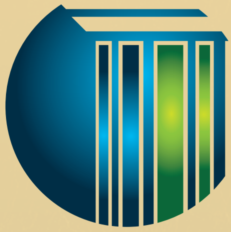

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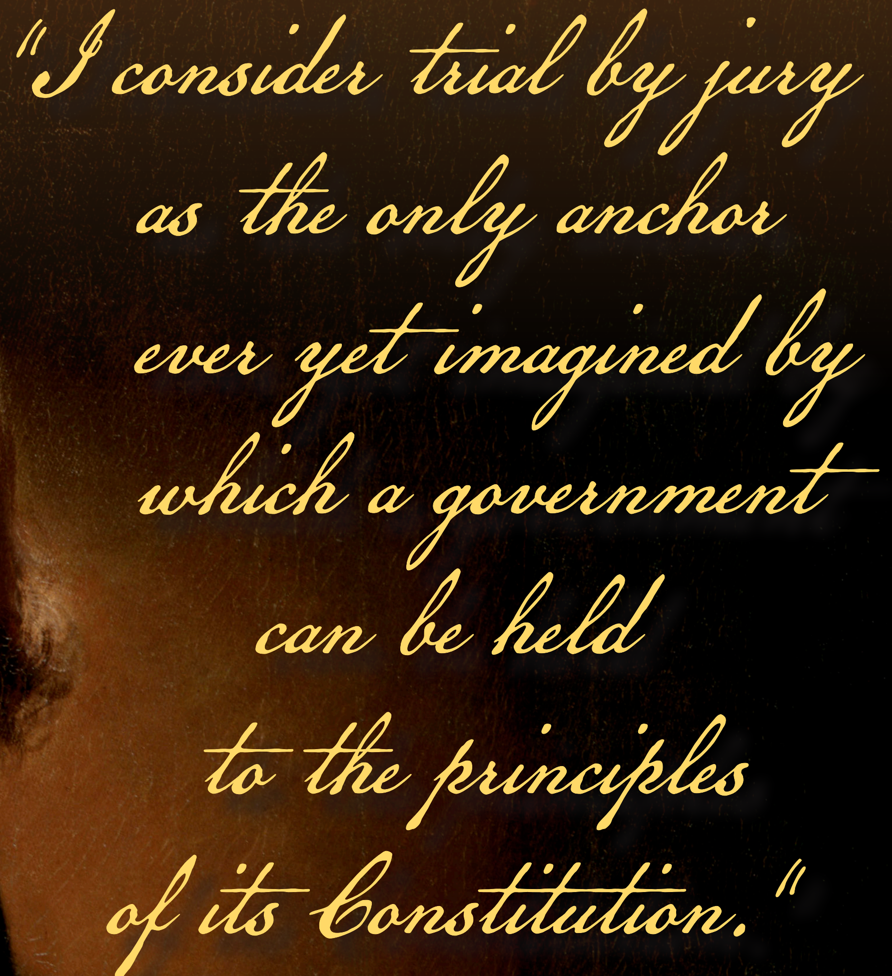
Spring 2019



- Thomas Jefferson

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President's Message: Right to Trial By Jury Under the Seventh Amendment

by Christian R. Patno

I find myself sitting at my desk waiting for a jury to return after a long medical malpractice trial. The hours have been dragging. You all know the feeling. I wish I had said this differently or done that differently while in trial. During closing argument, defense counsel objected to me reading from the Seventh Amendment of the United States Constitution. I thought to myself…… *really? Is that what this has come to? An opposing trial lawyer is actually objecting to a discussion of the importance of the right to trial by jury for disputes at common law?* Surprisingly, this was the same lawyer who attempted to rehabilitate jurors who had clear and undeniable bias admitted during *voir dire*.

We repeatedly deal with personal injury and medical malpractice bias. We deal with legislative lobbyists and statutory bias. As injury trial lawyers, we also often deal with social bias in everyday life. After 29 years I have seen it all, as have most of you. In this last trial I had two prospective jurors – one who lives 3 doors down from the defendant doctor, another who was the very active college buddy of defense counsel. Not shockingly, they both said they could be fair and unbiased. Fortunately, I was before a Judge who understood the law on challenges for cause. I was able to excuse multiple jurors who, upon extensive questioning, would admit their bias, but then, when questioned by defense counsel, would say they could still be fair and impartial.

This happens time and time again, in cases we have all been involved in for decades. In this anti-injury environment, the only way to have a chance of receiving a fair trial is to aggressively question the jurors who will not be able to weigh the evidence evenly and to seek their removal. I implore and challenge each of you to do so.

Gerry Spence often says "you have to show them yours" in order to understand their's. There are no truer words. This must begin immediately during *voir dire*. You MUST address the issues of bias you will deal with in your case immediately during *voir dire* and find out how the potential panel members respond to these issues. Some veteran lawyers say they don't want to "poison the pool" by asking such questions. I strongly believe the pool is already filled with poison, and if you don't identify it and exclude it your case you will later be forced to drink the poison when the jurors filter the evidence and eventually need to make a decision behind closed doors.

Be proud of what you do and of the families and victims we represent. Hit the most concerning biases head on. Tell them people in your own family and your own friends have these very same biases. Tell them *you* even have them as well. It is natural and human, and would be unnatural, if people had no biases. You don't get this far in life without having formed opinions – and *some very strong opinions* – over the years.

After the pool starts talking about their biases and discussing the issues – as opposed to *you* talking – you have succeeded. Revered Federal Judge Manos told me and often said that a trial's determination was set in place by the life experiences of the jurors, and *voir dire* was the most important part of trial. This bias filter has changed with the generations, as well as geographically, politically, and educationally.

So next time you are preparing for trial, I challenge each and every one of you to spend time identifying the weaknesses and biases that will pervade and harm your case. Then do not hesitate to question the venire long and hard on these issues. I submit to you this time and preparation is vastly more important than preparing your liability or damage questions or even your opening statement or closing argument. Because, if you fail to root out and remove bias to the best of your ability, then no matter how wonderful a lawyer you are, your hard work for your deserving client will all be for naught.

In order to be successful, you also should educate the trial judge with a bench brief on challenges for cause if necessary. A juror should be removed if there is "any reason to be concerned" that they will be biased. Once the bell is rung by such answers it cannot be unrung. Toothpaste should not even be attempted to be placed back in the tube as we see occur time and time again.

Jury selection is simply too important. And, the United States Constitution and the Seventh Amendment require it. Whether defense counsel likes it or not. ■

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

Is Skype Worth The Hype?

Judge Frank G. Forchione

With the advances in technology, we are all facing new challenges in the courtroom. Every lawyer is looking for a way to present their testimony at trial efficiently, less expensively, and more conveniently for the witness. One of the biggest issues facing judges is whether to allow witnesses to testify remotely, or without showing up at trial, something that certainly wasn't contemplated by our founding fathers when drafting the Constitution. The issue has created a sharp division of opinions within the legal profession. Some see technology as a way to relieve pressure on an overburdened court system, while critics insist that only in-court testimony can permit judges and juries to fairly observe a witness' demeanor and uphold the principal of fundamental fairness.

Benefits

One of the benefits of Skype is that it is an effective way to present live testimony without having the witness actually in the courtroom. Most courtroom advocates agree that live witnesses hold a jury's attention longer. Skype brings the witness more to life than a video deposition. Everyone loves to see something live! Testimony via Skype is easier to schedule than trying to fit a witness into a packed trial schedule if they have limited availability. Most courts will maintain flexibility in scheduling these witnesses through Skype since it alleviates potential conflicts which require courts to reshuffle their schedules. Witnesses are thrilled to learn they do not have to appear in person, saving them transportation and travel costs. Some have the ability to testify from the comfort of their own home or office. A happier witness is usually a better witness, especially with expert witnesses being so critical in every case.

Limitations

On the other hand, like all technology, Skype is not perfect. You must guarantee a good audio and video quality so jurors can understand what they are taking in. Experiences in my courtroom demonstrate that there can be delays and disruptions by buffering and dropped calls. When that happens, jurors get frustrated, impatient, and may hold it against your client's case. One of the best examples was in the high-profile George Zimmerman case where a professor's testimony via Skype was interrupted by a series of noisy calls and alerts from pranksters which blocked the screen, forcing the judge to order the prosecuting attorney to quit questioning him and to "hang up the phone."

Not only can this be embarrassing, but it can also be detrimental to your case. It is critical that lawyers pick a location for the witness which does not have any clamor, distractions or interruptions. If jurors observe the testimony and hear airplanes or sirens in the background, or cellphones ringing, it can place the effectiveness of the witness' testimony in jeopardy. Furthermore, witnesses must be advised that they need to lock their eyes into the camera while providing their testimony. If they are looking around, up in the

air, to the side or back and forth, instead of providing persuasive testimony they may look like they were a member of the Brady Bunch during the opening credits. Finally, by presenting testimony by Skype, lawyers may be losing the physical connection between the witness and the jury. Jurors cannot observe the witness' body language, which could benefit their case.

Confrontation Clause

One of the biggest arguments against Skype is presented by the Confrontation Clause of the U.S. Constitution. The Confrontation Clause of the 6th Amendment states, "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with witnesses against him." A recent ruling by the New Mexico Supreme Court should give attorneys using video conferencing and courts using Skype some pause. New Mexico's highest court recently tossed out a murder conviction, ruling that the use of testimony via Skype violated the Constitution's Confrontation Clause. However, a close examination of recent rulings here in Ohio may offer some comfort to litigants. A recent ruling in *State v. Oliver*, 8th Dist. No. 106305, 2018-Ohio-3667 (see also *State v. Gay*, 8th Dist. No. 101345, 2015-Ohio-524) focused on this issue where the defendant faced a six-count indictment charging him with aggravated burglary, abduction, drug possession, resisting arrest, and two counts of assault. Prior to the trial, the state filed a motion requesting a witness be permitted to testify via Skype because the witness lived out of state and was recovering from a liver transplant and receiving dialysis. The 8th District Court of Appeals considered the Confrontation Clause and also looked for guidance in the United States Supreme Court case *Maryland v. Craig*, 497, U.S. 836, 849, 110 S.Ct. 3157, which held:

> In holding that the right to confrontation is not absolute, the court detailed a number of important reasons for that right, including 1) the giving of testimony under oath, 2) the opportunity for cross-examination, 3) the ability of the fact finder to observe demeanor evidence, and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant.

The 8th District also strongly factored in the case of *State v. Marcinick*, 8th Dist. Cuyahoga No. 89736, 2008-Ohio-3553, 2008 WL 2766174, citing *Harrell v. State*, 709 So.2d 1364, 1369 (Fla. App. 1998) in which the court utilized the two-part analysis from *Craig* to determine whether the admission of testimony via Skype at trial violated the defendant's right of confrontation. This court held:

> To qualify as an exception, the procedure must 1) be justified on a case-specific finding based on an important state interest, public policies, or necessities of the case, and 2) must satisfy the other three elements of confrontation-oath, cross examination, and observation of the witness' demeanor.

Applying the two-part test to the facts in *Oliver*, the trial court's ruling, allowing the witness to testify by Skype, was found to be proper.

Conclusion

In conclusion, Skype seems to be favored by both attorneys and judges. More judges appear open-minded to its value and convinced that it can overcome the Constitutional parameters. Most courts will probably make the determination on a case-by-case basis, focusing on the main reason the witness is unavailable. However, if it's going to be used, it's best to conduct some type of test run before the live Skype call. Jurors hate delays, and any malfunction may be held against the litigant proposing its use. Furthermore, since technology isn't perfect, be prepared for a worst case scenario. It may be best to have a backup plan if your Skype call simply isn't working. Also, make sure your own witness will be comfortable under this setting. Some, like children, may find the climate uncomfortable and clam up or provide testimony which proves difficult to rein in. Lastly, be prepared to handle the legal issues promulgated by the Confrontation Clause. Keep in mind, courts in Ohio are beginning to accept the world has changed and that the Constitutional limitations designed by Madison and Adams have not factored in Bob Dylan's words of wisdom, "'The Times They are a Changin'." ■

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What You Should (and Shouldn't) Agree To In Agreed Protective Orders

by Brenda M. Johnson

Corporate defendants routinely ask plaintiffs' attorneys to enter into agreed protective orders before complying with discovery requests. It can be tempting, both to plaintiffs' counsel and to the court, to simply sign off on these orders just to get things moving. However, an overly broad protective order that gives too much power to the producing party, and does not accurately spell out the respective duties of the parties under the order, can create more problems than it solves, and can lead to burdensome and unnecessary problems in the course of litigation. Before agreeing to a proposed protective order plaintiffs' counsel *and* the trial court should carefully consider whether the order is necessary in the first place, and whether defendant's proposed terms and conditions are actually justified.

An agreed protective order should track Rule 26(C)

Defense attorneys often propose protective orders that define confidentiality broadly, and give the producing party (namely, the defendant) a great deal of latitude in deciding what can be designated as confidential. Do not let this go unchallenged.

