

IN THE SUPREME COURT OF OHIO  
CASE NO. 2013-0021

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Appeal from Court of Appeals of Ninth Judicial District, Summit County, Ohio  
Case No. CA-25938

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THERESA HAYWARD, Plaintiff-Appellee

v.

SUMMA HEALTH SYSTEM, ET AL., Defendants-Appellants

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**BRIEF OF AMICUS CURIAE, SUMMIT COUNTY ASSOCIATION FOR JUSTICE,  
URGING AFFIRMANCE ON BEHALF OF PLAINTIFF-APPELLEE, THERESA  
HAYWARD**

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## **STATEMENT OF CASE AND FACTS**

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

## **INTEREST OF AMICUS CURIAE**

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

Because of that mission, the SCAJ's interest as amicus curiae in this case is to uphold the stability of Ohio's long-established jurisprudence concerning jury instructions and the standard of prejudicial error.

## LAW AND ARGUMENT AGAINST THE PROPOSITION OF LAW

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

**PROPOSITION OF LAW NO. 1: The Ninth District’s Decision in finding reversible error with respect to a remote cause jury instruction where a jury finds no negligence has effectively redefined what constitutes “prejudicial error” in jury instructions and, consequently, the Ninth District has created a direct conflict with this Court and other appellate courts throughout Ohio.**

### A. PROFESSIONAL MALPRACTICE

For more than 110 years, the Supreme Court of Ohio has consistently and repeatedly stated that in order to prove a medical malpractice case, a plaintiff bears the burden of proving that the plaintiff’s injury was proximately caused by an act or omission that a medical provider of ordinary skill, care, and diligence would not have committed under the same or similar circumstances. *See Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673, Syllabus at para. 1. *See also Littleton*, 39 Ohio St.3d at 93. This is a standard that has been in place in Ohio in medical malpractice cases since 1902. *See Bruni*, 46 Ohio St.2d at 131 (*citing* Ohio cases & *Davis v. Virginian Ry. Co.* (1961), 361 U.S. 354, 357, 80 S.Ct. 387, 4 L.Ed.2d 366 (1960)).

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

This Court also requires that causation, in and of itself, not be speculative and proved to the same standard of expert testimony as all the other elements of a medical malpractice case. Specifically, this Court held in *Stinson v. England* (1994), 69 Ohio St. 3d 451.

The admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the

causative event in terms of probability. [Citation omitted] An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue. [Citation omitted] Inasmuch as the expression of probability is a condition precedent to the admissibility of expert opinion regarding causation, it relates to the competence of the evidence and not its weight. [Citation omitted] Consequently, expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue.

*Id.* at Syllabus (Citations omitted and emphasis added).

## **B. JURY INSTRUCTIONS AND PREJUDICIAL ERROR**

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

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

OJI CV 101.35, at p. 15.

This Court requires trial courts to give jury instructions that correctly and completely state Ohio law. *Sharp v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307, 312, 649 N.E.2d 1219 (citing *Marshal v. Gibson* (1985), 19 Ohio St. 3d 10, 12, 482 N.E.2d 583). A party proposing an instruction must submit instructions which satisfy this requirement, especially when used along with other jury instructions and jury interrogatories. Here, the Appellants did not.

A remote cause jury instruction is not applicable in all medical malpractice case, just like it is not applicable in all motor vehicle cases. Evidence at trial must exist to support the proposed jury instruction and for it to be given. *Murphy v. Carrolton Mfg. Co.* (1991), 61 Ohio St. 3d 585, 591, 575 N.E.2d 828, 832 (citation omitted); *Pesek v. University Neurologist Assn.* (2000), 87 Ohio St. 3d 495, 498. This analysis requires a review of evidence and testimony.

*Pesek*, 87 Ohio St. 3d at 498 (no testimony at the trial to support the instruction). Whether the specific evidence existed or was sufficient to support the instruction is a matter for the trial court to decide and appellate court on review. Here, in review, the Appellants provided little or no testimony on the alternate theory of causation. In fact, the evidence at trial addressed potential other causes of Hayward's injuries and found them not applicable. Hayward's expert opined the cause of injury was the retractor. The Defendant, Dr. Cullado, opined that the injury "most likely correlated with the retractor". The testimony from all experts, including Dr. Cullado himself, reveals that the retractor's use can cause femoral neuropathy. The trial testimony even excluded other "remote causes": diabetes, hematoma, cutting a nerve, suturing a nerve, and other remote causes. Where was the remote cause which satisfies *Stinson v. England* (1994), 69 Ohio St. 3d 451? The standard for admissible evidence was satisfied, for causation, that an ordinarily prudent surgeon should have reasonably anticipated a patient, like Theresa Hayward, could sustain a femoral neuropathy from the retractor's improper placement. See *Hayward*, at para. 16 (citing *Jeanne v. Hawkes Hosp. of Mt. Carmel* (10<sup>th</sup> Dist. 1991), 74 Ohio App. 3d 246, 252). Likewise, the Appellants failed to satisfy the requirement for admissible evidence regarding remote cause and they did not.

