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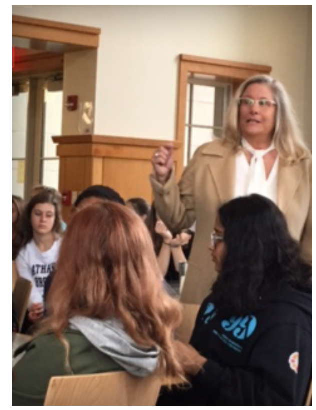

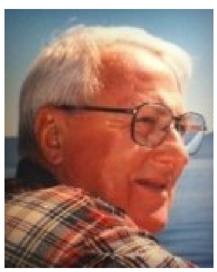

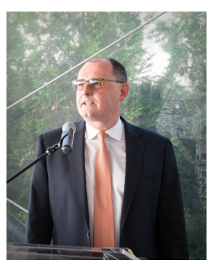

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President's Message:
"Celebrate The Power Of 64 Years Of CATA"

by Dana M. Paris

I attended a CATA sponsored seminar last winter and was delighted to hear one of our well-travelled, nationally recognized, members declare that CATA is one of the best trial lawyers organizations in the nation. Why? We have taken the notion of "friendly competition" and have embraced it in a way that benefits all of us as professionals, our clients, young aspiring trial lawyers, our bench and, ultimately, our communities. Through collaboration and education we inspire each other to improve our skill sets from the initial meeting with a new client to obtaining the verdict on their behalf. This is the cornerstone of our group and it does not happen by accident. It begins with collegiality: the desire to rub shoulders, laugh at ourselves or with each other, extend well-deserved congratulations on jobs well done, and share experiences. We raise the bar so that each of us will dig deeper and achieve the justice our clients deserve.

At the upcoming cocktail hour for students from our local law schools, make time to attend and explain why being a plaintiffs' trial lawyer is the greatest occupation and highest achievement possible.

When you receive the next email about one of our star-studded CLE seminars, make the time to attend and learn some of the best and newest courtroom techniques.

And when we have our annual installation dinner, make time to attend, share a wonderful time and celebrate CATA. ■

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How It "Does": Can John Doe Save Your *Clawson* Problem?

by Marilena DiSilvio and Gianna DeGeorge

The Ohio Supreme Court's ruling in *Clawson v. Heights Chiropractic* presents a challenge for plaintiff lawyers seeking to establish employer liability in negligence actions.[1] This decision draws upon precedent set in *Nat'l Union Fire Ins. Co. v. Wuerth* which held a law firm can only be held vicariously liable for legal malpractice when one or more of its attorneys are individually liable for such malpractice.[2] In *Clawson*, the Court concluded there is "no basis for distinguishing a law firm from any other entity to which Ohio law applies."[3] As a result, the rule articulated in *Wuerth* applies equally to claims of vicarious liability in cases of medical malpractice.[4]

As a precautionary measure, many plaintiff lawyers now find it necessary to sue every potential individual involved in the negligent act(s) in order to establish employer vicarious liability. This can be challenging where potential tortfeasor names are unknown. If the plaintiff and defense lawyers cannot agree to a *Clawson/ Wuerth* stipulation, then naming John Doe defendants is one mechanism to protect against the failure to join a necessary defendant. Ohio Civ. R. 15(D) governs the process by which to properly name and serve John Doe defendants.

Civ.R. 15(D) allows a plaintiff to designate an unknown defendant with any name and description in a pleading or proceeding when the defendant's name is not known. Civ.R. 15(D) **does not** grant plaintiff the authority to employ fictitious names as temporary placeholders for a defendant in a complaint filed before the statute of limitations expires.[5]

This article offers a practical approach to properly identifying and serving a John Doe defendant.

1. When to use a John Doe.

There are times when Plaintiff's medical records clearly identify all care providers involved in the alleged negligent conduct. There are ample instances, however, in which the identity of a specific individual care giver is simply not known. Consider a circumstance in which a plaintiff is seen in the emergency room by a physician's assistant and the name of the supervising/collaborating, attending emergency room physician is not included in the emergency room chart. Or, perhaps, a plaintiff's discharge summary and/or consent form includes an undecipherable signature, rendering the individual's name as unknown. There is also the situation in which your client recalls speaking with an unknown, on-call physician whose name is not in the record. These are all appropriate circumstances for using a John Doe designation to protect the statute of limitations from running as against that individual defendant and his/her employer.

2. How to use a John Doe.

Once you have decided it is appropriate to designate a John Doe care provider and John Doe Corp., you need to do so in accordance with Civ.R. 15(D):

- timely file your original complaint designating the defendant by a fictitious name;
- aver in the original complaint the identity of the fictitious defendant could not be discovered despite plaintiff's best effort;
- include the words "name unknown" in the original summons;
- personally serve the defendant with a copy of the original summons and original complaint

within one year of the filing of the original complaint; and
- amend the complaint to identify the defendant upon discovering the defendant's identity. [6]

Timely file the original complaint designating the John Doe defendant.

When designating a John Doe defendant, it is necessary to provide a sufficient description. Avoid using overly generic descriptions like "a doctor licensed in Ohio whose actions caused her husband's death and that doctor's professional corporation."[7] A specific and reasonably identifiable description is necessary to comply with the requirements of Civ.R. 15(D):

JOHN DOE NO. 1
The individual identified as ED physician on the attached Ex. "A", dated _____ name undecipherable and, therefore, unknown and address unknown
c/o ABC Hospital
Utopia City, Utopia 12345

JOHN DOE CORP NO. 1
The corporation and/or entity which, on ____ employed the individual identified as ED physician on the attached Ex. "A", dated _____name undecipherable and, therefore, unknown and address unknown
c/o ABC Hospital
Utopia City, Utopia 12345

JOHN DOE HEALTH CARE PROVIDER(S) NO. 2 – 3
Physicians, nurse midwives, and any other healthcare professionals that were taking call for _____ M.D. on _____ and _____, names unknown and addresses unknown
c/o ABC Hospital
Utopia City, Utopia 12345

JOHN DOE CORPORATION(S) NO. 2- 3,
Employers of physicians, nurse midwives and any other healthcare professionals that were taking call for _____M.D. on _____and _____who provided care, treatment and/or consultation to Plaintiff _____ and her unborn son, _____ names unknown and addresses unknown
c/o ABC Hospital
Utopia City, Utopia 12345

However, if you know, or should know, the name of a potential defendant because their name appears in the medical record, a John Doe designation will not protect the statute of limitations from running against them. Consider the following example: plaintiff designates a John Doe defendant in the complaint. Then, after the statute has expired, a named defendant claims an unnamed care provider identified in the medical record is the actual culpable party. Plaintiff cannot substitute that care provider for the designated John Doe[8] because his/her identity was, or should have been, known to plaintiff. "The identity of the practitioner who committed the alleged malpractice is one of the facts that the *plaintiff must investigate, and discover,* once she has reason to believe that she is a victim of medical malpractice."[9]

Aver in the original complaint the identity of the John Doe defendant could not be discovered.

To satisfy the requirements of Civ.R. 15(D), the original complaint must clearly state that the identity of the fictitious defendant could not be discovered.[10] Examples of averments to include in the complaint follow:

At all times herein relevant, Defendant John Doe No. 1 is the individual identified as ED physician on the attached Ex. "A", dated _____ name undecipherable and, therefore, unknown and address unknown. Plaintiff has been unable to identify the name and/or identity of Defendant John Doe despite reasonable diligence as this individual and/or their employment status is not identified anywhere in the medical chart of Plaintiff. Plaintiff, pursuant to R.C. §2323.451, reserves the right to substitute a named defendant for such John Doe Corp. No 1 upon discovery of his/her name and/or identity.

At all times herein relevant, Defendant John Doe Corp. No. 1 is the corporation and/or entity which, on _____ employed the ED physician on the attached Ex. "A", dated _____ name undecipherable and, therefore, unknown and address unknown. Plaintiff has been unable to identify the name and/or identity of Defendant John Doe Corp. Number 1 despite reasonable diligence as the employment status of John Doe Number 1 is not identified anywhere in the medical chart of Plaintiff, _____. Plaintiff, pursuant to R.C. §2323.451, reserves the right to substitute a named defendant for such John Doe Corp. No. 1 upon discovery of the name and/or identity of any such employer.

In *Erwin v. Bryan*, the Ohio Supreme Court emphasized a plaintiff should provide some form of identification for the defendant in the original complaint, even if the defendant's name is unknown. This identification involves including a

detailed description of the defendant in the complaint sufficient for personal service.[11] If the identification is insufficient, the John Doe defendant becomes merely a 'placeholder' and Civ.R. 15(D) does not apply in such cases.[12] To rebut against a 'placeholder' argument, provide sufficient information to identify the fictitious defendant, demonstrating awareness of the defendant's identity, even if the defendant's name remains unknown.

Include the words "name unknown" in the original summons.

Civ.R. 15(D) requires "the *summons* must contain the words 'name unknown.'" A summons is issued by the court based on the designation in the complaint. The rule is strictly construed – the words used must *actually be* "name unknown." For example, the 8th District Court of Appeals held that including the phrase "unknown physician" was insufficient.[13]

Personally serve the defendant with a copy of the original summons and complaint.

Personal service upon the John Doe defendant, with a copy of the original summons and complaint is required. Once you have learned the name of the John Doe, file a Motion to Appoint a Special Process Server to personally serve the John Doe defendant. Confirm with the clerk of courts the summons contains the words "name unknown." The requirement of personal service is strictly construed, so service via certified mail is insufficient for satisfying the requirement of Civ.R. 15(D).[14]

File a Motion for Leave to File First Amended Complaint, *Instanter,* to identify the defendant upon discovering the defendant's identity.

Once personal service has been achieved, the complaint must be amended to reflect the defendant's name and address. File a Motion for Leave to File First Amended Complaint to Substitute the John Doe Defendant, *Instanter,* adding the new party defendant.

All requirements of Civ.R. 15(D) have been met. Upon the court's granting of the Motion for Leave to Amend, the relation-back provisions of Ohio Civ. Rules 15(C) and 3(A) apply.

Simply Stipulate

When substituting a real defendant for a John Doe the parties can, where feasible, enter into a stipulation. This option is particularly appropriate where the individual John Doe care provider is an employee of a named defendant:

> We, the attorneys for the respective parties do hereby stipulate that Plaintiff may substitute_____as a party into this case in place of the current Defendant John Doe No. 2, the physician taking call for _____M.D. on _____and _____who provided care, treatment and/or consultation to Plaintiff _____ and her unborn son, _____. Plaintiff and counsel for Defendant_____ agree said stipulated substitution relates back to the filing of the original Complaint and any corresponding tolling agreement(s) entered between the parties.

Typically, counsel who has agreed to the stipulation will also agree to accept service of the complaint. Alternatively, with counsel's agreement, a Waiver of Service of Summons pursuant to Ohio Civ.R. 4(D) and 4.7 could be filed.

WHAT ABOUT OHIO REV. CODE § 2323.451?

Ohio Rev. Code §2323.451 permits a medical malpractice plaintiff to add additional medical claims or defendants at any time within six months of the filing of the complaint. If discovery can be quickly accomplished to learn the names of unknown individuals involved in the care at issue, O.R.C. §2323.451 is an efficient vehicle to add new defendants. Simply file a Motion for Leave to File First Amended Complaint to Add New Party Defendant ___ Pursuant to O.R.C. §2323.451, *Instanter.* ■

End Notes

1. *Clawson v. Heights Chiropractic Physicians, LLC*, 170 Ohio St. 3d 451, 2022-Ohio-4154, 214 N.E.3d 540 (2022).
2. *Nat'l Union Fire Ins. Co. v. Wuerth*, 122 Ohio St. 3d 594, 600, 2009-Ohio-3601, 913 N.E.2d 939 (2009).
3. *Clawson* at 461 citing *Wuerth* at 600.
4. *Clawson* at 461.
5. Civ. R. 15(D)
6. *Easter v. Complete Gen. Constr. Co.*, 10th Dist. Franklin No. 06AP-763, 2007-Ohio-1297, ¶11 (March 22, 2007); *see also Pearson v. City of Columbus*, Franklin C.P. No. 13 CV 9497, 2014 Ohio Misc. LEXIS 10252, *8; *Erwin v. Bryan*, 5th Dist. Tuscarawas No. 08-CA-28, 2009-Ohio-758 (Feb. 10, 2009).
7. *Schura v. Marymount Hosp.*, 8th Dist. Cuyahoga No. 94359, 2010-Ohio-5246, ¶15 (Oct. 28, 2010).
8. *Erwin v. Bryan*, 125 Ohio St. 3d 519, 523-24, 2010-Ohio-2202, 929 N.E.2d 109 (2010)
9. *Erwin* at 525.
10. *Erwin* at 524. *See also Easter* at ¶11; *Pearson* at¶8; *Schura* at ¶11.
11. *Harris v. Firelands Reg'l Med. Ctr.*, Erie C.P. No. 2016-CV-0268, 2017 Ohio Misc. LEXIS 20030, *44, citing *Erwin* at ¶s 24, 30, 38.
12. *Id.*
13. *Schura* at *9.
14. *Easter* at ¶32. *See also Schisler v. Columbus Med. Equip.*, 10th Dist. Franklin No. 15AP-551, 2016-Ohio-3302, ¶40 (June 7, 2016); *Laneve v. Atlas Recycling,* 119 Ohio St. 3d 324, 328, 2008-Ohio-3921, 894 N.E.2d 25 (2008); *Amerine v. Haughton Elevator Co.*, 42 Ohio St.3d 57, 537 N.E.2d 208, 209 (1989).

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Building Your Tribe: The Heartbeat of Endless Case Referrals

by Allen C. Tittle

In the ever-evolving world of marketing, attorneys are often captivated by the newest, shiniest toys. Whether it's the allure of Google Local Service Ads (a year or so ago), the latest TikTok fad, or the promise of the newest lead-generating tool, we're easily distracted. But in the midst of these technological advancements, it's imperative to remember one major truth: human connection remains paramount. A survey by *Gartner* found that brands that personalize experiences by integrating advanced digital technologies and proprietary data for customers can push revenue up by 15%.[1] The timeless strategy of building a loyal tribe that consistently refers cases to you is unbeatable. Why? Because humans crave relationships and community. This isn't just a strategy; it's a necessity for thriving in the legal world. Let's dive deeper.

Attorney Referrals

At Tittle & Perlmuter, our most significant cases are often the result of attorney referrals. And we are not alone - according to a study by *Attorney at Work*, 61% of legal professionals cited referrals as their primary source of new business.[2] For us, attorney referrals are also somewhat vetted, so you know there is a better chance of something being a case we would accept, as opposed to a lead from the internet. If you're not channeling your efforts into building these strategic alliances, you're missing out—both relationally and financially. Here's a peek into our recipe for referral success:

- **Know Your Audience:** Craft a tailored referral strategy, pinpointing your ideal referral partner. We spent time creating our top two referral avatars, including the best way to market to those perfect referral sources!
- **Keep Top of Mind:** Send out newsletters that personalize your firm and cases, with a focus on print because, to be brutally honest, lawyers do not read email.
- **The Old-Fashioned Stuff Works:** Prioritize face-to-face interactions, like lunches or coffee chats. Engage in networking events, both as a host and an attendee.
- **Gratitude:** Express gratitude for referrals with personalized thank-you cards.
- **Social Media for Attorney Referrals:** Harness LinkedIn's potential, including its ad platform. We designed a video marketing campaign with attorney referral partners explaining why they refer us cases!
- **Top Secret Tip:** And perhaps, most importantly, pivot from generic logo-clad gifts to personalized, recipient-centered ones. Pro-tip: The book "Giftology" by John Ruhlin is a game-changer.

The key takeaway? Action trumps mere knowledge. Prioritize implementing over planning. It's better to perfectly execute one strategy than to juggle four simultaneously.

