IN THE SUPREME COURT OF OHIO

CASE NO. 2019-1653

RANDY MAY; JOHN MAY
Plaintiff-Appellants,

-vs-

DONICH NEUROSURGERY AND SPINE L.L.C.; DANE J. DONICH, M.D.,
Defendant-Appellees.

ON APPEAL FROM THE NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, CASE NO. 29215

PLAINTIFF-APPELLANTS' MOTION FOR RECONSIDERATION

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MOTION

I. INTRODUCTION

Plaintiff-Appellant, Randy May, remains partially paralyzed as a result of the misplacement of a cervical neuro-stimulator paddle lead in her spine at Summa Barberton Citizens Hospital on February 25, 2014. Her claim of medical negligence against Defendant-Appellee, Dane J. Donich, M.D. ("Dr. Donich"), has been convincingly substantiated by neurosurgeon Robert M. Levy, M.D. ("Dr. Levy"), who is one of the foremost authorities in the nation with regard to these devices. *R. 29, Deposition of Robert M. Levy, M.D. filed July 23, 2018 ("Dr. Levy Depo."), pp. 30-57.* For twenty-four years he had served as a fully tenured professor of neurosurgery, physiology, and radiation oncology at Northwestern University before he assumed the position as the Chairman of the Department of Neurosurgery at the University of Florida in Jacksonville. *Id., pp. 14-15.* He then worked as the Chief and Primary Neurosurgeon at Boca Raton Regional Hospital, where he was also the Director of the Marcus Neuroscience Institute. *Id., pp. 7-8.* Throughout this period, he had placed more than one thousand stimulators in patients' spines. *Id., pp. 16-17.* Dr. Levy was also routinely consulted by the product manufacturers, including the company that had produced the stimulator at issue in this case. *Id., pp. 11-12.* He has assisted with the formulation and design of their research studies, educational programs, and instrumentation. *Id.*

A jury was never permitted to evaluate Dr. Levy's findings and opinions, and Dr. Donich was never required to defend his care, because the medical malpractice action was dismissed on purely procedural grounds. *Plaintiff-Appellants' Memorandum in Support of Jurisdiction ("Plaintiffs' Memo."), Apx. 0001-24.* Even though the expert neurosurgeon had detailed his criticisms of Dr. Donich's surgical care during his discovery deposition, the proceedings were terminated because of purely technical

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violations of the requirements for an Affidavit of Merit set forth in Civ.R. 10(D)(2). *Id.*

On February 18, 2020, this Court declined to exercise jurisdiction over this appeal. *Entry filed February 18, 2020.* A single proposition of law that had been offered by Plaintiff-Appellants, Randy and John May, stating:

> AN AFFIDAVIT OF MERIT SHOULD BE STRICKEN FOR NONCOMPLIANCE WITH CIV.R. 10(D)(2) ONLY TO FURTHER THE RULE'S OBJECTIVES AND NOT ON PURELY TECHNICAL GROUNDS.

Plaintiffs' Memo., p. 9. Justice Michael Donnelly dissented from this ruling. *02/18/2020 Case Announcements*, 2020-Ohio-518, p. 4.

Plaintiffs are now deeply concerned that the majority of this Court was misled by the inaccurate case history and flawed legal analysis that had been furnished in the Memorandum in Response of Appellees, Donich Neurosurgery and Spine L.L.C. and Dane J. Donich, M.D. filed January 2, 2020 ("Defendant's Memo."). Plaintiffs were not, of course, afforded an opportunity to respond to and correct the misstatements. *S.Ct. Prac.R. 7.04.*

As permitted by S.Ct.Prac.R. 18.02(B)(1), this Court should carefully reconsider the denial of jurisdiction in light of the actual events that transpired below as well as the most-sensible interpretation that should be afforded to Civ.R. 10(D)(2). In *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278, 282 (10th Dist.1982), Judge (later Chief Justice) Moyer granted such a motion at the intermediate appellate level and explained that:

> The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.

See also City of Columbus v. Hodge, 37 Ohio App.3d 68, 523 N.E.2d 515, 516 (10th

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Dist.1987). It has been noted that jurists should be open to rethinking their positions once difficult decisions have been made. *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 546-548, 697 N.E.2d 181, 186-188 (1998) (Lundberg Stratton, J., concurring).

II. THE PURPORTED FAILURE TO SUPPORT THE FIRST AFFIDAVIT

Perhaps the most troubling misrepresentation that has been asserted over-and-over by Defendant-Appellees, Donich Neurosurgery and Spine, LLC and Dr. Donich, is that Plaintiffs purportedly "waived," "forfeited," or otherwise abandoned their objections to the trial court's unrealistic application of Civ.R. 10(D)(2). *Defendant's Memo., pp. 1-2, 6, 8-9*. Their primary criticism is that: "In response to the trial court's March 29 Order, the [Plaintiffs] did not argue in the trial court proceedings that the First Affidavit was sufficient to comply with Civ.R. 10(D)(2)[.]" *Id., p. 4*. According to their "Statement of the Case[,]" that order did nothing more than deny the motion for extension to respond while affording sixty days to submit a second affidavit of merit. *Id.* But in reality, the ruling of March 29, 2018, found the first Affidavit of Merit ("2015 Affidavit") to be "defective under Civ.R. 10." *R. 14*. No explanation was ever offered by the trial judge, and Defendants made no attempt to justify on appeal, why no additional time was granted early in the refiled action to oppose the Motion to Declare Affidavit of Merit Defective filed March 15, 2018 ("Defendants' Mtn Declare"). *R. 9*. At the time of the surprisingly quick ruling, Plaintiffs' timely Motion for Extension of Time of March 22, 2018 had been unopposed. *R. 13*.

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Plaintiffs thus did not "waive" or "forfeit" anything with respect to the First Affidavit of November 17, 2015. They were never given a chance to defend the sworn statement before the trial judge found it to be defective. *Plaintiffs' Memo., Apx. 00025*. Had they been permitted to do so, they would have explained that the 2015 Affidavit had

been executed by Dr. Levy while he was both fully licensed and actively practicing neurosurgery. *Dr. Levy Depo., pp. 7-8, 14-16.* This was the same Affidavit of Merit that had been submitted early in the initially filed action, which had never sparked any objections from the defense during that proceeding.

By immediately ruling in the re-filed litigation that the 2015 Affidavit was "defective under Civ.R. 10[,]" the trial judge must have accepted defense counsel's claims as both accurate and uncontestable. *Plaintiffs' Memo., Apx. 00025.* The only "proof" of any defects was the defense attorney's own affidavit in which he asserted without any substantiation:

> 3. If the result of that investigation are correct, Dr. Levy is not involved in the active clinical practice of medicine, nor does he teach at an accredited school.
>
> 4. It is my good faith belief that Dr. Levy does not devote one-half of his professional time to the active practice of clinical medicine or its instruction at an accredited institution.

Defendants' Mtn. to Declare, Exhibit B, p. 1. The only other evidence that was submitted at that time was the 2015 Affidavit and a few pages of the neurosurgeon's deposition transcript in which he testified merely that he had been working as a consultant since March 2016 but intended "this summer, [to] be going back to clinical practice." *Id., Exhibits A & C, p. 6.* As the trial court had properly determined in the initial proceeding, the general rule is to gauge the expert's competency under Evid.R. 601(D) at the time of trial. *See Order filed May 19, 2017, p. 3.* Defendants cited no authorities then, and remain unable to do so now, that even remotely suggest that a brief hiatus following the execution of an affidavit of merit requires the sworn statement to be immediately stricken. In stark contrast to the inflexible standards that now exist in the Ninth District, the better reasoned decisions follow a more pragmatic interpretation of Civ.R. 10(D)(2) and Evid.R. 601(D). *See, e.g., Levin v. Hardwig*, 60 Ohio St.2d 81, 397 N.E.2d 762 (1979) (finding an

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expert employed solely in the performance of disability evaluations for the Veterans Administration as competent under predecessor statute); *McCrory v. State*, 67 Ohio St.2d 99, 423 N.E.2d 156 (1981) (adopting broad definition of "active clinical practice" for purposes of predecessor statute); *Crosswhite v. Desai*, 64 Ohio App.3d 170, 178, 580 N.E.2d 1119 (2d Dist.1989) (rejecting "present tense" interpretation of the rule and permitting physician to testify who had retired and was no longer engaged in the active clinical practice of medicine); *Smith v. Sass, Friedman & Assocs., Inc.*, 8th Dist. Cuyahoga No. 81953, 2004-Ohio-494 (agreeing with trial court that physician who had become more involved in patient based research was still sufficiently competent, leaving issues of credibility for the jury); *Wise v. Doctors Hosp. N.*, 7 Ohio App.3d 331, 455 N.E.2d 1032 (10th Dist.1982) (recognizing that purpose of the rule is to discourage experts with no first-hand knowledge of patient care and refusing to adopt a rigid interpretation of the "active clinical practice" requirement); *Robertson v. Univ. Hosps. of Cleveland*, 8th Dist. Cuyahoga No. 81150, 2002-Ohio-6508, ¶ 27-36 (holding that emergency medicine physician was competent to testify even though much of his time was devoted to research); *Aldridge v. Garner*, 159 Ohio App.3d 688, 2005-Ohio-829, 825 N.E.2d 201, ¶ 16-18 (4th Dist.) (finding that family practice physician who was testifying as an expert for a first time was competent based upon his years of prior clinical experience).

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The only other justification that was ever offered by Defendants for immediately striking the 2015 Affidavit of Merit was defense counsel's further assertion that Dr. Levy had supposedly failed to review "thousands of pages of medical records [that] were exchanged in discovery that would not have been available to him when he authored his Affidavit." *Defendant's Motion to Declare, Exhibit B, ¶ 5.* Once again, the trial judge should not have accepted this unsubstantiated representation without at least affording Plaintiffs an opportunity to respond as requested in the unopposed Motion for Extension.

They would have alerted the Court that the purported "thousands of pages of medical records" had nothing to do with the standard of care issues that had been addressed by Dr. Levy in his sworn statement, which were detailed in the charts that had been obtained during Plaintiffs' pre-suit investigations. And Plaintiffs could have further explained that no Ohio court has ever required the expert to continuously examine new records that are received in discovery following the execution of an Affidavit of Merit, which would presumably require new sworn statements to be prepared time-and-time again throughout the litigation. Even today, the defense remains unable to cite any authorities in support of the emphatic declaration that the "2015 Affidavit was outdated, however, and should have been updated to support the allegations in the 2018 Complaint." *Defendants' Memo., p. 12*. The claim of malpractice raised in the refiled action was precisely the same as that which was alleged in the original Complaint. And the 2015 Affidavit had sufficiently identified the malpractice that had been committed in February 2014 when Dr. Donich permanently damaged the patient's spinal cord while repositioning the cervical neuro-stimulator, which had been thoroughly documented in the records that Dr. Levy received pre-suit. These historical events were not going to be altered no matter how much time passed, nor would the standard of care applicable in 2014 be changing. The notion that an "updated" Affidavit of Merit must be submitted every time a lawsuit is re-filed is not just nonsensical, but also has no support in the actual text of Civ.R. 10(D)(2).

By finding that the 2015 Affidavit of Merit was "defective" without considering Plaintiffs' positions, the trial judge set in motion the entire cavalcade of bewildering events that resulted in a dismissal of the re-filed action on purely technical grounds. *Plaintiffs' Memo., Apx. 00025*. Had Plaintiffs been allowed to oppose the Motion to Declare and the trial judge had appreciated the fundamental flaws in Defendants'

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objections, there would have been no need to submit the 2018 Affidavit of Merit that Dr. Levy purportedly executed while his license was "suspended" in Florida. *Ninth Dist. Op., ¶ 7, attached to Plaintiffs' Memo. at Apx. 0004.* Nor would Plaintiffs have been forced to argue as a last resort that the need for the affidavit of merit was obviated when Dr. Levy thoroughly explained the factual and medical underpinnings for his opinions during his discovery deposition. Instead, the civil action would have proceeded to a final adjudication upon the merits, which is precisely what Ohio courts are supposed to be striving to achieve. *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 431 N.E.2d 644 (1982); *Natl. Mut. Ins. Co. v. Papenhagen*, 30 Ohio St.3d 14, 15, 505 N.E.2d 980 (1987); *Barksdale v. Van's Auto Sales, Inc.*, 38 Ohio St.3d 127, 128, 527 N.E.2d 284 (1988).

III. THE SUPPOSEDLY "INACTIVE" AND "SUSPENDED" LICENSE

Defendants have further persisted at this jurisdictional stage of the proceedings in misrepresenting the status of Dr. Levy's license in Florida at the time that he executed the 2018 Affidavit of Merit. For example, this Court has been assured:

> This second Affidavit was <u>false</u>, however, because Levy stated under oath that he was "licensed to practice medicine by the Florida Board of Medicine," even though his Florida license was listed as "delinquent" and was inactive when Levy signed the affidavit on May 29th. (Ninth District Opinion, ¶ 5); (Trial Court Order, pg. 4). (Emphasis sic.)

Defendants' Memo., p. 4. This is a classic example of bootstrap logic—Defendants have offered nothing more than citations to lower court rulings that are not evidence. Those findings were based upon unsubstantiated and highly questionable assertions that were never scrutinized, which is exactly why further review is warranted.

Apart from the assurances that defense counsel offered in his own affidavit about the results of his purported investigation, the <u>only</u> proof ever offered that there was something amiss with Dr. Levy's license was the Florida Department of Health print-out

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indicating that on June 13, 2018, his status was: "DELINQUENT/". *R. 19, Motion to Strike Affidavit of Merit of Robert M. Levy, M.D., filed June 20, 2018, Exhibit C, p. 1.* It was always a mystery, which remains to this day, what was supposed to follow the "/" in the defense exhibit. *Id.*

Another example of Defendants' mischaracterization of the proceedings below is their assurance that Plaintiffs "did not dispute in the trial court proceedings that Levy's license status was delinquent" when the 2018 Affidavit was executed. *Defendants' Memo., p. 9 (Citation omitted).* In timely opposing the Motion to Strike, Plaintiffs submitted their own Florida Department of Health printout of July 23, 2018, which indicated "DELINQUENT/ACTIVE". *R. 23, 28, Plaintiffs' Combined Notice of Submission of 'Affidavit of Merit' in the Form of the Deposition of Robert M. Levy and Brief in Opposition to Defendants' Motion filed July 23, 2018, Exhibit E.* And in their opposition brief they specifically maintained that because of his "brief hiatus in the active clinical practice of medicine, Dr. Levy's medical license in Florida necessitates renewal." *Id., p. 5.* Numerous authorities were cited recognizing that such temporary circumstances should not disqualify an expert from testifying at trial, provided that Evid.R. 601(D) is otherwise satisfied by that time. *Id., pp. 5-11.*

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Neither of the lower courts bothered to resolve the discrepancy between the parties' two license-status print-outs. Instead, the trial judge agreed with Defendants that Dr. Levy's "medical license was <u>suspended</u> by the Florida Board of Medicine." (Emphasis added.) *Common Pleas Court Order of September 28, 2018, p. 3, attached to Plaintiffs' Memo., at Apx. 00022.* She seemed unconcerned that the defense exhibit indicating "INACTIVE/" was dated June 13, 2018, which was several weeks <u>after</u> the 2018 Affidavit was executed. No evidence was ever introduced that on the day of signing on May 29, 2018, Dr. Levy was indeed "suspended" and prohibited from practicing or teaching

anywhere in the United States.

IV. THE PRESERVATION OF PLAINTIFFS' OBJECTIONS ON APPEAL

Finally, there is no merit to Defendants' contention that Plaintiffs' waivers persisted during the Ninth District proceedings. *Defendants' Memo., pp. 6-7.* While it is technically true that the Assignments of Error were "limited to procedural arguments[,]" that is only because the merits of the medical malpractice claim were never reached in the trial court. *Id., p. 6.* As should have been obvious, a termination of the proceedings through a "procedural" technicality is always going to result in a "procedural" appeal.

A review of the briefs that were exchanged during the appellate proceedings below will confirm that all of the salient issues were raised and addressed, particularly the sufficiency of the 2015 Affidavit (Assignment of Error I), the sufficiency of the 2018 Affidavit (Assignment of Error II), and Dr. Levy's competency under the evidentiary rules (Assignment of Error V). Now that the appellate court has ruled, Plaintiffs are under no obligation to mindlessly repeat the same arguments verbatim in this Court. It is, of course, entirely appropriate for parties to an appeal to expand the analysis and positions that were raised in the proceedings below, as the United States Supreme Court has explained:

> Courts of appeals * * * are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote to their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. (Emphasis added.)

Salve Regina College v. Russell, 499 U.S. 225, 232, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). Once Defendants' misdirection has been set aside, it is apparent from Plaintiff-

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Appellants' Memorandum in Support of Jurisdiction that serious issues of both public interest and great general importance are now imperiled as a result of the Ninth District's ill-advised ruling, which should be carefully evaluated by this Court.

CONCLUSION

The lower courts have worked a miscarriage of justice by denying relief to a seriously injured person on purely procedural grounds. In light of the actual procedural history that transpired below and the more sensible interpretations of Civ.R. 10(D)(2) and Evid.R. 601(D) that have been adopted and applied outside the Ninth Judicial District, this Court should reconsider the ruling of February 18, 2020, and accept jurisdiction over this appeal. *S.Ct.Prac.R. 18.02(B)(1).*

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion** has been served by e-mail on this 28th day of February 2020 upon:

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