

**IN THE SUPREME COURT OF OHIO**

**THERESA HAYWARD**

Plaintiff-Appellee

vs.

**SUMMA HEALTH SYSTEM, et al.**

Defendants-Appellants

CASE NO: 13-0021

On Appeal from the  
Summit County Court of Appeals,  
Ninth Appellate District,  
Case No. CA-25938

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**MEMORANDUM OPPOSING JURISDICTION OF  
APPELLEE, THERESA HAYWARD**

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

This case involves no constitutional issue. Nor is this a case of public or great general interest. This case was decided upon its facts and created no novel rules of law which this Court must consider or clarify. The issue in this medical malpractice case is whether, under the particular factual circumstance of this case, the trial court's submission of a clearly erroneous remote cause jury instruction to the jury was prejudicial error.

In strident terms, the Appellants, Dr. Cullado and Summa Health System, argue several grounds for this Court to exercise discretionary review. Dr. Cullado and Summa accuse the Ninth District of issuing a "result-oriented" decision by "conveniently ignor[ing]" the law and facts. (Memorandum in Support of Jurisdiction, at pp. 1, 3.) Dr. Cullado and Summa urge jurisdiction "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." (Memorandum in Support of Jurisdiction, at p. 1.) Dr. Cullado and Summa proclaim "profound consequences" for Ohio law, and accuse the Ninth District of eliminating the concept of "prejudicial error," creating inter and intra-district conflicts, and eliminating the import of Civ.R. 51. (Memorandum in Support of Jurisdiction, at pp. 9-15.) But none of these colorful accusations bear scrutiny.

What occurred in the Ninth District was a careful reading of the trial court record, coupled with the consideration of a clearly erroneous jury instruction, to which the Appellee, Theresa Hayward, appropriately objected. With the error properly preserved, and upon the facts of this case, and this case alone, the Ninth District found prejudicial error. 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*, 44 Ohio St. 3d 92, 94, 540 N.E.2d

1381 (1989) (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.

In this case, the overwhelming evidence was that Theresa Hayward was injured by a well-described injury to her femoral nerve from the inappropriate placement of retractors during surgery. This is a surgical error first documented in literature in 1896, and even the Appellants admitted that retractor placement was the cause of Ms. Hayward's injury. Remote cause, on the other hand, is limited to those situations where a person is injured in a truly "unusual occurrence that cannot fairly be anticipated or foreseen." *Jeanne v. Hawkes Hosp. of Mt. Carmel* 74 Ohio App. 3d 246, 252, 598 N.E.2d 1174 (1991). Thus, under the particular facts of this case, the Ninth District determined that a remote cause jury instruction should not have been given and that the jury was misled by it. There is nothing controversial about this application of the law.

This case does not present the Court with novel issues or an opportunity to clarify misunderstood law. For the reasons detailed below, this Court should decline jurisdiction over this matter.

### **III. STATEMENT OF CASE AND FACTS**

Theresa Hayward walked into Akron City Hospital for abdominal surgery to treat chronic diverticulitis. Several weeks later, she had to be rolled out in a wheelchair because the surgery rendered her left leg mostly useless. Theresa was injured when a retractor used in the surgery compressed her femoral nerve. This is a surgical error that abdominal surgeons are warned about in their first day of training. The cause of Theresa's injury – a retractor injury - was admitted by

Appellants. There was no evidence to support the notion of any remote cause for Theresa's injury.

On October 10, 2007, Dr. Michael Cullado, an abdominal surgeon, and Dr. Steven A. Wanek, a fifth year surgical resident at the time, performed Theresa's surgery. The procedure was performed with the use of a Bookwalter retractor, which is a device designed to hold back the skin and abdominal wall so the surgeon can operate on the organs below. Following the surgery, Ms. Hayward developed weakness and loss of sensation in her left leg.

Dr. Robert Lada, a neurologist, was asked by Dr. Cullado and Dr. Wanek to evaluate Theresa's leg symptoms. A nerve conduction study of the femoral nerve indicated that she suffered a prominent left femoral neuropathy – or damage to the femoral nerve. Dr. Lada ultimately concluded that the injury occurred as the result of a prolonged compression of the femoral nerve during surgery – likely secondary to a retractor injury. He specifically ruled out certain alternative causes of the condition with a differential diagnosis.

