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Spring 2020
News

President's Message: Pandemic Blues

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Cover design by Joanna Eustache

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President's Message: Pandemic Blues

by William B. Eadie

We live in uniquely uncertain times.

As the COVID 19 pandemic unfolds... businesses shut down, courts close, and we all learn to use the cloud from a home office. Whether we like it or not.

Unemployment claim rates set records, then break them in a week.

We watch as government leaders are variously inept and bumbling, or competent and inspirational.

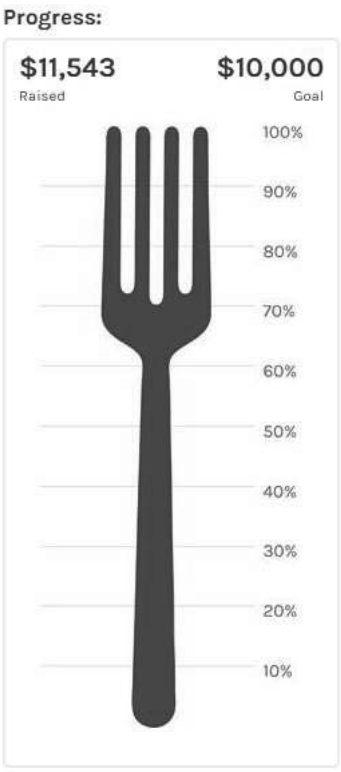
We learn what working from home is really like, or if we already worked from home, we watch as everyone else struggles.

During these uncertain times, we know one thing is certain: defendants and their representatives will use this as an opportunity to delay, delay, delay.

Luckily, we're nimbler than the behemoths, and therein lies our strength.

The disruption of our practice, our very industry, is an opportunity.

An opportunity to push for resolution and get those demands out.



In a time of uncertainty, CATA members stepped up to help others. That's what we do.

An opportunity to tee up those cases to hit the ground running when courts reopen.

An opportunity to pivot to leaner, cloud- and virtual-solutions. Efficiencies you can continue to embrace after things reopen.

An opportunity to push the paper discovery and alternative avenues to investigate when depositions are (mostly) on hold.

An opportunity to embrace Zoom and other video conference solutions to take and facilitate expert depositions. Which, when the pandemic is over, will still be radically more cost effective.

An opportunity to pivot to virtual mediations.

An opportunity to lead the way publicly and in social media in making positive contributions.

Let's remember that we're the leaner, more agile of the sides of the "v," not beholden to the billable hour. We can work smarter, not harder. As everyone else slows down and feeds on the opportunity to get by doing less, this is our opportunity to lay the groundwork for the future.

On that positive front, I'm proud of our board looking outward to support the Food Bank by matching donations—and our members for already blowing past the $10,000 goal. Sometimes small acts of kindness make all the difference. (A special thanks to Meghan Connolly for stepping up to coordinate and execute on this process.)

Let's continue to inspire each other, share with each other, and lead to a leaner practice that is, in reality, a chance to be more effective in the long run. No better place than our list serve. Share what you are struggling with, what you've learned, and your colleagues will share, too.

We've always been scrappy, representing the underdog. This is a time that demands—and may reward—that same scrappiness. ■

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Harrison v. Harris: The Long Journey to Justice

by Pamela Pantages

Where It All Began

When I was a brand new defense lawyer, the senior partner at my firm, Aaron Jacobson, said, "Kid, always remember this. Good cases get better. Bad cases get worse."

This is the case of Matthew Harrison versus Andre Harris, M.D.[1] Dr. Harris negligently managed Matthew's birth, and as a result, Matthew suffered a permanent brachial plexus injury. Dr. Harris's malpractice insurance policy through The Doctors Company (TDC) only covered Dr. Harris up to $1 million. Yet, true to Aaron Jacobson's words, Matthew's good case kept getting better, and TDC ultimately paid Matthew Harrison and his mother $2,877,016.97, nearly three times Dr. Harris's policy limits.

This is the story of how that came to be.

Statement of the Facts

Andre T. Harris, M.D. completed his residency training on June 30, 2006 and opened his solo practice in Dayton, Ohio on July 5, 2006. Matthew's mother, Maurita Henry, started her prenatal care with Dr. Harris on July 10, 2006. Her due date was February 11, 2007. Dr. Harris had few deliveries in the six months between opening his new office and Matthew's birth because, like Maurita, most of his new patients were early in their pregnancies.

At 4:00 p.m. on February 8, 2007, Dr. Harris admitted Maurita to Miami Valley Hospital for "expectant labor management." He artificially ruptured her bag of waters and gave her Pitocin to move her labor along. Maurita was completely dilated and began pushing at 1:20 a.m. on February 9. At 1:39 a.m., Dr. Harris started using a Mityvac vacuum extractor to further labor along. According to his documentation, the vacuum popped off five times over the course of ten pulls.

Dr. Harris recognized a shoulder dystocia immediately after delivering Matthew's head with the vacuum. He ordered McRobert's maneuver and suprapubic pressure, and used traction and delivery of Matthew's posterior arm to overcome the dystocia. Total head to body time was two minutes. The official time of Matthew's birth was 2:06 a.m. His birthweight was 8 pounds, 6 ounces (3910 grams).

The newborn nursery records described Matthew as floppy, pale and blue with no respiratory effort. He was immediately intubated. Apgar scores were 1, 3 and 6. Not long after birth, Matthew was described as having a flail right arm. He was diagnosed with a right brachial plexus injury, and at two weeks of age, began his long road of treatment at the Cincinnati Children's Hospital Brachial Plexus Clinic.

On April 17, 2007, at nine weeks of age, Matthew underwent electromyography (EMG) that was consistent with a "probable" C5 root avulsion and possible C6 avulsion. At 22 months of age, Matthew underwent a nerve transfer surgery due to deteriorating shoulder function.

Matthew continues to follow with the Cincinnati team. His brachial plexus injury is permanent and has resulted in disability and disfigurement, including a five-inch length discrepancy between his injured and uninjured arms.

The Litigation

Dr. Harris's Co-existing Lawsuits

On August 26, 2013, Maurita and Matthew's previous lawyer filed a lawsuit in Montgomery County Common Pleas Court. *Harrison v. Harris* would prove to be rife with unexpected twists and turns, and one such twist occurred three months before Dr. Harris was served with the complaint. On May 30, 2013, Dr. Harris delivered a baby named Symphony Oberry in

factual circumstances nearly identical to Matthew's: multiple pulls with a vacuum extractor, a shoulder dystocia, and the birth of a baby with a permanent brachial plexus injury.

In September 2013, Dr. Harris's lawyers entered their appearances in Matthew's case, and preliminary discovery got underway. On March 2, 2015, Matthew's previous lawyer voluntarily dismissed the lawsuit against Dr. Harris, and returned the file to Maurita.

Maurita persisted. She hired another lawyer (the author of this paper). In the meantime, Symphony's mother had hired an out-of-state lawyer who, coincidentally, retained Matthew's new lawyer as his local counsel. Dr. Harris was served with Symphony's lawsuit on June 14, 2016, and Matthew's re-filed lawsuit on December 2, 2016. The same defense lawyer represented Dr. Harris in both cases.

The Harrison Liability Experts

Plaintiffs identified obstetrician Marc Engelbert, M.D. and pediatric neurologist Daniel Adler, M.D. as their liability experts. Dr. Harris identified perinatologist Frank Manning, M.D. and pediatric neurologist Michael Noetzel, M.D. as the defense liability experts. What emerged over the course of their discovery depositions was that these four doctors agreed on two key points.

The "Three Pop-Off" Rule

According to the Mityvac manufacturer's recommendation, an obstetrician should abandon the vacuum and deliver by cesarean after three pop-offs. Dr. Engelbert and Dr. Manning agreed that the obstetric standard of care permitted only three pop-offs, and an obstetrician who exceeded that rule was committing malpractice.

Maurita's medical records clearly documented pop-offs outside the standard of care:

The hospital's instrument delivery check list:

OPERATIVE VAGINAL DELIVERY REPORT

DATE 2/9/07 | TIME 0206 | DELIVERY ☐ Singleton

VACUUM EXTRACTOR
☑ MityVac, M-Cup (Mushroom-shaped)
☐ MityVac, Polyethylene (Bell-shaped)
☐ Columbia Medical Cup
☐ Other, specify:

EASE OF APPLICATION
☑ Easy
☐ Mildly difficult
☐ Moderately difficult
☐ Very difficult

POP-OFFS
☐ 0 ☐ 1 ☐ 2 ☐ 3 ☑ >3

VACUUM TIME (Minutes) 23

EASE OF DELIVERY
☐ Easy
☐ Mildly difficult
☑ Moderately difficult
☐ Very difficult

NUMBER OF FORCEPS OR VACUUM PULLS
☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ >4, specify:

The hospital's labor and delivery summary:

Baby A
Delivery Information

Delivery Date: 02/09/07 02:06 EST
Method of Delivery: Vaginal
Born en Route: No
VBAC: N/A
Forceps: N/A
Vacuum Extraction: Successful
Vacuum Extract No. Pulls: 10
Vacuum No. of Pop-Offs: 5

Dr. Harris's dictated report of the delivery:

PROCEDURE DATE
02/09/2007

SURGEON
Andre Harris, MD*

total of 20 minutes of intermittent pulling for the vacuum. There were five pop-off throughout the delivery process. Once the baby's head was delivered, shoulder dystocia was quickly noted. McRoberts' position was

Dr. Harris's signature appeared on each of these entries documenting pop-offs in excess of the standard of care. So how did he have any defense?

At his deposition on August 8, 2014, Dr. Harris took the position that the "three pop-off" rule only applied to "true" pop-offs, and that two of the five pop-offs in Matthew's delivery didn't count because they weren't "true" pop-offs. Not only was Dr. Harris's testimony contrary to unambiguous medical records, it was based upon a memory of events seven years prior.

Dr. Manning gave Dr. Harris the benefit of the doubt on his "true pop-off" theory, but conceded that if the jury believed the medical records over Dr. Harris, five pop-offs were indeed below the standard of care. Dr. Manning further conceded that Matthew's injury likely occurred during the shoulder dystocia, which would have been avoided entirely if Dr. Harris had delivered Matthew by cesarean after the third pop-off.

The "Avulsion" Rule

The second key area of agreement between all of the liability experts was that avulsions do not occur in healthy babies in the absence of excessive traction by the obstetrician. According to the EMG done when Matthew was two months old, "nerve conduction studies demonstrated evidence of demyelination in the median sensory and motor fibers... consistent with a right brachial plexus injury involving the upper trunk and probable C5 root avulsion." When they were retained as plaintiff experts in other shoulder dystocia cases, Dr. Manning and Dr. Noetzel had previously testified that avulsions in healthy babies had no plausible explanation other than OB-applied traction.

In defending Dr. Harris, Dr. Manning and Dr. Noetzel relied on his denial of excessive traction to conclude that something other than Dr. Harris caused Matthew's injury. Additionally,

Dr. Noetzel, without personally examining Matthew, testified that Matthew's improved functional recovery was inconsistent with an avulsion. Dr. Manning and Dr. Noetzel conceded, however, that if the EMG report was true regarding the probable avulsion at C5, Dr. Harris likely caused Matthew's injury.

Dr. Adler, the plaintiffs' pediatric neurology expert and himself specially trained in electromyography, testified that EMGs were objective and reliable means of identifying nerve injuries. Dr. Adler's causation opinions were based on the multiple examinations of Matthew over the years by the brachial plexus team at Cincinnati Children's Hospital. At each exam, the team assigned a numerical value to each element of Matthew's active range of motion in his right shoulder, upper arm, elbow, forearm, wrist, hand and fingers. Over time, the functional data below Matthew's shoulder showed consistent improvement in his arm function, but the functional data from the shoulder itself did not. Rather, the data showed Matthew's persistently poor shoulder abduction/adduction function. Dr. Adler examined Matthew and his clinical observations were consistent with the Cincinnati team's.

At his deposition, Dr. Adler testified that some brachial plexus injuries are exquisitely responsive to surgical reconstruction and physical therapy, but that avulsion injuries are responsive to neither. Dr. Adler described the role the C5 nerve root played in shoulder function - namely, adduction and abduction. Matthew's stubborn lack of improvement in shoulder adduction and abduction, despite surgery and therapy, was objective evidence of a C5 avulsion, and corroborated the equally objective EMG findings.

Thus, the plaintiffs' explanation of how Dr. Harris's negligence caused Matthew's injury was based on objective evidence generated contemporaneously with the events at issue. On the other hand, Dr. Harris's theory of causation depended on multiple medical records being wrong, and on opinions he developed seven years after Matthew's birth while he was a defendant in a lawsuit.

Plaintiffs' Attempts At Settlement

After completion of discovery and a few weeks before trial, plaintiffs' counsel sent Dr. Harris's lawyer a demand letter, identifying the inconsistencies between Dr. Harris's defenses and the case's objective facts. Pointing to those inconsistencies as well as the five-inch difference between the lengths of Matthew's right and left arms, Matthew's lawyer cautioned that a jury verdict in Matthew's favor could exceed "an amount well beyond $2 million, a conservative estimate of his economic losses." Plaintiffs' counsel offered to settle the case within Dr. Harris's $1 million policy limits, and warned Dr. Harris's lawyer that his client's personal assets were at risk, given the evidence and TDC's limited insurance coverage. TDC responded to the demand letter with a zero offer.

Trial

Prior to the trial beginning on January 23, 2018, assigned Judge Mary Wiseman granted Dr. Harris's motion to exclude evidence of Symphony Oberry's brachial plexus injury and lawsuit, but permitted the plaintiffs to use Dr. Harris's deposition from the *Oberry* case for impeachment, as long as they did not disclose the name of the case or that Dr. Harris was the defendant.

During the plaintiffs' case in chief, Maurita testified about Dr. Harris and the delivery, and about Matthew's injury. She also introduced Matthew to the judge and jury during his brief courtroom appearance. In addition to Dr. Engelbert and Dr. Adler, plaintiffs also called a life care planner, a vocational expert and an economist. The defense's case in chief included Dr. Harris, Dr. Manning, Dr. Noetzel and Michelle Grimm, who all testified that the medical records were wrong regarding the number of vacuum pop-offs and the probable C5 avulsion, and that something other than Dr. Harris caused Matthew's injury.

On January 31, 2018, after four hours of deliberations, the jury returned a unanimous verdict in favor of Matthew and Maurita, and found economic damages in the amount of $1,500,000.00, and noneconomic damages in the amount of $1,250,000.00, for a total of $2,750,000.00.

Post Verdict Developments

Thereafter, the plaintiffs moved for prejudgment interest. Judge Wiseman reserved entering judgment on the verdict while the motion was pending. Subsequently, the parties settled the PJI issue,[2] and Judge Wiseman asked for a proposed judgment entry. The parties exchanged drafts and upon reaching a mutually satisfactory version of the entry, agreed that Dr. Harris's lawyer would electronically submit it to Judge Wiseman.

On June 14, 2018, at 2:48 p.m., Dr. Harris's lawyer emailed plaintiffs' counsel that he was "[g]oing to file this version today. Please note that this is not yet the Judgment. It will be when the Judge signs it and journalizes it."

On June 15, 2018, Judge Wiseman reduced the noneconomic damages to comply with the statutory cap, and electronically entered judgment on the verdict for $2,500,000.00, using the parties' proposed judgment entry. Judge Wiseman's filing consisted of three pages: two pages were the proposed judgment entry prepared by the parties,

and a third page contained her mark and electronic signature.

The time stamp on the first page of the judgment entry was Friday, June 15, 2018, 1:01:52 p.m. A notation on the third page reflected Judge Wiseman's electronic signature done on Friday, June 15, 2018, at 1:02:08 p.m. On the same day, the clerk of courts e-mailed the parties a notice stating, "a Judgment Entry has been filed with the Clerk of Common Pleas Court on 06/15/2018" and "[p]ursuant to Ohio Civil Rule 58(B) you are notified that a judgment has been filed that may be a final appealable order."

Upon receiving Judge Wiseman's signed final order, the lawyers for both sides brought to her attention that the document was still captioned "proposed judgment entry," and Judge Wiseman's signature was not on the entry itself but on a separate page. By e-mail, Judge Wiseman responded, "[t]he entry filed on June 15, 2018 was marked by me and docketed by the Clerk as a final appealable order which would trigger the applicable deadlines for post-judgment filings, including appeal." She offered to issue a *nunc pro tunc* order to clarify the June 15 entry. By e-mail, all counsel accepted her proposal, and agreed that the June 15, 2018 judgment entry was a final appealable order, and triggered applicable deadlines for post-trial motions and appeal.

On June 26, 2018, Judge Wiseman electronically filed a *nunc pro tunc* order substantively identical to the June 15, 2018 judgment entry. She removed "proposed" from the caption, and added, "This *nunc pro tunc* is retroactive to June 15, 2018 and entered to clarify the finality of the judgment entry filed on that date."

Dr. Harris's Motions for a New Trial and JNOV

Harrison vs. Harris was about to take on yet another shocking twist.

Dr. Harris's motions for new trial and for judgment notwithstanding the verdict were due on July 13, 2018, *twenty-eight days* from the entry of judgment, according to Civ.R. 50(B) and 59(B). In the absence of those motions, Dr. Harris's notice of appeal was due on July 16, 2018, *thirty days* from the entry of judgment, according to App.R. 4(A)(1).

On July 16, 2018, three days after the jurisdictional deadline, Dr. Harris's lawyer filed motions for a new trial and JNOV, complaining of Judge Wiseman's alleged errors during trial, including her refusal to allow him to re-call one of the plaintiffs' experts in the defense's case in chief to accuse him of perjury. Because his post-trial motions were late and probably null, Dr. Harris's failure to file a notice of appeal on the same day was an equally critical error.

On July 23, 2018 the plaintiffs filed a motion to strike both post-trial motions. With the tardy post-trial motions and the missing notice of appeal, it appeared the case was over.

The Clerk's Error?

On August 3, 2018, Dr. Harris's lawyer filed his opposition to the motions to strike, offering a creative but shaky argument, in light of the extensive e-mails between the parties and Judge Wiseman before and after her final entry. Dr. Harris's lawyer accused the clerk of courts of making a mistake by automatically journalizing the proposed judgment entry immediately after Dr. Harris's lawyer filed it, and without giving Judge Wiseman the opportunity to read or approve it. In other words, the 1:01:52 p.m. time stamp on the first page of the entry and the 1:02:08 p.m. time stamp on the third page showed that, because of the clerk's alleged docketing error, Judge Wiseman "did not approve or disapprove, sign or separately journalize the Proposed Judgment entry into its own journal entry as of June 15, 2018." Dr. Harris's lawyer contended that the June 15, 2018 judgment entry was a non-existent order to which the subsequent *nunc pro tunc* order could not relate back, despite Dr. Harris's lawyer's e-mailed consent to the *nunc pro tunc* at the time Judge Wiseman filed it.

More briefing followed. On August 9, 2018, the plaintiffs filed a reply brief in support of their motion to strike. Plaintiffs' appellate attorney, Kathleen St. John, meticulously detailed the Montgomery County local rules for electronic filing system practices and procedures, and showed that the time-stamp on judgment entry was when Judge Wiseman actually approved the proposed judgment entry, not when Dr. Harris's lawyer electronically submitted it. Attorney St. John cited Loc. R. 1.15(A)(4) and (G)(2) to show that the clerk of courts sends the party submitting a proposed order an electronic receipt (and no one else), confirming the date and time the document was received. The plaintiffs challenged Dr. Harris's lawyer to produce the electronic receipt the clerk sent him to prove his claim that he filed the proposed order on June 15, 2018 at 1:01:52 p.m.

