

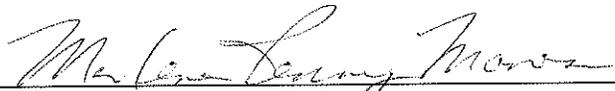
IN THE SUPREME COURT OF OHIO

CHARLES B. HUDSON, II,	:	CASE NO.: 2014-1354
	:	
PLAINTIFF/APPELLANT,	:	
	:	
vs.	:	
	:	ON APPEAL FROM THE HAMILTON
CINCINNATI GROUP HEALTH	:	COUNTY COURT OF APPEALS,
ASSOCIATES, INC.,	:	FIRST APPELLATE DISTRICT
	:	
CHARLES BURGHER, M.D.,	:	COURT OF APPEALS
	:	CASE NOS. C-130164 and C-130181
and	:	
	:	
CHERYLE WEBB, M.D.,	:	
	:	
DEFENDANTS/APPELLEES.	:	

APPELLANT'S MOTION FOR RECONSIDERATION AND MOTION TO CONSOLIDATE WITH
SUPREME COURT CASE No. 2015-0164 WITH COMBINED MEMORANDUM

Comes now appellant, Charles B. Hudson, II, and moves this Court for reconsideration, pursuant to Supreme Court §18.02, of its denial of his Memorandum in Support of Claimed Jurisdiction, and to consolidate this case with Supreme Court Case No. 2015-0164, currently pending in this Court, based upon good faith as set forth below.

Respectfully Submitted,



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CHARLES B. HUDSON, II

MEMORANDUM

This motion for reconsideration is not designed to rehash arguments previously made in the appellant's memorandum in support of claimed jurisdiction. Instead, it is focused on the need for Supreme Court review, as at least three other cases¹ have been announced by differing courts of appeals since Appellant (hereinafter "Hudson") filed his notice of appeal and memorandum on August 8, 2014 (hereinafter, Hudson I). Further, there has been additional procedural history since then as well.

As Justice Lundberg Stratton acknowledged in her concurring opinion in *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 546-548, 697 N.E.2d 81 (1998), there are times when it is imperative that this Court take another look at a case, especially (as herein) when there are differing decisions by experienced and learned appellate judges, which can lead to ". . . the loss of stability," and chaos. It is up to the Supreme Court to accept those cases which are in the grey area and clarify the rule of law.

This case originated in the First District Court of Appeals with Hudson suing two doctors and their professional corporation for failure to properly attend to his symptoms resulting in serious harm to him and medical expenses in the hundreds of thousands of dollars. A jury trial took place. Following the close of plaintiff's case-in-chief, the visiting trial judge, while finding negligence, granted a directed verdict in favor of the first doctor (Burgher) and denied the directed verdict motion of the subsequent doctor (Webb), solely on the issue of proximate cause. The case was submitted to the jury against Webb. No explanation was given to the jury as to Burgher's absence, As a

¹ *Burk v. Fairfield Ambulatory Surgery Center, Ltd.*, 2014-Ohio-4062; *Horner v. Elyria*, 2015-Ohio-47; *Slinger v. Phillips*, 2015-Ohio-357 (February 2, 2015)

courtesy to him, his expert witness was allowed to be called out of turn in Hudson's case-in-chief. Though Hudson's counsel moved to have his testimony stricken as Burgher had been dismissed, the Court denied that request leaving the jurors with his defense testimony and allowing speculation as to his absence.

After three days of deliberation, with a 5-3 vote in favor of Hudson, the jury was "deadlocked." The judge declared a mistrial. He also stated on the record that Hudson could take an interlocutory appeal in regard to the directed verdict granted to Burgher. Hudson appealed to the First District Court of Appeals. His appeal was dismissed as not being a final, appealable order as claims against Webb had not been resolved. An appeal of this dismissal was filed with this Court in Case No. 2011-2148. Hudson's memorandum in support of jurisdiction was denied.

The case was returned to the Common Pleas Court for a second jury trial. This second go around was confined to the negligence of Webb, and damages proximately caused by her deviations from care. This different jury found in favor of Webb.

Appeal was taken to the First District in regard to both trials, as there was now a final appealable order. On May 21, 2014, that court issued its opinion in *Hudson v. Cincinnati Group Health Associates, Inc.*, 2014-Ohio-2161 which is the subject of Hudson I, and this motion for reconsideration. In that opinion, the First District affirmed the granting of Burgher's directed verdict. Further, the court held that Webb's motion for directed verdict in the first trial should have been granted. The appellate court left unreviewed all of the other Hudson issues presented, and only considered the motions for directed verdict in the first trial. The appellate court refrained from reviewing any issues in regard to the second trial.

