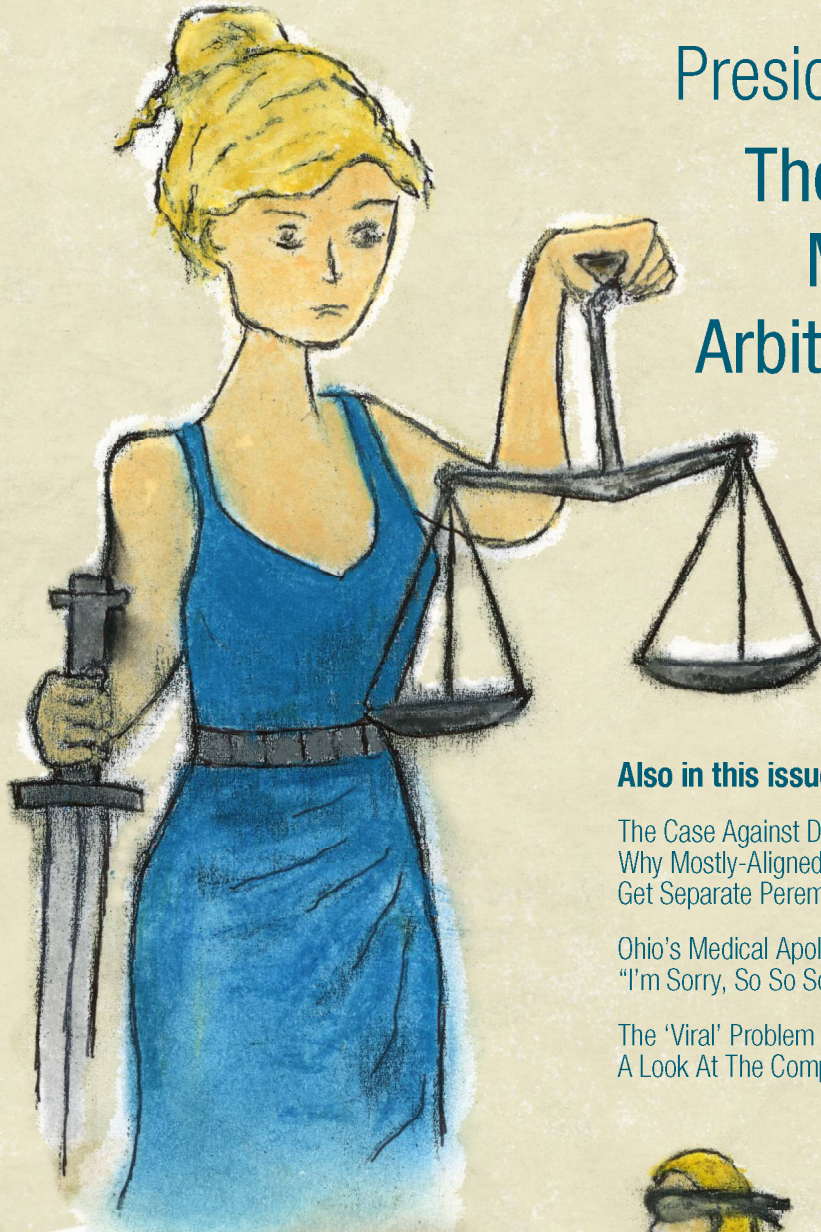




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PRESIDENT'S MESSAGE

# The Injustice Of Mandatory Arbitration Clauses

*by Cathleen M. Bolek*

September 25, 2017, marked the 228th anniversary of Congress's passage of the Seventh Amendment, which states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." 228 years have passed and we are still fighting for our clients' right to trial by jury.

Mandatory arbitration clauses are showing up everywhere, creating roadblocks to justice for employees, patients and consumers of nearly every type of goods and services. They are being written into contracts for employment, housing, student loans, home building, medical services, credit, and cellular service, to cite the most common. A 2015 New York Times investigation found what we, as trial lawyers, have experienced first hand. From 2005 through 2015, "thousands of businesses across the country — from big corporations to storefront shops — have used arbitration to create an alternate system of justice... The change has been swift and virtually unnoticed, even though it has meant that tens of millions of Americans have lost a fundamental right: their day in court." Silver-Greenberg, J., Corkery, M., *In Arbitration, a 'Privatization of the Justice System,'* N.Y.Times, Nov. 1, 2015, <http://www.nytimes.com>.

These clauses bring with them strict confidentiality, not only of any settlement

reached between the parties, but of the entire process as well as all facts uncovered by the plaintiff. Under their shroud, abuse is covered in darkness never to see the light of day. One need look no further than the recent sexual harassment allegations at Fox News to see the dangers these clauses present to our clients and society as a whole. In June, Gretchen Carlson bravely did what few women were in the position to do—stand up to Roger Ailes. She filed a lawsuit alleging Ailes fired her after she rejected his sexual advances. Within weeks, Ailes accused her of breaching her contract by filing a public lawsuit. According to Ailes' lawyer, "Gretchen Carlson had an arbitration clause in her contract, stating that any employment dispute regarding her employment at Fox News must be done via confidential arbitration." Koblin, J., *Roger Ailes, Arguing Gretchen Carlson Breached Contract, Presses for Arbitration.*, N.Y.Times, July 8, 2016, <http://www.nytimes.com>. Ms. Carlson's lawyers correctly noted that Ailes was trying to force the case into "a secret proceeding, and away from the public spotlight of a trial." *Id.*

Secret proceedings benefit abusers like Ailes. In fact, once Ms. Carlson's public lawsuit was filed, at least six other female on-air professionals came forward with their own stories of sexual harassment at Fox News. Had Ms. Carlson taken her case directly to confidential arbitration, as her contract allegedly required, how much longer would the abuse of these women have continued at that workplace?



Mandatory arbitration clauses also deprive our clients of the right to have a jury hear and decide their claims, and studies have repeatedly shown that juries are more impartial than arbitrators. For example, the New York Times found in their 2015 investigation, in arbitration, “rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients.” *In Arbitration, a Privatization of the Justice System,* *supra*.

As plaintiffs’ lawyers, we are often the great equalizer in the fight for justice. Our clients are rarely on equal footing with the corporation who injured them until we take up their cause. The adverse party is usually well funded and well insured. They don’t just have access to counsel, they have big law on retainer. It is the combination of our commitment to justice, litigation skill, and economic resources, and the right to have a civil jury decide their claims, that puts the scales in balance. Arbitration clauses are the anti-equalizer.

The loss of the right to a jury trial is no small thing. Our forefathers revolted against the King not only because he “plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people,” but also because he “depriv[ed] us in many cases, of the benefits of Trial by Jury...” THE DECLARATION OF INDEPENDENCE (U.S. 1776). The historic import of the right to a jury trial cannot be overstated. As Justice Douglas wrote:

It would be well for us to recall the First Inaugural Address, in March 1801, of President Thomas Jefferson, when he said, in part, that “[e]qual and exact justice to all men...; freedom of religion; freedom of the press; ... and trial by juries impartially selected-- these principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages and the

blood of our heroes have been devoted to their attainment. They should be the creed of our political faith...; and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety....

Will we be part of dimming that “bright constellation”? Will we, on our watch, permit the sacred right of trial by jury to be tarnished and weakened? I would hope not and, certainly, I could never be part of any such movement....

*Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624, 636-637 (1991) (Douglas, J., dissenting).

It has never been more important to fight back against these draconian measures. Write letters to your legislators. Educate your clients. Comment online. Don’t let the bright constellation of trial by jury dim on our watch. ■

## Editor’s Note

As we finalize this issue of the *CATA News*, we invite you to start thinking of articles to submit for the Spring 2018 issue. If you don’t have time to write one yourself, but have a topic in mind, please let us know and we’ll see if we can find a volunteer. We would also like to see more of our members represented in the Beyond the Practice section. So please send us your “good deeds” and “community activities” for inclusion in the next issue. Finally, please submit your Verdicts & Settlements to us year-round and we will stockpile them for future issues.

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

Kathleen J. St. John, Editor



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## The Case Against Double-Teaming: Why Mostly-Aligned Medical Defendants Shouldn't Get Separate Peremptory Challenges

By Brenda M. Johnson

It's a familiar scenario. You have a medical malpractice case going to trial. There were multiple care providers involved in providing the treatment at issue, and because of *Wuerth* and *Comer* issues you've had to sue each doctor, along with their professional corporations, as well as the hospital where the care was provided.

The physicians and their professional corporations are each represented by separate law firms, while the hospital and nurses are represented by another firm. Each defense firm has filed separate answers on behalf of their respective clients, and while each denies liability and has raised the fault of others as an affirmative defense, no defendant has filed a cross-claim against the other. After deposing the defendants and their experts, it's become clear that none of the doctors or their experts intends to criticize the conduct of any other defendant, and it's also clear that all of the defendants will be taking the same position with respect to causation.

Their interests, in short, are not really adverse. Yet, when it comes time to choose a jury, each separately represented group of defendants insists it is entitled to its own set of peremptory challenges. They point out they have separate attorneys, filed separate answers, and have retained separate sets of experts. You respond by pointing out that they have not criticized each other or made any cross-claims against one another, and they respond by claiming that it is technically possible that one or more will be held liable while others are not, and they argue that their defenses are not the same because they are from different specialties.

In scenarios such as this, Ohio courts have tended to agree with the defense position. In *Brown v.*

*Martin*,<sup>1</sup> for instance, the Fifth District found no abuse of discretion in a case where the trial court allowed two separate physician groups to exercise separate peremptory challenges where the groups were from different specialties, and had separate representation.<sup>2</sup> In *Bernal v. Lindholm*,<sup>3</sup> the Sixth District found the fact that one separately-represented defendant might possibly be found negligent to the exclusion of others was enough to justify allowing each to exercise separate peremptories.<sup>4</sup>

This approach, however, isn't consistent with the law or the purpose behind peremptory challenges, and it puts plaintiffs at a distinct disadvantage in medical malpractice cases.

The purpose behind peremptory challenges "is to enable a party to reject certain jurors based upon a subjective perception that they may be adverse or unsympathetic to his position even though no basis for a challenge for cause exists."<sup>5</sup> Used properly, peremptory challenges are a means by which the parties may, by excluding those jurors whom they believe will be "most partial toward the other side," eliminate "'extremes of partiality on both sides,' thereby 'assuring the selection of a qualified and unbiased jury.'"<sup>6</sup>

That said, "[t]he side with the greater number of peremptory challenges clearly has a tactical advantage created by its ability to eliminate potentially unfavorable jurors without cause."<sup>7</sup> Thus, if a group of essentially aligned defendants is given more peremptory challenges than the plaintiff, peremptory challenges lead to an unfair playing field. And in medical malpractice cases, plaintiffs already find themselves behind the eight-ball when it comes to jury preconceptions.



Jurors already favor medical defendants over plaintiffs.

Contrary to conventional wisdom, plaintiffs don't get a "sympathy" advantage with the jury in medical malpractice trials. Instead, as the authors of a recent article directed to the medical malpractice defense bar acknowledged, "jurors are not particularly sympathetic to the trial plaintiff," and are not swayed by compassion for the injured.<sup>8</sup>

What the research shows is that jurors actually have a bias *against* plaintiffs, especially in medical malpractice cases.<sup>9</sup> They are suspicious and judgmental of plaintiffs, tend to believe they are money hungry, and even wonder whether their attorneys have encouraged them to lie or exaggerate their injuries.<sup>10</sup>

Medical professionals, on the other hand, have a much better chance with the average juror, even when the facts are against them.<sup>11</sup> In studies where researchers compared jury verdicts with an independent medical expert's evaluation of the case, it turned out that the jury found for the defendants in as many as 50 percent of cases where an independent expert found strong evidence that medical error was at fault.<sup>12</sup> These studies comparing jury verdicts with independent expert reviews are "startlingly consistent," and they "consistently find that juries are deferential to physicians."<sup>13</sup>

Many factors play a role in this. Doctors have a favored status in the community, and jurors tend to believe what they say.<sup>14</sup> The complexity of medical cases, combined with the burden of proof, also favor medical defendants, since "[j]uries may be reluctant to hold a defendant liable when jurors are uncertain or confused about the evidence."<sup>15</sup> Years of media coverage of the so-called "medical malpractice crisis," combined with social norms that favor individualism,

self-reliance, and stoicism in the face of misfortune also combine to create an environment in which jurors are inclined to side with doctors.<sup>16</sup>

Allocating peremptory challenges to multiple defendants that have no real conflict with one another jeopardizes a plaintiff's right to a fair trial.

What this means in medical malpractice cases is that on the issues where peremptory challenges matter – namely, whether or not particular jurors may be sympathetic to one side or the other – defendants have a distinct shared advantage simply due to their status *as medical defendants*. This advantage, in turn, is amplified when there are multiple defendants involved.

When it comes to juror sympathy, medical defendants share the same goal with respect to eliminating those jurors whose sympathies favor plaintiffs. They are also aligned with one another as to juror sympathy in *favor* of the medical profession, regardless of their specialties.

So does Ohio law regarding peremptory challenges really require that these defendants be afforded separate peremptory challenges based solely on technical notions of adversity, like having separate attorneys, or because one might be found liable while another might not? The answer is no. Instead, it is clear from case law in Ohio and elsewhere that a trial court should look to the specific facts and posture of the case when determining whether parties are sufficiently "antagonistic" to one another to warrant separate peremptories, and not simply to the pleadings or the existence of separate representation.

In the majority of jurisdictions, the test for whether separate peremptories are warranted is whether the interests

of the parties are "essentially different or antagonistic." Separate answers and separate representation, however, have never been sufficient in themselves to establish the level of "antagonistic" interest sufficient to warrant separate peremptories.

In *Price v. Charleston Area Med. Ctr.*,<sup>17</sup> for instance, the West Virginia Supreme Court held that separate answers and separate representation are not enough; instead, a trial court should look to the posture of the case at the time its ruling is made.<sup>18</sup> Likewise, in *Patterson Dental Co. v. Dunn*,<sup>19</sup> an opinion that has been followed in a number of other jurisdictions, the Texas Supreme Court held that the antagonism necessary to warrant separate peremptories cannot be purely legal, but "must exist on an issue of fact that will be submitted to the jury."<sup>20</sup> In addition, such antagonism must exist between litigants on the same side, and cannot be based solely on the fact that the plaintiff has made different claims against the defendants, or because there are purely legal cross-claims alleged between the defendants.<sup>21</sup>

Courts applying these standards do so because they recognize that significant unfairness can arise if courts find "antagonism" based simply on the fact that their defenses may not necessarily rest on the same facts or theories. The Utah Supreme Court has noted that allocating separate peremptories to defendants based simply on the fact that their defenses may rely on different facts or theories "would entitle co-defendants to extra peremptory challenges in a majority of multiple-defendant cases, thereby imposing a significant disadvantage on plaintiffs."<sup>22</sup>

The Wyoming Supreme Court has also observed that co-defendants are afforded separate peremptories on the presumption that "certain of the extra challenges will be used to select a jury

for the case against the other defendant, rather than against the plaintiff.”<sup>23</sup> However, when no “good-faith controversy exists” between defendants, “the single-party plaintiff is placed in a distinct tactical disadvantage.”<sup>24</sup>

The multi-party defendants, having no motive to exercise their additional challenges against a co-defendant, are able to pool their challenges against the plaintiff.... In practice,... a party exercises peremptory challenges to reject jurors perceived to be unsympathetic to his case. **To allow nonantagonistic, multi-party defendants a two-, three-, or four-to-one advantage in the exercise of peremptory challenges affords them undue influence over the composition of the jury and implicates the single-party plaintiff’s right to a fair trial.**<sup>25</sup>

Ohio courts can and should apply the same approach, as it is fully consistent with Ohio law. When it was adopted in 1970, Rule 47 was meant to embody the majority rule regarding allocation of peremptory challenges among aligned parties.<sup>26</sup> And as far back as 1890, Ohio courts recognized that under these standards, defendants who file separate answers and are represented by separate counsel should still be considered one party for purposes of allocating peremptory challenges if their defenses are not truly “antagonistic.”<sup>27</sup>

An approach to allocating peremptory challenges among multiple defendants in any case should be tailored to the facts of the case, and should take into account the real danger of undue influence that arises when defendants have an advantage that is unwarranted due to their lack of adversity on the issues of potential juror sympathy that drive the jury selection process. This is critical to a fair trial in any case, and is even more crucial in medical malpractice cases. ■

