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President's Message

by Todd E. Gurney

CATA is a marvelous organization. It has no paid staff. It has no office. It is run by a Board of Directors, comprised exclusively of members that volunteer their time. Nonetheless, it is an ambitious organization — we are trial lawyers, after all — punching well above its weight class and offering copious benefits to its members (as well as non-members, especially judges and staff attorneys that we love to see at our events!). This explains why CATA has not just survived over the past 60+ years, it has grown stronger than ever.

When the COVID-19 pandemic struck without warning in March 2020, nearly all Ohio courts, schools, and businesses shut down immediately and indefinitely. We had no idea how long — or even whether — our practices could survive without jury trials. We had no time to transition into remote working, we did it on the fly. We all recognized the daunting challenges ahead of us, but we didn't buckle under the pressure. Sure, we may have panicked at first (let's be honest, it was scary); then we rolled up our sleeves, adjusted and adapted, and figured out a way to keep working for our clients. Because we are trial lawyers, and that's what trial lawyers do.

It would have been easy for CATA to slow things down this past year, cancel most of the events that could not be held in-person, and put a freeze on our philanthropic endeavors. Instead, the Board recognized this was a year that demanded *more* support for our members and our community, not less.

As I am writing this message in the beginning of April, my family just finished celebrating Passover. One of the holiday songs is "Dayenu," which means "it would have been enough…" As we sang it this year, it made me think of CATA: It would have been enough during the pandemic if CATA hosted only a few CLE seminars instead of five or six. It would have been enough if CATA published only one edition of *CATA News* instead of two. It would have been enough…

As I have said, however, CATA is an ambitious organization. This year was no exception. The full slate of CLE seminars featured a combination of nationally recognized speakers, published authors, local attorneys, judges, and more. These seminars provided invaluable insights and practical tips to improve and broaden our skills — and support our practices — during the pandemic and beyond. With topics ranging from Zoom depositions, to focus groups, preparing and empowering the plaintiff to testify, attorney fee structures, and increasing case value, there was something for everyone. Plus, most of the seminars were free of charge, so you can't get more bang for your buck!

And as always, this Spring/Summer edition of *CATA News* is filled with terrific articles and information. On that note, I would like to extend a special THANK YOU to our Editor-in-Chief, Kathy St. John: We could not do this without you! And to the entire Board of Directors: You have gone above and beyond the call of duty this year; your enthusiasm and dedication was inspiring and very much appreciated.

CATA is in good hands, and the future has never been brighter. With the end of the pandemic in sight, I look forward to being with everyone again at our CLE seminars and social/networking events. While I know CATA will continue to provide first-rate benefits and opportunities for its members (including new roundtable discussion groups, coming soon), I hope it also will continue to invest in and strengthen our community to make it a better, safer place for everyone. If this past year has taught us anything, it is that we are all in this together. ■

Editor's Note

As we finalize this issue of the ***CATA News***, we invite you to start thinking of articles to submit for the next issue. If you don't have time to write one yourself, but have a topic in mind, please let us know and we'll see if we can find a volunteer. We would also like to see more of our members represented in the Beyond the Practice section. So please send us your "good deeds" and "community activities" for inclusion in the next issue. Finally, please submit your Verdicts & Settlements to us year-round and we will stockpile them for future issues.

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

Kathleen J. St. John, Editor

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Ohio House Bill 606: Civil Immunity Related to COVID-19 Lawsuits

by Meghan C. Lewallen

Governor Mike DeWine signed Ohio House Bill 606 into law on September 14, 2020. On December 16, 2020 the law went into effect.

H.B. 606, the Good Samaritan Expansion Bill, ensures civil immunity to the health care community, businesses, schools, and individuals from lawsuits arising out of the pandemic by granting temporary immunity from civil actions related to the exposure, transmission, or contraction of COVID-19 and temporary qualified civil immunity for health care providers rendering health care services during a declared disaster or emergency.[1]

A temporary law, H.B. 606 provides limited relief from March 9, 2020, the date Governor Mike DeWine declared a state of emergency due to COVID-19, through September 30, 2021.[2] It was created in large part in response to lawsuits related to COVID-19 being filed across the country and to provide Ohio business owners the certainty and consistency needed during this time to re-open their businesses.[3]

Qualified Immunity for Health Care Providers (Section 1)

H.B. 606 grants qualified civil immunity for specified health care providers that provide health care services or emergency services during a declared disaster or emergency. The bill protects a broad range of "health care providers" which term is defined in the act.[4] A list of covered health care providers is also included at the end of this article.

Under H.B. 606, health care providers are not liable in tort actions or subject to professional disciplinary actions for rendering health care services, emergency medical services, first-aid treatment, or other emergency professional care as a result of or in response to a disaster or emergency that results in damages (injury, death, or loss) that allegedly arise from[5]:

1. An act or omission related to those services;
2. Decisions related to such services; and
3. Compliance with an executive order or director's order issued as a result of and in response to a disaster or emergency.

H.B. 606 also grants health care providers immunity from tort liability and professional discipline for damages allegedly resulting because the health care provider was unable to treat, diagnose, or test the person for any illness, disease, or condition, including the inability to perform elective procedures, due to an executive or director's order or local health order issued in relation to a public health emergency.[6]

Exceptions to immunity for health care providers

Certain exceptions to immunity for health care providers do exist under H.B. 606. The immunity described above does not apply under the following circumstances:

1. Immunity does not apply in a tort action if the health care provider's action, omission, decision, or compliance constitutes a reckless disregard of the consequences so as to affect the life or health of the patient.[7];

2. Immunity does not apply in a tort action if the health care provider's action, omission, decision, or compliance constitutes **intentional, willful, or wanton misconduct.**[8];
3. Immunity does not apply in a professional disciplinary action if the health care provider's action, omission, decision, or compliance constitutes **gross negligence.**[9]; and
4. Immunity does not apply in a tort or professional disciplinary action if a health care provider's actions are **outside the skills, education, or training of the health care provider** unless the action is undertaken in good faith and in response to a lack of resources caused by a disaster or emergency.[10]

For the purposes of the bill both "reckless disregard" and "gross negligence" are defined; however, "intentional, willful, or wanton misconduct" are not.[11]

H.B. 606 does not create a new cause of action or substantive legal right against a health care provider, affect any immunities established by another section of the Revised Code or at common law, or affect a health care provider's legal responsibility to comply with applicable Ohio laws and/or rules implemented by state agencies.[12]

General Qualified Immunity (Section 2)

H.B. 606 additionally ensures civil immunity to businesses, schools, and individuals from lawsuits arising out of the pandemic.

Under H.B. 606, no civil action for damages (injury, death, or loss) to a person or property may be brought against any "person" if the cause of action is based, in whole or in part, on grounds that such damages were caused by exposure to, or transmission or contraction of, COVID-19 or other coronaviruses, or any mutation thereof.[13] For the purposes of this section, "person" is defined to include schools, for profit or nonprofit entities, government entities, religious entities, or state institutions of higher education.[14]

There are also exceptions to the general qualified immunity granted under H.B. 606. Under circumstances where the exposure to, or the transmission or contraction of, any of the specified viruses or mutations thereof was the result of the **"reckless conduct," "intentional misconduct,"** or **"willful or wanton misconduct"** such immunity does not apply.[15] H.B. 606 defines "reckless conduct" as conduct by which a person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause exposure to, or a transmission or contraction of, any of those viruses or mutations thereof with "heedless indifference" to the consequences.[16]

Intent Related to Government Orders, Recommendations, and Guidelines

H.B. 606 is abundantly clear that orders, recommendations, and guidelines do not create any new legal duties for purposes of tort liability.[17] This includes all orders, recommendations, and guidelines from the Executive Branch, counties and local municipalities, boards of health and other agencies, and any federal government agency issued in relation to the pandemic.[18]

H.B. 606 states any such orders, recommendations, and guidelines are presumed to be 1) irrelevant to the issue of the existence of a duty or breach of a duty and 2) inadmissible at trial to establish proof of a duty or breach of a duty in tort actions.[19] COVID-19 based class actions are also prohibited under H.B. 606.[20]

The General Assembly's intent that orders, recommendations, and guidelines do not create new legal duties was based on various findings regarding the novelty and uncertainty about COVID-19 and civil liability.[21] The General Assembly acknowledged that recommendations regarding how best to avoid infection with COVID-19 change frequently[22] and that businesses and premises owners have not historically been required to keep members of the public from being exposed to airborne viruses, bacteria, and germs.[23] Ultimately it concluded that those individuals who decide to go into public places are responsible to take those steps they feel are necessary to avoid exposure to COVID-19 such as social distancing and wearing masks.[24]

Health Care Providers Covered by H.B. 606

H.B. 606 grants immunity to the following health care related individuals and entities:[25]

1. Advanced practice registered nurses, registered nurses, and licensed practical nurses;
2. Pharmacists;
3. Dentists and dental hygienists;
4. Optometrists;
5. Physicians;
6. Physician assistants;
7. Chiropractors;
8. Physical therapists;
9. Occupational therapists;
10. Athletic trainers;
11. Speech language-pathologists;

12. Audiologists;
13. Laboratory workers;
14. Massage therapists;
15. Respiratory care professionals;
16. Direct support professionals for individuals with developmental disabilities;
17. Emergency medical technicians (EMTs-basic, EMTs-I, and paramedics);
18. Behavioral health providers;
19. Home health agencies;
20. Hospice care programs;
21. Medicaid home and community-based services programs;
22. Other health care workers who provide healthcare related services to an individual under the direction of a health care professional with the authority to direct the worker's activities, including medical technicians, medical assistants, dental assistants, occupational therapy assistants, physical therapist assistants, orderlies, nurse aids, and any other similar individuals;
23. Facilities that provide health care services including, but not limited to, a hospital, emergency care, urgent center, laboratory, adult day-care, residential care, diagnostic or imaging center, or a rehabilitation or therapeutic health setting;[26] and
24. Agents, board members, committee members, employees, employers, officers or volunteers of a home health agency, hospice care program, and Medicaid home and community-based services provider or facility. ■

End Notes

1. HB 606 Section 1(B)(1), Section 2(A); Ohio Legislative Service Commission H.B. 606 Final Analysis.
2. HB 606 Section 4; Ohio Legislative Service Commission H.B. 606 Final Analysis.
3. HB 606 Section 3(A)(1), (2).
4. HB 606 Section 1(A).
5. HB 606 Section 1(B)(1).
6. HB 606 Section 1(B)(4).
7. HB 606 Section 1(B)(2).
8. HB 606 Section 1(B)(2).
9. HB 606 Section 1(B)(3).
10. HB 606 Section 1(C)(3).
11. HB 606 Section 1(18), (42).
12. HB 606 Section 1(C)(4), (E); Ohio Legislative Service Commission H.B. 606 Final Analysis.
13. HB 606 Section 2(A).
14. HB 606 Section 2(D)(2).
15. HB 606 Section 2(A).
16. HB 606 Section 2(D)(3).
17. HB 606 Section 2(B), 3(B).
18. HB 606 Section 3(B).
19. HB 606 Section 2(B); Section 3(B); Ohio Legislative Service Commission H.B. 606 Final Analysis.
20. HB 606 Section 1(D); Section 2(C).
21. HB 606 Section 3(A)(1); Ohio Legislative Service Commission H.B. 606 Final Analysis.
22. HB 606 Section 3(A)(2).
23. HB 606 Section 3(A)(3).
24. HB 606 Section 3(A)(3).
25. HB 606 Section 1(A); Ohio Legislative Service Commission H.B. 606 Final Analysis.
26. HB 606 Section 1(A)(15).

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Hospitals Are Not Special:
Consumer Laws You Need To Use When Dealing With Hospital Bills, Personal Injury Settlements, And Medical Malpractice

by Daniel J. Myers[1]

In Ohio, there are a handful of very broad, very powerful laws that protect consumers from unfair, deceptive, and unconscionable sales practices of businesses, debt collectors, and service providers. These laws are not new—most are decades old—but they are not well understood or used by most attorneys. These old laws provide new ways to solve many of the most persistent and vexing problems in medical billing, hospital payment, personal injury settlement negotiation, and could potentially provide some security in medical malpractice litigation.

This article explains what those laws are, and how they apply to hospitals, especially after a recent 2021 decision from Cuyahoga County Common Pleas Judge John P. O'Donnell in the putative class action lawsuit *van Brakle v. The Cleveland Clinic Foundation*. Finally, this article explores how attorneys may be able to use these laws when dealing with hospitals, nursing homes, and other "healthcare" or "medical" service providers, excluding physicians and chiropractors.

Hospitals have avoided compliance with these laws by not complying with the laws. In litigation, some have claimed that they are unique, different from all of the other businesses regulated by Ohio's consumer laws. That viewpoint is challenged in *van Brakle*, and should be challenged by attorneys in other practice areas, as well.

I. The Consumer Laws And Other Laws You Need To Know About If You Interact With Hospitals.

There are four consumer protection laws all attorneys should familiarize themselves with when they are forced to deal with hospitals, nursing homes, or medical bills. These are the Consumer Sales Practices Act (CSPA); the Cleveland Consumer Protection Ordinance (Cleveland Ordinance); the Summit County Consumer Protection Ordinance (Summit Ordinance); and the Fair Debt Collection Practices Act (FDCPA). This article will focus on the CSPA. The Ohio Association for Justice published an article previously in its *Trial* magazine discussing the application of the FDCPA to medical bill debt collectors and insurance reimbursement collectors.[2] The Summit Ordinance and Cleveland Ordinance generally mirror (or in Cleveland's situation, incorporate) the Ohio CSPA requirements and prohibitions, with some exceptions under the Summit Ordinance.

Attorneys should also be aware of three other state statutes that relate to the maximum amount that in-network hospitals can charge or attempt to collect from insured patients. Understanding these statutes is particularly important when negotiating or paying medical bills after settlement or judgment in a personal injury case.

A. The Consumer Sales Practices Act and local Ordinances.

The CSPA[3] has been Ohio's main consumer protection law since the 1970s. This law prohibits "suppliers" from engaging in unfair, deceptive, or unconscionable acts or practices with their consumer customers.[4] The CSPA broadly defines "suppliers" to include any person that is engaged in the business of effecting or soliciting the sale, lease, or transfer of goods or services to consumers.[5] The CSPA also applies to the individual owners, directors, and officers of a company when those persons participate in, direct, take part in, or otherwise cause the prohibited conduct to occur.[6] The CSPA does not apply to transactions with attorneys, physicians, dentists, certified public

accountants, or certain other professionals.[7] Some exemptions are blanket professional exemptions while others are limited to specific situations.[8]

Most of the specific acts the CSPA prohibits or requires are found in the Ohio Administrative Code, as well as a case database maintained by the Ohio Attorney General, known as the Public Inspection File.[9] The CSPA entitles consumers to rescind certain transactions or, in other situations, obtain actual economic damages, non-economic damages, treble actual economic damages, statutory damages for each violation, and attorneys' fees for knowing violations.[10] Consumers can also obtain declaratory relief and injunctive relief, with courts declaring specific conduct to violate the CSPA and forever prohibiting the business from engaging in that illegal conduct.[11]

As discussed later, the CSPA applies to hospitals and hospital systems because hospitals provide services to consumers, and hospitals are not physicians. Physicians, and not hospitals, are exempt from the CSPA.[12] Every Ohio appellate court and U.S. Federal District Court considering this issue has agreed that the physician exemption is limited to people that practice medicine, is narrowly interpreted, and does not include hospitals, or debt collectors, attempting to collect on a hospital bill.[13]

The CSPA specifically requires businesses that provide services, including non-profit businesses, to provide notices to a consumer before services are performed outlining the consumer's right to an estimate.[14] When an estimate is requested, a good faith attempt must be made to provide that estimate.[15] When a deposit or other partial payment is made toward the service, the business must provide, at that time, a written receipt that not only states the amount and date of the payment, but also the cash selling price of the services, and description of the services, to which the payment applies.[16] Central to the Receipt Rule is that the payment must actually be timely applied to the service. Subsequent payments (deductible or coinsurance) after the initial deposit (copayment) require the business to provide a similar written receipt, detailing the amount paid, date paid, and balance remaining due, among other things.[17] If the transaction amount or terms change, then the subsequent payments are considered initial payments, and the business must provide the more detailed written receipt for initial payments.[18] This prevents miscommunications and misunderstandings about amounts paid, amounts owed, and double billing.

The Cleveland Ordinance[19] and Summit Ordinance[20] are similar to the state law, and provide for similar, and cumulative, damages. The Cleveland Ordinance applies to all consumer transactions in the City of Cleveland, and the Summit Ordinance applies to all consumer transactions in Summit County. These can easily apply to most if not all Cleveland Clinic Foundation, University Hospitals, Summa Health, Metro, and other hospital and nursing home transactions.

