IN THE SUPREME COURT OF OHIO

Mark A. McLeod, Guardian of the Estate of Walter Hollins,	:	Case No. 06-1247
Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	Court of Appeals Case Nos. 04-85286, 04-85574, & 04-85605 (Consolidated)
Mt. Sinai Medical Center,	:	
and	:	
Ronald Jordan, M.D. and Northeast Ohio Neighborhood Health Services, Inc. f/k/a Hough-Norwood,	:	
Appellants.	:	

**BRIEF OF *AMICI CURIAE*,
THE OHIO HOSPITAL ASSOCIATION,
THE OHIO STATE MEDICAL ASSOCIATION, AND
THE AMERICAN MEDICAL ASSOCIATION
IN SUPPORT OF APPELLANTS**

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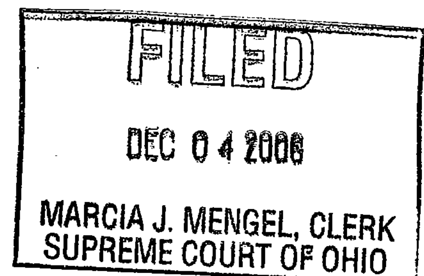

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STATEMENT OF FACTS

Amici curiae, the Ohio Hospital Association ("OHA"), the Ohio State Medical Association ("OSMA"), and the American Medical Association ("AMA"), incorporate the Statement of Facts submitted by Appellants in this case.

INTEREST OF *AMICI CURIAE*

This case is of utmost importance to the medical community. It involves the fundamental right afforded by the Ohio Constitution to a *fair* jury trial in the context of a medical negligence action. It also involves a $30 million judgment which:

- according to the trial judge, was tainted by improper conduct of counsel and erroneously admitted evidence, and was influenced by the passion and prejudice of the jury, and
- according to the court of appeals, was "manifestly excessive."

Ohio's medical community and the millions of Ohioans that it serves cannot withstand tainted verdicts, especially ones of this magnitude, without ramifications to the health care system at large. The risk of tainted judgments, let alone excessive ones, being upheld against medical providers will undoubtedly have a negative impact on Ohio's medical liability insurance market and, ultimately, on Ohio's patient population as patients find it more difficult to obtain access to needed medical services.

Earlier this decade, "the Ohio liability insurance market began to slip into what we now recognize as a crisis."[1] In response, the General Assembly enacted S.B. 281 to address concerns that Ohio medical liability insurance had become unaffordable and, thus, was impacting Ohio's patient population due to physicians leaving the state, retiring early, or ceasing to perform high risk procedures. A report prepared by the Ohio Department of Insurance in 2004, confirmed that

[1] Final Report and Recommendations of the Ohio Medical Malpractice Commission, April 2005, at 3 ("Ohio Medical Malpractice Commission's Final Report"), attached hereto as Exhibit A (but without all of the exhibits).

"high medical liability premiums are having an effect on health care services in Ohio, and that Ohio could soon face a crisis of access to care."[2] "While the Ohio medical liability market is beginning to recover, it is still in a state of crisis."[3] And, "the primary driver of medical malpractice rates is the costs associated with losses and defense of claims."[4] It is against this backdrop that *amici curiae* urge the Court to establish a rule of law to protect medical providers from tainted and/or excessive verdicts.

The OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. From its first major legislative undertaking involving the federal Harrison Narcotic Act, the OHA has provided a mechanism for Ohio's hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of more than one hundred seventy (170) private, state and federal government hospitals and more than forty (40) health systems, all located within the state of Ohio; these hospitals and health systems employ more than 240,000 employees. The total number of people working in Ohio hospitals, including physicians and volunteers is 303,000. The OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities.

The OSMA is a non-profit professional association founded in 1835 and is comprised of approximately 16,000 physicians, medical residents, and medical students in the State of Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The OSMA strives to improve public health through education, to

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[2] *Id.* at 5.
[3] *Id.* at 6.
[4] *Id.* at 7.

encourage interchange of ideas among members, and to maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The AMA, an Illinois nonprofit corporation, is the largest professional association of physicians, residents and medical students in the United States. It has approximately 240,000 members who practice in every state and in every medical specialty. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.[5]

ARGUMENT

While all of the propositions of law upon which this Court has accepted review in this case are important to *amici curiae,* the focus of this brief is Proposition of Law No. III set forth below.

