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News

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William Eadie is a nursing home abuse lawyer fighting to end nursing home abuse throughout Ohio. You can schedule a call back with him by calling 216.777.8856, or at www.eadiehill.com.

President's Message: This Thing of Ours

by William B. Eadie

This year, 2019, marks 60 years for the Cleveland Academy of Trial Attorneys, which was founded in 1959.

When I became a plaintiff's lawyer, one of the first things I was told was, "sign this CATA application."

It wasn't a debate, it wasn't a discussion, it was just the logical thing for any lawyer who represents individuals to do: join a group of smart, talented people fighting for the same purpose.

When I joined the CATA Board of Trustees, I was one of the younger members. As I looked around the room at my first meeting, I was intimidated.

Here I was in a meeting with skilled trial lawyers from across the community. People I recognized from reputation as trial lawyers. Folks who gave up their time and talent to keep the organization running, plugged into the history of the organization in a way that felt tangible and real.

When I was asked to serve on the executive team by Rhonda Baker Debevec, I was honored and, frankly, humbled. Looking through our past presidents is like opening a who's-who of trial lawyers who built their reputations on the real work of taking on corporations and standing up for the vulnerable. It was an honor to be asked to serve on the executive team of an organization with such a deep bench of talent.

When I recommend joining CATA to a new lawyer, I don't have to work hard to come up with the benefits CATA offers them.

The caliber of our members is unquestionable.

Our list serve gets you access to lawyers who have had incredible successes inside the courtroom and out.

Our CLE luncheons and litigation institute are substantial and meaningful, built by and for real practitioners at the top of their game.

Our journal, CATA News, is the best in the state. It's not even close.

All for an unreasonably low membership cost.

And yet, for all of this, our membership has stayed relatively level over the years.

Our membership represents much of the top talent in plaintiff's lawyers in our community. But while we might have many of the top plaintiff lawyers in the area, we are missing many of the folks who handle these cases every day.

That's a loss. Not just to those non-members, but to us, too.

Every lawyer out there fighting their way through plaintiff's work without the significant guidance, experience, and resources our members freely share is fighting harder, not smarter. This will

inevitably result in lower average settlements and verdicts in the community. We fight against an insurance industry and a defense bar that collaborates to stymie justice, tracking it all, ready to tell us how little "cases like this" are worth in our community.

For my term as President my initiative is to expand our membership base by inviting more members from the community into the fold. To bring the benefit of our expertise to bear in their fight against corporate greed. To bring this thing of ours to everyone who practices plaintiff's work.

I'm asking you—members, readers, judges, staff attorneys—to step up and reach out to one lawyer you know who does plaintiff's work and has not joined CATA. They can join on our website--clevelandtrialattorneys.org—by clicking on "Benefits of Membership."

If they are unsure, or on the fence, or just want to know more, have them call me. I'll get them to a luncheon or a membership. I'll cover their membership if they need it.

Because this thing of ours is too important not to share. ■

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

Two Gold Nuggets For Trial Lawyers From The Probate Omnibus Bill

by Meghan P. Connolly

Having to open an estate in order to simply request a decedent's medical records is just one of the many heavy burdens resting on the families of victims of medical and nursing negligence. In your practice, have you ever wished there was an easier and less expensive way just to get the records you need to evaluate the case? Thanks to the Probate Omnibus Bill HB 595, now there is a streamlined procedure available to trial lawyers to do just that.

R.C. § 2113.032 provides a new mechanism in probate court called the Application for Release of Medical and Billing Records. It went into effect in March 2019, and has slowly caught on at your local clerks' offices. Under the new rule, a person who is merely eligible to be appointed as a decedent's personal representative or named as an executor in a will may fill out the Application for the limited purpose of obtaining medical records to evaluate whether or not to file a wrongful death claim. The statutory language suggests a broad interpretation of who may apply to request the records. The new law generally encourages the prompt investigation of wrongful death cases and errs on the side of allowing a family member to obtain records with less red tape.

With the application, the applicant must file a Next of Kin form with waivers of notice, and/or provide notice to the next of kin with a copy of the Application for Release. The county court will also require a copy of the death certificate to be filed. After ten days and upon court approval, "[t]he court's order shall direct all medical providers that provided medical care or treatment to the decedent to release those medical records and medical billing records to the applicant for the limited purpose of deciding whether or not to file a wrongful death, personal injury, or survivorship action." The applicant can then send the court's order with written requests for the decedent's medical and billing records. So far, I have not had any issues obtaining records from providers with this new type of probate court order in lieu of traditional Letters of Authority.

Once the records have been obtained and a decision about the merits of the case has been made, the applicant must file a report with the court indicating whether an administration of the estate will be filed. This report must be made prior to the statute of limitations. It is important to note that the person given permission to obtain medical records through R.C. 2113.032 does not have authority to file a lawsuit without court appointment. As such, there may not always be time to obtain records through the Release and in some cases the estate should just be opened due to time constraints.

The advantages of the new rule are encouraging. For one, the process is simpler with less forms to file. Generally, the fees are much lower than opening a full estate, although the fees for the new Application vary widely from county to county. (See table below). The approval process is designed to be faster, allowing a more efficient investigation of the case. Plus, if there is no case to pursue, once the report to the court is filed,

there are no Accountings to file and no estate is left lingering open on the court's docket. Simply by making this process a little easier, this new rule is a win for our clients and our staff.

Also of note in the Probate Omnibus Bill is a new rule allowing probate court judges authority to create a trust for a minor beneficiary until age 25, when doing so would be in the minor's best interest. See R.C. § 2111.182. This new rule basically extends the trust option that already existed under Ohio's wrongful death statute, R.C. § 2125.03, to personal injury cases involving minors. The court retains jurisdiction over the matter and has discretion to release funds from the trust until the minor turns 25. ■

Local Filing Fees for the Application for Release of Medical and Billing Records	
Cuyahoga County	$100
Lorain County	$127
Erie County	$10
Ashtabula County	$10
Lake County	$80
Geauga County	$76
Medina County	$50
Summit County	$100
Portage County	$145

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 2020 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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When Should Necessary Parties Be Joined As Involuntary Plaintiffs? Not Nearly As Often As You'd Think

by Brenda M. Johnson

Rule 19 of the Ohio Rules of Civil Procedure governs the joinder of parties whose presence in an action is necessary for "just adjudication." Adopted in 1970, Ohio's rule deviates from its federal analog only to the extent that it specifies certain categories of parties who are deemed necessary, and further specifies the manner in which the defense of failure to join a necessary party is to be raised.[1] Where the Ohio and the original federal rule do *not* deviate, however, is that they both contain the following sentence:

> "If he [the necessary party] should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff."

This directive seems simple enough at first – if a party should be in the case as an additional plaintiff, and the defendant raises the issue in a timely manner, that party should be named as a defendant, unless it is a "proper case," in which case the party should be joined as an involuntary plaintiff. In other words, that party should be named as a defendant unless the case falls within the exception known as a "proper case." The rule, however, is frustratingly silent as to two things: What is a "proper case," and how do you join "an involuntary plaintiff?" Even more frustratingly, this silence has led some of our colleagues to assume that *every* instance in which a necessary party should be in the case as a plaintiff is a "proper case" in which to join them as an "involuntary plaintiff." But if that were so, why would the rule begin with what appears to be a presumption that unwilling plaintiffs usually should be named as defendants? As one federal court observed years ago, "[t]he Rule clearly does not mean that *whenever* an absent party is properly alignable as a plaintiff in a lawsuit, he should be brought in under Rule 19(a) as an 'involuntary plaintiff.'"[2]

The answer to these questions can be found in the history of the federal rule in which this directive originally appears. In fact, to find the answer, we must go all the way back to the 1937 advisory committee notes to the original federal Rule 19 and to *Independent Wireless Telegraph Co. v. Radio Corp. of America*,[3] an opinion arising from a patent infringement case that came before the United States Supreme Court in 1926.

A. *Independent Wireless* – Where It All Began

The 1937 Advisory Committee Note to the original Rule 19 specifically cites *Independent Wireless* as an example of a "proper case for involuntary plaintiff,"[4] which makes this opinion the perfect (and perhaps only) place to start. In that case, the patent at issue was held by a company known as De Forest Radio Telephone & Telegraph Company, which had licensed the patent to RCA. Another company, Independent Wireless Telephone Company, apparently infringed on the patent, and RCA wanted to enjoin it from doing so. However, under federal

patent law, RCA did not have standing as a mere licensee to seek injunctive relief by itself. Under federal law, the original patent holder (in this case, De Forest) had to be in the case as well. DeForest, however, had refused to join the patent infringement suit, and could not be made a defendant because it was outside the jurisdiction of the trial court. So, when RCA went to court to enjoin Independent Wireless from infringing on the patent, it included the following allegations in its bill in equity:

> [T]he De Forest Radio Telephone & Telegraph Company, as hereinbefore alleged, has certain rights in the patents in suit herein; that before filing this bill of complaint, said De Forest Radio Telephone & Telegraph Company, was requested to consent to join, as a co-plaintiff, herein, but declined; that said De Forest Radio Telephone & Telegraph Company is not within the jurisdiction of the Court and therefore can not be made a defendant herein; and that therefore to prevent a failure of justice, and to enable the plaintiff Radio Corporation of America to protect its exclusive rights under the patents in suit, said De Forest Radio Telephone & Telegraph Company, is made a plaintiff herein without its consent.[5]

The issue decided in *Independent Wireless* was whether RCA could actually do what it did in that paragraph – namely, make De Forest a co-plaintiff against its will. The Supreme Court's answer was yes, but only in the peculiar circumstances presented *in that case*.[6]

As noted above, under the patent law at the time, RCA could not pursue any kind of injunctive relief unless the patent owner (De Forest) joined as a plaintiff, which De Forest had refused to do.[7] This, as the Supreme Court noted, would have been an easy problem to solve if De Forest had been subject to personal jurisdiction in the forum and could have been named as a defendant:

> If the owner of a patent, **being within the jurisdiction,** refuses or is unable to join an exclusive licensee as a co-plaintiff, **the licensee may make him a party defendant by process and he will be lined up by the court in the party character which he should assume.**[8]

De Forest, however, was beyond the trial court's jurisdictional reach, and thus could not be compelled to join as a defendant. At the same time, De Forest had a duty (either express or implied) to allow its name to be used by RCA to the extent necessary to protect RCA's exclusive right to the patent.[9] And by refusing to join the case voluntarily (and thus lend its name to RCA's cause), De Forest effectively left RCA with no way to enforce its exclusive right to the patent against infringing third parties.

Faced with this conundrum, the Supreme Court determined that principles of equity permitted De Forest to be joined as a plaintiff, even though it was not subject to personal jurisdiction (and thus could not be compelled to join as a defendant), and even though it had not consented to be a party to the action. The Court's holding, however, was extremely restricted in its scope. For one, the Court clearly stated that such joinder is a last resort and is available **only** when the refusing entity is beyond the court's jurisdiction, but has a clear obligation to aid an exclusive licensee in protecting its rights: "We . . . do hold that, ***if there is no other way*** of securing justice to the exclusive licensee, the latter may make the owner without the jurisdiction a co-plaintiff without his consent in the bill against the infringer."[10]

Since any judgment would have to be binding on the non-consenting plaintiff in order to be meaningful, the Court also placed a notice requirement on such joinder, along with a requirement that the non-consenting plaintiff actually refuse to join the suit after having been given notice and an opportunity to do so:

> The [patent] owner beyond the reach of process may be made co-plaintiff by the licensee, but **not until after** he has been requested to become such voluntarily. If he declines to take any part in the case, though he knows of its imminent pendency and of his obligation to join, he will be bound by the decree which follows. We think this result follows from the general principles of *res judicata*.[11]

Thus, the singular example of a "proper case" cited in the Advisory Committee Note to the original Rule 19 presents an extremely unusual scenario – namely, a situation in which a party whose presence in the suit is necessary in order to allow the plaintiff's claims to go forward refuses to join, but cannot be compelled to do so because the party is beyond the court's jurisdiction.

B. Joinder As An "Involuntary Plaintiff" Is A Very Narrow Exception To The Rule, Which Is That Necessary Parties Who Should Join As Plaintiffs Should Normally Be Named As Defendants, Then Realigned If Appropriate

Ohio case law is silent as to the proper use of "involuntary plaintiff" joinder under Rule 19. Since Rule 19 has a federal counterpart, however, federal case law on the issue is a highly relevant source of guidance on this issue.[12] And, following *Independent Wireless*, federal courts have long held that such joinder is a procedure that should be used only when the party at issue is outside the jurisdiction of the trial court and has

refused to join voluntarily after having been asked to do so, and should generally *only* be used when the absent party has some obligation to allow its name to be used in the action.

An example of how the rule is framed by federal courts is set forth in *Dublin Water Co. v. Delaware River Basin Comm.*:[13]

> It is well settled that the "proper case" provision of Fed. R. Civ. P. 19(a) may only be invoked where the party sought to be joined as an involuntary plaintiff is beyond the jurisdiction of the Court and is notified of the action but refuses to join, and where the party seeking such joinder is entitled to use the non-party's name to prosecute the action. **If the non-party is within the jurisdiction of the Court, he must be served with process and made a defendant.**[14]

Conversely, where a necessary party should be joined and is subject to the jurisdiction of the court, normal federal practice has been to require that party to be served with process and added as a defendant.[15] Ohio's civil rules strongly support a similar approach – and not just because of the manner in which federal courts have interpreted Rule 19. Ohio has no procedural mechanism for serving a potential party that has been denominated an "involuntary plaintiff" with a summons and complaint and bringing it into an ongoing action. Civil Rule 4, which governs the issuance of process and summons, provides that "[u]pon the filing of the complaint the clerk shall forthwith issue a summons for service **upon each defendant listed in the caption.**"[16] Rule 4(B) provides that the summons "shall . . . be directed at the **defendant** . . .."[17] There is no provision in the rule for issuing a summons for service on an "involuntary plaintiff," which strongly supports the proposition that "involuntary plaintiff" joinder can and should be reserved for those instances in which the party who refuses to join is beyond the court's jurisdiction, and cannot be compelled to join through service of process.

Conclusion

While Rule 19(A) is silent as to what constitutes a "proper case" in which to join a necessary party as an involuntary plaintiff, there is still guidance to be found, both in the history of the rule and in the case law interpreting its federal counterpart. All of the persuasive authority – along with common sense – stands for the proposition that "involuntary plaintiff" joinder is an extremely narrow exception to the general rule, which is that necessary parties who are subject to the court's jurisdiction should be joined as *defendants*, even if the court later determines that they should be aligned as plaintiffs. Only when the party at issue is beyond the court's jurisdiction is it appropriate to join them as an "involuntary plaintiff," and even then, they should be named as such only if (a) they have a clear duty to join; and (b) they have been given notice of the pendency of the case and have refused to join voluntarily. ■

End Notes

1. Ohio's version of Rule 19, as adopted in 1970, is modeled on the federal version of the rule adopted in 1966. *See* Ohio R. Civ. P. 19 (noting date of adoption). Section (a) of the 1966 version of the federal rule, which is the section relevant here, provided as follows:

   (a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff.

2. *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, 962 (5th Cir. 1973) (emphasis in original).
3. 269 U.S. 459 (1926)
4. *See* Fed. R. Civ. P. 19, Advisory Committee Notes, 1937 Adoption ("For example of a proper case for involuntary plaintiff, see *Independent Wireless Telegraph Co. v. Radio Corp. of America,* 269 U.S. 459, 46 S. Ct. 166, 70 L.Ed. 357 (1926).").
5. *Independent Wireless*, 269 U.S. 459 at 462.
6. *Id.* at 464 ("The question for our consideration then is, Can the Radio Company make the De Forest Company a co-plaintiff against its will under the circumstances of the case?").
7. *Id.* at 465-466.
8. *Id.* at 468 (emphasis added). As the Court noted, this would have been well in line with general equity practice at the time, which allowed (and still allows) beneficiaries of a trust to "make an unwilling trustee a defendant in a suit to protect the subject of the trust." *Id.* at 469.
9. *Id.* at 469.
10. *Id.* at 472 (emphasis added).
11. *Id.* at 473. As the Court observed, requiring notice and an opportunity to join is necessary in order to allow the patent owner to be bound by a judgment rendered in its absence, and to protect the defendant in the case from the risk of multiple infringement actions: "By a request to the patent-owner to join as co-plaintiff, by notice of the suit after refusal and the making of the owner a co-plaintiff, he is given a full opportunity by taking part in the cause to protect himself against any abuse of the use of his name as plaintiff, while on the other hand the defendant charged with infringement will secure a decree saving him from multiplicity of suits for infringement." *Id.* at 474.
12. As Ohio's civil rules are modeled on the federal rules, the Ohio Supreme Court has held that "federal law interpreting a federal rule, while not controlling, is persuasive authority in interpreting a similar Ohio rule." *Stammco, LLC v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 18, 994 N.E.2d 408 (citing *Myers v. Toledo*, 110 Ohio St.3d 218, 2005-Ohio-4353, ¶ 18, 852 N.E.2d 1176).
13. 443 F. Supp. 310 (E.D. Pa. 1977)

14. *Id.* at 315 (emphasis added; citing, *inter alia, Independent Wireless,* supra); *see also Sheldon v. W. Bend Equip. Corp.*, 718 F.2d 603, 606 (3d Cir. 1983); E*ikel v. States Marine Lines, Inc.*, 473 F.2d 959, 962 (5th Cir. 1973); *Carter v. Deutsche Bank Nat'l Trust Co.*, No. 1:15-cv-544, 2016 U.S. Dist. LEXIS 135759 at *14 (S.D. Ohio Sept. 30, 2016); *Moerke v. Altec Indus.*, No. 12-cv-903-bbc, 2013 U.S. Dist. LEXIS 167780, 2013 WL 6185213 (W.D. Wis. Nov. 26, 2013); *Novak v. Active Window Prods.*, No. 01-CV-3566(DLI)(WDW), 2007 U.S. Dist. LEXIS 16065, 2007 WL 749810 (E.D.N.Y. Mar. 7, 2007); *Murray v. Mississippi Farm Bur. Cas. Ins. Co.*, 251 F.R.D. 361, 364 (W.D. Wis. 2008); *Hicks v. Intercontinental Acceptance Corp.*, 154 F.R.D. 134, 135 (E.D.N.C. 1994); *JTG of Nashville, Inc. v. Rhythm Band, Inc.*, 693 F. Supp. 623, 628 (M.D. Tenn. 1988); *Ruppert v. Secy. of the United States HHS*, 671 F. Supp. 151, 173 (E.D.N.Y. 1987); *Cilco, Inc. v. Copeland Intralenses, Inc.*, 614 F. Supp. 431, 433 n. 2 (S.D.N.Y. 1985); *N. Eng. & Plastics Corp v. Eddy*, 84 F.R.D. 621, 622-23 (W.D. Pa. 1979); *see also* 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §§ 1605, 1606 (2001) and cases cited therein.

15. *See generally* 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1605; *see also Dental Precision Shoulder, Inc. v. L.D. Caulk Co.*, 7 F.R.D. 203, 204 (E.D.N.Y. 1947) ("where formal process issuing out of the court can be used to bring a party into a suit, informal notice such as might be proper for the joinder of an involuntary plaintiff under other circumstances is unsatisfactory, for a number of reasons which ought to be clear.")

