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Spring 2015

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CATA
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Spring 2015
News

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President's Message: CATA's Community Outreach

by Ellen Hobbs Hirshman

My mission in life is not merely to survive, but to thrive; and to do so with some passion, compassion, some humor, and some style
– Maya Angelou

I find inspiration in many of Maya Angelou's writings, but on this particular day, while preparing my President's Message, I am motivated by these particular words of wisdom. I certainly have not achieved this mission, but strive to come close.

Throughout our careers as trial attorneys, we seek out inspiration on a daily basis to help make our lives a little more manageable, as well as the lives of those we represent. I pass on these words to you; hopefully to reflect on them and take a moment to elevate your approach to daily life.

That is exactly what CATA has attempted to do over the last few years. As I reported to you in our December issue of the CATA News, the Community Outreach Committee has adopted the End Distracted Driving Campaign as its project for reaching out into the community and making a difference. The committee is well on its way to scheduling many of these presentations. I, along with board member Dana Paris, presented at the Hawken Upper School to 450 plus students and teachers in January of 2015. CATA member Chris Carney also attended to observe the presentation with the intent of scheduling additional presentations at NDCL and other schools around Northeast Ohio.

I also presented along with CATA board members Paul Grieco and Steve Crandall at Fuchs Mizrachi on March 27; Steve Crandall presented at Chagrin Falls High School on April 9; board member Will Eadie presented at Lincoln-West High School on April 22 and at John Marshall High School on April 23. I also presented at Beaumont School on May 1, and we are communicating with ten other area high schools where EndDD presentations will be made by CATA members. CATA is committed to this project. I am committed to this project; and, I am pleased to announce that our incoming President, Kathy St. John, has asked me to remain on the CATA Board following the end of my term as President in June, for the purpose of continuing to spearhead the End Distracted Driving Campaign as well as the CATA Community Outreach Committee. So, stay tuned. We will be emailing you updates regarding these presentations and inviting other members to become involved.

In addition to the EndDD Campaign, our committee also sponsored a social networking event, planned along with the Cleveland-Marshall College of Law Criminal Law Society on Thursday, March 26, 2015. The event, held at the Speakeasy on West 25th Street, was well attended by Cleveland-Marshall Law students as well as CATA Members. This was a wonderful opportunity for law students to converse with well established attorneys in obtaining some practical insight into the practice of law. Perhaps

Ellen Hirshman giving EndDD presentation at Fuchs Mizrachi

there were even some students who discovered some helpful hints as they catapult into the practice of law. It was also an opportunity for attorneys to have impromptu interviews with potential law clerks.

The Community Outreach Committee has also reached out to Case Law School and will be scheduling an event with those law students in the fall. We also hope to reach out to other area law schools as we move forward. The purpose of this is to increase our presence at the grass roots level with our area law students. In speaking with area law students one on one, I discovered that they are consistently solicited by the big defense law firms. These big defense law firms often sponsor social events with the area law schools and that is the perspective they are left with. At CATA, we believe we have need to develop and maintain a presence in these area law schools. To further this goal, the CATA Board agreed to create a law student membership category, which enables law students to join CATA, on a calendar year basis, for one year for a discounted price of $15.00. This will provide them with the opportunity to be invited and attend our monthly CATA luncheon seminars, annual litigation institute and annual dinner, and receive a copy of our newsletter. I recall being a law student with no real direction as to where the journey would take me upon graduation. Perhaps our connection with these law students will provide them with more insight to make educated decisions.

So as I pass the baton of presidency on to Kathy St. John, I look forward to continuing to serve CATA in the capacity as Community Outreach Committee chair and continue to develop these projects which elevate our presence in Northeast Ohio; and, in return, assist us along with our mission in life to thrive with passion, compassion, some humor and, hopefully, some style. ■

Attorney Kenneth J. Knabe represents Ohio cyclists seriously injured or killed by inattentive, distracted or impaired drivers. Ken has 35 years of experience as an injury trial lawyer. He is Past President of the Cleveland Academy of Trial Attorneys. He has lectured on Tort law for the Ohio Association for Justice. Ken is a sponsor of the Spin-Litzler and Case Western Reserve University race teams as well as VeloFemme, a women's organization dedicated to promoting women's cycling and education. Ken is a co-author of the bike law section for bikecleveland.org - a local grass roots bicycle organization promoting bicycle access, education and rights. In his free time, Ken rides his Raleigh classic, road and cross bikes locally and nationally at various events. He can be reached at his Lakewood law firm at 216-228-7200; knabe@brownandszaller.com; www.brownandszaller.com

Bicycle Accident Law Basics

by Cyclist Attorney Kenneth J. Knabe

I. General View

Road bicyclists are many varying types: commuters, messengers, hipsters, social, hard-core and recreational. With the "green" revolution in alternate transportation, the proliferation of bike lane access, and the social and fitness benefits, bicycling is very popular in the Greater Cleveland area. Unfortunately, so are crashes - about 50,000 a year around the country. The National Governors Highway Safety Association reports bicyclist deaths increased sixteen percent between 2010 and 2012, while motor vehicle fatalities increased just one percent during the same time period.

We have all heard of someone getting hit or killed on a bike. The cyclist never wins in a crash with a three to four thousand pound vehicle. Broken bones, as well as serious long-lasting, debilitating injuries, and even death, can and do occur. Despite helmets, concussions occur frequently.

Humans are territorial. Drivers focus on their destination and dislike obstructions. Many drivers rationalize their self-interest and think they alone own the road. They openly detest cyclists, believing they "get what they deserve" for riding on the road; after all, they pay licensing fees and cyclists don't. Drivers expect cyclists to ride on metropark's recreational trails despite numerous "Share the Road" signs and the danger of cycling 18-20 mph on a recreational trail populated with baby strollers and slow walkers. Cyclists exercise their legal right to ride on the road but some ignore basic traffic rules, further infuriating drivers. The bottom line is that Ohio law requires cyclists and drivers to share the road within its legal parameters. Regardless of what territorial side of the road you are on, cyclists are here to stay and drivers must pay more attention to them to avoid needless serious and even catastrophic injuries.

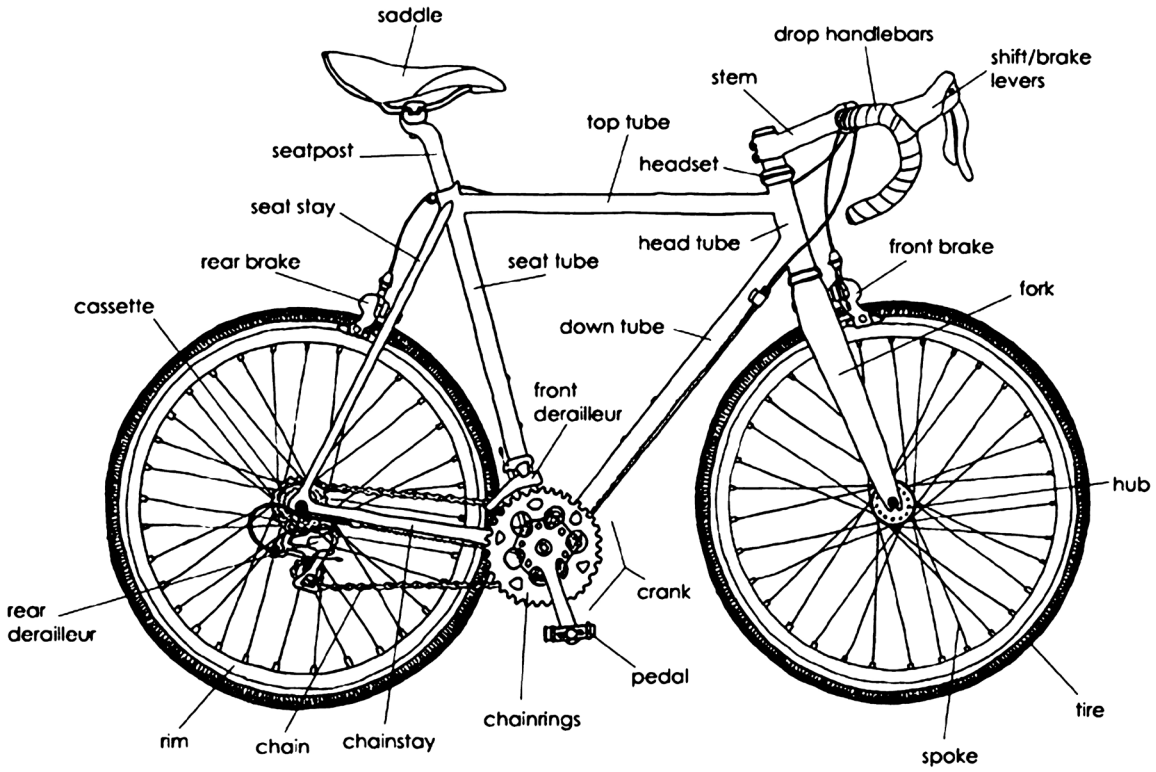
The good news is that many bike accidents are not the result of road rage or the frequent territorial bickering between drivers and cyclists. The bad news is that most crashes occur because the driver simply does not see what is there! Many cyclists are hit from behind or in an intersection by a car turning right or left. These accidents are usually due to inattention, poor eyesight, or distraction from texting, emailing or using the cell phone. Hit and run bicycle crashes occur frequently.

II. Property Damage

Property damage (PD) is a key component in any bike crash. The damaged bike frame, components, cycling computer, ripped handlebar tape, ripped seat, torn clothes, scuffed bike shoes, and cracked, bloodied or broken helmet are critically important pieces of evidence. You should familiarize yourself with the modern-day bicycle and its many components. A good relationship with a reputable bike shop will help establish a dollar value for the frame, wheels, rims and numerous other components and gear. Liability carriers will usually quickly pay a bike PD claim if your photos, receipts and estimates are in order.

Even after settling the PD, keep the damaged parts to corroborate the physical injuries. Remember also that to make a valid uninsured motorist claim in Ohio, you must have independent corroborative evidence. The bike frame damage may constitute that evidence. Also, look for paint stains on the frame from the hit and run vehicle. Many cyclists ride with video cameras to document driver error and road rage.

The following diagram depicts the basic component parts of the modern day road bicycle, many of which cost several thousand dollars.



III. CYCLING LAWS

The Reptile theory teaches us that humans tend to side in favor of safety issues that directly or indirectly affect them; violating traffic rules affects the safety of all who use the roads.

In Ohio, a bicycle is defined as a vehicle: a cyclist must obey all traffic rules applicable to vehicles. Ohio Rev. Code Ann. (ORC) §§ 4501.01(A) & 4511.01(A). FYI: cyclists that follow traffic laws are in 75-80% fewer accidents. For example, a cyclist must stop at red lights and stop signs (ORC § 4511.43); yield to pedestrians on a sidewalk (ORC § 4511.441); use a specified front white light, rear red deflector and light from sunset to sunrise and when visibility is low due to weather conditions (ORC § 4511.56); and ride in the direction of road traffic (ORC § 4511.25). Note that no points can be assessed for a cyclist who violates traffic laws unless the cyclist is Driving under the Influence (DUI) (ORC §§ 4511.52 and 4511.19). Often times, a police officer may cite a cyclist and inadvertently fail to delineate the citation as a no point violation. Be careful on waivers of traffic tickets issued to cyclists.

A cyclist must ride as near to the right side of the roadway as practicable, obey all traffic rules and exercise due care when passing. However, a cyclist is not required to ride at the right edge of the roadway when it is unreasonable or unsafe because of surface objects, hazards or a lane so narrow that a car cannot safely pass the cyclist (ORC § 4511.55(A) & (C)).

Ohio currently does not have a law that sets a specific distance for a car passing a bicycle. Passing a cyclist generally must be done to the left at a safe distance (ORC § 4511.27). However, check your local ordinances. Cleveland Ordinance § 431.03 requires a safe distance when passing – NOT LESS THAN THREE FEET {**Cleveland's 3 Foot Buffer Rule**}. I have successfully used this ordinance to establish liability when my cyclist client was hit by a passing car that obviously did not leave three feet of safe distance, despite allegations that my client was weaving. See also Cincinnati Ordinance § 506.71 & Toledo Ordinance § 331.03. HB 145 seeks to pass the three foot buffer rule statewide, but has stalled in Committee.

Ohio law does not mandate the wearing of a helmet, but some cities require helmets, especially for minors. Though it is generally legal for an adult to operate a bicycle without wearing a helmet, two-thirds or more of fatally injured bicyclists were not wearing helmets. Wearing a helmet is critical for a cyclist's safety and survival.

Ohio law provides that its state traffic

laws do not prevent local authorities from reasonably regulating the operation of bicycles; but no regulation can be fundamentally inconsistent with the state traffic laws and no regulation shall prohibit the use of bicycles on any roadway except a cyclist cannot ride on a Freeway (ORC §§ 4511.07(A)(8) & 4511.051).

Ohio Law permits cycling on the sidewalk, but many local ordinances have restrictions aimed at inherent safety concerns when cycling on a sidewalk. No local authority can require that bicycles be operated only on the sidewalk (ORC § 4511.711(A)).

Ohio law allows cyclists to ride two abreast (ORC § 4511.55(B)). Many local ordinances prohibit it. Query, are these local ordinances fundamentally inconsistent with state law?

A great resource for state law and local ordinance contrast is contained in http://bikelaws.org/neo-bikelaws.

Finally, Ohio law prohibits texting or e-mailing while driving subject to some exceptions. A minor with a temporary or probationary driver's license is prohibited from using a cell phone while driving (ORC §§ 4511.204 & 4511.205). Even if liability is admitted, keep searching for evidence of texting or cell phone use. If the evidence exists, pursue a claim for punitive damages for the reckless and wanton conduct that caused the bike crash. Good luck keeping our roads safe for lawful cyclists. ■

Kenneth Knabe, Cyclist Attorney

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Onboard Safety Technology – Preventing Truck Accidents Before They Happen

by Andrew R. Young

The top three causes of truck crashes are rear end collisions, lane departures, and rollover accidents.[1] A vicarious liability admission by the truck company on behalf of its driver's negligence is all well and good. However, it does not truly represent the best interests of the accident victims because it fails to provide real answers to the following burning questions:

1. Why did this truck crash happen?
2. Was the truck crash and loss to the victim(s) preventable?
3. Can the truck company prevent future similar crashes?

The Federal Motor Carrier Safety Administration (FMCSA) defines the word **"accident"** as "an occurrence involving a commercial motor vehicle operating on a highway in interstate or intrastate commerce which results in: (I) A fatality; (ii) Bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or (iii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicles to be transported away from the scene by a tow truck or other motor vehicle."[2]

A truck company/motor carrier must maintain an **"accident register"** for three (3) years after the date of each accident.[3] Information placed into the "accident register" must include the type of accident and the consequences that resulted.[4] The FMCSA provides educational materials that introduce the concepts of **"preventability analysis and accident countermeasures"** to aid motor carriers in their effort toward safety management proactively reducing the number and severity of truck crashes.[5] These materials assist motor carriers in analyzing their truck drivers' accidents to determine preventability and "to create strategies to keep similar accidents from happening in the future." [6]

Practice Tip: Take time to explore the Federal Motor Carriers Safety Administration's website and materials available to help motor carriers improve safety within their fleet. Download or print a copy of "A Motor Carrier's Guide To Improving Highway Safety."[7] The "Accident Countermeasures" section gives great guidance for training drivers to prevent accidents for all potential accident types: struck in rear by other vehicle; accidents at intersections; striking other vehicle in rear; sideswipe and head-on collisions; backing accidents; accidents while passing, etc.[8]

A Truck Company's Direct Negligence

An experienced truck accident attorney understands that in every trucking case a separate claim for negligent entrustment, hiring, training, supervision, retention, and vehicle maintenance must be alleged. More importantly, this attorney recognizes the importance of educating the judge that the truck company's direct negligence is a distinctly different liability claim than the vicarious liability / *respondeat superior* admission.

Ohio judges must allow discovery into areas of negligence regarding the truck company's hiring, training, entrustment, supervision, and retention of the defendant truck driver.[9]

Why should the additional discovery matter when liability is already admitted? The purpose is to expose the fact that a trucking company took unnecessary risks by not utilizing the safest available options for equipping their trucks with technology that supervises driving behavior and assists drivers with crash avoidance. The goal is to expose dangerous practices or unnecessary risks that have an effect on the motor carrier's entire fleet of drivers and trucks. This expands the liability exposure beyond the specific accident that is the focus of the litigation. It further allows a jury to determine and apportion fault between the truck company and the truck driver. An act or omission by the truck company likely was a contributing factor for the subject truck and driver failing to either stop in time, maintain his or her lane of travel, or keep the vehicle upright.

Filing suit, issuing written discovery, and taking a few depositions can reveal evidence establishing a motor carrier's patterns of unsafe behavior. The jury's attention can then be focused on the truck company's available safety choices versus simply calculating money damages based on the extent and nature of a victim's injuries. Expose whether the motor carrier's decision-makers failed to institute the safest available options, policies and/or technology and contributed to the cause of the subject crash. In essence, was there a missed opportunity to properly monitor and correct driver behavior and prevent the wreck before it happened? Or, was there technology available to equip the truck to assist the driver to prevent an accident or reduce crash severity?

Andy Young presenting at a Lorain County Bar Association Seminar.

Ohio common law recognizes that vicarious liability and direct negligence are two distinct and viable claims.[10] The Restatement (Second) of Torts (1965) can assist in persuading the Judge as to the clear difference between the truck company's direct negligence vs. vicarious liability through the truck driver. Under §308 the trucking company is negligent to permit an improper person (truck driver) to use its commercial vehicle which is under its control, if the trucking company "knows or should know" that the subject truck driver is likely to use the commercial motor vehicle "in such a manner as to create an unreasonable risk of harm to others."[11] Under §307, it is further direct negligence "to use an instrumentality" (either a truck driver or commercial vehicle) which the motor carrier "knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others." [12] To avoid direct negligence, a motor carrier must be proactive in training and supervising its drivers to ensure competency. Similarly, a motor carrier must reasonably maintain its commercial vehicles so that both driver and vehicle present no "unreasonable risk of harm" to other motorists.

Training, experience, and supervision matter! Pursuant to Restatement (Second) of Torts (1965) §390, the motor carrier must not assume that the truck driver will conduct himself properly if the facts which are known or should be known to the motor carrier allow the motor carrier to realize the truck driver poses an unreasonable risk of physical harm to himself and to the motoring public.[13] As such, a motor carrier is not entitled to assume that the truck driver will use a commercial motor vehicle safely if the motor carrier knows or has reason to know that the truck driver is likely to use it dangerously or lacks the training and experience necessary for such use. Specifically, the motor carrier knows that the truck driver has on other occasions acted dangerously or misused a commercial motor vehicle.

Practice Tip: Written discovery and deposition questions should focus on discovering the names of managers and decision-makers. Specifically consider those who have responsibility over the truck driver: dispatchers; human resources personnel (those with responsibility for hiring, training, and testing driver experience and knowledge); driver managers or coaches;

route planners; safety directors; and, truck company executives / owners. Perform a similar inquiry by considering those who have responsibility over the commercial motor vehicle itself: fleet maintenance managers; head mechanics; annual maintenance inspectors; acquisition managers (those who purchase the trucks and determine which safety features are to be installed on the truck); and, truck company executives / owners. Those who exercise control over the driver or the truck itself must be questioned regarding their thought processes toward fleet safety performance, compliance, and liability. Fleet-wide decision-making awareness is important for instituting the right safety and training policies and reasonably selecting the right safety equipment and technology that has an impact on fleet safety, crash severity, and prevention.

