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Cover design by Mary Szabados (drawing), Lillian Rudiy (concept), and Joanna Eustache (design execution).

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President's Message: Everyone Has A Purpose

by Christian R. Patno

Growing up in Vermont was a dream come true. Days were spent skiing, fishing, boating and hiking the Green Mountains. Summers were spent with my close family at our cottage on Lake Champlain or often at Cape Cod watching the surf crash for hours on end. As a child, my life was simple. It was uncomplicated. My father often worked several jobs in order to make ends meet. My mother, not unlike other mothers, made it her purpose to properly raise my sister and me, pushing us to be the best we could be in school, sports and music. And, when my father came home, his downtime was spent creating work projects around the house in which my mother, sister and I would all take an active role.

As a teenager, I first began to consider what the future held. Would I go to college in Vermont and work in the ski industry like my father did? Would I work in the service sector like most of my friends intended? Or would I leave the state for school and even potential employment outside of Vermont? Being multi-generational Vermonters, one would never actively consider leaving the state. These last words were sacrilege in my household.

Lucky for me, my sister Lisa first broke with tradition and went to college in New Hampshire for a degree in music performance. She was destined to become a music teacher since middle school. Music was her passion and teaching music to young children became her purpose. At the age of 55 she has only had one job and one professional purpose and she is fulfilled and energized now even more than when she started.

Unlike Lisa, it took years for my purpose to be found. I chose Union College because of their hockey program. I believed I would major in economics and dreamed of one day working on Wall Street. I received two Cs and immediately converted to political science. But then the next challenge arose: what am I going to do with a political science degree? My options were graduate school and teaching or law school. Graduate school seemed much more efficient since it was one year less, no bar exam and my student loan debt was exponentially mounting. I took the LSAT and only scored in the 50th percentile and this confused things for me even more. With such a poor score would I ever make it as a lawyer? My plan was to apply to multiple law schools hoping to get into one based upon my grades over my LSAT score. To my surprise, some obviously desperate schools accepted me and I then had the further task of choosing among them. Yet, after all these decisions I still had no purpose.

My father and I drove to Cleveland on a beautiful May day in 1987 and toured Case Western. It was more of a bonding adventure for us as opposed to ever honestly considering law school in Ohio. When we arrived, the flowers and trees were in bloom at the museum and the gardens. After experiencing East Coast aggressiveness for decades, the warmth and collegiality of the Midwest personalities was a breath of fresh air. I

made the decision to come to Cleveland for three years, enjoy some professional sports, and return to Vermont with my law degree. Yet, I still had no true purpose. My hope was to obtain a job at a law firm in Vermont and one day be able to pay off my ever-increasing student loans. In school, my grades were good but not the best. I would tape up and line my dorm room walls with rejection letters from law firm, after firm, after firm. I lost count after 70 and had literally covered all my walls.

Everything changed for me following my involvement with Ken Margolis and the CWRU Legal Clinic. I was provided with a client who needed help in a domestic relations matter. This ended up in Court on very contentious issues and eventually a story in the Plain Dealer referring to me as a "Legal Eaglet". It was at that point I began to realize my drive, passion and purpose was to represent individuals in Court. This spark was ignited by a legal clinic mentor who kindly advised me and helped me along the way. This then eventually evolved into personal injury, malpractice and death cases that still motivate, drive and fulfill me each and every day.

As a parent and as a legal mentor, the best advice I have ever given is to find something you love to do and then find a way to make a living doing exactly that. You will likely wake up most days energized and happy. There is nothing worse for your mental health than working in a job you dislike simply because it pays the bills. Fortunately for me, I have ended up with purpose and fulfillment I never realized existed and have worked along the way with colleagues many of whom have had similar experiences. And, along the way, I have met many wonderful people from all walks of life.

As my Presidency at CATA was about to arrive, I wanted to do something different with the organization and get back to roots similar to where it all began for me: working with Legal Aid, and eventually together with law students, where CATA members can help families most at risk to retain the stability of their home and avoid eviction. This new program will allow CATA members to represent clients in Housing Court alongside students and hopefully provide some of the students with the same type of opportunity and spark that was ignited in me over 28 years ago. My entry into injury trial work strangely began in the domestic relations court. My hope is to work in a partnership with Legal Aid where clients' interests are protected, CATA members are enriched, and future trial lawyers may be able to find purpose and fulfillment as many of us have.

For some like my sister, purpose for her came early and was focused. For others like me, it took time, good fortune and happenstance to develop. Time is our most valuable asset. There exists only a set amount of it. I would appreciate it greatly if some of us would take a part of our most valuable asset and donate it to Legal Aid. At the same time, I hope you will each be able to share your own story of purpose with a law student who may one day turn into a future trial attorney.■

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 2019 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 Art of Storytelling: The Power of a Story

by Pamela Pantages

I. Introduction

During a lunch break in jury selection, a courier from my office brings our trial materials into the courtroom. You know what I am talking about: the bankers boxes with the case file, pleadings, depositions, depo summaries, direct and cross outlines, motions in limine and responses, jury instructions, bench memoranda. There are also the large black vinyl zippered portfolio cases with time lines, enlarged exhibits, blow-ups of photographs, and anatomical drawings. My clients, watching the courier with interest, turn to me and say, "What's all this?" I say, "That's for our trial."

During the same break, the technical support team I have worked with for over a decade comes in with the tech support equipment. Tyler sets up his workstation near our trial table, erects the big screen, hooks up the projector to his computer, and uses duct tape to safely secure the plugs and cords. Tyler and I hug, and chat briefly. We confirm that we both have hard copy binders of Tyler's digital data bank, Bates-stamped from one to infinity. My clients, again watching with interest, again turn to me and say, "What's all this?" I say, "Meet Tyler. He's on our trial team."

There is something special about being a trial lawyer. I love it body and soul. What other profession so religiously, spiritually, meets and corresponds regularly to share our experiences – what's working, what isn't working, new ideas, great verdicts, justice deserved, justice earned?

Pages and pages have been written about trial lawyers as storytellers. Respectfully, we are more than storytellers. We are Cecil B. DeMille, Frank Capra, Steven Spielberg, Sidney Pollack, Jane Campion, Barbra Streisand, Francis Ford Coppola, Kathryn Bigelow, Martin Scorsese. Before the first day of trial, we have created an order of witnesses, summarized depositions, written direct and cross exam scripts, designed exhibits, prepped witnesses, edited and approved day-in-the-life videos, written and argued motions in limine, submitted proposed jury instructions, and written and choreographed opening statements.

We are more than storytellers. We are producers, directors, writers, cinematographers, editors, emcees and moral commentators.

II. Beginning, Middle and End

Every aspect of a trial should have a palpable *beginning, middle* and *end*. This construct simplifies the creation of everything. For example, voir dire *beginning:* introductions, breaking the ice, sharing your personal information, having jurors introduce themselves, sharing their personal information. Voir dire *middle:* discussion of legal issues, discussion of factual issues, smoking out strongly favorable/unfavorable jurors. Voir dire *end:* discussion of damages, discussion of juror rights, discussion of juror responsibilities.

The progression of everything – voir dire, opening statement, order of witnesses, direct exams, cross exams, closing argument and rebuttal should feel

orderly, and should make sense to the jury and to the court. An agreement with opposing counsel to allow defense witnesses out of order may be routine in some jurisdictions, but it disrupts the flow of your story, *and should be avoided whenever possible*.

III. Motions in Limine

Part of effective story telling is controlling the narrative. Motions in limine provide the opportunity to get control of that narrative weeks or months before the trial. Remember the basics of the rules of civil procedure. Only *relevant* evidence is admissible. But, not all relevant evidence is admissible. Relevant evidence is *inadmissible* if offered simply to turn the jury against the plaintiff or in favor of the defendant.

When considering what evidence should come in and what evidence should stay out, imagine your opponent's opening statement. What rosy defense talking points can you exclude even before she gets to stand up and speak? Go through the defendant's CV, look at his web page, check out his social media, Google him. Does he volunteer, work at a free clinic, or play in a rock band?

File motions in limine to exclude irrelevant evidence about the defendant offered to humanize him or to endear him to the jury. Evidence regarding his status in his family, his church or his community is irrelevant. In one of my trials, defense counsel pulled out all the stops during the defendant's direct exam, eliciting a lengthy and touching personal history. Lesson learned. In the next trial, I moved in limine to exclude any *irrelevant* evidence about the defendant: his missionary work, his long marriage, why he became a doctor, etc. I also moved to prevent defense counsel from introducing the defendant's family to the jury. Fortunately, we had an intellectually curious judge. "Why shouldn't the defense be permitted some leeway on this?" he asked. The issue, I suggested, was whether the defendant met the standard of care, not whether he is a good person. Reluctant to exclude *all* personal information about the defendant, the judge agreed with my reasoning and cautioned defense counsel. The judge did not allow defense counsel to introduce the defendant's family to the jury.

Consider other motions in limine concerning irrelevant information about the plaintiff. Medical records often include information about the plaintiff's social drinking, recreational drug use, smoking history and tattoos. Move to exclude bad conduct, bad relationships or documentary statements in evidence that will distract the jury from your real story.

IV. Demonstratives

Keep it simple. Demonstrative exhibits should be easy to put up and take down whether they are hard copy boards or digital projections. Demonstratives should highlight the memorable elements of the story. They should not require the jury's effort to see, read, understand or remember.

Is there a window of time central to the story? Create a simple time line placing the conduct of the *defendant* at its center.

Avoid technical language. Translate unfamiliar terminology into regular words or analogies easy for the jury to remember and repeat during their deliberations. Wherever possible, personalize your demonstratives to the plaintiff, using her name and photographs.

Finally, be familiar with the internet presence of the defendant and the defense experts. There may be artwork, diagrams, statistics, protocols or products on a defense-endorsed web page that ratifies your story.

V. Voir Dire

Going first is a big advantage. First impressions matter. A good storyteller easily and quickly connects with the listeners. Avoid the podium, scripts and reading glasses. Talk from your heart and not from a piece of paper. Be sincere. Use open body language and expressive hand gestures. Smile. Establish friendly eye contact. Move around. Talk to individual jurors. Use their names if you have them. Be polite and respectful. Thank each juror individually for their frankness, even if you do not like what they have said.

Give the venire the short, movie-trailer version of what your case is about. Omit some important facts so your story doesn't unfold all at once, ensuring a well-paced reveal over the course of the trial. Talk to the jurors about their jobs and responsibilities. Keep your ears open for their personal life experiences to weave into the themes in your story, revisiting them throughout the trial. Plan an orderly voir dire so that the discussion topics have a meaningful *beginning, middle* and *end*.

VI. Opening Statement - Point of View

The opening statement is our first opportunity to shine the spotlight on the defendant. David Ball teaches us that an effective opening statement aligns the defendant's conduct with the relevant rules. This approach immediately zeroes the jury's attention on the defendant – what he knew, when he knew it and what he did about it. The story should center on the rules and the defendant's duty to follow them. Construct the foundation of the opening statement from the perspective of the defendant's training, knowledge base and skill set (or lack of any of those). The imperative of opening statement is to waste no time getting down to focusing the jury's scrutiny on

the defendant and his actions *before, during* and *after* his tortious conduct.

Current research involving a listener's attention span suggests that we are becoming less patient with sagas and epics, and more attuned to telegrams and mini-bites of data. Use the fewest number of documents and words to tell the story. Remember that the jurors are strangers to your story and cannot absorb every fact in opening statement.

An opening statement should tell the story in present tense and active (not passive) voice. Choose your words carefully, using neutral descriptors. Avoid words that convey emotion, drama, hyperbole or judgment because these interfere with the jury's job of processing and sorting important facts. Avoid reference to "my client." No storyteller ever referred to the hero as "my client." It reminds the jury that you are a lawyer, and subverts your emergence as their storyteller.

PowerPoint is a helpful tool to minimize our reliance on a written script. Nevertheless, as a crutch, it distracts the jury's focus from you and your story. PowerPoint slides should be kept to a minimum. Backgrounds and fonts should be plain black or white – no distracting graphics or wallpaper. Words should be minimal. A juror who forgot his eyeglasses should still be able to absorb and digest a PowerPoint slide within a few seconds. If you cannot frame a PowerPoint slide within a few words, delete it. Never turn your back on the jury to read them the PowerPoint.

VII. Plaintiffs' Case in Chief

Baseball analogies are a great way to understand good story telling at trial. For example, I think of the ordering of the plaintiffs' trial witnesses as the best major league batting line up of all time. In Cleveland, my hometown and one of the greatest baseball cities in the world, that would be the 1995 Indians. Batting first is Kenny Lofton, reliable, fast and a smart base runner. Second, Omar Vizquel, also reliable, trustworthy, cool-headed. Third, Carlos Baerga, and fourth, Albert Belle had 50 home runs that season but, while a cannon, was notably a very loose one. The lower half of the line-up was nearly as strong, in particular Jim Thome, who averaged .314 that season.

Like a powerful starting line-up, the order of witnesses is critical in a primacy/recency way. Think again of the *beginning/middle/end* construct. The best witnesses appear in the beginning of your case, the weaker witnesses in the middle, and memorable witnesses at the end of your case to close strong before the defense gets started.

The first witness should set the tone for your case. Maybe a family member who best articulates who the plaintiff was before and after the injury. Or, maybe the expert witness with personality, persuasion and international credentials. Build the momentum through each witness's unique role in your story. Identify which witnesses will do the reveal of the material facts you intentionally omitted from voir dire and opening statement, and order those witnesses in such a way to keep your jury engaged, active and involved.

I have, for the most part, stopped calling the defendant on cross exam in my case in order to have maximum control over how we tell our story. Once, a smart defense lawyer coached his client to repeat one or two catch phrases during my cross exam in my case in chief, even if the catch phrase was wildly unresponsive to my question. I spent a large part of my cross exam trying to focus on the great admissions I had gotten from the defendant at his deposition -- when he was less prepared. Later, in the defense case when the defendant took the witness stand again, he'd already had a practice run in my case. He and his lawyer spent much of their direct exam softening his prior admissions, and explaining what he really meant to say. By not calling the defendant in the plaintiff's case in chief, we ensure that our story has already firmly taken shape in the jury's mind when they finally hear from the defendant in the defense's case.

VIII. Direct Exam - Edit, Edit, Edit

Not to beat the same drum, but keep the *beginning/middle/end* construct in mind when writing a direct exam. Each direct exam should be tightly scripted. By that, I do not mean read the witness your questions off a piece of paper in front of the jury. What I mean is draft the direct exam, put it aside, and then come back and read it some time later. Does it flow? Does it make sense? Is it interesting? Will the jury understand why you wanted them to meet this witness? Will the jury hear what the witness says that is relevant to your story?

Some of us were taught as young lawyers to devote the beginning of a witness's direct exam to her biography. This is especially true of expert witnesses. At a recent trial, the defense lawyer and his expert spent a good 15 minutes of the direct exam on the content of the expert's CV, talking about hospital committees, editorial committees, and even a tennis club committee the expert enjoyed. It was a long, boring way to introduce a witness to the jury who were largely not paying attention. The first 15 minutes of every direct exam should be as interesting as the first 15 minutes of *NCIS* or *Law & Order SVU*. If it is not, it needs editing.

We were also taught that leading questions are for cross exam, and open-ended questions are for direct exam. But, too many open-ended questions or questions that are too broad are not good

for strong storytelling. Think of the funnel approach but invert it. Introduce a new topic area with your witness with simple yes/no questions, followed by focused open-ended questions. Your witness can give concise, meaningful responses, and your story unfolds in a clear, understandable way. For example, question: "Did you drive your wife to the hospital?" Answer: "Yes." Question: "About what time did you get there?" Answer: "Around 11:00 p.m." Question: "What time did you first see the defendant?" Answer: "Not until around noon the next day." Question: "Do you remember what you talked about?" Answer: "I will never forget that conversation." Question: "Tell us about it." Prep your witnesses in advance, not only on the substance of their testimony, but also on the presentation. A simple "yes" or "no" response on direct exam followed by an intentional pause is an effective way of building storytelling momentum. In particular, the beginning and end of every direct examination should be powerful and unforgettable.

IX. Cross Exam - Edit, Edit, Edit

My biggest shortcoming in cross-examination is editing. The strongest cross-examination should be short as possible. Short questions, short answers, short exam. Like direct examination, the beginning and end of every cross-examination should be powerful and unforgettable.

X. Closing Argument/Rebuttal

The ending of the best story has a message, a lesson, a moral. Closing argument is more than a recap of the facts and evidence. Rather, it is confirmation of the most compelling issues in this plaintiff's story. What message does the story convey that will enable the jury to recognize the case's significance to themselves, to their families and to their community? The answer to the question often lies in a betrayal of a universal trust or obligation. Telling a story of betrayal of a trust activates a jury's sense of justice and protection. But, there should also be a strong message of hope. Hope is a great motivator for a jury and should be incorporated into closing argument in a positive, optimistic way.

XI. Some Final Thoughts On Storytelling

Hollywood has given us some iconic lawyers. Gregory Peck wanting us to walk around in another man's skin. Denzel Washington asking us to "talk to me like I'm a six year old." Tom Cruise demanding the truth. Paul Newman's dogged persistence. Joe Pesci's refusal to be bullied into being anyone other than his true, *pure* self. These are memorable characters because their stories timelessly embody a universal need, aspiration or moral -- a common thread in every trial. ■

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Confidentiality Provisions In Settlement Agreements: Are They Ethical?

by Todd E. Gurney and Brian N. Eisen

You've reached an agreement to settle your case. Well, at least you've agreed upon a number. Then, the defense lawyer inevitably asks for "strict confidentiality." You agree, but what does that mean?

