
In the Supreme Court of Ohio

KENNETH D. McFADDEN,

Plaintiff-Appellant,

v.

CLEVELAND STATE UNIVERSITY,

Defendant-Appellee.

CLAIMED APPEAL OF RIGHT AND DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO
CASE No 06AP-638

APPELLANT'S MOTION FOR RECONSIDERATION

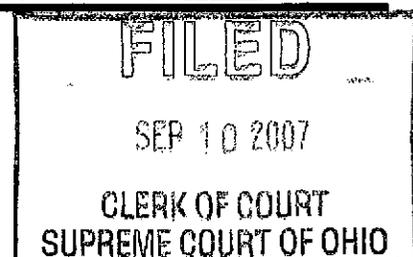
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I.

MOTION FOR RECONSIDERATION

Pursuant to Supreme Court Practice Rule XI, §2(A)(1), Plaintiff-Appellant Kenneth D. McFadden (“McFadden”) moves the Court for reconsideration of its order, journalized on August 29, 2007, in which the Court declined jurisdiction to hear this case and consequently dismissed his appeal. By a narrow majority, this Court voted to decline jurisdiction, although three Justices would have accepted jurisdiction over the appeal.¹ McFadden respectfully requests that the Court reconsider its decision and accept jurisdiction to review the case.

Permitting the Tenth Appellate District’s decision to stand in this case will allow all appellate districts in Ohio to ignore this Court’s express directive that “[a]ppellate courts are duty-bound to resolve conflicts within their respective appellate districts through en banc proceedings.” *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, syllabus paragraph two. Appellate courts are “duty-bound” to convene en banc proceedings whenever a conflict develops within that respective appellate district. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, at ¶40.

¹ Chief Justice Moyer and Justices Pfeifer and Cupp dissented from the order declining jurisdiction. See, *08/29/2007 Case Announcements*, 2007-Ohio-4285, at 18.

II.

ARGUMENT IN SUPPORT OF RECONSIDERATION

McFadden is mindful and respectful of this Court's clear admonition that its Rules of Practice do not permit motions for reconsideration to simply rehash arguments already advanced in the case. S.Ct.Prac.R. XI(2)(A). See also, *State ex rel. Shemo v. City of Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, ¶ 9, 24, *cert. denied sub nom. City of Mayfield Heights v. Shemo* (2003), 538 U.S. 906. With that in mind, this motion endeavors not to do so.² Rather, it is McFadden's intention in seeking reconsideration of the Court's declination of jurisdiction to bring to the collective attention of the justices certain facts and circumstances that were not immediately known or available at the time of his filing the Memorandum in Support of Jurisdiction and, thus, were not likely considered by the Court. It is McFadden's sound belief that once they are taken into account – in conjunction with a reevaluation of the arguments already advanced before this Court in support of jurisdiction – that the four justices who originally voted to not

² Two propositions of law were advanced by McFadden in his Memorandum in Support of Jurisdiction. In the interest of convenience, they are repeated here:

Proposition of Law No. I: An appellate court's convening of an en banc proceeding to resolve an intra-district conflict in the case law of that appellate district on an issue of law does not violate Section 3(A), Article IV of the Ohio Constitution.

Proposition of Law No. II: An appellate court abuses its discretion by erroneously denying an App.R. 26(A) application for reconsideration seeking en banc review of a conflict on an issue of law in the case law of that appellate district.

Having no apparent quarrel with either proposition of law, the Attorney General, representing Defendant-Appellee Cleveland State University, waived filing a memorandum opposing the Court's acceptance of jurisdiction over the appeal to resolve either proposition of law.

hear this appeal will, upon further reflection, find that this appeal is one of substantial constitutional import and that the issues raised are of public or great general interest to the stable and predictable development of the law in all twelve appellate districts in Ohio.

“[C]ourts of appeals are required to follow the law as it is interpreted by this court.” *Mannion v. Sandel*, 91 Ohio St.3d 318, 322, 2001-Ohio-47. Well-established as that sound principle may be, as the outcome in this particular case demonstrates, that is not what has happened in connection with this Court’s *In re J.J.* decision. What makes reconsideration not only appropriate but absolutely essential in this case is that the Tenth Appellate District is not the only appellate district to have been aware of *In re J.J.* yet refused to follow the express and clear dictate of this Court that intra-district conflicts are to be resolved through en banc proceedings. Declining jurisdiction over this appeal will not just bring to an end this case but, in doing so, will leave the courts of appeals, attorneys and litigants in complete and utter limbo as to whether en banc proceedings are constitutional. If jurisdiction is denied, it will be more likely than ever before that Ohio’s appellate courts will, despite *In re J.J.* and *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, at ¶40, refuse to convene en banc proceedings to resolve intra-district conflicts on issues of law.

