

ORIGINAL

No. 13-0021

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
C.A. No. 25938

THERESA HAYWARD

Plaintiff-Appellee

v.

SUMMA HEALTH SYSTEM/AKRON CITY HOSPITAL, et al.

Defendants-Appellants

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANTS-APPELLANTS
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I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case is of great public and general interest because the Ninth District Court of Appeals' Decision is both legally and factually flawed and, consequently, resulted in a complete usurpation of the jury's role as the finder of fact. The Ninth District issued a result-oriented Decision that is internally inconsistent both legally and factually and, more importantly, legally inconsistent with this Court's longstanding precedents, as well as decisions within the Ninth District itself and other Appellate Courts. The unjustifiable manner in which the Ninth District chose to reverse a jury verdict has profound consequences with respect to jury instructions in general and, in particular, a remote cause jury charge. This Court should take this opportunity to review the Ninth District's legally flawed Decision so that the Ninth District and other Courts will be deterred from creating and relying upon legally unsound reasons to interfere with the sanctity of the jury system.

The Ninth District's misinterpretation of the law involves several legal issues involving jury instructions in general and the remote cause jury instruction itself. First, the Ninth District's Decision is in direct conflict with the Tenth District's Decision in *Coulter vs. Stutzman*, 10th Dist. No. 07AP1081, 2008-Ohio-4184 with respect to what constitutes "prejudicial error" as it relates to jury instructions involving negligence and proximate cause. More specifically, it is inconceivable how the Ninth District determined that there existed "prejudicial error" with respect to a remote cause jury charge where the jury found no negligence. As a result, the Ninth District has completely redefined what constitutes "prejudicial error" as to an appellate court's standard of review of jury instructions in general and in particular, a proximate cause jury charge where a jury determines that there was no negligence in the first place.

In *Coulter*, the Tenth District addressed the identical factual and legal scenario as this case and held that if a jury finds no negligence on the part of the defendant, there can be no “prejudicial error” if a trial court charges the jury on remote cause. Yet, the Ninth District completely ignored the *Coulter* Decision despite the fact that Defendants relied heavily upon *Coulter*, because it was directly on point and applicable.¹

What constitutes “prejudicial error” as it relates to a jury instruction has been consistently set forth by this Court for years. Now, the Ninth District has chosen to disregard this Court’s longstanding precedents and, in particular, the Tenth District’s Decision in *Coulter* as it relates to “prejudicial error” and jury instructions. Simply put, there exists no justifiable basis upon which the Ninth District could conclude that a defense verdict should be vacated on the basis of an erroneous proximate cause jury charge where the jury outrightly determined that Defendants were not negligent. Such a conclusion demands this Court’s review because the Ninth District has effectively eliminated the “prejudicial error” aspect that appellate courts are bound to base their review and analysis of jury instructions. Moreover, it is imperative that this Court reconcile the conflict created by the Ninth District with the Tenth District so that there will be no confusion throughout Ohio.

Next, the Ninth District completely ignored its own Decision in *Van Scyoc v. Huba*, 9th Dist. No. 22637, 2005-Ohio-6322 for the proposition that a party waives any objection to a jury charge where the trial court explicitly requests the parties to state their objections before the jury is released to commence deliberations. In *Van Scyoc*, the Ninth District held that a party effectively withdraws any objection to jury instructions when no objection is stated upon the invitation of the trial court. Yet, the Ninth District disregarded its own precedent in *Van Scyoc*

¹ Defendants filed a Motion to Certify a Conflict between the Ninth District’s Decision herein and the Tenth District’s *Coulter* Decision. However, on December 28, 2012, the Ninth District denied Defendants’ Motion.

by finding that Plaintiffs did not waive their objection to the remote cause jury charge even though Plaintiffs failed to object at the time the Trial Court asked the parties to place their objections on the record before the jury was released to commence their deliberations.²

The Ninth District's Decision is not only in conflict with its own Decision in *Van Scyoc*, it effectively eliminates the proper manner in which to object and preserve an objection to a jury instruction pursuant to Civ. R. 51. This Court's review of this matter is essential in order to provide the proper guidance with respect to the manner in which jury instructions objections must be made/preserved in accordance with Civ. R. 51.

Finally, the Ninth District's determination that the inclusion of a remote cause jury instruction constituted reversible error has completely redefined the law on this issue. The Ninth District conveniently ignored the relevant legal issues and facts presented at trial. Further, the Ninth District completely misconstrued the law concerning a remote cause jury instruction and, therefore, the Decision, if allowed to stand, will create confusion over the appropriateness of a remote cause jury charge in Ohio. This Court's review of this matter is essential in order to provide Ohio litigants and Courts with the proper guidance on the law governing a remote cause jury instruction.

The issues presented in this appeal have implications far beyond the parties of this case and resolution and clarification of the issues will guarantee all litigants in Ohio with equitable treatment. This Court now has the opportunity to provide the proper guidance with respect to the law governing jury instructions in general as it relates to what constitutes "prejudicial error" and the proper manner in which to object and/or preserve an objection pursuant to Civ. R. 51. Also, this Court can eliminate the confusion that the Ninth District has created with regard to the law governing a remote cause jury charge. Accordingly, this Court should accept jurisdiction of this

² Defendants filed an Application for En Banc Consideration with the Ninth District but it was denied on December 17, 2012.

case in order to correct the obvious injustice caused by the Ninth District's legally and factually flawed Decision.

II. STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee Theresa Hayward suffered a femoral nerve injury during surgery performed on October 10, 2007 by Defendants-Appellants Dr. Michael J. Cullado and assisted by Dr. Steven A. Wanek ("Summa"). Contrary to Ms. Hayward's position, a femoral nerve injury is a known risk of the surgery performed and can undoubtedly occur in the absence of any negligence. In fact, Dr. Cullado's office consent form specifically listed nerve injury as a potential injury during this surgery. (Exhibit A) Additionally, there exists no peer reviewed medical literature that supported Ms. Hayward's contention that injury to the femoral nerve by the use of retractors is, in and of itself, below the standard of care.

Dr. Cullado was the primary surgeon who performed Ms. Hayward's surgery on October 10, 2007. Dr. Cullado is Board Certified in both general surgery and colorectal surgery. (Tr. Vol. 3, pg. 246). Dr. Cullado performs about 100 to 200 abdominal surgeries a year. In almost every abdominal surgery that Dr. Cullado performs, he uses the Bookwalter retractor (Tr. Vol. 3, pg. 248-249). A Bookwalter retractor is a flat metal ring that is positioned above the abdominal incision with retractors attached to the ring. The purpose of the Bookwalter retractor is to hold the abdominal wall open during the surgery. (Tr. Vol. 3, pg. 250).

Although the use of the Bookwalter retractor is "second nature" to Dr. Cullado, there are always risks associated with its use, including nerve injury (Tr. Vol. 3, pg. 250-255). This is why a nerve injury is listed as a risk factor in the surgical consent form. (Tr. Vol. 3, pg. 250-255).

Dr. Cullado explained to the jury in great detail how the Bookwalter retractor was applied during Ms. Hayward's surgery (Tr. Vol. 3, pg. 262-281). Of importance, Dr. Cullado testified

that during surgery, he continuously checked on the positioning of the blades to the Bookwalter retractor in order to confirm the appropriate location and that any risk of nerve injury was minimized. (Tr. Vol. 3, pg. 283-291). Dr. Cullado confidently opined that he did not commit medical negligence since he followed the proper procedure for the placement and use of the Bookwalter retractors during Ms. Hayward's surgery. (Tr. Vol. 3, pg. 291). In fact, Dr. Cullado explained how he adhered to the recommendations for using a Bookwalter retractor as outlined in the article authored by Ms. Hayward's expert, Dr. William Irvin, entitled "Minimizing The Risk of Neurologic Injury in Gynecologic Surgery" and the section called "Strategies to Minimize the Risk of Nerve Injury Associated with Abdominal Surgical Procedures." (Tr. Vol. 3, pgs. 282-292).

Defendants also presented the testimony of Dr. Peter Muscarella, a very well-credentialed and highly-respected general surgeon from Columbus, Ohio. Dr. Muscarella opined that Ms. Hayward's femoral nerve injury was a known complication of her surgery that was not caused by any deviation from the standard of care by either Dr. Cullado or Dr. Wanek. (Tr. Vol. 4, pg. 320-321). With respect to a femoral nerve injury, Dr. Muscarella stated that such an injury is not 100 percent avoidable. (Tr. Vol. 4, pg. 329). The risk of a nerve injury can be decreased with the careful placement of the retractor, but you can never make the risk zero. (Tr. Vol. 4, pg. 329-330).

With respect to Dr. Cullado's care and treatment, Dr. Muscarella believed that based upon his review of Ms. Hayward's operative note, Dr. Cullado is a "careful surgeon." (Tr. Vol. 4, pg. 321). Dr. Muscarella concluded that Dr. Cullado took steps to ensure Ms. Hayward's safety in order to minimize the risks or complications during her surgery, including the careful placement of the Bookwalter retractor.

On March 31, 2009, Ms. Hayward filed this medical negligence action against Summa.³ Ms. Hayward's allegations of medical negligence involved the femoral nerve injury that Ms. Hayward allegedly suffered during a surgery performed on October 10, 2009 by Dr. Cullado and assisted by Dr. Wanek. On January 24, 2010, a jury trial commenced. (R.1).

Relevant to this appeal is the Trial Court's jury instructions and, in particular, the remote cause jury charge. After the parties' counsel gave their Closing Arguments, the Trial Court instructed the jury. As part of the proximate cause jury instruction, the Trial Court properly charged the jury on remote cause. Although Ms. Hayward raised an objection to this instruction **prior** to when the jury instructions were given, Ms. Hayward's counsel failed to object to the remote cause jury instruction when it was given. (Tr. Vol. 4, pg. 434). Then, when the Trial Court specifically asked the parties whether there were "[a]ny objections you want to put on the record," Ms. Hayward's counsel made no objection at all with respect to the Trial Court's jury instructions or the remote cause jury charge. (Tr. Vol. 4, pg. 447). As such, Ms. Hayward effectively withdrew her objection just before the jury was released to commence its deliberations.

After deliberations, the jury returned a defense verdict in favor of Summa. Written interrogatories were answered by the jury specifically stating that Summa did not fall below the accepted standards of care in its care and treatment of Ms. Hayward. Additionally, the jury determined that the conduct of Dr. Cullado and Dr. Wanek did not proximately cause any injury to Ms. Hayward. (Tr. Vol. 4, pg. 451-452). Of importance, Ms. Hayward never objected to the manner in which the jury answered the jury interrogatories.

