IN THE SUPREME COURT OF OHIO

JANET HILD, ADM'R.	:	CASE NO. 2023-1076
	:	
Plaintiff-Appellee,	:	Appeal from the Second District Court
	:	of Appeals (Montgomery Co.)
v.	:	
	:	
SAMARITAN HEALTH PARTNERS, et al.	:	CT. APP. CASE NO. 29652
	:	
Defendants-Appellants.	:	T.CT. CASE NO. 2018 CV 5710

MERIT BRIEF OF PLAINTIFF-APPELLEE, JANET HILD, ADM'R.

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INTRODUCTION

Appellants want this Court to obliterate the way torts have been tried for many decades. And they wish this Court to do so by discarding a party's constitutional right to a full jury consideration of all the key elements of a standard tort claim. Appellants urge this Court to hold instead that, henceforth, persons properly selected through the process of voir dire to compose a jury can be precluded from participating in deliberations on causation simply because of the position they took on the issue of negligence. To be clear, Appellants are exhorting this Court to declare that in this and all tort trials in this State, *ad infinitum*, in any case where a jury non-unanimously finds a defendant negligent, the one or two other jurors are not permitted to participate in the consideration of the issue of causation.

Intriguingly, were a vote taken of litigation attorneys in Ohio on both sides of the aisle, as to whether the long-standing method of employing the "any majority" rule, such that all jurors are allowed to vote on cause and damages independent of their position on the preceding element(s) academically favored the plaintiff or the defense, the tally would almost certainly be in the upper 90% range for the defense. Yet here Appellants are pleading with this Court to ignore the constitutional infirmity of their argument, invalidate this established approach and forever change trial practice in Ohio – to win a single case!

In legal parlance, Appellants seek to have this Court replace the "any majority" rule with the "same juror" rule on the issue of causation in all tort cases. And, despite their assertion otherwise, doing so would require the application of the same juror rule to damages as well.

It is well-known that medical malpractice cases are uniquely situated in the civil tort arena in Ohio, in that the defense "wins" a staggering percentage of all trials, in the vicinity of

90%. The desire of the defense in this case to abandon one of its many advantages for a single victory is a bit surprising, despite the obvious self-serving goal. Of course, their proposal merely requires this Court to nullify the constitutional right of all parties to a full jury consideration of the key elements of torts.

Appellee timely objected to the jury instructions in issue to ensure that the case was fairly and properly tried, so there would be no appeal. Had the trial court realized then, as it admitted later, the correctness of Appellee's assertion, their shared goal of achieving a fair trial may well have been accomplished. In contrast, all three defense counsel chose to stand entirely silent, opting instead to oppose whatever position the Plaintiff espoused rather than, heaven forbid, help the court get it right at the outset.

Now they are left with this appeal, attempting to dissuade this Court from enforcing the parties' right to a fair trial, with full jury participation regarding all three of the major elements of the case.

STATEMENT OF FACTS

As indicated in previous pleadings in this case, what is before this Court is a legal issue regarding the jury. Thus, the testimony of witnesses is not critical to the issue. However, to put the case in context, factual summaries have been included at each step along the way.

The patient, Scott Boldman, presented to the defendant hospital on the early evening of Christmas Eve, 2017 to undergo an appendectomy, with general anesthesia provided by the CRNA defendant. The procedure was uneventful. However, the CRNA fell below the standard of care during the attempted emergence from anesthesia. Appellants' presentation of facts glosses over the very reason that the jury determined that the CRNA fell below the standard of

care. Emergence involves two basic components, reversing the paralytic agent and waking the patient from the sedation. For years, the CRNA claimed she first reversed the paralytic agent and 3-4 minutes later, had not even started the process of waking the patient when he suddenly awoke on his own and immediately became combative. However, as careful scrutiny of the CRNA's position with her own anesthesia records during trial established, the CRNA had begun the process of waking the patient from the sedation 6-8 minutes before initiating reversal of the paralytic agents. Thus, without paying adequate attention to what she was doing, the CRNA placed the patient in the precarious position of waking up but being paralyzed and intubated. The CRNA ultimately abandoned her original assertion in trial, when the records demonstrated that it simply was not true. Thus, the defense claim of sudden post-operative delirium was invalid, and the jury found the CRNA negligent.

Regarding the legal issue before the Court, during the jury instruction reading phase of the trial, at a point where the court was reading the first interrogatory, on negligence, to the jury, Appellee requested to approach the bench. This is clearly evident on the trial video, *see* Excerpted Transcript of Proceedings (Jury Instructions), (p.2 lines 12-15). While reading ahead, Appellee had noticed that the instructions pertaining to causation precluded anyone who did not agree on negligence from participating on the question of causation. This sidebar occurred prior to the trial court actually reading the erroneous instruction/interrogatory to the jury. *see* Excerpted Transcript of Proceedings (Jury Instructions), (p.2 line 3 – p.3 line 11).

While the "white noise" employed during sidebars rendered some of the audio on the trial video indecipherable to the transcriptionist, Appellee represents that his first statement to the trial court was that the causation instruction was "wrong", and that all jurors, regardless of

their position on negligence, were permitted to participate in the discussion and vote on causation. *see* Excerpted Transcript, (p.2 lines 17-24). During the further discussion with the court about the language at the bottom of the pertinent interrogatory instructing the jury that only those who voted yes on negligence could deliberate on causation, Appellee stated, "And I'm pretty sure it's not correct." Excerpted Transcript, (p.2 lines 19-25). The court expressly stated, "I'll note your objection", but opted not to research the issue further and overruled the objection. Excerpted Transcript, (p.3 lines 5-7). All three Appellants' counsel stood entirely silent during this sidebar.

Thereafter, the trial court completed the reading of the instructions (p.3 line 12 – p.12 line 14; p.15 lines 11-21). The bailiff escorted the jury out of the courtroom. Appellee then offered additional comments on the instructions and the same juror rule. (p.16 line 12 – p.17 line 4). Appellee reiterated his reference during the sidebar to a legal article on the subject that he kept in his office. (p.17 lines 10-12).

For reasons that continue to escape rational explanation, both sets of Appellants again attempt to obfuscate the above indisputable facts. Astonishingly, in the iteration of their position for this Court, they do not even mention the sidebar occurring. In addition, they suggest that Appellee *waited* to bring the issue up, absurdly inferring some unspecified advantage in such an approach. Further, they direct this Court to the wrong discussion, when Appellee offered additional comments, in support of her earlier objection, in open court after the court completed the reading of the instructions. The trial video, the portions of the audio that can be discerned and the trial court's own later decision, wherein he agreed that the objection had been made at sidebar, entirely invalidate the Appellants' baseless recitation. In

the Decision denying the new trial motion, at no time does the trial court find that Plaintiff failed to preserve her objection or waive her right to maintain her argument concerning the instructions/interrogatories, or that the court was wrong when it noted Plaintiff's objection at sidebar. The court of appeals agreed that a timely objection had been made. *Opinion*, 2nd District Ct. App. (July 14, 2023), ¶3, ¶¶37-39. ; see Civ.R. 51(A).

Appellants' description remains, as it has throughout, incorrect and completely misleading. Appellee did not just stand up after the jury left and decide to start talking about the same juror rule. What Appellants cite is the provision of additional information for the record after the sidebar, after the court overruled the objection, and after the court then read the objectionable portion of the instructions/interrogatories and a significant remainder of the instructions (approx. 9 transcript pages). The objection unequivocally occurred earlier, at the sidebar during the court's reading of the instructions. In their Merit Briefs, each set of Appellants had two opportunities to correctly recite the events and, with no reasonable explanation for it, omitted the actual objection.

Next, the jury followed the court's instructions. *see Pang v. Minch*, 53 Ohio St.3d 186 (1990), syllabus ¶4, *rehearing denied* 54 Ohio St.3d 716 (1990); *see also State v. Thompson*, 141 Ohio St.3d 254, 282 (2014), 2014-Ohio-4751 ¶150; *State v. Webster*, 2021-Ohio-3218 (10th Dist.), ¶50. Six jurors found the CRNA negligent. As a result, and exactly as the court instructed, the two who did not sign the negligence interrogatory did not participate in the discussion nor vote on the element of causation. The jurors permitted by the court to participate on causation found for Appellants.

Much of the remainder of Appellants' Statement of Facts is argument. Appellee will

address those arguments as they reappear in the subsequent provisions of Appellants' brief(s).

APPELLEE'S RESPONSES TO PROPOSITIONS OF LAW

[Anesthesia-Appellants' Proposition of Law 1 (A & B): Logic requires that the 'same juror' rule applies to negligence and proximate cause in actions based on negligence, including medical malpractice cases.
A. Use of the any majority rule requires a logical inconsistency.
B. The cases cited by the appellate court do not address this logical inconsistency.]

1. APPELLEE'S RESPONSE to Appellants' Proposition of Law 1 (A & B): Negligence and causation are independent key elements of torts, and precluding jurors from deliberating on causation by application of the same juror rule has no legitimate purpose and violates the parties' constitutional right to full jury deliberations.

Appellants are asking this Court to reverse its expressly restricted Decision in *O'Connell v. Chesapeake & O.R. Co.*, 58 Ohio St.3d 226 (1991) and apply the "same juror" rule to all tort cases. Strangely, the only case Appellants offer in conjunction with their request is the *O'Connell* case itself. However, *O'Connell* distinguishes between the independent elements present in standard cases and the inescapable interdependence when dealing with comparative negligence and apportionment. In other words, Appellants submit no caselaw to justify their request.

In a desperate effort to find something to support their unfounded assertion, Appellants offer a dizzying array of disjointed statements to claim that the "any majority" rule eliminates proximate cause as an element. With themselves as their only authority, Appellants cite nothing to prove this assertion, yet claim this rule that has been in effect for decades has somehow actually been "rewriting decades of established tort law". The contention simply makes no sense. The "any majority" rule mandates full jury participation with regard to the key components of tort trials. Proximate cause essentially has been a key element of tort litigation

since trials in the U.S. began.

To Appellee's knowledge, and apparently Appellants as well, at no time has any Ohio court declared in a known published opinion that causation is not a key element of torts. It is ingrained in a system that has employed the "any majority" rule in standard tort cases for far longer many of us have been alive. *see Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976). In Appellee's counsel's experience, in trying well over a hundred medical cases, mostly for the defense, Appellee's counsel has never seen any judge find or utter any statement that because it is voted upon independently causation is irrelevant. Appellants' contention belies common sense.

The "same juror" rule has a role in comparative negligence and apportionment cases because in that setting juries are dealing with two sides of the same coin. If a juror doesn't agree to the negligence of both, that juror cannot be expected to legitimately apportion damages between two negligent parties. The "comparative" aspect of the case makes the negligence of both parties so integrally intertwined as to be inseparable. However, even in that case the Court emphasized the importance of the fact that,

> Because the full jury undertakes the initial determination as to negligence and proximate cause, neither party is deprived of having all the jurors deliberate the material issue of negligence and proximate cause.

O'Connell, supra., at 235-236.

In a standard case the negligence and causation of a defendant are independent concepts, *i.e.* – separate coins, routinely decided by juries throughout this State without difficulty. In fact, defendants often view causation as a reserve chute in case the main chute fails.

The Ohio Supreme Court recognized the "same juror" rule in *O'Connell*, but only in the

limited circumstance of comparative negligence and apportionment. That case involved the question of respective percentages of fault between the driver of a motor vehicle and a railroad company that left a flatbed car blocking the roadway. The jury completed interrogatories that found negligence and causation as to both parties, and apportioned liability 70% plaintiff, 30% defense. Neither party objected to the interrogatories at the time. Therefore, the court entered judgment for the defense. The plaintiff's attorney later noted that one juror did not sign any negligence or causation interrogatories but did sign the apportionment interrogatory. A second juror did not sign the negligence interrogatory as to the defendant, but signed the apportionment interrogatory. They were two of the six who signed the apportionment interrogatory. *O'Connell, supra*, at 226-228.

This Court considered the two basic rules of law on juror participation in questions of apportionment – the "any majority" rule and the "same juror" rule. *O'Connell, supra*, at 231-235. The Court adopted the "same juror" rule for cases involving comparative negligence and apportionment principles. The Court determined that logically the determination of the initial causal negligence is a precondition to apportionment. Compelling a juror who found no causal liability to assign a percentage of liability would introduce arbitrariness / speculation into the process. *O'Connell, supra*, at 235-236.

That paradox is not present where the jury's decisions do not force inconsistent positions upon a single juror. The Court indicated that it would be unwilling to extend this approach to circumstances where a party is deprived of having all of the jurors deliberate the material issues of negligence and causation. *O'Connell, supra*, at 235-236. These primary elements are capable of independent analysis, whereas comparative negligence and

apportionment are so integrally related that jurors can be faced with accepting a position in part of their deliberations that they had declined to accept elsewhere in the discussions. *see O'Connell, supra*, at pp. 232-33.

In *Estate of Lawson v. Mercy Hosp. Fairfield*, 2011-Ohio-4471 (12th Dist.) the plaintiff took a position similar to that of the Appellants in this case – asking the court to apply the "same juror" rule to negligence and causation. Rejecting this argument, the court of appeals observed,

> In *O'Connell*, the Supreme Court addressed the importance of permitting all members of the jury, or the full jury, to be involved in the determination of certain issues within a claim: "Because the *full jury* undertakes the initial determination as to negligence *and* proximate cause, neither party is deprived of having all the jurors deliberate the material issue of negligence and proximate cause." Id. at 235-36 (emphasis added). The *O'Connell* Court therefore recognized that a party's right to a full jury would in fact be deprived if the full jury were not permitted to deliberate as to both negligence and proximate cause.

Estate of Lawson, *supra*. at ¶16; *see Dillon v. OhioHealth Corp.*, 2015-Ohio-1389 (10th Dist.).

Thus, use of the "any majority" rule for the primary and independent elements of a tort claim is entirely logical and consistent with the constitutional right to full jury consideration. The "same juror" rule appropriately is reserved for principles that are more entangled and interdependent.

There is little dispute that the Constitution protects the right to trial by jury as inviolate. The "any majority" rule promotes and protects that right. Without question, applying the "same juror" rule to the principal elements of a claim, as opposed to secondary interdependent issues, unquestionably assails that constitutional protection.

Appellants are putting forth arguments as if the negligence of a defendant and causation in a standard claim are somehow intertwined as in comparative negligence. Their contentions begin with a false premise that negligence and causation are not separate and

independent. They seem to be conceding that yes, cases like *Estate of Lawson* and *Dillon v. OhioHealth Corp.* support Appellee in this case. However, with no cases to substantiate they're view, they seem to posit that this honorable court should just ignore those cases, treat every case as if it were a comparative negligence case and apply *O'Connell* across the board to all torts. This Court rejected that concept in *O'Connell*.

