

IN THE SUPREME COURT OF OHIO

EMMETT O'LOUGHLIN, a Minor, by	:	Supreme Ct. No. 2015-0653
and through his mother and next friend,	:	
DARA O'LOUGHLIN, et al.,	:	Appeal No. C1300484
	:	
Plaintiff-Appellants,	:	Trial No. A1100372
	:	
-vs-	:	Appeal from the First Appellate District,
	:	Hamilton County, Ohio
	:	
MERCY HOSPITAL FAIRFIELD, et al.,	:	
	:	
Defendant-Appellees.	:	

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF
DEFENDANT-APPELLEES, MERCY HOSPITAL FAIRFIELD,
MERCY HEALTH PARTNERS OF SOUTHWEST OHIO,
AND CATHOLIC HEALTH PARTNERS**

Paul W. Flowers, Esq.
PAUL W. FLOWERS CO.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
Co-Counsel for Plaintiff-Appellants
P: (216) 344-9393 / F: (216) 344-9395
E: pwf@pwfco.com

Michael F. Becker, Esq.
Pamela Pantages, Esq.
THE BECKER LAW FIRM
134 Middle Avenue
Elyria, Ohio 44030
Co-Counsel for Plaintiff-Appellants
P: (440) 323-7070 / F: (440) 323-1879
E: mbecker@beckerlawlpa.com
E: ppantages@beckerlawlpa.com

John H. Metz, Esq.
1117 Edwards Road
Cincinnati, Ohio 45208
Co-Counsel for Plaintiff-Appellants
P: (513) 321-8844 / F: (513) 321-6389
E: metzlegal@aol.com

Jeffrey M. Hines, Esq. (0070485)
Thomas M. Evans, Esq. (0033430)
Karen A. Carroll, Esq. (0039350)
Ryan J. Dwyer, Esq. (0091761)
RENDIGS, FRY, KIELY & DENNIS, LLP
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
*Counsel for Defendant-Appellees, Mercy
Hospital Fairfield, Mercy Health Partners of
Southwest Ohio, and Catholic Health Partners*
P: (513) 381-9200 / F: (513) 381-9206
jhines@rendigs.com / tevens@rendigs.com
kcarroll@rendigs.com / rdwyer@rendigs.com

David C. Calderhead, Esq.
Joel L. Peschke, Esq.
CALDERHEAD, LOCKEMEYER &
PESCHKE
6281 Tri-Ridge Boulevard, Suite 210
Loveland, Ohio 45140
*Counsel for Defendant-Appellees, Daniel
Clifford Bowen, M.D. and the Professional
Organization of Daniel Clifford Bowen, M.D.*
P: (513) 576-1060 / F: (513) 576-8792
E: dcalderhead@clp-law.com
E: jpeschke@clp-law.com

TABLE OF CONTENTS

TABLE OF CONTENTS	i-ii
TABLE OF AUTHORITIES.....	iii
STATEMENT REGARDING JURISDICTION.....	1-3
Authorities:	
<i>Cromer v. Children’s Hospital Med. Ctr. Of Akron</i> , 2015-Ohio-229.....	1
<i>Nickell v. Gonzalez</i> , 17 Ohio St.3d 136, 477 N.E.2d 1145 (1985).....	2
Ohio Rule of Civil Procedure 47	2, 3
<i>LeFort v. Century 21–Maitland Realty Co.</i> , 32 Ohio St.3d 121, 512 N.E.2d 640 (1987).....	2, 3
STATEMENT OF CASE.....	3-6
FACTUAL OVERVIEW.....	3-5
PROCEDURAL POSTURE.....	5-6
ARGUMENT.....	6-15
Response to Plaintiff-Appellants’ Proposition of Law No. 1	6-10
A. <u>The Foreseeability Instruction</u>	6-8
Authorities:	
<i>Cromer v. Children’s Hospital Med. Ctr. Of Akron</i> , 2015-Ohio-229.....	8
B. <u>The “Reasonably Careful Person” Test</u>	8-9
Authorities:	
<i>Cromer v. Children’s Hospital Med. Ctr. Of Akron</i> , 2015-Ohio-229.....	8, 9
C. <u>Instruction Regarding Formation of the Physician-Patient Relationship</u>	9-10
Response to Plaintiff-Appellants’ Proposition of Law No. 2	10-11
Authorities:	
<i>Schloendorff v. Society of N.Y. Hosp.</i> , 105 N.E. 92 (N.Y. 1914).....	10, 11
<i>Nickell v. Gonzalez</i> , 17 Ohio St.3d 136, 477 N.E.2d 1145 (1985).....	10
<i>Steele v. Hamilton County Community Mental Health Board</i> , 90 Ohio St.3d 176, 2000-Ohio-47, 736 N.E.2d 10.....	10, 11