Since McFadden filed his Notice of Appeal to this Court, the Tenth Appellate District’s opinion casting serious doubt on the constitutionality of the en banc procedure has been officially reported.³ See, *McFadden v. Cleveland State Univ.*, 170 Ohio App.3d

³ While the previous precedential distinction made between reported and unreported (continued...)

142, 2007-Ohio-939. And, while this Court's decision declining to hear a discretionary appeal may not constitute an official affirmance of the judgment below, *Keesecker v. G. M. McKelvey Co.* (1943), 141 Ohio St. 162, paragraph three of the syllabus, nonetheless the denial of jurisdiction here creates at the very least the appearance that the Court has put its imprimatur upon the Tenth Appellate District's refusal to conduct an en banc proceeding due, in part, to the expressed view that "the use of en banc proceedings would violate the Ohio Constitution." *McFadden*, at ¶8, citing *Schwan v. Riverside Methodist Hosp.* (Feb. 25, 1982), Franklin App. No. 81AP-158. If allowed to stand, *McFadden* will, as it already has, permit the easy circumvention of the en banc process in each one of Ohio's other eleven appellate districts – with the possible exception of the Eighth Appellate District⁴ – no matter how serious, disruptive or irreconcilable the intra-district conflict may be. The *McFadden* case and the en banc issue presented by the Tenth District's opinion should be reviewed by the Supreme Court now.

Lest there be any question or doubt as to the actual widespread impact of the *McFadden* opinion upon future efforts to secure en banc review, the Court should be aware that the Ninth Appellate District, expressly in reliance upon *McFadden*, has posited that "while the Supreme Court has opined that intra-district conflicts should be

³(...continued)

opinions may have been abandoned in May 2002, the selection of an appellate opinion for print-publication is done by the Supreme Court Reporter based on the criteria, at least in part, that the opinion "contribute[s] significantly to the development of the law." See, S. Ct. R. Rep. Op. 5(D).

⁴ See, *State v. Lett*, 161 Ohio App.3d 274, 2005-Ohio-2665, rev'd. on other grounds *sub nom. In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, at ¶88, and *State v. Atkins-Boozer*, 8th Dist. No. 84151, 2005-Ohio-2666, rev'd. on other grounds *sub nom. In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, at ¶84.

resolved through en banc proceedings, such a procedure is arguably in tension with the Ohio Constitution.” See, *L.E. Sommer Kidron, Inc. v. Kohler*, 9th Dist. No. 06CA0044, juris. denied, 2007-Ohio-4285⁵ (Apx. at p. 1). The Court of Appeals opinion, if permitted to stand, will be pernicious.

Three justice of this Court have voted to hear this case. The Attorney General filed no memorandum opposing McFadden’s appeal or the two propositions of law being advanced. The Tenth District’s opinion in the case at hand on the en banc procedure is already reported officially. It has not just the potential but in actuality has already become an important and influential precedent in the area of appellate practice, one directly challenging and at odds with this Court’s opinion in *In re J.J.* An inter-district conflict that has developed between the Eighth Appellate District and the Ninth and Tenth Appellate Districts needs to be resolved.

Moreover, the Tenth Appellate District’s opinion unreasonably undermines the important principle that this Court is the ultimate authority of law in the State of Ohio. *Hayes v. State Med. Bd. of Ohio* (2000), 138 Ohio App.3d 762, 769. Ohio’s courts of appeals do not enjoy the privilege of choosing which decisions of the Supreme Court are sufficiently well-reasoned to merit being followed. *Penn Traffic Co. v. Clark Cty. Bd. of Elections* (1999), 138 Ohio App.3d 1, 5. Yet, that is precisely what the Tenth Appellate District has done here. It has served as the legal authority encouraging at least one other appellate district, the Ninth, to do the same. Other appellate districts are sure to follow (if they have not already done so). For this reason alone, McFadden respectfully

⁵ The appeal to this Court in the *Kohler* case did not involve a proposition of law relating to the en banc issue.

urges that this case should be accepted for review.

III.

CONCLUSION

WHEREFORE, Plaintiff-Appellant Kenneth D. McFadden respectfully prays that the Court reconsider its order of August 29, 2007, declining jurisdiction and further prays that the appeal be reinstated and accepted for review.

Date: September 7, 2007.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing *Appellant's Motion for Reconsideration* was sent by regular U.S. Mail, postage pre-paid, this 7th day of September, 2007 to the following:

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APPENDIX

STATE OF OHIO

COUNTY OF WAYNE

FILED
9th DISTRICT
COURT OF APPEALS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2007 APR 2 AM 7 34

L.E. SOMMER KIDRON, INC. & SONS, INC.
CLERK OF COURTS

C.A. No. 06CA0044

Appellee

v.

