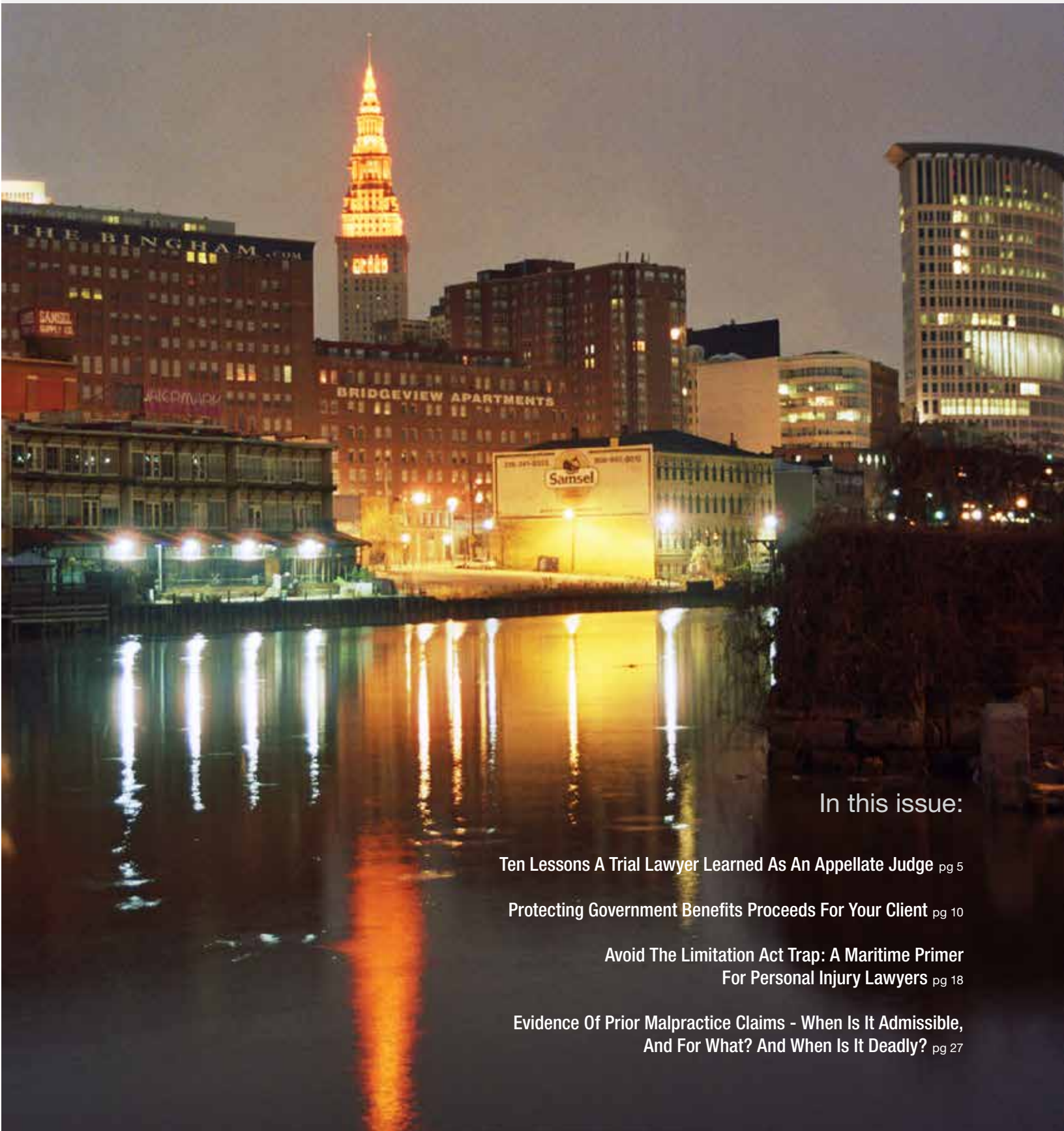
CATA News

CLEVELAND ACADEMY OF TRIAL ATTORNEYS

Spring 2013



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News

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Samuel V. Butcher is a principal at Samuel V. Butcher, Attorney and Counselor at Law. He can be reached at 440.572.3300 or samb@butcherelderlaw.com.

President's Message

by Samuel V. Butcher

Have you ever thought about just what distinguishes you in your practice of law? I have and I have an answer for you. While we are defined by what we have chosen to do, we are distinguished, I believe, by our relationships. We are litigators devoted exclusively to representing plaintiffs. We respect the right of every individual to effective counsel, yet believe with our entire being that we have chosen the better side in our decision to seek justice for the injured, the disabled, the victims of negligence and discrimination, and others for whom our advocacy stands to make a difference beyond measure. Still, as laudatory as those characteristics are, there are others similarly devoted and sharing the same belief in their respective practices. What we have, that they don't have, is the distinction of our membership in this academy. I ask you to give some serious thought to what that distinction means to you. I believe that if you do so you will conclude that your membership in CATA has made or (depending on how long you've been in practice) stands to make a very significant difference.

I devoted this space in our winter edition to the debt of gratitude we owe our founders and forebears and I commended the efforts of my fellow officers and current directors for continuing to serve with the same, if not even greater, dedication. CATA however is made up of far more than just the officers and directors. CATA is two-hundred and thirteen members strong. The fact that ninety percent of our members have paid their dues with little need for follow-up attests to an active membership as well as the value of membership in this organization. Take a look at our membership roster. Think of those you've seen in attendance at our CLE luncheons seminars, the CATA Litigation Institute, or better yet, please join us for our annual banquet on June 7, 2013 when we install new officers and directors and just look around the room. You will see among our ranks many of the finest and most skillful advocates in all of Ohio and the nation. Yet we are an intimate and closely knit group working passionately together here in Northeast Ohio to beat back the tide of a conservative brand that threatens to further erode the rights of individual citizens, our clients.

How will we remain vibrant for the future? What legacy will we leave? I believe, as I have always believed, that one of our most important functions is to train and support young lawyers. We should foster greater sharing of knowledge gained through experience by our more seasoned members with those just starting out. We need to explore additional ways to do so beyond the educational opportunities our academy already provides.

We must also increase our numbers. While we take pride in the quality of our membership we acknowledge that there are many more plaintiff lawyers in our community who meet the qualifications for membership in our academy. Some are members of OAJ and should be CATA members as well. We must actively encourage these practitioners whom we respect and admire to join our ranks and become involved. They

have the ability to be tremendous assets to our organization. We must, at the same time, enlist recent graduates and young lawyers to become involved. While our young lawyers benefit from the additional training and support they receive from CATA, they will bring to us a new expertise. Their knowledge of the internet, dexterity with electronic devices, and fluency with social media will enable them to make an immediate contribution to those of us less proficient in our application of the latest technological advancements. Thus they, too, will be great assets to our organization. Expanding our membership will enable us to play an even more active role and have a greater presence in the legal community in our region.

We are distinguished by our relationships. We are distinguished as trial attorneys by the relationships we share as members of The Cleveland Academy of Trial Attorneys. Our membership in CATA truly sets us apart. We are, after all, the premier plaintiffs bar association in Northeast Ohio. I'm proud of that distinction. Reflecting on my twenty plus years as a member it is impossible for me to account for all of the many ways in which I have benefitted from being a CATA member. I am indebted and grateful to all of the CATA members, past and present, for all that they, and you, have shared with me.

Sincerely, Sam Butcher

■

Kathleen J. St. John is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or kstjohn@nphm.com.

Christopher M. Mellino is a principal at Mellino Robenalt, LLC. He can be reached at 440.333.3800 or cmellino@mellinorobenalt.com.

Editors' Notes

by Kathleen J. St. John and Christopher M. Mellino

In this issue, we are privileged to have an article by fellow trial attorney, and former Eleventh District Court of Appeals Judge, Mary Jane Trapp. Her article, *Ten Lessons a Trial Lawyer Learned As An Appellate Judge*, reminds us of the steps we need to take at the trial level in order to have a winning appeal. Judge Trapp's article also provides rare and valuable insight into the technology used by appellate judges in reviewing briefs, and reminds us that *how* we present our arguments is often as important as *what* we have to say. Her writing tips are useful for capturing the attention of judges and staff attorneys not only in appeals, but in all brief writing and motion practice.

We are also fortunate to have Janet Lowder sharing useful tips on *Protecting Government Benefits Proceeds For Your Client*. Janet explains some of the arcana of government benefits and when the receipt of an award or settlement will interfere with the ongoing receipt of such benefits. The article is useful as a guide in your practice -- or perhaps just to signal when the government benefits issue should be referred to an attorney who concentrates his or her practice in this area.

In the spirit of the upcoming summer, we are pleased to have Stuart Scott's article on litigating boating accidents: *Avoid the Limitation Act Trap: A Maritime Primer for Personal Injury Lawyers*. Also from Stuart and his associate, Michael A. Hill, is an interesting case note on a recent decision from the 8th District Court of Appeals: *Young v. Cuyahoga County Board of Mental Retardation: Holding Ohio's Political Subdivisions Accountable for Reckless Personnel Decisions*. As Stuart and Michael explain, *Young* is an important precedent, as it holds political subdivisions directly liable for reckless personnel decisions that enable their employees to engage in acts that fall within one of the exceptions to immunity under R.C. 2744.02(B).

Turning to evidentiary issues, we have another gem from Brenda Johnson: *Evidence of Prior Malpractice Claims – When Is It Admissible, And For What? And When Is It Deadly?* This article addresses when it is acceptable to cross-examine an expert witness or medical malpractice defendant with the fact that he or she was previously sued for malpractice. It's a great little go-to piece for your malpractice cases; and Brenda, as always, breaks it down with such effortless simplicity that you'll have a handy addition to your trial notebook.

Finally, in addition to our regular features, we have an article from Andrew Thompson explaining the new CATA website, and encouraging our members to take advantage of its resources. Not only has Andrew been active in working with our website designer to create the new website, but he and Will Eadie have been active in updating its content.

As always, we encourage you to submit articles for future issues of the *CATA News*, or email us with ideas for topics you'd like to see covered in future issues. And do please support our advertisers, and let them know you saw their ads in the *CATA News*, as they help make this publication possible. ■

Mary Jane Trapp has recently completed a term as a Judge on the Eleventh District Court of Appeals. Currently she is of counsel with Thrasher Dinsmore & Dolan. She can be reached at 216.255.5431 or mjtrapp@tddlaw.com.

Ten Lessons a Trial Lawyer Learned as an Appellate Judge

by Mary Jane Trapp

Early in my career a veteran trial lawyer reminded me that you are not a real trial lawyer until you have had to defend what you did during trial on appeal. He was right. And while relatively few trial lawyers have had the opportunity to sit as an appellate judge, as one who was so privileged, I can assure you that lessons learned from reviewing hundreds and hundreds of trial transcripts and lower court records are invaluable, especially in today's world of litigation.

I have heard from younger attorneys that it has become increasingly hard for them to gain trial experience because so few cases actually go to trial, and when they do, the stakes are usually very high. Knowing the frequent mistakes made pre-trial, during trial and post-trial, as well as the pitfalls and the traps for the unwary, will increase the likelihood of a good outcome upon appeal.

So may I offer the ten lessons a trial lawyer learned while on the appellate bench. (Actually, I learned many more than ten lessons, especially lessons about judicial politics, but I will save those for another day.)

Lesson 1:

It is not an error unless it appears in the trial court record, so do not rely on the plain error doctrine to save your case.

A Good Record Begins at the Pre-Trial Stage

Creating a proper and complete record for appeal actually begins at the pre-trial stage, and making a record and assuring the record is complete is ultimately the trial lawyer's responsibility. If a document or transcript is not filed with the clerk of court it will not be a part of the record unless it is later admitted into evidence at the hearing or trial, and even then, it is the lawyer's responsibility to assure that the document is properly marked, identified on the record, actually offered, and whether admitted or not, given to the court reporter.

Do not forget about Civ.R. 32(A)—file those deposition transcripts. This is especially critical in summary judgment practice.

Preserving the Trial Record

Where the proceedings are electronically recorded, it is your responsibility to assure the exhibits are made a part of the trial court's file before everyone leaves the courtroom. Speaking of recording, never assume that the court will supply a court reporter or a recording device for every case, and never assume that the recording device will work properly at all times. When in doubt and when the nature and/or value of the case warrants, hire a court reporter. The hourly rate to preserve the testimony is worth it when compared to the amount of attorney's time (and difficulty) it takes to prepare an App.R. 9(C) statement.

When a court reporter is present, remember to ask the reporter to join you at side bar, and if the trial is being recorded, always be aware of the position of the microphones so all testimony, colloquies, and side bars are recorded.

Prepare duplicate sets of trial exhibits in the event the exhibits are lost or misfiled. If the parties at trial agreed on the record that the duplicate set was correct, App.R. 9(E) can be invoked to supplement the record with the copies for the originals by stipulation of the parties. Make color copies of documents in order to preserve evidence of margin notes or other evidence that will not appear on a black and white copy of an original document.

Please proffer—if the exhibit is not admitted, it must be proffered and included with the admitted exhibits so the appellate court may consider the excluded exhibit. This applies to excluded testimony as well. If the court of appeals has no idea *from the record* what anticipated testimony or evidence was excluded, it cannot evaluate the assigned error. Remember, a written proffer or pretrial voir dire of a witness made on the record is acceptable so long as they are made a part of the record.

Finally, while App.R. 10(B) appears to place the duty to transmit the record upon the clerk of court, in reality the ultimate duty to ensure the record is complete rests with the appellant. Never assume that the exhibits, photographs, trial testimony DVDs and transcripts will necessarily make it into the files that are delivered to the court of appeals. It behooves you to take a trip to the clerk's office to review the file to ensure that critical documents have been included. It is easier to deal with a missing document at this stage rather than waiting for a phone call that may never come alerting you to a missing part of the record.

Lesson 2:

Take the time to do your research up front, so you have identified all possible arguments and have advanced them at the trial court level.

Arguments made for the first time on appeal just will not fly. Remember, the appellate court is always looking for ways to avoid tackling your assignment of error head on, and this avoidance rule is unfortunately used too often.

Lesson 3:

Make and preserve your objections on the record.

This is another one of those ways an appellate court can avoid tackling your assignment of error head on. The last words you want to read (or have your client read for that matter) are the words "appellant failed to object." Remember the court of appeals is an ***error*** court, and I recommend reading Evid.R. 103(A) "Effect of erroneous ruling," to refresh your recollection of this core rule.

Pre-trial Motions and Depositions for Use at Trial

Do not forget to renew your motion in limine after trial has begun, and please do it on the record.

Be especially cautious with preservation depositions. I recall one case where it was impossible from the record to determine what testimony was excluded. The unedited DVD was in the record, along with the transcript of the testimony, but there was nothing in the record documenting precisely what parts of the testimony had been stricken.

The Jury Charge

Finally-the jury instructions. Many successful appeals are based on a trial court's failure to give a requested charge or giving an erroneous charge, but once again that proposed charge must be in the record in order to be evaluated.

Civ. R. 51 is a most effective tool, so remember to put your requested charge in writing and file it with the clerk. If during the jury charge conference with the court you request a certain charge for the first time and it is rejected or modified in a manner you oppose, put that requested charge in writing, file it, and give copies to the judge and opposing counsel at the first opportunity before the jury is charged. If time does not permit this, file your Civ.R. 51 request at the first opportunity in order to preserve it for appeal.

When the trial court is giving the instructions, listen carefully and read the written instructions as they are being given. You will have one more opportunity to make a record of your objections to the charge or to correct a mistake before the jury retires, so please call over the court reporter or make sure the microphone is at sidebar and make and/or renew those objections.

Lesson 4:

Check your citations and quotes and never misstate the record or the law.

The quickest way to undercut your entire case is to cite bad law or set forth substantive or procedural facts that are not true. Trust me, most judges can look past "shading" or "casting" facts in the light best for your case, but creating law or fact out of whole cloth or misstating law or fact will cause the judge to dismiss your argument and question your credibility in this and future appeals.

Similar to the software professors have to detect plagiarism, Lexis has a program that with one click allows you to immediately cite check an entire appellate brief and pull up pinpoint citations without even having to leave the document. You do not want to read this about yourself in an opinion, as I was forced to once write, "[appellant's] citation to *Bauer* and *Martin* reflects a lack of effort in researching the case law on the part of his appellate counsel."

Lesson 5:
The 24-hour rule

In the heat of battle and with increasing reliance on emails and even text messages for the bulk of correspondence with opposing counsel, a bad situation can become worse when an attorney does not follow the 24-hour rule. In most instances, write that "nastygram" as a cathartic exercise, then wait until the next day to send it after you have had time to cool down, read, and edit. A string of dozens of nasty emails provide little support for a legitimate discovery dispute and do not constitute personal consultations to resolve a dispute under Civ.R. 37.

This also applies to brief-writing. Ad hominem attacks, while cathartic, are not persuasive. Worse yet, never disparage the trial court judge or the appellate judge who authored the judgment or opinion on appeal. You are sorely mistaken if you believe that judge does not follow the case up to the next level, even reading the briefs or watching oral argument on the court website. With the advent of "Google searches" and briefs available on Lexis, I was shocked to find an appellant attempting to undercut my opinion in a medical malpractice action by referring to me by name and citing how many cases I had had with that particular carrier where no amount was paid when I was in practice. Apparently the attorney forgot that two other judges concurred in that judgment and opinion.

Lesson 6:
Do not lose your trial lawyer passion at oral argument and do not waive argument.

Maybe it is the appellate courtroom setting or maybe it is the effect of a three-judge panel staring down from the bench, but I have seen trial lawyers lose the passion about their case they once displayed in their closing arguments to a jury when they appear for oral argument. If you believe in your case, show it. You did at the trial court level and you should at the appellate court.

