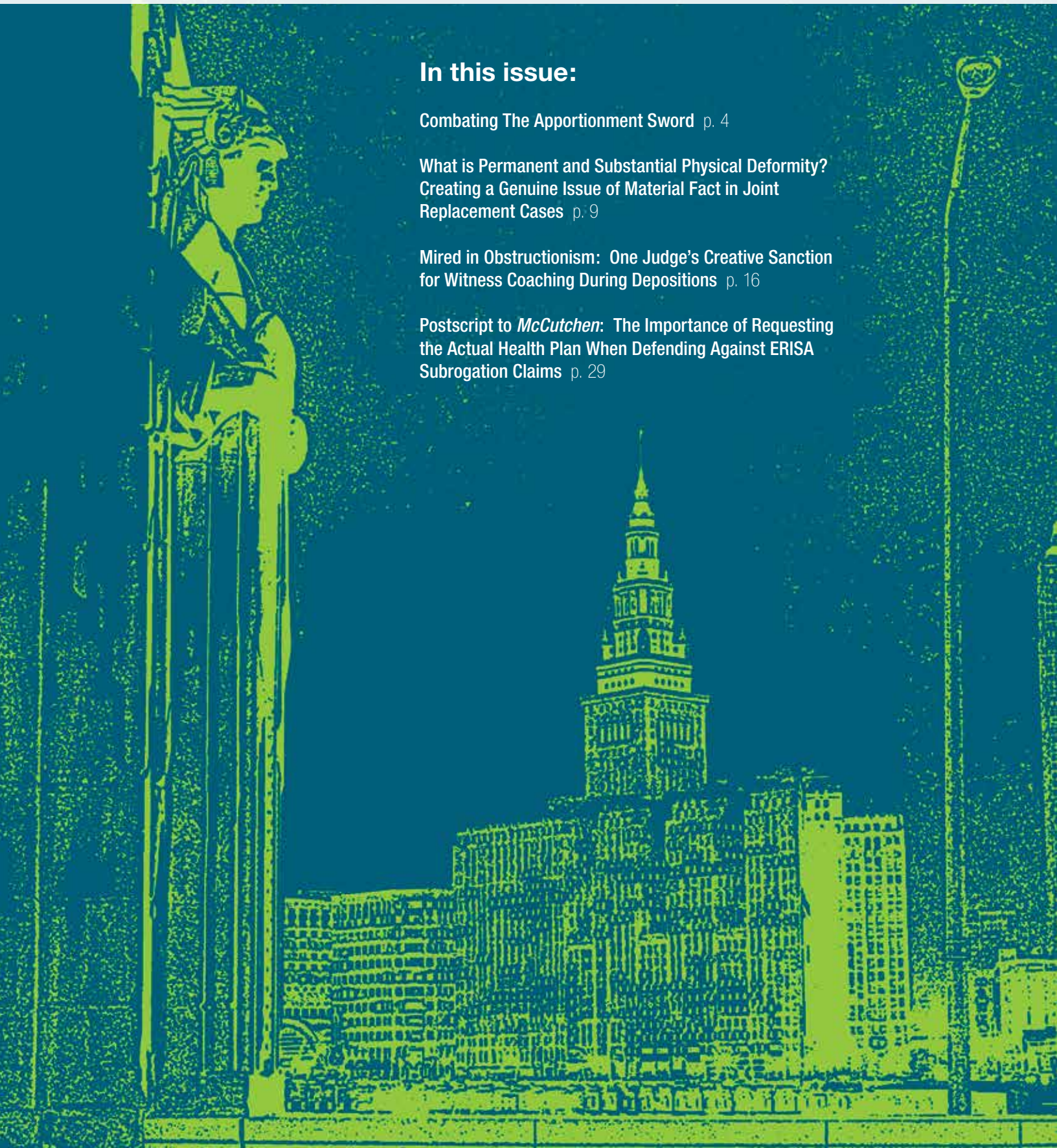
CATA
CLEVELAND ACADEMY OF TRIAL ATTORNEYS
News
Winter 2014 • 2015



In this issue:

NFP™
Structured Settlements

Structured Settlements. Financial Planning.
Special Needs Trusts. Settlement Preservation Trusts.
Medicare Set-Aside Trusts. Settlement Consulting.
Qualified Settlement Funds.

MICHAEL W. GOODMAN, ESQ.
Certified Structured Settlement Consultant

- 20 Years of Experience in Structured Settlements, Insurance and Financial Services
- #1 Structured Settlement Producer Nationally for Last 9 Consecutive Years
- Nationally Prominent and a Leading Authority in the Field
- Highly Creative, Responsive and Professional Industry Leader
- NFP has been ranked No. 8 in *Business Insurance's* "100 Largest Brokers of U.S. Business" and No. 9 in *Best's Review's* "Top Global Insurance Brokers."

Passionate Advocates. Proven Approach.

800-229-2228 www.NFPStructures.com

ATLANTA CHARLESTON CLEVELAND FORT LAUDERDALE
HARRISBURG LOS ANGELES PITTSBURGH TAMPA

CATA
CLEVELAND ACADEMY OF TRIAL ATTORNEYS
Spring 2014 • 2015
News

CONTENTS

ADVERTISERS IN THIS ISSUE

Opinions expressed in the articles herein are those of the authors and are not necessarily shared by CATA.
Cover design by Joanna Eustache based on photograph by Frank Strack and Erik Ovesny.

Ellen Hobbs Hirshman is an attorney at Loucas Law, L.P.A. She can be reached at 216.834.0400 or ehirshman@loucaslaw.com.

President's Message: CATA's Community Outreach

by Ellen Hobbs Hirshman

I am the master of my fate:
I am the captain of my soul.

These last two lines of William Ernest Henley's poem Invictus provide a constant reminder to me that we cannot sit back and let all of the external forces in this world control our destiny. There are certainly many that are outside of our reach, and I try on a daily basis to accept those, but there are other forces upon which we may exert our influence and truly make a difference.

This is the goal of CATA's Community Outreach Committee. This committee was created several years ago as our attempt to reach out to all citizens living in Northeast Ohio and make a change for the better. Of course, as trial attorneys, we already do this through our representation of our clients who have been injured in a car crash, in the boardroom, in the operating suite, in the emergency department, in the workplace and others, but through this committee, we as a community of trial attorneys have an opportunity to truly give back.

This is why last year, the Community Outreach Committee chose the End Distracted Driving Campaign as our project to achieve this goal. In our spring 2014 newsletter, there was an article which discussed this program in detail. In addition, at our annual meeting and installation of officers' dinner on June 13, 2014, Joel Feldman, the founder of the Casey Feldman Foundation and the End Distracted Driving Campaign, addressed our members to explain the origins of this program and his never-ending commitment to changing the landscape of distracted driving around this country.

Those of you in attendance already know, and those of you who read Susan Peterson's spring article are aware, that Joel Feldman's beautiful 21-year-old daughter, Casey, was killed in 2009 by a distracted driver in the summer just prior to her senior year at Fordham University. Out of this tragedy Joel has created something truly positive. Joel travels around the country, using his well-crafted PowerPoint packed with scientific data and alarming statistics, explaining how each one of us can make a difference and change perceptions about driving distracted. *Check out www.EndDD.org* CATA is now working together with Joel to spread this same message and change perceptions and driving habits in Northeast Ohio.

I personally am committed to this goal and believe we can make a difference. Think about it. There was a time in this country, for those of us old enough to recall, when wearing seatbelts was not fully embraced despite it being required by law. However, eventually it became commonplace and people buckled up. We are capable of achieving this same type of change in the perception of distracted driving if we go out into the community and make these presentations in our schools, businesses and community organizations. It is so easy to do. Joel has handed us his PowerPoint presentation.

All we need to do is commit some time to schedule and conduct these presentations.

The CATA Community Outreach Committee is well on its way to achieving this goal. This past April, CATA Board Member Will Eadie made two presentations at Shaker Heights and MLK High Schools. Will returned from his presentations truly inspired and encouraged by the positive response he received from the students at these schools. The students were excited and inspired to go forth from the presentation and attempt to make a change in not only how they drive, but how their parents and friends drive when they are passengers in the car.

At present, we have reached out to numerous schools in the Northeast Ohio area and are scheduling presentations. Once we have several of these presentations under our belts, we want our CATA members to become active participants in attending and making these presentations. Eventually, we firmly believe that the more people who receive the message, the closer we will be to achieving our goal of ending distracted driving. There is no doubt that we all drive distracted. We need to face the dangers of our distracted driving habits, and decrease these distractions. In the process, we will save lives.

My goal as president of CATA this year is to jump-start this program and to encourage others to not only drive safely, but to participate in educating the community around us. After all, we live in this community, we practice law in this community and we certainly want to give back to this community which we all love. ■

Christian R. Patno is a principal at McCarthy, Lebit, Crystal & Liffman Co. LPA. He can be reached at 216.696.1422 or crp@mccarthylebit.com.

Katherine L. Moscarino is an associate at McCarthy, Lebit, Crystal & Liffman Co. LPA. She can be reached at 216.696.1422 or klm@mccarthylebit.com.

Combating the Apportionment Sword

by Christian Patno and Katherine Moscarino

In Monty Python's Holy Grail, the Black Knight guards the "bridge" like many of us do daily for our clients and the civil justice system. The Black Knight is supremely skilled at sword play, but suffers greatly from an unchecked overconfidence and a staunch refusal to ever give up. This is demonstrated time and time again as King Arthur literally cuts the Black Knight from limb to limb with the Black Knight responding, "It's just a flesh wound!" The same fight and struggle exists in Ohio as trial lawyers are constantly forced to deal with new laws each and every year designed solely and specifically to create complexity for juries and to protect the insurance industry and defendants. One such law is Ohio's apportionment of fault statute set forth in R.C. 2307.23.

I. The Ohio Apportionment Of Fault Statutory Scheme.

R.C. 2307.23 instructs the trial court on how to determine the percentages of tortious conduct attributable to a party in a tort action under Sections 2307.22 and 2315.32 through 2315.36 of the Revised Code. In a jury trial, the jury is required to answer general verdict forms as well as interrogatories assessing the percentages of fault attributable to the parties and, in some instances, to non-parties from whom the plaintiff does not seek recovery.[1] Fault is not automatically assessed to non-parties under the statute. Rather, it is only attributed to non-parties if a defendant raises, as an affirmative defense, "that a specific percentage of the tortious conduct that proximately caused the damage" is attributable to a non-party.[2] The affirmative defense can only be raised "at any time before the trial" of the lawsuit.[3] In a non-jury action, the Court, as the finder of fact, engages in a similar allocation of fault among the parties and non-parties, if applicable.[4] In either case, the total fault of all parties and non-parties (if applicable) must equal 100%.[5]

The portion of the total damages a defendant is responsible to pay depends upon various factors, including the type of damages (*i.e.*, economic or noneconomic), the percentage of fault attributed to that defendant, and whether the basis of that defendant's liability is negligence or intentional misconduct.

For economic damages, traditional joint and several liability is kept alive, at least in some circumstances. If the defendant is found to be more than 50% at fault, that defendant will be liable for the full amount of economic damages.[6] If, however, the percentage of fault attributed to that defendant is 50% or less, that defendant will only pay his or her proportionate share of economic damages.[7] The only exception is when the defendant is liable under an intentional tort theory, in which case the defendant will be liable for the full amount of economic damages, regardless of the percentage of fault allocated to that defendant.[8]

For noneconomic damages, on the other hand, defendants can only be liable for their

proportionate share of fault.[9]

Notably, R.C. 2307.24 provides that the proportionate liability rules set forth in R.C. 2307.22 and 2307.23 do not apply to non-tort actions.[10] R.C. 2307.24 also provides that fault cannot be allocated between defendants to whom vicarious liability applies; in such circumstances, "the principal and agent, master and servant, or other persons having vicarious liability relationship shall constitute a single party" for purposes of apportioning fault under R.C. 2307.22 and 2307.23.[11]

Where does apportionment of fault leave the courts and those who must actually apply these laws on a day to day basis you might ask? In a big legal "chutes and ladders" mess. A synopsis of how Ohio courts have handled these issues is set forth below. A few practice considerations follow.

II. Ohio Cases Discussing Issues Under The Apportionment Statutes.

In *Kritzwiser v. Bonetzky*,[12] the plaintiff husband initially filed a medical negligence claim against two physicians for their delay in diagnosing the recurrence of his prostate cancer that they had previously treated. That action was eventually settled, but, before it resolved, the plaintiff and his wife filed a second action against another defendant, Dr. Bonetzky, for failing to diagnose plaintiff's prostate cancer two years before the other doctors had diagnosed and begun treating it. The first action settled and the plaintiff husband died, whereupon his wife, as administrator of her husband's estate, amended the complaint to assert a wrongful death and survival action against Dr. Bonetzky. The trial court dismissed the survival action on the ground that the statute of limitations began to run on that claim when the cancer was first discovered; but the wrongful death claim proceeded to trial, resulting in a verdict against Dr. Bonetzky.

On appeal, Dr. Bonetzky argued the trial court erred in failing to instruct the jury and submit jury interrogatories on apportionment of fault to non-parties pursuant to R.C. 2307.23. Dr. Bonetzky's answer had asserted contributory negligence on the part of the decedent, but did not allege negligence on the part of the physicians whose claims had previously been settled. The appellate court found that Dr. Bonetzky waived the issue of nonparty liability by not raising that defense in his answer, by not presenting any expert testimony or other evidence of nonparty fault at trial, and by failing to submit any proposed jury instructions or interrogatories on that issue. The court held that "[a]s non-party conduct or the liability of others must be pleaded as an affirmative defense pursuant to R.C. 2307.23(C), and Bonetzky failed to so plead,... Bonetzky has waived this argument."[13]

In *Banas v. Shively*, the plaintiff was involved in two car accidents two weeks apart, the second of which occurred while she was a passenger in her husband's vehicle.[14] She sued the driver in the first accident, contending that all of her injuries and medical bills were solely the result of the first accident. The defendant admitted negligence, but denied that all of plaintiff's injuries were caused by the first accident, and the case went to trial solely on the issues of proximate cause and damages. Although the plaintiff sought more than $80,000 in medical bills, the jury returned a verdict for the plaintiff in the amount of $7,338, of which $3,695.35 was attributed to past economic damages, the remainder being attributed to non-economic damages.

On appeal, and in an interesting twist, the plaintiff sought to "wield the affirmative defense provided in R.C. 2307.23(C) against [the defendant]."[15] The plaintiff argued that, under R.C. 2307.23(C), the defendant had the burden of proving how her damages were apportioned between the two accidents, and had failed to satisfy this burden.[16] Rejecting this argument, the appellate court found the defense in R.C. 2307.23(C) inapplicable as the defendant had not raised this defense in his answer, nor had he admitted -- as plaintiff contended -- that he was "at least partially responsible" for all of her medical bills.[17]

In *Gurry v. C.P.*, the plaintiff's vehicle was stolen by several minor children and damaged during an ensuing police chase.[18] The plaintiff sued one of the minor children for a theft offense and the child's mother under R.C. 3109.09(B), a statute making the parent responsible for her child's theft offense. The trial court found the mother and child jointly and severally liable, and rejected the mother's argument that proportional liability under R.C. 2307.22 applied. The Eighth District Court of Appeals affirmed, reasoning that the theft offense on which the mother's statutory liability was based was akin to an intentional tort; and intentional torts are not subject to apportionment under R.C. 2307.22.

In *Manchise v. Ionna*, Mr. Manchise, whose wife died from an undiagnosed and improperly treated bowel obstruction, brought a medical malpractice action against his wife's treating physicians.[19] He settled with most of the defendants prior to trial.[20] At the conclusion of the trial against Dr. Stephen Ionna and his medical group, the jury returned a verdict in favor of Mr. Manchise and awarded damages.[21] The jury also answered interrogatories that apportioned 35% of the liability to Dr. Ionna and 65% of the liability to

Dr. Lankin, a physician with whom Mr. Manchise had settled prior to trial.[22] Accordingly, the trial court reduced the judgment against Dr. Ionna to 35% of the jury's total award.[23]

On appeal, Mr. Manchise argued the trial court erred by permitting the jury to apportion fault to Dr. Lankin when Dr. Ionna had not pled Dr. Lankin's comparative fault in his answer to the complaint or to the amended complaint.[24] The First District Court of Appeals was limited to a review of plain error because Mr. Manchise failed to adequately raise this issue at trial.[25] At trial, Mr. Manchise never argued that Dr. Ionna's failure to plead apportionment of fault in his answer precluded the jury from considering this issue.[26] However, he did object to the interrogatories on other general grounds. The Court found that Dr. Ionna was not required to plead the non-party apportionment of fault defense when he filed his answers because Dr. Lankin was a party to the action at that time. Nor was Dr. Ionna required to amend his answer to assert this defense because Dr. Lankin was dismissed shortly before trial.[27]

The court further found that the issue of Dr. Lankin's negligence was tried with the consent of the parties, and did not come as a surprise to the plaintiff. Dr. Lankin's negligence was addressed in both parties' pretrial statements and in the cross-examination of plaintiff's expert gastroenterologist.[28] Dr. Lankin also testified at trial.[29] At no time did Mr. Manchise object to Dr. Ionna's presentation of evidence of Dr. Lankin's negligence.[30] Therefore, Dr. Ionna did not waive the defense and it was not error for the court to submit the apportionment interrogatories.[31]

In *Simpson v. Stieber Bros.*, the Sixth District Court of Appeals noted that a plaintiff's failure to object timely will allow apportionment to be applied.[32] In *Simpson*, a corn silo collapsed, spilling several hundred tons of corn onto the roadway, and causing the plaintiff's vehicle to hit a telephone pole. Although the trial court denied the defendant silo owners' motion to amend their answer to allege that a design defect by the non-party silo manufacturer caused the silo to collapse, the defendants pursued this theory at trial through the testimony of their expert witness, and an interrogatory was submitted to the jury regarding negligent design by the manufacturer. When the jury returned a verdict for the defendants, the plaintiff appealed on the ground that the jury should not have been permitted to consider the negligence of the non-party manufacturer because that defense was waived. Affirming, the court of appeals held that it was the plaintiff who had waived his right to object to this defense. Prior to trial, the plaintiff knew the defense expert would opine the silo failure was caused by negligent design, but failed to file a motion *in limine* to exclude the expert's testimony; and, in fact, agreed to a jury interrogatory asking whether the collapse was caused by a design defect.

In *Simkins v. Grace Brethren Church of Delaware*, a teenage girl who had been raped by a pastor sued his former employer, Grace Brethren Church of Delaware, Ohio ("Delaware Grace"), for negligent hiring, retention, supervision, recommendation, promotion, or support.[33] Over Delaware Grace's objection, the trial court refused to provide the jury with interrogatories apportioning fault between Delaware Grace and the non-party pastor. The trial court reasoned that, pursuant to R.C. 2307.24(B), apportionment did not apply because the claims against Delaware Grace were based on vicarious liability. The trial court also found that Delaware Grace had not raised the apportionment defense sufficiently in advance of trial, and that R.C. 2307.22(C), which permits the defense to be raised "at any time before the trial," is unconstitutional because it conflicts with the trial court's discretion to determine whether a party can amend a pleading, and thus violates Article IV, Section 5 of the Ohio Constitution, as well as the Due Process Clause of the Ohio and United States Constitutions.

The Fifth District Court of Appeals reversed. Theories of negligent hiring, retention, supervision, *etc.*, are not based on vicarious liability but on the employer's own independent negligence; as such, the exception to apportionment that exists for claims based on vicarious liability did not apply.[34] The Fifth District also found that Delaware Grace raised the apportionment defense sufficiently in advance of trial -- both in its answer[35] and in a "Notice of Intention to Seek Apportionment" filed two-and-a-half weeks before trial. The Court further found that the trial court erred in *sua sponte* finding the statute unconstitutional without providing the parties an opportunity to argue the matter.[36]

In *Roginski v. Shelly Co., et al.*, suit was filed as a result of Randy Roginski's property damage and death while working as a highway repaving inspector.[37] Plaintiff sued Shelly Company, the general contractor for the project, for wrongful death and survivorship claims with a demand for punitive damages. The jury awarded $19,000,000 on the wrongful death claim, comprised of $17,000,000 in non-economic damages and $2,000,000 in economic damages. For the survivorship claim, the jury awarded the estate $25 in economic damages and $0 in non-economic damages. The jury also rendered a $20,000,000 punitive damages award.

The jury apportioned 60% of the fault to Shelly, 35% to non-party driver Jones, and 5% comparative to the

decedent. Both parties filed post-trial briefs and argued that the Court should have addressed apportionment in the Judgment differently. The trial court reduced the non-economic portion of the jury's verdict pursuant to R.C. 2307.22 and R.C. 2307.23 from $17,000,000 to $10,200,000. The trial court decided not to reduce the economic damages award as to non-party involvement because the aforementioned statutes do not apply to economic damages under the facts here.

Shelly argued that the Court should have reduced the economic damage awards based upon the decedent's 5% comparative negligence. R.C. 2315.33 provides in pertinent part:

> The court shall diminish any compensatory damages recoverable by the plaintiff by an amount that is proportionately equal to the percentage of the tortious conduct of the plaintiff.

Plaintiff argued that, pursuant to R.C. 2315.32(B), the Court cannot reduce compensatory damage awards due to the decedent's negligence or non-party negligence due to Shelly's intentional conduct. Although they did not claim a specific intentional tort at trial, plaintiff contended they proved the equivalent of an intentional tort since the jury awarded punitive damages after finding clear and convincing evidence of malice.

The trial court rejected plaintiff's contention and held that a punitive damages award cannot transform a negligence claim into an intentional tort, thereby eliminating the required set-off for apportionment and comparative negligence. Judge Michael Jackson, in an extensive and very well written 55 page opinion, cited to the binding precedent set forth in *Niskanen v. Giant Eagle, Inc.*[38] In *Niskanen*, the Ohio Supreme Court held that a plaintiff must plead and prove an intentional tort in order for comparative negligence not to be considered in determining an award for compensatory damages.

