

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-2134

SETH NILES CROMER; MELINDA CROMER; RODERICK CROMER
Plaintiff-Appellees,

-vs-

CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON
Defendant-Appellant.

ON APPEAL FROM THE NINTH APPELLATE DISTRICT
CASE NO. 25632

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE,
IN SUPPORT OF PLAINTIFF-APPELLEES

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INTRODUCTION OF AMICUS CURIAE

This *Amicus Curiae* represents the interests of the Ohio Association for Justice ("OAJ"). The OAJ is comprised of approximately two thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The OAJ is submitting the instant Brief in support of the sound decision that was rendered by the Ninth Judicial District Court of Appeals. There can be no serious disagreement that the concept of foreseeability is often an important factor in determining the duty of care that is owed under the common law. Defendants should not be held liable for truly remote and attenuated losses. But the doctrine has no significance beyond that.

The Ninth District should be commended for laying to rest the widely shared misconception that even though the duty of care has been violated, a defendant must also foresee that harm will probably result before liability can be imposed in Ohio. As long as trial courts continue to require such unnecessary demonstrations, countless tortfeasors will be able to avoid legal responsibility for the harm they have negligently inflicted on others. Their attorneys will only need to argue that the damages suffered by the violation of the standard of care were either unforeseen, or believed to be improbable. In order to avoid such intolerable incongruities, the Ninth District's unassailable ruling should be affirmed in all respects.

ARGUMENT

This Court has accepted a single proposition of law for consideration, which is as follows:

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 MEDIAL MALPRACTICE CASES ON THE ISSUE OF FORESEEABILITY.

Because Defendant-Appellant, Children's Hospital Medical Center of Akron, and its *amici* are seeking to expand the concept of foreseeability well beyond its carefully delineated boundaries and impose an unjustified new burden on tort claimants, this Proposition of Law should be rejected.

A. THE CONCEPT OF FORESEEABILITY

Despite its presence in standardized civil jury charges, there is rarely ever a legitimate reason for furnishing an instruction on foreseeability. It is important to remember that, despite the considerable confusion that existed years ago, foreseeability is an element of the duty that is owed and not proximate cause. *Mussivand v. David*, 45 Ohio St.3d 314, 321, 544 N.E. 2d 265, 272 (1989) ("Thus we do not equate foreseeability with proximate cause."). As cogently explained by Presiding Judge Grady in his concurring opinion in *Horstman v. Farris*, 132 Ohio App.3d 514, 725 N.E.2d 698, 710 (2nd Dist. 1999) (Grady, P.J., concurring): "The point of distinction between proximate cause and foreseeability is elusive, but important. Foreseeability is an element of duty, which exists in the relationship between people and results by operation of law. Proximate cause exists in the relationship between events." The concept of foreseeability exists only to prevent liability from being imposed for truly remote causes.

Kemerer v. Antwerp Bd. of Edn., 105 Ohio App.3d 792, 664 N.E.2d 1380, 1383 (3rd Dist. 1995) (emphasis added).

Most law school students first encounter the often confounding doctrine of foreseeability when they are required to read and digest *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). In that seminal opinion, Chief Justice Cardozo recognized that the “risk reasonably to be perceived defines the duty to be obeyed *** (emphasis added).” Proximate cause was not even a consideration. *Id.*, 248 N.Y. at 346. The railroad passenger was precluded as a matter of law from recovering in that instance because the head injury inflicted by scales that had collapsed due to the exploding fireworks at the station was not a foreseeable consequence of a guard’s efforts to push another passenger into a moving train. *Id.* at 347.

One of the leading decisions in Ohio on the role of foreseeability in medical malpractice actions is *Oiler v. Wilke*, 95 Ohio App.3d 404, 642 N.E. 2d 667 (4th Dist. 1994). A wrongful death claim had been brought after the decedent succumbed to Acquired Immune Deficiency Syndrome (AIDS) in 1991. *Id.*, 95 Ohio App.3d at 407-408. The plaintiff maintained that she had acquired the affliction during an unnecessary blood transfusion in 1980. Since AIDS was largely unknown at that time, the defendants maintained that the plaintiff could not establish that the fatal disease was a foreseeable risk at the time the malpractice occurred. *Id.*

In the ensuing appeal of the entry of summary judgment in favor of the defendants, the Fourth District observed that:

*** [F]oreseeability of consequences, or, as it is sometimes called, the risk of harm, is only one of the factors which are important in determining negligence. Into the scales with it must also be thrown the gravity of the harm if it is to occur, and against both must be weighed the utility of the challenged conduct. *** [underlining added, citations omitted].

