

CATA
CLEVELAND ACADEMY
OF TRIAL ATTORNEYS

Spring 2017
News



Also in this issue:

When Can You (Or Your Opponent) Appeal That Horrible (Or Great) Order Compelling Discovery? *p.9*

Updated Federal Nursing Home Regulations For Plaintiffs' Lawyers *p.13*

What's Hiding In Your Complaint? An Appellate-Jurisdiction Decision To Be Aware Of *p.24*



Structured Settlements. Financial Planning.
Special Needs Trusts. Settlement Preservation Trusts.
Medicare Set-Aside Trusts. Settlement Consulting.
Qualified Settlement Funds.



MICHAEL W. GOODMAN, ESQ.
Certified Structured Settlement Consultant

- 22 Years of Experience in Structured Settlements, Insurance and Financial Services
- #1 Structured Settlement Producer Nationally for Last 10 Consecutive Years
- Nationally Prominent and a Leading Authority in the Field
- Highly Creative, Responsive and Professional Industry Leader
- NFP is ranked by *Business Insurance* as the 5th largest global benefits broker by revenue, and the 4th largest US-based privately owned broker
- Immediate Past President of the National Structured Settlement Trade Association (NSSTA)

Passionate Advocates. Proven Approach.

800-229-2228

www.NFPStructures.com

ATLANTA BOCA RATON CHARLESTON CLEVELAND FORT LAUDERDALE
HARRISBURG LOS ANGELES PITTSBURGH SAN ANTONIO TAMPA

CONTENTS

- 2 **President's Message: The Greatest Lesson Learned: Grow, And Then, Grow Some More** by Rhonda Baker Debevec
- 3 **The Biggest Challenge - CATA Members Share Their Insights**
- 9 **When Can You (Or Your Opponent) Appeal That Horrible (Or Great) Order Compelling Discovery** by Matthew D. Besser
- 13 **Updated Federal Nursing Home Regulations For Plaintiffs' Lawyers** by William B. Eadie
- 17 **Pointers From The Bench: An Interview With Judge Peter J. Corrigan** by Christine M. LaSalvia
- 19 **Matthew Barge, Esq. To Speak At CATA's Annual Installation Dinner**
- 20 **Beyond the Practice: CATA Members in the Community** by Dana M. Paris
- 22 **2017 CATA Litigation Institute: The Power Of Focus Groups** by Michael A. Hill
- 24 **What's Hiding In Your Complaint? An Appellate-Jurisdiction Decision To Be Aware Of** by Kathleen J. St. John
- 27 **Practically Legal** by William B. Eadie and Michael A. Hill
- 28 **Verdict Spotlight** by Todd E. Gurney
- 30 **Recent Ohio Appellate Decisions** by Meghan P. Connolly and Dana M. Paris
- 35 **Verdicts & Settlements**

ADVERTISERS IN THIS ISSUE

Community Fund Management Foundation.....	29
Copy King, Inc.	8
NFP Structured Settlements	Inside Front
Recovery Options Management, Inc.	8
Structured Growth Strategies	Back
Video Discovery, Inc.	18

Opinions expressed in the articles herein are those of the authors and are not necessarily shared by CATA.
Cover design by Joanna Eustache.

Rhonda Baker Debevec
President

Cathleen M. Bolek
Vice President

Christian R. Patno
Secretary

William B. Eadie
Treasurer

Directors

Meghan P. Connolly

David R. Grant

Paul Grieco

Todd Gurney

Ellen Hobbs Hirshman

James M. Kelley, III

Christina M. LaSalvia

William N. Masters

Dana M. Paris

Susan E. Petersen

Stuart E. Scott

Kathleen J. St. John

Francis E. Sweeney, Jr.

Ladi Williams

Editor in Chief

Kathleen J. St. John

Designer

Joanna Eustache, Copy King

Design Support

Lillian S. Rudiy,
Nurenberg, Paris

clevelandtrialattorneys.org

Past Presidents:

Kathleen J. St. John
Ellen Hobbs Hirshman
George E. Loucas
Samuel V. Butcher
John R. Liber II
Brian Eisen
W. Craig Bashein
Stephen T. Keefe, Jr.
Mark E. Barbour
Donna Taylor-Kolis
Romney B. Cullers
Dennis R. Landsdowne
Michael F. Becker
Kenneth J. Knabe
David M. Paris
Frank G. Bolmeyer
Robert F. Linton, Jr.
Jean M. McQuillan
Richard C. Alkire
William Hawal
David W. Goldense
Robert E. Matyjasik
Laurie F. Starr
William M. Greene
James A. Lowe
Paul M. Kaufman
John V. Scharon, Jr.
Scott E. Stewart
Joseph L. Coticchia
Sheldon L. Braverman
William J. Novak
Peter H. Weinberger
Alfred J. Tolaro
Fred Wendel III
John V. Donnelly
Michael R. Kube
Frank K. Isaac
Seymour Gross
Lawrence E. Stewart
Milton Dunn
F. M. Apicella
Fred Weisman
Franklin A. Polk
Albert J. Morhard
George Lowy
Eugene P. Krent
Walter L. Greene
T.D. McDonald
Ralph A. Miller
Nathan D. Rollins
Harold Sieman
Michael T. Gavin
Richard M. Cerrezin
Joseph O. Coy
Robert R. Soltis
James J. Conway



Rhonda Baker Debevec is a principal at The Debevec Law Firm, LLC. She can be reached at 216.331.0953 or rdebevec@debeveclaw.com.

PRESIDENT'S MESSAGE

The Greatest Lesson Learned: Grow, And Then, Grow Some More

by Rhonda Baker Debevec

Whether inexperienced or very seasoned, lawyers are well-served by pushing themselves to **GROW** at every stage of their careers by consistently reading, listening and trying different techniques. Sharp lawyering skills are not achieved by being complacent. Rather, they are earned through personal and professional growth. Although this article's scope cannot possibly address every lawyer skill needed for professional success, below are some key skills that tend to be overlooked.



Writing Persuasively.

While oral advocacy is highlighted in the media's depiction of our profession, much of our clients' fates rest on the written word. To be sure, effectively and persuasively representing our clients' interests during oral advocacy is important. But, more frequently, cases are evaluated and, even decided, upon written submissions. Given this, the ability to write concisely and persuasively pays professional dividends.

Organization.

Although becoming organized is often bandied about as a laudable personal goal, its value within the legal profession cannot be over-estimated. Good organization and systems allow a lawyer to prioritize effectively, delegate when possible,

and concentrate on those tasks that will most effectively propel the client's case forward.

Volunteerism.

If experience is the best teacher, then volunteering is the best teacher's assistant. For inexperienced lawyers, offering to help on cases, however possible, gets their proverbial foot in the door and provides learning opportunities. For experienced lawyers, giving of one's time and energy is both personally fulfilling and can be a path toward professional recognition.

Business-Minded.

No matter how much lawyers may want to spend all of their time and energy focused on their clients and craft, the business-part of the profession does matter. When done well, it enables lawyers to focus their time, energy and financial investment on worthwhile cases. For the sole-practitioner, this may require designating certain portions of the week to concentrate solely on business-related matters. Alternatively, in a partnership, this may be achieved by splitting responsibility for business-related matters amongst the partners. Although the solutions may vary, the need to tend to the business aspects of practicing law is universal.

Although one may not always be able to focus on all of these skills simultaneously, one should always be focused on growing in at least one of these areas. And then, grow some more. After all, it is called the "practice" of law for a reason. ■

The Biggest Challenge: CATA Members Share Their Insights

Editor's Note: Recently, CATA asked experienced members of the plaintiffs' bar to share their biggest challenges and how they overcame them. Here is what they had to say.

Expanding To New Areas Of Practice

You asked me to write something about the biggest challenges I have faced in my practice and how I overcame them.

In this regard, it became apparent to me that certain areas of personal injury law which I really enjoyed, including product liability and employer intentional tort, were being legislated away through tort reform efforts. The challenge presented to me was what other or additional work I could begin doing, in addition to the personal injury work I had done for some 25 years.

As it happened, I had been appointed to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court and served as a Commissioner for nine years between 1997 and 2006. In my capacity as a Commissioner, I recognized that a new practice area could include representing lawyers and judges in grievance matters as well as consulting with lawyers in law firms in connection with ethics and professional responsibility issues. Therefore, beginning in 2006, I began performing professional services for lawyers, judges and law firms in the ethics and professional responsibility area, thereby expanding my practice area. This new and additional area of law enabled me to replace the litigation which was dwindling due to tort reform. It has become a substantial and rewarding portion of my practice.

◆ **Richard C. Alkire**

Refining A Niche Practice

I have a niche practice. I handle only medical negligence cases. Early on, I found it hard to say no when people would

call me with other types of personal injury matters. I felt like I was losing opportunities by not representing people in car accidents and in premises liability cases. I kept thinking I could take on those cases, make a bit of money, and build a critical mass of satisfied clients who might later on refer me medical negligence cases.

But I decided to stick with what I love, representing victims of medical negligence. And it was the right decision for me. My focus actually turned out to be a selling point. Attorneys who handle personal injury cases but prefer to steer clear of risky and expensive medical negligence cases feel comfortable referring me those cases because they know I won't "compete" with them later for that client's automobile case or his workers' compensation business. I handle the one matter and "return" the client for all other business. It turned out that my decision to narrowly focus my practice actually increased – rather than decreased – my business opportunities, a fortuitous consequence of my decision to do only what I enjoy doing.

Once I started receiving referrals, the challenge became screening them properly. I had a tendency early on to lower my standards when a case came in from a new referral source. I wanted to impress the referring attorney and deliver a co-counsel fee (even a small one), so that I could earn future business. I took on cases I probably shouldn't have, hoping I could turn lead into gold. I soon discovered that bad cases usually get worse over time, and that it is best to be honest with referring counsel about a case's "warts" and to explain my reasoning for turning it down. The best time to reject a case is early on. Two decades later, that still seems to me to be the formula. In this area of the law, no business is better than bad business. Never lower your standards for a case because



your “docket” is down or because you want to satisfy someone else. Stick to your standards, build trust with your referral sources, and good things will happen. Above all else, find your passion and stick to it.

◆ **Brian N. Eisen**

Balancing Act

As young professionals, we all encountered many challenges: determining what area of the law and legal profession would become our life’s work, negotiating the various personalities that one encounters/interacts with on a daily basis at a law firm and on the other side of the table, realizing when it is time to move on to another law firm or area of practice, adjusting to the demands of working in a law firm. However, for me as a young professional, wife and soon thereafter, a mother, the biggest challenges I faced in my career dealt with successfully balancing the demands on my time between my work, home and personal life. Four years after being admitted to the Ohio Bar, I joined a large medical malpractice defense firm in Cleveland with a reputation for “aggressively” defending physicians, hospitals and other health care providers throughout Ohio and five other states. There was a lot of expectation to try a lot of cases as most cases, if warranted, carried a “no pay” position. Surprisingly, this was not a challenge to me. I have always been a confident, fairly aggressive person, and am not afraid of walking into a courtroom and zealously defending my client. What I found to be the biggest challenge was finding time to adequately devote to meticulously representing my clients while also having a superior presence in my home and maintaining my relationships with my spouse and children. Also, not to be forgotten, was being able to carve out enough time to devote to maintaining lifetime friendships which are still important to me to this day.

I was able to successfully balance the demands on my time, first of all, because I happened to choose a terrific life partner who totally understood the demands being made on my time at work and at home. And, the fact we worked together for more than twenty years certainly made it easier. My husband, Toby, understood that at times I would not be available to be at home because of the demands of my job, and was also understanding and worked together with me in covering a deposition or two when one of the children absolutely required my attention (and I had a child who had a learning difference that required my becoming his “study buddy” starting in second grade and continuing until high school



graduation). Organization played a big role in successfully carrying out this balancing act. It also helped to be able to afford quality nannies and personnel in the home to care for my children in my absence. This may sound funny but my one rule every evening when I came home from work was that my care provider could not leave until I had an opportunity to change into casual clothes. That is when I had officially transitioned into my mode as mom and wife.

Not all attorneys have a spouse and/or children but we all have other demands that plague us, especially when we start out as young attorneys. My advice is to be mindful of the other relationships in your life and to not ignore or abandon them. You have to structure your time and work to maintain a reasonable balance. If not, sooner or later it will catch up with you and you will be compromised as a professional, spouse, parent and friend.

◆ **Ellen Hobbs Hirshman**

Finding The Right Fit

After majoring in psychology as an undergrad and even experiencing some graduate studies, I realized that this particular discipline was not in my future. Law school, on the other hand, appealed greatly to me.



Why? Because, per my mentor’s advice, I could make money AND help people. Upon completing law school, the biggest challenge was determining the best career path. I got my start at the Ashland County Prosecutor’s Office with none other than Art Elk, the Ashland County Prosecutor, as my new mentor. After this initial professional experience, I left Ashland for the offices of the Geauga County Prosecutor, where I learned from the likes of Charles Brown and Jack Norton. Those were difficult times doing both civil and criminal work for the county, while learning how to craft legal opinions under the close scrutiny of Jack Norton who was, and still is, a great lawyer and writer.

I began to have fun trying cases there when eventually I took over Juvenile Court prosecutions. This job led me to the Cuyahoga County Prosecutor’s Office at which, just a year out of law school, I was trying murder cases. I enjoyed very much the criminal trial where one had to do it all, then and there, with no discovery.

After this experience I entered the civil arena, and toiled for ten years. First on the bigger firm plaintiff side and then on the bigger firm insurance defense side, neither of which

appealed to me...too many lawyers on too many ships sailing out to port. I learned that I clearly enjoyed plaintiff work much more than defense work. Yet, I had not found the right fit and was not always enamored with the practice of law. I took a year off to find myself and it worked.

When I returned from my Sabbatical, I was really ready to go. I met Jim Szaller and found the right fit with a small plaintiff firm where I was able to make my own decisions and choices, sink or swim. I operate that firm now. I have no one to answer to except myself. Taking that final leap could have come years earlier if only I had known how satisfying it would be.

I spent ten years seeking the right fit for me. I see many young attorneys with the talent and ability to succeed on their own yet they stay in a holding pattern working for others. If you discover what makes you happy in this expansive legal field, you have found the right fit. Don't hesitate - follow your gut and jump in!

◆ **Kenneth J. Knabe**

Learning From Losses

I had a string of devastating trial losses in the early 2000s, all med mal cases. In retrospect, the cases that I tried during that stretch evoked extreme versions of certain jury biases, like defense attribution bias. It didn't help that the public attitude toward medical malpractice cases was extremely negative then due to Bush's ginned-up tort reform campaign. After that experience, I really went to school on jury decisionmaking. As a result, I've grown more cautious in selecting medical malpractice cases, and have diversified into catastrophic MVA and workplace tort cases. In med mal cases, it is critical to identify a mistake that does not require the jury to understand complex medicine. Focus groups are useful to better understand juror comprehension and biases. I also focus a lot of effort on the deposition of the defendant. Med mal defendants are typically less sophisticated than experts, so it is easier to nail the story down, identify safe practices, and defuse common defenses, and do so early in the litigation. I've come to accept that it is a tough job, but someone has to do it.



◆ **David A. Kulwicki**

Managing Client Expectations

As an injury attorney with 36+ years of practice, who investigates a significant number of potential medical

negligence claims involving hospitals and doctors, the biggest challenge I continue to face is explaining to potential clients the difficult reality of attempting to hold a doctor or hospital responsible for causing preventable harm. Make no mistake, most of the potential clients that contact me have suffered an injury or a loved one has died under the care of a healthcare provider and probably the injury could have been avoided. The injuries are usually significant and the emotions are high but uncovering the truth and getting the client fairly compensated is far from a walk in the park. The potential client feels betrayed by his or her doctor and wants to be compensated for their loss. Frequently they have in the back of their minds the McDonald's case and their belief that if millions can be awarded in such a "frivolous lawsuit" they should be entitled to money damages for a bad outcome or a death during medical care.



Sifting through the details of the story and trying to determine whether the potential client has a legitimate and potentially winnable claim is time consuming, but must be done thoroughly and as early as possible so I can provide the client with an honest and objective analysis of whether I can help him or her. As we all know, many mistakes that are made do not result in sufficient harm to justify the time and expense of pursuing the claim. Many mistakes are described as near misses or poor communication or a lack of understanding of the inherent risks of the procedure or the medical condition itself. As hard a pill as it is to swallow, sometimes bad outcomes occur in the course of medical care that are not due to negligence. The unpleasant fact is that the story frequently has an unhappy ending with most claims being denied or a defense verdict returned and if compensation is awarded the claim is not resolved as quickly or for as much as the potential client believes should occur.

