

ORIGINAL

No. 2009-1715

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY, OHIO
CASE No. 01-08-065

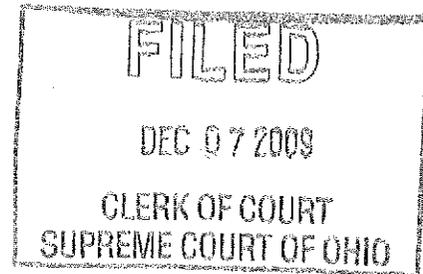
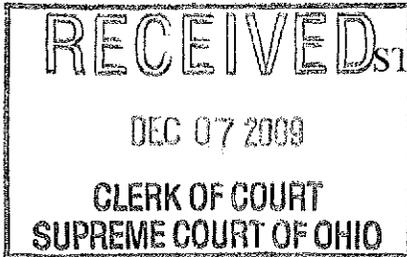
JEFFREY GEESAMAN, et al.,
Plaintiffs-Appellees,

v.

RITA'S MEDICAL CENTER, et al.,
Defendants,

and

JOHN COX, D.O.,
Defendant-Appellant.



MOTION OF APPELLANT JOHN COX, D.O. TO CONSOLIDATE APPEAL NOS. 2009-1715 AND 2009-2094

Dennis P. Mulvihill (0063996)
Gregory S. Scott (0067255)
LOWE EKLUND WAKEFIELD &
MULVIHILL CO., L.P.A.
610 Skylight Office Tower
1660 West 2nd Street
Cleveland, OH 44113-1454
Tel: (216) 781-2600
Fax: (216) 781-2610
E-mail: dmulvihill@lewm.com
gscott@lewm.com

Attorneys for Plaintiffs-Appellees

Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: ikeyse-walker@tuckerellis.com

*Attorney for Defendant-Appellant
John Cox, D.O.*

Wayne E. Waite (0008352)
FREUND, FREEZE & ARNOLD
1800 One Dayton Centre
1 South Main St.
Dayton, OH 45402
Tel: (937) 222-2424
Fax: (937) 425-0207
E-mail: wwaite@ffalaw.com

*Attorney for Defendant-Appellant Lima
Radiology Associates*

Patrick K. Adkinson (0016980)
ADKINSON LAW OFFICE
4244 Indian Ripple Road, Suite 150
Dayton, OH 45440
Tel: (937) 431-9660
Fax: (937) 228-0944
E-mail: pka.adklaw@bizwoh.rr.com

*Additional Counsel for Defendant-
Appellant John Cox, D.O.*

Anne Marie Sferra
Bridget Purdue Riddell
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
Tel: (614) 227-2300
Fax: (614) 227-2390
E-mail: asferra@bricker.com
bpurdueriddell@bricker.com

*Attorneys for Amici Curiae
Ohio Hospital Association,
Ohio State Medical Association,
American Medical Association, and
Ohio Osteopathic Association*

Defendant-Appellant John Cox, D.O., by and through counsel and pursuant to S.Ct.Prac.R. XIV, Section 4(A), hereby moves this Court for an order consolidating Appeal Nos. 2009-1715 and 2009-2094. Both appeals are from the same appellate judgment and opinion and Appeal No. 2094 is superfluous. Consolidation will promote judicial efficiency and prevent any confusion that might arise from the pendency of separate appeals.

The Third District Decision and Judgment

On August 10, 2009, the Third District Court of Appeals issued its Opinion and Judgment Entry reversing a defense verdict entered in favor of John Cox, D.O. and his employer (Defendant-Appellant Lima Radiology Associates, Inc. ("LRA")) in this medical malpractice action. The Court agreed with Plaintiffs' argument that evidence presented by Defendants *disputing* the "more probable than not" causation testimony offered by Plaintiffs, entitled Plaintiffs to a "loss of chance" instruction *in addition to*, and as an alternative for, a "full damages" instruction, and remanded for a new trial. Dr. Cox filed a motion to reconsider and a motion to certify a conflict; LRA filed a motion for clarification and/or reconsideration.

Appeal No. 2009-1715

On September 23, 2009, Dr. Cox filed his notice of appeal to this Court, along with a memorandum in support of jurisdiction. The appeal was docketed as S.Ct. No. 2009-1715.

On September 24, 2009, amici curiae Ohio Hospital Association, Ohio State Medical Association, American Medical Association, and Ohio Osteopathic Association filed a memorandum in support of jurisdiction.

On September 28, 2009, Dr. Cox notified this Court of the motion to certify a conflict pending in the Third District Court of Appeals.

On October 2, 2009, LRA filed an additional notice of appeal and memorandum in support of jurisdiction in S.Ct. No. 2009-1715.

On October 5, 2009, Plaintiffs filed their memorandum opposing jurisdiction.

