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DOCTORS, NURSES AND SUPERSEDING CAUSE: THE DEMISE OF THE LAST IN TIME DEFENSE

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I. INTRODUCTION

The Ohio Supreme Court's decision in *Berdyck v. Shinde*[2] brings to a head the problem in understanding superseding cause in Ohio. After extensively discussing of the evolution and expansion of a nurse's duty in Ohio, the Court, states:

> Thus we hold that the intervening negligence of an attending physician does not absolve a hospital of its prior negligence if both cooperated in proximately causing an injury to the patient and no break occurred in the chain of causation between the hospital's negligence and the resulting injury. In order to break the chain, the intervening negligence of the physician must be disconnected from the negligence of the hospital and must be of itself an efficient, independent and self-producing cause of the patient's injury.[3]

The question which naturally arises is whether the determination of superseding cause in this context is a question for the jury. Ohio case law has

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[2]613 N.E.2d 1014 (Ohio 1993).

[3]*Id.* at 1025.

long held, as a matter of law, that the aggravation of an injury by the subsequent malpractice of a physician never breaks the chain of causation.[4] Assuming that the original tortfeasor was negligent and that his actions caused the original injury, the only question left for the jury is whether the plaintiff herself exercised reasonable care in seeking treatment by a qualified physician.[5] This rule was affirmed and given its common appellation, "the subsequent tortfeasor rule," in *Travelers Indemnity v. Trowbridge*,[6] where the court held: "[t]he original tortfeasor is responsible for the negligence of the physician because the tortfeasor's negligence created the risk (the injury) and the occasion for the independent negligence of the physician."[7] Since 1884[8] the rule in Ohio has been that the subsequent negligence of a physician is foreseeable as a matter of law and the question is not one for the jury.[9]

If the foreseeability of a physician's negligence occurring after a nurse's negligence is a question for the jury, then either the Supreme Court has decided that a nurse's duty is somehow different than all other duties in Ohio or the Court has very discreetly overturned a century of Ohio case law.

II. THE SUPERSEDING CAUSE PROBLEM

The issue of superseding cause remains unclear. This can be seen by comparing Ohio Jury Instruction 3 on superseding cause with Instruction 6 on Superseding Responsible Cause.[10] The two instructions, if taken as equally valid propositions of the law, produce conflicting results in any case involving the foreseeable negligence of a second tortfeasor.

The source for this discrepancy is the existence of two seemingly disparate lines of cases which have developed on this issue. One line of cases, derived from *Mouse v. The Central Savings & Trust Co.*[11] and *Mudrich v. Standard Oil.*[12] was recently affirmed in *Cascone v. Herb Kay Co.*[13] *Cascone* gives the generally-accepted test for superseding cause:

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[4]Loeser v. Humphrey, 41 Ohio St. 378 (1884); Tanner v. Espey, 190 N.E. 229 (Ohio 1934).

[5]Loeser, 41 Ohio St. at 382.

[6]321 N.E.2d 787 (1975), *overruled on other grounds* Motorists Mut. Ins. Co. v. Huron Rd. Hosp., 653 N.E.2d 235 (Ohio 1995).

[7]*Id.* at 790.

[8]Loeser v. Humphrey, 41 Ohio St. 378.

[9]Heintz v. Caldwell, (1898) 16 Ohio C.C. 680 (1898), Bendner v. Carr, 532 N.E.2d 178 (Ohio App. 1987).

[10]1 O.J.I. 1130 (Anderson 1995).

[11]167 N.E. 868 (Ohio 1929).

[12]90 N.E.2d 859 (Ohio 1950).

[13]451 N.E.2d 815 (Ohio 1983).

