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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2015 CR 000316**
	:	
vs.		**Judge McBride**
	:	
KAILI FITZGERALD		**DECISION/ENTRY**
	:	
Defendant		
	:	

* *

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2015 CR 000317**
	:	
vs.		**Judge McBride**
	:	
MICHAEL FITZGERALD		**DECISION/ENTRY**
	:	
Defendant		
	:	

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Kroener Hale Inc., Jeffrey S. Hale, attorney for the defendant Michael Fitzgerald, 60 North Second Street, Batavia, Ohio 45103.

The defendants Kaili Fitzgerald and Michael Fitzgerald are each charged with child endangerment, a violation of R.C. 2919.22(A), a felony of the third degree. Each of the defendants waived his/her right to a trial by jury.

This cause came before the court for a bench trial from April 4, 2016 through April 7, 2016. At the conclusion of the trial, the court took the issues raised under advisement

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

Both defendants, Michael Fitzgerald and Kaili Fitzgerald, are charged with child endangerment in violation of R.C. 2919.22(A). The defendants have stipulated to facts that meet the elements of R.C. 2919.22(A), a first degree misdemeanor. They have not, however, stipulated to facts that raise their child endangerment charge from a first degree misdemeanor to a third degree felony under R.C. 2919.22(E)(2)(C).

The defendants, who reside in Clermont County, Ohio, are the biological parents of Z.F., who was born on June 5, 2014.[1] At three months of age, Z.F. had been at the 25th percentile in weight.[2] The defendants had been taking Z.F. to his pediatrician for

[1] Trial Stipulations, ¶¶ 1-2, 15.
[2] State's Exs. 6, 18a.

monthly infant checkups, but stopped after their August appointment.[3] They missed appointments for September, October, November, and December.[4]

On January 9, 2015, when Z.F. was seven months old, the defendants resumed taking him to his pediatrician for a checkup.[5] On the January 9th visit, Z.F.'s pediatrician referred him to the Cincinnati Children's Hospital Medical Center, where he was admitted.[6]

Upon admission to the hospital, Z.F. only weighed 5.6 kg.[7] Z.F.'s weight and head circumference fell below the third percentile for seven month old infants, and he was diagnosed with failure to thrive.[8]

Z.F. remained at Cincinnati Children's Hospital from January 9 to January 14, 2015.[9] By January 30, 2015, Z.F. weighed 7.63 kg.[10] Z.F. has since been diagnosed with gross motor delay, lack of coordination, muscle weakness, and abnormal posture, for which he received physical therapy.[11]

A diagnosis of failure to thrive refers to children whose weight or rate of weight gain is much lower than children of similar ages and genders.[12] Children with failure to thrive are either not receiving adequate nutrition, or they have an inability to retain proper nutrition to grow.[13] When failure to thrive is caused by a caretaker's failure to provide nutrition to an infant that cannot otherwise feed his or herself, such malnutrition

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[3] State's Ex. 5.
[4] State's Ex. 5.
[5] State's Ex. 5.
[6] Trial Stipulations, ¶¶ 10, 14.
[7] Trial Stipulations, ¶ 14.
[8] Trial Stipulations, ¶¶ 10, 14, State's Exs. 5, 18a-18b.
[9] Trial Stipulations, ¶ 11.
[10] Trial Stipulations, ¶ 14.
[11] State's Ex. 17.
[12] Trial Stipulations, ¶ 8.
[13] State's Ex. 15.

is referred to as non-organic failure to thrive.[14] If left untreated, failure to thrive can cause significant developmental delays and even death.[15] Moreover, failure to thrive may also lead to emotional and behavioral problems in children.[16]

The defendants Kaili Fitzgerald and Michael Fitzgerald were Z.F.'s primary caregivers.[17] They equally contributed to Z.F.'s failure to thrive diagnosis by not providing him with sufficient nutrients.[18] There were no other medical causes that contributed to Z.F.'s diagnosis, which was confirmed by the fact that he began to gain and maintain weight at an average pace once he was given proper nutrition via medical care.[19]

As their minor child, the defendants owed Z.F. a duty of care, protection, and support.[20] The defendants recklessly violated this duty of care, protection, and support.[21] In doing so, the defendants Kaili Fitzgerald and Michael Fitzgerald created a substantial risk to Z.F.'s health and safety.[22]