In *Miller v. ODOT*, Pauline J. Miller died after a truck approaching from the opposite direction on a state route hit one or more potholes, crossed the centerline, and struck her vehicle. [39] Mrs. Miller's husband filed an action against the State of Ohio and ODOT claiming the state negligently failed to repair the potholes.[40] The truck driver also filed an action against ODOT for damage to his vehicle, as well as a claim against ODOT for indemnification because his insurer paid policy limits to the Millers in settlement of a claim filed against him in federal court. The truck driver's claim for indemnification was based on an arguably extinct rule of law which provides that defendants whose negligence was "active" could be required to indemnify defendants whose negligence was found to be merely "passive." In his claim for indemnification, the truck driver asserted his negligence in driving over the centerline was passive, as opposed to ODOT's active negligence in creating the pothole. ODOT had moved for judgment on the pleadings on this theory, and the Court of Claims granted the motion, a decision which, in a separate appeal, the Tenth District Court of Appeals affirmed.[41] Meanwhile, the Court of Claims consolidated the negligence claims of the Millers and of the truck driver for trial, and found ODOT 100% at fault for Mrs. Miller's death.

On appeal from the judgment awarding more than $1.8 million to the Millers[42], ODOT argued the Court of Claims erred in failing to apportion some liability to the truck driver under R.C. 2307.23. The Court of Appeals disagreed. There was sufficient evidence to support the finding that ODOT was 100% at fault for this accident. That finding, moreover, was not inconsistent with the ruling granting ODOT judgment on the pleadings on the truck driver's claim for indemnification. Indemnification could only be based on a finding that the truck driver's negligence was "passive," but his complaint -- in which he alleged he was negligent in driving over the centerline -- alleged an affirmative act of negligence, not a passive one. Thus, although the Court of Claims later found ODOT to be 100% at fault, that finding was not inconsistent with its earlier conclusion that the truck driver's claim for indemnification failed to state a claim upon which relief could be granted. The Court of Appeals in the *Miller* appeal was limited to the evidence adduced at the liability trial, which did not include allegations made in the truck driver's pleadings.[43]

III. Practice Pointers For Dealing With Apportionment Of Fault Issues.

In preparing your case where issues of apportionment of fault are expected to arise there are many factors that you should consider. First, the Defendant has the burden of proof and must properly set forth apportionment as an affirmative defense prior to trial or there is waiver. How specific the defense must be has not been determined. Nor has the procedure once the Answer has been filed without such a defense. Is leave required? Must the Court allow the assertion? Must an Amended Answer be filed? Does the non-party need to be specifically identified? Since the defendant has the burden of proof do they need to raise this specific allegation in their opening statement? What burden of proof is imposed upon the defendant to prove its affirmative defense? What happens when partial summary judgment is granted as to one defendant and not others? Or what happens when there are multiple cases in multiple

courts with different defendants? In *Roginski*, Judge Jackson determined there could not be apportionment as to non-party ODOT since that could result in conflicting findings by different courts, and the defendant failed to properly assert the affirmative defense as to ODOT prior to trial. Under due process, can there be 100% fault found by a jury in "this action" when this action cannot include all the parties or result in a final resolution of all issues? And, since apportionment only applies to tort actions, what happens when the claims against one defendant sound in contract while those against other defendants sound in tort? Finally, what happens when the Court, as a matter of law, decides a party is dismissed from a case? Can the remaining defendants still seek apportionment to that non-party when there has been a determination as a matter of law that there is no fault?

As a trial lawyer, you need to determine if the affirmative defense was properly pled and asserted from the Answer through trial. You need to determine if there is vicarious liability by statute or common law and whether to focus on that conduct or open the door to apportionment by raising claims involving individual conduct. You need to determine strategically whom to make a party and whom not to make a party. You need to make sure the "burden of proof" jury instruction clearly sets forth the Defendants' duty under apportionment. You need to preserve all of your constitutional and due process challenges repeatedly on the record. You should move at the proper times for a Motion in Limine and for a directed verdict on apportionment. This is especially true when the matter involves expert testimony.

You also need to enlighten your experts and witnesses to not unwittingly fall in the trap of supporting the defendant's apportionment case in deposition and at trial. You need to make sure the interrogatories submitted to the jury on apportionment as to each non-party set forth the burden and whom it is on. You may even need to bring in witnesses and evidence in your case and possibly on rebuttal to defend against apportionment. Further, you need to prove lack of notice and unfair surprise if a defendant seeks to assert the defense too late or attempts to introduce interrogatories. Apportionment is something that cannot be ignored.

Reality often trumps legality in a courtroom. The reality is that apportionment also makes the defendants uneasy. They usually do not want to be viewed as pointing the finger. Defendants usually do not want to comment on apportionment in opening. They usually do not want to bring in experts or substantial evidence on apportionment. Instead, they often try to make their apportionment case through the back door with your experts and your evidence.

In the end, it is up to you to not be overconfident and to be better than the Black Knight guarding the "bridge" as the defense attorney attempts to use the apportionment sword to cut your case limb to limb. There are numerous strategic moves available from the time you take in the difficult and complex multi-party case until the verdict is reached. However, you must consider each and every one of these strategies on the front end and throughout the case in order to avoid your case taking it on the back end. ■

End Notes

1. R.C. 2307.23(A)(1)-(2) and R.C. 2307.23(C).
2. R.C. 2307.23(C).
3. *Id.*
4. R.C. 2307.23.
5. R.C. 2307.23(B).
6. R.C. 2307.22(A)(1).
7. R.C. 2307.22(A)(2).
8. R.C. 2307.22(A)(3).
9. R.C. 2307.22(B) and (C).
10. R.C. 2307.24(A).
11. R.C. 2307.24(B).
12. *Kritzwiser v. Bonetzky,* 3rd Dist. No.8-07-24, 2008-Ohio-4952.
13. *Id.* at ¶ 22.
14. *Banas v. Shively*, 8th Dist. No. 96226, 2011-Ohio-5257, 969 N.E.2d 274.
15. *Id.* at ¶ 31.
16. *Id.*
17. *Id.* at ¶ 32.
18. *Gurry v. C.P.*, 8th Dist. No. 97815, 2012-Ohio-2640.
19. *Manchise v. Ionna*, 1st Dist. No. C-120874, 2013-Ohio-3612, ¶ 1.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at ¶ 2.
25. *Id.* at ¶ 12.
26. *Id.*
27. *Id.* at ¶ 14.
28. *Id.* at ¶ 16.
29. *Id.*
30. *Id.*
31. *Id.* at ¶ 2.
32. *Simpson v. Stieber Bros.*, 6th Dist. No. H-12-012, 2013-Ohio-4089.
33. *Simkins v. Grace Brethren Church of Delaware*, 2014-Ohio-3465, 16 N.E.3d 687 (5th Dist.).
34. *Id.* at ¶s 49-51.
35. The affirmative defense in the answer stated: "[I]n the event that liability on part of either of these Defendants is established, each Defendant is liable for only that portion of Plaintiff's damages caused by his or her own proportionate share of fault." *Id.* at ¶ 55.
36. *Id.* at ¶ 58.
37. *Roginski v. Shelly Co., et al*, Cuyahoga C.P. No. CV-11-76090 (Aug. 21, 2014).
38. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St. 3d 486 (2009).
39. *Miller v. ODOT*, 10th Dist. No. 13AP-849, 2014-Ohio-3738, ¶ 2.
40. *Id.*
41. *Id.* at n.3, citing *Goscenski v. Ohio Dept. of Transp.*, 10th Dist. No. 13AP-585, 2014-Ohio-3426.
42. *Id.* at ¶26.
43. *Id.* at ¶s 76-81.

Mark Abramowitz is an associate at the DiCello Law Firm. He can be reached at 440.953.8888 or mabramowitz@dicellolaw.com.

What is Permanent and Substantial Physical Deformity? Creating a Genuine Issue of Material Fact in Joint Replacement Cases

by Mark Abramowitz

The history of tort reform in Ohio is well known and documented. One of the major aspects of it is limiting the amount of non-economic damages a Plaintiff can recover in a medical malpractice case. In medical malpractice cases, R.C. §2323.43(A) provides for two different compensation levels based on the type of injury.

The defense has characterized this distinction as being between catastrophic and non-catastrophic injuries. The different compensation levels are $250,000 or $500,000. The pertinent part of R.C. §2323.43 explaining when the higher cap of $500,000 is used provides:

> (A)(3) The amount recoverable for noneconomic loss in a civil action under this section may exceed the amount described in division (A)(2) of this section but shall not exceed five hundred thousand dollars for each plaintiff or one million dollars for each occurrence if the noneconomic losses of the plaintiff are for either of the following:
>
> > (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
> >
> > (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.

As you can see from the plain language of the statute, the word catastrophic is not used. This is important because in a recent case of *Ennis et al. v. Hunt et al.*[1] in the Ashtabula County Court of Common Pleas, this distinction became a major issue.

Plaintiff Ennis had received substandard care which resulted in Plaintiff Ennis having his hip replaced. The defense filed a motion for partial summary judgment asking the court to impose the lower medical malpractice non-economic damages cap.[2]

In their brief and at a pre-trial in front of Judge Yost, they repeatedly argued that a hip replacement is not a catastrophic injury. Whether an injury is catastrophic or not is not the standard in determining which cap applies. Allowing the defense to characterize the standard as being catastrophic makes it a higher standard than what it actually is. The standard as stated above is whether or not the injury is permanent and substantial.[3]

A survey of the case law into what constitutes a permanent and substantial injury according to R.C. §2323.43 is pretty bleak.[4] There is however some limited case law regarding R.C. §2315.18(B)(3)(a), which contains almost identical language to R.C. §2323.43 but is only applicable to non-medical malpractice personal injury cases.[5]

A particularly persuasive case dealing with the permanent and substantial standard in R.C.

§2315.18(B)(3)(a) is *Ohle v. DJO Inc.*[6] This is a federal district court case holding that a pain pump in a plaintiff's shoulder can constitute a permanent and substantial physical deformity.[7] In that case, the judge held that:

> The jury is in the best position to determine whether the nature and location of scaring [sic], removal of a portion of a bone, and/or total loss of cartilage deforms an individual. When reasonable minds might disagree about the nature of a plaintiff's injuries, the Court cannot impose its own factual determination.[8]

Using this as a roadmap, the strongest argument to make is to direct the Court to the medical records of the surgery and explain the gruesome details of how the surgery was performed.[9] Using the medical records and referencing how the actual procedure is performed allows the facts to speak for themselves. There is no lawyer, judge, or person who would happily submit to this surgery. The details in a surgeon's operative report explain the undeniable permanent and substantial changes that were done to the plaintiff's body. It also neutralizes the argument from the defense that "well it is only a hip replacement."

> In echoing this sentiment, Judge Yost in his decision stated:
>
> The Court finds that, in the case of a hip replacement, there is an *issue of fact as to whether the removal of natural bone and its replacement with a prosthetic device constitutes a physical deformity,* which is sufficient to require the question to be determined by the jury. (*emphasis added*)[10]

Stating that the removal of natural bone and replacement with a prosthetic device creates a genuine issue of material fact is powerful language. It can give guidance to other courts in any case where plaintiff requires a joint replacement. This is because in order to have a joint replaced, there is going to be permanent and substantial tissue and skeletal changes, and a prosthetic device is implanted. Thus, you should be able to demonstrate that there is a genuine issue of material fact as to whether or not the non-economic damages cap should be $500,000 in any joint replacement case. ■

End Notes

1. *Ennis et al. v. Hunt et,* Ashtabula Court of Common Pleas – 2013-cv-357.
2. R.C. §2323(C)(2) allows either party to seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination of the damages.
3. R.C. §2323.43(A)(3)(b).
4. "There is no specific definition in Ohio Revised Code . . . for 'permanent and substantial physical deformity.'" *Ross v. Home Depot USA, Inc.*, 2:12-cv-743, 2014 LEXIS 133507 (S.D. Ohio June 20, 2014) (citing *Weldon v. Presley,* 2011 WL 3749469, *6 (N.D. Ohio Aug. 9, 2011)). Furthermore, despite the lack of a specific definition for "permanent and substantial physical deformity," there is not a lot of case law on the issue. The limited case law that does discuss the issue of what constitutes a "permanent and substantial physical deformity" for purposes of R.C. §2323.43 does not define the phrase. But courts have determined that the nature and severity of a plaintiff's injuries should be resolved by a jury interrogatory at trial. *Guiliani v. Shehata*, Nos. C-130837, C-140016, 2014 WL 4792265 (Ohio Ct. App. 1st Dist. Sept. 26, 2014) (finding whether removal of bladder, large part of colon, and rectum constitutes "permanent and substantial physical deformity" was a jury question); *Wilson v. United State*, 375 F. Supp. 2d 467, 471 (E.D. Va. 2005) (finding under a similar statute that scarring associated with surgeries could constitute a "permanent and substantial physical deformity").
5. Although R.C. §2315.18(B)(3)(a) does not apply to medical malpractice cases, the statute is almost identical to R.C. §2323.43 and there is more case law regarding what constitutes a "permanent and substantial physical deformity" under R.C. §2315.18. These cases show that a plaintiff's injury does not have to include the loss of the use of a limb or the loss of a bodily organ system. *See Ross*, 2014 LEXIS 133507, at *11-12. Nor does the plaintiff's injury have to prevent him from being able to take care of himself or perform life-sustaining activities. *See id.* Instead, courts have found that mere scarring may be so severe as to qualify as a serious disfigurement, but not every scar or permanent injury can meet the definition of "substantial physical deformity" as a matter of law. *See Cawley v. Eastman Outdoors, Inc.*, No. 1:14-CV-00310, 2014 LEXIS 148194 (N.D. Ohio Sept. 16, 2014) (finding whether injury to a hand resulting in substantial scarring, decreased range of motion, and diminished grip strength constitutes "permanent and substantial physical deformity" is a question for the jury); *see also Bransteter v. Moore,* No. 3:09-CV-2, 2009 LEXIS 6692 (N.D. Ohio Jan. 21, 2009) (issue of whether perforated bowel and surgical scar qualified as "permanent and substantial physical deformity" submitted to the jury); *Ross*, 2014 LEXIS 133507, at *11-12 (finding whether "unnatural" and "distorted" conditions and "significant amount of hardware" implanted in knee and shoulder constitutes a "permanent physical deformity" is a question for the jury); *White v. Bannerman*, No. 2009CA00221, 2010 WL 3852354 (Ohio Ct. App. 5th Dist. Sept. 27, 2010) (finding "permanent and substantial physical deformity" where surgery to have glass removed from hands and face resulted in scarring, severed tendons in hands, and permanent numbness); *but see Weldon v. Presley*, No. 1:10 CV 1077, 2011 WL 3749469 (N.D. Ohio Aug. 9, 2011) (finding injuries to head, neck, shoulders, and back, as well as four centimeter surgical scar not a "substantial physical deformity" as a matter of law); *Giebel v. Lavalley*, No. 5:12-cv-750, 2013 WL 6903784, at *11 (N.D. Ohio Dec. 31, 2013) (finding no evidence of "permanent and substantial physical deformity" where plaintiff suffered neck and lower back sprain, damage to cerebellum portion of brain, other organic brain damage, and damage to optic nerve); *Simpkins v. Grace*, 2014-Ohio-3465 (Ohio Ct. App. 5th Dist. Aug. 8, 2014) (finding post-traumatic stress disorder and low grade depression did not constitute "permanent and substantial physical deformity").
6. *Ohle v. DJO Inc.*, 1:09-CV-02794, 2012 WL 4505846 (N.D. Ohio Sept. 28, 2012).
7. *Id.*
8. *Id.* at 4.
9. It is helpful to watch a youtube video beforehand so you have an idea of how gruesome the surgery is. Also, if your treating physician is comfortable with it, have them watch the video during their deposition and agree that is what the Plaintiff went through. You can then use it during both mediation and trial to really drive home how gruesome a joint replacement surgery is.
10. *Ennis et al. v. Hunt et*, Ashtabula Court of Common Pleas – 2013-cv-357.

Stuart E. Scott is a principal at Spangenberg, Shibley & Liber Law LLP. He can be reached at 216.696.3232 or sscott@spanglaw.com.

Utilizing Consent Judgments In Bad Faith Claims

by Stuart E. Scott

Special thanks to law clerk Kevin Donoughe who provided research for this article.

Consider the following two hypothetical situations: your client suffered a catastrophic head injury as a passenger in a vehicle that struck the rear of a dump truck on a high-speed highway. The dump truck was fully operational and its driver negligently parked it along the berm with the rear of the truck partway into the traveled portion of the highway. The trucking company, whose insurance will cover its employee's negligence, has a single-limit policy with a $1,000,000 limit. Your client's damages far exceed the trucking company's policy limits and the company has limited, if any, ability to pay an excess judgment. You have made a demand for the policy limits, which was rejected. The insurer claims it was the fault of the driver of the car. To complicate your client's predicament, the driver of the vehicle in which your client was injured has also made a claim on the policy, albeit for a much smaller amount. In a second hypothetical situation, maintaining all of the facts set forth above, assume the trucking company's insurer has abandoned the defense of the trucking company on the basis the crash was not covered under the policy. How can you ensure maximum recovery for your client in each of these hypothetical situations?

Your client *could* enter into a consent judgment with the tortfeasor, and in exchange for a covenant not to execute against him, the tortfeasor would assign your client his potential bad faith claim against his insurer. However, it is unclear whether this tactic will actually ensure maximum recovery for your client; Ohio courts have yet to determine whether a consent judgment is valid or may serve as the presumptive measure of damages in a bad faith action against the insurer. This article briefly outlines how arguing for the application of a reasonableness standard for a consent judgment can obtain a just outcome for your client while protecting the interests of both the insured, who fears exposure to an excess judgment or punitive damages, and the insurer, who is wary of the potential for fraud and collusion. Ohio Judges should be amenable to adopting the standard outlined below because it has been applied by a number of other states, it is not contrary to Ohio law, and it balances the interests of the insured and the insurer

A. Ohio's Standard for Bad Faith in the Duty to Settle.

In Ohio, if an insurer does not have a "reasonable justification" for refusing to pay its insured's claim, the insurer can be found to have breached its duty of good faith.[1] An insurer has a duty to act in good faith in the settlement of a third-party claim.[2] This is particularly true where the insured faces personal exposure because the plaintiff's damages are likely to exceed the insured's policy limits. [3]

In *Netzley v. Nationwide Mut. Ins. Co.*,[4] the Second District explored the factors that may be considered in determining whether an insurer has acted in good faith where it fails to settle within the policy limits and, as a result, an excess judgment

is entered against the insured. The court stated that the insurer must do the following: (1) engage in an appropriate investigation of the circumstances of the incident from which the claim arises; (2) make a general determination as to the degree of liability of its insured; and, (3) convey this determination of liability to the insured.[5] This is to ensure that the insured is duly apprised of any potential exposure to liability in excess of the policy limits.

Netzley found that "it is the duty of the insurer to fairly enter into negotiations looking to a settlement within the policy limits where there is reason to believe that the claim against their insured is a meritorious one, and where the reasonable expectation of successfully defending the action is negligible."[6] The court also stated that "an offer of settlement of the claim at, or near, the policy limits should be conveyed to the insured" in order to allow the insured to participate in settlement discussions.[7]

Under the hypothetical situation set forth above – armed with the knowledge that your client's claim far exceeds the trucking company's policy limits – you should first make a settlement demand for the policy limits, with a time limit attached. The insurer will expressly refuse to settle, will ignore the demand, make a counter-offer under its own terms or agree to pay the full policy. Unless the insurer pays the full policy limits, you continue to litigate the case. This can create one of the potential bad faith scenarios enumerated in *Netzley*. Because of the multiple claims to the policy and the fact that your client's damages alone far exceed the policy limits, the trucking company will rationally fear personal exposure to excess liability and will desire a resolution that minimizes its exposure. A consent judgment is one solution that would assuage the trucking company's fear of personal exposure while still providing your client the ability to maximize his recovery.

B. *Calich v. Allstate Ins. Co.*: The Question of Whether a Consent Judgment is Valid and Can Constitute the Measure of Damages in a Bad Faith Claim is Still Unanswered in Ohio.

Whether an excess *consent judgment* entered against the insured may serve as a valid judgment and the measure of damages in a bad faith case has yet to be decided by the Ohio Supreme Court. While the Ninth District addressed the issue in *Calich v. Allstate Ins. Co.*,[8] and the majority answered in the negative, the flaws in the majority's reasoning were exposed in the much more persuasive dissent.

In *Calich*, plaintiff Rebecca Calich made a settlement demand for the tortfeasor's policy limits – $100,000 per occurrence – to the tortfeasor's insurer, Allstate.[9] Under the terms of the settlement demand, Allstate was required to tender the insured's policy limits within 30 days.[10] When Allstate did not offer the full policy limits, Calich filed suit against Allstate's insured.[11] Ultimately, Calich offered to settle by having the tortfeasor enter into a consent judgment for $1,060,000 and an assignment, from the tortfeasor to Calich, of all his claims against Allstate.[12] While the trial court accepted the consent judgment, the Ninth District rejected it, holding that "without [] an *adjudicated* excess judgment, Calich was unable to file a bad faith cause of action either directly, or via assignment, against Allstate."[13] The court stated that "allowing the filing of such a bad faith claim can potentially encourage a judgment-proof tortfeasor to conspire with the plaintiff and enter an agreement for an astronomical sum with a full release to the tortfeasor."[14] The court continued that such a "manufacturing" of a bad faith claim "puts an insurance company in a precarious situation, without a legitimate opportunity to properly protect itself from a bad faith claim."[15]

Judge Carr espoused the opposite view in her dissent, relying on the Ohio Supreme Court's decision in *Carter v. Pioneer Mut. Cas. Co.*,[16] and finding that Ohio law dictates that an entry of excess judgment, alone, constitutes sufficient damage to sustain a recovery from an insurer for its breach of the duty to act in good faith in settling the insured's case within the policy limits.[17] Absent any guidance from the Ohio Supreme Court on the precise issue at bar, the dissent would have held that "an insured may assign its bad faith claim against an insurer, based on an excess consent judgment, so long as the insured remains personally financially liable under the consent judgment."[18]

Judge Carr's dissent properly pointed out that requiring an adjudicated excess judgment as a predicate for a bad faith cause of action would mean that "insurers could, with impunity, act as unreasonably as they choose," and would "lead to further inequality in the bargaining power that an insurer holds over its insured, by virtue of superior resources."[19] The dissent also shared the court's concern for the potential "fraud or collusion" that may arise with an insured settling with a plaintiff, obtaining a release from liability and assigning its bad faith claim against an insurer.[20] After addressing the potential concerns of both the insurer and the insured, Judge Carr stated that the employment of safeguards is a possible solution that would permit an excess consent judgment to serve as the measure of damages in a subsequent bad faith claim, while still providing some protection to the insurer.

