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President's Message: This Is Not A Lottery You'd Want To Win

by Kathleen J. St. John

I've always said that plaintiffs' personal injury lawyers have to work twice as hard as the defense to achieve a favorable result for their clients. This, in part, is due to the plaintiff bearing the burden of proof; in part, it's the product of the War-on-Plaintiffs conducted for decades by the Chambers of Commerce and the Insurance Industry.

The idea of a "favorable result," however, seems too cheerful a misnomer when speaking of obtaining a recovery for a horribly injured person or for a decedent's survivors. It's a victory – a win – of sorts, but, as far as the injury victim or her loved ones are concerned, the contest is one most people would not willingly enter.

As plaintiffs' lawyers we deal with this truism daily, and not only in the large loss cases. But it is through the catastrophic injury and death cases that the point is driven home most compellingly. This issue of the CATA News contains two vivid illustrations of that fact. One is the *Verdict Spotlight* article which tells the story of the eight-figure verdict achieved by CATA member, Chuck Kampinski, for his client, Mark Soberay. Soberay, a forty-something owner of a music studio, was returning from New York City on a Greyhound bus when the bus driver rear-ended a tractor-trailer, pinning the lower half of Soberay's body. He lost a leg and sustained numerous other grave injuries that will affect the rest of his life. To speak of this verdict in monetary terms alone misses the point.

What was achieved in that verdict – besides the recovery of damages – was the message the jury sent when awarding punitive damages. The jury found the driver fell asleep at the wheel, and Greyhound enabled this by failing to enforce its rule that drivers take a rest break every 150 miles or three hours. The $150 portion of the $4,000,150 punitive award was meant to send a message to Greyhound to enforce its rule.

Effecting systemic change as a result of catastrophic accidents is also the subject of Andy Young's article – *Broken Glass and Shattered Lives – A Mother's Journey Through Grief Brings Hope For Preventing Underride Truck Crashes.* Andy's article is not about a verdict or even a lawsuit. It's about the decades-long process of seeking improved safety regulations in the trucking industry, and the jump-start given this process by a grieving mother who lost two daughters in an underride collision. Andy's article is unique in recognizing the perspectives of all the industry players. The truck driver whose negligence causes the collision is himself a victim, as he must live with the consequences of his negligence. And however inconvenient corporations might find enhanced safety regulations to be, in the long run regulations benefit everyone, including those forced to implement them.

But the amazing fact at the center of Andy's article is how a grieving mother transformed her ineffable sorrow into a crusade to make the trucking industry safer. She, like all our

clients, plays the hand she was dealt – but with extraordinary grace. And, like our clients, she epitomizes a truth that often gets lost when we speak of damage awards: this is *not* a lottery you'd want to win.

***

As I come to the end of my presidential term, I would like to thank my fellow officers, board members, and all participants in the CATA News for their efforts to make CATA a meaningful organization. Top on my list is Ellen Hirshman whose boundless energy as chair of the Community Outreach Committee has resulted in CATA having more activities in a single year than ever before. In this term alone, Ellen and her committee have given ten End Distracted Driving (EndDD) presentations at local high schools; hosted two social networking events for CATA attorneys, judges, and law students from Cleveland Marshall and CWRU; and partnered with Shoes & Clothes 4 Kids® to distribute over 130 pairs of shoes or boots and socks to pre-school and school age children in Cleveland.

Commendations also go out to my fellow officers, Rhonda Debevec, Cathy Bolek, and Chris Patno, for the work they've done this year. Rhonda hosted the fall Litigation Institute; and has planned what promises to be a most exciting Annual Installation Dinner on June 24th. *See page 21 for details.* Cathy organized our luncheon CLEs which brought in speakers on a wide range of topics: Ohio's Newly Enacted Make Whole Law, R.C. 2323.44; Using Focus Groups to Maximize Case Value; Freedom of Information Act For Attorneys; The Ethics of Attorney Advertising & Solicitation; and A View from the Bench: Making the Most of Settlement Conferences. Chris, as Treasurer, kept us in the black, collecting membership dues, and balancing the checkbook – not to mention bringing his humor and wit to our board meetings. And, as Rhonda takes on the presidency, we welcome our newest officer, Will Eadie. Will brims with ideas and keeps us on the cutting edge of innovative thought and technology. I look forward to all of their leadership in the upcoming year.

As for me, I will continue – for a while – as Editor in Chief of the CATA News. I am grateful to the CATA News staff, and to all who have provided articles to the newsletter. As always, we invite everyone to keep the articles and ideas coming in. Thank you, especially, to Chris Mellino, my co-editor of the CATA News; and to our advertisers for helping us make this a successful publication. ■

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Broken Glass And Shattered Lives – A Mother's Journey Through Grief Brings Hope For Preventing Underride Truck Crashes

by Andrew R. Young

Energy absorbing bumpers, crumple zones, and seatbelts could not save the lives of backseat passengers, 13 year-old Mary and 17 year-old AnnaLeah. They were traveling in a four-door sedan driven by their mother, Marianne Karth.

Highway traffic slowed to a stop as the Karth sedan was hit from behind by a semi-truck. The first impact spun their blue, four-door sedan 180 degrees. The same semi-truck's momentum caused a second impact which shoved the Karth sedan backwards underneath yet another truck's trailer. The rear bar on the second truck's trailer was not strong enough to prevent the Karth vehicle from going underneath. The rigid structure of the trailer's steel frame effortlessly shattered the back window, which failed to protect the back of the Karth girls' heads and bodies. AnnaLeah died instantly. Four days later, Mary died as a result of her catastrophic injuries.

None of the car's manufactured, safety engineering made a difference to save the lives of Marianne's daughters. Why? Because the dynamics of the crash resulted in a truck underride.

Little did Marianne Karth know at that moment, on May 4, 2013, that she would become one of the nation's leading truck safety advocates working toward meaningful prevention of underride truck crashes.

5-Star Safety Ratings Matter Little in an Underride Truck Crash

A car is better off hitting a concrete wall than hitting a commercial truck. No matter how safe the car may actually be, the safety features of a car are only effective if there is good structural interaction (crash compatibility) between collision partners. A "5 star" crash test rating only matters when there is a geometrical match up of the crush structure of both the striking vehicle and the vehicle being struck.

A two vehicle collision involving a commercial motor vehicle (CMV) and a light passenger vehicle frequently results in a mismatch of structural components at the first point of impact. The crash incompatibility is in large part due to the height of the CMV.[1] In a truck collision, all too often, the lower profile passenger vehicle physically goes underneath the higher profile CMV. This is known as a truck underride crash.[2] The first point of impact is beyond the hood and into the glass windshield. The second point of impact then literally becomes the heads, faces, and chest of the lower profile vehicle's occupants.

Air bags do not deploy because the lower profile vehicle's bumpers and air bag sensors are not triggered. Energy absorbing bumpers and crumple zones, all designed to keep the passenger compartment intact, become irrelevant.The load path from the crash results in energy that does not initially strike the intended engineered crush structure of the passenger vehicle. With no air bag and the vehicle traveling underneath the opposing vehicle, the occupant compartment is pierced resulting in a passenger compartment intrusion ("PCI").

Thereafter, the seat belts restraining the occupants

fail to prevent catastrophic injury or deadly consequences as the energy from the collision is absorbed directly by the human body. The car's occupants then suffer the most horrific crash consequences: death by blunt trauma; decapitation; open skull fractures; traumatic brain injuries; degloving of the face; spinal cord injuries; paraplegia; or quadriplegia.

The truck driver, too, suffers with career-ending criminal vehicular homicide or felony vehicular assault charges. At the very least, the truck driver suffers the psychological trauma associated with being an integral part of such a horrific crash.

The truck company then likely encounters a civil lawsuit. The fatalities and catastrophic injuries associated with underride crashes typically produce seven figure to eight figure verdicts, all exceeding minimum insurance requirements. Truck companies are thereafter saddled with paying judgments in excess of insurance coverage. Smaller companies must sell assets and/or file for bankruptcy. Everyone loses in an underride truck crash, the truck company and truck driver included.

How Great is the Danger of a Truck Underride Crash?

Earlier this year, original equipment manufacturers (OEMs) reported that "[n]ew trailer orders in the United States reached 315,000, the second-highest annual total" and that orders were down in comparison to "2014's record total" of more than 356,000 new trailers.[3] These new commercial trailers will be added to the 11.7 million registered trailers in existence as reported by the Federal Highway Administration in 2012.[4] Combining all new trailer orders with currently registered trailers puts the total number of commercial trailers in the United States at well over 12 million.[5]

The Interstate Highway System is 46,875 miles long.[6] When one calculates the number of registered trailers per mile of the Interstate Highway System, this equates to over 250 registered commercial trailers for every mile of Interstate Highway. Average daily truck volume reaches up to 50,000 trucks on much of the Interstate Highway System East of the Mississippi River.[7] Each trailer and truck represents an opportunity for an underride crash.

Single-unit trucks (SUTs), more commonly known as "box trucks" or "straight trucks," likewise present the risk of an underride truck crash also due to the higher vehicle profile. These trucks are not a "combination" of a tractor and a trailer with an articulating section that requires more space for turning and backing. SUTs are typically found in a construction and/or urban settings because they are shorter and allow for tighter maneuverability. Urban settings also present more challenges, not only with greater vehicle congestion, but more bicycle and pedestrian traffic. 360 degree lower-profile protection / guards are necessary on all CMVs to protect bicyclists and pedestrians and to prevent vehicle underride.

Over 60 Years Without Meaningful Underride Crash Protection

The public seems fairly oblivious to the dangers of underride truck crashes. It is not until a family member loses a loved one that the survivors realize how many decades underride truck crashes have been a threat to the public. Marianne Karth's website, dedicated to her daughters' memory, reflects the astonishment and disbelief that not much has been done to protect against the horrors associated with underride truck crashes. For decades, government regulators, original equipment manufacturers and the trucking industry have remained idle on this issue without meaningfully addressing it.

The National Highway Traffic Safety Administration (NHTSA) is the regulatory agency with the authority to mandate that adequate protective guards be installed by OEMs. NHTSA is well aware of the problems presented by vehicle crash incompatibility and the need to prevent underride crashes as evidenced by its study focused on occupant compartment deformation and

Glossary of Abbreviations

CMV
Commercial Motor Vehicle

FMCSA
Federal Motor Carrier Safety Administration

FMVSS
Federal Motor Vehicle Safety Standards

IIHS
Insurance Institute for Highway Safety

NHTSA
National Highway Traffic Safety Administration

NTSB
National Transportation Safety Board

OEM
Original Equipment Manufacturer

PCI
Passenger Compartment Intrusion

SUG
Side Underride Guard

SUT
Single Unit Truck

TSC
Truck Safety Coalition

VRU
Vulnerable Road Users

occupant injury.[8] However, NHTSA remains slow to enact meaningful regulation, whereas the European Union and many other nations (United Kingdom, Brazil, Japan and China) have surpassed the U.S. in regulatory requirements for rear guards, front underrun protection, and side underride guards (SUGs).[9]

The U.S. first enacted a rear underride guard standard on CMVs in 1953. This standard mandated rear guards for trucks manufactured after December 31, 1952.[10] This early standard required rear guards to have a maximum ground clearance of 30 inches. Guards were not required if the rear axle/wheel setback was 24 inches or less from the rear of the CMV's cargo bed. This regulation mandated rear guards for **BOTH** single-unit trucks and combination tractor-trailers. This standard included **NO strength testing requirements** for the rear guards. So, as a result, the rear bars simply existed visually and easily folded under in a crash without really preventing underride or PCI.

Forty-five years after the 1953 rule, NHTSA promulgated an updated rear underride guard standard that became effective in 1998. The new rule required the following: rear guard ground clearance to be no more than 22 inches and **strength testing requirements.** Guards are not required if rear wheel setbacks are no more than 12 inches from the end of the cargo bed. The 1998 standard is **for combination tractor-trailers ONLY**.[11] Meaningful regulations have yet to become standard for SUTs, which still operate under the 1953 standard. Please see the Truck Underride Regulation Chronology Sidebar for a comprehensive historical chronology addressing the issues of truck underride regulation.[12]

Repeated Calls for Underride Protection

As can be seen in the decades long chronology for addressing truck underride, both the Insurance Institute for Highway Safety (IIHS) and the National Transportation Safety Board (NTSB) have repeatedly called on NHTSA to implement better underride protection standards. In the past five (5) years, a 2011 crash-test analysis by the IIHS demonstrated that underride guards on tractor-trailers continue to fail in relatively low-speed crashes in spite of the 1998 regulatory standard.[13] [14] In 2011, IIHS petitioned NHTSA for improvements in underride protection.[15]

In a letter dated April 3, 2014, the NTSB urged NHTSA to take action by improving rear underride protection systems. The NTSB letter even went one step further, requesting that newly manufactured trailers be equipped with "**side underride** protection systems that will reduce underride and injuries to passenger vehicle occupants."[16]

On May 5, 2014, Marianne Karth and the Truck Safety Coalition (TSC) hand-delivered a petition for rule making which asked NHTSA to improve the safety of rear underride guards on trailers and SUTs. Marianne Karth and TSC also requested rulemaking to prevent side underride and front override truck collisions. On July 10, 2015, NHTSA granted, in part, the petition and planned on issuing two separate notices – "an advanced notice of proposed rulemaking pertaining to rear impact guards and other safety strategies for single unit trucks, and a notice of proposed rulemaking on rear impact guards on trailers and semitrailers." [17]

2015 Rulemaking for Single Unit Trucks

On July 23, 2015, NHTSA issued the "Advance Notice of Proposed Rulemaking Underride Protection of Single Unit Trucks."[18] The agency's summary confirms that this rulemaking would respond to Marianne Karth and the Truck Safety Coalition's petition and also, in part, respond to the earlier petition for rulemaking by the Insurance Institute for Highway Safety.[19] A Google search of "Docket ID: NHTSA-2015-0070" can easily allow for a review of the rule and the seventy-three (proponent and opponent) comments made by the various interested parties.

OEMs and several trade associations are among the strongest opponents, arguing that many SUTs need to have "good off

Figure 1

Figure 2

Figure 3

road mobility at construction sites" or "hitch connections" and therefore cannot have rear impact protection. Specifically, a rear guard would interfere with the work the truck must perform.[20] A review of the Federal Register suggests that NHTSA seems to adopt the opposition arguments that underride guards would not be cost effective on SUTs.

Based upon this author's research and travel (twice) overseas to "The Commercial Vehicle Show" in Birmingham, England, opposition against rear underride guards on SUTs must be met with severe skepticism.[21] As can be seen in the photographs incorporated herein, many European CMVs already have rear underride guard protection on trucks like dump trucks and box trucks with lift gates *(Please see Figures 1 and 2)*.[22] Another photograph depicts a trade show vendor display of rear impact bars that allow for manual adjustment of the guard so that it can be moved up and down as needed *(Please see Figure 3)*. This author also videoed this vendor demonstrating how one of the guards depicted can be manipulated and locked into upward or downward positions. By manually adjusting the guard upward, it allows for a construction vehicle to encounter low ground clearances or to lift the guard out of the way so it does not interfere with a tow hitch when towing a trailer with equipment or materials. Likewise, the photographs show how rear impact guards can easily be integrated with lift gates.

As evidenced by the photographs, the U.S. lags far behind other developed nations. Hopefully, NHTSA is not too easily swayed by opposition to allow for meaningful regulations for rear impact protection on SUTs. This author submitted these photographs and many of the same arguments in a "public comment" in support of the rulemaking.[23] Eventually, the agency will be swayed by all of the proponents in favor and update the now more than half-century-old 1953 standard and finally mandate strength testing requirements for rear guards on SUTs.

2015 Rulemaking to Update Rear Guards on Tractor-Trailers

On December 16, 2015, NHTSA issued the "Notice of Proposed Rulemaking Upgrade Underride" to enhance the strength testing requirements of the 1998 standard to improve rear impact protection on trailers and semitrailers.[24] Again, the agency's summary confirms that this rulemaking would respond, in part, to petitions filed by IIHS, the Truck Safety Coalition, and Marianne Karth.[25] A Google search of "Docket ID: NHTSA-2015-0118" will allow for a review of the rule and the thirty-four public comments, virtually all of which are in support.

