

IN THE SUPREME COURT OF OHIO

SETH NILES CROMER, A Minor Child,	:	Case No. 12-2134
Deceased, et al.,	:	
	:	
Plaintiffs-Appellees,	:	
	:	On Appeal from the
v.	:	Ninth Appellate District
	:	Case No. CA-25632
CHILDREN'S HOSPITAL MEDICAL	:	
CENTER OF AKRON,	:	
	:	
Defendant-Appellant.	:	

**BRIEF OF AMICI CURIAE,
OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, AND
OHIO OSTEOPATHIC ASSOCIATION,
IN SUPPORT OF APPELLANT,
CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON**

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SUPREME COURT OF OHIO

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

The issue in this case — whether a jury may be charged on “foreseeability” in a medical malpractice action — applies specifically and exclusively to Ohio’s medical community. As such, Ohio’s doctors and hospitals have a particularly strong interest in this issue. They have a strong interest in ensuring that Ohio law is applied fairly and consistently to all litigants, but especially to defendants in medical malpractice cases. To this end, defendants in medical malpractice actions are entitled to have the cases against them decided under established Ohio law, including well-settled principles of negligence law. The reason for this is that a medical malpractice case is a negligence case. One of the bedrock principles of negligence law is foreseeability. For decades, Ohio juries have been given jury instructions that include the concept of foreseeability in both medical malpractice and other negligence actions. The decision of the Ninth District Court of Appeals, however, changed this by holding that juries in medical malpractice cases cannot be charged on foreseeability *and* that doing so constitutes reversible error.

In reversing the jury verdict for Appellant Children’s Hospital Medical Center of Akron (“Appellant”), the Ninth District Court of Appeals disregarded foreseeability as a fundamental principle of negligence law and went so far as to hold that a jury cannot consider the issue of foreseeability in a medical malpractice case. The Ninth District’s decision is not only contrary to established Ohio law, including the decisions of this Court, but is also contrary to jury instructions routinely used in medical malpractice cases. Significantly, the Ninth District has not provided a compelling (or even logical) reason to eliminate the issue of foreseeability in determining whether a health care provider is liable to a plaintiff, and there is none.

Amici curiae, described below, urge the Court to reverse the Ninth District’s decision. Not only is it incorrect as a matter of law, but if allowed to stand, it will dramatically and

unreasonably alter the way negligence law has historically been applied to Ohio health care providers by eliminating the concept of foreseeability from negligence actions against them.

The Ohio Hospital Association (“OHA”) is a private non-profit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a mechanism for Ohio's hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of 206 private, state, and federal government hospitals and more than 22 health systems, all located within the State of Ohio. The OHA’s mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities. In this regard, the OHA actively supports patient safety initiatives, insurance industry reform, and tort reform measures. The OHA was involved in the formation of the Ohio Patient Safety Institute¹ which is dedicated to improving patient safety in the State of Ohio, and created OHA Insurance Solutions, Inc.² to restore stability and predictability to Ohio’s medical liability insurance market.

The Ohio State Medical Association (“OSMA”) is a non-profit professional association of approximately 20,000 physicians, medical residents, and medical students in the State of Ohio. The OSMA’s membership includes most Ohio physicians engaged in the practice of medicine, in all specialties. The OSMA’s purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The Ohio Osteopathic Association (“OOA”) is a non-profit professional association, founded in 1898 that advocates for Ohio’s 4,600 licensed doctors of osteopathic medicine

¹ <http://www.ohiopatientsafety.org>

² <http://www.ohainsurance.com>

("DOs"), Ohio health-care facilities accredited by the American Osteopathic Association's Healthcare Facilities Accreditation Program, and the Ohio University College of Osteopathic Medicine in Athens. DOs represent twelve percent of the total physicians practicing in Ohio and twenty-six percent of the state's family physicians. OOA's mission includes promoting Ohio's public health and advancing the distinctive philosophy and practice of osteopathic medicine within the state.

STATEMENT OF THE CASE AND FACTS

Amici curiae defer to the Statement of the Case and the Statement of the Facts as set forth in Appellant's Brief.

