CATA News

CLEVELAND ACADEMY OF TRIAL ATTORNEYS

Winter 2012-2013

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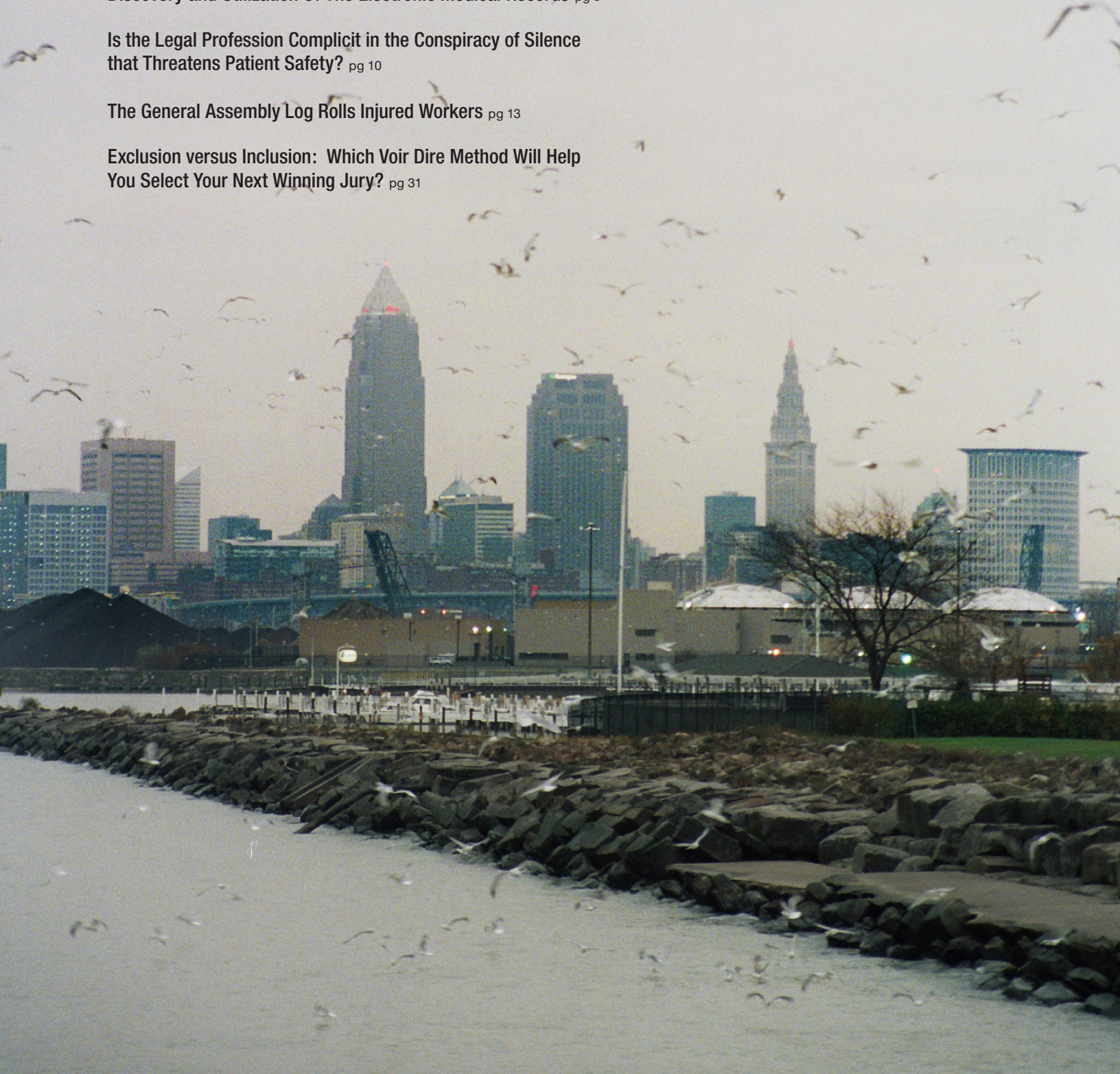

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Winter 2012-2013
News

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President's Message

by Samuel V. Butcher

Have you taken the time to visit our recently redesigned website? A brief history of our organization appears on the home page. According to that history, CATA was founded some fifty-three years ago by a dedicated group of Cleveland attorneys with the goal of helping trial lawyers better represent their clients through educational programs and information.

The goal hasn't changed but the activities undertaken to achieve that goal have changed. You can now be a "friend" of your Academy on Facebook, connect with it on LinkedIn, or follow it on Twitter. Thanks to the countless hours devoted to our website project by Andrew Thompson with help from Board Member, Will Eadie, CATA is keeping pace with the rapidly changing world of information technology. The new website even includes a blog with technology tips for attorneys. To access the CATA website, go to http://www.clevelandtrialattorneys.org.

I have had the good fortune to be a member of CATA for the past twenty-three years. I was encouraged to join CATA for the exclusivity of the organization to plaintiff attorneys and thus the commonality of interest that we share in continuing to educate ourselves to be more skillful trial lawyers, in seeking justice for our clients, and in championing the rights of individuals. Our founders were doubtlessly a dedicated group as were our forebears and we owe them a great debt of gratitude. My own observation, however, is that they could not possibly have been any more dedicated than those who have stepped up recently to carry on the tradition that they began.

Our Secretary, Ellen Hirshman, chairs the committee responsible for our CLE luncheon seminar series this year. Ellen and her committee kicked off the current CATA year with an outstanding presentation by Public Justice Attorney Matt Wessler on "How to Beat ERISA Reimbursement Liens in Your Personal Injury Cases." The attorneys in attendance were doubtlessly enlightened and encouraged by the work that Matt and Public Justice, America's Public Interest Law Firm, do and have been able to accomplish. Their work benefits us all and, more importantly, benefits our clients. They have asked for our support and I strongly encourage each of you to visit their website at http://www.publicjustice.net, learn more about their organization, and do whatever you can to help them in their mission.

Ellen and her committee have also put together two other luncheon seminars this year on "Utilizing the Current Climate for Trial Victory" and on "How Lawyers Can Use The iPad Effectively In Court and In Their Practice." Stay tuned for information on additional luncheon CLEs in 2013.

Kathleen St. John, in addition to her responsibilities as our new Treasurer, has generously agreed to continue to serve as Editor-in-Chief of this publication of which we can all be very proud. Kathleen, her new co-editor, Christopher Mellino, the members of the

CATA News committee, and others who have agreed to write articles for the newsletter continue to impress me with their devotion to our organization. Despite their busy practices, they have willingly stepped forward to author the timely articles that appear in this edition for our benefit.

Our equally hard-working and committed Vice-President, George Loucas, will, in addition to making arrangements for our annual banquet next June, work with his committee to plan the CATA Litigation Institute for the spring of 2013. George intends to invite your input regarding topics of interest. Please do not hesitate to offer him your suggestions.

The benefits of CATA membership are not limited to the foregoing. Perhaps most gratifying is the sharing of intellectual property that occurs every day among our members. This includes our deposition bank with access to over 10,000 reports and expert depositions as well as an active email listserv. I urge you to utilize and contribute to these resources which continue to make CATA, at an annual membership fee of only $125, a better value than ever.

And finally, if you have an interest in making an even greater contribution to our Academy, please communicate that interest to any of the officers or directors. We would be happy to have you join one of our committees or become one of our future directors.

Let us each do our part to further expand the collegiality fostered by this Academy and continue to work together for the common good. ■

Samuel V. Butcher
President

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Editors' Notes

by Kathleen J. St. John and Christopher Mellino

Shortly before the CATA News went to press, the Ohio Supreme Court released its decision in *Hewitt v. The L.E. Myers Co.*[1]

As CATA member Frank Gallucci, who represented Mr. Hewitt, stated, this decision is "yet another blow to injured Ohioans." In *Hewitt*, an apprentice lineman whose supervisor ordered him not to wear his rubber gloves and sleeves while working on a de-energized high tension line, sustained severe electrical burn injuries when he came in contact with an energized line. The plaintiff argued that the personal protective equipment constituted an "equipment safety guard" within the meaning of R.C. 2745.01 (C) and that his supervisor's decision to place him in an elevated bucket close to energized wires without this protective equipment constituted the "deliberate removal of an equipment safety guard" giving rise to a rebuttable presumption of intent to injure.

The Court, in a 6-1 decision, with only Justice Pfeifer dissenting, disagreed. The Court held that an "'equipment safety guard' means a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment"[2] and that personal protective equipment does not satisfy this definition. The Court further held that the "'deliberate removal' of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard."[3] Thus, "an employer's failure to train or instruct an employee on a safety procedure does not constitute the deliberate removal of an equipment safety guard."[4]

As Justice Pfeifer pointed out, the Court's interpretation of "equipment safety guard" is unduly narrow and isn't necessitated by the statute's language.[5] Equally disheartening is that the Court has turned a blind eye to the realities of the work place.

This issue contains an article by Stephen Vanek about the cases leading up to *Hewitt* and to the other case pending before the Court, *Houdek v. ThyssenKrupp Materials NA, Inc.* Although *Hewitt* severely restricts employer intentional tort actions, Steve's article remains a valuable resource as we continue to fight for justice for our clients.

*****

Our gratitude goes out to all who have helped with this publication. **Our advertisers make this publication possible, so please patronize them, and let them know you saw their ads in the CATA News.**

We are also grateful to our authors who, despite their busy practices, take time to contribute. Of equal importance are our assistants – Lillian Rudiy and Christa Courtney – who handle many of the details involved in getting this newsletter to press. Lillian, in particular, is the unsung hero behind this publication, as she spends many hours making sure we have the materials needed and organizing them to send off to our talented designer, Joanna Eustache, at Copy King.

Thanks to all, and may you have a wonderful holiday season, and an auspicious new year! ■

End Notes

1. Slip Opinion No. 2012-Ohio-5317 (Nov. 20, 2012).
2. *Id.* at the syllabus.
3. *Id.*
4. *Id.* at ¶29.
5. *Id.* at ¶35 (Pfeifer, J., dissenting).

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Discovery And Utilization Of The Electronic Medical Records

by Jay M. Kelley, III and Kimberly Young

The electronic medical record (EMR) is rapidly becoming the norm for the documentation of clinical care. It is imperative that we, as counsel, understand the various different EMRs in use at different hospitals and within different departments and clinical groups, in order to ensure that we obtain, review and incorporate all evidence of clinical care. As the integration of the electronic medical record evolves, many care providers currently have a blended chart. Many of their daily clinical notes are still handwritten traditional paper charts or flow sheets, while radiographs, orders and labs are only maintained electronically.

As to medical-legal issues, there truly is no disadvantage to the electronic medical record, assuming counsel has a full understanding of how much additional information can be obtained and/or retrieved from the record-keeping system. This article will attempt to provide a better understanding of the electronic medical record and provide practical tips to be utilized during both paper and fact discovery to ensure you have a full understanding of which providers accessed a medical record and when, and what traditional policies and procedures have been replaced with "clinical decision support" (CDS) to act as an algorithm or guideline for the clinicians.[1]

I. Broaden Your Requests Beyond "Medical Records" And "Charts"; And Ask For Metadata.

For decades, we have made requests for the entire "medical record" and/or "chart." Oftentimes deciphering what was written was a challenge due to legibility, and having a full understanding of which care providers were involved was difficult to ascertain. Re-defining your request from simply the patient's "medical record" or "chart" to include the electronic medical record, clinical information which is stored, paper charting, and other stored data can assist in ensuring you are reviewing a complete clinical picture.

Most health care providers have adopted, or will adopt, policies and procedures compatible with their individual EMR system and that address areas of potential discovery. For example, many systems provide a clear record of when a correction or addition has been made to a record, when done in accordance with the facility's policy. The integrity, accessibility, security, and privacy of protected health information must be addressed through policies and procedures that support the requirements of the state and federal laws as well as privacy regulations. Thus, systems are designed with built-in safeguards to prevent certain kinds of data entry errors and inadvertent losses or breaches of information. Discovery associated with EMR must therefore include metadata – such as audit trails and other embedded electronic data – that is typically not seen during ordinary use of the system.[2]

Metadata – commonly defined as "data about data" – can provide critical information, such as when and by whom a document or record was created, when it was last saved, who modified the record and how, who viewed a record, and more.[3] Since metadata is often hidden or

embedded, discovery targeted at IT professionals within an organization may be warranted to determine what information is retrievable within a particular system.[4]

While metadata is not specifically mentioned in the Ohio Rules of Civil Procedure or the corresponding federal rules, the federal rule drafters clearly contemplated that metadata was within the definition of "electronically stored information" (ESI) that is discoverable under the rules.[5] Indeed, not only have courts generally ordered production of metadata when it is expressly sought in the initial document request,[6] but a federal district court in the Southern District of Ohio has "expressed a preference for the production of electronically stored information in its native format" for the very reason that "the receiving party can view any metadata that might be embedded in the electronic document but not visible on the hard copy."[7]

II. Understand How The Data Is Stored And Draft Your Discovery Requests Accordingly.

Electronic charting often has multiple portals of entry. For example, within a medical institution there may be a primary electronic medical record which is available and maintained in a traditional records department. However, in a cardiology case involving an interventional procedure or an electrophysiology procedure, there are often tapes, clinical information and data which are maintained within those suites, separate and apart from the traditional medical chart. Failure to understand this fact, or to make an appropriate request, will result in the receipt of limited – or incomplete – information. Accordingly, it is suggested that, within your interrogatories and requests for production of documents, both the definitions and questions should be modified to include in the request the wider range of places where the medical information may be stored and modes of storage for such data.

For instance, in the "definitions" section of your request, a revised/broadened definition might state the following:

> A request for medical information and/or records throughout is deemed to be a request for all clinical information regarding the care and treatment provided to the patient, whether stored electronically on a primary medical record, videographically, on tapes, films, or paper, maintained in each and every department within the institution.

Similarly, a sample request for production of documents might read as follows:

> Please provide all medical information, records, data stored, printed or otherwise maintained in hard copy or electronically in each and every department within your institution for John Doe regarding care and treatment rendered between [date] and [date].

By expanding the nature of the request and specifying the data requested, a level of consequence is added for the responding parties if they fail to provide relevant information, or if they certify incomplete information as complete, knowing that their own internal definitions of medical records have broadened since the days of paper charts. The reality is that the definition of the medical chart has changed based upon the transition to electronic storage methods; and it is important that the plaintiff and defendant reach an agreement – or accord – on the definition and parameters of the medical request.

III. Understand The Governing Electronic Discovery Rules

Recently-promulgated Cuyahoga County Local Rule 21.3[8] governs the discovery of electronically stored information. It sets forth, in Loc. R. 21.3(A)(2), its primary purpose of encouraging parties to reach an agreement on issues involving ESI wherever possible.

The local rule specifically sets forth and anticipates that defining terms, parameters and scope in the electronically stored information age is critical to the management of discovery. Additionally, as it pertains to ESI, Loc. R. 21.3(C)(1) requires counsel in certain cases[9] to seek a meeting or agreement to confer at least fourteen days prior to a Case Management Conference (CMC) to set up the scope, nature and parameters of electronic discovery; and Loc. R. 21.3(C)(2) requires the parties in such cases to submit to the court a report of this "meet and confer" at least seven days prior to the CMC. This requirement to "meet and confer" can serve as the first opportunity for the setting of discovery parameters.

Local Rule 21.3, Civil Rule 34, and Civil Rule 26 (discussed below) discuss the right of a requesting party to receive information in a reasonably usable form, and provide that a party is entitled to production of that information which is reasonably accessible, proportionate to the case, and which does not impose an undue burden.

Utilizing the new parameters for discovery of electronically stored information leads to the question of what additional information, beyond the patient's care chart, is discoverable? Physician emails, cell phone records, audit trails, and clinical decision support (CDS) capabilities are all available from

the electronic record. This information can all be requested through discovery and should include the following requests:

Interrogatories:

1. "Please identify the brand and model of any electronic medical system being utilized in the documentation of care and treatment provided to John Doe."

2. "Pertaining to [the issues in the case], please provide a copy of the clinical decision settings which were in place within the above-referenced computer system on [date(s)]."

3. "Please describe whether or not there were any modifications or overrides to the clinical decision settings between the dates of [care and treatment at issue]."

4. "Please provide for each individual who made a medical entry into the chart their access code/PIN."

Requests for Production of Documents:

1. "Please provide a copy of the institution's medical charting policy, including requirements to sign in, sign out and any system-overrides which automatically sign an individual out of a medical record after a certain period of time."

The information gained through these requests will allow you, your medical expert, and electronic discovery expert, if necessary, to have an understanding of the exact nature of the system that is being utilized. Clinical Decision Support Systems (CDSS) are examples of algorithms, policies, procedures, alarms and alerts which are in place to work as a "system override" to minimize or reduce the risk of human error. These systems are modifiable; however, any modification can be tracked by way of the electronic audit.

Obtaining not only the names of the individuals who provided care, but also their personal identification numbers (PIN), will provide information as to when they accessed the chart, what information they viewed, and what information they entered. This is commonly referred to as an "audit trail" and gives you the ability to re-create any modifications or additions to the chart.

Perhaps more relevant and important, PIN entry requirements, log-out requirements, and systems designed to log someone out automatically following a period of inactivity – when viewed in combination with the hospital's HIPAA policy for charting – can demonstrate whether or not information pertinent to the claim was viewed, who viewed it, and exactly when it was viewed. In any claim where communication of results is a critical issue, this can provide hard documentation of what happened (or did not happen), including where information is available through remote access.

IV. Other Procedural Issues Relating To ESI

The Ohio Rules of Civil Procedure's most recent revisions address some issues that may arise with electronic health records as ESI, generally. Below, are some of the rule changes that have recently come to pass or may yet be anticipated as bearing upon discovery of ESI.

A. Civ. R. 16: Pretrial Procedure.

Two sub-sections of Civ. R. 16 touch on ESI. These subsections, which were added to the rule through a 2008 amendment, provide as follows:

> In any action, the court may schedule one or more conferences before trial to accomplish the following objectives:
>
> (8) The timing, methods of search and production, and the limitations, if any, to be applied to the discovery of documents and electronically stored information;
>
> (9) The adoption of any agreements by the parties for asserting claims of privilege or for protecting designated materials after production.

The Staff Notes to Civ. R. 16 state that "[n]ew subsections (8) and (9) are added to clarify that issues relating to discovery of documents and electronically stored information are appropriate topics for discussion and resolution during pretrial conferences."

Although the language of Ohio Civ. R. 16 is currently permissive, given the current trends in federal litigation, state courts, including those in Ohio, are likely to adopt local rules making discussions of these types of issues mandatory early in the litigation process. Indeed, as noted above, Cuyahoga County's recently adopted Loc. R. 21.3 now mandates (in certain cases[10]) a "meet and confer" between counsel fourteen days prior to the CMC (or as otherwise agreed by the parties) to discuss the preservation and production of ESI.

B. Civ. R. 26: General Provisions Governing Discovery.

Rule 26 has been amended to (a) include ESI within its description of information that is subject to discovery requests, (b) regulate the burden of producing ESI, and (c) mitigate the effect of inadvertent production of privileged documents.[11]

Generally, in order to avoid production of ESI, a party must demonstrate that the information is not "reasonably accessible" because of undue burden or expense.[12] However, neither the Ohio Rules of Civil Procedure nor their federal counterpart specifically define

the term "reasonably accessible" and no published decisions analyzing the factors for determining accessibility concern EMRs. Here again, carefully crafted discovery will minimize disputes or delay in obtaining a complete record of patient care.[13]

C. Civ. R. 34: Producing Documents, Electronically Stored Information, And Tangible Things, Or Entering Onto Land, For Inspection Or Other Purposes.

Rule 34(B) of the Ohio Rules of Civil Procedure permits the requesting party to specify the form or forms in which electronically stored information is to be produced. Obviously, before such a specification can be made, it is necessary to become familiar with the information available in a defendant's record-keeping system and how that information can be produced to allow for efficient review.

D. Civ. R. 37: Failure To Make Discovery; Sanctions.

Ohio Rule of Civil Procedure 37 now provides that, absent exceptional circumstances, a court may not impose sanctions on a party for losing electronically stored information as a result of a routine, good faith operation of an electronic information system.[14] The rule lists five factors that a court may now consider in deciding whether to impose sanctions: (1) whether and when any obligation to preserve the information was triggered; (2) whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue; (3) whether the party intervened in a timely fashion to prevent the loss of the information; (4) any steps taken to comply with any court order or party-agreement requiring preservation of specific information; and (5) any other relevant facts.

While routine deletions are less likely to be problematic with health records themselves, problems may arise in this area where a plaintiff is seeking telephone records, email, or other electronically stored data. Best practice would require inquiries to determine what kinds of routine deletions are undertaken and if they are performed by a third party vendor or service. It may be necessary to issue preservation letters to non-parties to avoid destruction of discoverable information by third parties.[15]

E. Discovering Miscellaneous Electronic Information.

Multiple institutions have the ability to track and locate where individuals were within their own facility at the time certain things occurred. This includes hospital "codes," phone calls, or access to certain portions of the medical record. Through discovery, it is critical to get an understanding of the name of the individual from the Information Technology ("IT") Department and/or Medical Records Department who can assist you in defining these terms, numbers and data.