Response to Plaintiff-Appellants’ Proposition of Law No. 3	11-14
Authorities:	
<i>Gomez v. Sauerwein</i> , 331 P.3d 19 (Wash. 2014).....	12
<i>Sandor v. Marks</i> , 9th Dist. No. 26951, 2014-Ohio-685.....	13
<i>Thatcher v. Grubler</i> , 12th Dist. No. 97APE05-733, 1997 WL 746428 (Nov. 25, 1997).....	13
<i>Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co.</i> , 10th Dist. No. 10AP-290, 2010-Ohio-5872.....	13
Response to Plaintiff-Appellants’ Proposition of Law No. 4	14-15
Authorities:	
Ohio Rule of Civil Procedure 47(C).....	14
<i>LeFort v. Century 21–Maitland Realty Co.</i> , 32 Ohio St.3d 121, 512 N.E.2d 640 (1987).....	14, 15
<i>State v. Greer</i> , 39 Ohio St.3d 236, 530 N.E.2d 382 (1988).....	15
<i>Striff v. Luke Medical Practitioners, Inc.</i> , 3rd Dist. App. No. 1-10-15, 2010-Ohio-6261.....	15
<i>Brown v. Martin</i> , 5th Dist. No. 14-CA-31, 2015-Ohio-503.....	15
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

CASES:

Brown v. Martin, 5th Dist. No. 14-CA-31, 2015-Ohio-503.....15

Cromer v. Children’s Hospital Med. Ctr. Of Akron, 2015-Ohio-229.....1, 8, 9

Gomez v. Sauerwein, 331 P.3d 19 (Wash. 2014).....12

Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., 10th Dist. No. 10AP-290,
2010-Ohio-5872.....13

LeFort v. Century 21–Maitland Realty Co., 32 Ohio St.3d 121, 512 N.E.2d 640
(1987).....2, 3, 14, 15

Nickell v. Gonzalez, 17 Ohio St.3d 136, 477 N.E.2d 1145 (1985).....2, 10

Sandor v. Marks, 9th Dist. No. 26951, 2014-Ohio-685.....13

Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914).....10, 11

State v. Greer, 39 Ohio St.3d 236, 530 N.E.2d 382 (1988).....15

Steele v. Hamilton County Community Mental Health Board, 90 Ohio St.3d 176, 2000-Ohio-47,
736 N.E.2d 10.....11

Striff v. Luke Medical Practitioners, Inc., 3rd Dist. App. No. 1-10-15, 2010-Ohio-6261.....15

Thatcher v. Grubler, 12th Dist. No. 97APE05-733, 1997 WL 746428 (Nov. 25, 1997).....13

STATUTES:

Ohio Rule of Civil Procedure 47.....2,3

Ohio Rule of Civil Procedure 47(C).....14

STATEMENT REGARDING JURISDICTION

This appeal arises out of a medical negligence action, which called into question the obstetrical care and treatment that was provided to Plaintiff-Appellants (hereafter “Plaintiffs”) by the Defendant-Appellees (hereafter “Defendants”) in January 2004. After years of discovery and extensive preparation, a lengthy trial was conducted in 2013, which resulted in a defense verdict. The trial court managed the subject proceedings with prudence and extreme diligence, as was confirmed by an exhaustive appellate review. Plaintiffs thereafter moved the Court of Appeals for reconsideration. Again, the trial court’s rulings were upheld and the verdict affirmed.

As in all actions of this nature, the facts and issues presented are of unquestionable personal importance to the litigants; however, when considered in the context of general public interest and the backdrop of this State’s existing jurisprudence, they are trite and, in some respects, utterly esoteric. Plaintiffs present four propositions of law, which address three entirely effete legal issues: foreseeability, informed consent, and peremptory challenges – all matters on which this Court has opined at length.

The issues associated with foreseeability and its place in medical negligence actions, such as this, were very recently addressed at length in the matter of *Cromer v. Children’s Hospital Med. Ctr. Of Akron*, 2015-Ohio-229. Therein, this Court specifically determined that “[f]oreseeability of harm is relevant to a physician’s standard of care” and, where justified by the evidence, is an appropriate subject for instruction to the jury. See *Id.*, syllabus. That decision, released on the heels of the First District Court of Appeals’ opinion in this matter, examined the very foreseeability issues referenced in Plaintiffs’ Memorandum in Support of Jurisdiction. Given the careful attention and extensive consideration that this Court has so recently provided to the issue of foreseeability and its place in medical negligence actions, there is no justification

for retreading that familiar ground.

