

IN THE SUPREME COURT OF OHIO

CORA ERWIN, ADMINISTRATRIX) ON APPEAL FROM THE FIFTH
) APPELLATE DISTRICT,
PLAINTIFF-APPELLEE,) TUSCARAWAS COUNTY, OHIO
) CASE NO. 2008-AP-04-0028
))
vs.) SUPREME COURT
) CASE NO. 2009-0580
))
JOSEPH E. BRYAN, M.D. *et al.*)
))
DEFENDANT-APPELLANTS.)

PLAINTIFF-APPELLEE'S MOTION TO STRIKE
AMICUS REPLY BRIEF

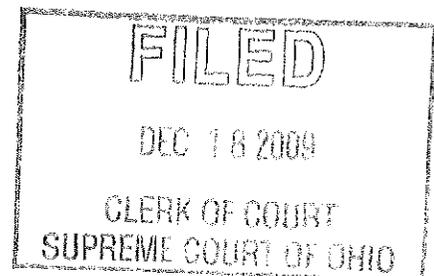
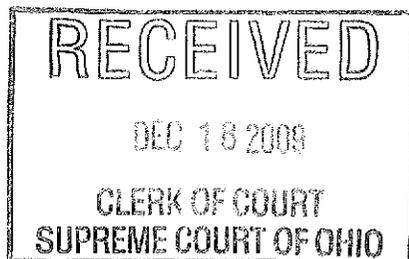
Ronald Margolis, Esq. (#0031241)
Jessica A. Perse, Esq. (#0078823)
BECKER & MISHKIND CO., L.P.A.
Skylight Office Tower
1660 W. 2nd Street, Suite #660
Cleveland, Ohio 44113
(216) 241-2600
FAX: (216) 241-5757

Rocco D. Potenza, Esq. (#0059577)
HANNA, CAMPBELL & POWELL LLP
3737 Embassy Parkway
PO Box 5521
Akron, Ohio 44334
(330) 670-7623
FAX: (330) 670-0977

Attorney for Defendant-Appellant

Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
(216) 344-9393
FAX: (216) 344-9395

Attorneys for Plaintiff-Appellee



MOTION

Plaintiff-Appellee, Cora Erwin, Administratrix of the Estate of Russell Erwin, Deceased, hereby requests that this Court strike the Reply Brief of *Amici Curiae*, Ohio State Medical Association, Ohio Hospital Association, and Ohio Osteopathic Association in Support of Appellants dated December 7, 2009. None of these *amici* had submitted a Brief on the Merits. In their 13-page Reply, they are now attempting to interject new arguments and positions which Plaintiff-Appellee will be unable to address in writing. Such sandbagging tactics should not be permitted.

Not surprisingly, the rules of this Court plainly establish that only an *amicus* which has initially disclosed its positions in an opening brief will be permitted to file a reply. Rule VI, Section 6(B), of the Supreme Court Rules of Practice specifically directs that:

*** If the *amicus* brief is in support of an appellant, the brief shall be filed within the time for filing allowed to the appellant to file a merit brief, and the *amicus curiae* may file a reply brief within the time allowed to the appellant to file a reply brief. *** [emphasis added]

A two-step process is thus imposed, which begins with the filing of an *amicus* merit brief. The Rules simply do not permit any party, including *amici*, to be heard solely through replies.

Here, Plaintiff-Appellee had been specifically relying on the fact that no *amici* had submitted a brief in support of Defendant-Appellants and had tailored her arguments accordingly. For example, she had maintained that:

In their effort to secure an early termination from the claims against them, Defendants have assured this Court that the Fifth District's opinion "creates a very dangerous precedent in medical malpractice cases." *Merit Brief of Appellants*, p. 7. If this were indeed true, one would have

expected to hear in this appeal from one of the *amici* which traditionally promote the interests of the health care community and their insurers. But none has offered any support for Defendants' unduly narrow and potentially disruptive interpretation of Civ. R. 15(D), including the Ohio Hospital Association, the Ohio State Medical Association, and the Ohio Insurance Institute.

Merit Brief of Plaintiff-Appellee, p. 12. Having lead Plaintiff-Appellee and her own *amici* into believing that the medical community did not intend to express any opinions in this well-publicized appeal, the Ohio State Medical Association, Ohio Hospital Association, and Ohio Osteopathic Association should not now be allowed to be heard through a reply.

Unless the instant *amici* are held to the terms of Section 6(B), then the novel practice they have devised will quickly become the norm. Why would any *amici* bother to submit a brief at the same time as the appellant when a reply can always be furnished later after the appellee's brief has been reviewed? The appellee will, of course, be locked-in at that point and the *amicus* will be able to interject previously undisclosed arguments and theories. Possessing the advantage of the "last word" is particularly potent when the appellee will only be able to respond at oral argument, assuming that time permits.

CONCLUSION

For the foregoing reasons, this Court should strike the Reply Brief of *Amici Curiae* Ohio State Medical Association, Ohio Hospital Association, and Ohio Osteopathic Association in Support of Appellants which was submitted on December 7, 2009 without a Brief on the Merits first being filed and served upon Plaintiff-Appellee. *Sup. Ct. Prac. R. VI, Section 6(B)*.

Respectfully Submitted,



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO. L.P.A.
Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion** was served via regular U.S.

Mail on this 16th day of December, 2009 upon:

Rocco D. Potenza, Esq.
HANNA, CAMPBELL & POWELL LLP
3737 Embassy Parkway
P.O. Box 5521
Akron, Ohio 44334
Attorney for Defendant-Appellants

Jonathan Stoudt, Esq.
ROURKE & BLUMENTHAL
495 S. High Street
Columbus, Ohio 43215
*Attorney for Amicus Ohio
Association for Justice*

Ann Marie Sferra, Esq.
BRICKER & ECKLER LLP
100 S. Third Street
Columbus, Ohio 43215-4291
*Association, Ohio Osteopathic
Association, Ohio State Medical
Association*

Marianna Brown Bettman, Esq.
UNIVERSITY OF CINCINNATI, COLLEGE OF LAW
P.O. Box 210040
Cincinnati, Ohio 45221-0040
*Attorney for Amicus, Ohio State Bar
Association*



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.
Attorney for Plaintiff-Appellee