I found this observation from a law review article on ethical appellate advocacy to be so true, "Many appellate lawyers equate timidity with deference to the court, and equate such deference with respect. Unfortunately, the lack of passion often displayed in appellate practice may lead reviewing courts to the conclusion that a case or claim is so lacking in legal or equitable merit that the client's own lawyer has little or no interest in the merits of the appeal. Ethical representation simply does not foreclose aggressive advocacy."[1]

Oral argument has real value. I have seen judges change their view of a case based on oral argument. Oral argument gives you a second bite at the apple in order to clarify a point or correct a misapprehension. If you waive oral argument, it may be a missed opportunity for you to answer questions the judges may have about your case.

Lesson 7:
Watch what you put in a footnote.

Here is an example of an "errant" footnote in a trial court brief that caused a loss:

Law and Argument

Defendant's counsel was justified in seeking the deposition of Ms. Smith and plaintiff's counsel's motion to quash was frivolous conduct under R.C. 2323.51. (footnote*)

(*footnote)-Defendant is not proceeding under Civ.R.37, only under R.C. 2323.51.

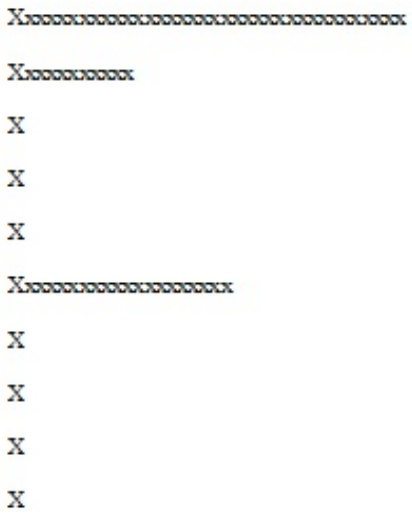
The question before the court was the issue of sanctions under *both* Civ.R. 37 and R.C. 2323.51. The trial court read this footnote and found that the defendant was abandoning the motion for Civ.R. 37 sanctions, which was not the case.

Try to use footnotes for tangential information, such as alerting the reader to a change in the code section, or as an aside.

Lesson 8:
Presentations using graphics and bulleted information that you have used for your jury trial are also effective tools in an appellate brief.

More and more judges read briefs on a screen. As readers obtain information from websites as opposed to the printed page, studies have shown that the reader's brain has been retrained. When you recognize that readers want information quickly and now scan, as opposed to reading each word or line by line, you will then recognize that your brief writing must adapt. I listened to a fascinating presentation on this topic by a Houston appellate lawyer, Robert Dubose.[2]

Mr. Dubose explained that eye-tracking studies demonstrate that screen readers scan a page of text in an "F-shaped" pattern:[3]



The studies suggest that screen readers are more likely to do four things: one, look for headings and summaries; two, read the first paragraph of the text more thoroughly than the balance; three, read the first sentence of the paragraph, but skim the balance; and four, look for "structural clues" down the left side of the page.

Mr. Dubose posits lawyers and judges are not immune from the long-term effects of screen reading despite our training which relies heavily on reading case law text. As demands on our time grow, he suspects most legal readers now "practice a hybrid of screen reading and deep reading." The legal reader will skim, looking for useful sections, which when found, will be read more in depth.

So should a legal writer adapt? I am of the opinion that we must. While I had the luxury of more time to read and research as an appellate judge, the trial court judge does not have that luxury, and in some courts the judges have no law clerks to assist. Your clients will also appreciate memos written in this style.

How does a legal writer adapt to effectively reach this new reader? Here are some of Mr. Dubose's examples and tips and some of mine:

- Be concise.
- Do not fear using shorter paragraphs without huge chunks of single spaced, doubled indented text.
- Use headings (with the important headings appearing at or toward the top of the page), outlines, bulleted lists where appropriate. Below is an example of a "Statement of the Case" section of an appellate brief written in this style:[4]

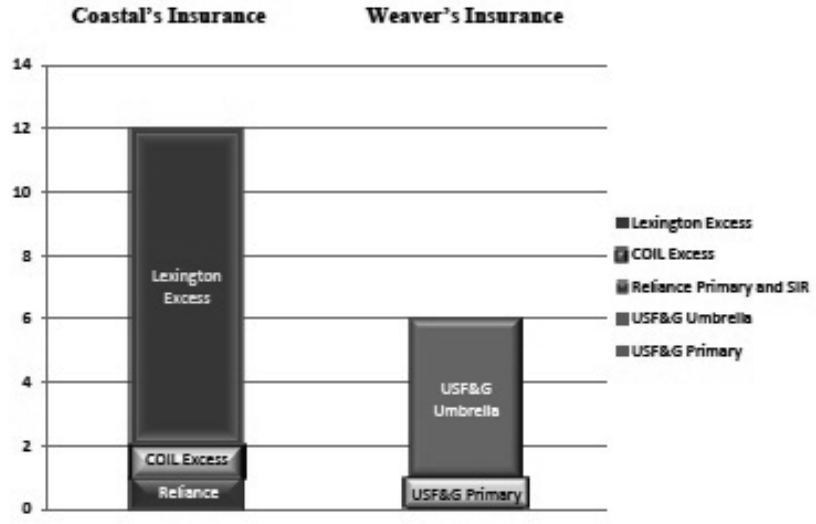
STATEMENT OF THE CASE

Nature of Case	Insurance-coverage dispute involving a claim for declaratory judgment and counterclaims for breach of contract and subrogation. CR 1:78-91, 92-100.
Trial Court	129th Judicial District Court, Harris County, Texas, Hon. Michael Gomez presiding
Course of Proceedings	After Judge Grant Dorfman granted summary judgment for Coastal on grounds not at issue in this appeal, CR 1:101, this Court reversed and remanded for further proceedings. *Coastal Ref. & Mktg., Inc. v. U. S. Fid. & Guar. Co.*, 218 S.W.3d 279 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). After a jury trial, Judge Gomez rendered final judgment. CR 7:1625-28.
Trial Court's Disposition	Judgment that Coastal, COIL, and Lexington recover from USF&G: • Actual damages of $6 million • Attorney's fees through trial of $1,039,054.92 • Attorney's fees for post-judgment motions and appeal of $170,000 • Pre and post-judgment interest. CR 7:1625-28.

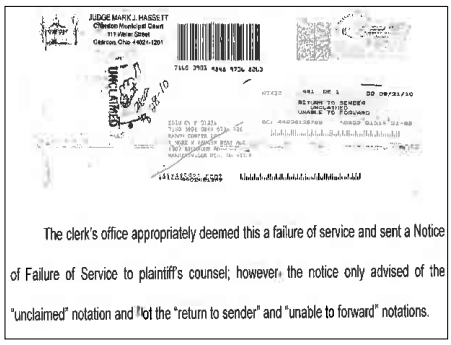
- Lead off a paragraph with a "topic sentence" that tells the reader what they are about to read.
- Incorporate graphics that illustrates and summarize the text, which is especially helpful for the "visual learner." A graph or chart like the one below also breaks up the text, making it easier to read:[5]

Coastal was insured under two towers of insurance coverage.

Coastal was insured under two separate sets – or towers – of insurance coverage. PX 2-6. The first tower was insurance purchased by Coastal. PX 4; PX 5; PX 6. The second tower was insurance purchased by Weaver, as the primary insured, which also named Coastal, but not its parent, as an additional insured. PX 2, pp. 3, 24; PX 3, pp. 3, 10.



- Scan in a critical document instead of telling the reader to stop reading and go to Exhibit ZZ at the end of your trial court brief or in the trial court record. Here is an example of a scan I inserted in an opinion (one picture may be worth a thousand words):[6]



Lesson 9:
Know your judge or your appellate panel and their relevant decisions.

It should come as no surprise that judges like to hear themselves being quoted. More importantly, you will be one step ahead if you find a prior decision supporting your position and if it does not, you will be prepared to distinguish it or find new case law that calls that prior decision into question or outright reverses it.

Lesson 10:
If you find yourself going to the court of appeals know the record inside and out.

Print out the docket and begin with a review of the pleadings, motions, briefs and rulings so you understand the case. You can use the docket as an abstract and make further annotations as you go along. Keep a running list of potential errors, and as you review the record keep track of pertinent documents and testimony that you will need to refer to for each issue under that error. This also allows you to review your issues critically in order to pick out 3-4 maximum (in most cases) assignments of error. It will also make it easier to write your statement of facts and statement of the case with references to the record. It helps to have an electronic version of the transcript or a fully functional PDF version.

If you were not the trial counsel, take the time to do a thorough interview of the trial counsel and maybe even the client who sat through the trial. You are looking for critical portions of the testimony, key exhibits, rulings, instructions in order to arrive at a road map for the appeal, identifying potential issues for appeal. With this map you can begin an intelligent review of the record during which you may find new issues and eliminate others.

Finally, when in argument, resist saying, "I was not trial counsel, so I cannot tell you what occurred." Armed with this intimate knowledge of the record you will be prepared for any question thrown from the bench.

Conclusion

I end with a few choice quotes from United States Supreme Court justices whose words echo the lessons learned during my time on the appellate bench:[7]

- "It isn't necessary to get your point across to put down the judge who wrote the decision you are attempting to get overturned. It isn't necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief. Those are just distractions. You should aim to persuade the judge by the power of your reasoning and not by denigrating the opposing side." Justice Ginsberg
- "[G]ood counsel welcomes, welcomes questions." Justice Scalia
- "I have yet to put down a brief and say, 'I wish that had been longer.'" Chief Justice Roberts ■

End Notes

1. J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. Miami L. Rev. 341, 383 (April 2005).
2. Dubose, *Legal Writing for the Rewired Brain: Communication in a Paperless World*, NFJE Seventh Annual Judicial Symposium: Applied Science and the Law (paper presented July, 2011).
3. *Id.* at 11.
4. *Id.*
5. *Id.*
6. *Denittis v. Aaron Construction, Inc.*, 11th Dist. No. 2011-G-3031, 2012-Ohio-6213, ¶ 57 (Trapp, J. dissenting).
7. Garner, *Interviews Conducted by Bryan A. Garner*, The Scribes Journal of Legal Writing (Vol. 13, 2010).

Janet Lowder is a principal at Hickman & Lowder Co. L.P.A. She can be reached at 216.861.0360 or jlowder@hickman-lowder.com.

Protecting Government Benefits Proceeds For Your Client

by Janet Lowder

I. INTRODUCTION

Current and continuing eligibility for government benefits is an important consideration when a litigator accepts a liability case. Accident and illness induced injuries often cause a permanent disability preventing the person from working and providing self-support. Older individuals are even more vulnerable because they often already have a reduced capacity to care for themselves. Coordination of the settlement with new or continuing eligibility for governmental benefit programs can be essential to helping the injured individual adjust and sustain as independent and comfortable life as possible.

A critical period for governmental benefits is often immediately after the injury or illness, at least until such time as the settlement is made. Litigators, focusing on the lawsuit, may not be prepared to plan for the current and ongoing eligibility of government benefits for their client, which could have a greater effect on their future welfare than the net value of the settlement that the client eventually receives.

Benefits received by other family members should always be considered but are often overlooked. Receipt of settlement funds by the plaintiff, or parents or spouse, could have unforeseen consequences on the eligibility of other family members for benefits they may need. For example, an allocation of an amount for loss of services to a parent can cause the child to lose Supplemental Security Income (SSI) and Medicaid even if a special needs trust is utilized for the child's settlement.

Legal malpractice claims against personal injury attorneys regarding advice and settlement and/or negotiation issues are on the rise due to a lack of consideration of one or more of these issues.

II. PRESERVATION OF GOVERNMENT BENEFITS

Many persons with disabilities depend on government benefit programs for income and/or health care coverage. Some programs, such as Social Security Disability Insurance (SSDI) and Medicare, may be available regardless of the recipient's income or property. Eligibility for these benefits is determined by prior work history, not by current financial assets. In contrast, need-based programs, such as SSI and Medicaid, have strict income and asset guidelines for eligibility. Medicaid provides coverage for medical expenses, including prescription drugs, in-home health care services, and payment for long-term nursing home care.

Many non-disabled low-income families in Ohio are on the Medicaid programs Healthy Start (for minor children) or Healthy Families (which also includes the parents of minor children). Participation in these low-income Medicaid programs is expected to grow tremendously next year when the Medicaid expansion under the Affordable Care Act goes into effect. This type of coverage will be expanded to include non-disabled, low-income adults without minor children. Eligibility for these programs is based on household income only; disability is not a factor and there is no resource test.

Receipt of assets or income from any source,

such as a personal injury settlement or inheritance, can impact one's eligibility for these need-based programs. A chronically ill or severely disabled person may be otherwise uninsurable,[1] and the assets received from the settlement may be insufficient to privately pay for the care provided by Medicaid. Federal and state laws permit a disabled individual to preserve assets in a trust to pay for supplemental needs and care while maintaining eligibility for Medicaid and other government benefits.

Any case in which the plaintiff is disabled should be analyzed to determine if a special needs trust is appropriate. In cases where the disability is severe, the need for government benefits should be reviewed early in the case. Your clients may be eligible to receive various benefits which could make their lives more comfortable even while the case is pending, which may also make resolution of the case easier, as the clients will have a better understanding of the benefits available, the value of those benefits, and the methods of protecting their eligibility after the settlement. Moreover, by obtaining eligibility for Medicaid waiver programs which do not deem income and assets of the spouse or parents to the injured person, allocation of a portion of the settlement to the spouse's loss of consortium claim or the parents' loss of services claims will not affect the Medicaid eligibility of the injured family member.

When making a determination of whether a special needs trust is appropriate in a case, consider whether the disability meets the Social Security definition. You cannot use a special needs trust to protect low-income Medicaid eligibility for a non-disabled person. Also compare the anticipated costs of care with the expected net settlement proceeds. This analysis should be based on the person's life expectancy and lifetime care plan, the expected growth of the funds under different investment models or the proposed structure, and how long the funds will last both with and without Medicaid and other government benefits. Alternative payment sources or providers of services must also be determined. These include additional income sources, such as Social Security Disability Insurance, private disability insurance, private health insurance and other government insurance programs. Even if private insurance is available, the limitations of this coverage must be reviewed carefully. The Affordable Care Act has abolished many limitations, such as caps, and pre-existing condition exclusions. A child's coverage under the policy may terminate at age 26.

Despite the Medicaid payback requirement upon the death of the beneficiary, the special needs trust often preserves more funds for other family members than would be available if the trust were not used. Medicaid generally pays for services and equipment at a much lower negotiated rate than the individual would pay privately.

III. OVERVIEW OF GOVERNMENT BENEFITS

A. Benefits **Not** Based On Financial Need

Benefits not based on financial need include Social Security Disability Insurance (SSDI) and Medicare.[2] Receipt of settlement funds will not affect eligibility for these benefits. These benefits will be lost only if the person can return to work and is no longer disabled.

SSDI. An individual is entitled to SSDI benefits if he or she is:

- under full retirement age;
- has at least 20 credits in the 40-quarter period ending with the quarter in which the individual became disabled (the 20/40 rule) and is fully insured (Social Security Handbook, http://www.ssa.gov/ OP_Home/handbook/ssa-hbk.htm, §207. See §203 for the definition of fully insured [generally one quarter for each year after attaining the age of 21 up to a maximum of 40 quarters] and currently insured [generally the 5-year period following full-time work] and §208 for a special exception to the 20/40 rule for workers disabled before age 31); and
- is disabled (To be disabled within the meaning of the Social Security Act, the individual must have a severe, medically determinable physical or mental impairment which has lasted or is expected to last for one year or to result in death. In addition, the impairment must make the individual unable to engage in "substantial gainful activity" 20 C.F.R. §404.1505 for SSDI, and 20 C.F.R. §416.905 for SSI).

The person must file an application for benefits and endure a waiting period of five consecutive months beginning with a month in which the worker was both insured and disabled.

An adult child who became disabled before age 22 and has remained continuously disabled may draw benefits on the record of a disabled, deceased, or retired parent as long as the child is disabled and unmarried. These benefits are often referred to as CDB (Childhood Disability Benefits) or DAC (Disabled Adult Child) benefits.

Medicare . Medicare is a federal health insurance program. SSDI beneficiaries are entitled to Part A Medicare benefits after 24 months of qualified disability. There are some exceptions for specific conditions, for example the waiting period is one month for a person disabled with ALS. There is no waiting period for a person with End Stage Kidney Disease

(ESRD) on kidney dialysis who does home dialysis, there is a three-month waiting period for patients receiving treatment at a dialysis center, and coverage may start up to two months before a patient receives a transplant if certain criteria are met.

Medicare Part A covers inpatient hospital services, home health, and hospice benefits. It also pays for a very limited amount of Skilled Nursing Home care, but not custodial care. SSDI beneficiaries who are eligible for Part A benefits may enroll for Part B and D benefits but must pay a premium. Part B benefits cover physicians' charges, while Part D covers prescription drugs. There are significant deductibles and co-pays unless the person opts for a managed care program called Medicare Part C.

Under current law, there are no resource or income limits for Medicare eligibility, however Part D has enhanced drug coverage for persons with low income and resources. There are several Medicaid programs which pay the Medicare premium and the copays and deductibles.

B. Benefits Based On Financial Need

Need-based programs, such as Supplemental Security Income (SSI) and Medicaid, are often critical to the care of the disabled individual. Medicaid can be especially important if the individual is uninsurable or needs extensive home care. There are a number of other need-based benefits which are not addressed in this outline, but included in the accompanying table, which must be carefully considered when settling a case. These include the Bureau for Children with Medical Handicaps (BCMH), Section 8 housing, various utility assistance programs, Healthy Families and Healthy Start Medicaid for low-income families, and food stamps.