Id. 95 Ohio App. 3d at 413. The entry of summary judgment was thus reversed, even though there was no dispute that the specter of AIDS could not possibly have been foreseen when the malpractice was committed in 1980. All that mattered was that harm to patients is a predictable consequence of the violation of the duty of care that is owed. *Id.* at 411-413.

B. THE CROMER DECISION

Because foreseeability is an element of the duty that must be followed, not proximate cause, no such charge should have been furnished in this case. It is axiomatic that the existence of a duty is generally an issue of law for the court – not juries – to resolve. *Mussivand*, 45 Ohio St.3d at 318; *Moeller v. Auglaize Erie Mach. Co.*, 3rd Dist. No. 2-08-10, 2009-Ohio-301, 2009 W.L. 161784 (Jan. 26, 2009), p. *6; *Estate of Mathewson v. Decker*, 3rd Dist. No. 14-05-59, 2006-Ohio-2790, 2006 W.L. 1519687 (June 5, 2006), p. *3. The appropriate procedural mechanism for challenging foreseeability is thus through a motion for summary judgment or directed verdict. Foisting the mind-numbing foreseeability theory upon the jury as a reasonable care issue to be weighed and debated was plainly improper and contrary to long established precedent.

Writing for a unanimous panel during the proceedings below, Judge Donna Carr thoroughly discredited Defendant-Appellant's erroneous view of the law. *Cromer v. Children's Hosp. Med. Ctr. Of Akron*, 2012-Ohio-5154, 985 N.E.2d 548 (9th Dist. 2012). The Court recognized, as the OAJ does, that a duty of care exists in Ohio only to prevent foreseeable injuries. *Id.*, ¶18-19. That is rarely, if ever, a concern in medical malpractice actions. The responsibilities that must be followed by the healthcare providers are established through the opinion testimony of their peers, and the implication always is

that noncompliance will risk harm to the patient. In other words, the sole purpose of the duty is to avoid worsening the patient's condition or inflicting further injury upon him/her. There is no logical reason for requiring the plaintiff to also prove not only that the standard of care was violated and proximately caused damages, but also that the defendant foresaw that harm was a probable consequence. *Id.*, ¶22-27. Accordingly, the *Cromer* decision should be affirmed.

C. THE PROBABILITY REQUIREMENT

The trial court misled the jury not only by imposing an unwarranted test of foreseeability, but also by requiring proof that “the treating professionals should have foreseen that Seth Cromer’s death was a natural and probable result of their actions or inactions.” *Cromer*, 2012-Ohio-5154, ¶14 (emphasis added). This probability requirement permits those who have violated the duty of care to avoid having to compensate their victims for the damages they have proximately caused whenever their attorneys can successfully argue to the jury that the harm either was not appreciable, or was believed to be unlikely. Unfortunately, the troubling liability loophole that is created by the probability requirement has worked its way into Ohio’s pattern jury charge. *O.J.I. §401.07(1) & (2)*.

Ohio courts have long recognized that an outcome is “likely” or “probable” if the chances of the occurrence are greater than fifty percent. *Stinson v. England*, 69 Ohio St. 3d 451-455, 1994-Ohio-35, 633 N.E.2d 532; *Waste Mgt. of Ohio, Inc. v. Mid-America Tire, Inc.*, 113 Ohio App. 3d 529, 536, 681 N.E.2d 492 (2nd Dist. 1996). Experts have thus been required to render proximate cause opinions in terms of what is probable (*i.e.*, likely), rather than possible. *Cincinnati Ins. Co. v. Volkswagen of Am., Inc.*, 29 Ohio App. 3d 58, 62, 502 N.E. 2d 651, 655 (10th Dist. 1985); *Fugett v. Harris*, 107 Ohio App. 3d 415, 419, 669 N.E.2d 6 (2nd Dist. 1995). Other aspects of the plaintiff’s burden of

