

ORIGINAL

No. 2012-2134

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE NO. 25632

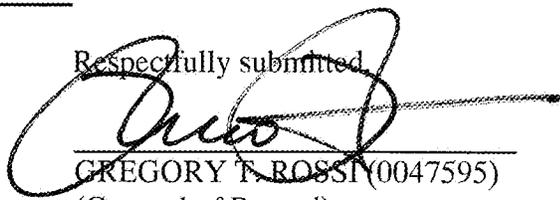
SETH NILES CROMER, Minor Child, Deceased, et al.  
Plaintiffs-Appellees,

v.

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

REPLY BRIEF OF DEFENDANT-APPELLANT  
CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON

Respectfully submitted,



GREGORY T. ROSSI (0047595)  
(Counsel of Record)  
ROCCO D. POTENZA (0059577)  
HANNA, CAMPBELL & POWELL, LLP  
3737 Embassy Parkway, Suite 100  
Akron, Ohio 44333  
Phone: 330-670-7600  
Fax: 330-670-7478  
E-mail: [GRossi@hcplaw.net](mailto:GRossi@hcplaw.net)  
[RPotenza@hcplaw.net](mailto:RPotenza@hcplaw.net)  
Counsel for Defendant-Appellant  
Children's Hospital Medical Center of Akron

Jack Morrison, Jr., Esq. (0014939)  
Thomas R. Houlihan, Esq. (0070067)  
Vicki L. DeSantis, Esq. (0075716)  
159 South Main Street  
Suite 1100 Key Building  
Akron, Ohio 44308  
Counsel for Plaintiffs-Appellees

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And

Paul W. Flowers, Esq. (0046625)  
(Counsel of Record)  
Paul W. Flowers Co., LPA  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113  
Attorney for Amicus Curiae,  
Ohio Association for Justice

Anne Marie Sferra, Esq. (0030855)  
Bricker & Eckler, LLP  
100 S. Third Street  
Columbus, Ohio 43215-4291  
Attorney for Amicus Curiae,  
Ohio Hospital Association. Ohio Osteopathic  
Association and Ohio State Medical Association

Rhonda Gail Davis (0063029)  
159 South Main Street, Suite 1111  
Akron, Ohio 44308  
Attorney for Amicus Curia,  
Summit County Association for Justice

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<<HCP #687027-v1>>

## **I. INTRODUCTION**

Plaintiffs' principal argument in opposition to Children's Hospitals appeal is that since proof of the standard of care in malpractice cases must be by expert witnesses, "lay jurors" using "lay foreseeability" concepts should not be permitted to speculate as to what is foreseeable to a physician. Accordingly, Plaintiffs argue that to instruct a jury in a medical malpractice action on the issue of foreseeability invites speculation by a jury and therefore it is an improper instruction. Plaintiff claims that this Court's decisions wherein it defined the standard of care in medical malpractice cases and the requirement of expert testimony supplanted traditional notions of foreseeability.

Plaintiffs' analysis is seriously flawed and without merit. First, in the very decisions cited by Plaintiffs this Court never stated, inferred nor suggested in any way, not even remotely, that it intended to supplant concepts of foreseeability in medical malpractice cases. To the contrary, this Court has always emphasized the importance of assessing foreseeability of harm when assessing whether a defendant has acted reasonably or negligently. This is consistent with the central role foreseeability has always played in determining whether there has been a *breach* of the standard of care.

Second, contrary to Plaintiffs' claims, it is a jury's role to decide the issues presented in a case, including the very issues which are the subject of expert testimony. This happens in virtually every case where expert testimony is presented. Thus, giving an instruction to a jury on foreseeability does not require the jury to *speculate* as to what a specially trained physician would foresee. Rather, the instruction provides guidance to the jury when deciding on conflicting expert testimony on the issue of foreseeability.

