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Ladi Williams is a partner at Merriman Legal, LLC. He can be reached at 216.522.9000 or Ladi@merrimanlegal.com.

President's Message

by Ladi Williams

It would not be an exaggeration to say that 2021 has presented a constant state of flux in many of our lives as Trial Lawyers and as human beings. If it was not the re-emergence of COVID 19 throughout the country or unexpected hiring and workflow challenges that continue to upend life as we knew it, it was surely the on again-off again status of Cuyahoga County's jury trial system, or perhaps the recent passing of long-time Judges, Nancy R. McDonnell, Joseph Russo, and Larry Jones, Sr., within days of each other, that brought home the instability of the current times. Through it all, however, CATA has continued to stand strong as a valuable resource for its members.

CATA's continued excellent financial position throughout the pandemic has allowed us to further support our community during these uncertain times. Our organization has maintained a prominent **Bronze Sponsor** level with the Legal Aid Society of Cleveland, which, in turn, has enabled that organization to continue carrying out its noble mission of helping the least fortunate among us. Our ongoing "Right to Counsel" partnership with Legal Aid has achieved tremendous results since its inception, culminating in the receipt of a Community Impact Award from Dominion Energy.

CATA has also successfully implemented its "Attorney Roundtable" sessions, which have brought together members of our organization in smaller groups to discuss various topics stemming from cases they are working on. The group setting allows for presentations regarding legal topics of note to take place as well. These sessions are designed to provide value for our members by building upon the natural camaraderie we already engage in to share best practices and strategies in handling our respective cases. If you haven't already, please consider participating in the Attorney Roundtable sessions. Thanks to our Treasurer, Scott Kuboff, for spearheading and moderating these meetings.

With the return of in-person class instruction across our region, Past President and Board Member Ellen Hobbs Hirshman has been instrumental in restarting our collaboration with EndDD.org and local schools. The collaboration involves our members providing a short, thought-provoking presentation to high school students with slides prepared by EndDD.org to encourage them to stop texting while driving. Please reach out to Ellen to take part in this very important program.

We were even able to safely hold two well-attended and fun-filled social events for members at Topgolf and Nuevo Modern Mexican & Tequila Bar this year in conjunction with our **Platinum Sponsor**, Tom Stockett and Rimon Bebawi of CW Settlements.

CATA is also in the process of rolling out a full slate of top-notch CLEs for its members to take advantage of – so stay tuned as these programs are advertised via our member email listserve. We want to express our thanks and gratitude to all of our advertisers and sponsors, for remaining steadfast in their continued support of CATA, even despite hardships they may have faced in their own businesses.

CATA is truly a great organization made up of great people and I take much pride in leading it during this unique time. We are always open to your ideas about programs CATA should pursue and ways in which we can grow, so feel free to reach out and contribute to the organization. As always, keep doing what you're doing as we all strive together to improve conditions in our communities and society through our important work. ■

Editor's Note

As we finalize this issue of the ***CATA News***, we invite you to start thinking of articles to submit for the next 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

Colin R. Ray is an associate at McCarthy, Lebit, Crystal & Liffman. He can be reached at 216.696.1422 or crr@mccarthylebit.com

Johnson v. Abdullah: What Is An Abuse Of Discretion And Who Can Testify As A Medical Expert?

by Colin R. Ray

Since its creation, Ohio's Evidence Rule 601(B)(5) has created no shortage of issues for practitioners on both sides of medical negligence claims. Because doctors regularly change their status, retire, or change their practice, and medical negligence cases in litigation can take years especially after being dismissed and re-filed, there is little shortage of case law regarding who precisely meets the rule's requirements. In *Johnson v. Abdullah,*[1] the Supreme Court sought to clarify the "active clinical practice" standard governing who may testify as a standard-of-care expert in medical negligence cases. In so doing, the Court limited a notable case, with potentially important consequences for those retaining medical experts. The Court also addressed the abuse of discretion standard, making clear that, contrary to an oft-quoted phrasing of that standard, courts do not have discretion to misapply the law. But in doing so, the Court may have created more confusion than clarity.

Pursuant to Evid.R. 601(B)(5), to testify as an expert witness in a "medical claim," persons must be licensed to practice medicine and devote at least "one-half" of their professional time to the "active clinical practice" in their specialty or to its instruction in an accredited school. In *Johnson*, Defendant Abdullah called a doctor to testify as his expert regarding alleged medical negligence that occurred in 2011. By 2017, when the case was taken to trial, Abdullah's expert, Walls, had become the chief operating officer of a hospital system. Prior to 2015, Walls devoted the majority of his professional time to administrative matters; after 2015 that figure rose to 90%.[2] Abdullah's counsel asserted that 75% of Walls' time was "active clinical practice" of medicine because, even as an administrator, "everything that happens related to patient care in the hospital is his direct responsibility[.]"[3] Specifically, he was "responsible for all of the teaching and training programs in the hospital" and "all of the quality and safety related to patient care."[4] This included one hour per week to making hospital rounds and mentoring sessions that did not take up "a huge amount" of his time.[5] He was also responsible for hospital staffing and hospital technology for patient care. Walls also taught an hour-long class every three or four months.[6] The Court concluded, "[a]t best, Walls indirectly supervised doctors."[7]

At issue was whether such work complied with the active clinic practice requirement of Evid.R. 601. The Supreme Court discussed its previous definition of "active clinical practice," as "work that is so related or adjunctive to patient care as to be necessarily included in that definition for the purpose of determining fault or liability in a medical claim."[8] *McCrory* also added that "the purpose of the statute is to preclude testimony by the physician who earns his living or spends much of his time testifying against his fellows as a professional witness, and to prevent those whose lack of experiential background in the very field they seek to judge, the clinical practitioner, makes the validity of their opinions suspect, from expressing those opinions for pay or otherwise."[9] *McCrory* made clear that the term "active clinical practice" is not limited to doctors in contact with patients at the bedside, but also includes doctors whose work is indirectly involved in patient care, such as pathologists, radiologists, and hematologists.[10]

Subsequently, in *Celmer v. Rodgers*[11] the Court considered whether an expert who at one time complied with Evid.R. 601, but does not do so at the time of trial, could nevertheless testify. The Court concluded that exceptions could exist, and

trial courts had the discretion after continuances and a stay, to allow the testimony.[12]

Following *Celmer*, a practitioner whose expert witness met the "active clinical practice" standard when retained, but who, during the course of prolonged litigation, retired or otherwise ceased to meet the standard, at least had a plausible argument for continuing to use that expert.

In *Johnson*, however, the Court took a plainly legalistic and literalistic view of Evid.R. 601. First, the Court limited *Celmer* to its facts and stated that the test is whether the expert witness meets the Evid.R. 601 criteria *at the time of trial*.[13] The Court explicitly stated that it "decline[d] to consider Walls's activities prior to 2015."[14]

Second, the Court declined to extend *McCrory* to allow those performing "primarily executive work in an administrative role" to satisfy Evid.R. 601,[15] holding that "a physician employed in an executive position who does not directly oversee physicians engaged in treating patients does not satisfy the active-clinical-practice requirement of Evid.R. 601."[16]

The Court then engaged in a long discussion of the abuse of discretion standard. Abdullah had contended that, even if the trial court erred in admitting Walls' testimony, that decision did not constitute an "abuse of discretion" as it did not rise to the level of being "more than an error of law or judgment[.]" Rejecting this argument, the Court distinguished factual determinations from decisions of law, and clarified that while courts have "discretion to settle factual disputes," or "manage [their] dockets," they do not "have discretion to apply the law incorrectly." In other words, "courts lack the discretion to make errors of law, particularly when the trial court's decision goes against the plain language of a statute or rule."[17] (Although this statement might seem self-evident, the deeper question is this: when does a ruling on a question of fact constitute a pure question of law that removes the issue from the abuse of discretion standard? Therein lies the conundrum created by the *Johnson* decision.)

Near the end of the decision, the Court acknowledged the potential unfairness of its strict interpretation of the "active clinical practice" language when applied to physicians like Walls whose credentials "would seem to make [them] well qualified to testify in [the] case."[18] This, however, did not cause the Court to retreat from its strict reading of the rule because "[i]f Ohio's Rules of Evidence should allow doctors who work in positions such as Walls's to testify as experts in cases like this, then the rule must be amended through the proper rule-amendment process. We should not amend the rule by misinterpreting its plain language."[19]

The holding in *Johnson* may have consequences for practitioners in the medical malpractice field. First and foremost, much of the "wiggle room" provided by *Celmer* in allowing physicians who at one time *did* meet the requirements of Evid.R. 601 but who no longer do so at the time of trial, appears to be foreclosed. It will be difficult (if not impossible) to argue that a recently-retired physician who was and is amply familiar with the applicable standard of care at the time the malpractice occurred, but who retired prior to trial, is nevertheless competent under the rule. Second, it is abundantly clear that physicians in primarily administrative roles will now face a much more difficult time qualifying as experts under the Court's literal interpretation of the rule.

Finally, the Court's discussion of the abuse-of-discretion standard may have far-reaching implications. The difference between an appeal with an abuse-of-discretion standard of review instead of a pure *de novo* standard could be the difference between winning and losing. It is possible to imagine a scenario where a trial court, presented with a less-than-perfect voir dire of an expert witness regarding their qualifications, could be forced to resolve the factual issue without the benefit of a more lenient standard of review. It seems unlikely that *Johnson* will be the final case on this issue.

With *Johnson*, the Court appears to have clarified some of the Evid.R. 601 jurisprudence for practitioners in the field of medical claims. Whether all of the issues were clarified is a question that will surely be answered over the coming years and appeals. ■

End Notes

1. 2021-Ohio-3304.
2. *Id.* at ¶9.
3. *Id.* at ¶8 (brackets omitted).
4. *Id.* at ¶26.
5. *Id.* at ¶27.
6. *Id.* at ¶31.
7. *Id.* at ¶29.
8. *McCrory v. State*, 67 Ohio St.2d 99, 423 N.E.2d 156 (1981).
9. *Id.* at 103.
10. *Id.* at 104.
11. 114 Ohio St.3d 22, 2007-Ohio-3697, 871 N.E.2d 557 (plurality).
12. *Id.* at ¶27.
13. *Johnson* at ¶24.
14. *Id.*
15. *Id.* at ¶32.
16. *Id.*
17. *Id.* at ¶s 38, 39.
18. *Id.* at ¶40.
19. *Id.* at ¶40.

Brenda M. Johnson is an attorney at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.694.5255 or bjohnson@nphm.com.

A Survey Of The Case Law Addressing "Permanent And Substantial Physical Deformity"

by Brenda M. Johnson

In 2003, the General Assembly enacted R.C. § 2323.43, which imposes caps on noneconomic damages available in medical malpractice actions. In 2005, it enacted R.C. § 2315.18, which imposes similar caps on noneconomic damages available in tort actions in general as well. Section 2323.43(A)(2), which applies to medical malpractice cases, imposes a cap of $250,000 or three times the plaintiff's economic loss, whichever is greater, with a maximum of $350,000 for each plaintiff and $500,000 for each occurrence. R.C. § 2323.43(A)(2). Section 2315.18(B)(2) imposes the same cap on tort cases in general. R.C. § 2315.18(B)(2). Both statutes, however, provide an exception to the caps when the injured plaintiff has sustained either:

> (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; [or]
>
> (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities.[1]

In the event a plaintiff in a medical malpractice case can demonstrate the requisite type of injury, the noneconomic damage cap is lifted to $500,000 per person and $1,000,000 per occurrence.[2] In an ordinary tort claim, the cap disappears entirely.[3]

This article is focused on the case law to date that has addressed what can constitute a "permanent and substantial physical deformity" for purposes of defeating the $250,000 cap on noneconomic damages imposed by these statutes. The term is not defined in either statute. Until recently, most of this case law emanated from Ohio's federal district courts; however, in the past two years, Ohio's state courts of appeals have generated several opinions that take on the issue, and which provide significant guidance as to the type of injuries that can get this issue to a jury.

Influential Federal Case Law

Bransteter v. Moore,[4] a federal district court opinion issued in 2009, may be the first opinion addressing the level of injury that is sufficient to constitute a "permanent and substantial physical deformity" for purposes of Ohio's damage cap statutes. In that case, the plaintiff had sustained a perforated bowel, and had undergone several surgeries that had caused scarring.[5] Noting there was "no legislative history or Ohio case law available to assist in answering" the question of whether the scar was a "permanent and substantial physical deformity," the district court looked to federal case law interpreting a similar West Virginia statute, and held that the issue of whether the scars qualified under Ohio's statute was one for the jury to decide.[6]

Bransteter, being an early decision, is frequently discussed and cited by both state and federal courts.[7] Other federal court decisions, however, indicate that scarring alone may not be sufficient to create a jury question. In *Weldon v. Presley*,[8] for instance, the court held that reasonable minds could not conclude that a four centimeter surgical incision scar was a "severe disfigurement."[9] The

court also rejected the idea that internal changes caused by surgery – at least on the facts in that case – could constitute a "substantial physical deformity" for purposes of evading the caps.[10]

In reaching these conclusions, the *Weldon* court relied on an interpretation of the exceptions to Ohio's damage caps that, as will be discussed below, has been adopted by Ohio's state courts and is frequently cited by federal courts as well – namely, that "permanent and substantial physical deformity must be severe and objective."[11] However, while this formulation has been widely adopted, its application has not precluded more plaintiff-favorable outcomes than the specific holding in *Weldon* might have suggested.

