**IN THE SUPREME COURT OF OHIO**

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| ABUBAKAR ATIQ DURRANI, M.D. and CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC. | : | Supreme Court Case No. _____ |
| Defendants-Appellants, | : | |
| v. | : | First District Court of Appeals Case No. C1900341 |
| DANA SETTERS and CRAIG SETTERS | : | |
| Plaintiffs- Appellees. | : | |

# MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS ABUBAKAR ATIQ DURRANI, M.D. and CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS

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## THIS CASE INVOLVES A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

The propositions of law presented here are questions of public or great general interest because they will not only affect future medical malpractice cases, but will also affect any case applying the harmless error doctrine or determining whether a defense is preserved for appeal—which are common questions. Moreover, this case is the first of likely dozens of trials involving Appellants and similarly situated Appellees in Hamilton County Common Pleas court to reach this Court after a jury verdict. The judges handling these cases are making common rulings on these issues, so decisions here are likely to directly affect up to hundreds of other jury trials.

The First District's decision will affect any case involving the preservation of a defense because the First District ignored the plain language of Civ.R. 12(H)(2) to impose a new burden on defendants. The Ohio Rules of Civil Procedure deal with waiver in Civ.R. 12(H). Under Civ.R. 12(H)(2), the defense of failure of joinder "may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits." The First District found that Dr. Durrani and CAST nevertheless waived the defense of improper joinder even though they raised it in their answer. Not only does this contradict the plain text of Civ.R. 12 (H)(2), but it goes against this Court's admonition that "the Civil Rules are not just a technicality." *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25, ¶ 23. And the decisions of the various Ohio courts of appeal show a clear distinction between Appellate Districts who take this principle to heart (the Fifth, Ninth, and Tenth Districts) and those who ignore that admonition (the First, Fourth, Seventh, Eleventh, and Twelfth Districts). The Court should accept this case to resolve the different approaches that the courts of appeals take to applying the Civil Rules.

The First District's decision will affect medical malpractice cases, especially those involving the revocation of a doctor's license. The First District found that the trial court erred in admitting evidence of Dr. Durrani's medical license revocations, that Dr. Durrani suffered prejudice from the evidence, but that the error was harmless. But in making that holding, the court ignored its own findings as to just exactly how prejudicial this evidence was. And this ruling will change the way that medical malpractice cases are tried because the First District has expanded by judicial fiat what errors are harmless. Counsel in future cases will push for ever-more prejudicial evidence—despite the prejudicial nature of that evidence—with little fear that an appellate court would ever find the erroneous admission of prejudicial evidence to be harmful.

Finally, the First District's decision will substantially influence damage awards in future medical malpractice cases. The First District held that the injuries suffered by Mrs. Setters were serious enough to constitute "catastrophic" ones and thus allowed her to access the higher damages cap for medical malpractice claims under R.C. 2323.43(A). Mrs. Setters' injuries, however, consisted only of a decreased range in motion in her neck, some skin abnormalities, and some scarring. The First District's decision upholding this as a "permanent and substantial physical injury" has lowered the bar as it has been understood and applied by Ohio courts heretofore. If Mrs. Setters' injuries meet the catastrophic injury test, then most any injury with persistent physical manifestations, that cannot be completely corrected, would meet the test as well. That is not what the legislature intended or wrote.

For all of these reasons, this case presents questions of public and great general interest. The Court should take jurisdiction over this appeal.

## STATEMENT OF THE CASE

Dana Setters suffers from Ehlers Danlos Syndrome ("EDS"), a condition that causes hypermobility in her joints and connective tissues. *Setters v. Durrani*, 1st Dist. Hamilton No. C-190341, 2020-Ohio-6859, ¶ 2. Mrs. Setters' EDS particularly affects her shoulders and her back. *Id.* From 2009 through 2012, Mrs. Setters sought treatment for her pain from at least three doctors. *Id.* After none of them could provide her with any relief, the third doctor referred her to Dr. Durrani. *Id.* Dr. Durrani performed two surgeries on Mrs. Setters' back but—like all of the doctors before him—he was unable to successfully relieve her pain. *Id.*