PROPOSITION OF LAW NO. III:

When the jury renders an excessive verdict after hearing surprise testimony suggesting damages exceeding those supported by plaintiff's expert reports, and after a trial and closing argument pervaded by attacks on the defendants and appeals to religion, race, and economics, a trial judge does not abuse his discretion by concluding that the verdict is influenced by passion and prejudice requiring a new trial rather than *remittitur*.

This case addresses the fundamental right afforded by the Ohio Constitution to a fair jury trial in the context of a medical negligence case. Ohio Constitution, Article I, §5. The right to a fair jury trial is guaranteed to all litigants, not just for their benefit but also for the benefit of all Ohio citizens. Perhaps nowhere does the impact of this right extend beyond the litigants to the public at large more than in medical negligence cases. This is particularly true given the complex medical issues involved in medical negligence cases and the fragile nature of Ohio's

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[5] The AMA and the OSMA are participating in this brief in their own persons and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

health care system, which continues to struggle to overcome a medical liability insurance crisis while striving to make quality, affordable health care available to all Ohio citizens.

For these reasons and the reasons set forth below, *amici curiae* urge this Court to reinstate the well reasoned decision of the Trial Court granting the defense a new trial so that the dispute at issue in this case can be heard and decided by a jury based upon the merits, thereby affording the litigants to this case and all Ohio citizens the opportunity for the fair trial that they deserve.

A. It Is Impossible To Get A Fair Jury Trial Where The Evidence[6] Presented To The Jury Is Obscured And/Or Manipulated.

As this Court is well-aware, an essential component for a fair jury trial is the existence of a panel of eight Ohio citizens who are each able and willing to make a fair and impartial decision based upon the evidence presented to them. See Civ.R. 38(B). However, even the best intentioned jury panel cannot provide a fair jury trial where the evidence presented to them for consideration is obscured and manipulated beyond recognition. This is true of the evidence in any case, but is critical in medical negligence cases where the evidence is already extremely difficult for a lay jury to understand and process. Because a jury is obligated to consider the evidence it is given, distorting and misrepresenting that evidence irreparably taints the entire process and dispels any hope of fairness or justice.

1. Any attempt by counsel to misrepresent medical testimony to a jury must be prohibited because it eliminates the possibility of a fair trial.

In a medical negligence action, the jury is generally asked to decide whether the plaintiff

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[6] Because the inappropriate conduct of Plaintiff's counsel affected the evidence that was presented to the jury, the term "evidence" is used broadly throughout this brief to include both the evidence itself and the conduct of Plaintiff's counsel.

can satisfy three separate, but interrelated elements.[7] See *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131, 346 N.E.2d 673, 677. It must first decide whether each defendant provided care that was inconsistent with the appropriate standard of care for his or her medical specialty. *Id.* See also *Littleton v. Good Samaritan Hospital and Health Center* (1988), 39 Ohio St.3d. 86, 92, 529 N.E.2d 449, 454; *Cooper v. Sisters of Charity of Cincinnati* (1971), 27 Ohio St.2d 242, 250, 272 N.E.2d 97, 102. If the jury decides that the care provided by any defendant was below the appropriate standard for that provider's specialty, the jury must next decide whether the below standard care that it identified was the direct and proximate cause of harm to the plaintiff. *Bruni*, 46 Ohio St.2d 127, 131. If the answer to that question is yes, the jury must decide the nature and extent of damage caused, and the appropriate monetary value that should be assigned for that injury.

In order to consider and reach a determination with respect to each of these elements, the jury is provided with evidence in the form of medical records, testimony of fact witnesses, testimony of expert witnesses, etc. While some of the evidence presented will deal with only one of the elements for determination by the jury, other evidence will deal with two or even all three elements.

