IN THE SUPREME COURT OF OHIO

Gregory J. Rau, et al.,	:	
	:	**Case No. 2025-0432**
Appellees,	:	
	:	**On appeal from the**
v.	:	**Second District Court of Appeals**
	:	**Montgomery County, Ohio**
Miami Valley Hospital, et al.,	:	
	:	**Court of Appeals Case No. CA 030032**
Appellants,	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE, OHIO STATE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, OHIO HOSPITAL ASSOCIATION, AND OHIO OSTEOPATHIC ASSOCIATION, IN SUPPORT OF APPELLANTS

Susan Blasik-Miller (0005248)
Meredith C. Turner-Woolley (0099270)
REMINGER CO., LPA
Fifth Third Center
1 South Main Street, Ste. 1800
Dayton, Ohio 45402-2017
(937) 800-1312
sbmiller@reminger.com
mtwooley@reminger.com
Counsel for Appellants, Thomas Cook, D.O. and Orthopedic Associates of Dayton

Brianna M. Prislipsky (0101170)
REMINGER CO., LPA
200 Public Square, Ste. 1200
Cleveland, Ohio 44114
(216) 687-1311
bprislipsky@reminger.com
Counsel for Appellants, Thomas Cook, D.O. and Orthopedic Associates of Dayton

Anne Marie Sferra (0030855)
BRICKER GRAYDON LLP
100 S. Third Street
Columbus, Ohio 43215
(614) 227-2300
asferra@brickergraydon.com

Ronald M. Wilt (59685)
Nancy J. Schook (26860-2024)
WILT & ASSOCIATES, PLLC
13113 Eastpoint Park Blvd., Ste. A
Louisville, Kentucky 40223
(502) 253-9110
ron@wiltinjurylaw.com
nancy@wiltinjurylaw.com
Counsel for Appellees

Lance K. Oliver (0085767)
RUSSELL, OLIVER & STEPHENS, PLC
5178 Wheelis Drive
Memphis, Tennessee 38117
(901) 844-4431
lanceo@roslawgroup.com
Counsel for Community Insurance Company, d/b/a Anthem Blue Cross and Blue Shield

Kellie Ann Kulka (0095749)
Bricker Graydon LLP
312 Walnut Street, Ste. 1800
Cincinnati, Ohio 45202
(513) 621-6464
kkulka@brickergraydon.com

Counsel for Amici Curiae,
Ohio State Medical Association, American Medical Association, Ohio Hospital Association, and Ohio Osteopathic Association

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STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio State Medical Association ("OSMA") is a non-profit professional association established in 1835 and is comprised of physicians, medical residents, and medical students in Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine. The OSMA's purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The American Medical Association ("AMA"), is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state.

The AMA and OSMA submit this brief on their own behalf and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The Ohio Hospital Association ("OHA") is a private, non-profit trade association established in 1915 as the first state-level hospital association in the United States. For more than 100 years, the OHA has provided a mechanism for Ohio's hospitals to come together and advocate for healthcare legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of 252 hospitals and 15 health systems. OHA's member hospitals directly employ more than 430,000 employees in Ohio.

Established in 1898, the Ohio Osteopathic Association ("OOA") works to advance the distinctive philosophy and practice of osteopathic medicine and promote public health. The OOA, a non-profit professional association and divisional society of the American Osteopathic Association, advocates for the more than 9,800 licensed osteopathic physicians ("DOs") in Ohio as well as approximately 1,000 medical students who attend medical school in Ohio or programs in Ohio.

Together, the OSMA, AMA, OHA, and OOA (referred to herein as "Amici Curiae") urge the Court to accept jurisdiction of this case on the basis that it presents critical issues concerning the fairness and integrity of the trial process – a process that the medical professionals on behalf of whom the Amici Curiae are entrusted to advocate rely on to protect medical standards while preventing undue harm to patients.

All litigants, including medical professionals, rely on fundamental tenets of the trial process, including the trial court's role as referee, and the finality trial brings absent appealable error. Where a reviewing court is permitted to substitute its own judgment, untethered to the evidence by proximity in both time and observation, it renders this process unpredictable and unfair. To allow a reviewing court to proceed this way undermines a provider's ability to defend themselves against meritless lawsuits.

