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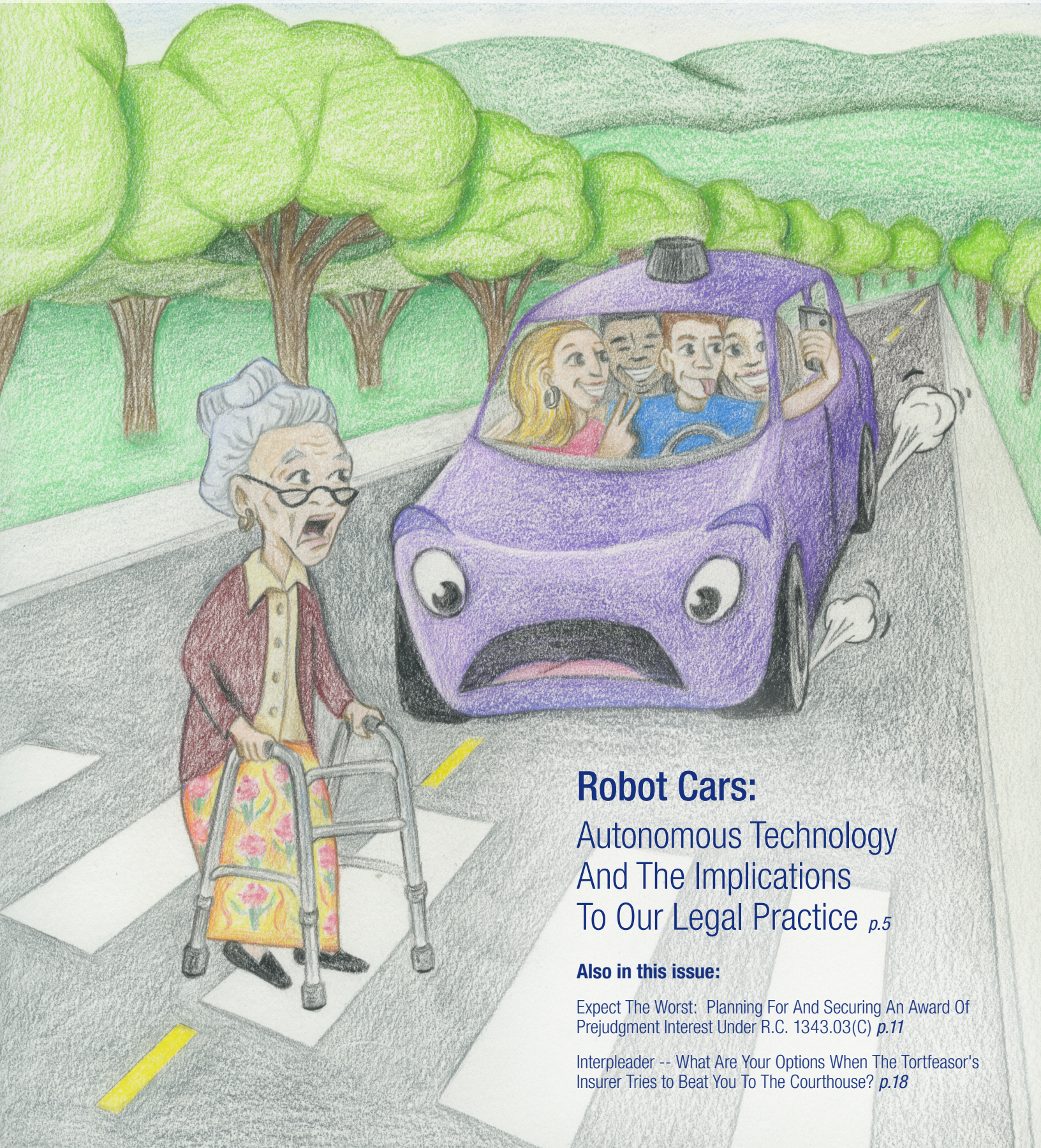

Robot Cars:

Autonomous Technology And The Implications To Our Legal Practice *p.5*

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News
Spring 2018

CONTENTS

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Cover artwork by Matthew Hanks.

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President's Message

by Cathleen M. Bolek

This message is one of my last official acts as an officer of this organization. In a few short months, Chris Patno will take the oath as the fifty-ninth CATA president, and I'll take my place in the line of past presidents. Thank you for allowing me to serve this outstanding organization. I would also like to thank my fellow officers, Chris, Will Eadie, and Todd Gurney, and the entire CATA board for making this year so easy for me. I dedicate this column to all of you, for your willingness to share your knowledge, experience, and enthusiasm has always made me a better lawyer.

As Plaintiff's lawyers, we often take each other for granted. Most of us work in small firms, yet with one email we can reach hundreds of other lawyers who practice in our field, brainstorm about cases and legal issues, share information and work product, and use our collective knowledge and experience to benefit the injured people we serve. We routinely save each other from reinventing the same wheel over and over. Thanks to CATA, none of us is ever alone in our practice.

A big firm defense lawyer once commented to me that he was jealous of the plaintiff's bar's willingness to share information and work product. It was some years ago, when I was still litigating medical malpractice cases. We were standing in line at an airport after I deposed his expert. During the deposition, I had used information given to me by another plaintiff's attorney. I don't recall the issue, but it took the defense attorney by surprise. Unless he had somehow obtained and read through every deposition his expert ever gave, he couldn't have known to prepare for the issue. The information came to me through another member of CATA.

Until he commented about it, I had not consciously considered the tremendous advantage that organizations like CATA give to our clients. At first, I was incredulous. I asked him, "don't defense attorneys share information?" And his response was telling. "Sometimes they do," he said, "but we are all in competition with each other, so it's not like it is on the plaintiff's side." I've since learned that some big law firms even have rules against sharing "work product" with lawyers outside the firm.

I thought a lot about what he said. As Plaintiff's lawyers, aren't we all in competition with each other as well? We compete for clients and accolades and press coverage. But with few exceptions, each of us willingly shares the results of our labor to help one another. Perhaps our willingness to help one another is not all altruistic. Plaintiff-friendly appellate decisions help all of us. When one plaintiff's counsel effectively cross-examines a doctor who frequently testifies for the defense, that lawyer has weakened the doctor's credibility in subsequent cases. Well-publicized large verdicts pressure defendants to settle subsequent cases with similar facts. So, camaraderie aside, there are many good business reasons for plaintiff's lawyers to pitch in and help each other out.

But isn't this true for defendants as well? I guess that depends on the point of view. While our interests are always aligned with our clients, the defense bar cannot say the same. A plaintiff-friendly appellate decision that recognizes a new cause of action is actually good for the defense lawyer's business, even when it's very bad for their corporate clients. One need look no further than *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St. 3d 660, 662, 710 N.E.2d 1116, 1118 (1999) to understand this dynamic. Insurance companies were incensed by the decision, but few could dispute that it was a boon for the defense bar. Of course, I'm not suggesting that these considerations have any impact on how defense lawyers practice.

So, what does account for the fact that information flows more freely among plaintiff's lawyers than among their colleagues on the defense? I give credit to the founders of CATA for creating this organization to do just that. At its core, CATA is not just another organization to benefit lawyers. It's an organization to help lawyers hold wrongdoers accountable. By freely sharing information, we aren't just helping another lawyer, we are helping to make the world safer. And that is worth far more than the price of dues. ■

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Opioid Litigation

by Jeremy A. Tor

Ever since last December, when the federal Judicial Panel on Multidistrict Litigation created the opiate MDL, Cleveland has been ground zero for efforts to tackle the opioid crisis. The MDL– officially known as *In re: National Prescription Opiate Litigation*–has the Honorable Dan Aaron Polster (N.D. Ohio) at the helm. He was picked by the Judicial Panel to preside over the consolidated litigation. An MDL judge has significant power, including authority to rule on all pre-trial matters, conduct bellwether trials, and spearhead settlement discussions. The latter is Judge Polster's forte and likely one of the reasons the Judicial Panel chose him.

Within a month of the MDL's inception, Judge Polster appointed leadership committees for both sets of litigants, selected three special masters, and held an initial pretrial conference with all the lawyers. Judge Polster was not reticent at the conference about his objective: "[T]o focus everyone's present efforts on abatement and remediation of the opioid crisis rather than pointing fingers and litigating legal issues." Judge Polster expressed his goal to forge a resolution and tackle the crisis short of full-blown litigation–years of discovery, voluminous motion practice, trials, etc.

The MDL consists of over 500 lawsuits. The plaintiffs are local government entities (cities, counties, etc.) and hospitals. The defendants consist of the major manufacturers and distributors of opiates like OxyContin, Percocet, and Hydrocodone–the drugs that helped spawn the epidemic. The legal claims include common-law causes of action, such as public nuisance, fraud, and negligence, as well as racketeering claims under RICO.

The opiate MDL is currently on two tracks: a settlement track and a litigation track. Judge Polster has held several settlement discussions, not only with the actual parties to this litigation, but also with other key stakeholders, including state attorneys general, the DEA, and the FDA. The U.S. Department of Justice also recently filed a notice of interest in the litigation and a motion to participate in settlement discussions.

As it turns out, meaningful resolution may not be possible without a bellwether trial. On April 11, 2018, Judge Polster issued the first case management order, acknowledging some progress on the settlement front, but also recognizing the need for the litigation track to culminate in a trial in the near term. The order sets a trial for March 18, 2019. Three cases will be tried together. The three plaintiffs at the trial table will be Summit County, Cuyahoga County, and the City of Cleveland. Until then, the defendants and these plaintiffs will engage in full discovery.

Contemporaneously with the case management order, Judge Polster issued another order directing the DEA to provide the parties access to the federal database–known as the ARCOS database–that tracks the sale and distribution of all opioid drugs. Judge Polster's peroration minced no words: "In closing, the Court observes that the vast oversupply of opioid drugs in the United States has caused a plague on its citizens and their local and State governments. Plaintiffs' request for the ARCOS data, which will allow Plaintiffs to discover how and where the virus grew, is a reasonable step toward defeating the disease. *See Buckley v. Valeo*, 424 U.S. 1, 67 ("Sunlight is said to be the best of disinfectants.") (quoting Justice Brandeis, *Other People's Money* 62 (1933))."

We are reminded nearly every day by the media about the myriad ways the opioid epidemic has ravaged our communities. Indeed the epidemic has cost over $500 billion and is responsible for the death of nearly 50,000 Americans each year. The MDL marks an important step along the way to rectifying the damage done and abating further harm by what is arguably the most significant public health crisis facing our nation. ■

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Robot Cars:
Autonomous Technology And The Implications To Our Legal Practice

by Dana M. Paris

Autonomous vehicles are not something of the distant future: they are here and the technology is developing at such a fast rate that regulators, policymakers, and lawyers are struggling to keep pace. By 2040, experts predict that autonomous vehicles are expected to comprise 25% of the global market. Tesla's Elon Musk believes that human-operated cars will be completely outlawed at some point in the future.[1] Although this belief is likely hyperbolic, there is no denying that autonomous vehicles are on the road and the legal implications must be addressed sooner rather than later.

Without a Driver, Who Should be Held Accountable?

When discussing vehicles with autonomous capabilities, the question that is asked most often is: when an autonomous vehicle causes a collision, who will be held legally responsible? There are potentially several answers to this question: the car manufacturer who created and/or supplied the self-driving technology; the software company who created and/or designed the software for the autonomous vehicle; the safety driver behind the wheel who may or may not have been operating the vehicle at the time; the safety driver who initiated the self-driving feature; or, if the safety driver is driving on behalf of a company and it is determined that the safety driver failed to exercise reasonable care, then the company could be held responsible for the driver's negligence.[2]

Companies such as Volvo and Mercedes-Benz have released campaigns stating that they would accept liability in cases where their self-driving system is determined to be at fault for a collision. Specifically, in 2015 Volvo stated it would accept full liability whenever one of its cars equipped with its own software is in autonomous mode.[3] However, the liability discussion does not stop there. Determining the owner of the software in autonomous vehicles is crucial. In March 2018, Volvo was involved in a fatal crash with a pedestrian in Arizona and issued a statement confirming that one of its vehicles was involved, but quickly clarified that the software controlling the autonomous driving feature was not one of its own and it would therefore not be accepting liability.[4]

In the current legal landscape, lawyers often look to the tortfeasor driver when determining whether they were somehow negligent. But when a driver is not operating the vehicle, lawyers must look to the autonomous software system and whether there is a design defect that caused the collision. Plaintiffs must then establish that the software had an inherent design defect that rendered it unsafe. It's likely that the new technology will shift the liability from drivers to the manufacturer or software developer.

Federal and State Guidelines

In 2016 the National Highway Traffic Safety Administration (NHTSA) released the Federal Automated Vehicles Policy in an effort to set forth a comprehensive policy which offers guidance in

the development of automated vehicle technologies. The Federal Automated Vehicles Policy presents a safety assessment and vehicle performance guidance for companies who are involved in the manufacture, designing, testing and sale of automated vehicle systems. The companies are expected to perform a 15-point "Safety Assessment" to NHTSA assessing the safety of the design, testing and deployment of the vehicles prior to releasing them on public roads.[5]

The federal government regulates the safety of vehicles, specifically the design, construction, and vehicle equipment which includes the hardware and software that performs functions formerly performed by the driver. However, state governments regulate the use of the vehicles through vehicle registration, licensing of drivers, the operation of the vehicles, enforcement of traffic laws, insurance and liability.

Although states are preempted from issuing any vehicle safety standard that regulates vehicle performance which is in conflict with the existing NHTSA standards, states are encouraged to develop laws and regulations relating to the testing, deployment and operation of automated vehicles. The U.S. DOT proposes that states should "begin to consider how to allocate liability among [autonomous vehicle] owners, operators, passengers, manufacturers, and other entities when a crash occurs."[6] Since 2012, at least 41 states and the District of Columbia have considered legislation related to autonomous vehicles. And twenty-two states have enacted legislation related to autonomous vehicles.[7] Specifically, states like California, Colorado, Florida, Georgia, Michigan, and Nevada have passed legislation which permits autonomous vehicles to operate on the open road.[8]

In 2016, Michigan entered the race to autonomous mobility by signing legislation which aims to put Michigan at the forefront of self-driving technology, real-time road testing and deployment of autonomous vehicles.[9] This law gives Michigan one of the broadest set of regulations, which excites automakers but forces consumers to wonder whether these laws are being enacted at the expense of consumer protection and safety.

For example, Arizona Governor Doucey signed an executive order allowing self-driving vehicles to operate without a safety driver behind the wheel on the open road, so long as they abide by all federal and state safety standards.[10] Sadly, in March 2018, a woman was fatally struck by an autonomous vehicle operated by Uber in Arizona. At the time of the crash, there was a safety driver at the wheel, but the vehicle was in autonomous mode while traveling 40 miles per hour.

The investigation revealed the following: (1) the safety driver was distracted and took his eyes off the road at the time of the crash; (2) the safety driver's hands were not on the steering wheel which most drivers are instructed to do in case they need to take control during a time of emergency; (3) and the self-driving car was equipped with a Lidar unit and laser beams which, when working properly, should have detected the pedestrian.[11]

Just a couple weeks after the fatal crash, it was announced that Uber reached a settlement with the family of the pedestrian thereby avoiding a legal battle and leaving many of the legal questions unanswered.[12]

In light of the Uber crash, it's important to wonder what Ohio is doing to protect the public from autonomous vehicles. On January 18, 2018, Governor John Kasich signed an executive order establishing DriveOhio in an effort to attract businesses who are developing autonomous vehicle technologies.[13] [14] Governor Kasich has also created the Smart Mobility Corridor which is a 35-mile stretch of U.S. 33 in central Ohio. The purpose of the corridor is to allow automotive testing, research, and manufacturing facilities to test smart transportation technologies on a highway that travels through rural and urban environments and will permit the vehicles to be tested in a range of weather conditions.

The bottom line is that it's crucial to balance the economic interest with that of consumer safety and protection. Unlike Arizona, Ohio should strive to put the safety of the consumer first and not move too quickly to appease corporations, developers and manufacturers. During this time of uncertainty and technological growth, it is imperative that plaintiffs' lawyers continue to hold automobile manufacturers and corporate entities responsible when an autonomous vehicle causes injury or death. ■

End Notes

1. Emily Badger, *Elon Musk Says We'll Outlaw Human Drivers in a World of Driverless Cars. Really?*, The Washington Post (March 18, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/18/should-weoutlaw-human-drivers-in-a-world-of-driverless-cars/?utm_term=.75c4616f9d1e.
2. A "safety driver" is an individual who is at the wheel of a vehicle in autonomous mode and who is there to take control of the vehicle in case of an emergency. Companies like Uber who employ safety drivers require them to undergo a training, testing and certification program where they are trained to keep their hands hovering near the wheel at all times so they can quickly take control when the vehicle does not safely respond to dangerous road conditions or "non-compliant actors." According to Uber's policies, safety drivers are not permitted to use digital devices while the vehicle is moving. *See, e.g.*, Laura Bliss, *Former Uber Backup Driver: 'We Saw This Coming,'* CityLab (March 27, 2018), https://www.citylab.com/transportation/2018/03/former-uber-backup-driver-we-sawthis-coming/556427/; Priya Anand, *Uber's Self-Driving Cars Hit the Road in Pittsburgh*, Buzzfeed News (September 14, 2016), https://

www.buzzfeed.com/priya/you-can-now-request-self-driving-ubers-in-pittsburgh?utm_term=.un9J80Lr0#.fix4JNqKN.