Frequently I am faced with trying to explain why the complication was either unavoidable or a "known and recognized complication of the procedure," or that, due to the cap or limit on what can be awarded for pain and suffering, I can't see that the client will benefit from the litigation process. I try to give the potential client who, in my professional judgment, likely does not have a case a clear understanding as to why I have reached this conclusion. I try to explain that my opinion is not the end-all and I encourage them, if in doubt, to seek further opinions. However, it is never easy and always emotionally challenging to have this type of frank and honest discussion, especially knowing that a potentially avoidable mistake may have occurred. I know my job is to be honest and

professional and to be an advocate for my clients, but trying to use my crystal ball to predict and determine if I can justify my time and expense to pursue the case is a huge challenge and it never gets easier to resolve.

The best advice I can give is to look at each potential client independently and to be honest and thorough and not make any promises that you can't keep. This way the challenges still will exist but you can sleep better at night knowing that you have done your job within the confines of the system we have to work within.

◆ **Howard D. Mishkind**

Outwitting The Academic Expert

Taking on the well-published expert is always tough. The first time I faced this was 20-plus years ago when I was contemplating what would be the first medical malpractice case I tried alone. I was sitting at my desk with the primary defense expert's C.V. that took up its own file gusset. It contained references to hundreds of peer-reviewed articles and book chapters. I was intimidated by the sheer volume and afraid of the doctor who wrote them. I didn't have a medical background or much trial experience. At that point I didn't know what to do, so I started from scratch. I read the C.V. carefully and critically analyzed everything cited within it with a beginner's mind.



I obtained all of the articles and book chapters cited in the C.V. Back then it wasn't so easy. I actually had to go somewhere. I walked up and down the metal stairs at Allen Memorial Library and photocopied the articles from dusty books. I read them over and over until I understood them. I highlighted stuff that sounded good and ignored the stuff I didn't think mattered. Some of the concepts were difficult to grasp. I ended up spending a lot of time at the library, and as a result, I met the people who worked there, including a medical student I paid to sit with me and explain the complicated parts of articles I didn't understand.

I wrote words and phrases from the expert's articles on index cards, and memorized them. I memorized his exact words so I could use them precisely in questions that I asked at deposition without having to look at my notes and make it obvious I was quoting him. I didn't have the confidence or sophistication on the medicine to debate the issues, so I decided to make him live by his words, or eat them, and I did find a few nuggets in the articles. I asked lots of questions at the deposition like, "Is it true that...(insert his words)."

Of course he answered "no, no, no" over and over again or I wouldn't be telling this story.

I repeated all the same questions at trial a couple of months later. Except this time he laughed when he said, "no, no, no" and added something like "I already told you all of this at my deposition - no I do not agree with that and no there isn't a credible expert who would." You can figure out what happened without hearing the rest of this story. We can all agree there's nothing better than a pompous blowhard who comes across as an advocate during your cross examination.

My point is that relatively inexperienced lawyers should not be intimidated by the academic expert. Sometimes the experts say helpful things in their ubiquitous publications. Often they say the same exact things over and over and re-publish them in multiple resources. It isn't necessary for you to go toe to toe on every issue on the medicine and reduce the trial to a nauseating debate no juror will understand. You just have to be better at controlling the conversation on the specific issues in your case.

Academic experts are smart, but they relinquish control when they step into your environment. Words matter. Lawyers live and die by their words and doctors should have to do the same. You can learn an expert's words and long-held beliefs and clearly know them at trial better than they remember having expressed them. If you confront an expert at trial with words that they do not like the sound of in the moment, they will either deny them or back away from them every time. You can beat these experts by outworking them. I've also done this with prior depositions and YouTube videos, but peer-reviewed publications are the best. You may not find these opportunities in every case, but when you do, it's so good.

◆ **Romney B. Cullers**

Finding Your Courtroom Self

For years I struggled with who I was going to be in the courtroom. It is one thing to say you are going to be yourself in court. It is another thing to actually do it. This is especially true when you are trying to be flawless in the courtroom and when you have read and seen so much about how different skilled trial lawyers present themselves in front of a jury.



Moreover, the courtroom is a unique setting so what of my own life experiences informed who I should be in that setting?

I won't say I have "overcome" this challenge but I have made progress. I did so by trying to strip away barriers between myself and the jurors. I had to get beyond my innate fear of rejection by being prepared to endure rejection should it come. In addition I became even more deeply connected to my clients and their injuries and losses. That is who I am and want to be in the courtroom.

I am not quite there yet, but I am getting closer.

◆ **Dennis R. Lansdowne**

Remaining Mindful Of Professionalism

There are any number of challenges we all face, particularly in the wake of never-ending legislative and judicial roadblocks designed to limit defendants' accountability and court access for consumers.



But I think the biggest challenge to overcome is the sense of eroding collegiality and professionalism among our peers in the litigation arena. We are not just practicing a trade or running a business. We are members of an honorable profession which is the very soul of a civilized society.

The late U.S. District Judge Sam Bell exuded respect for lawyers who appeared before him. By treating our adversaries with respect and kindness, we remind ourselves of our higher calling and we enhance our profession in the process, all without ever compromising our zealous advocacy on behalf of those who look to us for justice.

◆ **James A. Lowe**

Embracing The Heartbreak

For me, the biggest challenge I've faced as a medical malpractice lawyer is the heartbreak of the plaintiffs I've encountered.



My first job out of law school was with Jacobson Maynard Tuschman & Kalur. Its primary client was the largest malpractice insurance company in the Midwest. As a young malpractice defense lawyer, my first cases involved bad outcomes having mostly to do with teeth or toes. With more experience and skill, I found myself across the table from people with injuries that were more catastrophic, malpractice more egregious, and stories more tragic. I learned to suppress my own tears during

the depositions of grieving families, and to suppress my own anger when a bad doctor I was defending offered me poor excuses for his or her conduct. The better defense lawyer I became, the harder it was for me to do the job. Finally, after a particularly difficult trial, the plaintiff's lawyer telephoned me and finally put words to what I was feeling: "You're on the wrong side. Make the change."

I was and I did. That was 23 years ago, and over that near quarter of a century, I have confronted the biggest challenge of this job by embracing it. I comfort families, cry with them, reassure them, educate them, empower them, and work as hard as I can to get them justice.

Speaking from experience, I can attest that being a plaintiff's lawyer is a much more difficult job than a defense lawyer's. The defense has control over the medical records, the medical experts, the medical literature, and if that weren't enough, a bottomless financial well. The defense has the benefit of the peer review privilege, the protected incident report, the apology statute, the sudden emergency defense, and the mother of all benefits, tort reform. The defense's clients (mostly) are smarter, slicker and savvier about the litigation process than our clients. The defense walks in any courtroom with an automatic advantage with the jury because no juror wants to believe that health care providers hurt patients.

The worst part of this job is losing. Losing means a jury of the client's peers heard the same story I did but didn't react with the same sadness and outrage. Losing means that jury gave a bad doctor, an inadequately trained midwife or a careless nurse a free pass on poor care. Losing means an innocent victim whose life is forever changed got neither hope nor justice.

But the best parts of my job are this. True advocacy on behalf of victims - listening to their stories, advancing their causes, and leading juries to their ultimate truth - is as important a life's work as anyone could ask for. And, being another soldier in this larger army - CATA, OAJ, AAJ - where everyone is focused on giving a voice to the vulnerable, is gratifying in victory and comforting in defeat. The stories I listen to are still heartbreaking but, if justice prevails, I continue on with a new optimism.

◆ **Pamela E. Pantages**

Going With The Ebb And Flow

Challenges? What Challenges?

1. The ever increasing field of talented injury lawyers from whom consumers can make selections.

2. How we convey or showcase our talents to the public and co-counsel continues to morph over time.
3. Keeping current with technological changes affecting our practice.
4. Institutional mandates discouraging treating physicians from expressing opinions that assist our clients.
5. Rocket docket.
6. Special interests outspending consumer groups by large margins.
7. Legislators who eliminate long standing claims for relief with a stroke of the pen.
8. Supreme Court Justices who refuse to declare unconstitutional draconian legislation.



Then, I'm reminded of Marshall Nurenberg's remarks to me as a young lawyer. He'd say, "David, before 1984, we had contributory negligence. A plaintiff who was .001% at fault recovered NOTHING. Before the amendment of the wrongful death statute in 1982, the measure of damages was pecuniary loss. The loss of a homemaker or child was worth NOTHING. The guest statute, until 1975, precluded any recovery by a passenger in an automobile, unless he/she made a financial contribution to the trip or was on a joint venture." And so on....

So perhaps the biggest challenge I've encountered is maintaining a healthy perspective on our profession. There is an ebb and flow to the good work we do. When one door closes on our clients, collectively, we've been pretty good at finding another way in.

◆David M. Paris

Your Source for Complete Digital & Commercial Offset Printing Services



Digital Black & White & Color Printing
Commercial Offset Printing Services
Full Color Envelope Printing
Binding & Finishing
Graphic Design
Personalized Variable Printing
Scan Hard Copy to USB Drive or CD
Pick-Up and Delivery

COPY KING
On Time, On Demand

3333 Chester Avenue • Cleveland, Ohio 44114

Phone: 216.861.3377 • Fax: 216.861.6108

www.copy-king.com • sales@copy-king.com

Certified as a CSB and a FBE with the City of Cleveland and a SBE with Cuyahoga County

Committed to Customers • Committed to Quality • Committed to Service

RECOVERY OPTIONS MANAGEMENT, INC.

Pamela D. Hanigosky

RN / BSN / CRRN / CCM / CLCP

Specializing in:

- ***Life Care Planning***
 - ***Future Cost Projections***
- ***Case Management***
 - ***Medical & Catastrophic***
 - ***Worker's Compensation***
- ***Elder Care Management***

For additional information contact us at:

Phone: (440) 237-4840

E-mail: phrncmlcp@aol.com



Matthew D. Besser is a principal at Bolek Besser Glesius LLC. His practice focuses on appellate law, employment law, and civil rights. Matt also teaches appellate practice as an adjunct professor at Case Western Reserve University School of Law, and previously served as a law clerk on the U.S. Court of Appeals for the Third Circuit. He can be reached at 216.464.3004 or mbesser@bolekbesser.com.

When Can You (or Your Opponent) Appeal That Horrible (or Great) Order Compelling Discovery?

by Matthew D. Besser

Imagine you've won a crucial motion to compel production of documents that your opponent argues are privileged. Can the other side halt the entire case with an immediate appeal? Now imagine the shoe is on the other foot: a court orders you to produce your client's medical records, despite your objections. Can you take an immediate appeal? Until recently, the answer to both questions was a relatively settled one. It was yes. But in 2015 and 2016, the Ohio Supreme Court issued a pair of decisions that altered the landscape, at least in part. Whether orders compelling production of "privileged matter" are immediately appealable under Ohio law now depends on the specific discovery objection a party raises. For some of these orders, the answer seems to remain "yes." For others, the answer is now "it depends."

A. Under Ohio law, some orders compelling production of "privileged matter" are immediately appealable.

Article IV, Section 3(B)(2) of the Ohio Constitution grants the courts of appeals jurisdiction to review "final orders." Generally, orders compelling discovery are not final; they are interlocutory and not immediately appealable.¹

In 1998, the Ohio Legislature amended the statutory definition of "final orders" in Revised Code section 2505.02, creating a critical exception to the general rule against appeal of discovery orders. The amendment added orders granting

or denying a "provisional remedy" to the list of final orders.² In turn, a "provisional remedy" includes "discovery of privileged matter."³ With the amendment, the Legislature opened the door to immediate appeal of orders compelling production of documents that a party claims are privileged. That door, however, is not open in every case.

To be immediately appealable, an order compelling production of "privileged matter" must meet the two conditions set out in section 2505.02(B)(4). The first is that the order "determines the action" and "prevents a judgment in the action in favor of the appealing party" regarding the disputed discovery.⁴ The second is that the "appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment" on the underlying case as a whole.⁵ If a discovery order satisfies both, an aggrieved party can challenge it by immediate appeal.

For much of the time after the 1998 amendment, Ohio courts generally held that orders to produce discovery despite a "privilege" objection were "final, appealable orders under R.C. 2505.02(B)(4)."⁶ The typical rationale adopted by these courts was that once the documents are produced, "the bell cannot be unrung" by a subsequent appellate ruling.⁷ After all, once the documents at issue are released, "the damage is done and cannot be undone."⁸

Discovery disputes over "privilege" most obviously

conjure thoughts of attorney-client privilege and work-product objections. But particularly in personal injury and employment litigation, orders compelling production of medical records can be just as problematic. Citing the various statutes protecting medical records from disclosure—including the physician-patient privilege—in the years after the 1998 amendment, Ohio courts held that orders compelling production of medical records were final and appealable under section 2505.04(B)(4).⁹

Things changed in 2015. That year, the Ohio Supreme Court's decision in *Smith v. Chen*, raised doubt whether it would continue to be such a foregone conclusion that parties could immediately appeal orders compelling production of "privileged material."

B. *Smith v. Chen* held orders compelling production of privileged material are not always immediately appealable.

Smith v. Chen was a medical malpractice case in which a discovery dispute arose over a surveillance video of the plaintiff, made by defendants for use as impeachment. The defendants refused to produce the video, citing the work-product doctrine. After the court of common pleas ordered defendants to produce it, they appealed. The Tenth District held there was appellate jurisdiction to review the discovery order, and affirmed.¹⁰

In a 4-3 decision, the Supreme Court held the court of appeals lacked appellate jurisdiction. In response to the Supreme Court's show cause order to address appellate jurisdiction, the defendants made a consequential mistake: they did no more than make a conclusory reference to the Tenth District's holding that jurisdiction existed. The majority said that was not good enough. The

Court held that defendants' conclusory argument failed to meet the second condition in section 2505.02(B)(4)—"that they would not be afforded a meaningful or effective remedy" by appeal after resolution of the entire case.¹¹

Explaining its holding, the *Chen* Court announced what some would later interpret as a new (and more stringent) test under section 2505.02(B)(4)(b). It held that "[a]n order compelling disclosure of privileged material that would truly render a postjudgment appeal meaningless or ineffective may still be considered on immediate appeal."¹² Sensing concern that courts would read the decision as altering the law, the majority noted that was not its intent. The Court held: "This ruling does not adopt a new rule, nor does it make an appeal from an order compelling disclosure of privileged material more difficult to maintain."¹³

In a dissent joined by Justices O'Donnell and French, Justice Kennedy raised concerns that—the majority's contrary contention notwithstanding—the decision "summarily changes the law in all appellate districts."¹⁴ To illustrate the point, the dissent cited nine appellate districts that then-considered "orders compelling discovery of alleged privileged materials" as essentially *per se* final and appealable under section 2505.02(B)(4).¹⁵ In conclusion, Justice Kennedy offered somewhat of a prediction, writing "today's holding destabilizes the law with regard to whether orders compelling production of allegedly privileged material are final and appealable."¹⁶ As it turns out, she was right.

C. Ohio courts of appeals applied *Chen* inconsistently.

Despite the *Chen* majority's explicit admonition that the decision did not change Ohio law, the courts of appeals

struggled to apply the case, quickly leading to a split among the districts.¹⁷

Some districts followed the prior line of cases holding that parties could immediately appeal orders compelling production of privileged materials.¹⁸ These courts adhered to the traditional argument that "the proverbial bell cannot be unrung" by a subsequent appellate decision.¹⁹

Some districts went the other way.²⁰ These courts read *Chen* as heightening the standard of proof required for immediate appeal. They held that under *Chen*, "the disclosure of privileged documents during discovery, in and of itself, is insufficient to establish why an immediate appeal is necessary under R.C. 2505.02(B)(4)(b)."²¹ In other words, they held it is no longer enough to simply claim that "the proverbial bell cannot be unrung." Perhaps the most striking of these cases was *Walker v. Taco Bell*. In that case, the First District held that an order compelling production of medical records is no longer immediately appealable after *Chen*, breaking with nearly two decades of Ohio law to the contrary.²²

It took barely a year for this new district split to percolate back up to the Ohio Supreme Court.

