

**IN THE SUPREME COURT OF OHIO**

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

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**MEMORANDUM OF DEFENDANT-APPELLEES, MERCY HOSPITAL FAIRFIELD,  
MERCY HEALTH PARTNERS OF SOUTHWEST OHIO, AND CATHOLIC HEALTH  
PARTNERS FOUNDATION,  
IN OPPOSITION TO PLAINTIFF-APPELLANTS' MOTION FOR RECONSIDERATION**

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Paul W. Flowers, Esq.  
PAUL W. FLOWERS CO.  
Terminal Tower, 35<sup>th</sup> 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  
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  
E: jhines@rendigs.com /  
tevans@rendigs.com / kcarroll@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  
jpeschke@clp-law.com

## MEMORANDUM

### **I. Introduction**

Come now Appellees, Mercy Hospital Fairfield, Mercy Health Partners of Southwest Ohio, and Catholic Health Partners Foundation (collectively “Appellees”), by and through counsel, and offer the following Memorandum in Opposition to Appellants’ Motion for Reconsideration. In their motion, Appellants have petitioned this Court to reconsider its denial of jurisdiction with respect to only the first of the four propositions of law that they advanced in their Memorandum in Support of Jurisdiction (i.e., that addressing the appropriateness of a foreseeability instruction in the context of a medical negligence action). *Appellants’ Motion for Reconsideration*, 4. As demonstrated herein, Appellants have provided no legitimate basis to justify the rather extraordinary relief they seek. To be certain, they cannot satisfy the requirements for reconsideration under Supreme Court Practice Rule 18.02. As such, their Motion for Reconsideration should be denied.

### **II. Law and Argument**

Although there is no clearly defined test to be applied when ruling on a motion for reconsideration, one thing is clear. “A motion for reconsideration shall not constitute reargument of the case \*\*\*.” S.Ct.Prac.R. 18.02(B). Generally speaking, the test is whether a motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue that was not considered when it should have been. See *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (1981) (discussing motions for reconsideration under Appellate Rule 26). Most importantly, however, “[a] motion for reconsideration is not designed for use in instances when a party merely disagrees with the conclusions reached and the logic used by the appellate court.”

*Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. Erie County No. E–10–006, 2011-Ohio-2959, ¶ 2. “Neither is a motion for reconsideration an opportunity to raise new arguments that a party neglected to make in earlier proceedings.” *Id.*

First and foremost, it is clear that the issue(s) raised in Appellants’ jurisdictional memorandum, and again in their request for reconsideration, fall plainly within the ambit of this Court’s recent determination of *Cromer v. Children’s Hos. Med. Cntr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921. In fact, Appellants openly acknowledge that this matter involved a foreseeability charge that was “indistinguishable” from the one given in *Cromer*. *Appellants’ Motion for Reconsideration*, 3. Assuming that to be true, in the wake of the comprehensive analysis provided by this Court in *Cromer*, further consideration of the matter at bar is entirely unnecessary.

That is particularly true when one considers Appellants’ Motion for Reconsideration, which amounts to a carefully crafted attempt to reargue certain particulars about this case and, of course, to disagree with the conclusions reached by this Court in *Cromer v. Children’s Hos. Med. Cntr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921 (a case in which Appellants’ counsel also participated on behalf of *amicus curiae*). Of course, nowhere in their motion do Appellants claim that this Court committed an “obvious error” in its decision to deny jurisdiction for further appeal of this case.

Instead, Appellants ask this Court to revisit three issues it has previously addressed: (1) the propriety of a foreseeability instruction; (2) the use of the word “likely” in the foreseeability instruction; and (3) the inclusion of the phrase “reasonable person”

in the foreseeability instruction. Not one of these three issues is new. All three were thoroughly examined and decided in *Cromer*. All three were also exhaustively briefed and decisively ruled upon in the matter *sub judice*. Accordingly, it is incorrect for Appellants to claim that the *Cromer* majority opinion left these questions “unanswered.” *Appellants’ Motion for Reconsideration*, 4. The questions have been answered; Appellants simply disagree with the answers given by this Court. For the foregoing reasons, Appellants cannot genuinely maintain that their motion satisfies the dictates of Rule 18.02.

The foregoing notwithstanding, Appellants have suggested that, “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.” *Appellants’ Motion for Reconsideration*, 4. The “development” to which Appellants’ counsel refers is a similar request for jurisdiction that **they** filed in a completely separate medical negligence action — *Cox v. MetroHealth Med. Ctr. Bd. of Trustees*, 2015-Ohio-2950, 39 N.E.2d 843 (8th Dist.) — where issues surrounding foreseeability arose.<sup>1</sup> In essence, Appellants have attempted to obviate the prohibition against reargument by analogizing this case to a completely unrelated matter, which they claim has like issues. Appellants then proceed not only to reargue their case in the context of the other matter, but also suggest that the alleged similarities between the two somehow justify rescission of this Court’s denial of jurisdiction pending resolution of that matter.