Much of the evidence presented in a medical negligence case, particularly with respect to issues of liability, is expert medical testimony. Specifically, before a jury can determine whether a defendant is liable to the plaintiff, it needs to consider both evidence addressing the appropriate standard of care that applies to that defendant in his or her area of medical specialty and evidence addressing the way that the available medical care can or cannot impact a patient's outcome.

[7] The term generally is used to reflect the fact that medical negligence cases can proceed with a stipulation as to some of the elements, leaving the jury to determine only the remaining elements. In the case at bar, the jury was asked to determine all three elements as there were no stipulations on any of the elements of the claim.

These are incredibly complex concepts that are presented through physicians who have spent many years gaining their knowledge, but only have a few hours to teach these concepts to a lay jury. Undoubtedly, we expect a great deal from a jury – they must digest the evidence sufficiently to apply it to the facts of the case and use it to judge the actions of the named medical providers. Add to this task the fact that there is almost always disagreement between and among the experts retained by the respective parties and it is clear that this most critical evidence is highly susceptible to confusion.

Although not witnesses themselves, the trial attorneys spend more time speaking in front of the jury than anyone else during the course of a trial. This provides them with several opportunities to interject their personal opinions or interpretations regarding the evidence. These opportunities are present during voir dire, opening statements and closing arguments, as well as during direct and cross-examinations. At each of these opportunities, some "poetic license" may be appropriate where the respective parties reach different conclusions based upon the same evidence or genuinely recall the evidence differently. Conversely, intentional misrepresentation of the evidence is *never* appropriate. See *Fehrenbach v. O'Malley* (2005) 164 Ohio App.3d 80, 91, 841 N.E.2d 350, at ¶ 23 (citing *Pesek v. Univ. Neurologists Assn., Inc.* (2000), 87 Ohio St.3d 495, 721 N.E.2d 1011). In fact, as already recognized by this Court, "[t]he proper role of an attorney at the trial table is not that of a contestant seeking to prevail at any cost but that of an officer of the court, whose duty is to aid in the administration of justice and assist in surrounding the trial with an air conducive to an impartial judgment." *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, 349-350, 7 N.E.2d 544, 548.

In the case at bar, numerous medical expert witnesses were called representing a variety of medical specialties by each of the parties. See *McLeod v. Mt. Sinai Medical Ctr.* (2006), 166

Ohio App. 3d 647, 663, 853 N.E.2d 1235, 1247 (Karpinski, J., dissenting). These included an expert in pediatric neurology and a maternal-fetal medicine expert. *Id.* The position presented through the Plaintiff's experts was that the various Defendants fell below the standard of care in their medical specialties and their failures were the proximate cause of his injuries. *Id.* Conversely, the position presented through the Defendants' experts was that the care provided was appropriate and in conformance with the applicable standard of care and did not proximately cause Plaintiff's injuries. *Id.* Throughout the presentation of all of this evidence on the two issues that comprise the "liability" determination, Plaintiff's counsel relentlessly misrepresented key aspects of the medical evidence, often defying judicial admonishments in the process. *Id* at 666. As explained by Judge Karpinski in the dissenting opinion, examples of this flagrant misrepresentation included the repeated and intentional misuse of the term "fetal distress" to equate to imminent death from asphyxia and the misuse of the term "emergency c-section" to equate to a crisis requiring immediate action rather than simply an unscheduled c-section. *Id.*

These mischaracterizations were inconsistent with the meanings that were consistently attributed to those terms by all of the medical providers using them while providing care to the Plaintiff. *Id.* For a jury struggling to understand a deceleration on a fetal monitor strip (let alone whether it is good, bad or somewhere in between), counsel's assigning improper meaning and significance to medical terms makes the jury's role to fairly consider the evidence impossible. By misrepresenting the evidence addressing liability, Plaintiff's counsel tainted the evidence relating to the issues of liability and denied the parties, and the public, a fair jury trial in this case. See *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 84 N.E.2d 912, paragraph two of the syllabus; see also *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 350, 474 N.E.2d 291, 293 (applying the holding in *Maggio* to closing arguments). This must be rectified.