D. The Supreme Court weighed back in a year after *Chen*.

Darlene Burnham sued the Cleveland Clinic after slipping and falling while visiting her sister in the hospital.²³ In discovery, she sought an incident report created by the Clinic after her fall.²⁴ The Clinic objected, claiming the report was protected by attorney-client privilege.²⁵ The trial court ordered production.²⁶ The Clinic immediately appealed to the Eighth District, which dismissed for lack of appellate jurisdiction, citing *Chen*.²⁷ In *Burnham v. Cleveland Clinic*, the

Supreme Court “accepted jurisdiction to clarify *Chen* . . .”²⁸

In a splintered 6-1 decision, the Supreme Court limited *Chen* and reversed. The lead opinion—a three-justice plurality—held that *Chen*’s reference to “privileged material” did not include attorney-client privilege.²⁹ Instead, the plurality held, discovery orders implicating attorney-client privilege can be immediately appealed without meeting the “truly render” standard set forth in *Chen*. According to the plurality, “[a]n order compelling production of materials alleged to be protected by attorney-client privilege is a final, appealable order under section 2505.02(B)(4).”³⁰ Because the Clinic “plausibly alleged” a claim of attorney-client privilege, the plurality held the order in dispute was final and appealable.³¹

The plurality was far more equivocal about the finality of discovery orders compelling production of other types of “privileged” documents, including work-product documents. For them, the plurality announced that the standard for finality depends on the nature of the discovery protection at issue. **It held that “discovery protections that do not involve common law, constitutional, or statutory guarantees of confidentiality, such as the attorney work-product doctrine, may require a showing under R.C. 2505.02(B)(4)(b) beyond the mere statement that the matter is privileged.”**³² This language seems to suggest that some discovery orders besides those implicating attorney-client privilege will be automatically appealable upon a plausible allegation of privilege. Others—including those stemming from work-product objections—will require an additional showing beyond the argument that the “bell cannot be unrung.”

Concurring in judgment only, Justice Kennedy—joined by Justices O’Donnell and French—pulled no punches, calling

the plurality opinion “incomplete and disingenuous.”³³ The concurrence criticized the plurality, in part, for not recognizing “the common-law origins of the work-product doctrine.”³⁴ Its larger concern, however, was with the distinction the plurality drew between discovery protections in the first place. Advocating for a return to the pre-*Chen* days of uniformity, the concurrence argued that all orders compelling production of purportedly “privileged” documents or information should be final and appealable. The concurring Justices wrote they “would hold that an order requiring the release of privileged documents, whether protected by the attorney-client privilege or work-product doctrine, is a final, appealable order because the ‘proverbial bell cannot be unrung.’”³⁵ Thus, while disagreeing with the plurality’s rationale, the concurring Justices agreed that the order at issue was final and appealable.

E. How attorneys should approach appellate jurisdiction for discovery orders after *Chen* and *Burnham*.

In the aftermath of *Burnham*, the landscape is a little clearer than it was after *Chen*. But it is still more muddled than before *Chen*. Keep in mind, *Burnham* was a plurality opinion; there were only three votes for treating appeals based on attorney-client privilege different from other discovery protections. For now though, it appears that a party’s ability to immediately appeal a discovery order compelling production of privileged material hinges largely on which discovery objection the party raises.

First, it seems that discovery **orders implicating attorney-client privilege are immediately appealable**. Six Justices in *Burnham* held as much. In that sense, *Burnham* appears to hold that Ohio law remains as it has been since 1998. And yet there lingers a question

whether even that holding is categorical.

The *Burnham* plurality held that the defendants could appeal because they “plausibly alleged” the documents at issue were protected by attorney-client privilege. It is not clear whether the plurality intended that phrase to be a threshold standard, or whether—like the concurring Justices seem to have desired—appeals based on attorney-client privilege automatically satisfy section 2505.02(B)(4). It remains to be seen whether courts will use that “plausibly alleged” language as a gatekeeper, or will simply allow all appeals involving attorney-client privilege.

On the other hand, **discovery orders implicating the work-product doctrine are not automatically appealable**. For these appeals, it is not enough to simply state that “the bell cannot be unrung.” Appellants must instead make some additional showing: that producing the documents at issue “would truly render a postjudgment appeal meaningless or ineffective. . . .”³⁶ Just what that means exactly is unclear. Neither *Chen* nor *Burnham* provided much guidance on applying the “truly render” standard.

Regardless of how courts end up interpreting this standard, attorneys now have to be a little more thoughtful to get their foot in the court of appeals when challenging an order to produce work-product documents. At the outset, the attorney should put the alleged harm from production into the trial court record.³⁷ The attorney should then identify that harm for the court of appeals “as specifically as possible.”³⁸ As a practical matter, it might also be useful to draw a distinction between a request for fact-based discovery and requests that would reveal an attorney’s legal impressions and strategy. A court of appeals might be more apt to find irreparable harm from discovery of the latter.³⁹

After *Burnham*, there also seems to be a **general category of objections grounded in confidentiality upon which an immediate appeal might be based.** The plurality held that if a discovery protection does not arise from “common law, constitutional, or statutory guarantees of confidentiality,” an appellant must do more to satisfy section 2505.02(B)(4)(b) than merely claim “that the matter is privileged.”⁴⁰ The fair implication is that if a discovery protection *does* arise from “common law, constitutional, or statutory guarantees of confidentiality” it *will* be automatically final and appealable (assuming the protection is “plausibly alleged”). One such protection is particularly relevant to personal injury and employment-law practitioners.

The physician-patient privilege is a statutory protection from discovery.⁴¹ Because this “guarantee of confidentiality” comes from statute, *Burnham* suggests that **an order to produce medical records is immediately appealable** without any heightened showing. At a minimum, appellants compelled to produce medical records should make that argument. After *Chen*, at least one court held that orders to produce medical records are not immediately appealable.⁴² *Burnham* seems to have restored the balance to the pre-*Chen* days. This same argument would apply to other codified privileges as well—for example, the clerical and spousal privileges.⁴³

* * *

Whether you think *Chen* and *Burnham* were positive developments probably depends on which side of a motion to compel you find yourself on. Either way, Ohio law regarding the finality of discovery orders is far from written in stone. So for the time being at least, if your clients asks whether you (or your opponent) can appeal that horrible (or great) order to produce discovery, the answer is simple: “it depends.” ■

End Notes

1. See, e.g., *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St. 3d 118, 120–21 (1997).
2. R.C. § 2505.02(B)(4).
3. *Id.* at § 2505.02(A)(3); see *Myers v. Basobas*, 129 Ohio App. 3d 692, 697–98 (Ohio Ct. App. Franklin Cty. 1998).
4. R.C. § 2505.02(B)(4)(a).
5. *Id.* at § 2505.02(B)(4)(b).
6. *Burnham v. Cleveland Clinic*, 2016-Ohio-8000, P32 (Dec. 7, 2016) (Kennedy, J., concurring in judgment); see Mark Painter and Andrew S. Pollis, *Ohio Appellate Practice*, § 2.2 (2016).
7. *Burnham*, 2016-Ohio 8000, at P36 (citing *Ohio v. Muncie*, 91 Ohio St. 3d 440, 451 (2001)).
8. See *Walker v. Firelands Cmty. Hosp.*, 2003-Ohio-2908, P12 (Ohio Ct. App. Erie County June 5, 2003).
9. See, e.g., *Miller v. State Farm Mut.*, 27 N.E.3d 980, 983–84 (Ohio Ct. App. Summit Cty. 2015); *In re Guardianship of Powelson*, 2014-Ohio-3613, P10 (Ohio Ct. App. Muskingham Cty. Aug. 21, 2014); *Mason v. Booker*, 922 N.E.2d 1036, 1038 (Ohio Ct. App. 2009) (collecting cases); cf. R.C. § 149.43(A)(1) (a)(exempting medical records from public records law), and § 2317.02(B) (codifying the physician-patient privilege).
10. *Smith v. Chen*, 142 Ohio St. 3d 411 (2015).
11. *Id.* at 412.
12. *Id.* at 413 (emphasis in original).
13. *Id.*
14. *Id.* at 414 (Kennedy, J., dissenting).
15. *Id.* at 415 (citations omitted).
16. *Id.*
17. See *Burnham*, 2016-Ohio-8000, at P33 (Kennedy, J., concurring in judgment).
18. See *Nationwide Mut. Fire Ins. Co. v. Jones*, 2016-Ohio-513, P11 (Ohio Ct. App. Scioto Cty. Feb. 9, 2016); *Summit Park Apts., LLC v. Great Lakes Reinsurance (UK) PLC*, 2016-Ohio-1514, P11 (Ohio Ct. App. Franklin Cty. April 12, 2016); *Lavin v. Hervey*, 2015-Ohio-3458, P12 (Ohio Ct. App. Stark Cty. Aug. 24, 2015).
19. See *Summit Park Apts., LLC*, 2016-Ohio-1514, at P11 (internal quotation omitted).
20. See *Leipply v. Diamond Cut Lawn & Landscaping Serv. LLC*, 2016-Ohio-4748, P8 (Ohio Ct. App. Columbiana Cty. June 20, 2016); *Walker v. Taco Bell*, 2016-Ohio-124, P7 (Ohio Ct. App. Hamilton Cty. Jan. 15, 2016); *Burnham v. Cleveland Clinic*, 2015-Ohio-2044, P13 (Ohio Ct. App. Cuyahoga Cty.

May 28, 2015) (rev'd by *Burnham v. Cleveland Clinic*, 2016-Ohio-8000).

21. See, e.g., *Leipply*, 2016-Ohio-4748, at P8.
22. *Walker*, 2016-Ohio-4748, at P7.
23. *Burnham*, 2016-Ohio-8000, at P4.
24. *Id.* at P5.
25. *Id.*
26. *Id.* at P6.
27. *Id.* at P7.
28. *Id.* at P9.
29. *Id.* at P14–15.
30. *Id.* at P30.
31. *Id.* at P3. On remand, the Eighth District recently rejected the Clinic's claim of privilege. *Burnham v. Cleveland Clinic*, 2017-Ohio-1277 (Ohio Ct. App. Cuyahoga Cty. April 6, 2017).
32. *Id.* at P2.
33. *Id.* at P31 (Kennedy, J., concurring in judgment).
34. *Id.* at P34.
35. *Id.* at P36 (internal citation omitted).
36. *Chen*, 142 Ohio St. 3d at 412 (emphasis in original).
37. Painter & Pollis, *Ohio Appellate Practice* at § 2.21.
38. *Id.*
39. Cf. *Summit Park Apts., LLC*, 2016-Ohio-1514, P11 (holding appellate jurisdiction existed where “even if use of the documents as evidence were later forbidden or limited, the knowledge of what the documents contained would still be in the minds of counsel . . . and would still potentially affect the way the attorneys litigate the case”).
40. *Burnham*, 2016-Ohio-8000, at P2.
41. R.C. § 2317.02.
42. See *Walker*, 2016-Ohio-124.
43. See R.C. § 2317.02(C, D).



William Eadie is a nursing home abuse lawyer at Eadie Hill Trial Lawyers in Cleveland, Ohio. He handles nursing home abuse and neglect cases throughout Ohio. You can reach Will at william.eadie@eadiehill.com, or learn more about his nursing home practice at www.eadiehill.com/nursing-home.

Updated Federal Nursing Home Regulations for Plaintiffs' Lawyers

By William B. Eadie

The federal agency charged with overseeing most nursing homes, the Centers for Medicare and Medicaid Services (Medicare, or CMS), recently made the first substantial upgrade of existing federal nursing home regulations in 15 years. In this article, I review some of the more salient changes related to plaintiff's litigation.

I invite you to continue the discussion on the CATA blog by leaving your feedback and comments at clevelandtrialattorneys.org/regulations. This is a developing area and the more we share, the better we can serve our clients.

Nursing Home Regulatory Landscape

Nursing home resident care is covered by extensive federal regulations primarily implemented by the Nursing Home Reform Act of 1987, part of the 1987 Omnibus Budget Reconciliation Act (sometimes described OBRA '87). This forms much of the basis for nursing home inspections and violations, in a book sometimes referred to as the Watermelon Book.

While comprehensive, and providing quite a bit of teeth in establishing and evaluating compliance with the standard of care, it has not been substantially updated since 1991. Until now.

Ohio law (the Resident's Rights law in Revised Code section 3721.13) and Administrative Code (see section 3701-17) provide additional, often overlapping rules for Ohio nursing homes that

can be effective in setting a standard of care and developing "Rules of the Road" in nursing home cases.

While you usually won't be able to say the entire regulatory framework creates a standard of care—and there's no private right of action based on the federal regulations alone—you will be able to get agreement from nursing home personnel or representatives that the regulations are part of the standard of care. The regulations cover everything from notification and reporting of changes in health status (OAC 3701-17-12) to requirements to prevent or heal pressure ulcers, prevent wound infection, maintain nutritional status, and prevent urinary tract infections (42 CFR § 483.25(c)(1), (c)(2), (i), and (d)).

You can find links to some of the more relevant sections in the materials page for a recent presentation I gave on nursing home abuse at www.eadiehill.com/cata.

The new rule changes affect the federal regulations, and are already under challenge—particularly on forced arbitration—so things may change even by the time this goes to print. The American Health Care Association, along with myriad Mississippi organizations and nursing homes, filed a federal lawsuit and were granted a preliminary injunction to enjoin Medicare from implementing the arbitration rule change.¹

While already final, the regulation changes are being implemented in phases to be complete

on November 28, 2016 (Phase I), November 28, 2017 (Phase II), and November 28, 2018 (Phase III). This article will not go into the arbitration issue, which is a developing story much covered in legal news. Instead, I focus on the other changes related to resident care as it might affect the rules we use to establish a standard of care and its violation.

New, Stronger Regulations

The most notable new regulations—besides banning arbitration clauses—cover the following topics:

A. Definitions (§ 483.5)

Medicare has added definitions for “abuse,” “adverse event,” “exploitation,” “mistreatment,” “neglect,” and “sexual abuse,” among others. “Abuse” is defined in such a way that it includes deprivation (neglect) and, although it uses the term “willful,” that is defined as acting deliberately, not intending the harm.

Defining neglect as “abuse” is a strategy with which many nursing home lawyers are already familiar. The new language makes it official, because “abuse” is:

[T]he willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. **Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being.** Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish. It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology. Willful, as used

in this definition of abuse, means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm.

(emphasis added.)

“Mistreatment” is defined as “inappropriate treatment or exploitation of a resident,” and “neglect” is defined as “the failure of the facility, its employees or service providers to provide goods and services to a resident that are necessary to avoid physical harm, pain, mental anguish or emotional distress.”

B. Resident Rights (§ 483.10)

Medicare retained all existing residents’ rights in substance, but “updated” it to “improve logical order and readability, clarify aspects of the regulation where necessary, and updat[e] provisions to include advances such as electronic communications.”

It is worth refreshing yourself if you are not familiar with the new language to see how supposedly stylistic changes can help or hinder your arguments.

C. Freedom from Abuse, Neglect, and Exploitation (§ 483.12)

The new rule provides that a “resident has the right to be free from abuse, neglect, misappropriation of resident property, and exploitation.” The rule includes a provision regarding not employing caregivers found guilty of or disciplined for abuse and neglect:

(a) The facility must—

* * *

(3) Not employ or otherwise engage individuals who—

(i) Have been found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment by a court of law;

(ii) Have had a finding entered into the State nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of their property; or

(iii) Have a disciplinary action in effect against his or her professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of residents or misappropriation of resident property.

Medicare is requiring facilities to investigate and report all allegations of abusive conduct as well.

D. Admission, Transfer, and Discharge Rights (§ 483.15)

Among other things, Medicare is requiring specific information be exchanged with the receiving provider or facility when a resident is transferred, including at “minimum”:

- (A) Contact information of the practitioner responsible for the care of the resident;
- (B) Resident representative information including contact information;
- (C) Advance Directive information;
- (D) All special instructions or precautions for ongoing care, as appropriate;
- (E) Comprehensive care plan goals; and
- (F) All other necessary information, including a copy of the resident’s discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

E. Comprehensive Person-Centered Care Planning (§ 483.21—a new section)

The new regulation requires facilities to “develop and implement a baseline care plan for each resident that includes the instructions needed to provide effective and person-centered care of the resident that meet professional standards of quality care,” which must be “developed within 48 hours of a resident’s admission.” The nursing home must include initial goals for the resident, physician and dietary orders, and any necessary therapy services or social services, in this initial plan. The nursing home must give a summary of the plan to the resident representative.

This closes a gap in care planning: nursing homes claimed they did not have to have a care plan in place until 14 days after admission. This “baseline” care plan includes the instructions needed to provide effective care that meets professional standards of quality care.

