**[Cite as *Henry v. Cleveland Clinic Found.*, 2015-Ohio-1826.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 101652**

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## RISE ANN HENRY, EXECUTRIX OF THE ESTATE OF PAUL C. HENRY

PLAINTIFF-APPELLEE

vs.

## CLEVELAND CLINIC FOUNDATION, ET AL.

DEFENDANTS-APPELLANTS

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**JUDGMENT:**
AFFIRMED AND REMANDED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-788027

**BEFORE:** Laster Mays, J., E.A. Gallagher, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** May 14, 2015

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ANITA LASTER MAYS, J.:

**{¶1}** In this action for medical malpractice, defendant-appellant The Cleveland Clinic Foundation ("the Clinic") appeals from the trial court's decision to grant a new trial to plaintiff-appellee Rise Ann Henry ("Henry"), Executrix of the Estate of Paul C. Henry.

**{¶2}** The Clinic presents one assignment of error. The Clinic asserts that the trial court abused its discretion in granting Henry's Civ.R. 59(A) motion for a new trial. This assertion is based on the Clinic's argument that the jury's verdicts, i.e., that the Clinic was negligent in its care and treatment of Henry's decedent, but only with respect to Henry's claim for medical expenses rather than Henry's wrongful death claim, is consistent with the evidence presented at trial; therefore, the trial court wrongly determined that the jury rendered irreconcilable verdicts.

**{¶3}** Upon a review of the record, this court finds the trial court committed no abuse of its discretion. Consequently, the court's order is affirmed. This case is remanded to the trial court for further proceedings.

**{¶4}** Henry filed her complaint against the Clinic and four physicians on July 27, 2012. She alleged that the defendants had been negligent in their care and treatment of her decedent, and that their negligence had caused both the decedent's wrongful death and his "pain and suffering" from the time of his admittance as a patient until his wrongful death.

**{¶5}** After the doctors were dismissed as defendants in the case, the case eventually proceeded to a jury trial. During opening statement, Henry's counsel told the jury that its verdict would be determined by how it answered three questions.

> The first is did the care that Paul Henry received at the Cleveland Clinic, is that the care that a reasonably careful nurse or hospital would give a patient under these circumstances?
>
> The second question is if there was a failure for the hospital and nurses to be reasonably careful, is that what caused Paul Henry's anoxic brain injuries and death?
>
> Then if you answer yes to those two questions, the third question is what amount of money will it take to make up for the harms and losses caused from the anoxic brain injury and death?

**{¶6}** During opening argument, the Clinic's attorney summed up the issue for the jury as: "[T]he claim is we overmedicated him." Defense counsel advised the jury to notice in the records "how Mr. Henry was doing physically, not just looking at numbers of medications he got and the amounts and when, * * * and give a verdict for the Clinic, say the doctors and nurses aren't responsible, that they weren't negligent, that they weren't unreasonable in the care they gave to Mr. Henry * * * ."

**{¶7}** According to the evidence presented at trial, the decedent, who had suffered from back pain for a lengthy period of time, was admitted to the Clinic on August 18, 2011, for back surgery. His orthopedic physician conducted a laminectomy and fusion, which, although it required eleven hours, was largely uneventful.

**{¶8}** Following the surgery, at approximately 6:15 p.m., the decedent was taken to the Post-Anesthesia Care Unit ("PACU"), where two of the Clinic's resident physicians

unknowingly had both prescribed duplicative amounts of narcotics to the decedent for his severe post-operative pain. The PACU nurse followed both orders without questioning them.

**{¶9}** While the decedent remained in the PACU, he had "patient controlled analgesia," i.e., he administered his own medication up to the limit of the physicians' programs. The PACU nurse also administered, at her discretion, additional pain medication. The decedent's pain, however, continued to be extreme. His distress prompted the nurse to summon the PACU resident anesthesiologist, who indicated the decedent could have still another dose of pain medication. Throughout this period of time in the PACU, patients such as the decedent were constantly monitored, and the decedent's vital signs were unremarkable.

