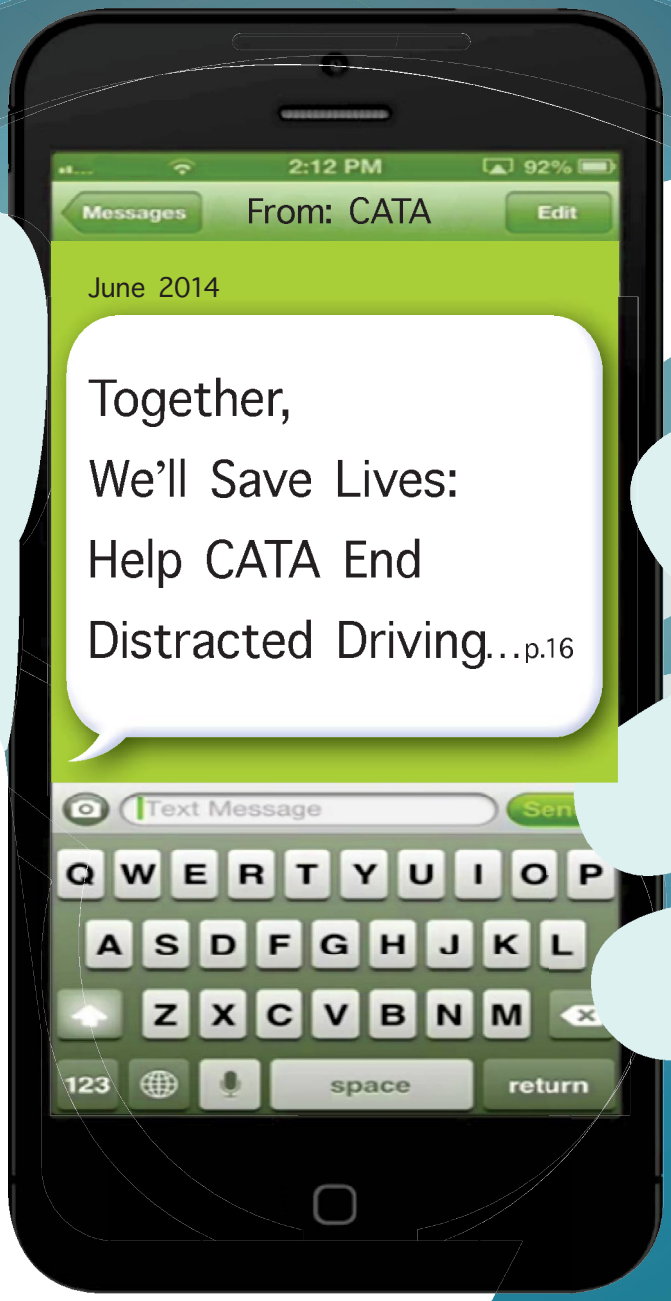
CATA
CLEVELAND ACADEMY OF TRIAL ATTORNEYS
News
Spring 2014



Also In this issue:

NFP™
Structured Settlements

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

- 20 Years of Experience in Structured Settlements, Insurance and Financial Services
- #1 Structured Settlement Producer Nationally for Last 9 Consecutive Years
- Nationally Prominent and a Leading Authority in the Field
- Highly Creative, Responsive and Professional Industry Leader
- NFP has been ranked No. 8 in *Business Insurance's* "100 Largest Brokers of U.S. Business" and No. 9 in *Best's Review's* "Top Global Insurance Brokers."

Passionate Advocates. Proven Approach.

800-229-2228 www.NFPStructures.com

ATLANTA CHARLESTON CLEVELAND FORT LAUDERDALE
HARRISBURG LOS ANGELES PITTSBURGH TAMPA

CATA
CLEVELAND ACADEMY OF TRIAL ATTORNEYS
Spring 2014 News

CONTENTS

ADVERTISERS IN THIS ISSUE

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

George E. Loucas is a principal at Loucas Law, L.P.A. He can be reached at 216.834.0404 or gloucas@loucaslaw.com.

President's Message: Musings of an Outgoing President

by George E. Loucas

Just when we thought tort reform would toll our final bell, could it be that history repeats? I remember the days when citizen rights prevailed over corporate interests. I dare recall then champions of the Ohio Supreme Court such as Justices Francis E. Sweeney and Frank D. Celebrezze, Jr., standing guard, preserving the Constitution and Common Law Doctrine of Stare Decisis.

Verdicts: could the tide be turning? Fair to say all eyes in the State are looking northeasterly at Cuyahoga County. A shift is occurring. I was in Columbus recently, mediating a case with lawyers from Cincinnati, Dayton and Columbus. The general consensus was plaintiff verdicts have been steadily on the increase in their recent experience. An insurance representative likewise said his office certainly is experiencing that change but no one will admit it. The conversation immediately shifted to the recent string of seismic jury verdicts from some of our very own CATA members in our very own backyard as evidence of a shift. I hesitate to name names in case I forget someone but rest assured the congratulatory notes were delivered and, as is customary, they will be invited to share the podium at some point.

We strive not to mention the numbers or sizes of large verdicts so as not to appear as though we brag or give reason to throw fuel on a public relations fire already raging. Good policy. Another good reason is so that we never forget that our clients come first over the size of a verdict; those catastrophically injured victims whose shoulders bear the daily burden of living life in the face of those injuries and thus the numbers justifying the large verdict. Yes, excellent lawyers work hard and take great risk in achieving such and yet always the great equalizer remains: great facts make great lawyers. Not to take anything away from our own -- who very much deserve recognition, accolades and congratulations -- but let us always bring humility to the forefront, forever reminding ourselves that client interests rank first. So congratulations to the clients and their respective champions.

Congratulations also to those who tried cases and met without such success! You, whose numbers when hanging in the balance far exceed the recent example of exemplary verdicts, must be recognized as well for keeping up the fight. Past president Dennis Lansdowne recently convened a teleconference to discuss and exchange ideas about the smothering confidentiality clauses our clients must execute for a fair settlement. We must begin again in freely reporting our verdicts and settlements, ***win or lose.*** When I read about a loss or a settlement that seems low, I have faith that counsel are doing their best and getting into the courtroom, if and as necessary. This helps me stay focused and fueled with the courage necessary to do the same. Keep the faith and courage because history could very well be repeating itself, slowly, case by case, verdict by verdict. We are witnessing the people of Ohio taking back their rights at the grass roots level, starting with the Constitutional right to trial by jury. Be a part of it, win or lose. That is what we do as trial lawyers. Tort reform has wreaked havoc and many practices have adopted different business models if not abandoned or limited contingency fee work in response. A change is coming as history does repeat itself. Do not leave before the magic of change comes again.

Legislation: we dodged another bullet with regard to Civil Rule 41(A) and voluntary dismissal without prejudice. Each year a potential bombshell of a proposed change in Civil Procedure or law lies buried in some no name bill. Perhaps it is a bill named for agriculture where, reading between the lines and tucked toward the end of the document, a proposed legislative amendment ambushes the Constitutional right of an injured victim's day in court. Thankfully, we have legislators or OAJ, for instance, standing guard on the watch tower and thus needing our support.

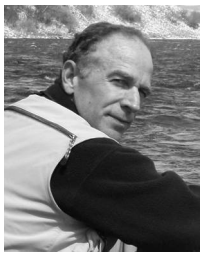
CATA is vibrant and doing well. We could not ask for better officers and directors. We are sound financially. Membership is thriving and why not: CATA has worthwhile benefits, beginning with the very substance of the personalities who form the fabric of our organization. We must not rest on our laurels but tend towards the future and plan accordingly. Our Newsletters are available online. Read past president Sam Butcher's message in the Spring 2013 issue about attracting future members as a priority. I heartily second Sam's recommendations.

I continue to marvel at the quality of our finished product, *CATA News*. The subject matter presented is current, informative and useful in our day to day practice of law. The authors are unselfish in their devotion of time and intellect. So what do I offer in comparison as a lame duck President preparing to exit stage left? A monumental thank you to those who work countless hours to create, organize, format, print and post so that we may enjoy this substantive read. Any and all recognition in this regard has its rightful beginning with CATA's incoming Vice President, Kathleen St. John.

Please remember to sign up and attend our upcoming seminar on May 30, 2014. We have lined up a wonderful program for the day with nationally recognized authors and speakers, Carl Bettinger and Fredilyn Sison, to help walk us through story telling in the courtroom. Help us realize our goal to make this spring seminar the sentinel event it once was.

Remember also to calendar this year's Installation Dinner for new officers and directors on June 13, 2014 at The Club at Key Center. Simply go to our website for more information.

It has been an honor and pleasure serving CATA. I can think of perhaps a few higher callings but indeed, serving CATA has been an exercise in giving of my heart and soul to that which motivates me every day of my life: fighting for those who cannot fight for themselves; speaking for those who cannot speak for themselves. I carried these ideals innately but they were more fully developed with the help of my mentor, another past president who mentions these words in the Winter Issue 2013-14. What greater venue to realize their fulfilment than being a lawyer dedicated to the proposition that all citizens, and in particular the victims we serve, have the Constitutional right to a courtroom and jury? ■



Carl Bettinger is a principal at Shapiro Bettinger Chase LLP, 7411 Jefferson NE, Albuquerque, NM 87109, www.shapbett.com. He can be reached at (505) 888-6463 or carlbett@shapbett.com

In Search of a Story: The Hero's Journey

by Carl Bettinger

Much ado about story

In recent years, many have promoted the need for "story" in trial work – it seems all the rage. Many luminaries say that we are all natural born storytellers, or words to that effect. I beg to differ. I think we are natural born story *listeners*, but one need only walk into most courthouses and sit through most any portion of a trial to see that most lawyers can't tell a story to save their souls. Most lawyers, when asked, "Tell me about what happened – *what's the story?*" begin with something along the lines of, "It's a case of wrongful death due to the negligence of D," or some such claptrap. Very few know the words, let alone the structure, of a decent story. The nearly universal choice of the word "case" to describe a story is a perfect example. People don't have "cases," they have stories.

I suspect that most of us lost the ability to tell a story in law school when we were forced to adopt the appellate court model of story telling, which is to say, "none." All is not lost, however. We can recover from the brain damage inflicted by law school by going back to the basics because, as Isak Dinesen said, "To be a person is to have a story to tell."

Why tell a story?

In *Tell Me a Story*, Roger Schank, an electrical engineer and computer scientist, makes the point that human beings are "hard-wired" for stories. In other words, all of us have story "receptors" that allow us to more easily track, process and understand material that is presented in story format. So, if we as lawyers can present what happened in a way that fits the receptors of our listeners – our jurors – we have accomplished a great deal. But that means that we, as the tellers, need to know the format of classic story, so that we can structure our stories -- not our cases -- accordingly. This means we must learn something about where story comes from, the role of the teller, the structure, the classic characters, and the universal truths which all compelling stories must offer.

Who is the teller?

Who are *you?*

> Self-knowledge is the root of all great storytelling. A storyteller creates all characters from the self by asking the question, "If I were this character in these circumstances, what would I do?" The more you understand your own humanity, the more you can appreciate the humanity of others in all their good-versus-evil struggles. *-- Robert McKee*

Few people will listen unless they have some sense for who the storyteller is, and that requires getting to know you a bit, which must happen way before opening, when most lawyers start their stories. It must happen during voir dire, where you must spend time not only on your jurors, but on yourself. I don't mean this in the fake, pretend, bad-lounge-singer way that so often happens during voir dire. Rather, you have to give the jurors a piece of yourself, an honest piece, a genuine piece, and often, a piece that you are not terribly proud of. In a recent trial, I said the following:

> You know, Martin Luther King fought against racism, and we still have that as a problem. But there is, in society, something called ageism. You know, the attitude that the old don't matter, that they all look the same. My grandmother was 101 when she died. I

> didn't visit her in the last six months of her life, and I felt, and still feel, real bad about that. I think that's because when I was in college, I had some of that in me. It's not a part of me that I'm proud of. It's a part of me that lives inside me.

You've got to give yourself to your jurors, before they will give themselves to you. You can't do this unless you've spent some serious time doing the personal work to find out who you are. You won't find the answers in a book, or at the typical CLE seminar. You might on a therapist's couch, or through psychodrama, which is a form of human development which explores, through dramatic action, the problems, issues, concerns, dreams and highest aspirations of people, groups, systems and organizations. It is mostly used as a group method, in which each person in the group can become a therapeutic agent for the others in the group. Developed by Jacob L. Moreno, psychodrama has strong elements of theater.[1]

Make the story about the listener.

In *East of Eden*, John Steinbeck wrote, "If a story is not about the hearer, he will not listen." Steinbeck knew how to tell a story. He knew that to get the listeners' attention, the story had to be about them, on some level. All good stories are about the listener, because all good stories deal with universal Truths, with a capital "T." For example, in *Moonstruck*, Nicholas Cage says to Cher:

> Love don't make things nice, it ruins everything. It breaks your heart. It makes things a mess. We aren't here to make things perfect. The snowflakes are perfect. The stars are perfect. Not us. Not us. We are here to ruin ourselves. And, and, to break our hearts. And to love the wrong people. And die. I mean, the story books are bullshit!

We know that good stories are about universal truths, because good movies or books cut across languages and cultures. In a good book or movie, the readers or viewers, strangers to one another, will likely feel the same emotions at the same time in the story. So, too, our trial work must contain such universal truths: that good should triumph over evil; that justice should prevail; that love, while it may ruin things, can find a way to rise triumphant. And, ultimately, that the ones to make it so are the twelve good men and women seated before us, empowered by our society to become heroes, should they wish to rise to the occasion.

The Herocentric Story Structure

The hero's journey is probably the most well known of classic story structures. Sam Goldwyn put it the simplest: "We introduce a hero, we chase him up a tree, and then we get him down again." In *Hero of a Thousand Faces*, Joseph Campbell sets out multiple examples of such stories in cultures across the ages and across the planet. Christopher Vogler's, *The Writer's Journey*, works similar magic using more modern examples.

Essentially, the hero begins in an ordinary world – think Neo in the Matrix, Bilbo in *The Hobbit*, Luke Skywalker in *Star Wars* – where as best the hero can tell, all is well. In fact, unknown to the hero, all is not well. Then something happens, an inciting event that shows the hero that all is not well – the knock at Neo's door and his introduction to the Matrix; Gandolf's knock at Bilbo's door; R2D2's projection of Princess Lea calling for help. Usually there is a call to adventure, at which the hero, or someone in his life, balks – Neo's initial refusal to confront the Matrix; Bilbo's reluctance to leave the Shire; Luke's uncle's admonitions that he stay home and work the farm. At some point the hero is helped over the threshold, into a new world, where he meets allies and enemies and undergoes tests of his will – Neo "unplugging" from the Matrix and teaming up with Morpheus and his crew; Bilbo traveling with Gandolf, the dwarves and the elves; Luke joining up with Obi-Wan-Kenobi, Hans Solo and Chewbacca. There is usually a mentor who helps the hero – for Neo it is Morpeus; for Bilbo it is Gandolf; for Luke it is Obe-Wan. At some point the hero must confront the ultimate enemy – for Neo the Agents; for Bilbo the dragon; for Luke, Darth Vader and the Deathstar – at which point there is often a true or metaphorical death, from which the hero returns through the help of some universal truth. In *The Matrix*, for example, Neo dies, but is brought back to life by Trinity's love and belief that he is "the One." The hero then returns with the solution, or elixir, to the problem originally posed in the beginning – Neo now has the power to see, understand, and control the code of the Matrix; Bilbo returns to the Shire with the Ring; Luke has The Force.

One way to structure the story in your case is by using the following structure:

Once upon a time… [the ordinary world]

And every day… [the ordinary world]

Until one day… [the inciting event]

And as a result of that… [the new world]

And as a result of that… [the new world]

And as a result of that… [the new world]

Until, finally… [the climax]

And ever since then… [the moral of the story]

The herocentric story structure is hardwired into our brains. We all "get it." So will our jurors. To that end, we must find ways to show and tell the elements of this structure to our jurors. We must show them the "ordinary world," not just of our client, but of the defendant, and of the jurors. We must deliver to them the inciting event, which drags our client, the defendant, and the jurors into a new world, for certainly the courtroom is a "new world" to the jurors, and one where they need a mentor. We must show

the trials and tribulations in that new world, the motivations of the client or the defendant. We must show the ultimate battle. And finally, we must deliver the story to the jurors, the ultimate heroes, to write the ending.

Classic Characters

Most stories have a villain, a victim, a mentor and a hero. Many attorneys give in to the temptation to label the final instrument of harm as the "villain." For example, in a nursing home or hospital negligence story, many times the immediate cause of harm is a nurse aide or nurse. But if the story stops there, it leaves untold the story of the real villain: Who put that overworked nurse aide or nurse in the position he or she is in? Who is the villain behind the scenes calling the real shots? Perhaps the frontline staff member is as much the victim as our client.

It is also easy to label our client as a victim, a term that does not endear the client to the jurors because people don't like victims, they like heroes. In many stories, the same character may play different roles, so why not show the heroic parts to your client? That she did not give up, that she fought on against the storms and cataclysms visited on her by the villain (defendant).

Who should be the mentor? Certainly not the judge! We don't want the jurors following the judge, we want them following us. So that must be a role we own, and to do so we must have the credibility necessary to be accepted as mentor, which requires that we address our own demons.

Unlike a finished story, where the author or director determines the ending, our trial stories are not finished until the endings are written in the courtroom, and only the jurors can write the endings. This means that in the final analysis, the jurors must be the ultimate heroes, for they are the ones with the power to make a difference. To that end, we must help them acknowledge, accept and utilize their power. We should do this in all parts of trial -- voir dire, opening, direct, cross and closing. For example, in a recent trial on behalf of a profoundly disabled man who was raped in a group home, I said in voir dire:

> All of you here have something in common, and what you have in common is that you showed up in response to the summons. There are empty chairs and empty spaces where people who received summons decided, for good or bad reasons, "I'm not coming." And so what I'd like to talk with you about now is that in exchange for coming, in exchange for coming if you're selected to be on the jury, the State does vest you with immense power at the end of the case. You'll be the most powerful people in the State, and we'll talk about that in a little bit, but what I'd like to start talking with you about is why. Why did you decide to come in response to the summons, and how do you feel about this system we have of juries deciding things? And someone help me, because I'm up here all by myself, and I need to hear from you.

