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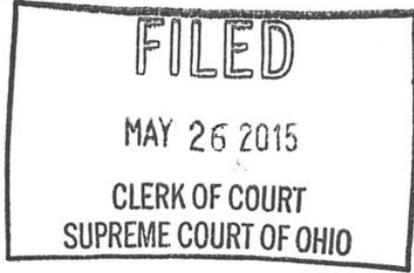
IN THE SUPREME COURT OF OHIO

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

vs.

CATHOLIC HEALTH PARTNERS
FOUNDATION; MERCY HOSPITAL
FAIRFIELD; DANIEL CLIFFORD
BOWEN, M.D.; THE PROFESSIONAL
ORGANIZATION OF DANIEL
CLIFFORD BOWEN, M.D.
Defendant-Appellees.

: Supreme Court No. 2015-0653
:
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: On Appeal from the First District
:
: Court of Appeals, Hamilton County,
:
: Ohio
:
:
: Court of Appeals Case No.
:
: C-1300484



MEMORANDUM IN OPPOSITION TO JURISDICTION
OF DEFENDANT-APPELLEES, DANIEL CLIFFORD BOWEN, M.D. AND
THE PROFESSIONAL ORGANIZATION OF DANIEL CLIFFORD BOWEN, M.D.

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I. **THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Since none of the three issues raised by the Plaintiff-Appellants are of public or great general interest or involve a substantial constitutional question, this Honorable Court should decline review.

FORESEEABILITY: Earlier this year in *Cromer v. Children's Hosp. Med. Ctr. of Akron* this Court held that “***the issue of foreseeability is relevant to a physician’s standard of care in treating a particular patient, and separate consideration of the foreseeability of harm is appropriate if there is a question for the jury regarding whether the physician knew or should have known that a chosen course of treatment involved a risk of harm.”¹

As will be conclusively established within this Memorandum by way of specific citation to the trial record, in the instant matter conflicting evidence of foreseeability was prevalent throughout trial. The foreseeability instruction was absolutely warranted and properly given, and review of this issue would serve no purpose other than for the Court to reiterate the *Cromer* decision it handed down just months ago.

INFORMED CONSENT: While the Plaintiff-Appellants assert two different Propositions regarding their purported informed consent claim, in actuality their claim failed to meet each of the elements this Court requires by way of *Nickell v. Gonzalez*.² Regardless, the entirety of this claim was still permitted to go to and be fully considered by the jury as part of the negligence claim. Therefore, Propositions of Law II and III assert arguments about a claim that was fully presented to the jury, rendering both moot.

¹ *Cromer v. Children's Hosp. Med. Ctr. of Akron*, ___, Ohio St.3d ___, 2015-Ohio-229, ___ N.E.3d ___, ¶44.

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

PEREMPTORY CHALLENGES: Per this Court's authority in *LeFort v. Century 21-Maitland Co.*,³ the physician-defendant ("Dr. Bowen") and hospital-defendant ("Mercy") were entitled to separate peremptory challenges as each had separate counsel, filed separate replies and defenses, and each attempted to prove that its own conduct was not negligent. Moreover, the individual defenses did not stand or fall together, as evidenced by the fact that Mercy emphasized literally from voir dire⁴ through cross-examination of the medical experts⁵ through closing arguments that a physician is subject to a higher standard of care and that nurses are unable to make medical decisions.⁶ In a case that hinged on medical decisions relative to the timing and manner of delivery, any one of those points could easily have led to the jury finding against one, but in favor of the other, Defendant.

Moreover, while the Plaintiff-Appellants now claim that the separate peremptory challenges ensured "that no jurors remained who were likely to view the***claim impartially,"⁷ in actuality they chose to pass on their final two peremptory challenges.⁸ As such, any error would have been harmless.

II. STATEMENT OF THE CASE AND FACTS

This medical malpractice case was filed by Dara O'Loughlin ("Dara"), James O'Loughlin ("James") and Emmett O'Loughlin ("Emmett"; where appropriate, the Plaintiff-Appellants are collectively referred to as "O'Loughlin") against, among others, Daniel Clifford Bowen, M.D. and his practice group (collectively "Dr. Bowen"). The allegations arise out of the management

³ *LeFort v. Century 21-Maitland Co.*, 32 Ohio St.3d 121, 512 N.E.2d 640 (1987).

⁴ T.p. 462, lines 21-25; T.p. 464, lines 1-4.