**{¶10}** After approximately three and one-half hours, at around 10:00 p.m., the decedent was transferred from the PACU to the regular nursing floor. He was provided with one of the pain pills he would be taking upon his release from the hospital. Upon his transfer to the regular floor, his nurse then gave him another pain medication and a sleeping aid. The decedent had no monitoring devices, but, occasionally, one of the floor nurses would check on him as part of her regular routine. The decedent's nurse gave him additional oxygen at midnight.

**{¶11}** At approximately 2:00 a.m. on August 19, 2011, a lab technician entered the decedent's room. The decedent was "cyanotic" and unresponsive. The technician told the nursing assistant, who summoned the nurse, who called emergency personnel. The

emergency personnel arrived at the decedent's bedside in nine minutes. Although they were able to re-establish the decedent's heart beat, he failed to recover. The decedent was pronounced dead on August 22, 2011. His orthopedic doctor eventually signed the decedent's death certificate, listing the cause of death as "anoxic brain injury due to respiratory arrest following surgery."

**{¶12}** At trial, Registered Nurse Dorothy Cooke testified as Henry's expert witness in nursing care, and opined that the nursing care the decedent received in both the PACU and on the regular floor fell below the medically accepted standard. Similarly, Louis Busco, M.D., an expert in anesthesia and critical care, testified that the decedent received an overdose of medication and was inadequately monitored based upon his known physical ailments; Brusco opined that the care the decedent received fell below a medically accepted standard. Brusco also testified that the negligent medical care proximately caused the decedent's respiratory arrest, anoxic brain injury, and death.

**{¶13}** The Clinic presented the testimony of Andrew Kofke, M.D. as an expert in anesthesia and critical care. Kofke testified that the medical care rendered to the decedent during his stay by the Clinic's staff met the relevant standard. Kofke asserted that the decedent had prior medical problems that precipitated an unforeseeable "cardiac event," and that the decedent did not suffer a respiratory arrest from over medication. Kofke acknowledged, however, that the resulting brain damage from this event led to the decedent's death.

**{¶14}** The parties prepared verdict forms and interrogatories for the jury to complete after its deliberations. Using the verdict form entitled, "**VERDICT FOR PLAINTIFF AGAINST DEFENDANT**," the jury rendered a verdict in favor of Henry and against the Clinic, awarding Henry $178,712 in compensatory damages "on the survivorship claim."[1] The jury awarded Henry "$0 on the wrongful death claim."

**{¶15}** Interrogatory No. 1 asked the jury if Henry had "proven, by a preponderance of the evidence, that the care provided to Paul Henry by the Cleveland Clinic Foundation was negligent?" The jury checked the line for "Yes."

**{¶16}** Interrogatory No. 2 required the jury to "[s]tate in what manner Cleveland Clinic Foundation was negligent in its care of Paul Henry?" The jury wrote as its answer, "The procedures for handling duplicate medical orders do [sic] not meet the standard of reasonable care. The morphine order was exceeded. Monitoring was not appropriate given the patient's medical history."

**{¶17}** Interrogatory No. 3 asked the jury if Henry had "proven, to a reasonable degree of medical probability, that the negligence stated in the answer to Interrogatory No. 2 directly and proximately caused Paul Henry any economic loss for medical care?" The jury checked the line for "Yes."

**{¶18}** At the bottom of interrogatory No. 3, the following instruction stated in boldface type:

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[1]By the time of trial, Henry's claim for "pain and suffering" from the time her decedent was admitted to the Clinic was referred to in this fashion, rather than as a claim for medical expenses.