In *Ohle v. DJO, Inc.*,[12] for instance, a case involving a defective pain pump in which the plaintiff alleged a permanent and substantial physical deformity based on the loss of shoulder cartilage, the replacement of her shoulder bone with a metal prosthetic, and several keloid scars, the district court let the issue go to the jury. In so doing, the district court described *Weldon* as a "narrow" holding, and rejected the proposition that internal modifications of the plaintiff's body or surgical scars could never be qualifying deformities.[13]

Likewise, in *Ross v. Home Depot USA Inc.*,[14] the district court held that distortions to the plaintiff's knee and shoulder, along with the surgical implantation of hardware, was sufficient to raise a jury question. A similar conclusion was reached in *Cawley v. Eastman Outdoors, Inc.*[15] a case in which the plaintiff, who was injured when an archery arrow shattered on release, underwent surgery to remove carbon fiber fragments that had penetrated his hand, and to repair damage to his ligaments and tendons. Relying on *Ohle*, the district court found a jury question as to whether the resulting scarring, along with "other external and internal deformities left as a result of the injury and subsequent surgeries" were sufficient to defeat the cap.[16] In *Swartz v. E.I. DuPont de Nemours & Co.*,[17] which was a chemical exposure case, the district court held that the removal of one third of a plaintiff's kidney, along with other major organ tissue and circulatory structures, and the presence of five external surgical scars, was sufficient to raise a jury question as well.[18] And more recently, in *Schmid v. Bui*,[19] Judge Benita Y. Pearson held that surgical scarring and the implantation of prosthetic joints can constitute a permanent and substantial physical deformity.

Ohio's Appellate Courts Weigh In

Though their opinions have come later, Ohio's appellate courts have not been silent with respect to what constitutes a permanent and substantial physical deformity under the damage cap statutes, and they have been amenable to arguments that scarring, as well as internal deformities and the implantation of hardware, can qualify.

In *White v. Bannerman*,[20] for instance, which was decided in 2009, the Fifth District affirmed a bench trial decision to award damages in excess of the caps where the plaintiff had severe scarring to her hands and face. And in *Torres v. Concrete Designs, Inc.*,[21] the Eighth District upheld a jury's determination that the threshold was met when the evidence showed that the plaintiff had sustained an open skull fracture, had undergone several surgeries, was blind in one eye, and that she had testified to scarring and to permanent physical changes to the bone structure of her face.[22] In so doing, the Eighth District found the district courts' analyses in *Bransteter* and *Ross* persuasive, while rejecting the defendants' reliance on *Weldon*.[23]

The Fifth District addressed the issue again in *Johnson v. Stachel*,[24] which involved a delayed diagnosis of a hip fracture. The delayed diagnosis precluded hip replacement as a treatment, which meant the plaintiff was required to undergo a complete removal of the hip joint with no replacement. Relying on *Bransteter*, which involved scarring, the defendant argued that an injury needed to be both profound and visible to defeat the caps. According to the defendant, the hip joint removal did not qualify because it wasn't visible, and because the plaintiff had already been wheelchair-bound before the injury.[25]

The trial court rejected this argument, and the Fifth District did so as well. Distinguishing *Bransteter* because it dealt solely with scarring, the Fifth District quoted the trial court's journal entry with approval:

> Plaintiff presented uncontested evidence that he suffers from permanent shortening of one leg and also that his hip joint was surgically removed due to Defendant's delayed diagnosis of his hip fracture. Such evidence is sufficient to constitute a permanent and substantial physical deformity. The Court is unpersuaded by Defendant's analogies to cases that hold scarring must be visibly severe in order to qualify as a "substantial physical deformity." Plaintiff's injury is not merely aesthetic or superficial — it is a structural change to his skeletal system. The complete removal of a joint is not insubstantial merely because it is not visible to the human eye.[26]

In *Fairrow v. OhioHealth Corp.*,[27] a medical malpractice case, the Tenth District upheld a jury verdict finding the plaintiff had sustained permanent and substantial physical deformities for purposes of R.C. § 2323.43(A)(3)(a) in a case where the

plaintiff sustained injuries to his penis due to a failed catheter placement. The plaintiff had gone in for an appendectomy; however, placement of the Foley catheter was botched by the nursing staff. The resulting "false passages" caused damage to the plaintiff's penis that ultimately required multiple surgeries, including a urethroplasty.[28]

In rejecting the defendants' challenge to the jury verdict, the Tenth District noted that "permanent and substantial physical deformity" is not defined in the statute, but that "courts have considered 'any 'permanent and substantial physical deformity' must be 'severe and objective.'"[29] The Tenth District also noted that while it is the trial court's role to decide whether there is enough evidence to meet the basic evidentiary threshold, it is the jury's role to decide the issue at trial.[30] In *Fairrow*, the evidence showed that the plaintiff underwent 12 different procedures in an eight month period, was left with scars on his scrotum and abdomen, and, as a result of the urethroplasty, which involved the removal of 4.6 centimeters of his urethra, suffered a corresponding shortening of his penis – all of which the Tenth District observed was sufficient to satisfy the standard.[31]

Finally, in *Setters v. Durrani*,[32] the most recent Ohio appellate court decision addressing this exception to the caps, the First District upheld a verdict in another medical malpractice action in which the jury determined that the plaintiff had sustained permanent and substantial physical deformities as contemplated under R.C. § 2323.43(A)(3)(a). In that case, the plaintiff's injuries consisted of "an abnormal cervical posture, or a tilt in the right side of her neck; a reduction in her cervical range of motion; two moveable nodules in her neck; and surgical scars."[33]

On appeal, the First District first noted that the phrase "permanent and substantial physical deformity" was not defined by statute, but that "under the plain and ordinary meaning of the word, a 'deformity' is 'a physical blemish or distortion' or 'the state of being deformed,' deformed meaning 'unshapely in form' or 'misshapen.'"[34] The court then looked to *Johnson v. Stachel*, which it identified as the only other Ohio appellate court opinion addressing "permanent and substantial physical deformity" for purposes of R.C. § 2323.43(A)(3)(a), noting that the Fifth District had found that a structural change to the plaintiff's skeletal system qualified as such.[35] The First District panel also noted the various federal court opinions, discussed above, stating that a deformity must be "severe and objective" to qualify under the statute.[36] At the same time, the First District noted that in *Ross* and *Cawley*, also discussed above, federal courts found that "misshapen or distorted conditions, restricted use of body parts, and significant scarring" could satisfy the statutory requirement.[37]

In light of these opinions, the First District concluded that there was sufficient evidence for the issue to have gone to the jury:

> In this case, all of the treating doctors and experts agreed that Setters's spinal anatomy changed as a result of the surgeries. Much like the plaintiff in *Cawley*, Setters suffered a restricted range of motion in her neck. According to Greiner, Setters could only rotate her neck approximately 20 degrees in either direction (normal rotation being 45-75 degrees). Akbik further testified that Setters could not laterally rotate or bend her neck. Setters also suffered from a "misshapen" neck, similar to the plaintiff's knee and shoulder in *Ross*. Setters testified that her head began "fall[ing] to the side" approximately one month after surgery. According to Setters, "[i]t just gradually kept getting worse" until she could no longer keep her head up straight. Setters stated that she could "straighten [her neck] some," but "it won't stay." All of the treating doctors and experts agreed that Setters sustained an abnormal cervical posture, or side flexion of her neck, from the C1-C2 fusion. Thus, taking into consideration the dictionary definitions and applicable case law, we find there was sufficient evidence to submit the issue of "permanent and substantial physical deformity" to the jury. We accordingly hold that the trial court did not err in denying the motion for a directed verdict, the JNOV motion, and the motion for a new trial on the award of noneconomic damages.[38]

So What Does This Mean for *Your* Case?

Evaluating the likelihood of defeating damage caps based on a claim of "permanent and substantial physical deformity" is, by necessity, a very fact-specific endeavor. But based on the case law to date, a good argument can be made for getting the issue to a jury in cases where your clients have sustained serious visible scarring, or have undergone significant physical changes (including changes that may not necessarily be visible in a social setting). However, one thing is clear from the case law to date – compiling an evidentiary record documenting objectively verifiable alterations to your client's physiognomy is crucial to defeating any challenge as to the sufficiency of that evidence. ■

End Notes

1. *See* R.C. § 2323.43(A)(3); R.C. § 2315.18(B)(3).
2. *See* R.C. § 2323.43(A)(3).
3. *See* R.C. § 2315.18(B)(3).
4. No. 3:09 CV 2, 2009 U.S. Dist. LEXIS 6692, 2009 WL 152317 (N.D.

Ohio Jan. 21, 2009) (Zouhary, J.).

5. 2009 U.S. Dist. LEXIS 6692, *6.

6. *Id.* at *7, citing *Wilson v. United States*, 375 F. Supp.2d 467, 471 (E.D. Va. 2005).

7. Opinions discussing or referring to *Bransteter* include *Schmid v. Bui*, No. 5:19-CV-1663, 2020 U.S. Dist. LEXIS 249241, 2020 WL 8340144 (N.D. Ohio Sept. 16, 2020) (Pearson, J.); *Swartz v. E.I. du Pont de Nemours & Co.*, Nos. 2:13-md-2433, 2:18-cv-136, 2019 U.S. Dist. LEXIS 101760, 2019 WL 2515186 (S.D. Ohio June 18, 2019) (Sargus, J.); *Cawley v. Eastman Outdoors, Inc.*, No. 1:14-CV-00310, 2014 U.S. Dist. LEXIS 148194, 2014 WL 5325223 (N.D. Ohio Oct. 17, 2014) (Gwin, J.); *Ross v. Home Depot USA Inc.*, No. 2:12-cv-743, 2014 U.S. Dist. LEXIS 133507, 2014 WL 4748434 (S.D. Ohio Sept. 23, 2014) (Kemp, J.); *Sheffer v. Novartis Pharms. Corp.*, No. 3:12-cv-238, 2014 U.S. Dist. LEXIS 184614 (S.D. Ohio July 15, 2014) (Rice, J.); *Ohle v. DJO, Inc.*, No. 1:09-cv-02794, 2012 U.S. Dist. LEXIS 140020, 2012 WL 4505846 (N.D. Ohio Sept. 8, 2012) (Pearson, J.); *Fairrow v. OhioHealth Corp.*, 10th Dist. Franklin No. 19AP-828, 2020-Ohio-5595; *Johnson v. Stachel,* 5th Dist. Stark No. 2019CA00123, 2020-Ohio-3015; and *Torres v. Concrete Designs, Inc.*, 8th Dist. Nos. 105833, 106493, 2019-Ohio-1342.

8. No. 1:10 CV 1077, 2011 U.S. Dist. LEXIS 95248, 2011 WL 3749469 (N.D. Ohio Aug. 9, 2011) (Baughman, M), adopted by 2011 U.S. Dist. LEXIS 95247 (N.D. Ohio Aug. 25, 2011 (Wells, J.).

9. 2011 U.S. Dist. LEXIS 95248, *21.

10. *Id.* at *22.

11. In *Simpkins v. Grace Brethren Church of Del.*,149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, for instance, the Ohio Supreme Court cited *Weldon* for the proposition that these exceptions, in general, require "'extreme qualifications.'" *Id.* at *19-*20 (quoting *Weldon*). *Simpkins* did not directly address the issue presented in this article, but other courts have relied on *Weldon's* general formulation – i.e., that there must be something objective about the injury – in doing so. *See, e.g., Sheffer v. Novartis Pharms. Corp.*, No. 3:12-cv-238, 2014 U.S. Dist. LEXIS 184614 (S.D. Ohio July 15, 2014) (Rice, J.); *Fairrow v. OhioHealth Corp.,* 10th Dist. Franklin No. 19AP-828, 2020-Ohio-5595, ¶ 67; *Torres v. Concrete Designs, Inc.*, 8th Dist. Nos. 105833, 106493, 2019-Ohio-1342 at ¶ 78.

12. No. 1:09-cv-02794, 2012 U.S. Dist. LEXIS 140020, 2012 WL 4505846 (N.D. Ohio Sept. 8, 2012) (Pearson, J.).

13. *Ohle*, 2012 U.S. Dist. LEXIS 140020 at *11. In *Sheffer v. Novartis Pharms. Corp.*, No. 3:12-cv-238, 2014 U.S. Dist. LEXIS 184614 (S.D. Ohio July 15, 2014), however, the district court distinguished *Ohle* and relied on *Weldon* in holding that a plaintiff who suffered osteonecrosis in her jaw did not sustain a permanent and substantial physical deformity, as her jaw had been fused and she no longer had exposed bone in her mouth.

14. No. 2:12-cv-743, 2014 U.S. Dist. LEXIS 133507, 2014 WL 4748434 (S.D. Ohio Sept. 23, 2014) (Kemp, J.).

15. No. 1:14-CV-00310, 2014 U.S. Dist. LEXIS 148194, 2014 WL 5325223 (N.D. Ohio Oct. 17, 2014) (Gwin, J.).

16. *Cawley*, 2014 U.S. Dist. LEXIS 148194 at *19-*20.

17. Nos. 2:13-md-2433, 2:18-cv-136, 2019 U.S. Dist. LEXIS 101760, 2019 WL 2515186 (S.D. Ohio June 18, 2019) (Sargus, J.).

18. 2019 U.S. Dist. LEXIS 101760 at *107-*109.

19. No. 5:19-CV-1663, 2020 U.S. Dist. LEXIS 249241, 2020 WL 8340144 (N.D. Ohio Sept. 16, 2020) (Pearson, J.). *Schmid* is interesting from a procedural standpoint as well, as it is a case in which the plaintiff filed a motion for summary judgment as to whether the issue could go to the jury. This created a procedural anomaly – namely, a situation in which the moving party sought to establish the existence of a genuine issue of material fact – which meant the plaintiff could not simply rest on the pleadings but had the obligation to come forward with evidence. *Id.* at *3-*4 (discussing standard).

20. 5th Dist. Stark Nos. 2009CA00221, 2009CA00245, 2009CA00268, 2010-Ohio-4846.

21. 8th Dist. Nos. 105833, 106493, 2019-Ohio-1342.

22. *Id.* at ¶¶ 82-83.

23. *Torres* at ¶¶ 78-80.

24. 5th Dist. Stark No. 2019CA00123, 2020-Ohio-3015.

25. *Id.*at ¶ 75.

26. *Johnson* at ¶ 76.

27. 10th Dist. Franklin No. 19AP-828, 2020-Ohio-5595.

28. *Id.* at ¶ 7.

29. *Id.* at ¶ 67 (quoting *Torres* quoting *Sheffer v. Novartis Pharmaceuticals Corp.*, 2014 U.S. Dist. LEXIS 184614, quoting *Weldon v. Presley,* N.D. Ohio No. 1:10- CV 1077, 2011 U.S. Dist. LEXIS 95248 (Aug. 9, 2011)). The court also noted that in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6498, 880 N.E.2d 420, the Ohio Supreme Court observed the higher caps were reserved for "catastrophic" injuries. Id.

