IN THE SUPREME COURT OF OHIO

Janet Hild, Administrator of the Estate of Scott Boldman, Deceased,	Case No. 2023-1076
Plaintiff-Appellee,	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
v.	Court of Appeals case no. CA 029652
Samaritan Health Partners, et al.,	Trial Court case no. 2018 CV 05710
Defendants-Appellants.	

BRIEF OF APPELLANTS CONSOLIDATED ANESTHESIOLOGISTS, INC., VINCENT M. PHILLIPS, M.D., AND SANDRA WARD, CRNA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Constitutional Provisions

Rules

Other Citations

INTRODUCTION

Does the 'same juror' rule apply to negligence and proximate cause in medical malpractice actions? The answer to this question should be yes. Can a juror deliberate on proximate cause and find liability when that juror found the defendant not negligent? The answer to this question should be no. Liability requires both negligence and proximate cause. A full jury determines whether a defendant is negligent, but a juror who does not find negligence cannot find the defendant liable because negligence is a precondition to a finding of proximate cause and liability. Applying the 'same juror' rule to both negligence and proximate cause in civil actions, including medical malpractice actions, ensures consistent and proper verdicts 'upon the concurrence of three-fourths or more of their number,' as required by the Ohio Constitution and Ohio Civil Rule 48.

In this case, the trial court followed standard and pattern jury interrogatories as promulgated by the Ohio Jury Instructions Committee, which applies the same juror rule to negligence and proximate cause. As the OJI common states, "interrogatories are required in all medical negligence cases." 1 OJI CV § 417.19, comment. The Second District held that these interrogatories and instructions constitute prejudicial error as a matter of law. This Court should hold that the same juror rule applies to negligence and proximate cause and that the OJI jury instructions are correct.

Even if this Court determines that the Ohio Jury Instructions are incorrect, this Court should hold that such error was harmless and not prejudicial under the circumstances of this case. Alternatively, this Court should reverse the Second District Court of Appeals' Order on Remand, such that the next full jury should deliberate and determine all issues in this medical malpractice action.

STATEMENT OF FACTS

Appellee Janet Hild, Administrator of the Estate of Scott Boldman, sued Appellants Vincent M. Phillips, M.D., Sandra Ward, CRNA, and Consolidated Anesthesiologists, Inc. ("CAI"), as well as Samaritan Health Partners, Good Samaritan Hospital, and Premier Health Partners for medical malpractice and wrongful death. The case involved emergency surgical care and treatment of Scott Boldman ("Boldman") in the evening hours on December 24, 2017, at Good Samaritan Hospital ("GSH"). Hild's principal claim of liability was against the Nurse Anesthetist Sandra Ward, who provided anesthesia care during surgery and the immediate post-operative time period. Hild's claim against Dr. Phillips was for respondeat superior (the right to control Ward); the claims against CAI and GSH were likewise based on vicarious liability. Therefore, any alleged liability against Phillips, CAI, and GSH flowed through any finding of liability against Ward; i.e., if the jury found no liability against Ward, there could be no liability against Phillips, CAI, and/or GSH.

On December 24, 2017, Boldman underwent an emergency appendectomy at GSH. CRNA Ward and Dr. Phillips (the supervising anesthesiologist) provided the anesthesia services during the surgery. Boldman was 37 years old, 5'8" and weighed 350 lbs.; his medical history included diabetes, obstructive sleep apnea, smoking, hypertension, lymphedema, and peripheral venous hypertension. At the end of surgery, as Boldman was emerging from anesthesia, he experienced post-operative delirium and he self-extubated; his heart stopped because of overwhelming demand ischemia, a condition where the oxygen demands of the heart exceed blood supply. He suffered an anoxic brain injury and died several days later. Hild's claim of negligence revolved around the emergence period of time and Boldman's self-extubation.

The case proceeded to a jury trial on January 24, 2022, and concluded on February 2, 2022. Liability – both negligence and proximate cause – was hotly contested, and both sides called numerous expert witnesses over a week and a half trial. Hild had a full and fair jury trial, calling all witnesses and presenting all the evidence she desired.

During a lengthy jury charge conference, the trial court submitted and all counsel discussed proposed jury instructions and the language and wording of jury interrogatories. At no time during this conference did Hild's counsel raise any objection as to the wording of the interrogatories. The trial court submitted the pattern jury interrogatories in the Ohio Jury Instructions. Interrogatory A asked if CRNA Ward was negligent. Interrogatory A further provided that if the jury found CRNA Ward negligent, "only those jurors who answered yes to Interrogatory A are qualified to participate in answering Interrogatory B." Interrogatory B asked the jury "in what respect was Defendant Sandra Ward, CRNA negligent?". Interrogatory B instructed the jury to then move to Interrogatory C, but that only those jurors who answered yes to Interrogatory A were qualified to participate in answering Interrogatory C. Interrogatory C was the proximate cause interrogatory. **After** the jury instructions were read to the jury, Hild's counsel said the following at sidebar:

> 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 discussion 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 weird, but I'm pretty sure the same juror rule says that. So that someone who could – 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 – I don't think the rest of the interrogatory instructions, I looked at them quickly, they seemed okay, **but this one concerns me**.

Transcript, Vol. II, pp. 258-259.

In response, the Court stated: "Ok. 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 . . ." *Id.* at 259.