⁵ T.p. 1442, line 25 – T.p. 1443, line 20; T.p. 1723, lines 15-21.

⁶ T.p. 5063, lines 3-5.

⁷ Plaintiffs-Appellants Memorandum in Support of Jurisdiction at p. 14.

⁸ T.p. 508, lines 21-24; T.p. 547, lines 20-22.

of Dara's labor in January, 2004, which O'Loughlin claimed caused Emmett to experience birth asphyxia, resulting in brain damage and the subsequent development of cerebral palsy.

A. The Bradley Method of Natural Childbirth

During this pregnancy Dara and James chose to follow a natural childbirth program named The Bradley Method ("Bradley"). In the words of their obstetrical expert, Bradley is a childbirth philosophy that "advocates for minimizing medical interventions."⁹ James described it as natural as childbirth has been since the beginning of time.¹⁰ He testified that they chose to follow Bradley "so***Dara and Emmett***could have what seemed like childbirth throughout the history of time."¹¹

Dara and James attended ten Bradley classes, each class being 2 ½ hours in length.¹² They utilized a Bradley workbook¹³ which defined Bradley "as our great-great grandmother gave birth, childbirth regarded and performed as a natural process without analgesia, anesthesia or surgery."¹⁴ This workbook contained an entire section teaching parents how to say "no" when their care providers offered or recommended medical interventions during labor.¹⁵ James admitted that "Bradley is real militant," qualifying that he and Dara were "probably not as militant."¹⁶

⁹ T.p. 1526, lines 6-12.

¹⁰ T.p. 3782, lines 15-18.

¹¹ T.p. 3683, lines 19-23.

¹² T.p. 2232, lines 4-6; T.p. 2237, lines 6-7.

¹³ T.p. 2759, lines 15-23; Defendants' Trial Exhibit 3.

¹⁴ T.p. 2783, lines 10-19.

¹⁵ T.p. 2798, lines 6-10.

¹⁶ T.p. 3783, lines 12-15.

B. The Birth Plan

During this pregnancy Dara drafted a typewritten birth plan setting forth written instructions for the management of her labor.¹⁷ This birth plan consisted of two different columns, one labeled “Procedures We Prefer” and the second labeled “Procedures to Avoid”; the latter column also contained three large, red Ø symbols.¹⁸ Fourteen different items were listed on the Ø side, including the use of continuous electronic fetal monitoring (“EFM”) of the baby during labor.¹⁹ Dara and James presented their birth plan to the hospital upon arriving in labor on the evening of January 9, 2004.²⁰ Dara testified that her birth plan “is saying to avoid a C-section unless absolutely necessary.”²¹

C. The Labor and Delivery

Dr. Bowen arrived in Dara’s L&D suite on January 10, 2004 around 1:00 p.m.²² and remained at her bedside, or immediately outside of her room at the nurses’ station, over the next four hours through delivery.²³ Upon arriving he reviewed the EFM strips from the hours before.²⁴ While the available EFM strip was very assuring, it was also an incomplete tracing due to Dara’s refusal of continuous monitoring.²⁵ Both of O’Loughlin’s standard of care experts conceded at trial that Dr. Bowen had wanted continuous EFM that day in an effort to obtain a

¹⁷ T.d. 2234, lines 14-25; Plaintiffs’ Trial Exhibit 72.

¹⁸ T.p. 2818, lines 14-24.

¹⁹ T.p. 2819, line 24 – T.p. 2820, line 23.

²⁰ T.d. 2202, lines 2-6; T.p. 2692, lines 22-24.

²¹ T.p. 2250, lines 12-13.

²² T.p. 4725-4726; T.p. 2713, lines 14-17.

²³ T.p. 4808, line 23 – T.p. 4809, line 21.

²⁴ T.p. 4729.