proof do not require a demonstration of probability, such as the question of whether the standard of care was breached. *Proctor v. Patel*, 9th Dist. No. 3173-M, 2002-Ohio-1381, 2002 W.L. 462941, p. *3 (Mar. 27, 2002), citing *Paul v. MetroHealth St. Luke's Med. Cntr.*, 8th Dist. No. 71195, 1998 W.L. 742173, p. *13 (Oct. 22, 1998); *Toth v. Oberlin Clinic, Inc.*, 9th Dist. No. 01CA007891, 2002-Ohio-2211, 2002 W.L. 987559, p. *2, ¶ 13 (May 8, 2002).

No logical reason exists for requiring the foreseeable harm to be established to a probability as is the case with proximate cause. Under that standard, any defendant can successfully defeat a negligence claim simply by asserting that he/she had believed that the odds of a detrimental result were less than 50 percent. How is a plaintiff ever to prove otherwise?

As just one example of the inherent flaws in imposing a probability requirement upon foreseeability, one can imagine a physician who is required by the standard of care to biopsy a lump that has been found in his patient's breast, but negligently fails to do so. In the unfortunate event that the mass later develops into untreatable cancer, the patient would only be able to prevail upon a malpractice claim if she could show to the jury's satisfaction that the physician should have foreseen that harm was a probable result if the biopsy was not performed. This would be impossible, since such tests are usually positive only about 10% of the time. Because foregoing the biopsy was statistically unlikely to be detrimental, no duty existed and no liability could be imposed under the instructions provided in the proceedings below.

Even outside the medical malpractice context, requiring foreseeability to be proven to a probability will produce countless defense verdicts in otherwise meritorious lawsuits. No sensible person would disagree that liability should be imposed upon any motorist who causes an automobile accident by deliberately disregarding a stop sign at

an intersection. It should be no defense that the crossing was situated in an uninhabited rural location and thus the odds of encountering a second vehicle were slim. But as the jury was instructed in the instant case, the innocent motorist would be unable to prevail since he/she would never be able to demonstrate that the tortfeasor should have foreseen that the odds of someone being hurt or killed as a result of running the stop sign at that desolate intersection were greater than 50%. The chances of a collision could undoubtedly be well less than that, as in many remote parts of the country one can speed through one intersection after another without ever coming close to another vehicle. Unless the foreseeability of the harm was "likely" or "probable," a breach of duty could never be established in such instances.

D. THE MENIFEE DECISION

The view that foreseeability must be established to a probability appears to originate from this Court's remark in *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 472 N.E.2d 707 (1984), that: "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act" (emphasis added). The Sixth Circuit's decision in *Freeman v. U.S.*, 509 F. 2d 626 (6th Cir. 1975), had been cited in *Menifee*, but the federal appellate court had merely observed that: "The law of Ohio is that actionable negligence occurs when an injury results from conduct that a reasonably prudent and careful person should anticipate would cause injury to the plaintiff or to those in a similar situation." *Id.*, at 629 (citation omitted). Noticeably absent from the unerring statement are any references to probabilities or likelihoods.

The *Menifee* Court had also cited *Thompson v. Ohio Fuel Gas Co.*, 9 Ohio St. 2d 116, 120, 224 N.E. 2d 131 (1967), but that eminently sensible opinion does not actually advocate a probability requirement. A county worker had been killed as a result of a gas

pipe that had exploded underneath him while he was operating a road grader. *Id.*, at 116. His survivors argued in the wrongful death action that the defendant had negligently placed and maintained the pipe under the roadway. *Id.*, at 117. By all appearances, no evidence was submitted by the decedent's beneficiaries to the effect that the defendant should have foreseen that the fatality was "likely" or "probable" under the circumstances. Nor did this Court suggest that such a peculiar demonstration was necessary. *Id.*, at 117-122.

Rather than adopt a probability requirement, this Court merely held that:

Where it is found that any unreasonable risk of danger should have been foreseen, the investigation of those seeking to define the outer limits of actual negligence must turn to the practicability of things the defendants should have done to avoid the risk. [emphasis added]

Thompson, 9 Ohio St. 2d at 120. The jury appeared to accept that a defendant's decision to take a chance on the safety of others, even when that chance is slight, can still be "unreasonable" given the magnitude of the harm that should have been foreseen. *Id.* This is both the legally and logically correct approach that should be employed whenever foreseeability is a legitimate issue at trial.