In radiology and obstetrics, remote access is a growing trend. The ability to review films, fetal tracings, lab results and other data from outside of the institution has increased physician remote involvement. Remote involvement of care providers in patient care is information that needs to be ferreted out in discovery, since it can further define what information was exchanged, not exchanged, viewed, or not viewed – and the timing of the same. ■

End Notes

1. "A clinical decision support system (CDSS) is an application that analyzes data to help healthcare providers make clinical decisions. A CDSS is an adaptation of the decision support system commonly used to support business management." http://searchhealthit.techtarget.com/definition/clinical-decision-support-system-CDSS. *See also*, 2011 *American Health Lawyers Association (AHLA), Journal of Health & Life Sciences Law* Vol. 4, No. 3, n. 181 (June, 2011) ("Clinical decision support is a broad term referring to software systems that can provide real-time information and guidance to clinicians. Clinical decision support systems provide this assistance by running complicated algorithms that analyze the patient's clinical data against archived data to assist physicians in predicting the patient's trajectory in light of the experience born out in the data by prior patients.")
2. Day, S., E-Discovery: Practical Tips for E-Survival, remarks at the Meeting of the Philadelphia Area Society for Health Care Risk Management (Jan. 25, 2007), ECRI Institute, Plymouth Meeting (PA).
3. *See, e.g., Scotts Co. LLC v. Liberty Mut. Ins. Co.*, S.D. Ohio No. 2:06-CV-899, 2007 U.S. Dist. LEXIS 43005, *11 n.2 (June 12, 2007) ("Metadata, commonly described as 'data about data,' is defined as 'a set of data that describes and gives information about other data.'.... [It includes] 'all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records'... [such as] a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates... and file permissions[.]")
4. Pierce, David P., *Electronically Stored Information in Ohio: Flying High With ESI*, 2012 Emerging Issues 6655.
5. Minutes of April 15-16, 2004, Civil Rules Advisory Committee Meeting, p. 13, available at http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf.
6. *In re Porsche Cars North America, Inc. Plastic Coolant Tubes Products Liability Litigation,* 279 F.R.D. 447, 449 (S.D. Ohio 2012) (citing *Aguilar v. Immigration & Customs Enforcement Div. Of U.S. Dep't of Homeland Sec* ., 255 F.R.D. 350, 357 (S.D.N.Y. 2006)).
7. *Id.* (citing *Superior Production Pship., d/b/a PBSI v. Gordon Auto Body Parts Co., Ltd.*, S.D. Ohio No. 2:06-cv-0916, 2008 U.S. Dist. LEXIS 97535, at *3 (Dec. 2, 2008)).
8. Cuyahoga County Local Rule 21.3 was proposed on February 21, 2012. The public comment deadline for this rule was April 13, 2012.
9. Loc. R. 21.3(C)'s "meet and confer" requirements apply to "the following civil cases: employment discrimination cases, cases in which a party alleges the existence of a class certifiable under Civ. R. 23, cases assigned to the commercial docket, and all other civil cases in which the parties or the court believes ESI may be an issue." Loc. R. 21.3(C)(1). Since ESI is probably an issue in all medical malpractice cases at this point in time, Loc. R. 21.3's "meet and confer" requirements probably apply to all

medical malpractice cases.

10. See n. 9, *supra*.
11. Pierce, David P., *Electronically Stored Information in Ohio: Flying High with ESI*, 2012 Emerging Issues 6655.
12. Ohio Rule of Civil Procedure 26(B)(4).
13. See generally, *The Sedona Conference Commentary on Preservation Management and Identification of Sources of Information that are Not Reasonably Accessible*, at 12 (July 2008).
14. Ohio Rule of Civil Procedure 37(F).
15. *In re: Nat'l Century Fin. Enterprises, Inc.*, 347 F. Supp. 2d 538, 542 (S.D. Ohio 2004).

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Is the Legal Profession Complicit in the Conspiracy of Silence that Threatens Patient Safety?

by Christopher M. Mellino

Settlement agreements in medical malpractice cases have historically contained provisions prohibiting plaintiffs from publicizing the amount of the settlement. However more recently medical malpractice defendants have become increasingly aggressive in attempting to prohibit both plaintiffs and their counsel from disseminating any information about the lawsuit. These provisions seek to suppress any and all information, not just the amount of the settlement, but also the facts of the case, the identity of the parties involved, and the merits of the case.

These secrecy agreements usually seek to preclude information about the case and or settlement from being disseminated not only publicly in any form, but also privately to anyone other than immediate family members.

Medical malpractice defendants present secrecy agreements, or "strict confidentiality" language, as a condition precedent to any settlement and secrecy clauses are labeled by the defendants in the settlement agreement as a "material term" of the settlement. Private mediators and judges who have worked out a settlement between the parties traditionally encourage plaintiffs to accept confidentiality provisions as routine. However as the language of these provisions becomes more extreme and as medical defendants are also becoming increasingly insistent on binding plaintiffs' counsel by forcing them to sign the settlement agreements as well, it may be time to examine if such provisions hold up to existing public policy, and the Rules of Professional Conduct.

Courts do not look favorably upon secrecy agreements. It is an unusual circumstance for a court to rule on the enforceability of a secrecy agreement or for someone to be sued for a breach of such an agreement. However one setting the enforceability of these agreements has been litigated is in the context of discovery.

The Sixth Circuit, in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*,[1] addressed "whether communications made in furtherance of settlement negotiations are discoverable by litigants in another action."[2] The Court held that "a settlement privilege should exist" regarding settlement communications, but held that "the settlement agreement itself was not privileged."[3] Thus, Courts in the Sixth Circuit have held as follows:

> **[C]onfidential settlement agreements are not privileged.** Further, the **agreements are not protected from discovery simply because they have been denominated "confidential" by the parties.** [A] general concern for protecting confidential information does not equate to privilege […]. [I]n the context of settlement agreements the mere fact that settling parties agree to the confidentiality of their agreement does not serve to shield the information from discovery. Simply put, litigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its confidentiality."[4]

The Ohio Supreme Court went even further in *Ohio Consumer's Counsel v. Public Utilities*

Commission of Ohio.[5] Finding that "no Ohio statute or case law expressly creates a settlement privilege," the Court held that not only was the settlement agreement discoverable, but all communications related to the settlement agreement were also discoverable regardless of whether the parties had agreed to keep these documents confidential.

Other jurisdictions have also shown a lack of regard for secrecy agreements. Courts time and time again have held that "[w]here a party designates certain documents as "confidential," she has not automatically shielded such evidence for purposes of discovery."[6]

In *Karzakowski v. Hwan*,[7] a Pennsylvania Court refused to seal a settlement agreement in a wrongful death case despite the parties' request. This case is notable because an oft cited justification for secrecy agreements is to promote and encourage settlement of cases. The Court in *Hwan* astutely commented:

> [A]lthough the general interest in encouraging settlements based upon a particularized need for confidentiality is a factor to be considered, it is outweighed by the public's right of access if the settlement agreement involves information important to public health and safety as matters of legitimate public concern.

The Court held that details of a malpractice settlement against a healthcare provider may be regarded as "information important to public health and safety or matters of legitimate public concern." Part of the settlement in *Hwan*, was paid by a taxpayer funded state agency that insured healthcare providers. The Court also cited the fact that the doctor was not able to establish a clearly defined serious harm that he would suffer by disclosure of the settlement.

Assuming that confidentiality does encourage and promote settlement doesn't an agreement not to publicize the amount of the settlement achieve that purpose? What is the harm to a defendant of an anonymous case report in a publication circulated only to attorneys? Or of a similar report on an attorney's website? Is the real purpose of secrecy agreements to prevent sharing of information by plaintiffs' attorneys and to hinder the public from identifying both doctors who are serial malpractitioners and lawyers who have successfully handled medical malpractice cases? Whether intended or not these are consequences of such overreaching secrecy agreements.

A strong argument can be made that language in a settlement agreement that precludes dissemination of any information, not just of the settlement itself but any details of the case, even in an anonymous case report violates public policy and, in cases where plaintiff's counsel is required to sign the release, violates the Code of Professional Responsibility.

The Board of Commissioners on Grievances and Discipline has found that when defendants insist that a plaintiff's counsel agree to indemnify them against third party claims such conduct is unethical. The Board stated that "[i]t is improper for a plaintiff's lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third person to the settlement funds."[8] Before this opinion was published it was commonplace for defendants to insist on such provisions.

The Board found that such "agreements" are not authorized by the Rules and that they violate certain provisions of Prof. Cond. Rules 1.7, 1.8, and 8.4. One reason the Board found these agreements unethical is that they create a conflict of interest for a lawyer. The same is true for secrecy provisions that restrict a lawyer from communicating any and all facts about a case.

The Rules of Professional Conduct clearly manifest the intent that we as lawyers have a duty to inform the public about legal proceedings that affect public safety and matters of general public concern. Clearly we should not be concealing such information from public view.

The comments to Prof. Cond. R. 3.6 state that:

> there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

This is almost identical to the language in the *Hwan* case recognizing that the public has a right of access to information important to public health and safety as matters of legitimate public concern.

It has now been well reported that the Institute of Medicine determined that 98,000 people are killed every year by medical malpractice[9] (that number does not include patients that were seriously injured or maimed but did not die). Instead of refuting that number other recent studies have found that the Institute of Medicine study *understated* the number of injuries.[10]

Despite this well established knowledge

and the fact that medical malpractice is now the sixth leading cause of death in this country,[11] the trend in the legal profession is to grant even more secrecy to culpable defendants. In contrast the medical profession is moving toward more transparency. In an article published in *The Wall Street Journal* on September 22, 2012 entitled *How to Stop Hospitals From Killing Us,* a surgeon from Johns Hopkins Hospital decries secrecy agreements and urges that:

> We need more open dialogue about medical mistakes, not less. **It wouldn't be going too far to suggest that these types of gag orders should be banned by law.** They are utterly contrary to a patient's right to know and to the concept of learning from our errors. (emphasis added).

The author argues that transparency is a crucial prerequisite to fixing health care and that making fair and accurate reports available to the public would be an important step to allowing patients to make informed decisions about health care.

While we as lawyers may not be charged with fixing the health care system, the tort system in this country has always been about accountability. The surgeon's article clearly illustrates how information relating to the facts and merits of a medical malpractice case is information that is important to public health and safety and a matter of legitimate public concern. When litigants suppress any record of medical malpractice cases that result in settlements the public is denied their right of access to valuable information of how and where malpractice is occurring. Shouldn't any patient who is undergoing medical treatment be able to access information about whether his or her doctor has been involved in a malpractice case or whether a procedure recommended for them has resulted in an injury to another patient? Onerous secrecy agreements prevent all of this information from being available.

The Rules of Professional Conduct recognize that when a patient is injured by negligent medical care they have a "need to know" what legal services are available to help them. The public's right this information can be found in Prof. Cond. R. 7.2. "To assist the public in obtaining legal services, lawyers should be allowed to make known their services[.]… The interest in expanding public information about legal services ought to prevail over considerations of tradition."[12] When a lawyer requests that a plaintiff's lawyer deny the public access to this information it would seem to be a violation of this Rule.

Finally there is a widespread myth that many if not most of the lawsuits filed against doctors and hospitals are frivolous. One way this myth is propagated is by concealing from the public meritorious and particularly egregious cases of malpractice through the use of these secrecy agreements. As more anti-justice laws that favor medical defendants are passed, more and more states are attempting to collect data on medical malpractice lawsuits and to track the resolution of these suits. By suppressing any information about cases that have been settled by use of secrecy agreements the medical industry is seeking to become the exclusive source relating to lawsuit outcomes and thereby controlling the information being collected. Again it seems to be common sense that it is in the public interest and better for patient safety if there is transparency and unfettered access to information relating to legal proceedings involving medical malpractice. ■

End Notes

1. 332 F.3d 976 (6th Cir. 2003).
2. *Id.* at 979.
3. *Id.* at 981.
4. *See also, Oberthaler v. Ameristep Corp.*, N.D. Ohio Case No. 5:08-cv-1613, 2010 U.S. Dist. LEXIS 37367 (N.D.Ohio April 13, 2010) (*citing Adams v. Cooper Indus.*, No. 03-476, 2007 U.S. Dist. LEXIS 22199 at *2 (E.D. Ky.March 13, 2007) (emphasis added).
5. 111 Ohio St.3d 300 (Ohio 2006).
6. *See, Auto-Owners Ins. Co., America Piping, Inc.*, Case No. 4:07 CV 00394, 2008 U.S. Dist. LEXIS 48779 (E.D. Mo. June 26, 2008) (*quoting EEOC v. City of St. Louis*, No. 90-313C(6), 1991 U.S. Dist. LEXIS 13519 (D. Mo. Mar. 27,1991) *See also, Gardiner v. Kelowna Flightcraft, Ltd.* , Case No. 2:10-cv-947, 2011 U.S. Dist. LEXIS 55331 (S.D.Ohio May 23, 2011) (holding the same).
7. Lackawanna Common Pleas No. 01 CV 934, 2004 Pa. Dist. & Cnty. Dec. LEXIS 219 (Lackawanna C.P. Sept. 23, 2004).
8. Ohio Sup. Ct., Bd. Comm'rs on Grievances & Discipline, Op. 2011-1 (Feb. 11, 2011).
9. To Err Is Human: Building a Safer Health System, Institute of Medicine, 1999.
10. Key Issues, Congressional Budget Office, December 2008, 150-154; Institute for Healthcare Improvement: Campaign – FAQs, Institute for Healthcare Improvement, http://www.ihi.org/IHI/Programs/Campaign/Campaign.htm?TabId=6; The Fifth Annual HealthGrades Patient Safety in American Hospitals Study, HealthGrades, April 2008.
11. Deaths/Mortality, 2005, National Center for Health Care Statistics at the Centers for Disease Control, viewed at http://www.cdc.gov/nchs/fastats/deaths.htm.
12. Official Comment (1) to Prof. Cond. R. 7.2.

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The General Assembly Log Rolls Injured Workers

by Benjamin P. Wiborg

On June 11, 2012, Governor Kasich signed into law the 2012 Mid-Biennium Budget Review, also known as House Bill 487.[1] HB 487 is an omnibus bill containing hundreds of statutory amendments that cover a wide range of budgetary issues and state appropriations. Hidden in the 1,788 page bill is an amendment that changes how the Ohio Bureau of Workers' Compensation pays a "loss of use" award. The amendment requires that a "scheduled loss" award for a permanent loss of use of a body part be paid out over time as opposed to a single lump sum payment.[2]

On September 7, 2012, a lawsuit, spearheaded by the Ohio Association for Justice (OAJ), was filed in the Cuyahoga County Court of Common Pleas claiming that the loss of use amendment violates the one subject rule of the Ohio Constitution and is therefore unconstitutional.[3] The plaintiffs seek declaratory and injunctive relief, and request that the scheduled loss amendment be severed from HB 487 and be found invalid and unenforceable because the amendment does not share a common purpose with HB 487.

A. History Of The One Subject Rule.

The one subject rule is contained in Section 15(D), Article II of the Ohio Constitution, which states "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." The one subject rule was added to the Ohio Constitution in 1851 to prevent legislative log-rolling, that is, the practice of combining various or unpopular provisions in a single bill that would otherwise not pass on their own.

The Ohio Supreme Court has had an interesting and evolving view of the one subject rule. The initial view of the Supreme Court, in the mid 1800s, was that the one subject rule was directory, and not mandatory, and therefore, not judicially enforceable.[4] In 1984, however, the Supreme Court, in *State ex rel. Dix v. Celeste*,[5] while reiterating that the one subject rule is directory, went on to hold that the one subject rule is judicially enforceable when there is a "manifestly gross and fraudulent violation of the one subject rule."[6]

The "manifestly gross and fraudulent violation of the one subject rule" standard set forth in *Dix* remains the law but, in the subsequent years, the Supreme Court has clarified its stance on the one subject rule. The Supreme Court has held that it is not fatal for a bill to have numerous topics so long as there is not a blatant disunity between the topics.[7] The Court went on to state that when there is a blatant disunity between the topics, it may be inferred that the amendment was included as a result of log rolling.[8] More recently, the Supreme Court modified *Dix*, holding that the one subject rule can no longer be seen as directory; rather, an amendment will be invalidated if it violates the gross and fraudulent standard set forth in *Dix*, *supra*.[9]

The Supreme Court has shown over the past few decades that the one subject rule has teeth. For example, in *Hinkle v. Franklin County Bd. of Elections*,[10] the Supreme Court severed and found invalid an amendment concerning a liquor control law that had been included in a bill, the focus of which was the state judicial system. The court reasoned that there was no "rational relationship

or common purpose" between the liquor control provision and the remainder of the bill which focused on the Ohio judiciary.[11]

Importantly, the Supreme Court has used the one subject rule to sever and invalidate an amendment found in an appropriations bill. In *Simmons-Harris v. Goff*,[12] the Supreme Court acknowledged that appropriations bills, similar to HB 487, are different from most bills written by the General Assembly because, by necessity, the bill encompasses many items. Nonetheless, in *Simmons*, the Court severed and found invalid a provision concerning a school voucher program. The Court reasoned that there was "considerable disunity in subject between the School Voucher Program and the vast majority of the provisions of Am.Sub.H.B. No. 117."[13]

Simmons is not the only case in which the Supreme Court has used the one subject rule to invalidate a provision in an appropriations bill. In *State ex rel. Ohio Civil Service Employees Assn. v. State Emp. Relations Bd.*,[14] the Supreme Court held that the one subject rule had been violated when a provision concerning collective bargaining rights was included in an appropriations bill. The Supreme Court reasoned that even though collective bargaining will have some budgetary implications, it does not bear a close enough relationship to the core purpose of the appropriations bill.

B. The Supreme Court Should Find That The Amendment Violates The One Subject Rule.

It is without question that the common purpose of HB 487 is the Ohio budget and state appropriations. This is reflected in HB 487's title, which states that the purpose of the amendments in HB 487 is "to make operating and other appropriations and to provide authorization and conditions for the operation of state programs."[15]

The amendment concerning a loss of use award bears very little, if any, relation to the Ohio budget or state appropriations. The reason for this is that the Ohio Bureau of Workers' Compensation system is funded by employers and does not rely on state revenue.[16]

Rather, the inclusion of the loss of use amendment to HB 487 appears to be a tactical decision. The proponents of the loss of use amendment must have known that the amendment, standing alone, would have been aggressively opposed. Moreover, given the successful effort last year to derail Senate Bill 5,[17] the proponents of the "loss of use" amendment might have anticipated a similar public outcry against this law, as it imposes a substantial burden on the most catastrophically injured of Ohio workers.

If the Supreme Court does invalidate the loss of use provision, it would not be the first time the Court invoked the one subject rule as the basis for overturning legislation that curtailed the rights of the injured. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,[18] the Supreme Court held that Am.Sub.H.B. 350, which, among other things, imposed various "tort reform" measures, violated the one subject rule because the various provisions did not have a common purpose. The Court found that the provisions concerned a wide range of issues including employment discrimination, securities, and class actions. Interestingly, the Supreme Court declared that the bill was unconstitutional in its entirety. However, as many of you are aware, this victory was short lived.

Since *Sheward*, the Supreme Court has been less amenable to using one subject rule arguments. For example, in *Holeton v. Crouse Cartage Co.*,[19] the Supreme Court rejected a one subject rule challenge to a workers' compensation provision that concerned subrogation because the provision was part of a statute that amended other portions of workers' compensation laws. The legislation in *Holeton*, however, is distinguishable from H.B. 487's "loss of use" amendment, as there was arguable unity in the workers' compensation amendments at issue in *Holeton*, whereas it is difficult to discern any legitimate justification for including the "loss of use" amendment in the appropriations bill.

C. The Amendment Will Have A Significant Impact On Injured Workers.

Prior to the effective date of HB 487, loss of use awards were paid out in a lump sum. For example, for an injury that occurred in 2012, the amputation or loss of use of an arm resulted in an award of 225 weeks of benefits, at the Statewide Average Weekly Wage rate of $809.00, which resulted in a lump sum award of $182,025.00.

Now, as a result of the amendment, that same loss of use award will be paid out over time and the injured worker will receive $809.00 per week for 225 weeks. To those unfamiliar with the workers' compensation system, this revision might appear fair, but the truth is that it significantly restricts what an injured worker can do financially. A major benefit to having an up-front lump sum payment is that the injured worker can invest the money and earn interest. Moreover, the new prolonged payment method will leave catastrophically injured workers without a cash reserve at a time they need it most.

Additionally, under the amendment, if the Bureau of Workers' Compensation agrees to commute a loss of use award to a lump sum, they will now only offer the present value of the award. The present value of the loss of use of an arm (based on an estimated BWC present value calculation) is approximately $140,000.00, resulting in a reduction of benefits of more than $40,000.00.

Furthermore, the amendment creates a problem for attorneys who practice in the area of workers' compensation. Quite

often, recovery of a loss of use award results from the significant efforts of the injured worker's representative. Some loss of use awards are paid as a result of an amputation of a body part - an award that is often straight forward. However, it is not always that easy. There are often legal issues to address about the underlying injury, such as whether or not the injury occurred in the course and scope employment. Similarly, a loss of use award can, and often does, result from ankylosis of a joint or injuries such as Complex Regional Pain Syndrome – the sorts of injuries that employers and the BWC typically oppose aggressively, requiring commensurate efforts on the part of the worker's attorney.

Needless to say, it can take years of effort to get a loss of use award paid in a claim. Now that the awards are paid out over time, there will likely be significantly less of an amount in accrued benefits as to which an attorney can recover a fee. (It is advisable to try to establish the workers' entitlement to the loss of use award as far back as possible so as to maximize the amount of accrued benefits. Otherwise, an attorney will be left with the unenviable task of trying to collect a portion of his or her client's payments for a prolonged period of time.)

Of course, there are those in Ohio who celebrate the passage of the "loss of use" amendment. Most Ohio employers support the amendment, claiming that it is financially burdensome to be hit with the cost of a loss of use award. Although this may be true, the fact remains that employers are in a better position to bear the cost of the loss of use award than are the injured workers. Ohio workers who sustain an amputation or other loss of use are often required to change occupations, often to a much lower paying job, assuming that they can find employment at all.

Moreover, historically (and up until this amendment) the legislature never intended the loss of use award to be paid out over time. Instead, the weeks attributed to a body part, for example 225 weeks for an arm, reflect what the legislature felt that particular body part was worth, and not the length of time the award was to be paid.

