

ORIGINAL

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

**BRIEF IN OPPOSITION TO RECONSIDERATION OF DENIAL OF JURISDICTION
OF PROPOSITION OF LAW II
OF APPELLEE, THERESA HAYWARD**

Counsel for Appellee, Theresa Hayward

Jack Morrison, Jr. (#0014939)
Thomas R. Houlihan (#0070067) *
Vicki L. DeSantis (#0075716)
Michael Schmeltzer (#0080340)
AMER CUNNINGHAM CO., L.P.A.
159 S. Main Street, Suite 1100
Akron, Ohio 44308-1322
(PH) 330-762-2411
(FAX) 330-762-9918

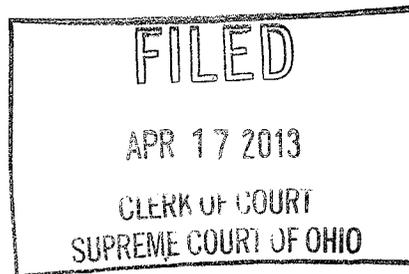
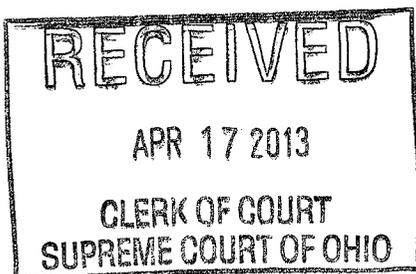
Houlihan@amer-law.com

*denotes counsel of record

Counsel for Appellees, Dr. Micheal Cullado
and Summa Health System:

Douglas G. Leak (#0045554)
ROETZEL & ANDRESS, LPA
1375 E. Ninth Street
One Cleveland Center, Ninth Floor
Cleveland, Ohio 44114
Phone: (216) 623-0150
Fax: (216) 623-0134
dleak@ralaw.com

Michael J. Hudak (#0037779)
ROETZEL & ANDRESS, LPA
222 S. Main Street
Akron, Ohio 44308
Phone: (330) 849-6704
Fax: (330) 376-4577
mhudak@ralaw.com



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.

A. Appellants' Proposition of Law 2 is not in the proper form.

As a threshold matter, this proposition of law is not in the proper form. 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). As with Proposition of Law No. 1, which was accepted by this Court, Proposition of Law No.2 merely complains of perceived errors in this particular case. It does not set forth a rule that could be accepted as syllabus law. If this proposition of law was adopted as syllabus law, it would not serve as guidance to other courts in the State. Jurisdiction should be refused for this reason alone.

B. Appellants' Motion for Reconsideration is merely a reargument of previously raised issues.

Despite acknowledging that a Motion for Reconsideration should not be a mere recitation of previously raised arguments, Appellants' Motion for Reconsideration is exactly that. A motion for reconsideration should not be a reargument of the case, and this Court will not grant relief on matters previously briefed. *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St. 3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶9. There is not a single case, rule, or principle cited in the Motion for Reconsideration that was not raised in Appellants' Memorandum in Support of Jurisdiction. As such, reconsideration should be denied on this basis as well.

C. The Ninth District's decision is consistent with this Court's prior authority.

Even if this Court does reach the merits of Appellants' Proposition of Law No. 2, Appellants' arguments are not persuasive. In this case, Theresa Hayward specifically objected to

the remote cause instruction that the trial court proposed, stating in detail on the record why it was inappropriate. Appellants Dr. Cullado and Summa Health System claim that the objection was inappropriate because it was placed on the record before, rather than after, the instruction was read to the jury.

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. 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.

Appellants argue that the existence of a 2005 Ninth District decision titled *Van Scyoc v. Huba*, 9th Dist. No. 22637, 2005-Ohio-6322, 2005 WL 3193843, where the Ninth District held that a failure to raise an objection to jury instructions after the instructions were read constituted a waiver, creates an intra-district conflict that should be addressed by this Court. But Appellants do not address the fact that this Court does not have jurisdiction to resolve perceived 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.

Further, *Hayward* does not announce any particular rule of law regarding the operation of Civ.R. 51. The state-wide deleterious effects of the *Hayward* decision prophesied by Appellants are not supported in any language of the *Hayward* opinion, which did not in any way address the proper manner of raising objections to jury instructions. Thus there is no basis for Appellants' claim that *Hayward* "created confusion throughout Ohio" on any issue related to the proper manner of objecting to jury instructions. (Motion for Reconsideration, p. 1)

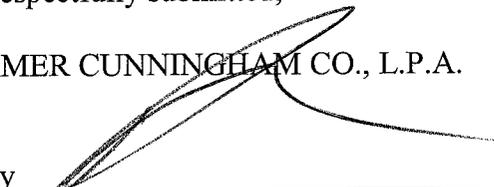
D. CONCLUSION

There is nothing in Appellants' Motion for Reconsideration which points out an error in this Court's prior consideration of this issue, nor does it provide any new or fresh grounds for evaluation of the issue presented in Appellants' Proposition of Law No. 2. As a result, this Court should DENY Appellants' Motion for Reconsideration.

Respectfully submitted,

AMER CUNNINGHAM CO., L.P.A.

By



Jack Morrison, Jr. #0014939
Thomas R. Houlihan #0070067
Vicki L. DeSantis #0075716
Michael Schmeltzer #0080340

Attorneys for Appellee

159 South Main Street, Suite 1100
Akron, Ohio 44308

(330) 762.2411

(330) 762.9918 facsimile

JMorrison@amer-law.com

Houlihan@amer-law.com

vdesantis@amer-law.com

mschmeltzer@amer-law.com

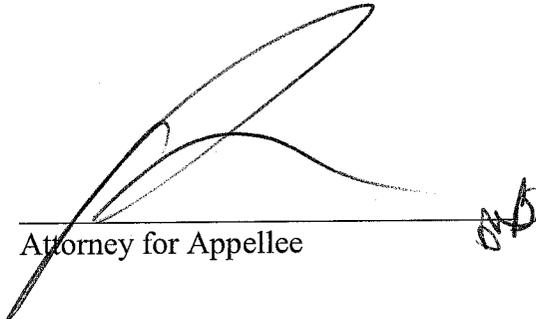
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular, U.S. Mail this 15th day of April, 2013 upon:

Douglas G. Leak, Esq.
ROETZEL & ANDRESS, LPA
1375 E. Ninth Street
One Cleveland Center, Ninth Floor
Cleveland, Ohio 44114

Michael J. Hudak, Esq.
ROETZEL & ANDRESS, LPA
222 S. Main Street
Akron, Ohio 44308

Counsel for Appellants Dr. Michael
Cullado and Summa Health System



Attorney for Appellee