B. The Other Medical Cost Statutes.

Ohio also has multiple statutes limiting the amounts that insured patients are allowed to be charged by an in-network facility or provider. One law prohibits hospitals and other providers from attempting to collect compensation from a patient that exceeds the patient's copayment, deductible, or coinsurance responsibility for the service, but it only applies to patients enrolled in health insurance plans that the provider contracts with, *i.e.* the provider is considered to be an in-network provider.[21] A hospital violates that law when they seek to recover from the insured patient an excessive amount. The law does not apply to situations where the hospital attempts to collect an excessive amount from someone other than the patient. For example, the law does not apply when the hospital seeks to collect payment from the patient's other insurers following an assignment of medical payment benefits.[22] When a hospital takes a copay from a consumer, fails to account for it, and then bills the patient the same amount or more, it has necessarily violated R.C. 1751.60 because it has attempted to collect more than allowed.

Another statute, R.C. 3923.81, similarly only applies to insured patients, but it limits the patient's responsibility when the patient is required to pay out of pocket for a service. The patient is not responsible for more than what the hospital would be paid by the patient's insurer "under applicable reimbursement rates negotiated with the provider."[23] Depending on the agreement between the hospital and the insurer, this amount could be lower than expected. The statute refers to the reimbursement rate as the rate that the insurer agrees to pay the provider for covered charges.[24] The statute does not appear to constrain the applicability of this out-of-pocket limit only to services that are actually covered by the insurance plan so long as the service has an applicable negotiated rate if it were covered.

Finally, Ohio attempted to enact R.C. 5162.80, a price transparency law requiring hospitals and providers to give patients a good faith estimate prior to non-emergency services being performed. However, hospitals appear generally not to have complied with this law, and its constitutionality has been challenged due to the procedure followed when it was enacted.[25]

These medical cost statutes, as well as the CSPA, were recently at issue, and remain at issue, in a putative class action pending in the Cuyahoga County Court of Common Pleas.

II. The Cleveland Clinic Foundation Medical Billing Lawsuit

In *van Brakle v. The Cleveland Clinic Foundation*[26] , a consumer alleged that her copayment for an imaging service was never applied to that service, and never applied to her account. She claims to have never received a receipt required by the CSPA, was never given an estimate required by Ohio law or the CSPA, and was never given a written notice of her right to an estimate as required by the CSPA. She claims that the Cleveland Clinic sent her to collections to attempt to recover an unlawful amount.

The Cleveland Clinic moved to dismiss the action arguing, among other things, that the CSPA did not apply to it because the Cleveland Clinic was exempt under the physician exemption to the definition of "consumer transaction," that the specific CSPA regulations in the Ohio Administrative Code were impossible to comply with and therefore did not apply to it, and that the CSPA claims were preempted by R.C. 5162.80, which it also argued was unconstitutional and not enforceable against it.

Judge John P. O'Donnell denied the motion to dismiss and issued a 12-page opinion disagreeing with the Cleveland Clinic's legal positions.[27] This decision provided detailed explanations previously missing from other legal authority on these issues.

Judge O'Donnell first noted that "[t]he CSPA does not exclude transactions between patients and hospitals or clinics" from its definition of "consumer transaction" because the physician exemption only applies to human beings, not corporate hospital systems.[28] This is consistent with long-standing medical malpractice case law that clearly distinguishes hospitals from physicians, because "only licensed physicians, not hospitals, are permitted to practice medicine."[29]

Additionally, Judge O'Donnell stated that a "hospital or clinic is not unambiguously excluded from the Ohio Administrative Code's rules," because the relevant regulations apply to consumer transactions, and therefore they apply to hospitals who are engaged in such transactions.[30] This has a far-reaching impact on other regulations, such as the requirement to provide a consumer with a written description of all services and goods provided during "services," including the identity of the individuals performing the various services.[31] Such a duty and such a failure have obvious impact and relevance to medical malpractice cases where the identity of the tortfeasor can be unknown or hidden from the patient, resulting in dismissal or statute of limitation issues. Additionally, regulations prohibit businesses from charging for services that are not expressly authorized, or charging for partially completed services without advance warning that charges will be incurred for incomplete services.[32]

Furthermore, Judge O'Donnell noted that R.C. 5162.80 did not preempt the CSPA claims for two reasons: first, that law appears to be unenforceable due to questions of its constitutionality, and unenforceable laws cannot conflict with anything; second, the CSPA and R.C. 5162.80 appear to require the same thing.[33] Additionally, the Court noted that it is empowered to declare new conduct to be unfair, deceptive, or unconscionable under the CSPA, even if no court has yet declared that conduct to be unfair, deceptive, or unconscionable.[34]

Ultimately, Judge O'Donnell stated that if Mrs. van Brakle is able to prove the allegations in her Amended Complaint against the Cleveland Clinic, "they are sufficient to support a class action claim."[35] This case, not to mention the supporting authority behind it, has clear and, up to now, unrealized potential use in personal injury and medical malpractice cases.

III. How These Statutes Help Injured Parties In Personal Injury And Medical Malpractice Cases.

Applying the CSPA to hospital billing and medical services brings more remedies, more defenses, and better protections for patients. It is important to note that there is a two-year statute of limitations period in which to bring CSPA claims against a hospital or debt collector, unless the hospital sues to collect the relevant bills or obligation from the patient, in which case all CSPA claims, even long-expired claims, can be raised in a counterclaim.[36] Additionally, it is critical to remember that the CSPA does not apply to physicians or chiropractors or other licensed practitioners of medicine, but does apply to hospitals and clinics and hospital systems.

Bearing that all in mind, and the strategic decisions, advice, and analysis each unique situation requires, it is clear that the CSPA and these laws have the potential to tip the balance in personal injury settlement negotiations. Using these laws could also provide some protection in medical malpractice cases where the individual physician is not known until after the statute of limitation has run.

A. Using the CSPA to Retain more Settlement Proceeds for Clients.

In personal injury cases, a substantial amount of time is spent negotiating with medical providers over billing or with debt collectors on insurance reimbursement claims, and clients often give up substantial sums of their settlement or judgment proceeds to these entities. Using the CSPA, attorneys for

injured parties can aggressively request proof of (1) estimates being provided up front on non-emergency (or even some emergency) services, (2) proper receipts being provided for copayments or other payments made previously, (3) identification of persons that provided the actual services, and (4) cost-breakdowns of labor separate from materials provided by the hospital.[37] If the hospitals or their debt collectors are unable to provide proof of these things, or refuse to do so, the patient may be able to leverage these claims to reduce the debt, or bring suit. In suit, the patient may be entitled to statutory or treble their actual damages from the hospital or debt collector, and may recover attorneys' fees.[38]

Additionally, attorneys can request the negotiated reimbursement rates between the provider and the insurer to make sure the patient is not being required to pay more than legally allowed. If the hospital has overbilled the patient because it did not submit the claim to the patient's insurer, the hospital could be requested to submit the claim to the insurer. In some situations, with delayed claims, insurers have issued an Explanation of Benefit form stating that the patient responsibility is $0, even when the claim is denied.[39]

There may be agreements between insurance companies and in-network hospitals that claims will be submitted within a certain amount of time. If the amount billed exceeds the amount the insurer agreed to pay for that service, there is good reason to reduce the charged amount due to the limitation on patient responsibility under R.C. 3923.81. Finally, when the hospital overcharged a patient under R.C. 1751.60, and collected more money that it was entitled to from the patient, a claim—perhaps even a class claim—might exist for unjust enrichment. When negotiating with hospitals and debt collectors, attorneys should remember the possible remedies available in a lawsuit, including the often-ignored declaratory judgment and injunctive relief that could forever alter the hospital's practices.

B. Belt and Suspenders for a Medical Malpractice Lawsuit.

In medical malpractice cases, hospitals are not generally liable unless the victim of malpractice can prove that a physician or employee was primarily negligent, and a plaintiff's failure to sue the proper physician may defeat a vicarious liability claim against the hospital.[40] Patients and their attorneys often do not know all of the individuals involved in the care of the patient, even after medical records are requested pre-suit. In these difficult situations, it may make sense for counsel to add one additional count to a malpractice action, against the hospital only, for violations of the CSPA. The CSPA becomes most helpful when the hospital has not identified, and the patient does not know, all of the persons that provided medical care or services.

Failing to sue the proper individual usually results in dismissal of the case against the hospital, or, at best for the malpractice victim, the hospital pointing to an empty chair at trial.[41] To avoid that, attorneys in the right situation may consider adding a claim for the hospital's (not the physician's) violation of the CSPA Service Rule, OAC 109:4-3-05(D). According to Judge O'Donnell's decision in *van Brakle*, the Service Rule requirements appear to apply to hospitals. These requirements include a duty to inform the patient in advance that someone other than the hospital's employees (*i.e.* subcontractors or other independent contractors) may be performing some of the services when the hospital disclaims any warranty or guarantee for those services.[42] Upon request, the hospital needs to specifically identify the other persons to the patient.[43] More to the point, the hospital is also required to given a written, itemized cost break down for the services rendered and goods or materials provided, and that writing must identify all individuals that performed services for the patient.[44] There is no requirement that the patient request this writing from the hospital—it exists as a legal duty on the hospital to provide to the patient. The hospital's failure to do these things can violate the CSPA. The hospital's failure to provide that information could create direct liability for the hospital under the CSPA.

Although the CSPA does not apply to claims of personal injury or death[45], and therefore it may not be possible to include the lost value of the unrealized malpractice action in the consumer claim against the hospital, it does bring up the possibility of additional damages, treble damages, statutory damages, limited non-economic damages, and attorney fees, against the hospital for its violations. Under the Cleveland and Summit Ordinances, those non-economic damages are not as limited as they are under the CSPA. Arguments could be made that non-personal injury damages should or could include the sunk expense of experts on the lost malpractice case, costs of attempting to locate the correct identities of physicians that should have been disclosed, or other expenses. It can also be raised during discovery to identify missing parties or obtain audit trails of medical records, to show that the hospital had a duty to provide this information pre-suit, and should not be dragging its feet during discovery on these issues or topics.

Attorneys may also be interested in exploring whether the failure to provide these identities is fraudulent concealment, as the hospital would have failed to disclose latent information that it was legally obligated to provide, and which was material to the service or billing of the service.

IV. Conclusion

While the *van Brakle* case is only one case, and has not been fully litigated, the decision of Judge John O'Donnell and the authority it is based upon make it clear that the CSPA should not be ignored or left unused in personal injury settlement negotiations or medical malpractice cases. The CSPA, as well as other statutes, should be consulted by personal injury attorneys, medical malpractice attorneys, and any attorneys dealing with consumer debt or representing individuals wronged by a company, even in non-traditional consumer law settings. There are lessons to learn, and roads never travelled, that could change hospital, nursing home, and debt collection practices for the better moving forward. ■

End Notes

1. Dan Myers is a consumer lawyer practicing statewide but located in the Cleveland-area. Dan focuses his practice on patients, homeowners, and individuals who have been overbilled, defrauded, or received shoddy services from hospitals, home improvement contractors, and debt collectors. In the past nine years, Dan has handled individual cases and class actions. You can find out more information about these laws, or Dan, at www.ShieldConsumers.com, or www.OhioHomeownerLaw.com. He, along with Scott Perlmuter of Tittle & Perlmuter, are counsel of record in the putative class action *van Brake. v. The Cleveland Clinic Foundation*. This article is not legal advice, and the author is not your attorney or co-counsel. This article is provided for informational purposes, and includes thoughts, opinions, and ideas of the author. The thoughts in this article should not be followed without an independent, specific analysis performed by counsel in each case or situation.
2. Daniel Myers, *The Forgotten Consumer: Statutory Damages most Personal Injury Attorneys Leave on the Table at Settlement*, 30 Ohio Trial (Publication of the Ohio Association of Justice), 36 (Winter 2020).
3. R.C. 1345.01 *et seq.*
4. R.C. 1345.02(A); R.C. 1345.03(A).
5. R.C. 1345.01(C); R.C. 1345.01(A).
6. *See, e.g., Garber v. STS Concrete Co., L.L.C.*, 8th Dist. Cuyahoga No. 99139, 2013-Ohio-2700, 991 N.E.2d 1225, ¶¶ 27-28 (discussion of individual liability of owners, offices, and directors under the CSPA).
7. R.C. 1345.01(A).
8. *Id.*
9. R.C. 1345.09(B); OAC 109:4-3-01 *et seq.*; the Online Public Inspection File can be accessed at https://opif.ohioattorneygeneral.gov/.
10. R.C. 1345.09(A)-(B).
11. R.C. 1345.09(D).
12. *See Thorton v. Meredia Suburban Hosp.*, 8th Dist. Cuyahoga No. 59405, 1991 Ohio App. LEXIS 5549, *2-3, 1991 WL 244206 (Nov. 21, 1991); *Summa Health Sys. v. Viningre*, 140 Ohio App. 3d 780, 749 N.E.2d 344, 356 (9th Dist. Dec. 27, 2000); *Elder v. Fischer*, 129 Ohio App. 3d 209, 215-16, 717 N.E.2d 730 (1st Dist. July 24, 1998) (appeal not accepted *Elder v. Fischer*, 84 Ohio St. 3d 1434, 702 N.E.2d 1213 (1998)); *Firelands Reg'l Med. Ctr. v. Jeavons*, 6th Dist. Erie No. E-07-068, 2008-Ohio-5031, ¶¶ 34-35; *Monroe v. Forum Health*, 11th Dist. Trumbull No. 2012-T-0026, 2012-Ohio-6133, ¶¶ 61-64; *Lockard v. Kno-Ho-Co Community Action Comm'n*, 5th Dist. Coshocton No. 92-CA-21, 1993 Ohio App. LEXIS 4503, at *9-10, 1993 WL 385359 (5th Dist. Sept. 20, 1993).
13. *See* cases cited in note 11. *See also Ruess v. First Fin. Collection Co.*, S.D. Ohio No. 1:08-cv-697, 2009 U.S. Dist. LEXIS 115624, 2009 WL 4828600 (S.D. Ohio Dec. 11, 2009); *Kelly v. Montgomery Lynch & Assoc.*, N.D. Ohio No. 1:07-CV-919, 2008 U.S. Dist. LEXIS 30917, *31 at fn. 6, 2008 WL 1775251 (N.D. Ohio Apr. 15, 2008); *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783, 808-09 (S.D. Ohio Dec. 5, 2006); *Leib v. Thompson, Dunlap & Heydinger, Ltd.*, S.D. Ohio No. 2:17-cv-00243, 2019 U.S. Dist. LEXIS 14014, 2019 WL 358904 (S.D. Ohio Jan 29, 2019).
14. OAC 109:4-3-05(A)-(C).
15. *Id.*
16. OAC 109:4-3-07(B).
17. OAC 109:4-3-07(C).
18. *Id.*
19. Cleveland Cod. Ord. § 641.01 et seq. (definitions); Cleveland Cod. Ord. § 641.11-12 (defining acts that are unfair or unconscionable); Cleveland Cod. Ord. § 643.02 (general prohibition); Cleveland Cod. Ord. § 643.11 (enforcement and damages).
20. Summit County Cod. Ord. § 201.01(h)-(i) (defining unfair and unconscionable acts prohibited); Summit County Cod. Ord. § 761.01 et seq.
21. R.C. 1751.60(A).
22. *King v. ProMedica Health System, Inc.*, 129 Ohio St.3d 596, 2011-Ohio-4200, ¶ 2, 955 N.E.2d 348.
23. R.C. 3923.81(A).
24. R.C. 3923.81(C)(2).
25. *Community Hosps. & Wellness Ctrs. v. State*, 6th Dist. Williams Nos. WM-19-001, WM-19-002, 2020-Ohio-401 (Feb. 7, 2020).
26. All allegations and descriptions of the claims in the *van Brakle v. The Cleveland Clinic Foundation* lawsuit are from the Amended Complaint filed in that case, available online at the Cuyahoga County Searchable Docket, located at *https://cpdocket.cp.cuyahogacounty.us*, Case Number CV-20-936348.
27. J.E. Denying Def's M. to Dism. Am. Compl., dated 01/14/2021 (hereinafter CCF Decision), available on the Cuyahoga County Docket.
28. *Id.*, at pp. 4-5.
29. *Schelling v. Humphrey*, 123 Ohio St. 3d 387, 2009-Ohio-4175, 916 N.E.2d 1029, ¶ 14 (emphasis added) (quoting *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 256, 553 N.E.2d 1038, (1990) *reversed on other grounds* as noted in *Poe v. Univ. of Cincinnati*, 10th Dist. Franklin Nos. 12AP-929 & 13AP-210, 2013-Ohio-5451, ¶ 37, 5 N.E.3d 61).
30. CCF Decision, at p. 7.
31. *See* OAC 109:4-3-05(D)(12) & (16).
32. *See, generally*, OAC 109:4-3-05(D).
33. CCF Decision, at pp. 9-10.
34. *Id.*, at pp. 10-11.
35. *Id.*, at p. 12.
36. R.C. 1345.10(C) (establishing a two-year statute of limitations, but noting that "an action . . . arising out of the same consumer transaction can be used as a counterclaim whenever a supplier sues a consumer on an obligation arising from the consumer transaction.").
37. *See, generally*, OAC 109:4-3-05; OAC 109:4-3-07.
38. R.C. 1345.09(B) (regarding damages); R.C. 1345.09(F)(2) (regarding attorneys' fees).
39. The author has professional experience receiving the same in relation to various client matters where hospitals submitted bills and claims to insurance too late. Your experience may differ.
40. *Cobbin v. Cleveland Clinic Foundatio*n, 8th Dist. Cuyahoga No. 107852, 2019-Ohio-3659, ¶¶ 25-30, 143 N.E.3d 1155 (discussion on hospital vicarious liability and physician liability).
41. *Rush v. University of Cincinnati Physicians, Inc.*, 1st Dist. Hamilton No. C-150309, 2016-Ohio-947, ¶¶ 23-26.
42. OAC 109:4-3-05(D)(16).
43. *Id.*
44. OAC 109:4-3-05(D)(12).
45. R.C. 1345.12(C).