Clients and Former Clients

You can't build a tribe without including your clients. But you will not have a bunch of raving fans unless their expectations are met on how their case was handled. In fact, dynamics have evolved, with clients expecting more than just legal advice; they seek a holistic, tailored, and transparent experience. We are attempting to do just that by implementing the following:

- **Personalize Your Client Experience:** According to a study by *Salesforce*, 84% of customers say being treated like a person, not a number, is very important to winning their business.[3] For law firms, this translates to making your client, or potential client, feel special. When a new client signs up for us, we have a customized intake box that includes all types of firm swag, depending on case value. From t-shirts to coffee cups, the client feels special from the outset.
- **Transparent Communication:** Clients expect regular case updates. We provide updates to all cases every three weeks. This allows staff to create a real connection with our clients.
- **Embrace Technology for Client Communication and Feedback:** Consider using a software to assist with client communication that automates case updates! There are several software packages available, like Hona or Case Status, that have remarkable capabilities.
- **Cards Are Not Just for the Holidays:** Everyone sends a holiday card or a birthday card – what is so special about that? Instead, think about what other firms fail to do! Client getting a surgery? Send flowers. Anniversary of a death? Send a thinking of you card. These are the things that will be remembered and appreciated, not forgotten and put in a pile of all the other cards received at the same time.
- **Keep top of mind after their case:** Things like a newsletter or client dinners are a great way to do this. Another top-secret tip – driving in a car with an extra 15 minutes? Call a former client, just to see how he or she is doing!

When you approach continuously expanding your network in this way, you will reap the benefits of your marketing efforts and your tribe of advocates compounding together.

Community Involvement

Tribe building doesn't end with referring lawyers and clients. A comprehensive community outreach program can further solidify your firm's reputation in the local area. Volunteering at local food pantries as a firm or collaborating with local nonprofits not only enhances your visibility but also positions your firm as a communitycentric entity. A *Nielsen* report showed that 56% of customers are more loyal to companies that actively support social issues they care about.[4] At our firm, we do the following: 1) Twice a year, close the firm for a morning to volunteer at the local food pantry put on by Mae Dugan; 2) Attend Fundraisers for organizations like Hanson House, a traumatic brain injury clubhouse or Equality Ohio; and 3) Provide a specific amount of paid time off for community involvement for staff!

Social Media

This wouldn't be a marketing article without touching on social media. Just like us, you probably have a love-hate relationship with it. You love the coverage you can get but hate the ever-changing algorithms and trends. However, the reality is this: you must have a presence on social media. Social platforms are constantly changing, but for right now at least, they are not disappearing anytime soon. Below are a few social media strategies we use to set ourselves apart:

- **Humanize Your Brand:** Social media is the perfect place to humanize yourself and your law firm. Yes, promote your recent verdict and share the prestigious award you received, but also show people that you're a normal person, just like them. According to the *Sprout Social Index*, 64% of consumers want brands to connect with them.[5] Share stories from behind the scenes, celebrate team achievements, and even delve into your personal passions occasionally. It helps break the stereotype that lawyers are unapproachable! When thinking about content, ask yourself this question, how do I document what I do day-to-day? Then, document that. It is easier than you think.
- **Educate and Engage:** Post high-value content that addresses common legal questions or sheds light on recent legal updates. The *Content Marketing Institute* found that 77% of consumers appreciate brands that provide informative content.[6]
- **Diversify Your Platforms:** While LinkedIn might be the obvious platform attorneys are on, Instagram is a significant player if you want to reach a younger audience. According to the Law Firm Social Media Census, Instagram usage by law firms increased by 37% in 2020.[7]
- **Monitor Your Reputation:** While you may not think about client reviews and social media, they go hand in hand. While Google has a review platform, so does Facebook.

A study by *BrightLocal* revealed that 87% of consumers read online reviews for local businesses in 2020.[8] Engage with reviews, both positive and negative, to show that you care about client feedback.

- **Leverage Video Content:** Video content is one of the most consumed forms of media on platforms like Facebook and Instagram. A report by *Hubspot* states that 54% of consumers want to see more video content from brands they support.[9] For me, video content is the secret weapon in social media. Walking into Court? Shoot a quick video explaining what you are doing. Prepping for a deposition? Shoot a quick video explaining your process (showing how dirty your desk is).
- **Consistency is Key:** According to a study by *CoSchedule*, brands that publish consistent content experience 3.5 times more traffic.[10] Use scheduling tools, such as Hootsuite, SocialPilot, or Pallyy, to ensure your firm maintains a consistent posting schedule.

At the end of the day, flashy marketing strategies might catch our eye, but it's the genuine human connections that truly make the difference. Building relationships with fellow attorneys, giving our clients that personal touch, and simply documenting our day on social media are what really set us apart. It's all about blending the new with the tried-and-true to stand out in our field! ■

End Notes

1. Gartner. (2020). "Maximize the Impact of Personalization".
2. Attorney at Work. (2019). Annual Law Firm Marketing Survey. Attorney at Work
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Michael A. Hill is a nursing home abuse lawyer fighting to end nursing home abuse throughout Ohio. Reach him at 216.777.8856 or www.eadiehill.com.

Get The Best Verdicts for Your Clients by Simplifying Your Case

by Michael A. Hill

In the last year, I have had 36 million dollars in verdicts on cases that had combined settlement offers of less than $200,000. That's right, ***combined***. These were the so-called bad cases according to the defense.

Some of what I'm about to say applies specifically to nursing home cases, but most doesn't.

Jurors forget what you say, almost immediately

Research shows that people begin forgetting information almost as soon as they hear it. Within one hour, most people forget more than 50% of the information they "learned." After 24 hours, that figure grows to about 70%. Within a week, people have forgotten about 90% of what they heard. Like it or not, jurors are going to forget what you told them. You can't fix it, but you can improve it. How?

Two things we know for sure about human understanding. We search for patterns, and we learn best when information is provided through multiple methods. So, present in a way that makes remembering easy.

Humans evolved to recognize patterns, and the smallest number to create a pattern is 3. This was recognized by ancient civilizations.

Think about some of the most memorable phrases everyone knows. They come in 3s. "Life, liberty, and the pursuit of happiness." "Government of the people, by the people, for the people." "Lights, camera, action!" "Blood, sweat, and tears." "I came, I saw, I conquered." "Location, Location, Location." "Mind, body, spirit." "Stop, look, listen." "DIY—Do it yourself." "Beginning, middle, end." You get it.

Any case has some memorable phrase or story structure that encapsulates what happened. In a bedsore (pressure injury) case, the rule of 3 may be: Inspect (the skin), report (to the doctor), treat (the wound). Say it and say it often.

Use multiple learning styles. Different people learn in different ways. The primary ways people learn are: audio, visual, verbal, note taking, drawing.

Audio: Some people prefer audiobooks because they retain more information that way. I don't. I'm distracted within 15 seconds. But that's how some jurors learn.

Visual: Some people are visual learners. Images, diagrams/demonstratives, and videos are a must for these people.

Verbal: This is a little bit different than audio because it involves audience participation, which is difficult in a trial. If you ask clear questions, especially if based on your rule of 3s, the jury will answer—hence, when you see them nodding along. They're just not allowed to say it.

Note Taking: This is an odd one because some judges still resist note taking but can be convinced. The ABA has endorsed juror notetaking.[1]

Draw Pictures: Use boards, elmos, and especially jury interrogatories and verdict forms to make your points.

Keep it simple, short, and relatable

Keeping it short

Every day the trial goes on, the more the jury forgets. What the jury heard last from the defense is what they remember most. So, you had better find the important points and keep it short. That requires up front time. It's like Mark Twain said, "I didn't have time to write a short letter, so I wrote a long one instead."

On average, I have been putting on about 20 witnesses in wrongful death cases, including

multiple experts, in two and a half days. I'm sure I could have done it faster.

Keeping it simple

You took the case because it was simple. There was some human element that struck you. You could explain the case in 30 seconds. Now you're close to trial and it's a convoluted mess. You're up at night wondering which of your multiple theories of liability will persuade the jury and even more concerned about the ever-increasing number of defenses you need to disprove. That's a gift to the defense. That's the opposite of simple. Get back to what hooked you about the case.

Standard of care is an area we tend to get lost in the technical weeds. In the nursing home context, it often involves regulations, e.g., whether a pressure injury was "clinically unavoidable" or whether there was "sufficient staffing." Those are subject to interpretation. If you have to interpret something, it's not compelling.

At the end of the day, the standard of care is just job performance. Everybody knows you need to do your job. That's not an intimidating concept. If what that job is, is simple and relatable, you're out of the weeds.

In my last few trials, the standard of care issues were short. In a bedsore (pressure injury) case, it was, "inspect (the skin), prevent (the wound), treat (the wound)." That's a lot easier to understand than the federal regulation that "requires that a resident who is admitted without a pressure ulcer doesn't develop a pressure ulcer unless clinically unavoidable, and that a resident who has an ulcer receives care and services to promote healing and prevent additional ulcers." 42 CFR 483.25(c).

In a case where a schizophrenic patient who was documented as combative and refusing care became malnourished, dehydrated, and aspirated when unsupervised, the rules were: (1) " a nursing home must meet the needs of every resident. If they can't, the nursing home needs to send them somewhere that can"; (2) "a nursing home must have enough staff to meet every resident's needs." That's the "do your job and if you can't, find someone who can" rule. It's easier to follow than the corresponding regulation.[2]

In a case where the power of attorney was never informed that their loved one had what could be considered signs and symptoms of an infection, the rule boiled down to: "a nursing home must never keep its residents in the dark." That's easy. The federal and state resident rights law it's based on isn't.[3]

While these are nursing home regulations, standard of care in most professional cases is based on technical jargon that can be reduced to simple concepts of job performance and the jury can decide—after explicitly being told that they are merely assessing job performance—whether the defendants did their job or not.

Making it relatable

People aren't always going to relate to the exact issues in your case—particularly in nursing home, medical malpractice, and civil rights cases where most people don't have much experience and might like to avoid ever imagining themselves in such a position.

There are commonalities, however, that people, regardless of their personal experiences, religion, or political affiliation are going to relate to. Find the commonality in your case.

How do you make the specific issue a commonality? By taking the technical issue and putting it in the context the jury understands. In a case in a rural county, many of the jurors revealed that they had significant military experience. They stated how you have to follow the chain of command or else the superiors who can do something don't have the information, and that can result in people dying.

The case involved the nurse's failure to report signs and symptoms of clostridium difficile to the attending physician. The facility policy required notifying the physician if there are signs of infection, as do the nursing home resident's rights. But, notifying the physician isn't the language that activated danger in the jurors minds. It didn't matter that I had never used the phrase "chain of command" in the case. It became the rule in the case. It's what the jury wrote on the interrogatory finding negligence. And against the corporate parent? It didn't make sure the nursing home was following the chain of command.

Use analogies to relate to jurors. In a case where everyone agreed that a resident needed "supervision," no one could agree what supervision was. The defense argued that they were supervising the resident because someone was in the room watching them when they fell. They wanted to make it a debate about what "supervise" meant. But, through my expert's analogy, supervision became pretty clear. It's like a crossing guard who's supposed to be watching the kids. If she doesn't stop the kid and the kid gets hit by a car, she wasn't supervising him. She was just there to watch him die. It's simple. It's scary. It's relatable.

Witnesses

Experts don't need to prove the commonalities. They need to rationally explain why they are important and can be performed. They give legitimacy to the commonality.

Impartial witnesses are far more important than any other witnesses. Of course, everyone has some degree of bias, but we're talking about witnesses who have the least to gain from the outcome.

Treating physicians, medical examiners, former employees, and family members of other residents who saw neglect at the nursing home.

In the nursing home context, there is frequent turnover. In the time between the event that caused the injury and the lawsuit, many of those people no longer work there. Talking to them before the defense does—and the defense will absolutely lie to them saying things like if the lawsuit is successful they will lose their license—makes all the difference. I know this because they have told me this many times.

Former employees put the defense in a precarious situation. First, their testimony about the operation, management, and neglect of residents is in stark contrast to the employees who are represented by the corporation's lawyers. Another issue for the defense is that if the former employee is a liar willing to come to court and lie under oath, why did they allow them to take care of society's most vulnerable members? It also exposes the defense's true colors. They likely told the jury how hard nurses and aides work, but when those same nurses and aides say something that doesn't fit their case, they go on the attack. They've lost credibility.

In a recent trial, the entire first day of trial was former employees. Each of these witnesses probably testified for 10-15 minutes. The case was won on day 1.

If your clients saw residents being neglected, then other family members probably did too. They saw the lack of staff. They witnessed call lights not being answered. They prove what your clients are saying before they say, or perhaps without them having to say it.

In nursing home cases, we often are faced with death certificates phoned in by a doctor who hasn't spent much if any time with the patient. They list as the cause of death chronic illnesses like dementia, cardiovascular disease, COPD or other illnesses that are in direct contrast to the case—and reality. That feeds the defense's case that this was a sickly person in the process of dying from preexisting illnesses that couldn't be prevented.

On several occasions, however, I've been able to demonstrate to the certifying physician or hospice doctor that they were unaware of most of the stuff that happened at the nursing home. Supplied with more information, they supported the case. The result isn't just evidence that the resident died from the nursing home's conduct; the nursing home covered up what really happened by giving the doctor limited information. That's an aggravating fact. They kept the doctor in the dark.

Don't get me wrong. All of this takes a ton of effort and time. Finding services that do nothing but locate former employees. Press releases. Facebook ads and posts. Phone calls and pounding the pavement. But it's worth it.

Don't chase their defenses

Trying to disprove things that didn't happen or don't matter is the opposite of simple, short, and relatable. If their defenses didn't happen or aren't actual issues in the case, point out they're a misdirection or distraction. The more time you spend on any part of the case that doesn't directly support your case, the more time goes by and the less the jury is going to remember it.

In nursing home cases, the injured person was sick, old, smoked cigarettes for 30 years, had no money, was an alcoholic and therefore had dementia, and whatever else. Who cares? I don't need to disprove that to prove my case.

Ask for the real value of the case early

Jurors have no frame of reference for what a case, injury, or life is worth. They're not insurance adjusters and they're not lawyers. They've never been told that a father's life is worth less just because he has 6 months to live or that not being a wage earner matters.

In my three most recent cases, the decedents were: (1) 84-year-old hospice eligible male with Parkinson's disease for 15 years, who had lost nearly 50 pounds in the prior 4 months at a different nursing home after severely injuring his leg at home; the liability was that they didn't notify the physician he had signs of an infection ($5 million); (2) 69-year-old schizophrenic male with no spouse or children who had been institutionalized since early 20s ($26 million); (3) 70-year-old male in a nursing home after suffering multiple intracranial aneurysms who fell in the morning hours and struck his head ($5 million).

So, keep trial short, simple, and relatable. ■

End Notes

1. I have briefing and case law on this that some, but not all, judges have found persuasive.
2. "The facility must have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at § 483.70(e)." Doesn't exactly role off your tongue.
3. "The right to participate in decisions that affect the resident's life, including the right to communicate with the physician and employees of the home in planning the resident's treatment or care and to obtain from the attending physician complete and current information concerning medical condition, prognosis, and treatment plan, in terms the resident can reasonably be expected to understand; the right of access to all information in the resident's medical record; and the right to give or withhold informed consent for treatment after the consequences of that choice have been carefully explained." ORC 3721.13(A)(8).

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The Five W's of Federal Medical Malpractice

by Louis E. Grube

Congress has federalized medical malpractice defense and liability coverage in some cases, but few know much about how these laws work. Under the Federally Supported Health Centers Assistance Acts, 42 U.S.C. § 233, and regulations issued under it, 42 C.F.R. § 6.6 (collectively "FSHCAA"), claims against certain federally funded clinics or the physicians employed there are transformed into claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). FSHCAA may even follow individual practioners to work performed outside a federally funded clinic, although these circumstances may not come to light until after a lawsuit is filed. While the law can be complicated in individual cases, here are some basic answers to the five Ws about FSHCAA.

Who receives the benefit of FSHCAA?