Within the rulemaking summary, the agency states that the new rule would upgrade the Federal Motor Vehicle Safety Standards that address rear underride protection in crashes into semitrailers.[26] More specifically, the stated goal of this rulemaking is to harmonize the U.S. standard with the existing 2004 Canadian underride guard strength testing requirements (from 30 mph crash protection to 35 mph crash protection).[27]

A review of the comments demonstrates very little opposition because OEMs already meet the 10-year old Canadian standard. The lack of opposition highlights the fact that NHTSA is seemingly not interested in challenging OEMs to come up with a better and safer underride solution, such as a guard that protects against a 40 mph crash.

While it was a victory that NHTSA granted the petitions submitted by Marianne Karth, the Truck Safety Coalition, and IIHS, both initiatives could do more and it is hoped will do more following NHTSA's review of the public comments.

Side Guards Save Lives

Marianne Karth, the Truck Safety Coalition, and the NTSB all urge NHTSA for a rulemaking mandating side underride guards (SUGs). While the European Union and many nations have had decade long standards for 360 degree lower-profile protection mandates for CMVs, NHTSA has not issued a single rulemaking initiative addressing the side protection of CMVs.

Side guards have proven particularly effective in urban settings protecting bicyclists and pedestrians. The initial impact between a truck-bicycle or truck-

Figure 4

pedestrian is not what causes a fatality. It is the fact that the bicyclist or pedestrian falls toward the larger vehicle and into the gap between the larger vehicle's front and rear axles. The bicyclist or pedestrian then ends up underneath the chassis and wheels of the larger vehicle, causing the fatality. European mandated lateral side guards prevent vulnerable road users (VRU) such as bicyclists and pedestrians from going underneath the larger vehicle. The side guards give something for the pedestrian or bicyclist to interact with upon impact deflecting them away from the truck (*Please see figure 4*). While injury may occur, the VRU does not end up crushed underneath the larger vehicle's tires.

Statistics in Europe have proven that side guards truly save lives. A study published by the Transport Research Laboratory identified a 61% reduction in truck-bicycle fatalities and a 20% reduction in truck-pedestrian fatalities in London since lateral side guards became mandatory in 1986.[28] These impressive statistics have inspired initiatives by exempt and unregulated entities, such as European SUT construction companies, to implement voluntary programs to outfit trucks with side guards. One voluntary program is known as the Construction Logistics and Cyclist Safety (CLOCS) initiative. It brings the construction logistics industry together to implement a road safety culture to "help protect pedestrians, cyclists, motorcyclists and other road users who share the road with construction vehicles." This program is "an industry led response to improve safety." [29]

Since NHTSA is slow to meaningfully regulate side underride guard protection, City and State Governments, safety advocates, liability casualty insurance companies, and/or trucking company owners have implemented policies of their own requiring installation of side underride guards (SUGs). Integral to this initiative is the aftermarket installation of SUGs since OEMs are not yet likely to install guards without a NHTSA required standard.

The City of Boston was the first U.S. institution to pass and enforce a law with meaningful side underride prevention. In 2014, Mayor Martin J. Walsh submitted the "Ordinance to Protect Vulnerable Road Users in the City of Boston."[30] The ordinance requires both City owned trucks and companies that contract with the City to install "lateral protection devices" or SUGs on their fleet of CMVs. The City of New York and many other cities are following Boston's lead. On May 11, 2015, the University of Washington announced that it has installed side guards on the thirty-one box trucks that are part of its campus fleet.[31] The only downside is that these devices are designed to protect VRU and are not strong enough to prevent vehicle underride. Hopefully, side guards protecting VRU will simply be step one and as the public and industry become accustomed to seeing the benefits side guards bring, then step two will be to prevent underride from cars.

The Market Is Demanding Better Underride Protection

Marianne Karth, the TSC, and IIHS anticipate that market adaptation will make the regulatory case easier for future side underride truck crash prevention. To help incentivize underride protection beyond mere regulatory compliance, Marianne Karth and the others hosted the first ever "Underride Roundtable" on May 5, 2016. IIHS's Vehicle Research Center in Ruckersville, Virginia served as the host facility.

Over the past year, momentum and excitement grew as the Underride Roundtable's agenda was finalized. Even beforehand, early registration reflected the importance of this historic event. The broad spectrum of attendees included safety advocates, trucking industry representatives, engineers, regulatory officials, trailer manufacturers, the media, and many others.

The first hour and a half was dedicated to a "Description of the Problem of Underride" with presentations from NHTSA Engineer Robert Mazurowski and NTSB Deputy Director for the Office of Highway Safety, Robert Molloy. Advocates for Highway and Auto Safety also gave a talk highlighting the concerns regarding the aforementioned slow regulatory progress.

The second half of the morning was dedicated to "Research That Points to a Solution." IIHS' brilliant Senior Research Engineer, Matt Brumbelow, gave a lecture reviewing the research on underride crashes and the safety evolution of guard performance.[32] Virginia Tech Senior Design Team next gave a presentation showcasing their new rear underride guard design with innovative strength enhancements to further protect cars from occupant deformation. To end the morning session, Kris Carter from the Mayor's Office of New Urban Mechanics, City

Truck Underride Regulation Chronology

1953	First federal standard requires underride guards for both combination tractor-trailers and single-unit trucks, but includes no strength testing requirements.
1967	Actress Jayne Mansfield dies in a rear underride truck crash.
1969	National Highway Safety Bureau (precursor to NHTSA) proposes guards on combination tractor-trailers and single-unit trucks with 18-inch max clearance; predicts side guards will be added after further research.
1971	NHTSA abandons 1969 rulemaking.
1971	NTSB recommends NHTSA require energy-absorbing underride and override barriers.
1972	NTSB urges NHTSA to renew the abandoned underride proposal.
1977	IIHS petitions NHTSA for a new rear underride standard.
1981	NHTSA issues proposal to upgrade underride protection requirement.
1996	NHTSA issues new standard effective 1998, covering combination tractor-trailers and requiring 22-inch max clearance and strength testing. The standard does not effect single-unit trucks.
2004	Transport Canada issues standard after crash tests show U.S. standard is insufficient. Canadian rule approximately doubles strength requirements.
2010-12	IIHS testing shows guards can fail in 35 mph impacts. Guard on Manac trailer is only one from 8 largest manufacturers to prevent severe underride in 30% overlap test.
2011	IIHS petitions NHTSA for improvements to standard for rear underride protection.
2013	NHTSA releases study, "Heavy-vehicle crash data collection and analysis to characterize rear and side underride and front override in fatal truck crashes."
April 3, 2013	NTSB urges NHTSA to take action to improve underride guards.
May 5, 2014	Marianne Karth and Truck Safety Coalition submit their own petition for underride rulemaking.
July 23, 2015	In an advance notice of proposed rulemaking, NHTSA suggests rear underride guards would not be cost-effective on single-unit trucks.
December 16, 2015	NHTSA proposes adopting Canadian underride guard requirements for combination tractor-trailers.
May 5, 2016	IIHS, Annaleah & Mary for Truck Safety, and Truck Safety Coalition host industry-wide, Underride Roundtable to identify solutions to this six decade long safety concern.

of Boston gave a presentation about the City's Ordinance mandating SUGs for the protection of vulnerable road users. Boston is truly leading the way as a bicycle and pedestrian friendly City.

Next, attendees and participants witnessed a live crash test of a Chevy Malibu into the back of a 53 foot semitrailer. The test performed was a "30% overlap, offset at 35 mph."[33]

Wabash, Stoughton, Vanguard, and Great Dane (four of the largest U.S. trailer manufacturers) had representatives attending this event. Wabash and Stoughton donated trailers for testing purposes. Wabash, in particular, received recognition after safety advocates gave an award to motor carrier giant, J.B. Hunt, for ordering 4,000 Wabash National DuraPlate® dry van trailers that include the new RIG-16 Rear Underride Guard System.[34] "This new rear impact guard is engineered to prevent underride in multiple offset, or overlap, impact scenarios."[35] Representatives from each trailer manufacturer walked away with the message that their companies' future market share depends on going beyond compliance to address underride concerns.

Live crash test at the Truck Underride Roundtable

Andy Young and Marianne Karth at the Truck Underride Roundtable

The day ended with an engaging more than two hour panel discussion focused on "Identifying a Unified Approach to Implementing Solutions to the Problem." This author was humbled and proud to be asked to participate as Moderator. The panelists included:

- Jack Graczyk, Director of Fleet Services, New York City;
- Scott Manthey, Vice President of Safety, Interstate Distributors (a motor carrier);
- Mark Roush, Vice President of Engineering, Vanguard National Trailer;
- Robert Martineu, CEO, Airflow Deflector (an aftermarket SUG manufacturer);
- Roy Crawford, crash reconstructionist who lost a son in an underride crash; and,
- Dr. Alex Epstein, Volpe, The National Transportation Systems Center.

This diverse group of panel members helped attendees "connect the dots" and flush out much of the debate, both pros and cons, as to why 360 underride protection on CMVs is a "no brainer" to protecting the motoring public. Overall, the message was fairly clear that the consumer (the trucking industry) wants a safer product that will value safety above all else. J.B. Hunt's 4,000 trailer purchase is the best example that market forces are likely to surpass regulatory red tape.

Marianne Karth, the Truck Safety Coalition and IIHS are to be thanked for this historic opportunity for bringing real hope to survivors of underride truck crashes. Marianne Karth in particular should be commended for her courage and perseverance to turn "sorrow to strength" (her words) in raising meaningful awareness that will without a doubt save lives. In this author's opinion, Marianne Karth deserves hero status and recognition for all of the work she has done honoring the memory of her daughters AnnaLeah and Mary.

* * *

Postscript: In honor of her daughters, Marianne Karth founded a truck crash victim advocacy organization, "AnnaLeah & Mary for Truck Safety." In addition to advocacy, the organization raises funds to support Underride Research. To donate to this fund, please visit www.fortrucksafety.com. To learn more about Marianne and her family's highway safety advocacy, you can visit her website, www.annaleahmary.com. There Marianne shares, in a personal, moving, and inspirational way, the story of her daughters – 13 year old Mary and 17 year old AnnaLeah. From the heartbreak of their deaths, Marianne Karth has forged real hope for preventing truck underride crashes. ■

End Notes

1. A standard tractor-trailer sits 50 inches from the ground, the average height of a common loading dock.
2. Crashes in which one vehicle goes over another vehicle can be referred to as underride or override."Underride" is the spelling utilized by U.S. Government publications. The City of Boston Ordinance requiring lateral protection devices spells it as "under-ride." In Europe, the phrase "underrun" is used to describe a crash wherein a smaller vehicle ends up beneath the larger vehicle.

3. The American Trucking Association, Transport Topics, *Trailer Shipments Set Record As 2015 Orders Stay Strong*, by Roger W. Gilroy, Page 1, Week of February 1, 2016.
4. https://www.fhwa.dot.gov/policyinformation/statistics/2012/mv11.cfm *See also* the American Trucking Association's February 5, 2016 Comment on the pending NPRM Docket No. 2015-0118 Rear Impact Guards, Rear Impact Protection. Note: as referenced in the ATA comment, many of these trailers are not used on a regular basis.
5. According to the U.S. Census, the State of Ohio has a population of 11,594,163. The State of Pennsylvania has a population of 12,787,209. The population of these states provides a basis of comparison to show the magnitude of registered trailers in the United States.
6. https://www.fhwa.dot.gov/interstate/faq.cfm#question3
7. U.S. Department of Transportation, Federal Highway Administration, Office of Freight Management and Operations, Freight Analysis Framework, "Estimated Average Annual Daily Truck Traffic." http://ops.fhwa.dot.gov/freight/freight_analysis/nat_freight_stats/docs/06factsfigures/index.htm
8. Eigen, A.M.; Glassbrenner, D., Mathematical Analysis Division, National Center for Statistics and Analysis, U.S. Department of Transportation, National Highway Traffic Safety Administration, *The Relationship Between Occupant Compartment Deformation and Occupant Injury*, DOT HS 809 676, November, 2003.
9. United Nations Economic Commission for Europe ECE Regulation No. 73, Lateral Protection; United Nations Economic Commission for Europe ECE Regulation No. 93, Front Underrun Protection; and, United Nations Economic Commission for Europe ECE Regulation No. 58 for Rear Underrun Protection. http://www.unece.org/trans/main/wp29/wp29regs41-60.html
10. Blower, D., Woodrooffe, J., Page, O., University of Michigan Transportation Research Institute; on behalf of the U.S. Department of Transportation, National Highway Traffic Safety Administration, Office of Applied Vehicle Safety Research, *Analysis of Rear Underride in Fatal Crashes, 2008*, DOT HS 811 652, August, 2012.
11. NHTSA. FMVSS: Rear Impact Protection; Final rule. *Federal Register; Vol* 61, p. 2004, January 24,1996. Federal Motor Vehicle Safety Standards 223 and 224: 49 C.F.R. § 571.223 Standard No. 223; Rear impact guards. 49 C.F.R. §571.224 Standard No. 224; Rear impact protection.
12. This historical chronology addressing Truck Underride from 1953 to present was put together by this author (who served as a Moderator of the May 5, 2014 Underride Roundtable), in collaboration with IIHS representatives, the Executive Director of the Truck Safety Coalition, and Marianne Karth.
13. The American Trucking Association, Transport Topics, *Insurance Group Cites Concerns on Underride Guards*, March 1, 2011.
14. Brumbelow, M.L. and Blanar, L., "Evaluation of US Rear Underride Guard Regulation for Large Trucks using Real-World Crashes." Stapp Car Crash Journal 54: 119-131, 2010.
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32. Matt Brumbelow is a well-known author and voice on the issue of passenger compartment intrusion and underride truck crash prevention.
33. 100% "overlap" no "offset" is when 100% of the car's bumper from the right side to the left side, interacts squarely with 100% of the back of the rear guard, again from right to left. In a real-world crash, however, the driver often attempts to steer away from the truck at the last minute. Assuming the car driver steers left, then only 50% or 30% of the right side of the passenger car's bumper interacts ("overlaps" or "offsets") with 50% or 30% of the left portion of the rear guard. Past IIHS testing showed the majority of trailer manufacturers failed to prevent underride in offset crashes. Passenger compartment intrusion would occur along just one side of the car. Frequently, occupants not affected by the passenger compartment intrusion (particularly at lower speeds) can sustain no injury at all while those affected by the PCI can suffer fatal consequences or catastrophic injuries. Trailer manufacturer engineers have worked toward preventing PCI even in these "offset" impacts.
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Fighting Against Accountability: Defense Tactics In Undermining The Reptile Trial Approach

By William Eadie

In this article I outline a few of the main lines of attack I and others who share information have experienced from the defense bar regarding the Reptile, and how I've been successful fighting them off. There is a link at the end of this article to a blog post where I post example briefs and motions.

If you are familiar with the work by David Ball and Don Keenan, the unfortunately named Reptile, you know what it is really about: a new approach to framing the old concept of accountability. Accountability to the injured party, and to the community. Empowering the jury to do their job and hold dangerous people accountable for the harm they cause. Exactly what the civil justice system has been about for hundreds of years.

As the results of this approach are borne out in jury verdicts, the defense bar has taken notice. List serves post template Motions *in Limine* seeking to exclude references to "safety" or "rules," there are articles and videos explaining how to undermine the Reptile approach, even seminars profiting off the defense bar's fear. Witnesses are being coached to deny there are any rules at all in their profession (a scary thought, if it were true). I had an expert witness tell me I was trying to "dazzle him with the Reptile" when I asked if patient safety should be a reasonable doctor's priority in treating patients.

If you have not experienced the push back yet, rest assured, you will.

The main attack has been to suggest the Reptile approach is a prohibited "Golden Rule" argument. Some of these Motions *in Limine* are superficial cut-and-paste jobs—I've gotten them with the wrong party names in the body of the brief—while others are more detailed in describing the Reptile and how deposition (and presumably trial) questions based on it will result in impermissibly asking the jury to put themselves in the shoes of the injured person.

