[Cite as *Hild v. Samaritan Health Partner*, 2023-Ohio-2408.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JANET HILD, ADMIN. OF THE ESTATE OF SCOTT BOLDMAN, DECEASED	:	C.A. No. 29652
Appellant	:	Trial Court Case No. 2018 CV 05710
v.	:	(Civil Appeal from Common Pleas Court)
SAMARITAN HEALTH PARTNER, et al.	:	
Appellees		

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O P I N I O N

Rendered on July 14, 2023

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PATRICK K. ADKINSON and DOUGLAS D. BRANNON, Attorneys for Appellant

JOHN B. WELCH, GERALD J. TODARO, JOHN F. HAVILAND and JAREN A. HARDESTY, Attorneys for Appellees

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WELBAUM, P.J.

{¶ 1} In this medical malpractice case, Plaintiff-Appellant, Janet Hild, as Administrator of the Estate of Scott Boldman, deceased ("Hild") appeals from a judgment denying Hild's motion for a new trial. According to Hild, the trial court erred in submitting jury instructions and interrogatories that wrongly applied the "same juror" rule to the issue

of causation. Hild further contends that the court erred in finding that its error in submitting these instructions and interrogatories was harmless and, therefore, in denying Hild's motion for a new trial. Hild's position is that prohibiting a full jury from deliberating on both negligence and proximate causation denied her right to a jury trial.

{¶ 2} In response, Defendants-Appellees, Samaritan Health Partners, Good Samaritan Hospital, Premier Health Partners, Vincent Phillips, M.D., Sandra Ward, CRNA, and Consolidated Anesthesiologists, Inc. (collectively, "Appellees") contend that Hild forfeited any alleged error and that even if the court erred in instructing the jury, any error was harmless.

{¶ 3} For the reasons discussed below, we conclude that Hild sufficiently objected to the trial court's instructions and interrogatories. Furthermore, the trial court erred (as it conceded) by including jury instructions and interrogatories which stated that jurors who disagreed with a finding that defendant Sandra Ward was negligent were not qualified to participate in deliberations on proximate cause. The trial court found its error harmless, because the same six jurors who found Ward negligent also signed an interrogatory finding that Ward's negligence did not proximately cause Boldman's injuries and death. However, this error was not harmless, because parties have a constitutional right to have a full jury determine all essential elements of their claims, and forbidding jurors who do not find a breach of duty from participating in proximate cause deliberations violates this right.

{¶ 4} Moreover, the "same juror" rule, which provides that a verdict is invalid unless the same jurors agree on all issues, does not apply here and does not require a different

result. The Supreme Court of Ohio adopted the "same juror" rule in the context of a comparative negligence case, and the major principle behind the rule is that deciding if a party is casually negligent is not independent from apportioning the degree of fault for that negligence. Therefore, if a juror who disagrees that a defendant was casually negligent also signs a verdict assessing fault to the defendant, the verdicts are inconsistent.

{¶ 5} From this rule, Appellees extrapolate the principle that if verdicts (or interrogatory answers, as here) are consistent, any error in allowing deliberation must be harmless. This is incorrect, however. Appellate courts have declined to apply the "same juror" rule in other situations, including those that do not involve comparative negligence or that involve separate and independent issues. This latter type of situation includes verdicts involving liability and damages (even in comparative negligence cases), because inquiries about liability and damages are separate and independent, not interdependent. Likewise, negligence (or breach of a duty of care) and proximate cause are separate and independent inquiries. Thus, jurors who find, for example, that a party is not negligent can still participate in deciding issues of proximate cause. And again, precluding these jurors from participating deprives a party of the right to a full jury trial.

{¶ 6} Accordingly, the trial court's error was prejudicial, and the court erred in denying Hild's motion for new trial. Because App.R. 12(D), in conjunction with Civ.R. 42(B), authorize courts of appeals to order retrial of only those issues, claims, or defenses in the original trial which resulted in prejudicial error, and to let issues tried free from error stand, the trial court's judgment denying a new trial will be reversed in part and affirmed

in part. The denial of a new trial regarding the negligence of Sandra Ward, CRNA, will be affirmed, because six jurors signed an interrogatory finding that Ward was negligent. This occurred before the two jurors who disagreed were prohibited from further participation.

{¶ 7} In all other respects, the judgment denying the motion for a new trial will be reversed, and this matter will be remanded to the trial court for a new trial. On remand, the remaining issues to be submitted to the jury will be: (1) whether Ward's negligence directly and proximately caused Scott Boldman's injury and death; (2) whether Ward was under the direction and control of Dr. Phillips; (3) whether Good Samaritan was responsible under the doctrine of agency by estoppel; and (4) the total amount of compensatory damages, if any, caused by Ward's negligence. All the defendants (including Consolidated Anesthesiologists, Inc., Ward's employer) will remain as defendants for purposes of the new trial.

I. Facts and Course of Proceedings

{¶ 8} On December 11, 2018, Hild filed a medical malpractice and wrongful death action against Samaritan Health Partners, Good Samaritan Hospital, Premier Health Partners, Vincent Phillips, M.D., Robert Custer, M.D., Sandra Ward, CRNA, Consolidated Anesthesiologists, Inc., and Heather McKinley, D.O. The action arose from medical treatment provided to Scott Boldman in late December 2017, which allegedly caused his death on January 1, 2018. The Ohio Department of Job & Family Services Tort Recovery (ODJFS) was also included as a defendant as it might have a claim in the case,

and Hild asked for a declaration that ODJFS did not have a subrogation claim.

{¶ 9} On January 11, 2019, ODJFS filed an answer and cross-claim seeking recovery against the other defendants for the cost of services provided to Boldman. On the same day, Consolidated Anesthesiologists, Custer, Phillips, and Ward (collectively "Consolidated") filed an answer to the complaint. They then filed an answer to ODJFS's cross-claim on January 16, 2019. On January 31, 2019, McKinley filed a notice of removal to the United States District Court.

{¶ 10} On February 11, 2019, Samaritan Health Partners, Good Samaritan Hospital, Premier Health Partners, and McKinley (collectively "Good Samaritan") filed an answer to the complaint and an answer to the ODJFS cross-claim. On June 27, 2019, Hild filed a notice indicating that the federal district court had remanded the case to state court.[1]

{¶ 11} Previously, on May 16, 2019, Hild had filed a motion in limine in the state action, which asked the court to exclude evidence of healthcare reimbursements based on amendments to R.C. 2317.45 that became effective on March 20, 2019. The court granted the motion on August 29, 2021, and on September 20, 2021, denied

[1] Before remand, the United States of America filed a notice in the federal district court case, substituting itself in place of McKinley, as she was a United States Air Force employee at the time of the alleged negligence. The United States then filed a motion to dismiss Hild's claims, because Hild had "failed to file an administrative claim with the USAF relating to Dr. McKinley's treatment of the Decedent at Good Samaritan Hospital, as required by the Federal Tort Claims Act." *Hild, as Admin. of the Estate of Scott Boldman v. Samaritan Health Partners*, S.D. Ohio No. 3:19-cv-00025-WHR, 2019 WL 1319467 (Feb. 7, 2019), citing 28 U.S.C. 2675. Subsequently, the parties stipulated to the dismissal of the United States as a party pursuant to Fed.R.Civ.P. 41(a)(1)(A)(ii), without prejudice and with the right to refile within one year of the date of dismissal. Stipulation of Dismissal (Feb. 26, 2019). Thereafter, McKinley was no longer part of the state case.

Consolidated's motion for reconsideration. The court noted that the motion for reconsideration could be renewed at trial.