While Theresa was in the hospital, Dr. Wanek and Dr. Cullado agreed that Theresa's injury resulted from the retractor. The discharge summary, which was dictated by Dr. Wanek and signed by Dr. Cullado, concludes that Ms. Hayward “most probably suffered a femoral neuropathy secondary to retractor injury.” At trial, 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.” (Tr., Vol. I, pp. 53-54.) Theresa’s expert witness, Dr. William Irvin, also concluded that “the cause of her injury came from compression of the femoral nerve with a lateral retractor blade[.]” that was improperly placed. (Tr., Vol. II, p. 127.) There is no evidence

that Ms. Hayward's injury resulted from anything other than the inappropriate placement of the retractor.

Furthermore, the only evidence is that this type of injury was eminently foreseeable to the physicians involved in Theresa's treatment. As the femoral nerve passes through the pelvis, it runs through the psoas muscle. If the blades of the Bookwalter retractor are not carefully placed, they can go deep enough into the pelvis to dig into the psoas muscle and compress the femoral nerve against the ileum bone, causing nerve injury. Dr. Cullado and Dr. Wanek both agreed that if a Bookwalter retractor is incorrectly placed, it may cause injury to the femoral nerve. In fact, Dr. Cullado testified that the "risks of directly compressing the psoas muscle . . . [have] been well known for a long time. It's not a mystery. And it's something we train our residents about every day." (Tr., Vol. III, p. 284.) Even Dr. Cullado and Summa's expert witness, Dr. Peter Muscarella, confirmed this type of injury is foreseeable. He testified that physicians who use retractors during surgery "are all aware of the possibility of these things happening" and therefore "take measures to prevent the nerve injuries from occurring due to the retractors." (Tr., Vol. IV, p. 347.)

Due to this known risk, the standard of care when placing a Bookwalter retractor is to use one's hand to feel for space between the bottom of the blade and the top of the psoas muscle. If the retractor is appropriately placed (leaving space between the retractor blade and the psoas muscle), it is absolutely impossible for the blade to compress the psoas muscle. Placing the blade of the retractor on the femoral nerve is negligence and falls outside of the standard of care. There is no dispute about this. (Tr., Vol. II, p. 143; Tr., Vol. IV, pp. 367-368, 370.)

On March 31, 2009, Theresa filed her medical malpractice negligence complaint against Dr. Cullado, Dr. Wanek, their employer, Summa Health System, and additional parties. Theresa

alleged that these parties negligently provided medical care to her, that her injuries were the proximate result of Dr. Cullado and Dr. Wanek's negligence, and that she suffered damages as a result. Some parties, including Dr. Wanek in his individual capacity, were subsequently dismissed, and trial commenced.

Dr. Cullado and Summa submitted a proposed jury instruction on remote cause. Prior to the jury retiring to consider its verdict, counsel for Ms. Hayward objected to the submission of a remote cause jury instruction due to the overwhelming evidence establishing that the injury was foreseeable and the lack of any alternative theory of causation. (Tr., Vol. III, p. 305-306.) The trial court, however, overruled the objection and submitted the erroneous instruction to the jury anyway. The jury ultimately found no negligence on the part of Dr. Cullado or Summa, answering vicariously for the actions of Dr. Wanek. The jury also went on to conclude no causation, even though the jury interrogatories clearly indicated that the jury should only complete the causation interrogatory if it found negligence. The trial court entered judgment based upon the verdict.

Theresa appealed to the Ninth District, arguing, among other things, the trial court's decision to submit the erroneous remote cause instruction to the jury constituted prejudicial error. The Ninth District agreed and overruled the trial court's decision, concluding that the remote cause jury instruction was prejudicial because it was "so clearly not warranted" under the facts of this case and "there is evidence that the instructions did confuse the jury . . . ." *Hayward v. Summa Hosp. System*, 9<sup>th</sup> Dist. No. 25938, 2012-Ohio-5396, ¶ 17 (Nov. 21, 2012). After some post-decision motions, Appellants now request this Court to exercise jurisdiction over this matter.