> The test . . . is whether the original and successive acts may be joined together as a whole, linking each of the actors as to the liability, or whether there is a new and independent act or cause which intervenes and thereby absolves the original negligent actor.[14]

The terms "new" and "independent" are defined in the Ohio Jury Instructions as 11.33 based upon the discussion of these terms in *Springsteel v. Jones & Laughlin Steel Corp.*[15]

> The term 'Independent' means the absence of any connection or relationship of cause and effect between the original and subsequent act of negligence. The term 'new' means that the second act of negligence could not reasonably have been foreseen.[16]

Thus, for an intervening act of negligence to rise to the level of a superseding cause thereby breaking the chain of causation and relieving the original tortfeasor of liability, it must be both unrelated to the original act and unforeseeable. The unforeseeability requirement is further explained in the case citing in the Instruction:

> It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in injury to someone.[17]

This test is in accord with the test propounded in the *Restatement (Second) of Torts*, Section 447:

> *Negligence of intervening acts.* The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about if (a) the actor at the time of his negligent conduct should have realized that a third person might so act or (b) a reasonable man knowing that the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted or (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.[18]

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[14] *Id.* at 819.

[15] 192 N.E.2d 81 (Ohio App. 1963).

[16] 1 O.J.I. 1130(3) (Anderson 1995).

[17] Springsteel, 192 N.E.2d at 88.

[18] RESTATEMENT (SECOND) OF TORTS § 447 (1965) [hereinafter RESTATEMENT].

This also represents the approach of a majority of jurisdictions in the United States.[19]

> The instruction in O.J.I. 11.30, Section 6, however, presents a very different test: If an independent and responsible party was aware of the existing hazard and could or should have eliminated it, there is a break in the chain of causation and the party who created the original hazard is relieved from liability because of such intervention by the other party.[20]

This Instruction is based upon the oft-cited language of *Thrash v. U-Drive-It*:[21]

> Where there intervenes between an agency creating a hazard and an injury resulting from such hazard another conscious and responsible agency which could and should have eliminated the hazard, the original agency is relieved from liability.[22]

While both these tests are offered as instructions to the jury to aid them in deciding whether an intervening act of negligence is a superseding cause, they can, in fact, only produce confusion. While both tests arguably include the concept of "independence," the *Cascone* test turns on the question of foreseeability while the *Thrash* test precludes consideration of foreseeability. What then of the foreseeable negligent intervention of a responsible party?

The *Restatement* resolves this problem by recognizing that the *Cascone* test is the general rule and the *Thrash* test is applicable only under certain circumstances. The *Restatement* 452(2) of the *Restatement* outlines those circumstances when the negligent conduct of a third party will work to release the original tortfeasor of liability:

> Where because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person the failure of the third person to prevent such harm is a superseding cause.[23]

The Reporter's Note more fully describes under what circumstances that may happen:

> One way in which the responsibility may be shifted is by express agreement by the actor and the third person. By contract, by gratuitous promise or by mere implication from what is agreed, it may be

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[19]Comment Note, Annotation, *Foreseeability as an Element of Negligence And Proximate Cause*, 100 A.L.R.2d 942 (1995).

[20]1 O.J.I 11.30(b) (Anderson 1995).

[21]110 N.E.2d 419 (Ohio 1963).

[22]*Id.* at 422.

[23]RESTATEMENT § 462(2) (1965).

> understood that the third person has taken over full responsibility for the situation and that the actor is relieved of his obligation.[24]

While the *Restatement* offers a logical resolution to the problem of subsequent third-party negligence, the question remains, is it the rule in Ohio?

III. THRASH REDUX

A close examination of the decision in *Thrash* reveals it was never intended as a blanket statement of the law regarding superseding cause but rather a decision limited to certain unusual situations.

In 1953, the law regarding products liability was still in its early stages. That this was a primary concern of the court in *Thrash* is evidenced by its reference to the "widely approved" decision in *McPherson v. Buick Motor Co.*[25] *Thrash* involved the liability of the seller of a used car to an injured plaintiff who purchased the car from an intervening buyer.

Thrash was, by its own terms, a limitation on the rule espoused in *McPherson*: "certainly though, this rule is subject to limitation."[26] It was an attempt to bring under control the expanding area of products liability.

