third Restatement of Torts. Since the question of the propriety of the instruction on foreseeability has been the subject of multiple appeals in the last several years and since there are now divergent approaches taken by Ohio courts of appeals, it is evident that the issue requires this Court's review. Moreover, the Ninth District's decision, by failing to apply the proper standard, allows a court of appeals to invalidate a jury's verdict no matter how insignificant the alleged error in a jury charge. Finally, the Court's interpretation of Evidence Rule 601(D), by permitting a court to consider "administrative duties" as "active clinical practice," effectively creates a rule without any real guidance. Accordingly, this Court should accept jurisdiction and allow this appeal to proceed so that the important legal issues presented can be reviewed on the merits and reconciled with the existing law in Ohio.

Respectfully submitted:



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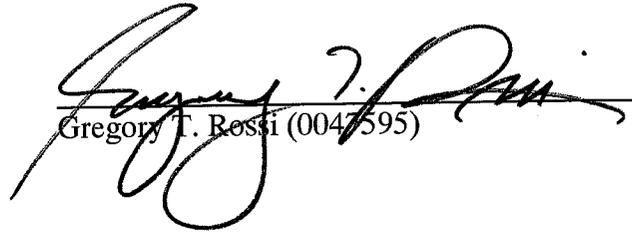
Children's Hospital Medical Center of Akron

**CERTIFICATE OF SERVICE**

A true copy of the foregoing *MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON* was served by regular U.S. mail on the 20~~e~~ day of December, 2012 upon:

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<<HCP #657258-v1>>

STATE OF OHIO )  
COUNTY OF SUMMIT )

NOV 7 2012 8:25 AM  
COURT OF COMMON PLEAS

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

SETH NILES CROMER, et al.

C.A. No. 25632

Appellants

v.

CHILDREN'S HOSPITAL MEDICAL  
CENTER OF AKRON

Appellee

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2008 07 4775

DECISION AND JOURNAL ENTRY

Dated: November 7, 2012

CARR, Presiding Judge.

{¶1} Appellants, Melinda Cromer, individually; and Roderick Cromer, Jr., individually and on behalf of their late son Seth; appeal from a judgment entered on a jury verdict for Children's Hospital Medical Center of Akron on the Cromers' claims against it, which alleged that their son's death was caused by medical negligence of the hospital's employees. Because the trial court incorrectly stated the law when it instructed the jury about the hospital's standard of care, this Court reverses and remands for a new trial.

I.

{¶2} This case involves the death of five-year-old Seth Cromer during the early morning hours of January 14, 2007, while he was being treated as a patient in the pediatric intensive care unit ("PICU") at Children's Hospital. Seth had been diagnosed with an ear infection by his pediatrician several days earlier and, although he had been taking antibiotics and had shown signs of improvement initially, his condition worsened after several days. Seth's

parents brought him to the hospital emergency room because he had developed a stomach ache and fever, and was clammy, cold, and listless.

{¶3} Because many of the specific details about Seth's treatment at the hospital are disputed by the parties, this Court will confine its recitation of facts primarily to those that are not disputed. Due to an unexplained failure of the hospital to document what transpired in the first exam room, an error in which another patient's information was noted on Seth's medical records, and apparently because the hospital staff became too busy with the hands-on treatment of Seth, Seth's hospital records include incomplete details about the progression of his symptoms and the treatment he received while in the emergency room. Therefore, most of the evidence about the time Seth spent in the emergency room came from the conflicting recollections of witnesses.

{¶4} It is not disputed that, at approximately 10:44 p.m., shortly after his arrival at the hospital emergency room, Seth was assessed by a triage nurse, who noted that he was pale, had a tender abdomen, and had a fast heart rate. Although Seth had no fever at that time, his parents stated that they had given him Advil a few hours earlier. The nurse assigned Seth a triage level of "urgent," which indicated that he needed to be seen by a physician quickly.

{¶5} Seth was initially assigned to exam room 18 and remained in that room for approximately 30 minutes. At some point, a doctor assessed Seth and concluded that he was in shock because he was dehydrated, had an elevated heart rate and elevated respiratory levels, and his blood pressure was decreasing. At approximately 11:20 or 11:30, the doctor ordered that Seth be moved to exam room 3, which had more equipment to monitor his vital signs and was closer to the nurses' station.