In *Estate of Lawson*, supra., ¶18, that court follows *O'Connell* by finding that, "(a) breach in the standard of care is a separate issue from whether the breach was the proximate cause of the injury sustained." In that same paragraph the court emphasized that "(a) party has the right to have a full jury determine all of the essential elements of a claim, and to forbid a juror who voted against a breach of duty from participating in a determination of proximate cause would violate this right." *see Estate of Lawson, supra*.

With the "any majority" rule, all 8 jurors will be considering causation. With the "same juror" rule 1 or 2 of the jurors may be precluded from deliberating and deciding upon causation. As this Court explained in *O'Connell*, *supra*., at p. 232,

> (T)he Ohio Constitution does provide that "[t]he right of trial by jury shall be inviolate, except that in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." Section 5, Article I, Ohio Constitution.

Appellants also contend that Appellee 'would have them believe' that had the "any majority" rule been applied at trial Appellee would have won. Once again, Appellants completely misconstrue the issue. Appellee has never made that assertion. In its decision on Appellee's new trial motion, the trial court did hold that Appellee had to prove she would have won. *Decision…Denying Plaintiff's Motion for New Trial*, pp. 9-10. On appeal, Appellee emphasized that that is an impossible standard. Jury deliberations are sacrosanct, and a party

would have to be in the jury room taking notes to have even the slightest possibility of predicting a particular juror's position. The court of appeals agreed with Appellee that the issue was not about proving the outcome would have been different. Rather, it is about the denial of Appellee's right to a full jury consideration of her claims. The prevention of two jurors from participating on causation was prejudicial error. *see 2nd Dist. Opinion*, ¶87.

The critical point is that the parties in this setting have a constitutional right to jury trial with full participation of all jurors on all three of the key elements – negligence, causation and damages. When that does not occur upon considering causation, as in this case, the decision on that issue irreparably harms the party's constitutional right.

Appellants again confuse the issues when they attempt to construct an example where the CRNA is one of several individual defendants and all are found negligent. For no legal reason Appellants then simply pass by causation in this hypothetical and go right to apportionment. First, that is not a comparative negligence case; plaintiff negligence is not part of Appellants' story. Next, Appellants argue that in the case of a single individual defendant, 100% liability should be considered apportioned. There is simply no basis in law or logic for such an argument.

No one but Appellants are espousing this bizarre theory that causation is somehow skipped when employing the "any majority" rule. The question is whether all jurors are permitted to deliberate on causation regardless of how each voted on negligence versus one or two being precluded from deliberating on causation because of the position they took on negligence. To suggest that causation is somehow eliminated because all jurors are permitted to deliberate on that very element eradicates logic.

Next, Appellants attempt to degrade the opinion cited by the Court of Appeals here that entirely supports Appellee's position in this matter – *Wildenthaler v. Galion Cmty. Hosp.*, 2019-Ohio-4951 (10th Dist.); *see 2nd Dist. Ct. Opinion*, ¶¶78-82. Consistent with other assertions by Appellants, simply by argument, without supporting caselaw, Appellants claim it would improperly permit insufficient interrogatory support for a verdict. *Wildenthaler* relied upon *O'Connell, Estate of Lawson* and *Dillon* to find that full jury participation as to negligence and causation is necessary. That court expressly determined that the Ohio Jury Instructions were flawed in wrongfully implying that the full jury cannot consider both negligence and causation. *Wildenthaler, supra*., at ¶29.

Strangely, after arguing that in all cases the "same juror" rule should apply to causation, Appellants endeavor to claim that the "any majority" rule appropriately applies to damages. According to Appellants, a juror who does not find negligence cannot logically find that the conduct found to be negligent was the cause of the harm. However, that same juror who does not find negligence and therefore does not discuss or vote on causation can participate in the discussion on damages. That position is entirely inconsistent with Appellants' "same juror" rule theory. Either the "same juror" rule applies to causation and damages, or it applies to neither. If a juror did not go along with the majority on negligence and the "same juror" rule precluded him/her from going along on causation, the juror would have to be precluded from deliberating on damages. If a juror is precluded from discussing and voting on causation, how can that juror then be permitted to deliberate and vote on the damage that the negligence the juror did not find caused? Again, the constitutional right to a full jury for all key elements of a tort protects against such disjointed evaluation of tort claims.

[Appellants' Proposition of Law 1(C): The Ohio Jury Instructions on jury interrogatories in medical malpractice cases is correct.]

2. APPELLEE'S RESPONSE to Appellants' Proposition of Law 1(C): The OJI comments are flawed and clearly misinterpret the Supreme Courts' holding in *O'Connell v. Chesapeake & O.R. Co.*, 58 Ohio St.3d 226 (1991)

Appellants ask this Court to ordain the OJI comments and proposed instructions and interrogatories with unassailable authority, apparently even over the Ohio Constitution. Clearly however, the OJI comment in issue is incorrect. *see Wildenthaler, supra.* First, the Constitution takes precedence over any comments in OJI. Second, the comment clearly misinterprets *O'Connell*, in which the Court specifically limited the scope of that decision to comparative negligence cases, and not to standard tort cases. It is irrational to suggest that a comment in OJI should take precedence over the contrary holdings of the very case it cites.

Further, the OJI instructions expressly recognize that the Ohio Courts of Appeal have not applied the "same juror" rule to the issue of proximate cause. see Chapter 403 (Comparative Negligence), OJI CV 403.01, 403.03, comment, citing *Dillon* v. *OhioHealth Corp.*, *supra*, and *Estate of Lawson*, *supra*. Further, the Second District's decision is in complete agreement. All of these cases described the Ohio Jury Instructions as being flawed. see *2nd Dist. Opinion* (July 14, 2023), ¶¶75-82.

Revising or updating model OJI instructions in terms of sample interrogatory instructions is something for the Ohio Judicial Conference Committee to consider and amend in accordance with continuing case law. While OJI is very helpful, it is not imbued with absolute authority. Flaws are not to be overlooked, but corrected through the appropriate process. OJI is nonbinding guidance. *State v. Napier*, 105 Ohio App.3d 713, 720, 664 N.E.2d 1330 (1st Dist. 1995). As one court has stated, OJI is "'the product of a committee of the Ohio Judicial

Conference which suggests model instructions, but which have no force or effect as a rule of law. They are merely the suggestions of one or more trial or appellate judges as to what those judges feel is an appropriate instruction.'" *Id*. at 720-721, quoting *State v. Mitchell*, 10th Dist. Franklin No. 88AP-695, 1989 Ohio App. LEXIS 1632, 1989 WL 47083 (May 2, 1989); see State v. Burchfield 66 Ohio St.3d 261, 263 1993- Ohio 44, 611 N.E.2d 819 (1993) (recognizing that OJI should not be "blindly applied"). The proper inquiry is whether the instruction was proper.

[Appellants' Proposition of Law 1(D): Waiver]

3. APPELLEE'S RESPONSE to Appellants' Proposition of Law 1(D): Appellants' assertion that Appellee did not timely object is factually wrong and wholly meritless, as the trial court acknowledged the timely objection on the record, and the Court of Appeals found that Appellee made a timely objection.

Appellants' claim of a failure to timely object is wholly without merit and a desperate attempt to find some basis to succeed where they have failed twice before, in the trial court and court of appeals. In their "Statement of Facts" and in this section, Appellants completely omit any mention of the sidebar occurring and attempt to steer this Court to the conversation that occurred after the court finished reading of the charge to the jury. While Appellants counsel remained notably silent during the sidebar, it is difficult to believe they weren't listening either. The transcript demonstrates the point of the discussion.

While the court was reading the instructions, specifically Interrogatory A, counsel for Appellee asked to approach the bench, which the court granted. Appellee stated to the court that the instruction that only those who answered yes to the negligence interrogatory could deliberate on the causation interrogatory was "wrong". While portions of the conversation on the trial video were found to be indecipherable by the transcriptionist, the transcript contains

an express statement by the court to Appellee's counsel that he would "note your objection". Excerpted Transcript, p.3. line 6.

Appellees counsel requested the sidebar just as the trial court was beginning to read the interrogatories but had not reached instruction in issue. With the instructions in hand Appellee explained to the court that the only those who vote yes on negligence can participate on causation instruction was wrong. The court reviewed the instruction and opted to proceed as is, while noting Appellee's objection. Once the sidebar concluded, the court then read the instruction that occasioned the sidebar and the remaining instructions. The video and audio record demonstrate these facts.

In his Decision on the post-trial motion, the trial court made a point of stating that the objection did not occur during the charge conference or prior to the court beginning to read the instructions to the jury. However, the court conceded that the objection was made during the reading of the charge to the jury and prior to reading of the instruction in issue. Decision, p. 3, at fn. 1. The trial video and transcript clearly demonstrate that Appellee presented the objection before the instruction/interrogatory in issue was read to the jury. Excerpted Transcript (p.2, line 3 – p.3, line 11).

Nowhere in its Decision did the trial court conclude that Appellee failed to timely object, nor did the court find that Appellee waived her right contest the issue. The court of appeals also correctly determined that Appellee made a valid and timely objection to the defective instruction. see *2nd Dist. Opinion*, ¶¶37-39.

> [Appellants' Proposition of Law 1(E): If the trial court erred by instructing the jury on the "same juror" rule, the error was harmless]

4. APPELLEE'S RESPONSE to Appellants' Proposition of Law 1(E): Violating a party's Constitutional right to full jury deliberations on the key elements of a tort by precluding jurors from participating in the discussions and vote on causation is a denial of a substantial right.

Appellants attempt to claim that regardless of the violation of Appellee's constitutional rights, precluding two jurors from deliberating on causation is harmless error.

Where an error affects a substantial right, harmless error cannot be used to excuse the error. The concept of harmless error applies only where the error does not adversely affect a substantial right of a party. Civ.R. 61 (Harmless Error) provides in part,

> The court at every stage of the proceeding must disregard any error or defect in the proceeding which **does not affect the substantial rights of the parties**. (*emphasis added*).

Appellants assert that Appellee's loss of the right to a full jury deliberating the essential claims does not qualify as a violation of a substantial right. Appellants cite to a case, Wagner v. Roche Labs, 85 Ohio St.3d 457 (1999), a case that does not involve an inviolate constitutionally protected right, where the court held that a party must establish prejudice.

However, very few things could be more of a substantial right than a constitutionally protected right to a jury trial with full jury participation. The right to a fair trial involving consideration of all primary elements in issue by a complete jury is unquestionably a substantial right. *see O'Connell*, *supra*. The use of the same juror rule unequivocally affected Appellees substantial, constitutional right. Yet, Appellants wish to impose an additional hurdle, an impossible-to-meet burden requiring proof that the verdict would have changed.

The deliberations in this case lasted approximately 3½ hours. With the added contributions of the two precluded jurors, an innumerable number of scenarios could play out,

and all would be speculative. To impose an obligation on Appellee to prove that the scenarios favoring Appellee would have been the outcome is entirely unwarranted and unjustified when we are dealing with a question so fundamental to jury trials – full participation of the jury.

The inapplicability of harmless error to improperly restricted jury participation is discussed in *West v. Curtis,* 2009-Ohio-3050 (7th Dist., Belmont Co.), ¶95-123. In that matter, a jury found for the plaintiff in her sexual harassment claim against a physician, and 7 jurors found that the defendant's conducted warranted punitive damages. The trial court had bifurcated the question of the amount of any punitive damages (and attorney's fees). The court permitted only the 7 jurors who found the defendant liable for punitive damages to participate in the deliberations in the second phase of the trial. The defendant appealed, relying upon *O'Connell*, *supra.*, at ¶99.

The court of appeals analyzed *O'Connell* in depth, along with several court of appeals decisions and concluded that all jurors are entitled to deliberate on damages regardless of how they voted on negligence and causation, *i.e.* – the same juror rule does not apply to damages. *West, supra.*, at ¶¶100-119.

Next, the *West* court found that the defendant was prejudiced by the failure to permit the 8th juror to participate. The fact that the juror should have been permitted to participate and was not allowed to do so denied the defendant his right to a full jury trial. *see West, supra., at ¶121, citing Civ.R. 38(B); Ohio Const. Art. I, Sec. 5; Art. VII, Sec. 8.* The court further observed that, "regardless of the number of signatures on the forms, it is **not harmless error to deny a party the right to a full jury on every issue**." *Id., at ¶122* (*emphasis added*).

Jury deliberations are a dynamic process and at any given moment the positions of

jurors may vary and be swayed by further discussion. No one, not even the court, has a right to interfere with or impede the deliberative process. The court's responsibility in fact is to promote discourse and ensure that the jury as a whole knows that each and every juror should have the opportunity to participate and voice his or her opinions. The right to have a full complement of jurors debate and decide upon the relative merits of the parties' positions is fundamental to the jury system. Were this court to disregard the Constitutional right involved and accept Appellants' assertion that Appellee would need to demonstrate to a probability a different outcome, the same juror rule could be used with impunity, as no plaintiff could ever meet that burden.

In terms of negligence and causation, the Court in *O'Connell* recognized that the parties are entitled to consideration of all essential elements of the involved claims by a full jury. However, when there is a failure in that fundamental aspect of jury trials process, it should not then be demanded of the aggrieved party to precisely predict that contributions by the precluded jurors would have altered the outcome. Nor should that party be obligated to demonstrate that other jurors would have been persuaded or responded to their input to such a degree that the verdict would undoubtedly have been reversed. Denying a party a right to a full jury is too fundamental and too critical to the process to ever be deemed harmless error. *see West, supra.* The denial itself is the prejudicial adverse impact on a substantial right.

What is categorically established in this case is that a full jury did not engage in the determination regarding causation. That is an undeniable violation of Appellee's right to a full jury. Juror preclusion on primary elements of presented claims is a complete denial of a substantial right, period. Nothing more needs to be considered. There may be no greater

interest in a civil courtroom than protecting the fundamental right to a full jury.

Further, this is not a matter of merely taking the plaintiff's side. Had the six jurors determined instead that the CRNA proximately caused the injury / death of the decedent, the defense could make the same argument – two jurors were denied permission to deliberate on causation in violation of our constitutional right to a full jury. The only difference would have been that they would have had to argue plain error, since they did not object but instead supported the wrongful application of the same juror rule.

> [Appellants' Proposition of Law 1(F): If the error was not harmless and the case must be remanded for retrial, the only fair remand requires retrial of the entire case.]

5. APPELLEE'S RESPONSE to Appellants' Proposition of Law 1(F): at no time have Appellants argued that the jury erroneously arrived at the finding of negligence on the part of the CRNA, and the Court of Appeals acted entirely within its authority to reverse and remand as to causation and the undecided claims, and determine that the negligence finding stands as decided by the jury.

Finally, Appellants seek a reversal of the court of appeals' determination that negligence has been decided and is no longer an issue for a jury.

