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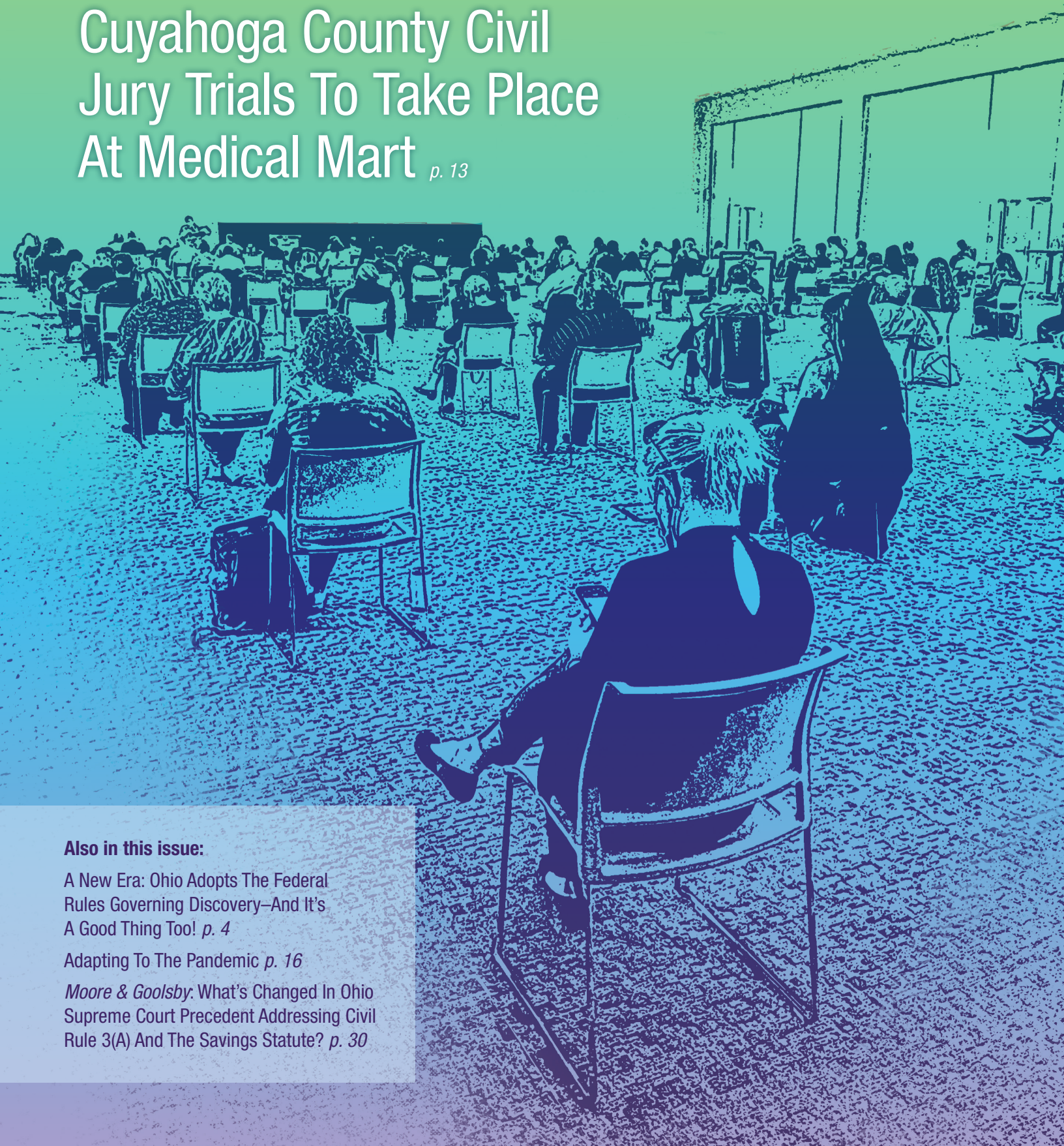

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Cover design by Joanna Eustache based on photo take by Darren Toms, Community Outreach Coordinator for the Cuyahoga County Court of Common Pleas.

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President's Message

by Todd E. Gurney

I was devastated when I heard the sad news that Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court, passed away in September. She was a true American hero, and a woman who dedicated her entire life to the pursuit of justice and equality. As the impressive story of her life and personal accomplishments were being recounted on television and of course on Twitter, this particular quote of hers – about the meaning of life – stood out to me the most:

> "To make life a little better for people less fortunate than you. That's what I think a meaningful life is. One lives not just for oneself, but for one's community."

As individual trial lawyers, we're fighting every day to make life better for each of our clients. As a group of trial lawyers, however, CATA strives not only to help our members and their clients, but to make our community a better, safer place for everyone.

I am happy to report that the state of CATA's finances is stronger than ever. This is one of the reasons why we have been able to broaden our support of other organizations in our community that align with our values, message, and mission.

Since 2011, CATA has been a proud ***Bronze Sponsor*** of The Legal Aid Society of Cleveland, and we are especially proud of our partnership (led by Past President Christian Patno) in Legal Aid's Housing Justice Alliance. Together, we are helping to ensure fairness when evictions and housing conditions threaten a family's safety or well-being. Thanks to CATA's support, Legal Aid has been able to meet the increased demand for services since the onset of COVID-19. Requests for assistance with housing-related issues are up 39% and intake for employment assistance is up 22% just in the past few months. Legal Aid expects that uptick to continue so our sponsorship makes a meaningful impact during a time of great need in the community.

CATA also is proud of our new partnership with The League of Women Voters of Greater Cleveland, a local nonpartisan, nonprofit political organization whose mission is to increase voter turnout, defend democracy, and encourage informed and active participation in government. Since it is an election year, this seemed like a perfect partnership. A special thanks to our Treasurer, Dana Paris, for spearheading this effort, and for appearing with me on WKYC's ***"It's About You"*** program to promote CATA, the partnership, and the importance of voting.

CATA's support of our community – and especially the less fortunate members of our community – is not limited to our own financial contributions. In the beginning of the pandemic, CATA started a fundraiser for The Greater Cleveland Food Bank and exceeded our goal of raising $10,000 in donations! (Special thanks to our Secretary, Meghan Connolly, for leading this effort!)

In addition, we are proud to continue to support many other worthy causes, including EndDD.org, ORT America, and Shoes and Clothes for Kids.

Of course, CATA also has continued its long tradition of providing invaluable benefits and resources to our members – even during the pandemic! – including CATA News (the best publication around), CLE seminars (several free of charge!), and some virtual social and charitable events (shout out to our ***Platinum Sponsor***, Tom Stockett and Rimon Bebawi of CW Settlements).

It truly is an honor to lead this wonderful organization, especially during these uniquely challenging times. If you have ideas about how CATA can continue to grow and to help our members and our community, there is no better time to step up and get more involved. Let's keep working together to make life a little better for people less fortunate than us. ■

Dustin B. Herman is an associate at Spangenberg Shibley & Liber. He can be reached at 216.696.3232 or dherman@spanglaw.com

A New Era: Ohio Adopts The Federal Rules Governing Discovery—And It's A Good Thing Too!

by Dustin B. Herman, Esq.

On July 1, 2020, Ohio amended its civil rules governing discovery to match the federal rules. These amendments significantly change the way discovery is to be conducted in Ohio state courts and require attorneys (on both sides) to do a lot more work very early in the case—but the work is worth it.

New requirements like Initial Disclosures, the mandatory Rule 26(F) Discovery Planning Conference, and a written Discovery Plan being filed with the court—all occurring within 60 days of the defendant responding to the complaint—force the parties to get together, put their cards on the table, and discuss—and find solutions to—the inevitable discovery issues that will arise, especially in cases involving the discovery of electronically stored information (which, nowadays, is basically every case).

Going forward, if you hear opposing counsel (who might not be familiar with the new requirements) say things like, "we can deal with these discovery issues down the road" or "you can ask those questions during depositions"—your response should be something like, "I hear you, but that is the old way of doing things," and you should point them to the new rules.

This article is intended to be a reference outline covering three of the major changes to Ohio Civ. R. 26 (titled "General Provisions Governing Discovery"):

1) The New Scope of Discovery—Relevant and Proportional;
2) Mandatory Initial Disclosures; and
3) The Rule 26(F) Early Mandatory Discovery Planning Conference & Written Discovery Plan.

This reference outline provides helpful citations to the new Ohio rules, the Staff Notes, and the corresponding federal Committee Notes which you can bring to the attention of opposing counsel (and if necessary, the court) if opposing counsel continues to try to do things the "old way."

RULE 26(B)(1): THE NEW SCOPE OF DISCOVERY—RELEVANT & PROPORTIONAL

A. PROPORTIONALITY IS EXPRESSLY ADDED TO THE TEXT OF CIV. R. 26(B)(1)

1. **Same as Federal Rule 26(b)(1)**. The scope of discovery under Ohio Civ. R. 26(B)(1) is now identical to Fed. R. Civ. Pro. 26(b)(1) (as amended in 2015), and most of the Staff Notes are pulled directly from the 2015 Committee Notes to the federal rule. A blacklined version of the new rule is included in the end notes.[1]

2. **Relevant and Proportional.** "Parties may obtain discovery regarding any nonprivileged matter that is ***relevant*** to any party's claim or defense and ***proportional to the needs of the case***[.]" Civ. R. 26(B)(1).

3. **Proportionality Factors.** Parties and courts are directed to consider proportionality in light of six factors:

a) "the importance of the issues at stake in the action"

b) "amount in controversy"

c) "parties' relative access to relevant information"

d) "parties' resources"

e) "importance of the discovery in resolving the issues"

f) "whether the burden or expense of the proposed discovery outweighs its likely benefit"

4. **No More "Reasonably Calculated."** The phrase ~~"reasonably calculated to lead to the discovery of admissible evidence"~~ has been deleted from the Rule.

   As the federal Committee Notes explain: "The 'reasonably calculated' phrase has continued to create problems . . . and is removed by these amendments." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 19.

   The new rule simply states: "Information within the scope of discovery need not be admissible in evidence to be discoverable." Ohio Civ. R. 26(B)(1).

5. **Proportionality is Not New.** Most of the proportionality factors were already contained in Civ. R. 26(B)(4) and the corresponding federal rules.

   As the federal Committee Notes point out: "The present amendment restores the proportionality factors to their original place in defining the scope of discovery." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 18.

B. PROPORTIONALITY IS A BALANCING TEST

1. **Parties Must Identify and Discuss the Burdens and Benefits.** Every proportionality analysis starts with the parties figuring out what the actual burden is of preserving and producing discoverable information.

   "The parties may begin discovery without a full appreciation of the factors that bear on proportionality. ***A party requesting discovery, for example, may have little information about the burden or expense of responding.*** A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. ***Many of these uncertainties should be addressed and reduced in the parties' Civ. R. 26(F) conference*** and in scheduling and pretrial conferences with the court." Civ. R. 26(B)(1), Staff Notes 2020, para. 3.

   "A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery." Civ. R. 26(B)(1), Staff Notes 2020, para. 3.

2. **Information Asymmetry.** "With regard to the parties' relative access to relevant information, some cases involve what often is called 'information asymmetry.' One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that ***the burden of responding to discovery lies heavier on the party who has more information, and properly so."*** Civ. R. 26(B)(1), Staff Notes 2020, para. 4.

3. **Monetary Stakes Are Only One Factor.** The 2015 Committee Notes to Fed. R. Civ. Pro. 26 state: "[M]onetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized 'the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus, the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.' Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 14.

C. WHETHER ESI IS NOT REASONABLY ACCESSIBLE BECAUSE OF UNDUE BURDEN OR COST—SAME RULE SINCE 2008

1. **ESI Identified as Not Reasonably Accessible.** "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Civ. R. 26(B)(5).

2. **Same as Federal Rule.** The language in Civ. R. 26(B)(5) is identical to the corresponding Fed. R. Civ. Pro. 26(b)(2)(B).

3. **Same Since 2008.** The "reasonably accessible" language in Civ. R. 26(B)(5) has not changed since 2008.

4. **Party Claiming Undue Burden Has Burden of Proof.** "On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost." Civ. R. 26(B)(5).

5. **Can Still Obtain the Discovery For Good Cause Shown.** "If that showing [not reasonably accessible because of undue burden or cost] is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause." Civ. R. 26(B)(5).

6. **Procedure for Resolving Claims of Undue Burden—Key is Meaningful Discussions Between the Parties.** The Committee Notes to Fed. R. Civ. Pro. 26(b)(2)(B)—which is identical to Ohio Civ. R. 26(B)(5)—describe what is expected of a party who claims that a source of ESI is not reasonably accessible:

   Must Identify Sources Not Searched. "The responding party must also ***identify, by category or type, the sources containing potentially responsive information*** that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to ***enable the requesting party to evaluate the burdens and costs*** of providing the discovery and the likelihood of finding responsive information on the identified sources." Fed. R. Civ. Pro. 26(b)(2), Committee Notes 2006, para. 6.

   Preservation of Sources Not Searched. "A party's identification of sources of electronically stored information as not reasonably accessible ***does not relieve the party of its common-law or statutory duties to preserve evidence.*** Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. ***It is often useful for the parties to discuss this issue early in discovery."*** Fed. R. Civ. Pro. 26(b)(2), Committee Notes 2006, para. 7.

   Parties Must Discuss the Burdens and Benefits. "If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the ***parties should discuss the burdens and costs of accessing and retrieving the information,*** the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate." Fed. R. Civ. Pro. 26(b)(2), Committee Notes 2006, para. 8.

   Discovery May Be Needed to Test Assertion of Undue Burden. "If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The ***requesting party may need discovery to test this assertion.*** Such discovery might take the form of requiring the responding party to conduct a ***sampling of information*** contained on the sources identified as not reasonably accessible; allowing some form of ***inspection of such sources***; or taking ***depositions of witnesses knowledgeable about the responding party's information systems.***" Fed. R. Civ. Pro. 26(b)(2), Committee Notes 2006, para. 9.

7. **Discovery About a Party's ESI Systems is So "Deeply Entrenched in Practice"—It Goes Without Saying.**

   The old Civ. R. 26(B)(1) contained language that expressly allowed discovery of the "existence, description, nature, custody, condition and location of . . . electronically stored information . . . and the identity and location of persons having knowledge of any discoverable matter." Such language was deleted from the new rule.

   The 2015 federal Committee Notes explain why such language was no longer necessary: "Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. ***Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.***" Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 17.

D. IMPORTANT OHIO STAFF NOTES

1. **Greater Judicial Involvement.** "Civ. R. 26(B)(1) now includes language bearing on proportionality, which contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." Civ. R. 26(B)(1), Staff Notes 2020, para. 1.

2. **ESI Disputes Cause Delays**.
   "The scope of available information, including the ***increase and pervasiveness of electronically stored information***, has greatly increased both the potential cost of wide- ranging discovery and the ***potential for discovery to be used as an instrument for delay or oppression.*** The present amendment reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management." *Id*.

3. **Early, Effective and Cooperative Case Management Reduces Delays and the Need for Judicial Involvement**. "It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own." *Id*.

4. **Boilerplate Objections Prohibited—Counsel Must Know What Burden Is Before Claiming Undue Burden.** "This change does not place on the party seeking discovery the burden of addressing all proportionality considerations. ***Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.*** The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." Civ. R. 26(B)(1), Staff Notes 2020, para. 2.

E. ADVANCES IN TECHNOLOGY CONTINUE TO EXPAND WHAT IS REASONABLY ACCESSIBLE

1. **More ESI Than Ever Before.** The Rules recognize there has been an explosion of ESI. That also means there has been an explosion of potentially relevant and discoverable electronic evidence.

2. **ESI is Easier to Get Than Ever Before.** Advances in technology have dramatically reduced the burdens and costs of preserving and producing ESI. What was not reasonably accessible because of undue burden or cost in 2006 or 2010 or even 2015, may very well be reasonably accessible today.

   Back in 2006, the federal Committee Notes made the following factual observations about advances in technology:

   "Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 4.

   "Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used." *Id*. at para. 5.

3. **ESI is Easier to Search Than Ever Before.** Human review time is by far the largest expense of responding to discovery. Technologies like document review platforms, search tools, and artificial intelligence have significantly reduced the amount of human review time required in finding relevant documents. In 2015, the federal Committee Notes made the following observations about computer-assisted review:

   "The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. ***Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information.*** Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available." Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 16.

F. KEY TAKEAWAYS AND PRACTICE TIPS

1. **Proportionality Means—as a Starting Point—We Get Everything That's Relevant and Easy to Get.** The Staff Notes recognize a party "may have vast amounts of information, including information that can be ***readily retrieved*** and information that is more ***difficult to retrieve.***" Civ. R. 26(B)(1), Staff Notes 2020, para. 4.

   Practically speaking, the proportionality balancing test means we will get the stuff that's readily retrievable, we won't get the stuff that's difficult to retrieve, and everything in the middle will be determined on a case by case basis and will ultimately be up to the individual judge.

2. **Our Job is to Figure Out the Easiest and Cheapest Way for a Producing Party to Give Us What We Want.** We must show the court how easy and cheap it is for a producing party to preserve and produce the ESI we are seeking.

   The nuts and bolts of preserving and producing ESI will vary from case to case, but generally speaking the overall process for a producing party will come down to the same 3 steps in every case. A producing party will need to:

   (1) ***Identify*** the Sources of Potentially Relevant ESI—that is, make a list.

   (2) ***Preserve*** the Sources of ESI—that is, make a back-up copy of the ESI. This is usually done most efficiently through bulk collection (e.g., downloading all emails—or all emails within a certain date range—and saving them to a computer or flash drive so they can be sorted out later). Additionally, forensic imaging of a phone, computer, laptop, tablet, etc.—which will make a back-up copy of everything on the device—can be done for under $500.

(3) ***Search*** the ESI—that is, once a back-up copy has been made, the relevant documents will need to be separated from the non-relevant documents. Here, document review platforms, search terms, and technology assisted review are a huge help and have become extremely cheap to use.

3. **Talk to or Depose Opposing Party's IT Person.** By far, the best way to learn about an opposing party's information systems and figure out an easy and cheap way for the party to give you want you want is by talking to the party's IT person.

   An IT person will not only be able to help identify all the opposing party's sources of ESI, but they will be able to walk you through the steps of making a back-up copy of the ESI (e.g., they can tell you exactly how to download every single email on a company's server and that they can do it in under 30 minutes).

   Indeed, the federal Committee Notes explicitly recognize that ***"identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful."*** Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 34. And the new Ohio Civ. R. 26(F)(2) expressly allows a court to order a party representative (e.g., an IT person) to attend the Rule 26(F) Discovery Planning Conference.

   A meet and confer with the opposing party's IT person (if opposing counsel will allow it) can be very helpful and very efficient, but obviously with a deposition you get the added benefit of having a transcript you can cite to in a brief.

4. **Talk to/Hire an Expert**. It often helps to consult with your own IT expert and/or have an IT expert involved in the meet and confer process (e.g., Michael Zinn with Micro Systems Management here in Cleveland, www.msmctech.com). These kinds of experts will be able to explain how easy it is to preserve and produce ESI across all kinds of information systems.