{¶6} The doctor ordered that Seth be given normal saline fluids intravenously. Due to an error by one of the nurses, however, Seth was given D5 ½ normal saline, which was not the correct or optimal fluid to treat his dehydration. The evidence is disputed, however, about how much of that incorrect fluid Seth received and what, if any, negative impact it had on his condition. When the emergency room doctor realized the error, he ensured that Seth began receiving normal saline solution through his IV. At some point, epinephrine was added to Seth's intravenous fluids, in an attempt to increase his blood pressure. The epinephrine was later increased to a high dose, although the exact dosage is disputed. The negative or positive impact of the epinephrine was also disputed by the parties.

{¶7} Shortly after midnight, Seth was transferred to treatment room 1. While in that room, Seth seemed to show some signs of improvement because he was more alert and was talking. In hindsight, however, given some of his other symptoms, experts agreed that Seth was actually in compensated shock, meaning that his body was attempting to compensate for the shock. Although his physical condition might have appeared in some ways to be improving, it was actually getting worse. Because the emergency room doctor apparently recognized that Seth was in compensated shock and believed that he was in critical condition, Seth was transferred to the pediatric intensive care unit ("PICU") at approximately 1:14 a.m.

{¶8} Shortly after Seth arrived in the PICU, the critical care doctor assessed him and also determined that he was in shock. Suspecting that Seth's shock had progressed to the point that he had acidosis, the doctor believed that he would probably need to intubate Seth and place him on a ventilator. Ventilation would help reduce the acidosis by decreasing the carbon dioxide levels in the blood. The doctor first placed a central venous line to establish stable intravenous access to continue administering the epinephrine and other medications, if needed. He then

placed an arterial line to draw blood for testing, which revealed that Seth was suffering from significant acidosis. The doctor intubated Seth at approximately 2:15 - 2:25 a.m., and then ordered an echocardiogram. During the echocardiogram procedure, at approximately 3:45, Seth went into cardiac arrest and a code blue was called. Cardiopulmonary resuscitation was not successful and Seth was pronounced dead at 4:05 a.m.

{¶9} The Cromers filed this action against the hospital and several individual defendants, alleging that Seth's death was caused by the negligent medical care that he received at the hospital. The individual defendants were later dismissed and case proceeded to trial against the hospital. At trial, although there was disputed evidence about some of the treatment that Seth received, particularly while in the emergency room, the primary dispute between the parties was the cause of Seth's death. All experts agreed that Seth died due to coronary failure. The dispute involved whether his heart failure was caused by an unknown, pre-existing heart defect or the hospitals' failure to properly treat the septic shock that had developed from his viral infection.

{¶10} The Cromers' medical expert, Dr. Margaret Parker, testified that, although Seth's autopsy revealed that he had a pre-existing narrowing of his left coronary artery, that condition did not cause his death. Instead, she opined that Seth died due to septic shock that had not been appropriately and timely treated at the hospital but was allowed to progress to severe cardiac and respiratory failure. She explained that, when Seth arrived at the hospital, he was suffering from septic shock, which, if not quickly treated and reversed, can lead to cardiac shock. She further explained that untreated shock can lead to acidosis, which if not treated will ultimately cause death. Dr. Parker pointed to evidence that Seth developed both respiratory and metabolic acidosis while in the emergency room. She further explained that the primary method of treating

acidosis is to intubate the patient and put him on a ventilator. Intubation and ventilation help to decrease the patient's respiratory rate and the stress on his heart and allow carbon dioxide to be released and oxygen to be increased in the blood.

{¶11} Dr. Parker testified that the hospital departed from the standard of care by not intubating Seth sooner, or no later than 12:15 a.m., when his blood gas levels indicated that he was suffering from severe acidosis. She explained that, by the time Seth was actually intubated after 2:00 a.m., he had already "fallen off the cliff" and it was too late to save his life. Dr. Parker further testified that the hospital departed from the standard of care by not treating Seth within 30 minutes of his arrival at the hospital, by not giving him intravenous fluids sooner, and by giving him the wrong intravenous fluids.

