

IN THE SUPREME COURT OF OHIO

SETH NILES CROMER, a Minor Child,
Deceased, et al.,

Plaintiffs-Appellees

vs.

**CHILDREN'S HOSPITAL MEDICAL
CENTER OF AKRON**

Defendant-Appellant

CASE NO: 12-2134

On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District,
Case No. CA- 25632

**MEMORANDUM OPPOSING JURISDICTION OF
APPELLEES, SETH NILES CROMER, MINOR CHILD, DECEASED, ET AL.**

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FILED

JAN 17 2013

CLERK OF COURT
SUPREME COURT OF OHIO

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II. THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION OR A MATTER OF GREAT PUBLIC OR GENERAL INTEREST

The Ohio Supreme Court “will grant a motion to certify **only** if there is a substantial constitutional question or if the case is of public or great general interest.” *Noble v. Colwell* (1989), 44 Ohio St. 3d 92, 94, 540 N.E.2d 1381, 1383 (emphasis added); Section 2(B)(2)(e), Article IV of the Ohio Constitution. The Supreme Court limits its discretionary review to novel issues because “[n]ovel questions of law or procedure appeal not only to the legal profession but also to this court's collective interest in jurisprudence.” *Noble, supra* at 94.

Cases of “public or great general interest” typically deal with weighty topics of statewide interest, such as public school funding, *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, matters of first impression where the Supreme Court is asked to define the common law, *Danziger v. Luse*, 103 Ohio St.3d 337, 2004-Ohio-5227, or cases which require a novel application of this Court’s Rules, *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847. The issues in this case are neither weighty, nor of broad interest. The Ninth District did not extend or modify existing law, but rather applied well-accepted principles of law to achieve a just result.

First, Children's Hospital Medical Center of Akron argues that medical malpractice juries should be required to evaluate what is foreseeable to a medical professional. Children's Hospital claims that the decision is contrary to longstanding tort principles. But the foreseeability analysis performed in the older cases cited by Children's Hospital has been completely incorporated into the modern requirement that a medical malpractice plaintiff put on expert evidence of the standard of care owed by a medical provider. In effect, the standards developed by this Court in medical malpractice cases replace a foreseeability inquiry by a lay jury with a requirement that the plaintiff put on expert testimony as to what is foreseeable to medical professionals.

Children's Hospital asks that a medical malpractice plaintiff be required to prove what is foreseeable to medical professionals through testimony regarding the standard of care, and also prove what would be foreseeable to a layman by insisting upon a foreseeability jury instruction. But the problem with mixing the two standards is illustrated by this case, where the trial court layered a lay foreseeability instruction atop medical malpractice standard of care instructions, and as a result, told the jury that they could not impose liability upon medical providers unless the medical providers foresaw that Seth Cromer was going to die from their inaction, and then failed to act. These flawed jury instructions changed inquiry into a quasi-intentional tort, because what medical provider would fail to act, knowing that the outcome would be the death of a patient?

The Ninth District correctly applied this Court's clear precedent in correcting the error. While Children's Hospital claims there is a conflict between the Ninth District's decision in this matter and the decisions of several other Districts, a close look at the cases cited by Children's Hospital reveals no conflict, as those cases were often resolved on other clearly established precedent, such as waiver, invited error, or harmless error. As a result, Children's Hospital's first Proposition of Law does not present a matter of general or state-wide interest.

Second, Children's Hospital argues that this case should be accepted for review because the Ninth District did not recite its standard of review in the body of the decision. But an examination of the opinion reveals that the proper analysis was done, so this Proposition also fails to set forth an important matter of public interest.

Finally, Children's Hospital argues that the Ninth District inappropriately failed to find an abuse of discretion in the trial court's decision to qualify an expert witness. Again, both the trial court and the Ninth District applied clear and predictable authority from this Court in applying Evid.R. 601. As such, no public interest would be served by consideration of Children's Hospital's

third Proposition of Law. As a result of the foregoing, this is not a case of great public or general interest.

III. STATEMENT OF CASE AND FACTS

Seth Cromer was an energetic five-year-old boy with an ear infection who became dehydrated. His parents took him to Children's Hospital Medical Center of Akron after he became listless and his skin felt clammy. Six hours later, his parents bathed his body a final time before he was rolled to the morgue.

Seth died of shock after being ignored, mixed up with other patients, given the wrong fluids, given too much medicine, and denied a timely breathing tube. Shock is a well-recognized condition that is treatable if the patient is quickly provided with appropriate fluids and cardiovascular support.