B. Where Tainted Evidence Addressing Liability Has Been Presented To A Jury, The Only Available Remedy Is To Order A New Trial

Where evidence presented to a jury is tainted, the decision made by the jury based on such evidence is also tainted. In that instance, it is incumbent upon the court to provide a remedy because neither party received the fair trial guaranteed by the Ohio Constitution. See *Manigault v. Ford Motor Company* (2002), 96 Ohio St.3d 431, 433, 775 N.E.2d 824, 826 (holding that a new trial was the appropriate remedy, because defense counsel presented evidence that was "seriously misleading"). In order to identify the most appropriate remedy in a medical negligence case where the issue is tainted evidence, the court must determine which elements the evidence addressed. Where the tainted evidence only addressed the element of damages, remittitur may be appropriate. See *Brooks v. Wilson* (1994), 98 Ohio App.3d 301, 307, 648 N.E.2d 552, 556. Conversely, where the tainted evidence addressed the elements of standard of care, proximate causation, or both, the only appropriate remedy is a new trial. See *id*. See also *Manigault v. Ford Motor Company*, 96 Ohio St.3d 431, 433.

1. Remittitur is an incomplete and inadequate remedy where the evidentiary error relates to liability.

Remittitur is one remedy available to trial courts where tainted evidence was produced during trial. This remedy is designed to correct an unfair judgment where the court's only concern is the *amount* of the verdict awarded by the jury. Because remittitur does not disturb the liability determination, it is necessarily premised upon the conviction of the Court that the evidence that addressed both standard of care and causation was *not* tainted. Therefore, this remedy is only appropriate where the tainted evidence related exclusively to the element of damages and valuation. Because the case before this Court involved tainted evidence addressing both standard of care and proximate causation, remittitur is not an appropriate remedy.

Prior to the trial herein, the Plaintiff submitted reports estimating the cost that would have to be incurred to provide his care for the balance of his lifetime. The reports reflected care by a home health care aide, not a registered nurse or other medical professional, and stated an estimated value between $4,303,088 and $6,413,639. Accepting these figures, the defendants did not retain an expert of their own to refute the estimated cost of care. Although there was absolutely no evidence supporting the need for any registered nursing care and no mention of registered nursing care in the reports submitted prior to trial, the Plaintiff presented evidence at trial that if the same level of care were provided by a registered nurse, it would cost three times as much as previously reported for an aide. *McLeod,* 166 Ohio App. 3d. 647, 663 (Karpinski, J., dissenting). Permitting the Plaintiff to present this evidence to the jury, both through the economist and through a medical expert witness, was improper and denied the parties a fair trial because it artificially inflated the value of Plaintiff's claim.[8] If this were the only improper evidence, remittitur may provide an appropriate remedy. But, here, the improper evidence permeated throughout the trial and affected everything, including the elements required to establish liability. Therefore, remittitur here would provide an incomplete and inadequate remedy.

2. A new trial is the only appropriate remedy where the evidentiary error relates to liability.

A new trial is another remedy available to trial courts where tainted evidence was produced during trial. This remedy is designed as a "do over" when a fair trial was not afforded on the first attempt. Unlike remittitur, which cannot correct errors addressing issues of liability, a new trial does provide a means of correcting errors where evidence presented to a jury that addressed either standard of care or causation was tainted. Because the case before this Court

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[8] *McLeod,* 166 Ohio App. 3d. 647, 663 (Karpinski, J., dissenting).

involved tainted evidence addressing issues of both standard of care and proximate causation[9], a new trial is the only appropriate remedy.

The record is replete with examples of misrepresentations of the evidence by Plaintiff's attorney during the trial. As referenced above, this includes repeated attempts with multiple witnesses to misrepresent the meaning and significance of key medical terminology used by the medical providers. This conduct rendered the well meaning jury utterly incapable of reaching a fair decision on the merits relative to the liability determination. Specifically, liability is an all or nothing proposition based upon the Plaintiff's ability to establish a deviation from the standard of care and proximate causation to a preponderance of the evidence. There is simply no way for the trial court to remove the tainted evidence from the scales of justice to see if they no longer tip in favor of liability. Only by presenting untainted evidence to a jury for consideration can a fair determination be made. This requires a new trial.

