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President's Message

by Ladi Williams

As our calendars fill up with in-person Court appearances and we draw nearer to jury Trials that will actually go forward, it is worth taking a moment to reflect on the fact that in more ways than not, we have overcome the darkest depths of the Omicron variant and are moving full speed ahead! Throughout the fall and so far, this spring, CATA has not only maintained, but has increased its financial strength. This fortunate circumstance has allowed us to continue to support our members as well as organizations that share our values. While we cannot fully predict what lies ahead, CATA continued to fire on all cylinders along with you as we entered the Spring of 2022, with an action-packed set of events for our members to come together and take advantage of.

On April 29th, CATA hosted its highly anticipated Litigation Institute at the Huntington Convention Center, which included a panel discussion and workshop featuring Katherine James, a Trial Consultant and Author of *"Harvesting Witnesses' Stories: How to Maximize Human Damages"*. Also featured was Andrew Caple-Shaw, Vice President of SAG-AFTRA television and film performers union of Nashville and a member of the American Society of Trial Consultants.

Ms. James specializes in live communication skills based in the discipline of theatre. She has been working to make attorneys and witnesses better courtroom communicators for over 40 years. Over 40,000 attorneys have taken her "ACT of Communication™" workshops and she has helped take over 2,500 matters to trial and helped prepare literally thousands of witnesses, including experts of every stripe. She also coaches witnesses and their lawyers to reach, persuade and activate jurors. This event proved to be entertaining and a worthwhile addition to your practice so thank you to all who attended!

On the heels of the Litigation institute, on June 2, CATA will once again be returning to the beautiful shores of Lake Erie at the Shoreby Club to host its Annual Installation Dinner. We will feature our Keynote Speaker, Captain Eric McIlvenny, as well as our special guest, Hon. Justice Jennifer Brunner, as we welcome our Incoming President and Executive Officers. This year's Dinner on the lake is going to be extremely enjoyable and we hope you can take part in the festivities, which are a long time coming.

At this time, I would like to express my sincere gratitude to all our advertisers and sponsors that have supported CATA throughout this calendar year and have contributed to our success. Your continued contributions to this organization are cherished and we look forward to maintaining and enhancing our strong partnerships with your companies.

As you know, part of what makes CATA so enduring is its ability to adapt to its members' needs. In this respect, please continue to share your ideas with us about programs CATA should pursue as well as how we can continue to help you enhance your legal practices. It has been a great honor leading this wonderful organization throughout this year and I can't wait to see all of you in the near future! ■

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Bicycles, E-Bikes and Micromobility Devices: The Alternative Transportation Age

by Kenneth J. Knabe

You've seen them, most notably in downtowns across the country, but elsewhere in our parks, our neighborhoods, and increasingly, on our streets. Yes, I'm talking about bicycles, but not just the regular muscle powered kind… I'm also talking about the rise of Electric Bicycles ("E-bikes") and micromobility devices (think Bird and Lime electric scooters, but also personal ones). The roll out of these new, electric powered transportation choices have been both lauded by advocates and bemoaned by opponents.

Regardless of what side of that debate you're on, E-bikes and micromobility devices (from here out I will use the term "scooter" as "micromobility device" is a mouthful) are here to stay. They're in our cities as part of bike and scooter share systems, and they're in our parks and suburbs as the E-bike segment of the bicycle industry is exploding with consumers. It's time to get up to speed. How are they defined? Where are they allowed to ride? Why is it so important we have uniform laws to govern them? Read on.

Street Legal?

First, it's important to understand that traditional bicycles ("bikes"), E-bikes, and scooters are all generally allowed to be on the street legally with cars (except closed access highways and interstates, etc.). Dealing first with the bikes and E-bikes, people should know they are defined as "vehicles" under the Ohio Revised Code.[1] Regular bikes have had this status for decades, and it only makes sense that E-bikes be considered the same given the speed and acceleration characteristics of these 21st century machines. Ohio (like most places), divides E-bikes into three separate categories:

- **Class 1:** provides motor assistance only when the rider is pedaling and stops assisting once the bike reaches its **max speed of 20 mph.**
- **Class 2:** provides motor assistance without the rider pedaling and stops assisting once the bike reaches its **max speed of 20 mph.**
- **Class 3:** provides motor assistance only when the rider is pedaling and stops assisting once the bikes reaches its **max speed of 28 mph.**[2]
  - An interesting note on Class 3 E-Bikes: unlike regular bicycles, many motorcycles, and even other classes of E-bikes, you are statutorily required to wear a helmet.[3]

At 20–28 mph, it's easy to see why the legislature categorized them as legal road vehicles authorized for use alongside cars. But what about scooters? They're not as fast, and they're not a "vehicle" under the Ohio Revised Code.

As of April 15, 2021, scooters have their own section of the Ohio Revised Code which provides in pertinent part, "a low-speed micromobility device [scooter] may be operated on the public streets, highways, sidewalks, and shared-use paths, and may be operated on any portions of roadways set aside for the exclusive use of bicycles in accordance with this section."[4] This makes sense. They get this provision because while they are generally slower than cars and limited to less than 20 mph (in reality even slower with

Cleveland limiting scooters in their jurisdiction to 15 mph) and thus it would be unsafe to grant them the same privileges and access as cars, they are still significantly faster than the average pedestrian traveling at 3–4 mph on the sidewalk and perfectly suitable to many low speed roads -- particularly ones with bike lanes. Local knowledge here is key, which is why the legislature deferred to local authorities in regulating scooters by granting them this express authority:

> "Notwithstanding division 4511.01(A)(1), a municipal corporation, county, township, metropolitan park district, township park district, recreation district, or any division of the department of natural resources may . . . Regulate or prohibit the operation of low-speed micromobility devices [scooters] on public streets, highways, sidewalks, and shared-use paths, and portions of roadways set aside for the exclusive use of bicycles, under its jurisdiction."[5]

Cleveland has taken this grant of legislative authority to eliminate the use of E-bikes and scooters on sidewalks in "business districts"[6] (a relatively complex definition, but you generally know one when you see one) and places where bicycles are already prohibited.[7] Counterintuitively for some people, another common prohibition includes riding a scooter in some municipal parks![8]

So, the next time a scooter cuts you off when you are driving downtown, at least you know the rider is allowed in the street and probably would have done the same to you in his car.

Other Misconceptions

Focusing again on bikes and E-bikes, most people (I hope) at the very least understand they're generally allowed on the road, but there are a few common misconceptions around this point worth clearing up:

1. Bikes do not have to use the sidewalk just because one is available. If you ride bikes, you'll hear "Get on the sidewalk!" from time to time because some people think the street is there only as a last resort. This isn't true and most of the time the cyclist has a choice between the road and the sidewalk. Moreover, not only are bikes allowed to ride in the street if there is a sidewalk present or not, but it's illegal to require people to operate bicycles on sidewalks.[9]

2. People on bikes do not have to ride on the shoulder, nor do they have to ride "far right" or as far to the right as *possible*. Riders only need to be as far right as is "practicable," and may take the full lane of travel just like any other vehicle if the need necessitates. Conditions that may require riding away from the edge of the roadway include when necessary to avoid fixed or moving objects, parked or moving vehicles, surface hazards, or if it is otherwise unsafe or impracticable to do so; including if the lane is too narrow for the bicycle or electric bicycle and an overtaking vehicle to travel safely side by side within the lane.[10] When you consider most lanes of travel are 10–12 feet wide, that could mean it is virtually never safe for a car and a bike to exist side by side in the same lane safely with their respective space requirements (six feet for the car, three feet buffer to the rider, three feet for the rider themselves, plus an additional two to three feet from the curb to avoid surface hazards and debris), and the car should slow, wait, and change lanes to pass safely.

3. Although state approved turn and stop signals exist for bikes and their use is encouraged, not only is there no requirement for a cyclist to hold a signal continuously, but a cyclist may forgo signaling entirely if they feel it is unsafe to take their hands off the bars for any reason.[11] With Cleveland streets often being what they are, you'll agree there are times when a rider may want both hands on the bars approaching a corner!

4. People on bikes may ride two-abreast (two-up, or side-by-side) and do not have to move into single file to allow cars to pass.[12] Again, this makes sense. When you're riding two-up with your friend (or three), you present as a more compact unit on the road. This is exacerbated if the group of riders is even bigger. Think about it: it's much easier to pass a group of riders in a compact two-by-two configuration than it is if they're strung-out single file. It might seem counterintuitive, but it relates back to point #2; it usually isn't safe for a car and a bike to exist side by side in the same lane. So, if you need to change lanes to pass, it's safer, easier, and quicker to complete the pass when riders are not in single file.

This last point, the riding in single file, is a point of controversy in some areas (including Northeast Ohio). Because of the idea that cyclists riding two-abreast is annoying, obstructive, or unsafe, some localities have ordinances on the books banning such conduct. This creates confusion, promotes unsafe passing, and feeds misinformation drivers carry with them to other geographies later used to fuel the divide between motorists and cyclists.

Uniform Laws

But who cares? Well, we should as lawyers who have all taken an oath to support the Constitution and improve the law, but there are also good practical arguments. In my experience most road rage incidents stem from a lack of knowledge or understanding. While the general public is slowly accepting bikes legally on the street as part of the urban landscape, there is still work to do in suburban and exurban areas where people on bikes and E-bikes are still not well received. Consider the conflict between a motorist who sees local signs posted in Gates Mills or Solon where they live stating that bikes shall ride single file, then encounters a group of cyclists from Cleveland pedaling the famed Emerald Necklace loop who understand riding 2-abreast is not only permitted by State Law, but safer. If the motorist so chooses (and some often do), they will take the opportunity to try and "educate" the riders. Naturally, conflict ensues… and it is our fault. All parties here believed they were right, and they can point to different sources of law to back their argument. Moreover, the conflict causes the police to expend resources harassing cyclists in their jurisdiction, believing they are enforcing a valid law and promoting public safety, while the riders think (and usually know) they are allowed to ride that way in Ohio. At best this is a waste of valuable police resources, and at worst damages relations between the general public and the people charged with serving and protecting them.

These "single file" Ordinances are remnants of bygone bike law era, and ripe for a constitutional challenge as conflicting with Ohio's general law allowing cyclists to ride 2-abreast. Be cognizant, however, that these conflicts can cut the other way as well. In *Kane v. City of Dayton* (2018),[13] Dayton's local ordinance relaxed Ohio law and only required bike lights to be on one hour **after** sunset. (Ohio law requires bike lights **at** sunset.) A cyclist was hit by a motor vehicle and injured within the one-hour period after sunset when he didn't have his lights on. Not having his lights on was not illegal under Dayton's ordinance, but it is illegal under the Ohio Revised Code. The Court conducted a home rule analysis to determine the controlling law. The Court of Common Pleas of Montgomery County held that the Dayton ordinance must yield to state law because it was an exercise of police powers (not local administration) that should belong to the state, and the provision of the ORC in question is a general law of Ohio designed to operate uniformly, prescribing conduct that applies to all citizens generally. This case illustrates the importance of following state law concerning mandatory lights from sunset to sunrise, regardless of what you might see on your local books.

What To Do?

If you are a Law Director or in a position of legislative influence, I encourage you to check your ordinances for conflicts and align your ordinances with the Ohio Revised Code. If you live in an area where you know such a conflict exists, I encourage you to contact our law firm. Beyond personal injury, we are the only law firm in Northeast Ohio specifically geared to serving cyclists, and our *pro bono* advocacy work includes efforts such as this to improve the law where our clients live. If you or a client have been incorrectly cited for such an offense, we encourage you to contact us. ■

End Notes

1. R.C. § 4511.01(A).
2. R.C. § 4511.01(SSS).
3. R.C. § 4511.522(D)(2).
4. R.C. § 4511.514(A)(1).
5. R.C. § 4511.514(F)(1).
6. Cle. Ord. § 401.07.
7. Cle. Ord. §§ 473.01; 473.09(b).
8. Cle. Ord. § 473.09.
9. R.C. § 4511.711.
10. R.C. §§ 4511.55(A); 4511.55(C).
11. R.C. § 4511.39(A).
12. R.C. 4511.55(B).
13. *Kane v. City of Dayton*, Montgomery Cty. C.P. Ct. No. 2017-CV-04722 (2018).

Judge Frank G. Forchione is a judge on the Stark County Court of Common Pleas General Division in Canton, Ohio, where he was first elected in 2008, and re-elected in 2014 and 2020.

Should I Object?

by Judge Frank G. Forchione

One of the biggest perils lawyers regularly face during the heat of battle is whether they should object to a question or answer. A recent trial caused me to reexamine this dilemma. There's an unwritten code among lawyers that you refrain from objecting during opposing counsel's opening statement and closing argument, and if necessary keep objections to a minimum. Objections are disruptive, annoy the jury, and interrupt the flow of presentation. Recently, a young lawyer in my courtroom objected to opposing counsel's opening statement over ten times and nonstop during the trial. I attributed this to his experiences learned through law school trial advocacy and mock trial programs where there is importance placed on standing up and issuing an objection to any possible violation to the rules of evidence. I bumped into the lawyer a few days after the jury reached their verdict and he asked me, "Do you think I object too much?" I responded, "It depends. Let's talk about this..."

The most logical answer is that a lawyer offers an objection to preserve their client's right to appeal. Objections must be made immediately – as soon as the witness or opposing attorney attempts to improperly introduce evidence. Objections are used to call the Court's attention to information which is inadmissible, unduly harmful or prejudicial and not to be considered. The decision to make an objection and protect the record must be balanced against the need to present their client's case effectively to the jury. Sometimes the number of objections are based on the complexity of the case.

Before exercising this option the lawyer has several considerations. First, the lawyer must decide, do I have a legitimate objection under the rules of evidence? Secondly, they must consider whether it is worth making the objection. In conducting this evaluation lawyers must have a strong grasp of the rules of evidence and a sound strategy for each potential objection.

It is important to object in the proper manner. If you choose to object, stand up and properly address the judge and state your objections in a calm, clear and concise manner. Far too often, the Court faces either "the screamer" who yells "objection" repeatedly so loudly that the medical skeleton used for medical malpractice cases begins to shake; "the mild and meek", a bashful soul who speaks so softly that often the judge doesn't rule on it because he does not hear it and the trial just moves forward; "the conscientious objector" that insults the judge by prefacing every objection with "with all due respect"; "the apologetic", who says "I'm sorry, Your Honor, I must object" every time the objection is offered; and "the mad dog" who bellows a deafening roar while pounding their fist on the table.