F. Food and Nutrition Services (§ 483.60, formerly 483.35)

The regulation requires facilities to “provide each resident with a nourishing, palatable, well-balanced diet that meets his or her daily nutritional and special dietary needs, taking into consideration the preferences of each resident.” The bit about “preferences” is new. It also adds the requirement that the “sufficient staff” needed to provide the services must have “the appropriate competencies and skills sets to carry out the functions of the food and nutrition service, taking into consideration resident assessments, individual plans of care and the number, acuity and diagnoses of the facility’s resident population.”

When I’ve worked on malnutrition and dehydration cases, the staffing issue has revolved around having poorly trained and over-worked staff handling

meals. This means residents who need assistance and encouragement to eat may be left alone when eating, and eventually starve. Hopefully this revision provides more teeth.

G. Staffing and Care versus Administration (renumbered § 483.70)

The administration section becomes effective as part of Phase 2 on November 28, 2017. This will include some important changes for any nursing home case involving understaffing—which is usually all of them.

The new regulations still require “sufficient” staff, versus a set minimum (which is the right approach). But they have—for the first time—described the factors nursing homes must consider in staffing decisions during a yearly facility assessment (at minimum), specifically: (1) the number, acuity, diagnoses, and care required for their residents; and (2) the staff training, experience, and skills.

Specific language from the section adds specific elements few poorly-staffed facilities will be evaluating properly, including:

- (ii) The care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;
- (iii) The staff competencies that are necessary to provide the level and types of care needed for the resident population;

§ 483.70(e).

In my experience, the in-facility staff supposedly responsible for setting staffing levels do not have real authority. Nor are they (or the real people with control at the corporate level) taking any of this into account. They’re being

handed a budget that basically sets their ability to staff—usually too low—then triage as best they can to minimize the harm from the inevitable understaffing.

The regulations also define “providing care” as assessing, evaluating, planning and implementing resident care plans and responding to the resident’s needs—not administrative tasks such as charting. This will likely be another fruitful area in which to reveal understaffing, or the nursing home’s lack of analysis and planning. They will likely have no actual knowledge of the time their nursing staff spends on care as opposed to administrative tasks like charting.

H. Infection Control (§ 483.80)

The new regulation requires facilities to develop an Infection Prevention and Control Program (IPCP) that includes an Antibiotic Stewardship Program and designate at least one Infection Preventionist (IP). This is a major step forward given the prevalence of infections and infection-related deaths in nursing homes.

I. Unnecessary and Psychotropic Drugs (§ 483.45)

Previously part of the quality of care section, the psychotropic drug and pharmacy services section has some meaningful changes (some of which only kicks in at phase 2, in November, 2017). For example, many of the limitations on anti-psychotics now apply to psychotropic drugs generally.

This includes not moving residents to psychotropic drugs absent a specific condition diagnosed and documented in the medical record, attempting to reduce psychotropic drug use, and limitations on the length of as-needed (*pro re nata*, or PRN) prescriptions without revision and justification:

- (e) Psychotropic drugs. Based on

a comprehensive assessment of a resident, the facility must ensure that—

- (1) Residents who have not used psychotropic drugs are not given these drugs unless the medication is necessary to treat a specific condition as diagnosed and documented in the clinical record;
- (2) Residents who use psychotropic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs;
- (3) Residents do not receive psychotropic drugs pursuant to a PRN order unless that medication is necessary to treat a diagnosed specific condition that is documented in the clinical record;
- (4) PRN orders for psychotropic drugs are limited to 14 days. Except as provided in § 483.45(e)(5), if the attending physician or prescribing practitioner believes that it is appropriate for the PRN order to be extended beyond 14 days, he or she should document their rationale in the resident's medical record and indicate the duration for the PRN order; and
- (5) PRN orders for anti-psychotic drugs are limited to 14 days and cannot be renewed unless the attending physician or prescribing practitioner evaluates the resident for the appropriateness of that medication.

Psychotropic drugs are defined as "any drug that affects brain activities associated with mental processes and behavior" including, but "not limited to" the following categories: "(i) Anti-psychotic; (ii) Anti-depressant; (iii) Anti-anxiety; and (iv) Hypnotic." (§ 483.45(c)(3).)

Notably, each resident's drug regimen

must be reviewed by a licensed pharmacist monthly, **including review of the medical chart**. There is a reporting requirement, too. The "pharmacist must report any irregularities to the attending physician and the facility's medical director and director of nursing, and these reports must be acted upon." (§ 483.45(c)(4).)

"Irregularities" include any "unnecessary drugs," which is "any drug when used":

- (1) In excessive dose (including duplicate drug therapy); or
- (2) For excessive duration; or
- (3) Without adequate monitoring; or
- (4) Without adequate indications for its use; or
- (5) In the presence of adverse consequences which indicate the dose should be reduced or discontinued; or
- (6) Any combinations of the reasons stated in paragraphs (d)(1) through (5) of this section.

(§ 483.45(d).)

Reports of irregularities "must be documented on a separate, written report that is sent to the attending physician and the facility's medical director and director of nursing." Moreover, the "attending physician must document in the resident's medical record that the identified irregularity has been reviewed and what, if any, action has been taken to address it. If there is to be no change in the medication, the attending physician should document his or her rationale in the resident's medical record." (§ 483.45(c)(4)(ii) and (iii).)

This puts a lot of teeth into knowledge and correction of drug issues that should have a meaningful impact on care and, when it does not, on the nursing home and medical director's liability for that failure.

Conclusion

There are a lot of improvements in the recent changes to the federal regulations that anyone involved in nursing home litigation needs to consider. This is not a complete analysis, but a starting place. How do you envision these changes affecting nursing home litigation? What other changes do you find relevant? Please join the conversation by leaving a comment or question on the CATA landing page for this article at <http://clevelandtrialattorneys.org/regulations/>. You'll need to be logged in to view it, so that our comments are protected. ■

End Notes

1. *American Health Care Association, et al. v. Burwell, et al.*, ND MI No. 3:16-CV-00233, November 7, 2016 Order (Doc.#: 44).



Christine M. LaSalvia is a principal at Cristallo and LaSalvia. She can be reached at 216.400.6290 or christine@MakelRightOhio.com.

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

By Christine M. LaSalvia

The Honorable Peter J. Corrigan was recently elected to his third term in the Cuyahoga County Court of Common Pleas. He has served on the bench since January 4, 2005 and is known for his diligence and dedication to trying cases and ensuring a fair playing field for both parties.



Judge Corrigan

Judge Corrigan grew up in a large family on the west side of Cleveland. He graduated from St. Ignatius High School and Brown University. He was very influenced by his father who served as a Judge in the Cuyahoga County Court of Common Pleas and in the Probate Court. He credits his father with instilling an early love of politics. He has early memories of knocking on doors and passing out political flyers.

Despite these early experiences, while at Brown University, Judge Corrigan did not anticipate a future as a Judge. Instead, he developed a strong interest in law enforcement while working as a reserve police officer in a small town in Maine. After graduation, he took the test to become a Cleveland police officer. While waiting for the results, Judge Corrigan was offered and accepted a job with Aetna Insurance as a claims adjuster. Judge Corrigan credits his time at Aetna for teaching him about the difficulties and

documentation entailed in negotiating personal injury cases. After leaving Aetna, Judge Corrigan decided to enter law school. He attended at night and upon graduation joined the prosecutor's office. While working as a prosecutor, he gained significant experience trying cases and developed a particular interest and respect for voir dire and communicating with jurors, a skill that he utilizes today.

Since taking the bench, Judge Corrigan has become known for his commitment to full and fair voir dire and ensuring that jurors leave with a deeper understanding of the law. He noted that people don't come to a courtroom with an understanding of the law. Upon taking the bench, he knew that it was important for him to ensure that jurors in his Courtroom understand their directives and come away with a better understanding of the system. His commitment to this value has led to his decision to handle the majority of voir dire. As a result, Judge Corrigan is known for voir dire that can sometimes last up to two days, depending on the nature of the case. Judge Corrigan has learned that he can question the jurors and address issues related to bias in a way that lawyers often cannot.

I asked Judge Corrigan what he has learned from his extensive conversations with jurors. He told me that jurors are intelligent and lawyers should not speak down to them. He recalled a statement made by his father that you should "raise jurors up." People may not have experience with the law, but they have the intelligence and ability to

learn. He has noted that jurors often start out as suspicious as to why they are in Court. Judge Corrigan tries to allay these concerns and explain that the case is not a mystery which needs to be solved. The legal system is meant to provide an even playing field for both parties to resolve a problem and both sides deserve respect and an open mind. He also typically addresses the McDonald's coffee case as he has noted that it is still always an issue, particularly in personal injury cases. Judge Corrigan also tries to ensure that jurors understand that our system is set up to hold businesses and people accountable when they are negligent, which helps make our country safer. When asked what trial lawyers can do better to obtain justice in the Courtroom, he responded that we need to find a way to make jurors understand why they need to care about our clients. Judge Corrigan has a strong

commitment to trying cases and does not spin any case. Instead, he has each trial on a one week standby and has been known to move directly from one trial into the next.

Judge Corrigan also believes in the importance of pre-trial settlement conferences. It is important to take the time to try to settle a case as it is almost always better for both parties. He credits his staff attorney, Cheryl Hannan, with assisting him in resolving cases prior to trial. He and his staff will take time to meet with and speak to a party personally to help them understand the issues which will be faced at trial. He credits the Honorable John Russo with teaching him the value in meeting with parties. When asked what attorneys can do better to ensure a fair resolution, he noted the importance of preparation and providing evidence to claims adjusters

early so they have time to get authority prior to the settlement conference. He has also noted an increase in discovery disputes and has recently started setting discovery conferences where both parties come to court, with their clients, and explain why certain documents have not been provided.

In his free time, Judge Corrigan serves on the board of the West Side Community House. The West Side Community House provides supportive services to women, children, and seniors in Cleveland. He finds his work there very rewarding and speaks highly of the director who has guided the West Side Community House through tough economic times. He has recently developed an interest in music and is learning to play the keyboard and guitar. ■



Litigation Support Team

VIDEO DISCOVERY, INC.

Video Depositions
Trial Director™ Support
Multimedia Depositions
Day-In-the-Life Docs.
Settlement Videos
High-Res Playbacks

Exhibit Boards
Digital Photography
Interactive Timelines
2D & 3D Animation
Medical Illustration
Focus Group Presentation

14245 CEDAR ROAD, CLEVELAND, OH 44121

p. 216.382.1043 f. 216.382.9696

www.videodiscoveryinc.com

Matthew Barge, Esq. To Speak At CATA's Annual Installation Dinner



Incoming CATA President, Cathleen M. Bolek, is pleased to announce that attorney Matthew Barge, Vice President & Deputy Director of the Police Assessment Resource Center (PARC), will be the keynote speaker for CATA's Annual Installation Dinner on Friday, June 16, 2017.

Mr. Barge was appointed by Federal Judge Solomon Oliver, Jr. to oversee implementation of the Consent Decree between the U.S. Department of Justice and the City of Cleveland concerning the Cleveland Division of Police. That decree addresses the use of force, community policing, discriminatory policing, and other operational issues.

Mr. Barge co-authored Department of Justice-sponsored national standards for monitors and police oversight professionals, and was also the lead author of national standards for internal affairs (IA) investigations. He has lectured frequently at universities, law schools, and before police professional organizations on police accountability and Fourth Amendment issues.

Previously, Mr. Barge worked as a litigator specializing in mass torts and complex litigation at the law firms of Skadden, Arps, Slate, Meagher & Flom and Quinn, Emanuel, Urquhart & Sullivan in New York City. He holds a J.D. from N.Y.U. School of Law and graduated summa cum laude from Georgetown University.

CATA's Annual Installation Dinner will be held on **Friday, June 16, 2017 at the Hilton Cleveland Downtown, 100 Lakeside Avenue, East**. The reception will begin at 6:00 p.m., followed by dinner and the keynote address: "Smart Policing: Helping Law Enforcement Work."

Invitations will be in the mail. We hope to see everyone there!

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

On Thursday, March 30th, Ohio Association for Justice organized a volunteer opportunity at the Greater Cleveland Food Bank and many of our CATA members eagerly participated in this great event. Some of the volunteers included, **Ellen Hirshman, Toby Hirshman, Paul Grieco, Tom Merriman, Howard Mishkind, David Kulwicki, Pamela Pantages, Dana Paris, Jordan Lebovitz, Jeffrey Heller, Florence Murray, Amy Herman, Colin Ray,** and many others!



Dana Paris, Tamara Brininger, and Jordan Lebovitz



Toby Hirshman and Amy Herman

The Greater Cleveland Food Bank was created in 1979 in an effort to confront the critical issue of hunger in the Cleveland Community. Many of the founding members were involved in the local food industry and recognized the large amount of food waste that was occurring each day. The Greater Cleveland Food Bank works to solicit, collect, sort, and distribute food in an efficient manner in order to ensure that food is distributed to people in need within the

community. By 2016, the Food Bank has become the largest relief organization in Northeast Ohio and has provided 50 million meals to hungry individuals in Cuyahoga, Ashtabula, Geauga, Lake, Ashland, and Richland counties.



Pam Pantages, Ellen Hirshman, and Toby Hirshman

During the day of service, volunteers were tasked with sorting and packaging food that would be later handed out to individuals in need. Needless to say, this was a very memorable experience that reminds you of how truly lucky we are. If you, your firm, family, or friends are looking for a volunteer opportunity, the Greater Cleveland Food Bank is an outstanding organization that has a direct impact on individuals and families in the area.

Ellen Hirshman, Paul Grieco, and Tom Robenalt presented the End Distracted Driving program to students at Hathaway Brown and Rocky River High School. The goal is to reach out and attempt to change the students' behavior in an effort to help avoid injuries and save lives.



Ellen Hirshman gives EndDD presentation at Hathaway Brown



Tom Robenalt gives EndDD presentation at Rocky River High School

The students were engaged and joined in the discussion about how everyone needs to make a conscious effort to not drive distracted, as well as not permitting someone, like friends or family, to drive distracted when you are traveling as a passenger in a car.

According to the 2015 statistics collected by the Ohio State Highway Patrol, 13,261 drivers in Ohio crashed while being distracted within their vehicles. Thirty-nine of these drivers were in fatal crashes which resulted in 43 deaths. The numbers of reported distracted drivers rose 11% from 2014 to 2015. The numbers are clear - we all need to make a conscious effort to put the phones down and focus on the road. The text or call can wait.

William Eadie and **Michael Hill** of Eadie Hill Trial Lawyers were proud to sponsor this year's mock trial national finals and the important mission of American Association for Justice to train future trial lawyers. The competition took place at the Cuyahoga County Justice Center from March 30 to April 2, 2017. Eadie Hill attorney Will Eadie coordinated the event.



Judge Robert McClelland and Michael Hill offer practical pointers to Wake Forest trial team.

Each year future trial lawyers converge at a designated city to demonstrate their courtroom skills in the premier mock trial competition in the country. There are 16 regional locations, with 16 teams competing within each region. The winners of each region come together for a national finals competition to compete and crown the national champion.

While Will has coordinated a regional competition in Cleveland each of the past 4 years, this was the first year that Cleveland has hosted the national finals. The final round was a competition between Wake Forest School of Law and Belmont University College of Law. It was judged by **Michael A. Hill** of **Eadie Hill, David Herman** and

Jordan Lebovitz of **Nurenberg, Paris**, and the **Honorable C. Robert McClelland**. Wake Forest took all 3 ballots on a very tight trial on points.

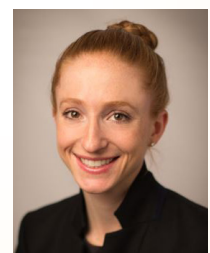
The national finalists included:

1. Wake Forest University School of Law (national champion)
2. Belmont University College of Law (national champion runner-up)
3. Chicago-Kent College of Law Illinois Institute of Technology (semi-finalist)
4. Tulane University Law School (semi-finalist)
5. Harvard Law School (quarter finalist)
6. Loyola Law School Loyola Marymount University (quarter finalist)
7. Stetson University College of Law (quarter finalist)
8. University of Missouri - Kansas City of Law (quarter finalist)
9. McGeorge School of Law University of the Pacific
10. Baylor University School of Law
11. Syracuse University College of Law
12. Fordham University School of Law
13. University of Akron School of Law
14. University of Maryland School of Law
15. University of California-Davis School of Law



Will Eadie and Michael Hill with the National Champion trial team.