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The Supreme Court's Final Gift of 2020 - The Elimination Of Some Patients' Rights To A Remedy And The Retroactive Creation Of A Legal Malpractice Trap

by Rhonda Baker Debevec

The Supreme Court ended the already tumultuous year of 2020 with the issuance of *Wilson v. Durrani*, 2020-Ohio-6827. This decision deprives injured patients of a remedy; retroactively imposes potential legal malpractice liability on patient advocates; and significantly curbs patient advocates' ability to utilize the savings statute going forward. In *Durrani*, the Supreme Court answered, in the negative, the question left lingering by *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432:[1] "whether a medical malpractice claim that is timely re-filed within the one-year afforded by the savings statute but beyond the four-year timeframe afforded by the statute of repose is time-barred?"

In *Durrani*, a large group of spinal surgery patients claimed their spinal surgeon had performed unnecessary spinal surgery. During the course of the litigation, the spinal surgeon, Dr. Durrani, fled the country. Ultimately, the patients voluntarily dismissed and then subsequently re-filed their claims within the one-year savings statute, R.C. 2305.19(A), but beyond the four-year timeframe permitted under the statute of repose, R.C. 2503.113(C). In the defendants' motion for judgment on the pleadings, they argued that, notwithstanding the plaintiffs' proper invocation of the savings statute, the re-filed complaint was barred by the four-year statute of repose. The trial court granted the defendants' motion but was subsequently reversed on appeal by the First District, 2019-Ohio-3880, 145 N.E.3d 1071. The Supreme Court accepted discretionary jurisdiction. While *Durrani* was pending, the Supreme Court also accepted discretionary review of other cases in which the defense argued the medical malpractice statute of repose barred the re-filed claim.

Ultimately, the *Durrani* court held that claims refiled beyond the four-year timeframe allowed by the statute of repose were barred even when the savings statute had been properly invoked. In reaching this decision, the *Durrani* court took a circuitous route through precedent in which it:

a) discarded as mere *dicta* the Court's previous holding that "where R.C. 2305.19 applies, the date for filing the new action relates back to the filing date for the preceding action for limitations purposes." *Frysinger v. Leech*, 32 Ohio St.3d 38, 42, 512 N.E.2d 337 (1987).

b) failed to recognize that both statutes could be reconciled and given full effect;

c) incorrectly inferred legislative intent from the differences in statutory language between the product liability and medical malpractice statutes of repose despite the latter being enacted after *Frysinger*; and,

d) rigidly interpreted the statute of repose's lack of an exception for the savings statute operation as determinative despite paradoxically ignoring the savings statute's lack of an exception for the statute of repose.

These inconsistencies are best summarized in Justice Stewart's dissent: "I agree with the majority opinion that it is not our job to establish legislative policies or to second guess the General Assembly's policy choices. (citation omitted.) But that is exactly what the majority is doing here when it goes out of its way to manufacture reasons to find that two otherwise perfectly compatible statutes are operating at odds with each other." Despite fervent arguments raised both at argument and in Motions for Reconsiderations, the majority did not change course.[2]

Even though the *Durrani* court did not specify whether its decision would be applied retrospectively, this question was indirectly answered by the Court's disposal of the Motion For Reconsideration filed by amicus curiae, Kathleen McCarthy. In her Motion For Reconsideration, Ms. McCarthy argued retrospective application would unfairly deprive her and other injured patients of recourse and simultaneously subject patient lawyers to potential liability claims who had relied upon the saving statute. These arguments fell on deaf ears as her motion was unceremoniously denied without decision.

Notwithstanding the *Durrani* court's reliance on the statute of repose's "clear and unambiguous" language, it may still be open to the possibility of some claims being filed beyond the four-year statute of repose and outside the four-corners of the statute's enumerated exceptions. In response to the plaintiff's argument that the Defendant's absence from the jurisdiction since 2013 tolled the statute under R.C. 2305.15, the *Durrani* court remanded that issue to the First District for further findings and decision. It remains to be seen whether the *Durrani* court is, in fact, amenable to the tolling statute extending the viability of claims beyond four-years. Given the *Durrani* court's focus on the specific language of the savings statute, however, one can still argue that other tenets of law outside of the savings statute justify the filing of claims beyond four calendar years.

After *Durrani*, patient advocates opposing current motions face an uphill battle. That said, there may be some arguments available to ameliorate its impact. In addition to the tolling argument remanded in *Durrani*, left unanswered is whether parties' express agreements to permit re-filing beyond the four-year statute of repose will be honored. Similarly, in complaints that allege multiple acts of negligence over an extended period of time, the patient may be able to "save" the later acts of negligence. Separately, given the *Durrani* court's finding that the legislature intended to treat medical malpractice claims differently from product liability claims, there may be a basis for additional constitutional challenges to the statute. Although these and other potential challenges are untested, after *Durrani*, the following is now clear:

1) A plaintiff can no longer voluntarily dismiss his claim after the four-year anniversary in reliance on the savings statute; and,

2) If a medical malpractice claim has been voluntarily dismissed, the re-filing deadline can no longer be automatically tracked for one-year without careful consideration of the defense's potential statute of repose arguments.

Although legislation may be enacted to bring the medical malpractice statute of repose in line with the product liability statute of repose and enumerate the savings statute as an exception, until then, medical malpractice practitioners should beware of this new malpractice trap.[3] ■

End Notes

1. In *Antoon*, the plaintiffs' claims were re-filed beyond the four-year statute of repose but not within the one-year permitted under the savings statute. Thus, the Supreme Court specifically noted that it "did not decide today whether Ohio's saving statute, R.C. 2305.19, or the federal tolling statute, 28 U.S.C. 1367, properly invoked, may allow actions to survive beyond the statute of repose."
2. Ironically, Judge Gwin from the Fifth Appellate District joined in the majority despite previously joining the majority decision applying the savings statute to allow a claim filed beyond the four-year statute of repose to survive. *Johnson v. Stachel*, 2020-Ohio-3015.
3. For a thoughtful and complete argument in support of the inapplicability of *Wilson v. Durrani* to wrongful death claims, see Plaintiffs' Brief in Opposition, *Pelletier v. Mercy Health Youngstown, LLC*, filed April 8, 2021, Case No. 2020-CV-01822, Mahoning County Court of Common Pleas. But compare, Journal Entry, dated February 12, 2018, *Ostrowski v. Meridores*, Case No. CV-17-873873, Cuyahoga County Court of Common Pleas, granting partial summary judgment in a wrongful death claim premised upon underlying negligent medical treatment finding that "the four-year statute of repose is a true statute of repose that bars claims regardless of circumstance."

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You Can't Handle The Truth! Lying To The Jury In UM/UIM Cases

by Meghan P. Connolly

What is a jury trial if not a quest for the truth, the whole truth, and nothing but the truth? Well, in UM/UIM cases, insurance carriers often request permission to lie to the jury. They ask the court for permission through a motion in limine to conceal their identity and role as a defendant or to be falsely identified as the at-fault driver "in name only". The theory in support of this charade trial is that if the jury knows the defendant is an insurance company, they simply can't handle the truth! And would deliver an inflated verdict.

But there are some pretty good reasons to tell the truth to the jury and identify the defendant insurance carrier at the UM/UIM trial, such as the United States and Ohio Constitutions and the Ohio Rules of Evidence 411 and 403 (which expressly operate against *misleading the jury*). This article aims to take a closer look at these concerns.

The Constitution

Whether the defendant insurance company should be identified at trial has never been directly decided by the Ohio Supreme Court, and so this issue is unsettled in Ohio. If the issue does reach our highest court, one hopes that the constitutional implications will be at the forefront.

The Ohio Constitution is infringed upon in several respects when a defendant's identity is concealed or falsely altered at trial. For one, the plaintiff has a right to trial by jury guaranteed by Section 5, Article I of the Ohio Constitution. Inherent in the right to trial by jury is the right to test the qualifications and competency of prospective jurors. Indeed, R.C. § 2313.17(B) specifically states that a prospective juror's close relationship with one of the parties is good cause for challenge.[1] If the identity of the party insurance company is concealed or *changed* at trial, the plaintiff is deprived of their right to discover whether prospective jurors are related to the party and, if so, to dismiss them for cause on that basis. This is an obvious infringement upon the plaintiff's right to trial by jury.

Second, allowing the defendant insurance company to proceed in secret or to use a false name infringes upon the open courts provision of the Ohio Constitution found in Section 16, Article 1. The open courts provision gives the jury, as well as the public, access to the identity of the litigants and the true nature of the dispute. Otherwise, the trial is not truly open to the public. This is in line with deep-rooted public policy in support of open judicial proceedings. As the court stated in *Tucker v. McQuery,* "jurors have the right to know who the real party in interest is." [2]

First Amendment guarantees are also implicated when a court decides to restrict public scrutiny of judicial proceedings.[3] When a court agrees to conceal a publicly named defendant at trial, the jury and the public are deprived of their right to witness an open proceeding. Most UM/UIM cases do not make the front page of the paper,

but imagine if the press reported on a UM/UIM trial, completely unaware that the trial was actually against an insurance company. The press's right to access the public proceeding is obviously thwarted when the defendant's identity is concealed or changed at trial.

It is worth noting here that Ohio law does provide for litigant anonymity under certain circumstances when privacy interests outweigh the interest in open judicial proceedings, such as in some cases of sexual assault. [4] However, none of the legally recognized privacy interests are present in a UM/UIM trial.

Ohio Evidence Rule 411

Defendant insurance companies rely on Evidence Rule 411 in support of their motion in limine to conceal the insurer's identity from the jury. It seems insurers look for a knee jerk reaction from the bench, or as Ohio Supreme Court Justice Pfeifer quipped, a "Pavlovian response", to the word "insurance". But, on its face, the Rule in no way supports the exclusion of evidence of insurance in a UM/UIM case:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness.[5]

Importantly, a UM/UIM case does not sound in negligence—it is a first party contractual dispute.[6] An essential element of any contract claim is proving "the identity of the parties to be bound".[7] The existence and binding nature of the insurance contract is not only relevant evidence at trial but it is an essential element of the plaintiff's cause of action. The first sentence of Rule 411 excludes evidence of liability insurance when used as evidence of negligence or wrongful conduct. Seeing as there is no allegation of negligence or even wrongful conduct against the insurer in a UM/UIM case, Rule 411 is simply not triggered.

The second sentence of Rule 411 expressly *supports* identification of the insurer at trial, as clearly the existence of insurance in a UM/UIM trial is offered for "another purpose".[8] The Supreme Court of Ohio has held "the exclusionary principle of Rule 411 applies only where liability insurance is offered to establish negligence and culpability." *Nolan v. Conseco Healthy Ins. Co.*, 2008-Ohio-3332 citing *Beck v. Cianchetti*, 1 Ohio St. 3d 231 (1982). Again, seeing as there is no allegation that the insurer acted negligently in a UM/UIM trial, Rule 411 should be no impediment whatsoever to identifying the insurer at trial.

As Justice Pfeifer wrote in *Ede v. Atrium S. OB-GYN*, "[t]he second sentence of Evid.R. 411 exists for a reason—it recognizes that testimony regarding insurance is not always prejudicial."[9] Further, "'the second sentence of Evid.R. 411, which allows courts to operate in a world free from truth-stifling legal fictions, ought to be embraced."[10]

Evidence Rule 411 weighs in favor of accurately identifying the UM/UIM party at trial.

Evidence Rule 403

Because the plaintiff's UM/UIM cause of action against their own insurance company sounds in contract, evidence of insurance is obviously relevant under Evid.R. 401. The danger of unfair prejudice pursuant to Evid.R. 403 is often the focus of the insurer's argument for anonymity. However, the real risk of unfair prejudice in concealing the defendant insurer's identity, is to the plaintiff. There is real risk that, by concealing the insurer's role at trial, a false picture is painted for the jury that the loss is uninsured—that the tortfeasor will be on the hook out of their own pocket.

The Ohio Supreme Court recognized in *Ede v. Atrium S. OB-GYN, Inc.*, that "[i]nstead of juries knowing the truth about the existence and extent of coverage, they are forced to make assumptions which may have more prejudicial effect than the truth." It follows that by not acknowledging the UM/UIM insurer's role at trial, the jury is invited to speculate about the identity and role of the defendant insurer and their counsel. This creates a high likelihood of unfair prejudice to the plaintiff, especially when the negligent driver is a sympathetic type.

Aside from unfair prejudice, equally as important is Evid. R.403's concern for confusion of the issues, and *misleading of the jury*. How can misrepresenting the identity of a party not be considered per se misleading of the jury? Quite literally the stated purpose of the Ohio Rules of Evidence is "to provide procedures for the adjudication of causes to the end that the *truth may be ascertained* and proceedings justly determined. ***".[11] If proper weight is given to Evid.R. 403 and the purpose of the Rules of Evidence, the insurer's identity should be truthfully disclosed to the jury.

While the Ohio Supreme Court has not weighed in directly on this issue, many Ohio court decisions support identification of the defendant UM/UIM insurer at trial.[12] It is also worth noting that the Ohio State Bar Association jury instructions for UM/UIM cases call for the identification of the case as a UM/UIM case and the express identification of the insurer to the jury.

Other jurisdictions have shown zero tolerance for concealing or falsely representing the identity of the insurance company in a UM/UIM trial. For example, the Supreme Court of Florida has taken the position that "it is per se reversible error for a trial court to exclude from a jury the identity of an [UM/UIM] insurance carrier that has been joined as a necessary party to an action."[13] The court admonishes this concept of concealing the insurer as a "miscarriage of justice" and states:

> "[We have taken] a strong stand against charades in trials. To have the UM insurer, which by statute is a necessary party, not be so named to the jury is a pure fiction in violation of this policy. The unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance."

Other state courts have also come down on the side of truth on this issue, including Maryland[14]; Maine[15]; Utah[16]; West Virginia[17]; Iowa[18]; Montana[19]; District of Columbia[20]; Kentucky[21]. And I do not claim that my list is exhaustive.

Conclusion

When UM/UIM cases proceed to trial, and when the insurer asks to proceed in secret or in disguise, the jury should be told the truth. The UM/UIM carrier should be identified by name and their role as the plaintiff's insurer should be disclosed. The proposition of lying to the jury about the insurer's identity can only invite speculation, unfair prejudice, and the obvious misleading of the jury. With the sophistication of juries and their ability carry out their important role in our civil justice system, we should trust that they *can* in fact handle the truth!, about UM/UIM insurance. ■

End Notes

1. See also OJI-CV 301.03(2), and Comment.
2. *Tucker v. McQuery*, 107 Ohio Misc.2d 38, 736 N.E.2d 574 (Clermont C.P. 1999).
3. *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981).
4. *Doe v. Bruner*, 135 Ohio St.3d 277, 2013-Ohio-954, 985 N.E.2d 1288.
5. *Rule 411 - Liability Insurance*, Ohio R. Evid. 411.
6. *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 635 N.E.2d 317 (1994).
7. *Alligood v. Proctor & Gamble Co.*, 72 Ohio App.3d 309, 594 N.E.2d 688 (1992).
8. See *Tucker*, supra, at 41-42 ("The purpose is, allegedly, to disclose who the real defendant is. Such a disclosure does not require exclusion, as this is 'another purpose' as contemplated by Evid.R. 411").
9. *Ede v. Atrium S. OB-GYN, Inc.*, 71 Ohio St.3d 124, 642 N.E.2d 365 (1994).
10. *Id.*
11. Evid. R. 102 (emphasis added).
12. See *Tucker*, supra.; *Shaefer v. Allstate*, 76 Ohio St.3d 553, 668 N.E.2d 913 (1996); *Tona v. Pugh*, Summit County Case No. 2011-02-1073, Order of May 29, 2012 (finding that the insurance contract and the declarations page is relevant and admissible at trial).
13. *Medina v. Peralta*, 724 So.2d 1188 (Fla. 1999).
14. See *King v. State Farm Mut. Auto. Ins. Co.*, 850 A.3d 428, 435 (Md. App. 2004) (finding trial court abused its discretion in permitting UIM insurer to proceed at trial anonymously).
15. *Pinette v. Patrons Oxford Ins. Co.*, No. CV-15-211, Me. Super. LEXIS 187, at *3 (Mar. 23, 2017) (denying UIM insurer's motion to substitute its identity with name of tortfeasor at trial).
16. *Lima v. Chambers*, 657 P.2d 279 (Utah 1982).
17. *State ex. Rel State Farm Mut. Auto. Ins. Co. v. Canady*, 197 W.Va. 107, 475 S.E.2d 107 (1996) (holding "the jury is entitled to be aware of the uninsured motorist carrier's identity.").
18. *Leuchtenmacher v. Farm Bureau Mutual Insurance*, 461 NW.3d 291 (Iowa 1990) (finding "any direct claim against an insurer on a contract dispute necessarily involves the introduction of the insurance policy and its terms").
19. *Dill v. Montana Thirteenth Judicial District Court*, 979 P.2d 188 (Mont. 1999).
20. *Smith v. Summers*, 334 F.Supp.3d 339 (2018) (denying defendant's motion in limine "in so far as it seeks to prevent disclosure to the jury of the existence of Plaintiff's UIM coverage, that Plaintiff paid for that coverage, or that Defendant is her UIM insurer.").
21. *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004).