The claim that in *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), the Court provided the one and only jury instruction to be given on standard of care in a medical malpractice action is flawed as well. This Court and the courts of appeals have approved time and time again additional jury instructions (of less significance than foreseeability) designed to assist juries in determining whether a medical-defendant has deviated from the standard of care. These include instructions regarding “bad results,” “physicians not guarantor”, “hindsight”, “different methods” and “customary methods”.

## **II. LAW AND ARGUMENT**

### **A. Foreseeability Is, And Has Always Been, Fundamental To A Jury’s Determination In Negligence Actions As To Whether The Defendant Deviated From The Standard Of Care – i.e. Failed To Act Reasonably Under The Circumstances.**

Plaintiffs do not dispute that jurors should be instructed on foreseeability in ordinary negligence actions. The reason is that this Court has repeatedly stated that foreseeability is fundamental to a determination of whether a defendant has acted negligently:

“In determining in any given case whether a defendant exercised that care which an ordinarily and reasonably prudent man would have exercised under the same or similar circumstances, *one of the most important of the circumstances* is ‘the potential danger *apparently* involved.’ . . . The remaining question was whether it was apparent. *That is to say, should the defendant have foreseen this danger?*”

*Schwer, Admx., v. New York, Chicago & St. Louis Rd. Co.*, 161 Ohio St. 15, 21, 117 N.E.2d 696, 43 A.L.R.2d 606 [1954].

“[T]he elementary rule [is] that the degree of care to be exercised is determined by the danger to be apprehended.” *Weaver v. Columbus, S. & H. Ry. Co.*, 76 Ohio St. 164, 176, 81 N.E. 180 (1907) (Emphasis added).

In *Di Gildo v. Caponi*, 18 Ohio St.2d 125, 247 N.E.2d 732 (1969), this Court rejected the plaintiff's challenge to a very similar foreseeability instruction as was given in the instant case.

In upholding the foreseeability instruction, the Court explained:

Appellant contends further that the following instruction to the jury was erroneous: 'the test is whether in light of all of the attending circumstances, all of them, a reasonably prudent person *would have anticipated* the injury was likely to result to someone from the performance of the act in question.'

The trial court's charge here was a correct statement of the law of foreseeability as announced in *Neff Lumber Co. v. First National Bank*, 122 Ohio St. 302, 171 N.E. 327 [1930], and followed in *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 39, 90 N.E.2d 859, 863 [1950]: '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.' See, also, *Miller v. B. & O. Southwestern Rd. Co.*, 78 Ohio St. 309, 325, 85 N.E. 499, 18 L.R.A., N.S., 949 [1908]; *Gedeon v. East Ohio Gas Co.*, 128 Ohio St. 335, 190 N.E. 924 [1934].

*Id.* at 130 (emphasis added).

#### **B. This Court Has Not Eliminated Or Supplanted Foreseeability As An Appropriate Instruction In A Medical Malpractice Action.**

In their brief, Plaintiffs argue this Court eliminated foreseeability as a jury consideration in medical malpractice cases nearly 111 years ago. They begin their analysis by citing *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902), wherein the Court stated that a physician is held to the standard of reasonable care of reasonably prudent physician. *Gillette* however had absolutely nothing to do with the issue of foreseeability or "supplanting concepts of general negligence." Rather, the issue in that case was whether plaintiff's case was filed within the statute of limitations.

From the *Gillette* decision, Plaintiffs jump forward to this Court's decision in *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976). The issue presented in *Bruni* again had

nothing to do with the issue of foreseeability or whether medical malpractice law totally altered fundamental concepts of negligence law. Rather, the issue in *Bruni* was whether the standard of care is measured by a local standard or a national standard. In its decision, the Court set forth its oft cited definition of the standard of care applicable to physicians as follows:

it must be shown by a preponderance of evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things.

*Bruni* at syllabus paragraph 1.

