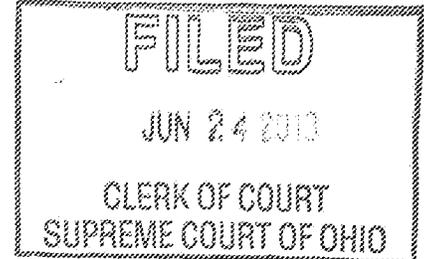


## IN THE SUPREME COURT OF OHIO

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



**BRIEF OF  
AMICUS CURIAE, SUMMIT COUNTY ASSOCIATION FOR JUSTICE  
IN SUPPORT OF  
APPELLEE, SETH NILES CROMER, DECEASED, ET AL.**

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## **STATEMENT OF CASE AND FACTS**

The Amicus Curiae, Summit County Association for Justice, adopts and incorporates by reference the Statement of the Case and the Statement of the Facts as set forth in the Merit Brief of the Appellees.

## **INTEREST OF AMICUS CURIAE**

The Amicus Curiae, the Summit County Association for Justice, is a not-for-profit association of attorneys in the Summit County, Ohio, area, whose mission is to preserve and protect the legal rights of the individual, including championing people's access to justice and the Constitutional right to a trial by jury.

Because of that mission, the SCAJ's interest as amicus curiae in this case is to uphold the stability of Ohio's long-established jurisprudence concerning professional malpractice cases.

## INTRODUCTION

For more than 110 years, the Supreme Court of Ohio has consistently and repeatedly stated that in order to prove a medical malpractice case, a plaintiff bears the burden of proving that the plaintiff's injury was proximately caused by an act or omission that a medical provider of ordinary skill, care, and diligence would not have committed under the same or similar circumstances. See *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673, paragraph one of the syllabus (1976).

That's all.

But now the Appellant, Children's Hospital Medical Center of Akron, and the *amici* supporting it want this Court to completely re-write Ohio's law and abandon long-established precedent to require injured people to prove an extra element: that the physician who treated them not only failed to live up to the standard of care, but foresaw that that failure could cause harm.

As the SCAJ will show, that is unacceptable.

SCAJ is also concerned that this Court's adoption of the proposition of law will essentially add more confusion of jury instructions' use in other professional malpractice actions, such as pharmaceutical, accountant, attorney, and other areas. Is this Court prepared to allow all areas of professional negligence to include a foreseeability instruction as used in the trial court in *Cromer*? SCAJ believes that the long-time exclusion of the foreseeability instructions in the professional context should be maintained. Changing the law here will have many unintended consequences for all professional negligence actions.

## ARGUMENT

The Summit County Association for Justice argues that the following proposition of law should not be adopted by the Court.

### **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.**

## I. NEGLIGENCE AND PHYSICIAN MALPRACTICE

### A. Negligence, In General, in Ohio

Ordinarily, such as in a case involving a motor vehicle accident or an injury sustained by a guest at one's house, the injured plaintiff is required to prove:

- 1) the existence of a duty owed by the defendant to the plaintiff;
- 2) a breach of that duty; and
- 3) proximate causation between the breach and the plaintiff's injury.

See *Littleton v. Good Samaritan Hosp. & Health Center*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449 (1988), citing *Hadfield-Penfield Steel Co. v. Sheller*, 108 Ohio St. 106, 114, 141 N.E. 89 (1923); *Baier v. Cleveland Ry. Co.*, 132 Ohio St. 388, 391, 8 N.E.2d 1 (1937); *Bennison v. Stillpass Transit Co.*, 5 Ohio St.2d 122, 214 N.E.2d 213 (1966); *Wills v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986).

The concept of "foreseeability" enters the equation at two points. First, the existence of a duty depends on the foreseeability of the injury. See *Littleton* at *id.*; see also *Cox v. Metrohealth Med. Ctr. Bd. Of Trustees*, 8<sup>th</sup> Dist. No. 96848, 2012-Ohio-2383, ¶ 63, 917 N.E.2d 1026, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). The court decides whether injury is foreseeable and,

therefore, a duty exists. See *Menifee*, 15 Ohio St.3d at 77. The test for foreseeability is “whether a reasonably prudent person, under the same or similar circumstances as the defendant, should have anticipated that injury to the plaintiff or to those in like situations is the probable result of the performance or nonperformance of an act.” *Commerce & Industry Ins. Co. v. City of Toledo*, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989).

Second, whether injury is a foreseeable result of a particular action must be considered when that action is an intervening or superseding cause. See OJI.

