IN THE SUPREME COURT OF OHIO

Michael Walling, Administrator of the Estate of Raeann Walling, Deceased,	:	Case No. 2021-0241
Appellant,	:	Appeal from the Sixth District Court of Appeals**,** Lucas County Court of Appeals Case No. L-19-1264
The Toledo Hospital,	:	
Appellee.	:	

MERIT BRIEF OF AMICI CURIAE OHIO HOSPITAL ASSOCIATION AND OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLEE THE TOLEDO HOSPITAL

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INTRODUCTION

This case presents a straightforward question with an answer this Court has already twice provided: should this Court permit a plaintiff to pursue a negligent-credentialing claim without first obtaining a prior finding that the medical negligence of the physician at issue caused harm to the plaintiff? The answer is no. In *Albain v. Flower Hospital*, 50 Ohio St.3d 251, 553 N.E.2d 1038 (1990) and *Schelling v. Humphrey*, 123 Ohio St.3d 387, 2009-Ohio-4175, 916 N.E.2d 1029, this Court held that, in order to proceed on a negligent-credentialing claim, a plaintiff first must obtain a prior determination that the physician's medical negligence caused the patient's harm.

Appellant Michael Walling, as Administrator of the Estate of Raeann Walling, asks this Court to stray from that basic principle. In short, Walling would overturn this Court's decisions in *Albain* and *Schelling*. Instead of requiring a prior determination of a physician's medical malpractice before a negligent-credentialing claim can be pursued, Walling would require only some testimony or evidence in the record that could show—but was never actually determined to prove—that a physician might have committed medical malpractice.

In lieu of a prior determination of a physician's liability for medical negligence, Walling asks that this Court permit a cross examination—which he deems to be "effective" but does not define what that means—to stand in the place of an actual adjudication by a court or jury that the physician committed malpractice. However, if Walling's argument is adopted, it will wreak havoc on negligent-credentialing claims and civil trials across the State. For instance, if "effective" cross-examination can be substituted for a determination (or admission) of liability for medical malpractice, why stop there? Why not shorten all trials and get rid of the finder of fact entirely by simply establishing the equivalent of a jury verdict based on one party's perception of the cross-examination of an important witness?

The Ohio Hospital Association and the Ohio Association of Civil Trial Attorneys request that the Court affirm the decision of the Sixth District Court of Appeals. This will ensure that this Court's decisions in *Albain* and *Schelling* are not improperly overturned, and it will protect the inviolability of trial by judge or jury on the issues of standard of care and causation. Amici curiae ask the Court to affirm the decision below.

STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Hospital Association ("OHA") is a private nonprofit 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 243 hospitals and 15 health systems, collectively employing more than 280,000 employees in Ohio.

The Ohio Association of Civil Trial Attorneys ("OACTA") is comprised of attorneys, corporate executives, and claims professionals devoted to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. For more than fifty years, OACTA's mission has been to provide a forum where dedicated professionals can work together to promote and improve the administration of justice in Ohio. OACTA supports laws and policies that promote predictability, stability, and consistency in Ohio's civil justice system. OACTA serves as the voice of the civil defense bar in the State of Ohio and it joins as amicus for the purposes of clarifying that experience of its members has shown that one effective line of questioning in a cross-exam is not the same as prevailing at trial.

STATEMENT OF THE CASE AND FACTS

OHA and OACTA adopt the Statement of the Case and Facts set forth in the merit brief of Appellee The Toledo Hospital.

LAW AND ARGUMENT

The Court accepted a single proposition of law for consideration. While OHA and OACTA file this single brief, OACTA only joins the argument in this brief related to whether a cross-examination of a physician can satisfy a negligent-credentialing claim's threshold requirement of a prior finding that the plaintiff's injury was caused by the physician's malpractice.

> **Appellant's Proposition of Law:** Negligent credentialing confers a duty upon hospitals that is separate from and independent of the duty a physician owes to its patients and therefore can exist in the absence of a prior adjudication or stipulation that the physician was negligent.