C. Arguing for the Adoption of a Reasonableness Standard for Excess Consent Judgments in Ohio.

Elements of Judge Carr's potential solution have been adopted in other jurisdictions in varied form. Rather than altogether rejecting consent judgments between the plaintiff and tortfeasor from serving as the measure of damages in a subsequent bad faith action (as the *Calich* majority concluded), Ohio should instead adopt a reasonableness standard similar to that of other states. Arguing for the application of a reasonableness standard will validate the consent judgment and allow it to serve as the measure of damages in a subsequent bad faith action, while alleviating the court's – and the insurer's – concerns regarding the potential for fraud or collusion.

In *Besel v. Viking Ins. Co. of Wisconsin*,[21] the Washington Supreme Court rendered its seminal opinion on this issue. In Washington, a consent judgment becomes the presumptive measure of damages in a subsequent bad faith action against an insurer where the judgment is deemed reasonable under certain criteria.[22] The court in *Besel* identified the following factors to guide the determination of whether a consent judgment is reasonable: (1) the releasing party's damages; (2) the merits of the releasing party's liability theory; (3) the merits of the released party's defense theory; (4) the released party's relative fault; (5) the risks and expenses of continued litigation; (6) the released party's ability to pay; (7) any evidence of bad faith, collusion or fraud; (8) the extent of the releasing party's investigation and preparation; and (9) the interests of the parties not being released.[23]

This approach "promotes reasonable settlements and discourages fraud and collusion."[24] Under this approach, the plaintiff bears the burden of proving the reasonableness of the consent judgment; and, once reasonableness of the consent judgment is proven, the burden shifts to the insurer to show that the judgment was the product of fraud or collusion.[25]

Application of the *Besel* reasonableness standard aligns with Judge Carr's suggestions for how Ohio law may employ safeguards in this consent judgment scenario, because the *Besel* approach places the burden of proof on the plaintiff and also allows the insurer to raise the defense of fraud or collusion.[26] The reasonableness standard has been applied in various forms by a number of other jurisdictions to validate consent judgments in subsequent bad faith actions.[27]

In our second hypothetical situation, in which the trucking company's insurer abandoned the company's defense, the consent judgment is an even more viable option. Most jurisdictions accept reasonable consent judgments where the insurer has abandoned the legal defense of its insured.[28] These jurisdictions reason that where an insurer improperly abandons its insured, the insured is justified in taking steps to limit his or her personal liability. By refusing to defend, the insurer takes the risk that it may have erred in determining that the policy did not provide coverage. The "majority rule is based on the rationale that when an insurer has refused to defend its insured, it is in no position to argue that the steps the insured took to protect himself should inure to the insurer's benefit."[29]

Returning to our opening hypothetical, assume your client's damages are between $3 million and $5 million, and your client has agreed to a consent judgment with the tortfeasor for $3.5 million. Under the terms of the consent judgment, your client is assigned the tortfeasor's bad faith claim against his insurer and is bound by a covenant not to execute the judgment until the outcome of the bad faith claim. To avoid the specter of fraud or collusion, your client and the tortfeasor have agreed to the terms of the consent judgment through arm's length negotiations. Your client files his bad faith claim against the insurer, who may move for dismissal based on the lack of an *adjudicated* excess judgment. Assuming you are not in the Ninth District, this will be a case of first impression. Thus, you can argue that the court should apply the reasonableness standard to the consent judgment.

Viewing the hypothetical case in light of the *Besel* standard: your client can prove the accident caused him severe injuries; the tortfeasor's liability is strong; the risk to the tortfeasor of continued litigation is extreme, as it is likely to result in the tortfeasor's personal exposure to liability and possibly punitive damages, which are not dischargeable in bankruptcy; and, the tortfeasor has minimal, if any, ability to pay a judgment against him. The consent judgment exceeds the tortfeasor's policy limits by $2.5 million, but is less than the full extent of your client's damages. If the court applies the *Besel* factors, it is very likely that the consent judgment would be deemed reasonable, shifting the burden to the insurer to demonstrate fraud or collusion. This approach thus balances your client's interests in maximizing recovery, the insured's interest in minimizing its personal exposure to liability and the insurer's interest in the ability to contest the judgment.

Just as other states have recognized the merits of this approach, the adoption of a reasonability standard for consent judgments in insurance bad faith actions is the right approach for Ohio. Adopting this approach would reasonably accommodate the competing interests of the parties and considerations of public policy. It will discourage collusive or overreaching impositions upon insurance carriers, discourage unnecessary litigation and, at the same time, will be conducive towards encouraging settlement and protecting an insured in its efforts to resolve a claim against it after its insurer fails to fulfill its duty to settle. ■

End Notes

1. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, paragraph one of the syllabus (1994). *Zoppo* reaffirmed the standard set forth in *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185 (1949), *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272 (1983), and *Staff Builders, Inc. v. Armstrong*, 37 Ohio St.3d 298 (1988).
2. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 275 (1983).
3. *See id.; see also Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, syllabus (1949).
4. 34 Ohio App.2d 65, 296 N.E.2d 550 (2d Dist. 1971).
5. *Id.*
6. *Id.* at 74.
7. *Id.* at 74-75; *see also Wasserman v. Buckeye Union Cas. Co.*, 29 Ohio App.2d 7, 16, 277 N.E.2d 569 (8th Dist.1972), *rev'd on other grounds*, 32 Ohio St.2d 69 (1972). The *Wasserman* court enumerated some elements to be considered in determining whether an insurer acted in good faith, including the following: (1) "how severe is the injury and what is the strength of the claimant's case on the issues of liability and damage and the likelihood of a verdict in excess of the policy limits?"; (2) whether the insurer advised the insured of his right concerning the obtaining of personal counsel to look after his interests; (3) whether the insurer advised the insured of his potential liability for any judgment in excess of the policy limits; (4) whether the insurer informed the insured of any compromise offers; (5) whether the insured demanded the case be settled for the policy limits; and, (6) whether the insurer insisted that the case be tried.
8. 9th Dist. No. 21500, 2004-Ohio-1619.
9. *Calich*, at ¶ 6.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at ¶ 8 (citing R*omstadt v. Allstate Ins. Co.,* 59 F.3d 608, 615 (6th Cir. 1995)); *accord Louque v. Allstate Ins. Co.*, 314 F.3d 776, 783 (5th Cir. 2002) (holding that, under Louisiana law, insured has no cause of action against its insurer for bad faith refusal to settle in the absence of an *adjudicated* excess judgment against the insured).
14. *Id.* The court elaborated: "even if the tortfeasor is not judgment-proof, he still escapes liability as a result of the full release. The result is extremely beneficial to the tortfeasor, who escapes liability, and to the plaintiff, who has the potential to gain a sum of money that greatly exceeds his or her actual injuries." *Id.*
15. *Id.*The court reasoned that without an adjudicated excess judgment, an insurer would not have been "given a reasonable opportunity to protect its interests and rights." *Id.*
16. 67 Ohio St.2d 146, 423 N.E.2d 188 (1981).
17. *Id.* at ¶ 14 (Carr, J., dissenting) (citing *Carter,* 67 Ohio St.2d at 148-49). Importantly, Judge Carr recognized that the "law is not settled in Ohio" regarding the viability of an excess consent judgment as a predicate to a bad faith cause of action. *Id.* at ¶ 23.

18. *Id.*at ¶ 26.

19. *Id.*at ¶ 22 (quoting *Ohio Bar Liab. Ins. Co. v. Hunt*, 152 Ohio App.3d 224, 2003-Ohio-1381 (2d Dist.)).

20. *Id.*at ¶ 24.

21. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wash.2d 730, 49 P.3d 887 (2002).

22. *Id.* at 738 (citing *Chaussee v. Maryland Cas. Co.,* 60 Wash. App. 504, 512, 803 P.3d 1339 (1991)). The criteria are commonly referred to as the "*Chaussee* factors."

23. *Id.*, 146 Wash.2d at 738. The Court noted that "no single criterion controls and trial courts must exercise their discretion in applying the criteria. All nine criteria will not necessarily be relevant in every case." *Id.* at 739, fn. 2.

24. *Id.*

25. *See id.* at 739.

26. *Compare id. with Calich* at ¶ 25 (Carr, J., dissenting).

27. *See, e.g., Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65, 81-82 (Kan. 1997) (holding stipulated judgment enforceable in case of refusal to settle within policy limits where judgment was reasonable and entered into in good faith); *Himes v. Safeway Ins. Co.*, 66 P.3d 74, 85 (Ariz. Ct. App. 2003) (expressly adopting Washington's *Chaussee* factors); *Griggs v. Bertram*, 443 A.2d 163, 174 (N.J. 1982) (holding that settlement may be enforced against insurer where it is reasonable in amount and entered into in good faith); *Old Republic Ins. Co. v. Ross,* 180 P.3d 427, 434 (Colo. 2008) (finding that stipulated judgment may be enforceable against insurer where insurer has acted in bad faith and judgment is subjected to adversarial proceeding before neutral factfinder); *Red Giant Oil Co. v. Lawlor,* 528 N.W.2d 524, 535 (Iowa 1995) (simplifying reasonableness inquiry to what a reasonable person in defendant's position would have settled case for, involving a "consideration of the facts bearing on the liability and damage aspects of plaintiff's claim, as well as the risks of going to trial").

28. *See, e.g, Hamilton v. Maryland Cas. Co.*, 41 P.3d 128, 134 (Cal. 2002) ("The denial of coverage and a defense entitles the policyholder to make a reasonable, noncollusive settlement without the insurer's consent and to seek reimbursement for the settlement amount in an action for breach of the covenant of good faith and fair dealing."); *Black v. Goodwin, Loomis & Britton, Inc.*, 681 A.2d 293, 299 (Conn. 1996) ("An insurer who chooses not to provide its insured with a defense and who is subsequently found to have breached its duty to do so must bear the consequences of its decision, including the payment of any reasonable settlement agreed to by the plaintiffs and the insured."); *S. Guar. Ins. Co. v. Dowse*, 605 S.E.2d 27, 29 (Ga. 2004) ("An insurer that denies coverage and refuses to defend an action against its insured . . . becomes bound to pay the amount of any settlement within a policy's limits made in good faith."); *Guillen v. Potomac Ins. Co. of Illinois*, 785 N.E.2d 1, 13 (Ill. 2003) (same holding); *Lawlor*, 528 N.W.2d at 532-33 (same holding); *Griggs*, 443 A.2d at 175 (same holding); *Ross*, 180 P.3d at 432 (same holding).

29. *Black*, 681 A.2d at 299. "Under the majority view, when an insurer breaches its contractual duty to defend and, as a result, improperly leaves its insured to fend for itself, the insurer will not be heard to complain when the insured enters into a settlement agreement 'so long as the insured acts in good faith, and without fraud.'" *Id.*

Kathleen J. St. John is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or kstjohn@nphm.com.

Mired in Obstructionism:[1] One Judge's Creative Sanction For Witness Coaching During Depositions

by Kathleen J. St. John

In the Spring 2011 issue of the *CATA News*, Ellen Hirshman hosted a roundtable discussion on Speaking Objections At Depositions.[2] Three plaintiffs' lawyers, one defense lawyer, and a Common Pleas Judge discussed obstructionist tactics during depositions and how to deal with them.[3] These attorneys noted that while speaking objections are an infrequent problem for the seasoned litigator, they still do happen, and once they have taken place "the damage is done and the witness's response has been shaped accordingly. The question then arises, what relief, what sanctions, am I entitled to from the Court?"[4]

Recently, a federal judge imposed a creative sanction on a lawyer who engaged in excessive speaking objections. In *Sec. Nat'l Bank v. Abbott Labs.*,[5] Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa ordered the offending attorney to "write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal or state court."[6]

The decision illustrates the obstructive tactics litigators are sometimes confronted with, and a novel solution one court imposed to discourage their recurrence.

A. The *Sec. Nat'l Bank* Case.

1. Background.

Sec. Nat'l Bank was a product liability action on behalf of a young child who suffered brain damage after consuming baby formula allegedly tainted by harmful bacteria. During trial, the judge, *sua sponte*, filed a show cause order as to why he should not sanction one of the defense attorneys for a "serious pattern of obstructive conduct" exhibited during depositions.[7] The show cause hearing was postponed until after the verdict – which was returned in favor of the defendant Abbott Laboratories.

The offending attorney, a partner in a large law firm, was represented in the sanctions hearing by another partner, whom the court described as "one of the best trial lawyers I have ever encountered."[8] The attorney urged that sanctions by a federal judge would seriously affect the offending attorney's otherwise outstanding career, and "should be imposed, if at all, with great hesitation."[9] The court did not disagree, but believed the facts warranted sanctions. Judges, the court stated, "so often ignore [obstructionist] conduct, and by doing so we reinforce – even *incentivize* –obstructionist tactics."[10]

2. The Improper Conduct.

The court found the offending attorney to

have engaged in three categories of obstructive tactics: excessive use of form objections, witness coaching, and "ubiquitous interruptions and attempts to clarify questions posed by opposing counsel."[11]

The least of these offenses – but still disturbing to the court – were the "at least 115" form objections raised by the attorney in two depositions.[12] Although the court believed that objecting to "form" without stating a basis for the objection was improper, it declined to sanction counsel for these objections because other courts have held them to be proper.[13] The court found, however, that the excessive "form" objections "facilitated" the witness coaching and other interruptions, and, to that extent, "amplified" the sanctionable nature of that other conduct.[14]

As for the witness coaching, the conduct fell into several categories. First, there were the "clarification-inducing objections" that caused witnesses to request clarification of "otherwise cogent questions.[15] Objections such as "vagueness," "calls for speculation," "ambiguous," or "hypothetical" served as cues for the witness to avoid the examiner's question. At times, the results bordered on the comical as in the following excerpt:

> Q. Is there – do you believe that there's – if there's any kind of a correlation that could be drawn from OAL environmental samples to the quality of the finished product?
>
> COUNSEL: Objection; vague and ambiguous.
>
> A. That would be speculation.
>
> Q. Well, if there were high numbers of OAL, Eb samples in the factory, wouldn't that be a cause for concern about the microbiological quality of the finished product?
>
> COUNSEL: Object to the form of the question. It's a hypothetical; lacks facts.
>
> A. Yeah, those are hypotheticals.
>
> . . .
>
> Q. Would that be a concern of yours?
>
> COUNSEL: Same objection.
>
> A. Not going to answer.
>
> Q. You're not going to answer?
>
> A. Yeah, I mean, it's speculation. It would be guessing.
>
> COUNSEL: You don't have to guess.[16]

Elsewhere, the clarification-inducing objections caused the witness to give "the seemingly Pavlovian response, 'Rephrase'" and evoked "a tag-team match, with counsel and the witness delivering the one-two punch of 'objection' -- 'rephrase[.]'"[17] Such objections, the court noted, are improper as they seek to create confusion in the witness's mind that may not otherwise exist. The court explained:

> Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The witness – not the lawyer – gets to decide whether he or she understands a particular question[.][18]

Next, there were the "if you know" or "if you understand the question" objections that predictably result in the witness having a sudden deficit of knowledge or understanding. For instance:

> Q. ... Is there any particular reason that that language is stated with respect to powdered infant formula?
>
> COUNSEL: If you know. Don't – if you know.
>
> A. No, I – no, not to my knowledge.
>
> COUNSEL: If you know. I mean, do you know or not know?
>
> A. I don't know.[19]

The "if you know" or "if you understand the question" objections, the court noted, "'are raw, unmitigated coaching, and are never appropriate.'"[20]

Then, there were the objections in which the attorney defending the deposition became both examiner and witness. These included instances where counsel reinterpreted or rephrased the examiner's question, supplied the witness with additional information, or responded to the examiner's question before the witness responded. Most outlandish among these was the moment when the offending attorney *disagreed* with the witness's answer, causing the witness to change her testimony:

> Q. My question is, was that a test – do you know if that test was performed in Casa Grande or Columbus?
>
> A. I don't.
>
> COUNSEL: Yes, you do. Read it.
>
> A. Yes, the micro – the batch records show finished micro testing were acceptable for the batch in question.[21]

The court found all of these objections "allowed [the offending attorney] to commandeer the depositions, influencing the testimony in ways not contemplated by the Federal Rules."[22] Each obstructionist tactic defeated the very purpose of the deposition as a "question-and-answer session between the examiner and witness[.]"[23] The court was not persuaded by the offending

attorney's argument that the objections were designed to steer opposing counsel "to the correct ground" when he "was on the wrong track factually" or to "speed up the process by helping to clarify or facilitate things" when "things got bogged down."[24] The court stated: "It is not for the defending lawyer to decide whether the examiner is on the 'wrong track,' nor is it the defending lawyer's prerogative to 'steer [the examiner] to the correct ground.'"[25]

Finally, the court addressed the category of excessive interruptions – a category encompassing much of what was already discussed but that provided "an independent reason to impose sanctions."[26] The court noted that the offending attorney's name appeared at least 92 times – or once per page – in the transcript of one deposition; and 381 times – or almost three times per page – in the transcript of another deposition. "By interposing many unnecessary comments, clarifications, and objections," the court stated, "Counsel impeded, delayed, and frustrated the fair examination of witnesses during the depositions Counsel defended."[27]

3. The Sanction.

Although the offending conduct would justify monetary sanctions, the court was "less interested in negatively affecting Counsel's pocketbook than... in positively affecting Counsel's obstructive deposition practices" and "deterring others who might be inclined to" engage in similar practices.[28] Hence, the "outside-the-box" sanction of creating a training video explaining the "holding and rationale of this opinion."[29]

The video was to be written and produced by the offending lawyer; and that lawyer or another partner in the firm was to appear in the film. Once approved by the court, the completed video was to be provided to all lawyers in the firm who engaged in state or federal litigation or who worked in any practice group in which at least two of the lawyers had filed an appearance in any state or federal case in the United States. The sanctioned lawyer then had to file an affidavit with the court certifying compliance with the court's order, along with a copy of the email notifying the appropriate lawyers in the firm about the video.

B. Conclusion.

The *Sec. Nat'l Bank* case presents an extreme example of obstructionist tactics used by some attorneys in depositions. The court in that case acknowledged that occasional instances of the conduct described in its decision would not warrant sanctions.[30] Indeed, as discussed in the prior issue of the *CATA News*, "sometimes the talking objection is absolutely essential to prevent abusive questioning. So when a judge is confronted with this question, it's not a one-side question. He has to get to the heart of the matter, as to what the interactions were and what the real situation was in the deposition."[31]

As of the writing of this note, the *Sec. Nat'l Bank* sanctioning order is on appeal in the Eighth Circuit Court of Appeals, and the order is stayed. But the opinion has caught the attention of practitioners,[32] and, regardless of the outcome on appeal, remains a rich source of authority to cite when seeking sanctions for excessive obstructionist conduct in depositions. ■

End Notes

1. "Discovery – a process intended to facilitate the free flow of information between parties – is now too often mired in obstructionism." *Sec. Nat'l Bank v. Abbott Labs.*, 299 F.R.D. 595, 596 (N.D. Iowa 2014).
2. *Speaking Objections At Depositions: A Roundtable Discussion*, hosted by Ellen H. Hirshman, CATA News, Spring 2011, pp. 12-17.
3. The plaintiffs' attorneys were Gerry Leeseberg of Leeseberg & Valentine in Columbus, Ohio; Steve Collier of Connelly, Jackson & Collier, in Toledo, Ohio; and Toby Hirshman, then of Linton & Hirshman in Cleveland, Ohio.The defense attorney was Bill Bonezzi of Bonezzi, Switzer, Murphy, Polito & Hupp in Cleveland, Ohio. The judge was Richard McMonagle of the Cuyahoga County Court of Common Pleas.
4. Gerry Leeseberg, quoted in *Speaking Objections At Depositions, supra*, at p. 14.
5. 299 F.R.D. 595 (N.D. Iowa 2014).
6. *Id.* at 610.
7. *Id.* at 598.
8. *Id.* at 597.
9. *Id.*
10. *Id.* (emphasis by the court).
11. *Id.* at 598.
12. *Id.* at 600.
13. *Id.* at 603.
14. *Id.* at 603-604.
15. *Id.* at 604.
16. *Id.*
17. *Id.* at 605.
18. *Id.* (citing *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 U.S. Dist. LEXIS 1363, 2012 WL 28071, at *5 (D. Kan. Jan. 5, 2012)).
19. *Id.* at 607.
20. *Id.* (citing *Serrano*, 2012 U.S. Dist. LEXIS 1363, 2012 WL 28071, at *5).
21. *Id.* at 608.
22. *Id.*
23. *Id.* (citing *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993)).
24. *Id.* at 608-609.
25. *Id.* at 609.
26. *Id.* (citing *Fed. R. Civ. P. 30*, advisory committee notes (1993 amendments)).
27. *Id.*
28. *Id.*
29. *Id.* at 610.
30. *Id.*
31. Toby Hirshman, as quoted at p. 15 of *Speaking Objections at Depositions,* n. 1, *supra.* Compare, *Cuyahoga County Local Rule 13.1(B)(3)(f)* (permitting objections "necessary to assert that the questioning is repetitive, harassing, or badgering").
32. *See, e.g.*, Joe Patrice, Biglaw Firm Ordered To Make A Video Apologizing For Discovery Abuses, July 30, 2014 at 5:37 p.m., http://abovethelaw.com/tag/june ghezzi/

Daniel Frech is a senior associate at Spangenberg, Shibley & Liber Law LLP. He can be reached at 216.696.3232 or dfrech@spanglaw.com

Courts Grapple With The Effect of Arbitration Clauses Added After Filing But Before Certification

By Daniel Frech

Imagine that you have filed a consumer class action based, at least in part, on the terms of consumers' form agreements with their bank, cellular provider, digital content provider or other mass proliferator of adhesion contracts. After years of litigating – successfully overcoming a motion to dismiss, completing large swaths of discovery and finally obtaining class certification – the defendant ambushes you with an order to compel arbitration. It contends your client assented to mandatory binding arbitration and a class action waiver as part of their agreement with the company. You look back at the agreement that was in effect at the time the case was filed and there is no arbitration clause. Nor is one present in the agreement your client entered into at the inception of the relationship years before – what gives?