At no time prior to the effort to obtain this Court's review did Appellants ever raise an issue regarding the negligence finding. In Appellee's "Conclusion" in her Reply Brief in the Court of Appeals, Appellee simply pointed out the obvious, that the finding of negligence was not impacted by the appeal. *see Mast v. Doctor's Hospital North*, 46 Ohio St.2d 539 (1976); App.R. 12(D); Civ.R. 42(B); *see also Catalanotto v. Byrd*, 2017-Ohio-7688 (9th Dist.), ¶¶28-29; *Fisher v. Univ. of Cincinnati Med. Ctr*., 2015-Ohio-3592 (10th Dist.), ¶57; *Dailey v. Masonbrink*, 2015-Ohio-2207 (3rd Dist.), ¶¶28-29.

Once again, Appellants are arguing without support. Appellants filed no post-trial

motions and did not appeal anything related to the jury's finding that the CRNA was negligent. That decision was made free and clear of any error. Appellants do not raise any error with the negligence determination even now, which of course would be far too late anyway. There is absolutely no basis to retry an issue that has been properly determined by the jury.

In this matter, deliberations as to negligence of the CRNA occurred and concluded with absolutely no demonstrable error in those deliberations. Further, the jury appropriately and consistently answered Interrogatory No. 1 (CRNA negligence) and No. 2 (narrative statement of the negligence). The decision on CRNA negligence was submitted to and accepted by the trial court, and no effort to provide the trial court or court of appeals with any reason to reverse that finding occurred. There is simply no valid justification to alter the negligence finding.

Appellants refer to cases that pre-existed the Ohio Civil and Appellate Rules of Procedure. However, in *Mast, supra.*, a defendant appealed a plaintiff's verdict, asserting that the verdict was excessive. The appellate court agreed, reversed and remanded for an entirely new trial. That court certified a conflict on whether a case could be reversed on damages alone and remanded solely for a re-trial on damages. In a *per curiam* decision this Court held,

> It is the opinion of a majority of this court… that App. R. 12 (D), in conjunction with Civ. R. 42(B), authorizes a Court of Appeals to order the retrial of only those issues, claims or defenses the original trial of which resulted in prejudicial error, and to allow issues tried free from error to stand.

Id., at 541; see Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co., 12 Ohio State.3d 241 (1984); see also State ex rel. Smith v. O'Connor, 71 Ohio St.3d 660, 662-663 (1995)(mandamus and prohibition denied as court of appeals actually had not ordered a limited retrial).

The court of appeals exercised its authority pursuant to *Mast*, to do just that, order a new trial on the proximate cause finding that it reversed on appeal and on the issues not

decided in light of the erroneous causation finding, and allow the negligence finding, tried free of error, to stand. Nothing about the court of appeals decision in that regard violates any rule or caselaw, nor mandates reversal of its proper exercise of its authority.

The Court of Appeals finding, that negligence has been decided and is not impacted by the court's ruling on causation, is proper and reasonable. The court explained in its *Opinion*, ¶¶ 88-94, that,

> The law is established that "[u]pon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." State ex rel. Stevenson v. Murray, 69 Ohio St.2d 112, 113, 431 N.E.2d 324 (1982), citing Commrs. of Montgomery Co. v. Carey, 1 Ohio St. 463 (1853), paragraph one of the syllabus. Accord L.G. Harris Family Ltd. Partnership I v. 905 S. Main St. Englewood, L.L.C., 2d Dist. Montgomery No. 26682, 2016-Ohio-7242, ¶ 24.
>
> The error in question here occurred when two jurors were not allowed to deliberate with the full jury on the issue of proximate cause. At that point, six jurors had already concluded that Ward was negligent…

Opinion, ¶¶88-89.

In addition, contrary to Appellants claim, a new jury will not be required to hear all of the negligence testimony. The court will instruct the jury that negligence has been decided, and base its' instruction on the narrative interrogatory completed by the jury. And regardless, the possibility that a jury may hear evidence of negligence does not mean, 'we might as well go ahead and try it again'. That issue was properly tried and Appellants never even attempted to assert error in that finding. The court of appeals was well within its authority to determine that the jury's negligence decision is unaffected by the appellate issues.

Finally, the allegations against Appellant Good Samaritan Hospital, et al. are based upon *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435 (1994), 1994-Ohio-519, and vicarious liability for the acts and omissions of the CRNA. Their appellate arguments are

essentially identical to those presented by the anesthesia Appellants and have been addressed herein.

CONCLUSION

Thus, at the most critical juncture in the proceedings, jury deliberations, the now self-admitted incorrect instructions given to the jury by the trial court denied Appellee the indisputable right to have the full jury discuss and vote on proximate cause. That trial court decision adversely affected a substantial right, and it was anything but a harmless error. The court of appeals appropriately remanded the case to the trial court for further proceedings consistent with its thorough and well-reasoned opinion.

WHEREFORE, Appellee, Janet Hild, respectfully submits that this honorable Court should find that the any majority rule applies to tort cases unencumbered by questions of comparative negligence. The court should AFFIRM the Decision of the Second District Court of Appeals in favor of Appellees in its entirety and remand this case for retrial on the issues of causation, damages and vicariously liability. The issue of negligence has been fairly decided by a jury and no party has appealed any issue with respect to the jury's conclusion regarding negligence.

The application of the "same juror" rule constituted a clear violation of the Appellee's substantial right to a full jury consideration of her claims. It is irrational to think this could be overlooked as harmless error. The Second District Court of Appeals thoroughly addressed the issues in this matter and determined that Appellee was entitled to a new trial on all issues after the full jury deliberated on the CRNA Defendant's care and found her conduct to be negligent.

It is incontrovertible that the "same juror" rule was improperly applied to this case and deprived Appellee of a full jury deliberating on causation, as is her constitutional right. This

honorable Court should AFFIRM in its entirety the Opinion of the Second District Court of Appeals on this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I e-filed and served a copy of the foregoing Plaintiff-Appellee's Response to Appellants' Memoranda in Support, on this **20th day of February 2024**, as follows:

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APPENDIX

A. OPINION – 2nd Dist. Court of Appeals (July 14, 2023); Hild v. Samaritan Health Partners, et al., CA 29652 [42 pages]

B. Decision…Denying Plaintiff's Motion for a New Trial; Hild v. Samaritan Health Partners, et al., 2018 CV 5710 (Nov. 7, 2022) [13 pages]

APPENDIX - A

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JANET HILD, ADMIN. OF THE ESTATE OF SCOTT BOLDMAN, DECEASED	:	C.A. No. 29652
Appellant	:	Trial Court Case No. 2018 CV 05710
v.	:	(Civil Appeal from Common Pleas Court)
SAMARITAN HEALTH PARTNER, et al.	:	
Appellees	:	

. . . . . .

O P I N I O N

Rendered on July 14, 2023

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PATRICK K. ADKINSON and DOUGLAS D. BRANNON, Attorneys for Appellant

JOHN B. WELCH, GERALD J. TODARO, JOHN F. HAVILAND and JAREN A. HARDESTY, Attorneys for Appellees

. . . . . .

WELBAUM, P.J.

{¶ 1} In this medical malpractice case, Plaintiff-Appellant, Janet Hild, as Administrator of the Estate of Scott Boldman, deceased ("Hild") appeals from a judgment denying Hild's motion for a new trial. According to Hild, the trial court erred in submitting jury instructions and interrogatories that wrongly applied the "same juror" rule to the issue of causation. Hild further contends that the court erred in finding that its error in

submitting these instructions and interrogatories was harmless and, therefore, in denying Hild's motion for a new trial. Hild's position is that prohibiting a full jury from deliberating on both negligence and proximate causation denied her right to a jury trial.

{¶ 2} In response, Defendants-Appellees, Samaritan Health Partners, Good Samaritan Hospital, Premier Health Partners, Vincent Phillips, M.D., Sandra Ward, CRNA, and Consolidated Anesthesiologists, Inc. (collectively, "Appellees") contend that Hild forfeited any alleged error and that even if the court erred in instructing the jury, any error was harmless.

{¶ 3} For the reasons discussed below, we conclude that Hild sufficiently objected to the trial court's instructions and interrogatories. Furthermore, the trial court erred (as it conceded) by including jury instructions and interrogatories which stated that jurors who disagreed with a finding that defendant Sandra Ward was negligent were not qualified to participate in deliberations on proximate cause. The trial court found its error harmless, because the same six jurors who found Ward negligent also signed an interrogatory finding that Ward's negligence did not proximately cause Boldman's injuries and death. However, this error was not harmless, because parties have a constitutional right to have a full jury determine all essential elements of their claims, and forbidding jurors who do not find a breach of duty from participating in proximate cause deliberations violates this right.

{¶ 4} Moreover, the "same juror" rule, which provides that a verdict is invalid unless the same jurors agree on all issues, does not apply here and does not require a different result. The Supreme Court of Ohio adopted the "same juror" rule in the context of a comparative negligence case, and the major principle behind the rule is that deciding if a

party is casually negligent is not independent from apportioning the degree of fault for that negligence. Therefore, if a juror who disagrees that a defendant was casually negligent also signs a verdict assessing fault to the defendant, the verdicts are inconsistent.

{¶ 5} From this rule, Appellees extrapolate the principle that if verdicts (or interrogatory answers, as here) are consistent, any error in allowing deliberation must be harmless. This is incorrect, however. Appellate courts have declined to apply the "same juror" rule in other situations, including those that do not involve comparative negligence or that involve separate and independent issues. This latter type of situation includes verdicts involving liability and damages (even in comparative negligence cases), because inquiries about liability and damages are separate and independent, not interdependent. Likewise, negligence (or breach of a duty of care) and proximate cause are separate and independent inquiries. Thus, jurors who find, for example, that a party is not negligent can still participate in deciding issues of proximate cause. And again, precluding these jurors from participating deprives a party of the right to a full jury trial.

{¶ 6} Accordingly, the trial court's error was prejudicial, and the court erred in denying Hild's motion for new trial. Because App.R. 12(D), in conjunction with Civ.R. 42(B), authorize courts of appeals to order retrial of only those issues, claims, or defenses in the original trial which resulted in prejudicial error, and to let issues tried free from error stand, the trial court's judgment denying a new trial will be reversed in part and affirmed in part. The denial of a new trial regarding the negligence of Sandra Ward, CRNA, will be affirmed, because six jurors signed an interrogatory finding that Ward was negligent. This occurred before the two jurors who disagreed were prohibited from further

participation.

{¶ 7} In all other respects, the judgment denying the motion for a new trial will be reversed, and this matter will be remanded to the trial court for a new trial. On remand, the remaining issues to be submitted to the jury will be: (1) whether Ward's negligence directly and proximately caused Scott Boldman's injury and death; (2) whether Ward was under the direction and control of Dr. Phillips; (3) whether Good Samaritan was responsible under the doctrine of agency by estoppel; and (4) the total amount of compensatory damages, if any, caused by Ward's negligence. All the defendants (including Consolidated Anesthesiologists, Inc., Ward's employer) will remain as defendants for purposes of the new trial.

I. Facts and Course of Proceedings

{¶ 8} On December 11, 2018, Hild filed a medical malpractice and wrongful death action against Samaritan Health Partners, Good Samaritan Hospital, Premier Health Partners, Vincent Phillips, M.D., Robert Custer, M.D., Sandra Ward, CRNA, Consolidated Anesthesiologists, Inc., and Heather McKinley, D.O. The action arose from medical treatment provided to Scott Boldman in late December 2017, which allegedly caused his death on January 1, 2018. The Ohio Department of Job & Family Services Tort Recovery (ODJFS) was also included as a defendant as it might have a claim in the case, and Hild asked for a declaration that ODJFS did not have a subrogation claim.

{¶ 9} On January 11, 2019, ODJFS filed an answer and cross-claim seeking recovery against the other defendants for the cost of services provided to Boldman. On the same day, Consolidated Anesthesiologists, Custer, Phillips, and Ward (collectively

"Consolidated") filed an answer to the complaint. They then filed an answer to ODJFS's cross-claim on January 16, 2019. On January 31, 2019, McKinley filed a notice of removal to the United States District Court.

{¶ 10} On February 11, 2019, Samaritan Health Partners, Good Samaritan Hospital, Premier Health Partners, and McKinley (collectively "Good Samaritan") filed an answer to the complaint and an answer to the ODJFS cross-claim. On June 27, 2019, Hild filed a notice indicating that the federal district court had remanded the case to state court.[1]

{¶ 11} Previously, on May 16, 2019, Hild had filed a motion in limine in the state action, which asked the court to exclude evidence of healthcare reimbursements based on amendments to R.C. 2317.45 that became effective on March 20, 2019. The court granted the motion on August 29, 2021, and on September 20, 2021, denied Consolidated's motion for reconsideration. The court noted that the motion for reconsideration could be renewed at trial.

{¶ 12} On July 17, 2020, the court had set a trial date for October 25, 2021. Consolidated then filed a motion on October 12, 2021, asking the court to allow

---

[1] Before remand, the United States of America filed a notice in the federal district court case, substituting itself in place of McKinley, as she was a United States Air Force employee at the time of the alleged negligence. The United States then filed a motion to dismiss Hild's claims, because Hild had "failed to file an administrative claim with the USAF relating to Dr. McKinley's treatment of the Decedent at Good Samaritan Hospital, as required by the Federal Tort Claims Act." *Hild, as Admin. of the Estate of Scott Boldman v. Samaritan Health Partners*, S.D. Ohio No. 3:19-cv-00025-WHR, 2019 WL 1319467 (Feb. 7, 2019), citing 28 U.S.C. 2675. Subsequently, the parties stipulated to the dismissal of the United States as a party pursuant to Fed.R.Civ.P. 41(a)(1)(A)(ii), without prejudice and with the right to refile within one year of the date of dismissal. Stipulation of Dismissal (Feb. 26, 2019). Thereafter, McKinley was no longer part of the state case.

substitution of an expert witness and to continue the trial date. After holding a hearing, the court overruled the motion on October 19, 2021. However, the court did vacate the trial date and set a new trial date for January 24, 2022. On January 21, 2022, Hild dismissed her claims against Dr. Custer, without prejudice. The jury trial then took place as scheduled.

{¶ 13} Although a full trial transcript has not been filed for purposes of appeal, the parties have provided some facts about the case as context. Essentially, Scott Boldman was a 37-year old man who went to Good Samaritan North on Christmas Eve 2017 after experiencing right upper quadrant pain. At the time, Boldman was 5'8" tall and weighed 350 pounds. Besides the pain, Boldman's diagnoses included: "Type I Diabetes, obstructive sleep apnea, one pack a day smoker, hypertension, and unrelenting lymphedema in both lower extremities, with statis dermatitis and peripheral venous hypertension." *See* Hild Brief, p. 4; Consolidated Brief, p. 4.

{¶ 14} That evening, Boldman was transferred to the main facility of Good Samaritan Hospital for an emergency appendectomy, which took place at around 7:30 p.m. A laparoscopic appendectomy was performed, with general anesthesia administered by Sandra Ward, CRNA, under the supervision of Dr. Phillips. The surgery itself was uneventful. *Id*. After the surgery, Dr. Phillips left the operating room and Ward, a circulating nurse, a scrub technician, and a surgery resident remained in the operating room with Boldman. Post-operatively, Boldman suddenly emerged from anesthesia and became combative. Hild Brief at p. 4-5; Consolidated Brief at p. 4; Good Samaritan Brief, p. 1.

