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President's Message

by Meghan P. Connolly

Thank you for opening your CATA News Magazine. Seriously, thank you for opening it, because you have a busy day ahead, a thousand emails, needy clients, personnel issues at your firm, and even other trial magazines on your desk. Please know we are truly grateful for the moments you've devoted to these articles written by your colleagues. Hopefully something here will resonate and serve your practice in a meaningful way.

Please know that this magazine is a group effort spearheaded by our dutiful Editor in Chief Kathy St. John, supported by our CATA News Committee, who together with guest authors, deliver high quality writing on topics of great importance. I am so very grateful for Kathy and her team's efforts to bring to bear another collaborative, creative issue. Many times, I have found my next great idea to help a client in the pages of this magazine. I've said it before, and I maintain, that this magazine should be winning awards.

At our Annual Dinner many months ago, I spoke about maintaining optimism in the face of endless challenge. I reflected on the importance of recognizing our power as trial attorneys to fight for justice despite how damn hard this job is. Now, coming off a thrashing at the polls, we are called to really dig deep into our thought work. We cannot allow a loss to diminish our power or depress our spirit. We must resist the urge to turn inward. As trial lawyers, we understand that our power is rooted in the fight and not the outcome, and so we fight on.

As much as I am tempted to wallow in my frustrations and grief, I am thinking about how trial lawyers can gain strength and grow in this challenging and rather depressing time. I suggest we cannot go wrong by doing the following:

1. Collaborate. We are in a golden age of collaboration in the practice of law. As a bar we are already very good at sharing information, but what about actually working together? Ask yourself how you can collaborate with another CATA member to serve your client in an amazing way. Think about how you can prop up another member with your expertise, and offer to help. Who would be a great attorney to bring in on a focus group to present the opposition on your case? Who would be a great trial partner for your case? Taking collaboration to the next level will raise the tides even higher. Great things happen when we lift each other up.

2. Diversify. CATA has initiated a Diversity and Inclusion Committee to face the issue of poor diversity and inclusion in our local plaintiff's bar. We aim to address this issue of monumental importance in ways that have worked for other bar associations. I encourage you to discuss diversity and inclusion at the firm level, as I'm sure many of you already do, and identify some small way you can improve. It goes without saying that diversity is inherently valuable and allows a firm to better serve its clients and to better connect with juries. CATA is working on developing tools to assist our members

in efforts to become more diverse and inclusive, and thereby gain more power, so stay tuned.

3. Go to trial. Despite how we all feel after this election, it is not all doom and gloom for plaintiffs. Recall that when Courtney Rowley presented to us via Zoom during the pandemic, she called out a prediction that post-covid verdicts would be great for plaintiffs. As usual, she is right. Our members have been serving up justice by way of impressive verdicts, and everyone is noticing. Congratulations to our members and their clients who have had the courage to try their case. Every time a CATA member tries a case, it benefits us all, because it is an exercise of the very power that makes us who we are. As Sari de la Motte insisted to us at CATA Litigation Institute a few years ago: It is not our job to win, it is our job to fight!

Please enjoy this issue of the CATA News, keep fighting for your clients, and know that CATA is grateful for you. As President of CATA please reach out to me if I can assist you or your firm in your efforts to collaborate, diversify, go to trial, or remain optimistic. Any time. ■

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CATA'S Newly Formed Diversity and Inclusion Committee Tackles Lack of Representation in Our Legal Community

by Adeladi WIlliams

It is no secret that the legal profession has historically underperformed in the areas of minority and gender diversity within its ranks. Many legal organizations and law firms throughout the country, including the Ohio Association for Justice and the American Association for Justice, have responded to these trends by instituting programs, committees, and initiatives aimed at recruitment and retention of underrepresented populations at all organizational levels.

While studies performed by the American Bar Association have shown that modest gains have been made in diversity recruitment and retention efforts in the last 10 years, the legal profession still lags behind other industries on this front, especially in its racial minority representation.

CATA President Meghan Connolly has spurred the creation of CATA's Diversity and Inclusion Committee in order to allow us to gain perspective on our organization's standing as it relates to these issues. As Chair of this Committee, I will be working with several board members to better understand our organization's general demographic makeup in order to increase diversity recruitment and retention levels within CATA's membership.

We will also work in conjunction with the Cuyahoga Metropolitan Bar Association's already-established Diversity and Inclusion initiatives in order to provide our members with opportunities to participate in programs such as the "Louis Stokes Scholars Program" for college students interested in the law and the "Minority Clerkship Program" for first-year law students, just to name a few. We look forward to your support of these initiatives in the coming weeks and months. ■

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

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Carly E. Caldrone passed the bar in November and recently started as an attorney at an immigration law firm. When this article was written, she was a law clerk at Nurenberg, Paris, Heller & McCarthy Co., LPA.

What's The Hold-Up? – Filing A Bad Faith Claim For Unreasonable Delay

by Kathleen J. St. John and Carly E. Caldrone

Insurance companies benefit from delaying payment of first party claims. The delay may result from a denial of liability, or a dispute about the value of the claim. Delays may be compounded by trial continuances or other scheduling difficulties, and many years may pass between the date the claim arose and the date it is paid.

When the case finally does resolve – whether through trial or settlement – you might consider filing a bad faith claim. The following provides an overview of things to know before filing a bad faith claim on your client's behalf.

Bad Faith And The "Reasonable Justification" Standard

In Ohio, insurance providers have a duty to act in good faith when settling third-party claims against their policy holders.[1] The duty of good faith also applies to the provider's handling and payment of its insured's first party claims, such as for uninsured/underinsured motorist benefits.[2] When that duty is not met, an insured may initiate a bad faith tort action against the insurance provider, apart from any breach of contract claim.[3] Third parties, such as injury victims, cannot bring a bad faith claim against the wrongdoer's insurer absent a valid assignment after judgment is rendered.[4]

Bad faith can take many forms, including "the insurer's refusal to pay a claim, refusal to defend its insured against a third-party claim, or other action or inaction in handling a claim."[5] Bad faith might exist when an insurer denies policy benefits after conducting an insufficient investigation into the circumstances.[6] Bad faith might also exist when the insurer extends an unreasonably low settlement offer or declines to defend its insured against a third party.[7]

The Ohio Supreme Court has established a "reasonable justification" standard for determining whether an insurer has acted in bad faith.[8] Under this standard, "an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor."[9] For a brief period, intent was an additional element required to show bad faith,[10] but it was considered a divergence from precedent and expressly overturned in *Zoppo v. Homestead Ins. Co.*[11] *Zoppo* held that "[i]ntent is not and has never been an element of the reasonable justification standard."[12] If an insurer's conduct lacks a reasonable justification, then it is not made in good faith.

An insurer lacks reasonable justification when it acts in an arbitrary or capricious manner.[13] The crucial inquiry is whether the insurance company's decision was arbitrary, capricious, and without reasonable justification, not whether its decision was correct.[14] An insurer is reasonably justified only where "the claim was fairly debatable and the refusal was premised on either the status of the law at the time…or the facts that gave rise to the claim."[15] The burden lies with

the insured to show that the insurer's action or decision lacked a reasonable justification and was not made in good faith.[16]

Unreasonable Delay As A Basis For A Bad Faith Claim

The duty of good faith, however, goes "beyond those scenarios involving an outright denial of payment for a claim."[17] Consequently, unreasonable delay, or an insurer's "foot-dragging in the claims handling and evaluation process" supports a bad-faith cause of action.[18] Generally, insurance companies are expected to make thorough and timely assessments of their policy-holders' claims.[19]

To recover on a bad faith claim relating to delay, "an insured must put forth evidence that the claim was . . . unreasonably delayed and the insurer had no justification for such . . . delay."[20] A plaintiff will typically be more successful if they can show other evidence of bad faith in addition to the delay.[21]

In underinsured motorist cases, bad faith often involves a combination of delay and unreasonably low settlement offers. *Mundy v. Roy* is a case in point. In *Mundy*, the insured, injured by an underinsured motorist, filed claims against the tortfeasor as well as his own UIM carrier.[22] The UIM carrier then took two years to authorize a settlement with the tortfeasor's insurance company and later disputed the amount of damages on the UIM claim.[23] In the ensuing bad faith action against the UIM carrier, the trial court denied the insured's discovery on the bad faith claim and granted summary judgment to the insurer.[24] On appeal, the trial court's decision was reversed.[25]

The Second District found that the insured could make a valid bad faith claim against the insurer due to its "excessive delay before authorizing a settlement with the tortfeasor's insurance company" and its "refus[al] to make a good-faith settlement offer on his underinsured-motorist claim."[26] It further found that the insureds were improperly denied discovery on their bad faith claim.[27] The insurer's claims file was discoverable as it "might contain other information relevant to the insurance company's handling of his claim and the reasonableness of its settlement offer."[28]

Marshall v. Colonial Insurance also involved a bad faith claim against the insured's UIM carrier arising out of unreasonable delay in resolving the claim.[29] The insurer in *Marshall* took over two years to respond to the tortfeasor's settlement offer.[30] It further delayed the process by refusing to produce employees for depositions, and by not obtaining its own medical expert until a year after its first settlement offer.[31]

The court held there was enough evidence of a bad faith delay to survive the insurer's summary judgment motion.[32] "Considering the combination of acts and omissions, it cannot be said the record is devoid of any evidence tending to show a lack of good faith[.]*** Even if certain circumstances would not individually qualify as bad faith conduct, the overall circumstances are relevant and must be viewed in the light most favorable to Appellant."[33]

Bad faith can also be found when the insurer makes an unreasonably low settlement offer with an aura of finality, then sits back and waits for the insured to resume negotiations. That was the situation in *Toman v. State Farm Mut. Auto. Ins. Co.*[34] In *Toman*, the plaintiff sustained injuries when her vehicle was struck from behind by another motorist. The motorist had a $12,500 policy; the plaintiff had $100,000 in UIM coverage plus $10,000 in med pay. After settling with the tortfeasor for policy limits and receiving the full med pay, the plaintiff pursued a claim under her UIM coverage. Her expenses related to the accident exceeded $14,000.

Having not heard back from the insurer for several months, plaintiff's counsel wrote inquiring about the status of the claim. In response, the adjustor sent a letter stating that it appeared the plaintiff "'has been fully compensated for her injuries resulting from the*** motor vehicle accident'" as "'she has collected $10,000 under her medical payments coverage as well as $12,500 from the underlying liability carrier[.]'"[35] The letter concluded with a request that the adjustor be contacted "'[i]f you have any questions and would like to discuss this matter further.'"[36]

On appeal from summary judgment for the insurer on the bad faith claim, the Eighth District reversed. The insurer argued that a jury could only conclude the insurer's handling of the claim was reasonably justified because "'a veteran underinsured claims adjustor followed the routine procedures State Farm used to evaluate claims and concluded that plaintiffs have been fully compensated.'"[37]

In rejecting this argument, the court explained it was not sufficient that the adjustor determined, "purely as a matter of his personal opinion, that [the plaintiff] had already been fully compensated for her injuries[.]"[38] Instead, the insurer "needed to present evidence establishing that there was no genuine issue of fact that its justification*** was reasonably based on the relevant facts."[39] As the insurer had not met this burden, the court found a jury question to exist as to whether the insurer lacked a reasonable justification for its refusal to offer any money on the UIM claim and acted arbitrarily

and capriciously in its handling of the claim.[40]

The court also rejected the insurer's argument that the adjustor's letter was not intended to be a "'line in the sand,'" but instead was "'an invitation for Plaintiff's counsel to submit further evidence or present additional arguments.'"[41] Although the jury might find this argument to be reasonable, it did not provide a basis for granting summary judgment as the evidence could "just as easily lead to the opposite conclusion"[42] and "be suggestive of bad faith negotiation."[43]

Damages Recoverable On A Bad Faith Claim

When an insurer breaches its duty of good faith, the insured may recover compensatory damages that flow from the bad faith conduct.[44] These are extra-contractual damages – that is, "actual damages over and above those covered by the insurance contract" that are "sustained by the insured as a consequence of the insurer's bad faith[.]"[45] Such damages might "encompass such things as interest on the amount of money wrongfully withheld under the contract and damages resulting from the insured's inability to pay for needed repairs."[46]

Compensatory damages on a bad faith claim may also include attorney fees in prosecuting the underlying action.[47] There is a division of authority as to whether attorney fees can be awarded as compensatory damages absent an award of punitive damages.[48] An interesting case on this issue is *TOL Aviation, Inc. v. Intercargo Ins. Co.*[49]

In *TOL*, the trial court awarded the insured attorney fees for litigating both the underlying action and the bad faith case. The Sixth District upheld the former but reversed the latter. The court held that attorney fees for litigating the underlying action could be awarded as compensatory damages "'even if [the] insured has not demonstrated the existence of actual [or punitive] damages separate and distinct from said attorney fees.'"[50] The court found, however, that attorney fees, costs, and litigation expenses incurred while prosecuting the bad faith action "are not so much compensation to the insured as they are punishment to the insurer. Under such circumstances, attorney fees cannot be awarded absent a finding that punitive damages are warranted."[51]

Punitive damages may also be awarded on a bad faith claim.[52] However, "[t]he conduct necessary to support an award of punitive damages is separate from that sufficient to establish bad faith."[53] Thus, whereas bad faith is established when the insurer violates the "reasonable justification" standard, punitive damages may only be recovered "upon proof of actual malice, fraud or insult on the part of the insurer."[54] Actual malice is: "'(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscience disregard for the rights and safety of other persons that have a great probability of causing substantial harm.'"[55]

Procedural Considerations

a. Statute of limitations

Since a claim of bad faith is an action in tort and not in contract, it is not subject to the time limits set forth in the insurance policy.[56] Instead, a bad faith claim is governed by the statute of limitations for torts, which is four years in Ohio.[57] The statute of limitations begins to run when the injured party discovers, or reasonably should have discovered, the resulting injury - in this case that the insurer has unreasonably delayed the payment of benefits.[58]

b. Bifurcation

The insured's initial complaint should combine the contract based UIM/UM claim with the tort based bad faith claim. The defense, however, is likely to move for bifurcation of the two issues.[59] Courts are sometimes favorable to bifurcation and might grant a stay of discovery on the bad faith claim to avoid prejudice to the insurer until the underlying contract claim is resolved.[60]

There is, however, no *requirement* that bad faith claims be bifurcated.[61] To avoid bifurcation, plaintiffs should emphasize that (1) the insurer has not met their burden of showing they would be prejudiced by trying the claims together, (2) the plaintiff would be highly prejudiced because the contract and bad faith claims are so entwined, (3) it would not overly confuse a jury to try the claims together, and (4) "the interest of judicial economy weighs against bifurcation of the two claims."[62]

Statutorily, if the complaint seeks *punitive damages* in addition to compensatory damages on the bad faith tort, the court is mandated to bifurcate upon the motion of any party.[63] Although the statute "does not require bifurcation of the breach of *contract claim* and the *bad faith claim*, it does require the bifurcation of the presentation of evidence of *compensatory damages* and that of *punitive damages* regarding the bad faith tort claim."[64] Only evidence that relates solely to punitive damages may be excluded.[65] Thus evidence related to the compensatory claim, even if it also supports the punitive claim, can still be used at trial of the compensatory damages claim.[66]

If the trial is bifurcated on the issue of bad faith or punitive damages, discovery should not be stayed on those issues. As the court stated in *McKinley Dev. Leasing Co.*, "some judges in Ohio have stayed discovery, delaying the punitive

damages trial for several months, and even ordered a whole new set of jurors for a second trial. It is this Court's opinion that method does not promote fairness, justice, or judicial economy."[67]

c. Discovery

An insurer's policies and training manuals are relevant and discoverable to determine whether a reasonable justification supported their decision.[68] "Courts have recognized that training and policy manuals are relevant in determining whether an insurance company lacked a 'reasonable justification' when investigating a UIM claim by misinterpreting, or not abiding by, the written policy provisions."[69] An insurer's employee compensation and incentive plan may also be discoverable, as "relevant in determining the motivation underlying employees' actions in handling bad faith claims."[70]

Documents that are ordinarily protected by attorney-client or work-product privilege may also be discoverable, with some restrictions.[71] In *Boone v. Vanliner*, the Ohio Supreme Court opened the door for plaintiffs to discover an insurer's privileged materials in a bad faith claim.[72] This broad opening was later scaled back by the Ohio Legislature, and now requires an insured to establish a *prima facie* case of bad faith, as well as an *in camera* review by the court, before the disclosure of privileged material.[73]

