

IN THE SUPREME COURT OF OHIO

THERESA HAYWARD

Plaintiff-Appellee

vs.

SUMMA HEALTH SYSTEM, et al.

Defendants-Appellants

CASE NO: 13-0021

On Appeal from the  
Summit County Court of Appeals,  
Ninth Appellate District,  
Case No. CA-25938

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MERIT BRIEF OF APPELLEE, THERESA HAYWARD

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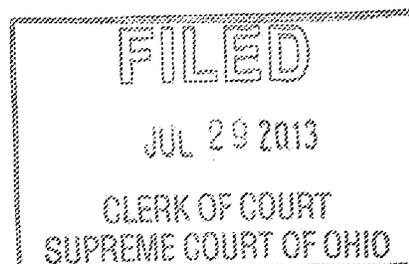
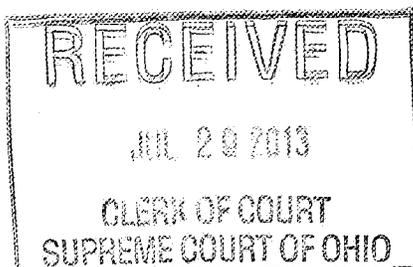


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### III. Introduction

Appellants, Dr. Michael Cullado and Summa Health System, implicitly concede that the trial court's remote cause jury instruction was unsupported by evidence, because they offer no argument or evidence in support of it. Instead, Dr. Cullado and Summa argue that the error was automatically harmless, and that the Ninth District erred in concluding that the instruction was prejudicial.

However, Dr. Cullado and Summa fail to recognize that the Ninth District's analysis is well supported by this Court's authority in *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St. 3d 169, 729 N.E.2d 726, (2000). Pursuant to *Hampel*, when an instruction is wholly unsupported by evidence (as opposed to merely poorly worded), a presumption arises that the instruction was prejudicial. This is a recognition that the jury was effectively given the wrong law to apply, and without such a presumption, the affected party would essentially be unable to demonstrate prejudice in any circumstances.

Once the presumption of prejudice arises, it is then incumbent upon the reviewing court to examine the record to determine whether there are any circumstances that would allow the reviewing court to conclude that the error was harmless. If the presumption of prejudice is not rebutted from a review of the record, the reviewing court may then give effect to the presumption of prejudice, and remand the matter for a new trial.

Contrary to Dr. Cullado and Summa's argument that the Ninth District created an automatic rule that any error in causation jury instructions entitles a plaintiff to a new trial, the Ninth District did exactly what *Hampel* commands - once the presumption of prejudice arose, the Ninth District examined the record in detail to determine whether the presumption was rebutted. *Hayward v. Summa Hosp. System*, 9<sup>th</sup> Dist. No. 25938, 2012-

Ohio-5396, ¶ 15-17 (Nov. 21, 2012). The Ninth District concluded, after a careful review of the record, that it could not rule out prejudice, and accordingly remanded the case for a new trial. There was no error in doing so.

#### **IV. Statement of Facts**

Theresa Hayward had abdominal surgery, and as a result, suffered permanent injury to her leg, which has left her unemployable and significantly limited. This is a rare medical malpractice case where the parties are substantially in agreement as to the mechanism of injury – a retractor injury – and the fact that a retractor injury is outside the standard of care. Despite the fact that no other cause for Theresa’s injury was described by either of the parties, the trial court, over objection, gave the jury a remote cause instruction. This instruction was wholly unsupported by evidence, and prejudiced Theresa’s attempt to prove her case, because the question of causation was inexorably tied to the question of negligence.

Theresa Hayward is a lifelong Akron resident, and worked as a floor technician for various healthcare providers, buffing and stripping waxed floors with a buffer machine. (Tr., Vol. I, p. 68-69). Prior to her injury, she was active, running and playing with the children in her extended family and caring for her wheel-chair bound mother. (Tr., Vol. I, p. 60, 69-70, 102-103).

Theresa suffered from chronic diverticulitis, a condition where material in the digestive tract gets caught in the folds of the colon, causing inflammation. She was hospitalized in October, 2007 with chronic diverticulitis. (Tr., Vol. II, p. 125). Theresa met with Dr. Michael Cullado, an abdominal surgeon, who recommended that Theresa

have a sigmoid resection to remove the portion of her diseased colon to prevent her from future upsets of diverticulitis. (Tr., Vol. II, p. 125).