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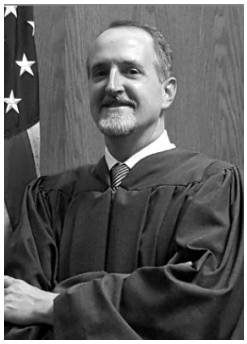
Pointers From The Bench:
An Interview With Judge William F.B. Vodrey

By Christine M. LaSalvia

Judge William F.B. Vodrey was elected to the Cuyahoga County Court of Common Pleas in November 2020. He ran for judge pledging to build on the reforms already underway in the court and striving to reduce racial and socioeconomic disparities in the justice system. He also hopes to get more of his colleagues involved in the Ohio high school mock trial program, of which he has long been a coach and judge. His decision to run for judge in Cuyahoga County was the result of a long career in which he worked hard to ensure that the less fortunate were given fair access to the courts.



Judge William F.B. Vodrey

Judge Vodrey graduated from Case Western Reserve University law school in 1992 and then entered private practice, working with his father, also a lawyer, in handling real estate and business law cases in his hometown of East Liverpool, Ohio. He served as a staff attorney in New Philadelphia, Ohio for Southeastern Ohio Legal Services, where he primarily worked on civil protection orders for victims of domestic violence, and on civil class action cases. Judge Vodrey spoke with pride of his hiring by the late Stephanie Tubbs Jones to be an assistant prosecutor in Cuyahoga County in 1995. He served in this role, primarily in the felony trial division, until 2001, when he was appointed a magistrate of Cleveland Municipal Court. As a magistrate, Judge Vodrey had the opportunity to develop many of the skills which would prepare him for his new role as a Common Pleas judge, ruling on motions and objections and presiding over many civil, criminal and traffic cases. During his time as a magistrate, Judge Vodrey always did his very best to be fair and impartial. He is proud that, from time to time, he was thanked by litigants who'd received unfavorable rulings because, even though their cases had not ended as they wished, they understood that the case had been handled fairly.

Since taking the bench, Judge Vodrey has been grateful for the opportunity to make a positive difference on his criminal docket. He is guided by the core belief that poverty should not be criminalized. He speaks passionately about the importance of treatment and counseling in lieu of jail for nonviolent crimes and low-level drug offenses. People who have made mistakes or who come from less fortunate circumstances should, he believes, whenever possible be given the opportunity to be rehabilitated, and prison should be a last resort. Judge Vodrey strives to make a positive impact on the lives of those who come before him. He finds satisfaction when he is told by the Probation Department that a person is eligible for early termination of probation because they did all that was required of them and have made a change for the better in their lives.

Judge Vodrey also hopes to have a positive impact on the civil docket. He acknowledges that he has joined the Cuyahoga County bench in unusual times, and wishes to ensure everyone's safety during the COVID-19 pandemic. He believes that phone conferences and Zoom hearings are usually more appropriate than in-person hearings currently. However, he has had some socially distanced in- person civil and criminal hearings when requested by the parties. He is also interested in possibly hearing bench trials by Zoom, with the consent of the parties, in the future.

Judge Vodrey credits his staff attorney, Dave Peters, for his capable assistance with the civil docket, particularly in the mornings. Judge Vodrey believes in allowing lawyers the time and attention necessary to fully develop their cases. He does not intend to have a "rocket docket," but instead believes in reasonable deadlines which are agreeable to all but then firmly enforced, unless for good cause shown. He allows lawyers free rein in voir dire within reason. Judge Vodrey also allows jurors to ask written questions after direct and cross examination, reviewing them at sidebar with counsel before asking the witness. He also allows jurors to take notes, giving a limiting instruction to ensure that they don't defer to another juror who may have taken more detailed notes. He believes that taking these steps leads to greater juror engagement and satisfaction.

When asked to give advice to civil trial attorneys, Judge Vodrey said 1) be prepared, 2) be professional and courteous, and 3) work hard for your client. He also noted the importance of an attorney keeping an open mind and being flexible in working towards possible settlement.

Judge Vodrey is proud to be a member of the Cuyahoga County Common Pleas bench, and would like the lawyers who appear before him to know that he strives to be reasonable and to give lawyers a fair and open space in which to present their cases.

Judge Vodrey lives in Cleveland with his wife Susan and their three sons. He is an avid reader and movie buff who also enjoys listening to music, and is, weather permitting, an avid bicyclist. ■

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Private Prosecutors: A New Method for Accountability

by Louis E. Grube

Ohio law provides a powerful tool for civil litigants and their attorneys to hold wrongdoers accountable: the civil claim for recovery of damages resulting from a criminal act. Revised Code 2307.60(A)(1) states in simple terms that "Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action[.]" Recovery of costs, attorney fees, and punitive damages is permitted on the same terms as in any other case. Although this statute has existed in largely the same form since the mid-80's, it has not been utilized heavily. But, for a few reasons, this cause of action could act as an important gap filler for plaintiffs whose injuries do not fit neatly into the typical common law torts.

At first, the courts did not understand that this cause of action even existed. The statute originally served to reject the old rule from the English common law rule that civil claims would be barred because they were premised upon the same facts and circumstances as a criminal prosecution. The language stating that a person "has" a "civil action" was added in 1985. And for decades following that change, the courts treated the new language as merely a continuation of the preexisting law, rejecting the argument numerous times that a crime victim could sue the perpetrator of their criminal injuries under the statute.

All of that changed in 2016 when the Supreme Court of Ohio decided *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434. In that case, a pro se litigant brought claims against her former conservator on the theory that she had been injured as a result of the commission of the crimes of unlawful restraint, kidnapping, and child enticement when she was kept away from her mother and sent away on an airplane to live with other members of her family in Florida. The question that traveled up to the High Court was: "Does the current version of R.C. 2307.60 independently authorize a civil action for damages caused by criminal acts, unless otherwise prohibited by law?" The majority decided in a no-frills opinion that yes, based upon the plain language of the statute, the statute creates a cause of action. The decision reserved answering any practical questions about the nuts and bolts of prosecuting and proving a claim for later. Associate Justice Sharon L. Kennedy delivered a detailed decision concurring in judgment only that described the full, colorful history of the statute.

As the statute came into use after decades of dormancy, the defense bar quickly set out to make recovery under this statute difficult. In an employment matter, several defendants argued to the United States District Court for the Northern District of Ohio that there could be no claim under the statute unless the defendant had been convicted of a crime. The plaintiff had asserted injury resulting from the crimes of retaliation, intimidation, and interfering with civil rights after she reported unequal pay practices and ethical misconduct by a public official in Geauga

County. The District Court asked the Supreme Court of Ohio to decide whether a conviction was required to file a claim under the statute.

In *Buddenberg v. Weisdack*, 161 Ohio St.3d 160, 2020-Ohio-3832, the Supreme Court of Ohio accepted the certified question and decided that no, the plain language of the statute does not require proof of an underlying criminal conviction. Chief Justice Maureen O'Connor wrote for the majority that "the word 'conviction' is noticeably absent from R.C. 2307.60(A)(1)." The obvious point, that "crimes can be committed without a conviction," won the day. This observation is important. It has long been true that courts will not add words that are left out of a statute in order to reach a certain result. But with a no-frills statute like R.C. 2307.60, future arguments by defense counsel must be rooted in the short, basic text of the statute.

Because it is so straightforward, the civil claim for recovery of damages resulting from a criminal act could be a handy tool for plaintiffs' lawyers going forward. As amicus counsel in *Buddenberg*, the team of lawyers I worked with made the point that the thicket of difficult rules that govern common-law claims simply does not exist for the R.C. 2307.60 claim. One of the arguments we most strongly opposed was that the "remedies provided in R.C. 2307.60 are the same as those available under tort law" and that these common law remedies "would provide relief to a civil plaintiff without the need to further expand R.C. 2307.60 to include situations where there is no underlying conviction." Wrong! The most obvious response to this was that common-law tort claims to recover for injuries that were in no way physical are heavily limited. We used the example of an action for intentional infliction of emotional distress, in which damages for emotional distress cannot be recovered without proof of "extreme and outrageous conduct." One of the most prominent decisions in this area, *Yeager v. Local Union 20, Teamsters, Chauffers, Warehousemen, & Helpers of Am.*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), had specifically held that not all criminal conduct is extreme and outrageous. Yet with the claim enacted in R.C. 2307.60, the only elements stated are 1) the commission of a crime, and 2) injury to person or property.

The Amicus team I served with also made the point that the available restitution in a criminal case was likewise limited to "an amount based on the victim's economic loss" under R.C. 2929.18(A)(1) and 2929.28(A)(1). The damages recoverable under R.C. 2307.60—"full damages" and punitive damages—are much broader. So this civil claim for recovery of damages resulting from a criminal act fills glaring holes in both the civil and criminal justice system.

In the future, practitioners should be creative about pleading claims on the authority of R.C. 2307.60. First of all, it is hardly a surprise to anyone that there are quite a few criminal prohibitions on the books at this point. Over the previous decades, a flood of criminal laws has been passed, expanding the potential ways in which someone can be criminally prosecuted. Criminal liability is also expanded by the crimes of attempt, complicity, and conspiracy, which criminalize partial crimes, assistance in the commission of a crime, and the agreement to commit or planning of a crime, respectively. I can say from my experience litigating criminal appeals that, during that same period, the courts have issued an equally flood-like number of decisions affirming convictions on the theory that "sufficient evidence" has been presented to a jury to sustain a criminal conviction by "proof beyond a reasonable doubt." These decisions should be very helpful to a civil practitioner seeking to get past summary judgment under the far-less burdensome standard of proof by a preponderance of the evidence.

As a practical matter, any time a civil practitioner runs into trouble proving a common-law claim due to some technical hang-up rooted in arcane case law, their eyes should turn to R.C. 2307.60. If a tortfeasor's conduct is obviously wrong, it is possible that the Ohio General Assembly passed a helpful criminal statute that could save the day. ■

In Memoriam: John E. Duda

by William N. Masters

One of the finest amongst our ranks, Attorney John Duda passed away on December 21, 2020. John was a very special kind of attorney. Professionally he was a skilled litigator, a ferocious advocate, an honorable gentleman, a professional true to his word, and a force within our legal community. John championed the causes of our clients like no other. His esteemed career spanned over five decades and his mark, as a champion of the rights of those impacted by the unacceptable conduct of others, will forever be remembered.

John's respect for all people and his passion for advocacy went on full display early in his career when he prevailed in establishing integration of cemeteries and barbershops throughout Ohio while Ohio's Assistant Attorney General. Socially he made his mark upon everyone he met, with his wit, style, charm, and unique sense of humor. His devotion to his clients, his family, friends, colleagues, and all that knew John never ended. He will be missed. Memorial contributions in John's memory can be made to the Greater Cleveland Food Bank, 15500 S. Waterloo Road, Cleveland, OH 44110. May his memory be eternal.

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Todd Gurney — ORT

Todd Gurney

Todd Gurney, CATA President and partner at **The Eisen Law Firm**, recently accepted a nomination to join the Executive Board of the Ohio Region of ORT America. ORT America is a non-profit organization whose mission is to increase access to quality education for children and young adults throughout the world. ORT America is the leading fundraising organization for World ORT, whose global education network, schools, colleges and international programs propel more than 300,000 students in more than 30 countries to develop careers and lead fulfilling, independent lives. ORT's schools and programs reach underserved students by bridging the gap between aptitude and opportunity, as ORT works to expand knowledge and build autonomy.

At the heart of a sustainable future is the ability to empower the next generation with increased access to quality education. ORT breaks through social and economic barriers to transform lives.

Scott Kuboff — 50K Trail Race

"Why? What are you running from," asked **Chris Patno** to fellow board-member, Scott Kuboff. At the time, Scott was running his first 50K trail race - that's 31.1 miles over undulating and rugged terrain. For his second 50K, Scott found a reason to run: a 9-month old girl, Laila.

In early March 2020, Laila, the daughter of family friends, Chris and Marissa, was diagnosed with Wilms Tumor - an aggressive type of kidney cancer that affects children. At the time, the tumor was so large that surgery was initially deemed too risky. Six weeks later, Laila was in surgery because the tumor did not respond to chemo and they could not risk it rupturing. Surgery was a success and Laila followed with 28 weeks of chemo and radiation therapy.

Scott Kuboff, right, running the "Layla's Ultra Adventure"

To support Laila, Scott set a goal to raise $3,100.00 for Lurie Children's Hospital in Chicago, Illinois (where she was being treated) while he was training for the Doan Creek 50K. Unfortunately, in July, Scott received an email that the race was canceled due to COVID. Since he had already been training and raised over $1,000.00 by the time the race was canceled, Scott charted a course of his own

Scott with Laila and Laila's mom and brother

through the Cuyahoga Valley National Park and picked September 19, 2020 as the day he would run "Laila's Ultra Adventure."

By the time Scott reached mile 32 at Station Road Bridge in Brecksville, he had raised $3,440.00 to benefit Lurie Children's Hospital. Although exceeding his fundraising goal was an achievement, the best news came a few months later when he found out that Laila is cancer free!

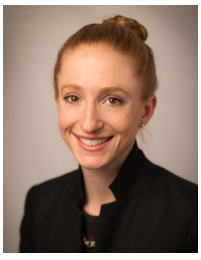
Nurenberg, Paris, Heller & McCarthy — A Special Wish

Nurenberg, Paris, Heller & McCarthy is thrilled to partner with A Special Wish Foundation Cleveland Chapter, a non-profit organization dedicated to granting the wishes of children across Northeastern Ohio who have been diagnosed with critical illnesses.

Every month through the NP4Kids program, the firm will be supporting the granting of a wish through A Special Wish Foundation Cleveland Chapter's "When I Grow Up" program. These wishes are able to be granted, in part, due to an $8,000.00 donation made by Nurenberg, Paris.

The firm hopes to inspire the children supported by A Special Wish Foundation to see a bright future. Through funding the NP4Kids "When I Grow Up" program it's possible to encourage these children to envision their dream job when they grow up. This can be anything the child can imagine, from a firefighter, to astronaut or a chef.

A Special Wish Foundation coordinates the wishes with professionals in our community in careers across the spectrum to help the Wishers experience their dream job. Helping dreams come true is an inspiration, and Nurenberg, Paris is proud to partner with A Special Wish on this exciting adventure. ■



Dana M. Paris is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.694.5201 or danaparis@nphm.com.

Announcements - Spring 2021

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 **Benjamin P. Wiborg, Esq.** has been promoted to partner at the law firm. Benjamin's practice focuses on workers' compensation claims

Nurenberg, Paris, Heller & McCarthy Co., L.P.A. is pleased to announce that **Regan Sieperda, Esq.** has joined the firm as an associate attorney. Regan's practice focuses on auto accidents, truck accidents, motorcycle accidents, premises liability and other personal injury cases.

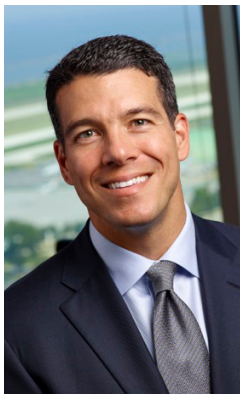
Lowe Scott Fisher is pleased to announce the opening of a brand-new office in downtown Chardon, OH, conveniently located at 115 Main Street on Chardon's historic Downtown Square. The new space will serve as a full-service injury law firm with practice areas including personal injury, medical and legal malpractice, product liability, social security disability and workers' compensation.

Now in its 42nd year of operations, **Jeffries, Kube, Forrest & Monteleone Co., L.P.A.** has moved to a new address in Beachwood at 23611 Chagrin Blvd., Suite 300, Beachwood, OH 44122-5540. Partners **David A. Forrest** and **M. Jane Rua** have taken "Of Counsel" status and Partner **Jarrett J. Northup** is now the Principal attorney for the firm.

Honors, Awards, and Appointments

Lowe Scott Fisher Co., LPA is delighted to announce that founding partner, **James A. Lowe**, will be inducted as a 2021 Cleveland-Marshall College of Law Hall of Fame member in November. He was originally included among the 2020 inductees, but due to concerns regarding COVID-19, the induction ceremony was delayed to 2021.