There is a significant portion of the now-famous language regarding the "conscious and responsible agency" which precedes the oft-used quote, but is usually not included: "Moreover, in the circumstances of this action, the U-Drive-It Company may invoke the rule that . . . ."[27]

What, then, are the "circumstances" which distinguish the situation in *Thrash* and permit the use of the test for superseding cause? The *Thrash* court takes pains to distinguish it's facts from those of an earlier case, *Penn. Railroad Co. v. Snyder*.[28] In *Penn Railroad Co.*, the Pennsylvania Railroad ran cars into Ohio that were ultimately bound for Detroit. Penn allowed one of those cars onto the line with a defective handhold at the top of a ladder. In Dayton, the cars were transferred into the control of the Lake Shore & Michigan Southern Railroad Company. Both Penn and Lake Shore admitted they had a duty to inspect the cars and the jury found that the car was defective at the time it was delivered to Lake Shore. Snyder, an employee of Lake Shore, climbed on the car after the

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[24] *Id.*

[25] 111 N.E. 1050 (N.Y. 1916).

[26] Thrash, 110 N.E.2d at 422.

[27] The actual holding in Thrash is very fact-specific:

> We conclude that where the owner of a used motor vehicle sells the same "as is" to a dealer and those articles for such disposition as the dealer may make of it, such owner may not ordinarily be held liable for injuries occasioned to one who purchased the vehicle from the dealer or for injuries to another because of false or imperfections in the vehicle which existed or occurred during the time it was in the possession of such owner.

Id. at 423.

[28] 45 N.E. 559 (Ohio 1896).

transfer and was injured because of the absent handhold. Prior to trial, Lake Shore was dismissed as a defendant.

Penn Railroad contended that "[t]he causal connection was broken by the intervening negligence of the Lake Shore Company."[29] However, the court held, that:

> To relieve the latter from the consequences of its negligence, it is not enough that the act of the Lake Shore Company was nearest in the order of events to the injury, nor that without it the injury would not have occurred; to have that effect it must have been the efficient, independent, and self producing cause, disconnected from the negligence of the plaintiff in error. The causal connection is not broken, 'if the intervening event is one which might in the natural course of things be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation.'[30]

This test, using independence and foreseeability as its criteria, is the same as the *Cascone* test.

The *Penn* case featured a second conscious and responsible tortfeasor who acknowledged a failure in it's duty to inspect. How, then, did it differ from the situation in *Thrash*? The *Thrash* court itself explains the basis of the distinction:

> Here, the U-Drive-It Company sold its used motor truck outright in the condition it was and assumed no obligation and exercised no control with respect to its future disposal.[31]

The criteria upon which the *Thrash* court permitted the application of its alternate rule parallels that of the *Restatement*.[32] There was a contractual relinquishment of duty in *Thrash* which served to sever liability.

Most cases which have followed *Thrash* have maintained this contractual flavor.[33] Generally, the *Thrash* exception has not been followed where the facts stray from either an express or implied termination of duty.[34]

The primary application of the *Thrash* rule, outside of the contractual context, can be found in the case cited in the Ohio Jury Instructions[35] as the source of the rule: *Hurt v. Rogers Transportation Co.*[36] In *Hurt*, the Ford Motor Co. shipped

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[29] *Id.* at 561.

[30] *Id.* at 562.

[31] Thrash, 110 N.E.2d at 423.

[32] RESTATEMENT, *supra* note 22.

[33] Stamper v. Power Ruckman Home Town Motor Sales Inc. (1971), 25 Ohio St. 2d 1; Oropesa v. The Hoffman Manufacturing Company (1965), 9 Ohio App. 2d 337; Ikerd v. Lapsworth, 435 F.2d 197 (7th Cir. 1970).

[34] Neff Lumber v. First Nat'l Bank, 122 Ohio St. 302 (Ohio 1930).

[35] 1 O.J.I. 11.30(6) (Anderson 1995).

[36] Hurt v. Charles J. Rogers Transp. Co., 130 N.E.2d 824 (Ohio 1955).

steel forgings in pallet boxes. These boxes were loaded onto a truck under the supervision of Rogers and transported by one of Rogers' drivers, Carr.

