[Cite as *Dillon v. OhioHealth Corp.*, 2015-Ohio-1389.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael Dillon,	:	
Plaintiff-Appellee,	:	
v.	:	No. 13AP-467 (C.P.C. No. 10CV-9220)
OhioHealth Corporation,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
John Does et al.,	:	
Defendants-Appellees.	:	
Michael Dillon,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
v.	:	No. 14AP-259 (C.P.C. No. 10CV-9220)
OhioHealth Corporation,	:	(REGULAR CALENDAR)
Defendant-Appellant/ Cross-Appellee,	:	
John Does et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 9, 2015

Volkema Thomas Miller & Scott, A Legal Professional Association, Michael S. Miller and *Warner M. Thomas, Jr.*, for appellee/cross-appellant Michael Dillon.

Roetzel & Andress, LPA, Robert B. Graziano, Michael R. Traven and *Douglas G. Leak*; *Zeiger, Tigges & Little, LLP, Steven W. Tigges, John W. Zeiger* and *Matthew S. Zeiger*;

Chester P. Porembski, for appellant/cross-appellee OhioHealth Corporation.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} This matter involves cross-appeals concerning a trial in the Franklin County Court of Common Pleas in which two different verdicts were rendered for the same trial by the same jury and on the same evidence, the first one for defendant-appellant/cross-appellee, OhioHealth Corporation ("OhioHealth"), and the second one for plaintiff-appellee/cross-appellant, Michael Dillon. The second verdict effectively "replaced" the first verdict and awarded Dillon nearly three million dollars for injuries Dillon alleged were inflicted by OhioHealth, through an employee, Frank Varian. The trial court did not inform any party of the first verdict, and the parties did not discover the fact of the first verdict until after the trial, when counsel were permitted to discuss the case with the jurors. The judgment appealed from is the trial court's March 4, 2014 post-trial order, rendered close to one year after the trial. The order we consider in this appeal vacates the trial court's final entry on the last jury verdict.

{¶ 2} Dillon appealed the March 4, 2014 order vacating the trial court's judgment in his favor. OhioHealth also appeals, claiming that, having correctly vacated the improper entry on the verdict in favor of Dillon, the trial court should have entered judgment in OhioHealth's favor based on the prior defense verdict from the same jury. OhioHealth further appeals a number of rulings on jury instructions, evidentiary issues, and motions for directed verdicts. Understandably, both parties appear to be concerned about the cost and expense of a new trial in this matter.[1] Unfortunately, on review, the best and only legally correct recourse is to affirm the trial court's order for retrial and remand it on all claims and issues.

---

[1] The parties took more than 60 depositions in this case and tried the matter before a jury in a trial that spanned one month and included testimony from more than 40 witnesses.

I. FACTS AND PROCEDURAL HISTORY[2]

{¶ 3} Dillon suffers from schizophrenia and has demonstrated tendencies to act erratically when not medicated. When Dillon's father discovered on June 20, 2009 that Dillon had not been taking his medication for at least one week, he sought assistance to stabilize Dillon and have him resume his prescribed course of medication. Dillon's father called for an emergency squad to transport Dillon to the hospital. An emergency squad in an ambulance responded, and emergency personnel convinced Dillon to accompany them to the hospital.

{¶ 4} Several times, while en route to the hospital, Dillon stood up in the ambulance, causing concern and speculation that he may have been attempting to exit the moving vehicle. Upon arriving at Doctor's Hospital West ("Doctor's West"), a hospital operated by defendant, OhioHealth, Dillon made several attempts to leave. Evidence varies about how vigorous or violent Dillon's attempts were to leave or avoid medical care. However, it is undisputed that Dillon was not compliant with instructions from healthcare workers at Doctor's West. A patient care assistant at the hospital, Frank Varian, attempted to physically subdue and hold Dillon in order to place him into a hospital bed.

{¶ 5} Testimony differs about how Varian subdued Dillon. Some witnesses testified that Varian put Dillon in a "full nelson." This is a hold accomplished by standing behind the subject, facing the subject's back, threading each arm underneath each of the subject's armpits, and locking hands behind the subject's head.[3] It is undisputed that this hold has at least the possibility of causing neck damage.

{¶ 6} The evidence about how Dillon was ultimately forced to lie on the hospital bed was conflicting, but it is undisputed that he did not go willingly. Once Dillon was placed prone on the bed, he was chemically sedated and fastened into soft wrist and ankle restraints. Testimony also differs about whether Dillon was still being held in the full nelson position by Varian at the time he was sedated. If he had been, according to Dillon's expert, the relaxation of the muscles would have increased the possibility of injury from the hold.

---

[2] The record is extremely extensive and rife with disagreements in testimony and other conflicts of evidence.
[3] *See, e.g., Oxford English Dictionary* (3d Ed.2012) ("A hold in which both arms are passed under an opponent's arms from behind and the hands or wrists are clasped on the back of the neck.").

{¶ 7} Approximately ten hours after Dillon was sedated and restrained at the hospital, workers there noticed him violently struggling in bed, leaning far forward and then whipping his head and upper body back against the mattress. He was chemically sedated a second time. The next evening, June 21, 2009, Dillon reported that he could not squeeze hard with either hand and was unable to move his legs. In addition, nurses noted that Dillon did not respond to stimuli intended to elicit pain when applied to his feet, toes, or legs.

{¶ 8} The next day, June 22, 2009, Dillon underwent a CT scan. Doctors discovered he had a subluxation of the C5-6 vertebrae that had apparently caused compression of the spinal cord and incomplete paralysis. Expert testimony varied on the etiology of Dillon's injury. Some suggested the subluxation may have already existed when Dillon came to Doctor's West and simply worsened while there. Some testified that it was likely the result of Varian's attempts to subdue Dillon, either solely or in conjunction with sedation. Others testified that Dillon could have either injured himself or aggravated an existing injury by whipping about in his restraints. There were a number of possible explanations offered for the undisputed fact that Dillon walked into Doctor's West but could not walk out.

{¶ 9} Initially, Dillon's paralysis was quite severe. He had no bowel or bladder control, was completely unable to move his legs, and he had only weak and unreliable control over some muscles in his arms. Dillon received treatment, including surgery and considerable therapy. By the time of trial, Dillon had recovered essentially full use of his arms, had better (though not perfect) control of his excretory functions, and could walk relatively short distances with the aid of a walker.

{¶ 10} Although, initially, a large number of parties were named in the complaint, Dillon ultimately dismissed all of them before trial except for OhioHealth. Dillon went to trial against only OhioHealth on April 5, 2013 before a jury of eight. At the close of Dillon's evidence and again at the close of all evidence, OhioHealth moved for directed verdicts. The trial court denied these motions, and jury began deliberations on April 30, 2013.

