

IN THE SUPREME COURT OF OHIO

CASE NO. _____

**EMMETT O'LOUGHLIN, A MINOR; DARA O'LOUGHLIN;
JAMES O'LOUGHLIN
Plaintiff-Appellants,**

-vs-

**CATHOLIC HEALTHCARE PARTNERS FOUNDATION; MERCY HOSPITAL
FAIRFIELD; DANIEL CLIFFORD BOWEN, M.D.
Defendant-Appellees.**

**ON APPEAL FROM THE HAMILTON COUNTY
COURT OF APPEALS CASE NO. C-130484**

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
PLAINTIFF-APPELLANTS,
EMMETT, DARA, AND JAMES O'LOUGHLIN**

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STATEMENT OF ISSUES OF PUBLIC AND GREAT GENERAL IMPORTANCE

This appeal presents this Court with an opportunity to resolve several questions of law that frequently arise in Ohio courtrooms. While this case is a medical malpractice action founded upon allegations that an OB/GYN and the hospital staff failed to timely recommend an emergency cesarean section delivery, these issues bear upon a wide range of tort actions. Three oft-debated topics are implicated

FORESEEABILITY: The first Proposition of Law will permit this Court to address those questions that remained unresolved in the wake of *Cromer v. Children's Hosp. Med. Cntr. of Akron*, ___ Ohio St. 3d ___, 2015-Ohio-229, ___ N.E. 3d _____. More specifically, the courts below adhered to the now discredited view that jurors must always consider whether this element of the duty of care has been satisfactorily proven, even when the pertinent evidence is undisputed. *Apx. 00022, ¶30*. The error was compounded when the court announced that the test is whether “a reasonably careful person” would have foreseen the danger, instead of a similarly situated healthcare provider. *T.p., Vol. XXIII, pp. 5223-5224*. And the trial court required proof that the foreseeable harm was not just material, but “the likely result” of a breach. *Id., at 5223*. In other words, Plaintiffs could not prevail absent a convincing demonstration that the Defendants appreciated that harm was probably going to occur but proceeded anyway. As Justice O'Donnell's concurring opinion observed (which Justice Kennedy joined), an instruction that is framed “in terms of a layperson's ability to anticipate that death would likely result from an act or a failure to act by the hospital's medical professionals” is outdated and should not be furnished. *Cromer, 2015-Ohio-229, ¶52*.

INFORMED CONSENT: Turning to the next two Propositions of Law, the First Judicial District Court of Appeals adopted – for the first time in Ohio jurisprudence – a “trespass” requirement for the civil tort of lack of informed consent. This Court's

established precedents had recognized that proof was only required of (1) a failure to disclose and discuss material risks and dangers inherently involved in the proposed treatment, (2) which actually materialized and are the proximate cause of an injury to the patient, and (3) which a reasonable person would not have accepted. *Nickell v. Gonzalez*, 17 Ohio St. 3d 136, 477 N.E. 2d 1145 (1985), syllabus. But the appellate court held that the jury did not need to be charged upon the tort of informed consent in this case, because the OB/GYN “did not trespass on his patient.” *Apx. 00019*, ¶22. Citing a New York decision that had been issued over a century ago, the First District held that “a lack-of-informed-consent claim contemplates something more than a failure to disclose; it requires an act against the patient without his or her full knowledge or understanding of the attendant risks of that act.” *Id.* Before the well-recognized cause of action is artificially restricted to just trespasses against the patient, this Court should carefully consider the wisdom of the precedent that now exists in some parts of Ohio.

PEREMPTORY CHALLENGES: Every day trial courts across Ohio are faced with the recurring issue of assigning peremptory challenges. The First District has joined a few other courts that allow otherwise united co-parties to multiply their strikes during *voir dire* by retaining separate counsel, filing their own pleadings and motions, and pursuing some different legal theories. *Apx. 00013*, ¶6. Even though no cross-claims or other antagonistic interests existed between the OB/GYN and the hospital that had afforded him admitting privileges in this case, they were afforded six challenges while the Plaintiffs were limited to just three. As but one example of the consequences of this ill-advised practice, a group of separately represented plaintiffs who are allegedly injured by the same defective product are each entitled to their own three strikes, while the manufacturer is limited to just three. So long as such inequities are permitted in Ohio, co-parties who are aligned in interest can be easily manipulate the jury selection process to the considerable detriment of their common opponent.

Given the issues of public and great general importance that have been implicated in this proceeding, this Court should accept jurisdiction over this appeal.

CASE HISTORY

This medical malpractice action was tried to a jury in the Hamilton County Court of Common Pleas over a period of approximately four weeks. A divided six-to-two verdict was returned on the afternoon of June 17, 2013 in favor of Defendant-Appellees, Daniel Clifford Bowen, M.D. (“Dr. Bowen”), Catholic HealthCare Partners Foundation and Mercy Hospital Fairfield (collectively “Mercy Hospital”). *Trial Tr., Vol. XXIII, pp. 5262-63.* Plaintiff-Appellants, Emmett, Dara, and James O’Loughlin, commenced an appeal raising six separate Assignments of Error, including several devoted to foreseeability, the informed consent claim, and the 2-to-1 disparity in the allotment of peremptory challenges. The First District nevertheless affirmed the trial judge on January 21, 2015. *Apx. 0008.*

Six days later, this Court released *Cromer, 2015-Ohio-229*, which substantially restricted the use of the foreseeability charge in medical malpractice actions. As permitted by App. R. 26(A), Plaintiffs filed a Motion for Reconsideration and Reconsideration *En Banc* urging the appellate court to revise its decision to comply with the new Supreme Court precedent. At the same time, they filed a Motion for Certification of a Conflict arguing that the new trespass requirement for lack of informed consent claims is incompatible with appellate decisions that had been issued in other judicial districts. Even though the parties collectively submitted over ninety pages of briefing on these complex issues, the Motions were denied in a one-sentence entry on March 9, 2015. *Apx. 00025.*

STATEMENT OF FACTS

Dara was in early labor when she was admitted to Mercy Hospital slightly before midnight on January 9, 2004. *T.p. 969 & 1005-06*. The next morning, Karen Hauser, R.N. (“Nurse Hauser”) noted a decrease in the long term variability of the baby’s heart rate, which raised her suspicions. *T.p. 1047-48*. She called Dara’s admitting OB/GYN, Dr. Bowen, to discuss the situation at 7:45 a.m. *Id., 903-904 & 1053*. Positive accelerations were then detected at 9:00 a.m., which was a good sign. *Id., 1054*.

One of the Plaintiffs’ standard of care experts was Larry M. Cousins, M.D. (“Dr. Cousins”). He testified that the hospital’s monitoring revealed moderate decelerations in the baby’s heart rate at 1:12 p.m. which became severe by 1:19 p.m. *T.p. 1568*. Continuous fetal monitoring should have been discussed at that point. *Id., 1568*. Furthermore, a cesarean section delivery would have to be raised if decelerations continued by 2:00 p.m. *Id., 1568*.

Plaintiffs’ nursing standard of care expert was Laura Mahlmeister, R.N., Ph.D. (“Nurse Mahlmeister”). *T.p. 1235*. She explained that the Mercy staff should have started continuous fetal electronic monitoring without delay. *T.p. 1396-97*. Apparently because of limited strip information, the nurses did not realize that the baby was getting into trouble by early afternoon. *Id., 1397-98*. Oxygen should have been administered at approximately 1:30 p.m. *Id., 1397-98*. Even with the gaps in the fetal heart rate tracings, by 3:00 p.m. it should have been apparent that he was going downhill. *Id., 1448-49*. If Dr. Bowen was not willing to take immediate action, the nurses should have invoked the hospital’s chain of command and sought the intervention of their superiors. *Id., 1446-47*.