30. *Id.* at ¶ 68 (citing *Ohle v. DJO, Inc.*, N.D. Ohio No. 1:09-cv-02794, 2012 U.S. Dist. LEXIS 140020 (Sept. 28, 2012)). The Tenth District also noted that in *Arbino*, the Ohio Supreme Court also noted that the trial court should not impose its own factual determinations on what the award should be. *Fairrow* at ¶ 68.

31. *Id.* at ¶¶ 71-73.

32. 1st Dist. Hamilton No. C-190341, 2020-Ohio-6859, *discretionary appeal not allowed*, 162 Ohio St.3d 1439, 2021-Ohio-1399, 166 N.E.3d 1261.

33. 2020-Ohio-6589, ¶ 32.

34. *Id.* at ¶ 33 (citing *Merriam-Webster's Online Dictionary,* https://www.merriam-webster.com/dictionary/deformity and https://www.merriam-webster.com/dictionary/deformed (as accessed Dec. 1, 2020)).

35. *Setters* at ¶ 34.

36. *Id.* at ¶ 35 (citing *Sheffer v. Novartis Pharms. Corp.*, No. 3:12-cv-238, 2014 U.S. Dist. LEXIS 184614 (S.D. Ohio July 15, 2014) and *Weldon v. Presley*, No. 1:10 CV 1077, 2011 U.S. Dist. LEXIS 95248, 2011 WL 3749469 (N.D. Ohio Aug. 9, 2011).

37. *Id.* at ¶¶ 36-37.

38. *Id.* at ¶ 38.

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

Neutralizing The Issue Of Sympathy

by Meghan C. Lewallen

As civil trials resume amid the ongoing global pandemic the issue of sympathy remains an important issue to address during voir dire.

Striking the most sympathetic jurors has long been a defense bar strategy, particularly those likely to show sympathy towards the plaintiff. Pinpointing these individuals can easily be accomplished by the defense simply by requesting self-identification. For instance, requesting jurors to rate themselves as a "crier" on a scale of 1-5 (1 being no tears versus 5 uncontrollably sobbing to a Hallmark film). Once the most sympathetic jurors have been identified additional probing on the issue may push these individuals to the point where they satisfy the requirement to be removed "for cause" under Ohio Revised Code 2313.17. Namely, upon admission of the belief that he/she will be unable to set sympathy aside and follow the law as instructed by the Court or will otherwise be unable to be fair and impartial due to the same. [1]

To effectively manage this defense tactic, it is imperative that the plaintiffs' bar neutralize the issue of sympathy during Plaintiffs' opportunity to question the jury. It is particularly important to educate the jury as to their freedom to feel natural human emotions, such as sympathy and empathy, during the course of the trial and even to discuss such feelings during deliberations. Despite this, each individual must affirm that, when reaching their decision, they will only consider the facts and evidence presented and follow the law as instructed by the Court. [2] Jurors must understand they are not required to lose their sense of humanity but simply cannot let feelings of sympathy alone become a reason or a basis for their decision. Effectively communicating the difference is crucial.

Jurors must further understand this principle applies to feelings of sympathy that may arise toward the plaintiff *as well as toward the defense* – a point that can often be overlooked or unanticipated. If not adequately addressed during voir dire it is possible that jurors will have been conditioned to shield themselves from feeling any empathy or sympathy for the plaintiffs without the same mindset for the defense and their witnesses. This may manifest itself by way of jurors intentionally not looking at evidence or not listening to testimony presented by the plaintiffs for fear of feeling sympathetic, but not using the same caution during the defense's case.

In essence, jurors must appreciate they cannot find in favor of the plaintiffs simply because they feel bad about their injuries or loss in any given case. Likewise, they cannot find in favor of the defense solely because they find the defendant endearing and feel sorry there is a lawsuit against them.

Neutralizing the issue of sympathy will ultimately help level the playing field not only during voir dire but throughout the course of trial. ■

End Notes

1. R.C. 2313.17(9).
2. OJI-CV 301.01 §4; OJI-CV 317.03 §4.

Kathleen J. St. John is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.694.5246 or kstjohn@nphm.com.

The Trier Of Fact Can Disbelieve Uncontradicted Testimony

by Kathleen J. St. John

Recently, a hospital sought summary judgment as to its nurse-employee's negligence in failing to timely contact the on-call physician because the physician testified she would have done nothing different had the nurse contacted her earlier. Citing *Albain v. Flower Hospital*,[1] the hospital contended the doctor's testimony conclusively established the nurse's negligence was not a proximate cause of the plaintiff's injury. Although the case resolved before a ruling was made, the hospital's motion raises an interesting question. *Must a doctor who testifies she wouldn't have done anything different had she been called earlier be believed?*

More than one-hundred-fifty years of Ohio case law suggests the answer to this question is "no." To the extent *Albain* suggests otherwise, it can be distinguished on its facts.

I. *Albain* Revisited.

Albain was a birth injury/wrongful death action in which the plaintiffs alleged the infant's death was due to delay in diagnosing a placental abruption and in performing a caesarian section. The events leading to the infant's birth began when his mother, eight months pregnant, experienced vaginal bleeding. She was taken to Flower Hospital at 2:00 p.m., and admitted to the obstetrical unit. As her obstetrician did not have privileges there, the on-call obstetrician, Dr. Abbo, was called. The hospital's employee/nurse informed Dr. Abbo that the mother's vital signs, blood pressure, and CBCs, as well as the fetal heart tones and ultrasound results, were all normal, but failed to mention the mother's pad was saturated with bright red blood. Dr. Abbo, who was seeing patients in her office, told the nurse she would be in to evaluate the patient at 5:30 p.m., after her office hours were over. This call occurred at 3:50 p.m.; the nurse did not call Dr. Abbo again until 7:00 p.m, to tell her they'd been expecting her since 5:30 p.m.

When Dr. Abbo arrived, the decision was made to transfer the patient to Riverside Hospital, where the baby was delivered by caesarean section at 11:49 p.m. The infant suffered complications of neonatal asphyxia and died two months later.

In the ensuing lawsuit, the parents named, *inter alia*, Flower Hospital and Dr. Abbo. Summary judgment was granted to Flower Hospital, and an interlocutory appeal was taken. The most well-known aspect of this case is the plaintiffs' attempt to hold Flower Hospital liable for Dr. Abbo's alleged negligence on an agency-by-estoppel theory. Although the Supreme Court in *Albain* rejected that argument on the facts before it by narrowly construing that doctrine,[2] that aspect of the holding in *Albain* was overruled four years later in *Clark v. Southview Hosp. & Family Health Ctr.*[3]

The other aspect of the holding in *Albain*, which wasn't overruled, involved the hospital's liability for the nurse's negligence in failing to keep Dr. Abbo fully informed of the patient's condition. The hospital contended that even assuming the nurse breached this duty, the plaintiffs could not prove proximate cause because Dr. Abbo testified that even if she had gone to the hospital earlier,

she would not have done anything differently.

In affirming summary judgment for the hospital on this issue, the Court found Dr. Abbo's testimony crucial to the issue of proximate cause because the plaintiffs' expert testified the irreversible damage to the infant occurred between 4:00 and 5:00 p.m. Then, analyzing the evidence, the Court stated:

> Dr. Abbo testified that even if she had been informed of Sharon's bleeding at 3:50 p.m., she would not have arrived at the hospital until 5:30 p.m. as promised. Moreover, it is further instructive*** that even when Dr. Abbo arrived at the hospital and examined Sharon at 8:00 p.m., she did not believe that the child was in imminent danger or that a cesarean section was immediately required. In her deposition, Dr. Abbo testified that in her opinion Sharon was in stable condition when she was transferred to Riverside Hospital at approximately 8:45 p.m., and Dr. Abbo determined up through that time that a vaginal delivery was still to be contemplated.
>
> *** Based on the above testimony*** we hold that appellees failed to establish a genuine issue of material fact as to Flower Hospital's derivative liability for the alleged negligence of the nurses for failing to fully inform Dr. Abbo regarding Sharon's condition. The above testimony demonstrates that even if the nurses were so negligent, such negligence was not the proximate cause of the terrible loss suffered by appellees.[4]

The Court in *Albain* did not expressly hold that Dr. Abbo's testimony as to what she would have done had she been contacted earlier must be believed and was conclusive on that issue. That, however, is how the defense interpreted *Albain* in the summary judgment motion referenced at the outset of this article. But do the facts in *Albain* justify that interpretation?

A New Hampshire court, considering a similar issue, found *Albain* to be distinguishable from cases holding that a doctor's testimony as to what she would have done has to be believed.[5] The difference, the court stated, was that "[i]n *Albain*, there is no indication in the court's opinion that the plaintiffs had expert evidence showing the standard of care would have required the attending physician to come to the hospital and take action prior to the time the baby suffered injury."[6] Such testimony could have discredited the obstetrician's testimony, as it would have tended to suggest the obstetrician would have acted more quickly than she claimed she would have.[7]

Albain is also distinguishable since Dr. Abbo's subsequent conduct after she became aware of the patient's condition corroborates her testimony as to what she would have done had she been informed of it earlier.[8] But such corroborating testimony won't always be available. For instance, a physician who claims never to have been contacted will have no subsequent conduct to bolster her testimony as to what she would have done had she been called.

But assuming, *arguendo*, that *Albain* does support the proposition that a doctor's testimony as to what she would have done is conclusive on that issue, is that conclusion sound? Longstanding Ohio case law suggests it is not.

II. A Witness's Testimony Does Not Have To Be Believed, Even If Uncontradicted.

Ohio law has long held that the trier of fact is the sole judge of witness credibility. This is so even if the witness is not directly impeached or contradicted by other witnesses. As early as 1853, in *French v. Millard*,[9] the Ohio Supreme Court held:

> It is not true in law, that a witness must be credited, unless directly impeached, or contradicted by other witnesses; his manner, the improbability of his story, and his self-contradiction in several parts of his narrative, may justify the jury in wholly rejecting his testimony, though he be not attacked in his reputation, or contradicted by other witnesses.[10]

In 1919, this principle was applied in a personal injury action arising from a motor vehicle collision. In *Henderson v. Wertheimer*,[11] Wertheimer was injured when a vehicle driven by Henderson rear-ended his. Henderson's defense was that *his* vehicle "had been struck by one coming up behind him."[12] Both Henderson and his passenger testified that his vehicle had come to a full stop "and was catapulted by the automobile following it."[13] Wertheimer offered no witness "to contradict directly the statement about the automobile behind Henderson, nor was there any testimony offered attacking the reputation of defendant's witnesses."[14]

On appeal from a verdict for Wertheimer, Henderson argued, "the court can not rightfully reject uncontradicted and unimpeached testimony, and that therefore the statements of the two witnesses for defendant must be regarded as establishing a fact."[15] The First District Court of Appeals rejected this argument based on the above-quoted syllabus from *French v. Millard*.

Sixty years later, the same principle was reiterated in *Darcy v. Bender*,[16] another two car accident. The defendant driver died after the lawsuit was filed, thus precluding the plaintiff from testifying under the then-existing "Dead Man's

Statute." This left, as the only witness to the accident, the plaintiff's nine-year-old daughter, who was six at the time of the accident, and who was a passenger in the plaintiff's car. The daughter testified that her mother was driving on the right side of the road when the defendant's vehicle careened out of its lane to collide head-on with the plaintiff's vehicle. The trial court directed a verdict for the plaintiff based on the daughter's testimony, but the court of appeals reversed, stating:

> The fact that there was no evidence to contradict Tara's testimony does not establish the truthfulness of that testimony.*** Rather, her credibility is a question for the jury.[17]

The child's credibility was called into question based on the "juxtaposition of several factors," including "the witness' youth, her interest in the outcome, her status as sole witness to the negligence, and the crucial nature of that issue."[18]

Two decades later, the same principle was applied by the Tenth District Court of Appeals in *Pearce v. Fouad*.[19] In *Pearce*, a 16 month old girl was badly burned in a fire in her family's apartment. The fire was determined to have been caused by one of two fans, one of which was purchased at a Kmart store. Even though both fans were found in the vicinity of where the fire started, the plaintiff's mother testified that the fire had to have been caused by the Kmart fan because the other fan was inoperable. As Kmart presented no evidence to contradict the mother's testimony and did not challenge her credibility on this issue, the trial court directed a verdict for the plaintiff on Kmart's liability. The Court of Appeals reversed. It noted that although credibility issues typically arise when there is conflicting testimony on a question of fact,

> credibility concerns can also be present where the evidence supporting the party moving for a directed verdict appears to be uncontroverted. This will be the case where the resolution of a factual issue raised on a motion for a directed verdict turns on uncontroverted testimony, but the circumstances surrounding the testimony place the testifying witness' credibility in question.*** For example, uncontroverted testimony may be disbelieved where the witness has an interest in the litigation, the witness' story is improbable, or there are contradictions in the witness' testimony.*** In such cases, the credibility of the witness should be resolved by the trier of fact and not on a motion for a directed verdict.[20]

This principle was again reiterated in *Spero v. Avny*,[21] a commercial dispute in which the trial court directed a verdict for one of the parties on the amount of damages he claimed to be owed because his opponents "did not present any of their own evidence regarding his damages."[22] In reversing this aspect of the trial court's decision, the Ninth District Court of Appeals held:

> '[t]he fact that there is no evidence to contradict a witness'[s] testimony does not establish the truthfulness of that testimony.'*** Mr. DeAngelis's credibility remained 'a question for the jury.'*** Just because the Avnys did not attempt to impeach Mr. DeAngelis's testimony as to the amount of his damages and did not present any evidence on this issue does not mean that the jury had no choice but to accept his evidence as credible. The trial court, therefore, incorrectly directed a verdict as to the amount of Mr. DeAngelis's damages.[23]

In short, as repeatedly stated by Ohio courts, "the trier of fact is not bound to accept even uncontradicted testimony of a witness, but may consider his interest, the improbability of his story and the contradiction of parts of his story to reject his testimony."[24]

III. The Rule Regarding Witness Credibility Should Apply To Doctors Who Claim They Would Have Done Nothing Different Had They Been Called Earlier.