This Court has found that the best and most experienced trial lawyers tend to limit the number of objections during trial. Remember that with some pretrial preparation, the majority of the conflicts can be resolved outside the presence of the jury by filing a motion to exclude or limine prior to trial. The biggest fear for the lawyer is that by objecting, they will be perceived by the jury as

an obstructionist. In fact, the objection actually draws attention to the objected testimony. Jurors frown on objections because they feel excluded. Think about it. Have you ever approached two friends sharing juicy gossip and when you arrive they immediately stop? You're left feeling excluded and uncomfortable. That's exactly how jurors feel about objections, especially when they observe the parties engaged in an animated debate in private at sidebars.

Sometimes it's more useful to let the objection slide. The lawyer needs to ask themselves, did the question really hurt their case? Remember that every time you make an objection in front of the jury, it can cost you. It can lead the jury to peg you the villain of this plot. They may feel they are about to learn something vital to the case from the other side and you are trying to prevent them from hearing it. Don't sweat the small stuff – perhaps it's best to let it go.

This does not mean you have to sit there and get pounded repeatedly like Rocky Balboa. Jurors aren't dumb. They expect lawyers to fight and want to witness some animosity in the courtroom. Just be shrewd in your strategy. Actually, objections can turn out to be a very useful tool. For example, the objection can throw the opposing side off when one of their witnesses is on a roll. It may be tossed out simply to break a lawyer or witness' train of thought. Savvy lawyers use it for their own benefit when things are not going well for one of their own witnesses on cross examination. A timely objection serves as a life preserver, rescuing the witness from drowning and giving them time to gather their wits.

In conclusion, objections are a necessary part of the trial process. Used effectively, they can prevent damaging statements or evidence to be admitted which could be detrimental to your client's case. Often it's necessary to consider the judge handling the matter, as well as your own opponent. Lawyers know certain judges run a tight ship and anticipate problems before they begin. On the other hand, they view other jurists as timid and easily bullied. Therefore they feel the need to take action. In the end, the answer to the question of whether you object is – "it depends". ■

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A Patient's Right To Access & Inspect Their Electronic Medical Record

by Calder C. Mellino and Meghan C. Lewallen

Patient medical records are now digitized across nearly all hospitals in the United States.[1] Medical providers can browse multiple tabs, organize pertinent information, review data over a selected time frame, and perform countless other tasks using simple view clicks. These vast information systems have no doubt revolutionized healthcare, yet, production of information maintained in these systems for litigation remains stuck in the Dark Ages. Colorful, dynamic data is reduced to static, black & white paper photocopies numbering hundreds, sometimes thousands, of unorganized pages.

By limiting production to cumbersome copies of its choosing, a healthcare provider retains unilateral control of the information contained in a patient's medical record and enjoys an exclusive opportunity to view it in the same manner as medical providers. A wealth of information is not depicted in outdated print-outs of a patient's electronic medical record. Much like a physical site inspection, viewing a patient's medical record in the native, electronic format can be critical to understanding what happened during the care and treatment of any given patient.

Under federal law, a patient has a right to view all of the information stored in his or her electronic medical record. Corresponding federal regulations and standards detail healthcare providers' compliance and address common concerns such as private and proprietary information. Civil Rule 34 further provides the procedural basis for exercising this right pursuant to litigation. As explained more fully herein, any attempt to prohibit or restrict a patient's access to their own medical record is without merit and risks violating federal law.

Legal Basis

Procedurally, an inspection of a patient's electronic medical record may be performed pursuant to Civil Rule 34.[2] Substantively, the right to conduct this inspection is declared by the Department of Health and Human Services, which requires that "an individual has a right of access to inspect and obtain a copy of Protected Health Information about the individual."[3] This federal regulation was codified into law by the HITECH Act.[4]

Recently, Congress extended and emphasized this right even further in the 21st Century CURES Act. In a section entitled "Empowering Patients and Improving Patient Access to Their Electronic Health Information," the CURES Act amended the HITECH Act to further require that patients have direct access to their protected health Information.[5]

To assist with compliance, a congressional subcommittee provides a thorough Standard detailing the obligations of healthcare entities and further addresses many of the common concerns discussed below.[6]

Factual Basis

In addition to a patient's federal right to inspect his or her own Protected Health Information, there are often additional case-specific reasons inspection of the medical record is warranted and necessary:

- Information missing from the EMR;
- Inconsistent or contradictory information contained in the EMR;
- Information contained in a monitor, device, or other software that was not

communicated or transferred to the printed medical records;
- The ability to visualize how the medical providers were able to view (or should have viewed) information at critical moments;
- What information was or was not accessed or entered and when; and,
- What information was auto-populated by a template of the software versus what was manually entered by a medical provider.

Although a patient's right to view their own records is absolute, factual grounds such as these can further demonstrate why an inspection of the EMR is critical.

Differences Between Paper Records and EMR

As one deponent put it simply, trying to read a printed copy of his own charting from the hospital's EMR was like "trying to read in a dark room wearing sunglasses." Without an inspection, a defendant healthcare entity is the only party with access to the well-organized, dynamic, and interactive records contained on their information systems. The Civil Rules prohibit unilateral control to access of information; like a site inspection, actually viewing it in person provides far more information.

Understanding the type of information that is not contained in the paper record is therefore critical to ensuring that the parties have equal access to all information collected in the patient's care. Greyscale paper copies of the medical record are substantially different from the electronic version of the medical record. Unlike electronic medical records, the electronic information stored on these computers contain a wealth of information about a patient's medical care that does not appear when a patient's medical records are printed out, for instance:

- The information in paper copies is not in the same format as the electronic medical record when it is viewed by the caregivers.
- EMR systems are predominantly interactive system and were never meant to be printed in their entirety such as the PDF form of the live record.
- The static, grayscale copies of records often produced are indescribably dissimilar to the active record used in patient care that meaningfully utilizes color and offers interactive features.
- Paper copies do not display whether templates or order sets were used to create the records, whether there were alerts, alarms, pop-ups, clinical support data offered or utilized, communications and messaging, associated devices for monitoring and treatment, and much more.
- Paper records do not show amendments to notes (progress notes, physician notes, nurses' notes, etc.) contained within the record.

As a result, the hospital has *exclusive* control of information contained in the electronic version of a patient's medical record. The opportunity to access and inspect the patient's EMR provides all parties with equal access to the medical record of the care at issue.

Objections & Common Concerns

Requests to inspect a patient's electronic medical record are routinely met with resistance despite the patient's federally mandated right to access and inspect their own medical record. When informal attempts to reach a resolution are unsuccessful seeking the Court's intervention may be necessary, i.e., contacting the Court for a status conference or filing a motion to compel pursuant to Civil Rule 37. A number of objections and concerns may be raised in attempt to preclude the inspection all of which lack any merit.

Right of access to a patient's EMR does not apply to plaintiffs' counsel & consulting expert. The responding party may acknowledge that a patient has a right to access their electronic medical record yet claim that right is limited to the patient or a personal representative responsible for making "decisions related to health care" and does not extend to plaintiffs' counsel and their consulting expert.

This argument is directly undermined by the subcommittee's Standard for implementing and enforcing this law, which expressly states: "Audit logs and healthcare information shall be provided when specifically requested by authorized healthcare providers; the patient, his personal representative, advocate, and/or designee; researchers; quality control personnel; and organizational managers or administrators or both; and other persons authorized to have access to patient records or patient-identifiable information or both in any form."[7] Likewise, Ohio courts have found no such limitation exists and instead have ordered hospitals to permit Plaintiff, through counsel and counsel's expert, to inspect the hospital's electronic medical record as set forth more fully below.[8]

Allowing plaintiffs' counsel or their consulting expert to access the hospital's EMR violates its licensing agreement with the EMR software company and exposes intellectual property and proprietary information. A healthcare entity may also claim that an inspection would violate the terms of its agreement with the company that installed and/or maintains their information systems and that proprietary information could be exposed.

Once again, this argument is directly contradicted by the ASTM's Standard, which requires that third party users, including patients and their

representatives be able to access a patient's electronically stored information. Per these requirements, EMR software, and any applicable licensing or other type of agreements, account for such access.

Further, as explained more fully in Best Practices, a hospital representative is in complete control of what information is accessed during the inspection. If it was easy for trained employees to inadvertently access privileged information HIPAA violations would be occurring on a daily basis.

Additionally, many hospitals have "Open Chart" or similarly named policies which provide for patient access to their electronically stored health information. These objections may be addressed or even preempted by requesting these written policies in discovery.

Plaintiffs' notice of inspection is not appropriate under the Ohio Rules of Civil Procedure. The responding party may argue that plaintiffs' notice of inspection exceeds the extent of discovery under the Civil Rules particularly as it relates to privilege and proportionality issues, claiming the notice is not proportional to the needs of the case and makes demands greatly beyond the usefulness of any information that might be gleaned from the inspection.

Bald claims that an inspection would not produce information that would be useful is pure conjecture and irrelevant to whether an inspection is proper under the Discovery Rules. Such claims further ignore the fact that allowing a patient to access their medical record is required by federal law.

No requirement to produce information in more than one form. The healthcare entity may also make the general argument that because the designated record set has been produced in a format that all parties can use "as they are kept in the usual course of business" there is no need to produce the same information in more than one form.

This argument is directly contradicted by the clear language of 45 CFR § 164.524(a)(1), which states that a patient has a right to access ***to inspect and obtain a copy of*** *their protected health information.*

Moreover, a patient's right to inspect their electronic medical record cannot be preempted by printing out paper copies of the patient's medical records for the same reason that black and white photographs of defendants' choosing cannot take the place of a site inspection by the parties. Patients have an explicit right to both.

Record as it was is no longer available. In attempting to preclude the inspection, a healthcare entity may also represent that what Plaintiff seeks to view, inspect and record does not exist due to the time that has lapsed since the care at issue. Additionally, they may claim that computer software is frequently updated so the live version currently available incorporates changes or may have interactive features that were not previously available to the treaters.

Whether the layout of the information has changed is irrelevant to whether the parties can conduct the inspection. Just like an after-the-fact site inspection during litigation all that matters is that the data contained in the record is still there. A patient's federally mandated right to access and inspect their own medical records is not abridged because the information might appear in a different format on the computer monitor.

Costs and other technical concerns. Remaining concerns expressed often center around costs associated with the inspection, use of information obtained, and potential COVID-19 based restrictions.

These concerns can be easily addressed and alleviated in good faith and should in no way restrict a patient's right to inspect their electronic medical record.

Best Practices

Consult with an EMR expert. Engage an EMR expert to review a patient's medical record for completeness. Given their background and experience EMR experts are uniquely positioned to identify what portions of the medical record are missing and are able to explain in detail the differences between the paper record and electronic medical record to establish the inspection is warranted and necessary via sworn testimony. Additionally, because EMR experts have vast experience performing these types of inspections they are better able to explain how easily it can be done without violating the privacy of other patients, licensing agreements, or any other concerns.

Educate the Court. First, lay out the legal basis for this inspection and inform the court why it is necessary and warranted. Then, explain in detail how the inspection will take place to eliminate any concerns related to potential breach of confidentiality or other protected health information. Explain that plaintiffs' representative verbally guides and instructs the individual of defendants' choosing to operate the hospital's computers. Plaintiffs' representative may guide the mouse through instruction; however, it is the hospital's designated representative that is in physical control of the patient's electronic medical record, what is accessed, and what is viewed with the click of a button. With the hospital's own designated employee operating the system any concern related to accidental access is eliminated.

This explanation is often most compelling coming from the EMR expert themselves, via affidavit or otherwise. This third party can utilize their expertise to explain how the printed records differ

from the electronic display, what may be missing or left out by printing, and why an inspection is necessary and warranted in any given case. An experienced expert can also attest to the fact that these inspections are performed routinely at hospitals across the country on a regular basis.

Carefully draft Notice. Patients have a legal right of access to inspect their own personal health information electronically stored and any missing information not contained in paper records. In order to obtain such access, one must properly propound a notice of inspection pursuant to Civil Rule 34 which provides that any party may serve a request to "enter upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection."[9]

If an EMR expert will lead the inspection, be sure to include everything he or she will need to complete their inspection without issue. In conjunction with those items, consider including the following criteria in a notice of inspection:

- All electronically stored health information concerning the patient;
- Plaintiffs and their representatives must be able to view the patient's electronic health information in the same manner and format as healthcare providers at any given facility;
- Intranet access must be provided;
- Live/production, test, and/or support (mirrored/copy production) environments must be available;
- Screen(s) must be visible to all individuals present and videotaped;
- Noticing party must be able to print all portions of the electronic medical record;
- Noticing party must be able and permitted to take, save, and print screenshots; and,
- Noticing party must be able and permitted to create a digital folder for downloads and screenshots which can be transferred to a USB drive.

Become knowledgeable as to these criteria and be able to explain the need for them if challenged—another good reason to engage an EMR expert.

Do not be afraid to amend the notice to clarify a request or expectation. Work with opposing counsel in good faith to address any issues or misunderstandings. This method is much easier than opposing a motion for protective order which often seeks to preclude the inspection entirely.

Keep a record in writing. Make sure the inspection is recorded and videotaped by a court reporter. Additionally, all objections raised prior to the inspection should be specified in a written response. Civ. R. 26(C) further requires a moving party to make a good faith effort to resolve any dispute before filing a motion for protective order and to detail such efforts in the motion. It is not enough for the responding party to call opposing counsel to state their position and/or objections.

Be willing to adapt in good faith. Be amenable to cost sharing and entering appropriate stipulations such as agreeing the use of videotape and production of screenshots during the course of the inspection is limited to this particular case. As to any issues related to COVID-19 based restrictions virtual appearance by Zoom should alleviate any concerns.

Recent Ohio Court Rulings

Importantly, recent rulings by Ohio courts further illustrate that a patient's federal right to inspect his or her health information that is electronically stored on a hospital's computers is applicable under Ohio law. *See Acree v. Cleveland Clinic Foundation, et al.*, Case No. CV-20-935893, Cuyahoga County Court of Common Pleas (Journal Entry dated August 5, 2021) (GRANTED Plaintiffs' Motion to Compel Inspection of Plaintiff's Own Electronic Medical Records.); *see also Cheers v. Mercy Health-Regional Medical Center LLC, et al.*, Case No. 20CV201797, Lorain County Court of Common Pleas (Journal Entry dated August 11, 2021) (DENIED Defendants' Motion for Protective Order as to Plaintiffs' Notice of Inspection. Defendant shall permit Plaintiff, through counsel and counsel's expert, inspection of the hospital's electronic medical record system for review of the treatment records provided in 2011 by the defendants.). ■

End Notes

1. https://www.healthit.gov/data/data-briefs/hospital-capabilities-enable-patient-electronic-access-health-information-2019.
2. Civ.R. 34(A)(3).
3. 45 CFR § 164.524(a)(1).
4. 42 U.S.C. § 17935.
5. 130 STAT. 1183, § 4006(b)(3).
6. ASTM E2147-18.
7. ASTM E2147 – 18, § 1.2.
8. *Acree v. Cleveland Clinic Foundation, et al.*, Case No. CV-20-935893, Cuyahoga County Court of Common Pleas (Journal Entry dated August 5, 2021); *Cheers v. Mercy Health-Regional Medical Center LLC, et al.*, Case No. 20CV201797, Lorain County Court of Common Pleas (Journal Entry dated August 11, 2021).
9. Civ. R. 34(A)(3).