It is from the above that Plaintiffs make the unjustified leap: “this statement of the law entirely supplants the general negligence standards of ordinary care, reasonable and prudent person, and foreseeability.” Plaintiffs’ Br. P. 28. Similarly, Plaintiffs argue: “[the *Bruni*] standard incorporates an inquiry as to what is foreseeable to a physician, and does not contemplate that a lay jury will be speculating on what is foreseeable to a highly trained physician.” *Id.*

A review of the *Bruni* decision fails to disclose any comments, discussion, statement or dicta that suggests in any way that this Court intended on eliminating foreseeability as a concept from medical negligence cases. If this Court had intended on eliminating such an important, fundamental concept from medical negligence cases, the Court would have clearly stated as much.

Moreover, Plaintiffs’ statements in this regard clearly ignore this Court’s acknowledgment in *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92, 529

N.E.2d 449 (1988) that “the same three elements must be shown to establish a negligence action generally, including a survivorship action predicated upon ordinary negligence or medical malpractice.” As stated in *Kurzner v. Sanders*, 89 Ohio App.3d 674, 627 N.E.2d 564 (1st Dist. 1993) “a medical malpractice action is nothing more than an ordinary negligence claim against a medical professional.”

Accordingly, there is no support for Plaintiffs’ argument that this Court eliminated foreseeability by virtue of the *Bruni* decision or its predecessors.

**C. In A Medical Malpractice Action, Jurors Are The Ultimate Arbiters Of Issues That Are The Subject Of Expert Testimony, Including Issues Of Foreseeability.**

In their brief Plaintiffs repeatedly argue that to provide “lay jurors” instructions on foreseeability in a medical malpractice action will result in jurors speculating. For example, Plaintiffs argue: “[the *Bruni*] standard incorporates an inquiry as to what is foreseeable to a physician, and does not contemplate that a lay jury will be speculating on what is foreseeable to a highly trained physician.” Plaintiffs’ Br. p. 28. Plaintiffs further state “[the Ninth District’s] only holding was within the context of medical malpractice cases, where the *Bruni* standard of establishing what is foreseeable to a physician by expert testimony of his or her peers has supplanted lay speculation as to what is or is not foreseeable to a physician.” Plaintiffs’ Br. P. 38.

Plaintiffs confuse the requirement that a plaintiff is compelled to produce expert testimony to support a medical malpractice claim with the role of the jury in determining whether a physician has acted in a negligent manner. Ultimately, a jury is the ultimate fact finder and must determine which of the competing experts’ testimony on issue of the foreseeable risks involved in a particular course of action is more credible. It is well settled that determining the

credibility of witnesses, including expert witnesses, is a function for the jury. *Pangle v. Joyce* (1996), 76 Ohio St.3d 389, 395; *Paul v. Moore* (1995), 102 Ohio App.3d 748, 756; *Bailey v. Emilio C. Chu, M.D., Inc.* (1992), 80 Ohio App.3d 627, 635, jurisdictional motions overruled (1992), 64 Ohio St.3d 1409; *Turner v. Children's Hosp., Inc.* (1991), 76 Ohio App.3d 541, 556, jurisdictional motions overruled (1992), 63 Ohio St.3d 1469; *Earl Evans Chevrolet, Inc. v. Gen. Motors Corp.* (1991), 74 Ohio App.3d 266, 280.

This Court has explained that there is a significant distinction between the roles of experts and the roles of juries:

... '(t)he jury is the sole judge of the weight of the evidence and the credibility of witnesses. It may believe or disbelieve any witness or accept part of what a witness says and reject the rest. (In so doing it) \* \* \* should consider the demeanor of the witness and the manner in which he testifies, his connection or relationship with the \* \* \* (plaintiff) or the defendant, and his interest, if any, in the outcome.' *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548. \* ***Thus the function of the expert who gives opinion testimony in order to aid the jury in reaching a just determination is entirely separate from the function of the jury which must assess credibility and settle controverted issues of fact.***

*McKay Mach. Co. v. Rodman*, 11 Ohio St. 2d 77, 228 N.E.2d 304 (1967) (emphasis added).