As an ethical matter, settlement agreements may include confidentiality provisions that prevent each party from disclosing the existence of the settlement agreement, the terms and conditions of the agreement, any monies paid to the plaintiffs, and other confidential or non-public information. The lawyers in the case are obligated to their clients to maintain the confidentiality of the settlement agreement under Professional Conduct Rules 1.6 and 1.9.

In nearly every personal injury case, however, the defense lawyer will seek additional confidentiality provisions that specifically prevent the plaintiff's lawyer (not just the client) from making any public announcement, comment, or communications concerning the case to the media or through lawyer advertising, including publicly available information contained in a court record. For instance, this is the type of language typically included in draft settlement agreements from defense lawyers:

> Releasor, her attorneys and law firm shall keep this Settlement, **the facts and allegations of this case, all claims,** and all the terms, conditions, and amounts of this Confidential Release and Settlement Agreement strictly confidential. Releasor, her attorneys and law firm shall not expressly or implicitly reveal or disclose the fact of this settlement or the terms, conditions, and amounts of this Confidential Release and Settlement Agreement, or any other confidential information, whether as an anonymous case report, using fictitious names or pseudonyms, in generic form or otherwise, to any person or entity, including but not limited to legal trade journals, reporting services, the media, and the internet, and they shall not take any action or inaction calculated to lead to such a revelation or disclosure by another. Releasor, her attorneys and law firm shall not publish or disseminate these matters in newsletters, publications, web sites, or marketing materials, either explicitly or as an anonymous case report, using fictitious names or pseudonyms, in generic or otherwise.

This is not what I had in mind when I agreed to keep the settlement confidential. But what leverage do I have to negotiate the terms of this provision? In the past, I have argued that the facts and allegations in the Complaint and other documents filed with the court are a matter of public record and, therefore, I have no ability to keep that information confidential. I also have informed the defense lawyer of ethics opinions from other states, including one from Washington D.C. (Opinion 335) that states: "A settlement agreement may not compel counsel to keep confidential and not further disclose in

promotional materials or on law firm websites public information about the case, such as the name of the opponent, the allegations set forth in the complaint on file, or the fact that the case has settled. Such conditions have the purpose and effect of preventing counsel from informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases."

Unfortunately, ethics opinions from other states are not controlling authority in Ohio, and the defense lawyer would (almost) always insist on strict confidentiality. Recognizing that my desire to publish information about the case and settlement on my website and in marketing materials may benefit me, but not necessarily my client, I was reluctant to push back here as I did not want to create a conflict of interest with my client.

Everything changed in June 2018 when the Ohio Board of Professional Conduct issued Advisory Opinion 2018-3. This ethics opinion provides that **a prohibition on a lawyer's disclosure of information contained in a "court record" is an impermissible restriction on the lawyer's right to practice.**

The Board noted in the Opinion that the term "court record" has the same meaning as "case documents" filed with a clerk of court or submitted with a court as those terms are defined in Superintendence Rule 44(B)-(C)(2). "Case document" means a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices…" Sup.R. 44(C)(2).

Since potential clients have the ability to search court records for lawyers who have brought similar lawsuits against the same defendants, the Board found that prohibiting the lawyer from using the same information directly interferes with the lawyer's ability to advertise and market his or her services in a manner consistent with the Rules of Professional Conduct. And since advertising of a lawyer's services and the solicitation of clients is an integral part of the practice of law, the Board concluded that this may not be restricted through a private settlement agreement.

The Board recognized that the intent of a settlement agreement provision prohibiting communication of information contained in a court record is to limit the plaintiff's lawyer's ability to attract new clients based on the lawyer's prior experience against a particular defendant. In order to protect the public's unfettered ability to choose lawyers who have the requisite background and experience to assist in pursuing their claims, the Board held that requiring lawyers to limit their future communication of information contained in court records, including their participation in a case, serves as a restriction on their right to practice law and advertise their services – a restriction that is contrary to Professional Conduct Rule 5.6(b). The Board concluded, therefore, that it is unethical for a lawyer to participate in a settlement agreement that includes a restriction on the lawyer's right to disclose information about the case that is included in a court record.

What is the practical implication of this Advisory Opinion? Plaintiffs' lawyers cannot be required to keep confidential the facts of a case or any information contained in any pleading, motion, or exhibit filed with the court, including depositions, discovery responses, medical records, etc. In fact, it is unethical for a defense lawyer even to offer a settlement agreement that requires the plaintiff's lawyer to keep this information confidential.

Does this also apply to information contained in "case documents" filed with the Probate Court? A claim involving a minor or a wrongful death cannot be settled without probate court approval, and the Probate Court will not approve a settlement without knowing the facts of the case, the identities of the parties, and the amount of the settlement. Indeed, this information is required in the Application to Settle the claim, which must be filed with the Probate Court. Accordingly, this information is contained in a "case document" or "court record."

So, if you have settled a claim involving a minor or wrongful death, can you publish on your firm's website the information in the case documents filed with the Probate Court, including the facts and allegations of the case, as well as the identities of the parties and the amount of the settlement? According to the Opinion, the answer appears to be yes. Doing so certainly would promote the goal of protecting the public's unfettered ability to choose lawyers who have the requisite background and experience to assist in pursuing their claims. It also would provide more transparency, and hopefully improve patient safety. However, the potential ramifications of this Opinion are not yet clear.

The Opinion also addresses another important question: What happens when a lawyer is faced with a situation where a client's willingness to settle is heightened when a larger settlement is conditioned on inclusion of a confidentiality provision that amounts to a restriction on the lawyer's right to practice? According to the Opinion, the lawyer should advise the client that he or she is ethically prohibited

from participating in the settlement. If the client insists upon accepting the settlement with the condition, the lawyer must withdraw from the representation.

Say what? The plaintiff's lawyer must withdraw? After spending years litigating the case and finally reaching a settlement, the plaintiff's lawyer must withdraw – before the money is paid – because the defense lawyer has violated the ethical rules? This does not seem fair, but it is what the Opinion says.

On a related note, it is important to remember that when you are negotiating the confidentiality provision, you should not ask for more money in exchange for confidentiality because it may subject your client to significant tax liability. Personal injury settlements normally are not taxable (26 U.S.C. 104(a)(2)), but income received as consideration for a confidentiality agreement is taxable. *See Amos v. Commissioner of Internal Revenue*, T.C. Memo. 2003-329, 2003 WL 22839795, (U.S. Tax. Ct. Dec. 01, 2003) (No. 13391-01).

To avoid any taxation issues, tell the defense lawyer that confidentiality must be required of both sides, or of neither, and that no monetary consideration will be paid or accepted for the confidentiality provision. And make sure this is written in the settlement agreement. You can even provide this sample language to the defense lawyer:

> The parties agree to keep the terms and conditions of this settlement confidential, except as incident to the effectuation of its terms or as incident to obligations imposed by law. The parties acknowledge that this confidentiality provision is a material term of their agreement to settle this matter, and this provision is contractual in nature and not a mere recital. The parties acknowledge that no portion of the settlement amount represents consideration for the mutual promise of confidentiality. Rather, the parties expressly have agreed that each other's reciprocal confidentiality covenant is the sole consideration given in exchange for that of the other.

The bottom line is there's a lot more to a settlement than just agreeing on a number. Don't fall for the "you're the only lawyer who fights about this stuff" line. The terms of the settlement agreement are negotiable, so don't be afraid to negotiate! ■

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Why Damage Cap Exceptions Must Extend To All Claims Arising From A Catastrophic Injury, Including Derivative Claims – A Statutory Analysis

by Brenda M. Johnson

Section 2315.18 of the Revised Code imposes caps on noneconomic damages in tort actions, except where the injury at issue is sufficiently catastrophic. In those cases, R.C. § 2315.18(B)(3) provides that no limitation on noneconomic damages applies. The injured person, however, is seldom the only person with tort claims arising from those injuries. Family members have their derivative claims, which raises the question of whether the caps on noneconomic damages are lifted as to those claims as well. The statutory language is not expressly clear on the issue, and there's no case law offering any guidance. But the most reasonable interpretation of the statute is that the cap exception is not limited to the injured person alone, but extends to *all* persons who have claims as a result of those injuries.

As with any exercise in statutory interpretation, the analysis must begin with the language of the statute itself. Our focus is on R.C. § 2315.18(B), which is quoted in full below with an emphasis on certain key terms:

> In a *tort action* to recover damages for injury or loss to person or property, all of the following apply:
>
> (1) There shall not be any limitation on the amount of compensatory damages that represents the economic loss of *the person who is awarded the damages* in the tort action.
>
> (2) Except as otherwise provided in division (B)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the *plaintiff* in that tort action to a maximum of three hundred fifty thousand dollars for *each plaintiff* in that tort action or a maximum of five hundred thousand dollars for each *occurrence* that is the basis of that *tort action*.
>
> (3) There shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a *tort action* to recover damages for injury or loss to person or property if the noneconomic losses of the *plaintiff* are for either of the following:
>
> (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
>
> (b) Permanent physical functional injury that permanently prevents *the injured person* from being able to independently care for self and perform life-sustaining activities.

Of the highlighted terms, two are defined in the statute. "Tort action" is defined as "a civil action for damages for injury or loss to person or property," with the exception of medical claims.[1] "Occurrence" is defined as "all claims resulting or arising out of any one person's bodily injury."[2] Other key terms, like "plaintiff" and "injured person," are not defined, but under standard principles of statutory interpretation, they should be "read in context and construed according to the rules of grammar and common usage."[3]

Applying these standards, it is clear that (B)(2) sets forth caps that are designed to apply separately to each individual plaintiff who has a claim arising from a single person's physical injuries, subject to a maximum per-occurrence cap, and that division (B)(3) removes these caps with respect to *all* claims arising from a single person's physical injuries if the injuries satisfy (B)(3)' s requirements.

Division (B)(2) specifically links caps on noneconomic damages to the damage claims of individual plaintiffs, while at the same time applying a separate overall cap for each "occurrence," except as provided in division (B)(3). "Occurrence," as noted above, is a term that is specifically defined to include "all claims" arising from "any one person's bodily injury." Division (B)(3) operates to lift the cap, providing that there "shall not be any limitation" on noneconomic damages recoverable in a "tort action . . . if the noneconomic losses of the plaintiff" arise from injuries that satisfy the requirements of the statute. Division (B)(3), however, does not specify that the plaintiff's noneconomic losses must arise from physical injuries sustained directly by that plaintiff in order for the caps to be lifted. Instead, to the extent this division of the statute speaks to the issue at all, it references "the injured person" rather than "the plaintiff" or "a plaintiff."

In light of this, the only reasonable interpretation of Division (B)(3) is that it is designed to remove caps on noneconomic damages for derivative claims, such as loss of consortium, arising from injuries that satisfy the requirements of that division, and not just those of the injured person alone. To interpret the statute otherwise would violate basic principles of statutory interpretation, and would lead to illogical results.

If the statute is interpreted in a way that would lift caps on noneconomic damages available to the individual who sustained injury, while at the same time imposing caps on the derivative claims arising from the same injury, a situation could arise where the plaintiffs with derivative claims arising from the worst sorts of injuries would be prevented from recovering any noneconomic damages at all.

Consider the following scenario: An individual with a spouse and children sustains physical injuries that satisfy the requirements of division (B)(3). Assume that in the ensuing tort action, which would by necessity have to include the derivative claims of the spouse and children, a jury awards the injured individual noneconomic damages that exceed $500,000, and also awards noneconomic damages to the spouse and children. Division (B)(3) would apply to the injured individual's noneconomic damages, which would be unlimited and would exceed $500,000. If the caps in division (B)(2) were to be applied to the derivative claims of the spouse and children under these circumstances, a trial court would either have to ignore division (B)(2)'s per-occurrence maximum cap of $500,000, or it would have to enter a judgment awarding no noneconomic damages whatsoever to the family of the injured party in a case where their noneconomic damages are likely to be profound. Standard principles of statutory interpretation, however, require that "all words [in a statute] should have effect and no part should be disregarded."[4] Thus, there is no way to apply caps to some, but not all, claims arising from a single injury without risking a scenario in which the families of catastrophically injured people receive no compensation whatsoever for their noneconomic injuries.

This would be an absurd result, and it would violate basic principles of statutory interpretation, as well as the intent of the statute itself. It is "an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences."[5] Section 2315.18 clearly was designed to allow for the unlimited recovery of noneconomic damages in the most tragic of cases. Interpreting this statute in a manner that would deprive family members of catastrophically injured people of a full recovery would be both unreasonable and absurd.

A similar analysis applies to R.C. § 2323.43, which limits noneconomic damages in medical cases. The default tier of damage caps in R.C. § 2323.43(A)(2) cannot be applied to derivative claims arising from injuries that satisfy the requirements of division (A)(3) of that section without creating an unreasonable tension between the per-occurrence damage caps in division (A)(2) and the higher caps in division (A)(3). ■

End Notes

1. R.C. § 2315.18(A)(7).
2. R.C. § 2315.18(A)(5).
3. R.C. § 1.42.
4. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health,* 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 19, 773 N.E.2d 536; see also R.C. § 1.47(B).
5. *State ex rel. Dispatch Printing Co. v. Wells,* 18 Ohio St.3d 382, 384, 481 N.E.2d 632 (1985).

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Protecting Your Elderly Client's Recovery With The Help Of An Elder Law Attorney

by Rachel Kabb-Effron

Sometimes it seems that it is open season on the elderly in nursing homes. Tort reform makes it harder and harder to make a case for a person who, although wronged, is considered a lower value case because the damages are lower. To invest the time and money in a case only to watch that recovery go to Medicaid or worse, the nursing home that wronged the person, makes evaluating that case painful. Taking nursing home negligence cases can be difficult but they are the only way to compel nursing homes to improve their care. That goal coincides directly with those of us practicing elder law. Elder law can help, post recovery, to protect both the person who was wronged and the recovery. There are tools to help preserve the recovery in the elder law practitioner's arsenal.

So, how does an elder law practitioner look at a case? To do that, let's set some parameters. Elder law attorneys can help protect net proceeds to the client. Subrogation is an entirely different issue. When we look at a case, there are several tools. The first is spend down, the second is permissible transfer, and the third is improper or restricted Medicaid transfer.

Spend Down

What does a person in a nursing home need? Many foolishly assume that all their needs are provided by Medicaid. If that were true, the resident wouldn't be your client as care would be perfect without extra advocacy. All nursing home residents need dignity items. Dignity can be found in simple things like room décor or a new television or a private room (which can be prepaid). The clothes that are lost in one month in a nursing home would clothe a small village. Perhaps the person will need specially adapted equipment or a new wheelchair that would not be paid by Medicare. Perhaps they can leave the nursing home entirely with the funds received and go to an assisted living facility that they would not be able to afford without the settlement. Another common spend down need is prepaying the funeral of both the client and their spouse. Granted, spend down is relatively limited, but it should be considered.

Another consideration with spend down is if there is a spouse in the community, the money can be transferred to the spouse and used for paying off a mortgage or other debts. While debts can be paid down for the institutionalized person, caution is needed to pay off debts with funds that can be used for care.

Another way to spend down is for the client to fund a pooled trust. A pooled trust is a type of special needs trust used for those over 65 years of age. Many attorneys are familiar with Special needs trusts for younger people such as self-settled (d)(4)(A) trusts which are so named because of 42 U.S.C. 1396p(d)(4)(A). The pooled trust is prescribed under the law as an exempt trust under 42 U.S.C. 1396p(d)(4)(C). The pooled trust is named because the trust "pools" the money of multiple beneficiaries into a non-profit fund. Each beneficiary has their own account, but a non-profit manages the global fund. The benefit of the pooled trust is that the funds in the trust do not count against the $2,000.00 individual asset limit for Medicaid but can be used for anything that is for the benefit of the individual on Medicaid subject to the non-profit trustee's discretion. It is relatively simple to set up the pooled trust and the management and set up costs are minimal. The only downside of the pooled trust is that, upon the death of the client, the funds either go back to the State of Ohio, are retained by the trust, or are payable

to a contingent beneficiary. The pooled trust can be set up for the client or their spouse.

The pooled trust is a good tool for smaller recoveries. So long as the pooled trust is funded by the end of the month of the recovery or at least by the month after, the funds can be protected and used for the client during the remainder of their life.

Permissible Transfers

Many times, it is assumed that all transfers from a Medicaid recipient to someone else are improper. This is not true. First, the client can transfer assets to a disabled adult child without any penalty. Medicaid considers any adult child to be disabled if they are receiving Social Security disability benefits, Veterans disability benefits, or even long term disability payments from an employer. If the client is on Supplemental Security Income (SSI), then the elder law attorney must be careful to avoid disqualifying the child from benefits themselves.

Additionally, the child who is not working due to disability can even be *pending disability* and transfers are considered permissible. We often encourage the children of the client if they are disabled but have put off applying for disability to do so immediately.

Impermissible Transfers

Medicaid and the elder law bar have been in a cat and mouse game for decades. Congress or State legislatures make rules and the attorneys interpret the laws. Medicaid is a federal program administered the States. In Ohio, it is administered by the Ohio Department of Job and Family Services "ODJFS". While centralized within the Administrative Code in OAC § 5160:1-3, each county is slightly different.

Way back in the "olden days" of Medicaid, there were financial eligibility criteria but no policing whether someone transferred everything and applied for Medicaid the next month. It didn't take long for Medicaid to get wise to that and impose a "look back" to see if an applicant or their spouse transferred their assets. The first look back was 36 months. Currently, it is 60 months. What that means is that the ODJFS is looking back in the client's bank statements to see if they transferred anything. If they find a gift in the "look back," they penalize it. The penalty is a period of ineligibility for Medicaid. The penalty is calculated by taking the amount of the gifted funds and dividing it by a divisor based on the average private pay rate of nursing homes in Ohio (currently $6,570.00/month) set by the State. The penalty starts on the date the applicant is otherwise eligible for Medicaid.