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10 Things You Must Request In Every Medical Malpractice Case

by Dustin B. Herman, Esq.

Electronic Health Record (EHR) systems contain huge amounts of data and electronic messages that go well beyond "just the medical records." We must make specific requests for these data and communications. Here are 10 things to request in every medical malpractice case.

1. Medical Records

Medical records are just "reports" run from the Electronic Health Record system. Some reports provide less information than others. We must request the most comprehensive set of medical records, and we must request them in color and in native format.

Some defense firms produce a scanned-in version of the medical records. That is, the EHR generates an electronic PDF of the records, but some defense attorneys print the records into hard copy, then scan the hard copy records, and then produce the scanned-in version of the records instead of the original PDF. This is unacceptable. First, the original (native) PDF version of the records will contain bookmarks which make the records very easy to navigate. Second, the scanned-in records cannot be reliably searched using search terms because text recognition software is not perfect. The original version of the records generated from the EHR can be searched with 100% accuracy (except for handwritten text, obviously). Third, the scanned-in versions will be much—much—larger than the native version (like 4MB for the original vs 700MB for the scanned-in version).

Here is an example RFP for medical records:

> **<u>Medical Records</u>. Produce the most comprehensive set of medical records, in color, for [name of patient] for the treatment at [name of medical facility] in [date range]. This will include all data in the medical records, including all notes, all orders, all flow sheet data, all medicine administration records, all lab results, all test results, all procedure results, all imaging results, all discharge instructions, all scanned-in documents, all messages, all alerts, all phone records, all vital signs, all office visits, etc., etc.**
>
> **Pursuant to Civ. R. 34(B), we are hereby specifying the form of production: The medical records should be produced in native format—that is, they should be produced as originally generated by the Electronic Health Record system (typically a PDF document). Electronic records that have been printed out and then scanned back into electronic format are not acceptable because word searches cannot be reliably performed on a scanned-in version of a document.**

2. Note History

The "Note History" is just another report that can be run from the EHR. The Note History shows all the different versions of the note (e.g., version 1, version 2, version 3, etc.), based on each time the note was saved. The Note History will

show all the edits made to the notes and the times the edits were made. Some Note Histories will basically have "red-lined" changes just like Track Changes in Microsoft Word, so the reader can easily see what was added or deleted in each version. The Note History can easily be produced in PDF format.

Here is an example RFP for a Note History:

> **Note History. Produce the entire Note History of the ED Provider note electronically signed by [name of provider] on [date and time], including all revisions made to the note, who made the revisions, when the revisions were made, and the reasons for the revisions.**
>
> **Pursuant to Civ. R. 34(B) we are hereby requesting the Note History that shows the "tracked changes" with new text being underlined and deleted text being crossed-out (just like track changes in Microsoft Word). All major EHR systems are capable of running this Note History report on individual notes.**

Alternatively, you could ask for the Note History for all notes in the medical records. At Lake West Emergency Department, for instance, the "Note History" is a single report and shows the Note History for each physician and nursing progress note.

3. Audit Trail/Log

An audit trail (aka audit log) is a spreadsheet that basically has a row for every time a provider clicked a button in the records, and each row provides some general information about what the provider was doing in the records. It will also indicate whether any Best Practice Advisories were triggered and the exact time they were triggered. Most importantly, an audit trail will provide the exact times a provider was in the records and for approximately how long.

The audit trail must be produced in its native spreadsheet format (either Excel or .csv format) so it can be re-sorted by provider (which allows you to see a clear timeline of exactly when the provider was looking at your clients' records). Some defense attorneys will only produce the audit trail as a PDF. This is again nonsense. An audit trail in PDF format is useless. An audit trail in PDF format also will not show hidden data (e.g., an audit trail in PDF will only show timestamps down to the minute, but if you have the spreadsheet version and click on the time, it will show the timestamp down to the second).

Most audit trails are produced in chronological order. Once the audit trail is received, you should re-sort the audit trail by provider and make separate audit trails for the relevant providers (by just copying and pasting all the rows for an individual provider into a new spreadsheet). For example, we received an audit trail recently that had over 4,600 rows, but we created a defendant-specific audit trail for a specific day that only had 167 rows—and we offered the defendant-specific audit trail into evidence at trial.

You should also notice a 30(B)(5) deposition for the audit trail to lay a foundation for what the information in the audit trail means and to lay a foundation for any provider-specific audit trails.

Here is an example RFP for an audit trail/log:

> **Audit Trail/Log. Produce, in native format—that is, Microsoft Excel or CSV format—the Audit Trail (aka Audit Log), in color, for [name of patient] across all [name of hospital system] facilities from [date] to the present date. This Audit Trail must comply with applicable federal laws and regulations and include at least the following:**
>
> 1. **Date and time of event – the exact date and time of the access event and the exit event;**
> 2. **Patient identification – unique identification of the patient to distinguish the patient and his health information from all others;**
> 3. **User identification – unique identification for the user of the health information system;**
> 4. **Access device – terminal or work station or device from which the user obtained access;**
> 5. **Type of action (additions, deletions, changes, queries, print, copy) – specifies inquiry, any changes made (with pointer to original data state), and a delete specification (with a pointer to deleted information);**
> 6. **Source of access – identification of the application through which the access occurred; and**
> 7. **Reason for access.**
>
> **Pursuant to Civ. R. 34(B), we have specified the form of production: The Audit Trail should be produced in native Microsoft Excel or CSV format (i.e., as originally generated by the Electronic Health Record system). The Audit Trail should not be converted into a PDF format before being produced. A PDF version of the audit trail is not reasonably usable.**

4. Emails

All hospitals use emails. We must request emails. In a recent medical malpractice trial against the Cleveland Clinic, an email was Exhibit # 1 and was used heavily by both sides. In another medical malpractice case against Lake

Health, the defense told us they found over 1,000 emails using the 5 search terms we provided (plaintiff's last name, Patient ID #, Medical Record #, Account #, and Encounter #).

The procedure for searching for relevant emails is the real issue here. We must be reasonable in asking a hospital to search for emails. We must be willing to provide limitations on the search (e.g., limitations on date ranges, limitations on the persons whose email boxes will be searched, and limiting the search using search terms). Getting *some* emails is better than getting no emails.

Here is an example of an RFP for emails:

> **Emails. Produce all e-mails (and their attachments) related to [patient name] and/or the treatment she received at [name of facility] in [date range], including, but not limited to, any emails that contain the following search terms: "[patient last name]"; "XXXXXXX" (Patient ID No.); "XXXXX" (Medical Record No.); "XXXXXXXX" (Account No.); "XXXXXXX" (Encounter No.).**
>
> **Please note: If your response asserts a privilege as the basis for any objection to this Request for Production or a basis for withholding any responsive e-mails or other electronic communications, please produce a privilege log as required by Civ. R. 26(B)(8)(a).**

5. Text Pages

Through a recent 30(B)(5) deposition, we have learned there are over 40,000 written "pages" (similar to text messages) sent every day in the Cleveland Clinic system in the U.S. They are all saved in a database (going all the way back to 1998) and can all be obtained. There are similar paging systems in all hospital facilities.

CCF searches for text pages by identifying the provider and the provider's pager number and the date/time range of the pages. A spreadsheet will be produced for each provider's pages during that time period. The defense lawyers will then have to redact information related to other patients.

Here is an example RFP for text pages:

> **Pages. Produce all pages related to [patient's name] during [relevant time frame].**
>
> **Said pages can be searched for using the provider name and provider pager number. Thus, a search should be conducted for all pages sent or received by [name of providers] during [relevant time frame]. All pages unrelated to [patient's name] should be redacted from the spreadsheet.**

6. In-Basket Messages

Any facility that uses "Epic" as its EHR system (e.g., the Cleveland Clinic and Mercy Health) will have "in-basket messages." These in-basket messages are very similar to emails. They can be produced in a spreadsheet format.

Many of these in-basket messages are generic messages (e.g., messages to patients reminding them about appointments). But we have also found that providers sometimes communicate with each other in the Epic system by using "in-basket messages." Indeed, we recently resolved a case for a very favorable amount after discovering some extremely damning communications between two doctors in the in-basket messages.

Here is an example RFP for in-basket messages:

> **In-Basket Messages. Produce all "In-Basket Messages" in native format for [patient's name] during [relevant timeframe].**

7. Critical Alert Messages

Hospitals may have separate messaging systems for sending out critical alerts (like critical blood results and sepsis alerts). In a 30(B)(5) deposition we found out that Lake Health uses the "Veriphy" critical alert messaging system and that the Veriphy system is not connected in any way to the EHR system (so there is no record of the Veriphy critical alert messages in the normal medical records).

We requested the audit trail for the Veriphy system on the relevant dates and it showed that 13 critical red alert messages were sent out over the course of 30 minutes after blood culture results showed that a patient had a blood infection (and still, nobody called the patient and the patient died). The audit identified the time each critical alert was sent and each device that received the critical alert. It also had some notes from people involved in sending and receiving the alerts. We took another 30(B)(5) deposition related to this Veriphy audit and we were able to identify all the people who received these alerts.

Here is an example RFP for critical alert messaging systems:

> **Critical Alert Messages. Produce an audit for any messages/alerts sent through the Veriphy system—or other messaging/alert systems utilized by Defendant—that relate to [patient's name] during [relevant timeframe].**

8. Text Messages

Even though they are not supposed to—we know providers use text messaging to communicate about patients. For example, we recently obtained text messages in a medical malpractice case that showed critical post-surgery communications between a resident and a surgeon about our client.

This may be a dead end because providers may just say they did not use text messages or, even if they did, that they no longer have them on their phone. Still, we must request text messages in every case—and follow up with questions about text messages during depositions.

Here is an example RFP for text messages:

> **Text Messages. Produce all text messages related to [patient's name] sent or received by any healthcare provider that provided treatment to [patient's name] during [relevant timeframe].**

9. Best Practice Advisories

Best Practice Advisories (BPAs) are alerts that pop-up on the screen to alert a provider about patient information and recommend a certain course of action. For example, sepsis alerts often pop up in the form of a BPA and alert a provider that, for example, "This patient meets SIRS (Systemic Inflammatory Response Syndrome) Criteria and may be septic." The BPA may also recommend a course of action (e.g., for the sepsis BPA, the recommended orders would include lactate, fluids, cultures, urinalysis, and a chest x-ray).

In a recent medical malpractice trial, the jury wrote "ignored best practice advisories" as their top reason for why the defendant was negligent. So these can be very significant!

To date, I have not been able to get a picture of the actual BPA that was shown to a provider (although this should be possible to do), but we have obtained the text from BPAs that were shown to providers. We tracked this down during a 30(B)(5) audit trail deposition. The fact that a BPA was triggered is often noted in the audit trail. A properly prepared 30(B)(5) witness should be able to use the corresponding "alert ID" number in the audit trail to identify the exact BPA that was triggered. We had the 30(B)(5) witness use the alert ID number to pull up the coding page for the BPA on his screen (during a Zoom depo). The coding page showed the actual text of the BPA. We had him share his screen so we could see it and then we took screen shots and marked those screen shots as exhibits to the deposition. At trial, we were able to show the text of the BPA to the jury. It was very powerful.

Here is an example RFP for Best Practice Advisories:

> **Best Practice Advisories. Produce all Best Practice Advisories that were triggered for [patient's name] during [relevant time frame].**
>
> **Please note: Any EHR system can easily identify the Best Practice Advisories that were displayed during any encounter. The least burdensome way to produce the Best Practice Advisories is likely just taking a screen shot of the Best Practice Advisory when it is displayed on the screen and then producing the screen shot.**

10. Catch All RFP For Electronic Communications

Just in case there are other electronic messages/communications that are not covered by the above requests, we should include a catch-all request.

Here is an example of a catch all RFP for electronic communications:

> **Produce all electronic communications (e.g., emails, pages, in-basket messages, text messages, and other forms of electronic communications) that relate to [patient's name] during [relevant timeframe].**
>
> **Please note: If your response asserts a privilege as the basis for any objection to this Request for Production or a basis for withholding any responsive electronic communications, please produce a privilege log as required by Civ. R. 26(B)(8)(a).**

Bonus Request: Secure Chat

The EHR Epic allows providers to send electronic messages through a system called "Secure Chat." They look just like text messages (you can Google Secure Chat to see what they look like). Apparently, the Secure Chat conversations disappear after 14 days, but I have to believe they are saved somewhere within the EHR. I have not yet obtained any Secure Chat messages. I hope someone out there can!! ■

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Ergonomically Speaking – For Lawyers

by Jody Heyman, OTR/L, CHT, CIDN, CKTP, CEAS

According to a nationwide survey conducted by the American Bar Association from September 30, 2020 to October 11, 2020 of over 4,200 members of the ABA, more than half (54%) responded that they were working from home 100% of the time. Fast forward to 2022 and this appears to be the new normal with many lawyers continuing to work remotely or follow a hybrid work model. While we have found that remote work actually has many benefits such as cost saving and increased flexibility, did you know that it can also be detrimental to your physical health? Ask yourself some of these questions:

- Do you experience muscle pain or soreness in your neck, shoulders, and /or low back while working at your home computer?
- Do you find yourself shaking out your hands because they fell asleep while typing?
- Do you notice yourself rubbing your eyes after staring at your monitor for long periods of time?
- Do you experience frequent headaches?
- Do you find you are less productive and easily fatigued since working from home?

If you answered yes to any of these questions your home workstation is most likely the cause of the pain in your neck. The good news is some simple adjustments can make a world of difference!

Ergonomically speaking: some general rules to follow to ensure proper fit in one's workstation.

The top 1/3rd of the monitor should be at or just below eye level. Often, that will involve raising the height of the chair.

Keyboard and mouse should be at the level of the elbows while the shoulders are in a relaxed position.

It is important to avoid over extension or deviation of the wrist which can cause Carpal Tunnel Syndrome and other wrist/hand injuries.

Feet should be flat on the floor. Avoid leg crossing or tucking the feet under the chair.

Posture recommendations: Even with an ideal setup, it is vital to maintain good posture.

Keep your back as upright as possible, making sure that you have adequate Lumbar support.

Be mindful of neck positioning. Even with a straight back, it is common to lean the neck forward. The neck should stay in alignment with the rest of the spine. The monitor location may need to be adjusted to allow for this.