There was no confusion. The judge read the interrogatory responses and the verdict. While six of the eight jurors found that Ward breached the standard of care, the ***same six jurors*** found that Ward's breach did *not* proximately cause injury or death to Boldman. Hild's counsel expressly waived polling of the jury and also stated he had no wish to look at the interrogatory responses or verdict forms at that time. The jury's verdict was entirely consistent and proper. Therefore, pursuant to the jury's verdict, the trial court entered final judgment in favor of all defendants.

On February 28, 2022, plaintiff filed a motion for a new trial, which all defendants opposed. On November 7, 2022, the trial court denied Hild's motion for a new trial, and she appealed. On appeal, Hild argued the trial court erred in instructing the jury that only those jurors who found negligence were permitted to participate in the deliberation on proximate cause. In denying the motion for a new trial, the trial court found the instruction did not affect Hild's substantial rights because it could not be said that without the instruction the jury would not have arrived at the same verdict. Six of the eight jurors found Ward negligent, and those *same six* jurors determined that her negligence was *not* a proximate cause of injury or death. Three-fourths of the jury found no liability. The trial court correctly found there was no inconsistency between the interrogatories and the general verdict. The trial court held that Hild's presumption – that the two jurors who did not find negligence would have found proximate cause, convinced four of the other six jurors who did not find proximate cause to find proximate cause, and render a verdict in her favor when those two did not find Ward negligent – was far too speculative at best to somehow warrant a new trial. The trial court was absolutely correct in this regard; the more likely conclusion is that the jurors who did not find Ward breached her duty to Boldman would, by the force of logic and reason, have

found no causation – because finding causation would have meant she would be liable for damages when they did not think she was negligent.

The Second District Court of Appeals held that the trial court erred by giving the jury instructions and interrogatories that stated those jurors who did not find Ward negligent could not participate in the deliberations on proximate cause. The trial court properly and quite logically concluded that any *alleged* error here was harmless *because the same six jurors who found negligence found no proximate cause and the two jurors who found Ward was not negligent were highly unlikely to find causation where such a finding would impose liability*. However, the appellate court disagreed; it held this error was not harmless as 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." *Opinion*, ¶ 3, Appx., p. 5.

However, a full jury did determine the essential element of Hild's claim: *Ward's liability*. A juror cannot logically and consistently find proximate cause and then liability when that juror found Ward *not negligent*. The appellate court also did not address that had a different group of six found that Ward proximately caused Boldman's injury and death, she would have been held liable to Hild when only half of the jury found she was causally negligent (liable), and that this would result in an inconsistent verdict in violation of Ward's constitutional right to a verdict on the concurrence of not less than three-fourths of the jury. The appellate court then compounded its own error by remanding the case for a new trial on causation and damages only, depriving Ward's constitutional right to have a *full jury* determine all the essential elements of her claims, i.e., her liability, which begins with negligence.

ARGUMENT

I. PROPOSITION OF LAW: 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

This Court has not expressly ruled on application of the "same juror" rule as to negligence and proximate causation in a malpractice case. However, this Court's reasoning in *O'Connell v. Chesapeake & O. R. Co.*, 58 Ohio St.3d 226, 569 N.E.2d 889 (1991), where it adopted the same juror rule for apportionment of negligence in comparative negligence cases, demonstrates the rule should logically apply to "regular" cases of negligence as well, including medical malpractice cases such as the underlying action herein.

Negligence and proximate causation are not fully independent issues in a malpractice case, just as this Court held that apportionment is not independent in a comparative negligence case in *O'Connell*. The "same juror" rule requires that only those jurors who find a defendant negligent are permitted to deliberate on whether that negligence proximately caused plaintiff injury. The "any majority" rule states that all jurors may deliberate on all elements in a malpractice claim, and so long as any majority (actually defined as three-fourths) of them find negligence and any majority (again, three-fourths) of them find causation, the defendant is liable. Logic requires that the "same juror" rule should apply to cases where there is no assertion of comparative negligence just as it is applied to apportionment. This is because, in a malpractice case, the plaintiff must show that the defendant breached a duty to the plaintiff, and that *this breach* proximately caused plaintiff injury.

Medical malpractice cases "require a plaintiff to demonstrate by a preponderance of the evidence that the injury was a direct and proximate result of the physician's failure to use ordinary

skill, care or diligence." *Estate of Hall v. Akron Gen. Med. Ctr*., 125 Ohio St.3d 300, 2010-Ohio-1041, 927 N.E.2d 1112, ¶ 21, citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), ¶ 1 syllabus. Hild was required to prove *liability* on the part of Ward; that is, Hild was required to prove that Ward was negligent and that *her negligence* was a proximate cause of injury and/or death to Scott Boldman. While six of the eight jurors found Ward negligent, the same six jurors found that Ward's negligence was not a proximate cause of injury or death in this case. The jury's verdict, which constitutes a three-fourths majority, was read in open court and polling of the jury was waived. Pursuant to Ohio Civil Rule 48, which provides that in civil actions, "a jury shall render a verdict upon the concurrence of three-fourths or more of their number," the jury's verdict was complete and proper, and entirely consistent with the interrogatories. Accord Ohio Constitution, Article I , Section 5.

Failure to apply the same juror rule to negligence cases means that a plaintiff need only show negligence and an injury, negating the requirement that *the negligence* (as opposed to non-negligent conduct by the defendant or even conduct by someone else) is a proximate cause of injury by a jury of three-fourths majority. The result eliminates proximate cause as an element in any claim for liability in this state, in essence, rewriting decades of established tort law.

O'Connell held, "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." At syllabus. Therefore, *O'Connell* held that three-fourths of the jury must agree as to *liability* as to a party, and only those jurors who so find may participate in apportionment of that *liability* as to that party.