{¶ 12} On July 17, 2020, the court had set a trial date for October 25, 2021. Consolidated then filed a motion on October 12, 2021, asking the court to allow substitution of an expert witness and to continue the trial date. After holding a hearing, the court overruled the motion on October 19, 2021. However, the court did vacate the trial date and set a new trial date for January 24, 2022. On January 21, 2022, Hild dismissed her claims against Dr. Custer, without prejudice. The jury trial then took place as scheduled.

{¶ 13} Although a full trial transcript has not been filed for purposes of appeal, the parties have provided some facts about the case as context. Essentially, Scott Boldman was a 37-year old man who went to Good Samaritan North on Christmas Eve 2017 after experiencing right upper quadrant pain. At the time, Boldman was 5'8" tall and weighed 350 pounds. Besides the pain, Boldman's diagnoses included: "Type I Diabetes, obstructive sleep apnea, one pack a day smoker, hypertension, and unrelenting lymphedema in both lower extremities, with statis dermatitis and peripheral venous hypertension." *See* Hild Brief, p. 4; Consolidated Brief, p. 4.

{¶ 14} That evening, Boldman was transferred to the main facility of Good Samaritan Hospital for an emergency appendectomy, which took place at around 7:30 p.m. A laparoscopic appendectomy was performed, with general anesthesia administered by Sandra Ward, CRNA, under the supervision of Dr. Phillips. The surgery itself was uneventful. *Id*. After the surgery, Dr. Phillips left the operating room and

Ward, a circulating nurse, a scrub technician, and a surgery resident remained in the operating room with Boldman. Post-operatively, Boldman suddenly emerged from anesthesia and became combative. Hild Brief at p. 4-5; Consolidated Brief at p. 4; Good Samaritan Brief, p. 1.

{¶ 15} The parties differ on what occurred thereafter. According to Consolidated, "as Boldman was emerging from anesthesia, he experienced post-operative delirium, he self-extubated, struggled and his heart stopped because of overwhelming demand ischemia where the oxygen demands of the heart exceeds blood supply." Consolidated Brief at p. 4. Hild's theory was that "the incorrect handling of emergence from anesthesia by the CRNA caused respiratory compromise, patient combativeness, extubation and a cardiopulmonary arrest, for which resuscitative efforts were unsuccessful, resulting in severe brain damage and ultimately death." Hild Brief at p. 6.

{¶ 16} The jury found in favor of Good Samaritan, Phillips, Ward, and Consolidated on Hild's claims. Further, while the jury found that Ward had been negligent in Boldman's care and treatment, it also concluded that Ward's negligence had not proximately caused injury and death to Boldman. The court entered a final judgment in favor of the defendants and against Hild on February 15, 2022.

{¶ 17} On February 28, 2022, Hild filed a motion for new trial. The court denied the motion on November 7, 2022. Hild timely appealed from the judgment denying the motion for a new trial.

II. "Same Juror" Rule

{¶ 18} Because Hild's three assignments of error are intertwined, we will consider them together. Hild's three assignments of error states:

> The Trial Court Erred in Submitting to the Jury, Over Plaintiff-Appellant's Timely Objection, Instructions and Interrogatories That Wrongly Applied the "Same Juror" Rule to the Issue of Causation, Thereby Depriving Plaintiff-Appellant her Substantial Right to the Full Jury Deliberating on and Deciding the Issue of Causation.
>
> The Trial Court Erred in Overruling Plaintiff's Motion for a New Trial, Given the Court's Error at Trial in Applying the "Same Juror" Rule to the Issue of Causation, Thereby Depriving Plaintiff-Appellant Her Substantial Right to the Full Jury Deliberating on and Deciding the Issue of Causation.
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> The Trial Court Erred in Overruling Plaintiff's Motion for a New Trial, Given the Court's Error at Trial in Applying the "Same Juror" Rule to the Issue of Causation, Thereby Depriving Plaintiff-Appellant Her Substantial Right to the Full Jury Deliberating on and Deciding the Issue of Causation.

{¶ 19} Under these assignments of error, Hild contends that the trial court erroneously applied the "same juror" rule in its jury instructions and improperly deprived her of a substantial right to have a full jury decide issues of causation. Hild did not appeal from the judgment entered on the jury verdict but appealed from the denial of her motion for new trial. Hild's argument concerning the new trial denial is the same but is directed to the fact that the court erred in denying her motion for new trial and in finding that any error in the instructions was harmless. Thus, all of Hild's arguments involve the same

issues.

{¶ 20} In response, Good Samaritan argues that Hild forfeited any error by failing to meaningfully object in the trial court. Good Samaritan further asserts that even if any error occurred, it was harmless, because the same six jurors who found Ward negligent also found that her negligence did not proximately cause Boldman's injury or death. According to Good Samaritan, it would be "absurd" to suggest that the two jurors who failed to find negligence would then turn around and conclude that proximate cause existed. Good Samaritan Brief at p. 6. Consolidated echoes these arguments and also contends that the trial court did not abuse its discretion by giving the instructions because no case law or statute definitively holds that applying the "same juror" rule to negligence and causation is an error of law. Consolidated Brief at p. 7-9. Before we consider these points, we will discuss the applicable review standards.

A. Standards of Review

{¶ 21} Hild's motion for new trial was brought under Civ.R. 59(A)(1), (7), and (9). Cv.R. 59(A) provides, in relevant part, that:

> A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

* * *

(7) The judgment is contrary to law; [or]

* * *

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

{¶ 22} "Our review of decisions on new trial motions depends on whether the issue is one of law or is a matter over which the trial court exercises discretion. On matters of law, we review de novo, and on discretionary issues, we consider whether the trial court abused its discretion." *Doss v. Doss*, 2d Dist. Champaign No. 2021-CA-28, 2022-Ohio-1339, ¶ 31, quoting *Rohde v. Farmer*, 23 Ohio St.2d 82, 83, 262 N.E.2d 685 (1970), paragraphs one and two of the syllabus.

{¶ 23} Review under Civ.R. 59(A)(1) is for abuse of discretion. *E.g., Koch v. Rist*, 89 Ohio St.3d 250, 252, 730 N.E.2d 963 (2000). This type of irregularity in the court's proceedings involves "any matter 'as constitutes a departure from the due, orderly and established mode of proceeding therein, where a party, with no fault on his part, has been deprived of some right or benefit otherwise available to him.' " *Meyer v. Srivastava*, 141 Ohio App.3d 662, 667, 752 N.E.2d 1011 (2d Dist.2001), quoting *Sherwin-Williams Co. v. Globe Rutgers Fire Ins. Co*., 20 Ohio C.C. (N.S.) 151, 154, 31 Ohio C.D. 248, 1912 WL 768 (1912). An example of this would be where an alternate juror sat through the entire jury deliberation. In that situation, the Supreme Court of Ohio held that the trial court did not abuse its discretion in granting a mistrial. *Koch* at 250.

{¶ 24} The case before us does not involve such an irregularity in the court's

proceedings; it simply concerns a trial court's allegedly erroneous jury instruction. As a result, Civ.R. 59(A)(1) does not apply.

{¶ 25} The remaining grounds asserted by Hild were Civ.R. 59(A)(7) and (9). Rulings on these grounds are reviewed on a de novo basis. *Hoke v. Miami Valley Hosp*., 2d Dist. Montgomery No. 28462, 2020-Ohio-3387, ¶ 29, citing *Harrison v. Horizon Women's Healthcare, LLC*, 2d Dist. Montgomery No. 28154, 2019-Ohio-3528, ¶ 11. *See also Wildenthaler v. Galion Community Hosp*., 2019-Ohio-4951, 137 N.E.3d 161, ¶ 26 (10th Dist.), quoting *State v. Akbari*, 10th Dist. Franklin No. 13AP-319, 2013-Ohio-5709, ¶ 7 (de novo review applies to some parts of Civ.R. 59(A) because " 'no court has the authority, within its discretion, to commit an error of law' "). We have stressed for many years that "[n]o court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law." *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, 932 N.E.2d 345, ¶ 26 (2d Dist.).