3. Kirsten Korosec, *Volvo CEO, We Will Accept All Liability When Our Cars are in Autonomous Mode,* Fortune (Oct. 7, 2015), http://fortune.com/2015/10/07/volvo-liability-self-driving-cars/.
4. Tina Bellon, *Fatal U.S. Self-Driving Auto Accident Raises Novel Legal Questions*, Reuters (March 20, 2018), https://www.reuters.com/article/us-autos-selfdriving-uber-liability-anal/fatal-u-s-self-driving-auto-accident-raisesnovel-legal-questions-idUSKBN1GW2SP.
5. See National Highway Traffic Safety Administration, *Federal Automated Vehicles Policy: Accelerating the Next Revolution in Roadway Safety* (Sept. 2016), https://www.transportation.gov/sites/dot.gov/files/docs/AV%20policy%20guidance%20PDF.pdf.
6. *Id.* at 24.
7. See National Conference of State Legislatures, *Autonomous Vehicles - Self-Driving Vehicles Enacted Legislation* (March 26, 2018), http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enactedlegislation.aspx.
8. Cal. Veh. Code §38750; Cal. Code Reg. tit. 13, div. 1, ch. 1, art. 3.7; S. Res. 17-213, 71st Gen. Assemb., Reg. Sess.(Colo. 2017); Fla. Stat. §§316.85-86, 319.145; S. Res. 219, Gen. Assemb., Reg. Sess. (Ga. 2017); Mich. Comp. Laws §§257.2b, 257.601a, 257.602b, 257.606b, 257.643, 257.643a, 257.665, 257.665a, 257.665b, and 600.2949b; Nev. Rev. Stat, ch. 482A, ch. 372B, §§484A.080, 484B.127, 484.165, and 706.011 to 706.791.
9. Melissa Burden, *Snyder Signs New Michigan Self-Driving Vehicles Law*, The Detroit News (Dec. 9, 2016), https://www.detroitnews.com/story/business/autos/2016/12/09/autonomous-car-law/95199544/.
10. Ryan Randazzo, *Gov. Doug Ducey: Self-Driving Cars Allowed on Arizona Roads Without Human Behind the Wheel*, AZ Central (March 1, 2018), https://www.azcentral.com/story/money/business/tech/2018/03/01/gov-dougducey-issues-order-keep-arizona-capital-self-driving-cars/385812002/.
11. Troy Griggs and Daisuke Wakabayashi, *How a Self-Driving Uber Killed a Pedestrian in Arizona*, New York Times (March 21, 2018), https://www.nytimes.com/interactive/2018/03/20/us/self-driving-uber-pedestrian-killed.html.
12. Scott Neuman, *Uber Reaches Settlement with Family of Arizona Woman Killed by Driverless Car*, NPR (March 29, 2018), https://www.npr.org/sections/thetwoway/2018/03/29/597850303/uber-reaches-settlement-with-family-ofarizona-woman-killed-by-driverless-car.
13. http://www.governor.ohio.gov/Portals/0/%21EX%202018-01K%20%28Drive%20Ohio%29%20SIGNED%20_1.pdf.
14. http://drive.ohio.gov/

Editor's Note

As we finalize this issue of the ***CATA News***, we invite you to start thinking of articles to submit for the Winter 2018-2019 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 we can find a volunteer. We would 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 the next issue. Finally, please submit your Verdicts & Settlements to us year-round and we will stockpile them for future issues.

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

Kathleen J. St. John, Editor

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Does The Attorney-Client Privilege Apply To Wrongful Death Beneficiaries?

by Meghan P. Connolly

The pursuit of a wrongful death claim almost always implicates discovery with regard to the decedent's family members, including family member depositions. If the lawyer for the estate meets with a statutory beneficiary who is not the named plaintiff prior to their deposition, is the lawyer's communication with the witness protected by attorney-client privilege? The knee jerk reaction from many lawyers would be, yes, considering that each wrongful death beneficiary has a separate and distinct claim embodied in the lawsuit. However, a review of the case law and statutory developments should give the wrongful death lawyer pause. Under the law as it stands today, it may be necessary for the lawyer to establish an *express agreement* to representation with the beneficiary in order to trigger the attorney-client privilege.

Whether the attorney-client privilege automatically applies to wrongful death beneficiaries is not readily apparent under Ohio law. No Ohio court has specifically decided whether the attorney-client privilege automatically protects a lawyer's communications with wrongful death beneficiaries.[1] A review of the case law demonstrates that the majority of courts analyzing an attorney's relationship with a beneficiary do so in the context of privity and the right to sue the attorney for legal malpractice. This legal malpractice precedent may inform the wrongful death lawyer as to whether attorney-client privilege automatically protects communications with wrongful death beneficiaries.

In *Brinkman v. Doughty*, the decedent was killed in a head on collision.[2] The decedent's daughter filed a wrongful death claim individually and as estate representative. The case was settled and the funds distributed with probate court approval. Over a year later, the decedent's mother and seven siblings, who were never notified or identified as next of kin in court proceedings, found out about the settlement. The decedent's mother and siblings sued the attorneys for legal malpractice.

The Second District found instructive that "the Ohio Supreme Court has held that if a fiduciary relationship exists, the attorney-client relationship extends to those parties included in the fiduciary relationship."[3] Accordingly, the court held that the attorney-client relationship existing between the attorney and the estate administrator extends to the wrongful death beneficiaries for purposes of maintaining their legal malpractice action.

While the applicability of attorney-client privilege was certainly not before the *Brinkman* court, the extension of the attorney-client relationship to wrongful death beneficiaries would presumably result in their ability to invoke the attorney-client privilege. Because the attorney-client relationship extends to wrongful death beneficiaries, so too should the protection of the attorney-client privilege.

Furthermore, each statutory wrongful death beneficiary's claim is considered separate and distinct from the claim of the estate, and from each other, pursuant to R.C. 2125.02(A)(1).[4] By statute, wrongful death cases are brought "for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent." 2125.02(A)(1). One could argue that based on the existence of the separate distinct wrongful death claims, by pursuing the wrongful death case, the lawyer is representing all beneficiaries and all beneficiaries are afforded attorney-client privilege.

A closer look at the *Brinkman* decision, however, muddies the water. The general rule in Ohio, articulated in *Scholler v. Scholler*, has been that "an attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously."[5]

The Ohio Supreme Court revisited the privity rule in *Simon v. Zipperstein* where the court held the potential beneficiary of an estate had no vested interest in the estate and therefore lacked privity with the attorney.[6] Lacking an attorney-client relationship, the beneficiary could not sue the attorney for negligently failing to comply with his client's intent.

Next, in *Elam v. Hyatt Legal Servs.*, the Ohio Supreme Court held, "[a] beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists, the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance."[7]

Then in *Arpadi v. First MSP Corp.*, the Supreme Court arguably expanded *Elam* by deciding that "those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates."[8]

Following the expansion of the attorney liability from *Scholler* to *Elam* and *Arpadi*, there was an uproar from attorneys. The Ohio State Bar Association prompted the general assembly to enact Ohio Revised Code 139.18(A) in 1998, renumbered as Revised Code 5815.16 in 2007. Under the statute, "absent an express agreement to the contrary, a lawyer who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort or otherwise to any third party to whom the fiduciary owes fiduciary obligations."

By all accounts, the statute was intended to aggressively limit lawyer liability to beneficiaries, being described as an assault on *Arpadi*, as well as "an effort to nullify the effect of *Elam*'s holding."[9]

In the wrongful death context, one could argue that under R.C. 5815.16,

SIDEBAR: Attorney-Client Privilege: The Basics

by Meghan P. Connolly

The attorney-client privilege is one of the oldest privileges for confidential communication, having been well established in England by the late 1500's. Ohio's attorney-client privilege is an animal of both statutory and common law. The statutory privilege is governed by Revised Code 2317.02(A), which generally prohibits an attorney from testifying "concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client."

Of more interest here is the common law attorney-client privilege, the purpose of which is "to permit complete freedom of disclosure to his attorney without fear that any facts so disclosed would be used against him."[1] The privilege broadly promotes public interests in the observance of law and the administration of justice. "The privilege belongs to the client, and unless a waiver or other exception causes the privilege to not apply, it offers full protection from discovery."[2]

As distinguished from a lawyer's confidentiality obligations under RPC 1.6, Ohio's common law attorney-client privilege guards against compelled testimony of attorney-client communications. Importantly, it is the communication between the lawyer and client that is protected by the privilege. Of course, the privilege is not absolute and is subject to waiver and exceptions. ■

End Notes

1. *State Ex Rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶20, 824 N.E.2d 990.
2. *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000 *citing* R.C. 2317.01(A); Civ.R. 26(B)(1).

a wrongful death beneficiary would have to *expressly agree* to the attorney's representation in order to form an attorney-client relationship. Such an express agreement would then serve as the foundation for asserting the attorney-client privilege, without which the privilege would not apply.

The Eleventh District has analyzed R.C. 5815.16 and concluded that it does limit the attorney-client relationship to estate beneficiaries who have expressly agreed to representation by the lawyer.[10] *Ivancic* was not a wrongful death case, but is instructive on how R.C. 5815.16 might be interpreted.

In *Ivancic*, decedent died intestate leaving behind two daughters who were half-sisters, Ms. Enos and Ms. Ivancic. Shortly before decedent's death, Enos retained counsel to assist in the administration of her father's estate.

Enos informed the attorney about her half-sister, but the half-sister was not disclosed as a beneficiary. Enos inherited from her father's estate and it was closed. Eventually, Ivancic came forward and filed suit against the attorney.

In analyzing the issue, the court recognized that, "the law relating to the attorney's duty to a beneficiary of an estate is still evolving after *Scholler, Elam* and *Arpadi*." Importantly the court then pointed out that, "[t]he passage of statutes designed to shield an attorney from liability to a third party including Revised Code 5815.16" suggests that the attorney did not owe a fiduciary duty to the Ivancic, who was excluded from the application.

Clearly, the *Ivancic* court was persuaded that Revised Code 5815.16 functioned to limit the duty owed by the estate lawyer to the undisclosed beneficiary. Because courts have treated wrongful death beneficiaries and estate beneficiaries similarly, it stands to reason that RC 5815.16 could also limit the duty owed by the lawyer to statutory beneficiaries.[11] Considering R.C. 5815.16, and *Ivancic*, without an express agreement to the representation the attorney-client relationship and attorney-client privilege may not apply automatically to the wrongful death beneficiaries.

Creating even more confusion on this topic, despite its influence in *Ivancic*, R.C. 5815.16 simply never made a major impact on the case law. It has not been frequently cited by Ohio courts, and the Ohio Supreme Court has revisited the issue of privity between an estate attorney and the beneficiary of a will without one word of mention of R.C. 5815.16.[12]

In conclusion, given the evolving landscape of the law in Ohio, there is no well-defined authority entitling wrongful death beneficiaries to automatic attorney-client privilege. Therefore, if it is the attorney's intention to invoke the privilege, the lawyer should consider creating an express agreement to representation. In doing so, the lawyer escapes the potential limiting effect of R.C. 5815.16 and expressly creates the foundation for assertion of the attorney-client privilege.[13] ■

End Notes

1. Perhaps the privilege is not often tested because for various reasons there is not much effort from the defense bar to compel discovery of such communications.
2. *Brinkman v. Doughty*, 140 Ohio App.3d 494, 748 N.E.2d 116 (2000).
3. *Id.*
4. *Wood v. Shepard*, 38 Ohio St.3d 86, 90, 526 N.E.2d 1089, 1092 (1988).
5. *Scholler v. Scholler,* 10 Ohio St.3d 98, 462 N.E.2d 158 (1984).
6. *Simon v. Zipperstein*, 32 Ohio St.3d 74, 512 N.E.2d 636 (1987).
7. *Elam v. Hyatt Legal Servs.*, 44 Ohio St.3d 175, 541 N.E.2d 616 (1989).
8. *Arpadi v. First MSP Corp.*, 68 Ohio St.3d 453, 628 N.E.2d 1335 (1994).
9. *Ivancic v. Enos*, 11th Dist. Lake No. 2011-L-050, 2012-Ohio-3639, 978 N.E.2d 927.
10. *Ivancic, supra.*
11. The *Brinkman* court noted that the Ohio Supreme Court precedents relied upon were not wrongful death cases, but nevertheless found them applicable. No distinction was made between estate beneficiaries and statutory beneficiaries in the court's analysis, other than noting that wrongful death beneficiaries' interests vest at the time of the decedent's death.
12. *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167.
13. The representation of co-clients including all statutory beneficiaries cannot be discussed without a nod to conflicts of interest rules. Each fact pattern in each case calls for the attorney to identify and address potential conflicts of interest between all beneficiaries.

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Expect the Worst:
Planning For And Securing An Award Of Prejudgment Interest Under R.C. 1343.03(C)

by Kathleen J. St. John

For many lawyers, the first serious thoughts about prejudgment interest occur only after a bell-ringer verdict in a hard-fought case.

Yet, to secure prejudgment interest in a tort action, the cautious lawyer should be thinking about it from the moment the case is signed-up.

This is so because the standard for granting prejudgment interest in a tort action requires you to expect the worst from the opposition: that they will fail to engage in good faith settlement efforts, while you yourself will not do so. And in establishing both entitlement to and amount of prejudgment interest, certain aspects of the statute and case law make advance planning advisable.

What follows are suggestions for dealing with some of the common obstacles in pursuing prejudgment interest under Ohio Revised Code Section 1343.03(C). But, first, a word about the governing standards.

A. The *Kalain* Standard.

Unlike contract actions, in which prejudgment interest is (for the most part) automatically awarded to the prevailing party,[1] in civil actions based on tortious conduct there is no such automatic right. Instead, to recover prejudgment interest in a tort action, the prevailing party must establish that the losing party "failed to make a good faith effort to settle the case" but that the prevailing party "did not fail to make a good faith effort to settle the case." R.C. 1343.03(C)(1). This statutory provision is designed to promote settlement efforts, "thereby conserving legal resources and promoting judicial economy."[2] It also "serves the... purpose of compensating a plaintiff for a defendant's use of money which rightfully belongs to the plaintiff."[3]

The standard for determining whether a party's settlement efforts evinced "good faith" was set forth by the Ohio Supreme Court three decades ago. In *Kalain v. Smith*,[4] the Court held that for parties to have made a good faith effort to settle, they must have done all of the following:

1. Fully cooperated in discovery proceedings;
2. Rationally evaluated their risks and potential liability;
3. Not unnecessarily delayed any of the proceedings; and,
4. Made a good faith monetary offer or responded in good faith to an offer from the opposing party.[5]

The Court in *Kalain* added a caveat that typically becomes the centerpiece of the defendant's opposition to an award of prejudgment interest. The caveat holds that "[i]f a party has a good faith objectively reasonable believe that he has no liability, he need not make a monetary settlement offer."[6]

This caveat, however, must be "strictly construed so as to carry out the purposes of R.C. 1343.03(C)."[7] In other words, the exception cannot be so broadly construed as to swallow

the rule. Moreover, a defendant may have failed to make a good faith effort to settle even though it has not acted in "bad faith." This point was clarified in *Moskovitz v. Mt. Sinai Med. Ctr.*, in which the Ohio Supreme Court expressly overruled language from an earlier decision that equated "a lack of good faith" under R.C. 1343.03(C) with "a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud."[8]

The burden of establishing entitlement to prejudgment interest is on the moving party.[9] But whether a party did or did not engage in good faith settlement efforts is a discretionary decision for the trial judge that will only be reversed for an abuse of discretion.[10]

B. Rules For Pursuing Prejudgment Interest.

1. *Rule No.1: Pay attention to your own settlement efforts.*

When we, as plaintiffs' lawyers, think of good faith settlement efforts, we tend to focus on what the defense did wrong. While it may be true that obstinacy on the part of the defendant and its insurance company is the reason a settlement didn't happen, you still need to make sure your own efforts are sufficient, and, preferably, that they are documented.

Beware of appellate decisions finding plaintiffs' settlement efforts inadequate because they were not sufficiently "aggressive." This language surfaces in decisions as far back as the 1980s,[11] but is it justified? It does not appear to be consistent with either the statutory language or *Kalain*, as "good faith" and "aggression"[12] are hardly synonymous. Notably, however, the "aggressive settlement efforts" language has almost always appeared in decisions where the appellate court is *affirming* a trial court's discretionary decision denying prejudgment interest[13], and has rarely been a basis for *reversing* an award of prejudgment interest.[14] In that sense, this language should be seen as explaining the outcome of certain discretionary decisions as opposed to increasing the plaintiff's burden.[15]

The "aggressive settlement efforts" language, moreover, is inapposite as it disregards the delicate balance between the parties. The injured plaintiff has a built-in incentive to settle, as the reason for filing the lawsuit is to seek compensation for her injuries. But to appear over-eager to settle weakens the plaintiff's ability to command a fair deal. The defendant and his insurer are not similarly incentivized: it is in their interest to delay settlement to retain the use of the funds for as long as possible. Thus, to demand "aggressive" settlement efforts from the plaintiff will always tilt the balance in favor of the defense. This is why the *Kalain* test's focus on the objective reasonableness of the parties' risk assessment is the sounder way to achieve the statute's goals. For it places the parties on equal footing without giving an edge to the party who has no incentive to make the effort otherwise.

Still, in light of this language, it is best for the plaintiff to document her settlement efforts in correspondence to the defendant as early and often as possible. Although negotiations just prior to, or even during, trial have been recognized as probative of a party's good faith settlement efforts,[16] some courts have found last minute demands or counter-offers do not justify an award of prejudgment interest.[17]

2. *Rule No.2: Don't let the Kalain exception swallow the rule.*

In most prejudgment interest disputes, the battle focuses on the second and fourth *Kalain* factors and the *Kalain* caveat. Although each presents a distinct issue, they ultimately boil down to a single question: Was the defendant, who failed to make a serious offer (or an offer anywhere near the jury's award of damages), justified in not doing so by an objectively reasonable good faith belief that it had no liability?

The key phrase here is "objectively reasonable." But to imbue that phrase with meaning, it is necessary to look back at the second and fourth criteria. That is, the defendant cannot be said to have had an ***objectively reasonable*** good faith belief that it had no liability if it did not ***rationally evaluate*** its risks and potential liability[18] or tailor its monetary offers to that rational evaluation.[19]

Why do I say this? Think back to the *Moskovitz* clarification of the *Kalain* caveat. The *Kalain* caveat must be strictly construed to carry out the statutory goal of promoting settlement efforts. If the defense can sit pretty on its belief it will prevail at trial, without giving serious thought to its chances of losing or the size of the verdict should plaintiff win, then either the plaintiff will be forced to bargain against herself [20] and accept an unreasonably low settlement offer, or settlement efforts will grind to a halt thus defeating the statute's purpose.