So how does the rule regarding witness credibility apply when a doctor testifies she would not have done anything different had she been summoned earlier by the hospital's nursing staff?

The answer appears self-evident. Doctors who testify are witnesses; thus, even if their testimony is uncontradicted, it does not have to be believed. Their testimony is subject to the same rules applicable to all witnesses: the jury may consider their interest, the improbability of their story, and contradiction of parts of their story to reject their testimony. As with all credibility determinations, motives matter. A doctor who testifies she would not have done anything different may be trying to protect herself, the hospital, or the nurses. She may be trying to justify what happened in a way that does not reflect badly on the medical profession. She may simply have a strong antipathy for medical negligence cases.

But a witness is a witness, and the same rules should apply to all.

That said, it is worth recalling the New Hampshire court's insight. Testimony from an expert to the effect that any reasonably qualified physician would have acted sooner had the nurses called her earlier can challenge the credibility of the physician's contrary claims. ■

End Notes

1. 50 Ohio St.3d 251, 553 N.E.2d 1038 (1990).
2. *Id.* at paragraph four of the syllabus.
3. 68 Ohio St.3d 435, 1994-Ohio-519, 628

N.E.2d 46 (1994), overruling paragraph four of the syllabus in *Albain.*

4. *Albain*, 50 Ohio St.3d at 265-266.
5. *Landry v. Murphy*, 2009 N.H. Super. LEXIS 91, at n.3.
6. *Id.*
7. *Id.* at *10, discussing dissenting opinion of Justice O'Mara Frossard in *Seef v. Ingalls Memorial Hosp.*, 311 Ill. App.3d 7, 724 N.E.2d 115 (1999).
8. Even if this corroborating evidence is of such force as to render the physician's testimony conclusive as to what she would have done, is that sufficient to destroy proximate cause with respect to the nurse's negligence? Under *Berdyck v. Shinde*, 66 Ohio St.3d 573, 1993-Ohio-183, 613 N.E.2d 1014, whether the physician's subsequent negligence is a superseding cause absolving the hospital of liability for its prior negligence typically presents a jury question.
9. 2 Ohio St. 44 (1853).
10. *Id.*, at the syllabus.
11. 12 Ohio App. 249 (1st Dist. 1919).
12. *Id.* at 250.
13. *Id.*
14. *Id.*
15. *Id.*
16. 68 Ohio App.2d 190, 428 N.E.2d 156 (9th Dist. 1980).
17. *Id.*, 68 Ohio App.2d at 191.
18. *Id.* at 192.
19. 146 Ohio App.3d 496, 2001-Ohio-3986, 766 N.E.2d 1057 (10th Dist. 2001).
20. *Id.* at ¶26.
21. 9th Dist. Summit No. 27272, 2015-Ohio-4671, 47 N.E.3d 508.
22. *Id.* at ¶18.
23. *Id.* at ¶19.
24. *Vlahos v. Pendergrass*, 10th Dist. Franklin No. 91AP-1319, 1992 Ohio App. LEXIS 2338, at *6, 1992 WL 97784, citing *French v. Millard*, *supra*, and *Henderson v. Wertheimer, supra*. See also, *Warren v. Simpson*, 11th Dist. Trumbull No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at *7-8, 2000 WL 286594; *Foster v. Wells-Sowell*, 8th Dist. Cuyahoga No. 103062, 2016-Ohio-4558, at ¶13; *Trimble v. Rossi*, 8th Dist. Cuyahoga No. 108683, 2020-Ohio-3801, at ¶50.

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

How Has The Practice Of Law Changed Since You Started Practicing?

Views From Several Generations Of CATA Members

by Christine M. LaSalvia

2021 has been year of transition in the world and in the practice of law. At the beginning of the year, I never would have guessed that I would still be scheduling depositions via Zoom and attending court hearings by phone at the end of the year. As the world re-emerges from its pandemic related cocoon, the staff at the CATA News wondered, how have things changed and how has the experience of learning how to represent a client changed? A lawyer who begins his or her practice today is launched into a legal landscape that bears little resemblance to that existing when I started my practice in 2003, and even less to that existing for lawyers who started their practices in the 70's or 80's. I spoke with several of CATA's finest to explore this issue.

James Lowe of Lowe, Scott, Fisher, is nationally recognized product liability attorney, known for his success on complex cases. Mr. Lowe started his practice in 1972. He has seen many changes in his close to 50 years as a trial attorney. One of the chief changes he has witnessed is the move from in person to electronic communications. He explained that when he started he spent his days at a much smaller Cuyahoga County Justice Center. The County had fewer Judges and the civil cases were handled in a centralized area. Lawyers would spend their days being physically present in the Court building. This would allow the attorneys and the Judges to have more personal relationships – conditions that facilitated some early resolutions. Mr. Lowe also believes that this close proximity allowed the parties to maintain mutual respect and congeniality.

Mr. Lowe indicated that every aspect of practice has changed with the advent of cell phones and computers. He appreciates the ability to handle even complex matters from his home office and cell phone. He noted that when he began his practice, discovery and motion practice were done by typewriter. The time-sensitive nature of preparing documents led to a culture where there was less paperwork being dumped on attorneys by opposing counsel. The advent of computers and technology has opened the door to more time-intensive paperwork and pleadings. This is specifically a difference that I had never considered while I was toiling away answering discovery requests.

Mr. Lowe misses the collegial nature of the past and believes that it helped create a culture of increased professionalism. Yet, when asked what he considers to be the most positive change, he spoke very proudly of his law firm and how impressed he is by the talent of his partners and associates. He was quick to tell me that the future of the practice is in good hands.

I also spoke with **Ken Abbarno**, of DiCello, Levitt and Gutzler, who was admitted to the practice of law in 1992. Mr. Abbarno practices in the area of medical malpractice and complex litigation. He had a slightly different perspective as he initially worked as a defense counsel for many years. He believes the convenience factor of Zoom is both a plus and a minus. The positive aspect is that it has made it easier to take expert depositions. The ability to take an expert witness via Zoom cuts down on some of the expense and time spent traveling. However, he is concerned that Zoom depositions often provide a benefit to the party who is taking the deposition. This is so because when everyone is attending virtually it makes it more difficult for an attorney to provide counsel and comfort to the client who is being deposed. Mr. Abbarno also noted that the advent of telephonic and virtual case management conferences and pre-trials has vastly changed the practice. Initially, attorneys would spend time in person, in court, waiting for their turn. This time was valuable as it allowed attorneys to be together in one place where they could develop relationships. It also provided some practical time to work through issues in the case which allowed for more professionalism and practical resolution to matters.

Allen Tittle of Tittle & Perlmuter practices in the area of personal injury and medical malpractice. He was admitted to the practice of law in 2010. He noted that the biggest changes he has seen since entering the practice of law arise from the variety of new technology in the legal market. When he started there was a more limited universe of case management software. Case management software has improved by leaps and bounds over the past few years. Newer case management software provides the ability for automatic task flow which allows a firm to effectively handle cases at a higher volume than before. He also recognized the larger universe of vendors allows attorneys to find professionals to assist them with time consuming tasks such as organizing medical records or marketing. This is another factor that allows him to handle a greater number of cases efficiently and to grow his firm. Another positive change he notes is that social media and legal organizations have made it easier for him to interact and share information with attorneys across the country.

Regan Sieperda of Nurenberg Paris is a newer attorney who began her practice of law in December 2020, in the midst of the COVID crisis. She is very excited to be representing injured people and credits the strong support of her law firm in helping her learn and grow during these complicated times. One major difference between Ms. Sieperda and the other lawyers I interviewed is this: as a digital native, she had the benefit of learning the latest technologies and using Zoom throughout her education. Consequently, she is accustomed to communicating with people via Facetime or text messages, making it easy for her to transition these skills into the practice of law. It was eye-opening to hear that her first deposition was via Zoom and that the vast majority of her court hearings and pre-trials have been virtual as opposed to the in-person experience I recall from my early days. Ms. Sieperda did note that while she is very comfortable with technology, she does miss having the in-person experiences that would have occurred had she started her practice prior to COVID. She is working to build relationships with defense counsel and courts but notes it would be easier with more in person events. Also, as a practical matter, she is very eager to try her first case, as it was continued due to COVID restrictions.

Overall, I think everyone agrees that while they appreciate new advances, our practice would benefit from more in person communication and collegiality. However, one of most important benefits to an organization like CATA is that it allows trial attorneys of all generations to share their experiences. More seasoned attorneys can share their wisdom learned through their decades of practice. Newer attorneys can teach the skills they have from growing up as digital natives in an increasingly complex world. ■

In Memoriam: Judge Nancy R. McDonnell

Judge Nancy R. McDonnell passed from this life on September 28, 2021, with her husband, John Kosko, by her side.

Judge McDonnell was a trailblazer, serving as our Court's first female Administrative and Presiding Judge from 2006-2009. Her nearly 25 years on the Bench were distinguished, and she brought compassion and caring to her role as a Judge.

The opening of Cuyahoga County's Community Based Correctional Facility came at a time when Judge McDonnell was recovering from a double lung transplant. She was Administrative Judge at the time, and had spearheaded the effort to get it built. The Judges voted to name it in her honor while she was hospitalized. When Judge McDonnell found out about the vote, she jokingly tried to change it, but her colleagues told her it was too late, and the McDonnell Center was dedicated in her name.

"Judge McDonnell was, quite simply, one of the strongest persons I have ever known," says current Administrative and Presiding Judge Brendan J. Sheehan. "September 28 was a sad day for our Court and Judge Nancy McDonnell's extended personal and professional family. However, we, and the citizens of Cuyahoga County, were fortunate to have had her on our Bench and in our lives."

A Cleveland-area native, Judge McDonnell was a graduate of Regina High School in South Euclid, The Catholic University of America in Washington, D.C., and the Cleveland-Marshall College of Law. Before joining the Bench in 1997, she served as an Assistant Cuyahoga County Prosecutor in the Major Trial Division and was a Magistrate in the Lakewood Municipal Court.

Most recently, Judge McDonnell presided over our Drug Court, and often made use of the CBCF named for her.

While the double lung transplant saved her life, it also created a series of health issues that she battled bravely for the rest of her career. Even when she was unable to be in the courtroom, she was still in her office at the Justice Center or at home working on her docket. The advent of Zoom hearings during the pandemic helped Judge McDonnell work until the very end while still protecting her compromised immune system.

Judge McDonnell's strength, determination, and compassion were well known in the justice system, and she will be greatly missed.

In Memoriam: Judge Joseph D. Russo

On October 2, 2021, the Cuyahoga County Court of Common Pleas, General Division, suffered a great loss when Judge Joseph D. Russo passed away at the age of 59.

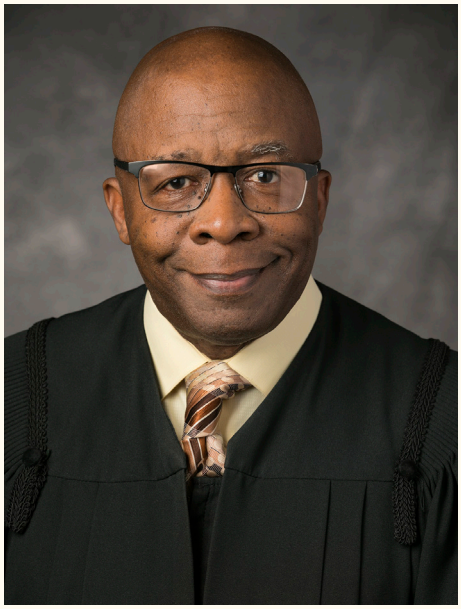
Judge Russo was a valued member of the Bench for two decades; he took the oath of office for the first time in January of 2001. Judge Russo attended St. Joseph High School and then went on to pursue his undergraduate degree at Case Western Reserve University. He received his law degree in 1991 from the Case Western Reserve University School of Law. Prior to joining the bench, Judge Russo had his own practice for 10 years where he developed a love for the law and made great networks in the legal community.

"Joe Russo was my colleague on the Bench for 12 years, and his loss is deeply felt by the legal community and the citizens of Cuyahoga County," says Administrative and Presiding Judge Brendan J. Sheehan. "I became Administrative Judge just two months before the start of the pandemic. Joe was a source of support to me in that time. He would walk across the hall to check in, and during our meetings in those early months of COVID, would offer what he referred to as, 'The Fauci Report,'—an update on current COVID numbers in our community. I certainly miss him."

When the Court created its first Commercial Dockets, Judge Russo immediately expressed an interest in presiding over one of the four dockets dedicated to complex commercial cases. He served the docket for a three-year term.

We offer our most sincere condolences to Judge Russo's wife of 28 years, Diana, his son, Joseph, daughter, Gabriella, and the entire Russo family.

In Memoriam: Judge Larry A. Jones, Sr.
(1953-2021)



The legal community mourns the sudden loss of Eighth District Court of Appeals Judge Larry A. Jones, Sr. He joined the court in January of 2009, after serving in the Cleveland Municipal Court for 21 years. While serving in the Cleveland Municipal Court, Judge Jones spearheaded the first drug court in Cuyahoga County and served as administrative judge for 14 years. Prior to joining the bench, Judge Jones was an Assistant Cuyahoga County Prosecutor and Cleveland Councilman.

Judge Jones was "one of a kind." He possessed a unique leadership style that believed in comradery and leading by example. He treated everyone as family and with a deep love and respect for others. "Larry Jones was the quintessential public servant—dedicated to making the judiciary and the community better," says Administrative and Presiding Judge Mary J. Boyle. "Apart from being a pioneer and legend in the legal community, he was a friend to everyone and made everyone feel that they were his favorite."

Judge Jones often quoted Justice Thurgood Marshall, who said: "You do what you think is right, and the law will catch up."

He was committed to making a difference in the world and giving people a second chance. In addition to his service in the Cleveland Metropolitan Bar Association, the Norman S. Minor Bar Association, the National Bar Association, the Ohio State Bar Association, and the Ohio Black Judges Association, he was a member of the National Association of Drug Court Professionals and the Greater Cleveland Drug Court Advisory Board. Judge Jones was also involved in many community and civic-oriented organizations, exemplifying the motto that he lived by: "If you can help someone out, then help them out."

