

IN THE SUPREME COURT OF OHIO

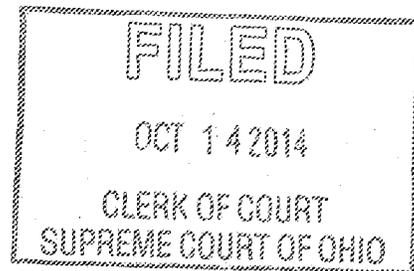
CHARLES B. HUDSON, II	:	Supreme Court No. 14-1354
	:	
Plaintiff-Appellant	:	On Appeal from the First District
	:	Court of Appeals
vs.	:	
	:	Court of Appeals Case Nos.
CINCINNATI GROUP HEALTH ASSOCIATES, INC., et al.	:	C-130164, C-130181
	:	
Defendants-Appellees.	:	

APPELLEES, CINCINNATI GROUP HEALTH ASSOCIATES, INC., CHARLES BURGHER, M.D., AND CHERYLE WEBB, M.D.'S MEMORANDUM IN OPPOSITION TO PLAINTIFF/APPELLANT'S MOTION FOR STAY AND/OR REMAND WITH MEMORANDUM

The instant matter is not a case where a plaintiff established a prima facie case of medical negligence as to multiple defendants. Rather, this is a case where the plaintiff failed to establish proximate cause as *any* of the multiple defendants. Therefore, the facts of the instant matter are significantly distinguishable from *Burk v. Fairfield Ambulatory Surgery Center, Ltd.*¹ and no conflict exists between that decision and the First District's holding in this case.

Hudson's interpretation of *Burk* is mistaken, his attempted reliance on that case is misplaced, and his continued argument that he was not required to establish proximate cause as to any defendant in his medical negligence claim remains at odds with the longstanding legal authority of this State. In fact, in the *Burk* opinion that Hudson now claims creates a conflict between districts, the Fifth District specifically recognized **"that expert testimony is required**

¹ *Burk v. Fairfield Ambulatory Surgery Center, Ltd.*, 2014-Ohio-4062.



to establish a causal link between the alleged negligent act and the injury sustained.”² As will be easily and conclusively demonstrated below, there is absolutely no conflict between *Burk* and the instant matter. Hudson’s Motion to Stay and/or Remand should be denied.

The plaintiff in *Burk* alleged that too much Lidocaine had been negligently administered during surgery, and that this negligence proximately caused her to suffer an arrhythmia.³ Unlike Hudson in the instant case, the plaintiff in *Burk* established proximate causation for that claim, as her expert testified that a tourniquet used during surgery deflated prematurely,⁴ causing the improper release of Lidocaine into the patient’s system.⁵ This same expert testified that “[t]he premature release of the tourniquet caused the Lidocaine to be introduced into (plaintiff’s) system, **which caused an arrhythmia** and the cessation of breathing.”⁶ He further testified, to a reasonable degree of medical probability, as follows:

“I believe that an elevated blood concentration of lidocaine **was the proximate cause** of the patient’s arrhythmia.”⁷

Since the plaintiff in *Burk* had also established that during this surgery two different defendants both had control over the instrument which could have caused the tourniquet cuff to deflate,⁸ the question then became which of these two individuals was the proximate cause. It was under that specific set of facts, completely inapplicable to the instant case, that the Fifth District entertained the use of the alternative liability doctrine on the issue of negligence. But in doing so, the Fifth District first recognized that a required element of a prima facie case of

² *Burk* at ¶37, citing *Bruni* at 130. (Emphasis added).

³ *Id.* at ¶14.

⁴ *Id.* at ¶29.

⁵ *Id.* at ¶30.

⁶ *Id.* at ¶25. (Emphasis added).

⁷ *Id.* at ¶35. (Emphasis added).

⁸ *Id.* at ¶34.

medical malpractice is demonstrating that the alleged medical negligence “**was the proximate cause of the patient’s injury.**”⁹

The Fifth District further acknowledged that:

“It is well settled in Ohio that in order to prevail in a medical malpractice claim, a plaintiff must demonstrate through expert testimony that, among other things, the treatment provided did not meet the prevailing standard of care and the failure to meet the standard of care caused the patient’s injury.”¹⁰

As evidenced by the expert testimony quoted above, the plaintiff in *Burk* had established both of these required elements of her claim through expert testimony. In the instant case, conversely, Hudson failed to establish the required, well settled element of causation. In analyzing this issue, the First District correctly recognized that:

“Where ‘the plaintiff’s evidence on the issue of proximate cause is so meager and inconclusive that a finding of proximate cause would rest solely on speculation and conjecture, the defendant is entitled to judgment as a matter of law.’”¹¹

In reviewing the evidence, or more accurately the lack of evidence, that Hudson presented, the First District correctly concluded that “**the jury could do no more than speculate***.**”¹² Speculation does not provide a valid basis to survive a directed verdict.

A closer examination of the alternative liability doctrine, as detailed within the *Burk* opinion, further confirms the complete and total inapplicability of the same to the facts of the

⁹ *Id.* at ¶22, citing *Egleston v. Fell*, 6th Dist. No. L-95-127, Ohio App. LEXIS 365, 1996 WL 50161, *2 (Feb. 9, 1996) citing *Bruni*, 46 Ohio St.2d 127, 346 N.E.2d 673, paragraph one of the syllabus. (Emphasis added).