The golden rule attacks are patently absurd. I suggest you counter, first, by pointing out what the motion really seeks to do: ban you from making a whole host of arguments, rather than addressing inadmissible evidence. In Ohio, though, "[g]reat latitude is afforded to counsel in presentation of closing argument to the jury." *Hinkle v. Cleveland Clinic Found.*, 2004-Ohio-6853, ¶66. *For more of these citations, see the example motions, briefs, and orders in the blog post cited at the end of this article.*

Another line of attack is to suggest the use of terms like "safety rule" or "rule" at all is somehow objectionable or inflammatory. They will not have much in the way of legal authority. Hit them hard on this attempt to dictate your presentation of the case, and to make the case unnecessarily complicated for the jury.

Also point out "rules" and "safety rules" are deeply ingrained in the industry. In a recent nursing home case, I pointed out that Ohio's Nursing Home Residents' Bill of Rights—R.C. 3721.13—speaks

to the resident's "**right to a safe** and clean living environment," the "**home's safety rules** and under applicable laws and rules of the state." Simply googling "patient safety rule" turns up numerous governmental and healthcare provider websites regarding rules for patient safety. It's hard to argue "safety rule" is an invention of the plaintiff's bar when the U.S. Department of Health & Human Services has an entire section of its website dedicated to "patient safety rules." Similarly, look at the same regulations, laws, and other resources in the particular industry you should already been consulting for the content of the rules. They are likely to use terms like "rules" a lot.

Attacks as to relevance or Evid. R. 403 unfair prejudice or jury confusion should be met, first, with a reference to your burden at trial. You are not throwing words like "safety rules" around for fun: it is part of meeting your burden of proof. If the court understands this is how you're presenting your case, it makes the likelihood of being excluded much lower.

In medical cases, you can go right to the standard of care. Your experts will, indeed must, offer conclusions regarding what a reasonably prudent and careful – *i.e.*, safe – caregiver would do, or not do, under the circumstances. So your experts must be permitted to testify that the standard of care consists of a caregiver or nursing home's conformity to general "rules" of conduct that are widely accepted and establish the standard of care.

Since as early as 1911, Ohio medical malpractice jurisprudence has recognized "rules" – *i.e.*, customary practices or principles recognized in the field – as establishing the standard of care. As the court noted in *Stites v. Hier*:

> And so it seems to the court that it was proper to ascertain from Dr. Knight, a surgeon learned in his profession and acquainted with the practices and rules thereof as usually or ordinarily employed, what was, at the time of plaintiff's treatment the proper usual and approved method in surgery, 'in light of the modern advancement and learning on the subject,' as fixing the standard of care or degree of care to which the defendant as a surgeon should be held * * *

25 Ohio Dec. 88, 90, 11 Ohio N.P. 161 (C.P. 1911). It is hard to characterize "rules" as an invention from a recent trial practice book in this context.

Above all, I suggest you craft a careful proposed order denying the defendant's motion in order to increase the chance of detailed entries that can provide support in other cases. If we simply allow defense counsel to file canned motions in every case, the fact that 99% of them are denied is of no help if there are no published opinions. And there will definitely be a published opinion when it is granted that 1% of the time, which will become the ammo for future briefs.

If you are an adherent of the Reptile approach, make sure you reach out to the local state list serve for Reptile members (you can find out more at their website). They share research and gather orders like the ones you'll be winning in your cases.

I've posted links to a number of example motions *in limine*, briefs in opposition, and court orders on the CATA blog, which you can access at http://goo.gl/yu2OjX. **NOTE: you must be logged into the CATA website to review these materials.**

I'll leave you with a great quote from a South Carolina judge I always cite. Let's get some local orders using similarly persuasive language.

> Here, the Court finds that a party cannot seek to limit opposing counsel's strategy via SCRE, 401 or 403. More importantly, Defendant fails to demonstrate any specific evidence that is "unfair." Instead, Defendant seeks to summarize for the Court a purported trial strategy set forth in a book and prevent Plaintiff's counsel from using said techniques or strategy.
>
> Quare: Could Plaintiff's counsel seek to prohibit a defense strategy designed to show plaintiff is malingering on the basis that strategy is unfair?
>
> Second, no specific evidence has been shown necessary to exclude on the basis of "unfair prejudice, confusion of the issues, or misleading the jury." Rather, Defendant claims that questioning a doctor about safety rules to which he apparently agreed to during deposition, should now be off limits at trial.
>
> * * *
>
> Third, it is well established that a party can use non-conformity with industry standards, regulations, or other rules as evidence from which a jury may conclude negligence.

Jones v. Anesthesia Associates of Charleston, Case No. 2012-CP-10-0009 (Court of Common Pleas, South Carolina). Read the full decision on the CATA Blog at http://goo.gl/yu2OjX (you must be logged in to see the post).

Please give feedback, ideas, and contribute to the library by commenting on the blog post or contacting me directly. ■

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Ohio's Workplace Intentional Tort Statute – A Recent Trial Victory

By Nicholas A. DiCello and Jeremy A. Tor

In November, 2015, a Cuyahoga County jury returned a $400,000 verdict to compensate a young man, Xavier Lunsford, who lost part of his dominant thumb while working on an industrial router machine at a local plastics manufacturer.[1] The case settled before the punitive damages phase. We had the privilege of representing Xavier in this lawsuit, which involved a claim under Ohio's Employer Intentional Tort Statute.[2]

Most of us have some general understanding that workplace intentional torts no longer really exist under Ohio law and legal precedent. We have seen our colleagues' creative and impressive wins under the current statute undone in the appellate and Ohio Supreme courts. So when the jury returned this verdict, we received a lot of inquiries about the case. We share some of our insights here.

The Concept of Intent Under the Current Workplace Intentional Tort Statute

The case presented challenges at every turn and required us to adopt some unorthodox methods. For starters, we had to contend with the statute, which requires proof that the employer intended to injure its employee. We all learned in law school that a person intends the consequences of his actions when he knows with *substantial certainty* that the consequences will result.[3] But the legislature, with the endorsement of the Ohio Supreme Court, has written the substantial certainty concept of intent out of the statute. Plaintiffs now must prove the employer had a specific intent to injure the employee.[4]

Given the exacting standard, overcoming summary judgment was our first major challenge—and our first major victory. The court's denial so surprised the defense that it filed a motion for reconsideration with the opening line, "It is very unusual for a trial court to deny summary judgment to an employer under R.C. § 2745.01." That statement is very true. There are fewer and fewer recent positive appellate or Supreme Court rulings in this area for use at summary judgment.

Arguing an issue of fact as to intent at summary judgment is difficult to do – no employee is going to testify at deposition that he or she intended to injure your client. And if he or she did, such conduct is arguably outside the course and scope of his or her employment, potentially eliminating the employer's responsibility. So even arguing that any individual employee acted with intent to injure is potentially rife with pitfalls.

We were conscious of this, both as it related to legal issues in the case, but just as importantly, as it related to proving intent to the jury. Accordingly, while we had common law claims against individual co-employees, which common law claims we argued (successfully) were subject to the old substantial certainty concept of intent, we intended to dismiss those individual employee defendants before trial, and we did. We did not want to have to prove to the jury that any one individual acted with a specific intent to injure our client.

Deliberate Removal of an Equipment Safety Guard

The workplace intentional tort statute affords a presumption of intent to injure if the plaintiff can prove "deliberate removal of an equipment safety guard." We argued the router machine at issue did not have a bit guard covering the router blade (the "bit") at the time of the injury. OSHA investigation documents supported this allegation. The router table machine, however, was put together and taken apart every day. It was some 60 years old. So it was not a machine that had a permanent bit guard in place. We argued, under the literal language of the statute, that bit guards had been used in the past and were, according to routine, removed at the end of the day, but no bit guard was put back on the machine at the time of set-up for the job Xavier got injured on. The defendant argued that not every job can be performed with a bit guard like the kind we argued was necessary. Furthermore, the defendant argued that the machine did have an equipment safety guard – a piece of acrylic plastic that sat over top of the bit against which the piece being routed was guided across the blade. One of the singular issues then was whether this piece of equipment was a "guide" or a "guard."

So we found a few dispositive issues of fact to focus on for purposes of summary judgment. Was the piece of acrylic on the machine a guide or a guard? Had a bit guard (an equipment safety guard) been deliberately removed? Because the statute references "an equipment safety guard," we argued that there could be more than one for any particular piece of equipment. So even if the piece of acrylic (the guide) was also a guard, it was just one kind of guard and the statute contemplates the deliberate removal of other guards. That is, any given machine doesn't have just one guard.

If we could prove the deliberate removal of an equipment safety guard – an issue for the jury – the law presumes intent, a presumption the defendant can rebut. We did our best to develop genuine issues of fact concerning the presence and/or removal of an equipment safety guard.

Corporate Intent

In preparing for trial, we had to think carefully about framing the issue of intent. Although the law requires proof of specific intent, the jury instructions do not define intent and the court elected not to provide a specific definition. In voir dire we explored the meaning of intent with the jurors – we asked about the idea of "actions speak louder than words" when it comes to deciding someone's intent. This became a theme throughout the trial.

We focused on "corporate intent." Remember, we dismissed the individual defendant employees before trial. This permitted much more agreeable crosses of the people responsible for setting up the machine without the (correct) guard. We didn't attempt or need to vilify these employees (except for one, but only after we had the implicit permission of the jury to do so based on his answers and conduct on the stand). Instead, we largely sympathized with them – they did what they were required to do by the corporation; the corporation didn't tell them important safety information; the corporation did not give them the resources they needed, the corporation had a deadline to meet, the corporation didn't hire enough people, they were just doing their job for the most part, etc…

The defense paraded out most of these same employees in its case – asking each of them if they ever intended to hurt anyone – a common refrain from the motion practice. Of course, they were very credible that they did not intend to injure. Our crosses focused not on their subjective intent – indeed, we made it sound bizarre that anyone would suggest these good folks intended to hurt a 19 year-old kid. We focused on the corporation's actions, *i.e.*, the corporation's ultimate intent and motive.

Jury Instructions and Argument – How to Prove (Disprove) Intent

The jury instructions in these workplace intentional tort cases are draconian – page after page of telling the jury what intent is not, and all the ways a plaintiff cannot prove intent, and all the things that are not intent or relevant to intent. There is a dearth of specifically applicable OJI instructions. So the Court has to fashion most instructions from the case law, and there are hardly any cases where plaintiffs have prevailed. So the instructions come primarily from cases where the facts failed to amount to intent. The statute is bad enough, and the jury instructions are even worse.

We had to work with what we had though. We used the lack of clarity and direction in the instructions as to what intent means to our advantage. Because the first question the jury needed to answer was whether there was a deliberate removal of a safety guard, we focused on answering that question in the interrogatories first in closing argument. We argued the jury had to answer that question in the affirmative, in which case the law instructs the jurors to presume intent on behalf of the corporation. We then, in closing argument for the first time explicitly, asked the jury how in the world a corporation can disprove the intent the law presumes when an equipment safety guard is deliberately removed. In doing so, the jury instructions started to work to our advantage because while they did not set out a clear pathway to prove intent for us – other than proving

the deliberate removal of an equipment safety guard – they did not lay out a clear way to disprove "corporate" intent.

We argued that it's a difficult and awkward thing to try to disprove intent, which is why the defense felt obligated to ask its witnesses—the corporation's supervisors—whether they intended Xavier to be injured. We used the vagueness and lack of clarity of the instructions against the defense who we argued now had the burden of disproving corporate intent. We harkened back to our discussions during voir dire that actions speak louder than words.

Messaging the instructions and ordering the interrogatories in the right way was critical to a plaintiff's verdict.

Some Other Stuff that "Worked"

It's always easy to endorse techniques and strategies after a successful verdict. But, for what it's worth, here are a few other strategies that "worked" in this most unique trial.

Rules and Community Safety

When we interviewed the jurors after the verdict, the first thing they collectively said is that the corporation needed to improve its safety practices to make sure other workers don't get injured. We used the rules of the road approach and focused the rules and the case on protecting the safety of temporary workers in our community. This definitely resonated with the jurors. We made the case about much more than just Xavier's injury. We rarely referred exclusively to Xavier (except when focusing on his specific damages). Rather, we almost always talked about protecting workers in our community.

"Where is Your Client?"

The first time we heard this was when defense counsel asked just before voir dire. I replied that he would not be present. Defense counsel was shocked – "may I ask why not?" I said, matter of factly, "the case isn't about my client, it's about yours." She gave me a weird stare and sat down.

The second time someone asked this question was after my first closing argument when a trusted and experienced colleague approached me from the back of the courtroom. "Where is your client?" He shot me the same weird look, if maybe a little more sympathetic.

For this case keeping the client out of the courtroom, except for his trial testimony, was the right choice. I am always reluctant to permit the jury to evaluate and critique every move and gesture my client makes over the course of days during a trial. Will he ever look bored, angry, happy, disrespectful, capable, in pain, not in pain, etc… If he looks bad and injured, the jury is desensitized. If he doesn't, the jury minimizes. I know some people disagree, and this approach may be ill-advised for any particular case, but I would have to be convinced of the benefit of having this client scrutinized at trial all day every day by the jury.

Furthermore, Xavier was in school and we were able to tell the jury early in the case that is where he would be for the entirety of the trial except when he testified. That is, he had a good reason, one that was consistent with his image and intentions in the case, for not attending the trial – he was at school working toward a degree so he could get a job because he could no longer join the air force as he had planned as a result of his injury. In fact, we argued in close that Xavier was at school working toward his future. He was not in court all day hoping for a big money verdict. We pointed out to the jury who was, however, at trial all day every day with his corporate lawyers watching the corporation's money – the corporation's CEO. A CEO who had never even met Xavier and never apologized to Xavier, except for the first time from the witness stand hours before the jury would decide how much money his company would owe.

The focus of our case, outside of Xavier's damages, was about the choices the corporation made and the things the corporation did. It was not about what our client did or did not do. So having only the CEO present I think helped highlight this.

We asked the jury how they felt about Xavier not being present after the verdict. No one had any issues with it. Sometimes we forget that many jurors don't have the understanding or expectations we have. They are not familiar with how things typically proceed at a trial. Most of them seemed unaware that Xavier's non-presence was unusual.

Forget *Robinson v. Bates* Altogether

I generally despise medical bills, *Robinson* numbers, EOBs, "write-offs," and whatever or whoever *Jaques* is. If you are like me, consider the following.

We were able to secure a stipulation to an amount of medical bills in between the billed amount and the "*Robinson* number" before trial. We have had success in this regard in our last two trials. It may or may not work depending on the difference between the numbers or the amount of the numbers (although it can be argued that the higher the numbers or greater the difference the more reason to stipulate to a middle number for both sides).

As in many cases, the bills in this case, once appropriately redacted pursuant to the collateral source rule, were indecipherable beyond the billed amount. That is, no jury could understand and the court would not permit counsel to argue

what the amount accepted was from the face of the bill. In light of this, we offered the middle ground stipulation to avoid the need for the defense to subpoena or otherwise bring in numerous medical billing representatives. Not having to worry about or figure out how to argue billed amount vs. amount accepted as full payment at trial is nice.

Forget the Expert

We considered getting an industrial safety or routing machine safety expert in this case. It is a natural inclination. Because we understood the odds stacked against us and the particular need in this case to keep expenses down, we critically analyzed the need for an expert. We educated ourselves about router machines and router machine safety rules. Jeremy actually checked books out from a library that apparently exists outside of the internet somewhere. We used the books as good sources of simple safety rules. We used 30(b)(5) to obtain testimony from the corporation about router machines and router machine safety rules. These went well and we decided we didn't need an expert – we would use their witnesses as the experts.

I am certain that had we hired an expert and produced a report, the defense would have hired an expert and produced a report and the trial would have included, unnecessarily, a battle of the experts. This would have certainly made our points less simple, less clear, and more oppositional. There was, of course, the risk of the defense hiring an expert and having the only (hired) expert in the case. We considered that and we were happy to argue that the corporation, unhappy with its own answers (30(b)(5)) had to hire an outside expert to testify, contrary to its own admissions. Not having experts worked in this case to our advantage.