Most of our clients transfer assets within the 5 year look back and the transfer is disclosed. In its simplest summary, the rule is that if a client transfers assets, Medicaid will not pay for long term care services either at home or in a facility for a set number of months. Conversely, if you transfer outside of the 60 months, then an applicant cannot be penalized by law because of that transfer.

The penalty is not a criminal one and Medicaid does not seek recovery from the person who received the gift. The penalty is that ODJFS will not pay for long term care either at the nursing home or for in home care. When the nursing home will not get paid, that acts as a strict penalty for an applicant since they will either need to pay or be discharged.

Like all laws, there is the rule and then there are the exceptions. For example, say your client receives a net settlement of $100,000.00. If the client immediately decides to transfer it, the client will have to stop receiving Medicaid and pay for 15.22 months ($100,000.00 divided by $6,570.00). Unfortunately, the nursing home is $10,000.00 and the income is $2,000.00 so the $8,000.00 month shortfall will not be covered by the gift.

What is the solution?

The elder law specialist will come up with an amount that can be gifted and an amount to fund either an annuity or a pooled trust to cover the penalty period. Taking the example above, the client would gift $40,000.00 which would create a 6.5 month penalty period and then the client would fund a pooled trust with the other $60,000.00 to pay for the cost of care during that 6.5 month penalty period. The nursing home is paid by the pooled trust together with the income and the gift penalty is mitigated. Everything is disclosed to Medicaid and the client goes back on Medicaid after the 6.5 months is over. They will even have a bit left in the pooled trust for other incidentals.

What are some of the pitfalls for the trial attorney?

Pitfall 1 - Structured settlements

Many personal injury attorneys, upon settlement, seek to create a structured settlement for a variety of reasons. It may seem attractive as an option to avoid the settlement disqualifying the Medicaid applicant from asset-based benefits. Unfortunately, the structured settlement income will disqualify the client on Medicaid for years to come. In one example, a woman was receiving $3,000.00 structure income and $800.00 in social security. She was married and had a disabled adult child. The husband's income was above the maximum maintenance needs allowance, so the wife's entire income was going to the nursing home as her share of cost. The structure had been set up years ago when she settled her case. Had she taken the settlement, she might have been able to save more assets.

In the end, we petitioned to buy out the structure so that she could gift the funds to her adult disabled daughter (an exempt transfer) and protected nearly $200,000.00.

Pitfall 2 - Failing to negotiate with the State of Ohio

When a trial attorney obtains a judgment for a living plaintiff who is on Medicaid, there are obviously subrogation issues. While subrogation is a separate issue, many times the State may push for money over and above the subrogation to keep the person on Medicaid. In nearly all cases, it is better to take the plaintiff off Medicaid, do some planning with an elder law specialist as outlined above, and go back on Medicaid after the penalty period. Doing what the State suggests should always raise a red flag for the attorney. Remember that there are two options: one is to pay the State back even more of the settlement; the other is to take them off Medicaid and protect assets for the client. The government is usually not there to help our clients.

For the deceased client, the settlement of a wrongful death case should be allocated to the spouse as much as possible. If the claim belongs to the "spouse" then the estate or Medicaid recipient and the attendant estate recovery claim does not attach to the settlement proceeds. If there is no spouse, the estate recovery can be negotiated. The Ohio Medicaid estate recovery unit is comprised of the Ohio Attorney General (usually one person) and multiple Deputy Attorneys General made up of collection firms around the country. Whenever possible, the actual Attorney General, rather than one of the "Deputy Attorneys General," should be the main point of contact for negotiation purposes.

Conclusion

Multiple factors go into whether to take any case. This is true in any area of law. Medicaid is a confusing area of law where lots of misinformation is freely disseminated. The important take away is that there is always something that an elder law attorney can do so that the client is protected and doesn't lose everything. Elderly clients in nursing homes need all the help that they can get to be protected from abuse, neglect, and malpractice. Many times, the fear of a lawsuit is what is necessary to motivate a bad facility to provide the right care. The trial attorney should never fail to take on a good client because of the fear of Medicaid "taking it all." ■

Current Status of Medicaid Subrogation

by Meghan P. Connolly

Ohio's Medicaid Subrogation statute was revised in 2015 as part of a huge budget bill wherein O.R.C. §5101.58 became §5160.37. As revised, Medicaid beneficiaries now have a pathway, albeit arduous, to appeal the final subrogation amount determined by the Ohio Department of Medicaid ("ODM"). As revised and further amended in 2017, R.C. §5160.37 provides:

1. **MINIMUM AMOUNT MEDICAID IS ENTITLED TO RECOVER BY STATUTE:** "After fees, costs, and other expenses are deducted from the total judgment, award, settlement, or compromise, there shall be a rebuttable presumption that the department of Medicaid or county department shall receive no less than one-half of the remaining amount, or the actual amount of medical assistance paid, whichever is less." O.R.C. §5160.37(G)(2).
2. **RIGHT TO AN ADMINISTRATIVE HEARING:** "A party successfully rebuts the presumption by a showing of clear and convincing evidence that a different allocation is warranted." O.R.C. §5160.37(L)
3. **RIGHT TO APPEAL HEARING EXAMINER'S DECISION TO MEDICAID DIRECTOR:** O.R.C. §5160.37(M)
4. **RIGHT TO APPEAL MEDICAID DIRECTOR'S DECISION TO A COURT OF COMMON PLEAS:** O.R.C. §5160.37(N)

A class action lawsuit seeking recovery for all monies paid to ODM by beneficiaries prior to the 2015 amendment is currently pending on appeal of class certification from Cuyahoga County. See *Pivonka v. ODM*, Eighth District Court of Appeals Case No. CA-18-106749. The class argues that the prior version of the Medicaid statute was unconstitutional and invalid because it sought payments to the State from portions of tort recoveries that were not related to medical costs paid by Medicaid. The class argues that all moneys paid to the state under R.C. §5101.58 must be returned to the beneficiaries. As for the appeal process itself provided for in R.C. §5160.37, it does not appear to be a popular avenue for plaintiffs in Ohio as no hearing results have been reported by any CATA members upon a call for results. ■

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CATA Making a Difference Through the Housing Justice Alliance

by Christian R. Patno

The second part of the Installation Dinner theme for my presidency for the 2018-2019 year was "Making a Difference". Through our practices we all make material and profound differences in the lives of our clients each day. Many of us also are active in funding Legal Aid and other worthy causes. It is my desire to stretch myself and other CATA members to another level of commitment: one where we can work with Legal Aid to help reduce eviction and housing instability and improve the lives of impoverished children and families. In the coming years CATA will have a role with Legal Aid, in an advisory capacity as well as actual representation in Court, helping to represent in Housing Court those who need it most. It is also my hope to coordinate law students into the program, thereby providing CATA with a connection to future lawyers at a level which does not currently exist.

"You have the right to an attorney" — everyone is familiar with the *Miranda* right. Our constitution ensures access to no-cost legal counsel when someone is accused of a serious crime and cannot afford an attorney. Yet there is no such constitutional right to legal counsel in housing cases.

Picture a young mom living in poverty, working hard to make ends meet to provide for her family, to keep them healthy and safe. Now, imagine just one thing goes wrong, and that one thing changes the course of her life – her landlord files an eviction. She can't afford to hire a lawyer to defend her family; she has no voice, no right to counsel, in a system that is not designed to be navigated alone. She loses her home, ends up having to move – a lot, falling deeper and deeper into poverty by moving into substandard housing. Her family may even end up homeless. The situation becomes unstable, unsafe, mom loses her job, she becomes depressed, the kids change schools and fall behind. Eventually they end up dropping out. Her children see that the system doesn't work for people like them.

But what if mom got the legal help she needed? What if someone who understood the system intervened for her family? How would their future change?

The stakes are extremely high in eviction cases. A household can lose so much and it happens very quickly. Yet, standing before the judge, landlords are usually represented by counsel, and tenants almost always are not. The trial lasts five minutes. Most tenants lose.

Consequences of Evictions

Research shows that evictions lead to:

- Employment loss (missed work due to attending trial and moving)
- Health problems – greater hospitalizations, depression, other illnesses
- Lower achievement and higher drop out rates for children in school
- Increased use of all social service systems
- Less stable communities

An eviction can be devastating to a family's overall wellbeing. A 2018 Boston Medical Center study[1] found that unstable housing circumstances are associated with adverse health outcomes for caregivers and young children. Specifically, the strain of homelessness, multiple moves and even being behind on rent is linked with maternal depression, increased child hospitalizations, and poor overall health for both children and caregivers.

Furthermore, a 2016 Harvard University study[2] showed that workers were 11 to 22% more likely to lose jobs if they were recently evicted or otherwise forced from their homes. For many, an eviction spurs a spiral into deeper poverty, creating lasting inequity for every member of the evicted family.

And once a tenant has an eviction on their record, that eviction cannot be erased. Which makes it much harder for tenants to find future housing.

In Cleveland, the mother described above would normally face the eviction process alone She is one in about 9,000 – 10,000 evictions that are filed every year in the City of Cleveland. And, of those 9,000 evictions, only 1-2% of tenants are represented in court by an attorney, while nationally 90% of landlords are represented by an attorney.

Those 1 to 2% now are being represented by Legal Aid. The attorneys at Legal Aid stop issues from escalating into more expensive community problems. Founded in 1905, Legal Aid is the only nonprofit specifically addressing the civil legal needs of Northeast Ohio's poor, marginalized and disenfranchised. Legal Aid's 45 staff attorneys and 35 support staff members provide high-quality civil legal service where and when people need it most. With more than a century of expertise in poverty law and housing advocacy, Legal Aid is poised to halt the cascade of consequences that inevitably flow from eviction and homelessness.

CATA's Partnership with Housing Justice Alliance

CATA has agreed to work with Legal Aid to invest in the community by providing tenants a right to legal counsel through Legal Aid's Housing Justice Alliance. Home is the center of life. And, every tenant at risk of losing their home should be represented by an attorney.

The progression of the Housing Justice Alliance will be divided into three parts: the preliminary phase, Phase 1 (partial implementation) and Phase 2 (full implementation).

In the preliminary phase (pre-phase 1) of the project, Legal Aid housing attorney Hazel Remesch was chosen to participate in the Sisters of Charity of Cleveland's Innovation Mission Fellowship, an initiative to incubate and make ready for implementation innovative solutions to improve the lives of those living in poverty in Cleveland.

The research phase of the fellowship has included visits to viable right to counsel programs in Washington, D.C., and New York City. Those viable programs revealed how critical it is to have a comprehensive understanding of the landscape of evictions and the downstream effects of eviction in our communities in Cleveland. This led to initiating a study with Case Western Reserve University to determine the effects of eviction in Cleveland.

In Phase 1 of the program, anticipated to begin in mid-2019, Legal Aid will focus on providing enhanced legal assistance to residents facing eviction and whose incomes are below 200% of federal poverty guidelines. Legal Aid will not be able to represent every tenant and therefore will collect data to show the social and monetary impact of no-cost legal counsel as compared to tenants without legal assistance. Residents in eviction cases for whom we are not able to provide services will have access to a tenant eviction help desk at the housing court, providing information and resources for pro se representation.

Evaluation of Phase 1 will help launch Phase 2 in 3 to 5 years. In Phase 2, the Program will launch an actual right to counsel in Cleveland Housing Court, where all residents facing eviction who meet the financial eligibility requirements will have the option of being represented by an attorney at their eviction trials.

Studies show that tenants who received full legal representation in eviction cases were more likely to stay in their homes and save on rent or fees. For this reason, The Housing Justice Alliance will focus on providing tenants with full legal representation in Cleveland housing court to ensure that tenants participate meaningfully in the eviction process.

A Community-Wide Effort

In anticipation of my upcoming Presidency with CATA, one of my desires was for CATA members to become more personally involved with Legal Aid. We both have the same focus and goal of helping those in our community who need an attorney but cannot afford to pay one hourly. I reached out to Legal Aid searching specifically for a new, meaningful and special project where we as Trial Lawyers could make a difference. After several organizational meetings, the Housing Justice Alliance has been formed.

I am proud to now sit on the advisory committee for the Housing Justice Alliance alongside:

- Cleveland City Councilman Tony Brancatelli
- Ian Friedman, Esq., President-Elect, Cleveland Metropolitan Bar Association

Housing Justice Alliance Advisory Committee

- Delores Gray, Community Representative
- Cleveland City Council President Kevin Kelley, Esq.
- Jennifer Heinert O'Leary, Esq., Special Counsel, Cleveland City Council
- Tom Mlakar, Esq., Legal Aid
- Gladys Reed, Community Representative
- Hazel Remesch, Esq., Legal Aid
- Steven Rys, Special Assistant to Council, Cleveland City Council
- Abigail Staudt, Esq., Legal Aid
- Ken Surratt, Deputy Director of Housing and Community Development, Cuyahoga County

Our work together will create a right to counsel which will preserve all of our other community investments. New York City is the first city in the country to provide a right to counsel for tenants facing eviction. There, evictions have dropped by 24%. And, the city is expected to save $250 million because of an increase in tenant representation in eviction cases. San Francisco is following suit, by recently passing similar legislation.

Now, what if we could do that in Cleveland? How would the lives and our community change? That young mother might be able to stay out of the shelter system, keep her job, and keep her children in school.

All our community investments to educate, feed, and employ – they are all in vain if we cannot stabilize housing. A right to counsel in eviction cases is a way to protect not only housing stability, but also the hundreds of other community investments to ensure our growth.

Our work will tip the scales for those who cannot afford a lawyer when their homes are at risk. By establishing a right to free, high-quality legal representation, the Housing Justice Alliance will secure safe, affordable and stable housing for Cleveland families living in poverty. This community effort will extend justice and help Cleveland grow and thrive.

I look forward to CATA's partnership with Legal Aid in this very worthy endeavor. I hope each of you do as well.■

End Notes

1. Megan Sandel, Richard Sheward, Stephanie Ettinger de Cuba, Sharon M. Coleman, Deborah A. Frank, Mariana Chilton, Maureen Black, Timothy Hereen, Justin Pasquariello, Patrick Casey, Eduardo Ochoa and Diana Cutts, *Unstable Housing and Caregiver and Child Health in Renter Families*, 2 PEDIATRICS 2018, Jan. 22, 2018, http://pediatrics.aappublications.org/ content/141/2/e20172199.
2. Matthew Desmond and Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, 0 SOCIAL PROBLEMS 2016, Jan. 11, 2016, https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson. sp2016.pdf?m=1452638824

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Strategies for Negotiating the BWC lien

by David R. Grant

Over many years of negotiating BWC liens, I have learned a number of strategies that assist in reducing the amount the BWC will ultimately accept under the BWC subrogation statute found in R.C. §4123.931 (with certain definitions found in R.C. §4123.93). This article will discuss some of the more common strategies and some practical suggestions of how they can be utilized. Not every approach is available in every case. Likewise, what works in one lien negotiation may not work in another.

STEP 1: Decide When To Begin Negotiating The BWC Lien

The first step in negotiating with the BWC is deciding when to start the process. Some attorneys are used to contacting a lienholder to begin negotiating only after a settlement has been reached. With a BWC lien, however, it may be more helpful to begin at least a dialogue as negotiations with the tortfeasor are progressing but before any settlement is reached. This allows you to begin setting the BWC's expectations of the ultimate recovery appropriately. This may also allow you to learn how difficult your BWC negotiation may be so you can factor that into your negotiations with the tortfeasor as well as your discussions with your client.

In most cases, the BWC will notify the injured worker and their attorney (who may not be the personal injury attorney) that it is asserting a subrogation claim. If the BWC does not, that does not change the existence of the lien or of the claimant's obligation to notify the BWC. Under R.C. §4123.931(H) the BWC's right of subrogation "is automatic, regardless of whether [it] is joined as a party or not." Additionally, R.C. §4123.931(G) requires the claimant to provide notice of "the identity of all third parties against whom the claimant has or may have a right of recovery …." That subpart also provides that no settlement or judgment is final unless prior notice has been provided to the BWC with a reasonable opportunity to assert its rights. If that notice is not provided, then the third party and the plaintiff/claimant "shall be jointly and severally liable to pay … the full amount of the subrogation interest." R.C. §4123.931(G). I am aware of one occasion where the BWC threatened to demand the full amount of its lien with no reduction because a settlement was accepted before negotiating the BWC lien, but the BWC ultimately backed down and agreed to negotiate. The point being, it is generally a good idea to reach out on the BWC lien before a settlement is finalized to avoid your client being the test case for the enforceability of R.C. §4123.931(G).

STEP 2: Confirm The Total Lien Amount

Once you are ready to begin negotiating, the next step is to make sure you know the total amount of the lien that the BWC will be asserting. This includes not just the amount of medical benefits that were paid, but also "indemnity" payments for things such as temporary total disability,

permanent partial disability awards, loss of use, etc. Often your client and you will have both received letters from the BWC notifying you that they are asserting a subrogation claim. These letters often list the amount of all benefits paid as of the date of the letter and those letters are updated periodically. The amount listed in those letters, however, is not necessarily the total amount that they will claim. If the BWC is not a party to the case then you can contact the individual whose name is listed on the BWC letter. That is the person assigned to handle your client's BWC lien negotiation. If the BWC is a party to the case, then your request should be directed to the special counsel representing the BWC in the litigation.[1]

The definition of "subrogation interest" set forth in R.C. §4123.93(D) says it "includes all past, present and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses to be paid … ." This definition seems all-encompassing. As a result, to avoid any surprises after settlement it is best to request not only a printout of all benefits paid to date but also any estimate of future payments. If the client's BWC claim is still open (they usually are) then knowing what the BWC estimates for future benefits is very important.