Discovery should include:

- A copy of the policy held by the client with the insurer.
- All correspondence between the client and insurer.
- The insurer's claims files related to the client's UM/UIM claim.
- Insurer's policies and training manuals, employee compensation and benefit plans.
- Net worth of the insurer for punitive damages claims.
- Special interrogatories to identify who was involved in handling the claim.

d. Witnesses

If an insurer has justified its decision by relying on its own expert witness, or on the personal opinion of one its experienced adjusters, it is not necessarily shielded from a bad faith claim.[74] "Reliance upon the expert must be reasonable and must provide reasonable justification for a denial of coverage."[75] "An insurer cannot avoid a bad faith claim simply by establishing that its claims decision was based on the personal opinion of a seasoned adjustor. Rather, the purpose of a bad faith inquiry is to determine whether the adjustor lacked a reasonable justification for that 'personal opinion.'"[76]

Conclusion

There is a certain amount of irony in litigating a bad faith action based on the UIM insurer's delay. You've already waited many months – perhaps years – to get the underlying action resolved only to start all over again with a bad faith action. In some cases, the pandemic has added to the delays, giving insurers an excuse (however flimsy) for repeated continuances in cases where only damages are at issue. We hope the foregoing discussion will provide guidance and perspective should you choose to litigate a bad faith action for the insurer's unreasonable delay. ■

End Notes

1. *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, 87 N.E.2d 347 (1949).
2. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983).
3. *Id.; see also Staff Builders v. Armstrong*, 37 Ohio St.3d 298, 525 N.E.2d 783 (1988).
4. *See, e.g., Hamrick v. Safe Auto Ins. Co.*, 10th Dist. Franklin No. 08AP-734, 2009-Ohio-1380, ¶10 ("An insurer's duty to act in good faith runs only from the insurer to its insured, not to third parties such as those injured by the insured.*** Thus, *** the only way appellants can maintain this action is if Ward validly assigned his rights as the insured to appellants.").
5. *Captain v. United Ohio Ins. Co.*, 4th Dist. Highland No. 09CA14, 2010-Ohio-2691, ¶29.
6. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 555, 644 N.E.2d 397 (1994).
7. *See Mundy v. Roy*, 2d Dist. Clark No. 2005-CA-28, 2006-Ohio-993; *Grange Mut. Cas. Co. v. Rosko*, 146 Ohio App.3d 698, 767 N.E.2d 1225 (7th Dist.2001).
8. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (1994).
9. *Id.* at 554.
10. *See Motorists Mut. Ins. Co. v. Said*, 63 Ohio St.3d 690, 590 N.E.2d 1228 (1990).
11. *Zoppo* at 555.
12. *Id.*
13. *Hoskins* at 277.
14. *Winter Ents., LLC v. W. Bend Mut. Ins. Co.*, S.D.Ohio No. 1:17-cv-360, 2018 U.S. Dist. LEXIS 51323, at *11 (Mar. 28, 2018).
15. *Toman v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. Cuyahoga No. 102483, 2015-Ohio-3351, ¶ 3.
16. *Hoskins* at 276.
17. *TOL Aviation, Inc. v. Intercargo Ins. Co.*, 6th Dist. Lucas Nos. L-05-1308, L-06-1050, 2006-Ohio-6061, ¶50; *see also, Zaychek v. Nationwide Mut. Ins. Co.*, 9th Dist. Summit No. 23441, 2007-Ohio-3297, ¶11 ("We do not agree that Ohio law supports a rule of law that a bad faith claim can never exist absent an insurer's refusal to pay a claim."); *McNair v. State Farm Fire & Cas. Co.*, 6th Dist. Lucas No. L-13-1163, 2012-Ohio-5625, ¶24 ("Even where a claim is ultimately paid, the insurer's 'foot-dragging' in handling and evaluating the claim may support a bad faith cause of action."); *Brit Ins. Holdings N.V. v. Krantz*, N.D. Ohio No. 1:11CV948, 2012 U.S. Dist. LEXIS 1398, *14-17, 2012 WL 28342 (rejecting insurer's contention that bad faith claim cannot exist under Ohio law unless an insurance claim is actually denied by the insurer).
18. *Unklesbay v. Fenwick*, 167 Ohio App.3d 408, 2006-Ohio-2630, 855 N.E.2d 516, ¶¶15, 26 (2d Dist.) (Where plaintiff's allegations include bad-faith handling, processing, evaluating, and refusing to pay his claim, it essentially alleges foot-dragging on the part of the insurer); *see also, Mundy v. Roy*, 2d Dist. Clark No. 2005-CA-28, 2006-Ohio-993; *Wagner v. Midwestern Indemn. Co.*, 83 Ohio St.3d 287, 294, 699 N.E.2d 507 (1998) ("The jury could reasonably have found bad faith from the fact that Midwestern waited nearly a full year after its physical investigation had been completed before refusing the claim.").

19. *See, e.g., McNair*, at ¶27, citing *Furr v. State Farm Mut. Auto Ins. Co.*, 128 Ohio App.3d 607, 625, 716 N.E.2d 250 (6th Dist. 1998); and *Beever v. Cincinnati Life Ins. Co.*, 10th Dist. Franklin Nos. 02AP-543, 02AP-544, 2003-Ohio-2942, ¶'s 18, 40, 42.

20. *Vargo v. State Auto Mut. Ins. Co.*, N.D.Ohio No. 4:09CV2304, 2011 U.S. Dist. LEXIS 796, at *30-31 (Jan. 5, 2011); *see also, Stefano v. Commodore Cove E. Ltd.*, 145 Ohio App.3d 290, 295, 762 N.E.2d 1023 (9th Dist.2001) ("Although insurer ultimately paid its obligation to pay claim, an issue of fact existed as to whether there was a reasonable justification for the delay.").

21. *See Price v. Dillon*, 7th Dist. Mahoning Nos. 07-MA-75, 07-MA-76, 2008-Ohio-1178 (A seven-month delay in paying an insurance claim, without more, is not evidence of bad faith.).

22. *Mundy* at ¶4.

23. *Id.*

24. *Id.* at ¶¶10-14.

25. *Id.* at ¶17.

26. *Id.* at ¶9.

27. *Id.* at ¶17.

28. *Id.* at ¶20.

29. *Marshall v. Colonial Ins. Co.*, 7th Dist. Mahoning No. 15 MA 0169, 2016-Ohio-8155.

30. *Id.* at ¶30.

31. *Id.* at ¶70.

32. *Id.* at ¶83.

33. *Id.; see also Zaychek v. Nationwide Mut. Ins. Co.*, 9th Dist. Summit No. 23441, 2007-Ohio-3297 (Appellant's bad faith claim survived summary judgment where the insurer waited one year to make a settlement offer on appellant's UM/UIM claims and took over two years to complete their med-pay claims.).

34. *Toman v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. No. 102483, 2015-Ohio-3351.

35. *Id.* at ¶13.

36. *Id.*

37. *Id.* at ¶33.

38. *Id.* at ¶34.

39. *Id.*

40. *Id.*

41. *Id.* at ¶38.

42. *Id.*

43. *Id.* at ¶39.

44. *See Zoppo* at 402; *Furr v. State Farm Mut. Auto. Ins. Co.*, 128 Ohio App.3d 607, 716 N.E.2d 250 (6th Dist.1998).

45. *Asmaro v. Jefferson Ins. Co.*, 62 Ohio App.3d 110, 118, 574 N.E.2d 1118 (6th Dist. 1989).

46. *Id.*

47. *See, e.g., Furr, supra*, 128 Ohio App.3d at 627; *TOL*, at ¶74; *Valley Force Ins. Co. v. Fisher Klosterman, Inc.*, S.D. Ohio No.1:14-cv-792, 2016 U.S. Dist. LEXIS 55485, *39-40.

48. *See, e.g., Valley Force Ins. Co., supra*, at *41 ("As for whether the compensatory damages of attorneys' fees may be awarded without an award of punitive damages, there is [a division of authority.]").

49. *TOL Aviation, Inc. v. Intercargo Ins. Co.*, 6th Dist. Lucas Nos. L-05-1308, L-06-1050, 2006-Ohio-6061.

50. *Id.* at ¶74, quoting *Brown v. Guarantee Title & Trust/ARTA*, 5th Dist. No. 94-41, 1996 Ohio App. LEXIS 3812. Internal brackets by the court in *TOL*.

51. *Id.* at ¶¶87-88.

52. *Asmaro, supra*, 62 Ohio App.3d at 118, citing *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983), paragraph two of the syllabus.

53. *CSS Publ'g. Co. v. Am. Economy Ins. Co.*, 138 Ohio App.3d 76, 86, 740 N.E.2d 341 (3d Dist.2000); *Staff Builders v. Armstrong*, 37 Ohio St.3d 298, 304, 525 N.E.2d 783 (1988).

54. *See Hoskins* at 272.

55. *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991), quoting *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), syllabus.

56. *Stevenson v. First Am. Title Ins. Co.*, 5th Dist. Fairfield No. 05-CA-39, 2005-Ohio-6461.

57. *Id.; see also, United Dept. Stores Co. No. 1 v. Continental Cas. Co.*, 41 Ohio App.3d 72, 534 N.E.2d 878 (1st Dist.1987); R.C. 2305.09.

58. *Stevenson*, at ¶18; *Harsh v. Geico Gen. Ins. Co.*, S.D.Ohio No. 2:17-cv-00814, 2018 U.S. Dist. LEXIS 162032 (Sep. 21, 2018).

59. *See Garg v. State Auto. Mut. Ins. Co.*, 155 Ohio App.3d 258, 2003-Ohio-5960, 800 N.E.2d 757 (2d Dist.).

60. *See Id.; Ettayem v. State Auto Ins. Cos.*, C.P. No. 16CVH01-795, 2016 Ohio Misc. LEXIS 17838 (Aug. 31, 2016); *Harris v. Am. Family Ins.*, C.P. No. CV 2015-03-1754, 2015 Ohio Misc. LEXIS 30556 (Aug. 31, 2015).

61. *See Stewart v. Siciliano*,11th Dist. Ashtabula No. 2011-A-0042, 2012-Ohio-6123, 985 N.E.2d 226.

62. *Id.* at ¶37.

63. R.C. 2315.21(B)(1).

64. *See Stewart* at ¶39; *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, C.P. No. 2020 CV 00815, 2020 Ohio Misc. LEXIS 881 (Nov. 16, 2020).

65. R.C. 2315.21(B)(1).

66. *Howell v. The Eliza Jennings Home, et al.*, Cuyahoga C.P. No. CV-14-824578 (July 12, 2015).

67. *McKinley Dev. Leasing Co., 2020 Ohio Misc. LEXIS 881, at *6-7.*

68. *Sutter v. Am. Family Ins. Co.*, S.D.Ohio No. 1:20-cv-974, 2022 U.S. Dist. LEXIS 91201, at *10 (May 20, 2022).

69. *Id.*

70. *Id.*

71. *The Scott Fetzer Co. v. Am. Home Assur. Co.*, 8th Dist. Cuyahoga No. 110428, 2022-Ohio-1062.

72. *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 2001-Ohio-27, 744 N.E.2d 154.

73. *See Fetzer* at ¶22; R.C. 2317.02(A)(2).

74. *See Jay v. Massachusetts Cas. Ins. Co.*, 5th Dist. Stark No. 2006CA00201, 2008-Ohio-846, ¶89.

75. *Id.*

76. *Toman* at ¶33.

How To Get "Permanent And Substantial Physical Deformity" Issues To A Jury – And Win

by Brenda M. Johnson and Dana M. Paris

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Ohio's noneconomic damage cap statute for medical malpractice actions – R.C. § 2323.43 – was enacted in 2003. A similar cap on general personal injury actions – R.C. § 1315.18 – was enacted in 2005. These caps can be avoided if the injured plaintiff can show she suffered a "permanent and substantial physical deformity" as a result of the tortious conduct at issue.[1]

The term "permanent and substantial physical deformity" is not defined in either statute, and the case law that has developed so far is highly fact-specific. A survey of the case law available as of the date of its publication was included in the last winter edition of the CATA News.[2] That article ended with the following sentence – "[O]ne 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."

This article is intended to pick up where that sentence left off, and to provide practical advice, based on our experience, as to how to build an evidentiary record, and how to make sure that evidentiary record gets to a jury.

Build An Evidentiary Record

Both the case law to date and our experience make one thing clear – making sure that the permanent and substantial nature of your client's physical injuries is fully documented in the course of discovery is critical. Motion practice on whether the issue can get to the jury is inevitable, and you will need an evidentiary record on which to oppose these challenges.

Here, experts and photographic documentation are indispensable. Both state and federal courts have found expert reports and affidavits detailing the nature of the plaintiff's injuries, as well as their permanency, to be key factors in denying defense motions for partial summary judgment on this issue. In *Swink v. Reinhart Foodservice, LLC*,[3] plaintiff's counsel offered an expert affidavit describing the plaintiff's "extensive and permanent scarring, both from the trauma of her injuries and subsequent surgical intervention," along with an opinion that the scarring along with anatomical changes relating to the nonunion of a femur fracture were "a permanent and substantial physical deformity."[4] Judge Knepp of the Northern District of Ohio found the affidavit and report sufficient to defeat summary judgment.

Photographs and your client's own testimony can be critical as well, both for and against your case. In one of our cases, we were able to present an expert report, photographs, and testimony from our client regarding permanent surgical scarring, abnormal bone growth in his foot, and other observable changes in his body, which then allowed us to defeat a motion to prevent the caps from being applied.[5] Conversely, in *Poteet v. MacMillan*,[6] the Twelfth District recently reversed a trial court's denial of a defense

motion for a directed verdict on this issue in a case where expert testimony on the issue was equivocal, and the only evidence of any visible misshapenness or scarring was in the form of four year old photographs of the plaintiff's initial surgical wounds.[7]

Poteet is notable for other reasons as well, as it appears to be in conflict with *Johnson v. Stachel*,[8] in which the Fifth District held that a deformity does not need to be visible to qualify as "substantial." Either way, the best approach is to be able to present as much evidence of a *currently visible* and *permanent* physical deformity as possible, whether through expert testimony, photographs, or your client's own testimony and willingness to display his or her condition as necessary, whether in an IME, a deposition, or at trial.

Set the Procedural Stage

Before trial, the appropriate procedural method for raising the issue is via a Rule 56 motion. This is clear both from the nature of the issue, as well as the language of the caps statutes. Both of the damage cap statutes specifically provide that prior to trial, "any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination" as to whether the injury falls within an exception to the caps.[9]

Despite this, it has been our experience that defense counsel will wait until the eve of trial to raise the issue – often through a motion *in limine*. This mechanism is inappropriate, since motions *in limine* are directed to the admissibility (as opposed to the sufficiency) of evidence a party might offer at trial.[10] Thus, it is important to educate your court beforehand.

To ensure this issue is raised well before the eve of trial, make sure your court includes a dispositive motion due date in the case management order. That way, if defense counsel attempts to raise the issue on the eve of trial, you will be in a position to challenge it as untimely. Once the dispositive motion date runs, the only procedural option that *should* remain to the defendant is a motion for directed verdict.

Finally, be sure you include both a jury instruction and a jury interrogatory as to whether the caps apply, and do so in any case in which there is a potential question on this issue. Though neither of the caps statutes requires an instruction or an interrogatory on this issue, in *Giuliani v. Shehata*,[11] the First District has held that they both are necessary to preserve a verdict, regardless of how obvious it may be from the evidentiary record that the caps should not apply. ■

End Notes

1. *See* R.C. § 2323.43(A)(3); R.C. § 2315.18(B)(3).
2. *See* Brenda M. Johnson, *A Survey of the Case Law Addressing "Permanent and Substantial Physical Deformity,"* CATA News, Winter 2021-2022.
3. No. 3:20 CV 1997, 2022 U.S. Dist. LEXIS 74229, 2022 WL 1203063 (N.D. Ohio April 22, 2022).
4. *Id.* at *3-*4.
5. *See* Order dated Dec. 18, 2020, *Hay v. Shirey*, N.D. Ohio No. 1:19-cv-02645-PAG [DE 38].
6. 12th Dist. Warren No. CA2021-08-071, 2022-Ohio-876.
7. *Id.* at ¶¶ 21-22 (plaintiff did not testify about misshapenness or scarring, and the only photographic evidence was four year old photos of fresh surgical wounds).
8. 5th Dist. Stark No. 19AP-828, 2020-Ohio-5595.
9. R.C. § 2315.18(E)(2); R.C. § 2323.43(C)(2).
10. *See, e.g, Louzon v. Ford Motor Co.*, 718 F.3d 554 (6th Cir. 2013) (distinguishing motions *in limine* from motions for summary judgment).
11. 1st Dist. Hamilton Nos. C-13087, C-140016, 2014-Ohio-4240.