On February 23, 2011, the Trial Court journalized the jury verdict in favor of Summa. (Appx. 1). On March 7, 2011, Ms. Hayward filed a Motion for Judgment Notwithstanding the

³ Ms. Hayward also named several other defendants who were voluntarily dismissed. (R. 29 and R. 30).

Verdict and/or New Trial. (R. 78). Basically, Ms. Hayward argued that the jury's verdict in favor of Summa was against the manifest weight of the evidence. On April 20, 2011, the Trial Court issued its Order overruling Ms. Hayward's Motion for JNOV and/or New Trial (Appx. 2-7). In doing so, the Trial Court issued an Order that was very well-reasoned and provided an in-depth factual and legal analysis. With respect to Ms. Hayward's Motion for JNOV, the Trial Court held that "since reasonable minds could have reached different conclusions on these issues, plaintiff is not entitled to a Judgment Notwithstanding the verdict." (Appx. 5). Then, the Trial Court rejected Ms. Hayward's manifest weight of the evidence argument by properly accepting the jury's answers to the interrogatories that Ms. Hayward failed to prove **both** negligence and proximate cause. (Appx. 5-6).

Ms. Hayward timely appealed to the Ninth District raising five assignments of error. On November 21, 2012, the Ninth District issued its Decision and Journal Entry (Appx. 1-10). The Ninth District did not address all five assignments of error. Initially, the Ninth District held that the Trial Court did not err in denying Ms. Hayward's Motion for JNOV. (Appx. 3-5). Then, the Ninth District addressed Plaintiff's last assignment of error where Ms. Hayward argued that the jury was improperly charged on remote cause.

With respect to Summa's argument that there could be no "prejudicial error" in charging the jury on remote cause because the jury found no negligence on the part of Summa, The Ninth District ignored the Tenth District's Decision in *Coulter, supra* which was applicable to this case. Just like the Tenth District in *Coulter*, the Ninth District should have rejected Ms. Hayward's challenge to the remote cause jury instruction since the jury found no negligence. Instead, the Ninth District speculatively stated that "the jury considered causation and could have confused the issue of breach of the standard of care with remote causation." (Appx. 8)(Emphasis Added). Consequently, the Ninth District created a direct conflict with the Tenth District as to

what constitutes “prejudicial error” as it relates to jury instructions and, specifically, the remote cause jury charge.

As to Summa’s argument that Ms. Hayward effectively withdrew any jury instruction objection where she failed to state any objection when asked by the Trial Court, the Ninth District erroneously stated “[w]e note that Ms. Hayward brought **her concern** about the instruction to the Trial Court’s attention before the instructions were presented to the jury.” (Appx. 6)(Emphasis Added). Interestingly, the Ninth District used the term “concern” as opposed to “objection.” The Ninth District could not note an objection raised by Plaintiff because she failed to do so when asked by the Trial Court before the jury was released to commence its deliberations.

Of importance, the Ninth District failed to address its own case of *Van Scyoc, supra* in which the Ninth District explicitly held that where a party fails to renew an objection to a jury instruction where the trial court specifically provided the party the opportunity to renew the objection, the party has effectively withdrawn the objection. It is worth noting that the Ninth District ignored its own Decision in *Van Scyoc* even though Ms. Hayward admitted in her briefing before the Ninth District that the *Van Scyoc* case was directly on point with this case:

But Appellees [Summa] cite Van Scyoc v. Huba, 9th Dist. No. 22637, 2005-Ohio-6322, for the proposition that Appellant’s failure to renew her objection after the jury was charged withdrew the objection. **Theresa has not been able to harmonize Van Scyoc with Presley, Wolons, and Callahan.** There is no indication in Presley, Wolons, or Callahan that the parties renewed their objections after the jury was charged. It appears that if Van Scyoc was the law, Presley, Wolons, and Callahan would not have turned out the way those cases did. It also does not appear that Van Scyoc has been cited for this proposition since it was decided. **Judging by the dissent in Callahan, it appears that there may be divergent views on this issue between the judges of the Ninth District. Perhaps this panel can resolve whether Callahan or Van Scyoc will be the law in this district going forward.**

(Ms. Hayward's Reply Brief, pg. 11)(Emphasis Added).

Although Ms. Hayward recognized a conflict within the Ninth District and even requested the Ninth District to resolve the conflict, the Ninth District side-stepped the objection issue altogether. So, the Ninth District not only created a conflict with the Tenth District, it created an intradistrict conflict as well.

In addition to committing error in failing to reject Ms. Hayward's assigned error on the remote cause jury instruction from a procedural standpoint, the Ninth District also erred substantively. The Trial Court properly instructed the jury on remote cause because it was legally and factually supported by the evidence. However, the Ninth District failed to recognize the legal and factual bases upon which the Trial Court properly charged the jury on remote cause. It illogically agreed with Ms. Hayward's position that the remote cause instruction was not warranted and, as a result, the Ninth District effectively redefined the law pertaining to the appropriateness of a remote cause jury charge.