He was an avid golfer, woodworker and ballroom dancer. Judge Jones leaves a void at the court of appeals and will be greatly missed. He leaves behind his beloved wife of 44 years, Jennifer; daughter, LaToya Jones; son, Larry Jones II; and granddaughter, Ciarra.

Announcements - Winter 2021-2022

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

Nurenberg, Paris, Heller & McCarthy Co., L.P.A. is pleased to announce that **Joshua D. Payne, Esq.** has joined the firm as an associate attorney. Josh's practice focuses on auto accidents, truck accidents, premises liability, construction and workplace accidents, and other personal injury cases.

Tittle & Perlmuter is excited to announce that **Katie Harris** has joined their team as an experienced attorney. Katie's practice areas include car accidents, semi-truck accidents, nursing home abuse, and medical malpractice.

Honors, Awards, and Appointments

William Hawal, a partner with Spangenberg, Shibley & Liber, received the Michael F. Colley award at the Ohio ABOTA Chapter dinner meeting on November 18. The recipient is chosen for their service to the trial bar, leadership to his/her colleagues, an extraordinary standard of professional conduct, and total dedication to the ideals of mutual respect for all, and the preservation of the Right to Trial by Jury. Hawal is a past President of the Ohio ABOTA Chapter.

Attorney Meghan Connolly Receives Professor Stephen Werber Professionalism Award

Lowe Scott Fisher Partner Attorney Meghan Connolly is the first-ever recipient of the William K. Thomas Inn of Court's Professor Stephen Werber Professionalism Award. The award is new this year and is presented to a William K. Thomas Inn of Court member who has exhibited an exceptional commitment to the Inn's values of professionalism, ethics and integrity. Connolly has been a member of the William K. Thomas Inn of Court since 2019.

More info on this announcement can be found at: https://lsflaw.com/attorney-meghan-connolly-receives-professor-stephen-werber-professionalism-award/

Brenda M. Johnson, of the Nurenberg Paris firm, was recently appointed as one of two vice-chairs of the CMBA Grievance Committee, and has been speaking on Social Media Ethics issues for both the OAJ and CATA.

Honors, Awards, and Appointments

Dennis R. Lansdowne was appointed by Dean Lee Fisher to the Health Law & Policy Advisory Council at CMLaw. The Advisory Council will provide assistance to the law school's Center for Health Law Policy, which endeavors to build on the outstanding health law curriculum at the school and advance the development of research and scholarship in health law and policy.

Knabe Law Firm is honored with a Bicycle Friendly Business Silver designation for 2021-2025 by the League of American Bicyclists via its Bicycle Friendly America (BFA[SM]) program!

KLF is one of only two Ohio Law Firms awarded this Silver designation, joining the international Cleveland-based law firm Squire Patton Boggs. The BFA[SM] program provides "a tool for (making) bicycling a real transportation and recreation option for all people." Ken's ongoing commitment to protecting and supporting fellow cyclists through safety education, Vision Zero Cleveland legislation, and legal representation continues to be his passion. Many thanks to the League of American Bicyclists for recognizing KLF's commitment with this timely and meaningful award!

Congratulations to Knabe Law Firm Legal Intern **Rob Thompson** who recently received news of passing the Ohio Bar Examination.

Publications

"Luke Stewart was killed for sleeping while Black. Qualified immunity robbed his family, and community, of accountability."

Sarah Gelsomino, partner at the civil rights law firm Friedman, Gilbert + Gerhardstein, was recently featured as an opinion contributor to USA TODAY as a part of an ongoing series examining the issue of qualified immunity and its impact on victims' access to justice in the courts.

You can read her article at:
https://www.usatoday.com/story/opinion/2021/10/21/qualified-immunity-police-killed-luke-stewart/5711758001/

CATA Events

On November 10, 2021, attorney **Jeff Heller** of the Nurenberg Paris firm gave an End Distracted Driving ("EndDD") presentation at Beachwood High School to 240 sophomores and juniors. The EndDD campaign was started by Pennsylvania attorney Joel Feldman following the death of his daughter Casey by a distracted driver in 2009. In 2015, during **Ellen Hirshman's** term as CATA president, she spear-headed CATA's participation in the program. She and other CATA members have been giving EndDD presentations ever since. We are pleased to see that, with the easing of COVID restrictions, presentations are back on the agenda this year.

When not representing clients or engaging in service activities, CATA lawyers know how to take a break and have fun. This year CATA's Platinum Sponsor, Tom Stockett and Rimon Bebawi of CW Settlements, sponsored an event at Top Golf for CATA members. It was a great way to de-stress after a hard day at work. A big thank you to CW Settlements for sponsoring this activity!

In Memoriam: Jack Landskroner (1967-2021)

"A Very Special Man"

by Christian R. Patno

When asked to write Jack's In Memoriam for CATA I recalled many I have read over the years which focus on the great legal accomplishments of those who have predeceased us. Jack Landskroner also had many noteworthy accomplishments. Yet, the success that defined Jack best cannot be found in the recitation of a large resume.

My friendship with Jack began during a 1991 night out at the Lincoln Inn with him and the late Judge Joseph D. Russo. Jack was a law student. Joe was a young lawyer running Jack's father's firm. Jack was an amazing acoustic guitar player and singer. Joe was one of the best blues singers in Cleveland. Even at a young age, the warmth, passion and exuberance Jack exhibited was palpable and sucked me in. That evening set us on a friendship and legal journey that would see 3 decades and many major life events pass us by. We tried numerous cases together, traveled internationally for work, often visited each other's homes and families, and spoke regularly even though there were gaps. Jack was also the king of spontaneous pranks. During one trial, he called me before the jury and used my body as a demonstrative exhibit for a surgical procedure with an unsterilized nasal speculum.

I had a very special and deep relationship with Jack that I thought was unique. What I came to learn was that throughout his life Jack had developed special and deep relationships with many others, regardless where they stood on the societal ladder. This included childhood friends, family, opposing counsel, fellow trial lawyers, restaurant workers, and the judiciary. Jack made each and every person feel special because he listened. He cared. He wanted to help in times of tragedy and truly make a difference. And he *did* make a difference for me, for many of you, and for the many clients he represented over the decades.

Fate "brought the band back together" in March 2019 as a result of the unfortunate UH embryo tank failure. Over the next two years, Jack, I, and our firms tirelessly researched, litigated and advocated claims on behalf of 157 victims. We spoke daily and saw each other constantly. Jack brilliantly spearheaded the damage gathering and negotiations while I was responsible for evidence gathering and depositions. Jack excelled at his "good cop" role for one reason: he was such a warm, talented, sincere, and interested communicator. Thus, his nickname "Happy Jack".

Jack was a fighter, in court and out, for what he believed was right. He tried always to be fair and never held a grudge. In the law, protecting children became his passion. I learned a lot by example from Jack as I expect many of you did. Even during his last heroic fight with cancer Jack remained driven, focused, positive, and energetic. He knew what he was up against and that the odds were not good. Yet, during the precious time Jack had left, and with the love and support of his family, he reached out, connected, and cemented a lasting bond through private meetings with his closest friends. In the end, all Jack cared about was one thing: *How are you? How is your family? How is your business?* And all was asked with sincere interest, warmth, and a smile that was quintessential Jack.

Rest in peace my dear friend Jack. You are and shall always remain……. a very special man.

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

Pointers From The Bench:
An Interview With Judge Joan Synenberg

By Christine M. LaSalvia

It has often been a struggle to feel positive about the legal landscape during the time of COVID. The world seems a little darker and the courthouse can feel like it has more plastic partitions than people as we emerge from the pandemic. However, the courtroom of Judge Joan Synenberg is an oasis of positivity in a world of Zoom and gloom.

Judge Synenberg joined the Cuyahoga County Court of Common Pleas in 2012. Previously she spent two years in the Cleveland Municipal Court. She credits the recently departed Honorable Larry Jones for his mentorship and assistance. Prior to taking the bench she spent 16 years in a successful private practice. She is a proud Clevelander who attended Mayfield High School, Cleveland State University, and the Cleveland Marshall College of Law. She worked as a social worker and even spent some time at the iconic Cleveland radio station, WMMS, working on the token joke of the day. She speaks with pride about her past; but it is her current role as Judge that engages and inspires her as she works to find innovative ways to be a positive force in the community.

Judge Synenberg believes strongly that the Court is a place for the people to be heard. She has a great appreciation for how lawyers can impact a person in need. She believes the relationship between a lawyer and a client is based on trust that the lawyer will zealously advocate for a client. The job of a lawyer is to advocate for and to help a person who otherwise cannot help him or herself. Judge Synenberg applies this philosophy to her role presiding over the Recovery Court.

Judge Joan Synenberg

Recovery Court is a specialized docket which has existed since January 2015. It was created to better assist those in the Court system who are dealing with a dual diagnosis of drug and alcohol addiction and trauma related mental health issues. It is the first dual diagnosis docket certified by the Supreme Court in the state of Ohio. The purpose of this court is to handle felony level charges while also helping individuals overcome addiction and treat mental health issues related to trauma. Individuals in Recovery Court work to develop tools needed to overcome their past and have a fresh start. Typically they will have some residential treatment, followed by time in a sober living environment.

Judge Synenberg spoke with great pride about how the Recovery Court can help bring people through the darkest parts of their lives. She endeavors to respect the person, while acknowledging their mistakes, and works to maintain a positive environment, even when giving sentences. She has a sincere desire that the people who come before her for sentencing take the experience as a lesson and use it to start a new beginning.

Judge Synenberg is inspired by the stories of people who have graduated from the Recovery Court. She believes these victories deserve to be celebrated. This year the graduation ceremony was held jointly with the Greater Cleveland Drug Court at the Rock & Roll Hall of Fame. The ceremony was a true celebration of the graduates' efforts and included caps and gowns and musical guests. At the ceremony, Judge Synenberg urged the graduates to look around at the people in the seats and realize that each seat is filled with a person in the Community who cares about them.

While presiding over the Recovery Court, Judge Synenberg realized that the individuals who come before her face important civil issues which can jeopardize their recovery. These include landlord issues, evictions, collection issues, and custody problems – all of which can destabilize a life but do not automatically entitle a person to counsel under the law. If people were to succeed in Recovery Court, she needed to find them help for these other issues. Reaching out to the legal community, she developed a community of lawyers willing to assist, when necessary, with civil issues. From this idea was born the Pro Bono Collaborative. The Pro Bono Collaborative seeks to bridge the justice gap created by civil issues which require an attorney but for which a person is not automatically given counsel, hopefully reducing the barriers to success in Recovery Court.

I visited Judge Synenberg on the day of the Pro Bono Collaborative and was immediately inspired by the passion of the Court, her staff, the lawyers, and law students for this project. On the day of my visit, I found Robert Weltman sitting in the courtroom helping a man who spoke no English with a complicated collections issue through an interpreter hired by the Court specifically for this meeting. I found law students excited to give their time to designated members of the community, and a well-oiled system of intake and case assignment, rivaling that of many personal injury law firms.

In the past few years, the Pro Bono Collaborative has served 1,000 people with civil needs. In the first year of its existence the Pro Bono Collaborative was given an Award by the Ohio State Bar Association for the Most Innovative Court Program. In the second year, the Nord Family Foundation came in to see how the program worked and was so impressed that it funded a full time coordinator for the Program. The coordinator, Morgan Foster, works closely with Judge Synenberg to facilitate the needs of its clients. Although the program originally was meant to be for individuals in Recovery Court, it has been expanded to include anyone in Cuyahoga County. The expansive reach of the Pro Bono Collaborative has kept Judge Synenberg and her staff very busy, a fact which makes the Judge very happy as it helps fulfill her mission of making sure that her courtroom is a positive place for the community to experience justice.

The Judge also credits the attorneys who participate in the Pro Bono Collaborative. She has never seen lawyers happier than when they are in the courtroom working for the Pro Bono Collaborative. Jeremy Tor, of Spangenberg, Shibley & Liber, LLP, noted: "Judge Synenberg' s pro bono collaborative is the best pro bono clinic I've been privileged to participate in. Our community is lucky to have it. Each time I volunteer, I am struck by the level of engagement and compassion Judge Synenberg shows to both the lawyer-volunteers and the clients. For many clients, this is a rare opportunity to feel that, within the legal system, they matter and are important. So, too, for the lawyers."

Marilena DiSilvio, a partner with Elk & Elk, said she is honored to be part of the Pro Bono Collaborative. She is inspired by the passion of the court to help the community, and found her experience with the clinic to be so fulfilling and important that she is bringing her mentee through the Supreme Court Lawyer-to-Lawyer Mentoring Program to the next Pro Bono Collaborative. She also credits the Judge with inspiring other attorneys to give their time to help with this unique and important project.

If you would like to join with Judge Synenberg, fellow CATA members, and the legal community in supporting the Pro Bono Collaborative, please contact coordinator Morgan Foster at MMFoster@cuyahogacounty.us. ■

Recent Ohio Appellate Decisions

by Kyle B. Melling and Brian W. Parker

Patterson v. Am. Family Ins. Co., 9th Dist. Medina Nos. 20CA0075-M, 20CA0078-M, 2021-Ohio-3449 (Sept. 30, 2021).

Disposition: Affirming the Medina County Court of Common Pleas rulings that: the state court had subject matter jurisdiction over an employer health care plan under ERISA, 29 U.S.C. § 1132; the Plan was not entitled to a right of subrogation under the Plan documents despite such right being mentioned in the Plan Summary; plaintiff was not entitled to sanctions against the Plan under R.C. § 2323.51 because plaintiff did not establish that the Plan's delay in producing the Plan documents was "frivolous."

Topics: ERISA jurisdiction in state court; subrogation rights of ERISA plan in personal injury claim; motion for sanctions for frivolous conduct.