²⁵ T.p. 4729, lines 9-11.

more complete picture of the baby's status.²⁶ Per O'Loughlin's birth plan, however, the care providers were "to avoid" (Ø) using continuous EFM.²⁷

Dr. Bowen continued to express his desire for continuous EFM throughout the next four hours,²⁸ though each time Dara and James would ask if there was anything on the EFM tracing telling him that they had to do more.²⁹ Since the available EFM strip at those times was reassuring, each time Dr. Bowen truthfully responded that he was not seeing signs of compromise.³⁰ He documented these discussions that same day in his delivery summary.³¹

On multiple instances Dr. Bowen also discussed performing a C-section.³² At 4:10 p.m. that day he told Dara that a C-section had become her only good option and that it needed to be performed at that time.³³ But Dara vehemently refused, yelling "no" multiple times.³⁴ Dr. Bowen also documented this discussion that same day.³⁵

Around 5:00 p.m. Dr. Bowen became so concerned by what he was seeing on the EFM strips that he told Dara that a vacuum delivery was necessary.³⁶ He recalls James trying to object, but Dr. Bowen was able to accomplish a vacuum-assisted, vaginal delivery during the next contraction.³⁷ Unfortunately, Emmett was born in a depressed state. After the delivery James thanked Dr. Bowen "for saving my baby's life."³⁸

²⁶ T.p. 1600, lines 15-21; T.p. 1441, line 16 – T.p. 1442, line 2.

²⁷ T.p. 3959, lines 3-17; T.p. 3960, lines 11-14.

²⁸ T.p. 4731.

²⁹ T.p. 4730.

³⁰ T.p. 885.

³¹ T.p. 4749, lines 18-21.

³² T.p. 906.

³³ T.p. 4744, lines 9-16; T.p. 4746, lines 8-9, 17-19.

³⁴ T.p. 4747, lines 4-13.

³⁵ T.p. 4750, lines 3-8.

³⁶ T.p. 4757, line 23 – T.p. 4758, line 9.

³⁷ T.p. 4758, lines 10-20.

³⁸ T.p. 4765, lines 3-4.

At trial, Dr. Bowen testified that: “I did everything I could to prevent this condition”³⁹ and that: “***I was doing what I could do within the limits of constraints that the family put on us,”⁴⁰ as “[t]his couple made things very, very difficult.”⁴¹ O’Loughlin’s obstetrical expert agreed that Dara and James made it challenging by not allowing continuous fetal monitoring.⁴² In fact, O’Loughlin’s sole OB standard of care expert admitted at trial that the situation Dr. Bowen was in on January 10, 2004, asking for continuous EFM but the patient saying “no,” was such a rare occurrence **that he is not sure that anybody has even defined the standard of care for this specific situation.**⁴³

III. ARGUMENT AGAINST PROPOSITIONS OF LAW

Response to O’Loughlin’s Proposition of Law I:

A. The foreseeability instruction in this case was warranted by the conflicting evidence introduced at trial on that issue.

In *Cromer* this Court specifically held that “***the issue of foreseeability is relevant to a physician’s standard of care in treating a particular patient, **and separate consideration of the foreseeability of harm is appropriate if there is a question for the jury regarding whether the physician knew or should have known that a chosen course of treatment involved a risk of harm.**”⁴⁴ Even O’Loughlin’s Proposition of Law I concedes that “[a] foreseeability instruction is proper***when conflicting evidence has been introduced on the issue***”⁴⁵ The following three paragraphs will conclusively establish that conflicting evidence on foreseeability was rampant throughout trial in the instant case.

³⁹ T.p. 943, lines 7-8.

⁴⁰ T.p. 4708, lines 12-14

⁴¹ T.p. 936, lines 18-19.

⁴² T.d. 1647, lines 8-15; T.p. 1648, lines 15-23.

⁴³ T.d. 1606, lines 13-20.

⁴⁴ *Cromer*, 2015-Ohio-229, ¶44. (Emphasis added).

⁴⁵ Plaintiff-Appellants’ Proposition of Law I.

Foreseeability was the crux of O'Loughlin's case. It provided the basis for every standard of care violation asserted and was the reason O'Loughlin claimed that Dr. Bowen needed to "do more." Foreseeability was why O'Loughlin's nursing expert went through the last four hours of the EFM strips, testifying that they demonstrated a "stair step to death pattern."⁴⁶ Foreseeability was why O'Loughlin's OB expert testified that this "tracing speaks for itself," that "there was enough information on the tracing to indicate that the baby's condition was deteriorating,"⁴⁷ and that "[i]t was obvious that there was a change in fetal status."⁴⁸ And to tie their experts' EFM interpretation into the alleged foreseeability of brain damage, O'Loughlin's OB expert was asked: "And should an obstetrician know that in 2004, that birth asphyxia, severe birth asphyxia, can and will cause brain injury?" (i.e. was it foreseeable?)