Hips and knees should be at 90-degree angles to allow for proper alignment.

Position the wrists and forearms in a neutral position so that they are not reaching up or down while typing on the keyboard.

Movement Breaks: Our bodies were built to move rather than be stationary.

Even with an ideal setup, it's helpful to change positions. Consider obtaining a convertible sit-to-stand desk.

Sneak in some movement every chance you can: march in place while on hold, during webinars, etc.

Take a 10-minute walking break during your lunchtime.

While seated and with a straight back, gently lean forward over straight legs to stretch the back of the legs and the low back.

Gently clasp your hands together behind your back and squeeze shoulder blades together. This will stretch the chest muscles that tighten from sitting at computers all day.

Take a break from typing to stretch the forearm and wrist musculature by straightening the elbows with palms down and bend wrists up with the opposite hand. Then hold until a stretch is felt in the back of the forearm. Next reverse and bend the wrists down until a stretch is felt on the inside of the forearm.

Following some of these simple suggestions can help alleviate and even more importantly prevent problems before they even start. Remember the best position is the next position. The body is not meant to stay in one position for extended periods of time. Movement throughout your day from sitting to standing and walking in between will make working from home less likely to be a pain in the neck. ■

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Pointers From The Bench:
An Interview With Judge Nancy A. Fuerst

By Christine M. LaSalvia

Judge Nancy A. Fuerst has been an active member of the Cuyahoga County Common Pleas Court, General Division since January 1997.

Judge Fuerst took a nontraditional path into the practice of law. After working as a bookkeeper and administrative assistant for a local decorator for more than a decade, she later translated those business skills by starting and operating her own catering company. While she enjoyed running her own business, Fuerst was influenced by the experience of her father, the late Norman Fuerst, and his longstanding tradition of public service. Judge Norman Fuerst served in the Ohio Legislature, on the Cleveland Municipal Court, and on the Common Pleas Court for a total of 42 years of public service. Among his many accomplishments, he was credited for his role in implementing the model rules of civil procedure as part of the Ohio Rules as we know them today.

In 1985, as a single parent with 4 children and a full-time day job at the County Auditor's Office, Fuerst enrolled in night school at Cleveland Marshall College of Law. Like many other parents, she was able to somehow balance the demands of work, school, and family with a strong work ethic and the help of friends and family. She chuckles at recounting the craziness of working all day, studying in the middle of the night while doing laundry, and running home to make dinner and supervise homework. She would often attend night classes with a few of the younger kids in tow who would hang out at the snack bar until classes ended. Fortunately, the schedule got a bit easier as Fuerst re-married and finished in the day program. As part of her program, she completed an externship in the Eighth District Court of Appeals.

Judge Nancy A. Fuerst

After graduation, Fuerst clerked for a magistrate in the U.S. District Court then entered private practice with an office in the Standard Building. In addition to doing criminal defense work at the trial and appellate levels, she represented individuals and small businesses for 7 years. Judge Fuerst credits her small business experience for giving her insight into the problems of her clients. While practicing law, she actively participated in various activities and committees of the Cuyahoga County Bar and Cleveland Bar Associations and supported the merger of the bar associations into the current CMBA. Fuerst took

training in mediation and also served as an arbitrator for the ADR Department of the Common Pleas Court which instilled an appreciation of the value of alternate dispute resolution.

Judge Fuerst was honored to serve as Administrative Judge in the Common Pleas Court from 2010-2013. She spoke about the unique value of each of her colleagues and the diversity of opinion and practice that each judge offered. Among her many accomplishments, she is proudest of launching the E-filing system utilized by practitioners, essentially converting the paper docket into the electronic docket. While it is taken for granted today, filing documents with the click of a button was not always the case. Since leaving her role as administrative judge, she acts as a commercial court judge, serves on court committees, and continues to mentor new judges as they assume their new duties and roles.

Judge Fuerst tremendously enjoys being a trial court judge. She has an active and busy docket and is known for her efforts to assist civil attorneys to engage in settlement discussions. She respects and enjoys working with attorneys and believes that her time spent working as a civil attorney helps her in dealing with the attorneys who appear before her. She recognizes the importance of communication between attorneys and the court, and of problem solving within a case, and likes to make herself available to work out problems with discovery as soon as possible. She encourages counsel to communicate with her staff attorney, Clare Gravens, to notify the court and timely address any issues.

Judge Fuerst credits the effort of lawyers who represent personal injury claims and recognizes that it can be a difficult task. When asked what attorneys who represent plaintiffs can do better, she notes that it is important for attorneys to do their due diligence and to know the value of a case prior to a settlement conference. She cites the importance of being realistic with clients about potential outcomes, as well. Judge Fuerst is happy to meet clients to add a human touch to the proceedings and to instill confidence that the court is working for the people. Based on her prior training and experience, Judge Fuerst was a proponent of alternate dispute resolution before it was commonly used. She particularly sees its effectiveness for smaller cases in which it would be cost prohibitive to go to trial.

In the event that a case cannot be settled, Judge Fuerst is committed to working with attorneys and giving them a fair and efficient courtroom in which to try a case. With assistance of the attorneys, she strives to present an understandable synopsis of the case and the issues to be decided. She conducts an extensive voir dire and utilizes the one-strike method for jury selection. Jurors are permitted to take notes, to ask questions, and to receive a written jury instruction. Judge Fuerst encourages attorneys to be themselves in front of a jury and to reveal any potential downside of their case before their opponent does to earn the trust of the jury.

In her free time, Judge Fuerst is an active member of the community and, with her husband Economist Dr. John F. Burke Jr., supports many local cultural, civic, and academic institutions. With 6 children, 4 stepchildren and 22 grandchildren, she enjoys travel, family, and entertaining. ■

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The 2022 Race for a Supreme Court Majority: A Preview

by Meghan P. Connolly

There are three Ohio Supreme Court vacancies to be decided by voters on November 8, 2022. This will be our first partisan judicial election since 1910. Previously, Ohio held partisan primaries and nonpartisan general judicial elections until Governor DeWine signed Senate Bill 80 into law.

Both parties have the potential to take the majority. For CATA members, our clients, and all Ohioans, these races are of paramount importance.

The Race For Chief

One of the open seats is Chief Justice, which will be won by an incumbent of either party; Jennifer L. Brunner (D) or Sharon L. Kennedy (R).

Whoever wins the Chief spot will vacate her unexpired Associate Justice term, and Governor DeWine (R) will appoint a Republican replacement.

The Ohio Constitution dictates that our Chief Justice is elected separate from the six Associate Justices. The Chief holds a position of power to influence the administration of justice and practice of law. For example, the Chief decides on motions to disqualify lower court judges, appoints the judges of the Ohio Court of Claims, and assigns visiting judges to hear cases. In many instances, the Chief Justice is the public face of the highest court.

Current Chief Justice Maureen O'Connor's (R) term expires at the end of the year. She is constitutionally prohibited from running again due to age limitations. We are all familiar with the incumbents facing off to replace her:

Justice Jennifer L. Brunner

Justice Brunner was elected to the Ohio Supreme Court in 2020. Prior to that, she served on the Tenth District Court of Appeals for six years, and the Franklin County Court of Common Pleas for over four. Justice Brunner served as Ohio's first female Secretary of State from 2007-2011. She was in private practice for seventeen years. Justice Brunner is uncontested in the Democratic Primary.

Notable Supreme Court Opinion: Motorists Mut. Ins. Co. v. Ironics, Inc., Slip Opinion No. 2022-Ohio-841 (on appeal from a declaratory action, holding that Motorists' Umbrella Policy afforded coverage for the damages claimed.)

Justice Sharon L. Kennedy

Justice Kennedy was elected to our court of last resort in 2012 and again in 2020. Prior to serving on the Ohio Supreme Court, she served as a Judge at the Butler County Court of Common Pleas, Domestic Relations Division since 1999, acting as that Division's Administrative Judge since 2005. Justice Kennedy is uncontested in the Republican Primary.

Notable Supreme Court Opinions: Baker v. Wayne Cty., 147 Ohio St.3d 51, 2016-Ohio-1566 (holding that county is immune because exception to political subdivision immunity does not apply); *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121 (holding that city is entitled to judgment as a matter of law under political subdivision immunity); *McConnell v. Dudley*, 158 Ohio St.3d 388, 2019-Ohio-4740 (holding the exception to political-subdivision immunity in R.C. 2744.02(B)(1) for the negligent operation of a motor vehicle does not encompass actions for negligent hiring, training, or supervision of a police officer who was involved in a motor-vehicle accident while responding to an emergency call.).

The other open seats are those of Justices Fischer and DeWine.

Associate Justice Seat No. 1:

Judge Terri Jamison (D) v. Justice Patrick F. Fischer (R), *Incumbent*

Judge Terri Jamison (D)

Judge Jamison is currently serving on the Tenth District Court of Appeals, to which she was elected in 2020. Previously, she served as a Judge on the Franklin County Court of Common Pleas for eight years. She has experience as a public defender and in private practice. She is unopposed in the Democratic Primary.

Notable opinion: State ex rel. Toledo Refining Co., L.L.C. v. Indus. Comm., 2021-Ohio-2829 (holding res judicata did not bar workers' compensation claim under R.C. 4123.52).

Justice Patrick F. Fischer, (R) *Incumbent*

Justice Fischer runs for reelection after being elected to the Court in 2016. He graduated with Honors from Harvard Law and Harvard College before his career in private practice. He is a Past President of OSBA and the Cincinnati Bar Association. Justice Fischer is unopposed in the Republican Primary.

Notable opinion: Wayt v. DHSC, L.L.C., 155 Ohio St.3d 401, 2018-Ohio-4822 (extending the noneconomic damages cap in R.C. 2315.18 that applies to injury tort actions to defamation claims, thereby reversing both lower courts.)

Associate Justice Seat No. 2:

Judge Marilyn Zayas (D) v. Justice R. Patrick DeWine (R), *Incumbent*

Judge Marilyn Zayas

Judge Zayas is currently serving on the First District Court of Appeals, to which she was elected in 2016. She is the first Latina judge elected to an Ohio Court of Appeals. Judge Zayas has sat by appointment of Ohio's Chief Justice O'Connor on the Ohio Supreme Court and on the Second, Sixth, Eighth, and Tenth District Courts of Appeals. Judge Zayas is unopposed in the Democratic Primary.

Notable Opinion: Johnson v. Cincinnati Metro. Hous. Auth., 2022-Ohio-26 (affirming the trial court's denial of summary judgment on the issue of immunity in regard to Johnson's negligence claim).

Justice R. Patrick DeWine (R), *Incumbent*

Justice DeWine was elected to the Court in 2016. Justice DeWine served for four years on the First District Court of Appeals, and prior to that, for four years on the Hamilton County Common Pleas Court. He also has experience as a County Commissioner and a member of Cincinnati City Council. Justice DeWine is unopposed in the Republican Primary.

Notable Decision: Moore v. Mt. Carmel Health Sys., 162 Ohio St.3d 106, 2020-Ohio-4113 (holding when a plaintiff attempts to commence a medical malpractice action but fails to obtain service within one-year commencement period and action has not failed other than on the merits, plaintiff cannot use savings statute to revive the action outside the limitations period.)

The winners will join the good company of Associate Justices Melody J. Stewart (D) and Michael P. Donnelly (D) who are not up for reelection until 2024. And the bench will be rounded out by the Republican Justice soon to be appointed by the Governor. ■

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Attorney **Chris Carney** and his daughter, Annie, participated in the University Hospital Ahuja Center for Women & Children's Spring Bunny Breakfast on Saturday, April 16, 2022 at the Dunham Tavern Museum. This event was free to the community and offered a hot breakfast followed by an egg hunt for the children. Chris volunteered his time and helped serve 150 people.

CATA member, **Bill Masters**, has spent much of his time focused on the Cleveland arts scene. He serves as a member of the Board of Directors of the Cleveland Institute of Art which is one of the nation's leading accredited independent colleges of art and design. Founded in 1882, the college has been an educational cornerstone in Cleveland. In addition, Bill also serves on the Board of Directors of Graffiti HeArt, a non-profit foundation focusing on education and the beautification and revitalization of neighborhoods surrounding Cleveland. Graffiti HeArt works with graffiti and street artists and partners with donors who are interested in adding color to any canvas. The programs with Graffiti HeArt help fund art-focused education scholarships and urban development projects in the Cleveland Community.

The EndDD presentations continue to be a fulfilling and impactful experience for the presenter and students alike. In March 2022, attorney **Aaron Berg** presented to the junior class at Rocky River High School. The research and science continue to prove that prohibiting the use of cell phones while driving can save lives. In a recent discussion with Dr. Ian J. Reagan, a senior research scientist at the Insurance Institute for Highway Safety, he noted that states which enacted laws banning texting or cell phone usage decreased fatal car crashes by 6%. In states where the law enforcement officers are required to stop and ticket a driver if they observe a violation, fatal crashes decreased by an average of 12%. If you or a colleague are interested in giving a presentation, please contact Ellen Hirshman

Announcements

After many decades downtown, The Eisen Law Firm has moved our primary office to Beachwood. We are in the Fairways Building near the corner of Chagrin and Green. We still focus on medical malpractice, wrongful death, and birth injury cases, we still have our websites, www.malpracticeohio.com and www.birthinjuryohio.com, and we still co-counsel cases with other CATA members. If you're on the east side, stop in and say hello! ■

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Common Expert Witness Questions And Misperceptions

by Colin R. Ray

Introduction

Many practitioners are familiar with the standards for the admissibility of expert witness testimony within Ohio. But recent changes in how certain hospitals care for motor vehicle crash victims and further development of expert witness law, in both medical and ordinary negligence cases, may leave them with questions about the application of this area of law in newer cases. This article reviews those changes and possibly dispels misconceptions that practitioners face.