#### IV. LAW AND ARGUMENT

**Appellants' 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.**

As a threshold matter, none of Dr. Cullado and Summa's propositions are in the proper form. A memorandum in support of jurisdiction must set forth an appellant's propositions of law. S.Ct.Prac.R. 7.02(C)(1). A proposition of law must be stated so that, if adopted, it could serve as syllabus law if the appellant prevails. S.Ct.Prac.R. 16.02(B)(4); *Drake v. Bucher*, 5 Ohio St.2d 37, 39, (1966). Dr. Cullado and Summa's propositions of law complain about perceived errors in this particular case. If Appellants' propositions of law were adopted as syllabus law, they would not serve as guidance to other courts in the State. Jurisdiction should be refused for this reason alone.

As to the suggestion that the Ninth District "redefined" the prejudicial error standard, the contention is unsupportable. Dr. Cullado and Summa claim that a proximate cause jury instruction is automatically harmless if the jury concludes no negligence occurred. Dr. Cullado and Summa further claim that this is a well-recognized concept that the Ninth District ignored. In so doing, Dr. Cullado and Summa not only mischaracterize the law generally but also the legal analysis and reasoning contained in *Hayward* and the Tenth District's decision in *Coulter v. Stutzman*, 10<sup>th</sup> Dist. No. 07AP1081, 2008-Ohio-4184, 2008 WL 3856324.

When considering whether an erroneous jury instruction is harmless or prejudicial, the critical inquiry is whether the jury charge as whole "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, 560 N.E.2d 165 (1990). See also *Kokitka v. Ford Motor*

*Company*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995). Whether an instruction was harmless or prejudicial to a party's rights necessarily requires consideration of the claims at issue and the evidence presented at trial.

Ohio law is clear that measuring the effect of a jury instruction is done on a case-by-case basis, under the particular facts of each case. As two examples, in *Becker*, 53 Ohio St.3d 202 at 208, this Court concluded that a jury instruction was erroneous, however, it was harmless because "[t]he conduct of the pharmacist was not at issue in this trial." Making this determination required this Court to consider the particular facts of the case. In *Bales v. Kurt*, 6th Dist. No. L-03-1335, L-04-1005, 2004-Ohio-7073, 2004 WL 2983619, ¶¶ 41-42, the court determined that the erroneous jury instruction was prejudicial because, in light of the claims and evidence, the parties substantial rights were affected. Again, the question turned on a factual determination.

In support of their position that an error in a causation instruction is always irrelevant if a jury finds no negligence, Dr. Cullado and Summa primarily rely upon the Tenth District's decision in *Coulter and Peffer v. Cleveland Clinic Foundation*, 8<sup>th</sup> Dist. No. 94356, 2011-Ohio-450. Contrary to Dr. Cullado and Summa's argument, though, these cases do **not** stand for the proposition that an erroneous proximate causation instruction is **always** harmless error if the jury finds that the defendants were not negligent – regardless of the legal claims asserted and evidence presented at trial. The concrete rule espoused by Dr. Cullado and Summa was never adopted by these courts.

While it is true that both *Hayward* and *Coulter* dealt with circumstances where a jury went on to consider a remote cause instruction after finding no negligence, the cases applied different standards of review, which drove the consideration of the particular facts of each case.

In *Coulter*, the plaintiff failed to object to the instruction, and in *Hayward*, the plaintiff did object to the instruction at pages 304-306 of Vol. III of the trial court transcript. *Compare Hayward, supra*, at ¶ 14 with *Coulter, supra*, at ¶¶ 9-10. Thus, the Tenth District in *Coulter* performed a civil plain error review, while the Ninth District in *Hayward* did not. Because the Ninth District and the *Coulter* court analyzed the cases under different standards of review, it is not surprising that, under the factual circumstances of each case, the answer to the two different legal questions was different.