Accordingly, in the interest of preserving the integrity of the judicial process, and the ability of the medical community to defend against allegations of medical negligence, the Amici Curiae urge this Court to accept jurisdiction.

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

It is axiomatic that medical providers accused of medical negligence should be afforded a fair and fulsome opportunity to present their defense – just as those alleged to have been injured

by medical negligence should be afforded the same opportunity to present their claims. And as part of this process, litigants on both sides of the "v" trust that the referee and fact-finder (the judge and jury respectively) are best suited to make determinations on the admissibility of evidence on the one hand, and what the evidence tends to show on the other.

The trial process also grants a litigant some sense of finality; that a higher court will not substitute its own judgment for that of the judge and jury that actually heard the evidence, save for errors that unfairly prejudice either party. Further, it is in the public's interest to promote legal precedent and consistency, the same being an integral tool in promoting resolution, and allowing litigants to adequately assess risk before they proceed to trial. And for those litigants who are members of the medical community, these notions are integral to both preserving trust in the medical community ***and*** the integrity of the judicial system.

Here, that system broke down. Here, the Court of Appeals substituted its own judgment for that of the trial court, ignoring well-established Ohio case law that limits an appellate court's ability to overturn evidentiary decisions barring an abuse of discretion. Here, the appellate court failed to afford the trial court the deference Ohio law requires.

In its January 3, 2025 Opinion, the Second District Court of Appeals reversed the judgment of the trial court, thereby vacating a jury verdict in favor of the Defendants-Appellees Dr. Thomas Cook ("Dr. Cook") and Orthopedic Associates of Dayton, Inc. ("OAD") (together, Dr. Cook and OAD are the "Appellants"). It did so on the erroneous basis that the trial court erred in admitting evidence surrounding known complications of Plaintiff-Appellee Gregory J. Rau's ("Rau")[1] knee replacement surgery, and on the basis that the trial court erred by admitting testimony from two separate experts, which it decided was cumulative. In neither instance did the Second District

[1] Mr. Rau and his wife, Plaintiff-Appellee Bette Rau are together the "Raus."

afford appropriate deference due to the trial court, instead substituting its own judgment post hoc in the trial court's stead.

Where an appellate court is afforded this level of unchecked control, no litigant can trust the finality of the trial process. This is especially dangerous in medical negligence cases, where it is not just monetary damages at stake, but a provider's reputation as a medical care-giver, and public trust in the medical community as a whole.

In sum, medical negligence cases are often complex and always require expert testimony. The trial process, which entrusts the trial court as the arbiter of evidentiary decisions, ensures some semblance of predictability and finality in such cases. Unless a trial court has engaged in an obvious abuse of discretion, its evidentiary rulings made during trial—after appropriately considering the arguments of counsel—should not be disturbed by an appellate court.

STATEMENT OF THE CASE AND FACTS

Amici Curiae adopt the Statement of the Case and Facts set forth in the memorandum in support of jurisdiction of the Appellants.

LAW AND ARGUMENT

Proposition of Law No. 1:

A defendant in a medical malpractice action may present evidence of known risks of a procedure when the evidence is presented to show that the injury need not have resulted from negligence.

A. Standard of Review

Critical to this case is the correct application of the relevant standard — as this is preliminarily where the Second District went astray. As this Court well knows, a trial court's decision to admit or exclude evidence is reviewed under an abuse-of-discretion standard. *Est. of Johnson v. Randall Smith, Inc.,* 2013-Ohio-1507, ¶ 22 citing *State v. Hancock,* 2006-Ohio-160. Before a reviewing court can find that the trial court abused its discretion, it must find that the trial

court acted in such a way that is unreasonable, arbitrary, or unconscionable. *Id*. citing *State ex rel. Beacon Journal Publishing Co. v. Akron,* 2004-Ohio-6557, ¶ 59. In making such a determination, "an appellate court may not substitute its own judgment for the trial court's judgment." *Lucas v. Ohio State Dental Bd.,* 2024-Ohio-4986 (1st Dist.), ¶ 13, quoting *Pons v. Ohio State Med. Bd*., 66 Ohio St.3d 619, 621 (1993).