Those challenging the constitutionality of the loss of use amendment have a strong argument that the inclusion of the amendment is in violation of the one subject rule. The loss of use amendment has very little, if any relationship with the state budget or appropriations. Rather, it appears that the inclusion of the amendment was merely a surreptitious way of passing a bill that would likely have never passed on its own. It is unfortunate that this log rolling is at the expense of some of Ohio's most injured and economically vulnerable citizens. ■

End Notes

1. Am. Sub. H.B. 487, 129th General Assembly.
2. The "loss of use" award, pursuant to R.C. 4123.57 and the corresponding regulations, provides payment of "scheduled loss" benefits to workers who have lost, or lost the use of, limbs, appendages, and other organs in work-related accidents. The award is designed to compensate these workers for the permanent loss of function of a particular body part. The loss of a body part can result from a traumatic amputation or it can arise where the body part remains, but has no functional use, which can occur as a result of a chronic and disabling disease, such as Complex Regional Pain Syndrome. Prior to the HB 487 amendment, workers who have sustained these types of injuries were entitled to a lump-sum payment of scheduled benefits upon the Bureau's approval of the award.
3. The complaint was filed by the Ohio Association for Justice ("OAJ"), Robert E. DeRose, President of OAJ, and David E. Nager, Esq., against Steve Buehrer, administrator of the Ohio Bureau of Workers' Compensation, the Industrial Commission of Ohio, and Jon Husted, the Ohio Secretary of State. *Ohio Association for Justice, et al., v. Buehrer, Admr., Ohio Bureau of Workers' Compensation*, Cuyahoga County C.P. No. CV 12 791971.
4. See *Pim v. Nicholson*, 6 Ohio St. 176 (1856) (holding that one subject rule was incorporated into the Ohio Constitution as a guide to the general assembly.)
5. 11 Ohio St. 3d 141, 464 N.E.2d 153 (1984).
6. The Supreme Court stated: "This holding strikes the proper balance. It recognizes the necessity of giving the General Assembly great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws...
   ...
   At the same time, this holding provides a sufficient guard against logrolling and stealth and fraud in legislation by stating that a manifestly gross and fraudulent violation of the one-subject provision will render an enactment invalid. For, when there is an absence of common purpose or relationship between specific topics in an act and when there are no discernable practical, rational or legitimate reasons for combining the provisions in one act, there is a strong suggestion that the provisions were combined for tactical reasons, i.e., logrolling. Inasmuch as this was the very evil the one-subject rule was designed to prevent, an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purposes of the rule."

   Id. at 145.
7. *Hoover v. Bd. of County Com'rs, Franklin County*, 19 Ohio St. 3d 1, 482 N.E.2d 575 (1985) (reversing the court of appeals, which held that the one subject rule is only directory).
8. *Id.* at 6.
9. *In re Nowak,* 104 Ohio St. 3d 466, 2004-Ohio-6777, at the syllabus (holding that "a manifestly gross and fraudulent violation of the one-subject rule provision ... will cause an enactment to be invalidated. Since the one-subject provision is capable of invalidating an enactment, in cannot be considered merely directory in nature.")
10. 62 Ohio St. 3d 145, 580 N.E.2d 767 (1991).
11. *Id.* at 148.
12. 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).
13. *Id.* at 15.
14. 104 Ohio St. 3d 122, 2004 Ohio 6363 (2004).
15. Am. Sub. H.B. 487, 129th General Assembly.
16. *See, e.g., Village v. General Motors Corp.*, 15 Ohio St. 3d 129, 131, 472 N.E.2d 1079 (1984) ("The cost of [the workers' compensation system] was, and still is, properly taxed to the employer as an expense involved in carrying on a business. The present system of workers' compensation has proved eminently more satisfactory to both employers and employees than the common-law system of requiring injured employees to bring personal injury actions against employers.").
17. In 2011, an organized effort by government employees, teachers, democrats, and others successfully derailed Senate Bill 5, legislation designed to limit the collective bargaining rights of public workers.
18. 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999).
19. 92 Ohio St. 3d 115, 2001 Ohio 109 (2001).

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Employer Intentional Torts: Two Pending Decisions That May Alter The Landscape

by Stephen S. Vanek

Ever since the Ohio Supreme Court upheld the constitutionality of R.C. §2745.01 in *Kaminski v. Metal and Wire Co.*,[1] and *Stetter v. R.J. Corman Derailment Services, LLC*,[2] both trial and appellate courts have wrestled with the application of the statute to a number of diverse fact patterns. No small feat this, since the legislature took "substantial certainty" – a phrase backed by years of judicial refinement and one measuring probability – and re-cast it as a level of intent. Clarification may be in the wings as two cases accepted by the Supreme Court have been argued and are currently awaiting decision: *Houdek v. ThyssenKrupp Materials, N.A.*,[3] and *Hewitt v. The L.E. Meyers Co.*[4] Each of these cases concerns a different aspect of the statute.

A reading of the statute reveals, pursuant to section (A), there are two separate means of proving an employer intentional tort: (1) where the employer commits the tortious act with "intent to injure" ***or*** (2) where the employer commits the tortious act with the belief that the injury was "substantially certain" to occur. These two are necessarily distinct as the statute employs the use of the disjunctive "or." Additional support for this premise is found in sections (B) and (C). Section (B) defines "substantially certain" to mean that the employer acts with ***deliberate intent*** to cause the employee to suffer an injury, disease, condition or death. Section (C) provides that the deliberate removal of an equipment safety guard or the misrepresentation of a toxic or hazardous substance by the employer creates a rebuttable presumption that the removal or misrepresentation was committed with ***intent to injure*** another if an injury directly results from either.

Most courts analyzing a case under R.C. §2745.01 have attempted to determine whether the plaintiff is able to maintain an employer intentional tort ("EIT") claim as a deliberate intent case under section (B) or an intent to injure/equipment guard removal or misrepresentation of a toxic substance case arising under section (C). This article surveys some of the more recent opinions by the trial and appellate courts leading up to the *Houdek* and *Hewitt* cases.

A. Deliberate Intent/Substantial Certainty

Most cases ***not*** involving the removal of an equipment safety guard, and therefore analyzed under the "deliberate intent" standard, have met with summary judgment being granted in favor of the employer. It is no surprise that cases with facts sufficient to show deliberate intent on the part of the employer are likely few and far between. Starting with the decision in *Kaminski*, *supra*, the Supreme Court held that "we find nothing in the record demonstrating that Kaminski can prove that her employer committed a tortious act with the intent to injure her or that the employer acted with deliberate intent to cause her to suffer an injury for purposes of R.C. 2745.01(A) and (B)." In part, this finding arose from the fact that Rose Kaminski voluntarily undertook the act that resulted in her injury (attempting to steady a steel coil by hand) without specific directives from the employer ordering her to do so.

In *Stetter*, after the Supreme Court answered the certified questions regarding the statute's constitutionality, the case was re-examined by the federal district court.[5] In that case Carl Stetter was attempting to mount a tire on a rim that *he knew* was damaged when the tire exploded and injured him. The employer was unaware of the OSHA requirement that tire cages be used for this task and did not possess them. The court ruled that "(a)t most, the facts here show a substantial level of risk, foreseeability and negligence" but that there was no evidence to show deliberate intent (or intent to injure). Both *Kaminski* and *Stetter* failed on their facts – there was nothing in the record to show any deliberate intent or intent to injure on the part of the employer.

1. Appellate decisions under the deliberate intent/ substantial certainty subsections have often been unsuccessful.

In *Forwerck v. Principle Bus. Enters.*,[6] the employee bypassed a plexiglass enclosure around a production line by standing on a ladder and reaching over the barrier to remove excess glue off a roller. There were buttons to stop the line and posted signs warned that the machinery should not be operated unless all safety guards were in place. Nevertheless, the employee reached over the plexiglass fence while holding a rag and attempting to wipe glue off the roller while it was in operation. The rag caught on the glue and pulled his hand and arm into the roller. While the employee claimed the employer was aware of this practice, the court held that the deliberate bypass of safety operations and the plexiglass enclosure did not rise to the level of deliberate intent (nor was it the removal of a safety guard, since the employee intentionally bypassed the existing safety guards).

In *McCarthy v. Sterling Chems.*,[7] Patrick McCarthy, an employee of Kinder Morgan, was injured while transferring a liquid from a pressurized railroad tank car owned by Sterling Chemicals, Inc. to a tank owned by Kinder Morgan. McCarthy was standing on the top of the railcar when the manway assembly separated from the car. McCarthy was struck by the manway assembly and fell 15 feet to the ground. While Sterling argued that Kinder Morgan failed to provide fall protection for McCarthy, failed to adequately train and supervise McCarthy, and exposed McCarthy to a substantial risk of injury by requiring him to work on top of the railcar, the court held that those alleged failures did not rise to the level of intent or deliberate intent to cause injury required by R.C. 2745.01. The court stated that "the record contains nothing to demonstrate that Kinder Morgan committed a tortious act with the intent to injure McCarthy or that it acted with deliberate intent to cause McCarthy to suffer an injury."[8] Again, the factual record failed to show any evidence of affirmative acts by the employer that could sustain such a finding.

In *Hubble v. Haviland Plastic Prods. Co.*,[9] the employee was rendered a quadriplegic when a bale of plastic fell on him while he was sweeping a warehouse floor. The employer had knowledge that bales would occasionally fall and had been cited by OSHA in the past for improper stacking and securing of the bales. Despite this, the court held:

> A review of the facts in this case clearly indicate that the employer acted with reckless disregard for the safety of its employees when it was aware of the danger of the falling bales and took no action to correct the situation. However, reckless disregard does not reach the statutory requirement of "deliberate intent to cause an employee to suffer an injury, a disease, a condition or death." R.C. 2745.01. Without evidence that MPR intended for someone such as Hubble to be injured, he does not meet the current statutory requirements to recover for an employer's intentional tort.[10]

While this would seem to have been a case that should have survived summary judgment, the court found the employer's actions reckless, but insufficient to show deliberate intent. Given the size of the bales (1,000-2,000 lbs.) and the certainty of injury if one fell on a person, coupled with the employer's history of inadequate stacking, this decision seems suspect.

In *Dover v. Carmeuse Natural Chems.*,[11] the appellant was working as a tramway maintenance mechanic. The injury occurred when he grabbed an ore bucket loaded with crushed sandstone in an attempt to intercept and stop it. He was dragged six or seven feet and injured as a result. The Court observed:

> In the instant case, we find no evidence of any act or omission on the part of Appellee which proximately caused Appellant's injury. Further, we do not find any evidence that Appellee acted with intent to injure Appellant. Appellant himself testified in his deposition that it was his decision to leave where he was standing and to "walk over and try to stop the bucket." [Citation omitted.] Additionally, he testified that he was not aware of any other employee having ever been hurt due to two buckets coming out at the same time.

In *Dover*, as in *Kaminski*, the employee made a voluntary decision to undertake the task that resulted in the injury. There was no evidence of a directive given by the employer that precipitated the act.

In a similar case, *Trusick v. Lindsay Concrete Prods. Co.*,[12] the plaintiff was a temporary worker assigned to a job smoothing out concrete on the top of molds used to make septic tanks. Employees were to use the foot rail in order to reach the top of the mold to smooth it from the side. Some molds contained a walkway which allowed workers to smooth the top of the mold while standing on the walkway. If a mold did not contain a walkway or a platform, the employees used ladders to reach the tops of the molds. On the day he was injured, the appellant butted a ladder up against the mold in order to reach the top, just as he had done on other molds on prior days. He climbed the ladder to the second-to-last rung, then stepped off the ladder to climb on top of the concrete mold. When he attempted to climb back onto the ladder, he slipped and fell, sustaining injuries. Appellant testified he had not been told he was not able to stand on the top of the mold. Appellee's safety director testified he had instructed the employees not to stand on top of the mold, and did not know employees were doing so until after appellant's accident. Appellee's supervisor testified employees were not to get on top of the molds if there was no walkway. Instead, the employees were to work from the side, even if they needed a ladder. He testified the employee would put a ladder up beside the mold to use a concrete vibrator to remove the air bubbles and to finish it with a trowel. The appellate court found that the record failed to contain evidence that the employer deliberately intended to injure appellant, nor was the accident substantially certain to occur.

In *Klaus v. United Equity, Inc.*,[13] the appellant's hand was amputated when an employee activated the power to an auger which the plaintiff, unseen by the other employee, was attempting to repair. Appellant alleged an inadequate lock out/tag out (no training and policy was not enforced) and a mis-communication between the employee charged with watching the power switch and the employee who turned on the power to the auger. The court held that nothing in the record indicated that United acted with deliberate intent to cause Klaus to suffer an injury for purposes of R.C. 2745.01(A) and (B). The court found that the injury was instead the result of a mis-communication between United's employees--an unfortunate accident, but not an employer intentional tort.

In *Holloway v. Area Temps*,[14] the employee was injured while attempting to load a pallet onto the back of a truck parked at a loading dock. As he loaded the truck it began to move and the stand- up tow motor the employee was operating started to fall backwards off the truck. The employee attempted to jump clear of the tow motor. However, it fell on top of his leg causing significant injuries. At the time of the accident, the driver of the truck claimed that he placed a chock under a wheel to keep the truck from moving. The appellant, however, testified that he did not see any wheel chocks in use; and investigation of the scene by other employees supported appellant's testimony. The record also showed that the truck was running in neutral, with the parking brake only partially engaged. The appellant testified that he believed that the accident was the result of a mistake by the driver in not chocking the wheels of the truck. The court found that there was no evidence that the *employer* acted with a specific or deliberate intent to cause the employee to suffer an injury. The court found that the accident was caused by mistake or negligence, rather than intentional conduct.

In *Mal-Sarkar v. Cleveland State Univ.*,[15] a CSU botany professor was electrocuted in one of the laboratories while attempting to plug in a timer attached to a fluorescent light wired to a metal shelving rack. The fluorescent fixture was defective allowing electricity to energize the metal rack. It was undisputed that the light rack assembly was not purchased, put into use, or authorized by CSU. Neither party could establish when the rack, light fixtures, timer, and by-pass adapter were acquired or if they had ever previously been put into use at the laboratory. In addition, the professor was utilizing a cheater plug which reduced a three prong plug to a two prong thereby eliminating the electrical ground.

The court held:

> Upon review of the testimony and other evidence presented, the court is convinced that, although CSU may have violated certain PERRP and OSHA regulations, such violations do not rise to the level of either tortious acts committed with the intent to injure or actions committed with deliberate intent to cause injury for purposes of R.C. 2745.01(A) and (B). * * * Similarly, there is no way that any failure to train employees such as Dr. Mal against the use of cheater plugs or the importance of GFCIs could give rise to substantial certainty of injury, inasmuch as the presence of the metal rack assembly was not known and could not reasonably have been anticipated.[16]

Again, the record failed to establish any knowledge by the employer of the hazardous condition or any specific directive to use the defective rack and light assembly involved.

2. The 8th District's decision in *Houdek* finds a jury issue under the substantial certainty/ deliberate intent subsections.

What set of facts then, would be sufficient to show substantial

certainty/deliberate intent to injure? In *Houdek*, *supra*,[17] we may find some answers. Bruce Houdek was crushed by a sideloader while working for ThyssenKrupp Materials. Prior to this injury, Houdek had sustained a back injury while on this job. His physician had placed him on light duty restrictions which included limitations on bending. When he went back to work to turn in his light duty slips from the doctor he was told that the company did not have any light duty work for him. However, rather than allowing him to leave, ThyssenKrupp assigned him to work on re-tagging inventory in its warehouse as part of the company's inventory change over. This task required repeated bending to reach inventory on the warehouse racks as well as climbing up and down a portable ladder. It was to be performed in a dead-end, dimly lit aisle that was simultaneously used by electric sideloaders to pull inventory orders. While Houdek was in the process of re-tagging inventory, the sideloader operator, who had been told that Houdek would be working in the aisle, forgot he was there and entered the aisle. Because the sideloader took up the entire width of the aisle, Houdek was unable to escape. The sideloader operator, seated sideways, did not see Houdek until the last minute, too late to avoid striking him.

The facts as developed in the case showed that Houdek was working under a disability from a prior work-related back injury and that the employer had him working in violation of his light duty restrictions. Days before this incident, ThyssenKrupp's foreman was warned by the sideloader operator about this exact risk of injury, but the foreman advised the operator that Houdek would get out of his way. The sideloader operator had even requested permission to postpone picks from the area where Houdek was working until later, but ThyssenKrupp denied his request. The foreman admitted, after the fact, that he knew something like this could happen but did nothing about it. ThyssenKrupp's sideloader operators were instructed to operate at full speed, a directive the operator was following at the time he struck Houdek. Lighting in this particular aisle was dimmer than in adjacent aisles, making it more difficult to see Houdek. Lastly, pedestrians were never in the aisles under normal circumstances, and when there were inventory "hand pulls," these were done by sideloader operators themselves so there was no conflict between pedestrians and the sideloaders.

The trial court granted summary judgment to ThyssenKrupp on Houdek's EIT claim. On appeal, the Eighth District Court of Appeals stated:

> {¶31} * * * Houdek and the side-loading forklift operator acted in accordance with a series of direct orders that resulted in Houdek's catastrophic workplace injuries. Krupp's direct order placed Houdek in harm's way with no chance to avoid the oncoming sideloader. Perhaps, a twenty-year-old with the speed, agility, and strength of a Force Recon Marine, Army Ranger, Navy Seal, or Olympic gymnast could have effected an escape from the oncoming sideloader. Houdek, however, as a middle-aged man whose mobility was limited by his prior physical injury and by being directed by Krupp to work a scissors-lift, could not.
>
> {¶32} The fingerprints of Krupp's specific directives were all over Houdek's workplace injuries. Whereas in *Kaminski*, the workplace injuries resulted in the absence of any specific directives of employer.

What appears to have driven the court's decision was the fact that the Houdek was intentionally placed in a situation where harm was certain to occur if the sideloader entered the aisle. These "employer directives" were a major distinguishing factor from other cases where the employers were unaware of the danger – here ThyssenKrupp and its foreman were expressly warned by their own employee prior to the injury of the precise danger. ThyssenKrupp made the deliberate decision to keep Houdek working against medical restrictions, in an aisle shared by a sideloader whose operator was expressly forbidden from avoiding that aisle while Houdek was there. ThyssenKrupp's assertion that Houdek would get out of the way of the sideloader was a physical impossibility. These facts prompted the Eighth District to conclude "[i]f the facts and circumstances of this case do not present genuine issues of material fact as to the existence of an employer tort, then none shall."[18] How the Supreme Court will interpret the statute in the context of this case remains to be seen.

Another issue raised by the appellate court's decision in *Houdek* was whether the "belief" of the employer must be viewed from a objective or subjective perspective. The appellate court held that the test must be an objective one, that is – "what would a reasonable prudent employer believe?" Obviously, the Eighth District was concerned that it would be too easy for an employer to claim that it "didn't intend to injure the employee" or was ignorant of the hazardous condition and thus absolve itself of liability. Proving the state of mind of an individual is one feat; knowing the mind of a corporation made up of numerous individuals, something else entirely. Absent a confession, knowing with absolute certainty the intent of a person (or corporation) is a practical impossibility. Therefore,

the law settles for proof of subjective intent through actions and inactions – reviewed by the trier of fact in order to determine what the employer's belief was to have been. Except in the rarest of circumstances, "intent" in the context of an employer intentional tort case may only be proven through circumstantial evidence. Such evidence is often the only means of divining the "intent"of a person, let alone that of a corporation. It is important to note, however, that "belief" only applies to the specific intent of substantial certainty/deliberate intent standard in R.C. §2745.01(A) and (B). The statute does not inquire as to the employer's "belief" under the "intent to injure" standard of subsection (C).

As regarding intent, courts have held that it is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts. If the voluntary act exhibits an intent to injure, then a jury may reasonably make such a finding. Because the statute requires proof of the specific employer's intent, this author believes that an objective/reasonably prudent employer test is not what the statute requires. However, this may be a distinction without a difference, as circumstantial evidence of intent is properly considered by the jury to infer the employer's subjective belief/intent. The *Houdek* decision is likely to provide some clarification on this point.

B. Intent to Injure Another.

Most of the EIT cases surviving summary judgment involve claims brought under subsection (C) of the statute, concerning the removal of an "equipment safety guard" or the misrepresentation of a toxic or hazardous substance. The statute creates a presumption of intent to injure if the employer deliberately removes an equipment safety guard. Many cases wrestle with what constitutes an "equipment safety guard," a phrase not defined in the statute and one whose meaning may vary depending upon the context and activity being performed. Although "intent to injure" is another way of proving an EIT, the statute ***does not state that*** "intent to injure" may only be proven through the removal of an equipment safety guard or misrepresentation of a toxic or hazardous substance. It only provides that these will result in a presumption of intent to injure.

In *Diaz v. SES, Inc.*,[19] the plaintiff, who worked for an industrial cleaning company, fell through an opening created when the property owner parked and locked out a charge crane in a position that created an unguarded fall hazard. The employer failed to provide proper fall equipment or to require and train on the proper use of fall protection. The trial court denied summary judgment finding that a question of fact remained as to whether an employer's failure to provide fall protection equipment could be considered removal of safety equipment guard.

In *Dudley v. Powers & Sons, L.L.C.*,[20] the employee was injured on a press where the employer had removed the original dual palm activation buttons and substituted a light curtain. While the plaintiff argued that the removal of the buttons was the removal of an equipment safety guard, the employer argued that the direct cause was not the removal of the palm buttons, but the installation of the optical sensor, and therefore the rebuttable presumption of subsection (C) did not arise. The appellate court reversed summary judgment finding that the cause of the injury was a question of fact for the jury, whether it was removal of the palm buttons or the installation of the optical sensor. The court also held that a company employee's affidavit attesting that there was no intent to harm the plaintiff was not dispositive, but that the jury must weigh the affidavit and all other evidence to determine whether the presumption has been rebutted.