Meghan C. Lewallen, a partner in the Mellino Law Firm, was recently nominated to join the Cleveland-Marshall Law Alumni Association Board as a Trustee. Meghan was a member of the Class of 2013. She will be sworn in at the CMLAA annual meeting scheduled for June 3, 2021.



Spangenberg, Shibley & Liber, LLP is happy to announce that **Nick DiCello** has been appointed to the Board of Directors for the CMBA. Spangenberg has a long and proud history of Bar leadership going back decades, including several Bar presidents.

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

Bullying In Schools – *A.J.R.* Is A Shield For Educators But Not A Castle

by Scott M. Kuboff

On November 10, 2020, in *A.J.R. v. Lute*, Slip Opinion No. 2020-Ohio-5168, the Supreme Court of Ohio held teachers and school administrators are immune from liability for injuries that result from bullying where there is either no history of violence or aggressiveness between the students involved or when the educators take care to address the bullying of which they are aware.

I. Factual Background

A.J.R. was a kindergartner at DeVeaux Elementary, which is a part of the Toledo Public School System, during the 2015-2016 school year.[1] She was considered "gifted" and was one of the first early entrants to kindergarten.[2]

According to the *Amended Complaint*, A.J.R. was teased daily by other students for being four years old.[3] Her parents notified A.J.R.'s teacher, Amanda Lute,[4] the assistant principal, Cynthia Skaff,[5] and the principal, Ralph Schade.[6] The parents were reassured that A.J.R. was not subjected to bullying and that the DeVeaux staff would closely monitor the student who the parents considered the bully.[7]

On March 3, 2016, the bully approached A.J.R., told her she did not like the way she looked, and stabbed A.J.R. in the face with a pencil after multiple attempts.[8]

On March 3, 2017, A.J.R.'s parents filed an *Amended Complaint* against Ms. Lute, Assistant Principal Skaff, and Principal Schade alleging recklessness in their care, protection and support of A.J.R. as well as in their supervision of the other students.[9]

Following discovery, it was revealed that, when Principal Schade learned of the teasing, he spoke with the students and the teasing stopped.[10] He also made an effort to visit with A.J.R. during lunch where he observed her eating with the kids who previously teased her.[11] According to Principal Schade, A.J.R. informed him she was doing well and he never observed any students teasing her at lunch.[12]

Ms. Lute was informed of the teasing when she returned from leave in November 2016 but did not think that was unusual for kindergartners.[13] She nonetheless monitored the kids to ensure the teasing did not continue and, prior to the pencil incident, was not made aware of any other instances of bullying.[14]

A.J.R.'s father spoke with Assistant Principal Skaff in October 2016 about the child who was teasing her and the effect it was having on his daughter.[15] Following this conversation, she spoke with A.J.R. and the other student.[16] A.J.R reported that no one was being mean to her and that she was friends with the other student.[17] Assistant Principal Skaff continued to check in with A.J.R. throughout the year and found her to be doing well.[18]

There was never any report of physical violence towards A.J.R. prior to the March 6, 2016 incident.[19]

II. Motion for Summary Judgment

On May 16, 2017, the Defendants filed their *Motion for Summary Judgment* asserting they were immune from individual liability pursuant to R.C. 2744.03(A)(6) because A.J.R.'s parents had failed to produce any evidence the teacher and administrators acted with malicious purpose, in bad faith, or in a wanton or reckless manner with respect to A.J.R.[20] Revised Code 2744.03(A)(6) states, in relevant part, as follows:

> (A) In a civil action brought against . . . an employee of a political subdivision to recover damages for injury . . . or loss to person . . . allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:
>
> * * *
>
> (6) . . . the employee is immune from liability unless one of the following applies:
>
> * * *
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner . . . .

As a general matter, whether an employee is entitled to R.C. 2744.03(A)(6) immunity is ordinarily a question of law.[21] However, whether the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner generally are questions of fact.[22] Summary judgment in favor of a political subdivision's employee is appropriate only when the facts are clear and fail to rise to the level of conduct that could be construed as malicious, in bad faith or wanton and reckless.[23]

The sole claim in the *Amended Complaint* was based upon "recklessness," which the Supreme Court of Ohio has defined as a perverse disregard of a known risk.[24] Recklessness, therefore, necessarily requires something more than mere negligence and "the actor must be conscious that his conduct will in all probability result in injury.[25]" *Id.*

In granting the Defendants' motion, the trial court found there was ample evidence demonstrating the teacher and administrator responded appropriately to the bullying claims by speaking with A.J.R. and the other student and monitoring them thereafter.[26] Further, the trial court found A.J.R.'s failure to point to any evidence that the other student had a history of physically harming other students was fatal to the recklessness claim as "there is no question of fact as to whether Defendants consciously disregarded or were indifferent to *a known or obvious risk of physical harm* to [A.J.R.].[27]"

IIII. Appeal to the Sixth District

A.J.R.'s parents appealed and the Sixth District Court of Appeals reversed the trial court's judgment in a split decision on August 23, 2019. Although recognizing that the teacher and administrators presented evidence that they were only aware of limited bullying, that they monitored and addressed the situation, and that they had no reason to suspect that bully would physically harm A.J.R., the Sixth District found the parents presented evidence that the bullying of A.J.R. was ongoing and that it involved physical contact such as "pushing in the bathroom line," in addition to teasing and demanding that A.J.R. consume odd combinations of food.[28]

Following the reversal of summary judgment, the teacher and administrators appealed to the Supreme Court of Ohio and presented the following proposition of law:

> There can be no finding of reckless conduct or perverse disregard of a known risk where the record establishes that in response to reports of student teasing, educators promptly speak with the students about the teasing, frequently ask the students how they are doing, and regularly monitor the students in the lunchroom and classroom. Under these circumstances, if a student with no history of violence later pokes another student with a pencil, R.C. 2744.03(A)(6) shields these educators from liability.[29]

IV. Appeal to the Supreme Court of Ohio

In it's review of the case, the Supreme Court of Ohio noted that the family's argument regarding recklessness was focused on the failure to take any care to protect A.J.R. from the other student.[30] In the motion for summary judgment, Ms. Lute, Assistant Principal Skaff, and Principal Schade argued that the family failed to demonstrate they knew the other student would physically harm A.J.R.[31]

In reversing the Sixth District, the Court reasoned that there was only evidence of verbal bullying and one incident of pushing A.J.R. while in line.[32] There was no evidence of the extent of the pushing.[33] Outside of the one instance, the Court found the family failed to offer any evidence indicating the other student had a history of physical bullying or aggressiveness.[34]

The Court determined the general assertion of being pushed in line was "insufficient to establish that there was a known risk that [the other student] might cause harm to A.J.R.[35]" The Court was also satisfied that, prior to the pencil incident, there was no evidence the other student caused A.J.R. physical harm.[36]

Accordingly, the Court held "[b]ased on the record before us, the allegation that [the other student] pushed A.J.R. while they were in line, on its own, is insufficient to show that [the teacher and administrators] should have been aware that [the other student] might cause physical harm to A.J.R.[37]" As such, the Court concluded the family failed to establish that there was a "known risk" that the other student would attack A.J.R. and, without it, the teacher and administrator could not have been reckless.[38]

The Court went on to say that even if being pushed in line was sufficient to create a known risk, A.J.R.'s parents failed to demonstrate the teacher and administrators disregarded it.[39] Instead, the Court found "the opposite of a conscious disregard or indifference" was present.[40] The Court noted the teacher and administrators took time to address A.J.R.'s class to curtail any bullying that might occur.[41] Moreover, each took care to observe and communicate with A.J.R. to ensure she was doing well and not experiencing further bullying.[42] The Court reasoned "[t]he fact that [the teacher and administrators] paid special attention to A.J.R. and the situation shows that they neither consciously disregarded any risk nor were indifferent to any risk.[43]"

Ultimately, the Supreme Court of Ohio reversed the Sixth District's ruling and reinstated the trial court's decision granting summary judgment in favor of the teacher and administrator on the basis that they are immune from liability under R.C. 2744.03(A)(6).[44]

V. Conclusion

While teachers and administrators will point to *A.J.R.* as a re-affirmation of immunity in bullying claims, it is not blanket-immunity. *A.J.R.* was decided upon the facts and record before the Court. The question remains how Ohio courts will interpret *A.J.R.* in cases involving middle school or high school students, cases where there is a clearer record of physical violence or aggressiveness, or cases where the teacher and administrators do not take such care to address the reports of bullying. ■

End Notes

1. *Amended Complaint*, March 3, 2017, at ¶ 2 and 8.
2. *Id.* at ¶ 9-10.
3. *Id.* at ¶ 10.
4. *Id.* at ¶ 4.
5. *Id.* at ¶ 5.
6. *Id.* at ¶ 6.
7. *Id.* at ¶ 15-16.
8. *Id.* at ¶ 19-20.
9. *Id.* at ¶ 26-32.
10. *Motion for Summary Judgment* at pg. 2.
11. *Id.*
12. *Id.*
13. *Id.* at pg. 3.
14. *Id.*
15. *Id.*
16. *Id.* at pg. 4.
17. *Id.*
18. *Id.*
19. *See id.* at pg. 3.
20. *Id.* at 8 (there were no allegations that the defendants' conduct were manifestly outside the scope of their employment nor that civil liability was expressly imposed by a section of the Revised Code.)
21. *See, e.g., Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133, 595 N.E.2d 862.
22. *Id.*
23. *Long v. Hanging Rock*, 4th Dist. Lawrence No. 09CA30, 2011-Ohio-5137, ¶ 17.
24. *O'Toole v. Denihan,* 118 Ohio St. 3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 73.
25. *Id.* at ¶ 74.
26. *Opinion and Order*, December 11, 2017, at pg. 5.
27. *Id.* (Emphasis original.)
28. *A.J.R. v. Toledo City School Dist. Bd. Of Edn.,* 6th Dist. Lucas No. L-18-1004, 2019-Ohio-3402, ¶ 40.
29. *A.J.R. v. Lute*, __ Ohio St.3d __, 2020-Ohio-5168, ¶ 11.
30. *Id.* at ¶ 18.
31. *Id.*
32. *Id.* at ¶ 19.
33. *Id.*
34. *Id.*
35. *Id.* at ¶ 20.
36. *Id.*
37. *Id.* at ¶ 21.
38. *Id.*
39. *Id.* at ¶ 22.
40. *Id.* at ¶ 24.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at ¶ 20.

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"A Lawyer On The Other End Of Every Bullet": An Analysis Of Gun Liability In Ohio

by Colin R. Ray

At a recent Ohio concealed carry handgun class, the instructor opened by saying, "there's a lawyer on the other end of every bullet that goes out the barrel of your gun." With millions of new firearms owners appearing in 2020 and 2021, there is likely to be an increase in incidents caused by people discharging firearms, lawfully or otherwise.[1] While gun industry representatives often tout "good guy with a gun" stories, there is no question that firearms remain dangerous instrumentalities likely to cause needless loss when not used safely. This article discusses some of the considerations involved in firearms litigation and suggests areas of further recommended study based on the individual facts of different scenarios.[2]

A. Negligent Discharge And Firearms Rules

First, firearms users can unintentionally cause injury, and negligent discharges are a major cause of injuries. The term "negligent discharge," while not defined in Ohio law, is any unintended discharge of a firearm caused by a user.[3] It differs slightly from an "accidental discharge," which generally refers to a discharge caused by a mechanical failure of a firearm resulting in a discharge. What they both have in common is that it is nearly impossible for a negligent or accidental discharge to cause harm if the rules of firearm safety are observed. Accordingly, cases involving negligent discharge will often be straightforward once the rules of firearm safety are established.

Many hunter and firearm safety courses begin, for obvious reasons, with firearm safety rules. While verbiage may vary, many courses will begin with these three rules of firearm safety:

1. Always keep the gun pointed in a safe direction;
2. Always keep your finger off the trigger until ready to shoot;
3. Always keep the gun unloaded until ready to use.[4]

Other sources add the additional rules of "treat every firearm with the respect due a loaded gun," and "never point a gun at anything you do not want to shoot."[5] But, in general, the first three rules will apply to nearly any situation in which a person is accidentally struck by a gunshot.

B. Storage And Control Issues For Firearms

Firearm storage is an often overlooked but critically important piece of the gun safety puzzle. Many firearm owners may fail to safely secure their firearms, leaving them in a place where they may be misused by minors or bad actors. In Ohio, all federally licensed firearms dealers, (typically your local gun shop), must offer a "trigger lock, gun lock, or gun locking device" for sale to firearm purchasers.[6] These locks, when used as intended, typically disable a firearm, and

many newer firearms are sold with such devices in the box.

Once a gun is inside a home, it is prudent to secure the firearm, either with a trigger lock or in a gun safe, or both, to prevent minors or bad actors from accessing a gun. In Ohio, failing to secure a firearm in a safe or with a lock, in a position where minors would likely have access to it, when in contravention of typical safe practices, likely leads to a genuine issue of material fact regarding that firearm owner's negligence.[7] Nevertheless, this is not a bright-line rule and requires vigorous development of the factual record to support such a claim.[8] Additionally, failures in firearm safety and storage may occur with professionals, and also may lead to liability.[9]

C. Firearm And Ammunition Selection

While a detailed examination of ballistics and firearms is beyond the scope of this article, it will often be important for an attorney investigating a claim to become acquainted with particular features of firearms and ammunition to the extent they are relevant to a fact pattern. For instance, many firearms are still capable of discharge even if they appear to be unloaded, as one live round can remain in the chamber and be fired even when there is no magazine inserted.[10] Additionally, choice of firearm and selection of ammunition both can be important from a legal perspective, with regard to characteristics of bullet on impact.[11] Numerous secondary sources exist for those wishing to learn more, including the reference book *Shooter's Bible*.[12] For ease of access, hundreds of YouTube videos also exist with reviews and overviews of many of the more popular models of firearms and calibers. Furthermore, since the beginning of the COVID-19 pandemic, many firearms courses, including concealed-carry classes, can now be taken online. Given the ease of access to information, practitioners evaluating or taking new firearms cases should consider the benefits of becoming well-acquainted with the specifics of their case.

D. Intentional Discharge And Self-Defense

Firearms injuries are not limited solely to those caused by carelessness. Under most states' common law, people are privileged to use deadly force where they are able to prove affirmatively that they reasonably believed they were "in danger of death or serious bodily harm and could prevent that harm only by the immediate use of deadly force."[13] After decades of this being the legal standard in Ohio, it is no longer the law. In a public and controversial change, Ohio self-defense law changed dramatically in early 2021 when Ohio became a "stand your ground" state. The bill, codified at SB 175 and signed by Governor DeWine, resulted in several important changes to Ohio law, including:

- Revision to R.C. 2307.601, clarifying that a person lawfully in one's residence has no duty to retreat before using force in self-defense, defense of another, defense of another's residence, and no duty to retreat while an occupant in one's own vehicle or a vehicle owned by an immediate family member and forbidding the jury from considering possibility of retreat;[14]
- Revision to R.C. 2901.05, shifting the burden of proof to the prosecution to prove that an accused did not act in self-defense;[15]
- Revision to R.C. 2901.09, clarifying that there is no duty to retreat from residence or vehicle before using self-defense;
- Revision to R.C. 2923.126, adding immunity to nonprofit corporations (in addition to extant immunity to private employers, institutions of higher learning, and political subdivisions in certain instances) for loss caused by a person bringing a lawful concealed weapon onto premises unless exercised with malicious purpose.[16]

Due to the recent modifications, these statutes have not yet been tested in the criminal or civil case law. At present, the Ohio civil jury instructions for self-defense direct attorneys to the criminal instructions, which are already somewhat unsettled and which will likely continue to be unsettled.[17] The likely outcome of these changes is the legal defense of self-defense in civil cases will become easier to apply.

E. Additional Immunities And Considerations In Firearm Cases

In addition to the immunities already discussed, other immunities granted by statute can complicate cases. Under Ohio law, owners, lessees, and occupants of premises may be found to owe no duty to "recreational users" and may also avoid liability caused by acts of the recreational user.[18] However, these immunities are not ironclad, and injuries caused by others may not result in a dismissal.[19]

Lawsuits against manufacturers or sellers of firearms can be difficult for a variety of reasons. Under the federal Protection of Lawful Commerce in Arms Act, firearms manufacturers generally have immunity for loss caused by crimes committed with firearms.[20] The statute does not bar product liability claims, or negligent entrustment claims where a seller may know a gun is intended to be used in a crime. However, as of the printing of this article, the constitutionality of the PLCAA is under litigation in Pennsylvania and may eventually arrive in the Supreme Court.[21]

Nevertheless, many cases must carefully be examined for their elements even where there is no immunity issue. For instance, in *Mossberg*, the court assessed an issue of a lack of a "loaded chamber indicator," which can tell a user if a gun is loaded. The court concluded that even if the manufacturer failed to include such a feature, and such was a defect, the defect was not a proximate cause of the underlying negligent discharge. Mossberg was therefore entitled to judgment as a matter of law on the plaintiff's design defect claim.[22]

Finally, as this article was going to press, President Joseph Biden announced a series of federal executive actions designed to curb what he described as a "gun violence epidemic." According to news releases, the actions would direct the Department of Justice to issue rules regarding "ghost guns," to clarify rules on when stabilizing arm braces effectively turn pistols into short-barreled rifles as those terms are defined in the National Firearms Act, to publish model red-flag legislation which would allow courts to temporarily bar someone from accessing a gun, and to issue a comprehensive report on gun trafficking.[23] Since these changes have not yet occurred, and will likely face legal challenges, the outcome of this initiative is unclear. Nevertheless, these changes will likely result in some impact on both civil and criminal cases.