In closing in the same trial, I returned to that theme:

> When first we met I told you that you all had something in common, no? You showed up. And I told you that in exchange for that, if you were selected, as you have been, to sit as the actual jurors, that you would -- that society, that we as a society would vest in you tremendous power. Remember that? Society in exchange for the time that you have given to us of your lives vests in you the power to do certain things. It vests in you the power to hold accountable that [the Defendant] which up 'till now has said, "it's not our fault, we're not responsible, talk to our lawyers." It vests in you the power to put a value on an injury which in some ways may be worse than death, because it leaves a scar on the soul. It vests in you the power, should you decide to exercise it, to make sure that this never happens again.
>
> In short, in exchange for your service, society makes you into heroes, because it vests in you the power to save the day, and that's what heroes do.
>
> Now, you should note that you all have this power in equal amounts, a woman, or man, younger or a bit older, whether you have a Ph.D or a GED, on the keyboard of this courtroom, all of your notes sound equally, and if you choose to work those notes together, you have the opportunity to transform an injustice into a justice.

Conclusion

A trial provides an excellent opportunity to tell a great story. So, ask yourself:

What about myself am I going to share with the jurors so that I, as the storyteller, have credibility?

Whose story do I want to tell?

- Which facts lend themselves to the different classic story elements – ordinary world, inciting event, new world, climax, return home?
- Which of the classic story characters – villain, victim, mentor, hero – should be filled by the different players?
- How can I use each part of the trial to further empower the jurors as the ultimate heroes of the story, the ones who, by their verdict, literally have the power to save the day? ■

End Notes

1. *See* http://nationalpsychodramatrainingcenter.com for more information on this remarkable methodology

In Memoriam: Mark Walter Ruf

The legal community lost a tenacious, creative, and relentless advocate on November 13, 2013. Mark Ruf was a stellar trial and appellate attorney, and former member of CATA. In every endeavor he pursued, Mark was a bulldog and sought excellence. He never backed down from a tussle with opposing counsel or a hostile witness. He could be as blunt as a sledgehammer. He didn't sugarcoat it. He called things as they were. His slender frame and wire-rimmed glasses marked the fierce competitor and gifted athlete he was. Mark could ski faster and mountain bike harder than anyone. He was built for speed and endurance. He was a master of efficiency.

Mark was known as much for his humility, as for his intellectual fire power. He was a former patent lawyer who graduated at the top of his high school class. He wrote with an efficient staccato style that was austere and without frills. He could go toe to toe with the most aggressive in our business, and yet, once the fighting was over, was the consummate gentleman.

Mark spent time volunteering and spending time with his family. He was a reliable, trustworthy and loyal friend who was always there for those who needed him. Sadly, Mark died while vacationing in Palm Springs, California. His last phone call was to his father, Dr. Walter Ruf, who was preparing to pick him up from the airport the following day. Mark had been mountain biking in California and was standing at the top of the San Bernardino Mountains. He was basking in the sunshine and the majestic view, with the desert on one side and the ocean on the other. He felt like he was on top of the world. He told his dad he had never been happier and was looking forward to getting back home to be with his family.

Unfortunately, that day never arrived. A coroner's investigation in California revealed that he died from carbon monoxide poisoning from a faulty pool heater adjacent to his hotel room.

Mark is survived by his parents, Dr. Walter and Patricia Ruf, his sister and brother-in-law, Tina and Steve Haas, and his beloved niece, Ella. Our thoughts and prayers are with them. Mark will truly be missed.

As a frequent author of amicus briefs for the Ohio Academy of Trial Lawyers (n.k.a. the Ohio Association for Justice), Mark Ruf's name lives on in many reported decisions from the Ohio Supreme Court, including the following:

- *Oberlin v. Akron General Medical Center*, 91 Ohio St.3d 169 (2001)
- *Waite v. Progressive Insurance Company*, 85 Ohio St.3d 1226 (1999)
- *Turner v. Central Local School District*, 85 Ohio St.3d 95 (1999)
- *Cater v. City of Cleveland*, 83 Ohio St.3d 24 (1998)
- *Gladon v. Greater Cleveland Regional Transit Authority*, 75 Ohio St.3d 312 (1996)
- *Cole v. Holland*, 76 Ohio St.3d 220 (1996)
- *Buchman v. Board of Education of Wayne Trace Loc. School Dist.*, 73 Ohio St.3d 260 (1995)
- *Sorrell v. Thevenir*, 69 Ohio St.3d 415 (1994)

Alex L. Constable, ASA, principal of Constable Consulting, LLC, provides specialized consulting services in litigation damage analysis. He has been recognized as an economic expert testifying in both State and Federal Courts and has been working in this field more than twenty-three years. He can be reached at (330) 463-5400 or aconstable@constableconsulting.com.

What is an Appropriate Discount Rate in a Lost Earning Capacity Assessment, and Why is it Important?

by Alex L. Constable, ASA

When representing a plaintiff who because of his or her injuries cannot work, one recoverable item of damages is that individual's Lost Earning Capacity.

Earning Capacity

Ohio Courts have defined lost earning capacity as follows. In *Hanna v. Stoll*, 112 Ohio St. 344, 353, 147 N.E. 339, 341 (1925), the Court indicated,

> The measure of damages for impairment of earning capacity is the difference between the amount which the plaintiff was capable of earning before his injury and that which he is capable of earning thereafter.

Earning capacity is a measure of a person's ability and/or power to earn as opposed to actual lost wages. The fact that the plaintiff may have been unemployed at the time of the injury is not fatal to recovering for a loss of earning capacity. In *Eastman v. Stanley Works*, 180 Ohio App.3d 844, 2009-Ohio-634, ¶ 59, the court recognized that earning capacity "*is not necessarily dependent upon what is actually earned before or after the injury.*" In Ohio, this category of damages is still not subject to any artificial limitation.

Your economic expert has many important considerations for a damage analysis in a Loss of Earning Capacity Report. These include years in the work force, appropriate levels of income and fringe benefits and how they change over time, growth rates (if any) of income and fringe benefits, and finally, the interest, or Discount Rate used to bring future dollars back to Present Value. Selection of the appropriate Discount Rate is a critical part of the Present Value analysis.

Discount Rate and Present Value

In an earnings case, a Discount Rate is a rate of return paid in the future as interest on today's invested capital. The terms Discount and Interest are interchangeable. In essence, one accepts a reduced amount to receive cash today (i.e. discount) in exchange for future interest and a future stream of cash flows, or lost future earnings.

Present Value is the measure of the time-value of money. It gives the current value of a future sum of money (or future flow of monies) based on a specified Discount (or Interest) Rate. As such it represents the lump-sum dollar amount given today in exchange for future monies.

According to the Ohio Jury Instructions:

1. PRESENT PECUNIARY VALUE. In the event you find for the plaintiff, the measure of any future damage is the present (loss in dollars) (pecuniary loss) which the (plaintiff) (heirs) with reasonable certainty will sustain in the future, and which is

capable of measurement by the present value of money. (You may not speculate upon any change in the value of the dollar). OJI-CV 315.45 §1.

Discount Rate Selection

Mathematically, the total Present Value dollars and the Discount Rate are inversely related; the higher the discount rate, the lower the total Present Value, and vice versa. For example, consider the following alternatives:

> 1) If one selects 9% as the Discount Rate for a future stream of annual payments of $25,000 (e.g. Total Annual Earnings) for the next 15 years starting today, the corresponding Present Value is $219,654. A 9% Discount Rate corresponds to a long-term, riskier, average stock market investment return.
>
> 2) If one selects 1.74% as the Discount Rate in the same scenario, the corresponding Present Value is $333,296. The 1.74% is the 2013 average market yield on U.S. Treasury securities corresponding to the term in this illustration. U.S. Treasury Securities are the benchmark interest rate for an investment return with no risk of the loss of principal, and are therefore viewed as being "risk-free."

So why the difference in Discount Rates? Higher Discount Rates are commensurate with higher risk. Risks may include inflationary erosion in the value of future monies, high volatility, and/or outright loss of invested capital. Lower Discount Rates preserve and protect the capital invested. Examples, building from low risk to high risk, are U.S. Treasury Securities (bills and bonds), State and local government bonds, corporate bonds, and then large and small company stocks.

An important consideration which is reflected in the above example is that if one were to accept a risk-adjusted Discount Rate in the damage analysis for a Lost Earning Capacity report (e.g. 9%), there would be adverse risk sharing among the parties. That is the plaintiff would be assigned all of the inherent risk that accompanies use of a higher Discount Rate while the defendant receives all of the benefit. The monetary burden of the shifted risk is the differential Present Value between use of the two Discount Rates (i.e., $333,269 less $219,654, or $113,615).

This economic Discount Rate selection is illustrated in *Jones & Laughlin Corp. v. Pfeifer*, 462 U.S. 523, 537, 103 S.Ct. 2541 (1983), where Justice Stevens observed as follows:

> The discount rate should be based on the rate of interest that would be earned on the best and safest investments. Once it is assumed that the injured worker would definitely have worked for a specific term of years, he is entitled to a risk-free stream of future income to replace his lost wages; therefore, the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default.

When do you need an Expert?

The spectrum of subjects as to which an economic damages expert may be required is broad and unique to each case. A typical case for my practice may be a Loss of Earnings opinion in a wrongful termination, injury, or death matter. In Business Litigation, I may be asked to speak to commercial damages such as a Loss of Profits from the violation of a non-compete, profit disgorgement, or a Reasonable Royalty Assessment. Other economic experts may be used to provide analyses in areas such as antitrust and competition policy, merger reviews, class certification, statistics, and survey/sampling design. Additionally, forensic accountants and valuation experts may opine on business values, reductions thereto, business interruption claims, and fraudulent activities.

In any economic damages case, consider the credentials, experience, and reputation of your expert. These are among your important considerations when protecting your client's legal rights. ■

Jane D. Heron, RN, BSN, MBA, LNCC, is a Legal Nurse Consultant and Expert Witness with Med League Support Services, Inc., 260 Route 202/31, Suite 200, Flemington, NJ 08822. She can be reached at (908) 788-8227 or www.medleague.com.

Meghan C. Lewallen is an associate at Mellino Robenalt LLC. She can be reached at 440.333.3800 or mlewallen@mellinorobenalt.com.

1006 Summary Witness: The Nurse as a Summary Provider

by Jane D. Heron, RN, BSN, MBA, LNCC and Meghan C. Lewallen

Would you like to give your clients a voice without having them testify about their own care and treatment? Do you want to bring their story to life? Do you want to avoid adding to your clients' pain and suffering by making them relive a terrible experience? Perhaps they don't remember what happened to them, are unable to communicate, or are not alive to tell their story. Do you want a jury to decide against your client simply because they did not understand what your client went through?

As an Evidence Rule 1006 summary witness, a professional registered nurse can give your clients the voice they need to share their story. Unlike an expert witness, 1006 summary witnesses are not called to testify about liability issues in a case. They do not offer opinions on standard of care, causation, or even what injuries the plaintiff sustained as a result of malpractice or negligence. Instead, the 1006 summary witness provides a clear, unbiased explanation of what your client endured. The idea is for the jury to fully comprehend how your client's life was affected by his or her injuries, medical conditions, complications, or treatment.

1006 summary witnesses are generally retained in medical malpractice or personal injury cases where it is important for the client's story to be told. This includes cases involving: (1) delay in diagnosis, (2) delay in treatment, (3) motor vehicle accidents, (4) burns, (5) spinal cord injuries, (6) workplace injuries, (7) medication errors, (8) surgical errors, and (9) drug reactions. These types of cases often involve thousands of pages of medical records that the jury would be forced to read and comprehend on their own. Because a nurse has specialized knowledge, skill, experience, training and education, he or she is able to explain information in your client's medical record in a way that is easy for the jury to understand. It is unrealistic to expect that a jury will go through thousands of pages of medical records and fully comprehend the information, particularly if the records are complex. Medical records are often filled with technical medical terminology, abbreviations, symbols, and notes and reports that are difficult to decipher.

1006 summaries can be presented to a jury in two forms: (1) a written report and (2) trial testimony. In the report, the witness may use a variety of methods to explain your client's complex care and describe procedures performed. It is important for reports to accurately reflect the underlying medical records; however, they may be comprised of a combination of narrative summaries, exhibits of symptoms, illustrations to explain procedures, charts, graphs, quotes, illustrations from the medical records, and photographs.[1] At trial, the 1006 witness can then walk the jury through your client's medical records by testifying about the information contained in his or her report.

Because of their unique role, summary witnesses offer value to your case that experts and clients

cannot provide. Expert witnesses typically provide a brief summary about your client's care and then focus on deviations from the standard of care. They do not provide a detailed summary of what your client went through. The expert focuses on his or her area of expertise and not on the full scope of your client's experience. Often times, medical experts find it difficult to clearly explain complex care and terminology to lay people. Think about the last time you visited your doctor's office. Did you leave fully understanding everything your doctor said? Were all your questions answered? Put yourself in the shoes of a jury trying to follow and remember complicated expert testimony about your client's course. Would it be helpful to have a nurse add clarity to your client's story? Likewise, when clients testify about their experience, they usually lack the skill, knowledge, and understanding necessary to explain the care they received in a clear manner. Additionally, a number of other benefits to retaining a summary provider include:

- Summarizing thousands of medical records in a report of moderate length;
- More cost effective and *efficient* than calling all of your client's healthcare providers to testify in court;
- More understandable and compelling than a piecemeal presentation by each treating or examining provider;
- The nurse serves as a surrogate to convey information to the jury;
- The nurse possesses technical and specialized knowledge to assist the trier of fact in understanding the evidence;
- The nurse provides a better understanding of voluminous records that cannot be conveniently examined and understood by a jury unfamiliar with the medical terminology, abbreviations, and symbols found in medical records;
- The nurse provides a clear, unbiased voice for your client, which allows you to focus on the legal aspects of your case.

When a 1006 summary provider is properly utilized the impact of the witness's report and testimony can be very powerful. Because few attorneys have encountered this type of witness, as trial approaches opposing counsel will likely try to exclude the witness's report and testimony with a motion *in limine*. In an effort to exclude such evidence defense counsel will suggest the summary report goes beyond what is permissible in Evidence Rule 1006. In order to overcome this argument, it is important to have a strong grasp on the rule itself as well as its underlying purpose.

Ohio Evidence Rule 1006 governs the use of summary evidence. Ohio courts have recognized the purpose of Rule 1006 "is to permit summary documents prepared by witnesses, not lawyers, to enhance or clarify their testimony and aid the jury in understanding complicated or voluminous data."[2] Specifically, Rule 1006 states "[t]he content of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."[3]

Importantly, under Rule 1006, an individual must establish five requirements before the admission of summary evidence: (1) the underlying documents are so voluminous that they cannot be conveniently examined in court; (2) the proponent of the summary must have made the documents available for examination or copying at a reasonable time and place; (3) the underlying documents must be admissible in evidence; (4) the summary must be accurate and non-prejudicial; and (5) the summary must be properly introduced through the testimony of a witness who supervised its preparation.[4]

Most hospital inpatient admission charts fulfill the first three criteria. Issues generally arise with the fourth requirement that the summary be accurate and non-prejudicial. Opposing counsel will likely attack the witness's report if he or she does not limit the summary to a list of dates, times, and events set forth in the medical records. However, the records themselves are not limited to lists of dates, times, and events. Instead, every medical chart includes documentation about the reasons for procedures and tests; and Operative Reports or Procedure Notes contain descriptions of procedures. If the medical records are not limited to dates, times, and events, there is no justification for limiting the 1006 report to those items.

Opposing counsel may also suggest that the use of charts and photographs within the report is unfairly prejudicial. However, Rule 1006 expressly permits the use of "charts, summaries, and calculations." As previously stated, ultimately, the purpose of summary evidence is to present information in a way that is easy for the jury to understand. In essence, a 1006 summary report is nothing more than a summarization of the client's medical records, supported by admissible demonstrative evidence used to help illustrate unfamiliar medical procedures and equipment.[5]

Jane Heron, RN was recently retained as a 1006 summary witness in a case involving a woman that sustained a hypoxic brain injury. In that case, the patient went to the hospital for an elective procedure. As part of anesthesia for this surgery, the patient was given a drug in the same family of drugs as the drug to which the patient was allergic. When the drug was administered the patient went into anaphylactic shock, stopped

breathing, and could not be resuscitated without extraordinary measures. The patient was transferred to another hospital. Over the next fifteen days the patient was placed on ventilation support, blood transfusions, and an ECMO machine. During this time she also underwent extensive medical procedures, including ECMO removal of both cannulas; intra aortic balloon pump insertion via the left femoral artery; open repair of right common femoral artery; placement of two chest tubes; and placement of left internal jugular Swan Ganz catheter. The medical chart from this hospitalization was about 1500 pages.

Ms. Heron prepared a summary report that illustrated and explained contents of the client's hospital records during her fifteen-day admission. Importantly, the report was written in terms that individuals without medical training would be able to understand. Most lay jurors are not familiar with what anaphylactic shock entails, what an ECMO machine is or does or how a person is placed on such a machine, nor are they familiar with many of the other procedures that were performed on the patient at the hospitals where treatment occurred. Ms. Heron later testified at trial as to the contents of her report. Without her testimony, it would have been virtually impossible for the jury to truly understand what the client experienced.

Now that almost every hospital has switched to electronic medical records it makes even more sense to have a nurse summarize these records which are essentially unintelligible to most jurors.■

Additional Resources

1. Judge Sabatino, Superior Court of New Jersey Law Division, Mercer County, 5/9/2002 regarding the Heinzerling case 359 NJ Superior 1 Appellate Division.
2. Patricia Iyer, The Expert Fact Witness, in Patricia Iyer (Editor) Medical Legal Aspects of Pain and Suffering, Lawyers and Judges Publishing Co. Tucson 2003.

End Notes

1. *See United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998) (Reports must summarize the information contained in the "underlying documents accurately, correctly, and in a non-misleading manner.").
2. *In re Estate of Lucitte,* 6th Dist. No. L-10-1136, 2012-Ohio-390, ¶ 71.
3. Ohio Evid. R. 1006.
4. *United States v. Moon, 5*13 F.3d 527, 545 (6th Cir. 2008).
5. See *Moretz v. Muakkassa*, 9th Dist. No. 25602, 2012-Ohio-1177, ¶ 21 ("This Court has held that demonstrative evidence is admissible to illustrate a witness's testimony."), rev'd on other grounds at 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479.

[***Editor's Note:*** In *Moretz,* the Supreme Court held that "[i]llustrations from medical textbooks are subject to the learned-treatise hearsay exception set forth in Evid. R. 803(18) and therefore shall not be admitted into evidence as an exhibit over the objection of a party." *Id.* at syllabus 1. *Moretz,* however, did not overrule the more general proposition that demonstrative evidence is admissible to illustrate the testimony of a witness.]

Stacy M. Callen is an associate at Nager, Romaine & Schneiberg Co., L.P.A. She can be reached at (216) 289-4740 or scallen@nrsinjurylaw.com.

