

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 12-0797

Appeal from Court of Appeals
Ninth Judicial District
Summit County, Ohio
Case No. CA-25602

LARRY J. MORETZ, et al.
Plaintiff-Appellees

v.

KAMEL MUAKKASSA, M.D.
Defendant-Appellant

FILED
AUG 14 2012
CLERK OF COURT
SUPREME COURT OF OHIO

**APPELLEES' MEMORANDUM OPPOSING MOTION FOR
RECONSIDERATION**

ATTORNEYS FOR APPELLANT:

Stacy Delgros (0066923)
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, Ohio 44308
330.376.2700 (telephone)
330.376.4577 (facsimile)

Douglas G. Leak (0045554)
ROETZEL & ANDRESS, LPA
One Cleveland Center, Suite 900
1375 East Ninth Street
Cleveland, Ohio 44114
216.623.0150 (telephone)
216.623.0134 (facsimile)

ATTORNEYS FOR APPELLEES:

Mark D. Amaddio (0041276)
MARK D. AMADDIO CO., LPA
55 Public Square, Suite 850
Cleveland, Ohio 44113
216.274.0800 (telephone)
216.522.1150 (facsimile)

David M. Todaro (0075851)
DAVID M. TODARO CO., LPA
126 North Walnut Street
Wooster, Ohio 44691
330.262.2911 (telephone)
330.264.2977 (facsimile)

RECEIVED
AUG 14 2012
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION

Dr. Kamel Muakkassa's motion for reconsideration of propositions of law I, II, III should be denied.

Dr. Muakkassa has offered nothing new in his motion for reconsideration. Therefore, Dr. Muakkassa has failed to meet the standard set forth by the Ohio State Supreme Court. S.Ct. Prac. R. 11.2.(B) states a motion for reconsideration shall not constitute a re-argument of the case. Here, Dr. Muakkassa simply restates the arguments previously made and rejected in his memorandum in support of jurisdiction.

Throughout Dr. Muakkassa's motion for reconsideration he is claiming no "hands-on" involvement. Dr. Muakkassa's failure to scrub in and participate in the surgery is, in fact, the essence of Mr. Moretz's case. This is a case of negligence by omission. The jury was the trier of fact in this case. The jury justifiably imposed liability upon Dr. Muakkassa because he purposefully chose not to have "hands-on" involvement in the surgery.

Dr. Williams and Dr. Muakkassa agreed to act as co-surgeons. Weeks prior to the operation, it was agreed that Dr. Muakkassa would scrub in and physically remove the cyst from Mr. Moretz's spinal cord. The surgery was started with the understanding that Dr. Muakkassa would scrub in and assist and actually remove the cyst from Mr. Moretz's nervous system. On the date of the surgery, Dr. Williams exposed the spinal cord cyst and asked Dr. Muakkassa to scrub into the surgical field to remove the cyst from the spinal cord. Dr. Muakkassa refused to scrub in because he was performing another neurosurgical procedure in a different room within the hospital. Dr. Williams was unaware that Dr.

Muakkassa was performing another surgery in a different room. Dr. Muakkassa's expert conceded that it was improper to perform two neurosurgical procedures at the same time.

Dr. Muakkassa periodically left the surgery scheduled in the other operating room and returned to the operating room where Larry Moretz was having surgery. Dr. Muakkassa instructed Dr. Williams from outside the surgical field as to how to remove this spinal cord cyst. Dr. Williams had never performed this type of surgical procedure or any other surgical procedure within the nervous system but continued under the supervision and direction of Dr. Muakkassa. Dr. Muakkassa assured Dr. Williams that he was doing fine. Dr. Muakkassa failed to instruct Dr. Williams to use magnification and nerve stimulation in order to avoid injuring nerves. Dr. Muakkassa's expert testified that removing a spinal cord cyst without the use of magnification and nerve stimulation is a breach of the standard of care.