In *McKinney v. CSP of Ohio, L.L.C.*,[21] the employee lost part of her hand in a mold press that had not been properly programmed for the parts being run at the time. The employer had been notified of the malfunctions prior to the incident but ordered the operator to continue to run the press. The employee, however, was not told of the malfunctions which occurred on a prior shift. The court held that the improper programming of the press amounted to the deliberate removal of a safety guard as it rendered the T-stand button and light curtains inoperable and, had these devices been in place, the employee would not have been injured. Here, the programming, although not a physical guard, was nevertheless found to qualify as one since it controlled the operation of the press's safety features.

The court acknowledged that the terms "deliberate removal" and "equipment safety guard" were not defined in statute, but held that undefined statutory terms must be given their plain and ordinary meaning and do not require definition by way of expert testimony. The court went on to define "deliberate" as "characterized by or resulting from careful and thorough consideration - a deliberate decision." The court also defined "remove" as "to move by lifting, pushing aside, or taking away or off ... also to get rid of; eliminate." The court found that "removal" does not require proof of physical separation from the machine, but may include the act of bypassing, disabling, or rendering inoperable. Thus it found "that 'deliberate removal' for purposes of R.C. 2745.01(C) means a considered decision to disable, bypass, or eliminate, or to render inoperable or unavailable for use."[22] On this basis, the proper programming of the press was an important equipment safety guard.

In *Berardelli v. Foster Wheeler Zack, Inc.*,[23] a boilermaker was injured when he fell from a pullover boiler. The employer had initially erected and used scaffolding, but then removed it during the final phase of the project. The plaintiff argued that this was removal of a safety guard under subsection (C). The employer argued that this was merely a failure to follow a safety procedure which does not create a presumption under subsection (C). The court concluded that the failure to use scaffolding in the final phase of the boiler project stated a plausible basis for relief under § 2745.01(C). Critical to the court's decision was the fact that scaffolding was used initially during the project but subsequently removed. The court held that it was possible to conclude that the absence of scaffolding at the time of the plaintiff's injury amounted to the "[d]eliberate removal . . . of an equipment safety guard."[24] The court cautioned that not every failure to install scaffolding will state a claim for relief under subsection (C), but, in this instance, where plaintiff alleged that scaffolding was initially used as a safety device but was later deliberately removed by the employer, the plaintiff's claim could proceed.

In *Zeckariah Harris v. McSweeney's, Inc.*,[25] the employee was injured while operating a press. The employee claimed that he had been trained to bypass the use of a safety wand and to instead place his arm into the press to spray graphite on the parts. While attempting this the press cycled on his hand. He also claimed that the employer had changed the press activation pedal from a two-step pedal to a single step. The court granted summary judgment on the claim as to the step pedal, noting there was no evidence the press actually had a two-step pedal in the past. However, the court denied summary judgment as to the metal wand, since the jury could reasonably believe the employee's testimony that he had been trained to bypass the use of the wand. The court held that the wand was a safety device since its purposes was to keep the operator's hands out of the dies when performing a necessary step of applying graphite to the dies during the manufacturing process. In this case, the equipment safety guard was not attached to a piece of machinery.

Not all EIT claims alleged to arise under subsection (C) have met with success. In *Beary v. Larry Murphy Dump Truck Service*,[26] the employee was injured at a jobsite when a bobcat that lacked a functioning backup alarm backed over him. Evidence was presented that the backup alarm had not been working for some time due to corroded wires. The appellate court held that the backup

alarm was not an equipment safety guard pursuant to R.C. §2745.01(C). The Court cited the decision in *Fickle*, *infra*, holding that an equipment safety guard is commonly understood to mean a device designed to shield the operator of the equipment from exposure to, or injury by, a dangerous aspect of the equipment. Thus, a back up alarm did not qualify.

In *Barton v. G.E. Baker Construction*,[27] an employee was injured when a trench collapsed. The employer had not been using a trench box, which is designed to prevent such collapses. The employee argued that a trench box would have prevented his injuries. The trial court granted summary judgment in favor of the employer. The Ninth District held that not all workplace safety devices were "equipment safety guards" as that term is used in subsection (C). A trench box did not qualify as an "equipment safety guard" because it was designed to protect workers from trench collapses. It was not a piece of equipment, and the trench box was not designed to protect the *operator* of any piece of equipment. As a result, the employer's failure to use a trench box did not create a rebuttable presumption of an intent to injure.

In *Fickle v. Conversion Techs. Int'l, Inc.*,[28] the plaintiff was injured when her hand was caught in a pinch point on a machine laminating roofing material. Part of her job consisted of removing non-conforming material and re-splicing the ends together. The machine had a jog/continuous setting (jog advances the material only while the switch is depressed, continuous runs the material continuously); and plaintiff had been shown the splicing procedure two hours prior to her injury. She was instructed to set the machine to continuous run for the procedure. There was an emergency stop cable attached to a button on the side of the machine, but at the time of her injury the cable was disconnected. Fickle alleged that the employer acted with intent to injure under subsection (C) by disconnecting the E-stop cable and by training her to run the machine in continuous mode. The court disagreed finding that "a failure to train * * * cannot be construed as a deliberate removal" and that the jog switch is not a guard because it does not "shield from accidental contact, the [operator's] hand and/or arm from entering the rewind pinch point in the first place."[29] With regard to the emergency stop cable, the court explained that the cable does not guard or prevent the rotating rewind pinch point from catching or entangling the operator's hand, arm or clothing; rather, it is an emergency shut-off cord to stop the rewind to minimize the extent of the injury to the operator. Thus, the emergency cable is not a guard. In addition, the emergency stop cable was never removed or taken off the machine; it was still there, having merely been disconnected. The Court concluded that, as used in R.C. 2745.01 (C), an "equipment safety guard" would be commonly understood to mean a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment. *Fickle* is a troubling holding since it appears to limit "equipment safety guards" to those devices that protect *operators*. However, there are numerous equipment safety guards that protect persons and employees other than the operator from injury.

Such was the case in *Pixley v. Pro-Pak Industries, et al.*[30] Phillip Pixley was employed by Pro-Pak, a company that manufactured corrugated paper products. A transfer car was used to move product from one conveyor line to another. The front of the transfer car was equipped with a safety bumper that, when depressed, stopped the transfer car's movement. While Pixley was bent down at one end of a conveyor to obtain a serial number off a motor, a transfer car came down the aisle. It struck Pixley, catching his leg between the car and the conveyor, and partly de-gloving his leg. In addition to the safety bumper, the transfer car had operator stations at each end and company policy required the operator to operate it from the leading edge. This policy was not enforced, however, and the driver, who was operating it from the trailing edge, failed to see Pixley in the aisle.

Pixley alleged that the employer must have bypassed the safety bumper as the only way the transfer car could have continued to move after striking him was if the bumper had been intentionally bypassed. In addition, an OSHA video taken the next morning during testing of the car showed the safety bumper being depressed yet the car was still operational. Despite this evidence, the trial court granted summary judgment on plaintiff's subsection (C) claim. Applying the definition of "equipment safety guard" from *Fickle*, the court held that subsection (C) did not apply, as the safety bumper was meant to protect people or objects in the path of the transfer car and not the operators of the equipment. *Pixley* is currently on appeal in the Sixth District.

A few courts, however, have begun to consider how such a narrow statutory construction of subsection (C) creates absurd results. In *Beyer v. Rieter Automotive North America, Inc.*,[31] the Sixth District backed away from its decision in *Fickle*. In *Beyer*, the employee suffered exposure to silica dust in the workplace. The record revealed that the employer knew that the masks were locked up at certain times, preventing their use, but still required employees to perform jobs under conditions in which inhaling silica dust was certain to occur. The unavailability of the masks allegedly caused the appellant, who was required to perform his job, to be directly exposed

to toxic dust and chemicals. The court referred to the Eighth District's decision in *Hewitt*, stating:

> {¶ 11} Subsequent to our decision in *Fickle*, the term "equipment safety guard" has been interpreted more broadly in an Ohio appellate court. In *Hewitt v. L. E. Myers Co.*, the Eighth District Court of Appeals determined that protective rubber gloves and sleeves to be worn by electrical workers were equipment safety guards. *Hewitt*, 8th Dist. No. 96138, 2011-Ohio-5413, ¶30. The *Hewitt* court reasoned that the gloves and sleeves "are equipment designed to be a physical barrier, shielding the operator from exposure to or injury by electrocution (the danger)." *Id.* * * * We agree with the reasoning in *Hewitt* and now conclude that, to interpret the statutory terms so narrowly to exclude all protective equipment simply because it is not attached to a machine is to produce an absurd result.
>
> {¶ 12} In this case, like the protective rubber gloves in *Hewitt*, the face masks at the plant were personal protection equipment used in conjunction with other machinery or work and were necessary to prevent exposure to injury. * * *
>
> {¶ 13} Modifying our decision in *Fickle*, we more broadly construe R.C.2745.01(C) to include free standing equipment, such as face masks, within the scope of an "equipment safety guard." To exclude the face masks in this case, would be to permit, if not invite, an employer to escape liability for intentional tort acts by purporting to provide protective equipment which is never actually distributed or made available to their employees. Consequently, for the purposes of summary judgment, we conclude that appellant presented sufficient evidence to establish a rebuttable presumption under R.C. 2745.01(C) of the employer's deliberate intent to injure due to the removal of an equipment safety guard. Therefore, we conclude that the trial court erred in granting summary judgment as to appellants' claim for employer intentional tort.

Although the face masks were referred to as personal protective equipment used in conjunction with the employer's work, the court still found them to be equipment safety guards.

This brings us to the *Hewitt* case currently pending before the Ohio Supreme Court. Larry Hewitt was a second step apprentice who, early in his apprenticeship training, was sent to a job site in New London. Hewitt was supervised by journeyman lineman Dennis Law who informed Hewitt that he would be replacing the wiring on the poles alone in the bucket above, while Law directed traffic. The crew was apparently short staffed so Law was instructed to direct traffic in addition to supervising Hewitt. Hewitt testified Law then told him that he shouldn't need the protective rubber gloves when going up to work on the line because he would not be working with energized wires. Thus, Hewitt believed that he was not going to be working with any energized lines that day.

Hewitt maneuvered the bucket near the wires and removed the neutral wire wearing his leather gloves. Law yelled up to Hewitt, which caused Hewitt to look over his shoulder. As he did so, the tie wire he held in his right hand touched an energized wire, causing him to be electrically shocked resulting in severe electrical burns to his arm, shoulder and back. At trial, Hewitt presented evidence in support of his EIT case, and the employer moved for a directed verdict which the trial court denied. The employer then rested its case without presenting any evidence and the jury returned a verdict in favor of Hewitt. The employer appealed arguing that subsection (C) only applies when the employer removes a guard from a piece of equipment that the employee is required to use and which keeps the employee from coming into contact with some dangerous aspect of the machine. As a result, the rubber safety gloves were not "equipment safety guards," but were instead personal protective equipment.

The Eighth District rejected Meyers' argument:

> Just as in *McKinney*, in the instant case, L.E. Myers' actions cannot be described as reckless. Rather, after thorough consideration, L.E. Myers' supervisors made a deliberate decision to place Hewitt in close proximity to energized wires without wearing protective rubber gloves or sleeves. Their actions amounted to the deliberate removal of an equipment safety guard when they instructed Hewitt, a second-step apprentice lineman, not to wear his protective gloves and sleeves and by sending him alone and unsupervised up in the bucket to work with excessive amounts of electricity, despite the known safety measures and risks.

Meyers appealed to the Supreme Court which just recently heard arguments in the case.[32] The propositions of law to be addressed by the Court include:

> **Proposition of Law No. 1:** An "equipment safety guard" under R.C. 2745.01(C) includes only those devices on a machine that shield an employee from injury by guarding the point of operation of that machine.
>
> **Proposition of Law No. 2:** The

> "deliberate removal" of such an "equipment safety guard" occurs when an employer makes a deliberate decision to lift, push aside, take off or otherwise eliminate that guard from a machine.

Meyers, like other employers in the cases above, is urging the Court to adopt a very narrow construction of what constitutes an "equipment safety guard" under subsection (C). Such an interpretation, however, fails to acknowledge that what constitutes an equipment safety guard in the EIT cases should be viewed within the context of the specific industry setting and the job being performed. Because the hazards attendant to any particular job are unique, so too are the safety guards. As a result, a fact specific inquiry is necessary in each case. If the Court adopts Meyers' position, then only physical guards attached to a piece of machinery will qualify for the subsection (C) presumption. This would effectively eliminate a host of industries and occupations where the harm is produced from a source other than a machine.

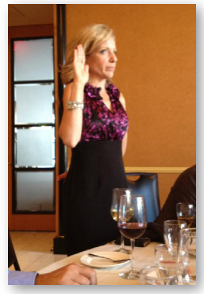
C. Conclusion.

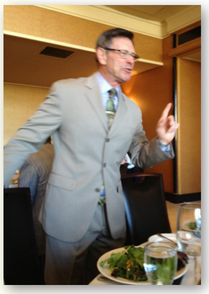
The Supreme Court's decisions in *Houdek* and *Hewitt* will hopefully provide some much needed clarification on the application of R.C. 2745.01. Both are expected before the end of the year. Although the defense bar continually cites to the *Kaminski* decision (particularly with reference to "specific intent"), *Kaminski* concerned the constitutionality of the statute itself and *dicta* in the opinion does not provide a clear interpretation of the statute or its application. For example, the term "specific intent" is not used anywhere in the statute. How the Court will explain "substantial certainty" in relation to "deliberate intent" will be interesting, as this was the struggle the *Houdek* court could not readily resolve. Whether the Court will again refer to "specific intent" as it did in *Kaminski* will also be important. The Supreme Court has affirmed that employer intentional tort claims are still viable – hopefully these decisions will clarify to what extent. ■

End Notes

1. 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066.
2. 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d. 1092.
3. Supreme Court Case Number 2011-1076.
4. Supreme Court Case Number 2011-2013.
5. *Stetter v. R.J. Corman Derailment Servs., LLC*, N.D. Ohio No. 3:07CV866, 2011 U.S. Dist. LEXIS 28611 (Mar. 21, 2011).
6. 6th Dist. No. WD-10-040, 2011-Ohio-489.
7. 193 Ohio App.3d 164, 2011-Ohio-887, 951 N.E.2d 441.
8. *Id.* at ¶15.
9. 3d Dist. No. 11-10-07, 2010-Ohio-6379 (Dec. 27, 2010), *cert. denied*, 128 Ohio St. 3d 1482 (May 4, 2011).
10. *Id.* at ¶9.
11. 5th Dist. No. 10-CA-8, 2010-Ohio-5657 (Nov. 18, 2010), *cert. denied*, 128 Ohio St. 3d 1428 (Mar. 16, 2011).
12. 5th Dist. No. 2010-CA-00029, 2010-Ohio-4235 (Sept. 7, 2010).
13. 3d Dist. No. 1-07-63, 2010-Ohio-3549 (Aug. 2, 2010).
14. 8th Dist. No. 93842, 2010-Ohio-2106 (May 13, 2010).
15. Ct. of Claims No. 2006-02331, 2010-Ohio-5913 (Nov. 17, 2010).
16. *Id.* at ¶¶20, 22.
17. *Houdek v. ThyssenKrupp Materials, N.A., Inc.*, 8th Dist. No. 95399, 2011-Ohio-1694.
18. *Id.*. at ¶38.
19. Lorain C.P. No. 09 CV 160223 (Feb. 16, 2011).
20. 6th Dist. No. WM-10-015, 2011-Ohio-1975 (Apr. 22, 2011), *discretionary appeal not allowed* 129 Ohio St.3d 1489, 2011-Ohio-5129 (Oct. 5, 2011).
21. 6th Dist. No. WD-10-070, 2011-Ohio-3116.
22. *Id.* at ¶17.
23. S.D. Ohio No. 2:09-CV-946, 2010 U.S. Dist LEXIS 102151 (Sept. 17, 2010).
24. *Id.* at *12.
25. (S.D. Ohio, 5-23-2012), Case No. 1:10-CV-775.
26. 5th Dist. No. 2011CA00048, 2011-Ohio-4977.
27. 9th Dist. No. 10CA009929, 2011-Ohio-5704.
28. 6th Dist. No. WM-10-016, 2011-Ohio-2960.
29. *Id.* at ¶12.
30. Lucas C.P. No. CI0201004718.
31. 6th Dist. No. L-11-1110, 2012-Ohio-2807, 973 N.E.2d 318.
32. Oral argument in *Hewitt* was held on September 25, 2012.

2012 Annual CATA Banquet: A Photo Montage















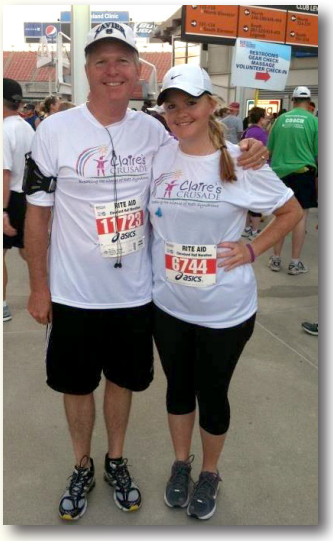



Beyond The Practice: CATA Members In The Community

by Susan E. Petersen

"Service to others is the rent you pay for your room here on earth." -- Muhammad Ali

Beyond the practice of law, here is what some of our CATA members are doing in their communities to give back.



Frank G. Bolmeyer and his daughter, Lauren

Attorney **Frank G. Bolmeyer of Sammon & Bolmeyer Co., L.P.A.** in Cleveland knows firsthand that "it does feel good to do good." He was never a big runner, and certainly not a marathoner, however, his daughter, Lauren, talked him into the Cleveland Half Marathon. He began training with her but he was lacking motivation. That's when they decided to take on "Claire's Crusade." Claire is the oldest daughter of Colleen and Sean Reilly. Claire is also an adorable two year old with bright blue eyes, tight blonde curls, a smile that does not quit – she also has Rett Syndrome.

Rett Syndrome is a rare development disorder often misdiagnosed as Autism. It is caused by a non-inherited gene mutation. There is no known cure. Rett causes a regression in development and motor skills in addition to a host of other medical complications. Some studies have shown that aggressive therapy early on can arrest the regression and improve long-term prognosis.

Frank knew that Claire's parents had consulted with a renowned Rett expert in New York City and were doing everything they could to improve Claire's quality of life including near daily physical, speech and occupational therapies. He also knew the costs were significant, and only a small portion was covered by insurance.

Frank and Lauren decided to raise money, by seeking donations for each mile they would run in the race. All of the donations would go to an irrevocable trust set up for Claire's ongoing care. In the end, Frank and Lauren completed the half Marathon and more importantly, won *their* crusade, raising $4,000 for Claire's medical journey.

If you would like to make a donation or learn more about Rett Syndrome, visit http://www.clairescrusade.net. Frank warns however – "Careful, you will fall in love with her."

Ellen McCarthy (upper right) volunteering for Youth Challenge Scavenger Hunt

Helping children also serves as motivation for **Ellen McCarthy of Nurenberg Paris**. She became a member of the Board of Youth Challenge (YC) this last year, having volunteered for the organization for the past five years. YC brings together children with physical disabilities with their trained youth volunteers in adapted sports and recreational activities. All programs and transportation are provided free of charge. Currently, more than 150 children with physical disabilities and 400 youth volunteers are served by Youth Challenge. Amongst Ellen's volunteer efforts for YC were its 27th Annual Race Day and Fun Run this past summer. More than 350 members of the community, YC families and friends ran in the 5K and 1-Mile Fun Run. In addition to Nurenberg Paris's sponsorship of the event, Ellen was out there helping with set up and timing of participants. All in all, the event raised over $10,000 to benefit Youth Challenge. Ellen also participated, this past summer, in Youth Challenge's annual scavenger hunt. She tossed and hit tennis balls to the kids so they could hit a target and get their next clue in the scavenger hunt. To learn more about Youth Challenge, visit http://www.youthchallengesports.com.

Fortunately, there wasn't a need to call in any criminal defense lawyers when certain CATA Members were "arrested" and "detained" at the Justice Center this summer. It was all part of the 2012 Cleveland Executive Lock Up fundraiser for the Muscular Dystrophy Association (MDA). The MDA is a nonprofit health agency dedicated to curing Muscular Dystrophy and other neuromuscular diseases by funding

David Herman

Chris Patno

worldwide research. As part of its "Lock-up," attorneys and other prominent individuals throughout the city are "tagged" by others who participated in the program in the past; and, if they agree, are "arrested" and held hostage to collect funds for the organization. We are proud to report that CATA members **Chris Patno of McCarthy Lebit** raised $2,750 and **David Herman of Nurenberg Paris** brought in $2,000 toward the total funds raised: $73,857. Because of the generosity of our community, MDA was able to send 92 kids back to MDA summer camp, fund 18 hours of critical research, and repair 147 wheelchairs, leg braces and communications devices. Way to go!

The lawyers of **Spangenberg Shibley & Liber** were up to good again. As part of the firm's "Help End Hunger" initiative, the firm's lawyers and staff volunteered at the Cleveland Foodbank and also raised money through participation in the Hunger Network's Walk for Hunger and a clever Facebook competition. As part of this, the firm set up a Facebook app and for each "like" they received, they agree to donate $5 up to $1,500 to the Foodbank and give away an iPad2 to one lucky participant. In the end, **Spangenberg** donated $1,500 to the cause.

Attorneys and staff at Spangenberg volunteer at the Cleveland Foodbank.