While Wake Forest took home the trophy, all of the competitors and teams from across the country were phenomenal! To view additional photographs of the competition, please visit: www.facebook.com/EadieHillTrialLawyers. ■



Dana M. Paris is an associate at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or danaparis@nphm.com.

2017 CATA Litigation Institute: The Power of Focus Groups

by Michael A. Hill

As many of us know, a well-executed focus group can be one of the most important tools in a trial lawyer's toolkit. When used properly, focus groups provide invaluable insights to trial lawyers.

But used improperly, focus groups can be detrimental by discouraging us from pursuing a good case or, even worse, providing us with a false sense of confidence about a bad case.

For these reasons, it is important that a focus group is conducted by the right person with these potential pitfalls in mind. The results of the focus group are only as good as the consultant.

That's why it was such a pleasure to have Ken Levinson of Levinson & Stefani present a live focus group at the 2017 Cleveland Academy of Trial Attorneys Litigation Institute.

The CATA Litigation Institute was held at the CMBA on March 3, 2017. Despite Cleveland's unpredictable weather—which produced one of the few snowstorms of the season—CATA members came out in droves to support the event. Those in attendance witnessed a truly unique experience far different from most CLEs.

Recognized by Super Lawyers as one of the top 100 lawyers in Illinois, Ken is a graduate of Gerry Spence's Trial Lawyers College and a member of the Trial Lawyers



Ken Levinson presenting about the power of focus groups at the CATA Litigation Institute.



Ken Levinson demonstrates how to conduct a focus group.

College Alumni Board, as well as the American Association for Justice. He is the author of the latest edition of *Litigating Major Automobile Injury and Death Cases*, published by AAJ Press/Thomson Reuters.

Ken is often invited to speak by AAJ and multiple state bar and trial lawyer associations. In addition to representing clients, Ken is frequently retained to create focus groups and assist lawyers throughout the country in the presentation of their case.

At the 2017 CATA Litigation Institute, Ken spoke on the importance of focus groups. Following his presentation, Ken conducted a focus group in front of a live audience of CATA members.

Ken has presented to CATA on focus groups on a prior occasion as part of the luncheon series. Conducting a focus group before a live audience, however, is a truly novel idea for a CLE and showed firsthand why focus groups have become increasingly popular for trial lawyers.

The focus group discussed an actual nursing home wrongful death case. The case involves the death of an elderly woman who developed Stage IV pressure sores and a severe infection leading to her death after a few-week stay in a rehabilitation unit in a nursing home.

As with any focus group, the participants were intended to be representative of members of our community and were diverse in age, race, occupation, and political affiliation. Also, an effort was made to select jurors who were assumed to be difficult for the case.

The participants had no connection to the case, the lawyers involved, or the legal community. They were paid a relatively nominal fee for their participation. The participants signed a confidentiality agreement requiring that they keep any facts of the case or focus group confidential. The demographic information for the focus group participants and Ken Levinson's PowerPoint presentation are available at <https://goo.gl/ibbRg0>.

Unlike most CLEs that are static and rely exclusively on PowerPoint presentations, this was a truly dynamic and unscripted event.

Those in attendance saw firsthand the impact a focus group can have in clarifying issues and terms in a case, including issues as seemingly minor as the group's divergent reactions to the choice of phrases "nursing home" versus "short-term rehab." For instance, the group provided an interesting lay

person insight that a resident of a "nursing home" was likely "put there to die," while a patient in "short-term rehab" was "healthier" and had a "better quality of life."

It is often these minor details that influence the value of our cases. This is only one of many useful, educational lessons learned from the CATA Litigation Institute.

As Levinson points out, "we always learn new things about our cases from focus groups." According to Levinson, "preparing for a focus group properly forces you to know your case in plenty of time before trial. Our philosophy is to test, test and then test some more!" As a trial lawyer who presents each of his cases before multiple focus groups prior to trial, Ken Levinson's words could not be more accurate.

As usual, CATA pushed the boundaries with a truly unprecedented CLE format. The 2017 CATA Litigation Institute reinforced the power and importance of focus groups, and we certainly learned valuable information from the live focus group Ken conducted. Thank you to CATA's Vice President, Cathleen Bolek, for organizing this excellent CLE.

If anyone would like to contact Ken about his presentation or for consulting, he can be reached at ken@levinsonstefani.com. ■

Michael A. Hill is a nursing home abuse and medical malpractice trial lawyer at the Eadie Hill Trial Lawyers firm in Cleveland, Ohio. Michael handles cases throughout Ohio and much of the country. His trial practice focuses on nursing home abuse and neglect and medical malpractice related to stroke and heart attack. Michael can be reached at michael.hill@eadiehill.com and you can learn more about his practice at www.eadiehill.com and www.ohiostrokealawyer.com.





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.

What's Hiding In Your Complaint? An Appellate-Jurisdiction Decision To Be Aware Of

By Kathleen J. St. John

The jury returns a plaintiff's verdict after a two-week trial involving a motor vehicle collision in which your client was a passenger. The losing defendants are the driver of one of the vehicles and his employer who stipulated the driver was in the course and scope of employment. After the verdict, the driver and his employer file a motion for new trial which is denied, and you file a motion for prejudgment interest which is granted. The losing defendants and their insurer then file an appeal on both the new trial and prejudgment interest issues. The appeal is fully briefed, but, a month before oral argument, the court asks the parties to file supplemental briefs addressing "whether all claims asserted against all parties have been adjudicated consistent with Civ. R. 54(B), with particular attention given to the disposition, if any, of the negligent entrustment claims asserted by both plaintiffs."¹

This was the situation in *Rojas v. Concrete Designs, Inc.*,² in which the Eighth District Court of Appeals held it lacked jurisdiction over the appeal because the negligent entrustment claims pled in the complaints but not pursued at trial were never resolved.

In *Rojas*, two passengers riding in the same vehicle were seriously injured in a collision between that vehicle and a dump truck. The passengers filed separate actions, which were later consolidated, against the dump truck's driver, his employer, and the driver of the car in which they were passengers. Each complaint pled alternative theories of liability against the dump

truck driver's employer — *respondeat superior* and negligent entrustment. But, as the employer stipulated its driver was in the course and scope of his employment, the plaintiffs did not pursue the negligent entrustment theory at trial. The jury returned a verdict finding the dump truck driver and his employer 100% at fault for the collision. In the appeal that followed, the court of appeals *sua sponte* ordered the parties to brief the above-quoted jurisdictional question; and, in a 2-1 decision, concluded the appeal had not been taken from a final appealable order.

Due to the unusual way the issue came up, the appellees found themselves arguing the appellate court *had* jurisdiction, while the appellants asserted it *did not*.³ The appellees argued that, by not pursuing their negligent entrustment theory at trial, they had effectively abandoned it, it was moot, and it had merged into the final judgment. Furthermore, because no claim remained pending, Civ. R. 54(B) was inapplicable.

The majority rejected these arguments. First, the court found that "[a]bandoning a claim will not result in a final order under Civ. R. 54(B) because abandonment does not result in a final disposition."⁴ In support, the court quoted an Ohio Supreme Court decision, *IBEW, Local Union No. 8 v. Vaughn Indus., L.L.C.*,⁵ for the proposition that: "To allow a court to find implicitly that one party abandoned his claim would thus significantly alter the definition of a final, appealable order. We decline to make such an alteration."⁶

As the *Vaughn* decision was not cited by the parties or mentioned by the court before it issued its decision, it is worth examining. In *Vaughn*, a union filed a prevailing wage complaint against the defendant company which, in turn, filed an answer requesting “statutory fees and costs necessitated in defending this action” as well as Rule 11 sanctions. The trial court granted the company’s motion for summary judgment, and ordered the plaintiff to pay the costs of the proceedings, but no ruling was made on the request for attorney fees, as the company had not mentioned it in the summary judgment briefing. “After the court journalized its order, the company filed a motion for attorney fees and costs, pursuant to [R.C.] 4115.16(D) and/or Civ. R. 11 and R.C. 2323.51.”⁷ Meanwhile, the plaintiffs appealed from the summary judgment. The Sixth District Court of Appeals dismissed the appeal as premature on the ground that the attorney fee claim had not yet been resolved, and no Civ. R. 54(B) determination had been made.

The Supreme Court accepted jurisdiction to address the certified question: “Where attorney fees are requested in the original pleadings, may a party wait until after judgment on the case in chief is entered to file its motion for attorney fees?” In answering “yes,” the Court rejected the appellant’s argument “that a party abandons his attorney-fee claim if he does not request fees ‘in the final disposition.’”⁸ The Court stated:

International Brotherhood’s argument suggests that in order to qualify as final and appealable, an order need dispose only of claims presented or preserved immediately before the entry of the order disposing of the other issues in the case. Civ. R. 54(B), however, does not require that parties reserve or restate their claims, nor does it describe any action beyond the

pleading stage that is necessary to ‘preserve’ a claim for adjudication by the trial court. To allow a court to find implicitly that one party abandoned his claim would thus significantly alter the definition of a final, appealable order. We decline to make such an alteration.⁹

The majority in *Rojas* did not analyze the *Vaughn* decision. It simply applied the last two sentences of the above-quoted excerpt as being dispositive of the abandonment issue. Yet the circumstances in which the abandonment issue arose in *Rojas* and *Vaughn* are markedly different. *Vaughn* involved a request for attorney fees raised by the party who prevailed on summary judgment after the order granting summary judgment was entered. *Rojas* involved the question of whether a legal theory not pursued during a liability trial remains pending after judgment is entered on the jury’s verdict in circumstances where there was no bifurcation and where the legal theory was never mentioned by the plaintiffs after being pled in their complaints. The attorney fee issue in *Vaughn* was not part of the substantive liability issue on which the summary judgment was based; rather, it was the relief the company sought after the court determined it was not liable on the plaintiff’s claim. In *Rojas*, however, the legal theory of negligent entrustment was applicable to the liability determination: by not raising it during trial when the liability determination was made, the plaintiffs had effectively waived their ability to pursue it further.

The *Rojas* majority disagreed with this latter point. Rejecting an earlier Eighth District decision, *Francis Corp. v. Sun Co.*,¹⁰ which held alternative causes of action pled but not pursued at trial to be “moot,” the *Rojas* majority found *Francis* to be wrongly decided because it failed to consider “the affect (*sic*) a declaration

of mootness could have on an unresolved cause of action.”¹¹ To explain its concern, the *Rojas* majority gave the following example:

Suppose on similar facts to this case that, applying *Francis*, we found a negligent entrustment cause of action to be moot because the damages for that cause of action were duplicated by a negligence cause of action. Then suppose we heard the appeal on the merits of a negligence cause of action and found that the court erred by refusing to direct a verdict in favor of the defendants. Under these facts, the plaintiff would no longer think that his negligent entrustment claim was moot, because it could be his only viable ground for recovery following a reversal on the negligence claim.¹²

This example is problematic as it fails to recognize that negligence of the trustee is a necessary element of a negligent entrustment claim.¹³ Thus, the scenario posited by the court could not occur. If the employee/driver was not negligent, his employer could not be liable on the negligent entrustment claim. Indeed, even if this particular example were not flawed, the underlying principle is. The Ohio Supreme Court has held that legal theories raised in the pleadings but not pursued until after trial are waived. In *Gallagher v. The Cleveland Browns*,¹⁴ the Court found the defense of primary assumption of risk was waived where the defendant raised it generically in its answer but did not pursue it until its motion for judgment notwithstanding the verdict. The Court emphasized “[t]his case went to the jury in the way it did precisely because appellees made a tactical choice... to rely on implied assumption of the risk as their defense, and not to rely on primary assumption of risk.”¹⁵

Waiver and abandonment are time-

hallowed doctrines designed to ensure finality in judicial proceedings. To permit a plaintiff who abandons a legal theory at trial to revive it in the event of a remand would seriously undermine that objective.

The dissent in *Rojas* believed the plaintiffs abandoned their negligent entrustment theory by not discussing it in opening or closing statements, not offering any evidence on the theory at trial, and not requesting a jury instruction on negligent entrustment.¹⁶ The dissent emphasized the mootness rationale from *Francis* – that the measure of damages was the same regardless of whether the alternative theory of liability had been pursued at trial, and thus nothing could be gained by requiring the alternative theory to be disposed of before the judgment was considered final. The dissent also relied on the Ohio Supreme Court’s decision in *Wise v. Gursky*,¹⁷ for the principle that “a judgment in an action which determines a claim in that action and has the effect of rendering moot all other claims in the action as to all other parties to the action is a final appealable order pursuant to R.C. 2505.02, and Civ. R. 54(B) is not applicable to such a judgment.”¹⁸ The dissent concluded:

Here, the trial court’s judgment on the jury’s verdict resolved all liability issues between the parties. When English was found to be 100 percent

at fault for the collision, Concrete Designs became vicariously liable for the entire verdict. With 100 percent fault on Concrete Designs through English, as the owner, there was no different or greater recovery the plaintiffs could have obtained had they pursued the negligent entrustment theory. By not pursuing the negligent entrustment theory at trial, the plaintiffs abandoned that claim. When the trial court entered judgment on the jury’s verdict, denied the motion for new trial, and granted prejudgment interest, there were no remaining claims for the court to resolve. As a result, plaintiffs waived their right to further adjudicate their negligent entrustment claims and rendered these claims moot.¹⁹

Nevertheless, it is the majority’s opinion in *Rojas* that sets forth the law in this district. As such, plaintiffs’ lawyers would be well-advised to look back at their complaints prior to trial, and seek leave to amend to remove articulated legal theories they no longer intend to pursue. ■

End Notes

1. *Rojas v. Concrete Designs, Inc.*, 8th Dist. Nos. 103418 and 103420, 2017-Ohio-379 (Feb. 2, 2017).
2. *Id.*
3. One might have expected the appellants to argue that the appeal was taken from a final appealable order. In this case, however, the

appellants wanted the trial court to modify certain aspects of its ruling on prejudgment interest and, for that additional reason, urged the court to find the judgment was not ripe for appeal. The court of appeals did not address these additional arguments in its opinion.

4. *Id.* at ¶6.
5. 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187, ¶11.
6. *Rojas*, ¶6, quoting *Vaughn Indus.*, at ¶11.
7. *Vaughn*, ¶5.
8. *Id.* at ¶11.
9. *Id.*
10. 8th Dist. Cuyahoga No. 74966, 1999 Ohio App. LEXIS 6306 (Dec. 23, 1999).
11. *Rojas*, ¶9.
12. *Rojas*, ¶11.
13. See, e.g., *Gulla v. Straus*, 154 Ohio St. 193, 93 N.E.2d 662 (1950), paragraph three of the syllabus (“The owner of a motor vehicle may be held liable for an injury to a third person upon the ground of negligence if the owner knowingly, either through actual knowledge or through knowledge implied from known facts and circumstances, entrusts its operation to an inexperienced or incompetent operator *whose negligent operation results in the injury.*”) (emphasis added). See also, *Mastran v. Urlichich*, 37 Ohio St.2d 44, 523 N.E.2d 509, 512 (1988).
14. 74 Ohio St.3d 427, 1996-Ohio-320, 659 N.E.2d 1232 (1996).
15. *Gallagher*, 74 Ohio St.3d at 437 (emphasis by the Court).
16. *Rojas*, (Kilbane, J., dissenting), at ¶18.
17. 66 Ohio St.2d 241, 243, 421 N.E.2d 150 (1981).
18. *Rojas*, (Kilbane, J., dissenting), at ¶22, quoting *Wise v. Gursky*, 66 Ohio St.2d 241, 243.
19. *Rojas*, (Kilbane, J., dissenting), at ¶24.

Editor’s Note

As we finalize this issue of the *CATA News*, we invite you to start thinking of articles to submit for the Winter 2017-2018 issue. If you don’t have time to write one yourself, but have a topic in mind, please let us know and we’ll see if someone else might take on the assignment. We’d also like to see more of our members represented in the Beyond the Practice section, so please send us your “good deeds” and “community activities” for inclusion in that section. Finally, please feel free to submit your Verdicts and Settlements to us year-round and we’ll stockpile them for future issues.

From everyone at the *CATA News*, we hope you enjoy this issue!

Kathleen J. St. John, Editor-in-Chief



William Eadie is a nursing home abuse lawyer at Eadie Hill Trial Lawyers in Cleveland, Ohio. He handles nursing home abuse and neglect cases throughout Ohio. You can reach Will at william.eadie@eadiehill.com, or learn more about his nursing home practice at www.eadiehill.com/nursing-home.