If a jury instruction is inadequate and misleads the jury, the error in giving the instruction is reversible error. *Sharp v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307, 312, 649 N.E.2d 1219 (citing *Marshal v. Gibson* (1985), 19 Ohio St. 3d 10, 12, 482 N.E.2d 583). For the reviewing court, it must the jury instructions/charge, as a whole—including jury interrogatories, to determine whether the jury instructions/charge misled the jury "in a matter materially affecting the complaining party's substantial rights". See *Ohio Farmers Ins. Co. v. Cocharan* (1922), 104 Ohio St. 427, 135 N.E. 537, at Syllabus para. 6. See also *Becker v. Lake County*

*Mem. Hosp. West* (1990), 53 Ohio St. 3d 202, 208. This matter was proven by the interrogatories to the jury in Jury Interrogatory No. 3. When they completed Jury Interrogatory No. 3, they specifically intended that they found one or more of the Defendants negligent and addressed causation. Their inconsistent statements revealed their confusion with the jury instructions, which merits the remand.

### **C. APPELLANT'S CASES—HAYWARD IS NOT IN CONFLICT**

Contrary to Summa's assertion, the Ninth District Court of Appeals' decision does not conflict with either the Supreme Court's precedents or decisions from its sister Courts of Appeals. In each of the case Summa cites, each court derived its holding from a case-by-case analysis of the particular facts of the case before it and the circumstances attending the jury's verdict, including jury interrogatories, and none of the courts announced a rule of law that would have precedential effect or give rise to an actual conflict between or among any of them.

At least one of the cases involves the "two-issue rule," which does not apply to this case. The two-issue rule generally states that when a case presents two causes of action (or two defenses) that raise separate and distinct issues, but the jury has issued a general verdict that has not been tested by special interrogatories to determine which issues the prevailing party won, the court will presume that the jury found for the winner on all of the issues. *See Hampel v. Food Ingredients Specialties* (2000), 89 Ohio St.3d 169, 185, 729 N.E.2d 726. When such a case is on appeal, "where a single determinative issue has been tried free from error, error in presenting another issue will be disregarded." *Id.*

The *Hampel* case described the two-issue rule in detail in connection with an employment discrimination case that involved several intertwined causes of action – and then went on to explain that the fact that the jury in the *Hampel* trial tested the verdict (by

questioning the jurors about their verdict before they were dismissed) made the two-issue rule inapplicable. *See Hampel*, 89 Ohio St.3d at 187.

Many of the cases Summa cites are also materially distinguishable because in those cases, the jury verdict was not tested by interrogatories, or the answers the jury gave to interrogatories supported the verdict. By contrast, in this case, the Ninth District Court of Appeals specifically noted that the verdict for Summa was tested by interrogatories, and the answers to those interrogatories showed that the jury was confused by the proximate cause instruction. *See Hayward*, 9<sup>th</sup> Dist. No. 25938, 2012-Ohio-5396, at ¶ 17.

For example, in *Wagner v. Roche Laboratories*, the Court noted that Roche Laboratories failed to ask for interrogatories, and this failure made it “impossible” to determine whether a supposedly erroneous jury instruction was prejudicial. *See Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 460, 462, 709 N.E.2d 162 (1999).

*Seeley v. Rahe* was a case stemming from a multiple-vehicle pileup. It was erroneously litigated on the basis of contributory negligence, rather than comparative negligence, but the error was not prejudicial because “the jury’s answers to interrogatories show that none of the parties to the accident was negligent.” *Seeley v. Rahe* (1985), 16 Ohio St.3d 25, 27, 475 N.E.2d 1271. Notably, the *Seeley* Court did not announce a bright-line rule holding that a jury interrogatory finding that one party was not negligent immunized the case from being overturned.

Similarly, even though the jurors in *Sech v. Rogers* received an objectionable jury instruction, the way that the jury answered the six interrogatories addressing the issues of negligence, contributory negligence, and assumption of the risk indicated to the Court that even

if the jury instruction in question was erroneous, it did not play a part in the jury's verdict. See *Sech v. Rogers* (1983), 6 Ohio St.3d 462, 463, 465, 453 N.E.2d 705.

In *Peffer v. Cleveland Clinic Foundation*, the jury answered an interrogatory indicating it found that the defendants were not negligent, and was therefore not required to consider the erroneous proximate cause instruction – but unlike in this case, there was no evidence from any other interrogatories indicating that the *Peffer* jury lost its way. See *Peffer v. Cleveland Clinic Found.*, 8<sup>th</sup> Dist. No. 94356, 2011-Ohio-450, ¶ 57.