On August 30, 2018, Dr. Harris's lawyer filed a surreply brief, repeating his earlier criticisms against the clerk of courts, but without producing the electronic receipt - or any other evidence -- to show that the clerk automatically filed the proposed judgment entry without allowing Judge Wiseman time to approve and sign it.

On September 4, 2018, Judge Wiseman granted the plaintiffs' motion to strike the motions for a new trial and JNOV. Taking the initiative herself to track down the clerk's missing electronic

receipt, Judge Wiseman answered the question of when Dr. Harris's lawyer filed the proposed judgment entry:

> The court's electronic filing system tracks the filing and routing of all submissions, filings, and orders. ***That tracking shows that the proposed judgment entry was submitted by Defendants on June 14, 2018 at 3:27 p.m.*** The Court signed the judgment entry on June 15, 2018 at 1:02 p.m. Then, the clerk approved the proposed judgment on June 15, 2018 at 2:22 p.m.
>
> The electronic tracking of all submissions and filings in the court's eFile system, the email communications regarding the nunc pro tunc judgment entry, and the *nunc pro tunc* judgment itself, separately and/or in combination, ***make crystal clear that the operative date triggering deadlines for Defendant's JNOV and new trial motions was June 15, 2018.***
>
> Hence, Defendants missed the jurisdictional deadline triggered by the June 15, 2018 final judgment entry.

Dr. Harris's New Theory for Relief from Judgment

On October 3, 2018, Dr. Harris filed a motion for relief from judgment, informing Judge Wiseman that he was not waiving any of his prior theories about the clerk's alleged error. But this time, he raised an alternative scenario: excusable neglect due to his lawyer's failure to calendar the due date for post-trial motions to run from the "proposed" judgment entry of June 15, 2018. A supporting affidavit said, "Due to either mistake, inadvertence and/or excusable neglect, the June 15, 2018 (sic) was not calendared by defense counsel as the Judgment Entry on the verdict, presumably looking at the June 26, 2018 Judgment Entry as the true Judgment Entry on the verdict. Consequently, defense counsel's calculation of days to file their Post-Trial Motions was mistakenly not done from the June 15, 2018 date."

Yet more briefing followed. On October 16, 2018, the plaintiffs filed their brief in opposition and Dr. Harris filed his reply on October 23, 2018. In the meantime, the court of appeals granted a limited remand for Judge Wiseman to rule on Dr. Harris's motion for relief from judgment, which she did on December 27, 2018, denying it.

Dr. Harris's Stay of Judgment and Notice of Appeal

Harrison v. Harris took yet another interesting turn on September 6, 2018 when Dr. Harris filed a Civ.R. 62 motion requesting a stay of execution on the judgment. Under the rule, a defendant obtains a stay only "by giving an adequate supersedeas bond … at or after the time of filing the notice of appeal." The posted bond guarantees a plaintiff's full recovery if the defendant loses his appeal. In Matthew's case, the plaintiffs did not oppose the stay itself, but rather asked Judge Wiseman to set the supersedeas bond at $2,932,857.40, reflecting the $2,500,000.00 verdict, and pre and estimated post judgment interest.[3]

It is important to remember that TDC's limit of liability was only $1,000,000.00, less than half of the actual verdict and with no pre or post judgment interest. Not surprisingly, Dr. Harris's lawyer objected to the plaintiffs' bond proposal. But what was surprising was his counteroffer to post a supersedeas bond for the full verdict plus court costs.

On September 26, 2018, Judge Wiseman granted Dr. Harris's motion to stay execution on the judgment if he posted a supersedeas bond for $2,503,236.45, i.e., the verdict plus costs but no pre or post judgment interest.

The plaintiffs' counsel asked themselves whether TDC would actually ever post a bond that far beyond Dr. Harris's million dollar policy limit?

Shortly thereafter, Dr. Harris's lawyer filed a notice of appeal, but no bond.

Three weeks after Judge Wiseman's order, TDC still had not posted the bond. On October 18, 2018, plaintiffs filed a motion, notifying Judge Wiseman of the missing bond and asking her to enforce her September 26 order.

By November 5, 2018, a month after Dr. Harris's notice of appeal, TDC still had not posted the bond.

Instead, the TDC claims representative sent Matthew's lawyers a letter saying:

> As you are aware, Dr. Harris and his corporation have shared policy limits of $1,000,000. This correspondence will serve as a formal offer of $1,000,000, which we are extending in an effort to resolve this matter now in exchange for a full and final release of all claims and as satisfaction of judgment in the above captioned case.
>
> We believe this settlement proposal is in the best interest of both our insureds and your clients given the uncertainty of the outcome of the appeal.

Plaintiffs' counsel responded the next day, rejecting the settlement offer, explaining the irrevocability of jurisdictional deadlines for motions for a new trial and JNOV, and stating:

> [I]f TDC continues to ignore Judge Wiseman's order regarding the supersedeas bond, we are prepared to begin proceedings to enforce the jury's unanimous judgment in favor of Matthew Harrison and his mother.
>
> TDC is not doing us any favor by tendering the policy limits at this

juncture, since under R.C. 3929.06, we are entitled to satisfaction from TDC without foregoing our right to collect the difference from Dr. Harris's personal assets, which I affirmatively advised defense counsel we would do when trial began with zero offer from Defendants. We are long past the point where paying the policy limits will get this case resolved.

Shortly thereafter, Judge Wiseman granted the plaintiffs' motion to enforce her September 26 order, noting that in the absence of a supersedeas bond, "there is no stay and the judgment may be collected by the Plaintiff."

By December 7, 2018, two months after filing Dr. Harris's notice of appeal, TDC had still not posted the bond. The plaintiffs served Dr. Harris with a notice of his deposition and requested *duces tecum* that he bring documentation of his personal and business assets.

On December 21, 2018, TDC posted a supersedeas bond for $2,503,236.45, the full amount of Judge Wiseman's order.

Dr. Harris's Appeal to the Second District Court of Appeals

On April 4, 2019, Dr. Harris filed his merit brief with the Second District Court of Appeals, still clinging to the notion that he filed the proposed entry contemporaneous with Judge Wiseman's approval, despite Judge Wiseman's debunking that notion with the electronic receipt showing Dr. Harris's lawyer had actually filed it 22 hours earlier. More briefing ensued, followed by oral arguments on August 13, 2019.

On August 30, 2019, the three-judge panel ruled in favor of Matthew and his mother, finding that Judge Wiseman had correctly determined she was without jurisdiction to consider Dr. Harris's motions for a new trial and JNOV because they were filed after the deadline. Dr. Harris filed a motion for reconsideration, and the three-judge panel unanimously denied it on October 7, 2019.

Dr. Harris Turns to the Ohio Supreme Court

On November 15, 2019, Dr. Harris's lawyer filed his notice of appeal to Ohio Supreme Court. On January 21, 2020, after the requisite briefing, the justices unanimously ruled in Matthew's favor, and declined to accept jurisdiction.

On January 31, 2020, metaphorically bloodied and beaten – after a unanimous jury verdict, a three-judge decision in the Second District on the appeal, followed by a three-judge decision refusing to reconsider, followed by a unanimous "no" on Supreme Court jurisdiction – Dr. Harris's lawyer filed a motion asking the Ohio Supreme Court to reconsider.

On March 17, 2020, that motion was denied.

TDC's Supersedeas Bond

Upon being served with the Ohio Supreme Court's decision, Matthew's lawyers immediately went back to Judge Wiseman with a motion to enforce the bond. Two weeks later, Dr. Harris filed a brief in opposition, asking Judge Wiseman to withhold ruling on the motion for 60 days for two reasons. First, according to Dr. Harris's lawyer, "Defendants are presently in the process of addressing issues pertaining to execution on the supersedeas bond and resolution of this case. This process involves several entities and individuals who are attempting to arrive at a final resolution of this case." Second, Dr. Harris's lawyer pointed to the coronavirus pandemic as yet another reason to avoid paying the judgment.

Matthew's lawyers responded on April 1, 2020. "Enough is enough," they said, with a detailed timeline of the delays and denials over the previous two years. The next day, Judge Wiseman granted the plaintiffs' motion to enforce the bond, noting that she was "unpersuaded" by the defendants' assertions, and that any further delay would prejudice Matthew and his mother. Judge Wiseman ordered that the supersedeas bond was "due as of the date of this order."

Epilogue

It is mostly true that good cases get better and bad cases get worse.

Admittedly, some good cases get worse, despite our best efforts. But the best case is when juries, trial judges, appellate judges and even conservative justices hear the same story we hear, ask the same questions we ask, and demand the same justice we demand. Matthew and his mother, in the end, got the justice the jury intended them to have, and that they deserve. ■

End Notes

1. The appellate decision can be found at *Harrison v. Horizon Women's Healthcare, LLC*, 2d Dist. Montgomery No. 28154, 2019-Ohio-358, discretionary appeal not allowed by *Harrison v. Horizon Women's Healthcare, LLC*, 2020-Ohio-122, 137 N.E.3d 1216 (Jan. 21, 2020), reconsideration denied at 2020-Ohio-877, 158 Ohio St.3d 1437, 141 N.E.3d 254 (Mar. 17, 2020).
2. The defense had moved to dismiss plaintiffs' motion for prejudgment interest on the ground that prejudgment interest cannot be awarded on future damages; that the jury interrogatories did not segregate future from past damages; and that, because plaintiffs did not request a jury interrogatory separating these amounts, the plaintiffs could not recover prejudgment interest on *any* part of the verdict. The defense also moved to hold discovery on prejudgment interest in abeyance pending ruling on the motion to dismiss. Following briefing on the issues, the trial court denied the motion to dismiss. With discovery on the motion back on track, TDC surprisingly agreed to settle the claim for prejudgment interest for the full value of $158,301.37.
3. Although the prejudgment interest claim had been settled on June 11, 2018, at the time of the briefing on the supersedeas bond amount, TDC had not yet tendered the $158,301.37.

Nuts & Bolts of Ohio Civil Rule 30(B)(5): Deposition of a Corporation

by Meghan C. Lewallen and Calder C. Mellino

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It is well understood that Ohio Civil Rule 30(B)(5) permits a party to depose a corporation, a partnership, or an association. Historically, attorneys seeking information from a corporate entity were required to request the deposition of the person "most knowledgeable" pursuant to Civ. R. 30(b)(1). However, two problems arose: (1) as corporations grew they became more compartmentalized causing fewer individual persons to be the "most knowledgeable" on any one topic and (2) corporations began to utilize the limits of Rule 30(b)(1) to inhibit discovery efforts by "bandying" a string of witnesses requiring the discovering party to depose increasing numbers of company officers.[1] Civ. R. 30(b)(6) was created to address these issues.[2]

Civ. R. 30(B)(5) is Ohio's adoption of Federal Rule of Civil Procedure 30(b)(6) and is nearly identical to the federal rule.[3] The Ohio Supreme Court has held that "because the Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal law interpreting the federal rule is appropriate and persuasive authority in interpreting a similar Ohio rule."[4]

This article is intended to provide readers with the "nuts & bolts" of Ohio Civ. R. 30(B)(5), to highlight common issues encountered, and to offer best practices to better position your case.

Rule 30(B)(5): Duties of the Requesting Party

The key to a successful Rule 30(B)(5) deposition begins with a carefully crafted deposition notice. The purpose of the notice is to identify areas of examination or documents requested for the responding party so that they can sufficiently prepare the designated deponent.

Proper notice. A properly noticed deposition pursuant to Rule 30(B)(5) must: (1) provide the date, time, and place for taking the deposition; (2) specify the name and address of the entity being deposed; (3) set forth with reasonable particularity the matters for examination; (4) indicate the method by which the testimony will be recorded and whether documents are sought; and (5) be accompanied by a document request or by a formal Rule 34 request for the production of documents.[5] If records are requested, Rule 34(B)(1) requires that the responding party must receive at least 28 days' notice.

Reasonable particularity. Rule 30(B)(5) mandates the requesting party adequately describe all information sought and topics to be discussed with "reasonable particularity."[6] The test of a 30(B)(5) notice's effectiveness is whether the topics listed provide the responding organization with notice of what to sufficiently prepare. Requests are described with "reasonable particularity" where the "outer limits of the inquiry" are determinable.[7] Courts have cautioned against use of language such as "including but not limited to" and "etc." because it is too overbroad.[8]

Rule 30(B)(5) applies to depositions of both party and nonparty corporations. For nonparty deponent corporations, the rule requires that the noticing party issue a subpoena pursuant to Civ. R. 45.

Rule 30(B)(5): Duties of the Responding Party

Upon receipt of a properly served 30(B)(5) notice of deposition a responding party has four duties: (1) duty to appear; (2) duty to designate; (3) duty to prepare; and (4) duty to substitute.

Duty to appear. The responding party has a duty to appear for a properly noticed Rule 30(B)(5) deposition. If the responding party thinks the deposition is improper, objectionable, or for one reason or another does not want to comply they must seek a protective order *before* the deposition as required by Civ. R. 37(D)(2).[9] Likewise, a party cannot unilaterally cancel a deposition;[10] therefore, if the date noticed is not agreeable to the opposing party they have a responsibility to find a mutually agreeable date before the date of the noticed deposition.

Duty to designate. The responding party must choose one or more of its proper employees, officers, agents or other persons duly authorized to testify on its behalf.[11] The persons so designated shall testify as to matters known or available to the organization.

Duty to prepare. Once one or more people have been designated as witnesses the responding party must adequately prepare and educate their designated witnesses on the topics noticed. The responding party's duty to prepare a 30(B)(5) witness goes beyond matters personally known by the designee or matters in which the designated witness was personally involved.[12] Instead, the responding party must prepare its 30(B)(5) witness to the extent the matters are *reasonably available* from documents, past employees, or other sources.[13] This includes questioning employees, agents, and others that may have information which may lead to or furnish the necessary and appropriate response to the particular matters of examination.[14] Likewise, the responding party must review all available documents and ESI that may contain responsive information including the company's own records and those documents the organization has a legal right, authority or practical ability to obtain.[15] The corporation must *collect* the information requested and provide it to the designated witnesses. "In other words, a corporation is expected to *create* an appropriate witness or witnesses from information reasonably available to it if necessary."[16] The testimony of a 30(B)(5) witness represents the collective knowledge of the organization not necessarily the witness' personal knowledge. Failure to comply with the preparation requirements of Rule 30(B)(5) may result in sanctions.[17]

Duty to substitute. If it becomes apparent during the deposition that the witness produced was not sufficiently prepared on all matters in the notice, the responding party has a duty to substitute another witness to fully respond to the discovery request.[18] The duty to substitute is a necessary requirement if the responding party fails to comply with their duty to prepare.[19] Rule 37 permits sanctions for the responding party's inadequate preparation by requiring the responding party to pay for the costs of the additional deposition.[20] Be prepared to make a record to support your demand for substitution.

Differences Between Ohio Civ. R. 30(B)(1) & 30(B)(5)

Understanding the differences between Rule 30(B)(1) and Rule 30(B)(5) is paramount as confusion between the two often must be explained or addressed to the Court when discovery disputes arise which may result in a motion to compel or request for sanctions. A deposition pursuant to Rule 30(B)(5) is substantially different from a witness's deposition as an individual pursuant to Rule 30(B)(1). Unlike Rule 30(B)(1),

- Rule 30(B)(5) imposes a *duty to prepare* the designee that goes beyond matters personally known to the designee or matters in which the designee was personally involved;[21]
- A Rule 30(B)(5) witness is responsible for providing *all relevant information known or reasonably available* to the entity.[22] It is not sufficient to simply produce the individual who is the most knowledge about the topics (or some of the topics) identified in the notice;
- A designated witness under Rule 30(B)(5) is *"speaking for the corporation"* and is distinguished from testimony of a mere corporate employee;[23]
- Under Rule 30(B)(5) a corporation is *bound* by the testimony of its designated witness(es) at trial[24] and cannot escape its obligations under the Rule by claiming that individual fact witnesses have or will testify on the same issue.[25] Likewise, testimony obtained may be used for any purpose at trial, regardless of whether that individual is available to testify;[26]
- A Rule 30(B)(5) notice identifies an *entity* for deposition rather than a specific person. If a notice is titled as a 30(B)(5) notice of deposition but names a specific person as the deponent, it becomes a 30(B)(1) and there is no duty to prepare the witness.[27]

Common Issues & Best Practices

Issue #1: Improper objections & motions for protective order. Upon receipt of a Rule 30(B)(5) notice of deposition the responding party may raise general objections such as the notice is "overly broad" or the "information is available elsewhere."

Best Practices: Set a deadline for objections in the body of the notice and request any objections to be provided in writing. Work with opposing counsel to address any issues or misunderstandings surrounding the matters for examination set forth in the notice. Do not be afraid to amend the notice to clarify a topic. This method is much easier than opposing a motion for protective order which often seeks to preclude the deposition entirely. When presented with objections by your opponent keep the following in mind:

- An objection that a Rule 30(B)(5) notice of deposition is overly broad is not a basis for a protective order.[28]
- A deposition under Rule 30(B)(5) is not considered unduly burdensome simply because the information is available elsewhere.[29]
- Producing documents and responding to written discovery is not a substitute for providing a thoroughly educated Rule 30(B)(5) deponent.[30]
- The fact that individually named witnesses have testified concerning a subject does not preclude a 30(B)(5)

deposition on the same subject.[31]

- Objections to a notice must be made in good faith by the responding party by promptly raising any concerns about the notice.[32]
- If the parties cannot resolve their discovery dispute the responding party must move for a protective order before the scheduled deposition.[33]

Issue #2: Knowledge and prep of each witness is limited. The responding party may also choose to designate more than one individual to testify on behalf of the corporation for any given notice. Courts have recognized that where a corporation expects its designee to be unprepared to testify on any relevant listed topic the responding party should advise the requesting party of the designee's limitations *before* the deposition begins.[34]

Best Practices: Request the identity of each witness that will be designated to testify on behalf of the corporation by name and job title as well as the topic(s) each witness will address. This request should be made in advance of the deposition to allow you to prepare accordingly.

Issue #3: Questions outside the scope of the Rule 30(B)(5) notice. It is improper for a defending attorney to instruct the witness not to answer questions asked during a Rule 30(B)(5) deposition simply because they fall outside the scope of the notice. Civ. R. 30(B)(5) does not prevent a party from examining a designee about matters that were outside the scope of the deposition.[35] If such questioning occurs general deposition rules govern and apply to answers outside the scope of the notice. Relevant questions may be asked; however, the answer is not necessarily binding on the corporation but rather based on the individual's personal knowledge.[36]

Best Practices: Make sure you are acutely aware of your 30(B)(5) notice and your line of questioning related to each topic. Keep in mind that questions outside of the scope of inquiry can be asked during the deposition; however, they may not bind the corporation. So long as the questions are relevant an instruction not to answer is not appropriate. Be prepared to call the judge should the defending attorney continue to instruct the witness not to answer and obstruct the deposition. A request for sanctions may be necessary.