A trial court's power to enter a protective order is circumscribed by Rule 26(C), even when the parties are willing to agree to broader constraints on disclosure.[1] As one court put it, "[a] judge cannot delegate the determination of whether there is 'good cause' to the lawyers in the case."[2] Thus, even if the parties are willing to stipulate to an order that exceeds the scope of the rule, the trial court still has an obligation to make its own independent determination as to whether "good cause" exists to enter the order, and whether the proposed nondisclosure categories are, in fact, authorized by Rule 26(C).[3]

Based on this, federal courts have denied joint motions for protective orders that exceed the scope of Rule 26. In *Maxchief Invests., Ltd. v. Plastic Dev. Group, LLC*,[4] for instance, Judge Thomas W. Phillips of the Eastern District of Tennessee recently denied a joint motion for a blanket protective order when the parties made no effort to show there was good cause for the order, and the categories of protected materials were far broader than any Rule 26(c) category.[5]

Judge Phillips was highly critical of the parties' three-sentence motion, which made no effort whatsoever to satisfy the good cause requirement. As Judge Phillips noted,

> when parties agree to a blanket protective order, do not show–*specifically*-that the documents subject to the protective order will contain sensitive information whose disclosure will case harm, and retain the right to decide which of these documents they will exclude from discovery, then they abuse Rule 26(c) by converting to their own use the inherent discretion that belongs to the Court. This scenario describes what the parties have done here.[6]

He also criticized the scope and imprecision of the proposed order, which "cast the widest of nets, seeking to protect 'any document, information or other thing' that, in [the parties'] judgment, they 'deem[]' to be confidential or highly confidential."[7] Notably, Judge Phillips criticized the use of the term "not limited to" in defining potentially confidential materials, as it could allow the parties to "keep practically any item off limits" to disclosure.[8]

Likewise, in *Solar X Eyewear, LLC v. Bowyer*,[9] Judge James Gwin of the Northern District of Ohio denied a joint motion for protective order when the parties failed to make an adequate showing of good cause, and the proposed order was overly broad. Like Judge Phillips (who would later rely on Judge Gwin's opinion), Judge Gwin was critical of the fact that the proposed protective order was "so broad and speculative as to defy any credible assertion of particularized injury" as required under Rule 26(c).[10] He was particularly critical of the fact that the proposed order would have extended to information that "may" qualify as a trade secret, or "could" harm a party's business interests.[11]

What's it take to show good cause?

These opinions, as well as the case law on which they rely, are a good foundation from which to challenge overbroad and imprecise language. But what kind of language should you insist on? Here, both Ohio and federal case law offer guidance.

Good cause is a fact-specific issue, but there's one point where the courts agree – simply claiming the information is confidential isn't enough.[12]

To satisfy Rule 26(C), the party seeking protection "must articulate specific facts showing 'clearly defined and serious injury'" that would result if the documents or information were disclosed.[13] It's not enough for a defendant to claim general injury to reputation, especially if it's a business enterprise.[14] Instead, a business enterprise must make a "particularized" showing of pecuniary or economic harm that would result from disclosure.[15]

Thus, in place of broad and imprecise terms such as "including, but not limited to," "may," or "could," a protective order should be limited to documents or information that, if disclosed, "**will** work a **clearly defined injury** to the requesting party's business."[16] Ohio courts have adopted and applied this standard, expressly stating that "any lesser standard would be insufficient and would compromise our system of justice."[17] You should insist on language that tracks this standard.

Make sure the burden of showing "good cause" stays with the designating party

To avoid confusion later, any proposed agreed confidentiality order should also spell out what the case law already says, which is that confidentiality designations must be made in good faith, and that "the party claiming confidentiality bears the burden of proving that the purportedly confidential documents are, indeed, confidential, as defined in the governing confidentiality order."[18]

A confidentiality designation "should be viewed as equivalent to a motion for protective order" under Rule 26(C), subject to the same requirements, and subject to the same risk of sanctions under Rule 37 if made without good cause.[19] In the context of agreed protective orders, good faith requires "a document-by-document or very narrowly drawn category-by-category assessment" in making initial confidentiality designations.[20] Language that emphasizes the designating party's initial duty to act in good faith, combined with language that expressly places the burden of defending confidentiality designations on the party claiming confidentiality, should be a standard part of any agreed order.

The order should acknowledge that different standards apply when it comes to filing documents under seal

Confidentiality in discovery is one thing, but when it comes to filing documents with the court, other considerations arise. Unlike discovery materials, there is a strong presumption that the public will have access to materials filed with the court – especially if they are part of a dispositive record or are used at trial.[21] "Good cause" under Rule 26(c) is not enough to defeat this presumption, which can only be defeated for "the most compelling reasons."[22]

The standard for confidentiality at the discovery phase doesn't address these issues. To avoid confusion and delay as your case proceeds, you should make sure that any agreed protective order includes a separate provision acknowledging that the order does not extend to materials filed with the court or used at trial. It should also provide a procedure for filing documents or information under seal that won't delay your case preparation or impose unnecessary burdens. One possibility, for instance, would be to include a provision that would allow you to file confidential materials under seal on a provisional basis, while setting a deadline for the defendant to file a motion with the court explaining why confidentiality should be preserved.[23]

Conclusion

An agreed protective order shouldn't impose unnecessary burdens on plaintiffs or the court – and it doesn't have to. There's no reason that you, or

the trial court, should have to accept confidentiality terms that aren't supported by law, and aren't necessary to protect a defendant's legitimate concerns. ■

End Notes

1. *See, e.g., Jepson, Inc. v. Makita Elec. Works*, 30 F.3d 854, 858 (7th Cir. 1994) and cases cited therein.
2. *Certain Underwriters at Lloyd's v. United States*, No. 2:08-cv-481, 2010 U.S. Dist. LEXIS 81484 at *2, 2010 WL 2683124 (S.D. Ohio July 1, 2010) (citing *Citizens First Nat. Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)).
3. *Jepson* at 858.
4. No. 3:16-cv-63, 2017 U.S. Dist. LEXIS 24307, 2017 WL 710956 (E.D. Tenn. Feb. 22, 2017).
5. *Id.* at *11-*12.
6. *Id.* at *11.
7. *Id.* at *11.
8. *Id.* at *12.
9. No. 1:11-cv-763, 2011 U.S. Dist. LEXIS 100421, 2011 WL 3921615 (N.D. Ohio Sept. 7, 2011).
10. *Id.* at *6.
11. *Id.* at *6.
12. *Eberhard Architects, LLC v. Schotenstein, Zox & Dunn Co.* , 8th Dist. Cuyahoga No. 99687, 2013-Ohio-5319 at ¶14; *see also Ro-Mai Indus. v. Manning Props.*, 11th Dist. Portage No. 2009-P-006, 2010-Ohio-2290 at ¶ 28.
13. *Kline v. Mortg. Elec. Sec. Sys.*, No. 3:08-cv-408, 2014 U.S. Dist. LEXIS 141027 at * 14, 2014 WL 6617263 (S.D. Ohio Oct. 1, 2014); *see also Eberhard*, supra at ¶ 14; *Hope Acad. Broadway Campus v. White Hat Mgmt.* , 10th Dist. Franklin No. 12AP-116, 2013-Ohio-911 at ¶¶ 29, 31; *Koval v. Gen. Motors Corp.*, 62 Ohio Misc.2d 694, 697 (Cuyahoga C.P. 1990).
14. *See, e.g., Glenmeade Trust Co. v. Thompson*, 56 F.3d 476, 484 (3d Cir. 1995); *Wauchob v Domino's Pizza, Inc.*, 138 F.R.D. 539, 546 (N.D. Ind. 1991).
15. *See Glemeade Trust*, supra; *see also Cook Inc. v. Boston Scientific Corp.*, 206 F.R.D. 244, 247-248 (S.D. Ind. 2001) ("Proponents of protective orders must make particularized showings of the competitive harm likely to result from the disclosure of protected information.").
16. *Koval v. Gen. Motors Corp.*, 62 Ohio Misc.2d 694, 697 (Cuyahoga C.P. 1990).
17. *Id.* at 697. *Koval* has been followed by other Ohio courts, most notably the First and Tenth District Courts of Appeals. *See Byrd v. U.S. Xpress, Inc.*, 1st Dist. No. C-140260, 2014-Ohio-5733 (citing *Koval*); *Hope Acad. Broadway Campus v. White Hat Mgmt.*, 10th Dist. Franklin No. 12AP-116, 2013-Ohio-911 (same).
18. *Gross v. Morgan State Univ.*, No. JKB-17-448, 2018 U.S. Dist. LEXIS 21411, at *9 (D. Md. Feb. 9, 2018) (quoting *Flo Pac. LLC v. NuTech, LLC*, No. WDQ-09-510, 2011 U.S. Dist. LEXIS 163147, 2011 WL 13214114 at *2 (D. Md. Apr. 12, 2011)).
19. See David M. Herr, MANUAL FOR COMPLEX LITIGATION, § 11.432, n. 134 (4th ed. 2017) (commenting on burden).
20. *Gross v. Morgan State*, supra, at *9-*10.
21. *See, e.g., Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978); *Poliquin v. Garden Way*, 989 F.2d 527, 533 (1st Cir. 1993).
22. *Nat'l Org. for Marriage v. McKee* , 649 F.3d 34, 70 (1st Cir. 2011).
23. *See* Lori E. Andrus, *Fighting protective and secrecy orders, Sunshine is the best disinfectant*, Plaintiff Magazine, Aug. 2014 (https://www.plaintiffmagazine.com/recent-issues/item/fighting-protective-and-secrecy-orders-2 (last accessed Apr. 25, 2019)).

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 2019 - 2020 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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Medical Record Mix-Up Cases: How To Obtain Your Client's Complete Records

by Jeremy A. Tor and Stuart E. Scott

Consider the following: A hospital (or nursing home or doctor's office) mixes up patient records and, as a result, dispenses medication to, or performs surgery on, the wrong patient. Sadly, this kind of thing happens—and often, as highlighted by a recent story in USA TODAY about a $12.25 million jury verdict in a case described as "Wrong-patient prostate cancer surgery."[1]

When a medical record mix-up happens, it seems uncontroversial that the victim should be entitled to a copy of her complete medical chart, including the other patient's record—*i.e.*, the record that set into motion the events leading to the wrong medication or the wrong procedure. As we learned from recent experience, however, some defense lawyers have fought disclosure of the "other" patient's record based (incorrectly, as we'll see) on the Ohio Supreme Court decision *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399 (2009).

In *Roe*, Planned Parenthood was sued by parents who claimed the clinic illegally performed an abortion on their daughter by failing to secure their consent. During discovery, the parents sought "the medical records of nonparty minors who had been patients at Planned Parenthood during a ten-year period." This was not a case involving a medical record mix-up, the requested records were of doubtful relevance, and the parents acknowledged they were seeking "confidential, privileged information of third parties" and did not argue any exception to the privilege applied. The Supreme Court therefore ruled that the records were not discoverable. Even though *Roe* did not involve a medical-record mix-up, defense counsel recently tried to use it against us in such a case as a basis for withholding key medical records.

Our case involved a sixty-four-year-old woman with liver cirrhosis who was treated at a hospital and then discharged to a nursing facility for continuing care. During the transfer process, the hospital sent the nursing home the wrong medication orders—orders intended for another patient, who had lung (not liver) disease. The nursing home entered those orders into the woman's medical chart and then gave her a dozen wrong drugs for several days, resulting in acute drug intoxication. Eventually, she died.

At the outset of the lawsuit, we requested the decedent's complete medical chart. The defendants—the hospital and nursing home—produced most of the chart but withheld the records of the other patient, forcing us to file a motion to compel. In our motion, we proposed redaction of the other patient's personal identifying information (name, date of birth, etc.).

The defendants opposed the motion, claiming we were seeking "medical records that are not the medical records of the decedent," which they argued were "privileged from disclosure per R.C. 2317.02 [the physician-patient privilege]" and HIPAA. Defendants acknowledged the

relevancy of the records but cited *Roe* as a reason for withholding them—even with the proposed redactions. One of the defendants, quoting *Roe*, argued that "redaction of personal, identifying information does not remove the privileged status of the records since redaction 'is merely a tool that a court may use to safeguard the personal, identifying information within confidential records that have become subject to disclosure by waiver or by an exception.'" The defendants contended that no exception to the physician-patient privilege existed and that no waiver had occurred.

We knew from a pre-motion telephone conference that this would be the defendants' argument, so we decided to reframe the issue. Rather than argue that the key records were those of a third party (the patient with lung disease), we argued that the records actually became part of the decedent's medical chart when they were used to render her medical treatment—wrong and dangerous though the treatment was. We pointed out that we were simply seeking production of the decedent's own medical chart, which she (more precisely, her estate) had the clear right to obtain. We cited *Griffith v. Aultman Hosp.*, 146 Ohio St. 3d 196, 203 (2016), which held that patients have a right to obtain their complete medical records, including all documents and data generated and maintained "in the process of the patient's healthcare treatment and that pertained to the patient's medical history, diagnosis, prognosis, or medical condition."

We also argued that it would be unfair for a healthcare provider to dispense the wrong medication (thereby causing a patient harm) and then be allowed to withhold the portion of the patient's chart that triggered the medication error. A patient should not be hampered in her ability to prove her case against a provider, we explained, by being denied access to her complete chart—to the very evidence she needs to prove her case. We relied on *Ward v. Summa Health Sys.*, 128 Ohio St. 3d 212 (2010), in which a patient, who contracted Hepatitis B after undergoing heart surgery, sued the hospital and then requested the heart surgeon's personal medical information (though the surgeon was not a party to the case) because the patient believed he contracted the virus from the surgeon. The Supreme Court ruled that the patient was entitled to the information because it was essential to the patient's ability to prove his case.

The trial court, relying on both *Griffith* and *Ward*, granted our motion to compel: "The Court agrees with Plaintiffs that, once the non-party's medical record was used to treat decedent, the non-party patient's record became data pertaining to decedent that was generated and maintained in order to provide her with medical care." The court explained why policy considerations favored disclosure of the records:

> The Court rejects the extreme view—apparently taken by the [defendant-hospital]—that, even with redaction, the non-party patient's record is never discoverable. Applying that extreme view could have the result of shielding medical care providers from all liability for mistakes related to patient identity, an unfair result that would deprive an entire class of medical negligence victims from redress for injury. Instead, the more just approach is to protect identifying information of the non-party patient while allowing the plaintiff access to medical information that, once it was used for treatment, became part of the plaintiff's own medical record.

This decision explains why it is improper for health care providers to withhold their patients' complete medical charts in cases involving medical records mix-ups and why victims of medical negligence should not be denied a fair opportunity to obtain justice by being prevented from obtaining the very evidence they need to prove their case. ■

End Notes

1. https://www.usatoday.com/story/news/nation/2019/04/05/wrong-patient-prostate-cancer-surgery-medical-malpractice-trial/3382957002/

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Nuts And Bolts Of Dog Bite Cases

by Kyle B. Melling

State Farm recently reported that Ohio had the third most dog bite claims in the country in 2018, trailing only California and Illinois. State Farm further reported that it paid out an average of $27,000 for Ohio dog bite claims.[1,2] Clearly, there is no shortage of dog bite claims in Ohio that are covered by insurance. This raises two important considerations for attorneys: how are dog bite cases different from standard personal injury cases, and what should an attorney be aware of in order to be prepared to handle a dog bite case.