5. **Do Not Fall for the Trap—You Have the Burden.** Technically, the producing party has the burden to show responding to discovery would be an undue burden, but do not fall into that trap. It is incredibly easy to make the collection, searching, and production of ESI seem incredibly complicated and expensive. But it's not. We must take the initiative, as contemplated by the Rules, to learn about a party's information systems and come to a common understanding with opposing counsel about what the actual burden is—and be prepared to provide the court with *evidence* of what the actual burden is (e.g., deposition testimony of IT person).

6. **Use Available Discovery Tools to Identify the ESI and Understand the Burden.** You should make a list of the sources of ESI you think need to be searched and then figure out the most efficient way to preserve and search the ESI. You should start the list and add to it as you learn more about the producing party's information systems. As discussed above, the rules recognize the producing party may need to provide detailed information about its information systems. See Fed. R. Civ. Pro. 26, Committee Notes 2015, para. 17 (***"Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources."***).

The meet and confer process can go a long way here, but often an IT person will need to be involved in the meet and confer process or be deposed. Here is a quick outline of the discovery tools available to learn about an opposing party's information systems.

a) Rule 26(F) Discovery Planning Conference (discussed in more depth below). Send a list of questions/discussion topics in advance of the meet and confer.

b) Additional Meet and Confers with Counsel. Conduct additional meet and confers with opposing counsel after they have obtained additional information from their client.

c) Meet and Confer with IT Person. Ask for an informal off-the-record meet and confer with a producing party's IT person. Those conversations can go a long way.

d) Deposition of IT Person. If you or opposing counsel want the conversation with the IT person on the record, notice the deposition of the IT person.

e) 30(B)(5) Deposition. If opposing counsel wants to receive a list of topics in advance of the deposition, put together a 30(B)(5) Notice.

f) Inspection. Conduct a Rule 34 Inspection of the premises to identify sources of ESI.

g) Interrogatories. Serve interrogatories early to identify the names of the opposing party's IT-type persons.

h) Requests for production. Receiving even a small number of documents while the meet and confer process is ongoing can often be a great help in understanding the opposing party's information systems.

RULE 26(B)(3): EARLY MANDATORY INITIAL DISCLOSURES

A. INITIAL DISCLOSURES—CONTENT

Without waiting for a discovery request, a party must disclose to the opposing party the following information:

1. **Names of Witnesses.** A party must disclose the names of all persons who have information that ***supports the party's case***, including each person's address and phone number, if known, and the subjects of information possessed by each person.

2. **Documents/ESI/Tangible Things**. A party must produce a copy—or a "description by category and location"—of all documents, ESI, and tangible things that ***support the party's case***, unless it would be used solely for impeachment.

3. **Damages.** A party must produce a "computation" of each category of damages being claimed.

4. **Insurance Coverage.** Not applicable to most plaintiffs.

B. INITIAL DISCLOSURES—TIMING

1. **Parties Can Stipulate.** Pursuant to Civ. R. 26(B)(3)(c), Initial Disclosures must be produced before the initial case management conference, unless otherwise ordered by the court or agreed upon by the parties.

2. **Practice Tip.** You want to exchange Initial Disclosures before the Rule 26(F) conference so the meet and confer can be as productive as possible. Thus, as soon as you receive an answer or motion to dismiss from a defendant, send an email to opposing counsel to set an agreed upon date to exchange Initial Disclosures.

RULE 26(F): EARLY MANDATORY DISCOVERY PLANNING CONFERENCE & WRITTEN DISCOVERY PLAN

A. RULE 26(F)—SUCCESSFUL HISTORY

In the year 2000, the federal Committee Notes stated: ***"The Committee has been informed that the addition of the [Rule 26(f)] conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide."*** Fed. R. Civ. Pro. 26, Committee Notes 2000, para. 31.

In 2020, Ohio adopted the federal requirement of the 26(f) conference and written discovery plan: ***"This amendment introduces to Ohio's civil rules the concept of an early, mandatory conference among the attorneys and any unrepresented party, and requires the filing of a written report outlining the results of that conference."*** Civ. R. 26(F), Staff Notes 2020, para. 10.

B. RULE 26(F)(1)—TIMING

1. **Courts Must Issue Scheduling Order in First 60 Days.** "The court shall issue the scheduling order as soon as practicable, but unless the court finds good cause for delay, the court shall issue it within . . . 60 days after any defendant has responded to the complaint." Civ. R. 16(B)(2).

2. **Scheduling Conference With Court in First 60 Days.** Because courts are now required to issue a scheduling order within 60 days of any defendant responding to the complaint, the scheduling conference must also occur within the same 60 days (unless the court is going to issue a scheduling order without having a scheduling conference).

3. **Rule 26(F) Discovery Planning Conference in First 30 Days.** "[P]arties shall confer as soon as practicable – and in any event no later than 21 days before a scheduling conference is to be held." Civ. R. 26(F)(1).

   Thus, the parties should plan to have the Rule 26(F) Discovery Planning Conference within about 30 days of the defendant responding to the complaint (or on day 39 at the latest as that would be 21 days before day 60).

4. **Written Discovery Plan Filed Within 14 Days of 26(F) Discovery Planning Conference.** A Joint Report outlining the parties' discovery plan must be filed with the court within 14 Days of the Rule 26(F) Discovery Planning Conference. Civ. R. 26(F)(2).

C. RULE 26(F)(2)—DISCOVERY PLANNING CONFERENCE

1. **Use the Rules as an Agenda.** Rule 26(F) and Cuyahoga County's Local Rule 21.3 provide a list of discovery issues that must be discussed at the Discovery Planning Conference and addressed in the written Discovery Plan. You can use the Rules as an agenda for the Discovery Planning Conference.

2. **Parties' Responsibilities.** "In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Civ. R. 26(A)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan." Civ. R. 26(F)(2).

3. **Discuss Party's Information Systems.** "It may be important for the parties to discuss those [information] systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the ***parties can develop a discovery plan that takes into account the capabilities of their computer systems.***" Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 34.

4. **Discovery From Persons With Special Knowledge of Party's Computer Systems.** "In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 34.

5. **Identify Sources of ESI and Burden of Retrieving and Reviewing ESI.** Parties "may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information." Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 35.

6. **Forms of Production.** "The parties may be able to reach agreement on the forms of production, making discovery more efficient. . . . ***Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.***" Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 35.

7. **Preservation.** Parties "should discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. ***Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes."*** Fed. R. Civ. Pro. 26, Committee Notes 2006, para. 36.

8. **Cuyahoga County's Local Rule 21.3.**Local Rule 21.3's "Schedule A" template report provides an excellent ***guide/agenda/checklist*** for identifying, discussing, and resolving ESI issues. In any Cuyahoga County case that involves ESI issues, the Schedule A template report—which is required to be submitted to the court by Local Rule 21.3(C)(2)—should just be merged with the Rule 26(F) Joint Report.

   Some helpful topics identified in Local Rule 21.3 include:

   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."

   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."

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

   d. "The scope of production of metadata and embedded data."

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

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

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

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

9. **Counsel Must Be Prepared for the Meet and Confer.** "Counsel and unrepresented parties ***shall 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."*** Cuyahoga County Local Rule 21.3(C)(3).

D. <u>RULE 26(F)(3)—WRITTEN DISCOVERY PLAN</u>

1. **Discovery Plan.** "A discovery plan shall state the parties' **views and proposals** on" items (a)-(h) below.

   "The litigants are expected to attempt in good faith to ***agree on the contents of the proposed discovery plan.*** If they cannot agree on all aspects of the plan, their ***report to the court should indicate the competing proposals*** of the parties on those items, as well as the ***matters on which they agree.***" Fed. R. Civ. Pro. 26, Committee Notes 1993, para. 51.

Practice Tip. Send a draft Discovery Plan to opposing counsel with your views and proposals written out on each discovery issue as necessary and ask opposing counsel to write down their competing proposals if they disagree with your proposals. You can label paragraphs in the Discovery Plan "Plaintiff's Views and Proposals" and "Defendant's Views and Proposals." Opposing counsel will often be more agreeable once they have to put a competing proposal in writing.

Rule 26(F)(3) ***requires*** the parties to put their views and proposals in writing on the following issues:

a. **Initial Disclosures.** Civ. R. 26(F)(3)(a) ("what changes should be made in the timing, form, or requirement for disclosures under Civ. R. 26(B), including a statement of when initial disclosures were made or will be made").

   In most cases, Initial Disclosures should be exchanged before the Rule 26(F) conference so the conference can be as productive as possible. In complex cases, it may be more useful to have the conference before exchanging Initial Disclosures.

b. **Proposed Case Management Schedule.** Civ. R. 26(F)(3)(b) ("agreed-upon deadlines for discovery and other items that may be included in a case schedule to be issued under Rule 16").

   The goal here is for the attorneys to agree upon and submit a proposed scheduling order to the court before the court has to issue a scheduling order. See Rule 16(A) (attorneys "shall endeavor in good faith to agree on all the schedules contemplated by this rule and courts shall consider such agreements in the establishment of any such schedule").

c. **Subjects of Discovery.** Civ. R. 26(F)(3)(c) ("the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues").

   A requesting party should be prepared to explain why they believe discovery on certain subjects is important to the case. Civ. R. 26(B)(1), Staff Notes 2020, para. 3 ("A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them.").

d. **ESI Issues.** Civ. R. 26(F)(3)(d) ("any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced").

   Again, Cuyahoga County's Local Rule 21.3 and its corresponding "Schedule A" template report provide an excellent ***guide/agenda/checklist*** for identifying, discussing, and resolving ESI issues.

e. **Public Records.** Civ. R. 26(F)(3)(e) ("disclosure and the exchange of documents obtained through public records requests").

f. **Privilege Issues.** Civ. R. 26(F)(3)(f) ("any issues about claims of privilege or of protection as trial-preparation materials").

   The parties should discuss predictable issues related to privilege and the form of a privilege log. A privilege log is required by Civ. R. 26(B)(8)(a): "When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is ***sufficient to enable the demanding party to contest the claim."***

g. **Changes to Limitations.** Civ. R. 26(F)(3)(g) ("what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed").

h. **Other Orders.** Civ. R. 26(F)(3)(h) ("any other orders that the court should issue under Civ. R. 26(C) or under Civ. R. 16(B) and (C); and any modifications required or to be requested under any scheduling order issued under Civ. R. 16").

   Civ. R. 26(C) relates to "Protective Orders." The parties should anticipate and discuss whether a protective order will be needed to keep certain documents confidential.

   Here, disputes are usually about the scope of documents that get designated as confidential. Thus, an important part of this discussion will be about developing a protocol for challenging the confidentiality designation of documents the receiving party believes should not be subject to the protective order. Below is an example protocol for challenging confidentiality designations:

   "If the confidentiality designation for certain documents is challenged and agreement cannot be reached through the meet and confer process, the objecting party can

send the designating party a formal written objection pursuant to this paragraph which identifies the documents for which the confidentiality designation is being challenged. Upon receipt of a formal written objection pursuant to this paragraph, the designating party will have 14 days to file a motion to maintain the confidentiality designation of the documents identified in the formal written objection. If the designating party fails to file such a motion within 14 days of receiving the formal written objection, the confidentiality designation of the documents identified in the formal written objection is waived and such documents will no longer be subject to the confidentiality designation. If the designating party files a motion to maintain the confidentiality designation of the documents identified in the formal written objection within 14 days of receiving the formal written objection, the documents identified in the formal written objection will maintain their confidentiality designation until the Court rules on the matter."

E. PRACTICE TIPS

1. **Send Email to Opposing Counsel to Set Dates.** As soon as the defendant responds to the complaint (with an answer or motion to dismiss) you should send an email to opposing counsel to schedule the 26(F) Discovery Planning Conference, the date the Joint Discovery Plan will be filed, and the date Initial Disclosures will be exchanged.

2. **Send Opposing Counsel a Draft Discovery Plan Before the Conference.** To have a productive Discovery Planning Conference, you need to have an agenda and a draft report to guide the discussion. Send the draft report to opposing counsel well in advance of the meet and confer so they have time to prepare and obtain information from their client. Write out the expected ESI issues in the draft Joint Report as you would in a 30(B)(5) notice. You should also include the reasons you believe the ESI is relevant to the case.

3. **After the Conference.** After the conference you will have 14 days to finalize the Discovery Plan and file it with the court. Immediately send opposing counsel an email (or an updated draft report) summarizing the discussion and identifying the issues for which they said they would get back to you with more information. As mentioned above, put your views and proposals in writing in the draft report and ask opposing counsel to either agree or put their alternative proposals in writing.

CONCLUSION

The 2020 changes to the Ohio Rules governing discovery are significant and will require a lot more upfront work by the attorneys. But by complying with the new requirements and taking our meet and confer obligations seriously, we will resolve issues early, prevent future delays due to discovery disputes (especially ESI disputes), and minimize the need for judicial involvement. Ohio has finally adopted the federal rules governing discovery—and it's a good thing too! ■

End Notes

1. Civ. R. 26(B)(1) now reads: "In General. ~~Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~ Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties'relative access to relevant information, the parties'access to resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

Cuyahoga County Civil Jury Trials To Take Place At Medical Mart

by Meghan P. Connolly and Ellen Hobbs Hirshman

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Civil trials at the Cuyahoga County Court of Common Pleas were officially suspended on March 16, 2020, in reaction to the Coronavirus pandemic. Cuyahoga County's Justice Center presents a lot of challenges to control the spread of coronavirus. As one of Ohio's most populated counties, Cuyahoga County has been hit hard by the virus. The Justice Center is known for crowding at the entrances, elevators, and of course, in courtrooms, some of which are smaller than others. Voir dire raised significant concerns, considering the process entails social closeness, with a lot of talking in close quarters.

Faced with the unique challenges of the times, Administrative Judge Brendan Sheehan continued the suspension of civil jury trials several times over the course of the summer. Eventually, it became clear that the ongoing pandemic called for a creative solution that would allow the wheels of justice to begin turning again for civil litigants under the safest possible conditions.

That is when the brilliant solution of utilizing the space across the street emerged. Why not hold trials at the Global Center for Health Innovation ("Medical Mart") located across Ontario Street from the Justice Center? The Medical Mart offers spacious rooms and easy to clean hard surfaces that offer huge improvements over the Justice Center, and it stood basically empty and ready to be transformed. Not to mention, the building is impressive and stylish, making it a somewhat enjoyable place to be.

Fig 1.

Fast forward to September of 2020 and a lot of impressive progress had been made. As of late September, the Medical Mart was set up to function as a courthouse. The suspension of jury trials was lifted on September 21, 2020, with a green light for civil jury trials to proceed at the Medical Mart.

With the new juror system, jurors are assigned to one specific case, not a large general pool. They are instructed to call in for instructions, and if their case has settled, they are not to report. Potential jurors are told to report directly to the Medical Mart and will bypass the Justice Center altogether.

As potential jurors enter the Medical Mart, there is a security check point. **Fig. 1.** At this checkpoint, everyone is screened for COVID-19 symptoms and exposure. Their temperature is taken. If they pass the screening, a wristband is

Fig 2.

Fig 3.

Fig 4.

given indicating they are permitted to enter the Medical Mart.

Next, potential jurors encounter a juror check in station with plexiglass dividers. **Fig. 2.**

Jurors then proceed to a large open room for orientation. The chairs are appropriately spaced to comply with social distancing requirements. **Fig. 3.** (Photo credit to Darren Toms, Cuyahoga County Court of Common Pleas, Community Outreach Coordinator.) They watch orientation videos on a big screen, including a message about the importance of their safety from Administrative Judge Sheehan. The videos are available on the court's website.

Potential jurors then report to their assigned courtroom for voir dire. There are several courtrooms set up on the second and third floors of the Medical Mart. **Fig. 4.** Each courtroom has a jury area where each juror's chair is separated by plexiglass dividers. **Fig. 5.** Jurors are required to wear face shields provided by the county (not masks) to offer added protection while still allowing their faces to be observed during voir dire and trial.

If a juror is not selected for the case, their duty has concluded. They do not return to a pool.

The courtrooms also feature counsel tables with plexiglass dividers between each attorney. **Fig. 6.** Attorneys are required to wear face masks during trial. The podium and other areas of the courtroom are sanitized during breaks and in the evenings. The courtrooms are outfitted with PPE. **Fig. 7.**

The judge presides over the courtroom from the bench. **Fig. 8.** The witness box is next to the judge, and a plexiglass divider can be used between them.

The Medical Mart courtrooms are considered open to the public, as any other courtroom is, subject to the space limitations. The public gallery chairs are appropriately spaced. **Fig. 9.**

During breaks, jurors will encounter high touch point surfaces that are covered in "self-cleaning" surfaces. **Fig. 10.** The sinks in the restrooms are divided with plexiglass as well. **Fig. 11.**

After visiting the space, we were left with the impression that court administration has done everything they can to prevent the spread of coronavirus during a jury trial. As of the date this article was written in October, 2020, all of the civil trials slated to begin at the Medical Mart have settled. However, that could change at any time, as civil trials are scheduled to begin each Monday, Tuesday, and Wednesday at the Medical Mart. If a Monday trial goes forward, the Tuesday and Wednesday cases are reset. If Monday's trial settles, Tuesday's trial will proceed. Wednesday's trial would be on deck in case Tuesday's trial settles too.

Fig 8.

Fig 9.

Fig 5.

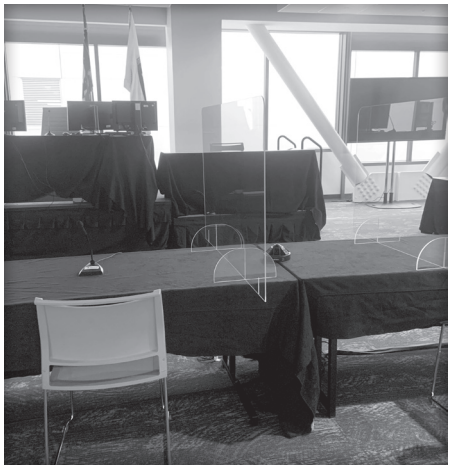

Fig 6.

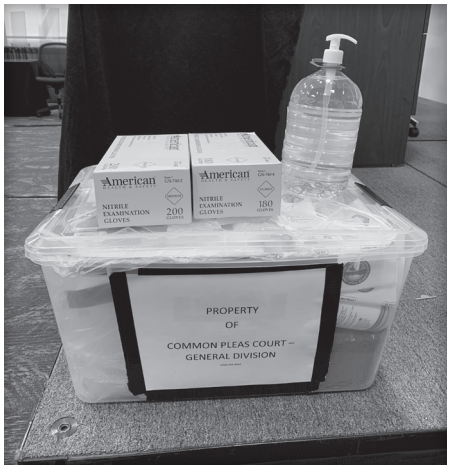

Fig 7.

The court is using a civil trial decision matrix to decide which cases to schedule for trial at the Medical Mart. The matrix allows Administrative Judge Sheehan to review cases submitted by the 34 Cuyahoga County judges for scheduling. Judge Sheehan considers the age of the case, the type of case, and any special circumstances that call for the case to receive priority in scheduling.

While no civil trials have gone forward as of the time this article was written, Judge Sheehan did preside over a criminal trial at the Medical Mart. Judge Sheehan provided the following insight:

How was your experience presiding over the criminal trial at the Medical Mart?