The law regarding the tort of lack of informed consent is well documented in the jurisprudence of this State. Its elements were clearly articulated by this Court in the matter of *Nickell v. Gonzalez*, 17 Ohio St.3d 136, 477 N.E.2d 1145 (1985), a decision that stands to this day as the seminal authority for lack of informed consent claims. Contrary to Plaintiffs' suggestion, nothing in the opinion of the First District Court of Appeals in any way contradicts the holding of *Nickell*. The appellate court below agreed with the trial court that the facts of this case did not support a claim for lack of informed consent. In the course of addressing Plaintiffs' arguments, the appellate court very cogently explained why the facts of this case did not support simultaneous medical negligence and lack of informed consent claims against the Defendants. In so doing, it made careful examination of the tort's historical roots and referenced the tort of informed consent as a "trespass" upon the person. The language of the appellate court's decision has plainly been misconstrued by Plaintiffs and does not support their efforts to secure yet further appellate review.¹ To be certain, what Plaintiffs actually seek is not clarification, but expansion of this unique cause of action in ways that would render it indistinguishable from medical negligence.

Peremptory challenges are an inherent part of every jury trial. Ohio Rule of Civil Procedure 47 specifically defines the number of peremptory challenges available to each party and the manner in which they are to be assigned. By Plaintiffs' own admission, the trial court correctly applied Civil Rule 47. In doing so, the trial court was careful to adhere to the precedent established by this Court in the matter of *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio

¹ Plaintiffs suggest that the First District Court of Appeals has altered the law of informed consent in this State. Defendants reject that contention, as did the First District Court of Appeals when it denied Plaintiffs' request to certify a conflict on this very issue.

St.3d 121 (1987). Peremptory challenges in this case were assigned to the parties in conformity with Civil Rule 47 and the criteria enunciated in *LeFort*. As such, it strains credulity to suggest that the lower court's decision on this settled issue constitutes a matter of great general interest.

As noted above, each of the propositions of law advanced by Plaintiffs involves a matter that has already been addressed by this Court – some as recently as a few weeks ago. That Plaintiffs maintain dissatisfaction with the verdict rendered below is readily apparent; however, their dissatisfaction is insufficient justification for further discretionary review. The parties to this action received an incredibly fair trial and full opportunity to address these very issues on appeal.² All were thoroughly examined by the First District Court of Appeals. Its decision, along with the underlying verdict, was consistent with the existing law of Ohio. As such, both should stand. For these reasons, additional review of this matter is unwarranted.

STATEMENT OF CASE

Factual Overview

When Plaintiff-Appellant, Dara O'Loughlin, became pregnant, she and her husband sought out training in the Bradley Method, an alternative approach to natural childbirth that seeks to significantly minimize interventions by healthcare providers during the labor process. *T.p.* 876. For this reason, the Bradley Method is often at odds with applicable standards of care and can present difficult challenges for health care providers. *T.p.* 1436. Despite the foregoing, the O'Loughlins authored a birth plan consistent with Bradley Method philosophy to which they remained uncompromisingly committed throughout Mrs. O'Loughlin's labor.

When Mrs. O'Loughlin was admitted to Mercy Hospital Fairfield ("MHF") on January 9, 2004, she and her husband presented the nursing staff with a copy of their birth plan, which

² At Plaintiffs' request, the First District Court of Appeals agreed to remove the matter from the accelerated docket so as to allow expanded briefing and exploration of the issues.

indicated that they did not want, among other things, the use of continuous electronic fetal monitoring (“EFM”), a method of screening for in utero fetal heart rate changes. *T.p.* 4512. As Mrs. O’Loughlin’s labor persisted, she and her husband adhered to their birth plan and rebuffed the Defendants’ efforts to utilize continuous EFM and other interventions during the course of the labor.³ *T.p.* 4513. For a long time, Plaintiffs would only agree to intermittent use of EFM.

Use of intermittent fetal monitoring only was not without consequence, as it led to a “broken strip” (i.e., a sporadic fetal heart tracing). *T.p.* 4284-94; 4525-29, 4660-61. Both Dr. Bowen and the nursing staff repeatedly informed Plaintiffs that continuous EFM could potentially be of benefit to their efforts to monitor labor.⁴ *T.p.* 917-19, 4524-30, 4729-32. Despite Plaintiffs clear understanding of the purpose of EFM, *T.p.* 4730-31, they remained recalcitrant to it and other methods of intervention. *T.p.* 4524-25.