It is clear that the legal and factual conflicts and inconsistencies in the Ninth District's jurisprudence require guidance and clarification from this Court. This Court now has the opportunity to provide all Ohio Appellate and Trial Courts with clarification on what constitutes "prejudicial error" with respect to jury instructions; the proper manner in which to raise and preserve a jury charge objection pursuant to Civ. R. 51; and the law governing a remote cause jury instruction. This Court should accept jurisdiction in order to address the Ninth District's legally and factually flawed Decision.

III. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: The Ninth District's Decision In Finding Reversible Error With Respect To A Remote Cause Jury Instruction Where A Jury Finds No Negligence Has Effectively Redefined What Constitutes "Prejudicial Error" In Jury Instructions And, Consequently, The Ninth District Has Created A Direct Conflict With This Court And Other Appellate Courts Throughout Ohio

In considering whether the Trial Court erred in charging the jury on remote cause, Ms. Hayward's assigned error was moot since the jury found no negligence on the part of Summa. If a jury returns an interrogatory finding that a defendant is not negligent, any assigned error pertaining to proximate cause or damages can be summarily overruled by a reviewing court as constituting harmless error. *Seeley vs. Rahe*, 16 Ohio St. 3d 25, 475 N.E. 2d. 1271(1985); *Schultz vs. Duffy*, 8th Dist. No. 93215, 2010-Ohio-1750. Absent a finding of negligence, there is no need to engage in an analysis of proximate causation. *Peffer vs. Cleveland Clinic Foundation*, 8th Dist. No. 94356, 2011-Ohio-450. In other words, if a jury finds no negligence, the complaining party cannot logically prove any prejudicial effect as a result of errors pertaining to either proximate cause or damages. *Sech vs. Rogers*, 6 Ohio St. 3d 462, 453 N.E. 2d 705 (1983).

In this case, any proposed error relating to the Trial Court's remote cause jury instruction constituted harmless error, since the jury found no negligence on the part of Summa. The remote cause jury instruction was indisputably limited to the issue of proximate cause and, consequently, said jury charge became immaterial after the jury's determination that there was no negligence. The Ninth District erroneously concluded that the remote cause jury charge was not immaterial, but the Tenth District Court of Appeals explicitly rejected this identical argument in *Coulter, supra*. In *Coulter*, the Tenth District rejected the plaintiff's challenge of a remote cause jury instruction since the jury found no negligence. The Tenth District held:

Because the jury in this case determined that Appellees were not negligent, the remote cause instruction is not germane to its verdict. For this reason, we perceive no exceptional circumstances that require the application of the plain error doctrine to prevent a manifest miscarriage of justice, or to prevent a material adverse effect on the character of, and public confidence in, judicial proceedings.

Id. ¶11 (Emphasis Added).

The *Coulter* decision is directly on point herein and, thus, should have been applied to this case by the Ninth District. The remote cause jury instruction was not germane to the jury's verdict since the jury specifically found no negligence. The Ninth District's failure to address the *Coulter* Decision and other legal precedents from this Court and other appellate courts has redefined what constitutes "prejudicial error" regarding jury instructions in general and, in particular, a remote cause jury charge. Consequently, the Ninth District has set forth conflicting law that will inevitably cause confusion throughout Ohio. If the Ninth District's Decision is allowed to stand as is, reviewing courts will be able to automatically find prejudicial error on any proximate cause matter even if a jury found no negligence on the part of a defendant.

This Court should accept jurisdiction over this matter in order to address this obvious legal error in which the Ninth District has redefined the definition of "prejudicial error."

PROPOSITION OF LAW NO. 2: The Ninth District's Decision Disallowing The Remote Cause Jury Instruction Has Effectively Eliminated The Manner In Which Objections Must Be Made And Preserved Pursuant To Civ. R. 51 And In Doing So, The Ninth District Has Created New Law And Has Also Created An Intradistrict Conflict Within The Ninth District Court Of Appeals

It is undisputed that Ms. Hayward failed to object to the Trial Court's remote cause jury instruction when it was given. (Tr. Vol. 4, pg. 434). Additionally, just prior to the jury being excused in order to commence its deliberations when the Trial Court explicitly asked the parties whether there were any objections to the jury charge, Ms. Hayward's counsel raised no objections at all. (Vol. 4, pg. 447). Ms. Hayward basically approved the Trial Court's jury charge using the remote cause jury instruction. However, the Ninth District failed to acknowledge that she failed to object to the Trial Court's remote cause instruction when given and, also, failed to raise any objection to the jury instructions as a whole when asked by the Trial Court just prior to the jury being excused for its deliberation.

Instead, the Ninth District merely stated that Ms. Hayward previously raised a “concern” about the remote cause jury charge. Obviously, this erroneous finding by the Ninth District has basically deemed Civ. R. 51 meaningless. If the Ninth District’s misinterpretation and misapplication of Civ. R. 51 remain undisturbed, there will be grave ramifications throughout Ohio. In other words, there will be confusion as to the proper manner to object and/or preserve objections to jury instructions.

In *Van Scyoc, supra*, the Ninth District held that when a party fails to renew an objection to a jury instruction where the trial court specifically provided the party with the opportunity to renew the objection, the party has effectively withdrawn the objection. Consequently, Ms. Hayward’s failure to renew her objection to the remote cause jury instruction constituted a withdrawal of her objection and, therefore, such withdrawal had the effect of waiving all but plain error on appeal. *Id.* ¶18-19.