It went even better than expected. The Global Center provides us with the necessary space for social distancing, and the Sheriff's Deputies are right on top of any security concerns. The Convention Center and Global Center staff have been extremely helpful with providing whatever we need.

How do you think the jurors felt about serving—did they feel adequately protected by all of the precautions?

The jurors I spoke with had nothing but positive things to say. They were very impressed with the thought and care that has been put into making them feel as safe as possible. They understand their importance to the legal system and how much we value their participation.

While the number of trials scheduled to proceed under this new system has been greatly reduced from what is usually scheduled to proceed at the Justice Center, it is great news for jurors, civil litigants and their counsel that a creative solution has been achieved in Cuyahoga County.

ADDENDUM:
On November 9, 2020, The Cuyahoga County Court of Common Pleas released the following statement on their website:

> As COVID cases continue to rise in Cuyahoga County, the Judges voted on Monday, November 9, to suspend jury trials until December 1. At that time, the Judges will re-evaluate the infection rates in the community. Juror summons will continue to be sent. Any juror scheduled to report should call the number on their summons the evening before their report date to determine the status of trial. ■

Fig 10.

Fig 11.

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Adapting To The Pandemic

by Meghan C. Lewallen

The COVID-19 global pandemic has forced individuals around the world to adapt to a completely new way of living. This new normal has undeniably transcended into the way we navigate the legal profession. Over the last several months judges across the country have made efforts to adapt their courtrooms to ensure the safety of clients, counsel, and courtroom staff. Meanwhile, lawyers have largely relied on technology to continue to prosecute their cases virtually at various stages of litigation including depositions, mediations, and focus groups. With in-person interaction likely to remain limited for the foreseeable future, COVID-19 has forced us to embrace these new practices, many of which will likely be here to stay long after requirements for social distancing are lifted.

Virtual Depositions

Virtual depositions quickly became routine as concerns related to COVID-19 began to rise across the country. With uncertainty as to when one could safely travel and gather with others for several hours virtual depositions became the obvious solution as they allowed everyone involved to participate remotely requiring only a webcam-equipped computer or mobile device with an Internet connection. Over the last several months not only has the prevalence of virtual depositions grown exponentially, but so has appreciation for the features and flexibility this platform offers.

Access. Virtual depositions not only save time and money due to minimal travel involved but also provide witnesses, experts, counsel, and court reporters the flexibility and convenience of attending depositions remotely from the safety of their own home or office simply by clicking a link. The ability to instantaneously attend a deposition from virtually anywhere has even extended to the court where judges have appeared in the middle of a deposition by request to address discovery issues causing obstruction. Before virtual depositions became mainstream the idea that the court would appear in a Zoom deposition was almost nonexistent; however, this is one of the many benefits the virtual platform offers.

Exhibits. Management and presentation of exhibits during virtual depositions certainly require additional preparation and practice; however, there are multiple options available.

Traditional hard copy exhibits may still be used during virtual depositions so long as they are sent to the court reporter electronically or by mail in advance to eliminate unnecessary delay. Alternatively, there are several ways to display exhibits during the deposition in real time so that the documents are visible to everyone participating regardless of their location. Exhibits can be shared at any time using Zoom's share screen feature. This allows you to share a document on your computer screen, share content on an iOS device (i.e., TrialPad), or connect to a document camera as a second camera. Each option displays the document at the time of questioning and offers zoom and annotation capabilities. A laser

"spotlight" is also available to direct the deponent's attention to a specific portion of a record or document. Additionally, a whiteboard feature is available to share which allows counsel and the deponent to annotate a blank document to create lists, timelines, and the like using text, lines, arrows, cross marks and other shapes. Once annotated the whiteboard created can be saved and later attached as an exhibit.

Importantly, court reporters have the ability to record virtual depositions with timestamps so that they are certified for use at trial. Both the witness and any content displayed on a shared screen during the deposition is visible in the recording for the jury.

Best practices. (1) Test the screen share feature well in advance of the deposition to allow time to work out any challenges faced and develop an organized plan for how documents will be saved and presented. (2) Determine which virtual platform best fits your needs. Although Zoom has become the most popular platform, others are available such as Microsoft Teams[1] and GoToMeeting[2] which offer video-conference capabilities, screen sharing, and chat, among other features. (3) Despite the ease, flexibility, and advantages virtual depositions offer, opposing parties may attempt to prevent a deposition from moving forward unless they can attend in person. When your client or expert is the deponent it is best to file a motion with the court requesting the individual be permitted to attend the deposition remotely. There is absolutely no reason that counsel, the witness, or the court reporters retained should be placed in a potentially dangerous position when remote alternatives are readily available. Similarly, the idea of continuing to postpone depositions is not a viable option as we have no idea when the severity of the pandemic will end in any given city or state. Even worse, health experts expect a second surge in COVID-19 over winter months, making an end date even more uncertain.

Virtual Mediations

Despite limited in-person events taking place inside courthouses across the country parties have been able to successfully resolve cases through virtual mediations conducted by both judges and private mediators.

Virtual Rooms. By using Zoom's breakout room feature parties and their clients are not only able to appear remotely but also have the ability to speak with the judge or mediator just as they would have the ability to do at an in-person mediation. Security measures in place allow only the participants assigned to any given breakout room to see and hear one another allowing the freedom to discuss privileged information without concern of the opposing side listening in.

Assignment & Control. It is essential that the mediator is the assigned "host" of the virtual mediation as the host/administrator is the only person that has the ability to assign participants to different breakout rooms. Similarly, the host is the only individual that can gain access to each breakout room in order to have discussions with each party.

As the host, mediators have the option to pre-assign participants to breakout rooms at the time the virtual mediation is scheduled or manually assign and manage the parties during the mediation. This offers the mediator the choice of managing technical aspects of the mediation in the manner they find most comfortable. They can conduct the mediation pursuant to own their style, i.e., joining together as a group to allow time for opening statements, or they can immediately separate the parties into the assigned virtual rooms for the entirety of the mediation.

Best practices. If there are any concerns related to potential technical difficulties a reliable court reporting company should be used to schedule and set up the mediation. Often an IT representative offers one-on-one training to the mediator and the parties, if desired, and is further available for support during the mediation if issues present themselves. Further, although confidentiality concerns should be eased when Zoom security components are enabled, some lawyers and mediators have opted to use enterprises such as Skype, Microsoft Teams, and WebEx to discussion confidential information.

Virtual Focus Groups

COVID-19 has made conducting in-person focus groups particularly challenging in light of social distance requirements. However, with a few modifications they too can be successfully accomplished using a virtual platform.

Maintaining focus. The primary concern about virtual focus groups is participant focus. Limiting the number of participants involved and reducing the length of time for discussion compared to a traditional focus group help combat the disadvantage of not presenting information in person. Retaining a limited number of participants not only allows each individual to express their view but also keeps them engaged in small group discussion. Rather than hand out questionnaires at different points throughout the focus group, Zoom's chat and polling features can be used to elicit the same information electronically and further serve to keep participants actively involved and assist with guiding discussion.[3] The chat feature allows the moderator to send questions to the entire group and can allow participants to respond privately or to everyone. The chat can then be saved manually or automatically for further evaluation. The polling feature allows

the moderator to create and launch single-choice or multiple-choice polling questions to participants. Responses can be gathered from attendees during the focus group and a report of polling can be downloaded upon completion.

Key topics. The topics discussed during a virtual focus group should be narrowed to key points of interest because of the reduced time allotted.[4] A more focused approach will allow for the best feedback in a limited timeframe. Additionally, one person should plan to serve as a moderator while another manages interactive features and takes notes. This will allow the moderator to focus on the participants and follow the discussion.[5]

Best practices. Housekeeping matters to keep in mind: (1) a confidentiality agreement should be sent to and signed by each participant before the focus group; (2) test technology with participants beforehand to ensure they have access to a computer and/or tablet and are comfortable using the technology required; (3) determine whether payment will be distributed electronically (i.e., PayPal, Venmo, or the like which will require participants to set up an account to receive payment) or by mail; (4) make sure participants "rename" their account so that their first name is visible to facilitate group discussion and keep track of individual feedback; and (5) ask participants to sign-in 10-15 minutes before the focus group begins so you have time to chat with each participant and make sure cameras, microphones, etc. are all working properly.[6]

Virtual Tips

- Enable security safeguards
- Be mindful as to lighting and background to achieve the best visibility and limit distractions
- Test your camera and audio in advance
- Camera should be at eye level for optimal display
- Retain a court reporter that has experience with virtual platforms
- Make sure a strong internet connection is available
- Firms with existing conference room systems such as Polycom or Cisco have the ability connect their system to the deposition directly using the Zoom conference room connector

How to: Additional Resources & Guidance

Step-by-step guidance and video tutorials are referenced below to better assist with adapting your practice to virtual platforms.

- Sharing your screen, content, or second camera[7]
- Sharing content from an iOS device including TrialPad[8]
- Sharing a whiteboard[9]
- Zoom Conference Room Connector[10]
- Managing breakout rooms[11]
- Enabling waiting rooms[12]
- In-meeting chat for virtual focus groups[13]
- Polling for virtual focus groups[14]
- PayPal money transfer for virtual focus group incentive payment[15] ■

End Notes

1. Unify Square Resources, Microsoft Teams vs. Zoom: How to Determine the Right Fit, *https://www.unifysquare.com/blog/microsoft-teams-vs-zoom/*
2. GetVoIP, Zoom vs GoToMeeting: Which is the Best Video Conferencing Solution?, https://getvoip.com/blog/2020/04/01/zoom-vs-gotomeeting/
3. Conducting remote online focus groups in times of COVID-19, UXalliance, https://uxalliance.medium.com/conducting-remote-online-focus-groups-in-times-of-covid-19-ee1c66644fdb (April 14, 2020).
4. *Id.*
5. *Id.*
6. *Id.*
7. Zoom Help Center, *Sharing your screen, content, or second camera*, https://support.zoom.us/hc/enus/articles/201362153-Sharing-your-screen-content-or-second-camera
8. Zoom Help Center, *Share an iOS Device Screen Using a Cable*, https://support.zoom.us/hc/enus/articles/115003341686-Share-an-iOS-Device-Screen-Using-a-Cable
9. Zoom Help Center, *Sharing a whiteboard*, https://support.zoom.us/hc/en-us/articles/205677665
10. Zoom Help Center, *Getting Started With H.323/SIP Room Connector*, https://support.zoom.us/hc/enus/articles/201363273-Getting-Started-With-H-323-SIP-Room-Connector
11. Zoom Help Center, *Managing Breakout Rooms*, https://support.zoom.us/hc/en-us/articles/206476313-Managing-Breakout-Rooms
12. Zoom Help Center, *Waiting Room*, https://support.zoom.us/hc/en-us/articles/115000332726-Waiting-Room#h_11875115-ac6e-491b-a594-548058954ad2
13. Zoom Help Center, *Using in-meeting chat*, https://support.zoom.us/hc/en-us/articles/203650445-In-meetingchat#:~:text=While%20in%20a%20meeting%2C%20tap,person%20or%20group%20of%20people.
14. Zoom Help Center, *Polling for meetings*, https://support.zoom.us/hc/en-us/articles/213756303-Polling-formeetings
15. PayPal Help Center, *How do I send money?*, https://www.paypal.com/us/smarthelp/article/how-do-i-send-moneyfaq1684

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"Evidence.com": A Public Record Goldmine

by Meghan P. Connolly, Esq. and Taylor Rose, CP

"Evidence.com" is a cloud-based software system created by Axon Enterprise, a company that produces weapons and technologies for law enforcement. Police departments around the country are beginning to utilize Evidence.com to manage and store digital evidence, such as videos from police body cams and street cameras relative to case investigations. For injury lawyers, Evidence.com offers convenient and efficient access to a broader range of public record evidence when accidents occur in cities that contract with Evidence.com. This evidence may include police body camera footage that can serve as compelling evidence in our cases.

Personally, our first experience using Evidence.com was this past August. We began investigating a disputed liability bicycle accident that occurred in Lakewood, Ohio. We were told by the potential client that there were two street cameras near the accident scene with relevant footage. One of the video cameras was owned by the city, and one was owned by a store.

In this situation, we would usually have to contact the city and the private entity to request the video footage which may or may not still exist. However, our co-counsel mentioned that the Lakewood Police had obtained the videos as part of their investigation and stored them on Evidence.com. We sent a simple request to the Lakewood Police Department, and one day later, received an email from the Sheriff including an Evidence.com link. Upon selecting the link, we created log in information using an email address, and were able to view and download file after file of case information that had us on the edge of our seats.

We had been given immediate access to the police photographs, the street camera footage (which had already been edited down to the relevant time-period), as well as police body camera footage from the scene. I had never reviewed police body camera footage before in connection with an investigation, and this footage was extremely interesting!

The police body cam footage from several different officers thoroughly captured the scene as it appeared after the crash. I was glad to see that even though the crash occurred at dusk, the body cam videos showed adequate lighting and visibility. The footage included the police interviews with eye-witnesses and the defendant himself. Instead of being limited to the witness statements reduced to writing in the police report, I was able to listen to the interviews word for word. I could hear how the questions were posed by police and how exactly they were answered. I could see the witnesses, their body language, and their demeanor in supplying information. I also listened to the officers deciding not to cite the defendant for driving under a suspended license. Viewing this footage was almost as if I had been given the chance to investigate the scene myself right after the crash happened.

Further, the police spoke to my client at the scene while he was being assessed in the street by EMS

and then carried into an ambulance. While he was lying in the street several feet away from his bike, I was glad to see he was wearing his bike helmet. The body cams also captured images of blood in the street and my client's injured state as he received emergency care.

Of particular interest was footage from inside the ambulance where the police officer attempted to take a statement from my client about the facts of the collision while a flurry of emergency medical care was taking place. My client was unable to state the current month, year, or President, yet the police officer was asking him for details about his route and direction of travel.

I believe the body cam scenes from the street and inside the ambulance will assist my client in telling his story. It also may be helpful to have recordings of this time-period that my client may not fully recall due to his injuries.

With contradictory witness statements regarding how the incident occurred, a review of everything on Evidence.com was extremely helpful in deciding whether to take the case. Being able to review all of the evidence within a day's time, as a result of sending a single request, provided the most efficient and comprehensive review of public record information that I have experienced in any case. As more departments contract with Evidence.com, it will greatly improve our ability to quickly evaluate cases. We are also excited to see how the police body camera footage can be used to prove our client's case and convey the story.

To access information from Evidence.com, an attorney simply sends a request to the participating police department. The police department produces an email through Evidence.com with a download link. The attorney then must create a "log in ID" to access the information on the website. The information sent is only accessible for a few days after the link is emailed. If the evidence is not downloaded by the expiration date, another request must be made through the police department.

For attorneys and their staff, the good news about Evidence.com is that it offers a singular and simpler solution to retrieving evidence, and that the information available is more comprehensive than the typical police report with photos. If police departments are not using a cloud-based system, they typically have their own unique method of storing and sending evidence. Typical storage methods consist of a hard drive with a limited capacity; the production methods typically consist of attachments to an email, which is not secure and cannot accommodate large files, or an upload to a flash drive or disc that is mailed. The flash drive or disc contains video software that is compatible with the police department's particular video files. The software must be downloaded onto the attorney's computer before playing the video. This can often be a tedious process that is extremely inefficient. The cloud-based system on Evidence.com is much faster, more secure, and more efficient than other outdated methods of public records production.

Another benefit to using Evidence.com is that many police departments do not have the evidence organized, sorted, and ready to send, until it is requested from an outside party. Evidence.com allows departments to upload and store evidence in shareable form on the front end. For instance, Axon Body Cams are able to upload video directly to the cloud. The benefit for attorneys is that responses to requests are typically much faster. Also, the cloud, unlike a typical hard drive, has an enormous storage capacity, meaning it does not need to be regularly cleared to make space for new evidence storage. Thus, evidence can be retained by police departments for longer periods of time.

This exciting advancement in public records production technology is sure to better serve plaintiffs' attorneys in investigating and preparing cases. ■

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Structured Settlements R.I.P.? *Not so fast…*

by Thomas W. Stockett, CSSC, CW Settlements

The COVID-19 Pandemic has taken a toll on many industries including the legal industry. Correspondingly, the utilization of structured settlements is down drastically year to date in 2020 after a record strong first quarter for many structured settlement firms. Why? First, let us look at the obvious. There has been tremendous disruption in the settlement process due to the closure of courts, a dramatic reduction in jury trials, and cash strapped entities with little incentive to resolve claims. However, there is a more pressing Grim Reaper facing the structured settlement industry: the current interest rate environment.

Today, the utilization of a guaranteed tax-free fixed structured settlement annuity has fallen out of favor in comparison to years past due to lackluster returns. Structured Settlement Annuity rates are formulated based upon investment grade corporate bonds and subsequently yields on a 10 year US Treasury. Let us take a closer look. Over the past 20 years, the yield on the 10 Year US Treasury has dropped precipitously. In fact, the highwater mark for the bellwether Treasury over the last 20 years was 5.52% recorded in the year 2000 and the lowest closing level recorded was this summer at .52%, an approximate decline of over 90%.

The decline in interest rates has not just negatively impacted structured settlement annuities but all interest rate saving vehicles such as money markets, savings accounts, certificates of deposit, and retail annuities. The recent zero interest rate policy enacted by the Federal Reserve to combat the COVID-19 economic downturn has been devastating to risk averse savers. This is predicted to be felt for many years to come.

Before we lay structured settlement annuities to rest, let's take a quick history lesson in structured settlements and why they are so important to our clients. Over 100 Years ago, The Revenue Act of 1918 established that personal injury settlements were excluded from taxable income which is presently codified as Internal Revenue Code 104(a)2. Structured Settlements were first recorded in the United States in the 1960s in medical malpractice cases. After years of utilization and Private Letter Rulings regarding taxation, the Periodic Payment Settlement Act of 1982 codified the income-tax-free status of structured settlements. The United States government realized the benefit of providing long-term, tax-free financial security to injury victims.

By 2006, over $100 Billion of structured settlement annuity contracts had been funded. Since then, approximately another $100 Billion of contracts have been funded to date. For over 50 years, injury victims and their families have benefited from the security, guarantees, and tax-free growth afforded by structured settlements. The spendthrift provisions associated with structured settlements have been invaluable in protecting settlement recipients from premature dissipation. Countless civic, business, and legal leaders including late Congressman John

Lewis and legendary investor Warren Buffet have praised the utilization of structured settlement vehicles to provide protections for plaintiffs and their families.

Now let us examine historical interest rates of structured settlement annuity contracts. In the 1980s, structured settlement contracts offered high single digit to low double-digit tax-free returns which provided extremely attractive payouts. By the late 1990's to 2007, returns of 5% to 8% were the norm. Then, in 2008-2009 the Great Recession hit and commenced the downward trend in interest rates. Several economic crises later and dovish monetary policy for well over a decade has driven interest rates around the world to record low levels, even to negative levels in Europe. The effects have been devastating to risk averse savers who prefer principal protections over market risk. Money markets, certificates of deposit, and fixed annuities are returning some of the lowest returns in history. Currently, rates on structured settlements tend to be under 3.00%.