Mr. Moretz is impotent and incontinent of urine and stool because the neurosurgeon he hired, Dr. Kamel Muakkassa, refused to scrub in and participate in the surgery that he had agreed to perform with general surgeon Dr. Williams. The defense expert neurosurgeon conceded that if he were involved in Mr. Moretz' surgery that he would have scrubbed in to assist Dr. Williams.

After the operation, Mr. Moretz was diagnosed with injuries to the sacral nerve roots that were contained in the spinal cord cyst. Both parties agreed the surgery at issue in this case caused Mr. Moretz' injuries. Mr. Moretz has been through several surgical procedures at the Cleveland Clinic in an attempt to return some function to his bladder, bowel, and sexual organs. Mr. Moretz has not regained any function in these areas. He wears diapers and has been forced to resign from his job as a FedEx truck driver. Mr.

Moretz now has a colostomy bag to empty the contents of his bowel and he self-catheterizes himself to empty his urine. He still wears a diaper to deal with accidental bowel and bladder dysfunction. He remains impotent.

At trial, the jury found, based upon the facts and evidence presented, Dr. Muakkassa committed negligence that proximately caused injury and damage to Larry Moretz. Consequently, there are no issues of great public or general interest involved and certainly no substantial constitutional questions. Thus, this Court should deny this motion for reconsideration of propositions I, II, III for lack of jurisdiction.

BRIEF IN OPPOSITION

Opposition to Proposition of Law No. 1: The Ninth District Court of Appeals properly upheld the Trial Court's decision to allow the presentation of the videotaped trial testimony of the Plaintiffs' expert where the Plaintiffs complied with the specified requirements of Civil Rule 30 and Superintendence Rule 13e.

Dr. Muakkassa's sole challenge to the videotaped trial testimony of the Moretz' expert witness was that it was not filed the day before trial. There is no such requirement under Superintendence Rule 13. The filing requirements of Superintendence Rule 13 are crystal clear:

Filing Where Objections Not Made. Where objections are not made by a party or witness during the deposition and, if pursuant to Civil Rule 30(F)(1) a party request, or the court orders, that the deposition be filed with the court, the officer shall file the deposition with the clerk of court.

Filing Where Objections Made. When a deposition containing objections is filed with the court pursuant to Civil Rule 30(F)(1), it shall be accompanied by the officer's log of objections. A party may request that the court rule upon the objections within 14 days of the filing of the deposition, or within a reasonable time as stipulated by the parties.

Superintendence Rule 13(A)(10), (11).

The Trial Court did not order the parties to file the videotaped trial testimony of plaintiffs' expert witness. Therefore, either party could have filed the videotaped trial testimony at any time. There is simply no requirement that the party submitting the videotaped trial testimony do so before the start of trial. Dr. Muakkassa did not demonstrate any prejudice caused by the timing of the filing of the videotaped trial testimony. Dr. Muakkassa's counsel was present for the videotaped trial testimony, objected to questions and conducted a thorough cross-examination. The Appellate Court upheld the ruling admitting the video taped testimony.

Opposition to Proposition of Law No. 2: The Ninth District Court of Appeals properly upheld the Trial Court's decision to admit into evidence an illustration of a cyst when it was identified by the Defendant's expert on cross-examination and extensively discussed by Defendant's expert on redirect.

Appellant argues that the admission into evidence of the illustration of the cyst, Exhibit 36, constitutes reversible error. Appellant is wrong. The admission of a copy of the illustration into evidence as Exhibit 36 was proper and appropriate. Exhibit 36 is a copy of an illustration of a cyst. Contrary to the statements made by Appellant, the treatise from where the illustration originated was not admitted into evidence. No text was admitted into evidence. The only thing admitted into evidence was a copy of the illustration of the cyst.

Ohio Evid. Rule 803(18) expressly states:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

The admission of evidence is within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St. 3d 173. The standard of review for admissibility of evidence is abuse of discretion. *See, Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St. 3d 296. An “abuse of discretion” means more than an error of law or judgment. Rather, an abuse of discretion means that the court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, citing *State v. Adams* (1980), 62 Ohio St. 2d 151.