Thus, while this Court has repeatedly held that expert testimony is required in medical malpractice actions, it has never held that such a requirement removes foreseeability from a jury's consideration. If Plaintiffs' argument were valid, then lay jurors should not be permitted to ever decide any issues which are the subject of expert testimony, including the standard of care because they would be "left to speculate".

Rather, expert witnesses provide testimony to aid jurors in deciding factual issues, including what a reasonably prudent physician would have anticipated or foreseen under the

same or similar circumstances. The foreseeability instruction provides guidance to the jury as to how they judge the defendant's conduct in light of the competing expert testimony.

The present case is a perfect example. Throughout the course of trial, testimony from the plaintiffs' expert, the defendant-physicians and the defense experts detailed the foreseeable risks associated with one course of action over another. The jury was charged with assessing the reasonableness of the Defendants' actions in light of this competing testimony. Thus, it was incumbent upon the trial court to give the jury guidance with the foreseeability instruction.

**D. In Medical Malpractice Actions, The Trial Court Is Not Limited To Instructing A Jury Solely With The *Bruni* Definition.**

In their brief, Plaintiffs argue that the sole definition that the trial court should have given on the issue of standard of care is the O.J.I. Instruction based on *Bruni*. According to Plaintiffs, to give any other instruction would serve to confuse a jury. Contrary to this argument, Ohio courts, including this Court, have repeatedly approved providing additional instructions to help guide jurors in their assessment of whether or not a medical defendant has deviated from the standard of care. In particular, the courts have approved instructions on "hindsight", "bad results/physicians not guarantors", "customary methods" and "different methods." *Pesek v. University Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 498, 2000-Ohio-483 (holding that different methods instruction is appropriate if supported by the evidence); *Holda v. Blankfield, M.D.*, 8th Dist. No. 84350, 2005-Ohio-766 (upholding hindsight instruction); *Thompson v. Capaldo*, 5th Dist. No. 08 CA 1, 2008-Ohio-6329 (upholding hindsight instruction); See *Miller Defiance Regional Med. Ctr.*, 6th Dist. No. L-06-1111, 2007-Ohio-7101 and *Callahan v. Akron General Med. Ctr.*, 9th Dist. No.2005-Ohio-5103 (upholding bad result and not guarantor instruction); and *McGarry v. Horlacher*, 149 Ohio App.3d 33, 2002-Ohio-3161, 775 N.E.2d 865 (upholding "customary methods" instruction). If *Bruni* were intended to be the sole instruction

on the issue of the standard of care barring a foreseeability instruction, it certainly would act as a bar to these instructions as well.

Interestingly, the "hindsight" line of cases are analogous to foreseeability concepts. In a case just decided within the last month, *Miller v. Andrews*, 2013 WL 3055347, 2013-Ohio-2490 (June 13, 2013), the Fifth District Court of Appeals approved a hindsight instruction in a medical malpractice case. In so doing, the court cited with approval the analysis of the Third District Court of Appeals in *Clements* which addressed a foreseeability instruction in a medical malpractice action:

With respect to the *Clements*' issue with the phrase "foresight, not hindsight," we find that this was not an inaccurate statement regarding the law. Even though this language is absent from the Ohio Jury Instructions (hereinafter "OJI"), the OJI instructions are only models or guidelines and are not mandatory. *State v. Burchfield* (1993), 66 Ohio St.3d 261, 263, 611 N.E.2d 819. With respect to foreseeability, the question is one looking forward from the time of the purported negligent action (foresight), not looking back after the injury has occurred (hindsight). *Grabill v. Worthington Industries, Inc.* (1994), 98 Ohio App.3d 739, 744, 649 N.E.2d 874 ("[i]t is nearly always easy, after an [incident] has happened to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence.")\* \* \* *Id.* at ¶ 75.

The fact that Ohio courts have repeatedly approved instructions designed to aid jurors in determining whether a medical defendant has deviated from the standard of care that go beyond the *Bruni* instruction, demonstrates that Plaintiffs' argument that trial courts should only give the *Bruni* instruction is without merit.