Summa only quoted a portion of the 10<sup>th</sup> District Court of Appeals' reasoning in *Coulter v. Stutzman* for why it would not apply the plain error doctrine to a civil case. The Court of Appeals was not asked to determine whether giving a causation instruction in a medical malpractice case was prejudicial error; instead, it was asked to apply the plain error doctrine. Its reason for saying “no” was more nuanced than Summa would like the Court to believe, as is shown when one reviews the language from Paragraph 11 of the *Coulter* decision that Summa omitted:

In the present case, Jury Interrogatory No. 1 asked the jury “[w]ere the defendants Dr. Stutzman and his employer Orthopedic & Neurological Consultants, Inc. negligent?” The jury answered “No.” It is clear that the jury never reached the issue of causation because it found that appellees were not negligent. The plain language of the jury instruction at issue indicates that the instruction on remote cause comes into play only after a defendant has been found to have been negligent.

*Coulter v. Stutzman*, 10<sup>th</sup> Dist. No. 07AP-1081, 2008-Ohio-4184, ¶ 11.

Two things distinguish *Coulter* from *Hayward*. First, as the Tenth District noted, the plain language of the jury instruction told the jury not to consider remote causes unless they found that the defendant was negligent. Second, unlike *Coulter*, the 9<sup>th</sup> District in *Hayward* noted that the jury answered the proximate cause interrogatory, even though it had been

instructed not to unless it found the defendant breached the standard of care, thereby indicating that it was confused by the proximate cause instruction.

The same is true in *Schultz v. Duffy*. In that case, the plaintiff challenged a defense verdict because the judge reread a portion, not the entire, proximate cause instruction to the jury. But again, the jury returned an interrogatory finding that the defendant was not negligent, there was no mention of whether the jury unnecessarily answered any proximate cause interrogatory, and “[m]oreover, we note that Schultz failed to object to the court’s partial reading of the proximate cause instruction.” *Schultz v. Duffy*, 8<sup>th</sup> Dist. No. 93215, 2010-Ohio-1750.

Finally, none of these cases supports the action Summa wants this Court to take, which is to announce a bright-line rule that a proximate cause jury instruction that includes foreseeability shall never, ever, under any circumstances constitute prejudicial error if the jury finds there was no negligence. None of the courts in any of the cases did so; instead, they examined the circumstances of each verdict and determined whether an instruction constituted reversible error on a case-by-case basis.

#### **D. OTHER ARGUMENTS ARE NOT RELEVANT AND ARE IMPROPER**

Appellee also brings to this Court's attention the fact that the arguments addressed here (alleged prematurity of objection, and failure to renew resulting in "effective waiver") are improperly raised before this Court. These arguments were subsumed in Appellants' Proposed Proposition of Law No. 2. This Court initially declined review over said Proposition of Law No.2, and again upon Appellants' Motion for Reconsideration. Thus consideration by this Court is improper. This Court limited the argument and consideration of issues specifically to Proposition No. 1 exclusively.

## CONCLUSION

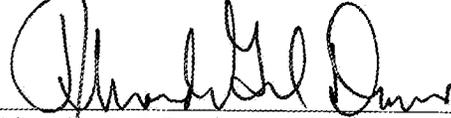
The Ninth District Court of Appeals decision is a correct statement of Ohio law and should be affirmed by this Court. In this instance, the remote cause instruction was unnecessary and confusing to jury. The law is well-settled in Ohio regarding prejudicial error under these circumstances and this case should be remanded to the trial court for another trial. The Summit County Association for Justice urges this Court to affirm the Ninth District Court of Appeal's decision in *Hayward*.

In this case, the Appellants sought a remote cause instruction which could be confusing to jury. And it was. Proof in the jury interrogatories reveal that the jurors were confused and that the remote cause instruction was truly improper and should not have been given.

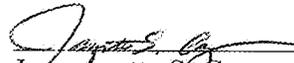
In *Hayward*, the Ninth District Court of Appeals detailed its review of the instruction and performed the required "case-by-case" analysis under Ohio law. The Ninth District Court of Appeals held that the instruction was improper and it was prejudicial error to give that remote cause instruction. The appellate court remanded the case to the trial court for a new trial.

SCAJ argues that this appeal by Summa Health System and others is not proper. The Supreme Court of Ohio is not an appeal-because-you-did-not-like-the-appellate-decision court. Something more is required—this Court should address areas of controversy in Ohio law, requiring clarification or adoption or rejection of legal principles. A case-by-case review standard is not one that demands or requires this Court's attention and time. Treating this Court as such, without novel issues of law, is treating this Court like a lower court of appeals, where there is an appeal by right. Clarification by this Court is not needed.

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