Conclusion

The ever-evolving legal landscape for firearms law will certainly have major impacts for legal practitioners in the area of firearms law. With a new presidential administration and recent well-publicized mass shootings,[24] as well as enormous growth in firearms sales, it seems likely that further firearms injuries, new regulations, and litigation will be with us for the foreseeable future. Attorneys looking into these issues should use available resources to stay abreast of the changes in this area of the law. ■

End Notes

1. Chauncey Alcorn, "Gun sales in January set a new record after Capitol Hill insurrection," CNN Business, Feb. 3, 2021, *available at* https://www.cnn.com/2021/02/03/business/gun-sales-january/index.html (noting a record 4.3 million instant background checks in January 2021, on top of a record 39.7 million background checks in 2020) (last accessed April 8, 2021).
2. All technical information such as ballistics is intended to be presented in general form and should be rigorously verified depending on the facts of each particular case.
3. *See* Paul Harrell, "The Most Common Types of Negligent Discharge," published on YouTube, Jan. 24, 2020 (last accessed April 8, 2021).
4. *See* "NRA Gun Safety Rules" available at https://gunsafetyrules.nra.org (last accessed April 8, 2021).
5. *Gay v. O.F. Mossberg & Sons., Inc.*, 11th Dist. Portage No. 2008-P-0006, 2009-Ohio-2954, ¶ 3.
6. R.C. 2923.25.
7. *Gay v. O.F. Mossberg & Sons., Inc.*, 11th Dist. Portage No. 2008-P-0006, 2009-Ohio-2954, ¶¶ 48-49.
8. In *Nearor v. Davis*, 118 Ohio App.3d 806, 694 N.E.2d 120 (1st Dist. 1997), the court held that a minor using an unsecured gun, that a parent told minor was unsecured, to murder a neighbor, was unforeseeable.
9. *Brown v. C&E Gunshows*, Franklin C.P. No. 09CVC04-5454, 2010 Ohio Misc. LEXIS 4584 (Oct. 6, 2010)(denying summary judgment motion of gun show promoters and exhibitors on tort and contract grounds with regard to violation of rule requiring firearms to be unloaded when negligent discharge occurred).
10. One of the most famous instances of this is likely the death of Travis Maldonado, made famous by the Netflix series "Tiger King," in which Mr. Maldonado died of an accidental self-inflicted gunshot wound apparently premised on a belief that the brand of firearm he had would not fire. Christine Pelisek, "Tiger King's Joshua Dial Says He has PTSD from Witnessing Travis Maldonado's Accidental Gunshot Death," *People*, April 9, 2020 *available at* https://people.com/crime/joshua-dial-ptsd-tiger-king-travis-maldonado-gunshot-death/ (last accessed March 30, 2020).
11. *See generally, Ghane v. Mid-South Ins. of Self Def. Shooting, Inc.*, 137 So.3d 212 (Miss. 2012) (discussing overpenetration of rounds fired during training and finding no immunity for private contractor who built, but failed to properly test safety of, training area in case where person was struck with round that over penetrated wall).
12. *See, e.g.*, Jay Cassell, Ed., *Shooter's Bible*, 111th Ed., 2019.
13. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 124, 679 N.E.2d 1099, 1105 (1997).
14. R.C. 2307.601(B) (effective April 6, 2021).
15. R.C. 2901.05 (effective April 6, 2021).
16. R.C. 2923.126 (effective April 6, 2021).
17. *See* OJI CV 421.21 (Rev. Aug. 5, 2020) (containing paragraphs of commentary on 2019 revisions to R.C. 2901.05).
18. R.C. 1533.181.
19. *See generally, Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372 (finding no recreational or governmental immunity where spectator was killed at fireworks show by shrapnel).
20. 15 U.S.C. §§7901-7903.
21. *Gustafson v. Springfield, Inc.*, Pa. Super. No. 207 WDA 2019, 2020 Pa. Super. LEXIS 956 (Dec. 3, 2020) (granting petition for reargument).
22. *Gay v. O.F. Mossberg & Sons., Inc.*, 11th Dist. Portage No. 2008-P-0006, 2009-Ohio-2954, ¶ 141.
23. Kevin Breuninger, "Biden says gun violence in U.S. is an epidemic, unveils executive actions and calls for national red flag law," CNBC, *available at* https://www.cnbc.com/2021/04/08/biden-says-gun-violence-is-an-epidemic-calls-for-national-red-flaglaw.html, (last accessed April 8, 2021).
24. Carolina A. Miranda, "Recent mass shootings in the U.S.: A timeline," *L.A. Times*, Mar. 24, 2021, *available at* https://www.latimes.com/world-nation/story/2021-03-24/la-na-us-mass-shootings-timeline (last accessed Mar. 30, 2021).

William Eadie and Michael Hill are nursing home abuse lawyers fighting to end nursing home abuse throughout Ohio. Reach us at 216.777.8856, or www.eadiehill.com.

Practically Legal: Advanced Zoom Techniques

by William B. Eadie and Michael A. Hill

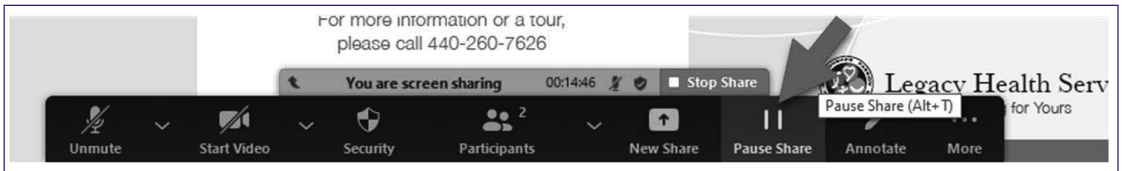
By now you're a Zoom expert. Hopefully you've been taking a lot of Zoom depositions, or have been resolving cases at Zoom mediations. We're laying out some of the advanced Zoom hacks and tips to take you to the next level.

If you have a Zoom pro tip to add, comment on our Facebook page at facebook.com/ClevelandTrialAttorneys!

1. Pausing Screen Shares

One of the best part of Zoom depositions is screen sharing, a real-time picture-in-picture experience without the need for multiple video cameras. It makes for a more engaging examination for the audience when used well.

Switching between exhibits or finding things on the fly can be difficult to handle in this "live" setting. Zoom gives you the option to pause a screen share, just like trial presentation software and apps. So you can scroll ahead, or even get the next exhibit ready.



"Pause Share" allows you to keep the screen share for everyone else—including the recording—while you can move the exhibit or queue up the next one in the background.

While the screen share is paused, everyone else sees whatever the share was showing when you paused it. Whenever you hit "Resume Share," it will show what you're showing on your screen again. So if you're sneaking a peek in the same document, you want to note where you are so you can go back there before resuming the share. If you're queueing up the next exhibit, jut have it showing when you resume.

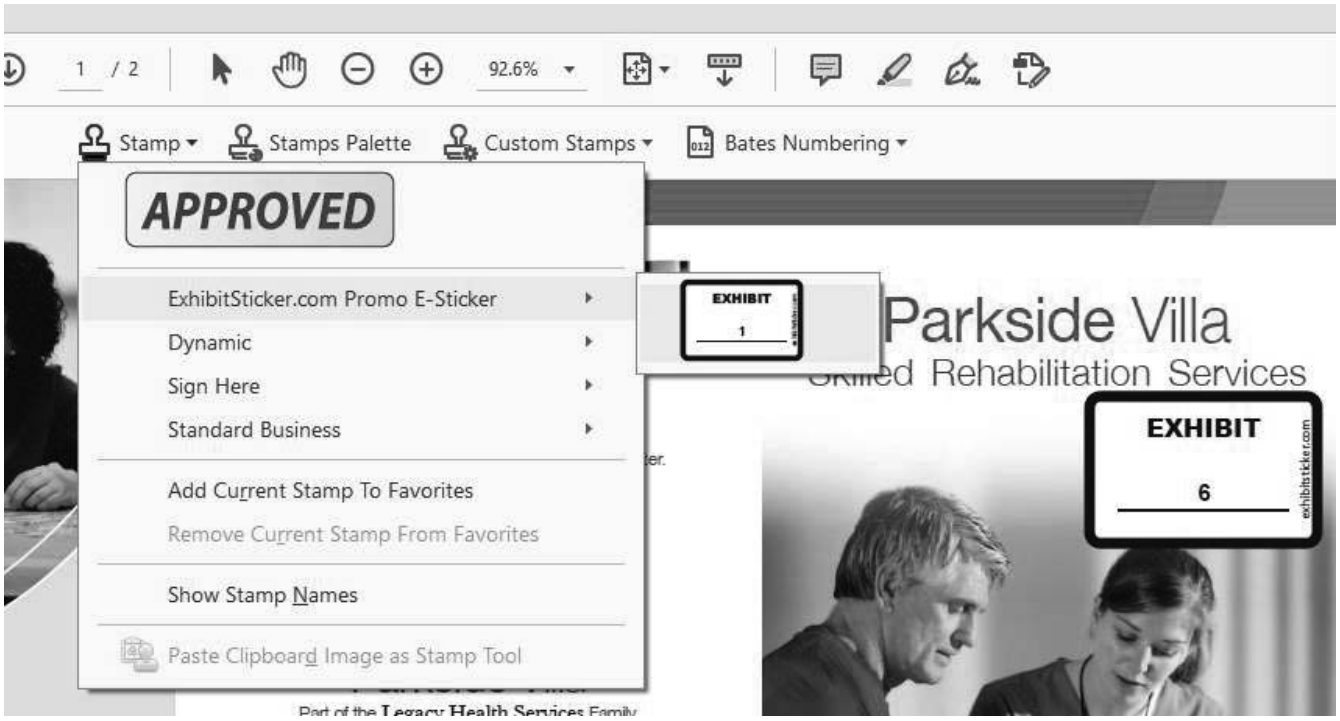
While we're talking about sharing the screen, if you're having someone record the deposition, be sure the witness is "pinned" on their screen, so the witness is always the "big screen" view, and everyone else is hidden. When you screen share, the witness and other parties will be the small picture-in-picture screens, and the exhibit will be large and easy for the jury to see.

2. Marking Exhibits Live

Some reporters will stamp exhibits for you to use in advance using a digital stamp. That's great if you have everything planned to that level. But if you want to be able to improvise, or are working with a reporter who doesn't offer this, it is really helpful to be able to stamp exhibits yourself.

I'm sure there are several ways to do this. We use a free stamp template for Adobe Acrobat you can download from https://exhibitsticker.com/. There are different options you can buy, but the free version works just great!

Once installed, you simply turn on the stamp tool in Adobe Acrobat, select it under custom, and it lets you pick the number or letter for the exhibit after you position the stamp.



Mark exhibits on the fly in Adobe Acrobat using a plugin. You can move the exhibit sticker around up until you print it "flat."

3. Timestamps

If you don't know already, Zoom has an option to imprint a timestamp on your recordings. A great feature if you're recording Zoom depositions, which you should be.

4. Always Be Hosting

If you are taking a deposition, be the host. Always.

The best way is to pony up the few bucks to be a "pro" level Zoom account and make the meetings yourself. Upgrade to the SIP room package and you'll be able to schedule meetings that folks can join from hardwired videoconference systems like Polycom.

But if you prefer to have the reporter set things up, or someone outside your organization anyway, make sure they know that you need to be the host. They can accomplish this by making sure someone—like the reporter—is the host, something they should be doing already. Otherwise, nobody in the room can address issues like being locked out of screen sharing or muting or kicking out a crasher.

Just ask the host to make you co-host, and you'll have all the power, including being able to record, do breakout rooms, share screens, and anything else authorized on the meeting.

If you are the host, and you have someone else recording, you'll need to make them co-hosts.

5. Control The Camera

If you have folks joining from a system that has movable cameras—called "pan tilt zoom" or PTZ, as used in Polycom and other videoconference systems—Zoom gives you a button to "request camera control."

This is a great feature. Use it!

You can frame the view the way you want, without having to get the "tech person" (if there even is one) on the other side to adjust it for you. And you can zoom out to see what defense counsel is doing if they're in the room. ■

What other tips do you have? Let me know! william.eadie@eadiehill.com, or on CATA's facebook page, https://www.facebook.com/ClevelandTrialAttorneys/

Recent Ohio Appellate Decisions

by Kyle B. Melling and Brian W. Parker

Ford Motor Co. v. Eighth Judicial Dist. Court, ___ U.S. ___, ___ S.Ct. ___, 2021 U.S. LEXIS 1610, 2021 WL 1132515 (March 25, 2021).

Disposition: U.S. Supreme Court affirmed rulings by the Montana and Minnesota Supreme Courts denying Ford's motions to dismiss for lack of personal jurisdiction. Specific jurisdiction existed over Ford for the product liability claims arising out of automobile accidents in the respective states. The two plaintiffs' respective claims were closely enough related to Ford's business activities in Montana and Minnesota, notwithstanding that Ford did not sell the accident vehicles to the plaintiffs in those states, and did not design or manufacture the vehicles in those states.

Topics: Civil procedure; Specific Personal Jurisdiction.

Personal jurisdiction tests whether a court's assertion of jurisdiction over a defendant satisfies the Due Process requirements of the Fourteenth Amendment. There are two kinds of personal jurisdiction: general and specific. General jurisdiction over a corporate defendant is present in states in which the defendant has its principal place of business and/or is incorporated. Specific jurisdiction exists where the plaintiff's claims ***either*** arise out of, ***or*** relate to, the defendant's contacts with the forum state.

In this case, the two individual plaintiffs sued Ford in Montana, and Minnesota, respectively, asserting separate product liability actions arising out of two automobile accidents in those states involving Ford Explorer and Crown Victoria vehicles. Ford argued that personal jurisdiction only existed if the company's conduct in the respective state had given rise to the plaintiff's claim, and thus, Ford contended, there must be a causal link between Ford's actions in those states and the plaintiff's injuries. Ford further argued that because the plaintiffs did not purchase their vehicles in those states, and Ford did not design or manufacture the Ford vehicles at issue in those states, the necessary causal relation did not exist, and thus specific personal jurisdiction in Montana and Minnesota did not exist.

The Court rejected Ford's argument, holding that its "causation-only" approach between a plaintiff's suit and a defendant's activities in the forum state was not supported by the Court's precedents. The Court's most common test for specific jurisdiction requires ***either*** that the suit arise out of the defendant's activities in the forum state (i.e., a causal link) ***or*** that the action relate to the defendant's contacts with the forum state. Ford improperly focused only on the first part of this disjunction. The second half of the disjunction "contemplates that some relationships will support jurisdiction without a causal showing." The Court emphasized, however, that the second disjunction "does not mean anything goes," and it incorporates "real limits" to adequately protect defendants foreign to a forum.

On the facts of this case, the Court noted that Ford sold the Crown Victoria and Explorer vehicles at 36 dealerships in Montana, and 84 dealerships in Minnesota. Ford also sought to foster ongoing relationships with the owners of Ford cars in those states, and there regularly serviced and maintained Ford vehicles, which involved the distributions of replacement parts to its own dealers and to independent auto shops. Further, the plaintiffs' respective claims arose from a car accident involving a Ford vehicle in the forum state. The Court summarized:

> In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation" – the "essential foundation" of specific jurisdiction.

Wilson v. Durrani, S.Ct. Slip Op. 2020-Ohio-6827 (Dec. 23, 2020).

Disposition: Decision of 1st District Court of Appeals reversed. The trial court had properly granted the defendant physician's motion for judgment on the pleadings based upon the operation of the medical malpractice statute of repose, R.C. § 2305.113(C). The savings statute, R.C. § 2305.19(A), did not extend the operation of the four-year statute of repose. Thus, because the plaintiffs re-filed their lawsuit more than four years after the defendant committed the malpractice, the plaintiffs' actions were barred.

Topics: Medical malpractice statute of repose, R.C. § 2305.113(C); savings statute, R.C. § 2305.19(A).

The two plaintiffs' medical malpractice claims against the defendant arose in April 2010, and April 2011, respectively. The plaintiffs originally commenced their respective medical

malpractice actions in timely actions in Butler County. The plaintiffs then dismissed their claims, without prejudice, in late 2015. The plaintiffs re-filed their actions in December 2015 in Hamilton County, and claimed that their actions were timely based upon the savings statute, R.C. § 2305.19(A).