The amount the BWC estimates for future benefits should be rooted in reality, but often it is not. There is a matrix that they use to estimate future benefits which is based, at least in part, on what was the most recent benefit paid in the claim. For that reason, the matrix can skew their estimate of future benefits either too high or (sometimes) too low. In my experience, the amount of estimated future benefits can be negotiated down if you can offer a logical argument why.

STEP 3: Know And Understand The Statutory Formula

The subrogation statute provides a formula to determine the amount that must be paid to the BWC. This formula is a word formula that will remind you of elementary school math. Like any math formula, however, the end result is directly dependent upon the figures used in the equation. Immediately following the word equation, the statute contains a clause that reads "except that the net amount recovered may instead be divided … on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee [BWC]." R.C. §4123.931(B). The BWC reads and applies this clause to mean that they will agree to split the net proceeds (defined in R.C. §4123.93(E) as the settlement amount minus attorney fees minus case expenses) equally with the plaintiff. There are rare occasions where this may result in a lower amount owed than the formula, but often it does not. Since the clause requires both the claimant and the BWC to agree to division of proceeds different than the formula, the BWC cannot unilaterally insist on ignoring the formula.

STEP 3a: The "Uncompensated Damages" amount (R.C. §4123.03(F))

Turning to the statutory formula, you must first determine the "uncompensated damages" amount. This amount is defined as the "demonstrated or proven damages minus the [total] subrogation interest [i.e. all past and future benefits]." R.C. §4123.93(F). The term "demonstrated or proven damages" is not defined anywhere in the statute. The BWC believes that term means the settlement amount, but it does not. I believe this term means the total amount plaintiff's counsel could "board" in front of a jury. You must argue and be prepared to show that the "demonstrated or proven damages" is an amount higher than the settlement amount. The higher this amount, the less the subrogation amount owed will be. The BWC has gotten wise to this and now has an internal policy that if support is shown in a given case, the highest they will concede for demonstrated or proven damages is 1 ½ and possibly 2 times the settlement amount. In very rare cases and with the right set of facts and evidence, you may be able to move this higher.

One argument to raise to move the "demonstrated or proven damages" higher than the settlement amount is where the settlement was for policy limits. This allows you to argue the claim value was higher but the recovery was restricted due to the available limits. Another is to argue that liability was disputed. Here you can argue the demonstrated claim value itself was higher but the recovery had to be reduced due to questionable liability or comparative negligence.

Once you have a sense of what the actual amount or probable range for "demonstrated or proven damages" is, simply deduct the total subrogation amount to arrive at the "uncompensated damages" amount. R.C. §4123.93(F).

STEP 3b: The "Net Amount Recovered" (R.C. §4123.03(E))

Next, consider what constitutes the "net amount recovered." Under R.C. §4123.93(E), this is "the amount of any award, settlement, compromise or recovery… minus the attorney's fees, costs, or other expenses incurred by the claimant in securing [the recovery]." In many cases, however, this does not simply mean the recovery amount less attorney fees[2] and expenses. Instead, consider whether the BWC's lien truly attaches to the entire settlement or only a certain portion of it. It should only attach to economic damages recovered

for the plaintiff/claimant since those are the only damages the BWC ever paid for and will ever pay for in the future.

For instance, if the settlement includes payment for loss of consortium (spouse and/or child), that portion should be deducted out of the recovery before applying the formula because no part of the BWC benefits include any compensation for loss of consortium. The same is true for punitive damages. Since the BWC does not compensate for pain and suffering, it is my position that portion should be deducted as well. Support for this can be found in the statute that requires a jury verdict to separate out economic from non-economic damages. There should be no difference if the recovery is obtained through settlement rather than a jury verdict. If there were, that would penalize and discourage settlements. Deducting non-economic damages from the settlement is one area where the BWC will not willingly concede … yet.

In my experience, an allocation to non-covered damages such as loss of consortium will usually be accepted if it is within reason and you can offer reasons why there is value to that claim. Any allocation to these other damages should be consistent with your negotiations with the tortfeasor. You may also consider whether to specify that allocation within the release agreement with the tortfeasor.

When applicable, I have also argued that other outstanding liens must also be deducted from the amount of recovery to arrive at the "net amount recovered." This may occur where some of plaintiff's treatment was denied or otherwise not covered by the BWC claim so there is either a patient balance remaining or a med-pay insurer or a health insurer paid for that treatment and now has a valid lien claim.

Thus, an example of how the "net amount recovered" is calculated pursuant to R.C. §4123.93(E) is:

$175,000.00	Settlement amount subject to BWC lien ($200,000 recovery minus $25,000 loss of consortium)
- 70,000.00	Attorney fees on amount subject to BWC lien
- 7,478.34	Expenses
- 12,683.24	Other liens, pt. balances, etc.
_____	
$84,838.42	**"Net amount recovered" per R.C. §4123.93(E)**

Without backing out the loss of consortium and other liens, the "net amount recovered" in this example of a $200,000 recovery would be $112,521.66, instead of $84,838.42.

STEP 3c: Calculating the BWC Lien Amount Owed (R.C. §4123.931(B))

The next step is to plug your numbers into the formula. The equation to determine the BWC's portion and the plaintiff's portion looks like this:

> BWC = total subro. amount/ (subro. + uncompensated damages) x net amount recovered
>
> Plaintiff = uncomp. damages/ (subro. + uncomp. damages) x net amount recovered

Remember, if you are able to establish that the "demonstrated or proven" damages are higher than the recovery amount, this will result in the "uncompensated damages" amount being higher. This will result in reducing the BWC's lien further and increasing the plaintiff's portion.

Likewise, by deducting non-BWC covered damages and other liens from the recovery (as well as attorney fees and expenses) this will result in a lower "net amount recovered". This, too, will result in reducing the BWC's lien and increasing the plaintiff's portion.

STEP 4: Finalizing the Lien Reduction

Once you have reached an agreement with the BWC on how much will be paid from the recovery to satisfy their subrogation claim, the BWC will provide you with a short, separate release agreement. This release will need to be signed by both the plaintiff/claimant as well as an authorized representative of the party paying the settlement. An attorney representing that party will suffice. The BWC's stated reason for this release is to ensure that the total recovery amount is what it was represented to be.

Be aware that the BWC has started asking for a copy of the Settlement Distribution Sheet or Closing Sheet between Plaintiff and their counsel. I have never provided this and believe it is a privileged communication that they are not privy to. Depending on the amount of case expenses, the BWC may also ask for an itemization of those expenses to confirm the number used in the formula is correct. I have not yet provided an itemization of expenses and the BWC has never followed up on their request or refused to settle.

The foregoing are a few of the more common approaches and strategies that can be employed to make sure the BWC lien is reduced an appropriate amount pursuant to the subrogation statute. ■

End Notes

1. The multiple considerations of whether or not to make the BWC a party to the litigation are beyond the scope and space limitations of this article.
2. It is important to make sure you inform the BWC of the correct percentage or amount of your attorney fees. Otherwise, they will presume your fees are 33 1/3% of the total recovery, which may or may not be accurate.

William B. Eadie

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Practically Legal

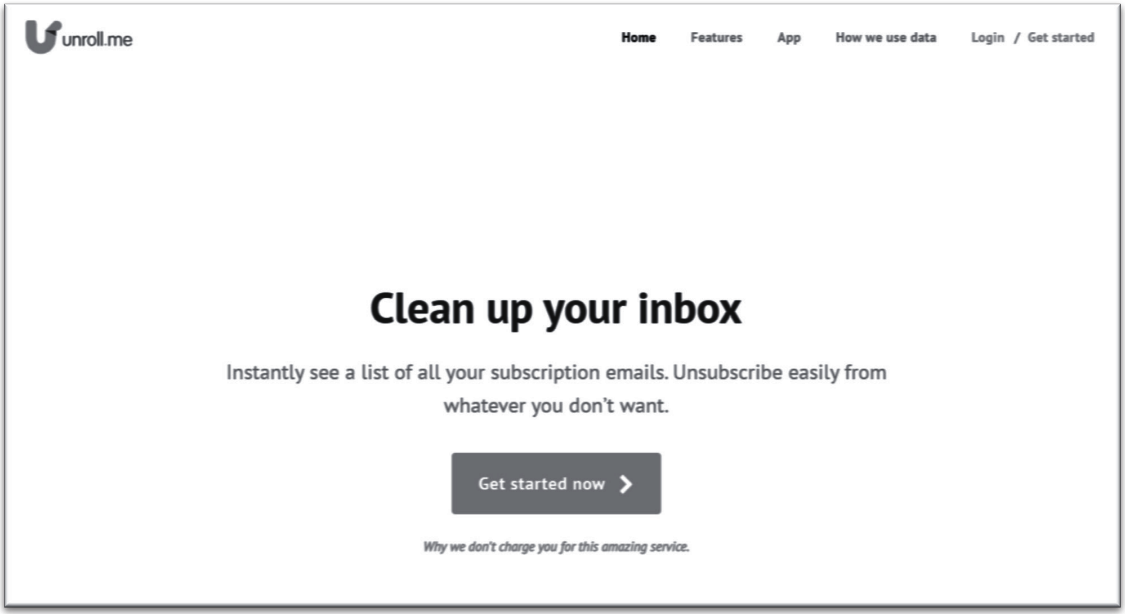
by William B. Eadie and Michael A. Hill

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 or Michael A. Hill at michael.hill@eadiehill.com.

Today's Suggestion: UnRoll Yourself from Emails

One major productivity killer in any business is email. It was a great idea, but once it became the go-to communication for both internal and external communication, and once people figured out they can sell to you there, it proved to be an imperfect system.

One great way to get a handle on the time you spend in your inbox—and make sure you're doing something worthwhile there—is to use a free service called unroll.me to "roll up" your email subscriptions into a neat little package:



Suddenly, your email inbox is much easier to navigate to important items, because there are fewer of the almost-but-not-quite-junk items in the way.

Like a list serve summary, a neat email with all the rolled-up items comes once a day. A quick scroll and you know if there's anything worth looking at. You can even decide when to get the roll-up to suit your schedule.

It also arms you with tools like automatic unsubscribe in your gmail or mobile email client, and even makes suggestions for emails you ought to "roll up" moving forward.

Setup is quick and easy. It will scan your emails and suggest emails to roll up with just a click. ■

2018 Installation Dinner: A Photo Montage

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

On July 19, 2018, **Paul Grieco, partner at Landskroner Grieco Merriman,** performed with his band SIX sometimes SEVEN at the Legal Aid Society of Cleveland's annual summer fundraiser, Jam For Justice. With a fundraising goal of $100,000.00, Jam for Justice is an event that brings together several local bands for a night of dinner, dancing, and music and to raise awareness of the great services that the Legal Aid Society of Cleveland provides to our community.

Paul Grieco singing with his band "SIX sometimes SEVEN"

"SIX sometimes SEVEN"

As one of the oldest legal aid organization in the United States, Legal Aid Society provides legal services to low income individuals in Northeast Ohio. Although Legal Aid employs attorneys to represent those in need, it also relies on local volunteer attorneys to ensure that individuals receive access to justice. As one of the volunteer attorneys, **Paul Grieco** spends his time providing pro bono assistance to those in need.

After working at the New York Legal Aid Society in his early career, Paul wanted to continue his involvement with the Legal Aid Society of Cleveland and contribute his time and talent to this vital resource.

His rock and roll cover band, SIX sometimes SEVEN, was formed about seven years ago after meeting at the School of Rock. The band plays classic rock cover songs and continues to play together in the Cleveland area. As one of the featured bands performing at Jam for Justice, they played a 40-minute set to a packed house.

This year **Nurenberg, Paris** partnered with the Make A Wish Foundation and granted the wish of a young girl, Isabella. She is a passionate animal lover and especially loves penguins. Isabella suffers from an immune disorder and a connective tissue disease, but throughout her battle, she has remained incredibly strong and kept a positive outlook on life. Inspired by her love for penguins, Isabella's heartfelt wish was to go to Sea World and be a penguin trainer.

Her wish trip took her to Orlando, Florida where she spent the day at Sea World learning about and training penguins. Afterwards she spent the rest of her week at Disney World, Universal and Animal Kingdom where she got to enjoy the simple pleasures of being a kid.

Chris Patno as Aaron Burr

CATA members, **Chris Patno, Dennis Lansdowne, James Lowe,** and **Dana Paris** participated in a presentation for the William K. Thomas Inns of Court where they were tasked with interpreting how attorneys craft arguments and narratives through the lens of Alexander Hamilton's legacy. Specifically, the presentation focused on the duel between Alexander Hamilton and Aaron Burr and whether Burr should be held responsible for the murder of Hamilton. Once Hamilton and Burr were in position with their tri-cornered hats and pistols, a duel ensued and an abbreviated criminal trial followed that included voir dire, opening statements and witness testimony. Chris played Burr, James did the voir dire, Dennis did the opening, and I played the witness under cross-examination. Although the defense put on a strong case on behalf of Burr, the jury is still out as to whether he was found guilty of murder. ■

Dennis Landsdowne gives the opening Statement at the Inns of Court presentation.

Chris Patno plays his part at the Inns of Court presentation.

James Lowe conducts voir dire at the Inns of Court presentation.

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Pointers From The Bench:
An Interview With
Judge Janet R. Burnside

By Christine M. LaSalvia

I met with Judge Janet Burnside on a gray and rainy day in Cleveland. It was one of those days as a lawyer when the phone won't stop ringing and the clients won't stop complaining and your desk is covered with huge, brown files that all blend together. I trudged over to the Justice Center, running a to do list in my head, feeling a little beaten down by the system. I walked into Judge Burnside's chambers and was immediately jolted out of my dreary mood by her enthusiasm and energy.

Judge Janet R. Burnside

Judge Burnside is not ready to retire. She believes in the power of the civil justice system to make a positive impact in the community. Since joining the Cuyahoga County bench in 1991, she has worked hard to ensure that her Court creates an open and fair environment for all litigants. Judge Burnside told me in no uncertain terms that she is saddened to be retiring because she knows that she has a lot more to offer the community.

Judge Burnside spoke with great passion about the importance of the civil justice system. She believes an important contribution she has made was to ensure that civil litigants be treated with respect and be given the time and attention necessary to pursue their claims. The political and cultural environment has become much more difficult for plaintiffs during her time on the bench. There is a tremendous cynicism regarding individuals who claim damages. She believes that it is crucial for lawyers that represent plaintiffs to keep up the fight and to continue to represent people and try cases, despite the great odds against us. The public does not realize the importance of their right to file a lawsuit and pursue their case in Court. It is incumbent upon trial attorneys to protect the right to trial by a jury, so it is not taken away.

Judge Burnside spoke often during our conversation about the importance of maintaining order in the community, which includes order in the Courtroom and careful application of the law. She believes strongly that lawyers should learn and follow the rules of civil procedure. This appreciation for the rule of law started in her first job out of law school, working at a firm which handled personal injury cases. Her initial role in the firm was to find the law and craft the jury instructions to back up the arguments made by the other attorneys. Judge Burnside noted that civil lawyers today are not always being taught how to use and apply the rules of civil procedure properly. Part of the duty to uphold the law and protect our system is making sure that you are educated as to its finer points. She also believes that attorneys today do not give enough attention to jury instructions and would urge lawyers to think more carefully about what they submit to the Court and jury.

One of the ways Judge Burnside has worked over the years to ensure a fair playing field is by doing her own voir dire. She is proud of her detailed and interactive voir dire. She feels particularly strongly about the necessity of quality voir dire based on the changes she noted in the culture. The voir dire is a way to bond with the jury and ensure that they are educated on some of the issues and law involved in the trial. She thinks it is important to do this in a way where the jury is forced to participate. She also feels that her voir dire helps forge a bond between her and the jury and allows her to present issues in a way that lawyers cannot based on our adversarial role. Her job as a civil lawyer before becoming a Judge combined with her judicial experience informs her voir dire.

I asked Judge Burnside what advice she would give a trial attorney on how to most effectively represent a plaintiff. She told me that as attorneys we need to be "relentless." As an example, she noted the efforts of the trial counsel for a malpractice case which was recently tried in her room. This case stood out to her because of the tremendous effort and hard work by the attorneys for the plaintiff in ensuring that their discovery was answered fully and that they had evidence necessary to try the case effectively. If they asked for 12 documents, they did not rest until their received all 12 documents, despite excuses to the contrary from the defense. She said that the reason the attorneys were successful was because they persevered in a difficult situation and relentlessly ensured that their client's needs were met.

During our conversation about trials, I reminded Judge Burnside of a small case that I tried in her courtroom a few years ago. The case was an auto accident with a liability dispute and a soft tissue injury. My client's medical bills were only $5,000 – and that was the billed amount, not the *Robinson v. Bates* number. That trial has always stood out to me because it was so small, yet the Judge gave my case her full attention and showed both parties great respect. I remember during the entire trial feeling a little worried that I was "wasting" so much of the Court's time with my case. Judge Burnside told me in no uncertain terms that I was wrong. It is important to keep pushing all cases. She understands the economic forces that cause most of these smaller cases to settle. However, it is important to protect the rights of all people. Trying cases, including smaller ones, helps make sure that order is maintained, and the needs of the community are met.

At the end of our discussion, Judge Burnside showed me a gift she received from a client during her time as a lawyer. She keeps the gift as a reminder that her role as an attorney made a difference in that person's life. Talking to Judge Burnside reminded me that our role is important and that even helping someone with a smaller problem can make a huge difference. It is easy to feel frustrated by the system, but we should never forget that there is honor in what we do, even when we are defeated. Judge Burnside left me with a reminder to never doubt the social significance of the work that we do. Our work is nearly sacred in upholding and maintaining the integrity of the community. ■

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The Dreaded Child Support Lien

by Jeffrey M. Heller

This scenario has happened to all of us: you are getting ready to settle a case; you locate your letter(s) of protection and the bill(s) behind it; you audit your clients' medical bills and determine the rest of their out-of-pocket expenses; you pull the case expenses and determine your fee; and of course, as a diligent lawyer, you make sure to confirm any subrogation. Then BAM! There it is. Hidden in the bottom of your file: the dreaded child support lien.