{¶ 11} Before any verdict was announced in open court, on May 2, 2013, at 10:05 a.m., the trial court's bailiff sent a text message to counsel for both parties, informing

them that the jury had reached a verdict. Counsel and others involved in the trial appeared in the courtroom, at which time the trial court informed them that the jury had not reached a verdict, but, rather, had a question. The jury's question related to whether OhioHealth could be considered vicariously liable for the acts of Varian. At the end of the hearing, OhioHealth's counsel specifically asked the trial judge if the jury had returned a verdict, and the trial judge answered "no." (Tr. Vol. XIV, 2196.) Later in the day, the jury had additional questions, this time relating to whether comparative negligence could be imputed to Dillon based on conduct by Dillon's father and whether pre-hospitalization conduct could be considered. Approximately four and one-half hours after the bailiff had first announced that the jury had a verdict/question, the bailiff again contacted counsel and informed them, "NOW we have a verdict." (R. 672, exhibit No. 1.)

{¶ 12} The parties, counsel, the jury, and all other necessary persons again assembled in the courtroom. The judge conferred on the record with the jury foreperson and confirmed that the jury had reached a verdict. Then, the judge read the verdict in open court for $2,866,521.35 in favor of Dillon. After thanking the jury for their service and relieving them from the admonition not to discuss the case, the judge adjourned the trial and freed the jurors to mingle with counsel.

{¶ 13} During informal discussions between jury and counsel for OhioHealth, some jurors apparently mentioned that the jury had initially reached, signed, and attempted to present a verdict in favor of OhioHealth. When OhioHealth learned from the jurors that this had happened, counsel for OhioHealth sought copies of the first set of verdict forms from trial court staff. A trial court staff member informed OhioHealth's counsel that the forms had been discarded because they had not been completed properly. After requests by OhioHealth designed to ensure that the trash would not be emptied and/or the prior verdict forms permanently destroyed, the trial judge retrieved the verdict forms from the recycling bin and promised to hold a hearing on the matter.

{¶ 14} On May 6, 2013, the trial judge entered a statement on the record explaining what had happened. Two interrogatories and a general verdict were returned by the jury at approximately 10:00 a.m. on May 2, 2013. One interrogatory sought an answer to the question of whether Varian was negligent. The second sought an answer to whether, if found negligent, Varian's negligence was the proximate cause of Dillon's

injuries. The jury answered the first interrogatory "yes" and the second "no." Each interrogatory was signed by the requisite supermajority of six jurors. However, the group of six was not the same for each interrogatory. Two jurors who signed the first interrogatory did not sign the second and vice-versa. All eight jurors signed a general verdict in favor of OhioHealth finding that it was not liable to Dillon. The court, believing that the "same juror rule" applied in this situation so as to render the initial, unverified verdict defective, discarded the verdict forms. The judge then sent the bailiff back to the jury room with instructions to tell the jury that the same group of jurors needed to sign the interrogatories and to continue their deliberations.

{¶ 15} Based on these circumstances, counsel for OhioHealth requested that the trial court enter a judgment consistent with the first verdict. Instead, the trial court entered judgment later that day on the second verdict, in favor of Dillon.[4]

{¶ 16} Ten days later, OhioHealth filed a post-trial motion requesting that the trial court vacate its entry of judgment on the second verdict in favor of Dillon and instead enter judgment on the first verdict in favor of OhioHealth. OhioHealth also submitted three affidavits that it had obtained from jurors as evidentiary support for its post-trial motion. Dillon opposed the motion and requested that the affidavits be stricken. The parties appealed the trial court's actions, but this court stayed the appeal on June 12, 2013 until the trial court decided the pending motions.

{¶ 17} On March 4, 2014, the trial court vacated the entry on the second verdict in favor of Dillon and struck two of the three juror affidavits. It did not, however, order a new trial or enter judgment consistent with the first verdict.

II. ASSIGNMENTS OF ERROR

{¶ 18} OhioHealth submits five assignments of error:

> [I.] The Trial Court Should have Entered Judgment Consistent with Verdict #1.
>
> [II.] The Trial Court Erred in Striking the Affidavits of Maggie Dudley and Mark Garver.

---

[4] Because the trial court applied a non-economic statutory damages cap, the total award was $2,819,460.55 rather than $2,866,521.35.

> [III.] The Trial Court Erred in Overruling Several of OhioHealth's Motions for Direct Verdict.
>
> [IV.] The Trial Court Erred in Ostensibly Ordering a New Trial.
>
> [V.] If a New Trial Is the Only Outcome Available, the Appellate Court Should Limit the Scope of the Remand for Trial.

{¶ 19} Dillon presents a single assignment of error:

> THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFF-APPELLEE CROSS-APPELLANT MICHAEL DILLON IN VACATING THE JUDGMENT ENTERED IN HIS FAVOR.

These assignments of error are addressed out of order to facilitate a cogent review of the issues presented for review.

III. DISCUSSION

A. THE SAME JUROR RULE

{¶ 20} The rule that initially led the trial court to discard the first jury verdict is known as the "same juror rule." The trial judge in this case discarded the first jury verdict because the six jurors who signed one interrogatory were not the same six who signed the other. The trial court thereafter reconsidered this decision. Determining whether the same juror rule should have applied to the first verdict is fundamental to considering several of the other assignments of error. Therefore, we begin our review of the parties' assignments of error by first discussing the same juror rule.

{¶ 21} The same juror rule is a requirement established by case law that applies in cases where comparative negligence must be determined. Jurors who seek to apportion negligence in comparative negligence cases must be the same jurors who found negligence and proximate cause. *See O'Connell v. Chesapeake & Ohio RR., Co.*, 58 Ohio St.3d 226 (1991), syllabus. In other words, if a juror did not find that a defendant was negligent, that juror could not cogently find that, for instance, the defendant was 70 percent negligent. The Supreme Court of Ohio stated, in adopting the same juror rule:

> [W]e find that the * * * rational and analytically sound rule is the "same juror" rule. Our decision is based on a number of reasons. 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.

{¶ 22} The concerns identified by the Supreme Court in *O'Connell* are not implicated by what occurred in this case; the same juror rule should not have been applied by the trial court. While the case does involve a claim for comparative negligence, there was no apportioning of negligence by a juror who did not find that defendant or plaintiff was causally negligent. Six persons found that Varian[5] was negligent. As to causation, a different grouping of six found that Varian had not proximately caused Dillon's injuries. There was no need to apportion fault, because the jury did not reach the issue of comparative negligence, having found no causation. The trial court should not have applied the same juror rule to the differing questions of negligence and causation. For more than just this reason, the trial court should not have refused the first verdict.

{¶ 23} In addition to the factual disparity between *O'Connell* and the case at bar, the logical inconsistency that fueled the *O'Connell* decision (a juror apportioning negligence who did not find that the defendant or plaintiff was causally negligent) is not present here. *Id*. There need not be congruency between the six jurors finding negligence and the six jurors finding that negligence was not the proximate cause of the injuries. Jurors who did not find OhioHealth to be negligent could also find that OhioHealth was not the cause of Dillon's injuries. Since an actor may cause injury without negligence, a juror who failed to find negligence was still able to determine proximate cause, either for or against OhioHealth.