The trial court granted the defendant's motion for judgment on the pleadings, ruling that the medical malpractice statute of repose barred the plaintiffs' re-filed claims because the claims arose out of surgeries that had been performed more than four years before the plaintiffs re-filed their actions. On appeal, the First District reversed the trial court, holding that plaintiffs had timely re-filed their claims pursuant to the savings statute, and that the statute of repose did not bar their re-filed claims.

On further appeal, the Ohio Supreme Court reversed the First District, and held that the savings statute did not apply to toll the statute of repose. The Court reasoned that the statute of repose did not expressly mention the savings statute, whereas the statute of repose did expressly mention exceptions to its application for minority or an unsound mind, for foreign objects, and for delayed discovery of injury. In contrast, the Court noted that the statute of repose in product liability cases, R.C. § 2305.10(C), expressly mentioned the savings statute. Moreover, the Court held that, as a matter of policy, statutes of repose provide an absolute temporal limit on a defendant's potential liability, thereby protecting him or her from an interminable threat of liability. Any incursion on this protection is, in the Court's mind, a job for the legislature to remedy, if it so desires.

In a dissent, Justice Stewart noted that the medical malpractice statute of limitations in R.C. § 2305.113(A) also does not expressly mention the savings statute. Yet, the Court has recognized that the statute of limitations does not bar a re-filed action after the one-year period has lapsed so long as the requirements of the savings statute are met. Justice Stewart also noted that application of the savings statute assumes that one has previously timely commenced an action within the period provided for by the statute of repose. Therefore, the savings statute would not abrogate operation of the statute of repose if it were applied to save the plaintiffs' actions.

<u>Ellis v. Fortner</u>, 9th Dist. Summit No. 28992, 2021-Ohio-1049 (March 31, 2021).

Disposition: Affirming trial court's ruling on various evidentiary issues in favor of plaintiffs after the jury entered verdict for plaintiff in a medical malpractice action. The defendants raised nine issues on appeal, and the Ninth District overruled every one of them.

Topics: Various evidentiary issues: *Daubert* rulings on causation evidence; direct and cross-examination of expert; exclusion and limitation of other expert testimony; cumulative effect of alleged errors.

This was a medical malpractice action alleging that medical negligence occurred during the labor and delivery of the plaintiffs' son. The plaintiffs alleged that the defendant physician had failed to correctly evaluate the size and position of the fetus, and had failed to appreciate and advise the parents of the need for a caesarian section. As a result of this negligence, plaintiffs claimed that their son sustained permanent structural brain damage, and had developmental and cognitive impairments.

A jury verdict was reached in favor of the plaintiffs. On appeal, the defendants alleged that there were several evidentiary rulings which required a reversal. The defendants first argued that the trial court had erred in denying its *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) motion on the reliability of proximate cause evidence concerning cranial compression ischemic encephalopathy ("CCIE").

Defendants argued that the CCIE theory failed all four reliability factors set forth in *Daubert*. In this regard, the defendants argued that CCIE had not been accepted by the medical community, and specifically, by the American College of Obstetricians and Gynecologists ("ACOG"). The Ninth District rejected this argument, noting that ACOG was not completely unbiased as it was concerned about the effect CCIE would have on the cost of medical services. The court further noted that the test of reliability is flexible, and should not be used to exclude all evidence of questionable reliability. This was particularly true given the defendant's ability to cross-examine the plaintiff's experts, and present its own evidence on the issue.

Further, although a defense expert was permitted to testify concerning his personal reasons for believing that CCIE was not a viable theory, that expert was properly prohibited from testifying as to why ACOG did not allow the theory to be published as a recognized mechanism of fetal brain injury. In addition, under *Daubert*, the court also upheld the admission of evidence linking autism spectrum disorder with hypoxic ischemic encephalopahy ("HIE").

The court also affirmed the trial court's rejection of the defendant's objections to the direct and cross-examination testimony of plaintiff's expert, Dr. Barry Schifrin. The court found, *inter alia*, that defendants had not properly objected to the evidence, and that otherwise, the trial court's handling

of the issue was not an abuse of discretion. Further, the court upheld the trial court's exclusion of two defense experts on the basis that their testimony on their respective topics would be cumulative of other testimony.

Interestingly, the court upheld the trial court's allowance of cross-examination of the defendant gynecologist concerning a side skin-care business she had started. The plaintiffs' rationale for that testimony was that "people can conclude that folks who are unhappy with their work aren't as careful, and I think it is relevant."

Finally, the court rejected the defendant's contention that, even if there were no individual error warranting a reversal on appeal, the cumulative effect of errors warranted reversal. The Ninth District noted that the cumulative error doctrine is not typically employed in civil cases, and even if it were, the court stated that it had found no error in the trial court's rulings.

Brandt v. Pompa, 8th Dist. Cuyahoga No. 109517, 2021-Ohio-845 (March 18, 2021).

Disposition: Affirmed trial court's reduction of jury verdict.

Topics: Tort Caps for sexual abuse victims.

Plaintiff filed suit claiming that Defendant molested and sexually assaulted numerous female children, including Plaintiff when she was ages 11 and 12. Included in Plaintiff's case was evidence that Defendant would drug Plaintiff before she went to sleep in order to commit sexual acts against her without her knowledge or being fully aware. Plaintiff was 26 years old at the time of the trial, and testified that prior to the abuse she had a normal childhood. Plaintiff presented, through her own testimony and testimony of an expert psychologist, evidence that the abuse had caused her serious emotional problems, that she had lost friends, had difficulty sleeping, that her grades dropped, that she became very angry and suffered "a lot of breakdowns" that required counseling. She testified that she was still in counseling as a result. The evidence also indicated that she suffered from constant nightmares, PTSD and anxiety, became addicted to heroin and at one point attempted suicide. The jury was also presented with expert testimony from a clinical psychologist who evaluated Plaintiff, and opined that Plaintiff suffered from PTSD, and that her condition would continue with some degree of intensity for a significant period of time into the future. Plaintiff then testified that she had recovered from her addiction, was now sober, married, had two young children, and was working towards obtaining her real estate license at the time of trial.

The jury returned a verdict for compensatory damages of $14 million for noneconomic damages incurred prior to April 6, 2005 (the effective date of R.C. 2325.18), and $20 million for noneconomic damages occurring after April 6, 2005, and $100 million in punitive damages. The trial court granted defendant's post-trial request to cap the amount of noneconomic damages occurring after April 6, 2005 to $250,000.

On appeal, Plaintiff argued that R.C. 2325.18 is unconstitutional as it violated her constitutional rights to a jury trial, open courts and a remedy, equal protection and due process of law. The Eighth District relied on *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307 (2016), and found that Plaintiff did not demonstrate by clear and convincing evidence that R.C. 2315.18 violated her constitutional rights. The Court found that Plaintiff's constitutional challenges to R.C. 2315.18 were substantially the same as the constitutional challenges presented to the Ohio Supreme Court in *Simpkins*, and thus, rejected Plaintiff's arguments.

Plaintiff also argued that the evidence of her substantial psychological damages should trigger the exception to the damages cap for "[p]ermanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system," or for "[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining injuries." The Court reasoned that while the Plaintiff presented evidence that she suffered from PTSD, depression, anxiety, recurrent nightmares, became addicted to heroin and tried to commit suicide, the evidence also indicated that she was now married with two young children, held a job as a part-time waitress, and completed the necessary classes to obtain her real estate license and hoped to establish a career selling real estate. "Thus it appears that she is able to independently care for herself and perform life-sustaining activities, . . ." Thus, the Eighth District rejected the Plaintiff's argument that her injuries fell into the exceptions found at R.C. 2315.18(B)(3) and upheld the Trial Court's cap on Plaintiff's non-economic damages.

Sidwell v. Allstate Fire & Cas. Ins. Co., 8th Dist. Cuyahoga No. 109751, 2021-Ohio-853 (March 18, 2021).

Disposition: The Eighth District reversed a granting of the defendant's motion for summary judgment. The trial court improperly dismissed plaintiff's complaint rather than granting plaintiff's motion to substitute, pursuant to Civ. R. 15(C), the real party for an improperly named defendant.

Topics: Civil Procedure; The appropriate use of Civ. R.

15(C) to substitute the real party defendant for a mis-named party.

This lawsuit arose out of a multiple vehicle accident caused by a driver, Lisa Ligus. The plaintiffs incorrectly named Lisa's husband and the owner of the vehicle, James Ligus, as the defendant driver. Plaintiffs did not assert a claim for negligent entrustment that could have properly been alleged against James Ligus.

James Ligus moved for summary judgment. In response, plaintiffs moved, pursuant to Civ. R. 15(C), for leave to amend the complaint to substitute Lisa for the incorrectly named defendant, James. Attached to plaintiffs' motion were: (1) a complaint from another action filed against Lisa by another person injured in the same accident; (2) a copy of the police report; (3) a copy of the docket sheets that showed that Lisa had accepted service in both the current action, and in the other action; and (4) Lisa's deposition in which she admitted to driving James' car at the time of the accident.

Despite this evidence, the trial court, without written opinion, denied plaintiffs' Civ. R. 15(C) motion, and also granted James' motion for summary judgment.

The Eighth District stated: "Civ. R. 15(C) provides a mechanism to substitute misidentified parties by amending the pleadings as long as the claims arose out of the same conduct, transaction, or occurrence as set forth in the original pleadings." The court summarized the "test" for using this Rule: if the party to be substituted, sometime within the year established under Civ.R. 3(A), has both received notice of the action and knew or should have known that but for the mistake the action would have been brought against them, substitution is proper.

The court rejected the defendant's argument that the substitution rule is narrowly limited to correcting minor errors. The Eighth District gave a more expansive interpretation of the Civil Rule, and corrected previous dictum that had improperly been used to limit application of the Rule. The court stated as follows:

> We continue to acknowledge that the mistaken identification contemplated under Civ.R. 15(C) is not limited to "minor errors," such as misidentifying the corporate designation or correcting a "middle initial" ... but extends to bringing in a party technically not then before the court under the unambiguous language of Civ. R. 15(C) that permits such course of action.

The court further noted the long-standing rule from *Peterson v. Teodosio*, 34 Ohio St.2d 161, 297 N.E.2d 113 (1973) that a trial court abuses its discretion by denying a timely motion to amend where it is possible that plaintiff may thereby state a claim upon which relief may be granted. However, the court noted that Civ. R. 15(C) cannot be invoked to amend a pleading to add additional (as opposed to substituted) parties.

Applying these principles to the case before it, the Eighth District held that the trial court abused its discretion in denying the plaintiffs' motion to amend the complaint pursuant to Civ. R. 15(C). The court further held that the summary judgment granted in favor of James Ligus would become a legal nullity once the amended complaint was filed.

Leckrone v. Kimes Convalescent Ctr., 4th Dist. Athens No. 20CA02, 2021-Ohio-556 (Feb. 22, 2021).

Disposition: Affirming trial court's granting of defendant's motion for judgment on the pleadings based upon two Affidavits of Merit that were defective on the issue of causation. A nurse was not qualified to testify on the issue of causation, and a physician's Affidavit was also defective as the physician improperly relied on another expert's opinion.

Topics: Civil procedure; requirements for valid Affidavit of Merit in medical malpractice action under Civ. R. 10(D)(2).

The plaintiff's decedent passed away after being treated in the defendant's nursing home. The plaintiff filed his complaint, and contemporaneously plaintiff requested, and then obtained, a 90 day extension of time to file his Affidavit of Merit.

The plaintiff then filed two Affidavits of Merit: one from a nurse that opined as to the nursing staff's breach of the standard of care, as well as to causation, i.e., that the breach of the standard of care caused the decedent's death; and one from a physician who opined that, based upon another medical expert's (the nurse's) opinion, the defendant's breach of the standard of care was a cause of the decedent's death.

The trial court granted the nursing home's motion for judgment on the pleadings based upon defective Affidavits of Merit. The trial court held that the nurse could opine on the breach of the standard of care, but it was improper for her to offer an opinion as to causation because she was not a licensed medical practitioner.

The trial court further held that the physician's Affidavit of Merit improperly referred to another medical provider's opinion on causation, and thus was also defective. The offending language was as follows: "I have been asked to

assume that another medical expert will testify that the standard of care was breached by employees and/or agents of Marietta Memorial Hospital * * * [B]ased on that assumption, it is further my professional opinion [this breach] ultimately caused and contributed to his premature death...."

Finally, the trial court denied the plaintiff's motion to file a corrective Affidavit of Merit, as plaintiff had already obtained a 90 day extension, and thus had exhausted any additional time to file a corrective Affidavit of Merit.

On appeal, the Fourth District affirmed. The appellate court held that neither the nurse's nor the physician's Affidavit of Merit properly testified to the issue of causation. With respect to the nurse's Affidavit, the court stated that both R.C. § 4723.151(A) (which prohibits a nurse from providing a medical diagnosis, or practicing medicine), and Ohio appellate law, provide that expert nurse testimony on the issue of proximate cause is inadmissible.

With respect to the physician's Affidavit, the court held: "It is well-established that an expert may not base his or her opinion on other's opinions. Each element of fact upon which an expert opinion is based must either be based on personal perception or upon facts in the record." The court summarily rejected the plaintiff's contention that the physician did not attempt to "bootstrap" another opinion in his Affidavit of Merit on the issue of causation, but was only referring to the yet-to-be-filed Affidavit of Merit of the nurse on the standard of care

Miller v. Cardinal Mooney High Sch., 7th Dist. Mahoning No. 20 MA 0037, 2021-Ohio-720 (Jan. 21, 2021).

Disposition: Affirmed granting of summary judgment.

Topics: Primary Assumption of Risk, Open and Obvious.

Plaintiff was a high school student who played on the Junior Varsity Basketball Team. After a JV game, her coach mandated that she stay and observe the first half of the varsity game. During halftime of the varsity game, the Plaintiff went into the locker room to collect her things and leave for the day. The locker room door was a windowless door that was located 14 feet behind the baseline of the court, approximately seven feet left of the center of the hoop where the varsity game was being played. While Plaintiff was in the locker room, the varsity game resumed playing. Plaintiff went to exit the locker room and used her left hand to push the door open. At the same time, a varsity player who was playing in the game crashed into the door, causing it to slam shut on Plaintiff's right hand causing significant injury.

The Plaintiff sued the high school that was hosting the game. The trial court dismissed Plaintiff's claims finding that the school's duty was eliminated by the doctrine of assumption of the risk, and the open and obvious danger doctrine. Plaintiff appealed to the Seventh District.

The Seventh District affirmed the trial court's ruling. The court found that the doctrine of primary assumption of risk applied. In response to Plaintiff's arguments, the Court found that Plaintiff's status as a either a spectator at the event or a business invitee did not preclude the application of the primary assumption of the risk doctrine. Given that it was foreseeable that a player on the basketball court could have stumbled off the court, it was an assumed risk that a player would hit the locker room door that Plaintiff was traveling through. The Court then concluded that the only potential attendant circumstance that could apply was the conduct of the Plaintiff herself in choosing to use the locker room door during the game. Therefore, the primary assumption of the risk doctrine applied, and no attendant circumstances existed.

The court next held that there was no evidence of any reckless or intentional conduct on the part of the defendant in failing to warn and in failing to prevent ingress and egress from the subject door while basketball games were being played.

Finally, the Court found that alternatively, even if the primary assumption of the risk doctrine did not apply, the danger of a player crashing into the locker room door was sufficiently open and obvious. In finding so, the court relied on the fact that the Plaintiff had previously used that locker room door repeatedly earlier in the day and that the location of the door was readily observable as being in the vicinity of where the varsity game would be playing.

Walling v. Brenya, 6th Dist. Lucas No. L-19-1264, 2021-Ohio-29 (Jan. 8, 2021).

Disposition: Affirmed summary judgment to the hospital on negligent credentialing claim.

Topics: Negligent credentialing; proof of requires determination or stipulation establishing the doctor's underlying medical malpractice.

Plaintiff brought a medical malpractice claim against two doctors and a clinic, alleging that Plaintiff's decedent suffered a fatal pulmonary vein stenosis as a consequence of the doctors' repeated and incompetent catheter ablation procedures in treating her catecholaminergic polymorphic ventricular tachycardia (CPVT), a genetic condition characterized by a particular kind of atrial arrhythmia, and the doctors' negligent failure to recognize and address stenosis. Plaintiff amended her complaint based on information learned during discovery,

to bring an additional claim of negligent credentialing against Defendant The Toledo Hospital. The trial court bifurcated the negligent credentialing claim and stayed discovery pending the outcome of the underlying medical malpractice claim.

During a multi-day jury trial one of the Defendant doctors testified that his care fell below the standard of care, as he failed to review certain records of the decedent. Had he reviewed those records his diagnosis would have changed and his course of treatment would have changed. Before the trial concluded the parties agreed to a settlement. The signed release stated that the Defendant had denied any wrongdoing or liability, but the released parties reciprocally acknowledged that Plaintiff did not admit that the released parties were without fault. Further the release stated that nothing "shall be deemed to release or impair in any way the pending claims . . . against" defendant The Toledo Hospital. Additionally, the release said, "This settlement and release is made in good faith specifically pursuant to ORC 2307.28, incorporating its provisions that this settlement does not discharge any other tortfeasor."