The central issue then is the degree to which Z.F. was harmed through the defendants' neglect. The state and each defendant presented separate experts on this issue. All experts agree that Z.F.'s failure to thrive was caused by the fact that he was not given adequate nourishment and that he was not at a significant risk of death at the

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[14] Defs. Ex. B.
[15] State's Ex. 15.
[16] State's Ex. 15.
[17] Trial Stipulations, ¶ 13.
[18] Trial Stipulations, ¶ 9.
[19] Trial Stipulations, ¶ 12, Defs. Ex. B.
[20] Trial Stipulations, ¶ 3.
[21] Trial Stipulations, ¶ 5.
[22] Trial Stipulations, ¶ 6.

time that he was hospitalized.[23] However, they disagree regarding the degree of harm that malnutrition caused Z.F.

The state's expert, Dr. Kathi Makoroff, is a pediatrician who is board certified in child abuse pediatrics.[24] She presently practices at the Mayerson Center for Safe and Healthy Children and is an Associate Professor of Pediatrics.[25] Dr. Makoroff found that the defendants' neglect caused Z.F.'s failure to thrive. Dr. Makoroff found Z.F.'s low head circumference growth to be concerning because brain growth is often equated with a person's abilities and development, some of which cannot be remedied once a child regains weight and nutrition. Dr. Makoroff opined that Z.F. is developmentally behind in gross motor skills because he is not walking independently or running. She testified to a reasonable degree of medical probability that Z.F.'s failure to thrive has caused his motor delays. However, she acknowledged that often other causes for developmental delay can become apparent as a child continues to grow. Although nothing in Z.F.'s medical records indicated another cause for his motor delays, Dr. Makoroff noted that not all possible causes had been ruled out. For instance, no genetic testing had been done.

Dr. Makoroff also found to a reasonable degree of medical probability that Z.F. would have suffered acute or severe pain at some point between ages three and seven months old. According to Dr. Makoroff, he would have suffered prolonged pain during that same time frame for days and weeks at a time.

The defendant Michael Fitzgerald's expert, Dr. Lisa Prock, is the associate medical director and developmental behavior pediatrician at the Medicine Center

[23] State's Ex. 15, Defs. Exs. B, E.
[24] State's Ex. 14.
[25] State's Ex. 14.

Boston Children's Hospital.[26] She is also an Assistant Professor of Pediatrics at Harvard Medical School and is board certified in developmental behavioral pediatrics.[27] Dr. Prock found that there were no medical reasons for Z.F.'s failure to thrive, and that he was only gaining about one quarter of the weight that he was expected to gain from three to seven months of age. She opined that Z.F.'s case is consistent with malnutrition from neglect, as Z.F. was able to regain weight and eventually reached the 75th percentile for weight once he was provided adequate nutrition.

Dr. Prock believes that Z.F. would have suffered hunger pains and been very uncomfortable. Because he was chronically malnourished, she could not state within a reasonable degree of medical probability that Z.F. would have suffered acute pain. Dr. Prock acknowledged that it can be difficult to know if an infant is in pain because an infant cannot speak. She further testified that she could not give an opinion to as to whether Z.F. would suffer from long term developmental problems secondary to his failure to thrive diagnosis.

The defendant Kaili Fitzgerald's expert, Dr. David Roer, is a general pediatrician at the Children's Medical Center in Dayton, Ohio.[28] As with the other experts, Dr. Roer concurs that Z.F.'s failure to thrive derives from inadequate nutritional intake and that Z.F. went for long periods of time without adequate intakes. Dr. Roer opined that Z.F. will not suffer any long term serious harm.[29] He highlights that once Z.F. was given adequate nutrition, he reached the 74th percentile for weight at his 12 month exam.[30]

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[26] Defs. Exs. A-B.
[27] Defs. Exs. A-B.
[28] Defs. Ex. D.
[29] Defs. Ex. E.
[30] Defs. Ex. E.

Dr. Roer also opined in his report that Z.F. will have no permanent developmental delays, noting that although at Z.F.'s 11 to 12 month exam he was diagnosed with mild delay, Z.F. has normal tone and strength, and he babbles, pulls up, and waves, all of which indicate that his development is improving towards normal expectations.[31] At trial, Dr. Roer could not offer an opinion to a reasonable degree of medical probability as to whether Z.F.'s motor delays resulted from failure to thrive. He explained that there can be multiple factors for motor delays, including genetic reasons. Finally, Dr. Roer testified that, based on Z.F.'s presentation, Z.F. did not suffer any acute or long term pain.