Issue #4: Designated witness is not adequately prepared. Despite issuing a carefully crafted Rule 30(B)(5) notice of deposition the responding party may produce a witness that is not adequately prepared to discuss the topics identified. There may also be instances where the deponent responds to a question by staying "I don't know," "I can't recall," or "I'm not sure." Under Rule 30(B)(5) such non-answers are not acceptable. An entity's designation of a witness who is not prepared or lacks knowledge of the matter specified in the notice amounts to a failure to appear to testify.[37]

Best practices: Begin the deposition by reviewing each area of inquiry with the designee and confirming that he or she is fully prepared to provide all the information known to the organization regarding each area. If at any point during the deposition it becomes clear that the designated deponent was not adequately prepared to testify as to the issues noticed it is imperative to make a clear record. Make sure to tie preparation back to the notice to clarify what topics are unaddressed. It is important to establish the corporation does in fact have access to the information requested. Be sure to ask questions such as:

- *Who would know that?*
- *Where would you look for that information?*
- *Where are those documents located?*
- *What is that document called?*

A record must also be made establishing the responding party did not prepare the witness as required by Rule 30(B)(5) by asking:

- *What did you do to prepare for this deposition?*
- *Who did you speak to?*
- *What did you review?*
- *Did you look for documents?*

Once a record has been made that the responding party did not take affirmative actions to prepare the designated witness on the topics at issue one must decide whether to proceed to get any information available that the unprepared witness may possesses or whether to pocket that line of questioning for a more prepared witness and make a request to substitute.[38] Conversely, where the witness's lack of information is advantageous it is best to establish the witness was produced and prepared to testify on behalf of the corporation yet has no knowledge on the issue. If the witness does not have knowledge, and is unable to ascertain information from corporate records, then the organization may be precluded from introducing testimony on these areas at trial.[39]

Issue #5: Claim of privilege. The defending party may instruct the witness not to answer on grounds of privilege.

Best practices: Given preservation of privilege is one of three grounds on which your opponent can instruct a witness not to answer under Civ. R. 30(C)(2) it is imperative to know what information is actually protected when a witness is designated under Rule 30(B)(5).[40] Facts that a corporation communicated to its attorney are not protected by the attorney-client privilege.[41] The corporation's duty to prepare a witness to provide knowledgeable answers reasonably available to the corporation includes factual information the witness learned through or from the corporation's counsel.[42] Likewise, even when the preparation process uses

documents or communication with counsel that may be subject to attorney-client privilege under Rule 30(B)(5), the facts and other information contained therein are not privileged.[43]

Issue #6: Individual with knowledge of specified topics in 30(B)(5) notice of deposition no longer works for the organization. Counsel for the corporation may object to a topic listed in a 30(B)(5) notice on grounds that the individual with knowledge of the topic at issue no longer works for the corporation. However, "[t]he mere fact than an organization no longer employs a person with knowledge on the specified topics does not relieve the organization of the duty to prepare and produce an appropriate designee."[44]

Remember, at the end of the day the goal of Ohio Civil Rule 30(B)(5) is to get the information you need, *not* the perfect witness. Do not get so tied up in making a record that you forget to get the information the witness before you *does* have. Lastly, make sure the Court understands the difference between Rule 30(B)(5) and Rule 30(B)(1) to increase the likelihood of getting the information you want and need particularly when the opposing party is likely to claim certain testimony is beyond the individual's personal knowledge. ■

End Notes

1. Fed.R.Civ.P. 30 advisory committee's note (1970) Amendments.
2. Fed.R.Civ.P. 30 advisory committee's note (1970) Amendments.
3. Civ.R. 30 Staff notes.
4. *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 333-334, 2015-Ohio-3430, 49 N.E.3d 1224.
5. Civ. R. 30(B)(5).
6. *United States v. Taylor,* 166 F.R.D. 356, 360 (M.D.N.C. 1996).
7. *Reed v. Bennet*, 193 F.R.D. 689, 692 (D.Kan. 2000).
8. *Reed v.Bennet*, 193 F.R.D. 689, 692 (D.Kan. 2000); *see contra Heartland Surgical Center Specialty Hosp., LLC v. Midwest Div. Inc.* , D.Kan., No. 05-2164-MLB-DWB, 2007 WL 1054279 (April 9, 2007).
9. *Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Res. Auth.,* 93 F.R.D. 62, 67 (D.P.R. 1981) (citing 8A C. Wright, A. Miller & R. Marcus, *Fed. Prac. & Proc.* § 2035, at 262); Civ. R. 37(D)(2).
10. *Pac. Elec. Wire & Cable Co. v. Set Top Int'l Inc.*, S.D.N.Y. No. 03 CIV 9623 (JFK), 2005 WL 2036033, at *3 (Aug. 23, 2005); *Smith v. B.C.E., Inc.,* W.D. Tex. No. CIV ASA04CA0303 XR, 2005 WL 1523354, at *1 (June 22, 2005).
11. Civ. R. 30(B)(5).
12. *QBE Insur. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012) (citing *Wilson v. Lakner,* 228 F.R.D. 524, 529 (D.Md. 2005)).
13. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 37 (D. Mass. 2001).
14. *Moore's Federal Practice*, ¶ 36.11 [5][d]; *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 78 (N.D.N.Y. 2003)
15. *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000).
16. *QBE Insur. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012) (citing *Wilson v. Lakner*, 228 F.R.D. 524, 529 (D. Md. 2005)).
17. Civ. R. 37(D).
18. *QBE Insur. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012) (citing *Alexander v. FBI*, 186 F.R.D. 137, 142 (D.D.C. 1998)).
19. *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989).
20. *QBE Insur. Corp. v. Jorda Enterprises, Inc.,* 277 F.R.D. 676, 699 (S.D. Fla. 2012); *Marker v. Union Fid. Life Ins. Co.,* 125 F.R.D. 121, 126-27 (M.D.N.C. 1989).
21. *Wilson v. Lakner*, 228 F.R.D. 524, 528 (D.Md. 2005).
22. *Smith v. General Mills*, S.D. Ohio No. C2 04-705, 2006-WL-7276959, *5 (Apr. 13, 2006) (quoting *Sabre v. First Dominion Capital, LLC*, S.D.N.Y. No. 01 Civ 2145, 2002 U.S. App. LEXIS 22193, *7-8 (Nov. 7, 2002)).
23. *United States v. Taylor,* 166 F.R.D. 356, 361 (M.D.N.C. 1996) (citing 8A Wright, Miller & Marcus § 2103, 36-37).
24. *United States v. Taylor,* 166 F.R.D. 356, 360 (M.D.N.C. 1996); *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F.Supp. 2d 82 (D.D.C. 1998).
25. *Smith v. General Mills*, S.D. Ohio No. C2 04-705, 2006-WL-7276959, *5 (Apr. 13, 2006).
26. Civ. R. 32(A)(1)-(2).
27. *Youell v. Grimes*, D. Kan. No. 00-2207-JWL, 2001 WL 1273260, *1 (Apr. 13, 2001).
28. *Aikens v. Deluxe Financial Services, Inc.*, 217 F.R.D. 533, 535 (D. Kan. 2003).
29. *Murphy v. Kmart Corp.*, 255 F.R.D. 497, 506 (D.S.D. 2009); *Prosonic Corp. v. Stafford,* S.D. Ohio No. 2:07-CV-0803, 2008 WL 23223528, *4 (June 2, 2008).
30. *Murphy v. Kmart Corp.,* 255 F.R.D. 497, 507 (D.S.D. 2009) (quoting *Great Am. Ins. Co. v. Vegas Constr. Co. Inc.*, 251 F.R.D. 534, 541 (D. Nev. 2008)).
31. *Smith v. General Mills,* S.D. Ohio No. C2 04-705, 2006-WL-7276959, *5 (Apr. 13, 2006) (quoting *Sabre v. First Dominion Capital, LLC*, S.D.N.Y. No. 01 Civ2145, 2002 U.S.App. LEXIS 22193, *7-8 (Nov. 7, 2002)); *Prosonic Corp. v. Stafford,* S.D. Ohio No. 2:07-CV-0803, 2008 WL 23223528, *4 (June 2, 2008).
32. *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1158 (10th Cir. 2007).
33. Civ.R. 37(D)(2).
34. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.,* 201 F.R.D. 33, 38 (D.Mass. 2001).
35. *Columbus Steel Castings Co. v. Transportation & Transit Assoc.*, 10th Dist. Franklin No. 06AP-1247, 2007-Ohio-6640, *17.
36. *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995).
37. *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000).
38. *QBE Insur. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012) (citing *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2nd 196, 198 (5th Cir. 1993)); *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.,* 228 F.3rd 275, 305 (3d Cir. 2000).
39. *QBE Insur. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D. N.C. 1996).
40. Civ.R. 30(C)(2).
41. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96, 101 S.Ct. 677, 66 L.E.2d 584 (1981).
42. *Great American Ins. Co. v. Vegas Constr. Co.,* 251 F.R.D. 534, 542 (D. Nev. 2008).
43. *Sec. Ins. Co. Of Hartford v. Trustmark Ins.* Co., 218 F.R.D. 29, 33 (D. Conn. 2003) (citing *In re Six Grand Jury Witnesses*, 979 F.2d 939, 945 (2d Cir. 1992)); *Upjohn Co. v. United States*, 449 U.S. 383, 395-96, 101 S.Ct. 677, 66 L.E.2d 584 (1981); *see also, Sprint Communications Co., L.P. v. Theglobe. com, Inc.*, 236 F.R.D. 524, 527 (D. Kan. 2006).
44. *QBE Insur. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012) (citing *Fowler v. State Farm Mut. Auto Ins. Co.*, D. Haw. No. 07-00071 SPK-KSC, 2008 WL 4907865, *4 (2008)); *Great Am. Ins. Co. v. Vegas Constr. Co. Inc.,* 251 F.R.D. 534, 540 (D.Nev. 2008); *United States v. Taylor,* 166 F.R.D. 356, 361 (M.D.N.C. 1996); *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1148 (10th Cir. 2007).

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10 Tips for Videotaping the Defense Medical Examination

by Dustin B. Herman, Esq.

We should be videotaping every single defense medical examination. No excuses. Having a witness attend the DME, or attending ourselves, doesn't do us any good. We need a complete and objective record of the proceedings--just like we would for any deposition. That means having a videotape and transcript of the entire examination. Here are ten tips for getting it done:

1. File a Motion to Compel as Soon as Possible.

Defense attorneys will rarely agree to videotaping a defense medical examination, and many doctors will object as well. You will almost certainly need to file a motion to compel to videotape the DME. But you can't file a motion to compel until there is a genuine dispute over the issue. So, as early as possible, tell defense counsel--in writing--you want to videotape the DME; get an objection in writing; and then file the motion to compel.

Don't wait until a week or two before the date of the DME to file the motion. That gives the judge an easy out to deny your request. Some defense attorneys might not give you a direct answer on videotaping the DME until they disclose their experts. Use your judgment as to whether your judge will be receptive to a motion to compel the videotaping of a DME before the identity of the defense medical examiner has been disclosed.

The first paragraph of your motion might read something like: "Plaintiff has agreed to undergo a defense medical examination, but has requested the examination be videotaped so there is a complete and objective record of the examination. Defendant has objected to the videotaping of the examination, which necessitated the filing of this Motion."

2. Arguments in Support of Videotaping the DME.

There are many arguments you can make in support of videotaping the DME:

- *A DME is an Adversarial Proceeding.* A medical examination under Rule 35 is a discovery proceeding: it is a court-ordered event over which the court controls the time, place, scope, conditions and manner. It is a discovery tool, much like a deposition itself, where one party (through its agent--a paid medical expert) may interview and obtain *evidence* from an opposing party. There is no doctor-patient relationship and there is no treatment rendered. Notably, a Rule 35 examination is the only discovery tool that requires a court order and court-determined conditions to ensure a fair proceeding, with the burden on the defendant to show good cause. See Civ.R.35(A). This burden is on the defendant because such an examination is, by its nature, an adversarial proceeding that entails the examinee being questioned about personal and private things, by a medical expert, to obtain evidence to be used (potentially) against the examinee. A DME is an adversarial proceeding and it should be treated as such.

- *Videotaping is the Best, Most Efficient, and Least Intrusive Way to Obtain a Complete and Objective Record of the Examination*. Because of the adversarial nature of the proceeding, Ohio courts have uniformly recognized the right of a plaintiff to have his or her attorney or doctor present at a Rule 35 examination.[1] In the past, videotaping an examination was not economically feasible in most cases and an attorney being present at the examination was the best way to ensure a fair examination and to protect the plaintiff's rights. That is no longer the case. Today, a videotape is the best, most efficient, and least intrusive way to obtain an objective record of the examination—*that is, to capture the truth, the whole truth, and nothing but the truth of the entire examination*. A video record with a transcript eliminates the need to rely solely on the fallible memory and note-taking abilities of individuals for testimony at a later time. It also prevents biased or inaccurate interpretations of the events recorded, and addresses misunderstandings and ambiguities which naturally exist in any verbal exchange between two people. This is the reason courts allow impeachment of a witness by a deposition transcript or video rather than by mere notes taken by counsel during a deposition.
- *All Other Discovery Proceedings Are Objectively Recorded*. Objectively recording discovery proceedings is the norm for all forms of discovery in Ohio. Depositions are recorded by stenographic or video means. Interrogatories and Requests for Admissions must be exchanged (and verified) in writing. Trials are transcribed or otherwise recorded.
- *Video Recording is Expressly Contemplated by Various Rules Governing Courts in Ohio*. Civ.R. 40 permits all testimony and other evidence to be presented by video. The Superintendence Rules, governing all courts of common pleas, expressly grant trial courts the authority to permit discovery proceedings to be recorded by "video recording systems." Sup.R. 11(A). (Under the requirements of this rule, Plaintiff would voluntarily pay for videotaping. Sup.R.11(F).) The Superintendence Rules also allow the videotaping of other discovery proceedings, such as depositions. Sup.R. 13(A). It is within the discretionary power of a trial court to permit, as a condition of the Rule 35 examination, video recording of the examination proceeding.
- *Video Recording of the DME Provides Necessary Protection for the Plaintiff*. When a defense lawyer takes the deposition of a plaintiff, the plaintiff is protected in a various ways under Civ.R. 30, including having his/her legal counsel present, having a court reporter and/or videographer record the deposition, the right to preserve objections, the right to assert privilege, the right to review the transcript for errors, the right to be free from harassment or annoyance, and the right to reasonable parameters for time length, breaks and other accommodations. When a medical examiner, acting for defense counsel, questions a plaintiff about facts directly relevant to the litigation, the plaintiff should be afforded similar protections.
- *Plaintiff Can Waive Any HIPAA Concerns*. Defense attorneys sometimes argue that a DME cannot be videotaped due to HIPAA concerns. Luckily, your client can waive any concerns over HIPAA, so that is never a valid argument.

3. Helpful Caselaw to Cite in the Motion.

The trend is clear: Ohio courts permit video recordings of medical examinations conducted by party opponents. You should cite and attach to your motion as many trial court opinions as possible that have permitted the videotaping of DMEs.

"[V]ideo recording of the examination would be... wholly objective" and "the best solution to the potential problems" posed by issues of credibility. *Caulkins-Jones v. Hatfield*, Franklin County, CP Case No. 13-CV-003606 at p. 5 (October 22, 2013).

> While a true "observer," who would be present for the examination without uttering a single word would be rather unobtrusive, its value in preventing errors and addressing the concerns espoused by Plaintiff's counsel would be quite low. Put differently, if a dispute arises about a statement made during the examination, it would still come down to a matter of credibility (Plaintiff and observer vs. doctor and staff).
>
> On the other hand, a video recording of the examination would be even less obtrusive and wholly objective. The Court sees this as the best solution to the potential problems.

Id. *See also Jesenovec v. Marcy*, Cuyahoga County, CP Case No. CV08651591, 2012 WL 7659165 ("Because advances in technology have greatly increased the frequency and acceptability of video recording throughout society, the Court finds older case law based on the disruption of recording to be less persuasive."); *Albu v. Camaco Lorain Manufacturing*, Lorain County, CP Case No. 08-CV-155034 (April 14, 2010) ("[T]he best way to protect the integrity of the examination and evaluation for

trial purposes with minimal disruption to the defendant's expert is to simply record the evaluation.")[2]

4. Draft the Order You Want Entered.

Make it easy for the judge to give you the relief you seek. You can attach a proposed order or, even easier, just type it out in the "wherefore" paragraph. But don't overreach. Make your demands reasonable. Below is an example you can use:

WHEREFORE, Plaintiff respectfully requests this Honorable Court issue an Order granting Plaintiff's Motion to Compel the Videotaping of the Defense Medical Examination of Plaintiff and ordering the following:

1. The defense medical examination will take place at the office of the defense medical examiner.
2. The examination will be videotaped in its entirety at Plaintiff's expense.
3. The videographer shall not interfere with the examination.
4. Counsel for either party may attend the examination.
5. The defense medical examiner shall not be hampered in performing a complete and full evaluation, obtaining a full and complete history, and any other matters necessary to form appropriate opinions in the within matter.
6. Plaintiff's counsel will provide Defendant with a complete and unaltered copy of the video recording of the examination.
7. Copies of any notes taken by the defense medical examiner and any forms completed by the Plaintiff must be provided to Plaintiff.

5. Videotaping and Transcribing the DME: Nuts and Bolts.

You need both a videotape and transcript of the DME. There are basically three options you have for doing this:

8. Hire a traditional videographer to videotape the DME. That is the most expensive option, but judges will be most familiar with this form of recording and will tend to trust it the most. Then get a certified court reporter to create a transcript of the examination. Having a court reporter present at the DME is another possibility, but judges may be less inclined to allow this. You should address this in advance of the DME and get a stipulation--or a court ruling--that a court reporter can either use the video to create an official transcript or attend the examination.
9. Hire a remote court reporting company like CourtScribes (https://courtscribes.com.) They will videotape the proceedings and will have a remote court reporter type up the transcript in real time (at half the price of a traditional court reporter and videographer).
10. Videotape the DME yourself with an iPhone or camera. Make sure to send a copy to defense counsel immediately (e.g., upload the video to Dropbox at the end of the DME and send defense counsel a link to the video right then and there). That way there can be no questions of the video being altered. You will still need to get the video transcribed by a certified court reporter.

6. Attend the DME.

You would never not attend the deposition of your client. You should also never not attend the DME of your client.

7. Get Copies-Or Take a Picture-of the DME's Notes at the Conclusion of the DME.

As mentioned above, you should include in your proposed order that any notes taken by the defense medical examiner must be provided to the plaintiff. You should bring a copy of the order with you to the DME and, at the end of the DME, request that copies be made of the notes and provided to you--or simply use your phone to take pictures of the notes. If the defense attorney or DME gives you a hard time, pull out the court order that requires them to provide you with a copy.

8. Prepare Your Client for the DME.

We need to prepare our clients for a DME as we would for a deposition. We need to advise our clients on what to expect, how to answer questions (truthfully and without exaggeration), and how to dress. This will be on video so your client better be prepared properly.

9. Create Videoclips for Use at Deposition or Trial.

Once you have a digital video recording and transcript of the DME, you will want to break the video down into short video clips that you can use at deposition or trial. There are many software programs with which you can easily create video clips. (DepoView is a good one.[3]) You will need a transcript in ".txt" format and the video in MPEG-1 format. These software programs allow you to simply highlight a section of the transcript to create a video clip of the highlighted section. You might create 5, 10, maybe more, short video clips from the DME that you can play at deposition or trial. Remember to title the video clips with a clue to their content so you can identify them easily.

And remember, statements made by defense medical examiners *during the examination* are *not* hearsay. *See* Evid.R. 801(D)(2)(d) ("A statement is not hearsay if... [it is] a statement by the party's agent or servant concerning a matter within the scope of the agency[.]").

10. Be Prepared to Use the Video Clips at Deposition.

At trial we will usually have the technology available to play video clips, but we should also be prepared to use video clips of the DME at the videotaped deposition of the defense medical examiner. To do this we need:

1. Laptop or iPad with video clips loaded and accessible. Using an application like TrialPad with the iPad works great. Dropbox works as well. A folder on your desktop works too. Make sure your laptop/iPad can hook up to an HDMI cable. HDMI adapters for any laptop/iPad can be bought at BestBuy for less than $30.