On October 21, 2009, the Third District Court of Appeals filed its Judgment Entry denying Dr. Cox's motion for reconsideration, denying Dr. Cox's motion to certify a conflict, and denying LRA's motion for reconsideration. (See Exh. A, attached.) The Court did conclude, however, that "although it should be evident to the parties," certain "erratum" in footnote 2 and an "ambiguity" in ¶ 63 of its August 10 Opinion were "worthy of clarification to remove any doubt." The Court therefore granted LRA's motion for clarification "to the extent that an erratum to the opinion shall issue correcting 'Footnote 2' and Paragraph #12, and Paragraph #63." (Id., pp. 2-3.)

On that same date, the Court issued its "Erratum to Opinion" correcting clerical errors in footnote 2 and ¶ 63 of the August 10 Opinion. (See Exh. B, attached.)

On November 4, 2009, Dr. Cox notified this Court of the Court of Appeals' refusal to certify a conflict.

Appeal No. 2009-2094

On November 17, 2009, LRA filed a second notice of appeal and memorandum in support of jurisdiction in S.Ct. No. 2009-1715. This second notice states that it appeals the Third District's Judgment Entry "filed on October 21, 2009, which clarified the judgment entry of August 10, 2009." In fact, the October 21 Judgment Entry only clarified portions of the Court of Appeals' August 10 *Opinion*. It did not address the August 10 Judgment Entry at all. (See Exhs. A and B.)

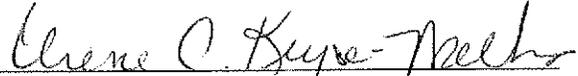
Although the second notice and supporting memorandum were filed in No. 2009-1715, the Clerk assigned it a new docket number – S.Ct. No. 2009-2094.

Reasons Supporting Consolidation

The Third District's October 21, 2009 entries do not vacate, reconsider, or modify the August 10, 2009 Judgment Entry that is the subject of S.Ct. No. 2009-1715. The October 21 Judgment Entry *denies* both Dr. Cox's and LRA's motions for reconsideration (as well as Dr. Cox's motion to certify a conflict) and merely clarifies language in the August 10, 2009 *Opinion* that already "should be evident to the parties." (Exh. A, p. 2.) The "Erratum to Opinion" is just that – the correction of a clerical error in the August 10, 2009 Opinion. Those filings are properly part of Appeal No. 2009-1715 and no additional notice of appeal was necessary. However, because the Clerk of this Court docketed LRA's second notice of appeal as a separate case, Dr. Cox filed an additional notice of appeal in No. 2009-2094 in an abundance of caution. Dr. Cox now

seeks consolidation of the two appeals, to avoid confusion and promote judicial efficiency.

Respectfully submitted,



Patrick K. Adkinson (0016980)
ADKINSON LAW OFFICE
4244 Indian Ripple Road, Suite 150
Dayton, OH 45440
Tel: (937) 431-9660
Fax: (937) 228-0944
E-mail: pka.adklaw@bizwoh.rr.com

Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: ikeyse-walker@tuckerellis.com

Attorneys for Defendant-Appellee John Cox, D.O.

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 24th day of December, 2009, by

U.S. Mail, postage prepaid, upon the following:

Dennis P. Mulvihill
Gregory S. Scott
Lowe Eklund Wakefield &
Mulvihill Co., L.P.A.
610 Skylight Office Tower
1660 West 2nd Street
Cleveland, OH 44113-1454

Attorneys for Plaintiffs-Appellees

Wayne E. Waite
Freund, Freeze & Arnold
1800 One Dayton Centre
1 South Main St.
Dayton, OH 45402

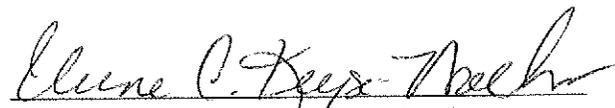
*Attorney for Defendant-Appellant Lima
Radiology Associates*

James F. Nooney
Eastman & Smith, Ltd.
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, OH 43699-0032

*Attorney for Defendant Ali S. Al-Mudallal,
M.D.*

Anne Marie Sferra
Bridget Purdue Riddell
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215

*Attorneys for Amici Curiae
Ohio Hospital Association,
Ohio State Medical Association,
American Medical Association, and
Ohio Osteopathic Association*


Elaine C. Keys-Mack
*One of the Attorneys for Defendant-
Appellant John Cox, D.O.*

COURT OF APPEALS
FILED

2009 OCT 21 PM 1:08

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

W. C. STALEY-BURLEY
CLERK OF COURTS
ALLEN COUNTY, OHIO

JEFFREY GEESAMAN, ET AL.,

PLAINTIFFS-APPELLANTS,

CASE NO. 1-08-65

v.

ST. RITA'S MEDICAL CENTER, ET AL.,

JUDGMENT
ENTRY

DEFENDANTS-APPELLEES.

This cause comes on for determination of the application for reconsideration and application to certify a conflict filed by Appellee John Cox, D.O., with response briefs in opposition, and the motion for clarification and/or reconsideration filed by Appellee Lima Radiology Associates, Inc., with response briefs in opposition.

