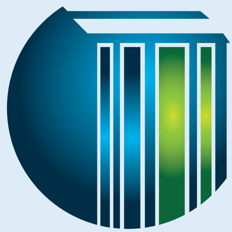

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News

Spring 2024

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What Litigation Has Taught Me *p.8*

Everhart v. Coshocton County Memorial Hospital – Four Year Statute of Repose for Wrongful Death Caused by Medical Negligence *p.23*

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President's Message

by Dana M. Paris

My time serving as President of CATA has been one of the most rewarding experiences. One of my goals set forth this year was to increase member involvement. It's easy to get stuck in our day-to-day routine and not carve out the time to take advantage of all that CATA has to offer. This year, I'm pleased to report that we had record breaking attendance at our monthly seminars and excellent member engagement at our recent Litigation Institute with Jim Lees and our first annual members' night at the Monster's hockey game.

If there's any time for our members to become more engaged and collaborative with one another – it's now. Over the last couple of years, the shift in the mentality of Ohio juries has been monumental as evidenced by the recent verdicts. We should be talking, listening, and learning strategies and lessons from one another so we can continue successfully litigating cases and obtaining the best outcomes for our clients. The next time you get an email about an upcoming CATA seminar with a panel discussion where members describe their recent trial experience, take the time to register and attend. You will not regret it.

As the saying goes, a rising tide lifts all boats. Our members should be encouraged by the recent verdicts, and I remain hopeful that this is an indication of the changing tides. This momentum is imperative, and I challenge you to continue to be active members of this impressive organization. ■

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The Pursuit of Truth:
Leaving No Stone Unturned in the Battle for Justice

by Susan Petersen

In January 2024, a Cuyahoga County jury delivered a resounding $1,487,500 million verdict for 92-year-old John Paganini, who was left blind in one eye by medical negligence following cataract surgery. The verdict, which came after five days of trial and five hours of jury deliberations, was the culmination of a grueling legal battle, marked by a Court Order sanctioning a pattern of discovery abuse by the defense. The Defendants were the Cataract Eye Center of Cleveland ("CEC") and Dr. Gregory Louis. Leading our trial team were myself and my law partner, Todd Petersen. Behind every victory lies a story —this is ours.

When Mr. Paganini walked through our office doors, we were admittedly hesitant about taking his case, which involved a missed diagnosis and delay in treatment of endophthalmitis, a severe eye infection requiring urgent care. Delay in treatment can lead to vision loss, and in Mr. Paganini's case, time was crucial. Early morning the day after routine cataract surgery, Mr. Paganini called his surgeon's practice, reporting symptoms indicative of an emergency. The practice scheduled a mid-morning appointment. Dr. Louis saw him, but advised him that his symptoms sometimes happen. Mr. Paganini specifically recalled being told: "The good news is, there's no infection." By the next morning, Mr. Paganini's symptoms were even worse, leading to a retinal specialist and a diagnosis of endophthalmitis too late for effective treatment and resulting in complete vision loss in the surgical eye.

We knew the case presented significant challenges -- his advanced age, the constraints imposed by Ohio's caps on non-economic damages, and the always arduous task of proving causation. However, it was Mr. Paganini's unmistakable charm and the captivating story of his life, punctuated by recent significant losses, which won us over.

Mr. Paganini's life was one of dedication and love; a 68-year marriage, fatherhood to four wonderful children, honorable service in the U.S. Marine Corps, and a trailblazing career in the IT industry. Despite recent vision challenges, he led a vibrant and healthy life, a testament to his remarkable family genetics. He cherished his role as a younger brother to his 105-year-old sister. Mr. Paganini made 90 seem youthful.

The case was filed on November 29, 2022. Within five months after filing the lawsuit, we recognized that getting to the truth was not easy. It started after a signed agreement between counsel to exchange "Initial Disclosures." Per Rule 26(B)(3), the parties must supply certain information/documentation without waiting for written discovery requests, including:

> (i) The name and, if known, the address, telephone number, and e-mail address of each individual likely to have discoverable information - along with the subjects of that information - that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

Per the R. 26(B)(3) Staff Notes, "[t]he purpose of the initial disclosure obligation is to accelerate the exchange of information about the case, consistent with Civ. R. 1 and 26(B)(1)." The rule clearly says that parties ***must*** make initial disclosures by the first pre-trial or case management conference, unless otherwise directed by stipulation, court order, or objection. Parties cannot excuse themselves from disclosures due to incomplete investigations, disputes over the adequacy of another party's disclosures, or the absence of another party's disclosures. Civ. R. 26(B)(3)(e). On the agreed upon date, the Plaintiff fulfilled this requirement; the Defendants, however, failed to provide any disclosures at all.

In March 2023, the Plaintiff obtained the Defendants' replies to our initial batch of written discovery inquiries, which included significantly more objections than substantive responses. As insufficient as the responses were, though, what caught our attention was the absence of the mandatory verification signatures from the individuals responsible for the responses in all three sets, a requirement under Ohio Civil Rule 33. This absence came into play in July 2023 during the deposition of Defendant Dr. Louis:

> 091:11 - 092:13 (LOUIS, GREGORY 7/31/23 VOL 1)
>
> Q. I'm providing you a copy of -- and it's Exhibit 6. And these are the written questions that I referred to at the beginning of our deposition asking if you had ever seen their written questions and answers that are a part of this case. And so Exhibit 6 are the written questions that we directed to you. Have you ever seen these before?
>
> [Defense counsel]: So I'm going to object. Don't talk about anything that you've discussed with lawyers, but you can answer if you recall seeing these.
>
> A. My initial answer is no, I don't remember --
>
> Q. Okay.
>
> A. -- seeing these.
>
> Q. Do you remember if you ever -- have you ever signed a verification page relative to these? Because we never received one.
>
> A. I don't recall that.
>
> Q. Okay. <u>Do you know who answered these questions?</u>
>
> [Defense counsel]: I'm going to object. Don't answer that in terms of if you're going to say something about a lawyer and you discussing anything. If you –
>
> A. <u>I have no idea.</u>

This called into question "his" response to the following Interrogatory which simply sought the identity of those involved in Mr. Paganini's care:

John Paginini and Susan Petersen, Esq.

INTERROGATORY NO. 4: Please identify by full name, home address, job title, dates of employment and credentials, all the health care personnel, including but not limited to, Dr. Gregory J. Louis, and any other staff who were engaged in activities which in any way related to rendering medical care to Plaintiff John Paganini from 2016 through the present.

ANSWER:

OBJECTION: This Interrogatory is vague, overly broad, unduly burdensome in part, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the requested information can be derived or ascertained from an examination and inspection of the medical record that are in Plaintiff's possession, and the burden of deriving or ascertaining the requested information is substantially the same for the party serving the Interrogatories as for the party served. Without waiving the objection, if Plaintiff would like to have a particular name in the medical record identified, Plaintiff is invited to submit a copy of the record with the name highlighted and reasonable efforts will be made to identify such individuals.

Yet, when we questioned Dr. Louis in deposition, he identified an employee known only as "Tammy D"— he couldn't remember her last name — who played a significant role in the emergency visit at issue. Her name didn't appear in the handwritten, impossible-to-decipher office note, just the letters "T.D." written amongst other scribbled notes.

We immediately sought the deposition of "Tammy D." and asked for supplementation of the discovery response. Amazingly, into August, defense counsel claimed they still had to determine if "Tammy D" existed, despite Dr. Louis' testimony.

The defense's failure to timely supplement Tammy D.'s full name — who turned out to have had a considerable solo interaction with Mr. Paganini and whose identity should have been provided in the Initial Disclosures — pushed us to our limit. We filed a Motion to Compel on August 18, 2023, highlighting what we perceived as deliberate impediments to the discovery process. On September 5, 2023, the defense indicated a shift in strategy by substituting an entirely new legal team. The Court then held its ruling on the Motion to Compel in abeyance.

Despite the ongoing discovery challenges, we were determined to move forward and keep our January 2024 trial date. Therefore, we submitted our medical expert report using the information available, while simultaneously expanding our investigation with depositions of several more employees. Each deposition revealed critical details, either a previously undisclosed name or document. In October, we finally got the deposition of "Tammy D." She testified that she did not know why the office had difficulty identifying her. She had worked there as an ophthalmic technician full-time since August of 2021 and saw Dr. Louis at least once a week.

Another notable breakthrough came in October via the deposition of the CEC Operations Manager, who disclosed the participation of an additional physician, Dr. Tamar Shafran. Not only had Defendants had not disclosed Dr. Shafran's name in prior discovery responses, but her name was absent from the medical records. To us, this disclosure indicated the defense's pattern of withholding vital information. As it turned out, Dr. Shafran was a CEC doctor and the first to address Mr. Paganini's eye emergency in the early morning hours the day after surgery. Unfortunately for Mr. Paganini, by the time Dr. Shafran's name and involvement was revealed, the statutory deadline for adding new parties to the lawsuit had elapsed. Compounding the issue, the Defendants chose to disclose Dr. Shafran's involvement one month after she left for a year-long sabbatical overseas.

As the trial approached, we focused on Dr. Shafran's role in handling Mr. Paganini's before-hours emergency call to the clinic, made via a third-party answering service. We issued a foreign subpoena to the service located in another state, which yielded comprehensive documentation and key testimony about the call. This process uncovered that CEC used a weekly schedule to assign on-call duties to its doctors. It was CEC which assigned Dr. Shafran to be on-call physician the morning at issue. Despite this, the defense failed to disclose her name and role, which was readily accessible with a simple check of their computer system.

On December 4, 2023, we filed an "Emergency Motion for Sanctions for Blatant and Continuing Violations of Rule 26 Requirements," which began with a powerful statement:

> **This isn't how discovery is supposed to go . . .** Instead of a direct pursuit of truth and justice, the Defendants have chosen to make this extremely difficult. John Paganini, a 92-year-old Marine veteran and esteemed community member, does not deserve the prejudice caused by the Defendants' ongoing pattern of evasion and obstruction. Gamesmanship has plagued this case from the beginning with the final straw being drawn on November 20 during the deposition of a previously undisclosed employee, who revealed more hidden evidence. The Defendants' unfair treatment of Mr. Paganini not only underestimates his resolve but also shows a disregard for the principles of fair play and transparency mandated by Ohio's legal standards. This Motion is being filed out of a very strong conviction by the Plaintiff that enough is enough.

The trial court set the Motion for a Hearing for January 3, 2024. It lasted five hours, including a pointed cross-examination of the defense's initial counsel.

On January 8, 2024, Judge Timothy McCormick issued a Judgment Entry, imposing sanctions against the Defendants after evaluating testimony from the CEC's COO, front desk manager, Dr. Louis, "Tammy D.," and the original defense lawyer, alongside the written briefs and exhibits. The Judgment Entry read in pertinent part:

> The testimony revealed that the Defendants' initial discovery responses were lacking. While the responses were timely in a sense, they were not truly responsive to the requests. The initial objections tendered were overly broad and mostly baseless in response to the most basic of questions. Answers tended to be obfuscatory and unhelpful. At Dr. Louis's deposition, Paganini learned significant information about relevant witnesses that the Defendants should have disclosed as part of their initial

> disclosures, provided in response to interrogatories, or supplemented as more information became available.
>
> The testimony revealed that the investigation required to satisfy Paganini's requests was minimal and could be done with relative ease. For instance, the guidelines to handling emergency calls were easily retrievable from the Defendants' systems yet were not provided to Paganini in response to his straightforward request for production . . .
>
> The delays and obfuscation had the most effect on Paganini's ability to investigate and proceed against Dr. Shafran. The delay in discovering the role of Dr. Shafran and others meant that Paganini could not add them as defendants because R.C. 2323.451 contains a 180-day deadline to add new parties in a medical claim after filing . . .
>
> None of the witnesses, including Attorney Hess, explained why the Defendants' initial discovery responses were lacking, why there was no supplementation, and why no serious efforts to investigate and respond to initial requests until September 2023.

In the end, the trial court issued Sanctions under Civ. R. 37(C), holding that "[w]hile the Defendants never violated a direct order of this Court, the Defendants did not participate in discovery in a forthright and timely fashion. Their conduct included violations of both the letter and spirit of the civil rules.'"

Civ. R. 37(C) gives the Court authority to deal with issues of timely discovery responses, particularly as it relates to witnesses. Under Civ. R. 37(C), "[i]f a party fails to provide information or identify a witness in a timely manner as required by Civ. R. 26(A) or (E), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard, may do any of the following:

> (a) Order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (b) Inform the jury of the party's failure;
>
> (c) Impose other appropriate sanctions, including any of the orders listed in Civ. R. 37(B)(1)(a) through (g)."

The Court decided against imposing the sanction of default judgment and any adverse inference jury instruction. Instead, the Court opted to give the following explanatory instruction to the jury:

> You have heard testimony from witnesses concerning the involvement of Dr. Tamar Shafran. Dr. Shafran did not testify at this trial and the Plaintiff did not take her deposition. This is because Defendants did not reveal the identity and role of Dr. Shafran to Plaintiff until October of this year. By that time, Dr. Shafran was getting ready to leave on a yearlong sabbatical overseas and was unavailable for trial or deposition.

Additionally, the Court prohibited the Defendants from employing an "empty chair" defense strategy, which would suggest that Dr. Shafran or another unnamed party was responsible for the negligence. It was determined that any negligence found to be associated with Dr. Shafran or another employee would be considered the responsibility of the practice. The Court also retained the authority to impose sanctions, including ordering the Defendants to cover reasonable expenses and attorney's fees, with a decision on the appropriateness of such sanctions to be made later.

As the trial approached, we redoubled our efforts. On January 10, we filed a Motion for Reconsideration and an Emergency Motion for Sanctions, spurred by testimony at the Sanctions Hearing about the existence of numerous other policies and procedures on the "O drive" under the "front desk" subfolder, contradicting Defendant CEC's earlier discovery response as follows:

> REQUEST FOR PRODUCTION NO. 29: Produce a complete color copy of each and every of bylaw, policy, code of conduct, rule, protocol, guideline, procedure manual , and/or handbook for every Defendant you are in any way associated with, including but not limited to the table of contents and /or indices, applicable to any individuals involved in John Paganini ' s care from 2015 through the present. *NOTE: In lieu of production of each and every, Plaintiff is amenable to production of indices and/ or tables of contents which can then be highlighted with specific policies to be produced thereafter.*
>
> RESPONSE:
>
> OBJECTION: Vague, ambiguous, overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving the objection, if Plaintiff would like to narrow the scope of topics of the Request, Plaintiff is invited to identify such topics and reasonable efforts will be made to identify such policies.

Ahead of the trial, the judge ordered the Defendants to reveal these additional policies. Due to their previous conduct, we

sought a court mandate for a screenshot of the computer folder holding these policies to check the validity of the defense production. The court concurred, and a later examination of the screenshot revealed the folder holding the "Emergency Eye Triage" policy (a document previously withheld until its existence was revealed in an employee deposition in November) was modified during the litigation process.

The trial proceeded the week of January 23, 2024. Our case presentation exposed not only the medical oversights that resulted in Mr. Paganini's harm but also allowed us to explain to the jury why Dr. Shafran was not part of the story to be told.

Our medical expert – a retinal specialist and a clinical associate professor at Yale University School of Medicine – did an excellent job. He meticulously deconstructed the departures from the standard of care and explained how Mr. Paganini's loss of one eye amounted to the loss of a bodily organ system as well as a permanent and substantial physical deformity. He outlined the extensive pain and suffering Mr. Paganini endured and will continue to endure, including the probable surgery to remove his eye and fit a prosthetic replacement.

The defense introduced a highly qualified expert from Tufts Medical Center in Boston for the trial. He asserted that the treating physician met the standard of care and that earlier intervention wouldn't have altered the outcome. We made the strategic choice not to depose their expert in discovery. While we typically locate prior testimony for expert witnesses, we found none for this expert. On the eve of his trial appearance, we made the decision to completely overhaul the approach to his cross-examination.

