

**IN THE SUPREME COURT OF OHIO**

ESTATE OF KATHERINE  
TOMLINSON

CASE NO. 2023-0230

APPELLATE NO. 22 CAE 03 0020

PLAINTIFF-APPELLEE,

vs.

MEGA POOL WAREHOUSE, INC.  
AND STEPHEN B. GOLD

DEFENDANTS-APPELLANTS.

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**MERIT BRIEF OF AMICI CURIAE OHIO ASSOCIATION OF  
CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS**

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## STATEMENT OF THE CASE AND FACTS

The now-deceased Appellee, Katherine Tomlinson, filed her Complaint with the caption that included the phrase, “JURY DEMAND ENDORSED HEREIN,” regarding a dispute over the installation of a deck and a residential inground swimming pool alleging a breach of contract, breach of warranty, negligent workmanship, and violations of the Ohio Consumer Sales Practices Act (“CSPA”). *See* Compl., 18 CV H 06 317; Ans. & Counterclaim, 18 CV H 06 317; Compl. for Dec. Judg., 19 CV H 05 0255. Appellee later timely paid the required deposit to the Delaware County Court of Common Pleas Clerk of Courts, thereby perfecting Appellee’s jury demand. Compl., 18 CV H 06 317; July 5, 2019 Dock. Ent. (Confirming jury demand deposit paid). Appellants did not make a separate jury deposit relying upon Appellee’s perfected jury demand. The trial court set and reset multiple jury trial dates throughout the litigation during COVID-19 closures and beyond. *See* Sept. 6, 2018 Scheduling Entry.; *See* Apr. 11, 2019 Order Granting Motion to Continue Trial Date; *See* Sept. 13, 2019 Mag.’s Order to Continue Trial; Oct. 31, 2019 Order Scheduling Pretrial and Trial Dates; *See* Mar. 25, 2020 Mag.’s Order; *See* July 21, 2020 Mag.’s Order re Trial Date.

The Magistrate requested the parties notify the trial court whether they would be willing to waive their perfected jury trial rights under Civ.R. 38 and Civ.R. 39. *Id.* Appellants promptly notified the trial court, pursuant to Civ.R. 38 and Civ.R. 39, that they did not consent to waiving their rights to a jury trial. *See* Defs.’ July 29, 2020 Motion to Maintain Jan. 26, 2021 Jury Trial. On August 6, 2020, the trial court overruled Appellants’ written objections and permitted Appellee to unilaterally withdraw her jury demand. *See* Aug. 6, 2020 Judg. Ent. When the trial court permitted Appellee to unilaterally withdraw Appellee’s jury demand, this denied Appellants their constitutional right to a jury trial and a bench trial occurred, over Appellants’ objection, in which

the trial court found in favor of Appellee on some of her claims. *See* Nov. 19, 2021 Dock. Ent. Appellants requested a new trial based on irregularities in the proceedings and/or errors of law that occurred justifying a new trial which included the trial court’s denial of their constitutional rights to a jury trial. *See* Feb. 3, 2022 Motion for New Trial. The trial court summarily overruled the Motion without permitting a full briefing on Appellants’ thorough Motion. *See* Feb. 18, 2022 Judg. Ent. Denying Defs Motion for New Trial.

Appellants appealed the matter to the Fifth District and on January 26, 2023, the Fifth District issued its Judgment Entry with its Opinion. The Fifth District inappropriately held that Appellants’ constitutional rights to a jury trial were permissibly disregarded in favor of application of the trial court’s Local Rule, even though Appellee had perfected her jury demand and Appellants timely objected to the withdrawal thereof. The Fifth District improperly disregarded the language of Civ.R. 38(D) and 39(A) that a “demand for trial by jury \* \* \* may not be withdrawn without consent of the parties” and “[t]he trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record \* \* \* consent to trial by the court sitting without a jury.” Instead, the Fifth District held that the trial court’s Local Rule “controls [its] analysis,” requiring each and every party that desires a jury to be convened to pay a separate jury deposit in contradiction of Civ.R.38(D) and Civ.R. 39(A).

Appellants appealed the decision of Fifth District of Court of Appeals, this court accepted jurisdiction based on the following proposition of law:

**PROPOSITION OF LAW III**

***A civil litigant’s constitutional right to a jury trial is violated where a trial court’s local rule permits a party to withdraw a demand for a jury trial without consent of the parties.***

As stated below, Ohio Association of Civil Trial Attorneys files its Amici Curiae Merit Brief requesting this court to reverse the judgment of The Fifth District Court of Appeals and remand the case back for a new trial on all remaining triable issues because Appellee perfected a jury demand based on Civil and Local Rules and that Civ.R. 38 and Civ.R. 39 require consent of all parties to withdraw the jury demand which Appellants refused to provide. Fifth District's Opinion should also be reversed because the Fifth District found the trial court's local rule supersedes Appellants' constitutional right to a jury trial and this Court's civil rules.

### **PROPOSITION OF LAW III**

*A civil litigant's constitutional right to a jury trial is violated where a trial court's local rule permits a party to withdraw a demand for a jury trial without consent of the parties.*

Parties have a constitutional right to a jury trial in civil lawsuits. Ohio Const, art. I, § 5; U.S. Const, amend. VII. This court is implicitly delegated the authority to hear cases as the gatekeeper of the Constitution involving questions arising under the Ohio Constitution. Ohio Constitution, Article IV, Section 2(B)(2)(a)(ii). OACTA and its members rely upon the Constitution and civil rules every day and rely on the court to address local rules that contradict civil rules promulgated by this court. When any court disregards a provision of the Constitution, the Ohio Supreme Court has the authority to step in and rectify the situation.

This Court has provided the exclusive methodology and procedures in Civ.R. 38 and Civ.R. 39 by which the right to a jury trial is exercised. *Cleveland v. Lancaster*, 2d Dist. Greene No. 02CA0123, 2003-Ohio- 4976, paragraph 10. Civ.R. 38(B) provides that a jury demand is properly made when endorsed upon a pleading in the caption, stating "Jury Demand Endorsed Hereon." Civ.R. 38(D) provides that, "[a] demand for trial by jury made as herein provided may not be withdrawn **without the consent of the parties.**" (Emphasis added). Civ.R. 39(A) states that a

“demand for trial by jury \* \* \* may not be withdrawn without consent of the parties” and “[t]he trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record \* \* \* consent to trial by the court sitting without a jury \* \* \*.”

**1. The trial court denied Appellants’ constitutional rights to a jury trial when it permitted Appellee to withdraw its perfected jury demand under the local and civil rules over appellants’ objection.**

Appellee timely made a jury demand in the caption of her Complaint by stating “JURY DEMAND ENDORSED HEREON.” Loc.R. 25.04 provides that “[i]f a party is seeking a jury trial in a civil case, the party must submit a \$500 jury deposit” and the failure to do so “will be deemed as a waiver of the jury.” Appellee’s jury demand became perfected upon making the jury demand endorsement in the caption of the Complaint and paying the \$500.00 jury deposit. *See, e.g., Hanson v. Moore*, 6th Dist. No. E-06-039, 2007-Ohio-2829, U 21 (providing a jury demand becomes effective upon making the advance deposit under Local Rules). Under Ohio law, once a jury demand is perfected, a party is “entitled to rely on the case’s designation as a jury action and \* \* \* not required to make a separate jury demand because, once designated as such, the demand [can] only be waived with [all other parties’] consent.” *Smith v. Hofaker*, 6th Dist. No. WD-97-049, 1998 Ohio App. LEXIS 95, \*5-6 (Jan. 16, 1998) (finding reversible error where plaintiff’s jury demand was effective, and defendant objected to waiver of the plaintiff’s effective jury demand). Appellee paid the required jury deposit under Local Rules which perfected the jury demand and also the action was designated upon the docket as a jury action as provided by Civ.R. 38.

Civ.R. 38(D) provides that, “[a] demand for trial by jury made as herein provided may not be withdrawn **without the consent of the parties.**” (Emphasis added). Likewise, Civ.R. 39(A) provides that the “trial of all issues so demanded shall be by jury, unless \* \* \* the parties or their

attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court entered in the record, consent to trial by the court sitting without a jury \* \* \*.” Thereafter, Appellee sought to withdraw her jury demand without Appellants’ consent and over their timely objection. The Fifth District improperly disregarded the language of Civ.R. 38(D) and 39(A) by holding that the trial court’s Local Rule “controls [its] analysis,” requiring each and every party that desires a jury to be convened to pay a separate jury deposit. This Court provided the exclusive methodology under Civ.R. 38(D) and Civ.R. 39(A) to withdraw a perfected jury demand in a civil action but the Fifth District Court relied on, unconstitutional application of a Local Rule when it held Local Rule control its analysis.

Thus, since Appellants timely objected to the withdrawal of the jury demand and triable issues of fact remained, the sole procedure to withdraw Appellee’s jury demand was by “consent of the parties” under Civ.R. 38(D) and Civ.R. 39(A). *Id.* The Fifth District disregarded Appellants’ constitutional rights to a jury trial by finding that the trial court’s local rule governed the analysis, requiring that each and every party desiring a trial by jury must separately pay a jury deposit.

This policy would also result in unpredictable results. (See analysis of *Aaron Frieda, et al. v. Aetna Better Health, Inc., et al.*, filed in the Southern District of Ohio, involves 400 Plaintiffs and 60 Defendants stated in Appellants’ Merit Brief, pp. 11, and we incorporate their analysis). If every party involved in that case is required to file a separate jury deposit to enforce their constitutional rights to a jury trial, \$230,000.00 is required in jury deposits. The windfall of deposits that the Delaware County Court of Common Pleas Clerk of Courts would receive is not a “moderate and reasonable regulations” contemplated by the Ohio Supreme Court in *Walters v. Griffith* to ensure payment for the costs of a jury. *Walters v. Griffith*, 38 Ohio St.2d 132 (1974), syllabus. Rather, there would be one jury to be convened, and therefore, the costs of only one jury

would be incurred. The costs for defendants in these cases would increase significantly to preserve their constitutional rights while providing a windfall to the courts.

After jury demand was perfected, “the demand [could] not be withdrawn without the consent of the parties.” *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 438, 763 N.E.2d 1169 (2002), citing Civ.R. 38(D). Appellee conceded at the Fifth District that she “could not withdraw her jury demand without Appellants’ consent.” *Est. of Tomlinson v. Mega Pool Warehouse, Inc.*, 5th Dist. Delaware No. 22 CAE 03 0020, Appellee Merit Brief at pp. 21. “Civ.R. 39 provides the general methods to waive the right to a jury trial once such a request has been made.” *Soler* at 438.

The jury demand requirement of Civ.R. 38 was met with endorsement of “Jury Demand Endorsed Herein.” On July 25, 2019, Appellee paid the jury deposit of \$500.00 fulfilling the Local Rule requirement. Upon the requirements of both Rules being met, the parties’ constitutional rights to a trial by jury were perfected. Civ.R. 39(A) provided only three ways in which the jury trial could be circumvented. *Soler* at 438. Thus, once a demand for a jury has been made, the civil rules provided only three ways in which the jury trial could be waived: 1) the parties could stipulate to a bench trial on the record, Civ.R. 39(A)(1); 2) the trial court could have held that the jury was waived, Civ.R. 39(A)(2); and 3) the party who demanded the jury may withdraw the demand with the consent of all parties. *Holman v. Keegan*, 139 Ohio App.3d 911, 916 (6th Dist.2000), quoting Civ.R. 38, and citing, *Cincinnati Ins. Co. v. Gray*, 7 Ohio App.3d 374, 377 (1st Dist.1982), *Bishop v. Hybud Equip. Corp.*, 42 Ohio App.3d 55, 57 (9th Dist. 1982); *Haddix v. Mercury Marine*, 6th Dist. Lucas No. L-91-270, 1992 Ohio App. LEXIS 3563, \*3-4 (July 10, 1992). None of the exclusive methods to waive the right to a jury trial occurred in this case. *Soler* at 438. Rather, Appellee was allowed to unilaterally withdraw her jury demand, over Appellants’ timely objection.

Both the trial and reviewing courts found that Appellants could not rely on Appellee's deposit, but rather Appellants had to make a separate jury deposit if Appellants wanted a jury trial. *Est. of Tomlinson v. Mega Pool Warehouse, Inc.*, 5th Dist. Delaware No. 22 CAE 03 0020, 2023-Ohio-229, ¶ 46. The lower courts' findings are in direct contravention to the plain language of the Civil Rules and this Court's precedent.

This Court's analysis in *Soler* is instructive because plaintiff made a timely jury demand with the filing of her Complaint. *Soler* at 437. Defendants filed an answer and counterclaim, but did not assert a jury demand. Plaintiff later voluntarily dismissed her complaint pursuant to Civ.R. 41(A). *Id.* After plaintiff filed her voluntary dismissal, she was still entitled to a jury trial on her defense to the defendants' remaining counterclaim. *Id.* This Court held that her general jury demand served as notice to her opponents that she preserved her right to a jury trial as guaranteed by the Ohio and United States Constitutions. *Id.* at 437-38. When a general jury demand is timely asserted, a second demand is not required with the filing of a counterclaim to preserve a jury trial on issues asserted in the counterclaim or reply. *Id.* Even though the plaintiff did not demand a jury trial on the counterclaim, the plaintiff was allowed to rely upon her previous general jury demand in the complaint. *Id.* at 438-39. This Court further held that the voluntary dismissal of her complaint which contained the jury request is not referenced as a possible method to waive the right to a jury trial and none of the waiver methods mentioned in Civ.R. 39 were utilized, preserving the plaintiff's right to a jury. *Id.* at 438-439.

Following *Soler*, Appellee timely perfected her general jury demand under both the Civil and Local Rules providing notice to Appellants that Appellee wanted a jury trial as guaranteed by the Ohio and United States Constitutions. Appellants were not required to file a second jury demand to preserve all triable issues raised in the Complaint to be decided by a jury under Civ.R.

38(B). Appellants were allowed to rely upon previously asserted general jury demand in the complaint. *Soler* at 438-439. Since unilateral withdrawal of Appellee's jury demand, over written objection of Appellants, is not a method mentioned in Civ.R. 39, Appellants' jury trial rights remained intact. *Id.* at 439. Likewise, Appellee's argument to the Fifth District that she did not withdraw her jury demand, but merely her jury deposit likewise fails because Appellee conceded at oral argument that she did not actually take any action to withdraw her jury deposit and has never received a refund of her jury deposit. *See Est. of Tomlinson v. Mega Pool Warehouse, Inc.*, 5th Dist. Delaware No. 22 CAE 03 0020, Appellee's Merit Brief at pp. 22-23. *Accord Dock. Ents.* (Indicating no such refunds).

The Fifth District's holding affirming the withdrawal of the jury based on its interpretation of the trial court's local rule, without Appellants' consent, was in direct contravention of Civ.R. 38(D) and Civ.R. 39(A). *Vorisek v. North Randall*, 64 Ohio St.2d 62, 63, 413 N.E.2d 793 (1980). Courts can adopt additional rules concerning local practice in their respective courts so long as the rules are consistent with the rules promulgated by the Supreme Court. Civ.R. 83(A) states a court may adopt its own local rules of practice as long as the local rules are not inconsistent with these rules; *Kimble v. Troyan*, 124 Ohio App.3d 599, 602-03, 707 N.E.2d 1 (7th Dist.1997) and *Cassidy v. Glossip*, 12 Ohio St.2d 17, 23, 231 N.E.2d 64 (1967).

The Fifth District mistakenly found the trial court's local rule requiring each party desiring a jury trial to submit a separate jury deposit constituted a moderate and reasonable regulation of the right to a trial by jury under this Court's holding in *Walters v. Griffith*, 38 Ohio St.2d 132, 311, N.E.2d 14 (1974). *Est. of Tomlinson* at ¶ 44. This Court in *Walters* held that "[l]ocal court rules, requiring an advance deposit as security for the costs of a jury trial and providing that the failure of a party to advance such deposit constitutes a waiver of the right to a trial by jury, are moderate

and reasonable regulations of the right of trial by jury, and are constitutional and valid.” (Emphasis added.) *Walters* at paragraph one of the syllabus. *Walters* is factually distinguishable, because plaintiff that filed suit with no jury demand and a defendant filed an answer that included a jury demand, but defendant failed to pay the jury deposit under the local rule.

This Court highlighted the policy behind its holding in *Walters* to permit trial courts to establish moderate and reasonable regulations through a *single advance deposit* to ensure financial security for the costs of a *single jury* to be convened for a *single jury trial*. *Id.* This Court held that there will be one jury convened if the case went to a jury trial, and a trial court may reasonably require by local rule an advance deposit to cover the cost of convening one jury. The trial court’s local rule in this case requiring each and every party that may desire a jury trial to pay a separate advance deposit of \$500.00 exceeds the tailored, practical application of this Court’s holding in *Walters*, and is outside the bounds of moderate and reasonable regulation, impairing litigants’ rights to a jury trial. *Skiadas v. Finkbeiner*, 6th Dist. Lucas No. L-05-1094, 2007-Ohio-3956, ¶ 23. The right to a jury trial may not be impaired, but it may be subject to moderate and reasonable regulation.

Appellee and lower courts cited various court of appeals’ opinions that are also factually distinguishable from this case. As one example, the Tenth District’s Opinion in *Am. Hotel Group LLC v. Wyandotte Plaza LLC*, ruled that the plaintiff filed suit with a jury demand, but failed to pay a jury deposit waiving the jury; *Am. Hotel Grp. LLC v. Wyandotte Plaza LLC*, 10th Dist. Franklin No. 16AP-296, 2017-Ohio-5520. The Court also cited opinions from other district courts which did not involve cases where a party made a jury demand and paid the jury deposit, thereby perfecting the demand. Rather, each of the cases are factual distinguishable because a party made an original jury demand but failed to pay the initial jury deposit required by the local rules. *See*

*Lehman v. Smith*, 5<sup>th</sup> Dist. Stark No. 2000CA00034, 2000 WL 1608827 (Oct. 23, 2000); *Arlington Natural Gas Co. v. Martens*, 173 Ohio App.3d450, 2007-Ohio-5479; *Ebbets Ptnrs. v. Foster*, 8th Dist. Cuyahoga No. 80728, 2002-Ohio-6324.

Each case cited above to deny Appellants' right to a jury trial, by the requesting party never timely paid a jury deposit under the local rules and to perfect a jury demand. By requesting the jury demand and paying the deposit, Appellee perfected its jury demand, requiring mutual consent as prescribed by Civ.R. 38 and Civ.R. 39 as the sole procedural avenue for later withdrawing it. Appellants timely objected to Appellee's withdrawal of her perfected jury demand. The trial court's construction of its Local Rules, that each and every party to a civil action must submit a separate jury deposit after the initial demand is perfected is contrary to the Civil Rules, the Revised Code, and the Ohio and United States Constitutions. None of the rules state that consent can be withheld by reimbursing the jury deposits of all parties who seek to withdraw their jury demands. The trial court in this case created this additional condition to the rule, which does not exist in its plain text.

Ohio appellate courts consistently hold that the exclusive remedy of withdrawal of an effective jury demand is set forth in Civ.R. 38 and 39. *Holman v. Keegan*, 139 Ohio App.3d 911, 916 (6th Dist. 2000); *Bishop v. Hybud Equip. Corp.*, 42 Ohio App.3d 55, 57 (9th Dist. 1982); *Haddix v. Mercury Marine*, 6th Dist. Lucas No. L-91-270, 1992 Ohio App. LEXIS 3563, \*3-4 (July 10, 1992). Based on the foregoing, Ohio Association of Civil Trial Attorneys respectfully submit that Appellants and other defendants in the future have been or will be deprived of their constitutional rights to a jury trial by the trial court permitting Appellee to withdraw her perfected, effective jury demand, over Appellants' timely objection. The trial court's Entry requiring

Appellants to submit their own deposit is contrary to Civ.R. 38 and Civ.R. 39, and to the Ohio legislature's intent in promulgating R.C. 1901.26(A)(3) and R.C. 2335.28(A).

**CONCLUSION**

The Ohio Association of Civil Trial Attorneys respectfully requests this Court to reverse the judgment of the trial court and order a new trial by jury.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served electronically to the following counsel of record on the 8<sup>th</sup> day of August, 2023:

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