{¶12} According to the results of the autopsy performed by a pediatric pathologist at the hospital, Seth died of heart failure that was the combined result of a pre-existing narrowing of his left coronary artery and a viral infection that had spread to his heart. The hospital's experts testified that Seth's pre-existing heart problem caused his acidosis and his eventual death because his heart could not pump effectively. They testified that there was nothing more that the treating physicians could have done to save Seth's life.

{¶13} During Dr. Parker's testimony, the hospital objected and later moved to strike her testimony, asserting that she was not qualified as a medical expert pursuant to Evid.R. 601(D) because she did not devote at least half of her professional time to active clinical practice. The hospital then moved for a directed verdict on that basis, arguing that, without the expert's testimony, the Cromers had not presented a prima facie claim of medical malpractice. The trial court denied both motions.

{¶14} Following the presentation of evidence, over the Cromers' objection, the trial court instructed the jury that, in determining whether the hospital exercised its duty of care, the jury was required to consider whether the treating professionals should have foreseen that Seth Cromer's death was a natural and probable result of their actions or inactions.

{¶15} The jury returned a general verdict in favor of the hospital. In response to its first interrogatory, the jury indicated that the plaintiffs had not proven that the hospital was negligent. The trial court entered judgment for the hospital. The Cromers moved for a new trial, but the trial court denied their motion.

{¶16} The Cromers appeal and raise three assignments of error. The hospital raises one assignment of error, in the event this Court finds merit in any of the Cromers' assignments of error and reverses the judgment.

## II.

### APPELLANT'S ASSIGNMENT OF ERROR I

#### THE COURT ERRED IN INSTRUCTING THE JURY.

{¶17} Through their first assignment of error, the Cromers argue that the trial court committed reversible error by improperly instructing the jury on the hospital's standard of care. Specifically, over their objection, the trial court instructed the jury that, in determining whether the hospital exercised ordinary care, it was required to consider "whether the defendant should have foreseen under the attending circumstances that the natural and probable result of an act or failure to act would cause Seth Cromer's death." The Cromers argue that the trial court's instruction that defined the hospital's standard of care as requiring it to consider the foreseeability of Seth's death was an incorrect statement of law and constituted reversible error in this case. We agree.

{¶18} Generally, to establish a claim of negligence, the plaintiff must prove the existence of a duty by the defendant, breach of that duty, and an injury proximately caused by that breach of duty. *Menifee v. Ohio Welding Products, Inc.* 15 Ohio St.3d 75, 77 (1984). A fundamental aspect of proving negligence is determining whether the defendant owed the plaintiff a duty. *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142 (1989). It is well established that the existence of a duty will depend, in part, on the foreseeability of injury to the plaintiff. *Menifee* at 142.

{¶19} The defendant's duty to exercise due care to protect the plaintiff does not arise unless the risk of injury is foreseeable:

In delimiting the scope of duty to exercise care, regard must be had for the probability that injury may result from the act complained of. No one is bound to take care to prevent consequences which, in the light of human experience, are beyond the range of probability. Only when the injured person comes within the circle of those to whom injury may reasonably be anticipated does the defendant owe him a duty of care.

*Gedeon v. E. Ohio Gas Co.*, 128 Ohio St. 335, 338 (1934).

{¶20} In addition to the foreseeability of injury, the existence and scope of a tort duty will depend upon the relationship between the parties. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 645 (1992). "Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff." *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 98 (1989), citing *Baltimore & Ohio Southwestern Ry. Co. v. Cox*, 66 Ohio St. 3d 276, 278 (1902).

{¶21} Certain relationships, by their very nature, impose a duty on the part of one person to act for the benefit of another. *Berdyck v. Shinde*, 66 Ohio St.3d 573, 578 (1993). The defendant's duty is imposed by law in those relationships specifically due to the "risks and

dangers inherent in the relationship.” *Id.* at 579. In other words, the law has recognized that a duty will be imposed in those relationships because there is always some foreseeability of injury. “The most frequently applied example of persons of superior knowledge and skill who are held to a standard of good practice is that of physicians.” *Id.* “The law imposes on physicians engaged in the practice of medicine a duty to employ that degree of skill, care and diligence that a physician or surgeon of the same medical specialty would employ in like circumstances.” *Id.*, citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130 (1976). Unless the allegations that the defendant deviated from the standard of care are obvious to a lay person, “[p]roof of the recognized standards must necessarily be provided through expert testimony.” *Bruni* at 131–132. The expert testimony establishes the standard of care. “A negligent failure to discharge that duty constitutes ‘medical malpractice’ if it proximately results in an injury to the patient.” *Berdyck* at 579, citing *Bruni* at 134-135.