Michael A. Hill is a nursing home abuse and medical malpractice trial lawyer at the Eadie Hill Trial Lawyers firm in Cleveland, Ohio. Michael handles cases throughout Ohio and much of the country. His trial practice focuses on nursing home abuse and neglect and medical malpractice related to stroke and heart attack. Michael can be reached at michael.hill@eadiehill.com and you can learn more about his practice at www.eadiehill.com and www.ohiostrokelawyer.com.

Practically Legal

By William B. Eadie and Michael A. Hill

Practically Legal is a series discussing how to work on, not just in, your business, for lawyers who want to grow their practice and free up their time. For topic suggestions or questions please contact William Eadie at william.eadie@eadiehill.com or Michael A. Hill at michael.hill@eadiehill.com.

Today's Suggestion: Stop Answering the Phone

Have you ever had the feeling that you were **really** busy at work, but you couldn't name a single accomplishment? ("Answered a ton of emails" just doesn't sound cool when you're telling your kids or spouse what you did at work all day.) Or have you spent hours doing something that should have been accomplished much faster, but took so long because of all the other things you had to do at the same time?

If you haven't already seen the science and been convinced, let's take a second to review some basic truths.

First, there is no such thing as "multi-tasking" in the way we usually mean it. There is **task-switching**, where you jump back and forth between tasks.

Second, you're not good at task-switching. There is strong evidence proving that you suck at it. If you only have two things you're switching between, you still lose time—it takes you longer to get finished than just doing those two things separately—but add a third or fourth thing to the mix, and you're positively hemorrhaging time.

Why? Because you're losing the time shifting from one task to the other—especially switching back to the main task you never seem to get done. One study featured in *Fast Company* back in 2008 showed "it takes an average of 23 minutes and 15 seconds to get back to the task." Every three times you're interrupted costs you an hour of time.

What's an hour of your time worth? Do you only get interrupted three times a day? Of course not! Many lawyers spend their entire mornings switching between tasks as they are constantly interrupted by staff, phones, emails, and whatever else.

Which leads us to a third truth: there is no excuse for answering your phone. None. At all. Not a single one!

Yet every time we've discussed this with other lawyers, we hear a litany of reasons why it would never work for their practice. Their practice is too unique. Their clients are so important. Their clients need them. Or something.

Like anything new, there is a fear-based reaction to try and maintain the status quo—which unfortunately means not valuing your own time and productivity.

How do you do it?

The best suggestion we've seen is to never take unscheduled calls. Your receptionist—or virtual receptionist, or whoever answers the phone (which shouldn't be you)—takes messages. You return calls in "batches," say from 4-6 pm, or whatever time makes sense for you. It doesn't matter. Just pick a time slot during the day to return all of your calls. This means that every phone call is not an interruption, it's planned. Not only are you not interrupted, but you know what the call is about, and you have had time to prepare.

In our office, we've developed a script process that does exactly this—with some exceptions (a call from court personnel gets through, for example). The best part for clients is they get a scheduled call back time, and a prepared lawyer answering their questions (since the receptionist gets a list of the questions / issues they have). Instead of a half-distracted lawyer torn between the desire to give good client service, and that brief that must be filed by 5. In which case, you're doing two clients a disservice.

Many lawyers have told us that they are afraid to try this because their clients would not be satisfied if they couldn't be connected with them at the moment they call. In our practice, we have found the opposite to be true. Clients like having a prepared lawyer on the phone. Also, in other facets of life, those same clients do not expect to have a professional on the phone immediately when they call.

Have you ever called your doctor and had him patched through immediately on the other line? Probably not, and you probably didn't fire your doctor as a result. You expect him to be busy and not waiting for you to call. Your clients will feel the same way.

Have you tried this? Want to give feedback? Please let us know what you think! ■



Todd E. Gurney is a partner at The Eisen Law Firm Co., L.P.A. He can be reached at 216.687.0900 or todd@eisenlawfirm.com.

Verdict Spotlight

By Todd E. Gurney

December of 2013 was frigid, but the 19th was one of those rare days when the temperature reached into the 40's. There was snow on the grass, but none on the sidewalks at the Pinebrook Tower Apartments in Lorain. Unfortunately for 41 year old Brandy West, a remaining patch of ice on the sidewalk changed her life forever.

This ice formed as a result of a flexible corrugated pipe, which had been placed by Pinebrook employees at the direction of the Pinebrook owner. This pipe directed drain water from the roof of the building directly onto the sidewalk. As a result, while Brandy was walking from her car to her apartment on the evening of the 19th, she slipped and fell and cracked her head on the sidewalk. This resulted in a concussion, post-concussive syndrome, and anosmia (the loss of senses of taste and smell).

When attorney Chris Carney took this case in, he thought there was very little chance that it would ever go to trial. Indeed, this was the best unnatural accumulation of ice case he had seen in over 20 years of practice. However, after his client was deposed for six hours by defense counsel from Pittsburgh, and after defense counsel characterized Brandy West's injuries as merely "a bump on the head," Chris began to think differently.



Chris Carney

Just over three years after the fall, Chris found himself in a trial in the very conservative Geauga County, before the Honorable Forrest Burt. After three days of trial, the jury – made up largely of professionals and business owners – returned a verdict of \$250,000, which is believed to be the largest reported verdict of its kind in Geauga County.

Chris credits the verdict to several factors. First, Chris used a story-telling technique during opening statement and closing argument, which contrasted strongly with defense counsel's traditional, dry style. For instance, Chris began his opening statement by saying:

When Brandy West woke up on the morning of December 19, 2013, she savored the smell of the coffee brewing in the kitchen . . . she loved the smell of her two year old daughter's freshly washed hair when she took her out of the tub . . . she craved the taste of the upcoming Christmas turkey. But by the time she went to bed in the early hours of December 20, 2013, Brandy West had a permanent and traumatic brain injury that would prevent her from ever enjoying any smells or tastes for the rest of her life.

Chris then asked the jury to put themselves in the parking lot that night, and walked them through the incident, step by step, as if they were viewing it for themselves. He continued by having the jury standing in the ER as Brandy was examined; watching the Christmas celebration at Brandy's apartment, with Brandy only being seen when she ran from her bedroom to the bathroom because she was vomiting uncontrollably; sitting in the doctor's office when he explained to Brandy that she would never regain her senses of taste or smell. Chris believes that making the jury a part of the story held their attention much better than a simple recitation of the facts to be presented.

In closing, Chris told the jury a story about himself to solidify his theme of accepting responsibility for one's actions, which was fitting since the defendant denied fault throughout the case. When Chris was 12 years old, he was playing baseball in the yard, and hit a line drive through his neighbor's window. His father paid the neighbor for the window, then landed Chris a job carrying newspapers to pay him back. Chris told the jury that his father did not make him pay

for that window because his dad needed the money, or because his dad was angry that the window was broken; rather, it was to teach Chris an important life lesson: society demands that we accept responsibility for our actions. This theme was further developed and weaved into the remainder of the closing argument, to great effect.

Chris believes that another key factor in obtaining this large verdict was the decision not to introduce Mrs. West's \$20,000 in medical bills. Chris was afraid that the bills, together with a \$3,000 Medicaid lien, would present a negative anchor to the jury in its deliberations. Chris is quick to point out that he appropriated this strategy from our colleague, Michael Leizerman, whom he believes deserves the credit.

Chris also gives a lot of credit to his expert architect, Richard Zimmerman of ZZ Design, Inc. Mr. Zimmerman

testified that Pinebrook knew or should have known that this pipe would direct water onto the sidewalk, and that directing water onto the sidewalk violated multiple housing, building, and safety codes. He also easily negated many defense arguments and, on cross-examination, he never wavered from his opinions and conclusions.

On the other hand, the defense medical expert, Stephen Brose, M.D., did not hold up on cross-examination. Before trial, Chris attempted to exclude him from testifying since he failed to fully comply with a subpoena for financial information. That attempt was overruled, but Chris was able to effectively cross-examine Dr. Brose on this issue at trial. Dr. Brose's inability to explain his failure to comply with a duly served subpoena really hurt his credibility. That's when Chris went in for the kill. He challenged Dr. Brose about his allegation that Mrs. West's

complaints were "non-organic" by forcing him to concede that none of her treating physicians ever noted that she had any "non-organic" complaints. In closing argument, Chris was able to draw a sharp contrast between the strong, credible opinions of his witnesses and the slippery, overreaching opinions of the defense team.

"It is always nice to get a large verdict," Chris notes, "but it is most satisfying when you get a big verdict on behalf of a wonderful woman like Brandy West."

It is interesting to note that although Pinebrook made a \$15,000 offer in the midst of trial, there was no offer at the start of trial. Post-trial motions, including Plaintiffs' Motion for PJI, and Defendants' motions for JNOV, new trial, remittitur, etc., are pending. The case caption is *Brandy West v. Rhockle Investment Group*, Geauga County Case No. 15P469, Forrest Burt presiding. ■



COMMUNITY FUND MANAGEMENT FOUNDATION

Trust accounts for Ohioans with Disabilities

Trust accounts help individuals with disabilities enjoy a better quality of life throughout Ohio

- Safeguard eligibility for government benefits
- Benefits Ohio resident with a disability
- Can be funded with inheritance, life insurance proceeds, personal injury settlements, gifts, Social Security back payments, excess resources, and more
- Trust may be used to purchase medical equipment not covered by insurance, cable/internet service, vacations, cell phone and electronic devices, furniture, advocacy, and other supplemental services

Plan today for a brighter tomorrow

Questions?

Please visit www.cfmf.org or call (216) 736-4540

Recent Ohio Appellate Decisions

by Meghan P. Connolly and Dana M. Paris

Hill v. Mullins, 2d Dist. Montgomery No. 27127, 2017-Ohio-1302 (April 7, 2017).

Disposition: Reversing grant of summary judgment to defendant homeowners in a premises liability case.

Topics: Open and obvious danger as fact question based on attendant circumstances.

The Defendant homeowners, the Mullinses, were renovating a residential home and hired the plaintiff, Hill, for tiling work in a bathroom. Early on in the remodel, the Mullinses removed two walls and a doorway that enclosed the stairs to the basement. Where the walls and doorway once stood was a three-foot by four-foot opening to the basement that remained unguarded when Hill came to view the property. As Hill walked through the home toward the bathroom, she fell into the hole and suffered severe orthopedic injuries.

The trial court granted the defendant property owners' motion for summary judgment on the basis that the three-foot by four-foot hole was an open and obvious danger. The Second District reversed, finding attendant circumstances obviated the open and obvious doctrine for purposes of summary judgment. Specifically, the court of appeals cited to evidence that a wall inside the home would have obscured the plaintiff's view of the hole until she could see around the wall, at which time it would have been too late to avoid falling.

There was conflicting testimony between Hill and Mullins regarding the circumstances leading up to the fall, including whether they were talking, whether Mullins was pointing things out to Hill along the way, and the exact path that Hill took through the home. After reviewing the evidence, the court of appeals found that if the plaintiff's testimony were believed, she would not have had an opportunity to observe the hole as she came upon it because of the presence of an interior wall. With Hill's view of the hole being obscured by the wall until she was virtually stepping into the hole, the danger was not open and obvious.

Judgment for the defendants was reversed and the case was remanded to the trial court.

.....

Portee v. Cleveland Clinic Found., 8th Dist. Cuyahoga No. 104693, 2017-Ohio-1053 (March 23, 2017).

Disposition: Reversing grant of summary judgment to defendant hospital.

Topics: Medical malpractice; applicability of Ohio's Savings

Statute to action originally filed in federal court.

This case concerns the cross-jurisdictional application of Ohio's savings statute, O.R.C. § 2305.19. The Eighth District Court of Appeals decided whether Ohio's savings statute, "saves" a case that was timely filed but ultimately dismissed, other than on the merits, in federal court then refiled in state court within a year." The court concluded that it does.

Plaintiff Pamela Portee filed a medical malpractice case against the Cleveland Clinic Foundation ("the Clinic") alleging that her surgeon negligently severed her ulnar nerve during her elbow surgery at the Clinic on October 3, 2012. Ms. Portee, a resident of Indiana, filed her original action in federal court, in the Southern District of Indiana, on October 2, 2013, clearly within the one year statute of limitations imposed by O.R.C. § 2305.113(A).

The federal court dismissed the case upon the Clinic's motion to dismiss for lack of personal jurisdiction on July 28, 2014. Under Ohio law, a dismissal for lack of personal jurisdiction is otherwise than on the merits.

Ms. Portee then refiled her claim against the Clinic in the Cuyahoga County Court of Common Pleas on July 17, 2015, within a year of the dismissal, thereby invoking Ohio's savings statute. The Clinic won its motion for summary judgment with the trial court based on a statute of limitations defense.

Because the savings statute is silent as to in which court an action must be commenced for it to apply, the Eighth District thoroughly reviewed the case law and policy considerations. The court found *Wasyk v. Trent*, 174 Ohio St.525, 530, 191 N.E.2d 58 (1963), to be procedurally on point with Portee's case. In *Wasyk*, the Ohio Supreme Court held that "where a plaintiff institutes a civil action in a federal court and *** the court *** dismisses the action *** otherwise than upon the merits *** such plaintiff can bring a new action in a court of this state under the provisions of Section 2305.19, Revised Code."

Regarding policy considerations, the court cited to precedent describing the savings statute as "perfectly consistent with the goals of statutes of limitations," and that savings statutes should be "liberally construed in order that controversies *** be decided upon important substantive questions rather than upon technicalities of procedure." *Kinney v. Ohio Dept. of Adm. Servs.*, 30 Ohio App.3d 123, 126, 507 N.E.2d 402 (10th Dist. 1986).

The court was persuaded that Ms. Portee's medical malpractice case was timely filed with the state court pursuant to the savings statute. Thus, the trial court erred in granting

the Clinic's motion for summary judgment. The case was remanded to the trial court.

.....
Wisniewski v. Marek Builders, Inc., 8th Dist. Cuyahoga No. 104197, 2017-Ohio-1035 (March 23, 2017).

Disposition: Reversing order granting referral to and stay pending arbitration.

Topics: Cancellation of construction contract under HSSA renders arbitration provision unenforceable.

Plaintiff Wisniewski contracted with Marek Builders for a home addition and remodeling of an existing structure. The construction contract included an arbitration clause under the AAA Construction Industry Rules. The contractor moved to stay pending arbitration and the trial court granted that motion. Wisniewski appealed on the basis that the contract had been cancelled under the Home Solicitation Sales Act, rendering the arbitration provision unenforceable.

Marek Builders first argued that the HSSA does not apply to the work they were hired to do (an "addition" rather than a "renovation" or "remodel"). However, Eighth District precedent clearly holds that "the HSSA applies to home improvement contracts involving 'consumer goods or services.'" *Camardo v. Reeder*, 8th Dist. Cuyahoga No. 80443, 2002-Ohio-3099.

Having found that the HSSA applies to the contract between the parties, the main issue on appeal was whether cancellation under the HSSA cancels the entire agreement, including the arbitration provision. Marek Builders relied on *ABM Farms v. Woods*, 81 Ohio St.3d 298, 1998-Ohio-612, and its progeny, for the proposition that cancellation of a contract does not defeat the enforceability of an arbitration provision within the contract.

In a 2-1 decision, the Eighth District found that the contract had been cancelled under the HSSA and there was no enforceable arbitration provision. The court reversed and remanded the matter to the trial court. The court noted that it would not extend the "contract within a contract" theory to this situation which involved the statutory cancellation of a contract.

.....
Miller v. MetroHealth Medical Center, et al., 8th Dist. No. 104296, 2017-Ohio-653 (Feb. 23, 2017).

Disposition: Reversing the trial court's decision, the Court of Appeals held that there was a genuine issue of fact for the jury as to plaintiff's medical malpractice claim. While the plaintiff's expert did retract some of his previous opinions, he did not retract his statement that defendant physician violated the standard of care when he failed to obtain informed consent from the plaintiff or

his statement that plaintiff would have died "from organ strangulation" as a complication of a procedure.

Topics: Medical malpractice; summary judgment; standard of care; proximate cause

The plaintiff filed a complaint against MetroHealth and Dr. Priebe alleging medical malpractice and vicarious liability in connection with the surgery that Dr. Priebe performed. The complaint also included a claim for battery because plaintiff alleged that he did not give informed consent regarding the surgery. The defendants denied liability and filed a motion for summary judgment which was ultimately granted. On appeal, the plaintiff argued that summary judgment should not have been granted because his medical expert did in fact render expert opinions in favor of plaintiff's medical malpractice claim.