{¶ 15} The parties differ on what occurred thereafter. According to Consolidated,

"as Boldman was emerging from anesthesia, he experienced post-operative delirium, he self-extubated, struggled and his heart stopped because of overwhelming demand ischemia where the oxygen demands of the heart exceeds blood supply." Consolidated Brief at p. 4. Hild's theory was that "the incorrect handling of emergence from anesthesia by the CRNA caused respiratory compromise, patient combativeness, extubation and a cardiopulmonary arrest, for which resuscitative efforts were unsuccessful, resulting in severe brain damage and ultimately death." Hild Brief at p. 6.

{¶ 16} The jury found in favor of Good Samaritan, Phillips, Ward, and Consolidated on Hild's claims. Further, while the jury found that Ward had been negligent in Boldman's care and treatment, it also concluded that Ward's negligence had not proximately caused injury and death to Boldman. The court entered a final judgment in favor of the defendants and against Hild on February 15, 2022.

{¶ 17} On February 28, 2022, Hild filed a motion for new trial. The court denied the motion on November 7, 2022. Hild timely appealed from the judgment denying the motion for a new trial.

II. "Same Juror" Rule

{¶ 18} Because Hild's three assignments of error are intertwined, we will consider them together. Hild's three assignments of error states:

> The Trial Court Erred in Submitting to the Jury, Over Plaintiff-Appellant's Timely Objection, Instructions and Interrogatories That Wrongly Applied the "Same Juror" Rule to the Issue of Causation, Thereby Depriving Plaintiff-Appellant her Substantial Right to the Full Jury Deliberating on and

Deciding the Issue of Causation.

The Trial Court Erred in Overruling Plaintiff's Motion for a New Trial, Given the Court's Error at Trial in Applying the “Same Juror” Rule to the Issue of Causation, Thereby Depriving Plaintiff-Appellant Her Substantial Right to the Full Jury Deliberating on and Deciding the Issue of Causation.

The Trial Court Erred in Overruling Plaintiff's Motion for a New Trial, Given the Court's Error at Trial in Applying the “Same Juror” Rule to the Issue of Causation, Thereby Depriving Plaintiff-Appellant Her Substantial Right to the Full Jury Deliberating on and Deciding the Issue of Causation.

{¶ 19} Under these assignments of error, Hild contends that the trial court erroneously applied the “same juror” rule in its jury instructions and improperly deprived her of a substantial right to have a full jury decide issues of causation. Hild did not appeal from the judgment entered on the jury verdict but appealed from the denial of her motion for new trial. Hild’s argument concerning the new trial denial is the same but is directed to the fact that the court erred in denying her motion for new trial and in finding that any error in the instructions was harmless. Thus, all of Hild’s arguments involve the same issues.

{¶ 20} In response, Good Samaritan argues that Hild forfeited any error by failing to meaningfully object in the trial court. Good Samaritan further asserts that even if any error occurred, it was harmless, because the same six jurors who found Ward negligent also found that her negligence did not proximately cause Boldman’s injury or death. According to Good Samaritan, it would be “absurd” to suggest that the two jurors who failed to find negligence would then turn around and conclude that proximate cause

existed. Good Samaritan Brief at p. 6. Consolidated echoes these arguments and also contends that the trial court did not abuse its discretion by giving the instructions because no case law or statute definitively holds that applying the "same juror" rule to negligence and causation is an error of law. Consolidated Brief at p. 7-9. Before we consider these points, we will discuss the applicable review standards.

A. Standards of Review

{¶ 21} Hild's motion for new trial was brought under Civ.R. 59(A)(1), (7), and (9). Cv.R. 59(A) provides, in relevant part, that:

> A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> * * *
>
> (7) The judgment is contrary to law; [or]
>
> * * *
>
> (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

{¶ 22} "Our review of decisions on new trial motions depends on whether the issue is one of law or is a matter over which the trial court exercises discretion. On matters of law, we review de novo, and on discretionary issues, we consider whether the trial court

abused its discretion." *Doss v. Doss*, 2d Dist. Champaign No. 2021-CA-28, 2022-Ohio-1339, ¶ 31, quoting *Rohde v. Farmer*, 23 Ohio St.2d 82, 83, 262 N.E.2d 685 (1970), paragraphs one and two of the syllabus.

{¶ 23} Review under Civ.R. 59(A)(1) is for abuse of discretion. *E.g., Koch v. Rist*, 89 Ohio St.3d 250, 252, 730 N.E.2d 963 (2000). This type of irregularity in the court's proceedings involves "any matter 'as constitutes a departure from the due, orderly and established mode of proceeding therein, where a party, with no fault on his part, has been deprived of some right or benefit otherwise available to him.' " *Meyer v. Srivastava*, 141 Ohio App.3d 662, 667, 752 N.E.2d 1011 (2d Dist.2001), quoting *Sherwin-Williams Co. v. Globe Rutgers Fire Ins. Co*., 20 Ohio C.C. (N.S.) 151, 154, 31 Ohio C.D. 248, 1912 WL 768 (1912). An example of this would be where an alternate juror sat through the entire jury deliberation. In that situation, the Supreme Court of Ohio held that the trial court did not abuse its discretion in granting a mistrial. *Koch* at 250.

{¶ 24} The case before us does not involve such an irregularity in the court's proceedings; it simply concerns a trial court's allegedly erroneous jury instruction. As a result, Civ.R. 59(A)(1) does not apply.

{¶ 25} The remaining grounds asserted by Hild were Civ.R. 59(A)(7) and (9). Rulings on these grounds are reviewed on a de novo basis. *Hoke v. Miami Valley Hosp*., 2d Dist. Montgomery No. 28462, 2020-Ohio-3387, ¶ 29, citing *Harrison v. Horizon Women's Healthcare, LLC*, 2d Dist. Montgomery No. 28154, 2019-Ohio-3528, ¶ 11. *See also Wildenthaler v. Galion Community Hosp*., 2019-Ohio-4951, 137 N.E.3d 161, ¶ 26 (10th Dist.), quoting *State v. Akbari*, 10th Dist. Franklin No. 13AP-319, 2013-Ohio-5709, ¶ 7 (de novo review applies to some parts of Civ.R. 59(A) because " 'no court has

the authority, within its discretion, to commit an error of law' "). We have stressed for many years that "[n]o court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law." *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, 932 N.E.2d 345, ¶ 26 (2d Dist.).

{¶ 26} "In de novo review, we independently review trial court decisions and accord them no deference." *Coldly v. Fuyao Glass Am., Inc*., 2022-Ohio-1960, 191 N.E.3d 514, ¶ 9 (2d Dist.), citing *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs*., 121 Ohio App.3d 188, 192, 699 N.E.2d 534 (8th Dist.1997). This will be the standard we apply.

B. Forfeiture of Error

{¶ 27} Appellees argue that Hild forfeited any error by failing to object or to properly object at the trial court level. In this regard, Civ.R. 51(A) states that "[o]n appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." An exception exists, however, which allows courts to take notice of plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209, 436 N.E.2d 1001 (1982), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. "A 'plain error' is obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse [e]ffect on the character and public confidence in judicial proceedings." *Id*. *Accord Goldfuss v. Davidson*, 79 Ohio St.3d

116, 121, 679 N.E.2d 1099 (1997).

{¶ 28} According to Appellees, forfeiture of the error is proper because a lengthy conference was held on jury instructions and interrogatories, and Hild failed to object. Instead, Hild objected while the judge was reading the jury instructions and, even then, only in a half-hearted manner.

{¶ 29} In this case, the parties submitted proposed jury instructions. Before trial, Good Samaritan filed proposed jury instructions, including a number of interrogatories for the jury to answer. Interrogatory "G," which related to negligence claims against Sandra Ward, instructed the jurors that:

> If the answer of six or more jurors to Interrogatory G is "Yes," move to Interrogatory H. Only those jurors who answered Yes to Interrogatory G are qualified to participate in answering Interrogatory H.

Defendants Samaritan Health Partners, Good Samaritan Hospital, and Premier Health Partners' Proposed Jury Instructions (Oct. 12, 2021), p. 43. Interrogatory "H" instructed jurors to detail how Ward was negligent and had the same instruction on whether jurors were qualified to participate further. *Id*. at p. 44.[2]

{¶ 30} Consolidated also filed various standard jury instructions and a set of proposed interrogatories. As pertinent here, interrogatories 4, 5, and 6 dealt with whether Sandra Ward was negligent in Boldman's care and treatment, the manner in

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[2] Interrogatory H had a typographical error, as it states that only jurors who answer "yes" to Interrogatory "D" are qualified to go on and consider Interrogatory I, which involved whether Ward's negligent acts proximately caused death or injury to Boldman. Interrogatory D involved another defendant, Dr. Custer, who was dismissed from the case before trial. The correct reference would have been that a "yes" answer to Interrogatory "H" would qualify jurors to participate in considering Interrogatory I. Good Samaritan Proposed Jury Instructions at p. 44 and 45. This typo has no impact on our discussion.

which Ward was negligent, and whether Ward's negligence proximately caused injury or death to Boldman. *See* Proposed Jury Interrogatories on Behalf of Defendants Consolidated Anesthesiologists, Inc., Robert Custer, M.D., Vincent Phillips, M.D., and Sandra Ward, CRNA (Oct. 21, 2021), p. 5-7. However, none of these interrogatories contained any instructions prohibiting jurors who disagreed with a negligence finding from participating in further deliberation.

{¶ 31} Hild then filed proposed jury instructions and interrogatories and verdict forms on December 28, 2021. Hild's interrogatories and verdict forms included interrogatories 1, 2, and 3, which pertained to Ward's negligence, the ways in which Ward had been negligent, and whether Ward's negligence had caused proximate injury or death to Boldman. Plaintiff's Proposed Jury Interrogatories and Verdict Form, p. 2-4. Like Consolidated, Hild did not mention any prohibition on further participation of jurors who did not agree to a finding of negligence.

{¶ 32} During trial, Hild filed further proposed jury interrogatories. While these additional instructions particularized items relating to Ward's alleged negligence, like failing to maintain Boldman's airway, they did not prohibit jurors from deliberating if they failed to join in a negligence finding. *See* Plaintiff's Proposed Jury Interrogatories (Feb. 1, 2022). Finally, Hild filed supplemental proposed jury instructions during trial, but they did not relate to anything pertinent to this appeal. *See* Plaintiff's Proposed Supplemental Jury Instructions (Feb. 1, 2022).

{¶ 33} Having reviewed the transcript, we note that when the parties were supposed to be talking about jury instructions, the bulk of the discussion instead concerned whether Hild would be allowed to amend the complaint to allege respondeat

superior and negligent supervision claims against Dr. Phillips. *See* Transcript of Proceedings ("Tr."), at 76-86 and 88-93. In fact, the court sent the jury home on February 1, 2022, and instructed the parties to provide authority regarding whether Hild could amend the complaint under Civ.R. 15(B) to conform to the evidence. *Id*. at 87-93. The parties then did so.

{¶ 34} Another major discussion at that point was how to handle the issue of reimbursement for medical expenses, given the court's prior ruling and the defense's failure (in light of the ruling) to offer evidence about what payments had actually been made. The court delayed ruling on this issue. *Id*. at 93-98. After this discussion, the court and parties began to consider interrogatories that had just been proposed (not the ones in question now), and then went off the record. *Id*. at 98-101. That was the end of any recorded discussion until the next day, which was the last day of trial.

{¶ 35} When the trial convened the next morning, further discussion occurred outside the jury's presence. The court granted Hild's motion to amend, and the parties then discussed instructions related to agency and respondeat superior. *Id*. at 106-111. The remaining topics were the reimbursement issue (*id.* at 112-117); a foreseeability instruction (*id*. at 120-121); admission of exhibits (*id*. at 123-128) and a life-expectancy instruction (*id*. at 129). At that point, the court went off the record and subsequently said, "Okay. We have gone through the jury instructions as well as the general – as well as the interrogatories." *Id*. at 129. The court then asked for objections, starting with the Plaintiff, but again went off the record. *Id*. The next event on the record was Hild's closing argument. *Id.* at 130.

{¶ 36} After Hild's closing argument, some discussion did occur concerning the

instructions, verdict forms, and interrogatories. *Id*. at 160-178. Notably, the parties did not get the final version of the interrogatories until that morning. *Id*. at 152. The main topics were language about Dr. Phillip's control of the CRNA Ward (resulting in amendment of Interrogatory D to add language); a defense objection to denial of an objection on hindsight; an addition about life expectancy; the reimbursement issue; and some non-substantive clarifications. *Id*. at 160-178. Thus, the major preoccupations during the total discussion of instructions and interrogatories were the complaint's amendment, instructions related to the amendment, and the reimbursement issue. Consequently, Appellees' focus on the *length* of the instruction discussion is misplaced and overstated.

{¶ 37} In any event, Hild did object to the interrogatories when the court was reading the instructions to the jury. *Id*. at 243-244. This occurred when the trial court had just finished reading the first part of Interrogatory A. *Id*. at 243. At that point, an objection was made and the attorney asked to approach. The content of most of the sidebar discussion is indiscernible, and the speakers are not identified in the transcript. However, the objecting party (clearly Hild's counsel based on a later objection) said, "I'm pretty sure this is wrong. (Indiscernible). (Indiscernible) It says, only (Indiscernible) can participate in all interrogatories. * * * one of them says you're not qualified to participate –." *Id*. at 243-244. After some discussion (which again is mostly indiscernible), the court *overruled the objection* and said the interrogatory instruction would be left as it was. *Id*. at 244. The court then instructed the jury that "Only those jurors who answered 'yes' to Interrogatory A [the negligence interrogatory] are qualified to participate in answering Interrogatory B." *Id*. at 245.

{¶ 38} After the judge finished instructing the jury, Hild's counsel again objected. The following exchange then occurred:

> MR. ADKINSON [Hild's Counsel]: My concern is that Interrogatory B is the one about (Indiscernible) the narrative, so A is negligence, the CRNA, so if you assume for the sake of this argument that the jury says yes, then they move to Number 2, and if the jury fills that out at the bottom it says only those of you fill this – filled A out, you go to C, and I'm pretty sure that's incorrect.
>
> I think it's called the same juror rule, and amazingly enough even though they may not have found someone negligent they could still participate in the discussion on causation. Always thought, found that to be a little bit weird, but I'm pretty sure the same juror rule says that.
>
> So that someone – someone could not agree with the negligence interrogatory, but they might be agreeing to the rest.
>
> I don't know that it's a big deal, but –
>
> THE COURT: Yeah, I don't –
>
> MR. ADKINSON: -- I don't think the rest of the interrogatory instructions, I looked at them quickly, they seemed okay, but this one concerns me.
>
> THE COURT: Mr. Welch, Mr. Haviland, any thoughts on that? Mr. Todaro?
>
> MR. TODARO [Consolidated's counsel]: (Indiscernible).
>
> MR. WELCH [Consolidated's counsel]: Same juror rule for

damages. I'm not sure about negligence and causation.

