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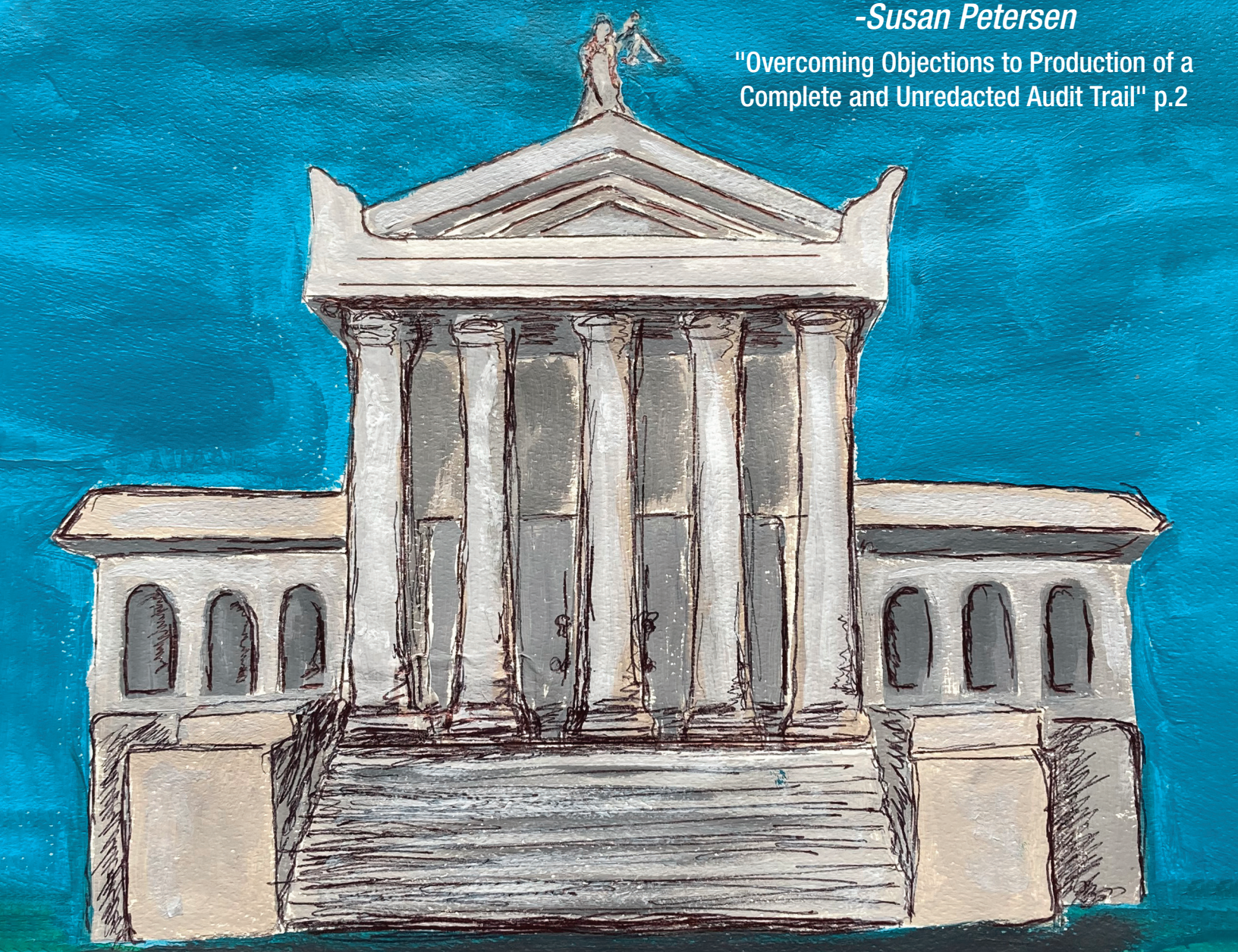
CLEVELAND ACADEMY OF TRIAL ATTORNEYS
Spring 2023
News

"Know the Law. Know Your Client's Rights. Work Hard to Protect Both."

-Susan Petersen

"Overcoming Objections to Production of a Complete and Unredacted Audit Trail" p.2



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Cover design by Mary Szabados (drawing) and Joanna Eustache (design execution).

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President's Message

by Meghan P. Connolly

Sing it with me now, "I love Cleveland in the springtime!" Finally, the greyness is lifting, which means another year of CATA programming is winding down. I look forward to next week's Litigation Institute, and our Annual Dinner is right around the corner. I am overwhelmed with gratitude this time of year, not only for that big bright thing in the sky but for the great accomplishments of our organization over the last year.

Thank you to my fellow CATA officers, Dana Paris, Scott Kuboff, and Dustin Herman. The three of you have stepped up this year to bring great value to our members. We had excellent luncheon programming courtesy of Scott's hard work. Dana brought the Ski-LE tradition back to life with a well-attended 15th anniversary event in Utah this past February. Dustin has planned a promising Litigation Institute for April, bringing in some fantastic speakers to workshop our Voir Dire skills. Dustin has graciously collected most of your dues for the next cycle, and the organization remains in good financial health.

I am grateful that Past President Ladi Williams chaired our first Diversity and Inclusion committee, which acted as a bridge to new relationships for the organization. CSU Law WLSA and BLSA networked with CATA at our happy hour event in March, and we were thrilled to sponsor and attend CSU Law BLSA's annual awards ceremony this past March. There is a bright future ahead of CATA for more diverse networking and membership. Thank you for your leadership, Ladi, and for the contributions of the entire D/I committee.

My sincere thanks go to Past President Ellen Hobbs Hirshman for continuing to serve CATA as chair of the Community Outreach committee, furthering our partnership with End Distracted Driving and with the local law schools. This past March, CATA presented the END DD program to Rocky River High School, with the help of volunteer CATA member Aaron Berg. CATA also held happy hour events with both Case (October) and CSU Law (March). Ellen, thanks for returning year after year to do this important work.

Thank you to Past President Kathy St. John and her team, including Lillian Rudiy at NPHM. As you all know Kathy chairs the CATA News Committee and takes on the monumental task of editing the CATA News magazine twice a year, in addition to authoring articles herself.

I want to thank two board members, Christine LaSalvia and James Zink, who represented CATA at a tabling event at CSU Law in November, connecting CATA with law students who are interested in working at plaintiff's firms.

Thank you Susan Petersen, for presenting to our members at the Ski-LE and again at the upcoming Litigation Institute, and for your contributions at the board meetings this year. It continues to be refreshing to have you on the Board. Your willingness to teach others is a great asset of our organization.

Thank you to the entire CATA Board whose collective input and participation have shaped a truly successful year. I genuinely look forward to our meetings because you are all smart, passionate, and effective people: All of those mentioned elsewhere, plus Ashlie Sletvold, Will Eadie, Todd Gurney, Sarah Gelsimino, Marilena DiSilvio, Colin Ray, Chris Patno.

Thank you to my team at LSF, who jump in to do CATA related things all the time. Specifically, Pam Dayner, who keeps us organized with registration, zoom links and calendar entries. Libby Brandt who professionalizes many of our marketing materials. Shannon McFarland who assists at many of the CLE luncheons. Kyle, Scott, and Ellen who serve with me on the board.

Thank you to the Cuyahoga County Common Pleas Bench, and especially Judge Shirley Strickland Saffold and Judge Dave Matia for participating in CATA's Pointers from the Bench this year. You were a pleasure for CATA to interview, and we are grateful you carved out the time in your demanding schedules to speak with us. Judge Matia also served as Faculty at the Ski-LE, and attended the Case law Student event—Thank you, Judge!

Thank you to the staff attorneys who attended our CLE programming this year, and to Judge Sheehan and his staff attorney, Jayne Jakubaitis, for seamlessly facilitating our communications with the court. We hope that you will come to more events next year and bring a friend from the 11th floor: David Oakley, Donna Thomas, Kelly Mason, Marja Mergl, Audrey Quinn, In Son Loving, Brandilyn Cook, Ariel Lipsky, Clare Gravens, Jayne Jakubaitis, Ethan Gee, and Paul Lubonovic.

Big thanks go out to our sponsors of CATA 2022-2023: CW Settlements, Preferred Capital Funding, Tackla Court Reporting, Vineyard Mediation, NFP Structured Settlements, Video Discovery, and Copy King. Your support of the organization allows us to offer our members exposure to sought-after speakers, quality programming, and this News Magazine. You allow us to keep our membership and registration costs low so that our members receive a ton of value at a great rate. We appreciate you and hope to continue our relationships into next year.

I owe thanks to every member of CATA for your membership and participation. I may be biased but I would put the legal minds of CATA up against any group of lawyers in the country.

Even though they don't read the CATA News (three of them don't know how to read at all yet), I would be remiss not to thank my husband Kyle, my boys Cameron, Luke, Hank, and Jack, their fulltime caregiver Lexi, my parents and in-laws, and our neighbors and friends who help us when we need it. It truly takes a village, and I thank God for mine.

May the new season fill you with gratitude, recharge your spirit, and invigorate your practice. I look forward to seeing you at the Annual Dinner in June! ■

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Overcoming Objections to Production of a Complete and Unredacted Audit Trail

by Susan E. Petersen

At this point, you have read about "A Patient's Right to Access and Inspect their Electronic medical records."[1] You know that amongst the "10 Things You Must Request in Every Medical Malpractice Case" is the audit trail/log.[2] Yet, in response to these discovery requests in your case, opposing counsel gives you nothing but objections. Now what?

This article will arm you with practical advice and lessons learned to overcome the frequent objections raised by hospitals and their attorneys to production of your client's electronic medical record ("EMR") and audit trails/logs.

1. Know The Federal Laws Regarding EMR Audit Trails:

The process of defeating the typical objections to production of an audit trail/log begins with knowledge of the statutory requirements of a hospital's EMR and corresponding audit trails/logs. These laws are your first line of defense. You must educate opposing counsel and your trial court that a patient's right to inspect and obtain copies of their EMR and audit trail/logs is protected by federal law. Arm yourself with an understanding of the list of federal regulations established by the US government to protect the privacy and security of patients' electronic health information. Federal laws and agencies that protect your right of access include the Health Information Technology for Economic and Clinical Health (HITECH) Act, the 21st Century Cures Act, the Office of the National Coordinator for Health Information Technology (ONC), the Health Insurance Portability and Accountability Act (HIPAA), and the federally adopted standard, ASTM E2147-18.

HITECH ACT

As part of a national effort relative to EMRs, Congress passed the Health Information Technology for Economic and Clinical Health (HITECH) Act in 2009. The goal of the HITECH Act was aimed at promoting the widespread adoption of EMRs in the US healthcare system. The HITECH Act also established regulations for privacy and security of electronic health information, including the requirement for healthcare providers to comply with the Health Insurance Portability and Accountability Act (HIPAA).[3]

HIPAA

HIPAA, enacted in 1996, sets national standards for the privacy and security of patients' health information. The HITECH Act amended HIPAA to strengthen its protections and to establish breach notification requirements for covered entities and their business associates.[4] The HIPAA Security Rule requires covered entities to implement procedures to regularly review and audit access to EMRs. Covered entities are defined as healthcare providers, health plans, or healthcare clearinghouses that transmit any health information in electronic form. This includes doctors' offices, hospitals, clinics, health insurance companies, and healthcare billing companies.[5]

Under 45 CFR §164.530, a section of the HIPAA Privacy Rule, covered entities and business associates are required to implement policies and procedures to document and track certain actions related to EMRs. This includes actions such as who accessed the information, when it was accessed, the user ID of the person accessing, and the actions performed on that information, such as viewing, modifying, or deleting.[6] Covered entities must maintain the audit trail for at least six years from the date of creation.[7]

ONC

The HITECH Act also established the Office of the National Coordinator for Health Information Technology (ONC) as the primary agency responsible for promoting the adoption and meaningful use of health information technology in the US healthcare system.[8] Under the ONC's regulations, covered entities are required to provide patients with access to their health information, including EMRs and audit trails/logs, in a timely manner and in a format that is convenient and accessible to the patient. Since its establishment, the ONC has continued to play a critical role in shaping the direction of health IT in the US. This has included the development of standards and policies for EMRs, the promotion of patient access to health information, and efforts to address privacy and security concerns related to the use of health IT.

CURES ACT

The 21st Century Cures Act, enacted in 2016, built upon the HITECH Act's provisions for patient access to health information by expanding patients' rights to access their health information electronically.[9] As part of the Cures Act, Congress mandated audit controls of a patient's EMR to "record and examine activity in information systems that contain or use electronic protected health information . . in order to protect the integrity of such information." This included the use of audit trails and edit histories as a necessary security measure to safeguard and protect electronic health information from improper alteration or destruction. [10, 11]

ASTM E2147-18

In 2018, the US government codified standards for recording and maintaining EMR audit trails/logs via 45 CFR §170.299. The purpose of this regulation was to establish a standardized way for healthcare providers and organizations to maintain audit logs and track disclosures of patients' health information, as required by the HIPAA Privacy Rule. Specifically, this regulation codified ASTM E2147-18, developed by the American Society for Testing and Materials (ASTM), which is the "Standard Specification for Audit and Disclosure Logs for Use in Health Information Systems."

The purpose of ASTM E2147-18 is expressly defined within the standard:

> 1.2 The first purpose of this specification is to define the nature, purpose, and function of system access audit logs and their use in health information systems as a technical and procedural tool to help provide privacy and security oversight and produce a self-authenticating record that would, when maintained together with its audit logs, speak to and confirm its own integrity and accuracy of the medical and other data within the record. Moreover, in concert with organizational confidentiality and security policies and procedures, permanent audit logs can clearly identify all system application users who accessed and acted on patient identifiable information or both, and identify the location of the user, identify patient information accessed, and maintain a permanent record of actions taken by the user. . . Full transparency of modifications or deletions or both is mandatory. For example, record changes shall not obscure previously recorded information. . . **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.
>
> 1.4 The second purpose of this specification is to identify principles for establishing a permanent record of disclosure of health information to external users and the data to be recorded in maintaining it. Security management of health information requires a comprehensive framework that incorporates both mandates and criteria for disclosing patient health information found in federal and state laws and rules and regulations and ethical statements of professional conduct. **Accountability for such a framework shall be established through a set of standard principles that are applicable to all healthcare settings and health information systems.**[12]

Significantly, ASTM E2147-18 4.3 explains why audit trails/logs are not privileged documents, stating:

> A patient has a right to know who has accessed their patient information and what occurred during such access. Access by any means (viewing or any other action) regarding the patient record and/or audit log or the data

contained therein by attorneys, risk management, or similar individuals or entities are not privileged actions and must also be fully transparent and disclosed.

By standardizing the way in which audit and disclosure logs are maintained and tracked, the federal government sought to promote greater transparency and accountability in the use of patients' health information, including the prevention of unauthorized access or disclosure of sensitive health information.

2. Practice Advice/ Lessons Learned on Overcoming Objections:

Defending against objections to the discovery of your client's audit trails/ logs will depend on the specific circumstances of the case and the available evidence. However, here are some approaches to overcome some of the objections we typically see:

"We do not have an Audit Trail. It does not exist."

If the defendant is claiming that it does not have an audit trail, you need to challenge this assertion by requesting further information or evidence. For example, you can:

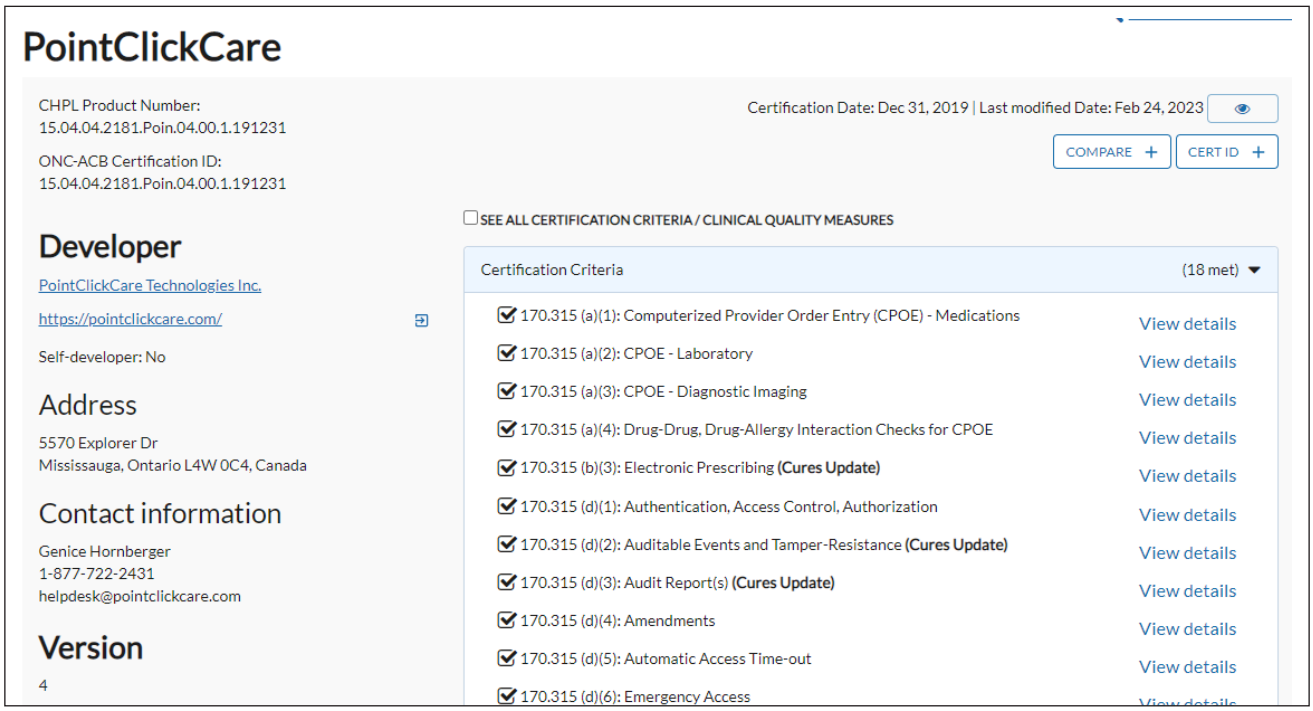
- Request that the defendant provide documentation or testimony from their EMR vendor or IT department to support their claim that no audit trail exists.
- Request the name of the defendant's EMR Software Vendor, product, and version and go to the ONC website.

"We cannot provide what we do not have" was the objection encountered in a recent wrongful death action. This was overcome via evidence independently obtained through the ONC website at https://chpl.healthit.gov.

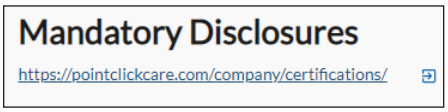
One of the ONC's main functions is to certify EMR software to ensure that it meets certain standards for functionality, security, and interoperability.[13] Specifically, EMR software vendors must undergo a certification process to receive ONC certification. The certification criteria cover areas such as privacy and security, clinical quality measures, and features to include audit reports.[14] Once an EMR software vendor receives ONC certification, the software product is listed on the Certified Health IT Product List (CHPL), which is publicly accessible through the ONC website.

The ONC website provides a searchable database of all certified EMR products, including the vendor's name, product name, certification date, and version number. In addition to the basic information about the certified EMR product, the CHPL also includes a set of mandatory disclosures that vendors must provide to include audit reports.

On the ONC website, just type the defendant's EMR software and hit search. When the EMR software product appears, a click will take you to a page of disclosures which provide detailed information about the product's capabilities and limitations. One of the items listed is whether the software meets criteria §170.315(d)(3) Audit Report(s)(Cures Update).[15] If the box is checked as evidenced by the following example, you have independent evidence that an audit trail exists and is producible from your defendant:



On the product webpage, there will also be a link to the company's mandatory disclosures as seen in the following example:



It will be impossible for a defendant to credibly maintain that an audit trail does not exist once you obtain the EMR software vendor disclosure to the government that it does.

"Audits are managed by a third party, we can't access them."

If the defendant claims that it cannot provide the audit trail because it is managed by a third party, you may need to take steps to secure evidence to compel the audit trail. For example, you could:

- Request a subpoena or court order compelling the third party to produce the audit trail.
- Argue that the defendant has a duty to ensure that third-party vendors are complying with industry standards and regulations for maintaining electronic medical records.
- Request that the Defendant produce a copy of its service agreement with the third-party vendor.

In the recent case we had, this was another objection to overcome. The defendant facility's software vendor was headquartered in Canada and not easily subject to subpoena. We got an Order to compel a copy of the EMR service agreement with the third-party vendor to establish what obligations the defendant and vendor had relative to the audit trail.[16]

"Producing the Audit Trails/Logs is unduly burdensome."

When overcoming an objection that producing an audit trail is unduly burdensome, there are a few potential strategies that can be employed:

- Challenge the claim of undue burden: The defendant has the burden of proving that producing the audit trail would be unduly burdensome, which requires showing that the cost or effort of producing the audit trail outweighs its potential value as evidence. Typically, an IT department can easily produce an audit trail/log into an excel document with a few key strokes.
- Seek a court order: If the defendant continues to object to the production of the audit trail, it may be necessary to seek a court order compelling its disclosure. This may require a motion to compel discovery, and could involve a hearing or other court proceedings.

"Audit Trails/Logs are irrelevant."