{¶ 26} "In de novo review, we independently review trial court decisions and accord them no deference." *Coldly v. Fuyao Glass Am., Inc*., 2022-Ohio-1960, 191 N.E.3d 514, ¶ 9 (2d Dist.), citing *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs*., 121 Ohio App.3d 188, 192, 699 N.E.2d 534 (8th Dist.1997). This will be the standard we apply.

B. Forfeiture of Error

{¶ 27} Appellees argue that Hild forfeited any error by failing to object or to properly object at the trial court level. In this regard, Civ.R. 51(A) states that "[o]n appeal, a party

may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." An exception exists, however, which allows courts to take notice of plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209, 436 N.E.2d 1001 (1982), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. "A 'plain error' is obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse [e]ffect on the character and public confidence in judicial proceedings." *Id*. *Accord Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997).

{¶ 28} According to Appellees, forfeiture of the error is proper because a lengthy conference was held on jury instructions and interrogatories, and Hild failed to object. Instead, Hild objected while the judge was reading the jury instructions and, even then, only in a half-hearted manner.

{¶ 29} In this case, the parties submitted proposed jury instructions. Before trial, Good Samaritan filed proposed jury instructions, including a number of interrogatories for the jury to answer. Interrogatory "G," which related to negligence claims against Sandra Ward, instructed the jurors that:

> If the answer of six or more jurors to Interrogatory G is "Yes," move to Interrogatory H. Only those jurors who answered Yes to Interrogatory G are qualified to participate in answering Interrogatory H.

Defendants Samaritan Health Partners, Good Samaritan Hospital, and Premier Health Partners' Proposed Jury Instructions (Oct. 12, 2021), p. 43. Interrogatory "H" instructed jurors to detail how Ward was negligent and had the same instruction on whether jurors were qualified to participate further. *Id*. at p. 44.[2]

{¶ 30} Consolidated also filed various standard jury instructions and a set of proposed interrogatories. As pertinent here, interrogatories 4, 5, and 6 dealt with whether Sandra Ward was negligent in Boldman's care and treatment, the manner in which Ward was negligent, and whether Ward's negligence proximately caused injury or death to Boldman. *See* Proposed Jury Interrogatories on Behalf of Defendants Consolidated Anesthesiologists, Inc., Robert Custer, M.D., Vincent Phillips, M.D., and Sandra Ward, CRNA (Oct. 21, 2021), p. 5-7. However, none of these interrogatories contained any instructions prohibiting jurors who disagreed with a negligence finding from participating in further deliberation.

{¶ 31} Hild then filed proposed jury instructions and interrogatories and verdict forms on December 28, 2021. Hild's interrogatories and verdict forms included interrogatories 1, 2, and 3, which pertained to Ward's negligence, the ways in which Ward had been negligent, and whether Ward's negligence had caused proximate injury or death to Boldman. Plaintiff's Proposed Jury Interrogatories and Verdict Form, p. 2-4. Like

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[2] Interrogatory H had a typographical error, as it states that only jurors who answer "yes" to Interrogatory "D" are qualified to go on and consider Interrogatory I, which involved whether Ward's negligent acts proximately caused death or injury to Boldman. Interrogatory D involved another defendant, Dr. Custer, who was dismissed from the case before trial. The correct reference would have been that a "yes" answer to Interrogatory "H" would qualify jurors to participate in considering Interrogatory I. Good Samaritan Proposed Jury Instructions at p. 44 and 45. This typo has no impact on our discussion.

Consolidated, Hild did not mention any prohibition on further participation of jurors who did not agree to a finding of negligence.

{¶ 32} During trial, Hild filed further proposed jury interrogatories. While these additional instructions particularized items relating to Ward's alleged negligence, like failing to maintain Boldman's airway, they did not prohibit jurors from deliberating if they failed to join in a negligence finding. *See* Plaintiff's Proposed Jury Interrogatories (Feb. 1, 2022). Finally, Hild filed supplemental proposed jury instructions during trial, but they did not relate to anything pertinent to this appeal. *See* Plaintiff's Proposed Supplemental Jury Instructions (Feb. 1, 2022).

{¶ 33} Having reviewed the transcript, we note that when the parties were supposed to be talking about jury instructions, the bulk of the discussion instead concerned whether Hild would be allowed to amend the complaint to allege respondeat superior and negligent supervision claims against Dr. Phillips. *See* Transcript of Proceedings ("Tr."), at 76-86 and 88-93. In fact, the court sent the jury home on February 1, 2022, and instructed the parties to provide authority regarding whether Hild could amend the complaint under Civ.R. 15(B) to conform to the evidence. *Id*. at 87-93. The parties then did so.

{¶ 34} Another major discussion at that point was how to handle the issue of reimbursement for medical expenses, given the court's prior ruling and the defense's failure (in light of the ruling) to offer evidence about what payments had actually been made. The court delayed ruling on this issue. *Id*. at 93-98. After this discussion, the court and parties began to consider interrogatories that had just been proposed (not the

ones in question now), and then went off the record. *Id*. at 98-101. That was the end of any recorded discussion until the next day, which was the last day of trial.

{¶ 35} When the trial convened the next morning, further discussion occurred outside the jury's presence. The court granted Hild's motion to amend, and the parties then discussed instructions related to agency and respondeat superior. *Id*. at 106-111. The remaining topics were the reimbursement issue (*id.* at 112-117); a foreseeability instruction (*id*. at 120-121); admission of exhibits (*id*. at 123-128) and a life-expectancy instruction (*id*. at 129). At that point, the court went off the record and subsequently said, "Okay. We have gone through the jury instructions as well as the general – as well as the interrogatories." *Id*. at 129. The court then asked for objections, starting with the Plaintiff, but again went off the record. *Id*. The next event on the record was Hild's closing argument. *Id.* at 130.

{¶ 36} After Hild's closing argument, some discussion did occur concerning the instructions, verdict forms, and interrogatories. *Id*. at 160-178. Notably, the parties did not get the final version of the interrogatories until that morning. *Id*. at 152. The main topics were language about Dr. Phillip's control of the CRNA Ward (resulting in amendment of Interrogatory D to add language); a defense objection to denial of an objection on hindsight; an addition about life expectancy; the reimbursement issue; and some non-substantive clarifications. *Id*. at 160-178. Thus, the major preoccupations during the total discussion of instructions and interrogatories were the complaint's amendment, instructions related to the amendment, and the reimbursement issue. Consequently, Appellees' focus on the *length* of the instruction discussion is misplaced

and overstated.

{¶ 37} In any event, Hild did object to the interrogatories when the court was reading the instructions to the jury. *Id*. at 243-244. This occurred when the trial court had just finished reading the first part of Interrogatory A. *Id*. at 243. At that point, an objection was made and the attorney asked to approach. The content of most of the sidebar discussion is indiscernible, and the speakers are not identified in the transcript. However, the objecting party (clearly Hild's counsel based on a later objection) said, "I'm pretty sure this is wrong. (Indiscernible). (Indiscernible) It says, only (Indiscernible) can participate in all interrogatories. * * * one of them says you're not qualified to participate –." *Id*. at 243-244. After some discussion (which again is mostly indiscernible), the court *overruled the objection* and said the interrogatory instruction would be left as it was. *Id*. at 244. The court then instructed the jury that "Only those jurors who answered 'yes' to Interrogatory A [the negligence interrogatory] are qualified to participate in answering Interrogatory B." *Id*. at 245.