16. Civ. R. 4(A) (emphasis added).

17. Civ. R. 4(B) (emphasis added).

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The Best Local Rule You've Never Heard Of: Cuyahoga County's Rule 21.3 on "Discovery of Electronically Stored Information"

by Dustin B. Herman

Cuyahoga County's Local Rule 21.3 is one of the best local rules I have ever seen regarding discovery of electronically stored information. It requires the parties to cooperate and share information so that the most efficient and cost-effective methods for searching for relevant documents can be implemented. Unfortunately, the Rule is rarely utilized by plaintiff's attorneys. ***We need to change that.***

This article outlines what Rule 21.3 requires of the parties and provides a framework for getting as much out of the rule as possible. Before turning to the Rule, we must remember that e-discovery is no longer limited to large product-liability-type cases. Simple auto cases now involve ESI from at least two sources: the cars and the phones. Nursing home and medical malpractice cases involve substantial ESI issues that go far beyond the electronic medical records. Lawsuits against a corporation for any reason (employment discrimination, premises liability, negligence, etc.) will involve searching for relevant electronic communications. And nowadays businesses use all sorts of instant messaging and collaboration software tools that allow employees to communicate with each other without using email. Examples include Slack, SalesForce, Wrike, Asana, Podio, Ryver, Basecamp, Flock, Microsoft Teams—and many many more.

The problem is in collecting and searching the ESI in a way that is cost-effective and proportional to the needs of the case. By far, the easiest and most cost-effective way to preserve and produce relevant documents is to: (1) identify all the sources of potentially relevant ESI; (2) collect all the data into a single place; and (3) search all the data at the same time. Just like raking the leaves—you want all the data in a single pile before dealing with them.

With the right information, plaintiffs can actually use the requirement of proportionality to their advantage—namely, by showing that the claimed burden for identifying, collecting, and searching the ESI is minimal. This is why Local Rule 21.3 is so important: It requires defendants to provide plaintiffs with detailed information about their ESI and how it can be collected and searched—enabling plaintiffs to diffuse the inevitable undue burden argument. If a defendant refuses to provide you with that information, you can use the Rule as leverage in requesting the court to compel a 30(B)(5) deposition (or even better, a deposition of the defendant's IT person).

1. Meet and Confer on ESI is Required in All Cases

Rule 21.3(C)(1) applies to "employment discrimination cases, noncompetition cases, [etc.] ***. . . and all other civil cases in which the parties or the Court believes ESI may be an issue."***

Section (C)(1) requires the parties to have a meet and confer at least 14 days before the initial case management conference to discuss the "preservation and production of ESI" and identifies nine specific topics which the parties are supposed to discuss.

Furthermore, Rule 21.3(A)(2) states that the "intent and purpose of this Rule is to encourage parties to meet and confer **on a regular basis**, as needed, concerning issues involving ESI . . . ." Thus, the initial meet and confer is just the beginning of the meet and confer process.

2. ESI Report Must Be Filed With the Court

Rule 21.3(C)(2) requires that the parties submit a report ("jointly if possible") to the Court at least 7 days before the initial CMC and states that the "report shall be in the form attached as Schedule A or in a substantially similar form." The template report in Schedule A provides a wonderful checklist, requiring the parties to inform the court whether each of the nine topics (discussed below) were discussed during the meet and confer.

3. Counsel Must Be Reasonably Informed and Prepared to Discuss Their Client's ESI

Perhaps the most important part of Rule 21.3 is that it requires counsel to be prepared for the meet and confer:

> Counsel shall, in advance of the meet and confer, be reasonably informed regarding the issues likely to be in dispute in the case, their clients' information management systems, and their client's practices with respect to retention, destruction, purging, archiving and backing-up ESI reasonably expected to be potentially relevant.

See Local Rule 21.3(C)(3). This gives the Rule some teeth. If counsel is not prepared to discuss these issues—which invariably they will not be—we can advise the court of the same in the Rule 21.3 Report and, as necessary, use that failure to prepare as a basis to compel the deposition of a 30(B)(5) witness or the defendant's IT person.

4. Nine ESI Topics that Must be Discussed and Included in the Report

Rule 21.3(C)(1) lists nine specific topics the parties "shall" discuss during the meet and confer process. The topics will be addressed in turn:

> **(a) The general nature of any ESI reasonably believed to be potentially relevant, the location where it is stored, the devices on which it is stored, and whether any party believes it should be preserved or should be subject to a litigation hold.**

Here, the issue is ***identifying*** the location of the data. But the "location" of ESI and the "devices on which it is stored" can be difficult to discern. For example, Microsoft Outlook emails might be stored on the Microsoft Cloud, a local server, or on an employees' local computer. Additionally, deleted emails that are no longer stored in one of those three locations might still exist on the back-up system (if any exists). Furthermore, if the company has a spam filter, emails might also be saved by the spam filter. If a company uses a communication tool like Slack or Microsoft Teams, the data is almost certainly stored on the cloud.

The goal is to get these questions answered during the meet and confer process and then to determine how the data can be collected/downloaded and searched. If you don't know where the data are stored, you can't know how the data can be collected and searched (or how much it would cost to do so).

Here's an example of how this can play out. In 2014, a woman with dementia died at an assisted living facility after falling out of a third-story window. We sued the facility and requested, among other things, all the medical records and all the emails about window security. The defendant produced a dearth of emails. After deposing a 30(B)(5) witness who did not know anything about where the emails were stored, I took the deposition of the facility's outside IT consultant (which is always where you get the best information). The IT consultant said the facility had produced the emails stored on the facility's server, but that there were a lot of emails stored on the individual computers that had not been searched or produced. I had the IT consultant, on the record, explain how the emails on the individual computers could be collected and searched. Essentially, he said he could go to each computer and download all the emails (that is, all the .pst and .ost files) onto a single flash drive and then load all the emails onto a single computer where they could all be searched at the same time. He said it would take him less then an hour to collect all the emails from the individual computers. A similar sequence of events has occurred in numerous cases, ending with the IT consultant spilling the goods about where the data are stored and how easily that data can be collected and searched.

> **(b) The scope and nature of the efforts each party will take to identify and preserve potentially relevant ESI, including but not limited to whether the ESI will be preserved by forensic cloning or some other method.**

Here, the issue is the ***collecting*** of the data—that is, the physical, step by step procedure, of how electronic copies of the data will be made.

The method described above (where the IT person downloaded all the emails onto a single flash drive) is one method of collecting data. If emails are stored on the Microsoft Cloud, all of the emails

(or emails for specific custodians or from specific date ranges) can easily be downloaded onto a local computer with a few clicks. If data is on Slack or other communication tools, the data can be exported from the cloud fairly easily as well.

Forensic cloning/imaging is the most comprehensive way to collect/preserve data on any digital device. It is usually done in larger cases, but can actually be done fairly cheaply. For instance, you can clone an iPhone for well under $1000. To forensically clone a device, you plug in what is essentially a very sophisticated flash drive to any phone or computer. The sophisticated flash drive "takes a picture" of all the data on that device. The data are then filtered through special software (like Forensic Toolkit) that extracts all of the "user-created files" (e.g., Word or PDF documents, notes, emails, etc.) from the data set. Those user-created files can then be searched or loaded into a document review platform.

You will certainly need help from an expert if you want to forensically clone a device. Be sure to take that opportunity to ask as many questions of the expert as possible. One thing I have learned is that forensic computer analysts love to talk about their craft and answer questions!

(c) The scope of email discovery and any protocol for searching emails for production.

Here, the issue is ***searching*** for relevant documents once the data have all been collected into a single place. A full explanation of search protocols is beyond the scope of this article, but we will briefly discuss search terms and Technology Assisted Review (TAR).

The use of search terms or TAR (or both) is often utilized to search for relevant documents within a large data set. With TAR, an attorney must train the computer on what documents are relevant and what documents are not (for each document, this is a simple thumbs up/thumbs down decision). After so many documents have been reviewed (maybe a few thousand or so, depending on the size of the entire data set), the computer can estimate the relevancy of the rest of the documents in the data set (this is TAR 2.0—aka—continuous active learning). Basically, TAR works in the same way as Pandora or Spotify. Pandora sees what songs you're already listening to and suggests more songs like those. With TAR, the computer sees what documents you think are relevant, and finds you more documents like those.

TAR is far superior to using search terms. As Judge Andrew Peck (an e-discovery guru) recently stated in *Hyles v. New York City*, "in general, TAR is cheaper, more efficient and superior to keyword searching" and "the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it." *Hyles v. New York City*, No. 10-civ-3119, 2016 WL 4077114, at *2 (S.D.N.Y. 2016) (citations omitted).

However, a plaintiff cannot (yet) force a defendant to utilize TAR. *Id*. at *3 ("Under Sedona Principle 6, the City as the responding party is best situated to decide how to search for and produce ESI responsive to [plaintiff's] document requests.").

The bottom line is that you want to be involved with and informed about the search protocols utilized by the defendant. Case law supports such involvement: "Technology-assisted review of ESI does require an 'unprecedented degree of transparency and cooperation among counsel' in the review and production of ESI responsive to discovery requests. In this regard, courts typically have required the producing party to provide the requesting party with full disclosure about the technology used, the process, and the methodology, including the documents used to 'train' the computer." *Youngevity Int'l, Corp. v. Smith*, No. 16-cv-00704, 2019 WL 1542300, at *12 (S.D. Cal. Apr. 9, 2019) (citations omitted).

(d) The scope of production of metadata and embedded data.

Metadata is often referred to as "data about data." It includes things like the author of the document, the date a picture was taken, and the date and time an email was sent and received. Metadata also includes certain hidden information like tracked changes or comments in a Word document or hidden rows/cells in an Excel spreadsheet. You want the metadata if you can get it. Civ. R. 34(B) allows you to request the specific form of ESI you want produced, so always request documents in their native format with all metadata included.

(e) The scope of any search of, and production of ESI contained on, back-up or archival systems.

The first issue here is whether any back-up systems exist. The second issue is how documents can be collected from the back-up system. The third issue is what documents might be found on the back-up system that are not available from other sources. You might find that when an employee puts an email in their "trash folder," the company has an automatic policy of double-deleting that email after a certain period of time (e.g., after 60 days). Thus, the double-deleted emails would only exist on the back-up systems (if they exist at all). You want to obtain information about the company's document retention policies through the meet and confer process as well as the details about the back-up systems and

how difficult they are to collect from.

(f) Whether any ESI in a party's possession is not reasonably accessible or subject to production without undue burden.

The key here is to get as much detail as possible about the claimed burden. Ask the defense attorney detailed questions about where the data is stored and how the data could be collected. Usually, they are not going to be able to provide complete answers. At that point you should request either a 30(B)(5) deposition or a deposition of the company's IT person. You want that person to take you, step by step, in excruciating detail, through the procedure for collecting data. I usually start with something like—okay, you're sitting at the computer, looking at the screen, with your hand on the mouse, tell me what you do—what button do you click?—what button do you click next?—etc. etc. Confirm the amount of time it would take to go through all of the steps. Be sure to confirm that this is actual working time and not merely time waiting for documents to download. The end product will be a transcript that gives a detailed account of what is involved in collecting the data and the burden of doing so.

(g) Who will bear the costs of preservation, collection, and production of ESI.

In a smaller case this will be a non-issue. As the cases get larger, you can encourage the defendant to utilize TAR. If the defendant is going to incur increased costs because it refuses to utilize TAR, then you can point this out to the judge in the report. In some cases, depending on the judge, and especially if you are seeking documents from back-up systems, you might want to "consider" bearing some of the costs. That may be the easiest way to undermine an undue burden argument (as opposed to spending a ton of time litigating the issue).

(h) The reasonably usable form and format in which ESI shall be produced.

As discussed above, Civ. R. 34(B) allows you to request the specific form of ESI you want produced, so always request documents in their native format with all metadata included. Production in native format means that the documents cannot be bate stamped, so in smaller cases you may be willing to accept production in PDF format and only request native format of certain documents. In larger cases involving tens of thousands (or more) of pages of documents, e-discovery consultants are usually involved and productions are regularly made in TIFF, txt, and native format.

(i) Whether the parties will enter into any confidentiality agreement, protective order, "quick peek" agreement or "clawback" agreement, as provided for in sections (B)(2) and (E) of this Rule.

Confidentiality agreements/protective orders are often necessary, but can also create a lot of difficulty. Defendants will inevitably over-designate documents as confidential and try to force you to file documents under seal. You want to be sure any protective order includes an efficient process for challenging a defendant's confidentiality designations. Public Justice (www.publicjustice.net) has a great model protective order you can use.

Claw back agreements allow defendants to produce documents and later on claw back any privileged documents that were inadvertently produced. This essentially gives the defendant a get out of jail free card and is supposed to encourage defendants to produce documents without incurring the burden of a privilege review. These agreements are widely favored by the courts, but I have never encountered a defendant who relied on a claw back agreement to forgo a privilege review.

* * *

We need to be utilizing Local Rule 21.3 in all cases and getting our Cuyahoga County judges accustomed to seeing Rule 21.3 Reports filed with the court and addressing Rule 21.3 issues at the initial case management conference. ■

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Obtaining ESI From Hospitals In Medical Malpractice Cases: Medical Records Are Just The Beginning!

by Dustin B. Herman

PRACTICE TIP #1 – Start Treating Medical Malpractice Cases Like Product Liability or Trucking Cases – and Get the Preservation Letters Out Immediately!

Everything is tracked electronically at a hospital, but don't think everything is preserved in the Electronic Medical Records (EMRs). There are many other devices and software systems used by hospitals that contain data related to patient care (like electronic vital sign monitors, fetal heart rate monitors, patient call buttons, electronic beds that monitor motion, ultrasound machines, PCA pumps, etc., etc.), but those devices may not, and likely do not, automatically send that data to the EMRs – which means that data never shows up in the medical records unless someone chooses to transfer the data.

So make sure you send out preservation letters to the hospital to preserve all electronic data from any devices used in the patient's care. And do this quickly. There is no telling how long the data from your client will exist on the various machines before they are overridden with new data.

PRACTICE TIP #2 – Use a 30(B)(5) Deposition to Learn About the Architecture of a Hospital's Electronically Stored Information – Don't Just Rely on the Medical Records!

A 30(B)(5) deposition can be an incredibly powerful tool when it comes to learning about a hospital's electronic systems and what, where, when, and how electronic data are collected and stored by hospitals – and, critically, how the data can be obtained. Do not let defense attorneys call this "discovery about discovery." This is discovery about patient information (your client's information) that a hospital stores electronically.

Below, Tip #4 provides some detailed examples of the topics to include in the deposition notice. But in medical malpractice cases, there is also the risk of trying to do too much with a 30(B)(5) deposition notice that is focused on the discovery of electronic information. Judges will not be accustomed to seeing that kind of notice in a medical malpractice case, and this might delay, or completely prevent, the scheduling of the deposition. Depending on your judge and defense counsel, the best strategy might be to send a simple notice that outlines some general topics just to make sure the deposition gets scheduled.

The hospital will invariably designate the wrong person (regardless of what goes in your notice), but it will likely still be a person who is somewhat familiar with the hospital's EMRs and the architecture of the hospital's information governance. You can learn a tremendous amount from each 30(B)(5) deposition you take related to a hospital's management of ESI.

PRACTICE TIP #3 – The *Judge* Is Your Primary Audience When Writing the 30(B)(5) Deposition Notice.

Regardless of how you approach the deposition notice (a detailed notice or a more simplified notice), you must specify the topics you intend to address. I write out the topics/questions in plain language so when the judge reads the notice, it is easy for the judge to understand what information I am asking for. Remember – if you can't explain to the judge what you want in a few simple sentences – you won't get what you want.

PRACTICE TIP #4 – Topics for Your 30(B)(5) Deposition Notice.

Below are topics you should "consider" including in a 30(B)(5) deposition notice related to electronically stored information in a medical malpractice case against a hospital.

- **Records and audio recordings of phone calls and pages to doctors, nurses, critical care teams, code blue teams, etc.** Questions to include in your notice or ask at the deposition: "Are any phone calls related to patient care ever recorded? If so, under what circumstances are the phone calls recorded? How are they recorded? Is there a Voice-over-Internet-Protocol (VoIP) software system used? On what systems or devices are the recordings stored? How can those recordings be accessed? Who would know? What policies and procedures, written or otherwise, exist related to recording phone calls related to medical care of patients at this hospital? What software is used for paging and phone calls? How can phone call/paging records – with dates and times – be obtained?"

- **Mobile devices carried by nurses.** Questions to include in your notice or ask at the deposition: "What mobile devices are carried by nurses that are related to patient care? What function – that is, each and every function – do those devices serve? Do/can those devices track the location of nurses? Are there sensors (maybe called something else) that monitor/track when a nurse enters a patient's room? If so, how does that system work? What sensors are there in the patient's room – or doorway – that enable the system to track when a nurse has entered a patient's room?"

- **Electronic monitoring systems for patient vitals** (heart rate, O2 sat, breathing rate, etc.). Please remember that electronic vital sign monitors store their own data and have their own audit logs. Depending on the hospital and the particular machine, continuous vital sign monitors might transfer data automatically to the Electronic Medical Record system used by the hospital, or more likely, the vital signs will only be transferred when the nurse decides to push a button to transfer a specific vital sign. Data in electronic vital sign monitors and other similar devices (e.g., fetal heart rate monitors) might not be stored for a long time, which is why preservation letters are so important. But you might also be surprised by the data that risk management preserves after a serious safety event has occurred. So you need to ask about how the devices store data, how long the data are stored, and how to download/access the data. Also ask about the audit logs for the individual devices, how to download and/or access those audit logs, and how the devices are connected with – and transfer information to – the hospital's EMRs.

- **Audit logs** (aka audit trails). These are better thought of as "reports" that are simply run from the EMR (or a separate electronic device). Information in EMRs is what is called "structured data" (as opposed to "unstructured data" – like a bunch of Word or PDF documents saved somewhere on your computer).

You can conceptualize structured data as a giant 3-D spreadsheet with millions of rows and columns. The data points are stored in the various fields/boxes within the 3-D spreadsheet. You can run a report for any data points that have a separate field/box. Think about the case management system in your law office. You can probably run reports for any data points that are contained in a field (like upcoming SOLs or cases assigned to a particular employee). Same thing with an EMR. Audit logs are just one particular type of report that tracks activity (i.e., a provider clicking buttons) in the medical records.

The audit log usually just gives information from limited fields – like time stamps for each click, the provider's name, and some rough information about the area of the records the provider is accessing. But there is no reason audit logs have to be limited to those fields. You should take a 30(B)(5) deposition of the hospital related to generating audit logs and reports from the EMR system (and/or separate electronic devices). Find out what other fields could be added to the audit logs and what other reports can be run (and the answer is essentially – they can run any report they want; for example, a hospital could run a report to find out every time a patient had a heart rate of 102 on a Tuesday). Once the data are in the structured fields, the data can be filtered and sorted in all kinds of ways.

Audit logs/reports are especially important for finding out whether certain records were late entries. The hospital will almost certainly have a template report designed to pull all the late entries for a particular patient.

In advance of the deposition, you should also request that the hospital produce the manuals related to audit trials and running reports within the specific EMR software system. They will claim those manuals are the property of the EMR software system, but that is nonsense because the employee you end up deposing will likely have electronic access to those documents and could, if permitted by counsel, pull them up in real time in the middle of the deposition. Lay the ground work by including that request for production in the 30(B)(5) notice.

PRACTICE TIP #5 – Consider Serving a Notice of Inspection!