During the trip, Carr became aware that the forgings were loose and bouncing off the truck into the highway. He discovered a broken box and, in order to repair it, he broke off boards from other pallet boxes and fastened them to the broken box. Carr subsequently stopped his truck to repair a flat tire. At that time, he noticed several steel forgings lying loose in the bed of the truck which escaped from one of the boxes from which he had previously removed some boards. Carr then continued on his journey and shortly after a forging bounced off the truck and struck the plaintiff's automobile.

The *Hurt* court held that, based upon the facts of the case, Ford was entitled to invoke the *Thrash* rule. In determining that Roger was a conscious and responsible agency the court looked to the exclusive control Rogers had over the shipment, Rogers' "actual knowledge of every claimed defect" and Carr's own "willful" actions.[37]

The Sixth circuit explained the rational of *Hurt* in *Lambert v. U.S.*[38] In *Lambert*, the court, citing the "full knowledge" language of Hurt, found that the intervening party's actual knowledge of the dangerous condition brought the case in accord with the *Hurt* rule.[39] The dissent in *Lambert* was more forthcoming in it's *Hurt* analysis. After reiterating the general rule of *Penn. Ry. Co. v. Snyder*, that a mere failure to remove or cure previous negligence does not break the chain of causation, the dissent focused on the actions of Carr in the context of his knowledge of the hazard:

> In the *Hurt* case, the chain of causation was clearly broken by the gross negligence of the company's driver, Carr, in continuing to drive the trailer when he could see the forgings falling out and bouncing on the highway.[40]

It would seem that the distinguishing characteristic of the *Hurt* rule is the actual knowledge of the risk and the failure to utilize reasonable care despite that knowledge on the part of the intervening defendant. Thus, in order to invoke the *Thrash* rule, absent any contractual agreement to terminate a duty, a defendant must show that a subsequent defendant, who itself had a duty to prevent harm to the plaintiff, persisted in acting in an unreasonable manner despite actual knowledge and appreciation of the risk. This, however, is precisely the definition of a "willful" tort in Ohio. A willful tort "may be shown by indifference to the safety of others, after knowledge of their danger, or failure, after such knowledge, to use ordinary care".[41]

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[37] *Id.* at 828.

[38] Lambert v. United States, 438 F.2d 1249 (6th Cir. 1971).

[39] *Id.* at 1252.

[40] *Id.* at 1269. (Dissent, Mc Allister).

[41] 70 Ohio Jur. 3d Negligence § 34 (1986).

This form of aggravated negligence has been widely recognized under the various names of willful, wanton or reckless all of which invoke a higher awareness of the risk than ordinary negligence. Prosser notes that in practice the three terms have the same meaning and all relate to the "penumbra of what has been called 'quasi-intent'."[42] The terms all refer to conduct in which:

> [T]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow.[43]

That such an aggravated form of negligence, embracing both actual knowledge of the risk and unreasonable conduct, can break the chain of causation has also been widely recognized. The *Restatement* Section 452 Comment F[44] states that in the absence of a contract or agreement certain factors may still operate to cause a third party's failure to prevent harm to break the chain of causation: "Among them are the degree of danger and the magnitude of the harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care."[45]

Viewed in this light, *Hurt* allows a more meaningful analysis of the terms "conscious and responsible agency" used in the Ohio Jury Instructions. Reasonable implies that the agency in question owes some duty to the plaintiff to act with reasonable care to protect him from the complained of harm. This, however, is a requirement for every action in negligence and, thus, adds nothing to help distinguish those intervening negligent acts which break the chain of causation from those which do not.

The term "conscious", in light of *Hurt*, obviously means more than a mere physiologic state of being. "Conscious" implies the actual knowledge and appreciation or "consciousness" of the risk coupled with a subsequent failure to act in a reasonable manner, in other words, willful or reckless behavior.

