

ORIGINAL

IN THE SUPREME COURT OF OHIO

LARRY ENGEL, JR.,

Plaintiff-Appellee,

vs.

UNIVERSITY OF TOLEDO  
COLLEGE OF MEDICINE,

Defendant-Appellant.

\* Case No. 2009-1735  
\* On Appeal from the Franklin County Court  
of Appeals, Tenth Appellate District  
\*  
\* Court of Appeals Case No. 09AP-53  
\*  
\*

PLAINTIFF-APPELLEE LARRY ENGEL, JR.'S MEMORANDUM IN RESPONSE TO  
THE UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE'S MOTION FOR  
RECONSIDERATION

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The University of Toledo's College of Medicine ("University") has filed a Motion for Reconsideration ("Motion") of this Court's Entry declining to accept jurisdiction of this action.

For the reasons set forth below, this Motion by the University should be denied in part.

### MEMORANDUM

#### I. The University's Motion Violates S.Ct. Prac. R. XI(2)(B)

In its Motion the University acknowledges, and then ignores, S. Ct. Prac. R. XI(2)(B)<sup>1</sup>. In its "Introduction" section the University categorically states that in filing its Motion it "...seeks only to emphasize the significant legal concerns in this case..." Thus, through its Motion, the University does not even pretend to be offering any new law or argument, but rather intends only to "emphasize" that which it stated in its jurisdictional brief. To the Appellee, a re-emphasizing of arguments already presented constitutes nothing more than an impermissible re-argument.

The University also notes in its Motion that the vote not to accept jurisdiction of this case was 4-3. Apparently the University hopes that by impermissibly "re-emphasizing" its earlier arguments, it can persuade one of the Justices from the majority to change his or her vote. The University cites no law, nor have the Appellee been able to find any, for the proposition that a close vote by this Court, standing alone, meets the criteria for reconsideration under S.Ct. Prac.R. XI (2)(B). As such, the University's Motion should be denied as being in violation of S.Ct. Prac.R. XI (2)(B).

If this Court should look past the Rule violation by the University, and get to the merits of its Motion, it becomes readily apparent that the University is true to its word when it states that the purpose of its Motion is to re-emphasize its earlier arguments. The University's Motion is long on

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<sup>1</sup> In its Motion the University mistakenly cites S.Ct. Prac. R.XI (2)(A), but quotes from subsection (2)(B).

concerns of public policy, and short on relevant law. As the Tenth District noted in its Opinion below, the University is directing its public policy concerns to the wrong branch of government. The Tenth District wrote:

Finally, UT argues that extending personal immunity to a volunteer faculty member is simply bad policy. UT directs this argument to the wrong branch of government. The General Assembly is the final arbiter of public policy; it is not the judiciary's role to weigh policy concerns or make policy decisions. [Citations omitted].

Engel vs. Univ. of Toledo Coll. Of Med., 2009-Ohio-3957, at ¶ 15.

## **II. Applicability of *Medcorp vs. ODJFS*, 2009-Ohio-6425**

While the Appellee does not believe that the public policy concerns the University has re-emphasized in its Motion are within the purview of this branch of the government, he does agree that whether or not a court decision should have retroactive or prospective -only application is within the purview of the judicial branch. Accord Medcorp vs. ODJFS, 2009-Ohio-6425.

In Medcorp this Court stated that:

We have applied the Sunburst Doctrine to limit a decision to prospective application only as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action.

Id at ¶ 3.

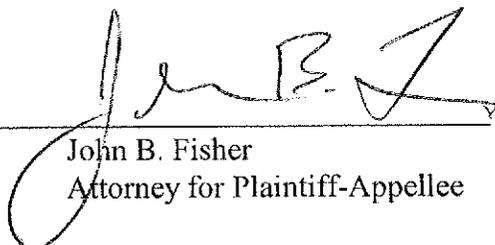
Because there certainly are other cases already pending in common pleas courts across the state that could well be impacted by the Tenth District's decision herein, the Appellee joins in the University's suggestion that this Court apply the Sunburst Doctrine to this case, and order that the Tenth District's decision below apply to the parties *inter se*, and thereafter only to causes of action that accrue after the date of the Tenth District's decisions in this action, August 11, 2009.

**III. Conclusion**

WHEREFORE, the Appellee, Larry Engel, Jr., urges that this Court deny the University's Motion for Reconsideration to the extent that it seeks anything other than merely limiting the application of the Tenth District Court of Appeals decision to the parties *inter se* and to order that its application be prospective only.

Respectfully submitted,

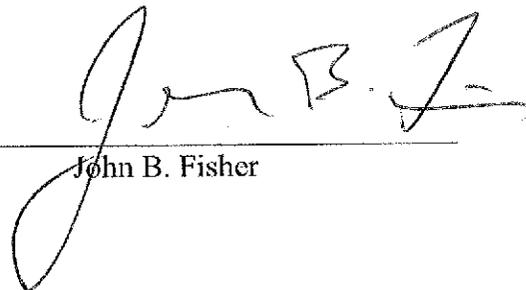
**GALLON, TAKACS, BOISSONEAULT  
& SCHAFFER CO., L.P.A.**

By:   
John B. Fisher  
Attorney for Plaintiff-Appellee

**CERTIFICATION**

This is to certify that a copy of the foregoing has been sent by ordinary U.S. Mail, postage pre-paid this 24<sup>th</sup> day of December, 2009, to:

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