A. Background

Expert witness testimony is guided by Evid.R. 702, and, frequently, attendant caselaw. In Ohio, under Evid. R 702,

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Briefly, "[t]he admissibility of expert testimony in Ohio is governed by Evid.R. 702 and 703, and the United States Supreme Court decision in *Daubert*,[1] and its progeny, *Miller v. Bike Athletic*.[2] Ohio has adopted the *Daubert* test for determining the reliability of an expert's opinion."[3] Furthermore, "Evid.R. 702 permits a witness to testify as an expert only if his opinion or testimony will aid the trier of fact in the search for truth."[4] "*Daubert* provides the analytical framework for determining whether expert testimony is sufficiently reliable to be admissible under Evid.R. 702. Under *Daubert*, experts may only testify if their testimony is (1) based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[5]

Additionally, when appropriate, *Daubert* and Ohio courts use a factor test to determine when scientific evidence is reliable. "These factors include (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance."[6] The *Daubert* court explained that "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method."[7] This, in turn, requires that the methodology be "based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."[8]

B. Whether law enforcement officers may testify as to accident reconstruction?

In many cases, and often in cases involving disputed-liability vehicle crashes, law enforcement witnesses are called to testify regarding their observations of a crash scene after the crash, as well as regarding their investigation into a crash. This can result in disputes about whether law enforcement officers are permitted to testify as experts within the field of crash reconstruction. Recent cases have confirmed that these officers can testify as experts in the field of crash reconstruction, so long as they otherwise meet the requirements of Evid.R. 702. Recently, in a criminal case, an officer testified regarding crash reconstruction based on his observation of the scene, evidence collected, experience in the field, his certification as a crash investigator, and his duties educating other officers in the field.[9] In evaluating objection from the defendant, the court analyzed his testimony under Evid.R. 702, *Daubert*, and *Bike Athletic*, and concluded that the officer's opinions were based upon "reliable technical evidence under Evid.R. 702(C)."[10] Accordingly, it is reasonable to conclude that where law enforcement officers possess relevant certifications and education, and base their opinions on reliable evidence in accordance with the *Daubert* and *Bike Athletic* caselaw, they are likely permitted to testify regarding accident reconstruction.

C. Whether a nurse practitioner or physician's assistant can testify as to proximate cause in a negligence case?

After car crashes that do not cause obvious catastrophic injury, patients often go to an emergency department to be examined. Oftentimes, where there is no serious traumatic injury, a patient may not even see a doctor, and instead will only see a physician's assistant or a nurse practitioner. A question may then arise as to whether the nonphysician may offer expert testimony as to proximate cause of injuries.

Under the July 1, 2020 amendments to the Ohio Rules of Civil Procedure, expert reports are no longer explicitly required if a witness actually provided certain types of care to a party. Under Civ.R. 26(B)(7)(d), "a witness who has provided medical, dental, optometric, chiropractic, or mental health care may testify as an expert and offer opinions as to matters addressed in the healthcare provider's records. Healthcare providers' records relevant to the case shall be provided to opposing counsel in lieu of an expert report in accordance with the time schedule established by the court." The comments to this rule indicate that requiring a written report from experts setting forth all opinions and the basis and reasons for such opinions may, in many cases, obviate the need for a deposition, and will lessen the time and significant expense associated with expert discovery."[11] Strictly speaking, the rule does not require the provider to be a physician.

For certain injuries, there is no need to obtain expert testimony. In Ohio, "[e]xcept as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion. In the absence of such medical opinion, it is error to refuse to withdraw that issue from the consideration of the jury."[12] It has also been explained that, "[i]t is when the internal complexities of the body are at issue that we generally initiate the [metamorphosis] in the evidential progression where medical testimony moves from the pale of common knowledge matters and within layman competency where expert testimony is not required, to those areas where such testimony is more appropriate and indeed most necessary for the trier of fact to understand the nature and cause of the injuries alleged."[13]

Medical testimony is not required for certain types of injuries where the law considers the "causal nexus" to be clear. Such injuries include bruises,[14] broken bones,[15] severe strains from lifting heavy objects,[16] and severe burns, particularly when they occur to the "delicate membrane" of the eye.[17] This does not extend to more complicated medical issues, such as foodborne illness,[18] or bacterial infection caused by other sources.[19]

In decisions prior to the July 1, 2020 amendment to Civ. R. 26(B)(7)(d), courts were reluctant to let persons other than physicians testify on the issue of proximate cause.[20] Rationales driving these decisions included the fact that, under R.C. 4723.151(A), nurses are prohibited from providing medical diagnoses or practicing medicine or surgery except in collaboration with a physician. Under the amended Civ. R. 26(B)(7)(d), however, expert testimony "as to matters addressed in the healthcare provider's records" is not explicitly limited to physicians. It remains to be seen whether healthcare providers who are not physicians will be permitted to testify on proximate cause of injuries under the amended Civ. R. 26(B)(7)(d).

D. Whether a doctor practicing in a substantially similar specialty may testify as an expert witness?

One additional area of expert testimony that has given rise to much dispute is Evid.R. 601, which governs admissibility of expert testimony in what the rule refers to as "medical claims."[21] In this respect, the rule provides:

(5) A person giving expert testimony on the issue of liability in any medical claim, as defined in R.C. 2305.113, asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless:

> (a) The person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;
>
> (b) The person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school and
>
> (c) The person practices in the same or a substantially similar specialty as the defendant. The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties.

Celmer v. Rogers[22] and its progeny have given rise to many decisions on this, including a recent one. At issue in *Gibson v. Soin*[23] was whether a cardiologist board certified in internal medicine and cardiology familiar with preparing patients for a surgery[24] to implant a spinal cord stimulator could testify as an expert in a medical negligence case regarding the standards of care for anesthesiology for a patient preparing for surgery. At issue specifically was subsection (c) and whether the cardiologist had sufficient familiarity and practice within the standard of care for anesthesiology. After a lengthy examination of the cardiologist's credentials, the trial court excluded him on the basis that he was not familiar with the standards of care of anesthesiology and did not practice in that field. On appeal, the Second District affirmed. The court found important that the cardiologist did not testify that he and defendants shared a similar standard of care even though he testified that the expertise to review whether a surgery should proceed was within his purview.[25] The court also found persuasive that he did not testify that "evaluating a referred patient was a similar standard of care required of a surgeon or anesthesiologist upon reviewing presurgical cardiac testing results."[26]

Conclusion

As science and society change, surely so too will the law surrounding experts' testimony and its admissibility. Whether a given person may end up being permitted to testify as an expert witness often depends in significant part on their role within a case and the evolving needs of both litigants and a given court's interpretation of data. ■

End Notes

1. *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
2. *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 1998-Ohio-178, 687 N.E.2d 735 (1998).
3. *Watkins v. Affinia Grp.,* 2016-Ohio-2830, 54 N.E.3d 174, ¶19-20 (8th Dist.) (parentheses removed), citing *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 1998-Ohio-178, 687 N.E.2d 735.
4. *Watkins* at ¶19-20, *citing State v. Clark*, 101 Ohio App.3d 389, 655 N.E.2d 795 (8th Dist.1995).
5. *Watkins* at ¶¶19-20, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
6. *Watkins* at ¶22, citing *Daubert*, 509 U.S. at 593-594.
7. *Id.*
8. *Daubert*, 509 U.S. at 593. *See also Bike Athletic Co.*, 80 Ohio St.3d 607, 611, 687 N.E.2d 725 (1998).
9. *State v. Rozikov*, 3d Dist. Wyandot No. 16-19-07, 2020-Ohio-4884.
10. *Rozikov* at ¶25.
11. Comments to July 1, 2020 amendment of Civ.R. 26(B)(7).
12. *Sultaana v. Barkia Enter's*, 8th Dist. Cuyahoga No. 109122, 2020-Ohio-4468, ¶18, citing *Darnell v. Eastman*, 23 Ohio St.2d 13, 17, 261 N.E.2d 114 (1970), syllabus.
13. *Tate v. Nails*, 8th Dist. Cuyahoga No. 107983, 2019-Ohio-4062, ¶22, quoting *Wright v. Columbus*, 10th Dist. Franklin No. 05AP-432, 2006-Ohio-759, ¶10.
14. *See White Motor Corp. v. Moore*, 48 Ohio St.2d 156, 357 N.E.2d 1069 (1976).
15. *Canterbury v. Skulina*, 11th Dist. Portage No. 2000-P-0060, 2001-Ohio-8768.
16. *Kelley v. Connor*, 5th Dist. Licking No. CA 2981, 1984 Ohio App. LEXIS 9193 (Apr. 9, 1984).
17. *See also Bowling v. Industrial Comm.*, 145 Ohio St. 23, 29, 60 N.E.2d 479 (1945).
18. *Prysock v. Bahner*, 10th Dist. Franklin No. 03AP-1245, 2004-Ohio-3381, ¶ 9; *see also Marzocco v. Taco Bell Corp.*, 2d Dist. Montgomery No. 17818, 2000 Ohio App. LEXIS 62 (Jan. 14, 2000).
19. *Tate v. Nails*, 8th Dist. Cuyahoga No. 107983, 2019-Ohio-4062 (bacterial infection allegedly caused by negligent sterilization of manicure equipment required expert testimony on causation.).
20. *Keck v. Metrohealth Med. Ctr.*, 8th Dist. Cuyahoga No. 89526, 2008-Ohio-801, ¶ 5 (a certified nurse practitioner is not qualified to testify regarding proximate cause of a patient's bedsores); *Hager v. Fairview Gen. Hosp.*, 8th Dist. Cuyahoga No. 83266, 2004-Ohio-3959, ¶ 10 (nurse incompetent to testify regarding proximate cause of injuries allegedly caused by pulling on teeth). *See also Robertson v. Mount Carmel East Hosp.*, 10th Dist. Franklin No. 09AP-931, 2011-Ohio-2043, ¶30. *But see Estrada v. Glancy*, Cuyahoga C.P. No. CV-14-834630, JE of Jan. 26, 2016 (Jackson, J.) (permitting advanced practice registered nurse who did not collaborate with physician in care and treatment of patient to testify regarding proximate cause of mental health condition).
21. Notably, the portions of the rule concerning admissibility of expert testimony in medical claims have been renumbered twice recently, in both 2020 and 2021. *See Gibson v. Soin*, 2d Dist. Montgomery No. 29154, 2022-Ohio-1113, ¶17. Furthermore, subsection (c) was only added to the rule in 2016. *Id.*
22. 114 Ohio St.3d 221, 871 N.E.2d 557, 2007-Ohio-3697.
23. *Gibson*, 2d Dist. Montgomery No. 29154, 2022-Ohio-1113.
24. *Id.* at ¶16.
25. *Id.* at ¶34.
26. *Id.*

Recent Ohio Appellate Decisions

by Kyle B. Melling and Brian W. Parker

Naso v. Victorian Tudor Inn, L.L.C., 8th Dist. Cuyahoga No. 110652, 2022-Ohio-1065 (Mar. 31, 2022).

Disposition: Affirmed granting of summary judgment.

Topics: Slip and Fall, Attendant Circumstances.

Defendant's Inn had on display a number of antiques as well as unique décor on the walls and shelves. Plaintiff and her daughter checked into Defendant's Inn, and the proprietor of the Inn gave them a tour of their room and encouraged them to make themselves comfortable and take a look around. Plaintiff was wearing glasses and flat shoes. While looking around, she noticed that she was very overwhelmed and distracted by all the things that were displayed in the Inn, including a shelf with cups and saucers on it. While looking at said shelf and attempting to walk toward it, she stepped forward and fell down a flight of stairs. Plaintiff claimed the stairs were partially hidden, she had no reasonable opportunity to see them before she fell, she had no expectation of encountering stairs where she fell, and that she did not have a duty to look down at all times in order to see the stairs. She also claimed that attendant circumstances existed. Plaintiff's primary argument was that the stairwell was partially hidden due to the presence of a half wall that blocked the staircase from the rest of the room.

The Eighth District rejected this argument, finding that the half wall actually served as notice of the existence of a stairwell in that location. The Eighth District next held that the "overwhelming" number of antiques and pictures throughout the room and the many items displayed on a cabinet at the top of the stairs were not an attendant circumstance so as to negative the open-and-obvious doctrine. The Court affirmed that for an attendant circumstance to negative the open-and-obvious doctrine, they must create "a greater than normal, and hence substantial, risk of injury." Because the displays were what one would expect to find in a historic inn where antiques are routinely displayed, they were not an attendant circumstance.

Bokma v. Raglin, 2d Dist. Montgomery No. 29250, 2022-Ohio-960 (Mar. 25, 2022).

Disposition: Affirmed granting of a motion to compel requiring Plaintiff to sign medical record authorization forms.

Topics: Medical authorizations in personal injury matters.

Plaintiff was injured in a motor vehicle accident with an uninsured driver. Plaintiff sued her insurance carrier in an uninsured motorist claim. Defendant insurance carrier insisted that Plaintiff authorize release of all her medical records dating back to early 2008. Plaintiff objected on the basis that the records would contain information about psychological and psychiatric treatment as well as physical conditions that were not at issue in the suit. The trial court issued an order requiring Plaintiff to sign all authorizations submitted by the Defendant. Plaintiff refused to sign, and instead filed an affidavit claiming that she did not suffer emotional or psychological trauma as a result of her accident. She simultaneously filed the instant appeal. The Second District held that, although she filed an affidavit claiming she did not suffer emotional or psychological trauma as a result of the accident, because her complaint alleged "both physical and emotional" injuries, she waived her doctor-patient privilege for medical records of both the physical and psychological/psychiatric varieties.

Everhart v. Coshocton Cnty. Mem. Hosp., 10th Dist. Franklin No. 21AP-74, 2022-Ohio-629 (Mar. 3, 2022).

Disposition: Reversing trial court's judgment on the pleadings granted to the defendant in a wrongful death action involving medical negligence.

Topics: The statute of repose in R.C. 2305.113(C) does ot apply to wrongful death claims under R.C. 2125.02.

The plaintiff filed a wrongful death action within two years of the decedent's death but more than four years after the alleged medical malpractice occurred. The defendant filed a motion for judgment on the pleadings arguing that the wrongful death claim was a "medical claim" barred by the four-year statute of repose in R.C. 2305.113(C). The trial court granted the motion, but the Tenth District Court of Appeals reversed.

The Tenth District noted that the only statute of repose included in the wrongful death statute is a ten year statute of repose for product liability claims. Conversely, the wrongful death statute does not mention a statute of repose for medical claims. Thus, "[a]s there is no statute of repose for wrongful death claims originating out of a medical claim provided in R.C. 2125.02," the court concluded that "the General Assembly did not intend to create one in this context."

The appellate court further stated that even if the statutory

language of R.C. 2125.02 were ambiguous, canons of statutory construction still warranted the conclusion that a wrongful death claim derived from a medical claim is not barred by the four-year statute of repose in R.C. 2305.113(C). In this respect, it is significant that "[t]here is not a single reference to wrongful death" in R.C. 2305.113(E)(7), which sets forth examples of "derivative claims for relief" that constitute "medical claims" subject to the statute. Moreover, by its very nature and under numerous court precedents, a wrongful death claim is not derivative of a medical malpractice claim, but is a separate and distinct cause of action.

(NOTE: *See also, McCarthy v. Lee*, 10th Dist. Franklin No. 21AP-105, 2022-Ohio-1033 (Mar. 29, 2022) (reversing the trial court's grant of judgment on the pleadings to the extent that the lower court applied the four year statute of repose for medical claims to the appellant's wrongful death action.).