---

[5] Who, through the doctrine of respondeat superior, would serve as the basis for liability on behalf of OhioHealth.

{¶ 24} Dillon, quoting another portion of *O'Connell*, urges us to agree with the trial court's original interpretation of the rule:

> 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.

(Dillon's Brief at 12, quoting *O'Connell* at syllabus.) While this quotation is accurate, its factual circumstances make its application to this case inapposite. Proximate cause is a separate question not dependent on a finding of negligence. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (N.Y.App.1928). Because the jury found no proximate cause, it did not and could not reach the point of deliberation on comparative negligence and, therefore, the same six jurors who found negligence did not need to be the same six jurors who found no proximate cause. Any six jurors could resolve a case in favor of a defendant by failing to find that either negligence or proximate cause exists.[6] Unless and until there is a finding that a defendant, such as OhioHealth, was both negligent and, through such negligence, caused the harm, the same juror rule does not operate to nullify a jury verdict. *O'Connell* at 235. Thus, we cannot conclude that only those jurors who agreed that negligence existed were permitted to consider whether proximate cause existed. Further, the Twelfth District has "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." *Estate of Lawson v. Mercy Hosp. Fairfield*, 12th Dist. No. CA2010-12-340, 2011-Ohio-4471, ¶ 16.

{¶ 25} Dillon draws our attention to a model instruction provided in Ohio Jury Instructions 403.01. 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.

---

[6] A juror who finds no negligence by OhioHealth could find either that OhioHealth caused the injury without negligence, or a juror could find that OhioHealth was negligent, but its negligence did not cause the injury.

{¶ 26} The Supreme Court in *O'Connell* specifically addressed the question of whether the same juror rule would prevent the full jury from deciding negligence and proximate causation:

> [W]e are 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. 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.

(Emphasis added; citations omitted.) *Id.* at 235-36. We 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.

{¶ 27} Dillon also argues that the jury instructions given in this case included the same juror rule and, by failing to object, OhioHealth has waived any objection to the application of the same juror rule. However, a review of the jury instructions and interrogatories given to the jurors shows that the actual language given to the jurors in this case does not contain language that the same jurors who find negligence must be those who consider proximate cause.[7] Rather, the interrogatories suggest the opposite, instructing the entire jury "if six or more of the jurors agree on an answer to this Interrogatory [regarding whether Varian was negligent], and that answer is '[y]es,' please proceed to the next Interrogatory." (May 8, 2013 Motion to Stay, exhibit B.) Nonetheless, Dillon argues that when the instructions used the word "you" they were addressing each individual juror and thereby implicitly giving instructions on the same juror rule. Dillon argues that the instruction, "[i]f you find that the defendant was negligent, you must also

---

[7] Instructions or interrogatories that contain such a statement misapply the same juror rule. *See O'Connell* at ¶ 25.

decide whether such negligence proximately caused the Plaintiff's injury," means that only jurors who found negligence could consider proximate cause. (Tr. Vol. XIV, 2158.) While, dicta in a footnote in *O'Connell* suggests that the instructions used in *O'Connell* at the trial level may have been directed individually rather than collectively to the jurors in that case, this is not the holding of *O'Connell* and does not apply to what occurred in the trial court in light of other relevant and longstanding principles of proximate cause. *Id.* at 232, fn. 2.

{¶ 28} Dillon's argument that "you" in the jury instruction and interrogatory is to be interpreted solely in the singular does not work linguistically. The first section devoted to "you" in the Oxford English Dictionary, for instance, is to its use in the plural (such as the entire jury): "Used to address two or more persons, animals, or personified things." *Oxford English Dictionary* (3d Ed.2012). Only at a later point in the entry does the Oxford English Dictionary define the word, "you," as: "Used to address a single person, animal, or personified thing, originally as a mark of respect, deference, or formality but later in general use." *Oxford English Dictionary* (3d Ed.2012). From our reading of the transcript of these proceedings and our review of the trial court's instructions, the judge instructed the jury collectively, not one at a time. We find that OhioHealth was under no duty to object to the instructions based on Dillon's interpretation of the language and, therefore, has not waived objection to the use of the same juror rule.

{¶ 29} Dillon finally argues that the first verdict was defective because all eight jurors signed the general verdict, but only six signed the interrogatory finding no proximate causation. Even if the two jurors who failed to find a lack of proximate causation would not have signed the general verdict form, it was signed by the requisite six other jurors who also found no proximate cause. At best, this was harmless error. *See, e.g., Snapp v. Castlebrook Builders, Inc.*, 3d Dist. No. 17-12-22, 2014-Ohio-163, ¶ 109; *Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc.*, 182 Ohio App.3d 768, 2009-Ohio-2460, ¶ 35 (9th Dist.); *Oliver v. MetroHealth Med. Ctr.*, 8th Dist. No. 70347 (Dec. 12, 1996). Moreover, had this verdict been announced in open court and counsel been provided the opportunity to poll the jurors under Civ.R. 48, questions about this situation could have been resolved.

{¶ 30} When the trial court misapplied the same juror rule under these circumstances and incorrectly discarded the first verdict it committed error. OhioHealth's

briefs imply nefarious secrecy on the part of the trial court and its staff in discarding the first verdict and related interrogatories. We are certain no one involved, including the trial court is happy with the fact that this case must be retried, and based on that belief, we find no basis to proceed further in that vein. Suffice it to say that, had the trial court conferred with counsel for both parties on the first verdict or even just on the same juror rule issue presented by that verdict, we have no doubt that the parties could have quickly researched the same juror rule and contributed to the trial court's decision making process with greater likelihood of the trial's successful conclusion, especially at such a critical juncture of the trial.

B. Dillon's First Assignment of Error and OhioHealth's First and Fourth Assignments of Error – Whether the Trial Court Should Have Ordered a New Trial or Entered Judgment on the First or Second Verdicts

{¶ 31} OhioHealth argues that the trial court had a duty to promptly enter judgment on the first verdict, based on Civ.R. 49(B) and 58. That is, since the same juror rule did not apply and the interrogatories were consistent with the verdict, the trial court should have promptly entered judgment on the defense verdict, and since it did not do so then, it should now. We would be inclined to agree with that assertion, except no verdict is valid (such that judgment could enter) until read in open court and the parties are given the opportunity to poll the jury in accordance with Civ.R. 48, which provides:

> In all civil actions, a jury shall render a verdict upon the concurrence of three-fourths or more of their number. The verdict shall be in writing and signed by each of the jurors concurring therein. All jurors shall then return to court where the judge shall cause the verdict to be read and inquiry made to determine if the verdict is that of three-fourths or more of the jurors. Upon request of either party, the jury shall be polled by asking each juror if the verdict is that of the juror; *if more than one-fourth of the jurors answer in the negative*, or if the verdict in substance is defective, *the jurors must be sent out again for further deliberation. If three-fourths or more of the jurors answer affirmatively, the verdict is complete* and the jury shall be discharged from the case.