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The End Of Emotional Distress Damages In Federal Discrimination Claims – *Cummings v. Premier Rehab Keller*

by Kyle B. Melling

In an expected but still inexplicable move, the United States Supreme Court, in a party line 6-3 opinion authored by Chief Justice Roberts, continued to chip away at the rights of everyday Americans. This time, the target was those who have been discriminated against by the recipients of federal funding. Specifically, this includes claims that are brought pursuant to legislation enacted under the Spending Clause of the Constitution: The Rehabilitation Act of 1973 §504[1], The Patient Protection and Affordable Care Act (ACA) §1557,[2] Title VI of the Civil Rights Act of 1964 (Title VI),[3] and Title IX of the Education Act of 1972 (Title IX).[4]

Background of the Case:

The case was *Cummings v. Premier Rehab Keller.*[5] Jane Cummings is deaf and legally blind. She sought physical therapy from Premier Rehab Keller, a small rehabilitation center in the Dallas-Fort Worth area. Due to her disabilities, Ms. Cummings requested an American Sign Language interpreter for her appointments. Premier Rehab declined to offer her an ASL interpreter, and instead suggested that she could communicate with her therapists using written notes, lip reading, and gesturing. Ms. Cummings sought and obtained care from another provider.

Premier Rehab receives reimbursement through Medicare and Medicaid for the provision of some of its services. Accordingly, Premier Rehab is subject to §504 of the Rehabilitation Act of 1973, and §1557 of the Patient Protection and Affordable Care Act. These statutes prohibit various types of discrimination in federally funded programs and other covered entities, including discrimination on the basis of the types of disabilities that Ms. Cummings has.

Cummings filed suit against Premier Rehab, alleging that its failure to provide an ASL interpreter constituted discrimination on the basis of disability in violation of these statutes. The District Court dismissed her complaint observing, "the only compensable injuries that Cummings alleged Premier caused were 'humiliation, frustration, and emotional distress'".[6] The Court of Appeals for the Fifth Circuit adopted the same conclusion and affirmed.[7]

Legal Background:

The Supreme Court began its opinion by exploring the background of statutes that prohibit the recipients of federal financial assistance from discriminating based on certain protected grounds, including §504 of the Rehabilitation Act and §1557 of the Affordable Care Act. The Court also identified Title IV of the Civil Rights Act of 1964, which forbids race, color, and national origin discrimination in federally funded programs or activities, and Title IX of the Education Amendments of 1972, which similarly prohibits sex-based discrimination from educational institutions who accept federal funding.[8] Each of these four statutes arise out of the Spending Clause of the

United States Constitution.[9] While these statutes do not expressly provide victims of discrimination a private right of action to sue a funding recipient, the Supreme Court and Congress have long recognized an implied right of action.[10] As such, the issue in *Cummings* was not whether a private person could bring a federal case against a funding recipient. Instead, the question considered by the Court was what kind of damages are available to victims. Specifically, whether victims of discrimination by funding recipients could receive non-economic damages for emotional distress.

Prior Prohibition of Punitive Damages:

Prior to *Cummings*, the Supreme Court considered *Barnes v. Gorman*.[11] There the Court was presented with the question of whether punitive damages were available in claims made under Section 202 of the Americans with Disabilities Act and under § 504 of the Rehabilitation Act of 1973. When Congress enacted § 504 of the Rehabilitation Act of 1973, it explicitly provided that the "remedies, procedures and rights set forth in Title VI" shall apply to aggrieved individuals under Section 504. Accordingly, due to the legislative coupling of Section 504 remedies to Title VI, when the Court considered in *Barnes* whether punitive damages were available, it also had to address whether Title VI permitted the award of punitive damages. As the text of Title VI was devoid of any text that would expressly provide for punitive damages, the court turned to common law contract doctrine as an interpretive tool. In the Court's view, Spending Clause based statutes operated like contracts, whereby the federal government would offer private entities federal money in exchange for recipients' agreement to comply with certain requirements, including not engaging in discriminatory practices.

Relying on this contract analogy, the Court explained that "[j]ust as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'"[12] Stated differently, the Court felt that only those damages that are traditionally available in breach of contract scenarios, should be available in claims brought under Spending Clause statutes. Because common law contract doctrine treats punitive damages as a special remedy, and not one that is ordinarily available for a contract breach, funding recipients did not have adequate notice that they were subject to punitive damages. As such, the *Barnes* court held that it would read Title VI, and by extension, Section 504 of the Rehabilitation Act, to foreclose the recovery of punitive damages.

Since 2002, in reliance on *Barnes*, district courts have repeatedly denied punitive damages for Title VI and Section 504 claims.

Cummings Prohibition on Emotional Distress Damages:

With the backdrop of the *Barnes* case, the Supreme Court again was presented with the question of what damages are available to victims of discrimination under these Spending Clause statutes. More specifically, the Court was charged with determining whether damages for non-economic injuries such as emotional distress were available to victims of discrimination. Here, the trial court dismissed Ms. Cummings' claims, reasoning that her only claimed damages were emotional, and emotional damages were unavailable under § 504 of the Rehabilitation Act and § 1557 of the Affordable Care Act. The Fifth Circuit affirmed.

This is a significant matter with significant consequences, as often emotional distress damages are the primary if not the only form of relief for victims of discrimination. Worse, the trauma can be severe and lasting and can affect some of the most vulnerable in our society – such as students or patients who experience sexual harassment or assault, victims of racial discrimination, and individuals forced to endure other degrading treatment and practices. Even more important, in Ohio, any concurrent state law claims are subject to the tort caps on non-economic damages, where the federal claims are not. One would think these traumas and the resultant suffering are presumably the exact type of dignitary and psychological harms that these anti-discrimination laws are meant to protect against. Apparently not.

Chief Justice Roberts authored the 6-3 opinion, holding that compensatory relief for emotional harm is unavailable in suits brought under § 504 of the Rehabilitation Act and § 1557 of the Affordable Care Act. In its analysis, the Court again returned to contract doctrine analysis and reasoned that because emotional distress damages are not "traditionally available," or "generally … available" or "normally available for contract actions" they would not be available in suits brought under Section 504 and Section 1557.

Strangely, the Court acknowledged Cummings' argument that traditional contract remedies in fact *do* "include damages for emotional distress." *Cummings at 1572*. However, again falling back on *Barnes*, the Court found that punitive damages can also be available in breach of contract actions in unique and rare cases, but it

is the exception, not the rule. Because under the general rule emotional distress damages are not available in breach of contract actions, the Court rejected the availability of emotional distress damages in Spending Clause discrimination matters.

In dissent, Justice Breyer pointed out the clear logical fallacy that the majority ignored. Namely, that punitive damages are only available in breach of contract cases when there is an accompanying tort action. According to Justice Breyer, the reasoning in *Barnes* to prohibit punitive damages was because they do not exist to make a plaintiff whole and are not calibrated to the harm suffered.[13] In summary, the *Barnes* Court held that punitive damages could not be allowed in these cases because of the unorthodox and unpredictable nature of them. "Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would have *accepted the funding* if punitive damages liability was a required condition."[14]

Justice Breyer continued to point out that, in contrast, emotional damages can be available in a case that is purely a breach of contract, even with no associated tort action. Further, emotional distress damages are wholly foreseeable results of discriminatory conduct, and are thus neither unorthodox nor indeterminate and disproportional like punitive damages can be.[15] The majority was not persuaded, and it is now the law of the land that similar to breach of contract actions for the sale of widgets, emotional distress damages are not available for victims of discrimination under at least §504 of the Rehabilitation Act and §1557 of the Affordable Care Act.

Implications on Other Civil Rights Statutes

On its face, the *Cummings* opinion bars victims of discrimination from recovery for emotional distress damages under Section 504 and Section 1557. However, this same reasoning could and will be read to foreclose emotional distress damages under other civil rights statutes, including Title VI and Title IX. Using the same analysis as in *Cummings* and *Barnes*, it is entirely expected that courts will prohibit these emotional distress damages in private suits under Title VI and Title IX.

In the current climate, Title IX is the most concerning of these statutes, as the last few years have seen literally billions of dollars paid out by Colleges and Universities for Title IX violations, based in large part on the emotional damages suffered by the plaintiffs. The Supreme Court has not expressly prohibited these damages in Title IX cases, but certainly the issue will be briefed in every Title IX case currently filed, and the Court will have its opportunity to do so soon.[16] ■

End Notes

1. 29 U.S.C.A. §794 – The Rehabilitation Act of 1973 prohibits discrimination against otherwise qualified individuals on the basis of disability in programs and activities that receive financial assistance from the US Department of Health and Human Services.
2. 42 U.S.C.A. §18116 – The Patient Protection and Affordable Care Act prohibits discrimination from participating in health programs and activities which receive Federal financial assistance, including credits, subsidies, or contracts of insurance.
3. 42 U.S.C.A. 2000d *et seq.* - Title VI of the Civil Rights Act of 1964 prohibits discrimination by any program or activity receiving Federal financial assistance.
4. 20 U.S.C.A. §1681 – Title IX of the Education Act of 1973 prohibits discrimination on the basis of sex from any educational program or activity receiving Federal financial assistance.
5. 142 S.Ct. 1562 (2022).
6. No. 4:18-CV-649-A, 2019 WL 227411, *4 (N.D. Tex. Jan. 16, 2019).
7. 948 F.3d 673 (5th Cir. 2020).
8. 78 Stat. 252, 42 U.S.C. §2000d; 86 Stat. 373, 20 U.S.C. § 1681.
9. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1.
10. *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).
11. *Barnes v. Gorman*, 536 U.S. 181 (2002).
12. *Id.* at 186 citing, *Pennhurst State Sch. And Hosp. v. Halderman*, 451 U.S.1, 17, 101 S.Ct. 1531 (1981).
13. *Barnes*, 536 U.S. at 189.
14. *Id.* at 188.
15. *Cummings*, 142 S.Ct. at 1579.
16. The decision may in fact come sooner than expected, as the Court is currently weighing accepting cert in *Fairfax County School Board v. Doe,* Docket No. 21-968 and *University of Toledo v. Wamer*, Docket No. 22-123 which both question whether the private right of action should even exist under Title IX in instances of student on student harassment.

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Pointers From The Bench:
An Interview With Judge Shirley Strickland Saffold

By Ellen Hobbs Hirshman

Judge Shirley Strickland Saffold has served the northeast Ohio community as a Judge in the Cuyahoga County Common Pleas Court, General Division, since January of 1995. Prior to joining the Common Pleas bench she served as a Cleveland Municipal Court Judge from 1987 through 1994. Before that she worked at The Legal Aid Society (Criminal Division) from 1973 through 1987, first in a position while attending law school working together with criminal defense attorneys offering alternatives to incarceration for their clients.

Judge Shirley Strickland Saffold

When she graduated from Cleveland Marshall College of Law[1] and was admitted to the bar in 1977, she transitioned to working as an attorney in the criminal division at Legal Aid representing indigent clients. Back then there were no federal or state public defenders sharing the responsibility of defending indigent clients. Therefore, she and other Legal Aid attorneys were responsible for representing this population of litigants. Judge Strickland Saffold believes her trial experience provided invaluable preparation and insight to guide her as she joined the bench, first in the Cleveland Municipal Court.

Judge Strickland Saffold did not grow up in Northeast Ohio. Raised in New Jersey, she graduated from Montclair High School in 1969. She has been a competitive athlete her whole life starting with being a member of her high school jump rope team (on which she was dubbed the "jump rope queen"). She has played slow pitch softball, tennis and racquetball (she is proud to have served as the first black woman to be president of the Ohio Racquetball Association). The Judge is also an avid golfer. She is looking forward to becoming proficient on the pickleball court. Evidently, Court of Appeals Judge Mary Jane Boyle has challenged Judge Strickland Saffold to join her on the court. In more recent years, Strickland Saffold runs or walks six miles a day with her dogs, a hound dog named "Justice" and a chihuahua named "Lucy Felony".

When deciding where to attend college Strickland Saffold was focused on attending a historically black university (HBCU) and chose to attend Central State University in Wilberforce, Ohio. She explains that it was an "eye-opening" experience because up until that point in time she had not been educated in a school with predominantly black students. It was inspiring for her to be educated in a student population that was 80% black, where teachers encouraged their students to elevate and challenge themselves to achieve at the highest level.

After graduating from Central State University in 1973 with a degree in political science and a minor in French, Strickland Saffold moved to Cleveland, Ohio where she started working for the Legal Aid Society. She had intended to move back to New Jersey and attend law school back home until she visited Cleveland Marshall

Judge Shirley Strickland Saffold golfing.

College of Law and had an interaction with then Dean James Douglas who encouraged her to apply to Cleveland Marshall. Without any real intention of attending Cleveland Marshall, Strickland Saffold applied and was accepted the following day. Thus, her fate was sealed and she attended and graduated from Cleveland Marshall College of Law in 1977.

Judge Strickland Saffold was elected to the Cleveland Municipal Court bench in 1987. She describes this experience as a wonderful steppingstone to becoming a Common Pleas Judge but distinguishes the experiences and environment of these two courts. She refers to the Municipal Court as a "people's court" because she personally encountered a lot of people on a daily basis; whereas on the Common Pleas bench they do not see as many people. As a Municipal Court Judge her focus was more on the community and trying to be a troubleshooter, providing assistance to a citizen in her courtroom and trying to connect them with the necessary resources to make their life and the community life better. As a Common Pleas Judge she is confronted with cases where the dangers to the community are more severe. The conduct at issue is often intense and the consequences are life altering.

When discussing the greatest influences in her life Judge Strickland Saffold quickly refers to her maternal grandfather, a Baptist minister. She describes him as having been both a religious and civic leader in their small community. He was a great organizer in the community and she learned politics by watching him, which motivated her to become involved in community issues back home at a young age and in student government.

It is this intense commitment to community which has motivated Judge Strickland Saffold her whole life. She has always been very competitive and is not an intimidated person. She has faith in our judiciary and takes her responsibility as a Common Pleas Judge very seriously. She believes that she is probably viewed as a conservative judge by criminal defense attorneys but her philosophy is that people need to follow the law. She perceives her responsibility as a judge to let all sides be heard and follow the facts and the law. She believes that as a judge one needs to be careful not to redefine the law. You need to be fair. You need to look at the whole picture and consider the impact of your decisions.

Judge Strickland Saffold reflected a bit on the fact that her tenure on the bench will come to an end in January 2025 given the age restrictions for judges in Ohio. Judge Strickland Saffold agrees with these age limitations. She believes it is a good age to move on and let the next generation step up. She is looking forward to the time when she will sit down, read, and just hang out with her dogs. She will move at her own pace, go to the theatre, and hopefully travel which she truly enjoys. She recounts her favorite destination is Senegal and describes this trip as being very emotional as it was a "homecoming" for her, she felt "at one" with the land and its people. She is truly moved just recounting the experience.

When asked what advice she would give to attorneys entering her courtroom she gave very solid advice: be prepared, be professional, don't be too relaxed in how you dress, suits are not out of style, and adhere to the rules. It is all quite simple.

And, for all you ladies out there, probably the best advice from Judge Shirley Strickland Saffold is posted on the wall to the right of the door as you enter from the back hallway into her courtroom. There, she has a picture of Justice Ruth Bader Ginsburg with sage advice "Fight Like a Girl". ■

End Notes

1. Now known as Cleveland State University College of Law.

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Resolving Workers' Comp Subrogation Liens

by James J. Zink

For personal injury practitioners, subrogation can be a significant roadblock to getting a third-party claim resolved where the injury falls under workers' compensation. While this article will provide some technical background, it will largely focus on the significant dangers the subrogation process can bring to a plaintiff's practice and some practical ways to address those dangers and the process as a whole.