From the fetal heart tracings available to him, Dr. Bowen did not perceive any risk of harm to the child. *T.p.* 4740-52. The tracings were “perfectly normal,” did not demonstrate any sign of danger, *T.p.* 4740-45, and were not perceived to evidence any risk to the child, *T.p.* 4270-71, 4537, 4539. In fact, all indications were that the child’s condition was normal, as supported by the presence of long-term variability and heart rate accelerations. *T.p.* 4288-99, 4651-57.

By 4:10 p.m., Mrs. O’Loughlin’s labor arrested and vaginal delivery appeared unlikely. *T.p.* 4744-45. Accordingly, Dr. Bowen stated to Plaintiffs that Cesarean delivery may be indicated. *T.p.* 4744-45. A discussion of Cesarean delivery ensued. However, because Dr.

³ For instance, Plaintiffs: (1) refused electronic fetal monitoring, *T.p.* 1043, 1068-69, 1071, 1088-89, 4519-20, 4567; (2) refused a uterine contraction monitor, *T.p.* 1165, 4266-67, 4279; (3) refused uterine contraction belts, *T.p.* 1045-46, 4266, 4279, 4514-15; (4) refused an IV, *T.p.* 4567-71; (5) refused a saline lock, *T.p.* 1043, 4567-71; (6) refused vital signs, *T.p.* 4608-10; and (7) deferred nurses’ “rounds.” *T.p.* 1054-56.

⁴ Dr. Bowen did not insist upon continuous EFM, since he knew that it could not predict or prevent cerebral palsy and birth asphyxia. *T.p.* 4730, 4465.

Bowen could not absolutely assure Plaintiffs that surgery was necessary to ensure their baby's well-being, Mrs. O'Loughlin adamantly refused surgery, exclaiming "no, no, no, no." *T.p.* 4747. When Dr. Bowen attempted to speak further on the issue, Mr. O'Loughlin again staunchly repudiated the suggestion.⁵ *T.p.* 1149, 4535. And so, labor continued.

It was not until around 5:00 p.m. that the Defendants first perceived a potential risk to the child based upon the tracings. *T.p.* 4757-58, 4270-71, 4537, 4539. Until that moment, the tracings had all been "reassuring" and "consistent with a normal healthy baby." *T.p.* 4740-45; 4549. As Dr. Bowen put it, "I had nothing on the tracing that told me that the baby was in distress." *T.p.* 4742. But at 5:00 p.m., Emmett's heart rate began to show signs of potential distress. *T.p.* 4757-58. Dr. Bowen immediately explained that delivery could wait no longer. He then conducted a vacuum assisted delivery without difficulty or delay. *T.p.* 4757-58.

Notably, subsequent testing performed on Mrs. O'Loughlin's placenta and umbilical cord provided a crucial revelation by confirming the presence of inflammation and infection. *T.p.* 4743-45, 3437-40. Testimony from an expert pediatric neurologist indicated that it was this inflammation and infection—not the labor and delivery process—that most likely caused Emmett's cerebral palsy. *T.p.* 3426-32; 3437-40.

Procedural Posture

This medical malpractice action was initiated by Plaintiffs in 2011 against multiple Defendants, including Clifford Bowen, M.D., his professional corporation of the same name, Mercy Hospital Fairfield, a number of its employed nurses, Mercy Health Partners of Southwest Ohio, and Catholic Health Partners. Dr. Bowen, an independent practitioner, and his practice

⁵ Notably, these were not uninformed refusals: Dr. Bowen had counseled Plaintiffs on the topic of C-sections, including "previous discussions . . . about the potential consequences of not delivering in a timely manner that included the possibility of stillbirth." *T.p.* 906-07, 4744-47.

were at all times separately represented from the remaining hospital Defendants. After extensive discovery, the matter proceeded to trial in May 2013. Over the course of three weeks, Plaintiffs put on their case-in-chief against the Defendants, presenting testimony from more than twenty different witnesses. They were also afforded the opportunity to present additional rebuttal testimony after the Defendants had completed their respective cases. On June 17, 2013, the jury returned a verdict in favor of the Defendants.