(Emphasis added.) In reviewing the record, the trial court skipped the steps of reading the verdict in favor of OhioHealth in open court and offering counsel the opportunity to poll the jury. Once the trial court reviewed the first verdict and interrogatory forms it

moved too quickly and sent out the jurors for further deliberation under Civ.R. 48. Polling the jury could have vetted for the court and parties whether actual or perceived problems existed with the first verdict and related interrogatories. Not only would it have tested the jury's understanding, but also the fairness of the verdict:

> [Polling the jury completes and verifies the jury's verdict.] A jury poll's purpose is to "give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented."

State v. Hessler, 90 Ohio St.3d 108, 121 (2000), quoting *Miranda v. United States*, 255 F.2d 9, 17 (1st Cir.1958). We note these issues arise infrequently, but approximately 70 years ago, the Fifth District also endorsed this reading:

> 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.

Ralston v. Stump, 75 Ohio App. 375, 377 (5th Dist.1944).

{¶ 32} OhioHealth argues that, when interrogatories are consistent with the general verdict (as they were with the first verdict), Civ.R. 49 mandates that the court enter judgment consistent therewith. OhioHealth contends that, were Civ.R. 48 intended to impose a precondition to this command, the authors of the rule would have written Rule 49 to mandate the entry of judgment only when "the provisions of Civ.R. 48 have been satisfied." (OhioHealth's Brief at 46.) We cannot read that interpretation into the application of these rules. The fact that Rule 49 does not specifically reference Rule 48 does not mean that one is excused from obedience to Rule 48 or that, having failed to follow Rule 48, one can simply enter judgment according to Rule 49. For example, in addition to Rule 48's requirements that verdicts be read and verified on the record, Rule 48 requires that verdicts be given by three-fourths of the jury. If a jury of 12 returned a

verdict form that only 1 juror had signed, no court would be justified in thereby entering judgment in blind obedience to the command of Rule 49. *See* Ohio Constitution, Article I, Section 5 ("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.").

{¶ 33} OhioHealth also draws our attention to two cases to persuade us that judgment can be rendered on a verdict not read and verified in open court. *Caserta v. Allstate Ins. Co.*, 10th Dist. No. 84AP-1036 (July 23, 1985); *Tullos v. Motorist Mut. Ins. Co.*, 10th Dist. No. 74AP-34 (June 18, 1974). While this district in *Caserta* in 1985 permitted a trial court to enter judgment on interrogatories notwithstanding a verdict, the case had more to do with inconsistency with the general verdict than with a failure to read the general verdict in open court. The focus on Civ.R. 58, on entry of judgment, presupposed that the verdict had been properly presented in open court, and the opinion does not specify whether the jury's attempt at a verdict (with inconsistent interrogatories) was read in open court and verified before the trial court entered judgment.

{¶ 34} In its second example, *Tullos*, one of the three verdicts rendered by the jury in that case was unverified. However, the facts in *Tullos* differ from the facts of the case under review such that we cannot apply it. In *Tullos*, one plaintiff sought judgment against two defendants. Three verdicts were returned, one in favor of one defendant, one in favor of the plaintiff against a second defendant, and one in favor of the plaintiff against both defendants. It was only the third verdict that was against both defendants that was not read and verified in open court. Under those circumstances, the Tenth District found that the plaintiff had proved his case, with the only confusion among the verdicts concerning the question of from which defendant the plaintiff could recover. Under the read and verified verdicts, the plaintiff could only have recovered against one defendant. Under the unread and unverified verdict, another defendant was exposed to liability. Under those circumstances, this court said that a mistrial resulting in a new trial (wherein plaintiff again would have to prove his entitlement to a recovery) was unjustified. However, even in subsequent, related litigation, judgment did not enter on the verdict that had not been read and verified in open court. *Tullos v. Motorists Mut. Ins. Co.*, 10th Dist. No. 75AP-192 (Dec. 16, 1975).

{¶ 35} OhioHealth has clearly and thoroughly researched this matter, as have we. We cannot recognize a case where a court knowingly ignored or circumvented Civ.R. 48's public reading and verification requirements to enter judgment on an unverified, unpublished verdict. However, we do find an Eighth District case that directly addresses the appropriate consequence when Civ.R. 48 has not been satisfied.

{¶ 36} In *Anselmo v. Davis*, 8th Dist. No. 69794 (May 16, 1996), the Eighth District affirmed the decision of a trial court to declare a mistrial when it was unable to comply with Civ.R. 48. The jury in *Anselmo* returned signed verdict forms and consistent interrogatories. However, before the verdict was read in open court and the jury polled, the court conducted a conference in chambers and temporarily sent the jurors back to the jury room. The jurors mistakenly believed themselves dismissed and left the building. When the trial court reconvened to read the verdict and poll the jury, which one party had requested, the jurors could not be located. On appeal, the plaintiff argued that the court's failure to comply with Civ.R. 49 and 58 was error when it failed to enter judgment on the written verdict, notwithstanding the failure to comply with Civ.R. 48. The Eighth District concluded that:

> [T]he trial court did not abuse its discretion in declaring a mistrial because the court did not have the ability to poll the jury and obtain an oral confirmation of the decision in open court and therefore could not accept the decision as a verdict upon which it could enter judgment. Hence, the court had no alternative other than to declare a mistrial.

A trial court cannot reduce to judgment a written verdict that has not been read in open court and for which the parties have not been offered the opportunity to poll the jury rendering it. Absent the fulfilling of these procedural requirements, a trial court has no alternative but to declare a mistrial.

{¶ 37} In reaching this conclusion, we find no value in distinguishing between whether the ability for a trial court to comply with Civ.R. 48 has been impeded by its own actions (*e.g.* mistaken application of the same juror rule) or by those of others (*e.g.* an entire jury leaving and dispersing under the misunderstanding that the trial was over, such as in *Anselmo*). Under no scenario of due process can we fashion an interpretation that would permit a trial court to dispense with Civ.R. 48, even when the facts of a

situation, potentially place its application in conflict with another civil rule. To demonstrate by example, if Dillon had polled the jury on the first verdict, and half (that is, four of) the jurors had stated that it was not their true verdict, we believe that no one in that scenario would argue for judgment entering on the first verdict, even though Civ.R. 48 had been followed. Civ.R. 49 and Ohio Constitution, Article I, Section 5 would have been abrogated. Nor is such a hypothetical completely fanciful. Less than four and one-half hours after returning the first verdict, the jury returned an opposite verdict. This could be for any number of reasons. It could be because some jurors changed their minds and convinced the other jurors. But it could also be that not all jurors were sanguine about the first verdict in favor of OhioHealth. If we were to command the trial court to enter judgment on the first verdict, we could be vindicating a genuine verdict for OhioHealth, or we could be ordering judgment on an unverified verdict that, had it been subject to polling, may not have stood. Whichever way such a conjecture would turn, there is no doubt that by imposing our will to reinstitute as final the first verdict, we impermissibly would be denying Dillon's right to poll the jury to verify that verdict. This we cannot do, and, thus, we are unable to order judgment on the jury's first verdict.