2. HDMI cord to connect your laptop/iPad to the TV (a 6ft. cord is probably more than enough).

3. A 35-inch television with an HDMI port (all new TVs will have this). The TV can be set up so both the deponent and the TV screen can be captured by the videographer at the same time. A 35-inch TV is a good size because it is light weight, can fit in any vehicle, and can be pulled through a standard-size door on a dolly.

4. Extension cord to give power to your laptop/iPad and TV.

5. Small foldup table for the TV. You can set the table up right next to the deponent so the TV is as close to the deponent's head as possible.

This is the cheapest way to capture the TV screen in a videotaped deposition. There are more expensive methods available, like having two cameras (one on the deponent and one on the TV) or having the videographer plug directly into your laptop/iPad to record what is being displayed on the TV. But a solid and cheap alternative is to just set up the TV on a table so it's sitting right next to the deponent's head.

* * *

The bottom line is that every defense medical examination should be videotaped—and it's not very hard to do. However, while video clips of a DME can easily be used at a deposition, I don't know of any orders allowing them to be played at trial. We should collect those orders and share them with our CATA members. *If anyone knows of or gets an order allowing a videotape of a DME to be played at trial, they should send it around on the listservs.* ■

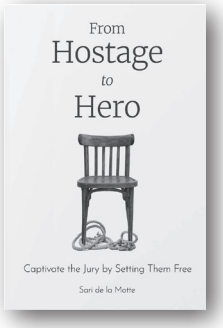
End Notes

1. *See, e.g., S.S. Kresge Co. v. Trester*, 123 Ohio St. 383, 384 (1931) (recognizing a plaintiff's right to have her attorney or physician present at a defense medical examination); *Francisco v. Hoffman*, 131 N.E.2d 692 (Franklin Cty. C.P. 1955); *Steele v. True Temper Corp.*, 174 N.E.2d 298 (Ashtabula Cty. C.P. 1961) (plaintiff has the right to have his counsel present at the pretrial examination); *Nomina v. Eggeman*, 188 N.E.2d 440 (Putnam Cty. C.P. 1962) (even though a full examination should be allowed, plaintiff's counsel should be present to ensure plaintiff's rights).

2. *See also Golson v. Johnson*, Cuyahoga County, CP Case No. CV-14-825499 (Aug. 20, 2014) (order by Judge Sheehan allowing the defense psychological examination of the plaintiff to be recorded by a remotely operated video camera); *Carpenter v. Springfield Regional Medical Center*, Clark County, CP Case No. 2012-CV-1170 (March 27, 2014); *Paden v. Carter*, Holmes County, CP Case No. 12 CV 025 (Oct. 28, 2013); *Dawaher v. Milligan*, Franklin County, CP Case No. 2010-CV-00812 (June 14, 2010); *Dyer v. Ohio Bureau of Workers' Compensation*, Franklin County, CP Case No. 09-CVC-18581 (Sept. 8, 2009); *Kaufman v. Brown*, Jefferson County, CP Case No. 2008-CV-00460 (Sept. 2, 2009).

3. http://support.indatacorp.com/software/depoview/getdepoview.aspx

Your Summer Reading List: Books with Positive Impact for Trial Lawyers

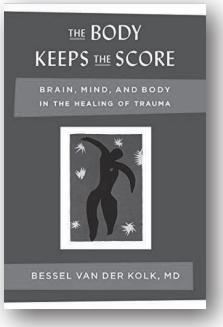


"*From Hostage to Hero*"

by Sari de la Motte

I am absolutely blown away by this amazing, no-BS, one-of-a-kind skill-builder. It's honest, well-written, relevant, and extremely well-organized. Although I hadn't yet finished her book before my last trial, I was able to implement much of her advice. When I stood up in front of that jury, I was present and engaged and, for the first time ever in voir dire, having fun. This is a book I'm going to read and refer to before every trial. High marks.

J. Michael Goldberg
Law Office of J. Michael Goldberg, LLC

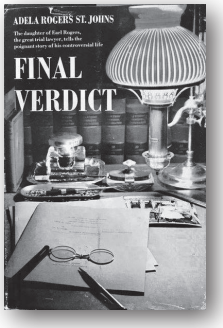


"*The Body Keeps the Score*"

by Bessel van der Kolk, M.D.

This book is essential reading for anyone interested in understanding traumatic stress and the scope of its impact on the individual and society. It gives litigators a better understanding of the physical effects that come from traumatic experiences.

Christopher M. DeVito
Morganstern, MacAdams & DeVito, Co., L.P.A.



"*Final Verdict*"

by Adela Rogers St. Johns

It is the biography of her father, Earl Rogers, one of the greatest criminal defense lawyers in the history of our country.

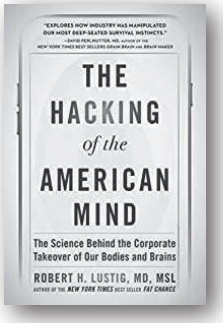
Jack Hildebrand
John P. Hildebrand Co., LPA

"*Trial by Woman*"

by Courtney Rowley and Theresa Bowen Hatch

I found this book to be an extremely valuable resource that not only shares the authors' well-developed Trial Perspective but also guides readers how to truly be your authentic self in the courtroom. Courtney and Theresa gracefully describe how they navigated and overcame challenges faced and further share their insight about how to make changes to your practice that highlight and honor your unique feminine gifts. *Trial by Woman* is a great read for women of all experience levels as well as managers and owners of law firms who have female partners and employees.

Meghan C. Lewallen
The Mellino Law Firm LLC

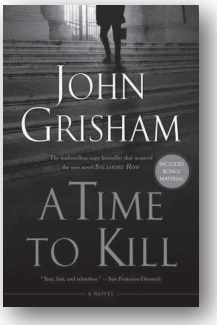


"*The Hacking of the American Mind: The Science Behind the Corporate Takeover of Our Bodies and Brains*"

by Robert H. Lustig, M.D.

The author is both a medical doctor and law school graduate. He provides a logical argument on how corporations have influenced our decision-making process by focusing on persuasive techniques to appeal to our dopamine "reward" neurotransmitters. He also provides sound reasoning behind his explanation as to how corporations, as an alternative, have tapped into an effort to increase our cortisol levels to alter our decisions by making us feel more anxious or put us under intense stress. As a trial lawyer, it is important to understand the neuroscience behind how we all think and likely how individual jurors and our clients think too. More importantly, this book provided a positive health and wellness component to my personal life.

Andrew R. Young
Leizerman & Young, LLP

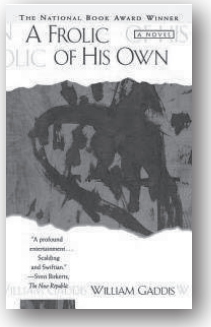


"*A Time to Kill*"

by John Grisham

"A Time to Kill" is the very beginning of an epic legal fictional series that continues to this day. Grisham is a storyteller's storyteller. He brings you right there into the action with character description, subplots, and imagery.

Christian R. Patno
McCarthy, Lebit, Crystal & Liffman Co., LPA

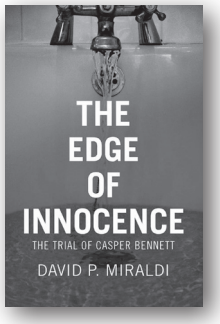


"*A Frolic of His Own*"

by William Gaddis

This multi-genre white-hot satire of our field of this profession sits on my shelf next to my Bryan Garner books and I occasionally page through it. It revolves around several highly absurd legal actions with fantastical litigants who are a good reminder that everything we do must at all times be grounded in reality and pass the sniff test. It's a difficult read but very dryly amusing and rewarding.

Colin R. Ray
McCarthy, Lebit, Crystal & Liffman Co., LPA



"*The Edge of Innocence: The Trial of Casper Bennett*"

by David Miraldi

I would like to recommend this book written by fellow CATA member and my partner, David Miraldi. The book was named the 2018 Book of the Year by the Rubery International Book Contest and tells the true story of a 1964 Lorain County murder trial in which David's dad was one of the defense attorneys. Not only does the book recreate the dilemmas faced by trial attorneys, but it also reveals the limitations of our criminal justice system.

Benjamin F. Barrett, Sr.
Miraldi and Barrett, Attorneys

Scott M. Kuboff is an attorney at Ibold & O'Brien. He can be reached at 440.285.3511 or at scott@iboldobrien.com.

Practice Tips For Handling A Bicycle Injury Case

by Scott M. Kuboff, Esq.

As spring brings warmer temperatures and longer days, many people will be out on Ohio's roadways riding their bicycles. In turn, the number of interactions between people operating motor vehicles and people riding bicycles increases as does the potential for collisions. While there have been positive changes in the law and great advocacy over the past few years, statistics from the Ohio Department of Public Safety suggest the number of crashes with injuries remain consistent:

Year	# of Crashes	w/ Injuries	Fatal
2014	1,516	1,266	12
2015	1,487	1,263	**25**
2016	1,507	1,278	18
2017	1,371	1,157	19
2018	1,295	1,051	**22**
2019	1,229	1,013	**23**

The most troubling factor – even more so than that 24.5% of bicycle involved collisions in 2019 were reported as a "hit skip" s(301 in total) –is that the number of fatal crashes remain high. Three of the last five years – 2015, 2019 and 2018 – have the highest reported fatalities in the last two decades. While there are a number of factors to consider –larger cars, more cars, more cyclists, cell phone usage –one thing is apparent: cities lack the infrastructure to allow people to ride their bicycles safely. In other words,more people are riding bikes on roadways built for cars.

Bike Cleveland and its affiliated clubs have done amazing work with local governments to increase the number of bicycle lanes, signage and outreach to the public to make our streets safe. However, collisions still happen. Here are a few practical tips to help establish liability and maximize recovery:

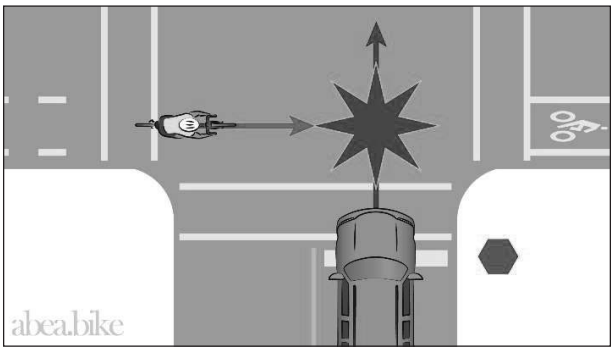
1. Know the Rules of the Road

As a practical matter, unless a police officer personally observes a collision, his or her determination of "fault"should not carry much weight and is certainly no substitute for your own thorough investigation. Moreover, even if the officer observed the collision, there is still a chance he or she will not properly apply the law applicable to bicycles. If you are representing an injured cyclist, you need to know:

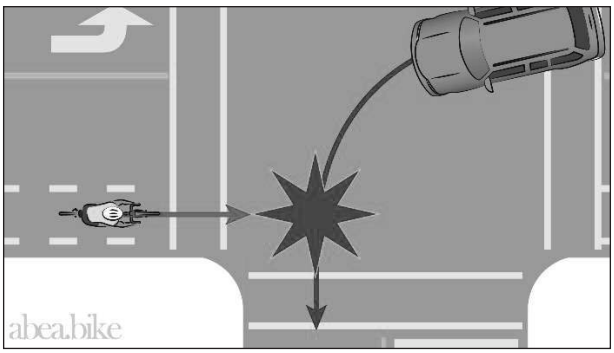
- Bicycles are considered *vehicles*.[1]
- People riding bicycles must follow the traffic laws applicable to motor vehicles[2] - yes, this means stopping at stop signs.
- Except for *freeways*[3] - which are divided multi-lane highways for through traffic with all crossroads separated in grade and with full control of access –bicycles are permitted to be ridden on the roadways.[4]
- Cities cannot require riding a bicycle on a sidewalk.[5]
- Bicycles shall be ridden "as near to the right side of the road as practicable"[6]; they may, however, use the full lane when riding to the right is *unreasonable* or *unsafe*.[7]
- Despite those "Bikes Must Ride Single File"signs, people are permitted to ride bicycles two abreast on the roadway.[8]
- Bicycles must use white headlights and red taillights / reflectors at night.[9]
- Bicycles are permitted to proceed through a red light after stopping if, and only if, the red light is malfunctioning due to the failure of a vehicle detector to detect the bicycle.[10]
- Three feet or greater is considered a safe passing distance when overtaking a person riding a bicycle.[11]

2. Common Types of Collisions

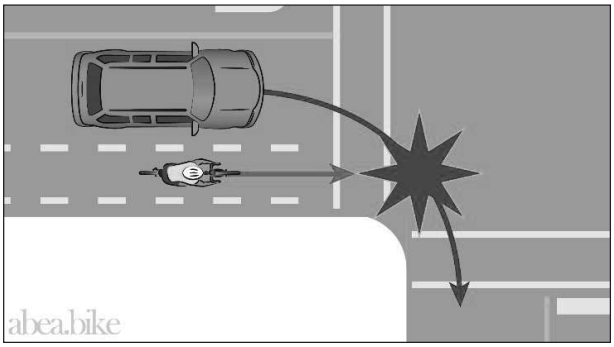
The T-Bone: You have seen this collision 100 times in your practice with motor vehicles. Considering that a person riding a bicycle takes up less physical space than a motor vehicle, it is more likely they will go unnoticed –especially by an inattentive driver. Moreover, many people do not appreciate the speed at which people can ride their bicycles and can misjudge the time they have to go through an intersection.



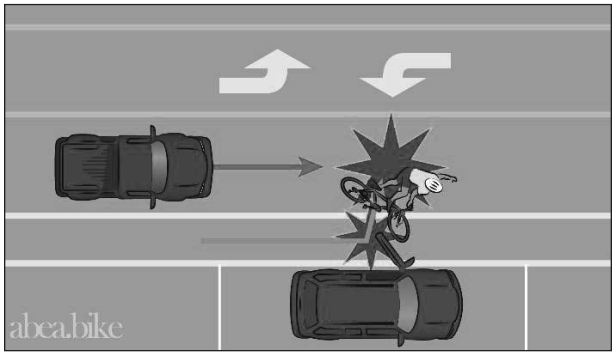
The Left Cross: This is another collision you have seen in motor vehicle cases. People fail to see the person riding their bicycle, misjudge the speed the person is riding towards them, or mistakenly assume that a bicycle can stop on a dime.



The Right Hook: This collision occurs when a motor vehicle overtakes a cyclist and suddenly makes an unsafe right turn into their lane of travel. Unfortunately, this also occurs when people on bicycles attempt to pass a stopped or slowing motor vehicle on the right side.



Getting Doored: Unique to bicycle cases – especially in communities with crowded onstreet parking – is the collision with a suddenly opened car door. This is caused when the person exiting the car does not look back to insure they can safely open their door. Even worse, if a motor vehicle is following too close behind the cyclist, the person who was just doored will likely be struck a second time.



3. Ride Data and Other Evidence

Many people use cycling computers like Garmin, Cateye, or Wahoo, watches like Polar, FitBit or Apple, or phone apps like Strava, MapMyRide or Endomondo to record measurables like speed, power, distance, heartrate, and time. Almost all of these are now equipped with GPS data which are uploaded to various platforms online (Strava is the most popular):

Reviewing ride data on Strava

Obtaining this information from your client could be helpful in determining pre-collision actions.

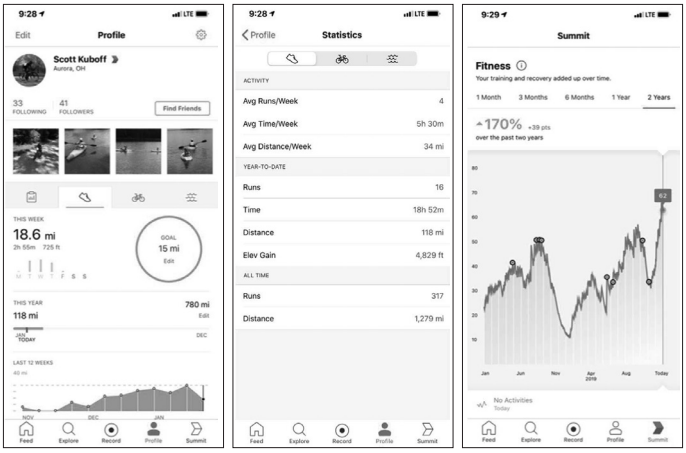
Even better is the use of handlebar mounted video cameras like Go Pro. If your client has a video of the collision, it will be incredibly difficult to dispute liability or otherwise try to place blame on your client:

Bike Cleveland! : The Hood of Woods 44107

Jaywalker – more concerned about cars – running into the path of a person riding a bike moments before the collision

4. Using Ride Data to Support Non-Economic Loss

While we are on the topic ride data, it is can be a treasure trove to support the other harms and losses your client sustained in a collision:



What better way to show how a particular injury affected your client's ability to participate in an activity they loved than supporting it with historical data showing the number of miles ridden, time in the saddle, number of rides, average speed, etc. More importantly, this data can be used to show how long it took your client to get back to their pre-collision volume and fitness level.

In addition, many cyclists possess licenses to USA Cycling, USA Triathlon, and USA Track and Field. You can search those organizations' websites to obtain past and current race results for your client to be used for the same purpose.

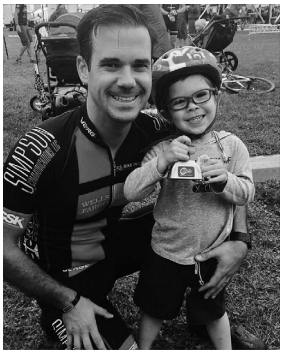
5. Property Damage Could Be More Than You Think

When preparing a settlement demand or complaint, be sure to fully consider the property damage component as there is likely additional value. A good road bike will set your client back $2,000 –higher end models are $5,000 or more –and that does not even include the pedals! A set of Speeplay or Look Keo pedals cost around $200; maybe your client purchased the *cheap* model of Garmin Vector pedals at $600. Moreover, it is not uncommon for people to upgrade their wheelset – Zipp 404 wheels will run in excess of $1,000 –or their group set –SRAM Red cranks, derailleurs, brakes, and shifters – will set a cyclist back $1,700.00. You get the point.

6. Do Not Forget About UM/UIM Coverage

Finally, be sure to ask whether your client has uninsured/underinsured motorist coverage on his or her auto policy and fully investigate whether there is coverage; you might be surprised to find out that many UM/UIM policies extend coverage to people injured by a motor vehicle while riding a bicycle. Whether the collision is a hit-and-run or the driver otherwise has inadequate coverage, pursuing a UM/UIM claim may be the only way to insure your client receives fair and just compensation for his or her injuries. ■

Scott M. Kuboff is an avid cyclist, runner, and a personal injury attorney with Ibold & O'Brien in Chardon, Ohio. Scott is a member of USA Cycling, USA Triathlon, Bike Cleveland, Cleveland Triathlon Club, and has presented to many local cycling organizations, teams, and companies concerning bicycle laws and safety.