And the *Coulter* court acknowledged that even under a more stringent “plain error” review of the case, reversible error could exist under different facts. The court specifically commented that under the particular circumstances at issue, it “perceive[d] no exceptional **circumstances** that require the application of the plain error doctrine to prevent manifest miscarriage of justice . . . .” *Coulter, supra*, at ¶ 11 (emphasis added).

In *Peffer*, the court considered a proximate cause jury instruction that inappropriately incorporated concepts of foreseeability. Under the specific circumstances presented in that case, the court found that the erroneous causation instruction was harmless. But the *Peffer* court did not make that determination by applying a blanket rule of law requiring an automatic conclusion but, rather, by considering the particular facts at issue in light of the law, just as the Ninth District has done in this case. After considering the evidence, including expert testimony and diagnostic findings, the *Peffer* court determined “[t]his case of medical diagnosis of a rare disease, which did not present itself in the classical manner, warranted such an instruction” *Peffer*, 2011-Ohio-450 at ¶¶ 55, 58 (emphasis added). After considering the instruction as a whole in light of the facts of this case, the *Peffer* court went on to find that although the foreseeability instruction was misplaced, it was harmless error. *Id.* at ¶¶ 57, 58. Had the court

determined that the instruction was inappropriate under the circumstances and that the jury was likely confused by the erroneous instruction, just as the Ninth District determined here, the outcome in *Peffer* would have been much different.

The other cases cited by Dr. Cullado and Summa on this point fair no better. In *Seeley v. Rahe*, 16 Ohio St.3d 25, 475 N.E.2d 1271 (1985), the introduction of an erroneous jury instruction was not even at issue. In *Sech v. Rogers*, 6 Ohio St.3d 462, 453 N.E.2d 705 (1983), this Court applied the same analytical framework as the Ninth District did in this case – identifying whether the contested instructions were prejudicial in light of the evidence submitted at trial. And in *Schultz v. Duffy*, 8<sup>th</sup> Dist. No. 93215, 2010-Ohio-1750, the court considered a failure to object at trial, which, again, is not at issue in *Hayward*.

There is no identified rule of law that an error in a causation instruction is irrelevant when a jury finds no negligence. Thus, a determination by the Ninth District that an erroneous remote cause instruction in this case was prejudicial is not in conflict with any existing rule of law. It is instead the proper application of the law – looking at the particular facts of the case and the instructions as a whole to determine the prejudicial effect of an erroneous jury instruction.

In an effort to summon support for their contention, Dr. Cullado and Summa claim that “[i]f 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.” (Memorandum in Support of Jurisdiction, at p. 11). But this is not true – the Ninth District invoked no "automatic" rule. Dr. Cullado and Summa claim that the Ninth District adopted the converse of this rule that Appellants have cut from whole cloth. As detailed above, the rule advanced by Dr. Cullado and Summa does not exist, and the Ninth District did not announce a rule in conflict with it. The prejudicial error standard requires

a case-by-case determination in light of the specific issues and facts presented at trial. There is no “automatic” finding of prejudice under the prejudicial error standard as it has been applied historically, or by *Hayward* or *Coulter*. Rather, it is Dr. Cullado and Summa that would have this Court turn the standard on its head and require an automatic finding of harmless error in causation instructions – regardless of the factual circumstances – where the jury concludes no negligence. The law is not so rigid.

The Ninth District applied the law in light of the facts, found that an appropriate and timely objection to the remote instruction was made, determined that the instruction was “so clearly not warranted” by the “overwhelming” and “substantial” evidence, and further concluded that there was evidence that the jury was confused. *Hayward, supra*, at ¶ 17. While the factual circumstances of *Hayward* can be distinguished from the decisions cited by Dr. Cullado and Summa, *Hayward* is congruent with well-established law. Therefore, there is no basis for the jurisdiction of this Court.

**Appellants' 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.**

Dr. Cullado and Summa next claim that Theresa objected to the remote cause jury instruction at an inappropriate time, and because the Ninth District did not credit Appellants' argument in this regard, the Ninth District has endorsed a violation of Civil Rule 51. (Memorandum in Support of Jurisdiction at pp. 12-13.) But *Hayward* does not disturb the operation of Civ.R. 51 in any way. Civ.R. 51 provides that "a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. . .