Whether you are a newcomer to the issue of domestic hunger or you have already been involved like the Spangenberg Firm, the Cleveland Foodbank has some great suggestions on how you can help provide hunger relief:

1. Invite friends to a "virtual lunch." Estimate the cost and donate that amount to your favorite hunger relief organization.
2. Find out how you can help serve a meal at a local shelter or community kitchen.
3. Know someone who is in need of food? Refer them to the Cleveland Foodbank to find out if they are eligible for benefits. Call 216-738-2067 or 1-855-738-2067.
4. Visit the websites of hunger-relief organizations to learn what they do and how you can help.
5. Become an advocate for hunger and poverty relief. Sign up to receive advocacy alerts from the Foodbank at http://www.clevelandfoodbank.org.
6. Take your children to the library and check out *Fly Away Home, Uncle Willy's Soup Kitchen* or another children's book featuring the theme of hunger.
7. Attempt to eat 3 healthy meals using only the average daily food stamp amount allotted per person which is $4.44.
8. Call and schedule a time to volunteer in the Foodbank's Cleveland Community Kitchen.
9. Hold a food drive in your school, work or faith community.
10. Help out by eating in. Share a home-cooked dinner with your family and donate what you would have spent on dinner to the Foodbank.

Helping to provide access to justice is a mission that falls in line with this organization and so, once again, CATA donated $3,000 to sponsor Legal Aid of Cleveland's Annual Luncheon & Report to the Community in late September. Representing CATA at the table were **George Loucas, Chris Mellino, Skip Sweeney, Nancy Iler, Chris Patno, Jim Lowe, Ellen McCarthy** and **Carla Tricarichi**. Each year, Legal Aid empowers 26,000 people to secure safety, gain shelter and realize economic stability in our community. To find out more, you can visit http://www.lasclev.org. ■

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Pointers From The Bench: An Interview With Judge Brian J. Corrigan

by Christopher Mellino

The Honorable Brian J. Corrigan will celebrate his 20th year as a member of the Common Pleas bench in January.

Judge Corrigan got a late start on his legal career. After graduating from St. Ignatius High School he earned an engineering degree from Dayton University. Working as an engineer proved to be less rewarding than he had envisioned, causing him to go to work in the family business with his father.

That business was selling property and casualty insurance. It was in that field that he was first exposed to liability and claims issues and he became intrigued by the legal nuances of these issues. That caused him to enroll in night school at Cleveland Marshall.

After obtaining his law degree he was in private practice for ten years. He practiced in an office-sharing arrangement with several other lawyers. Little did they know at the time that five of the lawyers in this small group would go on to become members of the judiciary.

While in private practice Judge Corrigan represented clients in criminal defense matters, small business starts up, plaintiff's personal injury and probate law.

As a member of the bench Judge Corrigan prides himself on running an efficient courtroom, trying an average of fifty five cases per year about one fourth of which are civil cases.

Judge Corrigan cited the shift in jurors' attitudes as the biggest change during his tenure on the bench. "Back in the nineties jurors would empathize with an injured plaintiff whereas now most jurors are suspicious of anyone who brings a lawsuit."

The judge cautions us to be suspicious ourselves. For instance, investigate your own experts before you hire them, citing an example of one expert who held himself out as a licensed engineer when it turned out he was not in fact licensed. (It's also helpful to know the background of the judge in your case, who may be checking on these things out of professional curiosity!)

Judge Corrigan marvels at the astuteness of the jurors' powers of observation. He warns that jurors are watching everything that happens in the courtroom at all times. He recalls an admitted liability case where a female plaintiff was suing because of a chronic low back injury. She received an award of zero dollars and, when talking to the jury afterwards, two of the jurors mentioned to him that they had noticed that the plaintiff had been wearing heels in court.

Despite the increased skepticism of jurors, Judge Corrigan is convinced that most prospective jurors come to the courthouse with a strong desire to do a good job and do the right thing. He believes that it is the lawyer's job to help jurors process the evidence in a way that is favorable to our clients. The best way to accomplish this is by learning about jurors' attitudes and beliefs during voir dire. Rather than attempting to indoctrinate or giving a mini-opening statement Judge Corrigan recommends asking open ended questions that welcome jurors to share their feelings and values. Only then can we determine whom to strike from the panel.

On a personal note Judge Corrigan enjoys snow skiing and frequents Holiday Valley in the winter. His full time hobby is working on cars which he insists is "therapeutic." ■

The Public Justice website is http://www.publicjustice.net. The Ohio State Coordinators for the Public Justice Foundation are Public Justice Foundation President Jack Landskroner and Scott E. Smith. If you have any questions regarding Public Justice or a potential case, contact Jack at (216) 522-9000 and contact Scott at (614) 846-1700.

Public Justice ERISA Reimbursement Case Reaches U.S. Supreme Court

by Public Justice Staff

Public Justice's ongoing battle against a nationwide campaign by employer-based health insurance plans to strip injured employees of their third-party compensation reached the U.S. Supreme Court on November 27, when the country's highest court heard *U.S. Airways v. McCutchen*[1], an ERISA reimbursement case decided in November of 2011 by the Third Circuit. Public Justice is lead counsel in the case.

In *McCutchen*, the U.S. Court of Appeals for the Third Circuit blocked—as Public Justice argued it should—an employer-based health insurance plan's attempt to obtain 100 percent reimbursement from an injured beneficiary.

In a similar case also handled by Public Justice, the U.S. Court of Appeals for the Ninth Circuit in June ruled that an ERISA plan is not entitled to full reimbursement of medical expenses by an injured beneficiary who recovered only a fraction of damages from the person who caused the injury. In its ruling in *CGI Techs. & Solutions, Inc. v. Rose*,[2] the Ninth Circuit also rejected the insurer's attempt to sue the attorney who represented the injured woman in her case against a third party.

Shortly after the *Rose* decision, the Supreme Court granted review of *McCutchen*. Public Justice Staff Attorney Matt Wessler was lead counsel in both cases and argued *McCutchen* in the fall of 2012 before the U.S. Supreme Court.[3]

"The issue in *U.S. Airways v. McCutchen* is whether a self-funded ERISA health benefit plan has the unfettered right to obtain 100 percent reimbursement of medical expenses from injured beneficiaries who recover any compensation for their injuries from a third party," said Wessler. "If Mr. McCutchen is forced to pay back all the medical expenses to his ERISA plan, he will be stripped of his entire recovery, and actually be left worse off than if he had never sued in the first place. The Third Circuit agreed that this result would be manifestly unfair and would constitute a 'windfall' for the ERISA plan—contrary to both the language and purpose of the governing statute, which is to protect participants, not plans."

The ERISA plan in the *McCutchen* case is seeking 100 percent of all the medical expenses it paid to James McCutchen, a former airline mechanic who was rendered permanently disabled in a car crash in which one other person was killed and two others suffered even worse injuries than McCutchen. He hired a lawyer to seek compensation from the driver who caused the accident. Due to insurance policy limits, he was only able to recover $110,000—a tiny fraction of his total damages. Only $10,000 of this money was from the driver; the remaining 90 percent of what McCutchen recovered was from his own uninsured motorist policy.

The ERISA plan filed suit against McCutchen and his attorneys, demanding reimbursement of all the advanced medical expenses it had paid without allowance for any costs and fees. The plan based its claim on Section 502(a)(3) of ERISA, which gives ERISA plans the right to seek "appropriate equitable relief" from plan beneficiaries.

McCutchen's plan argued that, under this

language, it is entitled to enforce the plan language as written, even if that would leave him worse off than if he had sought no compensation at all.

The district court granted the plan's request for 100 percent reimbursement on the ground that it was duty-bound to enforce the plan terms, no matter how unfair. If that ruling had been allowed to stand, McCutchen's entire net recovery would have gone to the ERISA plan, while also leaving him several thousand dollars in debt to the plan.

A unanimous panel of the Third Circuit reversed on the ground that the plan's reimbursement claim should be measured according to principles of equity, not by rote enforcement of plan terms. The court concluded that "the judgment requiring McCutchen to provide full reimbursement to US Airways constitutes inappropriate and inequitable relief" because it would leave him with less than full payment of his medical bills, "thus undermining the entire purpose of the Plan." The court of appeals remanded the case to the district court to determine what amount of reimbursement would be equitable under the circumstances of the case.

Seven months later, Public Justice won a similar victory from the U.S. Court of Appeals for the Ninth Circuit in *Rose*, where Public Justice is defending a Washington state woman's right to hold onto her fair share of a recovery that only compensated her for a small fraction of her total damages.

"The Ninth Circuit's *Rose* decision agreed entirely with—and built on—our previous victory in *McCutchen*, which recognized that requiring injury victims to pay full reimbursement can amount to an unfair windfall for ERISA plans," said Public Justice Senior Attorney Leslie Brueckner, co-counsel in both cases. "Both Mr. McCutchen and Ms. Rose paid premiums for their coverage, and then hired lawyers at their own expense to recover damages for their injuries. Their plans' attempts to take back all their money without paying a penny in costs or fees is both illegal and unfair."

Rhonda Rose, an employee of CGI Technologies, was seriously injured in a car accident with a drunk driver in 2003. The insurance plan she had through her job paid about $32,000 in medical benefits. Rose later hired an attorney to help her recover damages from the driver who caused the accident and was awarded a small amount of compensation. Despite the small recovery, the insurer demanded full repayment of the amount it had paid in medical expenses.

In denying the insurer's claim against Rose, the Ninth Circuit held that "parties may not by contract deprive [a court] of its power to act as a court in equity."

In a concurring opinion, a circuit judge observed that it would be "manifestly unfair" to allow the plan to recoup 100 percent of its medical expenses. Such a result would "leav[e] the beneficiary vastly undercompensated for her actual damages" and "unjustly enrich" the ERISA plan, which had been paid premiums for the expenses it was now seeking to recoup.[4]

Along with Wessler and Brueckner, Public Justice's litigation team in *McCutchen* includes Jon Perry and Paul Hilko of Pittsburgh. In *Rose*, the litigation team includes Paul Stritmatter, Mike Withey and Michael Nelson of Seattle, and Caitlin Palacios of Washington D.C. (It was Nelson's law firm, Nelson Langer Engle, PLLC, that CGI unsuccessfully sued.)

More than 170 million employees nationwide are covered by ERISA plans, so these two rulings have far-ranging implications for injury victims nationwide. ■

End Notes

1. 663 F.3d 671 (3d Cir. 2011), *cert. granted,* __ U.S. __, __ S.Ct. __, 183 L.Ed.2d 674 (2012).
2. 683 F.3d 1113 (9th Cir. 2012), *petition for certiorari filed on* Aug. 24, 2012 (No. 12-240).
3. Matt Wessler spoke at the October 18, 2012 CATA Luncheon CLE about the *McCutchen* case. The oral argument in *McCutchen* was held on November 27, 2012.
4. 683 F.3d at 1125 (Schroeder, J., concurring).

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Exclusion versus Inclusion:
Which Voir Dire Method Will Help You Select Your Next Winning Jury?

by Susan E. Petersen

"The only place where a person ought to get a square deal is in the courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into the jury box." -- Atticus Finch, To Kill a Mockingbird

Early in my career, I learned the difference that eight people can make. I had the privilege and pain of trying the same injury case ***twice***. At trial #1, the defendant dentist admitted negligence relative to a delay in diagnosing and treating a jaw-eating tumor. In trial, the defense expert admitted the defendant's negligence caused some harm. Our expert testified that the delay caused significant harm. During deliberations, when the engineer who we opted to leave on the jury asked the court for a ruler so he could measure the *x*-rays (taken at different magnifications), we knew it was not a good sign: defense verdict. Because of the expert's admission of "some harm," the judge awarded a new trial. After taking a ride up and down the appellate roller coaster, we tried the case again. At trial #2, it was déjà vu. The only real difference was the eight individuals who sat in that jury box. This time, the jury returned a sizeable plaintiff's verdict. At that moment I realized jury selection is the most important part of trial.

Research shows that eighty percent of jurors reach a verdict by the end of voir dire.[1] It is your chance not only to make a critical first impression, but to select a group most favorable to the issues in the case. What's the secret? Is there a method of jury selection that will improve your odds of selecting a winning jury? This article will provide you with an overview of two very distinct approaches to jury selection being used in our courtrooms today. One method aims to exclude: uncovering and removing all jurors who possess biases detrimental to getting a fair trial. The other aims to include: uniting individual ideas to form a cohesive group whose mission becomes providing justice to your client.

"Cause Is King": The Exclusionary Method

The goal of the exclusionary method of jury selection is to seek out and dismiss those jurors who do not see things our way or who we fear will harm us and our clients. We practice in a politically charged climate where jurors voice contempt for the civil justice system, trial lawyers, and plaintiffs. The reality of our polarized world is there are certain individuals who, no matter how compelling the evidence or arguments, will have made up their mind before voir dire even begins. For you, as an advocate, to have any real chance at winning, you must remove all jurors whose inner scripts would prevent them from fairly weighing the evidence.

Past OAJ President Dennis Mulvihill is a strong advocate for the exclusionary approach. Through his popular seminar "Cause is King," Mulvihill teaches us that because peremptory challenges are just too few in number, the goal of voir dire must be to remove for cause.[2] Mulvihill says, "Typically, those people are not consciously aware of that strong feeling, because they really believe they can be fair in any case. But the reality is that when they start to deliberate, they will evaluate the evidence through their ideological lens that disapproves of lawsuits. Thus, it will be very difficult to persuade them. The best way of making sure you have maximized your chance

of getting a fair jury is to find and get those people excused for cause. In most venires, you will have more biased people than you have peremptory challenges, so you will need to excuse a number of jurors for cause." Mulvihill says, on average, he is successful in removing five to eight people for cause in a typical trial.

The key to exposing biases and prejudices is to ask open-ended questions to find out how jurors truly feel about the issues critical to your case. Your questions must be geared toward uncovering their true attitudes and belief systems. National jury consultants Lisa Blue and Robert Hirschhorn suggest that one way to achieve this goal is to use scaled questions --

> An example of a scaled question is: "If a company does something wrong and a person suffers harm or injury because of the company's conduct, how important is it that the company be held responsible for that conduct?" Then you give the prospective jurors options: very important, important, somewhat important, or not important at all. Another way to ask a scaled question is to read a statement and determine how strongly individual panel members feel about the statement. For example, the statement could be: "People in America are too quick to sue." You then ask each potential juror which of the following options best describe their opinion of this statement: strongly agree, agree, somewhat agree, strongly disagree, disagree, or somewhat disagree. A scaled question gives you some sense of the prospective juror's belief system. You might ask prospective jurors: "How comfortable would you be awarding millions of dollars to a plaintiff?" Again, you should give panel members a range from very comfortable to very uncomfortable.[3]

Another critical element to the success of this method is to listen twice as much as you talk. The wise advocate will remember the old saying, "You have two ears and one mouth and you should use them in that proportion." When you hear an answer that could well be a challenge for cause, you must build the foundation for a cause challenge. Blue and Hirschhorn recommend – thank the juror for his/her honesty and then say, "[Juror's name], is it okay with you if we visit (talk) some more about this later?" When a juror has expressed a strong opinion that gives rise to a challenge for cause, ask the juror: (1) "[Juror's name], would it be fair to say that this is a strong opinion you have about this issue?" and, (2) "You'd agree with me that you have had this opinion or feeling for quite some time?" Conclude the challenge for cause questioning by asking the juror the following final question: "Given what you have just shared with us, do you mind if I ask the judge to excuse you from serving as a juror in this case?"[4]

For "cause" to be your "king," be armed with the proper interpretation of Ohio's statutes on removal of prospective jurors for cause: Revised Code §2313.42 and §2313.43. The cause challenges enumerated in Revised Code §2313.42 (A – I), are called principal challenges. If proven, they lead to a *per se* disqualification. Cause challenges under Revised Code §2313.42 (J) and §2313.43 are called favor challenges. These are up to the trial court's discretion to disqualify for good cause.[5] The exclusionary method requires the lawyer to work as hard as possible to make sure that no juror is seated so long as there is "any" doubt as to the juror being entirely unbiased, as R.C. §2313.43 instructs.

We Are A Tribe: The Inclusion Method

This method shifts the paradigm during voir dire from one of exclusion to inclusion. The goal is to take the individuals in the jury pool and form a united group by sending the message that we are joined together in a common cause. To form a tribe, you must accept what each juror has to say, show them they are important, and tell them the truth. It requires you to think in terms of "we" instead of "I" and "you."

This tribal philosophy is the brainchild of Gerry Spence, a trial attorney from Wyoming who is recognized nationwide for his powerful courtroom victories. He founded the nationally acclaimed Trial Lawyers College which established a revolutionary method for training lawyers, including the subject of voir dire. CATA brought Spence to Cleveland in 2011 as a speaker for its Annual Dinner and a half-day seminar on voir dire. Spence educated us on his philosophy that, at our core, we are all cavemen and people instinctively want to be part of a tribe. People don't want to be judged. People don't want to be cross-examined. They want to be understood. They want to be liked. They want to be respected.

Spence says the goal of voir dire is to form a tribe where you ultimately become its leader. To form a tribe, you have to create an environment in which the jurors are willing to listen to you, and you are willing to listen to them. The most effective voir dire takes place when the jurors are openly discussing issues in the case as a group – like they would during deliberations. This conversational approach happens only when you allow individual jurors to honestly express their feelings about the case issues, and to feel free to weigh in with their own opinions and attitudes about what the other jurors have said.

The key to this working begins with you being completely open and honest. You can show no judgment. You do not argue with what they have to say. You must come to terms with this being their

valid opinion. It must be acceptance and not rejection. You cannot cross examine them, but instead understand their perspectives. Even if you completely disagree with what they say, you must show that you appreciate their candor, respect them for voicing their opinion. In doing so, you will make them feel important and work toward forming a cohesive group.

Spence advises – "the mirror is always at work." If you are truthful, the jurors will be truthful with you. If you are loving to the group, it will return the love to you. If you are spontaneous, they will be spontaneous. It must be respected and accepted. It is a process of sharing opinions and ideas.

Before addressing any of the issues in the case, this method requires you to get in tune with where you are at when you stand before the jury for the first time. Are you anxious, excited, fearful? This is where the voir dire should start: sharing with the panel the honest feelings that you have in that moment. In doing so, you show a truth about yourself and you create an environment where the jurors will be freed to share their truths. The goal is for the jurors to see you not as a lawyer, but as one of them.

After attending the Spence seminar, I decided to give his method a try last summer in a soft tissue auto case involving a 72 year old woman. I dedicated myself to being completely open, caring, honest, and spontaneous. I began by disclosing to them that no matter how many cases I try, I am always nervous at the start and that's because I've worked so hard; I want to do a good job for my client; and I know this trial is their one chance to get justice. I opened up to them about all the parts of my case that had me worried (the danger zones): the 8 month lapse in my client's medical treatment; the defense theory that her neck hurts because of her age; my past experience with jurors ignoring the law when considering future damages. Voir dire took a half day. The trial was only a day and a half. I didn't appreciate that I had actually formed a "tribe" until it was all over. The jury awarded significantly more than I suggested in close and more than 31 times the pre-trial offer. My client and I stood in the hallway a bit overwhelmed. The jurors began coming out and the first one walked over and wished my client all the best. He then asked – do you mind if I give you a hug? By this point, the other jurors had formed a line. One by one, they came by and hugged my client. One told me – "We just wanted to make sure she was protected."

For more information about Trial Lawyers College and the Spence method, visit http://www.triallawyerscollege.com.

Conclusion

Recognize that what works for one trial attorney doesn't necessarily work for another. Be true to who you are and figure out a method which fits your personal style. The more juries you select, the more comfortable you will become with voir dire. So here's to fighting for justice and to getting out there and selecting a jury …. ■

End Notes

1. See Susan E. Jones, Voir Dire and Jury Selection, TRIAL, Sept. 1986, at 60.
2. The phrase "Cause is King" was first used by Florida jury consultant, Jay Burke, to describe the importance of challenges for cause as to jurors who possess biases detrimental to ones' ability to get a fair trial.
3. See "Trial Techniques: Goals and Practical Tips for Voir Dire", Lisa Blue & Robert Hirschhorn, American Journal of Trial Advocacy, Volume 26:2, Fall 2002.
4. "Ten Tips for an Effective Voir Dire", Lisa Blue & Robert Hirschhorn, State Bar of Texas: 14th Annual Choosing and Courting a Jury Course, March 26, 2010, Chapter 9.
5. *Hall v. Banc One Mgt. Corp.*, (2007), 114 Ohio St.3d 484.

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Utilizing the Court's Video Conferencing Capabilities

by David R. Grant

The video conferencing capabilities of the Cuyahoga County Court of Common Pleas for presentation of witness testimony are not well known or published. Unlike videotaped trial testimony, videoconference testimony provides real-time, live testimony – without the expense of bringing your witness in live.[1]

There are three ways to use video conferencing equipment at the Court, with varying degrees of availability and functionality. This article will provide the logistics and details you need to know in order to make use of each option, in no particular order.

I. 12th Floor Education and Training Room:

The first is the Education and Training room on the 12th floor of the Justice Center. To schedule this room, you will need to contact Colleen Kelley at (216) 443-8560.

As the name implies, the primary use of this room is for education and training of employees. It is also frequently used to conduct criminal pre trials and hearings with incarcerated defendants. As a result, scheduling of this room can become problematic, especially when you need to lock in a date days or weeks in advance. Your use of the room may also be subject to cancellation for events that are of a higher priority, such as criminal matters. To minimize the risk of cancellations, consider scheduling this room for presentation of your witness for later in the afternoon.

II. Two Equipped Courtrooms:

Another option is to schedule the use of either of Judge Hollie Gallagher's courtroom (16A) or Judge Michael Russo's courtroom (17C). These courtrooms are the County's pilot project, equipped with all of the equipment necessary to present video conferencing testimony, as well as other electronic presentation equipment including Elmo document projectors.

To schedule Judge Gallagher's courtroom, contact Staff Attorney Amanda Edwards Pinney at (216) 443-8579. To schedule Judge Russo's courtroom, contact Staff Attorney Laura Creed at (216) 443-8591. You will need to provide the dial-in number for the video conference location where your witness will be. The Staff Attorney will then contact and make arrangements with the County's IT person (Tom Arnaut), who will set up all the particulars and test the connection.