Although plaintiff's expert retracted some of his previous opinions, he did not retract his statement that the defendant physician violated the standard of care when he failed to obtain informed consent from the plaintiff. Additionally, plaintiff's expert did not retract his statement that the plaintiff would have died "from organ strangulation" as a complication of the surgery and the defendant physician acknowledged that the plaintiff experienced this dangerous complication following that surgery.

Reversing the lower court's decision and remanding the case for further proceedings, the Court held that there were genuine issues of material fact for a jury as to plaintiff's medical malpractice claim.

.....
Watson v. Bradley, 11th Dist. Trumbull No. 2016-T-0031, 2017-Ohio-431 (Feb. 6, 2017).

Disposition: Reversing grant of summary judgment to defendant homeowner.

Topics: Open and obvious doctrine and step in the dark defense presented questions of fact in this case.

Plaintiffs Dianna and Herman Watson sued their relatives Elester and Ozella Bradley for injuries and damages Dianna suffered as a result of a fall at the Bradley home.

Dianna and Herman Watson decided to use the home of Elester and Ozella Bradley to freshen up before a family reunion. Dianna had never been in the Bradley home before, and she followed Elester and Herman through the garage and into the Bradley home. After following Elester into a landing area off of the garage entrance to the home, Dianna, who was carrying her grandchild in her right arm, tried to steady herself by leaning against a wall. However, what Dianna perceived to be a wall was actually an open stairwell leading to the basement. Dianna fell headfirst down the stairs and

suffered injuries.

The Bradleys moved for summary judgment based on the open and obvious doctrine, and the step in the dark affirmative defense. The trial court granted summary judgment to the Bradleys. The Eleventh District Court of Appeals found that there were issues of fact for the jury as to both bases, and reversed.

As to the open and obvious doctrine, the court found there was conflicting testimony about the level of lighting in the area that Dianna fell. The evidence supporting the darkness of the area and the sudden nature of the opening for the staircase near the entrance off the garage was enough to create an issue of fact for the jury. Therefore, the court found a “genuine issue of material fact for the jury to decide as to whether the stairwell was discernible by a person exercising ordinary care in Dianna’s position.”

As to the step in the dark defense, the court relied on precedent holding that the rule applies “only in cases of ‘total darkness’ and not where testimony indicates some degree of illumination.” *Rothfuss v. Hamilton Masonic Temple Co.*, 34 Ohio St.2d 176, 183-186, 297 N.E.2d 105 (1973). Because of conflicting evidence regarding the level of lighting in the landing area from which Dianna fell, the step in the dark defense raised genuine issues of fact for the jury to decide.

Finding questions for the trier of fact as to both the open and obvious doctrine and the step in the dark defense, the court of appeals reversed summary judgment for the Bradleys and remanded the case to the trial court for further proceedings.

.....
Hornyak v. Reserve Alloys, 8th Dist. Cuyahoga No. 104302, 2016-Ohio-8489 (Dec. 29, 2016).

Disposition: Reversing grant of summary judgment to defendant.

Topics: Fact question existed as to whether defendant was “employer” so as to be entitled to employer immunity.

Plaintiff Darrell Hornyak was hired to work for an aluminum recycling business, Defendant Reserve Alloys. Technically, after interviewing with Reserve Alloys for the job, he was referred to a temp agency, Alliance, who hired him and referred him to work exclusively for Reserve Alloys.

While working at Reserve Alloys, Hornyak and his coworkers had to troubleshoot a shredding machine that was apparently jammed with aluminum. The operation manual to this machine warned not to process aluminum or other combustible materials through the machine. To troubleshoot the jam, Hornyak was instructed to shovel chunks of aluminum onto the conveyor belt that would that would feed into the machine. During the time the shredder was not working

properly, it was emitting blue smoke. After shoveling the chunks of aluminum as directed, and after getting a “thumbs up” to proceed, Hornyak walked under the belt and became engulfed in flames. He was life-flighted to the emergency room and suffered second-degree burns over 20 percent of his body. He required about a year of medical treatment, and received workers’ compensation benefits for his injuries, until he reached maximum medical improvement.

Hornyak brought several claims against Reserve Alloys including statutory intentional tort, common law intentional tort, frequenters statutory violations, premises liability, and negligence. Reserve Alloys moved for summary judgment on the basis of employer immunity under Ohio Workers’ Compensation Act, and the trial court granted Reserve Alloys’ motion.

On review, the Eighth District Court of Appeals reiterated that employer immunity only flows from the Act when the entity seeking immunity has complied with the provisions of the Workers’ Compensation Act, namely, has paid premiums for the injured employee. The relationship between Reserve Alloys and Hornyak was a complicated one, due to the involvement of the temp agency but also due to the involvement of a sister company, Regency Technologies, and another company related to Reserve Alloys, RSR Partners, LLC. Reserve Alloys’ potential immunity turned on whether it paid workers’ compensation premiums for Hornyak. A review of the record revealed that “[i]t is not apparent that Reserve Alloys was the employer who in fact contracted with the temporary agency and paid the workers’ compensation premiums.” As such, the court reversed the trial court and remanded the case for further proceedings.

.....
Cromer v. Children’s Hosp. Med. Ctr. Of Akron, 9th Dist. Summit No. 25632, 2016-Ohio-7461 (Oct. 26, 2016).

Disposition: Reversing defense verdict in medical malpractice case and remanding for new trial.

Topics: Jury not free to disregard undisputed evidence on breach of standard of care.

A five-year-old patient, Seth Cromer, presented at the children’s hospital in septic shock from an infection. The hospital doctor ordered that he receive normal saline fluids intravenously to treat his dehydration. A nurse admittedly made a mistake and did not follow that order. The nurse instead gave the boy D5 ½ normal saline, which is less effective in treating dehydration. It was undisputed that the boy was ordered to receive normal saline and that the order was not followed. Seth’s condition declined and, tragically, he passed away in the pediatric intensive care unit.

The case was defended on proximate cause with a theory that Seth had a pre-existing heart defect. The defense also disputed how much of the wrong saline solution was given to Seth and whether the error had a negative effect on his condition.

The case was tried to a jury, which found in response to interrogatories that the hospital was not negligent. Despite being instructed not to answer any further interrogatories, the jury also found in response to a later interrogatory that the hospital's negligence had not caused Seth's death. The jury returned a general verdict for the hospital, and the Trial Court entered a verdict in favor of the Hospital.

The child's family moved for a new trial, and the motion was denied. The denial was appealed on the bases that the verdict was against the manifest weight of the evidence, and that the trial court erred in failing to grant a new trial.

Upon review, the ninth district court of appeals did not find "any evidence to dispute or undermine the credibility of the opinion of the Cromers' medical expert that the nurse's act of failing to follow a doctor's orders and instead giving Seth the wrong saline solution constituted a departure from the standard of care." As such, the jury was not free to simply disregard the undisputed evidence of a breach in the standard of care.

Therefore, the court concluded that the jury lost its way in finding that the Cromers failed to prove that the hospital breached its duty of care owed to Seth. The cause was reversed and remanded for a new trial.

.....
Smith v. Bond, 7th Dist. Belmont No. 15 BE 0078, 2016-Ohio-5883 (Sept. 15, 2016).

Disposition: Reversing grant of summary judgment to defendant driver.

Topics: Duty of driver to exercise due care to avoid pedestrian in driver's right-of-way.

The Seventh District Court of Appeals reversed the trial court's granting of summary judgment for the defendant driver, Bond. Smith was a pizza delivery driver who was walking from the pizza shop to his car in order to deliver a pizza when he was struck by the Defendant's vehicle. There was a "worn-off" crosswalk at a nearby corner, but Smith was not in the crosswalk.

The critical rules of law implicated by the case were R.C. 4511.48(A) and (E). As paraphrased by the court of appeals, the law mandates that "a driver must exercise due care to avoid colliding with a pedestrian even if the pedestrian is in the driver's right [of] way" outside of a crosswalk.

The trial court found that Bond had been traveling lawfully when the incident occurred, and it was undisputed that Smith

was not crossing in the cross walk. The trial court erroneously concluded that under such circumstances, summary judgment for the driver was proper.

Upon review, the court of appeals emphasized that once a driver notices a dangerous situation, the driver must exercise due care to avoid colliding with a pedestrian who is in the driver's right of way. Because the defendant driver testified in his deposition that he saw the pedestrian enter the street out of the corner of his eye, he then had a duty to exercise due care to avoid hitting the pedestrian. The court reviewed the record including testimony that suggested Bond may have accelerated when he tried to apply the brakes before hitting Smith. The Court then concluded that "whether Bond noticed Smith in time to avoid hitting him and whether Bond accelerated when he meant to brake are genuine issues of material fact" precluding summary judgment.

Thus, the court of appeals reversed summary judgment and remanded the case to the trial court for further proceedings. ■

Meghan P. Connolly is an associate at Lowe Eklund Wakefield Co., LPA. She can be reached at 216.781.2600 or mconnolly@lewlaw.com.



Dana M. Paris is an associate at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or danaparis@nphm.com.



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: **Kathleen J. St. John, Esq.**
Nurenberg, Paris, Heller & McCarthy Co., LPA
600 Superior Avenue, E., Suite 1200
Cleveland, Ohio 44114
(216) 621-2300; Fax (216) 771-2242
Email: kstjohn@nphm.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.

George Kuchta, et al. v. Sarah Bordnik, et al.

Type of Case: Motor Vehicle Crash

Settlement: \$325,000.00

Plaintiff's Counsel: Jordan D. Lebovitz, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300

Defendant's Counsel: Withheld

Court: Cuyahoga County Common Pleas Case No. CV-16-859314

Date Of Settlement: March 28, 2017

Insurance Company: Erie Insurance Company

Summary: While driving home, plaintiffs, husband and wife, were struck head-on by the tortfeasor in winter driving conditions. Plaintiffs were extracted from their totaled vehicle and suffered injuries including, but not limited to, a fractured cervical vertebrae, fractured ribs, and a hip injury requiring total hip replacement.

Plaintiff's Expert: Withheld

.....

Martha Cummings v. Lin Jion

Type of Case: 2011 Motor Vehicle Collision: Plaintiff's car stopped, passenger side ahead of door struck at angle by defendant coming from parking lot on the right

Settlement: \$50,000 (Policy Limit)

Plaintiff's Counsel: J. Michael Goldberg and Meghan P. Connolly, Lowe Eklund Wakefield Co., LPA, (216) 781-2600

Defendant's Counsel: David Engle

Court: Cuyahoga County Common Pleas Case No. 836092, Judge Brian J. Corrigan

Date Of Settlement: March 23, 2017

Insurance Company: American Family Insurance

Damages: Neck sprain/strain + aggravation of preexisting spondylosis/stenosis; Meds: \$6311, Robinson: \$4908

Summary: 73 year-old woman involved in MVC on 4/16/2011. First ER visit 4/19 with c/o neck pain and tingling in right hand & fingers; first visit to treating doc 5/5. No PT. Referred for MRI to rule out cervical disc pathology. MRI 5/19 showed spondylosis, retrolisthesis, stenosis, multi-level disc herniations, and myelomalacia. Plaintiff referred to neurosurgeon. Meanwhile, plaintiff involved in second MVC approx. six weeks after first MVC (5/26/2011). Original law firm (who had both cases) settled the second MVC within a year. Of course, defense claimed that the second MVC was an intervening/superseding cause of plaintiff's injuries.

August 2011: Neurosurgeon recommended decompression surgery with fusion. Plaintiff opted not to have surgery (and has not had surgery to this day).

Plaintiff's Expert: Satish Mahna, M.D. (Treating Physician); and Teresa Ruch, M.D. (Neurosurgeon)

Defendants' Expert: Mark S. Berkowitz, M.D.

.....

Karen Tipton, et al. v. General Motors LLC

Type of Case: Product Liability / Wrongful Death

Settlement: Confidential

Plaintiff's Counsel: James A. Lowe, Esq., Lowe Eklund Wakefield Co., LPA, 1660 West Second Street, Suite 610, Cleveland, Ohio 44113, (216) 781-2600

Defendant's Counsel: McAfee & Taft, Williams Center Tower II, Two West Second Street, Suite 1100, Tulsa, Oklahoma 74103, (918) 587-0000

Court: United States District Court for the Western District of Oklahoma, Case No. CIV-16-225-C, Judge Robin J. Cauthron

Date Of Settlement: March 14, 2017

Insurance Company: N/A

Damages: Death by reason of a fuel-fed vehicle fire

Summary: Decedent's vehicle in a single-vehicle accident; engine fire led to fuel system involvement. Decedent did not escape vehicle. Death was due to inhalation of smoke and fire.

Plaintiff's Experts: Dynamic Safety Engineering; Forensic Automotive Consulting Team; Michael Schultz; Joseph Burton, M.D.

Defendant's Expert: Not disclosed

.....

Needham v. Myers

Type of Case: Auto - Failure to Yield

Settlement: \$75,000.00 - at Mediation

Plaintiff's Counsel: Howard D. Mishkind, Mishkind Kulwicki Law Co., L.P.A., (216) 595-1900

Defendants' Counsel: Joseph Ferrante

Court: Lake County Common Pleas, Judge Lucci

Date Of Settlement: March 2017

Insurance Company: Nationwide

Damages: Neck and Back

Summary: Clear liability. Plaintiff sustained neck and upper back injuries. No surgical intervention and no disc herniation. Primarily chronic neck and upper back symptoms with significant physical therapy. Defendant maintained

a \$100,000.00 policy -- no underinsured. Dispute over the extent of the treatment and the nature of the plaintiff's complaints.

Plaintiff's Experts: Augusto Hsia, M.D. (Ortho CCF); Thomas Torzok (Chiropractor CCF)

Defendants' Expert: Mark Panigutti, M.D. (Ortho)

.....
Denise Coley, et al. v. Lucas County, Ohio, et al.

Type of Case: 42 U.S.C. § 1983 Pretrial Detainee Death

Settlement: \$1,280,000.00

Plaintiff's Counsel: Joel Levin, Aparesh Paul, and Mark M. Mikhael, Levin & Associates Co., L.P.A., 1301 East 9th Street, Suite 1100, Cleveland, Ohio 44114, (216) 928-0600; Raymond V. Vasvari, Jr., Vasvari & Zimmerman, 1301 East Ninth Street, Suite 1100, Cleveland, Ohio 44114, (216) 458-5880

Defendant's Counsel: Dennis Lyle; Andrew Ranazzi; Richard Ellenberger; Joseph Simpson; Thomas Antonini; John Borell; Mark Meeks; Matthew Budds

Court: N.D. Ohio Case No. 3:09CV0008, Judge James Carr

Date Of Settlement: February 21, 2017

Insurance Company: Clarendon Insurance Company

Damages: Death in custody

Summary: In May 2004, while in the custody of the Sheriff's Department awaiting trial, the detainee, suffering from seizures, was rushed to St. Vincent's Hospital in Toledo for emergency medical treatment. He was discharged two days later and released into the Sheriff's Department's custody, fully restrained in handcuffs, belly chains and leg irons. As he was escorted through the jail's booking area, an officer struck him in the back of the head. Once in the medical cell, a sergeant placed him in a chokehold to assist in removing the restraints. The decedent began to gurgle and within moments went limp. The sergeant maintained the chokehold, even over the protests of other officers. The restraints were removed and the sergeant eventually released the detainee, leaving him for dead. No one reported the chokehold or the detainee's condition to the jail's medical personnel.

Ten minutes later, when jail personnel were making ordinary rounds, the detainee was found limp and lifeless. He was taken to the emergency room in a coma, never regained consciousness, and died two days later.

No report of the chokehold was made on any investigation report, nor to any law enforcement agency or the coroner. As the Sheriff's Department concealed the chokehold, the coroner ruled that the cause of death was natural from the onset of seizures.

Four years later, in the Spring of 2008, after a whistleblower came forward, the decedent's estate and family filed their civil

rights and wrongful death case in December 2008. The FBI conducted an investigation and, in 2009, four Sheriff's office employees, including the Sheriff, were indicted. The trial in November 2010 resulted in two convictions for deliberate indifference to medical needs and falsifying records.

Plaintiffs' case was stayed through the criminal proceedings, including subsequent appeals until January 2013, and again through the Fall of 2015, when the Sixth Circuit affirmed the denial of the qualified immunity motions and remanded the matter.