This is the wisdom reflected in the Supreme Court's decision in *Galayda v. Lake Hosp. Systems, Inc.*[21] In *Galayda*, the Court rejected the argument that the *Kalain* caveat relieves the defense of its obligation to make an offer whenever summary judgment or a directed verdict for the plaintiff would not be warranted. The Court stated:

> We decline to impose summary judgment or directed verdict analytical criteria on prejudgment interest proceedings. Existence of a good faith, objectively reasonable belief of nonliability does not excuse a defendant from the remaining *Kalain* obligations[.]***

> A defendant may well have fallen short of the good faith requirement of R.C. 1343.03 even where a trial court would have been justified in overruling a motion for summary judgment prior to trial or a motion for directed verdict made during trial.[22]

In other words, a defendant does not have an objectively reasonable belief it has no liability simply because there are factual issues for the jury to determine. In an oft-repeated passage, the *Galayda* court concluded, "[a] trial court does not abuse its discretion in awarding prejudgment interest… when a defendant 'just says no' [to settlement] despite a plaintiff's presentation of credible… evidence that the defendant [was negligent]… when it is clear that the plaintiff has suffered injuries, and when the causation of those injuries is arguably attributable to the defendant's conduct."[23]

What, then, goes into a rational evaluation of a party's risks and potential liability? Here, a variation on the old Learned Hand formula comes into play.[24] The evaluation should include an assessment of

> both the likelihood of the event occurring, i.e., its probability, and its impact if it should happen, i.e. its magnitude. Events that have a low probability of occurring, yet will be accompanied by an impact of great magnitude if they do happen, should properly be treated differently than those where the probability and the magnitude of the event are both low.[25]

Put otherwise, the evaluation should take into account the strengths and weaknesses of both sides' evidence, and the "size of an award should a jury discount the defense's evidence."[26]

Applying these tests, courts have awarded prejudgment interest to the prevailing plaintiff where the defendant's attorney and its insurer believed they had a 50-60% chance of prevailing at trial[27]; where the defense counsel believed the defendant had only a 30% chance of losing[28]; and where the defendant's evaluation "considered only the probability of liability and not its magnitude."[29]

Moreover, in considering the "magnitude of the event" – that is, the size of the award should the plaintiff prevail – the court may consider the disparity between the defendant's last offer and the jury's verdict (although this factor, by itself, is not dispositive).[30]

In short, strict construction of the *Kalain* caveat shifts the emphasis back to the four *Kalain* factors that are designed to promote good faith settlement efforts. Although the defendant is not ***required*** to make an offer if it has an objectively reasonable good faith belief that it has no liability, this caveat is not a "get out of jail free" card. The defendant and its insurer must treat settlement negotiations seriously, taking into account the real risk of the plaintiff prevailing. The consequences of not doing so are, and properly should be, an award of prejudgment interest.

3. Rule No.3: Beware the "future damages" trap.

Once an award of prejudgment interest is secured, there are still potential traps to be dealt with that early planning can avoid.

The first of these concerns the statutory provision that "[n]o court shall award interest under division (C)(1) of this section on future damages… that are found by the trier of fact." R.C. 1343.03(C)(2). This provision, which became effective June 2, 2004, was added to the statute during a wave of tort reform.[31] Prior to this amendment, prejudgment interest awarded to a tort plaintiff was calculated on the full amount of compensatory damages.

The future damages provision creates problems when the jury's award does not distinguish between past and future damages. This raises the question: who has the burden of requesting jury interrogatories segregating past and future damages? And, if none are requested how does this affect the prejudgment interest award?

The only Ohio appellate decision to address this precise issue places the burden of requesting such jury interrogatories squarely on the defendants. In *Luri v. Republic Services, Inc.*,[32] the trial court awarded prejudgment interest to the prevailing plaintiff on the full amount of compensatory damages. On appeal, the defendant contended this award was improper because the jury verdict included amounts for the plaintiff's lost future income.[33] In rejecting this argument, the Eighth District held that, by not requesting a jury interrogatory separating past and future damages, the defendant effectively waived its argument. The court stated:

> Appellants did not request that the jury parse the amount of compensatory damages into any categories. As with the application of the provisions of Ohio's Tort Reform statutes, appellants invited this error by submitting instructions and interrogatories that did not separate out future damages. Appellants' error will not induce this court 'to speculate concerning the specifics of the jury's award.'*** This assignment of error is overruled.[34]

Although the Eighth District's decision in *Luri* was reversed by the Ohio Supreme Court, the reversal was based solely on the trial court's failure to bifurcate the punitive damages claim.[35]

(This issue had recently been settled in *Havel v. Villa St. Joseph*[36] that was decided after the Eighth District's decision in *Luri*). Thus, the aspect of *Luri* dealing with who has the burden of seeking jury interrogatories on future damages remains the only Ohio appellate authority on this issue.

The Eighth District's decision in *Luri* is consistent with other Ohio cases holding that the proponent of an issue to be tested by a jury interrogatory bears the burden of requesting the interrogatory.[37] Chief among this line of authority is *Buchman v. Wayne Trace Loc. Sch. Dist.*[38] In *Buchman*, the jury returned a verdict in favor of the injured plaintiff against the defendant political subdivision in an amount in excess of five million dollars. In post-trial proceedings, the trial court, pursuant to the political subdivision set-off statute, applied set-offs against the verdict for various collateral benefits received or anticipated to be received by the plaintiff. The Supreme Court, however, reversed many of these set-offs, reasoning:

> A political subdivision is entitled to an offset for collateral benefits only to the extent that such benefits are actually included in the jury's award, and is entitled to an offset for future collateral benefits only to the extent that they can be determined with a reasonable degree of certainty. Thus, it is the defendant's burden to prove the extent to which it is entitled to an offset under R.C. 2744.05(B).[39]

The Court further explained:

> Although R.C. 2744.05(B) does not require the submission of jury interrogatories to quantify the categories of damages that make up the general verdict, as a practical matter, such interrogatories are the most efficient and effective method, if not the only method, by which to determine whether the collateral benefits to be deducted are within the damages actually found by the jury.*** ***To the extent that the failure to propose such interrogatories caused the trial court to speculate as to the amount of benefits to be deducted from the jury's verdict, [the defendant] simply failed in its burden of proof.***[40]

In prejudgment interest briefing, defendants tend to argue that the *Buchman* analysis requires the plaintiff, as the party seeking prejudgment interest, to request jury interrogatories on future damages. This argument misses the mark as it is the defendant who benefits from the future damages provision. Prior to the 2004 amendment to R.C. 1343.03(C), the plaintiff was entitled to prejudgment interest on the entire award. The future damages provision is designed to minimize the amount of interest the plaintiff can recover. As such, the defendant, as the beneficiary of this provision, as well as the proponent of the argument that the jury's award contains future damages, must be the one to request the jury interrogatory, failing which the argument is waived.

Nevertheless, at least one Ohio trial court refused to award prejudgment interest because the plaintiff failed to request a jury interrogatory segregating past and future damages.[41] Moreover, in the absence of such a jury interrogatory, courts have sometimes dealt with this issue by making their own determinations as to what portion of the jury's award is attributable to future damages.[42]

For these reasons, the plaintiff's lawyer who anticipates seeking prejudgment interest if successful at trial should consider requesting a jury interrogatory segregating past and future damages. Although the burden of seeking such an interrogatory *should* be on the defendant, by taking the initiative to seek the interrogatory herself the plaintiff's lawyer avoids unnecessary briefing and the potential of an adverse ruling.

4. *Rule No. 4: Beware the "notice" trap.*

Prior to the 2004 amendment, R.C. 1343.03(C) provided that prejudgment interest in a tort action was to be computed "from the date the cause of action accrued to the date on which the money is paid[.]" Under this former version of the statute, interest began to accrue "when the event giving rise to plaintiff's right to the wrongdoer's money occurred."[43]

The 2004 amendment shortened the accrual time to the earlier of two dates: either the date the defendant and its insurer were first given notice of the plaintiff's claim, or the date the complaint was first filed.[44]

The potential trap here occurs due to the wording of the "notice" provision. Under this provision, prejudgment interest begins to run

> [f]rom the date on which the party to whom the money is paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid*** ***gave to the party required to pay and to any identified insurer,*** as nearly simultaneously as practicable, ***written notice in person or by certified mail that the cause of action had accrued.***[45]

As of this writing, the curious wording of the notice provision has not been analyzed by any Ohio appellate court.

The provision is obviously intended to ensure that the defendant and its insurer receive actual notice. But does the foregoing language mean the written notice must be served "in person" or by "certified mail"? This would seem odd, particularly when it comes to the defendant's insurer. When was the last time you served an insurance company "in person"? Moreover, in cases where it is undisputed that the insurer received actual written notice, but not by certified mail, is the plaintiff deprived of the earlier accrual date simply because the notice was not delivered "in person" or "by certified mail"?

One possible interpretation of this language is that a comma was omitted between the words "notice" and "in person", making other forms of written notice permissible, such as ordinary mail, email, or fax. Alternatively, the notice provision is ambiguous, making it appropriate to examine the legislature's intent.[46] Moreover, any attempt to construe the statutory language "strictly" should be subordinated to the "rule of reasonable, sensible, and fair construction"[47], which imposes on the court "a duty to construe [the] statute[] in such a manner as to avoid ridiculous or absurd results."[48]

In other words, if the defendant and its insurer admittedly received actual written notice long before the complaint was filed, the only reasonable construction of the legislature's intent is that prejudgment interest should be computed from the date notice was actually received – even if it was served by means other than hand-delivery or certified mail.

Yet, because the meaning of this notice provision remains unresolved, it might be wise to send one's letter of representation by certified mail. Clearly, this is a costly option, particularly in a high volume practice. And choosing to serve by certified mail solely to preserve the earliest possible accrual date for prejudgment interest may constitute overkill in the vast majority of cases. But, particularly in cases that are not filed soon after being signed-up, it might behoove the cautious attorney to serve notice on the defendant and its insurer by certified mail. Depending on the size of the verdict, it could mean a substantial difference in the value of the prejudgment interest award.

5. *Rule No.5: Take time to calculate the amount of prejudgment interest.*

Litigating a motion for prejudgment interest can be time and labor intensive. Discovery typically includes both written discovery and depositions. The seminal decision of *Moskovitz v. Mt. Sinai Med. Ctr.*[49] permits the plaintiff to discover the insurer's entire claims file, except for "those attorney-client communications that go directly to the theory of the defense."[50] Typically, depositions are taken of the insurer's decision-making claims personnel and both sides' attorneys. Expert testimony might also be used. The court is required to set an evidentiary hearing on the motion[51], which is typically preceded or followed by briefing of the issues.

In all this activity, it is easy to overlook the need to compute the amount of prejudgment interest, should it be awarded. The formula is relatively simple to apply once you know your time parameters. As noted previously, prejudgment interest is computed from either the date of first notice or the date the complaint was filed until the "date on which the judgment, order, or decree was rendered."[52] In cases where the court defers entering judgment on the verdict until after it rules on the prejudgment interest motion, the amount cannot be calculated until after that judgment is entered. But even in this instance, it is helpful to provide the court with the formula or to request to file a supplemental brief calculating interest after the court rules on the motion but before final judgment is entered.

Interest is calculated for each pertinent year at the annual rate determined by the Ohio Tax Commissioner.[53] The formula requires one to know: (1) the date prejudgment interest begins to run; (2) the date judgment is entered on the verdict; (3) the principal amount on which the interest accrues; and (4) the interest rate for each year interest accrues. Once these are known, the following calculation is made for each applicable year:

(*Principal*) x (*interest rate*) x (*number of days interest accrued that year*) ÷ 365 = *interest for that year* [54]

The amounts for each year are then added to arrive at the total award of prejudgment interest. Notably, prejudgment interest is simple interest, not compounded.[55]

C. Conclusion

In addition to encouraging settlement efforts, prejudgment interest in tort actions is designed to compensate the plaintiff for the lost use of money to which she is entitled by the defendants' wrongdoing.[56] But to achieve an award of prejudgment interest in the greatest amount possible, much effort and advance planning are involved. All areas of litigation require us to embrace the adversarial nature of our role, but prejudgment interest in the tort context forces us to expect the worst of our adversaries in order to protect our clients' best interests. ■

End Notes

1. Prejudgment interest in contract actions is governed by R.C. 1343.03(A). *Textiles, Inc. v. Design Wise, Inc.*, 12th Dist. Madison Nos. CA2009-08-015, CA2009-08-018, 2010-Ohio-1524, ¶49. "'Once a plaintiff receives

judgment on a contract claim, the trial court has no discretion but to award prejudgment interest under R.C. 1343.03(A).'" *Id., quoting Zeck v. Sokol*, 9th Dist. Medina No. 07CA0030-M, 2008-Ohio-727, ¶44. The trial court, however, has discretion in contract cases to determine when the interest becomes due and payable. *Textiles, Inc.*, at ¶50. And if the prevailing party in a contract action fails to present evidence to show when the right to interest accrued, the court may decline to award prejudgment interest. *See, e.g., Nelson Jewellery Arts Co. v. Fein Designs Co., LLC*, 9th Dist. Summit No. 23655, 2007-Ohio-7042, ¶52.

2. *Peyko v. Frederick*, 25 Ohio St.3d 167, 495 N.E.2d 918 (1986).

3. *Condello v. Raiffe*, 8th Dist. Cuyahoga Nos. 83076, 83556, 2004-Ohio-2554, ¶47, citing *Musica v. Massillon Community Hosp.*, 69 Ohio St.3d 673, 676, 635 N.E.2d 358 (1994).

4. 25 Ohio St.3d 157 (1986).

5. *Kalain*, at paragraph one of the syllabus. To have satisfied its good faith settlement efforts obligation, a party must satisfy all four of the *Kalain* requirements. *Oyer v. Adler*, 4th Dist. Ross No. 13CA3405, 2015-Ohio-1722, ¶39. "[N]oncompliance with even one factor indicates that the party has failed to make a good faith effort to settle." *Id.*

6. *Kalain*, at paragraph one of the syllabus.

7. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 659, 635 N.E.2d 331 (1994).

8. *Id.*, 69 Ohio St.3d at 659, expressly modifying the law stated in *Villella v. Waikem Motors, Inc.*, 45 Ohio St.3d 36, 42 (1989). *Villella* had found that, for purposes of R.C. 1343.03(C), "a lack of good faith means more than poor judgment or negligence; rather, it imports a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud." *Villella* at 42. The Court in *Moskovitz* stated: "We now find that statement, as it relates to the lack of good faith effort to settle, does not represent the law as set forth in *Kalain*. Therefore, we now specifically modify the law stated in *Villella* by disapproving the above-quoted language. We hold that in prejudgment interest determinations... the phrase 'failed to make a good faith effort to settle' does not mean the same as 'bad faith.'" *Moskovitz*, at 659.

9. *Moskovitz*, at 659.

10. *Id.* at 658; *see also, Clark v. Grant Med. Ctr.*, 10th Dist. Franklin No. 14AP-833, 2015-Ohio-4958, ¶57.

11. The "aggressive settlement efforts" language originated in *Black v. Bell*, 20 Ohio App.3d 84, 88, 484 N.E.2d 739(8th Dist. 1984), a pre-*Kalain* decision, with one judge dissenting. In that R.C. 1343.03(C) had recently been amended to allow recovery for prejudgment interest on tort claims, *id.* at 87, *Black* represents an early effort to interpret the good faith standard. However, in light of the Supreme Court's decision in *Kalain*, the "aggressive settlement efforts" verbiage should not be seen as controlling the analysis.

12. *Webster's II New Riverside University Dictionary* (1988) defines "aggression" as: "1. Initiation of forceful, usu. hostile action against another: ATTACK. 2. The practice of attacking or encroaching, esp. in violation of territorial rights: INVASION. 3. *Psycho-anal.* Hostile action or behavior."

13. *See, e.g., Foreman v. Wright*, 8th Dist. Cuyahoga No. 82067, 2003-Ohio-5819, ¶15; *Pierce v. Pridemark Homes,Inc.*, 8th Dist. Cuyahoga No. 84841, 2005-Ohio-1191, ¶24; *Miller v. VanFleet*, 7th Dist. Mahoning No. 03 MA 200, 2004-Ohio-7214, ¶17.

14. In *Sindel v. Toledo Edison Co.*, 87 Ohio App.3d 525, 622 N.E.2d 706 (3d Dist. 1993), the court reversed an award of prejudgment interest because the plaintiffs' "sole offer of settlement one week prior to trial does not demonstrate an aggressive effort at prejudgment settlement." *Id.* at 533. This is one of the rare instances where a court *reversed* an award of prejudgment interest due to a plaintiff's lack of aggressive settlement efforts.

15. Indeed, the aggressive settlement efforts language is absent from all Ohio Supreme Court decisions and from numerous appellate decisions affirming awards of prejudgment interest to plaintiffs. *See, e.g., Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 644 N.E.2d 298 (1994); *Galmish v. Cicchini*, 90 Ohio St.3d 22, 734 N.E.2d 782 (2000); *Burton v. Slusher*, 7th Dist. Mahoning No. 07-MA-143, 2008-Ohio-4812; *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960 (1st Dist.); *Clark v. Grant Med. Ctr.*, 10th Dist. Franklin No. 14AP-833, 2015-Ohio-4958; *Weaver v. Kraft,* 5th Dist. Delaware Nos. 15CAE060046, 15CAE090073, 2016-Ohio-3300; *Bach v. DiCenzo*, 8th Dist. Cuyahoga No. 84396, 2005-Ohio-2611; *Wagner v. Marietta Area Health Care*, 4th Dist. Washington No. 00CA17, 2001 Ohio App. LEXIS 1362, 2001-Ohio-2424; *Ross v. St. Elizabeth Health Ctr.*, 181 Ohio App.3d 710, 2009-Ohio-1506 (7th Dist.); *Bush v. W.C. Cardinal Co.,* 7th Dist. Harrison Nos. 02 539 CA, 02 HA 546, 2003-Ohio-5443; *Strasel v. Seven Hills OB-GYN Associates, Inc.,* 170 Ohio App.3d 98, 2007-Ohio-171 (1st Dist.).

16. *See, e.g., Burton, supra*, 2008-Ohio-4812, ¶¶98-99 (affirming prejudgment interest award where negotiations began about one month prior to trial and included discussions during trial); *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960, 797 N.E.2d 132 (1st Dist.) (holding that the trial court abused its discretion in overruling plaintiff' motion for prejudgment interest where negotiations began 17 months prior to trial, and continued through the second day of trial); *Pruszynski v. Reeves*, 11th Dist. Geauga No. 2005-G-2612, 2006-Ohio-5190, *rev'd on other grounds*, 117 Ohio St.3d 92, 2008-Ohio-510, 881 N.E.2d 1230 (granting prejudgment interest where negotiations began at the outset of the case and included discussions on the day of trial).