It's important to at least understand the basics of workers' compensation and potential parties to a claim before getting into subrogation rights. There are essentially two ways an employer can pay for workers' compensation in Ohio. First, unique to Ohio when compared to almost any other state, an employer can have a policy through the Bureau of Workers' Compensation. These are called state fund employers. The BWC is responsible for almost any cost related to that claim, though the state fund employer remains involved as a party of interest. Costs related to the claim then affect policy rates of the state fund employer. Second, larger companies (typically 500 or more employees) can opt to be self-insured, meaning they are paying for every cost, dollar for dollar, in the claim. The BWC has limited participation and no exposure in SI claims.

With that understanding, O.R.C. 4123.93 and 4123.931 lay out who is covered and controlled by the subrogation statute and how it applies. The BWC or the SI employer are the subrogees against any third-party claim involved in the accident. Importantly, state fund employers have no right to interfere or participate in the subrogation process. Coming from the workers' compensation world, this is a huge benefit, as it's not uncommon for the employer to be spiteful and sabotage attempts to resolve claim matters, at times even when it's actually to their own financial disadvantage. The BWC is almost always a better party to work with on subrogation claims, as they tend to be far more reasonable in their demands and getting issues resolved.

Subrogees have two statutory rights of subrogation. First, they have a right against the third party itself. Second, they also have a lien against the claimant's claim against the third party. It is the responsibility of the claimant in the workers' compensation claim to ensure all potential subrogees are notified and have a reasonable opportunity to assert their right involving a third party. Any settlement of a third-party claim cannot be finalized until this happens.

This brings up the biggest danger the subrogation process can present to a third-party practitioner. Case law has held that this responsibility exists as long as there is even a potential claim. If you settle a third-party suit and the client then pursues a workers' compensation claim, it could lead to litigation by the subrogee against both your client and the third party/insurance company involved in the settlement, not to mention the potential malpractice claim against you, the settling attorney, for letting it happen with subrogation

rights unresolved. This is potentially true even if you are unaware that there even could be a potential workers' compensation claim. You could still face liability under the subrogation statute. This highlights the importance of either having an attorney on staff or a firm that you work with that can evaluate cases for potential workers' compensation issues to avoid this potentially significant pitfall.

Next, let's assume there is an allowed workers' compensation claim. What exactly is in the pot of money that would be subject to subrogation? This is called the net amount recovered. First, attorney's fees and costs in obtaining any third-party settlement/verdict are not subject to subrogation. Additionally, punitive damages, in the case of a verdict, are also not subject to the subrogation statute. Everything else, however, is fair game for subrogation.

The next step is figuring out what the subrogation amount will look like? The O.R.C. 4123.931 holds that a claimant is entitled to "an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered." Even those who continually find themselves in the subrogation world will tell you that the above formula is difficult to nail down. It is the result of multiple failed attempts at subrogation statutes that were struck down by the Ohio Supreme Court due to being over prescriptive on the level of subrogation. This version leaves a lot of room for argument on what exactly could be deemed appropriate to count for or against the subrogation amount. Overall, however, much like other areas of settlement, it ends up being what both sides agree it should be. There are provisions in the statute that allow third parties like the BWC or an ADR process to get involved, but those are virtually never used as, in the end, a compromise is generally reached.

From a plaintiff's perspective, understanding the limitations of the workers' compensation process would help bolster arguments for why the subrogation amount should be less, hence increasing the uncompensated damages portion of the formula.

One good example of this is the calculation of what is called the Average Weekly Wage, or AWW. The AWW is perhaps the most important determination in a workers' compensation claim because it is the basis for almost every type of benefit or award in a claim. The presumptive calculation for the AWW is to take how much an individual made over one year prior to the injury and divide that number by 52. There are arguments to be made to exclude weeks, which usually is when an individual was off work for reasons beyond their control (illness, inappropriate firing, etc.) but those arguments do not always carry the day with the BWC and the Industrial Commission. As such, a claimant who either did not work for the entire year or who earned lesser wages earlier in the year could easily end up with their AWW set below what they were used to making around the accident, and reducing the payout to them in virtually every award workers' compensation has to offer. An argument can, and should, be made that these sorts of limitations justify a smaller subrogation in order to make the client more whole from their third-party claim.

Another example of the inability to make a claimant whole is workers' compensation pay rates have varying caps depending on the type of benefit and the year of the injury. As such, high wage earners are often penalized in the workers' compensation process as they get capped out on their weekly benefit amount, meaning they are getting paid far less than on average they received otherwise. Again, there is a good argument here that these lost wages represent uncompensated damages. Having an understanding with whoever is handling your workers' compensation matter (if you are not doing it yourself) will help you establish a stronger position on uncompensated damages.

Once the uncompensated damages are defined, the other item in the formula to determine the subrogation amount is the subrogation interest. O.R.C. 4123.93 defines it as "past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee." In short, it's whatever has been paid and is anticipated to be paid in a claim. That is a pretty wide definition a subrogee can use to justify their interest.

Again, here is a situation where understanding what is happening in a workers' compensation claim is important. Obviously, what has been paid in a claim is not going to change. What the fight tends to be over is the future payments. Is the claim at a standstill due to denied medical conditions? Has the claimant been found to be at maximum medical improvement? How serious are the conditions that have been recognized? Are there potentially unpaid future awards like a loss of use award or a permanent partial disability award out there? All of these items could limit or support arguments about the potential future costs involved in a claim.

As stated earlier, these subrogation interests tend to get resolved through the settlement process. Both sides present their figures and it ends up somewhere in the middle. If you are dealing with the BWC, which as stated earlier is preferred, they will usually split the net

value of the third-party claim if their interest supersedes the claim's value.

SI employers are usually more difficult to deal with, but you can find resolution on the amount. However, there is sometimes an alternative they are willing to consider: the client walking away from the workers' compensation claim. While it is far from common, there are SI employers who are willing to waive their subrogation interests if a client is willing to close out their claim, even after significant money has already been paid. This can be especially useful in high value claims where an SI employer is potentially looking to be on the hook for additional significant long term care costs related to the client's injuries. It is something worth discussing when you find yourself having difficulty resolving a subrogation claim, or as a negotiating point in the third-party settlement if you can get them on board.

Let's close with a few practical matters. After notifying all the subrogees, you should be negotiating directly with the SI employer/BWC. Sometimes insurance companies want to get involved in this part of the process (or the SI employer/BWC will contact them) but they have little impact here as they do not know what the net amount recovered is going to be as they do not know your attorney fees or costs. If you are at the point where you cannot get to a settlement amount for the subrogation, then a lawsuit needs to be filed including all parties to the subrogation.

If you find yourself in a situation where a client is adamant that they solely want to pursue a third-party claim and not the workers' compensation portion, it's important the advice on potential future liability by filing a workers' compensation claim is clear and in writing to the client to protect yourself from any malpractice allegations.

Hopefully the information above provides some things to consider when trying to negotiate and resolve the subrogation matters. As you can see, there are a lot of opportunities to help maximize value for your client with some understanding of what the workers' compensation process does (and does not) provide for. Having competent co-counsel or in-firm counsel that understands the workers' compensation process not only will help get best results for clients, but also avoid potentially significant liability if a claim gets settled that may have a workers' compensation claim attached to it.■

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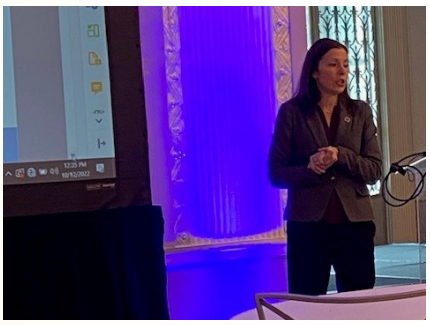
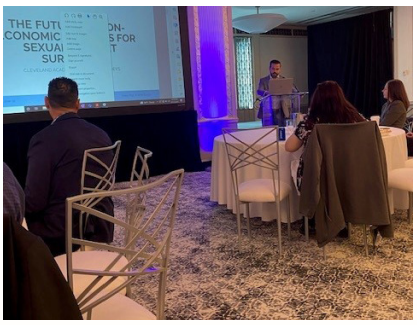




State Rep. Kristin Boggs speaking at CATA Luncheon CLE

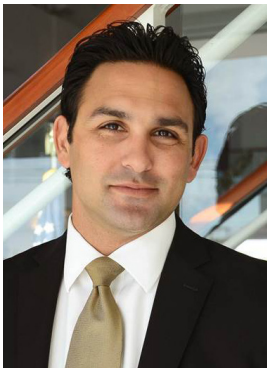
CMCL's Annual Career Fair

James Zink and Christine LaSalvia representing CATA at the CMCL Sidebar Annual Career Fair

Announcements - Winter 2022-2023

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

Recent Promotions and New Associations



Spangenberg Shibley & Liber is pleased to announce that **Dustin B. Herman, Esq.** has been named a partner at the firm. Dustin's practice focuses on product liability, medical malpractice, and mass tort litigation.

Peiffer Wolf welcomed associate **Marilyn K. Eble** to our Cleveland office. Marilyn is a graduate of the Cleveland Marshall College of Law and former law clerk to Judge J. Philip Calabrese on the Northern District of Ohio. Marilyn will work primarily in our product-liability and mass-torts practice focusing on multi-district litigation.

Plevin & Gallucci Co., L.P.A. is pleased to announce that **Theresa M. Lanese** has joined the firm. Theresa is an experienced attorney who focuses on personal injury and workers' compensation litigation. She earned her Juris Doctorate, magna cum laude, from Cleveland-Marshall College of Law and is admitted to practice before the Ohio Supreme Court and the United States District Court, Northern District of Ohio.

Eadie Hill Trial Lawyers welcomes attorney **K. Joshua Waters** as a nursing home abuse lawyer at the firm, working out of our Cincinnati office. You can learn more about Josh's background at https://www.eadiehill.com/our-attorneys/#AttorneyK.JoshuaWaters

Eadie Hill Trial Lawyers congratulates **Mark A. Tassone** for his first year with the firm and being part of the trial team that achieved a recent record-setting verdict for nursing home abuse cases. Mark works out of our Cincinnati office. You can learn more about Mark's background at https://www.eadiehill.com/our-attorneys/#AttorneyMarkTassone

Tittle & Perlmuter has added an experienced litigator to the team - attorney **Matthew L. Alden.**

Honors, Awards, and Appointments

Ashlie Case Sletvold, a managing partner with Peiffer Wolf, was appointed to the Plaintiffs Executive Committee in In re Abbott Preterm Infant Formula Products Liability Litigation, MDL 3026, pending in the Northern District of Illinois.

Allen C. Tittle recently achieved an AV Preeminent rating by Martindale-Hubbell. An AV Preeminent rating is the highest peer rating standard based on legal knowledge, communication skills, and ethical standards.

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Todd Gurney

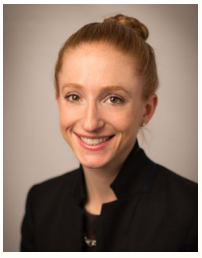
Attorney **Todd Gurney** has been selected as an honoree in the 2022 class of the Cleveland Jewish News' 18 Difference Makers. Started in 2015, this honor is bestowed annually upon individuals who embody 'tikkun olam" (repairing the world) and encourage it among others through actions and contributions to better our community.

Additionally, Todd was appointed as President of the Board of ORT America - Ohio Region. ORT is a non-profit organization that provides high-quality teaching, training and education to more than 100,000 students across 34 countries all over the world. ORT provides students the tools they need to thrive in the years ahead, while also looking back at 4,000 years of Jewish history, which will inspire, nurture, and sustain these traditions for future generations.

CATA & Case Western Reserve Law School Social

On November 17, CATA hosted a social gathering with current law students from Case Western Reserve University at Tacologist. The event gave the students the opportunity to learn more about personal injury trial work and socialize with our members and local judges.

CATA will host more events with the local law schools in 2023 as it serves as a wonderful way for our members to impart our wisdom, encourage the students to explore careers as personal injury trial attorneys, and meet the up-and-coming talent. We encourage our members to attend these events in the future. ■

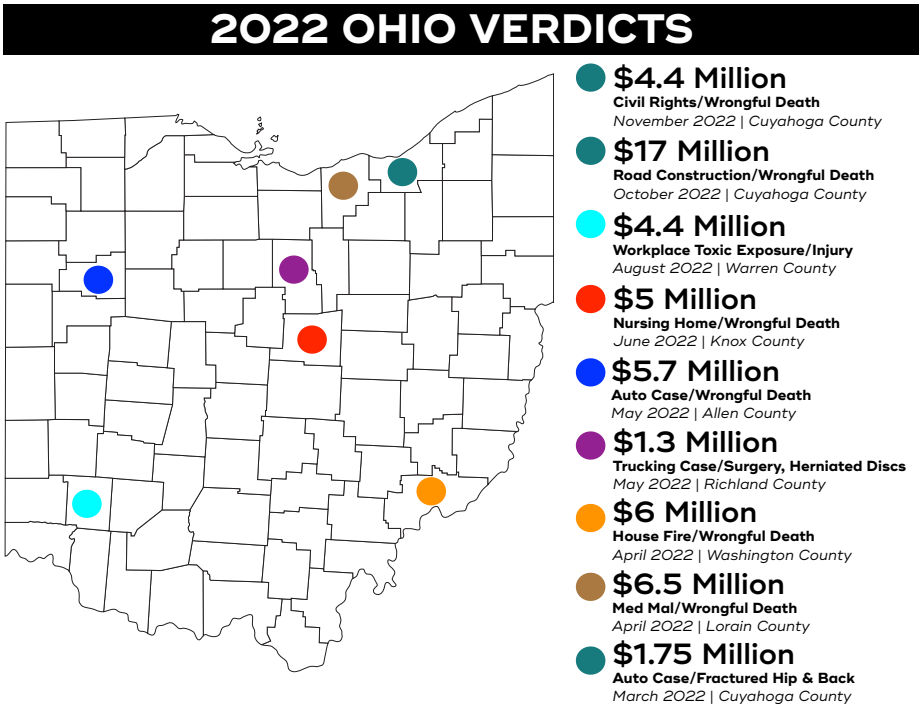


Dana M. Paris is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.694.5201 or danaparis@nphm.com.

2022 Ohio Verdicts — A Good Trend, But Watch Out For Tort Reform

by Dustin Herman | November 2022

Verdict sizes are increasing in Ohio and across the country. Just take a look at the map of 2022 Ohio Verdicts (and those are just the verdicts over $1 million that I am aware of). This trend is both good news and bad news, and here's why:



If you Google the phrase "nuclear verdicts," you will find a plethora of articles from the past two years discussing verdicts that exceed $10 million—a so-called nuclear verdict. One article from the American Transportation Research Institute is titled, "Understanding the Impact of Nuclear Verdicts on the Trucking Industry." This "study" looked at 600 verdicts from 2006 to 2019 and found that in the first five years of the data there were 26 cases with verdicts over $1 million and that in the last 5 years of the data, there were almost 300 verdicts over $1 million. It further found that verdicts over $10 million doubled during the same time frame.

My favorite article is from our friends at the U.S. Chamber of Commerce titled, "Nuclear Verdicts: Trends, Causes, and Solutions." It can be found on the website "InstituteforLegalReform.com." It is a 60-page document that highlights the fact that verdict sizes have been increasing throughout the U.S. over the past decade.

The Chamber's article presents data on 1,376 nuclear verdicts from 2010-2019 and concludes that nuclear verdicts are increasing in both amount and frequency—and that nuclear verdicts are most likely to occur in product liability, auto crash, and medical malpractice cases.

The rise in verdict amounts is good news for people who are seriously injured by the wrongdoing of others; but the Chamber of course sees rising verdicts as a serious threat to the interests of corporations and the insurance industry—and categorically views any verdict over $10 million as inherently flawed and unreasonable. Nowhere in the entire article does the Chamber acknowledge that such a verdict might be demanded by the seriousness of the injury a person suffered or reflects the appropriate punishment for horrible conduct by a corporation. Nor does the Chamber acknowledge that one of the "solutions" to nuclear verdicts is for businesses to focus on safety and avoid injuring people in the first place.

