**IN THE SUPREME COURT OF OHIO**

Janet Hild, Administrator of the
Estate of Scott Boldman, Deceased,

Plaintiff-Appellee,

v.

Samaritan Health Partners, et al.,
Defendants-Appellants.

**Case No. 2023-1076**

On Appeal from the Montgomery County
Court of Appeals, Second Appellate District

Court of Appeals case no. CA 029652

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

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## INTRODUCTION

This medical malpractice action for wrongful death proceeded to trial on January 24, 2022 and concluded on February 2, 2022. A duly empaneled jury returned a verdict in favor of Appellants; while six of the eight jurors (three-fourths majority) found CRNA Ward negligent, the same six jurors (three-fourths majority) found that her negligence did not cause injury or death. The verdict was proper, consistent, fair, and constitutional – with a three-fourths majority concurring. The trial court gave standard, routine pattern instructions as to the jury interrogatories from the Ohio Jury Instructions; pattern instructions that are routinely given, and continue to be given, by trial courts throughout this state. Those instructions apply the 'same juror rule' to both negligence and proximate cause, consistent with this Court's decision in *O'Connell v. Chesapeake & O. R. Co.*, 58 Ohio St.3d 226 (1991).

While *O'Connell* involved a case with comparative fault and apportionment, the same principles apply to the issues of negligence and proximate cause in cases without comparative fault/apportionment. As Appellants' proposition of law states: logic requires that the 'same juror' rule applies to negligence and proximate cause in medical malpractice actions. It is Appellants' position that logic, consistency, and the Ohio Constitution requiring a jury verdict of a three-fourths majority in a civil case require it. So, the debate is whether the 'same juror' rule or the 'any majority' rule applies to negligence and proximate cause in tort cases.

Appellee does not address the logical inconsistency inherent in the 'any majority' rule: if a juror finds a defendant was not negligent, it is illogical to find that the defendant's negligence proximately caused plaintiff's injury – because the defendant was *not negligent* according to that juror. Instead of deliberative debate, Appellee's counsel resorts to attacks on Appellants' counsel and positions, falsely stating that "Appellants simply want to obliterate the way torts have been

tried for decades, discard constitutional rights, exhorting the Court to unconstitutionality, astonishing, absurd, baseless recitations, misleading, no case law to justify any position, and Appellants are desperate and belie common sense . . .” Appellee even suggests that ‘academically,’ Appellants really agree with Appellee’s position in this case but only disagree out of greed in order to win “a single case.” Unfortunately, such rhetoric is so typical in the ‘age of rage’ where professionalism, decorum, decency, and rational debate have no place in discourse – only anger and rage.

## REPLY IN SUPPORT OF PROPOSITIONS OF LAW

Appellants do not ask this Court to reverse its decision in *O’Connell v. Chesapeake & O. R. Co*., 58 Ohio St.3d 226, 569 N.E.2d 889 (1991), but to simply clarify and expand it to specifically include the determination of negligence and proximate causation. Appellee’s Brief, p. 6.

Appellants do not, and have never, argued that the any majority rule “eliminates proximate cause as an element.” Appellee’s Brief, p. 6. Under the any majority rule, there is still a determination as to proximate causation but the problem is it will result in inconsistent verdicts, and verdicts on *liability* with less than three-fourths of a majority concurring as required by the Ohio Constitution. Appellee does not address the potential questions raised by the use of the any majority rule vis-à-vis the consistency of verdicts: 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 result in inconsistent verdicts. Appellee does not answer those questions and does not address the fact that the appellate court did not answer those questions.

The first issue in any medical malpractice action is the *liability* of the medical provider. Liability includes both negligence (or breach in the standard of care) and proximate causation. It is true negligence and proximate cause require independent and separate inquiries but they are also *interdependent* because you can't have one (proximate causation) without the other (first finding the provider negligent) to establish liability. They are integrally related in the determination of ultimate liability. See *O'Connell*, *supra* at 233. So, it is not just a choice of whether negligence and proximate cause are separate and independent inquiries *or* integrally related – they are both. Appellee claims a constitutional right to have a full jury deliberate on all the essential claims but under the same juror rule, Appellee did have a full jury deliberate on liability, i.e., a full jury first deciding the issue of negligence. But the next step is that the same juror rule logically requires that only those jurors finding negligence can deliberate on proximate cause. As previously stated, the same juror rule ensures consistent and constitutional verdicts.

This is not a choice of which constitutional right to protect. The same juror rule protects a party's constitutional right to a full jury on the deliberations of liability (first negligence then causation for those who found negligence) and the constitutional right to a three-fourths majority of the jury concurring in the verdict(s). Interestingly, Appellee only discusses "full jury deliberation on all elements" but says nothing about the Constitution requiring a three-fourths majority. Use of the same juror rule does not nullify the constitutional rights of all parties as Appellee asserts but rather extends the same constitutional protection to defendants as is provided to plaintiffs. Appellee does not explain why it is not a violation of the defendant's constitutional right to a full jury if she is found causally negligent by only half of the jury, yet liability is imposed on her.

