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President's Message: Five Words That Define Us

by Kathleen J. St. John

At the start of my term, Will Eadie, who has been active in maintaining CATA's social media pages, suggested CATA have a "catchphrase" for our Facebook profile picture. He suggested three words which led to a broader discussion among the board as to what words best define who we are and what we do.

Five words bubbled to the surface from Will's initial three:

Protect. Advocate. Educate. Collaborate. Innovate.

There was much discussion about which three words most closely identify CATA's essence, and the order of importance (or, for some, cadence) in which to place them. We never fully resolved the issue, in part because all five words describe some aspect of who we are.

Protect and **advocate** do not so much define what CATA itself does, as what our members do and what unites us. These words announce what we fight for daily -- what makes us return to work even when the stress of litigation seems overwhelming. When the public misunderstands trial lawyers and perceives us as being motivated by dollars, it is perhaps because they don't understand this inclination in us. We are drawn to representing injury victims because we naturally gravitate to helping those in need. We seek to protect our clients through courtroom advocacy; and we come together in this organization to support one another in this goal.

The other three terms define how CATA strives to help its members, and, through them, our clients and our community.

Education is an ongoing goal of CATA, and one of motivational forces that gave birth this organization. In the Winter 2013-2014 edition of the CATA News, past president Peter Weinberger described how "in the old days" a small group of local plaintiffs lawyers would meet monthly at the erstwhile Blue Fox restaurant in Lakewood. After dinner, the leading lights of the local plaintiffs' bar gave presentations, sharing their secrets for success in the courtroom. As Peter recounts, "it was their passion for their clients' causes and their capacity for innovation and imagination in the courtroom that was amazing and inspirational."

Today we carry on this tradition through our monthly luncheon CLEs and our Annual Litigation Institute. This year we've actually held two Litigation Institutes – an all day seminar in April, and, a half-day seminar this past November 18th. The speaker in November was CWRU law professor, Jaime Bouvier, who spoke on *How Emotional Intelligence Can Make You A More Effective Leader And Trial Lawyer.* The board decided to shift the Litigation Institute from spring to fall to ease the inundation of conventions and seminars that take place in the spring. We also opted for a half day rather than a full day seminar for the convenience of our members. I encourage you, however, to contact me or any of our officers or board members to

state your preferences. Input from our membership is essential to keeping our organization strong and relevant.

We also **educate** – and help jumpstart legal research – by publishing articles in the CATA News on current legal issues. One of the delights of my practice in the past five years has been serving as Editor or Co-Editor of this magazine. We can thank past president, Brian Eisen, and the board with which he served, for deciding to revive this magazine in its current format. But the CATA News could not exist without the contributions from so many members, judges and others, many of whom provide articles on a recurring basis. We are also grateful to our advertisers, to our designer, Joanna Eustache, and to our design assistant, Lillian Rudiy, all of whom contribute to making this publication successful.

Another way we **educate**, as well as **innovate**, is by bringing the End Distracted Driving (EndDD) program to schools in our community. Past president Ellen Hirshman, who has chaired our Community Outreach Committee for the past two years, is the champion and ongoing force behind this project. She brought its founder, attorney Joel Feldman of the Casey Feldman Foundation, to speak at CATA's annual dinner in June of 2014, and presented him with the President's Award at the dinner this past June. With the help of several CATA members – Dana Paris, Steve Crandall, Paul Grieco, Chris Carney, Will Eadie, and Frank Bolmeyer, to name a few – she has brought the EndDD program to hundreds of area high school students. This program has been well-received by the students, faculty and parents who have been exposed to it. We encourage all of you to consider getting involved in it by contacting Ellen at ehirshman@loucaslaw.com.

Ellen Hirshman gives an EndDD presentation at Our Lady of The Elms.

Professor Jaime Bouvier speaking at the November Litigation Institute

The Community Outreach Committee has also held two law student networking events – one with the Cleveland Marshall students last spring, the other with the CWRU students this past September. We supported Legal Aid by purchasing a table at their annual luncheon on November 30th. CATA also partnered with Shoes and Clothes for Kids, www.sc4k.org, to sponsor a Holiday Giving Event at the Payless Shoe Store in Steelyard Commons. CATA donated $2,000, augmented by cash donations from members, that enabled us to provide a new pair of shoes or boots to more than 100 children. By sponsoring these events, our membership **collaborates** to effect positive change in the lives of individuals in our community.

In fact, **collaboration** is the essence of what we do, for we, as an organization of competitors, seek to better the lives of our clients by sharing our knowledge with one another, knowing that by helping others in the profession, we improve the profession itself.

That then leaves the word about which our board had the most debate: **innovate**. The idea, attributable to Will, is that we "educate members to be better advocates, and do so in a cutting edge, innovative way." In practice, Will's vision (and that of the Technology/Networking Committee) is implemented in CATA's website, www.clevelandtrialattorneys.org, as well as in its Facebook page and Twitter account. Will, along with former board member Andrew Thompson, and board member Todd Gurney, have been encouraging us to make use of these social media platforms, and I urge you to visit these sites. Our website blog enables you to join or start a conversation; the more we use it, the more traffic we drive to our website to share the positive things we do. Similarly, if you have Facebook or Twitter accounts, please "like" or "retweet" our posts. Indeed, CATA will retweet relevant tweets from members, thus giving you greater visibility on the internet.

In each of these ways we strive to serve our membership and make a positive impact on our community and the profession. I invite you to contact me with further suggestions. ■

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Medical Records Are Full Of It!

by Charlie Murray

I. The Problem.

Every day, health care personnel create records to document patient symptoms, treatment and response. The personnel may also create records for their own protection. For example, a doctor writes a note in the chart, and expresses an opinion based on the currently available information. In the context of potential diagnoses, any health care provider opinions are not likely to be expressed to the degree of admissibility in a court of law. Especially in medical negligence cases, these opinions based on limited information create evidentiary challenges. Such evidence is hearsay!

Wouldn't it be nice and neat for us in trial if doctors only expressed informed, accurate opinions to a reasonable degree of medical probability? As lawyers, we are looking for evidence we can use for proof of a differential diagnosis or a plan for treatment. Instead, the records are being created in a chaotic environment as fraught with peril, in its own way, as the activity of texting while driving.[1]

Some days, we are faced with a decision about the admissibility of medical records from prior or subsequent treatment providers. Sometimes the prior records are helpful – a ten-year history appears to show a clean record, and no one else to blame. Or, the subsequent records state that our client has a condition which we would logically attribute to the negligence, and the records state that the patient had an event, and then had a problem. The records in such cases appear to provide a simple and inexpensive way to present the evidence and eliminate the need to take a deposition.

But be careful. The fact that they are doctors means they have opinions, and perhaps good ones. But these opinions may not be admissible even if the witness is on the witness stand. Several reasons may limit or prevent the admissibility of opinions, and the quality of the opinion has to be considered. For example, the witness may not be qualified to express this particular opinion. Or in the field of medical negligence, the opinion may not be based on all the relevant facts. Assuming you are cross-examining an expert whose limited opinions are favorable to the defense, the defense may argue that this objection goes to the weight of the opinion and not the admissibility.

In the trial of the *Estate of Mary Gallagher v. Firelands Regional Medical Center,* Erie County Court of Common Pleas Case No. 2013CV0390, we carved out an important argument against admitting hearsay opinions embedded within subsequent treatment records. Mary had a carotid procedure to improve blood circulation to her brain. Before and during the procedure, the notes indicate nothing unusual. After the procedure, she came out of the operating room and into the post-operative care unit where she had low blood pressure. She was transferred to the floor after one hour, but no doctor saw her in spite of the low blood pressure.

While she was admitted to the floor, Mary was

under the care of nurses, and no doctor was called to her room. No doctor had been called to evaluate her hypotension, and she went to sleep. When a floor nurse checked on Mary in the morning hours, she was unable to lift her arm. After eleven hours of low blood pressure, she was observed with signs and symptoms of a stroke. The first course of treatment was to increase fluids.

Twenty minutes after the floor nurse checked Mary's blood pressure that morning, she called a code. The hospitalist responded to the code and the nurse administered a bolus of fluid to Mary. Her blood pressure immediately responded, and she was exhibiting signs of normal pressure. But it was too late. Mary suffered a right-sided pontine stroke, with multiple small left-sided strokes. When the family convened with the doctors, everyone agreed Mary had a deep stroke and that she should be transferred to University Hospital.

This is where the hearsay began to creep into the medical records. UH doctors concluded that she must have had a cardio-embolic stroke, meaning that a blood clot formed in her heart and split into little pieces to shower clots all over her brain including the pontine infarct on the right side and in the watershed distribution on the left side. The doctors at UH did not know her history of hypotension for eleven hours.

The prolonged hypotension was a primary claim of medical negligence.

Plaintiff's theory was that the low blood pressure led to low perfusion in the vulnerable parts of the brain, including the pontine territory where she had small vessel disease which was visible on an MRI from two months before this procedure. We produced testimony from a nursing expert, a hospitalist and an interventional neuroradiologist.

The two foremost issues in this case focused on the nursing standard of care in light of the blood pressure and other vital signs as they were charted; and whether the violations of the patient's safety were a proximate cause of her left-sided hemiparesis.

The defense claimed that a cardio-embolic event (in this case, atrial fibrillation) had caused a blood clot to shower small fragments around the brain and find their way into vulnerable places including the pons where the left-sided loss of function was caused.

The defense asked questions of plaintiff's experts during their discovery depositions to suggest that they planned to use records from UH to help prove their theory that Mary had an unfortunate cardio-embolic infarct, and that it was not caused by the hypotension even if it was present (which, of course, they denied).

Mary's Estate filed a motion in limine to prevent the use of subsequent records. The leading case is *Hytha v. Schwendeman*.[2] First, the court in *Hytha* overruled the trial court and held that it improperly admitted a medical report. Second, in the syllabus of the *Hytha* opinion, the court provided that numerous strictures must be met to properly admit the records that contained opinions:

> (1) The record must have been a systematic entry kept in the records of the hospital or physician and made in the regular course of business;
>
> (2) The diagnosis must have been the result of well-known and accepted objective testing and examining practices and procedures which are not of such a technical nature as to require cross-examination;
>
> (3) The diagnosis must not have rested solely upon the subjective complaints of the patient;
>
> (4) The diagnosis must have been made by a qualified person;
>
> (5) The evidence sought to be introduced must be competent and relevant;
>
> (6) If the use of the record is for the purpose of proving the truth of the matter asserted at trial, it must be the product of the party seeking admission; and
>
> (7) It must be properly authenticated.[3]

The trial court agreed with Mary's Estate, and the motion in limine was granted. The defense filed a motion for clarification, and the court affirmed its earlier ruling. The defense filed a motion to reconsider, and the court again affirmed. The UH records were not coming in for the jury's consideration.

Going into trial, neither party deposed the UH doctors or called them as witnesses. The UH records were replete with opinions that Mary had a cardio-embolic event. But the doctors at UH could not have known about the negligence of the Firelands' nurses. The Firelands' records were not ever presented to the UH doctors, so they were not aware of Mary's medical history. Mary's family was not aware of the history of hypotension. And most doctors would not suspect that the prior nurses would leave a patient with low blood pressure for hours and hours without calling a doctor to intervene. (Are doctors even trained to suspect negligence? And, if they are, would they put that down as a diagnosis without concrete evidence?)

At UH, no one provided the neuroradiologist with a pivotal piece of evidence: this patient had a prior brain study from two months before this procedure which demonstrated small vessel disease in the pons. This fact would leave blood vessels in the pons territory vulnerable to low blood pressure and perfusion, so the opinion on proximate cause lacked foundation. Both the history of small vessel disease

and the prolonged hypotension were missing.

During the trial, defense counsel convinced the trial court to allow a cross-examination of plaintiff's witness, over objection, with regard to her conversation with the UH doctors. "And so my – I don't want to know about the discussion, but my only question is isn't it true that no University Hospital's doctors ever indicated to you that the care received by your mom at Firelands was bad, or inappropriate, or negligent?" Plaintiff objected, but the Court overruled the objection and required Mary's daughter to testify as to the opinions of unidentified, absent doctors.

This question clearly implied that University Hospital doctors did not find negligence at the hands of Firelands Regional Medical Center. Defendant attempted to bootstrap hearsay opinions by means of cross-examination. By overruling plaintiff's objection to this questioning, the court allowed unidentified, absent medical professionals to weigh-in on the issue of medical malpractice. Moreover, because these absent doctors were not testifying for plaintiff and were not hired by defendant, they appeared to be neutral.

At the close of defendant's case, counsel moved to admit the UH records, and, over plaintiff's objections, the court allowed the records to go to the jury.

II. What's Wrong With This Ruling?

By permitting these records to go to the jury, the court ignored the numerous safeguards the law requires and that the court had put in place through its pretrial evidentiary rulings. Those rulings had recognized that expert opinions in medical records must meet additional criteria to be admitted as business records.[4]

Fundamentally, "the portions of the medical records that contain medical opinions or diagnoses must be further authenticated to be admissible. This is because the medical opinions and diagnoses are expert testimony under Evid. R. 702."[5]

Once an exhibit is found to be both relevant and authentic, the remaining aspects of foundation must then be established for its admission. This is generally accomplished through testimony by a person competent to testify as to the existence of the contents of the exhibit.[6]

"[A] knowledgeable person must testify as to the diagnoses or opinions included in the medical records. To hold otherwise would permit a party to present expert medical testimony through a lay witness, or in this case no witness at all, and effectively prevent the opposing party from challenging the expert testimony through cross examination. This would violate Evid. R. 701 and 702." [7]

In *Bzdafka v. Bretz*,[8] defense counsel asked the plaintiff on cross-examination about an exhibit which was that plaintiff's medical record. Plaintiff's counsel objected to the admission of the exhibit into evidence because it was not authenticated and because he had not been provided with a copy.[9] The trial court admitted the evidence over the plaintiff's objection.[10] The court of appeals determined that the plaintiff was "not the proper person to authenticate these records."[11] Furthermore, neither the doctor who created the records nor the custodian who maintained these records was called to testify at trial.[12] The appellate court upheld the order granting a new trial in this case because it was error to admit the records and because the "submission of this exhibit to the jury was prejudicial to plaintiffs' case."[13]

Ohio courts readily acknowledge that Evid. R. 803(6) requires proof of additional elements of authentication.[14] The proponent of the evidence must show, or the parties must stipulate, that (1) the records were made at or near the time of the event, (2) the records were kept in the ordinary course of business, **and (3) the records were made by a person with knowledge.**[15]

The trial court's decision whether to admit evidence cannot allow a party to circumvent other applicable rules of evidence. For instance, in *Wasinski v. Adm'r, Bureau of Workers' Comp.*,[16] the court held "Evid. R. 803(6) does not preclude the admissibility of opinions or diagnoses contained in medical records or reports as long as they satisfy the foundational authentication requirements of Evid. R. 803(6) and do not violate other evidentiary rules (e.g., R.C. 2317.02(B); Evid. R. 402 and Evid. R. 702.)"[17]

In Mary's case, because her attorneys could not cross-examine the authors of UH records, those opinions which permeated Mary's UH records were hearsay within hearsay. All testimony, reference, or argument concerning the radiology interpretations or the cause of Mary's strokes memorialized by the UH doctors violated the hearsay rule and should have been precluded under Evid. R. 801. Moreover, when offered to bolster defendant's proximate cause theory, the radiology notes amounted to hearsay evidence.

These hearsay opinions did not fall within any exception to the hearsay rule. They did not fall within Evid. R. 803(4) (statements for the purposes of medical diagnosis and treatment) as they did not relate to the doctors' treatment plans or actual diagnoses, and were not made by the patient for purposes of medical treatment. "Evid. R. 803(4) applies to statements made by a patient for purposes of that patient's medical diagnosis

and treatment. It cannot be used to admit opinion testimony of treating physicians."[18] Indeed, Evid. R. 803(4) encompasses only statements made by a patient to medical personnel concerning the patient's physical condition.[19] Evid. R. 803(4)'s hearsay exception for patient statements furthering medical diagnosis thus does not apply to improperly admit a physician's hearsay opinion testimony.

The hearsay opinions from the UH doctors also did not come within the business records exception of Evid. R. 803(6). In this respect, "the great weight of authority in Ohio holds that medical opinions and diagnoses are not within the hearsay exception of Evid. R. 803(6)."[20]

Further, in Mary's case, the defendant failed to meet Evid. R. 702, and consequently the opinions contained in the UH radiology interpretations, as well as the opinion of the treating physician as to an ultimate issue, were improperly admitted expert opinions. Firelands Regional Medical Center presented no evidence or testimony to establish training, expertise, and sound methodology for an adequate basis for the hospitalist, neurologist, or radiologist to provide expert testimony under Rule 702. Thus, the diagnostic interpretations and offering of expert testimony as to an ultimate issue in this case was inadmissible and should have been redacted from the UH records.

Finally, the hearsay opinions in Mary's subsequent treatment records were inadmissible under Evid. R. 403 because their probative value was greatly outweighed by their prejudicial effect. The notes of the treating physician appeared to demonstrate that a non-witness agreed with defendant's theory of causation. Plaintiff had no opportunity to cross-examine the absent authors, who were not called as witnesses before the jury.

III. Conclusion.

We must be vigilant when defendants try to slip hearsay into the case by the back door use of medical records created in a war zone. The records are not reliable and we have to aggressively argue to keep such hearsay from the jury's consideration.

The war is not lost. Whereas the jury found negligence on the part of the nurses for several reasons, they referenced the evidence from UH as support for their finding that causation was not proven. In post-trial motions, the trial court recognized that the defense had worked effectively to confuse the issues and that the records replete with hearsay opinions should not have been admitted. The court granted Mary's Estate a new trial, and the hospital has filed its notice of appeal. ■

End Notes

1. *See, e.g.*, Burger, Jim, Outpatient Surgery, *Are EMRs Putting Patients in Peril?* Oct. 2, 2015, http://www.outpatientsurgery.net/outpatient-surgery-news-and-trends/general-surgical-news/ (last visited Nov. 10, 2015).
2. 40 Ohio App.2d 478, 320 N.E.2d 312 (10th Dist. 1974).
3. *Hytha, supra*, at the syllabus.
4. *Id.*
5. *LaPorte v. J.P. Food Serv.*, 11th Dist. No. 2000-P-0103, 2011-Ohio-4314, ¶5.
6. *Parsons v. Scott*, 11th Dist. No. 94-L-154, 1995 Ohio App. LEXIS 3888, at *10 (Sept. 8, 1995).
7. *LaPorte,* 11th Dist. No. 2000-P-0103, 2011-Ohio-4314, *6 (emphasis added).
8. 8th Dist. No. 95840, 2011-Ohio-3982.
9. *Id.* at ¶10.
10. *Id.*
11. *Id.* at ¶17.
12. *Id.*
13. *Id.* at ¶¶ 17-18.
14. *Lambert v. Goodyear Tire & Rubber Co.*, 79 Ohio App.3d 15, 606 N.E.2d 983 (1992).
15. *Id.*
16. 3rd Dist. No. 3-08-16, 2009-Ohio-2615.
17. *Id.* at ¶20, quoting *Smith v. Dillard's Dept. Stores, Inc.*, 8th Dist. No. 75787, 2000-Ohio-2689.
18. *Guarino-Wong v. Hosler*, 1st Dist. No. C-120453, 2013-Ohio-1625, citing *Johnson v. Cassens Transport Co.*, 158 Ohio App.3d 193, 2004-Ohio-4011, 814 N.E.2d 545 ¶21 (3rd Dist.).
19. See *Golden v. George Gradel Co.*, 6th Dist. No. L-88-091, 1989 Ohio App. LEXIS 492, *8.
20. *Ruth v. Moncrief*, 2d Dist. No. 18479, 2001 Ohio App. LEXIS 4886, *8 (Nov. 2, 2001); see also, *Guarino-Wong*, at ¶8, citing *Meyers v. Hot Bagels Factory, Inc.*, 131 Ohio App.3d 82, 100, 721 N.E.2d 1068 (1st Dist. 1999).

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The Gatekeeper's Discretion: *Daubert* is All About the Judge

by Dustin B. Herman

Between 2008 and 2013 the Eleventh Circuit reviewed 54 *Daubert* decisions. In only three (3) of those cases was the district court reversed.[1] That can be good or bad depending on how you look at it, but what it surely means is that you had better win at the trial court level. And since trial courts are given such wide latitude in making decisions to exclude or admit expert testimony, our focus must always be on the judge and getting the gatekeeper's discretion to work in our favor.