#### End Notes

1. 5th Dist. Fairfield No. 14-CA-31, 2015-Ohio-503.
2. *Id.* at ¶ 20.
3. 133 Ohio App.3d 163, 727 N.E.2d 145 (6th Dist. 1999).
4. *Id.* at 176 (“Appellees were represented by separate counsel and separate pleadings and motions were filed. With respect to the defenses asserted, the [defense causation theory] could have exonerated all defendants. However, if the jury chose not to accept that theory, it nevertheless could have found one defendant liable and not another. Hence the defenses asserted did not necessarily stand or fall together.” (citations omitted)).
5. *Fieger v. E. Natl. Bank*, 710 P.2d 1134, 1136 (Colo.App.1985) (citing *Nieves v. Kietlinski*, 22 Ohio St.2d 139, 258 N.E.2d 454 (1970)); see also *Wardell v. McMillan*, 844 P.2d 1052, 1061 (Wyo. 1992) (“a party exercises peremptory challenges to reject jurors perceived to be unsympathetic to his case.”).
6. *Holland v. Illinois*, 493 U.S. 474, 484, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)).
7. *King v. Special Resource Mgt.*, 256 Mont. 367, 371, 846 P.2d 1038 (1993). Notably, there is some evidence that peremptories, even when used properly, result in more conservative jury panels. See Joshua Revesz, *COMMENT: Ideological Imbalance and the Peremptory Challenge*, 125 Yale L.J. 2535 (June 2016)
8. Linda S. Crawford, J.D., *Why Winners Win: Preparing Witnesses for Testimony – Part One*, INSIDE MEDICAL LIABILITY 24, 26 (Third Quarter 2015) (citing Valerie P. Hans, *BUSINESS ON TRIAL* (2000)). “Inside Medical Liability” is touted as the “flagship publication” of the Physician Insurers Association of America (PIAA), a trade association of medical professional liability insurance companies. According to PIAA’s website ([www.piaa.us](http://www.piaa.us)), “PIAA members insure more than two-thirds of America’s private practicing physicians,” many other health care providers, and insure over 2,000 hospitals as well.
9. Crawford, *supra* at 26.; see also Richard Waites, J.D., Ph.D., and Cynthia Zarling, Ph.D., *Juror Attitudes and Perceptions in Medical Malpractice Cases*, available at <http://theadvocates.com/lib/jurorperch.htm> (last accessed on October 31, 2017)
10. Crawford, *supra* at 26.; see also Philip G. Peters, Jr., *Doctors and Juries*, 105 MICH. L. REV. 1453, 1482-83 (May 2007) (reviewing studies showing juror bias); Neil Vidmar, *Juries and Medical Malpractice Claims: Empirical Facts versus Myths*, CLINICAL ORTHOPAEDICS AND RELATED RESEARCH, 2009 Feb.; 467(2): 367-375.
11. Peters, *supra* at 1475.
12. Peters, *supra* at 1464-1465 (in studies where jury decisions were compared with independent medical evaluations, plaintiffs won 10 to 20 percent of cases with weak evidence, but only 50 percent of the cases where evidence of negligence was strong). Other studies discussed in the same article showed plaintiffs winning only 43 to 50 percent of those cases where reviewers found fault. *Id.* at 1466-68, 71-73.
13. Peters, *supra* at 1475.
14. Crawford at 27; see also Peters, *supra* at 1475 (juries are deferential to physicians)
15. Peters, *supra* at 1481.
16. Peters, *supra* at 1481.
17. 217 W. Va. 663, 619 S.E.2d 176 (2005)
18. *Id.* at 672.
19. 592 S.W.2d 914 (Tex. 1979)
20. *Id.* at 918.
21. *Id.* “Antagonism does not exist because of differing conflicts with the other side; e.g., when a plaintiff sues several defendants alleging different acts or omissions against each defendant. Antagonism would exist, however, if each of the defendants alleged that the fault of another defendant was the sole cause of plaintiff’s damage. The existence or non-existence of cross-actions or third-party actions is not determinative” *Id.*, citations omitted.
22. *Randle v. Allen*, 862 P.2d 1329, 1333 (Utah 1993).
23. *Wardell v. McMillin*, 844 P.2d 1052, 1061 (Wyo. 1992) (citing Daniel J. Sheehan, Jr. & Cynthia C. Hollingsworth, *Allocation of Peremptory Challenges Among Multiple Parties*, 10 ST. MARY’S L.J. 511, 530 (1979)).
24. *Wardell* at 1061.
25. *Id.* (emphasis added).
26. See 1970 Staff Notes, Rule 47(B) [currently Rule 47(C)], Challenges to Jury (“The second sentence of the rule restates the current case law regarding multiple parties and peremptory challenges,” citing *Chakeres v. Merchants & Mechanics Fed. Sav. & Loan Assn.* 117 Ohio App. 351, 192 N.E.2d 323 (2d Dist. 1962)).
27. *Gram v. Sampson*, 1890 Ohio Misc. LEXIS 45, 4 Ohio C.C. 490, 2 Ohio Cir. Dec. 666 (2d Cir. Clark 1890). *Gram* remains good law. See *Nieves v. Kietlinski*, 22 Ohio St.2d 139, 142, 258 N.E.2d 454 (1970) (quoting *Gram* with approval). See R.C. § 2317.02(C, D).





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## Ohio's Medical Apology Statute: "I'm Sorry, So So Sorry...(NOT)"

By Christian R. Patro

According to Merriam - Webster's dictionary, an apology is generally defined as an admission of error accompanied by an expression of regret. Many states, including Ohio, have adopted laws allowing doctors to apologize to patients after an adverse event. The purported basis for these laws is to protect physicians who want to say they are sorry but have that not considered an admission of negligence or fault at a later time. However, research from Vanderbilt University has shown that these apology laws are empirically unfounded. Approximately thirty-six states and the District of Columbia have passed apology statutes. In assessing the effect of such statutes on the number of claims and lawsuits, the researchers at Vanderbilt noted that apology laws have no statistically significant effect on the probability of a suit or claim occurring.<sup>1</sup>

Why, then, does the legislature of Ohio as well as the legislative bodies of the vast majority of states find the need to create such laws? The devil, my friends, can be found in the details. In Ohio, R.C. 2317.43 contains the framework for protection of a medical care provider and makes a "defendant's expression of sympathy for a victim inadmissible." Specifically, "[i]n any civil action brought by an alleged victim of an unanticipated outcome of medical care...any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a

relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as a result of the unanticipated outcome of the medical care are inadmissible as evidence of admission of liability or as evidence against interest." R.C. 2317.43(A).

In 2011, the Ninth Appellate District determined R.C. 2317.43(A) protects pure expressions of apology but not admissions of fault. In *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*,<sup>2</sup> the Court reasoned that if the General Assembly had intended admissions to be included with an apology and protected, it would have stated so in the statute by also including admissions of liability in the statutory wording.<sup>3</sup>

In 2013, the Ohio Supreme Court addressed the Apology Statute in *Estate of Johnson v. Randall Smith, Inc.*<sup>4</sup> In *Johnson*, the surgeon stated "I take full responsibility" for causing a post-surgical medical complication.<sup>5</sup> The Supreme Court held that no statement of apology such as this was admissible in any cause of action filed after the Apology Statute became effective on September 13, 2004.<sup>6</sup> In doing so, the Supreme Court explicitly rejected the Eleventh Appellate District's decision previously finding the statement admissible as a party admission and a declaration against interest.<sup>7</sup>

Although many states have enacted Apology Statutes, some states have limited these statutes solely to protecting from admissibility the portion

of the statement that is actually an apology. Thus, if the statement contains both an apology and an admission or declaration against interest, the admission or declaration against interest part is admissible even if the apology part is not. California's Apology Statute is one such statute. Cal. Evid. Code §1160 (a) (West 2013). Ohio's Apology Statute does not affirmatively address the issue of a hybrid admission/apology. Thus, arguments for allowing in, or excluding, admissions-combined-with-apologies have taken place, advocating for one or the other application. That had remained the status of the law as existed in *Davis* until September 12, 2017.

On that date, in *Stewart v. Vivian*,<sup>8</sup> the Supreme Court of Ohio not only put the issue of apology-versus-admission to rest, but did so in such an overreaching fashion that even Chief Justice O'Connor found, in a concurring opinion, that the result had been accomplished in a case where an apology likely had not even taken place. In *Stewart*, the holding by the Court was "a 'statement [ ]\*\*\* expressing apology' is a statement that expresses a feeling of regret for an unanticipated outcome of the patient's medical care and may include an acknowledgment that the patient's medical care fell below the standard of care."<sup>9</sup>

At issue in *Stewart* was a purported statement by the treating doctor in a suicide malpractice case following the death of his patient. The treating doctor had told a family member that the patient had previously told him she was going to keep trying suicide. Although not an admission, this can be construed as a declaration against interest since it involved support for a deviation from the standard of care. At deposition, the defendant physician testified he did not remember what he had said following the death. During a motion *in limine* hearing on the issue, however, he changed his

testimony to recall his statement was an attempt to commiserate.

The *Stewart* Court determined the General Assembly had not defined the term "apology." It therefore looked to Webster's Dictionary for a definition. In so doing, the Court found the definition set forth above.<sup>10</sup> The Court rejected the Ninth District's argument in *Davis*, finding that even though the General Assembly did not specifically treat admissions or declarations against interest differently, the Court must apply the plain meaning of words.<sup>11</sup> In doing so, the Ohio Supreme Court set a new legal standard in Ohio that allows almost any damaging statement by a medical care provider to be contorted into an apology or attempt to commiserate, which is then inadmissible. The Court even went so far as to provide such protection to care providers who testify under oath they do not remember what they said to the patient/family, but, at a later time, subjectively testify that whatever they said they intended as an attempt to commiserate. Thus, even though there may be conflicting evidence as to whether or not the statement is actually an apology, the *only* evidence that apparently matters to the Ohio Supreme Court on this issue is the self-serving subjective intent of the care providers.

Chief Justice O'Connor, in her concurring/dissenting opinion, found that the Court had gone too far. The Chief Justice found that the statements made in *Stewart* do not constitute an apology at all, and the application of the Apology Statute to the facts here was unreasonable since there was "no sound reasoning process" that would support the decision.<sup>12</sup> A statement that expresses a feeling of regret for an unanticipated outcome is not enough. Nor are statements intending or attempting to express commiseration or a feeling of regret as found by the Majority. According to Chief Justice

O'Connor, there needs to be more for the Apology Statute to apply. The statements must constitute an apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence as required by the statute. Under the law, Chief Justice O'Connor believes the care provider's subjective intent or purpose for communicating does not control.<sup>13</sup> Instead, one must look to the actual words and the statement itself.<sup>14</sup>

So where does Ohio law leave us now following the *Stewart* decision? In a very precarious position indeed, since we do not control the subjective intent of the care provider; the subjective intent appears to currently control; and the subjective intent can be raised at any time prior to the admission of the statement. In assessing the Apology Statute, however, there are still circumstances in which grey area statements may be admitted:

1. Where the outcome of the care was not unanticipated. To be protected, the outcome must be unanticipated. Direct discovery, requests for admission, and depositions around this issue.
2. Where the communication and conduct does not constitute an apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence. Direct discovery, requests for admission, and depositions around these issues.
3. Are the statements made by someone who is not a health care provider or employee of a health care provider?
4. Are the statements made to someone other than an alleged victim, relative of an alleged victim, or representative of an alleged victim?



5. Do the statements relate to the discomfort, pain, suffering, injury, or death of the alleged victim as a result of the unanticipated outcome of medical care?
  6. Are the statements admissible for any purpose other than an admission of liability or admission against interest? A close reading of the Apology Statute reveals that apologies are inadmissible only when offered to prove admission of fault or admission against interest. Like subsequent remedial measures, insurance, and offers of settlement, the statements may be admissible for other purposes, so it is imperative to search for other evidentiary bases under which to admit this evidence.
  7. Look up the definitions for “health care provider”, “relative”, “representative” and “unanticipated outcome” under R.C. 2317.43, as well as the definition of “health care provider” in R.C. 2317.02(B) (5)(b), to see if all definitional requirements have been met.
4. 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35.
  5. *Id.* at ¶4.
  6. *Id.* at ¶12.
  7. *Johnson v. Randall Smith, Inc.*, 196 Ohio App.3d 722, 2011-Ohio-6000, 965 N.E.2d 344 (11th Dist.).
  8. Slip Opinion No. 2017-Ohio-7526 (Sept. 12, 2017).
  9. *Id.* at ¶2.
  10. *Id.* at ¶¶27-28, quoting *Webster’s Third New International Dictionary* 101 (2002).
  11. *Id.*
  12. *Id.* at ¶136 (O’Connor, C.J., concurring in part and dissenting in part).
  13. *Id.* at ¶143 (“[T]here must be a limit based on the actual content of the statements and not the intention of the speaker.”)
  14. *Id.*

In order to assess the applicability of Ohio’s Apology Statute to a given statement or set of statements it is imperative to assess each statement in light of each precursor for statutory application. There are still ways by which this evidence can be found admissible. However, the evidentiary onion may have to be peeled back a few more layers now in light of *Stewart*. ■

#### End Notes

1. McMichael, Benjamin J. and Van Horn, R. Lawrence and Viscusi, W. Kip, *Sorry is Never Enough: The Effect of State Apology Laws on Medical Malpractice Liability Risk* (December 10, 2016). Available at SSRN: <https://ssrn.com/abstract=2883693> or <http://dx.doi.org/10.2139/ssrn.2883693>.
2. 193 Ohio App.3d 581, 2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.).
3. *Id.*



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## Three Experts May Be A Crowd

By Alyssa A. Landino

**H**ow many experts does it take to prove a point? One may be enough, according to Ohio courts.

Most litigation attorneys have confronted opponents who list several expert witnesses on their expert witness identification. Often times, the listed experts will have overlapping backgrounds, specialties, and/or opinions. This strategy is used particularly by the defense in medical malpractice cases, where the defense attorney names several experts in the same specialty, requires plaintiffs to expend resources to depose each expert, and then cherry picks the trial witnesses based upon the experts' performances in their depositions.

This situation presents certain problems. First, the plaintiff's attorney may be forced to take the depositions of each expert, which requires the expenditure of significant resources including time, travel, and payment of expert and court reporter fees. Second, multiple experts with overlapping opinions may result in prejudicial cumulative, repetitive testimony. To resolve these problems, Ohio trial courts have the authority to limit the number of expert witnesses a party may provide.

A 2011 trial court order is instructive. In *Strauss v. Akron General Medical Center*, Judge Mary M. Rowlands of the Summit County Common Pleas Court granted plaintiff's motion to limit the number of defense expert witnesses, despite the fact that there were multiple defendants.<sup>1</sup> *Strauss* involved a medical malpractice action that

arose from the death of plaintiff's wife. Included in defendants' expert witness list were two specialists in the same discipline of Pulmonary and Critical Care Medicine. The *curricula vitae* of both experts demonstrated similar work histories, professional memberships, fields of study, and publications.

Thereafter, plaintiff filed a motion to limit defendants to one Pulmonary/Critical Care expert. Plaintiff argued that presenting the testimony of two Pulmonary/Critical Care experts would result in the needless presentation of cumulative evidence, which is a ground for exclusion under Rule 403(B) of the Ohio Rules of Evidence. Plaintiff also argued that he was entitled to a protective order limiting discovery under Rule 26(C) of the Ohio Rules of Civil Procedure because two Pulmonary/Critical Care experts would prejudice plaintiff by forcing him to incur excessive costs to depose two duplicative experts.

Defendants opposed plaintiff's motion and argued that plaintiff's concerns of cumulative testimony were mere speculation because expert discovery had not yet been completed. Defendants also argued that denying defendants the opportunity to present their own cases through expert testimony violated defendants' due process rights under the 14th Amendment to the United States Constitution and § 15, Article 1 of the Ohio Constitution. Finally, defendants argued that plaintiff would not suffer financial prejudice because plaintiff brought the



case against defendants, and that all parties who participate in litigation are naturally burdened with time, effort, and expense.

The court granted plaintiff's motion. Rejecting defendants' argument that plaintiff's motion was premature, the court reasoned that since defendants had retained the experts at great expense, it was inconceivable that defense counsel would not know the extent to which their own experts would overlap. Moreover, defendants had failed to demonstrate how each Pulmonary/Critical Care expert would provide relevant, non-cumulative testimony. The court also noted the similarities in the *curricula vitae* of defendants' experts, and held that no due process concerns were present. Defendants were therefore limited to one Pulmonary/Critical Care expert.

In 2014, Judge Michael E. Jackson of the Cuyahoga County Common Pleas Court entered a similar order. In *Trodden v. Parma Community Gen. Hospital Association*, Judge Jackson granted plaintiff's motion to limit defense experts and struck down the number of purported experts from fourteen to six.<sup>2</sup> *Trodden* involved a medical malpractice action that arose from the death of plaintiff's husband. At the time plaintiff filed her motion, there were two remaining defendants - an individual physician and his employer. These two defendants identified fourteen medical experts, all of whom focused in three areas: general practice (5 experts identified); infectious disease (4 experts identified); and gastroenterology (3 experts identified). Plaintiff moved to limit the number of defense expert witnesses.

The court recognized that "parties are permitted to present their case, with no party having an undue or unfair advantage over another."

In *Trodden*, however, the undue advantage was in favor of defendants. The court explained, "deposing 14 medical experts is an onerous and expensive task imposed upon Plaintiff. This constitutes an unfair or undue advantage in favor of Defendants and at the expense of Plaintiff." Moreover, each expert provided reports that were "remarkably similar" in opinions and the bases upon which the opinions were formed. The court acknowledged that the expert witnesses may have used "different perspectives" to form their opinions. That does not suggest, however, "that multiple expert witnesses should be allowed to testify concerning the same contested point." Accordingly, the court limited each defendant to one of its experts in each of the three medical fields at issue, resulting in a total of six defense experts.

Numerous other Ohio trial courts, including in Cuyahoga County, have entered orders similar to those in *Strauss* and *Trodden* to exclude prejudicial cumulative expert testimony. The defense may therefore be entitled to present the testimony of experts with similar backgrounds or who specialize in similar fields, but it should be prepared to demonstrate why such experts will provide relevant, non-cumulative testimony. Otherwise, a trial court has the authority to limit the number of expert witnesses to prevent the needless presentation of cumulative evidence and avoid undue burden and expense, even if discovery is not yet complete. In light of these rulings, plaintiffs should be on the lookout for this defense strategy upon receipt of the initial expert witness disclosure. ■

#### End Notes

1. *Strauss v. Akron General Med. Ctr.*, Summit C.P. Case No. CV 2010 05 3668 (Aug. 30, 2011).
2. *Trodden v. Parma Community Gen. Hospital Assoc.*, Cuyahoga C.P. Case No. CV-12-797046 (Sept. 26, 2014).



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## Unborn Child's Lack Of Informed Consent Claim Recognized By Eighth District

By Kathleen J. St. John

The Eighth Appellate District recently held that a claim for lack-of-informed-consent may be pursued on behalf of an unborn child injured due to the doctor's failure to elicit informed consent from the child's mother.

You may be familiar with the case – *Jones v. MetroHealth Med. Ctr.*<sup>1</sup> – because of its rulings on set-offs from jury verdicts in the political subdivision context.

*Jones* was a birth injury case in which claims were brought on behalf of the minor child, Alijah Jones, and his mother, Stephanie Stewart, sounding in medical malpractice, lack-of-informed-consent, and loss of parental consortium. The jury returned a verdict for the plaintiffs in the amount of \$14,500,000, but, upon post-trial motions to enforce the statutory set-offs, the trial court reduced the judgment to \$3,451,000. The plaintiffs then appealed from the set-off rulings, while the defendants took a conditional cross-appeal on several issues, including the trial court's refusal to dismiss Alijah's lack-of-informed-consent claim.