What gives is that some defendants have recently sought to enforce arbitration agreements in class action litigation that were unilaterally added to consumer agreements *after* the putative class action was filed. The consumer is typically sent a "notice" of the added provision in the mail, by e-mail, or even through a text message, and there may be an "opt-out" clause permitting the consumer to reject the arbitration provision by filling out a form and returning it to the company. If the consumer fails to "opt-out" by the specified deadline provided, which an overwhelming majority invariably do, the arbitration agreement is automatically integrated into the agreement.

As with any dispute concerning the applicability of an arbitration agreement, the court's role is limited to determining whether the agreement is valid and whether the dispute falls within the scope of the agreement.[1] Challenging the validity of an agreement through contractual defenses, particularly unconscionability, has become more difficult in the wake of the Supreme Court's decision in *AT&T v. Concepcion*.[2] Pre-*Concepcion*, the agreements described above would potentially have been found unconscionable (and therefore unenforceable) due to the unilateral implementation, unequal bargaining power of the parties and waiver of class action participation. Today, these are viewed as standard elements of a consensual consumer agreement, and as one district court judge remarked, "[t]he Supreme Court has thus blessed class action waivers."[3] However, courts dealing with the unique factual scenario presented above have found that neither the Federal Arbitration Act's presumption of arbitrability, nor *Concepcion* and its progeny can shield similar agreements from invalidation.

RULE 23(d)

Rather than refusing to enforce these agreements based on traditional contractual defenses, courts have turned to an alternate source of law for support: the Rules of Civil Procedure, specifically, Rule 23(d). The crux of the argument is this: once a class action complaint is filed and a class of putative plaintiffs is born, the defendant's

communications with these individuals becomes subject to the supervisory authority of the court under Rule 23.[4] As articulated by the Supreme Court in *Gulf Oil Co. v. Bernard*, "[b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[5] Though courts had previously construed Rule 23(d) authority under *Gulf Oil* to require a "specific finding of abuses," this interpretation has since been expanded.[6] Courts generally accept now that the "abuse" referenced in *Gulf Oil* contemplates any improper communications that "threaten the integrity of the class action and the fair administration of justice."[7] This includes communications that mislead putative class members by "omitting critical information" – like the existence of a pending suit filed on their behalf and the fact that the arbitration agreement contained therein would disqualify them from participating in that suit.[8] Additionally, there is extra force in such an argument when the consumer is in an "ongoing and unequal business [. . .] relationship between the parties," "such that communications may be deemed inherently coercive."[9]

Agreements implemented in this manner – post filing, pre-certification arbitration agreements waiving class action relief unless the plaintiff opts-out – have not been treated favorably by district courts, whether in consumer or employment actions. As noted recently by the 11th Circuit: "District courts' corrective actions have included refusal to enforce arbitration agreements instituted through improper means and where the timing of the execution of those agreements was similar to the post-filing, pre-certification timing in this case."[10] Underlying these decisions is the notion that the court's authority to control the conduct of the parties with respect to class members "necessarily flows from the court's obligation to ensure that decisions as to participation by potential class members are freely made after appropriate notice."[11] This is in line with the Supreme Court's maxim that "arbitration is a matter of consent, not coercion."[12]

SCOPE

While arbitration agreements can have retroactive effect, courts interpreting them in this posture will closely peruse the text of the agreement to determine the true intent of the parties. In *Russell v. Citigroup, Inc.*, 748 F.3d 677 (6th Cir. 2014), the provision at issue mandated arbitration for "all employment related disputes [. . .] based on legally protected rights [. . .] and arise between you and Citi, its predecessors, successors and assigns, its current and former parents, subsidiaries, and affiliates, and its and their current and former officers directors, employees, and agents." *Id.* at 679. The court reasoned that the present tense verb "arise" meant the agreement would cover disputes occurring after the agreement became binding, noting "the present tense usually does not refer to the past."[13]

Because arbitration agreements that are not explicitly retroactive are presumptively vague as to that issue, courts also look to the intent of the parties to determine whether or not the agreement was meant to be retroactive. In *Russell*, the court seemingly used this as an opportunity to subtly prod the defendants for what they found to be an improper communication. For class action defendants, disclosing the drafter's intent can create problems and reinforce the notion that the provision was misleading or unconscionable: if the drafter admits he intended for the contract to be retroactive and the contract is distributed *after* a class action is filed, the defendant is essentially admitting it participated in what it knew – or should have known – was an improper class communication. Conversely, if the defendant states it was not its intent for the clause to be retroactive and the putative class members did not understand it to be retroactive then "[t]he common expectations of the parties will reinforce the point" that the agreement is not retroactive. *Id.* at 680. "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Concepcion* at 1752.

WAIVER

Finally, depending on how long the suit has been active and what pre-trial activities have occurred, the court may also find that the party compelling arbitration has impliedly waived that right. However, "[d]ue to the FAA's strong presumption in favor of arbitration, waiver of the right to arbitration is not to be lightly inferred."[14] To determine whether a party has waived a right to compel arbitration, the court must find the defendant has (1) taken actions "that are completely inconsistent with any reliance on an arbitration agreement"; and (2) delayed raising or invoking the arbitration agreement "to such an extent that the opposing party incurs actual prejudice." *In re Polyurethane Foam Antitrust Litigation*, 1:10 MD 2196, 2014 WL 705318, *2 (N.D.Ohio Feb. 25, 2014). *See also, S&R Co of Kingston v. Latona Trucking*, 159 F.3d 80, 83 (2d Cir. 1998) (finding right to enforce arbitration clause may be waived when party "engages in protracted litigation that results in prejudice to the opposing party."). Actual prejudice includes "unnecessary expense or delay." *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012) (finding eight-month delay in raising right to arbitrate, "expenses involved with numerous scheduling motions and

court-supervised settlement discussion," and engaging in extensive discovery constituted actual prejudice.). *See also, Stone v. E.F. Hutton & Co.,* 898 F.2d 1542 (11th Cir. 1990)(finding delay of over one year and eight months in requesting arbitration waived this defense and rendered motion to compel untimely.)

Federal courts have employed different legal bases for denying effect to arbitration clauses added to an underlying contract after the initiation of class action litigation. However, the post-*Concepcion* case law is still somewhat undeveloped and the general trend in federal courts of favoring arbitration in every instance remains strong. Whether the general trend toward arbitration can overcome the fundamental notion that the rules should not change in the middle of the game is something for class action practitioners to keep a close eye on going forward. ■

End Notes

1. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). ("In deciding a motion to compel arbitration, a court's role is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.").
2. 131 S.Ct. 1740 (2011).
3. *Damato v. Time Warner Cable, Inc.*, 2013 U.S. Dist. LEXIS 107117, 2013 WL 3968765 (E.D.N.Y. July 30, 2013).
4. *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 252-53 (S.D.N.Y. 2005)); *Kahan v. Rosenstiel,* 424 F.2d 161, 169 (3d Cir. 1970) ("The putative class members' rights in this litigation were protected as of the filing date of the complaint.").
5. 452 U.S. 89, 100 (1981).
6. *See In re Currency Conversion* at 254 (finding courts have authority to prevent communications "that undermined Rule 23 by encouraging class members not to join the suit.").
7. *O'Connor v. Uber Technologies, Inc.*, No. C-13-3826 EMC, 2014 WL 1760314 (N.D.Cal. May 2, 2014).
8. *See Balasanyan v. Nordstrom, Inc.*, 11-CV-2609-JM-WMC, 2012 WL 760566, *3 (S.D.Cal. Mar. 8, 2012) (finding defendant's failure to disclose pending litigation when it circulated its arbitration agreement for approval "create[d] an incentive to engage in misleading behavior.").
9. *Zamboni v. Pepe West 48th St. LLC*, 2013 U.S. Dist. LEXIS 34201, 2013 WL 978935 (S.D.N.Y. Mar. 12, 2013)*See also Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1199, 1206 (11th Cir. 1985) ("If the class and class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive").
10. *Billingsley v. Citi Trends, Inc.*, 560 Fed. Appx. 914, 923 (11th Cir. 2014) (citing *Balasanyan*, 2012 WL 760566, at *1–2; *Williams*, 2011 U.S. Dist. LEXIS 75502, at *8-12; *see also In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp.2d at 252-54).
11. *Carnegie v. H&R Block, Inc.*, 180 Misc. 2d 67, 73, 687 N.Y.S.2d 528 (N.Y. Sup. Ct. 1999).
12. *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 681 (2010).
13. *Carr v. U.S.*, 560 U.S. 438, 448 (2010).
14. *General Star Nat'l Ins. Co. v. Administratia Asifurarilor De Stat*, 289 F.3d 434, 438 (6th Cir. 2002).

Meghan P. Connolly is an associate at Lowe Eklund Wakefield Co., LPA. She can be reached at 216.781.2600 or mconnolly@lewm.com.

Representing Jane Doe: Can My Client File Suit Under Pseudonym In An Ohio Civil Sex Assault Lawsuit?

By Meghan P. Connolly

We regularly name our clients and disclose their addresses in the captions of publicly filed pleadings. But some cases, such as those arising from sexual assault for example, may merit special efforts to protect a client from public naming. This is especially so today as court records become increasingly accessible online with the advent of electronic filing.[1]

Public exposure in sexual assault cases may cause additional harm to our clients through re-victimization.[2] Public naming also runs the risk of creating a "chilling effect", whereby sexual assault victims would rather avoid the civil justice system altogether than confront their perpetrators publicly. Filing lawsuits under a pseudonym (i.e., "Jane Doe", "John Doe"), is a strategy trial lawyers may employ to seek civil justice for the unfortunate victims of sexual assault.

Of course the adverse party doesn't always agree that the plaintiff's use of a pseudonym is appropriate or fair to the publicly named defendant, and a defendant may challenge the common, and growing, practice. The Supreme Court of Ohio recently balked on its opportunity to decide the legal standard Ohio courts should employ when presented with the issue. As case law develops in Ohio, trial lawyers must advocate for as comprehensive a test as possible so that the personal impact of public naming on each plaintiff is given due consideration.

A. Applicable Authority

It is clear that Ohio public policy strongly favors protection of sexual assault victims who seek to hold perpetrators accountable in Ohio courts. This is made apparent by Evid.R. 404(A)(2) (limiting character evidence of victims of sexual abuse), Evid.R. 807 (out-of-court statement of childhood sexual abuse victim not hearsay), and O.R.C. 2907.02(D) (limiting impeachment of rape victim).

Yet the Ohio Revised Code[3] and the Ohio Rules of Civil Procedure are silent on a plaintiff's right to use pseudonyms in civil sexual assault complaints. *See* Civ.R. 10(A); *Doe v. Bruner*, 2012-Ohio-761, 2012 WL 626202 (12th Dist. 2012) (concurring opinion). Civil Rule 10(A) generally states, "[i]n the complaint the title of the action shall include the names and addresses of all the parties***." *See* Civ.R. 10(A). Importantly, neither Civ.R. 10 nor the comments thereto suggest that a pseudonym fails to satisfy the naming requirement.

The Ohio Supreme Court has not addressed a challenge to a civil plaintiff's use of a pseudonym. The Court heard oral arguments on the issue in *Doe v. Bruner*, 135 Ohio St.3d 277, 985 N.E.2d 1288 (2013) in February, 2013, but the case was dismissed sua sponte as improvidently accepted. *See Doe v. Bruner*, 135 Ohio St.3d 277, 985 N.E.2d 1288 (2013). In the void created by the dismissal of *Bruner*, plaintiffs' counsel should emphasize

that the practice of proceeding under a pseudonym is well established in Ohio. Many cases have been heard by the highest Court of this state under pseudonym in order to protect the plaintiff's privacy.[4] By permitting these cases to proceed pseudonymously, the Court has implicitly endorsed the practice.

In one of the most well-known constitutional law cases of our history, the Supreme Court of the United States also implicitly endorsed the use of pseudonyms to protect the privacy interest of a plaintiff. *See, e.g., Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973).[5] Like the Ohio Supreme Court, SCOTUS has not expressly set a federal standard.

Somewhat surprisingly, the Twelfth District Court of Appeals is the only Ohio Appellate Court to expressly decide the issue. See *Doe v. Bruner, supra*. *Bruner* involved allegations of unwanted homosexual activity forced upon the plaintiff by a fellow college student. The plaintiff sought to litigate as "John Doe."

B. The *Bruner* Test

In *Bruner*, due to the dearth of applicable Ohio case law, the Twelfth District adopted a balancing test from the Sixth Circuit Court of Appeals. Under the test, "a party can proceed under a pseudonym where a 'plaintiff's privacy interest substantially outweighs the presumption of open judicial proceedings.'" *Bruner* at ¶6. In conducting the balancing test, the Twelfth District considered only four somewhat outdated factors including the following:

> 1. Whether the plaintiffs seeking anonymity are suing to challenge governmental activity;
>
> 2. Whether prosecution of the suit will compel the plaintiffs to disclose information "of the utmost intimacy";
>
> 3. Whether the litigation compels plaintiffs to disclose an intention to violate the law, thereby risking criminal prosecution; and,
>
> 4. Whether the plaintiffs are children.

After applying the above factors to the facts of the case, the Twelfth District found that only the second factor concerning "the utmost intimacy" applied. Further, the court found that the applicability of only one factor was not enough to allow the plaintiff to proceed pseudonymously as "John Doe."

C. Improving upon the *Bruner* test by making it more comprehensive

The majority's analysis in *Bruner* is flawed for two reasons, both of which were stressed in the concurring opinion of Judge Ringland. First, the *Bruner* court mistakenly measured the *quantity* of factors present as opposed to the *quality* of the applicable factors. Second, the court unjustifiably limited its analysis to four outdated factors, when consideration of additional factors would have provided a more comprehensive analysis.

Regarding the first analytical flaw of the *Bruner* majority's decision, to count how many factors apply without weighing the effect of each factor was an exercise is arbitrariness. "For example, considerations of whether the prosecution of a suit would compel the plaintiff to disclose information of the utmost intimacy may be in and of itself more significant than whether threats of retaliation have not been met." *Bruner* at ¶18 (concurring opinion). In some civil sexual assault cases, the "utmost intimacy" factor would independently apply with sufficient weight to outweigh the presumption of open judicial proceedings.

The second flaw in the *Bruner* majority's analysis was that it stressed that the Sixth Circuit's list of considerations is "non-exhaustive", and that a trial court "should carefully review all circumstances of a given case", but failed to consider any additional factors. *See Bruner* at ¶7. Judge Ringland's concurrence suggests additional factors that embody a more comprehensive and modern review of *all* circumstances of a given case. The factors suggested by Judge Ringland include the following:

> 1. The extent to which the identity of the litigant has previously been kept confidential;
>
> 2. The reason upon which disclosure is feared or sought to be avoided;
>
> 3. The chilling effect, if any, of disclosure and being publically identified;
>
> 4. The strength or need of the public to know the litigant's identity;
>
> 5. Whether the party seeking pseudonym has a legitimate or illegitimate ulterior motive;
>
> 6. Whether either party is a public figure; and
>
> 7. Whether opposition to the use of pseudonyms has a legitimate basis.

This list of factors, and perhaps case-by-case variations of it, would improve upon the *Bruner* test by permitting the plaintiff to demonstrate the personal effect public naming would have on her or his well-being and ability to participate in civil litigation. A comprehensive list of factors permits full recognition of the impact of requiring a plaintiff to reveal matters of utmost embarrassment and humiliation without the protection of a pseudonym.

D. Conclusion

The next time the Ohio Supreme Court is appealed to in order to decide when a civil sexual assault plaintiff may proceed under a pseudonym, hopefully the Court, unlike the Twelfth District, will adopt a comprehensive and modern approach. Ohio victims of sexual assault should expressly be permitted to file suit under a pseudonym when doing so is appropriate to ensure access to the courthouse while minimizing the risk of additional and unnecessary harm to the plaintiff. ■

End Notes

1. The "information age" presents greater threats to plaintiffs' privacy interests, as private information is more easily discoverable on the internet. The privacy consequences faced by plaintiffs in civil sex assault cases become greater as online culture evolves. *See Starbucks Corp. v. Superior Court,* 168 Cal. App. 4th 1436, 86 Cal. Rptr. 3rd 482 (2008) (stating "the judicial use of Doe plaintiffs to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web.").
2. See *Protecting Victims' Privacy Rights; The Use of Pseudonyms in Civil Law Suits,* Violence Against Women Bulletin, July, 2011, National Crime Victim Law Institute (stating that "[s]ocial scientists have long recognized that victims can experience harm at the hands of the justice system.*** As one Connecticut court summarized: '[t]o force the plaintiff to proceed without the protection of the pseudonym Jane Doe could only subject the plaintiff to additional psychological harm and emotional distress.'")
3. States that statutorily allow the use of pseudonyms in civil suits include Alaska, Connecticut, Delaware, Florida, Illinois, New Jersey, and Texas. See *Protecting Victims' Privacy Rights: The Use of Pseudonyms in Civil Law Suits* at FN 26.
4. *See e.g., Doe v. Shaffer*, 90 Ohio St. 3d 388, 389, 738 N.E.2d 1243, 1244 (2000) fn.1; *Doe v. First United Methodist Church*, 68 Ohio St. 3d 531, 629 N.E.2d 402 (1994); *In Re Application of John Doe II*, 96 Ohio St. 3d 158, 2002-Ohio-3609, 772 N.E.2d 639; *Doe v. Archdiocese of Cincinnati*, 109 Ohio St. 3d 491, 2006-Ohio, 2625, 849 N.E.2d 268; *Doe v. Archdiocese of Cincinnati*, 116 Ohio St. 3d 538, 2008-Ohio-67, 880 N.E.2d 892; *Doe v. Marlington Local School District*, 122 Ohio St. 3d. 12, 2009-Ohio-1360, 907 N.E.2d 706, fn.1.
5. One commenter describes the trend following *Roe v. Wade* as "a virtual explosion not only in the number of cases brought by anonymous plaintiffs but also in the types of actions using the procedure."Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort,* 41 Wayne L.J. 1679 (1995).

Christopher M. Mellino is a principal at The Mellino Law Firm LLC. He can be reached at 440.333.3800 or cmm@mellinolawcom.

Pointers From The Bench:

An Interview With

Judge Pamela Barker

by Christopher M. Mellino

Congratulations to Judge Pamela Barker on her recent re-election to the Court of Common Pleas. Those of you who have had cases in front of Judge Barker know her to be a bright, thoughtful and fair Judge.

Judge Pamela Barker

Her diverse practice experience prior to becoming a Judge serves her well on the bench. Several years as an attorney with Progressive allowed her to hone her research and brief writing skills in addition to keeping a full trial docket.

After leaving Progressive she became a sole practitioner and had an active personal injury practice with some insurance coverage issues mixed in.

The next step in her career was to become a Brecksville Mayor's Court magistrate and the City's Juvenile Diversion magistrate, positions she held for 11 years. In those positions, then-Magistrate Barker discovered a passion for public service. She was empowered by the impact she could have on individuals and the community.

After 11 years, and desiring to have a broader impact, Barker was appointed to her current position on the bench in September 2011. Since that time she has campaigned and retained her position twice. Judge Barker is keenly aware of the frustrations of a trial lawyer having been one herself.

Therefore her courtroom and docket are geared toward being accessible, keeping cases moving and establishing a trial date certain. She does block out her criminal matters for civil trials so she expects the litigants to take the trial date as seriously as she does.

One disappointment as a Judge is the number of dispositive motions being filed that are devoid of any supporting evidence by way of deposition testimony, affidavits or other documentary evidence. She has been surprised by the number of lawyers relying on unsupported allegations in their briefs. Likewise she frowns upon the practice of mischaracterizing deposition testimony used to support a position or misstating the holding of case law that is being cited.

In the three years she has served on the bench Judge Barker has tried 12-15 civil cases and numerous criminal cases. Following all of her trials Judge Barker elicits feedback from the jurors. As you would expect jurors are consistently unhappy with repetition, contentiousness – whether between the lawyers or lawyers and witnesses – and lengthy closing arguments particularly when the lawyer uses it to recount the evidence in excruciating detail.

Judge Barker is enjoying her time on the bench. She loves being a judge, trying cases and considers it both an honor and a privilege to serve the public.