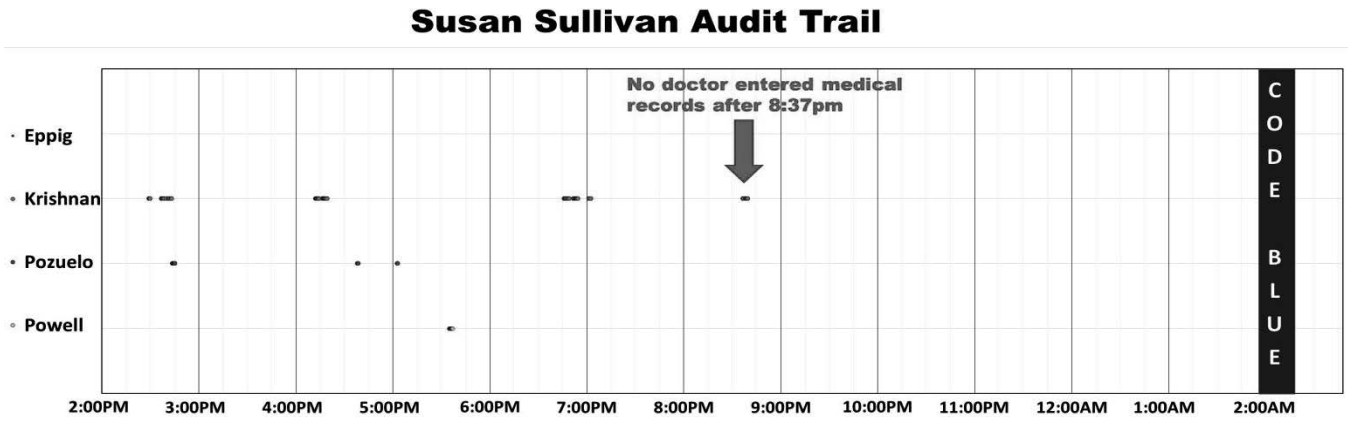
Along with the 30(B)(5) deposition notice, you should "consider" including

a notice of inspection and a request to inspect and photograph the actual electronic devices used by the hospital. This is a great tactic in many cases because you learn so much by walking around the defendant's facility and seeing things with your own eyes. Hospitals are a bit trickier, especially when it comes to taking photographs, due to HIPAA laws (or at least that is what the hospital will claim).

PRACTICE TIP #6 – Create a Timeline From the Audit Log Data to Show When Doctors Were (or Were Not) in the Medical Records.

If you have a failure to rescue or deadly delay case or another case in which it is important to know when the providers were (or were not) accessing the medical records during a certain period of time, follow these steps to create a timeline from the audit log:

1. Request a copy of the audit log for certain dates and make sure you receive it in Excel format.
2. Request a 30(B)(5) deposition of the hospital to discuss the contents of the audit log.
3. Request that the deponent be able to access the audit log electronically during the deposition (not just on paper). As a backup, make sure you bring a laptop on which you can pull up the audit trail.
4. During the deposition, ask the deponent (or do it yourself) to use Excel to sort the audit log by provider first, and chronological order second. This will separate the entries by provider (i.e., you will have all the activity of a single provider together and in chronological order for a certain period of time).
5. Have the deponent copy and paste all the entries for the specific provider into a separate tab/sheet in Excel – and save the separate tab/sheet as a separate exhibit. Now all the entries for a single provider are in their own exhibit.
6. Lay a foundation for the exhibit. Confirm on the record that Exhibit "X" is all the entries made by provider "X" in the electronic medical records within time period "Y". Can confirm with questions like "Provider 'X' never went into the medical records again after time 'Y' correct?" If they waffle on this, remind them that the entire integrity of the EMR system depends upon the audit log capturing every single action of every single provider in the medical records and that a provider cannot take an action in the medical records without it showing up in the audit log. The EMR system depends upon the audit log being 100% accurate and 100% complete.
7. Do this for as many providers as necessary.
8. Have the deponent email the separate exhibits in Excel format to both you and the court reporter.
9. After the deposition, have someone that is good with Excel (or find a tutorial on YouTube) and have Excel automatically populate the timestamp data for each entry in the audit log into a time line (see example below). You can make a powerful demonstrative – and jurors will lean out of their chairs to get a look at it because the audit log data are CSI-type evidence.
10. You could of course do all of this yourself instead of having the deponent do it, but the deponent may not agree to the laying of a foundation unless the deponent is the person who went through the steps of sorting the data. If you can't have the deponent lay a foundation, you might be able to use Fed.R.Evid. 1006 as a means of admitting the timeline as a "summary . . . . of voluminous writings." Indeed, the defendant could replicate your timeline with the audit log data – which is the test for its reliability. The problem is you may still need someone to testify about what the data in the audit log means (i.e., that the audit log in fact contains all the activity of all the providers within the medical records). ■



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Why Jurors Hate The Hobby Question

by Sari de la Motte

Voir dire. Two words that strike fear into the hearts of many trial attorneys. Voir dire is supposed to be a conversation where you get to know the people who will decide your case, but it often ends up being an awkward, stilted, cross-exam where it feels like pulling teeth just to get jurors to talk.

Enter the "hobby" question. Slide into any seat at your local courthouse and you'll probably hear an attorney asking jurors, "So what are your hobbies?" (Similar questions include: "How do you spend your free time?" "What do you do for fun?" and, "What books have you read lately?") You'd think you were witnessing a first date, not jury selection.

Attorneys have been trained to ask these types of questions to combat the awkwardness that voir dire inevitably creates. Most attorneys don't feel right about just jumping in and asking jurors how they feel about trial issues, so they attempt to "create rapport" first.

Here's the problem: You can't create rapport this way.

David Rock, author of *Your Brain at Work*, has identified five social needs that, when threatened, can activate the survival instinct in the brain. He organized these needs into what he calls the SCARF Model. S stands for Status, C for Certainty, A for Autonomy, R for Relatedness and F for Fairness. A decrease in status, a lack of certainty, a removal of autonomy, an absence of relatedness and the perception that something or someone is unfair are all perceived as threats by the brain. **Jury selection threatens jurors in each and every one of these areas.**

What's Your Hobby?

Several social interactions could threaten maybe one or two of these areas. A toast at a wedding, the inability to understand a medical bill, a family obligation you resent, or being passed over for a promotion are all things that could activate the survival response. But what situation puts all five areas directly under attack? Jury selection.

Knowing this, what could *possibly* make the situation worse?

Asking jurors what they do for a hobby.

The hobby question isn't fooling anyone. Jurors don't trust you, *especially* at the beginning of voir dire. They are on high alert for manipulation of any kind. When you ask jurors about their hobbies most jurors think, "You don't *really* want to know what I do for fun! You're just trying to butter me up so you can find out if I'll vote your way."

And, well, aren't you?

The Five P's

There's a better way: **Tap into the reward center of the juror's brain, and reverse the threat that jury selection creates.**

To do so, practice what I call the Five 'P's' of rapport.

Preserve Status

To tap into the reward center of a juror's brain, we need to preserve a juror's status. This means making it as easy as possible to speak in front of the group. But how?

Start by addressing the power imbalance.

Jurors are the most powerful people in the courtroom. They decide the case! But they don't feel powerful, especially at first. They don't have enough information. Jurors know next to nothing about your case. And yet we expect them to share their experiences, insights, and personal opinions when they aren't sure why we're asking in the first place.

Have you ever been working at your desk when your paralegal pops his or her head in and asks, "Are you free Wednesday afternoon?" If you're like me, my response is always, "Why?" I don't want to commit to anything until I know what it is. Jurors feel the same way.

Nothing activates the fear response like being put on the spot and asked to speak when you aren't sure of the context. This is why you must provide context to jurors before asking questions. You can do this through context statements. Context statements are simple and neutral. They do not give any information about the case that wouldn't be allowed, nor are they argumentative.

For example, if you are trying a car crash case, one context statement might be, "This case involves a car crash." Another might be, "In this case, the driver of the car was injured." You then ask questions related to the context statement such as, "Has anyone here been injured in a car crash?" Simple. But don't let the simplicity fool you; context statements create safety for jurors by giving them information everyone else in the room already has.

Providing jurors with context before asking them questions preserves their status by making it easier to speak in public. The more informed the jury, the more comfortable they feel.

Provide Certainty

Next, **provide certainty.**

If there's anything that jurors can count on, it's waiting. They wait and wait and then wait some more. So imagine what it's like, once they *finally* get into the courtroom and into the jury box to hear the question, "So, what are your hobbies?" Jurors want you to get to the point. They are desperate for some certainty in this process, and you need to provide it.

Almost every communication situation tends to fall into one of two buckets: relationship or issue. Most attorneys strive to create a relationship in voir dire; they want to get jurors to like and trust them. But jurors have no desire to have a relationship with you. Attempting to create a relationship with jurors at the beginning of voir dire doesn't work because **jurors begin the process in issue mode**. If we truly want a relationship with jurors, we have start with issue-oriented communication.

Years ago, I reached out to a new contact and expected the interaction to be a social call. But when I arrived she was ALL business. I was there for relationship, but she wasn't having it. I could have insisted on small talk and tried to steer the conversation back to our shared connection, but instead I picked up on her cues and communicated about the issue. Once we were done discussing the issue, however, she leaned back and asked me a personal question. That was my cue that she was now ready to be social. Acknowledging her preference for discussing the issue eventually got me *permission*: she was now open to relationship.

Permission can be defined as *how receptive people are to you and your message*. Meeting people where they are is the number one way to increase permission. Gaining a juror's permission is the true goal of voir dire, not trust. There simply isn't enough time to gain a juror's trust in voir dire, and attempting to do so can backfire. But we can get a juror's permission if we provide certainty and get to the point.

Jurors are expecting lame jokes, being talking down to, (does anyone really need an explanation of what bias is?) and attempts to get them to like you. When you get to the point, not only does permission go up, but so does your credibility. You're not who they were expecting. By getting directly to the point you communicate that you take this process seriously; and by doing so you teach them to take it seriously too.

Protect Autonomy

When you begin voir dire, start by **acknowledging resistance**. People who can communicate what others are thinking are perceived as more intelligent and credible. Simply start with, "Thank you for being here. I know you didn't have much of a choice." But don't stop there. Continue by pointing out that they did exercise some autonomy, however, by showing up. "Even though obeying a jury summons is required, many people chose to ignore that summons and not show up today. I appreciate all of you for ***making the choice*** to come here today and participate in jury selection."

These few sentences do two powerful things: 1) they communicate to jurors that you understand they are, for the most part, there against their will, but 2) they *could* have chosen not to come at all and therefore are still autonomous beings who can make their own choices.

So often attorneys attempt to do the first—acknowledge resistance—without doing the second—pointing out that jurors did in fact decide to come. If we acknowledge that jurors are there against their will and leave it at that, we haven't

done anything to **protect the juror's autonomy**. It's important to acknowledge not only the jurors' resistance, but also their autonomy.

Outside of acknowledging resistance and pointing out that jurors did, in fact, choose to show up, there isn't a lot we can do to reverse the threat that jury selection inflicts on jurors in regards to autonomy. But avoid making a big deal about how powerful jurors are in an attempt to compensate for the absence of autonomy until later in trial. Yes, jurors are the most powerful people in the room, but pointing this out too early in the process can feel manipulative; it's best to wait until the group is formed before reminding them of their immense power.

Promote Relatedness

The number one thing you can do in voir dire to tap into the reward center of a juror's brain is to **form the group**. Why?

1. **Forming the group creates safety.** When jurors feel related to each other, they feel safe, and jurors must feel safe to be able to learn about and decide the case.
2. **Forming the group reduces the need for autonomy.** When people feel that they belong and are doing important work they are more willing to give up their autonomy.
3. **Forming the group allows you to lead.** If there's no group, there's no need for a leader. People lead themselves; that's the basic definition of autonomy. But once a group is formed, they need a leader.

So how do you form a group?

Groups are primarily formed nonverbally. To get a group to form you must get them to:

- Look at each other (eyes)
- Talk to each other (voice)
- Do things together (body)
- Breathe together (breathing)

Think of the last cocktail party you attended. If there were people there you didn't know you probably avoided eye contact. At some point, hopefully, the host introduced you to the other party goers. That introduction gave you permission to look at each other, reducing the awkwardness and hopefully led to a more engaging party.

Although we aren't passing drinks around (that would make voir dire a whole lot easier!) we can still get jurors to look at each other. Here's how: once a juror finishes speaking, hold your hand out to him or her and then gesture and look at another juror. Ask, "Is what you're saying any different than [Name of Second Juror]?" You must look at the second juror, not the first. We are trained to maintain eye contact, but merely gesturing to another person while holding eye contact with the first won't make them look because people follow our eyes not our hands. (Although the gesture will help.)

You have now given these two jurors permission to look and talk to each other. The awkwardness is removed. They can look and talk to each other as much as they want and most likely will continue to do so during voir dire and otherwise. Continue to do this with as many jurors as possible and your group will start to form.

You can also form your group by getting jurors to do things together. Simple things like having everyone raise their hand at the same time help the group to form. When people do things together, they feel like a group. Why do we sing the national anthem before sporting events? To form the group.

Finally, you help form the group by getting them to breathe. Jurors are in fight or flight because jury selection invokes a threat response. But how on earth can you affect the breathing of the group? Breathe well yourself. Research shows that listeners adopt the breathing pattern of the speaker. If you aren't breathing well due to nervousness or anxiety, your jurors won't breathe. The jury will respond to how you breathe, so make sure you're breathing slow and low when you start voir dire.

Years ago, an attorney from Oklahoma flew out to work with me on voir dire. I taught him these same skills so he could form the group. He was skeptical. "Are you sure this will get the group to form?" he asked. "Yes," I responded. "Groups don't form by just being together. You've got to nonverbally help them."

The next morning a mock jury arrived. Within 20 minutes this group, which had sat quietly and stiffly just moments before was now lively chatting with the attorney and each other. At times the attorney couldn't get a word in edgewise. Once the jury was dismissed, the attorney said to me, "You rigged this!" He was amazed at how quickly he was able to form the group through these simple nonverbal techniques.

Prove Fairness

Finally, tap into the reward center of a juror's brain by proving that the process is fair.

Jurors perceive jury selection as unfair because they're forced to be there. But they also believe the process itself is unfair. Most jurors think the court system is broken, that lawyers are liars and that plaintiffs are just trying to get rich. The average juror thinks the entire legal system is rigged. Believing the system is rigged makes jurors resist engaging in the process at all. If the process is unfair, what's the point?

Your job is to prove that regardless of the reputation of the court system, you are playing fair. But to do this you have to let go of winning.

We all want to win. As humans we're wired to avoid pain at all costs. So, of course, we don't want to lose. And that's perfectly acceptable. You *should* want to win. You should want to win very much. But what you can't do is be *attached* to winning.

Now what do I mean by attached?

Think about this in terms of cross exam. We get attached. We *really* want to show the jury what a liar the defense doctor is. So we make it personal. We get snarky. We get rude. We say sarcastic things. All of which do nothing for our case. We're too attached. We think this is personal when it's not.

So how do you know if you're attached to the outcome? Anger is a really great indicator. The more attached we are to something, the more angry we get when things don't go our way.

Anger is dangerous for trial attorneys. Anger communicated at trial is almost always the wrong decision, especially for plaintiff attorneys. When you're angry at trial you communicate to the jury that *this is personal*. You're asking the jury to award YOU a verdict, not your client. There is no jury on the planet that is willing to award YOU, personally, a verdict.

But the biggest problem with a focus on winning is that you will communicate it. Jurors will pick up on your attachment to winning and they already think you're willing to do *anything* to win. You will lie, cheat and steal to win. Don't allow this to happen. Let go of winning, focus on the job at hand, and let the outcome take care of itself.

Drop the Gimmicks

Jurors hate the hobby question because it's a gimmick.

Years ago, I observed a jury selection where a juror indicated on her questionnaire that she found criminal defense attorneys "untrustworthy." The attorney made a big production of walking over to his client, dramatically putting his hands on his shoulders and asking, "Will your view of criminal defense attorneys affect your ability to judge my client fairly?"

He had barely finished his question when she shot out, "THAT! That right there is what I'm talking about! You're trying to *manipulate* me!!!"

Drop the gimmicks. Jurors are wondering if they can trust and believe in you. When you use gimmickry of any kind they shut off and pat themselves on the back for being right about you.

Jurors are looking for a real person. Someone who respects their time and has respect for the process itself. This is why you won't see Rick Friedman, for example, yacking it up with defense counsel or joking around with the judge. He knows jurors are watching his every move, and he shows them that he believes in this process and in this client by doing his job thoughtfully, seriously and without gimmicks. He communicates to jurors that what is about to happen is important. That *they're* important. And by doing so he puts jurors at ease so he can talk to them thoughtfully about the case.

So is there ever a time to ask the hobby question?

Sure. When you're at a barbeque or an office party or stuck talking with your brother-in-law Ned. In court, however, be authentic and do everything possible to reverse the threat that jury selection creates for jurors. ■

For more information on how to move jurors from hostage to hero, visit www.fromhostagetohero.com to access videos, resources, blog posts, and more.

SAVE THE DATE !!!

CATA's 2020 Litigation Institute will be held on Friday April 17, 2020.

Our guest speaker will be Sari de la Motte
the author of *From Hostage To Hero*
(*See* her article at page 17, on "Why Jurors Hate The Hobby Question.")

An expert in nonverbal intelligence, Sari de la Motte is known as "The Attorney Whisperer." Sari works with attorneys on trial communication, witness preparation, and jury selection. She has been interviewed in the Huffington Post, The Atlantic, The Oregonian, and on television and radio. Sari has worked with several law firms, including several members of the Inner Circle of Advocates. Sari is based in Portland, Oregon. You can email Sari at: sari@saridlm.com.

****

SAVE THE DATE !!!

CATA's Annual Installation Dinner will be held on Thursday, May 28, 2020.

Our guest speaker will be Judge Jennifer Brunner of the 10th District Court of Appeals, who is a candidate for the Ohio Supreme Court in the November 2020 election.

It will be a great dinner!! We hope to see you there!!

NEW from Trial Guides

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More info at fromhostagetohero.com or by calling (503) 894-8789

Christine M. LaSalvia is a principal at The Law Office of Christine LaSalvia. She can be reached at 216.400.6290 or christine@MakeItRightOhio.com.

Verdict Spotlight:
James Millard v. Eli Lilly & Co., Cuyahoga County C.P. No. CV 17 882734

by Christine M. LaSalvia

James Millard was a loyal employee to Eli Lilly, one of the biggest pharmaceutical sales companies in the world. He worked hard and gained the respect of physicians in his region. He was the type of salesperson that you would like to have come to your office. He impressed physicians with his knowledge and consistently met and exceeded his sales goals. You would think that a company would reward such an employee. However, in this case, Eli Lilly was unable to see past his exterior and instead of rewarding loyalty and success, he was fired. Fortunately, James found the law firm of Bolek Besser & Glesius and they were willing to take up his fight and put in the grueling hours and hard work that comes with an age discrimination claim against a behemoth in the pharmaceutical industry.

At Eli Lilly, James was a man in his sixties in a culture that was rewarding youth and speed over experience. Despite the fact that the year before he was fired, James had sales which were among the highest in the country, he began to notice problems when he was assigned to a new manager. This new, significantly younger manager began to make ageist comments that he was slow, forgetful and had "lost a step." James noticed that his new manager was treating the younger sales people more favorably. Seeing the writing on the wall, he acted to take steps to protect his job for which he had worked so hard and made a formal complaint to Eli Lilly objecting to the harassment from his new manager. Instead of changing course, the manager doubled down on her harassment and gave James a written warning, criticizing him for paying $3.49 in business expenses and a $10.00 tip out of his own pocket instead of including this amount on the expense report. This de minimus issue was an honest mistake and did not actually violate company policy. When giving the warning, his manager told James that he was receiving discipline solely related to the expense report issue; however she also included several subjective complaints regarding his performance. From that date forward, his manager spent time manufacturing documents to support unsatisfactory assessments of his work in the field.

In November of 2015, after receiving the warning, James was recognized by Eli Lilly for exceptional leadership. In December 2015, he met or exceeded substantially all of his sales goals. Immediately after these achievements, James was placed on probation for subjective reasons. Once James was placed on probation, he was deprived of bonuses and other benefits. Just a few months after his complaint, James' manager emailed another manager pressuring her to change a performance review from something "super positive in tone" to something "more critical in tone." All of this was to exert pressure to force James to quit. On March 28, 2016, James Millard was terminated. He was replaced by an employee who was twenty-seven years younger.

Bolek Glesius Besser filed a lawsuit in the Cuyahoga County Court of Common Pleas. The case was long and filled with hard work, including document production with 40,000 documents,

Matthew Besser, James Millard, and Cathleen Bolek

summary judgment and numerous pre-trial motions. The case culminated in a two-week trial in front of the Honorable Timothy J. McGinty.