> **If six or more jurors answer "NO," those jurors must sign the general verdict form in favor of Defendant as to the survivorship claim. All jurors must proceed to Interrogatory No. 4.**
>
> **If six or more jurors answer "Yes," those jurors must sign the general verdict form in favor of Plaintiff as to the survivorship claim. All jurors must proceed to Interrogatory No. 4.**

**{¶19}** Interrogatory No. 4 asked the jury if Henry had "proven, to a reasonable degree of medical probability, that the negligence stated in the answer to Interrogatory No. 2 directly and proximately caused Paul Henry's death?" The jury checked the line for "No." Once again, the jurors were instructed at the bottom of this interrogatory; they were instructed as follows:

> **If six or more jurors answer "NO," those jurors must sign the general verdict form in favor of Defendant as to the wrongful death claim. If the general verdict form for the survivorship claim has also been signed in favor of the Defendant, your deliberations are complete. Please notify the bailiff. If the general verdict form for the survivorship claim has been signed in favor of the Plaintiff, all jurors must then proceed to Interrogatory No. 5.**
>
> **If six or more jurors answer "Yes," those jurors must sign the general verdict form in favor of Plaintiff as to the wrongful death claim. If the general verdict form for the survivorship claim has also been signed in favor of the Plaintiff, all jurors must then proceed to Interrogatory No. 5. If the general verdict form for the survivorship claim has been signed in favor of the Defendant, all jurors must then proceed to Interrogatory No. 6.**

**{¶20}** Interrogatory No. 5 first instructed the jurors, in parentheses, that ***"If the Answer to Interrogatory No. 3 was 'No,' skip this Interrogatory and proceed to Interrogatory No. 6."*** The jury was informed that, if it found Defendant was negligent and that such negligence proximately caused Paul Henry to incur medical care costs, the

Plaintiff and Defendant have stipulated that the medical costs amount to $178,712.00." The jurors dutifully signed their agreement with this stipulation.

**{¶21}** Interrogatory No. 6 first instructed the jurors, in parentheses, that ***"If you Answered 'NO' to Interrogatory No. 4, your deliberations are complete. Do not Answer this Interrogatory. Your deliberations are complete. Please notify the bailiff."*** The jurors followed that instruction, and, thus, awarded Henry nothing as "an amount [it found] will compensate for the harms and losses to the surviving spouse and next of kin for the wrongful death of Paul Henry * * * ."

**{¶22}** According to the record, Henry filed the proposed jury interrogatories; the Clinic did not submit any for the trial court to consider. However, Henry's proposed interrogatories Nos. 3 through 6 did not include the "instructions" set forth in boldface print. The record fails to disclose the source of these instructions.

**{¶23}** The trial court noted that the verdict and interrogatories were problematic, but commented that it was disinclined to ask the jury to deliberate further. The parties agreed. The trial court indicated that, under the circumstances, it would entertain Henry's Civ.R. 59(A) motion for a new trial.

**{¶24}** Henry argued in her brief in support of the motion that a new trial was appropriate on the wrongful death claim. After the Clinic filed its response to Henry's motion, the trial court issued a journal entry and opinion that granted Henry's motion and, pursuant to Civ.R. 49(B),[2] ordered a new trial on both claims.

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[2]Civ.R. 49(B) provides that, upon timely request of a party, the court "shall submit written

**{¶25}** The Clinic appeals from the trial court's opinion and order and presents the following assignment of error.

I. The trial court abused its discretion in granting a new trial.

**{¶26}** In its assignment of error, the Clinic asserts that the trial court's decision was improper, because the jury's verdict can be justified. The Clinic cites the phrasing of the interrogatories provided to the jury, the evidence presented at trial, and the arguments of the parties during opening and closing arguments as permitting the jury to render a "split verdict."

**{¶27}** Upon a review of the record in conjunction with the trial court's opinion and order, this court agrees in part with the Clinic's premise; that is, that the interrogatories permitted a "split" verdict. This fact, however, does not render the Clinic's assertion persuasive. Rather, it lends support to the trial court's decision to invoke its discretion under Civ.R. 59(A) and 49(B).