Between 2:38 p.m. and 3:04 p.m., Dara continued to push the baby along as instructed by the hospital staff. *T.p. 1076*. Nurse Hauser grew concerned because “she had been pushing for two hours and was not making significant progress” and she did

not know “how much longer it was going to take[.]” *Id.*, 1081. There was little chance in her view that a baby was going to be delivered screaming and yelling. *Id.*, 1077.

The variable heart rate decelerations that had started at 1:00 p.m. continued to grow worse. *T.p.* 1728-29. At 4:10 p.m., Dara agreed to the administration of oxygen through a mask that was placed on her face. *Id.* 1093. At roughly the same time, Dr. Bowen suggested the consideration of a caesarean section with the qualification that it was not medically necessary. *Id.*, 909-11, 923-26, & 1666-67. Nurse Hauser noted “probable C-section” in the chart. *Id.*, 1094.

According to Dr. Bowen, the C-section was far more than just “probable” and he and the Charge Nurse alleged that they told the parents that “your baby could die” without an immediate delivery. *T.p.* 918. They claimed that the response they received was “no, no, no, no, no.” *T.p.* 940. The OB/GYN insisted that James took him aside and told him privately that they did not want a C-section under any circumstances. *Id.*, 914. Dr. Bowen even claimed that his patients adamantly refused to permit the interventions that they had previously approved their own birth plan. *Id.*, 935. All of these allegations are vehemently denied by Plaintiffs.

Inexplicably, none of these refusals were referenced in the delivery summary that Dr. Bowen prepared later that evening, while the episode was still fresh in his mind. *T.p.* 921-22 & 928-29. This charting was supposed to contain all the important information about what had transpired. *Id.*, 921-22. Likewise, not one of the nurses recorded in their own charting – which was prepared both during and after the delivery – that an emergency C-section had been recommended and rejected. *Id.* 1098. Mercy Charge Nurse Michelle Ellen Stokes, R.N. explained that a patient’s refusal of treatment will always be charted somewhere. *Id.*, 1205-06. But the only refusal that appeared in the nurses’ notations was in connection with the electronic fetal monitoring check at approximately 1:00 p.m. *Id.*, 1069 & 1473.

Consistent with the detailed medical charts, Dara testified that she had never refused any of Dr. Bowen's recommendations. *T.p. 2700-01*. According to both Dara and James, all that the OB/GYN said with regard to a C-section was that it was time to start considering that option. *Id., 2729-30, 3725-26 & 2830*. Dara was in the middle of a contraction with the oxygen mask over her face. *Id., 2730-31*. She had been pushing continuously for about three-and-a-half hours with no breaks or pain medications. *Id., 2730*. She was relieved that the ordeal was finally going to end and nodded her consent. *Id., 2731-32*.

At that point, the baby slipped past her pubic bone and Dr. Bowen announced that this was what he had "been waiting for[.]" *T.p. 924-925 & 2732-33*. According to Nurse Hauser, the OB/GYN exclaimed: "We'll hold off for now." *Id., 1096*.

Dara's labor was allowed to continue with the worrisome fetal heart rates. *T.p. 1558-59 & 1569-71*. By 5:00 p.m. with the baby descending the "stair step[s] to death[.]" Dr. Bowen finally said Emmett needed to be delivered emergently with the vacuum extractor. *Id., 2735*. The parents consented and the delivery was performed on the first pull. *Id., 1107-08*.

Emmett appeared "floppy" to Nurse Hauser on delivery. *T.p. 1109*. She had testified during her deposition (but refused to do so during trial) that the staff realized that the baby did not have a heart rate, which meant he was essentially born dead. *Id., 1114-15*. Emmett still survived and was rushed to Cincinnati Children's Hospital, where he suffered continuous seizures and was diagnosed with hypoxic-ischemic encephalopathy. *Id., 2741-43 & 4475*. He remained in the Neonatal Intensive Care Unit ("NICU") for the next 18 days and was discharged with permanent and profound brain damage. *Id., 2743*. Ultimately, the family's medical bills surpassed \$600,000.00. *Id., 2746-47*.

Dr. Bowen has confirmed that Emmett was born in a severely asphyxiated state.

T.d., 942-43. He has further conceded that, if Cincinnati Children’s Hospital is correct that the oxygen deprivation occurred at the time of delivery, then the newborn’s brain injury was avoidable. *Id.*, 943. Emmett is severely and permanently brain damaged and requires 24-hour care, not having control of his extremities or head, and needs to be suctioned periodically throughout the day.

ARGUMENT

PROPOSITION OF LAW I: A FORESEEABILITY INSTRUCTION IS PROPER ONLY WHEN CONFLICTING EVIDENCE HAS BEEN INTRODUCED ON THE ISSUE AND CAN ONLY REQUIRE THAT A SIMILARLY SITUATED PROFESSIONAL OR SPECIALIST COULD HAVE FORESEEN A MATERIAL RISK OF POTENTIAL HARM

A. THE UNWARRANTED FORESEEABILITY CHARGE

Recently, this Court established that foreseeability is an element of the duty of care that is owed, and is no longer a relevant consideration in the medical malpractice context once the physicians-patient relationship has been established. *Cromer*, 2015-Ohio-229, ¶26. But as the First District has explained, the jury was charged in this case on the issue solely because Plaintiffs’ experts had remarked that Dr. Bowen and the Mercy Hospital nurses “should have seen or known that the baby’s condition was deteriorating and that an injury could result.” *Apx. 00022*, ¶30. As this opinion tacitly acknowledges, Defendants never presented any evidence to the contrary. *Id.* Their staunch position was that they had recognized and complied with the standard of care. If for nothing else, jurisdiction should be accepted over this appeal so that the action can be remanded with instructions that *Cromer* precludes a foreseeability change when the issue is not in dispute. *Id.*, 2015-Ohio-229, ¶34. The plaintiffs’ introduction of some testimony on the matter does not somehow unlock the gates to the defense. *Needham v. Gaylor*, 2nd Dist. No. 14834, 1996 W.L. 531596 (Sept. 20, 1996).

B. THE MISINFORMED JURY

The jury was not just required to consider whether Plaintiffs had proven an issue that was not in dispute, but was actively misled in three significant respects over the actual requirements of Ohio law. As a result, Plaintiffs were deprived of their fundamental right to a fair trial before a properly instructed jury.

First, the “reasonably careful person” test is impossible to satisfy in almost every complex civil action founded upon allegations that a professional or specialist neglected to comply with the responsibilities of his/her field. In this case, for instance, few ordinary citizens appreciate that the failure to recommend a cesarean section once the fetus is in distress can result in cerebral palsy. Both Chief Justice O’Connor’s majority opinion and Justice O’Donnell’s concurring opinion recognized that the pattern O.J.I. charge is misleading in this regard and should be revised to be medically specific. *Cromer*, 2015-Ohio-229, ¶40, 52.

Second, in his concurring opinion, Justice O’Donnell observed that the “trial court compounded this error by stating the foreseeability instruction in terms of probability.” *Cromer*, 2015-Ohio-229, ¶53. A statistically small but still unacceptable risk of harm should be enough in any setting, particularly a hospital, to require the defendant to take appropriate action. *Id.* But in this case, the jurors were instructed that a defense verdict had to be returned unless Dr. Bowen and the hospital staff understood that the “likely result” (which was repeated twice) was that the patient would be injured. *T.p.*, pp. 5223-24. That is essentially the same test for proving malicious wrongdoing. *See, e.g., Preston v. Murty*, 32 Ohio St. 3d 334, 512 N.E. 2d 1174, syllabus (1987) (recognizing that actual malice includes “a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.”) Plaintiffs thus could not prevail by demonstrating that a mere oversight had occurred, but were required to prove instead that the healthcare providers actually

appreciated that harm would probably result but still did not offer a cesarean section.