Havenar v. Melaragno, 10th Dist. Franklin No. 21AP-336, 2022-Ohio-389 (Feb. 10, 2022).

Disposition: Reversing trial court's granting of summary judgment for physician in medical malpractice action. The appellate court held that reasonable minds could conclude that the physician's negligent delay in diagnosing the plaintiff's cancer was a proximate cause of her injury as the tumor grew in size and the delay necessitated removal of a larger mass. The fact that the plaintiff's overall options for dealing with the tumor did not change as a result of the doctor's negligence did not entitle the doctor to summary judgment.

Topics: Medical malpractice; proximate cause.

The defendant orthopedic physician (Dr. Melaragno) first treated the plaintiff in May 2016 in response to plaintiff's complaint of groin and hip pain on the right side of her body. At that time, the defendant ordered an x-ray. Plaintiffs alleged that the defendant failed to identify a lesion in the x-ray, and solely recommended injections for the plaintiff's complaint of pain. After further complaints of pain, defendant ordered an MRI in March 2017, which revealed a tumor on plaintiff's ilium, which the defendant described as "bigger than last year."

Plaintiff then consulted with a different doctor, Dr. Mayerson, who advised the plaintiff that the lesion was cancerous, and gave her two options for treatment. The first option was a leg sparing procedure called an internal hemipelvectomy. The second option was an amputation called an external hemipelvectomy. Given the risks of the first option, and advice that she would eventually need the second option, plaintiff elected to have the second option done right away.

Plaintiff sued the defendant doctor alleging that he was negligent in failing to timely diagnose and treat the lesion which was subsequently diagnosed as malignant sarcoma. The plaintiff further alleged that the roughly ten month delay caused severe and permanent injury, disability and damages, resulting in the amputation.

The defendant moved for summary judgment, arguing proximate cause: any negligence in delaying discovery of the lesion from May 2016 to March 2017 did not matter as plaintiff would have been presented with the same options for treatment in either event. Dr. Mayerson, the surgeon who performed the amputation, stated that he would have offered the same treatment to plaintiff in 2016 as he did in 2017. However, Dr. Mayerson also testified that he would have been comfortable offering the plaintiff the first option in 2016, while he did not recommend the first option as preferable in 2017.

The trial court granted defendant's motion for summary judgment as the record did not show that the plaintiff's chance of success with the first option was worse in 2017 than at the time of defendant's negligence in 2016. On appeal, the Tenth District reversed, stating:

> But a reasonable finder of fact could conclude that there is a difference between a choice a patient is offered and the calculus that informs that choice. And reviewing Dr. Mayerson's [i.e., the surgeon's] testimony in context, we also conclude that a reasonable finder of fact, giving the testimony a fair construction, could determine that Dr. Mayerson's evidence supports a reasonable inference that the calculus behind the choice in 2016 would have been decidedly different than it was in 2017.

The Tenth District also noted Ohio Supreme Court precedent for the proposition that where cancer is left undiagnosed, resulting in the removal of a larger lump, physical injury to the plaintiff results. The Tenth District then concluded that there was sufficient evidence in the present case to create a genuine issue of material fact as to whether Dr. Melaragno's alleged negligence proximately caused the plaintiff's lesion to go undetected as a problem while it grew in cancerous size and necessitated the removal of a larger lump.

Dansberry v. Mercy Health, 1st Dist. Hamilton No. C-210304, 2022-Ohio-360 (Feb. 9, 2022).

Disposition: Reversal of denial of Rule 56(F) motion.

Topics: Summary Judgment Evidence, Rule 56(F) motion for leave, Statute of Limitations.

Plaintiff filed suit against Defendants, asserting that she suffered injury while being transferred between medical facilities. Plaintiff's injury occurred when her foot got caught on something, possibly a wheel on her wheelchair. She suffered a broken bone and a sliced Achilles tendon. Plaintiff did not know the name of the driver who allegedly caused her injury, but she believed it to be "Bryan." Plaintiff filed suit nearly two years after her injury. Defendant argued that Plaintiff's claim sounded in medical negligence under R.C. 2305.113, and therefore Plaintiff's claims should be barred by the one-year statute of limitations. Defendant, because it believed it was entitled to summary judgment on the statute of limitations, refused to answer Plaintiff's discovery request for the identity of the driver who injured Plaintiff, instead offering a number of bizarre and irrelevant objections. Defendant then filed a Motion for Summary Judgment.

In response to Defendant's motion for summary judgment, Plaintiff filed a motion to compel along with a Civ.R. 56(F) request for additional time to respond to the motion for summary judgment, asking the court to force Defendant to identify the driver of the van, along with a number of other unanswered discovery and deposition requests. The trial court ordered Defendant to provide the requested information. Defendant again failed to properly respond to Plaintiff's discovery, including identifying the driver. Defendant did identify 16 people who were authorized to transport patients such as the Plaintiff on the date of the injury. Plaintiff renewed her Civ.R. 56(F) motion for additional time to depose the 16 individuals identified by Defendant, or at the very least, the one named "Bryan." The trial court denied Plaintiff's motion for additional time.

The First District reversed this denial. In reaching its decision, the Court determined that the importance of the identity of the driver was tantamount to the determination of whether the one-year medical malpractice statute of limitations applied, or the longer two-year statute. The Court found that if the driver was an employee of the defendant hospital, then the one-year statute may apply.

Volny v. Portage County, 11th Dist. Portage No. 2021-P-0085, 2022-Ohio-338, 184 N.E.3d 925 (Feb 7, 2022).

Disposition: Affirmed denial of summary judgment.

Topics: Political subdivision immunity, road repair, constructive notice, discretionary decisions.

Defendant Portage County was engaged in a construction project where its employees were replacing a crossover pipe on Parkman Road in two planned phases. At the conclusion of the first phase, the employees dug a trench across the road, replaced the pipe, and then filled the trench in with asphalt shavings. Phase two was scheduled to begin a few weeks later, when the employees were going to pave the road.

Between the two phases, Plaintiff and four of his friends were riding motorcycles around Portage County. When they turned onto Parkman Road, they drove in a single file line. The riders came across the construction site, and described a ditch, six inches deep, that went across the entire road. Plaintiff slowed down upon encountering the construction site. As he did, his front wheel hit a big hole and he was ejected from his motorcycle. The Ohio State Highway Patrol investigated and noted that the accident occurred "in a repair area of the roadway." The Patrol noted that the road surface had several potholes, asphalt debris, sand, and repairs. They also noted a "Bump" sign was posted prior to the area of impact. Defendant filed a motion for summary judgment asserting that it was entitled to immunity. The trial court overruled the motion, finding that while the maintenance of public roads was a governmental function, the exception to immunity for "negligent failure to keep roads in repair" found at R.C. 2744.02(B)(3) was applicable.

The Eleventh District focused on the definition of the term "in repair" from Revised Code 2744.02(B)(3). The Court noted that "in repair" is not defined by the statute, but the Ohio Supreme Court has defined "repair" in this context to mean "the state of being in good or sound condition." The Court found that the hole in the under-construction portion of the roadway was not "in repair." The County argued that the roadway was "under construction" and therefore, was not in a state of deterioration. The Court rejected that argument finding that the in-repair exception can apply when a public entity negligently fails to keep a road in repair during ongoing construction. The Court also rejected the Defendant's argument that the discretionary judgment provision of R.C. 2744.03(A)(5) should restore its immunity. The Court reiterated that physical impediments such as potholes are easily discoverable, and the elimination of such hazards involves no discretion, policy-making or engineering judgment, citing to *Franks v. Lopez*, 69 Ohio St.3d 345 (1994).

Gangale v. Coyne, 8th Dist. Cuyahoga No. 110772, 2022-Ohio-196 (Jan. 27, 2022).

Disposition: Affirming trial court's denial of motion to quash subpoena to obtain non-party's personal tax returns and tax returns of his closely held business.

Topics: Whether a person who is not the recipient of a subpoena duces tecum, but whose personal and business tax returns are at issue, has standing to file a motion to quash; whether trial court abused its discretion in denying the motion to quash.

Subsequent to divorcing her husband, the wife filed a legal malpractice action against the attorneys who represented her in the divorce proceedings and on post-decree motions. The wife claimed that her attorneys committed legal malpractice by, among other things, failing to adequately protect her interests, failing to conduct "necessary discovery" regarding her ex-husband's finances, failing to retain "appropriate expert witnesses" to establish her ex-husband's income and to value his businesses, and failing to "investigate" the "minimization" of his income and assets.

The wife's attorney in the legal malpractice action issued a subpoena to the accounting firm that prepared the ex-husband's personal and business tax returns. The ex-husband filed a motion to quash, arguing that the documents sought were "confidential financial information and documentation" and were "irrelevant" to the issues in the legal malpractice action. The trial court denied the husband's motion on the ground that the husband lacked standing to quash the subpoena as it was not served on him, and because the requested documents were not privileged, and were relevant to the legal malpractice claims.

On appeal, the Eighth District held that the husband did have standing to file the motion to quash the subpoena, but that the trial court did not abuse its discretion in ordering the documents to be produced. The court noted that "Civ. R. 45(C) does not limit who may file a motion to quash a subpoena, i.e., the rule 'does not say a motion to quash can only be filed by the person subject to the subpoena.'" *Id*. at ¶18. The court found that the ex-husband had a privacy interest in the subject documents, but that did not prevent them from being discoverable. The court concluded that "[b]ased on the limited record before us and given the broad scope of discovery permitted under the Civil Rules, [the ex-husband] has not shown that the trial court abused its discretion*** in determining that the documents at issue were discoverable*** [and]*** in ordering [the accounting firm] to produce the documents*** 'either under a protective order or in a manner that otherwise ensures for the confidentiality of the documents.'" *Id*. at ¶32.

King v. Emergency Med. Transp., Inc., 5th Dist. Stark No. 2021CA00057, 2022-Ohio-123 (Jan. 19, 2022).

Disposition: Reversing the trial court's ruling which had granted summary judgment for the defendant. The appellate court held that genuine issues of material fact existed as to whether two ambulance drivers on a 24 hour shift were in the course and scope of their employment during a meal break when they allegedly injured the plaintiff's hearing by accidentally sounding their horn in close proximity to the plaintiff.

Topics: Respondeat superior liability.

The plaintiff was a McDonald's restaurant employee who left the restaurant on a break from work and sat down in the parking lot of the restaurant. The defendant, EMT, employed two paramedic employees who drove their ambulance into the restaurant parking lot, stopping approximately two feet from where the plaintiff was located. One of EMT's paramedics went into the McDonald's to get some food. When that paramedic returned to the ambulance, the other paramedic started the engine and one employee accidentally sounded the ambulance's horn, which consisted of two visible bugle-like air horns in the front of the vehicle. The plaintiff suffered permanent hearing loss as a result of the defendant employee sounding the horn.

The plaintiff brought suit against EMT which operated the ambulance for a municipality. The plaintiff alleged that the two paramedics were in the course and scope of their employment with EMT when they negligently sounded the ambulance horn. The paramedics were on a 24-hour shift at the time of the incident. During the 24-hour shift, the paramedics were permitted to have breakfast, lunch, and dinner, and their time sheet did not provide space to input the time for the meal breaks. The paramedics would typically leave their station, get food, and bring the food back to the station eat. EMT permitted its paramedics to drive their assigned ambulance to a restaurant during their lunch break. EMT required that two employees take the ambulance during their lunch break, and also required that the paramedics stay relatively close to their station when on lunch break.

At trial, the defendant moved for summary judgment. In granting this motion, the trial court found that the alleged incident did not occur within the scope of the paramedics' employment with EMT, and that EMT thus was not

vicariously liable for the paramedics' conduct. The trial court reasoned that the paramedics were on a personal errand which provided no specific benefit to EMT.

On appeal, the Fifth District reversed. The appellate court noted that an employee's conduct is within the scope of employment when it is initiated, in part, to further or promote the employer's business. Ordinarily, an act committed by an employee when he is off duty is not within the scope of employment. However, an exception to this rule exists where the employee's duty extends to actions conducted after working hours.

EMT argued that the paramedic's negligence was outside the scope of employment because it happened when the EMT was purchasing lunch, which was a personal errand which did not benefit EMT, and moreover, EMT did not require the paramedic to eat lunch, or to take the ambulance to do so.

The Fifth District rejected EMT's argument for two reasons. First, the paramedics were working a 24-hour shift when the incident occurred; the paramedics were not merely "on call" where they came to work only when called. During the shift, EMT expected that its employees would eat and sleep at the station; the time sheets did not provide a space for meal breaks; and the paramedics were paid for their meal breaks.

Second, EMT required employees who drove the ambulance to lunch to be accompanied by another employee, and to stay close to the station so that they could respond quickly to an emergency.

The Fifth District concluded: "reasonable minds could reach different conclusions as to whether [the paramedics] were on a personal errand that removed them from the scope of employment or [whether] the circumstances of the 24-hour shift and the use of the ambulance [kept] them within the scope of employment because there was a benefit to EMT."

Johnson v. Cincinnati Metro. Hous. Auth., 1st Dist. Hamilton No. C-210240 , 2022-Ohio-26 (Jan. 7, 2022).

Disposition: Affirming in part, and reversing in part, trial court's decision denying defendant's motion for summary judgment.

Topics: What constitutes a "physical defect on the premises" for purposes of the exception to immunity in R.C. 2744.02(B)(4); and whether a violation of the Landlord Tenant act comes within the catch-all exception to immunity in R.C. 2744.02(B)(5).

The plaintiff rented a two-story house from the defendant Cincinnati Metropolitan Housing Authority ("CMHA"). A rubber mat located on a step at the top of the stairs was not properly secured such that it would "shift" when the plaintiff stepped on it. The plaintiff notified CMHA of this condition in March or April of 2017, and spoke with a CMHA representative about it again in November of 2017. Nevertheless, the problem was not corrected. Thus, on January 6, 2018, while the plaintiff was heading down the stairs, the mat shifted, causing her to fall, sustaining injuries to her left arm and wrist that resulted in multiple surgeries.

In the ensuing lawsuit against CMHA, the plaintiff alleged causes of action sounding in negligence, breach of duty under R.C. 5321.04 (the Landlord-Tenant Act), and breach of implied warranty of habitability. CMHA moved for summary judgment on the ground that it was entitled to immunity and that none of the exceptions in R.C. 2744.02(B) applied. The trial court denied CMHA's motion. On interlocutory appeal, the First District affirmed in part, and reversed in part.