**{¶28}** This court cannot reverse a decision by a trial court to grant a motion for a new trial unless that court abused its discretion. *Harris v. Mt. Sinai Med. Ctr.* 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, ¶ 35. An abuse of discretion consists of more than an error of judgment; it connotes an attitude on the part of the trial court that is

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interrogatories to the jury, together with appropriate forms for a general verdict." The court "shall direct the jury both to make written answers and to render a general verdict," and, "[w]hen one or more of the answers is inconsistent with the general verdict, * * * the court may * * * order a new trial."

unreasonable, unconscionable, or arbitrary. *Rock v. Cabral*, 67 Ohio St.3d 108, 616 N.E.2d 218 (1993). In applying this standard of review, an appellate court is not free to substitute its judgment for that of the trial court. *Harris* at ¶ 36.

**{¶29}** In its opinion and order, the trial court stated in pertinent part as follows:

> * * * In the present case, the Court grants a new trial on the following grounds.
>
> The Court recognizes that, in a particular case, it is possible for a jury to determine that a medical provider was negligent, but that this negligence did not ultimately cause a patient's death. * * * however, this is not that case. This case was consistently tried by both parties under an "all or nothing" theory, i.e.[,] either [the Clinic] was negligent and this negligence caused [the decedent's] death, or [the Clinic] was not negligent. This was evident from the arguments of counsel, and the fact that the survivor claim and the wrongful death claim were not separated on the verdict forms. Instead, there was one verdict form for [Henry] and one for [the Clinic].
>
> Despite the case being tried under the "all or nothing" theory, the jury returned a split verdict. The Court can only conclude that the jury was attempting to fashion its own remedy rather than decide the case based on the facts and the law. For these reasons, the jury's verdict cannot stand. Therefore, pursuant to Civ.R. 59(A)(2) and (7), * * * the Court orders a new trial in this matter.
>
> * * * [T]he Court cannot determine what the jury truly found. It is possible * * * that the jury believed [the Clinic] was negligent but did not want to award the larger category of damages that a wrongful death claim provides for. However, it is equally possible that the jury did not find [the Clinic] was negligent but, nevertheless, wanted to award something * * * .
>
> * * * If the Court enters judgment on the survivor claim, but the new jury finds for [the Clinic] on the wrongful death claim, there are once again inconsistent verdicts. To avoid this result, a new trial should be held on all claims. * * *

**{¶30}** The Clinic asserts that the trial court's premise that the issues in this case presented an "all or nothing" conclusion is flawed. The Clinic supports its assertion by "cherry picking" portions of the testimony presented at trial, mischaracterizing the theory of the case, and arguing that the jury followed the trial court's "instructions." However, the Clinic's "attempts to minimize the obvious problems with the jury interrogatories are not persuasive." *Reeves v. Healy*, 192 Ohio App.3d 769, 2011-Ohio-1487, 950 N.E.2d 605 (10th Dist.). Rather, the record supports the trial court's premise.

**{¶31}** The trial court actually instructed the jury, in relevant part, that:

> If you find by the greater weight of the evidence that the defendant through its employees failed to meet the standard of care, then you shall find the defendant negligent.
>
> If you find the defendant through its employees was negligent, then you will proceed to decide by the greater weight of the evidence whether such negligence was the proximate cause of Paul Henry's injuries and death and, if so, what is the extent of the damages.
>
> * * *
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> Proximate cause is an act or failure to act that in the natural and continuous sequence directly produced the injury and death and without which it would not have occurred.
>
> There may be more than one proximate cause. The fact that some other cause combined with the negligence of a defendant in producing an injury or death does not relieve the defendant from liability, unless it is shown such other cause would have produced the injury and death independently of the defendant's negligence.
>
> * * *
>
> If you find that the plaintiff proved each part of her claim by a preponderance of the evidence, you will then find for the plaintiff. You

> must then decide what damages, if any, were caused by defendant's conduct.
>
> * * *
>
> If you find for the plaintiff, you will determine what sum of money will compensate the beneficiaries for the damage and loss to them resulting by reason of the wrongful death of Paul Henry.