ARGUMENT

The Court has accepted review of this case based on the proposition of law set forth below.

PROPOSITION OF LAW: 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.

The Ninth District's decision — holding that foreseeability should never be a part of a jury's consideration in a medical malpractice case — is contrary to Ohio law and dramatically alters negligence law as it applies to health care providers. If allowed to stand, this decision will create uncertainty for years to come in medical malpractice (i.e. medical negligence) cases while courts and litigants grapple to fashion new rules to determine the appropriate standard of care, whether it has been breached, and whether the breach proximately cause the alleged injuries, all without considering the concept of foreseeability.

A. **Foreseeability is a Fundamental Principle of Negligence Law that Should Be Considered by a Jury in a Medical Malpractice Case**

1. **Foreseeability is Important in Determining Whether a Medical Malpractice Defendant Breached the Applicable Duty of Care**

It is well-settled that to establish actionable negligence, a plaintiff must demonstrate the (1) existence of a duty; (2) a breach of the duty; and (3) an injury proximately caused from such breach. *Menifee v. Ohio Welding Products, Inc.* 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).

Because a medical malpractice case is simply a negligence case against a health care provider, it is not surprising that these same requirements apply in medical malpractice cases. See *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92, 627 N.E.2d 449 (1988). However, in the context of medical malpractice, the “duty” of the defendant is often referred to as the standard of care owed to the plaintiff by the defendant. Thus, Ohio courts have held that, in order to prevail in a medical malpractice (or medical negligence) case, a plaintiff must demonstrate the (1) existence of a standard of care within the medical community; (2) the defendant’s breach of that standard; and (3) proximate cause between the defendant’s breach and the plaintiff’s injury. *Cox v. Metrohealth Med. Ctr.*, 8th Dist. No. 96848, 2012-Ohio-2383, ¶ 63; *Fritch v. Univ. of Toledo College of Medicine*, 10th Dist. No. 11-AP-103, 2011-Ohio-4518, ¶ 6; *Robertson v. Mt. Carmel E. Hosp.*, 10th Dist. No. 09-AP-931, 2011-Ohio-2043, ¶ 22. In medical malpractice cases, unlike in many other negligence cases, expert testimony is usually required to prove these elements because they are beyond the common knowledge and understanding of the jury. *Id.* at ¶ 23.

Foreseeability is a bedrock principle of negligence law. See *Oiler v. Willke*, 95 Ohio App.3d 404, 410, 642 N.E.2d 667 (4th Dist. 1994) (“Negligence * * * is conduct which falls below the standard established by law for the protection of others against *unreasonable* risk. It necessarily involves a *foreseeable* risk, a threatened danger of injury, and conduct unreasonable

in proportion to the danger.”) (quoting Prosser & Keeton, Torts (5 Ed. 1984) (emphasis sic). At least three of the elements of negligence — duty, breach, and proximate cause — are significantly implicated by foreseeability. Owen, DG, *Figuring Foreseeability*, 44 Wake Forest L. Rev. 1277, 1290-1292 (2009). And, of these, “[b]reach and proximate cause may be the most important * * *.” *Id.*

The concept of foreseeability is important in determining breach of the standard of care and proximate cause because it is directed at the reasonableness of the defendant’s actions under the same or similar circumstances. The ultimate issue that a jury must determine in a medical malpractice case is no different than in any other negligence case — whether the defendant failed to act as a reasonably prudent person under the same or similar circumstances. And in making this assessment, the jury cannot use the benefit of hindsight, but must use foresight. The jury in a medical malpractice action must determine “whether a reasonably prudent person would have *anticipated* that an injury was likely to result from the performance or nonperformance of an act.” *Cox v. Metrohealth Med. Ctr.*, 8th Dist. No. 96848, 2012-Ohio-2383, ¶63 (citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77) (emphasis added).

Despite the significant role of foreseeability in the assessment of whether the standard of care has been breached, the Ninth District prohibited juries in medical malpractice cases from considering it.