From the outset, counsel for James determined that this would be a good case in which to use the "Reptile" theory of voir dire. Since James had sold injectable diabetes medication, counsel worked to show the value of his knowledge and experience and the good James had done for the public. This was contrasted with Eli Lilly, which was sacrificing concern for public health for a culture of youth. Counsel spent time preparing and carefully planning for voir dire and did an initial questioning which lasted three hours. Counsel was shocked that Defendant asked almost no questions and passed on their pre-emptory challenges. Counsel was particularly surprised by the Defendant's decision to leave a 19-year-old woman on the jury who had indicated in her jury questionnaire that she had a "somewhat negative opinion" of big pharmaceutical companies.

Counsel moved on to opening statements and worked to argue James' case while also turning some of their weak points into a positive. While James was a very nice and engaging witness, he had made a few mistakes in his deposition which could be taken as inconsistencies. Counsel made the decision to address this issue head on and explain to the jury that an inconsistency is not necessarily a lie. Counsel carried this theme through with each defense witness. Instead of attacking, counsel used it as a chance to allow defense witnesses to explain that inconsistencies are not necessarily lies.

When asked about the particular strengths of the case, Cathleen Bolek described how she was able to bring in five endocrinologists to testify live. These doctors- some of whom worked for the Cleveland Clinic Foundation- came in for no charge, on their own time, without any subpoena or involvement from their employees, to testify on behalf James. These doctors testified that information contained in the field reports which were used as a basis to fire James was not accurate. They supported James as a knowledgeable and helpful resource.

Cathleen also spoke passionately about the contrast they were able to draw between how James was treated versus other younger employees. James was placed on probation for a small expense report issue. However, a younger salesperson was not punished in any way for appalling racist language.

Despite this compelling testimony and evidence, Defendant never made a realistic settlement offer before or during trial. The jury was out for forty minutes and came back with a verdict in the amount of $986,605.21. The foreman of the jury was the aforementioned 19-year-old girl with a "somewhat negative" impression of big pharmaceutical companies. This verdict represents Plaintiff's exact monetary requests to the penny. After this well deserved and hard-fought win, Defendant settled just moments before the punitive damages phase of the jury was set to begin. Bolek believes this verdict was based on hard work and time-consuming preparation for voir dire and witnesses. Bolek credits the Honorable Timothy McGinty as being a great trial judge and a lawyer's judge. She also noted that no judge ever worked harder to try to get a case settled.

Bolek was also proud of the fact that she was able to share this experience with her son who, after coming for one afternoon to help with technology, chose to sit through the remainder of the trial. Bolek spoke proudly of his enthusiasm and excitement at seeing his mother cross-examine witnesses and discuss the events of each day.

This verdict was a huge accomplishment and a warning to other companies doing business in Ohio to judge their employees on merit and not on stereotypes. ■

Jordan D. Lebovitz is an attorney at Nurenberg, Paris, Heller & McCarthy, Co., L.P.A. His practice focuses on truck crashes, negligent security actions, and other catastrophic and wrongful death litigation. Jordan obtained his Class A Commercial Drivers License (CDL) by going to night school while working as attorney; putting him in the driver's seat for cases involving commercial motor vehicles. Jordan was also the only Ohio attorney involved in the global $800 million settlement stemming from the October 1 shooting in Las Vegas, Nevada where he represented people who were shot, trampled, and suffered other serious injuries. He can be reached at 216.621.2300 or jordanlebovitz@nphm.com.

Negligent Security Pre-Litigation Checklist

by Jordan D. Lebovitz

People have the right to be safe. Whether eating dinner, enjoying a night out with friends, or at the movie theatre, no one should have to worry about violence while patronizing a business. So when violence does strike, and a family member is catastrophically injured or killed, that family deserves answers.

This article is written as a checklist or outline on what to do when you get that call from a potential client whose family member was hurt or killed by a third party act of violence on a business owner's premises. This is the pre-suit checklist to determine if you have a case. And although some of the same principles/steps may apply to cases involving misconduct of private security guards, those cases are not the focus of this article.

The Supreme Court of Ohio instructs: "a business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner."[1]

If the act was not foreseeable, you do not recover. Period. And you can't create "foreseeability" out of thin air just because the facts of the crime are so heinous. That's not going to work in Ohio. "The existence of a duty depends on the injury's foreseeability and the foreseeability of criminal acts of third parties depends on the business owner's superior knowledge of a danger relative to that of the invitee."[2]

So then what do you do when someone calls after their family member was shot and killed at a bar or restaurant?

First, conduct what I call the "free" (or nearly free) investigation. (This is important for a practical reason that will be discussed at the conclusion of this article). The free investigation should start with a site visit either the same day or soon after you sign up the case. Go yourself. Don't send someone. Take photos of the exterior of the building, both facing the building and facing away from the building in all directions. Try to take photos of the interior, but avoid going inside so you are not even tempted to speak with the owners/employees (*see* Prof. Cond. R. 4.2, 4.3). The site visit will help you write your Preservation of Evidence letter with specificity: *e.g.*, "Preserve any and all digital video recordings from the camera located on the Southeast corner of your building."

After walking the scene, go to the nearest businesses and speak with the customers, talk to the employees, and ask for the owner. It's amazing how often a shooting/stabbing/fight causes your neighboring business owners to spill the beans on how many times they called the police on shady characters in the area that were "all going to that bar/restaurant" and not theirs. These witnesses are also your starting point for other similar incidents in the surrounding area.

Second, after sending your Preservation of Evidence letter the same day, call the police. The non-emergency line, obviously, and ask to speak with the Supervisor for the District where the incident occurred. Don't try to speak with the investigating office him/herself - if you got the case early enough, you're better off speaking with someone else. From the supervisor, or person uninvolved in *this specific investigation*, try to get information about the area; see if there are "hot spots" for crime, or frequent "calls of service" to the surrounding area where your client got hurt/killed. This avoids wasting time with an overbroad Public Records or FOIA request. You don't need "every call of service for the past twenty (20) years for the one-mile radius surrounding the bar/restaurant in question" - it's a waste of time and won't prove your case.

You need to be specific: the Court will look at the "totality of the circumstances" surrounding the third party criminal act that hurt or killed your client to determine whether you get to a jury. The totality of the circumstances test considers: prior similar incidents, the propensity for criminal

activity to occur on or near the location of the business, and the character of the business.[3] Foreseeability can also come in the form of "actual knowledge" of *this specific criminal actor or criminal act*, but you won't know that until you are knee-deep in discovery and depositions.

Your Public Records Request should ask for three (3) years of "calls for service" to the location of the business in question, three (3) years of "all police reports generated" from the location of the business in question, and body camera footage (if available) from the calls for service that necessitated a report. Although the business may have had a "call for service" for a fight/assault/homicide ten (10) years ago, many expert witnesses are reluctant to use that data to the plaintiff's advantage unless there was litigation from that incident - which would be incredibly helpful at this investigation stage. A caveat here: some rely on ordering a CAP Index, which is a privately funded "crime risk report" that can be purchased and helps business owners (and expert witnesses) identify high crime areas (www.capindex.com). Although some experts find this very useful in their analysis as to whether the area is "high risk," I'd stick to specific reports/calls for service.

Also, use the information you gathered in the "free" first step from neighboring businesses if there are "calls for service" to the neighboring businesses. Multiple prior similar incidents at nearby businesses can add up to help overcome the "totality of the circumstances" test.

Third, spend *some* money on a deeper investigation. Why? Because you need it; these cases are tough and you may need more than just reports of crime on the property to get to a jury. ""Three main factors contribute to a court's finding the evidence insufficient to demonstrate the foreseeability of a crime as a matter of law: (1) spatial separation between previous crimes and the crime at issue; (2) difference in degree and form between previous crimes and the crime at issue; and (3) lack of evidence revealing defendant's actual knowledge of violence.'"[4] A business owner must either have known or should have known that a substantial risk of such harm existed.[5]

Actual knowledge is best when it comes from *inside* the business. Find prior employees of the business and interview them. Yes, they are fair game.[6] You can do that in a few different ways: (1) hire a private investigator (may be the best $2,000 you spend); (2) use "Sales Navigator" by LinkedIn (this allows you to search individuals by "past employment" [caveat - may not work for a dive bar]); or (3) use your new relationships with neighboring businesses to find prior employees. (Yes, this works). This is your opportunity to learn more about the clientele of the business: specifically, whether there have been fights/assaults that were never reported to the police, allowing you to argue that knowledge of those "incidents" can be imputed to the owner.

At this point, you should have a deep (enough) foundation and knowledge of the suspected business and its owner. But before you do anything else (that is, before you retain an expert witness, or spend any more money), you need a copy of the insurance policy. As if negligent security cases aren't hard enough, the insurance industry puts an even bigger potential roadblock in your road to recovery for your client: the "Deadly Weapons" exclusion.

As soon as you get the policy, look for a "Deadly Weapons" exclusion. The language often looks like this:

> This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of or resulting from the possession, ownership, maintenance, use of or threatened use of a lethal weapon, including but not limited to firearms by any person.

Similar exclusions have been used to preclude coverage for any claims arising out of a gunshot, regardless of how the claims are pled.[7] This is why Steps 1 and 2 are the most important at the outset of the case from a law firm perspective.

If you follow this checklist, and do the heavy (and basically free) lifting from the moment you are retained, you'll know whether you have a viable case. There is nothing worse than having a conversation with a client after their family member was catastrophically injured or killed, only to tell them that there is no path to recovery because of the law in Ohio. You owe it to your client, and your firm, to do what it takes, within reason, to find out if what happened to their loved one was preventable. For most of our clients, money is secondary to making sure this never happens to another family. ■

End Notes

1. *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 135, 652 N.E.2d 702 (1995); *see also, Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St.3d 171, 173, 543 N.E.2d 769 (1989).
2. *Brookshire v. Mayfield Boneyard, L.L.C.*, 8th Dist. Cuyahoga No. 100312, 2014-Ohio-1839, ¶ 9, citing *Proctor v. Morgan*, 8th Dist. Cuyahoga No. 97404, 2012-Ohio-2066, ¶ 7, citing *Haddad v. Kan Zaman Restaurant*, 8th Dist. Cuyahoga No. 89255, 2007-Ohio-6808, ¶ 18. *See also Heimberger v. Zeal Hotel Grp. Ltd.*, 10th Dist. Franklin No. 15AP-99, 2015-Ohio-3845.
3. *See Heimberger at* ¶ 17, quoting *Shivers v. Univ. of Cincinnati*, 10th Dist. Franklin No. 06AP-209, 2006-Ohio-5518.
4. *Heimberger* at ¶ 18, quoting *Shivers* at ¶ 9.
5. *Doe v. Beach House Dev. Co.*, 136 Ohio App. 3d 573, 582, 737 N.E.2d 141, 148 (8th Dist. 2000).
6. *See* Advisory Opinion 2016-5.
7. *See Robinson v. Hudson Specialty Ins. Group*, 984 F. Supp.2d 1199 (S.D. Ala. 2013); *Seneca Specialty Ins. Co. v. 845 North, Inc.*, M.D. Fla. Case No. 3:14-cv-922-J-34PDB, 2015 U.S. Dist. LEXIS 67791.

In Memoriam: F. Michael Apicella
(1930-2019)

"It is said that the two most important days in your life are the day you are born and the day you realize why. Mike Apicella was born to be a champion of the people. And what a champion he was."
– Retired Ohio Supreme Court Justice William "Bill" O'Neill

CATA mourns the recent passing of long-time member and former CATA president, F. Michael ("Mike") Apicella. Mike's sixty-five year legal career began in the military, where he served his country as a member of the 107th Armored Cavalry and as a 1st Lieutenant of the United States Army. Upon returning to civilian life, Mike practiced law at the National City Bank Trust Department and the New York Central Railroad Law Department, before entering private practice. For twenty years, he practiced with his wife – now Eleventh District Court of Appeals Judge Mary Jane Trapp – in the Cleveland firm of Apicella & Trapp before she took the bench.

Mike dedicated much of his legal career to representing the wrongfully injured. In the 1970s he became CATA's sixteenth president. He also served presidential terms in the Cuyahoga County Bar Association (1980-1981) and the Cuyahoga County Bar Foundation (1981-9182). In 2003, he received the Ritter Award from the Ohio State Bar Foundation for his unparalleled commitment to the betterment of the profession and the justice system. He served for many years on the CMBA's Judicial Selection Committee; the Ohio State Bar Association's Council of Delegates; and was one of the longest serving members of the Ohio Delegation to the American Bar Association House of Delegates, attending each meeting from 1983 to 2008.

Shortly before his death, he asked Judge Trapp to "convey to his CATA colleagues his firm resolve in the mission of CATA and his hope, as a past president of CATA, that the new leaders will continue the fight for the rights of the injured." On behalf of CATA, we extend our deepest sympathies to Judge Trapp and the rest of Mike's family, and will miss him at the annual dinner and other CATA events.

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

The attorneys at **Eadie Hill** are volunteering their time with Cleveland Public School students as part of the Cleveland Metropolitan Bar Association's award-winning 3Rs program. The pillars of the 3Rs program are: Rights, Responsibilities, and Realities.

The goal of the 3Rs program is to connect lawyers, judges, law students, and paralegals with 11th grade students enrolled in U.S. Government classes. The curriculum generally helps foster an understanding and appreciation of the U.S. Constitution and focuses on career counseling, freedom of speech, checks and balances, how laws are interpreted, and a special lesson on police encounters based upon current, real-world examples.

Eadie Hill Volunteers

Over the years, the program has evolved to encourage volunteer involvement by maintaining flexibility in how and when the lessons are taught, allowing the volunteers to visit the classes on their schedules, and making lesson dates a suggestion, as opposed to a requirement.

If you are interested in joining the 3Rs program, contact William Eadie at William.Eadie@eadiehill.com for further information. Will is the chair of the 3Rs committee at the CMBA and is always looking for legal professionals to join and volunteer their time.

* * *

The attorneys and staff of **Lowe Eklund Wakefield** recently spent an afternoon volunteering for the non-profit organization, Shoes and Clothes for Kids.

Shoes and Clothes for Kids (SC4K) is the only non-profit organization in Greater Cleveland providing new shoes, school uniforms, clothes, and school supplies throughout the year at no charge to thousands of children in need. The mission of this non-profit is to improve K-8 school attendance by eliminating lack of appropriate clothing, shoes, and school supplies as barriers. Due to successful strategic fund-raising and volunteering efforts, SC4K has distributed over $2.4 million in gift cards; over 230,200 gift cards for shoes; and over 400,000 school supplies.

Lowe Eklund Volunteers

Lowe Eklund Volunteers Packing Boxes

Nurenberg Paris "Jury Pool"

The team at Lowe Eklund Wakefield volunteered their time by helping to count, sort, stock, and pack cold-weather items for distribution ahead of the winter season. SC4K relies on volunteers to sort, pack, and distribute over $4 million worth of new shoes, clothes, and school supplies to thousands of children annually.

SC4K is always in need of volunteers to donate their time, especially during the winter months. If you or your firm are interested in volunteering, please send an inquiry to volunteer@sc4k.org.

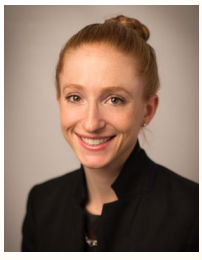
* * *

On September 18, 2019, attorney **Ellen Hirshman** delivered the End Distracted Driving presentation at Lorain County Community College to 120 members of the Lorain County Chamber of Commerce Safety Council. The safety council, which is comprised of private and public local businesses in the community, offers many benefits, including a forum for keeping the employees healthy and working.

The End Distracted Driving campaign was founded in 2009 by Joel Feldman and Dianne Anderson whose daughter, Casey Feldman, was tragically struck and killed by a distracted driver in 2009. Although distracted driving is still very much an issue, there seems to be some hopeful news on the horizon. According to the U.S. DOT NHTSA 2019 Traffic Safety Facts, distracted driving deaths fell in 2018 by the largest percentage in 10 years. In 2017, 3,242 people were killed in distracted driving crashes, while in 2018, 2,841 people were killed. That is an overall approximate 12% decrease in deaths. However, pedestrian and bicyclist deaths increased to a combined total of about 7,000 for the highest annual totals since 2009. Pedestrian and bicyclist deaths now account for about 20% of all highway fatalities. Clearly, there is still more work to be done in educating drivers about safety habits that can prevent these tragic losses. If you or your firm are interested in presenting an End Distracted Driving presentation, please contact Ellen Hirshman at Ehirshman@Loucaslaw.com.

* * *

The attorneys and staff at **Nurenberg Paris** participated in the Cleveland Metropolitan Bar Association's 18th Annual Halloween Run for Justice. The Nurenberg Paris team dressed up as members of a "jury pool" which earned them the award for Best Costume. Through the efforts of about 500 participants and 35 sponsors, the CMBA's Run for Justice generated support for its 3Rs program, Louis Stokes Scholars Program, Homeless Assistance Program, high school mock trial competitions, and Volunteer Lawyers for Arts program. ■



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

2019 Annual Dinner: A Photo Montage

Meghan C. Lewallen is a principal at The Mellino Law Firm LLC. She can be reached at 440.333.3800 or mcl@mellinolaw.com.

Connecting To Millennial & iGen Jurors

by Meghan C. Lewallen

What Defines a Generation?

Each generation has its own values, attitudes, and views of world which are a direct result of shared experiences in their formative years that forever shape their subsequent behavior.[1] A "generation" is said to form when a "defining moment" occurs: a moment so momentous that all members of that generation can tell you where they were when the event took place. Common generational influences include current events, technology, fads, economic times, parenting, education, and size.[2]

When considering how a juror's generation impacts how they will evaluate your case it is important to understand what drives their decisions, what they value, and how they perceive the world and the people that surround them. Evidence suggests that every generation is driven by what they view as pro-social and worthwhile values.[3] Trial attorneys have been studying the tendencies and mindset of jurors from each generation for years but there is little information available as it relates to Millennial jurors and even less on the generation that follows, mainly because these individuals have only recently begun appearing on juries. The Millennial generation is made up of more than 82+ million people and is currently the largest generation.[4] It is imperative to gain an understanding of these individuals and how best to connect with them given the potential impact they may have on our clients' outcomes at trial.