When the defendant objects that an EMR is not relevant, there are a few potential strategies to overcoming such an objection:

- Establish the relevance of the audit trail: You may need to demonstrate how it relates to the issues in the case. For example, you could argue that the audit trail is necessary to establish the authenticity of the electronic medical record, to show that certain medical decisions were made or not made, or to demonstrate the presence or absence of tampering.
- Challenge the objection on factual grounds: You may need to show that it contains information that is critical to the issues in dispute.

"Audit Trails are not kept in the ordinary course of business."

If the defendant argues that audit trails are not kept in the ordinary course of business, you need to disprove this proposition. For example, you could:

- Take the deposition of the IT Manager for the facility about its EMR record keeping and audit trails/logs.
- Present testimony from experts in the field of electronic medical records who can attest to the importance of maintaining audit trails and how they are typically managed.

In our recent case, the defense pivoted to this objection after the Court compelled the defendant facility to tender its audit trails "to the extent that Defendants maintain such documents in the ordinary course of business." In response to the Judgment Entry, the Defendants produced nothing. Following a hearing on Plaintiff's Motion to Show Cause, the trial court issued the following Sanctions Order:

> "The Court is not persuaded by Defendants' interpretation that the Court's order does not apply to them because they do not maintain audit trail information in the ordinary course of business. The evidence showed that Defendants maintained facility level audit trail information electronically and that it could provide the information in printed form to Plaintiff's counsel by clicking a few buttons. . . . The Court finds Defendants . . . in contempt and imposes the following: $1,000 for each day after June 28, 2021 for the first five days and $5,000 a day thereafter for Defendants failure to provide audit trail information as requested in Plaintiff's Request for Production

Nos. 46, 47, and 57. Defendant may purge this Order at any time."[17]

As set forth on the docket in subsequent briefing, the Defendant facility thereafter tendered 1,145 pages of its audit trail/logs on June 28, 2021.[18]

"Audit Report Data is privileged/ work product."

When the defense objects to production of complete audit trail/logs based upon a privilege claim, you must fight back and educate your trial court. Audit trails and logs are not privileged documents per the federally adopted standard for Audit and Disclosure Logs for Use in Health Information Systems. Section 4.3 of ASTM E2147-18, "Significance and Use" expressly states:

> Audit reports designed for system access provide a precise capability for healthcare providers, organizations, patients, patient representatives, and advocates to see who has accessed and/or manipulated patient information. Because of the significant risk of medical information manipulation in computing environments by authorized and unauthorized users, the audit report is an important management tool to monitor access and any such manipulation retrospectively. In addition, the access and disclosure logs become powerful support documents for disciplinary and legal actions. Moreover, audit reports are essential components to comprehensive security programs in healthcare and vital for the privacy rights of the individual. **A patient has a right to know who has accessed their patient information and what occurred during such access. Access by any means (viewing or any other action) regarding the patient record and/or audit log or the data contained therein by attorneys, risk management, or similar individuals or entities are not privileged actions and must also be fully transparent and disclosed.**[19]

Here are the arguments to overcome any "privilege" objection:

- Audit trail entries are not privileged per 45 CFR §170.299 and ASTM E2147-18. Under Ohio law, the attorney-client privilege and work-product doctrine protect only certain types of communications or materials, and only if certain requirements are met. In Ohio, the attorney-client privilege protects communications made in confidence between an attorney and a client for the purpose of obtaining legal advice or assistance. The work-product doctrine protects materials prepared in anticipation of litigation. As stated in ASTM E2147-18 4.3, neither of these privileges are applicable.

- Consider a protective order: If the defendant expresses confidentiality concerns, you may be able to reach a compromise by agreeing to limit the scope of the audit trail production or by seeking a protective order.

"Audit trail data after the date of the patient's discharge or death is not discoverable."

There is a good chance that if you get an audit trail/log, the defendants will have limited the data to a premature end date. This is despite the fact that EMRs can be accessed, changed, and/ or modified after a patient is discharged or dies. The terminology section of ASTM E2147-18 is extremely helpful to explaining why a partial production is unacceptable and contrary to law:

3.1.2 *access report*—record that is a subset of the "clinical audit report" documenting the following information about each access of patient medical information: user identification (the person accessing the record); the date and time of the access (documenting both start and exit times spent on each record accessed); total duration of access; specific terminal, hardware, or location from which the access occurred; type of action (for example, copy, print, addition, modification, and deletion to the record, and when any access has been made, even when the user makes no entry or change); specific patient data accessed.

3.1.2.1 *Discussion*—The above access information is an indispensable part of the medical record because it is clinically relevant and does not appear in certain iterations of the record. All accesses shall be recorded, and the entire access record shall be provided when an access record is requested.

3.1.4.1 *Discussion* — Authentication of the record is possible only when the associated audit data relating to the record is made an indispensable part of the medical record.

3.1.17 *integrity*—as it relates to health information, it means that the information/record is accurate, complete, and immutable in that all actions taken with respect to the record are transparent.

3.1.19.1 *Discussion*—Audit data is integral to self-authentication and trustworthiness of patient information including the medical record and billing record.

4.6 This specification also

> responds to the need for a standard addressing privacy and confidentiality as noted in Public Law 104–191(2), or the Health Insurance Portability and Accountability Act of 1996, and the need for a self-authenticating record that will verify accuracy and integrity.

By reviewing the audit trail up to the date of production of the EMR, a plaintiff can ensure that their medical records accurately reflect their medical history and the care that they received. If the plaintiff suspects that their records were altered or modified after the date of their discharge, the audit trail can help them identify any such changes and potentially provide evidence to support their claims.

3. Be wary once you receive the Audit Trail:

Although federal law prohibits editing the audit trail in the EMR system, the information can be altered once it is exported to a spreadsheet. More importantly, key items might be deleted or changed or eliminated from the production of the audit trial in discovery. Insist on the unedited, original electronic format of the document (e.g., "EXCEL"), and have a forensic expert examine it to ensure no one tampered with it. Do not accept other formats, such as a PDF document. Be sure to obtain the Search Header as part of its production. The Header will provide you with the search parameters in producing the audit trail which provide a window as to certain data being excluded.

Question audit records that lack evidence of any EMR access from the lab, radiology, pharmacy, or other departments within a hospital. Many of the EMR platforms are "closed systems," which means they cannot be integrated with other systems in the hospital. The documentation systems other departments use may not show up on an audit inquiry of the main clinical documentation system. Each database that is not directly connected to the main clinical charting system must be queried as part of a records search and will have its own audit trail/log which has to be produced.

Audit logs often include additional elements. ASTM Standard E2147-01 suggests that audit logs also should include data identifying the access device—the terminal, work station, or device from which the user obtained access—and the reason for access. Request a log of the terminal, work station, and device locations as part of your discovery requests to know where the access occurred.

4. If the Defendants' EMR and/or Audit Trails/Logs Production Appears Altered or Incomplete, Consider Asserting Your Client's Right to Inspect the EMR:

As part of the HITECH Act, the US Department of Health and Human Services requires that "an individual has a right of access to inspect and obtain a copy of Protected Health Information about the individual..." 45 CFR §164.524(a)(l). In a section entitled "Empowering Patients and Improving Patient Access to Their Electronic Health Information, Section 4006 of the Cures Act amends the HITECH Act to further require that patients have direct access to their protected health Information, providing:

> [I]f the individual makes a request to a business associate for access to, or a copy of, protected health information about the individual, or if an individual makes a request to a business associate to grant such access to, or transmit such copy directly to, a person or entity designated by the individual, a business associate may provide the individual with such access or copy, which may be in an electronic form, or grant or transmit such access or copy to such person or entity designated by the individual.[20]

Given the recent federal mandates, the dearth of case law on requests for inspections is not surprising. Where defendant-medical providers have nonetheless ignored these clear legislative mandates, Courts have ordered them to allow patients to conduct inspections required pursuant to the Civil Rules. *Borum v. Smith MD et al.*, Dist. Court, WD Kentucky (July 14, 2017); *Picco v. Glenn*, D. Colo. No. 12-CV-02858-RM-MJW, 2015 WL 2128486 (May 5, 2015); *Kirt v. Bozeman Deaconess Health Services*, Mont. 18th Dist. Ct. No. DV-10-209CX (Aug. 8, 2014).

In our recent case referenced in this article, we had enough doubt about the authenticity of the decedent's EMR that we pressed for a deeper dive. The trial court granted our motion to compel a virtual inspection of the EMR to be conducted and recorded via "Zoom" with our EMR expert using a court approved protective protocol and/or privacy agreement.[21] The defendants objected and appealed all the way to the Ohio Supreme Court, claiming an inspection would jeopardize confidential and privileged material.[22]

In the Eighth District Court of Appeals, there are two Judgment Entries which will be helpful to your cause should the need for a virtual inspection arise:

> Motion by appellee to dismiss appeal for lack of a final appealable order is granted. Discovery orders not involving the discovery of confidential or privileged information are not final appealable orders under R.C.2505.02(B)(4). *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio 4353. The trial

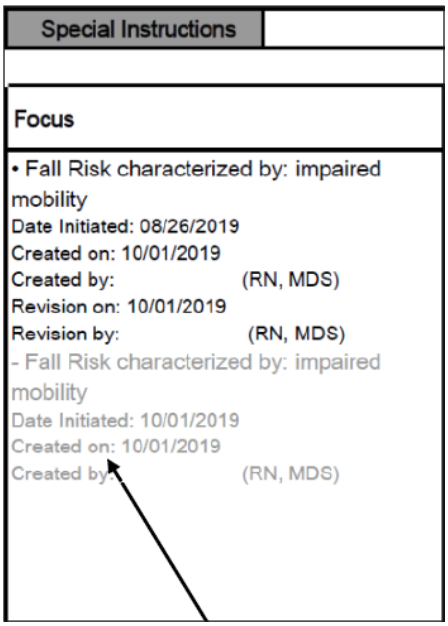
court's order allowing the estate of the decedent to view the decedent's electronic medical records maintained by the appellants does not involve privileged or confidential information. Appellants are concerned that other privileged or confidential documents would be viewable. However, the court approved a protected protocol and privacy agreement, which provides in part "the parties presently agree that the inspection shall be confined to the resident's clinical records only and shall not include any facility level reports or other patient data." Additionally, under the approved protocol, the appellants would control the remote viewing of the electronic documents.[23]

* * *

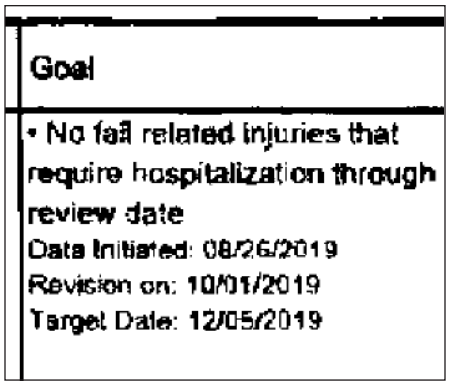
Application by appellants for reconsideration is denied. By the terms of the protective order, discovery is limited to the appellee-decedent's electronic clinical records. Pursuant to the discovery protocol, the appellants are given control over what is actually viewed by the appellee during the remote viewing of the electronic medical records. Even if the appellants' emails to the trial court's staff attorney properly raised the concern that the remote viewing may result in the appellee viewing documents that are outside the scope of discovery, the trial court's order restricts the viewing to the decedent's clinical records and does not allow for the release of privileged documents. *Smith v. Chen*,142 OhioSt.3d 411, 2015-0hio-1480.[24]

What occurred thereafter epitomizes why the battle to preserve the federally protected right to a complete EMR and audit trails/logs is so critical to truth and justice. The following comes directly from Plaintiff's Trial Brief on the publicly available docket:

> On August 17, 2021 – just over a month before trial – the Defendants lost their appeal to the Ohio Supreme Court to avoid this Court's order of a virtual inspection of Plaintiff's decedent's electronic medical record. Three days later, on August 20th, they turned over a complete copy of [the patient's] Fall Risk Care Plan, knowing that Plaintiff would soon discover it via the court ordered virtual inspection. As it turns out, [the patient's] Fall Risk Care Plan was NOT initiated on 8/28 afterall as the medical records previously led Plaintiff to believe. In fact, it was not initiated on any date that [X] was a patient of [the attending physician]. It was faked. The Defendants made it appear as if it existed during her residency by excluding the "Created On" date from the print job. The August 20th production finally included the data Plaintiff had been requesting for months and months as seen in the following snippet:



> The arrows point to the finally disclosed time stamped "Created On" date which revealed that the Defendants created this Fall Risk Care Plan AFTER [X]'s discharge and death. The Fall Risk care plan was not just below standard, it was backdated to make it look as though it was in place during her residency! . . . Not only did it fail to include all the needed interventions to keep her safe (e.g., bedside tables with wheels locked), it failed to include ANY interventions <u>because it didn't exist.</u>
>
> . . . The Fall Risk Care Plan provided pre-suit and in discovery in this case would lead anyone to believe that it existed during her residency. The following is a snippet of that version of the medical record provided which conveniently excluded from its print job the "Created Date:"



25

Conclusion

When it comes to these frequent objections to production of a complete and unredacted EMR and audit trail, it is imperative that legal professionals prioritize transparency and accountability. This discovery can provide crucial insights and evidence to determining the facts of a case. By overcoming objections and following the federal statutes, codes, and regulations for EMRs and Audit Trails/Logs, we can uphold the principles of integrity and truth. Know the law. Know your client's rights. Work hard to protect both. ■

End Notes

1. Mellino, Calder & Lewallen, Meghan, "A Patient's Right to Access & Inspect Their Electronic Medical Record," CATA NEWS, Spring 2022, pgs. 8 – 11.
2. Herman, Dustin, "10 Things You Must Request in Every Medical Malpractice Case," CATA NEWS, Spring 2022, pg. 12 -15.
3. Health Information Technology for Economic and Clinical Health Act (HITECH Act), Pub. L. No. 111-5, 123 Stat. 115 (2009). Section 13401 of the HITECH Act amends the privacy and security provisions of HIPAA to extend their application to business associates of covered entities and to increase penalties for noncompliance.
4. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18, 26, 29, 42, and 50 U.S.C.).
5. 45 CFR §160.103 and is available at the following link: https://www.ecfr.gov/cgi-bin/text-idx?SID=605210909db327f7bb8b0d13112f95a1&mc=true&node=pt45.1.160&rgn=div5#se45.1.160_1103.
6. HIPAA Security Rule, 45 CFR §164.312(b) and is available at the following link: https://www.ecfr.gov/cgi-bin/text-idx?SID=e53724509c83f7c57d50d14c7ec90faa&mc=true&node=se45.1.164_1312&rgn=div8.
7. 45 CFR §164.316(b)(1) - Policies and procedures and documentation requirements and is available online at the following link: https://www.govinfo.gov/content/pkg/CFR-2013-title45-vol1/xml/CFR-2013-title45-vol1-sec164-316.xml.
8. Health Information Technology for Economic and Clinical Health Act (HITECH Act), Pub. L. No. 111-5, 123 Stat. 115 (2009).
9. 45 CFR §164.312(b).
10. 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1033 (2016).
11. 45 CFR §164.312(c).
12. ASTM International. (2018). ASTM E2147-18 Standard Specification for Audit and Disclosure Logs for Use in Health Information Systems. Retrieved from https://www.astm.org/Standards/E2147.htm (emphasis added).
13. 45 CFR §170.304, which outlines the requirements for the certification of electronic health record (EHR) technology. This regulation was issued by the Office of the National Coordinator for Health Information Technology (ONC) and is available online at the following link: https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=3ca9b11ba8d1f6b1dc7a0c334a126d8d&mc=true&r=SECTION&n=se45.1.170_1304.
14. 45 CFR §170.302, which outlines the requirements for the certification of electronic health record (EHR) technology. This regulation was issued by the Office of the National Coordinator for Health Information Technology (ONC) and is available online at the following link: https://www.ecfr.gov/cgi-bin/text-idx?SID=d6f21917a3d55a7e3e0c1b14700eae48&mc=true&node=se45.1.170_1302&rgn=div8.
15. 45 CFR §170.315(d)(3) which outlines the certification criteria for the "Audit Report(s)" capability in electronic health record (EHR) technology. This regulation was issued by the Office of the National Coordinator for Health Information Technology (ONC) and is available online at the following link: https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=3ca9b11ba8d1f6b1dc7a0c334a126d8d&mc=true&r=SECTION&n=se45.1.170_1315.
16. *Michelle Bolaney, etc., et al. v. Mapleview Operating Company, LLC, etc., et al.*, Cuyahoga Cty. Case No. CV-20-934555, Judgment Entry 6/29/21 ("The Court, in having conducted an in-camera review of Defendant's service agreement with electronic medical records service vendor, determines that the agreement is discoverable. Defendants shall provide the agreement to Plaintiffs' counsel who shall maintain it confidentially, for counsel's eyes only, unless otherwise ordered by this Court. Defendants may redact any pricing information before tendering it to Plaintiffs' counsel.").
17. *Michelle Bolaney, etc., et al. v. Mapleview Operating Company, LLC, etc., et al.*, Cuyahoga Cty. Case No. CV-20-934555, Judgment Entry, 7/25/21.
18. *Michelle Bolaney, etc., et al. v. Mapleview Operating Company, LLC, etc., et al.*, Cuyahoga Cty. Case No. CV-20-934555, Plaintiff's Final Pretrial Statement, filed on August 24, 2021.
19. ASTM International. (2018). ASTM E2147-18 Standard Specification for Audit and Disclosure Logs for Use in Health Information Systems. Retrieved from https://www.astm.org/Standards/E2147.htm.
20. 42 U.S.C. § 300jj-52, Section 4006 of the Cures Act.
21. *Michelle Bolaney, etc., et al. v. Mapleview Operating Company, LLC, etc., et al.*, Cuyahoga Cty. Case No. CV-20-934555, Judgment Entry, 7/25/21.
22. 2021-0780 *Bolaney v. Mapleview Operating Co., L.L.C.*, Cuyahoga App. No. 110373.
23. *Bolaney v. Mapleview Operating Company, LLC, et al.*, Eighth District Court of Appeals, No. 110373, Judgment Entry, April 14, 2021.
24. *Bolaney v. Mapleview Operating Company, LLC, et al.*, Eighth District Court of Appeals, No. 110373, Judgment Entry, May 5, 2021.
25. *Bolaney v. Mapleview Operating Company, LLC, et al.*, Cuyahoga County Case No. CV 20-934555, Plaintiff's Trial Brief, filed on September 21, 2021.

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Does *Clawson v. Heights Chiropractic Physicians, LLC* Have Retroactive Effect?

by Tobias J. Hirshman

On November 23, 2022, the Ohio Supreme Court handed down its decision in *Clawson v. Heights Chiropractic Physicians, LLC*.[1] In that decision, the Court, for the first time, held that in a malpractice case against an employer of a negligent physician, the Plaintiff's vicarious liability claim based on the doctrine of *respondeat superior* must be dismissed if the negligent physician is not a party to the action due the expiration of the statute of limitations. In reaching that decision, the Court rejected almost a century of unquestioned agency law which gave the Plaintiff the option of suing *either* the master, the servant or both. In a radical departure, and with little analysis or explanation regarding the implications of its decision, the Court has, at least in the arena of medical malpractice, now imposed a duty on the Plaintiff to bring the negligent physician before the Court, regardless of his availability, in order to pursue a *respondeat superior* claim for malpractice against his employer. The implications of this decision, going forward, are stark enough, as it imposes on Plaintiffs what will be, at times, the impossible obligation of serving elusive or unknown defendants. However, adding insult to injury, if the decision is to be given *retroactive* effect, it will likely result in the callous dismissal of many meritorious malpractice cases in which plaintiff's counsel, relying on well-established authority and being without the benefit of a crystal ball, failed to obtain jurisdiction over a physician whose joinder has now been deemed essential. So, the question arises as to whether the *Clawson* decision will be given retroactive effect, or in the alternative, prospective effect only.

"The general rule is that a decision of a Court of Supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it was never the law."[2] This so-called *Peerless* doctrine recognized two exceptions which occurred when "contractual rights have arisen" or when "vested rights have been acquired under the prior decision." In those situations, the decision would be applied only prospectively.[3]

"However, blind application of the *Peerless* doctrine has never been mandated…"[4] Instead, "[c]onsistent with what has been termed the *Sunburst* doctrine,[5] state courts have…recognized and used prospective application of a decision as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not party to the action."[6] In *Minster Farmers Coop Exch. Co. v. Meyer*, the Court "establish[ed] the proper method for implementing interest rates exceeding the statutory maximum on a book account pursuant to R.C. 1343.03(A)" but the Court declined to apply the decision retroactively because the Court did not want to "create shock waves throughout the many sectors of Ohio's economy that rely on book accounts to do business."[7] Similarly, in *Wagner v. Midwestern Indem. Co.*, the Court declined to retroactively apply to the parties before it intervening case law that lowered the burden of proving that an insurer acted in bad faith, even

though under *Peerless*, when the Court overrules a bad decision, "the effect is… that the former decision…never was the law."[8] Accordingly, though the general rule in Ohio has been that a decision would be applied retrospectively unless retrospective application interfered with contract rights or vested rights under the prior law, a Court had the discretion to impose its decision only prospectively after considering whether retroactive application would fail to promote the rule within the decision or would cause inequity.