We conducted a thorough review of the ethical codes from every professional body to which he belonged. During cross-examination, we focused on his ethical obligation to be impartial and objective – a task deemed impossible given the Defendants' withholding of Dr. Shafran's involvement from him as well. By taking him through his own Massachusetts Society of Eye Physicians and Surgeon's Ethics Code on serving as an Expert Witness, we successfully challenged and cast doubt on the credibility of his assertions.

The trial was steeped in emotion from start to finish. Testimony from Mr. Paganini and his family did more than recount the loss of his vision; they painted a vivid picture of how this loss eroded his independence and compounded the anguish of losing his spouse in the same weeks as he was losing his vision.

In our closing arguments, we passionately called for justice, highlighting the blatant negligence involved and the subsequent refusal to take responsibility. We suggested that the jury use the Defendants' valuation of good eyesight in determining the value of this loss as measured by the $500 fee Dr. Louis testified he received for each cataract surgery performed to save a patient's vision. Our plea to the jury was to compensate Mr. Paganini with $500 for each day since the incident to the present and for an additional decade. We chose not to present a claim for economic damages.

The defense, in their final statements, attempted to deflect responsibility, portraying the doctor and the corporate representative as honest and cooperative. They shifted the blame onto the nebulous nature of the legal discovery process, suggesting any issues the jury found should be attributed to the lawyers, not their clients. This strategy aimed to dissociate the tangible harm suffered by Mr. Paganini from the actions of the Defendants, framing any discovery delays as a normal part of legal proceedings rather than evidence of wrongdoing. Of note, the Defendants' only monetary settlement offer of $50,000 came four days before trial; and, in closing, defense counsel sought a defense verdict.

The verdict for Mr. Paganini, though bittersweet, marks a significant victory. While it cannot undo the loss of his sight or the anguish endured, it reaffirms that our rights and dignity are sacrosanct, irrespective of age, and that violators will face accountability. In the end, the jury agreed that Mr. Paganini's loss of vision in one eye constituted both the loss of a bodily organ system and a permanent and substantial physical deformity.

Standing with Mr. Paganini has been an honor, reminding us of our profession's true purpose—to relentlessly pursue justice and truth. His bravery and resilience are a lasting inspiration. As we move forward, the lawyers of Petersen & Petersen pledge to keep fighting for those in need of a determined ally, ensuring that justice prevails. We remain dedicated to leaving no stone unturned.

I hope our story inspires you to dig deeper and push harder for the truth. They simply don't think you will. ■

Editor's Note: *On April 16, 2024, Judge Timothy P. McCormick held the $500,000 damages cap in R.C. 2323.43(A)(3), as applied to Mr. Paganini, violated his due course of law rights under Oh. Const. Art. §16. The Court therefore granted the Plaintiff's Motion To Include In Any Judgment The Full Amount Awarded for Noneconomic Damages.*

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What Litigation Has Taught Me

by Pamela Pantages

I. Prologue.

On October 16, 1992, Kurt Vonnegut wrote to his long-time friend, Dr. Robert Maslansky:

> *I am off to the city tomorrow, Thursday, and then to the outskirts of Chicago, to Harper College, where I will tell my audience about the pregnant woman who asked me in a letter if it was wrong to bring an innocent baby into a world as awful as this one.*
>
> *I told her that what made being alive almost worthwhile for me was all the saints I met almost anywhere, people who were behaving decently in an indecent society.*
>
> *I will tell the audience that I hope some among them will become saints for her child to meet.*

******

Recently, I took the depositions of two charge nurses in a case on behalf of a little boy I represent with catastrophic birth injuries. His mother did everything right during her pregnancy. She followed her doctor's instructions, ate well, exercised, and didn't miss any appointments. Early one morning right around her due date, she came to the hospital in labor, and from the start, electronic fetal monitoring was normal and reassuring. Her doctor was so confident about the imminent arrival of a healthy, robust newborn, she didn't bother to come to the hospital and do her own assessment. Rather, over the next several hours, the only provider managing the delivery was an inexperienced young nurse. When the day shift transitioned to the night shift, another inexperienced nurse assumed the care. The fetal heart pattern had changed by that point, was no longer reassuring, but rather, progressively nonreassuring. The night nurse knew enough to get the in-house doctor to the bedside, but he was unconcerned and let the labor continue. The inexperienced night nurse deferred to him. She ignored her independent duty to be her patient's advocate. Twelve hours after this mother's admission to the defendant hospital, her son was born without a heartbeat and not breathing. Now, two years later, after being diagnosed with a global hypoxic ischemic brain injury, he is unable to sit, crawl, walk, feed himself, or say any words.

By the time I deposed the day and night charge nurses, I had already deposed the day and night bedside nurses, the no-show primary obstetrician, the in-house night obstetrician, and the floor nursing manager. Among the defendants was disagreement about the case's basic facts, a plethora of excuses, subtle finger-pointing, and straight-up fairy tales. At the most recent depositions, the charge nurses – purportedly overseeing all laboring moms' electronic fetal monitoring at the main nurses station -- denied having a duty to assure the inexperienced bedside nurses reporting to them weren't in over their heads. The charge nurses further denied they had a duty to intercede with attending obstetricians who were either absent and/or unresponsive to the circumstances. In their depositions, all

providers agreed on one thing: they were shocked by the baby's appearance and condition at birth.

******

I'm sharing Vonnegut's note and my recent deposition experiences with you because they illustrate what plaintiffs' lawyers and plaintiffs experience before, during, and after litigation. I know this because not only have I been a plaintiff's lawyer for nearly 34 years, I've also been a plaintiff. Neither is easy. In both capacities, I've seen a lot of indecent behavior, but I've met many saints along the way, too. Some of those saints I've represented, and some have represented me. Still other saints -- my friends and colleagues -- are reading these words.

This article is about what litigation has taught me.

II. Susan Petersen's Rule of Three.

OAJ recently hosted a women lawyers' retreat in honor of International Women's Day 2024. Around the same time, CATA hosted a seminar celebrating the recent multi-million dollar verdicts around the state. The extraordinary Susan Petersen was among the illustrious speakers at both events.[1] Susan is a remarkable trial lawyer who is always generous with her skills and techniques that generate great outcomes for the injured people she's represented. At our recent retreat, Susan shared a fundamental method she uses to concisely convey her clients' stories to judges, mediators, and juries: The Rule of Three.

Susan's description of The Rule of Three got me to thinking about how ubiquitous it is in our lives, and why. It's an effective means of communication, simply because it's a pattern, and our brains process a pattern faster than chaos. The smallest pattern is the easiest to remember. The smallest number needed to actually create a pattern is three.

Here are some of my favorites according to The Petersen Rule of Three:

- Life, Liberty, and the Pursuit of Happiness.
- Government of the People, by the People, and for the People.
- I Came, I Saw, I Conquered.
- Location, Location, Location.
- Stop, Drop, and Roll.
- Three Blind Mice.
- Three Men (and a Baby).
- The Three Bears.
- The Three Amigos.
- Three Men in a Tub.
- The Ghosts of Christmas Past, Present, and Future.
- Friends, Romans, Countrymen.
- The Scarecrow, the Tin Man, and the Cowardly Lion.
- Chief Brody, Mr. Hooper, and Quint.
- A Priest, a Rabbi, and a Minister (Walk into a Bar).

Rest assured, I'm actually getting to my point here. With a lot of reflection, I can condense what litigation has taught me using The Petersen Rule of Three.

III. 3 Lessons I Learned from Litigation: Be Prepared, Be Persistent, By Yourself.

1. Be Prepared.

The first rule of being a successful trial lawyer (or plaintiff) is to be more prepared than anyone in the room.

Intake. There have been pages and pages written by experienced lawyers on the importance of really getting to know the human you are representing. The best way to do that, of course, is spending an abundance of time face to face, and in person. However, now that we have Zoom, cell phones, text messaging, and e-mail, it's easy for us to communicate with the clients, and for them to check in with us. Clients have my cell phone number, and I encourage them to text with me, and send me photos, videos, and any other information to help keep me up to date with their journey.

The case infrastructure. I'm committed to reading all the records myself, creating my own master time line as well as spin-off timelines, as the material events become more clearly defined during discovery. Admittedly, this becomes challenging when the client's medical records count climbs to the thousands of pages. At Nurenberg Paris, I'm lucky to be on a brilliant litigation team consisting of a case manager who tracks, labels, and updates all incoming records, and a nurse paralegal who does her own factual timeline identifying important issues, missing records, or topics she and I need to research and to update our medical literature bank for each case. Everyone on our team is detail-oriented and proud of their work product.

Early litigation. *Wuerth* and *Clawson*, along with specific affidavit of merit requirements, have necessitated additional layers of preparation. The nurse paralegal on my team and I identify all potential defendants we name in the complaint. As soon as defense counsel enter their appearance, we serve interrogatories requesting missing or subcontracting care providers who might fall outside the hospital's representation/insurance coverage, or the statute of limitations.[2] At the same time, I serve duces tecum notices of depositions that mirror my document requests for all witness notes not included in the medical records, text messages, recordings, audit trails, and the like.

A word on noticing depositions as soon as defense counsel enter their appearances. People tell me this is controversial, confrontational, and too heavy-handed. I disagree. We go first in discovery deadlines and at trial – expert reports, voir dire, opening statements, our case in chief, and closing arguments. We go first because we have **the burden** of proof.

There is no question in my mind that the tortfeasors' depositions should precede the victims'. Defendants and their experts control the medical literature, hospital policies, and our clients' medical records. How can we adequately prepare our clients for their pivotal deposition testimony without knowing what defendants will or won't remember? Why give defense counsel yet another advantage of knowing what the plaintiff does or doesn't remember, thereby enabling an early defense advantage of tailoring their case themes and clients' testimony to the plaintiff's case? I want to know as early as possible any provider's undocumented memories, so the client and I can **be prepared** at her deposition.

Here are some examples of why this is so important. In one case, by deposing all the defendants' employees first, I learned that nurse practitioners were staffing the unit without physician supervision, even though the name of the "attending physician" appeared on every single page of the medical record. Without those early defendant provider depositions, the client and I never would have known that a physician never come to the bedside. In another case, without any supporting documentation, a floor nurse and her supervising charge nurse claimed to overhear the client say she wanted to avoid a cesarean delivery if at all possible. The client and I were able to talk about this before her deposition, and she vigorously denied to me and at her deposition ever making such a statement.

Experts. There are so many aspects of our practice which require methodic and obsessive preparation. Among the most important is our preparation of our experts for their reports and testimony, and our own preparation for cross-examination of defense experts at their discovery depositions and at trial.

First, let's talk about our experts. We must have up-to-date records and know the facts of our case before we can intelligently talk to our experts.

In medical negligence litigation, particularly in my area of birth injury, we start with the outcome and work backwards. Question one is whether the client has a ***permanent, significant, and disabling*** injury. If yes, the next task is to identify all potential causes of the injury,

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and any comparative negligence "bad facts" likely to become the defense. Last but not least is to identify the standard of care and all the record evidence proving that someone breached it.

Ohio law regarding disclosure of expert opinions has changed recently in very meaningful ways. Previously, Cuyahoga County was among a handful of jurisdictions with an expert report requirement. In jurisdictions without an expert report requirement, defense counsel's expert disclosure often included a list of twenty or more experts, some of whom they had no intention of ever calling. Without a corresponding report requirement, there was no way for us to know which defense expert was legitimately participating, and which was mere padding.

Thanks to the new Civ.R. 26(B)(7), the defense faux expert list is obsolete. Now, all testifying experts must produce reports. Each party has up to 30 days before trial to supplement their reports, or else "[a]n expert will not be permitted to testify or provide opinions on matters not disclosed in his or her report." Civ.R. 26(B)(7)(c). Thankfully, every jurisdiction across Ohio now has the expert report requirement we've been meeting in Cuyahoga County all along.

The other good changes in Civ.R. 26(C)(7) are contained in paragraphs (f) and (g):

> **(f) Drafts of any report provided by any expert, regardless of the form in which the draft is recorded, are protected by division (B)(4) of this rule.**
>
> **(g) Communications between a party's attorney and any witness identified as an expert witness under division (B)(7) of this rule regardless of the form of communications, are protected by division (B)(4) of this rule except to the extent that the communications:**
>
> **(i) relate to compensation for the expert's study or testimony;**
>
> **(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or**
>
> **(iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.**

These changes in Civ.R. 26 enable us and our experts to be better prepared in developing and disclosing our experts' opinions, and ultimately, our theory of our case.

Paragraph (g) effectively converts nearly all communications between counsel and her expert as privileged. This is helpful in limiting discoverable items in an expert's file. It also restricts questioning about our discussions with an expert, as long as the expert is prepared to testify that they did not rely upon any representations by counsel in formulating their opinions.

Paragraph (f) is a welcomed addition to the civil rules. Draft reports are no longer discoverable, thereby eliminating the deposition question "Is this the only version of your report?" Paragraph (f) places the burden on us to assure that any factual statement made by our expert in their report is true and accurate before we share the report with defense counsel. That means having a close editor's eye.

Let's also bear in mind that our expert's report is defense counsel's structural deposition outline for that witness. Paragraph (f) provides the opportunity to edit our expert's report down to its nuclear form -- the shorter, the better. Our expert's report should not include unnecessary facts like patient noncompliance, or volunteer material like medical literature citations that could be potentially harmful, and most certainly will lengthen the deposition. I recall a defense expert witness who had a template for all his reports that included a half dozen literature citations that were helpful in supporting my cases. Apparently, either he didn't closely read the articles, or assumed that I wouldn't. More than once I was able to get significant concessions from him, based on the contents of citations he volunteered in his reports. Sometime later, his reports no longer included the citations. At a subsequent deposition, I asked him why. His response was, "They turned out to be not as helpful as I thought."

Finally, I am obsessive about preparation of defense experts. Period. I read everything that expert has said, written, or PowerPointed. Especially with the more frequent defense testifiers, this means reading bankers boxes, literally decades, of prior testimony. The pay-off is always worth it.

Here is an example. In an Ohio trial not long ago, during defense counsel's re-direct, his expert volunteered with bravado a new opinion that a baby injured during the birth process will have a visible reaction on her electronic fetal heart tracing, and since the client's fetal heart tracing had no such reaction, he could confidently exclude injury during her delivery. This particular expert is a known frequent flier who probably doesn't remember any of his previous testimony, and hopes I don't either.

On re-cross, I asked him the following:

> Q: Doctor, did you just testify [8 months ago] in the Warrell vs Banner Health case in Arizona about this topic of the fetal heart monitor?
>
> [You said] "I think you've asked

me in an indirect way the same question, and my answer is going to be the same. There is no scientific evidence upon which any individual can opine that the occurrence of shoulder dystocia, either the anterior or posterior shoulder, would be reflected on the fetal heart tracing. There is no data to infer anything."

Did you say that? Did I read that correctly, Doctor?

With effective impeachment, the witness's answer is irrelevant. When you are standing maybe 8 feet (not too close!) in front of him with a paper copy of his sworn testimony in your hand, it is very hard for him to recover his credibility. And he will be entirely more cautious in his responses when he knows that the bankers box on your trial table is filled with his previous depositions. He will know you have done your homework. And so will the jury.

CATA, OAJ and AAJ. A word about our organizations. I have belonged to these organizations since I joined the plaintiff's bar over 30 years ago. I can say without reservation that every meeting, conference, or seminar I go to, I learn something from you, including the importance of being prepared and how to do it.

2. Be Persistent.

Litigation delays are never the plaintiff's friend.

At each initial case management conference, I outline a detailed scheduling order for the judge or staff attorney, including fact witness deposition deadlines, plaintiff and defense expert report deadlines, expert witness deposition deadlines, and motion in limine deadlines. I advocate for the earliest possible deadlines and the earliest possible trial date. The sooner each of these litigation deadlines are met, the sooner the mediation, the more time for trial preparation, and the less likely the trial date will be moved due to unfinished discovery. I vigorously object to taking eve-of-trial defense experts' depositions, or to responding to eleventh-hour defense motions in limine when I should be focused on my trial preparation.