Without saying so, Walling seeks to overturn this Court's prior decisions in *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 553 N.E.2d 1038 (1990) and *Schelling v. Humphrey*, 123 Ohio St.3d 387, 2009-Ohio-4175, 916 N.E.2d 1029. Those cases collectively stand for the proposition that in order to prove a negligent-credentialing claim against a hospital for the conduct of a credentialed physician, a plaintiff must first obtain a prior determination that the physician breached the applicable standard of care and that the physician's breach proximately caused the patient's injury. *See Albain* at paragraphs one and two of the syllabus; *Schelling* at ¶ 16-18. Walling disguises this request to overturn *Albain* and *Schelling* by focusing on the fact that medical malpractice claims and negligent-credentialing claims are separate causes of action that can be asserted against different types of defendants (physicians vs. hospitals).

For over 30 years, this Court has made clear that a negligent-credentialing claim proceeds only after there is a prior determination of a physician's medical malpractice. This makes sense. If a physician did not breach the applicable standard of care and did not proximately cause the patient's alleged injury, why should the hospital be faulted for credentialing the physician? If the physician committed no wrong while treating the patient, how could the hospital have committed a wrong in allowing the physician to practice medicine on its premises?

Requiring a prior determination of a physician's liability for medical malpractice also preserves judicial and the parties' resources because there is no need to try the negligent-credentialing case in the absence of the physician's malpractice. *Schelling* at ¶ 27. It also avoids potential jury confusion and/or prejudice caused by trying a case within a case (the malpractice case in the same proceeding as the negligent-credentialing case). *Id.* at ¶ 28.[1]

This brief is broken into four parts. The first part is intended to give a short overview of credentialing at a hospital. The brief's second section discusses this Court's prior cases on negligent-credentialing claims and distinguishes those types of claims with other employer-related negligence claims—something that Walling attempts to obfuscate. The third part explains the implications of Walling's arguments on negligent-credentialing claims. The brief's last section addresses Walling's incredible proposition (and the implication) that cross examination is a viable substitute for a determination by a judge or jury on the issue of a physician's liability for medical malpractice.

I. Credentialing at a hospital and the duties and liabilities it imposes

To understand how Walling's argument goes astray, it's critical to understand exactly what credentialing is (and what it is not). Credentialing is the process of obtaining, verifying, and assessing information pertaining to a physician's qualifications to provide patient care services in or for a healthcare organization. To practice at a hospital, a physician must be credentialed by the hospital and have privileges to perform a specific procedure or treatment. It is a hospital's responsibility to engage in reasonable steps to ensure a physician's current competency—which is typically done through verification of a practitioner's education, training, licensure, specialty

[1] For instance, evidence of prior acts of malpractice may be relevant to a negligent credentialing claim, but "presents the risk of unfair prejudice in determining whether the doctor committed malpractice, see Evid. R. 403(A)." *Id.*

certification, experience, and skills. *See, e.g.*, R.C. 3701.351 (requiring a hospital to grant privileges if a physician satisfies objectively reasonable criteria for assessing competency).

All physicians (regardless of whether they are employees or independent physicians of the hospital) are credentialed by the hospital in order to have medical staff privileges to practice medicine at the hospital (*i.e.*, admit patients and use the hospital's facilities). *Schelling*, 2009-Ohio-4175, at ¶ 13-14; *Albain*, 50 Ohio St.3d at 256. A hospital's credentialing of a physician does not impose a duty on a hospital to constantly supervise or second-guess the clinical activities of a physician. *Albain* at 259, citing *Hendrickson v. Hodkin*, 294 N.Y.S. 982, 984-985, 250 A.D. 619 (N.Y.App. 1937) (Lazansky, J., dissenting); *see also Schelling* at ¶ 15. A hospital does not act as an "insurer of the skills of the private doctors to whom it has granted staff privileges." *Schelling* at ¶ 15; *Albain* at paragraph two of the syllabus. This Court has made clear that a hospital's duty is limited to the exercise of due care in the granting and continuation of clinical privileges. *Albain* at paragraph two of the syllabus and 258-259; *Schelling* at ¶ 13.