FSHCAA extends FTCA coverage to federally-supported clinics and the doctors who work there, including in some instances *when those physicians are working for non-federal providers*. The law generally directs that the "remedy against the United States" under FTCA "shall be exclusive of any other civil action" for claims arising from "the performance of medical, surgical, dental, or related functions" by a "commissioned officer or employee of the Public Health Service ["PHS"] while acting within the scope of his office or employment." *42 U.S.C. § 233(a)*. Each year, the Secretary of Health and Human Services ("HHS") will "deem" federally supported clinics and their employee physicians to be PHS employees for any given year in which such a clinic received a federal grant. *42 U.S.C. § 233(g)(1)(A)*.

If a defendant doctor injured your client somewhere other than a federal-grant-supported clinic, FSHCAA may sneak up on you. A physician deemed to be an employee of the PHS by virtue of their work at a federally-supported clinic may *also* work for some other medical provider that is not federally supported or a part of the PHS. In general, HHS has defined the scope of employment to exclude "services which are not on behalf of the covered entity, such as on a volunteer basis or on behalf of a third-party," and "acts and omissions which are related to such services are not covered." *42 C.F.R. § 6.6(c)*. But there are important exceptions to that rule. The Secretary of HHS can determine that "acts and omissions related to the grant-supported activity of entities" will still "be covered," even if they are "provided to individuals who are not patients of a covered entity." *42 C.F.R. § 6.6(d)*. Simply put, a physician working for a federally-supported clinic may bring FSHCAA coverage with them as they moonlight for other hospitals or practice groups, even if those other organizations are not federally funded.

For FSHCAA to follow a doctor out of their federal workplace, the Secretary of HHS is generally required to determine in advance that work for a non-federally-supported

employer "benefits patients of the [grant-supported] entity and general populations that could be served by the entity," "facilitates the provision of services to patients of the entity," or is "otherwise required to be provided to such individuals under an employment contract or similar arrangement." *42 C.F.R. § 6.6(d)(1)-(3)*. But the Secretary has laid out several "examples of situations" falling within that general rule, and an advance determination is not required under those enumerated scenarios. *42 C.F.R. § 6.6(e)(4)*. The most likely example includes instances in which "[p]eriodic hospital call or hospital emergency room coverage is required by the hospital as a condition for obtaining hospital admitting privileges" so long as there is "documentation for the particular health care provider that this coverage is a condition of employment at the health center." *42 C.F.R. § 6.6(e)(4)(ii)*. So, if a physician can show that her employment agreement with a federally-supported clinic specifically requires her to acquire admitting privileges at a local hospital, and if that hospital then requires her to cover call or ER shifts in return for conferring such privileges, her malpractice at the hospital during such shifts may be roped into the scope of FSHCAA and FTCA. There are other exemplary situations, whose application to an individual case could be unpredictable.

In summary, FSHCAA coverage could follow deemed employees of the PHS beyond the confines of their work for a federally-supported clinic, and such situations will be difficult to anticipate given the complexity of the legal structure involved.

What will happen if you file a malpractice claim against a doctor deemed to be an employee of the Public Health Service in State Court?

FSHCAA generally provides that the "Attorney General shall defend any civil action or proceeding brought in any court against" a PHS employee related to acts or omissions within the scope of their employment. *42 U.S.C. § 233(b)*. An action against a PHS physician will be removed to the local District Court by the local United States Attorney, who will file a certification that the defendant physician was operating within the scope of employment with the PHS. *42 U.S.C. § 233(c)*. Unlike in other contexts, this certification is not conclusive.[1] Instead, disagreement about whether a physician's negligence falls within the scope of PHS employment must be resolved after "a hearing on a motion to remand held before a trial." *42 U.S.C. § 233(c)*. Since this hearing will examine issues of federal subject matter jurisdiction, the District Court should permit some discovery related to the scope of employment with the PHS if a plaintiff seeks a remand to state court.

While FSHCAA sets up the elaborate scheme for determining the scope of grant-supported employment with the PHS laid out above, our firm has recently been litigating against the federal government over whether FTCA's adoption of state law on the scope of employment also plays a role.[2] The matter has been briefed before the United States Court of Appeals for the Sixth Circuit, with attorneys from HHS and the Appellate Staff of the United States Department of Justice, Civil Division arguing that FTCA borrows state agency law, thus extending the scope of PHS employment to meet fact patterns that the Secretary of HHS has not determined in advance fall within the scope of employment as defined in FSHCAA.[3] In a true moonlighting situation arranged by a federally-supported clinic for business reasons, rather than to support grant-funded activities, it is possible that Ohio law could extend the scope of employment farther than the definitions in FSHCAA and its regulations, making application of this law even harder to anticipate.

When do you need to worry about the potential application of FSHCAA?

Given the difficulties of discerning whether FSHCAA applies and complying with the FTCA on time, these are immediate concerns. Given the fluctuating state of the law around the scope of PHS employment, FSHCAA is a concern any time a physician is not directly employed by a non-federally-supported facility where medical malpractice occurred. If it is possible that the ultimate employer of a negligent physician is really a federally-supported clinic, it is vital to discover early on whether the federal government could be involved. Particularly, the FTCA requires compliance with administrative claims procedures before suit is filed. *28 U.S.C. § 2401(b)*. That process must be initiated within two years after "accrual" of a claim, which generally occurs when a plaintiff could have discovered the existence and cause of an injury through "reasonable diligence."[4] The fact that a limitations period in a particular case could run longer under state law for reasons of disability, minority, or other statutory tolling will not matter.

The broad scope of FSHCAA and strict requirements of FTCA work together to create a paramount problem for the practitioner: you may find out that your defendant physician was deemed a member of the PHS and certified to have been within the scope of that employment after suit was filed in state court. In these situations, the United States will appear, remove the matter to federal court, and request dismissal for failure to exhaust administrative remedies. Even if the suit is voluntarily dismissed so that administrative claims

can be exhausted, the government may then claim that the matter is time-barred because filing in state court does not meet or toll the limitations period for submitting administrative claims.[5] In the moment, this could feel like a trap. While accrual concepts and equitable tolling may be available to establish timely exhaustion of administrative claims processes, there is no substitute for knowing who the real defendant is before you take action.

Where do you look to find out whether potential defendants fall within FSHCAA?

The federal government does make some helpful information available. The Health Resources & Services Administration ("HRSA") maintains an online search tool, where the names of grant-supported clinics that have been deemed to be PHS employees may be found.[6] And more recently, HRSA has developed a digital graphic "Deemed Status Badge" that these clinics are permitted, but apparently not required, to display to give notice to patients online and in the real world.[7]

It is also worth searching for potential defendant names on PACER, where you may find previous appearances by the United States under FSHCAA/FTCA. If the medical facility where your client was injured is not itself a deemed PHS employee, but the physician is, prior cases on PACER may be the only way to discern that you have a federalized malpractice case. Unfortunately, it does not seem that there is any way to discover such an employment arrangement if you are the first one to encounter it.

Why did the federal government get into medical malpractice coverage and defense?

Through its Health Center Program, the HRSA has explained why this law was passed:

> Congress extended eligibility for FTCA protections to health centers in order to increase the availability of funds for health centers to provide primary health care services by reducing or eliminating health centers' malpractice insurance premiums. The Health Center FTCA Program saves Health Center Program grantees millions of dollars yearly that they can then invest in the provision of quality primary health care services.[8]

However laudable Congress' goal of standing in as the defendant with deep pockets in a malpractice case may be, that decision has created the foregoing procedural hurdles. Oddly enough, it seems that many of these barriers to recovery undercut the purpose of the FTCA, which was enacted to hopefully "reduce congestion of federal courts' dockets and to speed fair treatment of those asserting claims against the federal government."[9] If you have concerns about these laws, it is worth contacting your federal legislators to talk about it. ■

End Notes

1. *See, e.g., N.B. by Bray v. Bon Secours Mercy Health, Inc*., S.D. Ohio No. 1:20-CV-699, 2021 WL 2334177, *4 (June 8, 2021).
2. *See N.B. by Bray v. Bon Secours Mercy Health, Inc*., 649 F.Supp.3d 631 (S.D. Ohio 2023).
3. *See, e.g., 42 C.F.R. § 6.6(d)(1)-(3) and (e)(4).*
4. *See, e.g., McDonald v. United States*, 843 F.2d 247, 248 (6th Cir. 1988).
5. *See, e.g., S.W. by & through Wojcehowicz v. United States*, N.D. Ohio No. 1:19-CV-2947, 2020 WL 4604577 (Aug. 11, 2020).
6. Health Resources & Services Administration, *Federal Tort Claims Act Search Tool*, https://data.hrsa.gov/tools/ftca-search-tool (accessed November 2, 2023).
7. Health Resources & Services Administration, *FSHCAA FTCA Deemed Status Badge*, https://bphc.hrsa.gov/initiatives/ftca/status-badge (accessed November 2, 2023).
8. Health Resources & Services Administration, *FTCA Frequently Asked Questions*, https://bphc.hrsa.gov/initiatives/ftca/faq (accessed October 30, 2023).
9. *Douglas v. United States*, 658 F.2d 445, 447 (6th Cir.1981).

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Pointers From The Bench:
An Interview With Judge Richard A. Bell

By Ellen Hobbs Hirshman

Judge Richard A. Bell has just completed his third year of service as a judge in the Cuyahoga County Common Pleas Court, General Division, but he has been serving the Northeast Ohio community for over thirty years. Judge Bell was elected in November 2020 to fill the seat that was left open when Judge Michael Donnelly was elected to the Ohio Supreme Court. From 1990-2001 Judge Bell served as a litigating attorney in the Cuyahoga County Prosecutor's Office. From 2001 to 2009 he was Supervisor of the General Felony Unit, Diversion Unit, Major Trial Unit, Child Abuse Unit, and Elder Protection Unit. From 2009-2011 he was Chief of the Community Based Prosecution Unit, Mortgage Fraud Task Force, Grand Jury Unit, and Economic Crime Unit. From 2011 to 2020 he was Special Investigations Division Chief responsible for overseeing the Cold Case Unit Rape Kit Task Force, Human Trafficking, and Internet Crimes Against Children Task Forces. He also was responsible for the development of risk assessment tools and advocated for bail reform. Judge Bell also created the Cold Case GOLD Unit. And he served as a council member in Solon, Ohio from 2010-2015.

Judge Bell's service to the community comes as no surprise once you learn more about his upbringing. He was number eight of ten children growing up in St. Ann's Parish in Cleveland Heights, Ohio. His parents, both still providing guidance to Judge Bell, were the bedrock of

Judge Richard A. Bell

his childhood. His father worked for General Electric at Nela Park for 50 years and his mother, who has a music degree, was a choir director at St. Ann Church. He is a currently a member of the choir at St. Rita's, his parish. After raising 10 children, his mother went back to school and earned a second degree in counseling. She worked as an L.P.C.C. into her late 80's. Judge Bell notes that they never had time for a family pet since he and his nine siblings provided enough excitement for his parents. He shared some wonderful stories about growing up in Cleveland Heights around the Coventry Road neighborhood. His mother had a bell in their yard that she would ring when she wanted to round-up the troops. He and his siblings would stop play when hearing the first gong to listen to determine how many times their mother rang the bell. If she rang it eight times Judge Bell knew it was meant for him since he was number eight. His father's job took him around the world and in his travels he would collect bells

which currently are proudly displayed in Judge Bell's chambers. One particular bell was hand crafted by the Judge himself when he was in high school. It contains a beautiful artist rendering of his childhood home still standing on Derbyshire Road.

Judge Bell spent his first two years of high school at Cathedral Latin and then subsequently at Benedictine. He participated in the art program at both schools. Judge Bell possesses artistic and creative talents which motivated him to enroll in Kent State University's graphic arts program. After several courses he determined that although he was creative he was best served by choosing another path. He then segued into criminal justice and the law. After graduating from Kent State University Judge Bell attended Cleveland Marshall College of Law/Cleveland State College of Law where he graduated in 1989. While in law school, he clerked for the Federal Public Defender as well as for a private attorney, Robert Dixon. These clerkships provided him with a wonderful introduction into the world of criminal law and was a steppingstone for him to be hired by the prosecutor's office in 1990.

As most of us have experienced, that first trip into the courtroom can be intimidating. Judge Bell recalled his first trial and feeling overwhelmed, having butterflies, "feeling small". He discovered strength by tapping into his competitive nature, his wrestling days back in middle school and high school. He recalled that once he stepped onto the wrestling mat all of that intimidation went away and his competitive instinct took over. He has counted on that same competitive spirit throughout his career. It motivates him to be thorough, considerate, and prepared.

Judge Bell's chambers provide wonderful insight into how he conducts his personal and professional life. It is neat and organized just like his docket. Behind his desk you will see a large display of the bells earlier discussed that his father collected during his travels. You will also see illustrations of events that have inspired and motivated Judge Bell in both his personal and professional life. Amongst these treasurers are photographs of his wife, Andrea, who he met while working at Norton's, an old-time favorite restaurant at the top of Cedar Hill in Cleveland Heights. Andrea was in dental school while he was working on his law degree. Dr. Bell has been a practicing general dentist for 33 years. You will also see pictures of Judge Bell's four children, Rachel, Gillian, Olivia, and Christian Jacob (CJ). Rachel is a speech pathologist, Gillian is an occupational therapist, Olivia is attending medical school in West Virginia, and CJ is a biomedical engineering student at the University of Cincinnati.

In his chambers Judge Bell also has pictures of some of his high-profile criminal cases from the past thirty-three years. They include the Case Western Reserve shooter, the Gloria Pointer murder, and serial killer Samuel Little who murdered 93 women across the United States. A former trial attorney himself, he has tried over 100 cases and written over 30 appeals. These pictures serve as a reminder of how commitment and hard work pay off.

Judge Bell's penchant for organization is further displayed in his chambers with the various lists he maintains to stay on top of his docket. The first list we discussed was his **Pending Trial List**. This is a list he may easily access on his cell phone and does access on a daily basis. This list is color coded and identifies all of his upcoming scheduled trials. The list identifies all of the cases that are "over-aged" in red. The list identifies all of the cases that will definitely go to trial in green. It was impressive to sit with Judge Bell and discuss the fact that although he has a criminal background he believes that the right to a "speedy trial" should not be an excuse to continue a civil trial. This is why he maintains his pending trial list so he may keep a close eye on all cases set for trial and avoid having to cancel and reschedule cases on his trial list. Judge Bell expressed an understanding that as attorneys we all are managing the expectations of our clients, and having a judge who moves forward to trial on a scheduled date assists plaintiffs and defense attorneys in managing the expectations of their clients. He understands that litigation is very stressful for all concerned – plaintiffs, defendants, witnesses, and trial attorneys. He feels strongly that if he can provide some date certainty then he can help people resolve their cases by settlement or trial if necessary, so clients can move forward with their lives.

Judge Bell also maintains a **Trial Outcome List** which lists all civil and criminal cases that have been tried in his courtroom and their outcome. In his three years on the bench, Judge Bell, at the time of our meeting in October, had tried thirty-six cases, twenty-eight of them criminal and eight civil. All of these cases are listed on his Trial Outcome List. All his notes from these cases are also saved for future reference and review. He also shared that when he was a prosecutor, he would create an index card for every case he tried and following those trials, he would indicate on the back of the card how he could approach issues differently in his next trial. This is the same attitude Judge Bell has brought with him to the bench. Always seeking to improve the management of his docket.

Another list that Judge Bell maintains is an **Appellate Decisions List**. This list contains a binder and assists him in tracking all those cases which have been

appealed and the appellate decisions on those cases, which he states have been almost all affirmed. Again, he is a judge seeking to evaluate and improve through self-analysis.

Judge Bell's attention to detail and organization has not gone unnoticed. At present he is co-chair along with Judge Ashley Kilbane of the Data Committee. They are researching which type of data they may publish to the public on the court's website. He believes they may start with sentencing information. Judge Bell significantly reduced his docket by establishing a Personal Sentencing Database. He is also a "test pilot" for the Ohio Supreme Court's sentencing database and he has advocated for bail reform. Judge Bell has been encouraged to accept, and is considering accepting, one of the commercial dockets, handling complex civil cases. He continues to sit on the court Civil Rules Committee.