With the changes to Civ.R. 26, some scheduling orders now set separate deadlines for expert disclosures, followed some weeks or months later by deadlines for expert reports. This unnecessary gap eats up a lot of time, so I always ask for a combined expert disclosure/report deadlines as early as reasonably possible in the litigation. The local and state expert rules allow for supplementation of an expert's report up to 30 days before trial, so early disclosure/report deadlines keep discovery moving, and don't prejudice anyone.

Motions to compel or motions requesting status conferences can be helpful when discovery stalls, depending on how receptive the court is to intervene. Some courts are more proactive in the discovery process than others. Recently, we've noticed that the courts in Cuyahoga County have shown an enthusiasm for having civil cases move off their dockets more quickly.

A final note about persistence. A defendant's primary goal is to defend their personal conduct. So, for a defendant, litigation is always personal, and typically not for the greater good. As plaintiffs, we are always on the side of what is right, just, fair, and true. If our battle advances these goals, it is a battle worth pursuing, as long as we do it fairly and professionally.

3. Be Yourself.

At the recent OAJ women's retreat, Susan Petersen showed us a news story she did a few years ago featuring the first women law students and lawyers in Ohio – brave pioneers who were the only one or two women in their law schools. Women who -- after graduating at the top of their classes, successfully passing the bar exam, and being sworn into the Ohio bar as actual lawyers – were hired by their male colleagues as secretaries and law librarians.

Over the ensuing years, women became increasingly accepted in greater numbers in law schools, and increasingly visible in law firms, and eventually, courtrooms. But were we accepted? Perhaps, but with strict conditions.

For years, women were subjected to a weird fashion mandate of dressing like men -- prim navy blue suits, demure white blouses, and peculiar bowties. But … no pants. ***Definitely*** no pants. Male-dominated law firms and courtrooms steadfastly clung to the skirts-only rule. So, women lawyers obediently wore men-like suits, men-like shirts, and men-like bowties, but no pants. Only skirts. Those were odd days, indeed. I hated those bowties.

Early in my career, a male colleague told me no one would ever take me seriously as a lawyer unless I dressed like a man. In a skirt. He added that no one wants to see a woman lawyer in pants. Thankfully, this isn't true, of course. As a trial lawyer, I've learned that jurors are curious about who we are, and why we're doing what we do. Jurors want to see our authentic selves. They are suspicious of inauthentic lawyers, no matter what their gender. Fundamentally, that means telling the truth about the clients, the experts, and our cases. But, it likewise includes how we present our personalities, and our physical selves.

A well-executed trial is a dramatic production, like an engrossing play, epic cinema, or a moving opera. There is a story arc with the palpable prologue,

climax, and resolution. When we do our jobs right, jurors actively engage with us in our storytelling. They embrace the task of figuring out the good guys versus the bad guys, the heroes versus the anti-heroes.[3] To that end, years of litigation have taught me the necessity of being myself.

To fulfill the last of my three rules, I am mindful of where I thrive. Who am I?

I love the courtroom and everything she stands for. Advocacy, equality, justice. I do my best to always be respectful of the solemn environment that is my workspace. That said, I am human. I acknowledge my many shortcomings, and occasional mistakes. I'm not afraid to say I'm sorry, or to make amends.

In 33-plus years of being a trial lawyer, here is what I have learned from juries and my time in the courtroom:

- Dress appropriate to the day. I dress conservatively and solemnly for voir dire, opening statement, and closing argument. For direct examinations in my case in chief, I loosen up with only a little more color for interest, because I still want the jury's focus on the witness, not me. For cross-examinations, whether in my case in chief or in the defense case, I wear bright, happy colors, bold patterns, swap out the suits with a dress here and there, and with varying shoes.[4] For my cross-examinations, especially of defense expert witnesses who I know are going to disagree with me on just about everything, I want the jury's attention to be on me and the content of my leading questions.
- Unless the court requires, stay away from the podium. In other words, I am mindful of props that tempt me to hide behind them. My favorite courtrooms are those in which I am free to roam, to walk away from the witness or jury, and to re-enter their spaces when the questioning or testimony warrants it.
- Avoid copious notes, pens, water bottles, coffee cups, soft drinks, eye glasses, or any other physical item or activity in your hands or on your face that will distract the jury's attention from your witness, an important exhibit, or you. Seriously, by the time I am in trial, I know the case cold. The only reason to read from a script is fear. I'm mindful that I'm scared most of the time in trial, but no one needs to know that but me. I'm mindful not to publicize my fear. My mentor in law school, Professor J. Dean Carro, taught me to always eschew props that suggest you're hiding something, and use a body language that says you have nothing to hide – nothing between you and the jury, face forward, open arms, open hands.
- Mindful PowerPoints. I've learned over the years to anticipate rote, recycled, indecipherable defense PowerPoints in openings and closings. I've learned that on every slide of my PowerPoints, the jury must be able to digest my written message while listening to me at the same time. We don't stand silently and wait for the jury to read what's on the screen, right? I edit and re-edit my PowerPoints to achieve two goals. First, since I'm not behind the podium and not using notes, my PowerPoint is my speaking prompt. Second, the message the jury sees on the screen must be one they can easily and quickly copy into their notes while they're listening to me endorse that message.
- Mindful timelines. Same cautions and goals as PowerPoints.
- Presentation of evidence.
- Hard copy exhibit notebooks. The paralegal and case manager on our trial team are meticulous about these. Their work product is extraordinary, and I am proud to present our exhibits to the court, to the jury, and to Tyler Dorsey and the folks at Video Discovery, our go-to trial technical support group.
  - Courtroom visual evidence. Another shout-out to Tyler Dorsey, a true gem in our litigation community. Juries enjoy watching Tyler at work in the courtroom during the trial. They appreciate the ease, efficiency, and calmness with which Tyler calls up a document on the screen on a dime. By extension, juries appreciate our preparedness, and the professionalism in showing them the evidence they need to find in our favor.
- Open the virtual door for the jury.
  - Don't continually remind them of the adversarial litigation, but rather reinforce the shared human story.
  - Talk to the jury in our universal human language.
  - Don't ever say "my client." She isn't yours. Say her name.
  - Don't throw up obstacles between you and the jury with legal, medical, or scientific jargon. It's a breathing tube, not endotracheal ventilatory support. It's a heart attack, not STEMI. It's brain damage, not hypoxic ischemic encephalopathy.

Here are my last two notes under this rule of being yourself. **First, take the risk.** After 33-plus years of practice, I do indeed know what a strong plaintiff's case looks like. Yet, I'm always receptive to a second or third look at a case that might not tick all the boxes, or that another lawyer has turned down. Or to round-tabling a complex case with my team or my partners on the pros

and cons. Is there a significant injury, even though the liability part of the case might be a challenge? Does the set of facts or the client's story magnify the severity of the negligence, harms, or losses? When I was a young lawyer, a senior lawyer told me, "If you are trying only the easiest cases, you aren't a trial lawyer." Real advocacy isn't easy. Real justice is hard. After many years and many trials, among my best successes are cases that other attorneys – plaintiff and defense – were skeptical about. So, litigation has taught me to listen to my inner lawyer, and to trust my gut, even when other lawyers disagree.

Finally, pick your battles. As trial lawyers, we are genetically adversarial creatures, which is why we do what we do.

I'm mindful of condensing a case's story down to its purist form. It's important to separate the wrong-doers who manifestly changed the outcome from the wrong-doers who didn't. I'm mindful of conduct by defense counsel that warrants a fight versus conduct that merits compromise. I'm mindful of counting to ten, or maybe even sleeping on an e-mail response, before hitting "Send."

IV. Epilogue.

Those of you who know me know that for the entirety of my career, I have been a single mom to two remarkable daughters, and now five remarkable grandchildren. Before I submitted this piece for publication in the CATA Journal, I sent it to my daughters for their thoughts. One of my daughters said, "Mom, this is a lot of technical stuff specific to your baby cases. Tell them what litigation as a plaintiff lawyer and as a plaintiff has taught Pam Pantages."

I've learned that "Injustice anywhere is a threat to justice everywhere."[5] Even when the position we take is controversial, or challenges the status quo, or threatens the powerful, righting a wrong is always right. I stand by that.

I've learned that I love representing little children and their families. I love rising up as the voice of a mom who didn't get the care she and her baby deserved because of their economic status, their education, or any other social injustice. I love being the voice of the mom who did everything she was supposed to do, took care of herself and her unborn baby, and who trusted her care providers to do the same.

I've learned that I love being in the courtrooms of judges who actively engage in our litigation, and who, mindful of fundamental fairness, effectuate a balance so all parties can state their positions, and all counsel can try their cases. In other words, judges who facilitate an equal playing field for all the litigants, and let justice find her way.

I've learned to retell myself, even on my worst days, the affirmation my mother gifted me with when I was a little girl: "You are the smartest person in the room, and you are braver than you think."

I've learned that, regardless of gender, we are all equally entitled to a work/life balance without excuse, apology, or justification. As intelligent people, we are entitled to set work/life boundaries. I am as committed a trial attorney as I am a mother and a grandmother. My daughters, sons-in-law, and grandchildren are as entitled to my love, affection, support, unsolicited advice, and hilarious vacations as I am entitled to theirs. The love we give to our families and the love they give to us is what makes us human. Their love enables us to be the best lawyers we can be.

I am grateful to be in this remarkable community, and to know and learn from the saints among us. ■

End Notes

1. The OAJ women's retreat featured other inspiring speakers including Judge Mary Jane Trapp, Judge Deborah Turner, Judge Candace Crouse, Sydney McLafferty, Julia Metts, Courtney Rowley, Ashlie Case Sletvold, Megan Frantz Oldham, and Courtney Camillus. Equally motivating were CATA speakers Katie Harris, Scott Perlmuter, Patrick Murphy, Christian Foisy, as well as Susan and Todd Petersen.
2. See *Bray v. Bon Secours Mercy Health, Inc.*, 6th Cir. No. 23-3357, 2024 U.S. App. LEXIS 7415 (Mar. 29, 2024) (defendant physician's employment by a federally funded group (Healthsource Ohio, Inc.) necessitated claims against him to be filed according to the Federal Tort Claims Act within two years, with no tolling for a minor's claims). Due to Bray, we now set a 2-year statute of limitations from the date of birth on our baby cases, and do thorough checks on all potential defendants to identify potential federally funded agency employers.
3. There are epically good books on trial storytelling by Katherine James, Randi McGinn, Keith Mitnick, David Ball, Don Keenan, Carl Bettinger, Patrick Malone, among many, many others.
4. I know at this point, some of my readers are saying, "Pantages, what are you talking about? Shoes?" But, put yourself in the jury box for a moment. Especially in a two or three week trial. Consider that younger jurors have shorter listening intervals, and are accustomed to switching from social media platform to social media platform. If I, as one of the lead lawyers, look the same every day, and talk the same every day, I know I will lose the jury on day 2 or day 3. I always remember that I am the storyteller, and I am mindful of a palpable arc from beginning to end. The courtroom and I cannot look the same every day, and tell a compelling story at the same time. (This is another round-table that I would heartily endorse Susan Petersen to chair, because we've already discussed its importance.)
5. Martin Luther King, Jr., Letter from a Birmingham Jail, April 16, 1963.

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Pointers From The Bench:
An Interview With Judge Mary Jane Boyle

By Ellen Hobbs Hirshman

Judge Mary Jane Boyle has been serving the Northeast Ohio Community as an Appellate Judge on the Ohio 8th District Court of Appeals since February 2007. Prior to that she served as a Judge in the Cuyahoga County Common Pleas Court, General Division for over ten years, starting that term in January 1997. From 1989 through 1996, Judge Boyle was a domestic relations/employment litigation attorney with Zashin & Rich LPA. Judge Boyle cherishes her litigation experience having handled high end divorces and employment issues, but her ascent to the bench was no accident. She always aspired to serve in the judiciary, and worked diligently to make that happen at the young age of 32.

Judge Boyle was born in Cleveland at Fairview Hospital. Her father's employment as a salesman required that her family move around the country. She grew up in Iowa, Illinois, Florida, Virginia and ultimately in upstate New York where she attended Coleman, a Catholic Co-Educational High School. Judge Boyle attended Ithaca College where she received a B.A. in Psychology in 1986.

In 1985, during her junior year of college, Judge Boyle took her first steps on her path to a career in law when she interned in the Justice Program at American University in Washington, D.C. She was placed in Amtrak's criminal division, where crimes committed on trains are investigated and prosecuted. Judge Boyle has fond memories of her internship, during which she learned how to prioritize case and work assignments, tools she still uses in her work today. During this period, she also worked with the homeless. This was a time when the state psychiatric hospitals had closed, and many who had been institutionalized were released into the public. Judge Boyle worked with homeless advocate Mitch Schneider in preparing and serving meals, and doing other tasks to facilitate their transition from the institutions back into society.

Judge Mary Jane Boyle

After graduating from Ithaca, Judge Boyle returned to Cleveland and lived with her grandmother in the West Park neighborhood. Her grandfather was the Italian grocer in the Irish neighborhood whose store, Frankie's Delicatessen, was across the street from St. Patrick's Church. She recalls her uncles were instrumental in her decision to attend Cleveland Marshall College of Law. She knew she wanted to be an attorney and perhaps someday a judge. Her uncles advised that attending Cleveland-Marshall in the day/night program would provide her with the necessary education and experience. During her second-year domestic relations night course she met Bob Zashin, her law professor. He offered her an internship which segued into a position as an associate at Zashin & Rich. At that firm she handled primarily domestic relations cases but also represented clients in employment matters, personal injury cases, as well as some wills and trusts.

Judge Boyle achieved her goal of becoming a judge when she was elected as a Cuyahoga County Common Pleas Judge, General Division in November 1996. Her term commenced on January 3, 1997, assuming the docket of Judge Angelotta. Judge Boyle jokes that it would have been helpful to have served as an Appellate Judge first to gain the benefit of the errors and stumbling blocks that occur at the trial level (and are so closely scrutinized at the appellate level). There is a more sophisticated training program for new judges now that did not exist back then.

Judge Boyle recalls that her first trial was a Capital Murder Bench Trial. Judge Tim McCormick and Judge Carolyn Friedland presided over that trial with her. Her second trial was a complex Secured Transactions case which took three weeks to try to a jury. Judge Boyle recalls fondly the kindness of Judge Patricia Cleary who assisted her and guided her through that trial. Judge Cleary served as the "temporary bailiff" throughout this three-week trial and essentially taught Judge Boyle and her bailiff the ropes and how to run a courtroom. Again, this was before they had very detailed new judges' training or orientations. It is quite amazing that Judge Cleary would take the time out of her busy schedule to assist Judge Boyle through that first complex civil trial.

In fact, Judge Boyle recalls there was a wonderful comradery on the Cuyahoga County Common Pleas bench at that time, which included a fair number of female judges who were supportive of and encouraged each other. At that time, the dockets were exploding and she often worked through lunch to stay abreast of the work. She tried a lot of cases and is proud to have gained a reputation as a judge who would try your case.

Judge Boyle always possessed a strong interest in dispute resolution. Her thesis in college was written on this very topic. From 2008-2016 she chaired the Ohio State Supreme Court Commission and Advisory Committee on Dispute Resolution. She worked tirelessly to resolve disputes and educate the local counties how to create and manage dispute resolution programs. She worked with the elderly coordination program, coordinated custody issues with parents, and was involved with the Government Conflict Resolution Services (GCRS).

