IN THE SUPREME COURT OF OHIO

JANET HILD,	:	Case No. 2023-1076
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District,
SAMARITAN HEALTH PARTNERS, *et al.*,	:	Case No. 029652
Defendants-Appellants.	:	

REPLY BRIEF OF APPELLANTS GOOD SAMARITAN HOSPITAL, SAMARITAN HEALTH PARTNERS, AND PREMIER HEALTH PARTNERS

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INTRODUCTION

Nothing in Ms. Hild's Appellee Brief changes the fact that jurors cannot deliberate on proximate causation without first finding that a defendant was negligent. The Appellants are not trying to rewrite tort law. Instead, the Appellants are trying to ensure that courts are properly applying tort law and not reaching inconsistent verdicts.

Negligence is not a complicated tort to understand or apply. Did the defendant breach a duty owed to the plaintiff that proximately caused the plaintiff harm? Ms. Hild would rather the tort focus on: (1) Was there a duty owed? (2) Did the defendant breach it? (3) Regardless of the individual juror's answers to 1 and 2, did that breach proximately cause harm to the plaintiff?

ARGUMENTS OF LAW

I. A juror must have found a breach of the standard of care in order to deliberate on causation.

There is no real argument in Ms. Hild's Brief that disputes Good Samaritan's Proposition of Law I: the same juror rule, as established in *O'Connell v. Chesapeake*, logically applies to the issues of negligence and proximate causation in cases of alleged medical negligence.

Contrary to the Appellee's assertions, there is a body of case law that recognizes that there is a logical inconsistency that results when the same juror rule is not followed. *See, e.g., Clark v. Strain*, 212 Ore. 357, 365, 319 P.2d 940 (1958); *Hendrix v. Docusort, Inc.*, 18 Kan.App.2d 806, 811, 860 P.2d 62 (1993) ("The argument for the same juror rule seems to be most compelling in cases where the jurors have adopted positions which are arguably inconsistent. ***This includes cases where a juror assigns fault to a person the juror does not believe was negligent*.")** (emphasis added); *Fritz v. Wright*, 589 Pa. 219, 229-230, 907 A.2d 1083 (2006) ("States adopting the same-juror rule express concern that to do otherwise would actually permit a party to prevail by persuading fewer than the requisite number of jurors of the entirety of the case.");

State ex rel. Boyer v. Perigo, 979 S.W.2d 953, 957 (Mo.App.1998) (same juror rule requires a plaintiff to convince same group to agree unanimously on his case).

Good Samaritan is not, as Ms. Hild argued, saying that proximate cause is not a necessary element of a tort claim. *Contra* Appellee Brief at 7. Good Samaritan ***is***, however, saying that in order to first determine whether an injury was proximately caused by the negligence of the defendant, jurors ***must first*** determine whether there was a breach of the standard of care. If jurors find no breach, then proximate causation is not an element on which they should deliberate. Both negligence and proximate cause are essential elements to the claim.

O'Connell recognized that it would defy logic to allow a juror who did not find that a defendant committed a negligent act to apportion fault to that same defendant. *O'Connell v. Chesapeake & O. R. Co.*, 58 Ohio St.3d 226, 235, 569 N.E.2d 889 (1991). Ms. Hild unconvincingly argues that here, jurors are not forced into a logical inconsistency. *See* Appellee Brief at 8. That is wrong. Proximate cause is not some independent inquiry. A jury interrogatory does not ask: "Did something proximately cause harm?" Instead, the inquiry focuses on whether ***the breach of the standard of care*** proximately caused the harm. Therefore, if an individual juror found no breach of the standard of care, then it makes sense and is perfectly logical to preclude that juror from deliberating on proximate causation.

Good Samaritan's proposition of law should be endorsed by this Court.

II. Ohio Jury Instructions may not be technically binding, but Ohio courts treat it as if it were.

Most Ohio courts follow Ohio Jury Instructions ("OJI") and do not permit deviations from the approved OJI proposed instructions. *See, e.g., State v. Wyatt*, 11th Dist. Lake No. 2023-L-039, 2023-Ohio-4369, ¶ 7 (observing that while OJI is non-binding, they are "persuasive authority that most Ohio courts follow" and that the trial court followed OJI); *State v. Varner*,

2020-Ohio-1329, 153 N.E.3d 514, ¶ 54 (11th Dist.) ("The Ohio Jury Instructions are authoritative and are generally to be followed and applied by Ohio's courts.").

Good Samaritan agrees with Ms. Hild that flaws should be "corrected through the appropriate process." Appellee Brief at 13. That is why Good Samaritan requested that this Court hold, once and for all, that the medical negligence OJI proposed instructions are correct as a matter of law.[1]

III. Ms. Hild's counsel did not make a timely objection, and thus the error should have been forfeited for purposes of appeal.

As a preliminary matter, Good Samaritan must point out that at no point is it attempting to mislead this Court. Ms. Hild's counsel argued that Good Samaritan failed to point out that a sidebar occurred. *See* Appellee Brief at 14. That is patently incorrect. Good Samaritan stated that "[a]t sidebar, Ms. Hild's counsel stated that 'I'm pretty sure this is wrong,'" referring to the upcoming instruction. *See* Appellant's Merit Brief at 3. Then, Good Samaritan went on to quote Ms. Hild's counsel's half-hearted "objection" (even though the word "objection" was never uttered). *Id*. at 3-4.

Then, after the jury had begun deliberating, her counsel stated, "I'm pretty sure that's incorrect," and "Always thought, found that [same juror rule] to be a little weird," and "I don't know that it's a big deal." *Id*. at 4, quoting Tr., Vol. 2, 258-259.