C. <u>The Impact Of Unfair Jury Trials In Medical Negligence Actions Reaches Far Beyond The Litigants</u>

Anytime justice is not served because parties to litigation are denied a fair jury trial, Ohio citizens are injured. While the parties to the litigation are the most immediately and directly affected, nonparties to the litigation are not spared. Not only do they experience a loss of faith in the system of justice, but in the context of medical negligence cases, nonlitigants also face the risk of loss of medical services caused by the impact of the tainted judgment(s) on the individual provider(s) or the health care system generally. Although every single tainted verdict will not necessarily have a noticeable impact beyond the litigants, a tainted verdict that is excessive -- or the cumulative result of multiple tainted verdicts -- will likely harm the medical liability insurance market, self-insured hospitals, and Ohio's patient population.

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[9] *Id* at 665-666 (Karpinski, J., dissenting).

It is no secret that Ohio has been facing a crisis in the area of medical liability insurance. See Ohio Commission's Final Report. Since 2000, nine medical liability carriers left the Ohio insurance market. *Id.* at 4. Health care providers, such as doctors and hospitals, faced significant increases in premiums. *Id.* News stories throughout Ohio featured doctors who were closing their doors or limiting their practices because they were unable to obtain affordable insurance coverage. During this same time, numerous hospitals closed maternity wards and eliminated other patient services. Many closed their doors entirely. In fact, over the course of the past decade, at least thirty-two (32) different hospitals have closed in Ohio due, in large part, to the financial strains placed upon those institutions as a result of increased insurance costs.[10]

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[10] The OHA maintains an updated list of hospital closures in Ohio from 1980 to the present. Many of the closures are clearly attributable to financial losses. From 1994 through 2003, approximately 32 different hospitals were closed, compared with only 22 during the prior fourteen-year period. The affected hospitals include: **2003**: UHHS Saint Michael Hospital; Deaconess Hospital. **2002**: Riverside Mercy Hospital. **2001**: River Valley Health System (two hospitals); Doctors Hospital North; Columbus Community Hospital; Mercy Hospital Hamilton. **2000**: Bethesda Oak Hospital; Mt. Sinai Medical Center-University Circle; Youngstown Osteopathic Hospital; Veterans Memorial Hospital; Richland Hospital; Franciscan Medical Center; Oak Hill Community Medical Center. **1999**: Saint Luke's Medical Center; MedCenter Hospital. **1998**: Jewish Hospital (2 campuses consolidated into one location); Peoples Hospital; Dettmer Hospital; Stouder Memorial Hospital; and Piqua Memorial Medical Center (services consolidated at the new Upper Valley Medical Center, so net loss of just two hospitals, not three). **1996**: Fallsview Psychiatric Center; St. Joseph Riverside; Warren General Hospital; Western Reserve System – Southside; Care Unit Hospital; Woodside Hospital; Dartmouth Hospital; Mercy Hospital. **1995**: Molly Stark Hospital. **1994**: Emerson A. North Hospital; Parkview Hospital; Potters Medical Center; St. Joseph Hospital and Health Center; Brentwood Hospital. **1993**: Kettering-Mohican Area Medical Center. **1991**: MetroHealth Hospital for Women. **1990**: St. John Hospital of Cleveland. **1989**: Wellington Community Hospital. **1988**: Central Ohio Adolescent Center; Northeastern Ohio General Hospital. **1987**: Southern Hills Hospital. **1986**: Kaiser Foundation of Cleveland; Wayne General & Podiatry. **1985**: Rickly Memorial – Ohio Masonic Home; Woodland Centers; University of Cincinnati/Christian R. Homes Division. **1984**: Shaker Medical Center Hospital; Women's Hospital. **1983**: New London Hospital; New Horizon Center Hospital; Frazier Health Center. **1982**: Dayton Children's Psychiatric Hospital; Fairhill Mental Health Center. **1981**: Bay View Hospital; St. George Hospital. **1980**: Gibbons Hospital.