¹⁰ *Id.* at ¶23, citing *Ramage v. Central Ohio Emergency Services, Inc.*, 64 Ohio St.3d 97, 102, 1992-Ohio-109, 592 N.E.2d 828; *Hoffman v. Davidson*, 31 Ohio St.3d 60, 62, 31 Ohio B.165, 508 N.E.2d 958 (1987). (Emphasis added).

¹¹ *Hudson v. Cincinnati Group Health Assocs.*, 1st Dist. Hamilton Nos. C-130164 and C-130181, 2014-Ohio-2161, ¶15, citing *Williams v. 312 Walnut Partnership*, 1st Dist. Hamilton No. C-960368, 1996 Ohio App. LEXIS 5887, *18 (Dec. 31, 1996), citing *Renfroe v. Ashley*, 167 Ohio St. 472, 150 N.E.2d 50 (1958), syllabus.

¹² *Id.* at ¶15. (Emphasis added).

instant case. In citing “the classic illustration of alternative liability” from *Summers v. Tice*, the Fifth District quoted:

“***when the negligence of both defendants is established but it cannot be established which person’s negligence caused the plaintiff’s injuries, there exists a ‘practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, **when it is certain that between them they did all.**”¹³

The level of certainty required to apply this doctrine was demonstrated in *Summers*, where two hunters both fired their guns in the direction of the plaintiff, instead of at the target quail. It was literally certain that one of those two defendants’ guns was the source of the shot that hit and injured the plaintiff. “[I]n such situations, ‘let [the negligent defendants] be the ones to apportion [the damage] among themselves.’”¹⁴

“Such situation” is not present in the instant case, where it was never established that *any* defendant was responsible for Hudson’s claimed injuries. In fact, unlike in *Summers* and *Burk*, where the evidence presented by the plaintiff, if accepted by the fact finder, made it certain that the actions of at least one of the defendants was the proximate cause of the claimed injury, Hudson failed to establish that either Dr. Burgher or Dr. Webb were responsible for *any* of his claimed injuries. He failed to demonstrate that his outcome would have been *any* different had Dr. Burgher or Dr. Webb acted *any* differently. Specifically, in a case where Hudson alleged that all of his injuries resulted from the failure to diagnose his appendicitis before his appendix ruptured, he presented no medical expert testimony on *when* his appendix likely ruptured. He presented no medical expert testimony establishing that had either defendant-physician acted *any* differently that, more likely than not, surgery would have occurred *before* his appendix ruptured. While his own expert conceded that he needed to undergo surgery *regardless of when* his

¹³ *Burk* at ¶32, citing *Summers*, supra, at 85-86, 199, P.2d 1.

¹⁴ *Id* at ¶32. (Emphasis added).

appendicitis was diagnosed, Hudson presented no medical expert testimony that an earlier diagnosis by either defendant-physician would have resulted in a surgery less extensive than what was ultimately performed. He offered no medical evidence that an earlier diagnosis would have changed his surgical outcome in *any* way. Therefore, *Burk*, and its discussion of the alternative liability doctrine, is completely irrelevant and totally inapplicable to the facts of the instant matter.

When a plaintiff in a medical malpractice action alleges a delay in the diagnosis of his appendicitis, he must produce expert medical testimony that this alleged delay proximately caused him an injury of some type.¹⁵ It was Hudson's burden to present expert testimony establishing that there was a direct and proximate causal relationship between the alleged delay in diagnosis and the injuries he claimed.¹⁶ And, frankly, applying *Burk*, and/or the alternative liability doctrine, in the manner that Hudson's Motion to Stay argues would lead to preposterous results. It would allow a plaintiff in a medical negligence suit to present only standard of care testimony as to multiple defendants, then placing a "negative burden" on those defendants to establish that they were not a proximate cause of injury. Applied to the instant case, Hudson could present no evidence that an earlier diagnosis would have changed his outcome in any way. Hudson's position is 180 degrees from the actual legal standard in this State as set forth by *Bruni*.

There is absolutely no conflict between the instant case and *Burk*. In *Burk* the plaintiff established a prima facie case of medical negligence as to multiple defendants. In the instant case, Hudson failed to establish proximate cause as *any* of the multiple defendants. The First

¹⁵ *Bruni v. Tatsumi* (1976) 46 Ohio St.2d 127, 75 O.O.2d 184, 346 N.E.2d 673; *Kuhn v. Banker* (1938), 133 Ohio St.304, 315, 13 N.E.2d 242.

¹⁶ *Id.*

District properly followed *Bruni*¹⁷ in identifying the elements required to establish a prima facie case of medical negligence. The First District then stringently followed, and correctly applied, the Civ.R.50(A)(4) directed verdict standard to a medical malpractice case wherein the plaintiff clearly failed to establish a prima facie case of medical negligence - a case where the plaintiff alleged a delay in the diagnosis of his appendicitis but failed to produce any medical evidence that his care, treatment, or outcome would have likely differed in *some* way had the diagnosis been made earlier in time.

There is no reason to Stay this case. There is no reason to Remand this case. Hudson's Motion should be denied.

Respectfully submitted,

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¹⁷ *Bruni v. Tatsumi* (1976) 46 Ohio St.2d 127, 75 O.O.2d 184, 346 N.E.2d 673.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing was served upon all parties in this case by regular U.S. mail and/or electronic mail this 13th day of October, 2014.

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