Supplemental Security Income (SSI). SSI is a federal welfare program that provides a minimum level of income for some needy persons. To be eligible for SSI a person must be age 65 or older, blind, or disabled; a U.S. citizen (with limited exceptions); and not a resident of a public institution. In addition, the individual must meet the income and resource tests. Their income must be less than certain standards, and they may have no more than $2,000 of countable resources ($3,000 for a couple.)

Income is anything received in cash, with the following exclusions: (1) The first $20 of most income received in a month; (2) The first $65 of earnings received in a month and one-half of earnings over $65. "Deemed" income is income of another attributed to the claimant. Deeming is an issue when the minor child lives with an ineligible parent. Deeming stops the month following the child's 18th birthday.

An unmarried individual can have no more then $2,000 of countable resources. A countable resource is property which is both **owned** by the individual, **available** to him or her, and not exempt. Generally, countable resources include cash, liquid assets, and any real or personal property that an individual owns (or has the right to liquidate) and could convert to cash to use for his or her support and maintenance. 20 C.F.R. §416.1202.

Non-countable resources include:

(1) A home owned and occupied by the person with a disability, or if institutionalized, in many states, a home the person intends to return to.

(2) One automobile, if the vehicle is used for transportation for the individual or a member of the individual's household.

(3) Household goods and personal effects.

(4) Irrevocable funeral and burial arrangements. See POMS §SI 01130 for a list of non-countable resources.

Transfers of resources for less than fair market value within 36 months of an application for SSI will result in the imposition of a period of ineligibility (up to 36 months), which is determined by dividing the uncompensated value of the amount transferred by the federal benefit rate, plus any state supplement benefit rate.

Amounts owned on the first of the month are resources, while amounts received during the month are income. "Income" retained into the next calendar month is then considered a resource. Income and resources become countable only when they are available to the recipient (or could be available upon request.) An individual has a duty to report increases in income or resources within 10 days of receipt.

Medicaid. Medicaid is a joint federal and state funded program to provide medical services to the aged, blind, and disabled who are financially needy. In Ohio, it is administered by the county offices of the Department of Job and Family Services. The federal government provides about 60% of the funding and delegates the administration of each state's plan to the state. Income and resource tests are almost identical to those used for SSI eligibility, except the resource limit for a single person is $1,500 and for a married couple is $2,250.

Medicaid provides many services that are required or desperately needed by persons with disabilities or special needs.

(1) The federal Medicaid statute requires the state to pay for certain listed medical services. 42 U.S.C. §§1396a(a)(10)(A) and 1396a-(a)(10)(C), as well as 42 C.F.R. §§440.210, 440.220 and 440.230. These include: inpatient hospital services; outpatient hospital services; physician services; physical therapy; prescribed drugs; skilled and intermediate nursing services; home and community care for disabled individuals; community support living arrangement services; personal care services; case management services; and emergency and non-emergency medical transport.

(2) Ohio has several waiver programs which provide Medicaid services to individuals who live at home rather than in an institution. Waiver services include case management; homemaker services; home health aids; and personal care services. 42 C.F.R. §§441.300 et seq.

(3) State Medicaid Plans must provide for home health care for all persons entitled to nursing facility services.

IV. OPTIONS TO PRESERVE BENEFITS

A. Special Needs Trust or Medicaid "Payback"" Trust. 42 U.S.C. § 1396p(d)(4)(A); O.A.C. § 5101:1-39-27.1, ORC 5111.151

The special needs trust (SNT) must meet the following three requirements in order to be an exempt resource for purposes of Medicaid and SSI eligibility. (1) The trust must be established by a parent, grandparent, legal guardian, or a court. (2) The trust must be for the sole benefit of a beneficiary who is an individual under age 65 (trust remains valid after 65 but additional assets cannot be added), and the beneficiary must be disabled according to the Social Security definition (42 U.S.C. § 1382c(3)). (3) The trust must provide that upon the beneficiary's death, the state is reimbursed from the trust for all Medicaid benefits paid on behalf of the beneficiary.

Before implementing a special needs trust or pooled trust, you should consider whether the trust is the right answer. The cost of creating and funding the trust must be considered. In addition, the trust will incur administration expenses, including trustee's fees, attorneys' fees, investment fees, and tax return preparation fees. These costs may be excessive in relation to the amount in question. The beneficiary may not need SSI or Medicaid after receiving the settlement proceeds if the funds available to the injured person exceed his or her monthly care needs.

B. Pooled Trust. 42 U.S.C. § 1396p(d)(4)(C); O.A.C. § 5101:1-39-27.1; ORC 5111.151

The pooled trust is similar in most respects to the payback trust discussed in section IV.A. above, with the following exceptions. The trust may be established by the disabled individual himself or herself, as well as by the parent, grandparent, legal guardian, or court; the trust may be established for a disabled beneficiary over the age of 65,

the trust must be managed by a non-profit association, a separate account must be maintained for each beneficiary, with the individual accounts pooled for investment and management, and an option exists whereby funds which are retained by the trust at the death of the beneficiary are not subject to payback to the state. Several pooled trusts are available in Ohio.

The pooled trust is appropriate in cases in which the assets are insufficient for a corporate fiduciary to handle, when there is no suitable individual to serve as trustee, when the beneficiary is over the age of 65, when the beneficiary is competent to establish the trust, has no living parent or grandparent, and does not want to go through the court.

A special needs trust cannot be established for an individual over the age of 65. The Center for Medicare and Medicaid Services (CMS) has indicated that states may consider transfers to a pooled trust after age 65 as a disqualifying transfer for nursing home Medicaid eligibility; Ohio has not yet taken that position. SSI does penalize such transfers.

C. Non-Disability Medicaid Programs

When a low income family receives a settlement it is important to analyze if the settlement will affect their eligibility for these programs. If a parent receives a settlement here are the issues to consider:

- If the settlement is structured, the monthly structure payments will be treated as income. Does the structure put the family's income over the applicable limits for the program? If so, what will the cost be to purchase private insurance?
- Income for eligibility purposes includes household income of all family members, including a child who is receiving a personal injury settlement.
- If a child loses SSI/Medicaid because of a settlement can the child replace the lost Medicaid with Healthy Start coverage?
- Because these programs are not based on disability, a SNT will not protect the benefits. The family may not understand the difference between Medicaid based upon disability and Healthy Start based primarily on the household income.
- You may have family members on disability Medicaid and others on Healthy Start in the same household.

D. Spending Down and Other Alternatives

Alternatives to an SNT for smaller settlements include spending down the funds quickly to maintain benefit eligibility. The funds must be spent for the benefit of the disabled recipient, and if exhausted by the end of the calendar month in which received, will not affect Medicaid eligibility. A month of SSI benefit is likely to be lost. Settlement funds can be spent for the plaintiff as follows:

- Purchasing exempt resources, such as a car or home.
- Paying off debt, including mortgages and credit card debt.
- Prepaying bills.
- Quality of life expenditures, such as taking a vacation, paying for entertainment, electronics, etc.

Other methods of preserving benefit eligibility include making larger allocations to consortium claims or other derivative claims (always keeping in mind the deeming rules), or using traditional Medicaid planning techniques, such as transfers of assets for programs without a transfer penalty, and using structured settlement payments within the eligibility income limits. A parent of a child on SSI and Medicaid waiver can transfer funds the parent receives without penalty to maintain eligibility for the child.

V. THE ROLE OF THE SPECIAL NEEDS TRUST ATTORNEY

By consulting with an attorney experienced in drafting special needs trusts and knowledgeable about benefit programs, the personal injury attorney can avoid liability for failing to effectively protect benefit eligibility, or for failing to address issues involving Medicare and Medicaid liens. At the very least, personal injury attorneys owe it to their clients to alert them to the benefit issues a settlement may generate, and refer the client for further legal advice, so the client leaves happy and stays happy. The attorney consulted should be available to do the following:

- Determine which public benefits are in place or can be accessed for the injured person and family members;
- Review the life care plan or obtain an independent assessment of actual future needs; Analyze allocation issues where there are derivative claims;
- Recommend and prepare 468b settlement funds when appropriate;
- Work with the structured settlement agent to determine an appropriate structure to meet the plaintiff's needs;
- Help identify and resolve Medicaid and Medicare liens;
- Prepare Medicare set-aside arrangements when necessary;
- Attend mediation and court hearings;
- Draft or review court filings in probate and/or trial court;
- Review settlement agreements and releases;
- Draft an appropriate trust and explain it to the beneficiary and the family;
- Prepare other estate planning

documents for competent beneficiaries when appropriate, including a will, power of attorney, and health care directives;

- Find an appropriate trustee and trust advisors, arrange for the trustee to meet the beneficiary and family, negotiate trustee fees;
- Instruct the trustee and advisors concerning their responsibilities and administration of the trust, including appropriate distributions from the trust;
- Prepare funding instructions and obtain taxpayer identification number;
- Give formal notice of the trust and funding to public benefit agencies;
- Defend the trust in the context of eligibility reviews or when benefits are improperly terminated;
- Provide representation or advice in connection with the purchase or construction of an accessible residence or purchase of an adapted vehicle;
- Provide ongoing advice and representation to the family or the trustee in administration of the trust, including filing applications to expend, accountings, etc. for trusts under probate court supervision;
- Incorporate subsequent settlements into the trust, by appropriate court order if necessary;
- Upon the death of the beneficiary, advise the trustee concerning termination of the trust, repayment to the state, and final distribution;
- Provide a CYA letter if the client decides not to maintain benefit eligibility.

TEN RULES FOR LOW INCOME OR DISABLED CLIENTS

1. Verify existing benefits for the injured party as well as all family members. Use Table 1 as a guide. Get copies of Social Security award letters and get copies of all health coverage cards, including Medicaid, Medicare, and private health insurance.
2. If the individual is disabled, evaluate eligibility for benefits early in the case. If benefits can be put in place quickly, some of the financial and caregiving stresses may be alleviated while the litigation is pending.
3. Be aware of deeming issues! Income and assets of parents deem to a child until age 18 for most benefits. A spouse's income and resources generally deem to the disabled spouse.
4. Always evaluate for Medicaid Waiver early if the case is appropriate. Getting Waiver in place takes time, but obtaining a Waiver before settlement alleviates difficult deeming issues.
5. Verify family income, both earned and unearned. Also verify debt for purposes of spend-down.
6. Don't wait until just before settlement to notify agencies with right of subrogation. Begin gathering this information early.
7. Remember that rules for public benefits change constantly! Techniques that work today may not work tomorrow.
8. Don't forget appropriate probate court approval if the individual is a minor child or incompetent adult, or if the settlement is for a wrongful death. It may be advantageous to seek appointment of a guardian of estate for an adult incompetent prior to probating the settlement. Waiting until you settle the case can result in delays since the court requires a Statement of Expert Evaluation, and service at least seven days prior to the hearing by a court investigator. Some counties require a background check of the applicant, and/or attendance at an educational seminar put on by the court.
9. Stay attuned to changes within the family unit, whether changes in marital status, household composition, county of residence, etc.
10. Protect yourself. Your file should document the fact that options to protect benefits and the option to structure the settlement were presented to the client. If the client chooses not to use a trust or other mechanisms to protect benefits, you should have the client sign a statement to the effect that they were advised about the options, they understand that they will lose their benefits after the settlement proceeds are received, and they have chosen not to use a special needs trust or other options. Also, remember that your client who is on need-based benefits has a legal obligation to notify Social Security and the county Department of Job and Family Services within ten days of receipt of the settlement funds. You cannot notify the government agencies without the consent of your client, but remind them that failure to notify could result in an overpayment situation requiring repayment, or a fraud investigation in the future. ■

End Notes

1. The Affordable Care Act will dramatically change the availability of health insurance to individuals with disabilities in 2014. A severely injured person may still need Medicaid for the extensive home-care and other benefits not covered by traditional health insurance.
2. Other benefits which are not based on financial need include special education services, and civil service and military survivors' benefits for disabled adult children. These include Railroad Retirement, state teachers retirement (STRS), and Ohio Public Employees Retirement (OPERS).

Ohio Government Benefits for Low Income/Disabled/Elderly

2012-2013* Asset and Income Figures

Program	Benefit	Asset Limit	Income Limit	Transfer penalty	Deeming	Comments	Right of Subro
SSI – Supplemental Security Income	Cash benefit to disabled/elderly $710 single $1,066 couple	$2,000 single $3,000 couple Some assets exempt	Earned/unearned income reduces benefit	Yes, 3 yr maximum	Yes, parent to child and spouse to spouse	SNT will protect excess assets if under 65.	No
SSDI – Social Security Disability Insurance	Cash benefit for disabled person who paid into social security and under full retirement age	No	No, but earned income may affect eligibility	No	No	Lump sum settlement or structure will not affect benefit	No, but offset against private disability
SSD – CDB – Childhood Disability Benefits	Cash benefit for child who was disabled prior to age 22, benefits start when parent retires, is disabled or dies	No	No	No	No	Child receives 50% of parent benefit if parent gets SSDI or retirement SS; 75% of benefit at parent's death Child also eligible for Medicare	No
Community Medicaid	Medical coverage for elderly, disabled, low income	$1,500 single $2,250 couple	$622 single $1,066 couple Excess income creates spend-down	No	Yes, parent to child and spouse to spouse	SNT will protect assets for disabled beneficiaries under 65; pooled SNT for elderly beneficiary 65+	Yes
Medicare	Medical coverage for age 65 and older, or any age if on SSDI for 24 months	No	No	No	No	Part B premium is $104.90, subject to income adjustment Keep in mind possible need for a Medicare Set-Aside Arrangement	Yes

*2013 Federal Poverty Limits not yet released

Program	Benefit	Asset Limit	Income Limit	Transfer penalty	Deeming	Comments	Right to Subro
Medicaid Waivers	Services to allow a person who meets an institutional level of care to remain in a community setting	$1,500	$2,130, although income > $1,385 will result in a premium	Yes – 5 year lookback	No parent to minor child deeming No deeming for spouse, once eligible	SNT or pooled trust will protect assets for disabled beneficiaries. Once on waiver, assets received by the spouse or parent do not affect the individual's eligibility	Yes
Long-term Care Medicaid	Nursing home or Intermediate Care Facility for the Mentally Retarded (ICF/MR) Medicaid	$1,500	No, but all income less $40 must be contributed to cost of care	Yes – 5 year lookback	No deeming once eligible	SNT or pooled trust will protect assets for disabled beneficiaries. Once on waiver, assets received by the spouse or parent do not affect the individual's eligibility	Yes
Medicaid Buy-In for Workers with Disabilities (MBIWD)	Health coverage for working individuals whose earnings cause ineligibility	$11,148	250% FPL $2,328 single	No	Yes	If income > 150% of FPL, premium must be paid SNT can protect resources Income from a structure can disqualify	Yes
Bureau for Children with Medical Handicaps (BCMH)	State health department benefit for medically needy children	No	Yes	No	Family income		Yes
MSP – Medicare Savings Plan	Medicaid programs to help low income Medicare beneficiaries (QMB, SLMB, etc)	Yes	Yes	No	Yes	See specific MSP programs below	Yes
QMB - Qualified Medicare Beneficiary (MSP)	Medicaid benefit; pays Medicare premiums, Medicare co-pays and deductibles	$6,940 single $10,410 couple	100% of FPL + $20 $951 single $1,281 couple	No	Yes	Structure may disqualify based on income; SNT may protect lump sum if under 65; if 65+ pooled SNT	Yes

Program	Benefit	Asset Limit	Income Limit	Transfer penalty	Deeming	Comments	Right to Subro
SLMB – Specified Low-Income Medicare Beneficiary (MSP)	Medicaid benefit; pays Medicare Part B premiums	$6,940 single $10,410 couple	120% of FPL $1,117 single $1,513 couple	No	Yes	Structure may disqualify based on income; SNT may protect lump sum if under 65; if 65+ pooled SNT	Yes
QI – Qualified Individual (MSP)	Medicaid benefit; pays Medicare Part B premiums	$6,940 single $10,410 couple	135% of FPL $1,257 single $1,703 couple	No	Yes	Structure may disqualify based on income; SNT may protect lump sum if under 65; if 65+ pooled SNT	Yes
QWDI – Qualified Working Disabled Individual (MSP)	Medicare benefit; pays Medicare Part A premium for people who return to work and lose Medicare based on SGA but still disabled and under age 65	$4,000 single $6,000 couple	200% of FPL+$20 $1,882 single $2,542 couple	No		Structure may disqualify based on income; SNT may protect lump sum	Yes
Healthy Start-Children's Health Ins. Program	Health insurance for low income children under age 19 w/o creditable insurance	No	200 % of FPL for family size	No	Yes	Structure may disqualify child based on excess income; lump sum will not affect benefit	Yes
Healthy Families	Health insurance for low income individuals with children under age 19	No	90% of FPL for family size	No	Yes	Structure may disqualify family based on excess income; lump sum will not affect benefit	Yes

Program	Benefit	Asset Limit	Income Limit	Transfer penalty	Deeming	Comments	Right to Subro
SNAP – Supplemental Nutrition Assistance or Food Assistance (formerly food stamps)	EBT card to pay for food; amount varies with # in household, income and shelter expenses	Household assets below $2,000 or $3,250 if elderly or disabled	130% FPL for household unless elderly or disabled, then 165% FPL. Income reduces benefit	Yes, 1 yr maximum	Yes	Structure may disqualify or reduce benefit based on income; food stamp trust rules more restrictive than Medicaid/SSI SNT rules	No
OWF – Ohio Works First (Ohio's Temporary Assistance to Needy Families Program)	Cash assistance to families with minor children; child care subsidy if parent works or is in school	No	50% FPL Income reduces grant	No	Total household income is considered	Structure may reduce or eliminate benefits based on income	No
LIHEAP – Low Income Home Energy Assistance Program	Assistance to pay energy bills or weatherize home	No	60% of State Median income $36,657 for family of 3	No	Total household income is considered	Structure may reduce or eliminate benefits based on income; no trust to shelter lump sum if state has an asset limit	No
VA Pension	Cash assistance to low income veterans and dependents	Varies based on age	Income reduces benefit	No, although penalty is proposed	Spouse to spouse	Structure may reduce or eliminate benefits; lump sum annualized over 1 year; VA does not accept grantor SNT	No
Aid & Attendance	Cash benefit added to VA pension if care costs high	Varies based on age	Income reduces benefit	No, although penalty is proposed	Spouse to spouse	Structure may reduce or eliminate benefits; lump sum annualized over 1 year; VA does not accept grantor SNT	No
Section 8	Rent subsidy capping rent at 30% of household income	None	None	For 2 yrs 2% of gift imputed as income	Yes	Structure may increase rent because rent based on percentage of income	No

Stuart E. Scott is a principal at Spangenberg, Shibley & Liber Law LLP. He can be reached at 216.696.3232 or sscott@spanglaw.com.