In *DiCenzo v. A Best Prods. Co.*,[9] the Court was asked to decide whether its holding three decades earlier in *Temple v. Wean United*[10], applying strict liability to sellers of defective products, should be applied prospectively only. The Court adopted the analytic framework of *Chevron Oil Co. v. Huson*[11] in deciding when to apply its decisions prospectively only.

In *Chevron*, Huson, who was injured while working on an oil rig, filed an action seeking compensation for his injuries. At the time of the filing, it was thought that admiralty law - not state law - applied, and that the admiralty doctrine of laches determined the applicable statute of limitations. While the case was pending, the Supreme Court decided, in *Rodrigue v. Aetna Casualty & Surety Co.*,[12] that the applicable statute of limitations for such claims was the one-year Louisiana statute of limitations. As a result, Huson's claim was dismissed as time barred. On ultimate appeal to the Supreme Court, it was held that the *Rodrigue* case should only be applied prospectively, thereby saving Huson's claim from dismissal on non-substantive grounds.

In reaching that conclusion, the Court analyzed three questions in determining whether a decision should be applied prospectively only: (1) Does the decision establish a new principal of law that was not clearly foreshadowed?, (2) Does retroactive application of the decision promote or hinder the purpose behind the decision?, and (3) Does retroactive application of the decision cause an inequitable result.[13] After examining these questions the Court concluded that (1) applying the Louisiana statute of limitations to a federal admiralty case was a case of first impression that was not foreshadowed; (2) applying the one-year statute of limitations would deprive Huson of any remedy whatsoever, a result inconsistent with the goal of affording employees comprehensive remedies, and (3) applying the one-year statute of limitations to Huson's complaint would be inequitable because, at the time, he didn't know that the one-year statute of limitations was applicable to his case. Accordingly, the *Chevron* Court held that *Rodrigue* applied only prospectively and, therefore, Huson's claim was not time-barred.

In *DiCenzo*, the Ohio Supreme Court adopted *Chevron* as the test for determining when a Court decision should be applied retroactively. In doing so, the Court found it appropriate to apply its holding in *Temple v. Wean United*, that sellers of products were subject to strict liability for defects in the products they sold, in prospective fashion only.

The *Chevron* factors, as they apply to the retroactive application of *Clawson*, are discussed below.

1. New principle not clearly foreshadowed.

The Ohio Supreme Court recently observed, "[b]ackward application of [a decision that establishes a new principle of law] causes great inequity to those who are burdened by unforeseen obligations".[14]

The law in Ohio before *Clawson*, as it related to *respondeat superior* liability for employers in the absence of the primary tortfeasor as a party, was well settled. In 1940, the Supreme Court, in *Losito v. Kruse*,[15] stated the status of the law as follows: "For the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both…".[16] It is worth noting that, at the time of the *Losito* decision, with the rules of joinder not yet liberalized, suit against the employer without naming the employee was not only allowed; it was procedurally necessary. At the time, in light of the restrictive joinder rules, "there [could] be no joinder in a single action of the party primarily liable and the party secondarily liable because there [was] no joint liability" as there would be if the defendants were actually joint tortfeasors.[17] At the time of *Losito*, under the joinder rules in force, if the employer and employee "were joined in an action and this relationship appear[ed] on the face of the petition, it [was] demurrable for misjoinder of parties defendant."[18]

The rule allowing a plaintiff to sue an employer without joining the primarily liable employee was repeatedly confirmed to be the law of this state over the following years and decades. In 1986, for example, in *Billings v. Falkenburg*,[19] the 6th District Court of Appeals held that, under the doctrine of *respondeat superior*, "the injured party is free to seek full relief from either the employee or the employer at the injured party's option. Thus, in the event that the injured third party seeks to recover from the employer, all he need do is prove that the employee is negligent and that the employee is acting within the scope of his employment. *There is no requirement that the employee be named as a party to the lawsuit in order to prove his negligent acts.*"[20] *Orebaugh v. Wal-Mart Stores, Inc.*[21] is also instructive.

There, the 12th District Court of Appeals, in considering whether the Supreme Court's decision in *Comer v. Risko*,[22] requiring the presence of the offending physician to pursue an agency by estoppel claim against a hospital, was extendable to the arena of *respondeat superior* claims, asserted that "appellee's interpretation of *Comer* as extending to all agency relationships would overturn the extensive case law in Ohio on the issue of *respondeat superior*, master-servant liability, and agency liability in general."[23]

Even after *Nat'l Union Fire Ins. v. Wuerth*[24] was decided in 2009, there was no "clear foreshadowing" of the subsequent extension of the requirement of the employee's presence to prove a *respondeat superior* claim against an employer to medical malpractice cases. For example, in *Tisdale v. Toledo Hosp.*,[25] it was held that there is no requirement that the employee be named as a party to the suit in order to prove his negligent act in a *respondeat superior* claim against the employer. Similarly, in *Taylor v. Belmont Comm. Hosp.*,[26] the court found the facts in *Wuerth*, involving partners in a law firm, each of whom is a "part owner," to be "wholly distinguishable from the traditional employer-employee relationship existing in the case before us." See also Restat. 2d of Torts, Sect. 882, Illustration 1("A employs B, a servant, who negligently runs over C. C is entitled to maintain an action against A and B or against either of them.") The above authorities clearly establish that the *Clawson* decision was not "clearly foreshadowed."

2. Promotion or hinderance of the purpose behind the decision.

The *DiCenzo* Court, in considering whether to apply its ruling extending strict liability to sellers of products prospectively only, determined that "retroactive application [of the principle would] neither promote nor hinder the purpose behind the products liability laws." Notwithstanding that observed neutral effect, the Court applied the strict liability principles previously announced in the *Temple* case in a prospective fashion only. Similarly, in *State ex rel. Wal-Mart, Inc. v. Hixson*,[27] the Supreme Court decided to apply its previous holding which denied temporary total disability benefits when an injured worker voluntarily resigned from employment, in a prospective fashion only, notwithstanding the fact that applying the new rule retroactively would promote the purpose of its ruling by denying the award of benefits to workers who voluntarily left their employment. In both cases, the Court's analysis of factor two was overshadowed by factor three: the inequitability of imposing a new rule retrospectively. In malpractice cases filed against a physician's employer before *Clawson*, where the negligent physician was not joined, the question arises as to what legitimate public policy goal would be promoted by giving the decision retroactive application, thereby depriving an injured patient his/her day in court based on newly announced procedural niceties unrelated to the merits of their case.

The *respondeat superior* doctrine "depends on the existence of control by a principal (or master) over an agent (or servant)…".[28] The decision to apply *Clawson* prospectively only will have no discernable effect on the incentives of employers to responsibly control their employees as it relates to injuries that have *already occurred*. Accordingly, as to this *DiCenzo* factor, there is nothing to be gained from a public policy point of view in applying *Clawson* retroactively and nothing to be lost by applying it prospectively only.

3. The inequitability of retroactive application.

In *DiCenzo*, the Court determined that it would be inequitable to impose the financial burdens associated with strict liability upon sellers years after the fact for an obligation which was not foreseeable at the time and would result in great inequity. Accordingly, the Court gave its new holding, imposing strict liability on sellers, prospective application only.

In *State ex rel. Wal-Mart, Inc. v. Hixson*,[29] the Court, for similar reasons, chose to apply its previous ruling denying temporary total disability benefits to injured employees who voluntarily resigned their employment, in a prospective fashion only. In discussing the purpose behind the newly created rule, the Court acknowledged that retroactive application would serve the purpose of that rule by depriving recipients of those improperly obtained benefits when they had voluntarily left their jobs. The Court, nevertheless, balanced that point against the need to protect reliance interests. In discussing the inequitability factor, the Court acknowledged that that factor was concerned, in part, with "avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action."[30] In deciding to apply the *Klein* decision prospectively only, the Court reasoned that "retrospective application of *Klein* would implicate the awards of many claimants who are not parties to this action and were not parties to *Klein*"… "[T]he implications would be widespread, because the commission applied the abandoned rule for 22 years…[T]his would negatively affect the reliance interests of injured workers whose TTD-compensation awards have long been paid out and spent…".[31]

In *Beaver Excavating Co. v. Testa,*[32] the Court ruled that the use of revenue collected by the State's commercial activity tax on the sale of motor fuel for purposes other than the maintenance of public highways violated Ohio Constitution Article XII, Section 5 which mandated that such tax proceeds be used exclusively for the highway fund. In determining whether its ruling should be applied retroactively so as to require the state to replenish to the highway fund all amounts previously diverted, the Court considered the effect that such retroactive application would have on the State's budget, concluding that it would have "a significant consequential and negative impact on the State's fiscal footing" and chose to apply the ruling prospectively only.[33]

Similarly, in the case of *In re LMD Integrated Logistic Services,*[34] the Court, in giving only prospective application to a ruling, was motivated by the inequities associated with retroactive application. In that case, the Court held that a notice of appeal from a PUCO ruling need not be filed with the docketing department of the commission. There, the Court resolved an apparent conflict between various rules and statutory provisions as to whether the notice of appeal needed to be docketed with the commission by ruling that it did not. The Court then concluded that the decision would be given prospective application only. In doing so, the Court found that prospective only application would "avoid the inequitable result of prejudice to a party with a pending appeal" who had not filed in accordance with the rules set forth by that decision.[35]

In *Clawson*, the Court ruled, for the first time, that a physician must be a party to a malpractice suit in order to impose vicarious liability upon his employer. As discussed previously, this holding constitutes a reversal of the law of this State as previously understood. Plaintiffs have, for untold years, understood that one could proceed solely against an employer without joining the employee as a party. In fact, defendants also have relied on this understanding and have often asked plaintiff's counsel to dismiss an employee defendant as a party with the understanding that the case could, nevertheless, proceed against the employer without the employee's presence. This practice was particularly frequent in medical malpractice cases where hospital-employers would regularly request that the physician be dismissed with the understanding that the case would proceed against the employer after the physician's dismissal. And Plaintiffs' attorneys throughout the State have filed actions against employers, often not seeking joinder of an elusive employee, based on expectations, reasonably entertained under the prior state of the law.

To apply the *Clawson* decision prospectively only will avoid the inequitable result of prejudice to parties in pending actions where the employee has not been named and will avoid the substantial "injustice in cases dealing with questions having widespread ramifications for persons not parties to the action."[36] In light of the above discussion, a persuasive argument can be made that the *Clawson* ruling should be given prospective application only. And though a legitimate question may be asked as to whether a lower Court, in the absence of Supreme Court language giving *Clawson* only prospective application, will be inclined to so hold, only a cynic would deny the existence of many lower court judges with sufficient sagacity to appreciate the inequities implicit in retrospective enforcement and sufficient strength of character to make rulings preventing such outcomes. Moreover, these arguments, to the extent that they are worthy of being made, will need to be made at the trial court level, if they are to be preserved for ultimate Supreme Court determination. ■

End Notes

1. 2022-Ohio-4154, 2022 Ohio LEXIS 2357.
2. *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209 at 209, 129 N.E.2d 467 (1955).
3. *Id.* at 209.
4. *Wagner v. Midwestern Indem. Co.* (1998), 83 Ohio St. 3d 287, 290, citing *Roberts v. United States Fid. & Guar. Co.* (1996), 75 Ohio St. 3d 630, 633.
5. *Great N. Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 583, 53 S.Ct. 145, 77 L. Ed. 360 (State Courts have broad authority to determine whether their decisions shall apply prospectively only).
6. *Minster Farmers Coop Exch. Co. v. Meyer*, 117 Ohio St. 3d 459, 2008 Ohio 1259, quoting *Hoover v. Franklin Cty. Bd. Of Commers.* (1985), 19 Ohio St. 3d 1, 9 (Douglas J., concurring).
7. *Minster* at ¶ 30.
8. *Id.* at 289.
9. 120 Ohio St. 3d 149 (2008).
10. 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).
11. 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).
12. 395 U.S. 352 (1969).
13. *Chevron Oil*, 404 U.S. at 106-107.
14. *State ex rel. Walmart Inc. v. Hixson*, 2022-Ohio-4187, 2022 Ohio LEXIS 2409 (applying State ex rel. *Klein v. Precision Excavating and Grading Co.*, 155 Ohio St. 3d 78 (2018), which reversed workers' compensation rules to so as to deny temporary total disability when an injured worked subsequently quits his employment, in a prospective manner only).
15. 136 Ohio St. 183, 24 N.E.2d 705 (1940).
16. *Id.* at 187.
17. *Id.*
18. *Id.*
19. 1986 Ohio App. LEXIS 8183.
20. *Billings*, *supra.* (Emphasis added). See also *Krause v. Case W. Reserve Univ.* (December 19, 1996), Cuyahoga App. No. 70712, 1996 Ohio App. LEXIS 5784 ("Regardless of the fact that the seven doctors were not formally made parties defendant, plaintiff is entitled to the benefit of her allegations against them for the purposes of testing the merits of the dismissal against MetroHealth [Medical Center]. Liability for the employee's negligence is imputed to the employer when the doctrine of *respondeat superior* applies. *There is no requirement that an employee be named as a party to a suit in order to prove his negligent acts.*"). *Id.* at 17. (Citations omitted and emphasis added).
21. 12th Dist. Butler County No. CA 2006-08-185, 2007-Ohio-4969.
22. 106 Ohio St. 3d 191, 2005-Ohio-4559.
23. *Id.* at ¶ 21.
24. 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939.
25. 197 Ohio App. 3d 316, 2012-Ohio-1110 (6th Dist.).
26. 7th Dist. Belmont No. 09 BE 30, 2010-Ohio-3986, paragraph 34.
27. 2022-Ohio-4187, 2022 Ohio LEXIS 2409.
28. *National Union Fire Ins. Co. v. Wuerth*, 2009-Ohio-3601, 2009 Ohio LEXIS 1957, ¶ 20.
29. 2022-Ohio-4187, 2022 Ohio LEXIS 2409.
30. *Id.* at ¶ 31.
31. *Id.* at ¶ 33.
32. 134 Ohio St. 3d 565, 2012-Ohio-5776.
33. *Id.* at ¶ 46.
34. 155 Ohio St. 3d 137, 2018-Ohio-3859.
35. *Id.* at ¶ 30.
36. *Minster, supra*, at ¶ 30.

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Nuts and Bolts of Civil Rule 36 – Requests for Admissions

by Brenda M. Johnson

Both Ohio Civil Rule 36 and its Federal counterpart allow a party to serve any other party with written requests to admit certain matters for purposes of the pending action. This can be a powerful tool for narrowing the issues to be decided at trial, but it can also be a trap for the unwary if it is not properly understood. This article is intended to provide guidance, not just as to the basics of framing effective requests and evaluating your opponents' responses, but also as to your options in responding when you are served with Rule 36 requests by opposing counsel. It also addresses when and how an admission can be withdrawn, and the grounds for awarding costs under Rule 37(C) if a matter that is denied later is proven at trial.

How Ohio's Version Of Rule 36 Differs From Its Federal Counterpart.

Ohio Civil Rule 36 and its federal counterpart are essentially similar when it comes to substance, but there are some procedural differences that are worth keeping in mind.

Substantively, Rule 36, both in its state and federal version, provides that a party may serve written requests for admission on any other party once discovery has commenced.[1] Under both the state and federal version, a party may ask for the admission of the truth of any matters falling within the scope of permissible discovery that relate to statements or opinions of fact, or "the application of law to fact," or the genuineness of documents specified in the request.[2] When an admission as to the genuineness of documents is requested, the party making the request must supply copies of the documents with the requests unless they have already been made available.[3]

Both also provide that a failure to respond within the time period specified in the rule operates as an admission; however, the time period provisions in Ohio's rule differ from its federal counterpart. Ohio's Civil Rule 36(A)(1) allows the serving party to designate a response date, "not less than twenty-eight days after service," and also provides that the court may set a different response date as well. The federal version of the rule, in contrast, sets a response date of 30 days that can be altered only by stipulation of the parties or by order of the court.[4]

Finally, unlike its federal counterpart, Ohio's Rule 36(C) requires a party that includes requests for admissions in the same document with other discovery requests to clearly state that there are requests for admission in the caption of the document. If the requesting party does not do so, there is no duty to respond: "A party is not required to respond to requests for admission that are not made in compliance with this division."[5]

What Can You Ask Another Party to Admit?

As noted above, Rule 36 provides that a party may serve another party with "a written request for the admission, for purposes of the pending action

only, of the truth of any matters within the scope of Civ. R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request."[6] So what does this permit a party to ask in a request for admission?

First, as the rule clearly states, Rule 36 requests are limited to matters that fall within the scope of discovery as set forth in Rule 26(B) – namely, "any nonprivileged matter that is relevant to the party's claim or defense."[7] And they are not simply limited to issues of fact – they can be directed to "opinions of fact," and "the application of law to fact." To determine what this means in practice, however, it is necessary to look both at the history of the rule, its purpose, and at the case law interpreting its scope.

The advisory committee notes to the version of Fed. R. Civ. P. 36 that forms the basis of Ohio's version of the rule sheds some light on what its drafters intended in permitting requests on these terms:

> Not only is it difficult as a practical matter to separate "fact" from "opinion," but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving an application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran v. Hanigan*, [225 F. Supp. 628], plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. [8]

Based on these examples, it's clearly permissible to ask a party to admit combined matters of law and fact, such as whether an employee was acting in the course and scope of his employment, or who had custody or control over relevant premises or instrumentalities.

It is *not* proper, however, to request that another party admit to a pure conclusion of law. For example, federal courts have held that it is improper to ask a defendant driver to admit he had a duty to maintain control of his vehicle, or to exercise ordinary care, or to illuminate his vehicle once it became immobilized, since the existence of a duty is a question of law for the court to decide.[9] Moreover, whether "proper" or not, obtaining an admission of a legal conclusion is unlikely to remove the issue from your case, since the admission of a legal conclusion is not binding on the court, nor is it necessarily binding on the admitting party.[10]

Responding To Requests for Admission.

A party who is served with requests for admission has several options in responding. They may do nothing, they may admit or deny a request in whole or in part, they can state they have insufficient information to admit or deny a request, or they can object to a request.

If the party does nothing – *i.e.*, if the party fails to respond within the time period provided, the requests are deemed admitted without any need for further action by the serving party or the court. As the Eighth District recently noted, "Civ. R. 36 is a self-enforcing rule. Therefore, if the requests are not timely answered, they are automatically admitted and recognized by the trial court unless a party moves to withdraw or amend its admissions under Civ. R. 36(B)."[11]

A party may also formally admit a request, which is a straightforward matter. What is *not* necessarily straightforward is how, and on what basis, a party can deny a request for admission.

Rule 34(A)(2) provides that "[a] denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer, or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder."[12] Thus, courts will treat a general denial as an effective admission when the request for admission contains several assertion of fact "because it does not meet the substance of the request, i.e., it does not 'specify so much of it as is true and qualify or deny the remainder.'"[13]

A party cannot give lack of information or knowledge as a reason not to admit or deny a request for admission. Rule 34(A)(2) specifically states that "[an] answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny."

On this point, the courts have been clear that "a mere recitation of the rule text will not suffice."[14] If a party does not explain its efforts to make a reasonable inquiry with particularity, a failure to respond constitutes an admission.[15] What constitutes a "reasonable inquiry," in turn, is a fact-dependent question; however, federal courts have held that this does not require the responding party to seek information from third parties unless those parties have given sworn deposition testimony on the issue.[16] Instead, the general rule is that

"a 'reasonable inquiry' is limited to review and inquiry of those persons and documents that are within a responding party's control."[17] Depending on the stage of the litigation, however, this can include an obligation to consult with a party's designated experts.[18]

Objections to Requests – What Counts As Improper?

As noted above, Rule 34 allows requests for admissions to be directed to any nonprivileged matter that falls within the normal scope of discovery. By that token, it is entirely proper to object to requests that seek privileged information, or go outside the bounds of relevance. For the reasons set forth above, it would also be appropriate to object to a request for admission that seeks admission of a pure conclusion of law (such as the existence of a duty of care). But what counts as an improper objection?

Under the express terms of Rule 36, a party may not object to a request simply because it presents a genuine issue for trial – which makes sense, given that the purpose of the rule is to narrow the issues presented for trial where possible.[19] A party also may not object by claiming that the requesting party should obtain the information through discovery, or that the information is within the requesting party's knowledge.[20]

Perhaps most importantly, like denials, objections must be specific. As one court noted, the party responding "bears the burden of explaining the propriety of its objections and boilerplate objections do not accomplish this task."[21] An objection coupled with an answer "subject to" or "without waiving" the objection is improper as well, and courts will overrule them on this basis.[22]

If a requesting party believes a response or objection is improper or insufficient, Rule 36(A)(3) allows the requesting party to file a motion with the court – but the court's options in ruling on the motion are relatively broad. If the challenge is to an objection, the court can order the responding party to respond if the objection is not justified. If the court finds that a response was insufficient, the court can order that the matter is admitted, or it can order the responding party to modify its response. The court also, in lieu of those orders, can decide that final disposition be delayed until a future pretrial conference or some other date set by the court.

A party filing a successful motion under Rule 36(A)(3) can seek expenses as provided under Rule 37(A)(5) – but as with any other motion subject to Rule 37(A)(5), a good faith effort to resolve the issue without court intervention is a necessary prerequisite to any right to an award under the rule.

When (And How) Can A Party Withdraw An Admission?

Rule 36(B) provides that any matter admitted under the terms of the rule is "conclusively established unless the court on motion permits withdrawal or amendment of the admission." So what if a party (whether intentionally or through some oversight) admits a matter that is fatal to its case or its defense, and wants to withdraw or contest the admission?