Instead, the Chamber urges state legislators to enact legislation to prevent nuclear verdicts, including: bifurcating the compensatory and punitive damages phases of trial (Ohio law is given as an example for other states to follow); caps on damages (what the Chamber calls "damages guardrails"); putting restrictions on lawyer advertising; venue reform; requiring the disclosure of third party litigation funding; and finally—barring attorneys from asking for a specific dollar amount in trials.

While the trend in rising verdicts is a good thing for people who are seeking full compensation for their injuries, this is causing the tort reformers to gear up for battle. We need to be ready, willing, and able to help the Ohio Association for Justice in the upcoming fight. There is no one else to fight against these kinds of proposed bills that would interfere with the right to trial by jury or that would put limits on Ohioans' rights to obtain full justice when they are injured by the wrongful conduct of others—no one else but us, the trial lawyers. ■

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

Editor's Note: *To accompany Dustin Herman's article on verdict trends in Ohio, CATA has chosen to spotlight three recent verdicts obtained by our members instead of our usual one-per-issue. The poignancy of these stories, and diversity of facts, illustrates what we as trial lawyers can achieve – which is not to discount those less spectacular (but equally important) outcomes we obtain for our clients on a daily basis.*

Verdict Spotlight:

Laura Thompson, etc. v. American Electric Power Company, Inc.

Washington County No. 19 OT 263

by Jordan D. Lebovitz

A Washington County jury returned a $6 million jury verdict on April 15, 2022 against Ohio Power Company, Inc. (otherwise known as AEP Ohio) in a wrongful death case arising from the company's ten-hour delay in responding to a power line brought down in a storm by a tree limb. The downed service drop eventually caused a catastrophic fire at the home of Elsa Thompson, a Marietta resident who had gone to sleep after having been assured by AEP personnel that there was no danger. Mrs. Thompson was overcome by the smoke and died before she could escape the flames. The verdict included $2 million in survival damages and $4 million for Elsa's wrongful death, subject to a ten percent reduction for comparative fault due to a lack of smoke detectors in the home.

Jordan D. Lebovitz

On May 25, 2019, Elsa, the 85 year old matriarch of her family and an AEP customer, was at home when a late morning storm came through and took down a tree branch in her back yard. The branch landed on the service drop providing power to her home, taking it down to within six feet of the ground and pulling the weatherhead away from the house. This eventually severed the neutral leg of the service drop, creating a dangerous electrical condition which then caused the catastrophic fire that cost Elsa her life.

AEP got the first call reporting the downed service drop at 1:52 p.m. When the call was received, AEP's internal system identified this as a "Priority 2" known hazard because of the known dangers associated with a downed, but still electrified, service line. AEP's dispatchers promptly routed the report to the field servicer responsible for addressing service calls in the relevant area; however, instead of responding in accordance with AEP's priority system, AEP's servicer first went to several less urgent service calls – many of which had come in well after AEP first got notice of the dangerous condition at Elsa's house – before finally arriving at Elsa's home nearly 10 hours later. By that time, however, it was too late. Elsa's house was fully engulfed in flames shortly after 11:00 p.m., and her body was found by firefighters between her bedroom door and the hallway on the second floor of the home before AEP's service crew finally arrived at the house to address the downed service drop that was the cause of it all. Elsa's son and one of her grandchildren watched as she was brought out of the burning house and taken to the hospital.

The subsequent investigation showed that the neutral leg of the service drop had been mechanically severed, causing a dangerous electrical condition called a "floating neutral." A floating neutral causes dangerous voltage surges, which can overload electrical wiring and appliances, causing them to overheat and ignite. Our expert identified the remnants of a relocatable power supply (an "RPT," otherwise known as a power strip) at the area of origin of the fire, which reached temperatures of nearly 2000 degrees and spread quickly.

In discovery, we learned that AEP, like all utilities, has a priority system in place to 'triage' calls that come in, especially when there are multiple calls after a storm for a service area. Their representatives admitted that under AEP's written priority system, which conformed to industry standards, the downed service drop at Elsa Thompson's home was a higher priority than the other situations its servicer responded to that evening. However, they also presented witnesses at trial (both

company representatives and retained experts) who contended that under an unwritten policy, AEP's servicers had discretion to respond to lower priority service calls based on personal intuition. Their internal documents directly contradicted this position, including a document outlining procedural changes adopted by AEP in response to a Public Utilities Commission of Ohio inquiry regarding a pattern of delayed responses to high priority calls. We learned that document/procedure was created over 15 years prior to Elsa's calls. We also learned that their servicer on the ground that night was never trained on the AEP priority system, even after working there for over 10 years, and did not learn about the priority system until a year after our client perished…when he was promoted and now trains other mechanics.

Against this backdrop, the chronology of the servicer's decisionmaking process, and the types of decisions he made, were a powerful factor at trial. Through discovery, and analyzing the GPS data on the servicer/line mechanic's truck, we learned that at around 5:45 p.m. that afternoon, the servicer had a choice to take a right turn to get back into Marietta to take care of a known hazard, or make a left to address a situation that AEP assigned a lower "Priority 3" status. He took the left because it was closer, 7 minutes. The servicer then went to 2 additional lower priority calls, and then stopped at an IHOP to eat before responding to Marietta.

The defense strategy on causation was not to say our cause theory was impossible, but just to say there was not enough evidence to prove it by a preponderance of the evidence. They had a very highly credentialed expert who opined that the tree didn't cause the service drop to sever, but that it was squirrels who must have eaten the wire, and the fire inside the house was a coincidence, not a result of the downed line.

During trial, the corporate trial representative admitted negligence on the stand because we gave him an opportunity to admit that it was a lack of staffing that contributed to their inability to timely respond to Elsa's Priority 2 call. It was a jaw-dropping moment. It was even more shocking when the following morning that same witness testified that he "misspoke" when he admitted negligence and company failures the day before, and tried to backtrack his testimony. The defendants' standard of care expert admitted during cross that he would either have to change his opinions or withdraw as an expert if he heard the corporate trial rep's Day 1 testimony. That went a long way with the jury.

The courtroom was packed for closing arguments, as a testament to Elsa's contribution to the community, and we had dinner with the family after the jury concluded deliberations Thursday and asked to come back the following morning. The family told us that the outcome was less important than being able to see us work tirelessly on their behalf, spend whatever amount of money it took to present the best possible case, and to just let them tell their mom/grandmother/friend's story.

The jury came back around 11:00 a.m. on Friday, and unanimously found AEP violated the standard of care, that its breach was a proximate cause of her death, but also unanimously found Elsa was 10% comparatively at fault for failing to have smoke detectors. 7 of the 8 jurors agreed on the damages award: $4 million for the wrongful death claim, and $2 million for Elsa's conscious pain and suffering prior to her death, for a total of $6 million.

At first, though, the trial judge read the verdict as $4 million for Wrongful Death and $200,000 for the survival claim, until the foreperson stood up and said: "No, Judge, that's wrong. It was supposed to be $2 million." That may have been one of the most glorious typos we will ever get to experience. All jurors were polled to confirm the typo and it was corrected on the spot.

Trying this case with John Power and Thomas Prindable of the Chicago law firm Cogan & Power, PC was an amazing professional experience. Speaking with the jurors afterwards also gave great insight on how to frame cases moving forward. In particular, it makes a tremendous impact when the community understands the significance of the case they are presented with. I welcome any opportunity to spend time in Marietta in the future. ■

Jordan D. Lebovitz is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. He can be reached at 216.694.5257 or jordanlebovitz@nphm.com.

Verdict Spotlight:

Estate of Jack O. Huls, Sr. v. Laurel Health Care Co., et al.
Knox County No. 18OTO-0187

by Michael A. Hill

On June 24, 2022, a unanimous Knox County Jury returned a wrongful death only Plaintiff's verdict in the amount of $5 million for the death of an 84-year-old nursing home resident for failing to notify the physician when the patient had signs of an infection. The beneficiaries were his daughter and granddaughter, who are in their late 60s and late 40s, respectively. The jury apportioned liability 60% against the nursing home, The Laurels of Mt. Vernon, and 40% to the corporate parent, Laurel Healthcare Company. The trial team was led by Michael Hill of Eadie Hill Trial Lawyers, with the assistance of Mark Tassone, also from Eadie Hill.

Michael A. Hill

The case involved the death of Jack Huls. Although Jack had a 20-year history of Parkinson's disease, he managed to live with relative independence in an apartment with the assistance of two home health aides who collectively spent most of the day with him.

In the morning while getting out of bed, Jack fell landing on his leg. He lay with his leg under him until a home health aide arrived. By that point, his leg was severely swollen. He was taken by ambulance to Knox Community Hospital where he was diagnosed with compartment syndrome and life flighted to Riverside Methodist Hospital where 2 fasciotomy surgeries were performed to relieve the internal pressure.

After an 18-day hospital stay, Jack was discharged to Whispering Hills Care Center, a small 44-bed nursing home in Mt. Vernon, Ohio. Whispering Hills was not a defendant. While at Whispering Hills, Jack developed Stage II pressure injuries and experienced significant unintended weight loss.

After 41 days, Jack's family had him transferred to The Laurels of Mt. Vernon because they did not believe that he was making the progress that he should, and The Laurels advertised its state of the art rehab program. While at The Laurels of Mt. Vernon, the family visited daily and identified numerous problems including staff not putting in the patient's dentures and hearing aids (the facility accused the patient of refusing to wear them and taking them out and throwing them), significant unintended weight loss, relatively superficial pressure injuries from the prior facility healing and new significant pressure injuries forming, failing to involve the family in care planning and updating them on the patient's condition, falls, medication administration issues-including not providing Parkinson's medication as scheduled-and myriad other issues.

The crux of the case occurred on February 12, 2017. Jack's family had begun doing his laundry. On a Friday evening, a grandson in-law picked up a garbage bag of Jack's laundry and dropped it off at Jack's daughter's home to wash. When she opened the doubled-bagged laundry, she was met with a horrendous smell. Removing the laundry, she observed 5 pairs of Jack's pants saturated in feces from the waist to the cuff. She called the facility to express her concerns, and a care plan was scheduled.

5 days later, on February 17, 2017, Jack's daughter and granddaughter met with representatives from the facility and its corporate parent, including a facility administrator/ executive director, director of nursing, social worker, unit nurse manager, and clinical corporate nurse.

Attorneys Michael Hill (far left) and Mark Tassone (far right) with Jack Huls' daughter, Chere Krider, and granddaughter, Heather Figurski.

Over the weekend between discovering his soiled clothing and meeting with the facility staff, the family had begun researching potential explanations for Jack's diarrhea and found information online about Clostridium difficile (aka C. diff) an infection of the colon that causes severe, watery diarrhea. The family brought information they had printed off the internet about C. diff and informed the staff they believed he had C. diff. After looking through his records and determining that staff had not documented the presence of any diarrhea, the Laurels assured Jack's family that he did not have C. diff. Rather than C. diff, Jack just had a few episodes of incontinence, and the facility apologized for sending the soiled laundry home instead of washing them in house. Relieved that their loved one did not have a serious medical condition, they left him in the Laurels' hands.

No one from the facility notified the physician of the family's concerns or ordered a fecal sample to test for C. diff.

2 days later, on February 19, the family learned that Jack had been rushed to Knox Community Hospital unresponsive. He was diagnosed with septic shock, and the hospital began treatment for presumed C. diff. A fecal sample tested positive for C. diff. However, a second test 3 days later for C. diff was negative. Jack never regained consciousness and died 4 days later.

The primary defense at trial was that this was an elderly man whose wife of 60 years had recently died and who was losing weight and declining both physically and mentally before the injury occurred at his home and was noted to have poor rehab potential upon admission to the facility. The compartment syndrome and surgeries initiated a cascade of unpreventable problems including weight loss, overall decompensation, and death.

At trial, the defense attempted to frame the case as at least a 6-month decline while plaintiff attempted to narrow the case to a period of 7 days-which included the facility sending diarrhea saturated clothing home, the care conference where the family expressed concerns of C. diff, and the patient being sent to the hospital unresponsive.

The defense filed post-trial motions requesting a new trial on allegations of attorney misconduct by Michael Hill for "tricking" their expert and inflaming the jury, and in the alternative for a remittitur. Judge Weitzel summarily denied the post-trial motions finding "no factual or legal basis" for the Defendants' requests. ■

Michael A. Hill and Mark A. Tassone, Eadie Hill Trial Lawyers, are nursing home abuse lawyers fighting to end nursing home abuse throughout Ohio. They can be reached at 216.777.8856 or www.eadiehill.com.

Verdict Spotlight:

Estate of John Guagenti v. Bobcat of Lima, Inc., et al.

Allen County Common Pleas No. CV 2021 0018

by Dustin B. Herman

An Allen County jury returned a $5.85 million verdict in a wrongful death case in May 2022. At trial, the family of the decedent was represented by Dennis Lansdowne and Michael Lewis of the Spangenberg Firm, as well as John Huffman of Huffman, Kelley & Brock.

Dennis R. Lansdowne

During the afternoon of August 6, 2019, John Guagenti was stopped in traffic on Elm Street in Lima, Ohio when another driver crashed into the back of his SUV going about 46 miles per hour. John suffered significant injuries to his neck and never regained consciousness following the crash.

Michael P. Lewis

The driver that hit John was driving his work truck after leaving a meeting with John at a local Lima bar and grill. John and the driver were business associates with a friendly relationship.

At that meeting, the Defendant driver drank five alcoholic drinks, and appeared visibly impaired to the Ohio State Highway Patrolmen who responded to the scene of the crash. The Defendant driver was arrested, and John was transported to St. Rita's hospital for emergency evaluation.

At St. Rita's, John's family and friends gathered for support. They soon learned that John's injuries would be fatal and were faced with difficult decisions regarding the end of John's life. When told that John's organs could be donated so that others might live, John's family did not hesitate to fulfill John's wish to be an organ donor. Dozens of nurses, doctors, and healthcare workers lined the halls of St. Rita's to silently honor John as his family said goodbye and he was taken to the operating room. John is survived by his wife and two children.

Prior to trial, the court granted summary judgment as to the Defendant driver's employer, finding that the driver was not in the course and scope of his employment, despite his report to the Highway Patrol that he had just left a business meeting.

The first phase of trial was purely about compensatory damages. The jury never found out that the Defendant driver had been drinking alcohol before the crash or that he was arrested after the crash. The jury heard testimony about John's 30-year career in sales and the impressive insurance business John built from the ground up. They also heard about John's dedication to his family, friends, and community.

At the end of an emotional trial, on May 27, 2022, the jury returned a verdict of $5.85 million. The Defendant's insurance limits were sufficient to cover the full amount of the compensatory verdict.

To avoid a second phase of trial that would focus on the Defendant's alcohol consumption and conduct leading up to the crash, the Defendant settled for an additional $150,000, bringing the total recovery for the family to $6 million. ■

Dennis R. Lansdowne is a partner at Spangenberg Shibley & Liber. He can be reached at 216.696.3232 or dlansdowne@spanglaw.com.

Michael P. Lewis is an attorney with Spangenberg Shibley & Liber. He can be reached at 216.696.3232 or mlewis@spanglaw.com.

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

Recent Ohio Appellate Decisions

by Kyle B. Melling and Brian W. Parker

Campagna-McGuffin v. Diva Gymnastics Academy, Inc., et al., 5th Dist. Stark No. 2022 CA 00057, 2022-Ohio-3885 (Oct. 31, 2022).

Disposition: Affirmed grant of summary judgment.

Topics: Assumption of Risk.

Plaintiffs, the parents of three gymnasts, alleged that their daughters were injured as a result of excessive conditioning they were made to do by two coaches at the Defendant gymnastics gym. Specifically, Plaintiffs alleged that they had to do excessive frog jumps, butt scoots, v-ups and hang on the bars for long periods of time. The allegations asserted that this extra conditioning was a form of punishment, which breached the Defendant's duty to teach, train, and instruct according to United States of America Gymnastics (USGA) rules.

The trial court granted Defendants' motions for summary judgment on three grounds. First, the Court held that the deposition testimony of the Plaintiffs contradicted their claims that they actually suffered physical injury. Second, that Plaintiffs' claims were barred by the "Ohio Recreational Activity Doctrine" because Plaintiffs accepted the risks inherent in the sport by engaging in competitive gymnastics. Finally, that the Plaintiffs acknowledged the inherent risk and expressly assumed the risk by signing a release.