Both Judges are willing to make reasonable accommodations to allow other Judges to temporarily use their courtroom for the videoconference of a witness or two during a trial. To avoid potential scheduling conflicts, it is best to plan and schedule your witness(es) for later in the day.

If your trial requires the extended use of the videoconference or other electronic equipment in one of their courtrooms, Judge Gallagher or Judge Russo may be willing and able to accommodate you by agreeing to switch courtrooms with your Judge for the duration of your trial.

III. Mobile Equipment:

The final option is to use the connection equipment that the Court has. This is a piece of equipment that can be scheduled through Tim Thomas at (216) 443-8560, and taken to your courtroom. This equipment simply provides a mobile connection. You will still need to provide your own projector and screen. Also, this equipment is not capable of being connected to TV.

IV. Other Considerations:

It goes without saying that arrangements for using this equipment should be addressed well enough in advance to make necessary adjustments and avoid any last minute problems. This includes not only notifying the Court and opposing counsel, but also ensuring that an appropriate location with the necessary equipment is arranged at the witness' end. It is also wise to test the lighting and microphones in advance to ensure a seamless and effective presentation.

Additionally, while you will have a court reporter at your end, it is also a good idea to resolve with the Court and opposing counsel whether you will want or need to have a court reporter at the witness' end as well.

Finally, the County equipment is reportedly for use in criminal matters. The Court Administrator, however, has decided to make this equipment available for civil matters as long as they do not interfere with criminal matters. There is a belief by some in the Court that if requests for use in civil matters increase significantly, the Court Administrator may change the policy back to only allowing their use for criminal matters.

When planning for your next trial in Cuyahoga County, consider whether the logistics and associated expense make video conference presentation of your witness(es) preferable over live testimony or videotaped testimony. ■

End Notes

1. There are, however, expenses involved in securing a video conference location near your witness and paying your expert witness for their time – which, depending on how accurately you can predict your witness' starting time, may include paying for your expert's time spent waiting for the video conference to begin. As we all know, this can become very cost-prohibitive and dictate that videotaped testimony is your only option. You may also need to hire a court reporter to be present at your witness' location, unless the parties and the Court agree it is not necessary.

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Keeping Out Criminal History Evidence In Personal Injury Cases

by Kathleen J. St. John

Common wisdom holds that, in a personal injury action, all other things being equal, if the jury likes your client, you win; if they don't, you lose.

In keeping with this theory, our opponents are often eager to expose our clients' flaws – particularly if those flaws involve a criminal history. Our opponents have even been known to go, hammer and tongs, after our clients' non-party relatives and friends, finding slim excuses to call them as witnesses only to expose their criminal history – thus signaling to the jury that the plaintiffs and their circle are a "bad lot," unworthy of recovery, or, at least, of recovering substantial damages.

This occurs in medical malpractice cases where the stakes are high, but it also occurs in motor vehicle accident, slip-and-fall, workplace injury, employment discrimination, and a variety of other civil actions.

The reality is that many of our clients or their families have some sort of criminal conduct in their pasts, often felonies. When they do, it is important to file motions *in limine* to exclude this evidence or, at least, to minimize the extent of its mention.

It is with this in mind that I offer the following pointers.

I. Arrests And Warrants Are Not Admissible.

Having an outstanding warrant for one's arrest certainly doesn't look good for a plaintiff or her affiliated witness. But should the jury be told of this fact?

Ohio law holds that it should not be. As early as 1876, the Ohio Supreme Court held that "evidence can not be given to prove an infamous crime against a witness of which he has not been convicted, for purpose of impeaching his credit."[1] Since then, the general rule is that arrests without convictions are inadmissible and may not be used to impeach credibility.[2] Similarly, evidence that a warrant has issued for a witness's arrest is inadmissible.[3]

The rationale is simple; the accusations on which arrests and warrants are based have not been proven in a court of law:

> "The old-time question, 'How many times have you been arrested?' is clearly in and of itself unimportant and incompetent. It is a matter of common knowledge that arrests occur daily because of mistaken identity, mistakes as to law, mistakes as to facts, and the bare fact of one's arrest in no wise reflects on one's character...."[4]

In criminal cases, there is an exception to the foregoing rule when a witness's pending criminal charge is relevant to showing her interest, bias, or motive to fabricate.[5] But this exception is mostly inapplicable in civil lawsuits where lying on the stand to help one side or the other is unlikely to aid the outcome of the witness's pending criminal charges.

The rule that arrests and warrants are inadmissible to impeach a witness's credibility can, of course, work against you when it is the defendant's arrest that is at issue. In *Yost v. Bermudez*, the 11th District Court of Appeals, in a medical malpractice action, affirmed the trial court's exclusion of evidence that the defendant doctor was involved in a bar fight and was arrested for driving under the influence. Rejecting plaintiff's arguments that this evidence was admissible to impeach the doctor's credibility under Evid. R. 607(A), the court stated:

> Appellant argues that because appellee was allegedly involved in an altercation at a bar and because he was arrested for driving under the influence, he is less credible. We fail to see the correlation between these incidents and appellee's credibility. Therefore, the evidence was not admissible pursuant to Evid. R. 607.[6]

The court further found that "[t]he evidence appellant sought to introduce is not opinion or reputation evidence; therefore, Evid. R. 608(A) does not apply."[7] Additionally, the evidence had no bearing on the doctor's character for truthfulness; hence, Evid. R. 608(B) was inapplicable.[8]

II. Convictions May Be Admissible To Impeach Credibility, But With Many Limitations And Exceptions.

Felony convictions of parties or their witnesses are usually not relevant as *substantive evidence* in a personal injury action.[9]

For impeachment purposes, however, use of felony convictions is expressly allowed by the Rules of Evidence, with certain limitations. The main limitations have to do with the severity and/or nature of the crime, how long ago the conviction occurred, and balancing probative value against prejudicial effect under Evid. R. 403. [10]

A. Nature Of The Crime, Timing, And Unfair Prejudice Limitations.

Only two types of criminal convictions are admissible under Evid. R. 609 to impeach a witness's credibility: crimes punishable by death or imprisonment in excess of one year and crimes involving dishonesty or false statement. Conversely, crimes *not* punishable by at least one year imprisonment and *not* involving dishonesty or false statements are inadmissible under Evid. R. 609, regardless of how recent the conviction and without engaging in an Evid. R. 403 analysis. Thus, if your client is convicted of a misdemeanor the penalty of which is less than one year imprisonment, that conviction is not admissible for impeachment purposes[11] – unless, of course, the crime is one of dishonesty.[12]

As for the timing limitation, two things should be noted. First, the ten year period (beyond which the evidence of the crime is not typically admissible[13]) does not run from the date of the crime, or even necessarily the date of the conviction, but from

> the date of the conviction *or* of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction, *whichever is the later date*[.][14]

Second, the ten year time limitation is not an absolute. If the witness's conviction occurred beyond the ten year period (as calculated in the rule), the evidence is presumptively inadmissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."[15] Additionally, convictions more than ten years old may only be admitted if "the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."[16]

As to the third limitation – the "unfair prejudice" limitation – the rule is nuanced. Under Evid. R. 609(A)(1), impeachment of a witness whose crime is punishable by death or imprisonment in excess of one year is subject to both the (A) and (B) subsections of Evid. R. 403; whereas, under Evid. R. 609(A)(3), impeachment of a witness whose crime involves dishonesty or false statement, regardless of the punishment, is subject to Evid. R. 403(B), but not to Evid. R. 403(A).

The distinctions between the (A) and (B) subsections are simple. Under Evid. R. 403(A), the court *must* exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury.'" Under Evid. R. 403(B), the court *may* exclude evidence "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative issues."

In other words, crimes of the requisite severity but not involving dishonesty or false statements are subject to the "unfair prejudice" analysis, while crimes involving dishonesty or false statements typically are not. The justification for this distinction is that convictions involving dishonesty are highly probative in assessing credibility, and thus are not subject to exclusion because of unfair prejudice.[17] But if the conviction is more than 10 years old, Evid. R. 609(B) (discussed above) revives the prejudice analysis even for crimes involving dishonesty or false statements.

B. Using The "Unfair Prejudice" Argument To Exclude Evidence Of Past Convictions In Civil Cases.

In a personal injury action, the unfair prejudice argument, when available, should be aggressively pursued, as the relevance of such evidence is minimal while the likelihood of unfair prejudice is substantial.

A classic example of this principle can be found in *Earl v. Denny's, Inc.*,[18] a federal case out of the Northern District of Illinois. In *Earl*, the plaintiff brought suit against Denny's, Inc. for a fall he sustained at one of its restaurants. Prior to trial, the plaintiff filed a motion *in limine* to preclude the defendant from offering evidence of his conviction for aggravated criminal sexual assault. In granting this motion, the court stated:

> To begin with, the Court finds that the prior conviction for criminal aggravated sexual assault is of limited probative value. Evidence of prior convictions is not admissible to 'stink up' a witness's character, but only 'to shed light on the witness's credibility.'"[19]

The court then went on to find that, in contrast to the minimal probative value of this evidence,

> the risk of unfair prejudice that would result from admission of this evidence is substantial. **** The risk here is that if the jury learns of plaintiff's prior record for aggravated criminal assault, it will view him as a 'bad person' not because he is a liar..., but rather because he would perpetrate a sex offense that jurors might find odious. Thus, a jury may deny plaintiff a verdict and an award, not because it doubts his veracity, but because it is appalled by his prior conduct that has nothing to do with the events in question. That is precisely the kind of unfair prejudice that Rule 403 seeks to prevent.[20]

Although *Earl* is not an Ohio case, its reasoning is equally applicable under Ohio's Evid. R. 403(A). In *Morris v. Morris*,[21] the Ninth District Court of Appeals applied a similar analysis in an action for legal malpractice. The lawsuit in *Morris* arose out of the defendant attorney's failure to procure a liquor license on the plaintiff's behalf. Prior to trial, the plaintiff filed a motion *in limine* to exclude his felony conviction for gross sexual imposition and pandering obscenity which had occurred after he retained the defendant's legal services but before he sustained his alleged economic damages. The trial court granted the motion, and the jury returned a plaintiff's verdict. The court of appeals affirmed, stating:

> Although relevant to the issue of Appellee's credibility, the nature of the charges for which Appellee was convicted would, as the [trial] court intimated, have a highly negative impact on the jury. Moreover, it appears that the conviction occurred more than a year after Appellee hired Appellant to help him obtain a liquor license; this decreased the probative value of the conviction because it made it less likely that the felony conviction prevented Appellee from obtaining a liquor license.[22]

Another Ohio case in which the "unfair prejudice" analysis was effective in keeping out evidence of criminal convictions is *State Farm Fire & Casualty Co. v. Scandinavian Health Spa, Inc.*[23] That case arose from the theft of an expensive wedding ring from the locker of a former Cincinnati Reds baseball player while he was working out at the defendant health club. His insurer, State Farm, paid the claim then sued the club as subrogee. At trial, over the defendant's objection, the plaintiff introduced evidence of the criminal records of at least two specifically named club employees, although no evidence connected them to the theft. State Farm then used this evidence to argue that the defendant had "'hired thieves' and, by doing so, had negligently put 'the fox in charge of the chicken coop.'"[24]

In reversing the plaintiff's verdict on the ground that this evidence was improperly admitted, the court of appeals applied the "unfair prejudice" analysis of Evid. R. 403 (A). The court found that State Farm had failed to establish any connection between the employees and the thefts and thus "the sole purpose for eliciting testimony regarding the prior criminal records of two employees at Scandanavian was to inflame the passions of the jury with the highly prejudicial effect of this evidence."[25]

Keep in mind, however, that if the conviction at issue is one involving dishonesty or false statement, and falls within the ten year period, the "unfair prejudice" analysis is inapplicable and, if applied, will result in reversible error.

A case in point is *Schmidt v. B.E.S. of Ohio, L.L.C.*[26] In *Schmidt*, a married couple filed a medical malpractice action for a negligent blood draw from the wife that allegedly caused a nerve injury resulting in reflex sympathetic dystrophy (RSD). Following a verdict for the plaintiffs, the defendant appealed, arguing that the trial court abused its discretion in excluding evidence of the wife's prior conviction for theft by deception. The trial court excluded this evidence on the ground that its probative value was outweighed by its prejudicial effect. Reversing, the court of appeals noted that crimes of dishonesty or false statements are automatically admissible "'regardless of punishment and without consideration of unfair prejudice.'" Thus,"the trial court used an improper standard in ruling on admission of this evidence and its refusal to admit evidence of a crime involving dishonesty was unreasonable and arbitrary."[27]

III. No-Contest Pleas And Guilty Pleas In A Violations Bureau Are Also Inadmissible.

Finally, two other items made inadmissible by Evid. R. 410(A) are worth noting.

First, "no contest" pleas are inadmissible in personal injury actions – a matter that typically arises in motor vehicle collision cases.

Although *guilty pleas* to crimes falling within the scope of Evid. R. 609 are admissible for impeachment purposes, *no contest pleas* are expressly made inadmissible under Evid. R. 410(A). That rule provides that "evidence of the following is not admissible in any civil... proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions: *** (2) a plea of no contest or the equivalent plea from another jurisdiction[.]"

The purpose of this rule is to "'encourage plea bargaining as a means of resolving criminal cases by removing any civil consequences of the plea.'"[28]

Second, under Evid. R. 410 (A), "a plea of guilty in a violations bureau" is not admissible in a civil proceeding against the defendant who made the plea.[29] This is consistent with pre-rule case law that held that a guilty plea for minor traffic offenses in a system that permits the person charged to pay the clerk without appearance in court does not constitute an admission and is not admissible in a negligence action stemming from the accident that resulted in the traffic citation.[30]

IV. Conclusion.

In an already difficult litigation climate, the last thing you need in an otherwise promising case is to let the jury hear about the felony history of your plaintiff or her affiliates. But with diligent motion practice, and attention to the rules and case law, you should be able to keep out much (if not all) of this irrelevant and/or prejudicial evidence that is highly damaging to your case. ■

End Notes

1. *Webb v. State*, 29 Ohio St. 351, 358 (1876).
2. *State v. Sideras*, 2d Dist. No. 84-CA-43, 1985 Ohio App. LEXIS 7870, *7; *State v. Hector*, 19 Ohio St.2d 167, 178, 249 N.E.2d 912, 918 (1969). And see, *State v. Marshall*, 8th Dist. No. 91988, 2009-Ohio-4877, ¶27 ("Evid. R. 609 only applies to prior convictions – i.e., not current or pending charges.") (citing *State v. Brooks*, 75 Ohio St.3d 148, 151, 661 N.E.2d 1030 (1996)).
3. *State v. Dotson*, 10th Dist. No. 90AP-261, 1990 Ohio App. LEXIS 4914, *17-18, n. 1.
4. *State v. Mokros*, 7th Dist. No. 1177, 1975 Ohio App. LEXIS 6354, *8-9 (quoting *Harper v. State*, 106 Ohio St. 481, 485, 140 N.E. 364, 375 (1922)).
5. *State v. Hector* , 19 Ohio St.2d 167, 178, 249 N.E.2d 912, 918-919 (1969) ("While ordinarily the credibility of a witness may be attacked by proof of conviction of crime, but not by proof of indictment, this rule is subject to the exception that a witness in a criminal case may be asked if he is under indictment for a crime, if such fact would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely.")
6. 11th App. Dist. No. 2002-T-0007, 2003-Ohio-6736, ¶17.
7. *Id.* at ¶24.
8. *Id. Cf., Cleveland v. St. Elizabeth Health Center*, 7th Dist. No. 10-MA-151, 2012-Ohio-1472 (evidence that the defendant doctor had been convicted of a crime of dishonesty was admitted, but the facts giving rise to that conviction were held properly excluded as "the Rule does not provide for admitting the factual allegations surrounding a conviction" and "the 'facts' that appellant sought to introduce were never substantiated but were only the allegations of the federal agents who investigated [him].")
9. Under Evid. R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" The exceptions set forth in this rule are not typically applicable in personal injury actions, and certainly not in most medical malpractice cases.
10. *See also*, Evid. R. 609(C) and (D) which provide, respectively, that evidence of convictions that have been pardoned, annulled, expunged, etc., are not admissible under this rule, and that "[e]vidence of juvenile adjudications is not admissible except as provided by statute enacted by the General Assembly."
11. *See, e.g., L.A.D.S. Development Co. v. McCrary*, 8th Dist. No. 89816, 2008-Ohio-2367, ¶32 ("[A] misdemeanor conviction is not admissible evidence to attack a witness's credibility.") In criminal cases, however, the defendant's prior misdemeanor convictions may be admissible if the defendant, by testifying as to his own character, opens the door for rebuttal on cross-examination under Evid. R. 405(A). *See, e.g., State v. Eldridge*, 12th Dist. No. CA2002-10-021, 2003-Ohio-7002, ¶¶40-44 ("The rebuttal can cover any relevant convictions, including misdemeanors otherwise inadmissible under Evid. R. 609, but subject to the other applicable rules.")
12. *See, e.g., Schmidt v. B.E.S. of Ohio, L.L.C.*, 9th Dist. No. 23193, 2007-Ohio-1822, ¶11 ("'[E]vidence that the defendant has been convicted of a crime involving dishonesty or false statement is automatically admissible, regardless of the punishment and without consideration of unfair prejudice.'") (quoting *State v. Martin*, 12th Dist. Nos. CA2002-10-111, CA2002-10-115, CA2002-10-116, 2003 Ohio 6551, ¶21).
13. *But see*, Evid. R. 609(B) ("However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.")
14. Evid. R. 609 (B) (italics added).
15. *Id.*
16. *Id.* See also, n.9, *supra*.
17. *See* Staff Notes to the 7-1-91 Amendment to Evid. R. 609(A) ("Division (A)(3) concerns dishonesty and false statement convictions. Because of the high probative value of these convictions in assessing credibility, they are not subject to exclusion because of unfair prejudice.")
18. N.D. Ill. No. 01 C 5182, 2002 U.S. Dist. LEXIS 24066 (Dec. 13, 2002).
19. *Id.* at *6.
20. *Id.* at *8-9.
21. 9th Dist. No. 21350, 2003-Ohio-3510.
22. *Id.* at ¶14.
23. 104 Ohio App.3d 582, 662 N.E.2d 890 (1995).
24. 104 Ohio App.3d at 587, 662 N.E.2d at 894.
25. 104 Ohio App.3d at 588, 662 N.E.2d at 894.
26. 9th Dist. No. 23193, 2007-Ohio-1822.
27. *Id.* at ¶11.
28. *Edwards v. Bolden*, 8th Dist. No. 97390, 2012-Ohio-2501, ¶11 (quoting *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, 125 Ohio St.3d 362, 2010-Ohio-1043, 928 N.E.2d 685, ¶14).
29. Although there are exceptions to admissibility under Evid. R. 410(A), neither of these would be relevant in a civil action for damages. See Evid. R. 410(B).
30. *See, e.g., Hannah v. Ike Topper Structural Steel Co.* , 120 Ohio App. 44, 201 N.E.2d 63 (1963).

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Technology Tips for Attorneys...

(in about 140 characters (more) or less)

by Andrew Thompson and William Eadie

Here are your tips for this edition...

Proposed Amendments to ABA Model Rules Address Technology

The ABA Commission on Ethics 20/20 has proposed amendments to several rules or comments to the Model Rules with the purpose of adapting them to technological innovations in the practice of law. The changes include modification of Model Rule 1.1, which requires that a lawyer provide competent representation to a client. The new rule would require a lawyer to keep abreast of "the benefits and risks associated with technology." There are also proposals to incorporate the implications of technology into the rules covering client confidentiality (Model Rule 1.6), and the inadvertent disclosure of privileged communications (Model Rule 4.4).

The Best iPad Accessories

For those of you who have incorporated an iPad into your practice, you might want to check out this blog post from the Lawyerist.com to find the best keyboards and cases for use by attorneys. http://t.co/gRdk8BOq

Google Docs Collaboration

Sometimes we find ourselves in a group where the members are across town, or across the country. Or maybe you're travelling or on vacation, but need to get something out back at the office, and are working with people there to do so.

Remote collaboration is traditionally email-based: make your edits, send to me, I review, we call about it, another set of edits, etc. While this can work well, there are times when being able to sit in the same room for a few minutes would be invaluable.

Now there are tools that make real-time, remote collaboration not just possible but free and easy.

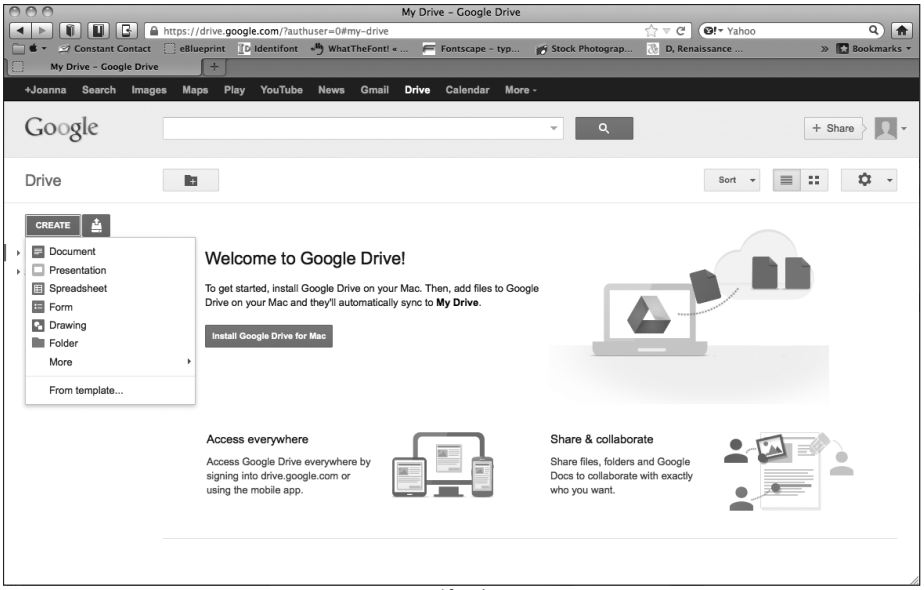
"Google Docs" is Google's thinly veiled invasion of Microsoft's Office suite turf, but the focus on web-based documents means you can share and collaborate on documents as a group—in real time if desired. So, by posting and inviting someone to collaborate on a Google doc, you can have a conference call and see each other's edits on the screen together.