{¶ 38} After the judge finished instructing the jury, Hild's counsel again objected. The following exchange then occurred:

> MR. ADKINSON [Hild's Counsel]: My concern is that Interrogatory B is the one about (Indiscernible) the narrative, so A is negligence, the CRNA, so if you assume for the sake of this argument that the jury says yes, then they move to Number 2, and if the jury fills that out at the bottom it says only those of you fill this – filled A out, you go to C, and I'm pretty sure that's incorrect.

I think it's called the same juror rule, and amazingly enough even though they may not have found someone negligent they could still participate in the discussion on causation. Always thought, found that to be a little bit weird, but I'm pretty sure the same juror rule says that.

So that someone – someone could not agree with the negligence interrogatory, but they might be agreeing to the rest.

I don't know that it's a big deal, but –

THE COURT: Yeah, I don't –

MR. ADKINSON: -- I don't think the rest of the interrogatory instructions, I looked at them quickly, they seemed okay, but this one concerns me.

THE COURT: Mr. Welch, Mr. Haviland, any thoughts on that? Mr. Todaro?

MR. TODARO [Consolidated's counsel]: (Indiscernible).

MR. WELCH [Consolidated's counsel]: Same juror rule for damages. I'm not sure about negligence and causation.

MR. ADKINSON: And like I told the judge, the article that I have kind of goes through it all is at home, so I can't give you a citation.

THE JUDGE: Okay. Well, at this point I'll leave it alone. I'll shoot for the best and hope there isn't any confusion at this point.

Tr. at 258-259.

{¶ 39} Based on the above discussion, we reject the claim that Hild forfeited any

claim of error. While Hild could have objected earlier, Civ.R. 51(A) only requires that parties object to instructions before the jury retires, and that was done. Furthermore, from the transcript, it is apparent that the jury instruction process was somewhat chaotic, continuing even after Hild's closing argument, and that the parties were preoccupied with other issues. Accordingly, we will employ the usual method of de novo review rather than reviewing only for plain error.

C. De Novo Analysis

{¶ 40} The jury interrogatories that were answered included "A," "B," and "C" and covered: (1) whether Ward was negligent in her care and treatment of Boldman (Interrogatory A); (2) the way in which Ward was negligent (Interrogatory B); and (3) whether Ward's negligence "directly and proximately caused the injury and death" of Boldman (Interrogatory C). These interrogatories were the same, in pertinent part, as the ones that Good Samaritan proposed. Interrogatory A stated that "If the answer of six or more jurors to Interrogatory A is 'Yes,' move to Interrogatory B. Only those jurors who answered Yes to Interrogatory A are qualified to participate in answering Interrogatory B." Interrogatory B contained the same prohibition, indicating that jurors who had not answered yes to Interrogatory A were not qualified to consider Interrogatory C. *See* Interrogatory A and Interrogatory B (both filed on Feb. 7, 2022).

{¶ 41} Six of the eight jurors signed yes to Interrogatory A. The two jurors who did not sign were not allowed to participate in considering the ways in which Ward may have been negligent (Interrogatory B) or whether her negligence proximately caused

Boldman's injury and death (Interrogatory C). The same six jurors who found that Ward had been negligent and detailed her negligence also found that the negligence had not proximately caused Boldman's injury and death. *Id*. *See also* Tr. at 267-268.

{¶ 42} Hild filed a motion for new trial, contending, as she does here, that the trial court erred in including the disqualifying language in the interrogatories. In its decision overruling the motion, the court agreed "with Hild that the interrogatories were flawed in that they required only the jurors who found negligence to participate in the determination of proximate cause." Final and Appealable Decision, Order, and Entry Denying Plaintiff's Motion for a New Trial (Nov. 7, 2022), p. 9. However, the court also found that Hild's substantial rights had not been affected because it could not say that "without the error, the jury would not have arrived at the same verdict." *Id*.

{¶ 43} In this regard, the court remarked that:

> Samaritan Defendants and Anesthesiologist Defendants argue that the trial court was able to determine the outcome intended by the jury based on the general verdicts executed by the jury and announced in open court. The Court agrees. The jury was able to reach a majority consensus on the interrogatories for negligence and proximate cause. Six of the eight jurors found that Defendant was negligent and those same six jurors determined that the negligence was not the proximate cause of death. As a result, there is no inconsistency between the interrogatories and the general verdict. Hild's argument that had the two jurors who did not find Defendant negligent participated in the determination of proximate cause, the jury's

> conclusion regarding proximate cause may have been different is speculative at best. Such an argument is far too speculative to say the jury's verdict would have been different. As previously stated, there is no inconsistency between the interrogatories and the general verdict and the jury was able to reach a majority consensus on the interrogatories for negligence and proximate cause. Six of the eight jurors found that Defendant was negligent, and those same six jurors determined that the negligence was not the proximate cause of death. The Court cannot reasonably say with any certainty that those two jurors would have changed the decision of the other six jurors had they participated, and therefore, the jury would not have arrived at the same verdict.

Order Denying New Trial at p. 9-10.

{¶ 44} As noted, Hild argues that her constitutional rights to a jury trial were violated. Under the Ohio Constitution, " '[t]he 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." *O'Connell v. Chesapeake & Ohio RR. Co.*, 58 Ohio St.3d 226, 232, 569 N.E.2d 889 (1991), quoting Ohio Constitution, Article I, Section 5. "Furthermore, Civ.R. 48 provides that '[i]n all civil actions, a jury shall render a verdict upon the concurrence of three-fourths or more of their number.' " *Id*.

{¶ 45} The parties agree that the Supreme Court of Ohio adopted the "same juror" rule in *O'Connell,* a comparative negligence case, but they disagree as to its potential application to cases like the one before us. The parties also disagree concerning

whether any error was harmless. After consideration, we conclude that the trial court erred (as it admitted), and that the error did prejudice Hild.

{¶ 46} The plaintiff in *O'Connell* was injured when her car collided with a parked flatbed car of a train that blocked a highway. The railroad crossing was located in a rural area and did not have any flashing lights or gates; it did have "wooden crossbuck signs," "a yellow railroad advance warning sign posted in the general vicinity before the crossing," and "diagonal lines with the letters R.R." "on the pavement in white reflectorized paint." *Id*. at 226. The flatbed car was painted black, there were no buildings or streetlights nearby, and the accident occurred at around 10:50 p.m. *Id*. The flatbed and other railroad cars had been uncoupled because the train yard was full, and a brakeman with a light had been waving cars through the crossing. When permission was given to enter the yard, the cars were recoupled, the flatbed car was left blocking the highway, and the brakeman walked up to the front of the train. At that point, the plaintiff's car collided with the flatbed car, and her car was then dragged forward with the train. As a result, the plaintiff sustained serious injuries. *Id*. at 226-227.

{¶ 47} After the plaintiff filed a complaint against the railroad alleging negligence and willful or wanton misconduct, the case was tried before a jury of eight. Counsel agreed that instead of returning a general verdict, the jury would answer six interrogatories. The jury found the plaintiff and railroad both negligent and that their negligence caused the injuries. However, because the jury assessed 70% of the negligence to plaintiff and 30% to the railroad, the trial court entered judgment for the railroad. *Id.* at 228.

{¶ 48} After examining the interrogatory answers and signatures, plaintiff's counsel discovered that one juror had failed to sign any interrogatories finding either side negligent and had not signed interrogatories finding proximate cause. However, this juror did sign the interrogatory apportioning fault. *Id*. In addition, another juror had failed to sign an interrogatory finding the railroad negligent but signed an interrogatory apportioning the railroad with 30% of the fault. *Id.*

{¶ 49} The plaintiff filed a motion for a new trial, which was denied. The court of appeals then affirmed the judgment, finding, among other things, that "there were no major inconsistencies among the jury's answers to the interrogatories that would have prevented the trial court from entering judgment in favor of the railroad." *Id*. On further appeal, the Supreme Court of Ohio reversed the judgment. *Id*. at 238.