Regardless of whether the physician is an employee or an independent physician, *only* the physician (and not the hospital) engages in the practice of medicine. *Schelling* at ¶ 14, quoting *Albain* at 259, citing R.C. 4743.41. This matters here, of course, because it is the physician on trial for allegedly breaching the standard of care and proximately causing injury to the patient — *not* the hospital. If a plaintiff is permitted to proceed to a negligent-credentialing claim against the hospital *before* obtaining a determination that the physician breached the standard of care proximately causing the injury to the patient, then the hospital will be forced to litigate both the malpractice claim and the negligent-credentialing claim at the same time. If the fact finder determines the physician is not liable for malpractice, the parties and the court will have wasted time and resources litigating the negligent credentialing claim. Unless and until there is a finding

of medical negligence on the part of the physician, a hospital cannot be liable for negligent credentialing.

Under this Court's current precedent, the malpractice and negligent-credentialing claims are bifurcated, the negligent-credentialing claim against the hospital is stayed, and the malpractice claim against the physician proceeds first. *Schelling* at ¶ 26-28. This prevents expending unnecessary resources on a negligent-credentialing claim that could be moot if the physician was not negligent and did not proximately cause the patient's injury.

II. There is no need to disrupt this Court's prior decisions in *Albain* and *Schelling*

Walling wants to disturb this Court's long-established precedent in negligent-credentialing claims. He does this in two ways. First, he cites to *Evans* v. *Akron Gen. Med. Ctr.*, 163 Ohio St.3d 284, 2020-Ohio-5535, 170 N.E.3d 1, a case from last year, that he claims is "instructive to the circumstances of this case." Appellant's Merit Br., at 9. Second, he misrepresents the actual impact of this case. But neither is persuasive. There simply is no reason for this Court to overrule its prior negligent-credentialing cases and create unnecessary confusion.

A. The Court's negligent-credentialing jurisprudence remains sound.

For over 30 years, this Court has been clear about what is required for a successful negligent-credentialing claim. In *Albain,* the Court first held that a hospital has an independent duty to appropriately credential physicians who seek staff privileges to practice at the hospital. *Albain*, 50 Ohio St.2d at paragraph two of the syllabus. The Court stated that, with "regard to staff privileges, a hospital has a direct duty to grant and continue such privileges only to competent physicians." *Id.* The mere granting of privileges to a physician, however, is insufficient to justify holding the hospital liable for a physician's negligent acts under a theory of respondeat superior or vicarious liability. *Id.* at paragraph one of the syllabus. Although the Court did not call this a negligent-credentialing claim, that's exactly what the *Albain* Court created:

> In order to recover for a breach of this duty [to grant and continue privileges only to competent physicians], a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or the retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have been injured.

Id. at paragraph two of the syllabus. That liability, though, is limited to the duty of care in granting and continuing clinical privileges and does not extend to making medical decisions. *Id.* at 259. That is because only physicians can practice medicine.

Nearly 20 years later, the Court recommitted to the negligent-credentialing claim it created in *Albain*. In *Schelling*, the Court reaffirmed—more explicitly—the negligent-credentialing principles it had originally raised in *Albain*. "[A] hospital's mere granting of privileges to a doctor, which the hospital may later revoke under its procedures, does not permit a court to hold the hospital liable for the doctor's negligent acts under a theory of respondent superior, or vicarious liability." *Shelling v. Humphrey*, 123 Ohio St.3d 387, 2009-Ohio-4175, 916 N.E.2d 1029, ¶ 16, citing *Albain* at paragraph one of the syllabus. The essential requirement of a negligent-credentialing claim? A determination that the physician is liable for medical malpractice.