Show the Jury

We had someone in our office make a very simple and inexpensive model of a router machine. When the defense adamantly objected, we knew it would be effective. Photographs are good, but showing the jury the mechanics of a router machine and how it works and where the fingers are and where the guard goes, etc… feet from their eyes in the courtroom is powerful. Of course, we made sure the model was fool-proof, we got comfortable using it, we beat it up to make sure it would not fall apart on us, and we made sure it could not be effectively used against us before we released it into the courtroom.

We passed the router bit guards around to the jurors so they could feel and touch them. We had the x-rays showing the hollowed out thumb printed on 4" x 6" foam boards so the jury could pass them around in their hands. These are very cheap and we were able to make them exhibits that went back to the jury.

We looked for ways to show the jury at every opportunity.

Language of the Case

Early in my career I had the opportunity to stand by the judge I clerked for as he questioned jurors after verdicts. One thing I learned is that the jurors, like all of us, adopt names, phrases and language to communicate about the case (and about us). So choosing the specific words we consistently used throughout the trial was important. For example, we exclusively referred to the defendant as the "corporation." We were so consistent that the defense lawyers, the judge, and the defense witnesses at times referred to the defendant as the "corporation." When we talked to the jurors after the verdict, they too referred to the defendant as the "corporation."

What Did We Learn About Employer Intentional Tort Cases?

Employer intentional tort cases remain difficult under Ohio law. Almost any employer intentional tort case could be dismissed on summary judgment at the judge's discretion. Furthermore, the court of appeals is not a friendly place for a successful employer intentional tort plaintiff. The Supreme Court is even less friendly. Threading the needle in one of these cases, assuming you can prove the deliberate removal of an equipment safety guard at trial, is daunting and tricky. But, with the right facts, and the right approach, employer intentional tort ("workplace safety") cases have very attractive components that can encourage a jury to rule in favor of the worker. ■

End Notes

1. *Xavier A. Lunsford v. H.P. Manufacturing Co., Inc.*, Cuyahoga County C.P. No. CV-14-828457.
2. O.R.C. § 2745.01.
3. Restatement (Second) of Torts § 8A (1965).
4. *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491 (2012).

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Hospital Policies And Procedures Are Relevant And Discoverable — And May Even Be Admissible At Trial

By Todd Gurney

The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) requires all hospitals that it accredits to have written policies and procedures for each hospital department. JCAHO does not tell the hospitals what specifically must be in those policies, only that they must have such policies. As a result, there is wide variation between hospitals regarding what actually is in each policy, and which situations or procedures have a written policy.

The purpose of hospital policies and procedures is to establish a standardized set of rules and guidelines to be followed by the hospital's nursing staff and, depending on the policy, by the medical staff as well. In any medical negligence case involving care and treatment provided at a hospital, one of the first things you should request in discovery is the hospital's policies and procedures. These materials are evidence of the standard of care that the hospital expects its staff to provide. If you can prove that the hospital caused harm to a patient by violating its own policies (*i.e.*, violating its own standard of care), this can be very persuasive to a risk manager or insurance adjuster - and a jury.

Hospitals often are reluctant, however, to produce their written policies and procedures in litigation. Indeed, hospitals routinely object to discovery requests for these materials, arguing they are irrelevant, confidential, and proprietary. Are these objections valid? Are hospital policies and procedures exempt from discovery? If not, why is it difficult to obtain these materials? This article will discuss the discoverability and the potential admissibility of this evidence, and also provide some practical considerations for obtaining it.

In order to establish a prima facie case of medical negligence, the first thing you must prove is the applicable "standard of care." This must be established through expert testimony. Hospital policies, alone, do not establish the standard of care. But hospital policies are important because they may provide critical information about whether the hospital established – and violated – its own standard of care. This is evidence that the expert witnesses should consider in determining the applicable standard of care. But, since each hospital has its own policies and procedures, the expert witnesses may not know the particular policies and procedures of the hospital in your case unless you obtain those materials in discovery. Of course, this begs the question: Are hospital policies and procedures discoverable?

We begin with the backdrop that the scope of pretrial discovery is broad, and parties may obtain discovery regarding any matter that is relevant and not privileged. Civ.R. 26(B)(1). Thus, hospital policies and procedures are discoverable if they are relevant and not privileged. The initial issue, therefore, is whether these materials are relevant.

In *Lostracco v. Cleveland Clinic*,[1] the Eighth District Court of Appeals held that, in a medical negligence case, the defendant-hospital's internal policies and procedures are "certainly relevant"

in determining the hospital's standard of care. In that case, the trial court committed reversible error by refusing to compel production of the Cleveland Clinic's internal policies and procedures relating to the care provided to the plaintiff.

In another medical negligence case, *Luettke v. St. Vincent Mercy Med. Ctr.*,[2] the Sixth District Court of Appeals held that the defendant-hospital's policies, rules, and regulations are relevant to the hospital's standard of care -- and its violation of that standard. In *Luettke*, the plaintiff obtained the hospital's policies and procedures in discovery, and attempted to introduce them into evidence at trial to demonstrate that St. Vincent established a specific standard of care to be followed by its entire medical staff, and that they violated that standard.

The trial court excluded the evidence, however, on the basis that it was irrelevant in determining the standard of care. The court found, in the alternative, that if the evidence had relevance, its admission would mislead or confuse the jury. The trial court further supported its conclusion by stating that expert testimony, rather than documents or other evidence, establishes the proper standard of care in a medical setting.[3]

The Sixth District Court of Appeals reversed the trial court's decision, noting that the Ohio Supreme Court has held that hospital policies and procedures are, at the discretion of the judge, admissible to provide evidence of the standard of care.[4] The Sixth District Court explained: "[I]f self-imposed policies, rules and regulations are not relevant to help determine a hospital's standard of care, as appellees and the lower court would have one believe, then why would an organization create such policies in the first place? The whole purpose of promulgating documents, such as the ones at issue here, is to ensure that employees follow a consistent standard of care and quality at all levels of an organization."[5]

The Sixth District also emphatically rejected the argument that hospital policies and procedures should be excluded (under Evidence Rule 403) because they would confuse or mislead the jury: **"When a hospital publishes its own policies, procedures, rules, and regulations establishing its standard of care, it defies logic to think that such documents would be confusing or misleading to a jury. If anything, [these] documents would have helped the jury determine the applicable standard of care."**[6] Accordingly, the Court held that the trial court's decision to exclude evidence of the defendant-hospital's policies and procedures was not justified and "clearly contrary to reason."[7]

In yet another medical negligence case, the Ohio Court of Claims actually found the defendant-hospital negligent based upon a violation of its own policies![8] As in *Luettke*, the hospital policies and procedures in *Siebe* not only were relevant and discoverable, they also were admissible at trial to show that the hospital established a standard of care, and then violated that standard.

Finally, in a case involving stockbroker malpractice, the U.S. Court of Appeals for the Sixth Circuit held: "The instant case involves evidence of violations of custom and internal rules. **When a defendant has disregarded rules that it has established to govern the conduct of its own employees, evidence of those rules may be used against the defendant to establish the correct standard of care."**[9]

These cases clearly stand for the proposition that hospital policies and procedures are relevant in medical negligence cases. The next issue is whether these materials are privileged, confidential, or otherwise protected from discovery.

The rules governing discovery afford protections for privileged and confidential materials. Civil Rule 26(B)(1) states that privileged material is not discoverable, and Civil Rule 26(C) states that a trial court may limit discovery through the issuance of protective orders, including an order "that a trade secret or other confidential research, development, or commercial information not be disclosed."[10] The burden of showing that information is confidential or privileged, however, rests upon the party seeking to exclude it.[11] Moreover, a claim of privilege "must rest upon some specific constitutional or statutory provision."[12]

There is no constitutional or statutory privilege applicable to hospital policies and procedures. The only basis left for objection, therefore, is that the materials somehow are confidential or proprietary.

It is well-settled that a party seeking to avoid discovery based on a claim of confidential or proprietary information bears a heavy burden.[13] For instance, a party seeking "trade secret" protection bears the burden to identify the precautions taken to guard the secrecy of the information, the amount of effort or money expended in obtaining and developing the information, and the amount of time and expense it would take for others to duplicate the information.[14] Although these factors do not directly apply here, they demonstrate the tremendous burden on a party seeking to avoid discovery.

Hospital policies and procedures are not "trade secrets." They are not proprietary or confidential, either. "Proprietary" simply means the information is owned by someone. Hospital policies and procedures may be owned by the hospital, but that is not a valid basis to

withhold them from discovery. Indeed, the federal courts have explained that for information to be properly withheld as proprietary it must have an inherent economic value such that, "if disclosed, it would cause substantial economic harm to the competitive position of the entity from whom the information was obtained."[15] "Confidential" simply means the information is intended to be kept secret. There is no reason to believe that hospital policies and procedures are intended to be kept secret. In fact, the very purpose of having written policies and procedures is to make sure the hospital staff is aware of (and follows) the policies and procedures. It would completely defeat this purpose to suggest these materials are intended to be kept secret.

Since hospital policies and procedures are relevant and not privileged, they must be discoverable. As a practical matter, however, it is not always easy to obtain these materials in discovery. Are hospitals just being difficult? Or, are our requests somehow deficient? Perhaps the better question is: What is the most efficient and effective way to obtain these materials in discovery?

In my experience, a request for "all policies and procedures" relating to a specific topic or a specific department will not get you very far. The better approach is to begin by requesting an Index or Table of Contents of all hospital policies and procedures. Then you can follow-up and narrow your request to a specific hospital department. Once you determine which policies and procedures actually apply to your case, you can narrow the scope of your request even further.

Based on the hospital's initial response, you should get an immediate sense about whether the hospital is likely to cooperate. If you think you will be forced to seek the court's involvement, you should bring the matter to the court's attention as soon as possible. Don't allow the hospital (or defense counsel) to beat you to the punch by filing a motion for a protective order before you file a motion to compel.

More importantly, don't allow the hospital to poison the well by trying to frame the issue as a "discovery dispute." This is not a legitimate dispute. The law in Ohio is clear: Hospital policies and procedures are relevant and discoverable. There is no valid basis for hospitals to withhold their policies and procedures, especially in Cuyahoga County.[16] As plaintiff's attorneys, we need to do a better job of educating our judges about this issue.

Finally, as with all other discovery issues, do not get discouraged when the hospital flat-out refuses to produce any of its policies and procedures, or even denies their very existence. Keep pushing. These materials could turn out to be the key evidence that tips the scales in your favor. This is why hospitals fight so hard to withhold their policies and procedures. And it is the very same reason why we need to keep fighting even harder to obtain this crucial evidence. ■

End Notes

1. 8th Dist. No. 86924, 2006-Ohio-3694, ¶ 15.
2. 6th Dist. No. L-05-1190, 2006-Ohio-3872, ¶¶ 32, 34.
3. 2006-Ohio-3872, ¶ 28.
4. *Id.*, ¶ 31 (citations omitted).
5. *Id.*
6. *Id.*, ¶ 36 (emphasis added).
7. *Id.*
8. *Siebe v. Univ. of Cincinnati*, 2001-Ohio-4109, ¶ 24, 117 Ohio Misc. 2d 46, 54, 766 N.E.2d 1070, 1076-77.
9. *Thropp v. Bache Halsey Stuart Shields, Inc.*, 650 F.2d 817, 820 (6th Cir. 1981).
10. *Hope Acad. Broadway Campus v. White Hat Mgt., L.L.C.*, 2013-Ohio-911, ¶ 21.
11. *Covington v. The MetroHealth Sys.*, 150 Ohio App.3d 558, 782 N.E.2d 624, 2002–Ohio–6629, ¶ 24 (10th Dist.).
12. *State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman*, 51 Ohio St.3d 94, 95, 554 N.E.2d 1297 (1990).
13. *Hope Acad. Broadway Campus v. White Hat Mgt., L.L.C.*, 2013-Ohio-911, ¶ 24.
14. *Id.* at 525–26, 687 N.E.2d 661.
15. *Diamond State Ins. Co. v. Rebel Oil Co.,* 157 F.R.D. 691, 697 (D.Nev. 1994).
16. *See Lostracco*, 2006-Ohio-3694.

Acclaimed Writer and Speaker, Professor Jelani Cobb, To Speak At CATA's Annual Installation Dinner

Incoming CATA President, Rhonda Baker Debevec, invites CATA members and their guests to join her at the Annual Installation Dinner where the guest speaker will be acclaimed writer and speaker, **Professor Jelani Cobb.**

Hailing from the University of Connecticut, Professor Cobb has provided engaging and meaningful contributions to the topic of race relations in his *New Yorker* columns and other publications, including *The Substance of Hope: Barack Obama and the Paradox of Progress*. His scholarly work has earned him Fellowships from the Fulbright and Ford Foundations as well as the Sidney Hillman Prize for Opinion and Analysis Journalism in 2015. As an engaging speaker, he has been invited to speak on National Public Radio and various news media outlets. His topic, **The Half-Life of Freedom: Race and Justice in America Today**, is both timely and important within our Greater Cleveland community.

CATA's Annual Installation Dinner will be held on **Friday, June 24, 2016 at The Club at Cleveland Marriott Downtown at Key Center.** The Reception will begin at 5:30 p.m., followed by dinner and the keynote address.

For further information, contact Rhonda Baker Debevec at rdebevec@debeveclaw.com or consult the CATA website at http://clevelandtrialattorneys.org/.

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 --

Oftentimes, patients and clients who suffer from cognitive impairments like Alzheimer's or other forms of dementia end up living very isolated and lonely lives. However, the non-profit, Music & Memory, was created to bring personalized music into the lives of the elderly as a way to improve their cognitive abilities and their quality of life. **Attorney Nancy Iler** first began her career as a nurse and then became a lawyer where she developed a specialty in handling nursing home cases. Her decision to volunteer and partner with Music & Memory was an obvious choice. Her firm is running an ongoing drive to donate iPods to certified Music & Memory care facilities whose staffs are trained to create personalized music programs for residents. If you are interested in getting involved with this organization, donating your iPod, or learning more about the therapeutic benefits of personalized music, please visit: http://musicandmemory.org/ and http://ilerlawfirm.net/music-memory/

Nancy Iler

Since 1979, the Greater Cleveland Food Bank has helped bridge the meal gap and provide individuals and families with nutritious meals they need to succeed. The organization successfully provided 47.8 million meals in 2015 to hungry people in Cuyahoga, Ashtabula, Geauga, Lake, Ashland and Richland counties all in an effort to eradicate hunger and ensure that everyone has nutritious food. A crucial aspect to the success of the Great Cleveland Food Bank are the volunteers who donate their time and energy to help collect, sort, re-pack, and distribute the food that comes through the warehouse everyday. **Attorneys David Kulwicki and Howard Mishkind** were some of those volunteers who donated their time to sort and re-package the food at the warehouse during this past holiday season. The Greater Cleveland Food Bank is always looking for volunteers and always has opportunities available. For more information, please visit: http://www.greaterclevelandfoodbank.org/

Imagine what you could accomplish if you had $30 million to solve the problems of shelter, safety, and economic security throughout the region? What if I told you the money is there – $30 million dollars every year – in unclaimed funds from class action lawsuits? In these lawsuits, a fund is created to pay damages to the injured "class," but there are often funds left over. The attorneys and judge may recommend that the residual funds be put to the "next best" use, for example, payment to a third party – like

Howard Mishkind and Dave Kulwicki volunteering at the Greater Cleveland Foodbank

Dworken & Bernstein Attorneys, Johnathan Stender, Kristin Kraus, and Anna Paige, present check to Legal Aid's Executive Director Colleen Cotter.