When it comes to amendment or withdrawal of an admission, "Civ. R. 36 does not specify that a formal motion is required nor does the rule identify a time when the motion must be filed."[23] Ohio courts have held that challenging the truth of admissions for purposes of opposing a motion for summary judgment can constitute a motion to withdraw, as can challenging the truth of admissions in trial proceedings.[24]

The grounds for allowing withdrawal or amendment of an admission, in turn, are relatively broad. The rule itself states that the court's power to permit withdrawal or amendment is subject to the same standards set forth in Rule 16 for amendment of a pretrial order – which simply requires a showing of good cause.[25]

Based on this, courts in Ohio and elsewhere have held that "excusable neglect" is not an element that must be shown in order to permit withdrawal or amendment of an admission.[26] Instead, a trial court may allow withdrawal or amendment "when presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits."[27]

Accordingly, in both Ohio and federal court, whether or not to allow withdrawal or amendment involves a two part test focusing on "the 'effect upon the litigation and prejudice to the resisting party[,] rather than focusing on the moving party's excuses for an erroneous admission."[28]

In both Ohio and federal court, this test puts the burden on the movant to show how allowing withdrawal or amendment would assist in reaching a just resolution on the merits. Both Ohio and Federal courts, however, have held that this burden "is clearly met when the effect of denying a motion to withdraw and amend would 'practically eliminate any presentation of the merits.'"[29] Accordingly, when key issues in the controversy have been admitted (especially when due to inadvertence or neglect), and allowing them to remain admitted would be dispositive of the case, courts tend to find the first prong is satisfied.[30]

Once this burden is met, it falls to the party who initially obtained the admission to show that it would

be prejudiced by the withdrawal of the admission.[31] The prejudice contemplated under the rule "'relates to the difficulty a party may face in proving its case' because of the sudden need to obtain evidence required to prove the matter that had been admitted."[32]

Simply having to present evidence, however, is not sufficient to show prejudice, nor is the fact that a party prepared a summary judgment motion based on the admission or admissions at issue.[33] Instead, the focus is on whether the requesting party has been deprived of the ability to obtain relevant witnesses or other evidence, and on whether the requesting party reasonably relied on the admissions.[34]

Not surprisingly, then, courts tend to allow parties who have inadvertently admitted to key elements in a case (such as liability) to withdraw those admissions when, in light of the nature of the case and the extent to which key elements of the case have been contested, it appears unreasonable for the requesting party to have relied on the admissions instead of developing his or her case. This is especially so when discovery is ongoing, dispositive motion deadlines either have not been set or have not yet passed, or when an inadvertent admission is due to a relatively short delay in responding.

As Ohio courts have noted, however, "there must be a point after which the party who gained the admissions has the right to rely on them."[35] Ohio courts can and do grant summary judgment based on unanswered requests for admission, especially when the party to whom the requests were directed fails to act promptly in asking the court to permit withdrawal or amendment.[36]

When Can A Party Be Awarded Costs For Proving A Matter That Was Denied?

If a party denies a request for admission, or claims to be unable to admit or deny the request after a reasonable inquiry, and the matter must then be proven at trial, Rule 37(C) requires the trial court to award the requesting party reasonable expenses, including attorney's fees, in proving the matter.[37] This expense-shifting rule, however, is not without exception.

As an initial matter, sanctions are not available under the rule if the requesting party did not actually have to present evidence contradicting the denial at trial.[38] Moreover, the Ohio rule and its federal counterpart both provide that sanctions are not available if (1) the request was held objectionable; (2) the issue was not of substantial importance; or (3) "[t]he party failing to admit had a reasonable ground to believe that it might prevail on the matter."[39]

The burden falls on the responding party to establish that it had a reasonable ground for believing it might prevail on the issue.[40] The standard for making this determination is an objective one, meaning that if the responding party had an objectively reasonable basis on which to maintain the matter genuinely was at issue, there is no basis for awarding costs under Rule 37(C).[41]

In other words, as stated in the Advisory Committee's notes to the version of the federal rule on which Ohio's Rule 37(C) is based, "the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail."[42] Ohio courts follow this standard, and will not award attorney fees in cases where the denying party had a good faith belief that the issue was one legitimately in dispute.

For instance, Ohio courts have denied costs when the denying party was entitled to doubt the credibility of persons with personal knowledge on an issue.[43] Ohio courts also have denied costs when the denying party offered conflicting evidence on the issue.[44] And Ohio courts have denied costs when the issue ultimately was of little to no importance in the case.[45]

Accordingly, when a party denies matters that could legitimately be disputed, courts are unlikely to impose Rule 37(C) sanctions, even if the matters ultimately are proven at trial.

Final thoughts –

Requests for admissions are an important tool for narrowing the issues for trial – but like any tool, they have to be used properly in order to fulfill their function. They are an effective means by which to dispose of matters that simply ought not to be in dispute. They are not, however, a means by which either a plaintiff *or* defendant can escape the need to prove a disputed case by demanding admissions to matters that can be denied in good faith, nor can they be used to dispose of ultimate legal questions. ■

End Notes

1. Under Ohio's version of the rule, a plaintiff may serve such requests on any defendant once the defendant has been served with the summons and complaint. Civ. R. 36(A). Under the federal version, the timing for such requests is governed by Fed. R. Civ. P. 26(d), which in most cases precludes discovery before the parties have conferred as required under Fed. R. Civ. P. 26(f).
2. Civ. R. 36(A); *compare* Fed. R. Civ. P. 36(a)(1)(a). While Ohio's version of Rule 36 is based on the 1970 version of its federal counterpart, the current federal version of Rule 36(a) has undergone edits that are stylistic in nature, and not intended to change the substance of the rule. *See* Advisory Committee Notes, 2007 Amendment, Fed. R. Civ. P. 36.
3. Civ. R. 36(A); Fed. R. Civ. P. 36(a)(2).
4. Fed. R. Civ. P. 36(a)(3).
5. Civ. R. 36(C).
6. Civ. R. 36(A).
7. Civ. R. 26(B)(1).
8. Advisory Committee Notes, 1970 Amendment, Fed. R. Civ. P. 36 (some citations omitted).

9. *Aprile Horse Transp., Inc. v. Prestige Delivery Sys.*, No. 5:13-CV-15-GNS-LLK, 2015 U.S. Dist. LEXIS 86379, *9-*10, 2015 WL 4068457 (W.D. Ky. July 2, 2015). Other examples of federal courts holding that a request for admission is improper if it seeks a pure legal conclusion include *Rubenstein v. Music Sales Corp.*, No. 19-cv-11187, 2021 U.S. Dist. LEXIS 145106, 2021 WL 3374539 (S.D. N.Y. Aug. 3, 2021) and *Taylor v. County of Calaveras*, No. 1:18-cv-00760-BAM, 2019 U.S. Dist. LEXIS 206485 (E.D. Cal. Nov. 27, 2019).

10. Though it involved admissions in a pleading (as opposed to a response to a request propounded under Rule 36), the Sixth District's opinion in *IBEW Loc. Union No. 8 v. Kingfish Elec., LLC*, 6th Dist. Williams No. WM-11-006, 2012-Ohio-2363 is instructive on this point. In that case, the Sixth District held that an employer's admission that two union members met the regulatory definition of "employee" for purposes of a prevailing wage claim was not binding on the employer or the court, "because to be binding, the admission must be of a material and competent fact, not merely a legal conclusion or statutory definition.").

11. *Caldwell v. Custom Craft Builders, Inc.*, 8th Dist. Cuyahoga No. 110168, 2021-Ohio-4173, ¶ 35 (citations omitted).

12. Civ. R. 36(A)(2); *see also* Fed. R. Civ. P. 36(a)(4).

13. *King Painting & Wallpapering, Inc. v. Aswin Ganapthy Hospitality Assocs., LLC*, 11th Dist. Trumbull No. 2013-T-0076, 2014-Ohio-1372, ¶ 51, quoting Civ. R. 36(A). That said, federal courts have noted that requests for admissions should be "direct, simple, and 'limited to singular relevant facts'" so that they "can be admitted or denied without explanation.'" *Dubin v. E.F. Hutton Group*, 125 F.R.D. 372, 375 (quoting, *inter alia*,8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2258 (1970)).

14. *See Aprile Horse Transp., Inc. v. Prestige Delivery Sys.*, No. 5:13-CV-15-GNS-LLK, 2015 U.S. Dist. LEXIS 86379, * 7-* 8, 2015 WL 4068457 (W.D. Ky. July 2, 2015) and cases cited therein.

15. *Fire & Marine Ins. Co. v. Battle*, 44 Ohio App.2d 261, 270 (8th Dist 1975).

16. *See, e.g., Dubin v. E.F. Hutton Group*, 125 F.R.D. 372, 374-75 (S.D. N.Y. 1989).

17. *T. Rowe Price Small-Cap Fund v. Oppenheimer & Co.,* 174 F.R.D. 38, 43 (S.D.N.Y. 1997); *see also Piskura v. Taser Int'l.*, No. 1:10-cv-248, 2011 U.S. Dist. LEXIS 141443, 2011 WL 6130814 (S.D. Ohio Nov. 7, 2011).

18. In *Drutis v. Rand McNally & Co.*, 236 F.R.D. 325 (E.D. Ky. 2006), a magistrate ordered that plaintiffs in litigation involving management of a pension benefit plan were required to submit certain requests for admission to their designated experts in order to properly respond. In *Piskura*, *supra* at note 17, however, the magistrate declined to issue a similar order because the parties had not yet designated their experts or disclosed their opinions. *See Piskura*, 2011 U.S. Dist. LEXIS 141443, *10-*13.

19. Civ. R. 36(A)(2); *see also Salem Med. Arts & Dev. Corp. v. Columbian County Bd. of Revision*, 82 Ohio St.3d 193, 196, 1998-Ohio-248, 694 N.E.2d 1324 ("That a matter 'related to' a genuine issue for trial should not suffice; only those matters actually determined to be 'in issue' meet the standard for 'good reason' to deny.").

20. *Diederich v. Department of Army*, 132 F.R.D. 614, 617 (S.D. N.Y. 1990) ("[W]e reiterate that the purpose of requests for admissions are to seek defendant's agreements as to alleged fact. Whether plaintiff could obtain the information independently or whether certain facts are within plaintiff's knowledge are irrelevant considerations.").

21. *Aprile Horse Transp., Inc. v. Prestige Delivery Sys.*, No. 5:13-CV-15-GNS-LLK, 2015 U.S. Dist. LEXIS 86379, * 4, 2015 WL 4068457 (W.D. Ky. July 2, 2015).

22. *Aprile Horse Transp., Inc. v. Prestige Delivery Sys.*, No. 5:13-CV-15-GNS-LLK, 2015 U.S. Dist. LEXIS 86379, * 4-*6, 2015 WL 4068457 (W.D. Ky. July 2, 2015) ("Rule 36 does not contain language allowing a party to answer a request to the extent not objected to.")

23. *Caldwell v. Custom Craft Builders, Inc.*, 8th Dist. Cuyahoga No. 110168, 2021-Ohio-4173, ¶ 36 (citing *Balson v. Dodds*, 62 Ohio St.2d 287, 290, n. 2, 405 N.E.2d 293 (1980)).

24. *See Balson v. Dodds*, 62 Ohio St.2d 287, 290, n. 2, 405 N.E.2d 293 (1980) ("[T]he trial court could reasonably find that, by contesting the truth of the Civ. R. 36(A) admissions for the purposes of summary judgment, appellee satisfied the requirement of Civ. R. 36(B) that she move the trial court to withdraw or amend these admissions."); *Haskett v. Haskett*, 11th Dist. Lake No. 2011-L-155, 2013-Ohio-145, ¶ 25 ("Mrs. Haskett's challenge to the truth of such admissions during the trial proceedings satisfied the requirements of Civ. R. 36(B) for withdrawal of admissions . . .").

25. *See* Civ. R. 16(B)(4).

26. S*ee Kutscherousky v. Integrated Comm. Solutions, LLC*, 5th Dist. Stark No. 2004 CA 00338, 2005-Ohio-4275, ¶ 17 (citing *Hanchar Ind. Waste Mgmt., Inc. v. Wayne Reclamation & Recycling, Inc.*, 418 N.E.2d 268 (Ind. App. 1981)).

27. *Balson v. Dodds,* 62 Ohio St.2d 287, 405 N.E.2d 293 (1980), syllabus at ¶ 2.

28. *Kutscherousky* at ¶ 17 (quoting *Mid Valley Bank v. North Valley Bank*, 764 F. Supp. 1377, 1391 (E.D. Cal. 1991); other citations omitted).

29. *Kutscherousky* at ¶ 19 (quoting *Westmoreland v. Triumph Motorcycle Corp.*, 71 F.R.D. 192, 193 (D. Conn. 1976)); *see also Riley v. Kurtz*, 194 F.3d 1313, 1999 U.S. App. LEXIS 24341 (6th Cir. 1999) (applying same standard).

30. *Kutscherousky* at ¶ 19; *see also Hadley v. United States*, 45 f.3d 1345, 1348 (9th Cir. 1995) (first prong "is satisfied 'when upholding the admission would practically eliminate any presentation on the merits of the case.'").

31. *Kutscherousky* at ¶ 26.

32. *Id.* at ¶ 25 (citations omitted).

33. *Kutscherousky* at ¶ 25.

34. *Kutscherousky* at ¶¶ 25-29.

35. Corwin v. Kimble, 5th Dist. Licking No. 22CA00002, 2022-Ohio-3395, ¶ 42 (citing *Kutscherousky*).

36. *Corwin* at ¶ 54 (citing *Jade Sterling Steel Co. v Stacey*, 8th Dist. Cuyahoga No. 88283, 2007-Ohio-532 and *Riddick v. Taylor*, 8th Dist. Cuyahoga No. 105603, 2018-Ohio-171)

37. Civ. R. 36(A)(2); Civ. R. 37(C); Fed. R. Civ. P. 37(c)(2).

38. *See Kamhikar v. Fiorita*, 10th Dist. Franklin No. 16AP-736, 2017-Ohio-5606, ¶ 47-48

39. *Altercare of Mayfield Village, Inc. v. Berner*, 8th Dist. Cuyahoga Nos. 104259, 104306, 2017-Ohio-958, ¶ 43 (citations omitted). Both the state and federal rule also include a "catch all" exception for "other good reason for the failure to admit." *See* Civ. R. 37(C); Fed. R. Civ. P. 37(c)(2).

40. *Id.* at ¶ 43.

41. *Salem Med. Arts & Dev. Corp. v. Columbiana County Bd. of Revision*, 82 Ohio St.3d 193, 196, 1998-Ohio-248, 694 N.E.2d 1324.

42. Advisory Committee Notes, 1970 Amendment, Fed. R. Civ. P. 37(c).

43. *See Youssef v. Jones*, 77 Ohio App.3d 500, 509-510, 602 N.E.2d 1176 (6th Dist. 1991) (defendant had good faith basis for denying requests for admissions dealing with plaintiff's injuries); *see also Sinea v. Denman Tire Corp.*, 135 Ohio App.3d 44, 45, 732 N.E.2d 1033 (11th Dist. 1999) (no award when witness credibility was at issue).

44. *See Sinea*, *supra* at 43; *see also Baltimore v. Johnson*, 8th Dist. Cuyahoga No. 42690, 1981 Ohio App. LEXIS 13963 (April 30, 1981) (no award when conflicting evidence was presented).

45. *See Tanio v. Ultimate Wash*, 8th Dist. Cuyahoga No. 98826, 2013-Ohio-939 (no award when fact had no causal relationship to the plaintiff's claims)

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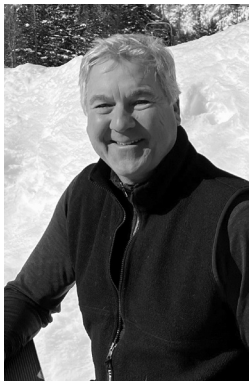
Pointers From The Bench:
An Interview With Judge David T. Matia

By Marilena DiSilvio and Ellen Hobbs Hirshman

Judge David Matia, now in his 25th year on Common Pleas Court, has extensive experience having handled thousands of cases and hundreds of trials. However, he is most proud of his work as founder of Cuyahoga County's first felony drug court in 2008. The court now has four drug court dockets that have improved the lives of well over a thousand individuals.



Judge David T. Matia

Born in October 1964 in Lackawanna, New York, a suburb of Buffalo, Judge Matia was given up for adoption shortly after birth by his mother, who was staying at Our Lady of Victory, a home for unwed mothers. His adoptive parents, Joan and David, brought him home to Independence, Ohio when he was three months old.

Judge Matia always knew about that he was adopted, but he initially had little desire to find his biological parents. Fate intervened on a trip to Toronto to celebrate his wife, Monica's, 30th birthday. On their way north, they drove past Our Lady of Victory, which was no longer an orphanage. There, they learned that Judge Matia's birth mother had left a letter. That letter prompted a LexisNexis search that ultimately led to Judge Matia meeting his birth mother, a teacher, who was then living in Columbus. A few months later, he met his birth father, a lawyer/business owner, in Lewiston, New York. Judge Matia stays in touch with his birth parents and his six half-siblings.

A graduate of St. Ignatius high school, Judge Matia received his B.S. in business from Miami University in 1987. After graduating from Case Western Reserve University School of Law in 1990, Judge Matia began his legal career as an attorney at Jacobson, Maynard, Tuschman and Kalur as a litigator in the defense of medical malpractice and mass tort matters. He then started his own practice in 1994, specializing in civil litigation, probate and domestic relations. The bench was the next step. Judge Matia was elected as judge in the November 1998 election. He took the bench the following January, at the age of 34.

Judge Matia's transition to the bench was made smoother by observing his father while growing up. His dad served as a Common Pleas judge from 1971 to 1986. The younger Judge Matia grew up in the Justice Center spending many of his days off from school with his dad. Advice from senior judges also helped pave his way. He still remembers the advice Judge Janet Burnside gave at new judge orientation that their reputations would be established within the first six months. Judge Matia took those words to heart and has established a reputation of committed service to the constituents of this County. Of all his duties, Judge Matia finds sentencing to be the most challenging. He is dedicated to breaking the cycle of recidivism through helping people better themselves while on probation by encouraging behavioral health treatment, thinking for a change programming and further education.

After about 6 years on the bench, Judge Matia considered a bid for the Court of Appeals. However, he realized his passion was helping those who came before him. "I also realized how much I would miss most of the lawyers. Lawyers are some of society's smartest and most interesting people." He plans to finish his career on the trial court. He attributes most of his success to his dedicated team, including his bailiff, staff attorney and the drug court professionals. "Those are the folks who deserve recognition for their dedication to serving the public."

In 2008, Judge Nancy McDonnell appointed Judge Matia to be the court's first drug court judge. The role has changed his life. "I'll be the first to admit that I have suffered with patience. Working with those suffering from dependency issues has

helped me with this weakness and it has led to a fulfillment that you can't realize in working a traditional criminal docket." Through his experience with drug court, Judge Matia has studied the science of addiction and in so learning treats addiction not as a crime but as a disease. He has heartwarming and inspiring success stories of individuals who have graduated the program and gone on to reestablish their personal relationships and work lives. One of his graduates recently called to thank Judge Matia from New Jersey, where he had relocated to reconnect with his children and where he continues to live happily in sobriety. Another of his graduates is currently in law school.

Drug court provides Judge Matia the opportunity to get to know the members of the class and he fully invests in each one. Currently, there are 90 individuals in the drug court class and he sees them all at least once a month. Together with a coordinator, public defender, prosecutor, two case managers and probation officers, each drug court participant is given the resources to succeed.

According to Judge Matia, the best part of drug court involves reading the participant's applications to graduate. Question 6 on the application asks the graduate to provide three sentences or more describing what life was like before and after the program. One common response described life before the program as "I was disappointed to wake up in the morning to find that I wasn't dead" and life after the program as "I now have the trust of my parents and friends and a feeling of self-worth."

Over 1,000 lives having been improved by Drug Court. "It is a privilege to be a judge," Judge Matia told us. "Fewer things are more fulfilling than helping turn around the lives of those with a substance use disorder. It's great to see the faces of their loved ones at our Drug Court graduation ceremonies. The glowing smiles and tears of joy let you know that you have altered someone's life for the better."

In addition to Drug Court, Judge Matia expanded the Rx Drug Drop Box Program countywide to offer all residents an option to safely dispose of prescription medications. He is a past president of the Ohio Common Pleas Judges Association and received the organization's President's Award in 2018 for his years of service. Judge Matia served on the Ohio Attorney General's Opiate Task Force and the Cuyahoga County Medical Examiner's Poison Death Review Committee. He is a recipient of the Exemplar Award from Recovery Resources and the C.J. McLin Award from the Ohio Justice Alliance of Community Corrections. Most recently he was appointed as Cuyahoga County's representative to the OneOhio Foundation Board which is charged with distributing 55% of the opioid litigation funds.

Judge Matia and his wife, Monica, have been married for thirty years. Monica, a former teacher, is now the project coordinator for the Moms House, a MetroHealth Medical Center program that started in 2019. The Moms House is a recovery home, which provides a structured, peer-accountable, and supportive setting for pregnant opioid dependent women. Monica has done everything from taking residents to get their driver's licenses to driving a resident and young child to preschool. She recently secured funding to open a second house.