Under Ohio law, there are two legal bases for pursuing dog bite claims.[3] First, a common law negligence claim exists. This claim is the harder one to prove, but may provide for punitive damages. Second, Ohio has a statutory claim found under R.C. 955.28. R.C. 955.28 imposes strict liability on any owner, harborer and/or keeper of a dog that causes any injury, death or loss to a person or property.[4]

These claims are not mutually exclusive —a Plaintiff is allowed to pursue both common law and statutory claims. However, it is important for a Plaintiff's attorney to know the difference between these claims and to understand which one may be more successful in a particular case.

Strict Liability under R.C. 955.28(B).

In the typical dog attack, a person usually encounters a dog at large —a dog not on a leash or not on the property of its owner, keeper, or harborer. For cases like this, where negligence is not immediately apparent, it is best to pursue a claim under Ohio's Dog Bite Statute, R.C. 955.28(B). This strict liability statute provides that "[t]he owner, keeper, or harborer of a dog is liable in damages for any injury, death, or loss or person or property that is caused by the dog. . ." with a few exceptions.

Notably, a person does not actually have to have been bitten or even aggressively attacked by the dog for the statute to apply. All the statute requires is that the dog cause the injury. This applies especially well in instances where a loose dog chases down runners or bikers, causing injury without biting. R.C. 955.28(B) does carry some important exceptions, however, and those must be explored before taking on an injury case caused by a dog. First, the statute does not apply if the injured party was committing or attempting to commit either a criminal trespass or another criminal offense that was not a misdemeanor on the property of the owner, keeper, or harborer. Next, the statute does not protect a party who was committing or attempting to commit a crime, other than a minor misdemeanor, against any person. Finally, the statute specifically excludes an injured party if they were teasing, tormenting, or abusing a dog on the owner's, keeper's, or harborer's property. If none of the above exceptions apply, the owner, keeper, or haborer of the dog is liable for the injuries to the injured party. The next question is, who is an owner, keeper, or harborer?

Owner, Keeper, or Harborer?

Naturally, the first issue to resolve is who to sue — the owner, the keeper, or the harborer? The obvious answer depends on whether any of these individuals are collectible or have insurance coverage. The most common type of applicable insurance is homeowner's or renter's insurance, that would provide coverage for the injury caused by the dog. It bears noting that in Ohio, multiple people can simultaneously be an owner, keeper, and/or harborer of a dog, and all can be held jointly and severally liable.[5]

One would think that the question of who is the owner of a dog would be straightforward, but the statute itself does not define "owner," and there is very little case law interpreting the issue. At least one court to date has relied on the *Black's Law Dictionary* definition of "owner" as "someone who has the right to possess, use, and convey something; a person in whom one or more interests are vested." That court also relied on the Ohio Jury Instructions definition, which states, "[t]he owner of a dog is the person to whom the dog belongs and who has the right to dispose of it."[6]

If ownership of the dog is not clear, evidence of who the owner is may be found starting with a record search in the county where the dog is or was registered. Dogs are required by statute to be registered in Ohio and the county where the dog resides will likely have registration information. As such, the first place to look for ownership is who maintains or originally purchased the license for the dog. While dog licenses are only valid for one year, it may be possible to find the original owner, and establish that no valid transfer of ownership ever occurred thereafter. Ohio Revised Code Section 955.11 requires that in order to legally transfer ownership of a dog, the seller of the dog shall give the buyer of the dog a transfer of ownership certificate that is signed by the seller. Further, that certificate is required to be recorded by the county auditor, along with a five-dollar fee. As such, a review of County records should provide a good starting point if it is unclear who owns the dog.

Thankfully for dog bite victims, Revised Code 955.28(B) allows that multiple individuals can simultaneously be an owner, keeper, and/or harborer of a dog, and all can be held jointly and severally liable.[7] So, if ownership of the dog cannot be established, the keeper and/or harborer of the dog can still be liable.

Courts have generally defined the keeper of a dog as one having physical charge or care of the dog.[8] This definition is in no way ironclad and many courts have considered both who had physical control of the dog at the time of the attack and who is generally responsible for care and custody of the animal.[9]

The harborer of a dog is the person who has possession and control over the premises where the dog lives and that person acquiesces to the dog's presence.[10] However, similar to the definition of keeper, this definition is somewhat fluid and fact specific. In these cases, the issue of harborer most often arises when a Plaintiff is trying to hold a landlord liable for the acts of dogs that live at their properties. This can be difficult to establish; however, it is far more likely that a landlord will have a valid insurance policy than a renter. As such, if the facts support it, a landlord as a harborer can make or break a case.

Courts have found landlords to be liable as harborer when the dog in question lived in or had access to common areas of a property where both a tenant and landlord had control over the premises.[11] Courts have been far more hesitant to extend liability to a landlord of properties where the tenant has possession and control of the entire property, such as single family residences.[12] Other courts have resorted back to the test of whether a landlord had the ability to admit or exclude people from the property in determining whether they had possession and control over the premises so as to be a harborer of any dog that lived there.[13]

Common Law Claims

In addition to the strict liability statute, Ohio also recognizes a common law negligence claim against a dog's owner or harborer.[14] However, unlike under R.C. 955.28, where all that one needs to prove is the identity of the dog's owner, keeper, or harborer, under the common law, a plaintiff must also show that the dog was vicious, the defendant knew of the dog's viciousness, and the dog was kept in a negligent manner.[15] The key to establishing a common law dog bite claim is showing that the defendant knew of the dog's vicious tendencies. This has commonly been referred to as the "one-bite rule." Essentially, if the dog has previously bitten someone, now the owner or harborer is on notice that the dog is vicious.

One might ask: why, with the strict liability statute being available, would anyone pursue a common law claim for a dog attack? The answer is quite simple: under the common law, punitive damages are available.[16] If you have the right facts and can show both knowledge of prior viciousness and negligence, a common law claim can lead to a much more substantial recovery.[17] Further, the Ohio Supreme Court has now clearly confirmed that you can bring both a common law and statutory claim simultaneously.[18] As such, if the facts support it, it is clearly to your advantage to plead both claims, as there are a number of sources of potential evidence that could come to light in discovery that could possibly establish a common law claim.

Other Considerations

As in all cases, careful consideration should be given to other sources of potential evidence to substantiate who the owner, harborer, and/or keeper of the dog is, as well as other evidence that could be used to support a common law claim.

Specifically, it is vitally important to try and get in contact with and interview neighbors or others that live in near vicinity to the dog to see if they can offer any information on the dog's temperament. Every owner, keeper, or harborer of a dog will likely testify (and genuinely believe) that they have the kindest, most gentle dog on the block, but their neighbors and even other family members may sing another tune. This witness testimony can go a long way in a potential punitive damage claim.

Additionally, there are often administrative proceedings that take place, either entirely within the county dog warden's office, or in the local municipal court, that could provide a wealth of evidence to support a common law claim against a defendant. Ohio Revised Code Section 955.11 divides so-called "bad dogs" into three categories – Nuisance, Dangerous, and Vicious. When a dog is categorized by a county dog warden as a Nuisance or Dangerous or Vicious, the owner, keeper, or harborer of the dog has the ability to appeal that determination in the municipal court.[19] As such, attorneys pursuing dog attack claims should endeavor not only to make record requests to county dog wardens, but also to diligently review any municipal court dockets that may at one time have had jurisdiction over the dog for administrative designations. Additionally, if a dog receives a designation of Nuisance, Dangerous, or Vicious, the Revised Code provides a heightened standard of care with regard to control and boarding of the subject dog.

Finally, while rare, there are instances where an owner, keeper, or harborer of a dog may try and claim that it wasn't their dog that attacked your client. As such, it is important to get started with discovery as soon as possible, and to make sure to ask for any and all photographs that the defendant has of the subject dog, so as to not be surprised at deposition if the defense attorney asks your client to describe the dog involved in the attack.

At the end of the day, dog bite and attack cases are not much different from general personal injury cases, and with the strict liability statute and the possibility of punitive damages, can be attractive cases to take. However, it is important to be familiar with the nuances that exist both under the statute and the common law surrounding liability and available damages. ■

End Notes

1. https://www.avma.org/News/PressRoom/Pages/ndbpw-2019.aspx?mode=full.
2. Nationally, State Farm reports that they are paying out an average of $39,017 per dog bite claim. *Id.*
3. *Beckett v. Warren*, 124 Ohio St.3d 256 (2010).
4. R.C. 955.28(B).
5. *Sawrey, v. Grant*, 31 Ohio App. 14 (8th Dist. 1928).
6. *Gaves v. Okolo*, Summit County Court of Common Pleas Case No. CV-18-06-2294; citing, Ohio Jury Instruction CV 409.01 (Rev. 2017); *Garrand v. McComas*, 5 Ohio App.3d 179, 182 (10th Dist. 1982).
7. *Sawrey, supra.*
8. *Buettner v. Beasley*, 2004-Ohio-1909 (8th Dist.).
9. *Garrad v. McComas*, 5 Ohio App.3d 179, 182, (10th Dist 1982); *Flint v. Holbrook*, 80 Ohio App.3d 21 (2nd Dist. 1992); *Khamis v. Everson*, 88 Ohio App.3d 220 (2nd Dist. 1993).
10. *Schneider v. Kumpf*, 2016-Ohio-5161 (2nd Dist.).
11. *Hall v. Zambrano*, 2014-Ohio-2853 (9th Dist.).
12. *Engwert-Loyd v. Ramirez* 2006-Ohio-5468 (6th Dist.).
13. *Flint v. Holbrook*, 80 Ohio App.3d 21 (2nd Dist. 1992).
14. *Beckett, supra.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*.; see also, *Darfus v. Clark*, 5th Dist. No. 12-CA-9, 2013-Ohio-563.
19. R.C. 955.11 *et seq.*

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Work-Life Balance: Survey Results And Thoughts Thereon

by Kathleen J. St. John

"Do you feel you lack work-life balance due to your responsibilities as a lawyer?"

❑ Frequently ❑ Sometimes
❑ Occasionally ❑ Never

This was the culminating question in an anonymous work-life balance survey I'd circulated to our membership earlier this year. The survey was designed by me, courtesy of "Survey Monkey," and with no greater credentials than three decades of working on the plaintiff's side in personal injury and appellate law.

The results, although not earth shattering, were interesting. Almost twice as many men as women responded – not terribly surprising given that our organization is heavily weighted in Y chromosomes – 83% to be exact.

Perhaps more surprising was the lack of one specific profile of those who report experiencing (or not experiencing) work-life imbalance on the extreme ends of the spectrum. It was difficult to detect a coherent pattern. A male attorney over the age of 60, with more than 31 years in practice, who works 6-8 hours a day on weekdays, and takes 21 vacation days or more a year reported experiencing work-life imbalance with the same frequency – "frequently" – as a female attorney, under 30, with less than 10 years in practice, who works 9-12 hours weekdays, has a child under the age of 6, and takes 5 or less vacation days a year.

On the other hand, a male attorney over age 60, with more than 31 years in practice, who works 9-12 hours a day on weekdays, and takes 11-20 vacation days a year, reports "never" experiencing work-life balance issues.

All told, the profiles of the responders and their responses to the 23 questions posed were as varied as the 53 participants.[1] Yet all but one – the aforesaid happily balanced gentleman – reported experiencing work-life imbalance at least "occasionally"; and approximately two-thirds reported experiencing work-life balance issues either "frequently" or "sometimes."

What follows is an account of some of the more intriguing findings, augmented by my discussions with some of our members, and with insights from persons outside of CATA who write or think about this topic.

I. The Questions.

The questions fell into three basic categories.

First, there were the profile questions: age, gender, number of years in practice, and whether the respondent lived with a spouse, significant other, and/or children. The profile questions also included age ranges for the children, and whether or not the spouse/significant other worked outside the home.

Second, there were the work-related questions. These included how many hours the respondent typically worked on weekdays and on weekends; how many vacation days the respondent took annually; what (if any) kind of work the

respondent did during vacation; and what methods the respondent used to deal with unusually heavy workloads.[2]

Third, there were the personal-life related questions. These included questions about how domestic tasks were divided between respondents and their spouses or significant others; whether the respondent had a sick or elderly family member to care for; the activities the respondents felt they did not get to do as often as they'd like; and the personal life activities that were most likely to suffer when the respondents were overloaded with their professional responsibilities.

The overall intent of these questions was to determine what factors play the greatest role in determining whether our attorneys are experiencing significant imbalance between their professional and personal lives. We *all* experience stress in our profession, but which of us have the least success in finding that happy medium in our lives, and why?

II. The "Frequentlies".

To make sense out of the survey data – 53 attorneys answering 23 questions for a total of 1,219 responses – I looked to the profiles and responses of those at different points on the spectrum. I was especially interested in those who experience work-life imbalance "frequently."

One thought stood out in my mind. Why did attorneys with similar profiles report different levels of work-life imbalance, while attorneys with distinctly different profiles reported the same degree of work-life imbalance? Although the four available answers to the question of whether the respondent experienced work-life imbalance – *frequently, sometimes, occasionally, and never* – were imprecise, certain patterns emerged among those who responded "frequently."

There were, of course, the respondents whose schedules are too crammed, or who do not allow themselves sufficient vacation time.

One was a male attorney in the 46-59 age range, who takes only 0-5 vacation days annually, has 3 children at home, does more than 50% of the meal prep/cleanup, auto maintenance, and yard maintenance, and spends 1-5 hours/week with an ill or elderly family member.

Another was a female attorney, in the 31-45 year age range, who works 9-12 hours weekdays, does 50% or more of the cleaning, grocery shopping, meal prep/cleanup, and yard maintenance, and takes a somewhat healthier number of vacation days: 11-20 annually, out of town.

Sidebar: Survey Excerpts

Q5 Number of hours you work on average weekday. (Check only one answer).

Answer choices	Responses	
5 or less	1.89%	1
6-8	39.62%	21
9-12	58.49%	31

Q6 Number of hours you work on average weekend.