She was inspired to be a lawyer by watching all of the lawyer shows on TV when she was a kid including such classics as *Judd for the Defense*, *Owen Marshall* and, of course, *Perry Mason*. She is a history and political science buff and an avid reader of books on a variety of topics. She also claims to love to research and write as evidenced by the numerous opinions she has authored already in her short time on the bench. Judge Barker enjoys putting her decisions down on paper but believes written opinions are important not only to allow the litigants to understand her reasoning but also to help a reviewing court, whether it agrees with her or not, to reach the correct result for that case. ■

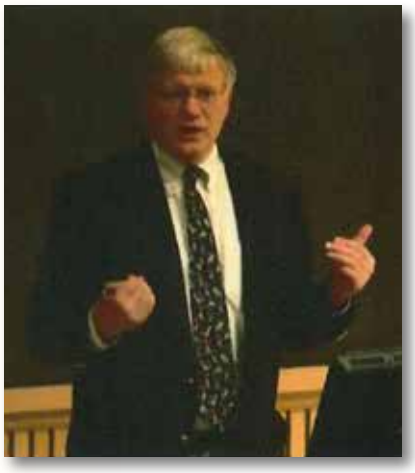
Beyond The Practice: CATA Members In The Community

by Susan E. Petersen

"Everybody can be great...because anybody can serve. You don't have to have a college degree to serve. You don't have to make your subject and verb agree to serve. You only need a heart full of grace. A soul generated by love." — Martin Luther King Jr.

Beyond the practice of law, here is what some of our CATA members are doing in their communities to give back --

When a good friend and fraternity brother died tragically of AIDS in the 80's, CATA member **Rick Stege** of the Solon law firm of **Stege & Michelson Co., LPA** knew he couldn't let his friend's work and leadership in the field of human rights be forgotten. Stege spearheaded a fundraising drive at their alma mater, Colgate University in New York, to raise money to support what is now known as the "Schaehrer Memorial Lecture in Peace and Conflict Studies." Since then, Stege has returned each year. Each year, the event has grown. In 2014, he served as coordinator for the Seventh Annual lecture and raised $350,000 to support the cause, bringing in as its speaker Fred Logevall, the Pulitzer Prize winner in History for his work on the Vietnam war (this being the 50th anniversary of the buildup there). The money is used to support two scholarships for students majoring in peace and conflict studies. As often happens when our members give back to causes close to their hearts, Stege says the event has become a smashing success and has truly enriched his life.



Rick Stege

CATA Member **Charlie Murray** and his partners at the law firm of **Murray & Murray** in Sandusky are another shining example of how our lawyers give back. "The Murray & Murray Charitable Foundation" was established years ago to enhance the quality of life in their community and to address the needs of its citizens. This year, it once again congratulated scholarship recipients who are each graduates of Sandusky High School. Each recipient is awarded an annual scholarship of $1,500 renewable for four years. The scholarship is awarded to a minority student from Sandusky High School with a GPA of 2.5 or higher who is beginning a post-high school, two-year or four-year education program. Since 1999, sixteen Sandusky High School graduates have received this scholarship. The 2014 graduate awarded this scholarship is Paul Guativa. Mr. Guativa is attending Case Western Reserve University. The Foundation also awards an annual scholarship to a student at Firelands Bowling Green State University. This year's recipient is Samuel Kuns, working toward his Associates of Science degree.

Firelands Habitat for Humanity Women's Build Groundbreaking with Murray Family Members

Beyond supporting the educational goals of local youth, **Murray & Murray Charitable Foundation** has also contributed to the Boys & Girls Club of Erie County for many years. Most recently, a contribution of $7,500 was given to the Club for the Club Recognition Program. The Foundation also contributed $2,500 through Second Harvest Food Bank of North Central Ohio to provide food for the children's backpacks distributed at the Boys & Girls Club. It helped fund the 2013 and 2014 Special Projects – Internship Initiative with the Erie County Council of Foundations, funded the Imagination Library providing books to children from infancy until school, provided funding to the Sandusky State Theatre for its 2014-2015 Children's Educational Series, and contributed monies for 40 Learn-to-Swim scholarships through the American Red Cross. For the fourth year, Murray & Murray Charitable Foundation has

contributed to the Regional Incubator for Sustainability and Entrepreneurship – RISE – Program run by the Erie County Economic Development Corporation. Lastly, Murray & Murray Charitable Foundation supports the Firelands Habitat for Humanity, pledging $30,000 towards it capital campaign.

At this time of year, our CATA members at the law firm of **Elk & Elk** continue a decade-long holiday tradition. The firms lawyers and staff have done their part to "Stock the Pantry" at St. Augustine Roman Catholic Church and Hunger Center. This has involved collecting food and monetary contributions for Cleveland's families in need. As in years past, **Elk & Elk** will be donating hundreds of turkeys for the center's Thanksgiving feast in November and collecting donations at the Center, located at 2486 on West 14th street in Cleveland's Tremont neighborhood, across from Lincoln Park. Donors didn't even have to get out of their vehicle, as **Elk & Elk's** partners, attorneys and support staff, along with their families, were on hand to unload donations. This year, St. Augustine's Hunger Center will serve over 18,000 Thanksgiving meals to those in need, with thousands being delivered to shut-ins.

CATA President Ellen Hirshman snaps a photo of the CATA table at the Legal Aid Luncheon

St. Augustine Hunger Center provides meals and addresses other needs of the poor and the homeless, such as food, clothing, emergency funding for rent and utilities, furniture and appliances, as well as advocating for those seeking medical help. Staffed entirely by volunteers, the Center is open year-round—serving three meals every day for hundreds of people in our community. You can help fight hunger. For more information including a list of much-needed items, visit http://www.elkandelk.com/About-Us/Community-Outreach/St-Augustine-Hunger-Center-2014.shtml.

Finally, in November, CATA gave back to the community by donating $3,000 as a Bronze Sponsor for The Legal Aid Society of Cleveland's 2014 Annual Luncheon & Report to the Community. The luncheon featured short presentations by several Legal Aid volunteer attorneys and the clients they had helped, and culminated in an inspirational talk by keynote speaker, the United States Secretary of Labor, Thomas E. Perez. CATA is proud to support The Legal Aid Society of Cleveland, whose mission "is to secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high quality legal services and working for systemic solutions."■

Susan E. Petersen is a principal at Petersen & Petersen, Inc. She can be reached at 440.279.4480 or sep@petersenlegal.com.

James A. Lowe is a principal at Lowe Eklund Wakefield Co., LPA. He can be reached at 216.781.2600 or jlowe@lewlaw.com.

GM's Ignition Switch Debacle Lessons Learned

By James A. Lowe

Beginning in February, 2014, General Motors, LLC ("New GM") began a series of recalls of vehicles, including Chevys, Pontiacs, Buicks, Cadillacs, Opels and Saturns because a defect in the ignition switch could cause the ignition switch to move from the "run" position to the "accessory" or "off" position.

From that spark, a firestorm of recalls, investigations and disclosures have erupted, with consequences yet to be fully known.

We can see these events as a catastrophe for the consuming public, or as an opportunity – or both.

Sadly, we have learned that there are literally millions of dangerously defective vehicles on the road, most with only two choices presently available: 1) park them and render them useless; or 2) drive them with the known defect, threatening the safety of the occupants and people in other vehicles.

Of course, it is not only the ignition switches in GM vehicles. It is also airbags in countless vehicles of various manufacturers and models – not just the Takata modules, but those manufactured by Key Safety Systems as well. And Chrysler trucks and SUVs have fuel heaters that can cause fires, while Ford acknowledges many of its airbags could fail to deploy.

The list goes on and on.

So what can we learn from all this? A great deal.

First, everyone who has been paying attention now knows that GM and Takata deliberately concealed from NHTSA and the public that they knew for years about deadly defective conditions in their millions of products. We know that this knowledge was not confined to one engineer; it is rooted in management.

We also know that these manufacturers insert lawyers into engineering meetings so as to label the memoranda and minutes from such meetings as protected by the attorney-client privilege, and thus undiscoverable.

We have also learned that it is trial lawyers whose determination and persistence has brought this corporate wrongdoing into the light. Not government regulators, not Congress, not the corporations themselves. It is, as it has always been, the trial lawyer's search for the truth that has uncovered these frightening threats to public safety.

Just another reason to be proud of what you do. ■

Daniel Copfer is currently 2L at Cleveland-Marshall College of Law and is a law clerk at Behrens, Gioffre & Schroeder Co., L.P.A..

Postscript To *McCutchen*: The Importance Of Requesting The Actual Health Plan When Defending Against ERISA Subrogation Claims

by Daniel Copfer

Resolving ERISA health insurance subrogation claims has become a major issue for lawyers handling personal injury cases. Health insurance companies are frequently hiring third parties such as Optum, Trover Solutions, or Xerox to aggressively pursue subrogation claims.[1] Attorneys (and our clients) get threatening letters in the mail from these third parties, demanding repayment of health benefits with little or no proof to support the alleged subrogation claim. So where should lawyers start when addressing the validity of an ERISA health insurance subrogation claim? This article will discuss the importance of forcing the entity making the alleged subrogation claim to provide the proper documentation needed to support it.

What governs a health insurance company's right to subrogation? First and foremost, there is nothing in the ERISA statute itself that automatically entitles a health insurance company to subrogation.[2] At best the statute provides that a fiduciary may bring a suit to "enforce…the terms of the plan."[3] Therefore, a health insurance company must have the subrogation clause in the health plan, because the terms of the summary plan description, or SPD, will not be enforced over the plan itself.[4]

The practical application for attorneys is that you MUST request a certified copy of the client's health plan that was in effect at the time of the loss. Third party collectors will frequently send a couple pages of subrogation language with no evidence substantiating that said terms were in the client's actual health plan and that it was in effect at the time of loss. They also sometimes will send a summary plan description. This is not sufficient to establish a right to subrogation.

A summary plan description [SPD] is a "disclosure meant 'to reasonably apprise [plan] participants and beneficiaries of their rights and obligations under the plan.'"[5] ERISA defines a "plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both"[6] that must "be established and maintained pursuant to a written instrument."[7]

Substantively, what needs to be in this written instrument to constitute a plan? The written "instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."[8] ERISA also specifies what must be included in "[e]very benefit plan."[9] Every plan shall:

> (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter;
>
> (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan;
>
> (3) provide a procedure for amending such plan, and for identifying the person who has authority to amend the plan; and

(4) specify the basis on which payments are made to and from the plan.[10]

In summary, "the plan's sponsor (*e.g.*, the employer), creates the basic terms and conditions of the plan, executes a written instrument containing those terms and conditions, provides in that instrument 'a procedure' for making amendments"[11] and specifies who payments are made to. Therefore, to constitute a plan under ERISA the "written instrument" must have all of these elements.

If there is a discrepancy between the terms of the SPD and the actual health plan, the terms of the actual health plan prevail. The Supreme Court has ruled on this issue in *CIGNA Corp. v. Amara*,[12] where it held that the statements in a summary plan description "communicat[e] with beneficiaries about the plan, but ... do not themselves constitute the terms of the plan."[13] It is important to note, however, that at the center of *Amara* is "the requirement that there be a conflict between the language of the SPD and the controlling plan document before the terms of the SPD can be ignored or overridden."[14] This makes sense because if the terms of the plan and the summary plan description are in harmony then one need not trump the other. Therefore, lawyers must first make sure to get the certified copy of the actual health plan to make sure the subrogation language is there and that it matches the SPD language. If it is not, or if the plan's language is in conflict with the SPD, then the legally binding actual health plan governs.[15]

Getting the actual health plan from these third party collection companies is not always easy. Even lawyers recently in front of the United States Supreme Court failed to obtain the actual health plan as they argued all the way to our highest court litigating over the wrong document. In *US Airways, Inc. v. McCutchen*,[16] the Appellant was injured when another driver collided with her.[17] Her accident-related damages were estimated to exceed 1 million dollars.[18] She was an employee of US Airways and was a participant in a self-funded health plan that fell under ERISA.[19] The plan paid $68,866 in medical expenses for McCutchen.[20] She retained attorneys to seek recovery for all accident related damages and they managed to get her $110,000 from the driver and her own insurance policy.[21] Once the 40% contingency fee was deducted McCutchen was left with $66,000.[22]

When US Airways learned about its employee's recovery it demanded reimbursement of its payment of $68,866.[23] In support of this claim it relied on a statement found in its summary plan description: "If [US Airways] pays benefits for any claim you incur…you will be required to reimburse [US Airways] for amounts paid for your claims out of any monies recovered from [the] third party including but not limited to your own insurance company…"[24]

Based on the Supreme Court's previous ruling in *CIGNA Corp.*, one would expect the actual health plan to be the controlling document and not the summary plan description. However, it was discovered by the Office of the Solicitor General of the United States and the Department of Labor, who demanded the actual health plan, that the plan and the summary plan description differed in material terms regarding US Airways' right to reimbursement.[25] It was discovered that the plan did not provide for a right to reimbursement nor did it mention the right to reimbursement from one's own insurance policy, both of which the SPD claimed it did.[26]

In an even stranger turn of events the Supreme Court, upon discovering this, decided just to rule based on the language in the SPD without examining the actual plan. The Court claimed that because the District Court and the Circuit Court both ruled solely on the language from the SPD so too must the Court rule on the SPD language without examining the terms of the actual health plan.[27]

On remand however, the fact that US Airways materially misled McCutchen and the Court is being dealt with. The district court has recently allowed McCutchen, six years after the start of the suit, to amend the complaint to add breach of fiduciary duties and statutory violations of non-disclosure, warranting relief based upon equitable estoppel and penalties.[28] The court stated that it was "troubled by US Airways's untimely production of the Plan documents and its disingenuous contention that [McCutchen] failed to request the Plan Document;" that "any prejudice to US Airways at this point of the litigation is a direct result of its failures;" and that US Airways's excuses for not producing the plan document are "woefully inadequate."[29]

What the *McCutchen* case serves to illustrate is that even lawyers arguing all the way to the Supreme Court have failed to obtain the actual health plan, which is the controlling document.[30] They mistakenly relied upon the subrogation language in the SPD, which was not to be found in the actual health plan.[31] Subrogation claims are fundamentally contractual claims, so lawyers must therefore force the third party collector to produce a certified copy of the actual health plan in effect at the time of the underlying accident causing injury to our client.[32] Despite being contractual in nature, the ERISA statute only allows for equitable remedies[33], to enforce the plan's terms usually through equitable liens or a constructive trust on particular funds or

property that must be in the defendant's possession.[34] This means that not all typical damages in contracts necessarily apply. Lawyers should tell third party collectors that they cannot even begin to address the alleged subrogation claim until the contractual basis for the claim is produced. Do not let these companies falsely assure you the terms are the same, because they might not be. Always demand from them the actual plan in effect at the time of the loss and do not take no for an answer or you may end up in front of the Supreme Court with the wrong document. ■

End Notes

1. For the purpose of the article the terms subrogation and reimbursement may be used interchangeably as both are dependent upon the language contained in the subject health plan. Also, I will assume that the health insurance plan is subject to ERISA.
2. Employee Retirement Income Security Program (ERISA), 29 U.S.C.A. 18, (West 2006).
3. *Id.* at § 1132 (West).
4. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1877 (2011).
5. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1882 (2011) (citing ERISA at § 1022(a).
6. 29 U.S.C. § 1002(3) (West 2014).
7. *Id.* at § 1102(a)(1).
8. *Id.*
9. *Id.* at § 1102(b).
10. *Id.*
11. *CIGNA*, 131 S. Ct. at 1877.
12. 131 S.Ct. 1866 (2011).
13. *Id.* at 1878.
14. *L&W Associates Welfare Benefit Plan v. Estate of Terance R. Wines*, No. 12 Civ. 13524 (E.D. Mich. Jan. 13, 2014)at 14; *See also Liss v. Fidelity Employer Services Co.*, 516 F. App'x 468, 473 (6th Cir. 2013) ("*Amara* does not support Liss's argument because there is no conflict between the SSIP and the SPD in the case at hand."); *Bidwell v. University Med. Center*, 685 F.3d 613, 620 n. 2 (6th Cir. 2012) (concluding that absent an actual conflict between the language of the plan summary and the plan itself, the court need not consider the applicability of *Amara*).
15. *CIGNA*, 131 S. Ct. at 1877.
16. 133 S. Ct. 1537 (2013).
17. *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1543 (2013).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at n. 1.
26. *U.S. Airways, Inc. v. McCutchen*, No. 2:08 Civ. 01593 (W.D. Pa. Mar. 17, 2014) at 2 ("the Plan differed in material respects from the SPD, neither providing for a right to reimbursement nor mentioning the right to reimbursement from a recovery from one's own insurance policy").
27. *Id.*
28. *U.S. Airways, Inc. v. McCutchen*, No. 2:08 Civ. 01593 (W.D. Pa. Mar. 17, 2014) at 3.
29. *Id.* at 3-4.
30. It should be noted McCutchen's lawyers did attempt to get the plan but the company told them the terms were the same and then denied them the actual health plan repeatedly.
31. *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1543 n. 1 (2013).
32. *See Mutual Serv. Cas. Ins. Co. v. Elizabeth State Bank,* 265 F.3d 601, 626 (7th Cir.2001) ("contractual" subrogation rights arise from an express or implied agreement between the subrogor and subrogee).
33. *Sereboff v. Mid Atl. Med. Servs., Inc.,* 547 U.S. 356, 363 (2006) ("the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable.").
34. *Id.* 547 U.S. at 363.

Kathleen J. St. John is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or kstjohn@nphm.com.

Proving A Negative:
What Evidence Is Sufficient To Hold A Supplier Liable "As If It Were The Manufacturer" Under R.C. 2307.78(B)(1)?

by Kathleen J. St. John

How much evidence is enough when you're trying to prove a negative?

That question came up in one of our recent cases, and presents an interesting conundrum. So if you're interested in an obscure bit of law where personal jurisdiction meets product liability, bear with me as I ruminate over this perplexing problem.

I. The Problem.

Our client was injured when a chair he had purchased two weeks earlier from an online retailer we'll call Iowa.net broke from under him. Iowa.net is located in Iowa, but has a warehouse in Ohio. The chair was part of a shipment of furniture Iowa.net had ordered from a Los Angeles distributor/wholesaler owned and operated by a Chinese expatriate. We'll call that company LA.distrib and its owner Mr. Chang.

LA.distrib purchased its products primarily from manufacturers located in China. Mr. Chang made frequent trips to China to find new products and manufacturers. The furniture in question was purchased from a manufacturer he had recently discovered, that we'll call Yunnan Products.

Given that a brand new chair requiring no assembly collapsed under the weight of an average-sized person, it was pretty clear the product was defective. Indeed, investigation showed that the glue used in assembling the chair had failed. But under the Ohio product liability statute only the manufacturer is strictly liable for design or manufacturing defects[1]; supplier liability -- with certain exceptions[2] -- is based on breach of express warranty or negligence.[3]

The exception we sought to apply to Iowa.net and LA.distrib is found in R.C. 2307.78(B)(1). That section provides that a supplier may be held strictly liable "as if it were the manufacturer of that product*** if the manufacturer of that product is not subject to judicial process in this state." Ohio courts have interpreted the phrase "subject to judicial process" to mean "subject to personal jurisdiction" in this state.[4]

Iowa.net and LA.distrib, not wanting to be held strictly liable for injuries caused by the Chinese manufacturer's defective chair, filed motions for summary judgment. They asserted it was the plaintiff's burden to prove that Yunnan Products was not subject to personal jurisdiction in Ohio and that we would not be able to satisfy our burden of proof on that issue.

The challenge presented was in proving a negative, which is the opposite of what plaintiffs typically must prove when personal jurisdiction is raised. Ordinarily, lack of personal jurisdiction is raised as a defense by a foreign defendant who has been served and entered an appearance in the action; and the plaintiff has the burden of proving that the court does indeed have personal jurisdiction over that defendant. In those situations, the plaintiff develops a factual basis for personal jurisdiction by serving written discovery on that

defendant and deposing its corporate representatives.

But here we had a defendant who had been served with process but had not entered an appearance. What exactly did we need to establish to prove that the court lacked personal jurisdiction over this foreign manufacturer sufficient to allow us to proceed against the supplier defendants "as if they were the manufacturer" for purposes of R.C. 2307.78(B)(1)?

II. Proving The Existence Of Personal Jurisdiction.

Proof of personal jurisdiction over a non-resident defendant involves a two prong inquiry. First, it must be established that Ohio's long-arm statute and applicable rule of civil procedure confer jurisdiction over the defendant. Second, it must be established that the Ohio court's exercise of jurisdiction would not deprive the non-resident defendant of due process of law under the Fourteenth Amendment to the United States Constitution.[5]

When a foreign manufacturer whose defective product causes injury in Ohio did not directly transact business with the Ohio consumer, and the plaintiff's claim is based solely on design or manufacturing defect, the only provision of Ohio's long-arm statute likely to apply is R.C. 2307.382(A)(4).[6] That provision authorizes personal jurisdiction over a non-resident defendant who causes tortious injury in Ohio through an act or omission outside this state if that non-resident defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state[.]"[7] The analogous rule of civil procedure, Civ. R. 4.3(A)(4), is worded identically, and authorizes service of process over nonresident defendants in the same circumstances.

Thus, in a typical case where the foreign manufacturer raises personal jurisdiction as a defense, the plaintiff will engage in discovery seeking to establish that the foreign manufacturer:

- regularly does or solicits business in Ohio;
- engages in any other persistent course of conduct in Ohio; or,
- derives substantial revenue from goods use or consumed or services rendered in Ohio.