#### **B. Relationship of the Parties**

Ohio’s courts have long recognized that the nature of the relationship between an injured party and a tortfeasor will affect the duty of care the tortfeasor owed to the injured party. See, e.g., *Toledo*, 45 Ohio St.3d at 98, 543 N.E.2d 1188; *Berdyck v. Shinde*, 66 Ohio St.3d 573, 576, 613 N.E.2d 1014 (1993) (“When risks and dangers inherent in the relationship or incident to it may be avoided by the obligor’s exercise of care, an obligor who fails to do so will be liable to the other person for injuries proximately resulting from those risks and dangers if the injuries were reasonably foreseeable.”); *DiGildo v. Caponi*, 18 Ohio St.2d 125, 274 N.E.2d 732, syllabus paragraph one (1969) (heightened duty of care and to warn owed to young child of “tender years”); *Simmers v. Bentley Construction Co.*, 64 Ohio St.3d 642, 645 (1992) (“Under the law of negligence, a defendant’s duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff’s position. \*\*\* Injury is foreseeable if a defendant knew or should have known that its act was likely to result in harm to someone.”); *Huston v. Konieczny*, 52 Ohio St.3d 214, 217, 556 N.E.2d 505 (1990).

In addition, the duty element may be established in the complete absence of foreseeability; it may be established, for example, by such things as the common law, legislative enactment, or even the particular circumstances of a case. See *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 23, 773 N.E.2d 1018, citing *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998); *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 119 N.E.2d 440, paragraph one of the syllabus (1954).

### **C. Professional Malpractice**

Though a medical malpractice case and an ordinary negligence case belong to the same genus of cases (namely, negligence), they are not members of the same species. The Court has established a separate calculus for negligence cases against professionals such as medical providers, attorneys, and even accountants, because of the degree of trust inherent in the relationship between, for example, doctor and patient. See, e.g., *Oiler v. Willke*, 95 Ohio App.3d 404, 409, FN2, 642 N.E.2d 667 (4<sup>th</sup> Dist. 1994).

This Court has recognized that, as a matter of law, it is *always* foreseeable that harm may befall a patient or a client if a professional fails to act as a reasonably prudent member of that profession would under the same or similar circumstances; thus, “the duty of the physician is established simply by the existence of a physician-patient relationship, *not* by questions of foreseeability.” *Oiler v. Willke, id.*, emphasis added; see also *Ryne v. Garvey*, 87 Ohio App.3d 145, 155, 621 N.E.2d 1320 (2<sup>nd</sup> Dist. 1993). It is very similar to the heightened duty of care an adult owes to a child, who, because of his age, cannot reasonably be expected to anticipate the same dangers that an adult would. See *DiGildo*, 18 Ohio St.2d at 127.

Therefore, the elements a plaintiff must prove in a professional malpractice case by a preponderance of the evidence are that the plaintiff's injury was proximately caused by an act or omission that a medical provider of ordinary skill, care, and diligence would not have committed under the same or similar circumstances. See *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673, paragraph one of the syllabus (1976); see also *Littleton*, 39 Ohio St.3d at 93. This is a standard that has been in place in Ohio in medical malpractice cases since 1902. See *Bruni*, 46 Ohio St.2d at 131 (citing Ohio cases and *Davis v. Virginian Ry. Co.*, 361 U.S. 354, 357, 80 S.Ct. 387, 4 L.Ed.2d 366 (1960)).

Foreseeability is thus *presumed* and is subsumed within the element of the standard of care. See *Oiler*, *supra*. In medical malpractice cases, that “standard of care \*\*\* is dictated by the custom of the profession.” *Littleton*, 39 Ohio St.3d at 93.

This calculus also gives rise to the longstanding requirement that plaintiffs can only prove professional malpractice with expert testimony, unless the error is so obvious that an ordinary layperson would understand it. See, e.g., *Bruni*, 46 Ohio St.2d at 130; *Kurzner v. Sanders*, 89 Ohio App.3d 674, 679, 627 N.E.2d 564 (1<sup>st</sup> Dist. 1993).

It is critical for a trial court to correctly charge a jury on this point because “There is nothing more material in a medical malpractice case than properly understanding the standard of care.” *Kurzner*, 89 Ohio App.3d at 680. “As stated by the Supreme Court in *Becker v. Lake Cty. Mem. Hosp. West* (1990), 53 Ohio St.3d 202, 560 N.E.2d 165, “a reviewing court must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.” *Id.* at 208, 560 N.E.2d at 171.” *Kurzner at id.* (Jury instruction that changed the standard of care from objective to subjective was prejudicial error.)