The Court found *inter alia* that the activities the gymnasts claimed they had to do were normal and routine competitive gymnastics training exercises and that the injuries complained of by the gymnasts were normal risks or hazards associated with the sport. As such, the Court held that the primary assumption of the risk doctrine applied, barring Plaintiffs' negligence claims.

The Court also found that the Plaintiffs had signed a release prior to the incidents alleged in the complaint. The release clearly specified the type of liability released, as it contained the word "negligence" multiple times. Plaintiffs argued that the release did not include the word "conditioning" and therefore, the release did not cover injuries associated with "conditioning." The Court rejected this argument finding that the release language had the qualifying language stating that "risks include, but are not limited to" a list of activities. Further the release stated that the Plaintiff expressly "assume[d] all of the risk inherent in this activity." Accordingly, the court held that the release was valid, and that express assumption of the risk barred Plaintiffs' claims.

Yoak v. Univ. Hosps. Health Sys., Inc., 8th Dist. Cuyahoga No. 11124, 2022-Ohio-3550 (Oct. 6, 2022).

Disposition: Reversing summary judgment on plaintiff's common law negligence claim; and affirming summary judgment on plaintiff's premises claim.

Topics: Common law negligence cause of action with open and obvious analysis; and premises cause of action in trip and fall case.

Defendant University Hospitals ("UH") operated a physical therapy and rehabilitation center on premises that were owned by the YMCA. There was a glass door connecting the premises leased by UH to the adjoining premises that were operated by the YMCA. A UH employee placed a board in the doorway between the separately operated premises to keep the glass door from closing. Plaintiff was exercising at the YMCA when he tripped over the board that the UH employee had placed in the doorway. Plaintiff filed suit against both UH and YMCA, but subsequently dismissed his claim against YMCA. The trial court granted UH summary judgment on both plaintiff's common law negligence claim and his premises claim. With respect to the common law negligence claim, the trial court found that plaintiff's complaint failed to state a claim. Plaintiff's complaint alleged that he "tripped over a board that was placed by [a UH] employee ... between the glass doors separating the [UH rehab center] from the YMCA exercise facilities," resulting in injury to his knee and ankle.

The Eighth District held that these allegations in plaintiff's complaint were sufficient to place UH on notice of plaintiff's common law negligence claim. The appellate court further held that the trial court improperly granted summary judgment on this claim. The fact that the UH employee created the dangerous condition by placing the board between the doors resulting in a foreseeable injury satisfied the duty element of the negligence claim. Moreover, conflicting testimony as to the size of the board created a genuine issue of material fact as to whether UH breached its duty. The Eighth District further held that the "open and obvious" doctrine did not apply to this claim because UH was not the owner or occupier of the premises where this accident took place.

With respect to plaintiff's premises claim, the Eighth District held that the trial court properly granted UH summary judgment because plaintiff did not enter the UH premises, but rather fell on the YMCA side of the glass door containing the board.

McQueen v. Amazon, 5th Dist. Licking No. 2022 CA 00039, 2022-Ohio-3491 (Sept. 28, 2022).

Disposition: Reversed trial court award of $0 in damages as against manifest weight of evidence.

Topics: Damages.

Plaintiff brought a negligence action against Defendant Amazon for injuries sustained when the Plaintiff was hit by a light fixture dislodged by Defendant's delivery workers. Plaintiff obtained a default judgment. At a damages hearing, the trial court awarded plaintiff zero damages despite being presented with medical bills, and no objection from defendant. The Fifth District held that medical bills are prima facie evidence of the reasonable value of charges for medical services pursuant to R.C. 2317.421. The Court also held that because the defendant failed to object to the testimony regarding damages as hearsay, the trial court was wrong in denying the Plaintiff damages simply on the basis of their incapability of being calculated with certainty.

Estate of Goins v. YMCA of Cent. Ohio, 10th Dist. Franklin No. 22AP-92, 2022-Ohio-3404 (Sept. 27, 2022).

Disposition: Reversed granting of summary judgment.

Topics: Inapplicability of waiver of liability; statement by counsel in defendant's brief did not constitute evidence under Civ. R. 56(C) for purposes of summary judgment motion.

Plaintiff's decedent died away from the YMCA premises shortly after having been evicted from that homeless shelter in February. Plaintiff alleged that YMCA's conduct caused the decedent to freeze to death from exposure to frigid weather conditions. The trial court granted YMCA's motion for summary judgment based upon a liability waiver that the decedent had signed, and alternatively, based on the grounds that YMCA owed no duty to the decedent.

Upon review, the Tenth District reversed the trial court on both grounds. Regarding the waiver of liability, the decedent had signed an agreement upon his arrival at YMCA which stated: "I waive all liability of and hold harmless, the YMCA shelter, its Board of Directors and staff for any injury I may suffer at the shelter or on its grounds." The dispositive issue was whether decedent died "at the shelter or on its grounds." Plaintiff's complaint alleged that decedent's corpse was "found in the rear area of the shelter." However, in its answer, YMCA denied this specific allegation. The appellate court thus concluded that the location of decedent's corpse was not demonstrated in the pleadings, and no Civ. R. 56(C) evidence otherwise supported YMCA's contention. As such, YMCA did not meet its burden of demonstrating its entitlement to summary judgment on the waiver of liability issue.

Also, YMCA contended that it owed the decedent no duty because YMCA had expelled the decedent from the shelter based upon decedent's violation of facility rules. However, there was no Civ. R. 56(C) evidence to support this contention; rather, it was simply asserted in YMCA's summary judgment briefing. The 10th District thus noted, "a counsel's unsworn statement in a brief is not Civ.R. 56(C) evidence," and concluded, "the trial court erroneously based its duty analysis on a fact not demonstrated in Civ.R. 56(C) evidence." Thus, the 10th District also reversed the trial court's granting of the defendant's motion for summary judgment on the duty issue.

Cline v. Market Street Assocs., LLC, 10th Dist. Franklin No. 22AP-77, 2022-Ohio-3298 (Sept. 20, 2022).

Disposition: Affirmed granting of summary judgment.

Topics: Slip and Fall, Attendant Circumstances.

Plaintiff tripped and fell in front of a Restaurant owned by Defendant. Plaintiff testified that she arrived at the restaurant in the mid afternoon and stayed more than an hour before leaving. When leaving, Plaintiff exited the front door and tripped over a defect in the sidewalk. The Plaintiff was deposed twice and changed her story slightly between depositions. In her first deposition, the Plaintiff testified that she didn't know what she had tripped on. In her subsequent deposition she identified uneven bricks as the cause of her trip. The trial court granted Defendant's motion for summary judgment concluding that the sidewalk area where the Plaintiff had tripped was open and obvious as a matter of law. The trial court further found that there were no attendant circumstances that would reduce the degree of care that an ordinary person would exhibit at the time of the fall.

In affirming the trial court decision, the Tenth District held that a pedestrian using a public sidewalk is under their own duty of care for their own safety as persons of ordinary carefulness and prudence would observe. The Court then held that when a danger is open and obvious it is ordinarily a question of law unless reasonable minds could differ with respect to whether the danger is open and obvious. Finally, the court held that walkways commonly have minor defects, and pedestrians should expect such variations. In reviewing the evidence, the Court found that the bricks where the plaintiff fell lacked some uniformity in size, shape and height, but that to the extent that there were any defects in the walkway, they should have been observable. As such, the Tenth District affirmed.

Ward v. Humble, 2d Dist. Montgomery No. 29417, 2022-Ohio-3258 (Sept. 16, 2022).

Disposition: Affirmed granting of summary judgment.

Topics: Dog Bite Harborer Liability for Landlords.

Plaintiff was bitten by a dog owned by the renters of Defendants, at the Defendant's Property. The Defendant landlord lived on the neighboring property. Plaintiff's theory included arguments that the lease contained a provision stating that no pets would be permitted on the property without the landlord's written consent and that the landlord failed to add fencing on the southern border of the property. The trial court dismissed the claims against the landlord holding that the landlord was not a harborer of the dog.

The Second District, in affirming, revisited the definition of "harborer" as it relates to landlords. The definition of "harborer" is "someone who has possession and control of the premises where the dog lives and silently acquiesces to the dogs presence." In affirming the granting of summary judgment, the court found that while the landlord owned the premises, and acquiesced to the dogs presence, the landlord did not have control of the premises at the time of the bite, as control and possession was delivered to the tenants exclusively.

Dabe v. M.K. Hufford Co., 2d Dist. Clark No. 2022-CA-11, 2022-Ohio-2802 (Aug. 12, 2022).

Disposition: Affirmed granting of summary judgment

Topics: "Insubstantial defect" rule in the context of the Landlord-Tenant statute, R.C. § 5321.04.

The plaintiff, a guest of a tenant, fell on a sidewalk leading to the tenant's apartment. The defect consisted of the fact that some of the "squares" of the sidewalk were raised one to two inches. Plaintiff alleged that she could only have seen the defect coming from one direction, and not from the other. The trial court granted the defendant's motion for summary judgment based upon the fact that the defect was less than two inches high and was open and obvious.

On appeal, the Tenth District first rejected the landlord's contention that the Landlord-Tenant statute did not apply to plaintiff's claims because the sidewalk where plaintiff fell was a "public sidewalk." The court reasoned that the record showed that the sidewalks leading to each apartment unit were part of the property belonging to the landlord, and were under the landlord's control. The court then rejected the plaintiff's contention that the "insubstantial defect" rule for imperfections in walkways measuring less than two inches did not apply to her action under the Landlord-Tenant statute. Specifically, the appellate court rejected plaintiff's contentions that the defendant failed to keep the premises in a "fit and habitable condition" under R.C. § 5321.04(A)(2), and also failed to keep common areas in a "safe and sanitary condition" under R. C. § 5321.04(A)(3). The court held:

> Dabe fell on a sidewalk on the premises that had a difference in pavement height of two inches or less. R.C. § 5321.04(A)(2) did not apply because the defect did not render the premises unfit and uninhabitable as that term has been interpreted. Furthermore, because the defect was insubstantial under the "two-inch rule" and there were no attendant circumstances, the landlord did not violate the requirement in R.C. § 5321.04(A)(3) to keep common areas safe and sanitary.

The Tenth District thus rejected the plaintiff's argument that the "two-inch rule" (a.k.a. the insubstantial defect rule) does not apply in the context of the Landlord-Tenant Act. [AUTHOR'S NOTE: In effect, while the "open and obvious" doctrine does not apply to the Landlord-Tenant Act, this court reached a different conclusion regarding the "insubstantial defect" rule. Perhaps a properly-framed claim under R.C. § 5321.04(A)(1) (for a violation of the Building Code, etc.) would not be subject to the insubstantial defect rule.]

Wicks v. Lover's Lane Mkt., 9th Dist. Summit No. 30019, 2022-Ohio-2652 (Aug. 3, 2022).

Disposition: Judgment of trial court reversed on evidentiary rulings.

Topics: Admissibility of police reports; and admissibility of summary logs of video evidence.

Plaintiff's decedent was attacked and killed outside of the defendant's store. Plaintiff sued the store, several store employees, and the assailants. In granting the defendant store's motion for summary judgment, the trial court ruled that all of the 33 police reports which were attached to plaintiff's brief in opposition via a properly framed affidavit, were inadmissible as hearsay. On appeal, the court noted that police reports are recognized as public records exceptions to the hearsay rule under Evid. R. 803(8). The court further noted that, despite this exception, portions of a police report that do not stem from firsthand observation are not admissible. However, portions of the police report which contain matters personally observed by a police officer are admissible into evidence. The Ninth District faulted the trial court for failing to make any effort to determine which parts of the 33 police reports were properly admissible. Instead, the trial court had abused its

discretion by erroneously concluding that because some of the information in the reports constituted hearsay statements collected from interviews, the police reports were inadmissible in their entirety.

The plaintiff next argued that the trial court had improperly rejected the plaintiff's summary log for the surveillance video under Evid. R. 1006. The trial court had concluded that the summary log was "replete with speculative, embellishing phrases" which went "well beyond the purpose of providing a succinct summary of the videos" and instead sought "to impose the argument of counsel under the guise of Civil Rule 56(C) evidence." The Ninth District held that the trial court's assessment of the summary log was not unreasonable. Nonetheless, the appellate court held that "the trial court should have struck the argumentative portions or given Ms. Wicks the opportunity to submit a version which omitted any problematic commentary."

The Ninth District also ruled that issue preclusion did not bar the litigation of a defendant's duty in the context of gross negligence, negligence per se and respondeat superior claims. Further, the court ruled that the trial court had no authority to consider the negligence issue which was not remanded to the trial court by a previous appeal.

Sexton v. Healthcare Facility Mgmt. LLC, 2d Dist. Montgomery No. 29262, 2022-Ohio-2376 (July 8, 2022).

Disposition: On motion for reconsideration of appellate court's prior decision, the court held that witness statements were subject to discovery because they were not prepared by or for the use of a peer review committee, and were not "incident reports."

Topics: Scope of peer review privilege under R.C. § 2305.25 et seq.

The plaintiff brought this nursing home negligence action against the defendant. In the course of discovery, plaintiff sought witness statements (denoted Exhibits B-25 through B-37) regarding the allegations of abuse by other residents of the nursing home (i.e., other than plaintiff). The trial court had originally held that such statements were admissible because the plaintiff was seeking them from a source other than the peer review committee (i.e., he was seeking them from the nursing home itself). The nursing home had sought review of this ruling, and in the Second District's initial decision, it ruled, inter alia, that the witness statements were protected by the peer review privilege.

Recognizing its error, on plaintiff's motion for reconsideration, the Second District reversed itself with respect to these witness statements and held that they were not subject to the peer review privilege. The court noted that it is possible for a health care entity itself to be an original source of investigative materials that are not protected by peer review privilege. The witness statements at issue were not accompanied by an affidavit stating that they were prepared for the use of the peer review committee, nor did they have an affirmation at the bottom of the pages that: "This document is for internal use only within our quality assurance program." Given the trial court's finding that the documents were being sought from an original source that was not a peer review committee, the appellate court on reconsideration concluded that the witness statements in Exhibits B-25 through B-37 fit within the original source exception to the peer review privilege statute.

Moreover, there was no sworn statement asserting that the witness statements were actually part of the incident report, which report would be protected by the peer review privilege. The court also held that the definition of "incident report" in R.C. § 2305.25(D) is not broad enough to include these witness statements. In sum, because the witness statements were not prepared by or for a peer review committee, but were prepared by or for a different "original source" (i.e., the nursing home itself), and there was no basis to classify the witness statements as "incident reports," plaintiff's motion for reconsideration was granted. ■

Kyle B. Melling is an associate with Lowe Scott Fisher Co., LPA. He can be reached at 216.781.2600 or kmelling@lfslaw.com.

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

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case:

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

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

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CATA Verdicts & Settlements

Editor's Note: *The following verdicts and settlements submitted by CATA members are listed in reverse chronological order according to the date of the verdict or settlement.*

Timothy Harber v. Greater Cleveland Regional Transit Authority

Type of Case: Workers' Compensation

Verdict: All 3 conditions allowed

Plaintiff's Counsel: Regan J. Sieperda, Esq. and Benjamin P. Wiborg, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 621-2300

Defendant's Counsel: Barbara Knapic, Esq.

Court: Cuyahoga County Common Pleas Case No. CV-20-928790, Judge John D. Sutula

Date Of Verdict: October 20, 2022

Insurance Company: None

Damages: None

Summary: This was an appeal filed by Defendant Employer GCRTA disputing the sought conditions of "post-concussive syndrome," "major depressive disorder," and "generalized anxiety disorder." After a four day trial, the jury found that Mr. Harber could participate in the Workers' Compensation system for all three conditions.

Plaintiff's Experts: Dr. John Bertsch, M.D.; and Dr. Jonathan Gordon, Ph.D.

Defendant's Expert: Dr. Kenneth Mankowski

Anonymous Plaintiff v. Anonymous Residential Care Facility

Type of Case: Assisted Living Resident Fall with Head Injury

Settlement: $475,000

Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856

Defendant's Counsel: *

Court: Miami County Common Pleas Court

Date Of Settlement: October 18, 2022

Insurance Company: *

Damages: Fall with head injury

Summary: Elderly assisted living resident was placed at a table with other fall risk patients. The table was left unattended. She stood and fell striking her head.