In his spare time Judge Bell enjoys walking three miles every morning and evening and exercising with weights. If you walk into his courtroom his wall will reveal another favorite pastime, traveling. There on the walls of his courtroom his wife has created a collection of photos from their excursions around the world. This all started when Judge Bell mentioned to his wife that it is difficult to look out into the courtroom with all of the vertical wood paneling. His wife surprised him with the photographs in an attempt to cover the paneling, and in essence created a picture book of their world travels. There you will see pictures of the Muir Woods in San Francisco, Duke University (which was a trip to fulfill his wife's bucket list goal of watching a Duke basketball game before Coach K retired), Jekyll Island, Aspen, Pike's Peak, Castles in Germany while cruising on the Rhine River, and Windmills in the Netherlands.

In Judge Bell's courtroom you will encounter a judge who understands that you are always managing your clients' expectations. He meets personally with the parties at every pretrial and takes an interest in every case. This judge will do his best to provide you with a date certain trial date but he will expect you to stay on task on your case and comply with deadline dates. If an issue arises in discovery lawyers are encouraged to talk to the other side and reach out to the court in advance to change any date if necessary. The judge and staff in courtroom 21D are there to work together with you. What more can a trial attorney ask for. ■

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Pointers From The Bench:
An Interview With Judge J. Philip Calabrese

By Marilena DiSilvio

On December 6, 2023, Judge J. Philip Calabrese will start his third year of service as a federal Judge for the United States District Court for the Northern District of Ohio. Judge Calabrese previously served as a judge in the Cuyahoga County Common Pleas Court, General Division. He was appointed to the Common Pleas Court to fill the vacancy left by Judge Pamela Barker's appointment to the federal bench and took the state court bench on July 15, 2019. His state court service ended in 2020, after he became a federal judge.

Judge J. Philip Calabrese

Judge Calabrese attended Gesu elementary school, on the east side of Cleveland. He then graduated from St. Ignatius High School and went on to receive a Bachelor of Arts, *summa cum laude* from the College of the Holy Cross. After graduating, Judge Calabrese earned a Fullbright scholarship to study ancient history at the American School of Classical Studies at Athens.

After completing his Fullbright scholarship, Judge Calabrese worked in the Wisconsin legislature, ultimately as the chief of staff to Senator Lynn Adelman, who now serves on the U.S. District Court, Eastern District of Wisconsin in Milwaukee. He was exposed to diverse individuals from myriad backgrounds including large law firms, legal aid, public defenders and prosecutors. In this position, he learned the importance of reading the law - the code books. As Judge Calabrese aptly advised: "Start with a statute or rule. That's what the law is."

During his time with the Wisconsin legislature, Judge Calabrese was involved as the Milwaukee parental school choice program was created, as the legislature built a new stadium for the Milwaukee Brewers, and as tort reform was debated and enacted. These legislative experiences and the litigation and political fallout from them provided first-hand lessons in the separation of powers, the proper role of each branch of government, and the allocation of power and responsibility in a federal system.

After three years of invaluable experience in Wisconsin, Judge Calabrese enrolled at Harvard Law School, graduating with a Juris Doctor, *cum laude*. Attending Harvard after a career in the legislature provided Judge Calabrese with great appreciation for all it had to offer. He served as a student representative in a faculty initiative to reimagine the traditional law school curriculum that ultimately bore fruit when Elena Kagan served as Dean. In characteristically humble fashion, Judge Calabrese described his classmates as remarkably intelligent, with one third of his contracts class fluent in Mandarin - never once mentioning his own palpable brilliance and sincerity.

After law school, Judge Calabrese returned to Cleveland and was a law clerk to the Honorable Alice M. Batchelder, U.S. Court of Appeals for the Sixth Circuit. He then went into the private sector and ultimately joined Porter Wright's Litigation Department where he focused his practice on complex litigation, including defending businesses named as defendants in class actions, product liability cases, toxic tort litigation, defense of securities fraud and antitrust cases, contract disputes and trade secret disputes.

While in private practice, Judge Calabrese was the president of the Federal Bar Association's Northern District of Ohio Chapter and served as a public member of the Sixth Circuit Advisory Committee on Rules. Since 2017, he has been an adjunct professor at Case Western Reserve University's School of Law teaching an advanced course on Expert Witness and Scientific Evidence. Not only does Judge Calabrese serve the public through his work as a judge, but he also dedicates his time to impacting law students to make the future of our practice better. And if that weren't enough, he also volunteers to teach in other professors' law classes at other institutions, leaving his imprint on so many young professionals.

When Judge Calabrese transitioned to the Common Pleas bench on July 15, 2019, he stepped into Judge Barker's fully functioning docket. In the first week, he was accepting plea changes and, within seven days of taking the bench, he was sentencing. As he went through the experience of acclimating to the bench, Judge Calabrese relied on the values he brought to civil practice and found they translated well on the criminal side. When Judge Calabrese left the bench, he had approximately 525 cases, 125 of which were criminal. This high-volume experience provided necessary skills and practice that prepared him well for Federal Court. He is an obviously dedicated and hard-working judge who takes his job seriously.

On the federal bench, Judge Calabrese enjoys handling both civil and criminal matters. He acknowledges there are many who argue greater importance should be placed on criminal matters because stakes are high and there is a right to a speedy trial, whereas civil cases focus on money compensation. Judge Calabrese cautions that the priority of a criminal proceeding does not mean civil cases should take a back seat or be delayed.

Judge Calabrese must report to Congress twice a year regarding every motion pending more than six months and every case older than three years. That said, Judge Calabrese recognizes more complicated cases will require more time and allows litigants the time necessary to fully brief the issues presented and does not shy away from explaining why additional time was needed through his reporting process.

Judge Calabrese has a dedicated team to help him and the lawyers who come before him. This team includes three law clerks and a courtroom deputy.

On his website, Judge Calabrese has an eighteen-page standing Civil Pretrial and Trial Order and a one page Guidelines for Witness Testimony. These detailed orders and guidelines reflect best practices and are designed to facilitate the pragmatic and professional practice of law so that the litigants encounter predictability and efficiency. Read through these documents and you will be beyond impressed by their detail and commitment to a process that has proven to work.

In order for Judge Calabrese to be effective, it is important to take appearances before the court seriously and to prepare for each one. Know what questions you are likely to be asked at a case management conference. Identify your goals for each case and have a path for how you are going to accomplish those goals. Confer with opposing counsel to determine what real disputes exist, if any. If a case needs to be tried then the clients deserve a full day in court until the trial is concluded. Having a trial is not a failure.

However, if a particular deposition or motion practice will answer the question at issue and allow for resolution, then take the specific action required rather than incur unnecessary and exorbitant expenses. Judge Calabrese holds frequent case management conferences to discuss the progression of the case and status of discovery, and to rule on any objections. He is there to keep the parties on task and keep the case moving in a thoughtful, resolution-oriented manner.

Judge Calabrese acknowledges that there are some things in discovery that you might need to fight about. "There is no shame in Motion to Compel." However, before a lawyer files a Motion, counsel for the parties need to have a conversation. An email is not sufficient. If the parties remain at an impasse after a discussion, they are directed to call chambers so a conference with the court may be scheduled to go forward within 24 hours. In the overwhelming majority of cases, the parties resolve the issue during the conference with the court and, if they cannot, Judge Calabrese's experience is that he can resolve it relatively easily. He is not afraid to roll up his sleeves, listen, and act.

Judge Calabrese is a hands-on judge who encourages the parties to thoughtfully identify the pertinent issues and questions presented from the outset of the litigation. He then keeps the case moving forward through frequent case management conferences

and ready availability to address and resolve disputes. He recognizes the importance of keeping a set trial date so that unnecessary expert and witness expenses are avoided.

Judge Calabrese is married to his wife of 25 years, Becky, who currently teaches English as a second language to refugees from the Middle East and Africa. The couple have a son who is a mechanical engineer in Cincinnati, Ohio and a daughter who recently graduated college.

One of Judge Calabrese's favorite books is Dark Places of the Earth by Jonathan M. Bryant. The book tells the story about a suspicious vessel that was spotted lingering off the coast of northern Florida in 1820, the slave ship *Antelope*. Since the United States had outlawed its own participation in the international slave trade more than a decade before, the ship's almost 300 African captives were considered illegal cargo under American laws. But with slavery still a critical part of the American economy, it would eventually fall to the Supreme Court to determine whether or not they were slaves at all, and if so, what should be done with them. Francis Scott Key, the legendary Georgetown lawyer and author of "The Star Spangled Banner," represented the *Antelope* captives in an epic courtroom battle that identified the moral and legal implications of slavery for a generation. Four of the six justices who heard the case, including Chief Justice John Marshall, owned slaves. Despite this, Key insisted that "by the law of nature all men are free," and that the captives should by natural law be given their freedom. This argument was rejected. The court failed Key, the captives, and decades of American history, siding with the rights of property over liberty and setting the course of American jurisprudence on these issues for the next thirty-five years and laying the ground work for the infamous *Dred Scott* decision. The institution of slavery was given new legal cover, and another brick was laid on the road to the Civil War.

In his spare time Judge Calabrese enjoys hiking, biking, baking and the orchestra. ■

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

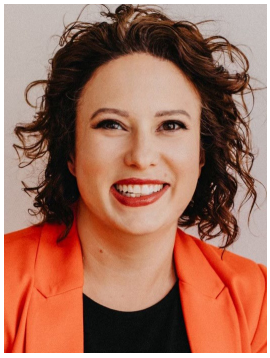
A Photo Montage - 2023 Annual Dinner

Announcements - Winter 2023-2024

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

William N. Masters Co., LPA is pleased to announce the addition of **Christopher G. Wincek, Jr.** to its Cleveland based practice. Chris has experience representing clients in personal injury, Workers' Compensation and Social Security Disability claims, and has assisted clients in non-profit corporate law and general business litigation matters. Chris obtained his undergrad degree from Cleveland State University, and his J.D. from Capital University Law School. Early on in his practice he worked at an insurance defense firm in Columbus and brings a wealth of knowledge and "other side of the table" perspective into the Plaintiff's practice. His empathetic personality and strong work ethic is already impacting the day-to-day practice of the MastersLaw team.



Flowers & Grube is pleased to announce that **Kendra N. Davitt, Esq.** joined the firm in September after serving as staff attorney to Judge Janet R. Burnside (2013-2016) and the late Judge Michael J. Russo (2016-2023). Kendra is a graduate of The Ohio State University, B.A., M.P.A, and The University of Texas School of Law. A full bio can be found at: https://www.flowersandgrube.com/kendra-n-davitt.

The law firm of Morgenstern, MacAdams & DeVito Co., L.P.A. is excited to welcome **Kate Kennedy**, graduate of Cleveland-Marshall College of Law, as an associate attorney. She will be practicing in the areas of family law and business litigation.

Jonathan Lomurro

Jonathan Lomurro Presents "Tips on Discovery"

In October, CATA welcomed renowned trial lawyer, Jonathan Lomurro, who riveted a sell-out crowd on his deep-dive methods of accessing electronic medical records in medical malpractice cases.

Audience photos of CATA CLE held on 10/25/23

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Nurenberg, Paris

The Thanksgiving holiday can be a joyful time for many, it can also be a challenging time for those unable to financially afford the necessities to create a homecooked Thanksgiving meal. The reality is that since 2021, the cost of groceries has increased by 15%. Nurenberg Paris recognized the struggle that many families face during this time and wanted to help. Nurenberg Paris hosted its annual Thanksgiving Gift Card Giveaway where ten people are randomly chosen to win a $200 Giant Eagle gift card.

Todd Gurney - ORT

Todd Gurney

ORT America-Ohio Region held its 52nd Annual Brunch on Sunday, October 29th at Beechmont Country Club. Over 150 people came together to support this wonderful organization that provides "Impact through Education" across the globe. This year, significant funds were raised to support ORT's Kfar Silver Youth Village, a rural boarding school near Israel's border with Gaza, which is home to 1,100 students. CATA's Past President, **Todd Gurney** - President of the Board of ORT America-Ohio Region - opened the brunch and continues to lead great fundraising efforts for ORT.

Thanks to heroic efforts by ORT's incredible staff, all the students, teachers, and families were quickly evacuated from the Village during the terrorist attack by Hamas on October 7th. We believe everyone is now safe and accounted for, but sadly the attacks, grief, and shock will carry on. The funds raised from this event are more important than ever to help ORT continue to provide not only high-quality education and training for its students, but a safe place to live and work for all of ORT's teachers, faculty, and staff.

Earlier this year, CATA once again proudly sponsored the ORT Jurisprudence Award Event on June 28th at the Union Club. That event raised significant funds for ORT's students in Ukraine whose lives had been uprooted by Russia's war. For more information about ORT, its mission, and its incredible work, go to: https://ortamerica.org/regions/ohio-region/event/jurisprudence-awards/.

Spangenberg Shibley & Liber

Members of the Spangenberg, Shibley & Liber firm participated in the Cleveland Metropolitan Bar Foundation's 22nd Annual Halloween Run for Justice. The proceeds from this event support the Cleveland Legal Collaborative (CLC) – the Bar Foundation's newest initiative. The CLC was created to accelerate our community's ability to serve those lost in the justice gap; to expand the Foundation's efforts to create a more diverse, inclusive, and equitable legal profession; and to grow the Foundation's Endowment with the goal of expanding its award-winning and life-changing pro bono and community outreach programs.

Spangenberg's Team at the Run for Justice

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.

In Memoriam:
The Honorable Judge Michael J. Russo
(October 2, 1955 - October 9, 2023)

by Kendra Davitt
(with generous contributions by Russell Kornblut and Magistrate Judge Amy Jackson)

To preside on the Common Pleas Bench was more than just a job for Judge Michael J. Russo; it was a calling. While sometimes that calling could be exasperating to those around him, his persnicketiness resulted from only the best intentions and led only to the best results.

A devout Catholic, Judge Russo attended the University of Dallas after his tour of duty at the local Catholic schools. There he met some of his best friends, including the love of his life, Becky "BB" Braniff. As with many Cleveland boys, he inevitably returned, bringing back a wife, a master's degree from Old Dominion University, and a new love of barbeque, pimento cheese, and sweet tea.

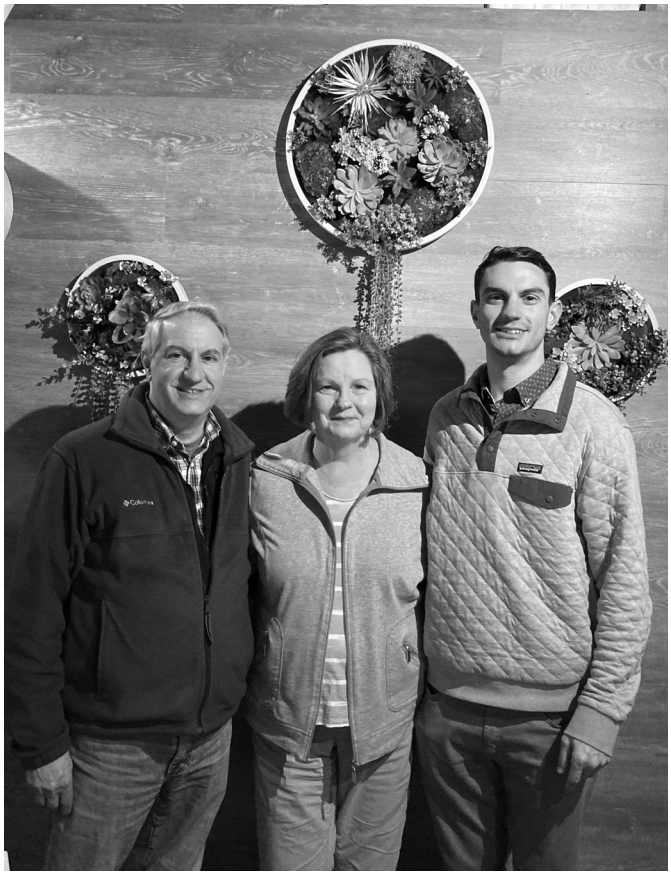
Michael enrolled in the College of Law at Cleveland State University. When asked about his time there, his more boisterous classmates (whose names you could guess but are withheld to protect the not-so-innocent) recalled him as a very serious student when compared to their shenanigans. Mike refused to take any shortcuts and rejected study guides until his dear friend and study partner, Russell Kornblut, bet him it wouldn't make a difference in their Criminal Law Class. When Russ received an A and Mike garnered only a B+, the future judge proclaimed, "you are setting a bad example." He later was spotted with a study guide, but he allegedly still read the full cases for class.