In *O'Connell*, this Court held that 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. *O'Connell*, *supra*, at syllabus. The Court disapproved of the any majority rule given the irreconcilable inconsistencies explicit in a jury addressing apportionment after having conscientiously concluded there is nothing to apportion. In fact, the *O'Connell* court gave an example of two jurors who did not find causal negligence participating in apportionment could result in a defendant being required to pay a substantial proportion of the damages when less than three-fourths of the jury concurred and/or a case in which two jurors who did not find the plaintiff negligent found the plaintiff 51% at fault, stripping the plaintiff of any recovery. "Such inconsistent results should not be tolerated in the name of expediency, for to do so would affect the very foundations of civil justice." See *O'Connell*, *supra*, at footnote 4. So, while the *O'Connell* court did state that because the full jury undertakes the initial determination as to negligence and proximate cause, neither party is deprived of having all the jurors deliberate the material issue of negligence and proximate cause, the Court discussed negligence and proximate cause *together*. In fact, the Court went on to state the allegation of fault *flows from* the adjudication of negligence and proximate cause. Likewise, the adjudication of proximate cause flows from a finding of negligence. In short, the same principles apply. The any majority rule could result in less than a three-fourths majority concurring in a finding of fault against a defendant when the full jury determined liability, i.e., negligence being the first issue. Therefore, Appellants urge this Court to clarify and expand the *O'Connell* holding to the issue of negligence and proximate causation.

Appellee asserts that application of the same juror rule must also include damages but that is not the case. First, several Ohio courts have held that those jurors who did not find liability

(negligence and proximate cause) can still deliberate on damages. The distinction is that while one could argue the same juror rule could apply to the determination of liability and damages, logic does not require it. 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 (medical expenses, cost of future care, lost wages, etc.), even though he/she disagrees the defendant is liable. It is logically impossible, however, for a juror who found that the defendant did not breach the standard of care to find that the defendant's breach proximately caused the plaintiff's injury. Simply put, the same juror rule as to negligence and proximate cause does not take away a party's right to full jury deliberation on liability and ensures consistent proper verdicts with a three-fourths majority.

**Waiver**

First, Appellants did not misrepresent that Appellee's counsel approached the Court at sidebar during reading of the instructions on interrogatories and raised the issue *before* the jury was excused for deliberations. See Brief, pp. 17-18. At that side bar, counsel only stated "I'm pretty sure it's not correct." After the jury retired to deliberate, counsel had additional comments in which he again said "I'm pretty sure that's incorrect, . . . 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 . . . I don't know that it's a big deal.' The trial court itself stated that Hild did not timely present an objection, at least not in an ideal fashion, and counsel offered no citation to cause law or even a specific request to remedy the situation. Appellants' counsel stayed silent because the OJI instructions are correct. In any event, the trial court's entire statement is as follows:

> 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*.

Trial court's *Final and Appealable Decision, Order, and Entry Denying Plaintiff's Motion for a New Trial*, 11/7/22, at p. 3, FN 1, *emphasis added*.

Trial lawyers know that the failure to *timely* object to a proposed jury instruction results in waiver of the issue for the purposes of appeal. Civil Rule 51(A); *Father's House Int'l, Inc. v. Kurguz,* 2016-Ohio-5945 (10th Dist.). Trial lawyers also know that 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). Here, the issue was raised in a general, vague manner and at the 'eleventh hour.'

**Harmless Error**

The harmless error doctrine is still the law of this state. R.C. 2309.59 and Civil Rule 61. The Second District Court of Appeals held the error in this case was 'prohibiting a full jury from deliberating on proximate cause.' The appellate court then simply held the error was not harmless, because 'it prohibited a full jury from deliberating on proximate cause.' The Second District made no determination whether the error was harmless or prejudicial; it simply concluded because there was error, it was not harmless. However, there must be an analysis as to whether the error affected a substantial right or was inconsistent with substantial justice. R.C. 2309.59, Civ. R. 61, see also

*O'Brien*, 63 Ohio St. 2d at 164-165. As this Court stated in *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787:

> Generally in order to find that substantial justice has been done to [a party] so as to prevent reversal of a judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial effect of those errors but also determine that if those errors had not occurred, the jury or other trier of the facts would probably have made the same decision.' *Id*., quoting *Hallworth v . Republic Steel Corp.* (1950), 153 Ohio St. 349, ¶ 3 of the syllabus. We conclude that the trial court's admission of appellant's testimony did not prejudice appellee's substantial rights. See *Beard, supra* at ¶ 35.

Specifically, the trial court noted that the determination must be based upon the review of the entire record, which of course in this case would include the erroneous instruction at issue but also the jury's verdict:

> 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).