When providing the reasoning for its adoption of this rule, this Court held, "First and foremost, we believe the determination of causal negligence [*liability*] on the part of one party to

be a *precondition* to apportioning comparative fault [*liability*] to that party. *It is **illogical** to require, or even allow, a juror to initially find a defendant has <u>not</u> acted causally negligently, and then subsequently permit this juror to assign <u>some degree of fault</u> 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, *emphasis added*.

O'Connell went on to reason that as a practical matter, it would not seem realistic to assume that a juror who concludes a party is not culpable (liable) would be able to conscientiously apportion financial responsibility (liability) to that party. In adopting the same juror rule as opposed to the any majority rule, the Court cited a dissenting opinion from a case in another state adopting the any majority rule in which the judge disapproved of the *irreconcilable inconsistency* explicit in a juror addressing apportionment after having conscientiously concluded there is nothing to apportion, as this would inject "such an arbitrary or speculative element into the deliberative process which would only tend to render the ultimate apportionment [verdict] unreliable." *Id., citation omitted*. Finding liability on the part of one party is a precondition to apportioning liability to that party.

Liability requires *both* negligence (breach of the standard of care) *and* proximate cause. As such, a finding of negligence is a precondition to finding liability on the part of even one party. As a legal matter, a juror cannot find proximate cause without first finding negligence, just like a juror cannot apportion liability to a party when that juror did not find that party liable. So while the *O'Connell* court chose the same juror rule with respect to apportionment specifically, these same principles apply to any negligence case; particularly this case where the ***same six*** jurors found that

the negligence of Ward did not proximately cause injury or death. The same juror rule ensures consistent, proper and constitutional verdicts.

Hild would have us believe that if the two jurors who did not find Ward negligent participated in the deliberations on proximate cause, they would have found proximate cause and convinced four of the other six jurors who did not find proximate cause to change their vote, thus rendering a verdict for Hild – when those same two jurors did not believe Ward was negligent. That presumption is not only arbitrary and speculative, but as this Court stated in *O'Connell*, it is ***illogical, incomprehensible, not realistic, and irreconcilably inconsistent***. How can a juror who found Ward (or any defendant) not negligent assign fault to her? Simple: they cannot. This Court, in *O'Connell,* would not approve allowing a juror to assume negligence and proximate cause after the juror had failed to find negligence in the first instance. The same should apply herein: after a juror "conscientiously concluded" that there was no negligence, requiring him or her to assume negligence would inject "such an arbitrary or speculative element into the deliberative process which would only tend to render the ultimate [verdict] unreliable." *O'Connell, supra*.

Imagine a case where other providers had been sued and the jury found other defendants in addition to Ward negligent and it was then asked to apportion liability among the providers (as required by R.C. 2307.23(A)). A direct application of *O'Connell* would require a determination of causal negligence on the part of Ward as a precondition to apportioning fault to her – that is, a juror would have to find that her breach caused injury or death before saying she was, for example, 25% at fault. Now, imagine the actual case – that *only* Ward was found negligent. A juror should still be required to find her negligence caused Boldman *some* injury or death before saying Ward was 100% at fault. Anything else is simply nonsensical.

Had a juror found Ward *not* negligent but then found that her *negligence* proximately caused injury or death, that juror's vote would be invalid: "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." *O'Connell, supra,* at 233. In fact, in *O'Connell,* this Court found that permitting a juror who found a defendant not negligent to assume negligence so as to apportion liability to that defendant was tantamount *to plain error*. *Id*. at 229. Put simply, the same should be true where the amount of fault "apportioned" is 100%.

Thus, the language in the interrogatories – that only those jurors who found that a given defendant (Ward) was negligent were permitted to consider whether that negligence proximately caused Boldman injury and/or death – was not an error of law because it is the only rule that makes consistent and proper verdicts. This Court should hold the same juror rule applies to negligence and proximate cause in *all* medical malpractice cases.

In this case, there was no confusion as the same six jurors who signed the interrogatories signed the verdict forms. If the any majority rule continues to be applied to negligence and proximate cause in negligence cases (as will occur on remand absent this Court's action), what happens where six jurors sign the interrogatory on negligence and six jurors sign the interrogatory on proximate cause, but they are *not* the same six? Who signs the verdict form? This would invite confusion and inconsistent verdicts. Further, as discussed below, it invites a violation of the *defendant's* constitutional rights.

Discussing the same juror rule as applied to comparative negligence cases, the Second District stated, "if a juror who disagrees that a defendant was casually negligent also signs a verdict assessing fault to the defendant, the verdicts are inconsistent." *Opinion,* ¶ 4, Appx., pp. 5-6. Likewise, if a juror in a malpractice case disagrees the defendant was negligent (i.e., finds she did

not breach the standard of care) and signs a verdict form assessing liability to that defendant (because that juror found proximate causation), that verdict would also be inconsistent. The Second District does not explain away this inconsistency *because it cannot*; use of the any majority rule in a negligence case *requires* this logical inconsistency.

Such a verdict would also alter the definition of liability because those jurors did not find that the defendant's negligence proximately caused injury, only that the defendant's *actions* caused injury – even though they found those actions were not negligent. Would the law then hold a defendant liable if her *actions* caused injury even though less than three-fourths of the jury (fewer than six people) found she was liable (causally negligent in her treatment of the plaintiff)? The Second District has now answered *yes* to this question and, in fact, has held that any instruction to the contrary is itself prejudicial error as a matter of law.