Avoid The Limitation Act Trap:
A Maritime Primer For Personal Injury Lawyers

by Stuart E. Scott

You've received a call from a widow who tells you that her husband was killed six weeks ago when a speedboat collided with his jet ski. You learn that the operator of the speedboat was intoxicated, driving the boat too fast for the conditions and was not maintaining a proper lookout when the speedboat sliced into the idling jet ski. She tells you the accident occurred on Lake Erie. This gives you pause because you know this potentially could be a "maritime" claim. But, you do some research and learn that under the Savings to Suitors Statute, you can pursue the case as an Ohio wrongful death claim in state court. Since you are an experienced personal injury lawyer, and this appears to be a pretty solid liability case with significant damages, you agree to represent the widow.

You file the lawsuit in state court bringing claims for wrongful death and survivorship. After the Defendant files his Answer, you start engaging in discovery. The initial discovery is all pointing to the fact that the cause of the collision was the fault of the speedboat operator. So far, so good. You send out the Notice of Deposition to depose the boat operator when suddenly, the case takes a bizarre twist. The Defendant files a Complaint in federal court against your client. Along with the Complaint is a Motion to Stay your state court case. Also submitted is a marine surveyor's assessment of the value of the boat that killed your client's husband. The vessel value is $32,000. After reading the pleadings a couple of times, you begin to realize that the defense lawyer is attempting some sort of "admiralty law" defense to limit the total value of the case to the value of the Defendant's boat. Your seemingly straightforward personal injury case on the water has suddenly become far more complicated.

This scenario is one of the pitfalls of litigating maritime personal injury cases. This defense "maneuver" is based on the Vessel Owners Limitation of Liability Act. In the above scenario, the experienced counsel should be able to overcome this "tactic" and have the limitation removed and the case remanded to state court. In other circumstances, however, the attorney and client will not be so lucky.

The Vessel Owners Limitation of Liability Act is codified at 46 U.S. Code § 30501, *et seq*. The key provisions of the Act appear in § 30505(a) and (b), which state:

> (a) In General. Except as provided in Section 30506 of this Title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.
>
> (b) Claim Subject to Limitation. Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

The phrase "privity or knowledge" in the Act has been defined broadly by the courts and generally encompasses not only acts, events, or conditions of which the individual or corporate vessel owner actually knew, but also those of which the owner should have known. With respect to a corporate owner, "privity or knowledge" generally means the privity or knowledge of managerial employees. The "value" of the vessel is its post-casualty value.

The Act became a law in 1851 and was later amended to broaden its coverage to all, not just commercial, vessels. It was re-codified and reworded in 2006, but the substance of the Act remains the same. The Act has been applied to pleasure craft, including jet skis, where the claim occurs on navigable U.S. waters. *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225 (11 Cir. 1990).

If and when the Act is applied to cap the damages exposure of the vessel owner, the potential for legitimate claimants being left uncompensated or inadequately compensated can arise whenever there are deaths or serious personal injuries following an accident, and the vessel involved has relatively little value. These inequities can occur even if the vessel owner has millions of dollars of liability insurance coverage.

One of the most dramatic examples of the potential inequities the Act can occasion is the sinking of the Titanic. After it sank, killing 1,517 people, Oceanic Steam Navigation C.O., Ltd., the owner of the grand liner, petitioned the federal district court in New York City to limit its liability to the post-casualty value of the vessel. The Court's April 21, 1913 opinion, which in clinical terms describes the tragedy, identifying key facts relevant to the Act's potential protections for the vessel owner, reads in pertinent part:

> The Titanic came into collision with an iceberg, as a result of which she sank about 2:20 AM on April 15, 1912; that 711 persons were saved in the boats; that her Master, and many of her officers and crew, and a large number of passengers, perished; that the vessel, her cargo, the personal effects of the passengers and crew, the mails, and everything connected with the vessel, except 14 lifeboats and their equipment, became a total loss; that the value of the lifeboats saved and of the pending freight and passenger monies did not exceed the sum of $91,805.54; and that the petitioner claimed exemption from liability. The petition prayed that the court adjudge the petitioner's liability be limited to the value of the petitioner's interest in the steamship at the end of the voyage.

In other words, since the Titanic itself was a total loss, the limitation fund to which the survivors could lay claim in court consisted of only the dollar value of the remaining 14 lifeboats and "pending freight," together totaling less than $92,000.

This same defense can and will be utilized by defense lawyers and their insurance liability carriers to limit their indemnity exposure in typical recreational boating accidents that occur on navigable waters, including lakes, rivers and inland navigable waters.

Fortunately, The Effect of the Act Can Be Limited or Eliminated in Most Recreational Boat Crashes

While terribly unjust results have been effectuated by this Act, and no doubt there will be others in the future, there is an escape path for many claims involving recreational boating accidents. While the Act provides corporate ship owners a generous measure of protection not available to any other enterprise in our society, it does not provide the same protection to owners of recreational boats who have "knowledge" of the events giving rise to the claim. Thus, in the typical boating accident scenario where the boat owner is operating the boat or is at least on board, the Plaintiff will be able to defeat the limitation provision of the Act. This is particularly true where the boat owner's negligence is the alleged cause for the crash or event that resulted in harm.

Where the boat owner was not present and did not commit an act of active negligence that contributed to cause the claim, the claim will likely be subject to the post-crash vessel value.

Plaintiff's counsel must be alert to the

fact, however, that after they receive the Complaint for Exoneration from Limitation of Liability, they must file an Answer to that Complaint, and submit a Claim within the period allowed by the federal court. If the Plaintiff or her counsel fails to file an Answer or does not submit a claim within the claims period, the entire claim may be lost. The Answer and Claim must be filed in the federal court proceeding before any attempt to remove the case back to state court.

Destruction of Right to Jury Trial

In the example story, there was a single claim arising out of the negligence of the boat owner. However, if this had been a collision resulting in multiple injuries, with multiple claims filed against the Defendant, the action would have remained in federal court for adjudication. This is because under the Act, the federal court must adjudicate all of the claims together in a single proceeding. The federal court will determine the liability issue, damages and the distribution of the competing claims to the limited (and likely inadequate) fund. There is no right to a jury trial for this admiralty proceeding. However, where there is only a single claimant, the federal courts will typically remand the case back to the state court for trial on the merits.[1] See *In Re: Mucho K, Inc.*, 578 F.2d 1156 (5th Cir. 1978).

Final Thoughts

It is good practice by Plaintiff's counsel to always anticipate this defense strategy before filing the case so that a determination can be made as to the viability of the Limitation defense, the value of the vessel and the number of potential competing claims. This analysis is important for establishing client expectations at the outset of the case. Moreover, counsel should look for and examine all potential contributing causes of the crash that can be traced back to the owner's knowledge. Issues such as boat maintenance, compliance with on-board safety equipment requirements and entrustment of the craft to an inexperienced operator will be vitally important in defeating the Limitations defense where the owner of the boat was not present on the boat at the time of the accident. ■

End Notes

1. The Plaintiff must enter certain stipulations that he will preserve the federal court's jurisdiction to hear the vessel owner's defense on limitation of damages under the Limitations Act after a jury trial in the Plaintiff's favor. *Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995). As a practical matter, this will be a moot point if the Plaintiff proved his or her case and obtained a Plaintiff's verdict for negligent conduct against the boat owner in the state court proceeding.

Michael A. Hill is an associate with Spangenberg, Shibley & Liber Law LLP. He can be reached at 216.696.3232 or mhill@spanglaw.com.

Stuart E. Scott is a principal at Spangenberg, Shibley & Liber Law LLP. He can be reached at 216.696.3232 or sscott@spanglaw.com.

Young v. Cuyahoga County Board of Mental Retardation: Holding Ohio's Political Subdivisions Accountable for Reckless Personnel Decisions

by Michael A. Hill and Stuart E. Scott

In *Young v. Cuyahoga County Board of Mental Retardation*, 8th Dist. No. 97671, 2012-Ohio-3082, the Eighth Appellate District confirmed that political subdivisions can be held directly liable for their reckless personnel decisions thereby ensuring that municipalities use safety as the first measure of performance in hiring, supervising and retaining employees.

The *Young* case arose from the tragic death of Kimberly Young on March 17, 2008. On that date, Kimberly was a pedestrian walking southbound across Chester Avenue near the East 55th Street intersection in Cleveland, Ohio, when she was struck and killed by a commercial bus that was owned and operated by the Cuyahoga County Board of Mental Retardation and Developmental Disabilities ("MRDD"). The bus was driven by an MRDD employee named Dennis Simpson. Post-crash testing revealed that Simpson had large amounts of cocaine in his system at the time of the collision. Simpson later pled guilty to operating a motor vehicle while intoxicated and aggravated vehicular homicide.

The Estate of Kimberly Young filed a lawsuit alleging that Dennis Simpson negligently operated the MRDD bus while in the course and scope of his employment with MRDD, and therefore, MRDD was vicariously liable for the conduct of its employee under the doctrine of *respondeat superior*. Pretrial discovery revealed that Simpson had multiple convictions for operating motor vehicles while intoxicated and that each of these convictions predated the collision that killed Kimberly Young. Further investigation uncovered that both offenses occurred during the period when Simpson was employed by MRDD as a commercial bus driver and that MRDD was aware of these offenses.

Based on this information, the Plaintiff amended his Complaint to include a claim that, in addition to being vicariously liable for Simpson's conduct, MRDD was directly liable for recklessly hiring, retaining and failing to appropriately supervise Simpson in permitting him to operate its commercial buses without imposing any chemical dependency evaluations or subjecting him to any enhanced random drug or alcohol testing. The Plaintiff argued that by assigning Simpson to operate its commercial buses without limitation or precaution, MRDD knowingly placed Kimberly Young, the general public and the developmentally disabled individuals who rely on its services in peril.

MRDD filed a Motion for Judgment on the Pleadings pursuant to Ohio Civil Rule 12(C) arguing that Ohio's Political Subdivision Tort Liability Act, R.C. 2744, entitled MRDD to immunity on Plaintiff's claim that MRDD was directly liable for recklessly hiring, retaining and failing to appropriately supervise Simpson. The trial court denied that Motion without elaboration.

The issue before the Eighth Appellate District was whether R.C. 2744 forecloses a claim for direct liability against a political subdivision. The Court of Appeals began its examination with the three-tiered analysis set forth by the Supreme Court of Ohio for determining whether a political

subdivision is immune from tort liability. First, R.C. 2744.02(A)(1) provides that, as a general rule, political subdivisions are immune from tort liability. Second, R.C. 2744.02(B) enumerates five specific exceptions to immunity, and the plaintiff has the burden of proving that one of those exceptions applies. Third, if one of the exceptions enumerated at R.C. 2744.02(B) applies, the political subdivision has the burden of showing that one of the defenses under R.C. 2744.03 applies.

All parties agreed that MRDD is a political subdivision. Accordingly, MRDD was immune from suit unless one of the exceptions applied. Specifically, the Plaintiff claimed that R.C. 2744.02(B)(1) applied. That section provides:

> [A] political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:
>
> > (1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the course and scope of their employment.

It was undisputed that Simpson was employed by MRDD and was acting within the course and scope of his employment when he struck and killed Kimberly Young. Consequently, any fault on the part of Simpson would be imputed to MRDD, and the issue of whether MRDD could be held vicariously liable was not before the court.

The contested issue, rather, was whether MRDD could be held directly liable for its reckless personnel decisions when those decisions caused or permitted its employee to engage in acts that are excepted from immunity under R.C. 2744.02(B). That is, when a political subdivision's employee's negligence falls under one of the enumerated exceptions to liability identified in R.C. 2744.02(B), is there an independent cause of action against the political subdivision when its conduct contributes to the injury causing event?

The Eighth Appellate District answered this question in the affirmative and held that the allegations in the Complaint--specifically that despite MRDD's knowledge of Simpson's history of prior substance abuse related convictions, MRDD failed to require him to participate in any drug or alcohol program and failed to evaluate his fitness to operate a commercial bus--supported a direct claim against MRDD, independent of the claim for vicarious liability. Thus, the Court of Appeals concluded that Ohio's Political Subdivision Tort Liability Act does not foreclose a direct claim against a political subdivision. The Supreme Court of Ohio denied jurisdiction to hear the case.

As the Court of Appeals' analysis makes clear, the holding in *Young* does not provide a cause of action against a political subdivision for each and every reckless personnel decision. The Court's decision applies to those circumstances where the political subdivision's employee's acts or omissions fall under an exception provided at R.C. 2744.02(B), and there is evidence that the political subdivision's own conduct allowed, permitted or created a circumstance where this violation was allowed to occur. While the *Young* case does not apply to every personnel decision of a political subdivision, it does apply with equal force to each of the exceptions to immunity set forth at R.C. 2744.02(B). Accordingly, *Young* is not limited to claims where the underlying tort involves the operation of a motor vehicle.

In evaluating whether the *Young* holding applies to a specific set of facts, attorneys need to answer three questions in the affirmative. Does the underlying tort committed by the political subdivision's employee fall within one of the exceptions to immunity set forth at R.C. 2744.02(B)? Did the acts or omissions of the political subdivision itself contribute to causing the underlying tort? Finally, do the acts or omissions of the political subdivision rise to the level of recklessness?

Although the holding in *Young* applies to a narrow set of cases, it ensures that injured parties have the right to hold political subdivisions accountable for their reckless personnel decisions and fosters an important policy objective to use safety as the first measure of performance when hiring, supervising or retaining employees or risk exposure through the civil justice system. ■

2013 CATA Litigation Institute: A Photo Montage

Beyond The Practice: CATA Members In The Community

by Susan E. Petersen

"Consciously or unconsciously, everyone of us does render some service or another. If we cultivate the habit of doing this service deliberately, our desire for service will steadily grow stronger, and it will make not only for our own happiness, but that of the world at large." -- Mahatma Gandhi

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

CATA members Kathleen St. John of Nurenberg Paris and **Brad Zelasko** volunteered as judges for the 30th Annual Ohio High School Mock Trial competition. There were 43 teams with students from 16 Northeast Ohio high schools who competed in "trials" in the courtrooms of the Cuyahoga County Justice Center. This year's fictional case was: Did police officers violate the Fifth and Fourteenth Amendment rights of a 15-year-old student, Dakota Allen, when they obtained a statement from him (or her) in which he (or she) said s/he started a fire at a high school that caused the death of a maintenance worker? Each team argued both sides of the case during two separate trials. The students, as always, gave impressive performances playing the roles of prosecution and defense lawyers, as well as witnesses. The teams that win in the District Competition go on to the Regional, then on to the State competition.

Another mock trial event, also held at the Justice Center in downtown Cleveland, kept **CATA Board Member William ("Will") Eadie,** of the **Spangenberg Law Firm**, busy this spring. Will acted as the Regional Coordinator for the Cleveland Regional of the 2013 AAJ Student Trial Advocacy Competition. The Spangenberg firm sponsored this event, in which Cleveland hosted 16 teams from 10 law schools. Over 25 trials took place at the Justice Center, with volunteer attorneys serving as presiding judges and jurors.

Will Eadie congratulates the winning team in the Cleveland Regional of the 2013 AAJ Student Trial Avocacy Competition.

Dave Herman at the AAJ Student Trial Advocacy Competition

Volunteer Judges for the AAJ Student Trial Advocacy Competition: Will Eadie, Judge Markus, Ron Rosenfield, and Dave Herman

Volunteer Judges for the AAJ Student Trial Advocacy Competition: Donna Taylor-Kolis and Larry Zukerman

Volunteer Judges for the AAJ Student Trial Advocacy Competition: Ellen M. McCarthy amd Stuart Scott

Will is grateful for the role CATA members and other attorneys play in making the event a success. "This was a great opportunity," he said, "to showcase the Cleveland legal community. CATA members like **Ellen Hirshman, Stuart Scott, Blake Dickson, Dave Herman, Ellen McCarthy, Brenda Johnson** and others stepped up to represent the local Plaintiff's bar. We also had a number of judges, prosecutors, and defense attorneys contribute their time. Everyone seemed to enjoy the experience. We're hoping to have a great turnout for next year!"

For the past three years, **Tom Robenalt of the Mellino Robenalt** law firm has served on the Development Committee of The Legal Aid Society of Cleveland. In that capacity, he is helping Legal Aid develop relationships with the plaintiffs' bar, small law firms and attorneys on the west side of Cleveland. Tom's leadership commitment to Legal Aid stems from pro bono service he has done with Legal Aid. "When I handled a pro bono matter for Legal Aid, I was so impressed by the professionalism of the organization," stated Tom. "I just had to get more involved and help spread the word about Legal Aid's great impact on the community." Tom notes how easy it was to volunteer for Legal Aid, as the organization provides support and mentorship for anyone taking a pro bono matter. "Now, as a leader on the Development Committee, I work to help get other people involved and support this great organization," says Tom.