Third, the trial court's ill-advised instruction forced the jury to consider whether sufficient foreseeability had been established, without affording them a complete explanation of the applicable law. The charge that Defendants prepared and the trial judge accepted never advised the jurors that foreseeability is already subsumed within the physician-patient relationship. *T.p.*, pp. 5223-24. Instead, the jurors were misled into believing the medical professionals just had "to foresee and treat only those diseases that appeared more likely than not to cause [the patient's] illness, regardless of whether a reasonable medical professional in the same specialty under like circumstances would have correctly diagnosed and treated the condition from which he suffered." *Cromer*, 2015-Ohio-229, ¶54 (O'Donnell, J. concurring). Had the jurors known that the duty had already been conclusively established through the physician-patient relationship and foreseeability was no longer an issue, the outcome of the trial undoubtedly would have been quite different.

C. THE ACTUAL PREJUDICE SUFFERED

In *Cromer*, the majority proceeded to hold that the plaintiffs had failed to demonstrate that the trial judge's error was sufficiently egregious to justify a new trial. *Id.* at ¶35-43. That certainly was not the case below. None of the appellate or trial court jurists suggested that the harmless error rule applied or the foreseeability charge had been inconsequential.

In stark contrast to *Cromer*, Defendants have not minced words during their unrelenting efforts to justify the foreseeability charge. Defendant Mercy declared that "[f]oreseeability is relevant to all three elements of negligence[,] the "foreseeability calculus is a central component of the standard of care (i.e., duty) and any related allegation of its breach[,] and refusing to furnish the charge would "deprive juries of one of the most critical tools they possess in determining whether a defendant-

provider met the standard of care.” *Mercy’s Court of Appeals Brief*, pp. 28 & 31. And, according to Dr. Bowen: “Foreseeability is vitally important in determining whether the standard of care was breached because it is directed at the reasonableness of the defendant’s actions under same or similar circumstances.” *Dr. Bowen’s Court of Appeals Brief*, p. 30. Even the appellate court acknowledged that: “The issue of foreseeability was a dispositive issue in this case.” *Apx. 00022*, ¶30 (emphasis added). At least in this particular lawsuit, the jury was seriously misled and required to resolve an issue that was not actually in dispute, thereby satisfying the requirement of actual prejudice.

PROPOSITION OF LAW II: A VALID CLAIM OF LACK OF INFORMED CONSENT DOES NOT NECESSARILY REQUIRE AN ACTUAL TRESPASS UPON THE PATIENT, BUT CAN BE ESTABLISHED WHEN THE HEALTHCARE PROVIDER FAILS TO DISCLOSE THAT SAFER OR MORE EFFECTIVE ALTERNATIVE TREATMENT OPTIONS ARE AVAILABLE

Damages that have been proximately caused by a healthcare provider’s failure to obtain informed consent have long been recoverable in Ohio. *Nickell*, 17 Ohio St.3d 136, syllabus. The Eighth District has observed that: “The doctrine of informed consent is based on the theory that every competent human being has a right to determine what shall be done with his or her own body.” *Perla v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 83058, 2004-Ohio-2156, ¶ 28 (citation omitted); *see also Siegel v. Mt. Sinai Hosp. of Cleveland*, 62 Ohio App.2d 12, 21, 403 N.E.2d 202 (8th Dist.1978). More important, lack of informed consent is an independent claim, separate and apart from a medical negligence claim. *Id.*

The Ohio Judicial College has prepared a separate “Lack of Informed Consent” pattern charge precisely because cases can arise, such as this, where damages are available regardless of whether the healthcare provider competently performed a medical procedure or technique. *Ohio Jury Instr.*, 417.05. In contrast to the general

charge on medical negligence (*Ohio Jury Instr.*, 417.01), a “standard of care” violation does not need to be established. *Nickell*, 17 Ohio St.3d 136, 477 N.E.2d 1145, syllabus.

In affirming the trial court’s *sua sponte* decision to withdraw the lack of informed consent claim from the jury, the First District became the first in modern Ohio jurisprudence to hold that the tort “requires an act against the patient without his or her full knowledge or understanding of the attendant risks of that act.” *Id.*, 00019, ¶22. This Court had established just three elements for the cause of action, none of which involve an actual physical act by the health care provider. *Nickell*, 17 Ohio St. 3d 136, syllabus. That is also true for the pattern charge that has been prepared by the Ohio Judicial College. *O.J.I.*, §417.05.

Plaintiffs had intentionally built their informed consent claim upon the period of the labor that extended from Dara’s onset of stage two at approximately 1:00 p.m. and the next few hours. Critical information should have been disclosed during this window of opportunity in order for Dara and James to properly evaluate the apparent risks to their unborn son and their medical options. Had informed options been timely presented, a caesarean delivery would likely have occurred much earlier, thereby avoiding Emmett’s brain damage. *T.p.* 2250-51, 2737, 3673 & 3722. Undoubtedly because they appreciated that triable issues of fact existed upon this independent cause of action, Defendants never sought either summary judgment or a directed verdict upon this aspect of the Complaint.

By adopting the new “trespass” element for claims of lack of informed consent, the First District has precluded any recovery whenever the healthcare provider fails to disclose that safer and more effective treatment options are available. So long as he/she remains silent and refrains from committing “an act against the patient” there is no need to fear that any lawsuits will follow. *Apx.* 00019, ¶22. This rash holding cannot be reconciled with those decisions recognizing that a lack of informed consent claim can

indeed be based upon a failure to disclose alternative treatment options. *Pilny v. Kustin*, 8th Dist. No. 53784, 1988 W.L. 51518 (May 19, 1988); *Stewart v. Cleveland Clinic Found.*, 136 Ohio App.3d 244, 736 N.E.2d 491 (8th Dist. 1999). This Court should therefore examine the unprecedented new test that now controls in Hamilton County.

PROPOSITION OF LAW III: A CLAIM OF LACK INFORMED CONSENT IS AN INDEPENDENT TORT, AND IS NOT SUBSUMED BY THE TORT OF MEDICAL MALPRACTICE

In granting a *sua sponte* directed verdict upon the lack of informed consent claim, the trial judge adopted the novel theory that the cause of action had been subsumed within the claim of medical malpractice. *T.p.*, 4975-76. As defense counsel had evidently recognized before the trial judge decided to direct out the informed consent claim on his own volition, the particular facts of this case justified instructions on both causes of action. Plaintiffs had devoted considerable effort to establishing the duties that were owed to fully inform the patients of the risks and benefits of the options available to them precisely because the prospect existed that the jurors could believe Dr. Bowen and find that Dara had declined continuous fetal monitoring or refused a C-section (or both). While that would be fatal to the claim of malpractice that was based upon delivering the newborn vaginally, the question that then should have arisen would have been whether the patient's choices were fully informed. *Estate of Leach v. Shapiro*, 13 Ohio App. 3d 393, 398, 469 N.E. 2d 1047, 1054 (9th Dist. 1984) ("Not only must a patient consent to treatment, but the patient's consent must be informed consent.") The same jury would have been equally entitled to conclude that the parents never received all the information required to intelligently assess the recommendations for continuous monitoring and the necessity of a C-section, thereby justifying an award of damages under the long-recognized theory of lack of informed consent. *Siegel v. Mt. Sinai Hosp. of Cleveland*, 62 Ohio App.2d 12, 21-22, 403 N.E.2d 202, 209 (8th

Dist.1978), citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 136, 346 N.E.2d 673 (1976), and *Canterbury v. Spence*, 464 F.2d 772 (D.C.Cir.1972).