{¶ 38} Conversely, Dillon argues that "substantial justice" was done by the second verdict, and, thus, it does not matter that OhioHealth perhaps may have won the case as a result of the first verdict. Dillon would have us hold, consistent with Civ.R. 61, that the error of the trial court in discarding the first verdict was harmless because the jury "freely" reached the right result in the end. However, Dillon presumes that the jury, in rendering the second verdict, was not influenced by what came before. The jury reached a defense verdict and the trial judge discarded it. Then the bailiff, upon instruction of the trial court, but without any involvement or knowledge of the parties, gave instructions to the jury off the record. Then, approximately four and one-half hours later, the jury reached the opposite result. Such circumstances are consistent with a jury changing its mind, but they are also consistent with the possibility that the jury might have believed that its first result was wrong and that it needed to reach a different outcome. In short, we do not know what conclusions the jurors drew from what was said to them privately and off the record by the bailiff or how the trial court's rejection of their first verdict not having spoken to them and not having dealt with the matter in open court affected their

judgment. They could have simply believed that they "got it wrong" on the first verdict and therefore reached a different verdict the second time.

{¶ 39} After the existence of the first verdict came to light, the bailiff testified about her off-the-record communications with the jury. She did not believe she influenced them, nor did she admit to having done so. However, her recollection of what she said to the jury was admittedly not verbatim. There is no record of exactly what she said to the jury. We have every confidence that the bailiff did not intend to prejudice the results by talking to the jury, but, because we cannot determine exactly what she said to its members, we cannot find that the jury was uninfluenced by her statements in reaching a diametrically opposite verdict. This danger is exactly why the Ohio Revised Code prohibits bailiffs, among other persons, from communicating with the jury. *See, e.g.*, R.C. 2945.33. When we consider what we can find in the record, we cannot say that substantial justice was done by the jury's second verdict.

{¶ 40} The conundrum in which the trial court found itself was this: if the trial court entered judgment on the first verdict, it violated Civ.R. 48 and, in its most basic analysis, could have ordered a judgment on what was not a true verdict. If the trial court had allowed judgment to stand on the second verdict (which had been read in open court and into the record in compliance with Civ.R. 48), uncertainty had already been created about whether the second verdict was a true verdict under the irregularities of the circumstances. If the first verdict had been afforded the safeguards of Civ.R. 48 and found to be the jury's true verdict, the second verdict would not have occurred and entry of judgment on that verdict would have been impossible. The trial court, in short, found itself in a situation where it could enter judgment on neither verdict and ultimately and correctly did not. Accordingly, we overrule Dillon's single assignment of error and OhioHealth's first and fourth assignments of error. While we are keenly aware of the waste involved in discarding the fruits of a nearly month-long trial, we are constrained both to affirm the trial court's judgment vacating the second verdict in favor of the plaintiff and to decline to enter judgment on the first verdict in favor of the defendant. The case is remanded for a new trial.

C. OhioHealth's Second Assignment of Error – Whether the Trial Court Erred in Striking the Affidavits of Two Jurors

{¶ 41} Because we have fully addressed the same juror rule and Civ.R. 48 issues in our review, we decline to address the question of whether two of three of the jurors' affidavits were appropriately stricken by the trial court. OhioHealth's second assignment of error is rendered moot.

D. OhioHealth's Third Assignment of Error – Whether the Trial Court Erred in Refusing to Direct a Verdict

{¶ 42} OhioHealth urges in its third assignment of error that the trial court erred in overruling motions of OhioHealth for directed verdict. We address each motion separately within our discussion of this third assignment of error.

{¶ 43} The standard of review for a motion for a directed verdict is as follows:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

Civ.R. 50(A)(4). "This standard corresponds to the standard established for summary judgment." *Parrish v. Jones*, 138 Ohio St.3d 23, 2013-Ohio-5224, ¶ 16.

1. *Medical Malpractice Claim*

{¶ 44} OhioHealth argues that neither of the two persons actually engaged in restraining Dillon (Varian and Steven Ison, a paramedic who may have held Dillon's legs) testified to any forceful flexion of Dillon's spine that could have caused the injury. Thus, posits OhioHealth, there was no evidence from which the jury could conclude that Dillon had proven causation. However, contrary to OhioHealth's assertion, there was evidence sufficient that reasonable minds could differ on whether Varian injured Dillon. Ison testified on direct examination that Varian came up behind Dillon and placed him in a full nelson:

> Q. Okay. And what did [Dillon] do?
>
> A. Basically, he just tried to get out [of the hospital].

> Q. Okay. And how did he do that?
>
> A. Oh, he turned around. He was ready to go right back out the door.
>
> Q. Okay. What did you do?
>
> A. Well, as he turned around, you could tell he was going to leave. I mean, you could tell he was ready to go.
>
> I just kind of stopped like this and wasn't going to let him get around me. And at that time [Varian], you know, all I seen -- all I seen was -- was just a quick set of hands and he was done. I mean, he was like this. And I'm like, huh, well, all right.
>
> Then the doctor said, well, let's just put [Dillon] in this bed over here. [Varian] leaned back a little bit. He was going to take [Dillon] over to the bed. I reached down and I grabbed [Dillon] right behind the knees and over top of his thighs, and it was about maybe four or five steps. I can't remember. It was one of the first beds. The beds were all aligned this way. It was one of the first beds that went this way, and he was like right here. So it was right within a couple steps, that I can remember, of that bed, and we laid him into that bed.
>
> * * *
>
> Q. Okay. So when [Varian] came up from behind him and put him in the hold, what kind of hold did he put him in?
>
> A. Well, it was a full nelson.
>
> Q. And when you say a full nelson, I'm going to put up -- can you see this picture --
>
> A. Yeah.
>
> Q. -- that we have up there?
>
> Is that the hold that you're talking about?
>
> A. That would be the hold * * *.

(Tr. Vol. III, 420-23; *see also* Tr. Vol. III, 486-87 "[Varian] grabs [Dillon] and puts him in a full nelson."). Ison also testified on redirect that "[t]he amount of force being applied to [Dillon] was the force needed to hold him where he was at." (Tr. Vol. III, 509-10.) And,

on cross-examination, that Dillon "struggled up until the time the drugs took effect." (Tr. Vol. III, 498.)

{¶ 45} The other paramedic, Joseph West, testified to similar effect on direct:

> Q. So what happened?
>
> A. Well, what happened -- at that point, [Dillon] was trying to get out the ER any way he can, and [Varian] came up, and I think he went to grab him, and I think [Dillon] did a gesture, like, I don't want to be touched, like, don't touch me, Hey, he didn't want anybody to touch him. So everything is starting to escalate real quick. [Ison] is trying to calm [Dillon] down, and at that point [Varian] kind of got behind him and put him in a nelson hold.
>
> Q. A full nelson?
>
> A. A full nelson * * *.

(Tr. Vol. IIIA, 530-31; also describes that Dillon was held and continued to struggle till drugs took effect.)