Tom Robenalt

The Legal Aid Society – which indirectly helps the entire class. As a Legal Aid Development Committee member, **Attorney Tom Robenalt** recently arranged for **Dworken & Bernstein** to present Legal Aid a check for $10,000 from its "Ohio Lawyers Give Back" initiative. The law firm of Dworken & Bernstein and **Attorney Patrick Perotti** have advocated the use of unclaimed funds as cy pres awards and through the firm's 'Ohio Lawyers Give Back' initiative, have directed over $27 million dollars to over 300 charities and non-profits, including The Legal Aid Society.

The donations The Legal Aid Society of Cleveland receives help support programming which benefits low income people in Northeast Ohio – people who might be victims of unfair, deceptive, discriminatory or predatory consumer practices. Legal Aid protects veterans, the elderly, immigrants, the working poor, and other vulnerable populations against fraud and abuse, and advises low-income people about their rights and responsibilities as consumers.

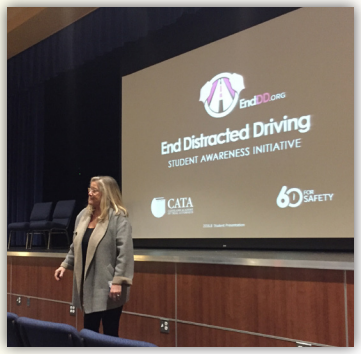
To learn more about cy pres, visit https://lasclev.org/donate/ways-to-give/cy-pres-grants/.

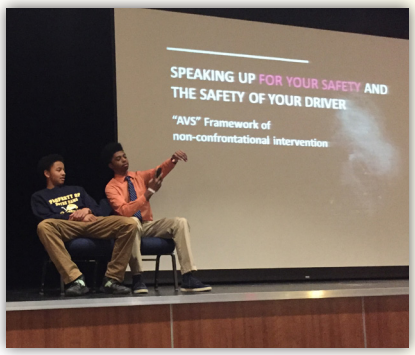
Bill Masters and Kelly Kerber

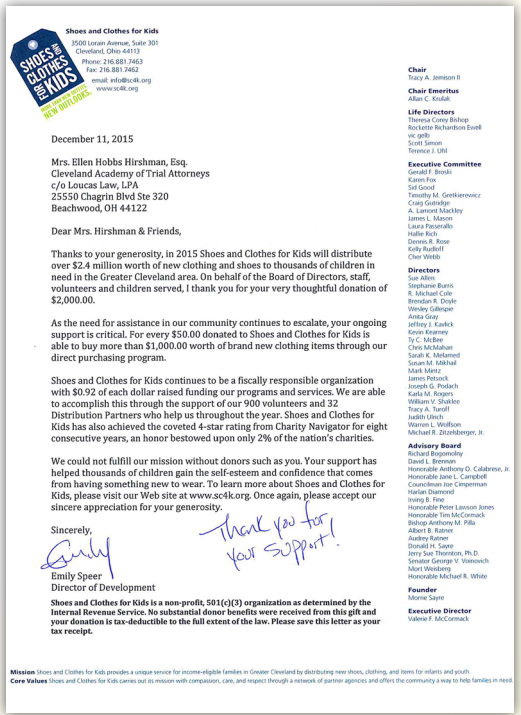
Outside of his law practice, **Attorney William Masters** is actively involved in the thriving arts community in Cleveland. Over the past five years, Bill has dedicated his time and energy to volunteering at a variety of fundraisers which benefit the Cleveland School of the Arts (CSA). CSA is well known for its strength in both academics and the arts. Established in 1981, CSA incorporates all aspects of the arts into its teaching approach. To its credit, and due to the impressive efforts of the students and academic staff members, 100% of the graduating seniors who apply to institutions of higher education are accepted. Bill also spends his time volunteering for the Morgan Paper Conservatory. The Morgan Art of Papermaking Conservatory and Educational Foundation is a non-profit art center dedicated to the preservation of handmade papermaking and the art of the book. Morgan Conservatory pursues its education and charitable purposes by serving the greater community locally, nationally, and internationally with sustainable practices in an innovative and sustainable environment. ■

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

CATA's Community Outreach Events 2015-2016







Shoes and Clothes for Kids
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Cleveland, Ohio 44113
Phone: 216.881.7463
Fax: 216.881.7462
email: info@sc4k.org
www.sc4k.org

December 11, 2015

Mrs. Ellen Hobbs Hirshman, Esq.
Cleveland Academy of Trial Attorneys
c/o Loucas Law, LPA
25550 Chagrin Blvd Ste 320
Beachwood, OH 44122

Dear Mrs. Hirshman & Friends,

Thanks to your generosity, in 2015 Shoes and Clothes for Kids will distribute over $2.4 million worth of new clothing and shoes to thousands of children in need in the Greater Cleveland area. On behalf of the Board of Directors, staff, volunteers and children served, I thank you for your very thoughtful donation of $2,000.00.

As the need for assistance in our community continues to escalate, your ongoing support is critical. For every $50.00 donated to Shoes and Clothes for Kids is able to buy more than $1,000.00 worth of brand new clothing items through our direct purchasing program.

Shoes and Clothes for Kids continues to be a fiscally responsible organization with $0.92 of each dollar raised funding our programs and services. We are able to accomplish this through the support of our 900 volunteers and 32 Distribution Partners who help us throughout the year. Shoes and Clothes for Kids has also achieved the coveted 4-star rating from Charity Navigator for eight consecutive years, an honor bestowed upon only 2% of the nation's charities.

We could not fulfill our mission without donors such as you. Your support has helped thousands of children gain the self-esteem and confidence that comes from having something new to wear. To learn more about Shoes and Clothes for Kids, please visit our Web site at www.sc4k.org. Once again, please accept our sincere appreciation for your generosity.

Sincerely,

Emily Speer
Director of Development

Thank you for your support!

Shoes and Clothes for Kids is a non-profit, 501(c)(3) organization as determined by the Internal Revenue Service. No substantial donor benefits were received from this gift and your donation is tax-deductible to the full extent of the law. Please save this letter as your tax receipt.

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Mission Shoes and Clothes for Kids provides a unique service for income-eligible families in Greater Cleveland by distributing new shoes, clothing, and items for infants and youth.
Core Values Shoes and Clothes for Kids carries out its mission with compassion, care, and respect through a network of partner agencies and offers the community a way to help families in need.

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 Maureen Clancy

by Christopher M. Mellino

In 2010 Maureen Clancy won a seat on the Cuyahoga County Common Pleas bench by stating: "I want to be a hands-on judge and be available to all parties at all times".[1] She is now completing her first term as Judge and is running unopposed for a second term. If you have had the good fortune to have a case in her courtroom you know that she has fulfilled that commitment to be a judge that is involved in all of the cases filed in her courtroom from the initial status call through resolution.

Judge Maureen Clancy

Judge Clancy graduated from St. Mary's College, Notre Dame, Indiana and received her JD from Case Western Reserve University School of Law. She was in private practice for 4 years before being hired by the former Congresswoman Stephanie Tubbs Jones as an assistant prosecutor. She practiced for over 15 years in the Cuyahoga County Prosecutor's Office, the last several years as a Supervisor in the General Felony Unit.

Despite her background in criminal law, once she became a member of the bench Judge Clancy has tried over 20 civil cases during her tenure. One of the things that she enjoys most about being a judge is the exposure to multiple areas of the law and the challenge of learning about each one. She is more than willing to put in the hours necessary to educate herself about the law and the issues involved to make fair decisions in all of her cases. So far she has been very impressed with the quality of the lawyering in the civil cases that have been in her room, particularly with the amount of preparation that is put into the cases.

Being an experienced litigator as a former prosecutor Judge Clancy understands the importance of giving the parties her full attention when she is presiding over a trial. Therefore, in order to give civil litigants full trial days, she does not interrupt civil proceedings to attend to criminal matters.

Voir dire is her favorite part of the trial and she normally will question a panel for the first 45 minutes of the process. She does not have time limits for either side in questioning during voir dire.

She is a proponent of calling witnesses live, especially experts, and also of the liberal use of visuals and technology. From her discussions with jurors she believes jurors expect and appreciate any technology that helps them understand the case.

On the other hand some jurors have told her that they really do not like extremely aggressive questioning of witnesses or when the lawyers yell or argue with witnesses or each other. It makes jurors uncomfortable.

Unlike several commentators, Judge Clancy believes many cases are won or lost in closing argument. She sees this as an opportunity to effectively sum up the case and to connect the dots or put the pieces of the puzzle together for

the jury. It is also an opportunity to effectively focus on the weaknesses of a particular witness' testimony.

Based on her prior experience, she believes a short final closing argument beginning with "I only need x more minutes of your time" is effective. Then give the jury a few short powerful one-liners that they can take back to the jury room with them.

Judge Clancy and her husband both come from large families and she spends a great deal of her time outside of work with family activities. She and her husband also have a Beagle Labrador mix which they rescued and requires a lot of hands on attention. She is an avid runner and swimmer.

She was inspired to become a lawyer by her father who was an FBI agent. Among his duties, he was assigned to monitor the march led by Dr. Martin Luther King from Selma to Montgomery, Alabama for any violations of a court order approving the march. He then assisted in the investigation of the killing of one of the marchers, Viola Lizzuo. Her father went on to become the Vice Dean at Case Western Reserve University School of Law and, with Professor Lewis Katz, ran the Center for Criminal Justice. She was also amazed by The Honorable Stephanie Tubbs Jones and all of her accomplishments and considered it an honor to be hired by her as an assistant county prosecutor. ■

End Notes

1. The Plain Dealer, Lawyers' website rates judges in 9 contested Cuyahoga County races, October 12, 2010.

Michael Goodman is a Certified Structured Settlement Consultant at National Settlement Consultants. He can be reached at 216.241.9722 or mgoodman@nfp.com.

Leading the Structured Settlement Industry

by Michael Goodman

For the past twelve months, I have had the honor and privilege of serving as the President of the National Structured Settlements Trade Association (NSSTA). NSSTA is the sole trade association in the industry, and is comprised of settlement consultants from across the country representing all of the life markets. This past year has been filled with significant and very positive changes for the structured settlements industry, and flush with professionally rewarding experiences as NSSTA President.

Overview

Structured settlements are a unique settlement tool for both property-casualty carriers and plaintiff attorneys. Both claims professionals and plaintiff attorneys work with structured settlement consultants, utilizing the product to create future payment streams thus ensuring the settlement proceeds last as long as necessary for the injured plaintiff. Often characterized as "unique investors," injured parties frequently confront significant financial challenges with life-long medical and income needs.

A structured settlement allows planning for future needs with income free from federal income tax, in accordance with Internal Revenue Code Sections 104(a)(2) and 130. This illustrates the major difference between a retail annuity and a structured settlement funded by an annuity — the entire structured settlement payment stream is free of federal income tax (as well as State income tax); whereas, if a plaintiff purchases his or her own retail annuity after s/he has already received settlement proceeds, the annuity earnings are taxable. Structured settlements are backed by many of the strongest life insurance companies in the United States. This type of safety and security often makes the most sense for injured plaintiffs who cannot afford to bet their financial futures on more risky options like stocks and mutual funds. Structured settlements are well suited for victims of physical injuries and especially for cases involving minor children. In most cases, structured settlements help to avoid a guardianship, and they also ensure that the funds are not distributed in one lump sum at age eighteen (18).

A Year of Change: Growth for the Structured Settlements Industry

For the first time in more than thirty years, NSSTA committed itself to identifying specific opportunities to expand the use of structured settlements. I created a growth committee and worked to develop the following exciting new growth initiatives:

1. Develop a Convertible Lump Sum Option (CLS): A CLS is an attempt to provide a plaintiff with an opportunity to take advantage of potentially higher interest rates in the future. It is not a "new" product. Instead, it adds a "twist" to current lump sums similar to the way a death commutation clause can be added to a contract (please note

the CLS only exists for living Payees — if the Payee is deceased, the lump sum is paid to the beneficiary or estate either when it is due or when it was commuted at death). Imagine a Lump Sum of $500,000 payable in 15 years; the CLS works as follows:

- The convertible feature for the Payee is triggered on the due date. In this example, the lump sum would convert in 15 years.
- The lump sum automatically converts into a predetermined/ preselected design of structured settlement payments (e.g. monthly payments for 20 years certain) upon the due date.
- The lump sum payment amount (e.g., $500,000) is used to fund the previously negotiated and agreed upon stream of periodic payments, but priced based upon the future interest rate. Once again, the CLS option could allow you to take advantage of potentially higher interest rates in the future.
- The original settlement agreement and qualified assignment would stand, as they would contain all of the terms and conditions, including the conversion stream, so the conversion was a part of the original structured settlement.

2. Amend the Federal Employee Compensation Act (FECA):
Our second growth idea involves trying to change FECA to allow for structured settlements. FECA claims are worker's compensation payments (medical, indemnity and death) paid to Federal employees or their survivors. FECA was enacted to mimic the benefits available to injured workers and their survivors in various states. Since it's inception, it has not permitted structured settlements. We are working with Congress to amend FECA to permit structured settlements for all three types of claims.

Enhanced Security for Injury Victims and their Families

Separate from growing the industry, we embarked upon further protecting our annuitants across the country. NSSTA has been the primary force in promoting the enactment of Structured Settlement Protection Acts in 49 states. Structured Settlement Protection Acts provide protection to structured settlement recipients who agree to sell some or all of their rights to receive future payments. These transactions include companies such as J.G. Wentworth and others who purchase structured settlements at a discount. Under my leadership as NSSTA President, we have worked effectively to pass strong consumer protection amendments to the State Structured Settlement Protection Acts in Illinois, Wisconsin, Virginia, Maryland and Florida.

New SSPA Laws, Amendments and Court Rules in Illinois, Wisconsin, Maryland, Virginia and Florida will:

- Require that any SSPA application involving a payee be brought in the county where the payee lives.
- Prevent factoring companies from engaging in "forum shopping".
- Require that state courts hold hearings on SSPA applications.
- Require payees to appear at those hearings unless they are excused for cause.
- Require that every SSPA application includes information regarding prior factoring transactions and attempted factoring transactions involving the same payee.

Established the Congressional Structured Settlements Caucus in Washington, DC

One of NSSTA's primary responsibilities to all our members is to work continuously on Capitol Hill to maintain support for critically important structured settlement industry tax code provisions. Working with groups such as the American Association of People with Disabilities (AAPD), the National Consumers League and the American Association for Justice we established the Congressional Structured Settlements Caucus, co-chaired by Congressman John Lewis, D–Georgia and Congressman James Sensenbrenner, R-Wisconsin. Currently, we have over 70 members of Congress that are part of this Caucus. During my tenure, I went to Washington, D.C. each month to meet with members of Congress and our various constituents. While the structured settlement industry has strong bi-partisan support, it is critical to make sure that we preserve our tax free status if any tax reform were to ever to occur.

I look forward to continuing to lead this trend of positive change for the structured settlements industry. My role as NSSTA President has been incredibly rewarding, and the change we enact together continues to provide meaningful advancements in our industry. ■

Brian W. Parker is an associate at Nurenberg, Paris, Heller & McCarthy Co., LPA. He can be reached at 216.621.2300 or bparker@nphm.com.

Ohio Emotional Distress Damages For The Loss Of A Fetus Prior To Viability

by Brian W. Parker

A partner came into my office with a challenge. Our firm represented a couple who had tragically lost an unborn child in an automobile accident. At the time of the accident, Naomi, our client, was 8 weeks pregnant. Defense counsel challenged the partner to show that Ohio would allow Naomi to recover emotional distress damages for the loss of an unviable fetus. Defense counsel asserted that emotional distress damages for the death of another are only available in Ohio in a wrongful death action, and that a wrongful death action was not available in this case due to the lack of viability of the fetus. Thus, defense counsel challenged, we were not able in the present case to recover for our client's emotional distress damages due to the loss of her unborn child.