In the original *Jones* decision, released July 7, 2016,<sup>2</sup> the Court of Appeals reversed certain aspects of the trial court's set-off rulings, increasing the judgment to \$5,151,000. The Court overruled all assignments of error in the cross-appeal, including the challenge to the trial court's finding that an unborn fetus has a claim for lack-of-informed-consent.<sup>3</sup>

Upon the plaintiffs' motion for reconsideration of

the set-off issue, the Court of Appeals revisited that issue, finding additional aspects of the set-offs invalid, and ordering the trial court to enter judgment for the plaintiffs in the amount of \$8,500,000. This decision, issued on August 24, 2017,<sup>4</sup> left intact the court's prior ruling on Alijah's lack-of-informed consent claim, with only the numbering of the paragraphs changing.<sup>5</sup>

### The Unborn Child's Lack-Of-Informed-Consent Claim

The lack-of-informed-consent claim in *Jones* was based on the defendants' negligence in failing to disclose "the material risks and dangers associated with vaginal delivery in light of the plaintiff mother's obstetric history, prenatal course, risk status, and fetal monitoring during labor."<sup>6</sup> The claim was brought on behalf of both mother and child, but the trial court found the mother's claim barred by the statute of limitations, and that aspect of the decision was not appealed.<sup>7</sup>

The issue on appeal, therefore, was limited to whether "the trial court erred by determining that an unborn fetus has an independent claim for lack of informed consent[.]"<sup>8</sup>

Lack-of-informed-consent claims require proof of three elements: (1) "[t]he physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;" (2) "the unrevealed risks and dangers which should have been disclosed by the physician actually

materialize and are the proximate cause of the injury to the patient;" and (3) "a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to the treatment been disclosed to him or her prior to the therapy."<sup>9</sup>

The defendants in *Jones* contended this claim belonged to the mother alone, and that the doctor owed no duty of disclosure to the fetus.

The lone Ohio case, prior to *Jones*, that had considered whether an unborn child has a claim for lack-of-informed-consent appeared to support their argument. That case, *Diekman v. R. Les Murray & Samaritan Ob/Gyn*,<sup>10</sup> involved a brachial plexus birth injury where the defendant doctor used forceps to deliver the baby. The First Appellate District reversed the defense verdict on another ground, but overruled the plaintiffs' contention that the trial court erred in dismissing the informed-consent claim. In rejecting the plaintiffs' contention that "a viable fetus has a right to informed consent during the birthing process,"<sup>11</sup> the court in *Diekman* stated:

Under [plaintiff's] argument, Dr. Murray would have been required to obtain consent on behalf of Robbie from his mother... concerning the use of forceps during the delivery process.

At trial, Dr. Murray and another expert testified that an obstetrician was not required to obtain consent before using forceps. Robbie failed to contradict that this was the appropriate standard at trial. Specifically, he did not provide any testimony relating to whether the appropriate standard of care required obtaining informed consent from an unborn for the use and application of forceps.<sup>12</sup> Moreover, Robbie has not provided,

and we are not aware of, any statutory or common-law basis for an unborn to bring an informed-consent claim. Given that, we conclude that the trial court properly dismissed the informed-consent claim, and that the trial court did not err in failing to instruct the jury about informed consent.<sup>13</sup>

The Eighth District in *Jones* distinguished *Diekman* based on the lack of evidence in that case to support the claim. As for the *Diekman* court's comment that there was no Ohio authority to support the existence of an unborn child's informed consent claim, the Eighth District stated:

The primary holding in *Diekman* was that there was no evidence to support the claim even if it existed. The court of appeals thus bypassed any direct discussion of whether the informed consent claim existed. Its passing comment – that it was unaware of any statutory or common law basis for an unborn child's claim for lack of informed consent – was in the nature of a parenthetical, not a direct holding. That the court was aware of no statute or case decision that specifically acknowledged an unborn child's right to a cause of action for lack of informed consent is not the same as a definitive statement that the cause of action does not exist.<sup>14</sup>

Having distinguished *Diekman*, the court in *Jones* embarked on an analysis as to why such a claim should be, and is, recognized under Ohio law. The court noted that Ohio law already recognizes claims for fetuses injured during the mother's pregnancy, as long as the fetus is viable at the time of the injury.<sup>15</sup> Viability, as defined in R.C. 2919.16(M), is "the stage of development of a human fetus where 'there is a realistic possibility of the maintaining and nourishing of a

life outside of the womb with or without temporary artificial life support."<sup>16</sup> When, as in Alijah's case, the injury occurs around the time of birth, viability is conclusively established.<sup>17</sup>

The court also discussed the development of the law in other states that recognize informed consent claims on behalf of unborn children. In one such case, *Miller v. Dacus*,<sup>18</sup> the Tennessee Supreme Court reached this result due to "two 'clear' principles: '(1) that a minor can recover for prenatal injuries caused by the negligence of another, and (2) that a minor has an independent action for lack of informed consent against the medical provider."<sup>19</sup> Noting that these principles apply in Ohio as well, the court in *Jones* agreed with the *Miller* court that "it would be 'arbitrary to allow a minor to recover for injuries sustained ten minutes after delivery [but] to prohibit a minor [from recovering for] injuries sustained ten minutes before delivery."<sup>20</sup>

The court in *Jones* concluded by rejecting the defendants' argument that the duty to inform runs to the mother alone, and is not divisible. In this respect, the court stated:

Assuming the injury occurred at an age where the child lacked the legal ability to consent, it would be the child's parent or guardian who gave consent. But, at all events, it would be an injury done to the child because the parent or guardian is merely the conduit through which the child's consent flows. Both Stewart and her son have similar, but independent, claims for lack of informed consent.<sup>21</sup>

## Conclusion

The Eighth District's decision upon reconsideration in *Jones* will provide much needed precedent in future cases on the set-off issues. But having recently



confronted a defendant’s argument disparaging our informed-consent claim on behalf of an unborn child, I am particularly grateful that this aspect of the *Jones* decision exists.<sup>22</sup> ■

End Notes

1. *Jones v. MetroHealth Med. Ctr.*, 8th Dist. No. 102916, 2017-Ohio-7329 (Aug. 24, 2017).
2. *Jones v. MetroHealth Med. Ctr.*, 8th Dist. No. 102916, 2016-Ohio-4858, 68 N.E.3d 281 (July 7, 2016), *on reconsideration rev'd in part, aff'd in part*, at 2017-Ohio-7329 (Aug. 24, 2017).
3. *Jones*, 2016-Ohio-4858, at ¶¶87-108.
4. *Jones*, 2017-Ohio-7329.
5. *Id.* at ¶¶88-109.
6. *Id.* at ¶88.
7. *Id.* at ¶88, n.9.
8. *Id.* at ¶86.
9. *Id.* at ¶91, quoting *Nickell v. Gonzalez*, 17 Ohio St.3d 136, 477 N.E.2d 1145 (1985), at the syllabus.
10. *Diekman v. R. Les Murray & Samaritan Ob/Gyn*, 1st Dist. Hamilton No. C-000467, 2001 Ohio App. LEXIS 4588, 2001 WL 1219586.
11. *Diekman*, at \*9.
12. The *Diekman* court’s interjection of standard of care language into an informed consent analysis is inconsistent with *Nickell*. *Nickell* adopted the “reasonable patient standard” for determining “whether a potential danger, albeit improbably remote, is sufficiently material to require disclosure.” *Nickell* at 139. “[A] risk is material when a reasonable patient, in what the physician knows or should know to be the patient’s condition, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed treatment.” *Id.*

In 2006, Justice Pfeifer, dissenting from the dismissal of an appeal as improvidently accepted, criticized the lower court’s use of standard-of-care terminology in describing the expert testimony needed to establish an informed consent claim. “Proof of deviation from the standard of care,” he asserted, “is not a part of a tort claim for lack of informed consent. Nor is it relevant to any of the three elements of a successful claim.” *Badger v. McGregor*, 107 Ohio St.3d 1210, 2006-Ohio-3, 839 N.E.2d 398, ¶13 (Pfeifer, J., dissenting).

The law on this point has been further muddled by the decision in *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033. In *White*, the Court held that

“[e]xpert medical testimony is required to establish the material risks and dangers inherently and potentially involved with a medical procedure, but what a reasonable patient would have done in light of these disclosed risks is determined by the trier of fact.” *Id.* at ¶37. Although this statement purports to preserve the reasonable patient standard, it places the determination of materiality, in the first instance, in the hands of medical experts, leaving little more for the jury to do than accept or reject the experts’ opinions as to materiality, but never to expand it. Justice Pfeifer, dissenting, declared the majority’s opinion “contradicts *Nickell* in regard to the first element of the test by holding that expert testimony is necessary to establish which risks of the procedure were material.” *Id.* at ¶53 (Pfeifer, J., dissenting). “The medical aspects of a lack-of-informed-consent case do require expert testimony, but whether a reasonable patient would have placed significance on the medical information a doctor allegedly failed to provide is a matter for the jury.” *Id.* at ¶64.

13. *Diekman*, at \*9-10.
14. *Jones*, 2017-Ohio-7329, at ¶93.
15. *Id.* at ¶¶99-100.
16. *Id.* at ¶101, n.10.
17. *Id.*
18. *Miller v. Dacus*, 231 S.W.3d 903 (Tenn. 2007).
19. *Jones*, 2017-Ohio-7329, at ¶105, quoting *Miller*, at 909.
20. *Id.*
21. *Id.* at ¶108.
22. The defendants in *Jones* filed a motion for reconsideration of the reconsidered decision. The case, however, has since settled, so the decision upon reconsideration will not be subject to further alteration.



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# Video Recording The Defense Medical Exam

By Meghan P. Connolly

*Editor's Note: This article deals with Civ. R. 35 as currently worded. The Supreme Court, however, has pending before it a proposed amendment to Civ. R. 35. If the amendment, as currently drafted, is adopted, it will give the examinee the right to record the examination by audio or visual means. It will also permit a third party to be present to perform the recording "in an unobtrusive manner", and it will limit the examiner's oral interrogation to "matters specifically relevant to the scope of the examination." If adopted, its effective date will be July 1, 2018.*

Civil Rule 35 permits a Defense Medical Exam (DME)<sup>1</sup> in any case where the plaintiff places his or her physical or mental condition in controversy. However, a defendant does not have an automatic, absolute, and unconditional right to a Rule 35 examination of a plaintiff, even in personal injury cases. Under the Rule's plain language, the court "shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." As part of this determination, it is wholly within the trial court's discretion to order video recording of the proceeding.<sup>2</sup>

It is not right for every case, but a video recording of the Defense Medical Exam can serve as objective evidence of what actually occurred in a setting that is inherently biased against the plaintiff. Imagine a deposition without a court reporter, and then one side writes a report about what was said. This is not a perfect analogy, but there is obvious value in having an independent record of what occurred in an adversarial proceeding, especially one where the plaintiff's lawyer is not present.<sup>3</sup>

## The Dilemma

The DME presents an uneven playing field. On all but rare occasions, the DME doctor performs DMEs on a regular basis. Some even garner millions of dollars as go-to examiners for insurance companies. The doctor is in complete control of the exam, it is conducted on their turf, and the doctor has been hired to chip away at the plaintiff's damages case. Conversely, the

plaintiff is totally unfamiliar with the process and probably only has a working knowledge of the medical issues in their case, the true role of the examiner, and their rights during the exam. Without video, an unfair DME can be devoid of a record with which to prove the unfairness.<sup>4</sup>

It is worth noting that a short list of the most commonly relied upon DME examiners in Ohio include: Dr. Thomas Bender, Dr. Louis Cannon, Dr. Dennis Glazer, Dr. Gerald Steiman, Dr. Steven Yakubov, Dr. Steven Wunder, Dr. Arthur Lee, Dr. Kevin Trangle, Dr. James Brodell.

The decision to record or not is not always easy, and of course, the video recording can be relied upon by *both* sides of litigation. Many DME doctors will, among other restrictions, simply not proceed with the exam if it must be videotaped. By insisting on video recording and obtaining an order from the court, the plaintiff effectively eliminates that doctor as examiner. Strategically, this could be a better or worse thing for the case than having the video.

## A Solution

If the plaintiff determines that videotaping the exam is the best strategy for the case, after a failed conference with defense counsel, a motion for protective order may be filed asking the court to order the recording. The court is likely to set parameters for the recording that minimize the effect on the exam, and obviously the cost of the recording will lie with the plaintiff.<sup>5</sup>

As an adversarial proceeding, a plaintiff is undoubtedly permitted to adequate

representation during the examination.<sup>6</sup> Arguably, adequate representation at a proceeding where the plaintiff's lawyer is not present includes a videotape of what occurred at the exam.

Superintendence Rule 11 provides further legal support for videotaping a DME, which allows a party to videotape any legal "proceedings." "Proceedings before any court and discovery proceedings may be recorded by stenographic means, phonographic means, photographic means, audio-electronic recording devices or video-recording systems..." Sup. R. 11(A); see also Sup. R. 13(A). Certainly, a Civ.R. 35 examination qualifies as a "discovery proceeding". The Ohio Rules of Civil Procedure also permit all testimony and other evidence to be presented by videotape at trial. Civ.R. 40. A Civ.R. 35 medical examination is no exception to the above rules.

## Examples

Several trial courts have issued orders permitting video recording of a DME. For examples, see:

- *Dawaher v. Milligan*, Stark C.P. Case No. 2010 CV 00812;
- *Fetters v. Janson*, Ashtabula C.P. Case No. 2009 CV 00270 (Feb. 9, 2011);
- *Kaufman v. Brown*, Jefferson C.P. Case No. 2008 CV 00460 (Sept. 2, 2009) (Judge Henderson from the Jefferson County Court of Common Pleas also ordered that a Civil Rule 35 examination of plaintiff must "be recorded in its entirety");
- *Albu v. Camaco Lorain Mfg.*, Lorain C.P. Case No. 2008 CV 155034 (April 14, 2010) (Judge Miraldi from the Lorain County Court of Common Pleas recently held, "Accordingly, the court exercises its responsibility under Civil Rule

35(A) to specify the 'manner [and] conditions ... of the examination' and finds that the best way to balance the rights of both parties under Rule 35 for purposes of this neuropsych evaluation is to allow the plaintiff to [video] record the examination and evaluation in as unobtrusive a way as possible");

- *Kulhawick v. Paladin Brands Group, Inc.*, Summit County C.P. Case No. 2014 CV 07-3188 (April 20, 2016) (Judge Mary Margaret Rowlands allowed an Independent Psychiatric Examination to be video recorded through a one-way mirror);
- *Gust v. Tullis*, S.D. Ohio Case No. 3:14-cv-185 (June 12, 2015) (Federal Magistrate Michael R. Merz ordered that the examination be video-recorded by a videographer, "provided that the operator of the recording device shall have the same independence of the parties as is required for court reporters");
- *Paden v. Carter*, Holmes County C.P. Case No. 12 CV 025 (Oct. 28, 2013) (Judge Robert Rinfret held "Plaintiff has the right to video-tape the entire examination of Plaintiff by Dr. Layne");
- *Jesenovec v. Marcy*, Cuyahoga County C.P. Case No. CV 08651591 (March 9, 2012) (Judge Brendan Sheehan held that "Plaintiff is permitted to videotape the physical examination by Dr. Mann via unobtrusive video recording equipment; and Plaintiff is permitted to videotape the neuropsychological examination by Dr. Layne via unobtrusive videographer; \*\*\*");
- *Wheeler v. Jones*, Cuyahoga County C.P. Case No. CV-16-861899 (Judge Kelly Ann Gallagher ordered, inter alia, that "the examinations will be videotaped in

their entirety at Plaintiff's expense."

- *Leipply v. Diamond Cut Lawn and Landscaping Service, LLC*, Columbiana County C.P. Case No. 2015 CV 00097 (June 28, 2017) (Judge C. Ashley Pike granted plaintiff's motion for protective order allowing video recording of his DME by Dr. Brodell).

This list is not meant to be exhaustive but represents my growing collection of trial court orders on this topic. Please feel free to forward any additional helpful trial court orders on our CATA membership listserv. ■

## End Notes

1. The term "Independent Medical Exam" (IME) is a misnomer in the context of litigation. If the examiner has been hired by a defendant, that doctor's examination of the opposing party should be referred to as a "Defense Medical Exam" (DME).
2. *Stratman v. Sutantio*, 10th Dist. No. 05AP-1260, 2006-Ohio-4712, at ¶21 (citing *Vetter v. Twesigye*, 159 Ohio App.3d 525, 2005-Ohio-201 (10th Dist.)).
3. The plaintiff's attorney essentially converts herself to a fact witness in the case if the DME is attended, thereby implicating the ethical parameters of the representation that can disqualify her as counsel. That is not to say that the client should ever attend a DME alone. Someone from the plaintiff's firm should attend the DME with the plaintiff.
4. Video recording was the focus of this article, but there are alternatives. Having a nurse or other professional attend and take detailed notes can safeguard the plaintiff. There may be other creative solutions that have proven to somewhat even the playing field of the DME, and I would welcome you to share your ideas with our membership on the CATA listserv.
5. For an idea of what this would cost, I received quotes from two video service providers in Cleveland, Ohio, and the average rate for recording a DME was \$275.00 for the first hour of recording.
6. See *S.S. Kresge Co. v. Trester*, 123 Ohio St. 383, 384 (1931); *Francisco v. Hoffman*, 131 N.E.2d 692 (Franklin Cty. C.P. 1955); *Staton v. Common Pleas Court*, 4 Ohio App.2d 10 (Ohio App. 10 Dist. 1964).





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## The Ohio Legislature Reduces The Statute Of Limitations For Workers' Compensation Injuries To One Year

By Benjamin P. Wiborg

On June 30, 2017, Governor Kasich signed the workers' compensation budget bill, known as House Bill 27 ("HB 27"). In addition to funding the Ohio Bureau of Workers' Compensation ("BWC") for fiscal years 2018 - 2019, HB 27 contains several substantive changes to Ohio workers' compensation law. Most importantly, the statute of limitations for filing a claim for an injury has been reduced from two years to one.<sup>1,2</sup>

### A. The Reduction To A One Year Statute Of Limitations Will Be Harmful To Injured Workers And Create Difficulties for Workers' Compensation Attorneys.

At the outset, it must be pointed out that the vast majority of workers' compensation claims are filed within the days or weeks following an occupational injury. Most of the time, the medical providers who have treated the injured worker for an on-the-job injury file a claim as soon as possible in order for the medical bills to be paid in a timely manner. Likewise, if an injured worker cannot work as a result of a work place injury, he or she would have an interest in ensuring that a claim has been filed so that he or she may receive workers' compensation benefits in an expeditious fashion.