Legal Aid's mission is to secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high quality legal services and working for systemic solutions. Legal Aid provides a voice to people who are too often invisible in a time where money and power get all the attention – the caregiver, the janitor, the restaurant server. Most of Legal Aid's clients – 70% – are women, and most of those women are the heads of a household with children. Legal Aid helps them to find a sense of their own power, of their dignity, of their own right-filled standing in the community. Legal Aid's goal is to empower, so clients can take their experience with Legal Aid back to their communities and to their neighborhoods.

Legal Aid has a staff of 45 attorneys, 1600 pro bono volunteers and the support of the community. If you would like to learn more, email trobenalt@mellinorobenalt.com.

Nurenberg Paris Harvest for Hunger drive

The law firm of **Nurenberg Paris** has been busy giving back this spring with two different charitable events. As part of an intra-office competition to collect food and raise money for the Cleveland FoodBank's annual Harvest for Hunger food drive, the attorneys and staff were divided into three teams, called: the Traffic Bureau, the Hard Hats, and Grey's Anatomy. In the end, they successfully brought in more than 800 food items and more than $1,200 in cash. Their other charitable event involved volunteering in the sorting of medical supplies at MedWish. The MedWish organization, headquartered in an old factory building in South Collinwood, repurposes medical supplies that have been collected from area hospitals and then distributes them to developing countries. The event was well-attended by more than half the support staff and many of the Nurenberg Paris attorneys.

The Nurenberg Paris volunteers for MedWish

In March, **Nurenberg Paris attorney Andy Young** testified before the Ohio Senate Committee on Transportation regarding a provision which increases the weight limits of trucks on Ohio's highways from 80,000 to 90,000 pounds. Andy made it clear that the provision may be good for the profits of the corporations, but that it will result in additional costs to independent truck drivers, damage to Ohio roadways, and danger to the motoring public. In addition to being a partner at Nurenberg Paris, Andy has a CDL trucking license and is the chair of the OAJ's Trucking Litigation Section.

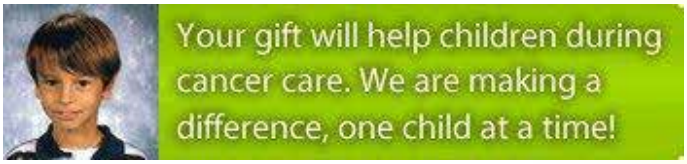
Finally, having written about all the good deeds being done by my colleagues over the last year and a half, I share with you how I have been inspired to get involved. I am in my first year of service on the board of The Samuel E. Szabo Foundation. Sam was my 9 year old son's buddy since preschool. In first grade, we learned that Sam was diagnosed with leukemia. Like so many children with cancer, Sam had to battle a disease when all he really wanted to do was play video games, go swimming, or watch his favorite cartoon – Scooby Doo.

Samuel E. Szabo

He fought with bravery and an amazing attitude. During one of his first hospital stays, the arts and craft person at the hospital came into his room and asked him what he felt like drawing. His smiley face is now the face of his foundation. Tragically, he lost his fight unexpectedly in October 2011. He was just eight years old. There are thousands of other children going through what he went through each and every day. Approximately 13,000-14,000 children per year are affected with some type of cancer – nearly 37 kids a day are diagnosed. Leukemia accounts for 1/3 of these diagnoses. The average 5 year survival rate is 80%. Statistically, adult cancers are significantly better funded from the private sector than pediatric cancers.

The Samuel E. Szabo Foundation's logo, based on a drawing by Sam Szabo

And so with the help of attorney Deviani Kuhar, chair of the Business Succession Planning & Wealth Management Practice Group of Benesch, Friedlander, Coplan & Aronoff LLP, we helped his parents, Jennifer and Paul Szabo, establish this non-profit organization in his honor. I'm proud to report that The Samuel E. Szabo Foundation, in its short existence, has been successfully working with northeast Ohio organizations that directly support and assist children and families dealing with childhood cancer. Its mission is to help find a cure for pediatric cancer, and to support children and families in ways that improve their experience, while they journey through their child's cancer center. We are planning a big fundraiser in the months to come. If you would like to help us or support our mission through a donation, please contact me or visit www.samuelszabofoundation.org. ■



Samuel E. Szabo

Susan E. Petersen is a principal at Petersen & Petersen, Inc. She can be reached at 440.279.4480 or sep@petersenlegal.com.

Brenda M. Johnson is an attorney with Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or bjohnson@nphm.com.

Evidence of Prior Malpractice Claims – When Is It Admissible, And For What? And When Is It Deadly?

by Brenda M. Johnson

In any malpractice case, there is always the possibility that one of the professionals involved in the litigation – either an expert or a defendant – has been sued in another case, possibly involving similar facts or similar claims of negligence. If a defense expert in one of your cases has been sued for similar negligence, you of course want to use this at trial. If *your* expert, on the other hand, has been the subject of similar claims, it's something you'd like to keep out. And what if the defendant has a history of being sued for the same malpractice that is at issue in your case? You'd *love* to use this at trial. But can you? Are there any pitfalls?

As it turns out, there are times when a medical professional's litigation history is relevant, and times when it is not. Fortunately, when it comes to experts, the factors governing admissibility favor plaintiffs, since courts in Ohio and elsewhere have held that prior malpractice claims against a defense expert can be relevant to show bias, but that they have no real relevance when it comes to plaintiff's experts. When it comes to prior claims against malpractice defendants themselves, however, look out. Ohio courts have excluded such evidence, and courts in other states have treated the subject of prior lawsuits as a sort of "third rail" to which the jury should not, under any circumstances, be exposed.

Can Evidence Of Prior Malpractice Claims Be Used Against Defense Experts? Mostly Yes.

In *Oberlin v. Akron Gen. Med. Ctr.*,[1] the Ohio Supreme Court held that evidence that a defendant's expert in a medical malpractice case is himself a defendant in a case involving similar allegations of negligence is relevant to prove bias, prejudice, or motive to misrepresent, and is generally admissible.[2] The plaintiff in the underlying action alleged permanent injury to his left ulnar nerve as a result of negligence during surgery, but was precluded from cross-examining the defendant's expert about the fact that he was a defendant in another lawsuit in which similar negligence was alleged.[3] The trial court refused to allow the plaintiff to cross-examine the expert regarding the other lawsuit, holding that the danger of prejudice required its exclusion under Evid. R. 403(A).

The Supreme Court reversed the trial court, finding that the existence of an active malpractice action against the defense expert involving a similar procedure and similar injury clearly was relevant for purposes of Evid. R. 611(B), which provides that "cross-examination shall be permitted on . . . matters affecting credibility," and for impeachment purposes under Evid. R. 616(A), which provides for impeachment through evidence of bias, prejudice or "any motive to misrepresent."[4] The Court noted that similarity of procedure and injury in the two actions was sufficient to indicate bias, as it would predispose the expert to find that the defendant's conduct was within the standard of care in order to minimize the risk of his testimony later being used against him: "If [the expert] were to criticize any aspect of [the defendant's] handling of the surgery, the [other] plaintiff might seize on that testimony and use it against [the expert] in her own suit."[5] In addition, the Court noted that "an expert with

an active malpractice case against him might be hostile to malpractice claimants in general," and that his hostility could color his testimony. [6]

With respect to the potential for unfair prejudice, the Court observed that, while such evidence "might affect how a jury views testimony of an expert," this was not in itself grounds to exclude it: "Of course, evidence of an expert witness's potential bias will prejudice the case of the party for whom he is testifying. But that is the very reason for establishing the bias of a witness – to cause a jury to think critically about the testimony being offered."[7] Thus, to the extent the plaintiff sought to disclose the fact that the expert was a defendant in a pending malpractice action, the Court held the evidence was admissible. At the same time, the Court signaled there were limits to the amount of detail a plaintiff would be allowed to share regarding another action:

> The only important inquiry is whether the evidence of bias is unfairly prejudicial. Were Oberlin's counsel in this case to attempt to inflame jurors by describing the horrors of the Canadian plaintiff's injury, that might be considered unfairly prejudicial. The fact the expert is simply involved in a pending malpractice action is not.[8]

Thus, *Oberlin* establishes that evidence that a defense expert is a defendant in a pending lawsuit involving a similar medical error is admissible to prove bias, prejudice or a motive to make misrepresentations. But what about prior lawsuits? Here, the issue is slightly less clear, but still very favorable to plaintiffs.

Neither the Ohio Supreme Court nor the lower courts have addressed the admissibility of an expert's prior lawsuit history directly. Other state courts, however, have held that such evidence is admissible. Indeed, in *Irish v. Gimbel*,[9] the Maine Supreme Court held that it was reversible error to exclude such evidence. The plaintiff's attorney in that birth trauma case previously personally sued the defense expert for similar negligence, obtaining a settlement on behalf of his own child. On appeal, the Maine Supreme Court held that the trial court acted properly in excluding any reference to plaintiff's counsel's involvement in the prior suit, but reversed the trial court for having excluded *all* evidence that the expert had been a defendant in a similar suit. Instead, the Maine court determined that "the excluded evidence was relevant to a crucial issue, bias or interest," and that the evidence, "if admitted, could have had a controlling influence on a material aspect of the case, i.e., whether defendant deviated from the applicable standard of care."[10]

Other courts have reached similar conclusions. In *Irish*, the Maine Supreme Court relied on *Hayes v. Manchester Mem. Hosp.*,[11] in which the Connecticut Court of Appeals held that the fact that a lawsuit alleging similar medical negligence had been pending against a defense expert when he was deposed, and had been settled prior to trial, was highly relevant to an expert's motive, and plaintiff therefore should have been allowed to introduce evidence of it at trial.[12] And in *Willoughby v. Wilkins*,[13] the North Carolina Court of Appeals also held that prior lawsuits against a defense expert were relevant to bias or interest, and should be admitted at trial.

Can Evidence of Prior Malpractice Claims Be Used Against Plaintiffs' Experts? No.

Courts seem uniform in holding that litigation against defense experts is relevant to motive or bias, but not so much when it comes to lawsuits against plaintiffs' experts. While the case law on this issue is limited, the better argument is that such evidence, when offered against a *plaintiff's* expert, loses its relevance and should be excluded.

The reason for treating plaintiff's experts and defense experts differently was explained in *Willison v. Pandey*,[14] an opinion recently issued by the U.S. District Court of Maryland. In that case, the defendant argued on the basis of *Oberlin* (among other things) that such evidence was relevant to test the plaintiff's expert's bias, prejudice and credibility.[15] The district court rejected this argument, finding that the difference in alignment obviated any likelihood that a lawsuit against a plaintiff's expert would have the same probative value as litigation against a defense expert:

> In contrast to the case *sub judice*, the expert in *Oberlin* was a *defense* expert. In this case, [the expert] is the *plaintiff's* expert. The defense does not articulate any reason to explain why a plaintiff's expert, who himself has been sued for malpractice, would be biased or prejudiced against the defendant-physician in evaluating whether the defendant acted outside the standard of care. If anything having been sued himself, [the expert] arguably would be sympathetic to [the defendant], hostile to medical malpractice claims, with a motive to conclude that [the defendant] did *not* deviate from the standard of care . . . .[16]

Can Evidence Of Prior Lawsuits Be Used Against the Defendant Himself ? The Fact Of Previous Lawsuits May Not, But Any Opinion Testimony The Defendant Gave In His Own Defense Is Fair Game.

Perhaps unsurprisingly, plaintiffs have argued that *Oberlin* provides a basis for introducing evidence that a defendant doctor (as opposed to a defense expert witness) has been sued in other cases. Ohio's courts of appeals, however, have disagreed. Instead, courts in Ohio and in other jurisdictions are fairly uniform

in holding that evidence of other malpractice claims against a defendant has no bearing on any legitimate issue, and is unfairly prejudicial as well. Indeed, at least two out-of-state courts have held that the issue is prejudicial enough to require a mistrial. If a defendant doctor offers opinion testimony on his or her own behalf, however, it is still fair game to cross-examine the defendant with opinion testimony the defendant may have given in other actions brought against him.

In *McGarry v. Horlacher,*[17] which was decided by the Second District, the plaintiff-appellant argued, based on *Oberlin*, that she should have been allowed to introduce evidence that the defendant had previously been sued for similar malpractice.[18] At trial, the court had permitted plaintiff to cross-examine the defendant about the opinions he had offered on his own behalf in the prior trial, but barred plaintiffs from disclosing the existence of the prior case, the facts of the case, or its result.[19] In affirming the trial court, the Second District drew a distinction between cross-examining a defense expert about his litigation history, which the Ohio Supreme Court held was permissible in *Oberlin*, and disclosing to the jury that the *defendant* himself had been sued before:

> In *Oberlin*, the supreme court held that "evidence that an expert witness is a defendant in a pending malpractice action alleging a medical error similar to the one at issue is probative and is admissible to prove bias, prejudice, or motive to misrepresent." In that case, the facts of the case in which the doctor was testifying as an expert were very similar to the facts in a pending malpractice case against the expert doctor. No previous medical malpractice claims against the defendant doctor were at issue. The court noted that the fact that the evidence presented "no * * * danger of an evidentiary ricochet," i.e., it revealed information relevant to the expert but not to the defendant, weighed in favor of its admission. The court concluded that such evidence, although prejudicial, was not unfairly prejudicial. The court did comment, however, that attempts to inflame jurors by describing the "horrors" of another plaintiff's injuries might be considered unfairly prejudicial. **Furthermore, while we recognize that a doctor often testifies as an expert in a medical malpractice suit against him, *Oberlin* did not specifically address whether a defendant doctor's own statements in another medical malpractice case could be used against him. Obviously, the fact that a defendant doctor has been involved in other medical malpractice cases has a greater risk of being unfairly prejudicial than such evidence related to an expert witness.**[20]

Based on this distinction, the Second District held that "[t]he trial court properly forbade this type of questioning,

and *Oberlin* does not support its admission."[21]

Plaintiffs have also attempted to argue that such evidence, while perhaps not relevant to bias or motive, may be relevant to show notice of a dangerous condition or that the doctor lacked competence to perform the procedure; however, these theories have been rejected as well. In *Lumpkin v. Wayne Hospital*,[22] for instance, the Second District rejected the argument that other lawsuits were relevant to show notice of a dangerous condition, and affirmed exclusion under Evid. R. 403.[23] And in other states, the rejection of such evidence has been vehement.

In *Persichini v. William Beaumont Hosp.*,[24] the Michigan Court of Appeals upheld a trial court's decision to declare a mistrial when plaintiff's counsel asked the defendant doctor if it was true that he had been sued six or eight times.[25] And in *Lai v. Sagle*,[26] Maryland's highest court reversed a trial court for failing to grant a mistrial when plaintiff's counsel referred in opening statement to the fact that the defendant doctor had been a defendant in prior medical malpractice actions. In so doing, that court established a brightline rule precluding the introduction of such evidence: "Courts often are reluctant to declare brightline rules or standards. There are good reasons for this usually. In this case, we overcome that reluctance."[27]

The reasons for the court's categorical reaction were as follows: First, the Court observed that evidence of prior negligent acts is substantially prejudicial in nature, and normally may only be admitted for extremely limited purposes similar to those set forth in Evid. R. 404(B), but that these purposes rarely present themselves in malpractice cases.[28] Motive or intent, for instance, are not relevant to proving negligence, and prior accidents cannot be used to show a predisposition to negligence.[29] Indeed, the court compared it to admitting evidence of prior arrests in criminal trials, and noted it would not even be proper for purposes of impeachment unless the defendant volunteered that he had never been sued for malpractice.[30] For these reasons, the Maryland court concluded that, absent some unusual circumstance, "we can conceive of no instance where making a jury aware in a malpractice trial, whether in statements of counsel or through proffered evidence, of prior malpractice litigation against a defendant doctor would be permissible."[31]

Other courts have perhaps been less vehement than Maryland's, but have come to similar conclusions regarding the admissibility and potential relevance of evidence of prior malpractice. In *Armstrong v. Hrabal*,[32] for instance, the Wyoming Supreme Court upheld the exclusion of evidence that the defendant doctor had been sued before for negligence on similar facts for reasons that parallel those articulated in *Lai*.[33] Among other things, the court upheld exclusion because lack of relevancy was a legitimate basis for doing so, and also because of the danger of a "trial within a trial" posed by commenting on the prior litigation.[34] Likewise, in *Laughridge v. Moss*,[35] a Georgia Court of Appeals held that evidence of previous medical negligence by the defendant was not admissible to show negligence on a different occasion, nor was it admissible for impeachment.

In sum, evidence of prior similar malpractice can be used against defense experts, but cannot be used against plaintiff's experts or against defendants themselves – although, to the extent malpractice defendants offer opinion testimony in their own defense, opinion testimony given by them in other cases may be used in cross-examination as long as the jury is not informed of the prior malpractice claim. ■

End Notes

1. 91 Ohio St.3d 169, 2001 Ohio 248.
2. *Id.* at 171.
3. *Id.* at 170-171 (describing testimony).
4. 91 Ohio St.3d at 171 (citing Evid. R. 611(B) and Evid. R. 616(A)).
5. *Id.* at 171.
6. *Id.* at 172.
7. *Id.* at 173.
8. *Id.* at 173.
9. 691 A.2d 664, 1997 ME 50.
10. *Id.* at ¶ 50.
11. 661 A.2d 123 (Conn. App. 1995). That opinion addressed a situation in which a lawsuit was pending against the expert when his deposition was taken, but had been settled by the time the expert testified at trial.
12. *Id.* at 125.
13. 310 S.E.2d 90 (N.C. App. 1983)
14. No. CCB-09-01687, 2011 U.S. Dist. LEXIS 118386 (D. Md. Oct. 13, 2011).
15. *Willison* at *16.
16. *Id.* at *17-*18 (emphasis in original). The defendant in that action also cited *Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926 (1st Cir. 1991), in which the First Circuit rejected the argument that the trial court erred in allowing such evidence to be admitted. In *Navarro,* however, evidence that the plaintiff's expert had been subject to three prior malpractice suits had been admitted in conjunction with evidence of other improprieties, including the submission of inflated bills for expert fees and the suspension of his notary license for failure to file required reports. *See Willison* at *18-19 (summarizing *Navarro*). As the court in *Willison* observed, the First Circuit had held that the admission of such evidence *as a whole* arguably did not exceed the trial court's discretion under Fed. R. Evid. 608(b) (allowing crossexamination as to specific instances of conduct to attack witness' character for truthfulness). *Willison* at *19. At the same time, the *Willison* court distinguished *Navarro* on those grounds as well.
17. 149 Ohio App.3d 33, 2012 Ohio 3161 (2d Dist.).
18. *Id.* at ¶¶ 41-43.
19. *Id.* at ¶ 43.
20. *McGarry* at ¶ 42 (emphasis added; citations omitted).
21. *Id.* at ¶ 43.
22. 2004 Ohio 264 (2d Dist.).
23. *Lumpkin* at ¶ 16.
24. 607 N.W.2d 100 (Mich. App. 1999).
25. *Id.* at 104.
26. 818 A.2d 237 (Md. 2003).
27. *Id.* at 239.