Why is a child support lien so dreaded, you ask? Because, unlike most liens, under O.R.C. § 3121.12, if your client receives a settlement of more than $150, child support *shall* garnish all of it. ALL OF IT.

According to O.R.C. § 3121.12: (A) On receipt of a notice that a lump sum payment of one hundred fifty dollars or more is to be paid to the obligor[1], the child support enforcement agency shall do either of the following:

> (1) If the obligor is in default under the support order or has any arrearages under the support order, issue an administrative order requiring the transmittal of the lump sum payment, or any portion of the lump sum payment sufficient to pay the arrearage in full, to the office of child support; or
>
> (2) If the obligor is not in default under the support order and does not have any arrearages under the support order, issue an administrative order requiring the immediate release of the full amount of the lump sum payment to the obligor.

If you think there is a built in mechanism to negotiate the lump sum payment, unfortunately, you are wrong. To understand *why* the lump sum payment is non-negotiable, the history of the child support program is important.

While child support statutes have been around since the beginning of the 1900s, the first child support *enforcement* statute was enacted in 1950. This was Section 402(a)(11) of the Social Security Act, 42 USC 602(a)(11), which required State welfare agencies to notify appropriate law enforcement officials upon providing Aid to Families with Dependent Children (AFDC) with respect to a child who was abandoned or deserted by a parent.[2] Up to that point, families received government financial aid – generally to families who lost a husband/father in war – without any concern for repayment. But in 1950, for the first time, the government focused on ensuring that families who received financial assistance had both parents providing support – either by caring for the child(ren) directly or financially. The 1950 enforcement statute meant that, for the first time, any parent of a child who was not living with that child (the "non-custodial" parent), was now required to either pay child support in full, or face enforcement mechanisms, i.e. jail. In 1975, under President Jimmy Carter, Part D was added to Title IV of the Social Security Act, which formally established the Child Support Enforcement Program.[3]

Along the way the child support enforcement statute has since been amended 19 times, with most of the impetus coming from Health and Human Services, the Internal Revenue Service, and the Treasury Department. But for purposes of this article, the most notable amendments came in 1994 and 1996. In 1994, Congress passed 42 U.S.C. § 466 (a)(8)(B)(i), which mandated immediate wage withholding orders. This meant that simultaneous with the establishment of a child support order came a directive to the obligor's employer to immediately send a portion of the obligor's wages to the child support agency.[4] Then, in 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which placed strict requirements on States as to how they administer, enforce, and collect child support orders. While up to that point child support agencies across the country were "enforcing" child support orders, i.e. garnishing wages and prosecuting obligors in default, PRWORA required that States strictly enforce the child support statutes and additionally establish more rigorous guidelines that absent parents had to follow.[5] Additionally, in 1996, electronic databases were established, which enabled the government to more easily communicate with potential sources from which to garnish.

As enforcement became a priority of the Federal government, the Consumer Credit Protection Act (CCPA), 15 U.S.C. 1673(b), put limits on the amount of wages the government could garnish. The CCPA limited wage garnishments to 25% of an individual's "disposable earnings." Disposable earnings are defined as "that part of the earnings of an individual remaining after the deduction from those earnings of any amounts required by law to be withheld," which can be determined by the scheme found in 15 U.S.C. 1672(B), or more simply by the formula: disposable income = gross income – mandatory deductions.

The importance behind the wage garnishment statutes is that they are protected by the CCPA. The purpose of the statutes is primarily to collect child support, but also to encourage absent parents to continue working and not abscond from the child support system altogether. By contrast, personal injury settlements and verdicts are not protected by any statutes whatsoever. Why? Because the rules for child support garnishments only apply to income. As we all know, and advise our clients every day, "personal injury settlements do not qualify as income for tax purposes."[6] Although personal injury settlements and verdicts account for reasonably certain past and future lost income, as well as other things such as medical bills and pain and suffering, personal injury settlements are designed to make an injured party whole after a loss – they are not income. Therefore, personal injury settlements and verdicts fall outside of the protections of the Consumer Credit Protection Act. This is what allows the child support agencies to swoop in.

In Cuyahoga County, all of the wage withholdings and lump sum payments are handled by Lisa Montville of Cuyahoga County Health and Human Services (HHS), Office of Child Support Services (OCSS). According to Montville, if your client receives a settlement and owes arrears[7], "[c]hild support will intercept the entire lump sum, up to the amount of the arrears owed. If the arrears are greater than the lump sum, we will intercept the entire amount."

But how does child support even become aware of our clients? Montville says that when a liability insurance company obtains an injured party's social security number, they input it into the "Child Support Lien Network," which is a database used by every child support agency in the United States. According to Montville, not all insurance companies use the database. But if they do, and enter a person's social security number into it, the database simultaneously notifies both the insurance company as well as the child support agency that administers the child support order(s) that an obligor is pursuing a bodily injury claim. Montville says that she personally receives a notification from the database and thereafter electronically issues both an income withholding notice and a lump sum notice back to the insurance company.

So what happens when child support garnishes the settlement or verdict? What do they take? It may be easier to look at what child support does *not* take. Child support does not garnish anything until the following are satisfied: (1) attorney's fees, costs, and expenses; (2) Medicare or Medicaid liens; (3) Bureau of Workers' Compensation liens; and (4) U.S. Department of Veterans Affairs liens. On the other hand, child support *will* take their arrearages out of whatever is left over after the above-listed items are satisfied, including taking their lump sum *before* non-Medicaid/Medicare bills are paid. Montville cautions lawyers who have non-subrogated liens, i.e. letters of protection, to be aware that they almost assuredly will not be able to protect those liens if their client has a child support order.

However, Montville states the Office of Child Support Services may potentially negotiate with an obligor's lawyer in order to satisfy both the arrearages and allow the obligor to keep some of their settlement or verdict. Montville outlines the following process for attempting to negotiate a child support lien: (1) fax a letter of representation to 216.443.5321; (2) request updated child support

lien(s)[8]; (3) notify her that you intend to request a compromise – 216.698.2437; (4) she will send your file to an Assistant Prosecuting Attorney for Cuyahoga County; and (5) the prosecutor will then contact the obligor's attorney directly and begin negotiations. Montville states the main factors the prosecutor will consider are how timely and consistent the obligor makes payments; whether they cooperated with the agency when the agency first attempted to establish the child support order(s); and whether the obligor himself/herself is receiving government assistance, most notably SSI. Montville says the lump sums are usually reduced to allow for payment of medical bills. The rest of the factors will play into how much more is reduced.

So what happens if the attorney does not comply with the lump sum child support notice? While Montville says all personal injury attorneys must comply with the notice if they are aware of it, the notices are issued to the insurance companies, not the obligor's personal injury lawyer; therefore, the insurance company is ultimately held responsible for not adhering to the child support notice. Montville says insurance companies are frequently investigated for not complying with lump sum notifications, but she cannot recall an instance where the Office of Child Support Services "went after" a personal injury attorney for failing to satisfy a lump sum notice. Montville said, "attorneys have to do so much work just to convince their client to sign off on a settlement involving child support that the notices are always complied with." ■

End Notes

1. "Obligor" means the person who owes child support.
2. https://www.acf.hhs.gov/sites/default/files/programs/css/fy1996_annual_report_appendix_h.pdf
3. https://www.irp.wisc.edu/publications/focus/pdfs/foc111d.pdf
4. https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1406&context=faculty_publications
5. https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1406&context=faculty_publications
6. https://www.irs.gov/pub/irs-pdf/p4345.pdf
7. Arrears are past due, unpaid balances owed by the Obligor.
8. Montville cautions that an obligor's children are usually assigned separate child support orders, so an obligor with multiple children will have multiple orders. If you fail to request updated orders then you may miss other outstanding liens.

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Some Thoughts On Proposed Rule Changes

by Kathleen J. St. John

It may be premature to write about Proposed Rule changes that may never come to pass. Still, three of the Proposed Amendments to the Rules of Practice and Procedure in Ohio Courts announced in the late summer of 2018 struck me as having particular relevance to our practices. What follows are my thoughts about whether these proposed changes constitute an improvement over the existing rules.

1. Changes to Civ. R. 6(C) and 56(C)

Probably the biggest change that caught my attention was the Committee's attempt to standardize deadlines across the State for motion practice. As proposed, Civ. R. 6(C)(1) would provide a standardized fourteen (14) days after service to respond to written motions other than summary judgment, and twenty-eight (28) days after service to respond to motions for summary judgment. The proposed change deletes the phrase "[u]nless otherwise provided by these rules, by local rule, or by order of the court" – thus removing the ability of individual counties and courts to promulgate rules that shorten the period of time provided by the Ohio Civil Rules. Similarly, the proposed amendment to Civ. R. 56(C) also deletes this phrase, and refers the reader back to Civ. R. 6(C) for the briefing deadlines.

For those of us who practice in multiple counties, this is a welcome change. I find this change particularly salutary with respect to summary judgment motions. For instance, as it currently stands, a party responding to summary judgment has:

- thirty (30) days in Cuyahoga County[1];
- twenty-one (21) days in Lorain County[2];
- seventeen (17) days in Lake County[3];
- and, as little as fourteen (14) days in Medina County where the deadline is computed based on the scheduling of the non-oral hearing which cannot be scheduled "sooner than fourteen (14) days after the motion has been filed[.]"[4]

The current state of affairs lends itself to confusion – particularly in counties that calculate deadlines based on a non-oral hearing date, or in courtrooms that have a standing order with unique briefing deadlines.

But the real problem with the existing rule is its tendency to disadvantage plaintiffs when responding to summary judgment motions in counties with shorter deadlines. Truncated deadlines make for hasty opposition briefs and fail to recognize that attorneys are usually juggling numerous other deadlines and responsibilities. Moreover, as a plaintiff, we cannot always predict when the defendant will choose to file her summary judgment motion. If it comes earlier than anticipated, there is an even greater likelihood of needing extra time in order to prepare a thorough and well thought-out opposition. Permitting sufficient time for response briefs results in better briefs. The more time spent in perfecting a brief, the simpler and clearer it becomes. This should make the court's job easier and, ultimately, result in a better body of decisional law.

The proposed rule does not deprive individual courts of the discretion to modify deadlines on a case-by-case basis. In this respect, proposed Civ. R. 6(C)(3) provides: **"Modification for good cause upon motion.** Upon motion of a party in an action, and for good cause, the court may reduce or enlarge the periods of time provided in Division (C) of this rule."

One downside of the proposed rule is that we lose two (2) days for opposing summary judgment in Cuyahoga County. An amendment that standardized response time to thirty days would have been preferable. However, on balance, the proposed changes to Civ. R. 6(C) and 56(C) appear to be beneficial. They create consistent and reasonable response times upon which the parties can rely, without completely removing the court's discretion to alter deadlines upon good cause shown.

2. Change to Civ. R. 36 – Limits on Requests For Admissions

How one feels about the proposed amendment to Civ. R. 36 might depend on one's experience with Requests for Admissions (RFAs). The proposed change seeks to limit the number of RFAs served on any party to forty (40), although leave of court for a greater number may be granted for good cause shown. If you have found RFAs to be a useful tool in your practice, chances are you object to this rule. However, if you've found most responses to RFAs to be full of denials and equivocations, or you've wasted a day or two responding to some one-hundred-forty imponderable RFAs, you might feel a greater enthusiasm for this amendment.

I understand that many in the plaintiffs' bar object to this change in principle. The thinking goes that since plaintiffs have the burden of proof, any rule seeking to limit the weapons in their discovery arsenal is undesirable. There is merit to this position. Still, in my experience, rarely have RFAs resulted in critical admissions that can be used in motion practice or at trial. And a recent experience in responding to an absurd number of RFAs has soured my perception of this discovery tool. Consequently, I support this amendment, knowing that many of my colleagues do not.

3. A Clarification of App. R. 3 – Filing Your Cross-Appeal In The Trial Court

Of the proposed amendments that caught my attention, the most obscure one is found in App. R. 3(C)(1), concerning cross-appeals. Currently, the rule provides:

> (1) *Cross Appeal Required*. A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order, shall file a notice of appeal within the time allowed by App. R. 4.

As currently written, the rule does not address in which court the cross-appeal is to be filed, at least not explicitly. However, the current version of App. R. 3(A) *does* address where notices of appeal in general are to be filed – namely, "with the clerk of the trial court." Extrapolating from App. R. 3(A), at least two appellate decisions have dismissed cross-appeals that were filed in the Court of Appeals, but not in the trial court – even though the Clerk's Office for both courts was located in the same place.

The lead decision in this respect is *Thompson v. Knobeloch*[5]. In *Thompson*, the defendants filed a timely appeal with the clerk of the trial court. The plaintiffs then had an additional ten days thereafter to file their cross-appeal. However, although the plaintiffs did file a notice of cross-appeal within the ten day period, they filed with the clerk of the appellate court, but not the trial court. In these circumstances, the Tenth District Court of Appeals held it lacked jurisdiction to hear the cross-appeal because it was filed in the wrong court. The Court stated:

> App. R. 3(A) requires that a notice of appeal (which includes a notice of cross-appeal) "shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by [App. R.] 4." (Emphasis added.) Because plaintiffs' notice of cross-appeal was filed in the wrong court, it does not comply with App. R. 3(A).
>
> The time to file an effective notice of cross-appeal has now run. Without an effective notice of appeal this court lacks jurisdiction to address the alleged errors raised by plaintiffs.*** Plaintiffs' cross-appeal is accordingly dismissed sua sponte.[6]

The proposed amendment to App. R. 3(C)(1) changes this trap for the unwary. The proposed amendment specifies that the notice of cross-appeal must be filed "with the clerk of the trial court" and that the cross-appellant "may also file a courtesy copy of the notice of cross-appeal with the clerk of the appellate court, within the time allowed by App. R. 4." The proposed amendment further states that the "clerk of the trial court shall process the notice of cross-appeal in the same manner as the notice of appeal."

The Staff Note to App. R. 3 describes this amendment as a "clarification" as opposed to a substantive change. The Staff Note explains that this amendment "clarifies that the cross-appellant must file the notice of cross-appeal in the trial court, not in the appellate court." It also explains that "this change is designed to avoid confusion and the harsh result that can follow when a cross-appellee mistakenly files the notice in the appellate court", and cites, as an example, the *Thompson* decision.

In that mistakes involving jurisdictional deadlines cannot be undone, the clarification in App. R. 3(C)(1) represents a valuable amendment. ■

End Notes

1. Cuyahoga County Loc. R. 11.0(I)(1).
2. Lorain County Loc. R. 9(I).
3. Lake County Loc. R. 3.04(G)(2).
4. Medina County Loc. R. 6.
5. 10th Dist. Franklin No. 16AP-809, 2017-Ohio-66.
6. *Id.* at ¶¶2-3. *See also, Torres v. Concrete Designs, Inc.*, 8th Dist. Cuyahoga Nos. 105833, 106493, Journal Entry dated 2/27/2018.

Recent Ohio Appellate Decisions

by Meghan P. Connolly and Brian W. Parker

White v. BWC, 9th Dist. Summit Nos. 28831, 28853, 2018-Ohio-4309 (Oct. 24, 2018).

Disposition: Affirming summary judgment for plaintiff on workers' compensation claim.

Topics: Coming-and-going rule; "zone of employment."

White was employed by Quest Diagnostics as a data entry worker. One day on a lunch break she ventured outside for a walk during which she unfortunately tripped and fell, breaking her arm. Her Worker's Compensation claim was disallowed, and her appeal was refused by the Industrial Commission. White appealed to the Summit County Court of Common Pleas, and cross motions for summary judgment were filed. The trial court granted judgment in favor of White and the BWC appealed to the Ninth District.

In support of denying the claim, the BWC argued that White's injury did not meet the two-prong test of R.C. 4123.01(C), which requires the injury to occur in the course of, and arising out of, her employment.

The Ohio Supreme Court recognizes the "coming-and-going rule," which provides generally that injuries sustained while traveling to and from work do not arise out of the employment for purposes of workers compensation benefits. An exception to this rule allows for coverage when the injury occurs inside of the "zone of employment," defined as: "the place of employment and the areas thereabout, including the means of ingress thereto and egress therefrom, under control of the employer."

The Ninth District concluded that White had fallen in the Quest Diagnostics parking lot, which was owned by her employer, and was a means of egress from her jobsite. The court therefore held that her injury occurred within the zone of employment, entitling her to worker's compensation benefits for her injuries. Judgment was affirmed in favor of White.

Wallace v. OhioHealth Corp., 10th Dist. No. 18AP-279, 2018-Ohio-4293 (Oct. 23, 2018).

Disposition: Reversing Franklin County Common Pleas Court decision which dismissed plaintiff's Complaint pursuant to Civ. R. 12(B)(6) for failure to include an affidavit of merit.

Topics: Affidavit of Merit, Civ. R. 10(D)(2)(a); Civ. R. 12(B)(6) motion to dismiss.

The plaintiff's Complaint asserted that personnel at defendant Doctor's Hospital tried to remove packing from a wound which had been treated surgically. Plaintiff alleged that the packing was not supposed to be removed; it was special surgical packing which was meant to remain in place until some or all of it dissolved on its own. Further, the plaintiff alleged that the sutures holding the packing in place were intended to dissolve over time, rather than be cut or severed, or tugged on. The plaintiff alleged that the tugging on the packing, and attempt to remove it, was wrongful in that the medical records clearly stated the packing should remain in place. As a result, the plaintiff alleged, he suffered severe pain and bodily injury.

