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IN THE SUPREME COURT OF OHIO

Mohamed Bassem Rayess,  
Plaintiff-Appellee,

v.

Educational Commission for Foreign  
Medical Graduates,  
Defendant-Appellant.

Case No. 2011-1933

On Appeal from the Montgomery  
County Court of Appeals, Second  
Appellate District

Court of Appeals  
Case No. CA 24125

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**APPELLEE'S MEMORANDUM IN RESPONSE TO APPELLANT'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

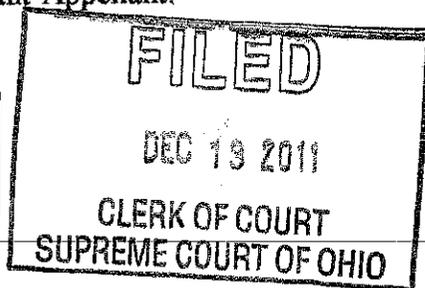
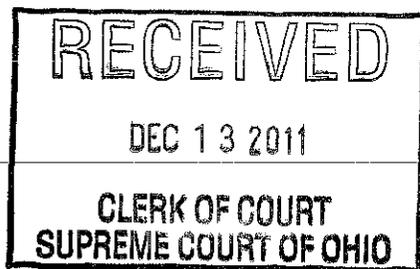
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**EXPLANATION WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

In the summer of 1993, Plaintiff-Appellee "Mohamed Bassem Rayess," as a graduate of a foreign medical school, was interested in being certified by Defendant-Appellant, the Educational Commission for Foreign Medical Graduates (hereinafter "ECFMG") to be able to do medical residency in the U.S.A. Certification by ECFMG is a must for said route, and to ultimately be a licensed physician in this country.

Since the questions of the "United States Medical Licensing Exams" (hereinafter "USMLE exams") are based on the programs of the Medical Schools in the U.S. and Canada, and there are some differences between those programs and the program that the Appellee followed in his medical school in overseas, the Plaintiff-Appellee enrolled himself in a review course in order to bridge that gap, and while being enrolled in the review course, Plaintiff-Appellee maintained his legal presence in the U.S. on the basis of Student visa F-1/I-20 issued by the review course institution which at that time was called Arc Ventures.

As mandated, after submitting a written application along with all the necessary exam-fees to the ECFMG to take USMLE step 1, Plaintiff-Appellee was assigned to take the exam at the Cincinnati-Ohio center on September 21 and 22, of 1993. After the Plaintiff-Appellee timely arrived for the exam on September 21, 1993, Defendant-Appellant failed to give Plaintiff-Appellee the necessary time (three hours) to complete the answers of the questions in book one of the exam. This time was guaranteed to all the examinees, and the time that was given to the Plaintiff-Appellee was lacking by 70 minutes.

The USMLE step 1 consists of four books of questions which are given in two days, and on each day an examinee will be given two books, and for each book every examinee should be given exactly three (3) hours, and this was a guarantee policy by the parent company of the ECFMG, which is the National Board of Medical Examiners.

ECFMG administers the USMLE exams under contract with the National Board of Medical Examiners. The guarantee policy about the time allotted for each book is mentioned in the brochure of information that is sent to the examinee in the same envelope as the application to be filled out for the exam, which indicates that the information of such brochure is an integral part of the written contract between the ECFMG and the examinees.

As a result of not being given sufficient time to answer the questions of the exam, the Plaintiff-Appellee failed the exam. Consequently, Plaintiff-Appellee complained to the ECFMG about the incident and asked the ECFMG for compensation to retake the exam, as well as monetary compensation to reenroll himself in a review course as his Student visa/I-20 was expiring on November 1, 1994, and in order to be certified, Plaintiff-Appellee had to pass not only the USMLE part 1 exam, but the USMLE part 2 exam and the English exam.

Another important issue was that the USMLE part 1 exam and USMLE part 2 exam were administered only twice a year. For example, in the year of 1993, the USMLE part 1 was administered in June and September, then in 1994 it was also administered in June and September. In 1994, the USMLE part 2 exam was administered in March and August.