The contention that both claims merged because the proof involved similar evidence defies common sense. That is usually the case when the two separate approaches to liability are raised in the same lawsuit. The critical distinction here is in the duties of care that apply. The general obligation at the core of Ohio Jury Instr. 417.01(1) concerns the “skill, care, and diligence” required under the particular circumstances. *Berdyck v. Shinde*, 66 Ohio St.3d 573, 579, 1993-Ohio-183, 613 N.E.2d 1014, citing *Bruni*, 46 Ohio St.2d at 130. But Ohio Jury Instr. 417.05(1) predicates the informed consent claim upon the separate duty to disclose the material risks of the choices that must be made. A health care provider can exercise commendable “skill, care, and diligence” in performing the approved treatments while simultaneously failing to provide the patient with the information needed to make intelligent decisions. The Ninth District and other courts thus recognize that a violation of the duty of disclosure is actionable “independent of malpractice” and can even amount to fraud. *Estate of Leach*, 13 Ohio App. 3d at 398 (citations omitted). Before countless patients are denied the remedy that has long been furnished in the common law under the tort of lack of informed consent, this Court should evaluate the wisdom of the First District’s “merger” theory.

PROPOSITION OF LAW IV: ABSENT EXIGENT CIRCUMSTANCES, A LITIGANT IS DENIED A FAIR TRIAL WHEN MORE PEREMPTORY CHALLENGES ARE AFFORDED TO OPPOSING PARTIES WHO ARE NOT ANTAGONISTIC TO EACH OTHER

Plaintiffs filed a motion to limit or equalize peremptory challenges prior to trial on September 21, 2012. *T.d.*, 164. They observed that no cross-claims had been raised, the Defendants were not blaming each other for the newborn’s brain injury, and indistinguishable defenses were being pursued. *Id.*, pp. 3-5. They requested that the

Court either require Dr. Bowen and Mercy Hospital to share three challenges, or the three Plaintiffs should be afforded a matching total of six, three for Emmett and three for his parents. *Id.*, 4-5. Relying heavily upon *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 125, 512 N.E.2d 640 (1987), Defendants maintained that as long as they were represented by separate counsel and did not necessarily stand-and-fall together, Plaintiffs would have to suffer a serious mathematical disadvantage during jury selection. *Id.*

In an entry that was issued on May 13, 2013, Judge Stich concluded that Dr. Bowen and Mercy Hospital would each be entitled to three peremptories, and no legal authorities allowed Plaintiffs to be awarded a matching total. *Apx. 0003 & 0006*. He later explained during the trial that he was “sympathetic” to Plaintiffs’ position but felt “obligated” by *LeFort* to allow Defendants to strike twice as many jurors. *T.p. 428*. If he had actually been following the Supreme Court precedent to the letter, he would have allotted Plaintiffs a total of nine peremptories since there were three of them, they were represented by three attorneys from two different law firms, and some could prevail in theory while others might not.

During *voir dire*, Defendants struck four jurors from the panel without cause. *T.p. 469, 485, 510, & 525-526*. Plaintiffs exercised only their first preemptory challenge, and passed on the last two. *Id.*, 447, 508, 547. There was nothing that their counsel could do to prevent the Defendants from ensuring that no jurors remained who were likely to view the young couple’s claim impartially. Given that a defense verdict was eventually returned by the slimmest of margins (6-2), the uneven playing field proved to be a decisive advantage.

A trial court commits reversible error when Civ.R. 47(C) is applied in a manner that affords one side a tactical advantage. *Nieves v. Kietlinski*, 22 Ohio St.2d 139, 145, 258 N.E.2d 454 (1970) (the erroneous allocation of preemptory challenges gave the

adverse parties “an additional power of choice, and made his right of peremptory challenge relatively more valuable,” while the opposing party’s similar right was “made relatively less valuable,” and therefore a new trial was the appropriate remedy). In such situations, a finding of prejudice is warranted as a matter of law. *Id.* Thus, the sole inquiry is whether the trial court properly allocated the peremptory challenges amongst the parties, and once it is determined that the trial court erred, the verdict must be vacated and the case remanded for a new trial. *Id.* Disruptions of an equal balance of peremptories should be allowed only in unusual circumstances. *Chakeres v. Merchants & Mechanics Fed. Sav. & Loans Ass’n.*, 117 Ohio App. 351, 192 N.E.2d 323 (2d Dist.1962).

This Court should confirm that *LeFort* does not stand for the proposition that co-parties are always entitled to their own allotment of peremptories whenever they have retained separate counsel, submitted separate pleadings, and could arguably be entitled to a favorable verdict (at least in theory) while a co-party is not. At the very least, this Court should instruct Ohio’s judiciary that even when one side receives additional peremptories as a result of antagonistic interests, fundamental principles of due process require the same number to be allotted to the other side to balance the playing field.

CONCLUSION

Given the issues of public and great general importance that are at stake in this appeal, further Supreme Court review is warranted.

Respectfully Submitted,

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John H. Metz, Esq. (#0019039)
Attorneys for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum** has been sent by e-mail on this 23rd day of April, 2015 to:

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s/Paul W. Flowers
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Attorney for Plaintiff-Appellants

COURT OF COMMON PLEAS
 ENTER
Carl *Stich*
 HON. CARL STICH
 THE CLERK SHALL SERVE NOTICE
 TO PARTIES PURSUANT TO CIVIL
 RULE 58 WHICH SHALL BE TAXED
 AS COSTS HEREIN.

ENTERED
 JUL 11 2013

COURT OF COMMON PLEAS
 HAMILTON COUNTY, OHIO



EMMETT O'LOUGHLIN, A Minor, : Case No. A1100372
 by and through his mother and :
 next friend, DARA O'LOUGHLIN : Judge Stich

AND :

DARA O'LOUGHLIN, Individually, :

AND :

JAMES O'LOUGHLIN, Individually, :

PLAINTIFFS, :

v. :

MERCY HOSPITAL FAIRFIELD, :

AND :

MERCY HEALTH PARTNERS OF
 SOUTHWEST OHIO, :

AND :

DANIEL CLIFFORD BOWEN, M.D., :

AND :

THE PROFESSIONAL
 ORGANIZATION OF DANIEL
 CLIFFORD BOWEN, M.D., :

DEFENDANTS. :

FINAL ENTRY OF JUDGMENT
IN FAVOR OF DEFENDANTS,
DANIEL CLIFFORD BOWEN,
M.D., THE PROFESSIONAL
ORGANIZATION OF DANIEL
CLIFFORD BOWEN, M.D.,
MERCY HOSPITAL FAIRFIELD,
AND MERCY HEALTH
PARTNERS OF SOUTHWEST
OHIO

FOR COURT USE ONLY
 S. C. Line #: 5



D102823066

This case came on for trial commencing May 20, 2013. On June 17, 2013, the jury returned its verdict in favor of Defendants, Daniel Clifford Bowen, M.D., The Professional Organization of Daniel Clifford Bowen, M.D., Mercy Hospital Fairfield and Mercy Health Partners of Southwest Ohio.

IT IS THEREFORE ORDERED that final judgment is hereby entered in favor of Defendants Daniel Clifford Bowen, M.D., The Professional Organization of Daniel Clifford Bowen, M.D., Mercy Hospital Fairfield and Mercy Health Partners of Southwest Ohio. Costs to Plaintiffs.

Entered this ____ day of July, 2013.