Judge Boyle's responsibilities in the Appellate Court have proven to be quite different from those at the trial court level. In the trial court most rulings are made very quickly whereas all rulings in the Appellate Court require deep consideration and a thorough review of all legal precedent on an issue. Judge Boyle enjoys the diversity of cases that

Judge Mary Jane Boyle

come to the Appellate Court which include appeals from Municipal Court, Domestic Relations, Administrative Law, general civil cases, tax cases, and criminal matters. Judge Boyle is currently the only appellate court judge with a domestic relations background.

Judge Boyle has good advice for trial lawyers, foremost of which is the importance of making a record. You need to object on the record to any ruling you believe was made in error and would potentially be reversible error. If the trial judge does not provide you with an opportunity to immediately proffer a statement on the record, it is up to you to ask the judge at the time of a break to place a statement on the record. This includes stating on the record what evidence, document, or testimony you would have presented if the court had not prohibited it and that you deem essential to your case. Likewise, the evidence which the Court refused to withhold may have been erroneously presented to the jury. This is why having a bench brief on issues which may arise during trial is of great benefit, not only to the trial judge but to the appellate

court if you find yourself appealing an unfavorable verdict. With the bench brief you immediately provide the court with a legal argument, in writing, and it can be filed and made part of the record.

Judge Boyle suggests that, following a verdict, you may want to consider filing a Motion to Stay the issuance of a judgment to provide you with more time to determine whether you want to appeal a decision.

Judge Boyle also suggested that as trial lawyers we need to give more consideration to whether we really want to appeal an issue. We need to consider whether we will be making good law or bad law. This includes determining who your "audience" will be and whether appealing an issue will be helpful down the road. You need to consider the whole body of case law and its repercussions to more than your one case. In addition, before appealing you need to consider whether the error was harmless.

Judge Boyle reminds us that, when possible, we should cite case law from the District where our appeal is pending. When framing assignments of error, exercise restraint. Too often appellants create more assignments of error than necessary, many of which just repackage the same issues. In the body of the brief, be concise and avoid ridiculous arguments. Read and distinguish your opponent's cases – something many attorneys fail to do. Remember that your reply brief is an opportunity to hone in on your strongest arguments. If, as the appellee, you don't get a reply brief, use your oral argument to drive home your main points. At oral argument, do not just stand up and read your brief – speak directly to the panel, to connect and convey your best argument.

Another word of sage advice is that if you are going to use artificial intelligence (AI) you need to ensure that all of your cases exist and that you have read them thoroughly because the judges certainly will check. If you use an argument or case law that you obtained through AI and it does not exist, you will be sanctioned for your conduct.

Judge Boyle reminds us to use the Court of Appeals' Mediation Services. Newton Cargill has been their Mediator since last year and they have had much success with him. She believes that if there is a chance for settlement the parties need to tap into this resource at the appellate level. The Mediator also has authority to extend your filing deadlines.

When jury trials were stayed during COVID, fewer appeals were filed. But once the courthouse doors reopened, the Court of Appeals was inundated with criminal appeals. Whereas before 2020, during hearing weeks the appellate court typically heard six cases, now they usually hear nine. They have returned to the pre-COVID filing rate and are busier than ever.

Judge Boyle has always been active as an educator. She is a volunteer at the CMBA's Bench/Bar Committee, as well as the CMBA's 3R's program. She is a member of Cleveland Employment Law American Inns of Court and a regular presenter at legal education programs around the state. Judge Boyle is the Chief Justice-Elect of the Ohio Appellate Judges Association. Currently she is the Educational Chair of the Eighth District Court of Appeals which will present the Advanced Appellate Symposium along with Case Western Reserve Law in November 2024. This will be an in person and zoom course provided free of charge, and will provide six hours of CLE to assist anyone attempting to obtain certification in Appellate Law.

In her spare time, Judge Boyle enjoys playing golf, pickle ball, and other sports. She is a member of St. Mary's of the Falls Catholic Church and has two adult children. ■

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Behind the Scenes:
Three Amazing Women

by Kathleen J. St. John

In my fourteen years as Editor of the *CATA News*, I've had the pleasure to work with many talented attorneys. The content of this magazine – the articles on legal issues, judges, lawyers, verdicts, settlements, and other aspects of our practices – is what makes the *CATA News* valuable to us as *lawyers*.

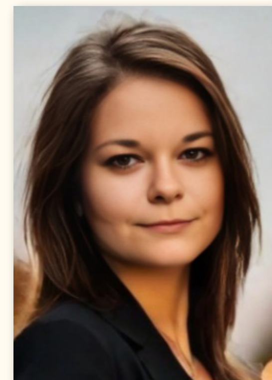
But there is another aspect of this publication that has been meaningful to me – namely, the aesthetics. And for that I have to sing the praises of three amazing women: Joanna Eustache, Lillian S. Rudiy, and Mary Szabados.

Joanna Eustache

Joanna, who works for Copy King, has been our graphic designer since the revival of the *CATA News* during Brian Eisen's presidency in 2010. With endless patience, cheerfulness, and talent, Joanna transforms the mass of materials we send her into a visually pleasing and readable magazine. Her cover designs are always magical – not the least of which is the photo she took of the Terminal Tower that graced the cover of that inaugural issue in 2010.

Lillian S. Rudiy

Lillian, who is my assistant – and more than that, a dear friend – is the person without whom this magazine in its current format would not be possible. Not only does Lillian pre-format every item sent to Joanna, but the detailed lists she has devised and is constantly updating create order out of chaos. Most of all, her unerring eye for the visuals helps bring to life my incipient cover ideas in a mock-up that makes it easier to explain our concept to Joanna.



Mary Szabados

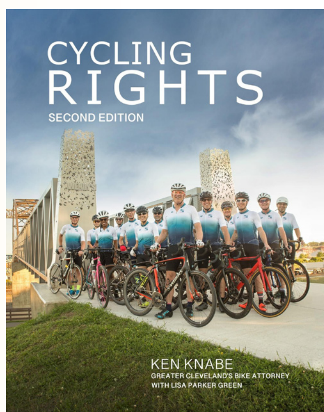
Last but not least – and the inspiration for this tribute – is the artist responsible for this issue's cover illustration, Mary Szabados. Mary, who works in Nurenberg Paris' docket department, has done original drawings for four of the past issues, including the courthouse drawing featured on the Spring 2023 cover. Not only does Mary have a natural talent in the visual arts, but she is currently working on an undergraduate degree in criminal justice, with the goal of eventually getting a law degree.

So, on behalf of CATA, let me say "thank you" to each of these remarkable women for making the *CATA News* much more than the black-and-white newsletter it once was. ■

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Ken Knabe



Ken Knabe's New Book

Attorney member Ken Knabe has published his new book *Cycling Rights: Second Edition*. Unlike driver's education, no bike education is required in Ohio even though a bike is a "vehicle" with road rights (except closed access highways). This book details the legal rights and responsibilities of Ohio's cyclists with Do's and Don'ts for cycling safety. This volume has seven comprehensive all-new chapters: Group Riding, Cycling Safety & Kids, Bike Cleveland, Local NEO Bike Clubs, The Ohio Bicycling Federation, The Ohio to Erie Trail, and another called The Julie Notice outlining how to effectively approach a local authority to abate hazardous road conditions for cyclists, including storm drains. Ken's new book can be purchased through Bike Cleveland with all profits going to Bike Cleveland.

Patrick Murphy

Patrick Thomas Murphy was born the third of eight children in Polranny, Achill Parish, County Mayo to Thomas and Angela Murphy. His family came to the United States in 1962 and have been active members of the West Side Irish-American Club ever since. He lives in Avon with his wife Carlene and they have three children, Kelly (Kurt), Tim (Samantha) and Danny. Pat is the proud Papa of 4 grandchildren, Breck, Keegan, Maddie and Gabby.

Pat is a former trustee and officer of the West Side Irish-American Club. When he was young he marched with the Junior Fife and Drum Corps, later becoming an instructor and leader of that unit. Pat also marched with the Senior Fife and Drum Corps. In 1983 he became the Club's Delegate to the United Irish Societies of Greater Cleveland. He was selected as Inside Co-Chair of the Parade in 1985, the same year his mother was the West Side Club's Woman of the Year. Pat went on to become a Deputy Director, Executive Director and now Director Emeritus of the Parade Committee. As Director Emeritus Pat had the idea

Patrick Murphy, Grand Marshal of the St. Patrick's Day Parade

to create a published history of the Cleveland Parade. He engaged and worked alongside the Irish American Archives Society to publish The Day We Celebrate, 175 Years of Cleveland's St. Patrick's Day Parade.

Pat is a member of the West Side Irish-American Club, the Irish American Club East Side, and the Mayo Society. He is a founding member and trustee of the Thomas J. Scanlon Irish American Law Society of Cleveland. In 2016 and 2022 Patrick chaired the Law Society's symposiums in Galway, Dublin and Cork. Pat was honored with the Walks of Life Award from the Irish American Archives Society in 2020 and named the iIrish Person of the Year in 2023. Recently Pat was selected to become a member of the Irish Heritage Advisory Committee for the Irishtown Bend project.

Pat graduated from the Cleveland State University College of Law in 1986. He is a partner at Dworken and Bernstein Co. LPA where he has worked for over 35 years. He focuses his practice on nursing home negligence, medical malpractice and wrongful death cases. Pat has been selected to the Irish Legal 100, named as an Ohio Super Lawyer and was voted as a finalist for Trial Lawyer of the Year by Public Justice. He is a member of the American Board of Trial Advocates and is rated AV Preeminent by Martindale Hubbell.

In addition to his love of all things Irish, Pat enjoys spending time with his family and friends, traveling and gardening.

Pat is extremely proud of the mission of the United Irish Societies and having had the privilege of working on the Parade Committee for over 40 years. Pat is honored to be selected as the 2024 Grand Marshal and thanks the United Irish Societies and the West Side Irish-American Club.

Nurenberg Paris NP4Kids Partnership with A Special Wish

As a personal injury law firm, Nurenberg Paris helps people every day. That value reaches into the community through our NP4Kids partnership with the non-profit A Special Wish Foundation Northeast Ohio. Supporting wish families, A Special Wish provides support and memorable experiences throughout a child's medical journey to provide joy and laughter, food drops while in-patient at a hospital, and monthly events to connect families together. Nurenberg Paris is proud to partner with A Special Wish to financially support their When I Grow Up Program through a unique partnership called NP4Kids. The NP4Kids program helps children experience their dream job by partnering with professionals and companies in the community. Nurenberg Paris sponsors those wishes. This NP4Kids partnership provides a child with a mini wish for a few hours allowing them to experience their dream job. That grow-up wish gives them hope to battle through their medical journey and something positive to look forward to. We have been able to grant some unique grow-up wishes that have included everything from a veterinarian, dentist, backhoe driver, train engineer, Lego designer, and even a mermaid.

Our most recent Grow Up Wish was for a six-year-old girl named Eleanor battling neuroblastoma. Her wish was to become a chocolatier. Malley's Chocolates factory graciously volunteered to be the community partner for this NP4Kid's wish. Malley's opened their doors to let Eleanor experience the sweet joy of being the number one chocolatier for an afternoon. The Malley's team welcomed Eleanor, her mother, and her grandmother to the factory for the afternoon, presenting Eleanor with a Malley's pink work t-shirt and name tag. She rode in a Malley's delivery truck across the parking lot to the loading dock, where she was given a key for the day to unlock the door to the factory. After a factory tour, she was allowed to work the chocolate line, creating chocolate-covered Oreos, potato chips, and pretzels (even combining those three items for a unique chocolate-covered treat complete with two kinds of pink

Eleanor making chocolates

sprinkles). She even won the pink factory trophy for the day, as the most successful product assembly line that day, while the entire factory cheered for her!

Eleanor also got to taste test eight chocolate delights not yet available to the public. She rated two of them 10/10, so maybe we will see a new Malley's chocolate treat on the market soon! The chocolate-covered cherry line set up a heart made of their chocolate-covered cherries for her. Those cherries were packed up for her to take home in addition to the boxes of chocolate-covered treats she made.

Those precious few hours allowed Eleanor to dream about a sweet future when she no longer has to go for regular cancer treatments and doctor visits. At the end of her day at Malley's, Eleanor could not wait to visit her nurses in a few days for her next treatment to share stories about her exciting day, and take each nurse a box of her very own Malley's chocolate, now with a sticker labeled "Eleanor's Chocolates."

Always remember that life is not about how much money you make, but how you make people feel. If you can make people feel special with a chocolate treat, it will be much sweeter!

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

Announcements - Spring 2024

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

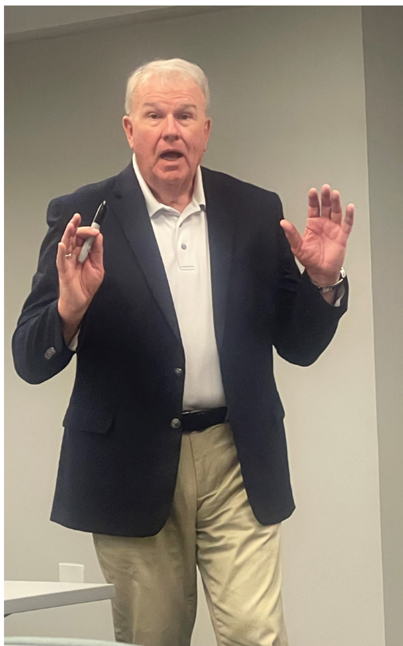
Recent Promotions and New Associations

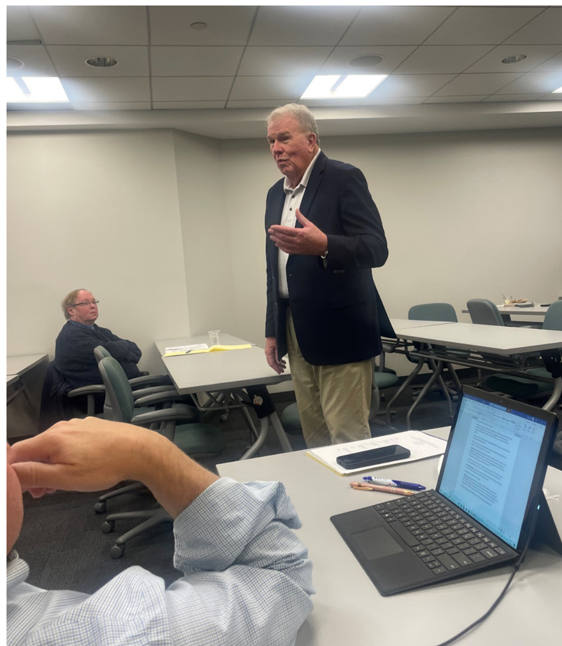
Past CATA President **William Eadie** announces he started Eadie Law: Nursing Home Injury Lawyers, focused exclusively on assisted living and nursing home injury cases, such as bedsores, falls, choking deaths, wandering, sexual assault, and medication errors. He looks forward to working with you and our legal community to serve those families impacted by nursing home abuse. He can be reached at william.eadie@eadielaw.com and www.eadielaw.com.

Kelly Rochotte has joined Bolek Besser Glesius as an associate attorney. After earning undergraduate and graduate degrees in English and journalism, and rhetoric and literature, respectively, she worked a decade as a paralegal before attending the University of Toledo School of Law. She graduated summa cum laude with top honors in Trial Practice and Advocacy.

Michael Hill Trial Law – a law firm dedicated to prosecuting nursing home abuse and neglect cases – is thrilled to announce its official opening. **Michael Hill** is joined by trial attorneys Matthew Mooney and Molly Morris. www.protectseniors.com.

2024 Litigation Institute





Jim Lees speaking at CATA's Litigation Institute

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Everhart v. Coshocton County Memorial Hospital
Four Year Statute of Repose for Wrongful Death Caused by Medical Negligence

by Calder C. Mellino

The Ohio Supreme Court rang in the new year with its controversial decision in *Everhart v. Coshocton County Memorial Hospital*, 2023-Ohio-4670. A narrow 4-3 ruling determined that the four year statute of repose for medical claims does indeed apply to wrongful death claims that arise from medical care.[1] This decision continues a series of rulings by the High Court which broadly interpret and apply restrictions on filing claims involving medical negligence in Ohio. Justice Fischer's opinion for the majority raises further concerns as to whether the one year statute of limitations for medical claims could soon be applied to this subset of wrongful death claims as well.[2]

Facts of the Case

In 2003, Todd Everhart was involved in a car crash and taken to Coshocton County Memorial Hospital. Among other treatment, an x-ray was taken of his chest before Mr. Everhart was transferred to Ohio State University Medical Center.