In 1993, and after the incident of September 21, 1993, the Plaintiff-Appellee complained twice in writing to the ECFMG asking them for full compensation to retake his exam. ECFMG made an offer to him to take the exam at no charge in the next administration of the exam, which happened to be in June 1994, but it denied him any further compensation, such as compensation for a review course and living expenditures, for the delay in administering the exam. The problem was that Plaintiff-Appellee's student visa/I-20 was about to expire on November 1, 1994, and if Plaintiff-Appellee took the USMLE part 1 exam in June of 1994, he would be left with only two months to take the USMLE part 2 exam in August of 1994. This case arises in part from ECFMG's refusal to put Plaintiff-Appellee in a position with his visa so that he had one year to plan ahead to take USMLE Part II after the suggested date to take the USMLE part 1 exam in June of 1994, which is the condition that existed prior to the breach of the written contract on September 21, 1993, so that Plaintiff-Appellee's student visa was such as he could continue his study to be certified.

As a result of ECFMG's refusal, ECFMG put a hold on Plaintiff-Appellee's future as a practicing physician in this country for many years until Plaintiff-Appellee could have his immigration status adjusted at a later date, at which time he could continue to take said examinations. Despite the fact that ECFMG was in business since the late 1950's and it administered said exams all over the U.S. and Canada, and also all around the world through its centers located in many countries, and millions of examinees took said exams during the past six decades all over the world, this is the first case of its sort in the history of the U.S.

In order to have similar case in the future, (1) the exam has to be administered in a frequency with a significantly long interval period of time in between two administrations (for example, nine months, as in this case), (2) the administrating company has to only be an examining company **like the ECFMG, not a school**, because if the administrator of the exam is a school, Ohio law determined that the relationship between a student and his/her school is regulated by implied (oral) contract, *see Behrend et al v. The State of Ohio*, Court of Appeals, Tenth Appellate District, Franklin County, 379 N.E.2d 617, 621, (3) The examinee like Plaintiff-Appellee has to have a specific limitations on his student visa with which he would not be able to continue his study if the administration of the exam was delayed several months (like in this case), and (4) The examinee has to be an Ohio resident during the entire period during which the statute of limitations was running (over 15 years) to maintain jurisdiction of the State of Ohio (like Plaintiff-Appellee).

Based on the above, it is only if all four of these unique factual circumstances happen to converge in a single case that this issue would be relevant. Added to that, Plaintiff-Appellee would like to tell this Court that this type of case became extinct since the beginning of the last decade as these exams became computerized. Starting in the year 2000, ECFMG started administrating the computerized version of the USMLE exams in a way that the candidate can take these exams anytime he/she wishes during the year. The vast majority of the exam companies administer their exams in a similar way nowadays. If the new computerized USMLE exams were available back in the year of 1993, ECFMG would be able to administer the USMLE part 1 of the exam to the Plaintiff-Appellee very shortly after the incident of September 21, 1993, and this case would not exist today.

Therefore, the likelihood that courts in Ohio would encounter a similar case in the future, simply put, does not exist. Even if these extremely rare circumstances miraculously assembled in one case, the statute already provides a clear answer to the issue. For all the aforementioned reasons, this case is not a matter of public or great general interest, and this Court should decline jurisdiction over its single proposition of law.

### **STATEMENT OF THE CASE AND FACTS**

Before applying to take the USMLE part 1 exam, Plaintiff-Appellee called the ECFMG to send him an application for the exam. Contrary to what the ECFMG said in its Memorandum in Support of Jurisdiction on p.4, ECFMG sent the application for the exam to be filled out, along with the brochure of information, together in the same envelope, and that was the way ECFMG was conducting business since the time Plaintiff-Appellee started to take these kind of examinations, not only with him but with all the other candidates. When the examinee fills out the application of the exam he has to agree on **part C of the application, which reads in part:**

“\*\*\*

I also certify and acknowledge that I have received the current edition of the Information Booklet on USMLE Step 1 and Step 2 examinations and ECFMG Certification and am aware of its contents.

\*\*\* ....”

After receiving the application and the brochure of information, Plaintiff-Appellee timely submitted his application along with the necessary fees to take the USMLE exam Step 1 on September 21, and 22, 1993. Consequently, Plaintiff-Appellee was assigned to take said exam in Cincinnati-Ohio center, so **ECFMG was not genuine at this point in its Memorandum in Support.**

On September 21, 1993, Plaintiff-Appellee showed up in time to take the exam, but ECFMG, due to the conduct of the proctors, forced Plaintiff-Appellee to lose 70 minutes out of 180 minutes (three hours) that was allotted for first book of the exam. As a result of that, the Plaintiff-Appellee failed the exam. Then, as it is mentioned above, ECFMG refused to give him the appropriate compensation. At that time, the Plaintiff-Appellee did not have sufficient funds to register in another review course to extend his visa, nor did he have the permanent residency immigration status that would enable him to take a loan to study.