Honorable Judge Stich

Approved by:

via e-mail authority (7/10/13)

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134 Middle Avenue
Elyria, OH 44035
and

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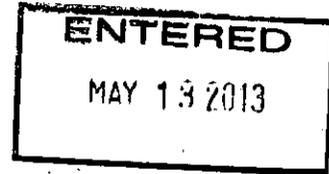
/s/Joel L. Peschke

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



EMMETT O'LOUGHLIN, et al. :
Plaintiffs : Case No. A1100372
vs. : (Judge Carl Stich)
CATHOLIC HEALTHCARE :
PARTNERS FOUNDATION, et al. :
Defendants :
:

**Order Denying Plaintiffs' Motion to
Limit or Equalize Peremptory Challenges**



Plaintiff has moved for an order limiting or equalizing the parties' peremptory challenges. Civil Rule 47(C) provides that "[i]n addition to challenges for cause provided by law, each party peremptorily may challenge three prospective jurors. If the interests of multiple litigants are *essentially the same*, 'each party' shall mean 'each side.'" (Emphasis added.) Plaintiff argues that the defendants collectively should be counted as one side because their "interests in the outcome of the litigation are the same."
PLAINTIFFS' MEMORANDUM at 2.

The controlling authority in Ohio remains *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St. 3d 121, 512 N.E.2d 640 (1987), which approved the following statement of the law:

Under statutes which allow a specific number of challenges to "each party," the majority view is that those who have identical interests or defenses are to be considered as one party and therefore only collectively entitled to the number of challenges allowed to one party by the statute. . . . However, if the interests of the parties

defendant are *essentially different* or antagonistic, each litigant is ordinarily deemed a party within the contemplation of the statute and entitled to the full number of peremptory challenges.

Quoting *Chakers v. Merchants & Mechanics Federal S&L Assn.*, 117 Ohio App. 351, 355, 192 N.E.2d 323, 326 (2d Dist. 1962) (emphasis added.)

The factors found relevant in *LeFort* to the denial of a motion to limit the number of peremptories include:

- That the defendants filed separate replies and defenses.
- That the defendants were represented by separate counsel.
- That one defendant filed a separate motion for summary judgment.
- The each defendant could assert defenses independent of the other, so that the defenses asserted did not necessarily rise or fall together.

Those factors were applied in *Bernal v. Lindholm*, 133 Ohio App. 3d 163, 727 N.E.2d 145 (6th Dist. 1999), where the defendants in a medical malpractice case were given a total of nine peremptory challenges to the plaintiff's three. The defendants were represented by separate counsel, but all defendants promoted a common causation theory. Even if the jury rejected the common defense theory, it could have found one defendant liable and not the others. "Hence the defenses asserted did not necessarily stand or fall together." 133 Ohio App. 3d at 176, 727 N.E.2d at 155.

In this case the defendants are divided into two groups represented by separate counsel. The two groups have filed separate pleadings and motions. Although they share some witnesses in common and could all benefit from challenges to the Plaintiffs' causation theory, they also have separate defenses. Most significantly, the claims against the Bowen defendants turn on standards of care for a physician, whereas the claims against the Mercy defendants turn on the standards of care for nurses. It is

reasonable to expect that the questions and evaluations of potential jurors for the two groups of defendants might differ.

Plaintiffs argue that the court could equalize the number of peremptory challenges by giving them six instead of three. They cite *Rentz v. Globe Amer. Cas. Co.*, 10th Dist. No. 90AP-270, 1990 Ohio App. LEXIS 5415, for the proposition that it is an abuse of discretion not to equalize the challenges available to the parties. The statement relied on by Plaintiffs was dicta, and it remains unclear why the court found an abuse of discretion. *Rentz* appears to be an anomaly. Nothing in Rule 47 permits or requires equalization of challenges. “[U]nlike the criminal rules, there is no provision in the civil rules that provides for each side in a civil action to have an equal number of peremptory challenges.” *Bernal v. Lindholm*, 133 Ohio App. 3d at 176, 727 N.E.2d at 155.

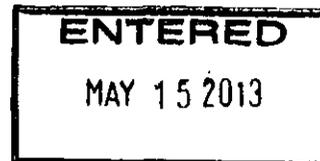
The requirements of Civil Rule 47(C) and the principles approved in *LeFort* require that the two groups of defendants each be given three peremptory challenges. Plaintiffs’ motion is therefore DENIED.

SO ORDERED.



Carl Stich, Judge

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



EMMETT O'LOUGHLIN, et al. :
Plaintiffs : Case No. A1100372
vs. : (Judge Carl Stich)

CATHOLIC HEALTHCARE
PARTNERS FOUNDATION, et al.

Defendants



D102074504

**Order Denying Plaintiffs' Renewed Motion to
Limit or Equalize Peremptory Challenges**

Plaintiff's renewed motion relies upon *Layne v. GAF Corp.*, 42 Ohio Misc. 2d 19, 537 N.E.2d 252 (Cuyahoga Ct. C.P. 1988), which granted the plaintiff an equal number of peremptories to those allowed the defendants. *Layne* is not binding on this court, and its conclusions are at odds with a wealth of authority in Ohio. Nor has its reasoning attracted a following in Ohio or elsewhere.

Layne has been cited twice, most recently in *Lambert v. Wilkinson*, 11th Dist. No. 2007-A-0032, 2008-Ohio-2915. The plaintiff in *Lambert* made the same argument as the Plaintiffs here – that that the court should have allowed her six peremptory challenges to equal those of the physician defendants.

To support her contention, appellant cites to *Layne v. GAF Corp.* However, while we acknowledge the ruling of the *Layne* court, we recognize that the decision is a published judgment entry of the Cuyahoga County Court of Common Pleas, which is not persuasive nor binding on this court.

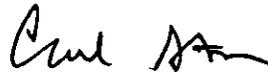
More importantly, the Supreme Court of Ohio reiterated the

majority view on this particular issue in *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St. 3d 121, 512 N.E.2d 640.

Id. at ¶¶ 21-22. The *LeFort* case has already been discussed in the Court's prior ruling.

The only other citation to *Layne* is the concurring opinion in *Wardell v. McMillan*, 844 P.2d 1052 (Wyo. 1992). The concurring justice advocated as an additional basis for reversal the trial court's refusal to equalize peremptory challenges between the plaintiff and the two physician defendants. The majority in *Wardell* did not agree, and held that there was no error in allowing three peremptory challenges to each of the two defendants and only three to the plaintiff. The rule announced by the Wyoming Supreme Court is indistinguishable from the rule described in *LeFort*.

Plaintiffs' motion is DENIED.



Carl Stich, Judge

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

EMMETT O'LOUGHLIN, a Minor, :

APPEAL NO. C-130484
TRIAL NO. A-1100372

DARA O'LOUGHLIN, Individually and :
as Parent and Natural Guardian of :
Emmett O'Loughlin, :

JUDGMENT ENTRY.

and :

JAMES O'LOUGHLIN, Individually :
and as Parent and Natural Guardian of :
Emmett O'Loughlin, :



D109272168

Plaintiffs-Appellants, :

vs. :

MERCY HOSPITAL FAIRFIELD, :

MERCY HEALTH PARTNERS OF :
SOUTHWEST OHIO, :

KAREN HAUSER, R.N., :

AMY RISOLA, R.N., :

LORI TRAMMEL, R.N., :

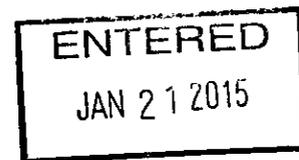
JUDY FRY, R.N., :

DANIEL CLIFFORD BOWEN, M.D., :

and :

THE PROFESSIONAL ORGAN- :
IZATION OF DANIEL CLIFFORD :
BOWEN, M.D., :

Defendants-Appellees. :



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

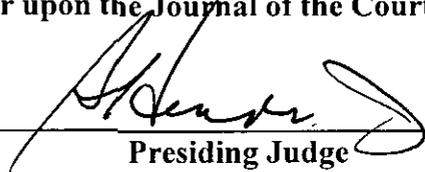
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on January 21, 2015 per Order of the Court.