LEGAL ANALYSIS

Ohio law prohibits the endangerment of children in R.C. 2919.22(A), which provides, in pertinent part: "No person, who is the parent * * * of a child under eighteen years of age * * *, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

A "substantial risk" is defined in R.C. 2901.01(A)(8) as "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."[32] Moreover, the culpable mental state for child endangerment is recklessness.[33] A person is reckless when "with heedless indifference

[31] Defs. Ex. E.
[32] *State v. Clopton*, 8th Dist. Cuyahoga No. 95297, 2011-Ohio-2392, ¶ 11.
[33] *State v. Lott*, 135 Ohio App.3d 198, 202, 733 N.E.2d 321 (11th Dist. 1999).

to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature."[34]

The defendants have already stipulated to facts that satisfy elements for child endangerment under R.C. 2919.22(A): (1) the defendants are the biological parents to Z.F.,[35] and were Z.F.'s primary caregivers,[36] (2) the defendants owed Z.F. a duty of care, protection, and support,[37] (3) the defendants recklessly violated this duty of care, protection, and support,[38] and (4) the defendants created a substantial risk to Z.F.'s health and safety by equally contributing to Z.F.'s failure to thrive diagnosis when they failed to provide Z.F. with sufficient nourishment.[39]

Generally, a violation of the child endangerment statute is a first degree misdemeanor.[40] However, when a violation results in "serious physical harm" to the child, a child endangerment offense becomes a third degree felony.[41] The central issue is whether the defendants caused Z.F. "serious physical harm." "Serious physical harm" is defined as any of the following:

> "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

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[34] Id. quoting *State v. McGee*, 79 Ohio St.3d 193, 680 N.E.2d 975, (1997), at the syllabus.
[35] Trial Stipulations, ¶¶ 1-2, 15.
[36] Trial Stipulations, ¶ 13.
[37] Trial Stipulations, ¶ 3.
[38] Trial Stipulations, ¶ 5.
[39] Trial Stipulations, ¶¶ 6, 9.
[40] R.C. 2919.22(E)(2).
[41] Id.

> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."[42]

Courts have observed that the "degree of harm that rises to [the] level of 'serious' physical harm' is not an exact science, particularly when the definition includes such terms as 'substantial,' 'temporary,' 'acute,' and 'prolonged.'" [43] As such, courts are "mindful of the fact" that serious physical harm has "historically" been given a "liberal interpretation."[44]

Numerous courts, including the Twelfth District Court of Appeals, consider whether a victim received medical treatment when analyzing an injury for serious physical harm: "courts have found there was 'serious physical harm' where the injuries caused the victim to seek medical treatment."[45] Nevertheless, even when a victim

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[42] R.C. 2909.01(A)(5).

[43] *State v. Sharp*, 12th Dist. No.CA2009-09-236, 2010-Ohio-3470, ¶ 11, quoting *State v. Irwin*, 7th Dist. Mahoning No. 06 MA 20, 2007-Ohio-4996, ¶ 37. *See State v. Henry*, 8th Dist. No. 102634, 2016-Ohio-692, ¶ 40 (holding same).

[44] *Henry*, 2016-Ohio-692 at ¶ 41, citing *State v. Davis*, 9th Dist. Cuyahoga No. 81170, 2002-Ohio-7068, ¶ 20.

[45] *Sharp*, 2010-Ohio-3470 at ¶ 11. *See State v. Tolle*, 12th Dist. Clermont No. CA2014-06-042, 2015-Ohio-1414, ¶ 12, citing *State v. Lee*, 8th Dist. Cuyahoga No. 82326, 2003-Ohio-5640, ¶ 24 ("However, '[w]here injuries to the victim are serious enough to cause him to see medical treatment, the finder of fact may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5).'"); *State v. Redman*, 3d Dist. Allen No. 1-15-54, 2016-Ohio-860, ¶ 25, quoting *State v. McCoy*, 10th Dist. Franklin No. 99AP-1048, 2000 WL 1262632, *2 (Sept. 7, 2000) ("When a victim's injuries are serious enough to cause [her] to seek medical treatment, the jury may infer that the victim suffered serious physical harm."); *State v. Scott*, 4th Dist. Washington No. 15CA2, 2015-Ohio-4170, ¶ 23, quoting *State v. Muncy*, 4th Dist. Scioto No. 11CA3434, 2012-Ohio-4563, ¶ 23 (finding that serious physical harm has been shown when a victim seeks medical treatment for his or her injuries); *State v. Soller*, 11th Dist. Ashtabula No. 2014-A-0034, 2015-Ohio-635, ¶ 28, quoting *State v. Bowden*, 11th Dist. Ashtabula No. 2013-A-0040, 2014-Ohio-158 (noting that it is "well-established that [serious physical harm] may be inferred '[w]here injuries to the victim are serious enough to cause him or her to seek medical treatment.'"); *State v. Lee*, 6th Dist. Lucas, No. L-06-1384,