While fixed returns have dwindled, the need and desire for protections among claimants have not. Prospective future returns do not mean much if funds are dissipated and squandered at an alarming rate. Injury victims and their families are often the most vulnerable to dissipation due to lack of financial sophistication or inability to manage funds due to incapacity. In many instances, structured settlements still offer great value to plaintiffs when viable alternative protections such as trusts are unable to be secured due to expense. Plaintiffs continue to gravitate to guarantees in order to protect their settlement funds.

The decline in rates and return has not gone unnoticed by the structured settlement industry. Instead of standing by and waiting for a reversion to the mean in interest rates, industry disruptors have set out once again to change the landscape of tax-free structured settlements. Products have emerged that allow plaintiffs and their attorneys to enter into a structured settlement and experience market related returns on their periodic payments while still offering spendthrift provisions. While the acceptance of such products has moved slowly to this point, it is the immediate future for an industry ravaged by easy monetary policy. COVID-19 digitized the world overnight, sparking the revolution of contactless purchases, deliveries, communications, and business dealings. Today we all suffer from "Zoom Fatigue" due to the abrupt change. Pandemics and unknown future financial crises that rely upon low interest rates will unleash the market based structured settlement revolution.

Structured Settlements will continue to be an important part of the settlement planning process for plaintiffs due to their protections and tax-free status. However, there is a high probability that they will look different. The future holds a better world for injury victims where options to mix and match established traditional fixed and market related return periodic payment vehicles will afford them continued protections, tax incentives, and growth. Structured Settlements R.I.P.? Not anytime soon…. ■

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No Expert, No Problem: To Reduce Future Damages To Present Value, Experts Need Not Apply

by Calder C. Mellino

Injured plaintiffs can recover compensation for the future costs of medical needs that result from their injuries. However, before a jury can include money in a verdict for future damages, the amount must be reduced to present value. Therefore, a question may arise in a case where future damages are sought as to whether testimony from an expert in economics is required. The answer under existing precedent of both the Supreme Court of Ohio and the Eighth District Court of Appeals is no.

The Supreme Court of Ohio held that expert testimony is not required for a plaintiff to recover future damages.[1] The Court specifically held that the reduction of future costs to present value is within the province of the jury.[2] Following this precedent, the Eighth District Court of Appeals ruled that expert testimony is not required to reduce a life care plan to present value.[3]

Moreover, valuation of future damages can and may *already* be calculated in "present value" and need not be reduced.[4] Proper reports, deposition preparation, and additional questions at deposition can preempt attacks on evidence of future damages.

Under Ohio law, "a plaintiff is entitled to an award of damages to compensate him for losses which he is reasonably certain to incur in the future."[5] These losses often take the form of costs for medical care and treatment, accommodations, nursing companions and respite care, equipment, medication, and therapy.

Expert testimony is required to show that the recommendations in the life care plan are medically necessary and that plaintiffs are reasonably certain to incur these costs in the future or, in other words, that they will need treatment and assistance.[6] Once a treating physician or other medical professional determines the future treatment an injured plaintiff is reasonably certain to need, another expert, such as a life care planner, can determine the costs of this treatment.

These costs must be reduced to "present value" and defendant is entitled to a jury instruction to that effect.[7] Critically though, the Supreme Court of Ohio held in *Sahrbacker v. Lucern Products, Inc.* that an expert is not required to help the jury calculate the present value of these costs.[8] Rather, "It is settled that reduction to present value lies within the province of the jury."[9]

Applying the precedent of *Sahrbacker*, the Eighth District Court of Appeals confirmed in *Daniels v. Northcoast Anesthesia Providers, Inc.* that the plaintiff "did not have to offer expert testimony reducing the life care plan to present value."[10] The argument that *Sahrbacker* does not apply to medical claims was specifically rejected in this decision written by Judge Melody Stewart, shortly before she joined the Supreme Court of Ohio.[11]

Attempts to exclude evidence of future damages when not reduced to present value by an economist often cite to *Reeder v. Suggs*.[12] This case did not

involve a life care plan.[13] Further, the Supreme Court of Ohio considered this unreported Third District case from 1982 in deciding *Sahrbacker* and determined it was not in conflict with the holdings therein.[14]

To preempt this argument nonetheless, a plaintiff's life care planner or similar expert should be careful not to account for economic matters such as interest, rate of return, or inflation when calculating the costs of future medical needs. Opposing counsel often recites a script of questions in their deposition of this expert to kindle a dispute, such as confirming that the expert is not an economist and did not calculate "present value" or otherwise reduce the future costs of medical care. Without these variables factored into their summations, there is nothing to "reduce" from the total amount of a life care plan or similar report.

The witness can therefore explain that no reduction is necessary because the calculations are already based on the present-day costs of care. If the witness is not provided the opportunity to properly explain this during opposing counsel's examination, plaintiffs' counsel should create a clean record at the end of the deposition with their own line of questioning to this effect. Additionally, an expert can preemptively include language in their report to this same end.

The law on this issue is clear; yet, defendants manage to confuse the issue. By providing a clear, consistent explanation and properly preparing experts for this attack, counsel for plaintiffs can ensure that injured victims have an opportunity to present the full amount of their future damages to the jury. ■

End Notes

1. *Sahrbacker v. Lucern Products, Inc.*, 52 Ohio St.3d 179, 556 N.E.2d 497 (1990).
2. *Id.* at 179, citing *Maus v. New York, Chicago, & St. Louis Rd. Co.*, 165 Ohio St.281, 135 N.E.2d 253 (1956).
3. *Daniels v. Northcoast Anesthesia Providers, Inc.*, 8th Dist. Cuyahoga No. 105125, 2018-Ohio-3562, 120 N.E.3d 52.
4. *Id.* at ¶ 54.
5. *Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 425, 1994-Ohio-64, 644 N.E.2d 298, citing *Pennsylvania Co. v. Files*, 65 Ohio St. 403, 407, 62 N.E. 1047 (1901); *Roberts v. Mut. Mfg. & Supply Co.*, 16 Ohio App.3d 324, 475 N.E.2d 797 (1984).
6. *Riedel v. Akron Gen. Health Sys.*, 8th Dist. Cuyahoga Nos. 104962 & 104968, 2018-Ohio-840, 97 N.E.3d 508, ¶ 31, citing *Marzullo v. J.D. Pavement Maintenance*, 8th Dist. Cuyahoga No. 96221, 2011-Ohio-6261, 975 N.E.2d 1("[E]xpert testimony is required to support future treatment, expenses, medical care, permanency of injuries, length of health impairment, and pain and suffering.").
7. *Galayda, supra*, at 425, citing *Maus, supra*, paragraph one of the syllabus.
8. *Sahrbacker*, at 179. *See, e.g. Chesapeake & Ohio No. Ry. Co. v. Adams*, 207 Ky. 668, 269 S.W. 1009 (1925); *Prince v. Kansas City So. Ry. Co.*, 360 Mo. 580, 229 S.W.2d 568 (1950); *Jacobsen v. Poland*, 163 Neb. 590, 80 N.W.2d 891 (1957); *Meier v. Bray*, 256 Ore. 613, 475 P.2d 587 (1970).
9. *Sahrbacker*, at 179, citing *Maus, supra*.
10. *Daniels*, at ¶ 57.
11. *Id.*
12. *Reeder v. Suggs*, 3d Dist. Allen No. 1-81-46, 1982 Ohio App. LEXIS 15782, 1982 WL 6822.
13. *Id.*
14. *Sahrbacker, supra.*

Announcements - Winter 2020-2021

Editor's Note: *In this new feature of the CATA News, we invite our members to share important milestones and achievements in their professional lives.*

Recent Promotions and New Associations

Ashlie Case Sletvold, Esq. has joined Peiffer Wolf Carr Kane & Conway, APLC as the managing partner of its Cleveland office. She has also been elected President of the William K. Thomas American Inn of Court for the 2020-21 and 2021-22 terms. The American Inns of Court are dedicated to upholding the rule of law and cultivating collegiality and excellence in the legal profession.

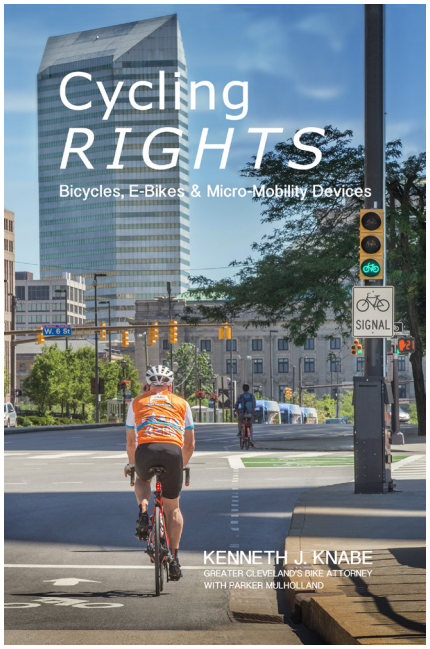
Michael Goodman, Esq. who is president of NFP Structured Settlements and managing partner of NDC Advisors (trust administration company) will be installed as President of the National Structured Settlements Trade Association (NSSTA) in May, 2021. NSSTA promotes the growth and preservation of structured settlements in order to provide long-term financial security to personal injury victims and their families. This will be the second time Michael has led the structured settlement industry in the past five years. Mr. Goodman is pleased to introduce personal financial expert, Emmy-award winner and author Suze Orman as a proponent of structured settlements as well as his keynote speaker at NSSTA's annual meeting where he will be installed as president.

www.nfpstructures.com or 800.229.2228.

Honors, Awards, and Appointments

Florence J. Murray, Esq. of Murray and Murray was voted into membership at ABOTA, the American Board of Trial Advocates. ABOTA is a National organization of experienced trial lawyers and judges dedicated to preserving the Seventh Amendment right to jury trial.

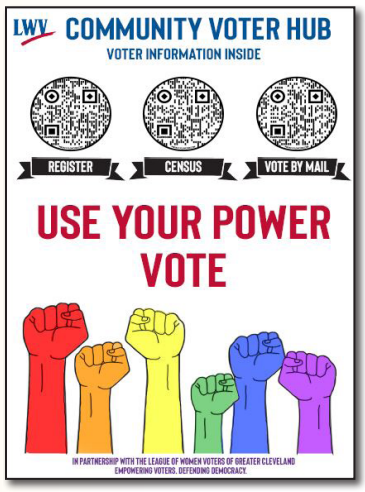
Publications



Ken Knabe of **Knabe Law Firm Co., LPA** has published a book titled **"Cycling Rights: Bicycles, E-Bikes & Micro-Mobility Devices."** This book helps Cleveland cyclists understand their rights and responsibilities. Ken provides legal and practical advice for cyclist safety, reviews Ohio cycling case law, and helps motorists better understand cyclist behavior as we all strive for calmer, safer roads where bikes, micro-mobility devices, pedestrians and motor vehicles share the road as co-equal users. All profits go to local bike organizations like Bike Cleveland, as well as local bike clubs and bike shops. You can pick up a copy of "Cycling Rights" at BikeCleveland.org/Shop. Also available on Amazon and Kindle.

Beyond The Practice: CATA Members In The Community

by Dana M. Paris



CATA - League of Women Voters of Greater Cleveland

The Cleveland Academy of Trial Attorneys recently partnered with the League of Women Voters of Greater Cleveland (LWVGC) whereby our organization made a financial contribution to assist the LWVGC in their mission to promote voter education and participation. The LWVGC is a nonpartisan political organization which encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. The donation was put towards the League's education fund which produced a comprehensive voter guide for the recent 2020 election covering all Cuyahoga County candidate races and was widely distributed throughout the County.

The mission of CATA and that of the LWVGC are directly aligned. We would encourage all of our CATA members to get involved with the LWVGC. There are several ways our members can get involved with the organization. To find out more about the various volunteer opportunities visit the LWVGC's website, https://my.lwv.org/ohio/greater-cleveland

CATA partners with the LWVGC

Joseph Darwal

Since 2015, **Joseph Darwal**, an attorney at **Obral, Silk & Pal**, has been a volunteer coach for the University of Akron School of Law's trial team. Due to the restrictions put into place because of COVID-19, his engagement with the program has been transformed into a virtual coaching experience. Meeting twice a week, Joseph mentors the students by helping them dissect the issues set forth in the tournament problem and to draft opening statements, cross examination, and closing arguments.

Joseph most enjoys rolling up his sleeves and preparing the students for the tournaments. During the weeks and months leading up to the various competitions, Joseph and his fellow coaches devote their week night evenings and weekends to the law students, helping them prepare for the tournament and hone their arguments.

As the tournaments approach, Joseph holds practice trials where he and his fellow coaches have the students try their cases against local attorneys who are generous enough to donate their time and expertise. The benefit of having local litigators demonstrate to the students the different litigation styles, thought processes, and overall command of the courtroom is invaluable. This also exposes the students to different areas of law that they may choose as their profession in the future as they have the opportunity to not only try cases against different attorneys, but receive feedback from them and discuss their careers.

The primary reason Joseph has chosen to devote so much of his time to coaching the trial team is because, as an alumni of the trial team, he empathizes with the students and wants them to derive the same benefit and gratification from the program that he did as a student. Additionally, he wants to keep the tradition of Akron Law's Trial Team strong as it is consistently a top 25 program in the nation. Finally, volunteering also helps to keep his own skills sharp, especially as the opportunity to try cases becomes a rare occurrence.

Calder Mellino

Calder Mellino of the **Mellino Law Firm** had the honor of co-chairing The West Side Catholic Center's Sips & Swigs Event this year. Fellow CATA member and member of The West Side Catholic Center's Associate Board, **Meghan Lewallen**, volunteered her time to the event as well. Usually a one-day beer festival, this year's pandemic-inspired event

Calder Mellino co-chairs the West Side Catholic Center's Sips & Swigs

offered a "to-go" beer festival that included packages of beer and cocktails from all over Ohio, pizza from Ohio City Pizzeria, an event t-shirt, and plenty of Ohio brewery swag. The event raised over $50,000.00 for the West Side Catholic Center, which provides hot meals, clothing, household goods, emergency services, advocacy, work force development training, and a family shelter and other housing solutions to those in need. Notable sponsors included fellow CATA firms, **Tittle & Perlmuter** and the **Knabe Law Firm**.

Florence Murray and Margaret Murray taking supplies to the Ohio Veterans Home

Murray & Murray

Murray & Murray Co., L.P.A. recently held a Day of Action to provide support to residents of the Ohio Veteran's Home who are in need of assistance with tasks we take for granted in our day-to-day lives. The technology the firm provided will help with tasks such as turning on/off the lights or television, answering the phone, playing music or even finding out the day's news or weather. Recipients received items that are voice-activated and/or simple touch for ease of use.

William Jacobson

Bill and Bobbi Jacobson as poll workers

William Jacobson of **Nurenberg, Paris, Heller and McCarthy**, along with his wife Bobbi, volunteered as poll workers in the 2020 general election. In Cuyahoga County, more than 4,500 people were needed on election day to help staff the polls, sanitize the voting booths after each use, transport ballots and materials, and maintain political balance. During the pandemic, one of the most important tasks was to protect the health and safety of the voters and poll workers. Bill and Bobbi were charged with setting up the polling location so that it was arranged in a manner that adheres to social distancing guidelines and sanitizing the voting booths, chairs, and other equipment inside the polling location. ■

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Pointers From The Bench:
An Interview With Judge Deborah M. Turner

By Christine M. LaSalvia

Judge Deborah Turner is a proud product of the City of Cleveland. She is a genuine Cleveland success story, who now works hard to give back to the people.

Judge Deborah M. Turner

She was born to parents that married young and divorced when she was five. She and her sister were raised by a hardworking mother with little education who owned a restaurant. Unfortunately, her mother ran into some legal trouble and was arrested. Fortunately, Stanley Tolliver, famed Cleveland attorney and activist, was a patron of the restaurant. He stepped in and represented Judge Turner's mother. Judge Turner recalls the day Stanley Tolliver took her and her sister to lunch and showed her a window. He told her that, if she looked up, she would see a hand between the bars. It was her mother waving. Mr. Tolliver assured her he was helping her and, if the system worked, her mother would be home soon. Her mother was released that Sunday and, from that moment forward, Judge Turner knew she wanted to be a lawyer so she could help people the way Mr. Tolliver helped her family.

Judge Turner attended Cleveland Municipal schools and was the first person in her family to graduate from high school. Even though it seemed financially impossible, she knew she would graduate from college. By day she worked difficult jobs, including as a hotel maid and stacking boxes at UPS. It took her seven years to earn her degree as she would need to leave school frequently for a quarter at a time to save up money for tuition. She eventually graduated with a degree in history.

Although she wanted to go to law school, at that point it did not seem possible, so she obtained her teaching degree and went to work as a social studies teacher in the Cleveland Heights School District. Judge Turner loved teaching. She spoke with great pride of her time in the classroom. Her teaching career was highly successful, and she participated in national programs with the Ohio Center for Law Related Education and the American Bar Association. She felt she had found her life's purpose in teaching.

In 1992, however, fate intervened when the Cleveland-Marshall College of Law offered to give ten teachers some legal education. This experience reawakened Judge Turner's desire to be a lawyer. But before she could start law school, she needed to make a plan. She knew she could not leave her job as she needed the income for her family, which included her four busy children who were all involved in sports and activities. At the time, her husband was employed with Ford and was scheduled to work during the day. Judge Turner wrote a letter to the Ford Motor Company, asking them to switch her husband's schedule so he could be available to help with the kids while she was at law school. Ford complied

and she started the busiest three and a half years of her life.

While maintaining her daytime teaching job, Judge Turner attended law school at night, then went home to take care of her children while simultaneously grading papers and maintaining her own studies. She slept about three hours a night. She speaks with great pride about how she did all this while still ensuring her children were able to participate in their activities. Each day she resolved just to put one foot in front of the other, knowing that, in life, it does not matter if the steps you take are baby steps; what matters is that you keep moving forward.

After Judge Turner completed law school, she continued to teach. In 1998, her friend, Judge Janet Burney, who became the first African American female judge in Juvenile Court, asked Judge Turner to come work with her. Thus began Judge Turner's career as a bailiff and magistrate. In her free time, she established her own family law practice. She had a great experience working with Judge Burney and, in 2005, while speaking at a career day, she met Judge Brian Melling who presided over Bedford Municipal Court. He asked if she was interested in working as an assigned counsel. She took the opportunity and worked for many years in Bedford Municipal Court. Eventually she spent some time as a Traffic & Small Claims Magistrate and ultimately was the prosecutor for Bedford Heights and Warrensville Heights.

In 2015, she decided to run for Judge in the Bedford Municipal Court. She and her husband worked incredibly hard during the campaign, walking the streets, knocking on doors, meeting and talking to the people. Although she was not successful in this campaign, her initial loss opened up a different opportunity. In 2018, she ran for one of the open seats on the Cuyahoga County Court of Common Pleas, and won.

Judge Turner considers herself blessed to be a part of the Cuyahoga County Common Pleas Court. She leads her courtroom with common sense and a strong belief in access to the courts and that people deserve to be heard. Meeting with people and hearing their stories is her favorite part of the job. Although the parties want to go to trial to tell their story, often there are good reasons why their case should not be tried. Judge Turner believes, however, they still deserve an audience with the Court and the chance to tell their story. People have layers, she says, and often you need to peel away the layers and have the patience to find the problem underneath.