Nonetheless, the reduction of the statute of limitations to one year will cause numerous problems for both injured workers and workers' compensation practitioners. First, and most

obviously, the reduction to a one year statute of limitations will bar otherwise valid claims if the claim is not filed in a timely manner. Second, the more common consequence will be that the condensed time frame will cause workers' compensation attorneys to scramble and struggle to obtain the necessary medical records and narrative reports prior to the expiration of the one year statute of limitations. As will be more fully discussed below, this is true for both the initial filing of a claim and for when a claim needs to be withdrawn and re-filed.

While a year might sound like an adequate amount of time, it is quite often the case that a claim is not filed in the immediate aftermath of an occupational injury. In fact, the initial filing of a claim is often delayed for reasons beyond the control of the injured worker. There are several scenarios in which this might occur. First, the medical provider might inadvertently - or on purpose - put the medical bills through the injured worker's health insurance and thus have no reason to file a claim. Second, not all medical providers in Ohio, or elsewhere, are BWC certified providers. It is difficult, if not impossible, for a non-BWC certified provider to receive payment from the BWC. Therefore, such a provider would have little to no interest in filing a claim.

As such, an individual who has been hurt on the job, and who has sought medical attention, and who has reported the incident to the employer, might only come to find out well into the one year

statute of limitations that no claim has been filed.

Likewise, the reduction of the statute of limitations to one year will cause problems even for claims that have been filed within the statute of limitations. The reduced statute of limitations is problematic in the sense that it limits a common practice of claimant attorneys, which is to withdraw a claim prior to an adjudication on the merits and to re-file it at a later date.<sup>3</sup>

Claims are withdrawn for a myriad of reasons. The most common reason to withdraw a claim is that claimant attorneys are often contacted on the eve of an Industrial Commission hearing. Once legal help has been sought, an attorney reviewing the file might realize that the pertinent medical records or narrative report, which are necessary to meet the burden of proof, are absent from the file. As such, workers' compensation attorneys often withdraw a claim and re-file it upon the receipt of appropriate medical support.

As mentioned, the one year statute of limitations will create problems for both claimants who have not yet had a claim filed and for claims that need to be withdrawn and re-filed. The problem is this: for the reasons discussed above, an injured worker or attorney will often have only a matter of months to do all of the necessary leg work that goes into filing a claim. The leg work includes, but is not limited to, meeting with the client, obtaining medical records from various providers, reviewing medical records, requesting and obtaining a narrative report from a physician, obtaining witness statements, and getting financial records.

Moreover, it can take months for medical providers to respond to a signed medical release, and longer still to provide a medical report. As such, the one year statute of limitations is going to be a

significant problem for injured workers and workers' compensation attorneys as it will often be difficult to gather the necessary medical information in enough time to file or re-file a claim.

### B. HB 27 Contains Several Other Substantive Changes To The Workers' Compensation Statute.

In addition to the reduction of the statute of limitations for filing a claim, HB 27 contains several other noteworthy amendments to the Ohio Revised Code ("ORC"):

- \* ORC § 4123.512(A) permits that "[e]ither the claimant or the employer may file a notice of an intent to settle the claim within thirty days after the date of the receipt of the order appealed from or the order of the commission refusing to hear an appeal of a staff hearing officer's decision... The filing of the notice of intent to settle extends the time to file an appeal to one hundred and fifty days" unless objected to by the opposing party within 14 days.
- \* ORC § 4123.512(F) increases the maximum attorney's fee to five thousand dollars "in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal."
- \* ORC § 4123.56(E) provides that if an injured worker is eligible for Temporary Total Disability compensation but the employee's full weekly wage rate has not been calculated then the employee shall receive thirty-three and one-third percent of the statewide average weekly wage rate.

Other than the reduction to a one year statute of limitations, the most

interesting amendment to the workers' compensation statute is the notice of intent to settle provision contained in ORC § 4123.512(A).<sup>4</sup> By filing the notice of intent to settle, the time period in which a notice of appeal must be filed in the court of common pleas is increased from sixty days to one hundred fifty days. The purpose of this amendment is to give the parties adequate time to reach a settlement agreement of a workers' compensation claim or condition prior to pursuing the matter into court. Also, the amendment has the added benefit of alleviating the court's docket by limiting the number of workers' compensation court appeals. It is a good idea in theory; however, it remains to be seen how the notice of intent to settle provision will work in practice.

### C. HB 27 Does Not Violate The Single Subject Rule.

House Bill 27 does not appear to suffer from the same fatal flaw as House Bill 487 (HB 487). Please recall, that on June 11, 2012, Governor Kasich signed HB 487, which was an omnibus bill containing hundreds of statutory amendments that covered a wide range of budgetary issues. Hidden in that nearly 1,800 page bill was an amendment that changed how loss of use awards in workers' compensation claims were to be paid.

Recently, in *Kljun v. Morrison*,<sup>5</sup> the Eighth Appellate District found that the portion of HB 487 that amends the period for paying loss of use awards violates the one-subject rule set forth in Section 15(D), Article II, of the Ohio Constitution.

In *Holeton v. Crouse Cartage Co.*,<sup>6</sup> the Ohio Supreme Court rejected a one subject rule challenge to a workers' compensation provision addressing subrogation rights because the provision was part of a statute that amended other portions of workers' compensation laws.

Here, unlike HB 487, HB 27 is limited to one subject: the workers' compensation budget. As such, HB 27 would likely survive a one subject rule challenge. ■

End Notes

1. Ohio Revised Code § 4123.84(A). The effective date of the change is September 29, 2017.
2. The statute of limitations for filing a claim for an occupational disease remains two years from the date of disability or death. Ohio Revised Code § 4123.85.
3. There is no limit on how many times a claim may be withdrawn and re-filed so long as the claim is re-filed prior to the expiration of the statute of limitations.
4. Pursuant to ORC § 4123.512, the claimant or employer may appeal an order of industrial commission to the court of common pleas of the county in which the injury occurred. The most common issues appealed to court are the initial allowance of the claim and additional allowances.
5. *Kljun v. Morrison*, 2016 Ohio 2939, 55 N.E.3d 10 (8th Dist.).
6. *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 2001 Ohio 109, 748 N.E.2d 1111.

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## Laura Volpini Shares Her Top 10 Financial Management Strategies For Your Contingency Law Practice At Our February Luncheon

by William B. Eadie

I'm excited to share this interview with our February luncheon speaker, Laura Volpini.

Laura is an attorney and businessperson who spent 16 years in private practice before following her passion into business development and management. In 2006, Laura switched her focus to law practice management and began to build and manage a successful, boutique law practice in Cleveland, Ohio. In this role, Laura experienced first-hand the endless issues facing solo practitioners and small firms. Realizing the demand for cost-effective solutions to practice management problems, Laura started a company to provide the "back office for your law firm," JurisINK.

Laura will be sharing her top 10 financial management tips for lawyers like us in February. I sat down with Laura to discuss what we can expect from her presentation.

**William:** Laura, we're excited to have you join us for the CATA Luncheon CLE February 7 on your Top 10 Financial Management Strategies for Your Contingency Law Practice. Can you tell us a little about your background and experience working with law firms and practice management?

**Laura:** Well, for starters, I am a practicing lawyer just like you. That makes me very unique in the field of law practice management since most other consultants are business school graduates with little to no practical knowledge of what it takes to practice law and the business/financial constraints, ethical considerations,

pressures, and demands of a busy law practice.

With a J.D./M.B.A., I have merged the practice of law and business together in order to provide lawyers and law firms with strategies and solutions for effectively running their law practices.

I got to put these skills into practice as the CFO of a very successful, start-up, boutique contingency law firm in Cleveland. Since leaving that position, I have assisted several solo practitioners and small law firms in organizing, operating, managing, and strategizing for, their businesses.

**William:** What are the types of strategies you'll be covering at your CATA Luncheon CLE?

**Laura:** Without giving away the "goods," I will be touching on critical parts of financial management for lawyers, including productivity tracking, business planning, budgeting, and administration and structure.

**William:** What's the most important or immediate benefit of incorporating these strategies for a contingency practice?

**Laura:** That's easy: more money with less stress.

**William:** Sounds great. Do you see many law firms missing some of these strategies? How does that impact their practice?

**Laura:** Yes, most law firms I've worked with miss some, if not all, of these strategies. In fact, the "top ten" list developed from my first-hand observation and experience with the "don'ts" of law firm financial management.

It has been quite shocking to discover that the business concepts which appear so basic and fundamental to me, seem so foreign to lawyers. As I tell most lawyers, a law practice is business first, the law second. You need to have your law practice running like a well-oiled machine to gain control, maximize efficiency and optimize profitability.

If you fail to have sound business and financial practices, it may devastate your law firm, or at the least, cause you to struggle unnecessarily.

**William:** What's one takeaway you hope attendees of the luncheon will be able to implement immediately in their practice?

**Laura:** I'm presenting a "top ten" list of financial management strategies. From my experience, lawyers, more than any other industry, are very reluctant to change. That said, if nothing more, I hope that each attendee implements at least one of the recommended strategies, and calls me in a year to tell me how much it has changed their law practice. Even a little attention and effort can make a big difference!

**William:** Thanks for your time and I'm looking forward to your presentation! ■



**Laura Volpini**

will be presenting

at the

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at The Hilton

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# Beyond The Practice: CATA Members In The Community

by Dana M. Paris

## Aware Marketplace

CATA Vice President, **Christian Patno** of **McCarthy, Lebit, Crystal & Liffman**, shared an inspiring story involving a former client of his who contracted bacterial meningitis as a student in high school. Although the meningitis caused her to undergo multiple amputations and a kidney transplant, that did not stop her from overcoming devastating adversity and pursuing her dreams. This fall, his client opened Aware Marketplace, a boutique located in the Hyatt Arcade. Aware Marketplace is committed to offering stylish and fashion-forward products that are consciously sourced. All of the products available at Aware Marketplace are local, cruelty-free, handmade, fair trade, eco-friendly, organic and may even be reclaimed.

If you or any of your friends or colleagues are downtown, remember to stop by Aware Marketplace and support this unstoppable woman. Be sure to follow them on facebook and instagram and check them out online as well, [www.awaremarketplace.com](http://www.awaremarketplace.com).



*Chris Patno and former client, Rachel Kayza, at Aware Marketplace*

## CMBA Halloween Run for Justice

The Cleveland Metropolitan Bar Association's 16th Annual Halloween Run for Justice took place this year on the West Bank of the Flats at Nautica. The proceeds from the run benefitted the Cleveland Metropolitan Bar Foundation. The Foundation funds the Justice for All pro bono and public service programs of the CMBA, including the 3Rs program. The 3Rs programs—standing for Rights, Responsibilities, Realities - is an award winning program that calls for more than 500 volunteers from the Cleveland Legal Community. They go to the 10th grade social studies classes in the Cleveland Metropolitan School District and East Cleveland City schools to personally connect with students, educate them about the U.S. Constitution, and provide practical career counseling.



*The Nurenberg Paris Team at the Run for Justice*



*The Spangenberg Paris Team at the Run for Justice*

This year the sponsors included **Nurenberg, Paris, Heller & McCarthy** and **Spangenberg, Shibley & Liber**. Additionally, the following CATA members braved the cold and rain to participate in the run: **Dennis Lansdowne, Nicholas DiCello, Jeffrey Heller, David Herman, Amy Herman, Jordan Lebovitz, Pamela Pantages, and Dana Paris**.



## Case Western Reserve University School of Medicine - Hike & Seek for Research

On September 10, 2017, Case Western Reserve School of Medicine hosted the "Hike and Seek for Research." This fund-raising event and scavenger hunt took place at



Rutter & Russin were sponsors of Hike & Seek for Research

five participating Cleveland Metro Parks locations. This fun event benefitted the Research Institute for Children's Health, which seeks treatment and cures for genetic-based diseases and disorders affecting 1 in 30 children. Sponsors of this event included CATA members, **Bob Rutter, Bobby Rutter** and **Justin Rudin** of the **Rutter & Russin** law firm.

The mission of the Research Institute of Children's Health is to improve the outcomes of children who suffer from genetic-based diseases by accelerating breakthroughs into new treatments and cures.

The current technology allows researchers to discover the causes of disease in a matter of weeks rather than years in many cases, thus allowing researchers to rapidly advance the process from gene discovery to therapeutic development. However, financial constraints are the greatest roadblock when attempting to develop treatments for these disorders and diseases. If you are interested in participating in the Hike and Seek for Research Event or donating to the cause, please visit, [www.hikeandseekforresearch.com/donate](http://www.hikeandseekforresearch.com/donate)

### MedWish

MedWish International is a not-for-profit organization that has a philanthropic and environmentally sustainable mission to help save lives and the environment by repurposing discarded medical supplies and equipment and providing aid to developing countries. This organization was founded in 1993 by Dr. Lee Ponsky. Prior to its formation, Dr. Ponsky was in Nigeria serving as a surgical assistant and witnessed firsthand the lack of

medical supplies that hindered developing countries. Soon thereafter, MedWish was created and began its mission of collecting unused medical supplies and donating them to developing countries. Since its inception, MedWish has recovered more than 4.5 million pounds of medical supplies that would otherwise have ended up in landfills, and re-directed them to countries and people in desperate need.

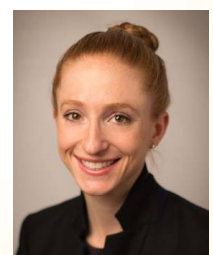
According to the 2016 statistics, in that year alone MedWish International partnered with 116 hospitals and healthcare providers in Northeast Ohio, who generously donated medical supplies and equipment. Also in 2016 more than 3,000 members of the Northeast Ohio community volunteered their time to support MedWish; and 304,328 lbs. of lifesaving medical supplies and equipment were delivered to more than 41 developing countries.

This year, MedWish International hosted its annual Band Aid Bash event at its new world headquarters located in downtown Cleveland. The event featured food stations, a silent auction, and entertainment from Rock the House. Guests and supporters of MedWish included **Jamie Lebovitz**, who is a member of the Board of Directors and serves as Board Secretary, **David Herman**, **Benjamin Wiborg**, **Jordan Lebovitz**, and **Jeffrey Heller**.



Nurenberg Paris lawyers Jeff Heller, Ben Wiborg, Jamie Lebovitz, Dave Herman & Jordan Lebovitz

MedWish International is always looking for volunteers who are able to dedicate their time to this mission. If you or someone you know is interested in volunteering, please contact them at [Volunteer@medwish.org](mailto:Volunteer@medwish.org) or call (216) 692-1685. ■



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## Pointers From The Bench: An Interview With Judge Brendan J. Sheehan

By Christine M. LaSalvia

**T**he Honorable Brendan Sheehan has served as a Judge in the Cuyahoga County Court of Common Pleas since 2009. Judge Sheehan is a graduate of St. Edward High School, in Lakewood, and Baldwin Wallace College. He attended the Cleveland Marshall College of Law. Upon graduation, he



Judge Brendan J. Sheehan

started his legal career working within the court system. He feels very fortunate to have spent time early in his career with the Honorable Donald Nugent. He credits this time spent working as a staff attorney and ultimately the chief staff attorney for Judge Nugent as a major influence on his legal career. This position allowed him to gain valuable experience in research, writing and shaping judicial opinions. He also credits his time spent as a bailiff with The Honorable Peggy Foley Jones as being an important influence.

After his experience clerking, Judge Sheehan spent some time working at Brown & Margolis handling administrative appeals where he gained experience working in a civil law firm. However, Judge Sheehan was eager to get into the courtroom. This interest led to a job as a prosecutor for Cuyahoga County. He credits his wife, Michelle, with encouraging him to follow his dreams to become a prosecutor and

encouraging him while he learned the ropes as a trial attorney. He started with cases in child support enforcement and worked his way up the ranks until he was handling major crimes. He took a special interest in the prosecution of internet sex crimes and ultimately became the Director of the Ohio Internet Crimes against Children Task Force. He also spent time teaching law enforcement on this issue.

Judge Sheehan got involved in the law because of a strong desire to help people and solve problems. He saw becoming a judge a natural extension of this desire and the ultimate way to help people. He feels strongly that citizens have the right to be heard by the Court. Judge Sheehan understands the need to meet with parties who come to the courthouse to ensure that their concerns are heard by the Court. He believes that it is important for people to feel confidence in the system and part of that is having access to the judiciary.

Judge Sheehan's commitment to making sure each party is heard extends to his practice in resolving discovery disputes. He prefers that the parties call before filing motions in a discovery dispute. He has a commitment to get back to the disputing parties within twenty-four hours. He finds that once people step away from their computers and talk to each other they can resolve disputes more easily. However, he is willing to work hard and spend long periods of time with the parties to resolve their issues.

He believes that the most rewarding part of

the case is seeing the parties leave and knowing that he helped both solve a problem and instill confidence in the Court system.

Although Judge Sheehan does believe in the importance of resolution, he is concerned about the loss of civil litigators due to the emphasis on mediation and out of court settlements. He is interested in hearing suggestions on changes that could be made in Cuyahoga County to allow parties- especially parties with smaller cases where expense is a greater issue- more access to the Court. He is a big proponent of a greater use of technology in the Cuyahoga County courtrooms. He believes that juries expect to see media and that lawyers are missing an opportunity to be persuasive if they are not utilizing some form of technology in their cases, including in voir dire.

Judge Sheehan believes that trial is the greatest opportunity for a lawyer to be on stage to persuade the jury. The best way to persuade the jury is by telling a compelling story. Sometimes when lawyers start their case, they are still so focused on motion practice and behind the scenes issues, that they get distracted from their goal of persuading an audience. He encourages lawyers to know their audience. Take the time in voir dire and through research into whatever public records are available to learn a little about the jurors. Knowing who is on your jury can help you to craft more compelling arguments that are targeted toward your jurors. Judge Sheehan has no restrictions on voir dire, but does think that lawyers sometimes miss out by not listening to the answers given when he questions the jury. He cautions lawyers not to ask repeat questions as that makes jurors feel

frustrated. Jurors are smart, and they do not like hearing the same point or question repeatedly.