> [T]o recover against a hospital on a negligent-credentialing claim, the plaintiff must establish the underlying medical malpractice of the doctor. The required element of the plaintiff's injury having been caused by the doctor's malpractice goes to the question of whether the ***hospital's*** alleged negligent credentialing of the doctor proximately caused the plaintiff's injury. 'Although medical malpractice claims against the doctor and negligent credentialing claims against the hospital are separate causes of action, * * * both causes of action fail without proof that the physician's failure to abide by ordinary standards of care proximately caused the patient's harm.'

(Emphasis in original). *Id.* at ¶ 19, quoting *Browning v. Burt*, 66 Ohio St.3d 554, 566, 613 N.E.2d 993 (1993) (Moyer, C.J., concurring in part and dissenting in part).

These cases have provided clear guidance to Ohio courts on how to handle negligent-credentialing claims. Since *Schelling*, there have been over 60 Ohio appellate and federal decisions and likely hundreds of trial court decisions that have successfully applied this Court's negligent-

credentialing analysis. The bright-line rule established by the Court—that a plaintiff must first receive a determination that a physician committed medical malpractice that caused a plaintiff's injury before pursuing a negligent-credentialing claim against a hospital—allows all parties involved to understand when and how a negligent-credentialing claim proceeds.

Stare decisis generally compels this Court "to recognize and follow an established legal decision in subsequent cases in which the same question of law is at issue." *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 28, citing *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, 133 N.E.3d 482, ¶ 18. In overruling substantive law, this Court has established a three-part test: (1) the prior decision was wrongly decided or circumstances no longer justify adhering to it, (2) the prior decision defies practical workability, and (3) abandoning the prior decision would not create an undue hardship for those who have relied upon it. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 48. Walling makes no effort whatsoever to attempt to show *any* of these factors, much less all of them. In short, there is no reason for this Court to disrupt, let alone overturn, its negligent-credentialing jurisprudence.

B. This Court's decision in *Evans v. Akron Gen. Med. Ctr.* does not require this Court to overrule *Albain* or *Schelling*.

Contrary to Walling's assertions, *Evans v. Akron Gen. Med. Ctr.*, 163 Ohio St.3d 284, 2020-Ohio-5535, 170 N.E.3d 1, is not controlling nor instructive because *Evans* involved claims for negligent hiring, negligent supervision, and negligent retention. These types of claims arise in the context of employment. This is *not* a case about employment. It is a negligent-credentialing case and negligent-credentialing claims arise *only* in the context of medical malpractice. *Evans* was not a case alleging medical malpractice.

The *Evans* Court considered whether a hospital negligently hired, supervised, or retained an employee (an emergency room doctor) after a patient alleged the doctor sexually assaulted, abused, and battered her while she sought treatment in the emergency room. *Evans v. Akron Gen. Med. Ctr.*, 163 Ohio St.3d 284, 2020-Ohio-5535, 170 N.E.3d 1, ¶ 2. The trial court granted summary judgment to the hospital because the plaintiff failed to file a cause of action against the doctor. As a result, the plaintiff failed to establish the doctor's civil liability or guilt of a criminal offense. *Id.* The court of appeals reversed and certified two questions of law to this Court. *Id.* at ¶ 3-4. One of the questions, relevant here, was: "Does the language of *Strock v. Pressnell*, 38 Ohio St.3d 207, 217, 527, N.E.2d 1235 (1988), require that a plaintiff show the liability of an employee in order to maintain a negligent hiring, supervision, or retention action against an employer?" *Id.* at ¶ 4.

This Court first looked to the elements of a negligent hiring, supervision, or retention claim and applied them in the context of the summary judgment motion that had been decided favorably to the hospital. *Id.* at ¶ 5. While the court of appeals applied a five-factor test, this Court made clear that it has never adopted such a test and declined to do so in *Evans*. *Id.* Instead, the Court focused solely on "whether the employee's act or omission caused the plaintiff's injuries," and whether the plaintiff has shown that there is a genuine issue of material fact to survive a motion for summary judgment.