Where It All Started: The Bendectin Litigation

Between 1956 and 1983, over 33 million women took Bendectin as an anti-nausea medication during pregnancy.[2] In the late 1970's and throughout the 1980's, thousands of lawsuits were filed all over the country claiming that Bendectin caused birth defects (specifically limb deformities). Prominent attorneys like Melvin Belli, Jim Butler, Allen Eaton, and Barry Nace spearheaded the litigation. In June 1983, Barry Nace obtained a $750,000.00 verdict for plaintiff, Mary Oxendine, whose mother had taken Bendectin while pregnant, and who was born with a shortened right forearm and only three fingers on her right hand. 13 days after the verdict, Merrell Dow Pharmaceuticals, Inc. took Bendectin off the market. Merrell cited an increase in insurance rates and maintained that the drug is perfectly safe.[3]

Despite the verdict, an issue that continued to loom over the entire litigation was – did Bendectin actually cause birth defects? And the central issue in each case was – did Bendectin cause *this* plaintiff's birth defects? At the time, no one knew the causal mechanism by which Bendectin (allegedly) caused birth defects, and no epidemiological study had ever concluded Bendectin caused birth defects. Courts across the country struggled with the issue of whether, and on what basis, an expert could testify that Bendectin not only caused birth defects, but caused the birth defects experienced by a particular plaintiff.

The question was – and is – essentially epistemological. That is – how does the expert "know" what the expert claims to "know"? What basis does the expert have for saying it? And the important question for courts in determining whether an expert's opinion is admissible is: What counts as a *sufficient* basis – as a legally adequate foundation – as "good grounds" – for an expert's opinion?

The Four *Dauberts* – All the Way Up and Back Down Again

In response to a motion for summary judgment in the *Daubert* case (this is now 1989), Barry Nace produced seven experts who testified that Bendectin can cause birth defects (in general) and one expert who testified that Bendectin caused the birth defects suffered by the two plaintiffs.[4] To reach their conclusions, the experts (all of whom had testified in other Bendectin cases) relied on: (1) *in vivo* animal studies; (2) *in vitro* (test tube) studies; (3) chemical structure analyses; and (4) a recalculation of previous epidemiological studies.[5] The experts weighed the available evidence and basically said – look,

it's true that we don't know the biological mechanism involved, and it's true that no published epidemiological studies have ever concluded there is a statistically significant relationship between Bendectin and birth defects, but we know that when we give Bendectin to pregnant rabbits, it causes limb deformities in the offspring; and we know that Bendectin has detrimental effects upon animal cells grown in test tubes; and we know that the molecular structure of Bendectin is very similar to that of other chemicals that are known to cause birth defects; and finally, if you take a closer look at the data from the published epidemiological studies, there really is a statistically significant relationship between mothers taking Bendectin while pregnant and their children being born with limb deformities.

The District Court acknowledged that, "there are two schools of thought governing expert testimony in these Bendectin cases."[6] The majority view (already supported by the First, Fifth, Sixth and D.C. Circuits) was that absent a scientific understanding of the causal mechanism, a "failure to present statistically significant epidemiological proof" was "fatal" to the case.[7] (Read: When the biological mechanism is unknown - the *only* thing that counts as a sufficient basis – as good grounds – for an expert's testimony on causation is epidemiological evidence.) The minority view on the other hand did not require epidemiological evidence to prove causation. It permitted experts to weigh all of the available evidence in reaching a conclusion, gave "deference to the expert's opinion," and viewed the "varying conclusions as involving a classic battle of the experts."[8]

The trial court in *Daubert* sided with the majority view's bright-line approach and held (without mentioning *Frye*) that, "epidemiological studies are the most reliable evidence of causation in this area" and that an "expert opinion which is not based on epidemiological evidence is not admissible to establish causation because it lacks the sufficient foundation necessary under FRE 703." (yes 703, not 702).[9]

The Ninth Circuit affirmed and, applying *Frye*, held that plaintiffs' recalculations of epidemiological studies were not performed using a "generally accepted scientific technique" because "they were unpublished, not subjected to the normal peer review process and generated solely for use in litigation."[10]

As we all know, the case reached the Supreme Court. What many people don't realize, however, is that the Court's *Daubert* decision was a victory for the *plaintiffs*. The Court vacated the Ninth Circuit's opinion, stating that *Frye*, "should not be applied in federal trials" because "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'"[11] Instead of adopting the bright-line "general acceptance" approach (as the majority of the circuit courts had), the Court assigned the trial judge the role of "gatekeeper" with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[12] In other words, the Court set a new, more flexible standard for what counts as a sufficient basis for expert testimony. The opinion actually gave the plaintiffs a second chance.

On remand, however, the Ninth Circuit put the case to bed for good. It's an incredibly sarcastic opinion, highly critical of the Court's new standard, and truly a good read all around:

> As we read the Supreme Court's teaching in *Daubert*, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."
>
> The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.
>
> Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method." Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.[13]

The Ninth Circuit avoided remanding the case to the trial court and held that summary judgment was appropriate even under the Court's new *Daubert* standard. It placed heavy weight on the fact that the expert's opinions were formed solely for litigation purposes. It simply did not trust the experts testifying in the case, stating: "It's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation."[14]

The court did note that if given another chance, plaintiffs' experts might be able to show that their opinions on general causation (i.e., Bendectin *can* cause birth defects) were derived using the scientific method and therefore are reliable. Nevertheless, applying the second prong of *Daubert*, the court held the testimony would not be relevant to the task at hand because, even if general causation could be proved, the plaintiffs could not prove specific causation.[15] The court reasoned that without evidence of a relative risk factor of 2.0 (a doubling of the risk), the experts could not testify that Bendectin *more likely than not* caused the birth defects suffered by the two plaintiffs.

Here, the Ninth Circuit may have smuggled in a rigorous general acceptance standard by not giving the experts an opportunity to testify to whether a differential diagnosis was performed. Indeed, the court acknowledged that in some cases a relative risk factor of less than 2.0 could be combined with other evidence to support specific causation under a "more likely than not" standard.

Regardless, the *Daubert* case was over and a new era of litigation had begun.

The New Standard: Qualifications, Reliability, and Relevancy

In 2014, in *Adams v. Lab. Corp. of America*, the Eleventh Circuit summarized the standard for admissibility of expert testimony: "We have distilled from *Daubert*, *Kumho*, and Rule 702 these three requirements: First, 'the expert must be qualified to testify competently regarding the matter he or she intends to address'; second, the expert's 'methodology ... must be reliable as determined by a *Daubert* inquiry'; and third, the expert's 'testimony must assist the trier of fact through the application of expertise to understand the evidence or determine a fact in issue.'"[16]

I will not discuss qualifications here, but instead turn to the heart of *Daubert* – reliability.

Reliability Means "Evidentiary Reliability" – i.e., "Trustworthiness"

The "reliability" prong is the primary focus in a *Daubert* challenge. It is critical to remember that *Daubert* was a case about scientific knowledge as opposed to the other types of knowledge expressly listed in FRE 702 ("technical, or other specialized knowledge"). The Court made clear: "Our discussion is limited to the scientific context because that is the nature of the expertise offered here."[17] Since *Daubert* was a case involving *scientific* knowledge as to whether a drug caused birth defects, the Court held expert opinions needed to be derived from the scientific method:

[I]n order to qualify as 'scientific

> knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.[18]

In footnote nine, the Court clarified what it meant by evidentiary reliability. It acknowledged that scientists usually distinguish between "'validity' (Does the principle support what it purports to show?) and 'reliability' (Does application of the principle produce consistent results?)."[19] The Court specified that "our reference here is to *evidentiary* reliability – that is, trustworthiness."[20]

We are all familiar with the notion that evidence must be trustworthy before it can be admitted into evidence. That is exactly what makes hearsay inadmissible — because something someone said out of court is not reliable evidence. We don't know if it's true. It can't be trusted. It can't be *relied upon*. Indeed, in footnote 9 the Court goes on to compare its *Daubert* standard of evidentiary reliability to the theory behind exceptions to hearsay, stating "hearsay exceptions will be recognized only 'under circumstances supposed to furnish guarantees of trustworthiness.'"[21] At the end of footnote 9, the Court states: "In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*."[22] The Court spends much of the rest of the opinion trying to set up a structure for evaluating scientific validity and discerning "good science" from "pseudoscience" (which is where the four factors come into play).

The take away is that the *trustworthiness* of an expert's opinion is really what *Daubert* is all about. The expert forms an opinion, and the trial court (as gatekeeper) gets to say, in essence – yea, but *how* do you know that? – what basis do you have for saying that? – please explain your reasoning.[23] In other words, under *Daubert*, experts must show their work.

Joiner – Analytical Gaps and Abuse of Discretion

In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the district court had precluded two experts from testifying that exposure to a certain chemical, PCB, "promoted" the plaintiff's lung cancer, where plaintiff smoked cigarettes and had a family history of lung cancer. The experts' opinions were based on mice studies and four (according to the district court – readily distinguishable) epidemiological studies. The district court found the studies to be an insufficient basis for the experts' conclusions on causation and granted summary judgment. The Eleventh Circuit overturned the decision, but the Supreme Court reversed and upheld the exclusion of the expert testimony.

In *Daubert*, the Court stressed, "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."[24] However, in *Joiner*, Justice Rehnquist, modified this requirement, stating:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[25]

Joiner is an exceedingly important case because it not only gives trial courts the discretion to evaluate the conclusions generated by an expert, but it also holds that a trial court's decision to admit or exclude expert testimony will not be overturned unless the court abuses its discretion.[26] This means that in most cases, whether the trial court decides to admit an expert's testimony or decides to exclude it, both decisions would be right (i.e., upheld).

Kumho – Technical Experts, Experience, and Intellectual Rigor

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court affirmed the district court's exclusion of a tire expert's opinion that the tire blow-out was caused by a defect in the tire rather than due to abuse or the tire being underinflated. The exclusion was based, in part, on the fact that the expert was unable to explain the method he used and repeatedly relied, "on the 'subjectiveness' of his mode of analysis," in response to questions seeking specific information about his method for determining the defect.[27] Additionally, and this was a big red flag, the expert determined the tire to be defective – and issued a report to that effect – after simply looking at photographs of the tire and only inspected the tire itself the morning of his deposition.[28]

The Court held that the trial court's gatekeeping function applies to all kinds of specialized knowledge, not merely scientific knowledge. The trial court must "make certain that [the] expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[29]

Factors Bearing on the Inquiry

Daubert listed four factors that will "bear on the inquiry" of reliability, but these were "general observations" and the

Court stated it did "not presume to set out a definitive checklist or test."[30] In *Kumho*, the Court explained this point further:

> [T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.[31]

The Court went on to state, "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."[32] But, "it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable."[33] Even the Committee Notes to Rule 702 state: "[T]he text of *Rule 702* expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."

Below is a non-exhaustive list of factors that will bear on the inquiry of reliability:

- Can be (has been) tested (*Daubert*)
- Peer reviewed (*Daubert*)
- Known or potential rate of error (*Daubert*)
- General acceptance (*Daubert*)
- Opinions formed for purposes of litigation[34]
- An analytical gap between premises and conclusion[35]
- Consideration of alternative explanations[36]
- Same level of intellectual rigor employed in the courtroom as used in professional work[37]
- Practical experience[38]

Despite the clear teaching by *Kumho* and the Committee Notes, attorneys often make a big deal out of an expert's opinion lacking the factors listed in *Daubert*. But when conclusions are based upon a review of scientific literature, "it makes little sense to ask whether the technique employed 'can be (and has been) tested,' or what its 'known or potential rate of error' might be."[39] Additionally, "reference to a published study... is not necessary to demonstrate minimum scientific reliability" where scientific literature "may not be extensive."[40]

Ultimately, as the Court stated in *Kumho*, "whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." And further, as held by the Eleventh Circuit, the abuse-of-discretion standard, "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion."[41]

It also must be noted that the proponent of the expert bears the burden of proving the reliability of the expert's opinion by a preponderance of the evidence.[42]

Relevancy – A Question of Helpfulness or "Fit"

Expert testimony must be "sufficiently tied to the facts of the case," – a consideration that has been described as "fit."[43] "'Fit' is not always obvious and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[44]

Some attorneys try to use this prong as a way to attack an expert's conclusions. Most of the time, attacks on an expert's conclusions should go to weight and not admissibility; the opposing attorney can bring out flaws in an expert's conclusions on cross examination. "We have repeatedly stressed *Daubert*'s teaching that the gatekeeping function under Rule 702 'is not intended to supplant the adversary system or the role of the jury: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking *shaky but admissible evidence*.'"[45]

The example set out in *Daubert* regarding what the Court meant by "fit" is very helpful in diffusing this argument:

> The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. *Rule 702*'s 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.[46]

***Daubert* Law in Ohio**

1. Ohio Trial Judges Are Gatekeepers. "This gatekeeping function imposes an obligation upon a trial court to assess both the reliability of an expert's methodology and the relevance of any testimony offered before permitting the expert to testify. We adopted this role for Ohio trial judges in *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607 (1998)." *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 24 (citing *Kumho* in

the preceding sentence, and again a few paragraphs later, indicating an adoption of the standard in *Kumho* as well as that of *Daubert*).

2. Focus is on Methods Not Conclusions. "Thus, a trial court's role in determining whether an expert's testimony is admissible under Evid. R. 702(C) focuses on whether the opinion is based upon scientifically valid principles, not whether the expert's conclusions are correct or whether the testimony satisfies the proponent's burden of proof at trial." *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 613-14 (1998).

3. It's Not What You Know, But How You Know It. "[W]e are not concerned with the substance of the experts' conclusions; our focus is on how the experts arrived at their conclusions." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 16 (*citing Joiner*, the court affirmed the exclusion of an expert because there was too great an "analytical gap" between the data relied upon and the opinion offered).

4. Differential Diagnosis Is Not a Sufficient Method Without Showing General Causation. "'Differential diagnosis' describes the process of isolating the cause of a patient's symptoms through the systematic elimination of all potential causes. Although differential diagnosis is a standard scientific method for determining causation, its use is appropriate only when considering potential causes that are scientifically known." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 22 (citations omitted) (affirming exclusion of expert testimony that exposure to various chemicals in the workplace was what caused plaintiff's brain cancer).

5. Two Step Causation Analysis in Toxic Torts. "To present a prima facie case involving an injury caused by exposure to mold or other toxic substance, a claimant must establish (1) that the toxin is capable of causing the medical condition or ailment (general causation), and (2) that the toxic substance in fact caused the claimant's medical condition (specific causation)." *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 15.

6. ***Daubert* Hearing Not Required.** "To the extent that Sliwinski argues that a trial court must always hold a *Daubert* hearing prior to the testimony of an expert, the law does not support her argument." *Sliwinski v. Village of St. Edwards*, 2014 WL 5358284, 2014-Ohio-4655, ¶ 15 (9th Dist.) (citing *Kumho*, 526 U.S. 137).

7. *Kumho*'s Intellectual Rigor Standard. "Although the Supreme Court expressly limited its discussion in *Daubert* to the context of scientific expert opinion, the trial court's gatekeeping function is not limited to expert opinion of a scientific nature. Rather, the United States Supreme Court extended the trial court's gatekeeping responsibilities to cover nonscientific expert evidence in *Kumho Tire Co.*,... the trial court fulfills its gatekeeping function by 'mak[ing] certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *State Farm Mut. Auto Ins. Co. v. Anders*, 197 Ohio App.3d 22, 2012-Ohio-824, ¶ 40 (10th Dist.) (*quoting Kumho*, 526 U.S. at 152).

8. Adopting *Kumho*'s Expanded Discretion. "A trial court possesses the same 'latitude in deciding how to test an expert's reliability... as it enjoys when it decides whether or not that expert's relevant testimony is reliable.' In some cases, 'the relevant reliability concerns may focus upon personal knowledge or experience.'" *State Farm Mut. Auto Ins. Co. v. Anders*, 197 Ohio App.3d 22, 2012-Ohio-824, ¶ 41 (10th Dist.) (*quoting Kumho*, 526 U.S. at 152, and affirming admissibility of testimony from accident reconstruction expert based upon experience, training, and a review of pictures, the police report, and witness testimony); *see also Sliwinski v. Village of St. Edwards*, 2014 WL 5358284, 2014-Ohio-4655 (9th Dist.).

9. Standard of Care Opinions. "[A] review of medical records in a medical malpractice action, such as was performed here by [the experts], coupled with their experiences, are appropriate principles and methodologies to be used by a physician expert in forming medical opinions." *Sliwinski v. Village of St. Edwards*, 2014 WL 5358284, 2014-Ohio-4655, ¶ 14 (9th Dist.) (affirming admission of expert testimony on breach of the standard of care by a nursing home).

10. No Epidemiological Evidence Required. "There is no requirement under Evid. R. 702(C) that a causation opinion be backed by a specific epidemiological study." *Walker v. Ford Motor Co.*, 2014 WL 4748482*9, 2014-Ohio-4208, ¶ 35 (8th Dist.) (affirming admissibility of expert testimony connecting asbestos exposure to Hodgkin's lymphoma).

11. *Daubert* Factors Do Not Apply To All Experts. "[T]he *Daubert* factors (peer review, publication, potential error rate, etc.) do not apply to this kind of testimony. The court recognized that unlike scientific testimony, expert testimony about gangs depends heavily on the expert's knowledge and experience rather than on the expert's methodology and theory." *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 119 (*citing United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000)).

12. *Daubert* and Novel Scientific Theories. There is a line of Ohio cases which hold that a "*Daubert* analysis" only applies to novel scientific and medical testimony. This is a significant departure from federal case law. Regardless, Ohio appellate courts have still conducted an

analysis of reliability in these cases, which ends up looking very similar to Kumho's intellectual rigor approach to reliability. Hopefully, the Supreme Court of Ohio clarifies this issue for Ohio's trial courts.

i. "*Daubert*'s application to Evid.R. 702 appears to be limited to cases in which there are novel scientific theories." *Goddard v. Children's Hosp. Medical Center*, 1996 WL 312474*3 (1st Dist. 1996) (*citing* Weissenberger's Ohio Evidence (1996) 302, Section 702.6). "But this is not a *Daubert* case." *Eve v. Johnson*, 1998 WL 754320*3 (1st Dist. 1998) (reversing the trial court's exclusion of defendant's orthopedic expert who testified to the absence of soft tissue damage).

ii. In a medical malpractice case involving a perforated rectum, the Sixth District Court of Appeals stated: "This is not a novel scientific theory requiring a *Daubert* analysis. We agree with the First District Court of Appeals that despite Evid.R. 702(C)'s language, not all scientific or medical opinions require a *Daubert* analysis such as the one that the Ohio Supreme Court held was necessary in *Valentine*." *Theis v. Lane*, 2013 WL 791871*4, 2013-Ohio-729, ¶ 16-17 (6th Dist.) (reversing the exclusion of plaintiff's expert and stating, "this court concludes that review of the medical records by a physician with experience, education, and training pertinent to the subject on which the medical malpractice claim is premised renders his testimony reliable and admissible.").

iii. "Evid. R. 702(C) does not explicitly require an expert to rely on scientific or medical literature for his or her testimony to be deemed reliable. A physician's experience, without further supporting medical literature, may, under certain circumstances, supply the foundation for a reliable expert opinion. However, this generally applies only in cases in which the scientific theory upon which the opinion rests is not a novel one requiring a *Daubert* analysis." *Walker v. Ford Motor Co.*, 2014 WL 4748482*9, 2014-Ohio-4208, ¶ 35, n.6 (8th Dist.); *see also Kinn v. HCR ManorCare*, 998 N.E.2d 852, 2013-Ohio-4086 (6th Dist.) (affirming exclusion of "novel" expert testimony in a medical malpractice claim brought against a hospice worker); *Blinn v. Balint*, 2014 WL 3530975, 2014-Ohio-3114 (9th Dist.) (affirming admissibility of orthopedic expert who did not examine the plaintiff and did not review a key X-ray, but whose opinion was based upon a review of the medical records and an MRI scan).

10 Takeaways From *Daubert*

#1 – It's all about the Judge. This is far and away the most important thing that I have learned. Because the trial court has such powerful discretion, the judge must accept your case and your experts as legitimate. To make sure this happens, you should try to teach the judge the science of the case at every opportunity – in the complaint, in motions to compel, at hearings, in *Daubert* and summary judgment motions, etc. Most judges (like people in general) learn better when information is accompanied by pictures and illustrations. Use them every chance you get.

#2 – Choose Experts Wisely. Because Daubert is all about trustworthiness, your expert's qualifications become extremely important. A well-qualified expert, with relevant experience outside of litigation, will carry a lot of weight with most judges. You can rely heavily on this experience in defending *Daubert* motions.

#3 – Provide Materials To Experts Early and Often. Give your expert all materials, depositions, medical records, etc. as early as possible. It's a terrible feeling to be in a deposition and listening to the defense attorney run down a litany of medical records your expert did not review. (You can do the same to the defense expert.)

#4 – Create Visual Aids. Get your expert to create pictures/diagrams/illustrations/3Dmodels to help explain the expert's opinions. Expert opinions are much easier to understand when they are supported by visual aids; they will also seem more trustworthy.

#5 – Utilize Expert Reports. While there is no requirement in most states for your expert to create an expert report, you may want to have your expert do so anyway. It will help the judge understand the expert's opinions much better than a deposition transcript. Make sure the report includes a caveat about amending the opinions based upon new information being provided to the expert. The caveat should also ask the defendant to provide the expert with any materials the defendant would like your expert to consider. Then at deposition or at trial, when the defense attorney says, "but, why didn't you consider XYZ," your expert can at least say – "well, I did ask you to give me any information you wanted me to consider."