Getting started is easy: log into your Google account (or make one if you don't have one) at www.google.com, then click "Documents" or "Drive" from the top tab. "Drive" is the new integrated platform for all documents. Then click "Create" to start (fig. 1). There are handy lessons on how to get started.

Speaking of Google, Let's Hangout

Not only can you collaborate on documents in real time, you can also do so in a free videoconference through Google+ Hangout. Google+ is Google's attempt at a social network to compete with Facebook.

Regardless of whether you love it, hate it, or are



(fig. 1)

ambivalent, Google+ offers some high-value tools that you can leverage in your practice. "Hangouts" are group video conferences—for free—that integrate with document work. When you sign up for Google, you will be prompted to create a G+ account (or go to plus.google.com). Easy to sign up—enter some professional info, and head shot, and you're done. Google helps you find contacts already on Google+ to connect with.

You can also use Skype—but, as of this writing, multi-party video calls require a paid subscription, and you cannot share documents in real time. These improvements may come eventually to Skype, though, which is focused on growing its paid services.

Ghostwriting of Attorney Blogs

Many law firms understand the importance of marketing their services with social media, including the use of blogs. However, finding the time to regularly post is difficult for busy attorneys. Some have dealt with this issue by hiring other people to post content on their firm's website and blogs. These ghostwriters are usually marketing professionals, not practicing attorneys affiliated with the subject law firm.

Kevin O'Keefe, author of Real Lawyers Have Blogs, suggests that the practice of ghostwriting law firm blogs is not only a bad idea, but it might be unethical. Is the failure to disclose to the reader that a law firm's blog is written by someone else "false" or "misleading," and therefore possibly a violation of Model Rule 7.1? O'Keefe thinks so, and starts a valuable discussion of the issue in his blog at the following link. http://alturl.com/gs85e

Twitter for Lawyers?

Many lawyers are joining Twitter, whether for personal or professional reasons. There are CLEs to get you started, as well as plenty of online resources. We can't cover the spectrum here, but for those who are interested, you can check out a few of the following resources:

Huge list of Tweeting Lawyers hosted by Scoop (JD Supra): http://goo.gl/vcBY2

CATA Twitter: https://twitter.com/CleveTrialAttys

Basic Twitter Etiquette: http://heidicohen.com/twitter-etiquette/ (there are lots of these lists out there—just try Google)

Did you know CATA is on Twitter? Please follow us @CleveTrialAttys—and let us know to follow you as a member. We re-tweet members' tweets regularly.

Droid Me

Tired of everything "tech" really meaning everything "Apple"? Check out www.thedroidlawyer.com for Jeffrey Taylor's take on being a lawyer and leveraging Android phones in practice.

You Tell Us

Got other ideas? Feedback? Suggestions? Post them on the online version of the CATA blog at www.clevelandtrialattorneys.com. ■

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Verdict Spotlight

by Christopher M. Mellino

An $8,583,000 medical malpractice verdict in Cuyahoga County is remarkable in itself. But when it is returned at 3:00 a.m. at the Justice Center, where a well-respected Visiting Judge and teams of attorneys (with clients in tow) have been anxiously waiting since the afternoon, that's one for the record books.

The case, *Nala Evans, etc., et al. v. MetroHealth Medical Center,* arose out of the profound brain injury sustained by the now three year old plaintiff, Nala Evans, in the minutes after her birth. Her mother, Tiera Myers, who gave birth at defendant MetroHealth Medical Center, had labor and delivery that were essentially uneventful, other than placental chorioamnionitis and fever shortly before birth. When Nala was born, however, her heart rate was under 100, and she was floppy, blue and not breathing. The labor and delivery nurse attempted to resuscitate her for 3-4 minutes before calling the Code Pink team. The team did not arrive until 5 minutes of birth. Resuscitation was thus delayed until 5 ½ minutes of birth, causing profound and irreversible brain damage, cerebral palsy, and spastic quadriplegia.

The plaintiffs alleged that the delay in summoning the Code Pink team was a breach of the standard of care as well as of the hospital's internal protocols, which indicated that the Code Pink team should have been summoned either at birth or within one minute thereafter.

The defense contended that its personnel acted within the standard of care and that its protocols for summoning the Code Pink team did not apply to its labor and delivery nurses, but were merely guidelines distributed to NICU residents and fellows. The defense also argued that Nala's brain injury was not caused by oxygen deprivation, but by distress resulting from a placental infection.

One of the more compelling items of evidence was the Code Pink sheet on which the labor and delivery nurse had entered APGAR scores for the first 5 minutes of Nala's life. A forensic examination of these scores by a handwriting expert indicated that the one-minute APGAR score had been altered to a higher score to justify a delay in calling the Code Pink team. Faced with this evidence, the defense did not dispute that the score had been altered, but argued that this was an innocent change.

Following a two week trial, over which the Honorable Richard A. Markus presided as Visiting Judge, the jury began deliberations late on a Wednesday afternoon. The next morning, the jury notified Judge Markus that Juror No. 1 had failed to appear. It turned out that Juror No. 1 had been arrested the night before on a domestic violence charge.

Ultimately, after a day of failed attempts to get Juror No. 1 back for deliberations, Judge Markus gave the parties the options of proceeding with seven jurors or recalling the alternate juror. The plaintiffs opted for the second choice, and the alternate was reseated on Friday morning. Then, as the jury requested permission to deliberate into the evening, the judge moved proceedings from the Old Courthouse to the Justice Center. Around 3:00 a.m. on Saturday morning, the jury returned a verdict for the plaintiffs, awarding Nala $351,000 for past medical expenses, $2,846,000 for future medical expenses, $586,000 for future impaired earning capacity, $100,000 for past noneconomic damages, and $1,400,000 for future noneconomic damages. The jury awarded Tiera $3,300,000 for noneconomic damages.

As MetroHealth is a political subdivision, the parties filed post-verdict briefs on damage caps and set-offs. Before rulings were made, the case settled.

William S. Jacobson

Plaintiffs were represented by **William S. Jacobson** and **Thomas Mester**. Briefing on the extensive pre- and post-trial motions was done by **Kathleen J. St. John** and **Brenda M. Johnson.** Congratulations on a tremendous effort and most of all for being a voice for justice for this young girl. ■

Thomas Mester

Recent Appellate Decisions

Editor's Note: *The following is a sampling of recent appellate decisions in which CATA members have achieved positive results for their clients.*

1.) Frenz v. Springvale Golf Course & Ballroom, 8th Dist. No. 97593, 2012 Ohio 3568 (Aug. 9, 2012).

Plaintiffs' Attorneys: Craig Bashein; Paul W. Flowers

Deft's Attorneys: Cara M. Wright; James A. Climer; John T. McLandrich; Frank H. Scialdone

Disposition: Denial of defendants' motion for summary judgment on immunity issue affirmed.

Topics: Political subdivision immunity; janitorial and maintenance functions do not reinstate immunity pursuant to R.C. 2744.03(A)(3) and (A)(5).

This was an interlocutory appeal by the City of North Olmsted from the trial court's denial of its motion for summary judgment on the political subdivision immunity issue pursuant to R.C. Chapter 2744. The plaintiff, who attended a wedding at a facility owned and operated by the defendant city, was injured when she fell on an excessively slippery dance floor. The plaintiff argued – and the Court of Appeals agreed – that the rental of a government-owned facility to accommodate a private wedding reception was a proprietary function, and that the plaintiff's claim thus fell within the exception to immunity set forth in R.C. 2744.02(B)(2). The Court noted that before the exception could be found to apply, the plaintiff must establish a prima facie case of negligence arising out of the "proprietary function" -- which the plaintiff in this case succeeded in doing. The Court rejected the defendant's contention that the city's immunity was reinstated pursuant to R.C. 2744.03(A)(3) or (A)(5). The Court found that neither of these exceptions – having to do with discretionary judgment by the political subdivision's employee – applied in this case. As to the (A)(3) exception, the Court found that "[t]he affirmative defense listed in R.C. 2744.03(A)(3) is inapplicable to the facts of the case before us because the negligence alleged does not involve 'policy-making, planning or enforcement powers.' Floor maintenance is janitorial work involving routine, everyday matters." *Id*. at ¶23. As to the (A)(5) exception, the Court stated "[d]ecisions concerning maintenance of the ballroom floor do not involve policymaking or a high degree of discretion, and therefore, the affirmative defense contained in R.C. 2744.03(A)(5), likewise, does not apply to this case." *Id*. at ¶26.

2.) Bidar v. Cleveland Electric Illuminating Co., 8th Dist. No. 97490, 2012-Ohio-3686 (Aug. 16, 2012).

Plaintiffs' Attorney: David I. Pomerantz

Defts' Attorneys: John J. Eklund; Thomas I. Michals; Eric S. Zell

Disposition: Summary judgment for defendants reversed.

Topics: Utility company's liability for placement of its utility poles in clear zone alongside roadway. *Turner v. Ohio Bell Telephone Co*., 118 Ohio St.3d 215, 2008-Ohio-2010, distinguished.

The plaintiff was injured when, due to a deer darting into the road, he swerved into a CEI utility pole located in the clear zone alongside the roadway. Suit was filed against CEI and First Energy Corp. Both defendants moved for summary judgment – CEI on the ground that it had permission to install the pole under R.C. 4931.03(A) and 4931.14; First Energy on the ground that it is just "a holding company and as such does not own, control, or maintain the property at issue[.]" *Id*. at ¶3. The trial court granted both motions; the Eighth District reversed.

The primary issue in this appeal involved interpretation of the Ohio Supreme Court's decision in *Turner v. Ohio Bell*, *supra*. In *Turner*, the Court held that "'[w]hen a vehicle collides with a utility pole located off the improved portion of the roadway but within the right-of-way, a public utility is not liable, as a matter of law, if the utility has obtained any necessary permission to install the pole and the pole does not interfere with the usual and ordinary course of travel.'" *Bidar*, at ¶9 (quoting *Turner* at ¶21). CEI argued that "the 'any necessary permission' language in *Turner* means a utility company may install a pole without explicit permission if permission is conferred by statute; specifically, in this case R.C. 4931.03(A)." *Id*. at ¶11. The Court of Appeals disagreed, stating: "CEI confuses a public utility's use of a public right of way for its lines and facilities with its placement of its lines and facilities.... Although a utility's use of a public right of way is presumed under Ohio law, placement of a utility's lines or facilities is not unfettered." *Id*. The Court held that the immunity afforded by *Turner* does not apply unless the utility had permission or a permit from the appropriate governmental entity for the pole's location – which CEI did not have in this case. *Id*.

As for the trial court's grant of First Energy's summary judgment motion on the ground that it was a "holding company and as such does not own, control, or maintain the property at issue," the Court of Appeals reversed because the plaintiffs presented evidence that created a genuine issue of material fact as to whether this was true.

3.) Spaeth v. State Auto. Mutual Ins. Co., 8th Dist. No. 2012-Ohio-3813 (Aug. 23, 2012).

Plaintiff's Attorneys: Robert F. Linton; Stephen T. Keefe, Jr.; Christian R. Patno

Deft's Attorneys: John G. Farnan; J. Quinn Dorgan; Shawn W. Maestle; Melanie R. Shaerban

Disposition: Reversing rulings on cross-summary judgment motions; and finding coverage to exist under umbrella policy.

Topics: "Resident relative" and "domicile" construed where named insured claims domicile in Florida but retains substantial presence in Ohio.

The plaintiff's decedent was fatally injured when his bicycle was hit by a vehicle driven by Robert Schill. The plaintiff settled with Robert on an underlying liability policy, following which coverage was pursued under an umbrella policy issued by The Cincinnati Insurance Company ("CIC") to Robert's parents, James and Jean Schill. The trial court granted summary judgment to CIC and denied the plaintiff's motion for summary judgment. The Court of Appeals reversed.

The issue on appeal was whether Robert was covered under his parents' umbrella policy. The policy provided coverage for the named insured and "your resident relatives." The term "resident relative" was defined as "'[a] person related to 'you' by blood, marriage or adoption that is a resident of 'your household' and whose legal residence of domicile is the same as yours.'" *Id*. at ¶15. The policy identified James and Jean Schill as the named insureds, and listed their address as a home in Burton, Ohio. James and Jean maintained homeowners' policies at this residence, as well as at their Florida residence. Robert resided at the Ohio residence of James and Jean. The question became whether James, who traveled between Ohio and Florida, was legally domiciled in Ohio.

The Court noted that the initial burden of establishing that James' domicile is in Ohio was satisfied by showing that James was born, raised, married, and worked in Ohio at least up until 1993 when his wife purchased a home in Florida. Thereafter, the burden shifted to CIC to show that James abandoned the Ohio domicile and replaced it with a Florida domicile. Although James and Jean moved to Florida in 1993, James continued to travel to Ohio 10 to 15 days per month to engage in his work as CEO and Chairman of Chem Technologies, Ltd. During this time, he stayed in the Burton home. He had never filed documents with the Ohio tax authorities indicating an official change of domicile. Weighing these and other factors, the Court determined that "reasonable minds can come to but one conclusion about the location of James's domicile," namely, that "James never abandoned his domicile in Ohio by virtue of his wife's purchase of a second home in Florida because he travels here and stays in Ohio for up to a minimum of two weeks every month to operate an Ohio business as its CEO and Chairman." *Id*. at ¶39. The coverage issue was thus resolved in the plaintiff's favor.

4.) Hyams v. Cleveland Clinic Foundation, 8th Dist. No. 97439, 2012-Ohio-3945 (Aug. 30, 2012).

Plaintiff's Attorneys: Christopher M. Mellino; Thomas D. Robenalt; Allen C. Tittle

Deft's Attorneys: Anna M. Carulas; Ingrid Kinkopf-Zajac; Douglas G. Leak

Disposition: Judgment on verdict for the plaintiffs affirmed.

Topics: Medical malpractice; expert witnesses'qualifications under Evid. R. 601(D) and 702 (B).

In this medical malpractice action a 9 year old child with an unexplained limp was misdiagnosed as suffering from a "conversion disorder" (a psychosomatic condition) instead of the rare genetic disorder – "dystonia" -- that the child actually had. The plaintiffs contended that, as a result of this misdiagnosis, the defendants engaged in an inappropriate treatment plan which involved punitive behavior modification approaches (such as making the child do sit-ups and push-ups each time he fell) and branding him as a child who was faking his condition to manipulate the adults around him. In actuality, his condition of dystonia was a movement disorder that caused his muscles to contract and spasm involuntarily. The jury found for the doctor who misdiagnosed the condition, but against the Cleveland Clinic and Dr. Weschler because of the treatment plan.

On appeal, the defense argued, *inter alia*, that the plaintiffs' expert witness, Dr. Granacher, was incompetent to testify because he had not been properly qualified under Evid. R. 601(D). The Court affirmed the trial court's overruling of this argument because the defendant failed to raise this objection until after Dr. Granacher had finished testifying and returned to his home in Kentucky, and because other evidence of record suggested that he would have been properly qualified had the defense timely raised this objection. The Court of Appeals also affirmed the denial of the defendant's motion to disqualify Dr. Granacher for allegedly failing to satisfy the requirements of Evid. R. 702(D). The Court rejected this argument on waiver grounds and because Dr. Granacher's qualifications satisfied Evid. R. 702(D). The Court also rejected arguments that Dr. Granacher's testimony on causation was speculative; and that the trial court abused its discretion in permitting the plaintiffs to only show portions of Dr. Weschler's video-taped deposition.

5.) Chapman v. Milford Towing & Service, Inc., 6th Cir. Nos. 09-4000/10-4457/10-4458/10-4497, 2012 U.S. App. LEXIS 18897, 2012 FED App. 0980N (6th Cir.) (Sept. 7, 2012).

Plaintiff's Attorneys: David M. Paris; Kathleen J. St. John

Deft's Attorneys: Felix J. Gora; Curtis Edward Kissinger; John J. Garvey, III; Jason E. Abeln

Disposition: Judgment on jury verdict for plaintiff affirmed.

Topics: Liability of tow truck operator for failure to follow proper towing procedures. Jury instruction on superseding cause not warranted when intervening conduct is within the scope of the risk created by defendant's negligence.

The plaintiff was the driver of a semi-tractor trailer who, when he felt the rear tandems on his trailer dragging, pulled off the road and called his dispatcher to request a serviceman to repair the vehicle. When a tow truck appeared instead, he told the tow truck operator not to tow the vehicle until he got permission from the dispatcher, then returned to the cab to call the dispatcher and organize his personal items in case the vehicle would be towed. The tow truck operator, meanwhile, began hooking up the vehicle for a tow – either ignoring the plaintiff's instructions or (according to the tow truck operator) believing the plaintiff had stepped out of harm's way. The tow truck operator then proceeded to lift the cab 12-18 inches off the ground. When the plaintiff, not knowing the cab had been lifted, started to exit the cab from the driver's side door, he lost his balance (as the lifted cab shook from his weight as he descended the steps) and fell into oncoming traffic. As a result, his right leg was amputated above the knee.

The jury returned a $2,000,000 verdict for the driver against the tow truck company and its operator, but found the plaintiff 25% negligent. Subsequently, after extensive discovery, briefing and an evidentiary hearing, the district judge awarded prejudgment interest on amounts deemed to represent past damages. On appeal, the defendants argued that the trial court erred in failing to instruct the jury on superseding cause, the intervening conduct being that of the plaintiff. The Court of Appeals disagreed, finding the causation and comparative negligence instructions sufficient as given and that the plaintiff's conduct could not be a superseding cause because it fell within the scope of the risk created by the defendants. The Court of Appeals also rejected the defendants' contentions that a casual and inadvertent mention of insurance by a defense witness on cross-examination constituted reversible error, or that the trial court erred in admitting an unsworn statement of the tow truck operator taken by an insurance agent who represented another erstwhile party.

The Court of Appeals also affirmed the trial court's award of prejudgment interest, but rejected the plaintiffs' argument on cross-appeal that prejudgment interest should have been awarded on the entire verdict as the defendants had not requested jury interrogatories segregating past and future damages. The trial court had made its own calculations as to what portions of the award were given for past and future damages (the medical bills, for instance, were all past damages) and the appellate court found this was not error.

6.) N.A.D. v. Cleveland Metropolitan School District, 8th Dist. No. 97195, 2012-Ohio-4929 (Oct. 25, 2012).

Plaintiffs' Attorneys: Craig Bashein; Paul W. Flowers; Andrew S. Pollis; David C. Weiner.

Defts' Attorneys: Joseph J. Jerse; David J. Sipusic; Wayne J. Belock

Disposition: Denial of defendant's motion to dismiss on immunity issue affirmed.

Topics: Applicability of R.C. 2744.02(B) to sexual assault of child on school bus; *Doe v. Marlington Local School Dist., Bd. of Edn.*, 122 Ohio St. 3d 12, 2009-Ohio-3601, distinguished.

The plaintiff, a 15 year old girl enrolled in the Cleveland Metropolitan School District's (CMSD's) special education curriculum, was assaulted by two other students on a CMSD bus. The plaintiff and her mother filed suit against CMSD, the bus driver, the students who committed the assault, and their parents. CMSD and the bus driver filed a motion to dismiss on the ground that they were immune from suit pursuant to the holding in *Doe v. Marlington Local School Dist., supra*. The trial court denied the defendants' motion to dismiss, and the 8th District affirmed. The Court distinguished *Marlington* for two reasons. First, *Marlington* was decided on a summary judgment motion, whereas N.A.D. involved a motion to dismiss. Second, although *Marlington* held that the exception to immunity set forth in R.C. 2744.02(B)(1) -- for negligent operation of a motor vehicle – does not apply to a school bus driver's supervision of the conduct of child passengers on a school bus, the complaint in this case did not allege negligent supervision, but the bus driver's negligent failure to inspect the bus. The Court, relying on its own post-*Marlington* decision in *Swain v. Cleveland Metro. School Dist.*, 8th Dist. No. 95443, 2010-Ohio-4498, held that "[t]he operation of a motor vehicle [for purposes of R.C. 2744.02(B)(1)] includes the inspection of the bus."

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

Counsel for Plaintiff(s): _____
Law Firm: _____
Telephone: _____

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

RETURN FORM TO: **Christopher M. Mellino**
Mellino Robenalt LLC
19704 Center Ridge Road
Rocky River, Ohio 44116
(440) 333-3800; Fax (440) 333-1452
Email: cmellino@mellinorobenalt.com

CATA Verdicts & Settlements

Editor's Note: *The following verdicts and settlements submitted by CATA members are listed in reverse chronological order according to the date of the verdict or settlement.*

Mary Butch, et al. v. Patricia A. Johnson, et al.

Type of Case: Auto vs. Pedestrian

Settlement: $350,000.00

Plaintiffs' Counsel: Andrew R. Young, Nurenberg, Paris, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendants' Counsel: David P. Stadler

Court: Medina County, Case No. 11CIV1618, Judge Christopher J. Collier

Date Of Settlement: October 30, 2012

Insurance Company: Allstate Insurance Company

Damages: L-1 compression fracture; jaw fracture; soft tissue right shoulder and left knee

Summary: Plaintiff was a 56-year-old woman who was a pedestrian walking to a pancake breakfast. While she was walking on the sidewalk, a motor vehicle turned into the parking lot striking her on the left side, knocking her to the ground. Defendant's independent medical examiner opined that Plaintiff's L-1 compression fracture and jaw fracture healed and any chronic pain was unrelated to the accident. He further opined that the right shoulder and left knee injuries were unrelated to the accident.