In-Cab Driver Performance Technology

"Ultimately, I am not the one behind the wheel of the truck," was the answer of one truck company owner to a deposition question about whether he had the ability to prevent the subject rear-end collision from happening.[14] Further inquiry revealed this truck company owner was unaware of the aforementioned FMCSA training materials published to assist a motor carrier to improve highway safety and to reduce the number and severity of crashes by instituting accident countermeasures. This deponent was also unaware of the technology available to assist drivers in collision avoidance and to monitor driver performance.

Without constant feedback, even the best drivers can develop unsafe behaviors or routines that can lead to accidents. In-cab driver-behavior technology gives the motor carrier and the driver constructive feedback regarding safe, aggressive, or unsafe maneuvers.[15] With built-in display on the dashboard, the driver receives real-time information regarding performance.[16] Driver performance monitoring systems use a host of technologies designed to alert drivers and fleet managers whenever a driver exhibits unsafe driving practices, such as hard braking, sudden acceleration, or sharp turning. Web based reports are generated for both managers and drivers, allowing both to review safety performance and trends.[17]

The industry uses the term "telematics" to describe the technology that is rapidly evolving and allowing for greater driver performance monitoring.[18] Telematics refers to any integrated use of telecommunications and informatics also known as ICT (Information and Communications Technology). It involves the technology of sending, receiving, and storing information via telecommunication devices linked directly to the truck's engine control module (ECM) and GPS technology. For instance, Freightliner's trucks have a "Hard-Braking Advisor" that determines when braking is severe enough to produce lockup at one or more wheels and/or rapid vehicle deceleration.[19] Thereafter, an advisory message is sent to the driver

Andy Young giving a trucking presentation with his semi-truck.

message center, recording and displaying both hard-braking event data and roll stability encounters.[20]

There are many different manufacturers (Green Road, Lytx's DriveCam, SmartDrive, Inthinc waySmart, PeopleNet) of driver-performance based software, each employing variations of the same concept. Most utilize an accelerometer to detect extreme acceleration or lateral movement and are integrated into the truck's ECM, which monitors information such as the gear engagement, engine speed, brake activity, accelerator pedal position, ignition switch status, and GPS location. Whenever a driver brakes hard, accelerates suddenly, or exhibits some other form of "unsafe driving," the device records the data from the ECM, and may send that information to alert the fleet manager and/or the driver. Fleet managers can review drivers' behavior by month, driving day, or each leg of the trip. Often, drivers themselves receive weekly emails to update their safety performance, including a personal trend chart to highlight the drivers' improvements or what they need to work on and where they can improve.[21] The systems are now providing driver-feedback through mobile applications compatible with Android or Apple iOS platforms, even on medium duty trucks.[22]

Some devices supplement the telematics system with cameras that record what's going on in front of and/or in the cab when unsafe driving triggers occur. The information can then be used for training, to reinforce safe driving practices and prevent accidents.[23] For instance, the DriveCam system has two cameras, one facing inside the cab and another facing outside the truck. The system triggers and begins recording when an unsafe driving maneuver is detected. The cameras record the eight seconds leading up to the trigger, and four seconds after the trigger. A flashing red light lets the driver know he or she is being recorded.[24] The program works as follows:

1. captures risky driving behavior;
2. uploads triggered event via wireless network;
3. reviews, analyzes, and scores the event;
4. downloads the event to a confidential website report for fleet manager access;
5. allows an opportunity to coach or train the driver; and,
6. the driver returns to the field with added knowledge and improved safety behavior.[25]

Utilizing in-cab, driver-performance monitoring has proven successful as evidenced by the following feedback from trucking industry executives:

> "It keeps people honest. Before we had the video, we really had no way of knowing what had happened in an accident." Michael Belcher, Safety Director, DS Waters, [about DriveCam]; [26]

> "The presence of the camera in the vehicle heightens the drivers' attention to what they're doing. They're less likely to take the risks that they had taken before." Dennis Dellinger, President, Cargo Transporters, [about DriveCam]; [27]

> "The first two weeks the driver has the technology, we get calls from him saying the unit must be broken because it's going off all the time. Three weeks later, we get another call from the driver thanking us for fixing it, because it doesn't go off nearly as much anymore. And we haven't done a thing." Thom Prong, Corporate Vice President for Safety, C.R. England;[28] and,

> "It's had a huge impact on compliance with the company's safety policy. It's changing driver behavior." Joe Pennesi, Safety Director, Quarles Petroleum, [about SmartDrive].[29]

The devices cost between $400 and $1,000 per vehicle, plus monthly fees of $20 to $40 per vehicle.[30] The result: fleet management awareness regarding driving behavior allowing for an opportunity to supervise, train, and/or dismiss truck drivers before accidents happen.

Practice Tip: Through written discovery and deposition testimony, determine whether any consideration was ever given to installing or utilizing driver-performance monitoring technology. Request copies of all OmniTRAC, Qualcomm, GPS, MVPC, QTRACS, OmniExpress, TruckMail, TrailerTRACS, SensorTRACS, JTRACS, XRS, WebTech, PeopleNet, Green Roads, Lytx's DriveCam, SmartDrive, Inthinc waySmart, PeopleNet, Driver Fatigue Monitors; Driver-Behavior Performance Monitoring, and other similar telematics / systems data for the six (6) months prior to the collision and the day of the collision, for the subject truck driver.

Onboard Driver Assistance Safety Technology

A. Forward Collision Warning Systems

Rear end collisions account for 33,000 or 23.1% of all truck accidents each year.[31] How is a truck company responsible for a truck driver stopping short of a collision? By choosing to install collision warning / mitigation systems. This technology can prevent rear end collisions or reduce crash severity by emitting an urgent audible alert and a driver display to warn the truck driver of an impending collision or that the following distance is unsafe.[32]

Collision Warning / Mitigation encompasses three related technologies: 1) Forward Collision Warning / Alert systems; 2) Adaptive Cruise Control; and, 3) Collision Mitigation Systems. Forward Collision Warning is the most basic, simply alerting drivers (both audibly and visually, on an in-cab display) that a rear-end collision is imminent. Adaptive Cruise Control allows a truck to maintain a set time-gap between it and a vehicle in front of it, by automatically decelerating if the other vehicle slows down, and re-accelerating (up to a set speed) if the other vehicle speeds up or switches lanes.

On-board radar is mounted in the front bumper to detect vehicles up to 500 feet in front of the truck.[33] The radar systems can only track metallic vehicles, and may miss smaller vehicles, such as motorcycles and bicycles. Radar systems are also unable to detect pedestrians. Newer improved technologies use a camera-based system that have enhanced detection capabilities that will detect pedestrians and bicyclists.[34]

At the Mid-American Truck Show (Trucking Industry Trade Show) in Louisville, Kentucky this past March, 2015, advanced technology was revealed wherein cameras have now been installed in new trucks that read posted speed limit signs.[35] The technology then compares the posted speed limit to the truck's current speed. An audible alert is issued to the truck driver when the truck is more than 5 mph over the posted speed limit. If the truck is more than 10 mph over the speed limit, the audible alert is accompanied with a one-second speed reduction (automated engine throttle reduction) to slow down the truck and further get the driver's attention.[36]

According to Dean Newell, Vice President of Safety, Maverick USA, "we have seen a clear downward trend in rear-end incidents since we started putting OnGuard systems on our trucks...our rear-end accidents were at a rate of 0.09 per million miles in 2008, and they went down to 0.06 per million miles in 2011."[37] Trucker, Collin Copeland, posted on twitter that, "seeing the speed of a car up to 300 yards ahead of you is nice."[38] He further commented that, "it will also slow you down if you get cut off or if you come up on someone too fast." An FMCSA study found that between 8,597 and 18,013 rear-end crashes could be prevented annually through the use of Forward Collision Warning systems.[39] This same study found that rear-end crashes cost on average $239,063 for an injury-related crash, and $1,056,221 for a fatal crash.[40]

B. Lane Departure Warning Systems

Out-of-lane collisions and side-swipe/same direction lane departures account for approximately 35,000 truck accidents each year.[41] These accidents often have the most devastating results due to a geometrical mismatch between the heights of the side of the commercial vehicle colliding with the side of the smaller passenger vehicle. These accidents often result in "side underride" with the first point of impact being the glass above the car body and the second point of impact being the heads of the occupants in the smaller vehicle as the smaller vehicle ends up underneath the trailer. The result is far too often wrongful death (sometimes by decapitation); open skull fracture / traumatic brain injuries; and paralysis due to spinal cord injuries. The safety engineering and features of a car, such as air bags and crumple zones, do not protect passengers in a side underride crash.

Lane departure warning systems provide the truck driver with an assistance feature that monitors the truck's position within roadway lane markings. When the commercial vehicle strays from its lane and crosses the lane markings, an audible in-cab sound warns the truck driver that the truck has left its lane of travel.[42] The sound, similar to that of a rumble strip, is emitted from the side of the vehicle that has drifted out-of-lane. This prompts the driver to steer away from the sound and correct the truck's path of travel centering the vehicle in the correct lane. The system triggers when the turn signal is not on and the vehicle is traveling more than 37 mph.[43] An in-cab switch can temporarily disable the lane departure warning system.

Safety Director Jeff Mercandante of Pitt Ohio states, "at first it takes a little getting used to because it's a change to the drivers, but once the drivers have it, they seem to like the system. It teaches them to be better drivers because you're always maintaining your position in the middle of those two lines."[44] According to the same FMCSA study, between 3,863 and 8,103 truck crashes could be prevented annually through the use of Lane Departure Warning systems.[45]

Practice Tip: Did the accident truck have a lane departure warning system? If not, why did the truck company not opt to have this feature included at the time the truck was purchased from the original equipment manufacturer or thereafter? If so, did the truck driver disable it prior to the accident? If not, was the truck driver otherwise impaired, distracted or fatigued?

C. Electronic Stability Control Systems

Roll over accidents account for approximately 13,000 accidents each year.[46] Driver assistance technology has been developed to help truck drivers prevent rollover accidents. There are two different kinds of roll stability systems – Roll Stability Control (RSC) and Electronic Stability Control (ESC). RSC is the more basic system, and is designed to prevent rollovers by detecting excessive lateral-acceleration and applying the tractor brakes.[47] Dashboard warning lights and an audible sound alert the driver shortly after a curve, lane change, or other maneuver that results in a rollover-detection. This advises the truck driver that the previous maneuver produced a rollover risk. ESC includes all of the functions of an RSC in detecting lateral-acceleration plus the ability to mitigate severe oversteer or understeer by automatically applying brake force at selected wheel-ends by monitoring yaw or rotational movement. The system then applies the tractor's brakes and the trailer's foundation brakes.[48] This reduces the likelihood of drift-out or jackknife situations causing hazards for other motorists.[49]

The National Highway Traffic Safety Administration (NHTSA) has a Notice of Proposed Rulemaking to establish a new Federal Motor Vehicle Safety Standard No. 136 to require ESC systems on truck tractors. The purpose is to mandate ESC systems on trucks to mitigate severe understeer or oversteer conditions that lead to loss of control by using automatic computer-controlled braking.[50] The latest NHTSA Department of Transportation reports forecast May 7, 2015 for the Final Rule to be published.[51] Between 1,422 and 2,037 rollover crashes could be prevented each year through the use of rollover stability control.[52]

Practice Tip: Participate in an inspection of the subject-accident truck, even in a rear-end accident. The original equipment manufacturer's "Driver's Manual" should be inside the truck. In fact, the manuals often state, "keep this manual in the vehicle at all times."[53] Look for and capture a photograph of the driver's manual. The manuals themselves have their own designated Part Number. Capture the manual's part number so that you can order a copy or have it produced through a production of documents request at a later date. Earlier this year, I participated in an inspection of a Freightliner involved in a rear-end accident. The driver's manual revealed an entire section entitled "Driver Assistance Features" outlining technology for Collision Warning; Lane Departure; Roll Stability and Enhanced Stability. The manuals also include various warnings – that the **"system is not a substitute for safe normal driving procedures, nor will it compensate for any driver impairment such as drugs, alcohol, or fatigue."**[54]

Conclusion

A truck company's owner or safety director must be aware of the accident preventability and accident countermeasures materials available through the FMCSA. They should also be aware of the numerous telematics devices available to record hard-braking event data. As such the truck company has the ability to "be behind the wheel" and "knows or should know" if a truck driver it employs is likely to use the commercial motor vehicle in such a manner as to create an unreasonable risk of harm to others. Additionally, did the truck company provide its drivers with the safest available technology to assist in accident prevention and/or reduce crash severity.

Each truck company must be held accountable for its negligent acts that led to the truck driver and truck being involved in the subject admitted liability accident. Discover and prove "WHY" this company failed to prevent this accident through the corporate decision-makers responsible for training and monitoring driver performance and outfitting its fleet of trucks with onboard safety systems that likely would have prevented wrongful death and/or catastrophic injury. By putting forth extra effort and doing a little digging, evidence may be unearthed that could potentially expose the subject truck company to punitive damages. Or, at the very least, answer the three aforementioned burning questions. ■

End Notes

1. James Hedlund and Daniel Blower, *The Large Truck Crash Causation Study (LTCCS) Analysis Series: Using LTCCS Data for Statistical Analyses of Crash Risk,* January 2006, Office of Information Management, Publication #: FMCSA-RI-05-037, "Table 4 - Estimated Number of Trucks in Crashes by Crash Type."
2. 49 C.F.R. §390.5.
3. 49 C.F.R. §390.15.
4. *Id.*
5. *Education & Technical Assistance Program: A Motor Carrier's Guide to Improving Highway Safety,* Section 4, Page 125, (December 2009) U.S. Department of Transportation, Federal Motor Carrier Safety Administration, Outreach Division, http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/ETA-Final-508c-s.pdf
6. *Id.* pg. 126.
7. *Id.*
8. *Id.* pgs. 125 - 136.
9. This article is primarily focused on driver performance monitoring and driver assistance technology. For more information regarding direct negligence as a result of negligent hiring, see 49 C.F.R. §391 - "Qualifications of Drivers." For direct company negligence claims regarding unreasonable vehicle maintenance practices, see 49 C.F.R. §393 - "Parts and Accessories Necessary for Safe Operation."
10. Clark v. Stewart , 126 Ohio St. 263, 185 N.E. 71 (1933); J.J. Burns, Note, *Respondeat Superior As An Affirmative Defense: How Employers Immunize Themselves From Direct Negligence Claims,* 109 MICHIGAN L. REV. 657 (Feb. 2011).
11. Restatement (Second) of Torts §308 (1965) **"Permitting Improper Persons To Use Things or Engage In Activities:** It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others." See also Restatement (Second) of Agency §213 (1958) Comment d. The motor carrier may be negligent because it has reason to know that the truck driver, because of his qualities, is likely to harm others in view of the work entrusted to him.
12. Restatement (Second) of Torts §307 (1965) **"Use of Incompetent or Defective Instrumentalities:** It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective that its use involves an unreasonable risk of harm to others."
13. Restatement (Second) of Torts §390, (1965) **"Chattel for Use by Person Known to Be Incompetent:** One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them." See also Comment *b.*
14. Deposition of Truck Company Owner, Bradley Wolters, Page 82, Line 11-13, Linda Copeland, et al. vs. Everman Brothers, Inc., In The Court of Common Pleas, Darke County, Ohio, Case No. 12CV787.
15. GreenRoad http://greenroad.com/.
16. "Kenworth Offers In-Cab Coaching Tool To Improve Performance of Drivers" by Seth Clevenger, Transport Topics, October 27, 2014, pg 15. (Transport Topics Publishing Group, a division of American Trucking Association, Inc.)
17. *Id.*
18. "Telematics Was MATS Focus" Transport Topics, March 30, 2015 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.)
19. Freightliner Cascadia's Driver's Manual, Publication Number STI-478-6 (2/13), Part Number STI 478, Page 6.13, Daimler Trucks North America LLC.
20. *Id.*
21. GreenRoad http://greenroad.com/.
22. "Ford Redesigns Medium-Duty Line, Including Updated Telematics System" by Joe Howard, Transport Topics, March 9, 2015 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
23. "Itech: Cameras Keep an Eye on Drivers: In-Cab Monitoring Can Bolster Safety Programs, Fleet Managers Say" by Stephen Bennett, Transport Topics, April 26, 2012 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
24. DriveCam - http://www.lytx.com/our-solutions/drivecam-programs.
25. DriveCam - http://www.lytx.com/our-solutions/dc-enterprise.
26. "iTECH - Cameras Keep an Eye on Drivers" Transport Topics, April 26, 2012 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
27. "iTECH - Cab Cam Keeps an Eye on Safety" Transport Topics February 19, 2013 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
28. "iTECH - More Truck Buyers Adding Onboard Safety Systems" Transport Topics, December 19, 2011 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
29. "iTECH - Cameras Keep an Eye on Drivers" Transport Topics, April 26, 2012 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
30. "iTECH - Driver Monitoring: Parsing the Cost of Behavior" Transport Topics, September 2, 2008 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
31. James Hedlund and Daniel Blower, *The Large Truck Crash Causation Study (LTCCS) Analysis Series: Using LTCCS Data for Statistical Analyses of Crash Risk*, January 2006, Office

of Information Management, Publication #: FMCSA-RI-05-037, "Table 4 - Estimated Number of Trucks in Crashes by Crash Type."

32. Freightliner Cascadia's Driver's Manual, Publication Number STI-478-6 (2/13), Part Number STI 478, Page 6.1, Daimler Trucks North America LLC.
33. Meritor WABCO "OnGuard", http://www.meritorwabco.com/Product,2,15,2,OnGuard%e2%84%a2-Collision-Safety-Systems-.aspx; Bendix "Wingman Advance", http://www.bendix.com/en/products/acb/wingmanadvanced_1.jsp
34. "Development of a Camera-Based Forward Collision Alert System" General Motors Company and Mobileye Vision Technologies Ltd.; http://www.mobileye.com/technology/applications/vehicledetection/foward-collision-warning/.
35. "Bendix Takes Wingman Collision Avoidance Tech To Next Level, Includes Auto Slowdown For Speeding." Overdrive, http://www.overdriveonline.com/bendix-takes-wingman-collision-avoidancetech-to-next-level-includes-auto-slowdown-for-speeding/.
36. *Id.*
37. "Anti-Crash Systems Proliferate As Fleets See Safety Benefits," Transport Topics, January 23, 2012 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
38. Twitter, Collin Copeland, @memorywillrust, self-described "OTR (over-the-road) Truck Driver", responded to a question that I posted on twitter on August 6, 2013 asking truckers about their experience with Forward Collision Warning Systems.
39. "Benefit-Cost Analyses of Onboard Safety Systems", by Amy Houser (MC-RRT), February, 2009, Federal Motor Carrier Safety Administration Office of Analysis, Research and Technology.
40. *Id.*
41. James Hedlund and Daniel Blower, *The Large Truck Crash Causation Study (LTCCS) Analysis Series: Using LTCCS Data for Statistical Analyses of Crash Risk*, January 2006, Office of Information Management, Publication #: FMCSA-RI-05-037, "Table 4 - Estimated Number of Trucks in Crashes by Crash Type."
42. Freightliner Cascadia's Driver's Manual, Publication Number STI-478-6 (2/13), Part Number STI 478, Page 6.6, Daimler Trucks North America LLC.
43. *Id.*
44. "iTECH - Cab Cam Keeps an Eye on Safety" Transport Topics, February 19, 2013 (Transport Topics Publishing Group, a division of American Trucking Association, Inc.).
45. "Benefit-Cost Analyses of Onboard Safety Systems", by Amy Houser (MC-RRT), February, 2009, Federal Motor Carrier Safety Administration Office of Analysis, Research and Technology.
46. James Hedlund and Daniel Blower, *The Large Truck Crash Causation Study (LTCCS) Analysis Series: Using LTCCS Data for Statistical Analyses of Crash Risk*, January 2006, Office of Information Management, Publication #: FMCSA-RI-05-037, "Table 4 - Estimated Number of Trucks in Crashes by Crash Type."
47. Freightliner Cascadia's Driver's Manual, Publication Number STI-478-6 (2/13), Part Number STI 478,Page 6.12, Daimler Trucks North America LLC.
48. National Highway Traffic Safety Administration, 49 CFR Part 571, Docket No. NHTSA-2012-0065, RIN 2127-AK97, Federal Motor Vehicle Safety Standards; Electronic Stability Control Systems for Heavy Vehicles, Notice of Proposed Rulemaking, Pg. 6.
49. Freightliner Cascadia's Driver's Manual, Publication Number STI-478-6 (2/13), Part Number STI 478, Page 6.13, Daimler Trucks North America LLC.
50. *Id.* pg. 1 ("The proposal is made pursuant to the authority granted to NHTSA under the National Traffic and Motor Vehicle Safety Act ("Motor Vehicle Safety Act"). Under 49 U.S.C. Chapter 301, Motor Vehicle Safety (49 U.S.C. 30101 et seq.), the Secretary of Transportation is responsible for prescribing motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms.")
51. "Bendix Takes Wingman Collision Avoidance Tech To Next Level, Includes Auto Slowdown For Speeding." Overdrive, http://www.overdriveonline.com/bendix-takes-wingman-collision-avoidancetech-to-next-level-includes-auto-slowdown-for-speeding/.
52. "Benefit-Cost Analyses of Onboard Safety Systems", by Amy Houser (MC-RRT), February, 2009, Federal Motor Carrier Safety Administration Office of Analysis, Research and Technology.
53. Freightliner Cascadia's Driver's Manual, Publication Number STI-478-6 (2/13), Part Number STI 478, See Introduction, Foreword, Daimler Trucks North America LLC.
54. *Id* pg. 6.1.