#6 – Stipulate to Confidentiality of Draft Reports. While drafts of expert reports are not discoverable in federal court, they are completely discoverable in most state courts. Ohio's rule used to be in line with that of other states, but, in 2012, the rule was amended so that draft reports are no longer discoverable. See, Ohio Civ. R. 26(B)(5)(c). If you are handling a case in a state that allows discovery of expert reports, you may be able to stipulate with defense counsel at the beginning of a case that all communication and drafts regarding

expert reports will not be discoverable. Confidentiality of draft reports is important because most experts do not know how to write a *Daubert*-proof report. They will need your help to do so, even if it's just providing an outline of what to include.

#7 – Depositions of Your Experts. You must take an active role at the deposition of your expert and walk your expert through the materials the expert reviewed and relied upon, the methodology the expert employed, and how the conclusions were derived from the methodology. Have the expert talk about how the method employed is similar to how the expert conducts work in his or her professional life.

#8 – Supplementing the Deposition. If your expert deposition does not go as smoothly as you would have hoped, you can supplement your expert's opinion with an affidavit from the expert. But, make sure that the affidavit only clarifies and does not contradict the deposition testimony. Or, after a *Daubert* motion is filed, you can request a *Daubert* hearing for your own expert, offering the judge the opportunity to speak directly to your expert.

#9 – Defending *Daubert* Motions. Again, the focus here should be on the judge and what the judge needs to understand. Use visual aids wherever possible; you can embed them right in the text. Make your motions short and concise. I usually start out all *Daubert* motions with a brief synopsis of why the overall case has merit. Attaching a new affidavit to your response to a *Daubert* motion can also be helpful, as long as the affidavit only helps refute the defendant's arguments in the *Daubert* motion and does not contain new opinions.

#10 – Motion to Admit Expert Testimony. You can file what in essence is a preemptive *Daubert* motion – a motion to admit the testimony of your expert. You have the burden of proof so you can make an affirmative showing to the court whenever you feel you are ready to do so instead of waiting for the opposing party to file one at the last minute. This also provides you with an opportunity to file a reply brief after the opposing party has responded to your motion. Also – the Third Edition of the Reference Manual on Scientific Evidence is an invaluable resource. Just Google it, download it, and use it.

10 Items To Be Included in Your Expert's Report

1. Summary/Roadmap of opinions.
2. Expert's Qualifications. Elaborate. Elaborate. Elaborate.
3. List of case specific materials provided to and reviewed by the expert so the judge knows the opinions are based upon "sufficient

facts and data." Be specific and thorough. Also list any other materials/sources relied on or referenced by the expert.

4. Background information on the science involved in the case. Educate the judge.
5. Step by step narrative of the work and analyses the expert performed in the case. The judge should be able to see and follow the expert's thought process. Include pictures, graphs, charts, etc., wherever possible.
6. Discussion of consideration and rejection of alternative explanations.
7. Citations to (and discussion of) publications and authority that support the opinions.
8. Explanation of how the method used to reach the opinions in the case would have been acceptable in the field and that people in the field would have relied upon the opinions reached in this manner.
9. Concise statement of each and every opinion – and sub-opinions, if any – and use appropriate language as necessary depending on burden (e.g.,"more likely than not").
10. Expert's CV, bills for the case, and history of testimony attached as exhibits to the report. ■

End Notes

1. *U.S. v. Alabama Power Co.*, 730 F.3d 1278, 1289 (11th Cir. 2013) (J. Hodge dissenting) ("That deference to the district court regarding *Daubert* evidentiary rulings is not idle dicta is established by research disclosing that, in the last five years, there have been 54 reported decisions of this court (13 published opinions and 41 unpublished opinions) reviewing district court evidentiary rulings under *Daubert*, and the district court was reversed in only three of those cases.").
2. http://www.nytimes.com/1983/06/19/weekinreview/shadow-of-doubt-wipes-out-bendectin.html
3. *Id.*
4. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570 (S.D.CA. 1989).
5. *Id.*
6. *Daubert*, 727 F. Supp. at 572.
7. *Id.* (quoting *Brock v. Merrell Dow Pharmaceuticals*, 874 F.2d 307 (5th Cir.1989), *modified*, 884 F.2d 166 (5th Cir.1989), *rehr'g denied, en banc*, 884 F.2d 167 (5th Cir.1989)); *see also, Richardson v. Richardson-Merrell*, 857 F.2d 823, 829 (D.C.Cir.1988); *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir.1987); *Hull v. Merrell Dow Pharmaceuticals, Inc.*, 700 F.Supp. 28 (S.D.Fla. 1988); *In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation*, 624 F.Supp. 1212 (S.D.Ohio 1985), aff'd, 857 F.2d 290 (6th Cir.1988); and *Thompson v. Merrell Dow Pharmaceuticals, Inc.*, 229 N.J.Super. 230, 551 A.2d 177 (1988).
8. *Id.* at 573 (*citing Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C.App.1986)).
9. *Daubert*, 727 F. Supp. at 575.
10. *Daubert v. Merrell Pharmaceuticals, Inc.*, 951 F.2d 1128, 1133 (9th Cir. 1991).
11. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 588 (1993) (citations omitted).
12. *Daubert*, 509 U.S. at 597.
13. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3 1311, 1316 (9th Cir. 1995).
14. *Id.* at 1318.
15. *See id.* at fn 16.
16. *Adams v. Lab. Corp. of America*, 760 F.3d 1322, 1328 (11th Cir., July 29, 2014) (*quoting Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010)).
17. *Daubert*, at 590, n.8.
18. *Daubert*, 509 U.S. at 590.
19. *Daubert*, 509 U.S. at 590, n.9.
20. *Id.* at n.9 (emphasis in original).
21. *Id.* at n.9 (quoting the Advisory Committee's Notes on Art. VIII of Rules of Evidence).
22. *Id.* at n.9 (emphasis in original).
23. The purpose of a *Daubert* analysis is, "to analyze not what the experts say, but what basis they have for saying it." *Daubert*, 43 F.3 1311, 1318 (9th Cir. 1995).
24. *Daubert*, 509 U.S. at 594-95.
25. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).
26. *U.S. v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005) ("[G]iven the heavy thumb—really a thumb and a finger or two—that is put on the district court's side of the scale, we conclude that it was not an abuse of discretion to admit the expert opinions . . . .").
27. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 155 (1999).
28. *Id.*
29. *Id.* at 152.
30. *Daubert*, 509 U.S. at 593.
31. *Id.* at 150 (internal citations omitted).
32. *Id.* at 156.
33. *Id.* at 151.
34. *See Daubert*, 43 F.3 1311 (9th Cir. 1995).
35. *See Joiner*, 522 U.S. at 146 (1997).
36. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).
37. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999).
38. "Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education--may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." Advisory Committee Notes on Fed. R. Evid. 702, 2000 Amendments (citing *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail)).
39. *See Daubert*, 43 F.3 at 1317 n.4 (9th Cir. 1995).
40. *United Fire & Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1342 (11th Cir. 2013) (citing Daubert, 509 U.S. at 593).
41. *Id.* at 152-53.
42. "Thus, the proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999) (*citing In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3rd Cir. 1994)).
43. *Daubert*, 509 U.S. at 591.
44. *Id.*
45. "We have repeatedly stressed *Daubert's* teaching that the gatekeeping function under Rule 702 'is not intended to supplant the adversary system or the role of the jury: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking *shaky but admissible* evidence.'" *Adams v. Lab. Corp. of America*, 760 F.3d 1322, 1334 (11th Cir., July 29, 2014) (emphasis in original) (*quoting United States v. Alabama Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013).
46. *Daubert*, 509 U.S. at 591.

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An Historical View And Future Of LGBT Employment Rights

By Brian Spitz

The problem with employment rights arguments for lesbian, gay, bisexual and transgender (LGBT) workers so far is that most arguments have been not framed properly as intragender association rights, but instead as sexual orientation rights, and that courts have narrowly defined gender stereotyping claims.

Employment laws, unlike many other laws dating back hundreds of years, are really in their infancy. Understanding where we are heading with employment law rights for LGBT workers needs to measured in the context of the history of other protected classes, particularly race. Laws are often created by analogy. By looking backwards at precedent, it should be clear that we are at the precipice of a landscape-changing period that will usher in protective employment rights for the LGBT community. It is not a question of *if* anymore, it is only a question of *when*. And, that when will likely be soon.

Historical Context

Slavery was abolished on December 6, 1865 when the Thirteenth Amendment to the Constitution became law. Two and a half years later, on July 9, 1868, the Fourteenth Amendment to the United States Constitution was adopted providing citizenship rights and equal protection of the laws by government action. But, these laws did not provide any direct employment rights. Quite the contrary, the separate but equal legal doctrine, as confirmed by the United States Supreme Court in *Plessy v. Ferguson*,[1] lasted from 1896 until 1954 when the Supreme Court decided *Brown v. Board of Education of Topeka*.[2] This means that if you were born before May 17, 1954, you were alive when it was legal to keep Black Americans out of designated White bathrooms and restaurants. Think for a moment about how prejudiced Whites at that time thought about sharing a bathroom with Black citizens and how uncomfortable that made them feel. But, any such negative feelings seem absurd today.

On July 2, 1964, President Lyndon B. Johnson signed Title VII of the Civil Rights Act of 1964 into law. And, still as of 1964, this was not easy legislation to get passed, particularly as it afforded employment protection based on sex (or gender), religion and national origin, in addition to race and color. It has been reported that Virginia Representative Howard Smith arranged for the word "sex" to be included in the list of protected classes solely in an attempt to kill the law, because he thought that no one would support equal gender rights in the workplace.[3] At the same time, Ohio Representative John Ashbrook argued against the ability to force employers to hire certain employees by arguing, "[i]t seems incredible that we would even seriously consider forcing an employer to hire an atheist."[4] But, as passed, the same level of protection was given to the protected classes of race, sex, religion and national origin. This means that cases decided based on the race or religion protections afforded under Title VII should be equally applied to gender.

Then on June 12, 1967, the United States Supreme Court issued its decision in *Loving v. Virginia*,[5] which overturned and held unconstitutional all remaining state law (mostly in the South) that prohibited interracial marriages. While *Loving* is not an employment decision, it sets the stage and is part of a pattern regarding protected class rights. Despite *Loving*, many courts continued to allow employers to fire employees for being married or in a relationship with a person of another race.[6] At that time, many interracial couples wondered how they could get married but be fired at work the next day for putting a picture of their spouse on their desk.

Starting in 1970, the EEOC took a position in several decisions that a violation of Title VII occurred where a White employee was discharged because of his friendly associations with black employees: "Inasmuch as Charging Party was distinguished from other employees only to the extent that he fraternized with employees whose race was not the same as his, we regard it as reasonable to infer that the treatment afforded him was based, at least in part, upon his race."[7] Historically, the EEOC decisions can be viewed as a precursor to legal changes in the courts.

Finally, in 1975, in *Whitney v. Greater New York Corp. of Seventh-Day Adventists*,[8] the United States District Court for the Southern District of New York dealt with an employee that claimed that she was fired because she was White and dating a Black man. Amazingly, the employer argued that Charlene Whitney was not fired because of her race, but was fired because of her partner's race, and thus, not protected under Title VII. Unlike past cases, however, Whitney's complaint specifically averred that her race was the issue, i.e. had she been Black, she would not have been fired for being romantically involved with a Black man. The Court 'agreed: "Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was 'discharge[d] . . . because of [her] race.'"

About four months later, in *Holiday v. Belle's Restaurant*,[9] the United States District Court for Western District of Pennsylvania also rejected the employer's argument that firing a White woman because she was married to a Black man failed to state a claim for unlawful discharge. Both *Whitney* and *Holiday* expressly pointed to the EEOC decisions as persuasive. Other courts continued to reach similar holdings.[10]

In 1986, in *Parr v. Woodmen of the World Life Ins. Co.*,[11] the United States Eleventh Circuit Court of Appeals became the first Circuit to hold that Title VII protects against relational discrimination, but was limited to race. Since that time, every Circuit Court of Appeal to address the issue has held Title VII protects against race association discrimination.[12] Critical to this discussion, in *Parr*, the Eleventh Circuit gave three reasons to support its decision: "First, we are obliged to give Title VII a liberal construction."[13] That reason would also apply to intragender association claims. "Second, the EEOC, which Congress charged with interpreting, administering, and enforcing Title VII, has consistently held that an employer who takes adverse action against an employee or a potential employee because of an interracial association violates Title VII.... The EEOC's interpretation of Title VII is to be accorded 'great deference.'"[14] I have not addressed the EEOC's position on intragender association claims, but by way of foreshadowing, it's coming. And, third, "it would be inconsistent to hold that Parr could state a claim of discrimination based upon an interracial marriage pursuant to section 1981, but not Title VII."[15]

At this point, I will again emphasize that because of the same protections given the protected classes under Title VII, this holding should still apply if gender was substituted for race. A man would be fired for his gender if he was fired for dating another man. Gender, like race in *Whitney* and *Holiday*, would be put at issue. Indeed, this rationale has already been implemented in applying the interracial relations decisions to differing national origin relationships. In *Reiter v. Center Consolidated School District*,[16] the employee sued, alleging that her employer declined to renew her employment contract because of her "close association with the Spanish citizens."[17] Citing directly to *Whitney* and *Holiday*, as well as other racial relationship cases, the court held: "These decisions indicate that the EEOC interprets Title VII as prohibiting discriminatory employment practices based on an individual's association with people of a particular race or national origin. I am required to give great deference to the EEOC's interpretations of Title VII. ... I hold that discriminatory employment practices based on an individual's association with people of a particular race or national origin are prohibited under Title VII."[18] So, if the associational discrimination laws apply to race and national origin, why not gender?

Although in the context of a race association discrimination case, in its 2009 decision, *Barrett v. Whirlpool Corp.*,[19] the United States Sixth Circuit Court of Appeals stated the associational standard in a manner inclusive of all protected classes,

by holding that an associational discrimination claim is stated where, "1) she was discriminated against at work 2) because she associated with members of a protected class." Under this standard as stated, a woman would have an associational discrimination claim if she was discriminated against at work because she associated with (by marriage or even dating) a Black person, a Jewish person, an Hispanic person, or a woman.

LGBT Employment Rights

"For much of the 20th century... homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973."[20]

In 1977, the Ninth Circuit decided *Holloway v. Arthur Andersen & Co.*,[21]holding that a formerly male employee who was undergoing treatment in preparation for a gender reassignment operation was not protected from discrimination on the basis of "sex" under Title VII because Congress had only the traditional notions of 'sex' in mind."

A year later in *City of Los Angeles, Dep't of Water & Power v. Manhart*,[22] the United States Supreme Court held that employers cannot discriminate on the basis of sex when they make employment decisions based "on mere 'stereotyped' impressions about the characteristics of males or females." While *Manhart* was not a case involving LGBT rights, but addressed "[m]yths and purely habitual assumptions about a woman's inability to perform certain kinds of work," it created a claim under Title VII for gender stereotyping, which would become a tent pole argument for later LGBT rights arguments.

On December 21, 1993, during the Clinton Administration, Department of Defense Directive 1304.26, better known as "don't ask, don't tell" policy, was instituted in what was seen as a progressive means to allow LGBs to serve in the military by hiding their sexual orientation. This is the same sort of the theoretical compromise that was believed equitable with "separate but equal."

In 1998, the United States Supreme Court decided *Price Waterhouse v. Hopkins*,[23] which had nothing to do with LGBT rights directly, but, like *Manhart*, set the stage for such arguments by holding that Title VII makes it illegal for an employer to discriminate against an employee for that employee's failure to conform to gender stereotypes. Ann Hopkins' partnership was delayed and then denied because Price Waterhouse partners described her as being too "aggressive" and not behaving in a sufficiently feminine manner. The Supreme Court held that this was illegal: "Impermissible stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men."

Through 2001, there are a series of cases that rejected Title VII arguments framed on sexual orientation, as opposed to being argued as intragender association claims.[24] However, while denying protection against sexual orientation discrimination, several of these courts did so reluctantly, including the First and Ninth Circuits, which held: "We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment-and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."[25] This means that some courts will be looking for acceptable legal rationales to afford protections to LGBTs, much like what happened when *Whitney* first brought interracial association claims within the purview of Title VII.

In one of the most significant cases to date, *Oncale v. Sundowner Offshore Servs., Inc.*,[26] in 1998, the United States Supreme Court expanded sexual orientation rights in the realm of sexual harassment claims, and in doing so applied prior race decisions:

> Title VII's prohibition of discrimination "because of ... sex" protects men as well as women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 103 S.Ct. 2622, 2630, 77 L.Ed.2d 89 (1983), and in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race. ... If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination "because of ... sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.

In *Oncale*, the Supreme Court provided three evidentiary paths to prove same sex harassment claims under Title VII: (1) the harasser is homosexual and allegedly motivated by sexual interest; (2) the victim's harassment shows that the harasser is generally hostile toward employees of the same sex; or (3) the harasser treats members of the different sexes in a disparate manner in a mixed-sex workplace.

The following year in *Shepherd v. Slater Steels Corp.*,[27] The Seventh Circuit Court of Appeals held that "we discern nothing in the Supreme Court's [*Oncale*] decision indicating that the examples it provided were meant to be exhaustive rather than instructive." Subsequently, every Circuit Court of Appeal to squarely consider the issue has held that the *Oncale* evidentiary paths are illustrative, not exhaustive, in nature.[28]

On June 21, 2000, the Ohio Supreme Court, in *Hampel v. Food Ingredients Specialties, Inc.*,[29] held: "We too find the high court's interpretation of Title VII in *Oncale* to be both persuasive and applicable in interpreting R.C. 4112.02(A). Accordingly, we hold that R.C. 4112.02(A) protects men as well as women from all forms of sex discrimination in the workplace, including discrimination consisting of same-sex sexual harassment."

In 2002, the United States District Court for the District of Oregon decided *Heller v. Columbia Edgewater Country Club*,[30] in which a lesbian employee sued under Title VII alleging her supervisor harassed her upon learning of her sexual orientation, and then terminated her for complaining about the harassment. The court rejected the employer's argument that Title VII was inapplicable because the claim was based on sexual orientation discrimination and not sex discrimination: "Nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone. Rather, Congress intended that all Americans should have an opportunity to participate in the economic life of the nation.... A jury could find that [the supervisor] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender."[31] This is the key holding for a intragender associational claim.

In 2004, in *Smith v. City of Salem, Ohio*,[32] the Sixth Circuit Court of Appeals applied *Price Waterhouse* to allow a discrimination claim to proceed under Title VII brought by a formerly male firefighter that had been diagnosed with Gender Identity Disorder as he transitioned to being a woman and acting in a feminine manner. In rejecting a line of pre-*Price Waterhouse* cases that had held transsexuals are not a protected class under Title VII, The Sixth Circuit held:

> Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.... After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[33]

In the May 16, 2005 case of *Kay v. Independence Blue Cross*,[34] the United States District Court for the Eastern District of Pennsylvania considered the case of Harry Kay, who was subjected to ongoing harassment using a multitude of homosexual slurs. But, given prior negative Third Circuit precedent in *Bibby v. Philadelphia Coca Cola Bottling Co.*,[35] strategically, "Mr. Kay has never alleged sexual orientation discrimination, and, instead, has proceeded on the theory that the actions of his co-workers constituted 'gender stereotyping.'"[36] With the argument framed in this fashion, the district court held that "IBC incorrectly argues that any stereotyping that occurred is not actionable because Mr. Kay was stereotyped as acting like a homosexual male and not because he was seen as acting like a woman. This argument frames the issue in a misleading fashion. ... [G]ender stereotyping claims may be brought by men when they have been harassed for failing 'to comply with societal stereotypes of how men ought to appear or behave.'. ... And, contrary to Defendant's assertions, having shown that his co-workers subjected him to abuse because they found him in some way not to be stereotypically masculine, Plaintiff need not specifically show that he was viewed as womanly."

On July 19, 2006, the Sixth Circuit Court of Appeals decided *Vickers v. Fairfield Med. Ctr.*,[37] in which the plaintiff sought to extend the gender stereotyping protections from Price Waterhouse to sexual orientation preferences. The Sixth Circuit rejected this argument: "Vickers contends that in the eyes of his co-workers, his sexual practices, whether real or perceived, did not conform to the traditionally masculine role. Rather, in his supposed sexual practices, he behaved more like a woman. We conclude that the theory of sex stereotyping under *Price Waterhouse* is not broad enough to encompass such a theory." A district court judge sitting by assignment dissented, and the request for an en banc rehearing was denied. This left us in the very unusual position of Title VII providing protection to men that wear lipstick and dresses, but not men or women who break the predominant gender stereotype that relationships should be with the opposite sex. This began a long line of cases that

protected transsexuals to higher degree than LGBs.

On August 28, 2009, in *Prowel v. Wise Bus. Forms, Inc.*,[38] the Third Circuit limited *Bibby* and set the distinction that can be used for an intragender discrimination claim:

> In evaluating Wise's motion for summary judgment, the District Court properly focused on our decision in *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir.2001), wherein we stated: "Title VII does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Id.* at 261 (citations omitted). This does not mean, however, that a homosexual individual is barred from bringing a *sex discrimination* claim under Title VII, which plainly prohibits discrimination "because of sex." 42 U.S.C. § 2000e-2(a).