Summa relied heavily upon the *Van Scyoc* Decision of the Ninth District in arguing that Ms. Hayward effectively waived her objection to the remote cause jury charge when she failed to raise an objection when specifically asked by the Trial Court before the jury commenced its deliberations. More importantly, Ms. Hayward, herself, recognized that she may have waived her objection to the remote cause jury instruction under the Ninth District’s precedent of *Van Scyoc*, i.e. “Theresa has not been able to harmonize *Van Scyoc*...;” and “... it appears that there may be divergent views on this issue between the judges of the Ninth District.” (Ms. Hayward’s Reply Brief, pg. 11). In fact, it was Ms. Hayward that explicitly requested the Ninth District to resolve the obvious intradistrict conflict, i.e. “Perhaps this panel can resolve whether *Callahan* and *Van Scyoc* will be the law in this district going forward.” (*Id.*).

Despite Summa’s reliance upon the *Van Scyoc* Decision and Ms. Hayward’s specific request for the Ninth District to resolve the intradistrict conflict, the Ninth District neither

addressed the *Van Scyoc* Decision nor acknowledged Ms. Hayward's request for a resolution of the intradistrict conflict. Left unresolved, the Ninth District has conflicting Decisions with respect to the manner in which to object and preserve an objection to a jury instruction pursuant to Civ. R. 51.

The Ninth District has eliminated the proper manner under Civ. R. 51 in which to object and preserve objections to jury instructions. Such an elimination of the requirements of Civ. R. 51 is of public and great general concern. Therefore, this Court should accept jurisdiction in order to clarify the requirements of Civ. R. 51 so there is no confusion throughout Ohio.

PROPOSITION OF LAW NO. 3: The Ninth District's Decision Disallowing The Remote Cause Jury Instruction Is Legally And Factually Flawed, Is Internally Inconsistent And Contradictory And Is In Direct Conflict With This Court And Other Appellate Courts Throughout Ohio And, Consequently, The Ninth District Has Redefined The Law Governing Remote Cause

The giving or the refusal to give a jury instruction is within the trial court's sound discretion. *State vs. Hipkins*, 69 Ohio St. 2d 80, 430 N.E. 2d 943 (1982). A trial court must charge a jury with instructions that are supported by the evidence and issues presented at the trial and, also, that are a correct and complete statement of the law. *Marshall vs. Gibson*, 19 Ohio St.3d 10, 482 N.E. 2d 583 (1985). In determining whether there was sufficient evidence to support a particular jury charge, the trial court has to find that based upon the evidence presented, reasonable minds might reach the conclusion sought by the instruction. *Feterle vs. Huettner* 28 Ohio St. 2d 54, 275 N.E. 2d 340 (1971).

In determining whether there exists any error pertaining to jury instructions, the instructions must be reviewed as a whole. If, taken in their entirety, the jury instructions fairly and correctly state the law applicable to the evidence and issues presented at trial, a new trial is not warranted merely on the possibility that the jury may have been misled. *Wozniak vs. Wozniak*, 90 Ohio App. 3d 400, 629 N.E. 2d 500 (9th Dist. 1993). Of importance, there exists a

strong presumption in favor of the propriety of a trial court's jury instruction. *Burns vs. Prudential Sec. Inc.*, 167 Ohio App. 3d 809, 2006-Ohio-3550, 857 N.E. 2d 621 (3rd Dist.).

With respect to a remote cause jury charge, a cause is remote when the result could not have been reasonably foreseen or anticipated as being the natural or probable cause of injury. *Jeanne vs. Hawkes Hosp. of Mt. Carmel*, 74 Ohio App.3d 246, 598 N.E. 2d 1174 (10th Dist. 1991). In this case, the Trial Court did not act unreasonably, arbitrarily or unconscionably in charging the jury on remote cause, because it was a correct statement of the law and was warranted by the evidence and issues presented to the jury. Although a nerve injury is a known complication of an abdominal surgery, it is considered an unusual occurrence that cannot be fairly anticipated or foreseeable if every precaution is taken to prevent such an injury. See *Metzer vs. Pennsylvania, Ohio, Detroit Rd. Co.*, 146 Ohio St. 406, 66 N.E. 2d 203 (1946). No ordinary prudent physician should have reasonably anticipated or foreseen that Ms. Hayward would suffer a nerve injury. As such, the Trial Court's jury charge on remote cause was pertinent to the facts and issues in this case and, thus, the Ninth District erred in reversing a jury verdict based upon one properly given jury instruction.

Also, The Ninth District could not reasonably establish any prejudice as a result of the Trial Court's remote cause jury instruction. Undoubtedly, the jury's verdict in favor of Summa was supported by competent credible evidence. The Trial Court's jury instruction, taken as a whole, neither prejudiced Ms. Hayward nor somehow induced an erroneous jury verdict. As mentioned above, the Trial Court's jury charge on remote cause was, at best, harmless in light of the fact that the jury initially determined that there was no negligence.

The Ninth District erroneously determined that the remote cause jury charge "could have" confused the jury. (Appx. 8). Clearly, this finding of prejudice was vague and was nothing more than speculation. Here, the alleged error pertained to the remote cause jury

instruction which had no bearing, whatsoever, on the jury's finding of no negligence on the part of Summa. There was absolutely no indication, whatsoever, that the jury was misled or that it was confused by the Trial Court's jury instructions.