{¶ 50} In considering the case, the Supreme Court observed that it had never decided the issue before it and that no statute applied. The court also remarked that the judgment would be constitutionally infirm if the two dissenting jurors could not validly participate, since "the jury did not concur by a three-fourths majority as to the apportionment of negligence." *Id*. at 232. On the other hand, if the two jurors were "not prohibited from taking part in apportioning fault, then the trial court's judgment may stand as six of the eight jurors (or three-fourths) concurred in the decision." *Id*.

{¶ 51} The court commented that two completing rules of law could apply: the "same juror" rule and the "any majority" rule. *Id.* at 232. The "same juror" rule provides that it is "necessary for the same jurors to agree on all issues or the resultant verdict is invalid." *Id*., citing *Fleischhacker v. State Farm Mut. Auto. Ins. Co.*, 274 Wis. 215, 220,

79 N.W.2d 817 (1956). The reason behind the rule is that:

> "The questions regarding the causal negligence of the parties and the apportionment of that causal negligence are not independent of one another, but are integrally related in determining ultimate liability. To illustrate, the question of apportionment is never reached, in the ordinary case, until one plaintiff and one defendant are found to be causally negligent. And when reached, its function is to give further definition to causal negligence for purposes of imposing liability. It is unlike the damages question, which can be, and is, answered independently of liability."

O'Connell, 58 Ohio St.3d at 233, 569 N.E.2d 889, quoting *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 37, 239 N.W.2d 190 (1976).

{¶ 52} The Supreme Court thus concluded that "the major principle behind the 'same juror' rule is that the determination as to whether a party is causally negligent is not independent from, but is indeed inseparable from, the apportionment of negligence. Stated otherwise, a juror's finding as to whether liability exists is so conceptually and logically connected with apportioning fault that inconsistent answers to the two questions render that juror's vote unreliable and thus invalid." *Id*.

{¶ 53} In contrast, the "any majority" rule states that "in a case involving the principles of comparative negligence, and where the votes of only nine jurors were necessary to reach a verdict, jurors who had disagreed with the majority on the issue of negligence could nevertheless provide votes necessary to decide the issue as to the

apportionment of damages between the parties." *Id*. at 233-234, citing *Juarez v. Superior Court*, 31 Cal.3d 759, 768, 183 Cal.Rptr. 852, 647 P.2d 128 (1982).

{¶ 54} The bases for the "any majority" rule include: (1) the lack of a reason why dissenting jurors could not accept the majority's decision and apportion fault; (2) holding otherwise would " 'prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues' "; and (3) " '[a] contrary rule would result in "time consuming writs, mistrials, frustrating delays and confusion for the trial judge and jury - all adding to the heavy burden of the * * * civil trial process," ' " i.e., lack of judicial economy. *Id*. at 234, quoting *Juarez* at 768.

{¶ 55} The Supreme Court of Ohio decided that the "same juror" rule was "more rational and analytically sound." *Id*. at 235. The court gave several reasons for this, stating:

> 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.

{¶ 56} The court further agreed with the dissent in *Juaraz* that, practically, " 'it does not seem * * * realistic to assume that a juror who concludes that a party is not culpable would be able conscientiously to apportion financial responsibility to that party. His perception of a legal compulsion upon him to affix *some* responsibility upon a party [who] he concludes is not responsible *at all* is more likely to cause that juror to assign to such a party an arbitrary proportion of the total liability.' " (Emphasis sic.) *Id.*, quoting *Juarez* at 772 (Richardson, J., dissenting).

{¶ 57} Furthermore, the court was "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." *Id*. In this vein, the court explained that:

> 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.* We do not, however, wish to minimize the

> apportionment of fault. This aspect of comparative negligence retains its importance in all these cases. Yet, it cannot be denied that the allocation of fault is a method through which a juror clarifies his or her finding that a party is causally negligent for the injury sustained. As such, the allocation of fault flows from the adjudication of negligence and proximate cause.

(Emphasis added.) *O'Connell*, 58 Ohio St.3d at 235-236, 569 N.E.2d 889.

{¶ 58} Finally, the Supreme Court of Ohio found the idea of judicial economy too speculative. *Id*. at 236. The court therefore held that "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." *Id*.

{¶ 59} According to Appellees, while *O'Connell* applied the "same juror" rule in an apportionment situation, the same principles apply here, because it would be illogical and inconsistent for jurors who did not find Ward negligent to then assign fault to her. Consolidated Brief at p. 10-11l; Good Samaritan Brief at p. 10-11. Therefore, Hild could not have been prejudiced by the failure to let all jurors deliberate on the proximate cause issue. *Id*. However, these arguments miss the point. "Fault," is not the same as "proximate cause," and evaluating whether a particular set of actions has caused an injury is an independent inquiry. As noted above, the parties differ as to the specific cause of Boldman's injury and death. The issue involves a more fundamental issue, which is whether the failure to permit a full jury to deliberate violated Hild's rights.

{¶ 60} After *O'Connell* was decided, the Supreme Court of Ohio has cited the case

only three times and has not further elaborated on the "same juror" or "any majority" rule, nor has it applied *O'Connell* in any substantive way. *See Schellhouse v. Norfolk & W. Ry. Co*., 61 Ohio St.3d 520, 526, and fn.3, 575 N.E.2d 453 (1991) (reversing the court of appeals and remanding for retrial because, as in *O'Connell*, the trial court failed to comply with Civ.R. 49, which prohibited special verdicts, and noting that *O'Connell* was not decided on this ground.) *See also Eberly v. A-P Controls, Inc*., 61 Ohio St.3d 27, 36, 572 N.E.2d 633 (1991) (finding plain error when non-party employer was included in interrogatories apportioning liability, as employer should not have been included); *Conley v. Shearer*, 64 Ohio St.3d 284, 293, 595 N.E.2d 862 (1992) (also citing *O'Connell* simply for plain error application in case where Court of Claims erroneously dismissed plaintiff's claim for failing to "comply with the requirements of R.C. 2743.02 in bringing his Section 1983 claim, a federal law claim"). This leaves interpretation to lower appellate courts.

{¶ 61} Some Ohio appellate districts have not discussed *O'Connell* in any relevant fashion. Our own mention has been confined to situations in which failing to object (either to a magistrate's decision or to inconsistency in interrogatories) waived error. *E.g., Foust v. Smith*, 2d Dist. Montgomery No. 26275, 2015-Ohio-787, ¶ 18 (noting objection to inconsistent interrogatory answers is waived unless raised before jury is discharged, but finding *O'Connell* inapplicable because answers were not inconsistent); *Minnich v. Burton*, 2d Dist. Miami No. 1999-CA-48, 2000 WL 1006567, *1 (July 21, 2000) (failing to object to magistrate's decision waives error other than plain error). Likewise, the Fourth District Court of Appeals has cited *O'Connell* only in the context of plain error or waiver. *E.g., In the Matter of Smith*, 4th Dist. Athens No. 92CA1561, 1993 WL

387029, *6, fn. 2 (Sept. 29, 1993) (plain error), and *Lewis v. Nease*, 4th Dist. Scioto No. 05CA3025, 2006-Ohio-4362, ¶ 35 (waiver).

{¶ 62} The Eleventh District Court of Appeals has mentioned *O'Connell* in two comparative negligence cases, but distinguished it factually. *See Martz v. El Paso Petro*, 11th Dist. Trumbull No. 95-T-5343, 1997 WL 402364, *4 (June 27, 1997); *Crouch v. Corinth Assembly of God*, 11th Dist. Trumbull No. 99-T-0075, 2000 WL 1735020, *2 (Nov. 17, 2000).