Plaintiffs appealed to the First District Court of Appeals, presenting six assignments of error. After extensive briefing and oral argument, the appellate court affirmed the jury's verdict. Despite the fact that the First District Court of Appeals decision was in complete accord with this Court's holding in *Cromer v. Children's Hospital Med. Ctr. Of Akron*, 2015-Ohio-229, Plaintiffs moved for reconsideration. Plaintiffs also simultaneously petitioned the Court of Appeals to certify a non-existent conflict involving the issue of informed consent. Both motions were denied. Plaintiffs' now seek further discretionary review by this Court.

ARGUMENT

Response to Plaintiff-Appellants' Proposition of Law No. 1:

A. The Foreseeability Instruction

Foreseeability plays a prominent role in virtually every birth injury case. This is due largely to the nature of the birthing process, the countless factors (known and unknown) that can affect the course of labor, and the utter unpredictability of fetal well-being. It is, thus, exceedingly rare in this genre of litigation that foreseeability of harm is undisputed. The matter at hand is a prime example of that fact. It featured a clear dispute over the health care providers' appreciation of the risk of harm to their patient. Under the facts and circumstances of this case, there is no reason for this Court to revisit a question that it definitively answered just weeks ago.

Nowhere is the concept of foreseeability more applicable than in cerebral palsy (“CP”) cases, such as this, where it is virtually impossible for an obstetrician to foresee the occurrence of CP via the use of EFM. Modern medicine has determined that the vast majority of CP is caused by conditions, such as intrauterine infections, that cause brain damage prior to labor and delivery. *T.p.* 3428-32. The use of a fetal monitor to predict CP during delivery has thus been proven to be a failed venture. *T.p.* 4464-73. Its unreliability invites vastly divergent opinions from practitioners and experts within the field of obstetrics, thereby magnifying questions regarding the foreseeability of injury.⁶

This case is no exception. It featured a contentious debate over whether the Defendants appreciated any risk of harm to the child at any time. Contrary to Plaintiffs’ allegations that Defendants should have appreciated the potential for injury and ordered a C-Section several hours prior to the actual delivery, Dr. Bowen repeatedly testified that he did not perceive any risk of harm to the child, because, throughout labor, the tracings had been “perfectly normal” and had not demonstrated any sign of danger. *T.p.* 4740-52. Likewise, Nurses Risola and Hauser testified that the tracings had appeared normal and had not indicated risk of injury to the child at any time during labor. *T.p.* 4282-99, 4328-31, 4527-30, 4534 4587-88, 4614-15, 4651-57.

In short, the record in this case is replete with several important factual disputes regarding foreseeability of harm. It is not an exaggeration to say that, in order to accept Plaintiffs’ contention that foreseeability was undisputed in this case, one would have to whitewash the trial record—the very stratagem Plaintiffs have employed in this appeal. Despite their best efforts, they simply cannot analogize this case to *Cromer* and thereby deny that a

⁶ For example, there was competing testimony at trial regarding the ability of EFM to predict injury and whether it was even possible for Dr. Bowen to foresee a risk of injury to the child during labor.

foreseeability instruction was warranted; for clearly it was.

This Court will, no doubt, see right through this subterfuge and appreciate the sharp factual contrast between this case and *Cromer*. Unlike the physicians in *Cromer*, who were immediately aware of a risk to the child's health, Dr. Bowen was never aware at any time during labor that vaginal delivery posed a risk of injury to Emmett. And, in contrast to the physicians in *Cromer*, who had all the medical information they needed to assess the child's condition, Dr. Bowen and the nursing staff were hamstrung in their efforts and ability to gauge Emmett's condition by the inherent limitations of EFM in diagnosing CP and Plaintiffs' refusal to permit it. Under the circumstances of this case, the Defendants did not and could not have perceived a risk or injury to the child or conducted an effective risk-benefit analysis. These critical factual differences set this case apart from *Cromer*, demonstrate that a foreseeability instruction was factually warranted, and obviate any necessity for further discretionary review.

The utter lack of prejudice resulting from the foreseeability instruction in this case only further militates against the need for discretionary review. Under the holding of *Cromer*, the giving of a foreseeability instruction unwarranted by the facts is not inherently prejudicial and, therefore, does not constitute reversible error absent a showing of material prejudice. *Cromer* at ¶¶ 2, 45. Indeed, *Cromer* emphatically rejected inherent prejudice as a valid means of attacking a foreseeability instruction in a medical malpractice action. In sum, this case presented the quintessential circumstances for a foreseeability instruction as delineated by *Cromer*.

