

IN THE SUPREME COURT OF OHIO

EMMETT O’LOUGHLIN, A MINOR,	:	Supreme Court No. 2015-0653
DARA O’LOUGHLIN, AND	:	
JAMES O’LOUGHLIN	:	On Appeal from the First District
Plaintiff-Appellants	:	Court of Appeals, Hamilton County,
	:	Ohio
vs.	:	
	:	Court of Appeals Case No.
CATHOLIC HEALTH PARTNERS	:	C-130484
FOUNDATION; MERCY HOSPITAL	:	
FAIRFIELD; DANIEL CLIFFORD	:	
BOWEN, M.D.; THE PROFESSIONAL	:	
ORGANIZATION OF DANIEL	:	
CLIFFORD BOWEN, M.D.	:	
Defendant-Appellees.	:	

MEMORANDUM IN OPPOSITION OF DEFENDANT-APPELLEES, DANIEL CLIFFORD BOWEN, M.D. AND THE PROFESSIONAL ORGANIZATION OF DANIEL CLIFFORD BOWEN, M.D. TO AMENDED MOTION FOR RECONSIDERATION OF PLAINTIFF-APPELLANTS, EMMETT, DARA, AND JAMES O’LOUGHLIN

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MEMORANDUM IN OPPOSITION

The sole basis for Plaintiffs’ Motion for Reconsideration is due to “developments that arose after they filed their memorandum in Support of Jurisdiction on April 23, 2015.” The “development” was an appeal petitioning jurisdiction filed with this Court on September 8, 2015 on *Cox v. MetroHealth Med. Cntr. Board of Trustees*, 2015-Ohio-2950, Sup. Ct. Case No. 2015-1485, alleging errors based on a foreseeability instruction in a medical malpractice case. However, when the curtain is pulled back, it is revealed that the *Cox* appeal was filed by the **same two attorneys**, Mr. Michael F. Becker and Mr. Paul W. Flowers, as are present in the instant case. New development? Hardly. The alleged new development might be more fairly described as an attempt to get yet another bite at the apple in this case.

Aside from the specious characterization that the *Cox* appeal is a new development warranting this Court’s reversal of its decision to decline jurisdiction, the *Cox* case is entirely distinguishable from the instant case. In *Cox*, a nursing aide rendered back blows to a newborn turning blue. The baby was later found to have a brain bleed. While the proximate cause of the bleed was controverted in the case, the issue of foreseeability of harm from back blows was not. In *Cox*, these same attorneys argue to this Court that the facts in *Cox* did not lend itself to a foreseeability instruction because **all experts agreed** that an injury via back blows was foreseeable under the circumstances of that case.¹ They also admit in their *Cox* brief that “[t]he clear and unmistakable lesson to be taken from *Cromer* is that the issue of foreseeability does not

¹ See Memorandum In Support of Jurisdiction of Plaintiff-Appellants, Joseph Cox, a Minor, and Mariann Cox, page 1.

arise unless competent evidence is actually introduced establishing that the tortfeasor **could not have** appreciated an unacceptable risk of harm.”²

In this case, there was competent evidence submitted to the jury that Dr. Bowen **could not have foreseen** asphyxia and brain damage under the circumstances. This was contrary to Plaintiffs experts’ testimony, thus creating an issue of fact regarding foreseeability:

- Plaintiffs’ sole OB expert testified that he was not sure that anybody had ever defined the standard of care for a situation when a physician, such as Dr. Bowen, asks for continuous electronic fetal monitoring (“EFM”) but the patient refuses;³
- Testimony was given by Dr. Bowen’s experts that EFM cannot foresee impending asphyxia;⁴
- Testimony was given that brain damage is not foreseeable even with a non-reassuring EFM strip;⁵
- Testimony that ACOG has published that continuous EFM does not prevent birth asphyxia or cerebral palsy, the very injuries alleged in this case;⁶
- Dr. Bowen’s expert, Dr. John White, testified that EFM has not been shown to prevent cerebral palsy and has been poor in improving the outcomes of newborns;⁷
- Testimony by Dr. Bowen that prior to the time of his intervention the EFM was “very reassuring” and “consistent with a normal, healthy baby” and not indicative of any fetal distress.⁸

² *Id.* page 14. Emphasis added.

³ T.p. 1606, lines 13-20.

⁴ T.p. 4469, lines 7-11.

⁵ *Id.*

⁶ T.p. 4465, lines 19-22.

⁷ T.p. 4383, lines 10-11, 18-20.

⁸ T.p. 4753, lines 10-15, T.p. 4742, lines 9-13.

- Testimony by Dr. White that the EFM showed nothing that warranted medical intervention, that the baby was well oxygenated, reassuring of fetal well-being and that the baby was tolerating labor.⁹

Unlike in *Cromer* and apparently *Cox* 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,”¹⁰ 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. Plaintiffs argued foreseeability literally from start-to-finish at trial, conflicting testimony was presented creating an issue of fact, and the jury was properly charged on that issue. Thus, it would make no sense for this Court to reconsider its denial of jurisdiction of this case in the prospect of accepting jurisdiction in *Cox*, a case that is entirely factually distinguishable on the issue of foreseeability. Even if this Court accepts jurisdiction in *Cox*, it would do nothing to change the application of *Cromer* to the facts of the instant case where foreseeability was clearly disputed giving rise to the necessity and appropriateness of the foreseeability jury instruction.

Based on the foregoing, there is no new “development” that warrants this Court’s attention. There is nothing more for this Court to hear. There is nothing more for this Court to see. And there is nothing more for this Court to do, other than to deny Plaintiffs’ motion for reconsideration. Defendants seek a conclusion to this litigation which was originally filed 10 years ago. Plaintiffs had their day in court, resulting in a defense verdict which was affirmed on appeal. To quote an often mentioned truism, “justice delayed is justice denied.” The Defendants request this Court take that remaining action forthwith and deny Plaintiffs’ motion for reconsideration.

⁹ T.p. 4410, line 25, T.p. 4411, line 2, T.p. 4414, lines 5-6, T.p. 4418, lines 9-10, T.p. 4421, lines 10-12.

¹⁰ *Cromer*, 2015-Ohio-229, ¶32.

Respectfully submitted,

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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 17th day of November, 2015.

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