17. *Sindel, supra*, 87 Ohio App.3d at 533.

18. *See, e.g., Maxwell v. The Columbus Maennerchor*, 10th Dist. Franklin No. 16AP-41, 2016-Ohio-7133, ¶15 ("We have previously found in the analysis of awarding pre-judgment interest that determining whether a defendant has a good faith, objectively reasonable belief that they have no liability necessitates reviewing whether the defendant rationally evaluated his risks and potential liability.*** 'A defendant who does not rationally evaluate his risks and potential liability cannot hold a good faith, objectively reasonable belief of no liability. Thus, our consideration of the two requirements merges into one analysis.'"), *quoting Whitmer v. Zochowski,* 10th Dist. Franklin No. 15AP-52, 2016-Ohio-4764, ¶118, 69 N.E.3d 17.

19. *See, e.g., Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960, ¶18, 797 N.E.2d 132 ("The question of whether a good-faith effort to settle a case has been made depends on whether the amount of the offer was based on an objectively reasonable belief.*** A substantial six-figure offer is not a rational evaluation if it fails to take into account the strengths and weaknesses of the evidence in assessing the size of the award should a jury discount the defense's evidence.").

20. Plaintiffs are not required to negotiate against themselves by unilaterally reducing their offer to settle. *Galmish v. Cicchini,* 90 Ohio St.3d 22, 34-35, 734 N.E.2d 782 (2000), *citing Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 429, 644 N.E.2d 298, 304 (1994).

21. 71 Ohio St.3d 421, 644 N.E.2d 298 (1994).

22. *Galayda*, 71 Ohio St.3d at 429; *see also, Conte v. General Housewares Corp.*, 215 F.3d 628, 634-635 (6th Cir. 2000) (no abuse of discretion in awarding prejudgment interest under Ohio law even though factual issues were strongly disputed).

23. *Id.* at 428-429; *see also, Whitmer v. Zochowski*, 10th Dist. Franklin Nos. 15AP-52, 15AP-60, 2016-Ohio-4764, ¶122; *Wagner v. Marietta Area Health Care,* 4th Dist.

Washington No. 00CA17, 2001 Ohio App. LEXIS 1362, *15; *Clark v. Grant Med. Ctr.*, 10th Dist. Franklin No. 14AP-833, 2015-Ohio-4958, ¶61, 47 N.E.3d 526; *Strasel v. Seven Hills Ob-Gyn Assocs.,* 170 Ohio App.3d 98, 2007-Ohio-171, ¶36.

24. Learned Hand's classic formula for balancing the probability a risk will occur, the gravity of the harm if it does, and the burden of taking precautions against it was set forth in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

25. *Wagner, supra*, 2001 Ohio App. LEXIS 1362, *16-17.

26. *Andre, supra*, 2003-Ohio-4960, ¶18.

27. *Bach v. Dicenzo*, 8th Dist. Cuyahoga No. 84396, 2005-Ohio-2611, ¶¶54-55.

28. *Clark, supra,* 2015-Ohio-4958, ¶62.

29. *Wagner, supra*, at *16-17.

30. *See, e.g., Ross v. St. Elizabeth Health Ctr.*, 181 Ohio App.3d 710, 2009-Ohio-1506, ¶64; *Andre, supra*, ¶15; *Strasel, supra*, ¶135.

31. R.C. 1343.03(C)(2) was added to the statute by virtue of 2003 Ohio HB 212, enacted March 3, 2004, with an effective date of June 2, 2004.

32. 193 Ohio App.3d 682, 2011-Ohio-2389, 953 N.E.2d 859 (8th Dist.), *rev'd and remanded on other grounds at* 132 Ohio St.3d 316, 2012-Ohio-2914, 971 N.E.2d 944.

33. *Luri,* 2011-Ohio-2389, at ¶39.

34. *Id.* at ¶42.

35. *Luri v. Republic Services, Inc.*, 132 Ohio St.3d 316, 2012-Ohio-2914, 971 N.E.2d 944.

36. 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

37. *See, e.g., Kronenberg v. Whale*, 21 Ohio App. 322, 336-337 (1925) (the burden was on "counsel for the defendant to submit interrogatories to the jury [on the matter it was complaining of], and, in the absence of such interrogatories to the jury,... the error complained of was not prejudicial... and no reversal could be based on that ground"); *Antonoff v. Allstate Ins. Co.*, 7th Dist. Mahoning No. 03MA105, 2004-Ohio-5681, ¶11 (rejecting Allstate's argument that the damages awarded against it were not supported by the evidence because "Allstate never requested jury interrogatories explaining how the damages which [the jury] awarded were divided between the physical and mental injury claims"); *Kritzwiser v. Bonetzky*, 3d Dist. Logan No. 8-07-24, 2008-Ohio-4952 (defendant not entitled to statutory set-off for liability of non-parties because he "failed to submit proposed jury... interrogatories to the trial court regarding liability of others").

38. 73 Ohio St.3d 260, 652 N.E.2d 952 (1995).

39. *Buchman*, 73 Ohio St.3d at 270.

40. *Id.* (emphasis added).

41. *Cobb v. Shipman*, Trumbull Cty. C.P. No. 2006 CV 2992 (Nov. 12, 2003).

42. *See, e.g., Chapman v. Milford Towing & Serv.*, 499 Fed. Appx. 437, 2012 U.S. App. LEXIS 18897, 2012 WL 3871868 (6th Cir. Sept. 7, 2012) (affirming trial court's award of prejudgment interest on economic damages alone where, in the absence of jury interrogatories, the trial court determined the economic damages awarded were past damages but the noneconomic damages were future damages). The *Chapman* court agreed with the plaintiff, however, that, by not submitting jury interrogatories, the defendant waived its contention that plaintiff was not entitled to any award of prejudgment interest. *See id.*, 2012 U.S. App. LEXIS 18897 at **30-31.

43. *Fairchild v. Curtis*, 5th Dist. Guernsey Nos. 95 CA 16, 95 CA 17, 95 CA 23, 1996 Ohio App. LEXIS 2919, *17, *quoting Musisca v. Massillon Community Hosp.*, 69 Ohio St.3d 673, 676, 635 N.E.2d 358 (1994).

44. R.C. 1343.03(C)(1)(c)(i-ii). However, if the defendant admitted liability in a pleading or engaged in conduct with the deliberate purpose of causing harm to the prevailing plaintiff, prejudgment interest begins to run the date the cause of action accrued. R.C. 1343.03(C)(1)(a)-(b).

45. R.C. 1343.03(C)(1)(c)(i)(emphasis added).

46. *Tomasik v. Tomasik*, 111 Ohio St.3d 481, 2006-Ohio-6109, ¶15 (if statutory language is ambiguous, court must construe it to determine the legislative intent).

47. *State v. Brown*, 170 N.E.2d 854, 1960 Ohio App. LEXIS 812, *7-8 (8th Dist. 1960).

48. *Soplata v. Endres*, 11th Dist. Geauga No. 2012-G-3116, 2013-Ohio-4424, ¶22.

49. 69 Ohio St.3d 638, 635 N.E.2d 331 (1994).

50. *Id.*, 69 Ohio St.3d at 662.

51. *Pruszynski v. Reeves*, 117 Ohio St.3d 92, 2008-Ohio-510, 881 N.E.2d 1230, paragraph one of the syllabus.

52. R.C. 1343.03(C)(1)(c)(i-ii).

53. *See* R.C. 5703.47.

54. The interest rates and formula can be found at https://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx (last visited April 10, 2018).

55. *Mayer v. Medancic*, 124 Ohio St.3d 101, 2009-Ohio-6190, ¶14.

56. *Condello v. Raiffe*, 8th Dist. Cuyahoga Nos. 83076, 83556, 2004-Ohio-2554, ¶47 (citing *Musica, supra*, 69 Ohio St.3d at 676).

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Interpleader – What Are Your Options When The Tortfeasor's Insurer Tries to Beat You To The Courthouse?

by Brenda M. Johnson

In the landmark case of *State Farm Fire & Cas. Co. v. Tashire*,[1] the United States Supreme Court observed that interpleader should not be used to compel tort plaintiffs to litigate claims against an insured tortfeasor "in a single forum of the insurance company's choosing."[2] This has not, however, stopped liability insurers from turning to interpleader in cases where they anticipate that multiple claims against one of their insureds will exceed policy limits.

Some insurers may do it because they think it will protect them from bad faith claims.[3] Often, though, despite the Supreme Court's observation in *Tashire*, interpleader is an insurer's preemptive attempt to select the forum in situations where its insured would not have a right to do so. Either way, whenever there are multiple potential tort plaintiffs and a potential defendant with limited insurance, there is a possibility that the insurer will file an interpleader action with the eventual aim of forcing the tort plaintiffs to litigate their claims in the context of that action, as opposed to a forum chosen by the plaintiffs.

When this happens, you have options, but they depend on the forum in which the interpleader has been filed. If you are in federal court and the tort claims can be heard in a state court, your options are relatively favorable, since federal courts generally will abstain from exercising jurisdiction over the underlying tort claims in favor of the tort plaintiff's choice of forum. If the interpleader action has been filed in state court, however, the situation is less clear. There are, however, very good arguments for allowing tort plaintiffs to litigate their underlying claims in a forum of their choosing, as opposed to one selected by a tortfeasor's liability insurer, even when the interpleader action has been filed in an Ohio court.

At least two state supreme courts have embraced the United State Supreme Court's reasoning in *Tashire*, and have held that a trial court cannot enjoin tort plaintiffs from litigating their tort claims in a forum of their own choosing, which suggests that the jurisdictional priority rule is not an absolute barrier to allowing plaintiffs to file separate actions. Further support for this lies in the fact that the tort claims, if brought in the context of the interpleader action, would have to be alleged as cross-claims. Cross-claims are permissive rather than compulsory, and thus should not be subject to the jurisdictional priority rule.

I. Interpleader Was Not Designed To Solve The Problems That Arise When A Tortfeasor Is Subject To Multiple Claims

Interpleader, simply defined, "is where the plaintiff says 'I have a fund in my possession, in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it between yourselves.'"[4] Having arisen as an equitable remedy, a party seeking interpleader "must be free from blame

in causing the controversy, and where he stands as a wrongdoer with respect to the subject matter of the suit or any of the claimants, he cannot have relief by interpleader."[5] This means that under traditional principles, while a tortfeasor's insurer may be able to invoke the remedy, the tortfeasor cannot.[6]

In its modern form, interpleader involves two stages. In the first stage, the court determines whether the interpleader plaintiff, also referred to as the "stakeholder," has properly invoked interpleader (*i.e.*, whether the court has jurisdiction, whether there are conflicting claims to the fund at issue, and whether there are any equitable considerations that might prevent the use of interpleader).[7] If these requirements are met, the stakeholder will then deposit the fund with the court and be discharged from the action, retaining no further standing to direct the disposition of the funds.[8]

Once the funds are deposited and the stakeholder is discharged, the action then proceeds to the second stage, which involves determining the respective rights of the claimants to the fund. The question this poses when liability insurance is involved is whether the parties can be compelled to litigate their underlying tort claims in the context of the interpleader action. In *Tashire*, the United States Supreme Court indicated that they should not.

Tashire arose from a 1964 collision of a pickup truck and a Greyhound bus in which two people were killed and over thirty others were injured. When the first lawsuits arising from the crash were filed in state court, State Farm (which had issued a $20,000 liability policy to the pickup truck driver) filed a separate interpleader action in federal district court. In a motion that would later be joined by Greyhound, State Farm then sought to compel all potential tort plaintiffs to litigate their tort claims against the potential tort defendants, including the truck driver, Greyhound, and the bus driver, in the interpleader action.[9]

The district court granted the injunction, which the Supreme Court ultimately held was in error, as it concluded that the federal interpleader statute did not authorize the district court to do so.

As the Court observed in *Tashire*, the classic problem interpleader arose to address was one "where a stakeholder, faced with rival claims to the fund itself, acknowledges – or denies – his liability to one or the other of the claimants."[10] It is a remedy that in many ways was designed to aid insurance companies – but not by allowing liability insurers to select the forum for litigating tort claims against their insureds.

Among other things, the Court noted that a liability insurer's interest in an interpleader action, which is no greater than its coverage limits, should not be allowed to determine where tort plaintiffs bring their underlying claims.[11] In so doing, the Court observed that the insurance problem interpleader was intended to remedy "was that of an insurer faced with conflicting but mutually exclusive claims to a policy, rather than an insurer confronted with the problem of allocating a fund among various claimants whose independent claims may exceed the amount of the fund."[12] The Court also observed that the insurer's interest, which was confined to the limits of its liability coverage, did not require the underlying tort claims to be litigated in a single forum, since it would "receive[] full vindication when the court restrains claimants from seeking to enforce against the insurance company any judgment obtained against its insured, except in the interpleader proceeding itself."[13]

II. Federal Courts Generally Defer To State Court Proceedings To Decide The Underlying Tort Claims

Tashire establishes that federal courts cannot enjoin the litigation tort claims outside of the confines of an interpleader action.[14] At some point in an interpleader action, however, the court must determine the respective rights of the claimants to the fund at issue. If the tort claims are pending in other courts, this poses a problem that *Tashire* does not address – namely, whether a district court should refrain from determining the rights of the parties to the fund at issue until their tort claims have been adjudicated in a forum of the tort plaintiffs' choosing.

The Supreme Court has not addressed this issue; however, in the spirit of *Tashire*, lower federal courts have recognized that issues of judicial economy, as well as issues of comity and deference to the authority of state courts to address state law issues, weigh heavily in favor of postponing the second phase of interpleader when the underlying tort claims are being litigated in state court. Thus, federal courts will generally invoke one of two doctrines under which a federal court can decline to exercise its jurisdiction in deference to a concurrent state court proceedings as a basis for staying the interpleader action until the underlying tort actions have been fully litigated.

In *Brillhart v. Excess Ins. Co. of America*,[15] and later in *Wilton v. Seven Falls Co.*,[16] the Supreme Court held that federal courts have discretion to decline to hear a declaratory judgment action when there is another suit between the same parties pending in state court that presents the same issues of state law, and a number of federal courts have applied this standard by analogy to interpleader actions.[17] Others have applied the more

rigorous "exceptional circumstances" abstention doctrine adopted by the Supreme Court in *Colorado River Water Conservation Dist. v. United States* [18] to interpleader actions, which can lead to a similar result.[19]

III. Ohio Law Is Less Clear, But It Should Not Preclude Filing Separate Tort Actions

Under Ohio law, interpleader is governed by Ohio's Civil Rule 22, which is similar to the federal rule on which it is modeled, but there is very little guidance in Ohio case law with respect to its application in cases involving tort actions. That said, there are certain legal principles that supply some guidance as to how, and when, an Ohio court in which a interpleader action has been filed should address the underlying tort claims.

The first question to address is whether the jurisdictional priority rule plays a role. This rule provides that "[a]s between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties."[20] Since the rule can apply even when the causes of action are not exactly the same, so long as "the suits present part of the same 'whole issue,'"[21] it raises a question as to whether another Ohio trial court would have authority to consider the underlying tort claims in a separate action if an interpleader action has already been filed.

Ohio courts have not addressed this issue directly. There are good arguments, however, that the jurisdictional priority rule should not prevent a tort plaintiff from litigating his or her claims in an action filed separately from the interpleader action.

First, at least two states that follow the jurisdictional priority rule have adopted the rationale in *Tashire*, in which the U.S. Supreme Court held that interpleader does not authorize a court to enjoin potential claimants from filing separate tort actions.

In *Oak Cas. Ins. Co. v. Lechliter*,[22] West Virginia's highest court held that "in an interpleader action filed by an insurance company seeking the orderly contest of insurance proceeds arising from automobile liability coverage, which proceeds are insufficient to cover all claims resulting from an accident involving its insured, the [trial court] may not restrict an interpleader defendant's right to file a lawsuit against the insured tortfeasor to determine the liability of that person or entity for the underlying accident."[23] In *Club Exchange Corp. v. Searing*,[24] the Kansas Supreme Court reached a similar conclusion, albeit while acknowledging that, "[a]s a practical matter . . . where the principal target of the claimants, and the only apparent source from which their claims may be satisfied, is the stake, all claims will no doubt be resolved in the interpleader action."[25]

This suggests that the jurisdictional priority rule should not operate as a barrier to the subsequent filing of such actions. If the filing of separate tort actions cannot be restricted by an interpleader court, it follows that jurisdictional priority rule should not bar filing them either.

Second, an argument can be made that the jurisdictional priority rule has no application in these cases, at least as far as the underlying tort claims are concerned. As courts in other states have noted, the jurisdictional priority rule serves the same purpose as res judicata, and thus the same rules should apply in determining the applicability of each.[26] For the tort claims to be adjudicated in the interpleader action, they would have to be brought as cross-claims between the parties named as interpleader defendants (presuming, of course, that the liability insurer has named its insured as a defendant). Cross- claims are permissive, not compulsory, which means the failure to bring such a claim in one action does not normally preclude bringing it in a separate action later.[27] By the same reasoning, the tort claims could also be brought in a separate action while the interpleader action is still pending.