ROGER KOHLER, et al.

Appellants

JOURNAL ENTRY

Appellees, L.E. Sommer Kidron, Inc. and L.E. Sommer & Sons, Inc., have filed with this Court a motion seeking an en banc hearing, reconsideration, and/or to certify a conflict.

The motions are denied.

With respect to Appellees' motion for an en banc hearing, this Court first notes that no mechanism exists in this district to perform such a review. Moreover, while the Ohio Supreme Court has opined that intra-district conflicts should be resolved through en banc proceedings, such a procedure is arguably in tension with the Ohio Constitution. See *McFadden v. Cleveland State Univ.*, 10th Dist. No. 06AP-638, 2007-Ohio-939, at ¶8.

Assuming arguendo that an en banc proceeding is constitutional, we find no intra-district conflict exists. In the instant matter, we noted as follows:

"Kidron, however, did not move to strike Dr. Olsen's report from the trial court's proceedings, so it was properly before the trial court to consider." *L.E. Sommer Kidron, Inc. v. Kohler*, 9th Dist. No. 06CA0044, 2007-Ohio-885, at ¶19.

Appellees have interpreted this provision to mean that an objection is not sufficient to preserve such an issue for review. That is not the holding in this matter. Assuming arguendo that Appellees' brief in opposition to Appellant's motion for summary judgment

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can be categorized as an "objection" to the admissibility of Appellant's expert's report, the evidence was still properly before the trial court. Appellees' "objection" was never ruled upon the trial court and was therefore presumed to be denied. See *State ex rel. V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469. Appellees did not cross-appeal and assert error in that denial. Accordingly, this Court correctly concluded that Dr. Olsen's report was properly before the trial court. We did not create a requirement that only a motion to strike could be used to preserve an issue for appeal. Furthermore, given that Appellees did not cross-appeal, the issue of whether Appellees preserved such an issue for review was not before this Court.¹ The motion for a rehearing en banc is denied.

In determining whether to grant a motion for reconsideration, a court of appeals must review the motion to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117. Upon review of appellant's motion, we find no obvious error or issue that we did not properly consider.

In their lengthy motion for reconsideration, Appellees have done little more than reiterate the arguments rejected by this Court in our initial decision. Appellees have not asserted that this Court failed to consider an issue or cited to an obvious error of this Court. Rather, they assert that this Court was simply wrong its decision. Accordingly, the motion for reconsideration is denied.

Finally, Appellees have requested that this Court certify a conflict. Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case

¹ We also note that Appellants are correct that a rehearing en banc would be futile herein as three of the five Judges on this Court have already decided this matter in Appellants' favor.

to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596. Further, App.R. 25(A) requires that "[a] motion under this rule shall specify the issue proposed for certification."

In their motion, Appellees proposed for certification the following issue:

"Must a party who seeks damages for exposure to a toxic substance establish the element of causation through expert opinion testimony."

Appellees assert that their decision is in conflict with *Bogner v. Titleist Club, LLC*, 6th Dist. No. WD 06-39, 2006-Ohio-7003, *Alden v. Phifer Wire Prods., Inc.*, 8th Dist. No. 85064, 2005-Ohio-3014, and the Fourth District's decision in *Valentine v. PPG Indus., Inc.*, 158 Ohio App.3d 615, 2004-Ohio-4521.

Initially, we note that each of the cases relied upon by Appellees involve injuries alleged to have resulted in *humans* as a result of toxic substances. The instant appeal involved injury to *property* caused by exposure to a toxic substance. We also note that in *Valentine*, the parties did not dispute that expert testimony was required to prove the plaintiff's case, so such an issue was not before the Court. Furthermore, no case cited by Appellees has held that expert evidence is *always* required to prove causation in a toxic substance case.

As we stated in our decision, "[u]nless a matter is within the comprehension of a layperson, expert testimony is necessary." *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 102. In *Bogner*, the plaintiffs alleged that exposure to mold caused them various medical ailments. Plaintiffs did not identify a specific toxin or submit any evidence of causation. In *Alden*, the plaintiff asserted that he suffered from

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encephalopathy and/or peripheral neuropathy from exposure to toxins that emanated from window shades. Finally, in *Valentine*, the plaintiff asserted that he suffered from "glioblastoma multiforme," a rare form of brain cancer which resulted from exposure to a "toxic brew of chemicals throughout his career." *Valentine*, supra, at ¶4-5. None of those cases can be said to be similar to the matter at hand.

Herein, through admissions, Appellants established that Appellees sold grain which was toxic and unfit for bovine consumption. Appellants also established that hundreds of cattle died after eating this grain. As the facts of these cases are markedly different and the requirement of expert evidence must be decided on a case-by-case basis, we find that no conflict exists.

Appellees' motions are denied.



Judge



Judge