MR. ADKINSON: And like I told the judge, the article that I have kind of goes through it all is at home, so I can't give you a citation.

THE JUDGE: Okay. Well, at this point I'll leave it alone. I'll shoot for the best and hope there isn't any confusion at this point.

Tr. at 258-259.

{¶ 39} Based on the above discussion, we reject the claim that Hild forfeited any claim of error. While Hild could have objected earlier, Civ.R. 51(A) only requires that parties object to instructions before the jury retires, and that was done. Furthermore, from the transcript, it is apparent that the jury instruction process was somewhat chaotic, continuing even after Hild's closing argument, and that the parties were preoccupied with other issues. Accordingly, we will employ the usual method of de novo review rather than reviewing only for plain error.

C. De Novo Analysis

{¶ 40} The jury interrogatories that were answered included "A," "B," and "C" and covered: (1) whether Ward was negligent in her care and treatment of Boldman (Interrogatory A); (2) the way in which Ward was negligent (Interrogatory B); and (3) whether Ward's negligence "directly and proximately caused the injury and death" of Boldman (Interrogatory C). These interrogatories were the same, in pertinent part, as the ones that Good Samaritan proposed. Interrogatory A stated that "If the answer of six or more jurors to Interrogatory A is 'Yes,' move to Interrogatory B. Only those jurors who answered Yes to Interrogatory A are qualified to participate in answering

Interrogatory B." Interrogatory B contained the same prohibition, indicating that jurors who had not answered yes to Interrogatory A were not qualified to consider Interrogatory C. *See* Interrogatory A and Interrogatory B (both filed on Feb. 7, 2022).

{¶ 41} Six of the eight jurors signed yes to Interrogatory A. The two jurors who did not sign were not allowed to participate in considering the ways in which Ward may have been negligent (Interrogatory B) or whether her negligence proximately caused Boldman's injury and death (Interrogatory C). The same six jurors who found that Ward had been negligent and detailed her negligence also found that the negligence had not proximately caused Boldman's injury and death. *Id*. *See also* Tr. at 267-268.

{¶ 42} Hild filed a motion for new trial, contending, as she does here, that the trial court erred in including the disqualifying language in the interrogatories. In its decision overruling the motion, the court agreed "with Hild that the interrogatories were flawed in that they required only the jurors who found negligence to participate in the determination of proximate cause." Final and Appealable Decision, Order, and Entry Denying Plaintiff's Motion for a New Trial (Nov. 7, 2022), p. 9. However, the court also found that Hild's substantial rights had not been affected because it could not say that "without the error, the jury would not have arrived at the same verdict." *Id*.

{¶ 43} In this regard, the court remarked that:

> Samaritan Defendants and Anesthesiologist Defendants argue that the trial court was able to determine the outcome intended by the jury based on the general verdicts executed by the jury and announced in open court. The Court agrees. The jury was able to reach a majority consensus on the interrogatories for negligence and proximate cause. Six of the eight jurors

> found that Defendant was negligent and those same six jurors determined that the negligence was not the proximate cause of death. As a result, there is no inconsistency between the interrogatories and the general verdict. Hild's argument that had the two jurors who did not find Defendant negligent participated in the determination of proximate cause, the jury's conclusion regarding proximate cause may have been different is speculative at best. Such an argument is far too speculative to say the jury's verdict would have been different. As previously stated, there is no inconsistency between the interrogatories and the general verdict and the jury was able to reach a majority consensus on the interrogatories for negligence and proximate cause. Six of the eight jurors found that Defendant was negligent, and those same six jurors determined that the negligence was not the proximate cause of death. The Court cannot reasonably say with any certainty that those two jurors would have changed the decision of the other six jurors had they participated, and therefore, the jury would not have arrived at the same verdict.

Order Denying New Trial at p. 9-10.

{¶ 44} As noted, Hild argues that her constitutional rights to a jury trial were violated. Under the Ohio Constitution, " '[t]he right of trial by jury shall be inviolate, except that in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." *O'Connell v. Chesapeake & Ohio RR. Co.*, 58 Ohio St.3d 226, 232, 569 N.E.2d 889 (1991), quoting Ohio Constitution, Article I, Section 5. "Furthermore, Civ.R. 48 provides that '[i]n all civil actions, a jury shall

render a verdict upon the concurrence of three-fourths or more of their number.' " *Id*.

{¶ 45} The parties agree that the Supreme Court of Ohio adopted the "same juror" rule in *O'Connell,* a comparative negligence case, but they disagree as to its potential application to cases like the one before us. The parties also disagree concerning whether any error was harmless. After consideration, we conclude that the trial court erred (as it admitted), and that the error did prejudice Hild.

{¶ 46} The plaintiff in *O'Connell* was injured when her car collided with a parked flatbed car of a train that blocked a highway. The railroad crossing was located in a rural area and did not have any flashing lights or gates; it did have "wooden crossbuck signs," "a yellow railroad advance warning sign posted in the general vicinity before the crossing," and "diagonal lines with the letters R.R." "on the pavement in white reflectorized paint." *Id*. at 226. The flatbed car was painted black, there were no buildings or streetlights nearby, and the accident occurred at around 10:50 p.m. *Id*. The flatbed and other railroad cars had been uncoupled because the train yard was full, and a brakeman with a light had been waving cars through the crossing. When permission was given to enter the yard, the cars were recoupled, the flatbed car was left blocking the highway, and the brakeman walked up to the front of the train. At that point, the plaintiff's car collided with the flatbed car, and her car was then dragged forward with the train. As a result, the plaintiff sustained serious injuries. *Id*. at 226-227.

{¶ 47} After the plaintiff filed a complaint against the railroad alleging negligence and willful or wanton misconduct, the case was tried before a jury of eight. Counsel agreed that instead of returning a general verdict, the jury would answer six interrogatories. The jury found the plaintiff and railroad both negligent and that their

negligence caused the injuries. However, because the jury assessed 70% of the negligence to plaintiff and 30% to the railroad, the trial court entered judgment for the railroad. *Id.* at 228.

{¶ 48} After examining the interrogatory answers and signatures, plaintiff's counsel discovered that one juror had failed to sign any interrogatories finding either side negligent and had not signed interrogatories finding proximate cause. However, this juror did sign the interrogatory apportioning fault. *Id*. In addition, another juror had failed to sign an interrogatory finding the railroad negligent but signed an interrogatory apportioning the railroad with 30% of the fault. *Id.*

{¶ 49} The plaintiff filed a motion for a new trial, which was denied. The court of appeals then affirmed the judgment, finding, among other things, that "there were no major inconsistencies among the jury's answers to the interrogatories that would have prevented the trial court from entering judgment in favor of the railroad." *Id*. On further appeal, the Supreme Court of Ohio reversed the judgment. *Id*. at 238.

{¶ 50} In considering the case, the Supreme Court observed that it had never decided the issue before it and that no statute applied. The court also remarked that the judgment would be constitutionally infirm if the two dissenting jurors could not validly participate, since "the jury did not concur by a three-fourths majority as to the apportionment of negligence." *Id*. at 232. On the other hand, if the two jurors were "not prohibited from taking part in apportioning fault, then the trial court's judgment may stand as six of the eight jurors (or three-fourths) concurred in the decision." *Id*.

{¶ 51} The court commented that two completing rules of law could apply: the "same juror" rule and the "any majority" rule. *Id.* at 232. The "same juror" rule provides

that it is "necessary for the same jurors to agree on all issues or the resultant verdict is invalid." *Id*., citing *Fleischhacker v. State Farm Mut. Auto. Ins. Co.*, 274 Wis. 215, 220, 79 N.W.2d 817 (1956). The reason behind the rule is that:

> "The questions regarding the causal negligence of the parties and the apportionment of that causal negligence are not independent of one another, but are integrally related in determining ultimate liability. To illustrate, the question of apportionment is never reached, in the ordinary case, until one plaintiff and one defendant are found to be causally negligent. And when reached, its function is to give further definition to causal negligence for purposes of imposing liability. It is unlike the damages question, which can be, and is, answered independently of liability."

O'Connell, 58 Ohio St.3d at 233, 569 N.E.2d 889, quoting *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 37, 239 N.W.2d 190 (1976).

{¶ 52} The Supreme Court thus concluded that "the major principle behind the 'same juror' rule is that the determination as to whether a party is causally negligent is not independent from, but is indeed inseparable from, the apportionment of negligence. Stated otherwise, a juror's finding as to whether liability exists is so conceptually and logically connected with apportioning fault that inconsistent answers to the two questions render that juror's vote unreliable and thus invalid." *Id*.

{¶ 53} In contrast, the "any majority" rule states that "in a case involving the principles of comparative negligence, and where the votes of only nine jurors were necessary to reach a verdict, jurors who had disagreed with the majority on the issue of

negligence could nevertheless provide votes necessary to decide the issue as to the apportionment of damages between the parties." *Id*. at 233-234, citing *Juarez v. Superior Court*, 31 Cal.3d 759, 768, 183 Cal.Rptr. 852, 647 P.2d 128 (1982).

{¶ 54} The bases for the "any majority" rule include: (1) the lack of a reason why dissenting jurors could not accept the majority's decision and apportion fault; (2) holding otherwise would " 'prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues' "; and (3) " '[a] contrary rule would result in "time consuming writs, mistrials, frustrating delays and confusion for the trial judge and jury - all adding to the heavy burden of the * * * civil trial process," ' " i.e., lack of judicial economy. *Id*. at 234, quoting *Juarez* at 768.

{¶ 55} The Supreme Court of Ohio decided that the "same juror" rule was "more rational and analytically sound." *Id*. at 235. The court gave several reasons for this, stating:

> First, and foremost, we believe the determination of causal negligence on the part of one party to be a precondition to apportioning comparative fault to that party. It is illogical to require, or even allow, a juror to initially find a defendant has not acted causally negligently, and then subsequently permit this juror to assign some degree of fault to that same defendant. Likewise, where a juror finds that a plaintiff has not acted in a causally negligent manner, it is incomprehensible to then suggest that this juror may apportion some degree of fault to the plaintiff and thereby diminish or destroy the

injured party's recovery.

Id. at 235.

{¶ 56} The court further agreed with the dissent in *Juaraz* that, practically, " 'it does not seem * * * realistic to assume that a juror who concludes that a party is not culpable would be able conscientiously to apportion financial responsibility to that party. His perception of a legal compulsion upon him to affix *some* responsibility upon a party [who] he concludes is not responsible *at all* is more likely to cause that juror to assign to such a party an arbitrary proportion of the total liability.' " (Emphasis sic.) *Id.*, quoting *Juarez* at 772 (Richardson, J., dissenting).

{¶ 57} Furthermore, the court was "not persuaded by the argument that the same juror rule would deny all parties the right to have a full jury deliberate on all issues." *Id*. In this vein, the court explained that:

> In a comparative negligence case, the initial, and somewhat talismanic question, is whether the defendant is causally negligent for the injury to the plaintiff. * * * The obvious corollary to this is whether the plaintiff was negligent in causing his or her own injury. The full assembly of jurors participates in these determinations and, thereafter, those jurors who find a party to be causally negligent then refine this determination by apportioning fault to the respective parties. Because the *full jury* undertakes the initial determination *as to negligence and proximate cause, neither party is deprived of having all the jurors deliberate the material issue of negligence and proximate cause.* We do not, however, wish to minimize the apportionment of fault. This aspect of comparative negligence retains its

> importance in all these cases. Yet, it cannot be denied that the allocation of fault is a method through which a juror clarifies his or her finding that a party is causally negligent for the injury sustained. As such, the allocation of fault flows from the adjudication of negligence and proximate cause.

(Emphasis added.) *O'Connell*, 58 Ohio St.3d at 235-236, 569 N.E.2d 889.

{¶ 58} Finally, the Supreme Court of Ohio found the idea of judicial economy too speculative. *Id*. at 236. The court therefore held that "in a case tried under comparative negligence principles, three-fourths of the jury must agree as to both negligence and proximate cause, and only those jurors who so find may participate in the apportionment of comparative negligence." *Id*.

{¶ 59} According to Appellees, while *O'Connell* applied the "same juror" rule in an apportionment situation, the same principles apply here, because it would be illogical and inconsistent for jurors who did not find Ward negligent to then assign fault to her. Consolidated Brief at p. 10-11l; Good Samaritan Brief at p. 10-11. Therefore, Hild could not have been prejudiced by the failure to let all jurors deliberate on the proximate cause issue. *Id*. However, these arguments miss the point. "Fault," is not the same as "proximate cause," and evaluating whether a particular set of actions has caused an injury is an independent inquiry. As noted above, the parties differ as to the specific cause of Boldman's injury and death. The issue involves a more fundamental issue, which is whether the failure to permit a full jury to deliberate violated Hild's rights.

{¶ 60} After *O'Connell* was decided, the Supreme Court of Ohio has cited the case only three times and has not further elaborated on the "same juror" or "any majority" rule, nor has it applied *O'Connell* in any substantive way. *See Schellhouse v. Norfolk & W.*

Ry. Co., 61 Ohio St.3d 520, 526, and fn.3, 575 N.E.2d 453 (1991) (reversing the court of appeals and remanding for retrial because, as in *O'Connell*, the trial court failed to comply with Civ.R. 49, which prohibited special verdicts, and noting that *O'Connell* was not decided on this ground.) *See also Eberly v. A-P Controls, Inc*., 61 Ohio St.3d 27, 36, 572 N.E.2d 633 (1991) (finding plain error when non-party employer was included in interrogatories apportioning liability, as employer should not have been included); *Conley v. Shearer*, 64 Ohio St.3d 284, 293, 595 N.E.2d 862 (1992) (also citing *O'Connell* simply for plain error application in case where Court of Claims erroneously dismissed plaintiff's claim for failing to "comply with the requirements of R.C. 2743.02 in bringing his Section 1983 claim, a federal law claim"). This leaves interpretation to lower appellate courts.

{¶ 61} Some Ohio appellate districts have not discussed *O'Connell* in any relevant fashion. Our own mention has been confined to situations in which failing to object (either to a magistrate's decision or to inconsistency in interrogatories) waived error. *E.g., Foust v. Smith*, 2d Dist. Montgomery No. 26275, 2015-Ohio-787, ¶ 18 (noting objection to inconsistent interrogatory answers is waived unless raised before jury is discharged, but finding *O'Connell* inapplicable because answers were not inconsistent); *Minnich v. Burton*, 2d Dist. Miami No. 1999-CA-48, 2000 WL 1006567, *1 (July 21, 2000) (failing to object to magistrate's decision waives error other than plain error). Likewise, the Fourth District Court of Appeals has cited *O'Connell* only in the context of plain error or waiver. *E.g., In the Matter of Smith*, 4th Dist. Athens No. 92CA1561, 1993 WL 387029, *6, fn. 2 (Sept. 29, 1993) (plain error), and *Lewis v. Nease*, 4th Dist. Scioto No. 05CA3025, 2006-Ohio-4362, ¶ 35 (waiver).