Importantly, in order to appreciate the defining moments that formed the members of this generation it is key to briefly address the generations that came before them. For the purposes of this article the date ranges and ages associated with each generation as of 2019 were defined by the Pew Research Center.[5]

Traditionalists/The Silent Generation (Born between 1928-45 - ages 74 to 91)

Traditionalists lived during WWII and grew up during the Great Depression. Key events at that time include Walt Disney, the radio, automobiles, and social security.[6] Traditionalists are known to be fiscally conservative, place great respect in authority, are self-sacrificing, and loyal.[7]

Baby Boomers (Born between 1946-64 - ages 55 to 73)

Baby Boomers grew up during periods of conflict and social change including the Vietnam War and the Civil Rights Movement.[8] Key events for this generation include the moon landing, the Beatles, Watergate and the recession. As of 2019, Boomers hold many of the positions of power and authority, especially in the workplace.[9] They value strong work ethic, professionalism, and individualism.[10] Boomers are known as workaholics who are critical of younger generations and their lack of commitment to the workplace and are particularly aggravated with their perspective that they are immune to paying their dues as it relates to advancement in their careers.[11] Members of this generation are confident, independent, self-reliant, dedicated, and goal-oriented.[12] The main technology breakthrough for this generation was television (black-and-white, then color).[13]

Generation X (Born between 1965-1980 - ages 39 to 54)

Generation X grew up amid non-stop scandal broadcasted on 24-hour news media. Such scandals included the government, big corporations, and even athletes.[14] Key events for Generation X include 24-hour media, the dot com boom and bust, the Challenger explosion, and video games.[15] Members of this generation

are skeptical of big business and government authority.[16] Importantly, at the time of their formative years the national divorce rate doubled and more women began to enter the workforce.[17] Known as the latchkey kids, members of Gen X are resourceful, independent, skeptical, and entrepreneurial. They value transparency, independence, work-life balance, and growth.[18]

Millennials
(Born between 1981-1996 - ages 23 to 38)

Members of this generation grew up with social media and experienced the fastest evolution in technology the world has ever seen.[19] Such exposure has resulted in expectations of constant innovation, connectivity, and equal irritation when those expectations are not met.[20] Millennials are the best educated generation in American History as far as percentage with four-year college degrees.[21] Key events and conditions experienced by members of this generation include the 9/11 terrorist attacks, the tech upgrade cycle (Apple iPhone), the Great Recession, increased Homeland Violence, the Self-Esteem Movement, and participation trophies.[22] Millennials are collaborative, globally connected, media-savvy, and environmentally-conscious.[23] They value integrity, innovation, efficiency, and speed.[24]

Often called the "me-me-me" generation, parents and teachers encouraged Millennials to speak up and share what was on their minds during their formative years in an effort to combat rising fear and uncertainty as a result of increased homeland violence beginning with the Columbine shootings and later the 9/11 terrorist attacks.[25] Millennials became accustomed not only to being told they were important but also to close relationships and open dialogue with parents, teachers, and authority figures.[26]

Notably, due to its size and key events that occurred during the formation of this generation its members are becoming more commonly viewed as two separate groups: Old Millennials (born 1981 to 1988 - ages 38 to 31) and Young Millennials (born 1989 to 1996 - ages 30 to 23). Old and Young Millennials were defined by two major events (the financial crisis and the rise of smartphones) and the age range of these individuals when these events occurred.[27] Millennials are generally more liberal than older generations both politically and socially[28]; however, they are much less likely to attach themselves to a group they view as an institution (religious, political, etc.).[29]

Generation Z/iGen
(Born between 1997-2012 - ages 7 to 22)

This generation has been known by several names ranging from Generation Z, iGen, Digital Natives, and Gen Edge.[30] Members of this generation seek instant gratification and are completely tech dependent.[31] This generation is the last that will experience a Caucasian majority and has been exposed to constant streams of violence and first-hand news from social media.[32] Key events and conditions for iGen include the presidency of Barack Obama, on-demand entertainment, YouTube, the Great Recession, and visual communication including emojis, bitmojis, and the like.[33] iGen is connected, diverse, resilient, and pragmatic.[34] They value stability, personalization, equality, and resourcefulness.[35] Members of this generation are constantly seeking input and stimuli, are smart and quick to process information, and have a very short attention span.[36] iGen seeks entertainment by media rather than interaction with others.[37]

Millennial Jurors

For years, Boomers and Gen X have labeled Millennials as entitled, impatient, disconnected, and indifferent to authority. As members of this generation continue to age, a more positive perception of this generation is beginning to develop. Regardless of the feelings that exist stemming from generations that came before them, as of 2020, Millennials will make up half of the workforce.[38] Not only that, these same individuals continue to make up a greater percentage of our juries each year and are beginning to take the bench.[39]

Sitting amongst Boomer and Gen X jurors, it is important to keep in mind how this generation learns, retains information, and their core values, which ultimately impact their decisions.[40] Insight as to this generation's perception of the world and their tendencies is of particular importance.

Short attention span. The notion that Millennial jurors have a much shorter attention span than generations that came before them is certainly not a new idea; however, it must be taken into consideration when preparing for trial and determining how information will be presented. This generation of jurors is impatient and has grown up, for the most part, with the ability to obtain instant gratification due to constant access to the internet to seek answers to any questions they may have.

Potentially even more concerning, members of this generation have become accustomed to being constantly entertained. If you look at any Millennial's phone you are sure to see numerous apps with access to a form of entertainment, news media, etc. Even worse, social media forms including Instagram, Facebook, and Snapchat have the ability to post "stories" on your account so that you are able to view a reel of short videos posted by your friends, celebrities, news media, or any other accounts you follow. At a later point, "live" stories and IGTV

were also introduced providing access to constant entertainment, often in real time. Members of this generation are also often deeply anxious about missing out on something better due to the constant access they have to social media and insight into other people's lives and activities.[41]

One must also take into consideration that Millennials are efficient at multi-tasking, particularly as it relates to the internet and mobile technology. They prefer looking at two screens at once and can usually be found using two forms of media at one time as they perform tasks.

With this much going on in a Millennial's life at any given time during a typical day, their attention span will be even shorter when that stimulation is taken away during trial. As such, it is imperative that trial lawyers get to the point and "connect the dots" of their case immediately and in as compact a manner as possible before these jurors lose interest or zone out.[42]

Team-oriented. It has long been recognized that team building is the hallmark of this generation and that in general Millennials tend to prefer working in a group as opposed to working alone.[43] As such, Millennial jurors have a team-oriented focus and tend to be consensus builders. Because they do not like conflict it is expected that Millennials will likely serve as mediators amongst other jurors of different generations during deliberation.[44] Notably, trial lawyers are beginning to see Millennials step into the role as foreperson at trial. Having worked in team-building environments their entire lives it is no surprise members of this generation feel comfortable in this role.[45]

Informed & opinionated. Millennials are informed and have strong opinions. As expressed above members of this generation were encouraged to speak up and express what was on their mind during their youth; therefore, it is unlikely Millennials will hesitate to express any opinions that may have during deliberations.[46] Although these jurors possess the tools they need to provide valuable insight and feedback, Millennials' beliefs and attitudes are largely shaped from more modern realities given their lack of real life experience as compared to Boomer and Gen X jurors.[47]

Because Millennials are accustomed to quickly searching the internet to become "experts" on anything with which they are unfamiliar, it may be particularly important to request the Court to remind the jury that research on their own of any kind, including on the internet, is not permissible.[48]

Personal responsibility. It has been recognized that Millennials have higher standards for personal responsibility than that of prior generations.[49] For example, as far as medical malpractice cases are concerned millennials will likely want to know whether the patient had a healthy lifestyle and was obedient to physician instructions/orders; and they may be critical if the plaintiff did not obtain a second opinion. By the same token, personal responsibility is equally important to millennials in the actions of the physician.[50] Additionally, members of this generation have a tendency to be less empathetic and are less able to understand another's point of view.[51]

Skeptical. Members of this generation are more skeptical than Boomers and Gen X and have a desire to uncover the truth.[52] Millennials believe they can find everything out for themselves and have a strong desire not to be fooled.[53] In general, Millennials have been known to believe they can uncover the truth simply by searching the internet.[54] This may explain why members of this generation seem not to value expertise or experience as much as Baby Boomers or members of Gen X.[55]

Safety conscious. Millennials are also more safety-conscious than prior generations.[56] This has been attributed to the homeland violence and terrorist attacks that occurred during their formative youth.[57] Millennials believe that everyone should have a security plan in place and are particularly fearful that events that occur without such a plan will happen to them or someone close to them.[58] Importantly, Millennials expect corporations to take every possible precaution to ensure safety.[59] With that in mind, Millennials also believe that policies and procedures are king and have the mindset that if it is not written down, it did not happen.[60] This is particularly important where there exist gaps in documentation in light of Millennials' desire to uncover the truth.

Ultimately, mixed opinions exist as to whether this generation of jurors presents more or less challenges to plaintiffs or defense as it relates to the verdicts returned and the amount awarded. Of the sources that have suggested one side or the other has benefited most from the infusion of Millenial jurors, none have differentiated whether these particular Millennials fell into the Old or Young group.

Connecting to Millennials

With a firm understanding of the mindset and tendencies of members of this generation it is arguably even more important to understand how to connect with them, especially at trial. Below are a few considerations for presenting your case visually to Millennial jurors given their unique characteristics. These tactics and methods, however, are not unique to Millenials, and may also apply to Boomers and members of Gen X.

Structure & Instruction. When connecting with Millennial jurors, it is

important to communicate as if they are students. Millennials appreciate structure and step-by-step instruction largely due to their highly structured childhoods.[61] By educating the jury on the basics of more complex issues of your case, you will be able to provide these jurors with the tools they need to become the experts and ultimately feel empowered to reach a conclusion on their own.[62] No matter how complicated an issue may be, there are ways to break it down in basic terms, often times using everyday occurrences or experiences as analogies. Teaching a 101 on a given topic and empowering Millennial jurors with the basics of a concept also follows a style of learning and decision-making that is familiar to them.[63] Teaching complex concepts to jurors will also naturally force you to simplify your case which will increase the jury's ability to retain information.

Embrace technology. As stated above, Millennials are accustomed to constant stimulation and have further grown accustomed to education accompanied by technological aids.[64] As such, Millennial jurors especially appreciate presentations that cater to their need for multisensory input.[65] No longer are the days when blackboards and overhead projectors were the only ways in which information was presented. Rather, members of this generation brought their laptops to class and were efficiently creating PowerPoints in high school and college. We are in an era where the majority of the jurors expect technology, so counsel should no longer be worried about looking too flashy or fancy; indeed, younger jurors can easily become bored and frustrated with exhibits on an ELMO.[66] This is not to say ELMOs should not be integrated into a trial presentation, but it should not be the only means by which information is presented.

Use visuals to communicate. When designing visuals for trial it is also important not to overload a PowerPoint slide with text. Rather, trial lawyers should include crisp and simple pictures or videos as visuals to communicate your main points and themes combined with your oral presentation.[67] The use of visuals will help jurors identify the elements of your themes and remember them more than they otherwise would if they just heard the information orally.

Checklists & timelines. Because Millennials have such an affinity for structure and organization, clear checklists and timelines assist in their ability to process the information in an organized manner.[68] Millennials love timelines because they favor open communication and feel the need to become educated on everything in the case.[69] They want details and they want them laid out in a linear fashion.[70] Timelines also lend to the transparency of who, what, and when.[71]

Animation. Animation on still PowerPoints is a useful way to present information to Millennial jurors and again incorporates multimedia and a bit of excitement to jurors' attention.[72] For example, attorneys can create a "pop up" feature to assist jurors with excerpts from the medical record by "zooming in" to a particular entry, lab value, etc., or to focus on a specific date on a timeline while discussing material events or action that occurred.[73] In addition to excerpts from the medical record, flash animation can also be used with other visuals to communicate your theme. Make sure to be mindful of the quantity of animation used during trial so as to not overpower your presentation and distract the jury.[74]

What We Can Expect Next

Just as trial lawyers begin to gain a handle on Millennial jurors, they will be forced to adapt again as members of iGen begin to increase in percentage on our jury pools. With the oldest members of this generation beginning to graduate from college it is worthwhile to understand the characteristics that define iGen. This generation is much more cynical than the Millennials and tends to be much more realistic and slightly jaded from a tough economy, terrorism and complexities of life.[75]

Members of iGen grew up in the aftermath of the Great Recession as the offspring of Generation X. iGen is motivated by security and watched firsthand as Millennials struggled to live independently and consumed with student debt.[76] As a result, this generation is much more aware and concerned about affording college and has started saving much earlier than Millennials.[77] Members of iGen are true digital natives and have great expectations for technology as well as for those that use it.[78] iGen is using their unlimited access to information and their unrestricted and far reaching voices on social medial to empower one another and enact change.[79] They are quick to contact companies via social media for customer service issues and catch first-hand video of an injustice, which has come to be known as "citizen journalism."[80] iGen members are next level multi-taskers and have had access to texting and social media outlets such as Snapchat and Twitter since grade school.[81] A few of the differences that have been seen thus far between the two youngest generations:

- Millennials grew up with computers while iGen grew up with touchscreens and their phones have always been "smart."[82]
- Millennials spent money boldly and with few boundaries while iGen prefers saving money to spending it.[83]
- Millennials grew up shopping at malls while iGen prefers to shop online.[84]
- Millennials grew up during a strong economy while iGen is growing up in a time of recession, terrorism, violence, and volatility.[85]
- Millennials subscribed to everything

social while iGen prefers social media that does not track when they communicate such as Snapchat.[86]

- Millennials loved sports and adventure while iGen play most of their games inside, usually on a screen, and see sports as a health tool.[87]
- Millennials grew up with slightly longer attention spans while iGen has an attention span of 8 seconds.[88]
- Millennials initiated text messages as a standard way of communication while iGen prefers communicating through images, icons, and symbols.[89] ■

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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: Hide Those Emails

Last time we discussed unroll.me to eliminate some of the junk wasting your time in your email inbox.

Today we're giving you a tip that lets you go much further: eliminating your email inbox altogether.

Not that it's gone for real. Just out of sight, out of mind.

Forbes says we check email 15 times a day, on average, and lose about 2.5 hours a day being unproductive in email.

I'll wager it's worse for some of us.

Inbox When Ready is a gmail plugin for Chrome that literally whites out your inbox to hide it from view until you choose to view it. (For you Outlook users, which I only recovered from recently, there are some options for you, too. Start by turning off any new email alerts!)

Email "batching" is a powerful way to preserve your focus until you choose to tackle the inbox: you set aside time and only check your email during that time. This allows you to do better work—the work you want to be doing—on cases without being distracted by someone else's idea of what you should be doing.

Because if you're constantly checking your email, you're giving up your schedule to whoever decided their "to do" list was more important for you when they emailed you.

The problem is that the human brain is built to be distracted, and most of us have our inbox open all the time. If you need to go find that message or attachment for the real work you're supposed to be doing, you invariably stumble across a bunch of emails that call out for your attention.

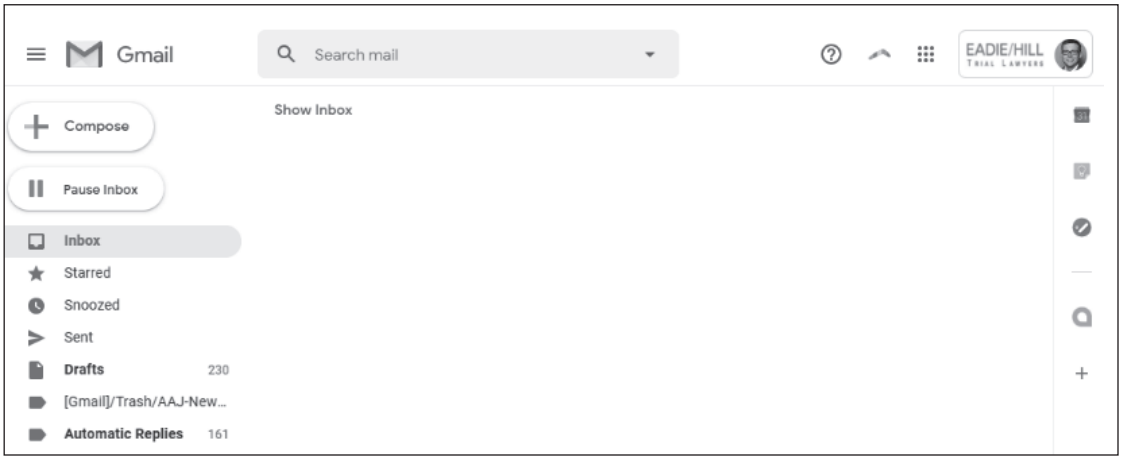
Inbox When Ready eliminates that by presenting no emails at all—just white space—until you click "Show Inbox."

The glorious calm of white space where your emails used to be.

This is a game changer for staff, too.

Have them schedule 20-40 minutes twice a day to process emails. Not only will the rest of their day be more productive, they'll also do a better job with their email. By setting aside time to handle their emails thoughtfully, you'll find they send better emails too, because they take the time to read and process them (instead of dashing off a reply while they're supposed to be doing something else).

Your time and focus are valuable. Don't give it up to anyone who happens to send you an email. ■



Leveraging Day-In-The-Life Documentaries To Illuminate The Impact of Injury

By Barry Hersch, CLVS

For nearly 35 years, I've used video to capture life experiences and produce them as "Day in the Life" documentaries, performing my duties with the compassion and moral honesty that is both critical and mandatory to my role. It is a humbling honor to enter a home that has been drastically changed for the worse and then be trusted to tell its story. I understand the expectation to professionally, fairly observe the environment and then document the situation with a goal to produce a video that clearly and thoroughly demonstrates the impact of severe and sudden change – something not fulfilled by mere text description on paper.

I approach each video documentary from the perspective that it's the most important piece of a puzzle. A great deal of the puzzle lays clearly before me, and it's obvious that life has changed dramatically for the injured party. It is then my job to recognize the missing piece, illuminate it, and bring it to the forefront to complete the picture. It is then the responsibility of the court system to review and evaluate each complete and unbiased story.

Long before a camera ever begins recording, usually as soon as the decision has been made to document a plaintiff, I arrange for an initial discussion with the family. This first step in the process is imperative to creating a rapport with the client that will, ultimately, result in a complete and effective video. It also gives me the opportunity to assess the situation and set expectations for the client and for myself. On site the day of the shoot, I carefully walk through every aspect of the injured party's day, documenting each thoroughly on camera – bathing, dressing, eating, transportation, medication, therapy, and more.

As important as it is to demonstrate the experience of the injured party, it's also meaningful to incorporate that of the surrounding family, understanding there is always an underlying impact on every member of the household. By the time a shoot is complete and I've left the home, I often feel emotionally drained by my observations – a signal to me that the documentary will succeed in creating clarity around the experience of the claimant and family.

Injuries change lives. It's almost impossible to explain the extent in words. A Day in the Life documentary is the most effective means of demonstrating impact and creating a path to understanding. In the end, videography is secondary to the primary responsibility I have – that being non-fiction storytelling that succeeds in opening the eyes of the audience to another's new, and stark, reality.

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Recent Ohio Appellate Decisions

by Kyle B. Melling and Regina M. Russo

Wilson v. Durrani, 1st Dist. No. C-180196, 2019-Ohio-3880 (Sept. 25, 2019).

Disposition: Reversed and remanded trial court decision.

Topics: Savings Statute and Statute of Limitations/ Statute of Repose in Medical Malpractice Claims.

Plaintiffs, both former patients, originally filed separate malpractice claims against a spine surgeon, spine orthopedic clinic, hospital, and academic medical center. Plaintiffs dismissed those separate claims and refiled their separate medical malpractice claims in a different county against the same defendants, alleging that the surgeries were medically unnecessary and were improperly performed.

Plaintiff Robert Wilson sought the treatment of defendants for relief of back pain. It was recommended to Wilson to undergo back surgery to repair discs along his spine, and Wilson did undergo two surgeries. Following the surgeries, Wilson experienced worsened pain and immobility. He eventually decided to sue the spine surgeon, claiming that the surgeries were medically unnecessary and improperly performed. Wilson filed suit against all of the defendants in Butler County in April, 2013. On December 11, 2015, Wilson voluntarily dismissed his complaint filed in Butler County and on December 16, 2015, filed a similar complaint in Hamilton County. Wilson's second complaint included additional factual details as well as an additional claim against the spine surgeon, and two additional claims against the orthopedic clinic and hospital based on information he learned in discovery in his first case.

Because the surgery was more than four years before Wilson filed in Hamilton County, the defendants moved for judgment on the pleadings asserting that the claims were time-barred pursuant to the statute of repose. The trial court granted the motion.

Plaintiff Mike Sand sought treatment of defendants to address weakness in his left leg. The spine surgeon recommended and performed spine surgery in April 2010. Following the surgery, Sand experienced the same leg pain he had prior to the surgery, and additional new back pain that limited his mobility. Sand filed suit claiming his surgery was medically unnecessary and improperly performed.

Sand sued the defendants on March 28, 2013 in Butler County for a variety of claims. On November 25, 2015, Sand voluntarily dismissed his complaint. He refiled a similar complaint in Hamilton County on December 9, 2015. In his refiled complaint Sand added more specific factual allegations and additional claims against the defendants based upon discovery disclosed in the Butler County Case.

Asserting the same arguments as in the Wilson case, the defendants moved for judgment on the pleadings.