But the hospital physicians and nursing staff had no adequate explanations for why Seth sat in an exam room, unattended, for an hour before treatment; why several different patients' examination results were recorded in his medical records; why he was given fluids different from the fluids ordered by the doctors (which did not rehydrate Seth as intended); why Seth was not immediately intubated when test results revealed that he had slipped into "severe" acidosis; why Seth was given double the amount of a "high" dose of epinephrine without any recorded doctor's order; why the intensive care unit failed to place a breathing tube for another hour after his transfer to that department; and why, when the doctors finally called for the placement of a breathing tube, they allowed the first attempts to be done by a therapist with four months of experience (who knocked out one of Seth's teeth in the process) before a physician stepped in and performed the procedure, albeit too late.

The Cromer family elicited evidence that Seth should have been treated with IV fluids within a half-hour of his presentation at the hospital, that he should have received fluids with the appropriate osmolarity to rehydrate him, and that he should have been placed on a breathing tube at least two hours before the belated attempt to intubate him. The Cromers' expert found that Seth died of septic shock that was not appropriately and timely treated, leading to severe acidosis, then ultimately cardiac and respiratory failure.

The hospital first sought to blame Seth's death on a heart virus it could not identify, then later on a heart lesion that the hospital pathologist purportedly detected through a microscope in preparation for trial, despite the fact that the pathologist had been unable to detect such a lesion during the 8 ½ month period that he worked on producing a report after Seth's autopsy. Unmoved by the hospital's lack of answers, Seth's parents brought a medical malpractice action against Children's Hospital.

Prior to trial, Children's Hospital proposed jury instructions on the standard of care that its doctors and nurses should be held to. These proposed jury instructions asked the jury to evaluate whether the physicians used "ordinary care" – as opposed to the care a medical provider owes under the standard of care defined by expert testimony – and whether the doctors should have foreseen that injury was "likely" to occur to someone if they failed to act. The Cromer family objected in writing to those proposed instructions, and several times at trial, explaining that the proposed instructions were unsupported by evidence and altered the standard of care owed by the medical providers. The court delivered the disputed instructions, repeating at several points the concept that the plaintiff must prove that the medical providers should have foreseen that their failure to act would probably or likely result in someone's death. (Tr. 1408-

1409). What medical provider would fail to act knowing that death was a likely result of inaction? After being given this flawed instruction, the jury found no negligence.

On appeal, the Ninth District held that giving the instruction was reversible error, because under the facts of the *Cromer* case, "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...." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, — N.E.2d —, 2012-Ohio-5154, ¶27.

IV. LAW AND ARGUMENT

Appellant's 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

Appellant Children's Hospital's first argument is to claim that foreseeability is an important concept that should be applied in medical malpractice cases, which the Ninth District failed to do. Children's Hospital claims that foreseeability should be considered by juries in deciding whether a tortfeasor breached his or her duty, even in the medical malpractice context. In support, Children's Hospital cites a number of cases from Ohio's early jurisprudence, where the courts were struggling with the sometimes confusing application of foreseeability in the (1) the imposition of a duty, (2) defining the extent of that duty, and (3) the impact of foreseeability upon proximate cause. In so doing, Children's Hospital ignores the development of the law of medical malpractice in the years since, which clearly subsumed a foreseeability analysis into the requirement that an expert witness define the scope and extent of a medical provider's standard of care. When the modern authority is applied, it is clear that the Ninth District did nothing aberrant – it simply applied existing authority to the particular facts of this case.

Children's Hospital notes several early cases in matters of first impression where foreseeability was an important consideration regarding whether a duty should be imposed upon an alleged tortfeasor. At page 7 of its Memorandum, Children's Hospital cites *Lakeshore & M.S. Ry. Co. v. Murphy*, 50 Ohio St. 135, 33 N.E. 403 (1893), a case involving railroad warnings. Children's Hospital extracts two quotes from the case. The first quote concerns whether a rule requiring railroad warnings should be imposed upon the defendant given the foreseeability of harm. (Appellant's Memorandum, p. 7).

But the question of whether a duty should be imposed upon a medical provider treating a patient has been clearly answered by this Court. In *Berdyck v. Shinde*, 66 Ohio St. 3d 573, 579, 613 N.E.2d 1014, 1021 (1993), this Court flatly stated that "[t]he 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, 75 O.O.2d 184, 186, 346 N.E.2d 673, 676 (1976). Thus, as a matter of law, this Court has determined the mere relationship between physician and patient imposes a duty in a medical malpractice case. A medical malpractice case is not a turn-of-the-century matter of first impression, where the Courts must decide whether an actor owed any duty at all to an injured person. Instead, as the law developed, the courts have held as a matter of law that the mere relationship between a medical provider and a patient imposes a duty of care. So raising the question of whether a duty is owed from a medical provider to a patient provides no excuse for improperly injecting foreseeability into the jury instructions of a medical malpractice case.