{¶ 46} Even Varian admitted on cross-examination that, while holding the struggling Dillon, he felt like his arms were breaking with the strain. In addition, several medical personnel testified that a full nelson can cause injury, and one expert testified that this full nelson did cause Dillon's injuries.

{¶ 47} Particularly when construing the issue in the light most favorable to Dillon, the nonmoving party, there was evidence from which a reasonable jury could have concluded that OhioHealth was liable. We affirm the denial of a directed verdict as to this issue.

2. *Negligent Training Claim*

{¶ 48} OhioHealth argues that it should have been given a directed verdict as to Dillon's claims that it negligently failed to train Varian in appropriate holds for restraining patients without injuring them. Specifically, OhioHealth argues that the evidence indisputably shows that it complied with the relevant regulations in order to qualify for government reimbursement. In fact, OhioHealth stresses that the evidence showed that personnel from Healthcare Facilities Accreditation Program ("HFAP") believed Doctor's West was meeting the relevant standards.

{¶ 49} As a preliminary matter, OhioHealth has not pointed us to any authority, nor are we able to locate authority, that stands for the proposition that meeting "CoPs" developed by the "CMS" or being approved through HFAP are a complete defense to negligence. (OhioHealth's Brief at 59.) Meeting or failing such standards would be helpful evidence in a negligent training claim, but it is not clear to us that the common law concept of negligence is the equivalent to what federal regulators have decided is an appropriate level of training for a hospital obtaining Medicare and Medicaid reimbursement. To limit negligence to a government standard, moreover, could create an unfavored and potentially unconstitutional irrebuttable presumption in our interpretation of the law. *See, e.g.*, *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (collecting cases and noting that the Supreme Court has "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment").

{¶ 50} In this regard, the record discloses evidence from which a jury could have found for Dillon on negligent training. For instance, one expert testified on direct as follows:

> Q. * * * What's your understanding of the training that Mr. Varian had regarding appropriate and proper physical restraint techniques for patients?
>
> A. Well, according to him he didn't have any training at all relative to proper physical restraint processes.
>
> Q. What is your understanding from the testimony you've reviewed regarding whether or not staff in the emergency room at Doctors Hospital, including Mr. Varian, nursing staff, and PCAs, whether or not they were participating in physically restraining patients prior to June 20, 2009?
>
> A. Well, my understanding from reviewing the depositions of the staff, working in the emergency department, was that they did it on a regular basis, which didn't surprise me. That's something that any emergency department would do, and so I'm not surprised, and that's what the testimony was, that they are involved in this on a regular basis. Mr. Varian said that what he did was not any bigger of a deal than taking vital signs, I believe.

Q. Do you hold a medical opinion whether or not OhioHealth, doing business as Doctors Hospital, had provided proper training to Frank Varian, Jr. regarding physically restraining patients or taking down patients prior to June 20, 2009?

A. Yes, I do.

Q. Please state that opinion and the basis.

A. My opinion is that he was not given appropriate training to do the things that he was apparently doing on a routine basis, that is, providing physical restraint, including being a primary provider for that restraint, he said, on a regular basis. So, if in fact he was doing that and he had not been trained properly as to how to do that and what not to do in circumstances like that and when he should be involved in that kind of a take-down or a restraint, then they were negligent or they were inappropriate in their training of Mr. Varian.

Q. Dr. Kiehl, why is appropriate training essential for staff and patient safety?

A. Well, I touched on that a little earlier, but I'll restate it, in that training is important in a variety of ways but particularly in patient care, so that we can provide safe environment for patients and for staff and also for appropriate treatment, particularly in situations that have potentials for significant serious problems and consequences.

Like, for instance, in our heart care, time is muscle for the heart. We need to get the patient quickly to the cath lab as soon as we identify it. So everybody is assigned a responsibility; EKGs are gotten; IVs are started; medications are given, so forth. Everybody sort of knows what their role is. And when you are involved in a situation where there are high stakes for staff and for patients, it's important for us to rehearse and go over these types of things, which can be done just by practice on-site. But it also is reinforced, and before you would do it the first time, you would need to have appropriate training so you know what to do and what not to do.

So it's very important, and repeated training is also important because its [sic] ingraining, you know, it's reps, you know, in a sports sense. It's doing the same thing over and over again, so you know what to do without having to think about it too much.

> Q. And how does that repetitive training affect or impact the incident of injury or deaths in a restraint-and-seclusion situation?
>
> A. That's a great question, because again restraint and seclusion is well-known to be high stakes. Patients can get hurt, and staff can get hurt. Unfortunately, in my practice, over the number of years that I've been doing this, I've seen both of those on a number of occasions. We try to learn from those things. Fortunately, over the years, we have accumulated more and more data which help us prevent injury to patients and staff. So our training, then, and policy and procedure follow that.
>
> So we learn from what we've done in the past and what we've experienced in the past codify that to a policy and procedure and regulations in the effort to make sure that patients are not injured and staff are not injured. When it's high stakes, you need to take advantage of training, experience, expertise, so that we can prevent something from happening and then not have to be stuck with trying to undue [sic] the damage that has been done.

(Tr. Vol. V, 748-51.) Based on this testimony, we find the trial court appropriately denied a directed verdict on this issue. Construing the evidence in a manner most favorably to Dillon, a reasonable jury could have found in his favor. We affirm the trial court's denial of a directed verdict on this issue.

3. *Statutory Caps on Damages*

{¶ 51} R.C. 2323.43(A) imposes caps on compensatory non-economic damages in civil actions for medical claims. Specifically, these caps are as follows:

> (2) Except as otherwise provided in division (A)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a civil action under this section to recover damages for injury, death, or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of three hundred fifty thousand dollars for each plaintiff or a maximum of five hundred thousand dollars for each occurrence.
>
> (3) The amount recoverable for noneconomic loss in a civil action under this section may exceed the amount described in

> division (A)(2) of this section but shall not exceed five hundred thousand dollars for each plaintiff or one million dollars for each occurrence if the noneconomic losses of the plaintiff are for either of the following:
>
> (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
>
> (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.

{¶ 52} OhioHealth argues that there was evidence that Dillon could perform life-sustaining activities. Thus, says OhioHealth, Dillon could not show that he was prevented from "being able to independently care for self *and* perform life sustaining activities." (Emphasis added.) R.C. 2323.43(A)(3)(b). Therefore, OhioHealth contends that the lower cap should have summarily applied to Dillon.

{¶ 53} "Life-sustaining activities" is a phrase that remains undefined in the Ohio Revised Code, and case law on that subject is scant. In fact, though courts in several cases discuss the statute, only two appear to discuss "life-sustaining activities" in any direct detail. *Weldon v. Presley*, N.D.Ohio No. 1:10-cv-1077 (Aug. 9, 2011), *report and recommendation adopted* (Aug. 25, 2011); *Williams v. Bausch & Lomb Co.*, S.D.Ohio No. 2:08-cv-910 (June 22, 2010).