The trial court awarded judgment on the pleadings for the defendants in both the Wilson and Sand cases.

In a consolidated opinion, the First District held that Ohio's savings statute would allow Plaintiffs' claims to survive the statute of repose, as their refiled complaints were substantially similar to their originally filed complaints. The court relied on the fact that the refiled cases involved the same plaintiffs suing the same defendants for almost identical causes of action and the defendants were aware of the claims against them.

Reiger v. Giant Eagle, Inc., ___Ohio St.3d ___, 2019-Ohio-3745 (Sept. 19, 2019).

Disposition: Reversing decision of the Eighth District that affirmed the trial court's finding of liability of grocery store.

Topics: Negligence; causation, "but-for" causation.

A customer with early stage dementia who was shopping in a Giant Eagle drove a motorized shopping cart into a regular shopping cart that was being used by the plaintiff customer. The regular shopping cart toppled over, striking the plaintiff and knocking her against a counter and then to the floor. The customer with early stage dementia was unaware of what happened and there were no witnesses. The plaintiff suffered soft tissue injuries and incurred medical expenses.

The plaintiff settled the tort case against the woman who hit her and proceeded against Giant Eagle on the theories of negligence, negligent entrustment and punitive damages. The plaintiff argued that the woman who hit her was diagnosed with dementia before the accident and Giant Eagle was negligent for allowing disabled patrons to use motorized carts.

The jury heard evidence that, before the subject accident, there had been 179 incidents involving motorized carts at Giant Eagle grocery stores, 117 occurring before the subject accident, and that there was no training on the use of motorized carts and/or who should be allowed to use them.

The jury found against Giant Eagle and awarded $121,000 in compensatory damages and $1,198,000 in punitive damages. The plaintiff's counsel successfully argued that the statutory caps on punitive damages under R.C. 2315.21 were not constitutional.

The Eighth District affirmed the jury finding on liability and compensatory damages but reduced the punitive damages to $242,000, finding the caps constitutional.

The Supreme Court of Ohio accepted a discretionary appeal of the case, regarding whether the Eighth District created new duties and/or imposed strict liability for providers of motorized shopping carts, and redefined malice for punitive damages.

The Supreme Court said that it need only address Giant Eagle's third proposition of law that it accepted for review to resolve the case. This proposition was:

> Proposition of Law III: For accidents involving motorized shopping carts, the Eighth District created a new strict liability standard for stores by (a) eliminating the need to prove that the store's negligence caused the accident and (b) basing that liability solely on dissimilar motorized shopping cart accidents thereby rendering the store an insurer for such accidents.

The Supreme Court determined that the key element in this case was causation. In order to prevail on a negligence claim, the plaintiff must provide evidence that any act or omission by Giant Eagle caused the accident. This is established by the "but-for" test, meaning that the harm suffered by the plaintiff would not have happened "but-for" Giant Eagle's actions or failure to act. The Court found that the only element that the Eighth District Court of Appeals found that the plaintiff had met was establishing the existence of a duty, from Giant Eagle's knowledge of 117 prior incidents involving motorized carts. The Supreme Court stated that even if it were to agree with the court of appeals that this was legally sufficient evidence for a reasonable jury to find that Giant Eagle owed a duty to the plaintiff, evidence of a plaintiff's injuries and a duty are not enough for a successful negligence claim. The plaintiff still had to prove that the store's failure to provide instruction or training to its patrons on how to use the motorized carts caused her injuries. Thus, because there was no evidence of causation, the Supreme Court stated that the court of appeals should have reversed the trial court's denial of Giant Eagle's motion for a directed verdict on the plaintiff's negligence claim.

In regard to the plaintiff's negligent entrustment claim, the Supreme Court stated once again that there was insufficient evidence of causation for a successful claim. There was no evidence that training patrons on how to operate motorized carts would have prevented the accident in this case. The woman who was driving the motorized cart had been driving them for well over a year, drove them on a regular basis, and had no accidents prior to the accident in this case. Further, there was no evidence that the woman's dementia rendered her incompetent to operate the motorized cart or that her dementia caused the accident. Since there was no evidence of causation to support a claim of negligent entrustment, the Supreme Court held that the trial court should have granted Giant Eagle's motion for a directed verdict on the plaintiff's claim of negligent entrustment.

The Supreme Court of Ohio reversed the Eighth District Court of Appeals' judgment and entered judgment in favor of Giant Eagle.

Korengel v. Little Miami Golf Ctr., 1st Dist. No. C-180416, 2019-Ohio-3681 (Sept. 13, 2019).

Disposition: Affirming Hamilton County Common Pleas Court's denial of summary judgment in part and reversing in part.

Topics: Political subdivision immunity; R.C. § 2744.02(B)(4).

A twelve-year-old boy and two friends were golfing at a golf course that was owned, operated, and maintained by a park district. The golf course had signs and statements on the scorecard that it will "attempt to notify them of potentially severe weather conditions" by sounding a siren, communicating the "reccomend[ation] [that the golfer] seek shelter or vacate the course immediately."

When the minors began golfing, the weather was normal. As they progressed, it became progressively windier. The golf course coordinator told the boys to pick up their pace, but he never warned them that there was an approaching storm. By the time they reached the seventh hole, they heard tree limbs cracking and saw tree limbs breaking and falling from trees in the woods adjacent to the course. As the twelve-year-old boy was preparing to putt on the eighth green, tree limbs from a nearby silver maple tree fell towards him. One struck him in the head, resulting in serious and permanent injury.

The family of the minor filed a complaint against the park district, as well as several other defendants who were later dismissed. The park district and its employees moved for judgment on the pleadings on the grounds of political subdivision immunity. The trial court denied the motion in its entirety. The First District Court of Appeals affirmed as to the claims for negligent/reckless maintenance of the tree, failure to use or maintain the storm sirens, and failure to warn the plaintiff of the pending danger, but reversed as to the other claims.

On remand, the plaintiffs pursued the remaining negligence claims, as well as a claim for reckless supervision. The defendants again moved for summary judgment which the trial court again denied.

In the second appeal, the First District again affirmed in part and reversed in part. At the outset, the court found there was a genuine issue of material fact as to whether the tree limb constituted a physical defect pursuant to R.C. 2744.02(B)(4). Both parties introduced conflicting expert opinions as to whether the tree limb constituted a physical defect. The defendant's expert opined that the tree was in good condition and that it was the high winds that caused the broken branches, not the condition of the tree. The plaintiffs' expert arborist opined that the tree was in an unhealthy condition and was a safety hazard. He further opined that condition of the tree "guaranteed a higher likelihood of a branch failure into the high use area of the green apron where [the golfer] was located at the time of the injury."

With respect to the alleged defect in the storm siren, since the plaintiffs did not introduce any evidence that the siren was not properly maintained or was not working properly, the court determined that summary judgment on that claim was appropriate.

Next, in regard to the employee negligence element of the physical-defect exception, the court determined that the golf course had a heightened duty of care because of the plaintiff's young age at the time of the incident. The court divided the plaintiff's remaining factual allegations into: "negligence in connection with tree maintenance" and "negligence in connection with the failure to manually activate the storm siren."

In regard to the first allegation, the court concluded that the evidence created a genuine issue regarding whether the park district employees fell below the required standard of care in the case. In regard to the second allegation, the court concluded that since there is conflicting evidence in the record, it is up to the trier of fact to weigh it. The plaintiffs presented sufficient evidence from which reasonable minds could conclude that the park district employees breached a duty to use the storm siren to warn the plaintiff of the dangers of the approaching storm.

With respect to whether the park district was liable to the minor plaintiff for reckless supervision based on the failure to warn him of the impending weather, while turning away other golfers because of the weather, the court determined that there were no facts to support this claim and summary judgment was proper.

Finally, the court determined that the defenses in R.C. 2744.03(A)(3) or (5) did not apply because neither the maintenance of trees nor the use of the storm siren (which was directed by the employee handbook) involved a discretionary decision.

Gilbert v. Cleveland, 8th Dist. No. 107934, 2019-Ohio-3517 (Aug. 29, 2019).

Disposition: Affirmed Trial Court's grant of Summary Judgment.

Topics: Recreational User Immunity.

Plaintiff Belinda Gilbert went to R.J. Taylor Park in Cleveland, Ohio to watch her sons play basketball. While walking through a concrete walkway entrance of the park, she fell into a hole that was exposed in the concrete walkway. The hole was created when a city of Cleveland employee removed a wooden barrier that had been installed to prevent

vehicles from driving up the concrete walkway. While she was receiving assistance with removing her leg from the hole, City of Cleveland employees apologized to her, and reinserted the removed wooden post.

The trial court found that the City was entitled to political subdivision immunity under R.C. 2744.02(A)(1), and under Ohio's recreational user statute, R.C. 1533.181. The Eighth District Court of Appeals only analyzed whether the City was immune under the recreational user statute, declining to determine if R.C. 2744.02 applied. The Court held that because Plaintiff entered the park for the sole purpose of watching her children play basketball, and did not pay a fee, she was a Recreational User as the term is defined under R.C. 1533.18(A). Further, the Court held that because the municipally owned park was outdoors and open to the public, it was a "Premises" as defined by R.C. 1533.18(A). Plaintiff argued that Recreational User Immunity should not apply as the condition that caused her injury was a hazard created by a City Employee. The Court rejected this argument stating that the City's alleged creation of a hazard on the premises does not affect their immunity. Accordingly, the City was immune from liability under R.C. 1533.181.

Wilson v. Pride, 8th Dist. No. 107793 2019-Ohio-3513 (Aug. 29, 2019).

Disposition: Reversed and Remanded Trial Court decision to enforce oral settlement agreement.

Topics: Oral Settlement Agreements.

Plaintiffs Kiley Wilson and two minor children were the victim of an automobile accident when their vehicle was struck by a truck driven by Defendant. Plaintiffs filed a complaint against Defendant and his employer. A trial for the case was set for Monday, September 10, 2018. On the Thursday and Friday prior to trial, attorneys for the parties engaged in settlement negotiations by phone. Defendant's attorney claimed that the parties reached a settlement agreement of $25,000. Plaintiff's attorney contended that he did not accept the settlement agreement, but needed to determine what effect the $15,000 Medicaid lien would have on the settlement if he did accept. Twenty minutes after this alleged agreement, Defendant's counsel sent an email to the court, copying Plaintiffs' attorney, to inform the court that the parties had reached a settlement. Upon receipt of the email, Plaintiffs' attorney phoned the court, informing the court that the parties had not reached a settlement. Plaintiffs subsequently filed a motion to vacate the settlement, and Defendant responded with a motion to enforce the settlement agreement. The settlement agreement was never reduced to writing.

The Court set a hearing on the competing motions where Defendant's counsel testified that Plaintiff's counsel accepted the settlement offer by telephone. Plaintiff's counsel did not testify. Kiley Wilson also testified that he did not discuss a $25,000 settlement offer with his attorney, would not accept a settlement in that amount, had outstanding medical bills and wanted to proceed with trial. The father of the two minor Plaintiffs testified that neither he nor the children's mother agreed to a settlement, and wanted to proceed with trial. The Trial Court then issued an opinion denying Plaintiffs' motion to vacate and granting the motion to enforce the settlement agreement. The trial court held that the Plaintiffs failed to present evidence to rebut the Defense Attorney's testimony that Plaintiffs' attorney accepted the $25,000 settlement offer on behalf of his clients.

The Eighth District held that the effect of a $15,000 Medicaid reimbursement would have on a $25,000 settlement offer was a material part of the agreement, and because the two attorneys had not come to an agreement on that lien, there was no meeting of the minds for purposes of creating an enforceable settlement contract. The court further found that the terms of the alleged agreement were not stated with sufficient particularity, and Plaintiff Wilson's assent to those terms was not established by clear and convincing evidence.

Ross v. Johnson, 9th Dist. No. 18CA011282, 2019-Ohio-2849 (July 15, 2019).

Disposition: Affirmed Trial Court granting of Summary Judgment.

Topics: Vicarious Employer Liability, Premises Liability.

Plaintiff entered Defendant Pudge's Place, a bar allegedly owned by TMB Investments of Elyria and Ginger Sherrill. Plaintiff got into a verbal altercation with Defendant Tracey Johnson, the bartender, eventually striking Johnson in the face. In response to being struck in the face, Defendant Johnson hit Plaintiff in the eye with a beer glass that shattered causing Plaintiff substantial and serious injury.

Plaintiff filed claims against Johnson, Pudge's Place, TMD Investments, and Ginger Sherrill. The trial court granted summary judgment on behalf of TMD and Sherrill, finding that there was no basis for liability to be imposed on those

defendants. After the summary judgment order, Plaintiff moved for default judgment against Johnson, and Pudge's Place confessed it was vicariously liable for Johnson's actions.

Plaintiff appealed the summary judgment ruling against Ginger Sherrill and TMD. Plaintiff alleged that Defendant Johnson was at all times an agent and/or employee of Sherrill, TMD and Pudge's Place. Plaintiff alleged that Sherrill, TMD and Pudge's place authorized and ratified the battery, and that they were negligent in their failure to exercise reasonable care to control Defendant Johnson.

Sherrill and TMD filed in support of their Motion for Summary Judgment an affidavit from Sherrill and a copy of a purchase agreement for Pudge's Place establishing that Johnson was not employed by Sherrill or TMD; Sherrill and TMD did not purchase Pudge's place until 2 days after the incident. In response, Plaintiff produced evidence that Sherrill was effectively running the bar at the time of the incident, as she was the Vice President of Pudge's Place Inc., until three days prior to the incident. Further, Sherrill managed many of the day to day operations, and was paid cash from the proceeds of the business. Sherrill hired Defendant Johnson, and Defendant Johnson testified that Sherrill was her immediate superior at the time of the incident.

In granting Summary Judgment, the Trial Court held that Sherrill and TMD did not take possession of the bar until January 21, 2015, two days after the incident.

The Ninth District Court of Appeals affirmed the judgment of the trial court, and found that Sherrill and TMD had not yet taken possession of Pudge's Place, and that Sherrill had already resigned her employment from Pudge's Place prior to the incident.

Blakely v. Goodyear Tire & Rubber Co., 9th Dist., No. 28733, 2019-Ohio-2598 (June 28, 2019).

Disposition: Reversing grant of summary judgment.

Topics: Asbestos statute: whether defendant owed decedent a duty to keep its premises safe from hazards and to provide notice of any concealed dangers which defendant knew existed.

Decedent Garry Blakely formerly worked for Goodyear Tire & Rubber Company in the Wheel and Brake Division in a building leased to Goodyear from Aerospace Corporation. In 2014 Blakely was diagnosed with malignant mesothelioma, and subsequently filed a complaint for asbestos exposure against multiple defendants, including Goodyear. The trial court granted summary judgment on Blakely's claims for product liability, supplier liability, and premises liability. Blakely, however, dismissed the case prior to a final judgment.

In 2017, Blakely's estate refiled the action against Goodyear, and again the trial court granted summary judgment in favor of Goodyear on the claims for product liability, supplier liability, and premises liability. Blakely's estate argued that the trial court erred in its reliance upon R.C. 2307.941 as being dispositive of its claim.

R.C. 2307.941 provides, in pertinent part:

> (A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:
>
> ***
>
> (2) If exposure to asbestos is alleged to have occurred before January 1, 1972, it is presumed that a premises owner knew that this state had adopted safe levels of exposure for asbestos and that products containing asbestos were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of asbestos in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state and that the premises owner allowed that condition to persist.

The events constituting the basis of the case occurred prior to January 1, 1972, and as such, there was a presumption that Goodyear knew (1) that the State of Ohio had adopted safe levels of exposure for asbestos; and (2) that products containing asbestos were used on its property only at levels below the maximum safe levels of exposure. The estate proffered no evidence to rebut this presumption. The trial court found that the unrebutted presumption under R.C. 2307.941 resulted in an absence of genuine issues of material fact as to an essential element of the claim.

The 9th District disagreed, and held that the presumption of compliance with the Ohio standard is not conclusive of non-liability, and that the analysis in a case should continue. The court then held that because the estate proffered evidence they believed demonstrated Goodyear knew the State of Ohio's adopted safe levels for exposures to asbestos were not necessarily safe levels, the analysis of Goodyear's duty to keep its premises safe from hazards was still at issue. Accordingly,

the Ninth District reversed the granting of summary judgment.

Wright v. Williamsport, 4th Dist. No. 18CA14, 2019-Ohio-2682 (June 21, 2019).

Disposition: Affirming Pickaway County Common Pleas Court's overruling of defendant village's motion for summary judgment.

Topics: Political subdivision immunity; R.C. § 2744.02(B)(4); open and obvious doctrine.

In July of 2017, a council member of the Village of Williamsport contacted a contractor about submitting a bid for repairing or replacing the roof of the village's maintenance barn. The contractor subsequently visited the barn to examine the roof. While doing so, he fell through a painted-over skylight and sustained serious injuries. The contractor and his wife brought suit against the village for his injuries, alleging that the village negligently and/or recklessly allowed a dangerous condition to exist at its maintenance barn. In particular, the plaintiffs claimed that the fiberglass skylight painted the same color as the roof looked identical to the roof's surface and created a dangerous condition.

The village denied liability on the basis of statutory immunity and moved for summary judgment. It contended that it was entitled to the presumption of immunity and that none of the exceptions to immunity applied. The village asserted that R.C. 2744.02(B)(4) did not apply because the contractor could not establish that the injuries arose from a village employee's negligence. The village argued that the contractor went onto the roof without informing any of the village employees and that the village did not have any chance to discuss the roof's condition with the contractor before he walked on it. Further, the village claimed that even if one of its employees was negligent, the discretionary defense reinstated immunity. The trial court denied the village's motion for summary judgment.

On appeal, the Fourth District Court of Appeals affirmed the trial court's denial of immunity.

In analyzing the R.C. 2744.02(B)(4) exception, the court found the critical issue in this case was whether the plaintiff's injuries were caused by the negligence of a village employee. As a premises liability claim, this determination hinged on the extent to which the village owed the plaintiff contractor a duty of care. This was dependent on whether or not the plaintiff was an invitee, licensee, or trespasser. The plaintiff argued that he was a business invitee because he was on the village's property to bid on the roof project. The village argued that the plaintiff was a trespasser because he did not have permission to be on the roof. The court viewed this as a dispute of fact for the purpose of summary judgment and found that the plaintiff could have been a business invitee. If the facts established him to be an invitee, the village owed the plaintiff a duty to exercise ordinary care and to protect him by maintaining safe premises.

Next, the court turned to whether the village breached its duty owed to the plaintiff as a business invitee. The village argued that, even if the plaintiff was a business invitee, it had no duty to warn him of open and obvious dangers. They argued that since they told him that the roof needed repairs and/or replacement, the entire roof was an open and obvious danger that was known to him. The plaintiff argued that since the fiberglass skylight was painted to match the rest of the roof, it was concealed, and he had no reason to expect its presence. The court agreed with the plaintiff and found that since the skylights were not readily discernible to a reasonable person, they were not open and obvious.

Finally, the court rejected the village's argument that it was nonetheless entitled to immunity under R.C. 2744.03(A)(3) or (5). The court observed that these exceptions apply only where a political subdivision employee is exercising discretion. They are inapplicable to routine maintenance decisions, such as those involved with the roof.

Badders v. Century Ins. Co., 2nd Dist. No. 28170, 2019-Ohio-1900 (May 17, 2019).

Disposition: Affirming summary judgment that the Montgomery County Court of Common Pleas had granted to the defendant insurance company in a dispute with its insured.

Topics: Insurance policy interpretation; assault and battery exclusion.