Ohio Workers' Compensation Managed Health Care System

by Stacy M. Callen

A. Proposed House Bill 517

In April 2012, House Bill 517 was introduced to the Ohio General Assembly. Ultimately, the 2011-2012 session adjourned and the bill died in the General Assembly. HB 517 proposed to amend several sections of Chapters 4121 and 4123 of the Ohio Revised Code. Among the changes to Ohio Workers' Compensation Law, the bill contained the following provision:

> "The administrator may limit freedom of choice of health care provider or supplier by requiring, beginning the forty-sixth day after the date of the injury or the forty-sixth day after the beginning date for treatment for the occupational disease, that claimant pay an appropriate out-of-plan copayment for selecting a medical provider not within the provider panel of a health partnership program vendor as provided for in this section."[1]

Had HB 517 been approved by the House and Senate and signed into law by the Governor, it would have limited the injured worker's choice of health care provider. Under Ohio's current workers' compensation system, an injured worker is not as restricted in choice of physician.

Although HB 517 was not enacted, this provision could surface again. John Van Doorn, with the Ohio Association for Justice (OAJ), takes the position that, "Although it is not presently in front of the General Assembly, the provision has not been forgotten by OAJ claimant council members."

B. Ohio Workers' Compensation Managed Health Care System

On October 20, 1993, House Bill 107 was enacted. It reformed Ohio workers' compensation by making managed health care a part of the system. The prior system allowed payment to health care providers equal to usual, customary and reasonable fees for services rendered.[2]

HB 107 restructured how the Bureau of Workers' Compensation (BWC) manages medical payments. It established a dual system for state-fund and self-insured employers, consisting of a Health Partnership Program (HPP)[3] for state-fund employers, administered by private vendors,[4] known as managed care organizations (MCOs), and permitting self-insured employers to establish Qualified Health Plan (QHP)[5] systems. Revised Code § 4121.44 sets forth the Administrator's implementation of the QHP and HPP.

The system for each employer is based on whether it is a state-fund or self-insured employer. A state-fund employer pays an insurance premium to BWC, which is placed in the state insurance fund. Alternatively, a self-insured employer is an employer who has applied for and been approved by BWC to administer its own workers' compensation claims. Self-insured employers agree to abide by BWC and the Industrial Commission of Ohio's (IC's) rules and regulations and to

provide accurate and timely benefits subject to those rules.[6] Self-insured employers pay benefits directly to injured employees and service providers, and do not pay premiums into the state insurance fund.

When a worker is injured while working for a state-fund employer, the BWC and MCOs manage workers' compensation claims. The BWC is responsible for making claim determinations and allowances; paying compensation; educating injured workers, employers and providers; and MCO oversight.[7] The MCOs are responsible for reporting claims; assisting injured workers in securing appropriate medical treatment from an approved, BWC-certified provider; medical case management, including reviewing treatment requests and making treatment decisions; initiating the alternative dispute resolution upon receipt of a written medical dispute; bill review and payment; and educating and assisting employers and providers regarding return-to-work initiatives and HPP.[8]

An MCO must meet ten statutory criteria in order to qualify for selection by the BWC.[9] If an MCO meets the statutory criteria, the bureau must certify an MCO as eligible to contract with the bureau to provide medical management and cost containment services for injured workers and employers.[10] MCO certification by the bureau is for a period of two years. Upon approval by the bureau, an MCO may expand its coverage area after the first year of certification and every year thereafter.[11] The administrator of workers' compensation may refuse to certify or recertify or may decertify a provider or MCO.[12]

When a worker is injured while working for a self-insured employer, the employer manages workers' compensation claims. Participation in QHP is voluntary for current self-insuring employers and mandatory for new self-insuring employers. A QHP will be responsible for medical management of all workers' compensation claims.

Currently, an injured worker can choose a physician of record[13] for his/her claim. A physician of record will be reimbursed as long as he is a BWC-certified provider. The BWC continually accepts new providers into the system. If the medical provider meets the enrollment and credentialing criteria and signs the provider agreement, then he will be certified to participate in the HPP.[14] An injured worker is not required to pay a copayment or deductible for approved treatment through workers' compensation.

C. Choice Of Physician

Historically, choice of physician by an injured worker was broad. Former Revised Code § 4123.651(A) granted an injured worker wide discretion to choose a physician of record, allowing "free choice to select any licensed physician as he may desire to have serve him, as well as medical, surgical, nursing, and hospital services and attention." The injured worker was required to give notification of a change of physician, including the new physician's name and address, and the reason for the change. However, administrative agencies could not deny or restrict an injured workers' right to choose a physician freely.[15]

Amended Substitute H.B. 107 repealed R.C. § 4123.651(A). Presently, neither current R.C. § 4123.651(A) nor any other section of Revised Code Chapter 4123 addresses whether an injured worker retains free choice to select a physician.[16]

Further, R.C. § 4121.44(J) now authorizes the Administrator to "limit freedom of choice of health care provider or supplier by requiring… that claimants shall pay an appropriate out-of-plan copayment for selecting a medical provider not within the health partnership program as provided for in this section."

Also, R.C.§ 4121.44(N) requires that the administrator pay non-plan or non-program health providers according to a fee schedule the administrator adopts for treating injured workers who live out of state or where no qualified health plan or an inadequate number of providers within the health partnership program exist.

D. HB 517 Effect On Choice Of Physician

The proposed legislative change would have created a few stark differences from the current managed health care. It would have essentially implemented a copayment by an injured worker or required choosing a doctor that was on the MCO's provider panel.

Concerns that this failed provision might resurface on the legislative agenda are not entirely unfounded. In January 2014, Ohio BWC Administrator Stephen Buehrer met with Celina area businesspeople.[17] He addressed cutting costs and improving BWC service.[18] According to *The Daily Standard*, "The BWC is asking the legislature to allow it to move employees on disability for more than 45 days to doctors with a proven record of getting people back to work quickly."[19]

Under the failed HB 517, that is exactly what would have happened. After forty-five days from the date of the injury or after the beginning date of treatment for an occupational disease, injured workers would have been required to pay a copayment if they selected a

medical provider that was not within the provider panel of the MCO. Further, it is not known how many providers would be on the panel by each MCO.

Essentially, MCOs generate revenue based on the number of employers to which they provide services. An employer may be solicited by MCOs every two years, during an open enrollment period. Since an employer can change its MCO, MCOs are motivated to keep employers satisfied with their services. If HB 517 were to reappear, the proposed legislative change would make the MCO responsible for creating the panel of medical providers. The concern is that the panel of providers would be exclusively doctors that have employers' interest in mind.

Further, the proposed legislative change would implement a copayment to the workers' compensation system. Historically, workers' compensation has been a system with no co-pays or deductibles for prescriptions or medical services. In order to treat with a physician outside of the panel, the proposed change would create a penalty that would essentially, in most circumstances, eliminate the worker's choice of physician. ■

End Notes

1. Proposed HB 517.
2. Philip J. Fulton, *Ohio Workers' Compensation Law*, §10.1, (4th ed. 2011), citing R.C.§ 4121.44(E), O.A.C. § 4121-17-03, R.C. § 4121.121(B)(16).
3. O.A.C. § 4123-6-01 (A) defines "HPP" as "The bureau of workers' compensation's comprehensive managed care program under the direction of the chief of medical services as provided in sections 4121.44 and 4121.441 of the Revised Code."
4. O.A.C. § 4123-6-01 (C) describes a "vendor" as a managed care organization (MCO).
5. O.A.C. 4123-6-01 (B) defines "QPP" as "A health care plan sponsored by an employer or a group of employers which meets the standards for qualification under section 4121.442 of the Revised Code and is certified as a qualified health care plan with the bureau."
6. O.A.C. § 4123-19-03; R.C. § 4123.35.
7. BWC Medical Guide.
8. BWC Medical Guide.
9. R.C. § 4121.44(F).
10. O.A.C. § 4123-6-03.4(A).
11. O.A.C. § 4123-6-03.4(B).
12. O.A.C. § 4123-6-02.5(B); O.A.C. § 4123-6-03.7(A).
13. O.A.C. § 4123-6-01 defines "Physician of record" of "attending physician" as meaning, "For the purposes of Chapters 4121 and 4123 of the Revised Code, the authorized physician chosen by the employee to direct treatment."
14. BWC Medical Guide.
15. *Parsley v. International Harvester* (1984), 15 Ohio App. 3d 38, 472 N.E.2d 397.
16. Philip J. Fulton, *Ohio Workers' Compensation Law*, §10.1, (4th ed. 2011).
17. Doug Drexler, *State Agency Takes Cost-Cutting Steps*, The Daily Standard, February 5, 2014.
18. *Id.*
19. *Id.*

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

Together, We'll Save Lives: Help CATA End Distracted Driving

by Susan E. Petersen

If your deposition was taken tomorrow, how would you answer the following?

Have you ever read an email while driving? Have you ever typed a text while going down the road? Have you read a text while you are pushing on the gas pedal? How many times in the last week were you guilty of distracted driving? Have you ever lost control of your car -- even if for just a second -- because your eyes left the road to look at your phone? Were your kids ever in the car to witness any of the above? Do you know someone who was hurt as a result of distracted driving?

According to statistics provided by the U.S. Department of Transportation, we already know the probable and frightening answers . . .

- As of December 2012, 171.3 billion text messages were sent in the US (includes PR, the Territories, and Guam) every month.
- At any given daylight moment across America, approximately 660,000 drivers are using cell phones or manipulating electronic devices while driving, a number that has held steady since 2010.
- Five seconds is the average time your eyes are off the road while texting. When traveling at 55mph, that's enough time to cover the length of a football field blindfolded.
- Engaging in visual-manual subtasks (such as reaching for a phone, dialing and texting) associated with the use of hand-held phones and other portable devices increased the risk of getting into a crash by three times.
- 10% of all drivers under the age of 20 involved in fatal crashes were reported as distracted at the time of the crash. This age group has the largest proportion of drivers who were distracted.
- Drivers in their 20s make up 27 percent of the distracted drivers in fatal crashes.
- The number of people killed nationally in distraction-affected crashes was 3,328 in 2012. An estimated 421,000 people suffered injury.[1]

Ohio's No-Texting Laws

Ohio's texting ban went into effect in August of 2012, but really did not begin to impact Ohio's drivers until March of 2013 when officers were permitted to issue citations rather than warnings. According to Ohio Revised Code § 4511.205, any driver younger than age 18 is banned from texting, emailing, talking on a phone (even if it has a wireless device like a Bluetooth attached), using a computer, playing video games or using a GPS (unless it is voice-operated or hands-free). For minors, the offense is a primary one, meaning that law enforcement officials can stop the driver on suspicions of distracted driving. A first violation of the texting law will result in a $150 fine and license suspension of 60 days. A second offense is $300 and a license suspension for a year.[2] For adults, § 4511.204 simply states that it is illegal to use a handheld device to write, send or read a text message. It is a secondary offense similar to the seatbelt law, meaning adults

can only be cited for texting if they were initially pulled over for a different traffic violation.[3]

End Distracted Driving

Despite the new laws, CATA Members reported seeing an increase in the number of new clients who suffered injury as a result of distracted driving. As part of our organization's mission to make Northeast Ohio a safer place to live and work, CATA decided it was time to get involved in a community initiative to end distracted driving. As trial lawyers, we felt we were particularly well-suited to bring this message to schools, civic groups, and other audiences in our communities.

In April (National Distracted Driving Month), the members of our Community Outreach Committee officially joined more than 850 attorneys (along with judges and other safety advocates) from all 50 states in the U.S. and Canada who have pledged to give safety presentations on distracted driving to local high schools, community groups and civic organizations. CATA hopes to educate students and other drivers in Northeast Ohio about the dangers of distracted driving and provide them with simple solutions to keep themselves and others safe while on the road. The *60 for Safety – End Distracted Driving: Student Awareness Initiative* is a professionally produced, interactive presentation that has been developed under the direction of accredited safety and educational experts. It promotes methods proven to help increase awareness and reduce distracted driving and helps to spread the message and mission of the Casey Feldman Foundation and EndDD.org, a 501(c)(3) nonprofit organization, to local high school students and community organizations.[4]

The Casey Feldman Foundation was established by attorney Joel Feldman and his wife, attorney Dianne Anderson, in honor of their daughter, Casey Feldman, of Springfield, N.J. On July 17, 2009, Casey was a senior at Fordham University. At 21 years old, she was smart, beautiful, and looking forward to a career in journalism. She was working a summer job at a restaurant on the boardwalk in Ocean City. It was broad daylight. She was walking across the street and in a crosswalk. A driver, who was distracted, went through a couple of stop signs and fatally hit her.

A Message from Joel Feldman and the Casey Feldman Memorial Foundation

"The night before she died, I asked her if she was happy – I don't know why, but I did. She answered, "yes." She said that she was happy not only in the moment, but also about her life as a whole. She had so much energy, excitement, vitality, compassion, love and self-confidence. She knew she would become a successful reporter. She knew she would make a positive difference in other's lives. I knew it, too. After telling me she was happy, she smiled. That is the last conversation I had with her, the last time I saw that pretty smile and the last time I saw her alive.

Casey died because a driver took his eyes off the road for just a few seconds. After it happened, I knew I could have easily been that driver. I had driven distracted many times. It took losing Casey for me to realize how lucky I was not to have killed another family's child, spouse, parent or friend. I lost Casey, and I changed the way I drive. But most people don't lose a loved one to distracted driving. Most people don't realize the chances they are taking when

In this age of technology, it should come as no surprise that there are now devices and apps that prevent mobile-device use while driving. Many of the apps are triggered when a GPS sensor detects that a vehicle is in motion. Some apps even alert parents when a user tries to beat the system. For example, Cellcontrol (http://www.cellcontrol.com) provides two options for connecting to a vehicle. One is a device the size of an EZpass transponder that is glued to the windshield with the same adhesive material used to secure rearview mirrors. The more sophisticated choice plugs into a vehicle's diagnostic computer port. The system works with iPhones, Androids, BlackBerrys and Windows Mobile. The software allows an authorized person (i.e., parent) to customize what the driver is permitted to do, and to monitor compliance. For example, calls could be restricted to an emergency number. Phones can actually be pre-programmed to go into safe mode when driving, but be fully operative when handed to a passenger. TextBuster® (www.textbuster.com) is another available app for this same purpose. It requires that you install a small hardware module under the dash of your car that will prevent Android phones, and soon iPhones, from texting inside the car. The device even reports to parents attempts to tamper with it, and prevents the driver from accessing all text, email or internet functions while driving their vehicle only. It does not prevent incoming or outgoing calls. Finally, most of the companies that sell cellphone service — Verizon, AT&T, Sprint and others — now also provide apps that can limit access. ■

they multi-task behind the wheel. Our children, the least experienced of drivers, are the most at risk.

After her death, Casey's friends told me that Casey taught them that everyone has a story, a unique and beautiful story. She taught them that telling someone's story made a difference, not just for the story-teller but for the audience as well. Stories, she believed, change lives.

Parents who have lost children feel the pain every day – what we have lost, what our loved ones whose lives were cut short have lost, and what the world has lost by not having these special people here. I can't hold or hug Casey, or hear her laugh and say "Daddy." I can't comfort her when she cries, can't see her graduate from college, find a satisfying career, give her away on her wedding day, or be there when she has children. But I can tell her story.

Telling Casey's story, as well as the stories of the many others whose lives have been changed forever by distracted driving, will make a difference. Telling these stories, together, will have an even greater impact."

Together, We'll Save Lives

CATA's Community Outreach Committee, chaired by President-Elect Ellen Hirshman, gave several EndDD presentations to area high school students since its April launch. We are looking to do more. If you know of a local high school which might have an interest in allowing us to spread this message via a presentation, please contact us or pass on our information.

To help spread the story, CATA is bringing Joel Feldman of the Casey Feldman Memorial Foundation to Cleveland in June. He will join our members in giving several heart-felt presentations during his stay. CATA is extremely pleased to announce that he has agreed to serve as the guest speaker at the Annual CATA Membership Dinner to be held on June 13, 2014 at the Club at Key Tower. For more information on the EndDD Campaign or tickets to our Annual Dinner, visit the CATA website at http://clevelandtrialattorneys.org.

As part of our effort, CATA asks this pledge from you: Do your part. Lead by example. Next time you get behind the wheel, put your phone away. Don't look at an email. Resist checking Facebook or your inbox. Don't contribute to the problem. Don't text and drive … period.

Together, we can save lives. ■

End Notes

1. See http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html.

2. **4511.205 Use of devices by persons under 18 years of age.**

   (A) No holder of a temporary instruction permit who has not attained the age of eighteen years and no holder of a probationary driver's license shall drive a motor vehicle on any street, highway, or property used by the public for purposes of vehicular traffic or parking while using in any manner an electronic wireless communications device.

   (B) Division (A) of this section does not apply to either of the following:

   (1) A person using an electronic wireless communications device for emergency purposes, including an emergency contact with a law enforcement agency, hospital or health care provider, fire department, or other similar emergency agency or entity;

   (2) A person using an electronic wireless communications device whose motor vehicle is in a stationary position and the motor vehicle is outside a lane of travel;

   (3) A person using a navigation device in a voice-operated or hands-free manner who does not manipulate the device while driving.

   (C)

   (1) Except as provided in division (C)(2) of this section, whoever violates division (A) of this section shall be fined one hundred fifty dollars. In addition, the court shall impose a class seven suspension of the offender's driver's license or permit for a definite period of sixty days.

   (2) If the person previously has been adjudicated a delinquent child or a juvenile traffic offender for a violation of this section, whoever violates this section shall be fined three hundred dollars. In addition, the court shall impose a class seven suspension of the person's driver's license or permit for a definite period of one year.

   (D) The filing of a sworn complaint against a person for a violation of this section does not preclude the filing of a sworn complaint for a violation of a substantially equivalent municipal ordinance for the same conduct. However, if a person is adjudicated a delinquent child or a juvenile traffic offender for a violation of this section and is also adjudicated a delinquent child or a juvenile traffic offender for a violation of a substantially equivalent municipal ordinance for the same conduct, the two offenses are allied offenses of similar import under section 2941.25 of the Revised Code.

   (E) As used in this section, "electronic wireless communications device" includes any of the following:

   (1) A wireless telephone;

   (2) A personal digital assistant;

   (3) A computer, including a laptop computer and a computer tablet;

   (4) A text-messaging device;

   (5) Any other substantially similar electronic wireless device that is designed or used to communicate via voice, image, or written word.

   Amended by 129th General AssemblyFile No.183, HB 606, §1, eff. 3/22/2013.

   Added by 129th General AssemblyFile No.106, HB 99, §1, eff. 8/31/2012.