Conversely, Dr. Bowen presented evidence that EFM cannot forecast impending asphyxia and that brain damage is not foreseeable, even with a non-reassuring EFM strip, since more than 99% of babies with non-reassuring strips are born completely normal.⁴⁹ He established that the preeminent obstetrical organization in this country has published that continuous EFM does not prevent birth asphyxia or cerebral palsy,⁵⁰ the very injuries alleged in this case. Dr. Bowen's OB expert, Dr. John White, testified that EFM has not been shown to prevent cerebral palsy⁵¹ and, in fact, "has been poor in improving the outcomes of newborns."⁵²

Then, in interpreting the very same EFM strips that O'Loughlin claimed foretold of asphyxia and brain damage, Dr. Bowen testified that prior to the time of his intervention this

⁴⁶ T.p. 1365-1387.

⁴⁷ T.p. 1575, lines 19-23.

⁴⁸ T.p. 1576, lines 11-12.

⁴⁹ T.p. 4469, lines 7-11.

⁵⁰ T.p. 4465, lines 19-22.

⁵¹ T.p. 4383, lines 10-11.

⁵² T.p. 4383, lines 18-20.

strip was “very reassuring,” “consistent with a normal, healthy baby,”⁵³ and not indicative of any fetal distress.⁵⁴ Dr. White, in direct contradiction of O’Loughlin’s experts, time-after-time pointed to this EFM strip as not warranting any medical intervention,⁵⁵ as evidencing that Emmett continued to be well oxygenated,⁵⁶ as being reassuring of fetal well-being,⁵⁷ and as being indicative that Emmett was tolerating labor.⁵⁸

Unlike in *Cromer*, where “****the parties did not dispute that the treating physicians foresaw that there was a risk of harm associated with their choice of emergency treatment,”⁵⁹ in the instant case the foreseeability of injury with continued labor was a hotly contested issue on which a multitude of conflicting evidence was presented. O’Loughlin argued foreseeability literally from start-to-finish at trial, yet cries foul that the jury was properly charged on that issue.

B. The jury was properly charged on foreseeability

The First District appreciated that the foreseeability instruction given in this case “mimics the language given by the Supreme Court and used in pattern instructions from the Ohio Jury Instructions.”⁶⁰ Moreover, the First District further correctly recognized that multiple other Ohio appellate districts have upheld the appropriateness of similar foreseeability instructions in medical malpractice cases.⁶¹

And, exactly as in *Cromer*, any reference within the instruction to a “reasonably careful person” was neither in error nor misleading since the jury instructions, as a whole, repeatedly

⁵³ T.p. 4743, lines 10-15.

⁵⁴ T.p. 4742, lines 9-13.

⁵⁵ T.p. 4410, line 25 – T.p. 4411, line 2.

⁵⁶ T.p. 4414, lines 5-6.

⁵⁷ T.p. 4418, lines 9-10.

⁵⁸ T.p. 4421, lines 10-12; T.p. lines 2-5.

⁵⁹ *Cromer*, 2015-Ohio-229, ¶32.

⁶⁰ *O’Loughlin v. Mercy Hosp. Fairfield*, 1st Dist. Hamilton No. C-130484, 2015-Ohio-152, ¶29.

⁶¹ *Id.*

defined “reasonable” in the context of a reasonably careful medical provider.⁶² As examples, the jury was instructed that Dr. Bowen had “**a duty to act as would a physician of reasonable skill, care and diligence, under like or similar circumstances,**”⁶³ “***to do those things which a **reasonably careful physician** would do and to refrain from doing those things which a **reasonably careful physician** would not do,”⁶⁴ and to act as “***a **reasonable specialist practicing medicine*****”⁶⁵ So, exactly as in *Cromer*, “the jury instructions regarding the applicable standard of care, as a whole, were not misleading.”⁶⁶

O’Loughlin’s remaining argument pertains to the inclusion of probability in the instruction and relies solely on Justice O’Donnell’s concurring opinion in *Cromer*. However, a concurring opinion is not controlling authority,⁶⁷ and had this Honorable Court wanted the inclusion of probability to potentially constitute reversible error (with a showing of material prejudice), certainly it would have done so in the *Cromer* opinion released just a few months ago.

C. Even had the instruction been in error, no actual prejudice was suffered

To the First District O’Loughlin argued that the “foreseeability charge was inherently prejudicial***”⁶⁸ and “inherently flawed,”⁶⁹ arguments flatly rejected by this Court in *Cromer*.⁷⁰ O’Loughlin repeats the substance of those very same arguments before this Court, only now attempting to relabel them as evidence of actual prejudice. This Court directs that “***the

⁶² *Cromer*, 2015-Ohio-229, ¶40.