The Appellee cited *Kurzner* to support the idea that a medical malpractice action is an “ordinary negligence claim.” The citation is misleading. It apparently comes from a reference to an Oregon case in this paragraph:

As we discussed above, use of the word “judgment” interposes into a medical malpractice case subjectivity which is not proper. Adding the word “clinical” to the word “judgment” not only does not cure the problem, but makes it worse, because it implies that there is something in the mystique of a doctor's craft which is a shield from liability so long as the doctor was indeed using that clinical judgment. In the words of the Supreme Court of Oregon, in an extremely cogent opinion rejecting the error-in-judgment instruction in malpractice cases, “medical malpractice cases are nothing more than negligence actions against medical professionals. The fundamental issue in these cases, as in all negligence cases, is whether the defendant breached the standard of care and caused injury to the plaintiff.” *Rogers v. Meridian Park Hosp.* (1989), 307 Ore. 612, 619, 772 P.2d 929, 932. Using expressions \*\*569 like “error in judgment” (or as in the instant case, “honest error or mistake in judgment”) “serves only to confuse a jury by implying that only an error in judgment made in bad faith can be actionable.” *Rogers, supra*, at 618, 772 P.2d at 932.

*Kurzner* at 681.

### **III. JURY INSTRUCTIONS**

Interestingly, OJI instructions were used, but incorrectly used, in this case. As requested by the Appellee and used by the trial court, the order and composition of the OJI instructions seems to have been incorrect.

#### **A. Purpose and Role of OJI Instructions**

By way of a backdrop, OJI instructions are specifically drafted in a court-user friendly format regarding subject and order of instructions.

The theory of OJI is simple. Each instruction is a brief, accurate, and complete statement in simple and understandable language covering a single situation, purpose, or point of law. Properly organized and systematically assembled, these instruction make up a complete charge in common situations.

It is significant that OJI is an ongoing, voluntary effort by judges and lawyers. The Committee has no authority that implies approval of the instructions or requires their use. Complete freedom of choice by the trial judge is essential to the orderly and continued development of this phase of instructional administration of justice. Although the instructions have been well received and used continuously for many years, it is necessary to repeat the caution that modification of OJI instructions is essential to respond to variations in each case and to changes in the law. Whether to use a standard instruction, modify it, or draft a more appropriate one is a decision that must be made by the trial judge.

OJI CV 101.19

#### **B. Jury Instructions and Party Requests**

In civil cases, requests for law to be included in final jury instructions are governed by Ohio Rule of Civil Procedure 51. A party may

...submit written requests, copies of which must be exchanged with opposing counsel, on matters of law to be included in the final instructions of the court. The written requests must be submitted at the close of the evidence or earlier if the court directs. Prior to closing arguments, the court is required to inform counsel of its proposed action on the requests, but the law to be announced and the language in which it is expressed in the general instruction remain exclusively with the trial judge.....

OJI CV 101.35, at p. 15.

### **C. Jury Instructions in Medical Malpractice Trials**

In Ohio Jury Instructions, the medical malpractice jury instruction differs from the ordinary negligence jury instruction, in that the instructions for medical malpractice specifically does not provide for ordinary care or foreseeability instructions. See OJI 417. OJI 417 includes a listing, noting that the relevant parts of proximate cause (OJI 405) and damages (OJI 315) instructions should be included in the complete medical malpractice instruction, but not sections for general negligence (OJI 401) or foreseeability (OJI 401.07).

OJI incorporates the law from *Bruni* 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," which is required to be proved by expert testimony. O.J.I. §417.01. OJI 417.01 presents the standard as what is foreseeable to a physician.

The mixing of the OJI instructions in a different order and from different sections not specifically delineated by OJI, as was done in this case, is inconsistent with Ohio law. OJI's exclusion of ordinary care instructions on foreseeability from the medical malpractice instructions is consistent with Ohio law. See *Ryne v. Garvey*, 87 Ohio App. 3d 145, 621 N.E.2d 1320 (2nd Dist. 1993); *Needham v. Gaylor* (Sept. 20, 1996), 2nd Dist. No. 14834, 1996 WL 531596; *Hinkle v. Cleveland Clinic Found.*, 159 Ohio App. 3d 351, 2004-Ohio-6853, 823 N.E.2d 945, ¶82. The Ninth District Court of Appeals' decision here is a continuation of this line of case law:

The order and inclusion of the inappropriate and incorrect instruction in the medical malpractice action actually caused the trial court to misstate the Ohio law on foreseeability as it related to the standard of care for a physician in a medical malpractice case. Further, inclusion of this incorrect instruction added to the jury's confusion in a very complex medical malpractice action.