As to the negligence claim, the court of appeals agreed with the trial court that the exception to immunity in R.C. 2744.02(B)(4) applied. That exception provides that political subdivisions are not immune from liability for injuries "caused by the negligence of their employees and that occur[] within or on the grounds of, and [are] ***due to physical defects*** within or on the grounds of, buildings that are used in connection with the performance of a governmental function***." (Emphasis added). The only issue under that exception was whether the "loose floor mat" constituted a "physical defect" for purposes of the statute. In resolving this issue, the court looked to prior cases that defined that term as "a 'perceivable imperfection that diminishes the worth or utility of the object at issue'" or as an instrumentality that "[does] not operate as intended due to a perceivable condition." The court concluded that a mat that shifts when stepped on because not properly secured satisfies these definitions.

The second question on appeal was "whether a claim for a violation of the Landlord-Tenant Act may proceed under the exception to immunity contained in R.C. 2744.02(B)(5)." This exception is applicable when a statute expressly imposes liability on the political subdivision. The court found this question had already been resolved in *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, which held that since R.C. 5321 does not expressly impose liability on a political subdivision, it does not fall within the exception of R.C. 2744.02(B)(5). Thus, the court of appeals reversed the trial court's judgment regarding the causes of action for breach of R.C. 5321.04 and breach of implied warranty of habitability, but affirmed as to the negligence claim and remanded for further proceedings.

McClain v. The Drinkery, 1st Dist. Hamilton No. C-210124, 2021-Ohio-4161 (Nov. 24, 2021).

Disposition: Reversing grant of summary judgment to the defendant.

Topics: Open and Obvious hazards.

Plaintiff was a patron at Defendant's bar, and entered the outdoor patio area. Adjacent to the patio was an alcove, accessible by stepping up a step approximately six-inches high. Stacked vertically in the alcove and leaning against the wall were three to four "slabs of pool table slates". There were no signs posted warning of any danger related to the slabs and no barriers erected to keep bar patrons away from them. Plaintiff was in the alcove area for approximately 15-20 minutes. When she finished her drink, she noticed that some drink glasses had been left on top of the slabs by other bar patrons. She removed the glasses and placed them on the ground next to the slabs, along with her glass. Plaintiff then stood next to the slab, and began using her phone. She rested her right hand, and part of her wrist on the corner of the top slab. Plaintiff felt the slabs move away from the wall, and she attempted to push them back into place. The slabs then fell over, causing Plaintiff to fall and break her leg. Plaintiff brought suit, and the trial court found that the slabs leaning against the wall represented an open and obvious hazard, and granted Defendant's motion for summary judgment.

The First District disagreed. The Court relied on the testimony of Plaintiff, who stated that while she saw the slabs before they fell, she had no warning or way of knowing that the slabs were dangerous until they fell. The Court held that, according to the facts in the light most favorable to the Plaintiff, Plaintiff was merely resting her hand on the top right corner of the slab, not leaning against them. Additionally, it was not clear to the court whether the slabs' weight and potential to fall would have been observable by a reasonable person through ordinary inspection, as is required for the hazard to be open-and-obvious as a matter of law. ■

Kyle B. Melling is an associate with Lowe Eklund Wakefield Co., LPA. He can be reached at 216.781.2600 or kmelling@lewlaw.com.

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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

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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Verdict Spotlight

A Cuyahoga County jury recently returned an $800,000 verdict against Sam Ghoubrial, M.D., an internal medicine doctor who also serves as medical director at several northeast Ohio nursing homes, for his negligent prescription of morphine to a patient with advanced chronic kidney disease. The verdict included $600,000 in wrongful death damages and $200,000 in survivorship damages. Healthcare Underwriters' Group did not make any formal offer on behalf of its insured prior to the verdict. Scott Perlmuter and Katie Harris, of Tittle & Perlmuter, represented the Plaintiff in a 6-day trial before Judge Timothy McGinty, while Dr. Ghoubrial was represented by Steven Griffin. Plaintiff reached a pretrial settlement with Seven Hills Healthcare Group, LLC.

Scott D. Perlmutter

Katie R. Harris

The malpractice occurred when a 78-year-old man came under Dr. Ghoubrial's care at Seven Hills in December 2017, having been admitted for physical therapy after a hospitalization for falls at home. Previously, the man had been living independently with his wife of 50+ years. Upon admission to the skilled nursing facility, the gentleman had Stage 4 chronic kidney disease, congestive heart failure, diabetes, peripheral vascular disease with prior amputations to his feet, and dementia.

Despite abundant scientific literature and what experts testified was a clear medical consensus that morphine is the most dangerous narcotic a physician can give someone with advanced chronic kidney disease, Dr. Ghoubrial immediately prescribed morphine to the decedent. In doing so, Plaintiff's experts testified that he negligently disregarded records showing the gentleman's pain was under control with non-narcotics and negligently disregarded the well-established principle that several other narcotics are safer for patients with advanced CKD. The first time Dr. Ghoubrial prescribed morphine, his nurse practitioner canceled the order immediately. She placed the decedent on as-needed Tylenol, and he never got a dose of the dangerous narcotic. Over the next five days, the decedent only needed Tylenol twice, for pain levels less than 5/10, and it was effective both times.

The decedent was briefly transferred back to the hospital, where he was treated for suspected pneumonia and a flare-up of congestive heart failure. When he returned to Seven Hills to complete physical therapy, his discharge condition was good, and his pain was under control with non-narcotics.

On December 30, 2017, Dr. Ghoubrial saw the decedent again. Although he noted severe back and leg pain, he did not document the decedent's chronic kidney disease. Once again, Dr. Ghoubrial immediately prescribed 15 mg of morphine twice a day. This time, no one canceled it, and the decedent was given 105 mg of morphine over several days. As the Plaintiff's experts testified, because morphine is cleared through the kidneys, someone like the decedent with advanced CKD cannot eliminate the drug's toxic metabolites. These build up over time and can cause overdose and other significant dangers to a patient's health.

The decedent's adult children visited their father on December 31, January 1, and January 2. All indications were that the gentleman was doing well, and that any prior pneumonia had cleared. This was also true when Dr. Ghoubrial saw him on January 2.

On the morning of January 3, 2018, a nurse found the decedent minimally conscious, drooling, and moaning when his name was called. At 8:00 a.m., Dr. Ghoubrial ordered

a stat chest x-ray, which he admitted on cross-examination did not show a recurrence of any prior pneumonia. At 11:30 a.m., Dr. Ghoubrial ordered nursing staff to hold morphine. The decedent's oldest son called 911 when he arrived around 4:00 p.m. and found his dad unresponsive, drooling, and unable to speak.

When EMS arrived, the decedent was showing classic signs of an opioid overdose, including pinpoint pupils. EMS administered Narcan. The decedent became slightly more responsive, and his pupils returned to normal – however, he went into cardiac arrest on the way to the hospital and was admitted in a coma on a ventilator. Chest x-rays later that day showed pneumonia, and cultures came back positive for a bacteria common to aspiration pneumonia. The decedent never came off the ventilator, never woke up, underwent a further amputation surgery due to worsening vasculature in his leg, became septic, and died on January 20, 2018.

At trial, Plaintiff's experts testified that morphine's toxic metabolites built up in the decedent's system until he overdosed. The opioid overdose caused him to have shallow, uneven breathing. He could not protect his airway and aspirated, which developed into an aspiration pneumonia that ultimately caused sepsis and his death. Dr. Joshua King, nephrologist and toxicologist from the University of Maryland, testified for the Plaintiff regarding causation, and Dr. Daniel Swagerty, geriatrician of Dayton, Ohio, testified regarding standard of care.

The defense asserted three main positions. First, Dr. Ghoubrial claimed that every other record regarding pain levels was wrong, including those from his own nurses, and that only he could assess the decedent's pain because they both spoke Arabic. The decedent emigrated from Egypt to the U.S. in 1983 and worked for decades in English-speaking jobs, but Dr. Ghoubrial testified that the jury should disregard nursing notes and testimony that indicated he could make most needs known despite the language barrier. A second defense argument claimed it was acceptable to prescribe morphine because the decedent should have been on hospice, even though he was not on hospice and his prognosis and rehab potential were listed as "good." The defense also suggested the decedent went into a cascade of multi-organ failure on January 3 for reasons that had nothing to do with morphine.

Dr. Emil Hayek, a University Hospitals cardiologist, and Dr. Steven Weisbord, a nephrologist from Pittsburgh, testified for Dr. Ghoubrial on causation. Dr. Daniel Cannone, a geriatrician from Canton, Ohio, testified for him on standard of care.

The decedent left behind a large and loving family, with adult children who all testified movingly about what his loss meant to them. The Plaintiff's closing emphasized that someone being old and sick doesn't give anyone the right to take away the time they do have left with their loved ones – and that if anything, those moments are more precious.

Trial lasted 6 days. The jury deliberated for approximately three hours and returned a verdict totaling $800,000 in noneconomic damages. It was a hard-fought and just result for a family that spent four years looking for answers about how and why this happened.

The case is Estate of *Ramzy Michaels v. Seven Hills Healthcare Group, LLC*, et al., Cuyahoga County Common Pleas Case No. CV-18-908687. ■

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.*

Laura Thompson, etc. v. Ohio Power Company d/b/a AEP, et al.

Type of Case: Wrongful Death
Verdict: $6,000,000.00
Plaintiff's Counsel: Jordan Lebovitz, John Power, Tom Prindable, Brenda Johnson, Nurenberg, Paris, Heller & McCarthy Co., LPA and Cogan & Power, PC, (216) 694-5257
Defendant's Counsel: Porter Wright - Columbus
Court: Washington County Common Pleas Case No. 19OT263, Visiting Judge O'Farrell
Date Of Verdict: April 15, 2022
Insurance Company: *
Damages: Wrongful Death and Survival Claim

Summary: On May 25, 2019, a thunderstorm came through Marietta, Ohio and as a result of the high winds from the storm, a tree limb fell onto AEP's service drop feeding from the pole to Elsa Thompson's home. At approximately 1:50 p.m., a neighbor called AEP to report the downed power line. Just before 5:00 p.m., Elsa Thompson called AEP to report the downed power line, and was told someone should be at her home by 6:00 p.m. She called AEP again at approximately 8:00 p.m. and was told that she could go to sleep and that everything would be fixed by morning. After Elsa went to bed, the aluminum neutral suffered a mechanical break from the weight of the tree limb and caused an imbalance of voltage traveling to the home causing a fire in a relocatable power tap (power strip) in her family room. The fire reached temperatures upwards of 2000 degrees and spread quickly. The fire caused Plaintiff's decedent to inhale the products of combustion and she died after suffering 3-5 minutes of conscious pain and suffering. Her body was found in between her bedroom doorway and the hallway. Plaintiff did not seek any economic damages, solely noneconomic wrongful death and survival damages.

Plaintiff's Expert: Brian Churchwell, P.E.; Edward Brill, P.E.; Edmund Donoghue, M.D.; and Michael Gelbort, Ph.D.
Defendant's Expert: James Lineback, M.D.; Nathan Bromen, IAAI, CFI; Troy Little, P.E.; and Jeff Paulus, P.E.

John Doe, Guardian v. Hospital Systems A and B

Type of Case: Medical Negligence
Settlement: $6 Million
Plaintiff's Counsel: Michael F. Becker and Romney B. Cullers, The Becker Law Firm, (440) 323-7070
Defendant's Counsel: Withheld - confidentiality
Court: Withheld - confidentiality
Date Of Settlement: March 31, 2022
Insurance Company: Self-Insured
Damages: Brain injury, profound neurologic deficits

Summary: A premature baby born by emergency Cesarean at 26 weeks and weighing less than two pounds was ejected from a transport warmer cart onto the floor during transport to the NICU shortly after delivery. When the incident occurred, the baby was being moved from the operating room to the NICU by a transport team that included a pediatrician employed by Hospital System A and nursing staff employed by Hospital System B. Prior to transport, a protective side panel had been removed from the warmer cart. The pediatrician claimed that the panel, if in place, would have made it too difficult for her to reach into the warmer to manage the baby's airways during transport because she was a small person and could not easily reach into the warmer. During transport, a member of the nursing staff inadvertently pushed the warmer into an obstruction in a doorway causing it to stop abruptly. The baby was then thrown from the warmer through the opening created by the missing panel and onto the floor. The baby had a rough NICU course which included significant respiratory distress and bleeding into the brain. The child survived but now has significant neurologic deficits and requires ongoing nursing and attendant care. The defendant hospital systems contended that the baby's profound brain damage was the result of the natural progression of hemorrhage associated with extreme prematurity and likely unrelated to trauma from the fall.

Plaintiff's Expert: Withheld - confidentiality
Defendants' Expert: Withheld - confidentiality

Steven Taylor v. JED Industries, Inc.

Type of Case: Workers' Compensation
Settlement: $290,000.00 with medical treatment for injuries to remain open for life.
Plaintiff's Counsel: Benjamin P. Wiborg, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., #1200, Cleveland, Ohio 44114, (216) 694-5227
Defendant's Counsel: Ohio Bureau of Workers' Compensation
Court: N/A (resolved Administratively)
Date Of Settlement: March 24, 2022

Insurance Company: Ohio Bureau of Workers' Compensation
Damages: *

Summary: 31-year old injured on the job when a strap holding a steel plate overhead broke causing the plate to fall on the worker's left upper and lower extremities. Injuries included loss of use of left hand and below knee amputation left leg. Loss of Use awards totaling $132,750.00 for left hand and $154,875.00 for amputation left foot. 61% Permanent Partial Disability award totaling $35,990.00 and finding of Permanent Total Disability.

Plaintiff's Expert: Todd S. Hochman, M.D.
Defendant's Expert: Ralph Kovach, M.D.

Jessica Gadelsayed, et al. v. Robert Lee Frost, et al.

Type of Case: Dump Truck, Rear-end collision into Jeep on Interstate 90-West
Verdict: $1,750,000.00
Plaintiffs' Counsel: Daniel J. Ryan, Thomas P. Ryan, Ryan, LLP, (216) 363-6082
Defendants' Counsel: Dennis Pilawa and James Reagan
Court: Cuyahoga County Common Pleas Case No. CV-19-917481, Judge John O'Donnell
Date Of Verdict: March 16, 2022
Insurance Company: Motorists Mutual (Now Encova) and Cincinnati Insurance
Damages: Pelvic Fracture - Bilateral Superior and Inferior Pubic. Rami Fractures; Sacral Fracture; Permanent skeletal fixation at sacral corridor (two Permanent internal rods)

Summary: Accident occurred February 21, 2019 at 10:30 a.m. Plaintiff was 17- years old, driving from college-prep class in Lakewood to her home in Rocky River. She was travelling on I-90 west and had just passed the McKinley Road entrance ramp. There was a construction zone and the left lane was closed while crews were performing tree trimming. Plaintiff could not merge in time and came to a stop to avoid entering the construction zone. Defendant Frost was travelling immediately behind the victim and failed to stop and crashed into the rear of Plaintiff's car at an estimated speed of 45-miles per hour.