{¶ 54} In *Weldon*, the plaintiff suffered whiplash in an automobile collision and, though no anatomical or structural alteration of her spine was visible, she complained of aching, stiffness, and burning of her neck and back. She had surgery to correct whatever physical problems were causing her symptoms, but the surgery apparently did not improve her condition. Nonetheless, the plaintiff reported that her life had changed little as a result of her injuries and that she did the "same old thing. House cleaning, clothes, grocery shopping, bill paying, just the normal routine." She did, however, claim that she could no longer perform some tasks like "running a sweeper, moving furniture around in her home, and performing yard maintenance including weed whacking and cutting the grass." The court found that these circumstances fell short of showing an inability to accomplish "life-sustaining activities."

{¶ 55} In *Williams*, due to an eye disease and a corrective procedure that did not improve the condition as expected, the plaintiff lost most vision in one eye and retained only mediocre vision in the other. The plaintiff in *Williams* was, however, able to pass an eye exam to continue to hold a driver's license and was able to dress herself, brush her teeth, wash her hands, comb her hair, and walk without assistance. This too, said the court, fell short of showing an inability to accomplish "life-sustaining activities."

{¶ 56} In contrast, there was evidence in this case to the effect that Dillon cannot walk any significant distance, cannot dependably make his way into the bathtub without assistance, cannot accomplish even the most basic of homemaking tasks by himself, and cannot even make it to the toilet every time without having accidents. While he can, like the plaintiff in *Williams*, brush his teeth and comb his hair, taking a view of the evidence most favorable to Dillon, reasonable minds could differ about whether Dillon is able to accomplish "life-sustaining activities." The decision of the trial court denying OhioHealth a directed verdict on this issue is affirmed.

{¶ 57} Accordingly, OhioHealth's third assignment of error is overruled.

E. OhioHealth's Fifth Assignment of Error – Whether Issues in the New Trial of this Case Should be Limited

{¶ 58} OhioHealth's fifth assignment of error is that this court, in remanding the case to the trial court for retrial, should limit the issues to be heard. The issues that OhioHealth urges limited are set out separately within our discussion of this assignment of error.

1. *Negligent Training/Punitive Damages and Whether the Case Involves a "Medical Claim"*

{¶ 59} OhioHealth argues that, in the new trial, Dillon should be foreclosed from asserting certain issues that OhioHealth argues were already settled by the jury in the first trial. OhioHealth urges that the first verdict, a favorable but unverified general verdict in OhioHealth's favor, and the second verdict for OhioHealth on negligent training and punitive damages, settled those issues of fact and, in addition, foreclose Dillon from arguing that this case did not involve a "medical claim." OhioHealth argues that these issues should not be retried.

{¶ 60} In support of its claim, OhioHealth maintains that App.R. 12(D), in conjunction with Civ.R. 42(B), authorizes this court to order 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.' " (OhioHealth's Brief at 66-67, quoting *Mast v. Doctor's Hosp. N.*, 46 Ohio St.2d 539, 541 (1976).) We are instructed by *Mast* that issues considered as settled in the first trial must be "free from error." *Id.* After thoroughly reviewing the extensive record and the briefs of the parties to this appeal, we are constrained, under the circumstances, from considering any portion of the trial as settled. Because of the difficulty of reconciling the actions of the trial court with the trial's outcome and its aftermath, we find that no issues can be considered settled and unable to be offered to a different trier of fact for consideration. We elaborate within the context of each verdict apparently reached by the jury.

{¶ 61} The first verdict was discarded sua sponte by the judge as violating the same juror rule. The record does not reflect how the judge obtained the verdict and related interrogatories before they were presented by the jury in open court. But the bailiff recalled the parties' counsel to the courtroom by text message which informed counsel, "We have a verdict. Please come to the courtroom." (R. 672, exhibit No. 1.) When the parties' counsel arrived at the courtroom, the trial court informed counsel that the jury had not reached a verdict and that it simply had a question. Consequently, the first verdict was never read or verified on the record and cannot, consistent with Rule 48, be considered to have settled anything.

{¶ 62} In addition, because of the way the interrogatories were structured and the way the first verdict was reached in finding OhioHealth not liable, the jury, in rendering its first verdict, did not answer the interrogatories or make written findings of fact concerning what they found Varian knew, what his training was, whether OhioHealth was negligent in its training of him, whether Varian was ordered by a physician to restrain Dillon, whether the restraint required expertise, or whether the restraint was necessary and ancillary to his treatment upon admission to the hospital. In short, there is no record that the jury, in rendering the first verdict, even considered the issues OhioHealth asks we declare settled and not subject to further trial on remand.

{¶ 63} While the second verdict does not suffer from the same obvious procedural problems as the first, because it was read and verified in open court, the very genesis of the verdict and the fact that it was not the jury's first verdict leaves its reliability open to

question. But for the fact that the trial court erroneously discarded the first verdict, the verdict for Dillon may not have ever existed. Moreover, the second verdict came after the bailiff, upon instruction by the trial court, but without any involvement or knowledge of the parties, impermissibly (R.C. 2945.33) gave instructions to the jury off the record.

{¶ 64} During the post-trial hearing on May 6, 2013, when the trial court was faced with what to do with two conflicting verdicts by the same jury, the bailiff's non-verbatim testimony about the substance of her off-the-record communications with the jury shed no new light on how to sort it out. Moreover, as we do not have her exact wording, even giving fair consideration to her testimony, it is impossible to rule out the potential that the jury may have reached the second verdict because it collectively perceived it had been instructed that the first verdict was wrong. From any appearance, when a jury apparently reached a complete defense verdict, then the bailiff spoke to its members off the record; then, in a matter of hours and without hearing any additional evidence, they reached a unanimous verdict in favor of the plaintiff for nearly three million dollars, it cannot be said that any factual finding concerning such a verdict is settled and need not be considered by a future fact finder. No outcome pinned on a process lacking the requisite verification and the safeguards of transparency can be relied on as an anchor for future proceedings. Because of this, we cannot say that any part of the jury's two verdicts was "free from error," and, therefore, we cannot allow any part of either of the two verdicts to stand.

2. *Statutory Immunity*

{¶ 65} OhioHealth sought to argue at trial that it was entitled to immunity under R.C. 5122.34. The trial court decided in limine that OhioHealth could not present this theory at trial. It also denied OhioHealth's motion for a directed verdict on the same issue. OhioHealth now argues that the trial court erred in these decisions.

{¶ 66} R.C. 5122.34 confers immunity from potential criminal and civil liability upon persons involved in the involuntary hospitalization of a mental health patient for claims arising from that involuntary hospitalization. R.C. 5122.34; *see also Daniels v. State Dept. of Mental Health*, 10th Dist. No. 85AP-763 (July 31, 1986). However, "[f]or [R.C. 5122.34(A)] immunity to apply, it must first be demonstrated that the statutory scheme was followed." *Ellison v. Univ. Hosp. Mobile Crisis Team*, 108 F.Appx. 224, 227

(6th Cir.2004), citing *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284 (1997), *superseded on other grounds by R.C. § 5122.34(B)*.