Ms. Hild's counsel had numerous opportunities to bring the concern to the Trial Court's attention in a timely manner. First, the parties conducted an exhaustive jury charge conference, during which the parties had the proposed interrogatories in hand and at no point did Ms. Hild's counsel have any concerns with the jury interrogatories. Second, counsel waited until almost

[1] If the OJI instructions are not correct (which they are), then Ohio practitioners and courts need to be aware that this Court thinks those OJI instructions are wrong, and then the drafters of the OJI can make changes accordingly. Otherwise, retrials will continue to happen across this State.

right before the Trial Court read the jury interrogatories to the jury before requesting the side bar. That would have been the opportunity to make whatever objection counsel wished to make. Instead, the more-developed "objection" came ***after*** the jury had been fully instructed. Incredibly, Ms. Hild's counsel stated that the Trial Court "opted not to research the issue further." Appellee Brief at 4. If Ms. Hild's counsel was concerned by this interrogatory, then it is Ms. Hild's counsel that should have had the citations of authority ready for the Trial Court when the issue was raised.

Given the way in which the issue was raised – at no point did counsel say "objection," – and because the so-called objection was equivocal ("A little weird," "I don't know that it's a big deal"), this Court should find that Ms. Hild's counsel's objections were forfeited.

IV. Ms. Hild failed to demonstrate prejudice; therefore, the Court of Appeals erred in reversing and remanding.

Ms. Hild seeks to have this Court rewrite the law on appeals and prejudice. This Court has already endorsed the approach of the United States Supreme Court that "[a litigant] is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Grundy v. Dhillon*, 120 Ohio St.3d 415, 2008-Ohio-6324, 900 N.E.2d 153, ¶ 30, quoting *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). There is also a "judicial preference for preserving the finality of trials." *Grundy*, ¶ 30.

If the Court were to follow Ms. Hild's approach, then a party would only have to state generally that their rights have been infringed and demand a remand. Of course, that would ill-serve the finality of trials.[2] If that were the standard, then the appellate districts' dockets would increase significantly.

[2] A major portion of Ms. Hild's Brief discussed a constitutional right to a full jury trial. The Ohio Constitution allows for a verdict of three-fourths of a jury in a civil trial. Ms. Hild received a full and consistent jury verdict as required by the Ohio Constitution.

Ms. Hild should have been required to demonstrate prejudice for reversal. She should have had to show that by not allowing the jurors to deliberate on proximate cause, she was somehow harmed. Such an argument would be without merit. If the mystery poll cited by Ms. Hild is correct – that 90% of the defense bar would prefer the "any majority rule" – then logically it would follow that permitting those jurors (who did not find a breach of the standard of care) to deliberate on proximate cause, it is far more likely those jurors would have convinced more jurors to come to their side and not find proximate cause. Allowing those jurors to deliberate could even result in jurors, who previously found negligence, changing their votes on the issue of negligence. Yet Ms. Hild thinks that because this did not occur, she should get a second bite at the apple.

The Court should reject Ms. Hild's argument and hold she had to demonstrate prejudice, and she did not do so.

V. If this Court disagrees with Appellants and affirms the Court of Appeals' decision, then at minimum, all issues must be before the jury on remand.

Ms. Hild argued that the cases that support the principle that the court has discretion to set the scope on remand predated the Rules of Civil Procedure and the Rules of Appellate Procedure. *See* Appellee Brief at 20. However, that is not true. *State ex rel. Smith v. O'Connor*, 71 Ohio St.3d 660, 663, 646 N.E.2d 1115 (1995) stands for the proposition that a court may set the scope on remand, and the Court expressly discusses App. R. 12 throughout its decision.

Ms. Hild argued that there is "no valid justification" to order retrial. Appellee Brief at 10. However, the prejudice to Good Samaritan and the Anesthesia Defendants would be insurmountable. Instead of the jury being able to hear all of the evidence regarding standard of care and breach, the jury would begin the trial with the understanding that there has already been negligence established. The only issues left for the jury to determine would be proximate cause

and damages. If that were the case, the Defendants would be prejudiced. Furthermore, if all jurors were permitted to deliberate on proximate cause, then the jurors who did not find negligence would still have the opportunity to convince jurors that there was no negligence in the first instance. Since no verdict is final until read in open court, this outcome is every bit as likely as the possibility of jurors reversing their conclusion on the issue of proximate causation. If there is going to be a retrial of any issue (and there should not be), then a fresh jury must determine each and every element essential for a verdict. If the trial begins with a previous jury finding of negligence, then the Defendants would have no chance of getting a fair trial.

If the Court decides against Good Samaritan and the Anesthesia Defendants (which it should not), then the Court should order a retrial on all issues—not just proximate cause and damages.

CONCLUSION

Good Samaritan respectfully requests the Court to (1) reverse the Second District Court of Appeals and affirm the Trial Court; (2) hold the same juror rule applies in cases of medical negligence; (3) hold that the OJI is correct as a matter of law; (4) hold that to follow the any majority rule would violate the Ohio Constitution; and (5) hold that an appellant must demonstrate prejudice before a court of appeals should reverse the trial court.

In the alternative, Good Samaritan submits if its arguments are not well-taken by this Court, on remand, the jury trial must encompass all issues. It is error and inherently prejudicial to Good Samaritan for the new trial to begin with CRNA Ward already found negligent.

This Court should reverse the Second District Court of Appeals and affirm the Trial Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2024, a true and correct copy of this Reply Brief was sent out via electronic mail to the following:

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