Alleging that Mrs. Setters got no relief from the surgeries, Dana and Craig Setters filed a complaint against Dr. Durrani, CAST, West Chester Hospital, and UC Health in December 2015. *Id.* at ¶ 8. In November 2018, the case proceeded to a jury trial against only Dr. Durrani and CAST. *Id.* at ¶ 9. The jury returned a verdict for the Setters. *Id.* After post-trial objections, an appeal to the First District followed. And the First District ruled, in part, for Dr. Durrani and CAST, remanding the case to recalculate damages because the defendants were entitled to a set-off against amounts the Setters previously recovered by way of settlement. *Id.* at ¶ 70. The First District, however, erred in most other respects, which are discussed below.

## PROPOSITIONS OF LAW AND ARGUMENTS IN SUPPORT

### Proposition of Law I: Under the plain language of Civ.R. 12(H)(2), a party does not waive a defense when it raises that defense in its answer, and is not obligated to raise the defense at another stage of the proceeding in order to preserve the defense.

Under Civ.R. 17(A), complaints must be brought in the name of the real party in interest. This brings us to joinder. Under Civ.R. 19(A), a person "shall be joined as a party in the action if … he has an interest relating to the subject of the action." The purpose of this rule is to "enable the defendant to avail himself of evidence and defenses that the defendant has against the real

party in interest, to assure himself of the finality of the judgment, and that he will be protected against another suit brought by the real party in interest on the same matter." *Shealy v. Campbell*, 20 Ohio St.3d 23, 24–25, 485 N.E.2d 701 (1985).

Blue Cross Blue Shield ("BCBS"), the Setters' insurer, is the real party in interest with respect to medical expenses, both past and future. But BCBS is not a plaintiff, and the Setters never attempted to join BCBS. Consistent with Civ.R. 12(H)(2), Dr. Durrani and CAST raised the Setters' failure to prosecute the action in the name of the real party in interest as a defense in their Answer. *Setters* at ¶ 58. Defendants having properly raised the affirmative defense of a failure to join an indispensable party (Civ.R. 12(B)(7)), it was the responsibility of the Setters to correct that joinder error. Instead, the Setters did nothing.

The First District agreed that BCBS "had a subrogated interest to the Setters' past medical expenses and was a party united in interest with [the] Setters," and "possessed a subrogated interest to Setters's past medical expenses . . ." *Id.* at ¶ 58. So, concluded the First District, the Setters "could pursue the full amount of damages *unless the issue of joinder was properly raised*." *Id.* at ¶ 55 (emphasis added). Then the First District lost its way, holding that Dr. Durrani and CAST waived this issue, despite the fact that Dr. Durrani and CAST raised it in their answer *and* in their motion for judgment notwithstanding the verdict.[1] *Id.* at ¶ 58.

[1] The importance of joining all necessary parties is illustrated perfectly by what happened here. Under R.C. 2323.43(H)(1)(b), economic loss includes "[a]ll expenditures for medical care or treatment." The $149,906 award of "economic" damages awarded to the Setters does not meet this definition because it was not an "expenditure" of the Setters; it was an expenditure by BCBS. Black's Law Dictionary defines "expenditure" as "the act or process of spending or using money," "the disbursement of funds," and "a sum paid out." Black's Law Dictionary (11th ed. 2019). Something can thus be an expenditure for a plaintiff *only* if the plaintiff paid that money. Here, the Setters did not. Of the $149,906 in economic damages, $76,423 came from past medical expenses. The Setters did not pay this sum—BCBS did. And the insurance company will pay most or all of the $73,483 in future medical expenses. The Setters have not lost that money,

The First District's decision ignores Civ.R. 12(H)(2), which plainly says that "a defense of failure to join a party indispensable under Rule 19 … may be made by any pleading permitted or ordered under Rule 7(A), *or* by motion for judgment on the pleadings, *or* at the trial on the merits." Civ.R. 12(H)(2) (emphasis added). This rule is perfectly clear. Dr. Durrani and CAST raised this defense in a pleading under Civ.R. 7(A)—their answer. So they did not waive it.