{¶ 63} Some appellate districts have limited the "same juror" rule to comparative negligence cases. *See Williams v. Mike Kaeser Towing*, 1st Dist. Hamilton No. C-050841, 2006-Ohio-6976, ¶ 14 (refusing to extend the analysis to situations other than comparative negligence); *Leavers v. Conrad*, 156 Ohio App.3d 286, 2004-Ohio-850, 805 N.E.2d 543, ¶ 81 (5th Dist.) ("same juror" rule did not apply in workers' compensation case). In addition, the Third District Court of Appeals noted in a contract case that *O'Connell* "specifically declined to extend its holding to liability and damages issues, such as those present in a breach of fiduciary duty and contract claim." *Blake v. Faulkner*, 3d Dist. Shelby No. 17-95-12, 1996 WL 669852, *4 (Nov. 6, 1996).

{¶ 64} The Third District also held in a comparative negligence case that the "same juror" rule does not apply to interrogatory answers concerning liability and damages, which can be "independently determined." *Hudson v. Corsaut*, 3d Dist. Defiance No. 4-94-16, 1995 WL 505936, *3 (Aug. 22, 1995). Similarly, in a case involving negligence rather than comparative negligence, the Sixth District Court of Appeals rejected the application of the "same juror" rule. *Sheidler v. Norfolk & W. Ry.*, 132 Ohio App.3d 462,

468, 725 N.E.2d 351 (6th Dist.1999). In *Sheidler*, the court remarked that "[t]he basis cited by the Supreme Court of Ohio for applying the 'same juror' rule to cases involving the determination of liability and the apportionment of liability does not exist in a case involving the determination of liability and of damages." *Id*., discussing *O'Connell*, 58 Ohio St.3d 226, 569 N.E.2d 889.

{¶ 65} In a case involving sexual harassment, the court separated trial into two phases: first the jury would decide if the plaintiff was entitled to compensatory damages and punitive damages; then, if the jury found liability for punitive damages, jurors would decide the amount of such damages during the second phase. *West v. Curtis*, 7th Dist. Belmont No. 08 BE 28, 2009-Ohio-3050, ¶ 97. Seven of eight jurors decided punitive damages were warranted, and before the second phase occurred, the court decided that only those seven jurors would be allowed to deliberate on the amount of punitive damages and whether attorney fees would be awarded. *Id*. at ¶ 98. After the jury awarded punitive damages, the appellant asserted on appeal that "he was denied his full jury on the amount of punitive damages and on liability for attorney fees." *Id*. at ¶ 1.

{¶ 66} In deciding this issue, the Seventh District Court of Appeals first discussed *O'Connell* in detail. *Id*. at ¶ 99-113. The court then stated that "[f]ew Ohio appellate courts have addressed whether the 'same juror' rule or the 'any majority' rule applies to damages; in other words, whether jurors finding no liability can vote on damages." *Id*. at ¶ 114. At that point, the court considered these few cases, which included *Hudson*, *Blake*, *Williams*, and *Sheidler*, and noted that the Supreme Court of Ohio had declined review in two of the cases. *Id*. at ¶ 114-118. The court also stressed *Hudson's*

comment about the Ohio Jury Instructions, which was that " 'since the issues relating to damages are analytically different from those relating to causal negligence, the determination of damages may be made by all jurors without regard to their individual votes on causal negligence.' " *Id*. at ¶ 115, quoting *Hudson*, 3d Dist. Defiance No. 4-94-16, 1995 WL 505936, quoting 1 Ohio Jury Instructions, Section 9.10, at 149 (1994). Finally, the court stressed *O'Connell's* observation that " '[Apportionment of fault] is unlike the damages question, which can be, and is, answered independently of liability.' " *Id*. at ¶ 119, quoting *O'Connell*, 58 Ohio St.3d at 233, 569 N.E.2d 889. (Other citation omitted.) The Seventh District concluded that this statement was not dicta, but was the rationale for *O'Connell's* apportionment holding. *Id*.

{¶ 67} Moreover, the Seventh District found reversible error, even though the vote of seven jurors satisfied the "three-fourth rule," because "appellant was denied his right to a full jury trial on the amount of punitive damages." *West*, 7th Dist. Belmont No. 08 BE 28, 2009-Ohio-3050, ¶ 121, citing Civ.R. 38(B) (right to eight jurors); Ohio Constitution, Article I, Section 5; and Ohio Constitution, Article VII, Section 8. The court stressed that "[r]egardless of the number of signatures on the forms*, it is not harmless error to deny a party the right to a full jury on every issue*." (Emphasis added.) *Id*. at ¶ 122.

{¶ 68} The above cases are not strictly on point here, as our case involves jurors who were not allowed to deliberate on proximate cause. However, proximate cause was considered in *Lawson v. Mercy Hosp. Fairfield*, 12th Dist. Butler No. CA2010-12-340, 2011-Ohio-4471. In *Lawson*, the plaintiff was injured in a fall and alleged that a hospital "failed to use reasonable care in assisting her as she moved from her hospital bed into a

bedside chair." *Id*. at ¶ 2. Six of eight jurors found the hospital negligent, and six of eight found the negligence did not proximately cause the plaintiff's injuries. However, two of the latter set of jurors were not the same ones who had found the hospital negligent. *Id.* at ¶ 3. On appeal, the plaintiff argued that the interrogatory answers were inconsistent because the same set of jurors did not agree on both issues. *Id*. at ¶ 7.

{¶ 69} In considering this matter, the Twelfth District Court of Appeals cited the comparative negligence decision in *O'Connell* and commented that "[w]hether a breach in the standard of care and proximate cause of injury are similarly interdependent so as to invoke the 'same juror' rule is an issue of first impression in Ohio." *Id*. at ¶ 11. The court discussed *O'Connell* at length, including its statement that " '[b]ecause 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 sic.) *Id*. at ¶ 16, quoting *O'Connell*, 58 Ohio St.3d at 235-236, 569 N.E.2d 889. Given this fact, the Twelfth District found that "[t]he *O'Connell* Court therefore 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*." (Emphasis added.) *Id*.

{¶ 70} The Twelfth District further stated that:

> A breach in the standard of care is a separate issue from whether the breach was the proximate cause of the injury sustained. The essential elements for a negligence claim consist of duty, breach of duty, and damage or injury that is a [sic] proximately caused by the breach. See *Winkle v.*

> *Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 912 N.E.2d 151, 2009-Ohio1724, ¶ 46. The failure of any of these elements will defeat the action. The apportionment of fault, as was at issue in the *O'Connell* case, is not an essential element of a cause of action for negligence. A party has the right to have a full jury determine all of the essential elements of a claim, and to forbid a juror who voted against a breach of duty from participating in a determination of proximate cause would violate this right. See Civ.R. 38(B) (right to eight jurors). See, also, Section 5, Article I, Ohio Constitution. Because the "any majority" rule emphasizes the importance of the full jury participating in deliberations as to the essential elements of a cause of action, we hold that this rule is properly applied to jury determinations regarding breach of the standard of care and proximate cause. Standard of care and proximate cause of injury are not interdependent pursuant to the analysis provided in *O'Connell*, and therefore we do not invoke the "same juror" rule herein.

Lawson, 12th Dist. Butler No. CA2010-12-340, 2011-Ohio-4471, at ¶ 18.

{¶ 71} Because the full jury in *Lawson* had been involved in deciding both negligence and proximate cause, the court overruled the plaintiff's assignment of error. *Id*. at ¶ 19.