Plaintiff's Expert: N/A

Defendant's Expert: N/A

John Doe v. ABC Company

Type of Case: Employer Intentional Tort

Settlement: $2,000,000.00

Plaintiff's Counsel: Christopher J. Carney and Larry S. Klein, Klein & Carney Co., LPA, (216) 861-0111

Defendant's Counsel: Withheld

Court: Cuyahoga County Common Pleas Court

Date Of Settlement: October 14, 2022

Insurance Company: Withheld

Damages: Crush injury to dominant hand

Summary: Punch press operator was required to work on press whose light curtains had been bypassed, resulting in severe crush injury to his dominant hand.

Plaintiff's Expert: Thomas R. Huston, Ph.D., P.E., C.S.P.

Defendant's Expert: None

Anonymous Plaintiff v. Anonymous Nursing Home & Physician

Type of Case: Failure to Treat Infection of Nursing Home Resident

Settlement: $600,000

Plaintiff's Counsel: Michael Hill and Mark Tassone, Eadie Hill Trial Lawyers, (216) 777-8856

Defendants' Counsel: *

Court: Mahoning County Common Pleas Court

Date Of Settlement: October 3, 2022

Insurance Company: Self-Insured / Captive

Damages: Wrongful death

Summary: The elderly decedent was a hospice eligible nursing home resident with numerous medical conditions including inoperable lung cancer, dysphagia requiring a feeding tube, severe progressive weight loss, and recurrent urinary tract infections. He was diagnosed with clostridium difficile (c. diff) that was caused by the multiple antibiotics. He was appropriately treated with vancomycin. His signs of c. diff returned and he was not timely re-treated or sent to the hospital.

Plaintiff's Experts: Karen Krueger, MD (Infectious Disease); Lance Youles, LNHA (Nursing Home Administration); and Lisa Contreras, RN (Nursing Home Director of Nursing)

Defendants' Experts: Robert Jayes, MD; Sara Keller, MD; Michael McIlroy, MD; James Stark, MD; Rebecca Strickland, MD; and Adele Towers, MD

HB Martin Logistics, Inc. v. Hissong Kenworth of Richfield

Type of Case: Breach of Warranty

Verdict: $443,625.00

Plaintiff's Counsel: Charles Kampinski and Kristin Roberts, Kampinski and Roberts Co., LPA, (440) 597-4430

Defendant's Counsel: Alex McCallion and Matthew Doney

Court: Summit County Common Pleas Case No. CV-2020-06-1808, Judge John Enlow

Date Of Verdict: September 22, 2022

Insurance Company: N/A

Damages: *

Summary: Plaintiffs, HB Martin Logistics, purchased a Kenworth T680 semi truck from Defendants, Hissong Kenworth of Richfield. From the time it was purchased new in 2016, until it was just out of warranty, it leaked coolant. Plaintiffs took the truck in for the leak to be repaired over and over again. They were eventually using cases of coolant to keep the truck running. When the cause of the leak was finally diagnosed, the repair was done negligently requiring the entire engine to need replacement. Plaintiffs successfully argued that the written limited warranty failed in its essential purpose, thus enabling them to assert a breach of the implied warrant of merchantability. The jury found that Plaintiff suffered monetary losses to their business as well as the costs of repair as a result of the breach of the implied warranty of merchantability.

Plaintiff's Expert: Jeff Grey

Defendant's Expert: Andrew Anderson

Anonymous Plaintiff v. Anonymous Nursing Home

Type of Case: Pressure Injury of Nursing Home Resident

Settlement: $500,000

Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856

Defendant's Counsel: *

Court: Hamilton County Common Pleas Court

Date Of Settlement: September 3, 2022

Insurance Company: Self-Insured / Captive

Damages: Wrongful death

Summary: Morbidly obese nursing home resident developed a sacral pressure injury resulting in death.

Plaintiff's Expert: N/A

Defendant's Expert: N/A

Jane Doe, et al. v. John Doe Rental Agency, et al.

Type of Case: Premises Liability

Settlement: $5,950,000

Plaintiffs' Counsel: David Grant and Frank Gallucci / Deborah Potter local co-counsel, Plevin & Gallucci Co., L.P.A. / Potter Burnett (Maryland), (216) 861-0804

Defendants' Counsel: Multiple from Maryland, identities withheld

Court: United States District Court for the District of Maryland

Date Of Settlement: September 2022

Insurance Company: Penn National Ins., Frederick Mutual Ins. Co., Generali Ins. Group

Damages: Plaintiff 1 - paralysis, Plaintiff 2 - multiple vertebrae fxs, Plaintiff 3 - shoulder fx

Summary: Cleveland area plaintiffs and their families rented a vacation home in Maryland for a long weekend. They were standing on the deck posing for a photo when a section of railing gave way, causing them to fall approx. 9-10 feet to the ground, suffering injuries. Through discovery, it was revealed that a worker for the rental agency had improperly repaired this section of railing 2 years before. Maryland has strict caps and contributory negligence law.

Plaintiffs' Experts: Multiple medical, damage and toxicology experts. Plaintiffs' Liability experts were Frank Woeste, Ph.D., P.E. (wood construction and engineering); Joseph Loferski, Ph.D. (Wood Engineering and Wood Science); Eric Robison (Deck Construction and Repair); James Hosken, P.E. (Structural Engineer); and Raymond Rase, P.E. (Civil Engineer)

Defendants' Experts: Allyn Kilsheimer, P.E. (Civil Engineer); and Yale Caplan, Ph.D. (Toxicology)

J.D., a Minor, Etc. v. John Doe, M.D., et al.

Type of Case: Medical Malpractice - Birth Trauma

Settlement: $3 Million

Plaintiffs' Counsel: Jonathan D. Mester, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5225

Defendants' Counsel: Withheld

Court: Washington County Common Pleas Court

Date Of Settlement: August 2022

Insurance Company: Withheld

Damages: Baby with Hypoxic Ischemic Brain Damage

Summary: Baby born with intrauterine growth restriction (IUGR) and mild to moderate hypoxic ischemic encephalopathy (HIE). The allegations in the case were delays in evaluating the mother who had presented to her doctor with complaints of decreased fetal movement on the morning of the emergency c-section delivery, and failure to diagnose IUGR during the prenatal period.

Plaintiffs' Experts: Steven Warsof, M.D. (Maternal Fetal Medicine); Yitzchak Frank, M.D. (Pediatric Neurology); Cynthia Wilhelm, Ph.D. (Life Care Planner and Vocational); and David Boyd, Ph.D. (Economist)

Defendants' Experts: Withheld

Anonymous Plaintiff v. Anonymous Medical Facility

Type of Case: Pressure Injury (bedsore)

Settlement: $750,000

Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856

Defendant's Counsel: Hanna Campbell

Court: Summit County Common Pleas Court

Date Of Settlement: July 29, 2022

Insurance Company: Self-Insured / Captive

Damages: Sacral Pressure Injury

Summary: The elderly decedent was admitted to the hospital with a severe spinal cord injury. He developed a large pressure injury (bedsore) to his sacral and coccyx region. There was no evidence of infection, and the death certificate related the cause of death to respiratory failure secondary to complications from the spinal cord injury.

Plaintiff's Experts: Ruth Ileuta, CNP (Wound Nurse); Dan Rosania, MD (Physical Medicine and Rehabilitation); and Fred Simon, MD (General Surgery)

Defendant's Experts: Harold Brem, MD (Wound Care); Steven Burdette, MD (Infectious Disease); John Horton, MD (Physical Medicine & Rehabilitation); Joseph Galante, MD (Trauma Surgery); and Ronald Sing, MD (General Surgery and Surgical Critical Care)

Estate of Kester Samples v. Lagrange Nursing & Rehab Center aka Keystone Pointe

Type of Case: Pressure Injury of Nursing Home Resident

Verdict: $500,000 plus attorneys' fees and expenses

Plaintiff's Counsel: William Eadie, Josh Waters, Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856

Defendant's Counsel: Ernie Auciello

Court: Lorain County Common Pleas Case No. 20 CV 201448, Judge Christopher Cook

Date Of Verdict: July 29, 2022

Insurance Company: Self-Insured / Captive

Damages: Sacral Pressure Injury

Summary: Elderly male nursing home resident suffered from recurrent urinary tract infections and a stage 3 sacral pressure injury. The death certificate related the death to medical issues unrelated to his pressure injury. The jury determined that the nursing home was negligent in its care of the pressure injury but did not determine that the death was related. The total verdict was $500,000 and attorneys' fees and expenses, which are still being determined.

Plaintiff's Experts: Mike Jeong, MD; Igor Melnychuk, MD; and Michelle Chapman, RN

Defendant's Expert: Aimee Garcia, MD

Estate of Philip Johnson v. New Leaf Liberty

Type of Case: Residential Care Facility - Wrongful Death

Settlement: $825,000

Plaintiff's Counsel: Michael Hill & Mark Tassone, Eadie Hill Trial Lawyers, (216) 777-8856

Defendant's Counsel: Louis DeMarco

Court: Mahoning County Common Pleas Court, Judge John Durkin

Date Of Settlement: July 3, 2022

Insurance Company: Cincinnati Insurance

Damages: Death of disabled individual

Summary: Disabled individual living in residential care facility choked while eating, and life sustaining efforts were not successful.

Plaintiff's Expert: N/A

Defendant's Expert: N/A

Anonymous Plaintiff v. Anonymous Nursing Home

Type of Case: Nursing Home Resident Fall with Broken Ribs and Head Injury

Settlement: $400,000

Plaintiff's Counsel: Michael Hill and Mark Tassone, Eadie Hill Trial Lawyers, (216) 777-8856

Defendant's Counsel: *

Court: Stark County Common Pleas Court

Date Of Settlement: July 1, 2022

Insurance Company: *

Damages: Fall with head injury and broken ribs

Summary: Elderly nursing home resident was allowed to fall several times resulting in broken ribs and head injury.

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

John Smith v. ABC Trucking Company

Type of Case: Commercial Vehicle v. Motorcycle

Settlement: $10,000,000

Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5257

Defendant's Counsel: Withheld

Court: Withheld

Date Of Settlement: July 2022

Insurance Company: Withheld

Damages: Amputation of lower extremity, fractured hip/pelvis

Summary: Plaintiff was operating a motorcycle in Southern Ohio when he was struck by a commercial vehicle.

Plaintiff's Expert: *

Defendant's Expert: *

Jane Doe v. Anonymous

Type of Case: Medical Negligence

Settlement: $8,000,000

Plaintiff's Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100

Defendant's Counsel: *

Court: Pre-Suit Settlement

Date Of Settlement: July 2022

Insurance Company: *

Damages: Death of 51-year old husband and father of two adult children

Summary: John Doe, who had risk factors for and a family history of coronary artery disease, went to his internist with complaints of exercise induced chest pain. The internist recommended more exercise, a low fat diet and blood work in six months. Sixteen days later, John Doe died from a massive myocardial infarction. The following morning, the internist entered the electronic medical record and altered his original note. The alterations included statements that the patient was offered and refused a stress test. An autopsy revealed severe three vessel coronary artery disease as the cause of death. Pre-suit production of the audit trail and note revision history revealed the exact time the alterations were made and the full content of the alterations.

Plaintiff's Expert: John Setaro, M.D. (Internal Medicine and Cardiovascular Medicine, Yale University)

Defendant's Expert: *

Jane Doe, et al. v. John Smith

Type of Case: Motor Vehicle v. Motorcycle

Settlement: $1,400,000

Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5257

Defendant's Counsel: *

Court: Pre-Suit

Date Of Settlement: July 2022

Insurance Company: Withheld

Damages: Fractured skull, collapsed lung, fractured femur with surgery

Summary: Plaintiff, a passenger on a motorcycle, was struck by a passenger vehicle turning left into the driveway of a members only club. The vehicle turned directly into the path of the motorcycle, failing to yield, and causing the passenger to be thrown from the motorcycle.

Plaintiffs' Experts: Treating surgeons only

Defendant's Expert: *

Muhammad v. D&S Distribution

Type of Case: Premises Liability, Construction

Settlement: Confidential

Plaintiff's Counsel: Jordan D. Lebovitz, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5257; James Robson, Esq., Glass & Robson, LLC

Defendant's Counsel: Withheld

Court: Withheld

Date Of Settlement: July 2022

Insurance Company: Withheld

Damages: Crush injury to lower extremity with multiple surgeries and skin grafting

Summary: Crane owned by the Defendant collapsed on Plaintiff's lower extremity at its property where Plaintiff was performing contract work.

Plaintiff's Expert: *

Defendant's Expert: *

Estate of Jack Huls v. Laurels of Mt. Vernon

Type of Case: Nursing Home - Wrongful Death

Verdict: $5,000,000

Plaintiff's Counsel: Michael Hill and Mark Tassone, Eadie Hill Trial Lawyers, (216) 777-8856

Defendant's Counsel: Paul McCartney and Margo Meola

Court: Knox County Common Pleas Court Case No. 180T08-0187, Judge Richard Wetzel

Date Of Verdict: June 24, 2022

Insurance Company: Self-Insured / Captive

Damages: Wrongful death only

Summary: The 84-year old decedent experienced signs and symptoms consistent with clostridium difficile (c. diff) infection, including diarrhea. Despite the family's concerns, the nursing home did not have him tested for c. diff. He was hospitalized 2 days later in septic shock presumed to be secondary to c. diff. He died 4 days later.

Plaintiff's Experts: Barbara Johanson, RN (Nursing Home Director of Nursing); John Cascone, MD (Internal Medicine, Nursing Home Medical Direction, Infectious Disease); and Michael Silverman, MD (Infectious Disease)

Defendant's Experts: Debra Kriner, RN (Nursing Home Director of Nursing); Daniel Swagerty, MD (Internal Medicine, Nursing Home Medical Direction); and Steven Burdette, MD (Infectious Disease)

Estate of John Doe v. ABC Truck Company, et al.

Type of Case: Truck Crash (Wrongful Death)

Settlement: Prior to mediation, the case settled for $5,000,000.

Plaintiff's Counsel: Andrew R. Young, Esq., Michael J. Leizerman, Esq., and DJ Young III, Esq. of The Law Firm for Truck Safety LLP, (216) 961-3932; Spencer Young, Esq. of Spencer C. Young Law, P.C., Oakland, CA, (510) 645-1585.

Defendants' Counsel: Confidential

Court: Confidential

Date Of Settlement: June 2022

Insurance Company: Confidential

Damages: Wrongful death

Summary: In April of 2019, John Doe was traveling to work early in the morning on Interstate 5. The highway was dark and unlit and it was raining. As John Doe came around a curve near Lankershim Blvd., John Doe struck the rear of ABC Truck Company's Ford F700 truck and the tongue of the 1974 pintle hook trailer it was hauling that had jackknifed across three lanes of the highway. John Doe died upon impact. The truck driver reported that he lost control of the truck after the trailer fishtailed just after he passed Lankershim Blvd. After he jackknifed, his truck shut off and he could not get it restarted. Although the truck had no lights on, another motorist was able to swerve and miss ABC Truck Company's jackknifed truck, so John Doe was initially believed responsible for the crash.

During the course of discovery, ABC Truck Company employees divulged the 1974 trailer was recently renovated by a company employee after it sat in their yard for years. The day before the container was to be transported, an employee who did not have much experience securing a container to a flatbed trailer, loaded the container in the forward-most position on the trailer so the weight would be on the draw bar and the trailer would have good contact at the pintle hitch. No conspicuity tape was affixed to the trailer as it was not required (the trailer was too old for regulations to apply), although conspicuity tape is readily available in the company shop. Additionally, the F700 truck and trailer had never been driven down the highway prior to the day of the subject crash. The truck driver for ABC Truck Company did not secure the container to the trailer, did not connect the trailer to the truck and never drove the F700 truck with this trailer down the road prior to the crash. The truck driver also admitted that shortly after he started his drive that morning, the trailer would fishtail when he hit a bump in the roadway. He was traveling under the speed limit due to the trailer sway and the

fact that it was raining. He also admitted he had some fault because he oversteered after he hit the last bump that caused him to lose control. The case settled prior to mediation.

Defense was contesting life expectancy as John Doe was in his 60s, blind in one eye, a couple months shy of retirement and had cancer which was in remission.