5 or less	66.04%	35
6-9	30.19%	16
10 or more	3.77%	2

Q17 How many vacation days do you take in a typical year? ("Vacation day" means any week day out of the office when you are either not doing any legal work, or are doing legal work remotely for less than 2 hrs./day.)

0-5	13.21%	7
6-10	32.08%	17
11-20	30.19%	16
21 or more	24.53%	13

Q19 What, if any, work do you do on vacation?

Check/respond to email	96.23%	51
Read law or case related materials	37.74%	20
Summarize depositions	11.32%	6
Take depositions	1.89%	1
Legal research or writing	9.43%	5
I don't work on vacation	3.77%	2
I don't take vacation days	1.89%	1

Q20 Which of the following activities do you not get to do as often as you'd like? Check all that apply.

Spend time with family	47.06%	24
Socialize with friends	47.06%	24
Exercise	62.75%	32
Eat healthily	29.41%	15
Engage in recreational activities	45.10%	23
Attend performances or cultural activities	35.29%	18
Engage in hobbies	54.90%	28
Read for pleasure	58.82%	30
Shop for pleasure	15.69%	8

Q23 Do you feel you lack work/life balance due to your responsibilities as a lawyer?

Frequently	22.64%	12
Sometimes	45.28%	24
Occasionally	30.19%	16
Never	1.89%	1

There was a male attorney over 60 years old, who works 9-12 hours on weekdays, 6-9 hours on weekends, does more than 50% of the auto maintenance and finances at home, and takes only 6-10 vacation days, equally divided between out-of-town and at home.

And there was a female attorney over 60 years old who works 9-12 hours weekdays, 6-9 hours weekends, does more than 50% of the cleaning and meal prep, and takes 6-10 vacation days, also equally divided between out-of-town and home.

But apart from these standard workhorse profiles, there were those whose answers suggested a deeper yearning – a desire to have time for other interests apart from practicing law. A male attorney over 60, for instance, who works 6-8 hours weekdays, has a stay-at-home spouse, does no more than 25-50% of any of the enumerated domestic tasks, and takes 21 or more vacation days annually, not only reported experiencing "frequent" work-life imbalance, but reported wanting to have more time to exercise, eat healthily, engage in recreational activities, attend performances or cultural activities, engage in hobbies, read for pleasure, and even shop for pleasure. Another male over 60 with a similar profile similarly reported not having enough time to spend with family, socialize, exercise, engage in recreational and cultural activities, and read for pleasure.

Indeed, all but three of the 14 respondents who reported "frequently" experiencing work-life imbalance complained of having insufficient time to read for pleasure. Moreover, not having time to read for pleasure was the second most common complaint of all those who reported experiencing *any* amount of work-life imbalance – 30 out of the 53 respondents registering this complaint. This was only exceeded by the complaint of not have enough time to exercise, an answer given by 32 of the 53 respondents.

III. What Is Work Life Balance Anyway?

Conventional wisdom holds that work-life imbalance is exclusively a women's issue. That, however, is not true. Granted, studies have shown that women having the primary responsibility for child care, elder care, or domestic tasks in addition to their careers are more likely than men to report "high levels of role overload and caregiver strain."[3] Yet, work-life imbalance is about more than how many responsibilities or tasks one has outside of one's professional life. It's about satisfaction with one's life, both personal and professional.[4] And to have that satisfaction, one needs to be content with one's career *and* to have help in one's personal life.

In speaking with CATA members, I found that those who achieved the desired balance were both excited about their work and had significant help from their spouses and others.

One female attorney explained that her success in balancing a busy trial practice with her roles as wife and mother was achieved, in part, by having chosen "a terrific life partner" with whom she practiced law. She emphasized the importance of being very organized, as well as being able to afford quality personnel to help care for the children. It also helps, she admitted, that she loves being busy, and – her children having grown – she actually misses the frenzy of earlier years.

A similar experience was reported by another female trial lawyer who practices law with her husband, and balances a highly successful career with raising four school-age children. The key, she said, is having "a 50/50 partner in everything", although she also attributes her success to others who have helped her and her husband "keep it together" over the years.

Other attorneys I spoke with emphasized the importance of viewing work-life balance not in an isolated period of time, but as part of a longer trend. As Oprah Winfrey puts it: "You can have it all. You just can't have it all at once."

One male attorney, speaking (as he said) on behalf of "senior attorneys", explained that, after selling his practice and taking on an "of counsel" role, he is truly enjoying the practice of law for the first time in his career. Relieved of management responsibilities, he can spend more time with clients, and has the opportunity to be more philosophical about his cases and life in general. Much of the stress in the practice of law he attributes to our desire to be successful at everything we do. We feel guilty when we cannot handle both our personal and professional lives perfectly. It gets better, he says, if you can survive the years of parenting and practicing law at the same time without getting burned out.

A similar theme was emphasized by a female attorney in the prime of her practice. Having practiced on "both sides of the aisle", she finds being a plaintiffs' trial attorney is more conducive to achieving a semblance of balance because her time is less likely to be monopolized by the demands of repeat clients. Still, she emphasized, there is "no such thing" as work-life balance at any particular time in one's life. Instead, balance is achieved by viewing one's life over time. Like others, she admitted to having a "great husband who collaborates on many things at home," including helping with the kids, as well as a great network of neighborhood friends.

Achieving a semblance of work-life balance, however, does not necessarily depend on having a spouse or significant other who shares the responsibilities. It

also depends on one's attitude – the sense of pride in being able to meet copious challenges. One CATA member I spoke with is single mother with her own law firm and two young daughters. While admittedly having no time for herself, she is proud of being able to bring her girls to the office where they hear her talk to clients and know that she is the boss. She also feels fortunate to have two female employees, and works hard to give them work-life balance, good health insurance, and the ability to stay home when their kids are sick.

These individuals' comments shed light on the inconsistencies in the survey data. Predicting *who* will experience the greatest sense of work-life imbalance depends on more than tallying up how many responsibilities an individual has. It depends on their attitude, available assistance, and enthusiasm for their work.

IV. Work-Life Balance Solutions.

Still, the fact that all but one of our respondents report experiencing work-life imbalance at least occasionally calls out for solutions. Having an amazing spouse or partner, great neighbors, employees, a flair for organization, and pride in one's accomplishments are prime ingredients for creating satisfactory work-life balance.

But that's not all. Consider the plight of one young attorney who works 55-60 hours/week, and is about to get married. He likes his work and understands the necessity of putting in the hours to gain experience and be the best lawyer possible. But, observing the divorce rate among some of his more senior peers, he has misgivings about the future. How does he avoid being married to his career at the risk of losing those who matter most in his personal life?

Employers can help – particularly with younger attorneys. Although it is rarely convenient, lawyers should be encouraged to take time off. As one study notes, "[i]f a person doesn't have a time to relax and recharge, their ability to do their job decreases and their performance level suffers."[5] Indeed, an extreme example of the work-horse lawyer who refuses to slow down was seen in a July 2017 *New York Times* story in which a Big Law partner, who worked 60 hours a week for 20 years, died while trying to participate in a conference call.[6]

Other solutions can be seen in some of the answers our respondents gave to the query: "Which methods do you use to manage a heavy workload?" Although the majority of respondents (32 of 53) ranked their number one method as "work[ing] extra hours [them]selves," others ranked "delegat[ing] work to a non-lawyer staff member" or "an associate attorney" or "a student law clerk" as important means of managing an overload of work. Granted, lawyers are ultimately responsible for the product of those who work on their cases, and we often fear that unless we do it ourselves it won't be done properly. But delegation is a means of preserving our sanity which ultimately is in the best interest of our clients.

But what about those respondents who experience frequent work-life imbalance despite having circumstances that appear less onerous? The male attorney, for instance, in the latter years of his practice, with few domestic responsibilities, and a lot of vacation time, who still experiences work-life imbalance "frequently"?

I have a theory which I call the "I yearn" theory. Maybe you recall the *Seinfeld* episode where Kramer asks George, "Do you ever yearn?" George responds: "Well, not recently. I've craved. Constant craving. But I haven't yearned."

I think that some of us, more than others, are "yearners." Whatever we may think of our professional work – however much we may love it (or not) – we yearn for other things that life has to offer. And, sacrificing the satisfaction of those yearnings due to professional demands, we feel the burden of work-life imbalance more acutely than others do.

For this, the only cure I know is to insist – both to yourself and others – on taking time to satisfy those needs. "Set expectations and communicate," one writer states.[7] "Be vocal about your intentions at home and at work, and set new expectations if you've been doing too much (like working from home after hours.)."[8]

"Burnout," another writer asserts, "is about resentment. Preventing it is about knowing yourself well enough to know what it is you're giving up that makes you resentful."[9] Or, as Michelle Obama recently stated in her memoir, "We need to do a better job of putting ourselves higher on our own 'to do' list."[10]

Of course, this is easier said than done. As attorneys, we possess a strong sense of duty to our clients and our work. But it is important to keep this principle in mind. We need to support each other in our attempts to maintain some kind of work-life balance. If not, we end up victims of the old adage: "Nobody on their deathbed has ever said, 'I wish I had spent more time at the office.'"[11] ■

End Notes

1. Roughly 23% of our membership responded to the survey.
2. Q21 asked the respondents to rank, in the order of most to least frequently, the methods they used to manage a heavy workload. The choices included: ask a colleague of equal status to help; delegate work to an associate; delegate work to a student law clerk; delegate work to a non-lawyer staff member; work extra hours yourself; take extensions and reschedule appointments; and cut corners in your work product. The number one response given by 32 of the 53 respondents was "work extra hours yourself." "Delegate work to a non-lawyer staff member" came in

second with 9 of the 53 selecting this as their first choice. This was followed by "delegate work to an associate attorney" and "asking a colleague of equal status to help", each of which earned 4 votes as the top method for managing a heavy workload.

3. Ms. S. Pattu Meenakshi, Mr. Venkata Subrahmanyana C.V., Dr. K. Ravichandran, "The Importance of Work-Life-Balance," IOSR JOURNAL OF BUSINESS AND MANAGEMENT, Vol. 14, Issue 3 (Nov.-Dec. 2013), pp. 31-35, discussing 2007 study by Duxbury and Higgins.

4. *Id.* at 31 ("Experts say there is no single definition [of work-life balance].... But generally they agree work-life balance translates to satisfaction with one's entire life – professional and personal – and it can be reached even while working long hours.")

5. "The Importance of Work-Life Balance," n. 3 *supra*, at p. 32.

6. Debra L. Bruce, "Leadership Impact on Work-Life Balance," ABA Law Practice, Aug 14, 2017.

7. Jessica Lutz, "It's Time To Kill The Fantasy That Is Work-Life Balance," https://www.forbes.com/sites/jessicalutz/2018/01/11 (last viewed 3/4/2019).

8. *Id.*

9. Jessica Stillman, Inc., "Marissa Mayer: Why Work Burnout Is About Resentment," https://www.cbnc.com, Sept. 17, 2012 (last visited 3/27/2019), quoting former Google executive turned Yahoo! CEO, Marissa Mayer.

10. Michelle Obama, Becoming.

11. This quote has been attributed to Rabbi Harold Kushner. A similar version has been attributed to Senator Paul Tsongas.

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Pointers From The Bench:
An Interview With
Judge Nancy Margaret Russo

By Christine M. LaSalvia

Judge Nancy Margaret Russo always knew that she wanted to be a Judge. She fulfilled her childhood dream when she was elected to the bench in 1997. Prior to her election, she spent time working in corporate America where she specialized in white collar crime and insurance fraud. She also spent time working for a sole practitioner and working for a large law firm as a paralegal. All of these experiences helped her understand civil litigation from different perspectives which she uses in her job today.

Judge Nancy Margaret Russo

Judge Russo is very passionate about ensuring that the public who use her courtroom have an efficient and fair resolution to their dispute. She is very aware of the stress and trepidation the average person feels when they come to Court. Discussing this topic with her was a good reminder that the Case Management Conference or pre-trial, which to us as litigators is a small blip in our day, is a huge event to our clients. The small auto accident, which we can handle easily and with little stress, can cause a lot of anxiety to our client. Judge Russo believes the best antidote to that problem is ensuring that disputes are resolved as quickly and efficiently as possible. Judge Russo believes that part of her role is to help garner confidence in our court system. When cases linger, our clients can lose confidence in the Court and have a hard time understanding why their problem is not solved. When the public sees that their lawsuit can be resolved quickly and efficiently, it helps protect our system.

One of Judge Russo's tools for ensuring a quick resolution is her Final Pre-Trial Order. Judge Russo told me quite candidly that she knows some people are not fans of the Order. However, she explained that it made a huge difference in managing her courtroom because the Final Pre-Trial Order creates an environment in which cases can be resolved quickly. The cases which remain unresolved tend to involve true disputes which require additional time from the Court. Judge Russo showed me her stand up file which holds the cases set for trial in the next month. She knows each case and has the time to devote to these more complicated problems. I was interested to find out that the Final Pre-Trial Order is actually not Judge Russo's creation. It is a document that was put together after she had meetings and sought input from both plaintiff and defense lawyers. She sought equal input from both sides to ensure that it would be a comprehensive document which would assist both sides in moving through litigation efficiently.

I asked Judge Russo what she thinks lawyers can do to help resolve cases more efficiently. She told me that she thinks it is important for lawyers to step back and look not just at the monetary settlement, but at the emotion underlying the problem. Judge Russo told me that in her

experience, there are often feelings which need to be addressed before a case can be resolved. Sometimes a client needs the relief of telling his or her story before an offer can be accepted. Judge Russo had several examples of cases where she listened to the parties and came up with creative resolutions to the case. My favorite example was when she convinced a defense attorney to set aside settlement money for a cruise in response to a plaintiff's concern that her loss of income would prevent her from affording a vacation.