End Notes

1. R.C. § 4511.01(A).
2. R.C. § 4511.55(A).
3. R.C. § 4511.051
4. R.C. § 4511.07(A)(8) stating "no such regulation shall prohibit the use of bicycles on any public street… "; *see also* R.C. § 4511.55.
5. R.C. § 4511.711; see also R.C. § 4511.07(A)(8).
6. R.C. § 4511.55(A).
7. R.C. § 4511.55(C) –this includes to "avoid fixed or moving objects, parked or moving vehicles, surface hazards, or if it otherwise is unsafe or impracticable to do so, including if the lane is too narrow for the bicycle or electric bicycle and an overtaking vehicle to travel safely side by side within the lane."
8. R.C. § 4511.55(B); see also R.C. § 4511.07(A)(8) stating no local ordinance shall be "fundamentally inconsistent with the uniform rules of the road prescribed by [R.C. 4511] . . ."
9. R.C. § 4511.56.
10. R.C. § 4511.132(A) –in such case a person must stop, yield the right of way, and proceed with due care.
11. R.C. § 4511.27(A).

Christine M. LaSalvia is a principal at The Law Office of Christine LaSalvia. She can be reached at 216.400.6290 or christine@MakeItRightOhio.com.

Pointers From The Bench:
An Interview With Judge Emily Hagan

By Christine M. LaSalvia

The Honorable Emily Hagan was elected to the Cuyahoga County Common Pleas Court in 2019. Since taking the bench, she has run her courtroom with a philosophy of open communication and common sense.

Judge Emily Hagan

Judge Hagan always knew she wanted to help people, particularly children. She obtained a degree in early childhood education and did her student teaching in Athens, Ohio. These experiences solidified her goal to have a professional life which would serve children and their needs. However, she realized that pursuing the law could achieve this goal in a different way. She obtained her Juris Doctorate degree with that goal in mind. She worked for two non-profit organizations before serving as staff attorney to Justice Michael Donnelly when he was seated on the Common Pleas Court. She held this position from 2007-2018.

Being a staff attorney was a tremendous training ground for her current position. She credits Justice Donnelly as an excellent teacher, and learned a lot from watching him preside over trials and deal with attorneys and visitors to his courtroom. She admires his temperament, specifically his patience and ability to listen to people. She believes that often those who visit her courtroom need the experience of being heard by the Judge. By listening, you can often find a common sense solution to resolve the problem that brought them to Court. She also credits Justice Donnelly with encouraging her to run for Judge.

Overall, Judge Hagan believes in having an open courtroom. She is always willing to meet with the parties, as some issues require the Judge to intervene and be present. She carries this philosophy through her civil trial order. Although Case Management Conferences are generally held by phone with the staff attorney, if the parties prefer to come to court and meet with the Judge, that option is available if requested.

Judge Hagan will assist with discovery disputes and is aware that nothing can slow a case down faster than an unresolved dispute. Her Court will listen to disputes and if the call cannot be transferred to her immediately, she will endeavor to provide a decision within twenty-four hours to keep the case moving toward a resolution.

Judge Hagan is willing to preside over settlement conferences in person, and to meet with the parties directly if the lawyers believe it will be helpful. She learned from Judge Donnelly that often this is what is needed to resolve the case.

Judge Hagan enjoys presiding over jury trials. She believes it is important for attorneys to keep the big picture in mind when presenting a case to the jury. It is helpful for attorneys to stipulate to anything both parties agree upon. Juries appreciate brevity and a streamlined trial.

Regarding voir dire Judge Hagan prefers that the entire panel be questioned at once. She poses a few questions to the jury, then allows the attorneys to handle most of the questioning, as they have a superior knowledge of the case and the issues.

When asked what aspects of being a Judge she found to be most rewarding, Judge Hagan went back to her original goal for attending law school. Her path in life has been guided by her desire to help people. She enjoys the parts of her job that allow her to make a difference. There are many ways to help people in the criminal arena, but in civil cases, one of the best ways to help is by assisting with the settlement to avoid the uncertainties of jury trial. In her free time, Judge Hagan likes to stay active by running, spending time with her family, and reading. ■

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Cleveland Academy of Trial Attorneys

The COVID-19 pandemic has affected the daily lives of all Ohioans. But, more than that, it has magnified the need to provide food to adults and children who otherwise do not have the financial means to access something so basic that many of us take for granted. In response to this demand, the Food Bank quickly enlisted the aid of the National Guard, Cleveland Police, and the Ohio State Highway Patrol and implemented a drive-thru to ensure that the distribution of food would be safe and efficient (wait time is an average of only 14 minutes) for the customers, workers, and volunteers. The Food Bank has been able to distribute fresh fruits, vegetables and a box of shelf stable items that are intended to last 5-7 days. Since the imposition of the Shelter in Place Order, the Food Bank has essentially been operating in "disaster mode." To put things in perspective, the Food Bank purchased and received 250,000-290,000 pounds of purchased product during the month of January. During the period of March 23-April 23, more than **one million pounds** of food product was purchased.

Chris Patno volunteers at the Cleveland Food Bank

In response to this growing demand, in March and April the Cleveland Academy of Trial Attorneys partnered with the Greater Cleveland Food Bank to launch a virtual food drive, in which CATA pledged to match donations up to $5,000. Treasurer Meghan Connolly spearheaded the drive, and encouraged members and their families to post on social media. Through the support of our members, family, and friends, CATA it pleased to announce that we exceeded our goal, raising a total of $11,543.00 for the Greater Cleveland Food Bank. We are grateful to all who contributed to help this worthy organization in these trying times!

Scott Kuboff

On February 22, 2020, **Scott Kuboff** of **Ibold & O'Brien** competed in the Olde Girdled Grit 50K, a race in the Lake Health Running Series, which took place at Lake Metropark's Girdled Road Reservation.

Training for the ultramarathon started in mid-December when Scott texted his brother-in-law a link to the race, adding: "We just ran 10 miles on the Buckeye Trail and I thought you'd want to do the half marathon distance." When his phone buzzed moments later, Scott read "you're not thinking of doing the whole thing?.. Let's do it." Both signed up before giving it a second thought.

While most training plans span 20 weeks, they had 11. Scott's training required putting in 6 to 8 mile days during the week, which he did before his family woke up. On Saturdays, Scott and his brother-in-law would meet at trailheads in the Cuyahoga Valley National Park before dawn and run between 15 to 20 miles. Sundays included another 8 to 10 miles to get used to running on tired legs.

Running an ultramarathon in the winter requires *a lot* of running in horrible conditions. "The night before the race, I received an email from the promoter advising of the 'less than desirable' trail conditions," Scott said. It was worse than he thought, explaining "thick ice covered the entire width of the trail at Girdled Road which accounted for 18 miles of the entire race."

Scott Kuboff training for 50K race

Scott and brother-in-law complete the 50K race

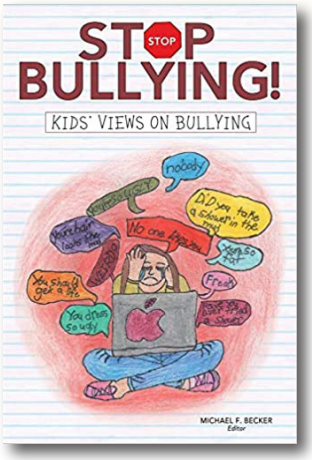
Despite the ice, Scott finished the race in a time of 5 hours 39 minutes – good enough for 15th place overall. This fall, Scott is running the Doan Creek 50K which is promoted by Running Forward and Giving Back to raise funds for the Steve Pierce Memorial Scholarship.

Nurenberg, Paris, Heller and McCarthy

The **Nurenberg Paris** law firm recently assisted two local organizations during the COVID-19 pandemic - Girl Scout Troop 1740 and Westlake Meals on Wheels. Prior to Ohio's Stay At Home Order, the local Girl Scout troop had picked up their shipment of cookies with the intention of selling them in the community as part of one of its largest fundraising efforts of the year. Unfortunately, with the imposition of the Order, the Girl Scouts were unable to sell the cookies at many of the intended locations due to safety reasons. Knowing that 1.7 million Girl Scouts depend on the cookie program to fund life-changing, female-led programs, experiences and learning, Nurenberg Paris purchased 300 boxes of cookies and delivered them to Westlake's Meals on Wheels program. This program is a non-profit community service which is organized to help individuals with medical and aging issues. Westlake Meals on Wheels operates with 100% community support and is primarily funded through community donations. For more information on how to support the Girl Scouts, please visit: https://www.girlscouts.org/en/cookie-care.html#buy-cookies and for more information on the Westlake Meals on Wheels, please visit, https://www.westlakemealsonwheels.org/.

NPHM staff members deliver Girl Scout Cookies to Meals on Wheels

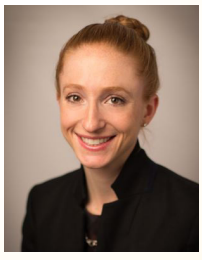
Michael Becker



In February 2020, Attorney **Michael Becker** published a book entitled, "Stop Bullying!: Kids' Views on Bullying." This book was written by Michael in collaboration with children between the 3rd and 8th grades from the Cleveland area. The purpose of the book is to provide the child's perspective on the different types of bulling, why bulling hurts, and ways in which to reduce and stop bullying. "Stop Bullying!" is also a tool parents, teachers, and community leaders can utilize when helping children to talk about and cope with bullying. Bullying is a pervasive public health threat among our children. It can start in early grade school and continue through high school. Over 13 million students are affected by bullying every year. Research shows that hundreds of thousands of students stay home from school each year as a way to avoid being bullied. The Pew Research Center recently reported that a majority of teens have experienced some form of cyberbullying.

The climate in a child's home, school, and in the community may be cultivating the bully. Respect and tolerance need to be taught in grade school and at home. Author Barbara Colorosa noted that we need a cultural change to have more "brave-hearted" kids, meaning kids with the moral strength and courage to resist the bully, defend those who have been targeted, or give witness to the cruelty in order to get a bully to stop. Kids need to strive to become "bravehearted" so that we can aspire to have a bully-free, safe space at school and in the community.

Michael Becker, through The Becker Law Firm, has been actively supporting a Cleveland based anti-bullying campaign for many years called "2 Strong 4 Bullies." This program includes educating the public on the dangers of bullying and ways to protect our children. The book is available for purchase through Michael's charitable foundation, www.mikes-kids.org. ■



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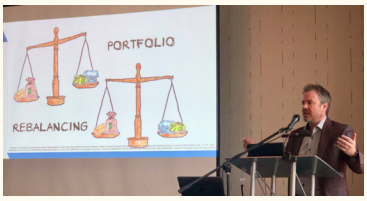
A Photo Montage: CATA Socials and Lunchcheon Sponsorship

November 2019 Luncheon

December 2019 Luncheon

CW Settlements Sponsors Luncheon CLEs and Happy Hour for CATA



CATA Social for CWRU Law Students 1-30-20

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Authenticating Webpages and Social Media Posts: A Practical Guide

by Dustin B. Herman, Esq., Jeradon Z. Mura, Esq., and Marie Magner

IN THE AGE OF FAKE NEWS AND DEEPFAKES, we will continue to see a steady increase in challenges to the authenticity of exhibits pulled from the internet, especially for printouts/PDFs of webpages and social media posts. With such exhibits, there are indeed reasonable questions to be asked: Did this webpage/social media post actually exist--or is the exhibit a forgery? Is the exhibit a fair and accurate representation of the webpage/social media post as it existed--or has it been altered? Who actually published/authored the original webpage/social media post?

Luckily, the bar for authenticity is very low. The judge need only find there is "evidence sufficient to support a finding that the matter in question ***is what its proponent claims.***" Ohio Evid. R. 901(A). The jury will then make the ultimate determination of whether the exhibit is what the proponent claims--which means most objections to authenticity will/should go to weight rather than admissibility.[1]

The problem is that many defense attorneys will not stipulate to anything and judges have wide discretion over authenticity determinations. We cannot simply print out a webpage and show up at trial and expect to have the exhibit admitted. The practical question is: ***What steps do we need to take to turn a printout of a webpage/social media post into a properly authenticated exhibit at trial?***

Below, we provide 8 practical tips for preparing for and overcoming objections to the authenticity of webpages and social media posts.[2]

Practical Tip #1: Remind Your Judge the Bar for Authenticity is Very Low and the Ultimate Determination of Authenticity is for the Jury

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid. R. 901(A).

- "The evidence necessary to support a finding that the document is what a party claims it to be has a ***very low threshold***, which is less demanding than the preponderance of the evidence." *State v. Gibson*, 2015-Ohio-1679, ¶46 (6th Dist.) (quoting *State v. White*, 2004-Ohio-6005, 61 (4th Dist.)). *See also State v. Padgette*, 2020-Ohio-672 (8th Dist.) ("The hurdle the proponent of the document must overcome in order to properly authenticate a document is not great.... The ultimate decision on the weight to be given to that piece of evidence is left to the trier of fact.") (quoting *State v. Brown*, 2002-Ohio-5207, ¶¶33-35 (7th Dist.)); *State v. Inkton*, 2016-Ohio-693, ¶73 (8th Dist.) ("the threshold standard for authenticating evidence pursuant to Evid. R. 901(A) is low").

- "[B]ecause ***authentication is essentially a question of conditional relevancy***, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims." *State v. Gibson*, 2015-Ohio-1679, ¶47 (emphasis added) (quoting *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 539 (D.Md.2007)). Thus, "a trial court 'need not find that the evidence is necessarily what the proponent claims, but only that there was sufficient evidence that the jury might ultimately do so.'" *Id*. (quoting *Lorraine*, at 542).
- "[O]nce the prima facie threshold is met, 'the burden of going forward with respect to authentication shifts to the opponent to rebut the prima facie showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document.'" *Gibson*, at ¶47 (quoting *Hartford Insurance Co. v. Parker*, 6th Dist., 1982 WL 6662, *7).

Practical Tip #2: Steps for Proving the Exhibit is a Fair and Accurate Representation of a Webpage/ Social Media Post that Actually Exists/Did Exist

The focus of any authenticity analysis will depend on what the proponent is claiming the exhibit to be. "Authentication procedure is a form of relevancy; that is, authentication connects the particular evidence sought to be introduced to the issues or persons involved in the trial." Evid. R. 901, Staff Notes. In the context of printouts/ PDFs of webpages and social media posts, the proponent is, at a minimum, claiming that the exhibit is a fair and accurate representation of a webpage/ social media post that actually exists (or did exist).

That burden can be easily satisfied with testimony from a person who visited the website and printed it/saved it as a PDF. *See* Evid. R. 901(B)(1) (authentication can be established through "[t]estimony that a matter is what it is claimed to be."). To do this you need: (1) someone--not you--to save the webpage as a PDF;[3] and (2) an affidavit from the person that did so which states--in as much detail as possible--how and when the webpage was accessed, how the webpage was saved as a PDF, and that the PDF is a fair and accurate representation of the webpage at the time it was accessed. Make sure the judge can track the steps the person took in accessing the website and creating the PDF (e.g., at this date and time the affiant used Google Chrome to access the webpage; affiant saved the webpage as a PDF using the "save as PDF" function (or whatever procedure the person used); the PDF is a fair and accurate representation of the original webpage; and the PDF is attached). The PDF itself should contain the full URL of the webpage and the date and time the webpage was saved as a PDF.[4]

The cheapest (free) way to do this is to have a staff member save/print the webpage and sign an affidavit. A better way is to hire a company to archive the webpage and provide an affidavit of the process they used for doing so. There are many companies out there that provide this service (e.g., Hanzo Archives, Inc.). They usually have their own software that creates a highly accurate copy of the webpage (much better than using the "save as PDF" function in your web browser). The cost for an affidavit is around $100 per webpage. If live testimony is necessary, that would cost extra.

Following those steps will establish the fact that the webpage/social media post was actually published on the internet at a specific point in time--and your judge will likely be annoyed if defense counsel requires you to bring the witness in live to testify. But you should make sure the witness is available to testify--and on your witness list--just in case. Of course, defense counsel may still contest who authored/published the webpage/social media post, and that issue is dealt with below.

Practical Tip #3: Proving Source Authenticity

The proponent of a webpage is usually, but not always, claiming that the webpage was authored/published by a specific person (e.g., the defendant, a defense expert, a governmental body, a medical authority, etc.). Fortunately, ***"challenges to the authorship of documents... normally go to the weight rather than admissibility."*** *State v. Bell*, 2019-Ohio-340, ¶73 (8th Dist.) (quoting *State v. Townsend*, 2005-Ohio-6945, ¶¶ 54-55 (7th Dist.)). We can often satisfy the burden of source authenticity by relying on circumstantial evidence--e.g., "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances", *see* Evid. R. 901(B)(4)--that would allow a reasonable juror to conclude the webpage/social media post was published by the purported publisher. *Id*.

Webpages almost always contain indicia of authorship (e.g., the defendant's name, logo, physical address, email address, phone number, location, other identifying information, etc.). Indeed, the Eighth District has upheld the admissibility of a plaintiff's webpage based merely upon an "affidavit attesting that [the witness] retrieved the information about [Plaintiff's] Microtel Hotels from its web page on the Internet." *Kassouf v. White*, 8th Dist. Cuyahoga No. 75446, 2000 WL 235770, *4. More recently, the Sixth Circuit upheld the admission of Facebook evidence based on circumstantial evidence, including an

"account in defendant's name, an email address with his name and moniker, a location linked to defendant, dates that correspond to witness testimony, and a picture of defendant." *United States v. Quintan*a, 763 Fed.Appx. 422, 427 (6th Cir.2019).

If you have a particularly skeptical judge, you should consider trying to establish that the defendant registered the domain name of the website. For a quick and dirty reference, try lookup.icann.org/lookup. Domain registration services like GoDaddy.com act as a proxy, publishing their information instead of the private owner of a domain. GoDaddy is responsive to subpoenas for domain-owner identities and account information. Mail subpoenas to Compliance Department, GoDaddy.com, LLC, 14455 North Hayden Rd., Suite 219, Scottsdale, AZ 85260.

Unlike webpages authored by a defendant, government websites--and the rules and regulations published by governmental and administrative bodies--are self-authenticating under Evid. R. 902(5). *State v. Frakes*, 2008-Ohio-4204, ¶44 (5th Dist.) ("The NHTSA manual qualifies as a self-authenticated exhibit under Evid. R. 902(5) and as such, extrinsic evidence is not required."). *See also Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 WL 33313134, *3 (S.D.Ohio) ("The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under Rule 902(5) of the Federal Rules of Evidence.").

You can use the rules and circumstantial evidence connecting the webpage to the purported author to satisfy the low authenticity burden. If the defendant wants to argue to the jury that the webpage was authored by someone else they are free to do so, but that should not affect the admissibility of the exhibit.

Practical Tip #4: Address Authenticity Issues for a Defendant's Statements Through Deposition Testimony, Stipulations, Requests for Admissions, or Interrogatories

Most authenticity issues can be--and should be--dealt with in advance of trial. "A member of the Federal Rules of Evidence Advisory Committee has stated: 'it may be well to remind bench and bar that in any event the problem of authentication or identification should be confronted before actual trial. Whether by interrogatories, depositions, requests for admission or--as is most effective--by confrontation in final pre-trial conference many (if not all) problems of authentication or identification should be isolated and resolved.... In a recent case...the writer had more than 1100 documents admitted in a little over two hours. This was possible because Judge Fullam ordered that counsel should meet *before* the final pre-trial conference to mark all documents and resolve all problems of authenticity or identity.'" Ohio Evid. R. 901, Staff Notes.

You can authenticate a defendant's current webpages, past webpages, social media posts, etc., by: (1) having the defendant authenticate the exhibit at the defendant's deposition; (2) serving requests for admissions--"A party may serve upon any other party a written request for the admission... of... the genuineness of any documents described in the request[.]" Ohio Civ. R. 36(A); (3) interrogatories; or (4) getting a stipulation in advance of trial.

Moreover, the Ohio Supreme Court has held that any documents produced by a party in discovery will be considered authentic. *Columbus City Schools Bd. of Education v. Franklin Cty. Bd. of Revision*, 2020-Ohio-353, ¶22 (Ohio).