In support of his position, defense counsel cited a Maryland case which, defense counsel indicated, was consistent with Ohio law. That case, *Smith v. Borello*, 370 Md. 227 (2002), states:

> A pregnant woman who sustains personal injury as the result of a defendant's tortious conduct and who, as part of that injury, suffers the loss of the fetus may recover, in her own action for personal injuries, for any demonstrable emotional distress that accompanies and is attributable to the loss of the fetus. The distress recoverable in that action includes that arising from the unexpected termination of her pregnancy and the enduring of a miscarriage or stillbirth. * * * It does not include, however, in the context of this case, pecuniary losses or solatium or loss of consortium damages recoverable under the wrongful death statute, whether or not that statute applies in the circumstances. **The recovery, in other words, is for the psychic injury inflicted on the mother and not for her sorrow over the loss of the child. Recovery for that sorrow must be had, if at all, under the wrongful death statute.**

Id. at 247-48 (Emphasis added).

Thus, it was defense counsel's position that we were not able to recover for our client's emotional damages resulting from the loss of her unviable fetus, thereby, in defense counsel's mind, significantly diminishing the value of the case.

Not only was I enthusiastic about silencing the bravado of defense counsel, but more importantly, I wanted to help Naomi and her husband recover for their tragic loss. If Ohio law was truly as defense counsel stated, it was clear that an injustice would be done. Naomi and her husband had been struggling to have a child. There was no question that Naomi had lost the baby as a result of the defendant's negligence, and it seemed unjust that defendant should get a windfall, at our client's expense, solely due to the early stage of the baby's development.

I first looked to see whether Ohio law allowed a wrongful death action for the death of a fetus who was not viable. Defense counsel was right in

this aspect of his challenge. Currently under Ohio law, there is no wrongful death claim for the death of a non-viable fetus, non-viability being the inability to sustain life of the child outside the mother's womb. *See Griffiths v. Rose Ctr.*, 5th Dist. No. 2005CA00256, 2006-Ohio-1573, ¶ 39 ("The law in Ohio recognizes the viable child as a person under the wrongful death statute rather than to designate the same status to a fetus incapable of independently surviving a premature birth"); *Werling v. Sandy*, 17 Ohio St.3d 45, syllabus (1985) ("A **viable** fetus which is negligently injured *en ventre sa mere* and subsequently stillborn may be the basis for a wrongful death action pursuant to R.C. 2125.01") (emphasis added).

The next question I looked at was whether emotional distress damages are available when a plaintiff loses a loved one where there is no wrongful death action available, such as where one suffers the loss of someone who is not a family member. Immediate legal research results in the context of deaths of unborn children did not prove fruitful. However, I found that the fact that a wrongful death action is not available does not mean that a plaintiff may not recover for emotional damages for the death of another person where the plaintiff is also injured in the accident. In *Binns v. Fredendall*, 32 Ohio St.3d 244 (1987), the Court held:

> Recovery for negligently inflicted emotional and psychiatric injuries accompanied by contemporaneous physical injury may include damages for mental anguish, emotional distress, anxiety, grief or loss of enjoyment of life caused by the death or injury of another, provided the plaintiff is directly involved and contemporaneously injured in the same motor vehicle and accident with the deceased or other injured person.

Id., syllabus ¶ 3.

In *Binns*, the plaintiff was a passenger in a car driven by her live-in boyfriend. The defendant negligently drove his vehicle into the driver side of the plaintiff's vehicle resulting in injury to the plaintiff and a gruesome death for the live-in boyfriend. The plaintiff sought damages including for "mental anguish and emotional distress suffered by the plaintiff as a result of the death of her boyfriend, Donald Binns and as an element thereof her loss of enjoyment of life." *Id.* at 281.

Defendant Fredendall objected to this element of damages, contending that it was only available in a wrongful death action, and since the boyfriend was not the plaintiff's husband, a wrongful death action was unavailable. In rejecting this argument the Court stated:

> The fact that mental anguish over the death of a relative is compensable in a wrongful death action does not preclude plaintiff's recovery of damages for such injury where plaintiff also suffers physical injuries in the same accident that caused the death of another. Plaintiff's recovery for mental anguish caused by the death of another, however, must be predicated upon her direct involvement in the accident, not upon the mere fact of the death, which is an aspect of a wrongful death action.
>
> * * *
>
> Accordingly, we hold that recovery for negligently inflicted emotional and psychiatric injuries accompanied by contemporaneous physical injury may include damages for mental anguish, emotional distress, anxiety, grief or loss of enjoyment of life caused by the death or injury of another. We strictly limit such recoveries to those plaintiffs directly involved and contemporaneously injured in the same motor vehicle and accident with the deceased or other injured person.

Id. at 246-47.

Here, Naomi was physically injured in the accident, and was obviously in the same motor vehicle with her unborn child. As such, the criteria for recovery for her grief caused by the loss of her child under *Binns* is met, notwithstanding the fact that plaintiff may not bring a wrongful death action with respect to the fetus.

Moreover, because Naomi was herself injured in the accident, she may recover her full emotional distress damages without proving the elements of the separate tort of negligent infliction of emotional distress. *See Loudin v. Radiology & Imaging Servs.*, 128 Ohio St.3d 555, 561, 2011-Ohio-1817, ¶ 20 ("Courts have allowed recovery for emotional distress accompanied by the slightest injury. When there is evidence of any injury, no matter how slight, the mental anguish suffered by plaintiff becomes an important element in estimating the damages sustained") (citation omitted); *id.*, syllabus ¶ 2 ("Emotional distress stemming directly from a physical injury is not a basis for an independent cause of action for the negligent infliction of emotional distress").

Despite these encouraging results I was still concerned that defense counsel may object that the rule in *Binns* does not apply because that case, unlike the present, did not involve the death of a non-viable fetus. However, I found that any objection by defense counsel in this regard should be rejected. Ohio law has recognized a mother's cause of action for emotional distress damages, including future damages, associated with the wrongful termination of a pregnancy

which involved a non-viable fetus.

In *Rechenbach v. Haftkowycz*, 100 Ohio App.3d 484 (1995), the plaintiffs, a woman and her husband, brought a medical negligence action against a physician for a miscarriage the physician had caused. The plaintiff mother was diagnosed by the defendant physician as having abnormal cells in her cervix, for which he recommended laser surgery. However, immediately prior to performing the surgery, the physician did not test the plaintiff to ensure she was not pregnant. She was in fact pregnant as of sometime in May 1990, with the surgery being performed by the defendant on June 7, 1990. The laser surgery caused the plaintiff to have a miscarriage of her non-viable fetus.

The jury returned a verdict in favor of the plaintiffs. On appeal, the defendant physician challenged the amount of damages awarded for future emotional distress associated with the miscarriage. In upholding the jury verdict for plaintiffs' damages, the Court stated:

> The injury appellee [i.e., the plaintiff mother] suffered as a result of appellant's negligence, viz., a miscarriage, is an "objective" injury. The fact that pain and suffering are subjective *feelings* makes the injury itself no less objective.
>
> In this case, both appellees testified concerning the pain and suffering they experienced because of the miscarriage. Moreover, they also testified they continued to experience pain and suffering up to the time of trial. Their testimony was sufficient evidence to prove damages occurred as a result of the injury and were continuing. "Since pain and suffering are subjective feelings, the injured person's testimony is the only direct proof of such damages."

Id. at 493 (citation omitted).

Thus, in *Rechenbach*, the Court allowed the parents of a non-viable fetus to recover damages, including future damages, for emotional distress without any limitation with respect to the plaintiffs' loss arising from the death of the fetus.

Also, in *Strasel v. Seven Hills Ob-Gyn Assocs*., 170 Ohio App.3d 98, 2007-Ohio-171, the Court allowed a mother to recover for emotional distress where the defendant physician had placed her pre-viable fetus (the mother was 6 or 7 weeks pregnant) in danger by performing a medical procedure on the mother. The physician had mis-diagnosed the mother's pregnancy as a blighted ovum and performed a

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 2016-2017 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

D & C procedure on the mother. After learning that she was in fact pregnant at the time of the procedure, the mother experienced severe emotional distress about the potential harm to the fetus, despite the fact that the child was eventually born healthy.

The Court stated the following in upholding the mother's claim for emotional distress damages despite the birth of a healthy baby:

> In this case, Strasel was clearly present when the D & C was performed. It is uncontroverted that her baby was subjected to a real physical peril by the D & C, regardless of whether the peril led to an actual injury. Strasel's emotional distress resulted from the very real risk of injury to a seven-week-old fetus subjected to what was the equivalent of an abortion procedure. The fact that the baby was born without any apparent physical injury did not alter the fact that the D & C had subjected the baby to a very real danger. Strasel clearly appreciated the risk to her baby, and as a result of her recognition of the peril she suffered psychological injuries that were compensable.....

Id., ¶ 22.

In addition, Ohio criminal law recognizes the legal value of a pre-viable fetus. In R.C. § 2903.06(A), it provides that a person may be criminally liable for the unlawful termination of a person's pregnancy by negligent operation of a motor vehicle, as follows:

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or **the unlawful termination of another's pregnancy**, in any of the following ways:
>
> * * *
>
> (a) Negligently;

(Emphasis added).

R.C. § 2903.09(A) includes a pre-viable fetus within the terms of the preceding statute, as follows:

> (A) "Unlawful termination of another's pregnancy" means causing the death of an unborn member of the species homo sapiens, who is or was carried in the womb of another, as a result of injuries inflicted **during the period that begins with fertilization and that continues unless and until live birth occurs.**

(Emphasis added). *See also State v. Feller*, 1st Dist. Nos. C-110775, C-110776, 2012-Ohio-6016, ¶ 35 (noting that per R.C. § 2903.09(A), "[t]he General Assembly elected to protect the unborn from the moment of fertilization, not from the moment of viability").

R.C. § 2903.06(A) has passed constitutional scrutiny despite the fact that a mother may legally terminate the life of her own fetus within certain constitutional parameters. *See State v. Alfieri*, 132 Ohio App.3d 69, syllabus (1st Dist. 1998) (noting that, *inter alia*, "a criminal defendant who assaults a pregnant woman [in that case with a motor vehicle], thereby causing the death of the fetus she is carrying, is not similarly situated to a pregnant woman who elects to have her pregnancy terminated by one legally authorized to perform the act").

Therefore, I was very pleased to inform the partner that defense counsel was incorrect in his assertion that Naomi in this case may not recover for the emotional distress related to the loss of her unborn child in this accident. Ohio law clearly establishes the validity for this type of damages in her personal injury claim. ■

Recent Ohio Appellate Decisions

by Todd E. Gurney and Dana M. Paris

Griffith v. Aultman Hosp.,____ Ohio St.3d ___, 2016-Ohio-1138 (March 23, 2016).

Disposition: Reversing decision of 5th District; holding data generated in the process of healthcare treatment that pertains to the patient's medical history, diagnosis, prognosis, or medical condition qualifies as a medical record. The physical location of the data is not relevant to the determination whether that data qualifies as a medical record.

Topics: Medical records.

This case began as a medical negligence and wrongful death action. The plaintiff's father, Howard, was admitted to Aultman hospital for surgery. After being transferred out of the intensive care to a step-down unit, he developed intermittent atrial fibrillation and was placed on continuous cardiac monitoring. Around 4 a.m. the next day, a nurse assessed Howard and he was doing well. About 45 minutes later, an x-ray technician found Howard in his bed with his gown ripped off and the cardiac monitor no longer attached to his body. He was unresponsive and did not have a heartbeat. He was resuscitated and moved to the ICU, but he had already suffered severe brain damage. He died the following day.

In discovery, the plaintiff requested a copy of Howard's complete medical record. In response, the hospital produced only the portions of the medical record that existed in the medical records department. After additional requests for the remainder of the record failed, the plaintiff filed a separate action to compel the complete medical record under Revised Code Sections 3701.74 and 2317.48.

The complaint alleged that the hospital had failed to produce any monitoring strips or nursing records. The hospital took the position, however, that because the monitoring strips were provided only to the hospital's risk management department, and not to the medical-records department, they are not a "medical record" as defined in Revised Code Section 3701.74(A)(8).

The trial court granted the hospital's motion for summary judgment, finding that the monitoring strips were not part of Howard's medical record. The Fifth District Court of Appeals agreed, holding that a patient's "medical record consists of what was maintained by the medical records department and information that the provider decides not to maintain is not part of the record." 2016-Ohio-1138, ¶ 39. The Court further held that documents kept by any other department, including risk management, "do not meet the definition of a medical record because they were not 'maintained' by the medical records department." *Id*. at ¶ 16.

On appeal to the Ohio Supreme Court, the plaintiff argued that a hospital should not be permitted to withhold portions of a patient's medical record by unilaterally selecting and storing those medical records in a department other than its medical records department. The Supreme Court accepted review to determine what constitutes a "medical record" as that term is used in Revised Code Section 3701.74(A)(8).

The Supreme Court agreed with the Fifth District that the term "medical record" does not include all patient data, but includes only that data that a healthcare provider has decided to keep or preserve in the process of treatment. However, the Court found the Fifth District erred in holding that the medical record consists only of information maintained by the medical records department.

The statute defines "medical record" to mean any patient data "generated and maintained by a health care provider," without any limitation as to the physical location or department where it is kept. Contrary to the hospital's assertion, the Court found the definition of "maintain" does not depend on a managerial decision to keep or preserve the data in a discrete location or file. Instead, it simply means the healthcare provider has made a decision to keep or preserve the data. The statute does not state that a medical record must be kept in a specific physical location.

Accordingly, the Court concluded that the physical location of patient data is not relevant to the determination whether the data qualifies as a medical record under Revised Code Section 3701.74(A)(8). Rather the definition focuses on whether a healthcare provider made a decision to keep the data that was generated in the process of the patient's healthcare treatment and pertains to the patient's medical history, diagnosis, prognosis, or medical condition.

Finally, the Court also concluded that Section 3701.74 does not require that a patient seeking a medical record state a reason for doing so.

Bret E. Thompson v. Oberlanders Tree & Landscape, Ltd., et al., 3rd Dist. No. 9-15-44, 2016-Ohio-1147 (March 21, 2016).

Disposition: Reversing and remanding the trial court's decision granting summary judgment to the defendant-employer. The Court held that, in accordance with R.C. 2745.01(C), evidence was presented which proved that federal regulations required hand guards and the

defendant-employer had knowledge that the chainsaw was lacking a hand guard prior to the injury.

Topics: Employer intentional tort.

Plaintiff, Bret Thompson, employed by Defendant Oberlanders Tree & Landscape, injured his hand while using a chainsaw to cut a tree. The chainsaw did not have the required safety hand guard to protect him from dangerous "kickbacks." The defendant filed a motion for summary judgment arguing that the plaintiff failed to present any evidence as to how the defendants intended to injure him or how they deliberately removed a safety guard. The trial court granted the motion.

On appeal, plaintiff argued the trial court erred in finding that, in an employer intentional tort case, an employee must prove the employer "specifically intended to injure the plaintiff" where plaintiff submits evidence from which reasonable minds could find a "deliberate removal of a safety guard."

Ohio's intentional tort statute, R.C. 2745.01, states:

(A) In an action brought against an employer by an employee, *** for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

(B) As used in this section, 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

(C) **Deliberate removal by an employer of an equipment safety guard *** creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if any injury *** occurs as a direct result.**

The Ohio Supreme Court has found that an "equipment safety guard" is "'a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.'" *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, quoting *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960. An employer deliberately removes a safety guard "when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine. *Hewitt* at ¶ 30. "Although 'removal' may encompass more than physically removing a guard from equipment and making it unavailable, such as bypassing or disabling the guard, an employer's failure to train or instruct an employee on a safety procedure does not constitute the deliberate removal of an equipment safety guard." *Id*. at ¶ 29. The Supreme Court of Ohio then decided *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, where it found that in the absence of a deliberate removal of an equipment safety guard, an employee must establish that his employer acted with the specific intent to injure him.

In this case, the plaintiffs argued that an employer's deliberate decision not to replace or repair a safety guard, which comes installed from the manufacturer and that is required to be installed by law or regulation, amounts to the deliberate removal of an equipment safety guard in accordance with R.C. 2745.01(C). The Court of Appeals agreed, finding that an employer deliberately removes an equipment safety guard when it makes a deliberate decision not to either repair or replace an equipment safety guard that is provided by the manufacturer and/or required by law or regulation to be on the equipment.