The Court looked to *Strock*, which held that an employer's liability for the hiring, supervision, or training of an employee is premised on the employee committing some wrongful act. *Id.* at ¶ 6, citing *Strock* at 217. The *Strock* Court held that a negligent supervision or training claim must be premised on the employee's tort or criminal guilt. *Strock* at 217; *see also Natl. Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d

939, ¶ 23. In *Evans*, the Court answered the certified question in the negative and concluded that a "plaintiff need not show that an employee has been adjudicated civilly liable or has been found guilty of a crime by a court in order for the plaintiff to maintain a negligent hiring, retention, or supervision claim against an employer."[2] *Evans* at ¶ 10. The Court found that "[g]enuine issues of material fact relating to [the doctor's] purported conduct * * * and whether such conduct was legally wrongful still exist." *Id.* at ¶ 11.

Walling tries to make the jump that the *Evans* Court's conclusion regarding a negligent hiring, supervision, or retention claim necessarily overrules this Court's decisions in *Albain* and *Schelling* on negligent-credentialing claims. That's simply a step too far. Not only did *Evans not* involve a negligent credentialing claim—which are controlled by *Albain* and *Schelling*—it specifically acknowledged that *Albain*, *Schelling*, and *Evans* were *consistent* with each other.

A simple analysis shows why *Evans* is not particularly relevant to negligent-credentialing claims. The first requirement of any negligent hiring, supervision, or retention claim is the existence of an employment relationship. *Evans* at ¶ 5. Whether a physician is employed by a hospital is irrelevant for purposes of a negligent-credentialing claim: the credentialing process is at issue, not the physician's employment status. Specifically here, no employment relationship exists between the physician and The Toledo Hospital. Because the instant case is a negligent-credentialing case and not a case premised on employment, the holding in *Evans* is not "instructive" or even relevant.

III. <u>This case will not have the impact that Walling claims it does</u>

In his brief, Walling outlines a parade of horribles that will occur if *Albain* and *Schelling*—which control negligent-credentialing cases—are permitted to stand. But Walling overstates—

[2] After reaching this conclusion, the Court cited to both *Schelling* and *Albain* to say that the *Evans* decision was consistent with those cases. *Id.*, quoting *Schelling* at ¶ 30.

and, in certain instances, misstates—what this case and other negligent-credentialing cases will do moving forward. Contrary to Walling's assertions, this is not a "harsh" or "rigid" rule that will suddenly not promote interests of judicial economy. The opposite is true: this Court recognized in *Schelling* that requiring the malpractice case to be tried separately and first actually promotes the preservation of judicial resources. *Schelling* at ¶ 28 ("If the fact-finder determines that the negligence of the doctor was not the proximate cause of the plaintiff's injury, then a hospital's grant of staff privileges is not the cause of the plaintiff's injury, as required by *Albain* * * * ."). The decision to affirm the Sixth District will simply keep the status quo—something that courts across Ohio have had no problem applying over the past 30 years.

For starters, the control of any medical malpractice or negligent-credentialing case still rests with the plaintiff. A plaintiff can choose whether to bring a case at all, can choose which claims to bring, and can choose to pursue certain claims against one party and other claims against a different party. Sure, a plaintiff must meet the requirements of each of those claims to succeed—but that is not a novel concept. Every cause of action has elements that must be proven by a plaintiff to prevail, some more burdensome than others. So simply because this Court has long required that a plaintiff must first obtain an adjudication of medical malpractice against a physician to succeed on a negligent-credentialing claim is not revolutionary, onerous, or rigid, as Walling argues. It actually makes sense. If the physician is not at fault, the hospital that credentialed him cannot be at fault.