**E. The Majority Of Districts In Ohio Support The Propriety Of A Foreseeability Instruction In Medical Malpractice Cases. Plaintiffs' Attempts At Distinguishing These Decisions Are Disingenuous.**

As noted in Children's Hospital's Merit Brief the majority of Appellate districts addressing the issue have uphold a foreseeability instruction in medical malpractice cases.

Despite this, Plaintiffs argue that the only case that reached such a conclusion was the *Ratliff* case and that all the other cases are distinguishable. However, an examination of Plaintiffs' arguments in this regard, as compared to the actual decisions, demonstrates that these arguments are disingenuous.

For example, Plaintiffs claim that the *Clements* decision involved only an isolated reference to foreseeability and, therefore, it was not persuasive. However, even a cursory review of the *Clements*, clearly indicates the foreseeability instruction was one of the major issues addressed by the Third District. First, the challenge to instruction was one of the assignments of error. Second, the court devoted several pages to its analysis of the issue, ultimately concluding that the foreseeability instruction similar to the one used by the trial court in the present case was appropriate.

Plaintiffs' attempts to distinguish the Eighth District's decision in *Cox v. MetroHealth Med. Ctr. Bd. Of Trustees*, 2012-Ohio-2383, 971 N.E.2d 1026 (8th Dist.) is similarly misplaced. Plaintiffs' argue that *Cox* was inapplicable to the present issue because "the court gave a foreseeability instruction to allow the jury to define the extent of the duty of a nursing assistant, a person who is not subject to the *Bruni* rule." Plaintiffs' Br. at 44. Contrary to this claim, the Eighth District did apply the *Bruni* standard and applied it directly to its analysis of the foreseeability instruction! The Eighth District provided:

The appellants first challenge the trial court's jury instruction on the foreseeability of the injury as it relates to the standard of care Metro owed to Joseph. Under Ohio law, in order to present a prima facie claim of medical malpractice, a plaintiff must establish: (1) the standard of care, as generally shown through expert testimony; (2) the failure of defendant to meet the requisite standard of care; and (3) a direct causal connection between the medically negligent act and the injury sustained. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), syllabus. The existence of a duty, or standard of care, depends on the foreseeability of the injury. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d

75, 77, 472 N.E.2d 707 (1984). In order to determine what is foreseeable, a court 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.” (Emphasis added.) *Id.* at 77, 472 N.E.2d 707.

Similarly, with respect to the 8<sup>th</sup> District’s decision in *Peffer v. Cleveland Clinic Found.*, 8th Dist. No. 94356, 2011-Ohio-450, Plaintiffs mischaracterize the court’s analysis and holding. In particular, Plaintiffs state that the case only involved the issue of a foreseeability instruction with respect to proximate cause. However, it is clear that the court also addressed whether a foreseeability instruction was appropriate with respect to the standard of care. The Eight District quoted the trial court’s instruction at issue as follows:

{ ¶ 52} “In deciding whether reasonable skill, care or diligence are used, you will consider whether either or both the defendants ought to have foreseen under the circumstances that the natural and probable result of an act or failure to act would cause some injury or damage.

{ ¶ 53} “ \* \* \*

{ ¶ 54} “If a defendant, by the use of reasonable skill, care or diligence should have foreseen some injury or damage and should not have acted, or if he did act, should have taken precautions to avoid the result, then the performance of the act or failure to take such precautions would be negligence.”

Interestingly, in finding that the trial court had not erred in giving the instruction above, the Eight District cited the third District Court of Appeals decision in *Miller and Clements*, both of which are cases that plaintiff claims are distinguishable from the issue here. *Id.* at ¶ 56.

In *Joiner v. Simon*, 1st Dist. No. C-050718, 2007-Ohio-425, contrary to Plaintiffs’ claim, the First District did analyze the propriety of the instruction and did conclude that the instruction appropriately stated the law regarding foreseeability as applied to medical malpractice actions stating: “[t]aken as a whole, the trial court’s foreseeability instruction was sufficiently clear to allow the jury to understand *the relevant law*.”