Here, plaintiff presented evidence that, under federal law, the hand guard was required to be fully functional on the chainsaw and that the defendant had knowledge that the chainsaw was lacking a hand guard. The Court therefore found that plaintiffs had successfully established a rebuttable presumption of intent under R.C. 2745.01(C) sufficient to create a jury issue.

Heard v. Aultman Hosp., 5th Dist. No. 2015CA00141, 2016-Ohio-1076 (March 14, 2016).

Disposition: Affirming summary judgment in favor of defendant-hospital in medical negligence action.

Topics: Expert reports not authenticated by affidavit are not considered proper Civil Rule 56(C) evidence.

In this medical negligence action, the plaintiff alleged that her four-year-old son was administered an overdose of morphine during surgery at a local hospital, causing respiratory distress and a hypoxic injury, resulting in debilitating brain damage. The defendant-hospital filed a motion for summary judgment, arguing there was no genuine issue of material fact that the correct dosage of morphine was administered.

In support of its motion, the defendant submitted the depositions of the involved physicians and nurses. In response, the plaintiff submitted the written report of her medical toxicology expert. The defendant then filed a motion to strike the report as unauthenticated pursuant to Civil Rule 56(C). The trial court granted the defendant's motion for summary judgment, and dismissed its motion to strike as moot.

The appellate court, conducting a *de novo* review, addressed the scope of Civil Rule 56(C) evidence. Citing a litany of cases holding that an unauthenticated expert report may not be considered for purposes of deciding a motion for summary judgment, the court noted that the proper procedure for

introducing an expert report is to incorporate it by reference into a properly framed affidavit. Accordingly, the appellate court refused to consider the expert report as allowable evidence under Civil Rule 56(C). Since the plaintiff failed to produce evidence creating a genuine issue of material fact, the defendant was entitled to judgment as a matter of law.

This case is a stern reminder: If you want the court to consider evidentiary matter of a type not listed in Civil Rule 56(C), you must incorporate the material by reference into a properly framed affidavit.

Rush v. Univ. of Cincinnati Physicians, Inc., 1st Dist. No. C-150309, 2016-Ohio-947 (March 11, 2016).

Disposition: Affirming directed verdict limiting liability of employer (physician's practice group) to conduct of the named physician; Holding defense experts did not offer new opinions at trial that would have required supplementation of discovery responses.

Topics: Vicarious liability of physician's employer; What constitutes "new subject matter" of expert testimony.

In this medical negligence action, Mr. Rush (the plaintiff), was admitted to the hospital after falling off a ladder and breaking his clavicle and eight ribs. He was treated by several anesthesiologists over the course of his hospital stay, all of whom were employees of UC Physicians (a named-defendant).

Mr. Rush's pain was treated primarily with medications administered via an epidural catheter. After a few days in the hospital, Thomas Kunkel, M.D. (another named-defendant) increased the epidural infusion rate.

The next evening, Mr. Rush complained to a nurse of increasing numbness and weakness in his legs and abdomen. The nurse telephoned an anesthesiologist about Mr. Rush's worsening condition. The hospital notes do not identify the anesthesiologist with whom she spoke, but the records contain a telephone order from Dr. Kunkel instructing her to decrease the epidural rate. Despite his name on the order, Dr. Kunkel insisted that he did not receive this phone call. In fact, he testified that: (a) he would have followed a different course of action if he had received the call; and (b) it was common practice for anesthesiologists to routinely sign electronic orders for each other. Dr. Kunkel further testified that it was likely Dr. Khalil who received the call and ordered the decrease as he was "on call" at the time.

Mr. Rush's condition continued to worsen the next morning. He did not recover, and he ended up paralyzed and in a wheel chair. Mr. Rush filed suit against a number of defendants who had been involved in his medical treatment, but eventually all of them were dismissed except Dr. Kunkel and UC Physicians. At trial, Mr. Rush argued: (a) he had become paralyzed as a result of a spinal epidural hematoma; and (b) Dr. Kunkel was negligent because he failed timely to identify the hematoma and take corrective action (*e.g.*, stop the epidural and order a stat CT).

The defendants moved for a directed verdict, asserting that UC Physicians could not be held liable for the conduct of physicians (specifically, Dr. Khalil) who were not named in the lawsuit. The court granted the directed verdict.

The First District Court of Appeals affirmed the directed verdict, relying upon the Ohio Supreme Court's decision in *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, and its own precedent in *Henry v. Mandell-Brown*, 1st Dist. No. C-090752, 2010-Ohio-3832. In *Henry*, the First District applied *Wuerth* to a medical malpractice claim, concluding that where claims against a physician were not filed within the statute of limitations period, the plaintiff could not pursue vicarious liability claims against the physician's employer. Thus, the court held in this case that UC Physicians may not be vicariously liable for the conduct of an unnamed physician.

The appellate court stated it was "not unmindful of the potential unfairness" of allowing the defendants to point the finger at Dr. Khalil as responsible for the order to which Dr. Kunkel's name was attached, yet allow UC physicians to avoid liability for any negligence of Dr. Khalil. By the time Mr. Rush discovered that the defendants intended to assert that Dr. Khalil had signed the note (and the electronic records were inaccurate), it was too late for them to name Dr. Khalil in the lawsuit. Moreover, the appellate court explicitly recognized that inaccurate hospital records may prevent a plaintiff from discovering the identity of a potentially liable defendant until after limitations period has passed.

Nonetheless, the court sided with the defense, holding that under Ohio law, once a cognizable event occurs that places a plaintiff on notice that an injury may have resulted from medical treatment, the statute begins to run and the plaintiff has a duty to investigate and identify all potential tortfeasors.

One of the appellate judges, however, did not agree with the majority's broad interpretation of *Wuerth*. In a dissenting opinion, it was noted that in *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940), the Ohio Supreme Court held that a party injured by the negligence of an employee (acting in the course and scope of employment) may sue the employee, the employer, or both. Not only is *Losito* still good law, it was favorably cited for this proposition in *Wuerth*! Indeed, other courts have come to the conclusion that *Wuerth* did not overrule *Losito*. *See Tisdale v. Toledo Hosp.*, 197 Ohio App.3d 316, 2012-Ohio-1110, 967 N.E.2d 280 (6th Dist.) and *Taylor v. Belmont Comm. Hosp.*, 7th Dist. No. 09 BE 30, 2010-Ohio-3986.

The dissent concluded that *Wuerth* should not apply to preclude any claim of vicarious liability flowing from the alleged malpractice of physicians not named as parties in the lawsuit. Nevertheless, the dissent was bound by the doctrine of stare decisis to follow the precedent of the First District's decision in *Henry* unless and until the Supreme Court resolves the differing interpretations of *Wuerth*.

The appellate court also addressed the plaintiff's contention that the trial court erred by permitting the defendants to introduce **new expert opinions** that were not disclosed prior to trial. Specifically, they contended the court permitted two defense experts to testify about posterior rib fractures that they had not identified prior to trial in their expert reports or deposition testimony.

The appellate court concluded that the trial testimony about posterior rib fractures did not constitute a new "subject matter" of expert testimony that required the defendants to supplement their discovery responses. The theory of the defense experts throughout the case had been that the cause of paralysis was an ischemic injury caused by fractured ribs. The experts mentioned the rib fractures in their reports as the cause of paralysis, but never pinpointed the fractures prior to trial as posterior. However, the plaintiffs never asked them to pinpoint the fractures. Accordingly, the appellate court held that the trial court did not abuse its discretion in permitting the experts to provide at trial a more detailed explanation of their theory of causation than what was provided in their reports.

Sheldon v. Burke, 8th Dist. No. 103576, 2016-Ohio-941 (March 10, 2016).

Disposition: Affirming dismissal of re-filed negligence action based on statute of limitations; Savings Statute held inapplicable where original action was not "commenced" by obtaining service within one year.

Topics: Savings Statute (R.C. § 2305.19); Civil Rule 3(A).

In this negligence action resulting from a motor vehicle collision, the plaintiffs filed their complaint within the two-year statute of limitations period. The case was dismissed under Civil Rule 3(A), however, because the plaintiffs failed to obtain service upon the defendant within one year. Relying upon Ohio's "savings statute" (R.C. § 2305.19), the plaintiffs re-filed their complaint within one year of dismissal and, this time, obtained service. But the defendant filed a motion to dismiss, arguing the plaintiffs failed to "commence" the action within the two-year statute of limitations (R.C. § 2305.10(A)). The trial court agreed and dismissed the complaint.

On appeal, the plaintiffs argued the trial court erred in granting the motion to dismiss. They contended their complaint was timely filed pursuant to the savings statute because it was filed within one year of the dismissal without prejudice of their first complaint.

The savings statute provides: "In any action that is commenced ***or attempted to be commenced***, [and] if in due time * * * the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits…" R.C. § 2305.19 (emphasis added).

Despite quoting the savings statute in its opinion, the appellate court determined that "in order to avail oneself of the savings statute, the original action that was dismissed must have been 'commenced' within the applicable statute of limitations." For this proposition, the court cited *Anderson v. Borg Warner Corp.*, 8th Dist. Nos. 80551 and 80926, 2003-Ohio-1500, ¶ 27, a case where asbestos claims were barred by the statute of limitations because the plaintiffs failed to obtain service on the defendants within one year of filing their complaint.

The appellate court then cited Civil Rule 3(A), which defines the commencement of a civil action and states that "[a] civil action is commenced by filing a complaint with the court, *if service is obtained within one year from such filing upon a named defendant*." (Emphasis added.) The court concluded that because the original action was never "commenced" as defined by Civil Rule 3(A), the savings statute was inapplicable and, therefore, the re-filed complaint was barred by the statute of limitations.

It appears the trial court and the appellate court overlooked – or simply disregarded – the clear language of the savings statute. The statute applies not only to any action that is "commenced," but also to any action that is **"attempted to be commenced."** R.C. § 2305.19. It is unclear from the Eighth District's opinion whether the plaintiffs attempted to commence the original action – i.e., whether they attempted service upon the defendant. (The online docket, however, shows that service was attempted and failed.)

As it stands, this decision of the Eighth District Court of Appeals essentially eliminates the phrase "attempted to be commenced" from the savings statute. If a case is dismissed without prejudice before service is obtained on any defendant, the savings statue will not apply.

Brandy D. Bowers, et al. v. Lisa Herron, et al., 5th Dist. Fairfield No. 15CA34, 2016-Ohio-766 (February 26, 2016).

Disposition: In granting sanctions, the trial court failed to hold a hearing to determine the reasonable nature of attorney fees. The Court of Appeals therefore reversed and remanded for a hearing on attorney fees.

Topics: Sanctions; Civ. R. 37; Motion for Attorney Fees.

The underlying civil action was brought against the defendants for personal injuries sustained as a result of a motor vehicle accident. Sam N. Ghoubrial, M.D. was the plaintiff's treating physician and appeared for a videotaped trial deposition. During the deposition, the Defendants' counsel asked several questions which Dr. Ghoubrial's personal counsel instructed him not to answer. The defendants filed a motion for attorney's fees and costs against Dr. Ghoubrial and his attorney specifically asking the trial court to award fees for all costs incurred in conducting Dr. Ghoubrial's deposition. The trial court granted defendants' motion for attorney's fees and ordered that Dr. Ghoubrial's attorney provide compensation for the following items: (1) defendants' reasonable attorneys' fees, costs, and expenses arising from a follow up deposition of Dr. Ghoubrial upon the unanswered questions; and (2) defendants' reasonable attorneys' fees for time spent preparing the motion. The trial court issued an order in which it awarded $1,525.00 to Defendants relative to their motion for attorneys' fees. Dr. Ghoubrial and his attorney appealed.

On appeal, the appellants argued that the trial court erred in considering evidence not in the record and in not conducting a hearing prior to making an award of attorney fees. Civ. R. 37(A) proves:

> (A) Motion for order compelling discovery
>
> Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery as follows:
> ***
>
> (4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Here, because the trial court did not provide an opportunity for a hearing prior to awarding attorney fees, the court of appeals reversed and remanded the matter for the trial court to conduct an evidentiary hearing on the reasonableness of the award.

Robert Howard v. Ohio Department of Rehabilitation and Correction, Ct. Of Cl. No. 2014-00950, 2016-Ohio-684 (January 14, 2016).

Disposition: Finding in favor of the plaintiff, the magistrate held that the defendant had constructive notice of the dangerous condition and should have been aware of the risk of harm to the plaintiff but breached its duty when it failed to take reasonable care to prevent the plaintiff from getting injured by the dangerous condition.

Topics: Slip and Fall; Natural Accumulation of Snow and Ice.

The plaintiff, an inmate at the Richland Correctional Institute, slipped and fell on an accumulation of snow and ice while traversing down a walkway. Generally, in a negligence claim, a possessor of land has no duty to protect an invitee from natural accumulations of ice and snow on his property. *Brinkman v. Ross*, 68 Ohio St.3d 82 (1993). "An invitee who chooses to traverse a natural accumulation of ice or snow is generally presumed to have assumed the risk of his or her action to the degree that no duty exists on the premises owner." *Dean v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 97API12-1614, 1998 Ohio App. LEXIS 4451 (Sept. 24, 1998). However, inmates incarcerated in a state penal institution are not afforded the status of a traditional "invitee" and are not always free, as an invitee would be, to refrain from traversing the accumulation of ice and snow; and thus cannot be said to assume the risk of doing so. *Id.* When there is a custodial relationship between the state and its inmates, the state has a duty to exercise reasonable care to prevent prisoners in its custody from being injured by dangerous conditions about which the state knows or should know. *Moore v. Ohio Dept. Of Rehab. & Corr.*, 89 Ohio App.3d 107 (10th Dist. 1993).

The Court found that when the plaintiff left his cell block and began to traverse the walkway with the natural accumulation of snowfall and ice, the ice covered spot on the walkway posed an unreasonable risk of harm to the plaintiff. Additionally, although the plaintiff did not present evidence that the defendant had actual notice of the dangerous condition, the defendant had constructive notice of the condition as this dangerous depression had existed in the walkway since at least 2005. The defendant should have been aware of the risk of harm to the plaintiff but failed to take reasonable care to prevent him from becoming injured by the dangerous condition, thereby resulting in bodily injuries to the plaintiff. ■

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Verdict Spotlight

by Kathleen J. St. John

On October 9, 2013, forty-three year old Mark Soberay was returning by Greyhound bus to Cleveland from New York City. Soberay, the owner of a Cleveland music studio, had been in New York to cast actors for a music video.

The bus driver, Sabrina Anderson, was doing a back-to-back nighttime route from Cleveland to New York and back. At 1:30 a.m., heading west on I-80 in Pennsylvania, about 190 miles from New York City, the bus crashed into the rear of a tractor-trailer hauling trash.

Soberay, asleep in the front passenger seat, was pinned by the front right side of the bus, and lay trapped and conscious for three hours until rescue workers freed him. His injuries include a below-the-knee amputation of his right leg, fractures of almost every bone in his left leg which is disfigured and largely unuseable, a pseudo-aneurysm in his aorta requiring placement of a stent, fractured humerus and socket of his right shoulder severely limiting motion in that arm, bilateral hip displacements and fractures with the left femur intruding into the pelvis, and a severed urethra requiring catheters and a bag for more than a year. The urethra was subsequently reattached, but he now suffers incontinence and impotence. He also suffered two fractured vertebrae, an injury to his spleen, removal of his gall bladder, and a severe eye laceration. He has undergone 30 surgeries, with more to come; and is in constant pain. Medical bills were roughly $1.5 million; the life care plan was about $4.5 million. There was no wage loss since he had a business which he still maintains.

Mark Soberay

The bus driver (who also lost a leg) refused to give a statement to police at the hospital. When she finally gave a statement, two months later, she attributed the accident to her right foot and right arm going numb, followed by her blacking out. She denied falling asleep.

The bus was full, resulting in numerous injuries, including one death. As such, the NTSB would ordinarily have investigated this accident. But on the morning of the accident the government

was in sequester (shut down), so the accident was investigated instead by the Pennsylvania Highway Patrol.