After Mr. Everhart was sent out, a doctor at Coshocton County Memorial Hospital read the x-ray and documented notable opacity in the upper right lobe of Mr. Everhart's right lung. No one ever informed Mr. Everhart or followed up.

Almost three years later, Mr. Everhart returned to Coshocton County Memorial Hospital with abdominal pain, blood in his urine, and a cough. A CT and x-ray again showed a large mass in the upper right lobe of his right lung. He was diagnosed with advanced stage lung cancer and died less than two months later.

Procedural History

In 2008 – less than two years after his death but five years after the first x-ray – Mr. Everhart's widow filed a claim for wrongful death.

Years of protracted litigation followed until 2017, when defendants sought leave to move for judgment on the pleadings arguing plaintiffs' claim for wrongful death was barred by the statute of repose in the medical claims statute, R.C. 2305.113(C).

Plaintiffs responded by asking for their own leave to amend their complaint to address these concerns, explaining that their amended complaint would show that the statute of repose would not apply because plaintiffs' claims were based upon ongoing acts of negligence occurring less than four years before plaintiffs filed their first complaint.

The proceedings were then delayed further by the bankruptcy of Coshocton County Memorial Hospital.

Finally, the trial court denied plaintiffs' request for leave, granted defendants', and granted judgment on the pleadings, finding that the statute of repose for medical claims in R.C. 2305.113(C) barred plaintiffs' claim for wrongful death.

The Tenth District Court of Appeals reversed this decision based in part on the Ohio Supreme Court's rulings in *Klema v. St. Elizabeth's Hosp.*[3] and *Koler v. St. Joseph Hosp.*,[4] which hold that wrongful death claims are separate and distinct from the medical malpractice claims on which they rely.[5]

The Tenth District then certified that its decision conflicted with decisions from the Third and Fifth District Courts of Appeals holding that the medical claims statute of repose does apply to wrongful death claims arising out of medical care.[6] Those decisions relied upon the plain language of the medical claims statute,[7] *Ruther v. Kaiser*,[8] *Antoon v. Cleveland Clinic Foundation*,[9] and *Wilson v. Durrani*[10]. Around the same time, the Eleventh District Court of Appeals also held that the statute of repose in the medical claims statute applies to wrongful death claims arising from medical treatment.[11]

The Ohio Supreme Court consolidated all of these cases and took up the question certified by the Tenth District: "Does the statute of repose for medical claims set forth under R.C. 2305.113(C) apply to statutory wrongful death claims?"

Holding: YES.
There is a four year statute of repose for wrongful death claims arising out of medical treatment.

Writing for the slim majority, Justice Fischer (joined by Kennedy, DeWine, and Deters) explained that the plain language of the medical claims statute "means what it says". Namely, that there is a four year statute of repose for any and all claims arising out of medical diagnosis, care, or treatment. Such claims in which the patient ultimately dies are no exception.

In separate dissents, Justice Donnelly (joined by Stewart) and Justice Brunner both pointed out the separate statutory basis, jurisprudence, common law history, and legal precedent distinguishing medical claims from wrongful death claims. These arguments were rejected however by the majority because, as it explained, the wrongful death statute cannot be read "in a vacuum."[12] Rather, "statutory provisions must be construed together and the Revised Code be read as an interrelated body of law."[13] Justice Fischer further addressed the dissents by noting that the current medical claims statute is defined much more broadly than the common law claims for malpractice at issue in the legal precedent for distinguishing wrongful death claims.[14]

As now understood, the medical claims statute imposes a statute of repose and the wrongful death statute says nothing to exempt those claims from the intentionally broad scope of the medical claims definition. As a result, there is no conflict in applying the statute of repose for medical claims to wrongful death claims that also fall under the sweeping definition of medical claims.

Discussion

This interpretation adheres to a series of rulings by the Ohio Supreme Court that the statute of repose in the medical claims statute applies without exception to all claims asserted in a civil action against a physician that arise out of medical diagnosis, care or treatment.[15] This pattern, as well as Justice Fischer's opinion in *Everhart*, raises real concern that the one year statute of limitation for medical claims may be applied to claims for wrongful death arising out of medical care as well, despite the clear two year statute of limitations in the wrongful death statute. Although the Ohio Supreme Court previously held in *Klema* and *Koler* that the statute of limitations for malpractice claims does not apply to wrongful death claims, the majority opinion seemingly goes out of its way to declare that those decisions are no longer good law in light of statutory changes since.[16] The opinion stops short of saying more, admitting that the issue is not before the Court here.

Regardless, the new reality is that the family of any patient who is able to survive an act of medical negligence for more than four years will be precluded from recovering for the wrongful death of their loved one. This is not some hypothetical scenario. At the time this case was briefed, there were at least four such instances currently in suit.[17]

The *Everhart* decision has already prompted some practitioners faced with these unfortunate circumstances to preemptively file and plead claims for wrongful death when death will no doubt result but has not yet occurred. But this approach appears to be untested at the appellate level thus far. ■

End Notes

1. 2023-Ohio-4670, ¶1.
2. *Id.* at ¶25.
3. 170 Ohio St. 519 (1960).
4. 69 Ohio St.2d 477 (1982).
5. *Everhart v. Coshocton Memorial Hospital.*, 186 N.E.3d 232.
6. *Smith v. Wyandot Mem. Hosp.*, 2018-Ohio-2441 (3rd Dist.); *Mercer v. Keane*, 2021-Ohio-1576 (5th Dist.).
7. R.C. 2305.113(C).
8. 134 Ohio St.3d 408, 2012-Ohio-5686.
9. 148 Ohio St.3d 483.
10. 164 Ohio St.3d 419, 2020-Ohio-6827.
11. *Martin v. Taylor*, 2021-Ohio-4616 (11th Dist.).
12. 2023-Ohio-4670, ¶19.
13. *Id.*
14. *Id.* at ¶24.
15. *See Antoon*, 148 Ohio St.3d 483; *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827.
16. 2023-Ohio-4670, ¶25.
17. *Davis v. Mercy St. Vincent Med. Ctr.*, S.Ct. Ohio Nos. 2022-0460 and 2022-0658; *McCarthy v. Lee*, S.Ct. Ohio Nos. 2022-0717 and 2022- 0718; *Wood v. Lynch*, S.Ct. Ohio Nos. 2022-0693 and 2022-0880; *Maxwell v. Lombardi*, S.Ct. Ohio Nos. 2022-0781 and 2022-0890; and *Ewing v. UC Health*, S.Ct. Ohio Nos. 2022-1121 and 2022-1166.

Brenda M. Johnson is an attorney at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.694.5255 or bjohnson@nphm.com.

Key Steps In Making A Pretrial Record – And Why They Matter

by Brenda M. Johnson

Trial lawyers are, by nature, focused on getting their cases ready for trial. Sometimes, however, the path to presenting a case to a jury also involves a little dispositive motion practice. Ohio's Civil Rule 56, which governs summary judgment motion proceedings, is specific as to the materials a party is allowed to submit either in support of or in opposition to a summary judgment motion.

As we all know, only facts that would be admissible at trial can be considered by a trial court in ruling on a summary judgment motion.[1] Rule 56, however, sets forth specific requirements as to the manner in which such facts can be presented at the dispositive motion stage. Under the rule, only "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations, if any" will do.[2] Documents, unless they are attached to a pleading, must be "sworn, certified or authenticated by affidavit" to be considered by the trial court.[3]

There are certain cases where a trial attorney can anticipate that summary judgment motions will be filed. We have no control, however, over whether a defendant will decide to move for summary judgment. The best practice, therefore, in all cases is to take certain basic steps in the course of discovery to make sure that you can respond properly in the event that occurs. What that means in a particular case depends, of course, on the facts and issues presented. However, there are certain basic principles that should apply in almost every case – and this article is an attempt to summarize them.

Rule One: When You Can, Get It Certified!!

For documents to be admissible at the summary judgment stage, they have to be sworn, certified, or authenticated by affidavit. So, whenever possible, if you're requesting medical records, public records, official investigation reports, or records kept by a business entity, get *certified* copies. This is a basic authentication method that you should incorporate into your practice if you haven't already.[4] Many health care providers and medical record retrieval services allow you to specify certified copies when you're asking for records pursuant to authorizations, and you should take advantage of this option, even if your case is not yet in suit.

Rule Two: Certification Is Not Always Enough

So you've gotten certified copies of all of the medical and business records – but you're not done yet. Depending on the issues presented in your case, you may need to take further steps to obtain admissible evidence of facts reflected in the *contents* of those records.

Evidence Rule 803(6) creates a hearsay exception for properly-authenticated business records, but the exception doesn't automatically extend to everything *contained* in those records. This is particularly important to be aware of where medical records are concerned. Statements made by your client for purposes of treatment, for instance, will likely fall within Evidence Rule 803(4), the hearsay exception for statements made for those purposes. Diagnoses made by her care providers, on the other hand, might not. Depending on what court you're in, these statements may be inadmissible hearsay. Courts in the Second, Sixth, Eighth, Ninth, and Tenth Districts allow such evidence, under varying standards.[5] The First and Fourth Districts, apparently, do not.[6]

If you anticipate dispositive motion practice in your case regarding causation or damages – and you *should* if there is any question as to whether an exception to noneconomic damage caps may apply – you need to be aware of the standards applied by your court in order to get that diagnostic evidence in. In courts where statements in the medical records are not enough, prepare to obtain testimony or affidavits from suitable experts or the treating physicians themselves.

Let's not forget police reports and other reports of official investigations. Police reports and reports

of official investigations are public records under Evidence Rule 803(8), but as with medical records, the contents of these reports can pose hearsay issues. Evidence Rule 803(8) extends to "[r] ecords, reports, statements, or data compilations . . . of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . ." Statements of investigating officers or other officials as to their own personal observations fall within this exception. Witness statements, however, do not, nor do matters that are not firsthand observations on the part of the investigating officials.

In other words, getting certified copies of qualifying records is a necessary first step in obtaining admissible evidence, but it is *only* the first step. It is imperative to examine the records carefully to determine whether there are facts or opinions reflected in those records that you will have to establish through direct testimony or other discovery.

Rule Three: Documents that Can't Be Certified Have To Be Authenticated By A Competent Witness – So Work This Into Your Discovery Depositions

If there are key documents in your case that don't qualify for certification, then you have to authenticate them the good old fashioned way – namely, through the sworn testimony of a witness with personal knowledge. Even when it seems a little tedious to do so, it's a very good practice to spend the time getting this kind of foundational testimony in the course of your discovery depositions. You (and your briefwriting colleagues) will be grateful you did in the event that the document is needed in order to oppose a dispositive motion.

Rule Four: Ask Foundational Questions In Your Discovery Depositions

Take the time in your discovery depositions to elicit testimony about foundational issues in your case that are within the personal knowledge of that deponent. This may seem tedious as well, since these issues may be things already known to you. But these matters are as important at the dispositive motion stage as they are at trial, and without a testimonial record, there is no way to present them to the court. Besides, there is always the risk that the deposition will be all you have to rely on at trial, since witnesses can become unavailable in many ways.

And A Suggestion: Consider Asking Questions In The Depositions Of Your Clients And Experts When The Defense Has Tried To Paint The Wrong Picture

When defense counsel takes the deposition of your client or your expert, he or she is not going to be focusing on creating a record that establishes the critical elements of your case. If critical issues aren't brought up during these cross-examinations, or are explored in a lopsided fashion, consider taking some time at the end of the deposition to get your client's or expert's full testimony on these issues on the record.

If your client's testimony needs clarification after a round of one-sided or possibly misleading questioning, it can make sense to allow her to revisit and clarify her testimony before the deposition is over, as opposed to getting an affidavit from her later. Likewise, if there is favorable evidence and testimony that you would like to get on the record, such as testimony about the extent of her injuries or how they have affected her, it can make good sense to bring this out in the deposition as well. Whether or not to do so depends on a multitude of issues, of course, but if your client is properly prepared this can be much more effective than supplementing or curing her testimony with an affidavit later.

Similar issues arise with experts. Defense counsel, for instance, may well try to trip your expert up, or spend all her time focusing on the weaker aspects of your expert's opinions. Defense counsel may not elicit the full basis for your expert's opinions, or she may ask misleading questions about your expert's credentials or background. It can be worthwhile, if your expert is properly prepared, to spend some time bringing out the substance of your expert's opinion and the basis for that opinion before the deposition ends, rather than expending additional resources on a curative affidavit once the deposition is over. ■

End Notes

1. *See, e.g., Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 631, n.4, 605 N.E.2d 936 (1992).
2. Civ. R. 56(C) ("No evidence or stipulation may be considered except as stated in this rule.").
3. Civ. R. 56(E); see also *Castle CFD Group, LLC v. Kenney*, 6th Dist. Lucas No. L-22-1245, 2023-Ohio-2980, ¶ 16; *Smith v. Gold-Kaplan*, 8th Dist. Cuyahoga No. 100015, 2014-Ohio-1424, ¶ 16 and cases cited therein.
4. *See* Evid. Rule 902(4) (public records); Evid. R. 903(11) (business records); Evid. R. 901(B)(10), R.C. 2317.422(A) (medical records).
5. A discussion of Ohio case law dealing with the admissibility of diagnoses in medical records could be a separate article in itself. The seminal opinion dealing with the issue, *Hytha v. Schwenderman,* 40 Ohio App.2d 478, 320 N.E.2d 312 (10th Dist. 1974), antedates Ohio's adoption of the evidence rules. In that opinion, the Tenth District held that certain opinions and diagnoses in medical records were admissible under R.C. § 2317.40. The Second, Sixth, Eighth, and Ninth Districts have adopted or applied *Hytha* in the context of interpreting Evid. R. 803(6), and will allow such evidence, subject to restrictions that vary by district. *See, e.g., Somerick v. YRC Worldwide, Inc.*, 9th Dist. Summit No. 29239, 2020-Ohio-2916; *Flowers v. Siefer,* 6th Dist. Lucas No. L-16-1002, 2017-Ohio-1310; *Ruth v. Moncrief,* 2d Dist. Montgomery No. 18479, 2001-Ohio-1709, *Gallagher v. Firelands Regional Med. Ctr.*, 6th Dist. Erie No. E-15-055, 2017-Ohio-483; *Smith v. Dillard's Dep't Stores*, 8th Dist. Cuyahoga No. 75787, 2000 Ohio App. LEXIS 5820, 2000-Ohio-2689.
6. *See Guarino-Wong v. Hosler,* 1st Dist Hamilton No. C-120453, 2013-Ohio-1625; *see also Gallagher v. Firelands Regional Med. Ctr.,* 6th Dist. Erie No. E-15-055, 2017-Ohio-483 (discussing district split).

Recent Ohio Appellate Decisions

by Brian W. Parker and Louis E. Grube

Mundy v. Centrome, Inc., 12th Dist. Warren No. CA2023-06-050, 2024-Ohio-1001 (March 18, 2024).

Disposition: Reversing the trial court's award of sanctions for a failure to supplement discovery responses.

Topics: Civil procedure: a party's duty to file motion to compel production of outstanding discovery prior to seeking sanctions for that failure.

This was a lawsuit brought by various employees of defendant Mane, Inc. ("Mane") alleging an intentional tort and product liability claims for the plaintiffs' exposure to a dangerous substance at work, diacetyl. In the view of plaintiffs and another defendant, OLI, Mane had not been forthcoming with discovery, and had failed to properly supplement discovery requests under Civ. R. 26(E). The discovery requested included OSHA investigations and findings.

