

No. 12-0797

In the Supreme Court of Ohio

**APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE No. CA-25602**

LARRY J. MORETZ, et al.

Plaintiffs-Appellees
v.

KAMEL MUAKKASSA, M.D., et al.

Defendant-Appellant

**DEFENDANT-APPELLANT KAMEL MUAKKASSA, M.D.'S
MOTION FOR RECONSIDERATION**

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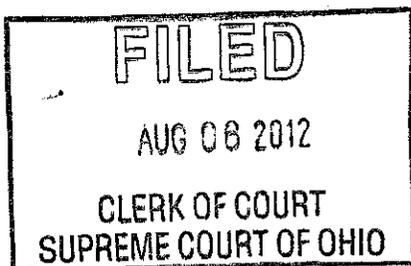
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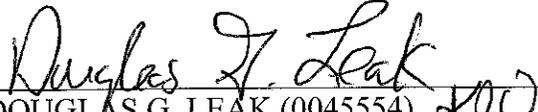
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MOTION FOR RECONSIDERATION

This is a case in which erroneous rulings throughout the Trial Court level and within the Ninth District's Decision have unjustifiably and unprecedentedly imposed liability upon an individual who had no "hands-on" involvement in the alleged negligent events at issue. Both the Trial Court and the Ninth District relied upon legally and factually flawed grounds to hold Dr. Kamel Muakkassa responsible for injuries that occurred during a surgery performed completely by another physician. The responsible physician who actually performed the surgery at issue settled with Appellees and then Appellees continued to pursue Dr. Muakkassa even though he did not perform any of the surgery. Any injuries in this case could not have logically been caused by anything Dr. Muakkassa did or did not do because Dr. Muakkassa was not an acting participant in the surgery at issue. Yet, Dr. Muakkassa was subjected to a trial full of multiple errors that the Ninth District erroneously affirmed relying upon obvious misconstructions and misapplications of Ohio's Civil and Evidentiary Rules.

The fact that legally flawed rulings permeated both the trial and the appellate proceedings is confirmed by this Court's acceptance of this appeal on Dr. Muakkassa's Proposition of Law No. IV. In accepting jurisdiction over Dr. Muakkassa's Proposition Of Law IV, this Court recognized that the Ninth District's Decision is worthy of this Court's jurisdiction. The same misguided logic that formed the bases of both the Trial Court and Ninth District's unprecedented rulings as to the need of expert testimony to support evidence of medical bill "write-offs" was consistently applied by both Courts with respect to Civ. R. 32(A), Evid. R. 803(18) and Civ. R. 49(B). As such, this Court should, likewise, accept jurisdiction over Dr. Muakkassa's remaining Propositions of Law in order to restore the principles of substantial justice and due process guaranteed to all litigants throughout Ohio. Why this **entire case** is of public and great general interest necessitating this Court's review is already supported by two Justices of this Court who

agree that all four of Dr. Muakkassa's Propositions Of Law should be accepted for review. Justices Lundburg Stratton and O'Donnell correctly recognized the vital importance of this entire case and that this Court should accept jurisdiction over all four of Dr. Muakkassa's Propositions Of Law. This Court should similarly accept jurisdiction and review this entire case.

Pursuant to S.Ct. Prac. R. XI, §2(B)(1), Dr. Muakkassa hereby moves this Court to reconsider its four-to-two decision of July 25, 2012 declining to accept jurisdiction over Propositions Of Law Nos. I, II and III.¹ Mindful that a motion for reconsideration shall not constitute a reargument of the issues, Dr. Muakkassa reemphasizes the significant legal implications and collateral consequences for litigants throughout all of Ohio that will arise if the Ninth District Court of Appeals' decision is left undisturbed. This case presents important questions for this Court's clarification and guidance, i.e. (1) the proper application of the mandatory filing requirements for depositions pursuant to Civ. R. 32(A); (2) enforcement of Ohio's Learned Treatise rule as set forth in newly enacted Evid. R. 803(18) that strictly prohibits the admission into evidence of any portion of a textbook for a jury's consideration during deliberations; and (3) the mandatory duty of a trial court under Civ. R. 49(B) to submit a jury interrogatory concerning multiple claims of negligence. The Ninth District's misinterpretation and misapplication of the applicable law pertaining to these areas of law is of such public and great general interest throughout **all** of Ohio that warrants this Court's reconsideration of its denial of jurisdiction over these three Propositions Of Law.