Initially the truck driver claimed he was cut off. Video footage of the accident was obtained by officers at the scene and it clearly showed Defendant was at fault. Officers detained the truck driver on suspicion of narcotic intoxication. Defendant tested positive for cocaine and other prescribed intoxicants. Defendant pleaded guilty to aggravated vehicular assault and spent 27 days in jail.

Plaintiff was treated at Metrohealth and required external fixation to her hips and back to repair fractures. Future injuries include impact on future pregnancies and pain in the hip and pelvic regions during normal activities such as sitting and walking.

Plaintiffs' Experts: Adam Hirschfeld, M.D. (Orthopedic Surgeon at Metro); Marianne Boeing, MSN, CLCP, CNLCP; Charles Fioritto (Accident Reconstruction); John Burke, Ph.D.; John Garofalo, M.D. (OBGyn); Victoria Whitehair, M.D. (Physical Rehabilitation)
Defendants' Experts: None

Jane Doe v. Anonymous OB/Gyn

Type of Case: Medical Negligence
Settlement: $1,200,000
Plaintiff's Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: March 7, 2022
Insurance Company: Confidential
Damages: Spread of Uterine Leiomyosarcoma, Multiple surgeries, Reduced life expectancy

Summary: 56- year old post menopausal woman presented to her OB/Gyn with complaints of new pelvic mass. Defendant recommended and performed robot assisted total laparoscopic hysterectomy for presumed uterine fibroid. Due to the size of the tumor, defendant manually morcellated the tumor in the pelvis. Pathology revealed the tumor to be leiomyosarcoma. Morcellation caused malignant cells to spread throughout the pelvis and abdomen resulting in multiple metastices.

Plaintiff's Expert: Farinaz Seifi, M.D. (OB/Gyn, Yale University)
Defendant's Experts: Ernst Lengyel, M.D. (OB/Gyn, University of Chicago); Joseph Sanfilippo, M.D. (University of Pittsburgh); Mihaela Druta, M.D. (Oncology, Moffitt Cancer Center)

Daniel McCloud v. Jeannine Payne

Type of Case: Disputed Liability MVA
Verdict: $100,000.00 in past non-economic damages
Plaintiff's Counsel: Alexander L. Pal and Joseph J. Darwal, Obral, Silk & Pal, LLC, (216) 529-9377
Defendant's Counsel: Terrence Kenneally
Court: Lorain County Common Pleas Case No. 19-CV-197715, Judge D. Chris Cook
Date Of Verdict: February 16, 2022
Insurance Company: State Farm Mutual Automobile Insurance Company
Damages: No medical bills were presented. Left Rotator

Cuff repair done almost 3 years Post MVA. No permanency opinion given by treating surgeon.

Summary: The Plaintiff was a 71-year old male making a left hand turn out of a private driveway of a business. The Defendant was negligent because she went left of a double yellow line to pass several cars who were waiting in backed-up traffic, so that she could access the left-turn lane up ahead. The argument was that she should not have entered the left turn lane early. Client got chiropractic treatment for about 5 months, then there was an almost 3 year gap in treatment before seeing an ortho for his shoulder. Defense denied liability and said give nothing. Only past non-economic damages were permitted to be requested by the Court.

Plaintiff's Expert: Daniel Zanotti, M.D. (would not give permanency on the shoulder despite having a shoulder surgery). The jury loved him because he is short and to the point. Total deposition was about half hour with cross.
Defendant's Experts: Duret Smith, M.D. (former Orthopedic Associates) (who was not called at the last second despite his video being completed); Jesse Templeton, M.D. (Orthopedic Associates)

Estate of John Doe v. ABC Construction Company

Type of Case: Construction/3rd Party Workplace Injury
Settlement: $7,350,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., #1200, Cleveland, Ohio 44114, (216) 694-5257
Defendant's Counsel: *
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: January 2022
Insurance Company: *
Damages: Wrongful Death and Survival Claims

Summary: Plaintiff, a construction worker, was electrocuted and killed when another contractor operated heavy machinery within an unsafe distance of an overhead primary power line causing an electrical arcing event of upwards of 13,200 volts. Plaintiff suffered briefly before being pronounced deceased. He was survived by multiple children.

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

Jane Doe v. ABC, LLC

Type of Case: Premises Liability
Settlement: $237,500.00
Plaintiff's Counsel: Dana M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5201
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas Court, Judge Dick Ambrose
Date Of Settlement: January 2022
Insurance Company: Westfield Insurance
Damages: Non-surgical rib fractures and pelvic fractures

Summary: Plaintiff was a tenant in a four-unit apartment building in Lakewood. While outside on her rear porch, she fell forward and came into contact with the porch railing which gave way and caused her to fall approximately nine feet to the ground below. Plaintiff suffered non-surgical fractured ribs, fractured pelvis, and abrasions. Defendant denied liability, denied damages and claimed that plaintiff was contributorily negligent.

Plaintiff's Experts: Richard L. Zimmerman, RA; Robert Corn, M.D.
Defendants' Expert: None

Jane Doe v. ABC School

Type of Case: Premises
Settlement: $2,200,000.00
Plaintiff's Counsel: David M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5206
Defendant's Counsel: Confidential
Court: *
Date Of Settlement: December 6, 2021
Insurance Company: Confidential
Damages: Multiple fractures with ongoing neck and back pain and PTSD

Summary: Our client was participating in a school organized and supervised outdoor exercise on school grounds. An unguarded defective condition on the property was not appreciated by the staff and as a result our client fell and sustained multiple injuries.

Plaintiff's Experts: Robert Corn, M.D.; Pam Hanigosky, RN (Life Care Plans); David Boyd, Ph.D. (Economist)
Defendant's Expert: *

Jane Doe v. Discount Drug Mart, Inc., et al.

Type of Case: Tractor-Trailer Rear Ends Car
Settlement: $750,000.00
Plaintiff's Counsel: Amy Papuga, Esq. and Andrew R. Young, Esq. of The Law Firm for Truck Safety LLP, (216) 961-3932 and Joseph G. Paulozzi, Esq., (216) 812-2100
Defendant's Counsel: Andrew Isakoff of Marshall Dennehey
Court: Stark County Common Pleas Case No. 2021CV00291, Judge Natalie Haupt

Date Of Settlement: November 2021
Insurance Company: CNA Insurance
Damages: Neck Surgery

Summary: Plaintiff slowed for traffic when she was rear-ended by a tractor trailer driven by a Discount Drug Mart employee. Plaintiff immediately had pain in her neck, back and shoulder. Plaintiff underwent a neck surgery within a few months after conservative care failed. The case settled at mediation.

Plaintiff's Experts: Nicholas Godby, M.D. FAAPMR (Life Care Plan); and Steve Belyus (Vehicle Download)
Defendants' Expert: Withheld

Estate of John Doe v. ABC Hospital

Type of Case: Medical Practice
Settlement: $750,000.00
Plaintiff's Counsel: Dana M. Paris and David M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5201 and (216) 694-5206
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: October 15, 2021
Insurance Company: Confidential
Damages: Wrongful death – unmarried 27-year old man with no dependents

Summary: Our client had been suffering from a fever, headache, and sinus pain for a few days. He presented to the Emergency Department with complaints of a severe headache, neck, and sinus pain. He did not have a temperature, altered mental state, nor did he have nuchal rigidity. His labs were unremarkable except for some elevation in his neutrofils. A head CT scan was consistent with sinus infection and he was discharged home. 36 hours later, he was brought back by EMS to the Emergency Department with symptoms of late stage bacterial meningitis, sepsis, hypotension, and seizures which resulted in brain death.

Defendant argued that he was correctly diagnosed at the first Emergency Department visit with sinus infection; since signs and symptoms for bacterial meningitis were not present, the standard of care did not require a lumbar puncture; and even if a lumbar puncture had been performed, it would not have been abnormal at that time.

Plaintiff's Experts: Michael Falgiani, M.D. (Emergency Medicine); Bruce Polsky, M.D. (Infectious Disease)
Defendant's Expert: Daniel Martins, M.D. (Emergency Medicine)

Jane Doe v. Geico

Type of Case: Motor Vehicle Accident
Settlement: $300,000.00
Plaintiff's Counsel: David M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5206
Defendant's Counsel: N/A
Court: N/A
Date Of Settlement: October 14, 2021
Insurance Company: Geico
Damages: Fractured index finger and laceration to the webbing between her dominant index finger and thumb.

Summary: Our 69-year old client was visiting Belmont County, Ohio from Arlington, Virginia when her car was struck by a left turning pickup who failed to yield.

Plaintiff's Expert: Haroon Hussain, M.D.
Defendant's Expert: *

Jane Doe v. Maines Paper and Food Service, Inc., et al.

Type of Case: Semi Tractor Trailer v. Car
Settlement: $575,000.00
Plaintiff's Counsel: Andy Young, DJ Young, III, and Amy Papuga of The Law Firm for Truck Safety
Defendant's Counsel: Andrew Isakoff of Marshall Dennehey
Court: Summit County Common Pleas Case No. CV-2021-05-1471, Judge Christine Croce
Date Of Settlement: October 2021
Insurance Company: Sentry Insurance Company
Damages: Closed fracture of left radius, ulna and open fracture of left humerus

Summary: Plaintiff was left rear passenger in a vehicle pulled off the shoulder of a highway. A tractor-trailer owned and operated by Maines Paper and Food Service, Inc. struck the left rear of the vehicle where Plaintiff was sitting. Plaintiff underwent surgeries to her left arm as a result of the crash. Case settled shortly after Complaint was filed.

Plaintiff's Experts: Nicholas Godby, M.D., FAAPMR (Life Care Planner); and Jim Crawford (Crash Reconstruction)
Defendants' Expert: Charles Veppert of Valley Technical Services (Crash Reconstruction)

Dean and Curry, et al. v. Pan-O-Gold Baking Company, et al.

Type of Case: Truck Crash (Wrongful Death / Injury)
Verdict: (Liability / Bifurcated) The Jury returned a comparative fault verdict as follows: 36% on truck driver Michael Soyring; 35% on truck company Pan-O-Gold Baking Company; 29% on Plaintiff Curry

Settlement: (Damages) $8,500,000.00
Plaintiff's Counsel: Andrew R. Young, Esq., DJ Young, III, Esq., and Amy Papuga, Esq. of The Law Firm for Truck Safety LLP, (216) 961-3932; Nathan Severson, Esq., Severson Wogsland & Liebl of Fargo, North Dakota (701) 297-2890; and Pete Kestner, Esq., Minneapolis, Minnesota (651) 224-3833
Defendant's Counsel: Corey J. Quinton, Fisher, Bren & Sheridan, LLP, Fargo, ND; John Lock, Lock Gordon Law Group, Malvern, PA; and James Gordon, Lock Gordon Law Group, Columbus, Ohio
Court: North Dakota, Cass County Case No. 09-2019-CV-03313
Date Of Verdict: July 28, 2021
Date Of Settlement: July 29, 2021
Insurance Company: Zurich American Insurance Company and XL Specialty Insurance Company
Damages: Wrongful deaths of two minors, TBI of a minor, multiple orthopedic injuries of driver

Summary: On March 25, 2018, Ms. Curry was driving on I29 near Grand Forks, North Dakota with her three children, C.D., M.D. and A.D., to visit her mother in Minnesota when she encountered a sudden snowstorm. Ms. Curry lost control of her vehicle and spun out for at least six seconds before coming to a controlled stop in the roadway. Defendant Michael Soyring, driving for Pan-O-Gold Baking Company of Fargo, North Dakota, was traveling behind Ms. Curry's vehicle, observed her lose control and failed to attempt to stop until just before he struck her vehicle resting sideways in the roadway. Two of the children, C.D. and M.D., were killed; A.D. and Ms. Curry were seriously injured.

Trooper dashcam recordings and plaintiffs' vehicle crash data retrieval (CDR) were key to the liability of the case. There were 25 depositions including witnesses, Troopers, and company personnel. The court bifurcated the liability and damages for trial. The only offer received was $1,000,000 on the first day of trial. The liability trial took six days. After about six hours of deliberation, the jury returned a liability verdict of 71% fault against defendants (36% against truck driver Soyring and 35% against his employer, Pan-O-Gold Baking Company) and 29% fault on plaintiff Ms. Curry. The case settled for $8,500,000.00 prior to the start of the damages phase of trial.

Plaintiffs' Experts: Jeff Kidd of Collision Specialists (Crash Reconstruction); Catherine Doty, M.D. (PM&R and Life Care Plan for A.D.); and Brooks Rugemer of Robson Forensics (Trucking Industry Expert)
Defendants' Experts: Roger Bergmeier (Crash Reconstruction); Daniel Melcher (Human Factors); and Annette Sandberg (Trucking Industry Expert)

Estate of Audria Truelove v. Planes Moving and Storage, Inc., et al.

Type of Case: Car strikes back of Tractor-Trailer
Settlement: $1,200,000.00
Plaintiff's Counsel: Andrew Young, Esq. and Michael Leizerman, Esq., The Law Firm for Truck Safety LLP, (216) 961-3932
Defendant's Counsel: Patrick Foppe of Lashley & Baer, P.C.
Court: United States District Court, Southern District of Illinois, Benton Division, Case No. 3:20-CV-791-MAB
Date Of Settlement: May 2021
Insurance Company: Vanliner Insurance Company
Damages: Wrongful Death

Summary: Decedent rear-ended Defendants' slow moving tractor trailer during daylight hours. Decedent was also found to be actively on her phone at the time she hit the back of the semi-truck. Defendants claimed a sudden medical emergency for shortness of breath/coughing fit because of prolonged flu-like symptoms that extended for months prior to the crash. The truck driver did not use hazard lights, was not actively braking, and did not pull off to the side of the road. The case settled at mediation.

Plaintiff's Experts: Lew Grill (Trucking Industry Expert); Jessica Ellis (Human Factors)
Defendants' Expert: Thomas M. Hyers, M.D. (Sudden Medical Emergency) ■

Application for Membership

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below. My application must be seconded by a CATA member and approved by the President. I agree to abide by CATA's Constitution and By-Laws and participate fully. I certify that no more than 25% of my practice, nor my firm's practice, is devoted to personal injury litigation defense. I also certify I possess the following qualifications for membership prescribed by the Constitution:

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

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

3. Excellent character and integrity of the highest order.

Name: _____ Email: _____

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Applicant Signature: _____ Date: _____

Invited By: (print) _____ (sign) _____

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

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

Please return completed Application with membership dues to:

Cleveland Academy of Trial Attorneys
c/o Scott M. Kuboff, Esq.
Ibold & O'Brien
401 South Street, Chardon, OH 44024
(440) 285-3511; Fax (440) 285-3363
Email: scott@iboldobrien.com

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