Children's Hospital goes on to cite a second paragraph of the *Lakeshore* case, which introduces a second application of foreseeability – the use of foreseeability as a tool to define the

extent (as opposed to the existence) of a duty. (Appellant's Memorandum at p. 7). It is appropriate for the courts, when faced with the claimed breach of a duty which is not already well-recognized under the law, to seek the jury's help in defining the extent of that duty by including a foreseeability jury instruction. As described by David Owen, the tort commentator cited extensively by Children's Hospital on pages 9 and 10 of its Memorandum, foreseeability in this context is the "seamless, moral thread that helps define interpersonal obligations, personal wrongdoing, [and] the extent of responsibility therefore...." Owen, DG, *Figuring Foreseeability*, 44 Wake Forest L. Rev. 1277, 1284 (2009).

On that theme, Children's Hospital goes on to cite several more examples of courts using foreseeability as a tool to define the extent of a newly-imposed duty on pages 7 through 9 of its Memorandum. Children's Hospital quotes from *Thompson v. Ohio Fuel Gas Co.*, 9 Ohio St. 2d 116, 224 N.E.2d 131 (1967), where the Court wrestled with the extent of duty to be imposed upon natural gas suppliers in connection with the routing of their pipelines. Children's Hospital also quotes *Weaver v. Columbus, S. & H. Ry. Co.*, 76 Ohio St. 164, 81 N.E. 180 (1907), where the Court defined the extent of a railroad's duty to provide clear sightlines down railroad tracks at road crossings. Similarly, in *Di Gildo v. Caponi*, 18 Ohio St. 2d 125, 127, 247 N.E.2d 732, 734 (1969), the Court considered the extent of a social host's liability for parking cars on an incline. None of these cases are medical malpractice cases, where expert testimony defines the extent of a medical provider's duty.

Each of the above cases considered allegations of negligence where the extent of a duty needed definition by a jury. In such a case, a foreseeability jury instruction may be warranted. But just because foreseeability was used as a tool to define the extent of a newly-recognized duty in those early cases does not mean that the general concept of foreseeability should be recited to

a jury in every medical malpractice case. Under current authority, it is the job of experts to guide the jury on the extent of the standard of care. Asking the jury to speculate about the extent of a physician's duty with lay notions of general foreseeability confuses the operation of the appropriate standard. As such, the recent revision of Ohio Jury Instructions cautions trial court judges that "[i]t matters little how well the jurors comprehend abstract principles of general law. Justice is attained by the application of specific law to specific facts." O.J.I. §101.75.

So the question becomes whether, in a modern medical malpractice case, a jury must be instructed on the abstract principals of foreseeability in order to render a just verdict. The answer to that question is "no," because despite Children's Hospital's efforts throughout its Memorandum to color medical malpractice as just another flavor of simple negligence, this Court has specifically adapted concepts of simple negligence to the particular challenges presented in a medical malpractice case.

Medical malpractice claims are different than simple negligence claims. Early courts struggled with how to analyze the claims, sometimes finding that the terms of the physician-patient relationship was controlled by contract, rather than tort principles. *Bowers v. Santee*, 99 Ohio St. 361, 364, 124 N.E. 238, 239 (1919) (remarking "[t]he relation of surgeon and patient grows out of a contract of employment, express or implied, entered into between them.") *overruled by Oliver v. Kaiser Cmty. Health Found.*, 5 Ohio St. 3d 111, 111, 449 N.E.2d 438, 439 (1983). Recognizing that medical malpractice claims arise from a consensual touching gone awry, some malpractice theories centered on the tort of battery. *Lacey v. Laird*, 166 Ohio St. 12, 22, 139 N.E.2d 25, 32 (1956).

But as the law of medical malpractice developed, Ohio adopted a unified approach to testing the liability of physicians and other medical providers. In a line of cases starting with

Ault v. Hall, 119 Ohio St. 422, 437, 164 N.E. 518, 522 (1928), through *Bruni, supra*, and culminating in *Berdyck, supra*, this Court recognized that lay juries would struggle understanding the norms and knowledge held by medical providers, so this Court dispensed with the practice of asking a jury to determine the extent of a physician's duty. Instead, this Court adopted a rule that requires expert testimony to establish the extent of a physician's duty. "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." *Berdyck*, 66 Ohio St. 3d at 578, citing *Bruni*, 46 Ohio St.2d at 130.