In this case, the Second District held that trial courts must use the "any majority" rule because "parties have a constitutional right to have a full jury determine all essential elements of their claim." *Opinion*, ¶ 3, Appx., p. 5. The court quoted *O'Connell* 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." Appx., p. 22, at ¶ 44, quoting *O'Connell, supra*, at 232, quoting the Ohio Constitution at Article I, Section 5. Similarly, Civ. R. 48 provides that in civil actions, "a jury shall render a verdict upon the concurrence of three-fourths or more of their number." Use of the any majority rule means that particular constitutional protection is only provided to plaintiffs, not to defendants.

The problem is that if you have six jurors find breach and a *different* group of six find causation, then there are fewer than three-fourths who find *liability* ("causal negligence"). That violates a defendant's right to only be held liable on the concurrence of at least three-fourths of

the jury. A defendant, such as Ward, could be held liable where only four jurors found both that she breached the standard of care and that her breach proximately caused injury or death. Surely the Ohio Constitution should not be interpreted so that its protections apply to only one party in the litigation.

The syllabus of *O'Connell* states, "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." Why should three-fourths of the jury need to ***agree on both*** negligence and proximate cause for a defendant to be liable in comparative negligence cases but not for liability against a defendant in a non-comparative case? Adoption of the same juror rule would require agreement of three-fourths of the jury on both elements of liability (negligence and proximate cause) In order to hold a defendant liable; it would require "the concurrence of at least three-fourths of the jury" for a verdict for all parties.

O'Connell held that its holding did not extend to the issues of liability and damages – that was not at issue there and that is not at issue here. However, it is logically *possible* for a juror who found no liability to figure out "how much" the plaintiff was damaged in terms of a monetary value, even though he/she disagrees the defendant should be liable. It is *logically impossible*, however, for a juror who found no negligence to determine that negligence proximately caused injury. The fact courts routinely permit jurors who did not find liability to deliberate on damages does not require use of the any majority rule when determining negligence and proximate cause.

B. The cases cited by the appellate court do not address this logical inconsistency

The cases cited by the appellate court below do not address this logical inconsistency required by the application of the any majority rule. There was no discussion about which jurors

signed the verdict when different groups of six sign the negligence and causation interrogatories, resulting in inconsistent, improper or unconstitutional verdicts.

Estate of Lawson v. Mercy Hosp. Fairfield, Butler no. CA2010-12-340, 2011-Ohio-4471 (12th Dist.), applied the any majority rule and held that, "A finding that a party breached its standard of care, but that this breach was not the cause of the injury, is not inconsistent." At ¶ 17. That is not inconsistent as the plaintiff must show both negligence and proximate cause to hold the defendant liable. The issue on appeal in *Lawson* was whether the jury's interrogatories, answers, and verdict were consistent; the inconsistency of having less than three-quarters of the jury find the defendant liable was not present. Here, there is no claim the jury's verdict was inconsistent – it plainly was consistent as the same six jurors who found negligence did not find proximate cause.

In *Wildenthaler v. Galion Cmty. Hosp*., 2019-Ohio-4951, 137 N.E.3d 161 (10th Dist.), the appellate court held a new trial should have been granted when the jurors executed a general verdict without completing interrogatories consistent with it. The Second District cites *Wildenthaler* for its holding that OJI CV 403.01 is erroneous because it prevents the full jury from considering negligence and proximate causation independently. *Opinion*, ¶ 78, Appx., pp. 36-37, citing *Wildenthaler* at ¶ 29.[1] The trial court in *Wildenthaler* held, "Just because the jury could not reach a consensus on whether or not the doctors were negligent does not mean that the jurors could not reach a decision on whether or not Kay's death was a result of the treatment the doctors provided." *Wildenthaler*, ¶ 22. While rejecting the trial court's conclusion that there was no prejudice to the plaintiff, the appellate court did not address the potential complication on remand: if the jury found

[1] Currently, OJI CV 403.01 includes the same juror rule in interrogatories for comparative negligence cases and OJI CV 417.19 includes the same juror rule in interrogatories for medical malpractice cases. Both state that only those jurors who found a defendant negligent/breached the duty of care may participate in determining causation.

her death was a result of the treatment but did not find negligence (that is, they found the treatment was not negligent), could/would the doctors still be held liable for wrongful death? The inconsistency is when a court, such as the Second District here, answers this affirmatively; the defendant is then liable when *only half* of the jurors, not the required three-quarters, find her negligent.

The Second District correctly found that *Gable v. Vill. Of Gates Mills*, 151 Ohio App.3d 480, 2003-Ohio-399, 784 N.E.2d 739, *reversed on other grounds* at 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, did not apply as it dealt with different jurors signing interrogatories based on two different causes of action.

However, the Second District incorrectly held that *Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc*., 182 Ohio App.3d 768, 2009-Ohio-2460, 915 N.E.2d 361 (9th Dist.), did not impact the analysis of the case at bar simply because it was a comparative negligence case. *Segedy* supports the Appellants' argument in two ways. First, one of the jurors who signed the general verdict did not find that the defendant was negligent and did not find causation; the court held, "A juror could logically find the defendant was not liable, but agree that the plaintiff's damages total a certain amount. It is, however, illogical for a juror to find the defendant was not liable, yet sign a general verdict finding against him and awarding damages to the plaintiff. That is what happened in this case." *Id*., ¶ 33. It held that juror's interrogatory responses were inconsistent and irreconcilable with the general verdict and thus rendered the verdict invalid, because without her vote, there were only five remaining signatures (jurors) on the verdict. *Id*., ¶ 34. That is the problem when not applying the same juror rule: there cannot be a valid verdict if six jurors find negligence but a different six find proximate cause; whichever set of jurors sign the

general verdict is inconsistent as there are not six (three-fourths majority) who found causal negligence (liability).