⁶³ T.p. 5218, lines 3-8. (Emphasis added).

⁶⁴ T.p. 5218, lines 10-14. (Emphasis added).

⁶⁵ T.p. 5218, line 21 – T.p. 5219, line 6.

⁶⁶ *Cromer*, 2015-Ohio-229, ¶40.

⁶⁷ 23 Ohio Jurisprudence 3d, Courts and Judges, Section 387 (citing *In re Adoption of Peshek*, 143 Ohio App.3d 839, 843, 759 N.E.2d 411 (2d Dist. 2001)).

⁶⁸ Plaintiffs-Appellants’ Motion for Reconsideration and Reconsideration En Banc at p. 5.

⁶⁹ *Id.* at p. 6.

⁷⁰ *Cromer*, 2015-Ohio-229, ¶2.

judgment is not subject to reversal absent a showing of material prejudice.”⁷¹ Simply put, O’Loughlin can point to no actual or material prejudice because none exists.

In a last ditch effort to argue otherwise, O’Loughlin first takes exception to Dr. Bowen’s previously articulated position that foreseeability is relevant to standard of care - a position subsequently validated by this Court in *Cromer*.⁷² Second, O’Loughlin repeats the claim that “the jury was***required to resolve an issue that was not actually in dispute***,”⁷³ meaning foreseeability, a position that has been demonstrated above to be false.

Response to O’Loughlin’s Proposition of Law No. II:

O’Loughlin’s claim that “[c]ritical information should have been disclosed during” Dara’s labor⁷⁴ went to the jury. O’Loughlin argued this claim to the very end, telling the jury during closing that Dr. Bowen “[f]ailed to tell the O’Loughlins we do need to do more.”⁷⁵ This claim was not sua sponte withdrawn from or directed out of the case. Rather, it was correctly recognized to be a part of the negligence claim. Having been permitted to fully present this claim to the jury, no error or prejudice can be found in Propositions of Law II and III.

A. O’Loughlin failed to establish each of the required *Nickell* elements

In *Nickell* this Court set forth the three elements necessary to establish an informed consent claim, the first of which requires an act (effectuating proposed therapy) by the physician:

- (a) 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**, if any;⁷⁶

⁷¹ *Id.*

⁷² *Id.*

⁷³ Plaintiffs-Appellants’ Memorandum in Support of Jurisdiction at p. 10.

⁷⁴ *Id.* at p. 11.

⁷⁵ T.p. 5040, lines 8-9.

⁷⁶ *Nickel*, 17 Ohio St.3d 136, 139, 477 N.E.2d 1145, 1148. (Emphasis added).

Problematically for O’Loughlin’s purported informed consent claim, they were not following Dr. Bowen’s proposed therapy. O’Loughlin’s standard of care experts admitted that one of Dr. Bowen’s proposed therapies was continuous EFM,⁷⁷ but O’Loughlin refused. The other proposed therapy was a C-section (thereby effectuating an earlier delivery) but, again, O’Loughlin refused. The contention that Dr. Bowen misinterpreted (i.e. misdiagnosed) the EFM strips that were allegedly forewarning of an injury is a negligence claim. Just as in *Stanley v. Ohio State Univ. Med. Ctr.*, the “plaintiffs confused their cause of action sounding in negligence for rendering an improper diagnosis with **a cause of action designed to prevent an unauthorized or uninformed touching.**”⁷⁸

While O’Loughlin claims that requiring an affirmative act by the physician in an informed consent claim is “a first” in Ohio jurisprudence, in actuality the First District’s holding is not even in conflict with another Ohio District. In *Maglosky v. Kest*, for example, the Eighth District referred to an informed consent claim as a medical battery, recognizing the requirement of an act in that “when a physician treats a patient without his consent, the doctor has committed a battery.”⁷⁹ In *Stanley*, where the plaintiff claimed that she did not have enough information to actually make an informed decision, the Tenth District recognized that “[w]hile such alleged conduct on the part of (the defendant-physician) may result in liability under another cause of action, it cannot give rise to a claim of lack of informed consent because said tort relates to the disclosure of risks and dangers associated with the procedure being or intended to be performed.”⁸⁰

⁷⁷ T.p. 1600, lines 15-21; T.p. 1441, line 16 – T.p. 1442, line 2.