{¶ 62} The Eleventh District Court of Appeals has mentioned *O'Connell* in two

comparative negligence cases, but distinguished it factually. *See Martz v. El Paso Petro*, 11th Dist. Trumbull No. 95-T-5343, 1997 WL 402364, *4 (June 27, 1997); *Crouch v. Corinth Assembly of God*, 11th Dist. Trumbull No. 99-T-0075, 2000 WL 1735020, *2 (Nov. 17, 2000).

{¶ 63} Some appellate districts have limited the "same juror" rule to comparative negligence cases. *See Williams v. Mike Kaeser Towing*, 1st Dist. Hamilton No. C-050841, 2006-Ohio-6976, ¶ 14 (refusing to extend the analysis to situations other than comparative negligence); *Leavers v. Conrad*, 156 Ohio App.3d 286, 2004-Ohio-850, 805 N.E.2d 543, ¶ 81 (5th Dist.) ("same juror" rule did not apply in workers' compensation case). In addition, the Third District Court of Appeals noted in a contract case that *O'Connell* "specifically declined to extend its holding to liability and damages issues, such as those present in a breach of fiduciary duty and contract claim." *Blake v. Faulkner*, 3d Dist. Shelby No. 17-95-12, 1996 WL 669852, *4 (Nov. 6, 1996).

{¶ 64} The Third District also held in a comparative negligence case that the "same juror" rule does not apply to interrogatory answers concerning liability and damages, which can be "independently determined." *Hudson v. Corsaut*, 3d Dist. Defiance No. 4-94-16, 1995 WL 505936, *3 (Aug. 22, 1995). Similarly, in a case involving negligence rather than comparative negligence, the Sixth District Court of Appeals rejected the application of the "same juror" rule. *Sheidler v. Norfolk & W. Ry.*, 132 Ohio App.3d 462, 468, 725 N.E.2d 351 (6th Dist.1999). In *Sheidler*, the court remarked that "[t]he basis cited by the Supreme Court of Ohio for applying the 'same juror' rule to cases involving the determination of liability and the apportionment of liability does not exist in a case involving the determination of liability and of damages." *Id.*, discussing *O'Connell*, 58

Ohio St.3d 226, 569 N.E.2d 889.

{¶ 65} In a case involving sexual harassment, the court separated trial into two phases: first the jury would decide if the plaintiff was entitled to compensatory damages and punitive damages; then, if the jury found liability for punitive damages, jurors would decide the amount of such damages during the second phase. *West v. Curtis*, 7th Dist. Belmont No. 08 BE 28, 2009-Ohio-3050, ¶ 97. Seven of eight jurors decided punitive damages were warranted, and before the second phase occurred, the court decided that only those seven jurors would be allowed to deliberate on the amount of punitive damages and whether attorney fees would be awarded. *Id*. at ¶ 98. After the jury awarded punitive damages, the appellant asserted on appeal that "he was denied his full jury on the amount of punitive damages and on liability for attorney fees." *Id*. at ¶ 1.

{¶ 66} In deciding this issue, the Seventh District Court of Appeals first discussed *O'Connell* in detail. *Id*. at ¶ 99-113. The court then stated that "[f]ew Ohio appellate courts have addressed whether the 'same juror' rule or the 'any majority' rule applies to damages; in other words, whether jurors finding no liability can vote on damages." *Id*. at ¶ 114. At that point, the court considered these few cases, which included *Hudson*, *Blake*, *Williams*, and *Sheidler*, and noted that the Supreme Court of Ohio had declined review in two of the cases. *Id*. at ¶ 114-118. The court also stressed *Hudson's* comment about the Ohio Jury Instructions, which was that " 'since the issues relating to damages are analytically different from those relating to causal negligence, the determination of damages may be made by all jurors without regard to their individual votes on causal negligence.' " *Id*. at ¶ 115, quoting *Hudson*, 3d Dist. Defiance No. 4-94-16, 1995 WL 505936, quoting 1 Ohio Jury Instructions, Section 9.10, at 149 (1994).

Finally, the court stressed *O'Connell's* observation that " '[Apportionment of fault] is unlike the damages question, which can be, and is, answered independently of liability.' " *Id*. at ¶ 119, quoting *O'Connell*, 58 Ohio St.3d at 233, 569 N.E.2d 889. (Other citation omitted.) The Seventh District concluded that this statement was not dicta, but was the rationale for *O'Connell's* apportionment holding. *Id*.

{¶ 67} Moreover, the Seventh District found reversible error, even though the vote of seven jurors satisfied the "three-fourth rule," because "appellant was denied his right to a full jury trial on the amount of punitive damages." *West*, 7th Dist. Belmont No. 08 BE 28, 2009-Ohio-3050, ¶ 121, citing Civ.R. 38(B) (right to eight jurors); Ohio Constitution, Article I, Section 5; and Ohio Constitution, Article VII, Section 8. The court stressed that "[r]egardless of the number of signatures on the forms*, it is not harmless error to deny a party the right to a full jury on every issue*." (Emphasis added.) *Id*. at ¶ 122.

{¶ 68} The above cases are not strictly on point here, as our case involves jurors who were not allowed to deliberate on proximate cause. However, proximate cause was considered in *Lawson v. Mercy Hosp. Fairfield*, 12th Dist. Butler No. CA2010-12-340, 2011-Ohio-4471. In *Lawson*, the plaintiff was injured in a fall and alleged that a hospital "failed to use reasonable care in assisting her as she moved from her hospital bed into a bedside chair." *Id*. at ¶ 2. Six of eight jurors found the hospital negligent, and six of eight found the negligence did not proximately cause the plaintiff's injuries. However, two of the latter set of jurors were not the same ones who had found the hospital negligent. *Id.* at ¶ 3. On appeal, the plaintiff argued that the interrogatory answers were inconsistent because the same set of jurors did not agree on both issues. *Id*. at ¶ 7.

{¶ 69} In considering this matter, the Twelfth District Court of Appeals cited the

comparative negligence decision in *O'Connell* and commented that "[w]hether a breach in the standard of care and proximate cause of injury are similarly interdependent so as to invoke the 'same juror' rule is an issue of first impression in Ohio." *Id*. at ¶ 11. The court discussed *O'Connell* at length, including its statement that " '[b]ecause the *full jury* undertakes the initial determination as to negligence *and* proximate cause, neither party is deprived of having all the jurors deliberate the material issue of negligence *and* proximate cause.' " (Emphasis sic.) *Id*. at ¶ 16, quoting *O'Connell*, 58 Ohio St.3d at 235-236, 569 N.E.2d 889. Given this fact, the Twelfth District found that "[t]he *O'Connell* Court therefore recognized that *a party's right to a full jury would in fact be deprived if the full jury were not permitted to deliberate as to both negligence and proximate cause*." (Emphasis added.) *Id*.

{¶ 70} The Twelfth District further stated that:

> A breach in the standard of care is a separate issue from whether the breach was the proximate cause of the injury sustained. The essential elements for a negligence claim consist of duty, breach of duty, and damage or injury that is a [sic] proximately caused by the breach. See *Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 912 N.E.2d 151, 2009-Ohio1724, ¶ 46. The failure of any of these elements will defeat the action. The apportionment of fault, as was at issue in the *O'Connell* case, is not an essential element of a cause of action for negligence. A party has the right to have a full jury determine all of the essential elements of a claim, and to forbid a juror who voted against a breach of duty from participating in a determination of proximate cause would violate this right. See Civ.R.

> 38(B) (right to eight jurors). See, also, Section 5, Article I, Ohio Constitution. Because the "any majority" rule emphasizes the importance of the full jury participating in deliberations as to the essential elements of a cause of action, we hold that this rule is properly applied to jury determinations regarding breach of the standard of care and proximate cause. Standard of care and proximate cause of injury are not interdependent pursuant to the analysis provided in *O'Connell*, and therefore we do not invoke the "same juror" rule herein.

Lawson, 12th Dist. Butler No. CA2010-12-340, 2011-Ohio-4471, at ¶ 18.

{¶ 71} Because the full jury in *Lawson* had been involved in deciding both negligence and proximate cause, the court overruled the plaintiff's assignment of error. *Id*. at ¶ 19.

{¶ 72} Subsequently, the Tenth District Court of Appeals came to the same conclusion about negligence and proximate cause. *See Dillon v. OhioHealth Corp*., 2015-Ohio-1389, 31 N.E.3d 1232 (10th Dist.). *Dillon* involved a lawsuit against a hospital based on injuries a schizophrenic patient sustained while being restrained. *Id*. at ¶ 3-10. Initially, the trial judge applied the "same juror" rule and discarded interrogatory answers where the same jurors had not participated in finding negligence and in finding lack of proximate cause for the plaintiff's injuries. However, all eight jurors had signed a general verdict for the hospital. Without telling the parties, the judge told the bailiff to instruct the jurors that the same set of jurors needed to sign the interrogatories and to continue deliberating. Later that day, the jury returned a verdict in favor of the plaintiff in a significant amount. When the hospital learned what had happened, it asked

the court to enter judgment on the first verdict; instead, the court entered judgment on the second verdict. *Id*. at ¶ 11-15. After the hospital filed a motion for new trial, the court vacated the second judgment but did not enter judgment on the first verdict; it also did not grant the new trial motion. *Id*. at ¶ 16. The hospital had previously appealed from the judgment, and the court of appeals had stayed the appeal until the judge ruled on the new trial motion. *Id*.

{¶ 73} When the Tenth District considered the case, it discussed both *O'Connell* and *Lawson* and found that the trial court had misapplied the "same juror" rule. The trial court, therefore, had erred in discarding the first verdict. *Id*. at ¶ 20-30. However, because the trial court had failed to comply with the requirements for entering a verdict, the first verdict could not be reinstated, and a new trial would need to be held. *Id*. at ¶ 31-40.

{¶ 74} During its discussion, the Tenth District commented that "[p]roximate cause is a separate question not dependent on a finding of negligence." *Id*. at ¶ 24, citing *Palsgraf v. Long Island RR.*, 248 N.Y. 339, 162 N.E. 99 (N.Y.App.1928). The court also noted *Lawson's* statement about depriving " 'a party's right to a full jury' " as well as *O'Connell's* observation about a " 'full jury' " undertaking " 'the initial determination as to negligence and proximate cause.' " *Id*., quoting *Lawson*, 12th Dist. Butler No. CA2010-12-340, 2011-Ohio-4471, at ¶ 16; *see also, id*. at ¶ 26, quoting *O'Connell*, 58 Ohio St.3d at 235-236, 569 N.E.2d 889. The Tenth District then stressed that it would "interpret and apply *O'Connell* in such a way that the full jury is to decide both negligence and proximate cause, the sum of which is causal negligence." *Id*. at ¶ 26.

{¶ 75} Notably, during this discussion, the Tenth District considered the plaintiff's

mention of "a model instruction provided in Ohio Jury Instructions 403.01." *Id*. at ¶ 25. In this regard, the court stated that:

> This instruction contains an interrogatory form which tells jurors that "only those jurors who answered 'yes' to [the negligence] Interrogatory * * * are qualified to participate in answering [the proximate causation] Interrogatory," and cites *O'Connell* as justification. Ohio Jury Instructions, CV Section 403.01 (Rev. Oct. 11, 2008). *Insofar as this interrogatory format operates to prevent a full jury from considering both negligence and proximate causation, it misapplies the same juror rule*.

(Emphasis added.) *Dillon*, 2015-Ohio-1389, 31 N.E.3d 1232, at ¶ 25.

{¶ 76} The current case involves 1 CV Ohio Jury Instructions 417.19 Interrogatories (claims arising on and after 4/11/03) [Rev. 2/27/21], for use in medical malpractice cases. However, this instruction contains the same language disqualifying jurors from participating in further deliberation and has the same infirmity as the instruction discussed in *Dillon*.

{¶ 77} The Supreme Court of Ohio subsequently denied review in *Dillon*. *See Dillon v. OhioHealth Corp.*, 144 Ohio St.3d 1407, 2015-Ohio-4947, 41 N.E.3d 446 (refusing to accept appeal and cross appeal); *Dillon v. OhioHealth Corp*., 144 Ohio St.3d 1480, 2016-Ohio-467, 45 N.E.3d 246 (denying motion for reconsideration).

{¶ 78} A later case from the Tenth District Court of Appeals reiterated that "negligence and proximate cause are separate and independent inquiries." *Wildenthaler v. Galion Community Hosp.*, 2019-Ohio-4951, 137 N.E.3d 161, ¶ 30 (10th Dist.), citing *Dillon,* 2015-Ohio-1389, 31 N.E.3d 1232, at ¶ 24, fn.6. In *Wildenthaler,* the court also

stressed its prior holding that "the Ohio Jury Instructions, CV Section 403.01 (Rev. Oct. 11, 2008) was erroneous in that it operated to prevent a full jury from independently considering negligence and proximate causation." *Id*. at ¶ 29.

{¶ 79} *Wildenthaler* was a medical malpractice case in which the jury indicated to the trial court that six jurors believed the plaintiff had failed to prove the cause of death and that it was unable to find six jurors to agree on two interrogatories (which related to whether two doctors had breached the standard of care). *Id*. at ¶ 18. The trial court told the jury that it did not need to agree on negligence. This allowed the jury to consider causation. (The jury had been instructed to consider the interrogatories in order, i.e., negligence first, and then causation.) *Id*. at ¶ 18-19. The jury again could not agree and asked the court if it could proceed to the verdict. *Id.* at ¶ 20. After the court allowed this (which let the jury proceed without deciding causation), the jury announced a verdict in the defendants' favor. *Id*. at ¶ 21. The verdict revealed that six jurors had signed the verdict, with no dissenting jurors, and that none of the interrogatories had been answered. *Id*.

{¶ 80} Subsequently, the trial court denied the plaintiff's motion for a new trial, reasoning that because the jury had reached a consensus, the negligence issue was irrelevant, and that "plaintiff had suffered no prejudice as a result of the jury's failure to complete the interrogatories." *Id.* at ¶ 22. The Tenth District disagreed, concluding that the court's only option at that point was to order a new trial. *Id*. at ¶ 24-27. The court also noted that "the model interrogatories provided in the Ohio Jury Instructions are flawed in that they wrongly imply that interrogatories on negligence and proximate cause must be answered in order of negligence first and that the full jury cannot consider both

negligence and proximate causation." *Id*. at ¶ 29, citing *Dillon* at ¶ 24-27.