This Court has described discretion as "'involv[ing] the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256 (1996) quoting *State v. Jenkins*, 15 Ohio St. 3d 164, 222 (1984). And that "[i]n order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Id.* quoting *Jenkins*, 15 Ohio St. 3d at 222.

The trial court's admission of evidence in this case was not "so palpably and grossly violative of fact or logic" to demonstrate passion or bias, and the Second District's decision demonstrates a clear substitution of its own judgment.

B. Evidence Concerning Known Risks to Rau's Knee Replacement Surgery Was Properly Admitted by the Trial Court.

In its Opinion, the Second District agreed with the Raus' contention that the evidence relating to informed consent should have been excluded under Evid. R. 403(A) as unduly prejudicial. Opinion, ¶ 22. However, this was not a call for the Court of Appeals to make — so long as the testimony was clearly relevant to the issues in the case, and its probative value not outweighed by its prejudicial impact, the trial court's evidentiary decision should not have been disturbed.

Under Evid.R. 403(A) relevant evidence should be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Thus, in order for the evidence to be excluded under Evid.R. 403, its "probative value must be minimal and the prejudice great." *State v. Morales*, 32 Ohio St.3d 252, 258 (1987). In weighing such evidence, it must be "viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect to one opposing admission." *State v. Frazier,* 73 Ohio St.3d 323, 333 (1995), quoting *State v. Maurer,* 15 Ohio St.3d 239, 265 (1984), citing *United States v. Brady,* 595 F.2d 359 (6th Cir. 1979).

Discussing the prejudice prong of Evid.R. 403, the Ohio Supreme Court observed that "it is fair to say that all relevant evidence is prejudicial" since "evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case." *State v. Crotts*, 2004-Ohio-6550, ¶ 23. On this basis, "only evidence that is *unfairly* prejudicial is excludable." *Id*. (emphasis in original). "If the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." *Id*. quoting *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172 (2001), quoting Weissenberger's Ohio Evidence (2000) 85–87, Section 403.3.

As discussed below, the evidence at issue — *relevant* (and therefore probative) evidence of known risks to Mr. Rau's knee replacement surgery was not so unfairly prejudicial that it "aroused the jury's emotional sympathies" in favor of Dr. Cook and against the Raus.

1. Evidence concerning known risks to Mr. Rau's knee replacement surgery was relevant to causation

To begin, the evidence introduced was clearly relevant. Like any medical malpractice case, a plaintiff must establish (1) the standard of care recognized by the medical specialty community,

(2) the failure of the defendant to meet the requisite standard of care, and (3) a direct causal connection between the medically negligent act and the injury sustained. *Stanley v. Ohio State Univ. Med. Ctr.*, 2013-Ohio-5140, ¶ 19 (10th Dist.), citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130 (1976).

Of course, an injury, alone, does not demonstrate medical negligence. Rather, "[c]ourts recognize that there may be a variety of causes for an injury in a medical malpractice case, and some procedures are so inherently risky that injuries may occur even when physicians are careful." *Estate of Hall v. Akron Gen. Med. Ctr.*, 2010-Ohio-1041, ¶ 22. And evidence of these risks is appropriately introduced through expert witnesses. *See, e.g.*, *Darnell v. Eastman*, 23 Ohio St.2d 13, syllabus (1970) (noting that "the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion.")

In its Opinion, the Court of Appeals recognized that evidence relating to informed consent was "relevant to demonstrate that arterial injuries may occur during knee replacement surgery in the absence of negligence," but nevertheless concluded that this theory was demonstrated through other testimony and therefore was unnecessary. *See* Opinion, ¶ 24. However, because the appellate court did not also conclude this evidence was unnecessarily cumulative under Evid.R. 403(B), its observation that it was "unnecessary" to introduce this evidence is irrelevant.

As this evidence clearly had probative value, it could have only been excluded if its prejudicial impact "substantially" outweighed that value. Here, it didn't — and neither did the Court of Appeals offer any rationale how it could have, except to make conclusory statements that it did. *Id.*, ¶ 27.