Second, in *Segedy*, all eight jurors signed an interrogatory apportioning negligence between the plaintiff and defendant, and two of those jurors did not find negligence or causation. The appellate court rejected the defense argument that this was plain error as in *O'Connell* because "even after excluding the votes of the two jurors who did not sign the liability interrogatories, the interrogatory apportioning seventy-eight percent of the liability to Dr. Netzley remains based on the agreement of three-fourths of the jury. Therefore, the two invalid votes on interrogatory ten did not create any inconsistency between the interrogatories and the verdict." At ¶ 35. There were still six valid signatures on the verdict. This supports the argument that if the trial court in the instant case erred, it was harmless error, because there were six valid signatures on the verdict for Ward – all of those who signed the general verdict found *both* negligence and no causation. *Segedy* recognizes that even an invalid interrogatory answer by a juror does not invalidate the verdict if there are still at least six jurors who agreed with the verdict and answered consistently. That is what occurred in this case. Accord *Ball v. Stark*, 10th Dist. Franklin No. 11AP-177, 2013-Ohio-106, ¶ 21.

The Second District here also cited *Segedy* to say that the question of damages can be answered independently of liability. This is an entirely different analysis. Once the required three quarters of the jury finds a defendant liable, all jurors can determine the amount of damages – it is not logically impossible for a juror who found no liability to figure out "how much" the plaintiff was damaged, even though he/she disagrees the defendant breached the standard of care and/or caused the injury. It is logically impossible, however, for a juror who found no negligence to then

determine that negligence proximately caused injury or death (and convince others to do the same to come to a plaintiff's verdict).

Finally, the appellate court cited *Russo v. Gissinger*, Summit no. 29881, 2023-Ohio-200 (9th Dist.), which also did not discuss the potential inconsistency although it apparently saw the problem: "one juror who had not agreed that Ms. Gissinger was both negligent and proximately caused injury signed the verdict form in favor of Mr. Russo. As in *Segedy*, that juror's interrogatory responses were inconsistent with the verdict form." Id., ¶ 12. However, defense counsel did not object and the court found *the error was waived* and that it was not plain error.

These cases do not address the logical inconsistency required by the application of the any majority rule, thus they do not mandate its adoption by this Court.

C. The Ohio Jury Instructions on jury interrogatories in medical malpractice cases is correct

The Ohio Judicial Conference is a "statutory entity, separate from the Supreme Court of Ohio, with the judicial branch of government that was created to serve the Ohio General Assembly by providing insight into proposed legislation that could impact Ohio courts." The Ohio Jury Instructions Committee of the Ohio Judicial Conference drafts jury instructions and jury interrogatories (OJI).

The OJI Committee has endorsed and followed the same juror rule as set forth in *O'Connell* on the issues of negligence and proximate cause in medical malpractice actions. The trial court in this case used the jury interrogatory found at 1 OJI CV § 417.19:

> If the answer of (six) (three-fourths) or more of the jurors to [whether the defendant was negligent] is "yes," move to interrogatory (B) [regarding proximate cause] and only those jurors answering "yes" may participate in answering interrogatory (B) [regarding proximate cause].

The OJI comment notes that these jury "interrogatories are required in all medical negligence cases." *Id.*, comment. The Second District held, in essence, the pattern instructions in OJI which are routinely used by judges throughout this state *constitute prejudicial error as a matter of law*. This Court should reverse that decision and hold that the pattern OJI instructions on jury interrogatories are correct as a matter of law.

D. Waiver

In this case, Hild's counsel failed to timely object to the interrogatory on the same juror rule, and it was not plain error to give pattern jury instructions and interrogatories as promulgated by OJI. "Errors that arise during the course of the proceedings and are not brought to the attention of the trial court by objection, or otherwise, at the time they could be remedied, are forfeited" for purposes of appeal. *Russo v. Gissinger*, 9th Dist. Summit No. 29881, 2023-Ohio-200, ¶ 20, citing *Lefort v. Century 21-Maitland Realty Co*., 32 Ohio St.3d 121, 123, 512 N.E.2d 640 (1987). On appeal, where a party failed to properly object, the reviewing court only applies a plain error review. *See Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). Courts of appeals must "proceed with the utmost caution," applying the doctrine of plain error only where there are "exceptional circumstances." *Id*.

As the trial court noted:

> [T]he 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.***

Trial Court's Decision, at 3, fn. 1 (emphasis added). The Court noted that it occurred "in the middle of the Court reading the instructions to the jury," and Hild's counsel 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*.

After the trial court read all the jury instructions and Interrogatory A (negligence), Hild's counsel requested a side bar with the Court and said:

> 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 discussion 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 weird**, but I'm pretty sure the same juror rule says that. So that someone who could – 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 –

Tr., Vol. II, 243, 258-259 (emphasis added).