In his free time, Judge Sheehan likes to spend time with his wife, Michelle, and children. He loves golfing and CrossFit.■



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## The 'Viral' Problem Of Personal Information Theft: A Look At The Complex World Of Data Breach Litigation

*By Ian D. Fijalkovich*

**I**t seems as though news of a freshly discovered “data breach” now comes as frequently as news of any other scandal. Word of the Equifax breach has made headlines around the country ever since the late-July announcement that the information of over 143 million Americans – nearly half of the country’s population – had been exposed in a single hack.<sup>1</sup> This breach is only one more in a seemingly constant stream of hacks, including those which compromised the information of 70-110 million Target customers in 2013, 56 million Home Depot customers in 2014, 76 million households and 7 million businesses utilizing JP Morgan Chase’s online services, and over 1 billion Yahoo! email accounts.<sup>2</sup> Some sources indicate that approximately 75% of all companies have suffered at least one successful cyber attack at some point.<sup>3</sup> Scores of well-known companies, including the likes of the aforementioned Target, Yahoo!, Home Depot, and others like Neiman Marcus, Sony, Anthem, and Whole Foods have been targeted by groups of malicious hackers, slipping into their computer systems and harvesting the private information of countless consumers. In the worst of these breaches, the personal information of hundreds of millions of customers – information ranging from credit card numbers to social security numbers, and even medical records – have been exposed.

Given the startling nature of these breaches, it is little wonder that litigation often follows. The Equifax breach alone, reported only at the end of July, 2017, has already spawned more than one hundred federal lawsuits and sixty separate class

actions.<sup>4</sup> This is understandable, of course: the Equifax breach epitomizes the sort of betrayal consumers feel after a data breach; if Equifax – a trusted credit bureau which held contracts with the IRS – could be breached, how can our personal information be safe anywhere? It is no wonder that the legions of victims created by these breaches suffer anxiety in addition to the time and money they may be forced to expend on protecting or restoring their identities after their information is stolen.

Regardless, however, of the growing frequency and severity of these breaches and the very real impacts they have on millions of Americans every year, it can be quite challenging for an attorney to successfully recover for a client exposed in such a breach. There are legions of potential plaintiffs, difficult-to-measure damages, and no simple answers to the question of what cause of action is best suited to tackle data breach. There is no coherent federal statutory regime: only a collection of loose-fits, a score of independent state statutes which may or may not provide a private cause of action, and ill-suited common law claims. Moreover, in litigation courts have turned time and time again to the issue of Article III constitutional standing as a major threshold question in the data breach context. For now, and for the foreseeable future, these data breaches show no signs of slowing down, much less stopping.

### I. What is a ‘data breach’?

Generally speaking, a “breach” may be defined as “unauthorized access to and acquisition of



computerized data that compromises the security or confidentiality of personal information...”<sup>5</sup> Perhaps the most familiar example of a breach is that which is exemplified in the Equifax or Sony data breaches. In these cases, computer hackers gain access to the vulnerable systems of a corporation, and harvest the personal information of thousands, if not millions of customers, clients, and employees. However, a breach may also occur as a result of physical theft.<sup>6</sup> A data breach may also take the form of compromised email addresses, where hackers gain access to the contents of all an account’s previous messages, including – potentially – social security numbers, credit card numbers, and bank account information.<sup>7</sup> No matter the method whereby a corporation’s systems are breached, however, the result remains essentially the same: the sensitive information of numerous customers, employees, and clients is exposed, and taken in by malicious thieves.

## II. Major Challenges in Data Breach Litigation

As common as data breaches have become, there remains no single, coherent theory of liability for attorneys to pursue. There is no one federal statute to grant a cause of action – merely a handful of statutes which may be applicable in some specific instances.<sup>8</sup> While 47 states have their own data breach laws, many of these require merely “notification” of the breach in some way. Only 14 states, the District of Columbia, Puerto Rico and the Virgin Islands possess statutes which expressly grant a private cause of action.<sup>9</sup> Beyond these statutory claims, many plaintiffs assert common law causes of action ranging from Breach of Contract and Negligence to Negligent Infliction of Emotional Distress and Bailment.<sup>10</sup> However, before discussing the merits of any theory of liability, courts ruling on

data breach cases have very frequently addressed a different problem: the issue of standing.

### A. Standing

Constitutional standing, if not the single most talked about issue in data breach cases, is very close to it. Generally speaking, the standing inquiry examines whether a plaintiff has suffered a sufficient injury, related to an action by the defendant, which is redressable by the courts. Until 2013, courts applied the standing test announced in *Lujan v. Defenders of Wildlife*.<sup>11</sup> However, in 2013, the Supreme Court revisited the standing issue. In *Clapper v. Amnesty Int’l USA*, the court examined standing again in a context more closely related to data breach than *Lujan*; however the case is still not factually on point. *Clapper* reviewed Section 702 of the Foreign Intelligence Surveillance Act of 1978 after a challenge by Amnesty International, alleging an “objectively reasonable likelihood” that confidential communications between amnesty and foreign contacts could be intercepted.<sup>12</sup>

In an opinion which some commentators have pointed to as narrowing the *Lujan* standard, the court announced that, in order to possess standing, a plaintiff must demonstrate

1. an injury which is “concrete, particularized, and actual or imminent,” wherein “actual or imminent” means “certainly impending” and “not too speculative;”
2. the injury is *traceable* to the challenged act of the defendant, and;
3. the injury is *redressable* by the court.<sup>13</sup>

Federal courts have applied *Clapper*’s standing test in the data breach context,

focusing primarily on the first “injury-in-fact” prong. Unfortunately, the circuits have not done so uniformly. There is a split of authority, placing the First and Third Circuits on one side, and the Sixth, Seventh and Ninth Circuits on the other, regarding which harms common in data breach cases constitute injuries-in-fact. This split remains unresolved.

### 1. Injury-in-fact: Standing’s Contentious First Prong

Though the standing test reiterated in *Clapper* features three prongs, only the first two – injury and traceability – are frequently discussed at length by the courts. Of these two, the courts as well as commentators spend the most time addressing injury. This issue – what purported ‘injuries’ are sufficient to fulfill the first prong of the standing test – has created the as-yet unresolved split in the federal circuits.

#### a. The First and Third Circuits

On one side of the Standing divide lies the First and Third federal circuits. These courts have been hesitant to accept many of the commonly alleged injuries brought forth in data breach cases as sufficient to meet standing requirements. Chief among these common alleged injuries are an increased risk of future financial harm, and the costs incurred in attempting to mitigate that future harm.

The Third Circuit, in their oft-cited opinion *Reilly v. Ceridian Corp.*, held that these injuries were not sufficient to satisfy Article III’s standing requirement.<sup>14</sup> While plaintiffs argued they suffered an increased risk of future financial harm as a result of a hacker’s intrusion into Ceridian Corp.’s systems, the court noted:

We cannot now describe how Appellants will be injured in this case without beginning our explanation with the word “if”: if the hacker read, copied and understood the hacked information, and if the hacker attempts to use the information, and if he does so successfully, only then will appellants have suffered an injury.<sup>15</sup>

Standing atop all of these “ifs,” the court dismissed the plaintiffs’ claims. Following this same line of logic, the court dismissed Plaintiffs’ allegations of injury predicated on the time and money they spent on credit monitoring services and other prophylactic measures.<sup>16</sup>

In line with the Third Circuit, the First Circuit’s decision in *Katz v. Pershing, LLC* dismissed a plaintiff’s claims, in part because they failed to allege sufficient injury-in-fact to satisfy the standing requirements.<sup>17</sup> Unlike *Reilly*, which featured an honest-to-goodness breach of Ceridian’s data security, the alleged “breach” at the center of *Katz* was a ‘speculative’ theft. Specifically, the plaintiff alleged that “a massive number of breaches of security have invariably occurred” as a result of the defendant’s lax security protocols.<sup>18</sup> The court rejected both this argument, as well as the argument, again, that purchased identity theft insurance and credit monitoring services constituted an injury-in-fact.

Although both *Reilly* and *Katz* were decided pre-*Clapper*, subsequent decisions from the district courts in these circuits have affirmed this reluctance to recognize injuries in the data breach context, absent actual misuse of the misappropriated private information. For example, in *Storm v. Paytime, Inc.*, the Middle District of Pennsylvania rejected claims where, as opposed to in *Katz*, the records of over 233,000 people were actually stolen by

hackers after they broke in to a payroll processing company’s database.<sup>19</sup> In addition to the time and money Plaintiffs spent on protecting their credit and identities, Plaintiffs also alleged more ‘tangible’ damages suffered by some individual plaintiffs.<sup>20</sup> Citing both *Clapper* and *Reilly*, the district court determined that, although plaintiffs did allege their information was “stolen” and “misappropriated”, this fact was not sufficient to constitute an actual injury.<sup>21</sup> Similarly, the court rejected the claim that the plaintiffs’ allegations that they were placed at an “increased risk of identity theft” as a result of the breach constituted an injury. This was, in part, because no plaintiff had become an actual victim of identity theft in the year since the breach had occurred. Thus, “a lay person with a common sense notion of ‘imminence’ would find this lapse of time, without any identity theft, to undermine the notion that identity theft would happen in the near future.”<sup>22</sup>

The general thrust of these cases is that an alleged increased risk of identity theft, on its own, ought not be considered a sufficient injury to grant standing. The courts on this side of the circuit split emphasize *Clapper*’s requirement that an injury be “concrete, particularized, and actual or imminent,” with particular weight on “imminence.” Moreover, these courts have held that so-called “prophylactic measures” – e.g. credit monitoring services – may not be considered injuries in their own right, because one should not be permitted to “manufacture” injury when no injury is independently imminent.<sup>23</sup>

#### b. The Sixth, Seventh and Ninth Circuits

Opposite the First and Third Circuits, the Sixth, Seventh and Ninth Circuits have taken a more liberal and—arguably— more sensible approach to the standing issue. Prior to *Clapper*,

the Ninth Circuit recognized that an increased risk of identity theft following the theft of personal information constituted sufficient injury for the first prong of the standing analysis. The court in *Krottner v. Starbucks Corp.* noted that, “if a plaintiff faces a ‘credible threat of harm’, and that harm is ‘both real and immediate, not conjectural or hypothetical’, the plaintiff has met the injury-in-fact requirement for standing under Article III.”<sup>24</sup>

Following *Clapper*, district courts in the Ninth Circuit have affirmed this decision, noting “*Clapper* did not change the law governing Article III standing. The Supreme Court did not overrule any precedent, nor did it reformulate the familiar standing requirements of injury-in-fact, causation, and redressability.”<sup>25</sup> Notably, the Northern District of California has explained that, while *Krottner* used the phrases “immediate danger of sustaining some direct injury” and “credible threat of real and immediate harm” to describe the imminence requirement of injury-in-fact, this formulation is essentially the same as *Clapper*’s “certainly impending” formulation.<sup>26</sup> However, even if *Krottner* were overruled, the court reasoned, the harm threatened by hackers deliberately targeting a company’s servers and collecting personal information is concrete and imminent enough to pass *Clapper*’s standard.<sup>27</sup> In that same case, the court noted that mitigating “prophylactic” measures, such as purchasing credit monitoring services, can constitute an injury so long such measures were taken in response to an imminent threat.<sup>28</sup>

After a breach of Neiman Marcus’s computer systems compromised the data of over 350,000 customers – including credit card numbers – the Seventh Circuit in *Remijas v. Neiman Marcus Group, LLC.* followed the Ninth’s lead. The court, citing *In re Adobe Sys.*, noted

how untenable it would be to require Neiman Marcus customers to wait for hackers to actually commit identity theft:

Like the *Adobe* plaintiffs, the Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an “objectively reasonable likelihood” that such an injury will occur.<sup>29</sup>

On the issue of prophylactic mitigation expenses, the Seventh Circuit wisely noted that “it is important not to overread *Clapper*.”<sup>30</sup> The court noted that *Clapper* concerned itself with truly speculative harm, while in *Remijas*, Neiman Marcus admitted that the data breach had occurred, and even offered a year of free credit monitoring and identity-theft protection. As the court noted, “it is unlikely that [Neiman Marcus] did so because the risk is so ephemeral that it can safely be disregarded.” Noting the not-insignificant cost of some credit monitoring services, the 7th circuit recognized mitigation expenses as a concrete injury.

Finally, reversing a decision by the Southern District of Ohio, the Sixth Circuit has followed the trend established by the Ninth and Seventh circuits. In *Galaria v. Nationwide Mutual Insurance Co.*, following a breach of Nationwide Insurance’s computer systems, and the subsequent theft of the personal information of 1.1 million individuals, the Sixth Circuit found sufficient injury in Plaintiffs’ allegations of an increased risk of harm, and the mitigation costs they incurred.<sup>31</sup> The court noted that “there is no need for speculation where Plaintiffs allege that their data has already been stolen and is now in the hands of ill-intentioned criminals.”<sup>32</sup> The court went on to explain that, while it may not be “literally certain” that the

plaintiffs would suffer any further harm as a result of the data breach, “it would be unreasonable to expect Plaintiffs to wait for actual misuse – a fraudulent charge on a credit card, for example – before taking steps to ensure their own personal and financial security.”

In addition to ruling in line with *Remijas* and *Krottner*, the Sixth Circuit took time to differentiate *Galaria* from the facts in *Reilly*. Specifically, the court pointed to all the uncertainty the Third Circuit was concerned with in *Reilly*, noting that – while in *Reilly* it was unclear whether any “identifiable taking” had occurred – the plaintiffs in *Galaria* alleged such an identifiable taking vis-a-vis “the intentional theft of their data.”<sup>33</sup>

In sum, the Sixth, Seventh and Ninth circuits have been willing to recognize the increased risk of identity theft resulting from a data breach in which personal information was actually stolen. This last point may signal that the circuits are not so split as they may first appear: As *Galaria* points out, the holding in *Reilly* is predicated on facts where it was not clear that any data was stolen – merely that the company’s firewall was breached. Similarly distinguishable is *Katz*, where not only did plaintiffs fail to allege that any data was stolen, but failed to allege that a breach occurred at all. In any event, Standing, and particularly the Injury prong of the standing inquiry, is a commonly discussed topic in data breach litigation, and one with which many attorneys will almost certainly need to tangle going forward.

## 2. Traceability: Standing's Second Prong

While the lion’s share of data breach litigation in the context of standing focuses on the injury prong, one can not simply ignore the second prong: traceability.<sup>34</sup> Fortunately, the circuits seem more unified on this prong than

on the injury prong: expounding on this second prong, *Clapper* stated that plaintiffs must “show that the defendant’s actual action has caused the substantial harm of risk.”<sup>35</sup>

The circuits have tangled with this issue as well, though not in as much detail as with the injury prong. Both *Remijas* and *Galaria* have applied the traceability prong in the data breach standpoint, finding that the respective injuries in each case were, in fact, traceable back to the defendant. Notably on this issue, the Sixth Circuit in *Galaria* noted that traceability does *not* require proximate causation, and thus “the fact that an injury is indirect does not destroy standing as a matter of course.”<sup>36</sup> Thus, *Galaria* held that the plaintiffs adequately alleged a traceable injury, because they established that the defendants had “failed to establish and/or implement appropriate administrative, technical, and/or physical safeguards to ensure the confidentiality of Plaintiff’s and other Class Members’ [data] to protect against anticipated threats to the security or integrity of such information.”<sup>37</sup> Similarly, the Plaintiffs in *Remijas* alleged a sufficiently traceable injury even when defendants argued Plaintiffs could not show the injury was traceable to their data breach and not some other breach.<sup>38</sup>

On the other hand, however, *Katz* addressed the traceability standard, stating this element requires “a sufficiently direct causal connection between the challenged action and the identified harm.”<sup>39</sup> The *Katz* court also noted that “when the injury alleged is the result of actions by some third party, not the defendant, the plaintiff cannot satisfy the causation element of the standing inquiry.”<sup>40</sup> Despite the apparent disagreement, it seems likely that courts like *Galaria* have the right of this issue: proximate causation is unnecessary to prove the second prong of standing.



Katz's formulation of the traceability requirement appears to impose a more substantial burden on plaintiffs than that imposed by *Clapper*.

## B. Theories of Liability

Standing aside, choosing the appropriate cause of action to proceed under in a data breach case can be a challenge. At this time, there is no single coherent federal statute addressing the problem of data breaches.<sup>41</sup> Instead, at the federal level, there are a handful of statutes which may be applied in narrow circumstances, depending upon the facts of the case.<sup>42</sup>

While the Federal government has not enacted a coherent data breach statute, many states have enacted their own. Forty-seven states, in fact, have enacted some form of data breach statute – only Alabama, New Mexico, and South Dakota lack any such statutes.<sup>43</sup> All of these statutes differ widely, establishing various principles from when notification is necessary, to the very definition of what constitutes “personal information.”<sup>44</sup> For example, Ohio's data breach notification law defines personal information as including “an individual's name (first name or first initial and last name), combined with and linked to the individual's: Social security number; driver's license number or state identification card number; or account number, credit or debit card number, in combination with any necessary security or access code or password.”<sup>45</sup> Other states, however, define personal information somewhat more broadly to include passwords, access codes for financial accounts, medical information, health insurance information, tax identification numbers.<sup>46</sup> However, despite this proliferation of data breach laws among the states, only the laws of 14 states, along with the District of Columbia, Puerto Rico and the Virgin Islands, permit a private cause of action for Data Breach.<sup>47</sup>

Due to the lack of a coherent federal cause of action for data breach in most circumstances, and in view of the hodge-podge of state statutes, many data breach complaints include common law claims grounded in breach of contract (express or implied), breach of fiduciary duty, negligence, public disclosure of private facts, emotional distress, and even bailment. As commentators have noted, however, proving the elements to any of these causes of action is likely to be a steep hill for the plaintiff's lawyer.