. " Civ.R. 51 does not specify *when* this objection must be made, just that it be made before the jury retires. Here, the trial court provided the parties with a copy of the jury instructions it was going to deliver, Theresa objected, stating specifically why the remote cause instruction should not be given, and Theresa was overruled. The trial court then delivered the contested remote cause instruction. Civ.R. 51 was entirely complied with.

Dr. Cullado and Summa, however, advocate for a reading of Civ.R. 51 that requires an objection *after* the instructions are read to the jury. That reading of Civ.R. 51 is not supported by the text of the rule or by interpretive case law. This Court has repeatedly held that a party complies with Civ.R. 51 by advocating for the correct jury instruction, regardless of when that occurs. *State v. Wolons*, 44 Ohio St. 3d 64, 67, 541 N.E.2d 443 (1989); *Presley v. Norwood*, 36 Ohio St.2d 29, 33, 303 N.E.2d 81 (1973); *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 61, 567 N.E.2d 1291 (1991). The Ninth District correctly applied the clear precedent of this Court.

In an effort to attract this Court's attention, Dr. Cullado and Summa argue that discretionary review is necessary to resolve a perceived intra-district conflict between *Hayward* and *Van Scyoc v. Huba*, 9<sup>th</sup> Dist. No. 22637, 2005-Ohio-6322, 2005 WL 3193843. But it is not this Court's role to resolve intra-district conflicts. Section 3(B)(4), Article IV of the Ohio Constitution only confers jurisdiction upon this Court to resolve conflicts between districts. Intra-district conflicts are left to the district to resolve. *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 896 N.E.2d 672, 2008-Ohio-4914, ¶ 7. Here, Dr. Cullado and Summa attempted that avenue of review in their Motion for En Banc Review, arguing to the Ninth District that a conflict existed between *Hayward* and *Van Scyoc*, but this effort was unsuccessful.

While Appellee still struggles to harmonize the Ninth District's precedent concerning objections to jury instructions, the Ninth District appears to have resolved any perceived conflict.

Judge Whitmore wrote the *Van Scyoc* opinion, but also joined the unanimous opinion in *Hayward*. *Hayward* is well grounded in this Court's prior authority in *Presley*, *Wollons*, and *Krischbaum*. While the *Hayward* panel may not have expressly distinguished *Van Scyoc* in the text of the *Hayward* opinion, that does not render this a matter of public or great general interest.

Even if one applied the standards applicable to **inter**-district conflicts to this asserted **intra**-district conflict, there is no ground for review. In order to certify an inter-district conflict, two courts must make conflicting pronouncements of law upon the same question. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596, 613 N.E.2d 1032 (1993). Here, the results of *Van Scyoc* and *Hayward* were different, but there is no pronouncement of law that differs between the two opinions. Thus, even if one treated this as an inter-district conflict, there would be no grounds for this Court to resolve it.

The *Hayward* Court applied Civ.R. 51 the same way that this Court did in *Presley*, *Wollons*, and *Krischbaum*: Where a party specifically advises the trial court on the record of the correct jury instruction to give and the trial court gives the wrong instruction, any error is preserved. Thus the warning bell sounded by Dr. Cullado and Summa – that *Hayward* has “grave ramifications” for Ohio because it effectively “eliminate[s]” the requirements of Civ.R. 51 – rings hollow. (Memorandum in Support of Jurisdiction at pp. 12-13.)

**Appellants' 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.**

Dr. Cullado and Summa's final argument is that the Ninth District was incorrect in finding that a remote cause instruction was error and that the error was prejudicial. (Memorandum in Support of Jurisdiction, at p. 14.) In making this argument, Dr. Cullado and

Summa ask this Court to serve as a court of errors and review the factual bases underlying the Ninth District's application of law. This is not an appropriate basis for Supreme Court jurisdiction.