Judge Frank G. Forchione is a judge on the Stark County Court of Common Pleas General Division in Canton, Ohio, where he was first elected in 2008, and re-elected in 2014.

Havel v. Villa St. Joseph: A Trial Without A Roadmap

By Judge Frank Forchione

On February 18, 2012, the Ohio Supreme Court in the case of *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, upheld an important part of the Tort Reform Bill enacted in 2005 which requires a trial to be split into two phases – or "bifurcated" – when a party files a complaint seeking both compensatory and punitive damages. By a 5 - 2 vote, the Court's majority held that the Ohio Assembly intended the bifurcation provision to be a substantial right and was therefore not an unconstitutional encroachment on the Court's powers to set procedural rules. Under the holding, trials must now be held pursuant to the statute. The end result strips away the trial court's discretion to decide on a case-by-case basis whether bifurcation is warranted. In turn, if a jury finds that a party is entitled to punitive damages, the trial court is now required to conduct an additional trial on punitive damages. Unfortunately, the decision leaves the trial court with many unanswered questions as to how the second trial should proceed – and additional anticipated litigation to fill in the gap.

In *Havel*, the Ohio Supreme Court examined the language in both R.C. 2315.21(B) and Civ. R. 42(B) which offer conflicting views on whether the trial of a tort action should be bifurcated for purposes of addressing claims for compensatory and punitive damages.

Civil Rule 42(B) provides that:

> The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when ***separate trials*** will be conducive to expedition and economy, may order a ***separate trial*** of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury.

Civ. R. 42(B) (Emphasis added.)

On the other hand, R.C. 2315.21(B) only addresses the specific instance of bifurcation of a claim for punitive damages in tort actions:

> (B) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, ***the trial of the tort action shall be bifurcated*** as follows:
>
> (a) The ***initial stage of the trial*** shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary

damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the ***initial stage of the trial*** that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the ***second stage of the trial***, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

The language inserted in both the statute and civil rule fosters ambiguity. Civ. R. 42(B) vests the trial court with the power to order separate trials, while R.C. 2315.21(B) requires the trial court to bifurcate the trials upon the motion of any party. Observing this inconsistency, the Ohio Supreme Court in *Havel* focused on the constitutionality of the statute, stating that it "depends upon whether the statute is a substantive or procedural law." The Supreme Court pointed out that substantive law "refers to common law, statutory and constitutionally recognized rights" whereas procedural law "prescribes methods of enforcement of rights or obtaining redress." Thus, the Supreme Court reasoned that classification of substantive or procedural law depends on whether the statute creates a right.

The Ohio Supreme Court considered other statutes that conflicted with the Civil Rules (*i.e.*, R.C. 2945.68, which grants appellate courts the discretion to allow the state to file a bill of exception in a criminal matter and R.C. 2945.42 which conferred upon an accused in a criminal trial the right to exclude privileged spousal testimony) while centering their analysis on the operative effect of the statute – which creates a right of bifurcation. As a result, the Ohio Supreme Court found that R.C. 2315.21(B) created a substantive right to bifurcation in tort actions when claims for compensatory and punitive damages have been asserted since they create, define and regulate an enforceable right to separate stages of trial relating to the presentation of evidence. Therefore, the *Havel* court held R.C. 2315.21(B) takes precedent over Civ. R. 42(B) and does not violate the Ohio Constitution.

The result of the *Havel* decision places the trial court in the same position of the dog who chases his tail and then catches it. What do we do now? As Justice Pfeiffer asked in the oral arguments:

> "How is this gonna work, bifurcation – if the jury comes back and says yes there are compensatory – and punitives have been pled and up to that point not knocked out, so they're still alive in the case – once the jury comes back, does the Judge say, ok tomorrow morning be back in the courthouse – and we'll begin the punitive part of the case?"[1]

The uncertainty of the bifurcation statute places burdens on everyone – the courts, counsel, the parties, and even the jurors. The lack of instruction in the statute creates significant evidentiary difficulties. In a sense, the trial court will now be required to conduct a second trial without a roadmap as to the manner in which it shall take place.

The initial question to determine is whether the statute requires two separate juries. Justice Pfeiffer again raised this concern when analyzing Civ. R. 42(B) which refers to "separate trials."

> "Am I wrong to think that separate trials mean separate trials? Not two parts of the same trial?"[2]

If this is the case, the parties, in a sense, may be trying the same case two different times since the majority of the same witnesses and exhibits used in the first trial would clearly be required for the second. The expenses for expert witnesses, subpoenas and other litigation costs would practically double. Would this truly provide judicial economy?

On the other hand, Justice Cupp did not appear convinced that the statute demanded two different juries:

> "Where in the statute does it say you have separate juries?"[3]

Justice Stratton hints that perhaps the best method for the trial courts to follow would be the form of a criminal capital case.

> "If we're to distinguish between the rule discretionary, state for many different types of trials versus this one – that requires the bifurcation but make clear to trial judges that it should be made with the same jury – could you conduct it similar to a death penalty – where you simply move to admit evidence, you've already admitted in the first part, in the second part, because they've already heard it – then do the additional. It would seem that most practitioners would rather try the case to the same jury twice, than face a brand new audience for the punitive stage. Especially since the new jury would have no background of the evidence presented in the prior trial. But even keeping the same jury for both trials brings a level of peril to the plaintiffs. For example, if the plaintiff were to receive a verdict in their favor by only six out of the eight jurors, the plaintiffs enter the second phase with two jurors presumed to be already against their case. Does this promote fairness?"[4]

Another major concern not addressed

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Sidebar: Pursuing Punitives In The Courtroom

by Ellen Hobbs Hirshman

It is with great interest that I read Judge Forchione's article regarding his perspective from the bench on how to navigate a punitive damages claim following the *Havel* decision. His article serves as a reminder as to how hard our brethren on the bench work in an attempt to maintain a level playing field in their courtrooms. It is also eye opening to read the judge's perspective on how to navigate and interpret the mandates of R.C. 2315.21(B) following the Supreme Court's decision in *Havel*.

I personally can appreciate the struggle Judge Forchione was confronted with as I was in his courtroom in August and September of 2013 presenting a nursing home negligence case which also contained a claim for punitive damages. Judge Forchione was first confronted with an issue regarding the punitive damage claim in our case when the defendants sought to preclude any discovery on this issue of punitive damages. When financial documents and information were sought regarding income, budgets, tax returns and the like, as the plaintiff we argued to the Court that the statute is clear: there shall be two phases of the trial (the first phase compensatory, the second phase punitive) but it is to be one trial, one jury. Therefore, we had no choice but to perform all discovery on the compensatory and punitive aspects of the case prior to trial. Judge Forchione found our arguments to be well taken, and issued an Order permitting plaintiffs to proceed with discovery on the punitive issue. I have a copy of this order if anyone wants a copy to use for reference in future cases.

In our case, the Court also had to decide, prior to the commencement of trial, whether or not the jurors would be informed about the possibility of a second phase of trial. Judge Forchione chose to preclude counsel from making any mention of a possible second phase or any mention of punitive damages in the compensatory phase of trial. He also precluded the parties from presenting any "conscious disregard" presentation of facts in the compensatory phase of trial.

From the plaintiffs' perspective, we were concerned that the jury would be very upset if, upon completion of the compensatory phase of trial, they were told "sorry folks, you are going to have to come back tomorrow for a second phase of this trial." In fact, I remember being on edge about the possibility that I was unable to voir dire any of the jurors on this issue. I was fearful that they may "punish" the plaintiffs in the end if they had to stay longer after having received no forewarning of this "prolonged jury duty."

As counsel for plaintiffs, I was also concerned that I had an out of state expert that had already taken time out of his practice, at expense to the plaintiffs, to come and testify as to the compensatory aspect of the case. If successful on the first phase, we would have to bring the expert back and incur additional expense. (Although we did have an expert that was willing to do this. He felt that passionately about the case, fortunately.)

Also, once we were successful in the first phase of trial, and while negotiating to settle the case prior to the commencement of the second phase of trial, I recall weighing in my mind the possibility that the jury may be angry and punish the plaintiff further, knowing that now the plaintiff wanted additional money. Since our case did settle prior to the commencement of the second phase of trial, I do not know the answer to that question. However, it is one of the considerations that concerned me, especially given that we were in a more conservative county in Canton, Ohio.

I also believe that although the motivation behind the establishment of this "bifurcation statute" was to protect against unjust damage awards and to keep awards from being inflated, I think the business community, who promoted this statute, may have unintentionally provided the plaintiff's bar with "two bites at the apple." Prior to the enactment of the statute, punitive evidence could be presented and considered at the same time as the compensatory case. Therefore, the jury was absolutely aware that there were two types of damages being considered and awarded. However, now that we have the two phases of trial and the jury is awarding compensatory damages without knowledge of a possible second set of damages to be awarded, in essence have we now been provided with two opportunities to ask for money? Previously, the jury would know about the two separate types of awards and come up with a figure that they wanted to award and place them on the two lines. Now, they have already heard the facts that support the finding of "conscious disregard", and have already awarded money with knowledge of the facts, but are presented with a second opportunity to award money.

These are just my thoughts and I am sure there are many of you out there that have had similar experiences. ■

at the oral argument is – when do you tell the jury about the potential for a second phase of the trial? In a capital case the jury is advised during the initial voir dire of the possibility of a second phase of the trial. Most are not surprised, having become familiar with the process through newspapers, other media outlets, or news sources. On the other hand, R.C. 2315.21(B) places the trial court in a quandary. The statute is clear that punitive damages are not to be discussed during the first trial. So how does the trial court explain to the jury that there may be a second trial? If the trial court advises the jury during the initial voir dire that there may be a second phase to the trial, with no explanation, doesn't that confuse the jury even more? This may lead to a "guessing game" amongst the jurors as to what the second phase is about, or even give them the impression the second phase may involve some type of penalty. Could this affect their judgment in considering compensatory damages? If so, this would defeat the whole purpose of the second trial.

In contrast, failure by the trial court to disclose the second phase of the trial to the jury until they reach their verdict on compensatory damages may create a new set of problems: When do you schedule the second trial? Any delay in the second trial creates a greater chance that jurors may forget critical parts of the testimony. Juror deliberations could be more difficult, confusing, and possibly inspire them to reach a verdict unsupported by the evidence. If the second trial were to begin immediately thereafter, the parties may not have enough time to issue new subpoenas and obtain service on the witness. Expert witnesses who may be out of state could be reluctant to travel back again to the courthouse for additional testimony. Finally, how will the jury react when they now learn that they will be required to sit through another trial, especially if the first trial takes a considerable amount of time to litigate? Many jurors find jury service intrusive and look forward to the end of the trial to reunite with families and get back to their daily lives. Jurors may become bitter and feel a bit betrayed when the second trial is sprung on them without warning. Their ambivalence or anger could affect their consideration of punitive damages.

Lastly the trial court will have to decide on its own what evidence will be presented at the second trial. The only guidance the statute provides is that no party may present evidence in the first trial "that relates solely to the issue of whether the plaintiff is entitled to punitive damages." Obviously, if it's a brand new jury, the parties could be retrying the whole case. If it's the same jury, the trial court will have the difficult role of weeding out duplicative testimony. More than likely the trial court will limit the testimony to evidence of "malice, willful or egregious conduct, or ill will." Justice Lanzinger commented that the second trial will probably focus on the issue of "deep pocket":

> "When push comes to shove, isn't the only evidence that has to be kept out of the first phase is how much the defendant can afford to pay?"[5]

In conclusion, it's obvious that tort reform advocates are in support of the *Havel* decision. They argue bifurcation protects against unjust damage awards, and R.C. 2315.21(B) will keep jury awards from being inflated. Advocates request a higher level of due process since punitive damages are the closest thing in the civil justice system to imposing criminal punishment on a particular defendant. Opponents claim that stripping away the discretion from the trial court is a huge mistake. They assert that trial judges are best suited to determine what evidence needs to come in and the guidelines posted in Civ. R. 42(B) should remain in effect. Until more guidance is provided, parties will continue to drift in uncharted waters. ■

End Notes

1. Case No. 2010-2148, *Sandra Havel v. Villa St. Joseph, et al.*, 9/21/2011, http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=132752.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

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Observations Based On Two Bifurcated Trials

by Christian R. Patno

Since *Havel* came down, with very little structural procedural direction, I have tried two cases to verdict involving bifurcated punitive trials. The judge in the first case refused to allow us to get into the issue of punitive damages during voir dire and also failed to advise the jury the trial could have two phases. The feeling of disgust from the jurors was palpable when they were told their job was not done after the first phase. The judge in the second case allowed voir dire on punitives and also advised the jury during voir dire that there could be more than one phase. The jury in the second case, *Lynette Roginski v. Shelley Co., et al.*, Cuyahoga County CV-11-760490, awarded attorney fees and $20,000,000 in punitive damages. The jury in the first case awarded no punitive damages or attorney fees believing they had already done their job.

It is imperative to remind the judge right away in your Brief in Opposition to Bifurcation that discovery is not bifurcated under statute. You must be allowed to pursue discovery related to the punitive phase in the case in chief in order to move forward on a punitive phase after a compensatory verdict. If you serve discovery with regard to a defendant's net worth and no information is provided you should later object to the introduction of such in the punitive phase as a later cap. R.C. 2315.21(B) only bifurcates evidence solely related to punishment. If it is relevant in the underlying liability case on compensatory damages it comes in during the first phase. You then must reincorporate this evidence in the first phase by reference on the record in front of the jury during the second punitive phase. You may very well need to offer no additional evidence and simply argue the case for punitives at the second phase. You also need to be careful not to abuse the same jury in the second phase with duplicative evidence already introduced in the first phase. In preparing for trial of a bifurcated case you need to have the jury instructions and interrogatories relating to punitives and attorney fees separately prepared for each phase. You need your exhibits and witnesses identified and subpoenas for both phases out prior to trial. You need to be ready for your punitive opening statement, presentation of evidence, cross examination, directed verdict and closing argument. Your punitive plan and strategy must be in place prior to the start of trial. The jury must be the same jury that rendered the compensatory verdict and I would strongly argue only those who signed onto the liability verdict in the compensatory phase case can now sit on the panel in the second phase. How can the outlier jurors from the compensatory phase find punitive damage if they found no fault previously?

It is critical to question the jurors on punitive damages and inform them there may be two phases during voir dire. You simply do not get another voir dire after the compensatory phase. You also have to make sure the trial judge and no one else speaks with the jury between the phases and make sure they are instructed not to speak with anyone or read anything until they are fully released. Otherwise, the risk of a mistrial exists. Further, you want to make sure the second phase

starts right away to avoid the risk of losing jurors or violating the procedure mandated by statute. Finally, you have to decide whether or not you will put on economic punitive evidence. Sometimes the art of large imagery about the size of a defendant is much more powerful and moving than a tax return or net worth statement.

In *Roginski*, we chose to not put on witnesses or any further evidence and instead focused on imagery throughout the case of the large and uncaring national corporation that did not even have the decency to come to the courtroom and tell the jury under oath during the punitive phase what systemic changes would be made so that something like this death never occurred again. Instead, the corporation sent the very same lawyers without even a company representative to state their intention to be safer. The very same lawyers who said the corporation did nothing wrong in the first phase also told the jury they simply could not find a compensatory verdict against the Defendant. The Defendant corporation in *Roginski* then attempted to argue post-verdict the punitive claim had to be capped at two times the property damage, survivorship claim (under $50), not two times the general wrongful death and survivorship combined compensation verdict in excess of $19,000,000. Judge Michael Jackson correctly disagreed, finding that such an application and punitive award under $100 would never punish or deter a wealthy corporation and that such a statutory limitation would clearly be unconstitutional as applied to our case. ■

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Taming the ERISA Beast:
Contesting the Denial of ERISA Insurance Claims

by Bob Rutter

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ERISA is a crazy law.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq., was supposed to be a great benefit to American workers, protecting them from unscrupulous employers who promised generous pensions that mysteriously vanished when retirement finally arrived.

ERISA was designed to fix this deplorable situation, and it largely has done so in the pension arena. But its tentacles have stretched far beyond pension reform. In trying to protect employees, the legislature–and the courts that have interpreted ERISA over the years–has given ERISA a breadth that would startle its original advocates.

Today, ERISA controls basically all employee benefits, not just pensions. This means that employer-sponsored life, disability, and health insurance all fall under the ERISA umbrella, and since most workers get these benefits from employers, the vast majority of such claims are now "ERISA claims" as opposed to traditional insurance claims.

And the rules governing ERISA claims are crazy. Far from protecting workers, these rules have become the scourge of workers, depriving them of benefits in a manner that would astonish anyone with even a cursory knowledge of how traditional insurance claims are handled.

Preemption of State Law Claims

An insurance policy is nothing more than a contract. We all learned in law school that the failure of one party to honor a contract gives rise to a claim for breach of contract. But not under ERISA.

ERISA preempts all state law claims, including claims for breach of contract, and substitutes the remedy allowed by the statute. That is, a claim "to recover benefits due to him under the terms of his plan." But isn't this just another way of wording a claim for breach of contract?

Perhaps, but what is more significant is that ERISA preemption also applies to state law claims for lack of good faith and the corresponding claim for punitive damages. Ohio law, for example, allows an insured to recover extra-contractual damages if an insurer's claim denial lacks reasonable justification. If the insurer acted maliciously, the insured may be entitled to punitive damages.

These are formidable arrows in the insured's quiver. But they do not exist under ERISA. If an insurer handling an ERISA claim denies coverage in bad faith or maliciously, the insured's remedy is limited to recovery of the amount due under the contract. That is, the insurer's punishment is limited to paying what it should have paid in the first place.