On October 10, 2007, a nonparty anesthesiologist put Theresa under anesthetic, and Dr. Cullado, with the assistance of Dr. Steven A. Wanek, performed the surgery. Dr. Wanek was a fifth year surgical resident in October, 2007. (Tr., Vol. I, p. 37). As a fifth year resident, Dr. Wanek had a very significant role in the surgery. (Tr., Vol. I, p. 39). Theresa was placed in a modified lithotomy position, where the patient is placed with legs in stirrups, not quite flat. (Tr., Vol. I, p. 64, Tr., Vol. II, p. 140). The modified lithotomy position is used to reduce the chance of injury to the nerves that could occur if the patient's surgery was done in a supine position. (Tr., Vol. II, p. 141). Following the surgery, Theresa was hospitalized to recover. On the second day after surgery, Theresa's catheter was removed, and she tried to get up and go to the restroom. (Tr., Vol. I, p. 71). Instead, she fell on the floor. (Tr., Vol. I, p. 71). She couldn't feel her left leg at all. (Tr., Vol. I, p. 71).

In response, Dr. Cullado called in a non-party neurologist, Dr. Robert A. Lada, to figure out what happened. (Trial Deposition of Dr. Robert A. Lada, p. 11,13). Dr. Lada examined Theresa, and found that her ability to flex her hip, extend her knee, and adduct her leg was impaired. (Lada Depo., p. 15). Theresa had decreased sensation to touch through her thigh and calf and an absence of reflex in her left knee. (Lada Depo., p. 15-16).

There was no indication that Theresa had left leg weakness prior to the surgery. (Lada Depo., p. 14). Dr. Lada concluded that Theresa suffered damage to her femoral nerve during surgery. Dr. Lada developed a differential diagnosis to determine the cause

of the nerve injury. (Lada Depo., p. 16). He initially included compression of the femoral nerve, retroperitoneal hematoma and diabetes in the differential. (Lada Depo., p. 16-17).

Dr. Lada ruled out diabetes due to a lack of evidence that Theresa had any sort of sugar problem. (Lada Depo., p. 17). Dr. Lada ruled out a hematoma by doing a CT scan. (Lada Depo., p. 17). After ruling out other potential causes, Dr. Lada believed that Theresa suffered some kind of nerve compression during the surgery. (Lada Depo., p. 17-18). Dr. Lada ordered a nerve conduction study for the femoral nerve and the study indicated that Theresa had suffered a prominent left femoral neuropathy, meaning damage to the nerve. (Lada Depo., p. 19-20). Dr. Lada testified that Theresa's injury occurred during the surgery as a result of prolonged compression of the femoral nerve. (Lada Depo., p. 21-22). Dr. Lada determined that the compression was most likely caused by use of a retractor during surgery. (Lada Depo., p. 25-26).

Dr. Lada discussed his findings with Dr. Cullado and Dr. Wanek. Four months after Theresa was discharged from the hospital, Dr. Wanek dictated a discharge summary. (Tr., Vol. I, p. 45, Exhibit 9). Dr. Wanek's discharge summary states that Theresa suffered a femoral nerve injury, likely secondary to a retractor injury. (Tr., Vol. I, p. 46, Exhibit 9). Dr. Cullado signed off on Dr. Wanek's discharge summary. (Tr., Vol. I, p. 53). Thus both of the physician defendants in this matter agreed that Theresa's nerve injury was caused by the use of retractors in her surgery.

In Theresa's surgery, Dr. Cullado and Dr. Wanek used a Bookwalter retractor. (Tr., Vol. I, p. 45). A Bookwalter retractor is a large metal ring that bolts to a post that is connected to the surgical table. It has movable blades which project down into the

patient's abdomen. The retractor is used to hold back the skin and abdominal wall so the surgeon can operate on the organs below. (Tr., Vol. III, p. 249-250).

Theresa called an expert witness, Dr. William Irvin, to explain the proper use of the Bookwalter retractor. Dr. Irvin is a gynecological surgeon who performs around four major abdominal surgeries per week. He uses a Bookwalter retractor in almost every case. (Tr., Vol. II, p. 119-120). Dr. Irvin has performed research on neurological injuries resulting from the use of retractors. (Tr., Vol. II, p. 120). Dr. Irvin has also published peer reviewed literature on the risks associated with retractors, specifically in the field of abdominal surgery. (Tr., Vol. II, p. 120-122). He has also lectured nationally and internationally on the topic. (Tr., Vol. II, p. 122-123).

Dr. Irvin explained that the femoral nerve allows a person to flex at the hip and extend at the lower extremities. (Tr., Vol. II, p. 130-131). The femoral nerve is both a sensory nerve and a motor nerve, allowing one to feel the anterior and medial thigh and medial calf. (Tr., Vol. II, p. 131). As it passes through the pelvis, the femoral nerve runs through the psoas muscle, and is not visibly apparent. (Tr., Vol. II, p. 130). If one is not careful in placing the retractor blades, a blade can go deep enough into the pelvis that it digs into the psoas muscle. (Tr., Vol. II, p. 132). When a retractor blade digs into the psoas muscle, it compresses the femoral nerve against the ileum bone, causing injury. (Tr., Vol. II, p. 132).