Judge Turner acknowledges her job has changed during the pandemic. She misses in-person settlement conferences, but still works hard to communicate with lawyers in keeping with the COVID-19 restrictions. She has escorted lawyers to the Global Conference Center to see the set up to plan for civil trials and believes it is a good set up if a trial were to go forward. She credits her tremendous legal staff for their hard work, too, and speaks with her staff attorney and meets with him several times a week.

In terms of trial procedure, Judge Turner selects jurors using the "struck" method. She does not believe in limitations on voir dire or trial presentation, but does caution attorneys to move things along and keep jurors interested.

When asked how civil attorneys can do better, she said lawyers need to be prepared and know the details of their case. In the beginning, you can look at the big picture, but by the end you need to know the details and be able to objectively see the merits and problems with your case. If you are not familiar with the nut ands bolts of your case, you will not be able to effectively articulate your arguments.

Judge Turner is thankful for the opportunity to serve the community in which she has lived her life. Her goal is for people to leave her courtroom knowing she was fair and listened to both sides. She wants them to know that, even if they did not get what they wanted, they were validated as a person and educated as to the reasons for the resolution of their case. ■

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Moore and Goolsby: What's Changed In Ohio Supreme Court Precedent Addressing Civil Rule 3(A) and The Savings Statute?

By Brenda M. Johnson

On August 20, 2020, the Ohio Supreme Court issued its decision in *Moore v. Mount Carmel Health System*,[1] in which the Court examined the relationship between Ohio's savings statute, R.C. § 2305.19(A), and the provisions of Civil Rule 3(A), for purposes of determining whether a medical malpractice action had been "commenced" in a timely fashion for purposes of the applicable statute of limitations.

The upshot of the Court's ruling is this – in order to have the benefit of the savings statute, a plaintiff must file her complaint within the applicable statute of limitations, and then must either (a) obtain service on the defendant within the one year period provided in Civil Rule 3(A), or, (b) after having attempted to obtain service, dismiss the action without prejudice within that same one year period. There are no exceptions.

In getting to this conclusion, the Court placed strict limits on *Goolsby v. Anderson Concrete Corp.*,[2] an earlier opinion addressing the interplay between R.C. § 2305.19(A) and Civil Rule 3(A). In *Goolsby*, the Court held that filing instructions for service in an action where the one-year period for service set forth in Rule 3(A) had passed could serve as the equivalent of refiling the complaint for purposes of the savings statute. *Moore* now conclusively establishes this rule applies **only** in cases where instructions for service that are filed *outside* Rule 3(A)'s one-year period are filed *before* the statute of limitations has expired.[3]

Moore added one more caveat – now, where service has been attempted, but not perfected, a failure "otherwise than on the merits' must occur *before* the one-year period for service under Rule 3(A) has elapsed in order for the savings statute to apply. In other words, *Moore* now stands for the proposition that a Rule 41(A) dismissal of a case in which service has been attempted, but not perfected, must be made *before* the one-year for service provided in Rule 3(A) has expired, or the savings statute will not preserve the dismissed case.

Moore's Procedural History

Moore arose from a medical malpractice case involving allegations of negligence on the part of an anesthesiologist. The complaint was filed one day before the statute (which had been extended by 180 day letters) was about to expire, naming the anesthesiologist as a defendant, along with his practice group, as well as the hospital at which the care at issue was provided. The plaintiff, who originally filed *pro se*, requested service on all defendants, but effective service on the treating anesthesiologist was not completed within the year following the filing of the complaint.[4]

After the year for service had passed, all three defendants moved for summary judgment, arguing that the plaintiff's claim against the anesthesiologist was time-barred because the plaintiff had failed to serve him within the one year period set forth in Civ. R. 3(A).[5] Plaintiff responded by issuing instructions to the clerk for

personal service on the anesthesiologist, which was perfected on the physician at his home.[6]

The trial court granted summary judgment in favor of all three defendants based on plaintiff's failure to obtain service on the anesthesiologist defendant within the year required under Civil Rule 3(A).[7] The Tenth District reversed, based on *Goolsby*.[8] As will be discussed below, the Supreme Court found that the Tenth District's reliance on *Goolsby* was misplaced.

The Holding In *Goolsby*

Goolsby arose from an auto case in which the plaintiff filed her action within the statute of limitations, but instructed the clerk of courts not to attempt service of the complaint and summons at the time of filing.[9] Then, two days before the statute was due to expire, she instructed the clerk to serve the defendant, which occurred six days thereafter.[10] The plaintiff then dismissed her action with leave of court pursuant to Rule 41(A)(2), and refiled four days later.[11]

The defendant moved to dismiss the second suit, arguing that no action had been commenced in the first suit because service had not be made within a year of filing, as required under Rule 3(A).[12] The trial court agreed and dismissed the suit, but the Supreme Court held otherwise.

The Court acknowledged that a "purely technical" application of Rule 3(A), which defines commencement of an action as requiring service within a year of filing the complaint, "would result in a finding that Goolsby had not commenced her action . . ." on the facts presented.[13] At the same time, the Court noted that " [o]ne clear consequence" of Rule 3(A), "is that it is not necessary to obtain service upon a defendant within the limitations period . . ., " which means the rule allows a plaintiff to "file a complaint on the last day of the limitations period and have a full year beyond that date within which to obtain service."[14] The Court also noted the parties did not dispute "that, had Goolsby dismissed her complaint and again filed at the time instructions for service were given, the [first] action would have been commenced" for purposes of Rule 3(A).[15]

Based on this, the Court held that under the circumstances presented, "when service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to obtain service and commence an action under Civ. R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint."[16]

How *Moore* Limits *Goolsby*

The Court's core analysis in *Moore* is based on the language of Rule 3(A) and the savings statute, R.C. § 2305.19, and not on prior precedent. Yet, as discussed below, the Court used *Moore* as an opportunity to place strict limits on *Goolsby*, an opinion it currently disagrees with but was not ready to overrule.

The Court first looked to Rule 3(A), which, as the Court noted, provides that an action is "*commenced* by filing a complaint with the court, *if service is obtained within one year* from such filing . . ."[17] "The upshot" of this, according to the Court, "is that to comply with the statute of limitations, an action must be "commenced" within the limitations period," which under Rule 3(A) "occurs when the action is filed within the limitations period and service is obtained within one year of that filing."[18] The Court then noted that the savings statute applies to (a) "any action that is commenced or attempted to be commenced" in which (b) the plaintiff fails otherwise than on the merits.[19]

Construing the rule and the statute together, the Court held that the savings statute did not apply, as the Court determined that Moore's action did not fail otherwise than on the merits; instead, it failed because the statute of limitations had run, which in turn had occurred because service had not been made within the year provided in Rule 3(A).[20] The Court further found that Moore had not filed a "new action" when he instructed the clerk's office to serve the original complaint, as required by the savings statute.[21]

It was on this second point that the Court undertook to address *Goolsby*. As the Court first noted, the facts in *Goolsby* differed from those in *Moore*, given that the limitations period had not yet run when Goolsby filed her instructions for service.[22] Based on this, the Court held that the rule in *Goolsby* did not apply.[23] Even so, the Court took pains to address its disagreement with, and intention to limit the applicability of, *Goolsby* in future cases:

> We have little difficulty in concluding that the rule announced in [*Goolsby*] does not apply in this case. But that leaves us with the question of the continued viability of our holding in *Goolsby*. Had we simply applied the plain language of the statutory scheme in *Goolsby*, we would have reached a different conclusion. Our decision in that case, however, was driven by a interest in judicial economy and avoiding unnecessary procedural hurdles. As today's case demonstrates, however, some courts have extended *Goolsby* well beyond the facts of that case, and in so doing, have extended the statute of limitations beyond what was ordained by the legislature. To prevent any further confusion, we make clear today that *Goolsby* is

limited to the factual circumstance that motivated its holding. **Thus, the rule announced in *Goolsby* – that a new instruction to the clerk to serve a complaint that is made after Civ. R. 3(A)'s commencement period has expired may be treated as a dismissal and refiling for purposes of the savings statute– applies only when the statute of limitations has not yet expired.**[24]

Rule 41 Dismissal And The Savings Statute - A Trap for the Unwary

In addition to limiting *Goolsby*, *Moore* also rejected the argument that a failure to perfect service within the year operates as a failure otherwise than on the merits for purposes of the savings statute, if service was attempted within the year provided in Rule 3(A).[25]

As framed by the Court, the argument it rejected was this: An attempt was made to commence the action when the complaint and initial request for service was filed, and the claim failed "otherwise than on the merits" when the year for perfecting service under Rule 3(A) elapsed, thereby triggering an additional year under the savings statute in which to file a new action.[26] In response, the Court observed that it had applied the savings statute in *Thomas v. Freeman*,[27] a case where service was attempted, but not perfected (and thus the action had not been "commenced"), but noted that the dismissal in that case had occurred before the year for perfecting service had elapsed.[28]

More importantly, the Court held that plaintiff's interpretation of the savings statute would effectively grant plaintiffs an automatic extension of time in which to serve a defendant, adding up to a total of two years in order to "commence" an action by effecting service, in derogation of Rule 3(A):

> Moore's argument would essentially change Civ. R. 3(A)'s one-year commencement rule to a two-year commencement rule. We decline to adopt such a construction in the face of the explicit language of Civ. R. 3(A). The savings statute does not apply *automatically* to extend the one-year commencement requirement. It applies only when its terms are met: when an action is commenced or attempted to be commenced; when a judgment is reversed or an action fails otherwise than on the merits, that is when there is either a voluntary dismissal under Civ. R. 41(A) or an involuntary dismissal without prejudice under Civ. R. 41(B); and when the complaint is refiled within one year.[29]

In other words, under the Court's analysis, when the statute of limitations has run on an action in which a complaint has been timely filed, and service has been attempted but not perfected within the one-year period provided under Civ. R. 3(A), the savings statute will *only* apply if either the plaintiff or the court formally dismisses the action without prejudice *before* the one-year service period elapses. Thus, if service has not been perfected in such an instance, and the year will elapse before service can be made, a plaintiff's only choice is to dismiss her case and refile – there is no other option.

Conclusion

Under *Moore*, if the year for service under Rule 3(A) elapses and the statute of limitations has run, a failure to perfect service on a defendant within that year will operate as a failure on the merits *unless* the action is dismissed without prejudice *before* the year elapses. The current Court has made it clear that there are no exceptions, whether based on judicial economy, equitable principles, or any theories other than strict statutory interpretation. ■

End Notes

1. 2020-Ohio-4113 (*slip op.*).
2. 61 Ohio St.3d 549, 575 N.E.2d 801 (1991).
3. *Moore* at ¶ 26 ("[T]he rule announced in *Goolsby*– that a new instruction to the clerk to serve a complaint that is made after Civ. R. 3(A)'s commencement period has expired may be treated as a dismissal and refiling for purposes of the savings statute– applies only when the statute of limitations has not yet expired.").
4. *Moore* at ¶¶ 3-5. As is reflected in the underlying Tenth District opinion, as well as the Tenth District's opinion certifying a conflict to the Supreme Court, the clerk of courts initially was instructed to serve the anesthesiologist by certified mail at the hospital's address, and the docket reflected that service had been completed at that address. *See Moore v. Mount Carmel Health Sys., (Moore II)* 10th Dist. Franklin No. 2017APE-10-574, 2018-Ohio-4130, ¶ 9. The anesthesiologist, however, had retired from practice by the time the action was brought. *See Moore v. Mount Carmel Health Sys., (Moore I)* 10th Dist. Franklin No. 2017APE-10-754, 2018-Ohio-2831 at ¶¶ 3-12. This apparently did not become clear until the anesthesiologist (who had participated at all times in the action) was deposed, which did not occur until over a year after the action was filed. *Moore I* at ¶ 10.
5. *Moore* at ¶ 7.
6. *Moore* at ¶ 7.
7. *Moore* at ¶ 8.
8. *Moore I* at ¶¶ 50-92.
9. *Goolsby* at 549.
10. *Goolsby* at 549.
11. *Goolsby* at 550.
12. *Goolsby* at 550.
13. *Goolsby* at 550.
14. *Goolsby* at 550.
15. *Goolsby* at 551.
16. *Goolsby* at 551.
17. *Moore* at ¶ 15 (quoting Civ. R. 3(A); emphasis in original).
18. *Moore* at ¶ 16.
19. *Moore* at ¶ 17 (quoting R.C. § 2305.19(A)).
20. *Moore* at ¶ 19.
21. *Moore* at ¶ 19 ("[I]f the savings statute means what it says, it does not apply.")
22. *Moore* at ¶¶ 22, 25.
23. *Moore* at ¶ 26.
24. *Moore* at ¶ 26 (emphasis added).
25. *Moore* at ¶¶ 27-29.
26. *Moore* at ¶ 27.
27. 79 Ohio St.3d 221, 10997-Ohio-395, 680 N.E.2d 997.
28. *Moore* at ¶ 28.
29. *Moore* at ¶ 30 (emphasis in original).

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Clients Funding Themselves- At What Expense?

by Colin R. Ray

I. Introduction

As attorneys know, in many cases where a client is seriously injured and cannot work, or has large medical bills, cash flow to a family can be an immediate and serious economic threat. For families with health insurance on a tight budget, the burden can push them to a difficult tipping point; for families without health insurance or in other dire straits, the situation can become disastrous very quickly. While in the past, help from families or community organizations would be given quietly and perhaps even anonymously, the internet has profoundly changed such giving with the emergence of GoFundMe and other online fundraising platforms.

Although often done with the best of intentions, raising money publicly can have profound consequences for clients and litigants. This process raises issues for both personal injury plaintiffs and defendants in similar ways to other social media platforms. Below I will discuss some of those consequences, and will offer some practice considerations for managing yet another internet platform that did not exist ten years ago.

II. Discussion

a. What is GoFundMe?

GoFundMe is an online fundraising platform that allows its users to raise funds from others for a given purpose. According to its website, GoFundMe is the "best place to fundraise, whether you are an individual, group, or organization."[1] The website prompts users in need of funds to set a goal, tell a story, add media, share, and then manage donations. A drop-down menu bar available around the time of the writing of this article encourages users to choose types of fundraisers for individuals and suggests medical, emergency, memorial, nonprofit, and education as potential impetuses. Other possible fundraisers suggested by the company include animals, family, newlywed, competition, and even business. "Legal" does not appear to be an officially-listed topic, though a brief perusal of active fundraisers is likely to bring a site visitor to a fundraiser motivated in full or in part by an encounter with the legal system.

As with all human pursuits, GoFundMe's darker side has emerged in time.[2] It is immediately clear that many fundraisers are ostensibly attempting to fill some sort of gap in a social safety net. The most popular category, "medical," accounts for approximately one in three campaigns.[3] Campaigns related to heartbreaking cancer diagnoses–often in advanced stages and featuring photos of young people–abound.[4] A perhaps-unsettling number of campaigns appear dedicated to raising funds to battle pets' cancer diagnoses alongside these campaigns for humans with cancer. Some campaigns apparently go on for years, often supported with progress updates on injured people, financial updates, and photographs. While some campaigns go viral and reach their fundraising goals, the average campaign earns less than $2,000 from a small number of donors.[5]

"Medical" fundraisers are obviously not limited to cancer and genetic diseases–a great number of such campaigns are related to traumatic injury. There is no shortage of emotionally-crushing fundraisers for medical bills associated with car crashes, bike crashes, catastrophic sports injuries, shootings, and all other manner of sudden or violent injury.

Similarly, legal fundraisers appear on the site. These range from those that appear meritorious, on hot-button political issues, to those which appear to be just one side of some acrimonious interpersonal battle. Sometimes "legal" fundraisers overlap substantially or entirely with other fundraisers that would appear to be "medical" with regard to traumatic injuries.

What nearly all GoFundMe campaigns have in common is that they are spearheaded by someone who appears to care strongly about the beneficiary or beneficiaries of the campaign. Successful campaigns can be tied to a notorious or newsy cause, or they can be authored by a gifted marketer or writer. According to *The Atlantic*, viral campaigns often contain a Horatio

Alger element where a "downtrodden but deserving" individual is elevated by a "relatively well-off person." While this may be true of "feel-good" stories, it would appear that many campaigns relating to traumatic injury are initiated by a close friend or family member–one who sometimes might have a financial stake in the outcome of related litigation.

b. What Impact Might Online Fundraisers Have On Cases?

The biggest impact GoFundMe will likely have on cases is that most, if not all, of anything posted on the site will often be admissible hearsay that will be authenticated either as party admissions, business records, photos, or otherwise. That which is not admissible hearsay will likely be available for impeachment purposes on cross-examination. At its core, GoFundMe is an internet platform through which photos, statements, and comments are posted–in short, another social media platform. Since campaign organizers are often people closely connected to the injured party, they are also likely to be witnesses who would be able to testify about the impact of some trauma on the injured party's life.

Defamation liability is another serious consideration. While statements of opinion are typically protected speech, statements of fact about another person or entity, if untrue, could give rise to liability. Since many campaigns arise from trauma raising an emotional reaction, this is an important consideration.

Campaigns on GoFundMe raise serious liability issues. A curious number of campaigns, seeming to curry sympathy, refer nebulously with the indefinite article to incidents like "a wrong way driver," or "an accidental shooting," or "a bike crash." While many campaigns outright admit or claim negligence, and some refer to a tortfeasor, a larger number seem to leave the question of fault in some doubt. Each position of assignment of fault could accordingly lead to difficult questions down the road. In any case with even a small amount of comparative fault, an accusation of fault against a defendant could lead to a defense based around jumping to conclusions or failure to fully investigate. And in disputed-liability claims, a failure to assign fault to a defendant could lead to damaging admissions on cross-examination. On the other hand, in campaigns with a paucity of facts pertaining to fault, many cases would appear to be fundraising efforts on behalf of people who are at fault. Additionally, many cases that seem fairly straightforward to a layperson, such as traumatic injuries with a products-liability component, often lead to complicated multi-party litigation. An initial focus on one or the "wrong" party could lead to issues as litigation advances.

Campaigns also raise problematic damages issues. Many long-running campaigns provide updates on the beneficiary's condition; and, since "feel-good" campaigns seem to do better, updates on severe injuries often emphasize how the condition has improved. These range from the neurologically incremental (*e.g.*, "she is now attempting to speak,") to the permanency-destroying (announcing a full healing, often with great gratitude to donors).

c. A Brief Survey of Legal Issues.

A party attempting to exclude evidence of a GoFundMe campaign faces a difficult task, as the limited amount of caselaw on GoFundMe appears slanted toward admissibility. In a criminal case,[6] a defendant argued GoFundMe screenshots were inadmissible on four obvious bases: authentication, relevance, prejudice, and inadmissible hearsay. The campaign in question was designed to help the defendant raise money for her legal defense, but her posts detailed the facts leading to the charges against her.[7] The court admitted the evidence, rejecting each of the defendant's arguments. With regard to the authentication issue, the court found a witness's testimony that she took screenshots of the posts sufficient to authenticate them.[8] While somewhat sidestepping the probative value issue, the court found no abuse of discretion in admitting the posts as relevant.[9] As for the defendant's protest that the posts forced her testify when she elected not to, the court found that "[t]he Rules of Evidence... do not summarily preclude prior written statements of a party simply because that party has chosen not to testify."[10] The gravamen of the decision is clear: screenshots of GoFundMe posts authored by a party are most likely going to be admissible against that party.