Either way, applying the jurisdictional priority rule in cases where a liability insurer has filed an interpleader action in one venue, when the tort plaintiffs wish to litigate in another, would serve none of the legitimate purposes on which the rule is based. The purpose of the jurisdictional priority rule is to prevent a second court from interfering with the resolution of issues that are already pending before the court that first obtained jurisdiction.[28] However, as the U.S. Supreme Court noted in *Tashire*, it is fundamentally unreasonable to allow a liability insurer whose interest is confined to its policy limits to "wag the dog" as far as forum selection is concerned, and compel tort plaintiffs to bring their underlying claims "in a single forum of the insurance company's choosing."[29]

In light of these principles, the jurisdictional priority rule should not automatically prevent bringing such claims in a separate action, nor would its application serve any of the purposes to which the jurisdictional priority rule is directed. As federal commentators have noted, in most interpleader cases of the type addressed in *Tashire*, "the stakeholder will be an insurance company that is simply seeking to discharge its liability under a policy; as a result, a cross-claim, which may be attempting to establish the tortfeasor's liability above and beyond the fund,

typically will not be very closely related to the interpleader claim."[30]

Finally, there is no procedural or jurisdictional rule that would preclude an Ohio court from staying the second stage of an interpleader action in order to allow the underlying tort claims to be tried in a forum of the tort plaintiffs' choosing. This approach would satisfy the legitimate concerns of all parties, as well as equally important issues of judicial efficiency and comity. ■

End Notes

1. 386 U.S. 523 (1967).
2. 386 U.S. at 534.
3. *See* Jonathan M. Stern, *Multiple Claims and Insufficient Limits*, For The Defense 19 (Sept. 2009) (discussing use of interpleader as a strategy to avoid bad faith liability).
4. *Aetna Ins. Co. v. Evans*, 57 Fla. 311, 335, 49 So. 57 (1909) (quoting *Hoggart v. Cutts*, 1 Craig & P. 204).
5. *Farmers Irrigating Ditch & Reservoir Co. v. Kane*, 845 F.2d 229, 232 (10th Cir.1988) ("Our attention has not been directed to any case where a tortfeasor in a multi-claim tort can admit liability, tender into court a minimal amount of money with the representation that such is all he has, force the claimants to prorate the amount deposited, and then obtain an order discharging him from any further liability for his tort.").
6. *See Pan American Fire & Casualty Co. v. Revere*, 188 F. Supp. 474, 481-82 (E.D. La. 1960).
7. *United States v. High Tech. Prods.*, 497 F.3d 637, 639 (6th Cir. 2007).
8. *Id.* Once an insurer interpleads the policy limits, it relinquishes any standing to direct the eventual disposition of the funds. *See Mahoney v. Westfield Ins. Co.*, 124 Ohio App.3d 639, 643, 707 N.E.2d 26 (10th Dist. 1997) (citing *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748 (1926)).
9. *See Tashire* at 526.
10. *Tashire*, 386 U.S. at 534.
11. *Id.* at 535.
12. *Tashire* at 533, n. 15.
13. *Id.* at 535.
14. Under federal law, there are two types of interpleader – statutory interpleader and rule interpleader – but the differences are mainly jurisdictional in nature. Statutory interpleader under 28 U.S.C. § 1335 only requires what is known as minimal diversity, *i.e*, diverse citizenship between at least two adverse claimants, and the amount at issue can be as little as $500. The citizenship of the stakeholder – the entity with the funds in question – is not relevant. Rule interpleader, which is governed by Rule 22 of the Federal Rules of Civil Procedure, requires a separate basis for jurisdiction, such as federal question jurisdiction or conventional diversity jurisdiction. *See Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997). There is a split of authority as to whether the stakeholder's citizenship is relevant in determining whether diversity jurisdiction exists in rule interpleader cases. *See UBS Fin Servs. v. Kaufman*, No. 3:15-CV-00887-CRS, 2016 U.S. Dist. LEXIS 74408 (W.D. Ky. June 8, 2016) (discussing split). Also, for purposes of diversity jurisdiction, the amount in controversy requirement is determined by the value of the interpleader stake, as opposed to the value of the claims against it. *See Brotherhood Mut. Ins. Co. v. United Apostolic Lighthouse, Inc.*, 200 F. Supp.2d 689 (E.D. Ky. 2002).
15. 316 U.S. 491 (1942).
16. 515 U.S. 277 (1995).
17. *See, e.g., Arnold v. KJD Real Estate, LLC*, 752 F.3d 700 (7th Cir. 2014) (*Wilton-Brillhart* abstention is applicable to interpleader actions involving claims that are the subject of parallel state court actions); *National Union Fire Ins. Co. v. Karp*, 108 F.3d 17 (2d Cir. 1997) (court may dismiss or stay action under *Brillhart* standards); *NYLife Distributors, Inc. v. Adherence Group, Inc.*, 72 F.3d 371 (3d Cir. 1995) (*Brillhart-Wilton* standards apply to determine whether to dismiss or stay statutory interpleader action in favor of parallel state court action); *Great W. Cas. Co. v. Frederics*, No. 1:10cv267, 2011 U.S. Dist. LEXIS 128211, 2011 WL 5326236 (W.D.N.C. Nov. 4, 2011) (same).
18. 424 U.S. 800 (1976).
19. *See, e.g., EMCASCO Ins. Co. v. Dairyland Ins. Co.*, No. 03-4174-SAC, 2004 U.S. Dist. LEXIS 6550, 2004 WL 838060 (D. Kan. March 4, 2004) (staying interpleader action on *Colorado River* grounds); *Crider v. Taylor,* No. 89-0001-R, 1989 U.S. Dist. LEXIS 18104 (W. D. Va. Nov. 13, 1989) (same); *but see Chaffe McCall, LLP v. World Trade Ctr. of New Orleans*, No. 08-4432, 2009 U.S. Dist. LEXIS 14353 (E.D. La. Feb. 6, 2009) (denying abstention under *Colorado River* standard); *W. Side Transp. v. APAC Miss.*, 237 F. Supp.2d 707 (S.D. Miss. 2002) (same).
20. *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279, 364 N.E.2d 33 (1977), syllabus. Notably, this rule applies only to actions pending in different Ohio courts with concurrent jurisdiction, and does not apply when an action is pending in another state. *See, e.g., Newman v. Martinez*, 4th Dist. Pike No. 15CA857, 2016-Ohio-647.
21. *State ex rel. Otten v. Henderson,* 129 Ohio St.3d 453, 2011-Ohio-4082, ¶ 29, 953 N.E.2d 809.
22. 206 W. Va. 349, 524 S.E.2d 704 (1999) (following *Tashire*).
23. *Id.* at 356.
24. 222 Kan. 659, 567 P.2d 1353 (1977) (following *Tashire*).
25. *Id.* at 665.
26. *Cruz v. FTS Construction, Inc,.* 140 N.M. 284, 2006-NMCA-109, ¶ 15, 142 P.3d 365 (N.M. App. 2006).
27. *See, e.g., SunTrust Bank v. Wagshul,* 2d Dist. Montgomery No. 25567, 2013-Ohio-3931, ¶ 10 (cross-claims are permissive, and failure to raise them does not have preclusive effect).
28. *Michaels Bldg. Co. v. Cardinal Fed. Savings & Loan Bank*, 54 Ohio App.3d 180, 182 (8th Dist. 1988).
29. *Tashire*, 386 U.S. at 535.
30. Wright, Miller & Kane, 7 FEDERAL PRACTICE & PROCEDURE Civil 3d § 1715, p. 644-645 (2001).

Beyond The Practice: CATA Members In The Community

by Meghan P. Connolly

On April 11, 2018, CATA sponsored a networking event with Cleveland Marshall College of Law students at the Hofbrauhaus Cleveland. The event was well attended and gave our members the opportunity to socialize and engage with law students who may not otherwise have the opportunity to network with the plaintiff's Bar. The social event is an effective networking event and allows the law students to become student members of CATA and become more engaged in our organization. Thank you to our Community Outreach Chairperson, **Ellen Hobbs Hirshman**, for organizing this event, and to all the CATA members and law students who participated!

CATA Social at the Hofbrauhaus Cleveland

Once again, **Ellen Hobbs Hirshman** of **Loucas Law** has been spearheading the local effort on behalf of CATA and the OAJ to bring the End Distracted Driving program to local high school students. In April, Ellen conducted an End Distracted Driving presentation to students at Rocky River High School. The EndDD presentations are aimed to save lives from distracted driving through advocacy, education, and action. One of the goals of the presentation is to not only have the students reflect on their own behavior when they are behind the wheel, but to also change the behavior of those around them, including their parents. According to an EndDD survey, more than 90% of teens who have attended an EndDD presentation say their parents drive distracted with them in the car.

Ellen Hobbs Hirshman giving EndDD presentation.

Oftentimes, audience members find that they recognize the dangers of distracted driving, but continue to engage in that exact behavior. According to the AAA Foundation for Traffic Safety, over 84% of drivers recognize the danger from cell phone distractions and find it "unacceptable" that drivers text or send emails while driving. Nevertheless, 36% of the same people admit to having read or sent a text message or e-mail while driving in the previous month.

It is through advocacy and education that drivers will change their behavior and resist the urge to be distracted while operating a motor vehicle.

If you are interested in participating in an EndDD presentation, please contact Ellen at ehirshman@loucaslaw.com.

Kenneth Knabe of the **Knabe Law Firm** and **Andy Young** of **Young & McCarthy** are volunteering their time and expertise working with the Cleveland City Council Safety Committee Chairman Matt Zone and Bike Cleveland, to help Cleveland become the first city in Ohio to pass Vision Zero legislation. Vision Zero is a comprehensive safety strategy to reduce and eliminate to zero the number of traffic related fatalities and severe injuries in Cleveland.

Ken's focus is bicycle safety and representation of cyclists needlessly injured by unsafe drivers. His Vision Zero focus involves the installation of safety side guards on all city commercial trucks. These side guards would protect cyclists and pedestrians from going into the gap between the front and rear wheels of the trucks.

Andy Young (right) with Councilman Matt Zone (center) and Robert Martineau

Andy's focus is truck safety and representation of those needlessly injured by large commercial trucks. His Vision Zero focus involves installing side guards and strengthening the truck rear guards to prevent underride collisions.

Ken Knabe with Matt Zone, Olivia Ortega, and Jacob VanSickle

Ken is pictured at City Hall in Council chambers with Bike Cleveland Executive Director Jacob VanSickle, Policy Research Associate Olivia Ortega, and Councilman Zone. Andy is pictured at City Hall with Councilman Zone and side guard expert Robert Martineau of Airflow Deflectors in Montréal who flew in to demonstrate the side guard design and implementation.

In April, the YWCA of Greater Cleveland honored 50 young professionals with the Distinguished Woman Award, recognizing women between the ages of 25 and 40 making a difference in Northeast Ohio. One of the 50 women chosen in 2018 was **Dana M. Paris** of **Nurenberg, Paris** who was recognized for making a difference through her career accomplishments, community involvement, and commitment to the YWCA's mission of eliminating racism and empowering women.

Dana Paris (right) with Margaret Mitchell

Established in 1868, the YWCA of Greater Cleveland is one of the oldest continuously operating non-profits in Cleveland and is the largest women's organization in the world. Although the YWCA is committed to the empowerment of women, its programs serve men, women, and adolescents. Some of its services and programs include:

- Early Learning Center - The early learning center provides a high-quality education for children ages three to five and allows working parents to pursue their career and educational goals.
- Nurturing Independence and Aspirations (NIA) - This program is a Trauma-Informed System of Care model that focuses on permanence, education, employment, housing, physical and mental health, and personal and community engagement for youths ages 14 to 24 years old who are transitioning from difficult environments, including foster care.
- Women's Leadership Initiative - This initiative empowers women to become effective leaders by teaching the skills and enrolling them in programs that are designed to support their career goals so that they may get their foot in the door and move up the career ladder.

At the recognition ceremony, Dana had the opportunity to meet her fellow recipients and the President and CEO of the YWCA of Greater Cleveland, Margaret Mitchell. ■

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Pointers From The Bench:
An Interview With
Judge Robert C. McClelland

By Christine M. LaSalvia

The Honorable Robert McClelland was appointed to the Cuyahoga County Common Pleas bench in 2011 after serving in private practice for 31 years. Since that time, he has run for re-election and won twice. Judge McClelland uses his practical experience gained from a career of trying over 150 cases to inform his court room decisions.

Judge Robert C. McClelland

Judge McClelland began his professional career working as a teacher. He taught high school English and Drama and spent a year teaching middle school while he attended law school at night. He enjoyed teaching and values his time spent with students but knew quickly that he wanted to be a lawyer. His desire to become a lawyer was encouraged by a close family friend.

Judge McClelland worked for the City of Westlake as an assistant law director and a prosecutor for ten years. He spent 31 years working at the law firm which was ultimately known as Rademaker, Matty, McClelland & Greve. Judge McClelland started as a law clerk at the firm and worked his way up to a partnership. He handled a variety of civil matters including the defense of workers' compensation cases, employer intentional torts, products liability and premises liability cases. He also handled cases involving mortgage fraud.

Judge McClelland enjoyed private practice and was very fulfilled by his work. He did not consider becoming a judge until towards the end of his civil career when he began to feel that his experience as a trial attorney would serve him well as a Judge. He admits there was definitely a transition from being a trial attorney to serving as Judge. His new position required a switch in thinking from being an advocate to being an objective and neutral decision maker, or as he puts it, being the person who "calls the balls and the strikes." However, he admits that in the beginning of his transition from attorney to judge, he would find himself occasionally wanting to object or considering how he would have presented evidence.

Judge McClelland values jury trials and would like to see more cases get to the Courtroom. However, he recognizes the difficulty that plaintiffs face in terms of costs and risk. He pointed to three medical malpractice cases over which he presided as really leaving an impression on him. He recognized that the lawyers fought hard but did not obtain the result they would have wanted. Despite these difficulties, he feels that lawyers should not be afraid of juries and that we need to give jurors credit for the hard work they do. He told me that the juries he sees take their job seriously and try to do what they believe is right.

When asked what attorneys can do to be more effective in the court room, he responded that we need to maintain the ability to look at our cases objectively. He realizes that it can be difficult to

maintain an objective view of the facts after building a strong relationship with your client and spending time preparing for trial. However, as a trial lawyer it is important to recognize the potential traps in your case. He noted that there was strength in being able to recognize weaknesses. Specifically, in regards to plaintiff, Judge McClelland would like to see some more creative arguments regarding *Robinson v. Bates*. He noted that it is easy to focus solely on the number and forget that it is really a question of the value of the medical treatment.

Although he would like to see more trials, Judge McClelland recognizes that it is often better for the parties to settle the case. He again encourages attorneys to keep an open mind and not foreclose discussions regarding the weaknesses in their case. He also noted that while he recognizes the need to demand an amount higher than what would be expected, you need to be cautious to not make a demand so high that it discourages meaningful discussion. He is willing to meet with the parties and discuss the case, but only if counsel agree. He feels strongly that lawyers should have the opportunity to handle their case and client as they see fit.

In terms of pre-trial procedure, he believes that attorneys would be better served with more preparation prior to pre-trials. It would be beneficial to provide your settlement demand and supportive documentation to the defense well in advance of the pre-trial. It is difficult for the Judge to assist with a settlement when the parties have not had time to review the information.

In his free time, Judge McClelland enjoys golfing, grilling and spending time with his wife and grandkids. He also enjoys taking care of his two rescue dogs. ■

William B. Eadie

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Practically Legal

by William B. Eadie and Michael A. Hill

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

Today's Suggestion: Zoom to Your Meetings

No doubt you've spent plenty of time traveling, to clients, depositions, hearings, you name it. Ohio has almost 1,000 nursing homes, and enough of them understaff and injure residents that we're often traveling hours to handle cases from Toledo to Steubenville, Youngstown to Cincinnati.

That's a lot of wasted drive time.

There are two great ways to reclaim that time: hire a driver to make the drive productive time, or eliminate driving entirely and use Zoom to show up via videoconference.

Yes, Everyone Can Have a Driver

"Hire a Driver" was a big deal for a long time, not that long ago. Think black town car, chauffeurs, and lots of money! That's changed.

Uber and Lyft have gone from obscure to commonplace in just a few years. That's dropped the price tag to be driven a few hours to a few hundred bucks, round trip. Even traditional private cars have dropped prices to compete. It's never been cheaper (or easier) to have someone drive you to your next deposition.

If that sounds silly or extravagant, do the math:

- How much is an hour of your prime work time worth?
- How much is that time worth to your clients?
- How much better prepared—instead of rushed or stressed—will you be for that expert deposition in Columbus if you spent the last two hours reviewing the file and sharpening your outline, instead of fighting traffic and hunting for parking?

Add in the mileage reimbursement you should be billing for, or a possible hotel stay, and you'll wonder why you hadn't started this earlier.

Most of the time, the driver is more than willing to stick around and drive you back, too, especially if they can Uber around town while you're in deposition.

And this is a totally justifiable case expense, to boot.

But don't feel guilty. Unless you're that unicorn—an attorney with extra time and nothing to do—you're being more valuable to your clients taking this approach. When Will had expert depositions in Columbus recently, he traded 4.5 hours of driving for around $300, or about $67 per hour. Do you add $67 / hour of value for your clients? I hope so! And since the client is paying the mileage either way, the added cost to the client works out to more like $30 per hour.

We're pretty confident we add more than enough value over those 4.5 hours of working time, instead of wasted driving time. You should be, too!

Next Best Thing to Being There in Person

If you haven't messed around with video calling since Skype made it commonplace, you're in for a treat. Modern apps like Zoom can give you a

better connection, the folks on the other side just need to click a link, and you're in a video-conference deposition at a fraction of the cost of video-conferencing systems.

You can click a button to record (free video taped deposition anyone?), show exhibits on the screen to the deponent as easily as pulling them up on your computer, even have a time and date stamp on the video.

(While you ought to secure opposing counsel's agreement to record depositions yourself—a huge money saver—we've had success with courts permitting it even over opposing counsel's objection. Email Will for an example court order.)

We use Zoom for more than just depositions. Gone are the days where you must be "in person" to have a personal connection. If blind phone calls are impersonal, and in-person is 100% personal, I'd put Zoom calls at 85%.

You get gestures, facial expressions, non-verbal cues, all the stuff that makes in-person so personal. That gives you a personal connection where you really can get to know people, have effective witness preparation, and rapport-building client meetings—all from hours away.

If you ever find yourself having client meetings or witness interviews by phone, there's no reason not to upgrade to Zoom. The basic free plan is good for 45 minute meetings, and the unlimited-meeting pro plan is just $15 / month.■

Recent Ohio Appellate Decisions

by Meghan P. Connolly and Brian W. Parker

Thayer v. B.L. Building & Remodeling, L.L.C., 8th Dist. No. 105950, 2018-Ohio-1197 (March 29, 2018).

Disposition: Reversing trial court's granting of summary judgment in favor of defendant independent contractor; holding open and obvious doctrine does not apply to independent contractor, and questions as to both defendant's and plaintiff's negligence were for trier of fact.

Topics: Open and obvious doctrine; negligence of independent contractor; and comparative negligence.

The plaintiff, a nurse at a hospital, was injured when she tripped over a wooden block and fell through an empty window frame in a kitchenette. The hospital had hired the defendant independent contractor to make modifications to the kitchenette. Part of the modifications included the independent contractor creating "a pictured framed window opening" (*sic*). At the time of the plaintiff's fall, the opening for the window had been partially constructed, but glass had not yet been placed in the window opening.