Upon consideration of same, the court finds that the application for reconsideration filed by Dr. Cox fails to call to the attention of the court an obvious error in the decision or raise an issue not properly considered in the first instance. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. The application sets forth the same arguments that were considered and decided properly in the first instance.

The court further finds that there is no true and actual conflict on a rule of law between the decision in the instant case and the decisions in *Haney v. Barringer*, 7th

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EXHIBIT A
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Dist.No. 06MA141, 2007-Ohio-7214; *McDermott v. Tweel*, 151 Ohio App.3d 763; *Liotta v. Rainey*, (Nov. 22, 2000), 8th Dist.No. 77396; *Wright v. Suzuki Motor Corp.*, 4th Dist.No. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494; and *Faulk v. Internatl. Bus. Mach. Corp.*, (Sept. 7, 2001), 1st Dist.Nos. C-000765, C-000778. The factual distinctions in these cases result in a rule of law that is not in conflict with the instant case. See *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594. Accordingly, the applications of Appellee Cox are not well taken.

In regard to the motion for clarification and/or reconsideration of Lima Radiology Associates, the court finds that it is not necessary to grant reconsideration and vacate the entire opinion. However, there does appear to be a misstatement in "Footnote 2" and, although it should be evident to the parties, an ambiguity in the concluding paragraph of the opinion, Paragraph #63, that is worthy of clarification to remove any doubt. For this reason the request for clarification is well taken and an Erratum to the opinion shall issue contemporaneously herewith.

It is therefore **ORDERED** that the application for reconsideration and application to certify a conflict filed by Appellee John Cox, D.O., be, and the same hereby are, overruled.

It is further **ORDERED** that the motion for clarification and/or reconsideration filed by Appellee Lima Radiology Associates, Inc. be, and hereby is, granted to the

Case No. 1-08-65

extent that an erratum to the opinion shall issue correcting "Footnote 2" in Paragraph #12, and Paragraph #63.





James A. Berger

JUDGES

DATED: October 21, 2009
/jlr

COURT OF APPEALS
FILED

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IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

EMMA C. STALEY-BURLE
CLERK OF COURTS
ALLEN COUNTY, OHIO

JEFFREY GEESAMAN, ET AL.,

PLAINTIFFS-APPELLANTS,

CASE NO. 1-08-65

v.

ST. RITA'S MEDICAL CENTER, ET AL.,

DEFENDANTS-APPELLEES.

ERRATUM
TO
OPINION

Appeal from Allen County Common Pleas Court
Trial Court No. CV2006 0914

Judgment Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Decision: August 10, 2009

Footnote 2 in Paragraph #12 filed on August 10, 2009 incorrectly reads:

The complaint names Lima Radiology Associates ("LRA") under the doctrine of respondeat superior as the employer of Dr. Cox or that Dr. Cox was the owner of LRA. The judgment entry on the jury's verdict indicates that LRA was dismissed pursuant to the verdict. However, LRA's involvement was not mentioned during the trial nor was there a finding by the jury in regards to LRA. Rather, all parties acted as if the case were solely against Dr. Cox and Dr. Almudallal.

Footnote 2 in Paragraph #12 filed on August 10, 2009 is hereby corrected to read:

The complaint names Lima Radiology Associates ("LRA") under the doctrine of respondeat superior as the employer of Dr. Cox or that Dr. Cox was the owner of LRA. However, LRA's liability under the doctrine of respondeat superior was not a question before the jury because LRA admitted in its answer to the plaintiffs' complaint that Dr. Cox was its employee at the time of Mr. Geesaman's injury and was acting

EXHIBIT B

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within the scope of that employment when he examined Mr. Gecaman's MRI and concluded that the MRI was normal. LRA denied, however, that Dr. Cox was negligent and/or that he caused the plaintiffs' injuries. Given these admissions and denials, LRA's liability was dependent upon the jury's verdict as to Dr. Cox. In accordance with the jury's verdict as to Dr. Cox, the judgment entry on the jury's verdict indicates that both Dr. Cox and LRA were dismissed pursuant to the verdict. Because LRA's liability is dependent solely upon the liability of Dr. Cox, throughout this opinion our rulings on the assignments of error as to Dr. Cox also apply to LRA.

Paragraph #63 filed on August 10, 2009 incorrectly reads; "Based on all of the foregoing, the judgment of the trial court in favor of Dr. Almudallal is affirmed, the judgment in favor of Dr. Cox is reversed, and the cause remanded to the trial court for further proceedings consistent with this opinion."

Paragraph #63 filed on August 10, 2009 is hereby corrected to read; "Based on all of the foregoing, the judgment of the trial court in favor of Dr. Almudallal is affirmed, the judgment in favor of Dr. Cox and Lima Radiological Associates is reversed, and the cause remanded to the trial court for further proceedings consistent with this opinion."

SHAW, ROGERS and BROGAN, J.J., concur.

(2nd District Court of Appeals Judge James Austin Brogan, sitting by Assignment)

/jlr