Plaintiff Mrs. Patterson, the wife of a participant in an employer health care plan ("the Plan") governed by ERISA, brought an action for personal injuries she suffered in an automobile accident, naming both the other driver and the Plan. The Plan had paid benefits towards Mrs. Patterson's treatment and contended that it was entitled to a right of subrogation from any recovery Mrs. Patterson collected from the other driver.

The Plan contended that its Summary Plan Description (SPD) contained its right to subrogation. The plaintiffs contended that the actual terms of the Plan were not in the SPD, but in the Governing Documents, which did not contain a subrogation clause. The plaintiffs and the Plan each moved for summary judgment on the subrogation issue, as well as on plaintiffs' motion for sanctions. The trial court granted plaintiffs' motion for summary judgment on the ERISA subrogation claim, ruling that the Plan did not have a contractual right to subrogation. The trial court also denied the plaintiffs' motion for sanctions in the form of attorney fees.

The Ninth District preliminarily addressed the Plan's contention that the state trial court did not have subject matter jurisdiction over this claim, as ERISA granted subject matter jurisdiction exclusively to federal courts for this type of subrogation claim. The Ninth District held that the state court had concurrent jurisdiction of this claim under ERISA Section 1132(a)(1)(B) because it was a civil action "to enforce [the plaintiffs'] rights under the terms of the plan." The Court further held that even though the claim could be characterized as one under Section 1132(a)(3) (for which jurisdiction in federal courts is exclusive), it could also be properly characterized as coming under Section 1132(a)(1)(B), and thus the state court had concurrent jurisdiction.

The Ninth District also held that although there was a mention of the Plan's subrogation right in the SPD, there was no mention of the subrogation right in the terms of the Plan itself. The Plan documents, and not the SPD, governed per the terms of the Plan documents. The Court thus stated:

> Addressing the relationship between a benefit plan and its summary, the United States Supreme Court has been clear that "summary documents, important as they are, provide communication with beneficiaries *about* the plan, but their statements do not themselves constitute the *terms* of the plan." (Quoting *CIGNA Corp. v. Amara*, 563 U.S.421, 438, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011); emphasis in original).

While there is case law holding that an SPD could function as a Plan document (such as where there is no separate Plan document), that was not the case here. Therefore, the Ninth District held that the Plan had no subrogation right in this case.

The Plan had not initially produced the Plan documents, but only the SPD. Plaintiffs contended that this delay was "frivolous" and entitled plaintiffs to attorneys fees under R.C. § 2323.51. The Ninth District disagreed, noting that there was case law that had held that the Plan documents were the SPD, which justified the Plan's delay.

Walworth v. Khoury, 8th Dist. Cuyahoga No. 109898, 2021-Ohio-3458 (Sept. 30, 2021).

Disposition: Affirmed granting of summary judgment.

Topics: Open and Obvious, Attendant Circumstances.

While carrying a box into the Defendant's basement, Plaintiff tripped on a pair of shoes Defendant left at the top of the basement stairs. Plaintiff fell down the stairs and suffered multiple injuries that required multiple surgeries. At the time of the incident, Plaintiff and Defendant were engaged. They subsequently got married.

The Eighth District Court of Appeals found that Plaintiff was

a social guest in Defendant's house. The classification of social guest exists when there is evidence that the host extended to the entrant "an actual invitation, express or implied . . . for the specific visit." The Eighth District found that the shoes at the top of the stairs were an open and obvious hazard, and the Defendant had no duty to warn Plaintiff of the presence of the shoes.

Plaintiff testified that he was carrying a box at the time he tripped on the shoes, and accordingly, he could not see the shoes. Plaintiff also argued that: the rear door to the residence opened inward and was partially blocking Plaintiff's view of the shoes; he had immediately turned to his right when he entered the landing where the shoes were; the landing was extremely short and provided little opportunity for him to see the shoes; and the shoes had never been there on previous trips through the landing area.

The Court held these conditions were not enough to create a genuine issue of fact as to whether there were attendant circumstances to overcome to open and obvious nature of the shoes. Regarding the carrying of the box, the Court held this was within Plaintiff's control, and therefore was not an attendant circumstance. The inward opening door was not an attendant circumstance, because the Plaintiff had regularly encountered this doorway hundreds of times before. Further, the submitted photographs showed the door open, and the shoes in question were readily visible and not blocked. Third, the layout of the entrance and the size of the landing were not "distractions" that would divert Plaintiff's attention, and thus were not attendant circumstances. Finally, the fact that the shoes had never been on the landing before did not count as an attendant circumstance and did not change their status as an open and obvious hazard.

Esposito v. Mauger, 9th Dist. Wayne No. 20AP0035, 2021-Ohio-2808 (Aug. 16, 2021).

Disposition: Affirmed granting of summary judgment.

Topics: Primary Assumption of Risk, Recklessness.

Plaintiff was injured when he was struck in the head by a golf ball hit by Defendant at a golf course. The Ninth District held that being struck by an errant or shanked golf shot was a risk that was inherent in the sport of golf. Accordingly, the only way Plaintiff could recover was if he established that the Defendant acted intentionally or recklessly. The Defendant testified that before his shot, he did not see Plaintiff's golf cart because it was 175 yards away. He first noticed the golf cart after he struck his tee shot. When he noticed that the wind was blowing his tee shot toward the golf cart, Defendant testified that he and another member of his foursome yelled "fore" in an attempt to warn Plaintiff of the flying ball.

The Ninth District held there was no evidence that Defendant's conduct was intentional or reckless. Further, the Court held that Defendant didn't violate the rules of golf, as there was no requirement for Defendant to wait until Plaintiff moved, since Plaintiff was on a separate hole. The court held that even if the Plaintiff was in the range of potential locations that Defendant's tee shot could land, it was not reckless for Defendant to hit his shot.

Hefler v. Remke Markets, Inc., 1st Dist., Hamilton No. C-200364 2021-Ohio-2694 (Aug. 6, 2021).

Disposition: Reversed granting of summary judgment.

Topics: Constructive notice of hazardous conditions, Slip and Fall.

Plaintiff and her fiancé were visiting Defendant's supermarket to shop for food. Testimony established that it was not raining outside on the day of the incident and Plaintiff was wearing flip-flops. While Plaintiff was walking down the frozen food aisle looking into the freezers, she slipped and fell in a puddle of water. Plaintiff and her fiancé testified that they did not see the puddle of water prior to Plaintiff's fall, and they did not know how long the puddle had been on the floor.

Defendant's store manager testified that he had independently discovered the puddle of water when he walked down the aisle toward the back of the store and found that a faulty door seal on one of the freezer doors was responsible for the leak.

The Trial Court granted Defendant's motion for summary judgment. In analyzing the case, the First District focused primarily on whether there was constructive notice of the puddle of water on the floor prior to Plaintiff's fall. The Court held that in order to prove constructive notice, the Plaintiff had to establish that the hazardous condition existed for a sufficient time to enable the exercise of ordinary care. The First District found sufficient evidence presented by the Plaintiff that the puddle of water existed for a sufficient time to constitute constructive notice of a hazardous condition. First, the puddle had accumulated due to a leak from Defendant's freezer. Second, it hadn't been raining or snowing on the date of the fall. Third, the Defendant's store manager confirmed that the leak was caused due to defective door seals, allowing for a reasonable inference that the puddle had developed gradually over time, as opposed to occurring

quickly. Accordingly, the First District found a genuine issue of material fact and reversed the grant of summary judgment.

Roy v. Grove, 10th Dist. Franklin No. 19AP-870, 2021-Ohio-2689 (Aug. 5, 2021).

Disposition: Reversed granting of summary judgment.

Topics: Tolling of Statute of Limitations.

On October 24, 2016, Plaintiff was rear ended in Ohio by Defendant in a motor vehicle. At the time of the accident, Defendant was a resident of Indiana and was visiting Ohio and looking for a possible future home. Defendant returned to Indiana the day following the accident. Defendant moved to Ohio approximately three months later in January 2017.

Plaintiff filed a complaint against Defendant on October 30, 2018, two years and six days after the accident. Defendant filed a motion for summary judgment, asserting that the claim was not filed within two years of the accident and thus was barred by Ohio's two-year statute of limitations. Plaintiff responded arguing that the two-year statute of limitations was tolled pursuant to R.C. 2305.15 as a result of the three months that Defendant spent outside of Ohio, from October 25, 2016 until January 2017. The trial court granted summary judgment, finding that the statute of limitations did not toll while the Defendant resided in Indiana.

The Tenth District conducted an extensive analysis of the constitutionality of R.C. 2305.15 as applied to the facts in the instant case. The Tenth District found that, as applied to the facts in the present case, the absence of the Defendant from the state of Ohio did not affect interstate commerce, and the only manner in which R.C. 2305.15 could have been held unconstitutional is if it placed an impermissible burden on interstate commerce. Because it did not place an impermissible burden on interstate commerce, R.C. 2305.15 was constitutional, and the tolling of the statute of limitations for the time in which Defendant was outside of the state of Ohio was appropriate.

Wolf v. Kaplan, 8th Dist., Cuyahoga County No. 110104, 2021-Ohio-2447 (July 15, 2021).

Disposition: Affirmed granting of summary judgment.

Topics: Primary Assumption of Risk, Recklessness.

Plaintiff and Defendant were participants in the USA Triathlon National championship event in Cleveland, Ohio. The Triathlon was overseen and sanctioned by USA Triathlon. Plaintiff alleged that while riding the bicycle portion of the triathlon, Defendant approached her bicycle from behind, and began riding in close proximity behind her in an attempt to gain an advantage. Defendant then moved to pass Plaintiff, and struck her on the side, causing her to crash off the course and sustain significant injury. Plaintiff's allegations, which were supported by witness testimony, were that just prior to hitting her, Defendant engaged in a practice known as "drafting." Drafting is prohibited by the rules of USA triathlon, specifically, "a participant is not permitted to position his bicycle in the proximity of another moving vehicle so as to benefit from reduced air resistance."

The trial court granted Defendant summary judgment on the grounds that colliding with another cyclist was a foreseeable and customary risk that was inherent to the sport of cycling. The trial court further found there was no evidence that Defendant acted intentionally or recklessly.

The Eighth District upheld this decision. The Eighth District first held that the risk of a collision between two cyclists in a bicycle race, such as a triathlon, is a foreseeable and customary part of the sport of triathlons. Accordingly, the primary assumption of the risk doctrine applies. Plaintiff argued that Defendant's violation of the sanctioned rules from USA triathlon should amount to per se reckless conduct. The Eighth District disagreed and found that the rules for USA Triathlon were designed to promote sportsmanship and fair play, as well as to protect the health, safety, and well-being of participants, and therefore a violation of the rules were not itself intentional or reckless conduct for liability purposes. The court instead said that the determination of recklessness required an analysis of whether the alleged conduct was foreseeable. Because the rules themselves both permit a cyclist to temporarily enter the drafting zone in order to pass, and because they provided for a penalty that could be imposed for rule violations, the alleged actions of the Defendant in contacting Plaintiff while he passed her were foreseeable, and therefore not reckless.

Figueroa v. Greater Cleveland Reg'l Transit Auth., 8th Dist. Cuyahoga No. 110069, 2021-Ohio-2268 (July 1, 2021).

Disposition: Reversing Cuyahoga County Common Pleas Court decision which granted defendant's motion for summary judgment on plaintiff's negligence claim; affirming trial court's denial of

plaintiff's motion to enforce parties' agreement to conduct a trial on issue of liability only.

Topics: R.C. § 2744, Political Subdivision Immunity Statute; App. R. 9(D), appellant's duty to provide a transcript of proceedings not already on file.

The plaintiff was riding his bicycle eastbound along Detroit Road, near the intersection with West 69th Street in Cleveland. Prior to this intersection, there is a dedicated bike lane, but at this intersection, the bike lane merges with the normal traffic lane. The defendant RTA bus was also traveling eastbound on Detroit Road, when the bus and plaintiff's bicycle collided.

The court held that, as a political subdivision, RTA possibly waived sovereign immunity for its negligence under R.C. § 2744.02(B)(1) (for negligent operation of a motor vehicle); and under R.C. § 2744.02(B)(2) (for its employee's negligence with respect to a proprietary function).

Regarding RTA's negligence, the RTA bus driver argued that prior to the accident the plaintiff was moving in and out of the bicycle lane up to the point where he was struck. The plaintiff contended that throughout his ride on Detroit Avenue, he was either in the bicycle lane or the curb lane for parked cars.

There was video footage of the accident on the bus's CCTV camera system. The court held that from the video, it was impossible to tell whether the collision occurred while the bicycle lane was still in effect or after the lane had merged into the regular traffic lane. Sustaining the plaintiff's appeal on this issue, the court held that "a genuine issue of material fact exists as to whether the bus was negligent in encroaching on the bicycle lane and causing the collision."

In his second issue on appeal, the plaintiff argued that the trial court erred in failing to enforce an agreement between the plaintiff and RTA that the case would proceed to trial on the issues of negligence and comparative negligence, with damages established for a stipulated amount. The plaintiff contended that this agreement was confirmed through email messages between counsel, and articulated in RTA's proposed jury instructions. There was a motion to enforce that agreement at the trial court, but plaintiff did not provide a transcript of that hearing in his appeal.

The Eighth District rejected the plaintiff's arguments because an appellant has a duty to provide a transcript for appellate review, and App.R. 9(B) provides that "the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record." The Eighth District thus held that, absent a transcript of the testimony from the hearing on the motion to enforce, it had to defer to the trial court's findings and judgment on this issue.

Renforth v. Staff Right Pers. Servs., LLC, 7th Dist. Mahoning No. 20 MA 0007, 2021-Ohio-2335 (June 30, 2021).

Disposition: Affirming the Mahoning County Common Pleas decision granting the employer's motion for summary judgment in an employer intentional tort action.

Topics: Employer intentional tort claim, R.C. § 2745.01, brought by minor. Evidence of employer's intent to injure an employee.

The employee was a minor working for the defendant employer which was a landscaping company. He suffered an amputation of a finger on his left hand when he was helping another employee operate a log splitter. After the minor employee placed a log on the splitter, the adult employee pressed the button operating the splitter too soon, causing the minor employee's injury.