After law school, Mike worked for Mr. Corrigan at the Office of the Prosecutor with the late Judge Nancy McDonnell, his self-described platonic soulmate and best friend, a bond which was obvious to anyone who knew them. He fondly recounted lunch break shopping trips they would take to the still thriving downtown retail scene and debate whether John Kosko was worthy of Nancy's attention. These leisurely lunches probably enabled the phenomenon lovingly referred to as Russo Standard Time (RST).

A prime example of RST in the wild is the very competitive Cleveland Heights Softball league in which

Judge Michael J. Russo

Mike played for 20+ years. It began promptly at 6:15 p.m., but Mike never liked to leave the Prosecutor's Office (and later Ulmer & Berne) before 5:30 p.m. Always the last to arrive, he would change from his suit in the parking lot and run full steam in his dress shoes and socks carrying his cleats, athletic socks, and often his jersey to the field. If the team was short-handed, they engaged a "Russo watch" with recon waiting in the parking lot to help him so they didn't forfeit. He joked "I was here by 6:15 wasn't I?" Trial attorneys will recognize "Russo watch" as a tactic employed by his staff. While RST aged the team manager, friends, his bailiff, magistrate, staff attorney, secretary, attorneys, courtroom deputy, wife, custodial staff, etc., he eventually fulfilled all his promises. Mike was good to his word as he was in everything he ever did, and often absolved his tardiness by quipping, "You worry too much."



Mike, Becky and son Peter

Sons Paul and Carl, with Carl's daughter Mary

Mike as doting grandpa

Mike enjoyed welcoming new attorneys to the profession and encouraging practicing attorneys in their careers. Whether through entertaining his colleagues' new mentees in the Ohio Supreme Court mentoring program or offering constructive criticism to young attorneys after their first trial, he always found time to share his experience. During the first major trial conducted by baby prosecutor, Kelley Barnett, his fussiness came out in court. Nervous, she fiddled with her pen during the cross examination of a minor witness. Some exasperated throat clearing followed from the bench. Finally, making a time-out signal with his hands, Judge Russo called for a sidebar with only attorneys. "No, actually, Ms. Barnett, just you." Approaching after an admonition from her Detective about what she could possibly have done, the Judge asked the also reasonable question: "Do you know what the jury thinks about you right now?" and held out his hand. Humbled, Kelley surrendered her clicky pen that had been reverberating throughout the courtroom, in favor of a judicially-blessed ink pen that would escape the jurors' notice. Kelley won't use clicky pens to this day, but she did earn an appointment by the Judge as a Life Member to the Eighth District Judicial Conference.

While his fastidiousness could invoke an eyeroll, Mike earned it. Mike earned everything. And he used his hard-won gains to help everyone he came across—from defendants in his courtroom, attorneys who practiced before him, the judicial college, new judges, to his many, many friends. Even his simplest gestures were filled with kindness and love, whether words of encouragement to criminal defendants whom he knew could surmount their past or a post-it note to his magistrate attached to his edits on an opinion: "Thank you for being you." We should all aspire as attorneys, judicial officers, and human beings to match Mike's service, demeanor, and attitude.

Only a very few of us are saints or largely unflawed. But Michael was as close to being a saint as anyone, whether despite his fastidiousness or because of it. A great attorney. An admired judge. The best boss. A better husband. An amazing father to wildly successful children. A doting grandfather. A true friend. Rest peacefully, Judge. ■

Verdict Spotlight:

Hance v. Cleveland Clinic

Cuyahoga C.P. No. CV-20-929034

by Kristin M. Roberts

On June 6, 2023, after a two-week trial, a Cuyahoga County jury returned a $7.625 million dollar verdict against the Cleveland Clinic Foundation arising from a medical malpractice and lost consortium claim brought by Eloise ("Laurie") Hance and her husband William Hance. The Plaintiffs were represented at trial by Charles Kampinski and Kristin Roberts of Kampinski & Roberts LLC.

This was a case of medical negligence committed before, during, and after spinal surgeries performed by neurosurgeon Dr. Iain Kalfas. Laurie Hance underwent two surgeries, the first in October 2018 and the second in February 2019.

Prior to the first surgery, Laurie was an extremely active and athletic person who regularly engaged in sporting and outdoor pursuits. In fact, after scheduling the surgery, she and her husband Bill vacationed in Acadia National Park, where Laurie engaged in hiking, biking, and kayaking. However, Laurie had been experiencing back pain and her primary care physician suggested she see Dr. Kalfas for an evaluation. Dr. Kalfas diagnosed her problem as syringomyelia, a condition in which a fluid-filled cyst called a "syrinx" had formed in the central canal of Laurie's spinal cord.

Dr. Kalfas recommended surgery, confidently telling Laurie and Bill that he was 95% sure that Laurie would be fixed after the surgery with a 5% chance that her condition would be unchanged but gave no indication that it could worsen. Laurie and Bill decided she would have the surgery since Dr. Kalfas was so confident in a good outcome.

Dr. Kalfas performed a syrinx-to-subarachnoid shunt, a procedure intended to drain the syrinx into the subarachnoid space surrounding the spinal cord. The subarachnoid space contains cerebrospinal fluid (CSF) which drains into the venous system through microscopic membranes called arachnoid granulations and is constantly replenished by new CSF created in the brain. But due to an infection Laurie had suffered five years earlier, she had a documented condition called arachnoiditis, in which scarring blocked the arachnoid granulations and prevented outflow of CSF. In performing a syringo-subarachnoid shunt, Dr. Kalfas was merely draining CSF back into an already overflowing space from which it had entered the spinal cord and created the syrinx. Thus, Plaintiffs' expert testified that the syringo-subarachnoid shunt was contraindicated. Indeed, Greenberg's *Handbook of Neurosurgery*, the book often referred to as the "Bible of Neurosurgery" for day-to-day practice, unambiguously warns that a syringo-subarachnoid shunt "requires normal CSF flow in subarachnoid space, therefore cannot use in arachnoiditis." Given Laurie Hance's preexisting arachnoiditis, the standard of care required that the syrinx be shunted to either the space around the lungs (pleural space) or the abdomen (peritoneal space), procedures Dr. Kalfas admitted he had not performed in at least twenty years. He further boasted that no matter what the etiology of the condition, he does the same type of procedure every time.

Charles Kampinski

Kristin Roberts

The catastrophic effects of the surgery manifested immediately as Laurie awakened from anesthesia. She had walked into the hospital fully capable of engaging in strenuous pursuits despite her back discomfort, but awoke from surgery in excruciating, unrelenting pain and had lost the use of her legs, her bowel, and her bladder.

Dr. Kalfas left his resident to close and wrote his operative report at 4:25 p.m., a half hour before Laurie woke up, stating, "patient to recovery room in satisfactory condition." But he removed that language at 9:00 p.m. that evening. He testified that his resident informed him immediately of Laurie's condition after she woke up. Yet despite claiming to have been somewhere in the hospital when he received the resident's call, he did not return to the operating room. This was in marked contrast to what he did after a previous surgery that resulted in a lawsuit. When that patient awoke from back surgery with traumatic post-operative changes, Dr. Kalfas was present when the patient awoke, ordered an MRI within 15 minutes, and re-opened the patient shortly thereafter. Plaintiffs believe that had Dr. Kalfas been told about Laurie's condition after she woke up, he would have done precisely the same thing with her and she would be fine now.

Despite Laurie's unexpected and drastically deteriorated condition, Dr. Kalfas chose to forgo the simple measure of ordering a post-operative MRI. An MRI would have enabled him to immediately intercede to surgically alleviate the compression on her spinal cord and reverse the paralysis. Laurie spent a week in the hospital under "observation" but with no imaging of her spine despite her continuing pain and incapacitation.

After several more months in which Laurie's condition remained unchanged, Dr. Kalfas finally scheduled an MRI in January 2019. Plaintiffs' expert testified that this MRI showed the presence of a foreign object -- most likely a sponge -- significantly compressing Laurie's spinal cord in the location of the surgical procedure.

While Dr. Kalfas and various defense experts insisted at trial that the MRI only showed the presence of fluid, not a foreign object, Dr. Kalfas's response to reviewing the January 2019 MRI was to recommend a second identical surgery which he performed in February 2019. This was highly suspicious behavior because by this time, Laurie's paralysis was permanent and a second identical shunt could not have alleviated her condition. Laurie's circumstances not only failed to improve as a result of the second surgery, but her pain became even worse.

Plaintiffs' expert testified at trial that a post-op MRI taken in March 2019 showed that the foreign object had been removed. Additionally, CCF had billed for removal of a "mass," despite the contention by Dr. Kalfas that he had not removed a mass and that the charge must have been a mistake.

Even assuming for the sake of argument that the second surgery was not performed to remove a foreign object, there was reason to question Dr. Kalfas' motivation in performing an unnecessary surgery. Indeed, a discovery battle that lasted for months and yielded evidence that was admitted at trial is of particular significance in this case.

A CCF neurosurgeon revealed in deposition that during the period encompassing Plaintiff's two surgeries, the Clinic's neurosurgery department had lost significant market share to competitors. CCF administrators urged the neurosurgeons to increase revenues by performing more surgeries, castigating the department for underperforming. This dissatisfaction was conveyed during departmental staff meetings, for which minutes were kept. The documents such as memoranda, meeting presentation slides, and emails also existed and demonstrated that the Clinic pressured its neurosurgeons to counter their loss of patient volume and revenues.

Plaintiffs immediately propounded discovery requests seeking relevant portions of the meeting minutes and other documents. The Clinic asserted two primary objections, arguing that the information requested was both protected by peer review privilege and subject to trade secret protection.

In their motion to compel, Plaintiffs argued that none of the documents sought could have involved peer review because they solely related to business, not quality of care. The subject matter of the information was the Clinic's desire for its neurosurgeons to produce more money. If there was any situation in which a hospital was attempting to stretch peer review protection beyond the breaking point, this was it.

As for its second argument, the Clinic claimed that the communications and financial information used to pressure its neurosurgeons fell within the definition of "trade secrets" and their production was therefore barred under the Uniform Trade Secrets Act (R.C. 1333.61-1333.69). This argument was wrong on multiple levels, the primary one being that the UTSA only applies to actual or threatened misappropriation of trade secrets and actions to prevent or obtain compensation for such misappropriation. The Clinic was not trying to prevent misappropriation of a trade secret. It was attempting to avoid production of relevant discovery in a medical malpractice action.

Following an in-camera review, the Trial Court determined that none of the documents at issue were subject to peer review or trade secret protection. In response to the Court's production order, CCF filed an interlocutory appeal. The Cuyahoga County Court of Appeals made short shrift of the Clinic's arguments and affirmed the trial court's order. See *Hance v. Cleveland Clinic*, 2021-Ohio-1493, 172 N.E.3d 478 (8th Dist.). CCF thus was forced to produce what proved to be a trove of documents demonstrating that its management had consistently pushed its neurosurgeons to perform more surgeries and increase departmental revenues. The documents were unquestionably relevant to demonstrate that Dr. Kalfas had been pressured by his employer to increase the number of surgical procedures performed and to increase the amount of business he generated – evidence that could cause a reasonable juror to find it credible that Dr. Kalfas was willing to "push the envelope" in deciding which surgeries he should perform and what facts he should disclose to the patient.

Plaintiffs' counsel believe that this evidence played a significant part in persuading the jury to find for the Plaintiffs. The revealed documents not only provided insight into the possible motivation for one doctor's questionable actions but also revealed a little-known and rather unsavory side to the vaunted Cleveland Clinic. This case serves as a reminder that even when a defendant is a non-profit organization, the pursuit of financial gain can affect its actions and lead to relevant evidence. ■

Charles Kampinski is managing partner at Kampinski & Roberts LLC. He can be reached at 440.597.4430 or ck@kampinskiandroberts.com.

Kristin Roberts is a partner at Kampinski & Roberts LLC. She can be reached at 440.597.4430 or kr@kampinskiandroberts.com.

Recent Ohio Appellate Decisions

by Brian W. Parker and Louis E. Grube

State ex rel. Mather v. Oda, __ Ohio St.3d __, 2023-Ohio-3907, __ N.E.3d __ (Oct. 30, 2023).

Disposition: Request for writ of prohibition granted. On limited remand from the Twelfth District Court of Appeals following an appeal, the trial court lacked jurisdiction to entertain a request for attorney fees that accrued after the final judgment.

Topics: Fee shifting on appeal; doctrine of law of the case; mandate rule; continuing jurisdiction.

Two plaintiffs, a residential development company and its manager, sued property owners who allegedly interfered with efforts to sell a nearby home. The Warren County Court of Common Pleas entered summary judgment in favor of the defendants and determined that they were entitled to an award of $235,000.00 worth of attorney fees and costs. On appeal, these defendants asked the court to affirm and remand for an award of additional fees incurred on appeal. While the Twelfth District Court of Appeals did affirm, the matter was remanded strictly for entry of a nunc pro tunc order making a minor correction as to the parties who were liable to pay the original fee award.

After the trial court complied with the remand instructions and the judgment was paid in full, the prevailing defendants filed a motion requesting a further award of $167,000.00 worth of attorney fees and costs. The manager of the residential development company filed the action in prohibition with the Supreme Court of Ohio, asserting that the Warren County Court of Common Pleas clearly and unambiguously lacked jurisdiction to conduct further proceedings following the narrow remand by the Court of Appeals. The Supreme Court of Ohio determined that there could be merit to the claim and granted an "alternative writ," which is comparable to a show cause order and effectively demands evidence and briefing from the parties.

In its final ruling, the Supreme Court of Ohio granted a writ of prohibition barring the Warren County Court of Common Pleas from exercising judicial power over the matter any further. While the residential development company manager argued that the trial court lacked jurisdiction because he had paid the final judgment, the Supreme Court did not reach this issue. Rather, the court ruled that before the claim for fees on appeal accrued, the trial court had resolved all pending claims and divested itself of jurisdiction over the case. And because a trial court strictly regains authority on remand to the extent of the appellate court's mandate, the trial court did not regain jurisdiction to preside over any claims for attorney fees by virtue of the limited remand order issued by the Twelfth District. The court rejected arguments that its prior rulings in *Cruz v. English Nanny & Governess School*, 169 Ohio St.3d 716, 2022-Ohio-3586, 207 N.E.3d 742, and *Klein v. Moutz*, 118 Ohio St.3d 256, 2008-Ohio-2329, 888 N.E.2d 404, had modified the mandate rule to permit post-appeal fee awards even where a court of appeals had not directed the lower court to conduct any further proceedings. The court noted that a similar issue is pending before it in *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, 9th Dist. Summit No. 30303, 2023-Ohio-1079, but it did not comment on the possible outcome of that matter.

Concurring in part, Chief Justice Kennedy and Associate Justice DeWine disagreed about what the Court had done in *Cruz*. By reference to her dissent in Cruz, the Chief Justice wrote that the trial court in that case had done exactly what the defendants in the underlying matter had asked the Warren County Court of Common Pleas to do here, even though there had been no permission to do so in the preceding mandate on remand from the Eighth District Court of Appeals. These justices concurred in every other aspect of the ruling and in the judgment.

Creech v. Allstate Insurance Company, 2nd Dist. Montgomery No. 29811, 2023-Ohio-3814 (Oct. 20, 2023).

Disposition: Reversing the trial court's order granting Allstate Insurance Company's motion for relief from judgment. A non-moving party must have the allotted time to respond to a motion under the Ohio Rules of Civil Procedure and Local Rules before a moving party's motion may be granted.

Topics: Civil Procedure, Civ. R. 6(C)(1), and consistent Local Rule.