28. *Lai* at 245. Rule 404(B) provides that evidence of other wrongs or acts is inadmissible to prove character "in order to show action in conformity therewith," but that such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid. R. 404(B).

29. *Lai* at 246.

30. *Id.* at 246-47.

31. *Id.* at 248.

32. 2004 WY 39, 87 P.3d 1226 (Wy. 2004).

33. The defendants in *Hrabal* had argued that the doctor's "fund of knowledge" (i.e., training and past experience) was irrelevant because the issue was not what the doctor knew or what her qualifications were, but whether she breached the standard of care at a particular time. *Id.* at ¶ 46. This, in turn, apparently was the grounds for the trial court's exclusion of the evidence. *See id.* at ¶ 47 (quoting record).

34. *Id.* at ¶ 48.

35. 294 S.E.2d 672 (Ga. App. 1982).

Save the Date

The Cleveland Academy of Trial Attorneys' Annual Installation & Awards Dinner will be held on

Friday, June 7, 2013
Reception: 5:30-6:30 p.m.
Dinner: 6:30 p.m.
Program: 7:30 p.m.

Keynote speaker: To be Announced

Location: The Club at Key Center
127 Public Square
Cleveland, Ohio 44114

President-Elect George E. Loucas will be sending out invitations shortly
Please join us for an evening of fun and collegiality!

Andrew J. Thompson is a principal at Dubyak, Connick, Thompson & Bloom, LLC. He can be reached at 216.364.0500 or andrew@dctblaw.com

CATA Website Offers Improved Benefits To Members

by Andrew J. Thompson

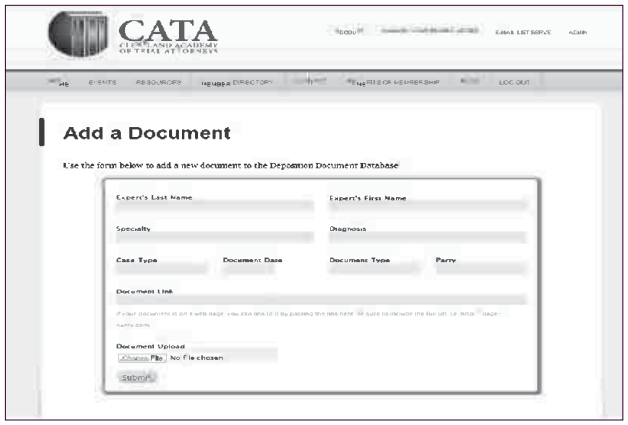
Last year, the Cleveland Academy of Trial Attorneys redesigned and significantly upgraded its website. The new website offers an easy and efficient way to access benefits available to CATA members, including past newsletters, a listing of upcoming events, the CATA document and deposition database, and a new CATA blog. Along with a Facebook page, LinkedIn group and Twitter account, the new CATA website has brought the organization up to speed with technology, and has allowed it to become a more valuable resource for its members.

The first step for members to take advantage of these new benefits is to register their profiles on the website. Much of the content described above is private and accessible only to CATA members. The website profile includes current contact information, a list of areas of practice, and a brief description of the member and his or her practice. Once an account is set up, contact information can be updated by a member at any time through the website. The member's profile is visible not only to other CATA members, but also to any public visitors to the website.

An Events page on the new site allows members to stay informed about upcoming CLEs or other events of the organization.

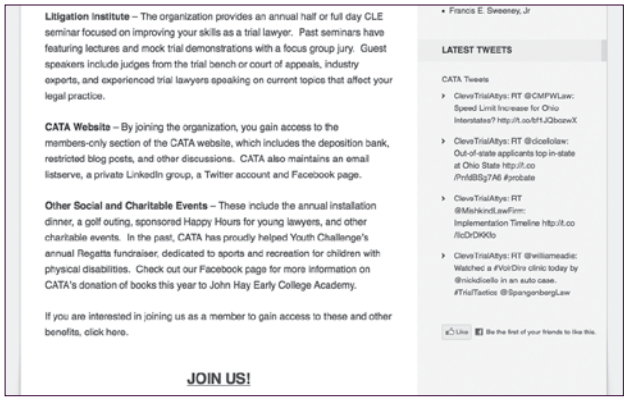
Perhaps one of the most important benefits of membership in the organization is access to a document database that includes hundreds of expert depositions. These documents can now easily be searched and downloaded from the website's Resources tab. The Expert List is a convenient listing of all referenced experts by area of specialty. For small firm or solo practitioners, access to such a voluminous database of information is invaluable. The new website enables members to find this material quickly and easily, and to download and print the items at the click of a mouse.

To keep the database current, the website also allows members to upload new material with the use of a basic form. The newly uploaded depositions are automatically organized in the system and easy to find. By making the process simple, CATA hopes members will continue to share expert depositions that will benefit everyone. A copy of the form can be found at the Add A Document link under the Resources tab.



The CATA blog serves several functions for the organization. It is used to highlight and provide information on CLE luncheons and other events sponsored by the group. It is also a convenient platform for posts on timely legal issues that are important to CATA members. For example, when the Ohio Supreme Court issued its opinion in *Hewitt v. L.E. Myers Co.* in November 2012, CATA member Frank Gallucci, counsel for the plaintiff in the case, posted a brief summary of the issues in the case and his thoughts on the result. A select group of CATA News articles are re-posted for the public on the CATA blog, including the hyperlinks found in the Technology Tips article. CATA also hopes that the blog becomes a place for ongoing discussion of issues between CATA members. Lengthy comments can become cumbersome on a listserve, however the website's blog offers a good place for members to share their thoughts on an issue and to get feedback from the author of a post.

CATA's Latest Tweets can be found in the margins of each web page. (Follow us @CleveTrialAttys). The organization Tweets recent decisions from the Ohio Supreme Court and Ohio appellate districts, and re-tweets valuable information from our members. If you are a CATA member and active on Twitter, please let us know so we can follow you.



If any member needs information about the CATA website, including how to set up an account and profile, contact Andrew Thompson at andrew@dctblaw.com. We hope that the new website becomes a valuable resource to the CATA membership. If you have not already done so, please check it out – www.clevelandtrialattorneys.org. ■

Christopher M. Mellino is a principal at Mellino Robenalt, LLC. He can be reached at 440.333.3800 or cmellino@mellinorobenalt.com.

Pointers From The Bench: An Interview With Judge Michael Astrab

by Christopher M. Mellino

In past editions we have profiled some of the more experienced jurists from the Court of Common Pleas. For a change of pace we asked one of the newer members of the court, Judge Michael Astrab, to share his thoughts with us regarding his time on the bench.

Judge Astrab graduated from Solon High School in 1989. He went on to Miami University and, after getting his degree there, he obtained a JD from Cleveland Marshall. His law practice consisted of representing clients in Juvenile Court and criminal defendants in Common Pleas Court. A unique aspect of his background is that he took time off from the legal practice to work in the financial sector as a broker at both Merrill Lynch and Smith Barney.

Judge Michael Astrab

Since taking the oath of office in 2011 Judge Astrab has tried four civil cases. He does not shy away from trying civil cases but thus far the vast majority of those on his docket have settled. While like any Judge he prefers that the parties reach a resolution, he looks forward to trying more civil cases. When the civil cases on his docket have gone forward to trial Judge Astrab has tried to solicit honest feedback from counsel as to what he is doing right and what can be improved upon.

In those cases he has tried he has been impressed with the jurors' ability to see things that the lawyers did not anticipate. In his experience juries collectively pick up on subtleties and nuances in the courtroom and draw logical inferences that get them to the right results but by a different path. He does allow jurors to take notes during trial but does not allow them to ask questions.

Judge Astrab is committed to ruling on motions himself rather than delegating that responsibility. As a result he reads the pleadings and briefs filed in his court. He will also issue written opinions as he believes the attorneys are entitled to more than a cursory "granted" or "denied." Expect to be called out, however, if you misquote or cite a case for the wrong proposition in your brief.

The "rocket docket" has been eliminated and as long as the attorneys are working together and the case is progressing he will allow them the time necessary to prepare and either resolve or try the case. However if the attorneys are bombarding the court with motions and not getting along he will intercede with deadlines. He will also involve himself in settlement of cases and prides himself on doing whatever necessary to resolve issues even though it might be unorthodox. This relates back to his time in the business world and he sees no reason a government entity can't run as efficiently as most businesses.

The judge describes himself as a "normal guy" with a wife, two kids and a Ford, who wants to be a good judge. He was reluctant to name a book or movie that inspired him but I found the following quote from his Facebook page.

If you find faults with our country, make it a better one. If you're disappointed with the mistakes of government, join its ranks and work to correct them... Run for public office. Comfort the afflicted. Defend the rights of the oppressed. Our country will be better, and you will be happier, because nothing brings greater happiness in life than to serve a cause greater than yourself. Fight to make sure every American has every reason to thank God, to be a proud citizen of the greatest country on Earth. With hard work, strong faith, and a little courage, great things are always within our reach. Fight for what's right for our country. Fight for the ideals and character of a free people. Fight for our children's future. Fight for justice and opportunity for all. ■

Andrew J. Thompson is a principal at Dubyak, Connick, Thompson & Bloom, LLC. He can be reached at 216.364.0500 or andrew@dctblaw.com

William B. Eadie is an associate with Spangenberg, Shibley & Liber Law LLP. He can be reached at 216.696.3232 or weadie@spanglaw.com.

Technology Tips for Attorneys...

(in about 140 characters (more) or less)

by Andrew Thompson and William Eadie

Here are your tips for this edition...

Moving Beyond Paper—DropBox Link Sharing

Trial attorneys can burn a lot of trees—and DVDs—exchanging documents in discovery like medical records, or serving pleadings with large appendices. With email and DropBox, there's no reason you can't provide all documents electronically, including voluminous records. Besides saving paper (and money) sending documents to opposing counsel, it also allows you to transmit large documents or videos to experts instantly, without the delay of mail transmission of a CD. Plus, the documents are available for download as long as you leave them up.

What is DropBox? It is a "cloud" storage system with a focus on accessibility and sharing. DropBox installs a folder on your computer that is really up in the cloud. Stick a document in the folder, and you can now see (and access) it on any other device, like your tablet, that also has DropBox. You can even access the document via a link from the internet—or send that link to someone else to download.

DropBox allows you to share any size file with a link, making email transmission of very large files easy and lightweight. The costs are minimal—free for the first 2 GB, scaling up to the $500/year line for larger enterprises. You'll find the savings add up quickly when you're not printing 1,500 pages of records, but just clicking "send."

Here's how to get your office up and running, quickly.

First, sign up for DropBox (https://www.dropbox.com) for your office. With subfolders for each attorney or paralegal, everyone can have their own remote drive. (If folders have to be secured from other attorneys in the same firm, you will likely need separate accounts, making enterprise management trickier.) They can then add all the folders they want to their folder—by case, legal issue, etc.

Second, start enjoying being able to access any file on the go. Wherever you are, if someone on your team can drop the file in your DropBox folder, it will be there on your device.

Third, let everyone know they should start using DropBox for transmitting any large attachment. The process is simple: (1) put the document in a folder inside the main DropBox folder; (2) right click the file and select DropBox >> Share Link; and (3) paste the link into any document, whether an email or an electronically-transmitted email.

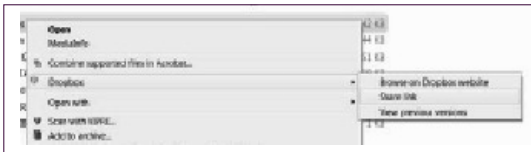


Figure 1: Sharing DropBox files is as easy as "right click"

You're just sending a link to a document that you stick in your DropBox folder, so it doesn't take up any space in the email (another savings—your email storage space). Once you send a link to a file, "removing" the link is as easy as deleting the file from DropBox, or just changing the folder name (breaking the link).

Finally, if you start using DropBox to serve pleadings and other documents, let opposing counsel know early on that you intend to serve documents via electronic means. Note that Ohio Civil Rule 5(B)(2)(e) allows for electronic service, but Federal Civil Rule 5(b)(2)(E) requires written consent. Just mention it in an early email or letter—before there's a dispute—and ask if they consent to you sending documents electronically.

Plenty of other cloud-based options exist, like Simplicity (http://www.syncplicity.com, file sharing), Cubby (www.cubby.com, more secure file sharing using encryption), and Huddle (http://www.huddle.com, focused on team sharing for collaboration). The bottom line is that snail mail—and even email with large attachments—are no longer constraining your office.

Amicus Anywhere

For those attorneys using Amicus Attorney for their office practice management software, the company has launched an ambitious new product in 2013 with a feature called Amicus Anywhere. This feature allows attorneys to use the software from any web browser or mobile device, similar to a cloud-based system. And not only does the product allow you to read information in your calendar, files, contacts, time entries, etc., but you can also modify and input such information remotely. The new technology gives you the same access to Amicus in the palm of your hand that you have when sitting at your desktop in the office. For more information on the product, check out www.amicusattorney.com.

Video Marketing Online

The popular legal tech blog The Lawyerist recently posted a worthwhile discussion of using video as a part of your online legal marketing efforts. You can read the post here: http://lawyerist.com/lawyers-google-plus-youtube-online-video/

Fastcase Advanced Sheets in eBook Format

Fastcase, an affordable online legal research website, now has available Advance Sheets of opinions from state and federal courts, including courts of appeal and supreme courts. The decisions are delivered on a monthly basis in easy to read eBook formats for the iPad, Kindle, Android or Nook devices. To find out more, go to www.fastcase.com.

To find hyperlinks to the items mentioned above, or to leave us questions or comments, go to the blog on CATA's website at www.clevelandtrialattorneys.org/blog/. ■

Christopher M. Mellino is a principal at Mellino Robenalt, LLC. He can be reached at 440.333.3800 or cmellino@mellinorobenalt.com.

Verdict Spotlight

by Christopher M. Mellino

After settling 98% of the claims relating to injuries caused by the drug Omniscan, GE Healthcare, Inc. ("GE") decided to try to exact some revenge on the attorneys bringing these cases. There were approximately 500 cases brought against GE relating to the marketing and sale of this product. Omniscan is a drug given to patients prior to undergoing an MRI. It has a propensity to break down chemically in patients with renal impairment because of prolonged retention, thereby releasing a potentially toxic metal called gadolinium. Omniscan can be filtered and excreted by normal kidneys but can cause nephrogenic systemic fibrosis (NSF) in patients with impaired kidneys. NSF causes painful hardening of the skin around the joints and can cause fibrosing of the internal organs.

The cases were consolidated for pretrial proceedings by the Federal MDL Panel which assigned the cases to Judge Dan Polster. Bill Hawal and Peter Brodhead were appointed to the Plaintiffs' Steering Committee and served as Liaison Counsel. They were instrumental, together with other PSC members, in developing the evidence in those cases.

While GE settled most of these cases there are approximately 8 cases remaining that GE has refused to pay. GE was looking for a case to force to trial and its counsel vowed to use the vast resources of GE to conduct the litigation in a scorched earth manner, thereby running up case expenses for the Plaintiff in what GE was sure would be a defense verdict.

This goliath chose to pick on Paul Decker, a 62 year old retired factory worker. Mr. Decker was an easy mark in today's environment because of his multiple comorbidities and a limited life expectancy.

His comorbidities included that he was a dialysis patient and a life long smoker who was recently diagnosed with esophageal cancer. He also suffered from arthritis and was diagnosed with endocarditis. As a result of his end-stage renal disease the plaintiff's experts projected a 4 year life expectancy.

These conditions, however, left him ill equipped to suffer the NSF that gadolinium causes and left him to live out the little time he had left in a crippled condition. GE chose this case to litigate precisely because it believed a jury would either excuse its conduct or return a *de minimis* verdict because of Mr. Decker's unrelated medical conditions.

CATA members Bill Hawal and Peter Brodhead were called upon to be part of the trial team that represented Mr. Decker and his wife, Karen, in Federal court presided over by Judge Dan Polster.

One of the first challenges was that Judge Polster limited the parties' presentation of evidence to a total of 30 hours each. Despite having the burden of proof and the necessity of presenting evidence on the issues of both liability and damages, the Plaintiffs were granted the same total number of hours as the defense.

This resulted in Plaintiffs being denied the

opportunity to call important witnesses that otherwise would have been presented to the jury.

Both sides were also limited to 15 minutes each for Voir Dire. GE tried to counter this by bringing in a high priced jury consultant. However the lawyer conducting Voir Dire for GE miscalculated and passed on a peremptory challenge which caused him to lose his remaining challenge much to the chagrin of the consultant.

GE came out of the box in opening statement with an anatomical drawing of the Plaintiff. The drawing labeled every ache and pain Mr. Decker had ever had as well as the more serious comorbid conditions.