2. Rau opened the door for Appellants to introduce evidence that Mr. Rau received information of the risks of surgery

Noting that the trial court initially granted Rau's *motion in limine* seeking to exclude this evidence, the Second District found that the admission of Appellants' experts' testimony "regarding the specific risks of knee replacement surgery" and "what Rau was told concerning those risks" was "erroneous" and "unduly prejudicial to the Raus' case." *Id.*, ¶ 27. However, this observation ignores that the admission of this evidence was invited by the Raus.

First of all, the fact that the trial court initially granted the motion is largely irrelevant. "[A] decision on a motion in limine is a pretrial, preliminary, anticipatory ruling on the admissibility of evidence." *Krotine v. Neer,* 2002-Ohio-7019, ¶ 10 (10th Dist.), citing *State v. Grubb*, 28 Ohio St.3d 199, 201–202 (1986). As circumstances develop at trial, the trial court is at liberty "to consider the admissibility of the disputed evidence in its actual context." *Grubb* at 201–202. Thus, even if the trial court granted the Raus' motion to exclude this evidence, as the facts developed at trial, the trial court was well within its discretion to allow testimony on this subject to develop.

And that's precisely what happened here — the facts developed in such a way that the trial court permitted certain limited evidence on the subject of known risks, and Mr. Rau's knowledge of those risks. In their case-in-chief, Mr. Rau offered testimony that he discussed the potential benefits with Dr. Cook and received the informed consent form. Given that Mr. Rau opened the door to this issue, Appellants requested the opportunity to supplement Mr. Rau's testimony with evidence that, in addition to these benefits, Dr. Cook also advised him of the risks. The trial court agreed to limited evidence on the subject, including the "general discussion" between Dr. Cook and Mr. Rau, and that Appellants' experts could "testify about what those risks could be." (Transcript, Volume II, 92:5-23.)

Appellants introduced evidence well within the parameters provided by the trial court. With the trial court's approval, Appellants cross-examined Mr. Rau, confirming only that Dr. Cook discussed risks of surgery with him in addition to the benefits he previously testified about, and that Mr. Rau proceeded with surgery weighing both the risks and benefits. Likewise, Dr. Cook testified to his usual practice, including the general types of risks he tells his patients about, including injuries to nerves, muscles and vessels. Appellants also introduced evidence through their expert, Dr. Abraham, who ***was*** permitted to discuss the specific known risks.

3. *Waller* Does Not Apply to the Facts of this Case.

Central to the Court of Appeals' analysis was *Waller v. Aggarwal*, 116 Ohio App.3d 355 (11th Dist. 1996), a case upon which the Raus rely. According to the Raus, "informed consent" is not an affirmative defense to medical negligence, and under *Waller*, where no battery claim is raised, the introduction of evidence that the plaintiff was informed of the risks attendant to certain medical care, and voluntarily accepted those risks, is tantamount to plain error. However, both the Raus and the Second District misconstrue the application of *Waller* to these facts.

In *Waller*, the trial court permitted the appellee to proceed on "informed consent" as an affirmative defense — despite that the claim was one for medical negligence. *Id*. at 356. It allowed appellee to question appellant directly on the topic, permitted discussion of the "affirmative defense" in opening and close, and allowed a jury interrogatory inquiring whether informed consent was a valid waiver of the right of the appellant. *Id*. at 357-358. The appellate court reversed, finding the admission of this evidence was tantamount to plain error, as it carried a great potential of confusion for the jury. *Id*. at 358.

Indeed, in *Beranek v. Shope*, 2020-Ohio-7024 (7th Dist.), the Seventh District rejected an argument virtually identical to one raised by the Raus here — that *Waller* prevented the admission of certain surgical consent forms where the appellant did not pursue an informed consent claim.

Distinguishing *Waller*, the Court of Appeals found none of the same issues present. *Id*., ¶ 30. In *Beranek*, like here, the jury instructions were clear, and the jury was charged with deciding whether there was a breach of the standard of care and the amount of damages. *Id*., ¶ 32. Nevertheless, the Seventh District concluded that even if the forms should not have been admitted, any error would amount to harmless error given that there was evidence that proved the appellee did not breach the standard of care, and the jury specifically made that finding. *Id*., ¶ 34.

