

IN THE SUPREME COURT OF OHIO

Mary J. Manley

Plaintiff-Appellee

v.

Nicholas P. Marsico, M.D.,

Defendant-Appellant

and

Eye Specialists, Inc.

Defendant-Appellee

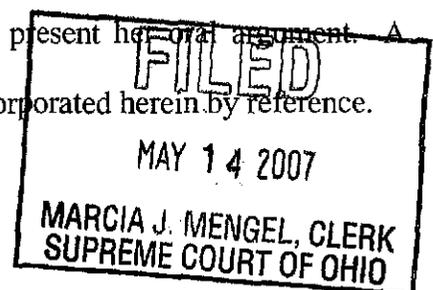
Case Number: 2006-1263

Discretionary Appeal from the Clinton County
Court of Appeals, Twelfth Appellate District

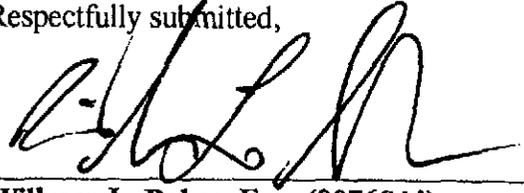
(Court of Appeals No. CA2006-04-013)

PLAINTIFF-APPELLEE MARY J. MANLEY'S
MOTION FOR ADDITIONAL TIME TO PRESENT ORAL ARGUMENT

Now comes Plaintiff-Appellee Mary J. Manley ("Ms. Manley"), by and through her undersigned counsel and hereby moves this Court, pursuant to S. Ct. Prac. R. IX, Section 5(B), for an order to allow Ms. Manley's counsel a full fifteen (15) minutes to present her oral argument scheduled for May 24, 2207 at 9:00 a.m. As grounds for this motion, Ms. Manley submits that sharing her oral argument time with counsel for Eye Specialists, Inc., an Appellee by default, is highly prejudicial to her case as Eye Specialists has the direct opposite argument from Ms. Manley. Eye Specialists should not be able to utilize Ms. Manley's time to present an oral argument that is essentially the same as the Appellant's, Nicholas P. Marsico, M.D. Ms. Manley should not be punished by having to share her 15 minutes of oral argument time because Eye Specialists failed to perfect their appeal. Accordingly, Plaintiff-Appellee Mary J. Manley respectfully requests that she be permitted a full 15 minutes to present her oral argument. A Memorandum in Support of this Motion is attached hereto and incorporated herein by reference.



Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of the forgoing has been delivered via ordinary U.S. Mail and E-mail this day, May 11, 2007, to:

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MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

This discretionary appeal arises from Plaintiff-Appellee Mary Manley's (hereinafter "Ms. Manley") January 12, 2006 re-filed Complaint which alleged medical malpractice against Dr. Nicholas P. Marsico (hereinafter "Dr. Marsico") and Eye Specialists, Inc. (hereinafter "ESI") in the Common Pleas Court of Clinton County, Ohio. In short, at first, Ms. Manley's Complaint did not contain affidavits of merit pursuant to Civ. R. 10(D)(2). However, only two weeks after the Complaint was filed, Ms. Manley filed a Motion for leave to file the affidavits of merit *instanter*. During that same period of time, Dr. Marsico and ESI filed motions to dismiss the Complaint and motions to strike the affidavits of merit alleging that they did not comply with Civ. R. 10(D)(2). The trial court granted the motion for leave to file the affidavits of merit *instanter* and denied Dr. Marsico's and ESI's motions to dismiss and motions to strike.

Dr. Marsico filed a notice of appeal to the Twelfth District Court of Appeals. However, on May 17, 2006, the Twelfth District Court of Appeals, *sua sponte*, dismissed Dr. Marsico's appeal, finding that it did not have jurisdiction to hear the appeals as the trial court's entry was not a final appealable order. Interestingly, there is no mention of ESI filing a notice of appeal.