Judge Matia and Monica have three children, Meredith, Laurel and David. Meredith is a graphic designer in New York City who will be getting married this summer. Laurel is a photographer living in Columbus and David will graduate this month from the University of Cincinnati with a degree in Industrial Design.

Staying active is important to Judge Matia. He enjoys mountain biking and skiing and any activity that brings him closer to nature. He is fortunate to have many good friends to keep him company.

Judge Matia's goal for the future is a County run hospital treatment center that connects people with medication and treatment.

Judge Matia is extremely grateful to the plaintiffs' bar, particularly those in northeast Ohio, who accomplished something that the F.D.A., the D.E.A. and many others could not do. "They brought the manufacturers and distributors of opioids to heel for their knowing and reckless behavior that afflicted this country with a multi-decade epidemic of death and family destruction. Their drive for justice and remediation took guts and a tremendous amount of personal financial risk. Most Americans will never realize the gratitude owed to these individuals, but I do."

If you're looking for some great books on the opioid epidemic Judge Matia recommends *Empire of Pain* by Patrick Raden Keefe and *American Cartel* by Scott Higham and Sari Horwitz. *Empire of Pain* is about the Sackler family and *American Cartel* goes into great detail about the other drug companies' and distributors' roles in the epidemic.

Other books he suggests are:

Grit
by Amy Duckworth

The Craving Mind
by Judson Brewer

The Body Keeps Score
by Bessel Van deer Kolk

Sapiens
by Yuval Noah Harari

Your Inner Fish
by Neil Shubin (another favorite)

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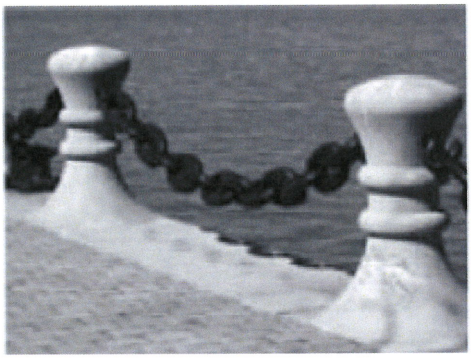

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In Memoriam: Jeffrey H. Friedman (1947 – 2022)

CATA mourns the death, on May 29, 2022, of long-time CATA member Jeffrey H. Friedman. Jeff was a friend and mentor to many CATA members, a remarkable attorney, and a powerhouse of a person. His image was iconic: having sustained a paralyzing spinal cord injury in an automobile accident at the age of 17, he was the personification of how personal tragedy can be transformed into a force for helping others.

Jeff's career spanned five decades, the last forty years of which he served as founding member and managing partner of Friedman, Domiano & Smith, LLC. Throughout his law practice he was a devoted advocate for the seriously injured and disadvantaged. Among his many victories was *Felden v. Ashland Chemical*, an employer intentional tort case which resulted in a $3.5 million verdict (the largest of its kind in the state of Ohio) and an oft-cited appellate decision.

In addition to his private law practice, Jeff served for many years as a part-time Assistant Attorney General, as well as a Councilman and Vice Mayor of University Heights. He sat on numerous boards, including Easter Seals and the Spinal Cord Injury Foundation, and was a life-long advocate for handicap-access laws.

Jeff will be greatly missed, including at our annual dinners that he attended for many years. Our deepest condolences go out to his wife, Margaret Duffy-Friedman, his stepdaughter, Colleen Cloherty, and all his extended family.

"A Unique and Remarkable Individual"

As a very young lawyer in the 1980's, I represented a client who insisted upon a loan lest she go elsewhere. A few days later, I received a call from Jeff Friedman, of whom I had heard. He was already an attorney of considerable stature and I guarantee you he had never heard of me. He told me that this client had approached him about switching lawyers and that he had given her a stern lecture to the effect that she was fortunate to already be well represented. Thereafter, the client returned and a resolution was one of the larger cases of my early years of practice.

As I came to know Jeff better over the years, I gained a greater insight into why he did what he did. Jeff wouldn't consider what he did as an act of kindness; rather, it was a manifestation of his attitude about the practice of law, and the need for professionalism, values which are, unfortunately, not ubiquitous within our ranks.

But what singled out Jeff from his peers more than anything else was his attitude about his circumstances. Jeff never complained. And I mean he never complained. He just went ahead and achieved a remarkable amount with a difficult hand that life had dealt him. Conversations with Jeff were about solving the problems at hand, and looking forward, never backward.

I feel privileged to have known this unique and remarkable individual.

– Bill Jacobson

Announcements - Spring 2023

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

Recent Promotions and New Associations

The Law Firm For Truck Safety is thrilled to announce that attorneys **Amy Papuga** and **Joshua Leizerman** have been promoted to Partner. You can find a link to Amy's press release here: https://truckaccidents.com/the-law-firm-for-truck-safety-names-truck-accident-attorney-amy-papuga-partner/.

NFP Structured Settlements congratulates **Amanda Buzo, Esq.**, and NDC Advisors on joining forces. Amanda will be an account manager providing trust services to needy clients.

Lowe Scott Fisher is pleased to announce that CATA Members **Scott Kuboff** and **Kyle Melling** have been named partners at the firm in April 2023. Additionally, longtime CATA member **Ellen Hobbs Hirshman** joined the firm in March 2023.

Hickman Lowder Lidrbauch & Welch Co., L.P.A.

Hickman Lowder has changed its name to **Hickman Lowder Lidrbauch & Welch Co., L.P.A.** In doing so, the firm recognizes the important contributions of its colleagues, **Elena A. Lidrbauch, CELA*** and **Ethan A. Welch**, as managers and principal shareholders of our firm.

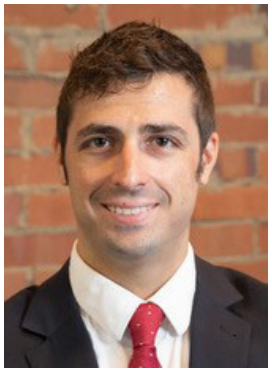
*Certified Elder Law Attorney by the National Elder Law Foundation

Recent Promotions and New Associations

Eadie Hill is pleased to announce that **Madeleine Skora** and **Matthew Mooney** have joined the firm as Nursing Home Abuse Lawyers. Madeleine Skora graduated magna cum laude from the Salmon P. Chase College of Law in May 2022. Matthew Mooney joined the firm's Cleveland office in March after several years with a well-known personal injury firm where his practice focused on medical malpractice.

Honors, Awards, and Appointments

Nurenberg, Paris, Heller & McCarthy is proud to announce that **Jonathan Mester** has been elected Managing Partner, effective January 2023. Jonathan is replacing David Paris, who is stepping down, but will continue practicing law with the firm.



Calder Mellino was recently appointed Vice Chair for the Ohio State Bar Association Access to Justice Committee.

Publications

DJ Young, a partner at The Law Firm For Truck Safety, had an article published in the February issue of *Trial Magazine*. The article details ways plaintiff attorneys can overcome the McHaffie Rule. The link to his article and to download the .pdf can be found here: https://truckaccidents.com/beating-the-mchaffie-rule-holding-corporations-accountable-in-trucking-cases/.

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Todd Gurney - ORT

ORT Ohio held a fun family-friendly event at the Cleveland Racquet club on Sunday, April 23rd. Led by CATA Past President **Todd Gurney**, the *Come ORT & Play* event brought together more than 60 families for games, activities, a balloon artist, and the popular kids' musician, Jesse Jukebox. The event helped raise money to provide education for ORT students across the globe.

ORT America is the leading fund-raising organization supporting ORT's global network, transforming lives through education and training in 40 countries. ORT is the largest non-governmental provider of education in the world.

In 2018, ORT honored CATA Past President David Paris with its prestigious Jurisprudence Award. This year, CATA is proud once again to sponsor the ORT Jurisprudence Award Event, which will be held at The Union Club on June 28, 2023. For more information, go to: https://ortamerica.org/regions/ohio-region/event/jurisprudence-awards/

Aaron Berg - EndDD Presentation

On March 22, 2023, CATA member, **Aaron Berg of Caravona & Berg, LLC** gave a distracted driver presentation at Rocky River High School. The presentation is the product of The Casey Feldman Foundation, honoring Casey Anderson Feldman who tragically passed away in 2009 from a distracted driving crash, to build awareness of the dangers of distracted driving. Assistant Principal Brian D. Gergley hosted the presentation, which was well attended by members of the Junior Class.

Aaron P. Berg

CSU BLSA Annual

The CSU Black Law Student Association (BLSA) annual banquet took place on April 1, 2023. The banquet was an evening to celebrate the success of the BLSA members and award scholarships to students in need. CATA was honored to be included in this event and sponsored a table.

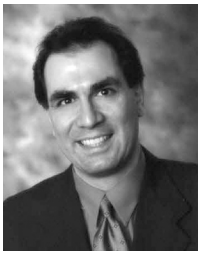
CATA Members Ladi Williams, Meghan Connolly and Todd Gurney, with Athena Williams, President of the CSU BLSA.

CATA Litigation Institute

Once again, CATA's Annual Litigation Institute, which was held on April 28, 2023, was a great success. This year's workshop was designed to help participants hone their Voir Dire skills by interacting with mock jurors in a focus group guided by Master Coaches. The coaches included Julia Metts, of Pensacola, Florida, Jim Lees of Charleston, West Virginia, and CATA members Chris Mellino, Nick DiCello, and Susan Petersen. Pictured here are some of the coaches and attendees.

CATA Litigation Institute coaches and some participants

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



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Time's Up: The End of Appraisal

by Dimitrios S. Pousoulides

The Standard

Almost all property insurance policies contain a clause that permits either the insurer or the insured to invoke an appraisal process if the parties fail to agree on the "amount of loss." Appraisal sometimes is used as an alternative dispute resolution tool and a shield from litigation.

The following is a fairly standard appraisal clause.

> Appraisal
>
> If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss. Each party will: 1. Pay its own appraiser; and 2. Bear the other expenses of the appraisal and umpire equally.[1]

Once one of the parties demands appraisal, then each party will identify an appraiser. The two appraisers will then select an umpire. The appraisal process then proceeds to determine the "amount of loss." Once two of the appraisers agree on the "amount of loss," their determination establishes the "amount of loss."[2] Some appraisal clauses specifically state that the insurer retains the right to deny the claim despite any appraisal demand.

Amount of Loss v. Scope of Repair

The "amount of loss" is the amount of money the insurance company owes to its insured as a result of damage caused to the insured's property as a result of a covered cause of loss. How that amount of money is determined is the issue that arises in many cases.

The "scope of repair" has been recognized as something different than the "amount of loss." For example, a hailstorm causes damage to a homeowner's roof. The number of shingles that were damaged and that need to be replaced as a result of the storm would be the "scope of repair." The cost to replace those shingles damaged by the storm would be the "amount of loss."

Disputes arise when the appraisers conflate the "scope of repair" and "amount of loss." If the "scope of repair" is agreed upon, then the appraisal process can address the "amount of loss," i.e. the amount of money that it will take to complete the "scope of repair." However, if the "scope of repair" cannot be agreed upon, appraisers stray

into the territory of scope of coverage issues. For example, appraisers may be asked to determine whether a shingle was damaged by a particular hailstorm, or whether it was caused by mechanical damage, or even a prior storm. This analysis pertains to the scope of repair, or the scope of coverage under the terms of the policy, and not the amount of loss. Some policies require repair with "like kind and quality" products, other policies require repair with "comparable material." Whether such a scope of repair complies with this policy language is a determination for the Court, not appraisers.

Just the Facts

The standard appraisal language states the appraisers "will determine the amount of loss." The appraisal process should be limited to the facts regarding the amount of loss. If the dispute is over the scope of coverage and the interpretation of insurance policy language, those are issues as a matter of law for the Court to decide. The appraisers have no authority to make coverage determinations or interpret an insurance policy.[3] "Questions over the extent of coverage and how to define the amount of loss also present legal questions of contract interpretation."[4] When one party argued a lawsuit should be dismissed because the appraisal process had been completed and an appraisal award had already been awarded, summary judgment was not appropriate when there is a coverage question in dispute under the terms of the insurance policy.[5]

Some courts have reached the conclusion that there is a distinction between "amount of loss" and "scope of repair" issues, and that appraisal would be premature until the court determines "scope of repair" and "scope of coverage" issues.[6] The thought process is that the court will interpret the insurance contract before the appraisal process determines the amount of loss. Some may argue the appraisal process can first determine the "amount of loss" and then the parties can proceed to the Court to determine coverage and scope of repair issues. However, this may represent a waste of resources where the appraisers are determining damages that a Court may later deem not covered. In fact, some appraisal clauses specifically state that the insurance company reserves the right to deny the claim even after the appraisal process.

Some courts, however, have permitted the appraisal process to stray into the territory of policy interpretation if it assists the appraisers to make a final determination as to the "amount of loss." This position has steered the appraisal process to disputes about how the appraisal process should be conducted.

Not a Simple Task

Sometimes during the appraisal process, there is a melding of amount of loss questions with coverage issues. For example, do the appraisers determine whether damage that appears on a shingle was caused by one particular storm, or from a different storm date, or was the damage caused by other means than a storm, or was the damage pre-existing? None of these questions pertain to the cost of installing a roof. These questions pertain to the cause of the damage.[7] Often, parties will hire professional roofers or engineers as experts to testify as to these causation issues. These causation issues raise the question of whether some appraisers are qualified to make such determinations. One insurance company has changed their appraisal language to address that very concern, which will be discussed further below. In any event, more often than not, disputes arise not from the cost of the shingle, or even the cost of the labor to install a roof. Those amount of loss issues have been pretty much resolved with cost estimation software, like Xactimate. Appraisers often are bogged down on causation issues, i.e. is the damage to the property caused by the covered cause of loss or is there some other reason for the damage?

As one Ohio federal court noted: "Separating coverage issues from loss issues is not a simple task."[8] That same court quoted, with approval, a Tennessee federal court on the subject: "practically speaking, it would be difficult to completely divorce causation and coverage findings from an appraised loss."[9] The mere fact that it may be difficult to separate causation and coverage issues from amount of loss issues is enough of a reason not to proceed through appraisal.[10]

A Voluntary Process

The Court in *Davis v. Geico Casualty Company* agreed with the Federal 2nd Circuit's analysis of a standard insurance appraisal clause. The 2nd Circuit found that an insured could not be compelled into appraisal by an insurance company. The 2nd Circuit specifically found that an insured was not limited to appraisal as the "sole remedy" to determine the "amount of loss." The 2nd Circuit focused on the permissive nature that either party "may" demand appraisal.

The *Davis* Court agreed:

> Yet there is nothing here that suggests that this provision—little more than an alternative dispute resolution mechanism—was intended to be anything other than a voluntary remedial option.
>
> * * * *
>
> The Court agrees with the aforementioned reasoning and finds that there is nothing in the language of GEICO's policy that requires the parties to engage in appraisal, it is merely a voluntary process.[11]

Many times, policyholders are frustrated with an appraisal process that drags on for an undetermined amount of time, with much money invested, and not much to show for it. And even when the Court becomes involved, there is not much clarity. Court decisions merely emphasize the lack of clarity in the standard appraisal clause.

Re-writing the Policy – Judges as Underwriters

The lack of instruction from appraisal clauses has caused some courts to issue instructions for the appraisal process. In some cases, the instructions can be numerous pages. In the case of *American Storage v. Safeco*, the Court ordered appraisal and issued instructions to the appraisers and umpire that were ten (10) pages.[12] The Court then asked the parties to clarify the appraisal process by briefing issues such as depreciation and the administration of the claim to assist the Court in supplementing the appraisal clause which was lacking in substance and direction.[13]

These are cases where the Court agrees to appraisal and attempts to enforce a one paragraph appraisal clause by issuing multi-page instructions to the appraisers and umpire. These Courts – though well intentioned – are re-writing the insurance policy. The mere fact the Court feels compelled to issue multi-page instructions to guide the appraisal process is proof of the failure of appraisal clauses. If the appraisal clause is so clear, why does the Court need to issue instructions?

In the interest of avoiding an in-court jury trial and instead facilitating an out-of-court alternative resolution, courts are propping up the appraisal clause in re-writing insurance policies so that the ends justify the means. For example, the Court in *American Storage v. Safeco* permitted the authors of the competing loss calculations to be present during the appraisal process inspection at the loss location even though the Court admitted such was not contained in the policy. The Court believed this addition in the policy language would aid the appraisal process.

> The Court recognizes that the appraisal procedure set forth in the insurance contract does not dictate the presence or availability of the authors of the competing loss calculations, but the Court is of the view that the appraisal process set forth in the insurance contract will be aided by the presence of the authors of the competing loss calculations.[14]

Also, the Court in *American Storage* included a deadline to complete the appraisal process. However, there is no time limit in the appraisal clause. So why is the Court writing in a time limit? I understand the reason the court is doing it: an attempt to facilitate the end of the appraisal process. But that is not what the parties bargained for. If they did, there would be a time limit in the appraisal clause. The mere fact courts feel compelled to play underwriter to address the shortcomings of appraisal clauses is enough to end appraisals.

Participating in a Process for Which They Did Not Bargain

One court in Ohio has found the appraisal clause to be ambiguous and ultimately unenforceable. In *Ocheltree v. Pike Mutual Insurance Company*, the insurance company filed a motion to order appraisal. The Court initially agreed to move forward with the appraisal process despite the insured's opposition to the motion that the insurance company was "asking the Court to permit the appraisers and umpire to interpret the insurance policy."[15]

The appraisal proceeded and the insured's appraiser and the insurer's appraiser both submitted estimates to the umpire. After reviewing the two estimates, the umpire announced he could not agree with either estimate. The insurer then filed a motion for clarification[16] requesting the court to order the umpire "to prepare his estimate and submit it to the Court, as well as the other two appraisers in order to determine whether two of the three appraisals are in agreement."[17]

The Court emphasized that insurance policies "should be written in a manner that a layperson or policyholder can clearly understand what is being covered." The Court found that "there is no question that the clause is susceptible to more than one reasonable interpretation." The Court determined that the terms "written agreement" and "umpire" were not defined in the policy and open to more than one reasonable meaning. Most importantly, the court noted there is no "instruction or guidance as to how the umpire is to perform his job."[18]

The Court denied the insurer's motion finding that the insurer's request was "to direct the Umpire to perform a task that this Court found was not contained within the policy."[19] The Court observed:

> The fact of the matter is Defendant wrote this policy and distributed it to the policyholder. It was their responsibility to make sure it was clear. They failed. Defendant, in writing the policy, chose not to define 'written agreement,' chose not to define what "an umpire is" and/or how they perform their job, their ability to visit the scene, speak to attorneys, or contact any of the prior appraisers. Since the policy is to be construed strictly against Defendant and liberally in favor of Plaintiffs, this Court cannot order

> Plaintiffs to participate in a process for which they did not bargain.[20]

The Court ended the appraisal proceedings and the case proceeded to trial.

This author understands that the *Ocheltree* case is a common pleas court case, not an appellate or Supreme Court case. However, the Court came to the conclusion which many have thought but have not been willing to say: appraisal does not work. The standard appraisal clause (which *Ocheltree* addresses) is simply lacking in specificity.

One insurance company recognizes the fatal shortcomings of the standard appraisal clause. State Farm Insurance Company, in some of its policies, has thrown out the standard appraisal language and substituted it with a much more detailed appraisal clause which spans over one page of its policy and about 750 words (compared to the approximately 164 words of a standard appraisal clause). Clearly, State Farm, the largest property and casualty insurance company,[21] has come to the realization that the current standard appraisal clause is unworkable.