Practical Tip #5: Users Can Download Their Entire Social Media Profiles

Authenticating social media evidence can be more complicated than merely showing a witness a printout of a Facebook photo or Tweet that includes an account name and profile picture. See e.g., *United States v. Vayner*, 769 F.3d 125 (2d Cir.2014) (prosecution failed to authenticate print out of social media profile bearing defendant's name). However, most social media platforms have a function that allows a user to download their entire profile, including all postings, messages, etc., made on the platform. The downloaded data will often include information identifying the IP addresses and devices used to log-on to the account and can be invaluable in showing, for instance, that a post was made at 2 am, from the party's own phone, at or near their home. Please note, however, that the downloaded data will not include deleted posts or deleted direct message conversations, nor any indication of whether something was deleted.

You should consider sending a request for the defendant to produce the relevant data from their social media platform(s)--and include instructions in the request for how the defendant can and should download their social media platform:

- **Facebook:** Go to Settings > Your Facebook Information > Download Your Information. Select the relevant date range and information to include, and click "Create File." The resulting zip file can then be shared with all relevant parties.
- **Instagram:** From the profile page, select the Settings gear > Privacy and Security > Request Download under the Date Download section.

- **Twitter:** Select "More" in the left-hand menu > Settings and privacy > Account > Your Twitter data. Enter the password under "Download your Twitter Data" and select "Request Archive."
- **WhatsApp** uses end-to-end encryption and does not store messages or transaction logs anywhere except on a user's device. WhatsApp was purchased by Facebook in 2014. In the app go to Settings > Account > Request Account Info > Request Report.

If you use social media, go through the download process for your own account and get familiar with how it works--and what information you can and cannot get from different platforms. Note that most social media companies are not keen on providing social media records or authenticating contents thereof--so do not count on them to simplify your authentication process. If you obtain social media content other than through discovery from a defendant, you will need to authenticate it similarly to other webpages.

Practical Tip #6: Avoid Problems of "Link Rot" and "Reference Rot" By Creating a Permanent Record of a Webpage with Harvard's Perma.cc or a Similar Archival Service

Websites are inherently dynamic. They are constantly changed, updated, and deleted. There are two primary issues that arise with older web content--link rot and reference rot. Link rot occurs when a URL is broken and no longer pulls up content (think a "404: Page Not Found" warning). Reference rot occurs when a URL is still active but the content to which it links has changed. Reference rot is actually a huge problem. Indeed, "50% of the URLs within U.S. Supreme Court opinions suffer reference rot." *See* https://harvardlawreview.org/2014/03/perma-scoping-and-addressing-the-problem-of-link-and-reference-rot-in-legal-citations/.

If you are seeking to admit a printout of a webpage that is no longer available, you may run into problems because the court can no longer verify the existence of the webpage by simply visiting it." [T]he attached press release here did not contain a web address to its location on the Ohio Attorney General's website. Moreover, a search of that website did not locate the press release. Therefore, we hold that the attached press release does not satisfy the condition precedent of authenticity, and as a result is inadmissible as evidence." *Residential Funding Co. v. Thorne*, 2012-Ohio-2552, ¶30 (6th Dist.). *See also Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir.2013) (Posner, J.) ("A document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself.").

You can avoid those issues by creating a permanent record of the website using an archival service like Harvard's Perma.cc, which allows you to make customized permanent records of webpages (the first 10 are free, but after that you will be charged a fee). The Wayback Machine has a similar "Save Page Now" feature.

Practical Tip #7: An Increasing Number of Courts Will Take Judicial Notice of the Wayback Machine/Internet Archive

If the web content was changed or deleted before you could preserve it yourself, we highly recommend taking advantage of the Wayback Machine. If you are not familiar with the Wayback Machine, you need to be. Courts across the country have taken judicial notice of the contents of the Wayback Machine (which is also known as the "Internet Archive"). *See Wensink Farm Seeds, Inc. v. Lafever*, No. 16-CV-1282, 2017 WL 2735573, *6 (N.D.Ohio 2017) ("'the Internet Archive... has been found to be an acceptable source for the taking of judicial notice.'") (citations omitted); *Pohl v. MH Sub I, LLC*, 332 F.R.D. 713, 716 (N.D.Fla.2019) ("This Court follows the lead of the overwhelming number of courts that have decided the issue and takes judicial notice of the contents of Wayback Machine evidence because they 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)(2).").

Thus, for those courts willing to take judicial notice of the Wayback Machine, to properly authenticate a webpage from the Wayback Machine all you need is an affidavit from the person who saved the webpage from the Wayback Machine, and you're good to go (although source authenticity--that is, the author of the original webpage--might still be an issue). To gauge the level of scrutiny your judge will apply to Wayback Machine evidence, you should simply ask your judge in advance of trial if they are familiar with the Wayback Machine.

Practical Tip #8: If a Court Will Not Take Judicial Notice of the Wayback Machine, You Can Get an Affidavit Directly from the Wayback Machine

For courts that will not take judicial notice of the Wayback Machine's reliability, you will need additional evidence to authenticate its results. The Second, Third, and Seventh Circuit courts and a number of district courts ask for an affidavit from a person with knowledge of how the Wayback Machine works.[5]

Due to the number of affidavit requests it receives, the Internet Archive established a system for responding to

them for a fee. Requesters take the first step by submitting payment and a list of desired URLs to be provided.[6] The Internet Archive will respond to any requests deemed reasonable.

A Wayback Machine affidavit costs $250 plus $20 per requested URL ($30 for those with downloadable or printable files, like .pdf files). There is an additional $100 fee for notarization which must be expressly requested if desired. The Internet Archive accepts payment via check or PayPal. Checks can be sent to Internet Archive, 300 Funston Avenue, San Francisco, CA 94118. If using PayPal, send payments to info@archive.org through http://www.paypal.com. Immediately send a confirmation of payment email to info@archive.org referencing your affidavit request. Whether through mail or PayPal, payments absolutely must reference the affidavit request and additional information so the Internet Archive can match your payment with your requested URLs. Due to being stiffed in the past, the Internet Archive will not process requests without first receiving payment.

The requested URLs must be sent electronically to the Internet Archive at info@archive.org. An extended URL must be provided for every desired page, even if they fall under a single domain. While the Internet Archive does not set a hard limit on how many URLs can be requested, it will refuse any request deemed unreasonable.

The Internet Archive makes no guarantees for response time but tries to turn these requests around in fifteen business days. The Internet Archive sends the requested documents by regular mail but will use FedEx if a FedEx account number is provided by the requester. It will not send documents by fax. You can learn more information at http://www.archive.org/legal.

* * *

The bottom line is that you must prepare in advance of trial to overcome objections to authenticity of webpages and social media posts. We hope these tips will help you in your practice! ■

End Notes

1. Authenticity challenges "normally go to the weight of the evidence the trier of fact should place on the evidence rather than their admissibility." *State v. Brown*, 2002-Ohio-5207, ¶ 40 (7th Dist.).
2. To be clear, there are obviously other objections under the rules of evidence (e.g., hearsay, relevance, 403, etc.) that must also be overcome before an exhibit can be admitted into evidence. This article focuses solely on overcoming challenges to authenticity.
3. Here we use "PDF," but it could also be saved as a JPEG or another type of electronic file or printed directly to a hard copy exhibit.
4. "[C]ourts have considered website print-outs sufficiently authenticated where the proponent declared that they were true and correct copies of pages on the internet and the print-outs included their webpage URL address and the dates printed." *Haines v. Home Depot U.S.A., Inc.*, 2012 WL 1143648, *7 (E.D.Ca. 2012).
5. *See., e.g., Specht v. Google Inc.*, 747 F.2d 929, 933 (7th Cir. 2014); *United States v. Bansal*, 663 F.3d 634, 667-68 (3d Cir. 2011); *United States v. Gasperini,* 894 F.3d 482, 490 (2d Cir. 2018); *My Health, Inc. v. GE*, W.D. Wis. No. 15-cv-80-jdp, 2015 U.S. Dist. LEXIS 172252 at *10 (Dec. 28, 2015); *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, M.D. Fla. No. 8:06-cv-223-T-MSS, 2006 U.S. Dist. LEXIS 28873 at *6 (May 12, 2006).
6. Pages found on the Wayback Machine will have a URL similar to http://web.archive.org/web/19970126045828/http://www.archive.org/.

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 2020-2021 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

William Eadie is a nursing home abuse lawyer fighting to end nursing home abuse throughout Ohio. You can schedule a call back with him by calling 216.777.8856, or at www.eadiehill.com.

Practically Legal: Working From Home, Like it Or Not

by William B. Eadie

Well here we are.

The world decided you're working from home, and most"techie"lawyers are still years behind their kids.

I thought I'd rattle off some easy ways to jump into working remotely and keeping your practice going strong.

1. Zoom.

It's hard to imagine by the time of this publication, you haven't gotten into Zoom.

But on the off chance you haven't, go sign up right now on zoom.us. (If you don't have a Google account to register with, pause before you sign up to register your email as a Google account.)

Zoom is easily the simplest, most user-friendly, and badass videoconference solution that works off your laptop, tablet or iPad, or even your phone. People who are stuck in the past can dial in with a telephone line Zoom built into the platform.

And for a 40 minute meeting, it's free. (Splurge on the $15 per month plan to get very powerful features.)

We use these for internal team meetings, new client meetings, expert meetings, and since the pandemic, virtual mediations.

If you're worried about your technology, splurge on a $100 HD webcam Amazon will have at your doorstep tomorrow. (Remember to disinfect that box though.)

2. Google everything.

If you've somehow resisted the siren song of the G Suite google option, now is the time to dive in. Google Drive is included and allows for password-protected sharing and uploading.

Meaning, when a facility can't get you records on paper because of COVID 19, you can make a secure folder and share a link for themto upload.

Or share large files like demand packages.

Yes, Dropbox is an alternative. It's clunkier, more expensive, and less user friendly. But it works, too.

3. Adobe Acrobat signatures (or DocuSign, or any other one).

If you've upgraded your Adobe Acrobat any time recently, you've probably already switched over to the subscription-based Acrobat DC.

What you might not realize is that as part of that Adobe Acrobat DC package, you have a built-in esignature platform that can allow staff to easily send contracts, settlement agreements, and other documents for electronic signature.

That basically pays for itself since other options like DocuSign cost as much as Adobe Acrobat alone.

The"fill and sign"tool couldn't be easier: open a PDF of a contract or anything else that needs signature, click"fill and sign,"and it walks you through making the document e-signature ready, and then handles sending it to everyone who needs to sign.

What's more, everyone gets updates as you go, and a final copy when everyone has signed.

We moved to this for all contracts long ago because it takes all the hassle out of signing clients.

4. Stamps.com and mailing services.

It turns out you do not have to go to the post office—or even your own office—to mail things (including certified mail). If you haven't checked out stamps.com, now is the time.

For $15 per month you get the privilege of sending mail, something you could have already done with a stamp. So why bother?

But there really is a benefit.

With stamps.com you can stick an envelope in the printer and it prints the address information and stamp directly on the envelope (priced appropriately for the weight), and will even do certified mail and return receipts.

So being stuck at home doesn't mean being stuck not sending mail.

Taking this to the next level, there are services that will mail the letter for you—again, including certified mail, even return-envelopes to get those signed documents back! We use mailform.io to send out mail pieces remotely, including certified and with return-envelopes. It even allows virtual assistants out of the country to mail things for you.

For all these services, you can bill the individual (not subscription) costs as postage costs back to the case.

5. Virtual Notaries

It turns out you do not need anyone to notarize things in person anymore.

While federal courts have moved to non-notarized declarations, state courts still require notaries to make affidavits, affidavits.

But that no longer requires notaries on staff or a trip to the local bank branch—both things not easy to accomplish in a pandemic, or when you're filing a summary judgment opposition late night—thanks to online notaries.

We've used these with expert affidavits and the like when they're out of town or busy during banking hours. The services work with the affiant to schedule a video call and notarize based on that call.

So if you're wondering how to get that settlement agreement notarized in a pandemic, here you go. Google"Remote Online Notarization"and find a vendor in no time.

6. Fax from Anywhere.

For those counties that do not have e-filing, all of a sudden fax-filing is available for anything and everything. Don't despair, you can fax from anywhere.

Most of you with VOIP systems probably already have a desktop phone app that can fax (whether you realize it or not; play around a bit).

If not, do not despair. There are myriad e-faxing services that are cheap and easy. I've used myfax.com to quickly and easily fax-file when our service was down, and frankly it was as easy—or easier—than our built-in service. With a free trial, what's not to love?

What else do you have? Share your work-from-home hacks with me! ■

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Verdict Spotlight

by Dana M. Paris

A Summit County jury recently returned a verdict in favor of the plaintiff and awarded him $565,000.00. The plaintiff was represented by attorneys **Mark Obral** and **Al Pal** of **Obral, Silk & Pal, LLC** and the trial team was victorious in defeating the defendant who was represented by attorneys Terry and Sean Kenneally.

Al Pal

Mark Obral

This case stems from a motor vehicle collision where the defendant lost control of his vehicle and spun out on Interstate 77 in Richfield, causing a head on collision with the plaintiff. The defendant and the carrier disputed liability from the early pre-litigation stages throughout trial.

As a result of the collision, the plaintiff suffered a cervical disc herniation which necessitated a cervical fusion. Immediately following the crash, the plaintiff went to the emergency room and sought chiropractic treatment for approximately two years for his neck injury. When the neck injury failed to improve and the pain persisted, the plaintiff was referred to pain management and an orthopedic consultation with Robert McClain, M.D. at St. Vincent Charity Medical Center. Dr. McClain confirmed the disc herniation on the MRI films and, two and a half years after the collision, performed a cervical fusion. Dr. McClain served as plaintiff's expert witness in the case. He opined that plaintiff's injury was a direct and proximate result of the crash; it was a permanent injury; and the plates and screws in the cervical spine constituted a permanent and substantial physical deformity. The defense retained Barry Greenberg, M.D. as its medical expert.

In terms of economic damages, the gross medical expenses were approximately $85,000.00 and the *Robinson* amount was approximately $30,000.00. In preparation for trial, plaintiff's counsel decided not to introduce the medical bills and to forego introducing any economic damages to the jury. Although the defense nevertheless sought to introduce the medical bills, the Court denied their request on relevancy grounds. The trial started on Monday and lasted until Friday afternoon. The defense called Dr. Greenberg to testify live at trial and, based upon the verdict, one can agree that the jury did not find his testimony to be credible.

On Friday afternoon, after three hours of deliberating, the jury came back with a verdict. In reviewing the verdict forms and jury interrogatories, Judge O'Brien noted some discrepancies. She therefore instructed the jurors to continue deliberating until the discrepancies were resolved. The jury did just that and, on Monday morning, returned a verdict. They agreed that the defendant was negligent, that his negligence was a proximate cause of the plaintiff's injuries, and awarded $565,000.00 in non-economic damages.

Unfortunately, the jury also agreed that the plaintiff was comparatively negligent and apportioned 51% negligence to the defendant. As such, the verdict was reduced to $288,150.00.

The case is *Daniel Russo v. Danette J. Gissinger,* Summit Cty. C.P. No. CV 2017-08-3458. ■

Leveraging Day-In-The-Life Documentaries To Illuminate The Impact of Injury

By Barry Hersch, CLVS

For nearly 35 years, I've used video to capture life experiences and produce them as "Day in the Life" documentaries, performing my duties with the compassion and moral honesty that is both critical and mandatory to my role. It is a humbling honor to enter a home that has been drastically changed for the worse and then be trusted to tell its story. I understand the expectation to professionally, fairly observe the environment and then document the situation with a goal to produce a video that clearly and thoroughly demonstrates the impact of severe and sudden change – something not fulfilled by mere text description on paper.

I approach each video documentary from the perspective that it's the most important piece of a puzzle. A great deal of the puzzle lays clearly before me, and it's obvious that life has changed dramatically for the injured party. It is then my job to recognize the missing piece, illuminate it, and bring it to the forefront to complete the picture. It is then the responsibility of the court system to review and evaluate each complete and unbiased story.

Long before a camera ever begins recording, usually as soon as the decision has been made to document a plaintiff, I arrange for an initial discussion with the family. This first step in the process is imperative to creating a rapport with the client that will, ultimately, result in a complete and effective video. It also gives me the opportunity to assess the situation and set expectations for the client and for myself. On site the day of the shoot, I carefully walk through every aspect of the injured party's day, documenting each thoroughly on camera – bathing, dressing, eating, transportation, medication, therapy, and more.

As important as it is to demonstrate the experience of the injured party, it's also meaningful to incorporate that of the surrounding family, understanding there is always an underlying impact on every member of the household. By the time a shoot is complete and I've left the home, I often feel emotionally drained by my observations – a signal to me that the documentary will succeed in creating clarity around the experience of the claimant and family.

Injuries change lives. It's almost impossible to explain the extent in words. A Day in the Life documentary is the most effective means of demonstrating impact and creating a path to understanding. In the end, videography is secondary to the primary responsibility I have – that being non-fiction storytelling that succeeds in opening the eyes of the audience to another's new, and stark, reality.

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Recent Ohio Appellate Decisions

by Kyle B. Melling and Regina M. Russo

Ayers v. City of Cleveland, S.Ct. Slip Op. No. 2020-Ohio-1047 (March 25, 2020).

Disposition: Affirmed.

Topics: Political Subdivision Indemnification.

In December of 2000 Plaintiff David Ayers was convicted by a jury of aggravated murder, aggravated burglary, and aggravated robbery. Plaintiff prevailed on a federal habeas corpus claim and was released from prison in 2011. He subsequently filed suit in federal district court asserting civil-rights violations against the City of Cleveland and two of the city's police detectives. The city was dismissed on summary judgment, and the case proceeded to trial against the two detectives. The district court entered a judgment against the detectives for $13,210,000 plus costs and attorneys fees. Following the trial, the two detectives offered to assign Plaintiff any indemnification claims that they might have against the city in exchange for an agreement by Plaintiff to forgo collection efforts against the detectives personally. Plaintiff rejected these offers.

The City of Cleveland did not actively seek to indemnify the detectives, and the detectives did not seek to enforce their rights to be indemnified by the city. Subsequently, one of the detectives passed away, and the other filed a petition for Chapter 7 bankruptcy and the bankruptcy court discharged his personal liability on the judgment.

Following the bankruptcy, Plaintiff filed a motion in his district court case to reinstate his previously dismissed claim against the city. The district court initially granted the motion, but then vacated its order and dismissed his claim for lack of subject-matter jurisdiction.

Plaintiff then filed the instant case against the City of Cleveland in the Cuyahoga County Court of Common Pleas for statutory indemnification pursuant to R.C. 2744.07(A)(2), tortious interference with the enforcement of a judgment, breach of contract, abuse of process, unjust enrichment, specific performance, and civil conspiracy.

The parties brought cross motions for summary judgment on the issue of whether the city was required to indemnify and pay the judgments rendered against its employees. The Common Pleas Court granted Plaintiff's motion and concluded that R.C. 2744.07(A)(2) required Cleveland to indemnify the detectives and pay the judgment.

On appeal, the Eighth District reversed the decision and concluded that Plaintiff, as a judgment creditor only, did not have standing to bring a private cause of action against the city to enforce the city's obligations to its employees. Plaintiff appealed and the Ohio Supreme Court accepted the appeal on the limited issue of whether R.C. 2744.07(A)(2) provided a third-party judgment creditor the right to proceed directly against an indemnitor.