This case arose out of an insurance dispute. Plaintiffs were homeowners insured by an Allstate policy. The insureds sued Allstate Insurance Company for bad faith and breach of contract for Allstate's failure to resolve the homeowners' claims arising from a burst pipe, and resulting property

damages. The insureds failed to attach a copy of their policy to the Complaint, and Allstate failed to file a timely Answer. The trial court signaled to plaintiffs that they should file a motion for default judgment, which the insureds did. The court granted the default judgment motion on May 2, 2023.

On May 16, 2023 Allstate filed a motion for relief from judgment pursuant to Civ. R. 60(B), contending that it was the wrong party. Allstate claimed that Allstate Property and Casualty Company, a distinct company, was the homeowners' insurer. Allstate further claimed that plaintiffs had not served the Complaint to the proper address, and an internal administrative error by Allstate led to the failure to respond to the plaintiffs' Complaint.

On May 26, 2023, before plaintiffs responded to Allstate's Civ. R. 60(B) motion, the trial court granted Allstate's motion for relief from judgment, finding that Allstate's failure to timely answer was due to excusable neglect.

On appeal, the insureds contended that the trial court erred by not affording them the 14 day period in which to respond to Allstate's 60(B)(5) motion. The Second District agreed, citing Civ. R. 6(C)(1), and noting that: "In accordance with the Ohio Rules of Civil Procedure, responses to a written motion, such as a motion for relief from judgment, may be filed ***14*** days after service of the motion." (Emphasis by Court). The Second District further cited a consistent local rule, Mont. Co. C.P.R. 2.05(B)(2).

The Second District held: "we find that, in granting Allstate's motion for relief from judgment just ten [10] days after the motion was filed, the [homeowners] were not afforded an opportunity to respond according to the Ohio Rules of Civil Procedure and the Montgomery County Local Rules."

The appellate court thus reversed the trial court's judgment and remanded the matter to the trial court to afford the homeowners an opportunity to file a response to Allstate's Civ. R. 60(B)(5) motion.

Speigal v. Ianni, 1st Dist. Hamilton No. C-220467, 2023-Ohio-3809 (Oct. 20, 2023).

Disposition: Trial court orders transferring venue, awarding attorney fees related to the transfer proceedings, and dismissing for failure to prosecute were affirmed.

Topics: Transfer of venue; frivolous conduct; award of attorney fees and costs.

A lawsuit between unmarried lovers and co-owners of a staffing agency ended badly for the plaintiff. While the allegations in the complaint are juicy, including substantial cash contributions, a Porsche boxster, and a business agreement with a penalty provision for cheating in the romantic relationship, the substance of the case was ultimately all procedural. The original complaint was filed in the Hamilton County Court of Common Pleas, but it was voluntarily dismissed after the trial judge denied early motions and observed that "many of the provisions in the alleged contract did not make sense and did not pass contract law." The plaintiff refiled the complaint in the Clermont County Court of Common Pleas the same day, this time with allegations that the agreement had been executed in Clermont County

The defendants filed a motion to transfer venue back to Hamilton County, asserting that only a single property in dispute was located in Clermont County and all other pertinent events happened in Hamilton County. The trial court granted this motion under the jurisdictional priority rule because it had been filed there "approximately 20 minutes before the Hamilton County dismissal was officially docketed," accused the plaintiff of "abject forum shopping," and noted that refiled complaints are meant to be returned to the docket of the prior presiding judge. The court did not premise the ruling on which county was the proper venue.

Back in Hamilton County, the defendant filed his own claims against the plaintiff, which were consolidated before the original judge. The plaintiff was evicted from a property that was the subject of the disputes. The defendant sought an award of attorney fees related to the motion to transfer venue. And under the frivolous conduct provisions of R.C. 2323.51 and Civ.R. 3(D)(2), the trial court entered a fee award of $44,226.68-just under $5,000 less than the requested amount of $49,322.08. During this phase of the litigation, the plaintiff's attorneys sought to withdraw twice. The second time, the trial court noted that the plaintiff had failed to stay in contact with her attorneys and ordered her to show cause why the matter should not be dismissed for failure to prosecute. She failed to appear, so the trial court entered judgment on the pleadings in favor of the defendant and otherwise dismissed the plaintiff's claims *with prejudice*.

The plaintiff appealed, challenging the orders transferring venue, making a fee award, and dismissing for failure to prosecute. The First District Court of Appeals initially noted an interesting question of appellate jurisdiction: when a court has transferred venue to a court sitting in a different appellate district, where are issues related to that order raised? For reasons of judicial economy, and also because improper venue does not itself render a court's orders void under Civ.R. 3(H), the court held that venue orders are reviewable by the court of appeals in the district where the transferee court sits.

As to whether the matter should have been transferred, the First District affirmed for different reasons than the trial court. It rejected the idea that the trial court was simply enforcing the jurisdictional priority rule, as dismissal would have been the proper remedy for that. Since the request for transfer had been premised upon venue principals, the court reviewed the transfer under for compliance with the venue provisions of Civ.R. 3. And while the plaintiff could have originally filed the case in Clermont County given that property in dispute was located there, the First District relied upon a case from the Eleventh District Court of Appeals, *McGraw v. Convenient Food Mart*, 11th Dist. Lake No. 97-L-271, 1999 WL 420592, 1999 Ohio App. LEXIS 2818 (June 18, 1999), which held that transfer orders are appropriate to fend off attempts at forum shopping. Since there had been obvious forum shopping following initial rulings by the Hamilton County judge, the transfer order was affirmed.

The court of appeals also rejected the plaintiff's argument that the trial court abused its discretion by failing to calculate its own lodestar and specifically consider the reasonableness factors in Prof.Cond.R. 1.5 when awarding fees. Because the trial court had briefing on these issues and awarded slightly less than the requested fees, its order was "sufficient to establish that the trial court found the rates charged to be reasonable and based its fees awarded on the lodestar." The appellate panel nonetheless observed that it "indisputably would have been better practice for the trial court to have specifically stated that it had found the rates billed to be reasonable and that it accepted the lodestar provided."

Finally, the court of appeals rejected the argument that the trial court had erred by dismissing the plaintiff's claims for failure to prosecute. She had been warned of the possibility of such an order when her attorneys were permitted to withdraw. And although it was possible that this notice had been sent to the wrong address, it is a plaintiff's "burden to update the court with her correct address." Although the harshness of this sanction was recognized, the plaintiff's own gamesmanship and intentional delay of the proceedings further justified it.

Jones v. Match Group, Inc., 11th Dist. Portage No. 2023-P-0064, 2023-Ohio-3418 (Sept. 25, 2023).

Disposition: Appeal dismissed for lack of a final appealable order.

Topics: Final appealable order; Article IV, Section 3(B)(2) of the Ohio Constitution; R.C. 2505.02(B); Civ.R. 54(B).

Pro se plaintiff sued a man she met and the company operating the dating application on which they met, lodging claims for negligence, intentional infliction of emotional distress, and fraud/negligent misrepresentation. She alleged that the man had pressured her into a relationship and led her to believe he had been using protection during intercourse, which resulted in a child. She further alleged that the dating app failed to screen its users.

The trial court dismissed the dating app company for lack of subject matter jurisdiction. Although claims remained pending against the individual defendant, the pro se plaintiff appealed. The Eleventh District Court of Appeals dismissed that proceeding for lack of a final appealable order in an earlier decision. Thereafter, judgment was entered in favor of the plaintiff against the individual defendant. The court scheduled a damages hearing.

Before damages were decided, the pro se plaintiff asked the trial court to reconsider its ruling dismissing the dating app company and other rulings. When reconsideration was denied, the plaintiff asked the court to set aside its ruling, continue the damages hearing, and give the case to another judge. The trial court continued the damages hearing but denied the rest of that motion. The plaintiff filed a second appeal from these rulings.

The Eleventh District Court of Appeals dismissed the second appeal, again for lack of a final appealable order. The decision noted that Civ.R. 54(B) permits trial courts to enter judgment against some but not all defendants only "upon an express determination that there is no just reason for delay." And it pointed out that an order that defers ruling on damages until later cannot "determine the action, prevent a judgment, or affect a substantial right in a special proceeding" under R.C. 2505.02(B). Holding that the provisions of both rules must be satisfied in order to render an order final and appealable, the appeal was dismissed because the orders at issue failed to meet either requirement.

Patterson v. Omni Orthopaedics, Inc., 5th Dist. Stark No. 2022CA00158, 2023-Ohio-3416 (Sept. 25, 2023).

Disposition: Affirming a trial court's summary judgment ruling in favor of defendant doctor in medical malpractice proceeding.

Topics: Summary judgment; testimony sufficient to establish breach of standard of care; inconsistency between an expert's report and deposition testimony.

Plaintiff suffered a femoral nerve injury during a left total hip arthroplasty surgery. He filed suit against the surgeon, relying on an expert opinion that "permanent damage to the femoral nerve does not happen unless the surgeon does something wrong" during such procedures, and the doctor had "negligently compressed the nerve with the placement of the retractors he used during the surgery and/or by leaning on the retractors and compressing the femoral nerve during surgery." But during his deposition, this same expert backed away from his opinion that such an injury could only occur as the result of physician error, acknowledged it was a known risk even without medical negligence, and admitted that he could not identify any particular lapse by the surgeon.

On summary judgment, the trial court ruled that the plaintiff failed to offer "an opinion with the requisite degree of medical certainty as to an act or omission on the part of Omni which constitutes a breach of the standard of care." The Fifth District Court of Appeals affirmed, ruling that the plaintiff's expert testimony did not establish the elements of breach of the standard of care and proximate cause. The court rejected the plaintiff's argument that the expert's report established a prima facie case of medical negligence because during his deposition, he "relied on the bad outcome of the case to speculate as to the manner" of breach.

Rankin v. Kirsh, 1st Dist. Hamilton No. C-220632, 2023-Ohio-3371 (Sept. 22, 2023).

Disposition: Affirming the trial court's granting of judgment on the pleadings in favor of medical defendants based upon the 4-year medical claim statute of repose.

Topics: Civ. R. 12(C), 4-year medical claim statute of repose, R.C. § 2305.113(E)(3), savings statute, and discovery rule.

Plaintiffs, husband and wife, re-filed a medical malpractice lawsuit against the defendants on December 3, 2020. Plaintiffs alleged that the defendant physician provided the plaintiff husband with surgical care and treatment from April 6, 2015 to December 1, 2016, and the physician last prescribed a medication on December 1, 2016, which plaintiff discontinued taking on December 2, 2016.

The defendant physician prescribed that medication for nine months from March 2016 through December 1, 2016 even though the recommended course of treatment was allegedly for 7 to 14 days, and the physician allegedly failed to monitor the effects of the medication on the plaintiff husband. The plaintiff husband ended up in the hospital on December 2, 2016 in an unconscious state, allegedly due to the medication.

The defendants moved for judgment on the pleadings based upon the 4-year medical statute of repose in R.C. § 2305.113(C), which the trial court granted, as the treatment by the defendant physician ended, at the latest, on December 2, 2016, more than 4 years before the lawsuit was filed.

On appeal, the plaintiffs made two arguments. First, they argued that the medical-claim statute of repose may not bar a claim where the statute of limitations – pursuant to the savings statute – has yet to run. Thus, the plaintiffs sought a ruling that the savings statute acts as an exception to the medical-claim statute of repose. Prior to refiling their claim on December 3, 2020 within the savings statute, plaintiff's had previously filed their claim against the defendants prior to the expiration of the 4 year statute of repose, and then dismissed their claims without prejudice.

The court of appeals rejected the plaintiffs' argument that the savings statute preserved their claims despite the running of the medical-claim statute of repose. The court cited Ohio Supreme Court precedent that once a complaint has been dismissed without prejudice, legally that action is deemed never to have existed. Thus, the savings statute does not preserve an action originally filed before the statute of repose, but then dismissed without prejudice and re-filed after the statute of repose.

Second, the plaintiffs argued that the discovery rule extended the time frame of the statute of repose. In this regard, the plaintiffs argued that the date the husband became conscious and understood why he was in the hospital should have extended the start time for the statute of repose. In rejecting this argument, the court stated: "the result would not change as R.C. 2305.113(C) starts the statute of repose running on the date the alleged malpractice was committed, not the date of its discovery."

Therefore, the plaintiffs' medical claims against the defendants were barred by the 4-year medical claim statute of repose, R.C. § 2305.113(C).

Nichols v. Durrani, 1st Dist. Hamilton No. C-220350, 2023-Ohio-3177 (Sept. 8, 2023).

Disposition: Order denying defendant's motion for new trial reversed. The matter was remanded for further proceedings.

Topics: Erroneous and prejudicial admission of evidence. Evid.R. 403(A) and 608(B).

Plaintiff sued the ubiquitous Abubakar Atiq Durrani, M.D., and the Center for Advanced Spine Technologies, Inc., alleging that this doctor had exaggerated findings in medical imaging and performed unnecessary surgeries, resulting in a variety of injuries. During trial, Plaintiff played a recorded "collage of testimony from Durrani," which "did not contain any questions regarding the surgery performed" but did include statements about "prior lawsuits filed against Durrani, the revocation of his medical licenses and suspension of his privileges to practice medicine," and "past criminal charges against him." Jurors returned a total compensatory and punitive verdict over $26 million, but following modifications by the trial court, judgment was entered in the total amount of $5,100,759.86.

On appeal, the First District Court of Appeals sustained the first assignment of error, holding that the trial court abused its discretion by admitting evidence of Durrani's license revocations, suspension of his privileges with various hospitals and insurers, and other lawsuits. While the defendants had not objected each and every time these matters were raised, they had objected when the collage recording was played. The trial court overruled this objection consistent with rulings in prior similar lawsuits. As the Court of Appeals had previously ruled in *Setters v. Durrani*, 2020-Ohio-6859, 164 N.E.3d 1159 (1st Dist.), and *Hounchell v. Durrani*, 1st Dist. Hamilton No. C-220021, 2023-Ohio-2501, the "prejudice resulting from the admission of the suspension and revocation evidence outweighed the scant probative value it offered the jury" under Evid.R. 403(A), and the collage was not admissible as rebuttal evidence going to credibility under Evid.R. 608(B). The court extended these rulings to evidence of past lawsuits and criminal matters.

Considering prejudice, the court ruled that the trial court's errors in admitting this evidence were not harmless. Due to inconsistent testimony about the impact of Dr. Durrani's lapses in the Plaintiff's case in chief and competing expert testimony on standard of care and breach, it was possible that the "jury would have considered Durrani's license revocations and privilege suspensions when rendering its verdicts." The appellate panel did not reach other assignments of error challenging rulings on prejudgment interest, the award of attorney fees, and a setoff against a prior settlement with another tortfeasor.

On October 23, 2023, the Plaintiffs filed a further appeal to the Supreme Court of Ohio, asking it to hold that the court of appeals made an impermissible cumulative error ruling and arguing that a missing witness instruction had some impact on an array of cases against Dr. Durrani.

Hoskins v. City of Cleveland, 8th Dist. Cuyahoga No. 112095, 2023-Ohio-3149 (Sept. 7, 2023).

Disposition: Affirming the denial of a motion for summary judgment filed by defendant, City of Cleveland.

Topics: Political Subdivision immunity exception for injuries caused by the negligence of employees and due to "physical defects" on the grounds of property used in connection with a governmental function under R.C. § 2744.02(B)(4).

The plaintiff's decedent drowned because of an epileptic seizure while swimming in the deep end of a swimming pool owned and operated by the City of Cleveland. The lifeguard on duty was not seated in the elevated lifeguard chair, but was sitting in a folding chair on the pool deck near the shallow end of the pool. The lifeguard testified she was sitting in the folding chair because she was too large for the elevated lifeguard chair. Equipment hanging from the elevated lifeguard chair obstructed the lifeguard's view, and as a result, the lifeguard could not see the decedent, whose epilepsy was known to the lifeguard, while he was swimming in the deep end of the pool. Upon leaving the folding chair, the lifeguard saw the decedent on the floor of the deep end of the pool.

The Eighth District stated that a municipal swimming pool operated by a political subdivision was a "governmental function." As such, the City faced potential liability under R.C. § 2744.02(B)(4) because of the negligence of city employees, and because of physical defects within or on the grounds of the pool. The plaintiff's expert testified that because the lifeguard's view was obstructed as she sat in the folding chair instead of in the elevated lifeguard chair, this created a physical defect on the pool grounds.