Finally, Plaintiffs attempt to characterize the Eight District's decision in *Ratliff v. Mikol*, 8th Dist. No. 94930, 2011-Ohio-2147 as an aberration. To the contrary, as set forth above, the vast majority of cases addressing this issue have concluded that a foreseeability is appropriate in medical malpractice actions. In fact, *Ratliff* indicated that this Court's decisions compelled that finding. In upholding the instruction, the Court stated:

The parties presented dueling evidence on the standard of care. It was in the province of the trier of fact to determine whether, based on the evidence presented, the standard of care owed to Baker included performing an emergency Caesarean section, as Baker argued. We therefore cannot say that the trial court erred in including or with regard to the language of the foreseeability instruction. We agree with Dr. Mikol that the foreseeability instruction given is a correct statement of law, is required by the issues of the case, and is clear in setting out the general rule.

*Id.* at ¶11.

The same was true in the present case. The parties presented dueling expert evidence on the standard of care, including testimony regarding the foreseeable risks involved in choosing one form of treatment over another. Accordingly, the foreseeability instruction was required by the issues in the present case.

#### **F. Cases Cited By Plaintiff Are Not Persuasive**

In their brief, Plaintiffs cite the case of *Ryne v. Garvey*, 87 Ohio App. 3d 145, 621 N.E.2d 1320 (2<sup>nd</sup> Dist. 1993) in support of their argument that foreseeability is not relevant to a jury's determining in a medical malpractice capacity. However, the *Ryne* case is of no assistance in the analysis of this issue before. In that case, the defendant physician had filed for JNOV after a plaintiffs verdict. In the motion, the physician argued that he owed no duty to the plaintiff. Thus, the court did not address the issue of whether a jury instruction should be given on foreseeability in connection with evaluation of the standard of care.

Plaintiffs also cite the Eighth District's decision in *Hinkle v. Cleveland Clinic Found.*, 159 Ohio App. 3d, 2004-Ohio-6853, 823 N.E.2d 945. However, the issues in *Hinkle* did not have even a remote connection to the issues in the present case. *Hinkle* in no way addressed a foreseeability instruction.

The only case prior to the Ninth District's decision to squarely conclude that a foreseeability instruction should not be given in a medical malpractice action is the second district's unreported decision in *Needham v. Gaylor*, 2<sup>nd</sup> Dist. No. 14834, 1996 WL 531596 (Sept. 20, 1996). In 17 years, the *Needham* decision has never been relied upon by any other court to stand for the proposition that foreseeability instructions should not be delivered in medical malpractice actions. In fact, in *Turner v. Elk and Elk, L.P.A.*, 8<sup>th</sup> Dist. No. 96271, 2011-Ohio-5499, the only case to consider *Needham*, the Eight District refused to follow *Needham*. Instead, the Court approved the use of the foreseeability instruction in the assessment of the standard of care.

Plaintiffs' citation to the Georgia Supreme Court's decision in *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009) is also misplaced. Plaintiff contends that the *Smith* case concluded foreseeability instructions should not be delivered to jurors in medical malpractice cases. To the contrary, a perusal of the *Smith* decision clearly indicates that the Supreme Court of Georgia acknowledged that a foreseeability instruction is appropriate in such cases. *Id.* at 712. However, in that case, the concern was not whether a foreseeable instruction should be given at all. Rather, it was the language of the instruction that had been given.

The foregoing authority cited by Plaintiffs fails to establish that there is any compelling reason why this Court should reject its long-standing position that the evaluation of whether a

defendant, including a physician, is negligent necessarily requires an analysis of the foreseeability of the risks involved in particular conduct.