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<sup>1</sup> Appellants’ motion assumes that this high Court lacks an understanding of the various cases that have been submitted to it for consideration. Barring evidence to that effect, Appellees do not believe it appropriate to engage in such speculative presupposition and, therefore, reject the unsubstantiated notion advanced by Appellants that this Court did not appreciate the existence of the *Cox v. MetroHealth Med. Ctr. Bd. of Trustees* when it denied Appellants’ request for jurisdiction to prosecute a discretionary appeal of the matter at hand.

The approach utilized by Appellants raises some obvious concerns. If the issues presented in *Cox* are, as Appellants suggest, truly identical to those that were presented in their first proposition of law in this matter, then Appellants have actually presented nothing new for this Court to consider. Instead, they are opportunistically seeking to utilize other matters in which their counsel are involved to provide a means to reargue this case. On the other hand, if the issues presented in *Cox* are actually different than those presented by Appellants in this matter, then Appellants are clearly seeking to raise new issues and assert new arguments – a practice that is wholly inappropriate in the context of a motion for reconsideration. In either instance, Appellants’ request, while clever, is plainly prohibited by Supreme Court Practice Rule 18.02.

Appellants self-servingly characterize the matter of *Cox v. MetroHealth Med. Ctr. Bd. of Trustees* as an ideal companion case to the matter at bar. But if Appellants truly believed that *Cox* should have been joined with *O’Loughlin*, why then did their counsel (who also happen to be counsel for the Appellants in *Cox*) wait to suggest consolidation of the two cases until **after** their request for jurisdiction in this matter was denied? Notably, Appellants’ counsel filed their appeal in *Cox* on September 8, 2015, almost two months prior to the ruling declining jurisdiction in this matter. During that time period, Appellants and their counsel failed to request, suggest, or utter a single word about potential consolidation of these actions. Their silence on this subject prior to being denied jurisdiction is actually quite deafening to the extent that it further belies the credibility of their contention that the two actions ought to be consolidated, whether for reasons of economy or justice. It would seem, instead, that that *Cox* is nothing more

than a convenient device employed by Appellants to seek yet another bite at the proverbial apple.

In reality, *Cox* is a unique action that stands upon its own merits. It involves different parties, different facts, and different standards, in addition to what appear to be a host of completely unrelated underlying circumstances. As such, any issues raised in that matter should be considered in the context of its facts and circumstances alone, as opposed to any that are associated with this action. Furthermore, it is well settled that, “In examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and ‘must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party’s substantial rights.” *Cromer*, 142 Ohio St.3d 257, ¶ 35. Therefore, it is not enough for Appellants to simply rely upon the fact that the language of the foreseeability instructions utilized in the *Cox* case bears similarity with the one utilized in the matter *sub judice*. To the contrary, it is the complete set of instructions that must be evaluated in the context of the circumstances of the case in question, along with any evidence that the jury which considered the instructions was, in fact, misled. These fundamental standards militate against any type of consolidation and further undermine Appellants’ sole basis for reconsideration in this instance.

The *Cox* matter will undoubtedly rise or fall on its own merits, as did this matter. Tempting though it may be to delve into the nuances of these two disparate and unrelated matters, Appellants’ invitation to do so is plainly inappropriate in the context of their motion for reconsideration. Implementation of consolidation at this juncture serves no purpose, other than to provide Appellants with the opportunity to relitigate their

foreseeability issues, which have now been presented, considered, and laid to rest thrice by the appellate courts of this State.

### **III. Conclusion**

In the end, Appellants have had their “day in court” several times now at the trial and appellate levels. A jury of their peers rendered a verdict in favor of Appellees. That verdict was affirmed by the First District Court of Appeals, which subsequently denied Appellants’ Motion for Reconsideration in the wake of the *Cromer* decision. This Court has now likewise fully considered and denied Appellants’ jurisdictional appeal. Appellants have availed themselves of and received every opportunity to plead their case. Their efforts to resuscitate this aged litigation (now pending approximately ten years) through self-referential machinations and creative pleading does nothing to change the simple fact that their proposition of law regarding foreseeability does not support or justify further appellate review. As such, Appellees respectfully urge the Court to deny Appellants’ Motion for Reconsideration.

Respectfully submitted,

*/s/ Jeffrey M. Hines*

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 18<sup>th</sup> day of November 2015, I served a true copy of the foregoing via ELECTRONIC MAIL ONLY upon the following:

Paul W. Flowers, Esq.  
PAUL W. FLOWERS CO.  
Terminal Tower, 35<sup>th</sup> 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

*/s/ Jeffrey M. Hines*  
\_\_\_\_\_  
Jeffrey M. Hines