On September 19, 2008, Plaintiff-Appellee filed claims against the ECFMG in the Court of Common Pleas in Montgomery County, Ohio, and then he dismissed it under Rule 41(A)(1)(a) on October 17, 2008. On October 16, 2009, Plaintiff-Appellee re-filed his Complaint alleging breach of written contract, tortious damages, negligent infliction of emotional distress (“NIED”), and intentional infliction of emotional distress (“IIED”) by ECFMG. Plaintiff-Appellee alleged in his Complaint that the failure of ECFMG to provide him with sufficient time to take USMLE Part 1 exam caused him to fail the exam, and coupled with ECFMG’s refusal to give him appropriate compensation to retake said exam, had a profound impact on his life, including but not limited to, deprivation of his ability to practice medicine as an orthopedic surgeon, earn money for retirement, obtain medical and dental insurance, and a negative impact on his social and marital life.

On March 17, 2010, ECFMG moved the Trial Court for judgment on the pleadings, arguing that no written contract existed between Plaintiff-Appellee and ECFMG, and that Plaintiff-Appellee’s tort claims were barred by the statute of

limitations. On April 30, 2010, Plaintiff-Appellee filed his Memorandum opposing ECFMG's Motion. On May 17, 2010, ECFMG filed a Reply in Support of Motion for judgment on the pleading, but that filing was in violation of the confidentiality order issued by the Trial Court. On June 3, 2010, the Trial Court granted ECFMG's Motion for Judgment on the Pleadings and issued a Rule 58(B) notice of final appealable order.

On June 29, 2010, Plaintiff-Appellee filed a notice of appeal in the Second Appellate District of Ohio. On May 10, 2011, Plaintiff-Appellee timely filed his brief pursuant to the Second District's Order, stating that the Trial Court erred when it granted ECFMG's Motion for Judgment on the Pleadings to deny Plaintiff-Appellee's claim for breach of written contract, and also erred when it failed to consider his tort claims as they are subject to a variety of tolling doctrines which should be applied on statutes of limitation for tort claims, since his injuries did not manifest themselves until late in March of 2008, while others like NIED and IIED claims were denied for no reason.

On June 13, 2011, ECFMG filed its Brief in violation of the Ohio Rules of Appellate Procedure, 32 days after the deadline that was set by the Second District's standing order of March 30, 2011, mandating that ECFMG's brief is due 20 days after the Court of Appeals ruled on ECFMG's Motion to Order Reformation. The Court of Appeals ruled on the Motion to Order Reformation on April 21, 2011, therefore, ECFMG's brief was due on May 11, 2011. On June 17, 2011, Plaintiff-Appellant filed a Motion to Strike ECFMG's brief, and on July 13, 2011, the Court of Appeals denied said Motion stating that it will adjudicate this case on the merits, and, consequently, it allowed ECFMG to present its oral argument contrary to Ohio Appellate Rule 18(C).

On August 22, 2011, Plaintiff-Appellee timely filed his reply brief in accordance to the Court of Appeals' standing order.

On August 23, 2011, despite the fact that the Court of Appeals granted Plaintiff-Appellee's Motion to hold the oral argument behind close doors to enable him to discuss freely the issues that were reported under seal, the Court of Appeals, in a last minute decision, and despite his Oral Motion, informed Plaintiff-Appellee while he was standing at the podium that it will hold the oral argument in public. At this point, Plaintiff-Appellee could only discuss the issue of breach of written contract, while the other issues (torts issues) he could not discuss in public in order to avoid incriminating himself.

On September 30, 2011, the Second District Court of Appeals of Ohio issued its Opinion and Final Entry. In its Opinion, the Second District reversed the Trial Court's grant of judgment on the pleadings on breach of written contract issue, and it affirmed the Trial Court on the other issues involving torts, NIED, and IIED. On October 13, 2011, Plaintiff-Appellant timely filed under seal an Application for Reconsideration explaining to the Court of Appeals of the Second District why the statute of limitations for his tort claims should toll on different grounds, and requesting that his NIED and IIED claims should be reconsidered. Plaintiff-Appellee also requested the Court grant his Motion to amend the Pleading in the Trial Court. In the same day, Plaintiff-Appellant filed a Conditional Motion to Certify Conflict, in case his Application for Reconsideration was denied.

#### **ARGUMENT IN OPPOSITION OF PROPOSITIONS OF LAW**

**OPPOSITION TO PROPOSITION OF LAW NO. 1:** A written contract exists between the Plaintiff-Appellee and the Defendant-Appellant "Educational Commission for Foreign Medical Graduates" which consists of the Appellee's written application to take

the United States Medical Licensing Exam step 1, the accompanying brochure of information, cashed checks, the receipts, and the accompanying papers.

Plaintiff-Appellee endorses everything the Court of Appeals of the Second District of Ohio stated regarding Plaintiff-Appellee's first assignment of error in its Decision of September 30, 2011, in the above referenced case. Furthermore, said documents that form the written contract clearly identify the two parties "Mohamed Bassem Rayess" and ECFMG, and the subject matter is that Plaintiff-Appellee should pay \$400.00 for his registration for the USMLE step 1, and in return the ECFMG will administer the USMLE part 1 exam for two days (September 21, 22, 1993) in the Cincinnati-Ohio center at a particular time.

Part C of the application, as is mentioned above, conditioned that the Applicant read and agree on all the information and conditions of ECFMG and United States Medical Licensing Examiners before signing the application in front of notary public. Among said conditions is that the USMLE Step 1 exam consists of two days, four three hour-books. Each examinee will be given two books per day. Plaintiff-Appellee submitted the required fees by checks, as was mandated, along with the application. ECFMG accepted Plaintiff-Appellee's application and checks, and it sent him an admission ticket and on the back of it the same policy was written, stating that the USMLE Step 1 is for two days, four three hour-book exams, to confirm mutual assent.

That mutual assent was materialized when Plaintiff-Appellee was accepted to enter the examination room to take the exam. The mutual assent was confirmed one more time when the ECFMG sent Plaintiff-Appellee two statements of accounts which are contracts, because they are not simple "sales slips" as they define mutual obligations to each party, including future terms, or past obligations. *Claxton v. Mains*, 514 N.E.2d

427, 429 (Ohio App. 10<sup>th</sup> Dist.) The two admission tickets have in their headings the ECFMG name, and they are for Plaintiff-Appellee to keep so they have to be added to the contract. See 17 A Am Jur. 2d, Contracts §188; *Klonowski v. Monczewski*, 109 Ohio St. 230 (1924); *Nankas v. National Bank of Commerce*, 30 Ohio App. 54, (6<sup>th</sup> Dist. Lucas County, 1924).

All the described documents, Plaintiff-Appellee's application for USMLE step 1 exam, accompanying brochure of information, cashed checks, the receipts, and the accompanying letters form the written contract because they indicate one transaction. See *The Sunday Creek Coal Co. v. The Big Baily Coal Company* (1922) 26 Ohio N.P. (n.s.) 117, 120-123, and *Gibbons v. Schwind Realty Co.* (1937) 25 Ohio L. Abs. 260, 263.

Thus, for ECFMG to say that the described documents do not define the contractual obligations of two named parties is genuinely putting itself on an untrodden legal path. Moreover, in support of said view, ECFMG cites cases from a variety of courts of appeals in Ohio. If ECFMG is genuine in its citations, it should have filed a motion to certify conflict in the Court of Appeals of the Second District, which is a thing it has never done.

ECFMG claimed that "pursuant to Civ. R10 (D) Rayess was required to produce "a copy of the....written instrument". The Plaintiff-Appellee attached sufficient documents to his complaint that indicate the existence of a written contract that clearly defined the obligations of the parties, and they include: (Exhibit 1) Rayess' to take the September 21, 22, 1993 administration of the USMLE Step 1 exam, (Exhibit 2) Accompanying letter to confirm the agreement(written contract) between the two parties, (Exhibit 2) Cashed check of \$400.00 by the ECFMG, (Exhibit 3) Accompanying letter to

confirm the written agreement to change the exam center from Washington D.C. to Cincinnati-Ohio, (Exhibit 3) Cashed check of \$35.00 as a change of center fees, (Exhibit 4) A copy of a portion of the USMLE's 1993 Bulletin of Information and ECFMG's Certification and Application Informational Brochure that shows ECFMG and National Board of Medical Examiners guarantee to the examinees that once they are accepted to take the USMLE Step 1 exam, they will have "four, three-hour test books", (Exhibit 4) A Western Union mailgram as "an admission ticket" to take the USMLE Step 1 exam at the Cincinnati-Ohio center, (Exhibit 5) Statement of The Account showing that Plaintiff-Appellant paid his exam fees to take USMLE Step 1 on September 21, 22, 1993, and his balance is \$-0- after said exam, because the document was dated October 22, 1993.