{¶ 67} R.C. 5122.10 mandates that, in the event of an emergency hospitalization, a "written statement shall be given to [the] hospital * * * stating the circumstances under which [the] person was taken into custody and the reasons for the [custodian's] * * * belief." R.C. 5122.10. We have previously held that the failure to meet this requirement is fatal to an attempted assertion of immunity. *Barker v. Netcare Corp.*, 147 Ohio App.3d 1, 13-14 (10th Dist.2001). In *Barker*, a woman had agreed to be treated at a mental health facility on the west side of the city of Columbus. *Id.* at 5-6. However, at 3:30 in the morning, she set out on foot from the facility wearing only hospital gowns. *Id.* at 6-7. The police found her and returned her to the facility where she was involuntarily restrained. *Id.* at 8. Despite the fact that a doctor gave oral permission for the restraints, no written statement was prepared in accordance with R.C. 5122.10. *Id.* at 9-10. In *Barker*, we explained our decision that immunity did not apply as follows:

> The trial court found that appellants were not entitled to immunity, pursuant to R.C. 5122.34, since there was no written statement by the Columbus police or [the doctor who ordered Barker restrained] setting forth the basis for taking Barker into custody, as required by R.C. 5122.10. Inasmuch as appellants failed to comply with the requirements of R.C. 5122.10, the court concluded they were not entitled to immunity pursuant to R.C. 5122.34. Appellants argue that the trial court erred in this decision because they are entitled to immunity and they acted in good faith.
>
> "R.C. 5122.34 does not apply to immunize mental health professionals from liability in all contexts." *Estates of Morgan v. Fairfield Family Counseling Ctr.* (1977), 77 Ohio St.3d 284, 304, 673 N.E.2d 1311. The grant of immunity presupposes that affirmative action was taken under R.C. Chapter 5122. *Id.* The preparation of the written statement explaining the basis for the detention "is a requirement for the initiation of an emergency involuntary commitment. The statement ensures the existence of probable cause to support the involuntary commitment of a person who may be mentally ill and in need of court-ordered hospitalization." *In re Miller* (1992), 63 Ohio St.3d 99, 585 N.E.2d 396, paragraph one of the syllabus.
>
> In this instance, no written statement was prepared as required by R.C. 5122.10. While there is some evidence

> appellants questioned Barker's mental health, there is no evidence appellants believed Barker was a mentally ill person subject to hospitalization by court order. Because there is no evidence appellants complied with or were proceeding pursuant to R.C. 5122.10, the trial court did not err in finding that appellants were not entitled to immunity pursuant to R.C. 5122.34.

(Footnote deleted.) *Id*. at 13-14.

{¶ 68} OhioHealth recognizes that the typical Application for Emergency Admission was not completed in this case but quotes a portion of the court's decision in *Barker* in arguing that no written statement is necessary. But, *Barker* stands for the proposition that a written statement must be prepared in conformity with R.C. 5122.10 for immunity to apply. *Id*.

{¶ 69} Alternatively, OhioHealth argues that there is, in fact, a written statement in this case that would satisfy R.C. 5122.10, that being Dillon's hospital chart. This is not a reasonable reading of R.C. 5122.10. A chart is not "given to" the hospital by the person initiating the involuntary hospitalization as is contemplated in section R.C. 5122.10. A chart is also not a separate statement of belief regarding the involuntary hospitalization. *See* R.C. 5122.10.

{¶ 70} We affirm the trial court's decision to grant Dillon's motion in limine preventing OhioHealth from claiming immunity under R.C. 5122.34, since no written statement was prepared as is required by R.C. 5122.10.

3. *Whether Dillon Should be Permitted to Argue, in the New Trial, That Negligence in the Intensive Care Unit (Rather Than Restraint in the Emergency Room) Caused His Injuries*

{¶ 71} OhioHealth argues that the trial court should have granted it a directed verdict on the issue of whether it was liable for injuries Dillon may have sustained in the Intensive Care Unit ("ICU") and that different jury instructions should have been given to take account of this issue. Additionally, OhioHealth claims that Dillon should not be permitted to argue in a new trial that OhioHealth is liable for negligence that may have occurred in the ICU.

{¶ 72} OhioHealth admits that Dillon did not argue that his injury resulted from ICU negligence. OhioHealth argued that, while in the ICU, Dillon injured himself. In response, Dillon suggested that, even if that were the case, the ICU staff should, perhaps,

have done a better job of ensuring he was fully restrained. In remanding this case for a new trial, we recognize that the parties may present their cases differently than in the first trial. Whether OhioHealth argues it is not negligent for its actions in the ICU is up to OhioHealth. If, because of OhioHealth's argument in the first trial, Dillon's counsel changes trial strategy in the second trial and wishes to introduce more or other evidence on the issue, OhioHealth can seek relief from the trial court. This issue is not ripe for decision at this time. *See, e.g., State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 89 (1998) ("judicial machinery should be conserved for problems which are real or present and imminent, not * * * problems which are abstract or hypothetical or remote").

4. *Whether the Trial Court Should, in the New Trial, Give a Different Standard of Care Instruction or Different Comparative Negligence Instruction*

{¶ 73} OhioHealth also asks that we order the trial court to give different jury instructions on remand. We are unable to do so because of the same ripeness deficit. *Id. a*t 89. On remand, the parties may try the case differently. The trial court may find different pretrial arguments persuasive and, without interference from us, use different jury instructions. The parties could settle the case without a trial. The question of jury instructions on remand and retrial is not ripe to be addressed on appeal.[8]

{¶ 74} For the reasons stated, we overrule OhioHealth's fifth assignment of error except to the extent that some issues raised thereunder are unripe for review. In remanding this case to the trial court for retrial, we decline to limit any issues for trial as having been decided by a previous trier of fact; we affirm the trial court's ruling in limine on OhioHealth's assertion of immunity pursuant to R.C. 5122.34; we decline to limit the presentation of evidence on whether OhioHealth was negligent in its treatment of Dillon in the ICU, finding it not to be ripe for review; and we decline, again for reasons of ripeness, to advise the parties of proper jury instructions in the retrial of this case.

---

[8] In its response brief, OhioHealth argues, for the first time before this court, that a rebuttal witness should not have been excluded by the trial court. Not only was this not part of an assignment of error in OhioHealth's brief as contemplated by App.R. 12(A)(2) and 16(A)(3) and (4), it is also unripe. *See Elyria Foundry* at 89. We decline to consider this argument.

IV. CONCLUSION

{¶ 75} Accordingly, we overrule both parties' assignments of error except to the extent that they are rendered moot or attempted to raise unripe issues. We find the trial below to have been of such character in its irregularity to warrant a completely new trial as to all claims. We affirm the trial court's ruling in limine preventing OhioHealth's assertion of immunity and its vacating of the judgment in favor of the plaintiff. We decline to rule on issues that are moot or not yet ripe and remand this matter for a new trial on all claims and issues.

Judgment affirmed.

TYACK and LUPER SCHUSTER, JJ., concur.