{¶ 81} Thus, while the trial court in *Wildenthaler* could have properly allowed the jury to consider proximate cause first, the court erred in these ways: (1) letting the jury skip that interrogatory; and (2) permitting the jury to not answer any interrogatories and to proceed to a general verdict. *Wildenthaler*, 2019-Ohio-4951, 137 N.E.3d 161, at ¶ 31. Because the jury could not answer the questions, the trial court "created a mistrial under Civ.R. 49(B) and Ohio precedent because the jury did not complete its assigned task." *Id*, citing *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, 865 N.E.2d 1289, ¶ 38 and 46, and *Aetna Cas. & Sur. Co. v. Niemiec*, 172 Ohio St. 53, 173 N.E.2d 118 (1961), paragraphs two and four of the syllabus. These parts of the syllabus stated that "[i]t is the duty of the jury to give definite answers to * * * interrogatories" and that "failure of a jury to answer such interrogatories constitutes a mistrial and necessitates a new trial." *Niemiec* at 53.

{¶ 82} As with *Dillon*, the Supreme Court of Ohio declined to review *Wildenthaler*. *See Wildenthaler v. Galion Community Hosp*., 158 Ohio St.3d 1452, 2020-Ohio-1090 (refusing to accept appeal).

{¶ 83} Finally, the few cases from the two remaining appellate districts either are of little assistance or do not impact the analysis. In *Gable v. Gates Mills*, 151 Ohio App.3d 480, 2003-Ohio-399, 784 N.E.2d 739 (8th Dist.), *rev'd on other grounds*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, the Eighth District Court of Appeals distinguished *O'Connell* because the case before it involved two independent causes of action. Thus, a juror dissenting on one cause of action was able to sign a general verdict in the defendant's favor. *Id* at ¶ 27. And, in *Segedy v. Cardiothoracic & Vascular*

Surgery of Akron, Inc., 182 Ohio App.3d 768, 2009-Ohio-2460, 915 N.E.2d 361 (9th Dist.), the Ninth District Court of Appeals noted that the "[t]he Ohio Supreme Court did not adopt a strict application of the same-juror rule in all cases. In fact, the court pointed out in *O'Connell* that it was not willing to 'extend [its] holding to reach' the application of the rule to '[a] jury's determinations as to liability and damages,' as other jurisdictions had done." *Id*. at ¶ 33, quoting *O'Connell*, 58 N.E. 3d at 232, 569 N.E.2d 889, fn. 3.

{¶ 84} *Segedy* did find that the jury's initial interrogatory answers were inconsistent with the general verdict, because one of the six jurors who had signed that verdict did not agree that a doctor had breached the standard of care. *Id*. However, *Segedy* further held that because the original verdict was invalid, the trial court correctly returned the forms to the jury for a reconciliation, which resulted in a proper verdict. *Id*. at ¶ 34-48. Unlike the present case, *Segedy* involved comparative negligence, so it is of little help.

{¶ 85} In a more recent case, the Ninth District rejected plain error in a comparative negligence case because the defendant had failed to object to any inconsistencies. *Russo v. Gissinger*, 9th Dist. Summit No. 29881, 2023-Ohio-200, ¶ 16. Although one juror in that case who found the defendant was not negligent had signed the general verdict form for the plaintiff, the court of appeals noted that "[n]either the interrogatory instructions nor the verdict forms indicated that only those jurors answering "yes" to both Interrogatory A and B were qualified to sign the verdict form for the Plaintiff." *Id*. Thus, unlike the case before us, the *entire jury* was allowed to consider all issues. And again, *Russo* involved comparative negligence.

{¶ 86} In summary, *O'Connell* was decided more than 30 years ago. Since that time, the Supreme Court of Ohio has not chosen to revisit the "same juror" rule, despite

the fact that lower appellate courts have limited its application to situations involving comparative negligence and the interrelated issue of apportioning fault. The court has declined review even in comparative negligence cases that found the rule did not apply to liability and damages and in other cases that found negligence and proximate cause to be independent and separate. Thus, under the prevailing law, instructions disqualifying jurors from further participation in deliberation are incorrect, and the trial court erred (as it agreed) in so instructing the jury.

{¶ 87} As noted, the trial court found the error harmless, and this is the argument Appellees make on appeal. However, the case law indicates otherwise. *See West*, 7th Dist. Belmont No. 08 BE 28, 2009-Ohio-3050, at ¶ 122 ("[r]egardless of the number of signatures on the forms, it is not harmless error to deny a party the right to a full jury on every issue"). *See also Wildenthaler*, 2019-Ohio-4951, 137 N.E.3d 161, at ¶ 24-29 (rejecting the trial court's conclusion that plaintiff suffered no prejudice when jury failed to complete interrogatories because six jurors agreed on the general verdict for the defendant). Thus, because Hild suffered prejudice due to the trial court's error, the first, second, and third assignments of error are sustained. Accordingly, the judgment of the trial court will be reversed, and this cause will be remanded for a new trial. Again, the point here is that even if the interrogatory answers were "consistent," that had nothing to do with the right that was at issue. The fault was in prohibiting the full jury from considering both negligence and proximate cause, and that deprivation was not harmless because it involved the right to have a full jury deliberate the case.

{¶ 88} This leaves the issue of what should be retried on remand. The law is established that "[u]pon remand from an appellate court, the lower court is required to

proceed from the point at which the error occurred." *State ex rel. Stevenson v. Murray*, 69 Ohio St.2d 112, 113, 431 N.E.2d 324 (1982), citing *Commrs. of Montgomery Co. v. Carey,* 1 Ohio St. 463 (1853), paragraph one of the syllabus. *Accord L.G. Harris Family Ltd. Partnership I v. 905 S. Main St. Englewood, L.L.C.*, 2d Dist. Montgomery No. 26682, 2016-Ohio-7242, ¶ 24.

{¶ 89} The error in question here occurred when two jurors were not allowed to deliberate with the full jury on the issue of proximate cause. At that point, six jurors had already concluded that Ward was negligent. This is because the trial court instructed the jury that after completing this interrogatory answer (Interrogatory A), jurors would then move on to Interrogatory B (ways in which Ward was negligent), and then proceed to Interrogatory C (proximate cause). Tr. at 245. Again, only jurors who had answered "yes" to Interrogatory A were allowed to consider the other issues. *Id*.

{¶ 90} A corollary principle of returning to the point of error is that "App.R. 12(D), in conjunction with Civ.R. 42(B), authorizes a Court of Appeals to order the retrial of only those issues, claims or defenses the original trial of which resulted in prejudicial error, and to allow issues tried free from error to stand." *Mast v. Doctor's Hosp. N.*, 46 Ohio St.2d 539, 541, 350 N.E.2d 429 (1976). This is based on the fact that "App.R. 12(D) vests the court with the necessary authority to order a trial court to exercise its powers under Civ.R. 42(B) to separately try any claim or issue, when such separation is 'in [furtherance] of convenience or to avoid prejudice, or when separate trials will be conductive to expedition and economy.' " *Id*. at 541-542, quoting Civ.R. 42(B) (1970).[3]

[3] Civ.R. 42(B) has since been amended, but the current version is essentially the same, allowing separate trials of claims or issues "[f]or convenience, to avoid prejudice, or to expedite or economize."

See also Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co., 12 Ohio St.3d 241, 243, 466 N.E.2d 883 (1984), paragraph one of the syllabus.

{¶ 91} "The rationale authorizing reviewing courts to order a limited remand implicitly recognizes the need for appellate courts to carefully exercise their discretion to determine the appropriate scope of remand." *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 37 Ohio St.3d 1, 523 N.E.2d 489 (1988), paragraph two of the syllabus. In this regard, compare *Hileman v. Kramer*, 2d Dist. Montgomery No. 15066, 1995 WL 765959, *12 (Dec. 12, 1999) (based on exclusion of medical expert's testimony, the court of appeals affirmed as to finding of hospital's negligence but reversed and remanded for retrial on issue of proximate cause and damages, if any); *Wood v. Harborside Healthcare*, 197 Ohio App.3d 667, 2012-Ohio-156, 968 N.E.2d 568, ¶ 18-25 (8th Dist.) (judgment remanded for trial on proximate cause and damages; jury found nursing center negligent, but trial court committed plain error by confusing jury about how to fill out other interrogatories during deliberations).

{¶ 92} In this context, we note that due to the erroneous instructions and the finding of a lack of proximate cause, the jury did not reach the issues of: (1) whether Ward was under the direction and control of Dr. Phillips; (2) whether Good Samaritan was responsible under the doctrine of agency by estoppel; (3) whether any of the defendants (including Consolidated, who was Ward's employer) were liable for causing Boldman's death and injury; and (4) the amount of compensatory damages, if any, that were caused due to Ward's negligence. Tr. at 229-230, 231-232, 240-243, and 245-250. Specifically, the jurors were instructed that if six or more jurors found that Ward's negligence did not proximately cause Boldman's injury and death, they would stop at that

point and render a general verdict for Ward, Dr. Phillips, Consolidated, and Good Samaritan. Tr. at 246. As a result, the jury did not answer interrogatories D, E, F, G, and H, which related to Dr. Phillips's right to direct and control Ward; whether Good Samaritan held itself out to the public as a provider of medical services and whether Boldman had looked to or relied on Good Samaritan as opposed to Ward to provide him with competent care; and the compensatory damages, if any, due to Boldman. *Id*. at 246-250 and 266-268. In light of these facts, all defendants who remained as such during the first trial are still part of the case on retrial.

{¶ 93} Based on the preceding discussion, the first, second, and third assignments of error are sustained, and this cause will be remanded for a new trial on the issues outlined above.

III. Conclusion

{¶ 94} All of Hild's assignments of error having been sustained, the judgment of the trial court denying the motion for new trial is affirmed in part, i.e., as to the finding of negligence by Sandra Ward. The judgment denying the motion for new trial is also reversed in part and is remanded for a new trial. On remand, the remaining issues to be submitted to the jury will be: (1) whether Ward's negligence directly and proximately caused Boldman's injury and death; (2) whether Ward was under the direction and control of Dr. Phillips; (3) whether Good Samaritan was responsible under the doctrine of agency by estoppel; and (4) the total amount of compensatory damages, if any, that were caused due to Ward's negligence.

. . . . . .

EPLEY, J. and LEWIS, J., concur.

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APPENDIX - B

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

JANET HILD,

Plaintiff(s),

-vs-

SAMARITAN HEALTH PARTNERS et al,

Defendant(s).

CASE NO.: 2018 CV 05710

JUDGE E. GERALD PARKER JR

FINAL AND APPEALABLE DECISION, ORDER, AND ENTRY DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL

DECISION, ORDER, AND ENTRY DENYING PLAINTIFF'S REQUEST FOR ORAL HEARING

This matter is before the Court upon *Plaintiff's Motion for a New Trial* ("*Motion*") and request for oral hearing filed on February 28, 2022 by Plaintiff, Janet Hild, Admin. of the Estate of Scott Boldman, deceased (hereinafter "Hild"). *See* Docket. On March 14, 2022, Defendants Good Samaritan Hospital, Samaritan Health Partners, and Premier Health Partners (hereinafter collectively "Samaritan Defendants") filed their *Defendants Good Samaritan Hospital, Samaritan Health Partners, and Premier Health Partners' Response in Opposition to Plaintiff's Motion for New Trial* ("*Response*"). *Id*. Defendants Consolidated Anesthesiologists, Inc., Vincent M. Phillips, M.D., and Sandra Ward, CRNA (hereinafter collectively "Anesthesiologist Defendants") also filed their *Defendants' Consolidated Anesthesiologists, Inc., Vincent M. Phillips, M.D. and Sandra Ward, CRNA Memorandum Contra Plaintiff's Motion for New Trial* ("*Memo Contra*") on March 14, 2022.

Id. Thereafter, on March 21, 2022, Hild filed *Plaintiff's Reply in Support of Motion for a New Trial* ("*Reply*"). *Id.*

This matter is now properly before the Court. For the reasons that follow, the Court hereby denies *Plaintiff's Motion for a New Trial*. The Court further finds oral argument to be unnecessary and additionally denies Hild's request for an oral hearing.

FACTUAL & PROCEDURAL BACKGROUND

The instant action arises from the *Complaint* filed by Hild on December 11, 2018. *See* Docket. Therein, Hild alleged claims for medical negligence, wrongful death, and survivorship. *See Compl.* Anesthesiologist Defendants filed their *Answer* on January 11, 2019. *See* Docket. Samaritan Defendants filed their Answer on February 11, 2019. *See* Docket.

This matter proceeded to a jury trial beginning on January 24, 2022. *See* Docket. On February 2, 2022, the jury found that Hild proved by the greater weight of the evidence that Sandra Ward, CRNA was negligent in the care and treatment of Scott Boldman. *See Jury Interrogatory A*, filed 02/07/22. The jury also found that Hild did not prove by the greater weight of the evidence that the negligence of Sandra Ward, CRNA, directly and proximately caused the injury and death of Scott Boldman. *See Jury Interrogatory C*, filed 02/07/22. Judgment was thus entered in favor of the Defendants on all of Hild's claims. *See Journal Entry of Judgment*, filed 02/15/22.

In her *Motion*, Hild asserts that the Court incorrectly employed the "Same Juror Rule" with respect to the issue of causation. *Motion* at 1-3. Hild contends that the jury instructions erroneously precluded two jurors from considering and voting upon the key issue of causation as the jury instructions instructed that only those jurors who found negligence were permitted to participate in the discussion and finding on the issue of proximate cause. *Id.* at 3-4. Hild claims that she has been prejudiced because she was deprived of the right to a full jury deliberating on the principal elements of her claims. *Id.* at 1, 4-5.

To support her request for a new trial, Hild cites to Civ.R. 59(A)(1, 7, and 9). However, Hild does not specifically delineate with respect to the separate sections of Civ.R. 59(A) why, or argue how, she is entitled to a new trial under that specific section. Instead, Hild generally asserts that she is entitled to a new trial pursuant to those sections. *See Motion*.

In their *Response*, Samaritan Defendants contend that the interrogatories submitted to the jury were proper because they mirrored the language used in the Ohio Pattern Jury Instructions. *Response* at 3. Samaritan Defendants further claim that the interrogatories, as provided to the jury, do not run afoul of Ohio's constitutional and statutory requirements for a valid jury verdict because Hild was given the opportunity to have the Jury polled (she waived the opportunity), the verdicts were announced in open court, and six of eight jurors all signed the verdict forms in favor of Defendants. *Id*. at 3-4. Additionally, Samaritan Defendants argue that Hild failed to provide any legitimate argument which would entitle her to a new trial because, unlike in the cases cited by Hild, there were no inconsistencies between the jury interrogatories and the general verdict. Samaritan Defendants argue that, in this instance, six of the eight jurors concluded that the Defendant, Sandra Ward, CRNA, was negligent and those same six concluded that the negligence was not the proximate cause of injury and death. *Id*. at 7. Samaritan Defendants assert that Hild's *Motion* should be denied in its entirety. *Id.* at 8.