   Related Legislative Provision: *See 129th General AssemblyFile No.106, HB 99, §3*

3. **4511.204 Driving while texting**.

   (A) No person shall drive a motor vehicle, trackless trolley, or streetcar on any street, highway, or property open to the public for vehicular traffic while using a handheld electronic wireless communications device to write, send, or read a text-based communication.

   (B) Division (A) of this section does not apply to any of the following:

   (1) A person using a handheld electronic wireless communications device in that manner for emergency purposes, including an emergency contact with a law enforcement agency, hospital or health care provider, fire department, or other similar emergency agency or entity;

   (2) A person driving a public safety vehicle who uses a handheld electronic wireless communications device in that manner in the course of the person's duties;

(3) A person using a handheld electronic wireless communications device in that manner whose motor vehicle is in a stationary position and who is outside a lane of travel;

(4) A person reading, selecting, or entering a name or telephone number in a handheld electronic wireless communications device for the purpose of making or receiving a telephone call;

(5) A person receiving wireless messages on a device regarding the operation or navigation of a motor vehicle; safety-related information, including emergency, traffic, or weather alerts; or data used primarily by the motor vehicle;

(6) A person receiving wireless messages via radio waves;

(7) A person using a device for navigation purposes;

(8) A person conducting wireless interpersonal communication with a device that does not require manually entering letters, numbers, or symbols or reading text messages, except to activate, deactivate, or initiate the device or a feature or function of the device;

(9) A person operating a commercial truck while using a mobile data terminal that transmits and receives data;

(10) A person using a handheld electronic wireless communications device in conjunction with a voiceoperated or hands-free device feature or function of the vehicle.

(C) Notwithstanding any provision of law to the contrary, no law enforcement officer shall cause an operator of an automobile being operated on any street or highway to stop the automobile for the sole purpose of determining whether a violation of division (A) of this section has been or is being committed or for the sole purpose of issuing a ticket, citation, or summons for a violation of that nature or causing the arrest of or commencing a prosecution of a person for a violation of that nature, and no law enforcement officer shall view the interior or visually inspect any automobile being operated on any street or highway for the sole purpose of determining whether a violation of that nature has been or is being committed.

(D) Whoever violates division (A) of this section is guilty of a minor misdemeanor.

(E) This section shall not be construed as invalidating, preempting, or superseding a substantially equivalent municipal ordinance that prescribes penalties for violations of that ordinance that are greater than the penalties prescribed in this section for violations of this section.

(F) A prosecution for a violation of this section does not preclude a prosecution for a violation of a substantially equivalent municipal ordinance based on the same conduct. However, if an offender is convicted of or pleads guilty to a violation of this section and is also convicted of or pleads guilty to a violation of a substantially equivalent municipal ordinance based on the same conduct, the two of the Revised Code.

(G) As used in this section:

(1) "Electronic wireless communications device" includes any of the following:

(a) A wireless telephone;

(b) A text-messaging device;

(c) A personal digital assistant;

(d) A computer, including a laptop computer and a computer tablet;

(e) Any other substantially similar wireless device that is designed or used to communicate text.

(2) "Voice-operated or hands-free device" means a device that allows the user to vocally compose or send, or to listen to a text-based communication without the use of either hand except to activate or deactivate a feature or function.

(3) "Write, send, or read a text-based communication" means to manually write or send, or read a textbased communication using an electronic wireless communications device, including manually writing or sending, or reading communications referred to as text messages, instant messages, or electronic mail.

Amended by 129th General Assembly File No.183, HB 606, §1, eff. 3/22/2013.

Added by 129th General AssemblyFile No.106, HB 99, §1, eff. 8/31/2012.

Related Legislative Provision: *See 129th General AssemblyFile No.106, HB 99, §3*

4. You can view the entire presentation online at http://enddd.org/presentation/EndDD-StudentAwareness-FinalVersion.pptx. Make a teenager you know watch it tonight. It could prevent an injury or save a life tomorrow.

Allen C. Tittle is an associate at Mellino Robenalt, LLC. He can be reached at 440-333-3800 or atittle@mellinorobenalt.com.

Pointers From The Bench:

An Interview With

Judge John P. O'Donnell

by Allen C. Tittle

The Honorable John P. O'Donnell has been on the bench since 2002. Prior to being elected, Judge O'Donnell worked in the field of insurance defense, and is currently running to become Ohio's next Supreme Court Justice.

Judge John P. O'Donnell

I had the opportunity to ask Judge O'Donnell for his view of the Plaintiffs' bar and some advice based on his observations after years of presiding over personal injury trials.

Overall, Judge O'Donnell views the Plaintiffs' bar as hard working professionals, who are attempting to get the best possible results for their clients. However, he was able to provide me some pointers based on what he has witnessed in the courtroom during his time on the bench.

First, while it seems obvious, the biggest mistake Judge O'Donnell has witnessed in his courtroom is not being prepared – whether that be at the initial case management conference or at trial. With that in mind, trial preparation should include time spent ensuring that all witnesses are adequately prepared. In Judge O'Donnell's opinion, many times a jury's verdict boils down to credibility of the witnesses, and without adequate preparation, a jury will not buy into your witnesses.

Another common mistake made by attorneys that Judge O'Donnell has noticed is that too much time is spent on issues that really do not have a bearing on the final outcome of the case. For example, in an admitted liability car accident case, some attorneys spend too much time on the negligent conduct of the tortfeasor, instead of focusing on the damages of their client.

Further, in terms of opening statement, attorneys need to try to avoid the "I think" or "I believe" statements, and just stick to "the evidence will show" statements. Finally, in Judge O'Donnell's opinion, the "angry litigator" technique at trial is largely ineffective. In other words, focusing on how "bad" a person the defendant is should be avoided; instead, you should focus on the positive evidence in your favor.

In Judge O'Donnell's courtroom, the attorneys ask all the questions in voir dire. Additionally, all the potential jurors, not just the eight in the box, are questioned at the same time. Then, after all potential jurors are questioned by both sides, the parties proceed to exercise their challenges.

When asked about the large number of defense verdicts in personal injury cases, Judge O'Donnell feels that there is a direct correlation to the effective marketing to the American public of the defense's view of torts, and that these verdicts have very little to do with effective or ineffective "lawyering" in the courtroom. In fact, in all his years on the bench, he has never witnessed an attorney do so poor of a job that the jury did not have the evidence it needed to render an educated verdict.

On a personal note, Judge O'Donnell grew up in Euclid, Ohio with six brothers and sisters, and attended St. Joseph High School. He now resides in Lakewood, Ohio with his wife, five kids, and golden retriever. Currently, his favorite television show is *Impractical Jokers* on truTV.

Additionally, I was able to ask Judge O'Donnell why the public should consider him for a seat on the bench of Ohio's Supreme Court. He responded that while he is not running to advance the views of a particular political party, the public often uses party affiliation as a shorthand for a judge's worldview, so that a politically balanced court promotes confidence in its decisions because it better represents everyone. Currently, there is only one democrat sitting on Ohio's Supreme Court – Judge O'Donnell hopes you are willing to add at least one more. ■

Pointers From The Appellate Bench:
An Interview With
Judge Patricia Blackmon

by Allen C. Tittle

The Honorable Judge Patricia Blackmon is a fourth-term incumbent sitting on the Eighth District Court of Appeals. Prior to being elected, Judge Blackmon was a staff attorney for the Ohio Turnpike and, prior to that, the Chief Prosecutor for the City of Cleveland.

I had the opportunity to sit down with Judge Blackmon to get her view on how the Plaintiffs' bar can be successful on the appellate level and her observations from the Court of Appeals.

Judge Patricia Blackmon

Overall, Judge Blackmon has seen a marked improvement in the work product of the attorneys before her. She attributes this to the increased sophistication of litigation, which correlates with the use of computers.

However, Judge Blackmon was able to point out a few common mistakes that should be avoided on the appellate level. First, attorneys should always know what the standard of review is as it relates to their case. The appellate panel's primary concern is what power does it have to act. Thus, attorneys should not overlook the fact that the court, at the appellate level, is simply asking, "what did the trial court do wrong?" and "can the appellate court fix it?"

Additionally, a common mistake is overreaching on choosing assignments of error. Some attorneys list up to ten assignments of error, which is a mistake. Instead, appellants should choose two to three assignments of error, if applicable; and then, focus on the "primary" assignment of error at oral argument. The overall concern should be whether the assigned error is winnable.

Finally, attorneys should avoid rearguing facts at the appellate level, unless that issue has been raised as an assignment of error. However, if a factual dispute is at issue on the appellate level, attorneys should remember that findings of fact may be overturned only by a finding of the manifest weight of the evidence. In order to reverse a factual finding three judges must agree.

In sum, to be successful at the appellate level, attorneys need to think about building the potential record for appeal from the very moment of taking in the case. Only then, will you be armed with all the potential ammunition one may need at the court of appeals.

I also asked Judge Blackmon about her opinion of oral argument, and whether she agrees with Judge Scalia's mantra that oral arguments are essentially useless. She emphatically disagrees; oral argument is the attorney's final moment to convince the judges of his or her position prior to the court deciding the case. In her opinion, oral argument should never be waived, and all the judges in the Eighth District are of the opinion that oral argument is very important to their decision making process.

Her decision making style is somewhat patterned after the style of Justice Brennan. She read many of his cases. In so doing she learned that three questions should be evaluated when deciding appellate cases: did the trial court choose the correct law; if so, was it applied to the facts correctly; and did the trial court interpret the law correctly. This is her approach unless the issue is fact specific.

When asked about the large number of recent defense verdicts and/or low monetary awards at trial, Judge Blackmon attributed this to the "McDonalds case effect." In her opinion, the media's sensationalism of this case has had a lasting effect on juries. Accordingly, one may want to attack the effect of this case on voir dire while at trial.

On a personal note, Judge Blackmon was raised in Jackson, Mississippi, and came to Cleveland to attend Cleveland-Marshall College of Law. She credits her mother and grandfather as being big inspirations in her life. In fact, her grandfather, who grew up during the reconstruction era following slavery, initially worked on a plantation as a youngster, but eventually owned and operated a large farm as an adult. He even found time to build a school and teach in it along the way, despite only having an eighth grade education. ■

Andrew J. Thompson is an attorney at Shapero & Roloff Co., L.P.A. He can be reached at 216.781.1700 or athompson@shaperoroloff.com

Technology Tips for Attorneys

by Andrew J. Thompson

Don't forget to look at the digital version of this article, with hyperlinks, on CATA's Blog at www.clevelandtrialattorneys.org/blog. Members can also use our website to access full copies of past editions of the CATA News.

Avoid Distractions with the Freedom App

As trial lawyers, we are all familiar with juggling many tasks at the same time. There are times, however, when we need a more singular focus, such as when we are writing a brief and need to meet a deadline. For those occasions, consider using *Freedom*. *Freedom* disconnects your computer from the Internet for as long as you need, up to 8 hours. At the end of the period specified, your computer reconnects without any changes to the computer's functionality. If there is an emergency, you can reboot your computer to get back online. If you need to do research online while writing, consider *Anti-Social*, a similar product that only disconnects specific distracting web sites, like Twitter, Facebook, etc.

Clean Up Your Inbox

There are very few emails we receive on a given day that are immediately handled and deleted from our Inbox. Most are left for later follow-up, when time allows. The problem is that our Inbox quickly ends up with hundreds of emails, and it is easy to forget or overlook an important message. *Boomerang* was created to deal with this issue, and is advertised as "a snooze button for your email." For $29.95, you can install *Boomerang* to work with your Outlook or Gmail accounts. *Boomerang* allows you to remove an email from your Inbox and have it redelivered at a later specified time. The return message can be flagged or marked as "unread." If the email received contains a date or time, Boomerang will detect it and suggest that as the appropriate follow-up time.

Help for the Traveling Attorney

If you've ever traveled to one of the more rural places in Ohio to meet a client, you know that it is hard to find a Starbucks or other location that offers a free Wi-Fi connection. JiWire was created as a database of wireless networks around the world. Click on the App from your phone and it will direct you to the nearest connection. JiWire also works offline, and will find a connection within a specified area.

Once you find a spot with free Wi-Fi, you still need to be careful connecting to an unsecure access point in a random hotel or coffee shop. A good way to protect yourself, and your clients' data, is proXPN, an application that creates a VPN (Virtual Private Network). For $6.25 per month, the premium service is available on your iPhone or Android device. Once installed, all information from your device that is exchanged with the web is fully encrypted, including your location. ■

Joel Feldman To Speak At CATA's Annual Installation Dinner

Joel Feldman

Casey Feldman

Ellen Hirshman is pleased to announce that attorney Joel Feldman, the founder of the End Distracted Driving (EndDD) campaign, will be the keynote speaker for CATA's Annual Installation Dinner on Friday, June 13, 2014.

Following the death of his daughter Casey by a distracted driver in 2009, Mr. Feldman has become one of the leading advocates in the country for safe non-distracted driving. He has created public service announcements used in distracted driving programs, and has worked with Children's Hospital of Philadelphia to develop a scientifically-based and effective distracted driving presentation. He trains professionals across the country to give effective distracted driving presentations in their communities, and coordinates the efforts of more than 400 professionals in giving presentations.

Mr. Feldman is a shareholder with the Pennsylvania law firm of Anapol Schwartz, and a member of the American Association for Justice's (AAJ) Trial Lawyers Care Committee, which encourages trial lawyers to work in their communities with local non-profit organizations.

CATA's Annual Installation Dinner will be held on **Friday, June 13, 2014 at The Club @ Marriott Key Center, with the Reception beginning at 5:30 p.m.,** followed by dinner and the keynote address.

For further information, contact Ellen Hirshman at ehirshman@loucaslaw.com or consult the CATA website at http://clevelandtrialattorneys.org/.

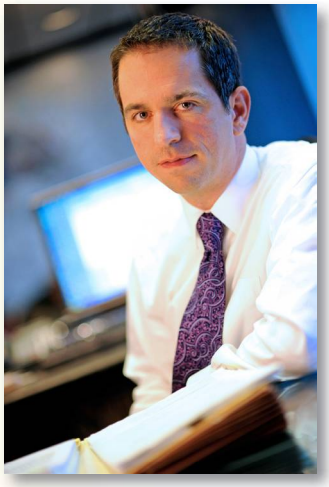
Beyond The Practice: CATA Members In The Community

by Susan E. Petersen

"Doing nothing for others is the undoing of ourselves." – Horace Mann

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

In an effort to help eliminate drunk driving accidents, the lawyers of **Plevin & Gallucci Company, L.P.A.**, are teaming up with Cleveland-based BeMyDD to provide a free designated driver for one lucky fan to and from each home game of the Cleveland Indians, Cleveland Cavaliers and Cleveland Browns beginning this April. *The Plevin & Gallucci Home Game, Home Safe Ride* debuted on April 8th for the Indians' home opener. On each game day, the first fan to call 1-877-UBEMYDD after 9 a.m. and request *The Plevin & Gallucci Home Game, Home Safe Ride* will win a free designated driver to and from that day's game.



Frank Gallucci

"We encourage all Cleveland sports fans to be responsible when supporting their favorite teams. By using a designated driver, fans can avoid drinking and driving and help prevent motor vehicle accidents and injuries," stated Frank L. Gallucci III, managing partner. *"The Plevin & Gallucci Home Game, Home Safe Ride* will enable fans to enjoy the game and travel safely. We are pleased to be joining forces with BeMyDD, another Cleveland company, to promote safe driving in Northeast Ohio."

BeMyDD is a transportation company in Cleveland that offers a new twist on the elite services of a chauffeur: A professional BeMyDD driver drives the customer's automobile, drops the customer off, picks the customer up and returns them home. BeMyDD provides designated driving and personal driver services in Cleveland, Cincinnati, Columbus, Toledo, and Youngstown, Ohio and in major cities around the nation. Call 1-877-UBEMYDD or visit www.BeMyDD.com to learn more.

Spangenberg Shibley and Liber team members once again volunteered at the Cleveland Foodbank, as part of the firm's Help End Hunger program. The group prepared take-home meals for children who do not have steady meals at home, repackaged vegetables and cookies, made over 600 pizza sandwiches, and stuffed brown paper bag lunches. In addition, the firm presented a donation of $1,500 to support the Cleveland Food Bank, supporting 6,000 meals towards the 1 in 6 northeast Ohio residents who are food insecure each day. In this same spirit of volunteerism, Spangenberg supported the blood donor drive in honor of American Red Cross Month in March, a time to recognize volunteers who serve in blood donation, disaster relief, military services, and health and safety training. Legal Assistant Kate Bennett, Client Services Manager Jessica Berberich, Attorney Dan Frech, Chief Operating Officer Barbara Andelman, and Accounting Manager Barbara Barnes volunteered as blood donors. Attorney Peter Brodhead also made his 52nd Apheresis donation of platelets, which are especially beneficial to chemotherapy and organ transplant patients.

Spangenberg lawyers working at the Cleveland Food Bank

Will Eadie and Rhonda Debevec present check for Cleveland Food Bank

Spangenberg lawyers and staff volunteering at the Cleveland Food Bank

The law firm of **Mellino Robenalt** continues to apply their firm mission to charitable activities. A focus of the firm's philanthropy is The Legal Aid Society of Cleveland – a nonprofit law firm that provides high-quality legal assistance to thousands of people each year. Legal Aid provides services that focus on

improving clients' safety, shelter and economic security. Among those helped in 2013 was the Jones family: Seventh-grader Mike Jones is a gifted pianist and good student. His sister, Sally, is a talented ballerina. Their mother, Ms. Jones, contacted Legal Aid after she was denied public housing. Homeless Ms. Jones had no place for her family to stay. Legal Aid established that she was actually eligible for public housing. The housing authority approved Ms. Jones for public housing, and she was able to afford a safe home, create a stable living environment that would enable her to keep a job, and ensure her children could stay in their same school. Ensuring safe housing is a key element of developing financial stability for a family.

Tom Robenalt and Chris Mellino

The Jones family was among the 22,081 people helped by Legal Aid in 2013 through 8,918 cases. There is no civil right to counsel in the United States. When someone is faced with the loss of something as basic as shelter, income, safety or education, the best response is often the use of our legal system. But, if you are facing the loss of shelter, safety or security – there is no right to counsel in United States' civil courts. Legal Aid – a private nonprofit – works to fill this gap in the judicial system.

Mellino Robenalt is hosting a fundraiser for Legal Aid at a private home in June. The goal of the event is to raise unrestricted funds for the great work Legal Aid does – specifically legal assistance, community education and outreach, and advocacy – for the most vulnerable in Northeast Ohio.