It should be noted that courts in other states have also disapproved instructions that allow juries to essentially second-guess the expert witnesses' testimony concerning the duty of care in medical malpractice cases. See, e.g., *Smith v. Finch*, 681 S.E.2d 147, 151 (Ga. 2009).

#### IV. APPELLANT'S CASES

Finally, the cases the Appellant cites do not actually support its position. Most involved acts or omissions that were not related to medical care, even though they were committed by a health care provider or organization.

*Littleton*, for instance, was a wrongful death action predicated upon the alleged malpractice of a psychiatrist, who was accused of negligently releasing from inpatient psychiatric care a woman suffering from severe postpartum depression, who within days murdered her baby. See *Littleton*, 39 Ohio St.3d 86, *passim*. The case does not stand for the proposition that once a trial court has determined that a duty of care is owed to a plaintiff in a medical malpractice case that a jury must decide for a *second time* that injury was a foreseeable consequence of a physician's breach of that duty of care.

The *Cox* decision was not a case against a physician. It was a case against Metrohealth Medical Center only because the case alleged that an untrained nurse's aide administered "back blows" to the plaintiff when, as an hours-old baby born at the hospital, he turned blue. Not only did the nurse's aide stray beyond the scope of her employment when she administered the back blows, but she caused the plaintiff severe and permanent brain damage. See *Cox v. Metrohealth Med. Ctr. Bd. Of Trustees*, 8<sup>th</sup> Dist. No. 96848, 2012-Ohio-2383, 917 N.E.2d 1026.

The Appellant's reliance on *Ratliff* is also misplaced, in that the *Ratliff* court overruled the plaintiff's assignment of error concerning the jury instructions as least in part because the plaintiff, by proposing the very jury instruction about which he complained on appeal, invited the error. See *Ratliff v. Mikol*, 8<sup>th</sup> Dist. No. 94930, 2011-Ohio-2147, 2011 WL 1744276, ¶ 15.

In the *Peffer* case, the focus was on the inclusion of foreseeability in the proximate cause instruction. See *Peffer v. Cleveland Clinic Found.*, 8<sup>th</sup> Dist. No. 94356, 2011-Ohio-450, 2011 WL 345958.

The *Clements* case involved three nurses who were allegedly negligent in releasing an infant from their care in fewer than 48 hours after his birth. The baby suffered from hypoglycemia that damaged his brain. The jury found that two of the nurses breached the standard of care, but that breach was not the proximate cause of the child's injuries. See *Clements v. Lima Memorial Hosp.*, 3<sup>rd</sup> Dist. No. 1-09-24, 2010-Ohio-602, 2010 WL 597368, ¶ 42.

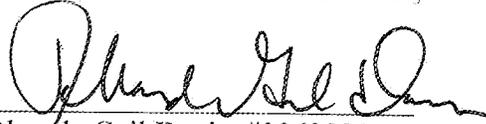
In the *Joiner* case, the plaintiffs complained that the foreseeability instruction ought to have said "would have anticipated that *an* injury was likely," rather than "would have anticipated that injury was likely." The Court of Appeals noted not only that the language was correct in the context of the overall jury instructions, but that the plaintiffs waived it for purposes of appeal because they failed to object to it at trial. See *Joiner v. Simon*, 1<sup>st</sup> Dist. No. C-050718, 2007-Ohio-425, 2007 WL 286296, ¶¶ 60-62.

Similarly, in *Miller*, the plaintiff did not object to a foreseeability instruction until he claimed on appeal that it was "misleading," though it was nearly verbatim from Ohio Jury Instructions. See *Miller v. Defiance Regional Med. Ctr.*, 6<sup>th</sup> Dist. No. L-06-1111, 2007-Ohio-7101, 2007 WL 4563473, ¶ 52.

## V. CONCLUSION

The Ninth District Court of Appeals decision is a correct statement of Ohio law and should be affirmed by this Court. Duplicative instructions place unfair burdens on the medical malpractice action plaintiff and unfairly repeat jury instructions. The law is well-settled in Ohio regarding physician's duties and the foreseeability is already contained in the standard jury instructions given in Ohio courts every day. The Summit County Association for Justice urges this Court to affirm the Ninth District Court of Appeal's decision in *Cromer*.

RESPECTFULLY SUBMITTED,



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**CERTIFICATE OF SERVICE**

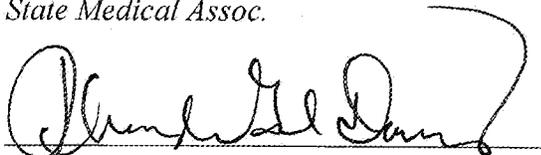
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