The plaintiff entered the kitchenette with another nurse to obtain ice and a beverage for a patient's husband. As the plaintiff entered, she was talking with the nurse and a physician who was already in the kitchenette. As the plaintiff left the kitchenette, she tripped over an eight inch long piece of wood and fell through the partially constructed window opening, sustaining serious injuries to her shoulder. The plaintiff and two employees all testified that, at the time the plaintiff fell, there was no caution tape, cones or any other markings or warnings to indicate that the area was under construction or to block off access to the partially constructed window.

The defendant independent contractor moved for summary judgment, arguing that the plaintiff's claims were barred because the danger posed by the window opening was open and obvious, the defendant owed no duty to warn of such hazards, and there was no evidence that the defendant otherwise breached any duty owed to the plaintiff. The trial court granted the defendant's motion for summary judgment without an opinion disclosing its reasoning.

On appeal, the Eighth District reversed. With respect to the open and obvious doctrine, the court held that the doctrine did not apply and was not a bar to a negligence claim brought against an independent contractor. Citing Simmers v. Bentley Constr. Co., 64 Ohio St.3d 642, 645, 597 N.E.2d 504 (1992), the court held: "Under Ohio law, an independent contractor who creates a dangerous condition on someone else's property is subject to the general laws of negligence[,]" and in such cases, the open and obvious doctrine "does not apply."

The court further stated that "[w]hile the open and obvious doctrine does not relieve an independent contractor of a duty of care, the open and obvious nature of a hazard may be relevant for other purposes in connection with a negligence claim." Specifically, a hazardous condition that is sufficiently discernable may, in and of itself, constitute an adequate warning of the danger, precluding a finding of breach by the defendant independent contractor. The court held, however, that this was not a case in which the trip hazard was so open and obvious that reasonable minds could only conclude that no warnings or other safeguards were necessary to protect persons who were using the kitchenette from the hazard.

The court also stated that any comparative negligence by the plaintiff due to her failure to protect herself from an obvious hazard was not a bar, as a matter of law, to the plaintiff's claims. The court observed that there was evidence that plaintiff's injuries were due to distraction or lack of attentiveness on her part. However, citing R.C. § 2315.33, the court held that this was not a case in which the evidence was "so compelling" that a reasonable jury could only find that the plaintiff's contributory fault was greater than the combined tortious conduct by the independent contractor and other entities from whom the plaintiff did not seek recovery in this action.

Therefore, the appellate court held that the trial court erroneously granted summary judgment for the independent contractor defendant.

Roberts v. Boehl, 12th Dist. No. CA2017-08-039, 2018-Ohio-1118 (March 26, 2018).

Disposition: Reversing summary judgment for defendant driver who asserted sudden medical emergency defense.

Topics: Sudden medical emergency defense; doctor's opinion on foreseeability not controlling.

Plaintiff Roberts was injured in a motor vehicle accident caused by Defendant Boehl. Before the collision, Boehl was driving his truck on I-275 when he started to feel lightheaded and decided he would exit the freeway. After driving for about five minutes, Boehl got off the freeway and entered a restaurant parking lot. While attempting to park his truck there, Boehl

fell unconscious. His vehicle ultimately traveled in reverse out of the parking lot, across four lanes of traffic, and into Roberts' vehicle. Boehl moved for summary judgment based on the sudden medical emergency defense. The trial court granted Boehl's motion and Roberts appealed to the Twelfth District.

The sudden medical emergency defense requires an inquiry into foreseeability. When the defense is asserted, under Ohio law, juries are instructed: "to decide whether [the defendant] had reasonable cause to foresee the possibility of sudden [loss of consciousness]*** you should consider whether the evidence establishes that he/she had previous experiences or knowledge that would have warned a reasonably (cautious) (careful) (prudent) person under the same or similar circumstances of a likelihood of such [loss of consciousness]." See OJI CV 410.21.

Boehl testified that he suffered a concussion about a week prior to the motor vehicle collision with Roberts. He also testified that six to eight years prior to the collision, he became lightheaded while driving, lost consciousness, and caused a minor collision. The Twelfth District concluded that this evidence raised genuine issues of material fact as to whether the sudden medical emergency was foreseeable to Boehl. The Court therefore held that Boehl was not entitled to summary judgment on the defense of the sudden medical emergency.

Interestingly, a piece of evidence relied on by the trial court in granting summary judgment to Boehl was a medical expert affidavit authored by Dr. Gerald Steiman. Dr. Steiman offered an opinion that Boehl had suffered either a seizure related to the earlier concussion or a panic attack. Dr. Steiman further opined that Boehl's loss of consciousness was "neither anticipated nor expected" in that Boehl "would not have foreseen he would lose consciousness." The Court of Appeals took issue with the latter portion of Dr. Steiman's expert opinion. Because the issue of foreseeability is a credibility issue measuring Boehl's subjective perceptions, the Court found that Dr. Steiman was in no better position than the average juror to determine what Boehl would have perceived under the circumstances. Accordingly, the Twelfth District was not swayed by Dr. Steiman's testimony.

Finding summary judgment inappropriate under the facts of this case, the Twelfth District reversed the judgment of the trial court and remanded for further proceedings.

Riedel v. Akron Gen. Health Sys., 8th Dist. Nos. 104962 and 104968, 2018-Ohio-840 (March 8, 2018).

Disposition: Upholding trial court's ruling that defendants were not entitled to offset economic damages by any medical expenses that may be covered by the Patient Protection and Affordable Care Act ("ACA").

Topics: Offset of damages pursuant to R.C. § 2323.41(A).

This is a medical malpractice case where the plaintiffs contended that the defendant physician and the hospital, which was NOT a political subdivision, failed to timely diagnose the plaintiff's spinal epidural abscess which resulted in his incomplete paraplegia. The defendant physician admitted that, in spite of the presence of an MRSA infection that was causing the plaintiff severe back pain, he failed to diagnose the abscess during the plaintiff's emergency room visit.

The jury returned a verdict for plaintiffs, awarding Mr. Riedel $5,200,000 in economic damages, but no non-economic damages. Each of his daughters were awarded $200,000 in non-economic damages.

On appeal, the defendants claimed that the trial court erred in failing to offset the economic damages by the amounts the plaintiff could recover from a health insurance plan issued pursuant to the ACA. The Eighth District held that because the defendant hospital was not a political subdivision, R.C. § 2323.41, and not R.C. § 2744.05(B)(1), applied to the case. R.C. § 2323.41(A) provides:

> (A) In any civil action upon a medical, dental, optometric, or chiropractic claim, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim, ***except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation.***

(Emphasis supplied by court). Therefore, the court noted: "Distilled, under R.C. § 2323.41, a medical malpractice defendant is permitted to introduce collateral benefits evidence ***except where a right of subrogation exists, be it statutory or contractual.***" (Emphasis added). The plaintiff submitted expert testimony that an ACA compliant health plan will contain a contractual right of subrogation. Therefore, the court concluded:

> We determined that R.C. § 2323.41 applies in this case, excluding consideration of the ACA as a collateral benefit due to contractual, statutory, or federal rights of subrogation.

Because the defendant hospital in Riedel was not a political subdivision, the court refused to apply R.C. § 2744.05(B)(1), or follow Jones v. MetroHealth Med. Ctr., 8th Dist. No. 102916, 2017-Ohio-7329, which had allowed a set-off of ACA benefits in an action against a political subdivision hospital. R.C. § 2744.05(B)(1) states in relevant part:

> * * * The amount of the benefits [for injuries or loss allegedly incurred from a policy or policies of insurance or any other source] shall be deducted from an award against a political subdivision under division (B)(1) of this section ***regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery, in whole or in part, for the claim.***

(Emphasis added). The purpose of R.C. § 2744.05(B) is to permit recovery by injured persons for torts committed by political subdivisions while at the same time conserving the fiscal resources of those political entities. The court held that neither the language nor the purpose of R.C. § 2744.05 applied in this case.

The court also issued plaintiff-favorable rulings in denying the defendant a new trial on economic damages (despite the fact that the trial court had granted plaintiffs a new trial on non-economic damages), and in finding that the defendant was not entitled to a directed verdict/jnov on the hospital's liability pursuant to agency by estoppel.

Stanfield v. Reading Bd. Of Education, 1st Dist. No. C-160895, 2018-Ohio-405 (Feb. 2, 2018).

Disposition: Reversing trial court's grant of summary judgment to school district; finding exception to immunity in R.C. 2744.02(B)(4) applied.

Topics: Political subdivision immunity exception in R.C. 2744.02(B)(4) as applied to injury on grounds used by track and field team.

Plaintiff Stanfield was a discus thrower on the Reading High School track and field team. Stanfield and his teammates practiced at a stadium facility owned by the City of Reading. The discus practice area consisted of a cage area and a concrete pad. The cage area was surrounded by poles which were surrounded with netting material. Unfortunately, the netting gaped where it met the poles and had several holes in it. Ultimately, Stanfield suffered a head injury when another student threw a discus that the net failed to contain. Stanfield brought a negligence action against the Reading Board of Education ("the Board").

The Board filed a motion for summary judgment on the basis that it was entitled to immunity under Ohio's Political Subdivision Tort Liability Act. The parties agreed the Board is a political subdivision under the Act and is thereby entitled to immunity under R.C. 2744.02(A). Likewise, the parties agreed the only potentially applicable exception to immunity under the second tier of the immunity analysis is that found in R.C. 2744.02(B)(4), otherwise known as the physical-defect exception. The First District's de novo review turned on whether the physical-defect exception applies to the case to deprive the Board of immunity.

The physical-defect exception requires that three prongs be met. The injury or loss must occur: (1) due to employee negligence; (2) within or on the grounds of the building used in connection with the performance of a governmental function; and (3) because of a physical defect within or on the grounds.

Primarily, the Board argued that Stanfield could not meet the second prong. Stanfield was injured at the City-owned stadium, not "on school premises", and so the Board argued it could not be liable under the physical-defect exception. However, the First District did not agree with the Board's narrow reading of the exception, and found evidence to support Stanfield's argument that he was injured on the grounds of a building used in connection with the performance of a governmental function. Namely, he was injured on the grounds of the stadium facility used by the high school in carrying out its track and field program.

As to the third prong of the physical-defect exception, the First District drew on its historical definition of "defect" as "a perceivable imperfection that diminishes the worth or utility of the object at issue". Applying this definition to the case, the court found that the netting was defective in that it had holes and gaped near the poles. The Board had no worthy rebuttal of this evidence. Therefore, the First District held that the physical-defect exception to immunity applied to Stanfield's case.

In the third tier of the immunity analysis, the Court examined whether R.C. 2744.03(A)(5) functioned to restore immunity for the Board. This section applies to protect a political subdivision's exercise of discretion and judgment. The Court held that the decision by the Board (through its employees) to use the netting during track and field practice was not the type of discretionary decision protected by the immunity statute. As to Stanfield's negligence claims based on the defective netting, the trial court's granting of summary judgment to the Board was reversed and the case was remanded for further proceedings.

It should be noted that immunity was restored to the Board on appeal with respect to Stanfield's inadequate supervision claims by operation of R.C. 2744.03(A)(5). Under ample precedent, decisions relating to the supervision of students are protected by the Act unless the facts support a finding of malice, bad faith, or recklessness.

Nicholson v. Loanmax, LLC, 7th Dist. No. 16 BE 0057, 2018-Ohio-375 (Jan. 26, 2018).

Disposition: Reversing the trial court's denial of summary judgment to the political subdivision defendant on immunity exceptions.

Topics: Statutory exceptions to immunity under R.C. 2744.02(B)(1), (3), and (4).

Miss Nicholson was injured while stepping off of her school bus parked in proximity to a pothole. The Bellaire Board of Education (the "Board") moved for summary judgment on the basis of statutory political subdivision immunity under R.C. Chapter 2744. The Seventh District undertook Ohio's three-tier immunity analysis in reviewing the trial court's denial of the Board's motion for summary judgment.

Both parties agreed that the first tier of the analysis was met as the Board was presumptively immune as a political subdivision. Nicholson argued that the exception to immunity found in R.C. 2744.02(B)(1) applies to her case to reinstate liability on the Board. This exception exposes political subdivisions to liability for negligent operation of a motor vehicle. The Court disagreed with Nicholson and held that because the bus was stopped at the time she was injured, there was no actual operation of the school bus at the time of her injury, and the exception does not apply.

Nicholson alternatively argued that the exception found under R.C. 2744.02(B)(3) applies. This exception provides that political subdivisions are liable for injuries caused by their negligent failure to keep public roads in repair. However, the Court held that the parking lot where Nicholson was injured is not a public road, and parking lots are not included within the statutory definition of public roads under R.C. 2744.02(B)(3). Therefore, the exception did not reinstate the Board's liability.

Additionally, Nicholson argued that the physical-defect exception under R.C. 2744.02(B)(4) reinstated liability in her case. According to the Seventh District, Nicholson's case would fit the exception only if she could show both elements of the exception. First, a negligent act, and second, a physical defect within or on the grounds of the political subdivision. Construing the evidence in a light most favorable to Nicholson, the Court found that this exception to sovereign immunity likewise did not apply to her case.

After shooting down all three of Nicholson's liability theories, the court reversed the trial court's denial of summary judgment in favor of the Board.

A dissent was authored by Judge Donofrio, setting forth his opinion that the immunity exception set forth in R.C. 2744.02(B)(1) does apply to Nicholson's case because the evidence showed that her injury occurred due to the bus driver's negligent operation of a school bus, i.e. the action of driving the bus over a large pothole and parking it there.

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Houston v. AT&T Teleholdings, Inc., 8th Dist. No. 105949, 2018-Ohio-293 (January 25, 2018).

Disposition: Reversing the Cuyahoga Court of Common Pleas; holding that the employee, in a workers' compensation appeal by the employer to the Court of Common Pleas, could not dismiss the claim without prejudice absent the consent of the employer.

Topics: Workers' compensation; civil procedure.

The employee was injured in the course and scope of her employment on December 12, 2013. In January 2015, the employee filed a motion requesting additional allowances for substantial aggravation of each of the initially allowed conditions. The Board of Workers' Compensation allowed the requested additional conditions. The Industrial Commission of Ohio staff hearing officer found that the employee's additional conditions were the proximate and direct result of the December 2013 accident, and therefore she was eligible to participate in the workers' compensation fund for these additional conditions.

The employer filed an appeal with the Court of Common Pleas, contesting the ruling of the ICO staff hearing officer allowing the employee additional conditions to her claim. The trial court set the case for trial for June 12, 2017. The employee sought a continuance, which the trial court denied. The employee then moved to voluntarily dismiss her complaint without prejudice. The trial court granted the employee's motion despite the fact that the employer did not consent to a voluntary dismissal of Houston's complaint pursuant to R.C. § 4123.512(D).

The employer, on appeal to the Eighth District, alleged that the trial court erred by granting the employee's motion to voluntarily dismiss the complaint without prejudice, in that the employer was the party that filed the court appeal and the employer did not consent to the dismissal as required by R.C. § 4123.512(D).

R.C. § 4123.512(D) provides:

> The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure,

provided that service of summons on such person shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section.

(Emphasis by Court).

The trial court, in allowing the employee to dismiss her claim without prejudice, relied on the Eighth District's decision in Ferguson v. State, 2015-Ohio-4499, 42 N.E.3d 804, which held that R.C. § 4232.512(D) was unconstitutional in that it violated the separation of powers doctrine and the equal protection and due process clauses of the Ohio and federal constitutions.

However, while this appeal was pending, the Ohio Supreme Court reversed the Eighth District's Ferguson decision in Ferguson v. State, 151 Ohio St.3d 265, 2017-Ohio-7833, finding the statute constitutional. Based upon this, the Eighth District in this case held:

> Therefore, we must abandon our holding in *Ferguson* and reverse the trial court's judgment allowing Houston to dismiss her complaint without AT&T's consent in violation of R.C. § 4123.512(D).

Weisman v. Wasserman, 8th Dist. No. 105793, 2018-Ohio-290 (January 25, 2018).

Disposition: Reversing decision of the Cuyahoga Court of Common Pleas; holding that genuine issues of material fact existed as to whether dog attack occurred in the common areas of a rental property, thus subjecting the landlord to liability as a "harborer" of the dog.

Topics: Dog bite statute, R.C. § 955.28(B).

A 6 year old child was bitten by a pit bull when he went to visit a neighbor in a two-unit rental property owned by the defendant landlord. The plaintiffs alleged that the landlord was aware that the pit bull was kept in common areas of his rental property, and that he was thus a "harborer" of the dog facing liability for the child's injuries under the dog bite statute, R.C. § 955.28(B).

R.C. § 955.28(B) imposes strict liability on the owner, keeper or harborer of a dog "for any injury, death, or loss to person or property that is caused by the dog." The application of R.C. § 955.28 requires three issues to be determined by the trier of fact in order to find one strictly liable: (1) whether one is the owner, keeper, or harborer of the dog; (2) whether the actions of the dog were the proximate cause of damage; and (3) the monetary amount of damage. The trial court granted summary judgment in favor of the landlord. The Eighth District, on appeal, reversed and remanded.

In order to show that the landlord harbored the pit bull, the plaintiffs were required to show that the landlord permitted the dog in the common areas. The Eighth District held that an attack in a common area would subject the landlord to liability as a harborer of the pit bull.

The landlord testified that he arrived at the rental property after the incident. He testified that there was blood both in the common area hallway and in the tenant's kitchen, with more blood in the kitchen. Specifically, the landlord stated that as he walked to the upstairs unit, he observed blood droplets on the ground in the hallway. There was blood on the stair landing and on one of the steps. He also observed "some blood droplets on the kitchen wall doorway, kind of, and maybe some smears."

The court concluded that the details of the attack, consisting of the landlord's and dog owner's after-the-fact account of the incident, provided evidence that the attack could have occurred in the hallway, which is a common area of the rental premises. Viewing this evidence in favor of the plaintiffs, the Eighth District found that genuine issues of material fact existed as to whether the landlord was a "harborer" of the pit bull. Therefore, the court ruled that summary judgment was improperly granted in favor of landlord.

Clark v. Barcus, 5th Dist. No. CT 2017-0019, 2018-Ohio-152 (Jan. 10, 2018).

Disposition: Reversing summary judgment that had been granted in the defendant's favor.

Topics: Primary assumption of risk held inapplicable.

Clark and Barcus were "gear head" friends who restored older vehicles together. On the night of Clark's injuries, their plan was to install Clark's Chevrolet 350 engine into Barcus' 1985 Chevrolet pick-up truck. Clark planned to sell the engine to Barcus if it met with his approval after the installation.