Finally, the **Nurenberg Paris** law firm has been working with Make-A-Wish of Ohio, Kentucky and Indiana to grant the wishes of several amazing and determined children from Northeastern Ohio. When these special children are faced with life threatening medical conditions, their lives and those of their parents become focused on the child's medical treatment. Family schedules revolve around medical appointments, tests, therapies, and consultations with physicians. Other children in the family don't always get the attention they need, but cope and try to be strong for the sake of their sibling. This is where Make-A-Wish comes in. For a short period of time, Make-A-Wish and its supporters are able to create a retreat from disease and the medical world. Each wish gives the child hope and strength to keep fighting against his or her disease.

Andy Young of Nurenberg Paris with Maxwell at his post-wish party.

Nurenberg Paris has been partnering with Make-A-Wish since 2009. They have sponsored children with brain tumors, leukemia, and Spinal Muscular Atrophy. The wishes granted include meeting favorite princesses at Disneyland, taking first commercial airplane flights, and taking cruises to the Caribbean. The firm has also granted wishes for several teenage boys. One boy traveled to Hawaii to tour Pearl Harbor where his grandfather was stationed during World War II; another was granted his wish to act as a sportscaster at a Cleveland Indians game. Nurenberg Paris is proud to be associated with Make-A-Wish and hopes to continue granting wishes long into the future. ■

Nurenberg Paris hosts party for Maxwell after he returns from his Make-A-Wish adventure.

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

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

An Introduction to Obtaining Out-of-State Discovery in State and Federal Court Litigation

by Brenda M. Johnson

If it hasn't happened already, at some point in your practice you will be faced with the prospect of obtaining discovery from a third party in another state who is outside your court's subpoena power. Perhaps a former employee or officer of the defendant in your Ohio trucking case has retired to Florida or Arizona. The nurse whose charting notes are crucial to your medical malpractice case against a Cleveland hospital has relocated to Minneapolis. Documents critical to the product liability case you brought in the Northern District of Ohio are in the hands of a third-party materials analysis service located in California.

In each of these situations, unless the third party wants to cooperate, you will need an enforceable subpoena to obtain the discovery you need. If you're in federal court, this is a relatively simple process; however, despite nearly one hundred years' of efforts on the part of the Uniform Law Commission (ULC) to promote a consistent approach, the procedure for issuing out-of-state subpoenas for discovery still varies, both in terms of procedure and clarity. In those states that have adopted some version of the ULC's most recent model legislation, it is sufficient to present the clerk of court in the county where your deponent is located with a subpoena from your state court, whereupon the clerk of court is required to issue a similar subpoena for service.[1] In states that, like Ohio, still follow a version of the ULC's first model legislation on the issue, you will need to obtain a commission from your trial judge and have it presented to the court of the state in which you seek discovery in order to get a subpoena issued.[2] Some states allow the issuance of a subpoena by a local attorney, without court intervention, and some will issue a subpoena upon proof that an appropriate notice of deposition has been served in the original action.[3]

In any case where it becomes apparent that you will need to obtain discovery from an out-of-state witness in conjunction with a state court case, your first step should be to locate your witness and determine the specific state court that has jurisdiction over that person or entity. Once you've done that, after reviewing the state's statutes and procedural rules regarding discovery in support of out-of-state litigation, contact the local clerk of court for guidance. If you are informed as to the general nature of the process, the local clerk is usually very helpful – so, in order to get you started, this article includes a list of current state statutes and rules relating to issuance of subpoenas for use in out-of-state litigation. Before getting to the list, however, here is a summary of the various approaches governing the issue.

Out-Of-State Discovery in Federal Court

Under the current federal rule, you can issue a subpoena from the district court in which your action is pending and serve it anywhere in the United States; however, there are geographic limitations on where you can require the discovery to take place, and you will have to go to the district court with jurisdiction over your witness if you need to enforce the subpoena, or if the recipient seeks to quash it.

Rule 45 of the Federal Rules of Civil Procedure, as amended effective December 1, 2013, permits nationwide service of a subpoena issued from the district court where your action is pending.[4] This is a welcome simplification from prior practice, which required the subpoena to issue from the district court in which compliance with the requested discovery was to occur, and imposed a range of geographic limitations on such service.[5]

At the same time, the new rule places specific restraints upon the place of compliance. An individual subpoena recipient may only be compelled to attend a deposition or produce documents within 100 miles of where the recipient resides, is employed, or regularly transacts business in person, and a corporate officer can only be compelled to attend within the state where the person resides, is employed, or does business in person.[6] Moreover, motions to quash or enforce a subpoena must be made in the first instance to the district court in which compliance is required, as opposed to the issuing court, although they can subsequently be transferred to the issuing court with the consent of the subpoena recipient or under exceptional circumstances.[7] If the matter is transferred, Rule 45 specifically provides that the attorney for the subpoena recipient will be permitted to appear before the issuing court; however, Rule 45 does not automatically allow the attorney who issued the subpoena to appear in the district court where compliance is required. This means, both formally and practically, that any dispute over compliance with an out of state subpoena is likely to require the involvement of counsel local to the district where compliance is to occur.

Out-of-State Discovery in State Court

1. The Uniform Foreign Deposition Act

The Uniform Law Commission first tackled the issue of out-of-state discovery in 1920, when it promulgated the Uniform Foreign Deposition Act (UFDA).[8] The UFDA, which was originally adopted by 13 states and remains the law in five states (Florida, Louisiana, New Hampshire, Wyoming and Ohio), provides in relevant part as follows:

> Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state. [9]

If you need discovery from a state following the UFDA approach, you should first contact the court with jurisdiction over your witness to find out what you need to obtain from your trial court in order to obtain a subpoena, and also to determine whether you will need local counsel.

2. The Uniform Interstate and International Procedures Act

The Uniform Interstate and International Procedures Act (UIIPA), which was drafted by the UPA in 1962, was meant to provide a more comprehensive treatment of the issue, but failed to catch on with the states, and the UPA withdrew it from recommendation in 1977.[10] It differs from the UFDA mostly in that it is more specific regarding the respective rights of the trial court and the discovery court to specify the discovery procedure; however, if it was not for the fact that it remains the law in Massachusetts, it would be of only historical significance.[11]

3. The Uniform Interstate Depositions and Discovery Act

Drafted in 2007, the Uniform Interstate Depositions and Discovery Act (UIDDA) has been adopted in some form by 29 states, as well as by the U.S. Virgin Islands and the District of Columbia. The goal in drafting the UIDDA was to "set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to deponents."[12]

The UIDDA allows a party seeking discovery to present the clerk of court in the jurisdiction where the discovery is sought with a subpoena issued under the authority of the trial court, and then the clerk is to issue a subpoena under the authority of the discovery court for service on the witness.[13] There is no need to file a motion with the court or to open a miscellaneous proceeding, and requesting a subpoena in this manner is not considered an entrance of appearance in the courts of the discovery state, which eliminates the need to obtain local counsel simply in order to obtain a subpoena.[14] The only local judicial involvement contemplated under the UIDDA occurs if there is a dispute over enforcement, in which case any application for a protective order or to enforce the subpoena must be made to the local court.[15]

This simplified procedure, however, is not necessarily available to all out-of-state litigants in all states that have adopted the UIDDA. Three states, namely Alabama, Georgia, and Utah, have reciprocity requirements that preclude litigants from states (such as Ohio) that have not adopted the UIDDA from using the simplified UIDDA procedures.[16] Litigants from non-UIDDA states must still obtain

commissions from their trial court in order to obtain discovery in those states.[17]

4. Other States

Thirteen states have declined to adopt any of the uniform rules promulgated by the UPA, and their procedures vary both in kind and specificity. As noted above, at least two (Arkansas and Oklahoma) will permit issuance of a subpoena upon proof that a notice of deposition has been served, and one (Minnesota) permits issuance by a local attorney, but the rest require some form of petition or motion practice in the discovery court, preceded by the procurement of a commission or letter rogatory from the trial court. At least two of these states (Connecticut and New Jersey) provide instructions on their state judicial website that are designed to aid out-of-state litigants in navigating the process. Nevertheless, in these states, and in any state in which you find you need to take discovery, the best practice is to check with the local clerk of court after doing your best to educate yourself as to that particular state's practices. To help you with this process, this article is accompanied by a list of the state statutes and civil rules governing out-of-state discovery. We have done our best to make sure this list is current as of the date of publication; however, we can make no guarantees, so make sure you check the current status of the law before you go forward with any discovery plan.

Current State Statutes And Rules

A.States Following the UIDDA

State	Statute or Rule	Procedural Notes
Alabama	Ala. Code. § 12-21-400 *et seq.*	Reciprocity required (Ala. Code § 12-21-406). Otherwise, a commission must be obtained. Ala. R. Civ. P. 28(c).
Arizona	Ariz. R. Civ. P. 45.1	
California	Cal. Code of Civ. Pro § 2029.100 *et seq.*	Alternative method is to retain local counsel to issue subpoena without court involvement (Cal. Code of Civ. Pro. § 2029.350)
Colorado	Colo. Rev. Stat. § 13-90.5-101 *et seq.*	
Delaware	Del. Code Ann. tit. 10, § 4311	
District of Columbia	D.C. Code. Ann. § 13-441 *et seq.*	
Georgia	O.C.G.A. § 24-13-110 *et seq.*	Reciprocity required (O.C.G.A. § 24-13-112(d)). In the alternative, a commission must be obtained from the court in which the action is pending. O.C.G.A. § 24-13-113(b).
Hawai'i	HRS § 624D-1 *et seq.*	
Idaho	Idaho R. Civ. P. 45(i)(2)	
Indiana	IC § 34-44.5-1 *et seq.*	
Iowa	Iowa R. Civ. P. 1.1702	
Kansas	Kan. Stat. Ann. § 60-228a	
Kentucky	Ky. Rev. Stat. Ann. § 421.360	
Maryland	Md. Cts. and Jud. Proc. Code Ann. § 9-401 *et seq.*	
Michigan	MCL § 600.2201 *et seq.*	
Mississippi	Miss. Code Ann. § 11-59-1 *et seq.*	
Montana	Title 25, Ch. 20, Rule 28, MCA (Mont. R. Civ. P. 28)	

A.States Following the UIDDA continued...

State	Statute or Rule	Procedural Notes
Nevada	NRS 53.100 *et seq.*.	
New Mexico	N.M. Dist.Ct. R.C.P. 1-045.1	
New York	N.Y.C.P.L.R. § 3119	
North Carolina	N.C. Gen. Stat. § 1F-1 *et seq.*	N.C. Gen Stat. § 1A-1, Rule 28(c), which predates adoption of the UIDDA, also provides for issuance of a subpoena upon presentation of a commission or other authority.
North Dakota	N.D. R. Ct. 5.1	
Oregon	Or. R. Civ. P. 38(c)	
Pennsylvania	42 Pa. C.S. § 5331 *et seq.*	
South Carolina	S.C. Code § 15-47-110 *et seq.*	S.C. R. Civ. P. 28(d), which predates adoption of the UIDDA, also provides for issuance of a subpoena upon presentation of a commission or other authority.
South Dakota	S.D. Codified Laws § 15-6-28.1 *et seq.*	The UFDA remains codified at S.D. Codified Laws § 19-5-4.
Tennessee	Tenn. Code Ann. § 24-9-201 *et seq.*	
Utah	Utah Code § 78B-17-101 *et seq.*	Reciprocity required (Utah Code § 78B-17-102). For nonreciprocal states such as Ohio, requirements are set forth on the Utah courts website at https://www.utcourts.gov/resources/attorney/outofstateattorney/ (last accessed March 21, 2014)
Vermont	V.R.C.P. Rule 45(f)	
Virgin Islands	V.I. Tit. 5, § 4922 *et seq.*	
Virginia	Va. Code Ann. § 8.01-412.8 *et seq.*	Applies only if "the jurisdiction where the action is pending has extended a similar privilege to persons in the Commonwealth, by that jurisdiction's enactment of the Uniform Interstate Depositions and Discovery Act, a predecessor uniform act, or another comparable law or rule of court providing substantially similar mechanisms for use by out-of-state parties." Va. Code Ann. § 8.01-412.14.
Washington	Wash. Rev. Code § 5.51.010 *et seq.*	

B. States Following The UFDA

State	Statute or Rule
Florida	Fla. Stat. Ann. § 92.251
Louisiana	La. R.S. 13:3821
New Hampshire	RSA 517-A:1
Ohio	O.R.C. § 2319.09
Wyoming	Wyo. Stat. § 1-12-115

C. Other States

State	Statute or Rule	Procedural Notes
Alaska	Alaska R. Civ. P. 28(c)	Subpoena acquired by motion
Arkansas	Ark. R. Civ. P. 45(f)	Allows issuance of subpoena by clerk of courts upon filing of a certified copy of a notice of deposition with the clerk's office.
Connecticut	Conn. Gen. Stat. § 52-148e	*See* Out of State Commission to Depose a Connecticut Resident – Revised 09/05/13 at http://www.jud.ct.gov/CivilProc/depose.pdf (last accessed March 20, 2014)
Illinois	Ill S. Ct. R. 204(b)	
Massachusetts	ALM GL Ch. 223A, § 11	Only state still following the UIIPA
Minnesota	Minn. R. Civ. P. 45.01(d)	May be issued by local attorney without judicial involvement
Missouri	Mo. S. Ct. R. 57.08	
Nebraska	Neb. Ct. R. Disc. § 6-328	
New Jersey	N.J. Court Rules, R. 4:11-4	Specifically requires retention of NJ attorney. *See* Information for Out of State Attorneys On the Procedure to Pursue Discovery of a New Jersey Resident for Use in Out-Of-State Litigation at https://www.judiciary.state.nj.us/civil/forms/10518_forgn_lit.pdf (last accessed March 21, 2014)
Oklahoma	12 Okl. St. § 2004.1	Court will issue subpoena on submission of proof of service of notice of deposition
Rhode Island	R.I. Gen. Laws § 9-18-11	Requires commission
Texas	Tex. Civ. Prac. & Rem. Code § 20.002	Requires commission
West Virginia	W. Va. R. Civ. P. 28(d)	
Wisconsin	Wis. Stat. § 88.24	

End Notes

1. *See* UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT (UIDDA) (2007) (at http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf (last accessed March 24, 2014)).
2. *See* UIDDA, *supra,* Prefatory Note at 1 (quoting the UNIFORM FOREIGN DEPOSITIONS ACT (UFDA) (1920)).
3. *See* Cal. Code of Civ Pro. § 2029.350 (subpoena can be issued by California attorney); Minn. R. Civ. P. 45.01(d) (may be issued by Minnesota attorney); Ar. R. Civ. P. 45(f) (clerk of court may issue subpoena upon receipt of a certified copy of notice of deposition); 12 Okl. St. § 2004.1 (court will issue subpoena upon proof of service of notice of deposition).
4. *See* F.R.C.P. 45(a)(2) (eff. Dec. 1, 2013) (subpoena must issue from court where action is pending); F.R.C.P. 45(b)(2) (eff. Dec. 1, 2013) (subpoena may be served anywhere in the United States).
5. *See* F.R.C.P. 45(a)(2) (eff. until Dec. 1, 2013) (governing issuance of subpoenas); F.R.C.P. 45(b)(2) (eff. until Dec. 1, 2013) (governing service).
6. F.R.C.P. 45(c) (statewide compulsion is available for trial, but only if it would not impose substantial expense upon the recipient).
7. F.R.C.P. 45(d) (motions to compel production and to quash or modify a subpoena must be made to the district where compliance is required); F.R.C.P. 45(g) (power to hold in contempt is with the court for the district where compliance is required); F.R.C.P. 45(f) (transfer provision).
8. *See* UIDDA, *supra*, Prefatory Note at p. 1 (discussing history).
9. *See id.*; see also O.R.C. § 2319.09.
10. *See* UIDDA, *supra*, Prefatory Note at p. 1-2 (discussing history).
11. *See* ALM GL Ch. 223A, § 11.
12. UIDDA, *supra*, Prefatory Note at p. 4.
13. *Id.*, Section 3 at p. 6.
14. *Id.* At least one state (California) allows litigants the alternative of retaining local counsel to issue a subpoena without court involvement. *See* Cal. Code of Civ. Pro. § 2029.350.
15. *Id.*, *supra*, Section 6 at p. 9.
16. *See* Ala Code. § 12-21-406; O.C.G.A. § 24-13-112(d); Utah Code § 78B-17-102. Virginia has adopted a reciprocity requirement as well, but it includes states that have adopted "a predecessor uniform act," which presumably would include Ohio. *See* Va. Code Ann. § 8.01-412.14.
17. *See* Ala. R. Civ. P. 28(c) (commission procedure); O.C.G.A. § 24-13-113(b) (commission requirement).

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

Attorney-Client Privilege in the Technology Age

by William Eadie

This is not another "how to avoid compromising attorney-client privilege with your client" article. That article has been written dozens of times over, from telling attorneys in the 1990s not to use email, to telling attorneys they might form an attorney-client relationship by having a web form on their website (use a disclaimer).

Use common sense: if it is available to non-lawyers, or there is not an expectation of privacy, don't use it to communicate with clients. Probably the biggest trap is an employer's email system--don't run the risk, as courts outside Ohio have held that employees don't have a reasonable expectation of privacy when employers tell them the employer reserves the right to search company emails. *See, e.g., Alamar Ranch, LLC v. County of Boise*, 2009 WL 3669741 (D. Idaho Nov. 2, 2009); *Holmes v. Petrovich*, 191 Cal. App. 4th 1047 (2011). (The current in-vogue fear is cloud-based systems; this will pass as people get used to the idea of third-party facilitated data. If you don't have the stomach, stay out until judges catch up.)

This is an article about piercing attorney-client privilege in the technology age when dealing with corporate defendants.

Why? Because many of the people and entities we sue cut corners. They put profits over safety. And they try to shield themselves from accountability however they can. One way they can do that--or try to, at least--is to shield communications, compliance reports, and other documents behind attorney-client privilege where it just doesn't apply.

This article will lay out a framework for assessing and, where appropriate, attacking attorney client privilege claims with corporate defendants. In-house counsel today act as spokespeople, managers, executives, investigators. If a company chooses to use lawyers in non-lawyer capacities, they can't use this as a shield to avoid discovery.

Privilege Generally

Courts apply a heightened scrutiny to inside counsel communications, in part to avoid a "zone of silence" surrounding internal counsel involved with business decision making. Since the 1980s, this required a "specialized showing" by corporate defendants that their in-house counsel was providing (primarily) legal advice, as opposed to business (or primarily business) advice. (For a general overview of the history and impact of this policy concern with in house counsel, see Philip J. Favro, Inviting Scrutiny: How Technologies Are Eroding the Attorney-Client Privilege, 20 Rich. J.L. & Tech. 2 (2013), available at http://jolt.richmond.edu/v20i1/article2.pdf.)