Accordingly, the standard of care when placing the Bookwalter retractor is to use one's hand to feel for space between the bottom of the blade and the top of the psoas muscle. (Tr., Vol. II, p. 134). If the Bookwalter retractor is appropriately placed, with space between the retractor blade and the psoas muscle, it is absolutely impossible for the

blade to compress the psoas muscle. (Tr., Vol. II, p. 134). Since Theresa suffered a retractor-related injury, as admitted by Dr. Cullado and Dr. Wanek, Dr. Cullado and Dr. Wanek fell below the standard of care by failing to appropriately place the retractor. (Tr., Vol. II, p. 143).

Interestingly, Dr. Cullado and Dr. Wanek agreed with most of Dr. Irvin's testimony. Dr. Wanek admitted that he knew that if the Bookwalter retractor was placed wrong, it could cause injury to the femoral nerve, and that the risk of injury to the femoral nerve from Bookwalter retractor placement was taught from day one of Dr. Wanek's training. (Tr., Vol. I, p. 48). Dr. Cullado admits that it is well known that directly compressing the psoas muscle can lead to injury. (Tr., Vol. III, p. 284).

Dr. Cullado testified that he typically re-adjusts the retractor blades several times during the course of the surgery. (Tr., Vol. III, p. 281). To meet the standard of care, Dr. Cullado checks the placement of the retractor blades with his fingers to assure that there is a finger width between the bottom of the retractor blade and the psoas muscle. (Tr., Vol. III, p. 264, 276, 284). Dr. Cullado believes he did this in Theresa's case, and that the retractor was not on the psoas muscle. (Tr., Vol. III, p. 301).

Nevertheless, Dr. Cullado admitted that Theresa's injury was "most likely associated with the use of the retractor." (Tr., Vol. III, p. 301). So on one hand, Dr. Cullado claimed that he met the standard of care and made sure that there was a finger-width between the retractor blade and the psoas muscle, and on the other hand Dr. Cullado admitted that the injury was most likely caused by the retractor.

In an effort to clear up this dichotomy, Appellees called an expert witness, Dr. Peter Muscarella, a gastrointestinal surgeon. (Tr., Vol. IV, p. 311). Dr. Muscarella offered two explanations for why Dr. Cullado and Dr. Wanek should not be liable.

First, Dr. Muscarella testified that these injuries could occur from a “constellation of factors that can come together,” resulting in a stretching of the nerve or a loss of blood flow. (Tr., Vol. IV, p. 328). He was unable to identify these factors in detail, and when asked for more specificity as to the cause of the injury to Theresa’s nerve, Dr. Muscarella could only identify “the surgery” as the cause. (Tr., Vol. IV, p. 363). Dr. Muscarella further testified in cross-examination that he was not aware that Dr. Lada and Dr. Cullado testified that the injury to Theresa’s femoral nerve was caused by the retractor blade. (Tr., Vol. IV, p. 356). In fact, Dr. Muscarella was surprised that Dr. Cullado admitted that Theresa’s injury was caused by the retractor blade. (Tr., Vol. IV, p. 357). Dr. Muscarella admitted that the first time that he learned that Dr. Cullado, Dr. Wanek, Dr. Irvin and Dr. Lada all testified that retractor blades were the likely cause of Theresa’s injury was during his cross-examination at trial. (Tr., Vol. IV, p. 363).

After learning that all of the other physicians in the case acknowledged that Theresa’s injury was a retractor-blade injury, Dr. Muscarella’s testimony mirrored plaintiff’s expert Dr. Irvin. Dr. Muscarella agreed that if Dr. Cullado had felt underneath the retractor blade to assure that it was not against the psoas muscle, there would have been no way for the retractor blade to injure the nerve. (Tr., Vol. IV, p. 357, 361). Dr. Muscarella further admitted the type of injury which occurs because of direct compression to the nerve from retractor blades can be “eliminated” simply by leaving space between the blade and the psoas muscle. (Tr., Vol. IV, p. 362). Therefore, he

agreed that if the retractor blade was improperly placed against the psoas muscle and caused injury to the femoral nerve that act would fall below the accepted standards of care. (Tr., Vol. IV, p. 367-368). Dr. Muscarella reiterated that placing the blade of the retractor on the femoral nerve would be negligence and would fall outside the standard of care. (Tr., Vol. IV, p. 370).

Dr. Muscarella offered a second argument against liability – that Dr. Cullado and Dr. Wanek's misplacement of the retractor was excused by a consent form that Theresa signed before the surgery. But this testimony was contradicted by Dr. Cullado's own testimony. While the consent form mentioned nerve injury as a possible complication, Dr. Cullado admitted that Theresa did not consent to nerve injury from improper placement of retractor blades. (Tr., Vol. I, p. 57). Dr. Cullado further admitted that when Theresa signed the consent form, she did not consent to being provided with medical care that was below accepted standards of care. (Tr., Vol. I, p. 63, 65). Dr. Cullado went on to note that the reference to nerve injury in the consent form covered “things like mechanical defects” in the retractors, which was not at issue in this case. (Tr., Vol. III, p. 255).