"I'm pretty sure that's incorrect" and "I don't know that it's a big deal" are not objections. In fact, counsel never even said the word "objection." It is well-settled that the failure to timely object to a proposed jury instruction results in a waiver of the issue for the purposes of appeal. Civ. R. 51(A); *Father's House Int'l, Inc. v. Kurguz*, 2016-Ohio-5945 (10th Dist.). A party who makes only a "general" or "vague" objection to the instructions may not later claim error. (See staff notes to Civil Rule 51(A).) After all:

> [it is doubtful that] the public's confidence in the jury system is undermined by requiring parties to live with the results of errors that they invited, even if the errors go to "crucial matters." In fact, the idea that parties must bear the cost of their own mistakes at trial is a central presupposition of our adversarial system of justice.

The Second District erred by (1) not finding waiver of error on appeal; and (2) after determining the error was waived, not concluding that these were not such "exceptional circumstances" to review the error under the plain error doctrine.

E. If the trial court erred by instructing the jury on the 'same juror' rule, the error was harmless

If there was any error by the trial court in this case, it was harmless. "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." *Morgan v. Cole*, 22 Ohio App.2d 164, 166, 259 N.E.2d 514 (1st Dist. 1969), *citation omitted*. "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." *Evans v. Thobe*, 195 Ohio App.3d 1, 2011-Ohio-3501, 958 N.E.2d 616 (2d Dist.), at ¶ 29, *citation omitted*.

The concept of harmless error is still the law in Ohio and, in fact, is expressly codified in R.C. 2309.59, which states:

> 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. In the judgment of any reviewing court upon any appeal in any civil action, when it is sought to reverse any final judgment or decree or obtain a new trial upon the issues joined in the pleadings, the reviewing court shall certify on its journal whether, in its opinion, substantial justice has been done the party complaining, as shown by the record of the proceedings and final judgment or decree under review. If the reviewing court determines and certifies that, in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors or defects occurring at the trial shall be deemed not prejudicial to the party complaining and shall be disregarded and the final judgment or decree under review shall be affirmed . . .

In addition, Civ. R. 61, *Harmless error*, states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. 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.

Pursuant to this rule, "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." *Hayward v. Summa Health Sys.*, 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶ 25, *citation omitted*. Here, Hild cannot show that the jury probably would not have arrived at the same verdict had the two other jurors deliberated on proximate cause. The same six jurors who found negligence by Ward said that her negligence did not cause Boldman injury. Thus, regardless of what those two jurors found regarding whether Ward's actions/omissions caused Boldman injury, there would still be at least six jurors who found no causation, making a defense verdict proper.

Hild's argument that participation by those two jurors in the deliberation on causation would have changed the mind of (at least) four jurors, in addition to those two finding causation themselves, is wishful thinking. Having found no breach in the standard of care, common sense and the force of logic compel the conclusion that those two jurors would not have found causation – particularly knowing that this would then impose liability on Ward where they did not think she did anything wrong.

Additionally, after reading the interrogatory answers and verdict into the record, the trial court asked counsel for both parties if they sought to have the jury polled and if they wanted to look at the verdict forms. Appellant's counsel responded "no" to both questions. Tr., Vol. II, p. 268.

In *Russo v. Gissinger*, 2023-Ohio-200, *supra*, the trial court gave the jury the same juror instruction on negligence and proximate cause. The Ninth District held that the court properly sent the jury back for further deliberations when they did not follow the court's same juror rule instructions on negligence and proximate cause. When the jury returned with a different verdict

following the court's instructions on the same juror rule, the trial court overruled any objections to that first verdict. While the court held that objections were waived, *it was not plain error to have instructed the jury on the same juror rule on negligence and causation and send the jury back when they did not follow those instructions*.

If this Court finds the trial court erred in only permitting the jurors who found negligence to participate in the determination of causation, the Court should agree with the trial court that this error was *harmless*; the result would have been the same even if all eight jurors participated in the determination of causation, hence the error was not a valid basis for reversing a *consistent and proper jury verdict* with a three-fourths majority concurring.

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

Finally, the Second District held that on remand, the new trial was to start with the premise that Ward had already been found negligent, and that only causation and vicarious liability issues were to be retried. Its reason was that "the law is established that upon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." *Opinion*, ¶ 88, citing *State ex rel. Stevenson v. Murray*, 69 Ohio St.2d 112, 113, 431 N.E.2d 324 (1982), Appx., pp. 41-42. It next held, "The error in question here occurred when two jurors were not allowed to deliberate with the full jury on the issue of proximate cause." *Opinion*, ¶ 89, Appx., p. 41.

The appellate court's remand instruction that requires a new trial postulating Ward's negligence presupposes that had the two jurors who did not find breach been permitted to deliberate with the full jury, they would not have convinced four or more of the other jurors that Ward was indeed not negligent. *The court assumed that further deliberation of those two jurors would not have changed the initial finding (negligence) but only that it may have changed the*

second finding (no causation). **Using Hild's and the Second District's logic, had those two jurors continued deliberation, they may have convinced four or more of the others that Ward did not breach the standard of care.** This is at least as logical as the proposition that those two jurors might somehow find causation and thus, liability. Therefore, in order to have a full jury consider all issues, the entire case must be retried.

> Until the conclusions of the jury is submitted to and accepted by the court, it is nothing more than a tentative agreement among the jurors, subject to revocation or change at any time before such submission and acceptance. Indeed under the quoted statute when the jury is asked whether it is the verdict of three-fourths or more of their number, a denial by a signing juror would vitiate the tentative agreement, the court would not accept it, and there would be no verdict.

