

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-0653

**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**

**MOTION FOR RECONSIDERATION OF
PLAINTIFF-APPELLANTS,
EMMETT, DARA, AND JAMES O'LOUGHLIN**

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MOTION

Because an ideal companion case was recently filed and remains pending before this Court, the Order of October 28, 2015 declining jurisdiction over this appeal should be reconsidered. *Sup. Ct. Prac. R. 18.02(B)(1)*. In *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278, 282 (10th Dist.1981), Judge (later Chief Justice) Moyer granted such a motion and explained that:

App. R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed. The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.

See also, City of Columbus v. Hodge, 37 Ohio App.3d 68, 523 N.E.2d 515, 516 (10th Dist.1987). It has been noted that jurists should be open to rethinking their positions once difficult decisions have been made. *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181, 186-188 (1998)(Lundberg Stratton, J., concurring).

In this medical malpractice case, Plaintiff-Appellants, Emmett, Dara, and James O'Loughlin, have raised the following four Propositions of Law:

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.

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.

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

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.

The first Proposition of Law is founded upon the trial court's instruction to the jury that the health care providers had to foresee that harm was "the likely result" of their actions based upon what a "reasonably careful person" would have understood under the circumstances. *Memorandum in Support of Jurisdiction of Plaintiff-Appellants dated April 23, 2015, pp. 7-10.* In a recent concurring opinion, Justices O'Donnell and Kennedy questioned whether both the probability requirement (*i.e.*, the likely result) and the "reasonable person" test were correct statements of Ohio law. *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 272, 2015-Ohio-229, ¶52-54. (O'Donnell, concurring). They reasoned that:

*** [T]he trial court's instruction on foreseeability fundamentally misstated the standard of care applicable in medical malpractice cases. The court framed its foreseeability instructions 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. But a reasonable layperson considering the circumstances in this case—in which a child presents to an emergency department suffering from an ear infection and dehydration—lacks the necessary knowledge, training, and experience to appreciate whether or not the child's death was likely to result. Rather, the question is whether the hospital's medical professionals "employ[ed] that degree of skill, care and diligence that a physician or surgeon of the same medical specialty would employ in like circumstances." *Berdyck v. Shinde*, 66 Ohio St.3d 573, 579, 613 N.E.2d 1014 (1993).

Id., ¶52. The concurring opinion further observed that:

The trial court compounded this error by stating the foreseeability instruction in terms of probability. Although the reasonable person in an ordinary negligence case may be required to anticipate only those injuries that are likely to result from a course of conduct, a doctor is charged with possessing the specialized knowledge and experience of the medical profession and therefore is required to anticipate diagnoses that may be unlikely or rare. ***

Id., ¶53. An indistinguishable foreseeability charge was furnished below over objection, even though there was no dispute amongst the experts that a duty of care was owed to recommend a cesarean section delivery under exigent circumstances, a violation of which exposed the fetus to an unacceptable risk of harm. *Trial Tr.*, pp. 5223-24. The malpractice case had turned instead upon the factual question of whether the OB/GYN timely offered, and his patient rejected, the C-section.

While the *Cromer* majority recognized that “[f]oreseeability of harm usually does not enter into the analysis of medical negligence[,]” *id.*, 142 Ohio St. 3d at 265, ¶31, Ohio trial courts are still routinely furnishing the pattern charge in all types of tort actions any time there is a dispute, at least in theory, over what the average individual would have appreciated was a probable outcome. Defense attorneys regularly insist upon the inclusion of the instruction precisely because of the considerable obstacle it imposes to a finding of liability. *Cromer’s* majority opinion left several important questions unanswered, most notably whether the tortfeasor has to foresee that the harm is probable, as opposed to just unacceptable, under a “reasonable person” standard that applies in all instances.

In this motion, Plaintiffs are not requesting that this Court revisit the merits of their four Propositions of Law. Reconsideration is warranted at this time solely as a result of developments that arose after they filed their Memorandum in Support of Jurisdiction on April 23, 2015. Specifically, an appeal was filed in this Court on September 8, 2015 raising largely the same issues of foreseeability and improper jury

instructions. *Cox v. MetroHealth Med. Cntr. Board of Trustees*, Sup. Ct. Case No. 2015-1485. This request for jurisdiction has been fully briefed and remains pending. The three Propositions of Law that have been raised in *Cox* are:

PROPOSITION OF LAW I: A CIVIL PLAINTIFF IS NEVER REQUIRED TO PROVE FORESEEABLE HARM TO A PROBABILITY OR LIKELIHOOD.

PROPOSITION OF LAW II: A REASONABLE PERSON TEST FOR FORESEEABLE IS MISLEADING AND PREJUDICIAL IN A MEDICAL MALPRACTICE ACTION, AS THE JURY SHOULD BE CHARGED THAT A SIMILARLY SITUATED HEALTH CARE PROVIDER MUST BE ABLE TO APPRECIATE AN UNACCEPTABLE RISK OF HARM.

PROPOSITION OF LAW III: ABSENT COMPETENT TESTIMONY THAT THE HEALTHCARE PROVIDER COULD NOT HAVE APPRECIATED AN UNACCEPTABLE RISK OF HARM UNDER THE CIRCUMSTANCES, A FORESEEABILITY CHARGE IS NOT WARRANTED IN A MEDICAL MALPRACTICE ACTION.

The Eighth District had determined in that malpractice case that the trial court properly instructed the jury that foreseeability had to be proven to a likelihood under a reasonable person standard because a factual dispute had existed over issues of causation. *Cox v. MetroHealth Med. Ctr. Bd. of Trustees*, 8th Dist. Cuyahoga No. 101673, 2015-Ohio-2950. Just as in the instant case, none of the defense experts had claimed that the health care providers could not have appreciated that harm to the patient was likely if the standard of care was violated.

In the event that jurisdiction is granted in *Cox*, then this Court should reconsider the Order of October 28, 2015 and accept the instant appeal as well. The *O'Loughlin* case can then be consolidated with *Cox* with briefing and arguments stayed. If the Eighth District is reversed in whole or in part, both *Cox* and *O'Loughlin* can be remanded for further proceedings consistent with this Court's analysis of the foreseeability issues that have been inconsistently applied throughout Ohio over the last

several decades. Nothing will be gained by terminating the *O'Loughlin* proceedings now given that this Court may well agree within the next few months, if not weeks, to issue a comprehensive ruling resolving all the questions remaining in the wake of *Cromer*, 142 Ohio St. 3d 257.

CONCLUSION

In the event that this Court agrees to accept jurisdiction over *Cox*, Sup. Ct. Case No, 2015-1485, then the ruling of October 28, 2015 declining jurisdiction should be reconsidered and this appeal accepted and consolidated with the *Cox* proceedings. *Sup. Prac. R. 18.01(B)(1)*.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum** has been sent by e-mail on this 9th day of November, 2015 to:

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