

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

KENNETH B. TAYLOR,	:	APPEAL NO. C-090447
	:	TRIAL NO. A-0606042
and	:	
	:	<i>JUDGMENT ENTRY.</i>
IVERY TAYLOR,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	
	:	
MICHAEL SCHMERLER, M.D.,	:	
	:	
and	:	
	:	
RIVERHILLS HEALTHCARE, INC.,	:	
	:	
Defendants-Appellees,	:	
	:	
and	:	
	:	
JEWISH HOSPITAL OF CINCINNATI,	:	
INC.,	:	
	:	
Defendant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

This case involves a claim for medical malpractice made by plaintiffs-appellants Kenneth and Ivery Taylor against defendants-appellees Michael Schmerler, M.D., and Riverhills Healthcare and defendant Jewish Hospital.² The Taylors claimed that Dr. Schmerler had been negligent in his treatment of Kenneth Taylor and that, as a result of that negligence, he had suffered a major stroke that

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² Jewish Hospital was voluntarily dismissed from the case prior to trial.

could have been prevented or treated more promptly. Kenneth Taylor's claim sought to recover for the physical injuries he had suffered, and Ivery Taylor claimed a loss of spousal consortium.

The case was tried before a jury, and at the conclusion of the trial, all eight jurors signed a jury interrogatory indicating that they had found that Dr. Schmerler had not been negligent in caring for and discharging Taylor. They also signed a general verdict in favor of Dr. Schmerler and Riverside Healthcare, and the trial court entered judgment accordingly. The Taylors then filed a motion for a new trial, which the trial court denied.

The Taylors have appealed, raising two assignments of error. For ease of analysis, we address them in reverse order.

In their second assignment of error, the Taylors claim that the verdict was against the manifest weight of the evidence. If a judgment is supported by some competent, credible evidence, it cannot be overturned.³ "When reviewing a judgment under a civil manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. This presumption arises because the [jury] had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'"⁴

A reviewing court should not reverse a judgment " 'simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal,

³ *Brokamp v. Mercy Hosp.* (1999), 132 Ohio App.3d 850, 874, 726 N.E.2d 5940.

⁴ *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, at ¶24, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

but a difference of opinion on credibility of witnesses and evidence is not.’ ”⁵ Further, it is unconstitutional for an appellate court to overturn a civil jury verdict based upon a manifest-weight claim unless the members of the appellate panel unanimously conclude that the standard for reversal has been met.⁶

In this case, the standard for reversal has not been met. In addition to giving his own testimony, Dr. Schmerler had two expert witnesses testify on his behalf. Dr. Randall Higashida, an author of the American Stroke Association guidelines and a clinical professor and Chief of Interventional Neuroradiology at the University of California at San Francisco, testified, at several points, that Dr. Schmerler’s overall conduct comported the appropriate standard of care. Additionally, Dr. Marc Chimowitz, a stroke neurologist from the Cleveland Clinic, testified that the course of treatment chosen by Dr. Schmerler met that standard of care.

While the Taylors presented evidence, including the testimony of their own experts, that Dr. Schmerler’s conduct fell below the appropriate standard of care, and at times they attempted to elicit similar concessions from Dr. Schmerler’s experts, a review of the record in toto reveals that the jury’s verdict was supported by some competent, credible evidence. We overrule the Taylors’ second assignment of error.

In their first assignment of error, the Taylors claim that it was improper for the trial court to give an instruction to the jury involving remote causation. The jury was given the following instruction: “A person is not responsible for injury to another person if his or her negligence is a remote cause and not a proximate cause.

⁵ Id., quoting *Seasons Coal Co.*, 10 Ohio St.3d at 80, 461 N.E.2d 1273.

⁶ Section 3 (B)(3), Article IV, Ohio Constitution; see, also, *Bryan-Wollman v. Domancko*, 115 Ohio St.3d 291, 2007-Ohio-4918, 874 N.E.2d 1198, and *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

A cause is a remote cause when the result could not have been reasonably foreseen or anticipated as being the natural and probable cause of an injury.”

The Tenth Appellate District recently addressed this issue and concluded that when a jury finds that a defendant has not breached a duty owed to a plaintiff and therefore does not reach the issue of causation, any error in giving an instruction on remote causation is harmless.⁷ After considering the exact instruction at issue here, the court concluded that “[t]he plain language of the jury instruction at issue indicates that the instruction on remote cause comes into play only after a defendant has been found to have been negligent. Because the jury in this case determined that appellees were not negligent, the remote cause instruction is not germane to its verdict.”⁸ We agree with this reasoning and overrule the Taylors’ first assignment of error.

Having considered and overruled both of the Taylors’ assignments of error, we affirm the trial court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on June 23, 2010

per order of the Court _____.

Presiding Judge

⁷ See *Coulter v. Stutzman*, 10th Dist. No. 07AP-1081, 2008-Ohio-4184.

⁸ *Id.* at ¶11.