The trial court granted the employer's motion for summary judgment. The main evidence relied upon by the minor employee was that the employer had been informed just days before this accident that minors were not permitted to operate the log splitter because this would violate state and federal child labor laws. On appeal, the Seventh District stated: "While the record here raises serious questions about Appellees' behavior as regards this minor, the laws regarding employer intentional tort do not hold employers of minors to any higher standard than those who employ adults."

The minor was also unable to show that the employer intended to hurt him. In this regard, the minor employee testified in his deposition that the employer did not intend to hurt him, or otherwise do anything to deliberately cause his injury.

The minor employee also alleged that the employer placed him in an unacceptably dangerous environment without the benefit of proper or expected safety equipment, protection, instruction, or training. The Seventh District construed this to be an allegation that the employer removed a safety device pursuant to R.C. §2745.01(C). However, again the minor employee's own testimony worked against him as he testified at deposition that the log splitter was not altered, and nothing had been taken off of it.

Oliveri v. Osteostrong, 11th Dist. Lake No. 2019-L-104, 2021-Ohio-1694, 171 N.E.3d 386 (May 17, 2021).

Disposition: Reversing decision of the Lake County Common Pleas Court; holding that the defendant was not entitled to summary judgment under the doctrines of express assumption of risk, primary assumption of risk, and implied assumption of risk.

Topics: Assumption of risk doctrines in personal injury action.

The plaintiff, who suffered from osteoporosis, was injured while exercising on a machine under the supervision of a trainer at defendant's gym. Upon joining the gym, the plaintiff had signed a document which provided, in relevant part:

> "* * * I assume all responsibilities for my decision to engage in the OsteoStrong program. I waive my right to pursue legal action against OsteoStrong, its owners, partners, and agents for any physical or mental anguish that I may incur as a result of my participating with the OsteoStrong system."

The trial court granted summary judgment to the defendant on the basis of this express waiver of liability. The Eleventh District noted that an agreement purporting to constitute an express assumption of risk must show a clear and unambiguous intent to release the party from liability for its negligence, and releases from liability for future tortious conduct are generally not favored by law, and are narrowly construed.

The Court held that the above quoted language did not effectively waive the plaintiff's right to pursue a negligence claim; damages in a negligence action need not rise to the level of "anguish" to be actionable.

The Eleventh District went on to address the defendant's arguments that it was entitled to summary judgment under the alternative bases of primary assumption of risk and implied assumption of risk.

The Court held that primary assumption of risk did not apply because there was no evidence that plaintiff was injured as a result of a danger inherent in the exercise she was performing: "Because she was not injured by a danger ordinary to the sport or exercise, we disagree that the doctrine of primary assumption of the risk applies to these facts, and as such summary judgment on this basis was not warranted."

The Court next noted that implied assumption of risk had merged into Ohio's comparative negligence statute, and this defense ordinarily involves questions of fact that generally are to be decided by the fact finder. Thus, summary judgment was not warranted under this doctrine, either.

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Bliss v. Manville, 6th Dist. Lucas No. L-20-1091, 2021-Ohio-1673, 172 N.E.3d 1146 (May 14, 2021), Discretionary appeal allowed by Bliss v. Johns Manville Corp., 2021-Ohio-3233 (Sept. 22, 2021).

Disposition: Reversing decision of Lucas County Common Pleas Court that had denied the defendant's motions for summary judgment and JNOV.

Topics: Employer intentional tort, R.C. § 2745.01. Definition of an "equipment safety guard." Sufficiency of an expert affidavit offered in support of employer intentional tort claim.

The plaintiff brought an employer intentional tort action for an injury arising from the employer's deliberate removal of an equipment safety guard. The machine which injured the plaintiff was a Base Fiber Feeder which uses a conveyor system to separate fiberglass fibers, feed the fibers into two adjacent "lift aprons," and then form the fibers into insulation.

There is a sensor on the lift apron which controls the speed of the conveyor. When the sensor becomes obstructed, the conveyor slows or completely stops. When this happens, an access window permits the employee to clean the sensor with a nylon brush. The plaintiff suffered a degloving injury when he attempted to clean the sensor while the machine was running.

A similar injury had occurred previously to another employee. In response, defendant added "bolts" to the access window on two of its three aprons in use on the Fiber Feeder. The employer removed one of the lift aprons and replaced it with the spare lift apron that did not have bolts on it. Therefore, on the date of injury, there were no bolts to impede the employee from using the access window, which led to his injury.

The trial court denied the employer's motion to strike the plaintiff's expert's affidavit, as well as its motion for summary judgment, and JNOV motion. The jury returned a verdict of $451,000 for the employee.

On appeal, the Sixth District first ruled that the trial court should have stricken the plaintiff's expert's affidavit because the expert "attempted to establish that appellant deliberately removed an equipment safety guard. However, the interpretation and meaning of these phrases from R.C. 2745.01 is a question of law for the court to determine, not a question of fact for which expert testimony would be permissible."

The Sixth District also held that the trial court should have granted summary judgment for the employer because the modified lift apron was not an equipment safety guard under R.C. § 2745.01(C). The Court stated:

the added bolts on the modified lift aprons did not prevent an employee from opening the access window, they simply made it more difficult to do so. The purpose and design of the access window was to allow an employee to open it, and this purpose was not changed with the addition of bolts.

Further, once the employee's expert's affidavit was stricken, the employee had no evidence that the modified lift apron was an equipment safety guard. Thus, the employee was not entitled to the presumption in R.C. 2745.01(C) that the removal of an equipment safety guard was done with deliberate intent to injure the employee. Furthermore, because there was no other evidence presented by the employee that the employer intended to injure him, the trial court should have granted the employer's motion for summary judgment. Thus, the trial court's entry of judgment for the employee was reversed.

The Ohio Supreme Court has allowed a discretionary appeal of this decision. ■

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.

Kyle B. Melling is an associate with Lowe Scott Fisher Co., LPA. He can be reached at 216.781.2600 or kmelling@lsflaw.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): _____
_____
_____

RETURN FORM TO: **Kathleen J. St. John, Esq.**

Nurenberg, Paris, Heller & McCarthy Co., LPA
600 Superior Avenue, E., Suite 1200
Cleveland, Ohio 44114
(216) 621-2300; Fax (216) 771-2242
Email: kstjohn@nphm.com

Verdict Spotlight

A Lucas County jury returned a $2 million verdict on September 28, 2021 against Mark Guzzo, M.D., an emergency medicine physician for his failure to order an MRI for a patient who presented with severe thoracic back pain. The verdict included $1 million for non-economic damages and $1 million for plaintiff's loss of earning capacity. The Doctors Company refused to make any offer on behalf of its insured, Dr. Guzzo, who had a $1 million policy. A pretrial settlement was reached with the plaintiff's treating physiatrist.

William Hawal

Dennis R. Lansdowne

The plaintiff, who was then 52 years old, had a history of episodic low back discomfort for which she was receiving physical therapy. During the therapy regimen one of the therapists began providing dry needling treatment with acupuncture needles. On one particular occasion, the therapist inserted needles along plaintiff's thoracic spine. Within 24 hours plaintiff began experiencing severe mid-back pain radiating to her abdomen. She placed a call to her physiatrist, who had referred her for therapy, with her new complaints. The physiatrist prescribed prednisone without speaking with or seeing his patient.

Later that same evening plaintiff presented to Flower Hospital Emergency Department with 10/10 mid-back pain radiating to the abdomen, as well as new right thigh numbness and urinary hesitancy. She also advised the triage nurse that she had undergone dry needling treatment and that her current symptoms were different from her chronic back discomfort.

The plaintiff was given a Toradol injection and oxycodone and was discharged with diagnosis of a urinary tract infection. At approximately 5:00 a.m. the next morning, the plaintiff tried to go to the bathroom but was unable to walk. She was taken to the Toledo Hospital Emergency Department where an MRI revealed a T7-T9 spinal hematoma. Surgical decompression ensued.

Although plaintiff recovered her ability to walk, she has bowel and bladder dysfunction and persistent neuropathic flank pain. Plaintiff owns and operates a number of restaurants in the Toledo area and is now unable to devote more than 10 hours per week to her restaurant management responsibilities. Defendant disputed the loss of earning capacity claim because plaintiff had elected to take no salary or distribution during the preceding six years.

The case was tried by Bill Hawal and Dennis Lansdowne of the Spangenberg, Shibley & Liber law firm. Post-trial motions include the defendant's motion for set-off of the settlement with the physiatrist, which the plaintiff opposed, and the plaintiff's motion for prejudgment interest.

The case is *Anong Pipatjarasgit v. Mark Guzzo, M.D.*, Lucas Cty. C.P. No. G-4801-CI-201902665-000.

Congratulations to Bill, Dennis, and their team for achieving justice for their client! ■

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.*

Seth Fletcher v. Correctional Officer Dustin Knox, et al.

Type of Case: Civil Rights - 8th Amendment Excessive Force and Deliberate Indifference to Serious Medical Needs
Settlement: $17,500,000
Plaintiff's Counsel:Nick DiCello and Jeremy Tor, Spangenberg, Shibley & Liber, LLP, (216) 696-3232; Geoffrey Fieger and Jim Harrington, The Fieger Law Firm
Defendant's Counsel: Ohio Attorney General's Office
Court: U.S. District Court, Southern District of Ohio, Judge Michael H. Watson, Case No. 2:20-cv-01912
Date Of Settlement: October 28, 2021
Insurance Company: State of Ohio
Damages: Quadriplegia

Summary: Seth Fletcher, age 20, was serving out a 2-year prison sentence at the Chillicothe Correctional Institution when, on April 3, 2020, just months before his release date, he was unjustifiably attacked and assaulted by corrections officers. During the assault Seth was taken down/tackled and suffered a cervical spinal cord injury. Seth immediately lost the ability to move his legs and clearly required emergent medical attention. Rather than obtain medical attention for Seth, corrections officers continued to assault and brutalize him.

Officers dragged Seth to an isolation cell where he languished, unable to move his lower body and eventually unable to move his upper extremities. Numerous additional prison personnel failed to intervene to assist Seth and get him the medical attention he needed. Seth was mocked and ridiculed. When he asked for water because he could not move to drink, personnel poured water into his mouth and all over his face as Seth lay paralyzed.

Seth did not receive medical attention for days. Seth has been rendered permanently quadriplegic as a result of his injuries and lack of medical treatment.

One of the corrections officers involved later bragged in text messages and posts about participating in the beating that paralyzed Seth Fletcher.

Plaintiff's Expert: Mario Ammirati, M.D. (Neurosurgery); Gerald Shiener, M.D. (Psychiatry); Ken Katsaris (Use of Force, Corrections); Robert Eilers, M.D. (Physical Medicine & Rehabilitation); Michael Thompson, Ph.D. (Economist)

Defendant's Expert: Stephen Renas, Ph.D. (Economist); Cathlin Mitchell, R.N. (Life Care Planning); Steven Day, Ph.D. (Life Expectancy); Thomas Groomes, M.D. (Physical Medicine & Rehabilitation)

Jane Doe, Guardian v. ABC Cardiology Group and ABC College

Type of Case: Medical Negligence and General Negligence
Settlement: $24 Million
Plaintiff's Counsel: Romney B. Cullers, Esq., The Becker Law Firm, (440) 323-7070
Defendants' Counsel: Withheld
Court: Withheld
Date Of Settlement: October 20, 2021
Insurance Company: Withheld
Damages: Brain injury, profound extremity weakness, partial blindness, cognitive deficits

Summary: The plaintiff was a college athlete who suffered a sudden cardiac arrest following basketball practice. He had experienced multiple episodes of shortness of breath and chest pain during pre-season conditioning drills. The team physician referred him to a cardiology group for evaluation. Cardiologists ordered standard exercise testing which did not demonstrate any abnormalities. They did not order any imaging studies, however, and as a result, failed to diagnose a rare, but treatable coronary artery anomaly. The cardiologists attributed the young man's shortness of breath and chest pain to "performance anxiety" and cleared him to return to full athletic participation. Two months later, he collapsed from a sudden cardiac arrest triggered by the undiagnosed anomaly.

The college's coaching staff present at the practice were not currently trained or certified in CPR or AED use in violation of NCAA bylaws and national guidelines for school-based athletic programs. The coaches did not recognize obvious signs of sudden cardiac arrest and failed to start CPR or apply an AED. The coaches called 911 and waited for paramedics. The athlete was in full cardiac arrest and pulseless for 8 1/2 minutes before paramedics arrived and started CPR. Paramedics were able to save the young man's life, but he suffered anoxic brain damage from lack of blood flow to his brain during the cardiac arrest event.

Plaintiff's Experts: Withheld

Defendants' Experts: Withheld

Jane Doe v. Ungers Kosher Bakery

Type of Case: Premises
Settlement: $525,000
Plaintiff's Counsel: David M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 621-2300

Defendant's Counsel: Patrick Roche, Esq.
Court: Cuyahoga County Common Pleas Court, Judge Michael Shaughnessy
Date Of Settlement: September 13, 2021
Insurance Company: Westfield
Damages: Fractured humerus with radial nerve damage

Summary: Plaintiff tripped on a piece of broken down cardboard wedged horizontally on the lower shelf of a shopping cart. The cart had been filled with broken down boxes by the stock boy who failed to remove it from the aisle when filled. Defendant argued open and obvious, comparative negligence and that the poor surgical result was the fault of her surgeon.

Plaintiff's Experts: Terrence Grisim; Richard Zimmerman; Michael Keith, M.D.

Defendant's Expert: Duret Smith, M.D.