Further, while following the Sixth Circuit in *Vickers*, *Prowel* highlights the problems with the lines draw on what gender stereotyping claims protect:

> The difficult question, therefore, is whether the harassment he suffered at Wise was because of his homosexuality, his effeminacy, or both. As this appeal demonstrates, the line between sexual orientation discrimination and discrimination "because of sex" can be difficult to draw. In granting summary judgment for Wise, the District Court found that Prowel's claim fell clearly on one side of the line, holding that Prowel's sex discrimination claim was an artfully-pleaded claim of sexual orientation discrimination. However, our analysis-viewing the facts and inferences in favor of Prowel-leads us to conclude that the record is ambiguous on this dispositive question. Accordingly, Prowel's gender stereotyping claim must be submitted to a jury.[39]

Thus, under this standard, effeminate gay men and masculine or perceived "butch" lesbians have cognizable claims under *Price-Waterhouse*, but masculine gay men and effeminate lesbians do not. This micro-parsing of claims will not likely be maintainable indefinitely.

On April 25, 2011, in *Hutchinson v. Cuyahoga Cty. Bd. of Cty. Commrs.*,[40] Northern District of Ohio Judge James S. Gwin denied a motion to dismiss a § 1983 claim brought by a lesbian employee, who was denied numerous promotions because of her sexual orientation. Relying exclusively on case law surrounding the applicability of Title VII to sexual orientation, the county argued for dismissal because sexual orientation is not a protected category under Title VII. The Court rejected this argument, finding that the employee could still make out a claim:

> [A]n employee who alleges sexual orientation discrimination under § 1983 is not per se precluded from establishing an equal protection claim against her employer. Simply because Title VII does not include sexual orientation as a statutorily protected class does not, in this Court's view, automatically remove all constitutional protection where a plaintiff employee claims equal protection violations based on her membership in that class. The Court is not convinced that application of Title VII's framework ... requires wholesale application of Title VII's limitations on what classes are protected whenever an equal protection claim arises in the employment context. Though sexual orientation may not be a suspect or quasi-suspect class, the Court finds that constitutional disparate treatment claims alleging sexual orientation discrimination by a public employer [are actionable under a Due Process analysis].

The plaintiff did not bring a Title VII claim, and had conceded that "sexual orientation is not a protected class under Title VII."[41]

As of September 20, 2011, the military's "don't ask, don't tell" ended, which opened the door to allow openly LGBs to serve, but still blocked transgendered individuals from service under Army Regulation 40-501, Standards of Medical Fitness, Aug. 4, 2011, Chapters 2-27n and 3-35, which provides: "Current or history of psychosexual conditions (302), including, but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias, do not meet the standard."[42]

In April of 2012, the EEOC issued its decision in *Macy v. Holder*,[43] in which a former male applied for a laboratory position with the FBI, Bureau of Alcohol, Weapons and Firearms. After a phone interview, the director said she should have the position so long as she cleared a background check. But, once it became clear in the application process that Macy was no longer a male, Macy was notified the position was no longer available. In this opinion, the EEOC extended Title VII protections to transgenders: "That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term 'gender' encompasses

not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity." This is an important change in policy for the EEOC, which had previously taken a contrary position in such cases as *Kowalczyk v. Dep't of Veterans Affairs*,[44] ("appellant's allegation of discrimination based on her acquired sex (transsexualism) is not a basis protected under Title VII"); *Campbell v. Dep't of Agriculture*,[45] ("gender dysphoria or transsexualism is not protected under Title VII under the aegis of sex discrimination"); and *Casoni v. U.S. Postal Serv.*,[46] ("[A]ppellant's allegation of sex discrimination on account of being a male to female preoperative transsexual... [is] not cognizable... under the provisions of Title VII.").

The Sixth Circuit's June 20, 2012 decision in *Wasek v. Arrow Energy Servs., Inc.*,[47] cuts both ways for LGBT rights. First, the Sixth Circuit appears to narrowly apply *Oncale's* three evidentiary paths, although recognizing that *Oncale's* list provides only "guidance."[48] But, the court went on to hold that even if an LGBT cannot state a claim for harassment, the employee would be protected under the anti-retaliation provisions of Title VII: "even though Wasek did not suffer sexual harassment under Title VII, he does not need to oppose actual violations of Title VII in order to be protected from retaliation.[49] Extrapolating from this holding, while sexual orientation discrimination may not be protected under Title VII, an LGB employee that complains about intragender association discrimination, reasonably believing that it is illegal, should be protected under Title VII from retaliation.

On September 27, 2013, the Fifth Circuit Court of Appeals, in *EEOC v. Boh Bros. Const. Co., LLC*,[50] blended a gender-stereotyping discrimination claim into a same sex harassment claim to affirm a verdict based on epithets like "fa — ot," "pu — y," and "princess," directed at the employee "two to three times" per day: "nothing in *Oncale* overturns or otherwise upsets the Court's holding in *Price Waterhouse*: a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping. Thus, the EEOC may rely on evidence that Wolfe viewed Woods as insufficiently masculine to prove its Title VII claim."

On March 25, 2014, in *Burns v. Ohio State Univ. Coll. of Veterinary Med.*,[51] Ohio's Tenth District Court of Appeals affirmed a decision from the Court of Claims (a notorious pro-employer forum), holding that R.C. § 4112.02(A) does not offer protection based on sexual orientation, which was the only argument advanced. The Ohio Supreme Court declined to hear the case. No Ohio case has addressed whether R.C. § 4112.02(A) would protect against intragender association claims.

On April 8, 2015, President Obama's Executive Order 13672-2014 took effect, prohibiting federal contractors from discriminating against homosexual employees or applicants. While this may seem to have a limited reach, because nearly one-fifth of the American workforce is employed by federal contractors, this Executive Order will cover nearly 11 million workers.

In *Tooley v. Van Buren Pub. Sch.*,[52] a 14-year-old transgender student (female to male) filed a complaint under Title IX, Title IV, and the Equal Protection Clause alleging that his school denied him equal treatment by banning him from the boy's restroom as opposed to alternative facilities.Although not an employment case, the relevance of this case is that the Department of Justice ("DOJ") filed a Statement of Interest on February 20, 2015 taking the position that transgender students should be able to use the restroom reflecting their chosen gender identity.[53] In June 2015, the DOJ filed a similar Statement of

Interest in *Grimm v. Gloucester County School Board*, which dealt with a 16-year-old transgender student (female to male) seeking access to the men's room.[54] But, before even allowing the DOJ to argue, Judge Robert Doumar of the United States District Court for the Eastern District of Virginia said on the record that being transgender is a "mental disorder"; denied the preliminary injunction; and dismissed the Title IX claim. While both cases remain pending, the critical aspect is the position taken by the DOJ.

On June 26, 2015, the United States Supreme Court decided *Obergefell v. Hodges*,[55] the landmark case holding that state laws prohibiting same-sex marriage were unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment, and that states had to recognize same sex marriage licenses issued in other states. While most believe *Obergefell* does not have any impact on employment laws, it does. Beyond the historical benchmark comparisons to *Loving*, which was cited in *Obergefell*, the Supreme Court expressly required employers to treat all spouses, regardless of gender, the same for health insurance; and implicitly brought intragender spouses within the protections of the Family and Medical Leave Act.

Three weeks after *Obergefell*, on July 15, 2015, the EEOC issued its decision in *Baldwin v. Foxx*,[56] and provided:

> When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination — whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.... Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms.... It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. ... Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. ... The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

Now is a good time to remember the deference to the EEOC shown in *Parr* and other cases.

On June 1, 2015, the Occupational Safety and Health Administration ("OSHA") published its "Guide to Restroom Access for Transgender Workers," which provides: "Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity." In doing so, OSHA made accommodating gender identity a health and safety issue. On this note, many states, including Colorado, Vermont, Washington, Iowa, the District of Columbia, and Delaware have passed laws that specifically require employers to allow employees to use the bathroom that is appropriate to their gender identity, rather than the gender they were assigned at birth. Ohio has not.

On July 27, 2015, in *Arredondo v. Estrada*,[57] the United States District Court for the Southern District of Texas, applying *Boh Bros*, expanded the scope of allowable same-sex sexual harassment claims. Although none of the *Oncale* evidentiary paths applied to this case, the court held: "More commonly, sexual harassment involves humiliation related to sexual desire. ... However, humiliation based on gender stereotyping meant to separate those who are deemed less manly from the rest of a crew is actionable."[58]

What's Next?

As discussed above, I suspect that either intragender association claims will be recognized under Title VII or the gender-stereotyping law will be expanded to cover sexual orientation.

Alternatively, from a legislative stand point, versions of the Employment Non-Discrimination Act ("ENDA") have been unsuccessfully introduced during each session of Congress since 1994, which would amend Title VII by adding the term "sexual orientation." These efforts have been replaced by the

recent introduction of the Equality Act, which would add sexual orientation and gender identity discrimination to the list of protected classes.

Twenty-two states and the District of Columbia have laws prohibiting employers from firing employees due to just their sexual orientation, while 19 states have laws that protect employees based on gender identity.[59] Ohio has no statewide laws. While over two hundred cities and counties have passed nondiscrimination employment laws with regard to sexual orientation, many do not provide any significant civil remedy for violations.[60] For example, Cincinnati Municipal Code Chapter 914 prohibits employers with ten or more employees within the City of Cincinnati from discriminating on the basis of sexual orientation or transgendered status, but imposes a maximum fine of $1,000 with no civil remedy. It may be possible to bring a wrongful termination in violation of public policy claim for violation of city statutes.[61]

On May 17, 2007, Governor Ted Strickland signed Executive Order 2007-10S, which prohibited discrimination against State employees on the basis of sexual orientation and gender identity. But on January 21, 2011, then newly elected Governor John Kasich signed Executive Order 2011- 05K, which offered the same protections based on sexual orientation, but deleted the term gender identity.

In the end, LGBT employment rights are coming, and history will reflect that opposition to these rights during our time is equally as absurd as those who previously opposed the rights of other minority workers. ■

End Notes

1. 163 U.S. 537 (1896).
2. 347 U.S. 483 (1954).
3. Eric Dreiband, Celebration of Title VII at Forty, 36 U. Mem. L. Rev. 5 (2005).
4. *Id.*
5. 388 U.S. 1 (1967).
6. *Ripp v. Dobbs Houses, Inc.*, 366 F.Supp. 205 (N.D.Ala.1973); *Adams v. Governor's Committee on Post-Secondary Education*, 26 F.E.P. Cases 1348, 1981 WL 27101, at *1 (N.D.Ga.1981); *Parr v. United Family Life Insurance Company,* 35 F.E.P. Cases 95, 983 WL 1774 (N.D.Ga.1983).
7. EEOC Decision No. 71-909, 3 FEP Cases 269 at 269 (1970); see also EEOC Decision No. 71-1902, 3 FEP Cases 1244 (1971); EEOC Decision No. 71-969 (1970), CCH, EEOC Decisions (1973) ¶ 6193; *Gutwein v. Easton Publishing Co.*, 8 E.P.D. ¶ 9728 (Md. Oct. 8, 1974).
8. 401 F. Supp. 1363 (S.D.N.Y. 1975).
9. 409 F. Supp. 904, 908–09 (W.D. Pa. 1976).
10. *Clark v. Louisa County School Bd.*, 472 F.Supp. 321 (E.D. Va. 1979); *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984); *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008).
11. 791 F.2d 888, 892 (11th Cir. 1986).
12. *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) *vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks*, 173 F.3d 988, 994 (6th Cir. 1999); *Drake v. 3M*, 134 F.3d 878, 884 (7th Cir. 1998); *Holcomb v. Iona Coll.,* 521 F.3d 130, 132 (2d. Cir. 2008).
13. *Id.* at 892, citing *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir.1970).
14. *Id.*, citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 434, 91 S.Ct. 849, 855, 28 L.Ed.2d 158, 165 (1971); Decision 71-969, 1973 EEOC Dec. (CCH) ¶ 6193 (Dec. 24, 1970); Decision 71-1902, 1973 EEOC Dec. (CCH) ¶ 6281 (April 28, 1971; Decision 76-23, 1983 EEOC Dec. (CCH) ¶ 6615 (Aug. 25, 1975); Decision 79-03, 1983 EEOC Dec. (CCH) ¶ 6734 (Oct. 6, 1978).
15. *Id.* (This third point has come under some scrutiny without affecting the conclusion of other courts.)
16. 618 F.Supp. 1458 (1985).
17. 618 F. Supp. 1458, 1459-60 (D. Colo. 1985).
18. *Id.*
19. 556 F.3d 502, 512–13 (6th Cir. 2009).
20. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596, 192 L. Ed. 2d 609 (2015) (citing See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974)).
21. 566 F.2d 659 (1977).
22. 435 U.S. 702, 707, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978).
23. 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989).
24. *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329–32 (9th Cir. 1979), *overruled on other grounds by Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Higgins v. New Balance Athletic Shoe*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 35-36 (2nd Cir. 2000); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001).
25. *Rene*, 243 F.3d at 1209 (quoting Higgins, 194 F.3d at 259).
26. 523 U.S. 75, 78-79, 118 S. Ct. 998, 1001-02, 140 L. Ed. 2d 201 (1998).
27. 168 F.3d 998, 1009 (7th Cir.1999).
28. *See, e.g., EEOC v. Boh Bros. Const. Co., LLC*, 731 F. 3d 444, 448 (5th Cir. 2013); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763-65 (6th Cir.2006); *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (But, still affirming dismissal); *Pedroza v. Cintas Corp.*, 397 F.3d 1063, 1068 (8th Cir.2005) (But, still affirming dismissal); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 263-64 (3d Cir.2001).
29. 2000-Ohio-128, 89 Ohio St. 3d 169, 178, 729 N.E.2d 726, 733-34.
30. 195 F.Supp.2d 1212, 1217-19 (D.Or.2002).
31. *Id.* at 1222–23.
32. 378 F.3d 566 (6th Cir. 2004).
33. *Id.* at 572-74 (emphasis in original).
34. No. CIV.A. 02-3157, 2003 WL 21197289, at *6 (E.D. Pa. May 16, 2003) *aff'd*, 142 F. App'x 48 (3d Cir.2005) (quoting *Bibby*, 260 F.3d at 264).
35. 260 F.3d 257 (3d Cir. 2001).
36. *Id.* at *5.
37. 453 F.3d 757, 763 (6th Cir. 2006).
38. 579 F.3d 285, 289 (3d Cir. 2009).
39. *Id.* at 291.
40. Case No. 1:08-CV-2966 (N.D. Ohio April 25, 2011), Doc. 41.
41. *Id.*
42. Army Regulation 40-501, Standards of Medical Fitness, Aug. 4, 2011, Chapters 2-27n and 3-35.

43. EEOC Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).
44. No. 01942053, 1994 WL 744529, at *2 (E.E.O.C. Dec. 27, 1994).
45. No. 01931730, 1994 WL 652840, at *1 n. 3 (E.E.O.C. July 21, 1994).
46. No. 01840104, 1984 WL 485399, at *3 (E.E.O.C. Sept. 28, 1984).
47. 682 F.3d 463, (6th Cir. 2012).
48. *Id.* at 468.
49. *Id.* at 469.
50. 731 F. 3d 444 (5th Cir. 2013).
51. 2014-Ohio-1190, ¶ 13, *cert. denied* 139 Ohio St. 3d 1473 (2014).
52. No. 14-13466 (E.D. Mich. Feb. 20, 2015).
53. https://www.nsba.org/tooley-v-van-buren-pub-sch-no-14-13466-ed-mich-feb-20-2015
54. http://www.buzzfeed.com/dominicholden/justice-dept-backs-transgender-boy-in-lawsuitagainstschool#.iy1rxRg45.
55. 135 S. Ct. 2584 (2015).
56. EEOC Appeal No. 0120133080 (July 15, 2015).
57. United States District Court, S.D. Texas, Corpus Christi Division, Civil Action No. 2:14-CV-170 (July 27, 2015).
58. *Id.* (citing *LaDay v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir. 2002); *Boh Bros., supra*.).
59. California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Hampshire*, New Jersey, New Mexico, Nevada, New York*, Oregon, Rhode Island, Utah, Vermont, Wisconsin* (* states that protect sexual orientation but not gender identity).
60. Lydia E. Lavelle, *Grassroots Gay Rights: Legal Advocacy at the Local Level*, 21 Am. U.J. Gender Soc. Pol'y & L. 507, 519 (2013) (citation omitted); *see also* Christy Mallory & Brad Sears, *An Evaluation of Local Laws Requiring Government Contractors to Adopt LGBT–Related Workplace Policies*, 5 Alb.Gov't L.Rev. 478 (2012).
61. *Das v. Ohio State Univ.*, 115 F. Supp. 2d 885, 892 (S.D. Ohio 2000) *aff'd*, 57 F. App'x 675 (6th Cir. 2003).

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Verdict Spotlight

by Christopher M. Mellino

One of the toughest challenges we face as Plaintiffs' attorneys is attaining full compensation for individuals in the absence of a significant economic loss. This applies particularly to people who are not employed, older people and people with a complex medical history.

Blake Dickson

Blake Dickson was able to overcome all of those issues and obtain a one million dollar verdict for his clients in a case involving the death of Mary Stevens, a 77 year old woman. Mary died from sepsis that resulted from two Stage 4 bed sores on her buttocks that became infected from fecal matter getting into those wounds.

A jury of six women and two men returned a verdict for compensatory damages in the amount of $440,000 to her 88 year old husband Jacob and her 5 adult daughters. The jury awarded $100,000 for loss of consortium, $125,000 for mental anguish, $50,000 for pain, $50,000 for suffering, $110,000 for medical expenses and $5,000 for funeral expenses.

The following day during phase two of the trial, which was the punitive phase, the same jury awarded $560,000 in punitive damages. Both verdicts were against Beachwood Pointe Care Centre and its affiliated corporate entities. The jury also awarded attorney's fees. That amount will be determined by the trial judge, the Honorable Lillian Greene.

Mrs. Stevens had a long history of diabetes and peripheral vascular disease which caused her to be in end stage renal disease. She received dialysis three times a week. She also had had a stroke and was wheelchair bound. After being cared for by her daughter for a number of years the time had come for her and her husband to move into assisted living. They chose Beachwood Pointe Assisted Care Centre. However, it was soon obvious that the staff there was not that interested in caring for the residents. Although it was documented in her care plan that Mary was underweight the staff left her in her room at meal time. Her husband who had the benefit of a motorized wheelchair would ride to her rescue and tow her to the dining room using his belt.

During one of these attempts Mary's chair hit a door frame and tipped causing Mary to break her leg. At least 5 staff members observed this incident but yet did nothing to help her. Her broken leg was diagnosed two days later because the dialysis center sent her to the hospital. Because of the resulting immobility from the broken leg she developed the bedsores that caused her death.

During discovery Blake established a pattern of indifference and conscious disregard by asking all of the staff members he deposed about the federal and state regulations governing nursing homes. He got the staff to commit to the fact that they are required to follow these laws, that the laws are passed to protect the safety of the residents. Importantly he got them to admit they are aware that if they do not

Mary and Jacob Stevens

follow these regulations it is probable one of the residents can be seriously injured.

Once Blake had these admissions, Plaintiff had the requisite elements to establish a claim for punitive damages, a conscious indifference for the rights and safety of others that has a great probability of causing substantial harm. These were significant admissions because the conduct in this case was not outrageous or criminal – i.e., the type that one would ordinarily think would inflame the jury. The message is that when a nursing home has a pattern of disregarding its statutory duties that should be enough to impose punitive damages under Ohio law.

In the closing arguments of the punitive phase defense counsel merely reargued the merits of the case despite the fact that the same jury had rejected those same arguments the day before. Blake took that opportunity to argue on behalf of all residents of nursing homes who didn't have a voice. He empowered the jury to send a message to other nursing home owners with similar practices to take notice and change the way they do business. The jury took him up on his challenge. This verdict should improve the quality of care in nursing homes throughout Ohio. Congratulations to Blake and his team.

The case is *Daniel P. Lang, as the Personal Representative of the Estate of Mary L. Stevens (deceased) v. Beachwood Pointe Care Center, et al.*, Cuyahoga County C.P. No. 803569. ■

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

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

This Fall, CATA members continued the community service mission of ending distracted driving by giving presentations to students at Gilmour Academy, Our Lady of the Elms, and Padua Franciscan High School in Parma. CATA past president, **Ellen Hirshman**, and CATA member, **Frank Bolmeyer**, spoke at Padua High School to a crowd of over 750 students. The students at all three schools were engaged, participated in demonstrations, and carefully considered the statistics and scientific data that support the dangers of distracted driving. As part of the end distracted driving campaign, Padua High School distributed the Family Safe Driving Agreement to its students to take home and share with their families. The Agreement sets forth eleven simple steps that drivers and passengers can take when driving and taking the initiative to end distracted and dangerous driving. It is the goal of CATA to continue giving the End Distracted Driving presentations to students and businesses into the indefinite future.

Ellen Hirshman gives an EndDD presentation at Padua Franciscan High School.