The First District claims that Dr. Durrani and CAST could have "file[d] a motion to dismiss for failure to join a party, move to join [BCBS], or request an appropriate jury instruction at trial" to preserve this issue. *Setters* at ¶ 58. True enough. Those are other proper options for preserving the defense, but they are not requirements. The First District would change the disjunctive "or" options offered in Rule 12 into conjunctive mandates. But Rule 12 does not mandate that failure to join a party must be raised in a motion to dismiss, or a joinder motion, or in jury instructions. Rule 12, by its terms, allows the defense to be raised in an answer and requires nothing more. The First District cannot engraft new requirements on this Court's rules.

The First District ignored the plain language of Civ.R. 12(H)(2) to excuse the Setters' failure to join the appropriate parties—but this Court has warned against exactly that. As the Court has declared, "the Civil Rules are not just a technicality." *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25, ¶ 23. Specifically, Ohio courts "may not ignore the plain language of a [Rule of Civil Procedure] in order to assist a party who has failed

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so those amounts are "nonpecuniary harm," or a noneconomic loss under R.C. 2323.43(A)(2), subject to a damages cap.

In rejecting this argument, the First District concluded that an "expenditure" constitutes "all pay outs of funds … regardless of the payor's identity." *Setters* at ¶¶ 68–69. But the First District erred by ignoring the ordinary meaning of "expenditure." Because the Setters did not and will not pay these expenses, these amounts cannot be considered expenditures by them.

to comply with a rule's specific requirements." *Id.* This is so because "[t]he Civil Rules are a mechanism that governs the conduct of all parties equally." *Id.*

Ohio courts have acknowledged this Court's mandate to follow the "plain language" of the Ohio Rules of Civil Procedure. On that basis, the Fifth District held that, under Civ.R. 3(G), a claim of improper venue alone is not a basis to vacate a judgment, though that same rule permits a right to appeal regarding venue. *Jackson v. Friedlander*, 5th Dist. Stark No. 2016CA00053, 2016-Ohio-7503, ¶ 10. The Ninth District has held that service by FedEx was not a permissible method of service under Civ.R. 4.3(B)(1). *J. Bowers Constr. Co. v. Vinez*, 9th Dist. Summit No. 25948, 2012-Ohio-1171, ¶ 15 (language allowing service by a "commercial carrier" was not yet incorporated into the rule). The Ninth District, likewise, has held that a deposition transcript is not a substitute for an affidavit under Civ.R. 10(D)(2)(a). *May v. Donich Neurosurgery & Spine, L.L.C.*, 9th Dist. Summit No. 29215, 2019-Ohio-4246, ¶ 36. And the Tenth District has held that Civ.R. 53(D)(3)(b)(iii) requires an "affidavit of evidence," not a "statement of evidence." *Gill v. Grafton Corr. Inst.*, 10th Dist. Franklin No. 10AP-1094, 2011-Ohio-4251, ¶ 15.

In support of its decision, the First District cited one case from each of the Fourth, Seventh, Eleventh, and Twelfth Districts, all of which held that raising the defense of failure to join a necessary party in an answer did not preserve that defense. *Garcia v. O'Rourke*, 4th Dist. Gallia No. 04CA7, 2005-Ohio-1034; *Monus v. Day*, 7th Dist. Mahoning No. 10MA35, 2011-Ohio-3170; *Brown v. Miller*, 11th Dist. Geauga No. 2012-G-3055, 2012-Ohio-5223; *Nationwide Mut. Fire Ins. Co. v. Logan*, 12th Dist. Butler No. CA2005-07-206, 2006-Ohio-2512. All those cases suffer from the same flaw as the First District's analysis—none acknowledge the deviation from the plain language of Civ.R. 12(H)(2), nor do they attempt to justify that departure.