receives medical treatment, that fact "does not alone 'substantiate [ ] an inference that the victim suffered serious physical harm' and although '[t]he inference derived from a victim seeking medical treatment is a proper factor to consider,' it is 'not a dispositive one.'"[46] Therefore, in order for harm to constitute "serious physical harm" within the meaning of the statute, "it must fall within at least one of the five categories enumerated in R.C. 29-1.01(A)(5)(1)-(e)."[47]

The Eighth District Court of Appeals addressed a similar failure to thrive situation in *State v. Clopton*, 8th Dist. Cuyahoga No. 95297, 2011-Ohio-2392. In *Clopton* the defendant was found guilty of third degree child endangerment for causing the minor victim to suffer serious physical harm.[48] The minor victim suffered from failure to thrive and was only at the three percent growth curve for her age.[49] The minor victim was admitted to the hospital, where the doctors were unable to find any medical explanations for her malnourishment.[50] Once the child was given regular nourishment at the hospital, she began gaining weight appropriately.[51] A jury found the defendant guilty of child endangerment in violation of R.C. 2919.22(A). The jury also found that

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2008-Ohio-253, ¶ 30, quoting *Lee*, 2003-Ohio-5640 at ¶ 24 ("Ohio appellate courts have held that '[w]here injuries are serious enough to cause [the victim] to see medical treatment, the finder of fact may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5)."); *State v. Drew*, 10th Dist. Franklin No. 07AP-467, 2008-Ohio-2797, citing *State v. McCoy*, 10th Dist. Franklin No. 99AP-1048 (noting that a jury may infer that the victim suffered serious physical harm when the victim sought medical treatment); *State v. Sales*, 9th Dist. Summit No. 25036, 2011-Ohio-2505, ¶ 19, citing *Lee*, 2008-Ohio-253 at ¶ 30 (stating that serious physical harm may be inferred when the victim has injuries serious enough to seek medical treatment); *Davis*, 2002-Ohio-7068 at ¶ 20 (noting that "a [trier of fact] does not err in finding serious physical harm where the evidence demonstrates the victim sustained injuries necessitating medical treatment.").

[46] *Henry*, 2016-Ohio-692 at ¶ 41, quoting *State v. Clopton*, 8th Dist. Cuyahoga No. 95297, 2011-Ohio-2392, ¶¶ 14-16.

[47] *Henry*, 2016-Ohio-692 at ¶ 41.

[48] *Clopton*, 2011-Ohio-2392 at ¶ 1.

[49] Id. at ¶ 3.

[50] Id. at ¶ 4.

[51] Id.

the defendant had caused the victim serious physical harm, and thus the defendant's violation was a third degree felony.[52]

The appellate court observed that the fact finder may infer that an injury constitutes "serious physical harm" when the victim had to seek medical treatment.[53] Even so, the court was clear that "standing alone," medical treatment is insufficient for the fact finder to find serious physical harm.[54] Rather, medical treatment "is a proper factor consider, not a dispositive one."[55]

In holding that the failure to thrive diagnosis and subsequent hospitalization satisfied the requisites of a felony conviction, the Eighth District Court of Appeals noted the following facts: the child's failure to thrive diagnosis resulted from not being fed, the child was treated at the hospital for over a week, and the defendant failed to ensure that the child was being monitored for her low birth weight.[56] Although the court ultimately found these facts sufficient to satisfy the requirements for "serious physical harm," it never identified which of the five subparts in R.C. 2901.01(A)(5)(a)-(e) were met.