This is akin to punishing a bank robber by making him return the stolen funds. There is basically no downside to an insurer wrongfully denying a claim, because the worst thing that will ever happen is that it will have to pay the claim. And don't think insurance companies don't know

this. They have grown emboldened to deny claims willy-nilly for any reason or no reason because they know that most insureds will not fight the denials and the ones that do–even if they succeed–will only get what they should have been paid in the first place.

Insurers Have Broad Discretion to Pay or Not to Pay

Under ERISA, the fox is guarding the hen house. The insurer is granted broad discretion to decide if it should pay the claim. Its decision is entitled to great deference by a reviewing court. Under the usual standard of review, the insurer's decision to deny a claim will be affirmed unless it was arbitrary and capricious.

This is probably the single strongest defense to overcome in any ERISA case. It is also completely illogical. Since when does a party to a contract have unfettered discretion to decide whether or not it will honor the contract? I would have flunked Professor Austin's contracts class if I had ever made such a ridiculous argument.

How did we get to this point? Easy. All insurers had to do was include a clause in the contract saying that they had unfettered discretion to decide claims, and the courts–like good matadors–stepped aside and allowed the bull to pass.

Once insurers saw how easy it was to evade judicial review, they all reacted in the same predictable way. They included discretionary clauses in all of their policies. Why not? Again, there is no downside.

The effect of discretionary clauses is to turn upside down the best-known maxim of insurance law–insurance policies must be construed broadly in favor of the insured and a court must adopt any reasonable construction of a policy that favors coverage. Armed with broad discretion to "interpret" their own policies, insurers not surprisingly look for interpretations that avoid coverage. Courts defer to insurers as long as the insurer's position is at least arguably reasonable. Instead of being broadly construed to *favor* coverage, ERISA policies are broadly construed to *avoid* coverage.

Michigan and a few other states have enacted statutes or regulations banning discretionary clauses. In *American Council of Life Insurers v. Ross*, 558 F.3d 600 (2009), the Sixth Circuit upheld the Michigan rules, meaning that all ERISA claims in the state are subject to de novo review. The de novo standard is more favorable to ERISA claimants because it requires that the court independently review the insurer's decision. Ohio has not enacted any similar rule, and is unlikely to do so given the pro-insurance mentality prevailing at the statehouse.

No Discovery in ERISA Cases

The normal reaction of a lawyer to a client who has a breach of contract claim is to file a lawsuit for breach of contract. After all, that is what lawyers do, right? Wrong. This is a big mistake in ERISA cases for a couple of reasons.

First, ERISA claimants are not entitled to discovery. The Federal Rules of Civil Procedure do not apply to ERISA cases. Instead, the courts have developed a unique procedure for ERISA cases. The cases are decided based on the administrative record that existed when the claim was denied. The justification for this rule traces back to the rule granting broad discretion to insurers. If an insurer did not have certain information when it made a claim decision, then how could it abuse its discretion by ignoring such information?

Based on this analysis, courts hold that there is no need to search for the truth. Rather, what is important is whether the insurer made the correct decision (remember unbridled discretion) based on the evidence that the insurer had before it–regardless of whether additional evidence would show that the decision was wrong. No discovery is necessary because discovery cannot change the evidence that was before the insurer back when the claim was decided.

This brings us to our second important point. A successful ERISA claim depends on the administrative record as developed during the administrative appeal. Most policies contain a provision allowing the insured to appeal a denial of benefits within 180 days of the denial. The appeal is to the same insurer that denied the claim, but it is supposed to be decided by a person or body not involved in the original claim denial. However, since discovery is not allowed it is often hard to tell how different these two decision-makers really are.

In any event, a successful appeal depends on a complete record. If the insured has any information that it wants the insurer to consider, then speak now or forever hold your peace. The insured must provide information so that it will become part of the administrative record. If the evidence does not convince the insurer, maybe it will be enough to convince the court at a later time. The situation is akin to that facing a lawyer at trial–make your record now or forget about arguing the issue on appeal. The appellate court–the district court in the ERISA context–can and will only consider the evidence in the administrative record at the time the insurer denied the claim, so put into the record everything you need to make your argument to the district court.

No Jury Trial-In Fact, No Trial at All

Assume that the insured's lawyer is on the ball and supplements the administrative record with a report from the treating doctor that says the insured is disabled. This report directly contradicts the insurer's report from the IME doctor saying the opposite. This is a factual dispute that must be resolved by a jury since we all know that juries resolve facts–not judges. Right?

Wrong again.

ERISA claimants are not entitled to a jury trial. In fact, there is no trial at all in most cases, not even a bench trial. Why? We once again get back to the issue of the insurer's discretionary authority. This discretion extends to fact-finding. The insurer has discretion to decide what facts to accept and what facts to reject. In essence, the courts have abdicated their responsibility to determine facts and transferred this duty to insurance companies.

Harkening back to a traditional breach of contract case, when is one party to a contract absolutely bound to accept the facts as determined by the adverse party. Bizarre? Illogical? Un-American? I submit that it is all of the above.

Some Courts Are Equally Dismayed

It is not just claimant's attorneys who find ERISA puzzling. Some judges have questioned the rules of the game that have developed piece-meal in the last 40 years. For example, *Andrews-Clarke v. Travelers Ins. Co.*, 984 F.Supp. 49 (D.Mass. 1997) involved the death of an insured who had been refused mental health treatment that his doctors asserted was necessary to manage his psychiatric disorders. Judge William Young commented that:

> As a consequence of their failure to pre-approve–whether willful, or the result of negligent medical decisions made during the course of utilization review–Clarke never received the treatment he so desperately required, suffered horribly, and ultimately died needlessly at age forty-one.
>
> Under traditional notions of justice, the harms alleged–if true–should entitle Diane Andrews-Clarke to some legal remedy on behalf of herself and her children against Travelers and Greenspring. Consider just one of her claims–breach of contract. This cause of action–that contractual promises can be enforced in the courts–predates Magna Carta. It is the very bedrock of our notion of individual autonomy and property rights. It was among the first precepts of the common law to be recognized in the courts of the Commonwealth and has been zealously guarded by the state judiciary from that day to this. Our entire capitalist structure depends on it.
>
> Nevertheless, this Court has no choice but to pluck Diane Andrews-Clarke's case out of the state court in which she sought redress (and where relief to other litigants is available) and then, at the behest of Travelers and Greenspring, to slam the courthouse doors in her face and leave her without any remedy.
>
> This case, thus, becomes yet another illustration of the glaring need for Congress to amend ERISA to account for the changing realities of the modern health care system.

Federal District Judge Letts voiced his concerns about ERISA in *Dishman v. UNUM Life Ins. Co.*, 1997 WL 906146 (C.D.Cal.):

> [T]he facts of this case are so disturbing that they call into question the merit of the expansive scope of ERISA preemption. [The insurer's] unscrupulous conduct in this action may be closer to the norm of insurance company practice than the court has previously suspected. This case reveals that for benefit plans funded and administered by insurance companies, there is no practical or legal deterrent to unscrupulous claims practices.
>
> Absent such deterrence, the bad faith denial of large claims, as a strategy for settling them for substantially less than the amount owed, may well become a common practice of insurance companies.

These cases were decided 18 years ago, and Congress has not moved to alleviate the problem. In fact, the problem has worsened with the proliferation of discretionary clauses in virtually all employee benefit plans. Given what we know about the incoming Congress, it is safe to assume that legislative change is not on the horizon.

So What to Do?

The Supreme Court provided a ray of hope in *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011), a case that has been construed by some lower courts as slightly broadening the equitable remedies available under ERISA law, and perhaps allowing discovery in some limited situations.

Practitioners, however, should still be on alert. ERISA cases are difficult, complex, and full of potential pitfalls. Being a good trial lawyer is not enough to validate handling an ERISA case, especially since actual trials are virtually non-existent. ERISA cases are motion-driven, and claimant's counsel will likely be opposed by knowledgeable counsel who has handled–probably successfully–numerous prior ERISA cases.

Proceed at your own peril. ■

Christopher M. Mellino is a principal at The Mellino Law Firm LLC. He can be reached at 440.333.3800 or cmellino@mellinolaw.com.

Pointers From The Bench:

An Interview With

Judge Hollie L. Gallagher

by Christopher M. Mellino

The Honorable Hollie L. Gallagher has been a member of the Cuyahoga County Court of Common Pleas bench since 2006. If you are not familiar with her despite her longevity on the bench it is because she prefers to avoid the limelight and strives to keep a low profile.

Judge Hollie L. Gallagher

From the beginning of her career she aspired to be a Judge. Judge Gallagher believes that this came from a desire to resolve disputes rather than arguing on only one side of a case. It's quite an unusual trait for a lawyer to prefer to remain neutral. But she feels most comfortable listening to both sides and determining what a fair resolution would be, which suits her quite well in her chosen career.

Because of her aspiration to be a Judge, upon graduating from law school she embarked on a fast and furious track to gain as much trial experience as possible. She was a staff attorney for Judge Leo Spellacy in the Eighth District Court of Appeals from 1995-1998. She then took a position with the Prosecutor's office for the City of Cleveland from 1998-2000 and, after leaving there, was a Cuyahoga County Prosecutor until 2006.

Judge Gallagher has been very impressed with the preparedness of the civil bar and how thoroughly we prepare our cases. When pressed to give some insight on how we could improve our client's chances she did offer some preferences based on her experience.

She believes that we should try harder to get along better and be more courteous to each other. She is very disdainful of the personal attacks she has seen in pleadings and motions filed in her court. She would like to see the parties, through their lawyers, expend more energy working together with mutual respect and most importantly always keep the focus of our actions on what is in the best interests of our clients.

Judge Gallagher would also like to see more of a focus on early resolution of cases which she believes is almost always in the best interests of the clients regardless of which side they are on.

Because she likes to be prepared and make the right decision, Judge Gallagher warned against last minute motions such as motions *in limine* filed the Friday before trial. While she understands that often these last minute filings are done for tactical reasons, she does not feel as if the litigants are being fair to her.

She also emphasized that she is always available to the parties upon request. She believes that accessibility should be a top priority of any court.

She has experimented with different types of voir dire over the years. She has polled jurors in her cases and settled on her current system based on juror preference.

All of the prospective jurors in the room are questioned during voir dire. At the conclusion of the questioning the jurors are excused and the challenges are made by both sides. Strikes can only be made of the first 8 jurors at the time of the strike.

Another thing that is a little unusual about voir dire in her courtroom is that jurors are never referred to by name, only by number. Again she learned from jurors that they preferred the anonymity.

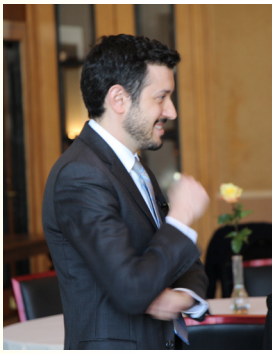
She also allows the jurors to take notes but does not allow questions by them.

During her time on the bench Judge Gallagher has been very active in the Mental Health Docket and found that she enjoys it very much. She has learned quite a bit about the outreach that is available to help individuals with serious mental illness. This activity has taken her outside the courtroom into the community. She is very involved with a local mental health hospital and helps them develop policies and procedures which she finds very gratifying.

In addition to her work Judge Gallagher's priority is her family. She, her husband and her two children are passionate about running, soccer, softball, basketball, the Cavs and the Indians. She finds it difficult trying to strike a balance between being a Mom and a Judge. But she believes that trying to find that balance makes her very efficient in her job so that she can maximize her time with her family.■

2015 CATA Litigation Institute

"Hot Topics & Persuasive Techniques"







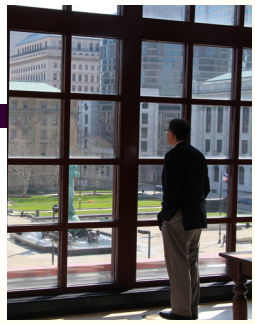










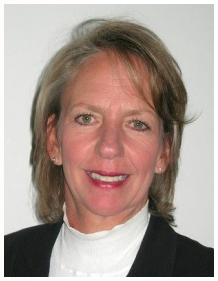



Beyond The Practice: CATA Members In The Community

by Dana M. Paris

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

Recently, CATA heard from Melanie Shakarian, the Director of Development and Communications at The Legal Aid Society of Cleveland. Ms. Shakarian offered praise and thanks for the CATA members who have volunteered their support to Legal Aid over the years. Below is an excerpt of her comments:



Sherry Pidala

James A. Lowe

David P Miraldi

Roger M. Synenberg

The Legal Aid Society of Cleveland is especially grateful for the institutional sponsorship of the Cleveland Academy of Trial Attorneys, and to many individual CATA members for their exceptional support. So many CATA members volunteer their time or provide generous financial support to help low income people defend their shelter, safety and economic security.

[One of the] CATA members who ... volunteered [her] time this year [is] **Sherry Pidala**[.]

Legal Aid also recognizes these CATA members for their longstanding financial support: **James A. Lowe** of Lowe, Eklund, & Wakefield Co., LPA, is now a member of the 10-year Giving Society. Mr. Lowe... started his legal career with Legal Aid and has remained a loyal supporter to the mission. **David P. Miraldi** of Miraldi & Barrett joins the 9-year Giving Society; **Roger M. Synenberg** of Synenberg & Associates is in the 5-year Giving Society; and... **Thomas Robenalt**, a member of Legal Aid's Development Committee, ... join[s] the 4-year Giving Society.

To volunteer at a Free Advice Clinic, take a pro bono case or make a gift to Legal Aid, please visit www.lasclev.org or call Melanie Shakarian, Esq. at 216-861-5217.

Volunteering for Legal Aid is only one of the community services CATA members perform. Here are some others.

Before entering law school, **Meghan P. Connolly**, an associate attorney at **Lowe Eklund Wakefield Co., LPA,** volunteered with The Cleveland Rape Crisis Center as a hotline and face-to-face advocate. Recently, she re-enrolled in the volunteer program. The Cleveland Rape Crisis Center supports survivors of sexual violence, promotes healing and prevention, and creates social change. CRCC offers direct services free of charge to anyone seeking to heal from sexual violence. Any survivor may call the hotline for any reason at any hour, day or night. Hotline advocates like Meghan are there to provide information, resources, or to simply listen to survivors and their supporters. Advocacy and activism can end sexual violence.

Drew Legando from the **Landskroner Grieco Merriman, LLC** law firm has volunteered his time as coach of the Huron High School varsity football team for the past 12 seasons and is the head coach to the junior varsity team. Being involved with the football team is something of a family tradition. As a student, Drew played on the team and was coached by his uncle and father. His father was a coach for the high school team for 27 years. As Drew transitioned from player to coach, he quickly realized the value of spending time on the field with the players and his family. Drew also volunteers countless hours off the field mentoring the students and helping them prepare for college. Each year he authors approximately 6 recommendation and scholarship letters. He continues to stay connected with the players even after they graduate from high school.

Drew Legando coaching his team.

Nurenberg Paris staff wraps gifts for adopted family.

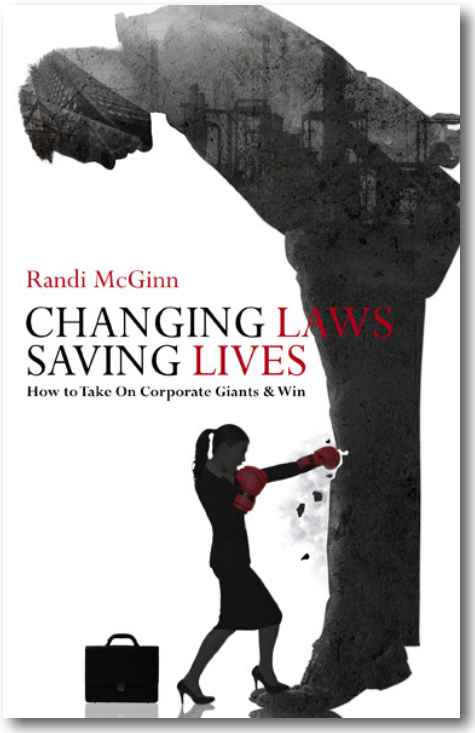
For the past 15 years, the **Nurenberg, Paris, Heller and McCarthy** law firm has adopted a family in need during the holiday season. The idea started when several employees decided that, instead of exchanging gifts with one another, they would focus on helping a family who truly needed it. The idea caught on quickly and became a firm-wide tradition. During the 2014 holiday, Nurenberg Paris connected with the Believe in Dreams foundation to adopt a family in need of some holiday cheer. Meredith, a single mother who suffers from a gastrointestinal disorder and was recently fired from her job, struggled to see how she would provide gifts for her 4 children. Members of the firm were quick to donate gifts and money and to volunteer their time to shop and wrap the gifts for the family. Nurenberg Paris is grateful that Believe in Dreams connected them with this family, and that they were able to make their holiday season a little brighter.

Steve Crandall and his son, Maximus.

Finally, as Ellen Hirshman stated in her President's Message, the EndDD program has really taken off this Spring, with CATA members giving presentations at various local high schools. One such presentation was given by **Steve Crandall**, of **Crandall, Pera & Wilt**, at Chagrin Falls High School on April 9th. As the presentation was attended by the entire school, Steve brought along his youngest son, Maximus, who helped pass out EndDD wrist bands. Steve's law firm is working with the high school's principal to award a gift certificate to a student who submits a family contract as advocated by the EndDD program. ■

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

Celebrated Trial Lawyer and Author Randi McGinn To Speak at CATA's Annual Dinner



Randi McGinn

Kathleen J. St. John is pleased to announce that **Randi McGinn**, celebrated trial lawyer and author of ***Changing Laws, Saving Lives: How to Take On Corporate Giants & Win***, will be the keynote speaker at CATA's Annual Dinner on Friday, June 5, 2015.

Known for her creativity in the courtroom, Ms. McGinn has been a trial attorney for over 34 years. She is a senior partner in McGinn, Carpenter, Montoya, and Love, a law firm comprised of four women partners in Albuquerque, New Mexico. Since 1993, she has been ranked one of America's top lawyers by ***Best Lawyers in America***. Out of the more than 130 cases she has taken to trial in state and federal court, she has lost only five. She teaches at the National Institute of Trial Advocacy, the National Criminal Defense College, and as an adjunct professor at the University of New Mexico Law School.

The Annual Meeting and Awards Dinner will be held on
Friday, June 5, 2015 at The Ritz-Carlton's Ballroom.
The festivities begin with a cocktail reception from 5:30-6:30 p.m., followed by dinner, the installation of officers, the awards ceremony, and Ms. McGinn's keynote speech. ***Changing Laws, Saving Lives*** will be available for purchase and signing by the author.

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

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

Ask the Expert – Resolving Medicare, Medicaid, Veterans, Tri-Care and ERISA Subrogation

by Stuart E. Scott

One of the plaintiff's lawyer's biggest challenges in handling a personal injury case is resolving the client's healthcare lien in a way that is fair to the client, will permit the case to be settled and will not jeopardize the client's future healthcare benefits or result in a potential claim against the attorney. Adding to the challenge is the fact that the law and regulations governing subrogation are constantly changing.

One way for the practitioner to resolve subrogation issues is to retain the assistance of lien resolution professionals like the Garretson Firm Resolution Group, Inc.[1] These professionals are dedicated to resolving healthcare liens following best practices that will both save your client money and preserve their healthcare benefits. This article is based on interviews with Sylvius von Saucken and Michael Russell of the Garretson Firm. Sylvius is Chief Compliance Officer and Michael Russell is the Director of Private Lien Resolution.

Q: What do you recommend the plaintiff's lawyer do at the beginning of the case to prepare for resolving healthcare liens?