The trend continues today. (In fact, Mt. Sinai Hospital in Cleveland, Ohio, one of the defendants in this case, has recently closed its doors.)

Over the period from 2001 through 2005, Ohio's five largest medical malpractice insurers, which cumulatively write about two-thirds of the Ohio market, experienced an aggregate increase in physician and surgeon malpractice insurance rates of 194.7%. *Id.* While there have been some recent signs that Ohio's medical liability insurance market is beginning to stabilize[11], medical malpractice insurance rates in Ohio are still extremely high overall, and particularly in certain geographic areas and medical specialties. For instance, in 2005, a neurological surgeon practicing in Ashtabula, Geauga, Lake, Mahoning, Portage or Trumbull Counties could expect to pay $227,599 for a fully mature claims made policy with limits of $1 million per claim and $3 million aggregate ("$1M/$3M," amounts which represent typical policy limits). See Ohio Department of Insurance Table, "Ohio Physicians Surgeons Medical Malpractice Rates: Selected Specialties by County," "Neurological Surgery," attached hereto as Exhibit C. A neurological surgeon practicing in Cuyahoga or Lorain Counties might expect to pay $252,888 for that policy. An OB/GYN practicing in those counties could expect to pay $190,407 to $211,563 in 2005 for a $1M/$3M policy. See Ohio Department of Insurance Table, "Ohio Physicians Surgeons Medical Malpractice Rates: Selected Specialties by County," "OB/GYN," attached hereto as Exhibit D.

Even as Ohio malpractice insurance rates increased dramatically, the total costs for medical malpractice claims (including costs for payments to claimants and costs for investigation and defense of claims) exceeded medical malpractice premiums. Over a three-year period,

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[11] Shannon Mortland, *Docs Find Relief at Last; Tort Reform Helps Apply Brakes to Steep Malpractice Insurance Hikes; More Physicians Staying in Ohio*, CRAIN'S CLEVELAND BUSINESS, Sept. 11, 2006, attached hereto as Exhibit B.

encompassing 2001 through 2003, for every $1.00 of premium received, Ohio's five largest medical malpractice insurers paid out $1.23 for claims. See Ohio Department of Insurance Table, "Premium, Losses, and Cost of Investigation and Defense," attached hereto as Exhibit E (showing the ratio of total claims costs to premiums experienced by Ohio's five largest medical malpractice insurance carriers was 123.7%).[12]

This documented increase in medical malpractice costs has had a substantial impact on physicians in Ohio, according to a recent survey conducted by the ODI. See Ohio Department of Insurance Report, "Physician Medical Malpractice Insurance Survey," attached hereto as Exhibit F. The survey found that nearly forty percent of respondents had retired or planned to retire in the next three years because of rising insurance costs. *Id.* (Only nine percent of respondents were over age sixty-four.) *Id.* In particular, physicians in high-risk fields such as neurology and specialty surgery, associated with the highest rates of malpractice insurance, were especially likely to retire. *Id.* Increases in medical malpractice insurance rates affect patient care in other ways as well. Sixty-six percent of the physicians who responded to the ODI survey reported that they have turned down high-risk patients or referred high-risk procedure patients elsewhere. *Id.* The results of the ODI survey indicate that this Court's decision as to whether a plaintiff may enjoy the overcompensation received as a result of an unfair trial will have far-reaching effects.

This Court's decision will also have a significant impact on self-insured entities in Ohio. As many as 50% of Ohio hospitals are self-insured for liability risks. When self-insured hospitals are required to increase their reserves for claims (as they would be to account for the increased risk emanating from the appellate court's decision), they must reallocate resources. This often means cutting other programs and services offered to patients, employees, and the

[12] This information was compiled by the National Association of Insurance Commissioners and is believed to be the most recent data available for this information.

community at large. It is not possible for the health care industry to fund the overcompensation of plaintiffs at the same time that it pursues other goals such as caring for the uninsured[13] and furthering medical research, especially since this overcompensation occurs in the context of a system with limited resources.

The health care system in Ohio is in a vulnerable state. As a result of an ongoing malpractice insurance crisis, Ohio has already lost physicians and medical facilities and remains in jeopardy of further losses. Any unnecessary insult to this system must be avoided. Overcompensation following an unfair jury trial is just such an unnecessary insult.