2. There is No Valid Reason to Eradicate Foreseeability from Medical Malpractice Actions

In reaching its erroneous conclusion, the Ninth District engaged in a flawed analysis which completely ignored foreseeability in the context of two elements of a negligence claim — breach of the standard of care (i.e. breach of duty) and proximate cause — and, instead, focused

only on the “existence of a duty” element of a negligence claim. Specifically, the Ninth District reasoned:

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

Cromer v. Children’s Hospital Medical Center of Akron, 9th Dist. No. 25632, 2012-Ohio-5154, ¶ 22 (“*Opinion*”). Importantly, none of the cases the Ninth District cites in its faulty analysis holds that a jury should not consider the issue of foreseeability.

In essence, the Ninth District determined that, because physicians owe a duty to their patients by virtue of the physician-patient relationship, it is unnecessary to consider foreseeability in determining the existence of a duty in the context of medical malpractice actions. Therefore, according to the Ninth District, foreseeability should not be considered by the jury. This truncated analysis ignores the fact that foreseeability is also pertinent as to whether the standard of care was breached and whether the breach was the proximate cause of the alleged injury. As a result, the analysis is incomplete and flawed.

Where there is a physician-patient relationship, the question is not *whether* the physician has a duty, but *what* duty the physician owes to the patient. The duty owed to a patient due to the physician-patient relationship is the standard of care, which is the duty to act as a physician of reasonable skill, care and diligence under like or similar circumstances. See *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673, paragraph one of the syllabus. In determining whether the standard of care was breached, it is proper for the jury to consider whether the defendant should have *foreseen*, under the attending circumstances, that the natural and probable result of the act

or failure to act would cause harm. See e.g., *Ratliff v. Mikol*, 8th Dist. No. 94930, 2011-Ohio-2147, ¶ 8; *Fowerbaugh v. Univ. Hosps.*, 118 Ohio App.3d 402, 408, 692 N.E.2d 1091 (8th Dist. 1997) (holding in a medical malpractice case that, “In deciding whether ordinary care was used, you will consider whether the defendant ought to have *foreseen* under the circumstances that the natural and probable result of an act or failure to act would cause some injury.”) (emphasis added); *Miller v. Defiance Regional Med. Ctr.*, 6th Dist. No. L-06-1111, 2007-Ohio-7101, ¶ 52.

Although the Ninth District did not recognize the role foreseeability plays in connection with the breach of duty and proximate cause elements of a medical malpractice action, one of the two cases it relied on in its analysis (set forth above) to reach this conclusion does. Foreseeability was the primary issue in *Oiler*, which involved a wrongful death action against a physician based on a blood platelet transfusion. *Oiler v. Willke*, 95 Ohio App.3d 404, 642 N.E.2d 667 (4th Dist. 1994). After the transfusion, the patient contracted and eventually died from AIDS. At the time of the transfusion, it had not been determined that AIDS was transmitted by blood. *Id.* at 409. The defendant asserted that, because the harm of acquiring AIDS was not foreseeable, he had no duty and could not be liable as a matter of law. *Id.* at 408-409. (The issue of breach of the duty/standard of care was not an issue before the court. *Id.*) The court of appeals engaged in a lengthy foreseeability analysis which recognized that foreseeability is relevant to both breach of the physician’s duty (i.e. breach of the standard of care) and proximate cause. *Id.* at 410-413. The court ultimately concluded, based in part on the language in the pattern OJI jury instruction on foreseeability,³ that even though the physician could not foresee the risk of AIDS from the blood transfusion, it was “sufficient that *an* injury

³ *Oiler* came before the court of appeals on review of summary judgment granted in favor of the defendant. While *Oiler* does not consider the propriety of any particular jury instruction, because none were given in the case, it does favorably cite to cases which include language based on the OJI jury instructions on foreseeability. See *Oiler*, 95 Ohio App.3d 404, 412.

[rather than this specific injury] was reasonably foreseeable.” *Id.* at 412 (emphasis sic). While the correctness of this decision is questionable, the court’s application of foreseeability in a medical malpractice case is not.