The trial court denied the City's motion for summary judgment. On appeal, the plaintiff argued, consistent with the testimony of her expert, that the lifeguard's failure to sit in the elevated lifeguard chair, and instead sitting in a low-level folding chair at the shallow end of the pool, created a physical defect at the pool. The Eighth District agreed with the plaintiff's arguments about the R.C. § 2744.02(B)(4) exception to the City's immunity, specifically noting the plaintiff's expert's testimony about the defect on the premises, the lifeguard's testimony that she had to get out of the folding chair to see the decedent, and the Court's previous ruling in *Kerber v. Cuyahoga Hts.*, 8th Dist. Cuyahoga No. 102419, 2015-Ohio-2766.

The Eighth District further held that the City's political subdivision immunity was not reinstated pursuant to R.C.

§ 2744.03(A)(5), regardless of the City's discretion, because a genuine issue of material fact existed as to whether the lifeguard was reckless by sitting in the folding chair instead of the elevated lifeguard chair. Therefore, the Eighth District denied all of the City's arguments on appeal.

Harris v. Hilderbrand, Supreme Court of Ohio No. 2022-0784, 2023-Ohio-3005 (Aug. 30, 2023).

Disposition: Reversing court of appeals which had held that sheriff's deputy enjoyed immunity, as a matter of law, for K-9 police dog bite of social guest.

Topics: Immunity of sheriff's deputy under R.C. § 2744.03(A)(6); scope of employment status of off-duty deputy putting police dog through paces during social party.

The defendant was a K-9 deputy who was required to keep the police dog he worked with at the deputy's home during off-duty hours. The dog's name was Xyrem. The defendant threw a private party at his home, and the plaintiff was one of the defendant's social guests. At the party, alcohol was served and the defendant was demonstrating what types of activities Xyrem was trained to do. After this process, Xyrem bit the plaintiff at the party.

The plaintiff brought suit against the defendant deputy, both under common law negligence, and the dog bite statute, R.C. § 955.28. The trial court denied the defendant's motion for summary judgment on the negligence claim, finding it was a question for the jury whether the defendant was immune given, on the one hand, that the dog was required to be in the home, but on the other hand, that the defendant was using the dog for amusement purposes at the time of the bite. The trial court granted the defendant's motion for summary judgment with respect to the R.C. § 955.28 claim because the immunity statute operated to grant him immunity for harboring the dog.

On interlocutory appeal by the defendant, the court of appeals held that the defendant deputy enjoyed immunity because social interaction of the dog with guests was a part of the dog's training in learning how to relate to different kinds of people. The court of appeals held that the trial court's ruling on the R.C. § 955.28 claim was not a final appealable order because the order did not deny the defendant the benefit of immunity under R.C. § 2744 with respect to that claim.

The Ohio Supreme Court agreed with the court of appeals that the R.C. § 955.28 claim was not ripe for review. With regard to the common law negligence claim, however, citing R.C. § 2744.03(A)(6)(a), the Court noted that a political subdivision employee is entitled to immunity unless the employee's acts or omissions were "manifestly" outside of the employee's employment or official responsibilities. The court held that the question was therefore, whether the defendant was "plainly and obviously acting outside the scope of his employment" before Xyrem bit the plaintiff.

The Court noted the use of alcohol by the defendant and his guests, some of which may have been given to at least one of the dogs at the party, and that the defendant was responding to a request from a social guest when he decided to show what Xyrem was trained to do. Given this, the Court held that reasonable minds could disagree as to whether the defendant deputy was obviously acting in a manner that did not further the interests of his department.

Thus, the Ohio Supreme Court reversed the court of appeals, finding that it was properly a question for the jury as to whether the defendant police officer was entitled to immunity under R.C. § 2744.03 with respect to the plaintiff's common law negligence claim.

Schultz v. Fairlawn Office Park One, LLC, 9th Dist. Summit No. 30286, 2023-Ohio-2233 (June 30, 2023).

Disposition: Reversing summary judgment for the defendants.

Topics: A defendant should not be allowed to raise new arguments in a reply brief submitted in support of defendant's motion for summary judgment.

Plaintiff slipped and fell on ice in the defendants' parking lot. In his lawsuit, plaintiff asserted causes of action for negligence and for breach of a contractual duty. In regard to the contractual duty, plaintiff alleged that defendants agreed to maintain the premises in good operating condition, and to keep the premises reasonably clean and free from snow and ice.

The defendants moved for summary judgment, addressing only the plaintiff's negligence claim. In his brief in opposition, plaintiff contended that defendants had a contractual duty to keep the parking lot free of ice. In their reply briefs, the defendants addressed the contractual duty for the first time, and raised the argument that plaintiff's contractual duty argument could not succeed because the plaintiff lacked any expert testimony to establish the standard of care with respect to the contractual duty to remove the ice. One of the defendants' reply briefs also raised for the first time the allegation that it did not have superior knowledge to plaintiff

of the conditions of the parking lot.

The trial court denied the plaintiff's motion to strike the defendants' reply briefs or grant leave to file a sur-reply brief. Then, the trial court granted the defendants' motions for summary judgment, addressing the contractual duty arguments, as well as the superior knowledge argument first raised by defendants in their reply briefs. The plaintiff thus did not have the opportunity to respond to the arguments that were raised for the first time in the reply briefs.

On appeal, the Ninth District noted that it is the responsibility of the moving party to delineate the basis upon which summary judgment is sought. This allows the opposing party a meaningful opportunity to respond. Thus, the defendant had the duty to address every claim in the plaintiff's complaint and delineate the basis upon which summary judgment was sought.

The appellate court held that because neither defendant addressed the contractual duty claim, nor the superior knowledge argument in its initial motion for summary judgment, the plaintiff was never provided with a meaningful opportunity to respond. The court stated:

> A reply brief should not set forth new arguments. Allowing new arguments in a reply brief denies an opposition party the meaningful opportunity to respond. [R]eply briefs are usually limited to matters in rebuttal, and a party may not raise new issues for the first time. Otherwise, a litigant may resort to summary judgment by ambush.

The Ninth District concluded: "The trial court granted summary judgment on grounds not specified in either Fairlawn Office Park or PSF's motion for summary judgment. Mr. Schultz's first assignment of error is sustained and we reverse the judgment of the trial court." ■

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.

Louis E. Grube is a principal at Flowers & Grube. He can be reached at 216.344.9393 or leg@pwfco.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.*

Jane Doe v. Insurance Company

Type of Case: Motor Vehicle v. Bicycle Collision
Settlement: $497,000.00
Plaintiff's Counsel: Dana M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5201
Defendant's Counsel: *
Court: *
Date Of Settlement: November 2023
Insurance Company: *
Damages: *

Summary: Plaintiff was struck as a bicyclist and suffered a humerus fracture and distal radius fracture requiring surgery and post-surgical rehabilitation. A second surgery was performed to remove the hardware. Plaintiff's expert opined that a future surgery (reverse shoulder replacement surgery) was required. The tortfeasor tendered its policy limits pre-suit and a first-party action was filed against the Plaintiff's UIM carrier.

Plaintiff's Experts: Robert Gillespie, M.D. (Orthopedic Surgeon); and Maryanne Cline, RN, CLCP (Certified Nurse Life Care Planner)
Defendant's Expert: *

Michelle L. Patrick, Individually and as Administratrix of the Estate of Brian D. Patrick, Deceased v. Alteon Health, LLC, et al.

Type of Case: Medical Negligence / Wrongful Death
Verdict: $7.0 Million
Plaintiff's Counsel: Stuart E. Scott, Michael P. Lewis, and Stephen T. Keefe, Jr., Spangenberg Shibley & Liber LLP and The Keefe Law Firm, LLC, (216) 696-3232 and (216) 375-0155
Defendants' Counsel: Steven J. Hupp, Ronald A. Margolis, and Madison L. Bear
Court: Mahoning County Common Pleas Case No. 2021 CV 00471, Visiting Judge Thomas J. Pokorny
Date Of Verdict: October 18, 2023
Insurance Company: ProAssurance
Damages: Wrongful Death. No economics. Survived by spouse, 2 adult children, and mother

Summary: Patient presented to the Mercy Youngstown E.D. with hematemesis of bright red blood and clots and increased NSAID use for back pain. Plaintiff was seen by a resident and the attending physician. The patient was discharged home with instructions to follow up with PCP in 1-2 weeks for endoscopy. The patient died from blood loss 2 days later. Plaintiff claimed decedent should have been admitted for endoscopy within 24 hours.

Plaintiff's Experts: Douglas G. Adler, M.D.; and Richard D. Zane, M.D.
Defendants' Experts: John A. Dumot, D.O., FASGE; and Carl R. Chudnofsky, M.D.

Anonymous Resident v. Assisted Living Facility

Type of Case: Assisted Living, Healed Pressure Injury
Settlement: $475,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: N/A
Court: N/A
Date Of Settlement: October 1, 2023
Insurance Company: Sunrise
Damages: Pressure Injury (Healed)

Summary: An elderly woman entered an assisted living facility after acquiring a UTI at home. At the assisted living facility, she developed pressure injuries to her heel and buttocks requiring a wound vac. Those injuries healed and she returned to living at home. The case was resolved presuit.

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

Jane Doe v. Corporate Defendant

Type of Case: Motor Vehicle Collision
Settlement: $600,000.00
Plaintiff's Counsel: Dana M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5201
Defendant's Counsel: *
Court: *
Date Of Settlement: October 2023
Insurance Company: *
Damages: *

Summary: Plaintiff suffered a right foot injury requiring a 2nd and 3rd tarsometatarsal arthrodesis and a subsequent surgery to remove the hardware.

Plaintiff's Expert: Tye J. Ouzounian, M.D. (Orthopedic Surgeon)
Defendant's Expert: *

John Doe v. ABC Insurance Company

Type of Case: Motor Vehicle v. Pedestrian
Settlement: $2,250,000.00
Plaintiff's Counsel: Jordan D. Lebovitz, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5257
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas
Date Of Settlement: October 2023
Insurance Company: Withheld
Damages: Multiple fractures, TBI, lacerations

Summary: Plaintiff, a young adult, was standing near a bus shelter when a drunk driver struck him causing severe injuries that required inpatient care for months.

Plaintiff's Experts: Henry Spiller (Toxicologist); and Ari Levine, M.D. (Treating Surgeon)
Defendant's Expert: *

John Doe v. Hospital, Doctors and Nurses

Type of Case: Medical Negligence
Settlement: $4,000,000
Plaintiff's Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: October 2023
Insurance Company: Confidential
Damages: Death of a 46-year old wife

Summary: The patient had minor outpatient gynecologic surgery for uterine fibroid disease. She had multiple risk factors for VTE. She received no VTE prophylaxis. Her vital signs became very abnormal in the PACU. She was transferred by ambulance to the hospital's main campus for observation. While in the observation unit her vital signs remained abnormal. She received no diagnostic work up. Later in the afternoon the following day she coded and died. The autopsy revealed that she died of pulmonary embolism.

Plaintiff's Experts: Farinaz Seifi, M.D. (Gyn Surgery, Yale University); Ashley Eltorai, M.D. (Critical Care/Anesthesia, Yale University); Errol Azdalga, M.D. (Hospitalist, Stanford University); Vinny Jha, M.D. (Critical Care/Pulmonology, Cal Pacific Med Ctr.); Jonathan Eisenstat, M.D. (Pathology, Atlanta, GA)
Defendants' Experts: Victor Tapson, M.D. (Pulmonology, Cedars-Sinai, Los Angeles, CA); Leslie Martin, M.D. (Hospitalist, University of Cal.); John White, M.D. (Ft. Mitchell, MI); Joel Kahn, M.D. (Cardiology, West Bloomfield, MI); Robert Hyzy, M.D. (Critical Care, University of Mich.); Stephen Cina, M.D. (Pathologist, Loveland, CO)

Michael Johnson, et al. v. Firelands Regional Medical Center, et al.

Type of Case: Medical Malpractice
Verdict: $6,190,957.00
Plaintiff's Counsel: Allen Tittle, Scott Perlmuter, Tittle & Perlmuter, (216) 222-2222
Defendants' Counsel: Mike Murphy, Reminger
Court: Erie County Common Pleas Case No. 2021 CV 0098
Date Of Verdict: September 28, 2023
Insurance Company: N/A - Firelands is Self Insured
Damages: TBI/Brain Bleed

Summary: Firelands Hospital admitted a 72 year old patient with a newly diagnosed heart condition - A-Fib, congestive heart failure, and a potential heart attack. As a result, the patient was prescribed seven (7) new medications, including a medication to lower heart rate and blood pressure to be given every 12 hours. In violation of hospital policy, the patient's gait was never checked (in addition to not checking orthostatic blood pressures) following the medication administration; and therefore, he was placed on only standard fall precautions, permitting him to walk around on his own. Additionally, the new blood pressure lowering medication was given over 7 hours early. A little over a hour after the early medication dose, the patient fell after going to the bathroom on his own, suffering a massive brain bleed.

Plaintiffs' Experts: Dr. MariPat King (Nursing); Craig Felty (Hospital Administration); Dr. Patrick McDonnell (Pharmacology); Dr. Ken Mankowski (Neurology); Marianne Boeing (Life Care Planner); and Alex Constable (Economist)
Defendants' Experts: Dr. Leonard Feldman (Internal Medicine, Life Expectancy, Hospitalist); Dr. Molly McNett (Nursing); and Dr. Gourang Patel (Pharmacology)

Tressel v. Hufeld, Safe Harbor Self Storage, and U-Haul

Type of Case: Motorcycle v. SUV
Settlement: $1,200,000.00
Plaintiff's Counsel: Joe Condeni and David R. Grant, Condeni Law / Plevin & Gallucci, Joe Condeni (216) 771-1760
Defendants' Counsel: Withheld
Court: Lorain County Common Pleas Case No. 20 CV 200877, Judge John R. Miraldi
Date Of Settlement: September 28, 2023

Insurance Company: Withheld
Damages: Death of a 45-year old woman

Summary: SUV pulled out of storage facility driveway into path of a motorcycle. Passenger on MC propelled onto roadway resulting in immediate death. Driver of SUV impaired with marijuana and alcohol. Claims asserted against SUV driver - paid policy limits 200k; Storage facility which parked U-Haul truck within highway right-of-way with claim truck obstructed MC driver view of SUV. Obstruction took his ability to perceive, react and avoid collision. Claim against storage facility settled for $1M after 3rd day of trial.

Plaintiff's Experts: Thomas Lyden (Right-of-Way); John Burke (Economist); Eric Brown (Crash Tech - collision animation creator)
Defendants' Expert: Fred Greive (Valley Technical - crash reconstruction)

Massingill v. Ohio

Type of Case: Wrongful Imprisonment
Settlement: $170,000
Plaintiff's Counsel: Louis Grube and Sarah Gelsomino, Flowers & Grube and Friedman, Gilbert + Gerhardstein
Defendant's Counsel: *
Court: Cuyahoga County Common Pleas Case No. CV-22-972071, Court of Claims Case No. 23-501WI
Date Of Settlement: September 27, 2023
Insurance Company: *
Damages: *

Summary: Massingill was convicted of carrying a concealed weapon and tampering with evidence. He had successfully disarmed an attempted robber in his neighborhood, but police officers heard a shot go off during the fracas. His convictions were vacated by the Eighth District Court of Appeals for insufficient evidence after he served 17 months in confinement. *State v. Massingill*, 8th Dist. Cuyahoga No. 109818, 2021-Ohio-2674.

Plaintiff's Expert: *
Defendants' Expert: *

Anonymous Group Home Resident v. Group Home

Type of Case: Group Home, Subdural Hematoma
Settlement: $575,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: N/A
Court/Case No/Judge: N/A
Date Of Settlement: September 18, 2023
Insurance Company: Cincinnati Insurance
Damages: Subdural Hematoma

Summary: A 60-year old group home resident with Down's Syndrome fell causing a subdural hematoma. The hematoma was evacuated, and he recovered nearly to his baseline. Within several months, he passed away. The Cuyahoga County Medical Examiner's office took jurisdiction and determined that the cause of death was senile degeneration of the brain caused by Down's Syndrome. This was largely due to the patient demonstrating episodes of functional decline prior to the head injury and a near return to baseline after the head injury.