### **G. Response To Brief Of Amicus Curiae, Ohio Association For Justice**

In this Brief, Amicus OAJ first argues that foreseeability instructions are inappropriate in any negligence action. The basis of this argument is that foreseeability is only relevant to the issue of duty and it is irrelevant to the issues of standard of care and proximate causation. This position is clearly contrary to this Court's decisions as outlined in Appellants' Merit Brief at pp. 26-28. The fact that it is relevant to evaluating whether a breach of care has occurred is without debate. In *Thompson v. Ohio Fuel Gas Co.*, 9 Ohio St.2d 116, 224 N.E.2d 131 (1967), this Court explained that foreseeability is important when assessing a defendant's conduct:

In determining in any given case whether a defendant exercised that care which an ordinarily and reasonably prudent man would have exercised under the same or similar circumstances, *one of the most important of the circumstances is 'the potential danger apparently involved.'* *Schwer, Admx., v. New York, Chicago & St. Louis Rd. Co.*, 161 Ohio St. 15, 21, 117 N.E.2d 696, 43 A.L.R.2d 606 [1954].

The danger here, as evidenced by the seriousness of the occurrence itself, was great. The remaining question was whether it was apparent. *That is to say, should the defendant have foreseen this danger?*

*Id.* at 119 (Emphasis added).

Moreover, the fact that foreseeability is appropriately implicated in a jury's analysis of *breach* is evident from the Restatement's position:

*j. The proper role for foreseeability.* Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, *the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence.* The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, for reasons explained in Comment i, *courts should leave such determinations to juries* unless no reasonable person could differ on the matter.

Amicus OAJ next argues an issue that goes beyond the proposition of law that has been accepted by this Court, i.e. whether a foreseeability instruction should be given in medical malpractice actions. Instead, Amicus second argument challenges the format of the foreseeability instruction given in this case. This Court has previously rejected a request to review this precise issue on several previous occasions. *See Ratliff v. Mikol*, 129 Ohio St.3d 147, 6953 N.E.2d 842 (Table) (2011); (2012); *Peffer v. Cleveland Clinic Foundation*, 129 Ohio St.3d 141, 1949 N.E.2d 1005 (Table) (2011). Moreover, there was no objection to the *form* of the instruction either at the trial court level or in the Court of Appeals. The sole objection was to the giving of the instruction at all.

In their brief, Amicus argue that the inclusion of the word “likely” or “probable” in a foreseeability instruction places an insurmountable burden on a plaintiff. However, this argument is contrary to the format of the instruction in O.J.I. which is fashioned from this Court's previous decisions. Moreover, this Court has specifically approved this instruction. In *DiGildo, supra*, this Court held:

Appellant contends further that the following instruction to the jury was erroneous: ‘the test is whether in light of all of the attending circumstances, all of them, a reasonably prudent person would have anticipated the injury **was likely to result** to someone from the performance of the act in question.’

The trial court’s charge here was a correct statement of the law of foreseeability as announced in *Neff Lumber Co. v. First National Bank*, 122 Ohio St. 302, 171 N.E. 327 [1930], and followed in *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 39, 90 N.E.2d 859, 863 [1950]:

*Id.* at 130 (emphasis added).

In rejecting a similar challenge to the language of the foreseeability instruction in a medical malpractice case, the court in *Joiner* upheld the instruction. The Court explained:

But this reading would take the phrase out of the context of the court's foreseeability instruction as a whole. Taken as a whole, the trial court's foreseeability instruction was sufficiently clear to allow the jury to understand the relevant law.

In the present case, just as in *Joiner*, the trial court's instruction on foreseeability was consistent with O.J.I., long-standing precedent from this Court and was sufficiently clear to allow the jury to understand the relevant law.

**H. The Court's Instruction In This Case, When Taken As A Whole, Fairly Apprise The Jury Of The Applicable Law And Did Not Mislead The Jury In Any Way.**

Finally, it is important to note that this Court has held that "instructions must be viewed in their totality, and if the law is clearly and fairly expressed, no reversal will be predicated upon error in a portion of the charge." *Laverick v. Children's Hosp. Medical Ctr. of Akron* (1988), 43 Ohio App.3d 201, 540 N.E.2d 305. See, also *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207. Moreover, an erroneous jury instruction is a basis for reversal only if it is clearly established that the erroneous instruction, when taken as a whole, probably misled the jury to an incorrect result. *Ohio Farmers Ins. Co. v. Cochran*, 104 Ohio St. 427, 428, 135 N.E. 537 (1922). Thus, only an egregious error that leaves little doubt that the outcome was indeed erroneously arrived at warrants a reversal. See *Centrello v. Basky*, 164 Ohio St. 41, 52-53, 128 N.E.2d 80 (1955) (reversible error only occurs where the error is "pernicious, misleading and confusing character").