Moreover, the First District's review appears to have consisted only of limited testimony of Hudson's expert in regard to proximate cause. In its opinion, the Court relied on the unreported case of *Seagle v. Scherzer*, 10th Dist. No. 00AP-1048, 2001 Ohio App. LEXIS 1974 (May 3, 2001), from the Tenth Appellate District. In *Seagle*, the court held that the plaintiff-patient had the burden of proving the exact moment that an appendix ruptured. Hudson contends that it was inappropriate for the First District to adopt the reasoning in this unreported case. Further, he contends that holding is inconsistent with other appellate case law, even other decisions of the Tenth District, and of this Court. This is especially true in regard to the shifting of the burden of proof when there is more than one doctor-tortfeasor as to proximate cause of injury/damages and percentage/apportionment to be attributed to the doctors individually, and/or jointly.

At the time the trial judge directed the verdict in favor of Burgher, he stated that this was based upon the "preponderance of evidence." Clearly, this basis was in violation of Civ. R. 50(A)(4). The judge weighed evidence which he was not permitted to do. Even though this error of law was brought to this attention, he did not change his position until a hearing on the proposed defense entry as to the directed verdict following the declaration of a mistrial. The judge then claimed he meant to say he did not see evidence on proximate cause.

In the First District's opinion, the appellate court sought to overcome this glaring inconsistency in the trial judge's statements and stated (at ¶11) that the trial judge "based (his) decision on the complete lack of testimony connecting Dr. Burgher's alleged negligence to Mr. Hudson's injuries." The appellate court went further by determining that the other defendant-physician was also entitled to a directed verdict in the first

trial, holding all other issues raised moot. This conclusion defies the extensive testimony and evidence produced in Hudson's case-in-chief.

There was no question as to the actual negligence of the two defendants-physicians. Instead, the appellate court required the patient-plaintiff to prove the exact timing of his injuries – a totally impossible task; particularly, because of the negligence of the defendants.

Moreover, the appellate court stated that on this point, the testimony of Hudson's expert was "meager and inconclusive" (at ¶15). That finding substantiates Hudson's claim that evidence was weighed in violation of Civ. R. 50(A)(4).

Hudson takes strong exception to this holding contending it is not supported by the testimony of Hudson's expert nor that of the defendants-physicians themselves. It was Burgher's defense that Hudson did not have an appendicitis nor even an acute abdomen when he examined him. Webb's defense was that she relied on Burgher's exam and diagnosis from the day before, without getting an accurate history from Hudson, but only a phone call from his elderly mother that Hudson now had a temperature of 103° (a change from the 100.5° from the day before when seen by Burgher). She prescribed a narcotic drug for diarrhea, and followed Burgher's diagnosis of intestinal flu.

It has been the accepted law in Ohio for years that an original tortfeasor physician who sets into motion the circumstances for additional harm to a patient is responsible for the entire injury, including that caused by a second negligent physician. *Tanner v. Espy*, 128 Ohio St. 82, 190 N.E.2d 229 (1934). It is not the responsibility of the plaintiff to prove apportionment, but of the co-defendants. *Pang v. Minch*, 53 Ohio St.3d 186, syllabi 5, 6, 7, 559 N.E.2d 1313 (1990); *Berdyck v. Shinde*, 66 Ohio St.3d 584,

585, syllabus 6, 1993-Ohio-183, 613 N.E.2d 1014. In *Berdyck* at 584, this Court has determined:

“The intervention of a responsible human agency between a wrongful act and an injury does not absolve a defendant from liability of that defendant’s prior negligence and the negligence of the intervening agency co-operated in proximately cause the injury. If the original negligence continues to the time of the injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate cause for which full liability may be imposed.”

On September 5, 2014, the Fifth District Court of Appeals in *Burk v. Fairfield Ambulatory Surgery Center, Ltd.*, 2014-Ohio-4062, rendered a conflicting opinion as to the qualitative and/or quantity of evidence required to overcome dispositive motions. Moreover, in *Hudson*, the First District appellate court ignored the concept of alternative liability, when there are multiple negligent acts by two health care providers, as to which party has the burden of proof as to causation, and when does the burden of proof shift to those tortfeasors.