Sylvius: Our motto is verify, resolve and satisfy. The lawyer should always verify potential liens at the beginning of the case. This will tell the lawyer whether the case is economically viable to pursue before investing time and money in the case. It will also tell the lawyer how he or she should set the client's expectations for net recovery.

Q: What exactly do you mean by verify?

Sylvius: Identifying who all of the potential lienholders are and auditing their claim/bills to verify which are actually related to your client's claim.

Q: How do you recommend the lawyer verify the potential lienholders?

Sylvius: Ask the client how they make their income and whether they know who their healthcare insurer(s) are. Do they or their spouse work in the military? Is their spouse a veteran? Do they collect SSD or SSDI? If SSDI, they are likely on Medicare. If SSD, they are likely on Medicaid.

Get a copy of their social security number and run it in the My Medicare.gov to verify enrollment in Medicare A, B, C and D.

Fax Ohio's Tort Recovery Unit to verify enrollment and obtain payment information.

If the client has healthcare benefits through their employer, ask them for the Plan. Is it an ERISA Plan? If so, look up the employer's tax Form 5500 Schedule A to determine whether

the employer has a self-funded or insured Plan. Compare this with Plan documents. The form is a simple check the box that the employer will check as a Trust (self-funded) or Insurance (not self-funded). The distinction carries with it important legal rights for the Plan's ability to recover.

Once you have identified the insurer, a request should be made for the bills so that they can be audited.

Q: What if the client does not have a copy of their Plan?

Sylvius: The client should request a copy of the Plan from their Plan Administrator. Their employer's HR person can provide this. If the lawyer requests the Plan, that will tip off the Plan Administrator that there is a good reason to suspect there is a subrogation or reimbursement claim. ERISA requires the Plan Administrator to provide an employee a copy of the Plan within 30 days of it being requested by the employee or their agent. The Plan can be subject to financial penalty if it does not produce the Plan within the 30-day window.

Q: What if the client tells the lawyer they do not want to notify their Plan about a potential third-party claim?

Sylvius: The lawyer has no duty to notify the Plan. But, the lawyer should, in writing, inform the client that they could jeopardize their future healthcare benefits. The Plan could refuse payment on future bills until the Plan is reimbursed what it deems to be its right of recovery from the third-party claim. Furthermore, there are now cases that say a self-funded ERISA Plan can take back the attorneys' fees if the lawyer did not resolve the lien. *See, e.g., Drury Indus., Inc. Healthcare Plan & Trust v. Goding*, 692 F.3d 888 (8th Cir.2012); *Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009).

Q: Let's turn to Medicaid for a moment. Many lawyers have been in the situation where Medicaid has paid medical expenses that are close to or exceed the settlement amount because of a tortfeasor's limited liability coverage. In my experience, Medicaid will divide the settlement three ways among the lawyers' fee, its reimbursement and the client's recovery. Is this outcome dictated by Ohio law?

Sylvius: Not exactly. Ohio law says Medicaid will split with your client 50/50 the net proceeds after attorneys' fee and case costs. The maximum attorneys' fee is one-third.

However, there is a recent trial court case out of Franklin County that held this division unconstitutional because it does not bear a rational relationship to the medical bills paid by the settlement.

The case is *Fowler v. Ohio Department of Medicaid* (2014), Case No. 13 CV 005683. This case was a direct challenge to the Ohio Department of Medicaid under the Federal Anti-Lien Statute.[2]

Because of the federal anti-lien law, Ohio Medicaid does not have a property right in the client's settlement. Thus, no lien can be levied against it. Medicaid obtains its rights through assignment when the Medicaid beneficiary applies for and is given Medicaid benefits. Because of the federal anti-lien law, the assignment is limited to the portion of the settlement related to the recovery of past medical expenses paid by Medicaid.

There is now a strong argument that in a case where recovery is limited (e.g., because of low liability insurance limits) Medicaid's right to recovery must be in proportion to the amount of medical expenses paid as compared to the total damages, rather than a straight 50% of the net proceeds.

Q: Has this changed the way Ohio Medicaid approaches resolution?

Sylvius: No. Not unless the lawyer specifically raises the constitutional issue and has prepared evidence of total damages and an apportionment that demonstrates a lower amount should be paid.

Q: Should lawyers be making these arguments in the appropriate cases?

Sylvius: Yes, but there can be significant costs associated with working up the total damages in a case with very low policy limits. So, it may not be economically feasible in every case.

Also, and this is important, the federal anti-lien law has been recently abrogated. This will go into effect between October 2016 and October 2017. So, this argument will likely have a short window. Even

worse, Ohio could potentially give itself a property interest in the settlement. Medicaid liens could possibly become like ERISA where Medicaid will take the entire settlement, including attorneys' fees.

However, that type of draconian approach would result in cases not being pursued and less money being recovered by the state.

Q: There has been much litigation over ERISA subrogation in the past 10 years. What do you recommend the lawyer do when taking on a new case where the client has, or might have, an ERISA plan?

Sylvius & Mike: First, verify the client's plan. Who is paying the bill? Their employer, their spouse's employer, another entity? If the client tells you their employer is paying the medical bills, ask whether he/she has a copy of the Plan or knows the name of the insurance carrier. If not, have the client get the Plan so you can verify it is ERISA. Next, find the Form 5500 Schedule A we talked about earlier to determine if the Plan is self-funded.

If the Plan is a self-funded ERISA plan, it is critical to obtain a copy of the Plan (written plan booklet or policy) to determine the strength of the Plan. By strength, I am referring to the subrogation language of the Plan and whether it has lockdown language that protects it against equitable attack by the Make Whole Doctrine, or the Common Fund Doctrine. Updated plans frequently have all of the protective language. This means the Plan can potentially take all of the settlement – including attorneys' fees.

Q: How do you determine if it is ERISA?

Mike: If the healthcare Plan was provided by an employer who is not a political subdivision, military, or a religious organization, it is most likely ERISA qualified.

Q: What can the lawyer do if the ERISA plan has all of the protective language?

Sylvius & Mike: If you have confirmed the language of the Plan and that the Plan is self-funded, the next step is to approach the Plan's Recovery Contractor. This should happen before counsel begins investing significant resources in the case. Most of the Plan contractors are working on a contingency like the plaintiff's lawyer so they understand the practicality of the situation that the lawyer and his or her client are not going to pursue claims just to turn the settlement proceeds over to the Plan. Most Recovery Contractors will work with you and your client to compromise the claim. Many Plans will split the net proceeds 50/50. If you have a case where the medical expenses are large with limited liability coverage and an uncollectible tortfeasor, contact the Plan Recovery Contractor, explain the situation and get a commitment early on as to what the payback will be if the case settles for policy limits.

You must make it clear to the Recovery Contractor for the Plan that you and your client are prepared to abandon the claim and walk away from a settlement if they refuse to negotiate fairly and equitably.

Q: What was the *USAirways v. McCutcheon* case about and how does it impact the injured party's rights vis-à-vis their ERISA healthcare plan?

Mike: The Supreme Court's decision in *McCutcheon* basically said that equitable doctrines apply, but that the plan language is king. This was a win for the healthcare plans because the plan can cutoff equitable rights with the right plan language.

Q: Any other legal updates on ERISA subrogation?

Mike: In my view, future litigation will likely center around what is a self-funded Plan. Do Plans with stop-loss or reinsurance coverage qualify as a self-funded ERISA Plan? Currently, many Plans with this type of back-end coverage claim to be self-funded.

Q: Let's talk about Medicare. What are the important points for the lawyer when resolving Medicare's right to be reimbursed from a settlement?

Mike: The most important thing for the lawyer to do is identify whether Medicare has an interest in the claim. This means checking first to determine whether the client is an insured under Medicare Part A or B; and if not, check whether they are insured under Part C or D. For Medicare Part A and B, you must contact Medicare to determine whether it is claiming an interest in the settlement. The current regulations require the Defendant and its insurance company to notify Medicare when it

makes a tort settlement payment for injuries. So, you will have to address these liens sooner or later.

Q: Do Medicare Advantage Plans (Medicare Part C) have the same rights as traditional Medicare?

Mike: Medicare Advantage Plans are private plans sold to individuals who are Medicare eligible. This has been an evolving area of the law over the past 5+ years. In my opinion, the courts are going in the direction that Medicare Advantage Plans have the same rights as traditional Medicare under the MSPA. *See In Re: Avandia Mktg.*, 685 F.3d 353 (3d Cir. 2012) (Health insurance company had rights to sue drug company under the Medicare Secondary Payer Act seeking reimbursement for healthcare expenses paid by insurer). Another recent case held that the health insurance company could collect double damages against its insured under the MSPA for knowingly violating its right of subrogation/reimbursement. There are no recent decisions holding that Medicare Advantage Plans do not have the same rights as Medicare.

Q: Will Medicare work with a client whose settlement is less than the Medicare lien?

Mike: Yes. In our experience, Medicare will compromise its lien if the lien will consume most or all of the settlement. Medicare typically will allow a three-way split: attorney, 1/3; Medicare, 1/3; and your client, 1/3. This allows everyone to recover something. Also, Medicare will waive its entire lien where there is evidence of circumstances why Medicare should take nothing. For example, to prevent an imminent home foreclosure. We deal with these situations daily.

Q: Does Medicare recognize allocation by agreements between settling parties or a court?

Mike: Medicare will not honor or recognize allocation agreements by the parties. They will look at what was claimed and what was released. However, Medicare will honor allocations by a court. So, if the jury allocates medical bills at trial, Medicare will honor that. If a Probate Court allocates a settlement between the survivorship and wrongful death claim, Medicare will usually honor the allocation. However, Medicare **must** be given notice of the hearing.

Q: What does the lawyer need to know when handling subrogation for a client who is insured through the military?

Sylvius: The two entities are Tri-Care for active military and the VA for veterans. Both have a federal statutory right of recovery and related regulations that require cooperation.

For Tri-Care, each branch of the military has its own regulations and requirements. Like any subrogation claim, you will want to request the claims history and conduct the audit to make sure the claim is accurate. One major difference is that Tri-Care will want an attorney protection letter that the lawyer will file a claim on behalf of the military to protect its interests. If the lawyer refuses, the military will not pull the claim or provide the numbers. This potentially places the lawyer at odds with his client's interests by forcing the Complaint to include claims that unconditionally protect the military's rights to recover.

Handling VA claims has its own challenges. Unlike Tri-Care, which has regional offices for handling recovery claims, the VA has no recovery group. So the lawyer must get the bills from the specific VA facility, which can be challenging depending on the facility. ■

End Notes

1. Make sure your Retainer Agreement specifically states that you will retain third-party contractors to resolve healthcare liens if you are contemplating retaining a firm and charging the professional services to the case.
2. 42 U.S.C. § 1396p.

Victoria M. Miller is a paralegal at The Mellino Law Firm LLC.

Basic Steps For Resolving Medicare And Medicaid Liens

by Victoria M. Miller

The most important piece of advice for any attorney representing a client whose medical bills have been paid for by Medicare or Medicaid is to make contacting these entities a priority. Start the process of getting the lien information as soon as possible, because the procedure can be (and often is) long and tedious. If the process is delayed the lien can hinder settlement negotiations or even receiving and disbursing settlement funds after a settlement. Insurance companies for the defense often want proof that the lien has been satisfied before sending the settlement check.

The first step is to find out if your client was Medicare or Medicaid eligible at the start of the client intake process. Obtain a copy of their Medicare or Medicaid cards. If you should discover your client was receiving Medicare or Medicaid your next step will be to identify the exact injury/accident/incident/etc. When did it occur? Be as specific as possible. This will be pertinent when you receive your conditional payment letter, because, as the beneficiary's attorney, your goal is to make sure the lien amount is only from bills that are related to the injury/accident/incident/etc. from the reported case.

I. Medicare Liens.

By law Medicare has the statutory right to recovery from 42 U.S.C. §1395y(b)(2), 42 C.F.R. 411.24(e) & (g), and from both §1862(b)(2)(A) and §1862(b)(2)(A)(ii) of the Social Security Act. In brief, most often payments made by Medicare are considered to be conditional when Medicare deems or believes that medical services paid for may fall under categories such as workers compensation, and no-fault or liability insurance. However, the right to reimbursement may exist anytime there is a recovery from a third party for medical expenses paid for by Medicare. Just think of a conditional payment as essentially a reimbursable payment, meaning that if later recovery is made due to a settlement or judgment Medicare has the right to recover back what it paid out conditionally. Medicare has the right to recover reimbursement for conditional payments from primary payers as well as any entity or party who received primary payments. The penalties for failing to pay back conditional payments when a settlement or award is given are outlined in the statutes. Penalties are steep ranging from incurring interest, to fees, to actions being filed against any and all entities that are required or responsible to make payments.

To start the process for a Medicare lien you will need to contact the Benefits Coordination & Recovery Center (BCRC) to notify them of your client's case and provide the agency with the following information:

- Beneficiary's name;
- Health insurance claim number (HICN);
- Beneficiary's gender and date of birth;
- Beneficiary's address and phone number;
- Date of Incident (DOI) or injury/accident;
- Description of alleged injury or illness;
- Type of claim (liability insurance, no-fault insurance, worker's compensation);
- Representative/attorney name;
- Law Firm name, address, and phone number.

You can contact the BCRC via telephone, facsimile, or mail; all their contact information can be found online at: www.cms.gov.

Once the case is open the BCRC will generate a Rights and Responsibility Letter. As soon as an attorney or beneficiary receives the Rights and Responsibility letter a Proof of Representation letter will need to be sent back to the Medicare Secondary Payer Recovery Center (MSPRC). The purpose of this letter is to permit the attorney to act on behalf of the beneficiary. This can be sent to the address provided in the Rights and Responsibility Letter and needs to include the following:

- The fee agreement/retainer signed by the beneficiary or the beneficiary's representative and counsel and must be dated. (Please note that documentation must be provided if signed by the beneficiary's representative – i.e., letters of authority or Power of Attorney.)
- A HIPPA compliant authorization must be sent out releasing any and all lien information regarding the beneficiary to the attorney/law office.
- A copy of beneficiary's Medicare card.

All documents and the letter itself must include the beneficiary's HCIN written or typed at the top of the document.

The next step in the process is receiving the Conditional Payment letter (CPL) from the BCRC, which lists out all the paid medical claims by Medicare. This letter can take up 65 days to receive after the date the Proof of Representation letter is received by the BCRC. Please note that providers have up to one year to submit a claim, which means the conditional payment letter is subject to change if you are within that first year and it is the attorney's responsibility to request an updated conditional payment amount.

The payment summary form included at the end of the CPL should be reviewed with a fine-tooth comb. The summary will include the billing providers, diagnosis codes, dates, total charges, reimbursed amounts and, lastly, the conditional payment amounts. Depending on the case this list can either be a short one-page list or several pages. Every line should be evaluated to make sure the dates, providers, and diagnosis codes are relevant to the reported case. The code directories are available on www.cms.gov and are listed in years. An attorney or paralegal will be able to look up the diagnosis code to find the corresponding diagnosis/injury/surgery and so forth. This process is extremely important to ensuring that the conditional payment amount is accurate and the charges are linked to the case.

If you find charges or diagnosis codes reported that are inconsistent with the case – *i.e.*, dates fall outside the reported injury date, charges listed more than once, or irrelevant diagnosis codes – your next step is to dispute the CPL. Start by indicating on the payment summary form by marking, circling, or crossing out with a pen the disputed charges. Then write a letter to MSPRC and include the marked copy of the itemization. Outline in your letter the claims you are disputing and provide reasons why they should be removed from the itemization. Once you send in your letter be aware it may take some time for the letter to be reviewed and for the MSPRC to contact you.

If you find that the charges are in fact accurate and related to the reported case, your next step is to send out a notice of settlement, judgment, award, or other payment. You will need to include the following information:

- Total Amount of the Settlement;
- Total Amount of Med-Pay or PIP;
- Attorney Fees to be paid by the beneficiary or their representative;
- Attorney expenses to be paid by the beneficiary or their representative;
- Date the Case was settled; and
- Description of Injuries.

Please note the CPL will include the Final Settlement Detail Document, which provides the above instructions on what and where to send the settlement notification. When calculating the Final Demand amount, the BCRC takes into account attorney fees and expenses. Only request the final demand letter once you are ready to make payment because the payment is due within 60 days of the date of the demand letter. If payment is not made within the 60 day period, interest will accrue. Once payment is sent and received by the BCRC the case will be closed out.

Attorneys now have the ability to manage Medicare cases online through the Medicare Secondary Payer Recovery Portal at www.cob.hhs.gov/MSPRP. After registering on the portal, attorneys and representatives can request case access with the ability to electronically request an updated conditional payment letter, dispute claims, provide notice of settlement, and access general case information.

II. Medicaid Liens.

If your client received benefits from Medicaid the reporting information is similar, but the actual process is quite different because it is state regulated. In Ohio the Ohio Revised Code Section 5160.37 outlines the statutory right to recovery for medical services paid for by the Ohio Department of Medicaid

(ODM). As far as putting ODM on notice of your client's possible recovery it must be done within 30 days as explained in Section 5160.37(c) of the Ohio Revised Code:

> A medical assistance recipient, and the recipient's attorney, if any, shall cooperate with the departments. In furtherance of this requirement, the medical assistance recipient, or the recipient's attorney, if any, shall, not later than thirty days after initiating informal recovery activity or filing a legal recovery action against a third party, provide written notice of the activity or action to the department of Medicaid or county department if it has paid for medical assistance under a medical assistance program.

In Ohio to open a case for a Medicaid lien one must go to www.ohiotort.com. The website provides instructions and explanations. Specifically, to begin the process of opening a case with the ODM one must fill out the Referral form and submit it online. It is important to keep a record of the electronic Referral form, so be sure to print or save a copy before submitting. In addition there is a HIPAA compliant medical release that needs to be filled out, signed by the beneficiary. The HIPAA authorization must be sent to the Ohio Tort Recovery Unit.

Similar to Medicare, medical providers have up to one year to submit bills to Medicaid. Once the case has been opened by the ODM Tort Recovery Unit a letter similar to the Medicare Rights and Responsibility letter will be sent to the attorney. Shortly thereafter (2-3 weeks), you will receive a printout of claims that are related to the incident/injury reported on the Referral form. (This process may take longer because each case is different in time and injury, and because medical providers have up to one year from date of service to submit bills to Medicaid.) The amount will either be the interim or final lien of the amount paid by Medicaid. If there are any claims to dispute from the lien amount the letter will provide the steps for disputing them.

Once the case has settled you will need to provide settlement information just like you would in a Medicare case. If notification to Medicaid is made just before settlement, funds should not be distributed until the final lien is confirmed and paid. According to Ohio Revised Code Section 5160.37, penalties for disbursing on a recovery without giving ODM "appropriate written notice" fall on both the client and attorney, both of whom will be liable to reimburse Medicaid for payments it made. Specifically, Ohio Revised Code Section 5160.37 (E) provides:

> No settlement, compromise, judgment, or award or any recovery in any action or claim by a medical assistance recipient where the department or county department has a right of recovery shall be made final without first giving the department or county department written notice as described in division (C) of this section and a reasonable opportunity to perfect its rights of recovery. If the department or county department is not given the appropriate written notice, the medical assistance recipient and, if there is one, the recipient's attorney, are liable to reimburse the department or county department for the recovery received to the extent of medical assistance payments made by the department or county department.