A good analysis of various state claims and common law claims may be found in the class action filed over Target's 2013 breach.<sup>48</sup> After the breach, which compromised the personal information of 110 million consumers, a class action was filed raising seven separate claims: violation of 49 states' consumer protection laws, violations of 38 states' data breach laws, negligence with regard to Target's failure to safeguard consumer data, breach of implied contract, breach of contract, bailment and unjust enrichment.<sup>49</sup>

With regard to the putative class's negligence claims, plaintiffs alleged Target had breached two duties: the duty to “exercise reasonable care in obtaining, retaining, securing, safeguarding, deleting and protecting [Plaintiffs'] personal and financial information in its possession from being compromised, lost, stolen, accessed and misused by unauthorized persons,” and the duty to “timely and accurately disclose... that [Plaintiffs'] personal and financial information had been or was reasonably believed to have been compromised.”<sup>50</sup> Target, for its part, did not oppose either of these duties, but instead claimed that the claims should be dismissed, because Plaintiffs alleged no *breaches* of those duties, and because some of the claims are barred by the economic loss rule.<sup>51</sup> In view of these complications, the court discussed the applicability of

the economic loss rule, and whether an independent-duty exception applied to that rule for 11 separate states listed in Target's briefing, ultimately resulting in the dismissal of claims in four of those states.<sup>52</sup>

The court's discussion of Plaintiffs' negligence, bailment and unjust enrichment claims ultimately serves to highlight how ill-suited common law tort theories of liability are to the data breach context. As seen in *Target*, the economic loss rule can stymie attempts to recover in tort.<sup>53</sup> Claims predicated on breach of implied contract have fared better: even in the *Target* case, the court noted that Plaintiffs alleged an implied contract and its terms, and the allegation was sufficient for the claim to move forward.<sup>54</sup> However, though breach of implied contract claims may survive dismissal more readily than tort claims, as at least one commentator has noted, this remedy may well be limited in cases where a company takes reasonable measures to protect data prior to a breach.<sup>55</sup>

## II. Conclusion

Given the difficulty of navigating the standing inquiry, and choosing the appropriate claims to bring, it is likely no surprise that the vast majority of cases either are dismissed, or settle.<sup>56</sup> Indeed, of the previously discussed cases, those that survived dismissal have gone on to settle: Target for \$18.5 million<sup>57</sup>, Nationwide for \$5.5 million<sup>58</sup>, Neiman Marcus for \$1.6 million<sup>59</sup> and scores of others, including a “record” \$115 million settlement from insurance provider Anthem for their 2015 breach.<sup>60</sup> One study has noted that, among all federal data breach cases, breaches caused by a cyber attack are 10 times likelier to settle than a breach caused by lost or stolen hardware.<sup>61</sup> Those in which a plaintiff alleges financial harm see a 30% increase in the chance of settlement as



opposed to those which do not feature financial harm ( an increase from 52% to 68%).<sup>62</sup> Importantly, however: while data breach cases seem to settle for relatively large sums, the actual injury to a majority of clients tends to be relatively minor. While injured individuals may suffer great concern and worry over their exposed data, the actual dollar value of the injuries caused by breaches is normally quite small.<sup>63</sup> Though millions of consumers may be caught up in any single breach, those victims that have suffered actual financial harm are comparatively few.

The data breach pandemic is unlikely to break any time soon. In the months of September and October 2017 alone, new breaches from Whole Foods, Hyatt Hotel, Sonic, Disqus, Deloitte and even the United States Securities and Exchange Commission have been reported.<sup>64</sup> Unfortunately, the roadmap to recovering for clients injured in these breaches has not been made any more clear. If one thing is clear, it is that data breaches are already a simple fact of our modern lives, and there is not, as of yet, an elegant legal solution to the problems they pose. Though the task of proving a client's injury and surviving dismissal poses a substantial challenge, those up to the task are sure to find plenty of opportunity in the coming years. ■

#### End Notes

1. Debra Cassens Weiss, *Equifax won't require arbitration of cybersecurity claims; are there lawsuit impediments?*, ABA JOURNAL, Sept. 14, 2017, available at [http://www.abajournal.com/news/article/equifax\\_wont\\_require\\_arbitration\\_of\\_cybersecurity\\_claims\\_are\\_there\\_lawsuit](http://www.abajournal.com/news/article/equifax_wont_require_arbitration_of_cybersecurity_claims_are_there_lawsuit)
2. Rachel M. Peters, *So You've Been Notified, Now What? The Problem With Current Data-Breach Notification Laws*, 56 ARIZ. L. REV. 1171(2014); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017 U.S. Dist. Lexis 140212 (N.D. Cal. Aug. 30, 2017).
3. Megan Dowty, NOTE: *Life is Short. Go to Court: Establishing Article III Standing in Data Breach Cases*, 90 S. CAL. L. REV. 683 (2017).
4. Cassens Weiss, *supra* n.1
5. Ohio Rev. Code Ann. § 1349.19(A)(1)(a). See also, Ind. Code § 24-4.9-2-2(a) (2014).
6. See e.g., *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010) (Finding several Starbucks employees had standing to sue when a laptop containing personal information of employees was stolen, and at least one plaintiff was notified when someone attempted to open a new bank account using his social security number.)
7. See, *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, N.D. Cal. No. 16 - MD- 02752, 2017 U.S. Dist. LEXIS140212 (Aug. 30, 2017).
8. Hillary G. Buttrick, Jason Davidson, Richard J. McGowan, *ARTICLE: The Skeleton of a Data Breach: The Ethical and Legal Concerns*, 23 Rich. J. L. & Tech. 1, P14 (2016)
9. *Data Breach Charts*, BAKER HOSTETLER, 17-19, [http://www.bakerlaw.com/files/Uploads/Documents/Data%20Breach%20documents/Data\\_Breach\\_Charts.pdf](http://www.bakerlaw.com/files/Uploads/Documents/Data%20Breach%20documents/Data_Breach_Charts.pdf), archived at <https://perma.cc/MM5K-ZRT3>.
10. See e.g., *In re Target Customer Data Sec. Breach Litig.* *infra* n. 48.
11. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992).
12. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S. Ct. 1138 (2013).
13. *Id.* Paragraph 3 of the syllabus
14. *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3rd Cir. 2011).
15. *Id.* at 43.
16. *Id.* at 45 ("though Appellants have incurred expenses to monitor their accounts... they have not done so as a result of any *actual* injury... Rather, they prophylactically spent money to ease fears of future third-party criminality. Such misuse is only speculative, not imminent. The claim that they incurred expenses in anticipation of future harm, therefore, is not sufficient to confer standing.").
17. *Katz v. Pershing, LLC.*, 672 F.3d 64 (1st Cir. 2012).
18. *Id.* at 79 (emphasis added). In fact, Plaintiff made no real allegations whatsoever that her information had already been stolen. This case, realistically, may be better classified as a "data insecurity" case, rather than a true "data breach" case.
19. 90 F. Supp. 3d 359 (M.D. Pa. 2015).
20. *Id.* at 363. Plaintiffs alleged not only did they spend time and money protecting themselves, but that some plaintiffs suffered actual damages, offering Plaintiff "Wilkinson". Wilkinson was an employee of a government contractor, and after reporting the breach, Wilkinson's security clearance was suspended, and he was required to work from a different job site, extending Wilkinson's commute by four hours each day.
21. *Id.* at 366.
22. *Id.* at 367.
23. See e.g., *Storm*, 90 F.Supp 3d at 367 ("[Plaintiff's supposed damages] although surely unfortunate, are merely a form of prophylactic costs the Supreme Court has warned cannot be used to 'manufacture' standing, even if those costs are reasonable. \*\*\* In *Clapper*, the Court reasoned, 'Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing – because the harm respondents seek to avoid is not certainly impending.'" (Internal citations omitted).
24. *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010). *Krottner* is a somewhat atypical data breach: rather than being hacked, someone stole a physical laptop which contained sensitive employee information.
25. *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197 (N.D. Ca. 2014).
26. *Id.* at 1214
27. *Id.*
28. *Id.* at 1216-1217 ("[I]n order for costs incurred in an effort to mitigate risk of future harm to constitute injury-in-fact, the harm being mitigated must itself be imminent. As the court has found that all Plaintiffs adequately alleged that they face a certainly impending future harm from the theft of their personal data,... the court finds that the costs plaintiffs... incurred to mitigate this future harm constitute an additional injury-in-fact.").
29. *Remijas v. Neiman Marcus Group, LLC.*, 794 F.3d 688 (7th Cir. 2015) (Citing *Clapper, supra*). This particular breach involved the theft of over 320,000 customer records, including credit card numbers. Note, however, *Remijas* employs an "objectively reasonable likelihood" standard, citing *Clapper*. It is significant that, as *Galaria, infra* notes, *Clapper* expressly rejected that standard, though this citation to *Clapper* is not central to the outcome or reasoning of *Remijas*. *Galaria v. Nationwide Mut. Ins. Co.*, 663 Fed Appx. 384, 389 (6th Cir. 2016) fn. 2.
30. *Remijas* at 694.
31. *Galaria v. Nationwide Mut. Ins. Co.*, 663 Fed Appx. 384, 2016 U.S. App. LEXIS 16840 (6th Cir. 2016).
32. *Id.* at 388. The court notes here that the increased risk Plaintiffs alleged rose "beyond the speculative allegations of 'possible future injury' or 'objective reasonable likelihood' of injury that the Supreme Court has explained are insufficient."
33. *Id.* at 389, 390. In a footnote, the court explained that, despite *Reilly's* suggestion that more is required than a mere allegation of an identifiable taking, "we must accept as true Plaintiffs' allegations about the nature of the breach and the data stolen, and construe the complaints in Plaintiffs' favor." *Id.* fn. 3, citing *Parsons v. United States DOJ*, 801 F.3d 701, 710 (6th Cir. 2015).

34. While one cannot ignore the third prong, redressability, either, in the data breach context, Plaintiffs commonly seek money damages, dispensing with this inquiry. Indeed, *Galaria* dispenses of this prong with a perfunctory “Here, Plaintiffs seek compensatory damages for their injuries, and a favorable verdict would provide redress.” *Galaria*, 663 Fed Appx. at 391.
35. *Clapper*, *supra*, at 110, n.5.
36. *Galaria*, 663 Fed Appx. at 389, quoting *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015).
37. *Id.* at 390.
38. *Remijas*, 794 F.3d at 696. The court noted that this argument is similar to the multiple tort-feasors argument, and that, in such a case, the burden shifts to the defendants to prove which among them is culpable. “We think that this debate has no bearing on standing to sue; at most, it is a legal theory that Neiman Marcus might later raise as a defense.” *Id.*
39. *Katz*, 672 F.3d at 71, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
40. *Katz*, 672 F.3d at 76, citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1447-48 (2011); *Raines v. Byrd*, 521 U.S. 811, 830 n.11, 117 S.Ct. 2312 (1997); *Allen v. Wright*, 468 U.S. 737, 757-58, 104 S.Ct. 3315 (1984).
41. *Buttrick supra*, n.8
42. For example, some data breach cases have been brought under the Computer Fraud and Abuse Act, 18 U.S.C. §1030 (2008). However, this statute applies only in two limited circumstances: “where a loss of at least \$5,000 is aggregated over a one year period or when there is damage affecting ten or more protected computers within a one-year period.” Peters, *supra*, n.2 at 1176-77. In the context of this statute, “protected computer” means any computer which is “used in or affect[s] interstate or foreign commerce or communication” 18 U.S.C. § 1030(e)(2). However, the CFAA has not been *successfully* used to provide a remedy for consumers: it is limited, because no action may be brought for the “negligent design or manufacture of computer hardware, computer software, or firmware,” and because it is rare for a plaintiff to suffer an aggregate total of \$5,000 in damages.
43. *Buttrick supra*, n.8
44. Peters, *supra* n. 2 at 1182. Noting also that only seven states provide specific time frames for notification after a breach, ranging from 5-45 days after the incident was discovered, and other differentiating factors between the myriad state statutes.
45. *Data Security Breach Rights and Obligations*, OHIO STATE BAR ASSOCIATION, Feb. 29, 2016. <https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-423.aspx>
46. Peters, *supra* n. 2 citing Alaska Stat. § 45.48.090(2013); Ark. Code Ann. § 4-110-103 (2014); Mo.Rev. Stat. § 407.1500 (2014); Iowa Code Ann. § 715C.1 (2013); MD. Code Ann., Com. Law § 14-3501 (2013).
47. *Data Breach Charts supra* n. 9
48. *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154 (D. Minn. 2014).
49. *Id.* at 1158. The court denied Target’s motion to dismiss with regard to the majority of the state consumer protection claims, but dismissed the claims with regard to the statutes from Alabama, Georgia, Kentucky, Louisiana, Mississippi, Montana, South Carolina and Tennessee. Regarding the state data breach notice claims for failure to give timely and accurate notice of the breach, Plaintiffs recognized that three of the states (Florida, Oklahoma and Utah) did not provide a private cause of action, and withdrew claims based on those states’ laws. The court went on to dismiss the claims with regards to Arkansas, Idaho, Massachusetts, Minnesota, Nebraska, Nevada, and Texas, because enforcement of those states statutes was limited to an enforcement action by the state’s Attorney General. *Id.* at 1168-69. Finally, the court dismissed Plaintiffs’ claims with regard to Rhode Island, because the statute was construed to prohibit private causes of action. *Id.* at 1170. The claims as to the remaining 26 states’ data breach notification statutes were permitted.
50. *In re Target, supra* n. 48 at 1170.
51. *Id.* at 1171.
52. *Id.* at 1172-1176, dismissing the claims as related to the states of Alaska, California, Illinois, Iowa, and Massachusetts. The court held it would be inappropriate to dismiss the claims from the District of Columbia, Georgia, Idaho, New Hampshire, New York, and Pennsylvania. Among the claims not dismissed, those from D.C., Idaho, and New Hampshire, were preserved because dismissal would simply be “premature” to do so.
53. With regard to Plaintiffs’ Bailment claim, the court noted that “Plaintiffs allege that third parties stole the information, not that Target wrongfully retained the information,” making a Bailment claim untenable. *Id.* at 1177. Plaintiffs’ unjust enrichment claim survived dismissal, insofar as plaintiffs alleged they “would not have shopped” at Target if they had been notified of the breach in a timely manner. *Id.* at 1178 (“a reasonable jury could conclude that the money Plaintiffs spent at Target is money to which Target ‘in equity and good conscience’ should not have received.”).
54. *Id.* at 1176-77. (“Count IV of the complaint claims that Plaintiffs and Target had an implied contract in which Plaintiffs agreed to use their credit or debit cards to purchase goods at Target and Target agreed to safeguard Plaintiffs’ personal and financial information.”) *See also Hannaford Bros. Co.*, 659 F.3d 151, 159 (1st Cir. 2011) (“When a customer uses a credit card in a commercial transaction, she intends to provide that data to the merchant only. Ordinarily, a customer does not expect – and certainly does not intend – the merchant to allow unauthorized third-parties to access that data. A jury could reasonably conclude, therefore, that an implicit agreement to safeguard the data is necessary to effectuate the contract.”)
55. Peters, *supra* n. 42 at 1187, noting that the first circuit in *Hannaford* implied that a company which takes reasonable measures to protect customer information may not be subject to a breach of implied contract claim.
56. Sasha Romanosky, David Hoffman, Alessandro Acquisti, *ARTICLE: Empirical Analysis of Data Breach Litigation*, 11 J. EMPIRICAL LEGAL STUD. 74 (2014).
57. Rachel Abrams, *Target to Pay \$18.5 Million to 47 States in Security Breach Settlement*, THE NEW YORK TIMES, May 23, 2017, available at <https://www.nytimes.com/2017/05/23/business/target-securitybreach-settlement.html>
58. Kevin McCoy, *Nationwide Mutual Insurance Agrees to \$5.5M Settlement Over Data Breach*, USA TODAY, Aug. 9, 2017 <https://www.usatoday.com/story/money/2017/08/09/nationwide-mutual-insuranceagrees-5-5-m-settlement-over-data-breach/552687001/>
59. Paul Tassin, *Neiman Marcus Data Breach Class Action Settlement*, TOP CLASS ACTIONS, July 20, 2017. <https://topclassactions.com/lawsuit-settlements/lawsuit-news/814462-neiman-marcus-data-breach-classaction-settlement/>
60. Pamela A. Maclean, *Anthem Agrees to \$115 Million Settlement Over Data Breach*, BLOOMBERG, June 23, 2017. <https://www.bloomberg.com/news/articles/2017-06-23/anthem-reaches-115-mln-settlement-inmassive-data-breach-case>
61. Romanosky *supra* note 56 at 98.
62. *Id.*
63. *See*, Marian K Riedy, Bartlomiej Hanus, *ARTICLE: Yes, Your Personal Data Is At Risk: Get Over It!*, 19 SMU SCI. & TECH. L. REV. 3. (“According to the 2006 Federal Trade Commission Identity Theft Survey Report, the median out-of-pocket consumer expense arising from all identity theft was \$0. The median number of hours spent resolving the problem was four. In 2014, according to the United States Bureau of Justice Statistics, one-third of those who had experienced identity theft in that year incurred no identifiable loss and of the two thirds who did, one-half incurred an out of pocket loss of less than \$99.”)
64. Heidi Daitch, *2017 Data Breaches – The Worst So Far*, IDENTITY FORCE, Oct. 19, 2017. <https://www.identityforce.com/blog/2017-data-breaches>



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# Practically Legal

by William B. Eadie

*Practically Legal is a series discussing how to work on, not just in, your business, for lawyers who want to grow their practice and free up their time. For topic suggestions or questions please contact William Eadie at [william.eadie@eadiehill.com](mailto:william.eadie@eadiehill.com) or Michael A. Hill at [michael.hill@eadiehill.com](mailto:michael.hill@eadiehill.com).*

## Today's Suggestion: Let People Into Your Calendar

One of the most common time wasters in my day is scheduling things—meetings, client calls, conference calls, even grabbing lunch or coffee with a colleague can be a five-email slog where it might get dropped. How's Tuesday next week? No good, what about Friday at 11? Let's look at the following week. That's loads of fun and a wonderful use of your time, right?

I should have said it *was* one of the most common time wasters in my day. Now I schedule everything with a single email. How?

I use an app called Calendly—and there are others—that shows people available time on my calendar so they can schedule things when it works for them. One and done: I send them a link, they pick the time, it shows up on both our calendars.

I know what some of you are thinking: another app / program / hack to have to learn? I have too many already. I can't learn a new thing.

This one is pretty darn easy. Here's how it works.

1. You sign up with the service (if you use G-Suite / google, you're in luck, it's 1 click and done).
2. You make an "event type"—client call backs, in-office or out-of-office client meetings, lunches, expert calls, whatever—that will specify which days the events can be on, how long the event is (I do 25 minutes for client calls, 45 for experts, etc.), even how many of

them can be on one day (only 1 lunch!).