Alternative liability has also been a recognized legal concept. *Burk, supra*. It is also well recognized in Ohio law that in addition to the concept of alternative liability, there is also the acceptance of “concurrent negligence (which) consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury.” *Garbe v. Halloran*, 150 Ohio St. 476, 83 N.E.2d 217, paragraph one of the syllabus (1948), adopted in OJI CV 405.01, ¶ 3(A). Burgher and Webb were joint and concurrent tortfeasors. Both doctors delayed Hudson’s diagnosis. They filed a joint answer, had the same law firm, had a joint defense, worked for the same employer, had no cross-claims against each other—not even a claim by Burgher that Webb was an intervening or superseding tortfeasor.

On October 9, 2014, Hudson filed a motion with this Court to stay and/or remand back to the First District Court of Appeals to permit Hudson to file with that appellate court, a motion for conflict certification. This motion was to be based upon the Fifth District Court of Appeals decision in *Burk, supra.*, which Hudson contends is in conflict with the holding of his First District Court of Appeals decision in *Hudson, supra.*, in regard to standards to be applied by the lower courts in ruling on dispositive motions.

On October 17, 2014, Hudson filed his motion for conflict certification in the First District Court of Appeals, along with a motion for leave to file said motion. Both of these motions were overruled with no explanation on November 14, 2014. Hudson moved for reconsideration on November 25, 2014. This motion was also denied, with no explanation, on December 15, 2014.

On January 12, 2015, the Ninth District Appellate Court issued an opinion in *Horner v. Elyria*, 2015-Ohio-47. Hudson contends *Horner, id.* is also in conflict with the First District Court of Appeals opinion in his case, but is consistent with the opinion issued in *Burk, supra.*

On January 29, 2015, Hudson filed his appeal to the Supreme Court from the First District's denials of his conflict certification motions. That appeal is docketed with this Court under Case No. 2015-0164 (Hudson II). Unbeknown to Hudson's counsel, this Court had, a day earlier, on January 28, 2015², issued its Entry declining jurisdiction over his appeal in Hudson I, and denying his motion for stay and/or

² Hudson's counsel inquired of the Supreme Court's Clerk's Office the morning of January 28, 2015, whether any action had been taken on his initial appeal in Case No. 2014-1354. Counsel was advised that no action had taken place, and the case was still being considered. Thus, Hudson proceeded to file his appeal of the denial of his motions for conflict certification the next day.

remand.

The *Burk* court found, through extensive research, that Ohio courts have uniformly recognized and accepted the concept of alternative liability, and that juries were permitted to consider inferences. Alternatively, in the case of *Hudson, supra.*, the First District Court of Appeals determined that the burden of proof was on the patient-plaintiff as to proximate cause and the exact timing of injury, even though there was testimony as to joint and concurrent negligence of two health care providers (doctors) and their independent acts of negligence as to causation. This included independent expert testimony as well as the testimony of the defendants-doctors. Burgher admitted that Hudson had abdominal pain and a temp of 100.5°, but he ran no tests, did not give complete follow-up instructions. He sent Hudson home with the diagnosis of the flu or gastroenteritis.

Webb, the next day in response to a phone message from Hudson's elderly mother stating Hudson now had a 103° temperature, relied upon the fact that he had been seen by Burgher the day before. She did not obtain any information from Hudson. Instead, she ordered a prescription for diarrhea with no follow-up. She authorized a work excuse for 3 days for the flu. She admitted that, in retrospect, Hudson needed to be seen immediately with his abdominal symptoms and high fever.

The First District rejected jury consideration as to any inferences as to causation by finding the defendants-doctors were entitled to directed verdicts in their favor at the close of plaintiff's (appellant's) case-in-chief.

Reconsideration is needed in order for there to be a defined standard to be applied by lower court judges throughout the state in regard to the degree of evidence required to overcome dispositive motions (whether for directed verdicts or for summary

judgment). The First District has placed a higher requirement than both the Fifth District in *Burk, supra.*, and the Ninth District in *Horner, supra.* The First District has even placed a higher burden on a non-moving party than is required by a reading of the wording in Civ. R. 56(C) and Civ. R. 50(A)(4).

The standards for the dispositive motions for summary judgment (Civ. R. 56(C)) and for directed verdict (Civ. R. 50(A)(4)) are basically the same, i.e., that said motions can only be granted when, after construing the evidence most strongly in favor of the non-moving party, the conclusion is adverse to the non-moving party. The trial court is not permitted (nor is a court of appeals later in reviewing the evidence) to weigh the evidence. That is the role of the actual trier of the facts.