Rather than filing a motion to compel, plaintiffs and OLI filed a motion for sanctions against Mane, Inc. under Civ. R. 37(A). The trial court initially granted attorney's fees and costs under R.C. § 2323.51(B)(1) as a result of what it characterized as Mane's frivolous conduct.

In a prior appeal of this case, the Twelfth District held it was improper to award sanctions under R.C. § 2323.51(B)(1) without giving Mane a chance to respond to the criteria necessary to find frivolous conduct. At that time, the appellate court remanded the case to the trial court and ordered it to either comply with the requirements of R.C. § 2323.51(B)(1), or award sanctions under Civ. R. 37(C) under which the initial motion for sanctions had been made.

Upon remand, the trial court awarded plaintiffs and OLI, under Civ. R. 37(C), the same amount of sanctions it had previously awarded under R.C. § 2323.51(B)(1). Mane appealed this judgment in the present case.

First, the appellate court held that Mane did not violate Civ. R. 26(E)'s duty to supplement discovery. The court stated: "it is apparent that what Mane failed to do was not to supplement its responses but rather to make a complete response to plaintiffs' and OLI's requests for production of documents. * * * Because the trial court's findings, and the record, do not show that Mane violated its Civ.R. 26(E) duty to supplement, the court could not impose sanction under Civ.R. 37(C)."

The Twelfth District then proceeded to instruct the proper procedure for addressing the sanctions question, as follows:

> Mane's incomplete and evasive responses required plaintiffs and OLI to file a motion for an order compelling responses. See Civ.R. 34(B)(1); Civ.R. 37(A)(3)(a). The trial court could then have ordered Mane to respond and to pay plaintiffs' and OLI's expenses. See Civ.R. 37(A)(5)(a). Had Mane failed to comply with that order sanctions may have been appropriate. See Civ.R. 37(B).

The court finally held that sanctions against Mane were not warranted because that defendant had finally produced all of the requested documents by the time plaintiffs and OLI filed their motion to compel, and for sanctions.

Ward v. Ross (In re Ruehlman), Supreme Court of Ohio No. 23-AP-191, 2024-Ohio-1306 (March 5, 2024).

Disposition: Finding trial court judge was disqualified to avoid an appearance of impropriety given that trial judge threatened vexatious litigator plaintiff with incarceration in the event vexatious litigator filed a lawsuit, without considering facts which might later be relevant in justifying such later suit.

Topics: Disqualification of judge pursuant to R.C. § 2701.03 to avoid an appearance of an impropriety.

This case arose out of two lawsuits: one by petitioner Roger Dean Ward against the City of Jackson and various local officials in response to the issuance of various traffic citations; and one against Ward by that City and local officials seeking to have Ward labeled as a "vexatious litigator." Common Pleas Court Judge Ruehlman dismissed Ward's Complaint in the first action, and the Ohio Supreme Court did not consider that suit in its ruling.

In the second lawsuit, however, Judge Ruehlman declared that Ward was a vexatious litigator. Moreover, Judge Ruehlman stated that Ward "can't file anything unless I give you permission. If you file anything, you'll be in direct contempt of this court and I will put you in jail. I'll find you in contempt of this court and put you in jail." Judge Ruehlman further said: "Now, listen to me, because I'm the guy you don't want to play with. I don't play well. I was the guy on the playground that nobody screwed with. My dad was a boxer. I was a boxer."

The Supreme Court applied R.C. § 2701.03 to the hearing, which provides, in relevant part, "[i]f a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice

for or against a party to a proceeding pending before the court or a party's counsel, or allegedly ***otherwise is disqualified*** to preside in a proceeding before the court," then an aggrieved party may file an affidavit of disqualification. (Emphasis added).

The Supreme Court denied Ward's arguments that Judge Ruehlman had a conflict of interest, or was biased against Ward. However, the Court found that the "otherwise disqualified" clause of the statute applied, as disqualification was necessary to avoid an appearance of impropriety.

The Supreme Court concluded, in this regard: "Because an objective observer would reasonably conclude that the judge has already determined that Ward would be guilty of direct contempt for which jail time is the appropriate punishment – regardless of the evidence adduced at a potential contempt hearing – Judge Ruehlman is disqualified from presiding ... to allay any concerns about the fairness and integrity of the proceedings and to assure the parties and the public of the unquestioned neutrality of the trial judge."

Kittis v. Cleveland Clinic Found., 8th Dist. Cuyahoga No. 112516, 2024-Ohio-659 (Feb. 22, 2024).

Disposition: Trial court orders granting a defendant hospital's motion *in limine* to exclude expert proximate cause testimony and motion for summary judgment were reversed, and the matter was remanded for further proceedings.

Topics: Wrongful death, medical expert testimony, testimony on causation expressed generally in terms of probability, summary judgment.

The plaintiff's spouse had suffered from a bowel obstruction discovered at defendant hospital's facility, where he underwent corrective surgery. The next day, he had increasing lactic acid levels and decreased urine output/renal dysfunction. Physicians attributed this condition to dehydration and ordered fluids. He was admitted to ICU that afternoon, where fluids continued. The second day after surgery, they went back in and found 500 centimeters of ischemic bowel, which the surgeon believed to be potentially viable. On the third day, the patient died.

Plaintiff filed suit against defendant hospital for medical negligence and wrongful death. Plaintiff's expert opined that whatever "the etiology of the ischemia," the increased lactic acid and decreased urine output were "clear-cut evidence of an intra-abdominal process highly suspicious for ischemia." He later clarified during a deposition that ischemia in the bowel could have been caused by any of a torsion, a blood clot, or a venous obstruction. But regardless of the particular cause of ischemia, he testified to a reasonable degree of medical probability that any of the possible conditions causing it were surgically correctable on the day after surgery, when a CT scan and exploratory surgery should have been performed. The failure to respond to these symptoms was the proximate cause of death.

Defendant hospital moved *in limine* to exclude the expert's causation testimony, calling it speculative as to the condition that caused bowel ischemia. When this motion was granted, the hospital requested summary judgment on account of the lack of evidence that a breach in the standard of care was the proximate cause of injury and death. The trial court granted this motion too. On appeal, plaintiff assigned each of these rulings as error.

The Eighth District Court of Appeals agreed that the trial court erred, sustained each assignment of error, and remanded for new proceedings. Judge Mary Eileen Kilbane wrote for the unanimous panel, Judges Lisa B. Forbes and Emanuella D. Groves concurring, that the expert physician had "stated the inability to identify the cause of Dennis's bowel ischemia did not impact his conclusions," and the court would not "unilaterally determine additional medical conclusions are required." The opinions given by the expert to a reasonable degree of medical probability were "sufficient" to demonstrate that "failure to recognize in a timely fashion the progressive acidosis and renal dysfunction was the proximate cause of Dennis's injuries and death." For the same reason, judgment as a matter of law had been improper.

Lewis v. MedCentral Health Sys., 5th Dist. Richland No. 2023 CA 0043, 2024-Ohio-533 (Feb. 13, 2024).

Disposition: Trial court order granting a motion to dismiss on the basis of the statute of limitations was reversed, and the matter was remanded for further proceedings.

Topics: Case of first impression, amendment to medical claim statute of limitations, joinder of new defendants after statute of limitations in a timely filed action, alternative to 180-day letter.

Plaintiff had been a patient at defendant hospital on February 14, 2022, when she fell out of her hospital bed, fracturing her neck. She timely filed suit against the hospital and ten John Doe defendants on October 18, 2022, generally alleging that they had failed to supervise her after she was sedated. Later on, plaintiff acquired consent to amend the complaint from defendant hospital and filed an amended complaint on April

14, 2023, eliminating the John Doe defendants and adding several defendant doctors, nurses, and the organizations that employed them. The amended complaint asserted that the action was filed pursuant to the newly amended R.C. 2323.451.

Through "an amendment to the complaint pursuant to rule 15 of the Rules of Civil Procedure," R.C. 2323.451(D)(1) permits a plaintiff to "join in the action any additional medical claim or defendant" within the period defined in subsection (D)(2), so long as the original complaint was timely. The subsection (D)(2) period is calculated by adding 180 days to the remaining days left on the limitations period at the time the complaint was filed.

One defendant doctor and his employer moved to dismiss the complaint against them as untimely under the statute of limitations. The trial court granted that motion, holding that the purpose of the law was "to allow for amendment of a complaint past the statute of limitations when new claims are discovered through the discovery process, and does not provide for the substitution of parties known but unnamed in the original complaint." It ruled that plaintiff had been required but failed to completely comply with the john-doe-defendant rules defined in Civ.R. 15(D). Plaintiff appealed immediately, as the trial court determined there was no just cause for delay under Civ.R. 54(B), assigning this ruling as error.

The Fifth District Court of Appeals agreed with plaintiff, and it reversed and remanded for the matter to proceed past the pleadings. The unanimous panel ruled that R.C. 2323.451 "refers to Civ. R. 15 for the procedure required to amend a complaint," "also does not specifically require Civ. R. 15(D) to be used for defendants contemplated but not identified at the time the complaint is filed," and "does not clearly set forth it applies only to newly discovered claims or newly discovered defendants." By using the word "additional," the court believed the statute was ambiguous as to whether it applied in the way the trial court interpreted it or, alternatively, permitting that "a newly identified defendant or claim may be added, even if the defendant or claim was generally contemplated in the original action."

With an ambiguous statute, the court examined the purpose of the law, which had been to end shotgun pleading by permitting parties to use the discovery process to identify additional defendants and add them within the short 180-day period. The panel also relied upon the remedial nature of a limitations period, which must be construed liberally to permit disputes to reach the merits. And it confirmed the law's purpose by reference to subsection (A)(2), allowing plaintiffs to use the joinder mechanism "in lieu of, and not in addition to" the 180-day letter process, indicating that these were alternatives where a plaintiff has "knowledge of both the claim and the identity of the practitioner."

The defendants have appealed this decision to the Supreme Court of Ohio.

Rader v. RLJ Mgmt. Co., 3d Dist. Hancock No. 5-23-37, 2024-Ohio-391 (Feb. 5, 2024).

Disposition: Reversing summary judgment for the defendant with respect to plaintiff's Landlord-Tenant statute claim, and affirming summary judgment on plaintiff's common law negligence claim.

Topics: Pleading requirements for a claim under the Landlord-Tenant statute, R.C. § 5321.04. Notice pleading. Open and obvious defense.

The plaintiff, a tenant of defendant management company, was injured when she tripped and fell in a large pothole on the defendant's premises. In her complaint, she stated that she was a tenant of the defendant, and she alleged that defendant violated duties owed to business invitees as well as non-delegable duties. However, plaintiff ***did not*** allege that she was making a claim under the Landlord-Tenant Act, R.C. § 5321.04. In its answer, defendant admitted that the plaintiff was a tenant of the defendant.

After discovery was complete, the defendant moved for summary judgment, contending that plaintiff's negligence claim was barred by the open and obvious doctrine. In her response to defendant's motion, plaintiff contended that the defendant had breached provisions of the Landlord-Tenant statute, to which the open and obvious defense did not apply.

In its reply brief, the defendant claimed that plaintiff's complaint did not allege a claim under the Landlord-Tenant statute, and she could not raise it for the first time in response to a motion for summary judgment. The trial court held that the plaintiff's failure to plead the statute in her complaint precluded the court from reviewing the issue because it would be unfair to require the defendant to respond to an un-pled claim without adequate preparation. The trial court then granted summary judgment on plaintiff's common law negligence claim based on the open and obvious doctrine.

On appeal, the Third District reversed the trial court's granting of summary judgment on the Landlord-Tenant statute claim. The appellate court reasoned that under Ohio's notice pleading rules, plaintiff's complaint satisfactorily pled the statutory claim. The court stated, "a complaint that alleges negligence and specifically states that the plaintiff was a tenant of defendant's

property is sufficient to put defendant on notice that a violation of the Landlord-Tenant Act is being alleged."

However, the Third District affirmed the grant of summary judgment for the defendant on plaintiff's common law negligence claim based upon the open and obvious doctrine.

Feagan v. Bethesda N. Hosp., 1st Dist. Hamilton No. C-230135, et seq., 2024-Ohio-166 (Jan. 19, 2024).

Disposition: Reversing the trial court's order granting sanctions against plaintiffs' counsel for filing frivolous medical malpractice lawsuits.

Topics: Civil Procedure, Civ. R. 10(D)(2), Civ. R. 11, and R.C. § 2323.51.

Plaintiffs' counsel filed several medical malpractice lawsuits without attaching the Affidavit of Merit required by Civ. R. 10(D)(2), and without filing a motion to extend the Civ. 10(D)(2) filing time. Defendants in each case filed a Motion to Dismiss, and plaintiffs' counsel then voluntarily dismissed these complaints, without prejudice, without having ever filed the Affidavits of Merit.

The defendants filed a Motion for Sanctions under Civ. R. 11 and R.C. § 2323.51 against plaintiffs' counsel, noting that plaintiffs' counsel had engaged in the same pattern of behavior in at least seven previous lawsuits as well. Plaintiffs' counsel contended that he had an absolute right to file a Civ. R. 41 voluntary dismissal in the cases for strategic reasons, and he should not be sanctioned.

The trial court granted the motion for sanctions, ruling that it did not need to find that the underlying medical malpractice claims were frivolous in order to find that plaintiffs' counsel's conduct of not following Civ. R. 10(D)(2) was frivolous. The trial court thus awarded attorney's fees and costs against plaintiffs' counsel.

On appeal, the Court first noted that while R.C. § 2323.51 uses an objective standard for defining frivolous conduct, Civ. R. 11 uses a subjective standard, requiring subjective bad faith on the part of the offending counsel. The Court noted that the statute and the Rule are not in conflict, both requiring an attorney to prosecute claims having merit under existing law.

On the facts before it, the Court noted that the question was whether filing the medical malpractice complaints without an Affidavit of Merit, and without a Motion to Extend the Time to file the Affidavit, was sufficient to constitute frivolous conduct, and thus justify the award of sanctions. This, in turn, requires a finding that the complaints were not warranted under existing law.

The Court ruled that Civ. R. 10(D)(2) is simply a procedural prerequisite to the suit, and the Affidavit of Merit does not go to the merits of the underlying claim; it is simply a pleading requirement that results in a dismissal without prejudice in the absence of such prerequisite. Plaintiffs' counsel's failure to comply with Rule 10(D)(2) did not amount to a finding that there was no support for the complaints under existing law. Therefore, sanctions under R.C. § 2323.51, and Civ. R. 11 were improperly levied against plaintiffs' counsel.

Wilkes v. Ohio Dept. of Transp., Ct. of Cl. No. 2019-00012JD, 2024-Ohio-558 (Jan. 12, 2024).

Disposition: Court of Claims ruled that the plaintiff failed to prove every element of negligence in a wrongful death action.

Topics: Discretionary immunity of state entity; foreseeability of intervening criminal acts.

A passenger was injured and killed when a 30-50 pound sandbag fell from an overpass into the window of the car as he was driven by. The sandbag had been used to secure vandal fencing on the bridge, which a contractor had been rebuilding. The four children who threw the sandbag off the bridge were prosecuted. The contractor was awarded summary judgment in federal district court after the passenger's estate sued it.

Plaintiff, the passenger's estate, lodged a wrongful death claim against the Ohio Department of Transportation ("ODT") in the Ohio Court of Claims. Defendant sought judgment as a matter of law before trial and after the plaintiff's case in chief, which was denied both times. The defendant rested its case without introducing any evidence. The trial court took the matter under advisement before rendering a defense verdict.

The plaintiff estate asserted that it was foreseeable that things would be dropped from the bridge, noting that ODT had installed vandal fencing on both sides of the bridge at an early phase of construction. But since the fencing had been removed from one side of the bridge after the sidewalk there was removed, the plaintiff focused the trial presentation on things that could have been done to decrease the risk of danger. It argued that an ODT policy required fencing on all bridges over traffic.