CONCLUSION

Jurors seated in a medical negligence action assume a tremendous responsibility. They are asked to take a crash course in medicine that involves nothing more than a series of one-way lectures by "educators" who usually disagree in many respects. Armed with only this limited education, the jury is then asked to judge the propriety of a medical provider's care and, where the care is found lacking, to determine how the patient was affected and assign a dollar value. A jury cannot be expected to accomplish this daunting task with tainted evidence. Tainted evidence absolutely precludes a fair jury trial.

The Ohio Constitution guarantees parties to litigation a fair jury trial in an Ohio courtroom. Where tainted evidence has denied litigants this fundamental right, it is incumbent upon the trial court to fashion a remedy. One such remedy is remittitur, but that remedy must be strictly limited to situations where the only evidentiary concerns deal with issues relating to the *amount* of damages awarded. Where the evidentiary concerns deal with issues relating to liability, the only appropriate remedy is to order a new trial. Because the evidentiary abuses in

[13] Based upon financial information provided to OHA by its members Ohio hospitals provided more than $636.5 Million in charity care and more than $1.2 billion in total community benefit in 2004. The figures are still being finalized for 2005, but are expected to be even higher.

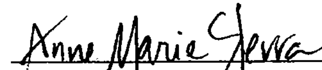
the case at bar, predominantly related to the conduct of Plaintiff's counsel, permeated damage *and* liability issues, a new trial is the only way to afford the parties the fair jury trial to which they are entitled.

The outcome of this case and the cases that follow will have an impact on Ohio's fragile health care system. Contributing to the system's fragile state are the financial strains of an insurance crisis that are only further aggravated by excessive jury verdicts. Where the excessive jury verdict is the result of an unfair jury trial, this is a strain that can and must be avoided. Ordering a new trial will afford all parties the opportunity for a fair jury trial. At the same time, it will eliminate the tainted and excessive $30,000,000 judgment and the correlating strain that these types of judgments (and their risks) impose on a system that is already vulnerable.

Additionally, the outcome of this case will have an impact upon the conduct of attorneys practicing in Ohio courtrooms in the future. Condoning egregious behavior of counsel by allowing a verdict to stand will encourage others to do the same in order to reap similar rewards for themselves and their clients. Truth and fairness will fall victim to theatrics and histrionics. In response, this Court can expect to see similar behavior develop from opposing counsel who see no alternative. Obviously, such a situation is not conducive to the orderly administration of justice, and would leave Ohio citizens with a guarantee that they cannot get a fair jury trial in this State.

For these reasons and those stated previously herein, this Court should reverse the Eighth District Court of Appeals' decision reinstating the verdict and order a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief of *Amici Curiae* Ohio Hospital Association, Ohio State Medical Association, and American Medical Association in Support of Appellants was served by ordinary U.S. mail, postage prepaid, upon the following this 4th day of December, 2006:

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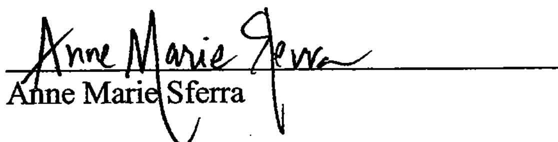

Anne Marie Sferra

APPENDIX

	EXHIBITS
Ohio Medical Malpractice Commission's Final Report	Exhibit A
Docs Find Relief at Last; Tort Reform Helps Apply Brakes to Steep Malpractice Insurance Hikes; More Physicians Staying in Ohio, CRAIN'S CLEVELAND BUSINESS, Sept. 11, 2006	Exhibit B
Ohio Physicians Surgeons Medical Malpractice Rates: Selected Specialties by County (Neurological Survey)	Exhibit C
Ohio Physicians Surgeons Medical Malpractice Rates: Selected Specialties by County (OB/GYN Survey)	Exhibit D
Premiums, Losses, and Cost of Investigation and Defense Table	Exhibit E
Physician Medical Malpractice Insurance Survey	Exhibit F