Dr. Cullado clearly testified that the consent form did not cover injury due to a departure from the standard of care. (Tr., Vol. III, p. 298). Ultimately, in cross-examination, Dr. Muscarella agreed that when a patient signs a consent form the patient is not agreeing to accept treatment below accepted standards of care. (Tr., Vol. IV, p. 351-352). There is no evidence that Theresa's injury resulted from a cause other than improper retractor placement. Thus, the consent form is not a defense.

Theresa was in a wheelchair for 3-4 months after leaving the hospital. (Tr., Vol. I, p. 76). After regaining the strength to get out of the wheelchair, Theresa was on a walker for about a year. (Tr., Vol. I, p. 76-77). Theresa now walks with a cane, but has significant mobility problems, and other neurological issues with her leg, such as itching, restlessness, and cramping. (Lada Depo., p. 30; Tr., Vol. I, p. 73). She lost her job as a result of her physical limitations. (Tr., Vol. I, p. 75). Vocational expert Rod Durgin, Ph.D. testified that Theresa is now essentially unemployable. (Tr., Vol. II, p. 183).

Theresa Hayward filed her medical negligence complaint against Dr. Michael Cullado, Dr. Steven Wanek, their employer, Summa Health System, and some additional parties on March 31, 2009. The additional parties were subsequently dismissed. (May 18, 2010 and May 21, 2010, Notices of Dismissal). No relevant motion practice occurred, and trial commenced on January 25, 2011. Over Theresa Hayward's objection, the Court gave a "remote cause" jury instruction that was unsupported by the evidence. (Tr., Vol. IV p. 434). The jury found no negligence on the part of Dr. Cullado, and Dr. Wanek, and contrary to the jury instructions and the jury interrogatories, also went on to find no causation. (Jury Interrogatories 1-4). The trial court entered judgment based upon the verdict on February 23, 2011.

This appeal was timely filed, and Theresa argued to the Ninth District that the trial court's decision to submit the unsupported remote cause instruction to the jury constituted prejudicial error. The Ninth District agreed and found the error to be prejudicial, concluding that the remote cause jury instruction was "so clearly not warranted" in light of the "overwhelming" and "substantial" evidence that a retractor injury was the cause of Theresa's injury, as opposed to some other cause. *Hayward v.*

*Summa Hosp. System*, 9<sup>th</sup> Dist. No. 25938, 2012-Ohio-5396, ¶ 17 (Nov. 21, 2012). Relying primarily on *Pesek v. Univ. Neurologists Ass'n*, 87 Ohio St. 3d 495, 721 N.E.2d 1011, (2000), where this Court found a new trial was warranted in a medical malpractice case when the court gave a “different methods” instruction that was unsupported by any evidence, the Ninth District remanded the case for a new trial. *Id.* Summa and Dr. Cullado timely sought review by this Court.

## V. Law and Argument

### Appellee’s Proposition of Law

**When a jury instruction is not supported by evidence, a presumption arises that the giving of that instruction is prejudicial error. It is then incumbent upon the reviewing court to examine the record for an indication that the error was harmless. *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St. 3d 169, 729 N.E.2d 726, (2000), followed.**

**A. The Ninth District did not “automatically” conclude that a retrial was warranted after finding that the remote cause instruction was improper.**

Toward the end of their Brief, Dr. Cullado and Summa claim that *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St. 3d 169, 729 N.E.2d 726, (2000), stands for the proposition that a reviewing court “cannot order a new trial upon a presumptive finding of prejudice....” (Appellant’s Brief, pp 7-8, internal quotations omitted). But *Hampel* supports Theresa’s view, not Dr. Cullado and Summa’s view. Because *Hampel* provides the proper framework to evaluate the analysis performed by the Ninth District in remanding the matter for a new trial, this Brief will address *Hampel* first.

At issue in *Hampel* was the two-issue rule, which holds that “where a single determinative issue has been tried free from error, error in presenting another issue will be disregarded.” *Hampel*, 89 Ohio St. 3d 169, 185. Dr. Cullado and Summa advance

the concept that two issue rule operates because the jury found, through interrogatories, no negligence and no causation. Thus, under the two issue rule, and in a vacuum, Dr. Cullado and Summa could argue that the jury's verdict on negligence independently resolved the case. But there are two problems with that analysis. First, where the two "issues" are two parts of the same theory of liability (such as liability and causation), there really is only one issue – whether the plaintiff prevails on that claim– and the two-issue rule does not operate. This point is explained in detail below in Section V.B. of the brief.