III. Medicare Advantage Plan Liens.

There is also a third type of lien, which a beneficiary is responsible for paying back and that is for Medicare Advantage plan. For example, a client may have a Medicare Advantage plan through Humana or another private insurance provider that has a contract with Medicare to provide benefits. In this instance an Attorney would need to contact the subrogation department of the private insurance provider and work with them directly to resolve the lien. This lien may be separate or in addition to the Medicare lien. Beneficiaries do have a duty to pay back these plans just like a Medicare plan.[1]

IV. Conclusion.

Dealing with Medicare and Medicaid liens can be frustrating because the process seems cumbersome with a lot of back and forth correspondence with long gaps in between. But if you start the process at the beginning of your client's case you can give yourself plenty of time to complete it. There have been improvements in the process with the help of the online portal for Medicare making some of the steps easier to accomplish as well as the Centers for Medicare website which provides several different handouts and charts online for help. As the Medicare/Medicaid lien process is continually evolving, attorneys and their support staff should make sure they are up to date on the process. ■

End Notes

1. ***Editor's Note:*** See discussion of Medicare Advantage Plan Liens in the Ask the Expert article by Stuart E. Scott on prior pages of this edition of the CATA News.

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Special Needs Trusts:[1]
For Trial Lawyers

by Michael A. Renne

A special needs trust (aka Medicaid Payback Trust) is commonly used when an individual eligible for Medicaid or supplemental security income ("SSI") receives a recovery in a personal injury action. If the recovery is not sufficient to pay for the individual's ongoing needs, a special needs trust must be considered.

The benefits of a special needs trust can be substantial. Medicaid benefits include nursing home care, in-home health care services, including custodial care, prescription coverage, hospital expenses, physician services, and other healthcare expenses. Custodial care and nursing home care are generally ***not*** covered by Medicare or private health insurance, including insurance under the Affordable Care Act. Thus, preserving Medicaid coverage becomes especially important for individuals with significant ongoing custodial care needs and insufficient assets to meet those needs.

In addition, special needs trusts are not considered resources when determining eligibility for supplemental security income ("SSI"), which currently provides cash payments of up to $733 a month for eligible Ohio individuals. 42 U.S.C. § 1382b(e)(5).

Special needs trusts also provide creditor protection for the disabled beneficiary. See O.R.C. § 5805.06(A)(3).

The potential disadvantages of a special needs trust also must be considered. The disabled individual loses control over the funds by transferring them to a trust. The trustee of the trust, and not the beneficiary, determines how the assets are invested and whether to make distributions. Distributions or payments are generally made only for items or services which will not reduce or eliminate government benefits available to the beneficiary. A special needs trust generally will not give its beneficiary cash. Instead, the Trustee must buy items or services for the beneficiary directly from the vendor or provider. This aspect of trust administration can be cumbersome.

Further, for special needs trusts administered under the jurisdiction of an Ohio probate court, the administration of the trust varies depending on which county probate court has jurisdiction over the trust. Some courts are more restrictive than others with respect to allowable expenditures. Some courts apply restrictions on expenditures that do not apply to guardianships.

The determination of whether a special needs trust is advisable generally involves a weighing of various factors, including the extent of the individual's disability and need for government assistance (now or in the future), the government benefits available, insurance available through Medicare or the Affordable Care Act, the individual's prognosis, the age, health, availability and commitment of family caregivers, the ability of the individual to properly manage his or her own finances, the policies and practices of the probate court with jurisdiction over the trust, and the nature and amount of the individual's assets. Individuals with great needs and few assets are generally more suitable for a special needs trust than those with minor disabilities and substantial assets, but there are no hard and fast rules. Each situation is different and must be evaluated on its own.

It is important to note that social security disability (SSD or SSDI) and Medicare benefits do not depend on whether an individual is impoverished. Entitlement to those benefits for a disabled person under age 62 is *generally* (there are exceptions) based on the individual having a prior work history. An individual who is entitled to receive these benefits will continue to receive them even after obtaining substantial sums in a personal injury action, and the award does not need to be placed in a special needs trust in order to preserve those benefits.

A special needs trust can also be used in conjunction with a Medicare set aside arrangement. The funds "set aside" can be segregated under the trust from the other settlement proceeds and used to pay Medicare related expenses in accordance with rules governing set aside arrangements.

It is also important to note that a special needs trust can be, and frequently is, used in conjunction with a structured settlement. The trust must be the "payee" of the structured settlement payments.

Basic Requirements for Special Needs Trust

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) sets forth the requirements for a special needs trust. These requirements are also part of the statute enacted by the Ohio General Assembly, O.R.C. § 5163.21(F)(1), effective March 9, 2004. The basic requirements for a special needs trust are:

1. Disabled Beneficiary. The trust must be established for the benefit of a disabled individual. When the intended beneficiary of the special needs trust is receiving either Title II (social security disability) or SSI (supplemental security income) benefits as a disabled person, the Ohio Department of Medicaid generally accepts the disability determination made for those programs. If the beneficiary is not receiving those benefits, the Department of Medicaid must then make a further determination concerning disability pursuant to administrative rules adopted under O.R.C. § 5163.02.

2. Under Age 65. The disabled individual must be under the age of 65. Ohio law mandates that the assets of the trust continue to be disregarded for Medicaid eligibility purposes even after the trust beneficiary becomes age 65, provided the individual continues to be disabled, but no assets transferred to the trust after that age will be disregarded.

3. Established by Parent, Grandparent, Legal Guardian, or Court. The trust must be established by the beneficiary's parent, grandparent, legal guardian, or a court. "Court" is not defined in OBRA '93 or the Ohio statute. For a mentally competent individual who has no living parent or grandparent, consideration should be given to having the Court with jurisdiction over the personal injury action establish the trust.

4. Payback Provision. The trust must contain a provision to the effect that, upon the death of the individual, the state will receive all amounts remaining in the trust, up to the amount equal to the total amount of Medicaid assistance paid on behalf of the individual. The payback provision does not encompass SSI (supplemental security payments), SSD (social security disability), Medicare, or other government benefits the beneficiary may have received – it only applies to Medicaid benefits. Amounts remaining after this "payback" can pass to the beneficiary's estate and be distributed in accordance with the beneficiary's Last Will and Testament, or pursuant to the Ohio statute of descent and distribution if the beneficiary has no Will.

Distribution Issues

1) Medicaid. The rules governing Medicaid income determinations are numerous and need to be taken into account before making distributions from a special needs trust. Cash distributions from a special needs trust are unearned income and non-cash distributions are treated under the rules governing in-kind income. O.R.C. § 5163.21(F)(1)(c). In-kind income generally means distributions in the form of food, clothing, or shelter. Various administrative rules have been enacted to determine how to value in-kind income for purposes of determining Medicaid eligibility.

Ohio regulations generally exempt or disregard a number of benefits from being counted as income, including:

- Non-cash Personal Service Benefits – including services not convertible to cash (like lawn mowing, household chores, and grocery shopping).
- Non-cash Medical & Social Service Benefits – including hospitalization, medical or clinical treatment, and legal aid services.
- Third-Party Payments for Non-In-Kind Benefits – generally, if a third party pays a bill directly to a vendor or creditor for anything other than food, clothing, or shelter, it is not counted as income.

If the trust beneficiary is a minor living at home with his parents, and he is not on one of the waiver programs which disregard the income of the parents for Medicaid eligibility purposes,

distributions to the beneficiary's parents, whether as payment for services or reimbursement for goods purchased, could have the effect of disqualifying the minor from Medicaid.

2) Supplemental Security Income (SSI). Although an irrevocable special needs trust is generally not considered a resource for SSI purposes, distributions from the trust can be considered income for purposes of determining SSI eligibility and can reduce or eliminate the amount a beneficiary receives. Income includes both earned and unearned income, and it is broadly defined for SSI purposes as "anything you receive in cash or in kind that you can use to meet your needs for food and shelter." 20 CFR 416.1102. Distributions for purposes other than food and shelter generally will not constitute income for SSI purposes. As with Medicaid eligibility, the rules which determine how income is counted are fairly complex.

Conclusion

The government has provided a substantial benefit for the quality of life of disabled individuals through authorization of special needs trusts. Without such trusts, many individuals would have to spend their entire personal injury award on healthcare expenses. The special needs trust makes it possible for many disabled individuals, some severely disabled, to substantially benefit from their personal injury awards. The trust can provide funds for therapies, custodial care, and other healthcare related expenses that are not covered under government or private insurance available to the disabled individual. The trust can make it possible for the individual to enjoy benefits that others take for granted, such as mobility and living at home.[2] Any time a disabled Medicaid (or SSI) recipient under age 65 receives a personal injury award, a special needs trust should be considered. ■

End Notes

1. ©Michael A. Renne, 2015. This article is intended for educational purposes only and does not provide legal counsel. While it is based on information believed to be reliable, no warranty is given as to its accuracy or completeness.
2. The government may also benefit when the trust facilitates a beneficiary's ability to live at home and avoid the costs of a nursing home or other institutional care.

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 2015-2016 issue. If you don't have time to write one yourself, but have a topic in mind, please let us know and we'll see if someone else might take on the assignment. We'd also like to see more of our members represented in the Beyond the Practice section, so please send us your "good deeds" and "community activities" for inclusion in that section. Finally, please feel free to submit your Verdicts and Settlements to us year-round and we'll stockpile them for future issues.

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

Kathleen J. St. John
Editor-in-Chief

William Eadie is an attorney at the Spangenberg Law Firm and a member of the firm's Business Litigation Group. Will focuses on medical malpractice, nursing home abuse, wrongful imprisonment, and complex commercial litigation including class actions. Will can be reached at william.eadie@spanglaw.com, 877.976.7828, or @williameadie.

Finally, Ohio Can Violate Your Rights For Free

by William B. Eadie

You cannot read the news regularly without seeing another case of someone wrongfully imprisoned being released. Usually the story involves DNA or witnesses recanting; the victim was truly innocent of the crime. In 2003, Ohio recognized another class of wrongfully imprisoned people: those who never should have been tried and convicted, but were because of a "procedural error." Maybe they're innocent, maybe they're not, but the State got it wrong somewhere and that makes the imprisonment wrongful.

For example, an illegal and unconstitutional search of your home reveals contraband. No question the evidence should not be used against you, but it is, you're convicted, you lose your job, reputation, and years of your life.

That's what happened to one of my clients who got in trouble years ago for signing for a box containing drugs. He cooperated with the police, was never charged with a crime, and eventually moved with his wife to Texas. He got a job, had children, paid taxes, even travelled out of the country on vacation.

When he returned to Ohio for a family event over a decade later, a traffic stop revealed a warrant based on a 13 year old secret indictment. The statute of limitations for the drug offense was 6 years. This is a no-brainer: the law, and the Constitution, say the man should not be charged. But Ohio charged him anyway, and convicted him. Although eventually vindicated by an appellate panel, he'd lost his job, his house, his future. He had a record.

That was wrongful.

A trial court found in his favor, designating him a Wrongfully Imprisoned Individual under Ohio's Wrongful Imprisonment Statute, R.C. 2743.48. All he had to do to get some compensation–a set per-year amount, lost wages, attorney fees–was take the judgment to the Court of Claims.

Then the Ohio Supreme Court released the *Mansaray* decision, 2014-Ohio-750.[1] With one decision, all the procedural error cases–over a decade's worth–died.

The procedural error prong of R.C. 2743.48 provided that "(5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release." The procedural error could occur at any time, but it "resulted in the release" after ("subsequent to") the sentencing. This makes obvious sense: if you were released before conviction and imprisonment, you weren't wrongfully imprisoned.

The state had been arguing for a decade–to no success–the "procedural error" itself must occur, not just "result in release," "subsequent to sentencing." The State advanced the straw-man argument that anyone whose conviction was reversed on appeal would be entitled to wrongful imprisonment payments if procedural errors could occur prior to conviction. We know that is not true, because most appellate courts have already taken the position that procedural errors occurring prior to sentencing must be what the General Assembly meant, and yet there has not been a flood of litigation since the 2003 amendment. This is because the claimants still have to meet the other elements–including that they did not plead guilty, and that no prosecuting attorney can or will bring them up on charges–which crosses off true criminal types.

But in *Mansaray*, Ohio's highest Court bought the State's argument, holding that the procedural error must occur after the conviction. How can a procedural error retroactively convert a proper conviction into a wrongful conviction? It cannot. So those folks sent to prison after an illegal or unconstitutional decision by the State are out of luck.

Why is this important? It's only the Constitution.

One of the most serious ways the State can punish someone is to take away their freedom. This is not about the good guys versus the bad guys: everyone must be protected by the Constitution, or no one is. Now the State is free to violate your rights, even send you to prison, for what they illegally (and unconstitutionally) discover, and never has to pay you back at all.

That's wrongful imprisonment. That's injustice.

You can access the *Mansaray* decision here: http://goo.gl/NVVkKf.

You can read more about the decision and comment on my blog post at: http://goo.gl/9eNnth. ■

End Notes

1. *Mansaray v. State*, 138 Ohio St.3d 277, 2014-Ohio-750, 6 N.E.3d 35.

Technology Tips for Attorneys

by William B. Eadie and Andrew J. Thompson

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William: Optimizing Your (Online) Workspace

Trying cases is exciting, exhausting, emotional... and for most lawyers, relatively rare. A lot of your time is probably spent doing all the work that leads to trial. And a lot of that is probably on a computer. Slaving away over a number of large briefs lately, I got to thinking about how I could make my workspace—my computer screen, basically—less of a drag. Something about late nights staring at blue screens is a little soul sucking. Here are a few ideas I came across, a starting place if you're interested in making working on a screen a more enjoyable experience:

- **Decrease resolution and increase distance.** The screens we use are getting better and better resolution. As a result, everything is getting smaller, leading to a lot of leaning closer to the screen. I've dropped the screen resolution and as a result, can lean back further from the screen. Joy. Takes a little getting used to everything seeming giant, but you'll feel better, and have better posture.

- **F.lux: Turn off the "blue screen" by making it... pink.** F.lux is a free app that works on desktops and laptops to adjust your screen color settings based on the time of day. It takes time to get used to the screen seeming pinkish instead of blinding blue-white at night, but it makes long work sessions a lot less stressful on your eyes. Installs in seconds. (www.justgetflux.com)

- **Stand up.** Standing desks, then even treadmill desks, were the rage last year. Fads aside, for a few hundred bucks you can get off your keister for a few hours a day, without changing anything about your current desk setup. How? Check out Ohio company Ergo Desktop's "Kangaroo" desk: it sits on a regular desk, holding your monitor, mouse, keyboard, even your phone, on something that looks like a normal desk pad. When you want to stand, the pneumatics allow you to raise everything to a standing level without effort. I've been using one for a few years, and the fact that you can effortlessly stand or—after working too long, sit—while keeping a "normal" desk is great. See www.ergodesktop.com.

What have you come up with? Share with us by commenting on the blog post for this article at www.clevelandtrialattorneys.org/blog.

Andrew: Is your website Mobile Friendly?

When you access your firm's website from your mobile device or tablet, does the design of the site adjust to the device? If not, your website is probably not "mobile friendly." Soon, that issue is going to become much more important than simple cosmetics. On April 21, 2015, Google will begin to use a new search Algorithm that rewards websites that are compatible with the search device. This means that if a potential client Googles "Ohio personal injury attorney" from a mobile device, mobile-friendly web pages will be displayed in the results ahead of pages that are not mobile-friendly. Google has said that the change in rankings will have a "significant impact" in mobile search results, and that "users will find it easier to get relevant, high quality search results that are optimized for their devices."

If your firm has invested in SEO marketing, and displays at the top of important search terms, you might notice a huge difference after April 21st if a potential client executes the search from a mobile device instead of a desktop. Pages that are not optimized for mobile devices may drop out of the search results, rendering your investment worthless. Google has noted that its new algorithm will analyze mobile compatibility on a page-by-page basis, rather on a website-wide basis. Therefore, pages that are mobile-friendly will still appear in mobile search results, even if every page on a particular site is not optimized.

How do you know if your website is mobile friendly? You can test compatibility on Google's test page: https://www.google.com/webmasters/tools/mobile-friendly/. After April 21st, Google will show a "Mobile Friendly" designation next to each search result. Google has also noted that its algorithm will analyze pages in real time, so your search results will reflect compatibility upgrades as soon as they are made.

(Want to find handy links to all the great stuff listed above, share feedback, or ask questions? Go to your CATA blog now: www.clevelandtrialattorneys.org/blog.)

Recent Ohio Appellate Decisions

by Meghan P. Connolly and Dana M. Paris

Natures Grove Dev., L.L.C. v. Thomas Law Offices, L.L.C., 7th Dist. Case No. 14 BE 23, 2015-Ohio-835.

Disposition: Reversing the Belmont County Court of Common Pleas judgment granting Defendants Thomas Law Offices, L.L.C., et al.'s motion for summary judgment.

Topics: Summary judgment, termination of attorney-client relationship, one year statute of limitations for legal malpractice under O.R.C. 2305.11(A)

Plaintiffs Natures Grove Development and John Green (hereinafter referred to as "Natures Grove") retained Defendants Attorney Thomas and Thomas Law Offices, L.L.C. (hereinafter referred to as "Attorney Thomas") in October, 1999, for legal representation related to the drafting of Natures Grove's condominium association declarations. Efforts were made by Attorney Thomas to cure certain defects in the signature page of the declarations in August, 2003.

Natures Grove was sued by its condominium owners for declaratory judgment and injunctive relief in April, 2007, related to the declarations. Natures Grove sought representation by Attorney Thomas for defense of that lawsuit, but Attorney Thomas declined, citing to a conflict of interest. Natures Grove thus hired another attorney to handle the litigation with the condominium owners. Natures Grove consulted various other attorneys thereafter, each of whom raised concerns over the declarations drafted by Attorney Thomas.

Natures Grove filed suit against Attorney Thomas on November 1, 2011 alleging legal malpractice related to the formation and development of the condominium association. Attorney Thomas moved for summary judgment on the basis that the one-year statute of limitations imposed by R.C. 2305.11(A) had expired. According to Attorney Thomas, the action had accrued no later than April, 2007 when the condominium owners sued Natures Grove. By then, Attorney Thomas argued, the attorney-client relationship had terminated and the lawsuit functioned as a cognizable event under the statute of limitations.

In opposition, Natures Grove argued that the attorney-client relationship continued until the filing of their 2011 lawsuit against Attorney Thomas, despite the fact that attorney Thomas declined representation of Natures Grove in the specific litigation with the condominium owners. Natures Grove argued that Attorney Thomas continued to represent Natures Grove outside of that litigation, in relation to the declarations, transfers of condominium ownership, and tax advice. Natures Grove produced E-Mails from Attorney Thomas in 2011 "indicating he was working on a resolution to problems caused by the Declarations" and similar voicemails.

The trial court found that the attorney-client relationship terminated in April, 2007, when Attorney Thomas declined representation in the litigation, or, at the latest, when Natures Grove's new attorney was retained for representation in the litigation. The court ruled in favor of Attorney Thomas and granted summary judgment to the Defendants.

The Seventh District Court of Appeals conducted a de novo review. The court of appeals found that Natures Grove's affidavit, E-Mails, and voice mail evidence suggested ongoing representation by Attorney Thomas through April, 2011, at least to the extent that a genuine issue of material fact exists regarding when the attorney-client relationship terminated. When the cause of action accrued was therefore a question for the jury. Because a genuine issue of material fact precluded summary judgment, the trial court's decision was reversed and the matter remanded.

Thomas v. Pisoni, 5th Dist. Case No. 2014CA00034, 2015-Ohio-376.

Disposition: Reversing the Stark County Court of Common Pleas judgment denying Plaintiff Gerri Thomas's motion for new trial based on the jury's award being inadequate and contrary to the weight of the evidence.