This analysis coincides with that of Prosser who, in discussing the requirements for an intervening cause to rise to the level of superseding, describes a "group of cases [which] involve the situation in which a third person fully discovers the danger, and then proceeds, in deliberate disregard of it."[46]

In Section F of the Reporter's Note to Section 452, the *Restatement* lists some other factors which will cause a break in the chain of causation. Included in this list is the existence of a special relationship between the third person and the

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[42] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 212 (5th ed. 1984) [hereinafter PROSSER].

[43] *Id.*

[44] RESTATEMENT § 452 (Anderson 1995).

[45] *Id.* Addressing this question directly the California Supreme Court in Stewart v. Cox, 362 P.2d 345 (Cal. 1961), that "negligent conduct with full realization of the danger may properly be considered highly extrodinary".

[46] PROSSER, *supra* note 42, § 44 at 318.

plaintiff or defendant. Is the doctor/nurse relationship one of those special relationships in which the doctor's subsequent negligence will cut off the negligence of the nurse?

IV. NURSE'S DUTY IN OHIO

Up until the decision in *Berdyck*, a good argument could be made that a doctor's subsequent negligence would cut off the negligence of a nurse. The nurse's duty, historically in Ohio, has been seen as circumscribed in scope and essentially derived from the authority of the physician.

Prior to 1964, it was recognized that the nurse had a duty to follow the orders given by a doctor.[47] In *Richardson v. Doe*,[48] the court recognized that a nurse was not required to use independent judgment and her primary duty was to report signs and symptoms to the physician.[49] This holding was reiterated in *Albain v. Flower Hospital*.[50] The *Albain* court further set out the requirements a plaintiff needs to meet in order to successfully prove causation in nursing negligence. "[A] plaintiff must prove that, had the nurse informed the attending physician of the patient's condition at the proper time, the physician would have altered his diagnosis or treatment and prevented the injury to the patient."[51]

The circularity of this reasoning should be obvious. In this tautology, nursing negligence will never survive subsequent physician negligence. If the physician errs because of the nursing negligence, the physician is not negligent. If he errs regardless of the nursing negligence, then the negligence of the nurse cannot, by definition, be causative. Simply put, nursing negligence can only be causative where the physician is not negligent, and where the physician is negligent, the nurse's negligence cannot be causative. The sharply circumscribed duty of the nurse under *Albain* and *Richardson*, dependent as it was on the knowledge and action of the physician, probably did fall under the special relationship between the defendant and the third person contemplated by the *Restatement* and, thus, under the rule of *Thrash*.

This was, in fact, the very question brought before the court in *Berdyck*. The trial court in *Berdyck* granted summary judgment to defendant McGruder Hospital. On appeal, the hospital argued that since Dr. Shinde admitted his

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[47]Klema v. St. Elizabeth Hosp., 106 N.E.2d 765 (Ohio 1960).

[48]199 N.E.2d 878 (Ohio 1964).

[49]*Id.* at 880.

[50]553 N.E.2d 1038, 1051 (Ohio 1990), *overruled on other grounds* by Clark v. Southview Hosp. Family Health Ctr. 628 N.E.2d 46 (Ohio 1994) and Stovall v. Brown Memorial Hosp., 1994 Ohio App. LEXIS 5703 (Ohio Ct. App., Ashtabula Cty. Dec. 16, 1994).

[51]Albain, 553 N.E.2d at 1051.

own negligence in failing to go to the hospital, his negligence must cut off the nurse's negligence and be the sole proximate cause of the injury.[52]

The appellants argued that the nurse's duty was not limited to following orders and transmitting information, but that the duty also extended to a duty "to act with reasonable care in the discharge of her professional duties."[53] The Court of Appeals held that "nurses have a professional duty to exercise ordinary and reasonable care to see that no unnecessary harm comes to his or her patient."[54]