Other courts that have dealt with malnourishment, however, have identified specific factors from R.C. 2901.01(A)(5)(a)-(e) when finding that "serious physical harm" existed. For instance, *State v. Lott*, 135 Ohio App.3d 198, 733 N.E.2d 321 (11th Dist. 1999), involved a defendant who had been convicted of third degree felony child endangerment under R.C. 2919.22(E)(2). The state argued that the child suffered

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[52] Id. at ¶ 11.
[53] Id. at ¶ 13.
[54] Id. at ¶ 14.
[55] Id.
[56] Id. at ¶ 21.

serious physical harm because she was severely malnourished and consequently suffered from hypokalemia.[57]

The defendant countered that, because the victim only needed "nutritional adjustments" to alleviate her condition, she did not satisfy any of the subparts in the "serious physical harm" definition in R.C. 2901.01(A)(5). The child's treating doctor had testified that there was a substantial risk of death without immediate treatment because the child's potassium levels had dropped so low.[58] As such, the appellate court concluded that the victim's condition satisfied R.C. 2901.01(A)(5)(b), which applies to serious harm that carries a substantial risk of death.[59]

Moreover, the court also highlighted additional evidence that supported the defendant's felony conviction.[60] The 22 month old victim weighed the equivalent of a seven month old at the time of her hospital admission, and the child had missed several checkups since her birth.[61] Accordingly, the court affirmed the defendant's conviction of felony child endangerment.[62]

Another child endangerment case stemming from malnutrition is *State v. Willingham*, 100 Ohio App.3d 326, 653 N.E.2d 1252 (2d Dist. 1995). In *Willingham* the defendant argued that the state failed to prove "serious physical harm" to support his felony conviction.[63] The child victim was extremely malnourished and suffered from marasmus, which is a state of progressive emaciation resulting from malnutrition.[64] The

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[57] *Lott*, 135 Ohio App.3d at 203.
[58] *Lott*, 135 Ohio App.3d at 204.
[59] Id.
[60] Id.
[61] Id.
[62] Id.
[63] *State v. Willingham*, 100 Ohio App.3d 326, 653 N.E.2d 1252 (2d Dist. 1995).
[64] Id. at 326.

court found that such disease satisfied the "broad statutory definition" of "serious physical harm," without identifying which subpart of R.C. 2901.01(A)(5)(a)-(e) was satisfied.[65] The court did make the observation that "common experience proves that undernourishment might have a more devastating effect upon a child than a black eye."[66]

In the instant case, the state argues that Z.F.'s injuries satisfy nearly all categories of serious physical harm listed in R.C. 2901.01(A).[67] The state argues that the strongest match is with subpart (A)(5)(a) which defines serious physical harm as "[a]ny mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment." The state posits that, because Z.F. was hospitalized for failure to thrive, which is "a condition," subpart (A)(5)(a) is satisfied. The defendants counter that subpart (A)(5)(a) only applies to mental illnesses or mental conditions.

In response, the state highlights the case of *State v. Clopton*, 8th Dist. Cuyahoga No. 95297, 2011-Ohio-2392, discussed above. The defendant in *Clopton* was found to have inflicted serious physical harm on a child who suffered from failure to thrive and had to undergo hospitalization.[68] However similar to this case, the *Clopton* court never indicates whether subpart (A)(5)(a) is satisfied, and it does not state whether subpart (A)(5)(a) can apply to non-mental health related conditions. The *Clopton* court explains

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[65] Id.
[66] Id. *See State v. Rockwell*, 80 Ohio App.3d 157, 608 N.E.2d 1118 (10th Dist. 1992) (finding that a child suffered from serious physical harm when she had facial bruises and had not been fed adequate food for a significant period of time).
[67] All parties agree, however, that R.C. 2909.01(A)(5)(d) is inapplicable, which defines serious physical harm as "* * * [a]ny harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement * * *."
[68] *Clopton*, 2011-Ohio-2392 at ¶ 21.

that when a victim seeks medical treatment for an injury, it is reasonable to infer that the injury was a form of serious physical harm, which is a proposition that numerous other districts agree upon.[69]

In the case at bar, Z.F. was hospitalized for his failure to thrive, and this court agrees that it may consider this as a factor in its "serious physical harm" analysis. However, as other courts, including *Clopton*, have acknowledged, Z.F.'s injuries must still satisfy one of the specifically enumerated subparts under subpart (A)(5)(a)-(e).[70] Therefore, the court will bear the fact that Z.F. spent six days in the hospital in mind, but this fact, standing alone, is insufficient to satisfy subpart (A)(5)(a), which is limited to a "mental illness or condition."