Thus, unlike a simple negligence case, a medical malpractice plaintiff has the responsibility to define the extent of a medical provider's duty by putting on evidence, from an expert, as to the limits of that duty. Therefore, there is no need for a foreseeability inquiry in medical malpractice jury instructions – the question of the extent of duty is already answered by expert testimony. This is why no foreseeability instruction is found in Chapter 417 of the Ohio Jury Instructions, which provides model instructions for medical malpractice. And while O.J.I. §417.01 refers the reader out to other sections of the publication for some instructions – such as to Chapter 405 for proximate cause instructions and Chapter 315 for damages instructions – it does not reference the reader to the general negligence Chapter 401, nor to the foreseeability test found in O.J.I. §401.07. In the medical malpractice context, concerns over foreseeability are already addressed by the requirement that the plaintiff defined the standard of care with expert testimony.

The harmful effect of instructing a medical malpractice jury on foreseeability as an element of a medical provider's standard of care is well-illustrated by this case. O.J.I. defines the physician's standard of care as "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." O.J.I. §417.01. That standard is proven by expert testimony. It is not proven by a jury, with no medical education, determining what particular things would or would not be known or foreseeable by a physician.

In this case, the trial court modified the standard of care instruction with a foreseeability inquiry, telling the jury that in order to hold the medical providers liable, the jury had to find that the medical providers "anticipated that death was likely to result to someone" yet failed to act. (Tr. Vol.XI, p. 1409). How can that standard ever be met, except through demonstrating that the medical provider maliciously ignored someone to death? The standard announce to the jury by the trial court essentially requires a showing of intentional conduct, and eliminates liability for those who are simply unskilled or forgetful.

The Ninth District correctly determined that the foreseeability instruction was inappropriate because "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." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, --- N.E.2d ----, 2012-Ohio-5154, ¶24. The effect of asking a lay jury to determine what is foreseeable to a medical provider inappropriately insulates the medical provider from liability for falling below the norms of his or her profession. *Needham v. Gaylor*, 2nd Dist. No. 14834, 1996 WL 531596, *3 (Sept. 20, 1996).

There is no error on behalf of the Ninth District for this Court to correct. But more importantly, there is no law that needs clarification. This Court has already spoken many times upon the existence and extent of the duties of medical providers in cases such as *Berdyck*, *Bruni* and *Ault*, *supra*. While Children's Hospital cites several cases that it claims are in conflict with

Cromer, Children's Hospital presents few specifics of these cases. When one examines the cases, they are easily distinguishable, and are also grounded in well-settled law. In *Cox v. MetroHealth Med. Ctr. Bd. of Trs.*, 971 N.E.2d 1026, 2012-Ohio-2383, the court gave a foreseeability instruction to allow the jury to define the extent of the duty of a nursing assistant, a person who is not as educated in medicine as the doctors and nurses in *Cromer*. *Id.* at ¶64. In *Peffer v. Cleveland Clinic Found.*, 8th Dist. No. 94356, 2011-Ohio-450, the question before the court was a foreseeability instruction that modified proximate cause, not standard of care. *Id.* at ¶44. In *Ratliff v. Mikol*, 8th Dist. No. 94930, 2011-Ohio-2147, the plaintiff invited any error by injecting issues of foreseeability into the jury instructions by proposing instructions which incorporated some concepts of foreseeability. *Id.* at ¶15. The Ninth District distinguished each of these cases in response to Children's Hospital's Motion to Certify a Conflict. (December 19, 2012, Journal Entry).

As for the remaining cases cited by Children's Hospital, they fare no better. In *Clements v. Lima Mem'l Hosp.*, 3rd Dist. No. 1-09-24, 2010-Ohio-602, ¶7, the court found that an isolated reference to foreseeability was not sufficient to demonstrate prejudicial error, while in *Cromer* foreseeability was discussed for two pages of the transcript. (Tr. 1408-1409). In *Joiner v. Simon*, 1st Dist. No. C-050718, 2007-Ohio-425, ¶62, the plaintiff failed to object to the challenged instruction, while here, the Cromer family objected repeatedly. And in *Miller v. Defiance Reg'l Med. Ctr.*, 6th Dist. No. L-06-1111, 2007-Ohio-7101, ¶52, the plaintiff failed to set forth any reason in the trial court why the challenged instruction should have been excluded, while here, the Cromer family objected in detail, both on paper and at the trial.

We do not have the several Districts applying the rules in two different ways. We have the several Districts applying the same rules to different facts and circumstances in complex

cases. The Ninth District did not pronounce that a foreseeability instruction may never be given in any malpractice case, and if *Cox*, *Peffer*, *Ratliff*, *Clements*, *Joiner*, or *Miller* had been heard by the Ninth District, those cases may well have turned out the same. This case would not serve as a vehicle to clarify or standardize any rule of law, thus it should not be accepted for review.