Before Clark arrived at the Barcus home on the night in question, Barcus and his father had already started the job. They had the engine rigged onto a cherry picker and suspended in the air for about two hours prior to Clark's arrival. As Clark began to assist in the project, one of the eyebolts holding the engine in the air broke. The engine fell and landed on Clark's right hand, causing him serious injury. Clark's lawsuit alleged that Barcus and his father negligently installed the engine onto the cherry picker.

Clark retained an expert who reviewed the Barcus' description of how the engine was rigged onto the cherry picker. Clark's

expert found several flaws with this part of the installation, concluding that the chain used to suspend the engine was too short, the eyebolts were too long, and the eyebolts were installed in the wrong orientation to carry the load of the engine. Barcus moved for summary judgment on the basis that he was immune under Ohio's recreational activity doctrine, otherwise referred to as "primary assumption of the risk". The trial court had granted summary judgment in Barcus' favor.

The Fifth District recounted that "because a successful primary assumption of the risk defense means that the duty element of negligence is not established as a matter of law, the defense prevents the plaintiff from even making a *prima facie* case." The Court further relied on precedent that, "whether a duty is owed to a plaintiff hinges on the foreseeability of the injury."

In Clark's case, whether a duty was owed to Clark in this restoration endeavor depended on the foreseeability of Clark's injury. After a review of the evidence, the Court concluded that based on the expert's affidavit, the injury sustained by Clark due to faulty rigging of the motor to the cherry picker was foreseeable. Construing the evidence in a light most favorable to Clark, the Court reversed the trial court's granting of summary judgment and remanded the case for further proceedings.

Levy v. Huener, 6th Dist. No. L-17-1081, 2018-Ohio-119 (Jan. 12, 2018).

Disposition: Reversing in part, and affirming in part, a grant of summary judgment to defendant on landlord tenant premises liability claims.

Topics: Common law negligence for premises liability; open and obvious danger doctrine; landlord's statutory duties.

Plaintiff Levy was temporarily renting a room from Defendant Huener under an oral agreement to pay $550.00 per month in rent. The most commonly used entrance to the home at issue was located in the rear of the house and was accessible by a set of steps and a ramp. A small sloped bridge, referred to as the "creek bridge", was situated nearby. The creek bridge did not have any handrails, traction tape, or any other safety features.

On the date of her fall, Levy and at least one other person were unloading items from a vehicle in the driveway and carrying the items to the rear entrance. The other individual was blocking the ramp, so Levy decided to walk across the creek bridge to get to the back door. She testified that she had a plastic grocery bag on her wrist and that the creek bridge was slightly wet, but did not look slippery or muddy. As she reached the apex of the curved creek bridge, her feet slipped out from under her. She "reached out to grab something, but there's no railing there". She fell, fracturing her left elbow and pelvis.

Levy's liability expert offered opinions that the creek bridge violated several building codes, including that its slope was greater than 5/8" per horizontal foot as set forth by the Code.

The Sixth District reviewed the trial court granting of summary judgment to Huener on Levy's common law and statutory negligence claims.

As to her common law claims, the Court found that any danger posed by the creek bridge was open and obvious. The fact that Levy knew that the creek bridge was wet, together with her knowledge that it lacked a handrail shows that its dangers were readily apparent to Levy. The Court affirmed summary judgment in favor of Huener on this basis.

However, as to Levy's statutory negligence claims, the Court followed precedent that the open and obvious doctrine does not apply. Further, Levy's testimony taken together with her expert's opinions, raised a genuine issue of material fact with regard to whether the slope of the creek bridge may have been the proximate cause of her fall. The trial court's decision was reversed and the case remanded for further proceedings.

Seaton v. City of Willoughby, 9th Dist. No. 28332, 2018-Ohio-77 (January 10, 2018).

Disposition: Affirming decision of the Summit County Court of Common Pleas; holding that genuine issues of material fact existed as to whether employer deliberately removed an equipment safety guard.

Topics: Employer intentional tort; R.C. § 2745.01(C) & rebuttable presumption of intent to injure an employee.

On the day of the accident, the decedent employee was operating an asphalt roller. After the employee drove to the top of a hill, the asphalt roller began to roll down an incline at a high rate of speed. The employee apparently attempted to operate the brake, but the machine would not respond. Eventually, the employee jumped off the machine and hit his head, fatally injuring himself.

After the accident, the BWC and the City's supervisor tested the parking brake and discovered that the brake was not tight enough, and thus, not operational. The employer was aware that the parking brake needed to be repaired in 2010, and made some modification shortly thereafter. The City supervisor admitted that several aspects of the parking braking system had been altered such as adding an extender to the brake lever, lowering the brake mounting bracket, and cutting away part

of the sheet metal that surrounds the calipers. The plaintiff's expert stated that the alteration of the brake caliper level effectively disabled the parking brake.

If an employer deliberately disables an equipment safety guard, a rebuttable presumption of intent to injure arises under the Employer Intentional Tort statute, R.C. § 2745.01(C), which provides:

> (C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance constitutes a rebuttable presumption that the removal or misrepresentation was committed with the intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

The trial court denied the City's motion for summary judgment. The trial court accepted the argument that the parking brake constituted a safety guard because its primary purpose was to ensure safety by preventing movement when the roller was not in motion. The trial court further concluded that there was a question of fact whether the City had deliberately disabled the parking brake.

On appeal, the Ninth District affirmed. The appellate court agreed that there was a genuine issue of material fact as to whether the City had deliberately removed the safety guard (i.e., the parking brake). The court cited the fact that the City supervisor acknowledged that the parking brake was substantially modified by the City. Furthermore, a retired supervisor for the City indicated that altering the design of the parking brake without consulting the manufacturer was "dangerous" because those modifications would substantially alter "the safety aspect" of the roller's design.

While there was contrasting evidence, including competing statements from experts, regarding the functionality of the parking brake prior to the accident, the plaintiff presented evidence that the City's modification disabled the parking brake. Even though the City presented evidence that the roller was used without incident prior to the accident, the court stated that it was mindful that "[s]imply because people are not injured, maimed or killed every time they encounter a device or procedure is not solely determinative of the question of whether the procedure or device is dangerous or unsafe."

The Ninth District concluded:

> Thus, under these circumstances, where there remains a question of material fact regarding whether the City deliberately removed a safety guard by disabling the parking brake, we cannot say that the trial court erred in denying the City's motion for summary judgment. ■

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

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.

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

RETURN FORM TO: **Kathleen J. St. John, Esq.**
Nurenberg, Paris, Heller & McCarthy Co., LPA
600 Superior Avenue, E., Suite 1200
Cleveland, Ohio 44114
(216) 621-2300; Fax (216) 771-2242
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Verdict Spotlight:

Lucas County Jury Determines That An Insured Homeowner Was Not In "Good Hands"

By Susan E. Petersen

Mr. Tyome Lake believed he was protecting the financial investment in his Toledo home when he took out a homeowner's insurance policy with Esurance - an insurance company owned by Allstate. However, when fire tragically destroyed his home in May 2015, he learned the hard way that he truly wasn't in "good hands."

While the insurance policy was in effect on the date of the fire, Esurance chose to deny coverage based on what it characterized as "Material Misrepresentations" that Mr. Lake allegedly made during Esurance's claim investigation into the fire. Esurance contended that Mr. Lake lied about who lived with him at the house at the time of the fire, how he found out about the fire, and that he sought reimbursement for rental housing expenses after the loss that he did not incur.

Mr. Lake maintained that he was forthcoming about the living arrangements at his home, how he learned of the fire, and that any perceived discrepancies were immaterial to the investigation of his claim for the damage to his home and belongings.

On January 24, 2018, a Lucas County jury agreed with Mr. Lake and returned a verdict in his favor. The jury determined that Esurance breached the terms of the insurance policy by denying his claim. The jury awarded damages for the estimated replacement cost value of the home in the amount of $224,432.00. The jury also determined that Mr. Lake was entitled to $47,209.77 in damages for his personal property, for a total award of $294,084.77. The jury, made up of three women and five men, voted 7-1 in favor of Mr. Lake.

Bobby Rutter

Justin Rudin

With a pre-trial offer of $0, this recent verdict is another feather in the caps of Cleveland trial attorneys Bobby Rutter and Justin Rudin of the Rutter & Russin Law Firm, who have a reputation for being passionate about protecting the rights of insurance policy holders. Rutter and Rudin filed the lawsuit on behalf of Mr. Lake, alleging breach of contract and bad faith relative to the denial of coverage.

In this three-day trial, the jury learned that Mr. Lake purchased the property in July 2014. In February 2015, he took out an insurance policy with Esurance. While Esurance knew the purchase price was only $6500, it refused to insure the property for less than $225K with an annual premium of $4500.

Just three months after the insurance policy took

effect, fire broke out in the kitchen of the home. The Toledo Fire Department was called to the scene and put out the fire. Unfortunately, the Fire Department had to return the next day as the fire reignited. Given the damage and due to safety concerns after the second fire, the City opted to just demolish the home, to include an unaffected detached garage. All contents of the house and the garage were buried/destroyed under a pile of structural rubble. In light of this, the cause of the fire remained impossible to determine.

Esurance immediately began investigating the claim. It took a recorded statement from Mr. Lake and then an "Examination Under Oath." Mr. Lake provide a full authorization form to Esurance so it could obtain any information about him that it wanted. He then provided a proof of loss detailing his damage. Soon thereafter, Esurance denied the claim stating:

> *Following a full investigation of the facts and circumstances surrounding the subject loss, we have determined that there is no coverage for the above referenced claim. During the course of our investigation you have made numerous material misrepresentations in the presentation of your claim. Due to the varying versions of events detailing the discovery of the fire and the inconsistent statements relating to who resided in the home and what was lost, as well as requested additional living expenses that were not incurred, our investigation has determined that your contradicting statements constitute material misrepresentations under your homeowners' policy.*

Given the denial, Mr. Lake sought legal representation and the Rutter/Rudin legal team went to work. After filing suit on January 9, 2016, discovery ensued to include an effective 30(B)(5) deposition of the Esurance corporate representative most knowledgeable on the denial of coverage. It was the testimony from this deposition which made a significant impact at trial, to include the fact that the 30(B)(5) representative couldn't articulate the material misrepresentations. She also confirmed that Mr. Lake had disclosed to Esurance from the outset the number of individuals living in the house and the manner in which he learned about the fire as evidenced by the transcript of his recorded statement. Esurance's claim that Mr. Lake fabricated housing expenses was debunked at trial, when Mr. Lake's former landlord was put on the stand and testified that Mr. Lake did indeed incur the claimed charges.

The Honorable Judge Linda J. Jennings presided over the litigation and ordered bifurcation of the claims. A review of the docket demonstrates that the trial team had their work cut out for them in motion practice, including readjusting trial strategy after receiving a court order permitting the identification and testimony of a defense expert just two days before trial. The Plaintiff proceeded without an expert. Retired Judge James E. Barber, who was sitting by assignment, presided over the trial. It took the jury half a day to reach its verdict. After the trial, the jury told the Rutter/Rudin trial lawyers that the consensus was that they just couldn't find any material misrepresentations.

Part two of the trial on the bad faith claim will begin on July 23, 2018.

> · *Tyome Lake v. Esurance Insurance Company*; Lucas County Court of Common Pleas Case No. CI 16-1224. Counsel for Defendant: Andrew J. Ayers, Bahret & Associates Co., L.P.A. ■

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.*

Jane Doe v. Truck Company

Type of Case: Truck Crash
Settlement: $122,500.00
Plaintiff's Counsel: Jordan Lebovitz, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Withheld
Court: United States District Court, Northern District of Ohio, Eastern Division
Date Of Settlement: March 28, 2018
Insurance Company: Occidental Fire & Casualty Company
Damages: L4-5, L5-S1 disc bulges with radiculopathy

Summary: Plaintiff was traveling home in a small passenger vehicle when an out-of-state commercial truck driver attempted to merge while Plaintiff was traveling in his blind spot causing her vehicle to spin and strike a concrete median. Defendant truck driver blamed the Plaintiff for not seeing that his truck was moving into her lane. The truck company failed to have proper training mechanisms in place to educate its drivers on safe driving practices.

Plaintiff's Experts: Medical Experts only: Dr. Tracy Neuendorf (The Doctors Pain Clinic); and Dr. Dominic Conti (Primary Care Physician)
Defendant's Expert: Dr. James Brodell

Matthews v. Kharief

Type of Case: Motor Vehicle Accident
Verdict: $115,000
Plaintiff's Counsel: Christopher J. Carney, Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: Beverly Adams for Erie; John Rubis for UIM carrier, State Farm
Court: Cuyahoga County CP Case No. 863472, Judge Deena Calabrese
Date Of Verdict: March 23, 2018
Insurance Company: Erie; State Farm
Damages: 61-year old female nurse sustained meniscus tears and acceleration of TKR by 10 years per treating doctor. Client had injections, but no surgery prior to trial. Approximately $20,000 in bills with $8,000 in Robinson numbers.

Summary: Disputed liability red light/green light case with no independent witnesses. Court allowed State Farm to be bound by the judgment without participating in the case, and without informing the jury that there was a UIM component to the case.

Matthew Harrison, et al. v. Horizon Women's Healthcare, et al.

Type of Case: Birth Injury
Verdict: $2.75 Million
Plaintiffs' Counsel: Pamela Pantages and Jeffrey M. Heller, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5205
Defendants' Counsel: Patrick Adkinson, Poling Law
Court: Montgomery County Common Pleas Case No. 2016 CV 06114, Judge Mary Wiseman
Date Of Verdict: January 31, 2018
Insurance Company: The Doctors Company
Damages: Unanimous jury verdict: $1.5 Million economic losses, $750,000 non-economic losses, $500,000 loss of consortium

Summary: Matthew was born on 2/9/07. Defendant Andre Harris, M.D. finished his OB residency in 6/06 and opened his solo practice in 7/06. Maurita Henry, Matthew's mother, was one of Dr. Harris's first OB patients in private practice. Ms. Henry went in to labor on 2/8/07. EFM became non-reassuring so Dr. Harris applied a vacuum over 23 minutes, 10 pulls and 5 pop-offs. All experts and Dr. Harris agreed the standard of care required a cesarean after 3 pop-offs.

Dr. Harris did not abandon the vacuum after 3 pop-offs but instead continued to pull with the vacuum and delivered Matthew's head. He immediately noted a shoulder dystocia which he managed with McRobert's maneuver, suprapubic pressure, and traction. Total shoulder dystocia time was 2 minutes.

Matthew had Apgar scores of 1, 3, and 6. A skull x-ray was remarkable for significant head swelling, blood under his scalp, and shifting of his skull bones. He also had a flail right arm and subsequently was diagnosed with a complete brachial plexus injury with a "probable" avulsion of C5 and "possible" avulsion of C6. All of the experts and Dr. Harris agreed that an avulsion, if one existed, could only be explained by excessive downward traction.

Matthew has had reconstructive surgery and extensive

therapy but still has a severe disability and obvious physical disfigurement. The jury deliberated for 4 hours. There was no offer of settlement.

Plaintiffs' Experts: Marc Engelbert, M.D.; Daniel Adler, M.D.; Maryanne Cline; John Pullman; and John Burke, Ph.D.
Defendants' Experts: Frank Manning, M.D.; and Michael Noetzel, M.D.

De'Carla Day v. Rochling Glastics-Composites, LP

Type of Case: Workers' Compensation
Verdict: Two conditions allowed
Plaintiff's Counsel: Jeffrey M. Heller and Benjamin P. Wiborg, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Timothy A. Marcovy, LoPresti, Marcovy & Marotta, LLP
Court: Cuyahoga County Common Pleas Case No. CV-17-874086, Judge Hollie Gallagher
Date Of Verdict: January 19, 2018
Insurance Company: Employer is self-insured
Damages: SLAP tear, supraspinatus rotator cuff tear, shoulder impingement

Summary: Client worked as a press operator, lifting objects overhead daily and scooping resin out of a 55-gallon drum. A couple weeks prior to the at-work injury she began feeling discomfort in her shoulder. On the date of injury she reached into a drum and felt a pull. She was diagnosed on x-ray with a shoulder strain. More than a year later an MRI revealed two shoulder tears and shoulder impingement. Trial hinged on whether the tears and impingement were degenerative. Jury found for the two tears, but against the impingement. Pre-trial offer was $1,500.00.

Plaintiff's Experts: Dr. Catherine Watkins-Campbell, M.D. (Advanced Orthopedics and Physical Therapy, Warrensville Hts., Ohio)
Defendant's Expert: Dr. Laurence Bilfield, M.D. (Kuhnlein and Martin, Inc.)

Jane Doe v. ABC Trucking Co.

Type of Case: Truck vs. Bicycle
Settlement: $1,500,000.00
Plaintiff's Counsel: Dana Paris and David Paris, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Confidential
Court: Portage County
Date Of Settlement: January 10, 2018
Insurance Company: Confidential
Damages: Degloving injury lower abdomen and left thigh; fractured pelvis

Summary: Plaintiff, age 10, was riding her bicycle to school and was struck by a right turning truck while riding through a crosswalk. Defendant contended he already crossed through the crosswalk in his turn and plaintiff rode into the side of his tractor with the crossing signal against her. Plaintiff contended she began riding across the crosswalk as soon as the crossing signal turned in her favor and was hit by the truck's front bumper.

Plaintiff's Experts: Introtech; TRTC Traffic Reconstruction; and Jennifer Greer, M.D.
Defendant's Expert: Charles Veppert

Anonymous Baby v. Anonymous Hospital

Type of Case: Medical Negligence
Settlement: $4,825,000.00
Plaintiff's Counsel: John Lancione, The Lancione Law Firm, (440) 331-6100; and Dov Apfel, Janet, Jenner & Suggs, LLC
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: January 2018
Insurance Company: Confidential
Damages: Brain damage resulting in Cerebral Palsy

Summary: Labor nurses failed to resuscitate fetal distress on the electronic fetal monitor, failed to notify the OB-GYN, failed to call neonatologist when STAT C-Section was finally called and negligent resuscitation with esophageal intubation.