By:


Presiding Judge

ENTERED
JAN 21 2015

ENTERED
JAN 21 2015

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

EMMETT O'LOUGHLIN, a Minor, :

APPEAL NO. C-130484
TRIAL NO. A-1100372

DARA O'LOUGHLIN, Individually and :
as Parent and Natural Guardian of :
Emmett O'Loughlin, :

OPINION.

and :

JAMES O'LOUGHLIN, Individually :
and as Parent and Natural Guardian of :
Emmett O'Loughlin, :

PRESENTED TO THE CLERK
OF COURTS FOR FILING

JAN 21 2015

Plaintiffs-Appellants, :

COURT OF APPEALS

vs. :

MERCY HOSPITAL FAIRFIELD, :

MERCY HEALTH PARTNERS OF :
SOUTHWEST OHIO, :

KAREN HAUSER, R.N., :

AMY RISOLA, R.N., :

LORI TRAMMEL, R.N., :

JUDY FRY, R.N., :

DANIEL CLIFFORD BOWEN, M.D., :

and :

THE PROFESSIONAL ORGAN- :
IZATION OF DANIEL CLIFFORD :
BOWEN, M.D., :

Defendants-Appellees. :

OHIO FIRST DISTRICT COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

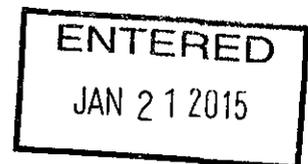
Date of Judgment Entry on Appeal: January 21, 2015

Paul W. Flowers Co., Paul W. Flowers, The Becker Law Firm, Michael F. Becker, Pamela Pantages and John H. Metz, for Plaintiffs-Appellants,

Rendigs, Fry, Kiely & Dennis, LLP, Jeffrey M. Hines, Thomas M. Evans and Karen A. Carroll, for Defendants-Appellees Mercy Hospital Fairfield, Mercy Health Partners of Southwest Ohio, Karen Hauser, R.N., Amy Risola, R.N., Lori Trammel, R.N., and Judy Fry, R.N.,

Calderhead, Lockemeyer & Peschke, David C. Calderhead and Joel L. Peschke, for Defendants-Appellees Daniel Clifford Bowen, M.D., and the Professional Organization of Daniel Clifford Bowen, M.D.

Please note: this case has been removed from the accelerated calendar.



HILDEBRANDT, Judge.

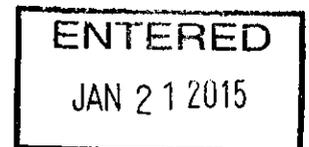
{¶1} Plaintiff-appellant Emmet O’Loughlin, a minor, suffered a traumatic brain injury at birth. Emmet and his parents, plaintiffs-appellants Dara and James O’Loughlin, sued defendants-appellees Dr. Daniel Bowen, the doctor that delivered Emmet, Dr. Bowen’s practice group, the hospital where Emmet was born, Mercy Fairfield, and four obstetrical nurses assisting in the labor and delivery of Emmet for medical malpractice. Following a four-week jury trial, the trial court entered judgment in favor of Dr. Bowen and his practice group and Mercy Fairfield and its nurses. The O’Loughlins now appeal, asserting six assignments of error. For the following reasons, we affirm the trial court’s judgment.

Peremptory Challenges

{¶2} In their first assignment of error, the O’Loughlins contend that the trial court abused its discretion and thus, skewed the jury-selection process by allowing “the aligned defendants” to each exercise three peremptory challenges.

{¶3} Civ.R. 47(C) provides that “each party peremptorily may challenge three prospective jurors. If the interests of multiple litigants are essentially the same, ‘each party’ shall mean ‘each side.’” In *LeFort v. Century 21-Maitland Co.*, 32 Ohio St.3d 121, 125, 512 N.E.2d 640 (1987), citing *Chakeres v. Merchants & Mechanics Fed. S. & L. Assn.*, 117 Ohio App. 351, 355, 192 N.E.2d 323 (2d Dist.1962), the Ohio Supreme Court held that

[u]nder statutes which allow a specific number of challenges to ‘each party,’ the majority view is that those who have identical interests or defenses are to be considered as one

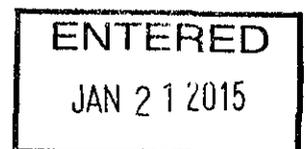


party and therefore only collectively entitled to the number of challenges allowed to one party by the statute. * * * However, if the interests of the parties defendant are essentially different or antagonistic, each litigant is ordinarily deemed a party * * * and entitled to the full number of peremptory challenges.

{¶4} In *LeFort*, the court held that the defendants were each entitled to three peremptory challenges, because (1) each defendant had been represented by its own counsel; (2) each defendant had filed separate replies and defenses; and (3) one of the defendants had filed a separate motion for partial summary judgment, alleging they had owed no duty to the plaintiffs. *Id.*

{¶5} In *Bernal v. Lindholm*, 133 Ohio App.3d 163, 727 N.E.2d 145 (6th Dist.1999), the appellate court applied the *LeFort* factors to affirm a trial court's award of nine peremptory challenges to defendants in comparison to the plaintiff's three challenges. There, the court noted that although the defendants promoted a common causation theory, if the jury had rejected that theory, it could have found one of the defendants liable and not the others. Thus, "the defenses asserted did not necessarily stand or fall together." *Id.* at 176, citing *LeFort* at 125.

{¶6} In this case, we find that the trial court did not err in granting each defendant three peremptory challenges. Here, the hospital and the nurses were one party-defendant and Dr. Bowen and his practice group were another party-defendant. Each party was represented by separate counsel, and separate pleadings and motions were filed. With respect to the defenses asserted, we recognize that the shared theory that Dara and James O'Loughlin had been committed to natural



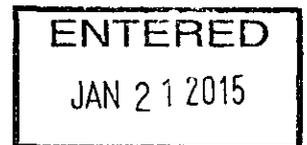
childbirth and had refused medical intervention could have exonerated all the defendants. But if the jury had chosen not to accept that theory, it nevertheless could have found one defendant liable and not the other, because Dr. Bowen and the nurses were subject to different standards of care. Thus, the parties' defenses did not necessarily stand or fall together. The first assignment of error is overruled.

Evidentiary Issues

{¶7} In their second assignment of error, the O'Loughlins maintain that the trial court abused its discretion by refusing to allow them to impeach the credibility of Dr. Bowen with evidence that he had failed to pass his OB/GYN board certification examination.

{¶8} "A trial court is in the best position to make evidentiary rulings and an appellate court should not substitute its judgment for that of the trial judge absent an abuse of discretion." *Branch v. Cleveland Clinic Found.*, 134 Ohio St.3d 114, 2012-Ohio-5345, 980 N.E.2d 970, ¶ 17. An abuse of discretion is more than an error of law or judgment; instead, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶9} The O'Loughlins believed that questioning Dr. Bowen about his failed attempt at board certification was relevant because it related to his credibility. But Ohio courts have held that questions concerning a doctor's failure to pass a board examination are not relevant to his or her credibility in medical-malpractice cases. *See Shoemake v. Hay*, 12th Dist. Clermont No. CA2002-06-048, 2003-Ohio-2782, ¶ 15; *Nash v. Hontanosas*, 12th Dist. Clermont No. CA2001-02-027, 2002-Ohio-1741; *Keller v. Bacevice*, 9th Dist. Lorain No. 94CA005812, 1994 Ohio App. LEXIS 5444

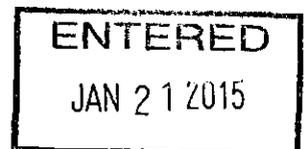


(Nov. 30, 1994); *Johnston v. Univ. Mednet*, 8th Dist. Cuyahoga No. 65623, 1994 Ohio App. LEXIS 3495 (Aug. 11, 1994), *overruled on other grounds*, 71 Ohio St.3d 608, 646 N.E.2d 453 (1995) (trial court did not abuse its discretion in finding that questions on cross-examination about doctor's failure to pass pediatrics board certification examination were not relevant to competency or credibility). Mainly because such questioning is not relevant to or determinative of the ultimate issue of whether a particular doctor has breached the applicable standard of care.