The Supreme Court held that R.C. 2744.07(A)(2) only requires a political subdivision to indemnify employees, and that right is personal to the employee. The right does not extend to third party judgment creditors like the Plaintiff. The Court, therefore, affirmed the decision of the Eighth District.

Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC, S.Ct. Slip Op. No. 2020-Ohio-1056 (March 25, 2020).

Disposition: Reversed in part and remanded.

Topics: Lodestar enhancements to attorney fee awards.

Plaintiff, Phoenix Lighting Group, an agency that sold branded lighting products, was awarded a jury verdict against Defendants for, among other things, tortious interference with business relationships, tortious interference with contractual relationships, misappropriation of trade secrets, unfair competition, civil conspiracy, and frivolous conduct. The jury awarded compensatory and punitive damages and reasonable attorney fees.

To determine the reasonable attorney fees, the court calculated a reasonable hourly rate, multiplied by the number of hours worked on the case (the "lodestar"). The trial court established a lodestar of $1,991,507. The trial court then considered whether an enhancement of that amount was warranted. In deciding to enhance the lodestar amount, the court determined that the case was "quite complex, both factually and legally," that the case took up so much of counsel's time that they were hindered "from accepting and pursuing other cases and clients," that Plaintiff's attorneys "obtained a highly favorable outcome," that the hybrid hourly fee and contingent nature of the compensation "forced Phoenix's counsel to assume a great financial risk," and that all of the attorneys involved in this case were "of high caliber," were "highly experienced, and maintained excellent reputations." Based on these determinations, the trial court applied a multiplier of two to the lodestar value and awarded a total of $3,983,014 in attorney fees.

On appeal, the Ninth District affirmed the verdict and compensatory-damages award, and the attorney fee award, including the enhancement.

The Supreme Court accepted jurisdiction and reversed the lodestar enhancement. In a unanimous decision (Kennedy

& Fischer concurring), the Court held that because there is a strong presumption that the lodestar method yields a sufficient attorney fee, enhancements should be granted rarely and only where the applicant seeking the enhancement can produce objective and specific evidence that an enhancement is necessary to compensate for a factor not already subsumed within the Court's lodestar calculation. The Supreme Court found that the factors relied upon by the trial court were those that were already built into the initial lodestar amount. The Court held that absent objective and specific evidence that an enhancement is necessary to account for a factor not already subsumed in the calculation, the lodestar amount should not be enhanced.

Crumb, et al., v. LeafGuard by Beldon, Inc., et al., 8th Dist. No. 108321, 2020-Ohio-796 (March 5, 2020).

Disposition: Reversed summary judgment.

Topics: Primary Assumption of Risk, slip and fall.

Plaintiff, William Crumb, resided with his mother-in-law at a house owned by a third-party landlord. The landlord hired LeafGuard to construct a gutter system for the house. While installing the gutter system, LeafGuard ran a downspout along the side of the garage, where it initially drained into an area of grass and dirt. Subsequently, a new driveway was installed which included the area of the downspout. After installation of the driveway, LeafGuard returned to add an elbow hook on the bottom of the downspout, above the driveway.

Plaintiff's wife was concerned because the downspout drained water onto the new concrete area. Her mother called LeafGuard to express their concerns and was told that someone from LeafGuard would come and inspect the situation. In December, there was a snowstorm and the temperature fell below freezing. When Plaintiff walked out of the house to clean the snow off his van, he slipped and fell on the ice.

In the trial court, LeafGuard filed a Motion for Summary Judgment asserting that Plaintiff knew and appreciated the risk presented by the weather conditions and the manner in which the downspout drained. LeafGuard characterized this defense as primary assumption of risk. The Trial Court granted LeafGuard's motion pursuant to the doctrine of primary assumption of risk only.

The Eighth District reversed the decision of the trial court. The Court held that the doctrine of primary assumption of the risk did not apply to the case at hand, for this doctrine requires an examination of the activity itself and not plaintiff's conduct. "If the activity is one that is inherently dangerous and from which the risks cannot be eliminated, then a finding of primary assumption of the risk is appropriate." While courts have extended the doctrine to non-recreational cases, no courts in Ohio have applied primary assumption of risk to the activity of walking on an icy driveway. The Court went on to hold that the doctrine of open-and-obvious cannot be used to shield an independent contractor from liability.

Because the Trial Court concluded that LeafGuard owed no duty to the Plaintiff under the doctrine of primary assumption of risk, and did not determine what, if any, duty LeafGuard owed to Plaintiff under a general theory of negligence, the Court reversed and remanded the case back to the Trial Court.

Alcus v. Bainbridge Twp., 11th Dist. Geauga No. 2019-G-0205, 2020-Ohio-543 (Feb. 18, 2020).

Disposition: Reversing grants of summary judgment to political subdivision and its employee.

Topics: Political subdivision immunity; township service department's maintenance area does not constitute "public grounds" as contemplated by R.C. 2744.01(C)(2)(e), nor does parking of a backhoe constitute "maintenance" of public grounds as contemplated by that provision.

The plaintiff was injured in the maintenance area of the Bainbridge Township service department premises. He went there to pick up toolboxes that he purchased from the township on an auction website. As the plaintiff and a township employee were loading one of the toolboxes onto the back of his truck, a backhoe parked by another township employee – with the engine running but the parking brake not engaged – rolled backwards down an incline. The rolling backhoe hit the plaintiff and his vehicle, causing injury to the plaintiff and damage to his vehicle.

The plaintiff and his wife brought an action for negligence against the township and its employee who parked the backhoe. The defendants each filed a motion for summary judgment on immunity grounds. The township conceded that its employee negligently parked the backhoe, but argued that it was nevertheless immune from liability because none of the exceptions in R.C. 2744.02(B) applied. The plaintiffs countered that either the function at issue was a proprietary function, in which case the R.C. 2744.02(B)(2) exception applied, or the function at issue was a governmental function, in which case the 2744.02(B)(4) exception applied as parking the backhoe without engaging the parking brake was a "physical defect" on the premises.

The trial court found that neither exception applied, and granted summary judgment to the township. The trial court also granted the employee's motion for summary judgment, on the grounds that he had not been sued in his individual

capacity and that his conduct did not rise to the level of reckless or wanton misconduct as required by R.C. 2744.03(A)(6).

The Eleventh District Court of Appeals reversed as to both defendants. As to the township, the court examined the definitions of governmental and proprietary functions, and determined that the activity of parking a backhoe constituted a proprietary function. The court rejected the township's argument that parking the backhoe was a governmental function as defined in R.C. 2744.01(C)(2)(e). That provision defines a governmental function as "[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds[.]" The court found that parking the backhoe did not constitute "maintenance" of the service department premises, and that, even if it did, the maintenance area of the service department premises did not constitute "public grounds" as that term is defined in prior case law.

Having concluded that the exception to immunity in R.C. 2744.02(B)(2) applied, the court found the exception to immunity in R.C. 2744.02(B)(4) – which requires the political subdivision to have been engaged in a governmental function – inapplicable.

The court also rejected the township's argument that immunity was reinstated by the defense to liability set forth in R.C. 2744.03(A)(5). The court held that the employee's decision whether to use the parking brake on the backhoe was a routine matter of safe operation and thus did not involve a discretionary function. The court further held that even if the employee's decision constituted the type of discretion contemplated by R.C. 2744.03(A)(5), there were genuine issues of material fact as to whether the employee exercised his discretion in a reckless or wanton manner.

As to the employee's own immunity arguments, the court found that the complaint did in fact sue the employee in his individual capacity, and thus rejected that basis of the trial court's decision granting the employee's motion for summary judgment. The court further found that there were genuine issues of material fact as to whether the employee's conduct was reckless or wanton under R.C. 2744.03(A)(6)(b), and that the trial court thus erred in ruling that the employee was entitled to immunity as a matter of law.

Huston v. Brookpark Skateland Social Club, Inc., 8th Dist. No. 108222, 2020-Ohio-1493 (April 16, 2020).

Disposition: Reversing and remanding grant of summary judgment to skate park.

Topics: Primary assumption of risk; statutory duties of skate parks.

The plaintiff was seriously injured while she was roller skating at a skate park and was hit by another skater. She filed a complaint against the skate park, alleging that it was careless, negligent, willful, and wanton, and breached its duties under Ohio common law and R.C. 4171.06 and 4171.07, et seq. Specifically, the plaintiff contended that the skate park encouraged and failed to stop skaters who were skating at dangerous speeds, posing risk to the other skaters. The skate park filed an answer generally denying the plaintiff's allegations and asserting affirmative defenses, including assumption of the risk.

After discovery was completed, the defendant skate park filed a motion for summary judgment. The trial court granted the motion and the plaintiff appealed. The skate park contended in its motion for summary judgment that the plaintiff assumed the risk of roller skating and it was, therefore, not liable for her injuries. The appellate court disagreed and announced an opinion on February 13, 2020. The plaintiff filed an App. R. 26 application for reconsideration. Thus, the February 13th decision was vacated and substituted with a decision on April 16, 2020.

On appeal, the Court considered the following two issues: (1) whether the roller rink is liable for failing to comply with its statutory duties for rink operators and floor supervisors, and/or (2) whether the roller rink can be found liable pursuant to the common law for willful, wanton, or reckless conduct.

In regard to the first question, the Court held that R.C. 4171.07 does not impose a statutory duty on the defendant skate park to prevent other roller skaters from coming in contact with the plaintiff. R.C. Chapter 4171 governs the operation of roller skating facilities in Ohio. Specifically, R.C. 4171.07 requires that rollers rink operators, through their floor supervisors, are to be available to assist skaters in understanding and adhering to their responsibilities as skaters, and to direct traffic and assist hurt skaters. The Court determined that the Revised Code does not provide that the roller rink owes a duty to protect skaters from the risks inherent to roller skating such as coming in contact with other skaters; rather, its duty is just to issue warning, reprimands, or penalties when a roller skater violates a duty owed by a roller skater to other skaters.

The Court then addressed the second issue of whether a roller rink may be liable under the common law for willful, wanton, or reckless conduct. The Ohio Supreme Court, in *Marchetti v. Kalish*, 53 Ohio St.3d 95 (1990), held that when "individuals engage in recreational or sports activities, they assume the ordinary risks of activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional' as defined in Sections 550 and 8A of the Restatement of Torts 2d."

A witness to the incident testified that they saw the in-line skater who hit the plaintiff skating at a dangerous and excessive speed prior to hitting her. The witness further testified that the in-line skater's behavior was observable multiple times by the floor supervisor, and that the floor supervisor had the opportunity to stop and correct the in-line skater.

The Eighth District held that assumption of the risk would not serve as a defense when the defendant's conduct was willful or wanton in reckless disregard of a plaintiff's safety. The appellate court reasoned that the skate rink observing a skater multiple times at dangerous speeds but taking no action could constitute conduct that was willful or wanton in reckless disregard of the plaintiff's safety. Thus, the matter was reversed and remanded.

Asher v. Glenway Real Estate, LLC, 1st Dist. No. C-180663, 2019-Ohio-4851 (Nov. 27, 2019).

Disposition: Affirmed in part, reversed in part and remanded.

Topics: Open and Obvious Conditions, Slip and Fall.

Plaintiff Patricia Asher, was attempting to enter Defendant Bernens' Pharmacy that was located in a building owned by Defendant Glenway. The rear entrance to the pharmacy was located in the back parking lot of the building, and to enter a patron had to walk up three steps. There was a handrail on the left side of the stairs. When Plaintiff reached the top of the stairs, she pulled open the door that opened outward and swung wider than the landing on the top step. Plaintiff had to step back to allow the door to fully open and, as she attempted to do so, she lost her footing and fell backwards down the stairs, suffering serious injury.

Plaintiff filed suit against the pharmacy and the owner of the building alleging claims for negligence and negligence per se on the basis that the rear entrance violated the Ohio and Cincinnati building codes and the Americans with Disabilities Act. Both defendants moved for Summary Judgment, arguing that any hazard posed by the configuration of the rear entrance was open and obvious and that they neither knew nor should have known that the rear entrance posed a hazard. They further asserted that the administrative regulations in the building codes and the ADA could not serve as the basis for a negligence per se claim. The trial court granted Defendants' Motions for Summary Judgment and held that any hazard posed by the rear entrance was open and obvious, and that the defendants had no knowledge of any alleged defect. The court further held that any alleged violations of the ADA or building codes did not support a finding of negligence per se.

On appeal the First District found that the hazardous door was not an open and obvious condition, because it was not apparent to a patron until the invitee actually opened the rear door and encountered the hazard. The court held that once the hazard was discovered, the invitee had already encountered it, and therefore, it was not open and obvious. The court went on to find that a genuine issue of fact existed as to whether Defendants were aware of the hazardous condition.

With regard to Plaintiff's contention that the doorway was violative of administrative building codes, the First District held, consistent with prior precedent, that a violation of a building code, which is an administrative rule, cannot serve as the basis for a negligence per se claim. The case was affirmed in part, and reversed and remanded in part.

Johnson v. Abdullah, 1st Dist. No. C-180309, 2019-Ohio-4861 (Nov. 27, 2019).

Disposition: Reversed and remanded.

Topics: Evid. R. 601(D).

The plaintiff underwent an invasive surgery. Despite his deteriorating condition during his recovery, the plaintiff was discharged from the hospital a few hours after his surgery. He returned to the hospital emergency room within hours of his discharge with complaints of shortness of breath. The defendant doctor in the ER performed several tests in an attempt to identify the problem. During one of the tests, the plaintiff suffered a cardiac arrest, which necessitated resuscitation before a pulse returned. As a result, the plaintiff suffered a brain injury, leaving him in a vegetative state.

Plaintiff's brother and appointed guardian brought a medical malpractice action against several defendants, including the doctor who performed the testing in the ER on the evening of the plaintiff's cardiac arrest. Prior to trial, all of the defendants except the ER doctor defendant settled with the plaintiff.

At trial, the plaintiff's theory of negligence against the defendant ER doctor focused on a narrow issue: whether the standard of care required the doctor to recognize his deteriorating respiratory status and thus intubate him in the ER prior to his cardiac arrest. Both parties presented expert testimony on the issue. One of the experts that the defendant introduced was a doctor who was the chief operating officer of Brigham Health and a professor of emergency medicine at Harvard Medical School.

The plaintiff objected to the expert witness's testimony, arguing that he failed to satisfy the requirements of Evid.R. 601(D) because he was not involved in the active clinical practice of medicine. The trial court conducted a short voir dire at trial, ultimately determining that the expert was competent to testify. The jury returned a unanimous defense verdict.

On appeal, the plaintiff argued six assignments of error. The most significant one was that the expert testimony was admitted in error. Specifically, the plaintiff asserted that the trial court erred in admitting the expert's testimony at trial because, at the time of trial, the expert did not devote at least one-half of his professional time to the active clinical practice of medicine, rendering him incompetent to testify under Evid. R. 601(D).

The appellate court determined that the trial court erred in allowing the physician to testify as an expert defense witness. The defense failed to establish that the physician devoted at least one-half of his professional time to the active clinical practice of medicine as required by Evid. R. 601(D) in his position as the chief operating officer of a hospital. Specifically, 90 percent of the expert's job involved administrative work far removed from patient care. Accordingly, the matter was reversed and remanded.

State ex rel. Heinen's, Inc. v. Indus. Comm., 10th Dist. 18AP-635, 2019-Ohio-4690 (Nov. 14, 2019).

Disposition: Affirmed Magistrate's Decision.

Topics: Permanent Total Disability, Workers' Compensation.

Relator employer, Heinen's, brought original action asking the 10th District Court of Appeals to order the commission to reverse its grant of Claimant Harry Strachan's application for permanent total disability benefits. Claimant Strachan sustained a work-related injury at the Heinen's grocery store, where he had been working part-time to supplement his social security disability income that he received in connection with his rheumatoid arthritis. His treatments due to job-related injuries included multiple shoulder surgeries and surgeries on both thumbs. He was referred to vocational rehabilitation, but he declined to participate after expressing concerns that the accompanying living maintenance benefit could imperil his SSDI eligibility.

At the commission level, a staff hearing officer denied Mr. Strachan's permanent total disability claim, finding that his "lack of participation in vocational rehabilitation for reasons unrelated to the allowed conditions in the claim constitutes a voluntary abandonment of the workforce and therefore, Worker [Strachan] is not eligible for permanent total disability."

On reconsideration, the commission found sufficient evidence to warrant review of the staff officer's decision. The Commission found that the hearing officer had made a clear mistake of law "by equating the Injured Worker's failure to participate in vocational rehabilitation to a voluntary abandonment of the workforce." The Commission then found that Mr. Strachan was permanently and totally disabled from a physical impairment standpoint alone, thus obviating a need for a vocational analysis. The Commission determined that a failure to engage in vocational rehabilitation does not automatically and necessarily trigger ineligibility through workforce abandonment. The Commission granted Mr. Strachan's application for permanent total disability.

Relator appealed the commission's determination, and then objected to the 10th District Magistrate's decision upholding the commission's determinations. The Tenth District agreed that permanent total disability shall not be compensated where an employee has voluntarily abandoned the workforce. However, the Court held that because the commission pointed to evidence that Mr. Strachan's physical state caused him to be permanently totally disabled, they were correct in concluding the same. While Mr. Strachan declined vocational rehabilitation services, the commission's award of permanent total disability compensation was appropriate because there was some evidence that the claimant's medical problems were debilitating and ongoing to an extent that his employment capabilities would not have benefitted from vocational rehabilitation.

Turner v. Dimex, LLC, 4th Dist. No. 19CA3, 2019-Ohio-4251 (Oct. 11, 2019).

Disposition: Affirmed granting of employer's motion for summary judgment.

Topics: Employer Intentional Tort.

Plaintiff was an employee who was injured at his employer's manufacturing facility when his right leg was crushed between two forklifts on a loading dock. Plaintiff brought suit against his employer, alleging an employer intentional tort for the deliberate removal of a safety guard. Specifically, the Plaintiff alleged that the employer removed the backup alarm off the forklift that caused the Plaintiff injury.

The Fourth District relied on the Supreme Court's decision in *Hewitt v. L.E. Myers Co.*, to opine that only those devices on a machine that shield an employee from injury by guarding the point of operation of that machine are "equipment safety guards" for purposes of R.C. 2745.01(C). Accordingly, the Fourth District held that a backup alarm does not shield an employee from "accidental contact"; thus, is not an equipment safety guard, as it is not designed to shield the operator or any other person from exposure to or injury.

Weeks v. 203 Main Street, L.L.C., 9th Dist. Lorain Nos. 18CA011405, 18CA011417, 2019-Ohio-2850 (July 15, 2019).

Disposition: Affirmed in part, reversed in part, and cause remanded.

Topics: Ohio Dram Shop Act, R.C. 4399.18; Spoliation of video-surveillance evidence.

The administrator of a deceased woman's estate filed a dram shop/wrongful death action against a bar in Wellington, Ohio and the bar building's owners. The action arose out of a head-on collision caused by a motorist who went left-of-center and whose blood alcohol level of 0.188 grams was more than twice the legal limit. Minutes before the crash, the drunk driver had left the defendants' bar where he had been drinking for approximately four hours.

After learning of the crash, an agent from the Ohio Department of Public Safety retrieved the bar's video surveillance unit. He reviewed it to determine if the intoxicated driver had been over-served, but determined there was insufficient evidence to bring criminal charges and returned surveillance unit to the bar the next day. Approximately two weeks after the crash, the plaintiff's attorney sent a notice to the bar and the building's owner, requesting that they preserve evidence from the night of the crash, including "any and all video surveillance[.]" The complaint was filed two months after the crash; but it was only during discovery that the plaintiff learned the surveillance footage had been overwritten. At that point, the plaintiff was granted leave to amend the complaint to assert a claim for spoliation of evidence.

