

ORIGINAL

IN THE SUPREME COURT OF OHIO

LARRY ENGEL, JR.,

Case No. 2009-1735

Plaintiff-Appellee,

On Appeal from the
Franklin County Court of Appeals
Tenth Appellate District

Vs

UNIVERSITY OF TOLEDO COLLEGE
OF MEDICINE,

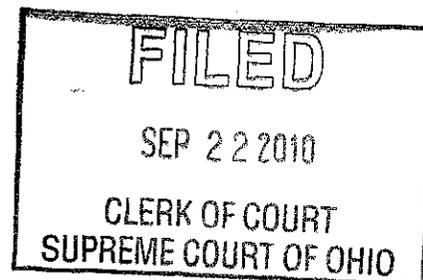
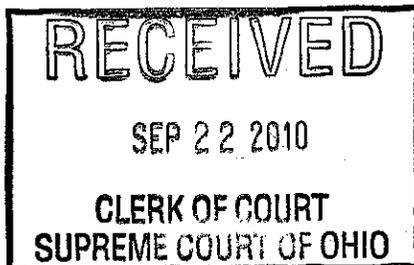
Court of Appeals
No. 09AP-53

Defendant-Appellant.

**MOTION BY AMICUS CURIAE DR. MAREK SKOSKIEWICZ TO PARTICIPATE
IN ORAL ARGUMENT**

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Amicus curiae Dr. Marek Skoskiewicz moves the Court under S. Ct. R. 9(6)(A) for leave to participate in oral argument. As grounds for this motion, Dr. Skoskiewicz states:

1. Supreme Court Rule 9(6)(A) provides for oral argument by amicus curiae as follows:

If an *amicus curiae* wishes to participate in oral argument but either does not receive the consent of counsel for the side whose position the amicus curiae supports or does not expressly support the position of any parties to the case, the amicus curiae make seek leave from the Supreme Court to participate in oral argument, but such leave will be granted only in the most extraordinary circumstances.

2. Although S. Ct. R. 9(6) thus provides that leave to participate in oral argument by an amicus curiae which does not support the position of any of the parties to the case will be granted only in the most extraordinary circumstances, as this matter has evolved before this Court, Dr. Skoskiewicz submits that the circumstances here now are indeed extraordinary.

3. In the Court of Claims, and again in the Court of Appeals, plaintiff-appellee Larry Engel vigorously, and successfully, advocated the position that, as held by both of these courts, Dr. Marek Skoskiewicz is entitled to immunity in this matter under R.C. 9.86. This was so, as it was stipulated that Dr. Skoskiewicz was acting within the scope of his position as an officially appointed clinical assistant professor and volunteer faculty member, and therefore, he was acting as an officer or employee as defined by R.C. 109(A)(1)(a).

4. Defendant-appellant University of Toledo College of Medicine appealed to this Court, in support of the proposition of law that “a physician serving as a volunteer faculty member for a State medical school is not entitled to immunity under R.C. 9.86,” and seeking to reverse the judgments of the lower courts.

5. Plaintiff-appellee Larry Engel filed a memorandum opposing the appeal by the University of Toledo, asserting, as he had in the Court of Claims and in the Court of Appeals,

that immunity applied to officially appointed volunteer medical staff members of a public medical school, such as Dr. Skoskiewicz.

6. Upon the issuance of an order declining jurisdiction on December 16, 2009, the University filed a motion for reconsideration, which again was opposed by plaintiff on the merits, save for agreement as to partial prospective application of the Court of Appeals decision.

7. Following this Court's order on reconsideration accepting jurisdiction over the University's discretionary appeal, and the filing by the University of its merit brief opposing immunity to volunteer medical staff such as Dr. Skoskiewicz, Dr. Skoskiewicz filed an amicus brief in support of the position expressed by plaintiff-appellee Larry Engel, Jr., in the Court of Appeals and Court of Claims, and in opposition to the University's appeal.

8. A brief was also filed by amicus curiae Ohio Association for Justice, in which there has been an attempt to inject an issue regarding the scope of employment, contrary to the stipulation below of the parties.

9. Thereafter, in a merit brief filed several weeks later, plaintiff-appellee Larry Engel, Jr., in an extraordinary and complete reversal of position, argued that both of the lower courts erred in adopting the position he had there advocated. Plaintiff-appellee now asserts before this Court that, consistent with the position of defendant-appellant University of Toledo, immunity does not apply to physicians such as Dr. Skoskiewicz, who have been officially appointed as a volunteer faculty member of a public medical school.

10. Plaintiff in that merit brief has also attempted to inject a new issue into the appeal, attacking for the first time in these proceedings this Court's decision in *Theobald v. University of Cincinnati* (2006), 111 Ohio St.3d 541.

11. The case thus now will come before this Court at oral argument in a highly unusual posture, in which the position previously advocated by plaintiff-appellee, and adopted by the two lower courts, is now under attack by both appellee and appellant, and will have no advocate before the Court; Dr. Skoskiewicz now is in the position of amicus curiae who does not support the position of any of the parties to the case.

12. Given the highly unusual, and belated reversal of position of the appellee in this case, amicus curiae Dr. Skoskiewicz submits that this is a most extraordinary circumstance in which the Court would be greatly assisted by permitting argument by amicus curiae from a perspective contrary to that of the appellee and appellant.

13. Amicus curiae Dr. Marek Skoskiewicz at oral argument would seek to support the decisions of the lower courts, and to focus on the issue properly before this Court, rather than those improperly and belatedly injected by plaintiff-appellee and amicus curiae Ohio Association for Justice.

14. Accordingly, Dr. Skoskiewicz respectfully requests that this Court grant him leave to present oral argument as amicus curiae for such a period of time as the Court deems appropriate.

WHEREFORE, Amicus Curiae Dr. Marek Skoskiewicz respectfully requests that this Honorable Court grant him leave to present oral argument in support of the position set forth by the lower courts and by Dr. Skoskiewicz in his brief as amicus curiae, and in opposition to the position of the defendant-appellant and current position of plaintiff-appellee.

Respectfully submitted,

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VALITUTTI & SHERBROOK

By: 

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Dated: September 20, 2010

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CERTIFICATION

This is to certify that a copy of the foregoing **MOTION BY AMICUS CURIAE DR. MAREK SKOSKIEWICZ TO PARTICIPATE IN ORAL ARGUMENT** has been served via ordinary U.S. Mail this 20th day of September, 2010, upon the following:

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Respectfully submitted,

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