Here, as in *Waller* and *Beranek*, no informed consent claim was raised. However, as recognized by the Court of Appeals, evidence regarding the known risks attendant to Mr. Rau's knee surgery was relevant to the issue of causation. Moreover, Mr. Rau testified to the conversations he had with Dr. Cook about the benefits of the surgery and the consent forms he received. As Mr. Rau, himself, opened the door to this evidence, Appellants were entitled to cross-examine him and clarify that not only was he informed of the benefits, but he was also informed of the risks. Moreover, just as in *Beranek*, the jury was properly instructed on the issues before it — the jury neither received an instruction on informed consent, nor was it asked to determine whether Mr. Rau waived any rights through written consent forms. Put simply, *Waller* is inapplicable to these facts.

C. The Trial Court's Error, If Any, Was Harmless.

As correctly explained in Judge Tucker's dissent, to the extent the trial court did err here, that error was harmless. Harmless error in the admission of evidence does not warrant a reversal of a judgment. *Kraynak v. Youngstown City School Dist. Bd. Of Edn*., 2009-Ohio-4277, ¶ 12 (7th Dist.). Rather, "[f]or error to constitute reversible error, it must affect the substantial rights of the parties." *Id*., citing Evid. R. 103(A); Civ. R. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); *O'Brien v. Angley*, 63 Ohio St.2d 159 (1980). To determine whether a party's substantial

rights are affected, the court must weigh the prejudicial effect of the alleged error and "determine whether, but for those errors, 'the jury * * * would probably have made the same decision.'" *Bender v. Durrani*, 2024-Ohio-1258, ¶ 93 (1st Dist.) quoting *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, ¶ 35.

Here, the jury made one singular finding: that Dr. Cook did not breach the standard of care. This finding is well supported by the record. Appellants presented testimony from Drs. Abraham, Molnar, Mankowski and Sonn, who each testified that Dr. Cook met each and every relevant standard of care. Appellants also proffered evidence to negate causation — that Mr. Rau's injury was caused by a plaque dissection, a known complication to knee surgery, which can occur in the absence of a provider's negligence.

Given that the jury's verdict is supported by the evidence introduced at trial, and notwithstanding this evidence, the jury likely would have made the same correct determination, it cannot be the case that the Raus' substantial rights have been affected. Thus, to the extent that the trial court erred in permitting evidence to also show that Mr. Rau was made aware of these risks, such error is harmless at most.

Proposition of Law No. 2:

An appellate court may not find reversible error based upon a finding of cumulative expert testimony where the sole basis for such a finding is the trial court's reconsideration of an interlocutory order.

A. Standard of Review

Amici Curiae incorporate by reference the same standard recounted above — and reiterate once again that the Second District's analysis was not properly tailored to the abuse of discretion framework.

B. Drs. Abraham and Sonn Testified from Unique Perspectives and Their Testimony Was Properly Admitted.

The Raus argued, and the Second District agreed, that Dr. Abraham's and Dr. Sonn's testimony was cumulative. According to the Second District, the fact that the trial court had already granted the Raus' motion *in limine* to exclude cumulative evidence demonstrated that the trial court "acted arbitrarily" and abused its discretion. Opinion, ¶ 33. Not so.

Under Evid. R. 403(B), only where the probative value of relevant evidence is "***substantially*** outweighed" by needless presentation of cumulative evidence may the trial court exercise its discretion to exclude it. (Emphasis added.) The introduction of repetitive evidence is not reversible error unless the defendant was unfairly prejudiced by its admission. *State v. Sims*, 2023-Ohio-1179 (4th Dist.), ¶ 90 citing *State v. Baker*, 2011-Ohio-1820 (2nd Dist.) "The pertinent question is whether the evidence was unfairly prejudicial to the defendant, not whether it was unfavorable to him." *Id.* citing *Baker, supra*.