Most of the evidence presented on behalf of the Plaintiff was by way of videotaped testimony of GE personnel who had been deposed in Oslo, Norway. Despite what could have been a dry presentation, according to Hawal the jury paid close attention as the evidence played out like the movie *The Insider.* Hawal, Brodhead and the team played hours of videotaped depositions of GE personnel admitting to the misconduct and concealment that went into the process of obtaining FDA approval for Omniscan. Highlights included a scientist who told of creating a report of her findings that were critical of the product. She was instructed by her supervisor to destroy the report and burn the data that supported it. That report was never turned over to the FDA.

There was video of GE's "Litigation Coordinating Counsel" admitting to the company's destruction of documents that related to Omniscan's development. The evidence GE was hiding was that although gadolinium could be used safely in healthy people, it had devastating effects when used in patients with renal compromise. GE was aware of this, hid it from the FDA and then unleashed it into the medical community once it obtained approval.

The Court struck plaintiffs' punitive damages claim on the basis of a Sixth Circuit decision out of Michigan, where the court held that punitive damages against a manufacturer of an FDA approved drug for failing to provide safety data to the FDA could only be pursued if there was a finding by the FDA that data was concealed.

GE steadfastly maintained throughout trial that Omniscan is a safe product that has been used without incident in millions of people and that it is no more dangerous than drugs sold by its competitors. The defense's closing argument started not with an explanation for GE's conduct but with the same anatomical chart and same emphasis on Mr. Decker's comorbidities.

NSF has caused the skin to harden around the joints in Mr. Decker's hands that are now like claws. He cannot stand because his knees cannot be straightened. He cannot perform simple tasks of daily living because he essentially has no use of his hands or legs. His wife Karen dresses and bathes him.

GE's strategy blew up in its face when the jury returned a verdict in Mr. Decker's favor for 4.5 million dollars and for Karen Decker for $500,000. The jury awarded the entire life care plan presented for the Plaintiff.

Rather than exacting revenge, GE has now exposed previously sealed "confidential" documents to media scrutiny and a motion for prejudgment interest is pending.

The case is *Paul Decker and Karen Decker v. GE Healthcare, Inc.*, No. 1:12-gd-50004-DAP in the U.S. District Court for Northern District of Ohio, Eastern Division.

Getting justice for our clients with pre-existing or unrelated medical conditions is especially difficult in today's climate. Verdicts like this one will be helpful to all of us. Thanks Bill and Peter! ■

Recent Appellate Decisions

Editor's Note: *The following is a sampling of recent appellate decisions relevant to the practices of CATA members.*

1.) Smith v. Ray Esser & Sons, Inc., 9th Dist. No. 12CA010150, 2013-Ohio-1095 (Mar. 25, 2013).

Disposition: Summary judgment for defendant reversed.

Topics: Workplace intentional tort; intentional failure to take necessary safety precautions creates fact question as to employer's liability under R.C. 2745.01.

The plaintiff was a 17 year old student working as an intern for a commercial plumbing contractor through a school sponsored program. The job involved repair of a leaking fire hydrant. Several days earlier, the crew dug a seven foot deep trench around the leaking hydrant. Over the next two days, the trench filled with rain water. On the day of the plaintiff's injury, the water was pumped out of the trench, and the student was sent down into it to "chip away at the brick thrust block with an electric chipping hammer." The foreman remained above ground, and the third member of the crew was sent for supplies. Contrary to OSHA regulations, the walls of the trench were not properly sloped, and no safety box or shoring was used to protect workers from injury. The foreman, moreover, did not meet OSHA's requirements as a "competent person" to inspect for situations that could result in possible cave-ins. Although the owner of the defendant company had used safety boxes or installed shoring in the past (including when his own son has gone down in the pit), he opted not to do so in this case because he considered the job a "simple repair."

While the plaintiff was in the trench removing debris from the thrust block, the trench started to rapidly fill with water. The plaintiff's hand became stuck, and he became submerged in the water. He eventually escaped, but with significant injuries to his hand.

The Court of Appeals held that the trial court erred in granting summary judgment to the defendant under R.C. 2745.01, as genuine issues of material fact remain. The Court reasoned that "[i]n the face of these dangerous conditions, [defendant] neither made an effort to ensure that the trench was properly sloped, nor did he put a competent person in place to inspect the dangerous conditions on the date of the incident. With full knowledge that certain safeguards could be put in place to ensure [the plaintiff's] safety, [the defendant] made a deliberate decision not to use a safety box or install shoring before sending [the plaintiff] into the trench.**** [The defendant] intentionally decided not to take necessary safety precautions... despite the fact that it had made a practice of putting such protections in place on prior projects[.]" *Id*. at ¶24

2.) Riffle v. Physicians and Surgeons Ambulance Service, Inc., __ Ohio St. 3d __, 2013-Ohio-989 (Mar. 21, 2013).

Disposition: Denial of defendant's motion for judgment on the pleadings affirmed.

Topics: Political subdivision immunity – R.C. 4765.49(B) expressly imposes liability on a political subdivision for purposes of R.C. 2744.02(B)(5).

This was a wrongful death action for the death of a three day old infant allegedly as a result of the willful and wanton misconduct of the City's medical-emergency personnel in responding to an emergency call. The call advised that the infant's then-pregnant mother had been experiencing serious vaginal bleeding. The City's emergency personnel responded, but rather than transporting her to the hospital, called a private service, thus delaying the baby's delivery. At the hospital, the unborn child had fetal bradycardia, and was delivered by emergency c-section. She died three days later.

The City filed a motion for judgment on the pleadings, arguing that it was immune from liability under R.C. 2744.02. The plaintiffs contended that the exception to immunity set forth in R.C. 4765.49(B) expressly imposes liability when emergency medical services are provided in a willful and wanton manner, thus triggering the exception to immunity in R.C. 2744.02(B)(5). The trial court denied the City's motion, and the City appealed.

The Court of Appeals affirmed, finding that R.C. 4765.49(B) conflicted with R.C. 2744.02(A)(1), and that R.C. 4765.49(B), as the more specific provision, applied. This statute exempts the political subdivision from liability for the *negligent* provision of emergency medical services, but holds the political subdivision liable for emergency services "provided in a manner that constitutes willful or wanton misconduct."

The Ohio Supreme Court, in a unanimous decision, agreed with the result reached by the Court of Appeals, but for a different reason. The Supreme Court held that R.C. 2744.02(A)(1) and R.C. 4765.49(B) do not conflict, but that the latter provision expressly imposes liability on a political subdivision for willful and wanton conduct, and thus constitutes an exception to immunity for purposes of R.C. 2744.02(A)(5). The Court concluded that since "the complaint alleges that the city of Akron medical-emergency personnel wantonly caused injuries to the Riffles and their unborn child,... it therefore states a claim for which relief may be granted." *Id*. at ¶24.

3.) Jeffrey v. Marietta Memorial Hospital, 10th Dist. Nos. 11AP-492, 11AP-502, 2013-Ohio-1055 (Mar. 21, 2013).

Disposition: Jury verdict for plaintiff resulted in post-trial motions all of which were denied. Cross-appeals were taken, and plaintiff also appealed an earlier grant of summary judgment to two of the defendants. Court of Appeals affirmed all rulings and found it was without jurisdiction to consider the earlier grant of summary judgment.

Topics: Medical malpractice; failure to object to disparity between jury interrogatory and general verdict while jury is impaneled waives the objection; verdict for plaintiff supported

by manifest weight of the evidence; trial court's attempt to "correct" a final appealable order is a nullity.

This wrongful death/medical malpractice action arose from the death of a 29 year old woman from sepsis following laproscopic surgery to remove abdominal adhesions. The defendants included the surgeon who performed the procedure, the hospital where it was performed, the hospital to which she was transferred by life flight, and several other medical care providers who treated her before her death. The plaintiff settled with several defendants (including the hospital to which decedent was life-flighted); summary judgment was granted to two other defendants; and the matter proceeded to trial against the surgeon, the surgeon's associate, and the hospital where the surgery was performed. The jury returned a verdict for the plaintiff, finding total damages to be $2 million, but allocating 60% of the fault to the hospital that had settled. The plaintiff and the defendant hospital filed cross-motions for JNOV, as well as other post-trial motions, including the plaintiff's motion for prejudgment interest.

The trial court denied all post-trial motions, and the Court of Appeals affirmed. Cross-appeals were taken, and the appellate court affirmed as to all matters appealed.

Of greatest interest from an appellate standpoint is the court's ruling that the order granting summary judgment to two defendants was not timely appealed. A year prior to trial, the trial court had granted summary judgment to the cardiologist and his group on the ground that plaintiff's expert, a general and colorectal surgeon, was not qualified to opine on the standard of care of a cardiologist. The journal entry signed by the court granting summary judgment contained a finding of "no just reason for delay." Although signed, the entry was not time-stamped by the clerk, but it *was* entered onto the official docket on June 24, 2008 as Entry No. 153. Not long thereafter, the plaintiff's counsel and counsel for the cardiologist contacted the court asking that the "no just reason for delay" language be removed. The court did this through a "Corrected Judgment Entry" filed on August 11, 2008. No appeal was taken from the summary judgment until after the judgment was entered on the verdict.

The Court of Appeals held that the August 11, 2008 judgment entry was a nullity as the trial court lacks jurisdiction to vacate a final judgment unless a party files a motion to vacate pursuant to Civ. R. 60(B). The Court held the summary judgment entry with the "no just reason for delay" language was properly journalized – even though it did not bear a common pleas court file-stamp – because the common pleas court clerk certified that the record "is a true copy of the docket and journal entries filed in the trial court" and the judgment entry bore the certified record sequence No. 153. The Court also rejected the argument that the Corrected Judgment Entry was within the trial court's authority to correct clerical mistakes pursuant to Civ. R. 60(A). The Court held that the trial court's "removal of Civ. R. 54(B) language from the June 24, 2008 entry constituted a substantive change and not merely the correction of a clerical mistake." *Id*. at ¶73.

4.) <u>Bierl v. BGZ Associates II, LLC</u>, 3rd Dist. No. 9-12-42, 2013-Ohio-648 (Feb. 25, 2013).

Disposition: Affirming in part, and reversing in part, the trial court's grant of summary judgment to the defendant.

Topics: Premises liability; open and obvious danger doctrine; landlord liability to guest.

The plaintiff was the mother of a tenant in an apartment building owned and operated by the defendant. The daughter/tenant hosted a party at the apartment complex's clubhouse. Afterwards the plaintiff/mother assisted with the clean-up effort. While carrying a 30-40 pound garbage bag to the dumpster, she tripped on a knee-high metal brace that ran diagonally from the ground to a wall surrounding the dumpsters. She sustained serious injuries to her left leg.

The trial court granted the defendant's summary judgment motion, finding the dumpster area not to be part of the leased premises, and finding the bracket to be an open-and-obvious danger. The Court of Appeals reversed (but affirmed one aspect of the trial court's decision that rejected the argument that plaintiff was a third-party beneficiary to her daughter's lease agreement).

As to the open-and-obvious danger issue, the Court of Appeals found there to be a question of fact based on the evidence. As to the "leased premises" issue, this issue was significant based on two conflicting lines of decisions following the Ohio Supreme Court's decision in *Shump v. First Continental-Robinwood Assocs*., 71 Ohio St.3d 414, 1994-Ohio-427. *Shump* held that "the obligations imposed upon a landlord under R.C. 5321.04... extend to tenants and to other persons lawfully upon the leased premises." *Id*. at 420. Following *Shump*, some courts have held that the landlord is not liable for injuries a tenant's guest suffers on the "common areas" of the landlord's premises, as those are not part of the "leased premises." *See, e.g., Shumaker v. Park Lane Manor of Akron*, 9th Dist. No. 25212, 2011-Ohio-1052, ¶12. Other courts have rejected this narrow interpretation, and have held that "landlords owe to guests of a tenant in the common areas the same duties the landlord owes to a tenant." *Mann v. Northgate Investors, LLC*, 10th Dist. No. 11AP-684, 2012-Ohio-2871, ¶20.

The 3rd District in this case agreed with *Mann*, and held that the "Landlord-Tenant Act applies with equal force to social guests of tenants regardless of whether they are injured in the common areas of a residential premises or within areas solely controlled by tenants." *Bierl* at ¶44.

Mann is currently pending before the Ohio Supreme Court on the certified question: "Whether a landlord owes the statutory duties of R.C. 5321.04(A)(3) to a tenant's guest properly on the premises but on the common area stairs at the time of injury?" S.Ct. Case No. 2012-1600. Oral argument is scheduled for April 24, 2013.

5.) Westerfield v. Three Rivers Nursing & Rehabilitation Center, LLC, 2nd Dist. No. 25347, 2013-Ohio-512 (Feb. 15, 2013).

Disposition: Affirming denial of defendants' motions to dismiss, to compel arbitration, and, in the alternative, to stay proceedings pending arbitration.

Topics: Revocation of arbitration clause in nursing home Admission Agreement.

This wrongful death action was brought against the defendant nursing home. When the decedent was admitted to the nursing home, he was competent, but his daughter had been appointed his attorney in fact. The nursing home presented the daughter with paperwork to sign upon her father's admission. She signed the Admission Agreement, which contained a mandatory arbitration provision, but refused to sign a separate Arbitration Agreement, telling the nursing home's representative that she would take it home with her instead. The nursing home's representative was "fine with" her doing so, and they proceeded to admit the father.

Not long afterwards, the father became ill and died of hypovolemic shock and sepsis. When the lawsuit was filed, the nursing home moved to dismiss, to compel arbitration, or, in the alternative, to stay proceedings pending arbitration. The trial court denied the motion and the Court of Appeals affirmed. The Court found that the arbitration provision in the Admission Agreement was unenforceable because the daughter essentially revoked that aspect of the agreement immediately after signing it. The Court found that the nursing home's representative and the plaintiff/daughter "both understood following their discussion of the Arbitration Agreement that [the plaintiff] did not agree to binding arbitration, and the admission process continued with that understanding." *Id*. at ¶26

6.) Johnson v. Emergency Physicians of Northwest Ohio at Toledo, Inc., 6th Dist. No. L-11-1290, 2013-Ohio-322 (Feb. 1, 2013).

Disposition: Reversing judgment on jury verdict for the defendants.

Topics: Medical malpractice; re-cross-examination of expert witness; two-issue rule; admissibility of expert testimony when fields of expertise overlap.

This wrongful death/medical malpractice action arose out of the defendants' failure to timely diagnose and treat an acute pulmonary embolism. The jury returned a defense verdict but the Court of Appeals reversed.

The error warranting reversal was the trial court's failure to permit the plaintiff to re-cross-examine one of the defense experts. This expert was offered as a witness by the urology defendants. The trial court permitted the other defendants (the emergency room defendants) to cross-examine this witness *after he was cross-examined by the plaintiff*. The plaintiff's cross-examination had been limited to the negligence issue raised on direct, but on cross-examination by the emergency room defendants, the expert gave opinions on proximate cause. Thereafter the urology defendants declined to do redirect of this witness; and the trial court denied the plaintiff the opportunity to recross this witness on the proximate cause issue on the ground that no redirect was done. The Court of Appeals held this to be error because "[t]he trial court's ruling acted to deny [the plaintiff] any cross-examination of the witness on the[] [proximate cause] opinions" and this was highly prejudicial to their case.

The court also rejected the defendants' argument that no reversible error occurred based on the "two issue rule." The court found that "this case does not present an independent ground supporting the general verdict that was tried free from the claimed trial court error." *Id*. at ¶29. The court also rejected the urology defendants' argument on cross-appeal that the plaintiff's expert -- who was board certified in emergency medicine, internal medicine, and critical care medicine -- was not qualified to testify on the standard of care for the urology defendants. The expert's testimony concerned the standard of care applying to communications between specialists and emergency room physicians generally, and the emergency room physician was competent to testify on this issue.

7.) Chlopecki v. Gilbane, 8th Dist. No. 98476, 2012-Ohio-6142 (Dec. 27, 2012).

Disposition: Reversing summary judgment for defendant.

Topics: Construction-site injury; "active participation" by the general contractor.

The plaintiff was an electrician employed by a subcontractor on a construction project. The plaintiff's job was to install smoke detectors in the ceiling, which required her to work on a 20-foot high scaffold with wheels permitting it to be moved from place-to-place. The building had a sub-floor with open holes to allow workers to install wiring beneath the floor. The holes were covered by the general contractor with plywood that was marked to indicate the existence of a hole but that was not fixed in place. On the day of the accident, the scaffolding rolled onto one of the pieces of plywood which moved, causing a wheel to get caught in the hole and the scaffolding to overturn.

The trial court granted summary judgment for the general contractor, but the Court of Appeals reversed. Although the court rejected the argument that the general contractor's supervisory role gave rise to a fact question on "active participation," it found that a genuine issue of material fact existed on "active participation" because the general contractor exercised control over a "critical variable" in the workplace environment – the placement of plywood boards covering the open holes on the floor. "Having undertaken to place the plywood, [the general contractor] was responsible for any negligence in how the plywood was placed." *Id*. at ¶11. The court also found that the plaintiff's knowledge that the holes were covered with plywood did not negate the general contractor's duty, but went to the issue of comparative negligence. *Id*. at ¶13.

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.*

Dennis D. Miller, Adm. v. ODOT, et al.

Type of Case: Wrongful Death/MVA/Negligent Maintenance of State Highway

Verdict: $3,343,025.00

Plaintiffs' Counsel: Jamie R. Lebovitz, Ellen M. McCarthy, Kathleen J. St. John, Nurenberg, Paris, Heller & McCarthy Co., LPA, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendants' Counsel: Willliam C. Becker; Emily M. Simmons

Court: Court of Claims No. 2009-07679, Judge Patrick M. McGrath

Date Of Verdict: April 4, 2013

Insurance Company: Allstate Insurance Company

Damages: Death of 48 year old wife and mother of 2 adult children. $1,300,000 for loss of earning capacity; $243,000 for loss of services; $1,000,000 for husband's loss of society/mental anguish; $400,000 each for son's and daughter's loss of society/mental anguish.