⁷⁸ *Stanley v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 12AP-999, 2013-Ohio-5140, ¶116. (Emphasis added).

⁷⁹ *Maglosky v. Kest*, 8th Dist. Cuyahoga No. 85382, 2005-Ohio-5133, ¶24.

⁸⁰ *Stanley*, 2013-Ohio-5140, ¶116.

In affirming the trial court in this matter, the First District also recognized that in *Schloendorff v. Society of N.Y. Hosp.*, Judge Cardozo used the word “trespass” in describing an informed consent claim.⁸¹ This Honorable Court, likewise, has quoted Judge Cardozo and his reasoning in *Schloendorff*.⁸²

Lastly, both of the cases cited by O’Loughlin contain affirmative acts by the care providers, as *Pilny*⁸³ involved the extraction of a tooth and *Stewart*⁸⁴ the administration of radiation therapy and performance of surgery.

Response to O’Loughlin’s Proposition of Law No. III:

O’Loughlin’s medical negligence and purported informed consent claims were identical. They arose from the exact same set of facts, relied upon the exact same witnesses, utilized the exact same evidence and testimony, and attempted to place the exact same professional duty to act upon Dr. Bowen. O’Loughlin even presented this as part of the negligence claim when their OB expert, in rendering standard of care criticisms, criticized Dr. Bowen for allegedly not obtaining informed refusal,⁸⁵ adding that “[t]he process***needs to be documented, and it’s not. **And that’s a breach (of the standard of care) as far as I’m concerned.**”⁸⁶

“[W]hen the gist of a complaint is malpractice, other duplicative claims are subsumed in the malpractice claim and the court can construe the complaint as only presenting a malpractice

⁸¹ *O’Loughlin v. Mercy Hosp. Fairfield*, 2015-Ohio-152, ¶22.

⁸² *Steele v. Hamilton County Community Mental Health Bd.*, 90 Ohio St. 3d 176, 180-181, 736 N.E.2d 10, 2000-Ohio-47, ¶2-3.

⁸³ *Pilny v. Kustin*, 8th Dist. Cuyahoga No. 53784, 1988 Ohio App. LEXIS 1900 (May 19, 1988).

⁸⁴ *Stewart v. Cleveland Clinic Found.*, 136 Ohio App.3d 244, 736 N.E.2d 491 (8th Dist. 1999).

⁸⁵ T.p. 1577, lines 16-23.

⁸⁶ T.p. 1569, lines 2-5. (Emphasis added).

claim.”⁸⁷ “The grounds for bringing the action are the determinative factors, the form is immaterial.”⁸⁸ Even had O’Loughlin’s purported informed consent claim met the *Nickel* elements it was, at best, completely duplicative of, and therefore subsumed within, the medical negligence claim.

In *Ill. Nat’l Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.* the Tenth District recognized that all of the various claims in that case arose from alleged malpractice: “No other alleged conduct occurred apart from that forming the basis of the***malpractice claim. As a result, the breach of contract and breach of fiduciary duty claims were subsumed within its legal malpractice claim”⁸⁹ and “it is clear that the trial court did not err in construing (the) complaint as presenting only a claim for malpractice.”⁹⁰

Just as in *Ill. Nat’l Ins. Co.*, all of O’Loughlin’s claims arose from the alleged professional malpractice and no other conduct occurred *apart from that* which formed the basis of the malpractice claim. “Malpractice by any other name still constitutes malpractice. It consists of the ‘professional misconduct of members of the medical profession[.]’”⁹¹

Response to O’Loughlin’s Proposition of Law No. IV:

“***[T]here is no provision in the civil rules that provides for each side in a civil action to have an equal number of peremptory challenges.”⁹² This Honorable Court “***has held that while the right to peremptory challenges has become a substantive right, the rules governing the

⁸⁷ *B&B Constrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 2012-Ohio-5981, 984 N.E.2d 419, (7th Dist.); *Estate of Barney v. Manning*, 8th Dist. Cuyahoga No. 94947, 2011-Ohio-480 at FN 2.

⁸⁸ *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179, 183, 465 N.E.2d 1298 (1984).

⁸⁹ *Ill. Nat’l Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner, Co., L.P.A.*, 10th Dist. Franklin No. 10AP-290, 2010-Ohio-5872, ¶17.