When a dispute cannot be resolved, Judge Russo was very clear with me about the importance of *voir dire*. She has about 20-25 questions which she typically asks so that the lawyers have time to listen and get to know the jurors. She is a big believer in the wisdom of Gerry Spence and credits one of his training sessions with shaping her thinking about *voir dire*. She believes it is important to ask creative, open ended questions which will garner a response beyond "yes" or "no." She believes in the importance of trial and works to give lawyers the time and space to try their case. She told me that jurors are smart and, in her experience, they pay attention and work hard.

Judge Russo told me that she values her role in helping people solve their problems. Her end goal and focus in everything she does is to ensure that each person who comes through her courtroom sees that they had a fair playing field and can understand the result. ■

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In Memoriam: E. Richard "Rick" Stege

The legal community suffered a substantial loss with the passing of CATA member Rick Stege on February 7, 2019. Our thoughts and prayers are with Rick's wife Elaine, their daughter Melinda, and the entire Stege family. The attorneys below have been kind enough to share their thoughts about Rick and his contributions to our profession.

Peter Pattakos, The Pattakos Law Firm LLC:
Brains, heart, and guts: Someone once told me that a good lawyer needs to have at least two of these things and a great lawyer has all three. Rick Stege was a great lawyer. He was passionate about standing up for people who were unable to stand up for themselves, he had the chops to push boulders back up the hills they were rolled down from, and the courage to act against injustice even when it wasn't easy or popular to do so. I'm only one of many who was lucky to count him as a mentor, but I owe a good deal of my best work to his efforts (his insistence, really) to help me see a bigger picture and follow through on it. I'll miss him dearly, and will be motivated by his memory and the hope that I can pass on at least a spark of his influence to future generations.

Nicole Bush, Wegman, Hessler & Vanderburg:
We have all felt the loss of Rick Stege. His passing marks a huge loss to the legal community, his colleagues, his friends, and of course, his family. In the weeks since his passing, many have discussed his significant contributions to the legal landscape – his landmark victories at the Supreme Court of the United States (*Moore v. City of East Cleveland (1977)* and *Local 93 v. City of Cleveland (1986)*), his tireless work in Legal Aid, his tenure as President of the William K. Thomas Inn of Court, his contributions as a plaintiff's attorney, and his heartfelt advocacy on behalf of his clients. Rick was my former employer, my mentor, and most importantly – my friend.

Rick treated every case as if it was his most important case. He viewed "law" as a higher calling to do greatness and to seek justice, no matter how small. The lessons Rick taught me are not about his accolades or accomplishments, but rather about the responsibility we have as legal professionals to be the voices of people we represent. He taught us to seek honor in our values of integrity, professionalism, passion, and advocacy when we perform our work – when people are watching, and when they are not.

For the rest of my life, I will be mindful of the lessons I was lucky enough to learn from Rick. I will forever miss my colleague and my good friend, but I believe he lives on in those of us who believe, as he did, in the importance of our profession and its demand for excellence and passion.

Avery Friedman, Avery Friedman & Associates:
Rick and I gave serious thought to creating a firm together last century. The idea was to double the effort to save the world. I figured he knew what he was doing. He thought I did.

Well, we might have both been wrong and never did create that firm. So instead we spent over forty years cheering each other on.

Rick was brilliant, quirky, never uncurious about anything. We loved to litigate and to teach how to. We both blinded ourselves into thinking we made the world better.

Maybe we did.

In recent years Rick and I took to the stage with an audience of judges and lawyers at The City Club to talk about federal practice and how hard and how much fun it's been to be change facilitators.

For me it's been a riot. He thought so too. We're all diminished by his absence.

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Colin R. Ray

Colin R. Ray, of McCarthy Lebit, Cristal & Liffman law firm, has been participating in the 3Rs program since his first year at Cleveland Marshall College of Law. The 3Rs program, organized through the Cleveland Metropolitan Bar Association, is designed to send small teams of judges, lawyers, and law students into Cleveland and East Cleveland public high schools to supplement the education of 10th and 11th grade students on the 3Rs: Rights, Responsibilities, and Realities. The curriculum of the program focuses on the Constitution and the First and Fourth Amendments. The program also offers career planning advice for students and assistance in applying to college and is a way to identify students who are interested in pursuing a career in the legal field. Each of the six one-class visits focuses on a different aspect of career planning or constitutional law. The sessions have a set curriculum but students oftentimes engage in discussion with practitioners on real-world topics touching on the curriculum. The program is a great way to provide practical contact to the profession for students, and is useful as a unique networking tool for the volunteers as well.

This year, as a team captain, Colin worked with attorneys from private practice, the Cuyahoga County Prosecutor's Office, Cleveland State's General Counsel, and a law student. Each team member's unique experience was useful to the students in answering questions from different perspectives. Students grappled with a real search warrant issued from the Northern District of Ohio, with an ambiguously-worded statute banning "vehicles" from a public park, and with the realities of applying to college during the final session of the year. The students were engaged with the material, asked thoughtful questions, and enjoyed each session.

Meghan C. Lewallen

Meghan Lewallen, a partner at the Mellino Law Firm, recently joined the Associate Board for West Side Catholic Center (WSCC) in December. The WSCC aims to provide individuals and families in need with food, clothing, shelter, and to advocate on their behalf during their journey to become self-sufficient members of society. Established in 1977 by several local churches to address extreme poverty in the area, the WSCC is an independent non-profit organization that operates distinctly from the Catholic Dioceses and official Catholic Charities. Some of the charitable services that WSCC provides include: providing hot meals to those in need; collecting donations of clothing and household items; and offering free shelter and housing solutions to the homeless.

Meghan also serves on the Ambassador's Committee for the First Tee in January. The First Tee is a non-profit national organization with several chapters operating across the country that serve their local communities. The Cleveland chapter is dedicated to providing the city's children with life and educational opportunities through golf. Some of the programs that the First Tee offers are: summer golf camps; partnerships with local youth programs; and connecting with elementary schools to promote physical education.

Kenneth J. Knabe

Greater Cleveland's Bike Attorney **Kenneth Knabe, of the Knabe Law Firm**, continues to earn his stripes, working tirelessly to promote our vibrant and evolving cycling

community and the alternative sustainable transportation cycling provides. He was honored with Bike Cleveland's Guardian of Sustainability Award at the 2019 Annual Meeting. Ken sponsored and participated in Bike Cleveland's Bike to Work event in 2018, as well as Bike Lakewood's Bike to School event. He became a Board Member of the Ohio To Erie Trail (OTET), a mostly-paved bike path—running from Cleveland to Cincinnati—which Ken rode last year. He is now responsible for the northern section which runs from Edgewater Park in Cleveland to Millersburg, Ohio. In addition, he has been named a new Board member of the Ohio Bicycle Federation (OBF), a statewide bike advocacy group whose work contributed greatly to the enactment of Ohio's three-foot passing law. In support of sustainable transportation, Ken proudly donated the custom-made Bike Lakewood bike rack now installed near the entrance of Lakewood Public Library Madison Branch in Birdtown, one of Lakewood's historic districts.

Ken Knabe (center)

Ellen Hirshman of Loucas Law continues her passionate pursuit to educate students on the dangers of distracted driving. This past April, Ellen conducted an End Distracted Driving presentation at Rocky River High School to a gathering of 225 juniors. ■

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

Photo Montage: A Year of CATA Seminars

Cell Phone Presentation

Eisen Presentation

Legal Aid Presentation

Litigation Institute

Staff Attorney Panel

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Spotting Common Auto Defects

by James A. Lowe and Meghan P. Connolly

There may come a time in your practice when a client has been severely injured or killed in a motor vehicle collision and you suspect their vehicle did not perform as it should have, thereby contributing to or causing distinct injuries. This may be so in a case where there is inadequate coverage for the loss from the tortfeasor and/or first party carriers. In such circumstances, it is important to be on the lookout for signs of an auto defect and act quickly if investigation is called for.

Time is always of the essence in crashworthiness cases because, with few exceptions, there is usually no case if there is no vehicle. Many total loss vehicles are not preserved very long at all. It is up to the attorney to move quickly and preserve the vehicle if an auto defect needs to be investigated.

Here are some common auto defects and how to spot them in your case:

SEATBACK FAILURE

If you are handling a rear end accident with severe injuries, it is important to investigate whether the occupants' seats performed as they should in the collision. Fig. 1 depicts the rear of a vehicle in a typical rear end collision where the striking vehicle was traveling at 30-50 mph and the struck vehicle was stopped or slowing. If you look closely you can see that the driver seatback is not upright like the other three seats.

Fig. 2 shows the collapsed driver seatback frame in the same vehicle, with the seat and padding removed. If you look closely at the bottom of the seat frame, you can see that the horizontal metal bar is completely sheared off from the vertical bar. One may not automatically think of a seatback as a safety feature, but in fact, seatbacks are designed to manage energy, absorb load, and keep the occupant in their seat during a rear end collision. When the frame shears as in Fig. 2, the

Fig. 1

Fig. 2

seat is unable to withstand the force of the impact, and the occupant is then thrown forcefully into the back seat, head and neck first, where brain and spinal cord injuries can result.

If there is an occupant in the rear seat, often a child, there is a likelihood of severe injury to both the front seat and rear seat occupants. If you discover in your case that a front seat occupant was ejected toward the back seat in a rear end collision, or see a collapsed seat in property damage photographs, or suspect for any reason that seat failure may have been the mechanism for a brain or spinal cord injury, consider immediately securing the vehicle for further inspection of the seatback.

AIRBAG FAILURE TO DEPLOY

Airbags have long been recognized as life saving safety features that protect occupants from colliding with hard surfaces within the vehicle, such as the steering wheel, instrument panel, windshield, side windows, and door frames. However, they do not always deploy as they should. If the airbag sensors fail to send the appropriate signal to fire during the crucial milliseconds of the crash, then the airbags simply will not deploy and the occupant is left without the protection of an airbag.

Side airbags are signaled to deploy by a sensor on the side of the vehicle. Fig. 3 depicts a vehicle that was T-Boned at the driver's door where the sensor should have been triggered to fire the airbags. Although the vehicle was equipped with side airbags, one can see that neither a side curtain airbag dropped from the top of the door frame, nor did a torso bag deploy from the driver seat. This failure of the airbag sensor resulted in death of the driver.

Figs. 4 and 5 depict a vehicle that was subject to heavy frontend damage, yet only the side airbag deployed. The side airbag is visible in both photos at the top of the driver's doorframe. Fig. 5 clearly shows the steering wheel still intact, from where the front airbag should have deployed had the sensors worked properly.

ROOF CRUSH IN ROLLOVERS

If a vehicle rolls over or partially rolls onto its roof, the occupant relies on the roof to withstand the impact. However, if the roof is not of adequate strength, it can crush down on the occupant from above, causing the cervical spinal cord to be severed resulting in quadriplegia. This was the unfortunate case in the vehicle pictured in Fig. 6.

Fig. 7 depicts a gray van that only rolled to half rotation, but the crush damage was so great that the A-pillar had to be cut away so that the roof could be lifted off the 5' 4" female driver's head.

Fig. 8 depicts a white van that was rolled in a simulation test without an occupant. Graphically, one can see what happens when a flimsy roof hits the ground in a rollover event.

Defendants always argue that the occupant was injured before any substantial roof deformation when they "dive" head first into the roof. But it can be shown that the roof deforms first, using a defendant's own videos frame-by-frame.

If you think your client has a potential crashworthiness case, bear in mind that it is subject to Ohio's statute of repose for product liability claims. R.C. §2305.10. The statute generally protects manufacturers from claims that do not

Fig. 3

Fig. 4

accrue within ten years from the date of first purchase.

These are by no means the only auto defects out there, but they are fairly common problems that anyone handling a motor vehicle collision should be able to spot and take action when necessary. In addition to providing further coverage for the case, it is of utmost importance that auto manufacturers be held accountable for unsafe vehicles on the road. ■

Fig. 5

Fig. 6

Fig. 7

Fig. 8

Recent Ohio Appellate Decisions

by Meghan P. Connolly and Regina A. Russo

<u>McAllister v. Myers Industries,</u> 9th Dist. No. 29040, 2019-Ohio-773 (March 6, 2019).

Disposition: Reversing trial court's dismissal of complaint alleging intentional tort claim against employer.

Topics: R.C. 2745.01 pleading requirements satisfied.

Plaintiff McAllister brought an employer intentional tort claim against his employer, Myers Industries, after he suffered a hand crush injury at work while operating an injection molding machine. Myers Industries filed a motion to dismiss the employer intentional tort claim on the basis that the complaint did not meet the heightened pleading standard required by law.

The statute at issue in the appeal is R.C. 2745.01 which sets forth the standard for an employer intentional tort. Subsection "C" states that the deliberate removal by an employer of an equipment safety guard creates a rebuttable presumption of the requisite "intent to injure". Citing to the Ohio Supreme Court in *Hewitt v. L.E. Myers Co.*, the Ninth District reminded that "as used in R.C. 2745.01(C), 'equipment safety guard' means 'a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.'"

The McAllister complaint did allege that the employer made a conscious decision to rewire the machine such that the interlocked safety guard would be bypassed and removed. From the complaint allegations, the Ninth District found that "one can reasonably infer that the function of the interlocked safety guard on the rear sliding safety gate was to prevent parts inside the machine from moving when the rear sliding safety gate was open."

Importantly, the Ninth District pointed out that upon a motion on the pleadings, the plaintiff need not *prove* that the guard at issue meets the definition of a safety guard under Ohio law. Rather, the court found that the allegations were sufficient to allege that Myers Industries deliberately removed the safety guard. The court therefore reversed the trial court decision and remanded the case for further proceedings on plaintiff's employer intentional tort claim.

<u>Baker v. Scheetz,</u> 10th Dist. No. 18AP-655, 2019-Ohio-685 (Feb. 26, 2019).

Disposition: Reversing trial court's *sua sponte* dismissal of complaint on statute of limitations grounds where neither party had raised the issue.

Topics: Where the complaint does not conclusively demonstrate the action was filed beyond the statute of limitations, trial court errs in dismissing the action, *sua sponte*, on statute of limitations grounds.