CATA past president, **Brian Eisen**, and his law firm participated in the first annual Youth Challenge "Adapted Ice Breaker". Held at the Thorton Park ice arena in Shaker Heights, the event gave the Youth Challenge sled and wheelchair hockey players an opportunity to spend the evening on ice, along with parents and volunteers, including members of the Shaker Heights High School varsity hockey team. Strapped into sleds or wheelchairs, and armed with hockey sticks, helmets, gloves, and elbow pads, the participants played "sled hockey" where they tested their

Brian Eisen participates in Youth Challenge's "Adapted Ice Breaker" event.

skills in the rink. The Youth Challenge players had a great time, and are looking forward to their next opportunity to play hockey. The proceeds from the event benefit Youth Challenge and the Shaker Heights High School Varsity Hockey Program. Youth Challenge, founded in 1976 by Executive Director, Mary Sue Tanis, provides children with physical disabilities the opportunity to participate in sports and recreational activities with youth volunteers, to the benefit of both.

The Boys and Girls Club of Erie County was established in 1998 and the law firm of **Murray and Murray** has been involved with the organization since its inception. The mission of the Boys and Girls Club is to organize after school programs aimed at helping local youth become productive, responsible, and caring citizens of the community. This organization offers academic programs such as "Academic Power Hours" where Club professionals and volunteers tutor students of all ages to become self-directed learners, and "Money Matters" which promotes financial responsibility and independence by learning how to manage a checking account and how to save for their future college education. Recently, CATA members **Margaret Murray**, **Florence Murray** and **Leslie Murray**, who also serves on the Board of the organization, participated in the after school tutoring program where they helped kids with their homework and played games.

Through the Ohio Association of Justice, CATA members **Ellen McCarthy** of **Nurenberg, Paris, Heller and McCarthy**, **Frank Gallucci** of **Plevin and Gallucci**, and **Amy Polomsky** of **Nager, Romaine and Schneiberg**, helped raise almost $2,500.00 for the Cleveland Kids in Need event, "Stuff the Bus." Cleveland Kids in Need is a non-profit organization that provides school supplies and resources to teachers and students who are most in need throughout Cuyahoga County. Since starting in 2001, Cleveland Kids in Need has provided over $1 million in school supplies to students and teachers in nearly 250 greater Cleveland area schools. This year, the charity's "Stuff the Bus" event was successful in filling nine school buses with school supplies. ■

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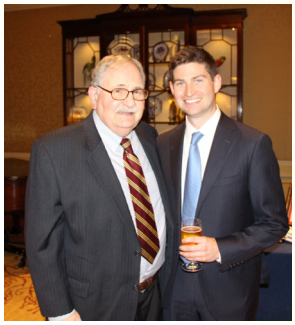
Amy Polomsky and Ellen McCarthy participate in the "Stuff the Bus" event.

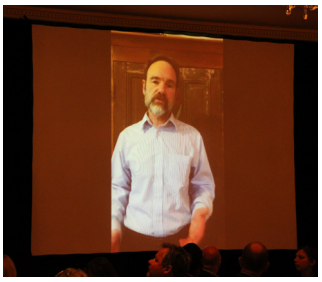
2015 Annual Dinner















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Pointers From The Bench
An Interview With
Judge Deena Calabrese

by Christopher M. Mellino

Upon entering the Justice Center for the very first time as a third grader on a field trip future Judge Deena Calabrese had a feeling of awe and inspiration. She knew then and there that she wanted to become a judge and began shaping her life in that direction.

Judge Deena Calabrese

One year for Halloween she even had her mom make her a black robe so she could dress up as a judge. Her father continually encouraged her by telling her what a great lawyer and great judge she would be.

Once she became a Judge she hit the ground running. In her first year on the bench she presided over a high profile case involving an emergency room doctor accused of killing his wife with cyanide laced calcium pills. In addition to it being a highly charged emotional trial, it was also being covered by the national media. CNN praised Judge Calabrese for her handling of the case and wrote that her warmth, humor and calm demeanor were responsible for keeping tempers and emotions in check. The jurors in that trial were so impressed with her that they presented her with an engraved gavel when the case was over.

Her background as an assistant county prosecutor in both Mahoning and Cuyahoga Counties prepared her well for that trial as well as her career on the bench. During her time as a prosecutor she participated in approximately one hundred trials involving murders and sex crimes.

In addition to her criminal trials, during her seven years on the bench Judge Calabrese has tried an average of 4 to 5 civil cases per year.

I asked Judge Calabrese what we as the Plaintiff's lawyers can do to help our clients get justice in their cases. In her time on the bench she has been impressed with the hard work that is put into both the preparation and trial of cases in her room. She does believe that most of us could do a better job with technology in the courtroom though. Most people today receive their information through some form of technology. More and more jurors are from the generation that grew up using computers and other technology. Yet a lot of lawyers are afraid of it and others fall in love with it to the point that it interferes with the message that they are trying to get across.

If you know Judge Calabrese you know that she could talk for hours about voir dire. It is hands-down her most favorite part of the trial. It was her favorite as a trial lawyer and still is as a judge. She suggests that lawyers put more time into picking their jury. She thinks that a lot of lawyers could benefit from having more of a plan and more of an idea of what types of jurors they are looking for in their case. Her experience tells her that people will almost always tell you what they are thinking but not always by what they are saying. Judge Calabrese encourages observing jurors during voir dire for non verbal communication and nuances in speech and body language.

The harshest feedback she gets from jurors after a trial is that lawyers talk down to them, especially during voir dire. Jurors have commented to her that questions were asked in a rude or insulting way. She has seen some lawyers who in an attempt to avoid talking in legalese go to the opposite extreme and are condescending.

Judge Calabrese has also seen that a lot of Plaintiffs lawyers are squeamish about asking for money. She recognizes that it may be awkward because most people that come to court for jury duty think that they will be deciding about justice not money. That issue must be explored in voir dire she cautions if you want to get the result that you are hoping for.

Judge Calabrese is very people-oriented so the job gives her the opportunity to interact with many different people on a daily basis and solve problems by bringing fairness and equity to the situation.

She was also recently appointed to the Mental Health Court and finds that to be very rewarding and challenging as well.

In addition to presiding over a high profile case in her rookie year as a Judge, she also gave birth to her first child, a son, that same year. She since has given birth to a daughter and is very busy as a Mom as well.

An English major in college she remains an avid reader. She is a fan of the classics particularly *East of Eden* and *To Kill a Mockingbird*. Her favorite movie is *The Wizard of Oz*.

A true Italian, her life centers around family. She loves to cook, swim, bicycle and spend time with her kids, her husband, her two younger brothers and her mother. She feels very blessed to be doing the job she always wanted to do and be able to balance that with spending time with her family. ■

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 2016 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

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Not All Injuries That Occur In Hospitals Are Medical Claims – But How Can You Tell Which Is Which?

by Brenda M. Johnson

You've received a call from a potential client who was injured in a fall at your local hospital while she was a patient receiving rehabilitative care. The injuries are serious, but more than a year has passed since the fall occurred. Does she still have a potential cause of action? The answer may depend on something as seemingly inconsequential as whether she was on her way to physical therapy as opposed to the bathroom when the fall occurred.

Whether or not an action constitutes a "medical claim," as that term currently is defined in R.C. § 2305.113,[1] controls whether it is subject to the one-year statute of limitations set forth in that statute (as opposed to the two-year statute applicable to claims of ordinary negligence), and it also controls whether a Rule 10(D) affidavit of merit must be filed with the complaint. Not every injury that occurs in a hospital or medical care setting is a medical claim, but the factors by which Ohio courts distinguish between medical claims and claims of ordinary negligence are far from self-evident. Nonetheless, whether they are particularly rational or not, and whether or not they generate consistent results, there are guidelines that can be discerned from relevant statutory language and the case law.

What Constitutes a "Medical Claim"?

As it is currently defined, the term "medical claim"

> means 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, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person.

R.C. § 2305.113(E)(3). The current version of the statute expressly provides that the term "medical claim" includes derivative claims, claims of negligent training or retention, and claims brought under R.C. § 3721.17 (the nursing home patient bill of rights) that arise out of medical care, diagnosis or treatment.[2]

Two Ohio Supreme Court opinions – *Browning v. Burt*[3] and *Rome v. Flower Memorial Hospital*[4] – set forth the principles by which Ohio's lower courts interpret this language in determining what constitutes a "medical claim" for statute of limitations purposes and for purposes of Rule 10(D). In *Browning*, the Court held that the word "care," for purposes of the statute, refers to "the prevention or alleviation of a physical or mental defect or illness," and further held that the word should not be interpreted broadly.[5] In *Rome*, however, the Court arguably did just that, which in turn has led to complicated and contradictory results in subsequent cases.

Rome was a consolidated appeal involving two

cases in which each plaintiff had been injured as a result of the misuse of hospital equipment. In one, the plaintiff, Barbara Rome, was injured when she fell from a radiological table because a student intern failed to properly fasten a footboard before positioning the table for an x-ray.[6] In the other, plaintiff Harold Eager was injured when a component in his wheelchair collapsed while he was being transported from physical therapy while a hospital patient.[7] Both claims had been alleged as claims for ordinary negligence, and were brought after the one year statute of limitations for medical claims had elapsed.[8]

In determining that both claims were, in fact, medical claims subject to a one-year statute of limitations, the Court held that with respect to Barbara Rome "the process of securing [her] to [the] radiology table [was] ancillary to and an inherently necessary part of the administration of the X-ray procedure which was ordered to identify and alleviate her complaints."[9] The Court also observed that "at the time of her injury, Mrs. Rome was a patient at [the hospital] and was being assisted by a [hospital employee who] was required to exercise a certain amount of professional expertise in preparing the patient for X-ray."[10] With respect to Mr. Eager, the Court held that "the transport of Mr. Eager from physical therapy was ancillary to and an inherently necessary part of his physical therapy treatment."[11] Likewise, as with Mrs. Rome, the Court found that Mr. Eager was a patient at the defendant hospital at the time of his injury, and that he was "assisted by [a hospital employee] who was required to use a certain amount of professional skill in transporting the patient in the wheelchair."[12]

Rome and Its Application

The principles cited in *Rome* as being relevant to determining whether a claim against a medical provider is a "medical claim," as opposed to a claim of ordinary negligence, have led to incongruous results as lower courts have attempted to fit specific facts to the factors in the *Rome* analysis.

In *Balascoe v. St. Elizabeth Hospital Medical Center*,[13] not long after *Rome* was decided, the Seventh District held that a claim arising from a slip and fall in a hospital setting was not a "medical claim." In that case, the plaintiff was an emergency room patient who was under the care of the hospital when she was assisted from a hospital bed to go to the bathroom, then slipped on a piece of plastic on the floor when she tried to return to her bed on her own after her calls for assistance went unheeded.[14] Invoking *Rome*, the hospital argued the fall constituted a medical claim as the injury arguably would not have occurred if the plaintiff had been helped back to bed, but the court disagreed, and held that it did not "arise directly from the 'medical diagnosis, care or treatment' of [the plaintiff] but rather arose from the alleged negligent maintenance of [the hospital's] premises."[15]

Shortly thereafter, however, on facts that seem difficult to distinguish, the Eleventh District reached a contrary result in *Long v. Warren General Hospital*.[16] In that case, the plaintiff was being prepared for a colonoscopy when he slipped while crossing the floor while wearing socks instead of hospital slippers.[17] Despite the close similarity to *Balascoe*, the court distinguished the case based on the fact that the plaintiff in *Long* was instructed to leave the gurney by an orderly, whereas the plaintiff in *Balascoe* was neither instructed to leave her bed nor assisted in any way by hospital personnel at the time she fell.[18]

In *Tayerle v. Hergenroeder*,[19] however, the Eleventh District further distinguished *Long*. The plaintiff in *Tayerle* was leaving a rehabilitation facility without assistance after receiving outpatient therapy when she was knocked over by a spring door. In an opinion authored by now-Justice William M. O'Neill, the court held the plaintiff's claim was one of ordinary negligence because (unlike the plaintiff in *Long*) the plaintiff in *Tayerle* was on her way out of the office after receiving treatment, and was not being assisted by facility employees in any way.[20]

In *Grubb v. Columbus Community Hospital*[21] the Tenth District held that another hospital fall case was a "medical claim." The patient, who was being transported from an MRI scan, had fallen backwards down a flight of steps when the orderly required the patient to dismount the gurney despite the fact that the plaintiff protested that he could not stand because of his medicated state.[22] The court held that *Rome* stood squarely for the proposition that the process of transporting a plaintiff from one diagnostic procedure to another was "ancillary to and an inherently necessary part" of medical diagnosis, and thus any resulting injury constitutes a medical claim.[23] In reaching its conclusion, the court rejected plaintiff's attempts to distinguish Rome by arguing that there was no evidence that the orderly in *Grubb* had any special training, or that medical equipment was a factor.[24] In so doing, the court observed that there was "no evidence" that the orderly who transported the plaintiff in *Rome* had any more training than the orderly whose conduct was at issue in *Grubb*, and that the use of medical equipment was immaterial to the analysis.[25]

Thus, a pattern began to develop in these earlier cases – namely, falls that occurred while a patient was in the course of being transported to treatment, or when the patient was under the direction of a hospital employee, would be treated as medical claims, whereas if the patient was unattended, the claim would be treated as one for ordinary negligence.

In more recent opinions, however, Ohio courts seem to have recognized that these rules, if applied rigidly, produce unfair and incongruous results.

In *Hill v. Wadsworth-Rittman Area Hospital*,[26] the Ninth District was asked to decide whether a claim arising from a fall sustained by a patient who was being transported by a nurse out of the hospital in a wheelchair was a "medical claim" for which a Rule 10(D) affidavit and expert testimony was needed. In that case, the plaintiff had undergone an outpatient procedure, and was being wheeled out of the building by a nurse who first left the patient unattended to deal with an apparent emergency, then took the patient to a pickup area, where the patient alleged she was again left unattended. The patient then tripped over the footrests on the wheelchair when she attempted to stand up.[27]

The trial court determined that the case involved a medical claim as that term is defined by statute, and thus required an affidavit of merit and expert testimony as to the standard of care.[28] The Ninth District held otherwise.[29] In so doing, the court held that *Rome* did not compel the conclusion that a claim arising from a patient's transportation by wheelchair was a medical claim, as it was not clear that such transportation necessarily required any particular level of professional skill and that any suggestion otherwise was *dictum:*

> . . . In examining the claim of the plaintiff transported in a faulty wheelchair, the *Rome* court stated that the plaintiff "was assisted by an employee of St. Vincent *who was required to use a certain amount of professional skill* in transporting the patient in the wheelchair." (Emphasis added.) *Rome*, 70 Ohio St.3d at 17. This language does not provide an indication as to any particular level of professional skill required. We believe this statement to be mere dictum rather than a statement of law.[30]

The Ninth District further distinguished *Rome* on its facts by noting that in the case at bar there was evidence, in the form of the defendant nurse's testimony, that a hospital volunteer had originally been assigned to transport the plaintiff, and that "[w]hen a volunteer with no requisite medical training is capable of completing the transport out of the hospital, professional skill is not implicated."[31]

In subsequent decisions, other districts also declined to find medical claims in cases involving transport or assistance involving little to no specialized professional training and little, if any, relationship to medical care. In *Conkin v. CHS-Ohio Valley, Inc.*,[32] for instance, the First District held that a nursing home resident who was injured in the process of being transferred into a Hoyer lift in order to shower had not pleaded a medical claim subject to a one-year statute of limitations, since there was no indication that the use of the Hoyer lift "was an inherent part of a medical procedure or that it arose out of physician ordered treatment," and there was no clear indication that any particular professional skill or expertise was required to operate the lift.[33]

In *McDill v. Sunbridge Care Enterprises*,[34] the Fourth District rejected the argument that a fall sustained at a rehabilitation facility by a patient who needed assistance to the bathroom was a medical claim, since transport to the bathroom was not transport for a medical procedure.[35] In *Haskins v. 7112 Columbia, Inc.*,[36] the Seventh District rejected the argument that a claim arising from the death of a nursing home patient whose leg was broken in the course of changing her linens was a "medical claim," since there can be non-medical reasons to change bed linens and the persons changing the sheets had no particular medical skill.[37]

For similar reasons, in *Carte v. Manor*,[38] the Tenth District rejected the argument that a fall in a skilled nursing facility was a medical claim, even though the patient was being actively assisted at the time of his fall. And in *Eichenberger v. Woodlands Assisted Living Residence, LLC*,[39] handed down in the same month as *Carte*, the Tenth District rejected the argument that a claim arising from the transportation by wheelchair of a nursing home resident was a "medical claim" when she was injured while being transported to the facility's dining area for her lunch, as transportation to the dining area clearly was not ancillary to, or an inherently necessary part, of the patient's medical care.[40]

Notably, both *Carte* and *Eichenberger* were issued by the same district that decided *Grubb*, in which the Tenth District held that a patient's fall while being attended by an orderly was a "medical claim," apparently solely because the fall occurred while the patient was being transported from a diagnostic procedure, as opposed to some other destination. This distinction was not addressed by the Tenth District in *Carte* or *Eichenberger*, neither of which even cite *Grubb*. Both opinions, however, cite *McDill*, in which the Fourth District squarely addressed the incongruity.

In reaching the conclusion that the fall in *McDill* was not a medical claim, the Fourth District made the following observation regarding the disparate results that *Rome* has produced:

> Following the *Rome* logic, courts have allowed recovery for a hospital employee's negligent use of hospital equipment if the equipment was not being used to transport the patient to a medical procedure, but it may not be had if the same equipment, in the same manner, is

> being used to transport the patient to a medical procedure. Certainly, a line exists between a medical claim and a general negligence claim that happens to occur at a medical facility. The line as presently drawn, however, does not appear entirely logical. Why is it reasonable to deny recovery to the patient who suffers a wheelchair injury due to employee negligence while being transported to a medical procedure or treatment, but the same patient may recover if the injury occurs while being discharged or transported to the bathroom? Perhaps the Ohio Supreme Court will clarify the seeming incongruity.[41]

Conclusion

Rome was a 5-2 decision accompanied by a succinct dissent on the part of Justice Pfeiffer, who observed that

> the causes of the injuries in these two cases are at least one step removed from diagnosis, care, or treatment. While being placed on an X-ray table and being transported in a wheelchair are tangentially related to medical care, they do not constitute medical care themselves. A claim sounding in negligence does not become a medical claim simply because the injury arises in a hospital.[42]

It is also a decision that lower courts have wrestled with, as its application has led to distinctions between medical claims and negligence claims that, as the Fourth District recently observed in *McDill*, are not entirely reasonable. There are, nevertheless, relevant factors by which to determine whether a court, under the current rules, is likely to treat an injury claim that arises in a clinical or hospital setting as one for ordinary negligence. These include:

- Whether the patient was in transit to or from a diagnostic procedure or treatment when the injury occurred. If so, the claim is likely to be treated as a medical claim, even though a similar injury incurred while en route to or from a bathroom or lunchroom might be treated as ordinary negligence;
- Whether the activity causing the injury could be considered non-therapeutic in nature. If the injury occurs in the course of what might be considered normal housekeeping or personal care duties (such as changing the patient's linens or transporting her for a shower), it is likely to be treated as a claim for ordinary negligence, even if similar activities undertaken while transferring a patient from a bed or gurney following medical treatment would not; and
- Though it seems to be decreasingly dispositive, whether or not the patient was being actively assisted by a caregiver at the time of the fall can affect a court's analysis as well.■

End Notes

1. The definition of "medical claim" discussed in this article originally appeared in R.C. § 2305.11, but was recodified in R.C. § 2305.113 in 2003.
2. *See* R.C. § 2305.113(E)(3)(a)-(d).
3. 66 Ohio St.3d 544, 1993-Ohio-178, 613 N.E.2d 993.
4. 70 Ohio St.3d, 14, 1994-Ohio-574, 635 N.E.2d 1239.
5. 66 Ohio St.3d at 557. The Court found that the terms "medical diagnosis" and "treatment" were terms of art with specific meanings "relating to the identification and alleviation of a physical or mental illness, disease, or defect." *Id.* Based on this, the Court held that a negligent credentialing claim was not a "medical claim." *See id.*, syllabus at 2. The General Assembly subsequently amended the definition of "medical claim" to include negligent credentialing claims; however, the Court's interpretation of the word "care" in the context of the statute remains otherwise undisturbed and continues to be followed by lower courts. *See, e.g., Cooke v. Sisters of Mercy*, 12th Dist. Butler No. CA97-09-181, 1998 Ohio App. LEXIS 2009, *7, n. 1, 1998 WL 221320 (May 4, 1998) (noting that the subsequent amendment to the statute was directed only to the issue of negligent credentialing, and did not otherwise affect the validity of *Browning's* interpretation of the definition of "medical claim").
6. *Rome*, 70 Ohio St.3d at 14.
7. *Id.* at 14.
8. *Id.*
9. *Id.* at 16.
10. *Id.* at 16.
11. *Id.* at 16.
12. *Id.* at 16-17.
13. 110 Ohio App.3d 83, 673 N.E.2d 651 (7th Dist. 1996).
14. *Balascoe* at 84.
15. *Balascoe* at 85-86.
16. 121 Ohio App.3d 489, 700 N.E.2d 364 (11th Dist. 1997).
17. *Long* at 490-491.
18. *Long* at 493.
19. 11th Dist. Geauga No. 98-G-2195, 1999 Ohio App. LEXIS 5931, 1999 WL 1313625.
20. *Tayerle* at *7.
21. 117 Ohio App.3d 670, 691 N.E.2d 333 (10th Dist. 1997).
22. *Grubb* at 672.
23. *Grubb* at 674 (quoting Rome, supra).
24. *Grubb* at 674-75.
25. *Grubb* at 674-75.
26. 185 Ohio App.3d 788, 2009-Ohio-5421, 925 N.E.2d 1012 (9th Dist.).
27. *Hill* at ¶3-4.
28. *Hill* at ¶ 12.
29. *Hill* at ¶ 12.
30. *Hill* at ¶ 16.
31. *Hill* at ¶ 16.
32. 1st Dist. Hamilton No. C-110660, 2012-Ohio-2816.
33. *Conkin* at ¶ 11.
34. 4th Dist. Pickaway No. 12CA8, 2013-Ohio-1618.
35. *McDill* at ¶¶ 23-24.
36. 7th Dist. Mahoning No. 13 MA 100, 2014-Ohio-4154.
37. *Haskins* at ¶ 15 (distinguishing *Rome*).
38. 10th Dist. Franklin No. 14AP-568, 2014-Ohio-5670.
39. 10th Dist. Franklin No. 14AP-272, 2014-Ohio-5354, 25 N.E.3d 355.
40. *Eichenberger* at ¶ 15.
41. *McDill v. Sunbridge Care Enters.*, 4th Dist. Pickaway No. 12CA8, 2013-Ohio-1618, at ¶ 24, n. 3.
42. *Id.* at 17 (Pfeiffer, J., dissenting).