Topics: Motion for New Trial under Civ.R. 59(A), inadequate jury award

Plaintiff Gerry Thomas was injured in a motor vehicle collision. Her vehicle was a total loss and Defendant Pisoni and his employer, Jerry Loveless dba Loveless Exterminating, admitted liability. The matter was tried to a Stark County jury on the issue of damages only.

Thomas's injuries included chest, knee, back, and shoulder pain, and most significantly, neck injuries including a fracture of the lamina at C6 and instability at C4-5. Thomas presented evidence of approximately $37,000.00 in medical bills with $4,467.00 in out-of-pocket expenses, and $9,400.00 in lost wages.

Thomas's treating doctor testified that her injuries were the proximate result of the collision. In her doctor's opinion, Thomas's resulting medical treatment, which including physical therapy, facet injections, and surgical fusion, was all related to the collision. He also opined that Thomas's activities were limited immediately following the collision and after surgery such that she missed work and lost wages. It was his opinion that Thomas's injuries are permanent and that she will likely require future treatment. The Defendants did not offer contrary medical testimony to challenge causation.

After deliberating, the jury awarded Thomas a total of $2,114.11. Of the total, $700 was for lost wages, $214.11 was reimbursement for her cervical collar, and $1,200.00 was for pain and suffering. Notably, no damages were awarded to Thomas for the cost of medical treatment.

The Court noted that even the appellee "agreed the jury should compensate appellant for her lost wages, medical treatment, and pain and suffering in the six weeks following the accident and recommended to the jury 'something in the neighborhood of $40,000.'"

Thomas moved the trial court for JNOV and in the alternative, for a new trial pursuant to Civ.R. 59(A). The Court denied Thomas's motion in both respects. Thomas's first assignment of error on appeal specifically addressed the Trial Court's denial of her Motion for a New Trial.

Under Civ.R. 59(A), "[a] new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds: (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice; *** (6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case; ***".

The Court agreed with Thomas that the jury's verdict was inadequate and contrary to the weight of the evidence. The Court stated, "[o]ur review demonstrates that jury's verdict was inadequate because there was no evidence disputing the severity of the collision; no evidence, expert or otherwise, disputing the collision neither solely caused appellant's fractured neck and subsequent surgery; nor disputing the collision resulted in limited life functions, pain and discomfort. The jury's award did not fully compensate appellant and denied her justice."

Thomas's first assignment of error was sustained and the matter was remanded for a new trial, rendering her second assignment of error moot.

Turner v. Cathedral Ministries, 6th Dist. Case No. S-14-020, 2015-Ohio-633.

Disposition: Reversing the Sandusky County Court of Common Pleas judgment granting Defendant Cathedral Ministries' motion for summary judgment.

Topics: Summary judgment, duty owed by owner/occupier, status as licensee v. business invitee

Plaintiff Tonya Turner was walking through Defendant Cathedral Ministries' church in order to attend a free religious education course. "As she approached the classroom, she tripped on a two-by-four that was stacked along a wall among other two-by-fours of varying lengths and was protruding into the walkway." As a result of tripping on the two-by-four, Turner fractured her right foot. Turner's recovery was complicated by a staph infection and MRSA.

Cathedral Ministries argued to the trial court that it was entitled to summary judgment because Turner's status on church property was that of a licensee. If Turner was a licensee, Cathedral Ministries merely owed her a duty only to refrain from willful and wanton misconduct. There was no evidence that Cathedral Ministries' conduct rose to the level of willful and wanton. The trial court agreed with Cathedral Ministries that Turner was a licensee and therefore granted its motion for summary judgment.

Turner appealed the trial court's decision. The Sixth District Court of Appeals conducted a de novo review to determine Turner's status on Cathedral Ministries' property on the day of her injury. Turner argued that she was a business invitee of the church, not a mere licensee, and so Cathedral Ministries owed Turner a duty to exercise ordinary care and protect her by maintaining the premises in a safe condition. The Court of Appeals agreed with Turner.

"Business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Turner* at ¶12 (internal citations omitted). The court was aware of only one Ohio case in which a person's status on church property while attending a church-sponsored activity was analyzed specifically, namely, *Freshwater v. Piqua Baptist Church*, 2nd Dist. Miami No. 88-CA-30, 1989 WL 33106 (Apr. 7, 1989). Following that case, the Court was persuaded by the fact that Cathedral Ministries "invited participants, required them to sign up for the class, and expected them to attend once they committed." The Court was also persuaded that the church benefitted from attendance at the free classes. "[W]hile

the church may not be engaged in economic transactions in the sense that church attendees pay money and walk away with a product, the church sought to increase participation and expand its congregation and it used these free religious courses as one means of accomplishing this goal."

Because Cathedral Ministries invited Turner to attend the class, and benefitted from such attendance, the Court found that Turner was a business invitee on the date that she fell. Therefore, Cathedral Ministries owed Turner a duty of ordinary care to maintain the premises in a safe condition. The matter was reversed and remanded to the trial court for a determination of whether Cathedral Ministries breached its duty of ordinary care owed to Turner as a business invitee.

Kobasko v. Jo's Dairy Dream, L.L.C., 7th Dist. Case No. 13 BE 35, 2015-Ohio-496.

Disposition: Reversing the Belmont County Court of Common Pleas judgment granting Defendant Jo's Dairy Dream, LLC's motion for summary judgment.

Topics: Summary judgment, step-in-the-dark, open and obvious rule, attendant circumstances

Plaintiff David Kobasko delivered ice cream to Defendant Jo's Dairy Dream (hereinafter referred to as Jo's) for the first time around 4:00 a.m. on July 19, 2010. Kobasko hauled about 250 lbs. of ice cream on a dolly through an entrance to Jo's. Once inside, Kobasko walked backwards pulling the dolly along for about four feet before he fell down a staircase and was injured.

In the trial court, Jo's argued that the staircase was open and obvious entitling Jo's to summary judgment. Kobasko argued that issues of fact remained as to whether poor lighting and the proximity of the staircase to the entrance constituted attendant circumstances precluding summary judgment.

In granting summary judgment to Jo's, "[t]he trial court found that the darkness on the night Kobasko fell was open and obvious. It further found the darkness was easily resolvable and, therefore, the stairs were easily discoverable and avoidable." Kobasko timely appealed.

On review, the Seventh District Court of Appeals acknowledged that "the open and obvious rule does not apply if attendant circumstances prevent the invitee from discovering the otherwise open and obvious danger." The court conducted a de novo review and, construing the facts in favor of Kobasko, presumed that the store was in fact dimly lit on the morning of the fall and that the stairway was only four feet from the threshold of the entrance door. According to the court of appeals, these attendant circumstances created a genuine issue of material fact that should be left for the jury. Summary judgment for Jo's was reversed and the matter was remanded.

This decision is in line with prior Seventh District cases in which poor lighting conditions could reasonably be considered attendant circumstances that prevent an invitee from discovering what is otherwise an open and obvious danger. *Kobasko* citing *Boston v. A&B Sales, Inc.*, 7th Dist. No. 11 BE 2, 2011-Ohio-6427 and *Smith v. Gracon*, 7th Dist. No. 05 MA 125, 2006-Ohio-886.

Mandelbaum v. Gemma Cassadesus Smith, 8th Dist. Cuyahoga No. 101888, 2015-Ohio-1035.

Disposition: Affirming grant of summary judgment to defendants because plaintiffs failed to present any evidence that the landlord had notice of the condition of the porch floorboards prior to plaintiff's injuries.

Topics: Landlord/Tenant; premises liability; duty to inspect; defective condition; actual and constructive knowledge.

Plaintiff was an invited guest on premises that were owned and managed by defendant. While on the premises, the plaintiff walked on the wooden porch and the floorboards collapsed, causing the plaintiff to fall through and sustain injuries. After the accident, it was apparent that the floorboards were rotten, but this fact was not noticeable prior to the incident. The defendant filed a motion for summary judgment arguing that she was never put on notice of the condition of the wooden floorboards. The trial court granted the defendants' motion for summary judgment and plaintiff appealed.

R.C. 5321.04(A) provides that a landlord is obligated to do the following:

1. Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;

2. Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition; and

3. Keep all common areas of the premises in a safe and sanitary condition.

The duties set forth in R.C. 5321.04(A)(1)-(3) apply to guests of tenants as well. Although a landlord will be held negligent *per se* if found to have violated any of the duties set forth in R.C. 5321.04, "a landlord will be excused from liability if she neither knew nor should have known of the factual circumstances that caused the violation." *Sikora v. Wenzel*, 88 Ohio St.3d 493, 727 N.E.2d 1277 (2000). Here, the plaintiff did not present any evidence that the defendant had actual knowledge of the condition of the hazardous porch. However, when the plaintiff argued that the landlord should have known of the hazardous condition if she had inspected the premises, the court rejected plaintiff's argument. Finding that there was no constructive knowledge, the court reasoned that "R.C. 5321.04 does not impose an affirmative duty on a landlord to inspect the premises to find prospective dangers or code violations." *Hallowell v. Aplis*, 8th Dist. Cuyahoga No. 100275, 2014-Ohio-1084. Since the defendant did not have actual or constructive knowledge of the hazardous condition of the porch and would not have known of the condition by simply viewing the porch prior to the collapse, the court held that the defendant did not violate R.C. 5321.04 and that granting summary judgment was proper.

Carte v. The Manor at Whitehall, 10th Dist. No. 14AP-568, 2014-Ohio-5670

Disposition: Reversing trial court's ruling that dismissed the lawsuit and finding that the action against the nursing home involved a common negligence claim and not a medical claim.

Topics: Nursing home; negligence claim; medical claim; R.C. 2305.113(E)(3)(b)

The decedent, 76 year old Aaron Carte, fell while being transferred to the bathroom and struck his head, causing him to suffer fatal injuries. The estate filed the lawsuit alleging both common law negligence and medical negligence claims. The complaint also included an affidavit of merit that was authored by Joahnna Dwan Evans Budge, RN, CCRN, CLNC with an attached opinion letter. The nursing home filed a motion to dismiss contending that the affidavit of merit failed to comply with Civ. R. 10(D) and the trial court agreed.

On appeal, the plaintiffs raised two assignments of error. The first assignment of error addressed the issue of whether or not the conduct of transferring a nursing home patient from the bathroom to his bed was considered a medical claim or a negligence claim. In short, the court found that the lawsuit involved a common negligence claim. Pursuant to R.C. 2305.113(E)(3)(b), a

> "medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following:
>
> ***
>
> (b) Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies:
>
> (I) The claim results from acts or omissions providing medical care;
>
> (ii) The claims resulting from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care or treatment.

When it comes to nursing home cases, the legislature has defined a "medical claim" to include any lawsuit against any nursing home which "arises out of the medical diagnoses, care, or treatment of any person." R.C. 2305.113(E)(3)(b). In a recent decision analogous to the present case, *Eichenberger v. Woodlands Assisted Living Residence, LLC*, 10th Dist. No. 14AP-272, 2014 Ohio 535, the plaintiff was a patient at an assisted living facility and fell out of his wheelchair while being transferred by an employee to the dining room. The court found the case to be distinguishable from *Rome v. Flower Mem. Hosp.*, 70 Ohio St.3d 14, 635 N.E.2d 1239 (1994) since the "decedent's injuries did not occur during her transportation to or from a medical test, procedure or treatment." *Id.* at ¶20. When a nursing home patient is transported by a staff member to the dining room, that conduct is "neither ancillary to nor an inherently necessary part of any prescribed care or treatment" and thus, not considered a medical claim under the statute. *Id.*

The court also heavily relied upon *McDill v. Sunbridge Care Ents., Inc.*, 4th Dist. No. 12CA8, 2013-Ohio-1618 which involved a nursing home patient who was assisted to the bathroom by two aides, but sustained injuries when she fell while washing her hands. The plaintiff argued that the action was one of common law negligence against the aides. The

nursing home argued that the lawsuit involved a medical claim since the it arose out of the failure of the staff to follow medical instructions to assist the patient at all times. Rejecting the defendant's argument, the Court found that the plaintiff's injuries arose when she had to use the bathroom and at no point was she in the process of receiving medical diagnosis, care or treatment.

Based upon Ohio's current case law, the Court found that the claim involved ordinary negligence and further emphasized that not all care that transpires in a hospital or nursing home involves medical care within the meaning of R.C. 2305.113(E)(3)(b).

Plaintiff's second assignment of error was that Nurse Budge, plaintiff's expert who provided an affidavit of merit, was not qualified to opine on whether defendant's alleged breach of the standard of care proximately caused injury to the plaintiff.

In this case there was "no serious debate that The Manor at Whitehall failed to abide by the standard of care to which it agreed." *Id*. at ¶31. The defendant, however, argued that Nurse Budge was not qualified to opine that the defendant's alleged breach of the standard of care proximately caused injury to the plaintiff's decedent. The court disagreed, finding that since the issue of proximate cause in this case was "within the common knowledge of a layperson, Nurse Budge could proffer an opinion that [decedent's] injuries were caused by the negligence of the staff at The Manor at Whitehall." *Id*. at ¶37. The court stated that Nurse Budge's opinion that the staff's negligence caused the fall was sufficient to support the allegation that the fall caused injuries to the decedent. The court added that "[a]lthough Nurse Budge is arguably not competent to establish that the subarachnoid hemorrhage caused [decedent's] death after the fall, she was qualified to express the opinion that the staff's alleged breach of duty had 'caused injury to the plaintiff' within the meaning of Civ. R. 10(D)(2)(a)(iii)." *Id*. at ¶38.

Carter v. Reese, 12th Dist. No. CA2014-04-095, 2014-Ohio-5395

Disposition: Affirming the trial court's grant of summary judgment, the Court held that R.C. 3205.23 protects individuals from civil liability who provide emergency care or treatment and is not limited to *emergency* medical care and treatment.

Topics: Good Samaritan statute, emergency medical care and treatment.

On April 24, 2012, plaintiff, a truck driver, pulled his tractor into a loading dock area. During the process of connecting the tractor and the trailer, plaintiff's leg became stuck between the loading dock and trailer. Hearing the plaintiff's cries for help, the defendant approached the plaintiff and agreed to move the truck forward in order to free his leg. However, the defendant ultimately put the truck in reverse, causing the truck to roll backwards and injuring the plaintiff's leg so seriously that it had to be amputated above the knee. The plaintiff filed suit in Butler County and claimed that the defendant failed to exercise reasonable care when operating the semi-truck. The defendant moved for summary judgment and, finding that the defendant was protected under R.C. 2305.23, Ohio's Good Samaritan statute, the court granted his motion.

On appeal, plaintiff argued that the defendant should not be afforded protection under R.C. 2305.23 because he was not offering emergency *medical* care at the time of the incident. R.C. 2305.23, states:

> No person shall be liable in civil damages for administering emergency care or treatment at the scene of an emergency outside of a hospital, doctor's office, or other place having proper medical equipment, for acts performed at the scene of such emergency, unless such acts constitute willful or wanton misconduct.

Like the majority of the states, Ohio's law extends immunity to <u>any</u> layperson who can satisfy the statutory requirement. However, there is an exception. A lay person will be held liable if his or her actions constitute willful or wanton misconduct.

Plaintiff relied heavily on *Butler v. Rejon*, 9th Dist. Summit No. 19699, 2000 Ohio App. LEXIS 285 (Feb. 2, 2000). In this case, Butler and his wife stopped while driving when they noticed a disabled vehicle on the roadway. While Butler was helping the driver of the disabled vehicle, Rejon collided into the rear of Butler's vehicle. As Butler helped free his wife from their car, he subsequently aggravated a pre-existing back injury and brought suit against Rejon. At trial, the jury found in favor of Butler, but found him 35% comparatively negligent. Butler appealed and argued that the trial court failed to instruct the jury on the Good Samaritan statute. The Ninth District ruled that "in order to be covered by the Good Samaritan statute, one must be providing emergency medical care or treatment to another individual. R.C. 2305.23. Consequently, R.C. 2305.23 shields a good samaritan from civil liability in an action brought by the person to whom emergency medical care was rendered." *Butler v. Rejon*, 2000 Ohio App. LEXIS 285 at *3.

However, the instant court found *Butler* distinguishable since its analysis focused on whether the Good Samaritan statute provides coverage to third parties, and since this case did not involve third parties, the court found that the language was dicta and, therefore, not controlling.

The common meaning of "emergency" is an "unforseen combination of circumstances or the resulting state that calls for immediate action." *Webster's Third New International Dictionary* 741 (1993). The common meaning of "care" is to "provide for or attend to needs or perform necessary personal services." *Id*. at 338. Here, the court stated that "an emergency clearly existed when a man's leg is pinned between his semi-truck and a loading dock, yelling so loud for help he is heard across the street" and found that the defendant's conduct of attempting to move the truck constituted "emergency care."

Lastly, the court had to determine whether the defendant acted in a willful and wanton manner in his attempt to rescue the plaintiff. Willful conduct is an "intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Anderson v. Massillon*, 134 Ohio St.3d 380, 938 N.E.2d 266. Wanton misconduct is more than mere negligence; it is the failure to exercise any care whatsoever. The court found that the defendant's actions of permitting the semi-truck to roll backwards did not amount to willful or wanton misconduct and, therefore, afforded the defendant protection under R.C. 2305.23.

Dissent: Judge Ringland, dissenting, found the language in *Butler* to be persuasive on the issue of whether R.C. 2305.23 only protects individuals who provide emergency *medical* care or treatment. Judge Ringland believed that since the defendant failed to provide emergency medical care to the plaintiff, he should not be held immune from liability under the statute.

Robinson v. The Dance Studio, et al., 8th Dist. Cuyahoga No. 101750, 2015-Ohio-320

Disposition: Reversing grant of summary judgment to defendants on the issue of whether the aisle lighting was to serve as a warning and whether a defective lighting existed.

Topics: Premises liability, aisle path lighting, open and obvious doctrine, step into the dark rule.

Plaintiff attended a recital that was held in the Tri-C auditorium. During a break in the performances, the plaintiff stood up to go up the aisle stairs, which were sufficiently illuminated. As she began to descend the stairs to return to her seat, the stage lights dimmed, to the point that it was completely dark in the auditorium. Plaintiff attempted to navigate the stairs, but ultimately fell down the stairs, causing her to sustain injuries. Although the stage and house lights were dimmed, the aisle lights were illuminated, except for the last step, which plaintiff tripped over. The last step was supposed to be illuminated, but was not at the time of plaintiff's fall. There was a dispute as to whether the aisle light was illuminated, significantly dimmed, or inoperable. The trial court granted summary judgment in favor of the defendants based upon the open and obvious doctrine and the step-in-the-dark rule.

Generally, a business ordinarily owes its invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 788 N.E.2d 1088. In this case, there was a lighting system put into place to warn patrons of the stairs. However, the issue on appeal was whether a defect in the aisle lighting existed which caused the plaintiff to fall. The Dance Studio's representative testified that the light on the last step was not illuminated, therefore implying that there was a defect. The Court found that there was sufficient evidence to create a genuine issue of material fact as to whether a hazardous condition, a defective aisle way lighting system, existed at the time of the injury and reversed and remanded the issue to the trial court.

However, the Court did emphasize that the open and obvious doctrine may still apply in cases where it's undisputed that the aisle lighting system is in proper working condition or where the aisle light served as a warning. ■

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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**
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Rocky River, Ohio 44116
(440) 333-3800; Fax (440) 333-1452
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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.*

Glenn Munger v. Rocky Top Building Products, et al.