{¶ 72} Subsequently, the Tenth District Court of Appeals came to the same conclusion about negligence and proximate cause. *See Dillon v. OhioHealth Corp*., 2015-Ohio-1389, 31 N.E.3d 1232 (10th Dist.). *Dillon* involved a lawsuit against a hospital

based on injuries a schizophrenic patient sustained while being restrained. *Id*. at ¶ 3-10. Initially, the trial judge applied the "same juror" rule and discarded interrogatory answers where the same jurors had not participated in finding negligence and in finding lack of proximate cause for the plaintiff's injuries. However, all eight jurors had signed a general verdict for the hospital. Without telling the parties, the judge told the bailiff to instruct the jurors that the same set of jurors needed to sign the interrogatories and to continue deliberating. Later that day, the jury returned a verdict in favor of the plaintiff in a significant amount. When the hospital learned what had happened, it asked the court to enter judgment on the first verdict; instead, the court entered judgment on the second verdict. *Id*. at ¶ 11-15. After the hospital filed a motion for new trial, the court vacated the second judgment but did not enter judgment on the first verdict; it also did not grant the new trial motion. *Id*. at ¶ 16. The hospital had previously appealed from the judgment, and the court of appeals had stayed the appeal until the judge ruled on the new trial motion. *Id*.

{¶ 73} When the Tenth District considered the case, it discussed both *O'Connell* and *Lawson* and found that the trial court had misapplied the "same juror" rule. The trial court, therefore, had erred in discarding the first verdict. *Id*. at ¶ 20-30. However, because the trial court had failed to comply with the requirements for entering a verdict, the first verdict could not be reinstated, and a new trial would need to be held. *Id*. at ¶ 31-40.

{¶ 74} During its discussion, the Tenth District commented that "[p]roximate cause is a separate question not dependent on a finding of negligence." *Id*. at ¶ 24, citing

Palsgraf v. Long Island RR., 248 N.Y. 339, 162 N.E. 99 (N.Y.App.1928). The court also noted *Lawson's* statement about depriving " 'a party's right to a full jury' " as well as *O'Connell's* observation about a " 'full jury' " undertaking " 'the initial determination as to negligence and proximate cause.' " *Id*., quoting *Lawson*, 12th Dist. Butler No. CA2010-12-340, 2011-Ohio-4471, at ¶ 16; *see also, id*. at ¶ 26, quoting *O'Connell*, 58 Ohio St.3d at 235-236, 569 N.E.2d 889. The Tenth District then stressed that it would "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." *Id*. at ¶ 26.

{¶ 75} Notably, during this discussion, the Tenth District considered the plaintiff's mention of "a model instruction provided in Ohio Jury Instructions 403.01." *Id*. at ¶ 25. In this regard, the court stated that:

> 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*.

(Emphasis added.) *Dillon*, 2015-Ohio-1389, 31 N.E.3d 1232, at ¶ 25.

{¶ 76} The current case involves 1 CV Ohio Jury Instructions 417.19 Interrogatories (claims arising on and after 4/11/03) [Rev. 2/27/21], for use in medical malpractice cases. However, this instruction contains the same language disqualifying

jurors from participating in further deliberation and has the same infirmity as the instruction discussed in *Dillon*.

{¶ 77} The Supreme Court of Ohio subsequently denied review in *Dillon*. *See Dillon v. OhioHealth Corp.*, 144 Ohio St.3d 1407, 2015-Ohio-4947, 41 N.E.3d 446 (refusing to accept appeal and cross appeal); *Dillon v. OhioHealth Corp*., 144 Ohio St.3d 1480, 2016-Ohio-467, 45 N.E.3d 246 (denying motion for reconsideration).

{¶ 78} A later case from the Tenth District Court of Appeals reiterated that "negligence and proximate cause are separate and independent inquiries." *Wildenthaler v. Galion Community Hosp.*, 2019-Ohio-4951, 137 N.E.3d 161, ¶ 30 (10th Dist.), citing *Dillon,* 2015-Ohio-1389, 31 N.E.3d 1232, at ¶ 24, fn.6. In *Wildenthaler,* the court also stressed its prior holding that "the Ohio Jury Instructions, CV Section 403.01 (Rev. Oct. 11, 2008) was erroneous in that it operated to prevent a full jury from independently considering negligence and proximate causation." *Id*. at ¶ 29.

{¶ 79} *Wildenthaler* was a medical malpractice case in which the jury indicated to the trial court that six jurors believed the plaintiff had failed to prove the cause of death and that it was unable to find six jurors to agree on two interrogatories (which related to whether two doctors had breached the standard of care). *Id*. at ¶ 18. The trial court told the jury that it did not need to agree on negligence. This allowed the jury to consider causation. (The jury had been instructed to consider the interrogatories in order, i.e., negligence first, and then causation.) *Id*. at ¶ 18-19. The jury again could not agree and asked the court if it could proceed to the verdict. *Id.* at ¶ 20. After the court allowed this (which let the jury proceed without deciding causation), the jury announced a verdict

in the defendants' favor. *Id*. at ¶ 21. The verdict revealed that six jurors had signed the verdict, with no dissenting jurors, and that none of the interrogatories had been answered. *Id*.

{¶ 80} Subsequently, the trial court denied the plaintiff's motion for a new trial, reasoning that because the jury had reached a consensus, the negligence issue was irrelevant, and that "plaintiff had suffered no prejudice as a result of the jury's failure to complete the interrogatories." *Id.* at ¶ 22. The Tenth District disagreed, concluding that the court's only option at that point was to order a new trial. *Id*. at ¶ 24-27. The court also noted that "the model interrogatories provided in the Ohio Jury Instructions are flawed in that they wrongly imply that interrogatories on negligence and proximate cause must be answered in order of negligence first and that the full jury cannot consider both negligence and proximate causation." *Id*. at ¶ 29, citing *Dillon* at ¶ 24-27.

{¶ 81} Thus, while the trial court in *Wildenthaler* could have properly allowed the jury to consider proximate cause first, the court erred in these ways: (1) letting the jury skip that interrogatory; and (2) permitting the jury to not answer any interrogatories and to proceed to a general verdict. *Wildenthaler*, 2019-Ohio-4951, 137 N.E.3d 161, at ¶ 31. Because the jury could not answer the questions, the trial court "created a mistrial under Civ.R. 49(B) and Ohio precedent because the jury did not complete its assigned task." *Id*, citing *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, 865 N.E.2d 1289, ¶ 38 and 46, and *Aetna Cas. & Sur. Co. v. Niemiec*, 172 Ohio St. 53, 173 N.E.2d 118 (1961), paragraphs two and four of the syllabus. These parts of the syllabus stated that "[i]t is the duty of the jury to give definite

answers to * * * interrogatories" and that "failure of a jury to answer such interrogatories constitutes a mistrial and necessitates a new trial." *Niemiec* at 53.

{¶ 82} As with *Dillon*, the Supreme Court of Ohio declined to review *Wildenthaler*. *See Wildenthaler v. Galion Community Hosp*., 158 Ohio St.3d 1452, 2020-Ohio-1090 (refusing to accept appeal).

{¶ 83} Finally, the few cases from the two remaining appellate districts either are of little assistance or do not impact the analysis. In *Gable v. Gates Mills*, 151 Ohio App.3d 480, 2003-Ohio-399, 784 N.E.2d 739 (8th Dist.), *rev'd on other grounds*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, the Eighth District Court of Appeals distinguished *O'Connell* because the case before it involved two independent causes of action. Thus, a juror dissenting on one cause of action was able to sign a general verdict in the defendant's favor. *Id* at ¶ 27. And, in *Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc.*, 182 Ohio App.3d 768, 2009-Ohio-2460, 915 N.E.2d 361 (9th Dist.), the Ninth District Court of Appeals noted that the "[t]he Ohio Supreme Court did not adopt a strict application of the same-juror rule in all cases. In fact, the court pointed out in *O'Connell* that it was not willing to 'extend [its] holding to reach' the application of the rule to '[a] jury's determinations as to liability and damages,' as other jurisdictions had done." *Id*. at ¶ 33, quoting *O'Connell*, 58 N.E. 3d at 232, 569 N.E.2d 889, fn. 3.