Dillon v. OhioHealth Corp., 2015-Ohio-1389, 31 N.E.3d 1232, ¶ 31 (10th Dist.), quoting *Ralston v. Stump*, 75 Ohio App. 375, 377, 62 N.E.2d 293 (5th Dist.1944) (discussing former statute that was worded similarly to current Civ. R. 48). *Ralston* continues, "Until such submission and acceptance, each juror is entitled to assert himself and has the privilege and the right to bring to his view, if possible, his fellow jurors." At 377. Here, the two jurors were entitled to assert themselves and had the right to attempt to convince the others that Ward did not breach the standard of care. Given the Second District's reasoning, there is no reason to believe that the two jurors would have found causation and convinced at least four others to agree, any more than there is reason to believe those two jurors would have convinced at least four others there was no breach.

Furthermore, *if* the parties have a constitutional right to have a "full jury to determine all essential elements of their claim," then the next jury must be able to *fully* participate on both negligence and proximate causation issues. Thus, if the case is to be remanded for a new trial, it must be a new trial on all issues, including whether Ward was negligent; otherwise, it would violate *her* constitutional right to full jury participation.

CONCLUSION

The Court should hold that the "same juror" rule applies to both negligence and proximate cause in medical malpractice actions so that all parties are protected by Article 1, Section 5 of the Ohio Constitution and Civ. R. 48, which both require a jury verdict to be based on the concurrence of not less than three-fourths of the jury and reverse the Second District Court of Appeals and reinstate the jury's proper, consistent verdict herein. Alternatively, any remand should be on all issues in the case, including negligence and proximate cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2024, I electronically filed the foregoing with the Clerk of the Court using the ECF/eFiling system, which will send notification of such filing to all counsel of record, and further certify that a separate copy was served by email to all counsel of record:

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APPENDIX

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

JANET HILD Appellant	:	C.A. No. 29652
v.	:	Trial Court Case No. 2018 CV 05710
SAMARITAN HEALTH PARTNER, et al. Appellees	:	**FINAL ENTRY**

. . . . . .

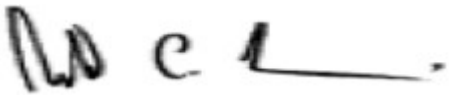
Pursuant to the opinion of this court rendered on July 14, 2023, the judgment of the trial court is affirmed as to the denial of a new trial on the issue of negligence. However, the judgment is reversed in several other respects, and the matter is remanded for further proceedings consistent with the opinion.

Costs to be paid by Appellees.

Pursuant to Ohio App.R. 30(A), the clerk of the Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the service. Additionally, the clerk of the Court of Appeals shall send a mandate to the trial court for execution of this judgment and make a note in the docket of the service. Pursuant to App.R. 27, a certified copy of this judgment constitutes the mandate.

JEFFREY M. WELBAUM, PRESIDING JUDGE

CHRISTOPHER B. EPLEY, JUDGE



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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

. . . . . .

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

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

JANET HILD, Admin. of the Estate of SCOTT BOLDMAN, deceased,	:	**CASE NO. 2018 CV 05710**
	:	**(Judge E. Gerald Parker)**
Plaintiff,	:	
v.	:	
SAMARITAN HEALTH PARTNERS, et al.	:	**FINAL JUDGMENT ENTRY**
Defendants.	:	

This cause came to be heard before a duly empaneled jury on January 24, 2022. On February 9, 2022 six members of the jury returned verdicts in favor of the Defendants, Good Samaritan Hospital, Samaritan Health Partners, Premier Health Partners, Vincent M. Phillips, M.D., Sandra Ward, CRNA and Consolidated Anesthesiologists, Inc. and against the Plaintiffs.

It is hereby Ordered that Final Judgment be and hereby is entered in favor of the Defendants Good Samaritan Hospital, Samaritan Health Partners, Premier Health Partners, Vincent M. Phillips, M.D., Sandra Ward, CRNA and Consolidated Anesthesiologists, Inc. and against the Plaintiffs.

Costs to the Plaintiffs.

IT IS SO ORDERED.

Judge E. Gerald Parker

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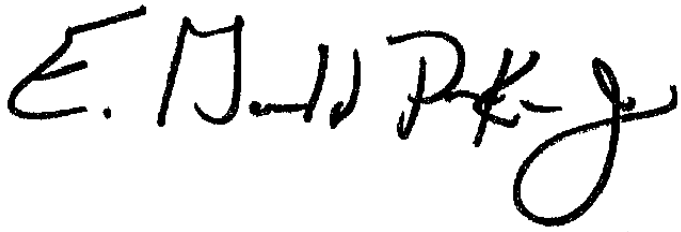
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Number:
2018 CV 05710

Case Title:
JANET HILD vs SAMARITAN HEALTH PARTNERS

Type:
Final Judgment Entry

So Ordered,



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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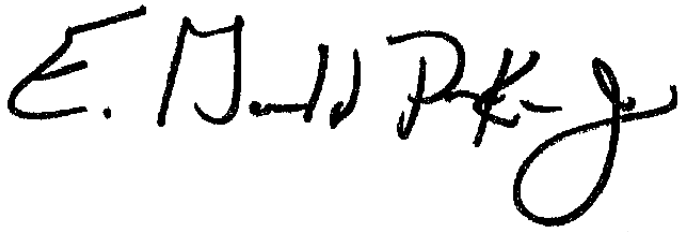
General Divison
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Number:
2018 CV 05710

Case Title:
JANET HILD vs SAMARITAN HEALTH PARTNERS

Type:
Decision

So Ordered,



Article I, Section 5 | Trial by jury

Ohio Constitution / Article I Bill of Rights

Effective: *1912*

The 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.