The defendants moved for dismissal pursuant to Civ. R. 12(B)(6), alleging that the plaintiff failed to include an Affidavit of Merit pursuant to Civ. R. 10(D)(2)(a), which requires:

> Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in R.C. 2305.113, shall be accompanied by one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness meeting the requirements of Evid. R. 702 and, if applicable, also meeting the requirements of Evid.R. 601(D). Affidavits of merit shall include all of the following:
>
> (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
>
> (ii) A statement that the affiant is familiar with the applicable standard of care;
>
> (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

The plaintiff submitted the following issue for review: "Does a trial court err when it dismisses a case for failure to include an affidavit of merit on a medical issue which does not require expert testimony?"

The 10th District noted that despite the clear language of Civ. R. 10(D), a body of case law exists that does not require

the plaintiff to submit an affidavit of merit where common knowledge, as opposed to expert testimony, is sufficient to establish liability. The court referred to these types of cases as "falls off a gurney or some other sort of fall in a medical facility." The court then noted that this body of case law makes a Civ. R. 12(B)(6) motion less likely to be sustained, and makes a motion for summary judgment the preferable procedural motion to address this question. In this regard, the court emphasized: "Of critical importance to our resolution of this appeal is the fact that judgment was entered following the sustaining of a motion to dismiss under Civ.R. 12(B)(6), as opposed to a judgment based on summary judgment finding under Civ.R. 56. In ruling on a motion filed under Civ.R. 12(B)(6), the trial court is supposed to accept as facts the allegations in the complaint."

The court therefore held that dismissal was not appropriate, stating that pursuant to "the common knowledge exception" to the Civ. R. 10(D)(2) affidavit of merit requirement, an expert is unnecessary to tell one that hospital personnel should not be disregarding medical records or physician's orders regarding the attempted removal of surgical packing that was to remain in place. The court stated: "At the pleading stage alone, a trial court judge could not tell whether the common knowledge exception applies."

Weber v. Geico Casualty Co., 6th Dist. Wood No. WD-18-003, 2018-Ohio-4158 (Oct. 12, 2018).

Disposition: Reversing summary judgment for insurer, and remanding for resolution of a fact issue that would determine the existence (or not) of coverage to the insured.

Topics: UM coverage; out-of-state insurance provision.

Weber was an Ohio resident who lived near the Michigan border. As part of his job duties as a courier, he would often drive into the state of Michigan to make deliveries. On one such occasion in Michigan, Weber's vehicle was struck by a drunk driver, causing him damages and injuries.

Weber had purchased an Ohio Geico auto policy. Weber's Geico policy included an out-of-state insurance provision wherein Geico agreed that in an out-of-state accident, Weber's coverage would increase to the extent required of out-of-state motorists by local law. Unlike Ohio, Michigan is a no-fault insurance state. Out of state drivers in Michigan are required to carry no-fault coverage if they travel into Michigan more than 30 days out of the calendar year.

When Weber presented the claim to Geico, the claim was denied. And when Weber filed suit, Geico moved for summary judgment on the issue of coverage on the basis that Weber's Geico policy was connected to affiliates not licensed in Michigan. Weber filed a cross-motion claiming that the out-of-state insurance provision in his Ohio Geico policy would conform his coverage to include no-fault benefits for a Michigan collision.

The trial court granted judgment for Geico and denied coverage to Weber as a matter of law. Weber appealed to the Sixth District. The Court reviewed the contract case de novo, pursuant to the plain meaning standard. The Sixth District found that reasonable minds can only conclude that the trial court erred in granting summary judgement to Geico. As long as Weber operated his motor vehicle in Michigan more than 30 days out of the year, the Michigan statutory requirement for PIP coverage was triggered, and Geico was responsible for rendering such coverage to Weber.

The case was remanded on the issue of fact concerning how many days out of the year Weber travelled into Michigan.

Crane Service & Inspections, LLC v. Cincinnati Specialty Underwriters Ins. Co., 12th Dist. No. CA2018-01-003, 2018-Ohio-3622 (Sept. 10, 2018).

Disposition: Reversing summary judgment that the Butler County Court of Common Pleas had granted to defendant insurance company in a dispute with its insured. The trial court should have granted the plaintiff's Civ. R. 56(F) motion, allowing it to conduct discovery prior to opposing the insurance company's motion for summary judgment.

Topics: Civ. R. 56(F) motion for a discovery continuance.

Plaintiff Crane Service & Inspections, LLC ("CSI"), an insured, filed an insurance bad faith action against the defendant Cincinnati Insurance Company ("Cincinnati"), alleging that Cincinnati had acted in bad faith in the handling and payment of claims filed by a third party, Nucor Steel Marion, Inc. ("Nucor"). In the underlying action, Nucor alleged damages resulting from a malfunction of a crane supplied by CSI. In that underlying action, Cincinnati had filed a motion to intervene denying there was coverage, but ultimately ended up agreeing to pay a large settlement to Nucor. In the present action, without filing an Answer to CSI's Complaint, Cincinnati moved to dismiss the Complaint, and also moved to stay discovery pending the outcome of the underlying action.

After the underlying case was settled, CSI filed a motion to lift the stay on discovery, which was not ruled on by the trial court. Subsequently, the trial court converted Cincinnati's motion to dismiss into a motion for summary judgment. In response, CSI moved for a discovery continuance pursuant to Civ. R. 56(F), in which CSI emphasized the fact that Cincinnati had never responded to discovery and deposition requests, and CSI had been prohibited from conducting any discovery whatsoever. Over nine months later, the trial court granted Cincinnati's motion for summary judgment, without addressing CSI's Civ. R. 56(F) motion.

On appeal, the 12th District held that the trial court abused its discretion in failing to address CSI's Civ. R. 56(F) motion, and in precluding CSI from conducting any discovery prior to granting summary judgment for Cincinnati. The court noted that a trial court cannot require the party opposing a motion for summary judgment to produce rebuttal evidence and at the same time deny them the opportunity to discover that evidence. Moreover, a trial court must afford adequate opportunity to complete discovery before ruling on a summary judgment motion. The court stated: "However, that did not happen in this case as no discovery was ever permitted regarding CSI's claims against Cincinnati Insurance."

Specifically, the appellate court noted that the trial court never acted upon CSI's request to lift the discovery stay, and never considered CSI's Civ.R. 56(F) motion which remained pending for more than nine months until the trial court granted Cincinnati's motion for summary judgment. The court thus stated that the trial court had abused its discretion by extinguishing CSI's right to discovery and denying it a meaningful opportunity to oppose Cincinnati's motion for summary judgment.

Portee v. Cleveland Clinic Foundation, ____ Ohio St.3d ____, 2018-Ohio-3263 (Aug. 16, 2018).

Disposition: Reversing decision of the 8th District; holding that if an action is commenced in another state, in either a state or federal court, and fails otherwise than upon the merits, and the statute of limitations has expired, the Ohio savings statute, R.C. § 2305.19, does not apply to permit commencement of a new action within one year.

Topics: Ohio Savings Statute, R.C. § 2305.19.

The plaintiff, Pamela Portee, an Indiana resident, had elbow surgery at the Cleveland Clinic on October 3, 2012. She alleged that the defendants were negligent in causing the severance of her ulnar nerve, resulting in a second surgery. The plaintiff and her husband filed a medical malpractice action against the Cleveland Clinic and two doctors in the United States District Court for the Southern District of Indiana on October 2, 2013. On July 28, 2014, the federal court dismissed the case for lack of personal jurisdiction. On July 17, 2015, the plaintiffs filed an identical action against the defendants in the Cuyahoga County Common Pleas Court.

The defendants moved for summary judgment, asserting that the one year statute of limitations in R.C. § 2305.113 barred the action, and that, pursuant to *Howard v. Allen*, 30 Ohio St.2d 130, 283 N.E.2d 167 (1972), the Ohio Savings Statute, R.C. § 2305.19, did not apply because the original action had been commenced in another state. The trial court, relying on *Howard*, concluded that the action was untimely and granted the motion for summary judgment. On appeal, the 8th District reversed, concluding that R.C. § 2305.19 does not specify in which court an action must be commenced for the Savings Statute to apply. The 8th District also distinguished *Howard* because that case involved an action initially filed in a foreign state court, not a foreign federal court.

On further appeal, in an opinion written by Justice O'Donnell, the Ohio Supreme Court reversed the 8th District, holding in the Syllabus: "If an action is commenced in another state in either a state or federal court and fails otherwise than upon the merits, and the statute of limitations for commencement of such action has expired, the Ohio savings statute does not apply to permit commencement of a new action within one year."

In *Howard*, the Court had held that a party originally filing an action in a foreign state court could not avail itself of the Savings Statute. The Ohio Supreme Court rejected the plaintiffs' attempt to limit the holding of *Howard* to actions originally filed in a foreign state court. The Court held that the distinction between foreign state courts and foreign federal courts for purposes of the Savings Statute is "a distinction without a difference." Further, the Court refused to follow an earlier precedent, *Wasyk v. Trent*, 174 Ohio St. 525, 191 N.E.2d 58 (1963), where the Court had allowed a plaintiff to use the Savings Statute after a dismissal from a foreign federal court for lack of subject matter jurisdiction. The *Portee* Court held *Wasyk* was not controlling because it predated *Howard*, "and the parties [in *Wasyk*] did not specifically dispute whether the savings statute could apply to an action originally commenced in a federal court."

The *Portee* Court also distinguished other precedent which supported the plaintiffs' position, and held: "[b]ecause the Portees originally commenced their medical malpractice action in a federal court in Indiana, the savings statute does

not apply to this action, filed in Ohio after the expiration of the statute of limitations."

Pelletier v. The City of Campbell, ____ Ohio St.3d ____, 2018-Ohio-2121 (June 5, 2018).

Disposition: Reversing decision of 7th District; holding that whether a stop sign is "in repair" pursuant to R.C. § 2744.02(B)(3), depends on its physical condition, not whether it no longer serves its purpose due to an extraneous factor, and the duty to "remove obstructions from public roads" applies only to obstructions that originate on the public road and does not apply to conditions that are only near or in the vicinity of public roads.

Topics: Political subdivision immunity; R.C. § 2744.02(B)(3).

The plaintiff ran a stop sign because, she alleged, she could not see the sign due to trees or large bushes in the "devil strip" – the grassy area between the road and the sidewalk. As a result of her failure to see the stop sign, she collided with another vehicle and sustained injuries. The plaintiff brought suit against the City, and various other entities which owned or maintained the devil strip.

The City moved for summary judgment, contending that it was immune from liability pursuant to R.C. § 2744, because the City had no duty to maintain the stop sign, the stop sign was not obstructed, and the City lacked notice of the overgrown foliage. The City submitted evidence that averred that the stop sign was 34 feet, two inches from the foliage in the devil strip. The trial court denied the City's motion for summary judgment, and the 7th District affirmed, holding that the City could be held liable for negligently failing to keep public roads in repair where the traffic control device no longer served its purpose because of the foliage blocking it.

The City appealed to the Ohio Supreme Court. For a political subdivision to be held liable under R.C. § 2744, a three tiered analysis must be conducted. The "first tier" examines whether the political subdivision was engaged in a "governmental function" or a "proprietary function" at the time of the alleged harm. Here, it was not disputed that the City was engaged in a governmental function. The "second tier" of political subdivision immunity analysis, pursuant to R.C. § 2744.02(B), examines whether there is an applicable exception to immunity. The "third tier" of analysis examines whether, assuming an exception to immunity was found under the second tier, immunity is reinstated pursuant to R.C. § 2744.03. Here, the only question before the Court was whether the plaintiff's lawsuit against the City came under the exception to political subdivision immunity under R.C. § 2744.02(B), which provides:

> (3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

The City argued that it could not be held liable for failing to keep a stop sign "in repair" based on "extraneous circumstances entirely unrelated to the actual condition of the sign." The plaintiff argued that the duty to keep public roads in repair requires a political subdivision to maintain the proper operation and functioning of traffic control signals that fall within the definition of a "public road," and that the City had a statutory duty to trim or remove limbs that were causing the stop sign to not be "in repair." The plaintiff further argued that the City could be held liable based on the exception to immunity for the negligent failure to remove obstructions from public roads.

The issues before the Ohio Supreme Court were thus whether the failure to remove foliage growing in the devil strip 34 feet, two inches from a stop sign constituted either: (1) a failure to keep a public road in repair; or (2) a failure to remove an obstruction from a public road. With respect to the first issue, the Court held that whether a stop sign is in repair depends on its physical condition, and nothing in R.C. § 2744.02(B)(3) supports a holding that a traffic-control device is not in repair when it no longer serves its purpose due to some extraneous factor, such as foliage. The Court therefore held that the plaintiff could not prevail on this issue because the stop sign itself was in good repair.

With respect to the second issue, the Court held that the duty "to remove obstructions from public roads" requires that the obstruction must originate in a specific location, i.e., the public road. Further, the Court held that because the word 'from' denotes a specific place, it cannot refer to conditions that are only near or in the vicinity of public roads. Therefore, because the obstruction was not on a public road, or on the stop sign itself, the City had no duty to remove the foliage that blocked the plaintiff's vision of the stop sign.

The Court concluded: "[i]n this case, the stop sign was in

repair, because it was in good or sound condition and was not deteriorated or disassembled. And because the foliage was not on the stop sign, the city had no obligation to remove it from the devil strip. No genuine issues of material fact remain, the city is immune from liability, and the trial court and appellate courts erred in failing to render judgment in its favor."

Giancola v. Azem,_____ Ohio St.3d _____, 2018-Ohio-1694 (May 3, 2018).

Disposition: Reversing the 8th District Court of Appeals; holding that the law-of-the-case doctrine from first appeal was not applicable to second appeal because, on remand from first appeal, the trial court had relied on new evidence not present in first appeal.

Topics: Law-of-the-Case Doctrine.

This case was a survival/wrongful death action alleging that the defendant "Walton Manor," had caused the decedent's death while he was staying at defendant's facility. Walton Manor filed a motion to stay the proceedings and to compel arbitration based upon terms of an arbitration agreement Walton Manor contended the decedent had entered into. The plaintiff contended that it was the decedent's mother, not the decedent, who had signed the agreement, and therefore it was unenforceable. The trial court concluded the arbitration agreement was enforceable because the decedent's mother had apparent authority to bind her son to the agreement's terms.

The plaintiff appealed this decision, arguing that the trial court erred in finding that the mother had apparent authority to bind her son, the decedent. As an attachment to its appellate brief, Walton Manor presented evidence that it was the decedent who signed the arbitration agreement, and not the decedent's mother. In *Kolosai I* (reflecting the last name of the first administrator), the Eighth District held that Walton Manor could not supplement the record on appeal, and noted that Walton Manor's argument was a concession that the trial court's opinion was erroneous. The Eighth District then reversed the trial court and remanded for further proceedings consistent with its opinion.

On remand, Walton Manor renewed its motion to stay proceedings and submitted the evidence it had submitted to the appellate court, together with the report and affidavit of a handwriting expert opining that the decedent had signed the arbitration agreement. The trial court again granted the motion to stay, and referred the case for arbitration. The plaintiff again appealed.

During the second appeal (*Kolosai II*), the Eighth District held that the trial court had violated the law-of-the-case doctrine when it reconsidered the issue of who had signed the arbitration agreement. The appellate court in *Kolosai II* ruled that, pursuant to *Kolosai I*, the arbitration agreement could not be enforced under a doctrine of apparent authority, and that the handwriting expert's report should not have been considered by the trial court as it was not newly discovered evidence.

> On further appeal to the Ohio Supreme Court, the Court noted that:
>
> The law-of-the-case doctrine has long existed in Ohio jurisprudence. The doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.

¶ 14 (citations omitted).

The Supreme Court noted, however, that the law-of-the-case only comes into play with respect to issues that were previously determined by the appellate court. As to other issues, on remand, a trial court is free to reach its own conclusions. After *Kolosai I*, the trial court was required to proceed from the point at which the error occurred (i.e., the point where the trial court granted the motion to stay arbitration on the basis of the mother's apparent authority to bind her son). Thus, the law-of-the-case doctrine did not prevent the trial court from considering new evidence as to whether the decedent had signed the arbitration agreement. Therefore, the Ohio Supreme Court reversed the Eighth District in *Kolosai II*.

Gillespie v. Waterwheel Farms, Inc., 2d Dist. Miami No. 2017-CA-16, 2018-Ohio-1535 (April 20, 2018).

Disposition: Reversing summary judgment for defendant on a strict liability statutory dog bite claim..

Topics: Dog bite statute, R.C. 955.28(B); status of plaintiff as invitee or trespasser.

Gillespie was a delivery driver who was bitten by a dog while completing a delivery to the defendant's farm, Waterwheel Farms. His lawsuit was comprised of common-law negligence and strict liability causes of action. The trial court entered summary judgment for the farm on both causes of action, and

Gillespie appealed on his strict liability statutory claim only.

The dog bite occurred during Gillespie's first delivery to Waterwheel Farms. At the time of the attack, he had finished making his delivery and was seeking a signature from one of the farm's hired hands. In doing so, Gillespie entered a building and then entered a closed door that allegedly had a sign on it reading, "DO NOT Enter Shop Without Permission. Dogs on Duty!". Gillespie stated he did not see the sign, nor did he see or hear any dogs. Gillespie did not claim to have permission to enter the building, or the machine shop, where the attack occurred. There was conflicting testimony about how many doors were necessarily entered by Gillespie inside the building in order for him to encounter the dogs.

Based on these facts, the trial court determined that Gillespie's status at the time of the bite was that of a criminal trespasser, which is an affirmative defense to strict liability under Ohio's dog bite statute.