⁹⁰ *Id.*

⁹¹ *Amadasu v. O’Neal*, 176 Ohio App.3d 217, 2008-Ohio-1730, 891 N.E.2d 802, ¶9 (1st Dist.).

⁹² *Bernal v. Lindholm*, 133 Ohio App. 3d 163, 176, 727 N.E.2d 145 (6th Dist. 1999).

allowable number of peremptory challenges is a matter of procedure.”⁹³ This procedure has been clearly articulated by this Court in *LeFort v. Century 21-Maitland Realty Co.*⁹⁴

When *LeFort* is applied to the facts of the instant case, it becomes obvious that Dr. Bowen and Mercy were separate parties and each entitled to three peremptory challenges. They had separate attorneys, filed separate pleadings, filed separate replies, and made separate motions, including for partial summary judgment. They had separate defenses and each attempted to prove that its own conduct was not negligent. Dr. Bowen called an obstetrical expert to testify only as to the appropriateness of his care,⁹⁵ whereas Mercy called its own obstetrical expert to testify only as to the appropriateness of the nursing care.⁹⁶

More importantly, the individual defenses did not stand or fall together. In fact, Mercy emphasized throughout trial that nurses are not doctors, nurses do not make medical decisions, and nurses do not have primary patient responsibility when a physician is present. Mercy repeated these themes from voir dire⁹⁷ to cross-examination of the standard of care experts⁹⁸ and through closing argument (i.e. “nurses are nurses and physicians are physicians*****(and) they are not equivalent in terms of the standard of care**”⁹⁹; “that nurses - - you know, they are not physicians; they don’t make medical decisions.”¹⁰⁰). In a case that hinged on the responsibility for the decisions made regarding the timing and manner of delivery, any one of these points could easily have led to the jury finding against Dr. Bowen but in Mercy’s favor. It is

⁹³ *Striff v. Luke Med. Practitioners, Inc.*, 3rd Dist. Allen No. 1-10-15, 2010-Ohio-6261, ¶26 citing *State v. Greer*, 39 Ohio St.3d 236, 244-246, 530 N.E.2d 382 (1988).

⁹⁴ *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 512 N.E.2d 640 (1987).

⁹⁵ T.p. 4367- T.p. 4495, line 8.

⁹⁶ T.p. 3126, line 17 – T.p. 3291, line 21.

⁹⁷ T.p. 462, lines 21-25; T.p. 464, lines 1-4.

⁹⁸ T.p. 1442, line 25 – T.p. 1443, line 20; T.p. 1723, lines 15-21.

⁹⁹ T.p. 5049, lines 15-20. (Emphasis added).

¹⁰⁰ T.p. 5063, lines 3-5.

abundantly clear that each of the *LeFort* criteria were met and that Dr. Bowen and Mercy were each “entitled to three peremptory challenges.”¹⁰¹

And as opposed to claiming that the defendants were perfectly aligned, as O’Loughlin argues to this Court, at trial O’Loughlin told the jury that there was “a conflict” between the nurses and Dr. Bowen in terms of how each interpreted the EFM strips.¹⁰²

Finally, even had error occurred, no resultant prejudice could be found since O’Loughlin used just one peremptory challenge in seating this jury,¹⁰³ passing on their final two peremptory challenges.¹⁰⁴ Had O’Loughlin been unhappy with the final jury composition in any way, certainly one or more of the remaining peremptory challenges would have been utilized. Moreover, since Dr. Bowen and Mercy each passed on their respective final peremptory challenges,¹⁰⁵ “appellant was placed at no disadvantage and, thereby, suffered no prejudice, as a result of the trial court’s award of only three peremptory challenges to the appellant.”¹⁰⁶

IV. CONCLUSION

As this case presents no issue of public or great general interest and does not involve a substantial constitutional question, this Honorable Court should decline review.

Respectfully submitted,



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¹⁰¹ *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 125, 512 N.E.2d 640.

¹⁰² T.p. 5001, lines 17-18.

¹⁰³ T.p. 447, lines 15-16;

¹⁰⁴ T.p. 508, lines 21-24; T.p. 547, lines 20-22.

¹⁰⁵ T.p. 547, line 17 – T.p. 548, line 1.

¹⁰⁶ *Bernal v. Lindholm*, 133 Ohio App. 3d 163, 176, 727 N.E.2d 145 (6th Dist. 1999).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following by electronic and/or regular mail this 26th day of May, 2015.

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