B. The “Reasonably Careful Person” Test

Plaintiffs suggest that *Cromer* requires a new trial when a foreseeability instruction incorporates a “reasonably careful person” standard, rather than a “reasonably careful medical professional” standard. Not so. *Cromer* held that although reference to a “reasonably careful

medical professional” in a foreseeability instruction would be “preferable,” reference to a “reasonable person” in a foreseeability instruction is not misleading—and certainly does not mandate a new trial—when the jury instructions, taken as a whole, define the standard of care in terms of a reasonable medical professional. *Cromer* at ¶ 40. Consequently, this Court upheld the jury instructions in *Cromer* because they “defined ‘reasonable’ and ‘ordinary care’ solely in the context of a ‘reasonable hospital,’ a ‘reasonably careful physician,’ and ‘hospitals, physicians and/or nurses of ordinary skill, care and diligence” *Id.*

The jury instructions in this case did exactly the same thing – they defined the standard of care in terms of a “physician of reasonable skill, care and diligence,” a “reasonably careful physician,” a “reasonable specialist . . . exercising reasonable skill, care and diligence,” a “nurse of ordinary skill, care and diligence,” a “reasonably prudent nurse,” and “the standard of professional learning, skill and care required of the nurses.” *T.p.* 5217-19; 5221-22. Thus, taken as a whole, reference to a “reasonable person” was not at all misleading. See *Cromer* at ¶ 40. Nor was the use of the word “likely” in the foreseeability instruction, as Plaintiffs’ suggest. In fact, the instruction that they criticize is consistent with Ohio law and the majority opinion in *Cromer*. Moreover, in the absence of material prejudice, no basis for review exists.

C. Instruction Regarding Formation of the Physician-Patient Relationship

According to Plaintiffs, a new trial is mandatory, because the jury was not advised that Dr. Bowen’s duty to Mrs. O’Loughlin existed independent of any foreseeability considerations. This is simply incorrect. The trial court instructed the jury that “[t]he existence of a physician/patient relationship places on the physician a duty to act as would a physician of reasonable skill, care and diligence, under like or similar conditions or circumstances. This is known as the standard of care.” *T.p.* 5218. The jury was thus instructed, in accord with

prevailing law, that Dr. Bowen's duty to Mrs. O'Loughlin was conclusively established by the formation of the physician-patient relationship. Plaintiffs' argument to the contrary is unsupported by the facts of this case. The jurors knew that a duty had been conclusively established and were instructed as to that very fact. More to the point, they were instructed to evaluate foreseeability of harm, not foreseeability of duty. Accordingly, jurisdiction should be declined.

Response to Plaintiff-Appellants' Proposition of Law No. 2:

The doctrine of informed consent finds its roots in tenets of personal autonomy. It is an expression of the primacy of the individualistic values that our culture holds sacrosanct and a reflection of the belief that every person is entitled to broad deference when it comes to matters of individual choice. In short, the doctrine of informed consent seeks to allow individuals to truly be the authors of their own undertakings. Thus, when a course of treatment is undertaken without informed consent and injury results, the treatment is viewed as a usurpation of a patient's bodily integrity, resulting in a "trespass to the person" or "a medical battery," as it has been referenced by this and a variety of other courts throughout Ohio and elsewhere.

In their second proposition, Plaintiffs take the First District Court of Appeals to task for its reference to *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914) and its characterization of the tort of informed consent as one involving a "trespass" upon the person. This Court clearly defined the tort of lack of informed consent in *Nickell v. Gonzalez*, 17 Ohio St.3d 136, syllabus (1985). Since then, this Court has not only cited *Schloendorff* in its discussion of informed consent, but it has explicitly adopted the language of Judge Cardozo's decision, stating that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body," *Steele v. Hamilton County Community Mental*

Health Board, 90 Ohio St.3d 176, 180-181, 2000-Ohio-47, 736 N.E.2d 10, at ¶¶ 2-3 (quoting *Schloendorff*, 105 N.E. at 93). As has been observed by this Court, and others throughout the State, even today the concept of trespass continues to serve as the foundation for the tort of lack of informed consent.

Neither of the cases cited by Plaintiffs offer support for their contention. In fact, both cases are readily distinguishable from the matter at hand and plainly inapposite the expansive twist that they have attempted to place on the doctrine of informed consent. For example, in neither case was there any dispute whatsoever as to the extent of the treating health care provider's knowledge, or the fact that treatment/intervention was needed. Moreover, in both instances, the patient accepted the recommended treatment, as contemplated by the elements of the tort of lack of informed consent.