The juxtaposition of the Appellate Districts, in fact, shows Ohio courts going in two different directions with respect to the application of the Civil Rules. The Fifth, Ninth, and Tenth Districts acknowledge this Court's rulings that "the Civil Rules are not just a technicality" and that courts "may not ignore the plain language of a rule [of the Ohio Rules of Civil Procedure] in order to assist a party who has failed to comply with a rule's specific requirements." *LaNeve* at ¶ 23. The Fourth, Seventh, Eleventh, and Twelfth Districts—and now the First District—have ignored that warning by ignoring the plain language of Civ. R. 12(H)(2).

**Proposition of Law II: Evidence of a doctor's license revocation in a malpractice lawsuit, unrelated to the treatment of the plaintiff, cannot be harmless error.**

The Ohio Rules of Evidence allow only relevant evidence that will not unfairly mislead a jury. *See* Evid.R. 402 (irrelevant evidence is not admissible); Evid.R. 403 (relevant evidence inadmissible for unfair prejudice). Those rules were violated here when the trial court admitted evidence of Dr. Durrani's medical license revocations in Ohio and Kentucky.

The First District agreed that admitting this evidence was error and that, by admitting this evidence, Dr. Durrani suffered unfair prejudice. *Setters* at ¶¶ 16, 19, 21. Despite that, the First District also found the error to be harmless. *Id.* at ¶ 26. The First District could reach that conclusion only by expanding what constitutes harmless error—admitting in one breath that evidence of a medical license revocation is extraordinarily prejudicial, then ignoring that concession in its harmless error analysis. The First District then amplified its mistake by concluding that other evidence (not relevant to the wrongly admitted evidence) was a substitute for the erroneously admitted evidence and that expert testimony given by a doctor who, similarly, had had his medical license and hospital admitting privileges suspended (though

defense counsel were not permitted to question the doctor on that matter) made up for that mistake. None of this is right.

In opening statement, the Setters' lawyers told the jury that they would hear that Dr. Durrani's medical licenses had been revoked in both Ohio and Kentucky. *Id.* at ¶ 24. Throughout cross-examination, counsel for the Setters questioned Dr. Durrani about these revocations. *Id.* And in closing argument, counsel for the Setters again reminded the jury that Dr. Durrani's medical licenses in Ohio and Kentucky had been revoked. *Id.*

These revocations were irrelevant because they had nothing to do with Dr. Durrani's treatment of Mrs. Setters. The Ohio and Kentucky Medical Boards "revoked Durrani's medical licenses due to an unrelated instance of misconduct." *Id.* at ¶ 18. The First District even agreed that "[t]here is no evidence that the revocations were attributable to the competency, knowledge, or skill possessed by Durrani during the time he performed surgery on Setters." *Id.* at ¶ 18.

The First District concluded that this evidence could not even pass the low threshold for relevance. *Id.* at ¶ 18. And it found unfair prejudice, concluding that the evidence could do "little more than prejudice the minds of the jurors." *Id.* at ¶ 19. Ultimately, the First District decided that admitting this evidence was an error so prejudicial that the trial court abused its discretion in doing so.

At this point, the First District's opinion goes wrong. The First District notes, "[a] judgment will not be reversed unless the trial court abused its discretion and a party has been materially prejudiced." *Id.* at ¶ 14 (citing *Davis v. Killing*, 171 Ohio App.3d 400, 2007-Ohio-2303, 870 N.E.2d 1209, ¶ 11 (11th Dist.). The First District then turned to harmless error; under Civ.R. 61, error is harmless unless that error is "inconsistent with substantial justice." But here, it was not possible to find harmless error due to the nature of the wrongly admitted evidence.

Evidence of the revocation of a doctor's medical license, unrelated to the treatment of the plaintiff, is so prejudicial that it cannot be harmless. The First District specifically noted the many ways this evidence prejudiced Dr. Durrani and CAST, concluding that:

- "The danger of unfair prejudice is readily apparent in this case." *Id.* at ¶ 21;
- The Setters' counsel used this evidence "in such a way that it invited the jury to draw an improper inference about Durrani's credibility." *Id.* at ¶ 21; and
- "Under these circumstances, one could easily infer that Durrani was an incompetent physician when he treated Setters." *Id.* at ¶ 21.