This issue, scope of the nurse's duty, was appealed to the Ohio Supreme Court. The Ohio Nurses Association joined the appellants and argued, in their amicus curiae brief, for the formal expansion of the nurse's duty in line with the elements found in the Ohio Nurse Practice Act. The Ohio Supreme Court affirmed the appellate court's holding that the "nurses are held to a greater accountability than informing physicians and following their orders."[55] The court went so far as to suggest that in addition to the duty of performing a competent nursing assessment, the nurse would be required to call consultations with nursing supervisors or other physicians when she found a physician's treatment to be in error.[56] The court further held that there may be an area where the duty of the physician and the nurse overlap.[57]

By recognizing the nurse's independent duty of reasonable care to the patient, the court extinguished the purely dependent relationship of the nurse's duty on the physician's conduct. This recognition elevated the duty to the same level as every other duty of reasonable care in Ohio. The impact, then, of the court's invocation of the *Cascone* test at the end of the opinion was to decisively remove nursing negligence from the realm of *Thrash* and subject it to the same general rules as other forms of negligence. Thus, under *Berdyck*, nursing negligence and physician negligence can co-exist and cooperate to result in injury to a plaintiff in the same way other forms of negligence can. The test then for whether subsequent physician malpractice breaks the chain of causation is not the "intervention of a conscious and responsible agency" test of *Thrash*, but, rather, the general rule that such intervention must be both independent and unforeseeable.

V. SUBSEQUENT PHYSICIAN MALPRACTICE

If nursing negligence is, as suggested, on the same level as other forms of negligence in Ohio, it must therefore be subject to the same rules of law as other

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[52]Berdyck v. Shinde, No. 90-0T-060, 1991 Ohio App. LEXIS 5209 (6th Dist. Nov. 1, 1991), *aff'd*, 613 N.E.2d 1014 (Ohio 1993).

[53]*Id.* at *11.

[54]*Id.* at *18.

[55]Berdyck v. Shinde, 613 N.E.2d 1014, 1023 (Ohio 1993).

[56]*Id.* at 1024.

[57]*Id.* at 1023.

forms of negligence. Ohio's view of subsequent physician negligence is in accord with both the vast majority of jurisdictions and the *Restatement*.[58] Section 457 of the *Restatement* states that an initial tortfeasor will always be liable for the aggravation of an initial injury by subsequent medical malpractice. The rationale for this view is found in Reporter's Note B:

> However, there is a risk involved in the human fallibility of physicians, surgeons, nurses and hospital staffs which is inherent in the necessity of seeking their services. If the actor knows that his negligence may result in harm sufficiently severe to require such services, he should also recognize this as a risk involved in the other's forced submission to such services, and having put the other in a position to require them, the actor is responsible for any additional injury resulting from the other's exposure to this risk.[59]

As more colorfully put by Prosser: "It would be an undue compliment to the medical profession to say that bad surgery is no part of the risk of a broken leg."[60]

As previously stated, this rule was first embraced in Ohio in *Loeser v. Humphrey*.[61] Here, the court upheld jury instructions and specifically stated that, if the defendant was found liable for the initial injury, then, as long as the plaintiff acted reasonably in choosing a physician, defendant would be liable for the aggravation of the injury caused by the physician's malpractice.[62] This holding was reiterated in *Tanner v. Espey* and formulated into the Subsequent Tortfeasor Rule in *Travelers Indemnity v. Trowbridge*. The same principle has been extended to the situation where the initial negligence is itself an act of medical malpractice and a plaintiff is then further injured by a subsequent act of malpractice.[63] In *Traster*, the plaintiff was injured during a negligently performed surgery and was subsequently further harmed by negligent post-operative care. The court upheld as a valid statement of the law the proposed jury instruction which stated, "[i]f a person suffers personal injuries by reason of a surgeon's negligence and such harm is aggravated by the negligence mistake, or lack of skill of a subsequent physician, then such aggravation is a proximate result of the negligence of the original surgeon . . ."[64]

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[58] RESTATEMENT § 457 (1965).

[59] *Id.* at cmt. b.

[60] PROSSER *supra* note 42.

[61] 41 Ohio St. 378 (1884).

[62] *Id.* at 380-81.

[63] Traster v. Steinreich, 523 N.E.2d 861 (Ohio Ct. App. 1987).

