

ORIGINAL

No. 12-0797

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**In the Supreme Court of Ohio**

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

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**LARRY J. MORETZ, et al.**

Plaintiffs-Appellees

v.

**KAMEL MUAKKASSA, M.D., et al.**

Defendant-Appellant

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**REPLY BRIEF OF DEFENDANT-APPELLANT  
KAMEL MUAKKASSA, M.D.**

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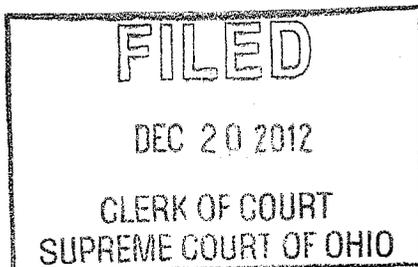
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## **I. INTRODUCTION**

Plaintiffs-Appellees Larry and Nicole Moretz want this Court to adopt the erroneous rulings of the Trial Court and the Ninth District that unjustifiably imposed liability upon an individual who had no “hands-on” involvement in the surgery performed by another physician. The Trial Court issued multiple erroneous and prejudicial rulings that undoubtedly deprived Defendant-Appellant Kamel Muakkassa, M.D. of a fair and impartial jury trial. Then, the Ninth District issued a Decision that inappropriately adopted the Trial Court’s errors. In doing so, the Ninth District set forth no justifiable legal or factual basis upon which to affirm the jury verdict. Similarly, Appellees’ Merit Brief presents this Court with no legally or factually sound reasons upon which the Ninth District’s Decision should be allowed to stand. In fact, Appellees raise several meritless legal and factual arguments in an attempt to convince this Court that the Ninth District’s erroneous Decision should not be disturbed.

If the Ninth District’s Decision is not reversed by this Court, Civ. R. 32(A), Evid. R. 803(18), Civ. R. 49(B) and this Court’s precedents in *Robinson vs. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E. 2d 1197 and *Jaques vs. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E. 2d 434 will all be rendered meaningless. More specifically, Ohio Courts and litigants need this Court to restore the proper guidance with respect to: (1) the mandatory duty to file depositions to be used at trial; (2) the prohibition of admitting into evidence as a trial exhibit a Learned Treatise and/or any portion of a Learned Treatise; (3) the mandatory duty to submit a narrative jury interrogatory where there are multiple claims of negligence; and (4) the proper admission of evidence of “write-offs” of medical bills without the requirement of expert witness testimony.

This Court should reverse the Ninth District's Decision in order to reinstate the proper application of Ohio's Civil and Evidentiary rulings and this Court's precedents. Not only will a reversal of the Ninth District's Decision provide proper guidance for Courts and litigants throughout all of Ohio, a reversal will overturn the injustice suffered by Dr. Muakkassa and prevent similar injustices from occurring in the future.

## II. LAW AND ARGUMENT

### **PROPOSITION OF LAW NO. 1: Appellees Present Both Factually And Legally Flawed Arguments That Do Not Adequately Address The Ninth District's Misapplication Of Civ. R. 32(A), The Mandatory Language Of Civ. R. 32(A) And The "Good Cause" Exception Of Civ. R. 32(A).**

Appellees desperately attempt to avoid the mandatory filing requirements of Civ. R. 32(A) by essentially shifting the burden upon Dr. Muakkassa to prove that he was not "surprised" by Appellees' **admitted** failure to file their expert's trial deposition/transcript/video. (Appellees' Merit Brief, pg. 12-13). However, what is worth noting is that in their Merit Brief, Appellees neither address nor acknowledge that both their counsel **and** the Trial Court **admitted** that they were required to timely file Dr. Dennis' trial video/deposition pursuant to Civ. R. 32(A) (Tr. 110, 111-120). Similarly, Appellees do not address or even acknowledge the "good cause" exception of Civ. R. 32(A) that permits the untimely filing of a deposition. The apparent reason for Appellees' failure to address this requirement under Civ. R. 32(A) is that Plaintiffs incorrectly believe that they were not bound by Civ. R. 32(A) to begin with. This position is wholly inconsistent with both the Trial Court's and Appellees' counsel's admissions at the time of trial that they were bound by Civ. R. 32(A) to file Dr. Dennis' trial video/deposition (Tr. 111; 110, respectively).

Just like the Ninth District, Appellees completely ignore the requisite "good cause" aspect of Civ. R. 32(A). In their Merit Brief, Appellees neither address, acknowledge nor analyze the

“good cause” exception to Civ. R. 32(A). Instead, Appellees apparently want this Court to summarily adopt the Ninth District’s judicial elimination of the “good cause” requirement in order to justify their own noncompliance with the mandatory filing requirement of Civ. R. 32(A).