The Ohio Supreme Court has said that only two things are required to justify reversal: error and prejudice. *See, e.g.*, *Scovern v. State*, 6 Ohio St. 288, 294 (1856) ("Now the rule seems to be settled in Ohio, that in order to justify the reversal of a judgment on error, the record must affirmatively show, not only that error intervened but that it was to the prejudice of the party seeking to take advantage of it."). The Court has applied that principle for nearly two centuries. *Smith v. Flesher*, 12 Ohio St. 2d 107, 110, 233 N.E.2d 137, 140 (1967) ("It is an elementary proposition of law that an appellant … to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial. …"); *Wagner v. Roche Labs.*, 85 Ohio St. 3d 457, 460, 709 N.E.2d 162 (1999) (same).

A finding that a party has been subject to "unfair prejudice," already indicates prejudice sufficient to justify reversal, even if that is not the ultimate conclusion. *See, e.g.*, *Grundy v. Dhillon*, 120 Ohio St. 3d 415, 421, 2008-Ohio-6324, 900 N.E.2d 153, ¶ 28 ("[C]onsistent with the harmless-error rule, a party must demonstrate that he was prejudiced. …"); *see also Bostic v. Connor*, 37 Ohio St. 3d 144, 149, 524 N.E.2d 881 (1988) ("[T]he error was harmless and appellant was not prejudiced."); *Sherer v. Smith*, 155 Ohio St. 567, 571, 99 N.E.2d 763, 766 (1951) (errors in admitting improper evidence are "harmless unless it palpably prejudiced the

jury"). And when the evidence at issue could allow a jury to "easily infer that Durrani was an incompetent physician,"—in a lawsuit about *whether he treated a patient incompetently*—that evidence is so plainly prejudicial that it cannot be harmless.

Recognizing the extraordinarily prejudicial evidence of medical license revocations, Ohio courts usually just avoid the trial court's mistake here by refusing to admit such evidence in the first place. *Lambert v. Wilkinson*, 11th Dist. Ashtabula No. 2007-A-0032, 2008-Ohio-2915, ¶ 54 ("[T]he admission of such evidence [of the defendant-doctor's medical license revocation] could do nothing more than prejudice the minds of the jurors.). Indeed, Ohio courts even protect non-party expert witnesses from such disclosures. *Millard v. CSX Transp., Inc.*, 10th Dist. Franklin No. 97APE05-717, 1998 WL 63546, *6 ("The fact that plaintiff's treating physician illegally prescribed diet medication to other patients years prior to her treatment of plaintiff's back and knee injuries, is simply not probative of the credibility of plaintiff's treating physician or her competency to treat plaintiff's condition.").

Counsel for the Setters used this evidence in exactly the way one would expect. Even the First District acknowledged that, thanks to this evidence, "one could easily infer that Durrani was an incompetent physician when he treated Setters." *Setters* at ¶ 21. This is especially so given that the jury had no idea whether Dr. Durrani's license revocations related to the filling of prescriptions, the treatment of Mrs. Setters, or the treatment of any other patient. Indeed, in a medical-malpractice case, it is only reasonable to infer that, when a doctor has his license was revoked shortly after the treatment of a particular patient, that patient's treatment factored into the revocation. That was the Setters' aim in submitting the evidence. Unfair prejudice to this level and harmless error cannot coexist.

Compounding its error, the First District said that this evidence was harmless because Dr. Durrani "was effectively impeached on a number of other topics relating to his credibility." *Id.* at ¶ 23. Counsel for the Setters, for example, elicited testimony regarding inconsistencies on Dr. Durrani's medical license applications. *Id.* With respect, that makes no sense. The use of the license revocation was not to challenge Dr. Durrani's credibility. Rather, it was offered to imply that he was a bad doctor whose treatment of Mrs. Setters was negligent—or worse. That evidence established that there were inconsistencies on Dr. Durrani's medical license application is a far cry from evidence which, in the words of the First District, allowed a jury to "easily infer that Durrani was an incompetent physician when he treated Setters." *Id.* at ¶ 21. This is a non-sequitur; one has no bearing on the other.