The state also argues that R.C. 2901.01(A)(5)(b) is satisfied, which defines serious physical harm as "[a]ny physical harm that carries a substantial risk of death." While the experts acknowledged that failure to thrive can eventually lead to death, all testified that as of January 9, 2015, Z.F. was not at a substantial risk of death. A "substantial risk" is defined in R.C. 2901.01(A)(8) as "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."[71] The court does not find that Z.F. was at risk of a "strong possibility" of death at the time of his hospitalization.

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[69] *Clopton*, 2011-Ohio-2392 at ¶ 13. *See Sharp*, 2010-Ohio-3470 at ¶ 11; *Tolle*, 2015-Ohio-1414 at ¶ 12, citing *Lee*, 2003-Ohio-5640 at ¶ 24; *Redman*, 2016-Ohio-860 at ¶ 25, quoting *McCoy*, 2000 WL 1262632 at *2; *Scott*, 2015-Ohio-4170 at ¶ 23, quoting *Muncy*, 2012-Ohio-4563 at ¶ 23; *Soller*, 2015-Ohio-635 at ¶ 28, quoting *Bowden*, 2014-Ohio-158; *Lee*, 2008-Ohio-253 at ¶ 30 quoting *Lee*, 2003-Ohio-5640 at ¶ 24; *Drew*, 2008-Ohio-2797, citing *McCoy*, 2000 WL 1262632 at *2; *Sales*, 2011-Ohio-2505 at ¶ 19, citing *Lee*, 2008-Ohio-253 at ¶ 30; *Davis*, 2002-Ohio-7068 at ¶ 20.

[70] *Clopton*, 2011-Ohio-2392 at ¶ 14.

[71] Id. at ¶ 11.

The state's third argument is that R.C. 2901.01(A)(5)(c) is met, which defines a serious physical harm as "[a]ny physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity." The state argues that Z.F.'s motor delays are caused by his failure to thrive, and thus he has suffered some form of incapacity.

The state's expert, Dr. Makoroff opined that Z.F. is developmentally delayed in gross motor skills because he is not walking independently or running. She testified to a reasonable degree of medical certainty that Z.F.'s failure to thrive has caused his motor delays. However, she acknowledged that often other causes for developmental delay can become apparent as a child continues to grow. Although nothing in Z.F.'s medical records indicated another cause for his motor delays, Dr. Makoroff noted that not all possible causes had been ruled out. For instance, no genetic testing had been done.

Dr. Prock, who is the expert for the defendant Michael Fitzgerald, testified that she could not be certain as to whether Z.F. would suffer from long term developmental problems in the future as a result of his failure to thrive. Of note, she is the only one of the three experts certified in developmental behavioral pediatrics.

Similarly, the defendant Kaili Fitzgerald's expert, Dr. Roer, testified that he could not offer an opinion to a reasonable degree of medical certainty as to whether the motor delays that Z.F. has suffered resulted from his failure to thrive. He explained that there can be multiple factors for motor delays, including genetic reasons, and those reasons have not been ruled out for Z.F. Upon reviewing the conflicting expert testimony, the

court cannot find that Z.F.'s failure to thrive caused him any permanent incapacity or some temporary, substantial incapacity.

Even if it was clear that Z.F.'s failure to thrive did cause his current motor delays, it is unclear whether his delays would be permanent. Both his medical records and the experts suggest that Z.F. has been making substantial progress through his physical therapy and is getting closer to exhibiting appropriate motor skills for his age.

Moreover, it is likewise difficult to conclude that Z.F.'s motor delays were a "temporary, substantial incapacity." It is not the case that Z.F. had certain motor skills and then temporarily lost them because he was malnourished. For example, it would be clear that a child suffered a temporary but substantial incapacity if the child was a three year old who became malnourished to the point where he could not walk for a time period. The three year old child had an ability, walking, which he lost. But for Z.F., he never had an ability to walk. Rather, in his case, walking is a skill he should have developed sooner, but did not. Under these circumstances it would be difficult to conclude that Z.F.'s delayed skills are a substantial incapacity. In sum, the court finds that Z.F.'s harm does not meet the requirements in R.C. 2901.01(A)(5)(c) for an incapacity.

Finally, the state argues that Z.F.'s harm falls under R.C. 2901.01(A)(5)(e), which defines serious physical harm as "[a]ny physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." The experts disagreed as to whether Z.F. would have suffered pain.

Dr. Makoroff testified that, as an infant being starved, Z.F. would have felt pain in his stomach. She opined, that to a reasonable degree of medical probability, Z.F. would

have suffered acute or severe pain at certain points from age three to seven months, and he would have suffered prolonged pain for periods of days or even weeks.