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Defeating Nursing Home Arbitration Agreements: Are You Overlooking Your Best Argument?

by Kathleen J. St. John

For the practitioner representing injury victims in actions against nursing homes, the typical first hurdle is defeating a "motion to stay proceedings and compel arbitration" due to an arbitration agreement signed when the patient was admitted to the nursing home.

Pre-injury arbitration agreements are ubiquitous in the nursing home context. Sometimes they are part of the Admissions Agreement itself; sometimes they are a free-standing document submitted for signature in a thick pile of admissions papers. Although the language varies, they typically require the parties to submit to binding arbitration any controversy, dispute, disagreement, or claim of any kind arising out of, or related to, the Admissions Agreement – though often with the droll exception of "claims arising out of nonpayment of charges" for which the nursing home reserves to itself the right to litigate in a court of law.

Although pre-injury arbitration agreements in the nursing home context are classic adhesion contracts, drafted by the nursing home for its benefit and entered into by the patient or her representative with little appreciation of its potential consequences, challenging them as unconscionable is an uphill battle. Between the preemptive power of the Federal Arbitration Act[1] which embodies an "emphatic federal policy in favor of arbitration"[2] and Ohio statutory and judge-made law expressing "a strong presumption favoring arbitration"[3], the plaintiff challenging an arbitration agreement on unconscionability grounds has a significant burden to shoulder: she must prove the agreement is both procedurally and substantively unconscionable.[4] As the Ohio Supreme Court's decision in *Hayes v. Oakridge Home*[5] illustrates, this burden is not easily met.

There is, however, a more promising avenue for challenging many nursing home arbitration agreements. Before being entitled to a presumption favoring arbitration, the party seeking to compel arbitration has the burden of proving the existence of a valid written arbitration agreement.[6]

When, as is often the case, a pre-injury arbitration agreement is not signed by the patient but by a family member, its validity turns on whether the family member had authority to enter into the agreement on the patient's behalf.

Nursing homes typically rely on one of two potential sources of authority: a Durable Power of Attorney for Health Care or apparent authority. Both are problematic for the nursing home and provide a fertile area for the plaintiff to challenge the enforceability of the agreement.[7]

I. Durable Powers of Attorney for Health Care Do Not Authorize The Agent To Enter Into Arbitration Agreements On The Patient's Behalf.

Under Ohio law, the Durable Power of Attorney for Health Care is a creature of statute, governed by Chapter 1337 of the Ohio Revised Code. Specifically, R.C. 1337.12(A)(1) provides:

> An adult who is of sound mind voluntarily may create a valid power of attorney for

> health care by executing a durable power of attorney, in accordance with division (B) of section 1337.09 of the Revised Code, **that authorizes an attorney in fact... to make health care decisions for the principal** at any time that the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for [him or herself].... (emphasis added).

What constitutes a "health care decision" within the contemplation of the statute is defined in R.C. 1337.11(G) and (H) as follows:

> (G) 'Health care' means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition or physical or mental health.
>
> (H) 'Health care decision' means informed consent, refusal to give informed consent, or withdrawal of informed consent to health care.

The statutory scheme also provides that a durable power of attorney for health care may be created "[b]y use of... a printed form," but the authorization that may be contained within that printed form may *only* pertain to health care decisions.[8] Many, if not most, individuals with durable powers of attorney for health care use printed forms; thus, in most cases in which these forms are relied upon as the basis of the agent's authority, the question becomes whether the decision to enter into a pre-injury arbitration agreement constitutes a "health care decision."[9]

Clearly, it does not. The durable power of attorney for health care is a limited power of attorney, and, as such, it must be strictly construed.[10] A decision to enter into a pre-injury arbitration agreement does not satisfy the statutory definition of a health care decision, as it does not involve informed consent to health care, refusal to give informed consent to health care, or withdrawal of informed consent to health care. Instead, it pertains to the forum in which any future *legal disputes* will be resolved, and results in the patient waiving her right to jury trial if, at some future date, the nursing home causes injury to the patient.

Moreover, the decision to sign the arbitration agreement cannot be deemed a "health care decision" as, under Ohio law, it cannot be a requirement for being admitted to the nursing home. Section 2711.23(A) of the Ohio Revised Code prohibits medical care providers, including nursing homes, from requiring the signing of a pre-injury arbitration agreement as a condition to admission.[11] If agreeing to arbitrate future claims is not a condition of access to health care, there is no logical nexus between the arbitration agreement and receiving health care from the nursing home.[12]

Although it seems obvious that a durable power of attorney for health care does not authorize the patient's agent to sign a pre-injury arbitration agreement on behalf of her principal, this argument only recently has been addressed – and adopted – by an Ohio appellate court.

In *Primmer v. Healthcare Indus. Corp.*[13], the Fourth Appellate District held the trial court correctly denied the nursing home's motion to stay proceedings and compel arbitration because the durable power of attorney for health care signed by the plaintiff's daughter did not authorize her to waive the plaintiff's right of access to the court and agree to binding arbitration. The court reasoned that "[t]he applicable Ohio statutory definitions of 'health care' and 'health care decision' governing powers of attorney for health care and the interpretation of similar issues by foreign jurisdictions support the conclusion that a decision to waive the right to litigate in favor of arbitration is legal in nature rather than being a health care decision."[14]

The court in *Primmer* noted that, "the 'conclusion that a health care agent does not have the authority to bind the principal to an arbitration agreement comports with the view of a majority of courts in other jurisdictions that have considered similar issues.'"[15] The court also quoted at length from *Dickerson v. Longoria*, in which a Maryland appellate court recognized a distinction between arbitration agreements that are a condition of admission and those that are not. In *Dickerson*, the court found that while the former agreements fall within the definition of health care decisions, the latter do not.[16] The court explained:

> The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement. In such a case, the decision primarily concerns the legal rights of the patient with respect to resolving legal claims. If signing the arbitration agreement is necessary to receive health care, then the decision to sign the agreement is a health care decision because the receipt of health care depends on whether the patient agrees to arbitrate his or her claims.[17]

Since Ohio does not permit a nursing home to condition admission upon the signing of an arbitration agreement, the signing of an arbitration agreement can never be deemed a health care decision in this state. Thus, if an arbitration agreement signed by a family member is to be valid in this state, the family member's authority to sign must derive from a source other than the durable power of attorney for health care.

II. Health Care Powers Of Attorney Do Not Become Effective Until The Principal Has Been Determined, By His Or Her Physician, To Lack The Capacity To Make Informed Health Care Decisions For Him Or Herself.

Prior to *Primmer*, some Ohio courts addressed a different rationale for finding a health care power of attorney to be an insufficient source of authority for the agent to sign a nursing home arbitration agreement on the principal's behalf. Noting that an agent's authority under a health care power of attorney is triggered *"only if*... the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for the principal"[18], these courts found the agent lacked authority to sign the arbitration agreement unless there was evidence that the principal's physician had made the requisite determination of the principal's incapacity.[19]

Although these decisions continue to be worth citing in opposing a motion to compel arbitration, their legitimacy is called into question by the *Primmer* rationale. If the health care power of attorney is incapable of conferring upon the agent the right to enter into pre-injury arbitration agreements, then whether that power of attorney has been activated by a physician's determination of the principal's incapacity is beside the point. Still, unless and until the Supreme Court adopts the *Primmer* rationale, it is advisable to continue making this alternative argument, assuming it is available under the facts of your case.

III. The Apparent Authority Arguments Are Typically Flawed On Their Facts.

The other source of authority upon which nursing homes rely to support their contention that the family member was authorized to sign the arbitration agreement on the patient's behalf is "apparent authority." This argument is heavily dependent on the facts, but, given the circumstances in which most people are admitted to nursing homes, it is often readily defeated.

To prove the existence of apparent authority, the nursing home must demonstrate:

(1) "[T]hat the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted [the putative agent] to act as having such authority[,]" and

(2) "[T]hat the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe the agent possessed the necessary authority."[20]

The principal herself, and not her putative agent, "must somehow represent to a third party, either intentionally or negligently, that the agent had authority to act on the principal's behalf."[21] That is, "[t]he principal must hold out the agent as possessing sufficient authority to embrace the particular act in question, or knowingly permit him to act as having such authority."[22] The nursing home, as the party asserting the existence of an apparent agency, has the burden of proving such a relationship exists.[23]

In *Primmer*, the court rejected the nursing home's argument that, if the health care power of attorney did not provide the daughter with authority to sign the arbitration agreement, she nonetheless had apparent authority to do so. The court noted the only evidence the nursing home had of a "holding out" by the plaintiff was the fact that he made his daughter his agent under a health care power of attorney. That evidence, however, was irrelevant as the power of attorney did not give the daughter the authority to enter into an arbitration agreement on his behalf.[24] Moreover, there was no evidence the father was even present when the daughter signed the agreement, or that the nursing home had a reasonable belief the daughter was authorized to sign on his behalf.[25] And the daughter's signing of *other* admissions papers did not endow her with apparent agency, as "a claim of apparent authority cannot be based on [the putative agent's] acts."[26]

Although, in other cases, the principal's presence – and failure to protest – when the nursing home arbitration agreement was signed has been held to constitute a "holding out" giving rise to apparent agency, such decisions should be narrowly limited to their facts.[27] In most situations, the health – if not the mental status – of the person entering the nursing home is significantly compromised[28], assuming he or she is even present when the admissions papers are signed, which is often not the case. The family members themselves are typically distressed; and rarely are they, or the patient, anticipating having to file a lawsuit due to some future wrong the nursing home might commit. The very notion of having to decide – when admitting one's loved one to the nursing home – the forum in which to bring an unanticipated future lawsuit is absurd. And this is assuming that the patient and her family members are even aware the arbitration agreement is contained within the papers they are signing, or that the nursing home admissions people explain (or themselves understand) those provisions – which themselves are fairly dubious assumptions.

If the nursing home wants to prove the family member signing the arbitration agreement was the patient's "apparent agent", it must have sufficient, credible evidence that the patient – in a lucid mental state – held that family member out as having authority to sign a legal document depriving the patient of her right to litigate in a court of law any future action she might have against the nursing home. As the Kentucky Supreme Court recently stated:

> [W]ithout a clear and convincing manifestation of the principal's intention to do so, we will not infer the delegation to an agent of the authority to waive a fundamental personal right so constitutionally revered as the 'ancient mode of trial by jury.[29]

That is a steep burden and one that, in the typical case, should be difficult, if not impossible, for the nursing home to meet. ■

End Notes

1. 9 U.S.C. §1, *et seq.*
2. *Marmet Health Care Center, Inc. v. Brown*, __ U.S. __, 132 S.Ct. 1201, 1203 (2012).
3. *Taylor Bldg. Corp. of Am. v. Benfield,* 117 Ohio St.3d 352, 2008-Ohio-938, ¶27; *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶15; R.C. 2711.01(A).
4. *Hayes*, at ¶20.
5. *See* n. 3, *supra.*
6. *Dodeka. L.L.C. v. Keith*, 11 Dist. No. 2011-P-0043, 2012-Ohio-6216, ¶25; *Hall v. Frantz,* 9th Dist. No. 19630, 2000 Ohio App. LEXIS 2186, *7; and see *Maestle v. Best Buy Co.,* 8th Dist. No. 79827, 2005-Ohio-4120, ¶10 ("[C]ourts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so.").
7. The focus of this article is on actions by the patient against the nursing home, or survivorship actions on the patient's behalf after his or her death. As for wrongful death actions, the Ohio Supreme Court has held that "[a] decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claims." *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, paragraph two of the syllabus. Thus, the agent's signing of the arbitration agreement on the principal's behalf should never force the wrongful death beneficiaries to be bound by the arbitration agreement, even if the agent who signs the agreement is herself a wrongful death beneficiary. *See, e.g., McFarren v. Emeritus at Canton*, 5th Dist. No. 2013CA00040, 2013-Ohio-3900, ¶30 (the arbitration agreement was not effective as to the wrongful death beneficiaries, including the grandson who signed the agreement, because he was signing as the decedent's purported representative and not in his individual capacity).
8. R.C. 1337.17 ("By use of such a printed form, a principal may authorize an attorney in fact to make health care decisions on his behalf, but the printed form shall not be used as an instrument for granting authority for any other decisions.").
9. Even if a printed form is not used in drafting the health care power of attorney, the powers granted the agents in these documents are typically limited to "health care decisions" and do not extend to decisions concerning the forum in which future litigation must be held.
10. *Spence v. Emerine*, 46 Ohio St. 433, 438 (1889); *In re Blackburn*, 4th Dist. No. 05CA3014, 2006-Ohio-406, ¶9; *Huntington Nat'l Bank v. Val Homes, Inc.*, 11th Dist. No. 2011-G-3021, 2012-Ohio-526, ¶29.
11. R.C. 2711.23(A) ("To be valid and enforceable any arbitration agreements... for controversies involving a medical... claim that is entered into prior to a patient receiving any care, diagnosis, or treatment shall include or be subject to the following conditions: (A) The agreement shall provide that the care, diagnosis, or treatment will be provided whether or not the patient signs the agreement to arbitrate[.]").
12. *See Dickerson v. Longoria*, 414 Md. 419, 444-448, 995 A.2d 721 (2010).
13. *Primmer v. Healthcare Indus. Corp.*, 4th Dist. No. 14CA29, 2015-Ohio-4104.
14. *Id.* at ¶2.
15. *Id.* at ¶20, quoting *Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-790, 2 N.E.3d 849 (2014). *See also, Life Care Centers of America v. Smith*, 298 Ga. App. 739, 742-743, 681 S.E.2d 182 (2009) (agreeing that "the plain language of the health care power of attorney did not give Smith the power to sign away her mother's or her mother's legal representative's right to a jury trial" and noting that "other states' case law directly on point... have reached this same conclusion, holding that a health care power of attorney was insufficient to bind the principal"); *State ex rel. AMFM, LLC v. King,* 230 W.Va. 471, 740 S.E.2d 66 (W.Va. 2013) at syllabus eight ("An agreement to submit future disputes to arbitration, which is optional and not required for the receipt of nursing home services, is not a health care decision under the West Virginia Health Care Decisions Act, W.Va. Code §16-30 et seq."); *Texas City View Care Ctr. v. Fryer,* 227 S.W.3d 345 (Tex. App. 2007) ("nothing in the medical power of attorney indicates that it was intended to confer authority on Griffin to make legal, as opposed to health care, decisions for Emmons, such as whether to waive Emmons' right to jury trial by agreeing to arbitration of disputes.... Thus, even if the medical power of attorney had become effective, the scope of Griffin's authority would not have extended to signing the arbitration agreement[.]"); *Flores v. Evergreen at San Diego, LLC*, 148 Cal. App. 4th 581, 594, 55 Cal. Rptr. 823 (2007) ("Unlike admission decisions and medical care decisions, the decision whether to agree to an arbitration provision in a nursing home contract is not a necessary decision that must be made to preserve a patient's well-being. Rather, an arbitration agreement pertains to the patient's legal rights, and results in a waiver of the right to a jury trial.")
16. *Primmer*, at ¶19, quoting *Dickerson v. Longoria*, 414 Md. 419, 444-448, 995 A.2d 721 (2010).
17. *Id.*
18. R.C. 1337.13(A)(1) (emphasis added).
19. *Tedeschi v. Atrium Centers, LLC*, 8th Dist. No. 97647, 2012-Ohio-2929, ¶18; *McFarren v. Emeritus at Canton*, 5th Dist. No. 2013CA00040, 2013-Ohio-3900, 997 N.E.2d 1254, ¶18 ("If the conditions required for a power of attorney to come into being are not fulfilled, the representative has no authority to bind the principal.").
20. *Master Consolidated Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), at the syllabus.
21. *Medina Drywall Supply, Inc. v. Procom Stucco Systems*, 9th Dist. No. 06CA0014-M, 2006-Ohio-5062, ¶10.
22. *Akers v. Classic Properties, Inc.*, 12th Dist. No. CA2003-03-035, 2003-Ohio-5436, ¶14.
23. *Id.; see also, Mortgage Electronic Registration Systems, Inc. v. Mosley,* 8th Dist. No. 93170, 2010-Ohio-2886, ¶39.
24. *Primmer*, 2015-Ohio-4104, at ¶24.
25. *Id.* at ¶25.
26. *Id.* at ¶26.
27. For instance, in *Broughsville v. OHECC, LLC*, 9th Dist. No. 05CA-008672, 2005-Ohio-6733, the court found apparent agency because the plaintiff was present when the arbitration agreement was signed by her daughter, but she "made no attempt to stop [her daughter from signing it], to ask questions of [the nursing home] or to request to read the document." *Id.* at ¶11. The court noted that "[w]hile it is averred that [the plaintiff] suffers from mild dementia, nowhere is it argued that she was incompetent at the time of the signing or was unable to vocalize an objection to [her daughter's] action." *Id.* "In fact, the only reason for [the daughter's] intervention was that [the plaintiff] was suffering from contractures." *Id.*
28. *See, e.g., Koch v. Keystone Pointe Health & Rehabilitation*, 9th Dist. No. 11CA010081, 2012-Ohio-5817, ¶11 (patient, whose daughter-in-law signed the arbitration agreement, had not held her out as having authority to act on his behalf, where "[h]e was confused upon his initial transfer from the hospital to [the nursing home], and there was no evidence that he informed anyone at [the nursing home] that his daughter-in-law had the authority to act on his behalf."); *Templeman v. Kindred Healthcare, Inc.*, 8th Dist. No. 99618, 2013-Ohio-3738, ¶23 (rejecting nursing home's apparent agency argument where the patient, admitted with a tracheotomy tube, "neither acted nor held her son out as her representative.").
29. *Extendicare Homes, Inc. v. Whisman*, 2015 Ky. LEXIS 1867 (Ky. Sept. 24, 2015).

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Technology Tips for Attorneys

by William B. Eadie and Andrew J. Thompson

William: Trial Presentation by Google

By now you've likely had occasion to consider using Google Maps' Street View at deposition or trial to show an image of an intersection or roadway. Being able to see the scene from different angles, and look around, can be invaluable, particularly when the desired view is from the position of a car in traffic.

Did you know that Google lets you access the street view images from every prior Google Car passing?

Take the intersection of East 55, Woodland, and Kinsman, rated the most dangerous traffic intersection in Cleveland. (The five- way intersection averages 52 crashes annually, resulting in an average of 7 injuries per year. That's a crash every week.)

The street view when accessed as of this writing is from September, 2014:

See that little clock in the corner, with the Street View date? Click on it and you can see the various prior dates Google passed by, in this case August, 2014, June and October, 2011, August 2009, and October, 2007:

I've found images in some cases that were just as accurate, but in the evening, or with more appropriate traffic (like a semi-truck). Or showing road construction or other conditions that aren't there by the time the client comes to you.

Have you used Google in deposition or trial as an exhibit? Share with us by commenting on the blog post for this article at www.clevelandtrialattorneys.org/blog

Andrew: Confidential Settlements in the Age of Social Media

Most of the settlements that we reach with our clients are subject to confidentiality. The clauses contained within a release are fairly common, and we have all had discussions with clients about the importance of not revealing the amount of the settlement with anyone outside of their immediate families or tax advisors. A story about the settlement of an employment case in Florida, however, suggests that in the age of social media, we need to be even more diligent in our warnings on this issue.