The above mentioned Exhibits sufficiently demonstrate that there is a written enforceable contract. However, if ECFMG wanted more documentation about the contract, it should have filed a motion for more definite statement under Rule 12(E) of the Ohio R. Civ. P. before it filed its Answer. As ECFMG failed to file such Motion, it waives the right to assert Plaintiff-Appellee's failure to attach the written instrument as a basis for dismissing the Complaint. *See McCamon-Ins. Agency Inc., v. Medical Mut. Of Ohio* (Ohio App. 7<sup>th</sup> Dist., 03-11-2003), 2003-Ohio-1221; *Oxford Systems Integration, Inc. v. Smith-Boughan Mechanical Services*, (Second App. Dist) 2005-Ohio-2010 at ¶ 18.

When ECFMG sent the Plaintiff-Appellee the admission permit for the USMLE Step 1 exam on September 21, 22, 1993, and on the back of it, it reads that the USMLE Step 1 exam is a two-day exam consisting of four books, that he will take the first two books on the first day, and the last two books on the second day, and that he will have three hours to complete each test book, ECFMG gave Plaintiff-Appellee a special

guarantee because it was guaranteeing him a seat at the Cincinnati-Ohio Center under said exam conditions, which both parties mutually agreed on. A special guarantee is an integral part of the written contract. See *National City Bank v. Concorde Controls, Inc.*, (11 th Dist.), 2002-Ohio-6578 at ¶¶ 10, 21.

When ECFMG failed to give Plaintiff-Appellee the three (3) hours for the first test book (it gave 110 minutes instead) on September 21, 1993, it breached its guarantee, which is a breach of contract. *Schultz v. Hobbs* (2d Dist.), 1993 WL 491337, 1993 Ohio App. Lexis 5678 at \*3-\*6. A breach of that particular part of the contract is also a breach of contract. See *The National City Bank of Cleveland v. Erskine & Sons, Inc.*, 158 Ohio St. 450, first paragraph of syllabus; *Schaelgel, Inc., v. Board of Trustees of Union Township*, 2006-Ohio-2913 (2d Dist. 2006) at ¶¶ 44, 45.

ECFMG claimed that the Second District's determination that ECFMG's Certification and Application brochure is part of written contract exposes ECFMG and other "similarly situated entities" to meritless claims, but the fact is such claims are extremely rare due to the degree of extinction, and if they ever occur, they are not meritless because they will be based on clearly existing contract law. On the other hand, if this Court ever reverses the Decision of the Second Appellate District on the issue of breach of written contract, it will create a "bombshell" for many other industries which are following the same rational of the Second Appellate District of Ohio. For example, in the banking industry, it is been considered for decades, that when a bank sends to a potential client an application for a credit card along with an informational brochure, and the potential client signed and sent back the application, it has been deemed that the two

parties entered into a written agreement, which consists of the application and the brochure, and that is a very similar situation to this case.

ECFMG also mentioned that in order to protect "the State of Ohio" this Court should accept jurisdiction to hear ECFMG's appeal. Plaintiff-Appellee finds no relationship between this case and the State of Ohio, because although the State of Ohio administers variety of licensing exams, since it offers no working visas like the ECFMG, which offers a J1 visa, the State of Ohio attracts a crowd different than ECFMG's crowd. The vast majority of the candidates who take Ohio licensing exams are either U.S citizen, permanent residents, or have work permits on their own, otherwise, no one would spend his money on a licensing exam if he cannot stay to work legally in this state. Consequently, there is no possibility for them to run into the same problem as Plaintiff-Appellee, as he was on a temporary visa like in this case, and the mission of this Court is not to protect the State of Ohio, but rather to protect justice in the State of Ohio. ECFMG does not represent the State of Ohio, the attorney general does.

### CONCLUSION

For all the foregoing reasons, it is evident that this case does not involve any matter of public or great interest, and a review of ECFMG's single proposition of law will be a judicial waste. Therefore, Plaintiff-Appellee respectfully requests that this Court decline jurisdiction to review this case on the merits.

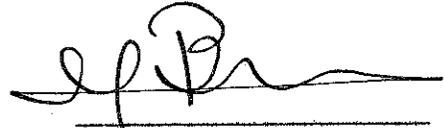
Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing instrument has been served via first class U.S. mail, postage prepaid, upon Audrey K. Bentz, JANIK L.L.P., counsel of record for Defendant-Appellant, 9200 South Hills Blvd, Suite 300, Cleveland, Ohio 44147-3521, this December 10, 2011.



Mohamed Bassem Rayess  
Plaintiff, Pro Se