The defendant urged the court of claims that no pertinent ODT policy applied to a bridge under construction as a matter of discretion, triggering immunity. It relied upon testimony about steps that had been taken to keep civilians on the opposite side of the bridge, including a three-and-one-half foot concrete barrier. And it argued that its conduct had

not been the proximate cause of injury because the childrens' criminal act had been an intervening, superseding cause.

Although the court of claims agreed with the defendant that there was no policy requiring fencing, discretionary immunity was denied because ODT had not actually engaged in any act of considering whether to take action in that regard. Because discretionary immunity is conferred to protect decisionmaking on policy, it will not apply unless there has been some consideration of different policies. Still, plaintiff did not meet its burden of proof because ODT did not owe any special duties to the decedent, and the proximate cause of his death was therefore the criminal act of another. Without repeated acts of vandalism or criminality by third parties during construction of the bridge, ODT had no duty to foresee and prevent the specific criminal acts of another. Consequently, the general rule that there can be no liability for the criminal acts of another applied.

Bellissimo v. Tripoint Med. Ctr., 11th Dist. Lake No. 2023-L-037, 2024-Ohio-40 (Jan. 8, 2024).

Disposition: Reversing the trial court's granting of a directed verdict in favor of a defendant cardiologist where reasonable minds could conclude that the cardiologist received, but did not respond to, texts and phone calls alerting him to the plaintiff's decedent's deteriorating condition.

Topics: Medical malpractice; standard of care.

The plaintiff's decedent had multiple coronary illnesses for which she was treated by defendant Dr. Wilson for 22 years. After a fall, the decedent was taken to Tripoint Medical Center for care to treat a low heart rate. Dr. Wilson agreed with other physicians about the proper management of the decedent's case at around 10:00 am the morning she was taken to the hospital.

Around 5:00 pm the same day, the decedent's condition changed, and her heart rate became high, and she was transferred to the ICU. Attempts to reach Dr. Wilson by the hospital staff were unsuccessful at that time. In all, the hospital staff and other physicians made multiple attempts to reach Dr. Wilson by page or cell phone between 5:10 and 9:00 pm. Ultimately, Dr. Wilson and another doctor ordered that the decedent be transferred to University Hospitals, where she arrived at 11:00 pm. She passed away two days later.

Dr. Wilson testified that he was not on call the evening of the 25th, and that he did not have his cell phone with him. Plaintiff's expert testified that the standard of care for Dr. Wilson was for him to respond to calls about his patients, even when he is not on call. Moreover, the expert testified that the failure to transfer the decedent to University Hospitals earlier in the day contributed to her death.

On appeal, the Court held that the trial court erred in granting a directed verdict for Dr. Wilson. The factual dispute as to whether written records supported a finding that Dr. Wilson was on call, and whether he received the pages and text messages sent by hospital staff, and others, were for the jury to decide, not for the court.

HB Martin Logistics, Inc. v. PACCAR, Inc., 9th Dist. Summit No. CA-30566, 2023-Ohio-4836 (Dec. 29, 2023).

Disposition: Affirming the trial court's denial of Defendant's motion for judgment notwithstanding the verdict. Remanding cross-appeal to the trial court with instructions to issue a written ruling explaining its implied denial of Plaintiff's motion for prejudgment interest.

Topics: Seller's attempt to reduce buyer's period of limitation to sue for breach of contract of sale under R.C. 1302.98; Meaning of words "original agreement" in statute; Application of incorporation by reference doctrine.

Plaintiff, a trucking company specializing in long-haul deliveries for Federal Express, purchased a new Kenworth T680 truck from the Defendant dealership on September 9, 2016. The truck experienced a malfunctioning coolant system persisting from the purchase date until March 2020, a 42-month period. Despite multiple attempts by Defendant to rectify the issue, it remained unresolved. Eventually, Plaintiff sought assistance from a non-authorized repair facility, which correctly diagnosed the source of the coolant system problem and resolved it by replacing the engine. Due to Defendant's failure to honor warranted repairs, Plaintiff incurred breakdowns, coolant replacement expenses, engine replacement costs, and substantial revenue losses totaling hundreds of thousands of dollars.

Plaintiff filed suit against Defendant within four years of the purchase date, alleging breach of an implied warranty of merchantability. R.C. 1302.98 stipulates a four-year statute of limitation for claims of breach of a sales contract, but also provides, "By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it." Defendant argued the suit was time-barred, citing language in its written limited warranty agreements that purported to reduce the period for initiating legal action to

one year. These warranties also included clauses disclaiming implied warranties, such as merchantability.

Plaintiff contended that the written warranties failed in their essential purpose, thus triggering application of implied warranties of merchantability and fitness for intended use. Ohio law implies such warranties in every sales contract unless effectively disclaimed. However, Defendant maintained that even if the warranties failed to achieve their essential purpose, that would not impact the reduction of the limitation period to one year, thus rendering the claim time-barred.

In response, Plaintiff noted that Defendant had not delivered the written warranties to Plaintiff until eighteen days after purchase, at which point Plaintiff's president signed and returned them. Moreover, the original sales contract made no mention of a shortened time frame for legal action and failed to integrate the warranty agreements by reference. Consequently, the reduction of the four-year limitation period to one year was deemed ineffective, as R.C. 1302.98 mandated any such reduction be accomplished "by the original agreement."

The trial court denied all dispositive motions, leading to a trial in which the jury awarded Plaintiff $446,000. The Ninth District Court of Appeals upheld the decision, concurring that the sales contract constituted the original agreement and contained no provision limiting the buyer's time to sue. The Court further agreed that the written warranty agreements had not been incorporated into the original agreement by reference.

This appeal also involved a cross-appeal by the Plaintiff. Plaintiff had moved for prejudgment interest, asserting that PJI is mandated in a successful contract claim. The trial court never ruled on the motion, which failure was treated by the appellate court as an implied denial. However, the appellate court remanded the matter to trial court with instructions to issue a written ruling explaining its reasoning. The trial court has yet to do so. ■

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.

Louis E. Grube is a principal at Flowers & Grube. He can be reached at 216.344.9393 or leg@pwfco.com.

Editor's Note

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

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

Kathleen J. St. John, Editor

CATA VERDICTS AND SETTLEMENTS

Case Caption: ______________________________

Type of Case: ______________________________

Verdict: ______________ **Settlement:** ______________

Counsel for Plaintiff(s): ______________________________

Law Firm: ______________________________

Telephone: ______________________________

Counsel for Defendant(s): ______________________________

Court / Judge / Case No: ______________________________

Date of Settlement / Verdict: ______________________________

Insurance Company: ______________________________

Damages: ______________________________

Brief Summary of the Case:

Experts for Plaintiff(s): ______________________________

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Experts for Defendant(s): ______________________________

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

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CATA Verdicts & Settlements

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

Baby Doe v. ABC Hospital and John Doe, M.D.

Type of Case: Medical Negligence; Birth Injury
Settlement: $8 Million
Plaintiff's Counsel: Romney Cullers, The Becker Law Firm, (216) 621-3000
Defendant's Counsel: Withheld per confidentiality
Court: Withheld per confidentiality
Date Of Settlement: April 2024
Insurance Company: Withheld per confidentiality
Damages: Hypoxic Ischemic Brain Damage

Summary: A first-time mother presented for induction of labor at a community hospital in a rural area. The electronic fetal monitoring tracing was Category I at the time of induction. Over the course of the next 24 hours, the tracing converted to Category II and the baby had two significant prolonged decelerations, the second longer than the first. Intrauterine resuscitative measures improved the tracing for a brief period, but it deteriorated again with recurrent variable decelerations and more prolonged decelerations, ultimately converting to Category III. By the time the obstetrician intervened, the baby was too deep in the pelvis for C-section delivery. The baby was delivered vaginally with low APGAR scores, umbilical artery acidemia, neuroimaging consistent with an intrapartum event, and evidence of multisystem organ involvement. The child, now 7 years old, has profound motor and cognitive deficits. The challenge in the case was overcoming brain MRI imaging suggestive of a posterior circulation abnormality consistent with both a stroke that had occurred in utero and significant placental pathology.

Plaintiff's Experts: Withheld per confidentiality
Defendant's Expert: Withheld per confidentiality

Decedent Driver v. John Doe Motorist

Type of Case: Wrongful Death Motor Vehicle Crash
Judgment: $15 Million
Plaintiff's Counsel: Jeffrey M. Heller, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5203
Defendants' Counsel: Not disclosed
Court: Geauga County Common Pleas Case No. 21P000764, Judge Carolyn Paschke
Date Of Judgment: March 20, 2024
Insurance Company: Defendant's personal funds and Nationwide Insurance
Damages: Death

Summary: Defendant, 54, was diagnosed with epilepsy at 2-years old. He was prescribed anti-epileptic drugs (AEDs) and was medication compliant throughout his childhood and early-adulthood. In his late-30s (late 90s/early-2000s), because he was seizure free, he stopped taking medication. In the early-2000s, he was involved in a one-car crash and taken to the ER by paramedics. While receiving treatment in the ER he told the doctors that the accident happened because he had a seizure while driving. Doctors immediately put him back on AEDs. About 10 years later, he had another seizure while driving and was involved in another one car accident. The ER doctors suspended his driver's license. He was then required to obtain approval from a qualified doctor who would have to submit forms to the Ohio BMV on his behalf granting him permission to drive. This occurred every six months for several years (where he also remained 100 percent seizure free) until he was able to convince a doctor to grant him privileges so long as he "was taking his prescribed AEDs and seizure free." As soon as he obtained this permission, he stopped filling his AED prescriptions and began self-medicating with CBD. While CBD is recommended as supplemental therapy for certain types of seizure disorders, it was not indicated for the type of seizure disorder he had.

On July 17, 2021, the Defendant was driving his 13-year old son home from karate practice when he suffered a seizure. He went left of center at 45 mph and struck Plaintiff, 19 and his fiancé, 19, head on. The force of the impact severed Plaintiff's left leg and broke his left arm in a way that his wrist was touching his elbow when paramedics arrived on scene. Plaintiff was conscious and breathing for nearly 10 min. before arresting in the ambulance on the way to the hospital. The Defendant's accident control module revealed no steering or pedal activity for more than five seconds before the crash.

Plaintiff was survived by his parents and three siblings. He recently graduated from vocational school and was working as a plumber's apprentice. He spent his weekends volunteering for the homeless and recording gospel music.

Chardon city prosecutors charged the Defendant with misdemeanor vehicular manslaughter. The civil case stalled while the criminal proceedings went on. The Court granted Plaintiff's request to depose the Defendant, where he invoked his right to remain silent to nearly every question asked of him. Thereafter, Plaintiff's counsel met with the prosecutor and was permitted to view the Defendant's medical records in camera. The last record from the Defendant's neurologist – four years prior to the accident – warned him that "not taking AEDs and driving was dangerous" and he would need to be

on AEDs "for the rest of [his] life." Plaintiff's counsel, with obvious support from Isaac's family, attempted to get the case re-indicted as felony vehicular manslaughter. The Geauga County Prosecutor's Office refused.

The Defendant ultimately pleaded no contest to misdemeanor vehicular manslaughter. After being referred to probation for a pre-sentencing report, he tested positive for marijuana use. He was subsequently sentenced to 90 days in jail with 60 days suspended.

Counsel thereafter obtained all the Defendant's medical records to formally amend the lawsuit to allege punitive damages. The Defendant was also re-deposed. The Defendant had a $100/300k policy with Nationwide Insurance, which was tendered almost immediately after the crash, but which Plaintiff refused to accept. Two weeks before trial, the Defendant – through insurance counsel and personal counsel on behalf of his real estate holding company – consented to a 15-million-dollar judgment. Within days the estate perfected liens on all the holding company's properties in Lake, Geauga, Cuyahoga and Horry (Myrtle Beach, SC) counties. All the properties, except for the Defendant's marital home, are unencumbered. As part of the consent judgment, the Defendant and his holding company agreed to not file for bankruptcy. Nurenberg Paris recently made a substantial donation to Empowering Epilepsy and a memorial for Plaintiff is currently underway.

Plaintiff's Experts: Peter Kaplan, MB BS, FRCP (Epileptology); Jonathan Eisenstat, M.D. (Forensic Pathology); and Andy Rich, BSME, ACTAR (Accident Reconstruction)
Defendants' Experts: William Conte, M.D. (Neurologist)

Jane Doe v. ABC Commercial Carrier

Type of Case: Pedestrian v. Commercial Vehicle Crash
Settlement: $7,500,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5257
Defendant's Counsel: Withheld
Court: Lorain County Common Pleas Court
Date Of Settlement: March 2024
Insurance Company: Withheld
Damages: TBI, multiple orthopedic injuries to lower extremities

Summary: Plaintiff, a 55-year old woman, was crossing the street when she was struck by a vehicle operated for commercial purposes. The incident was captured on video dash cam from a nearby vehicle showing the force of the impact.

Plaintiff's Expert: Nicholas Romeo, M.D. (Treating Surgeon); Anne Veh (Life Care Planner); and David Boyd, Ph.D. (Economist)
Defendant's Expert: Withheld

Bridgeway Diagnostics, LLC v. Hitachi Healthcare Americas Corporation, et al.

Type of Case: Fraud and Breach of Contract
Verdict: $5.7 Million
Plaintiff's Counsel: Peter Soldato and Justin Abbarno, DiCello Levitt LLP, (440) 953-8888
Defendant's Counsel: Jeffrey Dunlap and Lauren Garretson, UB Greensfelder
Court: Cuyahoga County Common Pleas Case No CV-21-945745; Judge William McGinty
Date Of Verdict: February 26, 2024
Insurance Company: N/A
Damages: $3.7 million in compensatory damages; $2 million in punitive damages

Summary: Hitachi Healthcare Americas Corporation promised to sell medical imaging provider Bridgeway Diagnostics, LLC, a used but refurbished MRI unit equipped with the "newest" generation technology currently available. In fact, Hitachi delivered an older generation MRI with significantly less technological capabilities.

Due to Hitachi's breach of contract, and the fraudulent misrepresentations made by Hitachi's salespersons (which induced Bridgeway to enter into the MRI purchase contract in the first place), Bridgeway suffered massive financial losses and decreased profits as a direct result of being unable to perform certain MRI scans that were urgently requested by Bridgeway's patients.

Plaintiff's Expert: Dr. Jason Hoover (MRI Technology Expert); David Levins (Medical Billing Expert)
Defendant's Expert: None

Eizember v. Smith, et al.

Type of Case: Rear-End Motor Vehicle Collision
Verdict: $143,485.00
Plaintiff's Counsel: Thomas Ryan, Daniel Ryan, Meaghan Geraghty, Ryan, LLP, (216) 363-6028
Defendant's Counsel: Pat Roche and Jonathan Phillip
Court: Cuyahoga County Common Pleas Case No. CV-22-967321, Judge Andrew Santoli
Date Of Verdict: February 23, 2024
Insurance Company: State Farm
Damages:

Summary: On October 14, 2020, the plaintiff, a healthy 42-year-old woman with no significant prior medical history,

was involved in a rear-end automobile collision caused by the defendant. As a result of the collision, the plaintiff suffered injuries to her left hip, back, and knee. She was initially treated in the emergency room but did not receive an MRI at that time.

Following the ER visit, the plaintiff followed up with her primary care physician and was referred to physical therapy. However, by the fourth month post-collision, her left hip pain had worsened to the point that she was unable to complete the prescribed physical therapy.

Upon returning to her primary care physician, the plaintiff was referred to an orthopedic specialist who ordered an X-ray and an MRI of her lumbar spine. Due to insurance limitations, the MRI did not include imaging of her left hip. Despite receiving injections and pain medications, the plaintiff's left hip pain persisted.

Approximately nine months after the collision, a second MRI was ordered and completed, focusing on her left hip. The results revealed a torn labrum in the setting of hip dysplasia. The defendant's insurer, State Farm, argued that the torn labrum was a pre-existing condition unrelated to the collision.