3. You get a link you can send people to book those types of events.

Done. That easy.

If you want all your client call-backs to be from 3-5 p.m., Monday through Thursday, you have a special link to use for scheduling them only during those times. You can even specify what information the person scheduling needs to put in when scheduling, like what questions the client has, where someone wants to go to lunch, what phone number to use for the expert call.

New clients get the link and can schedule a meeting whenever they want; no more phone tag or pile of voicemails to return. We have our reception service and assistants use the links, so when a client calls they can schedule a call back, with the client's questions listed, right then and there. You can get fancy and include reminder emails, so you're sure they'll be ready for your call.

The benefits are almost immediate. Someone says, "we should do lunch some time"? In the past, maybe you'd follow up, maybe it would get scheduled, maybe it would happen. Now, I can respond with, "sounds great, put it on my calendar!" Our close rate on meetings, potential clients, everything has shot up. No more back-and-forth emails to book lunch or a meeting, no more cold calls with clients coming in (interrupting your work, and potentially catching you off guard with questions you need time to answer), or out (good luck catching the client!).

Have you tried this, or have questions? Want to give feedback or suggestions? Please let me know what you think! In fact, feel free to book a call on any Friday to talk about Calendly, marketing, or (my favorite) nursing home abuse litigation: <https://calendly.com/william-eadie/firm-friday-calls> ■





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## Verdict Spotlight:

# Hamilton County Jury Returns \$28 Million Verdict for the Death of a Utility Lineman Killed by Falling Utility Pole

By Susan E. Petersen

**O**n June 7, 2017, a Hamilton County jury returned a \$28 million wrongful death verdict on behalf of the family of a Hamilton County lineman who was tragically killed while on the job. The jury ruled that defendant Utilimap Corporation was negligent in causing the 43 year old man's death after the utility pole he was climbing broke due to underground decay and collapsed on him and a coworker. The case was tried by Spangenberg Shibley and Liber LLP, lawyers Stuart E. Scott, Peter H. Weinberger, and Jeremy A. Tor. The trial, which lasted 2 1/2 weeks, was presided over by visiting judge, Timothy Hogan.

Keith Jester was a Senior Lineman working for Duke Energy Ohio, Inc. He was a 14-year veteran lineman with an excellent safety record and had been recently promoted to "senior" lineman before his death. Keith was selected by his supervisor to be a lead trainer of apprentice linemen in the field.

On February 27, 2014, Keith was leading a crew of apprentice linemen on the job. They were working on a farm near Morrow, Ohio, removing a line of 4 wood utility poles on the property so that electrical service could be run below ground to the pump houses that irrigated the agricultural field. Keith and a groundman co-worker were climbing one of the utility poles to remove the wires when the pole suddenly snapped below ground. The pole came crashing down on Keith and his co-worker. Keith was rushed from the scene to a nearby hospital where he died of internal injuries about an hour after the pole collapsed.

In 2011, Duke Energy hired the Defendant, Utilimap Corporation, a division of Quanta Services, to inspect 30,000 Duke utility poles in Southwest Ohio; this included the 4 poles at the farm where Keith was killed. The Inspection Agreement required Utilimap to perform both above-ground and below-ground inspections on the poles and to report to Duke any poles that had safety issues so Duke could repair or replace them. A key component of the pole inspection program required the Utilimap inspectors to partially dig out the pole and carefully inspect the wood below ground for rot and decay. If the pole had sufficient "good wood" below ground, the inspector would add a wood preservative treatment to protect the pole against rot and decay until the next 10-year inspection cycle. A pole with significant decay was tagged as a reject pole, and Duke would be notified about the pole.

The Contract also required Utilimap to notify Duke by phone and email if its inspector could not access a pole for any reason so that Duke could provide access through its easement rights.

The post-accident investigation revealed that the subject pole was severely rotted starting about 6 inches below ground down to 46 inches below ground. The investigation also revealed that the pole had not been inspected by Utilimap, although Duke was billed and paid for the inspections of the 4 poles on the farm.

During discovery, the Spangenberg trial team developed evidence that the 4 poles on the farm and at least 63 other poles had been skipped by Utilimap inspectors and that Duke was billed



for the inspections of the poles. They also developed evidence that Utilimap had fallen behind on the inspection project and had brought in additional inspectors from other projects who were not properly trained on all of the Contract specifications.

During the trial, Utilimap defended the case on the basis that it did not have access to the 4 poles on the farm because it would have caused crop damage. It also argued that Duke knew that it had not inspected the poles based on the data Utilimap submitted to Duke for the 4 poles reporting that the poles had a 0-inch circumference, inspection times of 1-minute apart, and notated in the comments that the poles were in a bean field. Utilimap also blamed Keith Jester for causing his own death by not recognizing that the pole was decayed based on the age of the pole, the presence of green algae stains near the base of the pole, and for not probing the pole with his lineman's screwdriver. Utilimap lawyers also blamed Keith for allegedly failing to adhere to Company procedures by not supporting the pole with guy wires prior to climbing.

The Spangenberg trial team anticipated and tested all of the defenses argued by Utilimap's lawyers through multiple focus groups and mock trials. By the time trial began, they felt confident how the jury would react to these defenses. Thus, they were able to maintain their focus and the jury's attention on Utilimap's misconduct, its failure to follow the specifications of the Contract, and the fact it refused to accept any responsibility for Keith's death rather than "chasing" the defenses. The trial team believed that their case theories would connect with even the "conservative" juror.

During discovery, the Spangenberg trial team developed the safety-of-the-community theme that decayed,



*SSL trial team with Christa Jester*

rotted utility poles are a danger to the workers and the community at large and that the pole inspections are really safety inspections that keep workers and the community safe. With every trial witness, they reminded the jury that utility poles are found everywhere: in backyards, along streets, on school property, and that wood utility poles are large, heavy objects that are extremely dangerous when they fall down because of the physical damage they cause and because they are supporting high voltage electrical lines.

During trial, the Spangenberg team anchored the damages starting with voir dire. They asked prospective jurors about the \$55 million verdict in the Erin Andrews case against Marriott Hotels where the harm was not a physical injury, but harm to her reputation and the embarrassment she experienced by the invasion of her privacy. They continued to anchor the damages during opening statements telling the jury that the evidence of the family's damages exceeded \$24 million.

In closing, the Spangenberg trial team told the jury that Utilimap chose to refuse any responsibility for its role

in Keith's death and instead chose to tarnish and diminish the reputation of a man who could not defend himself in Court. They presented a "first person" narrative of what Keith would have said if he was still alive and could testify. The closing damages argument anchored the non-economic damages to the \$100,000 per month Duke paid Utilimap for the safety inspections it hired them to perform to protect its employees and the public from decayed and rotted poles. They argued this was the market value for safety in the industry and compared that to Keith's remaining life expectancy.

Throughout the litigation, defense counsel promoted its belief that Hamilton County jurors are conservative and would never compensate non-economic wrongful death damages with millions of dollars. The jury returned a verdict of just under \$28 million. It awarded \$512,500 for Keith's one hour of pain and suffering, \$3.4 million for his loss of earning capacity and services, and a record \$24 million in wrongful death non-economic damages. The jury found Utilimap 100% responsible for the damages, assigning 0% blame on Keith. ■

# Recent Ohio Appellate Decisions

by Meghan P. Connolly and Dana M. Paris

**McFarland v. Niekamp, Weisensell, Mutersbaugh & Mastrantonio, LLP, 9th Dist. Summit No. 28462, 2017-Ohio-8394 (Nov. 1, 2017).**

*Disposition:* Summary judgment for defendant law firm reversed as genuine issues of material fact remain as to whether attorney was apparent agent of law firm.

*Topics:* Legal malpractice; apparent authority.

Attorney Rami Awadallah entered into an attorney-client relationship with McFarland and Folden (the Clients) to pursue a claim against the Clients' former stock broker. Mr. Awadallah prepared a complaint for the Clients but never filed it, and the statute of limitations on their claim expired. The Clients sued Awadallah for legal malpractice and brought vicarious liability claims against the various law firms that employed him throughout the relevant time period.

In order for the Clients' vicarious liability claims to survive against the law firm(s), they would need to show that Mr. Awadallah acted with either actual or apparent authority.

Mr. Awadallah worked at three different firms during his representation of the Clients. Mr. Awadallah left the first firm when he started his own firm, before joining the Niekamp, Weisensell, Mutersbaugh & Mastrantonio, LLP law firm. He did not notify the Clients of his last change in law firms, and never formally transferred the file to Niekamp, but the clients found him there online. The Clients utilized the Niekamp office staff to communicate with Mr. Awadallah and to arrange a meeting with him. The Clients met with Mr. Awadallah, albeit not at the Niekamp office, but according to the Clients, they did receive his Niekamp business card at that meeting.

The trial court granted summary judgment for Niekamp on the basis that Awadallah lacked actual authority, and lacked apparent authority to represent the Clients. It was undisputed that Awadallah lacked actual authority, so the reviewing court's analysis focused on the issue of whether Niekamp's conduct established Awadallah as an apparent agent.

The Ninth District Court of Appeals agreed with the Clients, finding genuine issues of material fact as to the appearance of apparent authority. The court found it significant that Mr. Awadallah was "held out" to the public by Niekamp as an employed attorney on the firm's website and firm business cards. Further, the court found that Niekamp's conduct, through its fairly regular and substantive communications between the office receptionist, secretaries, and office manager,

were "indicia of firm involvement in the representation of the [Clients'] interests."

Finding that a genuine issue of material fact exists as to apparent authority, the decision of the trial court was reversed and the case remanded for further proceedings.

**Christian v. Kettering Med. Ctr., 2nd Dist. Montgomery No. 27458, 2017-Ohio-7928 (Sept. 29, 2017).**

*Disposition:* Summary judgment for defendant reversed.

*Topics:* Whether fall from wheelchair while being assisted from vehicle to emergency room by a nurse constitutes a "medical claim" for purposes of the statute of limitations.

Christian sustained injury from a fall in the parking lot of the Kettering Medical Center while being assisted out of a vehicle by an emergency room nurse. In that her case was filed more than one year after her fall, the issue on summary judgment was whether the claim was a "medical claim" subject to a one-year statute of limitations.

This case went up to the Second District Court of Appeals in 2016 as a result of the trial court granting the defendant's motion for summary judgment on the basis it was a time barred medical claim. However, on appeal the first time, the court held "[the nurse's] act of transferring [the patient] from her friend's vehicle to a wheelchair was too attenuated from the receipt of medical treatment, care, and diagnosis to constitute a 'medical claim'". *Christian I* at 667. The court reasoned that "there was nothing in [the nurse's] actions that constituted medical treatment or diagnosis, and the need to transport [the patient] from a private vehicle to a wheelchair did not arise out of any diagnostic testing, treatment, or care directed by a physician." *Id.* In *Christian I*, the court acknowledged that "[i]t appears that Christian needed assistance to enter the hospital, where she could then be evaluated, diagnosed, and treated for her medical condition", but still found the fall to be too attenuated from the prospective care to constitute a "medical claim".

The case was remanded to the trial court, and additional discovery was conducted. The defendants obtained a new affidavit from the hospital's Director of Emergency, Trauma and Support Services setting forth that the transporting of prospective patients from private vehicles to the emergency department was part of a standard practice at the hospital, and that staff receive special training with regard to that practice.

When Kettering Medical Center again moved for summary judgment, in consideration of this new evidence, the trial court again concluded that Christian's claim was a medical claim, and granted summary judgment to the hospital.

Upon review, the Second District was not persuaded to deviate from its original conclusion that Christian's claim was not a "medical claim". The policy of the hospital, and specialized training of staff, as set forth in the witness's affidavit, while relevant to the question before the court, was not dispositive of the issue. The court found that nothing in the affidavit established that Christian's claim "arises out of the medical diagnosis, care, or treatment" of her. 2007-Ohio-7928 at ¶129. The decision of the trial court was again reversed, and the case was again remanded for further proceedings.

**Parker v. Red Roof Inn, 9th Dist. Summit No. 28489, 2017-Ohio-7595 (Sept. 13, 2017).**

*Disposition:* Summary judgment for defendant reversed.

*Topics:* Premises liability; open and obvious danger as question of fact.

Parker parked his pick-up truck in the Red Roof Inn parking lot. His parking space was marked with a parking bumper, beyond which there was a short curb, a narrowly paved area, and then a section of loose stones. Beyond the loose stones there was a retaining wall, followed by a steep embankment leading to another parking lot. There was no fence or railing to mark the drop-off.

When Parker maneuvered around the rear of his truck, "the ground went out from under [him], and [he] went crashing to the ground and rolled down the hill and came to the parking lot down below[.]" Parker suffered severe orthopedic injuries in the fall.

The Red Roof Inn moved for summary judgment on the basis that the embankment was an open and obvious hazard. The trial court granted summary judgment to the hotel, and Parker appealed.

On review, the Ninth District Court of Appeals found that an issue of fact remains with respect to whether the hazard was open and obvious. The court reviewed several photographs of the scene but felt the vantage of the photographs needed to be taken into consideration. "While it is true that the curb, loose stones, top of the retaining wall, and foliage are all visible in the photographs, it is not clear that a reasonable person in Parker's position would appreciate that a several foot drop was just beyond the retaining wall. A reasonable person could find that the photographs, taken at the level of the Red Roof Inn, fail to disclose the steep embankment leading to the parking lot several feet below." See ¶122.

The Ninth District reversed the decision of the trial court and remanded the case for further proceedings.

**Johnson v. Montgomery, Slip. Op. No. 2017-Ohio-7445 (Sept. 6, 2017).**

*Disposition:* Affirming intermediate appellate court's reversal of a plaintiff's verdict.

*Topics:* Application of Dram Shop Act to intoxicated employee; Dram Shop Act as exclusive remedy precluding ordinary negligence claim against bar.

Johnson was injured in a motor vehicle collision caused by an intoxicated driver who was on her way home from work as a dancer at the defendant's strip club. The Ohio Supreme Court's recent decision reversed the plaintiff's nearly three-million-dollar verdict.

The evidence showed that dancers at the defendant's club drank alcohol while working as a matter of course. In fact, the defendants encouraged and profited off of dancer intoxication, as the club's servers pushed customers to purchase drinks for dancers and the defendant charged a premium for them. Montgomery, the dancer, admitted that she was drunk on the night she caused the collision and injured the plaintiff.

Johnson brought a cause of action under Ohio's Dram Shop Act, together with a common law negligence claim. At trial, the court directed a verdict to the defendants as to the Dram Shop Act claim on the basis that there was no evidence that Montgomery had been "noticeably intoxicated", as required to prove liability under the statute. According to the Supreme Court of Ohio, that determination was not challenged on appeal and could not be addressed by the Court.

Thus, the issue that did reach the Ohio Supreme Court was whether Johnson could maintain a negligence action against the defendants. Her negligence action had reached the jury, and they awarded Johnson \$2,854,645.55. The Ohio Supreme Court agreed with the defendant strip club in holding that the Dram Shop Act provided the exclusive remedy under the facts of the case.

In reaching this conclusion the Court refused to look beyond the plain language of the Act. "The only cause of action against a liquor-permit holder for off-premises injuries caused by an intoxicated person arises when the permit holder (or employee) knowingly sells alcoholic drinks to a noticeably intoxicated person or an underage person." Johnson argued that by intoxicated "person", the legislature only contemplated an intoxicated "patron", based on legislative history and public policy against drunk driving. However, the Court found that based on the plain language of the statute, in Johnson's



case, "person" means person, and a dancer is a person", thereby affirming the judgment of the court of appeals.

**Cordova v. Emergency Professional Services, Inc., 8th Dist. Cuyahoga No. 105061, 2017-Ohio-7245 (Aug. 17, 2017).**

*Disposition:* Defense verdict in medical malpractice case affirmed.

*Topics:* Juror challenges for cause pursuant to R.C. 2313.17(B)(9) and R.C. 2313.17(D).

This is a medical negligence case brought by the Plaintiff against several defendants, including the emergency room physician who treated the Plaintiff. The Plaintiff alleged that the Defendant doctor misdiagnosed her diverticulitis and, because of his negligent care and treatment, caused her to suffer injuries.

The case proceeded to a jury trial and the jury selection began. In the first set of eight prospective jurors, several had medical backgrounds, including Juror No. 3, an internal medicine physician.

Plaintiff's counsel began to question Juror No. 3 and the following exchange took place:

Q: ... Given that you have, obviously, a lot of firsthand experience, training and so forth, are you going to be able to set aside your knowledge and listen and rely only on the evidence that comes through the records, or through witnesses, who will be presented throughout the course of the trial, or is it going to be kind of hard to set aside what you actually - what you actually know?

A: I don't think I can set aside my knowledge. It's my knowledge....

Q: Is there anything about the fact that you're a trained physician in - an internal medicine trained physician, given that this is a medical negligence case, before you've heard really any of the facts about the case, just a little bit that would make you even slightly lean one way or the other in favor of the patient or in favor of Dr. Mucci [the defendant].

A: The initial, when I heard it was a malpractice, medical malpractice, I guess - I guess my initial reaction would be to sympathize with the physician.

Q: ... Do you feel that maybe this would be a hard case for you to sit on and be totally fair and impartial to both sides?

A: I think it would be hard. I would try. I would certainly try.

Q: Do you think maybe there's probably a better case out there for you in your experience to sit on other than this case?

A: Probably.

However, when Juror No. 3 was rehabilitated by counsel for the Defendant, she agreed that she would listen to the testimony and evidence and use that to form her decision and agreed to be fair to both sides.

After Plaintiff's counsel challenged Juror No. 3 for cause which the court denied, they used a peremptory challenge to remove the juror.

At the conclusion of trial, the jury returned a verdict in favor of the defense.