Patrick Shay filed an age discrimination suit against his employer after his contract was not renewed. He eventually reached a settlement, the terms of which contained a confidentiality clause. After telling his daughter what happened in the case, she promptly posted the following message on Facebook to her 1,200 followers: "Mama and Papa Shay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." When the employer learned of the post, it refused to pay the proceeds of the settlement, claiming a breach of the agreement. The Florida Third District Court of Appeals agreed, holding that "Shay violated the agreement by doing exactly what he had promised not to do. His daughter then did precisely what the confidentiality agreement was designed to prevent, advertising to the Gulliver community that Shay had been successful in his age discrimination and retaliation case against the school." Shay ultimately forfeited the amount of the settlement. (Author's Note: And hopefully his daughter did not get to enjoy her vacation in Europe.)

We live in an age where the vast majority of our clients share even the most mundane details about their lives throughout the day on Facebook, Twitter, and other social media platforms. The settlement of a lawsuit, although common for us as trial lawyers, is a major event in the lives of our clients. Their first impulse could easily be to share that experience through social media. As the story above illustrates, we need to be aware of that behavior and act diligently to prevent it. ■

(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.)

Recent Ohio Appellate Decisions

by Meghan P. Connolly and Dana M. Paris

Sivit v. Village Green of Beachwood, L.P., 43 Ohio St.3d 168, 2015-Ohio-1193 (Apr. 2, 2015).

Disposition: Ordering remittitur of punitive damages award to comply with R.C. 2315.21(D)(2)

Topics: Applicability of R.C. 2315.21(D)(2) where case involves mixed questions of contract and tort law.

A 2004 fire at Village Green Apartments was determined to have been caused by construction defects. Another fire occurred in 2007 in a different building at the same apartment complex, and was determined to have been caused by faulty electrical wiring contaminated by water leaks. Tenants sued the complex for damages from the 2007 fire.

A jury trial was held, and the jury awarded compensatory damages of $582,146, as well as punitive damages of $2,000,000, and attorney fees of $1,040,000. The Eighth District Court of Appeals affirmed the awards.

The case involved mixed issues of contract and tort law. On appeal to the Supreme Court, the apartment complex argued that:

"An action to recover damages for injury to person or property caused by negligence or other tortious conduct is a 'tort action' within the meaning of R.C. 2315.21(A) even though the plaintiff's claim may have arisen from a breach of duty created by a contractual relationship and even though the defendant's conduct may have constituted both tortious conduct and a breach of contract."

Although the conflict in this case arose between parties to a contract, the Court found that the injurious conduct sounded in tort. Therefore, the Court applied R.C. 2315.21(D)(2)(a), which limits punitive damages in tort actions to twice the amount of compensatory damages. In applying the statute, the Supreme Court of Ohio held that the amount of punitive damages allowed exceeded the limit prescribed by R.C. 2315.21(D)(2)(a), and therefore reduced the punitive damages to twice the compensatory amount.

OBLH, LLC v. O'Brien, 11th Dist. No. 2013-T-0111, 2015-Ohio-1208 (March 31, 2015).

Disposition: Reversing trial court's dismissal of breach of contract claim.

Topics: Doctrine of part performance; statute of frauds.

Two brothers expected to inherit their father's real property and mineral rights upon his death based on an oral promise made by their father during his lifetime. With the expectation of inheriting the property, the brothers formed OBLH, LLC and prepared a deed for the purpose of taking title. According to the brothers' complaint, the brothers took the deed to their ailing father in the hospital when his wife, who was not the natural mother of the brothers, requested that the transaction not take place at that time. As a joint owner of the property, she then allegedly made an oral promise that if their father, Mr. O'Brien, did not execute the deed before his death, she would honor his wishes and transfer the property to the brothers.

Mr. O'Brien died before the transaction was complete. Mrs. O'Brien took action to transfer the jointly held property to her sole name instead of transferring the property to the brothers as promised. Mrs. O'Brien went on to lease the oil and gas rights to a third party which was also involved in the litigation.

Based on the trial court's finding that the statute of frauds applies, all claims were dismissed except for promissory estoppel. As to the breach of contract claim, the issue on appeal was whether the trial court erred in granting the motion to dismiss based on the statute of frauds. The appellants argued that although the statute of frauds, codified as R.C. 1335.05, applies to transfers of real property, the doctrine of part performance operated as an exception to the statute of frauds in their case.

Under Ohio law, the doctrine of part performance requires an unequivocal act by the party relying on the agreement, which is exclusively referable to the agreement and which has changed his position to his detriment. The O'Brien brothers

had "withheld the deed from their father for execution in exchange for [Mrs. O'Brien's] promise to transfer the property in accordance with their father's wishes". According to the Eleventh District, when construed in the brothers' favor, this could be construed as an unequivocal act done in reliance upon the promise that changed the brothers' position to their detriment. In so finding, the court held that the breach of contract claim should have survived the motion to dismiss based on the statute of frauds. The trial court's dismissal of the breach of contract claim was reversed and remanded.

Clemens v. Nelson Fin. Group, Inc., 10th Dist. No. 14AP-537, 2015-Ohio-1232 (March 31, 2015).

Disposition: Affirming trial court's grant of summary judgment on claim for negligence in giving financial advice.

Topics: Economic loss rule; exception for one who holds self out to give financial advice for a fee.

Plaintiff, trustee of the Clemens Trust, brought suit against the financial advisor to Mr. Clemens, Nelson Financial Group. The financial group advised Mr. Clemens as to, and sold to him, two life insurance policies, one of which was paid upon his death, the other which was not paid upon his death due to a lapse of the policy. Among the claims brought against Nelson Financial was a negligence claim for failure to use reasonable care in financially advising Mr. Clemens.

The defendant financial group moved for summary judgment on the negligence claim based on the economic loss rule. The rule stands for the proposition that, "absent tangible physical harm to persons or tangible things, there is generally no duty to exercise reasonable care to avoid economic losses to others." *Clemens* citing *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.*, 54 Ohio St.3d 1 (1990). The trial court agreed with Nelson Financial and granted summary judgment on plaintiff's negligence claim, holding that the claim was barred by the economic loss rule.

The Tenth District Court of Appeals recognized the exception to the economic loss rule set forth in *Alton v. Wyland*, 72 Ohio App.3d 685 (10th Dist. 1991). There, the Tenth District held that "one who holds himself out to be an investment advisor and for a fee gives investment advice to another is liable to such other person if he negligently gives inaccurate advice causing damage to the other person as a result of relying upon such investment advice." In recognizing that exception, however, the court stressed that its application is confined to claims for negligent misrepresentation, not pure negligence claims. Because Clemons's claim was for negligence, the court of appeals affirmed the trial court's bar of plaintiff's negligence claim under the economic loss rule.

Taneff v. HCR ManorCare Inc., 9th Dist. No. 27554, 2015-Ohio-3453 (Aug. 25, 2015).

Disposition: Reversing the trial court's decision finding that the plaintiff lacked standing because the decedent's daughter failed to show that there was an estate and that she was the duly appointed representative.

Topics: Nursing home; wrongful death; beneficiaries; personal representatives; standing.

In a wrongful death nursing home action, the decedent's daughter filed this lawsuit against the defendant nursing home, ManorCare, prior to opening an estate. Soon after filing the complaint, an estate was opened and Mr. Taneff was appointed as special administrator of the decedent's estate.

Defendant ManorCare moved for summary judgment arguing that the decedent's daughter lacked standing because she failed to show that there was an estate and that she was the duly appointed representative. The decedent's daughter then filed an amended complaint substituting Mr. Taneff as the representative of the plaintiff's estate.

Granting the defendant's motion for summary judgment, the trial court found that the decedent's daughter lacked standing because she was not the estate's representative at the time of the filing and that the amended complaint substituting Taneff as the plaintiff's representative failed to relate back to the original filing and was therefore barred by the statute of limitations.

On appeal, the plaintiff raised two issues: (1) whether the trial court erred in finding that the plaintiff must be appointed personal representative of the estate in order to have standing; and (2) whether the trial court erred in finding that relation back did not apply to the second amended complaint.

When addressing the first issue, the Court referred to the wrongful death statute, R.C. 2125.02(D)(1), which provides that wrongful death actions must be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children and the parents of the decedent. Standing involves whether a party has a personal stake in the outcome of an action, rather than a representative or nominal interest in the claim. *Reynolds v. HCR ManorCare, Inc.*, 9th Dist. Summit No. 27411,

2015-Ohio-2933. A party has standing if it is a real party in interest. *Id*. Courts have repeatedly held that "the real parties in interest in a wrongful death action are the beneficiaries, while the personal representative is a nominal party to the case." *Cushing v. Sheffield Lake*, 9th Dist. Lorain No. 13CA010464, 2014-Ohio-4617. Here, the Court held that as a surviving child of the estate, the decedent's daughter is clearly a beneficiary and a real party in interest and therefore has standing to bring this action.

When addressing the second issue, the Court relied on *Douglas v. Daniel Bros. Coal Co.*, 135 Ohio St. 641 (1939). In *Douglas*, the Supreme Court of Ohio held that an amended wrongful death petition related back to the filing of the original complaint, and the action was deemed commenced within the statutory time limit, when the wrongful death plaintiff amended her petition to show that she was appointed administratrix after the limitations period has expired. Additionally, the *Douglas* decision also addressed whether it was essential that the wrongful death statute required that the prosecution of the action be in the name of the personal representative. The court found that it was not an essential term, but rather that the requirement is "no part of the cause of action itself." *Id*. at 647.

Case law in Ohio illustrates that trial courts liberally permit pleadings to be amended to cure a defect, so that determinations may be made on the merits. *Stone v. Phillips*, 9th Dist. Summit No. 15908, 1993, Ohio App. LEXIS 3989, 1993, WL 303281 (Aug. 11, 1993). Furthermore, the general rule of the relation back doctrine is that the appointment of the administrator relates back to the filing of the petition. *Id*. at *3. Here, reversing the trial court's decision, the Court found that the substitution of Mr. Taneff was proper under the relation back doctrine and was not barred by the statute of limitations.

Sheffield v. Estate of Bentley, 12th Dist. No. CA2014-12-020 (Sept. 21, 2015).

Disposition: Affirming grant of new trial to plaintiff in negligence action where defense counsel, in closing argument, confused jury by using term "purposefully."

Topics: Circumstances warranting new trial in civil action based on improper comments in closing argument.

In attempting to park a vehicle in a residential garage, the defendant drove through the garage wall and into the plaintiff's kitchen, injuring the plaintiff. The negligence case was tried to a Fayette County jury.

In closing argument, defense counsel said, "What evidence is there that she purposefully stomped on the gas and drove through the wall?" The use of the word "purposefully" was objected to. The objection was well taken and the court attempted to give a curative instruction to the jury that the defendant's purpose or intent was not part of the negligence question in the case.

The jury returned a verdict for the defendant. The plaintiff filed a motion for new trial on the bases that the verdict was contrary to the evidence, and also that the verdict was fatally tainted by defense counsel's use of the word "purposefully" in closing argument.

In granting the plaintiff's motion for new trial, the court found that, although attorneys are allowed wide latitude in closing argument under *Pesek v. Univ. Neurologists Assn.*, Inc., 87 Ohio St.3d 495, 501 (2000), there was a substantial likelihood that the jury was misled and the verdict was affected by defense counsel's remarks. Under *Pesek*, "if there is room for doubt whether the verdict *** may have been influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party." Following *Pesek*, the Twelfth District gave deference to the trial court and affirmed the trial court's decision to grant a new trial to the plaintiff.

Brandon Nist, et. al., v. Richard Mitchell, D.O., 9th Dist. No. 27160, 2015-Ohio-4032 (Sept. 30, 2015).

Disposition: Affirming the trial court's decision finding that the Court did not err when it failed to dismiss a juror who had allegedly engaged in misconduct when she researched medical terminology during the course of the trial.

Topics: Juror misconduct.

The plaintiffs brought this birth trauma medical negligence action against Dr. Mitchell claiming that he breached the standard of care causing the plaintiff's baby to suffer a skull fracture, resulting in permanent developmental disabilities. The case went to trial against Dr. Mitchell and his employer, Paragon Health Assoc., Inc. The jury found that Dr. Mitchell did not breach the standard of care and returned a verdict for the defendants.

One of the issues on appeal was whether the trial court abused his discretion by failing to remove a juror who had

conducted her own research during the trial and not allowing plaintiff's counsel to voir dire the entire panel regarding this juror's conduct.

Under the abuse of discretion standard, courts "will not reverse the trial court unless it has handled the alleged juror misconduct in an 'unreasonable, arbitrary, or unconscionable' manner." *State v. Hessler*, 90 Ohio St.3d 108, 2000-Ohio-30, 734 N.E.2d 1237 (2000). When analyzing a case of juror misconduct, the trial court must first determine if the misconduct actually happened. The Court may rely on testimony of the juror in question and additional jurors who may have information. Once testimony by the juror(s) is given, the trial court has wide discretion to either believe or disbelieve the jurors' statements. *State v. Morris*, 9th Dist. Summit No. 25519, 2011-Ohio-6594.

During the trial, alternate juror number 9 advised the court that he had overheard juror number 5 state that she had researched the certain terms on her computer. The following questioning took place between the Court and Juror number 5 with counsel present:

Court:	We received information that you indicated to one or more of the jurors that you had looked up some medical definitions in the computer. Does that sound familiar?
Juror No. 5:	No, I didn't
Court:	So you haven't...
Juror No. 5:	I don't remember saying that to anyone.
Court:	Okay. Maybe somebody overheard it and didn't get the story right, but have you been getting on the computer looking up any definitions?
Juror No. 5:	No, no, I have not.

The Court also spoke to the alternate juror about his allegations. He testified that juror number 5 was in the jury room and he overheard her say that she was researching topics and terms online.

Finding that there was no definitive evidence that any juror misconduct occurred, the court of appeals affirmed the trial court's decision that the alleged juror misconduct was unfounded and not supported by evidence.

James H. McVay, individually and as executor for the estate of Patricia G. McVay, deceased, v. Aultman Hospital, 5th Dist No. 2015CA00008, 2015-Ohio-4050 (Sept. 29, 2015).

Disposition:	Reversing the trial court's decision which granted the plaintiff's motion to compel and ordered the production of a hospital record which the defendant argued was privileged under the work product doctrine.
Topics:	Work product doctrine; final appealable order; in-camera inspection.

Plaintiff brought a wrongful death medical negligence claim against Aultman Hospital claiming that the defendant hospital failed to properly monitor the decedent and resulted in the patient suffering a cardiac arrest while under the defendant's care.

Through deposition testimony, it was discovered that the cardiac monitor/station produced inaccurate readings and was off by ten minutes. Once this was disclosed, the plaintiff sent out additional discovery requesting any and all documents related to the time reading on the cardiac monitor. The defendant objected claiming that the hospital note was privileged under the work product doctrine as it was prepared by the risk management department in anticipation of litigation.

The plaintiff filed a motion to compel citing good cause. The defendant hospital opposed the motion arguing the note was privileged and, in light of the deposition testimony, the sought-after information had already been disclosed to plaintiff during the deposition. Rejecting the defendant's argument, the trial court granted the plaintiff's motion to compel and ordered the production of the medical record, finding that the defendant failed to present sufficient evidence that the note was privileged.

On appeal, the appellate court first determined whether this was an appealable issue. R.C. 2505.02(B)(4) provides the following:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties to the action.

By granting the plaintiff's motion to compel, the medical record was to be forever disclosed and could potentially be used throughout the course of the case. As such, finding that the requirements of R.C. 2505.02(B)(4) were met, the court stated that this was the only time for an appeal on this issue.

Turning to the issue of whether the medical record was protected under the work product doctrine, the Court held that due to the conflicting positions, the trial court should have, at the very minimum, held an evidentiary hearing and/or an in-camera inspection regarding the sought-after documents.

Leanne Brown v. FMW RRI NC LLC, d.b.a. Red Roof Inn, et al., 10th Dist. No. 14AP-953 , 2015-Ohio-4192 (Oct. 8, 2015).

Disposition: Reversing and remanding the trial court's decision, the 10th District Court of Appeals held that genuine issues of material fact existed as to whether the defendant and his dog were living at the hotel at the time of this dog-bite incident and whether defendant Red Roof Inn had sufficient possession and control over the common areas to be considered a harborer of the dog.

Topics: Dog bite statute, R.C. 955.28; harborer, resident.

The plaintiff, a guest at a non-party hotel, was walking her dog in the parking lot. Adjacent to the plaintiff's hotel was the Red Roof Inn. Although there was a fence separating the two properties, there was a hole at the base of the fence that had existed for approximately 8 months. Without warning, plaintiff was attacked by a pit bull that had climbed through the hole in the fence, thereby causing a significant hand injury which required surgery. It was later discovered that the pit bull was owned by Mr. Westley Rhone. Although the trial court found Mr. Rhone to be homeless, he had been staying as a guest at the Red Roof Inn at the time of this incident. The general manager testified that although Mr. Rhone's pit bull exceeded the weight requirement and failed to be on a leash when outside, he still gave permission to Mr. Rhone to have his dog live at the hotel with him. During the general manager's deposition, he testified that he considered Mr. Rhone and his dog to be residents of the hotel, as they stayed there for a three or four month long period.

The defendant hotel filed a motion for summary judgment which the trial court granted. The trial court found that the defendant was not a harborer of Mr. Rhone's dog under R.C. 955.28(B) because Mr. Rhone's stay was temporary and was not sufficient to establish that Mr. Rhone and his dog were living or had a residence at the hotel.

On appeal, the plaintiff argued that there were genuine issues of material fact as to whether Mr. Rhone was considered a resident of the hotel and whether the hotel was considered a harborer of the dog under the statute.

Ohio's dog bite statute is a strict liability statute and is set forth in R.C. 955.28. In order to prevail in a dog bite case the plaintiff must prove: (1) ownership, keepership, or harborship of the dog; (2) the actions of the dog were the proximate cause of damage; and (3) the monetary amount of damages. *Diaz v. Henderson*, 12th Dist. Butler No. CA2011-09-182, 2012-Ohio-1898. The issue of whether one is a harborer of a dog is an issue of fact for the jury to determine. *Padgett v. Sneed*, 1st Dist. No. C-940145, 1995 Ohio App. LEXIS 3012 (July 19, 1995). Although harborer is not explicitly defined by the statute, courts have come to recognize that a harborer is one who is in possession and control of the premises where the dog lives and silently acquiesces in the dog being kept there by the owner. *Flint v. Holbrook*, 80 Ohio App.3d 21, 608 N.E.2d 809 (1992). If the harborer knowingly permits the dog to live on his premises, then he may be strictly liable under the statute.

In this case, the next issue became whether Mr. Rhone and his dog were considered living at the hotel. The general manager testified he knew the dog was staying at the hotel; he permitted the dog to stay at the hotel and roam free in the common areas; and that Mr. Rhone and his dog stayed at the hotel for an extended stay of three to four months. Recognizing that "certainly there is no magic number which converts a temporary stay into a more permanent one," the Court held that summary judgment was inappropriate and that a reasonable jury could find Mr. Rhone and his dog were living at the Defendant hotel at the time of this incident.

Westfall v. Dlesk, 7th Dist. No. 14 HA 17, 2015-Ohio-4313 (Oct. 13, 2015).

Disposition: Reversing trial court's grant of summary judgment to insurer on coverage issue.

Topics: Whether physical damage collision coverage was included in defendants' motor vehicle liability policy; construction of ambiguities against drafter.

The plaintiff towing company, Westfall, brought a claim against the defendant Dlesk family for towing and storage fees of approximately $10,000. The towing and storage fees arose from a one-vehicle collision that killed the defendants' decedent. Westfall filed a declaratory action against the defendants' insurance company, Ohio Mutual Insurance Group, seeking payments of the towing expenses through the decedent's policy. The trial court granted summary judgment to the defendant, Ohio Mutual Insurance Group, finding there was no coverage as a matter of law with regard to the towing and storage fees.

In the declaratory action, Westfall argued that Ohio law mandates that insurance policies cover towing and recovery fees under collision coverage. Ohio Mutual Insurance Group argued that there is no such requirement under Ohio law. The trial court agreed with Ohio Mutual, holding that there is no statutory requirement to cover towing related expenses. The trial court also made a finding that the decedent had not purchased such coverage and granted summary judgment to Ohio Mutual.

The Seventh District Court of Appeals conducted a de novo review. After reviewing the decedent's policy, the court concluded that there was an ambiguity in the policy language as to whether there was collision coverage available under the policy. The court followed the well-founded principle that the court must construe ambiguous facts against the drafter. Moreover, an insurance policy must be construed strictly against the insurer and liberally in favor of the insured.

The Seventh District therefore reversed the trial court and entered judgment for the towing company, holding that the Dlesk policy did provide collision coverage that included towing and storage expenses. ■

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

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): _____
_____
_____

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CATA Verdicts & Settlements

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

Michelle Cirino v. Questar, LLC

Type of Case: Premises Liability

Settlement: $90,000.00

Plaintiff's Counsel: Dana M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300

Defendant's Counsel: Greg Collins

Court: Stark County Common Pleas Case No. 2015CV00305, Judge Kristin G. Farmer

Date Of Settlement: November 17, 2015

Insurance Company: Central Insurance Company

Damages: Medical Bills: $36,600.00. Injuries: Herniated discs at C3-4 and C4-5 and scalp laceration. Dr. Ko opined that the Plaintiff has permanent neck pain that will continue into the indefinite future.