Plaintiff's Expert: Jose Angela Soria-Lopez, M.D. (Neurology, Neurodegenerative Diseases, California)
Defendant's Expert: Settled before defense expert submissions

John Doe v. XYZ Corporation

Type of Case: Motor Vehicle Collision
Settlement: $1,100,000
Plaintiff's Counsel: David M. Paris, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5206
Defendant's Counsel: *
Court/Case No/Judge: *
Date Of Settlement: September 8, 2023
Insurance Company: Self-Insured
Damages: Fractured non-dominant wrist; impaired earning capacity

Summary: Our client, age 38, is an automobile mechanic. He was involved in a high speed collision when a van turned left in his path. He sustained a displaced fracture to his left (non-dominant) wrist that required fixation with a plate and pins. Within two years post-accident, he had developed mild post-traumatic arthritis. He claimed that performing mechanical work was painful over the course of a full work day and he was unable to maintain that pace in a competitive work environment. His work history was somewhat erratic. After high school, he served in the United States Marine Corps for 8 years maintaining and repairing large tactical vehicles. After his service he worked as a mechanic in different applications for 6 years with an average annual income of about $40,000. 4 years before the collision he decided he wanted to open his own repair shop and enrolled as a full time student obtaining an associate degree in business management and an ASE Master Automobile Mechanic certificate. As a full time student, he had no earned income in the 4 years before the collision.

His functional capacity evaluation demonstrated that he could perform the duties of a mechanic, although he did

so with discomfort. Dr. Klimo testified that (1) repetitive strenuous use of his left hand would accelerate his post-traumatic arthritis and (2) his 3" surgical scar and arthritis constituted permanent and substantial physical deformities. Bruce Growick opined that his pre-injury annual earning capacity with an ASE certificate was $75,000 - $100,000 in an elite repair center, but with an injured left wrist his career path would more likely be an auto service writer earning $52,000. Defense expert, John Pullman, opined there was NO loss of earning capacity because (1) his functional evaluation demonstrated he could work as a mechanic, (2) his pre-accident earnings were $40,000 and government data showed local and state average annual earnings for auto mechanics to be less than $50,000, and (3) our client was close to obtaining his B.S. degree in business management which would put him in a higher earning bracket. The case was mediated and resolved 3 days before trial.

Plaintiff's Experts: Gerald Klimo, M.D.; Rick Wickstrom, PT, DPT, CPE (Functional Capacity); Bruce Growick, Ph.D. (Vocational Rehab); and David Boyd, Ph.D. (Economist)
Defendant's Expert: John Pullman (Vocational Rehab)

Anonymous Nursing Home Resident v. Nursing Home

Type of Case: Nursing Home Fall with Subdural Hematoma
Settlement: $400,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: N/A
Court: N/A
Date Of Settlement: September 4, 2023
Insurance Company: *
Damages: Subdural Hematoma

Summary: Terminally ill patient receiving palliative care in hospice for advanced, terminal cancer fell suffering a subdural hematoma causing his death.

Plaintiff's Expert: Mark Shoag, M.D. (Internal Medicine, Ohio)
Defendants' Expert: N/A

Anonymous Resident v. Anonymous Assisted Living Facility

Type of Case: Assisted Living Neglect, Wrongful Death
Settlement: $2,300,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: Frank Mazgaj
Court: Lorain County
Date Of Settlement: August 28, 2023
Insurance Company: Ironshore
Damages: Aspiration Pneumonia, Death

Summary: An 81-year old patient with Parkinson's Disease (PD) entered an assisted living facility in Rocky River, Ohio. After an episode of somewhat bizarre but expected behavior, the patient was given large doses of risperidone over 3 days. Risperidone is contraindicated in patients with PD because it acts by reducing dopamine in the brain. PD is a movement disorder caused by insufficient production and absorption of dopamine. The effect of this medication in a PD patient is to further reduce dopamine thereby exacerbating PD symptoms. The patient suffered aspiration pneumonia secondary to reduced swallowing function following medication administration. The patient died approximately 1 month later. The death certificate was not favorable, listing end stage PD as the sole cause of death.

Plaintiff's Experts: John Cascone, M.D. (Geriatrician, Medical Director, Missouri); Daniel Sudakin, M.D. (Medical Toxicology, Oregon); Loraine Doonen, RN (Assisted Living Nursing Director, Connecticut); Binit Shad, M.D. (Neurological Movement Disorders, Virginia)
Defendant's Expert: Settled before defense expert submissions

Estate of Louis Cifranic v. O'Neill Healthcare

Type of Case: Nursing Home Subdural Hematoma
Verdict: $5,000,000
Plaintiff's Counsel: Michael Hill, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: Leslie Jenny
Court: Cuyahoga County Common Pleas Case No. CV19923824, Judge William McGinty
Date Of Verdict: August 24, 2023
Insurance Company: Self Insured
Damages: Subdural Hematoma Causing Death

Summary: Louis Cifranic was a 70-year old man who was in short-term rehabilitation following a craniotomy and clipping of multiple intracranial arteries. While in rehabilitation, he fell 5 times. The final fall occurred in the early morning hours. The physician was contacted but the patient was not sent to the hospital for 3 plus hours. The cause of death was blunt force trauma with subdural hematoma from the fall.

Plaintiff's Experts: Kathleen Hill-O'Neill, DNP, RN (Nursing Home Director of Nursing, New Jersey); Joseph Felo, M.D. (Forensic Pathology, Cuyahoga Cty. Medical Examiner's Office); Sarel Vorster, M.D. (Neurosurgery, Cleveland Clinic Treating Neurosurgeon); Francis Farhadi,

M.D. (Neurosurgery, Kentucky)
Defendant's Experts: Melissa Todd, RN (Director of Nursing) ; Linda Lewis, LNHA (Nursing Home Administrator); Kenneth Writesel, M.D. (Nursing Home Medical Director); Jason Sheehan, M.D. (Neurosurgery)

Jane Doe v. Aimbridge Hospitality, LLC, et al.

Type of Case: Premises liability / work-related
Settlement: $429,000.00
Plaintiff's Counsel: Aaron P. Berg, Caravona & Berg, LLC, (216) 696-6500
Defendant's Counsel: *
Court: *
Date Of Settlement: August 21, 2023
Insurance Company: Zurich Insurance and State of Ohio
Damages: Right humerus fracture, frozen shoulder syndrome, major depressive disorder

Summary: 51-year old female was staying at a hotel for a work event when she slipped and fell in the hotel room shower as a result of the shower gripper tread being negligently maintained. Discovery revealed that the hotel was aware of the condition and was scheduled to fix it but did not get around to it prior to this injury event. Case was settled with both the liability insurer and the State of Ohio concerning the indemnity portion of her BWC claim.

Plaintiff's Experts: Harry A. Hoyen, M.D. (Orthopedic Surgeon); Christine Brewer, Ph.D. (Psychologist); Todd Hochman, M.D. (Internal Medicine)
Defendants' Expert: *

John Doe v. Jane Doe Driver and ABC Construction Company

Type of Case: Motor Vehicle Crash
Settlement: $220,000.00
Plaintiff's Counsel: Aaron P. Berg, Caravona & Berg, LLC, (216) 696-6500
Defendant's Counsel: *
Court: *
Date Of Settlement: August 8, 2023
Insurance Company: Esurance, Geico, and Acuity
Damages: Acute displaced comminuted fracture of the right fibula

Summary: Plaintiff, 39-year old male, roadside construction worker was removing cones from the back of his work truck when a negligent motorist struck another work vehicle that was parked, causing it to strike the back of Plaintiff and fracture his fibula.
Plaintiff's Expert: Gregory Vrabec, M.D. (Orthopedics)
Defendants' Expert: *

Eloise L. Hance, et al. v. The Cleveland Clinic

Type of Case: Medical Malpractice
Verdict: $7,625,000
Plaintiff's Counsel: Charles Kampinski and Kristin Roberts, Kampinski and Roberts Co., LPA, (440) 597-4430
Defendant's Counsel: William Meadows and Brian Gannon
Court: Cuyahoga County Common Pleas Case No. CV-20-929034, Judge Emily Hagan
Date Of Verdict: June 6, 2023
Insurance Company: N/A
Damages: Paralysis of 68-year old female

Summary: Neurosurgeon Iain Kalfas, M.D., evaluated 68-year old Eloise Hance for back pain in October 2018 and found the presence of syringomyelia, a fluid-filled cavity in the spinal cord. He attempted to drain the syrinx using a syringo-subarachnoid shunt that was contraindicated for the patient due to her preexisting arachnoiditis. This surgery left Plaintiff in unrelenting postoperative pain and suffering from paralysis in her legs. Despite this unexpected outcome, Dr. Kalfas failed to order an MRI that would have revealed an opportunity to reverse the paralysis. Moreover, Dr. Kalfas performed an unnecessary second surgery in 2019, which surgery could not have alleviated the condition and instead caused it to worsen.

Plaintiffs' Experts: Dr. Aaron G. Filler, M.D., Ph.D., FRCS, J.D.; Dr. Richard P. Bonfiglio, M.D.; Dr. David H. Berns, M.D.; Dr. John F. Burke, Ph.D.; and Marianne H. Boeing, RN, MSN, CLCP, CNLCP
Defendant's Experts: Dr. Nicholas Theodore, M.D., M.S., FAANS, FACS; Dr. Antonio E. Chiocca, M.D., Ph.D.; and Dr. Allan D. Levi, M.D., Ph.D., FACS, FAANS

James v. Cuyahoga County, et al.

Type of Case: Civil Rights/Jail Abuse
Settlement: $250,000
Plaintiff's Counsel: Ashlie Case Sletvold, Peiffer Wolf, (216) 260-0808
Defendant's Counsel: Stephen Funk, Dave Lambert, Brendan Healy, and Janeane Cappara
Court: United States District Court, Northern District of Ohio, Case No. 1:21-cv-1958, Judge J. Philip Calabrese
Date Of Settlement: June 2023
Insurance Company: None
Damages: Injured elbow/emotional distress

Summary: Plaintiff was the victim of two incidents of excessive force involving pepper foam by corrections staff. In

both instances, officers failed to deescalate despite plaintiff's diminished mental capacity.

Plaintiff's Expert: *
Defendants' Expert: *

John Doe, a minor v. Unnamed Hospital, et al.

Type of Case: Birth injury, HIE
Settlement: $4 Million
Plaintiff's Counsel: Jonathan D. Mester, Nurenberg, Paris, Heller & McCarthy Co., LPA, 600 Superior Ave., E., Suite 1200, Cleveland, Ohio 44114, (216) 694-5225
Defendants' Counsel: Withheld
Court: Kentucky
Date Of Settlement: June 2023
Insurance Company: N/A
Damages: Hypoxic Ischemic Brain Injury

Summary: Delivery of full term baby. Primary allegation was that obstetrical nurses failed to inform OB/GYN of deteriorating fetal heart tracings which required delivery by emergency C-section.

Plaintiff's Experts: Withheld. Experts were retained in the areas of maternal/fetal medicine, obstetrical nursing, pediatric neurology, pediatric neuro-radiology, life care planning, and an economist.
Defendants' Expert: Withheld. Defendants each identified multiple experts in the same fields as Plaintiff's experts.

Estate of Stephen Tate v. Signature Healthcare of Warren, et al.

Type of Case: Nursing Home Subdural Hematoma
Verdict: $26,000,000, plus attorney fees and expenses
Plaintiff's Counsel: Michael Hill and Matt Mooney, Eadie Hill Trial Lawyers, (216) 777-8856
Defendant's Counsel: Paul McCartney, Jane Warner (Bonezzi Switzer Polito & Perry); Kevin Murphy (Harrington, Hoppe, & Mitchell)
Court: Trumbull County Common Pleas Case No. 2023CV00098, Judge Cynthia Rice
Date Of Verdict: May 26, 2023
Insurance Company: Hudson Insurance; Price Forbes and Partners
Damages: Aspiration pneumonia death

Summary: Stephen Tate was a 69-year old man who was severely injured when he was shot in the head with a shot gun by an unknown assailant when he was 19. Following his traumatic brain injury, he was diagnosed with schizophrenia and was institutionalized for the remainder of his life. As many schizophrenics do, he "scarfed" or "wolfed" food, putting him at risk of inhaling food and aspirating. In the afternoon, he aspirated on food and nursing staff delayed calling EMS for 45 minutes. The defense claimed that he did not aspirate on lunch but, rather, aspirated on gastric contents from breakfast and no one needed to be watching him at that time. The nurse reported and documented that she was passing the lunch trays when she entered his room to give him lunch and found that he had aspirated. However, we were able to demonstrate that any food from breakfast would have already entered the intestines given the timing and he could not have aspirated on breakfast. Also, numerous former employees testified that trays would have been passed 15-30 minutes before the nurse entered the room. Moreover, many former employees testified that they did not watch him when eating, even though they all knew he needed supervision, because they did not have enough staff. Finally, buried in 7,000 pages of records was a single electronic time stamp that the nurse was passing controlled medications at the moment she found him and she admitted at trial that she could not be passing both food trays and a med cart and could not explain the discrepancy.

Plaintiff's Experts: John Cascone, M.D. (Internal Medicine and Infectious Disease, Missouri); Janet McKee, RD (Dietician, Florida); Lisa Conteras, DPN, RN (Nursing Home Director of Nursing, California)
Defendants' Experts: Keith Armitage, M.D. (Infectious Disease); Melonie McManus, RN (Director of Nursing) -- Experts were excluded for untimely submission

John Doe v. Hospital

Type of Case: Medical Negligence
Settlement: $10,000,000
Plaintiff's Counsel: John A. Lancione, The Lancione Law Firm, (440) 331-6100
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: May 2023
Insurance Company: Confidential
Damages: Death of a 41-year old wife and mother of three teenage girls

Summary: The patient was seen in the ER due to complaints of muscle ache. She was diagnosed with severe sepsis and transferred to an observation floor due to worsening hypotension and tachycardia. The hospitalist gave her 5 mg. of Metoprolol IV to treat her tachycardia. Within seconds of receiving the medication the patient coded and died in front of her husband.

Plaintiff's Expert: Errol Ozdalga, M.D. (Hospitalist, Stanford University)
Defendant's Expert: * ■

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

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

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

3. Excellent character and integrity of the highest order.

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

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Invited By: (print) _____ (sign) _____

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Please return completed Application with membership dues to:

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c/o Colin R. Ray, Esq.
McCarthy Lebit Crystal & Liffman Co., LPA
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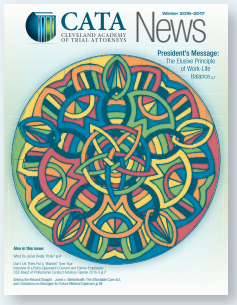

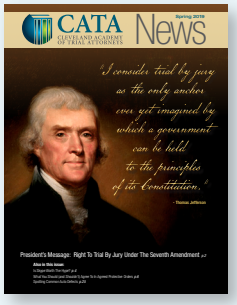

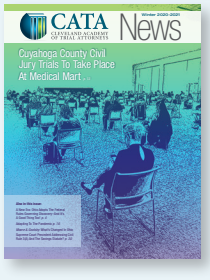

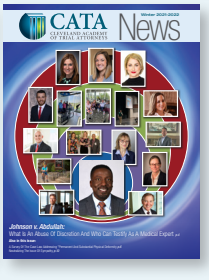

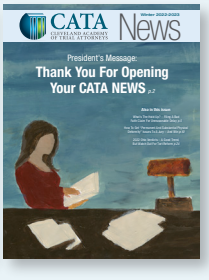

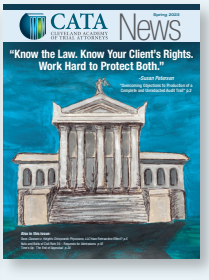

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