

ORIGINAL

No. 13-0021

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**In the Supreme Court of Ohio**

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**APPEAL FROM THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE NO. 25938**

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**THERESA HAYWARD, et al.**

**Plaintiff-Appellee**  
v.

**SUMMA HEALTH SYSTEM/AKRON CITY HOSPITAL, et al.**

**Defendants-Appellants**

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**REPLY BRIEF OF DEFENDANTS-APPELLANTS  
SUMMA HEALTH SYSTEM/AKRON CITY HOSPITAL**

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## **I. INTRODUCTION**

Plaintiff-Appellee Theresa Hayward raises several meritless legal and factual arguments in an attempt to convince this Court that the Ninth District's erroneous Decision should not be disturbed. The Trial Court conducted a completely fair trial for both parties in which none of its jury instructions, including the remote cause jury charge, was even remotely close to prejudicial error. The Ninth District issued a result-oriented Decision that contains no justifiable legal or factual basis upon which to reverse a jury verdict that was well reasoned and supported by the evidence. Similarly, Plaintiff's Merit Brief presents this Court with no legally or factually sound reason upon which the Ninth District's Decision should be allowed to stand.

Prior to addressing Plaintiff's flawed arguments, it is imperative that Defendants address Plaintiff's disingenuous assertion that Defendants "implicitly concede that the Trial Court's jury instruction was unsupported by evidence, because they [Defendants] offer no argument or evidence in support of it." (Plaintiff's Merit Brief, pg. 1) Nothing could be further from the truth. In both their Appellate Brief filed in the Ninth District and their Memorandum in Support of Jurisdiction, Defendants consistently argued and referenced the evidence they maintain, to this day, supported the Trial Court's remote cause jury instruction. This Court declined jurisdiction over Defendants' Proposition of Law No. 3 which challenged the Ninth District's rejection of Defendants' contention that the Trial Court properly instructed the jury on remote cause. Since this appeal is strictly limited to Proposition of Law No. 1 and the Ninth District's misapplication and misinterpretation of the law pertaining to "prejudicial error," Defendants did not brief either the facts or the law with respect to the legal and factual grounds for the Trial Court's jury charge on remote cause. By no means do Defendants "implicitly concede" that the remote cause jury instruction was not supported by the evidence. As such, Defendants will not address Plaintiff's

attempt to suggest that Defendants somehow concede that the Trial Court erred in charging the jury on remote cause.<sup>1</sup> Once again, Defendants still believe that the Ninth District erred in finding error with the Trial Court's jury instruction on remote cause.

If the Ninth District's Decision is not reversed by this Court, Ohio Courts and litigants will not have the proper guidance with respect to the law governing the determination of prejudicial error with jury instructions and, in particular, a remote cause jury instruction. Moreover, this Court should reverse the Ninth District's Decision so that the Ninth District and other Courts will be deterred from creating and relying upon legally and factually unsound grounds in order to interfere with the sanctity of the jury system.

## **II. LAW AND ARGUMENT**

**PROPOSITION OF LAW NO. 1: Just Like the Ninth District, Appellee Confuses The Law with Respect To What Constitutes "Prejudicial Error" And In Doing So, Appellee Presents Both Factually And Legally Flawed Arguments.**

**A. Plaintiff Is Misguided As To Defendants' Reliance Upon This Court's Decision in *Hampel v. Food Ingredients Specialties, Inc.* 89 Ohio St.3d 169, 2010-Ohio-128, 729 N.E.2d 726.**

In her Merit Brief, Plaintiff spends an inordinate amount of time and effort arguing that Defendants improperly relied upon this Court's Decision in *Hampel*. (Plaintiff's Merit Brief, pg. 10-14) Specifically, Plaintiff claims that Defendants are relying upon *Hampel* in order to "advance the concept that two-issue rule operates because the jury found, through interrogatories, no negligence and no causation." (*Id* at pg. 11) Plaintiff's position with respect to Defendants' reference to this Court's Decision in *Hampel* is without merit. A simple review of Defendants' Merit Brief confirms that Defendants never mentioned the two-issue rule and never

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<sup>1</sup> For this reason, Defendants will not address Section D of Plaintiff's Brief that pertains to Proposition of Law No. 3 which is not before this Court.