Summary: Plaintiff, Ms. Cirino, was employed at the time of this accident as a truck driver and was instructed to go to Questar to pick up a shipment of 55-gallon steel drums. When Plaintiff arrived at Questar, the Questar employees were unloading the steel barrels off of a trailer that was in the dock area. As a result of one of the Questar employees negligently and haphazardly stacking the 55-gallon steel barrels three-high on the loading dock area, the top most barrel became unsteady and fell on Plaintiff's head, thereby causing two herniated discs and a laceration to her scalp.

Plaintiff's Expert: Dr. Timothy Ko (Pain Management)

Defendant's Expert: None

Estate of Jane Doe v. ABC Store

Type of Case: Trip and Fall

Settlement: $500,000.00

Plaintiff's Counsel: Dana M. Paris and David M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300

Defendant's Counsel: John Gannon, Esq.

Court: Lorain County Common Pleas, Judge John Miraldi

Date Of Settlement: October 20, 2015

Insurance Company: Cincinnati Ins. Co.

Damages: Wrongful death

Summary: Plaintiff's decedent, age 79, tripped over an exposed corner of a 4x4 wooden pallet which supported an aisle display of birdseed bags. She struck her head on the floor and developed a cerebral bleed primarily due to being on a blood thinner. Open and obvious defense and egg shell plaintiff were primary concerns.

Plaintiff's Expert: J. Terrence Grism (Retail Merchandising)

Defendant's Expert: Allison Batchelor, M.D., Athens, Ohio

Michael Morris v. Kaitlin Foley

Type of Case: Motor Vehicle Accident

Verdict: $25,000.00

Plaintiff's Counsel: Ladi Williams, Esq. (representing plaintiff); Ann Markowski, Esq. (defending Counterclaim against plaintiff), 1360 W. 9th Street, Suite 200, Cleveland, Ohio 44113, (216) 522-9000

Defendant's Counsel: Michael Shanabruch, Esq. (defending Kaitlin Foley); Matthew Carty, Esq. (Asserting Counterclaim against plaintiff)

Court: Cuyahoga County Common Pleas Case No. CV-14-830495, Judge Michael Astrab

Date Of Verdict: October 19, 2015

Insurance Company: Progressive (liability); State Farm (UIM)

Damages: $18,587.30; write off amount of $8,995.00; lost wages of $6,200.00

Summary: Disputed liability, severe collision at Ridge & Pearl Road intersection in Parma, Ohio on 11/19/13. Both parties had a witness who blamed the other for driving through red light and causing accident. Plaintiff suffered soft tissue injuries to neck, lower back and left leg; counterclaimant broke ankle and required multiple surgeries and metal plate in ankle.

Plaintiff's Expert: Dr. Samir Shaia, D.O.

Defendant's Expert: Barry Greenberg, M.D.

VASA Order of America, et al. v. Rosenthal Collins Group, L.L. C., et al.

Type of Case: Securities Violation, R.C. 1707.43

Verdict: $1,861,849.26

Plaintiffs' Counsel: Joel Levin and Aparesh Paul, Levin & Associates Co., L.P.A., 1301 E. 9th Street, Suite 1100, Cleveland, Ohio 44114, (216) 928-0600

Defendants' Counsel: Jeffrey Schulman and John T. Murray

Court: Cuyahoga County Common Pleas Case No. CV-11-753705, Judge John P. O'Donnell

Date Of Verdict: October 13, 2015

Insurance Company: Defendant was self-insured

Damages: $1,861,849.26

Summary: The case concerned the sale of unregistered and fraudulent securities in Ohio. The Defendant, Rosenthal Collins Group, was found liable under R.C. 1707.43(A) for participating in or aiding a now convicted Ponzi schemer, Enrique Villalba, in making unlawful sales of securities. During the course of Rosenthal Collins Group's account servicing and support, it should have been apparent that Villalba was engaged in a fraudulent enterprise. At trial, Plaintiffs presented evidence of numerous red flags that Rosenthal Collins ought to have been aware of, including suspicious account activity, indicia of money laundering and transactions that belied the stated purpose of the account. To the demise of the victims, no one at Rosenthal Collins even raised an eyebrow as the firm netted commissions nearing $1 million. Their willful blindness allowed Villalba to continue to bilk innocent investors of millions of dollars.

Plaintiffs' Expert: Thomas Geyer

Defendants' Expert: Jack Donenfeld

Pre-Suit Settlement

Type of Case: Pharmacy Negligence

Settlement: $180,000.00

Plaintiff's Counsel: Charlie Murray, 111 East Shoreline Drive, Sandusky, Ohio, (419) 624-3127

Date Of Settlement: October 2015

Insurance Company: Pharmacists Mutual

Damages: Four days of hospitalization; PTSD

Summary: Patient was prescribed medication for menorrhagia (medroxyprogesterone) by her OBGYN. The pharmacy provided patient the wrong bottle in her correct bag, and had her correct label on the packaging. However, the medication was actually for a different pharmacy customer, and contained a high dose of Clozapine (for schizophrenia). Patient went into a coma and was hospitalized for four days. She now suffers with PTSD.

John Doe v. MTD

Type of Case: Product Liability

Settlement: Confidential

Plaintiff's Counsel: David M. Paris and Dana M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300

Defendant's Counsel: Patrick J. Quallich, Esq., Christopher A. Holecek, Esq.

Court: Cuyahoga County Common Pleas Court

Date Of Settlement: October 2015

Damages: Fractures to 4 digits and scaphoid of left hand.

Summary: Plaintiff, a 50 year old janitor, purchased an MTD snowblower in 2005. In 2013, while inflating a tire with a compressor, the plastic wheel exploded injuring plaintiff's left hand. The regulator on the compressor was set at 30 PSI. The wheel was marked "MAX 30 PSI". The product was the subject of a 2006 recall because of recurring explosions about which plaintiff was unaware. The plaintiff had previously lost his right hand in an industrial accident, making the left hand injury a greater hardship in his activities of daily living (ADLs). Plaintiff's medical bills and past wage loss amounted to $25,000.00. His future economic loss was $1,125,000.00. The case settled in private mediation shortly before trial.

Plaintiff's Expert: Michael Huerta, P.E.; Paul Tres, P.E.; Robert Corn, M.D.; John F. Burke, Ph.D.

Defendants' Expert: Joseph L. Grant (Tire Engineer); Daniel Martens; Brian Tanner, P.E.; Sandra Metzler, D.Sc. (Human Factors and Biomechanical Analysis); Maureen Reitman, P.E.; Duret Smith, M.D.; Sandra Manoogian, Ph.D. (Voc. Rehab).

Michael Bianchi, et al. v. Mountain Creations, Inc., et al.

Type of Case: Consumer - CSPA / HSSA

Verdict: $100,667.75 for Plaintiff (MSJ)

Plaintiffs' Counsel: Daniel J. Myers, 1660 West Second Street, #610, Cleveland, Ohio 44113, (216) 236-8202

Defendants' Counsel: David Gareau (withdrawn)

Court: Summit County Common Pleas Case No. CV 2014-09-4413, Judge Lynn Callahan

Date Of Verdict: September 24, 2015

Damages: $100,667.75, plus declaratory judgment (CSPA)

Summary: Homeowners purchased materials and design for a log home from a company registered in PA, no business location in Ohio. Court held that the company violated the Home Solicitation Sales Act by failing to provide required notices of cancellation, and not making a refund to the homeowners after they cancelled the contract. Also, court found the company and individual owners violated the Ohio CSPA. Found all owners/officers jointly liable with company for refund damages.

Confidential

Type of Case: Medical Malpractice

Settlement: $2,000,000.00

Plaintiff's Counsel: David A. Kulwicki, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: September 2015

Insurance Company: Confidential

Damages: Hemiplegia

Summary: Delay in diagnosis.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Confidential

Type of Case: Medical Malpractice

Settlement: $1,000,000.00

Plaintiff's Counsel: David A. Kulwicki, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: September 2015

Insurance Company: Confidential

Damages: Stroke

Summary: Delay in diagnosis.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Confidential

Type of Case: Auto/Motorcycle

Settlement: Policy limits

Plaintiff's Counsel: Howard D. Mishkind, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: September 2015

Insurance Company: Confidential

Damages: Death

Summary: Plaintiff struck from behind while riding on motorcycle.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Confidential

Type of Case: Medical Malpractice

Settlement: $670,000.00

Plaintiff's Counsel: Howard D. Mishkind, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: September 2015

Insurance Company: Confidential

Damages: Stillborn baby

Summary: Failure to timely deliver full term baby that had prolonged evidence of fetal distress.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Confidential

Type of Case: Medical Malpractice

Settlement: $2,800,000.00

Plaintiff's Counsel: David A. Kulwicki, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: August 2015

Insurance Company: Confidential

Damages: Hemiplegia

Summary: Delay in diagnosis.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Anonymous Plaintiff v. Anonymous Fraternity Organization and Local Fraternity's Chapter

Type of Case: Negligence, Premises Liability

Settlement: $3.5 Million

Plaintiffs' Counsel: Dennis Lansdowne and Michael Hill, Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio 44114, (216) 696-3232

Court: Confidential

Date Of Settlement: June 3, 2015

Summary: Liability, causation, and damages were disputed. The plaintiff was a 20-year-old female student who was assaulted by her boyfriend while at a university fraternity house. She was relatively asymptomatic for approximately 90

days following the assault. She then developed progressive neurological deficits resulting in spastic incomplete tetraplegia. She was diagnosed with a dural arteriovenous fistula near the brain stem. She underwent a craniotomy and microsurgical obliteration of the fistula at the Cleveland Clinic.

Plaintiffs' Experts: Brett Sokolow (Fraternity Liability); Harry van Loveren, M.D. (Neurosurgery - Treating Physician); Peter Rasmussen, M.D. (Neurosurgery - Treating Physician); Darlene Carruthers, MEd (Life Care Planner and Vocational Rehabilitation); & John Burke, Ph.D. (Economist)

Defendants' Experts: David Westol (Fraternity liability); Dianne Chipps Bailey (Non-Profit Liability); David Preston, M.D. (Neurology); Peter Bambakidis, M.D. (Neurology); Linda Gartman, RN (Life Care Planner); and Donald E. Shrey, Ph.D. (Vocational Expert)

Confidential

Type of Case: Medical Malpractice

Settlement: $6,000,000.00

Plaintiff's Counsel: Howard D. Mishkind, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: June 2015

Insurance Company: Confidential

Damages: Profound Brain Damage

Summary: Post-Operative Complication leading to delayed management of airway.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Estate of Robert Banfield v. Kindig Trucking, et al.

Type of Case: Exploding cylinder

Settlement: Confidential

Plaintiff's Counsel: David M. Paris and Andrew R. Young, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300

Defendants' Counsel: Gary Piper, Esq., Jan Roller, Esq.

Court: Lake County Common Pleas, Judge Richard Collins

Date Of Settlement: June 2015

Insurance Company: Westfield Ins. Co.

Damages: Wrongful death

Summary: Defendant Kindig asked Defendant GMSC to remove an accumulator cylinder from the tag axle of its cement mixer so Kindig could deliver it to a cylinder repair shop. The cylinder contained pressurized nitrogen gas of which Kindig claimed to be ignorant. GMSC was aware that this type of cylinder had pressurized gas but chose not to bleed the gas prior to removal and chose not to place a warning on the cylinder. The cylinder was delivered to decedent's employer for repair. Neither decedent nor anyone at his shop was familiar with a gas pressurized cylinder and during the dis-assembly, the pressurized gas propelled the piston into plaintiff's decedent, killing him instantly. The Court ruled that defendants would be permitted to argue apportionment to the immune employer. Decedent was survived by a spouse and 2 adult sons. Economic damages were $800,000 - $1,200,000.

Plaintiff's Expert: Michael Napier (Trucking); Gregory Wright (Heavy Equipment Mechanics); John F. Burke, Ph.D. (Economist)

Defendants' Expert: V. Paul Herbert (Trucking); Robert Reed (Trucking); Rory McLaren (Fluid Power Expert)

Tayba L. Tahir v. Akron Vascular Associates, Inc., et al.

Type of Case: Medical Malpractice

Verdict: $3,973,379.00

Plaintiff's Counsel: Nicholas DiCello and Michael Hill, Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio 44114, (216) 696-3232

Defendants' Counsel: R. Mark Jones

Court: Cuyahoga County Common Pleas Case No. CV-13-815602, Judge Hollie Gallagher

Date Of Verdict: May 11, 2015

Insurance Company: ProAssurance

Damages: Partial facial paralysis, complex regional pain syndrome, future lost wages, past and future medical expenses

Summary: The Defendant attempted a right temporal artery biopsy procedure (TAB) on Plaintiff to assist in diagnosing potential temporal arteritis. During the Procedure the Defendant biopsied a vein as opposed to the temporal artery. The Defendant performed the procedure below the hairline and anterior to the ear near the region of the trunk of the facial nerve. The Defendant damaged Plaintiff's facial nerve resulting in partial facial paralysis and debilitating complex regional pain syndrome. Plaintiff alleged the procedure was performed in the wrong place and that the Defendant did not obtain Plaintiff's informed consent for the actual procedure he performed given the location.

Plaintiff's Expert: Russell Samson, M.D.; Henry Vucetic, M.D.; John F. Burke, Ph.D.; Maryanne Cline, R.N.
Defendants' Expert: John Moawad, M.D.

Confidential

Type of Case: Medical Malpractice

Settlement: $6,000,000.00

Plaintiff's Counsel: David A. Kulwicki, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: May 2015

Insurance Company: Confidential

Damages: Stroke; 58 year old married female

Summary: Radiology negligence.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Doe v. ABC Big-Box Retailer

Type of Case: Motor Vehicle - Sudden Medical Emergency Defense

Settlement: $350,000.00

Plaintiff's Counsel: Rhonda Baker Debevec, Esq., The Debevec Law Firm, 700 W. St. Clair Ave., Suite 214, Cleveland, Ohio 44113

Defendant's Counsel: Withheld

Court: Withheld

Date Of Settlement: April 22, 2015

Insurance Company: Withheld

Damages: Multiple fractures in right lower extremity; all of which healed with the exception of post-traumatic arthritis that developed in the right knee.

Summary: Defendant Retailer provided a company vehicle to its store manager who suffered a seizure while driving and lost control of his vehicle striking the Plaintiff's car. Investigating officers issued no citation based upon medical emergency. Investigation ultimately established that the Defendant's store manager had not followed treatment recommendations for his known seizure disorder and that his anti-seizure medication had been sub-therapeutic on multiple occasions. Moreover, he had suffered a seizure while at work on at least one occasion.

Plaintiff's Expert: Treating Trauma Surgeon (withheld); Neurologist - Rieback Medical-Legal Consultants

Defendant's Expert: Withheld

Confidential

Type of Case: Auto/Underinsured

Settlement: Policy Limits

Plaintiff's Counsel: Howard D. Mishkind, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: March 2015

Insurance Company: Progressive Insurance

Damages: Closed Head Injury

Summary: Left of Center Collision. Plaintiff experienced severe headaches and short term memory problems.

Plaintiff's Expert: Dr. Sheital Bavishi, OSU Rehabilitation

Defendant's Expert: N/A

Confidential

Type of Case: Medical Malpractice

Settlement: $3,300,000.00

Plaintiff's Counsel: David A. Kulwicki, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: March 2015

Insurance Company: Confidential

Damages: Stroke

Summary: Surgical complication.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Confidential

Type of Case: Medical Malpractice

Settlement: $400,000.00

Plaintiff's Counsel: Howard D. Mishkind, Esq., Mishkind Kulwicki Law Co., L.P.A., 23240 Chagrin Blvd., #101, Cleveland, Ohio 44122, (216) 595-1900

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: March 2015

Insurance Company: Confidential

Damages: Delayed Diagnosis of Compartment Syndrome

Summary: Ankle fracture that was improperly managed leading to Compartment Syndrome and extensive fasciotomy.

Plaintiff's Expert: Confidential

Defendant's Expert: Confidential

Jane Doe v. Nursing Home

Type of Case: Nursing Home Negligence

Settlement: $750,000.00

Plaintiff's Counsel: Nancy C. Iler, Nancy C. Iler Law Firm LLC, 1360 West 9th Street, Suite 202, Cleveland, Ohio 44113, (216) 969-5700

Defendant's Counsel: Confidential

Court: Withheld

Date Of Settlement: 2015

Insurance Company: Confidential

Damages: Death

Summary: A 67 year old woman was admitted for short-term rehabilitation after a long hospitalization to a local nursing home. Days after admission, she began having chest pains which were not evaluated properly by the nurses, hours later when she was found unresponsive the nurses failed to perform life-saving care. In addition to the nursing negligence, the facility failed to follow its procedures for screening of employees.

Plaintiff's Expert: Case settled before expert disclosures

In Re: L.M. etc. vs. United States of America

Type of Case: Medical Malpractice

Settlement: $3,000,000.00

Plaintiffs' Counsel: Thomas Mester and William S. Jacobson, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300; Howard Skolnick, The Skolnick Weiser Law Firm, LLC, 1419 W. 9th Street, 2nd Fl., Cleveland, Ohio 44113, (216) 861-8888

Defendant's Counsel: David A. Ruiz, United States Attorney, 801 W. Superior Ave., Suite 400, Cleveland, Ohio 44113-1852; Angelita Cruz Bridges, Office of the U.S. Attorney, Four Seagate, Suite 308, Toledo, Ohio 43604-2624

Court: USDC, Toledo, Ohio, Case No. 3:13-CV-01940

Date Of Settlement: October 2014

Insurance Company: Government

Damages: Loss of earning capacity $2 Million, plus a multiple 7 figure life care plan

Summary: This claim is a federal tort claim arising from the birth of L.M. by her mother, Kaylyne McConnell, which occurred on May 16, 2001, at Womack Army Medical Center in North Carolina. Kaylyne was married to Corey McConnell who was in the military service at the time.

This action was pursued in Federal District Court in Toledo because a Federal Tort Claim can be made in the area where she resides. This matter was settled in the amount of $3 million pursuant to a private mediation prior to trial.

Kaylyne McConnell was treated by an obstetrician employed by the U.S. government who was managing the labor along with two obstetrical nurses at Womack Army Medical Center. During labor, the fetal heart tracings began to demonstrate marked changes including decelerations and there were periods of time they were unable to trace the fetal heart rate continuously. The tracings went from category one to category two. Further, Kaylyne developed a fever of 102; however, the nurses failed to advise the treating obstetrician of the maternal fever. L.M. was then delivered through thick meconium. The neonatal resuscitation team was not in the delivery so she was suctioned for meconium by a first year resident. L.M.'s one minute apgar score was noted to be one, with a heart rate below 100 and she received a zero for the other four apgar categories. At three minutes of life the neonatal resuscitation team arrived and successfully intubated the baby. Ultimately, her ten minute apgar was eight. L.M. was taken from the delivery room to the NICU and began to demonstrate seizure activity and was transferred to the University of North Carolina. Brain imaging studies thereafter showed severe hypoxic ischemia.

It was the plaintiffs' claim that the failure of the nurses to report to the obstetrician the presence of maternal fever was decisive in the obstetrician's management of labor, as well as whether or not to have the neonatal resuscitation team at the time of delivery. It was plaintiffs' position L.M. suffered from lack of ventilation and perfusion after the delivery for approximately three minutes, until she was intubated by the neonatal nurse. The obstetrician indicated had he known of the maternal fever, he would have suspected an infection and offered a C-section 55 minutes prior to the actual delivery during which time there was stress on the fetus as reported by the fetal heart tracings. As a result of these delays, L.M. suffered hypoxic ischemic encephalopathy and was diagnosed with cerebral palsy including spastic quadriplegia, profound cognitive loss as well as loss of vision.

It was defendants' position that there was no negligence by the defendant obstetrician or the labor and delivery nurses and that, in any case, the imaging demonstrated that L.M. sustained a hypoxic ischemic injury before delivery.

Plaintiffs' Experts: Steven Warsof, M.D. (maternal fetal medicine specialist); Yitzchak Frank, M.D. (pediatric neurologist); Barry Pressman, M.D. (pediatric neuro-radiologist); Kathy Loughren, R.N. (neonatal nurse practitioner); Cynthia Wilhelm, Ph.D. (life care planner); John Burke, Ph.D. (economist)

Defendant's Experts: Patrick Barnes, M.D. (neuro-radiologist); Elias Chalhub, M.D. (pediatric neurologist); Patricia Costantini, R.N. (life care specialist); Jay P. Goldsmith, M.D. (pediatric neurologist); Valerie Palmer, Esq. (health care advisor); Carolyn Salafia, M.D. (pathologist); Robert Shavelle, Ph.D. (life care planner); John Thorp, M.D. (OB/GYN); Thomas Walsh (economist) ■

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I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below. 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.

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_____

Date:_____ **Applicant:**_____

Invited:_____ **Seconded By:**_____

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

Please return completed Application with $125.00 fee to:

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Winter 2015 - 2016

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