Another concern raised by GoFundMe campaigns is whether the amounts raised on the plaintiff's behalf can be introduced into evidence by the defendant as a "collateral benefit." Under Ohio's collateral benefits statute, "the defendant may introduce into evidence any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person of property that is the subject of the claim" subject to exceptions related to subrogation.[11] Whether the proceeds of a GoFundMe campaign are "payable as a benefit to the plaintiff as a result of the damages that result from an injury... that is the subject of the claim" does not appear to have been tested yet by an Ohio court.

There is, however, a non-Ohio decision in which monies obtained through a GoFundMe campaign were held not relevant to the issue of compensatory damages as they could not be used to reduce the defendant's liability for damages. In *Stokes v. City of Visalia*,[12] a federal court in California considered issues surrounding a GoFundMe campaign started by a dog owner in response to her dogs being designated

as "vicious" by a city animal control official. The matter came before the court on motions to compel the plaintiff's deposition and access to her social media posts, and on plaintiff's motion for a protective order regarding the scope of the deposition. Initially, the court ordered that the social media posts within the plaintiff's control be produced as they were relevant and proportional to the needs of the case.[13]

With respect to the collateral source issue, the court concluded that the "benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages."[14] The court also held that the plaintiff need not produce information regarding the amount of money obtained from the GoFundMe drive, or the identity of the donors, as that information was visible on the campaign's page.[15]

The holding in *Stokes* may not help an Ohio plaintiff, as California still adheres to the common law collateral source rule[16] that has been superseded by statute in Ohio.[17] At the time of this writing, moreover, very little other case law exists regarding collateral source admissibility of GoFundMe or similar fundraisers.

d. Practice Considerations for GoFundMe Cases.

It is difficult to protect what one is not aware of. In most cases, it is prudent to keep very close track of your client's social media presence and of a GoFundMe in particular. Questions regarding social media must be considered and asked during intake. Larger firms might consider deputizing an employee to keep track of social media; solo practitioners should spend some time becoming proficient with all new forms of social media, including GoFundMe.

Spoliation concerns also exist whenever a GoFundMe exists. It is likely prudent not to publish statements at all, as discussed herein. Once a campaign exists, however, statements cannot be deleted or modified without creating serious spoliation issues, whether under the intentional tort of spoliation or under general discovery rules.

Just as it is prudent to research the tortfeasor's social media presence, it is a good idea to research whether *the defendant* has an identifiable fundraiser being run on their behalf. These can be tricky to uncover, as last names do not appear to be favored on the site. If a campaign to raise funds for a tortfeasor is located, it should be very carefully perused for material that could be useful in the litigation.

Once a case is in litigation, if a client does have a GoFundMe page, attorneys should consider a strategy to manage or protect it. The status of a known fundraiser should be considered, as many fizzle out short of goals, and others become quite successful. Since statements can be admissible either directly or on impeachment, a thorough investigation into all social media must be initiated. It may be prudent to bring these issues to the attention of the trial court through a motion *in limine*, on evidentiary or collateral-source grounds, or both, to guide future admissibility concerns and prevent jury contamination. Attorneys must be prepared for rapid objection or a motion for a mistrial or new trial, as needed. In short, GoFundMe should be treated like other social media issues. Further consideration should be given to each injured party's individual situation and to the tenor of the defense. Attorneys should consider whether the defense is focused on the injured party's greed, litigation history, or other motives not related to the primary issues in the case: the defendant's fault and the plaintiff's injuries.

Finally, given that GoFundMe law is in its infancy, it may be prudent to conduct additional research prior to trial to see whether any relevant developments have occurred.

III. Conclusion

Informal social safety nets, fundraisers, and cash payments for people who have fallen on hard times are as old as human culture. Just as socializing moved online in the social media era, so, too, have these fundraising systems of communities looking after others. And just as socializing dramatically changed with the exposure of the individual to the internet, so, too, have informal payments, with GoFundMe campaigns reaching vast amounts that would have seemed unlikely before the internet revolution. Attorneys must discuss with their clients and carefully consider the implications of a fundraising campaign when their clients or opposing parties have such fundraisers on their behalf. ■

End Notes

1. "How GoFundMe Works," http://www.gofundme.com/c/how-it-works (last accessed Sept. 28, 2020).
2. Monroe, Rachel, *When GoFundMe Gets Ugly*, The Atlantic, Nov. 2019.
3. *Id.*
4. *See, e.g.*, "Dinah 'has the' Powers," raising funds for a woman diagnosed with metastatic stage IV uterine cancer, https://www.gofundme.com/f/dinah-powers (last accessed Sept. 28, 2020); *see generally* gofundme.com.
5. Monroe, Rachel, *When GoFundMe Gets Ugly*, The Atlantic, Nov. 2019.
6. *State v. Croghan*, 9th Dist. Summit No. 29290, 2019-Ohio-3970, 133 N.E.3d 631.
7. *Id.* at ¶13.
8. *Id.* at ¶14.
9. *Id.*
10. *Id.*
11. R.C. 2315.20(A).
12. *Stokes v. City of Visalia*, E.D. Cal. No. 1:17-cv-01350-SAB, 2018 U.S. Dist. LEXIS 30732 *16-19, 2018 WL 1116548.
13. *Id.* at *16.
14. *Id.* at *17, citing *McLean v. Runyon*, 222 F.3d 1150, 1155-56 (9th Cir. 2000).
15. *Id.* at *17.
16. *Lund v. San Joaquin Valley R.R.*, 31 Cal. 4th 1, 10, 1 Cal Rptr.3d 412, 71 P.3d 770 (2003).
17. *See Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, ¶1, 928 N.E.2d 434.

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Practically Legal: Zoom Backgrounds Done Right

by William B. Eadie and Michael A. Hill

This far into the pandemic, you've probably been using Zoom a lot, for depositions, hearings, client meetings, and the like.

You've probably seen some interesting backgrounds, real and virtual.

If you are going to attend any meeting in which you need to appear professional, whether a formal proceeding or simple meeting, but have to appear from a location other than your office, a virtual background can save you significant time and trouble. But it can also leave you looking a little silly.

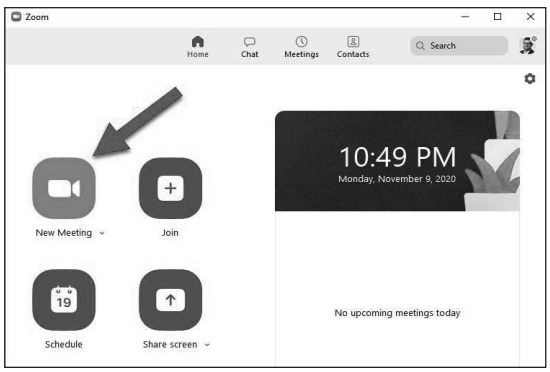
Here are some suggestions to keep things looking boss.

1. Start With A Great Image

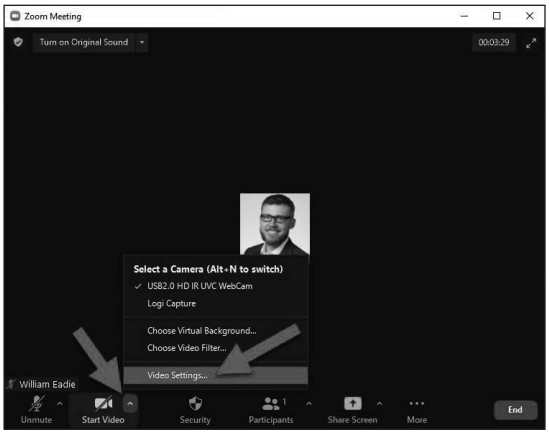
It is remarkably easy to get a great background by using an image of your ideal meeting space.

Take whatever you'd use at your office or home office, perfectly arranged and well lit, and snap a photo on your phone. Send it to yourself ("full size" if given a size option) on the device you use with Zoom, and save it somewhere easy to find (downloads folder, for example).

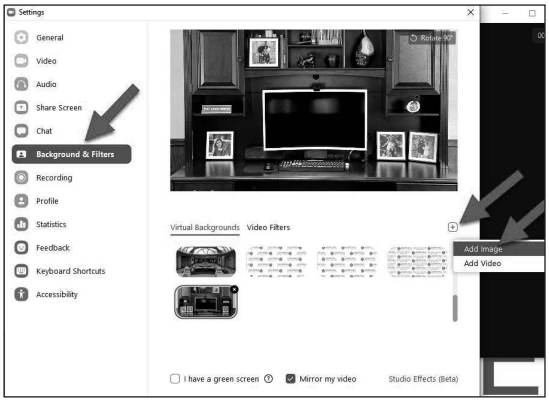
Open Zoom and click "New Meeting." (If you don't have Zoom on your computer, google "zoom download" and download it. Zoom is free and safe software.)



In the meeting, click the up-carrot over the "Start Video" icon to access Video Settings.



In the Settings screen, click Background & Filters, scroll down, and click the plus sign to select the image you just saved. Voila, instant professional background.



When you're shooting the image, take a few shots from different angles. Try to approximate the level of the webcam so it looks like a natural angle. Hold very still, or better yet, rest the camera on something solid to get a particularly crisp shot.

If you don't have an ideal space, or don't have the patience to set it up, Google "professional zoom backgrounds" and save a few of the best to a folder that's easy to find, like "downloads."

2. Be Well Lit So You Look Real On The Background

The easiest way to look like you're using a virtual background is to be poorly lit, or worse, backlit, during a meeting. You'll be hard to see, which looks all the more obviously fake against that great background you just made! Worse yet, you may drop out of the image altogether, as Zoom paints over you with the virtual background because it cannot clearly make you out against the real background.

The simple solution is to put a light somewhere close to where the camera is. You want to be front-lit. The kids today use "ring lights" that literally encircle the camera to get great lighting, but any lamp or window with good light will do. As close to straight-on as you can, which is a flattering look.

Now that you do not need to worry about what is behind you, finding a location with good lighting can be a lot easier, too.

3. Don't Worry About Mirrored Images

You likely have "mirror my image" selected in settings, which shows you a reversed image. This is the view you're used to seeing in the mirror, so it is easy on your brain as you gaze at your mug during meetings.

It will, however, reverse the virtual background on your screen, too. But never fear. Everyone else is seeing you normally, including your background!

4. Adjust The Camera Position

Depending on the angle of the photo and your webcam, adjust so it looks realistic. Don't be the weirdo floating over the desk.

5. Stop The Video If You Need To Walk Away

Zoom is trying to recognize you, and staying in the same position helps it do a great job and minimize dropping out. Try to stay relatively calm with your movements.

If you need to move away from the camera, just stop the video for a moment. The background will be there when you turn the video back on. Otherwise you'll walk through the background!

6. Wear Pants

This one is self-explanatory. ■

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 2021 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

Recent Ohio Appellate Decisions

by Kyle B. Melling and Brian W. Parker

Stiner v. Amazon.com, Inc., S.Ct. Slip Op. 2020-Ohio-4632 (Oct. 1, 2020).

Disposition: Summary judgment for Amazon affirmed. By merely posting product on its website, Amazon did not participate in the placing of a product in the stream of commerce, as that phrase is properly interpreted in R.C. § 2307.71. Thus, Amazon was not a "supplier" for product liability purposes.

Topics: Product Liability - "Supplier" Liability.

The plaintiff's decedent was an 18 year-old who tragically died after he ingested powdered caffeine. The decedent's friend had purchased the caffeine on the Amazon.com website, and the caffeine was posted and sold on the Amazon.com website by a company called Tenkoris. Tenkoris kept the caffeine in its own inventory, packaged it, and shipped it to the decedent's friend. For a fee, which was not paid in this case, Amazon would have stored the seller's product in an Amazon fulfillment center, and then would have packaged and shipped the product to the buyer.

The plaintiff sued Amazon and Tenkoris, as well as other entities, eventually dismissing all defendants, except Amazon. Amazon's motion for summary judgment was granted by the trial court, and affirmed by the Ninth District Court of Appeals, which ruled that Amazon was not a "supplier" under the Ohio Product Liability Act, R.C. § 2307.71, et seq. Thus, the sole question before the Ohio Supreme Court was whether Amazon could be held liable as a "supplier" under this Act.

Pursuant to R.C. § 2307.71(A)(15)(a)(i), a "supplier" includes "[a] person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or *otherwise participates in the placing of a product in the stream of commerce*." (Emphasis added). The plaintiff alleged that Amazon was a supplier because, through its website, it had participated in the placing of the caffeine powder in the stream of commerce.

The Ohio Supreme Court held that Amazon was not a supplier under the statute, reasoning that entities who "otherwise participate in the placing of a product in the stream of commerce" must be engaged in activity like that enumerated in the preceding statutory list. The items in this list all involve some act of control over a product exhibited by actions such as the selection, possession, maintenance, and operation of the product. Thus, because Amazon did not exercise this type of control over the caffeine powder, it could not be a supplier under the Act.

The Ohio Supreme Court further rejected the plaintiff's contention that public policy considerations favored holding Amazon liable as a supplier. The Court first noted that the Ohio legislature did not adopt the product liability public policy considerations set forth in 2 Restatement of the Law 2d, Torts, Section 402A, or in prior Ohio common law decisions.

The Court then stated that, even if those public policy considerations were relevant, they would not favor holding Amazon liable because Amazon did not have a relationship with the manufacturers of third-party products, and thus lacked control over product safety. In a concurrence, Justice Donnelly stated that Amazon is well positioned to monitor third-party sellers and their products, and to limit its e-commerce services to reputable third-party sellers that select safer products. However, Justice Donnelly agreed with the Court's analysis of the Ohio Product Liability statute.

Staples v. OhioHealth Corp., 10th Dist. Franklin No. 19AP-591, 2020-Ohio-4578 (Sept. 24, 2020).

Disposition: Judgment for hospital reversed and remanded. A nurse working at the hospital was an "employee" of the hospital despite the fact the nurse was technically employed by a staffing agency. The fact that the individual action against the nurse was time-barred did not affect the plaintiff's ability to bring his claim against the hospital. Thus, the holding of *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712 is limited to independent contractor physicians, and is not properly extended to nurses.

Topics: Medical malpractice; vicarious liability of hospital for negligence of independent contractor nurses; statute of limitations.

The plaintiff presented to the emergency department of defendant hospital with asthma problems where he was seen by, *inter alia*, a nurse who was technically an employee of a staffing agency, and not the defendant hospital. The nurse improperly injected the plaintiff with epinephrine intravenously, instead of intramuscularly, as ordered by the physician. The injured plaintiff sent a 180-day letter to the defendant hospital, but not the nurse. Within the 180-day time period, but after the

initial statute of limitations period had expired, plaintiff filed a complaint naming respondeat superior and agency-by-estoppel claims against the hospital and the nurse.

The defendant hospital moved for summary judgment which the trial court granted, dismissing plaintiff's complaint with prejudice. With respect to the respondeat superior claim, the trial court held that the hospital could not be liable for the non-employee nurse's negligence.

With respect to the agency-by-estoppel claim, the trial court held that the claims against the nurse were time-barred because there was no proof that the plaintiff had served the 180-day letter on the nurse, and the nurse was sued after the statute of limitations had expired. Further, the court held that this also time-barred the agency-by-estoppel claim against the hospital based upon its interpretation of *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712. In *Comer*, the Ohio Supreme Court had held that there can be no viable agency-by-estoppel claim against a hospital if the statute of limitations against an independent-contractor physician has expired.

Before the court of appeals, the plaintiff argued that the trial court had erred because *Comer* should be narrowly applied to only independent-contractor physicians, and not to independent-contractor nurses. The Tenth District agreed with the plaintiff's argument, and reversed the trial court's granting of summary judgment on behalf of the hospital. The court held that *Comer* related only to the negligence of an independent-contractor physician, not an independent-contractor nurse. Nurses, unlike physicians, are subject to the control and supervision of the hospital, and are required to follow hospital guidelines and protocols in carrying out their normal daily duties. The nurse in this case was controlled and supervised by the hospital, not the staffing agency, which neither dictated her tasks, nor the manner of completing those tasks, on a daily basis.

Thus, the court reasoned, in the hospital setting there is no distinction between the work performed by a hospital-employed nurse, and an agency-employed nurse. The Tenth District therefore concluded that the fact that the individual action against the nurse was time-barred did not affect the plaintiff's ability to bring his claim against the hospital. The court followed the outcome and reasoning of *Van Doros v. Marymount Hosp., Inc.*, 8th Dist. Cuyahoga No. 88106, 2007-Ohio-1140 in reaching its conclusion.

S.A.S. v. Wellington School, 10th Dist. Franklin No. 19AP305, 2020-Ohio-4478 (Sept. 17, 2020).

Disposition: Summary judgment for defendant is affirmed in part, reversed in part, and remanded.

Topics: Applicable statute of limitations for all claims arising out of childhood sexual abuse.

Plaintiff S.A.S., a former high school student, brought claims of gross sexual imposition, sexual imposition and attempt, invasion of privacy, and intentional infliction of emotional distress against her school, headmaster, and teacher, and negligent hiring, retention, and supervision against her former school. Defendant Wellington School asserted that only Plaintiffs' claims against her abuser, and not her claims against the school district or other defendants, were subject to the R.C. 2305.111(C) 12-year statute of limitations. The Tenth District held unequivocally that the plain language of R.C. 2305.111(C) provides that the 12-year statute of limitations applies not only to claims against an "actor" who committed the childhood sexual abuse, but also against other defendants, including related institutions, that are alleged to have violated a duty to the Plaintiff.

Buddenberg v. Weisdack, S.Ct. Slip Op. No. 2020-Ohio-3832 (July 29, 2020).

Disposition: Certified questions from federal district court answered in the negative. A crime victim need not show that a defendant was convicted of a crime in order to hold that defendant civilly liable for a criminal act.

Topics: Civil actions based upon commission of criminal act under R.C. § 2307.60 and § 2921.03.

The plaintiff brought a civil rights action in federal court against her former employer, her former supervisor, and others. Plaintiff's complaint included a claim for civil liability pursuant to R.C. § 2307.60 for the alleged violations of three criminal statutes, including R.C. § 2921.03, for intimidation. The relevant defendants moved to dismiss plaintiff's claims, contending that she failed to state a claim for relief because none of the defendants were convicted of the underlying criminal offenses.

The federal district court for the Northern District of Ohio denied the defendants' motion to dismiss, without prejudice, "finding no clear authority on whether a conviction is a condition precedent to civil liability pursuant to R.C. § 2307.60." The federal district court thus certified two questions to the Ohio Supreme Court. The first question asked: Does R.C. § 2307.60's creation of a civil cause of action for injuries based

on a "criminal act" require an underlying criminal conviction?

R.C. § 2307.60(A)(1) provides, in relevant part: "Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action...." The question for the Ohio Supreme Court was whether the legislature's use of the term "criminal act" required that a defendant be criminally convicted of an offense as a prerequisite for civil liability under this statute.

The Ohio Supreme Court answered the first certified question in the negative, holding that a criminal conviction was *not* required in order to bring such a civil action, noting "the word 'conviction' is noticeably absent from R.C. § 2307.60(A)(1)." The Court further reasoned that crimes can be, and often are, committed without a conviction. In this regard, a person's illegal conduct by itself in no way establishes that he or she will, in fact, even be prosecuted.