On appeal, the plaintiff's sole assignment of error was that the trial court impermissibly refused to excuse a juror who should have been dismissed for cause. The abuse of discretion standard applies when reviewing a challenge to a juror for cause under R.C. 2313.17(D). Plaintiff argued that R.C. 2313.17(B)(9) is a principal challenge that prohibits any attempt to rehabilitate by either court or counsel and that Juror No. 3's responses to the questions during voir dire required the trial court to automatically excuse her for cause. R.C. 2313.17(B) provides nine "good causes for challenge to any person called as a juror." One of the nine "good causes" is "that the person discloses by the person's answer that the person cannot be fair and impartial or will not follow the law as given to the person by the Court." R.C. 2313.17(B)(9). Ohio law states that if a principal challenge is found valid, "the court must dismiss the prospective juror, and may not rehabilitate or exercise discretion to seat the prospective juror upon the prospective juror's pledge of fairness." *State v. Swift*, 9th Dist. Summit No. 27084, 2014-Ohio-4041, ¶14, citing *Hall v. Banc One Mgt. Corp.*, 114 Ohio St.3d 484, 2007-Ohio-4640, 873 N.E.2d 290. "Where a party establishes the existence of facts supporting a principal challenge, this finding 'results in automatic disqualification,' and no rehabilitation of the potential juror can occur." *Hall* at ¶29.

The Court then had to determine whether the plaintiff established the existence of facts supporting a valid principal challenge under 2313.17(B)(9) such that Juror No. 3 could not be fair and impartial or would refuse to follow the law as given by the court. Existence of these facts would have required Juror No. 3 to be automatically disqualified.

Despite what Juror No. 3 stated during voir dire with Plaintiff's counsel, when rehabilitated by the defendant's counsel, Juror No. 3 indicated that she could follow the evidence and instructions of the trial court; follow the burden of proof in this case; weigh the testimony of the experts; set aside any prejudices she had in rendering a verdict; and that she would "certainly try" to be fair and impartial and follow the law. As such, the Court concluded that the plaintiff failed to establish the existence of facts to support a valid principal challenge that Juror No. 3 would not be fair and impartial or would not follow the law as given by the trial court.

The plaintiff also argued that the trial court abused its



discretion by failing to excuse Juror No. 3 pursuant to R.C. 2313.17(D). R.C. 2313.17(D) provides the following:

“In addition to the causes listed in division (B) of this section, any petit juror may be challenged on suspicion of prejudice against or partiality for either party ... The validity of the challenge shall be determined by the court and be sustained if the court has any doubt as to the juror being entirely unbiased.”

Relying on the Court’s earlier finding, it concluded that Juror No. 3 could have been fair and impartial and could have followed the law based upon her responses. Therefore, the Court could not say that the trial court abused its discretion in denying the plaintiff’s challenge pursuant to R.C. 2313.17(D).

Affirming the judgment from the trial court, the Court overruled Plaintiff’s assignment of error and held that the trial court did not abuse its discretion when it denied the plaintiff’s challenge to dismiss Juror No. 3 for cause under R.C. 2313.17(B)(9) or 2313.17(D).

**Sherer v. Progressive Select Ins. Co., 6th Dist. Lucas No. L-17-1033, 2017-Ohio-7278 (Aug. 18, 2017).**

*Disposition:* Summary judgment for UM carrier affirmed.

*Topics:* Plaintiff bicyclist’s negligence as sole proximate cause of his injuries.

Plaintiff was crossing the street on his bicycle when a motorcyclist struck him and caused him to sustain injuries to his left shoulder. The motorcyclist fled the scene and could not be identified following the collision. As such, the Plaintiff brought a lawsuit against his own insurance company pursuant to his uninsured motorist policy provision. At the trial court level, Defendant filed a motion for summary judgment which the court granted.

Appealing the lower court’s decision, the plaintiff argued that the trial court erred in granting summary judgment to the Defendant. Based upon the record, the Court focused on the following set of facts: (1) the plaintiff crossed the street on his bicycle despite there being oncoming traffic which was in close proximity to his body; (2) Plaintiff crossed the street at a location that lacked a crosswalk, traffic light, or any other traffic control device which would have created a potential duty to the motorcyclist to yield to the plaintiff; and (3) an eye witness testified that the plaintiff failed to look for oncoming traffic prior to “bolting” into the street.

Ohio courts have held that “where no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the jury to decide, and, as a matter of law, judgment must be given for the defendant.” *Westfall v. Lemon*, 4th Dist. Washington No. 14-CA-12, 2015-Ohio-384, at ¶23. In this case, no evidence was presented which supported a reasonable inference that any proximate cause could be

attributed in this matter to the motorcyclist or anyone other than the Plaintiff.

Affirming the lower court’s granting of summary judgment, the Court held that because Plaintiff failed to present any evidence supporting a reasonable inference through which proximate cause could be attributed to the motorcyclist or anyone other than the plaintiff, there remained no genuine issue of material fact and reasonable minds could only conclude that the Defendant insurer was entitled to judgment as a matter of law.

**Nationwide Mutual Fire Ins. Co. v. Jones, 4th Dist. Scioto No. 15CA3709, 2017-Ohio-4244 (May 31, 2017).**

*Disposition:* Dismissing appeal for lack of final appealable order.

*Topics:* Order bifurcating bad faith claim but permitting discovery of this claim to be pursued simultaneously with breach of contract claims not a final appealable order.

Nationwide sued its insured, Jones, for breach of contract and declaratory judgment arising from a house fire that destroyed their home. Nationwide alleged that Jones had intentionally set the fire, made false statements, and committed fraud, thereby precluding coverage for the loss.

Jones counter-claimed for breach of contract and bad faith, requesting compensatory and punitive damages.

Nationwide filed a motion to bifurcate the case and stay discovery on the bad faith claim. The trial court denied the motion, ordering that the trial “phases will be tried back-to-back, one right after the other, and [the] jury shall remain the same.” Further, the court determined that the “statute mandates bifurcation of the trial, not of discovery.” Nationwide immediately appealed the order.

The Fourth District dismissed the appeal, finding “we have nothing yet to review”. “[W]e have no specific documents that the trial court ordered appellant to produce or any specific findings concerning which documents, if any, are or are not protected under the attorney-client privilege”. See ¶17. This interlocutory appeal by Nationwide unfortunately caused a 16-month delay in the case. ■



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# 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.*

## **Sonia Newman v. Dawn Farrington, et al.**

**Type of Case:** Motor Vehicle Crash

**Settlement:** \$425,000.00

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

**Defendants' Counsel:** Jonathan Philipp, Esq.

**Court:** Ashtabula County Common Pleas Case No. 2017-CV-193, Judge Thomas Harris

**Date Of Settlement:** October 4, 2017

**Insurance Company:** Zurich

**Damages:** Herniated cervical disc, and migraine headaches

**Summary:** Ms. Newman was driving in Ashtrabula County when Defendant Farrington failed to yield causing a collision. At the time of the crash, Defendant Farrington was operating a company car for the nursing home management company she was employed by. Ms. Newman was employed as a UPS driver and could not return to work due to her herniated disc, migraines, and resulting physical/cognitive inabilities post-crash.

**Plaintiff's Expert:** Withheld

**Defendants' Expert:** Withheld

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## **Pre-Suit**

**Type of Case:** MVA Personal Injury

**Settlement:** 100K (policy limits), waiver of 5K MedPay lien by Farmers

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

**Defendants' Counsel:** None

**Court:** N/A

**Date Of Settlement:** September 30, 2017

**Insurance Company:** State Farm, Farmers (MedPay)

**Damages:** Whiplash with vertebral artery dissection

**Summary:** A moderate impact MVA with whiplash injuries became far more serious when the injured driver experienced mini-strokes 45 days post-collision. Imaging revealed an occluded vertebral artery, likely from traumatic origin (whiplash).

**Plaintiff's Expert:** Dr. Paul E. Collier, Sewicky, PA (Board Certified Vascular Surgeon)

**Defendants' Expert:** Unknown, but was reviewed externally of the carrier.

## **John Doe, Administrator v. John Foe, Inc., et al.**

**Type of Case:** Dental malpractice

**Settlement:** \$850,000.00

**Plaintiff's Counsel:** David A. Herman, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5209

**Defendants' Counsel:** Withheld

**Court:** Withheld

**Date Of Settlement:** September 2017

**Insurance Company:** Withheld

**Damages:** Wrongful death damages to the parents for the loss of their 33-year old daughter

**Summary:** Plaintiff's decedent sought care from an oral surgeon to repair an oral sinus fistula which had developed after having one of her teeth pulled. The procedure was done under a cocktail of anesthetic medication. The defendant deviated from the standard of care by administering too much anesthetic medication too quickly and the patient stopped breathing. The medication error led to an anoxic brain injury and eventual death.

**Plaintiff's Experts:** Michael Lee, DDS (Oral Surgery); and Martin Dauber (Anesthesia)

**Defendants' Expert:** Withheld

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## **Logan v. The Moreland Building**

**Type of Case:** Premises Liability

**Settlement:** \$1,005,000.00 (policy limits + med pay)

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

**Defendant's Counsel:** Todd Haemmerle

**Court:** Cuyahoga County Common Pleas Case No. CV-17-877593, Judge Nancy M. Russo

**Date Of Settlement:** September 2017

**Insurance Company:** Motorist Mutual

**Damages:** Open fracture of the right patella requiring multiple surgeries

**Summary:** Plaintiff was a tenant at Defendant's apartment building. While attempting to exit the building from the outside staircase, several stairs collapsed under his weight causing him to fall 8-10 feet to the ground.

**Plaintiff's Experts:** Richard Zimmerman (Architect); Alex Constable (Economist); and Robert Wetzal (Orthopaedic Surgeon)

**Jose M. v. Anonymous Salt Spreader Manufacturer.**

**Type of Case:** Product Liability  
**Settlement:** \$3,150,000.00  
**Plaintiff's Counsel:** David R. Grant and Frank Gallucci III, Plevin & Gallucci Co., L.P.A., (216) 861-0804  
**Defendant's Counsel:** Withheld  
**Court:** Cuyahoga County Common Pleas Court  
**Date Of Settlement:** August 21, 2017  
**Insurance Company:** Catlin and Chubb  
**Damages:** Above the elbow amputation of dominant arm

**Summary:** Plaintiff's arm was traumatically amputated when he reached over a hydraulically-powered auger of an under tailgate salt spreader. Plaintiff argued the spreader was defectively designed due to lack of guarding along top of spreader and also inadequate warning and instruction. Defendants argued it was guarded as well as it could be without entirely defeating its usefulness and that Plaintiff misused it or assumed the risk of injury by leaving it turned on.

**Plaintiff's Experts:** Brian O'Donel, P.E. (Mechanical Engineer); Michael Wogalter, Ph.D. (Human Factors and Warnings/Instructions); Kevin Malone, M.D.; Kyle Chepla, M.D.; James Medling, Ph.D.; Pamela Hanigosky, RN, BSN, CLCP; Mark Anderson (Vocational); and Alex Constable (Economics)  
**Defendant's Experts:** Dennis D. Skogen, MSME, PE; and Bruce Growick, Ph.D. (Vocational)

.....  
**John Doe v. ABC Hospital**

**Type of Case:** Medical Negligence  
**Settlement:** \$9,000,000.00  
**Plaintiff's Counsel:** John Lancione, The Lancione Law Firm, 619 Linda Street, Suite 201, Rocky River, Ohio 44116, (440) 331-6100, and Jesse Reiter, Reiter & Walsh  
**Defendant's Counsel:** Confidential  
**Court:** Confidential  
**Date Of Settlement:** July 2017  
**Insurance Company:** Confidential  
**Damages:** Cerebral Palsy

**Summary:** Mother of baby was scheduled for elective cesarean section due to previous cesarean section. She presented to hospital one day before scheduled c-section with severe abdominal pain and an abnormal electronic fetal monitor strip. Doctor and nurses ignored symptoms for hours. Mother suffered uterine rupture resulting in baby suffering severe brain damage.

**Plaintiffs' Experts:** Laura Mahlmeister, RN; Max Wiznitzer, M.D.; and Thomas Rugino, M.D.  
**Defendants' Experts:** None identified

**Kim A. Roberts v. Pilot Travel Centers, et al.**

**Type of Case:** Truck v. Pedestrian  
**Settlement:** Confidential  
**Plaintiff's Counsel:** Jordan D. Lebovitz, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300  
**Defendants' Counsel:** Withheld  
**Court:** Montgomery County Common Pleas Case No. 2015 CV 03730, Judge Timothy N. O'Connell  
**Date Of Settlement:** July 31, 2017  
**Insurance Company:** The Cincinnati Ins. Co.

**Damages:** Plaintiff suffered a crushed aorta, bilateral mandible fractures, clavicle fractures, and various soft tissue injuries to his arms and chest

**Summary:** Plaintiff, an over-the-road truck driver, was parked at a Pilot Travel Center truck stop near Dayton, Ohio for an overnight rest stop. Around 2:00 a.m., he left his truck to go into the facility to use the restroom. As plaintiff was walking across the parking lot, defendant truck driver, operating a loaded tractor-trailer, made a U-turn upon leaving the weigh station, and hit the plaintiff, seriously injuring him. Suit was initially filed against the truck driver, the truck driver's employer (Continental Express, Inc.), and the Pilot Travel Center. The claim against Pilot Travel Center was for negligent failure to provide sufficient lighting, but, following discovery, that claim was voluntarily dismissed and the case proceeded solely against the truck driver and Continental Express. These defendants argued that the plaintiff's comparative negligence was the proximate cause of his injury. Shortly before trial, the case settled for an undisclosed amount.

**Plaintiff's Experts:** William A. Tyndall, M.D.; Thomas Franz, M.D.; James B. Crawford; Harvey Rosen; and Roger Allen  
**Defendants' Experts:** Dan Aerni; David Hannallah, M.D.; and John Mitakides, DDS

.....  
**John Doe v. ABC Carrier**

**Type of Case:** Truck v. Pedestrian  
**Settlement:** Confidential  
**Plaintiff's Counsel:** Jamie R. Lebovitz and Jordan D. Lebovitz, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300  
**Defendant's Counsel:** Withheld  
**Court:** Federal court  
**Date Of Settlement:** 2017  
**Insurance Company:** Withheld  
**Damages:** Comminuted fractures of the distal humerus and distal ulna with bone loss



**Summary:** Plaintiff, a tow truck operator, while outside of his vehicle, was struck by a commercial box truck while attempting to load a disabled vehicle on the side of a roadway. Defendant disputed whether Plaintiff was inside the fog line and within the lane of travel while utilizing his tow truck equipment when struck; however, sufficient evidence proved that Plaintiff was outside of the fog line and not in the truck driver's lane of travel.

**Plaintiff's Expert:** James B. Crawford; J. Robert Anderson, M.D. (Orthopaedic Surgeon); Jacquelyn Vega Velez (Vocational Rehabilitation Specialist); and Harvey Rosen

**Defendants' Expert:** None

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**NOTE:** The following verdict was inaccurately reported in the Spring 2017 issue of the CATA News as a settlement when, in fact, it was a verdict.

**Kaylee Pritchett v. Ann Jones, et al.**

**Type of Case:** Rear end auto crash

**Verdict:** \$75,000.00

**Plaintiff's Counsel:** Kenneth J. Knabe, Knabe, Brown & Szaller, (216) 228-7200), and Allen C. Tittle, Tittle Law LLC, (216) 308-1522

**Defendants' Counsel:** Jay Hanson (for Jones); Megan Stricker (for Westfield on UIM)

**Court:** Cuyahoga County Common Pleas Case No. CV-15-844632, Judge Michael P. Donnelly

**Date Of Verdict:** November 3, 2016

**Insurance Company:** Tortfeasor-American Family Insurance & UIM-Westfield Insurance

**Damages:** Bulging Cervical Disc; No economic damage submitted

**Summary:** Plaintiff rear ended. Initially treated at ER, and attended one PT before 6 months delay in any further treatment. Tortfeasor's carrier offered \$2,500.00. Tortfeasor's policy limits were \$50,000.00

**Plaintiff's Expert:** Dr. Patrick McIntyre (Pain Management)

**Defendants' Expert:** Dr. Manuel Martinez (Orthopedic Associates) ■



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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.

Name \_\_\_\_\_

Firm Name: \_\_\_\_\_

Office Address: \_\_\_\_\_ Phone No: \_\_\_\_\_

Home Address: \_\_\_\_\_ Phone No: \_\_\_\_\_

Law School Attended and Date of Degree: \_\_\_\_\_

Professional Honors or Articles Written: \_\_\_\_\_

Date of Admission to Ohio Bar: \_\_\_\_\_ Date Commenced Practice: \_\_\_\_\_

Percentage of Cases Representing Claimants: \_\_\_\_\_

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

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

Date: \_\_\_\_\_ Applicant: \_\_\_\_\_

Invited: \_\_\_\_\_ Seconded By: \_\_\_\_\_

President's Approval: \_\_\_\_\_ Date: \_\_\_\_\_

**Please return completed Application with membership fee to: CATA, c/o Todd E. Gurney, Esq.**

First Year Lawyer Dues: \$28

New Member Applications received before July 1<sup>st</sup>: \$125

New Member Applications received on or after July 1<sup>st</sup>: \$75

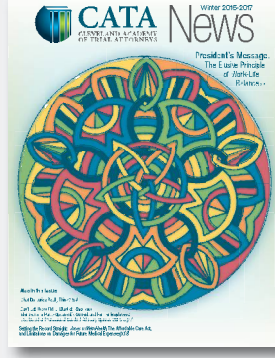
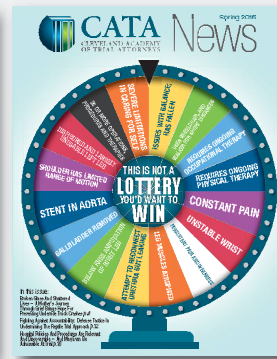
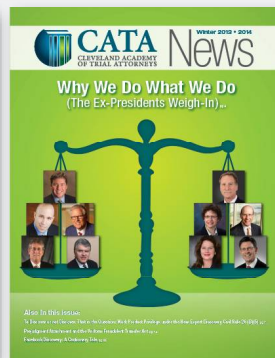
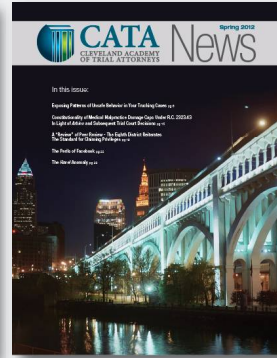
(Reduced mid-year rates do not apply to Current Members. Current Members remain responsible for annual dues (\$125) regardless of when payment is received.)

**The Eisen Law Firm Co., L.P.A.  
1300 E. 9<sup>th</sup> St., Suite 1801  
Cleveland, Ohio 44114**

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Winter 2017-2018

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