The patrolman in charge had only been on the Investigation Unit for five months, and had never investigated a bus accident, or one involving two large commercial vehicles. Using a conservation of momentum formula, he concluded the crash was caused by the truck driver going 16 mph. The truck driver (Gubica) was charged criminally in Pennsylvania, but was found not guilty. In Soberay's civil trial, the judge found the patrolman not qualified under the Daubert standard, and excluded his testimony. That did not stop Greyhound from getting its own expert, Steven Schorr, to essentially offer the same opinion. At trial, however, Schorr agreed that if the bus driver was not conscious, the speed of the truck did not matter, and the bus driver was the sole cause of the accident.

An important aspect of plaintiff's case against Greyhound concerned its failure to enforce a fatigue safety rule requiring its drivers to stop every 150 miles or every three hours. Greyhound maintained this rule was merely a "guideline" that drivers did not have to follow. Greyhound also maintained (and hired an expert to testify) that its driver did not fall asleep, but suffered a TIA that did not cause her to lose consciousness. The defense expert opined that the driver suffered a concussion *after* the accident, which caused her to have retrograde amnesia, presumably causing her to mistakenly recall blacking out prior to the accident. Plaintiff's nationally recognized stroke expert, Dr. Mark Levine, could not find any medical text to support defendant's theory.

Plaintiff's evidence, on the other hand, supported the conclusion that the bus driver fell asleep. One witness, a life-long truck driver trained in fatigue issues, had observed both the trash truck and the Greyhound bus at different points prior to the accident. He noticed Gubica's truck because it was so well-kept, with its tarps and lights all in working order. Later, this same witness noticed the Greyhound bus passing him about five minutes before the crash at 67 mph. The bus almost hit him, then veered to the left onto the rumble strips. His impression was the bus driver was either texting or falling asleep.

Numerous passengers on the bus, including the plaintiff, also observed the bus driver weaving earlier in the trip and going over the rumble strips. Two of the passengers testified they actually saw her fall asleep.

The camera installed on the bus was an event recorder that records the 10-20 seconds before the event. It was broken on impact, as has been the case in numerous other Greyhound rear-end accidents.

Another device on the bus was a D-deck which the State Trooper and defendant's expert used to calculate Gubica's speed prior to the accident. The overwhelming testimony from the experts, however, was that the D-deck is not reliable after an accident.

A third piece of equipment on the bus was a satellite monitoring device, known as a Cadec, which records the latitude and longitude of the bus each second. There were eight satellites interacting with the Cadec, making it extremely reliable. Greyhound initially denied having the Cadec since the computer card was sent by the State police to the manufacturer in New Hampshire. Plaintiff got an out-of-state commission to depose the Cadec personnel, who turned over only one portion of the Cadec file. The other portion – a mapping placed on Google Earth showing the bus's route – was not given to the plaintiff. Later depositions revealed emails from Greyhound personnel to Cadec telling Cadec they "would prefer" plaintiff not be given the mapping.

The jury returned a verdict in the amount of $23,018,790 for compensatory damages. In response to a narrative interrogatory, the jury found Greyhound failed to enforce its rules. The following week the jury returned a verdict of $4,000,150 for punitive damages. Greyhound had a number of past rear-end accidents where it blamed the speed of the vehicle its drivers hit, or alleged sudden medical excuses for its drivers, even if the NTSB found the bus driver at fault or the bus passengers testified the bus driver had fallen asleep.

In its punitive finding, the jury indicated Greyhound demonstrated reckless indifference to the safety of its passengers and drivers in failing to enforce its rule requiring rest stops every three hours or 150 miles. The $150 portion of the punitive award was designed to send a message to Greyhound to enforce its rule.

Chuck Kampinski

The plaintiff's attorneys were Chuck Kampinski, Kent B. Schneider, and Robert M. Weber. Their efforts not only obtained justice for their client, but will hopefully cause Greyhound to enforce its safety policies in the future. ■

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:

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Email: cmellino@mellinolaw.com

CATA Verdicts & Settlements

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

Bluemile, Inc. v. Atlas Industrial Contractors, LTD.

Type of Case: Property damage resulting in business loss
Verdict: $1,000,000
Plaintiff's Counsel: Bob & Bobby Rutter, 4700 Rockside Road, Cleveland, Ohio, (216) 642-1425
Defendant's Counsel: John Mazza
Court: Franklin County Common Pleas Court, Judge Stephen McIntosh
Date Of Verdict: April 8, 2016
Insurance Company: Travelers
Damages: All business loss damages

Summary: Atlas' electrician was working in Bluemile's data center and negligently caused a 2-hour service interruption that resulted in Bluemile losing income from clients who were dissatisfied with losing their internet/telephone services and either left Bluemile or decreased traffic to Bluemile.

Plaintiff's Expert: James Paskell (Economist); Robert Serrett (Telecommunications)
Defendant's Expert: Joel Chenevey (Accountant); Zach Horn (Telecommunications)

Bishop, et al. v. Abbott

Type of Case: Motorcycle
Settlement: $242,500
Plaintiff's Counsel: Jordan D. Lebovitz, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Withheld
Court: Pre-Suit Mediation
Date Of Settlement: March 29, 2016
Insurance Company: Westfield Insurance Co.
Damages: Fractured thumb, multiple foot fractures

Summary: Plaintiff, a 60 year old male, was traveling on Lost Nation Road in Willoughby when a driver failed to yield and struck Plaintiff's motorcycle.

Plaintiff's Expert: Treating physicians, Dr. Heather Vallier and Dr. Bram Kaufman, at MetroHealth Hospital

Joseph Stout v. Secretary of HHS

Type of Case: Vaccine Injury-Flu Shot leading to Guillain-Barre Syndrome "GBS"
Verdict: $165,000.00
Plaintiff's Counsel: Howard Mishkind, 23240 Chagrin Blvd., (216) 595-1900
Defendant's Counsel: Gordon Shemin, U.S. Dept. Of Justice
Court: U.S. Court of Federal Claims - Office of Special Master
Date Of Verdict: March 11, 2016
Insurance Company: N/A
Damages: Lower Extremity Weakness. No economic damages.

Summary: Plaintiff suffered Guillain-Barre syndrome ("GBS") and related complications as a result of receiving an influenza ("flu") vaccine on or about November 30, 2012. Maximum recovery potential was $250,000.00 reduced to present value.

Plaintiff's Expert: Omar Mullen-Ossman, Neurologist
Defendant's Expert: N/A

Dale Flanagan v. Michael Dimeff

Type of Case: Motorcycle collision - defendant failed to yield
Settlement: $500,000.00
Plaintiff's Counsel: Dana M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5201
Defendant's Counsel: N/A
Court: N/A
Date Of Settlement: February 22, 2016
Insurance Company: Grange Insurance Company
Damages: Amputated left leg, skin grafts, fractured ribs, abdominal hernia

Summary: Plaintiff was operating his motorcycle when Defendant, Michael Dimeff, failed to yield to the plaintiff and struck his motorcycle with such force that he was ejected. The Plaintiff was life-flighted to Metro where he remained in the ICU for months recovering from his amputated left leg and a multitude of other injuries.

Plaintiff's Expert: N/A
Defendant's Expert: N/A

Brummitt v. Seeholzer

Type of Case: Automobile Collision - Bad Faith + Punitive Damages
Verdict: $352,277, $250,000 + (5 yrs) attorney fees
Plaintiff's Counsel: Dennis E. Murray, Sr. and Florence J.

Murray, 111 E. Shoreline Dr., Sandusky, Ohio, (419) 624-3011
Defendant's Counsel: Craig Pelini
Court: Erie County Common Pleas Case No. 11-CV-626, Judge Roger Binette
Date Of Verdict: February 2 and February 3, 2016
Insurance Company: Ohio Mutual Insurance Group

Summary: Ohio Mutual had breached its duties to Mr. Brummitt and acted maliciously by not timely offering to settle with him, by not paying to him the monies that were owing to him, and by completely failing to take into consideration those matters that related to the well-being of their insured, Mr. Brummitt. Ohio Mutual's claims adjuster and litigation specialist admitted during the trial that Ohio Mutual had provided conflicts of interest incentives, in the form of compensation bonuses, for its claims handling staff to keep payments lower than it internally concluded that it should reserve.

Plaintiff's Expert: Charles Miller
Defendant's Expert: None

Mark D. Soberay v. Greyhound Lines, Inc., et al.

Type of Case: Personal Injury
Verdict: $27,018,940
Plaintiff's Counsel: Charles Kampinski, Kent B. Schneider, Robert M. Weber, Hermann Cahn & Schneider LLP, (216) 781-5515
Defendant's Counsel: Joseph T. Mordino, Bradley J. Barmen, Thomas P. Mannion
Court: Cuyahoga County Common Pleas Consolidated Case Nos. CV-13-817909, CV-14-824998, Judge John D. Sutula
Date Of Verdict: January 29, 2016
Insurance Company: Grange Insurance Company
Damages: Amputated left leg, skin grafts, fractured ribs, abdominal hernia

Summary: *See* Verdict Spotlight article.

In re: Johns-Manville Corporation, et al.

Type of Case: Asbestos
Settlement: $90 Million plus $13 Million Interest
Plaintiff's Counsel: Thomas W. Bevan, Bevan & Associates, Boston Hts., Ohio, Bruce Carter, Law Office of Bruce Carter, Fairfield, Ohio, Lawrence Madeksho, The Madeksho Law Firm PLLC, Houston, Texas
Defendant's Counsel: Barry Ostrager, Andrew Frankel, Simpson Thacher & Bartlett LLP, New York, NY
Court: Cuyahoga County Court of Common Pleas, Judge Leo Spellacy and Judge Harry Hanna
Court: United States Bankruptcy Court, For the Southern District of New York, Judge Burton R. Lifland
Date Of Settlement: Initial Settlement May, 2004; Final Settlement January, 2016
Insurance Company: Travelers Indemnity Company

Summary: Starting in 2003, the Plaintiffs filed "direct action" lawsuits against Travelers in Cuyahoga County Court of Common Pleas seeking to hold Travelers liable for asbestos-related personal injuries arising from (1) Travelers' underwriting of insurance policies for Johns-Manville; (2) Travelers' investigation, defense and settlement of claims against Johns-Manville; (3) the knowledge Travelers gained in the course of its nearly three-decade-long insurance relationship with Johns-Manville; and (4) Travelers' independent negligent undertaking relating to its insurance relationship with Johns-Manville.

The Cuyahoga County cases against Travelers were stayed by the United States Bankruptcy Court for the Southern District of New York pending a determination of whether such "direct action" claims against Travelers violated the Bankruptcy Court's 1986 permanent injunction of all claims against Travelers that arise out of or relate to the insurance policies Travelers issued to Johns-Manville.

Settlement, which was reached with Travelers in May, 2004, included over 12,000 Ohio asbestos plaintiffs. More than 10 years of contentious appeals followed, including 3 trips to the Second Circuit Court of Appeals and 1 trip to the U.S. Supreme Court. Ultimately, in July 2014 the Second Circuit ruled in the plaintiffs' favor and ordered Travelers to pay the $90 Million settlement plus $13 Million in interest. After a lengthy settlement fund distribution procedure, the settlement was paid in January and February 2016, nearly 12 years after the initial settlement.

Xavier A. Lunsford vs. The H.P. Manufacturing Company, Inc.

Type of Case: Employer Intentional Tort
Settlement: $400,000.00
Plaintiff's Counsel: Nicholas A. DiCello and Jeremy A. Tor, Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio 44114, (216) 696-3232
Defendant's Counsel: Jan Roller and Scott Gedeon
Court: Cuyahoga County Common Pleas Case No. CV-14-828457, Judge Nancy R. McDonnell
Date Of Settlement: November 10, 2015
Insurance Company: Westfield (defense only, no indemnification)

Damages: $46,000 past medical bills; amputation of half of thumb on dominant left hand; PTSD; deformity; pain, suffering and mental anguish.

Summary: The Defendant H.P. Manufacturing Company, Inc. hired Plaintiff Xavier Lunsford as a seasonal temporary employee about 3 weeks after Xavier graduated high school. On his sixth day on the job HP assigned Xavier to work on an industrial router machine. Xavier had never worked on or around industrial machines. The next day, while routing a plastic piece, Xavier's left thumb became trapped in the router machine's rotating bit. Xavier's left thumb was "hollowed out" by the rotating bit and had to be surgically amputated just below the interphalangeal joint. Plaintiff alleged and proved the deliberate removal of an equipment safety guard at trial.

Plaintiff's Expert: Michael P. Binder, M.D.; Raymond Richette, PH.D.

Defendant's Expert: Donald J. Tosi, Ph.D.

Marzec v. D'Amico

Type of Case: Intersectional collision (disputed liability)
Settlement: $540,000.00
Plaintiff's Counsel: Daniel J. Klonowski, 50 Public Square, 920 Terminal Tower, Cleveland, Ohio 44113, (216) 241-0666
Defendant's Counsel: T. Kenneally
Court: Cuyahoga County Common Pleas Case No. CV 14 828525, Judge Nancy Margaret Russo
Date Of Settlement: May, 2015
Insurance Company: State Farm Insurance
Damages: Fractured cervical vertebrae, pneumonia, 2 weeks in hospital, death.

Summary: Plaintiff, an 80 year old passenger in a motor vehicle, suffered a fractured cervical vertebrae in an intersectional motor vehicle collision. Defendant claimed she had a green light, and liability was disputed. Plaintiff survived for 2 weeks in ICU then died from pneumonia brought on by physical trauma. Case settled at Mediation prior to trial.

Plaintiff's Expert: Cuyahoga County Medical Examiner
Defendent's Expert: None

Molnar v. Ault

Type of Case: Premises Liability
Settlement: $270,000.00
Plaintiff's Counsel: Daniel J. Klonowski, 50 Public Square, 920 Terminal Tower, Cleveland, Ohio 44113, (216) 241-0666
Defendant's Counsel: N/A
Court: Athens County, Ohio
Date Of Settlement: January, 2015
Insurance Company: Farmers Insurance
Damages: Left open humerus midshaft fracture, radial nerve palsy (resolved) and comminuted left olecranon fracture.

Summary: Claimant was a guest at an off campus party at Ohio University. While leaving the party, she walked in the poorly lighted front yard, approaching a stairway that led from the elevated yard to the sidewalk below. She tripped on an irregularity on the walkway, fell forward onto the grass, which steeply pitched toward the edge of the front yard. The yard, approximately 7 feet above the sidewalk below, had no guardrail system. She suffered severe injuries to her left arm.

Plaintiff's Expert: Robert Corn, M.D. (Orthopedic); Thomas Jamieson (Premises)

Estate of Jane Doe, et al., v. ABC Bar, Inc.

Type of Case: Dram Shop
Settlement: $950,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: Withheld
Insurance Company: Withheld

Summary: Plaintiffs, husband and wife, were driving to WalMart when a drunk driver rear-ended their vehicle into a telephone pole. Based on surveillance footage, the drunk driver had been drinking at a nearby bar for roughly five (5) hours prior to the crash and consumed over ten (10) drinks (whiskey and beer). He had a BAC of approximately .309 at the time of the crash. Husband suffered an open right ankle fracture requiring surgery, and his wife died within one (1) hour of the crash.

As part of the settlement, the bar owners and bartenders were required to complete a training program conducted by the Ohio Department of Public Safety on safe alcohol serving practices. ■

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:

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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.

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_____

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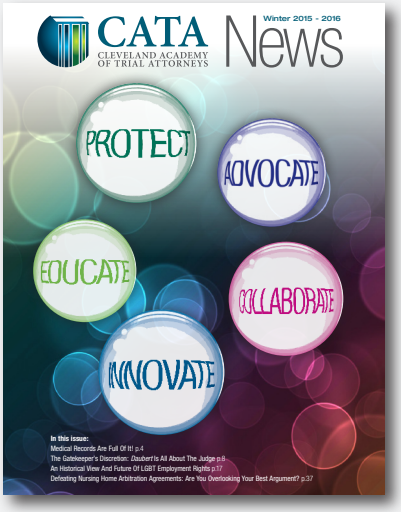

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