{¶10} The O'Loughlins argue that the cases cited above are not persuasive authority because the doctors in those cases were not qualified to testify as experts, as Dr. Bowen was here. But the doctor in *Hay* offered his expert opinion on the ultimate issue of his medical negligence, similar to Dr. Bowen. Dr. Bowen testified as to the facts of what happened before, during and after the alleged malpractice. He only opined, as an expert, that he had met the standard of care; he did not testify as an expert as to the causation of Emmet's injury or any other matter. Further, the jury heard on cross-examination that Dr. Bowen was not board certified, thus leaving the jury to weigh his testimony, as a non-board-certified doctor, with the O'Loughlins' experts, who were board certified.

{¶11} Based on the foregoing, we hold that the trial court did not abuse its discretion by refusing to allow the O'Loughlins to question Dr. Bowen about his failed attempt at board certification.

{¶12} The O'Loughlins also assert that the trial court abused its discretion by not allowing them to question Dr. Bowen about the hospital's concern that he was not board certified. Although they raise this issue, the O'Loughlins did not present any argument to support their assertion. Nevertheless, a review of the record reveals

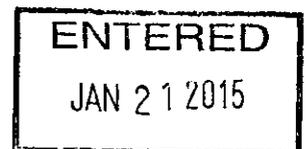


that the hospital only expressed concern about Dr. Bowen's lack of board certification when he began to teach residents in the hospital's residency program; there had been no concern expressed by the hospital in the previous years, including the year Emmet was born. Thus, because the O'Loughlins' questions were not relevant to whether Dr. Bowen met the standard of care, we cannot say that the trial court abused its discretion in refusing to allow questioning on this issue.

{¶13} The second assignment of error is overruled.

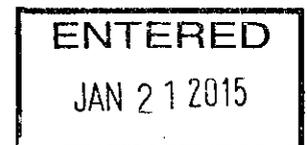
{¶14} In the third assignment of error, the O'Loughlins contend that the trial court abused its discretion when it permitted the defendants "to introduce a highly prejudicial 'refusal of treatment' form that misleadingly suggested that [the O'Loughlins] had waived their legal rights." We find no abuse of discretion and overrule this assignment of error. The defendants did not argue at trial that the O'Loughlins had waived their legal rights. The form was relevant because the O'Loughlins maintained that they did not refuse any necessary treatment during the labor and delivery of Emmet, including a necessary cesarean section. Finally, we cannot see how the presentation of this form to the jury was prejudicial to the O'Loughlins, when they introduced the exhibit themselves and relied on it during the testimony of their experts.

{¶15} Next, in the fourth assignment of error, the O'Loughlins maintain that the trial court further abused its discretion by restricting rebuttal testimony. The record demonstrates that the O'Loughlins wanted to present rebuttal testimony on approximately 15 issues. The court only allowed rebuttal on six of those issues. The O'Loughlins argue that the trial court applied the wrong standard in determining when to allow rebuttal testimony. We hold otherwise.



{¶16} The Ohio Supreme Court has held that “a party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent’s case-in-chief and should not be brought in the rebutting party’s case-in-chief.” *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994). An abuse of discretion will be found when this right has been unreasonably violated. *Klem v. Consol. Rail Corp.*, 6th Dist. Lucas No. L-09-1223, 2010-Ohio-3330.

{¶17} The record demonstrates that the trial court applied this standard when reviewing the O’Loughlins’ request for rebuttal testimony. While the O’Loughlins claim that the trial court refused to permit rebuttal in several highly prejudicial respects, they did not provide argument for each instance. Instead, they only refer to one issue involving Dr. Bowen’s testimony, during his case-in-chief, where he testified that Dara had said “no” to a cesarean section, and that he remembered her saying “no” because when she shook her head a “scrunchy” fell out of her hair. Dara wanted to rebut that testimony by explaining that she has never worn a scrunchy and that she could not have said “no” or anything else to Dr. Bowen because an oxygen mask had been strapped to her face at that time. The trial court denied this rebuttal because it determined that the scrunchy was a “collateral detail,” and that Dara had already testified during her case-in-chief that she had had an oxygen mask on and that she had not refused a necessary cesarean section. We find that the trial court did not abuse its discretion in refusing rebuttal testimony in this instance. We have no reason to disagree with the trial court that the scrunchy was a “collateral detail,” and the record reflects that Dara had already testified that she had been wearing an oxygen mask and thus, could not, and did not, refuse a necessary cesarean section.



{¶18} With respect to the other instances complained of, we have reviewed the record and hold that the trial court did not abuse its discretion in refusing rebuttal testimony on the remaining five issues.

{¶19} The fourth assignment of error is overruled.

Lack of Informed Consent

{¶20} In their fifth assignment of error, the O'Loughlins maintain that the trial court erred "by sua sponte entering a directed verdict on their claim of informed consent." In their complaint, they alleged, separate and apart from their theory of negligence, that damages were owed as a result of Dr. Bowen's failure to fully and timely disclose the risk of continuing with a vaginal delivery, and fully explain the necessity of a cesarean section. The trial court determined at the close of evidence that the informed-consent claim was subsumed in the negligence claim, and therefore, it did not instruct the jury on lack of informed consent. We hold that the trial court did not err.

{¶21} We review this assignment de novo. *Wilson v. Harvey*, 164 Ohio App.3d 278, 2005-Ohio-5722, 842 N.E.2d 83 ¶ 10 (8th Dist.2005). The tort of lack of informed consent is established when: (1) the physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to **the proposed therapy**; (2) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and (3) a reasonable person in the position of the patient **would have decided against the therapy** had the material risks and dangers inherent and incidental to treatment been disclosed to

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him or her prior to therapy. *Nickell v. Gonzalez*, 17 Ohio St.3d 136, 477 N.E.2d 1145 (1985), paragraph two of the syllabus.

{¶22} By its definition, a lack-of-informed-consent claim contemplates something more than a failure to disclose; it requires an act against the patient without his or her full knowledge or understanding of the attendant risks of that act. In considering a lack-of-informed-consent claim, Judge Cardozo stated that “the wrong complained of is not merely negligence. It is trespass.” *Schloendorf v. Soc. of New York Hosps.*, 211 N.Y. 125, 105 N.E. 92 (1914). Here, Dr. Bowen did not trespass on his patient. Dr. Bowen recommended a cesarean delivery, which Dara and James refused at the time it was offered. If they had agreed to a cesarean delivery at that time, Dr. Bowen would have been required to inform them of any risks attendant to that type of delivery. Failing to disclose the need for a cesarean delivery, while not amounting to an informed-consent claim, may have been considered negligence, and the jury was able to consider this issue under the O’Loughlins’ medical-malpractice claim, which relied on the same facts as the lack-of-informed-consent claim.

{¶23} Likewise, the allegation that Dr. Bowen failed to disclose the risks of continuing with a vaginal delivery does not support a lack-of-informed-consent claim, because Dr. Bowen did not recommend continuing with the vaginal delivery over other options, such as a cesarean delivery. But the fact that he allowed Dara to continue to attempt to vaginally deliver for a while could have been considered negligence, and again, the jury was able to consider this theory under the O’Loughlins’ medical-malpractice claim.