This is no trivial matter. When litigating against a major multi-national manufacturer, I found corporate counsel at the VP level of the parent company involved in business decisions that the defendant assumed were privileged because of counsel involvement. Not so fast. Some of those communications went to the root of the claim: what the defendant knew, and why the defendant did what it did. Needless to say, under those circumstances, you'll have to fight to determine the extent of the privilege.

In-House Counsel Test: Is it Legal Advice?

Federal courts apply the standard articulated in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and its progeny, when not sitting in diversity. In diversity cases, federal courts sitting in Ohio apply Ohio law, which generally follows *Upjohn*. (Ohio courts also routinely compare Ohio's attorney-client privilege to federal standards, despite Ohio's statutory and common law roots.)

The majority test is not, "is an attorney involved," but "is the corporate client seeking legal counsel"? Specifically, the party asserting the privilege must show:

1. A communication;
2. Made in confidence;
3. Between an attorney;
4. And a client;
5. For the ***purpose of seeking or obtaining legal advice.***

Courts draw a sharp distinction between business advice and legal advice. "Although on occasion seamlessly intertwined, there is nevertheless a sharp distinction between legal and business advice; the privilege protects only the former and not the latter." *First Fed. Sav. Bank of Hegewisch v. United States*, 55 Fed. Cl. 263 (Fed. Cl. 2003).

In analyzing these elements, inquire as to the following points:

- ***Was the communication made for the purpose of giving or receiving legal advice?***

  For example, there may be a significant business interest unrelated to legal advice. Some courts have explored whether, for example, contract negotiations are rooted in an attorney using legal knowledge versus industry-specific business knowledge to determine whether contract negotiation communications are privileged.

- ***Were the Documents provided to the lawyer solely to keep her apprised of business matters?***
- ***Was the role of the lawyer intended merely to immunize documents from production?***
- ***Did the lawyer function merely as a negotiator for a business deal rather than as a lawyer?***
- ***Was the attorney functioning as an accountant, investigator, or business advisor, rather than as a lawyer giving legal advice?***
- ***Was an employee who communicates with the attorney doing so at the direction of a superior?***

  Generally speaking, the "client" is the corporate entity, which acts through management. (This becomes more complicated after litigation begins, of course.)

- ***Was the direction given by the superior to obtain legal advice for the corporation?***

  Again, the corporation is the client.

- ***Was the communication disseminated beyond those persons who need to know the communication's contents?***

  This leads to the conclusion that it was not considered confidential, for legal advice, or confidentiality was waived. Check those email cc's and make sure you know who the non-attorneys are, and what their role in the communication was. If primarily for business purposes, they may lose privilege.

- ***Did the attorneys engage third-parties in collecting or reviewing the communications?***

  While third-parties who can assist the attorney-client communication can maintain privilege (e.g., interpreters, accountants for "translating" financial statements), this does not extend to third parties that merely help the in-house counsel in their tasks. In *Ravenell v. Avis Budget Group, Inc.*, 2012 WL 1150450 (E.D.N.Y. Apr. 4, 2012), the court held that while hiring a third-party company to prepare an employee survey to help the lawyers evaluate whether particular roles were exempt or non-exempt was privileged (because it was beyond the attorneys' capability), the same did not hold true for the company's initial review of the results. Imagine the impact on a wage and hour claim where this initial review--and the corporate decision to ignore parts of it--become an admissible part of the case.

In the end, even where a communication relates to transactions with legal consequences, was the primary purpose of the communication with regard to the legal issues? Compare *In re Grand Jury Subpoena DucesTecum*, 731 F.2d 1032 (2nd Cir. 1984) (advice on legal ramifications of business plans privileged) and *United States v. Loften*, 518 F. Supp. 839, 846 (S.D.N.Y. 1981) (primarily business-focused report not privileged merely because it included some legal advice).

Work Product Regarding Discovery Procedure.

Cases involving large-volume document discovery can result in disputes over how documents are collected, reviewed, and disclosed or withheld. Even in this context, corporate defendants cannot assert attorney-client privilege or the work product doctrine willy nilly--they must make a showing that the process of responding to discovery is privileged.

In *Li v. Olympic Steel, Inc.*, the plaintiffs alleged documents were altered prior to being produced, as they had multiple versions of a single document. The Eighth District held that defendants could not avoid corporate representative discovery on that issue: "After a thorough review of the record, Olympic has failed to rebut Li's arguments and has failed to set forth any evidence to show that testimony from the corporate representative regarding the way in which the documents were produced would violate Olympic's privilege with its counsel." 8th Dist. No. 97286, 2012-Ohio-603 para.13. Even if there was a privilege, the party made a good cause showing for the testimony.

There is also no privilege attached to the fact of a communication (as opposed to the contents of that communication). As such, inquiring as to whether and when an attorney spoke with a corporate defendant is not privileged. *Clapp v. Mueller Elec. Co.*, 162 Ohio App.3d 810, 2005-Ohio-4410, 835 N.E.2d 757 (8th Dist.) ("It is the contents of the communications that are privileged, however, not the mere fact that a communication took place. *Upjohn*, *supra*. Thus, the trial court properly allowed Clapp's counsel to inquire as to whether or not there had been any opportunity by appellants' counsel to influence Little's testimony, which had clearly undergone a radical transformation overnight.").

Conclusion

Attorney-client privilege waiver is much more a risk for the corporate defendant that incorporates lawyers as executives in business affairs, as many do. Plaintiffs' counsel facing privilege assertions based on the "zone of silence" approach to withholding communications should effectively analyze and push back against such claims. It is no longer enough to accept such assertions carte blanche, but to ensure the communications were made for the primary purpose of legal advice, limited in recipients, and not merely an attempt to inoculate communications or documents. ■

Recent Ohio Appellate Decisions

by Kathleen J. St. John

Ohio Supreme Court Decisions:

1.) Parrish v. Jones, 138 Ohio St.3d 23, 2013-Ohio-5224 (Dec. 4, 2013).

Disposition: Affirming court of appeals' judgment reversing the trial court's directed verdict for defendant after plaintiff's opening statement.

Topics: Standard for granting directed verdict after opening statement.

In this medical malpractice/wrongful death action, the plaintiff sued several defendants, including Dr. Jones and Dr. Skocik. In opening statement, the plaintiff's attorney focused on Dr. Jones' negligence, and failed to outline the standard of care, breach, and proximate cause elements with respect to Dr. Skocik. The plaintiff's attorney did, however, state that counsel for Dr. Jones "would present expert testimony critical of Dr. Skocik." *Id*. at ¶6. At the close of plaintiff's opening statement, Dr. Skocik moved for directed verdict, arguing that plaintiff had failed to meet the burden of establishing a case of medical malpractice against him. The trial court granted the motion, and the case proceeded to trial against Dr. Jones, resulting in a defense verdict.

The Fourth District Court of Appeals reversed, finding that the trial court erred by failing to consider the complaint, along with the opening statement, in ruling on the motion for directed verdict. As this decision conflicted with a decision from the Tenth District Court of Appeals, the Supreme Court certified a conflict, the question being whether a trial court must, or even may, consider the allegations in the pleadings in addition to the opening statement when ruling on a motion for directed verdict at the close of a party's opening statement.

The Supreme Court answered the certified question by rejecting both extremes. In ruling on a motion for directed verdict at the close of opening statements, the trial court may, but is not required to, consider the allegations in the pleadings. However, a trial court must exercise great caution in sustaining a motion for a directed verdict on the opening statement of counsel, and must give the party against whom the motion is made the benefit of the doubt. Such motion may only be granted when the opening statement indicates the party will be unable to sustain its cause of action or defense at trial – a circumstance which the Court emphasized will rarely occur.

2.) Hayward v. Summa Health System/Akron City Hosp., Slip Opinion No. 2014-Ohio-1913 (May 8, 2014).

Disposition: Reversing the court of appeals' judgment that had reversed the trial court's ruling denying the plaintiff's motion for a new trial.

Topics: Even if trial court erred in giving a remote-cause jury instruction, the error was not prejudicial because the jury's answers to interrogatories made clear that the jury found the defendants not to have been negligent, and the verdicts were consistent with that finding.

This was a medical malpractice action in which the plaintiff alleged the defendants caused a femoral nerve injury during abdominal surgery by negligent placement of a Bookwalter retractor. The defendants sought a remote-cause jury instruction, which the trial court gave over the plaintiff's objection. The jury was also given six interrogatories involving the negligence and proximate cause of the different defendants. While reading these instructions, the trial judge made several mistakes, which he later tried to correct. The interrogatories were formatted so that if the jury found no negligence on the part of a defendant, there was no need to proceed to the interrogatory on proximate cause. Nevertheless, the jury answered "no" to interrogatories concerning both negligence and proximate cause. The jury then returned verdicts for the defendants.

The plaintiff moved for judgment notwithstanding the verdict, or for a new trial, on the ground that the verdicts could not be reconciled with the evidence that a femoral-nerve injury caused by retractor placement always results from medical malpractice. As evidence that the jury lost its way, the plaintiff cited the fact that the jury answered the proximate cause interrogatories which should only have been answered if negligence had been found. The trial court denied the motions.

The court of appeals reversed and remanded for a new trial. The court found that the trial court erred in giving a remote cause instruction, and that the instruction misled the jury in a matter materially affecting the plaintiff's substantial rights, as evidenced by how they answered the interrogatories.

Although the Supreme Court declined to accept jurisdiction over the issue of whether the remote cause jury instruction was appropriate, it did accept jurisdiction over the question of whether the plaintiff's substantial rights were affected by that instruction, and concluded they were not. The Court found that since the answers to the interrogatories were consistent with the general verdicts, the court of appeals erred in speculating that the instruction materially affected the plaintiff's substantial rights. The Court remanded to the court of appeals to address other assignments of error that it had overruled as moot.

Justice Pfeifer, dissenting, believed that jurisdiction was improvidently allowed, as there was no question of public or great general interest at stake, and the Court typically does not accept review merely to determine whether the trial court's error was prejudicial.

Ohio Court of Appeals Decisions:

1.) Tuleta v. Medical Mutual of Ohio, 8th Dist. No. 100050, 2014-Ohio-396 (Feb. 6, 2014).

Disposition: Reversing trial court's denial of police chief's motion to dismiss on immunity grounds.

Topics: Ohio has not adopted the federal pleading standards in *Iqbal* and *Twombly*. Political subdivision immunity for police chief under R.C. 2744.03(A)(6)(a) and (b).

The plaintiff sued Medical Mutual of Ohio, one of its investigators, Cuyahoga County, the County prosecutor's office and several prosecutors, the City of Cleveland, and Police Chief McGrath for wrongfully prosecuting the plaintiff on drug and theft offenses. The county and city defendants moved to dismiss the complaint under Civ. R. 12(B)(6). The trial court granted each of these defendants' motions, but denied the police chief's motion to dismiss. Chief McGrath filed an interlocutory appeal on political subdivision immunity grounds, and the Court of Appeals reversed in his favor.

The plaintiff contended the complaint stated claims against McGrath for malicious prosecution, abuse of process, inducing breach of confidentiality, intentional infliction of emotional distress, and negligent infliction of emotional distress; and that these claims fell within the exceptions to immunity set forth in R.C. 2744.03(A)(6)(a) and (b).

Before examining the immunity issues, the court addressed the defendant's contention that the court should apply the federal court's heightened pleading standard set forth in *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). The court examined Ohio's history of notice pleading, the decisions in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009), and the Ohio appellate cases citing those decisions. The court concluded that none of the Ohio cases citing the federal authorities have applied a heightened pleading standard, and that Ohio remains a notice pleading state unless the Ohio Supreme Court adopts a new pleading standard or changes are made to the Ohio Rules of Civil Procedure.

The allegations against McGrath failed, however, even under notice pleading standards, as the complaint failed to set forth facts showing that McGrath's actions were manifestly outside the scope of his official responsibilities or were done with malicious purpose, in bad faith, or in a wanton or reckless manner. The negligent infliction of emotional distress claim also failed, because a political subdivision employee is immune from liability for negligence.

.....

2.) DeMarco v. Allstate Ins. Co., 8th Dist. No. 100192, 2014-Ohio-933 (March 13, 2014).

Disposition: Trial court's denial of UM/UIM insurer's motion for protective order is affirmed.

Topics: Insured's right to discover matters related to UM insurer's pre-suit evaluation of insured's claim.

The plaintiff was injured in a motor vehicle accident with an uninsured driver driving an uninsured vehicle owned by someone else. The plaintiff sued the driver and the owner of the uninsured vehicle, as well as her own UM carrier, Allstate. Allstate filed a motion for protective order to avoid producing information related to its investigation and defense of the claim. Plaintiff alleged this information was non-privileged as it "concerned the basis of Allstate's numerous and frivolous denials." These included Allstate's denial that the plaintiff was an insured under the policy or that her vehicle was an insured vehicle under the policy; and Allstate's denials that the tortfeasor and the vehicle he was driving were uninsured.

The trial court ordered Allstate to produce: (1) Allstate's investigation as to whether the subject Allstate policy provides coverage for the plaintiff's UM claim; (2) the manner in which Allstate evaluated the claim and how it arrived at the amount of the final settlement offer; (3) the identity of all persons (including any physicians or nurses) who assisted in evaluating the claim and in calculating the amount of the final settlement offer; (4) everything Allstate did to determine that the tortfeasor was insured; and (5) everything Allstate did to determine the vehicle the tortfeasor was operating was insured.

Allstate filed an interlocutory appeal alleging this information was subject to the attorney-client and work product privileges. The court of appeals affirmed. The court held that since plaintiff's complaint effectively alleged a bad faith claim against Allstate, the attorney-client privilege did not bar her right to discover these materials. The court also held that because the materials to be produced related to Allstate's pre-suit evaluation of the case they were not protected by the work-product privilege.

.....

3.) Woollacott v. Andreas, 8th Dist. No. 100168, 2014-Ohio-1079 (March 20, 2014).

Disposition: Affirming trial court's denial of dispatcher's motion for summary judgment on grounds of political subdivision immunity under R.C. 2744.03(A)(6)(b).

Topics: Fact question as to dispatcher's "recklessness" for purposes of R.C. 2744.03(A)(6)(b) in failing to timely dispatch first responders to emergency call.

This wrongful death action was filed against a Maple Heights dispatcher for recklessness in handling a 911 call. Decedent's wife called 911 at 1:48 a.m. requesting emergency assistance

because her husband was experiencing difficulty breathing. The dispatcher who answered the call was a trainee under the supervision of the defendant. Because all of the Maple Heights rescue squads were out on other calls, the defendant logged onto a computer and spent 4 minutes reading an email regarding recent amendments to standard operating procedures that were irrelevant. What she should have done was immediately requested another first responder to go to the scene, and then, with the assistance of the Mutual Aid Box Alarm System, determined which community to call for mutual assistance.

Instead, the defendant told the trainee to contact the Garfield Heights Fire Department, but inadvertently provided him with the number for the Warrensville Heights Fire Department. Meanwhile, when no one responded in the first 6 minutes after her call, the plaintiff called 911 a second time. This time, the trainee, at the direction of the defendant, called the Maple Heights Fire Station 2, which was located ½ mile away from the plaintiff's home. The fire engine reached the plaintiff's home at 1:58 a.m., at which time the plaintiff's husband was unresponsive. The firefighters had difficulty moving him because he was wedged between a doorway, so they contacted Maple Heights dispatch to seek assistance from Garfield Heights Fire Department on a full cardiac arrest. The Garfield Heights dispatchers dispatched a rescue squad at 2:02 a.m. Then, at 2:08 a.m., the Warrensville Heights rescue squad arrived on the scene. The plaintiff's husband was taken to Marymount, where he arrived at 2:28 a.m. He was pronounced dead at 2:52 a.m.

This interlocutory appeal was taken from the trial court's order denying the dispatch supervisor's motion for summary judgment. At issue was whether the defendant's conduct was reckless so as to come within the exception to immunity in R.C. 2744.03(A)(6)(b). Reckless conduct is characterized by a conscious disregard or indifference to a known or obvious risk of harm that is unreasonable under the circumstances and is substantially greater than negligent conduct. The court found that the defendant's numerous questionable acts in response to the 911 call, coupled with her knowledge that serious injury or death could result from her failure to follow established protocols, created a jury question on the issue of recklessness.

4.) <u>Hetzer-Young v. Elano Corp.</u>, 2d Dist. No. 2013-CA-32, 2014-Ohio-1104 (March 21, 2014).

Disposition: Reversing trial court's orders that excluded plaintiffs' causation expert as sanction for spoliation of evidence and that granted defendant's motion for summary judgment because plaintiffs now lacked an expert on causation.

Topics: Whether trial court abused its discretion in excluding expert testimony on causation in wrongful death action as a sanction for spoliation of evidence based on inspection of aircraft's muffler after crash.

A small airplane crash resulted in the deaths of the pilot and his two passengers. Initially, the NTSB had custody of the wreckage. The wreckage was later transferred to a storage facility where the plaintiff's expert had an opportunity to visually inspect and photograph it. At the time of this inspection, the plaintiff's expert noted that the entire exhaust system was distorted by impact forces.

The next inspection was attended by various plaintiffs' representatives, plaintiff' expert, and representatives of the airplane engine's manufacturer. During this inspection, the participants learned that the deformation of the outlet stack for the muffler impaired their ability to view the muffler's internal flame tube. They collectively decided to remove the outlet stack for a better view of the internal flame tube by using a precision milling machine to cut open the muffler canister. This equipment reduces the possibility of damaging the muffler's internal components.

The complaint was later amended to bring in additional defendants, including the muffler's manufacturer. Subsequent inspections were performed with all parties present. The plaintiff's expert opined that the crash was caused by a power loss resulting from a plugged muffler exit due to the deterioration of internal components.

The muffler manufacturer filed a motion for sanctions based on spoliation of evidence. It argued that plaintiffs spoliated evidence by cutting open the muffler in the earlier inspection, and by not documenting or photographing the muffler's immediate post-accident condition using a borescope.

The trial court granted the motion and sanctioned the plaintiffs by precluding them from offering any expert testimony that a defect in the muffler was a proximate cause of the crash. The court then granted the muffler manufacturer's motion for summary judgment on the ground that the plaintiffs lacked expert testimony on causation.