In their *Memo Contra*, Anesthesiologist Defendants assert that while Hild raised the issue of the same juror rule with the Court, she failed to object on the record to the Interrogatory at issue.[1] *Memo Contra* at 1. They further argue that six jurors signed the interrogatories and verdict forms, and

[1] In her *Reply*, Hild claims that the objection was raised during the reading of the jury instructions and interrogatories to the jury. *Reply* at 3. Review of the transcript submitted with Hild's *Reply* as Exhibit B reveals that, while difficult to discern what exactly was said, some statement regarding Interrogatory A being incorrect was made by Attorney Adkinson. The transcript further reveals that the Court understood this to be an objection. Exhibit B, p. 2-3. That being said, the Court conducted a lengthy jury charge conference during which the proposed instructions and interrogatories were reviewed with the parties prior to being read to the jury. At no time during the jury charge conference, or prior to the instructions being read to the jury, did Hild (through her counsel) present an objection to the interrogatories. While the "eleventh hour" objection may not technically be untimely because it was raised prior to the beginning of jury deliberations, it certainly was not raised in an ideal fashion given the fact that it was raised in the middle of the Court reading the instructions to the jury and Attorney Adkinson offered no citation to case law to explain the basis of his objection other than to say "I'm pretty sure it's not correct." *Id*.

because three-fourths of the jurors signed the verdict forms, the verdict was announced in open court, and polling of the jury was waived, the verdict complies with Ohio Civ.R. 48 and is valid. *Id*. at 1-2. Anesthesiologist Defendants further argue that it is nonsensical to claim that jurors who did not find negligence would assume that Defendants' negligence caused harm, and even if they did, there would still be a valid verdict because six jurors signed the verdict forms. *Id*. at 4. Anesthesiologist Defendants contend that the cases cited by Hild involved inconsistencies in jury interrogatories and, are therefore, distinguishable from this matter because there are no inconsistencies with the interrogatories and verdict forms. *Id*. at 4-5. Finally, they assert that there is no reasonable argument that if these two jurors had participated in determining the issue of causation, the outcome would have been different. *Id*. at 5.

In her *Reply*, Hild argues that her objection to the interrogatory was timely made at sidebar and that she placed her position on the record that the instructions to the interrogatories incorrectly precluded jurors from fully participating in the case. *Reply* at 3-4. Hild maintains that the issue is not that the verdict and interrogatories were inconsistent, but that the instructions provided by the Court deprived her of her right to have a full jury consider the essential elements of her claim. *Id*. at 9.

LAW AND ANALYSIS

Pursuant to Civ.R. 59(A), a new trial may be granted on all or part of the issues based upon one of the following enumerated grounds:

> (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

Civ.R. 59(A). "The decision to grant or deny a motion for a new trial, pursuant to Civ.R. 59(A) is reviewed for an abuse of discretion." *Hover v. O'Hara*, 12th Dist. Warren No. CA2006-06-077, 2007-Ohio-3614, ¶ 71.

As an initial matter, the Court finds that an oral hearing is unnecessary to resolve the instant motions given that the parties have substantially briefed all issues before the Court. *See* Civ.R. 7(B)(2); *see also State ex rel. Allen v. Warren Cty. Bd. of Elections*, 115 Ohio St.3d 186, 2007-Ohio-4752, 874 N.E.2d 507, ¶ 21 ("We deny relator Allen's request for oral argument, because the parties' briefs and evidence are sufficient to resolve the issues raised in this case."); *Greenberg v. Markowitz*, 8th Dist. Cuyahoga No. 93838, 2010-Ohio-2228, ¶ 5 ("if a party requests an oral hearing, the decision whether to grant this request lies within the trial court's discretion.").

Civ.R. 59(A)(1)

Civ.R. 59(A)(1) establishes that a new trial may be granted if an irregularity in the trial proceedings can be shown to have prevented the moving party from having received a fair trial. *Jacobs v. McAllister*, 6th Dist. Lucas No. L-06-1172, 2007-Ohio-2032, ¶ 19. "In the context of a motion for new trial, an 'irregularity' is a departure from the due, orderly, and established mode of proceeding, whereby a party, through no fault of his own, is deprived of some right or benefit

otherwise available to him." *Gill v. Grafton Corr. Inst.*, 10th Dist. Franklin No. 10AP-1094, 2011-Ohio-4251, ¶ 34. Civ.R. 59(A)(1) "preserves the integrity of the judicial system when the presence of serious irregularities in a proceeding could have a material adverse effect on the character of and public confidence in judicial proceedings." *Wright v. Suzuki Motor Corp.*, 4th Dist. Meigs No. 03CA2, 03CA3 & 03CA4, 2005-Ohio-3494, ¶ 114. Additionally, "[a] movant may not obtain relief pursuant to Civ.R. 59(A)(1) for an irregularity in the proceedings when the movant could reasonably have avoided the prejudice the irregularity caused." *Allin v. Hartzell Propeller, Inc.*, 161 Ohio App.3d 358, 2005-Ohio-2751, 830 N.E.2d 413, ¶ 17 (2d Dist.).

Civ.R. 59(A)(7)

Under Civ.R. 59(A)(7), a trial court can grant a new trial if the judgment rendered is contrary to law. *Innovative Techs. Corp. v. Advanced Mgmt. Tech*., 2d Dist. Montgomery No. 23819, 2011-Ohio-5544, ¶ 66. If a jury verdict "is in manifest disregard of or contrary to the court's instructions to the jury," it is contrary to law. *Landon v. Midwest Express*, 1995 Ohio App. LEXIS 2306, ¶ 20, quoting 90 Ohio Jurisprudence 3d (1989) 339-340, Trial, Section 675 (footnotes omitted).

Civ.R. 59(A)(9)

Civ.R. 59(A)(9) provides for a new trial based upon "[e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application." Civ.R. 59(A)(9). " 'The only time that error is grounds for the granting of a new trial is when the error is prejudicial to the moving party in a substantial way. In order for a party to secure relief from a judgment by way of new trial, he must not only show some error but must also show that such error was prejudicial.' " *Evans v. Thobe*, 195 Ohio App3d 1, 2011-Ohio-3501, 958 N.E.2d 616, ¶ 29 (2d Dist.), quoting Baldwin's Ohio Civil Practice, § 59:6.

"Even an erroneous jury instruction may not be sufficiently prejudicial to justify a reversal." (Citations omitted.) *Hayward v. Summa Health Sys*., 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶ 25. "To conclude that a party's substantial rights were materially affected, an appellate court

must find that the jury charge was so misleading and prejudicial as to result in an erroneous verdict. *Id*. "The jury instruction given in error must be 'so prejudicial * * * that a new trial is warranted.' " *Id*. at ¶ 26.

In *Hayward*, the Ohio Supreme Court reviewed the issue of whether the Ninth District Court of Appeals, after finding that the remote-cause jury instruction was not appropriate, properly applied Civ.R. 61 and R.C. 2309.59, and related case law, in determining that plaintiff's rights were materially affected by the instruction. *Id*. at ¶ 23. In its decision, the Court instructed:

> R.C. 2309.59 directs a court of appeals as follows:
>
> > In every stage of an action, the court shall disregard any error or defect in the pleadings or proceedings which *does not affect the substantial rights of the adverse party. No final judgment or decree shall be reversed or affected by reason of such error or defect*. * * * If the reviewing court determines and certifies that, in its opinion, *substantial justice has not been done* to the party complaining as shown by the record, such court shall reverse the final judgment or decree and render, or remand the case to the lower court with instructions to render, the final judgment or decree that should have been rendered.
> >
> > (Emphasis added.) That provision is consistent with Civ.R. 61: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."
> >
> > In ascertaining whether prejudicial error exists, the court is "bound by the disclosures of the record." *Makranczy v. Gelfand,* 109 Ohio St. 325, 329, 2 Ohio Law Abs. 150, 2 Ohio Law Abs. 183, 142 N.E. 688 (1924). To find that substantial justice has not been done, a court must find (1) errors and (2) that without those errors, the jury probably would not have arrived at the same verdict. *Hallworth v. Republic Steel Corp.,* 153 Ohio St. 349, 91 N.E.2d 690 (1950), paragraph three of the syllabus. Even an erroneous jury instruction "'may not be sufficiently prejudicial to justify a reversal.'" *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 186, 2000 Ohio 128, 729 N.E.2d 726 (2000), quoting *Smith v. Flesher*, 12 Ohio St.2d 107, 114, 233 N.E.2d 137 (1967). To conclude that a party's substantial rights were materially affected, an appellate court must find that the jury charge was so misleading and prejudicial as to result in an erroneous verdict. *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.*, 18 Ohio St.3d 268, 274, 18 Ohio B. 322, 480 N.E.2d 794 (1985). Making such a determination requires a "thorough review of the entire transcript of proceedings before the trial court." *Hampel* at 186.
> >
> > "A jury instruction must be considered in its entirety and, ordinarily, reversible error does not consist of misstatements or ambiguity in a part of the instruction." *Sech v. Rogers*, 6 Ohio St.3d 462, 464, 6 Ohio B. 515, 453 N.E.2d 705 (1983). "[W]e will not assume the presence of prejudice * * * but must find prejudice on the face of the record." *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 462, 1999 Ohio 309, 709

> N.E.2d 162 (1999). In addition, an appellate court must determine not only whether there was prejudice, but also "the degree of prejudice." *Id.* at 461. The jury instruction given in error must be "so prejudicial * * * that a new trial is warranted." *Id*.

Hayward v. Summa Health Sys., 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶¶ 23-26.

The Court determined that the Ninth District Court of Appeals erred in its decision because "the court speculated that the jury had been confused by the remote-cause instruction." *Id*. at ¶ 27. In its reasoning, the Court concluded that the trial judge misspoke while instructing the jurors and did not clarify that they should not answer Interrogatory Nos. 3 and 4 in the event that they answered Interrogatory Nos. 1 and 2 for the defense. *Id*. at ¶ 28. (Interrogatory Nos. 1 and 2 addressed the issue of negligence, while Interrogatory Nos. 3 and 4 addressed the issue of causation.) The Court further concluded that the jurors' answering Interrogatory Nos. 3 and 4 in favor of the defense, while unnecessary, was not inconsistent with answering "No" to interrogatory Nos. 1 and 2, because Verdict Forms A and B, which the jurors also signed, stated the jurors find for the defendants "on the issue of liability." *Id*. at ¶ 29. Moreover, the trial court had instructed the jurors that liability requires a finding on both negligence and proximate cause. *Id*. The Court stated that "[b]ecause the interrogatory answers were consistent with the general defense verdicts, the trial court was required to enter judgment for the defendants." *Id*. at ¶ 30. The Court instructed:

> Although it is established for purposes of this appeal that the remote-cause instruction was improper, the record does not indicate that the instruction resulted in the jurors' completing the causation interrogatories. We conclude, contrary to the court of appeals' ruling, that Hayward can show no prejudice from the instruction. The answers to the interrogatories were consistent with the general verdicts. Therefore, the court of appeals erred in speculating that the instruction materially affected Hayward's substantial rights. * * * A reviewing court cannot order a new trial upon a presumptive finding of prejudice where the record actually establishes the contrary.

Id. at ¶ 32.

In her *Motion*, Hild cites to multiple cases to support her argument that she is entitled to a new trial. *See Motion*. In their respective *Response* and *Memo Contra*, Samaritan Defendants and Anesthesiologist Defendants contend that the cases cited by Hild in her *Motion* are distinguishable from the instant matter, that the verdict is proper under the Ohio Constitution and the Ohio Civil Rules

of Procedure, and therefore, a new trial is unwarranted. *Response* at 7-8; *Memo Contra* at 3-5. Samaritan Defendants argue that the Ohio Supreme Court has emphasized that general verdicts give the trial judge the ability to understand the jury's intended outcome of the case and that knowledge helps guide the trial court in resolving disputes over issues with jury interrogatory responses. *Id*. at 6-7. Samaritan Defendants further argue that in the instant matter, the trial court correctly required the jury to enter a general verdict, which enabled the trial court to do what the court in *Schellhouse v. Norfolk & W.R. Co.*, 61 Ohio St.3d 520 (1991) and *O'Connell v. Chesapeake*, 58 Ohio St.3d 226, 569 N.E.2d 889 (1991) could not do: determine the outcome intended by the jury. *Id*. at 5-7.

"The purpose of using interrogatories is to test the jury's thinking in resolving an ultimate issue so as not to conflict with its verdict." (Citations omitted.) *Wright v. Suzuki Motor Corp.,* 4th Dist. Meigs No. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494, ¶ 133. "The goal is to have the jury return a general verdict and interrogatory answers that complement the general verdict." *Id.*

The Court agrees with the arguments raised by Samaritan Defendants and Anesthesiologist Defendants and finds this instance to be distinguishable from the cases cited by and relied upon by Hild. Nevertheless, based on the decisions in *Hayward, supra, O'Connell, supra, and Dillon v. OhioHealth Corp.,* 2015-Ohio-1389, 31 N.E.3d 1232 (10th Dist.), the Court agrees with Hild that the interrogatories were flawed in that they required only the jurors who found negligence to participate in the determination of proximate cause. However, the Court finds that this error is not so prejudicial to warrant a new trial because it cannot be said that without the error, the jury would not have arrived at the same verdict. Therefore, it does not affect the substantial rights of Hild.

Samaritan Defendants and Anesthesiologist Defendants argue that the trial court was able to determine the outcome intended by the jury based on the general verdicts executed by the jury and announced in open court. The Court agrees. The jury was able to reach a majority consensus on the interrogatories for negligence and proximate cause. Six of the eight jurors found that Defendant was negligent and those same six jurors determined that the negligence was not the proximate cause of

death. As a result, there is no inconsistency between the interrogatories and the general verdict. Hild's argument that had the two jurors who did not find Defendant negligent participated in the determination of proximate cause, the jury's conclusion regarding proximate cause may have been different is speculative at best. Such an argument is far too speculative to say the jury's verdict would have been different. As previously stated, there is no inconsistency between the interrogatories and the general verdict and the jury was able to reach a majority consensus on the interrogatories for negligence and proximate cause. Six of the eight jurors found that Defendant was negligent, and those same six jurors determined that the negligence was not the proximate cause of death. The Court cannot reasonably say with any certainty that those two jurors would have changed the decision of the other six jurors had they participated, and therefore, the jury would not have arrived at the same verdict. Consequently, the Court cannot conclude that the error resulted in an erroneous verdict.

Based on the foregoing, the error in the interrogatories is not sufficiently prejudicial to require a new trial. Therefore, as Hild has failed to demonstrate that a new trial is warranted under any of the provisions of Civ.R. 59(A), the Court hereby denies the *Plaintiff's Motion for a New Trial*.

CONCLUSION

For the foregoing reasons, the Court hereby denies Plaintiff's *Motion for a New Trial*. The Court additionally denies Hild's request for an oral hearing *upon Plaintiff's Motion for a New Trial*.

THIS IS A FINAL APPEALABLE ORDER. IN ACCORDANCE WITH APP.R. 4, ANY PARTY INTENDING TO APPEAL THIS DECISION SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

To the Clerk of Courts:
Pursuant to Civ.R. 58(B), please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

SO ORDERED:

JUDGE E. GERALD PARKER JR

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

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JANET HILD vs SAMARITAN HEALTH PARTNERS

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Decision

So Ordered,