Additionally, the Court reasoned that the available rebuttable evidentiary presumption in R.C. § 2307.60(A)(2), based upon a defendant's criminal conviction, made no sense if a conviction were required for liability under R.C. § 2307.60(A)(1).

The second certified question asked whether a criminal conviction was a condition precedent for civil liability under a criminal intimidation statute, R.C. § 2921.03, which also expressly provided for civil liability. The Ohio Supreme Court likewise answered this question in the negative, holding that the statute, which required "the commission of the offense" by the defendant, did not require that the defendant had actually been convicted of the crime for civil liability to exist. The Court reasoned that, like with R.C. § 2307.60, the word "conviction" was absent from R.C. § 2921.03.

Albright v. Eagles Nest Outfitters, Inc., 10th Dist. Franklin No. 19AP-746, 2020-Ohio-3046 (May 21, 2020).

Disposition: Judgment denying political subdivision's motion for summary judgment affirmed on different grounds. School board waived the defenses of political subdivision immunity and recreational user immunity by not raising them in a proper Civ. R. 12(B) motion, or in an Answer, or Amended Answer. School board could not effectively raise these defenses for the first time in a summary judgment motion.

Topics: Governmental immunity; recreational user immunity; civil procedure.

Plaintiff, a high school student, was seriously injured on school grounds when the tree to which his hammock was tied, collapsed, and struck him in the back. Plaintiff filed an action against the Board of Education of the Dublin City School District ("Board"), and the manufacturer of the hammock. In its answer, the Board failed to include governmental immunity or recreational user immunity as affirmative defenses.

The Board subsequently filed a motion for summary judgment, asserting governmental immunity under R.C. § 2744.02, and recreational user immunity under R.C. § 1533.181. In response, plaintiff contended that the Board had waived these defenses, as the word "immunity" was not even used in the Board's answer.

The trial court denied the Board's motion for summary judgment, but did not address the plaintiff's argument that the Board had waived the immunity defenses. Instead, the trial court concluded that the Board was not entitled to governmental immunity because the choice to not remove potentially hazardous trees on the school grounds was a maintenance decision, not giving rise to immunity.

On appeal, the Board argued that the trial court had erred when it denied the Board governmental immunity, and when it failed to address the Board's claim for recreational user immunity. The Tenth District stated, however, that prior to undertaking a statutory immunity analysis, it first had to determine whether the Board had preserved immunity as an affirmative defense.

The appellate court found that both governmental immunity under R.C. § 2744, and recreational user immunity under R.C. § 1533.181 were affirmative defenses. The court stated that there are only three ways that a defendant can properly raise an affirmative defense: (1) by setting forth the defense in a Civ.R. 12(B) pre-answer motion; (2) by affirmatively setting forth the defense in a responsive pleading pursuant to Civ. R. 8(C); or (3) by amending one's responsive pleading pursuant to Civ. R. 15 to include such a defense.

The court rejected the Board's argument, citing *Jones v. MetroHealth Med. Ctr.*, 8th Dist. Cuyahoga No. 102916, 2017-Ohio-7329, 89 N.E.3d 633, that it was entitled to assert its political subdivision immunity affirmative defense up until a post-trial hearing. The Tenth District stated that *Jones* only recognized a political subdivision's right to a statutory offset in a post-trial hearing, not a right to a post-trial assertion of immunity in order to avoid liability.

The court cited Ohio Supreme Court and other appellate authority for the well-established proposition that the failure to timely raise statutory immunity as an affirmative defense constitutes a waiver of that defense. In addition, the court

cited Ohio Supreme Court precedent stating that the issue of immunity was to be resolved early in a case in order to conserve resources for all concerned.

The Tenth District thus concluded: "Because [the Board] waived its right to assert governmental or recreational immunity, we agree with the trial court's denial of [the Board's] motion for summary judgment, albeit on other grounds."

Johnson v. Stachel, 5th Dist. Stark No. 2019CA00123, 2020-Ohio-3015 (May 15, 2020), appeal accepted for review, 2020-Ohio-4232 (held for the decision in *Wilson v. Durrani*, 2019-1560).

Disposition: Judgment for plaintiff affirmed. Plaintiff's refiled medical malpractice action was not barred by the four-year statute of repose. Although the plaintiff refiled his complaint more than four years after the alleged medical negligence, his action was not time-barred because he refiled his action within one year of the stipulated dismissal in accordance with the savings statute. The trial court also properly refused to set-off the entirety of the plaintiff's settlement with a nursing home for nursing negligence from the recovery against the defendant physician.

Topics: Medical malpractice statute of repose; savings statute; set-off; damages cap.

The plaintiff, a resident of a nursing home, sustained a hip fracture in a fall at the facility on August 23, 2013. After the fall, the radiologist who read the x-ray incorrectly informed the defendant physician that there was no hip fracture. The defendant physician therefore diagnosed the plaintiff as having a soft tissue injury. Despite continuing pain by the plaintiff, and an inability to do weight-bearing activities, the defendant physician did not reassess the plaintiff. Eventually, after a November 2013 hospital admission, it was determined that the plaintiff had earlier sustained a hip fracture, and not a soft tissue injury.

On February 5, 2015, the plaintiff filed suit against the radiologist and his group, the nursing home, and the defendant doctor. The court's opinion does not mention a 180 day letter, or other reason why the filing was within the statute of limitations for a medical malpractice claim. However, the opinion does not discuss any problems with the plaintiff having met the statute of limitations requirements. The plaintiff settled his claims against the other defendants, leaving only his negligence claim against the defendant physician.

On October 18, 2016, prior to trial, the parties agreed to a stipulated dismissal pursuant to Civ. R. 41(A)(1)(b), and on October 17, 2017, plaintiff refiled his complaint. Thus, the plaintiff refiled his complaint more than four years after his fall at the nursing home, but within one year of the stipulated dismissal in accordance with the savings statute. The defendant physician filed a motion to dismiss the refiled complaint on the basis it was filed outside the four-year statute of repose period.

The trial court denied the motion to dismiss, finding that the savings statute applied and the refiled complaint related back to the original filing for purposes of application of the statute of repose. The case proceeded to trial, resulting in a jury verdict for the plaintiff in the amount of $636,000, with $98,000 for past economic damages, and $538,000 for non-economic damages. The defendant physician requested a set-off of $225,000 for the settlement with the other defendants. In response, the trial court entered a partial setoff for $134,257.85, consisting of the entire $112,500 settlement with the radiologist group, and $21,757.85 of the settlement with the nursing home, representing medical bills.

On appeal, the defendant physician raised several issues. First, he contended that the trial court erred in refusing to apply the statute of repose to bar the plaintiff's claims. The question presented was whether the savings statute, properly invoked, allows actions to survive beyond the expiration of the medical malpractice statute of repose.

Citing *Wilson v. Durrani*, 1st Dist. Hamilton No. C-180184, 2019-Ohio-3880, appeal accepted for review, 2020-Ohio-313, 138 N.E.3d 1152, the court of appeals noted that the two goals of the statute of repose are to eliminate indefinite potential liability and to give defendants greater certainty and predictability. The court stated that those two goals are not at odds with those of the savings statute. The savings statute is given a liberal construction to permit the decision of cases upon their merits, rather than technicalities. Moreover, because the savings statute only extends the statute of repose by one year at the most, the statute is consistent with the goal of eliminating indefinite potential liability. With respect to the second goal, a defendant's certainty and predictability are only affected where the defendant is unaware that the first action was filed.

On the facts before it, the court held that policy considerations weighed in favor of application of the savings statute to the plaintiff's complaint. The court reasoned that not only was the defendant physician aware of the complaint within the four year statute of repose, he had participated in discovery, prepared for trial, and affirmatively agreed to allow the plaintiff to refile his complaint within one year pursuant to the savings

statute. Thus, the court held that the trial court properly denied the defendant physician's motion to dismiss.

The court of appeals also addressed several set-off, damages cap, and evidentiary issues. For example, the court held that the trial court properly refused to set-off the entirety of the plaintiff's settlement with the nursing home because claims against the nursing home were claims of nursing negligence, while the claims against the defendant physician were for medical negligence. The court further held that the trial court correctly set-off the entire settlement with the radiologist and his group as the two entities were concurrently negligent, there being no break in causation between the negligence of the radiologist and the defendant physician. In addition, the court held that the trial court properly applied the damages caps with respect to permanent and substantial physical deformity, and the computation of noneconomic damages.

The Ohio Supreme Court has accepted review of this decision, and is expressly holding it pending its resolution of the appeal in *Wilson*, *supra*.

Bartlett v. Tan Pro Exp., LLC, 6th Dist. Lucas No. L-19-1113, 2020-Ohio-2760 (May 1, 2020).

Disposition: Reversing summary judgment in a slip and fall case.

Topics: Slip and Fall, Negligence.

Plaintiff was a business invitee at Defendant's tanning salon to get his first ever spray tan. Upon arriving at the salon, Plaintiff signed up for a spray tan and entered his information into the computer system. He was then taken by an employee back to the spray tan room and shown how to use the equipment. In the spray tan room, there was an enclosed spray tan booth centered on the back wall that the user would step into to receive their spray tan. On the floor outside of the booth was a rubber mat. The employee left and Plaintiff undressed, including taking off his shoes. While walking across the spray tan room toward the booth Plaintiff fell and fractured his femur. He claimed he slipped on some sort of oily, shiny fluid on the rubber mat.

Defendant required its employees to clean each tanning room throughout the day after customers used the room. Cleaning the room required the employee to wipe down the tanning equipment, and they had a duty to inspect the spray tan rooms and ensure that the floors were dry and that there were not fluids or oils on the floor. The employee testified that she was required to keep cleaning logs, but had disposed of the logs approximately three months after the incident. Defendant argued that they did not create or have notice of the dangerous condition that caused Plaintiff's fall, and did not owe Plaintiff a duty of care because he slipped on an open and obvious condition.

The trial court granted Defendant's motion for summary judgment based on the fact that the Plaintiff did not present evidence showing that Defendant caused the hazard, had knowledge of the hazard, or had constructive knowledge of the hazard.

The Sixth District overturned the decision of the trial court. The Sixth District found that a question of fact existed regarding whether the Defendant breached its duty to reasonably inspect the store and maintain it in a safe condition. The Court based its decision first on the fact that the store employee cleaned the mat after Plaintiff fell, prior to taking photographs of it. Therefore, any evidence that there was an oily substance on the mat had been wiped away. Second, the Court found that while Defendant had a policy requiring employees to clean each room after a customer used it, reasonable minds could reach different conclusions on what actually occurred the day of Plaintiff's fall. ■

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Brian W. Parker is an attorney at Nurenberg, Paris, Heller & McCarthy Co., LPA. He can be reached at 216.621.2300 or bparker@nphm.com.

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

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Verdict Spotlight

Since the Covid-19 pandemic began, we've all been wondering how civil jury trials will look during the pandemic, and how injury victims will fare in this environment. A recent plaintiffs' jury verdict of $325,436.98 obtained in federal court by attorneys Nomiki Tsarnas and Michael Maillis, of the KNR law firm, provides insight into a Covid-19 era trial and hope that, despite the difficult odds, injury victims can prevail.

Michael J. Maillis

Nomiki Perantinides Tsarnas

The case arose out of a two-vehicle crash in Ottawa County, Ohio on July 9, 2016. The client, Jerry Ickes, was driving his truck with attached trailer carrying a boat northbound on State Route 19 in Carroll Township. At the same time, Johnny Word, an employee of Fresh Donuts, LLC, delivering donuts in his employer's van, was traveling westbound on Duff Washa Road. Word failed to yield to a stop sign at the intersection of State Route 19. His vehicle entered Ickes' path causing Ickes' truck to collide with the driver's side of Word's van. Word died as a result of the crash, but Ickes and his passenger (who was not a party to this action) were seriously injured.

The case was filed in federal court in Toledo on diversity grounds. The plaintiffs were Jerry Ickes and his wife, Rose Ickes; the defendants were Johnny Word's estate and Fresh Donuts, LLC. As the defendants stipulated Word alone was at fault, the case was tried solely on damages.

Jerry Ickes suffered multiple orthopedic injuries in the crash. He suffered a comminuted wrist fracture requiring a surgery with implantation of screws and plates that were later removed, and that would likely need a future wrist fusion. He fractured his patella, which required no treatment, and had a hairline fracture in his ankle and a broken baby toe in his right foot that did require surgery. He also sustained a laceration that became infected and had to be debrided.

Nevertheless, his damages case presented challenges. At the time of the crash, Jerry, in his 60's, was suffering from severe pre-existing rheumatoid arthritis. The arthritis was so advanced that his hands were disfigured, and caused him to need six prior foot surgeries. The defense argued the arthritis would have necessitated a wrist fusion even without the accident. The experts, however, ultimately agreed the wrist fractures were caused by the accident, but that Jerry was more susceptible to these injuries due to his pre-existing arthritis.

Another difficulty arose from the fact that Jerry had been on SSDI for ten years, but was still working as a truck driver. SSDI allows one to earn up to $14,000 per year without losing benefits, provided one is not engaged in "substantial work activities." The defense tried to use this fact against Jerry, arguing that although his tax returns showed him not exceeding the $14,000 cap, his gross before deductions exceeded that amount.

The trial began on October 6, 2020 in the federal courthouse in Toledo, presided over by Judge Jack Zouhary. The judge required potential jurors to respond to a COVID questionnaire, and anyone expressing concerns about serving on the jury

was dismissed. Consequently, the court forbade the lawyers from questioning the venire in voir dire about their attitudes toward the pandemic. The jury that was ultimately seated consisted of ten men and two women. To the best of plaintiffs' counsel's recollection, none of the jurors had a college degree, and all but one of them hunted, fished, or camped for recreation.

The courtroom was arranged with six jurors seated in the jury box, and six in the spectators' area. No spectators were allowed. Counsel tables were turned to face the jury. Everyone had to wear a mask at all times, but when the judge, witnesses, or lawyers were speaking, the masks were lowered. There was plexiglass at the witness box and around the court reporter and bailiff. Hand sanitizer and masks were provided. The lawyers had to examine witnesses while standing or seated at the counsel tables. Exhibits had to be pre-loaded on the attorneys' laptops, but exhibiting them on the screen was controlled by the bailiff. The attorneys could use the podium during opening and closing arguments, but had to move it over to the counsel table. Temperatures were taken each time one entered or exited the building. The jury's deliberations occurred in a fourth floor courtroom, while plaintiffs' counsel used the jury room.

After a two day trial, the jury returned a total verdict of $325,436.98. They awarded Jerry Ickes $76,436.98 for his economic loss, $175,000.00 for his noneconomic loss, and $54,000.00 in future damages. Rose Ickes was awarded $20,000 for loss of consortium. The defense's last offer was $260,000; the plaintiffs' last demand was $340,000. A different federal judge mediated the case before trial and recommended settlement of $300,000, which the defense rejected. They said they would "never pay a dollar over $260,000" – although this stance changed after the verdict. The plaintiffs' motion for prejudgment interest is currently pending.

The judge, who spoke with the jurors afterwards, reported they liked the plaintiff and thought the defense was too hard on him. In closing argument, Mike Maillis explained Jerry's drive to keep working despite his rheumatoid arthritis by using the analogy of Kirk Gibson's game-winning home-run in game one of the 1988 World Series despite his sore left hamstring and injured right knee. Like Kirk, Mike argued, Jerry loved his job and shouldn't be penalized for pushing through the pain.

Trials in the time of the pandemic may be hard to come by and difficult to wage, but the verdict won by Nomiki and Mike proves they are not impossible even under challenging circumstances.

The case is *Jerry D. Ickes, et al. vs. Ronald Thomas, Personal Representative of the Estate of Johnny Jay Word, et al.*, N.D. Ohio, W.D. No. 3:18-cv-00918. ■

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 v. John Doe

Type of Case: Motor Vehicle Accident
Settlement: $1,250,000.00 (policy limits)
Plaintiff's Counsel: Dana M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5201
Defendant's Counsel: *
Court: Union County Court of Common Pleas, Judge Don W. Fraser
Date Of Settlement: October 23, 2020
Insurance Company: Allstate Insurance Company
Damages: Wrongful death

Summary: Plaintiff was rearended by the defendant causing significant property damage to both vehicles. Plaintiff had neurologic complaints following the collision, but all imaging studies failed to demonstrate a spinal cord injury. Several months later, plaintiff's neurological symptoms substantially progressed leading to several surgeries. Although defense acknowledged that some of plaintiff's injuries were caused by the collision, the case was primarily defended on the basis of exaggeration.

Plaintiff's Experts: Matthew Kortes, MD (Physical Medicine & Rehabilitation); Ryan L. Nelson, M.D. (Orthopedic); Ronald T. Smolarski (Vocational Rehabilitation, Life Care Planner, and Forensic Economist)
Defendant's Expert: James R. Couch, Jr., M.D. (Neurologist)

Jane Doe, et al. v. ABC Health System, et al.

Type of Case: Medical Negligence
Settlement: $3,450,000
Plaintiffs' Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100, and Dennis Mulvihill, Wright & Schulte, (216) 591-0133.
Defendants' Counsel: Confidential
Court: Confidential
Date Of Settlement: October 6, 2020
Insurance Company: Self Insured
Damages: Total paralysis of lower extremities, partial paralysis of upper extremities

Summary: The plaintiff, a 59-year old female, underwent an anterior cervical corpectomy and fusion at C4-5 on February 12, 2016. Pre-operative imaging demonstrated that the patient had severe ossification of the posterior longitudinal ligament (OPLL) which was causing the severe cervical cord compression. During removal of the OPLL the defendant neurosurgeon caused a massive dural tear and CSF leak. He used a Duragen graft patch and DuraSeal, a polyethylene Glycol gel, to repair the dural tear and CSF leak. The DuraSeal instructions for use stated that use of the product in confined bony structures was contraindicated because it expands up to 50%. In the post operative period the DuraSeal expanded causing severe cord compression and the resulting paralysis.

Plaintiffs' Experts: Nancy Epstein, M.D. (Neurosurgery); Gordon Sze, M.D. (Neuroradiology); Cam Parker, R.N. (Life Care Planning)
Defendants' Experts: Christopher Shaffrey, M.D. (Neurosurgery); Gaurang Shah, M.D. (Neuroradiology)

Mother of Baby Girl Doe v. ABC Hospital, et al.

Type of Case: Medical Negligence
Settlement: $600,000
Plaintiff's Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100
Defendants' Counsel: Confidential
Court: Confidential
Date Of Settlement: October 1, 2020
Insurance Company: Self Insured
Damages: Death of full term female baby

Summary: The mother had an uncomplicated pregnancy during which multiple obstetrical ultrasounds were performed which revealed placenta previa and vasa previa. These conditions were not recognized by three radiologists who read the studies. During labor an internal fetal scalp electrode (IFSE) was placed to monitor the fetus. During placement of the IFSE a fetal vessel was ruptured and the fetus exsanguinated before she could be delivered. The fetus was deceased at birth. Vasa previa and velamentous cord insertion were documented during the emergency C-section and in the pathology report.