It is Dr. Muakkassa's intention to seek reconsideration in order to bring to the attention of all Justices of this Court the substantial public and general interest of this entire case, as two Justices have already acknowledged. Reconsideration should be granted and jurisdiction over this case should be accepted because the Ninth District essentially duplicated the clearly

¹ This Court correctly accepted Dr. Muakkassa's Proposition of Law No. IV pertaining to the collateral source rule and the admission of evidence of "write-offs" of medical bills.

erroneous rulings of the Trial Court. Permitting the Ninth District's Decision to stand will inevitably perpetuate the contradictory and inconsistent application of the Civil and Evidentiary Rules throughout Ohio. Ohio courts and litigants alike deserve fair, consistent and predictable application of these Rules through this Court's guidance.

BRIEF IN SUPPORT

Proposition of Law No. 1: The Ninth District's Decision Excusing A Party From The Mandatory Filing Requirements For Depositions Has Effectively Rendered Civ. R. 32(A) Meaningless And The End Result Will Be Uncertainty Throughout Ohio As To The Requisite Procedures For Filing Depositions Pursuant To Civ. R. 32(A)

The Ninth District's Decision was not only erroneous and in conflict with the language of Civ. R. 32(A) and this Court's precedents, it has caused uncertainty and confusion with respect to the mandatory duty to file depositions that are going to be used at trial. Left standing, the Ninth District's misconstruction of Civ. R. 32(A) will effectively result in the judicial abrogation of Civ. R. 32(A) that explicitly requires a party to file a deposition at least one day before trial. Compare, for example, *Creak vs. Montville Plastics & Rubbers, Inc.* 48 Ohio App. 3d 167, 548 N.E.2d 1319 (11th Dist. 1988) and *In the Matter of the Estate of Polvko*, 7th Dist. No. 93 C.A. 181, 1995 WL 264253 (May 2, 1995) where the Eleventh District and Seventh District, respectively, correctly construed Civ. R. 32(A) and held that failure to comply with the mandatory procedural requirements of Civ. R. 32(A) bars the admission into evidence of the deposition.

Ohio litigants and courts require consistent application of Ohio's Rules of Civil Procedure. The Ninth District has effectively rendered Civ. R. 32(A) useless by completely ignoring the mandatory dictate of Civ. R. 32(A) requiring parties to file depositions that are going to be used at trial. With this legally flawed precedent, parties and courts can now ignore

Civ. R. 32(A) and then rely upon the Ninth District's Decision as authority in order to avoid and/or bypass the mandatory filing requirements of Civ. R. 32(A).

The outcome of the Ninth District's Decision with respect to Civ. R. 32(A) is troublesome in that it has set forth an unwarranted judicial exception to a longstanding Civil Rule. This Court should reconsider its denial of jurisdiction over this error and then reinstate the stature of Civ. R. 32(A). Ohio Court's and litigants deserve consistent applications of Ohio Civil Rules and, therefore, this Court should accept jurisdiction of this entire case.

Proposition of Law No. 2: The Ninth District's Decision Allowing For the Admission Of A Portion Of A Medical Textbook As A Trial Exhibit Is Both Legally And Factually Flawed, In Direct Conflict With Evid. R. 803(18) And The End Result Will Be Uncertainty Throughout Ohio As To The Proper Use of Learned Treatises

Reconsideration is also appropriate because this case presents an important question of **first impression** in Ohio of the newly enacted Learned Treatise Rule as set forth in Evid. R. 803(18), i.e. whether a portion of a textbook can be admitted into evidence and provided to the jury for its review and consideration during deliberations. Undoubtedly, the Ninth District's Decision upholding the actual admission of a portion of a Learned Treatise into evidence is in direct conflict of the dictate of Evid. R. 803(18) that states "[i]f admitted, the statements may be read into evidence but **may not be received as exhibits.**" (Emphasis added). This Court now has the opportunity for the first time to clarify the scope of the use of a Learned Treatise pursuant to Evid. R. 803(18).

On July 1, 2006, Ohio repealed former Evid. R. 706 and adopted new Evid. R. 803(18). Under former Evid. R. 706, Learned Treatises could only be used during cross-examination and only to impeach an expert witness. Now, Evid. R. 803(18) allows for the use of Learned Treatises but as mentioned above, a Learned Treatise cannot be admitted into evidence and provided to the jury for its deliberations.

The Ninth District's misinterpretation and misapplication of Evid. R. 803(18) by admitting into evidence a portion of a medical textbook provides this Court with a case of **first impression**. This case provides this Court with its first opportunity to analyze Ohio's newly adopted Learned Treatise Rule under Evid. R. 803(18). In accepting jurisdiction over this matter, this Court will be able to provide the first necessary guidance to lower courts and litigants regarding the proper use of Learned Treatises at trial. This evidentiary issue is of vital importance to all litigants and courts throughout Ohio since this Court has not yet addressed Ohio's new Learned Treatise Rule as provided for in Evid. R. 803(18). The Ninth District has now given this Court its first chance to provide guidance to Ohio Courts and litigants with the proper application of Evid. R. 803(18).