According to 1 Giannelli & Snyder, Evidence (1996), 218-220, Section 403.8, "the factors of undue delay and needless presentation of cumulative evidence are not intended to protect the integrity of the factfinding process. They entail 'no serious likelihood of a miscarriage of justice.' Instead, these factors are designed to conserve judicial resources." *See also* 1 Baldwin's Oh. Prac. Evid. § 403.3 (4th ed.) (noting "the 'dangers' of division (A) affect the integrity of the factfinding process; the 'considerations' of division (B) affect only the efficiency of the courts.")

While both Dr. Abraham and Dr. Sonn opined that Dr. Cook did not fall below the standard of care, each offered testimony unique to their specific discipline, thereby aiding the finder of fact. On the one hand, Dr. Abraham, undertook a detailed review of Mr. Rau's operative report, and found nothing unusual about Dr. Cook's technique. On the other, Dr. Sonn, is an academic orthopedic expert who regularly trains residents and fellows at a Level 1 facility. Dr. Sonn offered

helpful and distinct testimony on Dr. Cook's recommendation for Mr. Rau to undergo a bilateral knee replacement.

Importantly, however, there is no evidence in the record, and no assertion made by the Raus that the trial was somehow rendered inefficient, or judicial resources wasted by the introduction of both experts' opinions. Neither does the Court of Appeals make such a finding. Accordingly, as each physician offered a unique perspective designed to aid the jury as to whether Dr. Cook acted reasonably and within the established standard of care, it cannot be said that the trial court abused its discretion in allowing the admission of both.

C. The Trial Court's Error, If Any, Was Harmless.

Again, the dissent is correct that any error that could be construed on the part of the trial court was harmless. The evidence introduced at trial clearly supports the jury's verdict. Notwithstanding the alleged cumulative nature of the evidence, the Raus' substantial rights have not been affected. As clearly evident from the record, either Dr. Abraham or Dr. Sonn's testimony, alone, would have sufficed to support the jury's verdict. Despite that the two experts offered distinct viewpoints, both aiding the fact-finding jury, the jury is likely to have drawn the same conclusion in the absence of one or the other. In short, to the extent that the trial court erred in admitting both physicians' testimony, such error did not affect the substantial rights of the Raus and is harmless.

CONCLUSION

Amici Curiae, Ohio State Medical Association, American Medical Association, Ohio Hospital Association, and the Ohio Osteopathic Association respectfully request that the Court grant jurisdiction in this case.

Respectfully submitted,

/s/ Anne Marie Sferra

Anne Marie Sferra (0030855)
BRICKER GRAYDON LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
asferra@brickergraydon.com

Kellie Ann Kulka (0095749)
BRICKER GRAYDON LLP
312 Walnut Street, Suite 1800
Cincinnati, OH 45202
(513) 629-2714
kkulka@brickergraydon.com

Counsel for Amici Curiae,
Ohio State Medical Association, American Medical Association, Ohio Hospital Association, and the Ohio Osteopathic Association

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via email transmission on March 25, 2025 to the following:

Susan Blasik-Miller
Meredith C. Turner
REMINGER CO., LPA
Fifth Third Center
1 South Main Street, Ste. 1800
Dayton, Ohio 45402-2017
sbmiller@reminger.com
mtwooley@reminger.com
Counsel for Appellants, Thomas Cook, D.O. and Orthopedic Associates of Dayton

Brianna M. Prislipsky
REMINGER CO., LPA
200 Public Square, Ste. 1200
Cleveland, Ohio 44114
bprislipsky@reminger.com
Counsel for Appellants, Thomas Cook, D.O. and Orthopedic Associates of Dayton

Ronald M. Wilt
Nancy J. Schook
WILT & ASSOCIATES, PLLC
13113 Eastpoint Park Blvd., Ste. A
Louisville, Kentucky 40223
ron@wiltinjurylaw.com
nancy@wiltinjurylaw.com
Counsel for Appellees

Lance K. Oliver
RUSSELL, OLIVER & STEPHENS, PLC
5178 Wheelis Drive
Memphis, Tennessee 38117
lanceo@roslawgroup.com
Counsel for Community Insurance Company, d/b/a Anthem Blue Cross and Blue Shield

/s/ Anne Marie Sferra
Anne Marie Sferra (0030855)