John Doe v. ABC Trucking Company

Type of Case: Motorcycle v. Semi Tractor Trailer
Settlement: $5,250,000.00
Plaintiff's Counsel: Dana M. Paris, Esq. and David M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 621-2300
Defendant's Counsel: *
Court: *
Date Of Settlement: September 8, 2021
Insurance Company: *
Damages: Right leg amputation; pelvic fractures

Summary: Our 20 year old client was riding his motorcycle southbound on a rural state route in Northeast Ohio. A semi tractor trailer was traveling northbound at a slow rate of speed and made a continuous left turn into a gas station. Our client applied his front and rear brakes and skidded into the passenger rear corner of the trailer sustaining multiple fractures and vascular injuries to his right hip and leg. Multiple surgeries to salvage the limb culminated in a "through knee" amputation. We assembled a team of experts to address the issues of fault and damages. An accident reconstructionist examined the motorcycle, the truck, the physical evidence at the scene and observations of witnesses to opine that there was a very long sight line with nothing to obstruct the truck driver's view of the oncoming motorcycle. The orthopedic experts opined that the resulting fractures to our client's pelvic ring, acetabulum and femoral head would result in traumatic arthritis in his hip joint requiring hip replacement and multiple hip revisions during his lifetime. A life care plan projected his lifetime future medical needs. Functional capacity evaluations limited his occupational pursuits to sedentary work and a vocational rehabilitation expert quantified his reduced earning capacity. The defense of the case centered around the likely speed of the motorcycle, thus eliminating his preferential right of way; a prosthetist who opined that advanced technologies would enable him to work and enjoy recreation at the same levels as before the injury; and a vocational rehabilitation expert who opined that there would be no impaired earning capacity. The case settled for the insurance policy limits with the trucking company contributing $250,000 of its own funds.

Plaintiff's Experts: Introtech (Accident Reconstruction); George Ochenjele, M.D. (Orthopedics); Rick Wickstrom, LPT (FCE); Pamela Hanigosky, R.N. (LCP); Bruce Growick, Ph.D. (Vocational Rehabilitation); David Boyd, Ph.D. (Economist)

Defendant's Experts: Richard Riley (Prosthetist); John Pullman (Vocational Rehabilitation); Sean Doyle (Accident Reconstruction)

Jane Doe, Etc. v. ABC Contractor

Type of Case: Construction - Wrongful Death
Settlement: $5 Million
Plaintiff's Counsel: Jonathan D. Mester, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 694-5225; John Fitch, Fitch Law Firm, Columbus, Ohio
Defendant's Counsel: Withheld
Court: Franklin County Common Pleas Court
Date Of Settlement: September 2021
Insurance Company: Withheld
Damages: Wrongful death of a 43 year-old, married with multiple children

Summary: Plaintiff's decedent was working for a subcontractor on a project involving construction of a new hotel. Plaintiff's decedent entered an elevator shaft and stood on a wood platform which had been erected by a fellow subcontractor at the direction of the general contractor. Plaintiff's decedent then fell through the platform after he stepped on the section towards the end of the platform, falling 4 stories to his death. Discovery revealed that the platform had been changed due to a failure to meet initial specifications, and that the side of the platform was ultimately improperly constructed.

Plaintiff's Experts: Mark Duckett (Structural Engineer); Kevin Rider (Safety Engineer); Jeff Lee, M.D. (Pathology); David Boyd, Ph.D. (Economist)

Defendant's Experts: Withheld

Romita Campbell v. Cunningham Paving Co., et al.

Type of Case: Motor Vehicle Crash
Settlement: $185,000

Plaintiff's Counsel: Aaron P. Berg, Esq., Caravona & Berg, LLC, (216) 696-6500
Defendants' Counsel: Law Office of Steven Proe
Court: Cuyahoga County Common Pleas Court, Judge Peter J. Corrigan
Date Of Settlement: September 2021
Insurance Company: State Auto
Damages: Closed head injury with concussion, soft tissue to neck and back, increased anxiety

Summary: Intersection auto accident with dump truck. Defendant driver disputed liability due to conflicting statements of bystanders at the crash scene.

Plaintiff's Experts: Choya Hawn (ACTAR); Timothy Fetterman, M.D.; James Medline, Ph.D.; DeAnna Frye, Ph.D.

Defendants' Experts: Timothy Herron, M.D.; Galit Askenazi, Ph.D.

Jane Doe, Admin. v. ABC Corporation

Type of Case: Wrongful Death - Motor Vehicle
Settlement, subject to Probate Court approval: $3,050,000.00
Plaintiff's Counsel: Dana M. Paris, Esq. and David M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 621-2300
Defendant's Counsel: *
Court: Mahoning County Common Pleas Court
Date Of Settlement: August 24, 2021
Insurance Company: *
Damages: Wrongful death - loss of support and mental anguish sustained by widow and minor son.

Summary: Defendant was a commercial driver operating a commercial vehicle on a 70 mph state route in rural Northeast Ohio. His Ford F 550 trailered a load of drywall weighing 7,700 lbs. The state route had 2 northbound lanes and 2 southbound lanes, separated by a grassy median strip. It was winter and although the roadway was clear, the median was snowy, damp and muddy. The defendant lost control of his truck and ended up stuck in the mud. He called his boss for guidance and was told to wait for a towing service that he would call. He called back to tell the driver that the tower would be about 60-90 minutes. The driver then flagged down a good Samaritan in a pick- up truck and asked if he had straps to pull him out. The driver called his boss who, without asking about the training or qualifications of the good Samaritan, gave his consent to proceed. The rear of the disabled truck was strapped to the front of the good Samaritan's truck. The good Samaritan then slowly traveled in reverse partially on the berm and partially on the roadway closest to the median in a southbound direction while in the northbound lanes. Contrary to the discussed "plan", the driver placed the disabled truck from neutral to reverse and began to gun the engine and spin the rear wheels. When the wheels contacted the asphalt berm, his truck catapulted across the first lane into the second lane directly into our client's northbound vehicle. Our client was pronounced dead at the scene. He left surviving a wife and minor son. The defense centered around our client's was comparative negligence based on his speed, his failure to slow and alcohol in his system.

Plaintiff's Experts: Introtech (Reconstruction and Toxicology); Patrick Gratziana (Towing); Michael Napier (Truck Safety); David Boyd, Ph.D. (Economist)

Defendant's Expert: Sean Doyle (Reconstruction)

Jane Doe v. Allstate Insurance Company

Type of Case: Motor Vehicle Crash
Settlement: $200,000.00
Plaintiff's Counsel: Aaron P. Berg, Esq., Caravona & Berg, LLC, (216) 696-6500
Defendant's Counsel: *
Court: *
Date Of Settlement: August 2021
Insurance Company: Allstate
Damages: Leg and pelvic fracture

Summary: At-fault driver drifted left of center and caused head-on crash. Claim was complicated by seat-belt defense to non-economic damages.

Plaintiff's Expert: Nicholas Romeo, DO

Defendant's Expert: None

K.D. and K.D. v. Major Ride Sharing Company and A.J.

Type of Case: Motor Vehicle Accident
Settlement: Policy limits with stacked policies
Plaintiffs' Counsel: Jeffrey M. Heller, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 694-5203
Defendants' Counsel: Jared Christianson of Bremer Whyte Brown & O'Meara (Las Vegas)
Court: Pre-Lit
Date Of Settlement: July 30, 2021
Insurance Company: Allstate and Farmers
Damages: See below

Summary: Clients were in the back seat of a ride share on their way to a restaurant in Las Vegas. As they went through a green light they were broadsided by a sedan that ran a red light. Neither client was wearing a seat belt and both were

thrown sideways. Male client suffered a TBI when his head hit the seat in front of him. Female client suffered a lower leg injury, diagnosed 18 months later as a talus fracture, as well as an eyelid injury leaving a scar.

Plaintiffs' Experts: Lisa Kurtz, M.D. (TBI); Amy Kutschbach (Vocational); Mark Panigutti, M.D. (Ortho); Samuel Salomon, M.D. (Ophthalmology)

Defendants' Expert: None

Jane Doe v. Yorktown Lanes

Type of Case: Premises
Settlement: $300,000
Plaintiff's Counsel: David M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 621-2300
Defendant's Counsel: Mark Greer, Gallagher Sharp LLP
Court: Cuyahoga County Common Pleas Court, Judge William T. McGinty
Date Of Settlement: July 19, 2021
Insurance Company: Auto Owners
Damages: Fracture subtalar joint with fusion

Summary: Plaintiff was a first time visitor to the bowling alley invited by her friends to watch them bowl on "Rock & Bowl" night – when the lights are dimmed and disco lights are turned on. Multiple sets of stairs from street level to bowling lane level allow access by descending 5 steps. The absence of a handrail, poor lighting, distracting disco lights, and tile patterned stair treads which blended into the floor all contributed to plaintiff's fall. Defendant contended open and obvious, comparative fault and the absence of any other "documented" falls on disco night in the preceding 30 years.

Plaintiff's Experts: Richard Zimmerman; Mark Hardy, DPM

Defendant's Experts: Richard Kraly; John Feighan, M.D.

Estate of Jane Doe v. ABC Trucking Company, Inc.

Type of Case: Truck Crash (Wrongful Death)
Settlement: $2,350,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 694-5257
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas
Date Of Settlement: July 12, 2021
Insurance Company: Withheld
Damages: Wrongful Death

Summary: Ready Mix concrete truck was traveling on a graded roadway and rolled while making a right turn directly on top of a passenger motor vehicle. Plaintiff traveling in the passenger vehicle was killed instantaneously.

Plaintiff's Experts: James Crawford, Introtech, Inc. (Crash Reconstruction); Dr. Harvey Rosen (Economist)

Defendant's Expert: *

Jane Doe, Admin. v. ABC Hospital

Type of Case: Medical Negligence
Settlement: $787,500
Plaintiff's Counsel: John A. Lancione, Esq., The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: July 2021
Insurance Company: Self Insured
Damages: Death of 71 year-old survived by wife, children, and grandchildren

Summary: The decedent underwent uneventful routine low back surgery. While in the PACU he was administered morphine, fentanyl and oxycodone. Despite not meeting discharge criteria, the PACU nurse turned off the vital sign monitor and left the patient unattended for several minutes. When she returned to the patient, he was unresponsive. The hospital claimed the patient had a sudden cardiac death.

Plaintiff's Expert: Rita Kay Restrepo. R.N.

Defendant's Expert: Marcia Bell, R.N.

SW, et al. v. USA, et al.

Type of Case: Medical Malpractice FTCA
Settlement: $3.76 Million
Plaintiffs' Counsel: Michael F. Becker and David W. Skall, The Becker Law Firm, (440) 323-7070
Defendants' Counsel: Withheld
Court: U.S. District Court, Northern District of Ohio, Judge James S. Gwin, Case No. 1:19-cv-02947
Date Of Settlement: July 2021
Insurance Company: Withheld
Damages: Newborn brain injury, cerebral palsy

Summary: Delayed c-section leading to increased fetal distress, bilateral intraventricular hemorrhages (IVH), permanent structural brain damage and disabling cerebral palsy in a now 5 year-old boy. As a prenatal patient of a defendant obstetrical practice that was a Federally Qualified Health Care Agency (FTHA) under the Federal Tort Claims Act (FTCA), the mother developed essential hypertension and had serial monitoring in the third trimester with largely reactive non-stress tests (NSTs). Just beyond 36 weeks gestation, she presented with decreased fetal movement, the NST result changed to become non-reactive, and the baby was found to be

growth restricted (IUGR) and at risk of intolerance to labor. The mother was immediately admitted to the co-defendant hospital for additional testing, namely a biophysical profile (BPP) that was equivocal, and significant decelerations of the fetal heart rate then started and increased thereafter. Rather than appreciating the evolving fetal distress and performing a prompt c-section, the attending obstetrician of the FQHA and nurses monitored the deteriorating fetus for another 8 hours and then started an induction of labor that seriously worsened the fetal heart rate. Finally, a belated decision for urgent c-section followed, but the baby was soon after found to have suffered the severe IVH that ultimately led to his brain damage and disability. The presence of severe IVH also greatly complicated the proximate cause linkage, as there were no traditional markers of birth-related asphyxia.

Plaintiffs' Experts: Withheld
Defendants' Experts: Withheld

John Doe v. Cope Farm Equipment

Type of Case: Motorcycle v. Truck
Settlement: $395,000
Plaintiff's Counsel: David M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., L.P.A., (216) 621-2300
Defendant's Counsel: *
Court: *
Date Of Settlement: June 3, 2021
Insurance Company: Sentry Select
Damages: Fractured wrist – full recovery; mid shaft fracture left tibia

Summary: Plaintiff was riding his motorcycle southbound on S.R. 193 in Trumbull County. Defendant was westbound on S.R. 87 and proceeded after stopping at the stop sign failing to yield to plaintiff's right-of-way.

Plaintiff's Expert: John Gentle, M.D.

Defendant's Expert: None

Baby Girl Doe, Deceased v. ABC Hospital

Type of Case: Medical Negligence
Settlement: $590,000
Plaintiff's Counsel: John A. Lancione, Esq., The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: April 2021
Insurance Company: Self Insured
Damages: Death of a full term newborn

Summary: The delivery of Baby Girl Doe was complicated by a 7 minute shoulder dystocia. Her one minute Apgar was zero. Neonatal resuscitation was initiated. Despite over 40 minutes aggressive resuscitation she suffered severe brain damage and died the following day. Her parents alleged negligent resuscitation.

Plaintiff's Expert: Shawn Hughes, RRTd

Jane Doe v. ABC Drunk Driver

Type of Case: Motor Vehicle Crash
Settlement: $125,000.00
Plaintiff's Counsel: Aaron P. Berg, Esq., Caravona & Berg, LLC, (216) 696-6500
Defendant's Counsel: Withheld
Court: *
Date Of Settlement: March 16, 2021
Insurance Company: Cincinnati Insurance Company
Damages: Concussion with post-concussion syndrome

Summary: Plaintiff, 63 year-old female, was stopped at a red light in Geauga County, Ohio when she was crashed into from behind by a drunk driver. The next morning, she presented to the Emergency Department and was diagnosed with concussion (as well as cervical and bilateral shoulder strains). She developed post-concussion syndrome and required 14 months of care. Medicals totaled $19,000.00 but health insurance write-offs reduced this to $9,500.00.

Plaintiff's Experts: Philip Fastenau, Ph.D. (University Hospitals); Christopher Tangen, DO (University Hospitals)
Defendant's Expert: *

■

Application for Membership

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

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

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

3. Excellent character and integrity of the highest order.

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Law School / Year Graduated: _____

Professional Honors or Articles Written: _____

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Please return completed Application with membership dues to:

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c/o Scott M. Kuboff, Esq.
Ibold & O'Brien
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Email: scott@iboldobrien.com

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