Plaintiff's Expert: Carol Benson, M.D. (Radiology)
Defendants' Expert: None disclosed

Richard Holloman v. Mt. Hope Auction Co., et al.

Type of Case: Personal Injury
Settlement: $1,075,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue,

East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5257
Defendants' Counsel: Withheld
Court: U.S. District Court, Northern District of Ohio, Eastern Division
Date Of Settlement: October 2020
Insurance Company: Withheld
Damages: Skull fracture and cervical spine decompression

Summary: Plaintiff was on the premises of an auction house when an exterior light fixture fell and struck him on the head causing head and neck injuries, including a skull fracture and a posterior cervical spine decompression with resulting fusion. The case was brought under a theory of res ipsa loquitur. Plaintiff was a single, retired man, age 65.

Plaintiff's Experts: Anna Gaines, M.D.; Pamela Hanigosky, R.N.; Harvey Rosen, Ph.D.
Defendants' Expert: *

John Doe v. ABC Insurance Co.

Type of Case: Motor Vehicle Accident
Settlement: $980,000.00
Plaintiff's Counsel: David M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5206
Defendant's Counsel: *
Court: Cuyahoga County Court of Common Pleas, Judge Brian J. Corrigan
Date Of Settlement: September 2020
Insurance Company: Motorists Mutual
Damages: Left tibial plateau fracture, right subtalar joint fracture

Summary: Plaintiff was operating a tractor trailer northbound on I-77 when an underinsured motorist driving the wrong way struck him head on. The collision caused his truck to be pushed over the guardrail 40 feet to the ground.

Plaintiff's Experts: Kim Stearns, M.D.; Robert Ancell; John F. Burke, Jr; Donald Weinstein, Ph.D.
Defendant's Expert: John Feighan, M.D.

John Doe, Admn v. John Doe Trucking Company

Type of Case: Semitruck Crash
Settlement: $1.7 million
Plaintiff's Counsel: Andrew R. Young, Esq., Ellen M. McCarthy, Esq., D.J. Young, Esq., and Amy Papuga, Esq.
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: September 2020
Insurance Company: *
Damages: Death of 54-year old man, never married, no children or surviving parents. Survived by 3 adult sisters

Summary: Plaintiff's decedent, 54-years old, was traveling in a dump truck and heading eastbound on US 33 in Delphos, Ohio when a semi tractor trailer pulled away from a stop sign. The semi driver did not see the plaintiff's decedent prior to impact. The decedent struck the trailer's left rear tires causing his dump truck to become entangled with the defendant's trailer. The collision caused the semi to turn on its right side and both vehicles slid into the median. Decedent was trapped inside his cab for approximately one hour. Decedent sustained massive injuries, including multiple spinal, rib and pelvic fractures, bilateral pneumothoraces, spleen and liver lacerations. Decedent was alert throughout most of his hospitalization. He died after a torturous hospital course that included intubation, ultimately sedation, three laparotomies, and ARDS. His sisters decided to end ventilation after being told by the medical staff that 24 hour medical care would be needed to sustain life. Defendants claimed the decedent had a BAC above the legal limit, the brakes on his dump truck violated the FMCSA regulations, and that he had significant cirrhosis of the liver.

Plaintiff's Expert: Joshua Seney (Digital Forensic Examiner)
Defendant's Expert: Steve Belyus (Accident Reconstruction)

Jane Doe, Admn. and Jane Doe v. John Doe Trucking Company

Type of Case: Semitruck Crash
Settlement: $2.095 million
Plaintiffs' Counsel: Andrew R. Young, Esq., Ellen M. McCarthy, Esq., D.J. Young, Esq., and Amy Papuga, Esq.
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: August 2020
Insurance Company: *
Damages: Death of 71-year old man, injuries to 65-year old spouse

Summary: Multiple defendants were involved in transporting asphalt and other road building materials to a road construction project. One of the trucks carrying the asphalt became disabled due to a diesel engine problem, and pulled off the road. That driver was ordered to get back on the road and deliver the asphalt. While en route to the construction site, the truck began emitting white smoke (due to a blown diesel turbo), creating a smoke screen across the roadway. Another truck encountering the smoke, stopped in the roadway. Plaintiff and his wife, unable to see the stopped truck, ran into the rear of the truck. Plaintiff, age 71, died at the scene. His

wife, age 65, was severely injured including T-12 compression fracture, ORIF right sacroiliac joint, ORIF left ankle, pelvic fracture and skin grafting for surgical areas. Defendants argued that plaintiff's decedent violated the ACDA, drove while blind in one eye, and had a limited life expectancy due to other co-morbidities.

Plaintiffs' Experts: Steve Belyus (Accident Reconstruction); Michael Napier (Trucking Analysis); Aaron M. Fritz, D.O.; Nicholas Godby, M.D. (PM&R and Life Care Planner)
Defendant's Expert: None

John Doe, Admn v. John Doe Trucking Company

Type of Case: Semitruck Crash
Settlement: $2.5 million
Plaintiff's Counsel: Andrew R. Young, Esq., Ellen M. McCarthy, Esq., D.J. Young, Esq., and Amy Papuga, Esq.
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: August 2020
Insurance Company: *
Damages: Death of 18-year old

Summary: Plaintiff's decedent, 18-year old female and only child, was killed when a semitractor trailer lost control, went left of center on a two lane rural road and hit her vehicle, rolling on top of it, crushing her. Plaintiff's decedent had just graduated from high school and was to attend college in the fall. The defendant driver's dash cam showed him drifting into the right berm, off the roadway. He then overcorrected, causing him to lose control. Part of the settlement was paid in excess of the insurance policy. $30,000 of the settlement was designated for improving the company's equipment safety and $18,000 for a scholarship in the name of the decedent.

Plaintiff's Experts: James Crawford (Accident Reconstruction); Joshua Seney (Digital Forensic Examiner)

Defendant's Expert: None

John Doe v. ABC Defendants

Type of Case: Motor Vehicle Accident
Settlement: $953,500.00
Plaintiff's Counsel: Dana M. Paris, Esq. and David M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5201
Defendants' Counsel: *
Court: Cuyahoga County Court of Common Pleas, Judge Brian J. Corrigan
Date Of Settlement: July 2020
Insurance Company: Nationwide; Cincinnati
Damages: Wrongful death

Summary: Our client registered to participate in a bike race event located in Sandusky County. The race intended to raise funds for a local charity. During the race, our client was pedaling his bike westbound on a country road. He was approaching an intersection. Although he had a stop sign, he was waved into the intersection by a volunteer race marshal who failed to see and warn him of an approaching southbound car. Although the driver did not have a stop sign, there was a small sign posted near the intersection advising drivers of the bike race as well as the presence of the race marshal at the intersection. The driver denied that either was visible to him as he approached. The collision occurred in the middle of the intersection and our client was killed instantly.

There was limited insurance from the driver and the race marshal's homeowner's policy. The race director had no insurance. The plaintiff had underinsurance coverage.

Motions for summary judgment were filed. The issues raised included 1) The UM carrier could not be liable because the underinsured motorist had the right of way, was traveling in a lawful manner and had no time to react once our client appeared in the intersection; 2) Express assumption of the risk precluded recovery of a wrongful death claim because our client signed a waiver acknowledging that being hit by a motor vehicle was a risk in the race; 3) Primary assumption of the risk precluded recovery because being hit by a motor vehicle in a bike race on a rural county road was an inherent risk of this recreational activity; 4) Implied assumption of the risk/comparative negligence precluded recovery because our client was hit after failing to stop at a stop sign; and 5) Apportionment of damages, pursuant to ORC 2307.22, must include the conduct of non-parties with limited or no insurance. The case resolved at private mediation.

Plaintiff's Experts: Henry Lipian (Accident Reconstruction); Bruce Dunn (Race Director); John F. Burke, Jr.

Defendants' Experts: Frederick Grieve (Accident Reconstruction); Alan Cote (Race Director)

John Doe v. Ron Roe

Type of Case: Negligent Discharge of Firearm
Settlement: $600,000
Plaintiff's Counsel: David M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 694-5206
Defendant's Counsel: *
Court: Geauga Court of Common Pleas, Judge Carolyn Paschke

Date Of Settlement: July 2020
Insurance Company: Ohio Mutual Ins. Co.
Damages: Fractured jaw; missing teeth; Horner syndrome

Summary: The plaintiff, age 20, was staying with a friend (the defendant), age 17, who lived in his grandfather's home. While in the basement, the defendant took hold of the 9 mm semi automatic pistol causing it to discharge directly into plaintiff's face. The carrier filed a dec action alleging that plaintiff was a "resident" of the household and in the "care and custody" of the policyholder and, as such, coverage was excluded. In addition, defendant claimed that unbeknownst to him, the plaintiff played with the gun and left a round in the chamber which contributed to his own injuries. The court granted plaintiff's motion for summary judgment on the issue of coverage and the case resolved in private mediation.

Plaintiff's Experts: Brad Hylan, DDS; Donald Mann, M.D.
Defendant's Expert: *

Galjan v. Young

Type of Case: Motor Vehicle Accident
Settlement: $147,000
Plaintiff's Counsel: Joe Joseph, Jr., Law Offices of Joseph T. Joseph Jr., LLC, (216) 522-1600
Defendant's Counsel: Rick DiLisi (tortfeasor Young); Holly Facer (UIM Carrier/Geico)
Court: Lorain County Common Pleas Court
Date Of Settlement: May 22, 2020
Insurance Company: Nationwide (tortfeasor); Geico (U-carrier)
Damages: Aggravation of underlying cervical spondylosis & stenosis requiring C4-5 and a C5-6 discectomy with interbody fusion and anterior plate fixation. Total medical specials were $82,605 with a Robinson number of $32,085.22.

Summary: Plaintiff, a 68 year old female, was struck from behind in an automobile accident and pushed off the side of the road. There was close to $10,000 in property damage.

Emergency vehicles arrived on scene and Plaintiff was taken to the hospital where injuries were assessed. Plaintiff suffered persistent pain in the neck/back region. Numerous avenues were explored to try and alleviate the pain and suffering, but there was no significant improvement with conservative treatment.

Over a year and a half after the accident, Plaintiff was seen by a spinal surgeon who recommended and performed surgical intervention. The client received a C4-5 and a C5-6 discectomy with interbody fusion and anterior plate fixation. Post surgery, plaintiff reported to feel mostly better but did have minor residual complaints.

Tortfeasor's carrier offered its limits of coverage of $25k which was advanced by Geico (the U-carrier). Case proceeded in litigation and settled prior to scheduled mediation with U-carrier.

Plaintiff's Expert: Robert J. Berkowitz, M.D.
Defendant's Expert: Raymond Horwood, M.D.

Doe Family v. OB Providers

Type of Case: Birth Injury
Settlement: $4 million
Plaintiff's Counsel: Pamela Pantages, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, (216) 694-5205
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: January 2020
Insurance Company: Confidential
Damages: Cerebral palsy, microcephaly, developmental delay, visual problems, speech & language delay, seizures & feeding issues

Summary: Plaintiff, a young, first-time mother with an uncomplicated prenatal course, underwent augmentation of labor at term. On admission, fetal heart monitoring was reactive and reassuring, and examination was consistent with active labor. Membranes were artificially ruptured with meconium-stained fluid. Pitocin was started but turned off 1½ hours later due to fetal intolerance of labor. Defendant OB #1 arrived at the hospital 1 hour later and ordered Pitocin restarted. Eight hours after admission, there was still no cervical change. Over the next 12 hours, the fetal heart pattern deteriorated into repetitive variables, prolonged decelerations, late decelerations, absent accelerations and minimal variability, while the providers continued to increase Pitocin. A night/day OB staff shift change occurred, and Defendant OB #2 assumed Plaintiff's care. Shortly thereafter, Plaintiff was instructed to push while the electronic fetal monitoring showed persistent fetal intolerance to labor. Defendant OB #2 arrived at the bedside 1½ hours later in time for crowning, and encountered a 20 to 30 minute delay to delivery. The baby was born with low Apgars, and required resuscitation and an extended NICU stay.

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

Baby Doe v. Healthcare Providers
Type of Case: Birth Injury
Settlement: $3.5 million
Plaintiff's Counsel: Pamela Pantages, Esq., Nurenberg, Paris,

Heller & McCarthy Co., LPA, (216) 694-5205
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: December 2019
Insurance Company: Confidential
Damages: Severe cognitive impairment, behavior problems, speech and language disorders, and focal epilepsy

Summary: Plaintiff, a first time mother with an uneventful full-term pregnancy, arrived at the hospital in the early morning hours after spontaneously rupturing her bag of waters. Under "continuity of care" training, a third-year family practice resident who followed Plaintiff's prenatal care arrived at the bedside a few hours later to manage her labor and delivery, under the supervision of a family practice attending and a "back-up" obstetrician. Initial hospital exam revealed Plaintiff was not yet in active labor. Fetal monitoring was reactive and reassuring. Pitocin was started around noon. Three hours later, Plaintiff was in active labor. Over the next few hours, Pitocin continued to run but with minimal cervical change. Early in the evening, the family practice resident notified the back-up OB about the lack of progress, but with no change in the plan of care. Later that evening, Plaintiff developed a fever and tachycardia. The family practice resident, family practice attending, and back-up OB were at the bedside, noting slow progress despite continuous Pitocin, and possible transverse position. They did not change their plan of care, despite electronic evidence of Pitocin-mediated uterine hyperstimulation. Rather, the providers allowed Plaintiff to labor for the next three hours with persistent uterine tachysystole, elevated uterine resting tone and absent uterine relaxation between contractions. Baby was ultimately delivered following a shoulder dystocia, with low Apgars, acidosis, scalp lacerations, and scalp and facial swelling. Seizures began at 12 hours of life and subsequent brain imaging showed significant injury, which required neonatal intensive care.

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

Valerie Leduc, Co-Exec, et al. v. Misty Blue Transport LTD, et al.

Type of Case: Semitruck Crash
Settlement: $3.5 million
Plaintiff's Counsel: Andrew R. Young, Esq., Ellen M. McCarthy, Esq., and D.J. Young, Esq.
Defendant's Counsel: Brett Bacon, Esq., Joseph Pappalardo, Esq. and Joe Golian, Esq. (on behalf of Plaintiff's Carrier)
Court: Cuyahoga County Common Pleas Court Case Nos. 17CV886214/17CV886181
Date Of Settlement: April 2019
Insurance Company: *
Damages: Death of 62-year old man, survived by 3 adult children

Summary: Plaintiff's decedent, a 62-year old man and a resident of Canada, collided with the rear end of another semi traveling ahead of him on southbound I-271. The other truck was slowing in an attempt to exit the express lanes by using the entrance ramp to the local lanes. The collision created a large fire. Due to the vehicle damage, plaintiff's decedent was unable to exit his cab. The Medical Examiner's Report indicated he died from smoke and soot inhalation. There were also claims between truck owners for the destruction of both trucks and trailers as well as the cargo. Those claims went to trial and the jury found in favor of the owner of the vehicle struck by the plaintiff's decedent.

Plaintiff's Experts: James Crawford (Accident Reconstructionist); David L. Dorrity (Certified Safety and Training Director); Joseph A. Felo, D.O. (Cuyahoga County Medical Examiner's Office)

Defendant's Experts: Michael K. Napier (Trucking Analysis); Sean Doyle, P.E.

John Doe v. John Doe Trucking Company

Type of Case: Semitruck Crash
Settlement: $2.4 million
Plaintiff's Counsel: Andrew R. Young, Esq., Ellen M. McCarthy, Esq., and D.J. Young, Esq.
Defendant's Counsel: Confidential
Court: Cuyahoga County Common Pleas Court
Date Of Settlement: March 2019
Insurance Company: *
Damages: Mild Traumatic Brain Injury, Orthopedic Injuries

Summary: Plaintiff, an investment banker in Cleveland on business, was unbelted in the backseat of an SUV driven by a co-worker when it was struck on the highway by a semi tractor trailer. The semi was traveling at an excessive rate of speed on ice and snow, lost control and jackknifed into the SUV. The evidence revealed that the truck driver was likely over his hours of service.

Plaintiff's Experts: Richard J. Boehme, M.D. (Neurologist); Azim Etemadi, M.D. (Psychiatry/Neurology); Stephen Honor, Ph.D. (Forensic Neuropsychiatry); Howard Rombom, M.D. (Behavioral Medicine); Matthew Grimm, M.D. (Interventional Pain Mgt.); Jaclyn Ghamar, Psy-D; Tarryn Moor, Psy-D; Edmond Provder (Vocational Rehab); Jeffrey Perry, D.O. (Orthopedics); Kim Stearns, M.D. (Orthopedics); Frank Carr (Executive Recruiter); Scott Green (ESI Consultant)

Defendant's Experts: Timothy Heron, M.D. (Neurologist); Michael Deveraux, M.D. (Neurologist); Scott Fero, M.D. (Neuroradiologist); William Bohl, M.D. (Orthopedics); Stephen Noffsinger, M.D. (Forensic Psychiatry); Galit Askenazi, Ph.D. (Neuropsychiatry); Howard Caston, Ph.D. (Vocational Rehab)

Kelsie Smith, Etc., et al. v. USA

Type of Case: Motorcycle
Settlement: $1 million
Plaintiffs' Counsel: Andrew R. Young, Esq., Ellen M. McCarthy, Esq., and D.J. Young, Esq.
Defendant's Counsel: US Attorneys Office, Louisville, KY
Court: U.S. District Court, Western District of Kentucky, Case No. 1:17-CV-85GNS
Date Of Settlement: March 2019
Insurance Company: *
Damages: Death

Summary: Decedent was traveling on his high performance motorcycle on a two lane rural road in Butler County, Kentucky. He encountered a US Postal vehicle delivering mail ahead of him. There was a dispute as to whether the postal vehicle was delivering mail and the USPS maintained that its driver was not delivering mail at that location. USPS claimed the decedent did not have a motorcycle permit, was inexperienced on this particular type of motorcycle as it was just purchased two weeks earlier, was not properly wearing his helmet and there was excessive treadwear on the rear tire. The postal vehicle suddenly executed a left turn from its stopped position as decedent's motorcycle was passing the USPS vehicle and struck the left side of the postal vehicle. Decedent died instantly.

Plaintiffs' Experts: James Crawford (Accident Reconstruction); Gilbert Mathis, Ph.D. (Economist); Harry B. Olotnick, Ph.D., J.D. (Forensic Toxicology)
Defendant's Expert: None

Estate of John Doe, deceased

Type of Case: Motor Vehicle Accident
Settlement: $4,000,000.00
Plaintiff's Counsel: Aaron P. Berg, Caravona & Berg, LLC, (216) 696-6500
Defendant's Counsel: Withheld
Court: *
Date Of Settlement: February 2018
Insurance Company: Withheld
Damages: Wrongful Death

Summary: 36-year old husband and father of 3 children was killed after being struck by a dump truck at a roadway construction site. Decedent was working at the site and was struck from behind by a dump truck owned and operated by another company on the project and suffered fatal injuries.

Plaintiff's Experts: Choya Hawn (Introtech Crash Reconstruction); Alex L. Constable, ASA (Economist)
Defendant's Expert: *
■

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

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3. Excellent character and integrity of the highest order.

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Professional Honors or Articles Written: _____

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

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