Finally, the First District justified its decision because there was "substantial competent evidence" to support the jury's verdict—namely, the Setters' expert witnesses. *Id.* at ¶ 25. But the First District ignores the fact that, despite admitting evidence of Dr. Durrani's license revocations, the trial court *excluded* similar evidence as to the Setters' expert. Counsel for Durrani plaintiffs commonly use Dr. Keith Wilkey as their star witness, including in this case. And here, the trial court gave Dr. Wilkey a helping hand; the trial court refused to let defense counsel question Dr. Wilkey about a suspension of his Kentucky medical license, the revocation of his hospital admitting privileges, or the fact that Dr. Wilkey was indebted to the Setters' counsel based on an earlier lawsuit. (T.p., Tr. Vol. 12 at 1097–98.) The First District cannot base its determination of harmless error on expert testimony when the trial court protected that expert from revelations similar to those made against the defendant.

The trial court's inconsistent approaches to the admissibility of the license revocations of both Dr. Durrani and Dr. Wilkey had exactly the prejudicial effect that Plaintiffs were counting

on. In closing, Plaintiffs' counsel urged the jury to weigh Dr. Durrani's testimony against Dr. Wilkey's testimony. (T.p., Tr. Vol. 19 at 2130–31.) And while counsel for the Setters reminded the jury of Dr. Durrani's license revocations, they heaped praise on Dr. Wilkey, calling him the "homegrown Greater Dayton-Cincinnati area doctor." (T.p., Tr. Vol. 18 at 2130.) By admitting evidence of Dr. Durrani's revocations and prior lawsuits but excluding similar evidence about Dr. Wilkey, the trial court only made things worse, and turned itself into an unwitting participant in Plaintiffs' character assassination strategy.

This error was not harmless, and it was exacerbated by its one-sided application. Nor will it be harmless in the many dozens of lawsuits against Dr. Durrani yet to be tried, if plaintiffs' counsel are allowed to present this evidence to a jury.

**Proposition of Law III: Only the most severe injuries qualify as "catastrophic" under R.C. 2323.43.**

The Ohio Revised Code caps the noneconomic injuries available to plaintiffs in a medical malpractice claim. The normal baseline is set in R.C. 2323.43(A)(2), which limits noneconomic damages to the greater of $250,000 or three times the plaintiff's economic loss, subject to a maximum of $350,000 for each plaintiff or $500,000 for each occurrence. Noneconomic loss means "nonpecuniary harm" such as "pain and suffering." R.C. 2323.43(H)(3).

The Ohio Revised Code has a higher cap for only "the most severely injured" people. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 12. A plaintiff may recover up to $500,000 in noneconomic damages when, as relevant here, she has suffered a "[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system." R.C. 2323.43(A)(3). This Court has called injuries meeting that definition "catastrophic." *Arbino* at ¶ 60.

The trial court denied Dr. Durrani and CAST's motion to remit the Mrs. Setters' noneconomic damages to $350,000. But Mrs. Setters did not suffer a catastrophic injury sufficient to grant her access to the higher damages cap of $500,000. Because of Ehlers Danlos Syndrome, Mrs. Setters had serious medical issues long before she ever saw Dr. Durrani. She saw at least three doctors to try to relieve the pain in her neck and back. Her pain was so severe that she stopped working, long before Dr. Durrani ever operated. Following her surgeries, Mrs. Setters complained of injuries including (1) an abnormal cervical posture, or a tilt in the right side of her head; (2) a reduction in the range of motion for her neck; (3) two moveable nodules (a skin growth) in her neck; and (4) surgical scars. *Setters* at ¶ 32. Such injuries are not "substantial" physical deformities and are thus not catastrophic.