Early on, the defendants moved for partial judgment on the pleadings, arguing that punitive damages may not be recovered on a dram shop claim. The trial court denied the motion. Subsequently, the defendants moved for summary judgment on the dram shop and spoliation claims. The trial court granted the motion. The trial court concluded that the expert testimony the plaintiff submitted on the dram shop claim was insufficient to establish that the intoxicated driver was served alcoholic beverages when he was noticeably intoxicated. The trial court also concluded that there was no evidence the bar's failure to preserve the surveillance footage from the night of the crash amounted to willful destruction of evidence.

The plaintiff appealed the grant of summary judgment, and the bar cross-appealed the denial of its motion for partial judgment on the pleadings.

The Ninth District Court of Appeals reversed the grant of summary judgment as to both the dram shop and spoliation claims, and affirmed the denial of the motion for partial judgment on the pleadings.

As to the dram shop claim, the court of appeals found that the affidavit and report of the plaintiff's forensic toxicology expert was sufficient to create a genuine issue of material fact. Both the bartender and the bar manager had denied having actual knowledge that the intoxicated driver was "noticeably intoxicated" when served. The toxicologist, however, provided scientific analysis to show that the driver would have been noticeably intoxicated, at least when served his last drink or two. Based on the driver's height and weight, his blood alcohol level, and the timing of the blood alcohol draw, the toxicologist was able to calculate how many alcoholic beverages the driver would have to have consumed to have reached that blood alcohol level. The toxicologist also opined that, based on that level of intoxication, the driver would have been well into the "[e]xcitement" stage of alcoholic influence, during which he would have exhibited signs and symptoms of intoxication that "would have been noticeable and obvious to [the bar employees] during interactions while serving him, at least, his last drink or two[.]"

As to the spoliation claim, the court of appeals rejected the trial court's finding that the third element of a spoliation claim – willful destruction of evidence by defendant designed to disrupt the plaintiff's case – was not supported by the evidence. The plaintiff had argued that the bar had reason to believe a lawsuit would be filed against it, so a jury could discredit its allegation that the video was innocently overwritten during the normal course of business. The plaintiff had also argued that a jury could reject, as disingenuous, the bar's statement that it did not believe it needed to preserve the video because it thought the Ohio Department of Public Safety would retain a copy even though it had returned the surveillance unit without pursuing a liquor violation against the bar. The court of appeals concluded that summary judgment on this claim was erroneous because the bar did not establish the absence of a genuine issue of material fact as to whether the video was recorded over before the bar received the preservation of evidence notice.

As to the cross-appeal, the court of appeals found the bar's contention that it was entitled to judgment on the pleadings on the question of whether punitive damages could be awarded on a dram shop claim to be premature. The court thus affirmed the trial court's denial of that motion. ■

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CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

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

CATA Verdicts & Settlements

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

Jane Doe v. XYZ Rehabilitation Facility

Type of Case: Fall
Settlement: $95,000
Plaintiff's Counsel: Christopher J. Carney, Esq. / Larry S. Klein, Esq., Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: *
Court: Geauga County Common Pleas Court
Date Of Settlement: February 19, 2020
Insurance Company: *
Damages: Fractured hip

Summary: 95 year-old woman struck by malfunctioning automatic door at rehab facility resulting in fall and fractured hip, requiring surgery. Plaintiff died of unrelated causes several months later and claim was settled on behalf of her estate.

Plaintiff's Expert: Michael Parish
Defendant's Expert: *

Jane Doe v. XYZ Restaurant

Type of Case: Fall
Settlement: $175,000
Plaintiff's Counsel: Christopher J. Carney, Esq. / Larry S. Klein, Esq., Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: *
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: February 4, 2020
Insurance Company: *
Damages: Fractured wrist and elbow (non-dominant hand)

Summary: Slip and fall on freshly mopped floor at restaurant shortly before closing time. While there was no dispute that a wet floor sign was out, the parties disputed the visibility of the sign to the Plaintiff as she walked to the bathroom.

Plaintiff's Expert: *
Defendant's Expert: *

Scofield v. Hanson

Type of Case: Dog bite
Settlement: $1,500,000.00
Plaintiff's Counsel: Ryan Fisher, Esq. / Kyle Melling, Esq., Lowe Eklund Wakefield Co. LPA, (216) 781-2600
Defendant's Counsel: Bartholomew Freeze, Esq.
Court: Trumbull County Common Pleas Court Case No. 2018 CV 02104, Judge Kontos
Date Of Settlement: February 2020
Insurance Company: PURE Insurance
Damages: CRPS, polyradiculopathy, PTSD, DVT and pulmonary embolism

Summary: Ms. Scofield (age 52) was mauled by three German Shepard dogs while she walked from one building to another while at work. The dogs belonged to the defendant who lived adjacent to the property where the attack occurred. Plaintiff sustained serious and permanently disabling injuries. The defendant claimed that the dogs that attacked the plaintiff were not owned by him and that the plaintiff didn't really have CRPS or PTSD and that she was able to return to work.

Plaintiff's Experts: Mike Shikashio (Aggressive Dog Expert); Jung Kim (Occupational Medicine); Stephanie Kopey (PM&R); Thomas Jones (Orthopaedics); Jennifer Kos (Psychologist); Marianne Boeing (Life Care); Heidi Peterson (Vocational); Alex Constable (Economist)
Defendant's Experts: Kenneth Mankowski (Neurology); Michael Murphy (Psychology)

Baby Doe v. John Doe Obstetrician and ABC Hospital

Type of Case: Medical Malpractice
Settlement: $3.625 Million
Plaintiff's Counsel: Romney B. Cullers, Esq., The Becker Law Firm, (440) 323-7070
Defendants' Counsel: Withheld
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: December 27, 2019
Insurance Company: Withheld
Damages: Brain injury, cerebral palsy

Summary: A pregnant first time mother presented for induction. She had complained of lack of fetal movement for two days. Electronic fetal monitoring demonstrated minimal variability on presentation, which continued for several hours. The baby eventually developed bradycardia and an emergency C-section was ordered. The baby was born severely depressed with an overwhelming infection that providers in the NICU described as septic shock and meningitis resulting from an advanced in utero infection, which was supported by placental pathology. The challenge in the case was demonstrating that the pattern of brain injury shown on MRI imaging was more consistent with a profound hypoxic ischemic insult at the time of birth than evolving septic shock or meningitis. The child is now severely neurologically impaired.

Plaintiff's Experts: Michael Cardwell, M.D. (OB/MFM); Heidi Shinn, RN (RN L&D); Paula Kolbas, M.D. (OB); Jerome Barakos, M.D. (Pediatric Neuro-Radiology); Alan Hill, M.D. (Pediatric Neurology); Edward Karotkin, M.D. (Neonatology); Judith Gooch, M.D. (PM&R); Eugene Shapiro, M.D. (Pediatric ID); Heidi Fawber, LCP (LCP); and Harvey Rosen, Ph.D. (Economist)
Defendants' Experts: Robert Debbs, M.D. (OB/MFM); Jeremy Marks, M.D. (Neonatology); Brian Woodruff, M.D. (Pediatric Neurology); Charles Prober, M.D. (Pediatric ID); Joel Meyer, M.D. (Neuroradiology); Beverly Rogers, M.D. (Placental Pathology); and Patricia Reilly Butcher, LCP (LCP)

Baby Doe v. ABC Hospital

Type of Case: Medical Malpractice
Settlement: $2.9 Million
Plaintiff's Counsel: Romney B. Cullers, Esq., The Becker Law Firm, (440) 323-7070
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: December 9, 2019
Insurance Company: Withheld
Damages: Brain injury, developmental delays

Summary: A pregnant first time mother presented at the emergency room at a rural hospital with complaints of severe abdominal pain which had started an hour before presentation. The nursing staff failed to recognize the signs of an evolving placental abruption and did not notify the on call obstetrician for 20 minutes. The obstetrician immediately ordered a stat C-section when notified. The baby was born severely depressed and currently has developmental delays. The challenge in the case was the tight causation window - in order for the baby to have been delivered free of injury, it would have been necessary for the nursing staff to have notified the obstetrician of the potential emergency within 5 minutes of the mother's arrival in the ER.

Plaintiff's Experts: Michael Cardwell, M.D. (OB/MFM); Linda Shinn, RNC (RN L&D); O. Carter Snead, M.D. (Child Neurology); Derek Armstrong, M.D. (Radiology); Judith Gooch, M.D. (PM&R); Heidi Fawber, LCP (LCP); and John Burke, Ph.D. (Economist)
Defendant's Experts: Mark Landon, M.D. (OB/MFM); Gordon Sze, M.D. (Neuro-Radiology); David A. Schwartz, M.D. (Pathology); John White, M.D. (OB); Mark Scher, M.D. (Pediatrics and Neurology)

Estate of John Doe v. Jane Doe, Dermatopathologist

Type of Case: Wrongful Death
Settlement: $4.3 Million
Plaintiff's Counsel: David W. Skall, Esq., The Becker Law Firm, (440) 323-7070
Defendant's Counsel: Withheld
Court: Summit County Common Pleas Court
Date Of Settlement: November 25, 2019
Insurance Company: Withheld
Damages: Death

Summary: The decedent, a 42 year-old, married father of three children, underwent a shave biopsy of a mole on his right forearm in 2015. The defendant dermatopathologist negligently evaluated and reported the tissue as benign when it was, in fact, early Stage I melanoma as confirmed via reexamination of the pathology slides in 2018. The negligent failure, therefore, caused a 3.5 year delay of the correct diagnosis that allowed the decedent's cancer to progress from highly curable to Stage IV metastatic disease, and he passed within 6 months of diagnosis.

Plaintiff's Experts: William Sharfman, M.D. (Oncology); Patrick Ott, M.D. (Oncology); Lynn Cooper, M.D. (Dermatopathology); Gerald Sokol, M.D. (Oncology); and John Burke, Ph.D. (Economics)
Defendant's Experts: Vernon Sondak, M.D. (Surgical Oncology); and David Silvers, M.D. (Dermatopathology)

Jane Doe v. John Doe

Type of Case: Fall
Settlement: $150,000
Plaintiff's Counsel: Christopher J. Carney, Esq. / Larry S. Klein, Esq., Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: *
Court: Lake County Common Pleas Court
Date Of Settlement: October 24, 2019
Insurance Company: *
Damages: Concussion and post-concussion syndrome

Summary: High school student alleged that she was pushed from behind by another student while in the bleachers at a football game. Case was complicated by fact that the victim was amnesic to the event and witness statements were wildly inconsistent.

Plaintiff's Expert: *
Defendant's Expert: *

Jane Doe v. XYZ Party Center

Type of Case: Fall
Settlement: $125,000
Plaintiff's Counsel: Christopher J. Carney, Esq. / Larry S. Klein, Esq., Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: *
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: October 15, 2019
Insurance Company: *
Damages: Trimalleolar fracture of ankle

Summary: Plaintiff stumbled and fell off of unusually small step at wedding reception. Case was complicated in that she had twice traversed the same step earlier in the evening without incident.

Plaintiff's Expert: Richard Zimmerman (Architect)
Defendant's Expert: *

Estate of John Doe v. ABC Hospital

Type of Case: Medical Malpractice
Settlement: $3.75 Million
Plaintiff's Counsel: Romney B. Cullers, Esq., The Becker Law Firm, (440) 323-7070
Defendant's Counsel: Withheld
Court: Franklin County Common Pleas Court
Date Of Settlement: September 17, 2019
Insurance Company: Withheld
Damages: Death

Summary: The decedent, a 56-year old married man, presented at an emergency room at a community hospital with complaints of upper back pain following a minor car accident in a parking lot. The attending ER physician diagnosed low back pain and prescribed muscle relaxants. Several hours after discharge, the patient died of a free rupture of the thoracic aorta. Three days after learning of the patient's death the involved ER physician accessed the electronic medical record and added a note suggesting that the patient had refused diagnostic testing.

Plaintiff's Experts: Gary Zimmerman (Emergency Medicine); Carl Adams, M.D. (Cardiothoracic Surgery); John Burke, Ph.D. (Economics)
Defendant's Experts: Robert Mulliken, M.D. (Emergency Medicine); Raymond Magorien, M.D. (Cardiothoracic Surgery); John Hyde Ph.D. (Hospital Administration); Patrick Vaccaro, M.D. (Cardiothoracic Surgery); Stephen Renas, Ph.D. (Economics)

Jane Doe v. ABC Landlord

Type of Case: Fall
Settlement: $106,000
Plaintiff's Counsel: Christopher J. Carney, Esq. / Larry S. Klein, Esq., Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: *
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: September 12, 2019
Insurance Company: *
Damages: Bimalleolar ankle fracture

Summary: Plaintiff tripped and fell over defect in driveway of friend's rental home. Case was complicated by Defendant's claim of no notice, open and obvious, and insubstantial defect.

Plaintiff's Expert: *
Defendant's Expert: *

John Doe v. ABC Commercial Property Owner

Type of Case: Fall
Settlement: $125,000
Plaintiff's Counsel: Christopher J. Carney, Esq. / Larry S. Klein, Esq., Klein & Carney Co., LPA, (216) 861-0111
Defendant's Counsel: *
Court: Mahoning County Common Pleas Court
Date Of Settlement: September 5, 2019
Insurance Company: *
Damages: Bimalleolar ankle fracture

Summary: Plaintiff, while walking from work to car for cigarette break, slipped and fell on unnatural accumulation of ice. Case was complicated by fact that plaintiff knew of the presence of the ice before attempting to traverse the area.

Plaintiff's Expert: Richard Zimmerman (Architect)
Defendant's Expert: *

Estate of John Doe v. ABC Overnight Camp

Type of Case: General Negligence
Settlement: $2.5 Million
Plaintiff's Counsel: Romney B. Cullers, Esq., The Becker Law Firm, (440) 323-7070
Defendant's Counsel: Withheld
Court: Summit County Common Pleas Court
Date Of Settlement: August 13, 2019
Insurance Company: Withheld
Damages: Death

Summary: A 12-year old boy drowned while being administered a swim test in a lake at an overnight youth camp. Lifeguards failed to follow recognized guidelines for

administering said tests and were inadequately trained in rescue and recovery of drowning victims.

Plaintiff's Expert: Alison Osinski, Ph.D. (Aquatic Safety)
Defendant's Expert: None

Estate of John Doe vs. John Doe Cardiothoracic Surgeon

Type of Case: Medical Malpractice
Settlement: $1.1 Million
Plaintiff's Counsel: Romney B. Cullers, Esq., The Becker Law Firm, (440) 323-7070
Defendant's Counsel: Withheld
Court: Franklin County Common Pleas Court
Date Of Settlement: July 23, 2019
Insurance Company: Withheld
Damages: Death

Summary: The decedent, a 28-year old man, bled to death during an elective video-assisted thorascopy procedure to address a pneumothorax. The surgeon lacerated the subclavian vein. Anesthesiologists were unable to resuscitate the patient with blood products in time to avoid a sudden, massive hemorrhage.

Plaintiff's Experts: Carl Adams, M.D. (Cardiothoracic Surgery); John Burke, Ph.D. (Economics)
Defendant's Expert: John Arnold, M.D. (Cardiothoracic Surgery)

Estate of Jane Doe v. ABC City

Type of Case: Automobile Negligence
Settlement: $4 Million
Plaintiff's Counsel: Michael F. Becker, Esq. and David W. Skall, Esq., The Becker Law Firm, (440) 323-7070
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: July 9, 2019
Insurance Company: Withheld
Damages: Death

Summary: The decedent, a 69-year old woman and mother of two adult children, was run down from behind by a city bus as she walked in the crosswalk on her way to work. She lived 22 days with massive brain trauma and ultimately her children had to withdraw life support. The case was settled after three days of trial.

Plaintiff's Experts: Harold Linda, Ph.D. (Grief Counselor); Ned Eistein (Transportation Specialist); Chelsea Robinson, MSW, LICSW (Licensed Clinical Social Worker); Susan E. Reynolds, MSW, LICSW (Licensed Clinical Social Worker)
Defendant's Expert: None

John Doe v. ABC Medical Group

Type of Case: Medical Malpractice
Settlement: $2 Million
Plaintiff's Counsel: Jonathan D. Mester, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5225
Defendant's Counsel: *
Court: Lucas County Common Pleas Court
Date Of Settlement: March 2019
Insurance Company: *
Damages: Paraplegia

Summary: Plaintiff was a patient of the defendant neurosurgeon. The allegation was a failure to timely diagnose a condition known as a spinal AVM, which is a very rare condition which was not present initially on imaging. As a result, there was a delay of several months in making the diagnosis, during which time Plaintiff's condition deteriorated significantly. He is now in a wheelchair with permanent bowel/bladder issues.

Plaintiff's Experts: Marc Friedberg, M.D. (Neurosurgery); Cynthia Wilhelm, Ph.D. (Life Care Planning and Vocational); David Boyd, Ph.D. (Economist)
Defendant's Expert: John Sampson, M.D. (Neurosurgery)
■

Announcements - Spring 2020

Editor's Note: *In this new feature of the CATA News, we invite our members to share important milestones and achievements in their professional lives.*

Recent Promotions and New Associations

Nurenberg, Paris, Heller & McCarthy Co., L.P.A. is pleased to announce that **Dana M. Paris, Esq.** has been promoted to partner at the law firm. Dana's practice focuses on catastrophic injuries and wrongful deaths stemming from automobile collisions, medical negligence, and birth trauma.

Nurenberg, Paris, Heller & McCarthy Co., L.P.A. is pleased to announce that **Jordan D. Lebovitz, Esq**. has been promoted to partner at the law firm. Jordan's practice focuses on truck crashes, negligent security actions, and catastrophic injury and wrongful death litigation.

Charles Kampinski, Esq. and **Kristin Roberts, Esq.** have started the firm of Kampinski and Roberts in Corporate Plaza II in Independence. The two have been recently joined by Jay Solomon, Esq. The firm specializes in medical malpractice and catastrophic injury cases.

Kampinski & Roberts
6480 Rockside Woods Blvd. South, Suite 140
Independence, OH 44131
www.kampinskiandroberts.com
(440) 597-4430

Honors, Awards, and Appointments

Christian R. Patno, Esq. of McCarthy, Lebit, Crystal & Liffman Co., LPA was voted into membership at ABOTA, the American Board of Trial Advocates. ABOTA is a National organization of experienced trial lawyers and judges dedicated to preserving the Seventh Amendment right to jury trial.

Pamela Pantages, Esq. of Nurenberg, Paris, Heller & McCarthy Co., L.P.A. was invited by the obstetric MD editors to contribute to their textbook: *Legal Concepts & Best Practices in Obstetrics: The Nuts & Bolts Guide to Mitigating Risk*. Pam wrote Chapter 3 (Who Are The Players?) and Chapter 28 (Like It Or Not The System Works: The Myth And Mission Of Tort Reform). The textbook can be found at: https://www.amazon.com/Obstetrics-Law-Steven-Warsof/dp/1496394135/ref=sr_1_1?keywords=warsof&qid=1583511687&sr=8-1

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 Meghan P. Connolly, Esq., Treasurer
Lowe Eklund Wakefield Co., LPA
1660 West 2nd St., #610, Cleveland, OH 44113
P: 216-781-2600

CATA Membership Dues

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

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

[FOR INTERNAL USE]

President's Approval: _____ Date: _____

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Spring 2020

CW SETTLEMENTS

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.

Structured Settlements

Experience

Knowledge

Mediation Attendance & Client Consultation

No Fees

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