{¶22} Under Ohio law, in order to present a prima facie claim of medical malpractice, a plaintiff must establish: (1) the standard of care, as generally shown through expert testimony; (2) the failure of defendant to meet the requisite standard of care; and (3) a direct causal connection between the medically negligent act and the injury sustained. *Bruni v. Tatsumi*, 46 Ohio St.2d at paragraph one of the syllabus. “[T]he duty of the physician is established simply by the existence of a physician-patient relationship, not by questions of foreseeability.” *Oiler v. Willke*, 95 Ohio App.3d 404, 409, fn.2 (4th Dist. 1994). “[P]hysicians are said to owe patients a legal duty to use recognized standards of professional knowledge and skill.” *Ryne v. Garvey*, 87 Ohio App.3d 145, 155 (2d Dist.1993). A plaintiff proves a breach of duty by showing that the physician failed to act in accordance with those established norms. *Id.* Consequently, evidence

that the physician could have foreseen the patient's injury is irrelevant because "[f]oreseeability is not determinative of a physician's legal duties." *Id.* at 154-155.

{¶23} The hospital cites *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86 (1988), to support its position that foreseeability of injury was relevant to its duty in this case, but that case has no application here. Although the *Littleton* plaintiffs brought claims alleging medical malpractice, they did not allege that injuries to a patient had resulted from the quality of medical care provided by the defendant. Instead, the *Littleton* plaintiffs sought to recover for the wrongful death of a third party, who had been killed by her mother, based on the alleged negligence of the mother's psychiatrist in failing to control her actions and prevent her from harming her child. *Id.* at 91-92. The alleged duty by the psychiatrist was not to his patient, but to her daughter, with whom he had no physician-patient relationship. Foreseeability of injury was relevant in that medical malpractice case because the plaintiffs sought to establish the existence of a new duty by the treating physician, as Ohio law did not recognize a duty on the part of a psychiatrist to control the conduct of his patient to protect third parties from injury. *Id.* at 92.

{¶24} In this case, the Cromers' only allegations of medical malpractice by the hospital pertained directly to the quality of medical treatment that Seth received while a patient there. There was no question in this case that the hospital and its treating professionals owed a duty of care to Seth, that the existence of the hospital's duty was imposed by law, and that the scope of its duty would be established at trial solely through expert testimony about the applicable standard of care. The risks inherent in treating patients in the emergency room and intensive care unit of the hospital had already been taken into account in establishing the professional standard of care. The Cromers were not required to prove actual foreseeability of Seth's death

by the treating professionals in this case. Therefore, instructing the jury to that effect was an incorrect statement of law and constituted reversible error.

{¶25} We cannot conclude that this error was harmless because, although the jury also found that the Cromers failed to prove causation in this case, the jury's causation finding was not that the hospital's actions or inactions did not cause Seth's death but that the hospital's "negligence" did not cause his death. The jury indicated in its answer to the first jury interrogatory that the Cromers failed to prove that the hospital was negligent. Given that finding, it was instructed not to answer the remaining interrogatories. Nevertheless, the jury answered "No" to the third interrogatory, which asked:

Do you find that the Plaintiffs \*\*\* have proven by a preponderance of the evidence that the negligence of Defendant CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON was a direct and proximate cause of Seth Cromer's death?

{¶26} The proximate cause finding was directly tied to the jury's finding that the hospital was not negligent. The jury had no choice but to find that the hospital's negligence was not the proximate cause of Seth's death because it had already found that there was no negligence by the hospital. Consequently, we cannot conclude that the trial court's improper instruction on the hospital's standard of care did not affect the ultimate outcome in this case.