The plaintiff filed a dental malpractice claim against her oral and maxillofacial surgeon claiming that due to his negligent care, she suffered severe and permanent injuries, disability, and she had to endure another surgery. Her complaint was filed with a motion for more time to file an affidavit of merit pursuant to Civ.R. 10(D). The defendant dentist moved for judgment on the pleadings pursuant to Civ.R. 12(C) on the basis that the complaint was filed without an affidavit of merit, and also arguing that plaintiff's motion for more time to file one was deficient.

Without ruling on the plaintiff's motion for more time, or the defendant's motion to dismiss, the court *sua sponte* dismissed

the case on its finding that the complaint was not filed in compliance with the statute of limitations.

However, the Tenth District was mindful that the plaintiff does not have the burden of affirmatively pleading compliance with the statute of limitations. In a medical malpractice case, this means that a plaintiff does not have the burden of affirmatively pleading their compliance with the 180-day extension provided by R.C. 2305.113, nor must the plaintiff plead the date the statute of limitations period began to run, which would occur at the termination of the physician-patient relationship or the discovery of the negligence, whichever is later.

Because no such burden on the plaintiff exists under Ohio law, the Tenth District found it was possible that the plaintiff could have timely filed her action. Thus, the trial court's dismissal was reversed and the case was remanded for further proceedings.

O-Brien v. DOT, 10th Dist. No. 18AP-231, 2019-Ohio-724 (Feb. 8, 2019).

Disposition: Reversing Court of Claims' adoption of the magistrate's determination that defendant ODOT was not liable to plaintiff passenger. It was an abuse of discretion that amounted to prejudicial error for the magistrate to exclude expert witness testimony of the passenger's psychologist regarding human factors.

Topics: Admissibility of expert witness testimony, Evid. R. 702-705.

The plaintiff was a passenger in a motor vehicle accident that happened on State Route 95, a two-lane rural highway. The driver of the vehicle had to navigate a sharp curve to the right to remain on State Route 95. If the driver went straight, he would travel through an intersection, cross the northbound lane of SR 95, and end up on Old Mansfield Road.

The collision occurred after the driver failed to follow the sharp right curve to remain on SR 95 traveling south, instead drove straight through the intersection toward Old Mansfield Road, and collided with a motor vehicle that was traveling north on SR 95.

The plaintiff passenger alleged that the defendant, ODOT, failed to follow the Ohio Manual of Traffic Control Devices ("OMUTCD") with respect to the signage in advance of the intersection where the collision occurred; it failed to post signs that were mandatory under the OMUTCD, and the discretionary signs it posted were not properly placed under the OMUTCD. The plaintiff argued that because the signs ODOT posted in advance of the intersection were inappropriate and/or in the wrong location, the driver traveling south on SR 95 was not afforded positive guidance and, thus, was unprepared for the actual layout of the intersection.

ODOT argued that this was not a case about signs because the driver of the car in which the plaintiff was a passenger testified he did not remember signs. ODOT argued that the collision occurred because the driver was driving too fast and not paying attention.

The plaintiff offered both lay and expert witnesses, including a human factors expert, to show that ODOT was negligent with respect to the advanced signage. The plaintiff asked the human factors expert to provide an opinion as to how the driver would have cognitively processed the signage for the intersection, how that might have influenced his thought process and decision-making as he approached the intersection, and how it affected what he remembered about the warning signs and the events before, during, and after the collision.

The expert proffered testimony on issues such as working memory, positive guidance, and perception/reaction time. The plaintiff's expert opined, from a human factors standpoint and from a psychologist's standpoint, the driver "could have driven down SR 95, seen or perceived the signs, and then not remembered them right after the accident." Furthermore, the expert offered testimony regarding how the driver "would have cognitively processed" the allegedly defective road signage as he approached the intersection.

ODOT objected to the expert's testimony, arguing that it was immaterial based on the driver's testimony and impermissible pursuant to Evid. R. 702 because it offered nothing more than what the magistrate already knew and what he/she had by way of the other evidence in the case.

The magistrate barred most of the testimony of the human factors expert and limited the rest. The magistrate ultimately concluded that the plaintiff had failed to prove by a preponderance of the evidence that ODOT had breached any mandatory duty as set forth in the OMUTCD. The plaintiff filed objections to the magistrate's decision, one of which was:

> The magistrate erred in disallowing and ignoring evidence regarding the science of human factors as it pertains to related issues of negligence regarding the signage of the intersection in question and causation.

The Court of Claims found that the magistrate had properly

determined the factual issues and had appropriately applied the law. The Court of Claims adopted the magistrate's decision and recommendations, overruled the plaintiff's objections, and rendered judgment in favor of ODOT.

On appeal, the Tenth District reversed and ordered a new trial. The magistrate's critical error, according to the court, was the decision to exclude the testimony of the human factors expert witness at trial. This witness rebutted a key part of ODOT's defense, namely that the driver must not have been paying attention to the road just before the collision as he did not recall seeing any of the allegedly defective road signs. The court, while acknowledging that the driver obviously made a mistake in navigating the intersection at issue, was persuaded that the facts show that a question of fact still remains as to whether the mistake was caused by the information that a driver would have absorbed from the intersection signage and whether it properly and adequately informed him what to expect on the roadway ahead.

<u>Davis v. Hollins,</u> 10th Dist. No. 17AP-716, 2019-Ohio-385 (Feb. 7, 2019).

Disposition: Reversing summary judgment that the Franklin County Court of Common Pleas had granted to defendant's shopping center and management company in a premises liability action for criminal acts of third parties. The trial court incorrectly applied a "specific acts and harm" requirement as opposed to "similar incidents and general harm" in a totality of the circumstances analysis.

Topics: Premises liability, foreseeability of criminal acts of third parties, totality of the circumstances.

The plaintiffs were loading their vehicle with groceries in a shopping center parking lot when they got into a verbal altercation with another driver who they felt was driving too fast. The driver relayed information of the altercation to a friend of hers in the parking lot, who was in another vehicle. The accomplice driver drove his vehicle to where the plaintiffs were loading their groceries and a second verbal altercation ensued. The accomplice driver began circling the parking lot at a high rate of speed and struck the plaintiffs, killing one and injuring the other.

Plaintiffs brought claims against the shopping center owner and management company for negligence, negligent and intentional infliction of emotional distress, and wrongful death. In Ohio, a duty on the part of a business owner to warn or protect business invitees from criminal acts of third parties arises only if the owner knows or should know that there is a substantial risk of harm to its invitees on the premises. The shopping center was in a high-crime area and the parking lot had been the subject of violent crime prior to the incident at issue. Tenants had previously indicated concern to the property manager about the lack of security and their own safety on the property. Neither the ownership nor management implemented any security measures, or took any action designed to improve the safety of shoppers, from the time they took control of the property through the time of the incident.

The trial court granted summary judgment in favor of the defendants, stating:

> While plaintiffs have submitted a plethora of evidence of the general crime present in the area, there is *nothing in the record that would indicate that Defendants know or should have known that the specific acts and harm perpetuated in this case were likely to occur.* (emphasis in original).

The Tenth District reversed and remanded the trial court's decision, concluding that a "specific acts and harm" requirement was too narrow in determining whether a criminal threat was foreseeable under the "totality of the circumstances" analysis. Instead, the trial court should have considered similar instances and general harm to determine foreseeability of the criminal act.

The court further stated that the purpose of the totality of the circumstances test is to avoid the imprecision of a bright line standard attempting to define when prior similar acts would make a subsequent criminal act foreseeable.

<u>Logossou v. AdvancePierre Foods, Inc.,</u> 1st Dist. No. C-170672, 2019-Ohio-363 (Feb. 6, 2019).

Disposition: Reversing trial court's Civ.R. 12(B)(6) dismissal of plaintiff's negligent-inspection and R.C. § 2745.01 employer intentional tort claims for failure to state a claim.

Topics: Employer intentional tort, R.C. § 2745.01; negligent inspection; heightened pleading; negligent performance of undertaking.

The plaintiff employee was severely injured and was required to have three fingers amputated when a coworker activated a mixing machine while the plaintiff was using his hands to remove meat from the blades of the machine.

The trial court dismissed under Civ.R. 12(B)(6) the employee's negligent-inspection claim against the two companies contracted by the employer to inspect the machine. One month prior to the accident, the companies inspected the guarding on the mixer and had advised the employer that it complied with relevant safety regulations. The trial court based its dismissal on a failure to allege facts establishing that the inspection companies owed a duty to the plaintiff.

The plaintiff premised his negligent-inspection claim on 2 Restatement of the Law, Torts, Section 324A (1965), "Liability to Third Person for Negligent Performance of Undertaking," which provides, in pertinent part:

> One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if*** (b) he has undertaken to perform a duty owed by the other to the third person***.

The trial court also dismissed the plaintiff's negligence and intentional-tort claims against the employer. It dismissed the negligence claim on the basis that R.C.§ 4123.74, Ohio's workers' compensation statute, provided him with the exclusive remedy for his alleged injuries. Further, the trial court found that the plaintiff had failed to assert sufficient facts to meet the heightened pleading requirements to set forth an employer intentional-tort claim under R.C. § 2745.01 and *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1998), and its progeny. In Ohio, to survive a Civ.R. 12(B)(6) motion to dismiss, a plaintiff bringing an employer intentional tort claim must allege facts supporting that claim with particularity.

The First District reversed the trial court's dismissal, finding that the facts as pleaded in the plaintiff's complaint on his negligent inspection claim were sufficient to state a claim for relief under Restatement Section 324(A)(b) and Ohio case law.

Further, the court found the dismissal of the intentional-tort claim erroneous as well. The complaint alleged that the employer knowingly removed the barrier guards that prevented body parts from coming in contact with the rotating blades, and, despite the known danger of the removal, had required the employee to operate the mixing machine without the guards. 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 appellate court found that the complaint stated a factual basis for the assertion that an equipment safety guard was deliberately removed from the mixing machine by the employer knowing that an injury was substantially certain to occur.

<u>Bugh v. Dept. of Rehab. & Corr.,</u> 10th Dist. No. 17AP-779, 2019-Ohio-112 (Jan. 15, 2019).

Disposition: Reversing Court of Claims' decision granting summary judgment to ODRC based on the medical malpractice statute of repose.

Topics: Medical malpractice statute of repose, R.C. 2305.113, begins to run at time of last culpable act or omission of the defendant.

Plaintiff Richard Bugh filed a medical malpractice case against the Ohio Department of Rehabilitation and Correction (ODRC) and the Ohio State University Wexner Medical Center (OSUWMC) for failing to diagnose his cervical nerve compression during the time he was incarcerated. In this medical malpractice case, the Court of Claims granted summary judgment in favor of both defendants on the basis that Bugh's claim was barred by Ohio's four-year medical malpractice statute of repose, R.C. 2305.113. Bugh only appealed the trial court's ruling as to ODRC.

It was undisputed that Bugh's complaint was filed on May 4, 2016. The Tenth District confirmed that "to determine whether the statute of repose bars an action, we must assess the last culpable act or omission and determine whether the complaint was filed within four years of that occurrence…". The trial court's review of the evidence led to its conclusion that the malpractice upon which Bugh's claims are based was more than four years prior to the commencement of his lawsuit. However, the Tenth District's review of the same evidence, construed in a light most favorable to Bugh, found that the last culpable act or omission occurred on July 26, 2012, when his doctors reviewed a neurological report showing indicators of the undiagnosed nerve compression problem. Because Bugh's lawsuit had been filed within four years of that last culpable act on July 26, 2012, his case against ODRC was not barred by the statute of repose.

The Tenth District reversed the Court of Claims' decision as to ODRC and remanded the case for further proceedings.

<u>Bledsoe-Baker v. City of Trotwood,</u> 2nd Dist. No 28052, 2019-Ohio-45 (Jan. 11, 2019).

Disposition: Affirming trial court's overruling of defendant city's motion for summary judgment.

Topics: Political subdivision immunity; R.C. § 2744.02(B)(2) and R.C. § 2744.03(A)(5).

The plaintiffs were homeowners in Trotwood, Ohio whose basement flooded with sewage, causing extensive property damage. The flooding occurred after a City Public Works Department employee removed a blockage from a sewer line near their residence. The plaintiffs filed a complaint against the City alleging that it had wrongfully and negligently attempted to clear the blockage. The City filed for summary judgment on the basis that it was not negligent, and that in the event it was found to have acted negligently, it was entitled to immunity under Ohio's Political Subdivision Tort Liability Act. The trial court overruled the City's motion for summary judgment.

The Second District employed the three-step analysis established by R.C. Chapter 2744 to determine whether a political subdivision is immune from liability. The parties did not dispute that the City was entitled to the general grant of immunity under R.C. § 2744.02(A)(1), which grants a political subdivision immunity from tort liability for acts or omissions connected with governmental or proprietary functions. Thus, the analysis focused on the second and third tiers.

The second tier of the analysis is to determine if one of the five exceptions to general immunity exists pursuant to R.C. § 2744.02(B). The plaintiffs argued that the exception found in R.C. § 2744.02(B)(2) applies to their case to reinstate liability to the City. This exception subjects political subdivisions to liability for "the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." The proprietary function exception will remove immunity if the plaintiff establishes: (1) the elements required to sustain a negligence action- duty, breach, proximate cause, and damages; and (2) that the negligence arose out of a "proprietary function."

The City conceded that sewer maintenance is a proprietary function, but it argued that the plaintiffs failed to offer any evidence sufficient to create a genuine issue of material fact that the City employees negligently caused their basement to flood by forcing water into the sewer line. The appellate court determined that information regarding another basement sewage backup at the plaintiff's neighbor's residence at the same time as theirs, coupled with circumstantial evidence, created a genuine issue of material fact as to the City's negligence.

The third tier of analysis examines whether, assuming an exception to immunity was found under the second tier, immunity is reinstated pursuant to R.C. § 2744.03. The City argued that immunity should be restored pursuant to R.C. 2744.03(A)(5). This section provides in pertinent part:

> (5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner

The city argued its employees reasonably exercised judgment and discretion when they 1) selected appropriate equipment to remove the blockage from the sewer line; and 2) determined the amount of water necessary to clear the blockage with the Jet-Vac hose.