Here, Dr. Cullado and Summa ask the Court to use its resources to review the factual record and the Ninth District's legal analysis "to correct the Ninth District's misapplication of the remote cause jury instruction." (Memorandum in Support of Jurisdiction, at p. 15.) Even indulging this request to argue about the facts of the case, it is clear that Dr. Cullado and Summa's argument has no merit. Dr. Cullado and Summa ask this Court to accept, as a matter of law, that nerve injuries from abdominal surgery are an unusual occurrence that cannot be fairly anticipated or foreseeable by a surgeon. (Memorandum in Support of Jurisdiction, at p. 14.) Dr. Cullado and Summa go on to argue, again as a matter of law, that "[n]o ordinary prudent physician should have reasonably anticipated or foreseen that Ms. Hayward would suffer a nerve injury." (Memorandum in Support of Jurisdiction, at p. 14.)

But the extent to which a surgeon can identify and guard against a cause of injury is not a matter of law. Instead, it is an issue that is resolved by expert witnesses reviewing facts of the case. A physician's standard of care to foresee and guard against surgical injuries is defined by the expert testimony of other physicians engaged in the same sort of care. "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 v. Shinde*, 66 Ohio St. 3d 573, 579, 613 N.E.2d 1014, 1021 (1993), citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130, 75 O.O.2d 184, 186, 346 N.E.2d 673, 676 (1976).

Thus, the entire premise of Dr. Cullado and Summa's argument is flawed. To accept Dr. Cullado and Summa's assertion that, as a matter of law, nerve injuries are unforeseeable (and therefore must be the result of a remote cause) is to ignore this Court's established precedent that the standard of care for a physician in any particular case is defined by expert witnesses who review the facts of the case and express the standard of care common to physicians confronted with those facts.

Here, many physicians reviewed the facts of Ms. Hayward's case, and they uniformly concluded that Ms. Hayward was injured by a well-recognized and well-described surgical error - compression of the femoral nerve by inappropriate retractor placement during abdominal surgery. This is a surgical error that has been documented since the 1890's. Dr. Wanek admitted that the risk of injury to the femoral nerve from abdominal retractors was taught from "day one" of his training. (Tr., Vol. I, p. 48). Dr. Cullado admitted that he knew at the time of surgery that a femoral nerve injury could occur if the retractor blades were not properly placed. Even Appellants' expert, Dr. Muscarella, confirmed that it was foreseeable that inappropriate retractor placement would cause femoral injury.

Thus under the facts of this case, a remote cause instruction, which incorporates the concept of foreseeable causes of injury, was not warranted, and the Ninth District correctly applied the law to the facts. Remote cause is limited to those situations where a person is injured in a truly "unusual occurrence that cannot fairly be anticipated or foreseen." *Jeanne*, 74 Ohio App. 3d 246 at 252. There may be situations where a remote cause instruction is appropriate in a medical malpractice case, such as where a hospital fire interrupts surgery, or another unanticipated disaster occurs. But there were no facts to support a remote cause instruction in this case, and its inclusion caused prejudicial confusion.

The Ninth District did not make a pronouncement of law that a remote cause instruction should never be given in a medical malpractice case. All the Ninth District did was review the trial court record in detail, determine that there were no grounds supporting such an instruction in this particular case, and find that the instruction was “so clearly not warranted” by the “overwhelming” and “substantial” evidence. *Hayward* at ¶ 17. Coupled with evidence that the jury was confused by the instruction, the Ninth District found prejudicial error and reversed. This was not a determination that applied the law in a novel way, or set a precedent outside the particular facts of this case. Accordingly, there are no grounds for review by this Court.

## 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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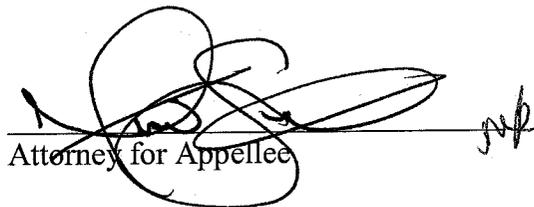
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by regular, U.S. Mail this 4th day  
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