Type of Case: Premises - Forklift backing accident

Settlement: $2M

Plaintiff's Counsel: John R. Liber II, Thrasher Dinsmore & Dolan, 1400 W. 6th Street, Suite 400, Cleveland, Ohio, (216) 255-5431), and Jeffrey H. Krasnow, Roanoke, Virginia

Defendant's Counsel: Kenneth J. Ries, Johnson Ayers, Roanoke, Virginia

Court: USDC Roanoke, Virginia, Case No. 7:14-cv-00448, Judge Contrad

Date Of Settlement: April 1, 2015

Insurance Company: Lumberman's Mutual of Indiana

Damages: Compound, comminuted right foot and ankle crush injury/ankle fusion - 59 years old

Summary: Plaintiff was a truck driver picking up a load of lumber in Virginia. As he was strapping down the lumber on his flat bed after loading, a tow motor operator backing up from an aisle of stacked lumber (called the "hole") with a load of landscape timbers ran over Pltf's foot crushing it under the rear wheel.

Plaintiff's Expert: Lawrence A. DiDomenico, D.O. (Treating Surgeon); Robert Reed (Lift Equipment); Douglas Muccio, Ph.D. (Treating Psychologist); John Newman (Vocational - Roanoke, VA); Larry Allen Lynch, Ph.D. (Economist - Roanoke, VA)

Defendants' Expert: None

Bluemile, Inc. v. Hartford Casualty Ins. Co.

Type of Case: First-party business income loss claim

Verdict: $2,252,928

Plaintiff's Counsel: Bob & Bobby Rutter, 4700 Rockside Road, #650, Cleveland, Ohio, (216) 642-1425

Defendant's Counsel: James Nolan, Smith Rolfes & Skavdahl

Court: Franklin County, Case No. 12 CV 5597

Date Of Verdict: March 4, 2015

Insurance Company: Hartford Casualty Ins. Co.

Damages: Business income loss

Summary: The insured provides internet and cloud services to a variety of customers. It suffered a BI loss when a contractor caused an electrical surge that caused the insured's servers to fail, resulting in customers losing their Internet and phone services. Consequently, unhappy customers sent less business and the insured suffered a loss of business income, and submitted a claim to Hartford.

Plaintiff's Expert: James Paskell, Liability and Litigation Management, Solon, Ohio (Forensic Accounting)

Defendant's Expert: Margaerite Hart, Matson, Driscoll & D'Amico, Pittsburgh, Pennsylvania (Forensic Accounting)

Presuit Claim

Type of Case: UIM

Settlement: $50,000 (policy limits)

Plaintiff's Counsel: Jarrett J. Northrup, Jeffries, Kube, Forrest & Monteleone, (216) 771-4050

Defendant's Counsel: N/A

Court: N/A

Date Of Settlement: March 2015

Insurance Company: Grange

Damages: Contusions to torso, laceration, aggravation of unsymptomatic degenerative hip condition requiring hip replacement surgery.

Summary: Claimant was driving to work and struck a newspaper delivery vehicle that was on the wrong side of the road. The liability insurer of the delivery person denied coverage on "business pursuits" exclusion. 50k UIM policy and 5k medpay was available.

Plaintiff's Expert: Treating PCP Joseph DiBlasio; Treating Orthopedic Surgeon Kraig Solak of Precision Orthopedics

Defendant's Expert: None

Jane Doe v. Dr. IM and Dr. Ortho

Type of Case: Medical Negligence

Settlement: $1,000,000

Plaintiff's Counsel: John A. Lancione, 619 Linda Street, Rocky River, Ohio 44116, (440) 331-6100

Defendants' Counsel: Withheld-Confidential

Court: Withheld-Confidential

Date Of Settlement: February 2015

Insurance Company: Withheld-Confidential

Damages: Loss of right arm at the shoulder

Summary: Plaintiff had a right brachial artery thrombosis. She was evaluated by her internist and an orthopedic surgeon. She had obvious signs and symptoms of upper extremity ischemia. Both defendants failed to make the correct diagnosis. Her arm ultimately became non-viable and was amputated.

Plaintiff's Expert: Robert Buynack, M.D. (Internal Medicine); Parish Hosalkar, M.D. (Orthopedic Surgery); Sunil Rayan, M.D. (Vascular Surgery)

Defendants' Expert: None identified prior to mediation

Carlos Velazquez v. Progressive Specialty Insurance Company

Type of Case: Underinsured motorist claim arising out of an automobile collision

Verdict: $105,000 for Carlos Velazquez for personal injuries; $15,000 for Isabel Velazquez for loss of consortium

Plaintiffs' Counsel: David P. Miraldi, Esq., Miraldi & Barrett Co. LPA

Defendant's Counsel: Progressive Insurance Company: Kelly M. Jackson, Esq.

Court: Lorain County, Case No. 14CV183097, Judge Thomas J. Pokorny/Magistrate James Blaszak

Date Of Verdict: January 16, 2015

$120,000. $25,000 to be deducted based on prior recovery against the underinsured motorist insurance company

Summary: Plaintiff was a 35 year old man who was struck on the driver's side by an underinsured motorist. He was seen at the emergency room where he complained of neck, left shoulder, and low back pain. He was followed by his family doctor and then received physical therapy for several months. His neck pain improved, but his low back pain got worse. An MRI showed a tear of the annulus fibrosis at the L2-L3 interspace and a bulging disc at L3-L4. A neurosurgeon determined that the condition was not surgical, but referred him for epidural injections. Plaintiff had 9 epidural injections over the next 3 years.

Plaintiff was a Mexican immigrant who had worked at the Elyria Foundry for eight years. He remained on light duty since the car crash and co-workers did any significant lifting for him. Without this help, he feared that he would lose his job. This was verified by a co-worker. Plaintiffs' expert testified that the disc injuries were caused by the collision and that the pain and future treatment was more likely than not.

The defense was that plaintiffs' injuries were not significant and he was still able to do his job.

Prior Negotiations: Defendant offered $5,000 in underinsured motorist benefits and advanced $5,000 in med pay as part of the underinsured motorist claim. Plaintiffs had received $25,000 from the underinsured motorist's liability insurance. Plaintiffs' lowest demand was $60,000 in new money.

Plaintiffs' Expert: Dr. Charles Choi, M.D. (Pain Management)

Defendants' Expert: None

Adam Georskey, et al. v. Safeco Insurance Company of Illinois, et al.

Type of Case: Breach of Contract

Verdict: $650,000; Total Recovery with Settlement: $675,000

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

Defendant's Counsel: William M. Harter, Katie Klingenhalfer, Frost Brown Todd, LLC

Court: Lake County, Case No. 13CV002380, Judge Joseph Gibson

Date Of Verdict/Settlement: December 12, 2014

Insurance Company: Safeco Insurance Company of Illinois

Summary: This was a UM/UIM case that included claims for breach of contract, breach of fiduciary duty and bad faith. In May 2011, the Plaintiffs Adam and Tracey Georskey entered into insurance contracts with the Defendants Safeco Insurance of Illinois and Safeco Insurance Company of America (hereinafter "Safeco"). They purchased two insurance policies for a total level of protection of $1,500,000. On November 7, 2011, 47 year old Adam suffered significant injuries to his hands in an automobile crash caused by an underinsured driver. The driver, insured through State Farm, negligently operated her vehicle, crossed the median, and struck Mr. Georskey's ambulance which he was driving as a paramedic/firefighter for his employer at the time. Mr. Georskey's hands were on the steering wheel as his vehicle was catapulted into the side of the bridge spinning the wheel and taking his hands with it. The trauma of the impact caused several broken bones in his right hand and one in his left. He had to endure a major surgery where six pins were inserted into his bones to try to put his hand back together. The trauma also triggered a right carpal tunnel syndrome which also required surgery. A second surgery was then needed to remove all the pins.

His treating surgeon testified that his injury to his right hand was permanent as were his pain and deficit, and that he will more likely than not need conservative treatment until he will have to undergo two future separate surgeries to his right hand at two separate times in probably 10 to 15 years. Each of those surgeries would come with pain, three months off work, and three months of physical therapy. He testified in no uncertain terms that even with the surgeries, Adam's hand will never return to normal function. He had residual issues with gripping and fine motor skills in the hand, but was still able to use it. The economic damages presented to the jury included:

Past Medical Expenses	$ 47,558.20
Future Medical Expense:	$ 57,964.66
Past Lost Wages	$ 33,167.28
Future Lost Wages:	$ 41,081.26
Past Domestic Services	$ 25,240.71
Future Domestic Services	$ 366,250.00
Total:	**$ 571,262.11**

(The basis for the domestic service claim stemmed from the fact that Mr. Georskey did all the maintenance on various rental properties before his injury and had to hire help thereafter. His workers were called as witnesses.)

Pre-suit, a global demand of $600,000 was communicated to both insurance companies. The Plaintiffs then settled the

case with the tortfeasor for her limits of $100,000. Safeco made several offers with its last offer being $127,500.00. At one point during the negotiations, Plaintiffs reduced their demand to $300,000.00.

One interesting point in the case was the unexpected turn of events in the defense medical examination. Safeco selected Dr. Michael Keith of MetroHealth Medical Center to conduct the exam. Mr. Georskey attested that in the examination, Dr. Keith stated to Mr. Georskey that the injuries to his hands were significant, his case was "airtight," that he had the utmost respect for his surgeon, and that whatever the insurance company was offering, it was too low. Thereafter, Safeco withdrew Dr. Keith and attempted to obtain leave for a new defense medical examination which was denied. They had no expert to refute the Plaintiffs' injuries other than Dr. Keith who was not on its witness list. Instead, the plaintiffs included Dr. Keith on their witness list and subpoenaed him to trial to cross-examine him on the admissions made.

The jury came back with a total award of $650,000 on the breach of contract claim, but said no to the bad faith allegation. In the end, Safeco paid its share of what was owed in the amount of $550,000, plus $25,000 in interest, for a total resolution of $675,000.

Plaintiff's Expert: Laszlo S. Harmat, D.O., Deborah B. Pawlak, P.T., Precision Orthopedics, Chardon, Ohio

Defendants' Expert: None

Linda Taurisano v. Frank DiMarco, et al.

Type of Case: MVA

Settlement: $195,000.00

Plaintiff's Counsel: John R. Liber II, Thrasher Dinsmore & Dolan, 1400 W. 6th Street, Suite 400, Cleveland, Ohio, (216) 255-5431)

Defendant's Counsel: N/A

Court: N/A - MVA occurred in Geauga County

Date Of Settlement: November 15, 2014

Insurance Company: Safeco

Damages: Right knee meniscal tear - PMHx rt. Knee arthroscopy appx 10 years before - 61 years old

Summary: Plaintif was t-boned at high speed. Car totaled. Taken by EMS to Geauga Hosp. with multiple contusions, scrapes and soft tissue complaints. Could not perform an MRI due to her pacemaker. Rt. knee swelling progressed and exploratory arthroscopy revealed Grade IV chondral injury with a "minimal" tear in the posterior horn of the knee, with a loose cartilage fragment. She eventually had a total knee replacement which the surgeon opined was "expedited" due to the MVA.

Plaintiff's Expert: Gregory Sarkisian, M.D. (Treating Surgeon); $25K "Robinson Number", $82K meds billed - more than half of which are due to TKR.

Defendants' Expert: None

Brian Heckman v. Sandusky Harbor Marina, et al.

Type of Case: Premises - Independent Contractor Liability

Settlement: $300,000.00

Plaintiff's Counsel: John R. Liber II, Thrasher Dinsmore & Dolan, 1400 W. 6th Street, Suite 400, Cleveland, Ohio, (216) 255-5431

Defendant's Counsel: Samuel G. Casolari, Marshall Dennehey

Court: Trumbull County, Case No. 2012 CV 1478, Judge Peter J. Kontos

Date Of Settlement: September 1, 2014

Insurance Company: AIG

Damages: Compound, comminuted right arm/elbow/shoulder fracture - ORIF 36 years old

Summary: Pltf was employed by I/C sprinkler fitting and repair company. He was part of a crew to repair a leak in one of Def.'s storage barns. As part of a casual agreement between the Marina and Pltf's company, the Marina provided the man-lift device for the work. Instead of renting suitable vertical lift equipment, the Marina "jerry-rigged" an aluminum shipping container on the forks of a tow motor. When raised to 15 feet, the container tipped sending Pltf to the floor.

Plaintiff's Expert: Raymond Boniface, M.D. (Treating Surgeon); Robert Reed (Lift Equipment); John F. Burke, Jr. (Economist)

Defendants' Expert: None

Thurman Trowbridge v. Franciscan Univ., et al.

Type of Case: Slip-Fall

Settlement: $1.25M

Plaintiff's Counsel: John R. Liber II, Thrasher Dinsmore & Dolan, 1400 W. 6th Street, Suite 400, Cleveland, Ohio, (216) 255-5431)

Defendant's Counsel: Matthew P. Mullen, Krugliak, Wilkins

Court: Jefferson County, Case No. 11 CV 713, Judge Joseph Bruzzese, Jr.

Date Of Settlement: August 1, 2014

Insurance Company: Cincinnati

Damages: Below the waist, incomplete paralysis, 66 years old

Summary: Pltf was a security guard performing rounds when he entered a vinyl tile floor stairwell that, unbeknownst to him, had recently been wet mopped. The shiny glare of the polished floor masked the appearance of wetness as he descended the stairs. The absence of wet floor signs was a heated issue. He slipped on a wet stair, struck the back of his neck on the edge, resulting in cervical compression fractures.

Plaintiff's Expert: Adam S. Kantar, M.D. (Treating Neurosurgeon); Robert F. Naples, D.O. (PCP); Don Ryan, R.N. (Life Care Plan); John F. Burke, Jr. (Economist)

Defendants' Expert: None

Geneva Massie, et al. v. Chrysler, LLC, et al.

Type of Case: Personal Injury / Product Liability - Motor Vehicle

Settlement: Confidential

Plaintiff's Counsel: James A. Lowe, Lowe, Eklund, Wakefield Co., L.P.A., 1660 West Second Street, Suite 610, Cleveland, Ohio 44113, (216) 781-2600; M. Shawn Dingus, Plymale & Dingus, LLC, 250 Civic Center Dr., Suite 600, Columbus, Ohio 43215, (614) 542-0220.

Defendant's Counsel: William M. Harter, Frost, Brown, Todd LLC, 10 W. Broad Street, Suite 2300, Columbus, Ohio 43215, (614) 464-1211 (Attorneys for Defendants Magna Seating of America, Inc.); Douglas W. Robinson and Erin L. Sparkuhl, Shook, Hardy & Bacon, LLP, Jamboree Center, 5 Park Plaza, Suite 1600, Irvine, California 92614, (949) 475-1500 (Attorneys for Defendants Magna Seating of America, Inc. and Magna International of America, Inc.); Lawrence A. Sutter, James A. Popson and Kevin W. Kita, Sutter O'Connell, 3600 Erieview Tower, 1310 East 9th Street, Cleveland, Ohio 44114, (216) 928-2200 (Counsel for Defendant, Chrysler Group, LLC); Roger H. Williams, Williams, Moliterno & Scully Co., LPA, 425 West Schrock Road, Suite 201, Westerville, Ohio 43081, (614) 495-3900 (Attorney for Defendant Bryon Woerner)

Court: Delaware County, Case No. 13CVB060480, Judge Everett H. Krueger

Date Of Settlement: June 19, 2014

Insurance Company: Zurich Insurance Company

Damages: Plaintiff Geneva Massie suffered a closed head injury, loss of consciousness, rib fractures and thoracic spine transverse process fractures with epidural hematoma, and severe spinal canal cord compression, rendering her a paraplegic.

Summary: This case arose out of a rear impact to a 2002 Chrysler Minivan. The Plaintiff was a seatbelted front seat passenger and was thrown rearward when her seat broke, striking her grandson in the seat behind her. The Plaintiff sustained a severe spinal cord injury, resulting in complete paraplegia and periodic loss of the use of her right arm. The Defendants were the driver of the striking vehicle, Chrysler Group, LLC, and the supplier of the defective seat, Magna Seating of America, Inc. The case was settled at Mediation.

Plaintiff's Expert: Robert Caldwell (Lafayette, CO); Donald Phillips (Lansdale, PA); Kenneth Saczalski (Newport Beach, CA); Dennis Deegan, Ph.D. (Easton, PA 18040); Paul R. Lewis, Jr. (Roswell, GA); Paul V. Sheridan (Dearborn, MI)

Defendant's Expert: Gregory D. Stephens (Gig Harbor, WA); David C. Viano, M.D., Ph.D. (Bloomfield Hills, MI); Andrew E. Levitt (Torrance, CA); David M. Blaisdell (Gig Harbor, WA); Robert D. Banks, B.Eng., M.D. (San Antonio, TX); Michelle M. Vogler, Ph.D., P.E. (Novi, MI); David J. Weiner and Victoria Wilkerson (Los Angeles, CA); Kathryn L. Doeschot (Thorton, CO)

Julio Alfredo Melgar, et al. v. Chrysler, LLC, et al.

Type of Case: Personal Injury / Product Liability - Motor Vehicle

Settlement: Confidential

Plaintiff's Counsel: James A. Lowe, Lowe, Eklund, Wakefield Co., L.P.A., 1660 West Second Street, Suite 610, Cleveland, Ohio 44113, (216) 781-2600; J. Randall Jones and Carol Harris, Kemp, Jones & Coulthard, LLP, 3800 Howard Hughes Parkway, 17th Floor, Las Vegas, Nevada 89169, (702) 385-6000; Daren G. Mortenson, Daren G. Mortenson, P.C., 124 West 1400 South, Suite 206, Salt Lake City, Utah 84115, (801) 949-7941.

Defendant's Counsel: Douglas W. Robinson, Darth K. Vaughn and Erin L. Sparkuhl, Shook, Hardy & Bacon, LLP, Jamboree Center, 5 Park Plaza, Suite 1600, Irvine, California 92614, (949) 475-1500; Brian K. Terry, Thorndal, Armstrong, Delk, Balkenbush & Eisinger, 1100 East Bridger Avenue, Las Vegas, NV 89101, (702) 366-0622

Court: Eighth Judicial District Court - Nevada, Clark County District Court Case No. A565284 - Dept. No. XVI, Judge Timothy C. Williams (District Judge)

Date Of Settlement: March 27, 2014

Insurance Company: Zurich Insurance Company

Damages: Severe spinal cord injury at the C3-C6 level with anterior subluxation of C5 over C6.

Summary: The case arose out of a rear impact to a 1997 Chrysler Minivan. The seatbelted driver was thrown rearward as his seat broke and deformed. Chrysler avoided responsibility by filing for bankruptcy in 2009, but the seat supplier, Magna Seating of America, 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. Plaintiff suffered a fracture dislocation of the cervical spine resulting in quadriplegia, gradually regaining limited use of all extremities. Plaintiff was 52 years old and unable to work again. Medical bills and lost wages exceeded $1 million.

Plaintiff's Expert: Dennis C. Deegan, Ph.D. (Easton, PA); Ronald E. Kirk, P.E. (Raleigh, NC); Paul R. Lewis, Jr. (Roswell, GA); Don Phillips, P.E. (Lansdale, PA); Kenneth J. Saczalski, Ph.D. (Newport Beach, CA); Norma Faris Hubele, Ph.D. (Chandler, AZ); Gary R. Couillard, CPA (Salt Lake City, UT); Archie C. Perry, M.D. (Las Vegas, NV)

Defendant's Expert: Gregory Stephens, Gig Harbor, WA); Dr. David C. Viano, Bloomfield Hills, MI); Dr. Elisabeth H. Raphael, Palo Alto, CA); Dr. Michelle M. Vogler (Novi, MI); David J. Weiner (Los Angeles, CA); Dr. Michael A. Wienir (Tarzana, CA); Adam Wittman (Novi, MI) ■

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 Cathleen M. Bolek, Esq.**
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