Following the dismissal of the medical malpractice claims, The Toledo Hospital moved for summary judgment on the negligent credentialing claim. The Hospital argued that to bring a negligent credentialing claim, there must be a prior determination that the provider actually committed medical malpractice, and because the trial ended in a settlement, and the settlement release did not contain any stipulation, no determination of medical malpractice was made. The Trial Court granted summary judgment finding that the Defendant doctor's "concession" on cross-examination during the trial did not constitute an adjudicated determination or stipulation that appellant's injuries were proximately caused by the doctor's negligence.

The Sixth District Court of Appeals affirmed. The Court confirmed that to prove a negligent credentialing claim, a plaintiff must establish the underlying medical malpractice of the doctor. The court found that while the doctor's testimony necessarily conceded the essential elements of a medical negligence claim, because there was no verdict, and because the settlement agreement failed to stipulate that the plaintiff's injury was caused by the defendant-doctor's negligence, the Plaintiff could not sustain his negligent-credentialing claim. The testimony provided did not constitute a determination or stipulation, but was simply evidence that, but for the settlement, would have been presented to a jury. The jury still would have had to weigh that evidence against other evidence, potentially including expert testimony as to causation, before making a determination.

Berardo v. Felderman-Swearingen, 1st District Hamilton No. C-200227, 2020-Ohio-4271 (Aug. 31, 2020).

Disposition: Reversed in Part and Remanded.

Topics: Motion for a New Trial, Manifest Weight of Evidence, Failure to Award non-economic damages.

Two Plaintiffs filed a complaint seeking damages for injuries they sustained in an automobile accident. Following trial, the jury rendered verdicts in favor of Plaintiffs against Defendant. The jury awarded past economic damages (specifically past medical expenses) and past noneconomic damages (pain and suffering) for one Plaintiff, and only past economic damages for the second Plaintiff. Plaintiffs filed a motion for a new trial pursuant to Civ.R. 59(A)(4), (6), and (7), asserting that the jury's awards for past noneconomic damages and the $0 awards for future noneconomic damages were inadequate, were not supported by the evidence, and were contrary to law. The Trial Court denied the motion.

On appeal, Plaintiffs asserted that during the trial the evidence of their pain and suffering went undisputed, that Defendant's medical expert agreed with their injuries, and that defense counsel conceded specific pain and suffering numbers to the jury in his closing arguments. Accordingly, they argued that the jury awards for less than what the defense counsel conceded were inadequate, against the weight of the evidence, and contrary to law.

With respect to the concessions made by defense counsel during his closing arguments, the First District held that those suggestions did not constitute judicial admissions, as there was no indication that defense counsel's remarks were intended to waive the Plaintiffs' burden of proof with respect to damages.

The Court found that the verdict with respect to the first Plaintiff was proper in all respects. However, with respect to the second Plaintiff, the First District held that when the jury awarded past economic damages to the second Plaintiff, but failed to award any non-economic damages for pain and suffering despite uncontroverted evidence that the second Plaintiff experienced pain and suffering, that verdict was against the manifest weight of the evidence. Thus the Court held that the denial of the motion for a new trial was error. ■

Kyle B. Melling is an associate with Lowe Scott Fischer Co., LPA. He can be reached at 216.781.2600 or kmelling@lsflaw.com.

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

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case:

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

RETURN FORM TO: **Kathleen J. St. John, Esq.**

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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.*

Anonymous v. Anonymous Company

Type of Case: Third Party Liability - Workplace Injury
Settlement: $175,000.00
Plaintiff's Counsel: Jarrett J. Northup, Jeffries, Kube, Forrest & Monteleone Co., L.P.A., (216) 771-4050
Defendant's Counsel: Withheld
Court: Summit County Common Pleas Court, Judge Ross
Date Of Settlement: April 2021
Insurance Company: TPS - Sedgewick
Damages: Neck/back/shoulder/knee strains and multiple cervical herniated discs

Summary: Failure to secure a semi-truck at a loading dock, causing skid steer operator to be injured when skid steer fell to the ground as truck rolled away from the loading dock. Admitted liability, clear neck/back/shoulder/knee sprains, disputed non-operative multi-level cervical disc herniations. 62-year old male plaintiff. BWC statutory lien of $38K.

Plaintiff's Expert: B. Ortega (Treating Doctor/Neurosurgeon)

Defendant's Expert: None, relatively early post-suit resolution

Estate of Jane Doe (a minor) v. ABC Corporation

Type of Case: Automobile Crash
Settlement: $2,750,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 694-5257
Defendant's Counsel: Withheld
Court: *
Date Of Settlement: March 2, 2021
Insurance Company: Withheld
Damages: Wrongful Death

Summary: Plaintiff, a 7-year old girl, was killed when an SUV struck the rear of the vehicle she was traveling in.

Plaintiff's Expert: None
Defendant's Expert: N/A

Settled Presuit

Type of Case: Motor Vehicle Crash
Settlement: $1,995,500.00
Plaintiff's Counsel: Dennis R. Lansdowne, Spangenberg Shibley & Liber, LLP, (216) 696-3232
Defendant's Counsel: Patrick S. Corrigan
Court: Settled Presuit
Date Of Settlement: March 2021
Insurance Company: The Cincinnati Insurance Company
Damages: Traumatic Brain Injury

Summary: On September 26, 2019 Plaintiff, a 68-year old male, was driving his vehicle on W. Edgerton Rd. in Broadview Hts., OH when a trailer that was attached to a landscaping truck veered into oncoming traffic after the trailer hit a bump in the road. The trailer collided head on into Plaintiff's vehicle. Plaintiff was rendered unconscious while his vehicle continued on for several hundred feet before striking the portico to his housing development. Plaintiff suffered a brain injury and was treated at Metro Hospital and then Metro Rehabilitation. While making a good recovery physically, Plaintiff has residual cognitive deficits. A guardian was appointed to complete the settlement. Plaintiff's wife also claimed a significant loss of her husband's attention, companionship and affection. She has become his caregiver. Case settled for policy limits.

Plaintiff's Experts: Scientific Analysis, Dallas, Texas (Accident Reconstructionist); Kip Smith, Ph.D. (Neuropsychology)
Defendant's Expert: Kurt Whitling (Accident Reconstruction)

Smith v. Triska

Type of Case: MVA - Minor Vehicular Damage
Settlement: $70,000.00
Plaintiff's Counsel: Jarrett J. Northup, Jeffries, Kube, Forrest & Monteleone Co., L.P.A., (216) 771-4050
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas Court, Judge Matia
Date Of Settlement: March 2021
Insurance Company: Progressive
Damages: Whiplash, Concussion & chronic vision disturbance/4th cranial nerve injury

Summary: Highway rear-ender resulting in whiplash and significant concussion. Minimal property damage. Concussion resolved but left ongoing peripheral blurred vision disturbance due to claimed 4th cranial nerve injury. College-aged female plaintiff.

Plaintiff's Experts: Treating doctors - relatively early resolution post-suit
Defendant's Expert: None

The Estate Of John Doe

Type of Case: Motor Vehicle Accident
Settlement: $225,000
Plaintiff's Counsel: Mitchell A. Weisman, Rumizen & Weisman Co., Ltd., (216) 658-5500
Defendant's Counsel: N/A
Court: N/A
Date Of Settlement: March 2021
Insurance Company: Central Insurance Company
Damages: Fractured femur / wrongful death

Summary: Plaintiff was an unsecured wheelchair passenger in a medical transport van. Plaintiff's vehicle stopped abruptly causing Plaintiff to be thrown from his wheelchair that turned over. Plaintiff, who had several underlying medical issues, suffered a fractured femur and died six days later. There was no police report. There was no incident report created by the transport company.

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

John Doe v. ABC Vape Company

Type of Case: Product Liability
Settlement: $510,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 694-5257
Defendant's Counsel: Withheld
Court: *
Date Of Settlement: February 9, 2021
Insurance Company: Withheld
Damages: Burn injuries to torso and flank

Summary: While working as a truck driver, Plaintiff's electronic cigarette (e-cig) exploded while in his breast pocket. The lithium ion battery (LIB) inside the e-cig box module (mod) was improperly identified as having a current rating higher than its actual capacity causing the explosion.

Plaintiff's Experts: Liability: Rong Yuan, Ph.D., P.E. (Berkeley Engineering and Research, Inc.). Damages: Joyesh Raj, M.D. (Plastic Surgery Consult)
Defendant's Expert: Withheld

John Doe v. ABC Industrial Company

Type of Case: Third Party Workplace Injury
Settlement: $3,700,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 694-5257
Defendant's Counsel: Withheld
Court: *
Date Of Settlement: January 12, 2021
Insurance Company: Withheld
Damages: Crush injury to left leg, resulting in multiple surgeries

Summary: Plaintiff, a 40-year old father of 3, was working at an industrial site in Southeast Ohio when he was struck by a forklift operated by a subcontractor at the worksite, pinning his leg against a steel barrier and causing crush injuries to his lower extremity. Liability was contested.

Plaintiff's Experts: Liability: Walt Girardi. Damages: Barbara Burk (Vocational Rehabilitation); Harvey Rosen (Economist); Pam Hanigosky (LCP); James Russavage, M.D. (Treating Plastic Surgeon); Peter Siska, M.D. (Treating Orthopedic Surgeon)
Defendant's Expert: Withheld

Doe Family v. OB Providers

Type of Case: Birth Injury
Settlement: Confidential
Plaintiff's Counsel: Pamela Pantages, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 621-2300
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: January 2021
Insurance Company: Confidential
Damages: Hypoxic brain injury

Summary: First time mother with uncomplicated pregnancy admitted to hospital in labor. On-call obstetrician, whom the mother had never met, managed the delivery complicated by prolonged vacuum extraction with excessive pop-offs, followed by lengthy shoulder dystocia. Unnecessarily delayed resuscitation following delivery due to L&D personnel's failure to timely have competent code pink team in the room, resulting in an acute profound hypoxic brain injury.

Plaintiff's Expert: Confidential
Defendant's Expert: Confidential

The Estate Of John Doe

Type of Case: Truck / Auto Collision
Settlement: $1,000,000.00 (Limits)
Plaintiff's Counsel: Mitchell A. Weisman, Rumizen & Weisman Co., Ltd., (216) 658-5500
Defendant's Counsel: N/A
Court: N/A
Date Of Settlement: January 2021
Insurance Company: Progressive
Damages: Wrongful Death

Summary: Truck jacknifed across multiple lanes on I-480W in Warrensville Hts. Plaintiff's decedent fatally crashed into the semitrailer. Initial police reports were not in Plaintiff's decedent's favor. Liability was disputed until the Chagrin Valley Enforcement Group (public agency) released its extensive accident reconstruction report vindicating Plaintiff's decedent of any and all comparative negligence.

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

Shane Hawes v. Downing Health Technologies, LLC, et al.

Type of Case: Employment Contract, Investment Contract, Fraud, Conversion, etc.
Verdict: $2,467,589.16
Plaintiff's Counsel: Christopher M. DeVito, Morganstern, MacAdams & DeVito Co., L.P.A., (216) 687-1212
Defendants' Counsel: Joshua R. Cohen & Ellen M. Kramer, Cohen Rosenthal & Kramer LLP
Court: Cuyahoga County Common Pleas Case No. CV-16-857599, Judge Deena R. Calabrese
Date Of Verdict: December 30, 2020
Insurance Company: N/A
Damages: Loss of private investment and back salary & future salary for total compensatory damages of $587,652.00, plus interest.

Summary: Hawes was an employee and investor in the corporate Defendants Downing Health Group and the individual Defendants' (i.e. Michael Shaut) Ponzi scheme related to medical devices and software that did not exist. After a two day bench trial and subsequent post-trial briefing and oral argument, the Judge found compensatory damages of $669,923.28, punitive damages of $1,000,000, and attorneys fees (after a separate hearing based on a 45 % contingency fee agreement and upward lodestar on the hourly rate of $750 per hour) in the amount of $764,965.44 in favor of Hawes on the claims of Violation of the Ohio Prompt Pay Act, O.R.C. § 4113.15(A), Fraudulent inducement/execution of Employment Contract, Fraudulent inducement/execution of Investment Contract, Conspiracy to execute Investment Contract, Violation of Ohio Blue Sky Laws, O.R.C. § 1707.43, and Breach of Fiduciary Duty.

Plaintiff's Experts: N/A
Defendants' Experts: N/A

John Doe, Claimant

Type of Case: Motor Vehicle Accident
Settlement: $225,000 (Limits)
Plaintiff's Counsel: Scott A. Rumizen, Rumizen & Weisman Co., Ltd., (216) 658-5500
Defendant's Counsel: N/A
Court: N/A
Date Of Settlement: December 2020
Insurance Company: Erie Insurance Company
Damages: Fractured femur

Summary: Defendant driver failed to yield the right of way causing a head-on collision with Plaintiff's vehicle. Plaintiff suffered a fractured femur that required open reduction surgery.

Plaintiff's Expert: N/A

Defendant's Expert: N/A

John Doe v. 2 Anonymous Insurance Companies

Type of Case: Personal Injury
Settlement: $5.9M
Plaintiff's Counsel: Steve Crandall, Crandall & Pera Law, (216) 538-1981
Defendants' Counsel: Anonymous
Court: Franklin County Common Pleas Court
Date Of Settlement: November 22, 2020
Insurance Company: Confidential
Damages: Paralysis

Summary: Plaintiff was a 54-year old married, employed man riding his motorcycle when defendant A was driving opposite him on a four lane roadway. Defendant A was employed by a large communications company, Defendant B, and went left of center, striking plaintiff and rendering him a paraplegic. Unfortunately the first attorney who represented plaintiff negligently executed a settlement with the driver, without obtaining consent and approval from her employer, defendant B. This case was settled after defendant B moved for summary judgment and new counsel was able to resolve the case with claims asserted against defendant B, as well as the insurance carrier for the first plaintiff's lawyer.

Plaintiff's Expert: Cam Parker (Life Care Planner)
Defendants' Expert: Confidential

Jane Doe Insurance Claim

Type of Case: Motor Vehicle Accident
Settlement: $250,000
Plaintiff's Counsel: Michael D. Goldstein, Goldstein & Goldstein Co. LLC
Defendant's Counsel: *
Court: *
Date Of Settlement: November 2020

Insurance Company: Safeco
Damages: Aggravation of Chiari I malformation

Summary: Plaintiff, a 27-year old woman, was rear-ended with approximately $400 vehicle damage. First medical treatment was physical therapy 17 days after the crash. She subsequently underwent suboccipital craniectomy for Chiari decompression with C1 laminectomy. Defendant's insurer paid policy limits.

Plaintiff's Expert: Dale Horne, M.D., Ph.D. (Neurosurgeon, Cincinnati, OH)
Defendant's Expert: N/A

John Doe v. Jane Doe Driver and UIM Carrier

Type of Case: Motor Vehicle Accident
Settlement: $559,000
Plaintiff's Counsel: Scott A. Rumizen / Mitchell A. Weisman, Rumizen & Weisman Co., Ltd., (216) 658-5500
Defendants' Counsel: N/A
Court: Superior Court, Indiana
Date Of Settlement: November 2020
Insurance Company: N/A
Damages: Fractured sternum; traumatic fractures at T-5, 6, 8; emergency surgery for herniated disc

Summary: Pick-up truck failed to yield to prisoner transport van at highspeed intersection. Plaintiff, a passenger in the van, was shackled to a flat bench seat without a safety belt. All prisoners/passengers in the van were injured.

Plaintiff's Expert: Dr. Peter Fragatos (Cleveland Spine & Pain Management)
Defendants' Expert: N/A

Ben Jones v. UK Medical Center

Type of Case: Medical Negligence
Settlement: $3.5M
Plaintiff's Counsel: Steve Crandall and Nick DiGennaro, Crandall & Pera Law, (216) 538-1981
Defendant's Counsel: In house counsel
Court: *
Date Of Settlement: September 25, 2020
Insurance Company: N/A
Damages: Wrongful death, survivorship

Summary: 52-year old married and employed father of one adult son, went to UK medical center with abdominal pain and an elevated white blood cell count. CT images were taken as well as lab work. UK physicians repeatedly diagnosed man with pancreatitis, when imaging and lab work were inconsistent with that diagnosis and, instead, showed he had a colon perforation. Man was treated incorrectly for weeks before dying from septic shock due to his undiagnosed perforation. The case was resolved before suit was filed with the assistance of private mediation.

Plaintiff's Experts: Dr. John Dumont (UH GI); Dr. Douglas Aach (General Surgery); Dr. Lawrence Cooperstein (Radiology); Dr. William Baldwin (Economist)
Defendant's Expert: *

■

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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.

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Professional Honors or Articles Written: _____

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_____

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_____

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Invited By: (print) _____ (sign) _____

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

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

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