Summary: 48 year old nurse, driving to work on a state highway in Columbiana County, was killed when a box truck, having hit a long series of potholes, swerved left-of-center hitting her head-on. Two witnesses who lived in the area testified that the potholes had been developing for several weeks prior to the accident, and one of these witnesses testified he called the state to complain about the potholes two weeks before the accident. ODOT's county manager testified he traveled the same road the prior week, had seen the potholes, and had planned to repair them, but didn't order them to be immediately repaired. In a bifurcated trial, the Court of Claims found that ODOT had constructive notice of the potholes, and found ODOT 100% at fault for plaintiff's decedent's death, even though ODOT attempted to shift the blame to the driver of the box truck.

The damages phase of the trial took place in January of 2013. The plaintiffs presented evidence of the extraordinary nature of the decedent and her family. The decedent was a nurse who worked at a hospital and also taught nursing, and who, along with her family, spent many hours traveling to local nursing homes to visit patients with no family or whose families stopped visiting them. The plaintiffs also presented testimony from John Burke, Ph.D., regarding the decedent's loss of earning capacity and the loss of services sustained by her husband. The trial judge rejected ODOT's argument that the decedent would only have worked to her work-life expectancy of 59.3 years, and instead awarded loss of earning capacity based on her Social Security retirement age of 66 years and 10 months.

The liability phase of this case was reported in the Verdict Spotlight of the Spring 2012 issue of the CATA News.

Plaintiffs' Experts: John Burke, Ph.D.

Defendants' Expert: None

Pelvic Mesh/Gynecare Litigation, Superior Court of New Jersey, Law Division, Atlantic County, Docket No. ATL-6341-10, Case No. 291

Type of Case: Products Liability

Verdict: $11.11 Million

Plaintiffs' Counsel: Benjamin H. Anderson, Anderson Law Offices, Cleveland, Ohio; Adam Slater, Mazie Slater Katz & Freeman, Roseland, New Jersey; David Mazie, Mazie Slater Katz & Freeman, Roseland, New Jersey; Jeff Grand, Bernstein Liebhard, New York, New York

Defendants' Counsel: Christy Jones and William Gage, Butler, Snow, O'Mara, Stevens and Cannada; Kelly Crawford Strange, Riker, Danzig, Scherer, Hyland & Perretti

Court: Atlantic County, Case No. 291, Honorable Carol Higbee

Date Of Verdict: February 26, 2013 - $3.35 Million (Compensatory); February 28, 2013 - $7.76 Million (Punitive)

Damages: See above

Summary: Plaintiff, Linda Gross was implanted in July 2006 with the Prolift Kit, a medical device made by Ethicon, a subsidiary of Johnson & Johnson. After the surgery, Mrs. Gross developed chronic, severe and debilitating pain, mesh erosion, urinary dysfunction, and loss of normal sexual relations. She has had 18 surgeries and over 400 medical visits since the implantation of the Prolift. The trial lasted 8 weeks with both the compensatory and punitive phases.

Brian Malin, et al. v. Ohio Turnpike Commission

Type of Case: Personal Injury

Settlement: $8.5 Million

Plaintiff's Counsel: Michael Becker/David Skall, 134 Middle Avenue, Elyria, Ohio 44035, (440) 323-7070

Defendant's Counsel: Ron Lee, Roetzel & Andress

Court: Cuyahoga County, Judge Michel Donnelly

Date Of Settlement: February 27, 2013

Insurance Company: Travelers

Damages: Brain damage

Summary: Failure to yield accident. Plaintiff was unbelted. No claim made for lost earnings or value of household services due to restriction of drug usage/rehab evidence via a Motion in Limine.

Plaintiff's Expert: Jeff Pike (Biomechanical Engineer);
Hank Lipian (Accident Reconstructionist);
John Conomy, M.D. (Neurologist)

Raglin v. Save-A-Lot and Home City Ice

Type of Case: Premises Liability - Slip and Fall

Settlement: $42,500.00

Plaintiff's Counsel: Christopher DeVito, 623 W. St. Clair Avenue, Cleveland, Ohio 44113, (216) 687-1212

Defendant's Counsel: Michelle Sheehan and John Gannon

Court: Cuyahoga County, Case No. CV-12-782017, Judge Dan Gaul

Date Of Settlement: February 2013

Insurance Company: Self-Insureds

Damages: Medical Bills $23,000.00 (Paid Amount $7,000.00) and Lost Wages ($2,000.00)

Summary: Plaintiff slipped and fell on July 4, 2010 in Save-A-Lot store after delivery of ice bags by Home City Ice driver. Ice dripping from the delivery caused the unsafe condition and accident.

Plaintiff's Experts: None

Defendant's Experts: None

Estate of John Doe, etc. v. John Doe Driver, Insurance Company & Agent

Type of Case: Wrongful Death/Errors & Omissions

Settlement: Combined: $1.33 Million ($500K - Negligence; $830K - Errors & Omissions)

Plaintiff's Counsel: Susan Petersen/Todd Petersen, Petersen & Petersen, 428 South Street, Chardon, Ohio, (440) 226-4889

Defendant's Counsel: Withheld

Court: Withheld

Date Of Settlement: 2012/February 2013

Insurance Company: Withheld

Damages: $60,000 in medical expense; $9,000 in funeral expense; $80,000 annual income; fractures of the left wrist, clavicle, multiple ribs and foot (husband); death (wife)

Summary: 52 year-old man and his wife went for a motorcycle ride. Tortfeasor failed to yield right of way and turned into their lane of travel. The man suffered serious injury. His wife suffered fatal injuries and died on the scene. The tortfeasor tendered his $250,000 policy limits as to each individual. Two months before the incident, the couple procured a $1 Million dollar umbrella insurance policy through an insurance agent with instructions to obtain "full coverage" or "total coverage." They relied upon the agent in placing the policy and, among other things, were not told that every vehicle in the household must be covered for the umbrella policy to provide comprehensive coverage. The motorcycle they were riding was not listed as a covered vehicle and coverage was denied. The couple filed suit against the agent, his agency and the insurance company.

Plaintiff's Experts: Ralph Guarasci (Insurance Expert); John Burke, Jr. (Economist)

Defendant's Expert: Daniel Skaljac (Insurance Expert)

Shauna N. Frencel v. John Percun, Jr., et al.

Type of Case: Two (2) Auto Cases - March 22, 2010 and May 21, 2010

Verdict: $85,600 (Last offer was $7,500.00)

Plaintiff's Counsel: Andrew R. Young, Nurenberg, Paris, Heller & McCarthy Co., LPA, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendant's Counsel: Jean Ann Showalter, - 1st Accident - Only Trial Defendant. Patrick Foy - 2nd Accident - Voluntarily Dismissed Prior to Trial

Court: Cuyahoga County, Case No. 12 777045, Judge Joseph Russo/Assigned Visiting Judge R. Patrick Kelly

Date Of Verdict: January 24, 2013

Insurance Company: Grange Insurance Company - 1st Accident. Progressive Insurance Company - 2nd Accident dismissed out.

Damages: Temporomandibular Joint Disorder (TMJ). Past medical bills - $1,600.00; Past noneconomic loss - $10,000.00; Future medical bills - $16,000.00; Future noneconomic loss - $58,000.00. Total Verdict $85,600.00

Summary: Plaintiff was involved in a rear end car accident on March 22, 2010. Her vehicle was declared a total loss. She was then involved in a minor impact 2nd rear end accident on May 21, 2010. Plaintiff's expert believes the TMJ was caused by the 1st accident. The 2nd accident was voluntarily dismissed from the case. Defendant for the 1st accident admitted negligence but argued proximate cause asserting a defense which included, a gap in treatment, preexisting condition, and the 2nd accident as the cause of Plaintiff's TMJ.

Plaintiff's Experts: James W. Moodt, D.M.D.

Defendant's Experts: None

Anonymous

Type of Case: Personal Injury/MVA

Settlement: $100,000

Plaintiffs' Counsel: Stuart E. Scott, Spangenberg Shibley & Liber LLP, (216) 696-3232

Defendants' Counsel: N/A

Court: N/A

Date Of Settlement: January 7, 2013

Insurance Company: Independent Claims Services

Damages: $25,913.00

Summary: Tractor trailer went left of center and struck plaintiff's vehicle head on. Broken arm, concussion and full recovery with no residual symptoms.

Guardianship of John Doe v. ABC Hospital

Type of Case: Medical Malpractice

Settlement: $2.9 Million

Plaintiff's Counsel: Stephen S. Crandall/CMPW Law, LLC, 50 Public Sq., 35th Floor, Terminal Tower, Cleveland, Ohio, (216) 538-1981

Defendants' Counsel: Anonymous

Court: Anonymous

Date Of Settlement: December 10, 2012

Insurance Company: Self-insured

Damages: Brain damage after respiratory arrest.

Summary: Plaintiff was an inpatient with a tracheostomy that was intermittently occluding. Staff failed to detect warning signs of respiratory arrest which led to severe anoxic brain damage.

Plaintiff's Experts: Dr. Eric Gluck (Pulmonary/Critical Care)

Defendants' Experts: Anonymous

Estate of Jane Doe v. John Doe Nurse Anesthetist

Type of Case: Wrongful Death/Medical Negligence

Settlement: $920,972.50

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: December 2012

Insurance Company: Withheld

Damages: Death of woman on post operative day 3; $11,100 medical specials; $17,052.65 funeral/burial.

Summary: 66 year old morbidly obese woman with undiagnosed coronary artery disease was cleared by nurse anesthetist for elective cosmetic surgery without preoperative cardiac testing and with abnormal oxygen saturation rate just prior to the start of MAC anesthesia/surgery. The plaintiff alleged that the nurse anesthetist failed to meet the standard of care in his preoperative evaluation and clearance of the patient as she was an inappropriate candidate for this type of surgery without prior medical clearance. There was no prior clearance or cardiac testing of any kind. The anesthesia lasted 7 hours and 22 minutes. The woman suffered a fatal heart attack on post operative day 3. The autopsy showed significant blockage in one of her coronary arteries. Significantly, the defense CRNA expert admitted that the Defendant CRNA was below standard in proceeding given the abnormal oxygen saturation rate that morning with an unknown cause. Plaintiff's cardiology expert opined that the postoperative pain and stress of the surgery was the cause of the fatal heart attack and death. The Defendant's cardiology expert conceded in deposition that the postoperative pain from this surgery was probably the cause of the fatal heart attack and death.

Plaintiff's Experts: Margaret Meenan, CRNA; Lloyd Klein, M.D. (Cardiology); Kenneth Gerston (Pathologist)

Defendent's Experts: Richard Ouellette; Barry Effron, M.D. (Cardiology)

John Doe Bicyclist v. Robert Roe Motorist

Type of Case: Motor Vehicle (Auto Struck Bicyclist)

Settlement: $150,000.00

Plaintiff's Counsel: Rubin Guttman, Esq., Rubin Guttman & Associates, L.P.A., (216) 696-4006

Defendants' Counsel: N/A - Suit not filed

Court: N/A

Date Of Settlement: November 2012

Insurance Company: Hanover Citizen's Insurance

Damages: $80,000.00 in medical expenses (Robinson-Bates' $30,914.00)

Summary: Plaintiff, a retiree, was an experienced bicyclist who was riding on a designated cycling pathway when he entered the street at a crosswalk. Defendant pulled his SUV in front of Plaintiff, causing him to fall and suffer a hip fracture necessitating hip joint replacement surgery. Plaintiff made an excellent recovery and has resumed long-distance cycling and jogging.

Plaintiff's Experts: James H. Walker, M.D. (Orthopaedic Surgeon)

Defendants' Experts: None

Baby Boy Doe v. Dr. John Roe

Type of Case: Medical Negligence

Settlement: $4,200,000.00

Plaintiff's Counsel: John A. Lancione, Lancione & Lancione, LLC, (440) 331-6100

Defendant's Counsel: Not disclosed (confidential)

Court: Ohio Common Pleas

Date Of Settlement: November 2012

Damages: Cerebral Palsy; Developmental Delay

Summary: Failure to timely recognize fetal distress and deliver fetus in woman with clinical placental abruption.

Plaintiff's Expert: Aaron Caughey, M.D.; Laura Mahlmeister, R.N.; Marcus Hermansen, M.D.; Robert Zimmerman, M.D.; Max Wiznitzer, M.D.

Defendants' Expert: Jeffrey Phalen, M.D.; Henry Farb, M.D.; Elias Chalhub, M.D.; Richard Martin, M.D.; Gordon Sze, M.D.; William Roberts, M.D.

Baby Girl Doe v. Dr. Roe

Type of Case: Medical Negligence

Settlement: $4,750,000.00

Plaintiff's Counsel: John A. Lancione, Lancione & Lancione, LLC (440) 331-6100

Defendant's Counsel: Not Disclosed (Confidential)

Court: Ohio Common Pleas

Date Of Settlement: September 2012

Damages: Cerebral Palsy and Blindness

Summary: Defendants failed to timely recognize fetal distress and failed to timely deliver fetus.

Plaintiff's Experts: Harlan Giles, M.D.

Defendant's Experts: Dwight Rouse, M.D.

John Doe v. Dr. Roe

Type of Case: Medical Negligence

Settlement: $1,500,000.00

Plaintiff's Counsel: John A. Lancione, Lancione & Lancione, LLC, (440) 331-6100

Defendant's Counsel: Not Disclosed (Confidential)

Court: Pre-Suit Settlement

Date Of Settlement: June 2012

Insurance Company: Not Disclosed (Confidential)

Damages: Terminal Prognosis

Summary: Dr. Roe failed to see tumor on kidney on CT of chest. Delay in diagnosis of renal cell cancer. Cancer went from Stage I to Stage IV during delay.

Plaintiff's Experts: Christian Pavlovich, M.D.; Myron Marx, M.D.

Defendent's Experts: None disclosed

Mary Doe v. Dr. Roe

Type of Case: Medical Negligence

Settlement: $800,000.00

Plaintiff's Counsel: John A. Lancione, Lancione & Lancione, LLC, (440) 331-6100

Defendant's Counsel: Not Disclosed (Confidential)

Court: Pre-Suit Settlement

Date Of Settlement: May 2012

Insurance Company: Not Disclosed (Confidential)

Damages: Chronic Pulmonary Embolism

Summary: Plaintiff had symptoms consistent with pulmonary

embolism. Her physician failed to timely diagnose and treat the pulmonary embolism resulting in chronic PE.

Plaintiff's Experts: Daniel Buynak, M.D., Myron Marx, M.D.; David Goldstein, M.D.

Defendants' Experts: None disclosed

Jane Doe v. Dr. Roe

Type of Case: Medical Negligence

Settlement: $1,000,000.00

Plaintiff's Counsel: John A. Lancione, Lancione & Lancione, LLC, (440) 331-6100

Defendant's Counsel: Not Disclosed (Confidential)

Court: Pre-Suit Settlement

Date Of Settlement: April 2012

Insurance Company: Not Disclosed (Confidential)

Damages: Partial loss of vision

Summary: The plaintiff, a minor, suffered from pseudo tumor cerebri. The pediatrician failed to timely diagnose and treat the condition.

Plaintiff's Experts: Carl Asseff, M.D.; Mark Epstein, M.D.; Carol Miller, M.D.

Defendants' Experts: None disclosed

Estate of Nicholas Christie v. Lee County Sheriff's Office

Type of Case: Civil Rights and Medical Malpractice

Settlement: $4,000,000.00

Plaintiff's Counsel: William Hawal and Nicholas DiCello, Spangenberg Shibley & Liber LLP, 1001 Lakeside Ave., E., Ste. 1700, Cleveland, Ohio 44114, (216) 696-3232

Defendant's Counsel: Greg Toomey and Summer Barranco

Court: U.S. District Court - Middle District of Florida

Date Of Settlement: February 24, 2012

Insurance Company: Self-insured

Damages: Pain and Suffering/Wrongful Death

Summary: 62 year old man arrested for trespass and intoxication with mental health issues was repeatedly pepper sprayed in jail for cleating disturbances, including being sprayed while in restraint chair. Detainee developed SOB and suffered cardio-pulmonary arrest after taken to hospital. Claims against Prison Health Services were for improper intake screening and failure to provide proper medical monitoring.

Plaintiff's Experts: Eugene Miller & Michael Berg (Use of Force); Dr. Sally Johnston (Prison Psychiatrist); Madeline la Marre (Jail Nursing); Dr. Woodhall Stopford (Occupational Med.); Dr. Raymond Magorien (Cardiology)

Defendants' Experts: Gary DeLand (Use of Force); Dr. Vincent DiMaio (Pathologist); Dr. Joel Kalm (Cardiologist); Dr. Richard Matthay (Pulmonologist); Dr. Kris Sperry (Pathologist)

Jane Smith v. Airplane Component Co.

Type of Case: Airplane Crash

Settlement: $3.1 Million

Plaintiff's Counsel: Jamie R. Lebovitz, Nurenberg, Paris, Heller & McCarthy Co., LPA, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: Confidential

Damages: Burns

Summary: Airplane crash - burns to one victim.

Plaintiff's Experts: Contact Plaintiff's counsel.

Defendants' Experts: Confidential

Estate of Jane Doe v. Charter Airline Co.

Type of Case: Airplane Crash

Settlement: $7.0 Million

Plaintiff's Counsel: Jamie R. Lebovitz, Nurenberg, Paris, Heller & McCarthy Co., LPA, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: Confidential

Damages: Death of single adult woman survived by father and siblings.

Summary: Airplane crashed during landing sequence.

Plaintiff's Experts: Contact Plaintiff's counsel.

■

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