The due process analysis focuses on whether the non-resident defendant maintains "certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[8]

The applicable test to determine whether due process is satisfied depends on whether the case involves general or specific jurisdiction. General – or "all purpose" -- jurisdiction extends to claims unrelated to the non-resident defendant's forum activities. It exists if the corporation has "continuous and systematic contacts" with the forum state so as to render the corporation "at home" in the forum state – which typically limits general jurisdiction to the state of incorporation or principal place of business.[9] The general jurisdiction analysis will typically not be applicable in efforts to hold the foreign manufacturer liable[10], and, indeed, is probably not applicable at all under Ohio law.[11]

Specific – or "case-linked" -- jurisdiction is limited to claims that arise out of the defendant's forum activities. To satisfy due process under a specific jurisdiction analysis, the court applies a three-part test:

- Has the defendant purposefully availed itself of the privilege of acting in the forum state?
- Did the cause of action arise from the defendant's forum activities?
- Does the defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable?[12]

Merely placing a product into the "stream of commerce" with the knowledge that the product might arrive in the forum state will not be sufficient to satisfy due process.[13] Instead, the defendant "must have engaged in additional conduct which shows an intent to serve the forum state's market."[14] Such additional conduct might include "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[15]

When the manufacturer enters an appearance in the action and raises the personal jurisdiction defense, the plaintiff has the burden of proving that the court has personal jurisdiction over that defendant.[16] Whether personal jurisdiction exists is a question of law that is determined based upon the evidence.[17] The plaintiff's burden of proof varies depending on whether the court makes its decision on the documentary evidence alone, or whether it holds a hearing with oral testimony. If the former, the plaintiff's burden is merely to set forth a prima facie case of personal jurisdiction.[18] If the latter, the plaintiff must establish personal jurisdiction by a preponderance of the evidence.[19]

III. Proving Lack Of Personal Jurisdiction Over The Manufacturer So As To Hold The Supplier Liable As If It Were The Manufacturer.

So what happens when, instead of having to prove that the court has personal jurisdiction over the non-resident manufacturer, the plaintiff instead bears the burden of proving that the court *lacks* jurisdiction over that entity?

The only Ohio case to date on this issue is *Hawkins v. World Factory, Inc.*[20] In that case, the plaintiff was injured when a tire she was inflating on a newly-purchased wheelbarrow exploded. The wheelbarrow was purchased from Kmart, who purchased it from a distributor, World Factory, Inc., who purchased it from a Chinese manufacturer. The plaintiff and her husband filed suit against Kmart and World Factory, but not against the manufacturer. Instead, they sought to hold World Factory liable as if it were the manufacturer pursuant to R.C. 2307.78(B).

On appeal from the grant of summary judgment to World Factory, the plaintiffs argued that ruling was improper because World Factory "failed to produce any evidence to establish any of the requirements of Ohio's Long Arm Statute apply to the manufacturer" and that the supplier could thus be held liable as if it were the manufacturer.[21] Rejecting this argument, the appellate court found that although lack of personal jurisdiction is an affirmative defense for the manufacturer to raise had it been joined as a party, for purposes of R.C. 2307.78(B) lack of personal jurisdiction over the manufacturer is an element of the plaintiffs' claim of supplier liability. It was thus plaintiffs' burden to come forward with evidence on this issue, a burden which they failed to satisfy as they merely relied on the allegation in their complaint that the manufacturer was not subject to judicial process.

What evidence should the *Hawkins* plaintiffs have provided to avoid summary judgment on their R.C. 2307.78(B) claim? Recall that under R.C. 2307.382(A)(4), jurisdiction against the nonresident only exists if it "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state[.]" If the manufacturer isn't present in the lawsuit, how does one establish the manufacturer's lack of Ohio-based activity sufficient to show the absence of long-arm jurisdiction over it?

In our case, we provided deposition testimony from Mr. Chang and from a representative of Iowa.net concerning the specifics of the transaction. They testified that when Iowa.net emailed Chang the purchase order for the 150 items of furniture including the chair, Chang created and sent a separate purchase order to the manufacturer in China. The purchase order did not provide shipping instructions, and the manufacturer itself did not get involved in shipping the product. Instead, Iowa.net arranged to have a freight forwarder pick up the furniture in China and have it shipped to the Ohio warehouse. No monies were exchanged for this sale in Ohio between Mr. Chang's Los Angeles distributorship and the Chinese manufacturer.

Chang testified he selected Yunnan Products to provide merchandise to his wholesale business during a trip to China, and that any communications he had with them were conducted in Chinese. When he first evaluated Yunnan Products as a potential supplier, it was their relationships with large customers in Europe that caused him to see them as a suitable business partner. If Yunnan Products had comparable relationships with vendors in the United States, we argued, it was reasonable to assume that Chang would have relied on those relationships as a selling point.

Finally, although Yunnan Products had a website, our clients had never visited it. And although the defendants argued that the English language component of that website proved the company conducted business in the United States,[22] we pointed out that the English language version was accessed by clicking on a United Kingdom flag, and that the website's interactive functions appeared to be inoperative.[23]

Was the foregoing evidence sufficient to prove the Ohio court's lack of personal jurisdiction over the Chinese manufacturer? We hadn't actually proved that Yunnan Products did not regularly do or solicit business in Ohio, or that it failed to engage in any other persistent course of conduct in Ohio, or that it did not derive substantial revenue from goods used or consumed in Ohio. We'd merely shown that nothing about this transaction, or about the way the defendant wholesaler conducted business with the Chinese manufacturer, gave rise to an inference that the manufacturer conducted business in Ohio.

Did this satisfy our burden of proof, and should the burden of coming forward with evidence have shifted at some point to the defendant supplier who had an interest in establishing that the manufacturer did indeed conduct business in Ohio? In this latter respect, the plaintiff might want to file an affirmative motion for summary judgment on the jurisdictional issue, thus shifting the burden of producing some evidence onto the defendant supplier.

Finally, is the lack of personal jurisdiction for purposes of R.C. 2307.78(B)(1) a question for the judge or the jury? When personal jurisdiction is raised as a defense, its existence is a question of law for the court. Does that hold true when the lack of personal jurisdiction

is an element of plaintiff's claim against the supplier?

These questions were never answered in our case as it settled before the court ruled on the motions.[24] But they continue to present some interesting issues to be resolved in future lawsuits. ■

End Notes

1. R.C. 2307.73(A).
2. R.C. 2307.78(B).
3. R.C. 2307.78(A).
4. *Hawkins v. World Factory, Inc.*, 5th Dist. No. CT2012-0007, 2012-Ohio-4579, ¶16; *Potts v. 3M Company*, 8th Dist. No. 87977, 2007-Ohio-1144, ¶20; *Evans v. Mellott Mfg. Co.*, 4th Dist. No. 98CA838, 2000 Ohio App. LEXIS 2824, *31.
5. *Kauffman Racing Equipment, LLC v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, ¶28 (citing *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.2d 181, 183-184, 624 N.E.2d 1048 (1994)).
6. If the personal injury claim was based on breach of warranty, the long arm statute would grant the Ohio court jurisdiction over the non-resident defendant if that defendant "might reasonably have expected [the injured person] to use, consume, or be affected by the goods in this state" and "provided that [the non-resident defendant] also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state." R.C. 2307.382(A)(5).
7. R.C. 2307.382(A)(4).
8. *Id.* at 316.
9. *See, e.g., Daimler AG v. Bauman,* ___ U.S. ___, 134 S.Ct. 746, 187 L.Ed. 2d 624 (2014).
10. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___, 131 S. Ct. 2846, 180 L.Ed. 796 (2011).
11. *See, e.g., National Strategies, LLC v. Naphcare, Inc.*, N.D. Ohio No. 5:10-CV-0974, 2010 U.S. Dist. LEXIS 137975, *8-9 ("A continuing debate exists among federal courts in Ohio as to whether Ohio law recognizes general jurisdiction or whether personal jurisdiction over an out-of-state defendant can be established only if Ohio's long arm statute is satisfied.")
12. *Kauffman Racing Equipment v. Roberts,* 126 Ohio St.3d 81, 88 (2010) (citing *Bird v. Parsons*, 289 F.3d 865 (6th Cir. 2002)).
13. *J. McIntyre Machinery, Ltd. v. Nicastro*, __ U.S. ___, 131 S.Ct. 2780, 180 L.Ed. 2d 765 (2011).
14. *Lum v. Mercedes Benz, USA, LLC*, 433 F.Supp.2d 853, 856 (N.D. Ohio 2006).
15. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).
16. *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, ¶11.
17. *Id.* at ¶11.
18. *Id.*
19. *Wood v. Fliehman*, 193 Ohio App.3d 454, 2011-Ohio-2101, ¶28 (quoting *Friedman v. Speiser, Krause & Madole, P.C.*, 56 Ohio App.3d 11, 13-14 (1988)).
20. 5th Dist. No. CT2012-0007, 2012-Ohio-4579. Although there are several other cases dealing with summary judgments to suppliers under R.C. 2307.78(B)(1), none address the issue of what a plaintiff must prove to avoid summary judgment. In *Evans, supra,* n.4 and in *State Farm Fire & Cas. Co. v. Kupanoff,* 83 Ohio App.3d 278(1992), the manufacturers, who entered appearances in the action, waived the defense of personal jurisdiction, which waivers conferred personal jurisdiction over those defendants. And in *Potts, supra,* n.4, the plaintiff unsuccessfully argued that the phrase "subject to judicial process" meant subject to institution of judicial proceedings, and thus did not apply to the bankrupt manufacturers.
21. *Id.* at ¶15.
22. Conducting business in the United States, generally, without evidence that the foreign defendant specifically targeted the forum, would not be sufficient to satisfy due process. *See, Nicastro, supra*, n.13.
23. Having an interactive website "where the user may exchange information with the host computer" may provide evidence of targeting the market depending on the "level of interactivity and the commercial nature of the exchange of information that occurs on the Web site." *Zippo Mfgr. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1123-1124 (W.D. Pa. 1997).
24. Because the settlement was confidential, the facts of the case and identities of the parties have been modified in this article.

Andrew J. Thompson is an attorney at Shapero & Roloff Co., L.P.A. He can be reached at 216.781.1700 or athompson@shaperoroloff.com.

William B. Eadie is an associate with Spangenberg, Shibley & Liber Law LLP. He can be reached at 216.696.3232 or weadie@spanglaw.com.

Technology Tips for Attorneys

by Andrew J. Thompson and William B. Eadie

(Want to find handy links to all the great stuff listed below, share feedback, or ask questions? Go to your CATA blog now: www.clevelandtrialattorneys.org/blog.)

Andrew: *Casetext* Legal Research

Casetext is an ambitious attempt to change the way people research the law online. The founders of the website suggest that it was created to allow the public free access to the law, and to provide legal professionals, academics and policy professionals with a platform to collaborate and benefit from the collective knowledge of the legal community. A free profile takes only a few minutes to create, and tiered premium memberships are available.

Like other legal research websites, Casetext is at its core a searchable database of primary legal sources. Its current database includes federal case law, the U.S. Code, the Code of Federal Regulations, and select state case law. (Ohio is currently not included.) Cases are displayed in a simple, easy to read design.

What distinguishes Casetext from other sites is the ability of users to post comments and information relevant to the displayed item. This additional content, which can include direct comments, external links to items such as blog posts, or uploaded documents like briefs or other opinions, is gathered under a "Posts" tab. Primary content can be shared to a user's social media profiles with a single click. Users can connect in the Community section of the website and engage in interactive discussions on issues. Users can also "follow" each other, combining the collaborative effect of social media with the resources of a legal research website.

Casetext won't replace most attorneys' primary legal research platforms because of its limited scope. And the functionality of Casetext depends primarily on the participation of the users: as a new platform, there is little additional content currently posted. Finally, like Wikipedia, the information shared on the website is not checked for accuracy. The information shared by a user may generate a worthwhile discussion, but should not be relied upon as a primary source without additional research. The reliability of the shared information will ultimately need to be policed by other users.

Despite these limitations, the idea behind Casetext is intriguing enough that I have already created a profile. Since a large part of my practice deals with federal law, the limited database is workable for me. I am curious to find out whether input from other users will make Casetext a valuable resource, or whether the scarcity of additional information will render the experiment a waste of time.

William: FastCase with Mobile App

By coincidence, my topic is also about an alternative research platform—Fastcase—specifically the mobile device integration through FastCase's iPad, iPhone, and Android apps.

Fastcase is a free-for-CMBA-members legal research platform that is robust with regard to Ohio and federal law (with a $200/year upgrade to all national law). As the CMBA explains, "Fastcase's smarter searching, sorting, and visualization tools help you find the best answers fast - and help you find documents you might have otherwise missed."

I've toyed with both FastCase and, more often, the OSBA's free Casemaker, as alternatives to Westlaw or Lexis for select types of research. For example, jury instructions and statutes can be much easier to access and use for trial preparation than on Westlaw. And the option in Fastcase to search Hein Online legal journals and AG Opinions is particularly handy.

Colleagues I've spoken with who want to avoid Westlaw and Lexis altogether find these alternatives robust enough for full research, too, and it integrates with Clio law firm management software—mostly a time tracking and billing platform, but also collaboration and scheduling. But they do not have anything like the public collaboration available on Casetext, something I'm going to check out.

Fastcase recently rolled out iPhone, iPad, and Android apps with full integration to the desktop version. This isn't just a handy on-the-go research tool, which is great already. This actually integrates, so research can be continued, saved, accessed, from desktop to mobile device or tablet. No more excuses in trial about not being able to find the case, it is all right at your fingertips.

Now we just need an app to find us extra time for all that research.

(Want to find handy links to all the great stuff listed above, share feedback, or ask questions? Go to your CATA blog now: www.clevelandtrialattorneys.org/blog.)

Editor's Notes

As we finalize this issue of the ***CATA News***, we invite you to start thinking of articles to submit for the Spring 2015 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 someone else might take on the assignment. We'd 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 that section. Finally, please feel free to submit your Verdicts and Settlements to us year-round and we'll stockpile them for future issues.

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

Kathleen J. St. John
Editor-in-Chief

Recent Ohio Appellate Decisions

by Meghan P. Connolly and Dana M. Paris

Fedarko v. City of Cleveland, 8th Dist. No. 100223, 2014-Ohio-2531 (June 12, 2014).

Disposition: Affirming trial court's judgment denying summary judgment to the City on the issue of political subdivision immunity.

Topics: Political subdivision immunity, trip and fall.

When walking on a City of Cleveland sidewalk, the plaintiff encountered a man hole cover that gave way. The plaintiff fell several feet into the water meter vault below and was injured. It was undisputed that the water meter vault had not been in use for several years, and that its cover had lost integrity over time. The plaintiff alleged that the city negligently failed to inspect, maintain, or repair the defective manhole cover, and such negligence caused plaintiff's injuries.

The City of Cleveland asserted political subdivision immunity pursuant to Ohio Revised Code Chapter 2744 and moved for summary judgment on that basis. When the trial court denied the City's motion, the City exercised its right to an immediate appeal to the Eighth District.

The Eighth District Court of Appeals followed the Ohio Supreme Court's three-tiered analysis to determine whether the City was immune from tort liability, as set forth in *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998), and *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 10-12.

According to the Eighth District, if the City's negligence with regard to the man hole cover were considered a failure to maintain the City's *sidewalks*, then the City would be afforded political subdivision immunity. This is because sidewalk maintenance is defined as a "governmental function" under Chapter 2744, for which no immunity exception applies. (R.C. 2744.01(C)(2)(e) states that a "governmental function" includes "[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, *sidewalks*, bridges, aqueducts, viaducts, and public grounds.") However, if the City's negligence with regard to the man hole cover were considered a failure to maintain the City's *water supply system*, then the immunity exception set forth by R.C. 2744.02(B)(2) would operate to strip the City of immunity. The exception exposes political subdivisions to tort liability for negligence in connection with proprietary functions. Importantly, R.C. 2744.01(G)(2)(c) provides that a "proprietary function" includes "[t]he establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a bus line or other transit company, an airport, and a municipal corporation *water supply system*."

In summary, the immunity issue turned "on whether the manhole cover and water meter vault fall within the city's water system under R.C. 2744.01(G)(2)(c) or the city's sidewalks under R.C. 2744.01(C)(2)(e)."

The Eighth District examined case law and subscribed to the legally significant distinction between injured parties who trip on man hole covers and fall on the sidewalk, and those who trip on man hole covers and fall *into water system vaults*. In cases where the injured party falls on the sidewalk, the alleged negligent maintenance relates to the sidewalk. In cases where the injured party falls into the water vault below, the alleged negligent maintenance relates to the water supply system.

In *Fedarko*, the plaintiff tripped and fell into the water vault. The Court held that the City's negligent maintenance therefore related to the water supply system. This determination fell squarely within the immunity exception for which the plaintiff argued. The trial court's denial of summary judgment to the City on the issue of political subdivision immunity was affirmed.

Whetstone v. Binner, 5th Dist. No. 13 CA 47, 2014-Ohio-3018 (July 7, 2014).

Disposition: Reversing trial court's refusal to permit punitive damages and attorneys' fees to be assessed against a deceased tortfeasor's estate.

Topics: Whether the recovery of punitive damages and attorneys' fees is permitted against a deceased tortfeasor's estate.

Plaintiff-Appellant mother, Christine Whetstone, brought suit against her aunt, Roxanne McClellan, individually and as the parent, natural guardian and next friend of Whetstone's minor daughters, Olivia and Lea Castle. Whetstone's case concerned various tort claims including assault, battery, false and/or unlawful imprisonment, and intentional infliction of emotional distress arising from an incident in which McClellan allegedly attempted to kill minor child Olivia Castle "by holding the child down on a bed in a bedroom… putting her hand over the child's mouth, and smothering the child with a pillow…". *Whetstone* at ¶9. Whetstone sought compensatory and punitive damages.

Defendant McClellan failed to timely file an answer in response to the complaint, and a default judgment was entered. Pursuant to Civ.R. 8(D), "averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Thus, the court deemed that defendant McClellan had admitted to maliciously, wrongfully, and unlawfully choking, smothering, and attempting to kill the young girl.

Defendant McClellan was diagnosed with cancer and died during the pendency of the matter. The Estate of Roxanne McClellan was substituted as the proper defendant after a suggestion of death was filed.

A hearing on compensatory and noneconomic damages was held, and amounts awarded to the plaintiffs. But, "the court declined to impose punitive damages finding that they 'cannot be awarded against the estate of a tortfeasor who is deceased.'" *Whetstone* at ¶11. "The court likewise declined to award attorneys' fees based upon its finding that punitive damages cannot be awarded against the estate of a tortfeasor who is deceased." *Id*. It was from those two declinations regarding punitive damages and attorneys' fees that the plaintiffs appealed to the Fifth District.

When the Fifth District reviewed the briefing, it became apparent that "the issue of whether the recovery of punitive damages is permitted against a deceased tortfeasor's estate is an issue of first impression at the Appellate level in the state of Ohio." *Id*. at ¶22. The court's review of other jurisdictions revealed that the majority rule disallows punitive damage recoveries after the tortfeasor has died. *Id*. at ¶23. The policy behind the majority rule is that the element of deterrence relative to punitive damages "requires a perception by others that the tortfeasor is being punished," which extinguishes with the death of a defendant. *Id*. at ¶24.

"A minority of courts in other states have held that a claim for punitive damages survives the death of a tortfeasor and may be pursued against his estate." *Id*. at ¶25. "The minority view emphasized the general deterrence aspect of punitive damages" in that "punitive damages serve to deter the tortfeasor **and others from engaging in like conduct.**" *Id*. (Emphasis added).

The Fifth District was persuaded by the minority view, finding that "the imposition of punitive damages on a decedent's estate serves to deter others from similar conduct." *Id*. at ¶27. Finding no per se prohibition against the imposition of punitive damages against a deceased tortfeasor, the court reversed the trial court and remanded the assessment of punitive damages for the jury's determination.

Because punitive damages were potentially available to the plaintiff per the court's disposition above, the plaintiff could also proceed to seek reasonable attorneys' fees. Thus, the trial court was likewise reversed with regard to the second assignment of error.

.....

Ponyicky v. City of Brunswick, 9th Dist. No. 13CA0039-M, 2014-Ohio-3540 (August 18, 2014).

Disposition: Affirming the denial of summary judgment to the City of Brunswick on the issue of immunity for a political subdivision.

Topics: Whether bus driver was an employee of political subdivision presented question of fact.

The plaintiff suffered injuries when the vehicle he was driving was rearended by a bus that was driven by Crystal Schemrich. The plaintiff brought suit against the driver, who was later dismissed, and the City of Brunswick. The City filed a motion for summary judgment asserting immunity under R.C. 2744.02, claiming that the bus driver was not an employee. When the trial court denied its motion, the defendant appealed and the court of appeals affirmed.

Generally, political subdivisions are not liable in damages in a civil action for injury, death, or loss to person or property. R.C. 2744.02(A)(1). However, political subdivisions may be liable if the injury is caused by an act or omission of an employee in connection with a governmental or proprietary function and if one of the exceptions in R.C. 2744.02(B) apply. On appeal, the defendant argued that the driver was not an employee of the City of Brunswick, but rather an employee of Medina County Public Transit. The relationship is determined by looking at the right to control the manner or means of performing the work. The right to control is the "right to direct 'the details or method of doing the work.'" *Gillum v. Indus. Comm.*, 141 Ohio St. 373, 48 N.E.2d 234 (1943). If it is established that the defendant has the right to direct the details or method doing the work, then the relationship is that of employer and employee. Although the bus driver was hired, paid, supervised and provided insurance by Medina Transit, the City of Brunswick enforced a discipline system that addressed problems with the drivers, was allowed to remove drivers upon request, and required the drivers to operate the buses on the routes set by the City. Further, if there was a failure to comply with the City's requirements, then that resulted in a financial penalty. Affirming the

decision, the Court held that a question of fact existed since evidence was presented that the defendant had control over the details and method of doing the work with the driver.

Auer v. Paliath, 140 Ohio St. 3d 276, 2014-Ohio-3632 (August 28, 2014).

Holding: In order to impose vicarious liability, a jury must first make the factual determination of whether the agent was acting within the course and scope of his or her agency when the tortious conduct was committed.

Paliath was a real estate agent for Keller Willliams Home Town (hereinafter "Home Town") and also owned a property "flipping"/rehabilitation business on the side. The plaintiff invested over $430,000.00 in properties listed by Ms. Paliath, and Home Town received a commission from the sale of each of the properties. When the plaintiff discovered that Ms. Paliath failed to renovate the homes, as was promised, she brought suit against Paliath and Home Town, under the theory of *respondeat superior.* The Court instructed the jury to find whether Defendant Home Town was vicariously liable for the agent's fraud and the jury agreed that Defendant Home Town was vicariously liable.