{¶27} Because the hospital's standard of care did not involve a jury question about whether the treating professionals in this case could have foreseen Seth's death due to their actions or inactions, the trial court committed reversible error by so instructing the jury. The Cromers' first assignment of error is sustained.

#### **APPELLANT'S ASSIGNMENT OF ERROR II**

THE JURY'S VERDICT IN THIS MATTER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

**APPELLANT'S ASSIGNMENT OF ERROR III**

THE COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION FOR A NEW TRIAL.

{¶28} Because this Court has reversed and remanded the trial court's judgment based on the improper jury instruction, the Cromers' second and third assignments of error have been rendered moot and will not be addressed. App.R. 12(A)(1)(c).

**THE HOSPITAL'S ASSIGNMENT OF ERROR**

PLAINTIFFS' ONLY EXPERT WITNESS WAS NOT COMPETENT TO TESTIFY BECAUSE SHE DOES NOT DEVOTE AT LEAST 50% OF HER PROFESSIONAL TIME TO THE ACTIVE CLINICAL PRACTICE OF MEDICINE. HER TESTIMONY ON THE STANDARD OF CARE SHOULD HAVE BEEN STRICKEN AND A DIRECTED VERDICT IN FAVOR OF CHILDREN'S HOSPITAL SHOULD HAVE BEEN RENDERED.

{¶29} Next, because this Court reverses the trial court's judgment, it will address the hospital's assignment of error. The hospital challenges the trial court's denial of its motion to strike the testimony of the Cromers' medical expert, Dr. Margaret Parker, because she was not competent to testify. It further asserts that, without Dr. Parker's testimony, which was essential to the Cromers' claim, it would have been entitled to a directed verdict.

{¶30} The hospital objected to the testimony of Dr. Parker and, at the close of the Cromers' case, argued that she was not competent to testify pursuant to Evid.R. 601(D). Although the hospital also now challenges the qualifications Dr. Parker to testify about the field of emergency medicine, it did not raise that challenge in the trial court when it moved to disqualify her testimony and has therefore forfeited the issue on appeal. *E.g., State v. Tibbetts*, 92 Ohio St.3d 146, 161 (2001).

{¶31} Consequently, the challenge on appeal is limited to whether Dr. Parker was competent to testify as a medical expert pursuant to Evid.R. 601(D), which requires that, to be

competent to give expert testimony in this case on the issue of the hospital's liability, the expert must hold a state license to practice medicine and "devote[] at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school." See also R.C. 2743.43(A)(2)(although superseded by Evid.R. 601(D), it includes the same "active clinical practice" language that has been construed by the Ohio Supreme Court); *Celmer v. Rodgers*, 114 Ohio St.3d 221, 2007-Ohio-3697, ¶ 17.

{¶32} The sole dispute here is whether Dr. Parker devoted at least half of her professional time to "active clinical practice" in her field of pediatric critical care or "instruction in an accredited school." The term "active clinical practice" is not defined in the Ohio Rules of Evidence, nor is it defined in R.C. Chapter 2743. Consequently, it has been judicially construed according to common usage, with an understanding that the purpose of this competency requirement is to preclude testimony by professional witnesses, or those who spend much of their professional time testifying against fellow professionals rather than gaining practical experience in the field they seek to judge. *McCrary v. State*, 67 Ohio St.2d 99, 103-104 (1981). The *McCrary* court further stressed that, although the phrase primarily includes the work of physicians treating their patients, it must also encompass the work done by physicians away from the patient's bedside "assisting, directing, or advising" the care provided by the treating physician, as they are also directly involved in the care of the patient and are aware of the progress and ultimate result of the treatment. *Id.* at 103. Therefore, the *McCrary* court construed the term "active clinical practice" to include "the physician-specialist whose work is so related or adjunctive to patient care as to be necessarily included in that definition for the purpose of determining fault or liability in a medical claim." *Id.* at syllabus.

{¶33} In *Celmer v. Rodgers*, 2007-Ohio-3697, ¶ 23, the Ohio Supreme Court “reiterate[d] that the purpose of Evid.R. 601(D) is to prohibit a physician who makes his living as a professional witness from testifying on the liability of physicians who devote their professional time to the treatment of patients.” Moreover, a trial court has discretion to determine whether a witness is competent as an expert under Evid.R. 601(D) and the court’s decision will not be reversed “absent a clear showing that the court abused its discretion.” *Id.* at ¶ 19.