Second, the *Hampel* court specifically stated that "the two-issue rule does not apply where there is a charge on an issue upon which there should have been no charge." *Hampel* at 185, quoting *Ricks v. Jackson* (1959), 169 Ohio St. 254, 8 O.O.2d 255, 159 N.E.2d 225, paragraph four of the syllabus, internal quotations omitted. In this case, Theresa has demonstrated that the remote cause instruction was wholly unsupported by evidence. In fact, Dr. Cullado and Summa implicitly concede the remote cause instruction was not supported by evidence, since they do not advance any argument that the instruction was proper. Thus the two issue rule does not operate, because there was an instruction given that was not supported by evidence.

And the *Hampel* Court went on, noting that when an instruction is given that is not supported by evidence "**prejudice is generally presumed.**" *Id.* at 186, quoting *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 461, 709 N.E.2d 162, 165, (1999) (emphasis added). This rule supports appropriate policy, because if the jury is given incorrect law under which to decide the case, the burden should not be on the aggrieved party to show that the improper instruction caused jury confusion, especially when the

aliunde rule bars the collection of most of the necessary evidence. It is thus appropriate to allow a presumption in favor of the aggrieved party.

The *Hampel* Court further held that while prejudice is presumed, there is no “rule of mandatory or automatic reversal whenever there is a charge on an issue upon which there should have been no charge.” *Id.* at 186. Instead, it is incumbent upon the reviewing court to determine if the presumption of prejudice is rebutted by the record. *Id.*

Only after the *Hampel* Court set forth the appropriate context – that prejudice is presumed when an unsupported jury charge is given, but that presumption of prejudice can be rebutted when the reviewing court examines the record – did the *Hampel* Court make the following statement partially quoted by Dr. Cullado and Summa: “Otherwise, a reviewing court could order a new trial upon a presumptive finding of prejudice where the record actually establishes the contrary.” *Id.* at 186.

Thus *Hampel* does not hold what Dr. Cullado and Summa claims it holds. *Hampel* does not hold that a remand cannot occur based upon a presumption of prejudice. Rather, it holds that there is no automatic finding of prejudice in the case of an unsupported instruction. Instead, the reviewing court must review the record to determine whether the presumption of prejudice is rebutted by the record. And the Ninth District fully complied with *Hampel* in its analysis. At paragraphs 15-17 of its opinion, the Ninth District identified the unsupported instruction, reviewed the record carefully, found nothing to rebut the presumption of prejudice, and found that the jury instructions as a whole “probably misled the jury in a matter materially affecting the complaining party's substantial rights” under the standard set forth in *Becker v. Lake Cnty. Mem'l*

*Hosp. West*, 53 Ohio St. 3d 202, 208, 560 N.E.2d 165, 171 (1990). *Hayward*, 2012-Ohio-5396 at ¶17.

While the Ninth District did not specifically cite to *Hampel*, it is clear that their analysis tracks the requirements of *Hampel*. The law is well settled that this court can presume regularity in the intermediate courts of appeal unless the record affirmatively demonstrates otherwise. *State v. Edwards*, 157 Ohio St. 175, 183, 105 N.E.2d 259, 264 (1952); *Jaffrin v. Di Egidio*, 152 Ohio St. 359, 366, 89 N.E.2d 459, 463 (1949). Nothing in the language or logic of the *Hayward* decision suggests that the Ninth District rejected *Hampel* or failed to consider its mandate, and the Ninth District's analysis considers the record in the manner compelled by *Hampel*. Accordingly, it can be presumed that the Ninth District applied *Hampel* in reaching its decision.

Dr. Cullado and Summa, at page 8 of their Brief, next castigate the Ninth District for making a finding that the jury “could have confused the issue of the breach of the standard of care with remote causation.” *Hayward*, 2012-Ohio-5396 at ¶17. According to Dr. Cullado and Summa, this is the “grand leap” where the Ninth District found prejudice. (Appellant's Brief at p. 8). Again, Dr. Cullado and Summa miss the context of the analysis – the Ninth District was not looking for evidence of prejudice, they were looking for evidence to rebut the presumption of prejudice under the framework set forth in *Hampel*. The Ninth District did not need to find conclusive evidence of prejudice to order new trial, instead, the Ninth District needed to find some grounds to rebut the presumption of prejudice in order to *not* order a new trial. The Ninth District acknowledged that “there could be another explanation for [the jury's] confusion,” but, in its estimation, any such alternate explanation was not sufficient to rebut the presumption

of prejudice. *Hayward*, 2012-Ohio-5396 at ¶17. As such, the Ninth District properly performed the analysis.

The Ninth District's approach was therefore entirely consistent with this Court's authority in *Hampel* and *Pesek*, 87 Ohio St. 3d at 498, where this Court found that a "different methods" instruction was inappropriately given in a medical malpractice case due to an absence of evidence, and a new trial was warranted. Dr. Cullado and Summa's claim that the Ninth District adopted a rule of law that allows the courts to "automatically find prejudicial error" in the event of an incorrect proximate cause instruction is simply unsupported by any fair reading of the *Hayward* case.