The intent of the article is not to address all case law in favor or against appraisal in a particular type of case. Those of us who have been involved with this issue know that there is plenty of case law on both sides. But the fact that there is no consensus on *how* appraisal should be conducted on a fairly standard ISO policy clause should be cause for concern on the ongoing viability of appraisal. ■

End Notes

1. Every policy is different as to the specifics. But in general, this is how most appraisal clauses are worded. This particular appraisal clause is consistent with other insurance appraisal clauses. It is a form of an ISO HO3 – Homeowners 3 property form. Other appraisal clauses may have different wording but for the purposes of this article, this particular appraisal clause is consistent with its lack of specificity.
2. The determination as to the amount of loss can be a combination of the two appraisers, or one appraiser and the umpire.
3. *McPheeters v. United Servs. Auto. Ass'n*, 1:20-cv-414 (S.D. Ohio Aug. 20, 2020) (*following Davis v. Geico* and *Ostendorf v. Grange*); *Ostendorf v. Grange Indem. Ins. Co.*, 2:19-cv-1147 (S.D. Ohio Jan. 13, 2020); *Davis v. Geico Casualty Company*, 2:19-cv-2477 (S.D. Ohio Jan. 7, 2020).
4. *Davis, supra*, fn. 2, (*quoting Milligan v. CCC Info. Services Inc.*, 920 F.3d at 154 (2d Cir. 2019)).
5. *Prakash v. Allstate Insurance Co.*, 5:20-cv-524 (N.D. Ohio Jan. 5, 2021).
6. *See Saunders v. Auto Owners Mutual Insurance Company,* 3:22-cv-18, Doc. 14 (N.D. Ohio June 23, 2022); *Marchionda v. Allstate Property and Casualty Insurance,* Mahoning C.P. No. 15CV2806, July 12, 2016; *Wooley v. State Farm Insurance Companies,* Stark C.P. No. 2003CV2946, Jan. 28, 2004; *Belt v. State Farm Insurance Companies*, Stark C.P. No. 2003CV1374, Jan. 20, 2004.
7. A careful examination reveals that if an appraiser is permitted to determine the cause of the damage to shingles, then appraisers should be permitted to determine the cause of damages in other cases. For example, appraisers should be permitted to determine whether a fire was accidentally caused or was the result of an intentional act. Consistency would lead to unwanted consequences.
8. *Prakash, supra*, p. 5.
9. *Id.* [*quoting Hill v. Auto-Owners (Mut.) Ins. Co.*, No. 4:19-cv-78, 2020 WL 7034321, at *4, (E.D. Tenn. Nov. 30, 2020)].
10. *Cf. Stonebridge at Golf Village Squares Condominium Association v. Phoenix Insurance Company,* 2:21-cv-4950, Doc. 29 (S.D. Ohio Sept. 22, 2022); *Westview Village v. State Farm Fire & Cas. Co.*, No. 1:22-cv-549, 2022WL3584263 (N.D. Ohio Aug. 22, 2022); *TransCapital Bank v. Merchants Mut. Ins. Co.*, No. 3:11-cv-1176, 2013WL322156, (N.D. Ohio Jan. 28, 2013).
11. *Davis, supra*, pp. 5-6 (*citing with approval Milligan, supra*).
12. *American Storage Centers Inc. v. Safeco Insurance,* USDC No. Dist., 5:08-cv-655, Doc. 34.
13. *Id.* at Doc. 41.
14. *Id.*, Doc. 34, p. 8.
15. *Ocheltree v. Pike Mutual Insurance Company*, 2019CV1235, Stark C.P. No. 2019CV1235, Jan. 4, 2021.
16. The mere fact that the insurer is filing a motion for clarification is again indicative of the vague and ambiguous nature of appraisal clauses. If the appraisal clause is so clear, why do we have to clarify?
17. *Ocheltree, supra.*
18. *Id.*
19. *Id.*
20. *Id.*
21. https://www.reinsurancene.ws/top-100-u-s-property-casualty-insurance-companies.

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Trauma Informed Lawyering and Motor Vehicle Collisions

by Regan J. Sieperda

Personal injury attorneys are no strangers to communicating with clients who have been subject to trauma. Not only is it an attorney's duty to consider the trauma when communicating with their client, but re-traumatization of clients is something which must be taken into account as well. It is in our nature as attorneys to seek the truth, but it is also important that each attorney be cognizant of their own communication style and practices when dealing with victims or clients who have suffered a trauma.

It serves as no surprise to acknowledge that motor vehicle accidents are a leading cause of death in the U.S.[1] Though nonfatal accidents often cause bodily injury or death, which may affect cognitive function, functional impairment or loss of quality of life, psychological disorders and deficits caused by motor vehicle crashes are oftentimes overlooked. Notably, studies have shown that it is likely that psychological distress is elevated even when no physical injuries were sustained.[2]

Trauma – Defined

The American Psychological Association defines Trauma as "an emotional response to a terrible event like an accident, rape or natural disaster."[3] Immediately after the event, shock and denial are typical.[4] Longer term reactions include unpredictable emotions, flashbacks, strained relationships, and even physical symptoms like headache and nausea.[5]

Knowing the aforementioned definition of trauma and its potential symptoms, attorneys must attempt to genuinely empathize with clients or victims who have suffered a traumatic event.

In fact, a significant portion of road traffic crash survivors will develop psychological disorders following a road traffic crash.[6]

In 2020, a study was conducted at the Josip Jurah Strossmayer University of Croatia, researching 155 Road Accident survivors. The survivors were studied approximately one month after their road accident.

The study sought to explore the psychological consequences to survivors of motor vehicle crashes -- those who sustained bodily injury, and those who did not. Shockingly, of the 155 participants, 32.2% were identified as having PTSD.[7]

PTSD Prevalence in MVAs

Over the course of the years, more than two dozen studies have been conducted on MVA-related PTSD. Members of the psychological field have surveyed MVA survivors, oftentimes from ER admissions or hospitals wards, and conducted validated structural interviews to assess those seeking medical attention. The persons sampled did not present seeking psychological treatment and were not classified to be "seekers." Of the interviews conducted, the presence of PTSD at least 30 days post-MVA was 25-33%.[8]

Notably, the aforementioned Croation study, which found that 32.2% of participants suffered from PTSD, revealed that only 3.2% (3.2) of participants suffered what was categorized as "Severe" injury (based on New Injury Severity Scale), and that 43.2% of the participants had a self-perceived threat to life at the time of the accident.

Predictors of PTSD present in the Croatian study group (associated with female gender) included: below-average self-perceived economic

status, medication use, not being at fault in the subject road traffic accident, claiming compensation, and injury related factors.[9]

Additionally, a separate study of 1,000 individuals, coming from 4 southeastern (USA) cities, demonstrated that prevalence rate of PTSD was 7.4%, and that MVAs were among the leading cause of PTSD in the sample.[10] This statistic, along with a rate of MVA-related PTSD found in a survey of relatively young Americans, suggests that, conservatively estimated, MVA-related PTSD may affect 2.5-7 million people in the United States.[11]

In a separate study conducted in 1997 where 130 MVA survivors were asked who was responsible for the accident (self-responsible v. other-responsible), it was reported that those "not responsible for their accidents reported more long-term distress and were marginally more likely to be diagnosed with PTSD than motor vehicle collision survivors who were responsible for their accident."[12] The findings of this study concluded that the perceived loss of control in an event where an individual sustains injury, causes the victim to feel that "the ability to control future driving experiences is diminished, and that the ability to act or respond to avoid future harmful crashes is compromised."[13]

Based on the aforementioned studies, it is clear that even when survivors of motor vehicle collisions do not have severe injuries, or where the survivor is not responsible, PTSD resulting from MVA trauma can present at an alarmingly elevated rate.

Initial Client Contact – Client Able to Communicate

There is a large chance when a client calls into a personal injury firm or requests to file a police report, that the individual has gone through some type of trauma. It is not our job as attorneys to attempt to subjectively weigh how significant a trauma is to a certain individual. It is, however, worth recognizing that a trauma has occurred, that an individual may continue to suffer from post-traumatic effects, and that this trauma could remain for the rest of the individual's life.

In order to fully determine whether a client, witness, or victim has trauma, it is important to build a trusting relationship with that individual. Lawyers must keep in mind that at the time of the initial client contact, the lawyer is nothing more than a stranger to the client or victim. Though some clients or victims are more likely than others to disclose their trauma, it is important to note although an individual might appear more reserved, a trauma might still exist.

Jordan Lebovitz is a partner at Nurenberg Paris and has litigated hundreds of cases, from soft tissue injuries to catastrophic loss cases. Many of his clients have undergone significant trauma. Needless to say Jordan has been exposed to and has had extensive contact with victims, their family members and their friends. I sat down with Jordan to get a better idea of how communications can best be established between a client and an attorney when the client has suffered a trauma.

Question #1: So how is trust initially established with a client who has suffered trauma?

Jordan: I believe that active listening is the most effective way to establish trust when first meeting with a client who has suffered trauma. By actively listening, and paying attention to their body language, tones, and other physical and emotional cues, you can lean in to their emotions and react and offer guidance only when it's truly necessary during that initial conversation. Listening to a client share their story, on their terms, is essential to building that trust.

Communications, Tone and Body Language – Client Able to Communicate

As Jordan mentioned, it is important to recognize a client or victim's communication style, tone, and body language when discussing a trauma. Though it is an attorney's job to either prove or disprove a case, it is important to note the comfortability of an individual when they are expressing their trauma. It is not an attorney's job to allow for the re-traumatization of a trauma to occur, but rather to create an understanding of the traumatic events themselves.

The first few sentences of deposition or trial testimony likely mention that every statement made by a client or witness is being taken down by a court reporter. Clearly, where a client or witness is under oath beneath the bright lights of a conference room or court room, the client will feel as though they are put under increased stress to re-hash their trauma perfectly. Most attorneys would chomp at the bit to impeach these clients on their inability to recall certain details, inconsistencies with testimony, and overall demeanor of the client. However, it is highly likely that an aggressive cross would call for the under-oath victim or injured party to suffer heightened stress which may impact his or her physical ability to continue answering questions (sobbing, hyperventilating, fainting, etc.). When clients or victims appear avoidant, detached, or emotional it can become difficult for attorneys to comprehend a trauma-inducing event.

Question #2: How can an attorney effectively question a client who has suffered trauma?

Jordan: Asking questions of someone who has suffered trauma starts with listening to their story, and then progresses to participating in their story by asking questions only when necessary. I find it essential to move at the client's pace when asking questions, and delve into the more detailed events only when appropriate. It's also OK to ask the client "would you mind if I asked you more detailed questions about _____?" or "do you mind sharing more details of how _____ happened?" You want to put the client in the position to tell their story, not to just bombard them with questions to fill in your client intake sheet or questionnaire.

Additionally, mirroring a victim's or client's communication style, tone, and/or body language has been scientifically proven to increase trust between two individuals. Mirroring is the second version of prior talk which may appear to be repetitious. Now, as we all know, repetitive questioning is objectionable, but responding with reiterations is strategic as it displays attentiveness but also seeks further elaboration on the repeated items in the preceding talk.[14] By this method of questioning, clients likely will be able to more freely disclose information which needs more elaboration or has not yet been mentioned.

Ongoing Psychological Effects on Clients

Trauma is not a one-time event. Trauma is not something that is easily disposed of. Trauma remains ongoing and could potentially remain ongoing for the rest of an individual's life. Thus, it is worth noting that once the significance of the trauma has been communicated to an attorney, the attorney keep in mind the trauma throughout the case. Attorneys must understand that some days may be better than others, but there are likely triggers which could, potentially, create re-traumatization of a client or a victim.

It goes without saying that if a client or victim has confided in their attorney that they need psychological help in regard to their trauma, the lawyer should take it upon himself or herself to help their client or victim get help.

Question #3: Is there any way I can help a client who has suffered a trauma?

Jordan: There are many ways to help, but it depends on what hat you are wearing. As an attorney, you can help by advocating for your client, and ensuring that they have the right to share their story on their terms and to achieve justice for what someone has taken from them or done to their physical and mental wellbeing. As a friend, you can listen and offer guidance and support when requested. You'll never walk in their shoes, but you can certainly appreciate what it would be like to be in their position by listening.

Conclusion

Given the aforementioned statistics, it is not too far fetched to believe that a large number of clients who present to attorneys have suffered some sort of trauma. It is important to note early on whether a client may have been subjected to and/or undergone a traumatic event. Attorneys should be equipped with the tools and mindset to move forward with their clients without subjecting their clients to re-traumatization. By recognizing this, attorneys can alter their communication style, tone, and actions when dealing with a client who has suffered a trauma, thus being better able to connect with and aid clients who have undergone trauma. ■

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Practically Legal: Fractional Executives

by William B. Eadie and Michael A. Hill

For many law firms and solos, we fit working on the business behind doing the legal work. And working on the business may mean doing just as much marketing and taxes as necessary to keep the ship afloat. Forget about long-term strategic planning or growth and expansion.

There is a way to buy executive-level management time without the costly hire of a full time manager or similar role: fractional executives.

Fractional executives—think Chief Operating Officer, Chief Marketing Officer, etc.—operate by working for more than one company, part time, dedicating a certain number of hours to each respective client. Some focus exclusively on law firms.

With many firms going cloud based since COVID, working with fractional executives has become even easier: they can access everything a full-time, in house person could, without being on-site.

These types of executives act like strategic coaches, allowing you to plan and execute (and be accountable for) strategies that can lead to growth, from better marketing and conversions to better hiring and growth plans. Fractional CFOs can help forecast and ensure cash flow remains sufficient as you grow.

For law firms in Ohio, as of this writing, fractional executives cannot be true executives—able to direct a lawyer's work—without being a lawyer, too. But that likely isn't an issue for most of us; spending too much time, not too little, on the legal work is the issue.

If having executive management employees to help you organize, plan, and grow your firm seems out of reach, fractional executives may be a great fit! ■

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Law Alumni Association Removes "Marshall" From Name

by Ben Wiborg, Treasurer - CSULAA

On January 19, 2023, the Cleveland-Marshall Law Alumni Association held a special meeting at which the Trustees voted in favor of amending the Alumni Association Code of Regulations to change the name of the organization to Cleveland State University Law Alumni Association ("CSULAA"). The vote removed the name "Cleveland-Marshall" from the title of the Alumni Association. CSULAA made the change to reflect Cleveland State University's decision to remove the name "Marshall" from the College of Law.

By way of background, in the summer of 2020, a petition was submitted that urged Cleveland-Marshall College of Law to remove the name Marshall from the title due to the first Chief Justice John Marshall's involvement with the institution of slavery. What followed was a comprehensive multi- year review and investigation into the proposed name change. The investigation included the creation of a "Law School Name Committee."

The Committee, which consisted of students, faculty, staff, and alumni, was tasked with seeking input from the Cleveland legal community and providing recommendations as to whether "Marshall" should be dropped from the Law School's name - and if so, recommendations as to what the College of Law should be called. In an effort to advance the investigation, the Committee created the "Law School Name Website." The Website was designed to be both a repository of information and a public forum for sharing thoughts and ideas.

The Committee's findings were made part of a "Law School Name Committee Report," which was provided to Cleveland State University in February of 2022. In addition to the Committee's findings, the 146 page Report included a discussion about the historical context of John Marshall as an individual and as a jurist; polling data conducted on alumni, students, faculty and staff; and information from University of Illinois Chicago School of Law's decision to remove the name John Marshall from its title.

On November 17, 2022, the Cleveland State University Board of Trustees voted to remove the title "Cleveland-Marshall" from the College of Law, and to rename the college "Cleveland State University College of Law." Regardless of whether or not one supports the change, the vote was made after an exhaustive and comprehensive investigation into the matter. ■

Verdict Spotlight:

Estate of David Sollars v. Perk Company, Inc. et al.
Cuyahoga County No. CV 2019-926993

by Jeremy A. Tor and Michael P. Lewis

In October, Mike Lewis and I obtained a nearly $17 million wrongful death verdict in Cuyahoga County. The case arose out of a crash that occurred in a road construction zone near the intersection of Cedar and South Green Road in University Heights. The defendants were Perk Company, Inc., the project general contractor, and Wiley Bridgeman, the driver of the car that struck and killed David Sollars.

As general contractor, Perk was responsible for handling traffic control services. This required Perk to close the lanes in accordance with the project plans to protect the traveling public and the workers.

Across the country, there are clear rules spelling out exactly how to safely close lanes during road work. The rules require the traffic control company—in this case, Perk—to place advance warning signs that inform drivers what to expect up ahead.

The rules also require the company to place orange barrels in the closed lane. The barrels tell drivers where the lane is closed, reroute them to an adjacent lane, and physically block the closed lane. This is done for the protection of the road workers.

The crash happened at 3 a.m. on March 28, 2019, the first day of this $4.5 million-dollar repaving project. Perk had two employees on the job site the night of the crash—a project superintendent and a traffic control supervisor. These men had already worked a full shift on another project the day before, went home for a few hours, and returned to work on the Cedar Road project for a full night shift—that is, they'd worked nearly 20 hours in a 26-hour period. Their sole task on the night of the crash was to uncover the advance warnings and place orange barrels in the road. Throughout the night, they followed and watched the other men working, including Dave and his team.

Jeremy A. Tor

Michael P. Lewis

Shortly before the crash, Dave and a coworker were working in the left lane of Cedar Road near the Green Road intersection. The lane was supposed to be closed to traffic and blocked off with orange barrels. Dozens of barrels were sitting on the sidewalk, feet away. Perk's employees saw Dave standing in the left lane, and they saw the lane was not blocked off. They left the barrels on the sidewalk, drove to a nearby parking lot, and sat inside their trucks—leaving Dave and his coworker dangerously exposed to vehicular traffic.

Several minutes later, a driver headed down Cedar Road toward the work zone. He approached the intersection in the left lane because Perk had not blocked the lane with barrels. The driver continued through the intersection on a green light and crashed into Dave and his coworker. The men somersaulted through the air and landed back on the pavement.

Paramedics rushed the men to the hospital. Dave died several days later from the blunt force injuries. He was 54 years old, married with three minor children.

By all accounts, Dave was an amazing father and husband. His coworkers described him as a hard worker and safety conscious. His mantra was, "Our goal is to get home every night to our families." When he got home from work, he always spent quality time with his kids. He worked with his son on woodworking projects, science experiments, and building a treehouse. He taught his two daughters to ski and took them regularly to Boston Mills.

Dave was a wonderful husband, too. He met his wife in the 90s. For their first date, Dave arrived at Shelley's house to pick her up and found a note on the front door saying she had to take a friend to the airport but would be back later. (This was before everyone had cell phones.) Dave waited patiently for her to return. She finally did, and that was the beginning of their loving relationship.

At trial, we put on several damages witnesses, including Dave's nephew, sister-in-law, brother-in-law, friends, and neighbors. They were powerful witnesses with compelling anecdotes that portrayed Dave as loving, caring—and at times silly. In wrongful death cases, I try to elicit vignettes that highlight the silly or goofy side of the decedent. This helps humanize the decedent, which (in my view) feels more authentic than painting a picture of a flawless superhero. It also uplifts a trial that is otherwise full of tragedy.

I also strive to ***show*** the case. To that end, I had an orange barrel in the courtroom the entire trial. I used the barrel—both in opening and closing—to demonstrate how easy the barrels are moved so the jury could see firsthand how simple Perk's job was—and how easily they could have prevented Dave's death.

Another demonstrative we presented was a pair of animations—one showing the crash and another showing Cedar Road with the barrels properly in place. The animations allowed the jury to see for themselves—and reach their own conclusion about—how a proper setup with barrels would have prevented the crash.

Perk defended itself at trial by blaming the driver. He passed away a year before trial, so he was not able to testify. But we had objective evidence of his conduct: A drug test revealed no drugs or alcohol in his system; and the police officers who investigated the crash determined, using standard crash reconstruction formulas, that the driver was not speeding.

Still, Perk made a big deal of the fact that, following the crash, the driver fled the scene and continued driving for

Traffic control setup with barrels

Jeremy Tor and Mike Lewis with their client, Shelley Sollars

several miles before crashing into a utility pole in Gates Mills. I knew these were problematic facts. Rather than shy away from them, however, I reframed their significance. The jury interrogatory on apportionment of fault asked the jury to state the percentage of negligence "that caused David Sollars's injuries and death." During closing argument, I emphasized this phrase and pointed out that the driver's conduct after the crash did not "cause" Dave's injuries, and so his decision to flee the scene is not relevant for purposes of apportioning fault.

Despite reframing the driver's conduct, I told the jury he does deserve some fault for the crash though Perk deserves the vast majority of the blame—because if Perk company had set up the barrels as required the driver never would have entered the left lane and never would have crashed into Dave.

Perk also defended by claiming someone else—possibly the Cuyahoga County engineer overseeing the project, Dave himself, or his employer—was responsible for the barrels. We defeated this defense by showing the contract between Perk and the County—which identified traffic control services as Perk's responsibility—and the specific line-item payment Perk received from the County for providing these traffic control services. We pointed out that Perk was the only company with a traffic control supervisor on the job site. And we noted that the orange barrels used for the project were all Perk's property. A simple trilogy captured the point: "Perk's people, Perk's payment, Perk's property."

The jury awarded $205,000 in survivorship damages for medical bills. (Given the tenuous evidence regarding conscious pain and suffering, I did not pursue those noneconomic damages.) The jury also awarded $1,700,000 in economic wrongful death damages and $15,000,000 in noneconomic wrongful death damages. Ultimately, the jury allocated 70% fault to Perk and 30% fault to the driver. One of the most gratifying aspects of the verdict was the jury's finding that Dave acted reasonably.

Shortly before the jury verdict was announced, we entered into a high-low agreement with Perk. As a result, the case against Perk settled for $9.5 million. We'd previously settled with the driver's estate for $2.1 million. ■

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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

Verdict Spotlight:

The Estate of Wayne E. Furr, Sr. v. Cincinnati GI, Inc., et al.
Hamilton County No. A 19 01085

Marilena DiSilvio and Phillip A. Kuri

A Hamilton County jury returned a $2.15 million verdict against Dr. David Hess and Cincinnati GI Inc. and Cincinnati Digestive Health Network arising from a wrongful death claim brought by the family of Wayne Furr Sr. At trial, the family was represented by Phillip Kuri and Marilena DiSilvio of Elk & Elk.

March 8, 2018, at age 77, Mr. Furr had an esophagogastroduodenoscopy (EGD) with a biopsy performed by Dr. Hess. Anesthesia services were provided by co-defendant Dr. John Puckett at a surgery center where prophylactic intubation could not be performed. Accordingly, Mr. Furr was under conscious sedation, without intubation, and aspirated during the procedure. Mr. Furr's oxygen saturation dropped during the procedure and remained low, requiring supplemental oxygen. EMS transported Mr. Furr to Mercy Hospital due to his respiratory distress and he was diagnosed with acute respiratory failure and hypoxia as a result of multi-focal pneumonia. Mr. Furr died because the aspiration occurred during his EGD leading to a fatal aspiration pneumonia. Plaintiff argued Dr. Hess failed to appropriately communicate with Dr. Puckett and engage in a "team approach" regarding Mr. Furr's risk of aspiration. Plaintiff's GI and anesthesia experts opined the risk of aspiration during the EGD required the procedure be performed with intubation. Had Mr. Furr been intubated, or the procedure cancelled, he would not have aspirated and died.