On appeal, the Court of Appeals held that the jury was properly instructed on the scope of agency and that, pursuant to R.C. 4735.71, the scope of agency for real estate brokers was a matter of law for the court to decide. The Ohio Supreme Court reversed.

Under R.C. 4735.21, "no real estate salesperson ... shall collect any money in connection with any real estate ... transaction, ... except in the name of and with the consent of the licensed real estate broker." The Ohio Supreme Court found the lower court's reliance on R.C. 4735.21 to be misplaced and disagreed that it creates a bright-line rule which establishes scope of agency for real-estate brokers as a matter of law. The scope of agency determination is fact specific and "turns on the fact-finder's perception of whether the [employee] acted, or believed himself to have acted, at least in part, in his employer's interest." *Ohio Gov't Risk Mgmt. Plan v. Harrison*, 115 Ohio St. 3d 241 at ¶17. The Court held that whether the agent's conduct was within the scope of agency such that Defendant Home Town was vicariously liable for her actions was an issue of fact for the jury to decide.

Sauer v. Crews, 140 Ohio St.3d 314, 2014-Ohio-3655 (September 2, 2014).

Holding: In determining whether an insurance policy provision is ambiguous, courts must consider the overall context of the policy in which the specific language of the provision is used.

Julia Augenstein was involved in a fatal collision with a flatbed trailer that was owned by Crews and her executors brought suit. Defendant Crews was insured under a commercial general-liability policy issued by Century Insurance. The issue during the bench trial was whether the Century policy extended coverage to the flatbed trailer. Crews argued that the flatbed trailer qualified as "mobile equipment" under the policy. However, in order for the trailer to be covered under the policy, the court had to determine whether the paving machinery that Crews transported on the trailer was considered "cargo." Since the term "cargo" was not defined in the policy, it was found to be ambiguous. Construing the ambiguous language against Century Insurance, the trial court concluded that the policy did in fact insure the flatbed trailer. The court of appeals affirmed, but the Ohio Supreme Court reversed.

Generally, ambiguous provisions in an insurance policy must be construed strictly against the insurer and liberally in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208. However, where there is a question of ambiguity regarding a policy provision, one must examine the purpose of the policy and the policy as a whole, instead of the "detached or isolated parts thereof." *Stickle v. Excess Ins. Co. Of Am.*, 136 Ohio St. 49, 23 N.E.2d 839 (1939).

Here, instead of isolating the word "cargo," the Court looked at the overall context of the policy and determined that the trailer was excluded from coverage. Under Section V(2)(a) of the policy, it states that a "trailer" designed for travel on public roads is considered an "auto" and the policy excluded coverage for any bodily injury arising from the use of an "auto" by the insured.

Burk v. Fairfield Ambulatory Surgery Center, 5th Dist. No. 13-CA-85, 2014-Ohio-4062 (September 5, 2014).

Disposition: Reversing the granting of summary judgment to defendants on the issue of whether the conduct of the defendant doctor and/or nurse fell below the standard of care.

Topics: Alternative liability applied in medical malpractice case involving surgical negligence.

Plaintiff brought a medical negligence claim against multiple defendants, the doctor, nurse, anesthesia company and

surgery center, alleging that they failed to meet the standard of care by allowing the tourniquet cuff to deflate prematurely during her surgery, which caused her to suffer an arrhythmia, anoxic brain injury, and memory and speech deficits. The defendants filed separate motions for summary judgment arguing that the plaintiff's expert failed to create a genuine issue of material fact to establish a breach in the standard of care that was the proximate cause of the plaintiff's injuries.

In a medical malpractice case, the plaintiff bears the burden of establishing (1) the physician deviated from the ordinary standard of care exercised by other physicians; and (2) the deviation was the proximate cause of the plaintiff's injury. The standard of care must be established through expert testimony. Here, the plaintiff's expert, Dr. Dershwitz, offered opinions as to the deviations of the standard of care as it relates to each defendant. Dr. Dershwitz testified that there was a deviation from the standard of care, but could not ascribe negligence to one defendant. The defendants argued that since Dr. Dershwitz couldn't identify which party committed the negligent act, the plaintiff failed to establish a breach of the standard of care. The court of appeals, however, did not agree.

Plaintiff proposed the application of the alternative liability doctrine which provides:

> That when the negligence of both defendants is established but it cannot establish which person's negligence caused the plaintiff's injuries, there exists a 'practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them, they did all.'

Summers v. Tice, 33 Cal.2d 80 at 86, 199 P.2d 1 (1948). Under this doctrine, the plaintiff continues to bear the burden of proving negligence. However, in situations where there are multiple negligent defendants involved, the burden of proving causation shifts and the defendants bear the burden of apportioning the damage among themselves.

The issue was whether the doctor or the nurse negligently permitted the tourniquet to prematurely deflate during the plaintiff's surgery, which subsequently allowed her oxygen levels to drop without anyone noticing for a period of time. There was testimony that the defendant doctor and nurse both had access to and control of the tourniquet cuff, which could have been the cause of the cuff to deflate. Plaintiff's expert opined that the defendant doctor and nurse were negligent by causing the cuff to deflate. It was not necessary for Dr. Dershwitz to testify with certainty as to which defendant was negligent in causing the tourniquet to deflate. Based upon the testimony and expert opinions, the Court held that there was a genuine issue of material fact for the jury as to the issue of negligence.

Haskins v. 7112 Columbia, Inc., 7th Dist. No. 13 MA 100, 2014-Ohio-4154 (September 15, 2014).

Disposition: Reversing the trial court's judgment granting defendant nursing home's motion for judgment on the pleadings.

Topics: Ordinary negligence v. medical claims; R.C. 2305.113; statute of limitations; judgment on the pleadings.

A nursing home resident's estate administrator filed a complaint against the defendant nursing home, Valley Renaissance Health Care Center, alleging that two nursing home employees were negligent in the course of changing the resident's bed linens, and that such negligence resulted in a fracture of the resident's femur.

The defendant nursing home moved for judgment on the pleadings pursuant to Civ.R. 12(C), asserting that the one year statute of limitations applicable to "medical claims" barred plaintiff's claims. *See* R.C. 2305.113. The trial court granted the defendant's motion, and plaintiff appealed.

A medical claim is defined as "any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, *** and that arises out of the medical diagnosis, care, or treatment of any person." *See* R.C. 2305.113(E)(3). Undisputedly, the defendant nursing home qualified as a "home" under the first part of the statute. *See* R.C. 2305.113(E)(14). But the Seventh District readily acknowledged that not all negligence occurring in a nursing home is medical negligence *arising out of medical care*. The court's determination therefore turned on whether the plaintiff's complaint alleged that the negligent changing of the resident's linens arose out of "medical care."

The Ohio Supreme Court has interpreted the phrase "medical care" to mean "the prevention or alleviation of a physical or mental defect or illness." *Browning v. Burt*, 66 Ohio St.3d 544, 1993 Ohio 178, 613 N.E.2d 993 (1993). The Supreme Court expounded that "medical care" often requires a "certain amount of professional expertise." *Rome v. Flower Mem. Hosp.*, 70 Ohio St.3d 14, 1994 Ohio 574, 635 N.E.2d 1239 (1994). Further, an act that is "ancillary to and an inherently necessary part of" a diagnostic procedure or doctor ordered

therapy, has been considered "medical care." *Id.*

The court acknowledged that there are a "variety of possible non-medical reasons that the sheets were changed the day [the resident] was injured." Limiting its review to the pleadings, the Court found "there is no indication from the record in this case that changing [the resident's] sheets was part of some type of medical test or procedure, was ordered by a doctor, or that it required any medical expertise or professional skill." *Haskins* at ¶18. In reversing the trial court, the Seventh District held that the plaintiff asserted a general negligence claim subject to a two year statute of limitations, rather than a "medical claim." The court noted that its decision did not foreclose upon the filing of future motions asserting the same defense after the close of pleadings.

Combs v. Ohio Dep't of Natural Res., 10th Dist. No. 14AP-193, 2014-Ohio-4025 (September 16, 2014).

Disposition: Reversing the Court of Claims of Ohio's judgment granting the Ohio Department of Natural Resources's (ODNR's) motion for summary judgment based on the recreational user statute, R.C. 1533.181(A)(1).

Topics: Recreational user statute, premises defects.

Plaintiff, Richard Combs, was walking to his favorite fishing spot at Indian Lake State Park when he was struck in the right eye with a rock. The rock had been launched into the air by a mower being operated by an ODNR employee.

The Court of Claims of Ohio granted summary judgment for defendant ODNR on the basis that R.C. 1533.181, commonly known as the recreational user statute, afforded ODNR immunity from liability for Combs's injuries.

R.C. 1533.181 defeats the duty element of a negligence claim under certain circumstances, thereby barring the injured party's cause of action. Under the statute, "[n]o owner, lessee, or occupant of premises *** [o]wes any duty to a recreational user to keep the premises safe for entry or use." *See* 1533.181(A)(1). Combs agreed that he was a recreational user on ODNR property. The issue for the court's determination then was whether Combs asserted that his injuries were caused by ODNR's failure to "keep the premises safe for entry or use."

The Supreme Court of Ohio supplied the answer in *Ryll v. Columbus Firewords Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372, in conjunction with *Pauley v. Circleville*, 137 Ohio St.3d 212, 2013-Ohio-4541, 998 N.E.2d 1083. In *Ryll*, a fireworks spectator was killed by errant firework shrapnel. The Supreme Court found that the shrapnel explosion "had nothing to do with 'premises' as defined in R.C. 1533.18(A)," and found the recreational-user statute did not apply. In discussing its holding in *Ryll*, the *Pauley* court clarified that "the recreational-user statute immunizes property owners from injuries that arise from a defect in the premises" and that "[b]ecause the shrapnel was not a defect *in the premises*, immunity did not apply."

The court found that the flying rock that had injured Combs was akin to the flying shrapnel that caused injury and death in *Ryll*. "Neither the rock nor the shrapnel constituted a defect in the premises. Consequently, although Combs, like the decedent in *Ryll*, was a recreational user, R.C. 1533.181(A)(1) does not immunize ODNR from liability for his injuries." *Combs* at ¶11.

Accordingly, the Court of Claims judgment granting defendant ODNR's motion for summary judgment was reversed, and the cause was remanded for further proceedings.

Guiliani v. Shehata, 1st Dist. Nos. C-130837, C-140016, 2014-Ohio-4240 (September 26, 2014).

Disposition: Affirming the trial court's judgment which reduced the jury award against the defendant doctor to $250,000.00, pursuant to R.C. 2323.43.

Topics: Medical malpractice damages caps under R.C. 2323.43.

There was a delay in diagnosing Plaintiff's colon cancer and the Plaintiff brought suit against the doctor. At trial, the jury found in favor of the plaintiff and awarded him $1,000,000.00 in non-economic damages. However, the jury found that the plaintiff was 30% negligent and the defendant doctor was 70% negligent, thereby reducing the plaintiff's award to $700,000.00. The trial court then capped the plaintiff's non-economic damages and further reduced his award to $250,000.00.

Both the plaintiff and defendant appealed. On appeal, the plaintiff argued that the court should have applied the higher damage cap of $500,000.00 since he had to undergo removal of his colon and rectum, thereby requiring a colostomy and urostomy bags, that left him with the loss of a bodily organ system and a substantial physical deformity. The plaintiff further argued that the statute did not require him to submit an interrogatory for catastrophic injuries. However, the court disagreed. The question of whether the plaintiff's injury comes within the higher damages cap is one for the jury and

must be determined through the use of a jury interrogatory. The court relied on *Ohle v. DJO, Inc.*, 2012 U.S. Dist. LEXIS 140020, *3 (N.D. Ohio Sept. 28, 2012) for the proposition that, since the jury is in the best position to determine the nature of the plaintiff's injuries, any issues "concerning the nature and severity of a plaintiff's injuries should be resolved jury interrogatory at trial." *Id*. at *9. Here, since the jury never made a factual finding that the plaintiff suffered an injury satisfying the requirements of R.C. 2323.43(A)(3)(a), the court affirmed the application of the lower cap amount.

On cross-appeal, the defendant argued that the court erred by first applying the comparative negligence statute and then reducing the award to the $250,000.00 cap. However, the court disagreed. Looking at the plain language and legislative intent of R.C. 2315.21 and R.C. 2323.43, the court found that "if the legislature had intended that the comparative-negligence statute apply after the damage-cap statute, it could have explicitly provided for that in the damage-cap statute." Finding no error, the Court held "that a jury's determination of comparative negligence should be applied before any statutorily mandated caps on damages are subtracted from the total amount of damages."

Grose v. City of Cleveland, 8th Dist. No. 101003, 2014-Ohio-4819 (October 30, 2014).

Disposition: Affirming the denial of summary judgment to the City of Cleveland on the issue of statutory immunity.

Topics: Political subdivision immunity for failing to maintain roadways under R.C. 2744.02(B)(3).

On Plaintiff's street, there was an on-going water problem due to the cracked surface of the roadway that resulted in large amounts of water accumulation. The plaintiff notified the City on two occasions prior to the incident, without it ever being remedied. While exiting his vehicle, the plaintiff suffered injuries when he slipped and fell on black ice. He sued the City of Cleveland for failing to keep the public roadway in good repair. Defendant moved for summary judgment, asserting sovereign immunity which was denied. Affirming, the court of appeals found that the exception to immunity existed under R.C. 2744.02 (B)(3).

Generally, determining whether R.C. 2744 is applicable when granting immunity for political subdivisions, the court relies on a three-tier analysis. The first tier provides that a political subdivision is immune from liability incurred when performing either a governmental function or proprietary function. The second tier determines whether an exception to immunity exists under R.C. 2744.02(B). If an exception exists, the third tier states that the political subdivision bears the burden of establishing that one of the defenses under 2744.03 exists. The exception provided under R.C. 2744.02(B)(3) states that a political subdivision will be held liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair.

Finding *Todd v. Cleveland*, 8th Dist. No. 98333, 2013-Ohio-101 to be analogous to the instant case, the Court reasoned that "keeping public roadways 'in repair' under R.C. 2744.02(B)(3) includes repairing holes and crumbling pavement when a road is deteriorating." Both the plaintiff and defendant's engineering expert agreed that the water below the roadway seeps through the cracks and holes in the pavement and the City's failure to make the necessary repairs caused the icy condition. Based upon the experts' testimony, the court concluded that a question of fact existed as to whether the icy condition of the roadway would have existed had the City repaired the cracks and holes. Further, since the City failed to raise any defenses to R.C. 2744.02(B)(3), the Court found that it was not necessary to apply the third tier of the analysis and concluded that the exception under R.C. 2744.02(B)(3) applied. ■

Meghan P. Connolly is an associate at Lowe Eklund Wakefield Co., LPA. She can be reached at 216.781.2600 or mconnolly@lewm.com.

Dana M. Paris is an associate at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or danaparis@nphm.com.

Christopher Mellino is a principal at The Mellino Law Fim LLC. He can be reached at 440.333.3800 or cmm@mellinolaw.com.

Verdict Spotlight

by Christopher Mellino

Just before dawn on a Sunday morning in November of 2010, a 1992 Honda Accord in which four young people were riding headed eastbound on the Lorain-Carnegie Bridge. The driver, 20 year old Jovanny Martinez, had recently gotten off work at a fast food restaurant. His best friend, 18 year old Joshua Rojas, was in the right front passenger seat; and their two other friends, 16 year old Kiara Torres, and 15 year old Yareline Santiago, were in the back seat, behind Rojas and Martinez, respectively.

They were talking and laughing and singing along to Bruno Mars' *Billionaire* on the radio, when the unthinkable happened: a dump truck made a lane change directly in front of them. In an effort to avoid the collision, Martinez steered left. The Honda's front bumper and hood narrowly missed the back of the dump truck, but its front-right "A-Pillar" caught the back left corner of the truck bed. It penetrated the passenger compartment and into Joshua Rojas's skull. The passenger-side roof then crushed down upon Kiara Torres. Rojas survived, but with an open skull fracture that destroyed more than a third of his brain and left him with severe cognitive and functional impairments. Torres also survived, but with a traumatic brain injury resulting in permanent cognitive defects. Martinez and Santiago were also transported to the hospital, but without serious injuries. Brian English, the dump truck driver, sustained no injuries.

English's version of events differed from that of the Honda occupants. He claimed that he changed lanes from the passing lane into the curb lane far in advance of the Honda, and that the Honda was speeding. The police did not perform an accident reconstruction, but accepted English's version of events; and, on their recommendation, the prosecutor's office charged Martinez with two counts of aggravated vehicular assault, even though he had no drugs or alcohol in his system. Faced with two felony counts, Martinez – who had no criminal history – accepted the advice of his public defender and pled guilty to a third degree misdemeanor of negligent assault.

These were the facts that Andy Young, representing Joshua Rojas, and John Gundy, representing Kiara Torres, had to overcome in the trial against English and his company (Concrete Designs, Inc.), and Martinez. Other than English and the occupants of the Honda, there were no eyewitnesses. The case thus came down to witness credibility and a battle of the experts. Although the physical evidence was minimal – photos of a tire scuff, debris from the point of impact, and damage to the vehicles – the plaintiffs' expert was able to show, through mathematical calculations, that if English's version was true, the accident would have occurred 1,000 feet farther down the bridge; and that the physical evidence more closely matched the Honda occupants' testimony.

After a two week trial, the jury returned a verdict of $34.6 million for Joshua Rojas ($8.2 million in economic and $26.4 million in noneconomic damages); and $7.8 million for Kiara Torres ($1.8 million in economic and $6 million in noneconomic damages). The jury found English and his company to be 100% at fault, and returned a verdict in favor of Jovanny Martinez. Westfield, the insurer for English and Concrete Designs, had never offered more than $125,000 collectively for the two plaintiffs.

Andy Young

Congratulations to Andy Young and John Gundy for the outstanding results they achieved for their clients. Joshua Rojas was also represented by Thomas Mester and Patrick Merrick; and Steven Tylman assisted John Gundy in representing Kiara Torres. ■

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

RETURN FORM TO: **Christopher M. Mellino**
The Mellino Law Firm LLC
19704 Center Ridge Road
Rocky River, Ohio 44116
(440) 333-3800; Fax (440) 333-1452
Email: cmm@mellinolaw.com

CATA Verdicts & Settlements

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

Kathleen DeVito v. Grange Mutual Casualty Company

Type of Case: Insurance - Breach of Homeowners Contract

Settlement: $65,000.00

Plaintiff's Counsel: Christopher DeVito, Morganstern, MacAdams & DeVito Co., L.P.A., (216) 687-1212

Defendant's Counsel: Brian Borla of Hanna, Campbell & Powell

Court: Cuyahoga County Case No. CV-12-790538, Judge Kathleen Sutula

Date Of Settlement: November 10, 2014

Insurance Company: Grange Mutual Casualty Company

Damages: $45,000.00 for roof repair from snow damage

Summary: Homeowner Kathy DeVito filed insurance claim for cracked rafter after winter. Grange Insurance denied coverage based upon Prugar Consulting engineering report that opined home in Shaker Heights not designed properly when constructed in 1957. However, no code defect identified because Ohio Building Code not in effect until July 1979.

Plaintiff's Expert: John Telesz, P.E.

Defendant's Expert: Prugar Consulting: Jerome Prugar and Scott Osowski

Jane Doe v. John Doe Race Director and John Doe County

Type of Case: Negligence by race promoter and by political subdivision in maintaining road.

Settlement: $207,500.00

Plaintiff's Counsel: Ellen M. McCarthy and Andrew R. Young, Nurenberg, Paris, Heller & McCarthy Co., L.P.A., 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: November 2014

Damages: Fractured jaw, three broken teeth, carotid artery injury.

Summary: 35 year old female participant in a triathlon hits a large pothole during the bike portion of the race and is thrown over the top of her bike landing on her jaw. The race course was supposed to be inspected and all potholes marked with arrows and a circle around the pothole. The part of the course where she was injured was scheduled for repaving by the county due to numerous potholes and crumbling side edges. It was admitted that a resident on the road complained to the county several months before the accident about the condition of the road. As scheduled, the county repaved the road three days after the accident using 109 tons of asphalt. The race director claims he inspected the road one week prior to the race and the roadway was even, free of potholes and not in need of repair or resurfacing. Plaintiff signed a release prior to the race and had participated in prior triathlons.

Baby Girl Doe v. ABC Hospital

Type of Case: Medical Malpractice

Settlement: $5,500,000.00

Plaintiff's Counsel: John A. Lancione, 619 Linda Street, Rocky River, Ohio 44116, (440) 331-6100

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: November 2014

Insurance Company: Confidential

Damages: Brain Damage, Cerebral Palsy

Summary: Failure to timely deliver baby in the face of non-reassuring electronic fetal monitor tracing.

Plaintiff's Expert: Mary D'Alton, M.D. (OB/GYN)

Defendant's Expert: William Roberts, M.D. (OB/GYN)

Boyd v. Physicians Link Center, Inc., et al.

Type of Case: Emergency room medical malpractice

Verdict: $1,200,000.00 (Judgment has been satisfied)

Plaintiff's Counsel: Benjamin F. Barrett, Sr. and David P. Miraldi, Miraldi & Barrett Co., L.P.A., (440) 233-1100

Defendants' Counsel: Mark Jones, Roetzel & Andress

Court: Lorain County, Case No. 12CV174997, Judge Mark Betleski

Date Of Verdict: October 9, 2014

Insurance Company: Pro Assurance

Damages: Loss of sole testicle

Summary: Plaintiff, a 25 year old man, presented to the EMH-Avon emergency room with severe lower abdominal pain. Discharged with a diagnosis of constipation. Returned to the ER the next morning and was diagnosed with testicular torsion which had been present too long to save testicle.

Plaintiff's Experts: Joshua Kosowsky, M.D. (Boston, MD, Emergency Medicine); Ralph Duncan, M.D. (York, PA, Urology); James Linser, Ph.D. (Oberlin, OH, Economist).