Finally, the *Menifee* Court had also cited *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 90 N.E.2d 859 (1950) which does contain the comment that:

*** It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone. [citation omitted]

Id., at 39. As in *Menifee*, no explanation has been offered for why the tortfeasor must foresee that the harm is "likely" as opposed to just "unacceptable." *Id.*

The decision in *Mudrich*, 153 Ohio St. 31, actually advocates the opposite conclusion. An employee of Standard Oil Company had carelessly spilled gasoline on the ground while filling the underground tanks at a general store. *Id.*, at 31-32. Two

seven year old boys who were playing with matches then lit the gasoline pools, and one of them was seriously burned as he was attempting to extinguish the blaze. *Id.*, at 33. It is difficult to believe that any sensible person could have concluded that the Standard Oil employee should have appreciated that the gasoline fire was “probable” or “likely” when he drove away from the store. The verdict that was rendered in favor of the plaintiff was still upheld because “the question of foreseeability was one for the jury.” *Id.*, at 40.

It thus appears that the probability requirement has emerged in this Court’s holdings without any discernable inquiry being conducted into whether a recovery should be permitted in those instances where an unreasonable risk is taken that is still less than 50 percent. The correct standard is found in *Thompson*, 9 Ohio St. at 120, where this Court properly recognized that only an “unreasonable risk of danger” had to be foreseen by the defendant. A tortfeasor therefore can be held liable in those situations where the possibility of catastrophic harm to others was appreciated, even though that possibility did not amount to a statistical probability.

The illogical constraint that has been imposed upon Ohio courts by this single sentence from *Menifee* is reflected in *Ratliff v. Mikol*, 8th Dist. No. 94930, 2011-Ohio-2147, 2011 W.L. 1744276 (May 5, 2011). In that medical malpractice action, the plaintiffs alleged that an OB/GYN’s failure to order a cesarean section delivery caused the newborn to sustain severe brain damage. The jurors were provided with the standard foreseeability instruction over the plaintiffs’ objection. *Id.*, ¶3. More specifically, their attorney argued that the charge would unjustifiably force the jurors to render a defense verdict since there was no evidence that the OB/GYN should have foreseen that the brain injury was probable. *Id.* The plaintiffs’ experts had merely testified that the danger of a traumatic birth was unacceptable given the risk factors that were present. *Id.* As predicted, a defense verdict

was entered after the jurors were instructed that foreseeability had to be established to a probability. *Id.*, ¶ 1.

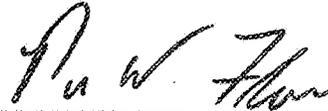
On appeal, the unanimous panel agreed that “there may be merit to this argument.” *Ratliff*, 2011-Ohio-2147, ¶10. Nevertheless, the trial court was affirmed because the instruction “mimicked the language given by the Supreme Court and used by the pattern jury instructions.” *Id.* The *Menifee* decision was cited in support of this holding. *Id.* It is thus evident that the unfortunate remark in this Court’s prior decision, and the nonsensical O.J.I. Instructions following therefrom, are now producing defense verdicts any time the plaintiff is unable to demonstrate that a probability - and not just an unacceptable possibility - of harm should have been foreseen.

The time has come for this Court to establish that this pattern charge is inconsistent with the more sensible “unreasonable risk of danger” standard that had been recognized in *Thompson*, 9 Ohio St. 2d at 120. This would not be the first time that the O.J.I. instructions have been determined to be confusing, contradictory, and even legally erroneous. *See State of Ohio v. Napier*, 105 Ohio App.3d 713, 720-721, 664 N.E.2d 1330, 1335-1336 (1st Dist. 1995).

CONCLUSION

In order to reestablish the correct standards for negligence in Ohio, this Court should modify *Menifee*, 15 Ohio St.3d at 77, reestablish that foreseeability does not need to be proven to a probability, and affirm the Ninth Judicial District in all respects.

Respectfully Submitted,



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