Plaintiff's Experts: Eric Deyerl, Dial Engineering (Accident Reconstruction): and V. Paul Herbert, C.P.S.A. (Commercial Motor Vehicle Safety and Compliance Expert)

Defendants' Experts: John Landerville, Momentum Engineering (Accident Reconstruction); Carl Beels, Beels & Associates (Human Factors); Jennifer Polhemus (Economist); and Dr. Scott J. Kush, Life Expectancy Group (Life Expectancy)

Jim Layden v. ABC-Health Hospital/Neurosurgeon

Type of Case: Medical Malpractice

Settlement: $4M

Plaintiff's Counsel: Steve Crandall, Crandall & Pera Law, LLC, (216) 538-1981

Defendants' Counsel: Anonymous

Court: Franklin County Common Pleas Court

Date Of Verdict: May 13, 2022

Insurance Company: Self-insured hospital

Damages: Partial paralysis, cognitive issues, lost wages

Summary: Jim, a 58 year old unmarried male with no children, developed hydrocephalus, that was diagnosed but negligently not operated on for several years. Surgery was belatedly done and the wrong surgical technique was employed. As a result, Jim suffered a mid-brain injury and was unable to work or care for himself independently.

Plaintiff's Experts: Dr. Alexander Coon (Neurosurgeon); Dr. Jonathan Citow (Neurosurgeon); Dr. Jeffrey Thomas (Neurosurgeon); Dr. Christopher Geiger (Neurology); Dr. Marc Orlando (Physical Medicine); Cam Parker, LCP; and Dr. David Boyd (Economist)

Defendants' Experts: Not identified before settlement

Jane Doe v. State Farm Mutual Insurance Co.

Type of Case: Motor Vehicle Collision

Settlement: $825,000.00

Plaintiff's Counsel: Dana M. Paris, Esq., Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5201

Defendant's Counsel: *

Court: Cuyahoga County Common Pleas Case No. CV-19-926813, Judge Maureen Clancy

Date Of Settlement: May 2022

Insurance Company: State Farm Insurance Co.

Damages: *

Summary: Plaintiff was involved in a rearend collision with very minor damage to the defendant's vehicle. Early on in the case, State Farm classified the claim as a minor impact crash only involving soft tissue injuries. However, the injuries were far more serious. As a result of the collision, the Plaintiff suffered a nerve injury to the upper and lower extremities, ataxia and severe physical deconditioning. After years of failed conservative treatment, the plaintiff began treating with a pain management specialist, Dmitri Souza, M.D., who recommended and surgically placed neuromodulation stimulators in each leg to address the nerve injury. The stimulators reduced the severity of the pain, but were never able to eliminate it, thus, requiring on-going pain management.

Dr. Souza also served as the medical expert. He opined that the plaintiff's injuries were caused by the collision, were permanent in nature, and future treatment was required. State Farm retained neurologist, Lisa Kurtz, M.D. who minimized the injuries and made it a focal point of her opinions that there were no objective findings on the nerve study to justify the treatment and surgical intervention.

In terms of damages, the Plaintiff claimed economic damages for her past and future medical expenses, lost earning capacity as she was no longer able to work as a nurse, and out of pocket expenses. It was Plaintiff's position that the cap on non-economic damages did not apply in this case. The issue was briefed with the Court, but the case settled prior to the Court issuing its ruling.

The case settled for $825,000.00 a week prior to trial.

Plaintiff's Experts: Dmitri Souza, M.D. (Pain Management); David Boyd, Ph.D. (Economist)

Defendant's Expert: Lisa Kurtz, M.D.

Estate of Jane Doe v. ABC Truck Company, et al.

Type of Case: Truck Crash

Settlement: $1,425,000.00

Plaintiff's Counsel: Andrew R. Young, Esq., Amy Papuga, Esq., and D.J. Young, Esq., of The Law Firm for Truck Safety LLP, (216) 961-3932; and Flora Templeton Stuart, Esq. and Kent Brown, Esq. of Flora Templeton Stuart Accident Injury Lawyers (888) 782-9090

Defendants' Counsel: Confidential

Court: Confidential

Date Of Settlement: April 2022

Insurance Company: Confidential

Damages: Wrongful Death and Survivorship

Summary: Jane Doe was traveling down a highway on her way to work in rural Kentucky when she struck the arm of an excavator that was hanging approximately six feet beyond the edge of a trailer. Jane Doe was not wearing a seatbelt and her head struck the arm of the excavator after it protruded into her windshield. She survived for a day with catastrophic head trauma.

The trailer and excavator were owned by ABC Truck Company, and were being hauled by ABC Truck Company's employee who was driving his own truck. The employee loaded the excavator on a twenty-foot trailer instead of the company's lowboy. He centered the excavator on the trailer's axles (which resulted in a six-foot overhang of the excavator arm off the rear of the trailer) and strapped the arm of the excavator to the cab. He did not plug the trailer electrical cord into the truck. He did not affix a warning flag to the six-foot overhang of the excavator arm. Due to the excessive weight of the trailer and excavator, he was unable to accelerate quickly or travel above 40 M.P.H. Jane Doe was traveling in excess of the speed limit and failed to recognize the slow-moving vehicle until just prior to striking the back of the truck and trailer. It was daylight outside. ABC Truck Company claimed Jane Doe was distracted by her phone. The case settled for $1,425,000 two weeks before trial.

Plaintiff's Experts: Joseph Stidham and Roy Head, Stidham Reconstruction & Investigation, LLC (Accident Reconstruction); Daniel Melcher, Focus Forensics (Human Factors); Mariusz Ziejewski (Biomechanics); Adam Grill, Atlantic Pacific Resource Group (Trucking Industry); and Gilbert L. Mathis (Economist)

Defendants' Experts: Dennis Crawford (Accident Reconstruction); Dr. David Porta (Biomechanics); and Ben Levitan and Derek Ellington (Cell Phone Forensics)

Ronald Smarr v. Rafel S. El-Atassi, M.D., Biosense Webster

Type of Case: Medical Malpractice

Settlement: $1,550,000.00

Plaintiff's Counsel: Charles Kampinski and Kristin Roberts, Kampinski and Roberts Co., LPA, (440) 597-4430

Defendants' Counsel: Ronald Margolis, Steven Hupp, Madison Leanza, Ryan Rubin, Kyle Gerlach, Sarah Johnston, Sarah Jin, and Kelley Olah

Court: Lorain County Common Pleas Case No. 20CV200969, Judge Christopher R. Rothgery

Date Of Settlement: April 2022

Insurance Company: **

Damages: **

Summary: A 60-year old man underwent a cardiac ablation procedure during which the electrophysiologist negligently ablated the normal conduction system of his heart. Since the conduction system was destroyed, he required emergent implantation of a temporary pacemaker and subsequently a permanent pacemaker. Following the completion of the procedure the cardiac mapping and other medical records were altered in an attempt to conceal the negligence. On the mapping, one of the "points" that represented the normal conduction of the heart, which was closest to the ablation, was deleted. This "point" was later retrieved by Plaintiff's counsel from the "delete bin." An additional point was then added post procedure much further from the actual ablation "point." The added "point" was then used to measure the distance from the ablation point in an attempt to make it seem as though the ablation was performed at a safe distance.

Plaintiff's Experts: John F. Norris, MD, FACC, FHRS; and John F. Burke, Jr., Ph.D.

Defendants' Experts: Frank Pelosi, Jr., MD; Hugh Calkins, MD; Helen S. Barold, MD; David J. Weiner, M.B.A., AM; Mark D. Metzl, MD, FACC, FHRS

Mr. and Mrs. John Doe v. ABC Hotel Company, et al.

Type of Case: Hotel Carbon Monoxide Poisoning

Settlement: Confidential

Plaintiffs' Counsel: Steven M. Goldberg (Local counsel/firm name withheld due to confidentiality), Goldberg Legal Co., LPA, (440) 519-9900

Defendants' Counsel: Confidential

Court: Confidential

Date Of Settlement: March 25, 2022

Insurance Company: Confidential

Damages: Traumatic Brain Injury

Summary: Assisted by local counsel we secured a $7.1 million dollar settlement in an action against a hotel and its management company. Plaintiff was a guest on a business trip at a hotel. While working at his desk, he was

rendered unconscious through exposure to extremely high concentrations of carbon monoxide caused by the Defendants' collective failure to properly maintain and operate a pool heater that had been condemned as unsafe days earlier. Plaintiff's room was adjacent to the hotel's indoor pool heater room, leaving just one thin wall to separate Plaintiff from the condemned pool heater spewing potentially lethal amounts of carbon monoxide. Hotel staff ignored a carbon monoxide alarm, and several hotel guests were impacted by carbon monoxide poisoning before the hotel was evacuated. It took hours before Plaintiff was finally found unconscious on the hotel room floor. Plaintiff, who was the most seriously injured, suffered a brain injury that has changed his and his family's life forever. Throughout the litigation, Defendants engaged in ongoing efforts to undermine the fair judicial process by attempting to cover up their blatant liability by spoliating some of the most salient pieces of evidence. Defendants fought causation and liability for over two years requiring Plaintiffs to prove what the Fire Department, Fire Marshall, Building Inspector, and examining water heater experts established the very day of this tragic event: that the condemned pool heater was the source of the carbon monoxide, an assessment Defendants shared on the day of the carbon monoxide leak because all guests were allowed to reoccupy the hotel upon the pool heater being locked out of service. After going through the expense of having an expert prove the source of the leak and Defendants failing to proffer any counterevidence or liability expert, the ownership Defendants finally admitted one month before the case settled on March 25, 2022, that the source of the carbon monoxide leak was the pool heater which was turned on by the Chief Engineer. But, the property manager defendant continued to deny that undisputed fact, or that the Chief Engineer was even their employee.

Plaintiffs' Experts: Confidential

Defendants' Experts: Confidential

Alex Justice v. John Doe ER/ABC Health System

Type of Case: Medical Malpractice

Settlement: $15M

Plaintiff's Counsel: Steve Crandall, Crandall & Pera Law, LLC, (216) 538-1981

Defendants' Counsel: Anonymous

Court: Montgomery County Common Pleas Court

Date Of Settlement: March 15, 2022

Insurance Company: Anonymous

Damages: Quadruple amputation, brain damage in a 3-year old boy

Summary: Alex started day care and was therefore exposed to various illnesses in that setting. He came home from Day Care with a mild fever that got worse, along with a cough and inability to hold down liquid and foods. Fever became worse, despite alternating anti-pyretics and father took Alex to an urgent care. Discovery revealed physician saw Alex for 2 minutes and that a template progress note was used. Alex was not tested for strep throat and later developed septic shock and subsequent amputations and brain damage.

Plaintiff's Experts: Dr. Paul Gabriel (ER); Dr. Ofer Levy (Pediatric ID); Dr. Raymond Pitetti (Peds ER); Cam Parker, LCP; Dr. David Boyd (Economist)

Defendants' Experts: Dr. Charles Emmerman (ER); Dr. David Talon (ER/ID); Dr. Robert Frenck (ID); Dr. Pranita Tamma (Peds ID)

Leigha Back v. AFC Industries, Inc., et al.

Type of Case: Frequenter/Employer Intentional Tort

Settlement: $1,250,000

Plaintiff's Counsel: David Grant and Frank Gallucci, Plevin & Gallucci Co., L.P.A., (216) 861-0804

Defendants' Counsel: Withheld

Court: Montgomery County Common Pleas Court, Judge Steven K. Dankof

Date Of Settlement: February 2022

Insurance Company: Travelers

Damages: Crush injuries to right hand leading to eventual amputation of index finger

Summary: Plaintiff worked through a temp. agency and was assigned to a factory. She was assigned to work on a ram form machine that was not equipped with the proper point of operation guarding. The machine had been switched out of dual palm button activation mode into foot pedal activation mode with a non-stationary foot pedal. As she was adjusting a part, her foot accidentally touched the foot pedal causing the machine to cycle while her hand was in the point of operation. Case was settled while MSJs were pending as to whether this was an EIT claim (with no ins.) or a PI claim (with ins.).

Plaintiff's Experts: Thomas Huston, Ph.D., P.E., CSP (Mechanical and Industrial Engineer); Gerald Rennell (Machine Guarding); Eugene Kim, M.D.; Cam Parker, RN, BSN, CLCP; Carl Sabo, Ph.D.; and David Boyd, Ph.D.

Defendants' Experts: Sal Malguarnera, Ph.D., P.E.; James Nappi, M.D.; Kenneth Mankowski, M.D.; and Tim Cody (Vocational)

Timothy & Jennifer Murphy vs. General Electric Company, et al.

Type of Case: Workplace Intentional Tort

Settlement: $750,000

Plaintiffs' Counsel: Steven M. Goldberg, Goldberg Legal Co., LPA, (440) 519-9900

Defendants' Counsel: Ron B. Lee & Jessica L. Sanderson, Roetzel & Andress, LPA; Patrick S. Corrigan, Cincinnati Insurance; Tom P. Mannion & Tim Chai, Lewis Brisbois Bisgaard & Smith; Nick A. Nykulak, Ross, Brittain & Schonberg Co., L.P.A.; and Jonathan W. Philipp, Zurich Insurance

Court: Cuyahoga County Common Pleas Case No. CV-19-916644, Judge Michael P. Shaughnessy

Date Of Settlement: December 2021

Insurance Company: Euclid Insurance; Electric Insurance; Zurich American Insurance; and Cincinnati Insurance

Damages: *

Summary: Tim Murphy, an industrial plumber, worked on a project involving the decommissioning of the Tungsten Plant, an industrial facility owned by General Electric. While tracing gas lines to purge the lines of flammable gas, Murphy stepped onto unsecured grates covering a drainage pit that were meant to provide a solid walking surface. Murphy fell into the three-foot deep pit as one of the grates flipped on its edge, puncturing Murphy's femoral artery near his groin/abdominal area (Murphy was ultimately life-flighted to a local trauma center for life-saving surgery). The grates over the pit in question were not structurally supported because a removable tank or some other supporting structure had been removed during the industrial cleaning process taking place at the facility and no remediation or warnings had been erected. Murphy returned to work after four months. The case was complicated by the layers of involvement of the host contractor GE and several subcontractors. Defendants vigorously contested liability and blamed Mr. Murphy for his injuries.

Plaintiffs' Experts: Richard Zimmerman; Kelly Baker/SCT; Michael Hayslip/NESTI, Inc.; Marianne Boeing (LCP); Alex Constable (Economist); John A. Pullman (Vocational Rehabilitation)

Defendants' Expert: *

John Doe v. ABC Surgery Center

Type of Case: Medical Negligence

Settlement: $4 Million

Plaintiff's Counsel: Todd Gurney and Brian Eisen, The Eisen Law Firm, (216) 687-0900

Defendant's Counsel: *

Court: Summit County Common Pleas Court

Date Of Settlement: September 2021

Insurance Company: *

Damages: Permanent Spinal Cord Injury

Summary: In anticipation of elective spine surgery, the patient went to preadmission testing ("PAT"). The PAT nurse noted and documented the patient's history of a bleeding disorder, but did not recognize its significance or properly inform the surgical team. On the day of surgery, the surgeon and the anesthesiologist both claimed to be unaware of the patient's bleeding disorder, despite having signed off on the PAT note. The surgery went forward without any precautions for the bleeding disorder. As a result, he developed multiple post-operative hematomas that caused a permanent spinal cord injury.

Plaintiff's Expert: *

Defendant's Expert: *

Estate of Jane Doe v. ABC Hospital

Type of Case: Medical Negligence / Wrongful Death

Settlement: $6 Million

Plaintiff's Counsel: Brian Eisen and Todd Gurney, The Eisen Law Firm, (216) 687-0900

Defendant's Counsel: *

Court: Cuyahoga County Common Pleas Court

Date Of Settlement: June 2020

Insurance Company: *

Damages: Death of 38-year old wife/mother

Summary: Minutes after her baby was delivered via C-Section, the mother began to bleed profusely. A large tear was noted on the lower half of her uterus. The obstetrician called a gynecologic surgeon for help to remove the uterus, but there was a delay in calling a trauma surgeon to help stop the bleeding. The excessive blood loss caused the mother's heart to stop, and resulted in anoxic brain injury and death.

Plaintiff's Expert: *

Defendant's Expert: * ■

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