Few Ohio courts have elaborated on what is a "permanent and substantial physical deformity." In *Torres v. Concrete Designs Inc.*, the Eighth District found that a jury could find a permanent and substantial deformity where the plaintiff suffered an open skull fracture with intracranial hemorrhaging and a frontal sinus fracture which caused the loss of vision in one eye, a diminished sense of taste and smell, and cognitive and behavioral functioning limitations that affected her every day—serious injuries indeed. 2019-Ohio-1342, 134 N.E.3d 903, ¶ 82 (8th Dist.). In *Johnson v. Stachel*, the Fifth District held that a permanent shortening of one leg and the surgical removal of a hip join, which rendered the hip non-weight bearing, likewise was a permanent and substantial physical deformity. 5th Dist. Stark No. 2019CA00123, 2020-Ohio-3015.[2] And in *Fairrow v. OhioHealth Corp.*, the Tenth District recently held that a failed

[2] Numerous federal courts have weighed in on what constitutes a "permanent and substantial physical deformity." These cases, like the Ohio cases, suggest that only the most serious injuries qualify. *See, e.g.*, *Weldon v. Presley*, N.D. Ohio No. 1:10 CV 1077, 2011 WL 3749469, *2 (Aug. 9, 2011) (concluding that a qualifying injury "must be severe and objective" and that pain, numbness, and scarring following a surgery did not suffice); *Sheffer v. Novartis Pharm. Corp.*,

catherization resulting in 12 procedures including several procedures to place devices in the plaintiff's abdomen, a reconstruction of the urethra, and a "substantially shorter" penis with a reduced ability to maintain an erection met the "basic evidentiary threshold" for this issue to go to the jury. 10th Dist. Franklin No. 19AP-828, 2020-Ohio-5595, ¶ 71.

Ohio cases discussing the meaning of a "permanent and substantial physical deformity" have thus shown—at least until the First District's decision here—that Ohio courts have held only the most serious injuries to qualify. Mrs. Setters' injuries simply do not suffice. A tilted neck (which Mrs. Setters testified that she can push back into place (T.p., Tr. Vol. 10 at 830)), a reduction in the range of motion in her neck, two nodules, and surgical scars are far short of the injuries that the courts in *Torres*, *Johnson*, and *Fairrow* held sufficient.

Any medical malpractice claim requires some kind of injury. If Mrs. Setters' injuries qualify, then there are few persistent injuries that would not. That is not in keeping with the statute, which requires those seeking the higher damages cap to have a "substantial" deformity. Nor is it in keeping with this Court's declaration that only "catastrophic" injuries qualify under R.C. 2323.43(A)(3). Given that few Ohio cases have discussed what it means to be a "permanent and substantial physical deformity" and given that the First District's decision here dramatically eases the standard for what suffices, the First District has significantly lowered the threshold for a "permanent and substantial physical injury." Unless the Court clarifies the statute, counsel in

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S.D. Ohio No. 3:12-cv-238, 2014 WL 10293816, *2–3 (July 15, 2014) (rejecting the argument that a since-healed broken jaw qualified because, though the plaintiff continued to suffer jaw pain, her jaw was still "functional"); *In re E. I. Du Pont De Nemours & Co. C-8 Pers. Injury Litig.*, S.D. Ohio No. 2:18-CV-136, 2019 WL 2515186, *3 (June 18, 2019) (evidence sufficient to go to jury when the defendant's product caused kidney cancer which required the removal of one kidney and the alteration of the other kidney); *Williams v. Bausch & Lomb Co.*, S.D. Ohio No. 2:08-CV-910, 2010 WL 2521753, *6 (June 22, 2010) (holding that complete blindness in right eye could not satisfy the damages cap exceptions, as plaintiff still had use of her left eye).

future medical malpractice cases will cite *Setters v. Durrani* in support of the argument that the catastrophic injury question should go to the trier of fact for any minor injury—including decreased range of motion, slight skin anomalies, and some scarring.

## CONCLUSION

The First District has ignored the plain text of Civ.R. 12(H)(2) to impose a new burden on defendants, sanctioned the outcome of a flawed trial in which the jury heard the most unfairly prejudicial evidence possible in a medical malpractice case, and has lowered the bar for what constitutes a "permanent and substantial physical deformity" (offering no limiting principle). The Court should take jurisdiction over these propositions.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that a true copy of the above was served on the following on February 8, 2021 by email:

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