Proposition of Law No. 3: The Ninth District's Decision Disallowing A Jury Interrogatory Regarding Plaintiffs' Multiple Claims Of Negligence Is Legally And Factually Flawed, Is Internally Inconsistent And Contradictory, Is In Direct Conflict With Decisions Rendered By This Court And Other Appellate Courts Throughout Ohio And Effectively Renders Civ. R. 49(B) Meaningless

Similarly, the likelihood of continued and unnecessary confusion is highly probable with respect to the Ninth District's failure to follow both the mandatory requirements of Civ. R. 49(B) and this Court's precedent of *Ragone vs. Vitali & Bettrami, Jr., Inc.*, 42 Ohio St.2d 161, 327 N.E.2d 645 (1975). The Ninth District's misconstruction of Civ. R. 49(B) and its ignorance of the Rule's purpose and scope will undoubtedly cause confusion and conflicts with respect to the mandatory nature of Civ. R. 49(B) in submitting a jury interrogatory. Most worrisome is that litigants and courts throughout Ohio can now rely upon the Ninth District's Decision as a means of avoiding Civ. R. 49(B) and this Court's longstanding precedent as clearly set forth in the *Ragone* case.

This Court should reconsider its decision denying jurisdiction and then take the opportunity to review the Ninth District's misconstruction and misinterpretation of Civ. R. 49(B)

and this Court's precedent. This Court now has the ability to provide the proper guidance with respect to the law governing jury interrogatories under Civ. R. 49(B).

CONCLUSION

Dr. Muakkassa did not perform the surgery that is the subject of this lawsuit and, therefore, there cannot logically exist any legal or factual reason to impose liability upon him for injuries caused at the hands of another physician. Yet, the Trial Court committed numerous errors that prejudicially allowed a jury to return a verdict against Dr. Muakkassa. Then, the Ninth District issued its Decision essentially adopting the Trial Court's erroneous rulings, misstatements of law and facts and its flawed reasoning. In doing so, the Ninth District has set forth law that is in direct conflict with the Civil and Evidentiary Rules and legal precedents with respect to the mandatory filing requirements for depositions, the proper use of Learned Treatises, the duty to give a narrative jury interrogatory and the collateral source rule.

By accepting jurisdiction of Dr. Muakkassa's Proposition of Law No. IV, this Court correctly recognized that both the Trial Court and the Ninth District's rulings are worthy of this Court's jurisdiction and review. Likewise, this Court should accept jurisdiction over this entire case, as already recognized by Justices Lundberg Stratton and O'Donnell. It is evident that legally flawed reasoning permeated both the trial and appellate proceedings. This Court should follow the opinions of its two colleagues that this entire case should be accepted for review.

Left undisturbed, the Ninth District's misinterpretation and misapplication of Civ.R. 32(A), Evid. R. 803 (18) and Civ. R. 49(B) will continue to cause confusion and conflicts among Ohio's trial and appellate courts. The likelihood of continued and unnecessary confusion caused by the Ninth District is, therefore, highly probable. Of importance, the effect of the Ninth District's decision is not limited to the parties of this case. Rather, the decision of the Ninth District, if left intact, will have a resounding effect on all litigants and courts throughout Ohio.

Reconsideration is justified because this case clearly presents issues of public and great general interest.

Finally, this Court has the opportunity to correct the injustice caused by the Ninth District's erroneous affirmance of a jury verdict against a physician who had no "hands-on" involvement in the surgery at issue. The Ninth District relied upon legally flawed analyses and conclusions in order to achieve the result it desired. Accordingly, this Court should accept jurisdiction and allow this appeal to proceed so that the important legal issues presented can be reviewed on the merits and reconciled with the existing law in Ohio.

Respectfully submitted,



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CERTIFICATE OF SERVICE

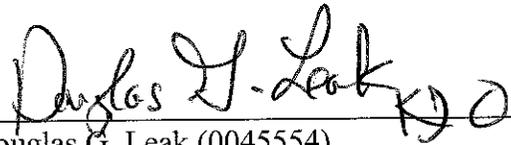
A copy of the foregoing was served on August 6, 2012 pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

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A handwritten signature in black ink that reads "Douglas G. Leak" followed by a stylized flourish or initials.

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