Notably, the dissenting opinion stated that “To hold a physician liable for unforeseen consequences or diseases unknown to medical science is to, in effect, adopt a public policy of making the physician an insurer.” *Id.* at 413-414 (Stephenson, J., dissenting). This point underscores the importance of the concept of foreseeability in medical malpractice actions. If a jury is unable to consider foreseeability, a medical malpractice defendant will be subjected to liability based on hindsight and will become an insurer of any outcome that is unsatisfactory to the patient.

3. Based on the Ninth District’s Analysis, Foreseeability May Be Eradicated from Other Negligence Actions

If not reversed, the Ninth District’s decision may be only the beginning of the eradication of foreseeability from negligence actions and the resulting uncertainty in Ohio’s courts. That is, under the Ninth District’s analysis juries cannot consider foreseeability in the context of a medical negligence action because the law already imposes a duty on physicians “by the existence of the physician-patient relationship.” *Opinion*, 2012-Ohio-5154, ¶ 22. But, the law imposes a duty on many types of persons (such as attorneys, fiduciaries, and coaches to name a few) based on the existence of their relationship with others and, to date, they are still entitled to have a jury consider foreseeability. This, however, may not be the case for long. If the Ninth District’s decision is not reversed, it will provide a springboard for eliminating the concept of foreseeability from more than just medical malpractice actions.

For instance, the OJI pattern jury instructions for “other professionals,” such as attorneys, engineers and architects, are quite similar to those for medical negligence. *See* OJI Chapter 421.

The same pattern OJI jury instructions on foreseeability applicable to medical negligence actions are also applicable to actions against other professionals. *See* OJI 401.07. If foreseeability is eliminated as an issue for medical professionals, it may be only a matter of time before similar challenges to foreseeability jury instructions will be lodged against other professionals.

B. The Ninth District's Decision is a Drastic Departure from Established Ohio Law and Trial Practice and Should Be Reversed.

The overbreadth of the Ninth District's decision is particularly troubling. In its sweeping decision, the Ninth District precludes juries from ever considering foreseeability in determining the liability of a medical malpractice defendant and goes so far as to hold that any consideration of foreseeability is reversible error. No other Ohio appellate court has blanketly prohibited any and all jury instructions on foreseeability in medical malpractice cases. (In fact, as set forth below, in the last six years all Ohio appellate courts that have addressed foreseeability instructions in medical malpractice actions have affirmed the trial court's decision instructing on foreseeability, except for the Ninth District.) The Ninth District's decision is a drastic departure from well-established Ohio law and trial practice and should be reversed.

For decades, Ohio trial courts routinely have given jury instructions on foreseeability in medical malpractice cases and, for the most part, that is still the practice today (albeit perhaps not in the Ninth District).⁴ If disputes arose in connection with charging the jury on the issue of foreseeability in the hundreds of medical malpractice cases decided by juries, the parties must not have deemed them significant as such disputes rarely have been mentioned in appellate decisions, until recently. In short, Ohio courts and trial attorneys have historically understood

⁴ While *proposed* jury instructions are often filed with the trial court in medical malpractice cases, the jury instructions actually *given* to the jury are usually not filed separately, but are part of the transcript. Exhibits A and B attached hereto are examples of excerpts of jury instructions from medical malpractice trial transcripts. Thus, jury instructions are not easily accessible to persons not involved in a particular case.

the importance of foreseeability in assessing the liability of medical malpractice defendants and charged the jury accordingly. Recently, however, jury instructions on foreseeability have gained popularity with medical malpractice plaintiffs challenging jury instructions on foreseeability in several Ohio cases.