Dr. Prock testified that Z.F. would have been highly uncomfortable, but not in acute pain, and she could not conclude whether he suffered. She explained that chronic malnutrition can cause fatigue, nausea, low blood sugar, and in some cases (but not Z.F.'s) joint, muscle, and mouth pain. Similarly, Dr. Roer testified that Z.F. would not have suffered pain. He defined acute pain as pain caused by something physical, like a trauma, that would cause the person to suffer physical pain. As an example he cited appendicitis. He concluded that Z.F. would not have experienced pain.

R.C. 2901.01 does not include a definition for "pain." "Where a particular term employed in a statute is not defined, it will be accorded its plain, everyday meaning."[72] Merriam Webster's Dictionary defines pain as "usually localized physical suffering associated with bodily disorder (as a disease or an injury); also: a basic bodily sensation induced by a noxious stimulus, received by naked nerve endings, characterized by physical discomfort (as pricking, throbbing, or aching), and typically leading to evasive action."[73]

Based on the expert testimony and evidence presented, the court finds that Z.F. did suffer "serious physical harm." Although all the experts were amply qualified, Dr. Makoroff was the only doctor board certified in child abuse pediatrics, which is particularly well suited to this case.[74] The court finds her testimony that Z.F. would have

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[72] (Citation omitted.) *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, 882 N.E.2d 899, ¶ 29

[73] Merriam Webster's Dictionary, *Pain*, available at http://www.merriam-webster.com/dictionary/pain (accessed Apr. 22, 2016).

[74] State's Ex. 14.

endured prolonged periods of pain due to starvation credible. It is difficult to fathom that a young infant would not undergo long periods of suffering if he was only fed enough to gain a mere one quarter of the weight he should have gained during a four month span. Although the pain may not have been acute, like appendicitis or a physical trauma, Dr. Makoroff's testimony that it would have lasted for days and weeks at a time supports a finding that the pain was "prolonged or intractable."

Further supporting the conclusion that Z.F. suffered serious physical harm is the fact that he required medical care due to malnutrition and dehydration. As discussed, the victim's injury is more likely a form of serious physical harm when medical treatment was necessary.[75]

Additionally, the present case involves multiple facts that other courts have deemed significant when they concluded that a child's malnourishment constituted a "serious physical injury": Z.F.'s weight was below the third percentile of infants his age on the growth curve at the time he was hospitalized,[76] Z.F.'s failure to thrive diagnosis resulted from his caregivers not feeding him,[77] Z.F. required six days of hospitalization,[78] and the defendants failed to take Z.F. to several checkups prior to his hospitalization.[79] In light of these additional facts, Dr. Makoroff's expert testimony concluding that Z.F. suffered prolonged pain, and the fact that serious physical harm has "historically" been given a "liberal interpretation,"[80] the court finds that Z.F. suffered serious physical harm within the meaning of R.C. 2901.01(A)(5). Because the

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[75] *See Clopton*, 2011-Ohio-2392 at ¶ 21.
[76] In *Clopton*, 2011-Ohio-2392 at ¶ 1, the victim was at the third percent on the growth curve for children her age.
[77] *See* id. at ¶ 21.
[78] *See* id. The victim in *Clopton* spent 10 days at the hospital.
[79] *See Lott*, 135 Ohio App.3d at 204.
[80] *Henry*, 2016-Ohio-692 at ¶ 41, citing *Davis*, 2002-,-7068 at ¶ 20.

defendants' violation resulted in serious physical harm, their violation of R.C. 2919.22(A) is a third degree felony.

CONCLUSION

Based on the foregoing findings and analysis, the court finds that the state has proven the guilt of each of the defendant beyond a reasonable doubt as to the offense of child endangerment, a violation of R.C. 2919.22(A). Because the defendants' violation of 2919.22(A) resulted in serious physical harm to Z.F., their violation is a third degree felony.

A presentence investigation shall be conducted by the Probation Department. The defendants shall promptly report to the Probation Department in order to schedule their presentence interviews and shall cooperate with the Probation Department in the presentence investigation. The sentencing hearing for each defendant will be held on June 1, 2016 at 8:00 a.m. The defendants' bonds shall remain the same pending sentencing.

IT IS SO ORDERED.

DATED: 5-2-16

Judge Jerry R. McBride