Appellant's 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

A court of appeals entrusted with determining whether instructions to the jury were improper is to consider the jury charge as a whole, and determine whether the charge misled the jury in a manner affecting the complaining party's substantial rights. *Kokitka v. Ford Motor Company*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995). This standard of review was set forth by both parties in their briefs before the Ninth District, but the Ninth District did not expressly relate the standard at the outset of its analysis. Generally, a court of appeals will not be reversed for failure to recite the appropriate standard of review. *See Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St. 3d 480, 483, 727 N.E.2d 1265, 1269 (2000).

Despite the fact that the Ninth District did not recite the *Kokitka* case, it clearly performed the analysis required by *Kokitka*. The Ninth District devoted four paragraphs of its decision explaining why the trial court's incorrect statement of the law imposed an impermissible burden on the plaintiff and was not harmless in the context of the jury's findings and the facts of the case. *Cromer*, 2012-Ohio-5154, at ¶24-27. Accordingly, Children's Hospital's argument in this regard is misplaced.

Appellant's 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.

As a threshold matter, this Court has published proposed rule changes for Civ.R. 10 and Evid.R. 601 which, if enacted on July 1, 2013, would completely supplant the analysis done by the Court of Appeals and trial court on this issue. Therefore, if this Proposition of Law was accepted, it would likely be inapplicable by the time this case was resolved.

But more importantly, the Ninth District correctly analyzed this issue and in so doing, applied clear precedent in a predictable way. Dr. Margaret Parker is a pediatric intensive care specialist, who due to the nature of the specialty, spent one week per month "on" duty, spending 24 hours per day at the hospital engaging in intensive patient care, balanced against three months "off" duty, where she worked approximate 40 hour weeks, engaging in administrative and educational functions, with some limited patient care. If one simply discounted all of Dr. Parker's "off" duty time as being unrelated to patient care, then compared the number of weeks that Dr. Parker was "on" duty vs. "off" duty, she would not meet the requirements of Evid.R. 601(D). But the trial court went further, and examined the number of hours of professional time in Dr. Parker's on-duty weeks versus the number of hours in her off-duty weeks. The lower courts further found that her administrative time was adjunctive to patient care. As such, the trial court did not abuse its discretion in allowing Dr. Parker to testify, nor did the Ninth District err in refusing to reverse that determination.

This result is well-supported by Ohio Supreme Court precedent. In *McCrorry v. State*, 67 Ohio St.2d 99, 105, 423 N.E.2d 156 (1981), this Court held that a testifying doctor who spent eighty-five percent of his time as the director of a clinical research department for a pharmaceutical company was competent to testify as an expert. The Court considered the "active clinical practice" requirement, and found that it included "not only the treatment of patients by

physicians, but “also includes the physician-specialist whose work is so related or adjunctive to patient care as to be necessarily included in that definition * * *.” *Id.* at 104.

In *Celmer v. Rodgers*, 114 Ohio St. 3d 221, 2007-Ohio-3697, 871 N.E.2d 557, at ¶21, this Court rejected a “narrow” interpretation to the “active clinical practice” of medicine requirement, and found that it “includes more than those physicians who regularly treat patients directly.” This Court explained that the thrust of Evid.R. 601 was to bar “testimony by the physician who earns his living or spends much of his time testifying against his fellows as a professional witness.” Dr. Parker is not a professional witness. She testified that she only does three or four medical-legal case reviews per year.

Dr. Parker practices in the same way other members of her specialty practices, following gravely ill patients for a week at a time, with comparatively light duties between those weeks. The trial court and Ninth District correctly detected that a rote application of the rule, based solely upon number of weeks Dr. Park spend in the ICU, would not only unfairly disqualify her, but probably also disqualify all of the members of her specialty. Accordingly, there is nothing controversial in the Ninth District's application of *McCrary* or *Celmer* that requires clarification by this Court. These cases provide appropriate guidance in the application of the standards found in Evid.R. 601(D). As a result, this proposition of law should not be accepted for review.

V. CONCLUSION

Based upon the foregoing law and argument, the matter is not one of general or widespread interest. As a result, this Court should DECLINE to exercise jurisdiction in this matter.

Respectfully submitted,

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VI. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ordinary U.S. Mail this 16th day of January, 2013 to: **Gregory R. Rossi and Rocco Potenza**, Attorneys for Appellant Children's Hospital Medical Center of Akron, HANNA CAMPBELL & POWELL, LLP, 3737 Embassy Parkway, Suite 100, P.O. Box 5521, Akron, Ohio 44334.

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