As a result of the Ninth District's erroneous Decision, the law governing the remote jury charge has been redefined altogether. As it stands now, there is now legal authority that effectively eliminates the remote cause jury charge regardless of what evidence/testimony is adduced at trial. This Court should accept jurisdiction over this case in order to correct the Ninth District's misapplication of the remote cause jury instruction.

IV. CONCLUSION

The Ninth District's Decision is not only legally and factually erroneous and in conflict with this Court and other precedents in determining "prejudicial error" with respect to jury instructions, the proper manner to raise and preserve jury instruction objections pursuant to Civ. R. 51 and the appropriateness of a remote cause jury instruction, its Decision is full of legal and factual inconsistencies that deserves this Court's jurisdiction. The Ninth District has improperly set forth new law and/or redefined existing law that has effectively caused uncertainty as to jury instructions in general and, in particular, the remote cause jury instruction.

Although the Ninth District's erroneous Decision is particularly egregious because it prejudicially vacated a defense verdict that was justified by the evidence presented at trial, its prejudicial effect goes well beyond the parties of this case – it affects all litigants throughout Ohio. Consequently, this case involves errors of law that are of public and great general interest.

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,

Douglas G. Leak via SDJ on 1/7/13

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A copy of the foregoing was served on January 7, 2013 pursuant to Civ.R. 5(B)(2)(c)

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[Cite as *Hayward v. Summa Health Sys.*, 2012-Ohio-5396.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

THERESA HAYWARD

C.A. No. 25938

Appellant

v.

SUMMA HEALTH SYSTEM AKRON
CITY HOSPITAL, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009 03 2529

Appellees

DECISION AND JOURNAL ENTRY

Dated: November 21, 2012

BELFANCE, Judge.

{¶1} Plaintiff-Appellant Theresa Hayward appeals from the judgments of the Summit County Court of Common Pleas. For the reasons set forth below, we affirm in part, reverse in part, and remand for a new trial.

I.

{¶2} Following bouts of diverticulitis, Ms. Hayward elected to have a portion of her sigmoid colon removed in an attempt to remedy the problem. On October 10, 2007, Defendant-Appellee Dr. Michael Cullado, M.D., and Defendant-Appellee Dr. Steven Wanek, M.D., a fifth-year surgical resident employed by Defendant-Appellee Summa Health System (“Summa”), performed the partial colectomy on Ms. Hayward. In the days following the surgery, Ms. Hayward developed weakness and loss of sensation in her left leg. Following a neurology consult by Dr. Robert Lada, M.D., Dr. Lada determined that Ms. Hayward suffered a nerve injury to the left femoral nerve during the surgery. After conducting a differential diagnosis as to

the cause of the nerve injury, Dr. Lada concluded that the injury occurred due to a prolonged compression of the nerve during surgery. He further concluded that, because there was no other evidence of the typical causes of femoral neuropathy,¹ the nerve injury was likely secondary to a retractor injury. The retractor in this case, a Bookwalter retractor, was used so that the anatomical structures at issue could be accessible and other structures not involved in the surgery could be held out of the way so as not to be damaged or compromised during the surgery. Ms. Hayward was discharged from the hospital on October 26, 2007. Four months later, in the discharge summary dictated by Dr. Wanek and signed by Dr. Cullado, the doctors also indicated that the neuropathy was likely secondary to a retractor injury.

{¶3} Prior to the surgery, Ms. Hayward had no problems with weakness or sensation in her leg and had no difficulty walking. Upon discharge, Ms. Hayward had to use a wheelchair to leave the hospital. Over time and many months of physical therapy, Ms. Hayward progressed to being able to walk with assistance of a walker, and finally with only the assistance of a cane. Nevertheless, Ms. Hayward continues to have problems with her left leg; she cannot stay in one position for prolonged periods of time and is most comfortable when lying down. Experts believe it is statistically unlikely that Ms. Hayward's condition will dramatically improve, that her injury is likely permanent, and that she will not be able to find work given her physical limitations and skill set.

{¶4} On March 31, 2009, Ms. Hayward filed a complaint against Summa, Dr. Cullado, Dr. Spear, Advanced Urology Associates, LLC, Dr. Wanek, Dr. Reedus, and several John and Jane Doe Defendants alleging that the Defendants were negligent in providing medical care to

¹ Common causes of femoral nerve injury, also known as femoral neuropathy include preexisting weakness, diabetes or retroperitoneal hematoma. After conducting tests and examining Ms. Hayward, Dr. Lada eliminated these possible causes.

Ms. Hayward, that they deviated from the standard of care, that as a proximate result of the negligence they caused injury and pain and suffering to Ms. Hayward, and that as a result Ms. Hayward has incurred numerous expenses and lost wages and earnings. Subsequently, Ms. Hayward filed motions pursuant to Civ.R. 41(A)(1) to dismiss Defendants Dr. Spear, Dr. Reedus, and Advanced Urology Associates, LLC.