“[A]n abuse of discretion involves far more than a difference in ...opinion... The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of the will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 87, 482 N.E. 2d 1248, quoting *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 222, 473 N.E. 2d 264.

The introduction of the exhibit into evidence at the trial was not an abuse of the Court’s discretion. Exhibit 36 is clearly not a learned treatise and therefore Rule 803(18) does not apply. The Trial Court found Exhibit 36 included only a copy of an illustration which was referred to and explained by Dr. Muakkassa’s expert during his testimony. As

such, Exhibit 36 was admissible and not precluded from admission under Evid. Rule 803(18). The Appellate Court correctly upheld the ruling of the Trial Court.

Opposition to Proposition of Law No. 3: The Ninth District Court of Appeals properly upheld the Trial Court's decision to exclude a narrative jury instruction where there is a single act of negligence.

The function of a jury interrogatory is to test the correctness of a general verdict by asking the jury to disclose its opinion on determinative issues in a case based upon trial evidence. *Cincinnati Riverfront Coliseum, Inc. v. McNulty, Inc.* (1986), 28 Ohio St.3d 333, 336-337. A trial court is not required under all circumstances to submit a proposed interrogatory to the jury. A trial court has discretion to reject interrogatories if they do not refer to a determinative issue or they are ambiguous, confusing, incomplete, redundant, or otherwise legally objectionable. *Ramage v. Central Ohio Emergency Service, Inc.* (1992), 64 Ohio St.3d, 97, 107-108. A trial court's decision to admit or reject a proposed jury interrogatory is reviewed under the abuse of discretion standard. *Freeman v. Norfolk & Western Ry. Co.* (1994), 69 Ohio St.3d, 611, 614.

Here, the sole basis of Dr. Muakkassa's negligence was his failure to scrub in and participate in the surgery. The physician who performed the surgery, Dr. Williams, was not qualified to perform neurosurgery and was not trained in the treatment of spinal cord cysts. Dr. Williams and Mr. Moretz testified Dr. Muakkassa agreed to scrub in and remove the spinal cord cyst.

The Trial Court allowed Dr. Muakkassa the opportunity to revise his proposed interrogatory. He refused and insisted on an all or nothing approach. Dr. Muakkassa had

the obligation to more carefully tailor his proposed interrogatory and his failure to do so prohibits him from assigning the Trial Court's decision as error. The Appellate Court held that the Trial Court properly exercised its discretion to keep out the narrative jury interrogatory proposed by Dr. Muakkassa.

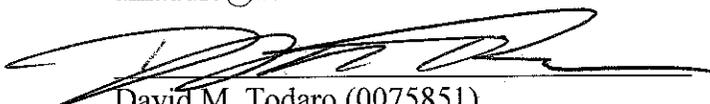
CONCLUSION

For the reasons discussed above, this Court should deny this motion for reconsideration of propositions I, II, III for lack of jurisdiction.

Respectfully submitted



Mark D. Amaddio (0041276)
MARK D. AMADDIO CO., LPA
55 Public Square, Suite 850
Cleveland, Ohio 44113
216.274.0800 (telephone)
216.522.1150 (facsimile)
amaddio@aol.com



David M. Todaro (0075851)
DAVID M. TODARO CO., LPA
126 North Walnut Street
Wooster, Ohio 44691
330.262.2911 (telephone)
330.264.2977 (facsimile)
davidmtodaro@aol.com

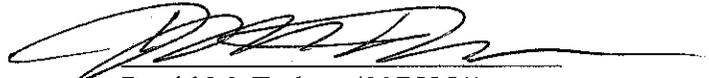
*Attorneys for Appellees Larry J. Moretz and
Nicole Moretz*

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing *APPELLEES' MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION* by first class U.S. mail, postage prepaid, this 13th day of August, 2012 upon the following counsel.

Stacy Delgros
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, Ohio 44308

Douglas G. Leak
ROETZEL & ANDRESS, LPA
One Cleveland Center, 9th Floor
1375 E. 9th Street
Cleveland, Ohio 44114


David M. Todaro (0075851)