{¶ 84} *Segedy* did find that the jury's initial interrogatory answers were inconsistent with the general verdict, because one of the six jurors who had signed that verdict did not agree that a doctor had breached the standard of care. *Id*. However, *Segedy* further held that because the original verdict was invalid, the trial court correctly returned the

forms to the jury for a reconciliation, which resulted in a proper verdict. *Id*. at ¶ 34-48. Unlike the present case, *Segedy* involved comparative negligence, so it is of little help.

{¶ 85} In a more recent case, the Ninth District rejected plain error in a comparative negligence case because the defendant had failed to object to any inconsistencies. *Russo v. Gissinger*, 9th Dist. Summit No. 29881, 2023-Ohio-200, ¶ 16. Although one juror in that case who found the defendant was not negligent had signed the general verdict form for the plaintiff, the court of appeals noted that "[n]either the interrogatory instructions nor the verdict forms indicated that only those jurors answering "yes" to both Interrogatory A and B were qualified to sign the verdict form for the Plaintiff." *Id*. Thus, unlike the case before us, the *entire jury* was allowed to consider all issues. And again, *Russo* involved comparative negligence.

{¶ 86} In summary, *O'Connell* was decided more than 30 years ago. Since that time, the Supreme Court of Ohio has not chosen to revisit the "same juror" rule, despite the fact that lower appellate courts have limited its application to situations involving comparative negligence and the interrelated issue of apportioning fault. The court has declined review even in comparative negligence cases that found the rule did not apply to liability and damages and in other cases that found negligence and proximate cause to be independent and separate. Thus, under the prevailing law, instructions disqualifying jurors from further participation in deliberation are incorrect, and the trial court erred (as it agreed) in so instructing the jury.

{¶ 87} As noted, the trial court found the error harmless, and this is the argument Appellees make on appeal. However, the case law indicates otherwise. *See West*,

7th Dist. Belmont No. 08 BE 28, 2009-Ohio-3050, at ¶ 122 ("[r]egardless of the number of signatures on the forms, it is not harmless error to deny a party the right to a full jury on every issue"). *See also Wildenthaler*, 2019-Ohio-4951, 137 N.E.3d 161, at ¶ 24-29 (rejecting the trial court's conclusion that plaintiff suffered no prejudice when jury failed to complete interrogatories because six jurors agreed on the general verdict for the defendant). Thus, because Hild suffered prejudice due to the trial court's error, the first, second, and third assignments of error are sustained. Accordingly, the judgment of the trial court will be reversed, and this cause will be remanded for a new trial. Again, the point here is that even if the interrogatory answers were "consistent," that had nothing to do with the right that was at issue. The fault was in prohibiting the full jury from considering both negligence and proximate cause, and that deprivation was not harmless because it involved the right to have a full jury deliberate the case.

{¶ 88} This leaves the issue of what should be retried on remand. The law is established that "[u]pon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." *State ex rel. Stevenson v. Murray*, 69 Ohio St.2d 112, 113, 431 N.E.2d 324 (1982), citing *Commrs. of Montgomery Co. v. Carey,* 1 Ohio St. 463 (1853), paragraph one of the syllabus. *Accord L.G. Harris Family Ltd. Partnership I v. 905 S. Main St. Englewood, L.L.C.*, 2d Dist. Montgomery No. 26682, 2016-Ohio-7242, ¶ 24.

{¶ 89} The error in question here occurred when two jurors were not allowed to deliberate with the full jury on the issue of proximate cause. At that point, six jurors had already concluded that Ward was negligent. This is because the trial court instructed the

jury that after completing this interrogatory answer (Interrogatory A), jurors would then move on to Interrogatory B (ways in which Ward was negligent), and then proceed to Interrogatory C (proximate cause). Tr. at 245. Again, only jurors who had answered "yes" to Interrogatory A were allowed to consider the other issues. *Id*.

{¶ 90} A corollary principle of returning to the point of error is that "App.R. 12(D), in conjunction with Civ.R. 42(B), authorizes a Court of Appeals to order the 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." *Mast v. Doctor's Hosp. N.*, 46 Ohio St.2d 539, 541, 350 N.E.2d 429 (1976). This is based on the fact that "App.R. 12(D) vests the court with the necessary authority to order a trial court to exercise its powers under Civ.R. 42(B) to separately try any claim or issue, when such separation is 'in [furtherance] of convenience or to avoid prejudice, or when separate trials will be conductive to expedition and economy.' " *Id*. at 541-542, quoting Civ.R. 42(B) (1970).[3] *See also Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.*, 12 Ohio St.3d 241, 243, 466 N.E.2d 883 (1984), paragraph one of the syllabus.

{¶ 91} "The rationale authorizing reviewing courts to order a limited remand implicitly recognizes the need for appellate courts to carefully exercise their discretion to determine the appropriate scope of remand." *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 37 Ohio St.3d 1, 523 N.E.2d 489 (1988), paragraph two of the syllabus. In this regard, compare *Hileman v. Kramer*, 2d Dist. Montgomery No. 15066, 1995 WL 765959,

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[3] Civ.R. 42(B) has since been amended, but the current version is essentially the same, allowing separate trials of claims or issues "[f]or convenience, to avoid prejudice, or to expedite or economize."

*12 (Dec. 12, 1999) (based on exclusion of medical expert's testimony, the court of appeals affirmed as to finding of hospital's negligence but reversed and remanded for retrial on issue of proximate cause and damages, if any); *Wood v. Harborside Healthcare*, 197 Ohio App.3d 667, 2012-Ohio-156, 968 N.E.2d 568, ¶ 18-25 (8th Dist.) (judgment remanded for trial on proximate cause and damages; jury found nursing center negligent, but trial court committed plain error by confusing jury about how to fill out other interrogatories during deliberations).

{¶ 92} In this context, we note that due to the erroneous instructions and the finding of a lack of proximate cause, the jury did not reach the issues of: (1) whether Ward was under the direction and control of Dr. Phillips; (2) whether Good Samaritan was responsible under the doctrine of agency by estoppel; (3) whether any of the defendants (including Consolidated, who was Ward's employer) were liable for causing Boldman's death and injury; and (4) the amount of compensatory damages, if any, that were caused due to Ward's negligence. Tr. at 229-230, 231-232, 240-243, and 245-250. Specifically, the jurors were instructed that if six or more jurors found that Ward's negligence did not proximately cause Boldman's injury and death, they would stop at that point and render a general verdict for Ward, Dr. Phillips, Consolidated, and Good Samaritan. Tr. at 246. As a result, the jury did not answer interrogatories D, E, F, G, and H, which related to Dr. Phillips's right to direct and control Ward; whether Good Samaritan held itself out to the public as a provider of medical services and whether Boldman had looked to or relied on Good Samaritan as opposed to Ward to provide him with competent care; and the compensatory damages, if any, due to Boldman. *Id*. at

246-250 and 266-268. In light of these facts, all defendants who remained as such during the first trial are still part of the case on retrial.

{¶ 93} Based on the preceding discussion, the first, second, and third assignments of error are sustained, and this cause will be remanded for a new trial on the issues outlined above.

III. Conclusion

{¶ 94} All of Hild's assignments of error having been sustained, the judgment of the trial court denying the motion for new trial is affirmed in part, i.e., as to the finding of negligence by Sandra Ward. The judgment denying the motion for new trial is also reversed in part and is remanded for a new trial. On remand, the remaining issues to be submitted to the jury will be: (1) whether Ward's negligence directly and proximately caused Boldman's injury and death; (2) whether Ward was under the direction and control of Dr. Phillips; (3) whether Good Samaritan was responsible under the doctrine of agency by estoppel; and (4) the total amount of compensatory damages, if any, that were caused due to Ward's negligence.

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EPLEY, J. and LEWIS, J., concur.