In the present case, not only did the trial court appropriately instruct the jury in regards to the issue of foreseeability, even assuming *arguendo* that the instruction somehow was improper, when taken as a whole, the trial court's extensive instructions on the standard of care could in no way have misled the jury.

### III. CONCLUSION

Foreseeability is the bedrock of negligence law, including, medical malpractice actions. It is one of the critical factors that a fact finder must consider in determining whether a medical defendants actions were reasonable under the circumstances. Simply because expert testimony is required in such cases does not render foreseeability irrelevant to a jury. Rather, just as in any other negligence case, the jury must decide among the conflicting evidence on foreseeability. The only difference is that the evidence is in the form of expert testimony.

The Ninth District has removed this fundamental consideration from juries in such cases. Not only is this position contrary to this Court's holdings, it is in direct conflict with the majority of other Ohio courts of appeals, and the position in both the Second and Third Restatement of Torts. Finally, the Ninth District's decision, by failing to apply the proper standard for reviewing alleged errors in instructions, allows a court of appeals to invalidate a jury's verdict no matter how insignificant the alleged error in a jury charge.

For all the foregoing reasons, Appellant Children's Hospital respectfully requests this Court reverse the Ninth District Court of Appeals decision and reinstate the jury verdict in its favor.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Gregory T. Rossi", is written over a horizontal line. The signature is stylized and cursive.

GREGORY T. ROSSI (0047595)

(Counsel of Record)

ROCCO D. POTENZA (0059577)

HANNA, CAMPBELL & POWELL, LLP

3737 Embassy Parkway, Suite 100

Akron, Ohio 44333

Phone: 330-670-7600

Fax: 330-670-7478

E-mail: [GRossi@hcplaw.net](mailto:GRossi@hcplaw.net)

[RPotenza@hcplaw.net](mailto:RPotenza@hcplaw.net)

Counsel for Defendant-Appellant

Children's Hospital Medical Center of Akron

**CERTIFICATE OF SERVICE**

A true copy of the foregoing *REPLY BRIEF OF DEFENDANT-APPELLANT CHILDREN'S HOSPITAL MEDICAL CENTER OF AKRON* was served by regular U.S. mail on the 15<sup>th</sup> day of July 2013 upon:

Jack Morrison, Jr., Esq. (0014939)  
Thomas R. Houlihan, Esq. (0070067)  
Vicki L. DeSantis, Esq. (0075716)  
159 South Main Street  
Suite 1100 Key Building  
Akron, Ohio 44308

*Counsel for Plaintiffs-Appellees*

Paul W. Flowers, Esq. (0046625)  
(Counsel of Record)  
Paul W. Flowers Co., LPA  
Terminal Tower, 35th Floor\  
50 Public Square  
Cleveland, Ohio 44113

*Attorney for Amicus Curiae,  
Ohio Association for Justice*

Rhonda Gail Davis (0063029)  
159 South Main Street, Suite 1111  
Akron, Ohio 44308

*Attorney for Amicus Curia,  
Summit County Association for Justice*

Anne Marie Sferra, Esq. (0030855)  
Bricker & Eckler, LLP  
100 S. Third Street  
Columbus, Ohio 43215-4291

*Attorney for Amicus Curiae,  
Ohio Hospital Association. Ohio Osteopathic  
Association and Ohio State Medical  
Association*

  
\_\_\_\_\_  
Rocco D. Potenza (#0059577)

<<HCP #687510-v1>>