In addition, the result created by the Sixth District's decision—much less *Albain* and *Schelling*—does not give a hospital two bites at the apple. Walling argues that it is "grossly unfair" that a plaintiff who is successful on a medical-malpractice claim against a physician "has gained no more than the right to proceed on the negligent credentialing claim and try the case all over

again." Appellant's Merit Br., at 14. This misses the mark for a few reasons. First, any negligent-credentialing claim against the hospital is usually bifurcated and stayed pending resolution of the medical-malpractice claim against the physician. *See Schelling* at ¶ 26-28. In those cases, the hospital is often not involved in the trial against an independent physician because the independent physician is represented by his own counsel (as in the instant case). *Schelling* at ¶ 15, citing *Albain* at 259. Second, if a plaintiff obtains a determination that a physician's breach of the standard of care proximately caused a patient's injury, the hospital—as a party to the case—is bound by that adjudication in the negligent-credentialing claim against the hospital. *See, e.g., Giancola v. Azem*, 153 Ohio St.3d 594, 2018-Ohio-1694, 109 N.E.3d 1194, ¶ 14 (holding that the law-of-the-case doctrine ensures consistency of results in a case and avoids endless litigation by settling issues). This cuts both ways, of course. On one hand, if a plaintiff secures a determination of medical malpractice against a physician, the negligent-credentialing claim can continue. But the inverse must also be true—if there is no such determination, there can be no negligent-credentialing claim.

Finally, a plaintiff will still be able to settle any case. Walling contends that the Sixth District's decision here essentially strips any reason or incentive to settle a case. A settlement of a medical-malpractice case, Walling argues, precludes any ability of a plaintiff to secure a determination that a physician committed medical malpractice, which would prohibit any negligent-credentialing case against the hospital. That is misguided. *Schelling* itself disproves that risk. It was a case where this Court allowed, through a narrow exception, a negligent-credentialing case to proceed when there was no prior adjudication or stipulation of medical malpractice against the physician.[3] *Schelling*, 2009-Ohio-4175, ¶ 29-31. There, the Court held

[3] The Schellings acknowledged that a settlement agreement had been reached "to some extent with the Bankruptcy Trustee for Dr. Humphrey." *Schelling* at ¶ 8.

that when a plaintiff's claim against the physician was impeded or prevented "through no fault of their own," a plaintiff still could proceed to their negligent-credentialing claim in that "unusual circumstance." *Id.* at ¶ 4. There, a defendant-physician filed for bankruptcy and, as a result, the plaintiffs dismissed their claims against him. *Id.* at ¶ 3. Rather than prohibit the negligent-credentialing claim, the Court permitted it to proceed because it was "through no fault of" the plaintiffs that they could not secure a prior determination of the physician's negligence. Courts can (and do) use this guidance from *Schelling* to determine when a plaintiff might not need to secure a prior determination of a physician's medical malpractice. There is no evidence or reason to believe that Ohio courts are unable to continue doing exactly that.

Simply because a plaintiff (like Walling) chooses to settle the malpractice claim and thereby eliminate the option of pursuing a negligent-credentialing claim does not mean that sound legal precedent requiring a determination of medical negligence as a condition precedent to a negligent-credentialing claim should be overturned. Decisions have consequences. There is no need to reset Ohio law on negligent-credentialing claims because Walling made the decision to settle this case without securing a determination of liability, particularly where his counsel believes the evidence was so favorable to the plaintiff.[4]

IV. Walling's argument that a cross examination has the weight of a prior adjudication is not supported by any law whatsoever

Perhaps the most incredible part of Walling's argument is that it seeks to assign a cross examination the same weight and authority as an adjudication. In essence, Walling contends that, even if this Court reaffirms *Albain* and *Schelling*, testimony presented during a trial—in the absence of adjudication by a jury or a trial court—is the equivalent of an adjudication that the

[4] The issue of collusion between a plaintiff and a physician in entering into a settlement agreement is not before the Court and need not be addressed.

physician committed malpractice. This proposition — which is unsupported by any law or case — simply shows how far afield Walling's arguments truly are.

