No. 23-1147

In the

Supreme Court of the United States

JAHMIR CHRISTOPHER FRANK,
Petitioner,

v.

GOOD SAMARITAN HOSPITAL OF CINCINNATI, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

MICHAEL P. FOLEY
Counsel of Record
ANTHONY G. RALUY
RENDIGS, FRY, KIELY & DENNIS, LLP
600 Vine Street
Suite 2650
Cincinnati, Ohio 45202
(513) 381-9200
MFoley@rendigs.com
TRaluy@rendigs.com

May 10, 2024

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent, Good Samaritan Hospital of Cincinnati, LLC states that there is no parent or publicly held company that owns 10% or more of the company's stock.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Rules

Treatises

COUNTER-STATEMENT OF THE CASE

Petitioner, Jahmir Frank ("Petitioner" or "Frank") was born at Respondent, Good Samaritan Hospital of Cincinnati ("Respondent" or "Good Samaritan") on July 30, 1998. *Frank v. The Good Samaritan Hosp. of Cincinnati*, No. 1:18-cv-00618, 2021 U.S. Dist. LEXIS 167487, at *2 (S.D. Ohio Sep. 3, 2021). His mother recalled that the delivery was uncomplicated, which was confirmed by video and photographs of the delivery. *Id.*, at *29. Frank was later diagnosed with periventricular leukomalacia ("PVL"), a condition "associated with the loss of periventricular white matter" which "likely occurred in the late second trimester or early third trimester of that pregnancy." *Id.*, at *30. Even though Frank was delivered at full term – remote in time to the "late second trimester or early third trimester" when the damage to the brain occurs in typical cases of PVL – Frank blamed the hospital for his condition. *Id.*

Good Samaritan was first made aware of Frank's diagnosis when Frank's stepmother requested his medical records on October 29, 2014 – sixteen years after his delivery. *Frank v. Good Samaritan Hosp. of Cincinnati*, No. 1:18-cv-00618, 2020 U.S. Dist. LEXIS 61720, at *6 (S.D. Ohio Apr. 8, 2020). Unbeknownst to Good Samaritan, the "mom and baby charts" for deliveries during 1997 to 1999 (including records of Frank's July 1998 birth) were inadvertently destroyed by the hospital's third-party document retention company, Cintas Corporation No. 2, in April of 2010 – four years before Frank's stepmother first requested his birth records and before Good

Samaritan was first made aware that Frank had been diagnosed with PVL. *Id.*

Despite not having access to his medical records from his birth, Petitioner sued Respondent in the Hamilton County (Ohio) Common Pleas Court for alleged medical malpractice. *Frank*, 2021 U.S. Dist. LEXIS 167487, at *2 n.1. Petitioner voluntarily dismissed his case before the state court could journalize its ruling granting Good Samaritan's Motion for Summary Judgment, and brought suit against Respondent in the United States District Court for the Southern District of Ohio, which exercised diversity jurisdiction pursuant to 28 U.S.C. §1332. *Id.* The negligent destruction claim was dismissed by the district court because the negligent acts of Respondent's third-party document retention company were insufficient to establish willfulness required to support a spoliation claim under Ohio law.[1] *Frank v. Good Samaritan Hosp. of Cincinnati*, No. 1:18-cv-00618, 2019 U.S. Dist. LEXIS 211327, at *11 (S.D. Ohio Dec. 9, 2019). The dismissal was affirmed by the Sixth Circuit in *Frank v. Good Samaritan Hosp. of Cincinnati, LLC*, 843 Fed. App'x 781, 782 (6th Cir. 2021).

Back in the district court, the Petitioner was required to produce admissible expert testimony establishing a breach of the standard of care and causation as part of the elements of a medical

---

[1] The district court applied Ohio substantive law to the claims for medical malpractice and negligent destruction of Respondent's medical records in accordance with *Erie R.R. v. Tompkins,* 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

malpractice claim under Ohio law. *Roberts v. Ohio Permanente Med. Group*, 76 Ohio St. 3d 483, 485, 1996-Ohio-375, 668 N.E.2d 480 (1996), *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131, 346 N.E.2d 673 (1976). When Petitioner was unable to produce such expert testimony, he blamed the failure on the inadvertent destruction of his medical records by Cintas, and demanded a dispositive negative inference. Petitioner filed a Motion for Partial Summary Judgment on February 25, 2020, in which he sought partial summary judgment as to the issue of liability "as a sanction for [Good Samaritan's] negligent destruction of [Frank's] birth records and failure to preserve access to fetal monitoring strips related to [Frank's] birth." *Frank v. Good Samaritan Hosp. of Cincinnati*, No. 21-3795, 2023 U.S. App. LEXIS 6265, at *2 (6th Cir. Mar. 15, 2023). At the center of Petitioner's Motion for Summary Judgment was the proffered affidavit testimony of Augustus G. Parker III, M.D. ("Dr. Parker") that "It is not possible to render a standard of care opinion without reviewing either the birth records of the delivery, fetal monitoring strips, or both." *Frank*, 2020 U.S. Dist. LEXIS 61720, at *7, 8. On April 8, 2020, the district court entered its Order Denying Plaintiff's Motion for Partial Summary Judgment and held that because Good Samaritan did not have a legal obligation to preserve the birth records at the time of their destruction, or a culpable state of mind, the negligent destruction of the birth records did not support a "dispositive adverse inference" demanded by Frank. *Frank*, 2020 U.S. Dist. LEXIS 61720, at *14.

Petitioner pivoted and disclosed as an expert, Jennifer Jones Hollings, M.D. ("Dr. Hollings"), who –

in direct contradiction to his other expert, Dr. Parker – claimed that she could give an opinion as to the standard of care notwithstanding the absence of Frank's birth records. *Frank*, 2021 U.S. Dist. LEXIS 167487 at *4. Although Dr. Hollings was board certified in obstetrics and gynecology, she had not graduated from medical school at the time of Frank's delivery (of which she purported to offer an opinion as to the standard of care), and she had never diagnosed PVL or otherwise practiced in the subspecialities of maternal-fetal medicine, neonatology, or pediatric neurology. *Id*. *11, 12. Indeed, Dr. Hollings, who was not then practicing obstetrics or delivering babies, was not engaged in the active practice of medicine at all at the time she rendered her opinion or testified. *Frank*, 2021 U.S. Dist. LEXIS 167487 at *15.

By virtue of Fed. R. Evid. 601, which incorporates the *Erie* doctrine in cases where expert opinion testimony is required under substantive state law, Hollings' opinion testimony was subject to the Ohio witness competency rules under Ohio Evid. R. 601. *Legg v. Chopra*, 286 F.3d 286, 290 (6th Cir. 2002). At the time of Hollings' opinion, Ohio Evid. R. 601(B)(5)(b) provided that a person is not competent to give expert testimony on the issue of liability in any medical malpractice case unless: "The person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school." Even though the phrase "active clinical practice" was not defined within Ohio Evid. R. 601 at the time of Dr. Hollings' opinion testimony, the last pronouncement of the Ohio Supreme Court affirmed that "generally" a proffered expert must satisfy the requirements of Ohio

Evid. R. 601 "at the time the testimony is offered at trial." *Celmer v. Rogers*, 114 Ohio St. 3d 221, 226, 2007-Ohio-3697, 871 N.E.2d 557, ¶27. Because she was not engaged in the "active clinical practice" of medicine at the time of her testimony, Dr. Hollings did not meet the expert witness competency rules under Ohio Evid. R. 601 as they then existed.

Respondent filed a Motion for Summary Judgment on the basis that Petitioner could not produce competent medical expert witnesses who could offer admissible opinions that Good Samaritan breached the applicable standard of care, and that the breach proximately caused Frank's PVL, as required under applicable Ohio substantive law for his malpractice claims. *Frank*, 2021 U.S. Dist. LEXIS 167487 at *4. In addition, Respondent filed a Motion to Strike Dr. Hollings and Dr. Michael Katz ("Dr. Katz"), as Plaintiff's Expert Witnesses Pursuant to Fed. R. Evid. 601 and 702, and Ohio Evid. R. 601, and alternatively objected to their proffered testimony pursuant to Fed. R. Civ. Pro. 56(c)(2). *Id*. Respondent challenged the competency of Dr. Hollings on many levels, including that she was not competent under Ohio Evid. R. 601 because she did not devote at least one-half of her professional activities to the active practice of medicine at the time of her testimony. Good Samaritan further objected to the opinion testimony of Dr. Hollings and Dr. Katz as too speculative and unreliable to be admissible under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). *See, Frank*, 2021 U.S. Dist. LEXIS 167487 at *5, 6.

On September 3, 2021, the district court entered its Opinion and Order (the "Summary Judgment Order") sustaining Good Samaritan's objections to the deposition testimony and expert reports of Dr. Hollings and Dr. Katz pursuant to Fed. R. Civ. Pro. 56(c)(2), and granting Good Samaritan's Motion for Summary Judgment. *Frank*, 2021 U.S. Dist. LEXIS 167487, *31. In the Summary Judgment Order, the district court cited with approval the then most recent Ohio appellate case interpreting Ohio Evid. R. 601, *Johnson v. Abdullah*, 136 N.E.3d 581 (Ohio Ct. App. 2019), which affirmatively held that an expert must devote at least one-half of their professional time to the active clinical practice of medicine at the time the testimony is offered. *Frank*, 2021 U.S. Dist. LEXIS 167487, at *16. The district court found dispositive the fact that Dr. Hollings was "not presently practicing obstetrics and [had] not managed a labor or deliver[ed] a baby since 'sometime prior to August of 2018[.]'" *Frank*, 2021 U.S. Dist. LEXIS 167487, at *15. The district court further held that Plaintiff's causation expert, Dr. Katz was not qualified to testify under Fed. R. Evid. 702(c) and *Daubert* because his opinion was "speculative" and "unreliable." *Frank*, 2021 U.S. Dist. LEXIS 167487, at *23 – 26. Importantly, the district court noted that Good Samaritan's proffered expert witnesses uniformly testified that despite the absence of birth records, the available evidence – including specifically the birth videos and photos – supported their opinions that, based upon a reasonable degree of medical certainty, Petitioner's PVL was completely unrelated to his delivery, and accordingly granted Respondent

summary judgment. *Frank*, 2021 U.S. Dist. LEXIS 167487 at *28 – 31.

The Summary Judgment Order properly cited the last appellate pronouncement on Ohio Evid. R. 601, *Johnson*, 136 N.E.3d 581, as the underpinning for its holding that Dr. Hollings was not competent to offer an expert opinion under Ohio Evid. R. 601. The district court also recognized that *Johnson* was under review by the Ohio Supreme Court. *Frank*, 2021 U.S. Dist. LEXIS 167487, *10, fn. 6. Less than three weeks after the entry of the Summary Judgment Order, the Ohio Supreme Court rendered its opinion in *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463 (2021). There, the Ohio Supreme Court affirmed the decision of the First District Court of Appeals in *Johnson*, 136 N.E.3d 581, and held that experts, such as Dr. Hollings, must satisfy the threshold requirements of Evid. R. 601(B)(5)(b) at the time of the proffered testimony. *Johnson,* 166 Ohio St.3d 427, 433, 2021-Ohio-3304, ¶ 24. The Ohio Supreme Court's opinion in *Johnson* confirmed that the district court had properly relied upon the decision of the First District Court of Appeals in *Johnson* in entering the Summary Judgment Order.

Frank appealed the Summary Judgment Order (the "Second Appeal"), but in his briefing he focused solely on the denial of his Motion for Partial Summary Judgment on the rejected dispositive adverse inference for spoliation, and he completely ignored the Summary Judgment Order and the district court's exclusion of his proffered expert testimony. See, *Frank,* 2023 U.S. App. LEXIS 6265, at *3 ("In fact, though his statement of issues says he challenges the

summary-judgment order, neither his opening brief nor his reply brief ever mentions it again."). With his Second Appeal fully briefed and submitted for decision, Frank filed his Motion to Vacate September 3, 2021 Order and for Shortened Response Time ("Motion to Vacate"), arguing that a *proposed* amendment to Ohio Evid. R. 601 by the Commission on the Rules of Practice and Procedure in Ohio Courts constituted an "exceptional circumstance" warranting relief under Fed. R. Civ. Pro. 60(b)(6). *Frank v. Good Samaritan Hosp. of Cincinnati*, No. 1:18-cv-00618, 2023 U.S. Dist. LEXIS 33720, *9 (S.D. Ohio Feb 28, 2023). The district court, acting in accordance with Fed. R. Civ. Pro. 62.1(a) denied the Motion to Vacate, holding that a proposed change in law did not constitute an extraordinary circumstance meriting relief under Fed. R. Civ. Pro. 60(b)(6). *Frank*, 2023 U.S. Dist. LEXIS 33720, *9, 12, 13. On March 15, 2023, the Sixth Circuit rendered its Opinion in the Second Appeal affirming the Summary Judgment Order in all respects. *Frank*, 2023 U.S. App. LEXIS 6265, *8.

Frank then appealed the Order denying the Motion to Vacate. The Sixth Circuit affirmed the district court in a brief opinion, holding that relief was unavailable to Frank under Fed. R. Civ. Pro. 60(b)(6) in part because the amendment was only a *proposed* change in law at the time of the filing of the Motion to Vacate. *Frank v. Good Samaritan Hosp.*, No. 23-3275, 2023 U.S. App. LEXIS 27221 , *4 – 6 (6th Cir. Oct. 11, 2023). The Sixth Circuit also held that relief would be inappropriate under Fed. R. Civ. Pro. 60(b)(6) due to his "lack of diligence" in neglecting to brief the issues related to his proffered expert witness opinions in the

Second Appeal. *Id*. Recognizing that Petitioner's arguments focused on the alleged misapplication of established law (instead of a change in decisional law), the Sixth Circuit further reviewed the Motion to Vacate under Fed. R. Civ. Pro. 60(b)(1), and also held that vacatur was likewise inappropriate because the district court didn't make a "substantive mistake of law" by enforcing Ohio law as it then existed. *Id*.

ARGUMENT AGAINST GRANTING THE PETITION

The Petition is a quixotic attempt to resurrect a medical malpractice case that the Petitioner simply cannot prove. There are no compelling reasons to justify this Court's review of the district court's denial of the Motion to Vacate. Petitioner readily concedes that this case turns on a matter of Ohio state law, which had not changed or been misapplied by the district court at the time it considered the Motion to Vacate. "The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 902, 129 S. Ct. 2252, 2275, 173 L.Ed.2d 1208, 1234 (2009). Yet, the Petition focuses solely on perceived injustices and neglects to provide the Court with any reason to grant certiorari outside of the potential effect it may have on Petitioner's lawsuit. The Petitioner does not argue that the decision of the Sixth Circuit conflicts with the decision of another Court of Appeals. This case does not involve an important federal question that conflicts with a decision by a state court of last resort. The Petitioner does not assert that the lower courts have decided an important federal question in a way that conflicts with the relevant decisions of this

Court. Indeed, the Petition fails to invoke any of this Court's established criteria under Sup. Ct. R. 10 for granting a petition for writ of certiorari. For the reasons set forth in detail below, the Petition for Writ of Certiorari should be summarily denied.

A. The Petitioner has not stated compelling reasons for additional review.

Petitioner's rambling Statement of the Case touches upon the fact specific nature of his PVL, the purported duty to retain medical records under Ohio negligence law, and expert witness qualification under Ohio Evid. R. 601, revealing the idiosyncratic nature of the underlying dispute between two private litigants. The grounds for relief are premised entirely on what Petitioner argues is a "clarification" of Ohio Evid. R. 601 which invokes only Ohio state law, and therefore does not present a question of national importance which would merit a grant of certiorari. *Tingley v. Ferguson*, 144 S. Ct. 33, 35, 217 L.Ed.2d 251, 254 (2023) (J. Alito, dissenting from grant of certiorari). This case is a confluence of facts and distinct state law that will likely never repeat itself again. At best, Petitioner's arguments reveal that he views the denial of the Motion to Vacate as merely a "one-off misapplication of law" which falls outside the ambit of Supreme Court review. *Thompson v. Lumpkin*, 141 S. Ct. 977, 978, 209 L.Ed.2d 497, 498 (2021) (J. Kagan, concurring).

1. This court has already developed a substantial body of law related to Fed. R. Civ. Pro. 60(b)(6), which was properly applied by the district court and the Sixth Circuit Court of Appeals.

While the Petition is ostensibly premised on the so-called "clarification" of Ohio Evid. R. 601, the crux of the appeal involves only the district court's application of Fed. R. Civ. Pro. 60(b). This Court has already spoken as to the standard by which the district court may apply Fed. R. Civ. Pro. 60(b)(6). Relief under Fed. R. Civ. Pro. 60(b)(6) is granted only in cases demonstrating "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S. Ct. 2641, 2649, 162 L.Ed.2d 480, 494 (2005), citing *Ackermann v. United States*, 340 U.S. 193, 199, 71 S. Ct. 209, 212, 95 L.Ed. 207, 210 (1950). A court may consider a wide range of factors in determining whether grounds exist to vacate a judgment under Fed. R. Civ. Pro. 60(b), including "the risk of injustice to the parties" and the "risk of undermining the public's confidence in the judicial process." *Buck v. Davis*, 580 U.S. 100, 123, 137 S. Ct. 759, 778, 197 L.Ed.2d 1, 21 (2017) citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S. Ct. 2194, 2205, 100 L.Ed.2d 855, 875 (1988). Trial courts are afforded "wide discretion" in considering motions brought under Fed. R. Civ. Pro. 60(b)(6), which are given "limited and deferential appellate review." *Gonzalez*, 545 U.S. at 535.

This Court has instructed that an intervening development in law, without more, "rarely constitutes the extraordinary circumstances required for relief

under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239, 117 S. Ct. 1997, 2018, 138 L.Ed.2d 391, 424 (1997). Admittedly, there are minor nuances among circuits as to the applicability of Fed. R. Civ. Pro. 60(b)(6) in cases where there has been a change in applicable law. *Crutsinger v. Davis*, 140 S. Ct. 2, 3, 204 L.Ed.2d 1188 (2019) (Sotomayor, J., concurring in denial of certiorari). The Third Circuit recognizes that a change in controlling law in and of itself may give reason for Rule 60(b)(6) relief. *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014). Several circuits, including the Second, Fifth and Sixth Circuits, closely follow *Agostini* and hold that a change in decisional law is usually not by itself an extraordinary circumstance justifying relief under Fed. R. Civ. Pro. 60(b)(6). *Priester v. JP Morgan Chase Bank, N.A.*, 927 F.3d 912, 913 (5th Cir. 2019), *Fed. Ins. Co. v. Kingdom of Saudi Arabia (In re Terrorist Attacks on September 11, 2001 (Kingdom of Saudi Arabia))*, 741 F.3d 353, 357 (2d Cir. 2013), *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001). In the Tenth Circuit, a change in case law does not constitute a basis for vacatur of a final order unless it exposes the parties to different rules in related cases. *FTC v. Elite IT Partners, Inc.*, 91 F.4th 1042, 1049 (10th Cir. 2024).

However, this split is immaterial to resolution of this case as there was no change in decisional law at the time the district court considered the Motion to Vacate. *Frank*, 2023 U.S. App. LEXIS 27221, *4, 5. The entire Motion to Vacate was premised on a *proposed* amendment to Ohio Evid. R. 601(B)(5)(b) put forward by the Commission on the Rules of Practice and Procedure in Ohio Courts which would permit an

expert witness to satisfy the minimum active-practice requirement "at either the time the negligent act is alleged to have occurred or the date the claim accrued." At the time the Summary Judgment Order was entered (and the time that the district court considered the Motion to Vacate), the proposed amendment to Ohio Evid. R. 601 had not been approved by the Ohio Supreme Court. *Frank*, 2023 U.S. App. LEXIS 27221, *4, 5. In its Order denying the Motion to Vacate, the district court astutely noted that the proposed amendment to Ohio Evid. R. 601 was not a change in decisional law, but "only a *proposed* change." *Frank*, 2023 U.S. Dist. LEXIS 33720, at *9. (Emphasis in original.) Noting that "a change in decisional law is usually not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief," the district court correctly held that a proposed change to Ohio Evid. R. 601 was insufficient grounds to grant the Motion to Vacate because it was impossible to predict whether the proposed amendment to Ohio Evid. R. 601 would ever become effective. *Frank*, 2023 U.S. Dist. LEXIS 33720, at *9-11.

The minor split among circuits related to the application of Fed. R. Civ. Pro. 60(B)(6) in cases of a change in decisional law is completely irrelevant in this case. It is for this reason that the Petitioner does not ask this Court "to provide lower courts with much-needed guidance, ensure adherence to [Supreme Court] precedents, and resolve a Circuit split." *Rogers v. Grewal*, 140 S. Ct. 1865, 1875, 207 L.Ed.2d 1059 (2020) (Thomas, J., dissenting). As this case would not resolve a Circuit split, or otherwise provide guidance with respect to Fed. R. Civ. Pro. 60(b)(6), there is no

reason for this Court to grant the petition for writ of certiorari.

2. The Petitioner has not articulated sufficient grounds for this court to grant certiorari because the Petitioner seeks review of a matter involving only private litigants, with no national implications.

The Petitioner repeatedly argues that this Court should grant certiorari because the "district court failed to apply existing law correctly." [Petition p. 24]. However, this "Court's role is not to remedy incorrect legal conclusions of the lower courts." Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis, 102 Geo. L.J. 272, 288 (2013). Nevertheless, Petitioner mistakenly argues that certiorari is appropriate because "Rule 60(b)(6)'s catch-all clause, which covers 'any other reason that justifies relief' similarly reaches legal errors and later developments that impugn a judgment." [Petition p. 23].

The Petitioner's stated cause for vacatur – that "the district court misapplied Ohio law" – does ***not*** invoke Fed. R. Civ. Pro. 60(b)(6). [Petition p. 19]. Rule 60(b)(6) only applies in cases where Rule 60(b)(1) through (5) are inapplicable. *Kemp v. United States*, 142 S. Ct. 1856, 1861, 213 L.Ed.2d 90, 96 (2022). Vacatur on the basis of the trial court's alleged errors of law fall solely under Fed. R. Civ. Pro. 60(b)(1), not Fed. R. Civ. Pro. 60(b)(6). *Id*. Although the Petitioner did not seek relief under Fed. R. Civ. Pro. 60(b)(1), the Court of Appeals correctly noted that relief under that subsection was unavailable because the Petitioner failed to demonstrate that the district court made a

"substantive mistake of law," when it applied the then current version of Ohio Evid. R. 601. *Frank*, 2023 U.S. App. LEXIS 27221, *4.

Amazingly, Petitioner chides the district court for failing to apply Ohio Evid. R. 601 correctly in his Petition. The district court interpreted Ohio Evid. R. 601(B) in accordance with *Johnson*, 136 N.E.3d 581, which was later affirmed by the Ohio Supreme Court in *Johnson*, 2021-Ohio-3304. The Staff Note to Evid. R. 601 openly states that "Division (B)(5)(b) is amended to clarify the time at which the active clinical practice requirement is needed to qualify the witness as an expert witness, in response to the Supreme Court of Ohio's ruling in *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304."[2] (Emphasis supplied.) The Staff Note recognized that without the amendment, *Johnson* would otherwise remain good law. There can be no legitimate dispute that the district court applied the correct interpretation of Ohio Evid. R. 601 when it entered the Summary Judgment Order wholly consistent with *Johnson* which would prove the lynchpin for the proposed change to the rule. Characterizing the amendment as a "clarification" or new interpretation of Ohio Evid. R. 601 does not change the result. In *Gonzalez*, 545 U.S. at 536 this Court held that a new interpretation of a law does not constitute grounds for relief under Fed. R. Civ. Pro. 60(b)(6) in cases where the district court properly interpretated the law under then prevailing judicial interpretation.

---

[2] www.supremecourt.ohio.gov/docs/LegalResources/Rules/evidence/evidence.pdf, p. 33 (last visited July 21, 2023).

Frank attempts to shift the focus of his Petition on the underlying Summary Judgment Order itself, rather than the proper application of Fed. R. Civ. Pro. 60(b), by arguing that the district court "wrongfully prohibited the testimony of Dr. August Parker III"[3] and that the district court "took no action to provide relief to Petitioner for Respondent's contractor's negligent destruction of Petitioner's birth records and Respondent's failure to obtain proprietary software required to obtain access to Petitioner's fetal monitoring tracings." [Petition pp. 17, 21, 22]. However, the underlying Summary Judgment Order is *not* reviewed by the appellate court when considering an appeal from the denial of a Rule 60(b) motion. *Browder v. Dir., Dept. of Corr.*, 434 U.S. 257, 263, 98 S. Ct. 556, 54 L.Ed.2d 521 (1978), fn. 7. Moreover, Petitioner's disagreement with a "highly factbound conclusion" of the lower courts as is the case is here constitutes "an insufficient basis for granting certiorari." *Cash v. Maxwell*, 565 U.S. 1138, 1141, 132 S. Ct. 611, 613, 181 L.Ed.2d 785, 787 (2012).

Petitioner avoids any pretense that granting certiorari will settle an important question of federal law or resolve a matter of national concern by arguing that this Court should grant certiorari because the district court failed to "remedy unlawful conduct" through the use of its "broad equitable powers." [Petition p. 26]. It is not a "denial of justice" to properly apply Fed. R. Civ. Pro. 60(b) in accordance

---

[3] In fact, the district court duly considered Dr. Parker's testimony that it was "not possible" to render a standard of care opinion in its Summary Judgment Order. *Frank*, 2021 U.S. Dist. LEXIS 167487, at *28.

with well-developed authority, as the district court and court of appeals did below. [Petition p. 25]. The district court properly held that there is no cause of action under Ohio law for the negligent destruction of medical records. *See, Frank*, 2019 U.S. Dist. LEXIS 211327, *9, 10. Similarly, the district court's denial of a spoliation sanction in the form of a dispositive adverse inference for the negligent destruction was proper in all respects. *Frank*, 2023 U.S. App. LEXIS 6265, *4. Yet, at the crux of his Petition, Frank demands vacatur of the Summary Judgment Order on the basis of "equitable considerations" instead of the necessary change in decisional law which has been the threshold inquiry applied in Fed. R. Civ. Pro. 60(b)(6) motion practice. [Petition pp. 25, 26].

Petitioner's criticism that the Court of Appeals failed to conduct a "case by case" analysis, highlights that this case involves a specific set of facts and only two litigants. [Petition pp. 15, 19, 25]. Petitioner's attempt to cast this matter as one involving "[i]mportant public interests… implicated by Respondent's unscathed status" is unavailing. [Petition p. 27]. There is no public interest in a back-door attempt to upset established Ohio state law requiring proof of intent as an essential element of the tort of spoliation. *Smith v. Howard Johnson Co.,* , 67 Ohio St.3d 28, 29, 1993-Ohio-229, 615 N.E.2d 1037 (1993), *White v. Ford Motor Co.*, 142 Ohio App.3d 384, 387, 755 N.E.2d 954 (10th Dist. 2001). Nor is the public interest served in effectively granting a dispositive inference on liability as a discovery sanction for negligent destruction of medical records without knowledge of a potential claim. This Court has avoided granting certiorari merely "to satisfy a

scholarly interest" or "for the benefit of the particular litigants." *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L.Ed. 897, 901 (1955).

Despite Petitioners' protestations to the contrary, this case does not involve a substantial public interest. The Petitioner fails to explain how reversal would impact anyone other than the current parties. Simply put, this Court should not grant certiorari under these set of facts as reversal "adds virtually nothing to the law going forward." *Taylor v. Riojas*, 141 S. Ct. 52, 55, 208 L.Ed.2d 164, 166 (2020) (Alito, J., concurring in judgment).

CONCLUSION

Distilled to its core, the Petition offers no grounds for a grant of certiorari. The Petition is conspicuously devoid of any reference to the criteria usually applied by the Court in granting certiorari. This matter is restricted to two private parties, litigating issues involving a non-uniform provision of the Ohio Rules of Evidence that are virtually certain never to arise again. Accordingly, the Petition for Writ of Certiorari should be summarily denied.

Respectfully submitted,

MICHAEL P. FOLEY
Counsel of Record
ANTHONY G. RALUY
RENDIGS, FRY, KIELY & DENNIS, LLP
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
(513) 381-9200
mfoley@rendigs.com
traluy@rendigs.com

Counsel for Respondents