See Trial court's *Final and Appealable Decision, Order, and Entry Denying Plaintiff's Motion for a New Trial*, 11/7/22, at p. 7. In addition, an appellate court must determine not only whether there was prejudice but also the degree of prejudice; the jury instruction given in error must be "so prejudicial" that a new trial is warranted. See *Hayward v. Suma Health Sys.*, 139 Ohio St.3d 238, 2014-Ohio-1913 at ¶¶ 23-26.

In *Hayword*, this Court held that when a jury's answers to interrogatories make it clear that the jury found the defendant was not negligent and the jury's verdict was consistent with that

finding, a jury instruction (on remote cause) – even if improper – cannot be found to have misled the jury in a manner affecting a *substantial right*. *Hayward*, *supra*, at syllabus. The jury in *Hayward* had signed verdict forms finding for the defendants "on the issue of liability," having answered interrogatories on both negligence and proximate cause. The point, however, is that the jury in *Hayward made it clear* they had found for the defendant on *liability* and, as such, any error in an instruction did *not affect a substantial right*.

In this case, Appellee had a full jury determine the issue of liability beginning with whether or not CRNA Ward was negligent. A three-fourths majority found that Ward was negligent but the same six jurors, the same three-fourths majority, found that her negligence did not proximately cause injury or death. The verdict in favor of the Appellants was consistent and valid. The jury *made it clear* they had found in favor of Ward on liability, thus as in *Hayward*, the erroneous jury instruction cannot be found to have misled the jury in a manner materially affecting Appellee's *substantial right*. Appellee had a full jury determine the issue of negligence, the first issue in determining liability. Since the same six jurors found no proximate cause, the jury was not misled and *made it clear* there was no liability.

Substantial justice was also done because there was no harm and no prejudice to Appellee for two of the jurors not to have deliberated on proximate cause. If in fact Appellee had a right for the two jurors who did not find Ward negligent deliberate on proximate cause, what harm did it cause? The Second District engaged in no analysis on this question as to whether the error was harmless or prejudicial, i.e., did it affect the substantial rights of the adverse party? It did not because the same six who found negligence found no proximate cause. Appellee's claim it would be impossible for her to prove prejudicial error under the same juror rule. In this case, that is true because Appellee suffered no harm and no prejudice whatsoever. However, in other cases,

prejudicial error can be established depending upon the jury's verdicts and what occurs at trial. It is not that all errors are harmless or not harmless. It depends entirely on what the jury does. On the other hand, the Second District simply stated and concluded the error was prejudicial here. If that is the case, then all errors by definition affect the substantial right and, therefore, any error during the course of a trial would be prejudicial. Such would abrogate the harmless error doctrine and puts trial lawyers in a situation in which they are retrying every case.

**Remand**

If this case is remanded, it will return to the trial court for another trial on the premise that full jury participation on the issues of negligence and proximate cause is sacrosanct and anything to the contrary violates the Ohio Constitution, a right much more important than a three-fourths majority concurring in a verdict. The logic is that had the two jurors who did not find Ward negligent participated on proximate cause, they may have convinced four or more of the others there was proximate cause to result in a verdict in favor of Appellee when they did not find Ward negligent; but since deliberations are so fluid and dynamic, it is impossible to know or prove. Again, under this same logic, it is just as likely that the two jurors who did not find negligence may have convinced four of the other six that Ward was not negligent and answered the first interrogatory in favor of Ward. But the premise on remand is that full jury participation on all elements of the claim should be protected. Yet, the Second District ordered a remand on proximate cause only, such that the next jury will not be able to fully deliberate on Ward's negligence – stripping Ward's right to full participation on all essential elements of Appellee's claims.

The Second District ordered a remand from the point in the trial in which the error occurred. However, the error occurred here when the trial court *instructed* the jury – not after the

jury decided the issue of negligence and before it decided causation. Until the jury submits its verdict to the court, it is "subject to revocation or change at any time." *Dillon v. OhioHealth Corp.*, 2015-Ohio-1389, 31 N.E.3d 1232 (10th Dist.), ¶ 31, *citation omitted*. "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." *Ralston v. Stump*, 75 Ohio App. 375, 377, 62 N.E.2d 293 (5th Dist.1944). Here, six jurors found Ward was negligent and those same six jurors found that her negligence did not proximately cause Boldman's injury. Had the two jurors continued deliberation, it is just as likely that they would have convinced four or more of the others that Ward did not breach the standard of care as it was that they themselves would find causation (having not found breach) and convince at least two others to find causation (who did not find causation originally). Thus, in order to have a full jury consider all issues, the entire case should be retried.

## CONCLUSION

This Court should reverse the Second District Court of Appeals and reinstate the jurors' proper, consistent verdict herein, affirming the trial court's final judgment. This Court should also hold that a party must demonstrate prejudicial error before a court of appeals reverses a trial court's final judgment. Alternatively, any remand should be on all issues in the case, including if there was any breach of the standard of care.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on March 8, 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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