Plaintiffs' Experts: Kim Stearns, M.D.; James W. Moodt, D.M.D.; Bhupinder S. Sawhny, M.D.; Harvey S. Rosen, Ph.D.

Defendants' Expert: James David Brodell, M.D., Inc.

Bradley J. Peffley, et al. v. Saturn Corporation, et al.

Type of Case: Personal Injury - Product Liability

Settlement: Confidential

Plaintiffs' Counsel: James A. Lowe, Lowe Eklund Wakefield & Mulvihill Co., LPA, 1660 W. Second St., Suite 610, Cleveland, Ohio 44113, (216) 781-2600; and Martin W. Williams, Williams DeClark Tuschman Co., L.P.A., 626 Madison Ave., Suite 800, Toledo, Ohio 43604, (419) 241-7700

Defendants' Counsel: Peter N. Lavalette, Robison, Curphey & O'Connell, LLC, Four SeaGate, 9th Fl., Toledo, Ohio 43604; and Kenneth P. Abbarno, Reminger & Reminger, 101 W. Prospect Ave., Cleveland, Ohio 44115

Court: U.S. Dist. Ct., N.D. Ohio, W.D., Case No. 3:09CV3022, Judge James G. Carr

Date Of Settlement: September 15, 2012

Insurance Company: Indiana Insurance/The Netherlands Insurance Company

Damages: A fractured skull, traumatic brain injury, compression fracture of his spine, collapsed lung, and severe fracture to his left femur, as well as other injuries that necessitated invasive surgeries and have caused minor child to experience permanent, debilitating health problems including executive dysfunction, hearing loss, foot drop, and severe respiratory problems.

Summary: On or about June 24, 2007, in the City of Loveland, Ohio, plaintiffs prepared to leave the home of friends they were visiting for the weekend. The keys to the 2004 Saturn Vue were not in the ignition. The gearshift selector was in "Park" and the engine was off. Plaintiffs' 4-year-old son, with his parents just outside the vehicle, got out of his car seat, climbed into the front of the vehicle and moved its gear shift out of "Park." The brake-shift interlock had been disabled because the worn ignition key had been removed when the ignition cylinder was not fully in "Lock." The vehicle began to roll backwards down the angled driveway. While the vehicle was moving, the child jumped or fell out of the driver's seat, through the open driver's door, was struck by the moving vehicle and sustained serious personal injuries.

Plaintiffs' Experts: Richard Clarke, Consulting Engineer; Lawrence S. Forman, M., Ed., Life Care Planner; Richard McSwain, Ph.D., P.E., Registered Engineer; Harvey S. Rosen, Ph.D., Economist; and Thomas Sullivan, Ph.D., Neuropsychologist

Defendants' Experts: Andrew N. Colvin, Ph.D., Clinical Neuropsychology; Robert L. Perry; Alexandre Reikher, Engineering Manager; Kon-Mei Ewing, Engineer; Dennis A. Guenther, Ph.D., P.E.; David G. McKendry, Engineering Consultant; and Mark S. Scher, M.D., Pediatric Neurologist

Julia Zilch

Type of Case: Fire loss

Settlement: $272,764.00

Plaintiff's Counsel: Robert P. Rutter, 4700 Rockside Road,

Suite 650, Independence, Ohio 44131, (216) 642-1425

Defendant's Counsel: Ken Calderone, Hanna, Campbell & Powell

Court: None

Date Of Settlement: September 2012

Insurance Company: Erie Insurance Company

Damages: Fire loss to residence

Summary: Fire destroyed the insured's home. Erie took an examination under oath of the insured, and then demanded appraisal as to the amount of loss.

Plaintiff's Expert: Richard Andrews, J.S., Moorhead & Associates - as to dwelling damages.

Confidential

Type of Case: Insurance Coverage; Insurance Agent Negligence

Settlement: $6,500,000.00

Plaintiff's Counsel: Robert P. Rutter, 4700 Rockside Road, Suite 650, Independence, Ohio 44131, (216) 642-1425

Defendant's Counsel: Confidential

Court: None

Date Of Settlement: September 2012

Insurance Company: Various

Damages: Tornado damage to apartment complex

Summary: A tornado damaged a 70-building apartment complex that was undergoing renovation. The insurer asserted that it only insured about 20 of the buildings under a builders risk policy. The agent had been requested to obtain coverage for all 70 buildings, but the policy was still being negotiated when the damage occurred.

Plaintiff's Experts: Steve Coombs, Chicago - Insurance agent practices; Charles Miller, California - Bad Faith; Todd Gillman, Chicago - Consequential Damages; and Alex N. Sill Company - Building Damage and Business Income Loss.

Defendant's Experts: Matson, Driscoll & Damico - Business Income Loss; Paul Lux, Chicago - Business Income Loss; and William Warfel, Indiana - Bad Faith.

Kelly Maron v. Timothy J. Pritchard, M.D.

Type of Case: Medical Malpractice

Verdict: $910,000.00

Plaintiff's Counsel: Stephen S. Crandall, 539 E. Washington St., Chagrin Falls, Ohio 44023, (216) 538-1981

Defendant's Counsel: Brant Poling & Jeffrey Schobert

Court: Lake County, Case No. 11CV000931, Judge Joseph Gibson

Date Of Verdict: August 27, 2012

Insurance Company: Hudson Insurance & Lake Hospital Systems

Damages: Removal of small bowel resulting in digestive issues

Summary: On June 24, 2009, Kelly Maron came under the care of defendants who failed to remove a surgical towel from Mrs. Maron's abdomen during surgery. The retained towel led to an abscess and caused damage to her large and small bowel.

Plaintiff's Experts: Dr. Kim Hamelberg and Dr. David Boyd

Defendant's Expert: Dr. Janice Rafferty

Evans v. MetroHealth

Type of Case: Medical Malpractice

Verdict: $8,500,000.00

Plaintiff's Counsel: William S. Jacobson and Thomas Mester, Nurenberg, Paris, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendant's Counsel: Marilena DiSilvio and Adam Davis, Reminger Co., LPA, 101 Prospect Ave., W., Suite 1400, Cleveland, Ohio 44115; Charles Fisher, Kitch Drutchas Valitutti & Sherbrook, 10 S. Main, Suite 200, Mount Clemens, MI 48043-7903

Court: Cuyahoga County, Case No. 743890, Judge Markus

Date Of Verdict: August 25, 2012

Insurance Company: Self-insured

Damages: Cerebral Palsy and cognitive dysfunction

Summary: Baby Evans was born depressed secondary to placental infection. Obstetrical nurse attempted to resuscitate baby and waited 3-4 crucial minutes to call for neonatal resuscitation team. Defense argued that infection had already caused brain injury.

Plaintiff's Experts: Gregory Hammer, M.D., Pediatric Airway Specialist (Stanford); Yitzchak Frank, M.D., Pediatric Neurologist (New York); Vickie Willard, Forensic Documents; Cynthia Wilhelm, Ph.D., Life Care; and John Burke, Ph.D., Economist.

Defendant's Experts: Michael Goldsmith, M.D.,

Neonatology; Robert Zimmerman, M.D., Neuroradiology; David Schwartz, M.D., Placental Pathology; Mark Scher, M.D. and Michael Duchowny, M.D., Pediatric Neurology; Mark Landon, M.D., Perinatology; Elie Rizkala, Pediatric Neurology; Cathlin Vinette Mitchell, R.N., Life Care; and S. Gary Kuzina, Economist.

Estate of Bernadine Schaffer, et al. v. Dennis R. Siesel, et al.

Type of Case: Truck vs. Van - Assured Clear Distance Ahead

Settlement: $495,000.00

Plaintiffs' Counsel: Andrew R. Young, Nurenberg, Paris, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendants' Counsel: Robert J. Bahret; Kurt R. Weitendorf

Court: Erie County, Case No. 2011CV0077, Judge Tygh M. Tone

Date Of Settlement: August 6, 2012

Insurance Company: Auto-Owners Insurance Company/ West Bend Insurance Company

Damages: Right lower extremity laceration and fractures/ wrongful death

Summary: Plaintiff's decedent was an 84-year-old woman who was a passenger in an adult day care facility-owned van. Defendant struck the back of the van with his truck. Plaintiff's decedent suffered right lower extremity fractures. Approximately one month following the accident, plaintiff's decedent died of pneumonia. A wrongful death claim was pursued on behalf of the Estate. Auto-Owners Insurance Company paid the per-person limits. An underinsured motorist settlement was reached with West Bend Insurance Company.

Plaintiffs' Expert: Stephen R. Payne, M.D.

Chante Johnson v. Miami Valley Hospital, et al.

Type of Case: Birth Injury

Verdict: $1,250,000.00 (zero offer)

Plaintiff's Counsel: Pamela Pantages, The Becker Law Firm, LPA, (800) 826-2433

Defendants' Counsel: Neil Freund and Julia Turner, Freund Freeze & Arnold

Court: Montgomery County, Case No. 2009 CV 04865, Judge Dennis Adkins

Date Of Verdict: August 2, 2012; PJI motion pending

Insurance Company: Med Pro; PICO

Damages: Permanent injury/deformity, reduced earnings, cost of future care

Summary: 18-year-old plaintiff brought case against hospital, attending OB and senior resident for mismanagement of her delivery. Her mother had no prenatal care and presented to MVH in labor. Attending and senior resident suspected gestational diabetes and macrosomia, but proceeded with trial of labor which resulted in severe shoulder dystocia and brachial plexus injury. Plaintiff had severe disability with little use of right arm and hand.

Plaintiff's Experts: Russ Jelsema, M.D.; Dan Adler, M.D.; Rod Durgin, Ph.D.; Ann Veh; and James Zinser, Ph.D.

Defendants' Experts: Mark Landon, M.D.; Henry Lerner, M.D.; Louis Weinstein, M.D.; Bruce Growick, Ph.D.; Scott Kozin, M.D.; Richard Katz, M.D.; and Richmond Abbott, M.D.

Bush v. Ohio Dept. Of Rehabilitation and Correction

Type of Case: Motor vehicle - left of center

Settlement: $2,000,000.00

Plaintiff's Counsel: Jamie R. Lebovitz, Nurenberg, Paris, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 694-5220

Defendant's Counsel: Peter DeMarco, Assistant Attorney General

Court: Ohio Court of Claims

Date Of Settlement: August, 2012

Insurance Company: Self-insured

Damages: Traumatic amputation - right leg above knee

Summary: Plaintiff, a retired minister, was traveling on an undivided 2 lane road when defendant's vehicle traveled left of center striking plaintiff's vehicle head-on.

Plaintiff's Experts: Dr. Cynthia Wilhelm, Ph.D.; Dr. James Powers; and Dr. John Burke

John Doe v. ABC Trucking Company, et al.

Type of Case: Motor Vehicle Accident (Trucking Death)

Settlement: $2,500,000.00

Plaintiff's Counsel: Dennis Lansdowne and Rhonda Baker Debevec, Spangenberg, Shibley & Liber LLP, (216) 696-3232

Defendants' Counsel: Withheld

Court: Cuyahoga County Common Pleas Court

Date Of Settlement: May 23, 2012

Insurance Company: ABC Insurance Company

Damages: Medical $68,106.40; Funeral $11,255.68; Vehicle $5,049.38 = Total $84,411.46

Summary: This was a trucking death lawsuit on behalf of a family whose daughter was killed in a semi-truck crash. The victim, a 23-year-old aspiring nurse, was killed in a five vehicle crash on Interstate 90.

As the young woman slowed down for a construction site, a semi driver slammed into the back of her car in excess of 50 m.p.h. The impact pushed her small vehicle with such force into the cars ahead that one was flipped over. Her car attached to the front of the semi and was carried several hundred feet into the median.

The defendant tractor trailer driver was driving beyond the posted speed limit as he approached the slowed traffic. The lawsuit established that he had failed to follow basic safety rules. Although he walked away unscathed, the young woman died from her injuries shortly afterward. Several others were injured as well.

Plaintiff's Experts: John Conomy (Neurologist), Beachwood, Ohio; Henry Lipian (Accident Reconstruction), Grafton, Ohio; and Robert Reed (Transportation Consultant), Columbus, Ohio.

Defendants' Experts: Dennis Guenther, Ph.D. (Accident Reconstruction), Columbus, Ohio; David Preston, M.D. (Neurologist & Professor of Neurology), Cleveland, Ohio; and David Stopper (Accident Reconstruction), Southlake, Texas.

Olympic Forest, et al. v. Mickey Karipides

Type of Case: Breach of Noncompete

Verdict: $300,000.00

Plaintiff's Counsel: Daniel Sucher, Young, Sucher, PLL, (440) 937-9100

Defendant's Counsel: Craig Pelini

Court: Cuyahoga County, Case No. 746543, Judge John O'Donnell

Date Of Verdict: April 25, 2012

Damages: Breach of Noncompete

Summary: Plaintiffs purchased a pallet brokerage company from defendants. The agreement contained an noncompetition provision. The defendant within 2 months of the agreement went to work for a competitor. The defendants denied working for a competitor.

Plaintiff's Expert: Jason Bogniard

Defendants' Expert: Robert Ranallo, JD, CPA

Estate of Jane Doe v. ABC Corporations

Type of Case: Wrongful Death/Negligence/Premises Liability

Settlement: $1,635,000.00 (Combined: $1.5 million nursing negligence/wrongful death; $135,000 premises liability)

Plaintiff's Counsel: Susan Petersen, Petersen & Petersen, 428 South Street, Chardon, Ohio 44024, (440) 279-4480

Defendant's Counsel: Withheld

Court: Withheld

Date Of Settlement: April, 2012

Damages: Economic: medical expenses of $160,441.61; Funeral and burial costs total $12,998.03

Summary: Plaintiff's counsel alleged that a greater than 70-year-old woman was the victim of substandard nursing care during an inpatient rehabilitation stay following an injury for a fall that occurred prior to admission. In the fall, the woman suffered a significant laceration of her knee and subsequent complications. The woman died several weeks later of sepsis. Plaintiff brought suit, alleging the nursing care was negligent and caused the woman's death. Punitive damages were also alleged against the facility. The defendant nursing provider disputed the allegations. The case also included a premises liability claim against the business owner where the original slip and fall occurred. The remaining terms of the settlement, including but not limited to the identity of the parties and Court in which the matter was pending, are confidential.

Plaintiff's Experts: Gretchen Hazle, R.N. and Dr. David Seignious, M.D., Frank Burg (Premises)

Defendant's Experts: Michael Seneff, M.D., and Richard A. Berg, M.D.

Anonymous Family v. ABC Hospital

Type of Case: Medical Malpractice

Settlement: $2,150,000.00

Plaintiff's Counsel: Stephen S. Crandall, 539 E. Washington St., Chagrin Falls, Ohio 44023, (216) 538-1981

Defendant's Counsel: Confidential Settlement

Court: N/A

Date Of Settlement: February 14, 2012

Insurance Company: ABC Hospital

Damages: Death

Summary: Plaintiff was an inpatient at ABC Hospital in July and August of 2011 for delivery of her second child. Her bowel was perforated which led to peritonitis and ultimately her death.

Plaintiff's Experts: Dr. Martin Gubernick, Dr. Myron Marx, and Dr. George Nichols

Confidential

Type of Case: Birth Injury

Settlement: $1,000,000.00

Plaintiff's Counsel: Pamela Pantages, The Becker Law Firm, LPA, (800) 826-2433

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: January 19, 2012

Insurance Company: Confidential

Damages: Permanent deformity/disability, reduced earning, cost of future care

Summary: Failure to diagnose and manage gestational diabetes and macrosomia followed by a negligent trial of labor that included vacuum extraction and severe shoulder dystocia. Baby had subgaleal bleed and brachial plexus injury with multiple avulsions, primary brachial plexus repair followed by secondary orthopedic surgeries.

Plaintiff's Experts: William Spellacy, M.D.; Dan Adler, M.D.; Char Daniels, R.N.; and Larry Forman

Defendants' Experts: Robert Gherman, M.D.; Scott Sullivan, M.D.; Angela Deneris, CNM; Mary Ann Lucia, R.N.; Mark Landon, M.D.; and Mark Scher, M.D. ■

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In addition, I certify that no more than 25% of my practice and that of my firm's practice if I am not a sole practitioner, is devoted to personal injury litigation defense.

Name_____

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Membership in Legal Associations (Bar, Fraternity, Etc.):_____

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Invited:_____ **Seconded By:**_____

President's Approval:_____ **Date:**_____

Please return completed Application with $125.00 fee to: **CATA, c/o Kathleen J. St. John, Esq.**
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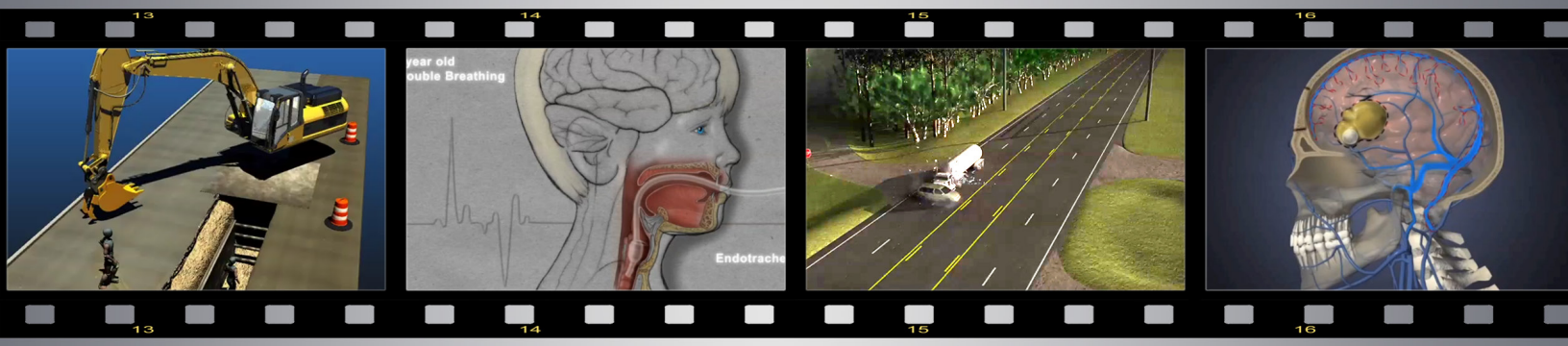

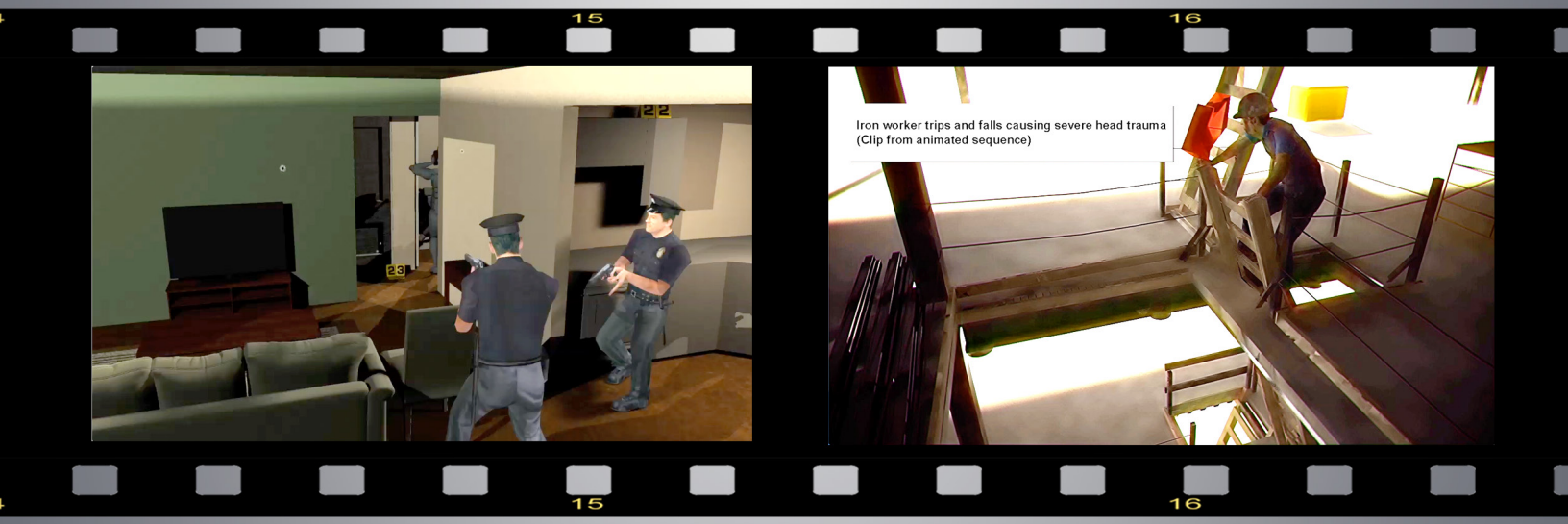

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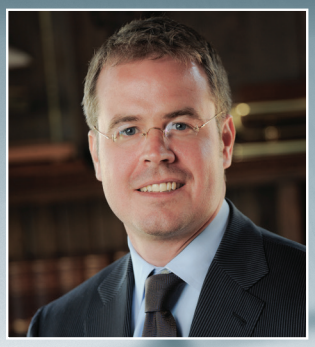

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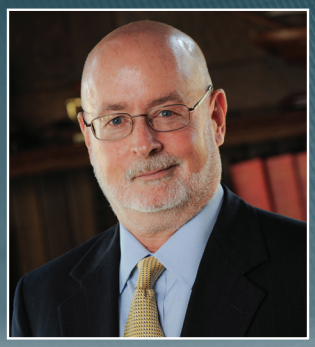

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