**{¶32}** The trial court's jury instructions comported with the theory of the case. Henry presented a cause of action for medical negligence. At trial, the parties to this case disputed: (1) whether the Clinic was negligent in its care of the decedent, and, if so, (2) whether that negligence proximately caused harm. That harm was alleged to have been both additional medical expenses *and* death. The evidence, arguments of counsel, and the trial court's instructions to the jury all were addressed to these two questions. *Hayward v. Summa Health Sys.*, 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶ 7.

**{¶33}** The problem arose in this case only when the jury answered interrogatories Nos. 3 through 6. As the court stated in *Reeves*, 192 Ohio App.3d 769, 2011-Ohio-1487, 950 N.E.2d 605:

> The purpose of jury interrogatories is twofold. *Hamm v. Smith* (Dec. 18, 1998), 6th Dist. No. E-98-026, 1998 Ohio App. LEXIS 6027. "The essential purpose to be served by [jury] interrogatories is to test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial." *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.* (1986), 28 Ohio St.3d 333, 336-37, 28 Ohio B. 400, 504 N.E.2d 415, citing *Davison v. Flowers* (1930), 123 Ohio St. 89, 9 Ohio Law Abs. 59, 174 N.E.137. Jury interrogatories also test the jury's factual determinations and express the jury's true intentions. *Hamm*, citing *Phillips v. Dayton Power & Light Co.* (1996), 111 Ohio App.3d 433, 446 , 676

> N.E.2d 565. The Supreme Court of Ohio stated that "the answering of [jury] interrogatories is even more important than the general verdict." *Aetna Cas. & Surety Co. v. Niemiec* (1961), 172 Ohio St. 53, 55, 173 N.E.2d 118.

**{¶34}** Contrary to their stated purpose, the jury's answers to interrogatories Nos. 3 through 6 expressed mixed intentions. These interrogatories permitted the jury to artificially sunder the "claims" Henry presented in her cause of action from each other. Moreover, the boldface print "instructions" included in these interrogatories were not only confusing in themselves, but also confused the issues of negligence and proximate cause. *Reeves*; *Cohen v. Todd*, 6th Dist. Lucas No. L-99-1305, 2000 Ohio App. LEXIS 3823 (Aug. 25, 2000); *compare Hayward* (jury's answers to interrogatories, that defendant was not negligent and did not cause harm to plaintiff, were consistent with general verdict for defendant); *Cromer v. Children's Hosp. Med. Ctr. of Akron*, Slip Opinion No. 2015-Ohio-229 (same).

**{¶35}** Under these circumstances, the trial court correctly determined that the verdict in favor of Henry on a claim of "survivorship" but a verdict against her on a claim of wrongful death, both of which were alleged to have resulted from a single cause of action for medical negligence, were inconsistent and were contrary to law. *Cohen*; *Johnson v. Burris*, 5th Dist. Guernsey No. 14-CA-12, 2015-Ohio-260 (grant of new trial affirmed; jury found negligence and proximate cause, so damage award for medical expenses but not pain and suffering was against the manifest weight of the evidence); *compare Dreamer v. Flak*, 163 Ohio App.3d 248, 2005-Ohio-4732, 837 N.E.2d 802 (2d Dist.) (grant of new trial on failure to award specific damages affirmed where negligence

was admitted and alleged injuries resulting from negligence were "separate and distinct"); *Arrow Mach. Co. v. Array Connector Corp.*, 197 Ohio App.3d 598, 2011-Ohio-6513, 968 N.E.2d 515 (11th Dist.) (denial of new trial appropriate in breach of contract case where jury concluded parties did not prove their cause of action against each other). The trial court, therefore, did not abuse its discretion in granting Henry's motion for a new trial.

**{¶36}** Consequently, the Clinic's assignment of error is overruled.

**{¶37}** The trial court's order is affirmed. This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR