

IN THE SUPREME COURT OF OHIO

Regina Harris, Guardian of the Estate of  
Walter Hollins,

Appellee,

v.

Mt. Sinai Medical Center, et al.,

Appellants.

Case No. 06-1247

On Appeal From the Cuyahoga  
County Court Of Appeals, Eighth  
Appellate District

Court of Appeals Cases No. 85286,  
85574, and 85605 (consolidated)

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APPELLANTS' RESPONSE TO APPELLEE'S MOTION FOR RECONSIDERATION  
AND MOTION FOR STAY PENDING PETITION FOR CERTIORARI TO THE  
UNITED STATES SUPREME COURT

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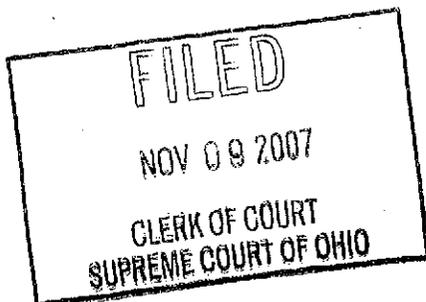
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The Court's rules require that any motion for reconsideration "shall not constitute a reargument of the case." That, however, is all that appellee Regina Harris' motion does. In asking the Court to reconsider its decision on the merits, Harris raises three grounds that were thoroughly addressed in the parties' merit briefs, all but one of which the Court expressly rejected in its opinion. Harris' motion, which merely recycles her previous arguments and offers nothing new to warrant a different result, should be denied because it violates the Court's rule against reargument.

Harris' motion not only ignores the rules; it also lacks support in fact or law. The Court's decision hardly dishonors the right to trial by jury when it requires trial courts to protect the fairness of trials vigorously and holds that a new trial is needed for that reason. The Court's decision hardly rests on the trial judge's alleged biased conclusions when the Court found that competent, credible evidence supports the trial judge's ruling. And the trial judge's communications with defense counsel and, separately, with jurors outside the presence of Harris' counsel, hardly rendered the new trial order void *ab initio* when the governing rules expressly authorize the communication with defense counsel, and the communications with jurors threatened to prejudice the trial proceedings only against *appellants*, not against Harris.

Harris' motion for reconsideration of her recusal motions should be denied because it is not one of the limited types of reconsideration motions the Court's rules permit. Also, this motion seeks not a second, but a third, bite at that apple. Harris twice before has asked members of the Court to recuse themselves on the same grounds she raises now, and the Court members have twice declined her request. Harris offers nothing new the third time around.

The Court should also deny Harris' separately-filed motion to stay the issuance of the Court's mandate pending her anticipated petition for *certiorari*. The resulting delay would make

a new trial, which would center on events that occurred twenty years ago, more difficult, with little chance that the United States Supreme Court would even accept for review, much less reverse, this Court's ruling. And if the United States Supreme Court accepted the case and concluded that a stay of the new trial proceedings were appropriate, then that Court could issue a stay.

**I. Harris' Motion For Reconsideration Violates The Court's Rule Against Reargument.**

Harris offers three grounds for her motion for reconsideration of the Court's decision on the merits: (1) the Court's supposed lack of deference to the jury's verdict; (2) the Court's supposed reliance on the trial judge's allegedly biased views rather than the evidence; and (3) the Court's reinstatement of, and reliance on, the new trial order that was supposedly void *ab initio* for misconduct by the trial judge. (Mot. for Reconsideration at 3-4.) Harris' motion violates the Court's rule against rearguing the case in a reconsideration motion.

While the Court's rules of practice permit motions for reconsideration regarding the "decision on the merits of a case," those same rules forbid motions that "constitute a reargument of the case." S. Ct. R. XI(A). Here, Harris made the same argument she makes now regarding the deference supposedly owed to the jury's verdict (as opposed to that owed to the trial judge's new trial order) on pages twenty-one through twenty-four and twenty-eight of her merit brief. Harris made the same argument she makes now regarding evidence in the record that supposedly supported the jury's verdict and the trial judge's supposed bias on pages one, two, seven through sixteen, twenty-three, twenty-six through twenty-eight, and thirty-four through thirty-six of her merit brief. Harris made the same argument she makes now regarding the trial judge's purported misconduct that supposedly rendered the new trial order void *ab initio* on pages seventeen,

twenty, and twenty-four through twenty-six of her merit brief. Harris' motion for reconsideration should be denied as improper reargument.

With respect to her third ground – the trial judge's supposed misconduct – Harris contends that the Court failed to address this ground in its decision. (Mot. for Reconsideration at 4-5.) The Court's rule against reargument, however, applies with equal force to issues raised in the parties' merit briefs that the Court does not expressly address in its decision. *See State ex rel. Shemo v. City of Mayfield Hts.* (2002), 96 Ohio St.3d 379, 380-81 (denying the portion of a motion for reconsideration asserting that the Court “did not apply . . . the analysis set forth in *Penn Cent. Transp. Co. v. New York*,” because the movants “previously asserted the applicability of the *Penn Cent.* inquiry in their merit brief”).

Harris' motion for reconsideration should be denied because it constitutes improper reargument.

## **II. The Court Correctly Rejected These Arguments The First Time Harris Raised Them.**

Were the Court to consider Harris' reargument, her three grounds lack merit. Harris first contends that the Court's decision –which *orders* a new trial by jury – “does not feign respect for the right to trial by jury.” (Mot. for Reconsideration at 3.) In fact, the Court's decision strongly protects the right to a *fair* trial by jury because it reaffirms a trial court's “duty . . . to see that counsel do not create an atmosphere [at trial] which is surcharged with passion or prejudice and in which the fair and impartial administration of justice cannot be accomplished.” *Harris v. Mt. Sinai Med. Ctr.*, No. 2007-Ohio-5587, Slip op. (“Slip op.”), ¶ 38 (quoting *Pesek v. Univ. Neurologists Assn., Inc.* (2000), 87 Ohio St.3d 495, 501). There is no right to an *unfair* trial by a jury tainted with passion and prejudice caused by counsel's misconduct.

Moreover, the Court's decision is hardly "unprecedented," as Harris contends. (Mot. for Reconsideration at 3.) The Court's opinion faithfully follows well-settled precedent, some of which was established more than one-hundred years ago. See Slip op., ¶ 36 (quoting *Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77). Indeed, every statement of law contained in the Court's opinion reversing the Court of Appeals is supported by a quotation from, or a citation to, an earlier decision of the Court. See *id.* ¶¶ 35-40.

Harris' second ground for reconsideration is the Court's supposed "utter disregard for the overwhelming evidence of liability and damages as set forth in the [trial] transcripts and the exhibits . . . ." (Mot. for Reconsideration at 3.) Harris first contends that the "Court of Appeals majority . . . actually based [its] opinion on the trial transcript," whereas this Court supposedly relied only on facts viewed "through the biased lens of" the trial judge. (*Id.*) Second, because the Court of Appeals majority found evidence supporting the jury's verdict, says Harris, the Court should have affirmed. (*Id.*) Harris is wrong on both counts.

First, the applicable standard of review – abuse of discretion – insures that the trial court's new trial order was not the "unreasonable, arbitrary, or unconscionable" result of some alleged bias. Slip op., ¶ 35. Rather, the Court confirmed that "competent, credible evidence supports the trial court's decision to award a new trial . . . ." *Id.* ¶ 37. See also *id.* ¶ 38 ("we find sufficient evidence to support the trial court's decision in that regard"). Thus, Harris' contention that the Court's decision merely rests on the trial court's alleged bias is wrong.

Second, the Court of Appeals majority's reliance on the existence of evidence supporting the jury's verdict – rather than evidence supporting the trial court's new trial order – was legal error that contravened this Court's established precedent. *Id.* ¶ 36 (quoting cases).

Harris' third ground for reconsideration is that the reinstated new trial order was void *ab initio* because the trial judge supposedly committed "ethical misconduct." (Mot. for Reconsideration at 4.) Despite having raised this argument twice now, however, Harris has never been able to explain either how the trial judge's conduct constituted misconduct or how it prejudiced, or indicated a bias against, Harris.<sup>1</sup>

On Friday, May 21, 2004, the jury heard closing arguments, received instructions, and was discharged for the weekend. (Jt. Supp. 2947-3133, Tr. 2157-2343.) On Saturday, May 22, the Cleveland *Plain Dealer* published a story on the front page of its "Metro" section, with the headline: "Malpractice Jury to Consider Case, Record Damages." (R. 466, Mt. Sinai Motion for New Trial, etc., Exh. A.) The article reported that "[i]f [Harris' trial counsel, Geoffrey] Fieger wins half of the money he asked for, it would be the largest jury award in county history. The current high-damage mark is \$17 million." (*Id.*)

Counsel for appellants Dr. Jordan and Northeast Ohio Neighborhood Health Services, Inc. ("Neighborhood Health Services") were the first attorneys to arrive at court on Monday, May 24, for deliberation. Immediately upon their arrival – before deliberation began and before any other party's attorneys arrived – these counsel "asked the presiding judge to ask the jurors if they had read the article and if so, to allow a separate voir dire to determine whether a mistrial motion would be appropriate or perhaps bringing in the alternate juror to substitute for one juror." (*Id.*, Exh. B, P. Supp. 434, ¶ 2.) Three jurors told the trial judge they had read the article. (*Id.*) The trial judge, however, refused counsel's request to voir dire those jurors to determine the article's effect on them; he "merely told them to disregard what they had read." (R.504, Judgment Entry at 11, Dr. Jordan and Neighborhood Health Services Merits Br., Appx. 83.)

<sup>1</sup> At the time of trial, the guardian of Walter Hollins' estate was Mark McLeod. Ms. Harris became the guardian later. In this brief, appellants use Ms. Harris' name to refer both to the plaintiff in the trial court and the appellee before this Court.

Counsel for appellant Mt. Sinai Medical Center arrived at court for the deliberation soon thereafter. (R. 466, Mt. Sinai Motion for New Trial, etc., Exh. C, P. Supp. 436, ¶ 2.) Upon learning that three jurors admitted to reading the article, he joined in the request to voir dire those jurors. (*Id.* ¶ 4.) That request was also denied. (*Id.*) All of this occurred before Harris' trial counsel arrived at court. (*See id.* Exhs. B & C, P. Supp. 434-37.)

In the new trial order, the trial judge recognized that "failure to permit a voir dire examination of the jury prevented defense counsel from determining if any juror had been influenced to the extent that he or she was no longer eligible to serve." (R.504, Judgment Entry at 11-12, Dr. Jordan and Neighborhood Health Services Merits Br., Appx. 83-84.) "It is entirely possible that having read the Plain Dealer article, some jurors may have found that the opportunity to return the record verdict in this County was irresistible. Defense Counsel should have had the opportunity to explore that question." (R.504, Judgment Entry at 12, Dr. Jordan and Neighborhood Health Services Merits Br., Appx. 84.) The trial judge also recognized that "there should have been no conversation between the Court and jury off the record." (*Id.*) This "irregularity in the proceedings" was one ground for the new trial order, in addition to plaintiff's counsel misconduct and improper damages evidence.

The Court of Appeals held that this ground did not justify ordering a new trial, and appellants did not appeal that ruling. This Court, of course, did not base its decision to reverse the Court of Appeals on this ground. Harris now tries to turn this ground into something that rendered the new trial order void *ab initio*.

Defense counsel, however, had a duty to raise the article with the trial judge at the earliest possible opportunity to try to prevent jurors who had read the article from infecting the other jurors' deliberations. It is beyond dispute that "the reading of newspaper articles by the jurors,

prejudicial to one of the parties litigant, [can be] cause for a new trial,” *Phillips v. Bd. of Educ.* (1924), 21 Ohio App. 194, 207, and that when counsel becomes aware of prejudicial newspaper publications, “[a] request to make such inquiry of the jury must be initiated by counsel” to preserve the right to request a new trial based on such publication. *Diener v. White Consol. Indus., Inc.* (1968), 15 Ohio App.2d 172, 181. Harris’ counsel’s tardy arrival at court hardly transforms that duty into prohibited *ex parte* contact.

The applicable ethical rules, moreover, expressly *permit* attorneys to alert judges about emergency matters collateral to the actual merits of a case without waiting for opposing counsel to appear. See DR 7-110(B) (permitting *ex parte* communications between attorneys and judges unrelated “to the merits of the cause”); Code of Judicial Conduct, Canon 3(B)(7)(a) (permitting “*ex parte* communications” regarding “emergencies that do not address substantive matters or issues on the merits”). Harris has never disputed the exigencies that required defense counsel to raise as soon as possible their concerns, which proved to be well-founded, that jurors may have read the newspaper article about the case on the eve of deliberations.

Moreover, Harris repeatedly insists that the trial judge “admitted misconduct.” (Mot. for Reconsideration at 5 (emphasis in original); see also *id.* at 4 (same).) In fact, the trial judge “admitted” that his failure to permit defense counsel to conduct voir dire may have allowed a jury prejudiced against the *appellants* – the defendants – to decide the case. Harris neither cites authority for nor explains her assertion that this conduct makes the trial judge appear partial to the *defense* so as render all his later rulings void. No presumption of partiality arises from the mere fact of *ex parte* communications, particularly where, as here, those communications were expressly permitted by rule. E.g., *United States v. Alcantara-Rueda* (Nov. 14, 2003), 9th Cir. No. 03-50103, 2003 WL 22701134, at \*1 (“the mere fact that a[n *ex parte*] communication took

place does not necessarily demonstrate that the judge's impartiality might reasonably be questioned").

The trial judge, Judge Robert Lawther, a visiting judge, eventually did inform the parties that he had no "desire to participate in a re-trial," and so he recused himself. (Appellant Mark A. McLeod's Motion To Remand, Exh. 3.) But that recusal did not concede that the new trial order was void *ab initio*. To the contrary, understanding the need for Harris not only to receive a fair re-trial but to *believe* she was receiving a fair re-trial, Judge Lawther recused himself "to avoid unnecessary controversy over selection of a Judge to preside over future matters involving this case . . . ." (R.512, Recusal Order.)

The trial judge noted an irregularity in the trial proceedings, which was one of several grounds on which he ordered a new trial. That ground dropped out of the case in the Court of Appeals and played no part in this Court's decision. The Court should deny the motion for reconsideration.

### **III. Harris' Motion For Reconsideration Of Her Recusal Motions Is Forbidden By The Court's Rules And Should Be Denied.**

Harris filed two separate motions seeking to recuse most or, alternatively, all of the members of this Court. The members of the Court rejected both motions. Harris now asks the Court to reconsider those recusal motions. (Mot. for Reconsideration at 6.) Harris' request is barred by two different Court rules and settled law.

First, this Court's rule governing reconsideration motions states that "[a] motion for reconsideration . . . may be filed only with respect to . . . (1) [t]he . . . refusal to grant jurisdiction to hear a discretionary appeal; (2) [t]he *sua sponte* dismissal of a case; (3) [t]he granting of a motion to dismiss; [or] (4) [a] decision on the merits of a case." S. Ct. R. XI,

§ 2(A) (emphasis in original). The rule does not permit a motion to reconsider the denial of a motion to recuse. This portion of Harris' motion should therefore be denied.

Second, as discussed above, Rule XI also prohibits reconsideration motions that merely repeat arguments the Court has already heard and rejected. Harris' motion for reconsideration merely "incorporates by reference" her two earlier recusal motions that the Court denied. (Mot. for Reconsideration at 6.) The Court should deny Harris' motion for this rule violation, too.

Third, Harris' accusations of a disqualifying bias find no support in the law. "A judge is presumed to follow the law and not to be biased . . . ." *In re Disqualification of George* (2003), 100 Ohio St.3d 1241, 1241. Ohio judicial disqualification law provides that campaign contributions by parties or their attorneys are not sufficient to overcome this presumption. *In re Disqualification of Maloney* (2000), 91 Ohio St.3d 1204, 1204 ("financial contributions and other forms of support during judicial campaigns do not raise a reasonable question regarding a judge's impartiality"); *see also, e.g., In re Disqualification of Horvath* (2004), 105 Ohio St.3d 1247, 1250 (similar); *In re Disqualification of Jackson* (1998), 84 Ohio St.3d 1232, 1233 (similar). *Accord, e.g., Grievance Administrator v. Fieger* (Mich. 2006), 714 N.W.2d 285, 285-86 ("Lawful campaign contributions, in support of and opposition to a judge, have never before constituted a basis for disqualification.").

Harris' motion for reconsideration of her two motions to recuse should be denied because it violates two Court rules and lacks legal support.

#### **IV. The Court Should Deny The Motion To Stay.**

In a separate motion, Harris asks the Court to stay issuance of its mandate pending Harris' anticipated petition for *certiorari* to the United States Supreme Court. (Mot. to Stay at 3.) The Court should deny this motion for three reasons.

First, a delay of the new trial could substantially harm the interests of justice. It has now been twenty years since the underlying events occurred. One party and key witness – Dr. Jordan – has died. Each day the retrial is delayed, the remaining witnesses grow older and their memories grow more stale. A stay pending a ruling on the petition for *certiorari* would prevent any progress toward the new trial for at least many months. All the parties’ interests in a just retrial would be served by denying the motion to stay.

Second, a delay of the new trial would likely be for naught, because Harris’ petition for *certiorari* is unlikely to result in a hearing before the United States Supreme Court, much less a reversal by that Court of this Court’s decision. The United States Supreme Court grants only a small fraction of petitions for *certiorari*. Harris’ counsel has twice before filed *certiorari* petitions raising similar issues, and the Supreme Court denied both. *Graves v. Warner Bros.* (2004), 542 U.S. 920; *Gilbert v. DaimlerChrysler Corp.* (2005), -- U.S. --, 126 S. Ct. 354. Even if the petition were granted, Harris’ appeal is unlikely to succeed on the merits, for all the reasons discussed above and in appellants’ oppositions to Harris’ recusal motions.

Third, if the United States Supreme Court were to grant *certiorari*, and if that Court were to conclude that staying the new trial pending the appeal was appropriate, then that Court could stay that proceeding. (See U.S. S. Ct. R. 23(2) (“A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment.”).) For these reasons, the Court should deny Harris’ motion to stay issuance of the mandate.

Finally, appellants Dr. Jordan and Neighborhood Health Services write separately to address Harris’ assertion that their trial counsel said “Defendants have no intention of ever settling this case” after this Court announced its decision. (Mot. for Stay at 3.) Harris offers no substantiation for this purported statement, and there is none. As these appellants noted in their

opposition to Harris' first motion to recuse, Harris has never made an appropriate settlement demand to these appellants. (Opp. to Mot. to Recuse at 5-7.)

**V. Conclusion**

For these reasons, the Court should deny Harris' motion for reconsideration.

DATED: November 8, 2007

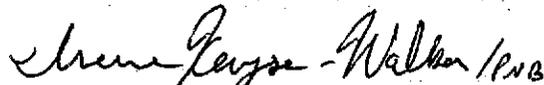


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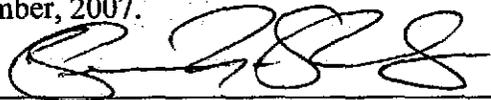
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by ordinary U.S. mail, postage prepaid, upon Jack Beam, Esq., BEAM & RAYMOND ASSOCIATES, 2770 Arapaho Road, Suite 132, PMB 135, Lafayette, Colorado 80026, Andrew S. Muth, Esq., MUTH & SHAPERO, L.C., Society Bank Building, 301 W. Michigan Avenue, Suite 302, Ypsilanti, Michigan 48197, Geoffrey Fieger, Esq., FIEGER FIEGER KENNEY & JOHNSON, 19390 W. Ten Mile Road, Southfield, Michigan 48075, and Sandra J. Rosenthal, Esq., 75 Public Square, Suite 1300, Cleveland, Ohio 44113, attorneys for appellee, and upon Irene C. Keyse-Walker, Esq., TUCKER ELLIS & WEST LLP, 925 Euclid Avenue, Suite 1150, Cleveland, Ohio 44115 and Marc W. Groedel, Esq., and Marilena DiSilvio, Esq., REMINGER & REMINGER CO., L.P.A., 1400 Midland Building, 101 Prospect Avenue, W., Cleveland, Ohio 44115, attorneys for Mt. Sinai Medical Center, on this 8th day of November, 2007.



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