The court of appeals reversed, holding the trial court abused its discretion by granting the motion for spoliation of evidence because the muffler manufacturer was not prejudiced by the cutting of the muffler. Based on the damaged condition of the muffler from the crash, the testing the defendant wished to perform was "of marginal, if not questionable relevance." *Id.* at ¶34. The court also found that "even if a sanction had been appropriate, the [trial] court also abused its discretion by imposing an unreasonable sanction." *Id.* at ¶39. The sanction was unreasonable because it was unrelated to the minimal degree of prejudice suffered by the defendant. The trial court's ruling on the summary judgment motion was also reversed as it was based on the improper exclusion of plaintiffs' expert testimony on causation.

5.) Vietzen v. Victoria Automobile Ins. Co., 9th Dist. No. 13CA010390, 2014-Ohio-749 (March 3, 2014).

Disposition: Reversing trial court's rulings on cross-motions for summary judgment in favor of the tortfeasor's automobile liability insurer and against the plaintiff/judgment creditor.

Topics: The statutory ten-day grace period for non-payment of automobile insurance premiums begins to run from the date the insurer sends notice, which notice cannot be sent until the due date for payment of premiums has passed with no payment having been received.

On September 6, 2009, the plaintiff, Mr. Vietzen, was injured by the driver of a motor vehicle owned by Ms. Henry, whose liability insurer was Victoria Insurance. Victoria Insurance contended the coverage did not apply as the policy had been canceled for non-payment as of 12:01 a.m. on September 6, 2009. Mr. Vietzen obtained a judgment against Ms. Henry for $97,000, then filed a supplemental complaint against Victoria Insurance. Cross-motions for summary judgment were filed on the coverage issue. The trial court granted summary judgment for the insurer and denied Mr. Vietzen's motion. The Court of Appeals reversed.

Under R.C. 3937.32(E), an automobile policy cannot be canceled for non-payment of the premium unless the insurer provides the insured "at least ten days notice from the date of mailing of cancellation accompanied by the reason therefor[]." Here, the insurer purported to provide the requisite notice in a billing statement mailed on August 24, 2009. The statement provided that payment was due on September 5, 2009, and, if not received on that date, the coverage would be canceled at 12:01 a.m. on September 6, 2009. The legal issue was whether this anticipatory breach cancellation notice satisfied the statutory notice requirement.

Noting the issue was one of first impression, the 9th District Court of Appeals held that a notice of cancellation mailed to the insured prior to date payment was due did not satisfy the notice provision. "Given the legislature's clear intent to protect the public from the burden of compensating for injuries sustained as a result of uninsured drivers, the reasonable interpretation of the notice requirements in R.C. 3937.32 is that the legislature intended to include a grace period of ten days in which an insured may pay a past-due premium before the insurance company may cancel the policy." *Id.* at ¶19. "Therefore, an insurance company must wait until the insured has actually failed to pay her premium when due before mailing notice of cancellation of the policy which will take effect no fewer than ten days after the date of mailing of the notice." *Id.*

6.) King v. Niswonger, 2d Dist. No. 2013-CA-1, 2014-Ohio-859 (March 7, 2014).

Disposition: Affirming jury verdict for plaintiff in action arising out of motor vehicle collision.

Topics: Appellate court's power to conform the record so that material inadvertently omitted is included; expert testimony from business accountant in support of impaired earning capacity of small business owner; directed verdict for plaintiff as to causation of past damages; jury interrogatory itemizing damages per *Fantozzi*; manifest weight of evidence challenge.

The defendant's inattention while talking on her cell phone caused a rear-end collision in which the plaintiff sustained injuries to his cervical, thoracic, and lumbar spine. These injuries were noted by the emergency room physician, and were subsequently treated by chiropractors. The defendant conceded her negligence, so that the action went to trial solely on proximate cause of damages. The jury returned a verdict for the plaintiff in the amount of $186,124.00, and the court of appeals affirmed.

On appeal, the defendant raised five assignments of error. First, the defendant argued that the trial court abused its discretion by admitting certain opinions of the plaintiff's business accountant who testified as to plaintiff's lost earnings and impaired earning capacity. The plaintiff, who owned a business that involved purchasing cars at auction and reselling them, testified his injuries affected his ability to physically inspect the cars, and thus affected the profitability of his business. The defendant contended that certain opinions given by the business accountant at trial on the issue of profitability exceeded the scope of his report and his deposition. The deposition, however, was not in the record, so the first issue the court addressed was whether it could consider the deposition pursuant to App. R. 9(E). The court found that it could do so since the trial transcript revealed that the trial court had considered the deposition in denying the defendant's motion to exclude the expert's new testimony. The court of appeals then found that the defendant had every reason to anticipate the "new" testimony given by this expert such that the trial court's admission of this evidence was not an abuse of discretion.

Second, the defendant argued that the trial court abused its discretion by refusing to permit the defendant to cross-examine the business accountant about impersonal market forces that may have affected the plaintiff's sales. The appellate court found that since the business accountant was not an economist, but was simply there to analyze the books, the trial court did not abuse its discretion in excluding cross-examination on "impersonal, macro economic factors" that might have affected plaintiff's business.

Third, the defendant contended that the trial court erred by directing verdicts for plaintiff on the issue of whether defendant's negligence proximately caused plaintiff to incur past medical expenses, past pain and suffering, and past impairment of daily activities. The court found there was no error as the evidence clearly showed that plaintiff was injured in the accident, and that he incurred medical expenses as a result of the accident (although the amount of such damages was left for the jury to determine).

Fourth, the defendant contended that the trial court erred by using a jury interrogatory on damages that was inconsistent with R.C. 2315.18(D) and OJI 315.01. The interrogatory itemized damages into the following categories – past medical expenses; past pain and suffering; effect on past daily activities; past lost income, if any; future medical expenses, if any; future pain and suffering, if any; effect on future daily activities, if any; and future lost income, if any – and instructed the jury to total the amounts awarded for each of these categories. The court of appeals found that this interrogatory, though more detailed than what R.C. 2315.18(D) or OJI 315.01 require, was appropriate because it "simply breaks down economic and non-economic losses into their constituent parts." The court noted that this interrogatory was consistent with the itemization approved in *Fantozzi v. Sandusky Cement Products Co.*, 64 Ohio St.3d 610 (1992).

Fifth, the defendant argued that various aspects of the jury's findings on damages were against the manifest weight of the evidence. Rejecting these arguments, the court noted, *inter alia*, that compensatory damages include compensation for the aggravation of an existing injury, and that the jury's award of damages for chiropractic treatment incurred after a six month break in treatment was not against the manifest weight of the evidence.

7.) Griffith v. Aultman Hosp., 5th Dist. No. 2013CA00142, 2014-Ohio-1218 (Mar. 25, 2014).

Disposition: Affirming the trial court's grant of summary judgment to the defendant in an action to compel medical records pursuant to R.C. 3701.74.

Topics: What constitutes a "medical record" for purposes of R.C. 3701.74(A)(8).

The plaintiff/executrix filed an action pursuant to R.C. 3701.74 to compel the defendant hospital to produce all medical records from her father's last hospitalization. The hospital filed a motion for summary judgment arguing that the only medical records the statute required it to produce were those "maintained" by the medical records department, as opposed to everything having to do with the patient. The trial court granted the defendant's motion, and the court of appeals – in a 2-1 decision – affirmed.

The statute defines a "medical record" to mean "data in any form that pertains to a patient's medical history, diagnosis, prognosis, or medical condition and that is generated and maintained by a health care provider in the process of the patient's health care treatment." R.C. 3701.74(A)(8). The court of appeals agreed with the hospital that the critical word in this definition is "maintained" and "'that the only meaning that can [be] attached to it, is that the hospital record is to be that which the hospital maintains, not that which a Plaintiff in a *** medical malpractice case thinks should be maintained, not everything having to do with the patient, but that which a hospital determines needs to be maintained by a health care provider in the process of a patient's health care.'" *Id.* at ¶22. The court found that the purpose of the statute was to enable a patient to obtain his or her file to pursue a second opinion or transfer to another medical provider, and that it was not intended to be used as a broad discovery device.

The dissenting judge believed the majority improperly limited a patient's access to her medical records in a manner not found in the statute's plain language. The dissent expressed concern that "the majority's opinion could lead to the concealment, even though unintended, of medical records if a health care provider can self-define the statutory definition of 'maintain' to only include those records it determines to send to its medical records department." *Id.* at ¶37.

8.) Brister v. Cleveland, 8th Dist. No. 100016, 2014-Ohio-1232 (Mar. 27, 2014).

Disposition: Reversing summary judgement that had been granted to the City.

Topics: Exception to immunity in R.C. 2744.02(B)(4).

The plaintiff was injured at a city-owned recreation center when the cable on a back lateral machine broke, causing the machine's bar to strike him on the head. In the ensuing negligence suit against the city, the city moved for summary judgment on the ground that it was entitled to immunity under Chapter 2744 of the Ohio Revised Code. The trial court granted summary judgment, but the court of appeals reversed.

The court of appeals rejected the city's argument that the exception to immunity in R.C. 2744.02(B)(4) did not apply because it only applies to physical defects in the real property or to fixtures on the buildings or grounds. The court found that a defect in an item on the grounds or building used in connection with a governmental function may fall within the definition of "physical defect" even if that item is not a fixture. The court also rejected the city's argument that it was entitled to a specific grant of immunity by application of R.C. 2744.01(C)(2)(u)(ii) for indoor recreation facilities. The

court noted that the case on which the city relied – *Bradley v. Cleveland*, 8th Dist. No. 83464, 2004-Ohio-2347 – had been invalidated by the Ohio Supreme Court in *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 457, 2009-Ohio-1250.

9.) C.K. v. State, 8th Dist. No. 100193, 2014-Ohio-1243 (Mar. 27, 2014).

Disposition: Reversing trial court's grant of summary judgment to the State of Ohio on a wrongful imprisonment claim.

Topics: Under what circumstances is the fourth element of a statutory wrongful imprisonment claim under R.C. 2743.48 satisfied – *i.e.*, when can it be said that, following reversal of the individual's conviction, "no criminal proceeding... can be brought or will be brought" against him "for any act associated with the conviction"?

Following the reversal of his murder conviction as being against the manifest weight of the evidence (based on Ohio's Castle Doctrine), C.K. brought an action against the State of Ohio for wrongful conviction pursuant to R.C. 2743.48. The statute involves a two step process: (1) an action in the Common Pleas Court seeking a preliminary determination of wrongful imprisonment; and (2) an action in the Court of Claims to recover monetary damages. To establish wrongful imprisonment under the first step, the plaintiff must prove, among other things, that his or her "conviction was vacated, dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and ***no criminal proceeding*** is pending, ***can be brought, or will be brought*** by any prosecuting attorney *** for any act associated with that conviction." R.C. 2743.48(A)(4).

Here, the state elected not to retry C.K., but instead dismissed his case "without prejudice." In granting summary judgment on the wrongful imprisonment claim, the trial court concluded that C.K. could not establish that no criminal proceedings "can... or will be brought" against him because, there being no statute of limitations for murder, he could still "possibly" be reindicted.

The court of appeals rejected the trial court's interpretation of "can... or will be brought" as too narrow, finding, instead, that this provision means that "criminal proceedings are still ***factually supportable*** and ***legally permissible*** following reversal." *Id.* at ¶28 , quoting *LeFever v. State*, 10th Dist. No. 12AP-1034, 2013-Ohio-4606, ¶26. Here, the only reason the prosecutor gave for considering C.K.'s case as still "open" was the lack of a statute of limitations for murder. There was no showing that the state had discovered new evidence or even that there was an ongoing investigation. The court of appeals thus concluded that a genuine issue of material fact remained as to whether "reindicting or retrying [C.K.] is both legally permissible and factually supportable." *Id.* at ¶35.

10.) M.B. v. Spence, 2d Dist. No. 25760, 2014-Ohio-1280 (Mar. 28, 2014).

Disposition: Affirming summary judgment for the defendants – a school nurse and an assistant principal – in a tort action by a 15 year old girl who was raped walking home from school after having been suspended.

Topics: Foreseeability of criminal acts by a third party.

A 15 year old girl was suspended from school for smoking marijuana. The school nurse determined her to be under the influence; the assistant principal suspended her. The girl called her mother to pick her up, but the mother, not having a car, needed to take the bus to get her. The girl convinced the assistant principal and school nurse to let her walk home. On the way home, she was accosted and raped. The girl and her parents sued the school nurse and the assistant principal. The trial court granted summary judgment for the defendants, and the court of appeals affirmed.

The plaintiffs argued that the defendants owed the student a duty because there was a special relationship between the student and the defendants, and because the defendants should have "foreseen that a minor who was under the influence of marijuana would be injured on a four-mile walk home alone through a dangerous, crime-ridden area." *Id.* at ¶20. Although the trial court concluded a special relationship existed (a finding that was not disturbed on appeal), it found the criminal acts of the third party were not foreseeable. The court of appeals agreed, finding that a newspaper article stating the school was one of the more dangerous ones in the area, and the assistant principal's testimony about cooperation between the school and the local police department to increase safety for the students were insufficient to establish foreseeability of criminal acts by third parties.

11.) Matt v. Ravioli, Inc., 8th Dist. No. 100553, 2014-Ohio-1733 (April 24, 2014).

Disposition: Reversing grant of summary judgment to the defendant.

Topics: Fact question existed as to applicability of open and obvious danger rule based on attendant circumstances.

Plaintiff attended a wedding reception at defendant's banquet facility. Upon arrival, she walked to her table, which was on

an elevated platform, but she did not have to ascend a stair to get there. She did not leave her table except once to go to the restroom, but the restroom was on the same level as her table. As she was leaving the event, with the lights dim, loud music playing, and people dancing, she took a different path away from her table. Believing that the floor was flat, she missed a step and fell, fracturing her hip. The trial court granted summary judgment on the ground that both the step and the darkness of the reception hall were open and obvious dangers. The court of appeals reversed.

The court of appeals found a genuine issue of material fact existed as to whether attendant circumstances operated to overcome the open and obvious danger rule. The court noted that "[t]he attendant circumstances demonstrate that an invitee attempting to cross a crowded dance floor with dimmed lights and loud music would not necessarily discover the stair especially because she had not traveled that same path upon her entry into the restaurant." *Id.* at 17. The court emphasized that "'the law does not impose an obligation on an individual to constantly look down while walking.'" *Id.* at ¶16, quoting *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911.

12.) <u>Hartings v. Xu,</u> 3d Dist. No. 10-13-11, 2014-Ohio-1794 (April 28, 2014).

Disposition: Reversing in part, and affirming in part, trial court's grant of summary judgment to the defendants.

Topics: Fact questions existed as to whether worker was an independent contractor or an employee of defendant companies; and as to whether defendants had constructive knowledge that worker was incompetent driver for purposes of negligent hiring and retention claims.

Mr. Xu, a carpet installer, ran a stop sign, causing a collision that resulted in the death of a three year old and serious injuries to three other persons. Wrongful death and personal injury actions were filed against the carpet company (Rite Rug Co.), as well as the company that hired the installers (Jung Ho Bae), and Mr. Xu. The plaintiffs asserted claims against both companies based on respondeat superior and negligent hiring and retention. The trial court granted summary judgment to both companies, but the court of appeals reversed.

The court of appeals found that there were genuine issues of material fact as to whether Mr. Xu was an employee of Rite Rug Co. and/or Jung Ho Bae, such that summary judgment was improper on the respondeat superior claims. The court of appeals, however, rejected the argument that the definition of employee contained in R.C. 4123.01(A)(1)(c) was applicable. That definition, the court found, is applicable only to workers compensation claims; respondeat superior claims are governed by the test set forth in *Bostic v. Connor*, 37 Ohio St.3d 144 (1988).

The court also found that there were genuine issues of material fact on the negligent hiring and retention claims. At the time of the accident, Mr. Xu did not have a valid driver's license as it had been suspended following convictions for three traffic violations. Although there was no evidence that either defendant company had actual knowledge of the license suspension, there were fact questions as to the defendants' constructive knowledge based on their failure to make a reasonable inquiry into Xu's driving history – a matter which turned on whether driving a car was considered part of his job responsibilities. The court also noted that, "[f]or purposes of a negligent hiring or retention claim, it is irrelevant whether the worker is an employee or an independent contractor." Liability on the part of the employer/principal may exist in either circumstance. *Id.* at n.11. ■

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

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

Verdict Spotlight

by Christopher Mellino

Congratulations to Chris Patno and Phil Kuri on the $39,000,000 unanimous jury verdict obtained on behalf of their clients in a wrongful death case against Shelly Company, one of the largest paving companies in Ohio.

Chris Patno

Phil Kuri

Chris and Phil represented the family of a 41 year old asphalt repaving inspector working for the Ohio Department of Transportation. Randy Roginski was in his third week on the job when he was assigned to be the inspector of an overnight paving project on a four mile stretch of I-271.

Shelly Company had been awarded the contract from ODOT which required single lanes of the interstate to be closed each night for work. Several factors contributed to this particular stretch of roadway being dangerous. There was a steep slope and a guardrail that prevented the workers from safely accessing the work zone from the median. There was an unusual amount of dust and debris from milling the road. Safety and visibility were so poor that night that the paver operator did not want to get on his machine. The traffic cones had been moved further into the right live lane causing traffic to move out onto the shoulder which created more dust. Finally the topography of the road area required the inspector to be outside the cones.

Pursuant to the requirements of the ODOT contract, Shelly Company was in charge of the safety of the work zone. Shelly chose shortcuts that night, putting profits over safety. Brooming the road eliminates dust and increases visibility. But it costs money to shut the project down to broom, so no brooming occurred. Law enforcement vehicles are required by ODOT at three areas: where trucks enter and exit from the 65 mph live lane into the cone-closed lane; where cones are being set out and picked up; and where the traffic tapers from two lanes down to one. Shelley saved money trying to cover all three areas with only one unit. The cost for each unit was $60.00 per hour.

Evidence at trial established Shelly knew the trucks delivering asphalt to the site would have to slow done to 25mph or slower when turning left into the construction site. This would occasionally cause car traffic in the right lane, which generally was traveling at 65 mph, to bail out onto the shoulder, the exact area where Randy Roginski was working. He was hit by such a car which, going 60-65 mph, had veered onto the shoulder to pass a slow-moving asphalt truck.

The defense tried to exculpate itself by blaming Randy for being on the shoulder as well as the driver of the Honda that struck the him. The jury did find the driver 35% and Randy 5% negligent; but, due to the additional finding that Shelly acted with malice, Chris and Phil argue apportionment does not apply. The defense also alleges the $20 million punitive award must be reduced to $50, arguing the punitive damages cap of two times compensatory damages only applies to survivorship property damages to clothing of $25, and not to any of the wrongful

death compensatory damages. An "as applied" constitutional challenge is brewing, and both issues of punitive and apportionment reduction are before the court.