First, Walling suggests that in this case the physician-defendant admitted various facts on cross examination that Walling contends satisfy the elements of duty, breach of the standard of care, and a causal connection between the breach of the standard of care and the harm to the patient. This, Walling says, satisfies the requirement from *Schelling* that a plaintiff must obtain, either by adjudication or stipulation, a determination of the physician's medical malpractice causing an injury. The problem with this approach is obvious: the jury (or in some cases, the court) is the ultimate trier of fact and gets to assess the credibility of each witness and choose how to weigh *all* of the testimony and evidence presented. *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967) ("In either a criminal or civil case the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts."). The defendant's testimony on cross-examination is just one component of the evidence presented to the jury, particularly in medical malpractice cases, which require expert testimony to prove the elements of the claim. *See Cromer v. Children's Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 40 (requiring expert testimony on the issue of foreseeability of harm in a medical-negligence case, "just like [expert testimony is required for] any other element of a medical-negligence claim"); *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130, 346 N.E.2d 673 (1976) ("The issue as to whether the physician and surgeon has proceeded in the treatment of a patient with the requisite standard of care must ordinarily be determined from the testimony of medical experts." (citation omitted)). After considering *all* of the evidence, the jury could have decided in favor of the physician or not. *See, e.g.*, *Aluminum Industries v. Egan*, 61 Ohio App. 111, 117, 22 N.E.2d 459 (1st Dist.1938), citing 42 Ohio Jur. 323, at 324-32 (recognizing that cross-examination is but one piece of evidence

that the jury shall consider). That is why it is not appropriate to substitute a cross examination (whether effective or not) for an adjudication or stipulation of liability.

Second, it would essentially be a short-cut to recovery against the physician for medical malpractice. A plaintiff must meet its burden of proving medical malpractice, as required by *Schelling*, before being permitted to proceed with a negligent credentialing claim against the hospital. Here, Plaintiff could have met this burden by successfully moving for a directed verdict or obtaining a favorable jury verdict upon conclusion of the evidence, but he secured neither. Instead, Plaintiff truncated the trial midstream and settled the case without an admission of liability by the defendant-physician. A physician's right to a trial by judge or jury would be stripped if cross-examination alone were sufficient to determine that the physician breached the applicable standard of care proximately causing injury to the patient. Similarly, a hospital's right under *Schelling* to have a prior determination of the physician's malpractice before proceeding with the negligent credentialing claim would be stripped as well if cross-examination were sufficient. Amici can think of no other situation in which cross-examination supplants the purview of the finder of fact as to essential elements of a cause of action.

Third, it would increase the number of negligent-credentialing claims a hospital is forced to defend because it would allow plaintiffs to proceed with a negligent-credentialing claim even though there may be no underlying medical negligence. It would entirely undermine the bifurcation process that this Court approved in *Schelling*. This would put an unprecedented burden on a hospital to defend its credentialing process without a finder of fact ever determining that the physician at issue did anything wrong.

If the Court adopts Walling's position and substitutes the "effective cross-examination standard" in place of a factual adjudication, the foundation of American jurisprudence's reliance

on the finder of fact will be undermined. Then, it will be only a matter of time before plaintiffs across Ohio will attempt to extend the relaxed evidentiary burden to other areas of the law.

CONCLUSION

Ohio law is clear on how to handle negligent-credentialing cases like this one. First a plaintiff must establish liability for malpractice against a physician. If that occurs, the plaintiff can proceed against the hospital for negligent credentialing. For over 30 years, Ohio courts have done just that. There is no need to overrule this Court's prior *Albain* or *Schelling* decisions as Walling urges. Amici curiae the Ohio Hospital Association and the Ohio Association of Civil Trial Attorneys respectfully request that this Court affirm the decision of the Sixth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent email transmission this 7th day of September, 2021 to the following:

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