The court disagreed. The city's decision to force water into the sewer line with the Jet-Vac was *not* a discretionary decision entitling it to immunity under (A)(5), because the City provided no evidence that any specific decision it made regarding its alleged negligence involved weighing alternatives or a high degree of official judgment or discretion. Thus, the Second District concluded that if the City is proven negligent under 2744.02(B)(2), immunity cannot be reinstated under R.C. 2744.03(A)(5).

<u>Adkins v. Women's Welsh Club of Am.,</u> 8th Dist. No. 106859, 2019-Ohio-70 (Jan. 10, 2019).

Disposition: Reversing Cuyahoga County Common Pleas Court's decision that dismissed plaintiff's medical malpractice complaint pursuant to Civ.R. 12(B)(6) for failure to include an affidavit of merit.

Topics: Affidavit of Merit, Civ.R. 10(D)(2)(a); Civ.R. 12(B)(6) Motion to Dismiss, dismissal without notice, extension of time.

The plaintiff administrator of the estate filed a complaint for medical malpractice along with a motion for a 60-day extension of time to provide an affidavit of merit pursuant to Civ.R. 10(D)(2). As grounds for the extension, plaintiff asserted that counsel needed the requested time to complete his interactions with several experts in the case. In response, the various defendants filed briefs in opposition arguing that the plaintiff had not established good cause to obtain an

extension because this was a refiled case, the initial lawsuit was voluntarily dismissed after plaintiff had been granted a 90-day extension to file an affidavit of merit, plaintiff had waited 365 days to refile the case under the saving statute, and the plaintiff remained unable to produce the required affidavit of merit. One of the defendant doctors also requested in his opposition brief that the court dismiss the complaint for failure to comply with Civ.R. 10(D)(2), but no motion to dismiss pursuant to Civ.R. 12(B)(6) was filed by any party.

Civ.R. 10(D)(2) requires any complaint that contains a medical claim to be accompanied by an affidavit of merit. The purpose of Civ.R. 10(D)(2) is to deter the filing of frivolous medical malpractice claims. Further, Civ.R. 10(D)(2)(b) permits a plaintiff to file a motion to extend the period of time to file an affidavit of merit, which the court shall grant for good cause shown and in accordance with Civ.R. 10(D)(2)(c).

The trial court issued an entry denying plaintiff's motion for extension of time to file an affidavit of merit for failure to show good cause. Simultaneously, and without notice, the trial court also issued an entry dismissing the case for failure to state a claim upon which relief can be granted.

The Eighth District, while recognizing that a court is allowed to grant *sua sponte* a Civ.R. 12(B)(6) motion to dismiss, found that the trial court erred by dismissing the plaintiff administrator's claim without adequate notice and opportunity to respond. The appellate court said that upon determining that plaintiff had not sufficiently demonstrated good cause, the trial court should have provided the plaintiff with notice that the case would be dismissed if he/she failed to file an affidavit of merit, or failed to provide supplemental information to demonstrate good cause for extension.

<u>Norman v. Tri-Arch, Inc.,</u> 9th Dist. No. 18CA011295, 2018-Ohio-5270 (Dec. 28, 2019).

Disposition: Reversing summary judgment is a slip-and-fall on wet floor case.

Topics: Genuine issue of material fact as to whether wet flooring was open and obvious from the plaintiff's perspective, and as to whether notice provided was adequate.

Jasmine Norman bought coffee at the Defendant's McDonald's restaurant drive-through, but was asked to pull up to a designated area to wait. While waiting, she decided to use the restroom inside. She walked into the restroom and did not observe any mopping or wet floor signs. On her way out of the restroom while walking toward the door, she slipped and fell on the wet floor and was injured.

Tri-Arch moved for summary judgment on the basis that water on the floor was an open and obvious hazard. Moreover, Tri-Arch argued that it displayed adequate warning of the danger by placing caution signs throughout the restaurant. Tri-Arch produced a video of the fall and argued that it confirmed the open and obvious nature of the hazard. The trial court agreed and granted summary judgment.

On appeal, Ms. Norman argued that while she was exiting the restroom, she was not able to observe the wet floor. The video was not of good quality and was not dispositive of the issue. The video was also not taken from her vantage point at the time of the fall.

The Ninth District Court of Appeals found there were genuine issues of material fact as to the open and obvious nature of the wet flooring from the plaintiff's perspective. Further, the court confirmed that the adequacy of the warning(s) provided by Tri-Arch presented a question of fact for the jury to determine. Summary judgment was reversed and the case remanded for further proceedings.

<u>Embassy Healthcare v. Bell,</u> ___Ohio St.3d___, 2018-Ohio-4912 (Dec. 12, 2018).

Disposition: Reversing the Twelfth District Court of Appeals; holding that a creditor was required to present its claims for unpaid necessaries to the decedent's estate before it could pursue a claim individually against the surviving spouse.

Topics: The Necessaries Doctrine, R.C. § 3101.03; Presentation of creditors' claims against a decedent's estate, R.C. § 2117.06.

The plaintiff, a nursing home facility, entered into an admission agreement with the defendant's decedent under which the facility agreed to provide him with certain goods and services. Six months and three days after the decedent's death, the plaintiff sent his widow, the defendant, a notice that it was seeking payment from the decedent's estate for an outstanding balance.

As of six months after the husband's death, no estate had been opened for him nor did the nursing home seek to have an estate administrator appointed for the purpose of presenting a claim for unpaid services to the husband's estate. The nursing home filed a complaint in municipal court against the wife of the

decedent seeking payment from her for the decedent's unpaid expenses under R.C. § 3103.03, Ohio's necessaries statute.

The defendant moved for summary judgment on two grounds. She argued that the nursing home could not prove one of the elements of its claim under R.C. § 3103.03 and that the six-month statute of limitations period in R.C. § 2117.06 for presenting claims to a decedent's estate barred the nursing home's claims.

The magistrate granted summary judgment for the defendant based on the first argument: that the nursing home was missing the element of evidence that decedent or any estate left by him could not pay for nursing home's services, a prerequisite for a § 3101.03 claim.

The nursing home filed objections to the magistrate's decision. The trial court overruled the objections and granted summary judgment in favor of the defendant widow, but for a different reason than the magistrate. The trial court concluded that the decedent's debt became a debt of his estate by operation of law and that his widow was not jointly and severally liable for her husband's obligation. Therefore, the nursing home was required to seek payment from the estate under R.C. § 2117.06 *before* pursuing a claim against the widow under R.C. § 3103.03. Since the nursing home failed to present its claim to the estate within the six-month limitations period in R.C. § 2117.06, it was time-barred.

On appeal, a divided panel of the Twelfth District reversed, holding that R.C.§ 3101.03 creates claims against a debtor's spouse that can be pursued independently from a claim against the estate under R.C. § 2117.06.

The Ohio Supreme Court reversed the Twelfth District's judgment. The Court analyzed the interplay between R.C. § 3101.03 and R.C. § 2117.06 and determined that the nursing home was required to present its claims for unpaid necessaries to the decedent's estate under R.C. § 2117.06 before it could pursue a claim individually against the surviving spouse under R.C. § 3103.03. Since the nursing home failed to do so or to seek appointment of an administrator within six months of decedent's death, the defendant widow was entitled to summary judgment.

Justice DeWine authored a dissenting opinion, contending that a plain reading of R.C. § 3103.03 does not require a claim for necessaries to always first be presented to a decedent's estate, nor does R.C. § 2117.06 mandate that in all cases, creditors seek payment from an estate. ■

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Verdict Spotlight:

$185,000 Verdict in MVA For Herniated Cervical and Lumbar Discs

The property damage photos the trial court admitted over plaintiff's objections showed little to no visible damage. The plaintiff had extended gaps in his medical treatment. The defense's main theme throughout the trial was that this was an "incredibly minor" collision and the plaintiff's problems were pre-existing.

Nevertheless, the jury returned a $185,000 verdict for this 31 year old teacher who suffered herniated cervical and lumbar discs. Plaintiff's counsel, Michael Goldstein, attributes the result to his client being an exceptional witness. It's not hard to imagine, however, that Goldstein's own efforts played no small role in this verdict.

Michael D. Goldstein

The incident occurred in April of 2015. The plaintiff, Michael Salwiesz, driving his 2012 Chevrolet Equinox, was stopped on Shaker Boulevard at Shaker Square when his vehicle was rear-ended by a 2000 Chevrolet Malibu driven by Daniel Krabach. Michael testified to a hard jolting impact, while Krabach claimed he rear-ended Michael at a low speed as he started forward from a complete stop. The photographs of the vehicles showed little to no property damage. The defendant's vehicle appeared to have "submarined" Michael's vehicle, causing the majority of the impact to be absorbed by the trailer hitch.

Liability was not disputed, so the trial centered around causation and damages.

Plaintiff's motion *in limine* to exclude the property damage photos was denied. At trial, Michael testified to the vehicle damage and repair estimates – $838 for replacement of the trailer hitch – and that he believed the hardened steel trailer hitch absorbed the force of the impact. The defense did not object to Michael's opinion testimony, and indeed argued that the significance of the vehicle damage was within the common knowledge of the jury. The defense presented evidence of $1,676 damage to Krabach's vehicle.

Michael testified to an immediate onset of pain in his neck and back, but his first medical treatment was not until one week after the crash when he saw his primary care physician. She sent him for an MRI which was conducted one week later and which revealed 3 cervical herniations (C4 through C7) and 2 lumbar herniations (L4-L5, L5-S1). Michael had one additional follow-up with his PCP in May and was sent for physical therapy. He underwent 12 appointments from June through August 2015 and was discharged with improving complaints.

His next medical treatment was not until May of 2017, after a gap of 20+ months. Michael explained that his symptoms continued, and he religiously performed his home exercises, but believed the only other treatment option was surgery. Rather than undergoing such invasive treatment, he limited his activities and tried to cope with the ongoing pain. Ultimately, however, when the pain became unbearable, he went to a chiropractor who referred him to neurosurgeon Peter Fragatos, MD for pain management. Dr. Fragatos performed 2 each of cervical and lumbar epidural injections between October 2017 and February 2018.

Michael's total bills for all of his medical treatment were $22,246, with write-offs reducing them to $17,865.56.

Dr. Fragatos testified the herniations were all related to the crash, based on Michael's lack of prior symptoms and the visual condition of the discs on the MRI. Dr. Fragatos testified that

MIchael Salwiesz hiking, pre-accident.

the amount of damage to the vehicles did not really matter; what mattered was the flexion/extension of the disc(s). He also testified that Michael would require future surgery, costing $120,000 to $150,000.

Defense expert, Manuel Martinez, MD, disagreed that Michael's herniations were related to the crash. He was adamant that visual evidence on the MRIs (darkened disc color) showed degeneration and lack of water content. He opined that Michael suffered strains and temporary irritation of degenerative disc disease, which typically returns to pre-injury state within 4-8 weeks. Dr. Martinez did agree that herniations are permanent injuries, that Michael's sprain and aggravation were related to the MVA, and that the treatment Michael received was all necessary as the result of the injuries.

Both doctors testified the amount of vehicle damage does not determine the extent of injury, although significant damage would make significant injury more likely.

The jury got to know Michael through his testimony, and he proved to be an exceptional witness. He has earned two Masters' degrees (from the University of Michigan and the University of Nevada, Las Vegas), a Doctorate from CWRU, and an MBA from Ohio State. He is currently a principal at a Cleveland Charter School and has focused his career as an educator on at-risk students and urban schools. At trial, his high school friend testified glowingly as to his character and pre-accident activity level, as did his ex-girlfriend whom he was dating at the time of the crash.

Michael testified that, prior to the crash, he was in softball leagues, ran in organized races, and was an avid golfer, skier, and tennis player. He had traveled extensively, backpacking through Europe and South America. After the crash he could not return to any of these activities. Blown-up photographs of him playing sports, and of his travels and backpacking, made for effective demonstrative evidence.

Despite his background, the defense attacked his credibility. As with any low property damage case, the defense argued that only minor injuries could have resulted, so anything to the contrary is untrue. These personal attacks had the opposite effect of what the defense intended, and caused the jury to want to help and protect Michael's future.

The defendant was insured by State Farm. The final pretrial offer was $15,000. On the day of the trial, during voir dire, the defense raised its offer to $30,000. Plaintiff's demand was $50,000. The trial lasted 3 days. The defense asked the jury to award $2,200 for the initial treatment and a total award of up to $4,000.

The jury returned its verdict – signed by 7 of the 8 jurors – after 2 hours of deliberations. The verdict included past medical bills of $17,865; past non-economic damages of $42,135; and future pain and suffering of $120,000. The jury did not award future medical expenses for surgery.

The case was tried before Visiting Judge Harry Hanna. It is captioned *Michael Salwiesz v. Daniel Krabach*, Cuyahoga County Case No. CV17878539. ■

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: ____________________

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Experts for Plaintiff(s): ____________________

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Experts for Defendant(s): ____________________

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RETURN FORM TO:

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CATA Verdicts & Settlements

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

John Doe v. ABC Trucking Co., Inc.

Type of Case: Truck Crash

Settlement: $250,000.00

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

Defendant's Counsel: Withheld

Court: Pre-Suit Settlement

Date Of Settlement: April 11, 2019

Insurance Company: Withheld

Damages: Fractured foot and bone bruises

Summary: Intermodal semi tractor trailer collision with the front of a passenger bus. Plaintiff incurred approximately $60,000 in medical bills following the crash.

Jane Doe v. ABC Trucking Co.

Type of Case: Truck v. Auto

Settlement: $1,250,000.00

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

Defendant's Counsel: *

Court: Lorain County Common Pleas Court, Judge Mark Betleski

Date Of Settlement: February 25, 2019

Insurance Company: Motorist Mutual

Damages: Fractures of bilateral knees, left ankle, right humerus and multiple ribs

Summary: 57-year-old unemployed female driving her compact car unrestrained was struck by a commercial pick up truck left of center. Issues were nature and extent of future care and whether wearing her seat belt would have prevented or substantially reduced her injuries.