This case stemmed from an incident at a bar. A man visited the bar and encountered his estranged wife, who was a regular patron. The man drank heavily while at the bar and began making inappropriate remarks to his wife. He was asked to leave. A friend of his agreed to drive him home, but instead the two men took the husband's truck to a house across the street. Several minutes later, the man returned to the bar with his truck. The bar was closed but he knew that employees and patrons sometimes lingered inside after the close of the bar. From the parking lot, the husband began sending text messages to his estranged wife. One of the texts was a threat

to drive his truck through the front of the building. Shortly thereafter, the man drove his car through the front of the bar. He caused extensive damage to the building and injured a bar patron and an employee.

The man pled guilty to two counts of felonious assault and one count of vandalism. The injured patron brought suit against the owner of the bar and the estranged wife of the man who caused the incident.

The owner of the bar was insured under a policy and demanded that the insurer interpose a defense to the patron's claim and indemnify him in the event he was found liable. The insurance company determined it had no such obligation under the policy, which prompted the bar owner to file a complaint. The insurance policy at issue had an 'assault and battery' exclusion. This provision excluded coverage for personal injuries and property damage "arising out of or resulting" from "any actual, threatened or alleged assault or battery." The trial court granted summary judgment to the insurer, finding the exclusion in the insurance policy applied to the patron's claims against the bar owner. The bar owner appealed.

On appeal, the bar owner argued that the 'assault and battery' exclusion did not exclude coverage for the bar patron's claims against him because, "[the husband's] actions were not necessarily *** an 'assault' or a 'battery'" in light of a genuine dispute "as to whether [the husband] intended to injure [the bar patron]." The owner based this proposition on the distinction between the statutory definition of assault and the common law definition. The common law tort of assault is an intentional tort. Criminal assault in Ohio, on the other hand, takes several forms and none of them require proof that the alleged offender acted with intent. The bar owner argued that since the policy itself did not provide a definition of assault, the trial court should have applied only the common law definition, which he asserted is the "plain and ordinary meaning" of the term. If the common law definition were controlling, the trial court would have erred by entering judgment pursuant to Civ. R. 56 because the question of whether the husband intended to harm anybody other than himself had not been settled when the trial court issued the order.

The Second District Court of Appeals found that this argument lacked merit. The court of appeals affirmed the trial court's holding, rejecting any argument that the plain and ordinary meaning of the term 'assault' is, and can only be, the common law definition. Further, the court noted that simply because there is more than one definition for the term 'assault' does not mean it is ambiguous. The court held that the exclusion "unambiguously applies to exclude coverage for personal injuries and property damage that result from any legally cognizable form of assault, without respect to whether the assault is criminal or tortious." Since the man who drove his car through the bar pled guilty to felonious assault, the insurer did not owe the bar indemnity or defense.

Judge Froelich dissented on the basis that the terms "assault" and "battery" only encompass the common law definitions and thus a determination of intent is required if the exclusion were to apply.

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Karimian-Dominique v. Good Samaritan Hosp., 2nd Dist. No. 28170, 2019-Ohio-2750 (May 17, 2019).

Disposition: Affirming Montgomery County Common Pleas Court order granting defendant hospital's motion to compel spouse's psychotherapy records.

Topics: Wrongful death, loss of consortium, physician-patient privilege.

The plaintiff was the surviving spouse of a patient who died at a hospital after suffering a massive pulmonary embolism. The surviving spouse brought an action against the hospital, doctors, and other defendants for medical negligence, wrongful death, survivorship, loss of consortium, and other claims.

One of the defendant doctors moved to compel the plaintiff to execute and deliver authorizations to disclose health information regarding her decedent husband's treatment for individual and marital counseling. The doctor argued that the disclosure of records was required under Civ. R. 26, Civ. R. 37, and R.C. 2317.02(B).

The surviving spouse opposed the motion and filed a motion for a protective order, seeking to prevent discovery of her husband's psychotherapy records. She claimed that the psychotherapy records were subject to doctor-patient privilege and that the privilege was not waived by the filing of the lawsuit, because the husband was deceased, and his emotional condition was not a genuine issue in the case. She separately moved for an in-camera review of the psychotherapy records "to determine the relevance of the materials and the applicability of the doctor-patient privilege, and whether that privilege is subject to waiver."

The trial court granted the doctor's motion to compel and denied the plaintiff's motions for a protective order and an in-camera review. The plaintiff appealed from the trial court's order. She argued that the trial court erred in denying her motions because privilege is preserved for medical records that are unrelated to the issues raised in the litigation, and

that her husband's mental health records are not "causally or historically" related to the physical or mental injuries involved in the case. She further argued that the trial court should have held a hearing on whether the records were privileged, that the records were not discoverable due to the purpose for which they were sought, and that the court should have conducted an in-camera review before ordering disclosure.

The Court of Appeals held that by asserting a claim for loss of consortium in both the survivorship and wrongful death claims, the surviving spouse placed her relationship with her husband directly at issue in the litigation. Accordingly, a request for the psychological records related to marital counseling fell within the waiver of privilege under R.C. 2317.02.

The Court of Appeals found that the individual counseling records presented a different factual question since those records may include a broad range of topics. Nevertheless, the Court held the privilege related to those records was also waived to the extent that the records contained communications related to the decedent's marital relationship or to matters affecting an evaluation of damages resulting from his hospitalization and death.

Finally, as to the motion for an in-camera review of the records, the court determined that the plaintiff did not create a sufficient factual record as to the type and nature of the records claimed to be privileged to warrant an in-camera review to determine if specific records retain physician-patient privilege.

The court concluded that the trial court did not abuse its discretion in ordering the disclosure of the records and denying the motion for a protective order for an in-camera review. ■

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Pointers From The Bench:
An Interview With
Judge Ashley Kilbane

By Christine M. LaSalvia

Judge Ashley Kilbane was elected to the Common Pleas Court Bench on November 6, 2018. Judge Kilbane always had an interest in serving as a judge and was inspired by an uncle who served as a judge in Chicago. She began her career at a large law firm handling business litigation. Although she enjoyed the work, she wanted to be in the courtroom. After four years, she left her job and joined office of the Cuyahoga County Prosecutor where she gained significant trial experience handling criminal matters. Judge Kilbane tremendously enjoyed her work as a prosecutor and really credits her time spent learning how the Justice Center works and gaining institutional knowledge as something which has assisted in her transition from litigator to judge.

Judge Ashley Kilbane

Since taking the bench, Judge Kilbane has found that she greatly enjoys her civil docket. She sees litigation as a collaborative effort and encourages attorneys to look at their cases with a practical eye toward resolution. She appreciates collegiality and notes that even though litigation is adversarial, both attorneys and the parties are working toward the same goal, which is a fair resolution to the case. She has worked hard to assist parties in hashing out fair solutions to problems in both case management orders and settlements. She believes that it is important for all the necessary parties to be involved in the settlement conference and does prefer that insurance adjusters with authority be available in person rather than by phone. Judge Kilbane also notes that it is important for counsel to be prepared to discuss the nuts and bolts of the case as often a lack of preparation will deter settlement. She is willing to meet with the parties depending on the case and if the attorneys believe it is appropriate.

Judge Kilbane also believes it is important to work with the parties toward a practical resolution of discovery disputes. She initially will start with a phone conference and if that does not suffice, will bring the parties in to discuss the issues in person.

Judge Kilbane loved being a litigator and does miss the action of the courtroom. She has some standard voir dire questions which she asks. She will also offer the parties the opportunity to have the court inquire as to agreed-upon issues as she believes some questions are better posed by the bench.

One issue which Judge Kilbane feels very passionate about is that of domestic violence. As a prosecutor she saw the difficulties surrounding resolution of these cases for both the victim and the defendant. Often there are overlaying issues – for example with housing court or with domestic relations court – which must be addressed. She ran on a platform of supporting and advocating for a domestic violence docket. She acknowledged the important work that Judge Sherrie Miday has done in starting the domestic violence docket and has interest in participating in the future.

Judge Kilbane is very busy when she is not on the bench as she is the mom of two busy twin four year old girls. ■

Verdict Spotlight:

Jacqueline Childs, et al. v. The Cleveland Clinic Foundation, Cuyahoga County C.P. No. CV-17-890086

On August 13, 2019, Nick DiCello and Kevin Hulick of Spangenberg Shibley & Liber, LLP won a $3.97 million verdict against the Cleveland Clinic for a woman who suffered a facial nerve injury during a temporal artery biopsy procedure performed at CCF Euclid Hospital.

On July 14, 2016, the patient underwent what she thought was going to be a simple, outpatient temporal artery biopsy scheduled to last less than an hour. She woke up hours later, however, in a lot of pain and the right side of her face was swollen and partially paralyzed. The patient learned that the procedure took over two-and-a-half hours. The paralysis resolved over the course of months, but the pain remained and the patient was eventually diagnosed with permanent facial nerve neuropathy.

Nick and Kevin claimed the surgeon made her incision in the wrong spot – an inch away from where the temporal artery resides – and in a place where the facial nerve is located. Plaintiff's vascular surgery expert performed a physical examination of the Plaintiff including the course of her right temporal artery. That exam, coupled with generally accepted medical diagrams of the temporal artery, allowed for a persuasive demonstrative exhibit supported to a reasonable degree of medical certainty. The exhibit showed the location of the incisional scar relative to the patient's temporal artery and the location of her facial nerve.

The surgeon believed Doppler ultrasound units, used to assist in localizing the temporal artery by emitting a sound when placed over a pulsatile artery, were not working properly. Plaintiff claimed the equipment was working fine; the surgeon was simply searching for the artery in the wrong place. Plaintiff maintained the CCF surgeon caused trauma to the facial nerve during the hours-long procedure.

The patient spent more than a year seeking out treatment for her unrelenting facial nerve pain. She tried medications, injections, and topical creams without meaningful relief. One doctor eventually recommended a peripheral nerve stimulator, suggesting Plaintiff enroll in a clinical trial. Weary of having another surgery on her face, and the experimental nature of the trial, Plaintiff elected not to undergo peripheral nerve implant surgery.

The patient eventually sought and came under the care of a local pain management doctor who prescribed her a trial of ketamine infusions. The infusions worked to abate her worst pain, but she requires monthly "booster" infusions to keep the pain at bay. Ketamine infusion therapy is expensive – $10,500 per infusion ($5,500 paid). Plaintiff's treating pain management doctor testified at trial that she will require monthly ketamine infusions for the rest of her life.

At trial, a key focus was whether ketamine was appropriate and effective for Plaintiff. The Clinic argued that Plaintiff failed to mitigate her damages by (1) failing to follow up on a psychiatry referral and (2) failing to try a peripheral nerve stimulator.

During her testimony, Plaintiff admitted that she should have followed up on the psychiatry referral. She took responsibility for not following through on it and made no excuses. In closing argument, Nick reminded the jurors how Plaintiff took responsibility for her actions and asked them to compare the Plaintiff's willingness to do so with what they have heard and were about to hear in closing argument from the Clinic's lawyers. The jury found 8-0 against the Clinic's failure to mitigate defense.

The nerve stimulator that Defendant's pain management expert recommended came with many limitations that Nick argued effectively prevented its use in this case. Chief among them was a disclaimer in the clinician manual stating that the stimulator was not intended for use on the facial nerve!

The Clinic's pain management expert, Dr. Adam Carinci from University of Rochester, recommended the nerve

stimulator and testified about the dangers of ketamine and how it was not effective for Plaintiff. His cross-examination was one of the highlights of the trial. First, Carinci charged over $40,000 and was arrogant about being entitled to this amount. Second, he advertised extensively on the internet, including on some unbecoming websites, many of which were shown live to the jury. Furthermore, he had recently testified in a criminal trial in Lorain County in which he defended the prescribing practices of a doctor who was found guilty of running a pill mill. The doctor he defended was convicted of manslaughter and found guilty on over 100 charges. At the conclusion of his testimony, while the judge was instructing the jurors before asking everyone to rise as they leave the courtroom, Dr. Carinci stood up, turned his back to the judge and the jurors, and stormed out of the courtroom.

The Clinic disputed liability, claiming its surgeon took reasonable steps before and during the procedure. It retained Dr. William Schirmer, a general surgeon from Columbus, to defend the care. Unlike Dr. Carinci, Dr. Schirmer appeared composed and knowledgeable on the stand. His brief cross-examination focused primarily on the differences between how he performs the procedure at issue versus how the Clinic's surgeon did it, and elicited that he has never encountered the problems the Clinic's surgeon did.

Whether the Doppler equipment was or was not working was an issue in the case. Nick and Kevin undertook substantial discovery on this point, including deposing two 30(B)(5) witnesses, and ultimately obtained an agreed stipulation that the "Doppler units" were working properly at the time of the procedure. During trial, however, the defense tried to argue that the "units" referenced in the stipulation only included the speaker boxes, not the Doppler probes. So Nick and Kevin walked the very next witness through this claim to highlight how preposterous it was – only the speaker boxes were checked and not the probes following this hours-long surgery that was complicated by potential equipment malfunction? Faced with this question, she admitted the probes were checked as well and found to be in good working order. The following day trial began with a new and refined stipulation from the defense.

Following a ten-day trial, the jury returned a verdict of $3,977,669.18 against the Cleveland Clinic. Of that verdict, $1.75 million was for non-economic damages ($750K for past pain and suffering and $1 million for future). This amount would have been reduced to $350K. The jury included more than $2 million in future damages, primarily the cost of future ketamine infusions. Both the amount billed ($10,500) and the amount accepted ($5,500) were admitted by the Court. Nick elicited from the treating physician that he does what he can to discount the amount charged, but cannot guarantee this same discount into the future. In closing argument Nick asked the jurors to split the difference between $10,500 and $5,500 as the reasonable cost/value of ketamine infusions (with the help of Dr. Burke's report on future costs), which the jurors agreed to do in their verdict.

The complaint alleged and sought punitive damages, which were bifurcated before trial. The Clinic moved for directed verdict following the compensatory verdict, but Judge Ashley Kilbane denied the motion. Plaintiff's punitive damages claim centered on a 'conscious disregard for safety' theory. Plaintiff's attornies were able to obtain an email the surgeon sent to her supervisors weeks after the procedure in which she admitted that she contemplated abandoning the procedure, likely before the incision, on account of what she perceived to be unreliable equipment, but decided to proceed.

The punitive damages phase never began, however, as late into the evening before the punitive phase was to begin the following day, the parties struck a settlement. In exchange for foregoing the punitive damages phase, Plaintiff demanded and obtained the full measure of the jury's verdict, removing the application of any damages caps. Plaintiff refused confidentiality of the terms of the settlement.

The case is captioned *Jacqueline Childs, et al. v. The Cleveland Clinic Foundation*, Cuyahoga County C.P. No. CV-17-890086. ■

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: _____
_____
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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.*

Jane Doe, Adm. v. John Doe, et al.

Type of Case: Auto v. Motorcycle
Settlement: $1,300,000
Plaintiff's Counsel: David M. Paris, Esq. and Dana M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, NE, Cleveland, Ohio 44114, (216) 694-5206
Court: United States Dist. Court, Northern Dist. of Ohio, Eastern Div., Judge Christopher Boyko
Date Of Settlement: November 2019

Summary: Plaintiff's decedent was riding his motorcycle to work on a through highway when the defendant tortfeasor pulled out of a private driveway into his path. Our client remained hospitalized for 10 days until he passed away. His medical bills exceeded $500,000. His self insured ERISA plan only paid approximately 15% of the bills and the hospital pursued the estate and widow for the balance under Ohio's necessaries statute. Plaintiff filed suit against the tortfeasor, the hospital, and the self insured ERISA plan. After cross claims, counterclaims, and extensive motion practice, the case proceeded to private mediation where all claims were resolved for policy limits, contribution from the tortfeasor, and significantly reduced allocations to the hospital.

Kimbrough, et al. v. Patton, et al.

Type of Case: Motor Vehicle Crash
Settlement: $875,000.00
Plaintiffs' Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, NE, Cleveland, Ohio 44114, (216) 694-5257
Defendants' Counsel: Withheld
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: October 3, 2019
Damages: Fractured ribs, fractured pelvis requiring surgery

Summary: Plaintiff was operating a sedan on the turnpike when he was struck by a pickup truck, causing him to spin out of control in front of a semi-tractor.

Plaintiffs' Expert: Dr. John Sontich
Defendants' Expert: N/A

Estate of Jennifer Patton v. JMC Distribution

Type of Case: Motor Vehicle Accident/Wrongful Death
Settlement: $1,150,000
Plaintiff's Counsel: Scott Perlmuter, Tittle & Perlmuter, (216) 285-9991
Defendant's Counsel: Brian Wildermuth
Court: Summit County Common Pleas Case No. CV-2018-09-3944, Judge Christine Croce
Date Of Settlement: October 2, 2019
Insurance Company: Nationwide
Damages: Wrongful death

Summary: Jennifer Patton was a passenger in her sister's vehicle when a delivery truck going in the opposite direction crossed the center line and crashed into them. Jennifer passed away as a result of her injuries sustained in the crash. The main disputes in the case stemmed from the delivery company's classification of the driver as an independent contractor - coupled with that driver's lack of personal insurance coverage, and the collectibility of the company above the policy limits.

Daubenmeyer v. Erie Insurance Company

Type of Case: Fire Insurance claim for property damage and bad faith
Settlement: Confidential
Plaintiff's Counsel: Bob Rutter, Rutter & Russin, LLC, (216) 642-1425
Defendant's Counsel: Robert Fitzgerald
Court: Northern District of Ohio Case No. 3:18-cv-1392
Date Of Settlement: October 2019
Insurance Company: Erie Insurance Company
Damages: House, personal property, additional living expenses

Summary: Plaintiff's house exploded while her husband was barricaded inside following a domestic dispute. The husband was killed in the explosion and the house destroyed. No officers were injured. The husband had a history of depression, paranoia, and anger management. Erie denied the claim because the husband was an insured and Erie thought that the husband had intentionally caused the loss. Plaintiff's position was that her husband was unable, due to his mental problems, to form an intent to cause a loss.

Plaintiff's Experts: Finnicum Adjusting Company (as to damages); Dr. Stephen Noffsinger (as to mental capacity)

Defendant's Expert: Dr. Galit Askenazai (as to mental capacity)

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

Type of Case: Medical Malpractice
Settlement: $19,900,000.00
Plaintiffs' Counsel: Charles Kampinski and Kristin Roberts, Kampinski and Roberts, LPA (previously with McCarthy, Lebit, Crystal and Liffman, Co., L.P.A.), (440) 597-4430
Defendants' Counsel: William Meadows / Christine Santoni, Reminger Co.
Date Of Settlement: August 2019

Summary: Plaintiff decedent was a 59-year old carpenter. In May 2015 he became ill from a virus in his heart called myocarditis. Due to insurance restrictions, plaintiff had to be treated at defendant hospital which was not their choice for cardiac care. Plaintiff received ventricular assist devices to aid his heart in pumping blood. He was placed on the heart transplant list through UNOS, the organization that oversees the nation's organ transplants.

In June 2016, UNOS placed defendant hospital's heart transplant program on probation for "low volume and early term recipient deaths" and "concerns with its quality management protocols." UNOS required the hospital to send letters to patients in the program informing them of the probation. Any other content was left to the hospital. On June 27, 2016, defendant hospital drafted and sent a letter stating that it had "agreed" to go on probation due to a low volume of transplants in 2014. The letter did not list the more serious reasons for probation and included misleading statistics regarding the program's survival rate. Had plaintiff's family been told the truth, they would have transferred care to the other transplant hospital in town which was not on probation, where plaintiff now had insurance, and according to one of the defendant physicians, he would be "alive and well today."

Instead, on August 25, 2016, he was taken to surgery to receive his transplant at defendant hospital. After being placed on cardiopulmonary bypass, the surgeon placed a cannula (tube carrying blood) back towards the heart instead of upwards towards the brain. The aorta should have been clamped below the cannula, isolating the heart, but the surgeon clamped the cannula instead of just the aorta. He then cut the outflow graft from the assist device, causing plaintiff to exsanguinate. The surgeon next placed another clamp on the cannula, causing the bypass machine to shut off. The surgeon finally recognized the problem, unclamped the cannula, placed it correctly, and clamped the aorta. Blood was restored to the brain. It was a matter of contention as to what, if any, brain injury occurred during this period-of-time.