Defendants' Experts: David Overton, M.D. (Western Michigan University, Emergency Medicine); Nivedita Dhar, M.D. (Wayne State, Urology).

Cedeno v. Miadich

Type of Case: Negligent operation of motor vehicle

Settlement: $80,000.00

Plaintiff's Counsel: Jarrett J. Northup, Jeffries, Kube, Forrest & Monteleone, (216) 771-4050

Defendant's Counsel: Contact Counsel

Court: Cuyahoga County Case No. CV-14-820334, Judge Michael Astrab

Date Of Settlement: October 6, 2014

Insurance Company: State Farm Mutual

Damages: Hip fracture requiring hip replacement surgery.

Summary: Disputed liability case alleging Defendant driver pulled away from curb before elderly passenger had fully exited back seat, causing fall and hip fracture.

Plaintiff's Expert: Mark Panigutti, M.D.

Defendant's Experts: None

Joshua Rojas v. Concrete Designs, Inc., et al. and Kiara Torres v. Concrete Designs, Inc., et al.

Type of Case: Dump truck motor vehicle accident

Verdict: $34,600,000 for Joshua Rojas; $7,800,000.00 for Kiara Torres

Plaintiffs' Counsel: Andrew R. Young and Thomas Mester, Nurenberg, Paris, Heller & McCarthy Co., L.P.A., 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300 (for Joshua Rojas). Patrick Merrick, Stever, Escovar, Berk & Brown Co., LPA, 55 Public Square, Cleveland, Ohio 44113 (co-counsel for Joshua Rojas). John Gundy, The Gundy Law Firm, 23240 Chagrin Blvd., Beachwood, Ohio 44122 (for Kiara Torres).

Defendants' Counsel: Jan Roller, Davis & Young (for Concrete Designs, Inc. and Brian English). Deborah Yue, Gallagher Sharp (for Jovanny Martinez).

Court: Cuyahoga County Case No. CV-12-795474 (Rojas), consolidated with Cuyahoga County Case No. CV-12-795422, Judge Thomas Pokorny (visiting judge)

Date Of Verdict: October 1, 2014

Insurance Company: Westfield

Damages: Joshua Rojas sustained traumatic brain injury (open skull fracture that destroyed more than 1/3 of his brain and left him with severe cognitive and functional impairments); Kiara Torres sustained traumatic brain injury with permanent cognitive defects.

Summary: *See* Verdict Spotlight.

Plaintiffs' Experts: James Crawford (Accident Reconstructionist); Robert Ancell (Vocational); John Burke (Economist); Kenneth C. Fischer, M.D. ; Irene Dietz, M.D.; Pamela Hanigosky, R.N. (Life Care Planner)

Defendants' Experts: Richard Stevens (Accident Reconstructionist); Jane Mattson, Ph.D. (Life Care Planner)

Jane Doe, Admin. v. ABC Hospital

Type of Case: Medical Malpractice

Settlement: $700,000.00

Plaintiff's Counsel: John A. Lancione, 619 Linda Street, Rocky River, Ohio 44116, (440) 331-6100

Defendant's Counsel: Pre-Suit Settlement

Court: N/A

Date Of Settlement: October 2014

Insurance Company: N/A

Damages: Death of 53 year old male.

Summary: The decedent had coronary bypass surgery with pacing wires placed. Prior to discharge the pacing wires were pulled and the patient coded and passed away. Plaintiff claimed the pacing wires were not properly placed resulting in a tear in the heart when they were pulled.

Plaintiff's Expert: Michael Koumjian, M.D. (Cardiothoracic Surgery)

Defendant's Expert: None

Petersen, et al. v. Adelstein, et al.

Type of Case: Defamation

Settlement: $500,000

Plaintiffs' Counsel: Christian R. Patno and Dennis Mulvihill, 101 W. Prospect Ave., Suite 1800, Cleveland, Ohio 44115, (216) 696-1422.

Defendants' Counsel: Brian Downey and Niki Schwartz

Court: Cuyahoga County Case No. CV-13-812613, Judge Carolyn Friedland

Date Of Settlement: September 25, 1014

Insurance Company: Homesite

Damages: Stress and damage to personal and professional reputation

Summary: Defendant Richard Adelstein, DDS was a settling party in an employment case in which the Petersens acted as counsel for the claimant. Following settlement of the underlying case, Adelstein began a pattern of activity intended to harm the Petersens professionally with false AVVO posts and personally with calls to the Petersen home and office alleging marital infidelity.

Plaintiffs' Expert: Treating physician as to physical effects of stress.

Armbruster v. City of Cleveland

Type of Case: Wage & Hour – FLSA improper time clock rounding

Settlement: $2,200,000+

Plaintiff's Counsel: Christopher DeVito (Co-counsel Anthony Lazzaro), Morganstern, MacAdams & DeVito Co., L.P.A., (216) 687-1212

Defendant's Counsel: Robert Wolff of Littler Mendelson

Court: Northern District of Ohio Case No. 1:13-cv-02626-CAB, Judge Boyko

Date Of Settlement: Final Class Action Approval Order September 16, 2014

Insurance Company: Self-Insured

Damages: Lost wages

Summary: On November 26, 2013, the Armbruster complaint was filed against the City of Cleveland for herself and approximately 3,800 similarly-situated individuals. The action alleges that the City violated the Fair Labor Standards Act ("FLSA") and Ohio Minimum Fair Wage Standards Act ("OMFWSA") by improperly rounding the starting and stopping times of its non-exempt employees pursuant to its written human resource policy for decades.

For example, if employees clocked in early within a 12-minute window, or clocked out late within a 12 minute window, their starting and stopping times were rounded against them to their scheduled starting and stopping times up to 15 minutes at the beginning and end of every day. If employees clocked in late or clocked out early during the day for lunch or breaks, their starting and stopping times were rounded against them in increments of six minutes to the next tenth of an hour.

The $2.2 million settlement amount is significantly larger than the two-year statute of limitations time period for damages allowed under the OMFWSA, which was calculated to be $1.7 million in overtime. The FSLA potential three year time period for willful violations was calculated to be approximately $2.8 million. The matter was also settled as an Ohio class action so all effected employees will receive payment and will not have to "opt-in" through an FLSA mechanism.

The Armbruster complaint caused an immediate change in the City of Cleveland's Kronos time clock policy. This ensures employees will be properly paid now and into the future. The settlement also required the City to pay all third-party claims administration fees, mailing expenses, and postage costs. The settlement also provides that any employee who may have not received notice has until December 31, 2015, to request inclusion and payments from the City.

Plaintiff's Expert: None

Defendant's Expert: None

Mark Schneider v. Samsung Electronics America, Inc., et al.

Type of Case: Motorcycle Accident

Settlement: $1,500,000

Plaintiff's Counsel: Jamie R. Lebovitz, Ellen M. McCarthy, and Jordan D. Lebovitz, Nurenberg, Paris, Heller & McCarthy Co., L.P.A., 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendants' Counsel: Robert P. Lynch

Court: Cuyahoga County, Judge Saffold

Date Of Settlement: August 29, 2014

Damages: 15 fractures requiring 11 surgeries.

Summary: On July 24, 2013, plaintiff, while traveling to work on his motorcycle, was struck by defendant's SUV that turned left in front of plaintiff, crossing the center double yellow lines into an adjacent driveway. Defendant was operating his SUV as part of his employment with defendant Corporation working at a nearby cell tower. Plaintiff was intoxicated, however, his intoxication was not a proximate cause of this accident.

Plaintiff's Experts: Dr. Lixn Cui (Metro); Dr. Brendan Patterson (Metro); Richard Bonfiglio, Ph.D.; Barbara Burk (Vocational); Pamela Hanigosky (Life Care Planner); James LaMastra (Functional Capacity); Hank Lipian; Harvey Rosen, Ph.D. (Economist); Michael McCue, Ph.D. (Neuropsychologist, University of Pittsburgh)

Defendants' Expert: Dr. Mark Panigatti; Dr. Harry Plotnick

Estate of John Doe v. John Doe Nursing Home

Type of Case: Wrongful death, nursing home negligence

Settlement: $450,000

Plaintiff's Counsel: Susan and Todd Petersen, Petersen & Petersen, 428 South Street, Chardon, Ohio 44024, (440) 279-4480

Defendant's Counsel: Withheld

Court: Withheld

Date Of Settlement: August 2014

Insurance Company: Withheld

Damages: Death of 74 year old spouse; $340K in medical bills; Funeral and burial costs - $10K

Summary: An elderly John Doe with comorbidities had a recently placed feeding tube due to dysphagia. He was then sent to nursing home for rehab. On day three, he was found on the floor with his feeding tuber dislodged from its original position. Instead of immediately notifying the doctor or sending him to the ER, the nurses slid the feeding tube back into his body and continued to feed. Plaintiffs presented evidence that the standard of care requires cessation of feeding until placement within the stomach is confirmed radiographically by a physician. With dislodged "new" feeding tube, the risk of improper replacement is high as track for the tube has not fully formed. John Doe began exhibiting signs of distress in the hours that followed, but the physician was not notified and the tube feeds continued. After five plus hours and John Doe's condition becoming life threatening, they sent him to the ER where CT showed that the tube was in the peritoneal cavity. By that point, he had gone into septic shock and multi-system organ failure. He underwent surgery and placement of a j-peg and remained hospitalized for the next 20 days. During the course of the stay, his j-peg came out. The two main theories for the defense were: 1) that there was an intervening and superceding cause of his death (the dislodgment of the j-tube); and 2) that he died of undiagnosed fungal meningitis.

Plaintiff's Expert: Nurse Linda Fowler; Surgeon Robert Bell; Treating Surgeon Joseph Talarico; and Infectious Disease Specialist, Dr. Henry Murray.

Defendant's Expert: Kenneth Writesel, D.O.; Arnold Baskies, M.D.; Keith Armitage, M.D.

Baby Boy Doe v. ABC Hospital

Type of Case: Medical Malpractice

Settlement: $2,750,000.00

Plaintiff's Counsel: John A. Lancione, 619 Linda Street, Rocky River, Ohio 44116, (440) 331-6100

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: July 2014

Insurance Company: Self-insured

Damages: Brain Damage and Hearing Loss

Summary: The 4 month old plaintiff was evaluated in the Emergency Department on two separate occasions with symptoms of bacterial meningitis. He was sent home both times. He developed seizures at home and was taken back to the hospital where he was diagnosed with bacterial meningitis, brain damage and hearing loss.

Plaintiff's Expert: Linda Arnold, M.D. (Pediatric Emergency Medicine); Jay Tureen, M.D. (Pediatric Infectious Disease)

Defendant's Expert: Marc Baskin, M.D. (Pediatric Emergency Medicine); Avinash Shetty, M.D. (Pediatric Infectious Disease)

Alijah Jones, et al. v. MetroHealth Medical Center, et al.

Type of Case: Medical negligence/informed consent

Verdict: $14.5 million

Plaintiffs' Counsel: Pamela Pantages and Michael F. Becker, 134 Middle Avenue, Elyria, Ohio 44035, (800) 826-2433

Defendants' Counsel: Leslie Jenny & Jason Ferrante; Marshall Dennehey

Court: Cuyahoga County, Case No. 11-757131, Judge Ron Suster

Date Of Verdict: June 10, 2014

Insurance Company: Hospital is self-insured with AIG excess carrier

Damages: $500,000 past economic, $8 million future economic, $1 million past cost of care/services, $5 million noneconomic

Summary: 36 year old school bus driver with history of prior emergency preterm cesarean admitted on 3 occasions for preterm labor. Each episode was stopped with inpatient admit on Metro's antepartum unit, tocolytic meds and bed rest. Discharged home at the 3rd admit at 24 weeks gestation. 6 days later, patient's water breaks, 4-5 cm dilated, active labor. Instead of elective cesarean as promised, Metro providers order Pitocin-augmented trial of labor. After 3 ½ hours of patient's repeated requests for cesarean and deteriorating fetal status, defendant attending OB calls for crash cesarean. Baby has massive Grade III hemorrhage, CP, cog impairment, retinopathy of prematurity.

Plaintiffs' Experts: Martin Gubernick, M.D. (OB, NYC); Steven Glass, M.D. (Pediatric Neurology, Seattle); Patrick Barnes, M.D. (Pediatric Neuroradiologist, Stanford); John Conomy, M.D. (Neurology, Cleveland); Mona Yudkoff (Life Care Planner, Philadelphia); John Burke, Ph.D. (Economist, Cleveland)

Defendants' Experts: Dwight Rouse, M.D. (Maternal-Fetal Medicine, Providence), Elias Chalhub, M.D. (Pediatric Neurology, Mobile); James Greenberg, M.D. (Neonatology, Cincinnati); Gordon Sze, M.D. (Neuroradiologist, New Haven); Rebecca Baergen, M.D. (Placental Pathology, NYC)

Jane Doe, Admin. v. Dr. Roe

Type of Case: Medical Malpractice

Settlement: $2,950,000.00

Plaintiff's Counsel: John A. Lancione, 619 Linda Street, Rocky River, Ohio 44116, (440) 331-6100

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: May 2014

Insurance Company: Confidential

Damages: Death of a 24 year old woman with 3 surviving minor children

Summary: The decedent developed preeclampsia shortly before delivering her third child. In the immediate post-partum period she developed severe preeclampsia. The defendant OB failed to timely recognize and treat the severe preeclampsia which resulted in hypertensive encephalopathy, brain stem herniation and death.

Plaintiff's Experts: Mark Landon, M.D. (OB/GYN); Baha Sibai, M.D. (OB/GYN)

Defendant's Experts: Dwight Rouse, M.D. (OB/GYN); Patrick Naples, M.D. (OB/GYN)

Confidential

Type of Case: Medical Malpractice

Settlement: $3,000,000.00

Plaintiff's Counsel: David A. Kulwicki, Mishkind Law Firm Co., L.P.A., (216) 595-1900

Defendant's Counsel: Withheld

Court: Clark County Common Pleas

Date Of Settlement: 2014

Insurance Company: Withheld

Damages: Stroke

Summary: Malpositioned central venous catheter

David Brown, Etc., et al. v. Stark County Dept. Of Job & Family Services

Type of Case: Personal Injury Claims for Deprivation of Rights pursuant to 42 USC 1983 and Reckless Conduct

Settlement: $2.5 million

Plaintiffs' Counsel: Jack Landskroner, Paul Grieco, and Drew Legando, 1360 W. 9th Street, Suite 200, Cleveland, Ohio 44113, (216) 522-9000

Defendant's Counsel: Jim Climer and Ross Rhodes

Court: Stark County, Case No. 2012CV03561, Judge Taryn Heath

Date Of Settlement: November 8, 2013

Insurance Company: Specialty Surplus Insurance and Frontier Insurance Company

Damages: Abuse and neglect

Summary: Between 1997-2004, Michael and Sharen Gravelle adopted 11 young children. Three of the children were placed in their home by defendant's agency. In 2005, all 11 children were removed from the home after it was discovered that the Gravelles had kept the children in cages. Further, it was discovered that the Gravelles had subjected the children to other forms of unforgivable abuse and neglect. Investigations revealed that Mr. and Mrs. Gravelle met in sexual abuse counseling; they had five marriages between them and their relationships with their natural children all involved intervention by social services before the children graduated high school. Plaintiffs alleged that defendants should never have placed children with the Gravelles because they were unsuitable applicants to serve as adoptive or foster parents and in doing so violated the children's constitutional rights and constituted a reckless conduct.

Plaintiffs' Experts: Denise Goodman, Ph.D.; John Matthew Fabian, Psy.D.; Marianne Boeing, RN, MSN, CLCP; Mark Lovinger, Ph.D.

Defendant's Experts: Karen Anderson, LISW-S; Thomas Swales, Ph.D.; Mary Ann Rohrig, R.N.

Louisiana Municipal Police Employees Retirement System v. KPMG, LLP

Type of Case: Class Action for Securities Fraud under The Security Exchange Act of 1934 §§ 10(b) and 20(a)

Settlement: $31.6 million

Plaintiff's Counsel: Debra Wyman and Darren Robbins (Lead Counsel), 655 West Broadway, Suite 1900, San Diego, California, Jack Landskroner (Liason Counsel), 1360 W. 9th Street, Suite 200, Cleveland, Ohio 44113, (216) 522-9000

Defendant's Counsel: John M. Newman, Adrienne Mueller, and David J. Tocco

Court: USDC, ND Ohio, Case No. 1:10-cv-01461-BYP, Judge Benita Pearson

Date Of Settlement: November 8, 2013

Damages: N/A

Summary: Plaintiff, on behalf of the class, brought claims for violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder, alleging that Defendant Diebold Corp. fraudulently manipulated the company's earnings and financial performance, causing it to publish materially false and misleading financial results. It was further alleged that KPMG, as the Company's outside auditor during the Class Period, was aware of these accounting manipulations but nevertheless issued unqualified audit reports. Defendants disputed all liability.

Plaintiff's Expert: None

Defendant's Expert: None

Jim Eubanks, Etc. v. Panther II Transportation, Inc.

Type of Case: Class Action for Violation of The Federal Truth in Leasing Act and Breach of Contract

Settlement: $2.5 million

Plaintiff's Counsel: Jack Landskroner, Drew Legando and Michael Arias, 1360 W. 9th Street, Suite 200, Cleveland, Ohio 44113, (216) 522-9000, Alfredo Torrijos, Los Angeles, California

Defendant's Counsel: Donald Scherzer and Amanda Knapp (Local Counsel), Robert L. Browning (Lead Counsel)

Court: USDC, ND Ohio, Case No. 1:11-cv-02705, Judge Solomon Oliver, Jr.

Date Of Settlement: September 9, 2013

Insurance Company: Self-insured

Damages: N/A

Summary: Defendant alleged to have failed to appropriately compensate independent truck drivers for contracted loads in accordance with the Truth in Leasing Act (49 CFR Part 376) and Contract.

Plaintiff's Expert: None

Defendant's Expert: None

Confidential

Type of Case: Medical Malpractice

Settlement: $2,445,000.00

Plaintiff's Counsel: David A. Kulwicki, Mishkind Law Firm Co., L.P.A., (216) 595-1900

Defendant's Counsel: Withheld

Court: Summit County Common Pleas

Date Of Settlement: 2013

Insurance Company: Withheld

Damages: Wrongful Death

Summary: Delayed diagnosis of malignant melanoma

Confidential

Type of Case: Medical Malpractice

Settlement: $1,775,000.00

Plaintiff's Counsel: David A. Kulwicki, Mishkind Law Firm Co., L.P.A., (216) 595-1900

Defendant's Counsel: Withheld

Court: Summit County Common Pleas

Date Of Settlement: 2013

Insurance Company: Withheld

Damages: Bilateral below-the-knee amputation

Summary: Delayed diagnosis of infection.

John Doe, Minor v. ABC Hospital, et al.

Type of Case: Medical Malpractice

Settlement: $9,750,000.00

Plaintiff's Counsel: James M. Kelly III, 6105 Parkland Blvd., Mayfield Hts., Ohio, (440) 442-6677

Defendant's Counsel: Withheld

Court: Withheld

Damages: Paralysis and neurological compromise requiring a lifetime of care with all activities of daily living. Parties contested whether HIE unrelated to negligence or inflammatory response accounted for many of the physical and cognitive deficits.

Summary: Minor born in distress as a result of emergency c-section and hypertonic uterus requiring admission to NICU. While admitted, a catheter was threaded into the ascending lumbar vein erroneously, versus the inferior vena cava. TPN nutrition was infused into ascending lumbar vein resulting in paralysis. Issues included verification of catheter tip location on floor, by x-ray, subsequent films and a failure to recognize clinical manifestations of paralysis and systemic inflammatory response. ■

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. I understand that my application must be seconded by a member of the Academy and approved by the President. If admitted to the Academy, I agree to abide by its Constitution and By-Laws and *participate fully in the program of the Academy*. I certify that 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.***

In addition, I certify that no more than 25% of my practice and that of my firm's practice if I am not a sole practitioner, is devoted to personal injury litigation defense.

Name_____

Firm Name:_____

Office Address:_____ **Phone No:**_____

Home Address:_____ **Phone No:**_____

Law School Attended and Date of Degree:_____

_____

Professional Honors or Articles Written:_____

_____

Date of Admission to Ohio Bar:_____ **Date of Commenced Practice:**_____

Percentage of Cases Representing Claimants:_____

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

_____

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

_____

Date:_____ **Applicant:**_____

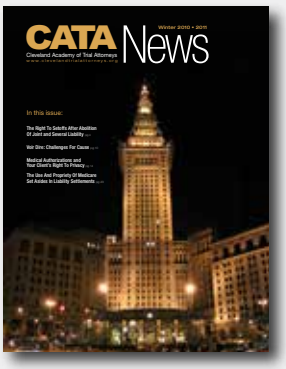
Invited:_____ **Seconded By:**_____

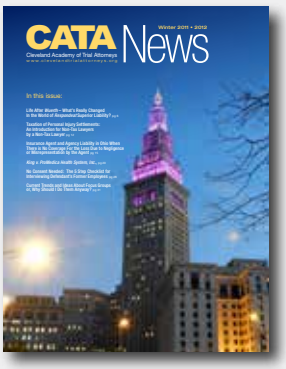
President's Approval:_____ **Date:**_____

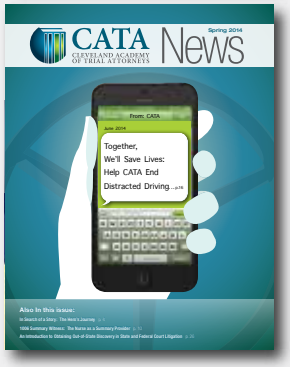
Please return completed Application with $125.00 fee to: **CATA, c/o Cathleen M. Bolek, Esq.**
Bolek Besser Glesius LLC
5885 Landerbrook Drive
Cleveland, OH 44124

CATA MEMBERS:

To view past issues of the CATA News, please go to http://clevelandtrialattorneys.org. You will need to log in with your user name and password.







Winter 2014 • 2015