Also, Appellees’ Merit Brief does not address the case law upon which Dr. Muakkassa heavily relied upon at the Appellate level and now presents to this Court. It is interesting that neither the Ninth District nor Appellees even attempt to distinguish either the Eleventh District’s Decision in *Creak vs. Montville*, 48 Ohio App.3d 167, 548 N.E.2d 1319 (11<sup>th</sup> Dist. 1988) or the Seventh District’s Decision in *In the Matter of the Estate of Pavolko*, 7<sup>th</sup> Dist. No. 93 C.A. 181, 1995 WL 264253 (May 2, 1995). Both of these cases properly recognize the mandatory duty under Civ. R. 32(A) that a deposition, if it is to be presented as evidence, be filed with the court at least one day before the day of trial. In fact, this case is virtually identical to the *Creak* case, i.e. (1) Appellees untimely filed the deposition of Dr. Dennis on the second day of trial; (2) Appellees did not obtain leave of Court to untimely file Dr. Dennis’ deposition; and (3) Appellees failed to show “good cause” for the delay. See *Creak* at ¶2. Therefore, neither the Ninth District nor Appellees should have ignored the applicable *Creak* Decision.

Both the Ninth District and Appellees cannot reasonably excuse Appellees from the mandatory filing requirement of Civ. R. 32(A) by labeling Dr. Muakkassa’s position herein as an attempt to gain a “technical victory.” (Appellees’ Merit Brief pg. 12, citing the Ninth District’s Decision at ¶10). Civil Rules and Evidentiary Rules alike establish procedural requirements for parties to follow and Courts should not “relax” such requirements. See, *Campbell vs. Warren Gen. Hosp.*, 105 Ohio App.3d 417, 664 N.E.2d 542 (11<sup>th</sup> Dist. 1994). In the *Campbell* Opinion, the Eleventh District refused to “relax” the expert competency requirement under Evid. R.

601(D) by rejecting the defendant's argument upon appeal that the trial court's enforcement of Evid. R. 601(D) was nothing more than a "hypertechnical" application of the rule."

In this case, the Ninth District did more than relax the mandatory filing requirement of Civ. R. 32(A) – it completely eliminated the filing requirement. The Ninth District erroneously refused to hold Appellees to their mandatory duty under Civ. R. 32(A) to file Dr. Dennis' deposition. Consequently, the Ninth District has effectively rendered Civ. R. 32(A) meaningless.

This Court should restore the mandatory filing requirement of Civ. R. 32(A) by holding Appellees' failure to show any "good cause" for their failure to file their expert's deposition was a clear violation of Civ. R. 32(A).

**PROPOSITION OF LAW NO. 2: Appellees Do Not Address The Plain Language Of Evid. R. 803(18) Which Explicitly States That A Learned Treatise Is Not Admissible As A Trial Exhibit For The Jury's Consideration During Deliberations.**

What is glaringly missing in Appellees' Merit Brief is any reference to the explicit language of Ohio's Learned Treatise Rule in Evid. R. 803(18):

If admitted, the statements may be read into evidence but **may not be received as exhibits.**

(Emphasis Added).

Additionally, Appellees do not even attempt to address the reasoning behind the prohibition of admitting a Learned Treatise into evidence as a trial exhibit:

... The rule provides that **the treatise may be read into evidence but not received as an exhibit to prevent the trier of fact from giving it excessive weight or attempting to interpret the treatise itself.**

Staff Notes to Evid. R. 803(18)(Emphasis Added).

In fact, Appellees never cite, refer to or even address Evid. R. 803(18), with the exception of citing the Ninth District's erroneous Decision. Appellees' Merit Brief is completely devoid of

any legal analysis of Evid. R. 803(18) which was the primary basis upon which the medical textbook illustration should never have been admitted into evidence as a trial exhibit for the jury's consideration during its deliberations. Without citing any case law or any other legal authority, Appellees want this Court to believe that bits and pieces of a medical textbook can be extracted and then admitted as a trial exhibit. But, the plain language and the intent of Evid. R. 803(18) **permits the use** of a Learned Treatise during trial; Evid. R. 803(18) **does not allow the admission of a Learned Treatise or any portion of a Learned Treatise as a trial exhibit.**

Next, both the Ninth District and Appellees are misguided as to the prejudicial effect of the admission of Exhibit No. 36 into evidence as a trial exhibit.<sup>1</sup> Dr. Muakkassa takes issue with the admission of an illustration taken from a textbook that Appellees' counsel represented and argued to the jury depicted the very condition that Mr. Moretz allegedly had – a congenital anterior sacral meningocele. Dr. Muakkassa and his expert, Dr. McLaughlin, adamantly denied that Mr. Moretz had a congenital anterior sacral meningocele. Instead, Dr. Muakkassa's entire defense was premised upon his position that Mr. Moretz had a neurogenic cyst as opposed to a congenital anterior sacral meningocele as depicted in the illustration admitted into evidence.