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1 OJI CV 417.19

CV 417.19 Interrogatories (claims arising on and after 4/11/03) *[Rev. 2/27/21]*

COMMENT

R.C. 2323.43 provides for limits on compensatory damages representing noneconomic loss in medical, dental, optometric, or chiropractic claims and specifies that the trial judge, not the jury, applies the limits to the fact finder's determination of total compensatory damages for noneconomic loss [R.C. 2323.43(A)(2) and (3)]; and states that the jury shall not be informed of the limit [R.C. 2323.43(D)(2)]. R.C. 2323.43(G)(1), (2) and (3) excludes such claims in specified cases.

The following interrogatories are required in all medical negligence cases. For interrogatories involving contributory negligence/fault, see OJI-CV Chapter 403, Comparative Negligence.

1. INTRODUCTION TO INTERROGATORIES. OJI-CV 321.01.

2. INTERROGATORIES.

(A) NEGLIGENCE. WAS THE DEFENDANT NEGLIGENT?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more of the jurors to (A) is "yes," move to Interrogatory (B) and only those jurors answering "yes" may participate in answering Interrogatory (B).

If the answer of (six) (three-fourths) or more of the jurors to (A) is "no," do not answer the remaining interrogatories, complete and sign the general verdict for the defendant, and report to the court that you have completed your deliberations.

If (six) (three-fourths) of the jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS THE DEFENDANT'S NEGLIGENCE A PROXIMATE CAUSE OF ANY (INJURY) (DAMAGE) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____

_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more of the jurors to (B) is "yes," move to Interrogatory (C) and all jurors may participate in answering the remaining interrogatories.

If the answer of (six) (three-fourths) or more of the jurors to (B) is "no," do not answer the remaining interrogatories, complete and sign the general verdict for the defendant, and report to the court that you have completed your deliberations.

If (six) (three-fourths) of the jurors cannot agree on an answer to Interrogatory (B), report this to the court.

(C) DID THE PLAINTIFF'S INJURIES INCLUDE EITHER OF THE FOLLOWING:

(1) PERMANENT AND SUBSTANTIAL PHYSICAL DEFORMITY, LOSS OF USE OF A LIMB, OR LOSS OF A BODILY ORGAN SYSTEM?

(2) PERMANENT PHYSICAL FUNCTIONAL INJURY THAT PERMANENTLY PREVENTS THE INJURED PERSON FROM BEING ABLE TO INDEPENDENTLY CARE FOR SELF AND PERFORM LIFE SUSTAINING ACTIVITIES?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If (six) (three-fourths) of jurors cannot agree on the answer to Interrogatory (C)(1) or (2), do not answer Interrogatory (C) and move to Interrogatory (D).

COMMENT

Interrogatory C should be used only when the evidence supports one or both of the findings at this Interrogatory (C)(1) or (2). R.C. 2323.43(A)(3).

(D) DAMAGES: ECONOMIC LOSS. WHAT PORTION OF THE COMPENSATORY DAMAGES, IF ANY, REPRESENTS PAST AND FUTURE ECONOMIC LOSS TO THE PLAINTIFF?

(1) ECONOMIC LOSS. "Economic loss" means any of the following:

(a) all wages, salaries or other compensation lost as a result of the plaintiff's claim; or

(b) all expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations as a result of the plaintiff's claim; or

(c) any other expenditures incurred as a result of the plaintiff's claim.

(i) PAST DAMAGES. "Past damages" means any damages that have accrued as a result of the plaintiff's claim up to the time that you reach your verdict.

(ii) FUTURE DAMAGES. "Future damages" means any damages that are reasonably certain to occur as a result of the plaintiff's claim after you reach your verdict.

PAST ECONOMIC DAMAGES	(A) $_____
FUTURE ECONOMIC DAMAGES	(B) $_____
TOTAL ECONOMIC DAMAGES	(A+B) $_____

_____ _____

_____ _____

_____ _____

_____ _____

If (six) (three-fourths) or more of the jurors cannot agree on the answer to Interrogatory (D), report this to the court.

Move to Interrogatory (E) and all jurors may participate.

(E) DAMAGES: NONECONOMIC LOSS. WHAT PORTION OF THE COMPENSATORY DAMAGES, IF ANY, REPRESENTS PAST AND FUTURE NONECONOMIC LOSS TO THE PLAINTIFF?

(1) NONECONOMIC LOSS. "Noneconomic loss" means pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training or education, disfigurement, mental anguish, and any other intangible loss experienced as a result of the plaintiff's claim.

(a) PAST DAMAGES. "Past damages" means any damages that have accrued as a result of the plaintiff's claim up to the time that you reach your verdict.

(b) FUTURE DAMAGES. "Future damages" means any damages that are reasonably certain to occur as a result of the plaintiff's claim after you reach your verdict.

PAST NONECONOMIC DAMAGES	(A) $_____
FUTURE NONECONOMIC DAMAGES	(B) $_____

TOTAL NONECONOMIC DAMAGES (A+B) $_____

_____ _____

_____ _____

_____ _____

_____ _____

If (six) (three-fourths) or more of the jurors cannot agree on the answer to Interrogatory (E), report this to the court.

Move to Interrogatory (F).

(F) DAMAGES: TOTAL COMPENSATORY DAMAGES. STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF.

$_____*

*To determine this amount, add the total amount of damages for economic loss from Interrogatory (D) to the total amount of damages for noneconomic loss from Interrogatory (E), then enter the total amount on the Verdict for Plaintiff.

_____ _____

_____ _____

_____ _____

_____ _____

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