On review, the Second District began by determining that Gillespie's status upon arrival to the farm was that of an invitee. The status of invitee is limited by the landowner's invitation, subject to an objective test to determine the scope of the invitation. Ultimately the court found, "taking into consideration the nature of the farm operation, the fact that the building housed the appellees' business office, the reason for Gillespie's presence, and the seemingly conflicting testimony about the location of the dogs, construing the evidence most favorably for Gillespie, we believe there are genuine issues of fact regarding whether Gillespie was an invitee or a criminal trespasser, when he was bitten by the appellees' dog."

In light of the issues of fact as to Gillespie's status on the defendant's property at the time he was bitten by the farm dog, summary judgment was reversed and the case was remanded for further proceedings.

Cremeans v. Heartland of Chillicothe, 4th Dist. Ross No. 17CA3589, 2017-Ohio-9399 (Dec. 29, 2017).

Disposition: Affirming trial court's ruling denying defendants' motion to enforce arbitration agreement.

Topics: Arbitration agreements not enforceable when named defendants are not identified in the granting clause or signature block.

The estate of Karen Cremeans brought a nursing home negligence and wrongful death suit against the owners and operators of a nursing home. Defendants filed a motion to stay proceedings pending arbitration, seeking enforcement of an alleged arbitration agreement signed by the nursing home resident herself. The court analyzed the arbitration agreement at issue and concluded that it was not enforceable because none of the defendants named in the lawsuit were actually parties to the alleged arbitration agreement.

The Fourth District relied primarily on Ohio Supreme Court precedent holding that "only signatories to an arbitration agreement are bound by its terms." *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787. In this case, it was undisputed that Karen Cremeans had signed the alleged arbitration agreement. However, the signatory for the nursing home was Brenda Long who signed as the "Center Representative". The court's analysis turned to which defendants, if any, were to be considered the "Center" under the agreement.

The Fourth District followed the lead of the Ninth District which had just decided another Manor Care nursing home arbitration case under strikingly similar facts. See *Kallas v. Manor Care of Barberton OH, LLC*, 9th Dist. Summit No. 28068, 2017-Ohio-76. In both cases, the named defendants were not identified in the granting clause or signature block of the alleged arbitration agreement and "were thus not parties to the agreement". Further, due to the lack of identifying a counterparty to the alleged agreement, "there was no valid contract to support a third-party beneficiary."

The court therefore affirmed the trial court's ruling and held that the defendants were not entitled to enforce the alleged arbitration agreement. ■

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Verdict Spotlight:

Jury Awards $300,000 for Death of Terminal 76 year-old Patient who Choked to Death on his Medication

By Stuart E. Scott

Jeff Heller of the Nurenberg Paris law firm obtained a $300,000 jury verdict in a challenging medical negligence case for a terminal patient who died from preventable complications of his Parkinson's disease. Despite numerous hurdles and obstacles both on liability and damages Jeff was able to obtain justice for his client's family.

Plaintiff's Decedent was a 76 year-old family man who had significant medical history for advanced Parkinson's disease, dysphagia, Lewy-body dementia, chronic UTIs, Supra Pubic catheter, severe atherosclerosis, as well as several other significant diseases and conditions. Plaintiff's Decedent, Mr. Porter, had been hospitalized or had visited an emergency department 100 times in the 10 years previous to his death.

On November 7, 2016, Mr. Porter suffered a fall at home. His son took him to Firelands Regional Medical Center in Sandusky, where *x*-rays came back normal. Mr. Porter was discharged, but the next day was in immense pain and was unable to move. His son took him back to Firelands, where a CT-scan revealed a fractured pelvis. Mr. Porter was admitted to the hospital for stabilization with a goal of discharge to a skilled nursing facility where he could rehabilitate his fracture. On November 12, Mr. Porter was found dead in a hospital room chair. Mr. Porter's primary care doctor filled out his death certificate and listed the cause of death as Cardiac Arrest. The family ordered a private autopsy at Ohio State Wexner Medical Center, which revealed a blue gelatinous capsule lodged in Mr. Porter's trachea above the carina. While the pathologist did not make a determination as to the cause of death, a mucous plug above the capsule combined with blue tissue staining into both bronchi indicated Mr. Porter was still breathing as the capsule was lodged and eventually obstructed his airway.

Jeffrey M. Heller

Mr. Porter's most debilitating illness was Parkinson's Disease, which manifested itself as dysphagia. One of the critical medications he took to treat his Parkinson's and dysphagia was Sinemet. After Mr. Porter was admitted to Firelands Hospital, the nurses failed to consistently administer the Sinemet, and as a result, Mr. Porter's swallowing capability declined. While a swallowing test upon admission indicated that he could have oral intake with appropriate safeguards, his ability to swallow continued to decline during the hospitalization. Jeff argued that this decline in swallowing ability was brought on by the failure to properly administer his Sinemet, which was crucial to maintaining his neurological/swallow function. Without the Sinemet, his Parkinson's worsened as did his dysphagia. His worsening but premature dysphagia ultimately caused him to exhibit signs and symptoms of aspiration, and

while several of Mr. Porter's room nurses charted the swallowing difficulties, they never notified a doctor and continued to administer his medications by mouth.

The Plaintiff's primary claim was that the nurses failed to go up the chain when Mr. Porter exhibited swallowing difficulties. Because the initial dysphagia screen indicated he could handle oral intake, the swallowing difficulties indicated a decline in his baseline, which a doctor should have been notified about. The inability to swallow then prompted nurses to withhold some of his medications, including Sinemet, which complicated the issue even more. Jeff argued that as a direct result of this negligence, Mr. Porter was administered a Uribel capsule which he should not have, which he ultimately asphyxiated on.

The hospital defended the case on the basis that nurses exercised reasonable judgment and discretion in holding and/or administering its medications. Their exercise of reasonable judgment in providing the medications orally did not require them to notify a doctor every time a medication was being administered. Their expert physician, Dr. Daniel Brotman, MD, (Johns Hopkins) testified he is grateful when nurses do not contact him for "every little issue."

Among the several significant hurdles that Jeff had to negotiate in the case was the fact that the Defense focused on Mr. Porter's numerous maladies that had placed him on death's doorstep. Jeff was able to overcome this by demonstrating that the Firelands doctors were preparing to discharge Mr. Porter to a short-term nursing facility to rehab his broken pelvis. Anticipating that the defense would focus on Mr. Porter's co-morbidities, Jeff neutered their impact by embracing all of those maladies in his opening statement. In effect, he told the jury what the defense was going to say and why those maladies had nothing to do with the negligence of the nurses in failing to provide him medication necessary to preserve his swallowing function. During the course of the trial he was also able to obtain key admissions from at least one of the nurses who testified in contradiction to the medication administration record and her own charting. Another key in the case was calling the hospital's speech pathologist who had evaluated and established Mr. Porter's swallowing function and had made recommendations that his baseline was that he could be fed by mouth and was able to eat, drink, and take pills overall. This should have alerted the nurses to contact the doctor when Mr. Porter deviated from that baseline and began experiencing increasing swallowing difficulties.

Jeff also had to overcome significant hurdles with regard to damages. Mr. Porter's life expectancy prior to his death was less than one year due to his numerous and significant co-morbidities. Furthermore, the client was DNR-CC. The family had told his regular doctors at the Cleveland Clinic that, if his swallowing difficulties became too severe, he did not want a feeding tube. The defense seized on the family's recognition that Mr. Porter's life was nearing an end and that they did not want him on a feeding tube, which was the next logical step that would have been taken had a doctor reassessed his worsening dysphagia. At trial, the family testified that had they been presented with a life or death scenario, they would have opted for short term feeding tube so Mr. Porter could have received his Parkinson's medication to restore his swallowing function. Jeff also made a compelling argument that Mr. Porter's asphyxiation and death was a horrible way to die thus giving the jury the ability to seize on the survivorship claim to compensate for the hospital's negligence.

As always, Jeff learned a number of important lessons through the work-up and trial of the case. One of the most important was that no matter how "bad the case appears," the creative trial lawyer focuses on what they have, not what they don't have. As the person presenting the case, you control how the evidence comes out and what the case is truly about. It is your case. Not theirs.

Overall, this was a remarkable verdict given the multiple hurdles and pitfalls that faced Jeff and his team.

The case is *Elaine Hines, executrix for the Estate of Peter Porter v. Firelands Regional Medical Center,* Erie County, 2016 CV 0702, Judge Tygh Tone presiding. ■

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.*

Russell Johnson v. David Craig Stachel, M.D.

Type of Case: Medical Malpractice
Verdict: $636,000.00
Plaintiff's Counsel: Rhonda Debevec, Esq., The Debevec Law Firm, LLC, (216) 331-0953
Defendant's Counsel: Stephen Griffin, Esq.
Court: Stark County Common Pleas Case No. 2017-CV-02075, Judge Taryn Heath
Date Of Verdict: October 26, 2018
Insurance Company: Health Underwriters Group, Inc. (Coverys)
Damages: Delayed diagnoses of hip fracture; deep vein thrombosis and loss of hip joint. (Girdlestone procedure.)

Summary: In 2013, Mr. Johnson was a 79-year-old stroke victim with left-sided deficits confined to a nursing home. In August 2013, he was left unattended on the toilet by an aide and fell on his left hip. After the fall, Dr. Stachel was informed of the patient's complaint of hip pain and ordered an x-ray. The x-ray report was negative for fracture. Over the following two weeks, Mr. Johnson continued to complain of hip pain and a significantly-impaired ability to transfer.

Dr. Stachel did not evaluate Mr. Johnson until fourteen days after his fall. Although Dr. Stachel documented the negative hip x-ray, he did not acknowledge Mr. Johnson's on-going complaints nor examine his leg. After this initial evaluation, Dr. Stachel did not order any additional studies to investigate the patient's complaints and functional decline.

Ultimately, Mr. Johnson's hip fracture was diagnosed about 73 days after his fall. By then, his hip joint had significantly deteriorated and efforts to perform a partial hip replacement were unsuccessful. In an attempt to control pain, his hip joint was removed in a Girdlestone procedure. As a result, Mr. Johnson's ability to transfer from his wheelchair was severely compromised. He required the use of a hoyer lift to transfer for about two years until he was transitioned to a mechanical sit-to-stand lift. He never regained his ability to transfer with the assistance of aides. The jury deliberated approximately seven hours. No meaningful settlement offer was made before trial.

Plaintiff's Experts: Theodore Homa, M.D. (Internist); and Ericka R. Glass Johnson, M.D. (Treating Orthopedic Surgeon)

Defendant's Experts: Douglas Clough, M.D. (Internist); John Feighan, M.D. (Orthopedics); and Lawrence Cooperstein, M.D. (Radiology)

Derrick Dent v. Sandy Supply & Trucking Co.

Type of Case: Motor Vehicle Accident
Settlement: $350,000.00
Plaintiff's Counsel: David A. Herman, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Patrick Roche, Jr.
Court: Cuyahoga County Common Pleas Case No CV-17-888946, Judge Saffold
Date Of Settlement: October 16, 2018
Insurance Company: Westfield Insurance
Damages: Low Back Injury and Torn Labrum

Summary: Forty-seven year old man rear-ended on his way home by a dump truck operator.

Plaintiff's Experts: Louis Keppler, M.D.; Todd Hochman, M.D.
Defendant's Expert: Dennis Crandall, M.D.

Anonymous Plaintiff v. Anonymous Nursing Home

Type of Case: Nursing Home Negligence
Settlement: $400,000
Plaintiff's Counsel: Michael Hill and William Eadie, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: Tom Prislpski, Reminger Co.
Court: Mahoning County
Date Of Settlement: September 24, 2018
Insurance Company: CNA
Damages: Pain and suffering following broken femur

Summary: The decedent fell at a nursing home breaking her femur. She was taken to the hospital where physicians noted that she had an osteoporitic, as opposed to traumatic, break. She died 10 days after the fracture.

Plaintiff's Experts: Cheryl Cronin (Nursing); Chris Davey (Medical); Dan Spitz (Pathology); Lance Youles (Administration); Ernest Tosh (Staffing)
Defendant's Experts: Mark Evans, M.D. (Medical); Denise Kresevic, RN (Nursing); and Steven Anderson, CPA (Staffing)

Celeste R. Meck, Executrix of the Estate of John W. Meck v. Cleveland Clinic Foundation

Type of Case: Medical Malpractice/Wrongful Death/Loss of Chance
Settlement: $200,000.00
Plaintiff's Counsel: Steven M. Goldberg/Jeffrey R. Wahl/Eric H. Zagrans, Goldberg Legal Co., LPA, (440) 519-9900
Defendant's Counsel: Withheld

Court: U.S. District Court, Northern District of Ohio
Date Of Settlement: August 2018
Insurance Company: Withheld
Damages: Paralysis/Death

Summary: Loss of chance involving an 81 year-old patient with multiple comorbidities, previously underwent open abdominal aortic aneurysm repair at Pennsylvania hospital. Thereafter Patient developed another aortic aneurysm, this time thoraco-abdominal (TAAA), which required repair. Due to his previous open repair and other disqualifying factors, the only option available to him was an IDE for a novel Endovascular Branched Stent Graft (as he could not undergo another open procedure). Patient was recommended to Cleveland Clinic for investigational phase 1 safety study of the Fenestrated Endovascular Aortic Aneurysm Repair (FEVAR). There were multiple inclusion criteria for participation and Patient qualified. Risk of paralysis was 4%, but in reality, with greater amounts of coverage of the aneurysm (the procedure placed an anchored stent within the aorta to isolate the aneurysm), the risk probably was more like 6-8%.

Patient underwent surgery in February 2013. One of the neuroprotective measures employed for almost all of the patients in the study was the insertion of a Lumbosacral Subarachnoid (SA) Drain, which would enable control of the flow of CSF and regulation of the CSF pressure. Paraplegia often results from FEVARs due the sacrifice of collateral blood flow beds which feed the spine, and the use of the drain is a successful measure in both preventing the likelihood of paraplegia, and/or reducing its severity and permanency. Patient's SA drain was placed by the cardiothoracic anesthesiologist in the OR without event. The SA drain line leading from the patient to the measurement and collection system used a small stopcock and an infusion port which is never used, and, in order to prevent accidental infusion, (which happened here) it is routinely covered by the inserting physician. In this case, the port was encapsulated with 2" white OR tape rendering it inaccessible, with "SPINAL DRAIN" in all capital letters in BOLD BLACK SHARPIE. The patient did fine in the OR, and was taken to the cardiovascular ICU (CVICU) to convalesce. The patient arrived in the CVICU with the tape on the drain port. For a number of hours, his legs moved normally and he had normal sensation (both excellent prognostic signs). The nurse who was assigned only two patients evening shift had been a nurse for a few years, but he only recently had started nursing in the CVICU. His previous reviews were horrifying and demonstrative of "unsafe" and poor nursing skills. Yet, he was hired into the CVICU. He had very little experience (admitted by him and his nurse manager) with SA drains, prior to this patient. The proper "meticulous" use of the drain is required or its therapeutic benefit is lost. Inexplicably, the CVICU Nurse injected Albumin (itself marked "IV only") into the infusion port of this patient's SA drain (having had to remove the warning tape/protective device). The Albumin SNAFU was discovered some time later triggering a middle of the night investigation. Strangely, the Nurse was put back on the floor after the investigation, to continue caring for Patient. There is one hour during the Nurse's shift where his whereabouts and activities are not described (Nurse did not chart for one complete hour, and added critical entries after they occurred without noting them as "late entries" as required), during which no nursing was provided to Patient by him, and the Patient's legs became paralyzed. The paralysis never was reversed, and Patient lived the remainder of his life incontinent of bowel and bladder, with no movement or sensation below his navel. Patient died from pneumonia (the most common cause of death among paraplegics) living in a hospital bed in his home in Pennsylvania.

The issues in the case were whether Nurse's conduct caused the paralysis (including mishandling/misuse of the SA drain, causing the paralysis to develop/persist) or whether his Albumin misadministration into the SA drain prevented the drain from doing its spinal neuroprotective purpose, causing the paralysis to persist and not recover. Nurse's negligence was admitted.

Plaintiff's Experts: Dr. Charles C. Hill (Cardiovascular ICU/Anesthesiologist/Critical Care Medicine); Dr. Albert T. Cheung (Anesthesiologist); Emily P. Moyer, RN (Advanced Practice Nurse Practitioner); Kelly Hoenisch, BSN, RN, NE-BC (Nursing); John F. Burke, Jr., Ph.D. (Economist)
Defendant's Experts: Dr. Gordon Morewood (Anesthesiologist); Dr. Thomas C. Naslund (Vascular Surgery)

James Roberts v. Edward Thomas

Type of Case: Motorcycle
Settlement: $1,425,000.00
Plaintiff's Counsel: Jordan Lebovitz, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Withheld
Court: Trumbull County Court of Common Pleas
Date Of Settlement: August 2018
Insurance Company: Progressive Insurance Company
Damages: Subarachnoid hemorrhage, temporal fracture, right orbital floor fracture, T6 compression fracture, right clavicle fracture, amongst other orthopedic injuries

Summary: Plaintiff was riding his motorcycle to work when a human transport van missed a turn after traveling over the crest of a hill and decided to travel in reverse on a two-lane undivided roadway causing a severe collision with Plaintiff's motorcycle. Liability was contested.