In 2016, Plaintiffs took over 15 depositions of Lucas County Sheriff's Department employees and coroner's office personnel. Counsel had to establish Plaintiffs' prima facie case upon cross-examination of these witnesses, including how the detainee was restrained, what type of resistance, if any, detainee was offering, how and for what length of time the chokehold was administered, the utter silence to on-site medical personnel about the chokehold, and the post-chokehold condition of the detainee.

Plaintiffs retained a use of force expert to opine that the chokehold was illegal, not authorized by any policy, custom or practice, and was an unreasonable application of force under the circumstances.

Plaintiffs next had to prove the cover-up, including with testimony on the omission of any mention of the chokehold in any incident report, how the internal investigation was handled, and concealing the chokehold from the coroner. Lengthy coroners' depositions demonstrated how and why in 2010 the cause of death was amended from natural to a homicide.

Plaintiffs were faced with formidable defenses. Defendants asserted that the claims were time-barred. They argued that Plaintiffs were on notice of wrongdoing a few weeks after death when the family placed an ad in the *Toledo Blade* seeking information on the "wrongful death" of the decedent or later, in 2005, when the family retained counsel to determine any basis for a wrongful death claim. Defendants claimed Plaintiffs had sufficient notice such that a case filed in 2008 was beyond the limitations period.

Defendants sought to introduce evidence of charges for multiple homicides against the decedent. They claimed that there was compelling evidence to prove decedent's guilt and that he would either have been executed or in prison for life, making him unavailable to provide companionship and care for his family. The Defendants further claimed that the minor child was not the decedent's son and that the family colluded and conspired to defraud the Court in establishing paternity to secure unauthorized benefits.

Defendants asserted that the seizures caused the decedent to be in such a debilitated condition that he should not have been discharged. Defendants argued that the release from the hospital and the lack of continued emergency medical care for decedent's seizures, not the chokehold, caused the death. Plaintiffs retained two medical experts, a pathologist to opine that cause of death was the chokehold, and not seizures, and a neurologist to opine on the specific brain injury suffered as a result of the chokehold.

Ultimately, Plaintiffs were able to place at significant risk the viability of these defenses and put forth compelling evidence to prove their claims such that the case, nearly thirteen years after the decedent's murder, resolved favorably for the family.

Plaintiff's Experts: Rebecca E. Zietlow; Robert F. Prevot; Frank Sheridan, M.D.; Cormac A. O'Donovan, M.D.

.....
Kevin Sunde v. Grange Property & Casualty Company

Type of Case: Fire Loss

Settlement: \$1,490,751

Plaintiffs' Counsel: Bob Rutter, Justin Rudin, Rutter & Russin, LLC, (216) 642-1425

Defendants' Counsel: Mark Gams

Court: Medina County Common Pleas Case No. 15 CIV 1275, Judge Collier

Date Of Settlement: February 2017

Insurance Company: Grange Property & Casualty Company

Damages: House and personal property lost in fire

Summary: Grange denied this claim asserting an arson defense based on three reports from three fire investigators who all concluded this fire was set intentionally with an ignitable liquid. The homeowner and his housekeeper were the only people present. Kevin said the fire started accidentally when he tried to light the propane-fueled fireplace.

Plaintiffs' Experts: Dennis Smith (Fire Cause and Origin); John Lentini (Fire Debris Analysis); Mark Mulcahy (Mechanical Engineer)

Defendants' Experts: Dan Kovacic (EFI Global); Jeff Paulus (Paulus Engineering); George Wharton (CED Technologies)

.....
Afolake Lawoyin, et al. v. Ayoade Akere, M.D., et al.

Type of Case: Birth Injury

Verdict: \$2,000,000.00 (Dr. Akere)

Settlement: \$300,000.00 (Dr. Tabarra, pretrial co-defendant)

Plaintiff's Counsel: Pamela Pantages, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300; Kathryn Conway, Powers, Rogers & Smith, 70 West Madison Street,

Suite 5500, Chicago, Illinois 60602

Defendant's Counsel: Cassiday Schade, LLP; Clausen Miller, P.C.

Court: Cook County Circuit Court Case No. 2013 L 001645

Date Of Verdict: Pretrial settlement (Tabarra) followed by verdict against remaining defendant (Akere) on January 27, 2017

Insurance Company: ISMIE Mutual

Damages: Permanent right brachial plexus injury.

Summary: Defendant family doctor (Akere) managing labor elected a vacuum assist due to "maternal exhaustion." Co-defendant Tabarra (House OB) called to perform vacuum, delivers head and turns delivery over to family doctor who misses a shoulder dystocia, does no maneuvers and causes permanent BPI.

Plaintiff's Experts: Lawrence Borow, M.D.; Daniel Ader, M.D.; Mona Yudkoff, RN; David Gibson

Defendants' Experts: Robert Gherman, M.D.; Richard Silver M.D.; Mark Scher, M.D.

.....
Brandy West v. Rhockel Investment Group

Type of Case: Slip & Fall

Verdict: \$250,000.00

Plaintiff's Counsel: Christopher J. Carney and Larry S. Klein, Klein & Carney Co. LPA, (216) 861-0111

Defendant's Counsel: Richard Andracki

Court: Geauga County Common Pleas Case No. 15P469, Judge Forrest Burt

Date Of Verdict: January 26, 2017

Insurance Company: Millers Capital Insurance Co.

Damages: Concussion, post-concussive syndrome, anosmia

Summary: Slip and fall case caused by drain pipe that was draining water onto a sidewalk at an apartment complex.

Plaintiff's Expert: Richard Zimmerman (ZZ Design, Inc.); Harold Mars, M.D.

Defendants' Expert: Stephen Brose, M.D.

.....
E. C., Individually and as Adm'r. Of the Estate of Y. C., Dec'd

Type of Case: Wrongful Death - Truck ran over pedestrian

Settlement: \$1,500,000.00

Plaintiff's Counsel: Rubin Guttman, Esq., Rubin Guttman and Associates, LPA, (216) 696-4006; Michael Leizerman, Esq., Leizerman and Associates, (800) 628-4500

Defendant's Counsel: Joseph Nicholas, Esq., Mazanec, Raskin and Ryder Co., LPA; David Utley, Esq., Collins, Roche, Utley and Garner, LLC

Court: Cuyahoga County Common Pleas Court, Judge David Matia

Date Of Settlement: January 2017

Insurance Company: Interstate Motor Carriers/Destiny Transportation, Inc.; Westfield/Unger's Kosher Bakery, Inc.
Damages: No economic damages claimed

Summary: Y. C. was 83 years-old, walked with a cane and suffered from Parkinson's and dementia. He was exiting Unger's store when he was run over twice by Defendant Destiny's driver and crushed. He suffered seconds of conscious pain and suffering. Y. C. had a 5 year life expectancy. He left a wife and 8 adult children. Defendant contested liability, claiming a lack of duty (Unger's) and assumption of the risk/contributory negligence by decedent who walked in front of truck with motor running.

Plaintiff's Expert: James B. Crawford (Introtech); Timothy M. Bussard, CDS (Robson Forensic); and Daniel J. Spitz (Pathology)

Defendant's Expert: Lane Van Ingen, PE; Transportation Safety Services; Robert Shavelle, Ph.D.; and Sean Doyle, PE (SEA)

.....
Withheld - Confidential

Type of Case: Medical Malpractice - IV Infiltration

Settlement: \$425,000.00

Plaintiffs' Counsel: Howard D. Mishkind, Mishkind Kulwicky Law Co., L.P.A., (216) 595-1900

Defendants' Counsel: Withheld

Court: Confidential

Date Of Settlement: January 2017

Insurance Company: Withheld

Damages: IV infiltration to the dorsum of a newborn's arm resulting in cosmetic and functional limitations to the use of her wrist

Summary: Baby was born premature. While in the NICU an IV extravasated resulting in a chemical burn to the dorsum of the infant's arm. Baby had to undergo a number of surgeries to debride the burn resulting in scarring and functional limitations to the wrist. Defense position was that the infiltration was discovered timely and the event was not due to any nursing negligence.

Plaintiffs' Experts: Withheld

Defendants' Expert: Withheld

.....
Kaylee Pritchett v. Ann Jones, et al.

Type of Case: Rear end auto crash

Settlement: \$75,000.00

Plaintiff's Counsel: Kenneth J. Knabe, Knabe, Brown & Szaller, (216) 228-7200), and Allen C. Tittle, Tittle Law LLC, (216) 308-1522

Defendants' Counsel: Jay Hanson (for Jones); Megan Stricker (for Westfield on UIM)

Court: Cuyahoga County Common Pleas Case No. CV-15-844632, Judge Michael P. Donnelly

Date Of Verdict: November 3, 2016

Insurance Company: Tortfeasor-American Family Insurance & UIM-Westfield Insurance

Damages: Bulging Cervical Disc; No economic damage submitted

Summary: Plaintiff rear ended. Initially treated at ER, and attended one PT before 6 months delay in any further treatment. Tortfeasor's carrier offered \$2,500.00. Tortfeasor's policy limits were \$50,000.00

Plaintiff's Expert: Dr. Patrick McIntyre (Pain Management)

Defendants' Expert: Dr. Manuel Martinez (Orthopedic Associates)

.....
John Doe v. ABC Construction Co. (Confidential)

Type of Case: Workplace Tort

Settlement: \$1,625,000.00

Plaintiff's Counsel: David A. Kulwicky, Esq., Mishkind Kulwicky Law Co., L.P.A., (216) 595-1900

Defendant's Counsel: Withheld

Court: Cuyahoga County Common Pleas Court

Date Of Settlement: November 2016

Insurance Company: Withheld

Damages: Cardiac arrest, PTSD, Tinnitus

Summary: Steelworker was shocked when electricity arced from a power line to a crane he was unloading. General contractor held liable on theory of negligent misrepresentation for telling subs power line could not be de-energized.

Plaintiff's Expert: John Conomy, M.D. (Neurology), Samuel Sero, P.E.

Defendant's Expert: Withheld

.....
Jane Doe v. ABC Hospital, et al.

Type of Case: Medical Malpractice

Settlement: Confidential

Plaintiff's Counsel: Steven M. Goldberg and Laurel A. Matthews, MD, JD, The Goldberg Law Firm Co., LPA, 31300 Solon Road, Suite 12, Solon, Ohio 44139, (440) 519-9900

Defendant's Counsel: Withheld

Court: Withheld

Date Of Settlement: November 2016

Insurance Company: Withheld

Damages: Spastic para-paresis and permanent disability

Summary: 47 year-old female assembly line worker who is now permanently disabled and suffers from spastic paraparesis as a consequence of negligent care in an urban emergency department. On her first presentation to the emergency room, the patient, who had no significant past medical history, presented complaining of severe pain in the back of her neck. She was assigned to receive care by a physician's assistant who diagnosed her with acute torticollis and sent her home with a prescription for pain medication and muscle relaxants. The patient had no relief from the first dose of pain medication and did not like the groggy feeling that she experienced from the muscle relaxants. Accordingly, she stopped taking the prescriptions. Over the following days, the patient continued to experience severe pain in the back of her neck and developed progressive numbness and tingling in her hands. She returned to the same emergency department twice reporting her progressive and unremitting symptoms. On her third presentation to the emergency department, the patient was finally brought to the attention of the E.R. physician who, like the physician's assistant, failed to perform a reasonable neurological evaluation and refused her family's repeated requests to perform a CT or MRI on the patient's neck to determine the cause of her progressive and unremitting symptoms. Instead, despite the patient's reports that she was not taking the pain medication and confirmation of this fact by urine drug testing that was negative for opioids, she was repeatedly dismissed by her E.R. caregivers as being "pain-seeking" and sent home. On the patient's fourth visit to the same emergency department, an MRI was finally performed and her epidural abscess was appropriately diagnosed and treated. Unfortunately, because the untreated abscess had been compressing her spinal cord for a substantial period of time before it was evacuated, the patient was left with significant permanent neurological injury.

Plaintiff's Expert: Withheld
Defendant's Expert: Withheld

.....
Confidential

Type of Case: Wrongful Death
Settlement: \$1,750,000
Plaintiffs' Counsel: Bob Rutter, Bobby Rutter, Rutter & Russin, LLC, (216) 642-1425
Defendants' Counsel: Confidential
Court: Ashtabula County
Date Of Settlement: October 2016
Insurance Company: Confidential

Summary: Wrongful death of 68 year-old married woman, still employed, with four adult and non-dependent children; no conscience pain and suffering.

Plaintiffs' Expert: Robert Ranallo, Skoda & Minotti (Economic Loss)

Defendants' Expert: None

.....
Estates of Jane and John Doe, et al. v. ABC Trucking Co., et al.

Type of Case: Tractor-Trailer vs. SUV
Settlement: \$1,500,000
Plaintiffs' Counsel: Steven M. Goldberg, The Goldberg Law Firm Co., LPA, 31300 Solon Road, Suite 12, Solon, Ohio 44139
Defendant's Counsel: Withheld
Court: N/A
Date Of Settlement: May 2016
Insurance Company: Withheld
Damages: Wrongful Death

Summary: Pre-suit settlement awarded on behalf of surviving adult children whose elderly mother and father were fatally injured when their SUV was struck from behind by a tractor-trailer, which crushed them into the rear of the tractor-trailer that was in front of them.

Plaintiffs' Expert: N/A
Defendant's Expert: N/A ■

Application for Membership

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below. I understand that my application must be seconded by a member of the Academy and approved by the President. If admitted to the Academy, I agree to abide by its Constitution and By-Laws and *participate fully in the program of the Academy*. I certify that I possess the following qualifications for membership prescribed by the Constitution:

1. *Skill, interest and ability in trial and appellate practice.*
2. *Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.*
3. *Excellent character and integrity of the highest order.*

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

Name _____

Firm Name: _____

Office Address: _____ Phone No: _____

Home Address: _____ Phone No: _____

Law School Attended and Date of Degree: _____

Professional Honors or Articles Written: _____

Date of Admission to Ohio Bar: _____ Date Commenced Practice: _____

Percentage of Cases Representing Claimants: _____

Names of Partners, Associates and/or Office Associates (State Which): _____

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

Date: _____ Applicant: _____

Invited: _____ Seconded By: _____

President's Approval: _____ Date: _____

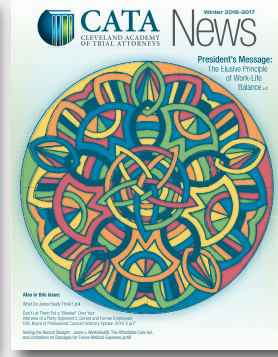
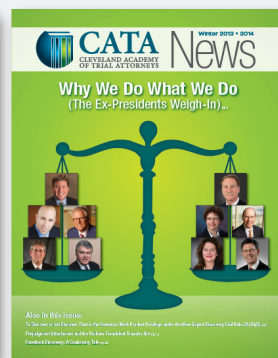
**Please return completed Application with membership fee to: CATA, c/o William B. Eadie, Esq.
Eadie/Hill Trial Lawyers
3100 East 45th Place, Suite 218
Cleveland, Ohio 44127**

First Year Lawyer Dues: \$28
New Member Applications received before July 1st: \$125
New Member Applications received on or after July 1st: \$75
(Reduced mid-year rates do not apply to Current Members. Current Members remain responsible for annual dues (\$125) regardless of when payment is received.)

Past Issues Of The CATA News Are Now Available On The Public Portion Of The CATA Website.

To view past issues, please go to:

<http://clevelandtrialattorneys.org/past-newsletters-issues>



Spring 2017

INNOVATIVE SETTLEMENT SOLUTIONS TO MEET YOUR FINANCIAL NEEDS

- *Over 2 decades of experience in the Structured Settlement industry.*
- *Partnered with Millennium, the country's leading and fastest growing plaintiff-based Structured Settlement provider.*
- *Strategic partnership with the National Association of Trial Lawyer Executives (NATLE)*

Millennium Settlement Consulting Services:

- ✓ **Structured Settlements**
- ✓ **Proprietary Attorney Fee Solutions**
- ✓ **Lien Resolution**
- ✓ **Medicare Set-Asides**
- ✓ **Special Needs Trusts**



Thomas W. Stockett
Certified Structured Settlement Consultant
tstockett@sgsplanning.com
800.453.5414

 **SGS**PLANNING

**MILLENNIUM**
SETTLEMENT CONSULTING

TODAY. TOMORROW. FOR LIFE.