The lead anesthesiologist is an expert in the cerebral oximetry monitor which measures oxygen levels in the brain. However, he left before the crisis occurred, leaving his inexperienced colleague in charge. The new anesthesiologist failed to watch the monitor or inform the surgeon that the oxygen saturations had dropped precipitously when the cannula was clamped.

When the lead anesthesiologist returned, after the problem was corrected, he noted that plaintiff's pupils were fixed and dilated. This is often a temporary side effect of cooling or medications which resolves without issue once the patient is warmed and free from surgical medications. Nonetheless, the surgical team still decided to halt their efforts. They told the family that plaintiff was brain dead as a result of an issue with anesthesia. They were never told the real facts. They were only told that he wouldn't receive the donor heart, could only be placed on ECMO (mechanical life support) for 48 hours, and that he wouldn't receive another heart. Faced with these alleged facts, the family turned off the machine and plaintiff expired.

Three hours after the surgery, the surgeon dictated an operative note which stated "[a]nd indeed, the cannula was pointed towards the aortic root and was clamped." Three days later he removed that language. The original note was hidden from plaintiff's counsel until late in the litigation and only produced due to an erroneous belief by the defendants that plaintiff already had it.

Plaintiffs expert was appalled that the donor heart was not put in plaintiff. He opined that there was an 85% to 90% chance plaintiff had sustained no brain injury. If a transplant is not completed it does not have to be reported as an early term recipient death on the hospital's statistics. This eliminated the risk that defendant hospital's heart transplant program would be shut down.

The hospital used plaintiff and his family as the poster family for the program, yet a year after plaintiff's death the hospital still threatened to put the widow in collections over a $10,000 bill for the third surgeon that came in to help fix the mistake in the operating room.

Plaintiffs' Experts: Anthony Lemaire, M.D.; Raymond Pollak, M.D.; John Conomy, M.D.; Hillel Laks, M.D.; Robert Ertner, M.D.; John Burke, M.D.
Defendants' Experts: Eugene Grossi, M.D.; James Anton, M.D.; Eduardo Rame, M.D.; James M. Gebel, Jr.; John Gutowski, M.D.

The Dinner Bell Cafe, Inc., et al. v. North American Bancard, LLC, et al.

Type of Case: Class Action
Settlement: $15 Million
Plaintiffs' Counsel: Steven M. Goldberg, Esq. / Goldberg Legal Co., LPA – Co-Counsel for Plaintiffs, 31300 Solon

Road, Suite 12, Solon, Ohio 44139, (440) 519-9900
Defendants' Counsel: Withheld
Court: U.S. District Court, Northern District of Georgia, Atlanta Division, Case No. 1:16-cv-04219
Date Of Settlement: August 2019

Summary: $15 million settlement to end a class action lawsuit brought by merchants against North American Bancard, LLC ("NAB") and Global Payments Direct, Inc. The lawsuit claims defendants overcharged for processing payment card transactions by marking up certain fees by small amounts and adding unauthorized fees. Defendants deny they overcharged merchants or that NAB agreed to change certain business practices in exchange for release of claims against NAB and dismissal of the class action lawsuit.

Daniel Lyon, Executor of the Estate of Kay Copp v. Jessica Gollihue, et al.

Type of Case: Motor Vehicle Crash
Settlement: $222,179.84
Plaintiff's Counsel: Amy K. Herman, Nager, Romaine & Schneiberg, Co. LPA, (216) 289-4740
Defendants' Counsel: Stephen Proe & David Culley
Court: Delaware County Common Pleas Case No. 19 CVC 09 0528, Judge David Gormley
Date Of Settlement: July 29, 2019
Insurance Company: Nationwide & State Auto
Damages: Fractured sternum and multiple thoracic disc herniations, medical bills in excess of $70,000.00

Summary: Plaintiff suffered serious personal injuries when she was struck by Defendant Gollihue in Kingston, Ohio. The impact pushed the Plaintiff's vehicle into a telephone pole. Plaintiff had emergency surgery and was admitted for two days following the crash. She also underwent physical therapy and injections. Unfortunately Plaintiff passed away during the pendency of the case due to unrelated medical issues. Defendant Gollihue's insurance offered their policy limit and additional settlement funds were obtained from Plaintiff's own underinsured motorist carrier.

Colin MacLean, et al. v. BMW, MINI Division

Type of Case: Administrative protest for improper turn down of a buy-sell agreement pursuant to R.C. 4517.56
Verdict: Order allowing the dealership transfer to Colin MacLean
Plaintiffs' Counsel: Christopher M. DeVito, Morganstern, MacAdams & DeVito Co., L.P.A., (216) 687-1212
Defendant's Counsel: Kirk Peterson and Stephen Bledsoe from Kansas City, Missouri
Court/Case No/Judge: Ohio Motor Vehicle Dealers Board/ Hearing Examiner Chad Murdock/ 18-01-MVDB-402 & 403-CM
Date Of Verdict: July 18, 2019, Board Order adopting 6-11-19 Recommendation of Hearing Examiner
Insurance Company: Not Applicable - Self-Insured
Damages: $468,545.21 in statutory attorney fees through May 31, 2019, and bond posted of $1.75 million for appeal.

Summary: Colin MacLean was the proposed transferee of the Cleveland of MINI dealership/franchise from Kirt Frye. The manufacturer BMW-MINI turned him down based upon allegedly poor performance of the Cleveland of MINI dealership while he was the general manager for one year. BMW also asserted its contractual right of first refusal in order to consolidate the Cleveland MINI dealer network from 2 to 1 dealerships with Jim Brown, the owner of Classic MINI. The consolidation was pursuant to an internal BMW market plan locally and across the nation. The Board determined that a ROFR does not exist in Ohio because it would circumvent the Ohio Dealer Act, R.C. Chapter 4517, protections and be a de facto termination. The Board also held the BMW did not meet its burden of proof and failed to consider and review MacLean based on the criteria set forth in the ODA. BMW instead used its own internal performance metrics, which were not reasonable, and it was pre-textual turn down because the manufacturer had previously decided to consolidate the Cleveland market before receiving and reviewing the application package of MacLean. The case is on appeal to the Franklin Court of Common Pleas pursuant to R.C. 119.12 for administrative appeals.

Plaintiffs' Expert: Patrick Anderson of Anderson Economic Group
Defendant's Expert: None. Excluded because the report was not timely submitted by BMW according to the deadline established by the Hearing Examiner to exchange reports by each side. Furthermore, BMW's attempt to introduce the expert report as a "rebuttle" report at the hearing was also denied.

Porter v. Osinski

Type of Case: Personal Injury
Verdict/Settlement: $40,000.00 Plus / $15,000.00 Personal payment by Defendant to avoid punitive damage trial
Plaintiff's Counsel: Joe Condeni, Condeni Law, LLC, (216) 771-1760
Court: Cuyahoga County Common Pleas Case No. 18 902796, Judge Maureen Clancy

Date Of Verdict/Settlement: July 17, 2019
Insurance Company: State Farm
Damages: Concussion - No Lost Income - Medical Expenses not submitted to the Jury

Summary: Defendant pushed a table down a flight of stairs at a restaurant. Plaintiff was walking up stairs when table hit him in the head. Plaintiff and Defendant were both patrons of restaurant and did not know each other. Plaintiff did not seek treatment until 4 days later. Gross Medicals $6,800 - R/B Medicals $3,500 - Medical Expenses not presented to jury. Case tried on basis of human harms/losses only.

Plaintiff's Expert: Holly J. Maggiano, M.D. (Treating Neurologist)
Defendant's Expert: Jody Pickle, Ph.D.

Flack Steel, LLC v. SS&G, Inc.

Type of Case: Accounting Malpractice
Verdict: $735,000
Plaintiff's Counsel: Scott Perlmuter and Jim Rosenthal, Tittle & Perlmuter and Cohen, Rosenthal & Kramer, (216) 285-9991 / (216) 815-9500
Defendant's Counsel: Rich Witkowski and Nick Dertouzos
Court: Cuyahoga County Common Pleas Court Case No. CV-17-882802, Judge Nancy McDonnell
Date Of Verdict: June 7, 2019
Insurance Company: AXA XL
Damages: Loss of business opportunity due to credit loss

Summary: Flack Steel is a steel distribution company which retained SS&G to perform accounting, consulting, and tax services for several years. Flack Steel purchased derivative contracts to hedge the price risk associated with steel inventory, and SS&G misapplied GAAP principles in accounting for the hedges. As a result, Flack Steel's financial statements erroneously showed losses on those hedges. The bad financial statements caused Flack Steel to have credit restricted with the bank, inhibiting Flack Steel's ability to conduct business.

Plaintiff's Expert: Ira Kawaller, Ph.D. (Economics); Jack Schwager, CPA
Defendant's Experts: The individual Defendants

Baby Boy Doe v. ABC Hospital

Type of Case: Medical Negligence
Settlement: $6,000,000
Plaintiff's Counsel: John Lancione, The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: Confidential
Court/Case No/Judge: Confidential
Date Of Settlement: June 6, 2019
Insurance Company: Self-Insured
Damages: Severe brain damage resulting in Kernicterus

Summary: The plaintiff was born healthy. His initial bilirubin was elevated and above the 95th percentile on the Bhutani Nomogram putting him at high risk for severe hyperbilirubnemia. His second bilirubin level was also above the 95th percentile and higher than the first level. He was discharged home without intervention. He began to show signs of bilirubin induced encephalopathy and was eventually diagnosed with kernicterus.

Plaintiff's Experts: Vinod Bhutani, M.D. (Neonatology); Steven Shapiro, M.D. (Pediatric Neurology); Amy Jnah, NNP; Steve Lowenthal, M.D. (Hospital Administration)
Defendant's Experts: Donald Nelms, M.D. (Neonatology); Robert Shavelle, Ph.D.

John Doe, et al. v. John Doe Corporation, et al.

Type of Case: Mesothelioma
Settlement: $710,000
Plaintiffs' Counsel: Steven M. Goldberg, Esq. / Goldberg Legal Co., LPA, 31300 Solon Road, Suite 12, Solon, Ohio 44139, (440) 519-9900
Court: Withheld
Date Of Settlement: June 2019
Damages: Death

Summary: John Doe was employed in the mid 1950's as an insulator. At his home, he also performed various home remodeling projects. During the course of Mr. Doe's employment as an insulator and during non-occupational work, including home and automotive repairs, he was exposed to and inhaled, ingested or otherwise absorbed large amounts of asbestos he was working with and around which were manufactured, sold, distributed or installed by the Defendants. On July 21, 2017, Mr. Doe first became aware that he developed Mesothelioma and he subsequently learned that the Mesothelioma was directly related to his work-related exposure to asbestos. Mr. Doe died on February 23, 2019.

Plaintiffs' Expert: Withheld
Defendants' Expert: Withheld

Ronald Oney, et al. v. The Cincinnati Insurance Company

Type of Case: MVA v. Pedestrian, Hit-Skip
Verdict: $430,000.00
Plaintiffs' Counsel: Jordan D. Lebovitz, Esq. and Jamie R. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, NE, Cleveland, Ohio 44114,

(216) 694-5257
Defendant's Counsel: Michael Fitzpatrick
Court: Cuyahoga County Common Pleas Court, Judge Nancy Margaret Russo
Date Of Verdict: May 15, 2019
Insurance Company: The Cincinnati Insurance Company
Damages: Face/eye lacerations, ACL/Meniscus tears, mTBI/concussion

Summary: Plaintiff, a 59-year old male from Medina County, was walking across the street with his best friend on the west side of Cleveland when he was hit by a car that fled the scene. Tried as an uninsured motorists case.

Plaintiffs' Experts: Dr. Mark Panigutti, as well as our client's treating physicians
Defendant's Expert: N/A

Perelman v. Air Excel

Type of Case: Aviation - Wrongful Death
Settlement: Confidential
Plaintiffs' Counsel: Jamie R. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, NE, Cleveland, Ohio 44114, (216) 694-5220
Court: Withheld
Date Of Settlement: May 2019

Summary: Jamie R. Lebovitz represented a family of five from Pittsburgh, PA who were on an African safari during the Christmas holiday of 2017. On January 2, 2017 they were scheduled to take a charter air flight from the Serengeti of Tanzania to Rawanda. During the take-off phase of the flight, the aircraft crashed and fire erupted. The family escaped from the burning wreckage; one of the family members returned to the wreckage to save the life of the pilot.

The passengers all survived with varying degrees of bodily injuries and Post-Traumatic Stress Disorder. Initial medical attention was provided in Tanzania and, upon return to the United States, by local physicians and psychologists.

The case was settled for a confidential sum of money.

Plaintiffs' Experts: A number of treating physicians and psychologists

Estate of John Doe v. XYZ Corp., et al.

Type of Case: Aviation - Wrongful Death
Settlement: Confidential
Plaintiff's Counsel: Jamie R. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, NE, Cleveland, Ohio 44114, (216) 694-5220
Court: Withheld
Date Of Settlement: March 2019

Summary: Decedent, a vascular surgeon, was a passenger on a Beechcraft Premier IA twin engine jet along with four members of his medical/surgical practice, en route from Nashville, TN to Thomson, GA on February 20, 2013. The airplane crashed during a rejected landing maneuver killing all five passengers. Vascular surgeon from Augusta, Georgia survived by wife and two minor children. Claims were brought against various entities including the operator of the aircraft, the owner of the airport, and the airport engineering firm. A civil action was brought in a Georgia state court. After four years of pretrial discovery proceedings, the claims were settled for a confidential sum.

Plaintiff's Experts: Rob Rivers (Piloting and Accident Reconstruction); John Bloomfield (Engineer); Al Fiedler (Accident Reconstruction); Marc Fruchter (Piloting and Part 91/135 Operations); Carl Steinhauer (Part 77 Airport Obstruction Issues); Charles Wetli, M.D. (Forensic Medicine); Frances W. Rushing, Ph.D. (Economist)

Jane Doe, et al. v. ABC Hospital, et al.

Type of Case: Medical Malpractice
Settlement: $1,550,000.00
Plaintiffs' Counsel: Charles Kampinski and Kristin Roberts, Kampinski and Roberts, LPA (previously with McCarthy, Lebit, Crystal and Liffman, Co., L.P.A.), (440) 597-4430
Defendants' Counsel: William A. Meadows, Esq., Reminger Co., L.P.A.
Date Of Settlement: December 2018

Summary: Defendants failed to diagnose and properly treat Plaintiff's optic nerve sheath meningioma (ONSM), a benign tumor, which led to her becoming blind in her left eye.

Plaintiff travelled out-of-state to see the defendant neuro-ophthalmologist for increased pressure in her left eye. She brought an MRI which was ordered by her local ophthalmologist. The defendant physician failed to look at the MRI and failed to order his own diagnostic imaging. He diagnosed her with pseudo tumor cerebri (PTC), a condition requiring no treatment. Further, he told Plaintiff that she could become pregnant as a surrogate. Pregnancy is absolutely contraindicated for ONSM patients. The meningioma grew rapidly as a result of hormone changes during the pregnancy.

Plaintiff then returned to the defendant, who again failed to look at the MRI or order a new MRI. Defendant physician, while still operating under his erroneous diagnosis of PTC, performed an optic nerve sheath decompression/fenestration, a contraindicated surgery for her actual condition of ONSM.

After the surgery she was completely blind in her left eye. An MRI was finally ordered by the defendant and the results revealed a much larger tumor than was present in the original MRI images. The meningioma was clearly visible on the original MRI. Plaintiff was a 38-year old labor and delivery nurse who had just graduated from nurse practitioner school and has been precluded from pursuing her chosen career as a dermatological nurse practitioner due to the negligence of Defendant. The case settled before final arguments for $1.55 million.

Plaintiffs' Experts: Richard A. Burgett, M.D.; John F. Burke, Jr., Ph.D.; Amy Kutschbach; Valerie Purvin, M.D.
Defendants' Experts: Elizabeth A. Barstow, M.D.; Howard L. Caston, M.D.; Leora Heifetz, RNC, MSN Ed.; Helen Shih, M.D.; Diane B. Whitaker, O.D.; David M. Yousem, M.D.

John Doe, et al. v. John Doe Corporation, et al.

Type of Case: Mesothelioma
Settlement: $520,000
Plaintiffs' Counsel: Steven M. Goldberg, Esq. / Goldberg Legal Co., LPA, 31300 Solon Road, Suite 12, Solon, Ohio 44139, (440) 519-9900
Court: Withheld
Date Of Settlement: October 2018
Damages: Death

Summary: John Doe worked construction in powerhouses and at various sites in Ohio from 1949 to 1980. He was a member of the International Association of Heat & Frost Insulators Local #3 in Cleveland. During the course of Mr. Doe's employment at these workplaces, he was exposed to and inhaled, ingested, or otherwise absorbed large amounts of asbestos fibers emanating from certain products he was working with and around which were manufactured, sold, distributed, or installed by Defendants. On June 19, 2015, Mr. Doe first became aware that he developed Mesothelioma and he subsequently learned that the Mesothelioma was directly related to his work-related exposure to asbestos. Mr. Doe died on September 28, 2015.

Plaintiffs' Expert: Withheld
Defendants' Expert: Withheld

John Doe, et al. v. John Doe Corporation, et al.

Type of Case: Mesothelioma
Settlement: $510,000
Plaintiffs' Counsel: Steven M. Goldberg, Esq. / Goldberg Legal Co., LPA, 31300 Solon Road, Suite 12, Solon, Ohio 44139, (440) 519-9900
Court: Withheld
Date Of Settlement: September 2018
Damages: Death

Summary: John Doe was employed as a boiler tender in the Navy from 1974 to 1984 at the Charleston Naval Shipyard, Philadelphia Naval Shipyard, and Portsmouth Naval Shipyard. Mr. Doe also performed mechanic work on his personal and family's vehicles. During his course of employment and during the non-occupational work at home and on the automobiles, Mr. Doe was exposed to and inhaled, ingested, or otherwise absorbed large amounts of asbestos fibers emanating from certain products he was working with and around which were manufactured, sold, distributed, or installed by the Defendants. On December 8, 2015, Mr. Doe first became aware that he developed Mesothelioma and he subsequently learned that the Mesothelioma was directly related to his exposure to asbestos while working as a boiler tender and his work at home on his automobiles. Mr. Doe died on November 3, 2016.

Plaintiffs' Expert: Withheld
Defendants' Expert: Withheld

John Doe v. John Doe Corporation, et al.

Type of Case: Mesothelioma
Settlement: $465,000
Plaintiff's Counsel: Steven M. Goldberg, Esq. / Goldberg Legal Co., LPA, 31300 Solon Road, Suite 12, Solon, Ohio 44139, (440) 519-9900
Court: Withheld
Date Of Settlement: August 2018
Damages: Death

Summary: John Doe was employed as a laborer at Electric Furnace Company in Salem, Ohio from 1966 to 1974. At home, Mr. Doe also performed various home remodeling projects. During the course of Mr. Doe's employment as a laborer and during non-occupational work, including home repairs, he was exposed to and inhaled, ingested, or otherwise absorbed large amounts of asbestos he was working with and around which were manufactured, sold, distributed, or installed by the Defendants. On September 15, 2016, Mr. Doe first became aware that he developed Mesothelioma and he subsequently learned that the Mesothelioma was directly related to his exposure to asbestos while working as a laborer and the home remodeling projects. Mr. Doe died on May 31, 2018.

Plaintiff's Expert: Withheld
Defendants' Expert: Withheld ■

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: _____

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Law School / Year Graduated: _____

Professional Honors or Articles Written: _____

_____

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_____

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 Meghan P. Connolly, Esq., Treasurer
Lowe Eklund Wakefield Co., LPA
1660 West 2nd St., #610, Cleveland, OH 44113
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CATA Membership Dues

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

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Winter 2019-2020

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