**B. There is no automatic rule that a jury's finding of no negligence cures any errors in jury instructions related to causation.**

The two issue rule does not operate in this case, because there is but a single issue – whether Dr. Cullado and Dr. Wanek caused Theresa's injury with the retractor. If they did, they were negligent, because the expert testimony is in agreement that such an act falls below the standard of care. (Dr. Irvin's testimony, Tr., Vol. II, p. 143; Dr. Muscarella's testimony, Tr., Vol. IV, p. 370). If they did not cause the injury with the retractor, then Dr. Cullado and Dr. Wanek were not negligent. Thus the question of causation drove question of negligence, and the two were inseparable. And the trial court's decision to give a remote cause instruction without any evidence to support it allowed the jury a path to find an absence of negligence, when no such finding was warranted, causing prejudice to Theresa Hayward.

Early in their Brief, Dr. Cullado and Summa claim that a proximate cause jury instruction is automatically harmless if the jury concludes no negligence occurred. Dr. Cullado and Summa further claim that this is a well-recognized concept that the Ninth

District ignored. In so doing, Dr. Cullado and Summa not only mischaracterize the law generally but also the legal analysis and reasoning contained in *Hayward* and the Tenth District's decision in *Coulter v. Stutzman*, 10<sup>th</sup> Dist. No. 07AP1081, 2008-Ohio-4184, 2008 WL 3856324.

There is no rule of law in Ohio that a finding of no negligence moots any consideration of error in causation instructions. In *Taylor v. City of Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724, (1944) this Court spoke on the converse situation – where an error in liability instructions was allegedly moot because a causation defense was asserted. In *Taylor*, a passenger injured in a car accident brought a claim against a city for maintaining a nuisance that caused the accident. The city raised two defenses to the claim, first, that it had no duty to cure the nuisance, and second, that the actions of the driver of the car were the sole cause of the passenger's injuries (an intervening cause theory, without using that terminology). The city obtained a defense verdict, and the court of appeals reversed, finding error with respect to jury instructions relevant to nuisance.

On appeal to this court, the city argued that the instructions given regarding intervening cause were correct, so any error in the nuisance instructions were moot under the two-issue rule. 143 Ohio St. 426 at 429. The Court rejected this contention, reasoning that “[a] claim on the part of a defendant that plaintiff's injuries were proximately caused by the negligent acts of a person other than the defendant **is but another form of a general denial.**” *Id.* at 430, emphasis added. This Court went on to state that the causation defense “does not create a separate issue and does not furnish any basis for the application of the two-issue rule.” *Id.*

Thus this Court in *Taylor* recognized that there is no conceptual division between issues of liability and causation when the propriety of jury instructions is at issue. Whether the defendant's denial is based upon an avoidance of liability or an interruption in causation, both constitute a general denial of the plaintiff's claim. This is illustrated by the recent revision to the model medical negligence interrogatories, found at Section 417.17 of Ohio Jury Instructions, which now treat liability and causation as a unified issue. ("Was the Defendant negligent and did that negligence directly and proximately cause any [injury] [damages] to the plaintiff? Circle your answer in ink: yes or no"). Accordingly, the conceptual foundation of Dr. Cullado and Summa's central point is flawed – negligence and causation are not separate issues.

The *Hampel* court, after setting forth the framework for analysis detailed above, went on to apply that analysis to the case before it, which involved a plaintiff's verdict on separate claims for intentional infliction of emotional distress and sexual harassment. The intermediate court of appeals reversed the judgment, finding no evidentiary support for the sexual harassment claim. *Hampel*, 89 Ohio St. 3d at 174. The *Hampel* court ultimately determined that the intentional infliction of emotional distress and sexual harassment were two independent legal theories, and thus the two-issue rule applied, further meaning that *Ricks* did not operate as an exception to the two-issue rule. *Id.* at 187. The ultimate result of *Hampel* is thus distinguishable from the present case: There were two independent theories at issue in *Hampel* which could support the application of the two-issue rule and thus avoid the presumption of prejudice, while in the present case, the question of liability and causation were two parts of the same claim, and did not support the two-issue rule, pursuant to *Taylor, supra*.

In any event, instead of an automatic, black-or-white rule holding that an unsupported jury instruction is either automatically harmless or automatically prejudicial, the *Hampel* court set forth a system where a presumption of prejudice arises, subject to rebuttal from the contents of the record. Once the presumption arises, in order to determine whether the presumption is rebutted by the record, the critical inquiry is whether the jury charge as whole “probably misled the jury in a matter materially affecting the complaining party’s substantial rights.” *Becker*, 53 Ohio St.3d at 208. Thus, determining whether an instruction was harmless or prejudicial to a party’s rights is not amenable to a black-or-white rule and necessarily requires consideration of the claims at issue and the evidence presented at trial.