requested this Court to apply the two-issue rule. Instead, Defendants' reference to the *Hampel* Decision was limited to the following:

Additionally, the speculative finding of the Ninth District that the jury "could have confused the issue of breach of the standard of care with remote causation" is inconsistent with this Court's precedents with respect to the determination of prejudicial error. (See Appx. 11.) In *Hampel v. Food Ingredients Specialities, Inc.*, 89 Ohio St.3d 169, 2000-Ohio-128, 729 N.E.2d 726, this Court held that a reviewing court cannot order a new trial "upon a presumptive finding of prejudice where the record actually establishes the contrary." *Hampel, supra* at 186. The giving of an erroneous jury charge is not always sufficiently prejudicial to justify a reversal of the judgment. *Id.*, citing *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 709 N.E.2d 162 (1999).

(Defendants' Merit Brief, pp. 7-8.)

Defendants explicitly cited this Court's *Hampel* Decision for the proposition that the Ninth District erroneously made a "presumptive finding" that the Trial Court's remote cause jury charge constituted prejudicial error. Defendants' Merit Brief is completely devoid of any mentioning of the two-issue rule; yet, Plaintiff heavily relies upon this rule of law in order to discredit Defendants' reliance upon the *Hampel* Decision.

**Standard Of Care And Causation Are Two Distinct And Separable Issues/Elements Of A Medical Negligence Case.**

As this Court is well aware from the landmark case of *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673, in order to establish a medical malpractice, a plaintiff has the burden of establishing **all** of the following elements: (1) a deviation from the standard of care; (2) the injury complained of was directly and proximately caused by the deviation from the standard of care; and (3) damages. Even if a plaintiff can prove a deviation from the standard of care, a medical negligence case fails if a plaintiff cannot prove causation. *Ramage v. Central Ohio Emergency Services*, 64 Ohio St.3d 97, 592 N.E. 2d 828 (1992). Accordingly, the issues of

standard of care and proximate cause are distinct and separate. See *Lawson v. Mercy Hospital Fairfield*, 12<sup>th</sup> Dist. No. CA2010-12-340, 2011-Ohio-4471.

Plaintiff completely ignores this long-established law in medical malpractice actions by incorrectly stating that "the question of causation drove question of negligence, and the two were inseparable." (Plaintiff's Merit Brief, pg. 14) It is well know that a plaintiff can still lose a medical malpractice action even if there was a deviation from the standard of care, i.e., where a plaintiff cannot prove proximate cause. Consequently, Plaintiff's claim that standard of care and proximate cause are inseparable is simply not true.

Next, Plaintiff is incorrect in arguing that the parties agree that if there was a retractor injury that this was automatically a deviation from the standard of care. (Plaintiff's Merit Brief, pg. 2, 14) Essentially, Plaintiff is effectively arguing that this was a *res ipsa loquitur* case. Yet, Plaintiff neither argued *res ipsa loquitur* nor requested a jury charge on *res ipsa loquitur*. At all times throughout this case, Defendants have maintained that there was no medical negligence committed and that Plaintiff's femoral nerve injury was a known complication of her surgery.

This case was tried on the separate issues of standard of care and proximate cause. After hearing all of the evidence, the jury properly determined that Plaintiff failed to prove a deviation from the standard of care or vacate the defense verdict. Based upon this particular finding by the jury, Defendants were entitled to a defense verdict. Consequently, any alleged error with respect to issues pertaining to the separate issue of proximate cause could not negate the jury's determination of no deviation from the standard of care. As such, there existed no basis upon which the Ninth District could hold that the Trial Court's jury charge on remote cause constituted prejudicial error.

**Contrary To Plaintiff's Position, The Case Law Cited By Defendants Confirms That The Ninth District Erroneously Found Prejudicial Error.**

Plaintiff desperately attempts to challenge the case law relied upon by Defendants that essentially holds that if a jury finds no negligence, the complaining party cannot logically prove any prejudicial effect as a result of an error pertaining to a remote cause jury charge.