At the time of his death, Mr. Furr had treated with Dr. Hess for 20 years for the management of Barrett's esophagus, a complication of gastroesophageal reflux. Mr. Furr had undergone eleven prior EGDs before March 8th, all under conscious sedation and without complications. The primary defense was proceeding with conscious sedation was appropriate for this twelfth EGD because the prior eleven had been done without intubation safely.

However, Mr. Furr had developed increased risk factors for aspiration at the time of the March 8th EGD. Specifically, gastroparesis as evidenced by retained stomach contents noted on the two prior EGDs despite being NPO. Additionally, at the time of the March 8th EGD, Mr. Furr was off metoclopramide, a medication that improves gastric emptying. Dr. Hess had "kept him off " the metoclopramide due to side effects. Finally, the morning of March 8th, prior to the procedure being performed, Mr. Furr told Dr. Hess "he was having symptoms of active reflux". Dr. Hess did not tell Dr. Puckett as required in a "team approach", or anyone else, about Mr. Furr's active reflux. According to Dr. Puckett, had Dr. Hess told him about Mr. Furr's active reflux, he would not have gone forward with the procedure.

Marilena DiSilvio

Phillip A. K

The jury found Dr. Hess failed to communicate appropriately with Dr. Puckett on the day of the procedure. Specifically, Mr. Furr was having active reflux and chest pain creating a heightened risk of aspiration. The jury further determined this deviation from the standard of care was the proximate cause of Mr. Furr's death.

No offer of settlement was made at any point. The Defendants shared the same insurance company. Ultimately, for the first time under cross-examination, Dr. Puckett conceded the procedure should not have gone forward, without intubation, based upon the presence of active reflux, information he did not know March 8th. The factual testimony regarding "active reflux" was first conceded during the cross of Dr. Hess during trial.

Mr. Furr proudly served in the Air Force for 20 years, with two tours in Vietnam. He later worked at General Motors as an electrician, retiring after 28 years. His high school sweetheart and wife of 57 years, Peggy, testified that before March 8, 2018, Mr. Furr was very active. He loved cars, racing and aeronautics. He enjoyed traveling to visit his two children and grandchildren. The testimony from his family highlighted Mr. Furr's dedication to his family and the impact he had upon a community, including the Masonic Temple, which all loved and embraced him. The jury determined his family suffered a significant loss and awarded the exact damage number set forth in closing argument. ■

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Recent Ohio Appellate Decisions

by Brian W. Parker and Kyle B. Melling

McFadden v. Discerni, 11th Dist. Trumbull No. 2022-T-0019, 2023-Ohio-1086 (March 31, 2023).

Disposition: Reversing summary judgment for the defendant on open and obvious doctrine; affirming summary judgment for the defendant on plaintiff's status as a social guest and not an invitee.

Topics: Open and obvious doctrine; status of entrant to premises as a social guest.

The plaintiff and the defendant were good friends. The plaintiff visited the defendant's home approximately once a week. On a prior visit, the plaintiff had pointed out to the defendant that an exterior stair at the defendant's house was "creaky," "a little shaky" and "it kind of would rock back and forth just a little bit." On the day of the accident, plaintiff ascended the stairs, gave a gift of corn to the defendant, and then, a bit later, fell while exiting because the stair he had expressed concern over "gave way."

The plaintiff sustained foot injuries requiring surgery, and he brought suit against the defendant. The trial court granted summary judgment for the defendant, finding that the plaintiff's claim was barred by the open and obvious doctrine. The trial court further found that the plaintiff was a social guest of the defendant, and not an invitee. The plaintiff appealed both findings.

With respect to the open and obvious doctrine, the 11th District reversed summary judgment, finding that there were questions of fact that needed to be decided by a jury. The appellate court reasoned as follows:

> Here, there is a genuine issue of material fact of whether McFadden knew there was a *danger*. Even though McFadden knew a step was "creaky," and had mentioned it to Discerni on a prior visit, it is not clear whether he knew the steps were "dangerous;" he only knew one of them was "creaky" and "a little shaky" when he used it. It is not, on this record, "open and obvious" that a creaky or shaky step is dangerous or that McFadden knew it to be. * * * Similarly, a reasonable factfinder could alternatively conclude that he did perceive the steps as "dangerous" because he told Discerni on a prior visit that he had "concerns" about the steps. * * * However, those are questions of fact for the jury. (Emphasis by court).

Regarding the second issue, the court stated: "A social guest is someone the owner or occupier of land invites onto the property for the purpose of social interaction." In contrast, an invitee is one on the owner's premises for purposes in which the owner has a beneficial interest. The duty owed to a social guest is less rigorous than that owed to an invitee. Namely, the duty to a social guest is limited to: (1) exercising ordinary care not to cause injury to the guest; and (2) warning the guest of any known condition reasonably considered dangerous.

Here, the only transactional benefit the plaintiff imparted to the defendant was the bringing of some corn to the defendant. However, the corn was not brought at the request of the defendant, but was a gift provided in the context of a friendship. As such, plaintiff was a social guest of defendant, and not a premises invitee. Therefore, the appellate court affirmed the trial court's finding on this second issue.

Lee v. Bath Manor Ltd. P'ship, 8th Dist. Cuyahoga No. 111756, 2023-Ohio-816 (March 16, 2023).

Disposition: Reversed and Remanded

Topics: Arbitration and Evidentiary Hearings under R.C. 2711.03

Plaintiff, individually and as administrator of the estate for her mother, filed a wrongful death complaint against a defendant nursing home. The defendant filed an answer and asserted an affirmative defense arguing that Plaintiff failed to comply with the requirements of the Admissions Agreement and/or Arbitration Agreement. Defendant then filed a motion to stay and compel arbitration agreement and request for a hearing. Plaintiff opposed the motion. The trial court denied the motion without holding a hearing. Defendant appealed.

On appeal, the Eighth District held that the trial court erred in failing to hold a hearing on the motion to stay. The Court reasoned that R.C. 2711.03 requires that when a motion to compel arbitration is filed, the parties should be afforded an evidentiary hearing on the validity of an arbitration clause where unconscionability is raised as an objection to its enforceability if a party specifically requests one. Because the court did not hold a hearing, the Eighth District reversed and remanded the trial court's denial of the motion to compel arbitration.

Pietrangelo v. Hudson, 8th Dist. Cuyahoga No. 111805, 2023-Ohio-820 (March 16, 2023).

Disposition: Affirmation of directed verdict

Topics: Soft Tissue Injuries and Expert Testimony

In the trial court, Plaintiff, pro se, brought a negligence action against Defendant alleging injury to his head, neck and back arising out of a motor vehicle accident. At trial, the Plaintiff failed to support his claims of "soft tissue injuries" with any expert testimony. At the conclusion of opening statements, the trial court granted defendant's motion for directed verdict. The court found that despite ordering the Plaintiff "for years" to produce an expert to support his injuries, the Plaintiff failed to do so. Accordingly, the court granted the directed verdict. On appeal the Eighth District agreed, holding that the Plaintiff failed to support his claim with expert opinions. In finding this way, the court affirmed that "soft tissue" injuries require expert testimony to substantiate, as they are not normally within the realm of understanding of a layman.

Fonderlin v. Trumbull Fam. Fitness, 11th Dist. Trumbull No. 2022-T-0082, 2023-Ohio-767 (March 13, 2023).

Disposition: Reversing summary judgment that had been granted for defendant on plaintiff's negligence claim.

Topics: A business's duty to protect a minor child from the criminal acts of third parties.

The plaintiff's son, eight years of age at the time, alleged that he had been sexually abused by two older boys while changing into his clothes in a locker room following a swim class at the defendant's private fitness center. The fitness center moved for summary judgment, claiming that it owed no duty to the plaintiff, an invitee, to protect him from the intentional acts of third parties. The trial court granted the fitness center's motion.

On appeal, the 11th District reversed, finding that the duty of care owed to invitees was inapplicable in this case. The appellate court cited to 2 Restatement of the Law 2d, Torts (1965), Section 323, "Negligent Performance of Undertaking to Render Services," which provides, in relevant part:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if * * * (b) the harm is suffered because of the other's reliance upon the undertaking.

The court noted that this theory of negligence does not require proof of a special relationship between the plaintiff and the defendant or proof of somewhat overwhelming circumstances, but it "follows the general rules for finding negligence, with the addition of one extra element of proof, that of reasonable reliance by the plaintiff on the actions of the defendant."

In addition, the appellate court followed the rule that children have a special status in tort law, and "the amount of care required to discharge a duty owed to a child of tender years is necessarily greater than that required to discharge a duty owed to an adult under the same circumstances."

The appellate court held that the defendant assumed a duty to supervise the assailants by virtue of its policy to leave no child unattended, and the specific staff training it provided for locker room supervision, including not leaving children alone for more than 10 minutes. The evidence for breach of this duty showed that the after-school program was short-staffed, that the boys' locker room was unsupervised, that the defendant was aware that the plaintiff and the alleged assailants did not get along, and that the assailants and the plaintiff were in the locker room unsupervised for much longer than 10 minutes.

The Eleventh District concluded: "Whether TFF undertook the duty to supervise and failed in that duty is a question of material fact that must survive summary judgment."

Riverside Drive Enters., LLC v. Geotechnology, Inc., 1st Dist. Hamilton No. C-220099, 2023-Ohio-583 (March 1, 2023).

Disposition: Affirming the trial court's granting of (1) the defendants' motion to strike the plaintiffs' expert affidavit; and (2) the defendants' motions for summary judgment. Further affirming the trial court's denial of plaintiffs' motion for reconsideration.

Topics: Compliance with a court's case management order pursuant to Civ. R. 26(B)(7)(b); requirements for supplemental expert reports under Civ. R. 26(E)(1); motions for reconsideration prior to a trial court's entry of final judgment.

This lawsuit arose from the defendants' alleged failures to properly construct a retaining wall on a construction site. The trial court set an expert report deadline of June 25, 2021 for plaintiffs, and a discovery cut-off date of September 24, 2021. Plaintiffs submitted their expert report in a timely manner, but the report consisted only of a two-page itemized breakdown of the estimated work needed to repair the wall.

In October 2021, two of the defendants moved for summary judgment. In response, the plaintiffs submitted an affidavit from the same expert who had submitted the expert report. In this affidavit, the expert provided opinion testimony about the condition of the retaining wall, and placed blame on the defendants moving for summary judgment.

Upon motion of the defendants, the trial court struck the plaintiffs' expert affidavit because it was untimely, and was not a supplemental report. The trial court further granted the defendants' motion for summary judgment because plaintiffs' opposition to it was not supported by expert testimony. Finally, the trial court denied the plaintiffs' motion for reconsideration.

On appeal, the court affirmed the striking of the plaintiffs' expert's affidavit. Were the affidavit considered a new expert report, it was untimely because it was filed after the discovery and expert report cut-off dates. Further, the appellate court held that the plaintiffs' expert affidavit did not qualify as a "supplemental report," holding:

> Only after a motion for summary judgment was filed, did appellants produce the Amicon Affidavit, clearly in an attempt to avoid summary judgment. It is undisputed that the information in the affidavit was known to appellants at the time the initial reports were filed. The affidavit did nothing to clarify the original reports. Rather, the affidavit contains an entirely new opinion about a new issue – the standard of care. That is not supplementation.

Because the expert affidavit was stricken, the appellate court also upheld the granting of the defendants' motion for summary judgment due to the plaintiffs' failure to put forth expert testimony to create a genuine issue of material fact. Further, the appellate court refused to allow plaintiffs to adopt an opinion from experts retained by two of the defendants. The court ruled that plaintiffs failed to disclose their intent to use these defense experts against another defendant, as required by Civ. R. 26(B)(7)(a).

Finally, the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration, even though that motion was timely as it came before the trial court journalized its final judgment entry. The appellate court ruled the trial court properly based its decision on the plaintiffs' failure to comply with discovery rules, and the trial court's case management order.

Freeman v. Lovejoy, 5th Dist. Fairfield No. 2022 CA 00016, 2023-Ohio-503 (Feb. 21, 2023).

Disposition: Affirmed denial of summary judgment

Topics: Individual immunity of political subdivision employees under R.C. 2744.03(A)(6)

Plaintiff was proceeding through an intersection on a green light when he collided with a fire engine that was proceeding through the intersection on a red light. Witness testimony established that the fire engine was using its lights and sirens and traveling under the posted speed limit when it entered the intersection. The trial court recognized that the driver of the fire engine would be entitled to immunity as a matter of law unless it was shown that he was acting outside the course and scope of his employment or official responsibilities, or if he acted with malicious purpose, in bad faith, or in a wanton or reckless manner. The trial court found that the fire truck driver was acting within the course and scope of his employment, but there existed a genuine issue of fact as to whether his actions were "reckless." Thus, the trial court denied the Defendant's Motion for Summary Judgment. The individual defendant appealed the decision. The Fifth District agreed with the trial court. The basis for their decision was that as the driver of the fire truck approached the intersection, he did not come to a complete stop before entering the intersection, but instead entered the intersection against a red light at 15-20 mph. The evidence indicated that the Fire Department's "Suggested Operating Guidelines" required a driver of a fire truck to "ensure all other traffic at [an] intersection is able to yield and to travel into an intersection at such a speed that the fire truck would be able to stop immediately if necessary. Here, because the fire truck's driver was not able to stop immediately, and did not ensure that all traffic was able to yield, a genuine issue of fact existed as to whether he was reckless.

Kassouf v. Barylak, 8th Dist. Cuyahoga No. 111594, 2023-Ohio-314 (Feb. 2, 2023).

Disposition: Reversing trial court's decision to deny the defendant's motion for relief from judgment without holding a hearing.

Topics: Default judgment, motion for relief from judgment due to lack of service of process.

This case arose out of a 2006 motor vehicle accident in which the plaintiff brought suit against the driver of the other vehicle, Barylak, and the alleged owner of that vehicle, Kern, and two uninsured motorist carriers. Plaintiff had alleged that Kern was liable for negligently entrusting his vehicle to Barylak.

Plaintiff attempted service of process on Kern, first by certified mail, and then by ordinary mail at a Parma, Ohio address. Kern failed to respond to these service attempts. In March of 2007, the trial court granted plaintiff's motion for a default judgment, leaving only the question of damages for trial. When Kern and Barylak failed to appear at trial, judgment was entered against them. In June 2007, the judgment against Kern and Barylak was transferred to the Parma Municipal Court for execution.

In May 2021, Kern filed a motion for relief from judgment, claiming that he was never properly served process in the

lawsuit, and did not receive actual notice of the action until after default judgment was entered. Kern claimed that although he owned the Parma property at which service was attempted, he did not live there at the time. Kern averred that he did not know of this case until his former girlfriend was served with a levy in the summer of 2007.

The trial court denied Kern's motion for relief from judgment as untimely, coming 14 years after the judgment. On appeal, the court stated that the proper vehicle for Kern's motion was to file a common law motion to vacate the judgment for lack of proper service. Thus, Kern's motion was timely under the common law, even though the time requirements of Civ. R. 60(B) for a relief from judgment were not met.

The appellate court further stated that the trial court never had personal jurisdiction over Kern if there was a failure to serve process on him, and a judgment rendered without proper service or entry of appearance is a nullity and void. Moreover, even if the defendant is aware of the filing of the action, this does not dispense with the necessity of service.

The court noted that the rebuttable presumption of proper service may be rebutted by evidence that the defendant did not reside, or receive mail, at the address to which ordinary mail service was addressed. Because Kern had submitted a sworn statement that he was not residing at the address where service was attempted, the trial court should have conducted a hearing to determine the validity of Kern's statement. The appellate court therefore remanded the case back to the trial court to promptly conduct an evidentiary hearing on Kern's statement.

Rolic v. Williams, 8th Dist. Cuyahoga No. 111518, 2023-Ohio-309 (Feb. 2, 2023).

Disposition: Affirming the denial of the intervenor insurance company's motion for summary judgment, and the granting of the plaintiff's motion for summary judgment in a dispute over insurance coverage in a dog bite case.

Topics: Insurance coverage for dog-bite case under the dog-owner's homeowners insurance policy which contained an exclusion for claims where there was a history of prior bites by the dog.

The plaintiff was attacked and bitten by the homeowner's dog, Beastro, on August 2, 2020. Prior to this attack, on June 8, 2020, the same dog had attacked another person. This first victim had not reported the earlier attack to the authorities until she witnessed the dog attacking the plaintiff on August 2. Following this August attack, the first victim reported the June attack to the authorities.

Plaintiff sued the homeowner for the August attack. The homeowner's insurance company, Nationwide Insurance Company, intervened into this action, contending that the homeowner's insurance policy excluded coverage based upon the following provision, as recited by the court:

> Personal Liability and Coverage and Medical Payments to Others do not apply to: 'Bodily injury' arising out of any dog with a prior history of attacking or biting person(s) or animal(s), as established through insurance claims records, or through the records of local public safety, law enforcement or other similar regulatory agency.

Nationwide contended that the above provision did not require the record documenting the dogs' prior history of attacking or biting to have been created prior to the August attack on the plaintiff. The court disagreed, stating that the only relevant time in an insurance contract dispute is the time of the plaintiff's accident. Because, at the time of the August 2nd attack, there was no record that the dog had previously attacked anyone, the exclusion did not apply.

The court stated in this regard: "the August 2, 2022 police report of the incident ... is the first 'established' history of Beastoro attacking or biting a person or animal." Thus, the trial court's order denying Nationwide's motion for summary judgment, and granting plaintiff's motion for summary judgment, was affirmed.

Inskeep v. Columbus Zoological Park Ass'n, 5th Dist. Delaware No. 22 CAE 05 0039, 2023-Ohio-288 (Jan. 31, 2023).

Disposition: Reversing summary judgment for the defendant.

Topics: Duty owed by defendant premises owner to plaintiff invitee based upon the "totality of the circumstances test." Foreseeability of intervening actor's conduct.

The plaintiff and her daughter were at the defendant zoo, walking near the Australia exhibit. An employee of the zoo was riding a golf cart on the premises, collecting signs from the zoo grounds. The employee would leave the golf cart ignition on when she left the cart to collect a sign. While the employee was away from the golf cart, a three-year-old child got in the cart, released the parking brake, and drove into the back of the plaintiff, knocking her to the ground and causing her injury.

The zoo policy was that for safety reasons, if golf carts were used while the zoo was open to the public, the golf cart must be escorted by a person walking in front of the vehicle to clear the path. Also, zoo policy was that golf cart use during zoo hours

was to be for emergency purposes only. It was conceded that the zoo employee had violated both provisions in this case.

The trial court granted the zoo's motion for summary judgment, holding that the zoo did not owe a duty to the plaintiff, as it did not in the exercise of ordinary care know of the danger posed by the golf cart. The trial court also held that the plaintiff could not prove proximate cause because the child who "drove" the golf cart which injured plaintiff was an unforeseeable intervening cause of plaintiff's injuries.

On appeal, the court rejected the zoo's argument that it owed no duty because there was no evidence of prior similar incidents occurring at the zoo, and the plaintiff's accident was thus unforeseeable. Instead, the court adopted the "totality of the circumstances" test to determine whether the third party's actions (i.e., the three year old "driver" of the golf cart) were foreseeable.

Using this test, the court noted that the zoo employee left the golf cart with the ignition on, and violated the two zoo policies mentioned above. Therefore, the appellate court held that under the totality of the circumstances, the zoo owed the plaintiff a duty and a genuine issue of material fact existed as to whether that duty was breached.

The appellate court also found that it was a question of fact as to whether the three-year old child who drove the golf cart into the plaintiff was an intervening superseding cause which absolved the zoo of liability. "We find reasonable minds could differ as to whether the act of the child constituted an intervening or superseding cause, and whether the intervening cause was reasonably foreseeable by the Zoo when a Zoo employee left a golf cart unattended and running."

Thus, the granting of summary judgment for the zoo was reversed.

Doe v. Greenville City Sch., Sup. Ct. of Ohio No. 2021-0980, 2022-Ohio-4618 (Dec. 28, 2022).

Disposition: Affirming the denial of a motion to dismiss filed by a political subdivision.

Topics: Political Subdivision immunity exception for injuries caused by the negligence of employees and due to "physical defects" on the grounds of property used in connection with a governmental function under R.C. § 2744.02(B)(4).

The two minor plaintiffs were public school students who suffered severe burns in a science class when a bottle of isopropyl alcohol caught fire and exploded. The students alleged that the classroom lacked a fire extinguisher or other safety equipment. The school district moved to dismiss the complaint, contending that it was entitled to political subdivision immunity, and alleging that the failure to provide safety equipment did not constitute a "physical defect" on its premises that would bring the case within the exception to immunity under R.C. § 2744.02(B)(4). That statute makes political subdivisions liable for injuries caused by the negligence of employees, and which are "due to physical defects within or on the grounds of buildings that are used in connection with the performance of a governmental function."