Plaintiff's Experts: Dr. Harry Hoyen; Dr. Robert Wetzel;

Jonathan Strychasz; James Crawford
Defendant's Expert: Tanya Czack

Scott A. Sherman v. Sharon Regional Health Systems and Dr. Sandeep Riar

Type of Case: Medical Malpractice
Settlement: $2,000,000.00
Plaintiff's Counsel: Steven M. Goldberg (Scott Melton/ Pennsylvania), Goldberg Legal Co., LPA, (440) 519-9900
Defendants' Counsel: Withheld
Court: U.S. District Court, Western District of Pennsylvania
Date Of Settlement: August 2018
Insurance Company: Withheld
Damages: Bi-lateral leg amputations

Summary: Case involved failure to timely diagnose and treat a severe circulatory compromise in Plaintiff's legs and feet, while he was hospitalized in the ICU, which led to a prolonged period of ischemia in his lower extremities and directly resulted in an above the knee amputation of Plaintiff's left leg and a below the knee amputation of his right leg. Plaintiff age 54, an unemployed welder with an 11th grade education, was single and living with his mother.

Plaintiff's Experts: Dr. Frank Criado (Vascular Surgery); Dr. Aaron Waxman (Pulmonary and Critical Care Medicine); Susan Smith, RN (Nurse); Matthew R. Marlin, Ph.D. (Economist); Jan Dolan, RN (Life Care Planner)
Defendants' Experts: Dr. Judy Schmidt (Hematology); Dr. Thomas Naslund (Vascular Surgery); Dr. Larry L. Schulman (Pulmonary and Critical Care Medicine); Dr. William Vernick (Anesthesia); Susan Dye, RN (Life Care Planner); Christopher Bartlett, Ph.D. (Economist)

Confidential

Type of Case: Wrongful Death
Settlement: $6,000,000.00
Plaintiff's Counsel: David R. Grant and Frank L. Gallucci II, Plevin & Gallucci Co., L.P.A., (216) 861-0804
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: July 20, 2018
Insurance Company: Withheld
Damages: Wrongful Death of a 33-year old husband and father of 3

Summary: Decedent was electrocuted by equipment in a high voltage substation on Defendant's property that Defendant's manager failed to properly shut off and test to verify there was no voltage. A key dispute centered on whether this was an employer intentional tort claim as Defendants argued or a negligence claim as Plaintiff argued.

Plaintiff's Experts: Richard L. Buchanan, P.E. (High Voltage Electrical Engineer); Kent E. Harsbarger, M.D.; Bryan D. Casto, M.D.; Stephen M. Renas, Ph.D. (Economist)
Defendant's Expert: Jesus Lopez, P.E.

Jane Doe, et al. v. OSU Medical Center

Type of Case: Medical Malpractice
Settlement: $3 Million
Plaintiffs' Counsel: David M. Paris and David A. Herman, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Jeffrey L. Maloon; Brian M. Kneafsey, Jr.
Court: Court of Claims
Date Of Settlement: July 20, 2018
Insurance Company: *
Damages: Paraplegia

Summary: Plaintiff, a 62-year old Type I diabetic, presented to OSU ER with sharp mid back pain radiating around her ribs and chest. Admitted for cardiac work up. CTA ruled out PE and aortic pathology and serial labs ruled out cardiac. Radiologist missed subtle inflammation at T7. Over the next 2 days, hospitalist failed to order MRI to rule in/out MSK origin despite fever, periapical abscess and confirmed bacteremia. On day 4, she became paralyzed and incontinent of bowel and bladder. MRI revealed a spinal epidural abscess.

Plaintiff's Experts: Myron Marx, M.D.; David Goldstein, M.D.; Richard Bonfiglio, M.D.; Cynthia Wilhelm, Ph.D.; John Burke, Jr., Ph.D.
Defendants' Experts: David Naeger, M.D.; Richard Fessler, M.D.; Richard Katz, M.D.; Douglas Anderson; Robert J. Reynolds, Ph.D.; David Boyd, Ph.D.; Gary Brewer

Baby Boy v. ABC Hospital and Dr. Doe

Type of Case: Medical Negligence
Settlement: $2,250,000
Plaintiff's Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100
Defendants' Counsel: N/A - Confidential Settlement
Court: N/A - Confidential Settlement
Date Of Settlement: June 2018
Insurance Company: N/A - Confidential Settlement
Damages: Wrongful Death of Newborn

Summary: During labor, the nurses and obstetrician failed to recognize fetal heart rate patterns showing the fetus was being exposed to damaging hypoxia and acidosis. The baby was born profoundly depressed and brain damaged. He passed away shortly after birth.

Plaintiff's Experts: Mary D'Alton, M.D.; Terrie Inder, M.D.;

Cynthia Kaplan, M.D.; Laura Mahlmeister, R.N.; Michael Katz, M.D.
Defendants' Experts: Marc Incerpi, M.D.; Patrick Naples, M.D.; Amy Sanborn, RN; Anne Hansen, M.D.; Juan Felix, M.D.; Harry Chugani, M.D.; John Thorp, M.D.; Dennis Whaley, M.D.

James O'Brien v. Brianna Colon

Type of Case: Motor Vehicle Accident
Verdict: $38,320.00 and PJI/Costs $2,126.85
Plaintiff's Counsel: Christopher M. DeVito, Morganstern, MacAdams & DeVito Co., L.P.A., (216) 687-1212
Defendant's Counsel: April C. Thomas
Court: Cuyahoga County Common Pleas Case No. CV 17 882251, Judge Maureen Clancy
Date Of Verdict: May 16, 2018
Insurance Company: 21st Century Centennial Insurance Co. (aka Farmers Insurance Co.)
Damages: Medical bills of $7,185.00 and property damage paid of $4,796.95

Summary: Rear-end collision on highway at approx. 35 mph

Plaintiff's Expert: Dr. Alok Bhaiji
Defendant's Expert: None

John Doe v. ABC Hospital

Type of Case: Medical Negligence
Settlement: $5,100,000
Plaintiff's Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: N/A - Confidential Settlement
Court: N/A - Confidential Settlement
Date Of Settlement: May 13, 2018
Insurance Company: Self Insured
Damages: Brain Damage, Total Disability

Summary: John Doe, a 42 year old electrical worker fell off a telephone pole and suffered a lower extremity fracture. He underwent surgical repair at ABC Hospital. Following surgery the floor nurse administered excessive amounts of opioid pain medication. John Doe suffered cardio pulmonary arrest. He was resuscitated but suffered a global anoxic brain injury resulting in total disability.

Plaintiff's Experts: David Goldstein, M.D., Barbara Levin, RN, Cam Parker, RN; David Boyd, PhD.; Jeff Unger, M.D.
Defendant's Expert: Edward Platia, M.D.

Anonymous Plaintiff v. Anonymous Nursing Home

Type of Case: Nursing Home Negligence
Settlement: $640,000
Plaintiff's Counsel: Michael Hill and William Eadie, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: Shirley Christian, Reminger Co.
Court: Mahoning County
Date Of Settlement: May 11, 2018
Insurance Company: Zurich
Damages: Death from subdural hematoma

Summary: The decedent was an 89-year-old woman who was admitted to a nursing home following a stroke. She fell in the middle of the night. She struck her head and was taken to St. Elizabeth's Hospital where she died from the traumatic head injury.

Plaintiff's Expert: N/A
Defendant's Expert: N/A

Gavin Ellis, a Minor, et al. v. Laura Kenny Fortner, M.D., et al.

Type of Case: Medical Malpractice
Verdict: $11.35 Million
Plaintiffs' Counsel: Michael Becker and David Skall, The Becker Law Firm, (440) 323-7070
Defendants' Counsel: Michael Ockerman and Brad Longbrake of Hanna, Campbell & Powell
Court: Summit County Court of Common Pleas Case No. CV 2016-07-2898, Judge Joy Malek Oldfield
Date Of Verdict: February 15, 2018
Insurance Company: TDC (The Doctor Company)
Damages: Brain injury in newborn

Summary: This malpractice case involves claims of a young man from Massillon, Ohio, now age 16, who suffered permanent brain damage and lifelong disabilities, in part, due to the negligence of Defendant physician, Laura Fortner, M.D. ("Dr. Fortner"), during his delivery and birth on April 25, 2001. After his mother, Lisa Ellis, pushed for just over 4 hours with intervals of concerning fetal heart rates, the baby was delivered vaginally with the use of a vacuum and then forceps. The delivery note stated that there were "several pop-offs" of the vacuum, and Lisa suffered a 4th degree tear of her perineum.

Gavin was born with low Apgars at 1 , 5 and 6. His heart rate, breathing and color were very poor, and he was intubated and taken to the Neonatal Intensive Care Unit. He had severe bruising on his face and a large contusion on his head, with significant swelling of his head. The bones of his skull were compressed to the point that they overlapped each other, and he began having seizures shortly after his 4th hour of life. He was diagnosed in the medical record as having Hypoxic Ischemic Encephalopathy ("HIE") as the result of a "difficult delivery." He remained in the hospital 11 days and was later discharged home on May 6, 2001.

After a fall at 15+ months of age, doctors obtained a CT film of the child's head. Though there was no new injury from the

fall, experts in the litigation all agreed that the film showed a remote "watershed" pattern of injury and tissue damage on both sides of Gavin's brain. This permanent injury is known to result when the brain receives insufficient oxygen and blood over a period of time that is generally at least an hour or longer. Given the birth and other medical history, this injury was attributed to the time around birth. Plaintiffs' neuroradiologist was able to also look back at an earlier CT scan of Gavin's brain that was done on April 27, 2001, when he was only 36 hours old. He found early signs of swelling just after birth in the same areas of the brain that later showed the watershed injury.

The doctors taking care of the child as a toddler and, into the school years, however, were not aware of the watershed injury when he was first diagnosed as being on the Autism spectrum. It was not until 2009, at age 8, that Gavin underwent a definitive MRI study that clearly confirmed the brain injury that had occurred many years earlier. With hard evidence of brain injury stemming from around the time of birth, the caregivers reevaluated that his intellectual impairments, social dysfunction and autistic-like features were the result of structural brain damage.

It was alleged that Dr. Fortner violated applicable standards of obstetric care in continuing the vaginal delivery as opposed to changing the care plan and performing a cesarean section. It was also alleged that her negligence resulted in a prolonged 2nd stage of labor, with vast, unrelenting trauma to the baby's head that ultimately damaged his brain. More specifically, Plaintiffs submitted evidence that Dr. Fortner negligently:

(1) Failed to respond to non-reassuring and concerning fetal heart rate changes;

(2) Failed to recognize a clinical cephalopelvic disproportion and/or labor dystocia/arrest that made safe, timely vaginal delivery highly unlikely;

(3) Failed to appreciate the risks of continuing the vaginal birth, and ultimately an operative vaginal birth, as opposed to changing the care plan to perform a safe, timely cesarean section; and

(4) Failed to obtain the proper informed consent of Lisa and/or Matt Ellis for the continued vaginal birth by not advising them of the true material risks of continuing the vaginal delivery as opposed to changing the care plan and performing a cesarean section. (The parents had suggested a C-section, but this was rejected by the doctor.)

Plaintiffs submitted that, in the absence of Dr. Fortner's above negligence, the child would have been delivered healthy via safe and timely cesarean section, and would have avoided brain damage and the permanent, life-long impairments and special needs that he suffers today and will endure for life.

Plaintiff's Experts: Barry Schifrin, M.D. (Obstetrician); Stephen Glass, M.D. (Neurologist); Gayle Huelsmann, RNC (OB Nursing)
Defendants' Expert: Jay Goldsmith, M.D. (Neonatologist); Mark Landon, M.D. (Maternal-Fetal Obstetrician); Gerry Taylor, Ph.D. (Pediatric Neuropsychologist)

Walter S. Batie, et al. v. Michael Chuwku and Ace Taxi Service, Inc.

Type of Case: Motor Vehicle Accident
Settlement: $525,000.00
Plaintiffs' Counsel: Steven M. Goldberg, Goldberg Legal Co., LPA, (440) 519-9900
Defendants' Counsel: Withheld
Court: Cuyahoga County Common Pleas
Date Of Settlement: February 2018
Insurance Company: Withheld
Damages: Cervical disc herniation, anterior inferior labral and posterior labral tear of left shoulder resulting in 3 surgical procedures

Summary: Plaintiff was proceeding through an intersection when a taxi-cab driver failed to yield and attempted to turn left and drove directly into the path of Plaintiff's car. Plaintiff missed work and underwent physical therapy.

Plaintiffs' Experts: Dr. Reuben Gobezie (Orthopedic Surgeon [shoulder]); Dr. Jason Eubanks (Orthopedic Surgeon [neck]); Alex Constable (Economist)
Defendants' Expert: None

Anonymous Baby v. XYZ Hospital

Type of Case: Birth Injury
Settlement: $1,900,000.00
Plaintiff's Counsel: Pamela Pantages, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5205
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: 2018
Insurance Company: Confidential
Damages: Total permanent brachial plexus injury

Summary: After 2 hours of fetal monitoring that progressed from Category 1 to Category 3, a resident attempted an expedited vacuum extraction followed by a severe shoulder dystocia.

Plaintiff's Expert: Confidential
Defendants' Expert: Confidential

Louis Bordonaro v. New Jersey Mfg. Ins. Co., et al.

Type of Case: Motor Vehicle Accident
Settlement: Confidential
Plaintiff's Counsel: Ellen McCarthy and Andy Young,

Young and McCarthy LLP
Defendants' Counsel: Joseph McCullough
Court: Montgomery County
Date Of Settlement: *
Insurance Company: USAA
Damages: *

Summary: Plaintiff was driving his truck when the defendant failed to yield at a stop sign. Truck rolled over. Plaintiff sustained a disc herniation at L-2-3 with lumbar laminectomy.

Plaintiff's Expert: Arash Emami, M.D. (Orthopedic Surgeon, New Jersey)
Defendants' Experts: Arthur F. Lee, M.D. (Orthopedic Surgeon); David Rubinfeld, M.D. (Orthopedic Surgeon)

Glen Daughtery v. Vatterott College

Type of Case: Premises Liability
Settlement: $850,000.00
Plaintiff's Counsel: Ellen McCarthy and Andy Young, Young and McCarthy LLP
Defendant's Counsel: Keith Thomas, Esq.
Court: Cuyahoga County
Date Of Settlement: *
Insurance Company: Cincinnati Insurance
Damages: *

Summary: Plaintiff was a student at Vatterott College. A large refrigeration unit fell on him during class. Plaintiff sustained a T-12 - L-1 compression fracture.

Plaintiffs' Experts: Jonathon Belding, M.D. (Orthopedic Surgery); Travis Cleland, M.D. (Physical Medicine and Rehabilitation); Heidi Peterson, CRC; Harvey Rosen, Ph.D.
Defendants' Experts: John Conomy, M.D.

Baby Doe v. John Doe OB

Type of Case: Birth Injury
Settlement: $600,000.00
Plaintiff's Counsel: Pamela Pantages, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5205
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: 2018
Insurance Company: Confidential
Damages: Permanent brachial plexus injury

Summary: Shoulder dystocia following difficult forceps application resulted in significant brachial plexus injury. Six months before trial, defendant filed a notice of immunity based upon a clinical academic appointment. In lieu of litigating the personal immunity issue, the parties reached a resolution.

Plaintiff's Expert: Confidential
Defendant's Expert: Confidential

Estate of Cynthia Munoz v. ABC Nursing Home

Type of Case: Nursing Home Neglect
Settlement: $400,000.00
Plaintiff's Counsel: Allen Tittle, Tittle & Permuter, (216) 285-9991, Michael Hill and William Eadie, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: Andy Jamison
Court: Cuyahoga County Common Pleas Case No. CV-18-892489
Date Of Settlement: *
Insurance Company: *
Damages: Wrongful death

Summary: Elderly woman with complete left sided paralysis was a resident of a nursing home wheelchair bound. During a bingo game, she fell out of her wheelchair hitting her head. Subsequently, despite being on blood thinners, hours went by without sending her to the hospital for emergent medical care. Subsequently, she was diagnosed with a brain hemorrhage causing her death.

Plaintiff's Expert: Dr. Mark Shoag
Defendant's Expert: *

NOTE: The following settlement was inaccurately reported in the Spring 2018 issue of the CATA News for $122,500.00 when, in fact, it was for $212,500.00.

Jane Doe v. Truck Company

Type of Case: Truck Crash
Settlement: $212,500.00
Plaintiff's Counsel: Jordan Lebovitz, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Withheld
Court: United States District Court, Northern District of Ohio, Eastern Division
Date Of Settlement: March 28, 2018
Insurance Company: Occidental Fire & Casualty Company
Damages: L4-5, L5-S1 disc bulges with radiculopathy

Summary: Plaintiff was traveling home in a small passenger vehicle when an out-of-state commercial truck driver attempted to merge while Plaintiff was traveling in his blind spot causing her vehicle to spin and strike a concrete median. Defendant truck driver blamed the Plaintiff for not seeing that his truck was moving into her lane. The truck company failed to have proper training mechanisms in place to educate its drivers on safe driving practices.

Plaintiff's Experts: Medical Experts only: Dr. Tracy Neuendorf (The Doctors Pain Clinic); and Dr. Dominic Conti (Primary Care Physician)
Defendant's Expert: Dr. James Brodell ■

Application for Membership

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

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

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

3. Excellent character and integrity of the highest order.

Name: _____ Email: _____

Firm: _____

Office Address: _____ Phone: _____

Home Address: _____ Phone: _____

Law School / Year Graduated: _____

Professional Honors or Articles Written: _____

_____

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

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

_____

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

_____

Applicant Signature: _____ Date: _____

Invited By: (print) _____ (sign) _____

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

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

Please return completed Application with membership dues to:

Cleveland Academy of Trial Attorneys
c/o Ladi Williams, Esq., *Treasurer*
Landskroner Grieco Merriman, LLC
1360 W. 9th St., #200, Cleveland, OH 44113
P: 216-487-7532

CATA Membership Dues

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

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

[FOR INTERNAL USE]

President's Approval: _____ Date: _____

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Winter 2018-2019

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