The Decision that is directly on point with the case, but went completely ignored by the Ninth District, is the Tenth District's Decision in *Coulter v. Stutzman*, 10<sup>th</sup> Dist. No. 07AP1081, 2008-Ohio-4184. Plaintiff's attempt to distinguish *Coulter* and argue that it is inapplicable to this case is undoubtedly misplaced. The following quote from the *Coulter* case cannot be emphasized enough:

**Because the jury in this case determined that Appellees were not negligent, the remote cause instruction is not germane to its verdict.** For this reason, we perceive no exceptional circumstances that require the application of the plain error doctrine to prevent a manifest miscarriage of justice, or to prevent a material adverse effect on the character of, and public confidence in, judicial proceedings.

*Id.* ¶ 11 (Emphasis Added).

It speaks volumes about the erroneous Decision of the Ninth District where it completely failed to address the *Coulter* Decision altogether. Had the Ninth District properly applied the *Coulter* reasoning to this case, it would have been compelled to find that the Trial Court's remote cause jury charge could not constitute prejudicial error since the jury found no negligence.

While the Ninth District completely ignored the *Coulter* Decision, Plaintiff desperately tries to distinguish it on the basis that *Coulter* dealt with the plain error doctrine because there was no objection to the remote cause jury charge. Regardless of the fact that the Court in *Coulter* reviewed the remote cause jury charge under the plain error doctrine, the ultimate determination to be made was whether the remote cause jury instruction constituted prejudicial error. Just like this case, there was no prejudicial error in the *Coulter* case as a result of the remote cause jury charge because the jury found no negligence. There can be no doubt that the

*Coulter* Decision should have been addressed and applied by the Ninth District. The Ninth District's failure to follow the *Coulter* Decision clearly resulted in its erroneous Decision.

Similarly, Plaintiff's efforts to distinguish the Eighth District Decision of *Peffer v. Cleveland Clinic Foundation*, 8<sup>th</sup> Dist.No. 94356, 2011-Ohio-450 is misplaced. In *Peffer*, the Eighth District found that the trial court erred in improperly including foreseeability as an element of proximate cause. However, since the jury determined that there was no negligence, such error was harmless. Likewise, the jury found no negligence on the part of Defendants herein. As such, the reasoning of *Peffer* applies to this case also, i.e., any error with respect to a proximate cause jury charge is harmless error.

Additionally, Plaintiff is incorrect in arguing that the Eighth District's Decision in *Schultz v. Duffy*, 8<sup>th</sup> Dist. App. No. 93215, 2010-Ohio-1750 is inapplicable. Quite the contrary the following holding in *Schultz* is clearly applicable to this case:

**We can summarily overrule this assignment of error because any error in rereading only a portion of the proximate cause instruction would be harmless given that the jury returned an interrogatory finding that Duffy had not been negligence.** That finding made it unnecessary for the jury to consider the issue of proximate causation. See *Cogswell v. Clark Retail Ent., Inc.*, 11<sup>th</sup> Dist. No. 2003-G-2519, 2004-Ohio-5640, at ¶ 21.

*Id.* at 9120 (Emphasis Added).

The above-mentioned Decisions are undoubtedly applicable to this case and support Defendants' position that since the jury in this case found no negligence, the Trial Court's jury charge on remote cause could not constitute prejudicial error.

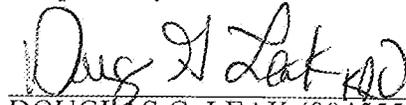
### **III. CONCLUSION**

Plaintiff fails to adequately refute the fact that the Ninth District's Decision is not only erroneous and in direct conflict with this Court's precedents and those of other appellate courts, its Decision is based upon inconsistent and contradictory findings of law and facts. There can be

no doubt that the Ninth District issued a legally and flawed Decision with the intent to reverse a defense verdict that was unquestionably supported by the evidence.

This Court should reverse the Ninth District's Decision since it is in conflict with this Court and other precedents with respect to the determination of prejudicial error pertaining to jury instructions and, in particular, a remote cause jury charge. If allowed to stand, the Ninth District's Decision will inevitably cause uncertainty and confusion throughout Ohio.

Respectfully submitted.



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**PROOF OF SERVICE**

A copy of the foregoing was served on August 19, 2013 pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

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A handwritten signature in cursive script, appearing to read "Douglas G. Leak", is written over a horizontal line. The signature is written in black ink and includes a small flourish at the end.

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