Plaintiff's Experts: Aaron Caughey, M.D. (Maternal Fetal Medicine); Max Wiznitzer, M.D. (Pediatric Neurologist); Edward Karotkin, M.D. (Neonatologist)
Defendant's Experts: Jay P. Goldsmith, M.D. (Neonatologist); and Michael Nageotte, M.D. (Maternal Fetal Medicine); Alan Bedrick, M.D. (Neonatologist); and Richard Towbin, M.D. (Radiologist)

Baby Boy Doe v. Anonymous Hospital

Type of Case: Medical Negligence
Settlement: $5,200,000.00
Plaintiff's Counsel: John Lancione, The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: January 2018

Insurance Company: Self-insured
Damages: Brain damage secondary to brain contusion

Summary: Baby Boy Doe was born premature and was low birth weight. The day after delivery his mother was discharged from the hospital. On the third day of life while he was the only baby in the Special Care Nursery, it was discovered that he had a depressed skull fracture. The hospital engaged in a cover-up from the beginning. Risk management did no investigation and told all the nurses in the Special Care Nursery not to talk about the baby with anyone. The hospital blamed the parents for the injury.

Plaintiff's Experts: Marcus Hermansen, M.D. (Neonatologist); Max Wiznitzer, M.D. (Pediatric Neurologist); Gordon Sze, M.D. (Pediatric Neurologist); and Jonathan Eisenstat, M.D. (Forensic Pathologist)
Defendant's Experts: Richard Katz, M.D. (Physical Medicine & Rehabilitation); and Perry Lubens, M.D. (Pediatric Neurologist)

Brett Cameron v. Michael Moore, et al.

Type of Case: Negligence / Motor Vehicle Accident
Settlement: $93,500.00 (100K Limits)
Plaintiff's Counsel: Jarrett J. Northup, Jeffries, Kube, Forrest & Monteleone Co., L.P.A., (216) 771-4050
Defendants' Counsel: Margo S. Meola, Esq.
Court: Lake County Common Pleas Case No. 2016 CV 241, Judge O'Donnell
Date Of Settlement: January 2018
Insurance Company: State Farm
Damages: Fractured Humerus, Hip Replacement, Misc. Trauma, Surgeries

Summary: Defendant's van was abandoned in middle lane of Rt. 2 when front wheel came off. Plaintiff was a passenger in a car that struck the van at high speed. Suit claimed that the van owner negligently affixed wheel and driver negligently abandoned vehicle in hazardous area.

Plaintiff's Expert: Dr. Mark Panigutti (Orthopedics)
Defendants' Expert: None identified at time of resolution.

Estate of Rider v. Ohio Dept. Of Public Safety, et al.

Type of Case: Personal Injury (Survivor), Wrongful Death
Settlement: $3,800,000.00
Plaintiff's Counsel: Jarrett J. Northup, Jeffries, Kube, Forrest & Monteleone Co., L.P.A., (216) 771-4050
Defendants' Counsel: Peter DeMarco, Brian Kneafsey (Ohio AG Office)
Court: Court of Claims No. 2017-00003, Magistrate Renick
Date Of Settlement: January 2018
Insurance Company: None - Self-insured (2 Million limit)
Damages: Catastrophic Traumatic Brain Injury, Death

Summary: MVA involving motorcycle and Highway Patrol car. Non-emergency situation. The catastrophically injured motorcyclist was a single 46-year old male who survived for 2 ½ years but never left skilled nursing care.

Plaintiff's Experts: Dr. John P. Conomy (Neurology); Dr. Brian Brocker (Neurosurery); Hank Lipian (Accident Reconstruction); Dr. Allan Taub (Forensic Economist); and Donald Ryan (Life Care Planner)
Defendants' Experts: Dr. John Fabian (Psychology); Dr. Paul Orsulak (Forensic Toxicology); Dr. Stephen Renas (Forensic Economist); Douglas Anderson (Ohio Dept. Insurance); Dr. Steven Day (Life Expectancy); Charles Veppert (Accident Reconstruction); and Dorene Spak (Life Care Planner)

Nissen v. Hampton Inn

Type of Case: Fall
Settlement: $95,000.00
Plaintiff's Counsel: Christopher J. Carney, Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: Joseph Wantz
Court: Cuyahoga County Common Pleas
Date Of Settlement: January 2018
Insurance Company: Liberty Mutual
Damages: 3 broken ribs and pneumothorax

Summary: 89-year old woman was in town from Florida for a family funeral, when she slipped and fell while getting into a bathtub at a Hampton Hotel. In depth discovery uncovered the fact that the tub had not been maintained in accord with manufacturer's recommendations, and expert determined that the tub's co-efficient of friction was below acceptable standards.

Plaintiff's Experts: John Coletta, M.D.; and James Secosky (Architect)
Defendant's Expert: Tara Amenson (SEA Ltd.)

Overberger v. Continental Service Solutions

Type of Case: Fall
Settlement: $85,000.00
Plaintiff's Counsel: Christopher J. Carney, Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: Michael Lyford
Court: Cuyahoga County Common Pleas
Date Of Settlement: January 2018
Insurance Company: Liberty Mutual

Damages: Torn rotator cuff

Summary: Plaintiff was employee at local grocery store. Defendant provided cleaning services, and rolled up runner to clean floors. Plaintiff tripped and fell over runner and sustained torn rotator cuff.

Plaintiff's Expert: Reubin Gobezie, M.D.
Defendant's Expert: N/A

Robert Ross v. Waikem Motors, Inc., et al.

Type of Case: Wrongful Death / Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe and Gregory S. Scott, Lowe Eklund Wakefield Co., LPA, 1660 West Second Street, Suite 610, Cleveland, Ohio 44113, (216) 781-2600
Defendants' Counsel: Attorneys for Defendants Kia Motors Corporation and Kia Motor America, Inc.: Michael P. Cooney and Boyd White, III, Dykema Gossett PLLC, 400 Renaissance Center, Detroit, Michigan 48243. Attorneys for Defendant Kia Motors America, Inc.: Clay Guise, Dykema Gossett PLLC, 39577 Woodward Avenue, Bloomfield Hills, Michigan 48304. Attorneys for Defendant Eli Hershberger: Kirk E. Roman, 50 S. Main Street, Suite 502, Akron, Ohio 44308
Court: Stark County Common Pleas Case No. 2016 CV 02132, Judge Forchione
Date Of Settlement: December 2017
Insurance Company: Unknown
Damages: Wrongful Death

Summary: On October 6, 2014, Heather Ross, age 54, was on her way home from work as a nurse when a pickup truck driven by 75-year old Eli Hershberger crossed into Heather's lane and hit her Kia Sedona head-on, with the left front of the pickup truck striking the left front of the Sedona. Although Mr. Hershberger was not wearing a seatbelt, the front airbag in his pickup truck did deploy, and he survived the accident. Although Heather Ross was wearing a seatbelt, the front airbag in her Kia Sedona minivan did not deploy, and she was killed nearly instantly in the accident.

Plaintiff's Experts: Harvey S. Rosen, Ph.D. (Burke, Rosen & Associates); Ronald E. Kirk, P.E. (Research Engineers, Inc.); Paul R. Lewis (BIO Forensic Consulting); and Ted Zinke (Automotive Safety Research, Inc.)
Defendants' Experts: Debora R. Marth, Ph.D. (Safety Forensics, PLLC); Gregory A. Miller, P.E. (Collision Protection Sciences, LLC); Stephen J. Fenton (Kineticorp.); and Thomas G. Livernois, Ph.D. (Design Research Engineering)

Sansavera v. 2207 West 11th Inc., et al.

Type of Case: Fall
Settlement: $75,000.00
Plaintiff's Counsel: Christopher J. Carney, Klein & Carney Co., LPA, (216) 861-0111
Defendants' Counsel: Michael Gilbride
Court: Cuyahoga County Common Pleas
Date Of Settlement: December 2017
Insurance Company: EMC Insurance
Damages: Fractured femur

Summary: Plaintiff went to dinner at restaurant in Tremont. Was seated at a table on a stage that required him to take one step up to get to table. After finishing his meal, plaintiff forgot about the step and fell, causing fractured femur.

Plaintiff's Experts: Robert Wetzel, M.D.; and Richard Zimmerman (Architect)
Defendants' Expert: Richard Kraly (Architect)

Don M. Terrell, et al. v. General Motors, LLC, et al.

Type of Case: Wrongful Death / Product Liability
Settlement: Confidential
Plaintiffs' Counsel: James A. Lowe and Gregory S. Scott, Lowe Eklund Wakefield Co., LPA, 1660 West Second Street, Suite 610, Cleveland, Ohio 44113, (216) 781-2600
Defendants' Counsel: Attorneys for Defendant General Motors, LLC, aka General Motors Company: Timothy R. Bricker, Michael H. Carpenter, and Caitlin E. Murphy, Carpenter Lipps & Leland LLP, Columbus, OH 43215; Brad J. Robinson, Hartline Dacus Barger Dreyer LLP, Dallas, TX 75231; and Wendy D. May, Brad J. Robinson, Hartline Dacus Barger Dreyer, LLP, Dallas TX 752312. Attorneys for Defendant Lear Corporation EEDS and Interiors: Hugh J. Bode, Reminger Co., LPA, Cleveland, OH 44115; and Burgain G. Hayes, Debi Martin, and Sarah McGiffert, Austin, TX 78766. Attorneys for Defendant Anthony J. Italiano: Adam E. Carr, The Carr Law Office, LLC, Hudson, OH 44236; and James S. Gentile, Youngstown, OH 44503.
Court: Mahoning County Common Pleas Case No. 2015 CV 00877, Judge Richard D. Reinbold
Date Of Settlement: December 2017
Insurance Company: Unknown
Damages: Quadriplegia; wrongful death

Summary: This lawsuit arises from a two-vehicle, rear-end crash that occurred on October 1, 2013. Plaintiff's decedent, Ellen L. Terrell, was rear-ended while stopped at the red light on southbound Market Street (U.S. 62) at the Warren Avenue intersection in Youngstown, Ohio, in her 2009 Saturn Vue. The impact from the bullet vehicle, a 2003 Chevrolet Silverado

C2500 Heavy Duty pickup driven by Defendant Anthony J. Italiano, propelled the Subject Vehicle forward and left into the opposite lanes of travel, where it eventually came to rest on a lawn. As to GM LLC, Plaintiffs contended that the subject vehicle's driver's seat collapsed and that the occupant restraint system was defective.

Plaintiffs' Experts: Robert J. Caldwell (Ponderosa Associates, Ltd.); Paul R. Lewis, Jr. (BIO Forensic Consulting); and Steve Meyer (SAFE Laboratories)
Defendants' Expert: David M. Blaisdell (Gig Harbor, WA)

Dona Greenlee v. Wilomene Koharik, et al.

Type of Case: Dog Attack
Settlement: $301,000.00 (Liability limits: $300,000/ Medical: $1,000)
Plaintiff's Counsel: Kenneth J. Knabe, Knabe Law Firm Co., L.P.A., (216) 228-7200
Defendants' Counsel: N/A
Court: N/A
Date Of Settlement: November 2017
Insurance Company: Hastings
Damages: Vicious dog bite on left forearm. Scarring/ neuroma; PTSD.

Summary: Plaintiff was viciously attacked by a dog while Plaintiff was delivering a package to the premises. Policy limits paid pre-suit. $300,000 liability and $1,000 med pay coverage.

Plaintiff's Experts: John Burke (Economic); Dr. Scott Schnell (Neuroma); Dr. Roman Ringel (Scarring); and Dr. Raymond Richetta (Psychologist)
Defendants' Expert: N/A

Deresha Dileen Rembert v. General Motors, LLC and Phillips Buick-GMC Truck, Inc.

Type of Case: Wrongful Death / Product Liability - Automobile
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe, Lowe Eklund Wakefield Co., LPA, 1660 West Second Street, Suite 610, Cleveland, Ohio 44113, (216) 781-2600; and Darryl L. Lewis, Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409
Defendants' Counsel: Adam L. Lounsbury, Spencer Shuford, LLP, Richmond, VA 23230; and Frank Hosley, Bowman and Brooke, LLP, Lake Mary, FL 32746
Court: In the Circuit Court of the Fifth Judicial Circuit in and for Lake County, Florida, Case No. 2013 CA 002575, Judge C. Richard Singletary
Date Of Settlement: May 2017 - Confidential
Insurance Company: ESIS
Damages: Wrongful death of minor child

Summary: On April 11, 2012, Deresha Rembert had just returned home after dropping off two of her children at the Marion Charter School located in or around Ocala, Florida. Upon arriving back home, she parked her 2005 Chevrolet Silverado truck, VIN: 1GCHK23235F958107 (hereinafter "Silverado"), straight in the driveway. She removed the keys from the ignition switch and left the vehicle driver side door open with J. Rembert, a minor, sitting secured in the backseat. She told J. Rembert to remain in the vehicle while she went into the house to get his shoes and a shirt before dropping him off at day care. While in the house, she heard a crashing noise so she ran outside to discover that J. Rembert had been run over by the Silverado.

Plaintiff's Experts: Richard McSwain; and Richard Clarke
Defendants' Experts: Emily Skow; Geoff Germane; Charles Rau, Jr.; Eddie Cooper; and Richard Keefer

John Adam Tallman, et al. v. Ontel Products Corporation, et al.

Type of Case: Personal Injury / Product Liability - Total Upper Body Workout Bar
Settlement: Confidential
Plaintiffs' Counsel: James A. Lowe, Lowe Eklund Wakefield Co., LPA, 1660 West Second Street, Suite 610, Cleveland, Ohio 44113, (216) 781-2600; Charles M. Boss, Boss & Vitou Co., LPA, 11 West Dudley Street, Maumee, OH 43537, (419) 893-5555; Cynthia Walters, Budd Larner, P.C., 150 John F. Kennedy Parkway, Short Hills, NJ 07078, (973) 379-4800
Defendants' Counsel: David R. Kott, McCarter & English, Newark, NJ; and Harry D. McEnroe, Tompkins, McGuire, Wachenfeld & Barry, Newark, NJ
Court: Lucas County Common Pleas Case No. G-4801-CI-201105658-000
Court: Superior Court of the State of New Jersey, Essex County, Judge Carey, Docket No. ESX-L-1818-14
Date Of Settlement: December, 2012, July, 2014, and July, 2017. Part of the July, 2014 settlement included an assignment of the right to pursue Ontel's supplier, HL Corp., a Chinese manufacturer, and its insurer.
Insurance Companies: Hartford Casualty Insurance Company; Hartford Fire Insurance Company; South China Insurance Company; Taiwan & Marine Insurance Co., Ltd.; The First Insurance Co., Ltd.; Shinkong Insurance Co., Ltd.; Cathay Century Insurance Co.; V & C Risk Services Taiwan, Ltd.; and H & B Global Adjusting Services, Ltd.

Damages: Plaintiff John Tallman suffered a catastrophic closed head injury which rendered him a quadriplegic with severe brain damage

Summary: Plaintiff John Adam Tallman was utilizing the "Total Upper Body Work Out Bar" when suddenly the bar dislodged from the doorway causing Plaintiff John Adam Tallman to fall and strike his head.

Plaintiffs' Experts: John H. Burke, Ph.D. and Harvey Rosen, Ph.D. (Burke, Rosen & Associates - Economists); Lawrence S. Forman, M.Ed., J.D. (Comprehensive Rehabilitation Consultants, Inc. - Life Care Plan); and Gerald S. George, Ph.D. (Safety Consultant)
Defendants' Experts: Dr. Eby; and Dr. VanEe

Anonymous Passenger v. Anonymous Driver

Type of Case: Motor Vehicle Accident
Settlement: $125,000.00
Plaintiff's Counsel: Jarrett J. Northup, Jeffries, Kube, Forrest & Monteleone Co., L.P.A., (216) 771-4050
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: Confidential
Insurance Company: Confidential
Damages: Bilateral Thoracic Outlet Syndrome, Cervical Sprain

Summary: Low-speed rear-ender MVA. Minimal property damage. Whiplash induced thoracic outlet syndrome claimed as injury, requiring two separate rib resection surgeries. Economic losses of 58K (medical) and 7K (wages) were claimed.

Plaintiff's Experts: Treating physician and surgeon
Defendant's Expert: Confidential

Anonymous v. Nursing Home Corporations

Type of Case: Nursing Home Bedsore and Infection Wrongful Death
Settlement: $500,000.00
Plaintiff's Counsel: William Eadie and Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: CNA counsel
Court: Jefferson County, Ohio
Date Of Settlement: *?*
Insurance Company: CNA
Damages: Death, leaving 6 adult children

Summary: Woman in her 80s is hospitalized for a week for an unexplained syncopal episode, then sent to a nursing home for rehabilitation. On admission to the nursing home, a skin breakdown is noted, which worsens over the next 30 days. The nursing home retains an external wound nurse practitioner mid-way through the 30 days. On day 34, the woman is hospitalized with sepsis and UTI. She dies 9 days later. Nursing home claimed this was worsening dementia and adequate care was provided for the wound, which started at the hospital. The case was against the nursing home, its parent company, and the wound NP. Resolved prior to expert discovery based on the depositions of nursing staff and an under-staffing analysis. The parent company contributed to the settlement. ■

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. My application must be seconded by a CATA member and approved by the President. I agree to abide by CATA's Constitution and By-Laws and participate fully. I certify that no more than 25% of my practice, nor my firm's practice, is devoted to personal injury litigation defense. I also certify I possess the following qualifications for membership prescribed by the Constitution:

1. Skill, interest and ability in trial and appellate practice.

2. Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.

3. Excellent character and integrity of the highest order.

Name: _____ Email: _____

Firm: _____

Office Address: _____ Phone: _____

Home Address: _____ Phone: _____

Law School / Year Graduated: _____

Professional Honors or Articles Written: _____

_____

Year Admitted (Ohio): _____ Year Began Practice: _____ Percent of Cases Representing Claimants: _____

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

_____

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

_____

Applicant Signature: _____ Date: _____

Invited By: (print) _____ (sign) _____

Seconded By*: (print) _____ (sign) _____

(*if blank we will seek a second from the membership)

Please return completed Application with membership dues to:

Cleveland Academy of Trial Attorneys
c/o Todd Gurney, Esq., Treasurer
1300 East 9th Street, Suite 1801
Cleveland OH 44114
Tel: 216-687-0900

CATA Membership Dues

First-Year Lawyer: $50
New Member (rec. before 7/1): $175
New Member (rec. after 7/1): $100

All members are responsible for $175 annual dues to remain in good standing

[FOR INTERNAL USE]

President's Approval: _____ Date: _____

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Spring 2018

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