{¶34} In this case, the hospital argues that Dr. Parker failed to satisfy the competency threshold that half of her professional time was devoted to the active clinical practice of critical care medicine. It focuses its argument on the following testimony that it elicited during its cross-examination of her:

Q. \* \* \* [Y]ou agree with me that only 25 percent of your time is clinical care, right?

A. Yes.

Q. Seventy-five percent of your time is administrative care or administrative function, true?

A. Administrative and teaching. I have some teaching responsibilities outside of the clinical arena, but, yes, pretty much.

Q. Would you agree with me now, doctor, as you sit on the witness stand right now that less than half of your time is clinical care and teaching?

A. Yes.

{¶35} Through her other testimony, Dr. Parker had the opportunity to explain the 75/25 percent allocation of her professional time in more detail. She testified that, like most pediatric intensive care specialists, she rotates direct patient care with other physicians assigned to the unit. Each physician is on 24-hour call in the PICU for one week and then off-call for three weeks because the round-the-clock work is “too stressful” and “too fatiguing” to maintain that

schedule every week. Because she was directly responsible for patient care in the PICU 24 hours a day during her one week on call, she testified that she worked 168 hours each month in direct patient care in the PICU. Given that she would work much shorter days during her three weeks outside the PICU, she actually devoted close to half of her professional time each month to direct patient care in the PICU. She also testified that she sometimes assisted her colleagues in the PICU during the weeks that she was not on call.

{¶36} Moreover, although the hospital suggests that Dr. Parker's "administrative" time could not qualify as active clinical practice, we do not agree. Dr. Parker explained that, during the weeks that she was not actively treating patients in the PICU, she devoted much of her professional time to oversight of intensive care treatment at the hospital. She had been the director of the PICU at Stony Brook University for seventeen years. Although she did not explain her oversight duties in detail, overseeing the work of other medical professionals in their treatment of patients involves the type of "assisting, directing, or advising," that was contemplated by the *McCrorry* court as "so related or adjunctive to patient care" that it falls within the definition of "active clinical practice." 67 Ohio St.2d at 103-104.

{¶37} Dr. Parker further testified that she taught pediatrics at the university, although she did not indicate how much of her time was devoted to her teaching duties. In addition to her other professional responsibilities, Dr. Parker had been nationally recognized as a leader in the critical care field and was actively involved with scholarly publications. Dr. Parker was an associate editor of *Critical Care Magazine*, which required her to evaluate and screen peer reviews of all medical literature submitted for publication. She was also on the editorial board of *Pediatric Critical Care Magazine*. In addition to editorial responsibilities, Dr. Parker had written many of her own scholarly articles in the field of pediatric critical care medicine, particularly on

the topic of septic shock and its association with myocarditis and cardiogenic shock, which was directly related to the substance of her expert testimony in this case.

{¶38} The record demonstrates that Dr. Parker was not a professional witness but was actively involved in the clinical practice of pediatric critical care medicine. Given the evidence before the trial court about Dr. Parker's extensive experience, which was directly related to the substance of her testimony in this case, this Court cannot conclude that the trial court abused its discretion by determining that she was competent to testify as a medical expert under Evid.R. 601(D). Therefore, the hospital's assignment of error is overruled.

### III.

{¶39} The Cromers' first assignment of error is sustained, which renders moot their remaining assignments of error. Consequently, the Cromers' second and third assignments of error were not addressed. The hospital's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is reversed and remanded for a new trial.

Judgment reversed  
and cause remanded.

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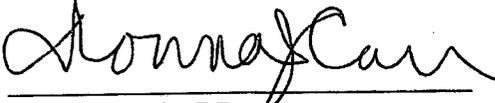
There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

  
DONNA J. CARR  
FOR THE COURT

DICKINSON, J.  
BELFANCE, J.  
CONCUR.

APPEARANCES:

JACK MORRISON, JR., THOMAS R. HOULIHAN, and VICKI L. DESANTIS, Attorneys at Law, for Appellant.

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