Plaintiff's Expert: Brendan Patterson, M.D.; Maryanne Cline, R.N.; John F. Burke, Jr., Ph.D.; Henry Lipian

Defendant's Expert: Brian Davison, M.D.; Galit Askenazi, Ph.D.; Pam Hanigosky, R.N.; David Boyd, Ph.D.; Douglas Morr, P.E.

Estate of Robert Richardson v. Montgomery County Sheriff's Office, et al.

Type of Case: In-Custody Death, Constitutional Rights Violations

Settlement: $4,000,000.00

Plaintiff's Counsel: Nicholas A. DiCello, Jeremy A. Tor, Kevin Hulick, Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue, Suite 1700, Cleveland, Ohio 44114, (216) 696-3232

Defendants' Counsel: Paul Krepps of Marshall Dennehey, Pittsburgh; Robert Hojnoski, Carrie Starts of Reminger, Cincinnati

Court: United States District Court, Southern District Of Ohio, Western Division at Dayton, Case No. 3:14-cv-158. Magistrate Judge Michael Newman by consent

Date Of Settlement: January 2019

Insurance Company: Catlin Insurance Company, Ltd.

Damages: Death, excessive force, constitutional violations

Summary: In 2012, 28-year-old Robert Richardson was

detained at the Montgomery County Jail in Dayton, Ohio for failure to appear at juvenile court proceedings. On the second day of his detention he suffered a medical episode to which corrections officers and medical personnel responded. Corrections staff cuffed Robert behind his back and held him on the ground in a prone position over the course of approximately 22 minutes until Robert was noticed to have stopped breathing. Efforts to revive Robert were unsuccessful and he was declared deceased at the Jail. Plaintiff alleged claims for excessive force and deliberate indifference to serious medical needs under the Fourteenth Amendment, assault and battery, and wrongful death, as well as *Monell* claims alleging unconstitutional customs, policies, procedures, inadequate training, and an inadequate investigation. Plaintiff claimed Robert died from restraint/positional asphyxiation when he was forcibly restrained in a prone position. Defendants claimed Robert was combative and needed to be restrained for his own safety and for safety and security purposes at the Jail. Defendants denied that Robert was restrained in a dangerous manner and denied that prone restraint was lethal. Defendants denied Robert died from restraint asphyxiation, arguing instead, with the support of the county coroner, that Robert died from preexisting coronary artery and hypertensive heart disease, obesity, and marijuana toxicity. Plaintiff defeated Defendants' claims for qualified immunity at the district court and appellate court levels, resulting in a published Sixth Circuit opinion addressing a detainee's clearly established 14th Amendment rights in the context of prone restraint, and defeated a petition for writ of certiorari filed in the United States Supreme Court. The case settled in the weeks leading up to trial.

Plaintiff's Experts: Dan Spitz, M.D. (Forensic Pathology); Arnold Leff, M.D. (Internal Medicine, Jail Medical Standards, Restraint Asphyxia); Lori Roscoe, Ph.D. (Jail Nursing Standards); Michael Berg (Use of Force, Jail Administration); Burke Rosen (Economist)

Defendants' Experts: Bryan Casto, D.O. (Forensic Pathology); Sam Faulkner (Use of Force); Nathaniel Evans, M.D. (Internal Medicine, Jail Medical Standards); Sue Medley-Lane, R.N. (Jail Nursing Standards)

Cordill v. Klinesmith

Type of Case: Motor Vehicle - Pedestrian

Settlement: Confidential

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

Defendant's Counsel: Withheld

Court: Portage County Common Pleas Court

Date Of Settlement: December 2018

Insurance Company: Withheld

Damages: Catastrophic injuries including TBI to pedestrian struck by motorist at shopping center.

Summary: Plaintiff was holiday shopping and after exiting a department store, was struck by an intoxicated motorist.

Plaintiff's Experts: Treating Physicians

Estate of James Smith v. ABC Trucking Co.
Estate of Jane Smith v. ABC Trucking Co.

Type of Case: Wrongful Death and Catastrophic Injury - Trucking

Settlement: Confidential

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

Defendant's Counsel: Cook County, Chicago, Illinois

Court: Withheld

Date Of Settlement: December 2018

Insurance Company: Withheld

Damages: Wrongful death of engineer survived by wife and three children; catastrophic injuries to wife.

Summary: Husband and wife traveling on Interstate 94 through Chicago, Illinois when struck by tractor-trailer while slowing for traffic.

Plaintiffs' Experts: John M. Goebelbecker, P.E., CEP, (Accident Reconstruction); Harvey S. Rosen, Ph.D.

Jane Doe v. ABC Hospital

Type of Case: Medical Negligence

Settlement: $1,900,000.00

Plaintiff's Counsel: John Lancione, Jack Landskroner, The Lancione Law Firm, (440) 331-6100

Defendant's Counsel: N/A - Pre Suit Settlement

Court: N/A

Date Of Settlement: December 2018

Insurance Company: N/A

Damages: Kidney damage, hemodialysis, kidney transplant list

Summary: Plaintiff had total abdominal hysterectomy for uterine cancer. Ureteral stents were placed to protect the ureters. The patient was never told to have the stents removed. Four years later she suffered kidney failure due to the retained stents.

Plaintiff's Expert: Steven Weisbord, M.D. (Nephrologist)

Defendant's Expert: None

Fiduciary of Estates of Suzanne Fleming and John R. Fleming v. Maverick Air

Type of Case: Aviation - Wrongful Death

Settlement: Confidential

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

Defendant's Counsel: Withheld

Court: Cuyahoga County, Ohio

Date Of Settlement: December 2018

Insurance Company: Withheld

Damages: Wrongful death of wife/mother and her two children. Survived by parents and siblings

Summary: Cessna Citation CJ4 jet crashed into Lake Erie shortly after take off.

Plaintiff's Experts: Marc Fruchter (Piloting); Al Fiedler (Accident Reconstruction); Dennis Handley (Airframe/ Power Plant)

John Doe v. ABC Landlord, et al.

Type of Case: MVA and Premises Liability

Settlement: $1,650,000.00

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

Defendants' Counsel: Tom Mazanec, Gregory Feldkamp, Sean Kenneally, Grant Mason, Randall Traub, Michael Reardon

Court: Lorain County Common Pleas Court

Date Of Settlement: December 2018

Insurance Company: Western Reserve Mutual; Capitol Specialty Insurance; GEICO

Damages: Amputation right leg; fracture left leg, right humerus.

Summary: A bar/restaurant was established as an LLC with John Doe as it's CEO. John Doe was also the CEO of another LLC that owned the land and was landlord to the bar/restaurant. The property on which the bar sat was at the corner of 2 state routes. The ODOT right of way extended beyond the paved portion of one of the state routes up to the edge of the building of the bar. ODOT required the bar to post "no parking" signs in the right of way. There was some evidence that the manager of the bar had been designated by John Doe to act as agent for the landlord in all matters of compliance with ODOT's rules and regulations.

Our client was employed by the bar/restaurant as a server. The bar manager and the chef decided to move its Food Truck into the ODOT right of way to be cleaned using the water spigot and hose attached to the bar. Our client was instructed to participate in cleaning the truck. He was standing at the rear of the Food Truck when a pick-up truck failed to see stopped traffic ahead and veered into the ODOT right of way. Plaintiff was pinned between both bumpers severing his right leg, fracturing his left lower leg and right humerus. A second vehicle also swerved off the road into the rear of the pick-up causing second collision.

The primary dispute involved 1) whether the landlord had exercised sufficient control over the premises and activity which led to plaintiff's injury to be liable – or whether it was truly a landlord out of possession who had signed an arms length "net-net lease", and 2) whether, as a matter of law, the errant vehicles were an intervening superseding cause of plaintiff's injuries. The court overruled the landlord's motion for summary judgment holding that these were questions of fact for the jury. The parties settled the matter with the court's assistance after an unsuccessful mediation.

Plaintiff's Experts: Patrick Altvater, P.E.; John Sontich,M.D.

Defendants' Expert: *

Doris Varner v. Marianne Guy

Type of Case: Motor Vehicle v. Pedestrian

Settlement: $214,415.00

Plaintiff's Counsel: Dana M. Paris, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5201

Defendant's Counsel: Presuit

Court: Presuit

Date Of Settlement: November 29, 2018

Insurance Company: Allstate

Damages: *

Summary: Plaintiff sustained bilateral wrist fractures after being struck by a motor vehicle in a parking lot.

Plaintiff's Expert: *

Defendant's Expert: *

Estate of John Doe v. ABC Nursing Home

Type of Case: Nursing Home Neglect

Settlement: $325,000

Plaintiff's Counsel: Allen Tittle, Scott Perlmuter, Tittle & Perlmuter, (216) 285-9991

Defendant's Counsel: *

Court: *

Date Of Settlement: September 2018

Insurance Company: *

Damages: Wrongful death

Summary: Elderly nursing home resident had an acute change of condition -- he was vomiting, had a fever, and low oxygen saturation level. The aide made repeated requests for the nurse on duty to assess the resident, but she refused over a three hour time frame. Eventually, when the nurse went to assess the patient, he was without a pulse. The resident was later pronounced dead at the hospital.

Plaintiff's Expert: Dr. Mark Shoag

Defendant's Expert: *

Estate of John Doe v. ABC Hospital

Type of Case: Medical Malpractice

Settlement: $627,500.00

Plaintiff's Counsel: Allen Tittle, Scott Perlmuter, Tittle & Perlmuter, (216) 285-9991

Defendant's Counsel: *

Court: *

Date Of Settlement: August 2018

Insurance Company: *

Damages: Wrongful death

Summary: Elderly man with a long history of mental illness was hospitalized for an exacerbation of his schizophrenia. Despite being a known fall risk, he was allowed to wander the halls unsupervised leading to a fall and neck fracture. Several months later, he died while in hospice. A secondary issue was whether the consent to enter into hospice was valid.

Plaintiff's Experts: Dr. Daniel Swagerty; Jean Acevedo; Jodie Lynch, R.N.

Defendant's Expert: *

Fiduciary of Estate of David Hartman v. Embraer, et al.

Type of Case: Aviation - Wrongful Death

Settlement: Confidential

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

Defendant's Counsel: Withheld

Court: Circuit Court, Broward County, Florida

Date Of Settlement: July 2018

Insurance Company: Withheld

Damages: Ph.D./Husband survived by wife and two children.

Summary: Embraer Phenom Jet aircraft crashed on approach to Montgomery County Airport near Gaithersburg, Maryland.

Plaintiff's Experts: John Cane (Accident Reconstruction); Mark Fruchter (Piloting); John Bloomfield (Avionics/Engineering)

Estate of James Roe v. XYZ Airplane Co.

Type of Case: Aviation - Wrongful Death

Settlement: Confidential

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

Defendant's Counsel: Withheld

Court: Withheld

Date Of Settlement: January 2018

Insurance Company: Withheld

Damages: Wrongful death of surgeon survived by wife and two children

Summary: Crash of a Beechcraft Bonanza while maneuvering to land near Charlottesville, Virginia.

Plaintiff's Experts: Lee Coffman (Aircraft Engines); Al Fiedler (Accident Reconstruction)

Kyle Hamlin, Admr. v. Ohio Department of Rehabilitation and Correction

Type of Case: Jail Death

Verdict: $350,000.00

Plaintiff's Counsel: Scott Perlmuter, Tittle & Perlmuter, (216) 285-9991; Mark Petroff, Petroff & Associates

Defendant's Counsel: Eric Walker

Court: Court of Claims Case No. 2014-00765JD, Judge Patrick McGrath

Date Of Settlement: November 2017

Insurance Company: *

Damages: Wrongful death

Summary: Serial killer was moved from a max security prison to a minimum security facility in violation of ODR's own policies as the inmate had attempted to murder a number of inmates previously. Once in the minimum security facility he murdered Brad Hamlin, a nonviolent offender imprisoned due to drug charges.

Plaintiff's Expert: Eugene Miller

Defendant's Expert: N/A ■

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2019 CATA LAW STUDENT WRITING COMPETITION ANNOUNCEMENT

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The 2019 competition will be open from August, 2019 (beginning of law school year) to September 30, 2019.

It is one of CATA's ongoing objectives to support and connect with our local law schools and expose law students to CATA's mission. To that end, the competition is open to all full and part-time students enrolled in a JD program during the 2019-2020 academic year at either Cleveland-Marshall College of Law or Case Western Reserve University School of Law.

FIRST PRIZE: $1,500.00
SECOND PRIZE: $1,000.00

At the sole discretion of CATA, one or more of the winning essays may be published in a future issue of the *CATA News*.

The 2019 Topic: The Seventh Amendment and the Ohio state constitution require that the right to a civil jury trial be "preserved" and "remain inviolate", yet the number of civil jury trials is at an all-time low in our state. Is the right to civil jury trial still important in modern society? Why or why not?

Each contestant will submit two documents to Essay@clevelandtrialattorneys.org:

1. The Submission Form in .pdf format, and
2. The contestant's essay in Word format.

Please refer to the 2019 CATA Law Student Writing Competition Rules available for review at https://clevelandtrialattorneys.org for any questions.

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 Ladi Williams, Esq., *Treasurer*
Landskroner Grieco Merriman, LLC
1360 W. 9th St., #200, Cleveland, OH 44113
P: 216-487-7532

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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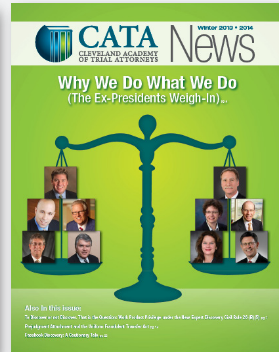
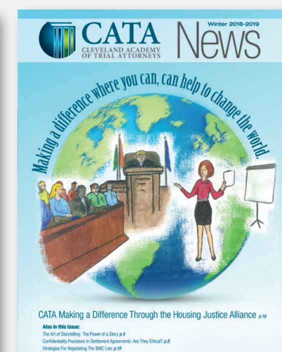
To view past issues, please go to:

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





CATA 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114-2654

Spring 2019

Tom Stockett is a Certified Structured Settlement Consultant with over 20 years of industry experience. His extensive knowledge of structured settlements, government benefits and litigation makes Tom one of the most trusted experts to take on any case, regardless of complexity.

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