{¶5} The matter proceeded to a jury trial. The jury concluded that Dr. Cullado and Summa were not liable, that Dr. Cullado and Summa by and through Dr. Wanek were not negligent in the care and treatment of Ms. Hayward, and that they did not cause injury to Ms. Hayward. Ms. Hayward filed a motion for judgment notwithstanding the verdict (“JNOV”) and a motion for a new trial. Both were subsequently denied by the trial court. Ms. Hayward has appealed, raising five assignments of error for our review. Her assignments of error will be addressed out of sequence to facilitate our review.

II.

ASSIGNMENT OF ERROR III

THE COURT SHOULD HAVE GRANTED APPELLANT’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

{¶6} Ms. Hayward asserts in her third assignment of error that the trial court erred in denying her motion for JNOV because the evidence was insufficient to support a defense verdict. We do not agree.

{¶7} “[M]otions for directed verdict and for JNOV present questions based on the sufficiency of the evidence * * * .” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 28. A JNOV motion pursuant to Civ.R. 50(B) presents questions of law. *Id.* at ¶ 25.

[Thus,] [a]s with an appeal from a court’s ruling on a directed verdict, this Court reviews a trial court’s grant or denial of a JNOV de novo. JNOV is proper if upon viewing the evidence in a light most favorable to the non-moving party and

presuming any doubt to favor the nonmoving party reasonable minds could come to but one conclusion, that being in favor of the moving party. If reasonable minds could reach different conclusions, the motion must be denied.

(Internal quotations and citations omitted.) *Schottenstein Zox & Dunn Co., L.P.A. v. Reineke*, 9th Dist. No. 10CA0138-M, 2011-Ohio-6201, ¶ 8.

{¶8} “In order to prove medical malpractice, the plaintiff has the burden to prove, by a preponderance of the evidence, that the defendant breached the standard of care owed to the plaintiff and that the breach proximately caused an injury.” *Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc.*, 182 Ohio App.3d 768, 2009-Ohio-2460, ¶ 11 (9th Dist.). “A medical-malpractice claim requires the plaintiff to prove causation through medical expert testimony in terms of probability to establish that the injury was, more likely than not, caused by the defendant’s negligence.” (Internal quotations and citations omitted.) *Id.*

{¶9} In the instant matter, Ms. Hayward’s expert, Dr. William Irvin, M.D., testified that Drs. Cullado and Wanek fell “below the accepted standards of care * * * []” and that doing so resulted in Ms. Hayward’s neuropathy. He testified that he believed that “the cause of [Ms. Hayward’s] injury came from compression of the femoral nerve with a lateral retractor blade[]” that was inappropriately placed. He also stated that it was impossible to suffer an injury to the femoral nerve as Ms. Hayward had suffered without improper placement of the retractor. However, the Defendants’ expert, Dr. Peter Muscarella II, M.D., testified that he did not believe the surgeons “deviated from the standard of care.” In addition, although there were no medical records pertaining to the use or placement of the retractor, he testified that he was “confident that this surgeon * * * carefully placed the retractor when he did the operation because everything else that he did during the operation was careful and thoughtful with the aim of minimizing complications for the patient.” We acknowledge that Dr. Lada opined that the injury was due to

prolonged nerve compression and Dr. Cullado and Wanek indicated that the injury was likely caused by the use of the retractor in their discharge summary. Dr. Cullado also acknowledged at trial that the injury most likely correlated to the use of the retractor. In addition, the bulk of Dr. Muscarella's opinions were made when he was unaware at trial that Dr. Cullado and Dr. Wanek had indicated that the injury was likely caused due to the retractor. Nonetheless, Dr. Muscarella continued to maintain that the doctors were not negligent even though he did not address or explain how Ms. Hayward could suffer a retractor injury absent a breach in the standard of care. However, these issues pertain to the weight of the evidence and not its sufficiency. The record is clear that at no point does Dr. Muscarella acknowledge or state that he believed that the surgeons were negligent or failed to meet the standard of care.

{¶10} Viewing the evidence in a light most favorable to the Defendants, and without evaluating credibility, there was evidence by which a jury could have concluded that the Defendants were not liable, given that there was expert testimony that there was no deviation from the standard of care and that the injury was not caused by the surgeons' negligence. *See Segedy*, 2009-Ohio-2460, at ¶ 11. Accordingly, Ms. Hayward's JNOV motion was properly overruled. In light of the foregoing, we overrule her third assignment of error.

ASSIGNMENT OF ERROR V

THE COURT ERRED IN INSTRUCTING THE JURY ON REMOTE CAUSE.

{¶11} Ms. Hayward asserts in her fifth assignment of error that the trial court erred in instructing the jury on remote cause. We agree.

{¶12} "A trial court must give jury instructions that correctly and completely state the law." *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 32. However, "[i]t is well established that the trial court may not instruct the jury if there is no evidence to support an

issue.” *Pesek v. Univ. Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 498 (2000). “A jury charge must be considered as a whole and a reviewing court must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party’s substantial rights.” *Becker v. Lake Cty. Mem. Hosp. West*, 53 Ohio St.3d 202, 208 (1990).

{¶13} The trial court gave the following causation instruction:

Now, to recover, the plaintiff must not only prove negligence, which has been defined for you, but the plaintiff must also prove that the negligent act was the proximate cause of plaintiff’s injuries.

Proximate cause is an act or failure to act which in the natural and continuous sequence directly produces the injury and without which it would not have occurred.

Proximate cause occurs when the injury is the natural and foreseeable result of the act or failure to act.