For those reasons more fully addressed in Defendants' response to Plaintiffs' third proposition of law, this case was never about informed consent. The alleged injury in this case did not arise out of a failure to disclose the Cesarean delivery as a treatment option, but rather an inability on the part of the health care provider(s) to appreciate the need for it. Quite simply, there cannot be a claim for lack of informed consent under such circumstances (i.e., when, as here, the responsible physician is not capable of fully appreciating the circumstances of the patient's condition). The only potential claim in such instances is one for medical negligence. Thus, the First District Court of Appeals was correct in its affirmance of the trial court's refusal to permit the claim, as well as its recognition that there was no trespass on the Plaintiff.

Response to Plaintiff-Appellants' Proposition of Law No. 3:

Quoting the Eighth District Court of Appeals, Plaintiffs state in their Memorandum that "lack of informed consent is an independent claim, separate and apart from a medical negligence

claim.” Defendants agree. Given this recognition, it is perplexing that Plaintiffs now seek to convolute the two.

If, in the course of caring for a patient, a physician or other health care professional fails to appreciate the significance of certain facts associated with the patient’s condition and/or fails to timely and reasonably act upon them, then the patient’s claim against the health care professional is one for medical negligence. If, however, a physician takes action to treat a patient without first adequately informing him/her about the associated risks and benefits of the proposed treatment, then the act of the physician in providing treatment may be considered a “medical battery” or “trespass upon the person,” giving rise to a claim for lack of informed consent. The latter scenario plainly presupposes an actual appreciation by the physician of the patient’s condition and acceptance of a recommended course of treatment by the patient. For, if the physician does not reasonably appreciate the patient’s condition and fails to meet the standard of care in acting for the patient, his/her actions are negligent.

Nowhere is the distinction between these two causes of action more important than in cases involving misdiagnosis (i.e., a failure to fully appreciate the circumstances of a patient’s condition). “Simply put, a health care provider who believes the patient does not have a particular disease cannot be expected to inform the patient about the unknown disease or possible treatments for it. In such situations, a negligence claim for medical malpractice will provide the patient compensation if the provider failed to adhere to the standard of care in misdiagnosing or failing to diagnose the patient’s condition.” *Gomez v. Sauerwein*, 331 P.3d 19 (Wash. 2014). The distinction between the two causes of action is necessary to avoid exposing a health care provider to the potential for double liability as a result of the same alleged misconduct. *Id.*

Plaintiffs’ action is and, without question, has always been about one thing and one thing

only – the Defendants’ alleged failure to recognize signs of fetal distress and timely intervene. The gravamen of Plaintiffs’ entire case was that the Defendants failed to appreciate developing fetal distress during the course of Mrs. O’Loughlin’s labor and take necessary action to timely intervene. Thus, this was clearly a claim for medical negligence, a fact which both the trial and appellate courts below astutely recognized.

Plaintiffs’ effort to characterize their claim as one for lack of informed consent was nothing more than an opportunistic effort to expose the Defendants to double liability for the very same alleged misconduct. The expansive application that they advocate bemeans the essence of the tort of lack of informed consent, depriving it of the very singularity by which it is defined. Taking their theory to its logical conclusion, every alleged act of medical negligence would simultaneously support a claim for lack of informed consent. Such proposed duplication of claims runs contrary to the law and is entirely inconsistent with the fundamental tenets of the doctrine of informed consent. If permitted, the duplication of claims would result in irreparable prejudice to health care providers and engender substantial confusion amongst juries.

As this and other courts throughout the State have recognized, “malpractice by any other name still constitutes malpractice.” *Sandor v. Marks*, 9th Dist. No. 26951, 2014-Ohio-685. The manner in which a party labels its cause of action is not determinative and has no bearing on the actual cognizability of the claim. See *Thatcher v. Grubler*, 12th Dist. No. 97APE05-733, 1997 WL 746428 (Nov. 25, 1997). “When the gist of a complaint sounds in malpractice, other duplicative claims are subsumed within the legal malpractice claim.” *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co.*, 10th Dist. No. 10AP-290, 2010-Ohio-5872.

Although Plaintiffs may not have appreciated the critical distinction between these claims, the difference was not lost on the trial court, which acted appropriately by eliminating the

inapplicable cause of action and the jury confusion that it would have inevitably engendered. The essence of Plaintiffs' claim was an alleged failure to appreciate risk. It was never about a failure to inform. Where, as here, allegations regarding the latter emanate entirely from the former, there can be no question as to the nature of the claim. The record clearly demonstrates that Plaintiffs were granted ample opportunity to present their claim in the context of medical negligence and they did so in spades. The fact that the jury was not charged on lack of informed consent in no way affected Plaintiffs' efforts to present their case or the many facts supporting their cause of action. Their proposition of law, while a matter of importance to the parties, presents no matter of great public interest and fails to satisfy the criteria for discretionary review.