On June 30, 2006, Dr. Marsico filed a discretionary appeal to this Court. Notably, ESI did not file a notice of appeal. On October 4, 2006, this Court exercised discretionary jurisdiction over the issue of whether there was a final appealable order. Dr. Marsico filed his brief on December 12, 2006. Although ESI did not appeal to this Court, it filed a Merit Brief claiming it was an "Appellant" although admitting in its brief that the appeal that it was a discretionary appeal filed only by Dr. Marsico. Since Dr. Marsico and ESI were both defendants in the lower court their causes of action and the arguments utilized in the briefs are essentially identical.

Ms. Manley filed her brief on February 1, 2007. Thereafter, on February 20, 2007, Dr. Marsico filed their respective reply briefs. However, on March 1, 2007, sua sponte, this Court struck ESI's reply brief finding that ESI did not perfect an appeal to this Court pursuant to S.Ct.Prac.R. II(2)(A)(1)(a) and is therefore not considered an appellant. As such, by its own default, ESI is considered an appellee. Because ESI did not perfect an appeal, it is considered an "appellee" and S.Ct.Prac.R. IX(5)(A) indicates that parties shall share the time allotted per side, as appellants and appellees, respectively. However, ESI has the *same exact position on the appealed issues* as Dr. Marsico and the *direct opposite position on the issues* of Ms. Manley. Consequently, Ms. Manley is now forced to share her 15 minutes of oral argument with ESI because it is by virtue of failing to perfect an appeal, an appellee.

ESI has requested by telephone that Ms. Manley split her time and provide ESI with exactly half of the time allotted. However, this essentially would be providing two defendants, one as appellant and one as an appellee, with 22 and ½ minutes of argument time to make essentially the same argument while Ms. Manley is left with only 7 and ½ minutes of argument, or just one fourth of the allotted time for oral argument to be heard. Accordingly, Ms. Manley respectfully requests, pursuant to S.Ct.Prac.R. IX(5)(B) that this Court vary the time for oral argument for Ms. Manley and allow her counsel to have its full 15 minutes to argue this discretionary appeal.

II. LAW AND ARGUMENT

The Supreme Court of Ohio practice rules indicate that by motion a party may request that the Supreme Court vary the time for oral argument permitted. S.Ct.Prac.R. IX(5)(B) states in pertinent part, the following:

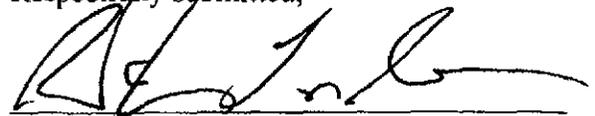
- (B) Either sua sponte or upon motion, the Supreme Court may vary the time for oral argument permitted by this section. Motions to vary time for oral argument shall be filed at least ten days before the date scheduled for oral argument.

As such, this Court may vary the time for oral argument. In this case, Ms. Manley recognizes that where there are multiple parties per side, the parties must share the time allotted to each side. However, this case is unique in that it presents with a defendant essentially being part of plaintiff's side solely by default because that defendant did not perfect an appeal. The briefs of Dr. Marsico and ESI are essentially the same. If ESI would have perfected its appeal, it would have been on the same grounds as those of Dr. Marsico in his perfected appeal. The motions to dismiss and motions to strike were virtually identical. As such, there is no doubt that Ms. Manley is prejudiced if her counsel can only present a 7 and ½ minute argument to counter the arguments of defendants, one as appellant and one as an appellee, where defendants' arguments are essentially the same and currently represent 22 and ½ minutes, or three fourths of the time allotted for oral argument.

III. CONCLUSION

For the forgoing reasons, Ms. Manley respectfully requests that this Court order an equitable adjustment in the time allotted by default such that Ms. Manley will be allowed to present a full 15-minute oral argument, which will represent the only oral argument in support of her position.

Respectfully submitted,



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