In the past six years, seven appellate decisions have been issued addressing the propriety of jury instructions on foreseeability in medical malpractice cases. In all but one (the Ninth District's decision here), the propriety of the jury instruction was upheld. *Cox v. Metrohealth Med. Ctr.*, 8th Dist. No. 96848, 2012-Ohio-2383; *Ratliff v. Mikol*, 8th Dist. No. 94930, 2011-Ohio-2147; *Pfeffer v. Cleveland Clinic Found.*, 8th Dist. No. 94356, 2011-Ohio-450; *Clements v. Lima Memorial Hosp.*, 3rd Dist. No. 1-09-24, 2010-Ohio-602; *Joiner v. Simon*, 1st Dist No. C-050718, 2007-Ohio-425; *Miller v. Defiance Regional Med. Ctr.*, 6th Dist. No. L-06-1111, 2007-Ohio-7101. By upholding the foreseeability jury instructions at issue in each of these cases, the appellate courts either expressly or implicitly recognized that jury instructions on foreseeability are proper in medical malpractice actions.

Indeed, one of these cases addressed virtually the same issue as is before the Court and squarely rejected that the jury instruction on foreseeability should be omitted altogether in medical malpractice actions. *Ratliff v. Mikol*, 8th Dist. No. 94930, 2011-Ohio-2147, ¶ 11.

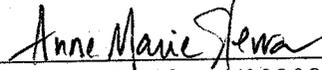
Amici curiae urge the Court to reach the same result here.

CONCLUSION

A medical malpractice action is an action sounding in negligence. Foreseeability is an important aspect of assessing liability in negligence actions. Jury instructions on foreseeability have long been the norm in medical malpractice cases tried to a jury in Ohio. There is no reason

to depart from established precedent and practice. This Court should continue to allow juries to consider the issue of foreseeability in assessing medical negligence.

Respectfully submitted,



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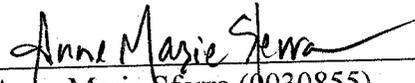
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of *Amici Curiae*, Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association, in Support of Appellant Children's Hospital Medical Center of Akron, was sent via regular U.S. mail, postage prepaid on May 23, 2013, to the following:

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2004 AUG 11 PM 4:34
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MONTGOMERY CO., OHIO

IN COMMON PLEAS COURT OF MONTGOMERY COUNTY
CIVIL DIVISION

TAMI MORELAND, etc., et al

Plaintiffs

-vs-

OAK CREEK OB/GYN, INC.
et al

Defendants

CASE NO: 02-CV-3784
CA 20468

TRANSCRIPT OF
JURY TRIAL

Date: March 19, 2004
March 20, 2004

Honorable G. Jack Davis

VOLUME VI
[Pages 1261 - 1512]

EXHIBIT

A

COPY

1 If you find that the Defendants were negligence --
 2 negligent, then you proceed to decide, by the greater weight of the
 3 evidence, whether such negligence was the proximate cause of
 4 Plaintiffs' injuries and if so, what is the extent of his damages.

5 Plaintiffs must prove the nature and extent of the
 6 damages and that Plaintiff -- and that Defendants caused them. On
 7 the other hand, you may find for the Defendants if Plaintiffs failed to
 8 prove to you by the greater weight of the evidence; one, that
 9 Defendants were negligent or, two, that Plaintiffs were injured or,
 10 three, that Defendants' negligence was the proximate cause of the
 11 injuries complained of.

12 The party who seeks to recover for injuries must
 13 prove not only that the other party was negligent, but also mu- --
 14 that such negligence was a proximate cause of injury.

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

18 Cause occurs when the injury is a natural and
 19 foreseeable result of the act or failure to act.

20 A person is not responsible for the injury of
 21 another if his negligence is a remote cause of an -- a -- and not a
 22 proximate cause.

23 A cause is remote when the result could have
 24 been -- could not have been re- -- reasonably foreseen or
 25 anticipated as being the natural or probable cause of an injury.

C
O
P
Y

FORM CSR - LASER REPORTERS PAPER & MFG. CO. 800-826-6313

1 There may be more than one proximate cause
2 when a negligent act or failure to act of one party joins the
3 negligence of another to produce the damage, the negligence of
4 each is a cause. It is not necessary that the negligence of each
5 occur at the same time, nor that there be a common purpose or
6 action.