[64] *Id.* at 862. *See also*, Blanton v. Sisters of Charity, 79 N.E.2d 688 (Ohio Ct. App. 1948); Shaw v. Donahue, 125 N.E.2d 368 (Ohio Ct. App. 1954).

A similar result was arrived at in *Savage v. Correlated Health Serv., Ltd.*[65] In *Savage*, a referring orthopedic surgeon was held liable for the subsequent negligent manipulation by a chiropractor. In finding the subsequent negligence of the chiropractor was neither outside the causal relationship of the orthopedic treatment nor was unforeseeable, the court found that, "[a]s a matter of law, the intervening negligence of the chiropractor appellants was not an intervening cause sufficient to interrupt the chain of causation."[66] In *Savage*, the court, in evaluating the "independent" requirement of the *Cascone* test, determined that "Dr. Sveda's [the orthopedic surgeon] negligent advice regarding manipulation made possible and brought about Dr. Schimmel's subsequent negligent act of excessively forceful manipulation."[67]

Such so-called "passive negligence" has also been specifically addressed by the courts in the context of successive medical negligence. In *Harris v. Middletown Radiologic Assoc.*[68] three practitioners successively failed to diagnose a fractured vertebrae. The court found that:

> Because we are talking about identical passive negligence on all three doctors' part, we conclude it does not satisfy the new and independent causation requirement. Dr. Litle and Dr. Keifhaber are not accused of creating some new or additional injury to appellee but of failing to diagnose the same condition appellant initially failed to find.[69]

Berdyck placed nursing negligence on the same footing as other negligent acts in Ohio. As such, the *Cascone* test of independence and unforeseeability must be used to determine if the subsequent negligent act will break the chain of causation. In the case of subsequent physician negligence, however, *Loeser*, *Tanner*, *Travelers*, and *Traster* state that such negligence is always foreseeable as a matter of law. What then are the respective roles for the court and the jury in determining whether the negligent actions of subsequent treating nurse or physician constitute a superseding cause?

VI. THE ROLE OF THE COURT AND THE JURY

In *Cascone*, the Ohio Supreme Court adopted the approach of the *Restatement* to this problem:

> It is the exclusive function of the court to declare the existence or non-existence of rules which restrict the actor's responsibility short of making him liable for harm which his negligent conduct is a

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[65] No. CA 14491, 14498, 1990 Ohio App. LEXIS 4590 (9th Dist. Oct. 17, 1990), *aff'd on other grounds*, 591 N.E.2d 1216 (Ohio 1992).

[66] *Id.* at *8.

[67] *Id.*

[68] No. CA 86-05-069 (Ohio Ct. App. July 20, 1987).

[69] *Id.*, slip op. at 5.

> substantial factor in bringing about, and to determine the circumstances to which such rules are applicable.[70]

Comments b and c of Section 453 further delineate the respective roles of the court and jury.

> b. If the facts are undisputed, it is usually the duty of the court to apply to them any rule which determines the existence or extent of the negligent actor's liability. If, however, the negligent character of the third person's intervening act or the reasonable foreseeability of its being done (*see* Sections 447 and 448) is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the undisputed facts three is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question is for the jury.
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> c. If the evidence is so conflicting or contradictory as to leave room for a reasonable difference of opinion as to the facts of the case, the court should instruct the jury as to the applicability of such of the rules stated in this Topic as are pertinent to such facts as the jury may reasonably find from the evidence. Thus, if the liability of the actor depends upon the wrongful character of the intervening act of the third person, the judge should, if the evidence is conflicting, leave it to the jury to find what the intervening actor did, and if there is a reasonable doubt as to whether his act, as it might be found by the jury, was or was not negligent, this question should also be left to them.[71]

For successive acts of medical or nursing malpractice it is the domain of the jury to resolve questions of fact and to determine whether there was negligence present on the parts of both the antecedent and subsequent tortfeasors. However, since the subsequent tortfeasor rule states that the simple negligence of a physician which exacerbates an existing injury is always, as a matter of law, foreseeable, there is never "room for reasonable difference of opinion as to foreseeability" with simple medical or nursing malpractice.