Although Dr. Muakkassa's expert, Dr. McLaughlin, admitted that the illustration, itself, depicted a congenital anterior sacral meningocele, Dr. McLaughlin explicitly denied that the illustration reflected what occurred in this case, i.e. that Mr. Moretz had a neurogenic cyst. (Tr. 455-460). Consequently, the jury was given a trial exhibit for its review and consideration that

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<sup>1</sup> Dr. Muakkassa still takes issue with whether the illustration taken from the medical textbook is actually depicted in Exhibit No. 36. At trial, Appellees' counsel never: (1) established whether Exhibit 36 was illustration No. 83.1 or No. 83.4; (2) marked exhibit 36 as an exhibit when used during Dr. McLaughlin's cross-examination; or (3) had Dr. McLaughlin confirm that the illustration was an accurate depiction of Mr. Moretz. (See Dr. Muakkassa's Merit Brief, pg. 5-7).

was not a piece of evidence but was merely demonstrative evidence of what Appellees alleged reflected Mr. Moretz's condition.

In their Merit Brief, Appellees improperly argue that since the illustration depicted a congenital anterior sacral meningocele, it was simply admissible as a trial exhibit. However, Appellees' counsel argued that the illustration depicted what they alleged reflected Mr. Moretz's condition, which Dr. Muakkassa consistently denied. In Closing Arguments, Appellees' counsel stated as follows:

If you recall, at the very end of Dr. McLaughlin's testimony, Mr. Treadon had him up with that picture that I'll show you a little bit later, and he indicated that that was a fair representation....that picture of an anterior presacral meningocele cyst, **so that he had a fair representation of Larry's anatomy, what Larry had.**

\* \* \*

**...We had a drawing up from that book published by Dr. Benzel that was a representative drawing of an anterior presacral meningocele of the type Larry had...**

(Tr. 629-630; 633-634).

Appellees' claim that Dr. Muakkassa should have introduced "a drawing of their version of Mr. Moretz's condition" is without merit and legally unsound. First and foremost, to do so would be to invite error since Dr. Muakkassa knew that neither portions of a medical textbook nor demonstrative evidence get admitted into evidence as a trial exhibit. What would have been admissible evidence as a trial exhibit reflective of Mr. Moretz's condition would have been a radiological study (CT Scan, MRI, etc.), a photograph of the surgery, a video of the surgery, etc. – not an illustration taken directly from a medical textbook.

Contrary to the Ninth District and Appellees' position, Dr. Muakkassa was indeed prejudiced as a result of the admission of Exhibit No. 36. Appellees' case hinged on whether the

jury believed Mr. Moretz had an anterior sacral meningocele versus a neurogenic cyst. The admission of an illustration of an anterior sacral meningocele as an exhibit was wholly prejudicial because the jury was undoubtedly allowed to give excessive weight to the illustration and conclude that it was representative of Mr. Moretz. It is this type of prejudicial effect that Evid. R 803(18) was intended to avoid by disallowing the admission of a textbook, or any portion thereof, as a trial exhibit to be sent to the jury for its consideration.

Finally, it is illogical for Appellees to argue that a portion of a Learned Treatise can be extracted from the textbook and then magically lose its status as a Learned Treatise. Without citing any case law or any other legal authority, Appellees claim that an illustration taken directly from a textbook does not constitute a "statement" within the meaning of Evid. R. 803(18). However, Appellees' argument is internally inconsistent. On the one hand, they claim that the illustration is not a statement. Yet, they want the illustration to depict an anterior sacral meningocele. Obviously, an illustration, in and of itself, constitutes a "statement" within the meaning of Evid. R. 803(18). Clearly, Evid. R. 803(18) was promulgated for the purposes of allowing the use of a Learned Treatise during trial but prohibit its actual admission as a trial exhibit in evidence, including illustrations taken directly from the textbook.

**PROPOSITION OF LAW NO. 3: Appellees' Merit Brief Is Completely Devoid Of Any Reference To Their Own Expert's Opinions Of Multiple Claims Of Alleged Negligence That Warranted A Narrative Jury Interrogatory Pursuant To Civ. R. 49(B).**

Apparently, Appellees implicitly agree that if there were truly more than one allegation of negligence against Dr. Muakkassa, a narrative jury interrogatory would have been warranted. However, Appellees incorrectly claim that one was not warranted in this case because the sole basis of Dr. Muakkassa's negligence was his failure to scrub in and participate in the surgery. What is glaringly missing from Appellees' Brief is any reference to their own expert's trial

testimony which included multiple claims of negligence. Instead, Appellees limit their focus of their position to only Dr. Williams and Dr. Muakkassa.

It was Appellees' expert, not Dr. Williams or Dr. Muakkassa, who had multiple claims of alleged negligence against Dr. Muakkassa. Dr. Dennis set forth several separate ways in which Dr. Muakkassa was allegedly negligent: (1) Dr. Muakkassa failed to scrub in; (2) Dr. Muakkassa failed to use magnification or loupes or advise Dr. Williams to do so; (3) Dr. Muakkassa failed to use nerve stimulation or advise Dr. Williams to do so; (4) Dr. Muakkassa should have used a posterior approach rather than an anterior approach; and (5) Failure of physicians to communicate. (Tr. of Dr. Dennis, pg. 31-36).

Query: Why is Appellees' Appellate Brief completely devoid of any reference to their own expert's multiple claims of negligence? Clearly, to reference Dr. Dennis' trial testimony would have defeated Appellees' argument that there was only one allegation of negligence against Dr. Muakkassa. Dr. Dennis explained to the jury how Dr. Muakkassa was negligent in multiple ways. Consequently, Dr. Muakkassa had an absolute right pursuant to Civ. R. 49(B) to test the jury's verdict with his proposed narrative jury interrogatory. However, the Ninth District ignored the mandatory nature of Civ. R. 49(B) by refusing to submit the narrative jury interrogatory.

Finally, Appellees' attempt to substitute jury interrogatories taken from Ohio Jury Instructions for the mandatory procedural rule of Civ. R. 49(B) is clearly without merit. As is well known in Ohio, OJI is not the law of the state but merely represents a commentary on the law. *State vs. Morris*, 7<sup>th</sup> Dist. No. 03 MO 12, 2004-Ohio-6810, 2004 WL 2913956. Trial Courts and Appellate Courts are not bound to follow OJI and, in fact, this Court has routinely warned that OJI should not be applied blindly. *State vs. Burchfield*, 66 Ohio St.3d 261, 611

N.E.2d 819 (1993). Ohio Jury Instructions are a product of a committee of the Judicial Conference and are merely suggestions as to what the committee believes is appropriate. *State vs. Mitchell*, 10 Dist. No. 88 AP-695, 1989 WL 47083 (May 2, 1989). By no means does OJI take priority over a Court's mandatory duty to submit a narrative jury interrogatory pursuant to Civ. R. 49(B).

This Court should reverse the Ninth District's Decision which has effectively eliminated the proper use of a narrative jury interrogatory as required by Civ. R. 49(B).

**PROPOSITION OF LAW NO. 4: Appellees' Merit Brief And, Also, The Amicus Briefs Are Requesting This Court To Ignore And/Or Reverse Its Prior Decisions In *Robinson vs. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.3d 1197 And *Jaques vs. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434.**

Once again, Appellees and Amici misinterpret Dr. Muakkassa's position that evidence of "write-offs" of the medical bills are automatically admissible pursuant to this Court's case of *Jaques vs. Manton*, 125 Ohio St.3d 342, 928 NE 2d 434, 2010 Ohio 1838. This Court in the *Jaques* Decision did not hold that expert testimony was required in order to admit evidence of "write-offs" of medical bills.

Now, Appellees and Amici want this Court to revisit its Decisions in both *Robinson vs. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6366, 857 N.E. 3d 1197 and *Jaques* in order to add a completely new element to the admission of evidence of "write-offs" by requiring proof through expert testimony. This was never the intent of this Court and to revisit this issue and accept Appellees and Amici's positions would result in the disparate treatment of Plaintiffs and Defendants in civil litigation, i.e. Plaintiffs would not need expert testimony to support the admission of evidence of medical bills whereas, Defendants would be required to present expert testimony in support of the "write-offs" of those identical medical bills.

Appellees and Amici incorrectly believe that the admission of evidence of "write-offs" of medical bills is intended to dispute the reasonableness and/or the necessity of the original medical bills. To the contrary, the admission of evidence of "write-offs" is intended to inform the jury that there were amounts subtracted from the entire medical bills so a plaintiff is not unjustly enriched. This does not require an expert witness according to this Court in *Jaques*.

It is abundantly clear that this Court has already held that evidence of "write-offs" is admissible even in the absence of expert testimony. As such, the Ninth District's misinterpretation and misapplication of this Court's precedent and R.C. 2317.421 should be reversed.

### III. CONCLUSION

The Ninth District improperly adopted the Trial Court's multiple errors that tainted the jury and prejudicially denied Dr. Muakkassa a fair trial. Appellees' Merit Brief fails to address several factual and legal issues and, thus, Appellees have not adequately responded to Dr. Muakkassa's arguments that the Ninth District's Decision should be reversed. Dr. Muakkassa respectfully requests that this Court reverse the Ninth District's Decision and vacate the jury's verdict in favor of Appellees.

Respectfully submitted,

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