

IN THE SUPREME COURT OF OHIO

CHARLES B. HUDSON, II,  
PLAINTIFF/APPELLANT,

vs.

CINCINNATI GROUP HEALTH  
ASSOCIATES, INC.,

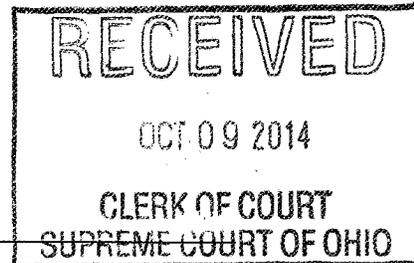
CHARLES BURGHER, M.D.,

and

CHERYLE WEBB, M.D.,

DEFENDANTS/APPELLEES.

: CASE NO.: 14-1354  
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: ON APPEAL FROM THE HAMILTON  
: COUNTY COURT OF APPEALS,  
: FIRST APPELLATE DISTRICT  
:  
: COURT OF APPEALS  
: CASE NOS. C-130164 and C-130181



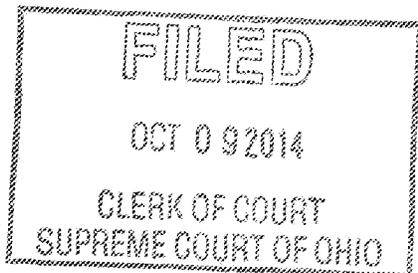
MOTION FOR STAY AND/OR REMAND WITH MEMORANDUM

Comes now the appellant, Charles B. Hudson, II, pursuant to Supreme Court Rules of Practice 7.07(A)(2), and moves this Court to stay his appeal, and/or remand to the First District Court of Appeals for the purpose of obtaining certification due to conflict, pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, with its opinion in Case Nos. C-130164 and C-130181, and that of the Fifth District Court of Appeals in *Burk v. Fairfield Ambulatory Surgery Center, Ltd.*, 2014-Ohio-4062, Case No. 13-CA-85, decided September 5, 2014.

Respectfully Submitted,

*Marlene Penny Manes*

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## MEMORANDUM

Appellant's appeal to this Court was docketed on August 8, 2014. Appellees' memorandum in opposition was filed in response on September 5, 2014. On that same day, September 5, 2014, the Fifth District Court of Appeals issued its opinion in *Burk v. Fairfield Ambulatory Surgery Center, Ltd.*, 2014-Ohio-4062, Case No. 13-CA-85. Its analysis and holding is contrary to that of the First District Court of Appeals opinion, which is the subject of this appeal. The Fifth District case became known to counsel only after and through a brief summary published in the Ohio State Bar Association Daily Report of September 19, 2014.

As a result, appellant is requesting a stay by this Court, and/or a remand to the First District Court of Appeals, in order to pursue a motion with that court for certification based on conflict. The conflict presented by these two different appellate courts is significant, as they judicially create differing standards for case dismissals<sup>1</sup> in their individual jurisdictions involving a determination as a matter of law versus questions of fact for jury consideration, expert testimony needed when there is negligence of more than one health care provider, and which party then bears the burden of proof as to proximate cause of injury to a patient.

The Fifth District found in its research “. . . that Ohio courts apply the doctrine of alternative liability in the same manner;<sup>2</sup> that is, to shift the burden of proof of causation when the negligence of two parties has been established.”<sup>3</sup> In other words, the Fifth District, while not specifically mentioning this Court's holding in *Pang v. Minch*

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<sup>1</sup> In the First District case, which is the subject of this appeal, both dismissals were based on directed verdict. In the *Burk* case, the dismissal was based on summary judgment in the trial court, and reversed by the Fifth District. The standards for determining motions for summary judgment and directed verdicts are the same. Civ. R. 56(C) and Civ. R. 50(A)(4).

<sup>2</sup> Referencing *Summers v. Tice* (1948), 33 Cal.2d 80, 199 P.2d 1.

<sup>3</sup> *Burk* at ¶32.

(1990), 53 Ohio St.3d 186, syllabi 5, 6, 7, 559 N.E.2d 1313, adopted this Court's propositions of law as applicable to medical malpractice cases by finding that the burden of proof shifts as to causation when there is more than one negligent actor. Thus, the Fifth District holding is directly applicable to appellant's Proposition of Law No. I, and is in conflict with that of the First District in this case, which placed the burden of proof not on the negligent tortfeasors, but on the patient-plaintiff, in regard to causation where there was one indivisible injury.

Wherefore, the appellant prays that this Court will grant his motion, as this conflict is extremely significant to the trial bar and the judiciary in regard to standards to be applied equally throughout the state in regard to dismissal of parties, burden of proof, and the elimination of issues and parties from jury determination.<sup>4</sup> With these two conflicting court of appeals opinions, constitutional concerns are presented involving equal protection, due process, equal access to the courts, and trial by jury.

Respectfully Submitted,



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<sup>4</sup>The First District relied upon the case of *Seagle v. Scherzer*, 2001 Ohio App. LEXIS 1974, Tenth Appellate District, Case No. 00AP-1048. Consequently, there is an additional opinion from another court of appeals contrary to this most recent opinion by the Fifth District in *Burk*.

**CERTIFICATE OF SERVICE**

I certify that a copy of this Motion for Stay and/or Remand with Memorandum was sent by ordinary U.S. mail to David C. Calderhead and Joel L. Peschke, Calderhead, Lockemeyer & Peschke, 6281 Tri-Ridge Boulevard, Suite 210, Loveland, Ohio 45140, on October 8, 2014.

  
Marlene Penny Manes (0022575)