The jury was made up of one man and 7 women. The man was a manager of a Rite Aid store and was the foreperson. After a two week trial in Judge Michael Jackson's courtroom the jury unanimously awarded:

Wrongful death damages:
Mental Anguish $5 million
Loss of Support $1.4 million
Loss of Services $600,000
Loss of Society $12 million

Survivorship damages:
Pain and Suffering $0
Loss of personal property $25

Randy is survived by his wife, Lynette, and three minor children.

Because the jury found that Shelly Company acted with malice the case proceeded to the punitive damage phase.

None of the Shelly representatives present throughout trial were present in the courtroom or even at the table for the punitive damage phase. Chris used a "roll call" to call out the officers by name, noting each of their absences on the record. Chris believed the "abundance of arrogance" shown by the company executives throughout the case caused the jury to award an additional $20 million in punitive damages. A hearing will also be set in the future on attorney fees awarded by the jury and on prejudgment interest. The case is *Lynette A. Roginski v. Shelly Co.*, Cuyahoga County Common Pleas Case No. CV-11-760490.

Kudos to Chris and Phil for a job well done and an epic verdict. ■

Editor's Notes

As we finalize this issue of the ***CATA News***, we invite you to start thinking of articles to submit for the Winter 2014-2015 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

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

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

CATA Verdicts & Settlements

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

Melgar v. Magna Seating of America, Inc.

Type of Case: Product Liability

Settlement: Confidential Amount

Plaintiff's Counsel: James A. Lowe, Lowe Eklund, Wakefield Co., LPA, (216) 781-2600

Court: District Court, Clark County, Nevada

Date Of Settlement: April 2014

Damages: Severe Spinal Cord Injury at the C3-C6 Level, with anterior subluxation of C5 over C6.

Summary: This case arose out of a rear impact to a 1997 Chrysler minivan. The seatbelted driver was thrown rearward as his seat broke and deformed. As a result, he sustained severe spinal cord injury. Chrysler avoided liability by filing for bankruptcy in 2009, but the seat supplier was subject to joint and several liability with the driver of the striking vehicle and Chrysler. The trial judge ruled that Magna was responsible for the entire amount of the Plaintiffs' damages.

Elizabeth Mehaffey, et al. v. Ohio State Medical Center

Type of Case: Medical Negligence

Verdict: for Plaintiff on Liability.

Settlement: $300,000

Plaintiff's Counsel: Michael D. Shroge, Plevin & Gallucci, 55 Public Square, Suite 2222, Cleveland, Ohio, (216) 861-0804

Defendant's Counsel: Karl Schedler, Assistant Attorney General

Court: Ohio Court of Claims, Judge Weaver, Case No. 2010-01123

Date Of Verdict/Settlement: Verdict - 11/16/12, Settlement - 4/2/14

Insurance Company: N/A

Damages: All pain and suffering and wrongful death due to statutory set-off.

Summary: Plaintiff underwent kidney biopsy while on Plavix. Plaintiff reported medication, but physician claims he was unaware of Plavix. Plaintiff suffered a severe bleeding episode following biopsy and died 5 months later due to complications from bleeding.

Plaintiff's Experts: Dr. Robert Toto (nephrologist, transplant surgeon - UT Southwestern Medical Center)

Defendant's Experts: Dr. Eric Brown (nephrologist - Columbia University)

Xiao Di, M.D. v. CCF/Dr. Andrew Esposito

Type of Case: Medical Malpractice

Verdict: $7.7 Million

Plaintiffs' Counsel: Steve Crandall, CMPW Law LLC, 15 ½ N. Franklin Street, Chagrin Falls, Ohio 44022, (216) 538-1981.

Defendants' Counsel: Anna Carulas and Joe Herbert at Roetzel & Andress

Court: Judge Pat Kelly, through Judge Joan Synenberg

Date Of Verdict: March 20, 2014

Insurance Company: Self-insured

Damages: Pain and suffering, loss of consortium, past and future wages

Summary: Dr. Di injured his left eye on 2/10/10 while performing neurosurgery at CCF. He was a CCF employee who specialized in endoscopic and minimally invasive neurosurgery. He had surgery performed on 1/14/11 by Dr. Andrew Esposito, who tore Dr. Di's iris and destroyed his pupil while attempting a cataract repair. Dr. Esposito claimed he was performing an iris reconstruction after an uncomplicated cataract repair was successful. The damage to Dr. Di's eye prevents him from ever operating again. CCF defended the case by arguing the surgery was indicated and not performed negligently.

Plaintiffs' Experts: Dr. Carl Asseff, Parma, Ohio

Defendants' Experts: Dr. Michael Snyder, Cincinnati Eye Institute

McRoberts v. Kelly

Type of Case: Dental Malpractice

Settlement: Confidential - 6 figures

Plaintiff's Counsel: E. Richard Stege, Stege & Michelson Co., 6001 Cochran Rd., #204, Solon, Ohio 44139, (440) 519-0900

Defendant's Counsel: Withheld

Court: Scioto County Case No. 12CIA001, Judge Marshall

Date Of Settlement: March 20, 2014

Insurance Company: Med Pro

Damages: Extractions of 19 teeth and restoration of same;

punitive damages

Summary: General dentist developed dementia. He continued to practice dentistry, to the detriment of the Plaintiff. She had to have 19 teeth "pulled".

Plaintiff's Experts: Withheld

Defendant's Experts: Withheld

.....

Redline, et al. v. Karl & Smith LLC, et al.

Type of Case: Legal Malpractice

Verdict: $312,000.

Settlement: Confidential

Plaintiffs' Counsel: Nicholas DiCello, William Eadie, Spangenberg, Shibley & Liber, Cleveland, Ohio, (216) 696-3232

Defendants' Counsel: Monica Sansalone, Jamie Price, Gallagher Sharp

Court: Cuyahoga County Case No. CV-12-781481 (Judge Coyne - Trial Judge, Judge Villanueva)

Date Of Verdict/Settlement: March 3, 2014

Damages: $212,000 economic, $100,000 non-economic

Summary: Legal malpractice, insurance agent malpractice, fraud, breach of fiduciary duty, and conspiracy verdict. Redlines were told to liquidate assets, purchase new assets, and fund a trust to protect money, which was a "churn" to generate fees for the Defendants. Settled with lawyer/law firm during deliberations for confidential amount.

Plaintiffs' Experts: Janet Lowder (elder law, Medicaid); Peter Bern, Leverity (insurance agent negligence)

Defendants' Experts: Richard Taps, Michael Murman

.....

Theresa Balzer, Adm. v. OSU Medical Center

Type of Case: Medical Negligence

Settlement: $1,000,000

Plaintiff's Counsel: Jeffrey Leikin and David M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendant's Counsel: Karl W. Schedler

Court: Court of Claims, Judge Patrick McGrath

Date Of Settlement: January 18, 2014

Insurance Company: State of Ohio

Damages: Wrongful death: survived by spouse and teenage son.

Summary: Plaintiff underwent a bronchoscopy followed by a sleeve resection of the upper lobe of his left lung in order to remove a carcinoid tumor. Plaintiff claimed that the cardiothoracic surgeon: (1) had insufficient experience to perform this procedure unsupervised; (2) the surgeon failed to dissect the pulmonary artery to the bifurcation and position a clamp for proximal control in the event that injury to vessels occurred in a distal location, which, in fact, occurred. A bleed occurred to the left main pulmonary artery which obscured the operative field resulting in an inability to position a clamp and stop the bleeding.

Plaintiff's Expert: Michael Koumjran, M.D. (cardiothoracic surgery); Harvey Rosen, Ph.D. (economist)

Defendant's Expert: Mark Ferguson, M.D. (thoracic surgery)

.....

Estate of Jane Doe v. ABC Trucking Co.

Type of Case: Trucking Death Case

Settlement: $4,500,000.00

Plaintiff's Counsel: Howard D. Mishkind, Mishkind Law Firm Co., L.P.A., 23240 Chagrin Blvd., Suite 101, Beachwood, Ohio 44122

Defendant's Counsel: Withheld

Date Of Settlement: January 2014

Insurance Company: Withheld

Damages: Death of a 27 year old husband and father of two minor children

Summary: Decedent was killed when the driver of a semi-tractor trailer ran off the road striking and killing decedent. Case settled at presuit mediation conference.

Plaintiff's Experts: Dr. David Boyd (economist)

Defendant's Experts: None

.....

John Doe v. ABC Trucking, Inc.

Type of Case: Negligent Retention

Settlement: Confidential

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

Defendant's Counsel: Todd Gray, Mannion & Gray

Court: Cuyahoga County, Judge John Russo

Date Of Settlement: December 18, 2013 (mediation)

Insurance Company: AIG

Damages: Traumatic brain injury; facial fractures; ACL disruption

Summary: One year before this collision, defendant's truck driver had a psychotic breakdown which required involuntary hospitalization. He was diagnosed as bipolar with a steep disorder. His psychiatrist released him to return to truck driving and took him off anti-psychotic medication. Four months later, he was reprimanded for conduct which could easily be interpreted as manic rather than insubordinate. Defendant took no steps to have the driver re-evaluated. Six months later, the driver crashed through a construction zone on the Ohio Turnpike injuring two and killing one worker. Defendant raised sudden emergency defense. Plaintiff's economic losses were ($6.4M life care plan); ($1.5M earning); ($300K past economic paid by Workers' Compensation).

Plaintiff's Experts: Kenneth Thompson (trucking); Stephen Noffsinger, M.D.; Donald Weinstein, Ph.D.; Sindy Warren, Esq. (human resources); Russell Benson, M.D. (neurology); Bradley Sewick, Ph.D. (neuropsychologist); Grant Jones, M.D. (orthopedics); Robert Eilers, M.D. (Life Care Plan); Robert Ancell, Ph.D. (vocational rehab); John F. Burke, Ph.D. (economist)

Defendant's Experts: Bruce Growick, Ph.D. (vocational rehab). The other defense experts had not yet been disclosed.

John Panza, Jr., et al. v. Kelsey-Hayes Company

Type of Case: Mesothelioma

Verdict: $27,515,000.00

Plaintiff's Counsel: John D. Mismas, The Mismas Law Firm 38052 Euclid Ave., Suite 104, Willoughby, Ohio 44094, (855) 556-2500

Defendant's Counsel: Mary Price, Baker & Hostetler-Denver

Court: Cuyahoga County Case No. CV-12-789009, Judge Harry Hanna

Date Of Verdict: December 18,2013

Insurance Company: Self-insured

Damages: $27,515,000.00

Summary: In 2012, plaintiff was diagnosed with mesothelioma at the age of 40. Plaintiff was exposed to asbestos from his father's work clothes. His father worked at Eaton Airflex in Cleveland where they used National Friction products, a division of Kelsey-Hayes, asbestos containing Friction material to make industrial clutches.

Plaintiff's Experts: Arnold R. Brady (cellular biologist), John C. Maddox, M.D. (pathologist), Susan Raterman, CIH (industrial hygienist)

Defendant's Experts: James D. Crapo, M.D. (internal medicine), Tim Oury, M.D. (pathologist), James Rasmuson, Ph.D., DIH (industrial hygienist), David Garabrant, M.D., Ph.D. (epidemiology)

Mary D. Chulock, et al. v. Royal Pet d.b.a. Pet Supplies Plus

Type of Case: Premises Liability

Verdict: $625,307.55

Plaintiffs' Counsel: Ellen M. McCarthy, Dana M. Paris, and Jordan D. Lebovitz, Nurenberg, Paris, Heller & McCarthy Co., LPA, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendant's Counsel: Shawn Cormier-Warren

Court: Cuyahoga County, Judge Burt Griffin

Date Of Verdict: December 16, 2013

Insurance Company: Ohio Casualty

Damages: Complete tear of the right hamstring which could not be reattached, post traumatic arthritis, right knee. Chronic pain.

Summary: Plaintiff entered Pet Supplies and fell in a puddle of water which formed in front of the end cap of an aisle. An employee of Pet Supplies was cleaning out a self serve dog wash located at the end of the aisleway using high pressure hoses. The door to the self serve dog wash was open and water was migrating into the retail part of the store. The store manager claimed that the door was closed during the cleaning, that the water could not have migrated out of the dog wash due to the slope of the floor inside the wash room, and that the seal around the door prevented the water from escaping the room. She testified the dog wash was the only source of water in the area but did not cause the puddle that caused the fall. Plaintiff was a 46 year old nurse at Parma Hospital.

Plaintiffs' Experts: Louis Keppler, M.D., Pam Hanigosky, R.N., John F. Burke, Ph.D

Defendant's Experts: Kevin Trangle, M.D., Joseph Cannelongo (vocational rehabilitation), Mary Ann Cline (life care plan), James LaMastra (functional capacity evaluation)

Deborah Neifer, et al. v. Gladis M. Zevallos, Executrix of the Estate of Carlos E. Zevallos, et al.

Type of Case: Medical Malpractice

Verdict: $2,700,000

Plaintiffs' Counsel: Peter H. Weinberger, Esq., Daniel Frech, Esq., Spangenberg, Shibley & Liber LLP,

1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio 44114, (216) 696-3232

Defendant's Counsel: Thomas B. Kilbane and Christine Santoni

Court: Cuyahoga County Case No. CV 12 787443, Judge Thomas Pokorny sitting for Judge Michael J. Russo

Date Of Verdict: December 6, 2013

Insurance Company: The Doctor's Company

Summary: This was a medical malpractice action brought by Deborah Neifer and her husband, Mark, against Carlos E. Zevallos, M.D., Debbie's rheumatologist. The Plaintiffs alleged that Dr. Zevallos continued to prescribe Debbie two drugs, Leflunomide and Methotrexate, which were known to cause lung injury even after Dr. Zevallos reviewed a chest x-ray showing that Debbie had the early signs of interstitial lung disease. Debbie was not taken off these drugs until she was hospitalized for breathing-related problems almost a year later. By that time, her lung disease was irreversible and terminal.

Dr. Zevallos denied any wrongdoing and the Doctor's Company, his malpractice insurer, refused to pay the $1,000,000 policy limits.

At the time of trial, Debbie's disease had progressed such that she was oxygen dependent, confined to a wheelchair and could not perform the activities of daily living. She was expected to live less than one year.

At trial, both sides called two testifying experts, a rheumatologist and a pulmonologist. The Defendant passed away in the months leading up to trial and his Estate was substituted as a Defendant. His widow represented the Estate at trial.

After a half day of deliberation, the jury found that Dr. Zevallos had breached the standard of care and that his negligence had caused Debbie's serious lung injury. They awarded Debbie $1,000,000 in economic damages for her medical expenses and $1,000,000 for her conscious pain and suffering. The jury also awarded Mark $700,000 for his loss of consortium during the time of Debbie's illness.

Should Debbie ultimately pass away as a result of Dr. Zevallos's malpractice, wrongful death damages would be determined in a separate action.

Plaintiffs' Experts: M. Eric Gershwin, M.D. (rheumatology), David Weiner, M.D. (pulmonology)

Defendant's Experts: David A. Fox, M.D. (pulmonology), Matthew Exline, M.D. (pulmonology)v

.....

Parts Supplier v. Global Manufacturer

Type of Case: Breach of Contract

Settlement: $3,375,000.00

Plaintiffs' Counsel: William Hawal, Dennis Lansdowne, Stuart Scott, Nicholas DiCello, and William Eadie, Spangenberg, Shibley & Liber, 1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio 44114, (216) 696-3232

Date Of Verdict: September 16, 2013

Summary: A Supplier had an exclusive requirements contract to supply cast metal parts to a major multinational Manufacturer of industrial equipment. The Supplier discovered that the Manufacturer was obtaining parts covered by their supply agreement from a Chinese competitor and filed suit. ■

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 of 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 $125.00 fee to: **CATA, c/o Rhonda Baker Debevec, Esq.**
Spangenberg, Shibley & Liber LLP
1001 Lakeside Ave., E., #1700
Cleveland, OH 44114

WE PROVIDE CASH ASSISTANCE FOR YOUR CLIENTS

Zach Glazer
Co-Founder
Buckeye Legal Funding

Ryan Rivchun
Co-Founder
Buckeye Legal Funding

Buckeye Legal Funding:

- Provides Non-Recourse Advances
- Makes The Process Easy For You & Your Clients
- Educates Plaintiffs On The Advance Process
- Works With Local Attorneys & Firms
- Works With You If A Case Turns For The Worse

Why This Is Right For You & Your Clients:

Do you ever have the weekly call from your clients asking if the insurance company has made an offer? For some clients, it may be more frequent than that. Buckeye Legal Funding offers non-recourse cash advances to pay basic life necessities. We are here to ease their financial burden, which should translate into fewer calls fielded about a settlement for you.

We Make Cash Advances Easy

We are confident you will find it easy to work with Buckeye Legal Funding. Our goal is to minimize the time spent evaluating a case and to get funding to plaintiffs as fast as possible. Cash advances from Buckeye give breathing room to your clients so they don't come across to the insurance companies as desperate. This often makes a difference for you to be awarded an increased settlement figure.

1 LOWEST INDUSTRY RATES

No Out-of-Pocket Fees With The Origination Of The Advance

Our non-recourse cash advances make the most sense as compared to other, less desirable, means of obtaining cash to cover expenses such as payday lending or car title loans. Help your client save money with Buckeye Legal Funding.

2 BUILDING WORKING RELATIONSHIPS

Easy Underwriting Process

Obtaining litigation financing for your clients can be a headache. Let us show you just how much easier it can be by working with Buckeye Legal Funding. We know that happy clients make your day brighter.

3 SERVING OUR LOCAL COMMUNITY

We Are Here When Cases Don't Go As Expected

We have a proven track record of working with attorneys when a case does not work out as expected. Give us a call to discuss what this means to you and your firm. At Buckeye Legal Funding, we are looking to build long term relationships.

CALL BUCKEYE LEGAL FUNDING FOR ALL YOUR INJURY CASES

26565 Miles Rd. Suite 200 Cleveland OH 44128
info@buckeyefunding.com
www.buckeyefunding.com

BUCKEYE LEGAL FUNDING
Call today! 216-395-7529

Spring 2014

FEE STRUCTURE *PLUS*™

- Defer Income and Taxation
- Earn Market-Related Returns on a Pre-Tax Basis
- Funds can be Managed by Your Financial Advisor or a Highly Rated Trust Company
- Offered by the Leading Provider of Attorney Fee Solutions in the United States

IFS Integrated Financial Settlements
STRUCTURED TO LEAD

WWW.FEESTRUCTUREPLUS.COM

Thomas W. Stockett
Certified Structured Settlement Consultant

MILLENNIUM SETTLEMENT CONSULTING

Guide. Direct. Provide. Protect.
Toll-Free: **800-453-5414** | info@sgsplanning.com