The trial court denied the school district's motion to dismiss, and on interlocutory appeal, the Second District affirmed. The Ohio Supreme Court defined the issue before it as: "Specifically, we must consider whether the absence of a fire extinguisher or other safety equipment is a physical defect within the meaning of R.C. § 2744.02(B)(4)." The lower courts in this case relied upon Moore v. Lorain Metro. Hous. Auth., 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, which held, in effect, that the absence of a smoke detector COULD amount to a physical defect on the grounds of a government building, and remanded that question for the trial court's consideration in that case.

The Supreme Court in this case noted that the term "physical defect" is not statutorily defined by R.C. § 2744.01 et seq., and therefore the term must be given its plain, common and ordinary meaning. The Court proceeded to briefly discuss the appellate case law interpreting this language, and agreed with those cases that held "the lack of safety equipment or other safety features could amount to a physical defect." Thus, the Supreme Court concluded that "the absence of a fire extinguisher or other safety equipment within a science classroom could be a physical defect such that an exception to immunity could exist under R.C. § 2744.02(B)(4)."

Therefore, the Supreme Court affirmed the Second District's decision, and held that the lower courts in this case had properly denied the political subdivision's motion to dismiss, and had properly found that the students "alleged sufficient facts that if proven, demonstrate that R.C. § 2744.02(B)(4) applies." ■

Kyle B. Melling is a principal at Lowe Scott Fisher Co., LPA. He can be reached at 216.781.2600 or kmelling@lfslaw.com.

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

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case:

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

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

Nurenberg, Paris, Heller & McCarthy Co., LPA
600 Superior Avenue, E., Suite 1200
Cleveland, Ohio 44114
(216) 621-2300; Fax (216) 771-2242
Email: kstjohn@nphm.com

CATA Verdicts & Settlements

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

John Doe v. ABC Company, et al.

Type of Case: Product liability
Settlement: Confidential but in excess of liability limits
Plaintiff's Counsel: David R. Grant, Plevin & Gallucci Co., L.P.A., (216) 861-0804
Defendants' Counsel: Withheld
Court: Montgomery County Common Pleas Court
Date Of Settlement: March 21, 2023
Insurance Company: Withheld
Damages: Death of 46-year old husband and father of 1 minor and 1 adult child
Summary: Plaintiff was an employee of a steel processing facility and was moving a 46,000 lb. coil of steel using a pendant-controlled overhead crane with a below-the-hook lifting device when the coil fell, landing on another coil on ground causing a chain reaction that led to another coil knocking Plaintiff to ground and coming to rest on his mid-section. A design defect and warning defect claim was brought against manufacturer of below-the-hook device.
Plaintiff's Experts: Thomas Huston, Ph.D., P.E., C.S.P.; John Green II, P.E.; James Doty (Crane and Below-the-Hook Device Expert); Karen Looman, D.O. (Coroner); David W. Boyd, Ph.D. (Economist)
Defendants' Expert: David Decker (Crane & Rigging Training)

John Doe v. ABC Company, et al.

Type of Case: Product liability and Employer Intentional Tort
Settlement: $2,000,000
Plaintiff's Counsel: David R. Grant, Plevin & Gallucci Co., L.P.A., (216) 861-0804
Defendants' Counsel: Withheld
Court: Federal Court
Date Of Settlement: March 17, 2023
Insurance Company: Withheld
Damages: Injury to non-dominant arm of 35-year old resulting in decision to amputate 3 1/2 years later
Summary: Plaintiff was a laborer in a commercial egg facility and was responsible for manually cleaning build up of manure off the roller for the manure conveyor system. Given the design of the system and controls, this was typically a two-person task but on this date he was performing it alone while the conveyor was running. Design defect and warning defect claims were pursued, along with employer intentional tort and premises liability.
Plaintiff's Experts: Thomas Huston, Ph.D., P.E., C.S.P.; Gerald Rennell; multiple treating medical experts; a vocational rehabilitation expert; and an economist
Defendants' Experts: Not yet disclosed

Estate of Anonymous Nursing Home Resident vs. Anonymous Nursing Home

Type of Case: Nursing Home Bedsore (Pressure Injury)
Settlement: $625,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: *
Court: Hamilton County Common Pleas Court
Date Of Settlement: March 15, 2023
Insurance Company: *
Damages: Coccyx/Sacral Pressure Injury (bedsore)
Summary: Failure to prevent the development of a large coccyx/sacral bedsore in a vulnerable nursing home resident leading to death.
Plaintiff's Expert: N/A
Defendant's Expert: N/A

Estate of Anonymous Nursing Home Resident vs. Anonymous Nursing Home

Type of Case: Nursing Home Wrongful Death
Settlement: $500,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: Reminger Co.
Court: Lucas County Common Pleas Court
Date Of Settlement: March 9, 2023
Insurance Company: *
Damages: Pressure Injury (bedsore)
Summary: Failure to prevent the development of pressure injury in an elderly nursing home resident.
Plaintiff's Experts: Joe Haines, Jr., M.D. (Geriatric Medicine); Michael Retholtz, M.D. (Treater); and Christine Caine, RN (Wound/Ostomy Nurse)
Defendant's Expert: N/A

Anonymous Plaintiff v. Anonymous Manufacturers of Asbestos Products

Type of Case: Personal Injury/Wrongful Death from Mesothelioma
Settlement: $1,205,330.00
Plaintiff's Counsel: Steven M. Goldberg [Local Counsel/ Firm from PA (Withheld)], Goldberg Legal Co., LPA, (440) 519-9900

Defendants' Counsel: Withheld
Court: Common Pleas Court of Allegheny County, Pennsylvania
Date Of Settlement: March 2023
Insurance Company: Withheld
Damages: Death
Summary: Plaintiff had a long and distinguished career, working for several companies over the course of several decades. Unfortunately, during his many years of employment, Plaintiff was exposed to and inhaled, ingested, or otherwise absorbed large amounts of asbestos fibers emanating from certain products he was working with and around, which were manufactured, sold, distributed, or installed by the Defendants. This exposure ultimately led to his diagnosis of Mesothelioma in May 2011, which he learned was directly related to his years of exposure while working. Despite his valiant fight against the disease, Plaintiff passed away on May 7, 2011.
Plaintiff's Expert: Withheld
Defendants' Expert: Withheld

Estate of Anonymous Nursing Home Resident vs. Anonymous Nursing Home

Type of Case: Fall with head injury
Settlement: $350,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: *
Court: Hamilton County Common Pleas Court
Date Of Settlement: February 10, 2023
Insurance Company: *
Damages: Fall with head injury
Summary: Failure to prevent fall with subdural hematoma
Plaintiff's Expert: Paul Kaloostian, M.D. (Neurosurgery)
Defendant's Expert: *

The Estate of Rose Crnjak v. Lake Hospital System, Inc., et al.

Type of Case: Medical Negligence and Wrongful Death
Verdict: $6,000,000
Plaintiff's Counsel: Nicholas DiCello and Dustin Herman, Spangenberg Shibley & Liber, LLP, (216) 696-3232
Defendants' Counsel: Beverly Sandacz, Brad Longbrake, Erin Hess, David Krause, Bret Perry, Elena Gutbrod
Court: Cuyahoga County Common Pleas Case No. CV 20 932285, Judge Hollie Gallagher (Judge Richard McMonagle for trial)
Date Of Verdict: February 10, 2023
Insurance Company: Aon Insurance Managers (Cayman), Ltd. and The Doctors Company
Damages: Wrongful death - $3,000,000 past and $3,000,000 future
Summary: A 68- year old woman presented to the Lake West ED with severe flank pain radiating into her groin, fever and chills. She triggered a sepsis alert and was treated in the ED for 8 hours, during which her symptoms resolved. Providers diagnosed her with a UTI and offered her admission, which she declined in favor of close follow up with her primary care physician within 1-2 days. The patient was discharged home around 3:00 AM.

The following day, at around noon, the patient's blood cultures came back positive for a blood infection. The emergency department physician was notified within about an hour. No one from the hospital or the ED group contacted the patient, who was found 4 days later deceased in her bed at home where she lived alone. Her cause of death was sepsis due to obstructing kidney stones.

Widowed, the Decedent left behind two adult sons in their mid- to late- 40's and her sister.
Plaintiff's Experts: Kevin Barlotta, M.D. (Emergency Medicine) was the only expert Plaintiff called to testify at trial
Defendants' Experts: Gregory Moran, M.D. (Emergency Medicine); Nathan Shapiro, M.D. (Emergency Medicine)

Estate of Anonymous Assisted Living Resident vs. Anonymous Assisted Living Facility

Type of Case: Bedsores (pressure injury)
Settlement: $450,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: *
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: February 1, 2023
Insurance Company: *
Damages: Multiple pressure injuries
Summary: Failure to prevent hospice patient in an assisted living facility from developing multiple pressure injuries.
Plaintiff's Expert: Scott Bolhack, M.D. (Wound Care)
Defendant's Expert: N/A

Steven Roberts, et al. v. The Ohio State University Wexner Medical Center

Type of Case: Medical Malpractice
Settlement: $975,000
Plaintiffs' Counsel: Charles Kampinski and Kristin Roberts, Kampinski and Roberts Co., LPA, (440) 597-4430
Defendant's Counsel: Jeffrey Maloon and Lauren Emery
Court: Ohio Court of Claims Case No. 2020-00717JD, Judge Patrick Sheeran, Magistrate Robert Van Schoyck
Date Of Settlement: January 24, 2023

Insurance Company: *
Damages: *
Summary: A fifty-five year old man suffered a rupture of the left medial biceps tendon while lifting a box out of his van. He was referred to Dr. Anne Marie Chicorelli, an orthopedic surgeon. Although Dr. Chicorelli was practicing in Wooster, she was an employee of The Ohio State University Wexner Medical Center. This was just the second time Dr. Chicorelli had ever attempted to perform a biceps repair on her own. The only occasion in which Dr. Chicorelli performed a biceps repair prior to Plaintiff's was eight years earlier during her residency. During the surgery, Dr. Chicorelli lacerated two arteries, but was unaware of this fact because a surgical tourniquet on Plaintiff's arm had not been deflated and obscured the abnormal bleeding. The bleeding would have been obvious had it not been for the failure to deflate the tourniquet. Dr. Chicorelli left the surgery and had her PA close the incision. He did so before the tourniquet was removed. Two hours after the conclusion of the surgery, roughly five minutes after Dr. Chicorelli had left the hospital without stopping to see Mr. Roberts, the PACU nurse telephoned Dr. Chicorelli. She advised her that Plaintiff was complaining of 10/10 unrelenting pain despite the maximum amounts of pain medications having already been administered, and a numb left hand. Dr. Chicorelli instructed the nurse to remove the surgical dressing and call her if the patient's condition did not improve. Even though she had just left the hospital, Dr. Chicorelli chose to continue to drive home, and not return in order to properly assess and diagnose Plaintiff's injuries. When the numbness did not abate, Dr. Chicorelli finally returned to the hospital, at which point Plaintiff was diagnosed with compartment syndrome. The maximum amount of time to intervene and fix a compartment syndrome is six hours. Wooster Community only had one vascular surgeon available who was out of the country, and thus Dr. Chicorelli arranged for Plaintiff to be transferred to Akron General Hospital. By the time he was transferred, the surgical repairs were delayed until 10:13 p.m, nearly 7 1/2 hours after Dr. Chicorelli began the biceps repair. Prior to these injuries, Plaintiff worked as a hospice nurse. His injuries prevent him from working due to the loss of use of his arm, and he suffers constant pain, hypersensitivity, numbness, tingling, decreased range of motion, strength, dexterity, and muscular endurance.
Plaintiffs' Experts: Dr. Henry Leis, M.D.; Dr. John F. Burke, Ph.D.; and Amy Kutschbach, MRC, CRC, ABVE/D
Defendant's Experts: Dr. Robert Goitz, M.D.; Dr. David C. Randolph, M.D.; Georgia Persky, Ph.D., RN, BSN, MBA, NEA-BC; Dr. James Weller, M.D.; and Dr. David Boyd, Ph.D.

Estate of Anonymous Nursing Home Resident vs. Anonymous Nursing Home

Type of Case: Nursing Home Wrongful Death
Settlement: $1,500,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: Reminger Co.
Court: Summit County Common Pleas Court
Date Of Settlement: January 19, 2023
Insurance Company: CNA
Damages: Death
Summary: Failure to respond to signs of respiratory distress by patient with ALS.
Plaintiff's Expert: N/A
Defendant's Expert: N/A

Estate of John Doe v. ABC Security Company, et al.

Type of Case: Wrongful Death - Negligent Security
Settlement: $1,000,000
Plaintiff's Counsel: Jordan D. Lebovitz and Joshua D. Payne, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5257; Sarah Gelsomino and Terry Gilbert, Friedman, Gilbert & Gerhardstein, 55 Public Square, Suite 1900, Cleveland, Ohio 44113, (216) 241-1430
Defendants' Counsel: Withheld
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: January 2023
Insurance Company: Withheld
Damages: Death of a 32-year old male
Summary: Victim was visiting a chain restaurant in Cleveland when he got into a verbal altercation with a third-party security guard. The security guard then shot and killed the victim.
Plaintiff's Expert: James Clark
Defendants' Expert: *

Michael Kovach v. City of Middleburg Heights., et al.

Type of Case: Commercial Equipment/Construction
Settlement: $3,000,000
Plaintiff's Counsel: Jordan D. Lebovitz, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5257
Defendants' Counsel: Withheld
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: December 2022
Insurance Company: Withheld
Damages: Multiple right ankle fractures, right fibula fracture, multiple left metatarsal fractures
Summary: Plaintiff was dropping excess refuse at a service

center when he was struck by a front end loader operated by City personnel.
Plaintiff's Expert: Nicholas Romeo, D.O. (Treating Surgeon)
Defendants' Expert: *

Jane Doe v. John Doe

Type of Case: Motor Vehicle v. Bicycle
Settlement: $1,100,000.00
Plaintiff's Counsel: Dana M. Paris and David M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5201, (216) 694-5206
Defendant's Counsel: *
Court: *
Date Of Settlement: November 2022
Insurance Company: *
Damages: Traumatic Brain Injury and multiple orthopedic injuries
Summary: Plaintiff was riding her bicycle through an intersection against the light when the defendant violently crashed into her, causing a severe traumatic brain injury and multiple fractures. The case resolved pre-suit for the policy limits.
Plaintiff's Expert: *
Defendant's Expert: *

Ewing v. Flats East Bank Management, et al.

Type of Case: Premises Liability / Professional Negligence
Settlement: $8,000,000.00
Plaintiff's Counsel: Dennis Lansdowne, Jeremy Tor, and Kevin Hulick, Spangenberg Shibley & Liber LLP, (216) 696-3232
Defendants' Counsel: Bill Benson, Benson & Sesser, Brian Lee, The Lee Law Firm, and Chris Jacobs, Houston Harbaugh
Court: Cuyahoga County Court of Common Pleas
Date Of Settlement: August 2022
Insurance Company: Various
Damages: Mr. Ewing suffered severe injuries to his left leg and will likely require a below the knee amputation. As a result of his physical injuries, Mr. Ewing was forced to retire from the military.
Summary: Plaintiff Jared Ewing, a 33-year old soldier in the Ohio National Guard, was visiting the Flats East Bank to celebrate a friend's birthday. At the end of the night, Jared was walking in the roundabout connecting Front Avenue and Old River Road toward an uber pickup area. The roundabout did not have a curb, but, instead, used concrete bollards to separate the road from the pedestrian area. A drunk driver drove into one of the bollards at a normal rate of speed. The bollard exploded, sending pieces of concrete flying. A large piece of concrete struck Mr. Ewing in his leg. But for a quickly applied tourniquet, Mr. Ewing would have bled to death. Mr. Ewing brought suit against the property developer and two contractors who helped design the roundabout, alleging that the bollard was inappropriate for the area. Discovery revealed that over 50 bollards had previously been broken upon impact in the two-and-a-half years preceding the incident.
Plaintiff's Experts: Douglas Smith, M.D. (Orthopedist); Benjamin Taylor, M.D. (Treating Provider); James Gatherwright, M.D. (Treating Provider); Darlene Carruthers, M.Ed. (Life Care Planner); Gary Thomas, Ph.D. (Civil Engineer); Jerry Regenbogen (Landscape Architect); General James Nuttal (Military Benefits Expert); Andy Irwin (Crash Reconstructionist); and John Burke, Ph.D. (Economist)
Defendants' Experts: John Wiechel, Ph.D. (Crash Reconstructionist); Paul Dorothy, Ph.D. (Engineer); James Quinn (Engineer); John Long (Landscape Architect); Charles Burke, M.D. (Orthopedist); and David Boyd, Ph.D. (Economist)

Jane Doe, Admin. v. ABC Day Care Center

Type of Case: Negligence
Settlement: $4,400,000
Plaintiff's Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: July 2022
Insurance Company: Self Insured
Damages: Death of 10-month old male
Summary: The infant became ill shortly after being dropped off at the day care center. State law and the center's own policies required the center to call the parent immediately when a child becomes ill. The center did not call the mother and the infant's illness progressed throughout the day. He vomited and became lethargic. When the mother came to pick him up at the end of the day, the infant could not hold his head up. The mother took him directly to a children's hospital emergency room where shortly after arrival he coded and passed away. Autopsy concluded the infant died from acute fulminant myocarditis. The mother claimed if the center called her earlier, she would have taken her son to the hospital earlier where the medical staff would have been able to diagnose and treat him before he died.
Plaintiff's Experts: Seth Hollander, M.D. (Pediatric Cardiology, Stanford); Anthony Chang, M.D. (Pediatric Cardiology, Children's Hospital of Orange County)
Defendant's Expert: None ■

Application for Membership

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

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

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

3. Excellent character and integrity of the highest order.

Name: _____ Email: _____

Firm: _____

Office Address: _____ Phone: _____

Home Address: _____ Phone: _____

Law School / Year Graduated: _____

Professional Honors or Articles Written: _____

_____

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

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

_____

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

_____

Applicant Signature: _____ Date: _____

Invited By: (print) _____ (sign) _____

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

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

Please return completed Application with membership dues to:

Cleveland Academy of Trial Attorneys
c/o Dustin B. Herman, Esq.
Spangenberg Shibley & Liber LLP
1001 Lakeside Ave., E., #1700, Cleveland, OH 44114
(216) 696-3232; Fax (216) 696-3924
Email: dherman@spanglaw.com

CATA Membership Dues

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

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

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President's Approval: _____ Date: _____

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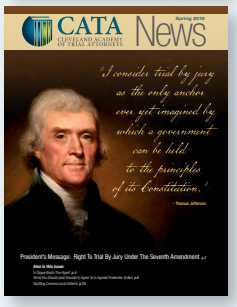
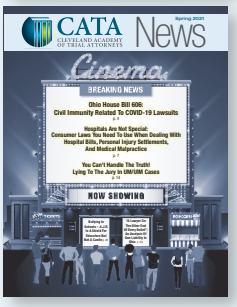
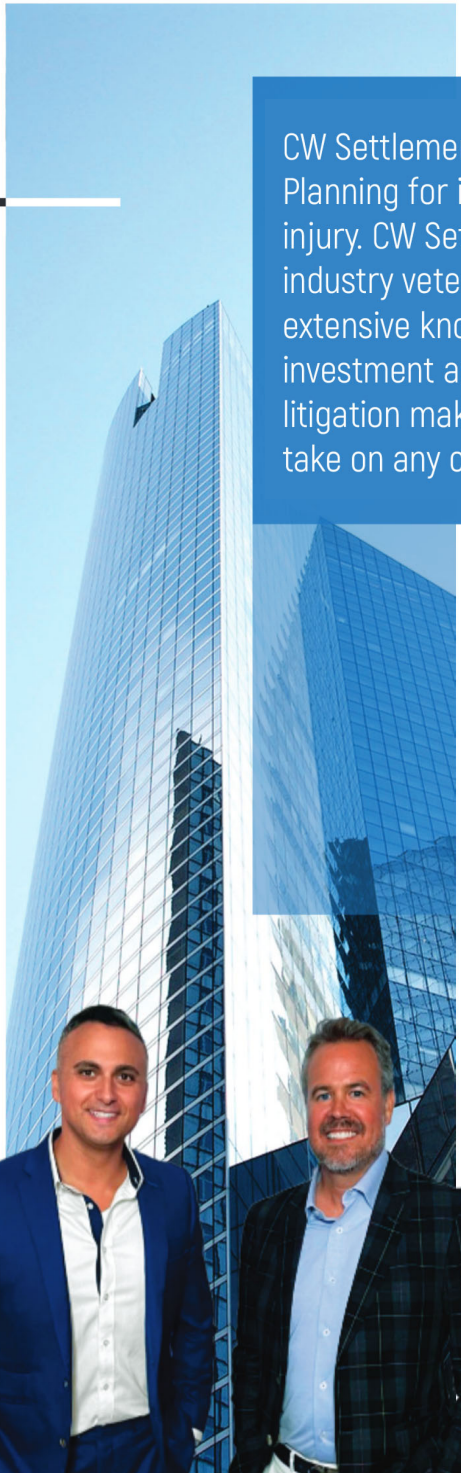




Spring 2023

Structured Settlements & Settlement Planning



CW Settlements specializes in comprehensive Settlement Planning for individuals and families affected by physical injury. CW Settlements founder, Tom Stockett, is an industry veteran with over 20 years of experience. His extensive knowledge of structured settlements, investment advisory services, government benefits and litigation makes Tom one of the most trusted experts to take on any case, regardless of size.

CW Settlements

- Analysis
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