Ohio law is clear that measuring the effect of an improper jury instruction is done on a case-by-case basis, under the particular facts of each case. As two examples, in *Becker*, 53 Ohio St.3d 202 at 208, this Court concluded that a jury instruction was erroneous, however, it was harmless because the instruction pertained to the conduct of a non-party. Obviously, making this determination required this Court to consider the particular facts of the case. In *Bales v. Kurt*, 6th Dist. No. L-03-1335, L-04-1005, 2004-Ohio-7073, 2004 WL 2983619, ¶¶ 41-42, the court determined that the erroneous jury instruction was prejudicial because, in light of the claims and evidence, the parties’ substantial rights were affected. Again, the question turned on a review of the record, not a dogmatic rule.

In the present case, the instruction was prejudicial, because in light of the findings from Dr. Lada and Dr. Irvin and the admissions from Dr. Cullado and Dr. Wanek that a retractor injury occurred, the cause of Theresa’s injury was not in legitimate dispute.

And in light of the expert testimony that a retractor-caused injury was negligence and that an injury from another cause may not be negligence, the remote cause instruction affected the jury's determination of both liability and causation.

In support of their position that an error in a causation instruction is always irrelevant if a jury finds no negligence, Dr. Cullado and Summa primarily rely upon the Tenth District's decision in *Coulter and Peffer v. Cleveland Clinic Foundation*, 8<sup>th</sup> Dist. No. 94356, 2011-Ohio-450. Contrary to Dr. Cullado and Summa's argument, though, these cases do **not** stand for the proposition that an erroneous proximate causation instruction is always harmless error if the jury finds that the defendants were not negligent – regardless of the legal claims asserted and evidence presented at trial. The concrete rule espoused by Dr. Cullado and Summa was never adopted by *Coulter, Peffer*, or any other court.

While it is true that both *Hayward* and *Coulter* dealt with circumstances where a jury went on to consider a remote cause instruction after finding no negligence, the cases applied different standards of review, which drove the consideration of the particular facts of each case. In *Coulter*, the plaintiff failed to object to the instruction, and in *Hayward*, Theresa did object to the instruction at pages 304-306 of Vol. III of the trial court transcript. Compare *Hayward, supra*, at ¶ 14 with *Coulter, supra*, at ¶¶ 9-10. Thus, the Tenth District in *Coulter* performed a civil plain error review, while the Ninth District in *Hayward* did not. Because the *Hayward* court and the *Coulter* court analyzed the cases under different standards of review, it is not surprising that, under the factual circumstances of each case, the answer to the two different legal questions was different.

And the *Coulter* court acknowledged that even under the less forgiving “plain error” review of the case, reversible error could exist under different facts. The court specifically commented that under the particular circumstances at issue, it “perceive[d] no exceptional circumstances that require the application of the plain error doctrine to prevent manifest miscarriage of justice . . . .” *Coulter, supra*, at ¶ 11.

In *Peffer*, the court considered a proximate cause jury instruction that inappropriately incorporated concepts of foreseeability. Under the specific circumstances presented in that case, the court found that the erroneous causation instruction was harmless. But the *Peffer* court did not make that determination by applying a blanket rule of law requiring an automatic conclusion but, rather, by considering the particular facts at issue in light of the law, just as the Ninth District did in *Hayward*. After considering the evidence, including expert testimony and diagnostic findings, the *Peffer* court determined “[t]his case of medical diagnosis of a rare disease, which did not present itself in the classical manner, warranted such an instruction” *Peffer*, 2011-Ohio-450 at ¶¶ 55, 58. In counterpoint, the *Hayward* court found under the circumstances of this case, that a remote cause instruction was “so clearly not warranted” by the evidence. *Hayward*, 2012-Ohio-5396, at ¶15.

After considering the instruction as a whole in light of the facts of this case, the *Peffer* court went on to find that although the foreseeability instruction was misplaced, it was harmless error. *Id.* at ¶¶ 57, 58. Had the court determined that the instruction was unsupported by evidence and that the jury was likely confused by the erroneous instruction, as the Ninth District determined here, the outcome in *Peffer* would have been much different.

The other cases cited by Dr. Cullado and Summa on this point fair no better. In *Seeley v. Rahe*, 16 Ohio St.3d 25, 475 N.E.2d 1271 (1985), the introduction of an erroneous jury instruction was not even at issue. In *Sech v. Rogers*, 6 Ohio St.3d 462, 453 N.E.2d 705 (1983), and *Schultz v. Duffy*, 8<sup>th</sup> Dist. No. 93215, 2010-Ohio-1750, no unsupported instruction was identified, and no presumption of prejudice arose.

There is no identified rule of law that an error in a causation instruction is irrelevant when a jury finds no negligence. Thus, a determination by the Ninth District that an unsupported remote cause instruction in this case was prejudicial is not in conflict with any existing rule of law. It is instead the proper application of the law – looking at the particular facts of the case and the instructions as a whole to determine the prejudicial effect of an erroneous jury instruction. Because the question of causation drove the analysis of negligence in this case, the Ninth District performed the proper analysis and reached the correct result.