7 In deciding whether ordinary care was used, you
8 will consider whether Defendants or anyone of them ought to have
9 foreseen, under the circumstances, that the natural and probable
10 results of their acts or failure to act would cause injury to Plaintiffs'
11 decedent Nancy Jane Moreland.

12 The test for foreseeability is not whether they
13 should have foreseen the injury exactly as it happened to the
14 specific person, the test is whether under all circumstances a
15 reasonable, prudent person would have anticipated that injury was
16 likely the result to someone from the act or failure to act.

17 If Defendants, by the use of ordinary care, should
18 have foreseen some injury and should have -- and should not have
19 acted, or if they did act, should have taken precautions to avoid the
20 result, then the performance of the act or the failure to take such
21 precautions is negligence.

22 Under the doctor -- Doctrine of Respondeat
23 Superior, a corporate medical practice such as the Defendant Oak
24 Creek O.B./G.Y.N. Inc., is liable for the negligence act of its
25 employees, including but not limited to doctors, nurses and

IN THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO

CAROL S. MILLER,)
)
Plaintiff,)
)
-vs-)
) Case No. 2010-CV-116
DANA H. ANDREWS, M.D.,)
et al.,)
)
Defendants.)

VOLUME VII
 TRANSCRIPT OF PROCEEDINGS
 TRIAL

Before the
 Honorable James D. Henson
 and a Jury

April 16, 2012

APPEARANCES:

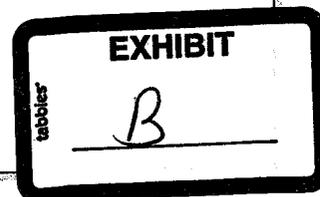
FOR THE PLAINTIFF

Mr. Michael L. Inscore

FOR THE DEFENDANTS

Mr. Gerald J. Todaro
 Mr. Gregory B. Foliano

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1 basis.

2 Negligence: What is negligence? Negligence is the
3 failure to use ordinary care. Every person and every
4 corporation is required to use ordinary care to avoid
5 injuring another person.

6 Ordinary care is the care that a reasonably careful
7 person would use under the same or similar circumstances.

8 In deciding whether reasonable care was used, you
9 consider whether the Defendant Dr. Andrews should have
10 foreseen under the circumstances that the likely result of an
11 act or failure to act would cause some injury.

12 The test of foreseeability is not whether a person
13 should have foreseen the injury exactly as it happened or to
14 the specific person. The test is whether under all the
15 circumstances a reasonably careful person would have
16 anticipated that an act or failure to act would likely result
17 in some injury.

18 A person is not responsible for injury to another
19 if his or her negligence is a remote cause and not a
20 proximate cause. A cause is remote when the result could not
21 have been reasonably foreseen or anticipated as being the
22 natural or probable cause of any injury.

23 This is a medical negligence claim brought by the
24 Plaintiff, Mrs. Carol Miller, to recover compensation for
25 injuries claimed to have been caused by the negligence of the

1 Defendants, Dr. Andrews and American Health Network. The
2 Plaintiff must prove by the greater weight of the evidence
3 that the Defendant physician was negligent and that his
4 negligence was a proximate cause of injury to the Plaintiff.
5 A physician is negligent if the physician fails to meet the
6 required standard of care.

7 A specialist is a physician who holds himself out
8 as specially trained, skilled, and qualified in a particular
9 branch of medicine. Dr. Andrews specializes in internal
10 medicine.

11 The standard of care for a physician in the
12 practice of a specialty is that of a reasonably -- reasonable
13 specialist practicing medicine exercising reasonable care,
14 skill, and diligence under like and similar circumstances,
15 regardless of where he practices.

16 A specialist in any branch is held to the same
17 standard of care as all other specialists in that branch.

18 If you find by the greater weight of the evidence
19 that Dr. Andrews failed to meet the standard of care, then
20 you shall find that he was negligent.

21 The existence of a physician-patient relationship
22 places on a physician the duty to act as would a physician of
23 ordinary care, skill, and diligence under the same and --
24 under like and similar circumstances and conditions. This is
25 known as the standard of care.