In order for the subsequent malpractice of a nurse or physician to break the chain of causation it must rise to the level of one of the exceptions noted in Section 452(2). It would be the provence of the jury to determine whether the facts of the case warrant such a finding and the provence of the court to then apply the law of superseding cause.[72]

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[70]Cascone, 451 N.E.2d at 820 (citing RESTATEMENT § 453).

[71]RESTATEMENT § 453 cmt. b, c (1965).

[72]An example of this in the setting of multiple medical malpractice would arise where a radiologist misreads an x-ray and the subsequent radiologist realizes the error but fails to notify the treating physician. In such an instance, it would be the job of the jury to determine whether such conduct rose to the level of willful or reckless behavior and the job of the judge to apply the law of superseding cause in the appropriate way depending on the answer. This approach has been taken in some Ohio cases. In Dillon

VII. CONCURRENT V. SUCCESSIVE TORTFEASORS

The confusion over the role of superseding cause in cases of multiple medical negligence has arisen, at least in part, from an attempt by defendants to cast themselves as successive tortfeasors in order to escape the joint and several liability incumbent upon concurrent tortfeasors. This view restricts concurrent negligence to those acts committed simultaneously and reduces proximate cause to a simple last in time test. The Ohio Supreme Court, however, has explicitly stated what concurrence means in the context of a negligence action: "Concurrent negligence consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury."[73] The subsequent tortfeasor rule is simply the same principle in slightly different language.

Thus, where the subsequent negligence of a physician results in the exacerbation of an existing injury, whether viewed as a successive or concurrent tortfeasor, the result is the same. The physician is jointly and severally liable for the injury with the original tortfeasor. The application of this rule was stated in *Blanton v. Sisters of Charity*[74] wherein the court held:

> An operating surgeon and the hospital wherein the patient is operated each sustain a relationship to the patient giving rise to a duty of care running directly to each participant in the common enterprise, for the violation or neglect of which, resulting in an injury to the patient, a primary liability is created on the part of each, which neither could escape by showing the other to be also guilty of a wrong.[75]

This rule was recently applied in *Miller v. Paulson*[76] where the court overturned a successful defense motion for judgment not withstanding the verdict. In *Miller*, the initial treating physician failed to make a proper diagnosis and the subsequent treating physician failed to use the proper treatment. The court, applying *Blanton*, held that the plaintiff need only prove "that the last chance to treat the condition with the same possibility and degree of success as was probable at the time of the alleged malpractice had passed at the time

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v. Medical Ctr. Hosp., 648 N.E.2d 1375 (1993), the court found that a physician's negligence did not, as a matter of law, relieve the hospital of its liability for the negligence of its nurses, the extended lapse of time between the negligent events did. This, of course, is in exact accord with § 452 (2) of the RESTATEMENT which specifically mentions lapse of time as a factor which can break the chain of causation.

In Silberman v. Dubin, Appeal No. C-910650, 1993 Ohio App. LEXIS 130 (1st Dist. Jan. 20, 1993), the court, relying on Thrash, held that the chain of causation was broken when one physician terminated his relationship with the patient and fully turned over the case to another physician.

[73]Garbe v. Halleron, 83 N.E.2d 217 (1948).

[74]79 N.E.2d 688 (1948).

[75]*Id.* at 689.

[76]646 N.E.2d 521 (1994).

of trial."[77] Thus, the court found that the "plaintiff may be able to sue defendant for all of her damages irrespective of whether Dr. May's [the subsequent treating physician] treatment was the proximate cause of those damages."[78]

In order to circumvent the burdens of joint and several liability, defendants race to the top of the timeline because the defendant last in line bears the sole liability. With *Berdyck* having eliminated the "special" nature of the doctor-nurse relationship, the question of superseding cause should rarely arise in the context of multiple medical negligence and should rarely serve as a basis for a hospital to escape liability.

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[77] *Id.*

[78] *Id.*