Response to Plaintiff-Appellants' Proposition of Law No. 4:

Under the law, each and every person is entitled to an opportunity to full participation in the trial process by which their claims are to be adjudicated. When that process involves a jury, the right to full participation demands that each party be justly afforded equal opportunity to select the jurors who will sit in judgment of his/her cause. This important principle is reflected in the language of Civil Rule 47(C), which governs the assignment of peremptory challenges. The Rule provides, in pertinent part, that, "In addition to challenges for cause provided by law, each party peremptorily may challenge three prospective jurors."

In the seminal case on this issue, *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121 (1987), this Court provided specific criteria to assist courts in determining whether the interests of multiple litigants are "essentially the same" for purposes of Civil Rule 47 such that peremptory challenges ought to be shared. Among them are the nature of the parties' representation (individual or shared), the defenses asserted, motions filed, and witnesses identified by each, just to name a few. Contrary to Plaintiffs' suggestion, it is individuality, not

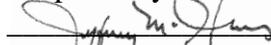
ostensible adversity, amongst party-defendants that is required in order to allow for separate peremptory challenges. To that point, this Court has specifically stated that, where “the defenses asserted” by defendants in an action do “not necessarily stand or fall together, *** [e]ach defendant” is “entitled to three peremptory challenges.” *Id.* at 125. This is in keeping with the well settled principle that “each litigant is ordinarily deemed a party within the contemplation of the statute and entitled to the full number of peremptory challenges.” *Id.*

Although the right to peremptory challenges is substantive, “[t]he same cannot be stated with regard to the number of peremptory challenges allowed.” *State v. Greer*, 39 Ohio St.3d 236, 530 N.E.2d 382 (1988). That determination has been expressly consigned to the discretion of the trial court and will not be overturned absent a clear abuse of discretion. See *Striff v. Luke Medical Practitioners, Inc.*, 3rd Dist. App. No. 1-10-15, 2010-Ohio-6261. Where, as here, the record plainly demonstrates that each Defendant was “looking out for their own interest in terms of being found not liable for claims of the Plaintiffs,” there was no abuse of discretion in the decision to assign each its own complement peremptory challenges. *Brown v. Martin*, 5th Dist. No. 14-CA-31, 2015-Ohio-503. The language of Civil Rule 47 is clear, as is the law regarding the manner in which it is to be applied. As such, further examination is unwarranted.

CONCLUSION

For the foregoing reasons, Defendant-Appellees respectfully submit that further appellate review of this matter is unwarranted and request that jurisdiction for such be denied.

Respectfully submitted,



Jeffrey M. Hines, Esq. (0070485)

Thomas M. Evans, Esq. (0033430)

Karen A. Carroll, Esq. (0039350)

Ryan J. Dwyer, Esq. (0091761)

600 Vine Street, Suite 2650, Cincinnati, Ohio 45202

Counsel for Mercy Defendant-Appellees

CERTIFICATE OF SERVICE

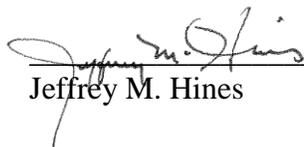
I hereby certify that on this 22nd day of May 2015, I served a true copy of the foregoing via electronic mail, as well as First Class U.S. Mail, postage prepaid, upon the following:

Paul W. Flowers, Esq.
PAUL W. FLOWERS CO.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
Co-Counsel for Plaintiff-Appellants
E: pwf@pwfco.com

Michael F. Becker, Esq.
Pamela Pantages, Esq.
THE BECKER LAW FIRM
134 Middle Avenue
Elyria, Ohio 44030
Co-Counsel for Plaintiff-Appellants
E: mbecker@beckerlawlpa.com
E: ppantages@beckerlawlpa.com

John H. Metz, Esq.
1117 Edwards Road
Cincinnati, Ohio 45208
Co-Counsel for Plaintiff-Appellants
E: metzlegal@aol.com

David C. Calderhead, Esq.
Joel L. Peschke, Esq.
CALDERHEAD, LOCKEMEYER & PESCHKE
6281 Tri-Ridge Boulevard, Suite 210
Loveland, Ohio 45140
Counsel for Defendant-Appellees, Daniel Clifford Bowen, M.D. and the Professional Organization of Daniel Clifford Bowen, M.D.
E: dcalderhead@clp-law.com
E: jpeschke@clp-law.com



Jeffrey M. Hines