A person is not responsible for damages to another if his negligence is a remote cause and not a proximate cause. A cause is remote when the result could not have been reasonably foreseen or anticipated as being a natural or probable cause of any damage.

{¶14} Ms. Hayward does not complain that the above is an inaccurate statement of the law; instead, she claims that the facts of the instant case did not warrant a remote cause instruction. We note that Ms. Hayward brought her concern about the instruction to the trial court’s attention before the instructions were presented to the jury.

{¶15} In light of the testimony at trial, we agree with Ms. Hayward that an instruction on remote causation was not appropriate in the instant matter. Assuming that the Defendants breached the standard of care, there was substantial evidence to support the conclusion that the injury was a foreseeable result of the Defendants’ negligence. There was overwhelming evidence that Ms. Hayward’s injury was connected to the use of the retractor. Further, the testimony as a whole indicated that the type of injury Ms. Hayward sustained tends to occur when a surgeon improperly places the retractor. While the Appellees provided ample testimony

that the standard of care was not breached, they did not provide much, if any, testimony on an alternate theory of causation, let alone evidence that Appellees' negligence would have been a remote cause of Ms. Hayward's injury. See *Pesek v. Univ. Neurologists Assn.*, 87 Ohio St.3d at 499 ("The trial court's instruction would have been appropriate had there been testimony that acceptable alternative methods existed for treatment of Caitlin's condition. There were, however, no acceptable alternative methods of treatment.")

{¶16} The discharge summary, which was dictated by Dr. Wanek and signed by Dr. Cullado, concludes that Ms. Hayward "most probably suffered a femoral neuropathy likely secondary to a retractor injury." Dr. Cullado testified that "[w]hen we went through the whole process and the entire workup and the data that we had to bear at that point in time, our collective conclusion was that [the injury] was most likely correlated with the use of the retractor." In addition, Dr. Cullado testified that "if you improperly place the retractors you're increasing the risks of an injury and the manner in which you improperly place them would relatively increase or decrease the risk of the injury." Ms. Hayward's expert, Dr. Irwin, testified that he believed that "the cause of [Ms. Hayward's] injury came from compression of the femoral nerve with a lateral retractor blade[]" that was inappropriately placed. From the testimony it can also be inferred that reasonably prudent surgeons are aware that improperly placing the retractor can cause femoral neuropathy. Further, there was undisputed testimony that the injury was not caused by diabetes, a hematoma, or cutting or suturing the nerve, all of which could have caused Ms. Hayward's neuropathy. From the evidence in the record, we can only conclude that an ordinarily prudent surgeon should have reasonably anticipated that Ms. Hayward could have sustained a femoral neuropathy from the improper placement of the retractor. See *Jeanne v.*

Hawkes Hosp. of Mt. Carmel, 74 Ohio App.3d 246, 252 (10th Dist.1991). Accordingly, a remote cause instruction was not appropriate. *See id.* at 252-253; *see also Pesek* at 499.

{¶17} Further, in light of the fact that an instruction on remote causation was so clearly not warranted, *Pesek* at 499, and because there is evidence that the instructions did confuse the jury, we conclude that “the jury charge probably misled the jury in a matter materially affecting the complaining party’s substantial rights.” *Becker*, 53 Ohio St.3d at 208. Despite the fact that the jury interrogatories indicated that the jury should only complete interrogatory number three, which dealt with causation, *if* the jury concluded that one of the defendants was negligent, the jury completed interrogatory number three anyway. Thus, the jury considered causation and could have confused the issue of the breach of the standard of care with remote causation. While there could be another explanation for this confusion, it nonetheless evidences that the jury was confused. In light of all of the above, we conclude that the jury instruction was unwarranted and that a new trial is required. *See Pesek* at 499 (concluding that, when there was no evidence to support the instruction, a new trial was required). We sustain Ms. Hayward’s fifth assignment of error.

ASSIGNMENT OF ERROR I

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

ASSIGNMENT OF ERROR II

THE COURT ERRED IN ALLOWING THE ADMISSION OF, AND ARGUMENT CONCERNING, CONSENT FORMS.

ASSIGNMENT OF ERROR IV

THE COURT SHOULD HAVE GRANTED APPELLANT’S MOTION FOR A NEW TRIAL.

{¶18} Ms. Hayward argues in her first assignment of error that the verdicts were against the manifest weight of the evidence. She asserts in her second assignment of error that the trial court erred in allowing argument and testimony concerning the surgery consent form and in the admission of the form. Ms. Hayward argues in her fourth assignment of error that the trial court erred in denying her motion for a new trial. Because we conclude that these assignments of error are rendered moot by our resolution of Ms. Hayward's fifth assignment of error, we decline to address these assignments of error. *See* App.R. 12(A)(1)(c).

III.

{¶19} In light of the foregoing, we overrule Ms. Hayward's third assignment of error, sustain her fifth assignment of error, and decline to address the remaining assignments of error because they are moot. Thus, we affirm the Summit County Court of Common Pleas' ruling on Ms. Hayward's motion for a JNOV, reverse the jury verdicts, and remand the matter for a new trial.

Judgment reversed in part,
affirmed in part,
and cause remanded.

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 equally to both parties.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

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

DOUGLAS G. LEAK, Attorney at Law, for Appellee.

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