**C. Theresa Hayward did not waive any objection to the remote cause instruction.**

Summa and Dr. Cullado, at p. 2 of their Brief, also advance the argument that Theresa withdrew any objection to the remote cause instruction by failing to renew her objection after the remote cause instruction was read to the jury. This was the topic of Summa and Dr. Cullado's proposed Proposition of Law No. 2, which was not accepted by this Court. In any event, Summa and Dr. Cullado's argument in this regard is misplaced. Theresa objected in detail to the remote cause instruction prior to its delivery. (Tr., Vol. III p 304-306). This Court has repeatedly held that a party preserves its jury instruction objections by advocating for the correct jury instruction, regardless of when that occurs. *State v. Wolons*, 44 Ohio St. 3d 64, 67, 541 N.E.2d 443 (1989); *Presley v. Norwood*, 36

Ohio St.2d 29, 33, 303 N.E.2d 81 (1973); *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 61, 567 N.E.2d 1291 (1991). Accordingly, Summa and Dr. Cullado's argument that Theresa withdrew this objection should be ignored.

**D. Summa and Dr. Cullado do not challenge the fact that the remote cause instruction was unsupported by evidence.**

Summa and Dr. Cullado submit no argument that the remote cause instruction was properly given and supported by evidence, and their Proposition of Law does not seem to address that topic. Accordingly, Theresa assumes that that issue is conceded.

In the event that this assumption is misplaced, then Theresa submits the following argument on this point. The analysis of remote cause in tort cases incorporates the concept of foreseeability as a limitation upon what outcome can fairly be attributed to the defendant's actions. Ohio Jury Instructions at §405.03 words the model remote cause instruction as "A (cause) (condition) is remote when the result could not have been reasonably foreseen or anticipated as being the likely cause of any (injury) (damage)." As such, remote cause is a tool to place a boundary upon the consequences of one's actions, because after all, "[e]ven harmful action cannot meaningfully be viewed as 'wrong' if the actor could not possibly have contemplated that the action might produce the harm." Owen, *Figuring Foreseeability* 44 Wake Forest L. Rev. 1277, 1277-1278 (2009).

But in this case, the possible outcome of their actions was well known by the defendants. The potential harm to a femoral nerve from a Bookwalter retractor was eminently foreseeable to anyone trained in abdominal surgery. Dr. Irvin testified that the type of retractor injury suffered by Theresa was first noted in medical literature as early as 1896, and the mechanism of injury was clearly described in medical literature in the

1960's. (Tr., Vol. II, p. 134). Dr. Wanek admitted that the risk of injury to the femoral nerve from the Bookwalter retractor was taught from "day one" of his training. (Tr., Vol. I, p. 48). Dr. Cullado admitted that he knew at the time of surgery that a femoral nerve injury could occur if the retractor blades were not properly placed. (Tr., Vol. I, p. 56). Even Appellees' expert, Dr. Muscarella, confirmed that it was foreseeable that inappropriate retractor placement would cause femoral injury. (Tr., Vol. IV, p. 347).

Accordingly, there was no evidence to support the inclusion of a remote cause instruction. *See Pesek, supra*. Remote cause instructions should be reserved for those occasions where an outcome is truly an "unusual occurrence that cannot fairly be anticipated or foreseen." *Jeanne v. Hawkes Hosp. of Mt. Carmel*, 74 Ohio App. 3d 246, 252, 598 N.E.2d 1174, 1177, (1991). But where, as here, a bad outcome is well-described and well-known to all of the medical providers involved in a patient's care, there is no justification for a remote cause instruction.

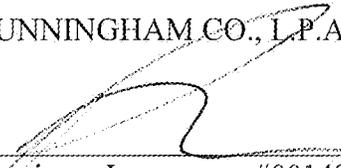
## **VI. Conclusion**

Based upon the foregoing law and argument, this Court should adopt the proposition of law advanced by Theresa Hayward, and AFFIRM the Ninth District's resolution of this matter. If this Court does reverse the matter, then it should be remanded to the Ninth District for consideration of Theresa Hayward's First, Second and Fourth assignment of error, which were not previously resolved by the Ninth District.

Respectfully submitted,

AMER CUNNINGHAM CO., L.P.A.

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## VII. Certificate of Service

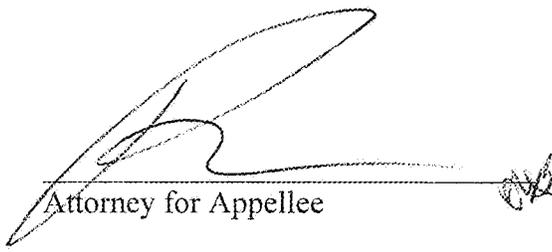
I hereby certify that a copy of the foregoing was served by regular, U.S. Mail this

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