At trial, the plaintiff's treating physician testified on her behalf, relating the torn labrum to the motor vehicle collision. The physician stated that, although the plaintiff had preexisting hip dysplasia, the condition was asymptomatic prior to the collision, and the impact from the accident caused the labral tear.

The plaintiff's past medical bills amounted to $23,000. State Farm's highest settlement offer was $70,000. The case proceeded to trial, where the jury returned a verdict in favor of the plaintiff, awarding her $143,485.00 in damages. The jury found that the defendant's negligence was the cause of the plaintiff's injuries, including the torn labrum in her left hip.

Plaintiff's Expert: Dr. Robert Wetzel
Defendants' Experts: Dr. Mark Paniguitti; Rebecca Reier, RN

John Doe v. UIM Carrier

Type of Case: Trucking
Settlement: $500,000.00
Plaintiff's Counsel: Joshua D. Payne, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio, (216) 694-5232
Defendants' Counsel: Withheld
Court: Lucas County
Date Of Settlement: February 20, 2024
Insurance Company: Withheld
Damages: Torn rotator cuff

Summary: Commercial motor vehicle operator involved in crash when motorist turned in front of him at a stoplight. Suffered rotator cuff tear requiring surgery. Settled for $500,000.00.

Plaintiffs' Expert:
Defendants' Expert:

Cheryl Trout v. Jay Shani Dev 8, LLC d/b/a Mr. Hero

Type of Case: Premises Liability
Verdict: $1,300,000.00 (8-0)
Plaintiff's Counsel: Katie Harris & Scott Perlmuter, Tittle & Perlmuter, (216) 222-2222
Defendants' Counsel: Adam Carr
Court: Cuyahoga County Common Pleas Case No. CV 21 955789
Date Of Verdict: February 12, 2024
Insurance Company: State Farm
Damages: Shattered patella

Summary: Cheryl Trout slipped and fell at a Mr. Hero while she was picking up food for her husband, who had stage 4 cancer. From Day 1, the defense denied that there was any water on the floor. There was no pretrial offer or interest in negotiating. The maximum offer during trial, before any testimony, was $100,000.00. At trial, the EMTs who responded to this incident testified that the floor was wet and corroborated everything our client had said for 3 years. After hearing expert testimony about the internal orthopedic changes to Ms. Trout's shattered knee, the jury found that this was a permanent and substantial physical deformity. They unanimously awarded $1.3 million in noneconomic damages.

Plaintiff's Experts: Amar Mutnal, M.D. (Orthopedic Surgery); Laurence Kessler (Franchise Restaurant Management)
Defendants' Expert: None

Baby Doe v. ABC Hospital and John Doe, M.D.

Type of Case: Medical Negligence; Mismanagement of Shoulder Dystocia
Settlement: $1 Million
Plaintiff's Counsel: Romney Cullers, The Becker Law Firm, (216) 621-3000
Defendant's Counsel: Withheld per confidentiality
Court: Withheld per confidentiality
Date Of Settlement: February 2024
Insurance Company: Withheld per confidentiality
Damages: Brachial Plexus Injury, Behavioral and Cognitive Deficits

Summary: A mother with a history of diabetes was delivered vaginally at term. The delivery was complicated by a prolonged shoulder dystocia. The delivering obstetrician employed

accepted maneuvers to resolve the impacted shoulder, but repeated some of maneuvers instead of proceeding to the next steps thereby delaying the delivery and ultimately applying excessive lateral traction. The baby was born with a moderate brachial plexus injury and had some motor function issues in lower extremities when learning to walk. The child was diagnosed at two years of age with diplegic cerebral palsy and then developed behavioral problems when starting pre-school. The challenge in the case was establishing that the motor function issues and behavioral problems were related to events that occurred during labor and delivery. Diplegic cerebral palsy, as opposed to spastic quadriplegia and dyskinetic cerebral palsy, is less likely to be related to intrapartum events and behavioral issues can be related to many causes.

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

John Doe v. UIM Carrier

Type of Case: Motor Vehicle Collision
Settlement: $240,000.00
Plaintiff's Counsel: oshua D. Payne, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio, (216) 694-5232
Defendant's Counsel: Withheld
Court: Marion County
Date Of Settlement: January 2024
Insurance Company: Withheld
Damages: Bilateral tinnitus with hearing loss

Summary: Motorist at a stop in construction on the highway when rear-ended at a high rate of speed. Suffered soft tissue injuries but began experiencing bilateral tinnitus and hearing loss which ultimately required hearing aids/maskers. Settled for $240,000.00.

Plaintiff's Expert: Michael J.A. Robb, M.D. (Oto-Neurology)
Defendant's Expert:

Estates of John Doe A and John Doe B v. ABC Power Company

Type of Case: General Liability, Wrongful Death
Settlement: $8.5 Million
Plaintiff's Counsel: Romney Cullers and Scott Kalish, The Becker Law Firm and Kalish Law Firm
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: December 2023
Insurance Company: Withheld
Damages: Death

Summary: A drunk driver swerved off the road and struck a utility pole, bringing down a powerline onto a wet roadway. The drunk driver's passenger survived the crash, crawled out of the car, and ran toward the road where he stepped on an energized powerline and was electrocuted. A bystander who lived across the road from the crash ran to help the passenger and was electrocuted by arcing from the wet pavement. The two deaths occurred within 20 to 30 seconds of the powerline falling on the road. The drunk driver survived with minor injuries and was charged with several offenses including two counts of aggravated vehicular homicide. He had an automobile insurance policy with 100/300 limits.

The protective coordination system installed on the involved electric distribution circuit failed to operate properly by not "locking out" when the powerline fell on the road. If it had operated properly, the powerline would have been de-energized within 12 to 15 seconds, preventing the two deaths. The power company claimed 1) that the drunk driver was solely responsible for the deaths, 2) that the two men who were killed were comparatively negligent because they were both intoxicated based on post-mortem blood alcohol concentrations consistent with impairment, and 3) even if the protective system on the circuit had functioned properly, it would not have prevented the deaths because they happened too quickly. The breakdown was $8,000,000.00 for the beneficiaries of the bystander, and $500,000.00 for the beneficiaries of the passenger. A third individual, also an unrelated bystander, suffered disfiguring electrical contact injuries. All terms of that settlement are confidential.

Plaintiff's Expert: Withheld
Defendant's Expert: Withheld

McCoy v. Avon Place, et al.

Type of Case: Nursing Home
Verdict: $2,800,000.00
Plaintiff's Counsel: Patrick Murphy and Christian Foisy, Dworken & Bernstein Co. LPA, (216) 861-4211
Defendant's Counsel: Ernest Auciello and DeAngelo LaVette
Court: Cuyahoga County Common Pleas Case No. CV 21 950678, Judge Jeffrey P. Saffold
Date Of Verdict: November 27, 2023
Insurance Company: Self Insured - Captive Insurance
Damages: Wrongful Death/Respiratory Arrest/Negligent Infliction of Emotional Distress/Resident Rights

Summary: Nursing Home rehabilitation resident suffered respiratory and cardiac arrest resulting in anoxic brain injury and death. Plaintiff claimed Defendant was negligent in equipment positioning and emergency response. Verdict was broken down to $300,000.00 for survivorship claim; $1,150,000.00 for Wrongful Death claim; $350,000.00 for

NEID claim; $500,000.00 for residents' rights claim; and $500,000.00 plus attorney fees for punitive damages.

Plaintiff's Expert: John Schweiger, M.D.; Kathleen O'Neill-Hill, RN; William Ozga, RT
Defendants' Expert: Kenneth Writesel, DO; Jesse Hall, M.D.

Baby Doe v. John Doe Obstetrician

Type of Case: Medical Negligence
Settlement: $4.75 Million
Plaintiff's Counsel: David Skall, The Becker Law Firm
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: November 2023
Insurance Company: Withheld
Damages: Brain Injury

Summary: A newborn girl, now 5 years old, suffered permanent brain injury and severe disability as the result of severe trauma and oxygen deprivation at birth. As opposed to performing a timely/safe C-section, the lawsuit set forth that the attending obstetrician and nurse failed to appropriately respond to initial signs of fetal distress and used a vacuum extractor excessively in an improper effort to force vaginal delivery.

Following a healthy pregnancy, the mother was admitted for induction of labor with Pitocin to stimulate contractions. The baby's heart rate over the next 10 hours changed from healthy and reassuring to concerning due to the increasing presence of decelerations. The decelerations suggested that the baby was weakening, becoming less tolerant to the stressors of labor, and at risk of insufficient oxygenation and injury. Despite maternal exhaustion and signs of increasing risk to the baby, the providers continued toward vaginal delivery with use of a vacuum extractor as opposed to opting for C-section. Two different vacuums were then applied 8 times (likely 15 – 20 separate pulls), "popped off" at least 5 times during 27 minutes of use, and it still took another 28 minutes following the failed vacuum attempts to complete delivery vaginally.

Unfortunately, the increasing stress of the labor and trauma of the vacuums caused the baby's oxygen levels to become critically low. She was born severely depressed with multiple fractures, required full resuscitation, and had to be emergently transferred to a children's hospital to undergo hypothermic cooling to limit impending brain damage. She went on to suffer seizures in the days following delivery and radiology of her brain soon after showed the disabling structural injury that resulted from the complicated and traumatic birth.

Plaintiff's Expert: Withheld
Defendant's Expert: Withheld

John Doe v. ABC Hospital

Type of Case: Medical Negligence
Settlement: $11 Million
Plaintiff's Counsel: Michael Becker and David Oeschger, Jr., The Becker Law Firm
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: October 2023
Insurance Company: Withheld
Damages: Catastrophic Brain Injury

Summary: A 53-year-old gentleman suffered permanent and catastrophic brain injury after resident physicians failed to timely and appropriately respond to a code blue for airway compromise due to a rapidly expanding neck hematoma.

The patient had undergone a single level disc replacement in his neck. Approximately 12-hours into his recovery, he got up to use the restroom, at which time he informed the nurse that he felt something "pop," and he was having difficulty breathing. The nurse then visibly saw his neck beginning to expand, and a code blue was called for this life-threatening airway compromise. Per hospital policy, an internal medicine physician on his ICU rotation was the only physician required to respond, and he was unable to properly establish an airway for the patient, despite two attempts at intubation. Following these two failed intubation attempts, and after another resident had come to assist, the attending emergency room physician was finally called, and she was able to quickly establish an airway almost immediately upon her arrival. Unfortunately, it was too late, as the lack of oxygen for such a long period of time had already caused catastrophic brain damage.

Plaintiff's Experts: Withheld
Defendant's Experts: Withheld

Estate of Baby Doe v. ABC Hospital

Type of Case: Medical Negligence, Wrongful Death
Settlement: $3.8 Million
Plaintiff's Counsel: Romney Cullers and Steven Goldberg, The Becker Law Firm and Goldberg Legal Co., L.P.A.
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: September 2023
Insurance Company: Withheld
Damages: Death

Summary: A 7-month-old girl died following surgery to correct a rare, congenital heart defect. The girl was born with a duct-dependent lesion which affects normal blood flow through the heart. This particular defect is usually repaired surgically during the early months of life. The surgery involves, among other things, the closure of a hole in the heart and the

enlargement of a valve by cutting away obstructive muscle tissue. During the procedure, the surgeon must paralyze the child's heart and maintain circulation with cardiac bypass technology. The child suffered a global ischemic heart injury during the surgery as a result of the surgical team's failure to properly infuse medications used to paralyze the heart. The child's heart essentially was rendered non-functional. She died several weeks later in the hospital when supportive measures were withdrawn.

Plaintiff's Expert: Withheld
Defendants' Expert: Withheld

John Doe v. John Doe Surgeon

Type of Case: Medical Negligence
Settlement: $3.75 Million
Plaintiff's Counsel: Michael Becker, The Becker Law Firm
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: August 2023
Insurance Company: Withheld
Damages: Spinal Cord Injury

Summary: A 45-year-old gentleman suffered paraplegia following a thoracic decompressive laminectomy performed at the wrong level of spine. The surgeon failed to obtain an intraoperative x-ray to identify patient-specific anatomy prior to beginning the laminectomy. Consequently, surgery was initiated at one level higher than the patient's defect. Once the physician became aware, the correct level was identified and decompressed, resulting in a larger operative field and increased exposure of spinal vasculature, leaving the patient vulnerable to postoperative bleeding. The patient then developed a postoperative spinal epidural hematoma compromising his lower extremity function. He was taken back to surgery for decompression, but recovery of motor function was minimal, and he is now reliant on a wheelchair for mobility.

Plaintiff's Expert: Withheld
Defendants' Expert: Withheld

Baby Doe A v. John Doe Obstetrician

Type of Case: Medical Negligence
Settlement: $4.55 Million
Plaintiff's Counsel: David Skall, The Becker Law Firm
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: June 2023
Insurance Company: Withheld
Damages: Brain Injury

Summary: A newborn boy, now 10 years old, suffered brain injury and cerebral palsy as the result of delayed delivery and oxygen deprivation at birth. As opposed to performing a timely / safe C-section, the lawsuit set forth that the attending obstetrician and nurse failed to appropriately respond to worsening fetal distress and used a vacuum extractor excessively in an improper effort to complete vaginal delivery.

Following a healthy pregnancy, the mother was admitted for induction of labor with Pitocin that caused the baby's heart rate to progressively deteriorate over the next 12+ hours. This trend and signs of mild fetal infection suggested that the baby was becoming less tolerant of the stressors of labor, insufficiently oxygenated, and susceptible to injury. The providers failed to appreciate the risks of ongoing stress and, instead, continued toward vaginal delivery with use of a vacuum extractor as opposed to opting for C-section delivery. The vacuum was then applied as many as 8 times, "popped off" twice during 16 minutes of use, and it took an additional 18 minutes to deliver vaginally after the failed attempts with vacuum assistance.

By then it was too late. The increasing stress of the labor and trauma of the vacuum had caused the baby's oxygen levels to become critically low. He was born severely depressed and required full resuscitation. He went onto to suffer seizures in the days following delivery and radiology of his brain soon after showed the disabling structural damage that resulted from the severe, birth-related loss of oxygen.

Plaintiffs' Experts: Withheld
Defendant's Experts: Withheld

Moore v. "Construction Company"

Type of Case: Wrongful Death/Construction Zone Negligence/Trucking
Settlement: $1.35 Million
Plaintiff's Counsel: Jessica Bacon, Bevan & Associates, (330) 650-0088
Defendant's Counsel: Dennis Rose
Court: Hancock County Common Pleas Case No. 2020 CV 00118, Judge Starn
Date Of Settlement: June 2023
Insurance Company: Hartford
Damages: Death

Summary: Mr. Moore was a 58-year old career truck driver that crashed into a line of stopped traffic due to a traffic drag being conducted without the proper advance warning to alert drivers of the stopped traffic. Mr. Moore burned to death in the cab of his truck.

Plaintiff's Expert: Dr. Joseph Felo; Eric Brown (Crashtech); and Andrew Rammish
Defendants' Expert: Hank Lipian (Introtech) ■

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.

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Law School / Year Graduated: ____

Professional Honors or Articles Written: __________________________________

____

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

____

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

____

Applicant Signature: ______________________________________ Date: ______________

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

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

Please return completed Application with membership dues to:

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c/o Colin R. Ray, Esq.
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Annual Installation Dinner

Please join CATA for our Annual Installation Dinner at the Shoreby Club

JUNE 2024

13

Honoring Susan Petersen

with

The Honorable Justice Michael P. Donnelly

Date & Time:

Thursday, June 13, 2024

5:30 pm - 10:00 pm

Location:

The Shoreby Club

40 Shoreby Drive, Bratenahl, Ohio

RSVP:

clevelandtrialattorneys.org/events

Susan Petersen
2024 Honoree

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Spring 2024

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