Before granting a directed verdict motion, the trial court must determine whether “**any** evidence exists on every element of each claim.” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 25. A trial court may not take the verdict from a jury even when the evidence is found to be only “marginally sufficient to establish damages.” *Corwin v. St. Anthony Medical Center*, 80 Ohio App.3d 836, 842, 610 N.E.2d 1155 (10th.Dist. 1992); also see *Bradshaw v. Wilson*, 87 Ohio App. 319, 94 N.E.2d 706, syllabi 3 & 4 (1950), a jury question was presented as to a reasonable inference that some of the pain suffered by the patient was caused by the doctor’s negligence reversing a directed verdict).

In *Hudson, supra.*, *Burk, supra.*, and *Horner, supra.*, the lower courts looked at the weighing of evidence by the courts differently. In *Hudson*, the First District appellate court decided, in reviewing only limited testimony, that there wasn’t enough evidence to overcome motions for directed verdict. The Fifth District, on the other hand, in *Burk*, took a different view (and which Hudson contends is the correct one),

i.e., that **any** evidence, regardless of its evidentiary weight, is sufficient to overcome a dispositive motion judgment. The “**any**” evidence acceptance was also followed in *Horner, supra.*

Just as significantly, the Fifth District in *Burk, supra.*, declared that its research confirmed that Ohio courts have long-recognized alternative theories. This long-recognized legal concept was not ignored by the First District in Hudson.

Following this Court’s denial of Hudson’s Memorandum of claimed jurisdiction on January 28, 2015, the Ninth District Court of Appeals reaffirmed its holding in *Horner, supra.*, by issuing its opinion in *Slinger v. Phillips*, 2015-Ohio-357, ¶¶ 11, 12 (February 2, 2015) (published in Ohio State Bar Association Daily Report for February 4, 2015). The Ninth District has been consistent that the judicial application of an improper standard (i.e., weighing the evidence) in regard to dispositive motions requires reversal. This most recent decision further supports Hudson’s motion for reconsideration.

Consequently, litigants in the Fifth Appellate District, which consists of fourteen counties, and those in the Ninth District, consisting of four counties, are afforded a more liberal interpretation of the evidentiary requirements than those of the First Appellate District, which is comprised of Hamilton County. This conflict is substantial and warrants Supreme Court review. Failure to do so violates Hudson’s constitutional right to equal protection, equal access to the judicial system, due process and due course of law (Art. XVI, Ohio Constitution) and right to trial by jury (Art. V, Ohio Constitution).

The Ninth District, in *Horner, supra.*, reiterated that a lower court “may not weigh the evidence and determine issues of fact.” (at ¶ 10). It criticized the trial court’s finding that the non-moving party failed in its burden to produce “sufficient evidence”

to overcome a motion for summary judgment (at ¶ 11). Instead, the court declared that the non-moving party was only required to produce "any" evidence "to show the existence of a genuine issue of material fact." "Thus, in the face of conflicting material evidence, it is not the trial court's role to resolve such conflicts" (*Horner, id.*)

As in *Horner*, the trial court (and then the appellate court) in *Hudson, supra.*, failed to consider, or overlooked, parts of testimony rendered in Hudson's case in chief. The *Horner* court determined that the misapplication of a higher standard (i.e., "sufficient" versus "any") for the granting of a dispositive motion required reversal (*Horner* at ¶¶ 12, 13). The *Horner* court rejected the reference to "sufficient" evidence as being the requirement necessary to defeat trial court-directed judgment. Instead, it found that the lower court had misapplied that standard when it was only required to find that the non-moving party had met the threshold of presenting **any** evidence (*Horner* at ¶11). It is Hudson's position that the First District Appellate Court not only weighed the evidence, but also improperly did not consider the totality of the evidence.

The *Horner* court found misapplication of the rule of law is not harmless error (*Horner* at ¶¶ 11-14). A judgment by the judiciary, and not by the trier of the facts, is to occur "**only**" when there are no issues open for debate as to material facts (*Horner* at ¶10; also see *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10). Hudson submits that the lower courts, as the trial court in *Horner, supra.*, misapplied the rule of law in granting directed verdicts and violated the letter and spirit of Civ. R. 50(A)(4) requiring reversal.

The issues raised in the initial appeal, which is the subject of this motion for reconsideration, are significant; particularly in light of different appellate districts within months adopting differing standards for ruling on dispositive motions. The

positions taken by the Fifth and Ninth District Courts of Appeals are consistent with those taken by the Tenth District 23 years ago in *Corwin, supra*.³ The *Seagle, supra*. opinion is in conflict with that of *Corwin, supra*. from the same appellate district (10th).