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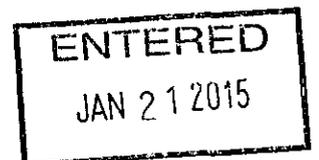
{¶24} Accordingly, because there was no treatment recommended by Dr. Bowen that Dara and James agreed to undertake, a claim of lack of informed consent was not tenable, and the trial court did not err in refusing to include a jury instruction on that claim. The fifth assignment of error is overruled.

Jury Instructions

{¶25} In their final assignment of error, the O'Loughlins maintain that the court gave erroneous and inapplicable jury instructions. They contend these erroneous instructions misled the jury and warrant a new trial.

{¶26} “A trial court has discretion whether to give a requested jury instruction based on the dispositive issues presented during trial. It is the duty of a trial court to submit an essential issue to the jury when there is sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue.” *Renfro v. Black*, 52 Ohio St.3d 27, 30, 556 N.E.2d 150 (1990). “A trial court must give a jury instruction that correctly and completely states the law. An inadequate jury instruction that misleads the jury constitutes reversible error.” *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170 ¶ 32.

{¶27} The O'Loughlins first challenge the instruction involving the foreseeability of Emmet's injury as it relates to the standard of care Dr. Bowen and the nurses owed to Dara and Emmet. In order to prove a claim of medical malpractice, the plaintiff must establish (1) the standard of care, as generally shown through expert testimony; (2) the failure of defendant to meet the requisite standard of care; and (3) a direct causal connection between the medically negligent act and the injury sustained. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976). The existence of a duty, or standard of care, depends on the foreseeability of the



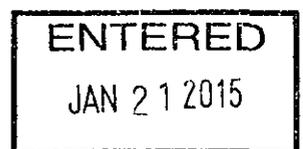
injury. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). In order to determine what is foreseeable, a court must determine “whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act.” *Id.* at 77.

{¶28} Here, the trial court instructed the jury that:

In deciding whether reasonable care was used, you will consider whether the defendant or defendants ought to have foreseen under the circumstances that the likely result of an act or failure to act would cause some injury.

The test for foreseeability is not whether the defendant or defendants should have foreseen the injury exactly as it happened to plaintiffs. The test is whether, under all circumstances, a reasonably careful person would have anticipated that an act or failure to act would likely result in some injury.

{¶29} This jury instruction mimics the language given by the Supreme Court and used in pattern instructions from the Ohio Jury Instructions. *See Menifee* at 77; *Miller v. Defiance Regional Med. Ctr.*, Lucas App. No. L-06-111, 2007-Ohio-7101. Further, multiple appellate districts in Ohio have upheld the use of a similar foreseeability instruction in medical-malpractice cases. *Ratliff v. Mikol*, 8th Dist. Cuyahoga No. 94930, 2011-Ohio-2147 (foreseeability instruction proper in medical-malpractice case alleging that doctor’s failure to order a cesarean section in light of fetal distress signs caused brain injury at birth); *Cox v. MetroHealth Med. Ctr. Bd. of*

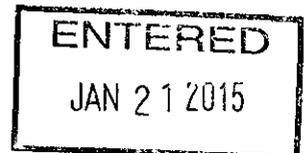


Trustees, 2012-Ohio-2383, 971 N.E.2d 1026 (8th Dist.); *Clements v. Lima Mem. Hosp.*, 3d Dist. Allen No. 1-09-24, 2010-Ohio-602; *Peffer v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 94356, 2011-Ohio-450; *Joiner v. Simon*, 1st Dist. Hamilton No. C-050718, 2007-Ohio-425, ¶ 59-61; *Miller, supra*.

{¶30} The issue of foreseeability was a dispositive issue in this case. The O’Loughlins presented testimony from their experts that under the circumstances presented, especially during the last four hours of Dara’s labor, Dr. Bowen and the nurses should have seen or known that the baby’s condition was deteriorating and that an injury could result. Based on the foregoing, we cannot say that the trial court abused its discretion in including an instruction on foreseeability.

{¶31} The O’Loughlins cite to *Cromer v. Children’s Hosp. Med. Ctr. of Akron*, 2012-Ohio-5154, 985 N.E.2d 548 (9th Dist.), *discretionary appeal allowed*, 134 Ohio St.3d 1484, 2013-Ohio-902, 984 N.E.2d 28, which held that the trial court had erred by including the foreseeability instruction in that medical-malpractice case. But that case is distinguishable because the trial court in *Cromer*, instead of instructing the jury to consider whether the doctor should have foreseen that his act would cause “some injury,” instructed the jury to consider whether the doctor should have foreseen that his actions or lack thereof would “cause [Cromer’s] death.” Ohio law is clear that doctors only have to foresee that their actions or lack thereof could have caused any injury, not a specific injury. Thus, the jury instruction in *Cromer* was an incorrect statement of the law.

{¶32} Next, the O’Loughlins contend that the jury instruction in this case was an incorrect statement of the law. They maintain that including the word “likely” in the foreseeability instruction effectively required them to prove that foreseeable



harm was “probable” (more than 50 percent). But the Eighth Appellate District has repeatedly rejected this same argument in medical-malpractice cases. See *Cox*, 2012-Ohio-2383, 971 N.E.2d 1026; *Ratliff*, 8th Dist. Cuyahoga No. 94930, 2011-Ohio-2147, at ¶ 10; *Peffer*, 8th Dist. Cuyahoga No. 94356, 2011-Ohio-450, at ¶ 44-57.

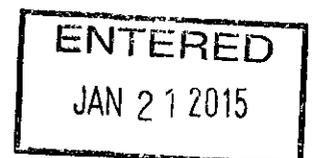
{¶33} Because the language used by the trial court here to instruct the jury on foreseeability has been approved by the Ohio Supreme Court, we cannot say that the trial court erred in its statement of the law, regardless of whether there is merit to the O’Loughlins argument. See *Menifee*, 15 Ohio St.3d at 77, 472 N.E.2d 707.

{¶34} Finally, the O’Loughlins maintain that the trial court erred by including a “different methods” instruction in the jury charge. We disagree. The defendants’ experts testified that Dr. Bowen had alternative methods of care to choose from in treating Dara, ranging from an emergency cesarean section or vaginal delivery, intermittent fetal monitoring or continuous monitoring, or vacuum assisted delivery, as opposed to forceps delivery. The nurses also had different options for treatment, including holding transducers in place by hand or applying them with belts, performing intrauterine resuscitation or not, and using the uterine-contraction monitor or not. Because there was evidence presented to the jury that different methods could have been utilized by the medical professionals, a “different methods” instruction was proper, and the trial court did not abuse its discretion in including such an instruction.

{¶35} The sixth assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and HENDON, J., concur.



OHIO FIRST DISTRICT COURT OF APPEALS

Please note:

The court has recorded its own entry on the date of the release of this opinion.

ENTERED
JAN 21 2015

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



EMMETT O'LOUGHLIN, et al.,

APPEAL NO. C-130484
TRIAL NO. A-1100372

Appellants,

vs.

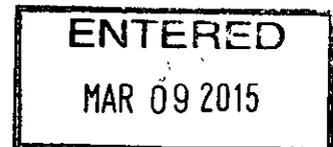
ENTRY OVERRULING MOTION
FOR RECONSIDERATION,
MOTION FOR EN BANC
RECONSIDERATION, AND
MOTION TO CERTIFY A
CONFLICT

MERCY HOSPITAL FAIRFIELD, et
al.,

Appellees.

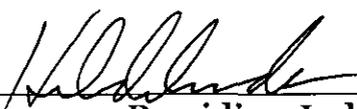
This cause came on to be considered upon the motion of the appellants for reconsideration, the motion of appellants for en banc reconsideration, the motion of appellants to certify a conflict, upon the appellees' memoranda in opposition, and upon the appellants' reply.

The motions are not well taken and are overruled.



To The Clerk:

Enter upon the Journal of the Court on MAR 09 2015 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)