The trial transcripts in regard to *Hudson, supra.*, show extensive testimony to substantiate not only the negligence of the two doctors, but also the proximate cause of damages to the patient. His temperature substantially increased between the contact with the first doctor and the contact with the second doctor. Hudson was on death's door when he was attended to by the life squad, admitted to the hospital, and underwent urgent, life-saving surgery. Not only did his surgeon testify that if he had been operated on earlier, his overall morbidity would have been different, but also the two defendant-doctors acknowledged that, as well. Further, these tortfeasors admitted that the extreme morbidity which occurred as a result of the delay in actually treating Hudson's acute abdomen, and the symptoms which Hudson demonstrated were foreseeable.

Hudson's expert⁴ was critical of both doctors. In summarizing his opinions as to proximate cause as relates to the two doctors, he stated emphatically that their deviations from the standard of care were a proximate cause of Hudson's damages, which included peritonitis, acute renal insufficiency, tachycardia, ruptured appendix, sepsis, brain hypoxia, organ failure, and multiple subsequent surgeries stated the following:

³ In contrast, the First District's reliance on the unreported case of the Tenth appellate district in *Seagle v. Scherzer*, 10th Dist. No. 00AP-1048, 2001 Ohio App. LEXIS 1974 (May 3, 2001), in which the court did not apply the *Corwin* standard, was inappropriate. The *Seagle* case required the patient to pinpoint the exact moment of appendix rupture, which is not the standard to be applied in regard to proximate cause in order to defeat a dispositive motion, particularly where there are two defendant-doctors and one indivisible injury.

⁴ Hudson's expert, the Chairman of the Department of Emergency Medicine at Wright State University Boonshoft School of Medicine and who, at the time of the first trial, was the appointed director for the national program of medical preparedness in national disasters, was extremely critical of the care rendered by both physicians.

“ . . . But I think what you’re really talking about is delay. Delay in diagnosis. And delaying diagnosis and allowing the potential of an appendix to move from being inflamed to being ruptured is a serious transition. And I think over the course of the care of these **two** individuals, that’s exactly what happened.”

Taking into consideration the Tenth District’s opinion in *Corwin*, there are at least three different Appellate Districts whose opinions in regard to the lower courts’ authority to grant dispositive motions are in conflict with the First District. Failure of this Court, the highest court of this state, to review the issues raised in Hudson’s appeals (Case No. 2014-1354 and 2015-0164) will permit unequal application of the rule of law between appellate districts in violation of Art. XVI of the Ohio Constitution.

CONCLUSION

Wherefore, Hudson prays that this Court will reconsider its previous denial, and recognize the substantial importance of his appeal. Moreover, he seeks reversal and remand back to the First District Court of Appeals for it to rule on the other assignments of error and the issues presented therein, which were left unaddressed as the court determined they were moot by the granting of the directed verdicts.

Hudson’s appeal brings to this Court not only issues subject to discretionary review, but also ones of constitutional importance. The issues raised have serious ramifications which cry out for this Court’s acceptance and decision-making authority.

Furthermore, Hudson prays that this Court will consolidate this case with his current pending appeal in Case No. 2015-0164.

Respectfully Submitted,



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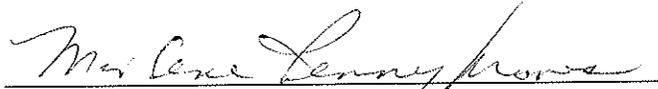
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CHARLES B. HUDSON, II

CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Motion for Reconsideration and Motion to Consolidate with Supreme Court Case No. 15-0164 with Combined Memorandum was sent by ordinary U.S. mail to David C. Calderhead and Joel L. Peschke, Calderhead, Lockemeyer & Peschke, 6281 Tri-Ridge Boulevard, Suite 210, Loveland, Ohio 45140, on February 9, 2015.



Marlene Penny Manes (0022575)

The Supreme Court of Ohio

FILED

JAN 28 2015

CLERK OF COURT
SUPREME COURT OF OHIO

Charles B. Hudson, II

Case No. 2014-1354

v.

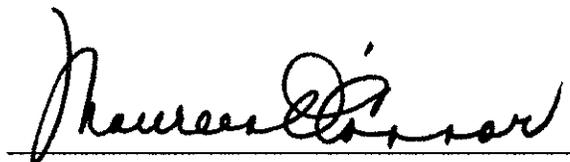
ENTRY

Cincinnati Group Health Associates, Inc., et al.

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

It is further ordered that appellant's motion for stay of Supreme Court case and/or remand with memorandum is denied.

(Hamilton County Court of Appeals; Nos. C-130164 and C-130181)



Maureen O'Connor
Chief Justice