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*** The Editor's Notes will return in the Spring 2014 issue.**

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Opinions expressed in the articles herein are those of the authors and are not necessarily shared by CATA.
Cover design by Joanna Eustache, Copy King

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President's Message: I Was Never Alone

by George E. Loucas

As of the printing of this CATA Newsletter, the holidays will have passed and the New Year begun. On behalf of the Cleveland Academy of Trial Attorneys (CATA), we wish you and your families, personal and professional, belatedly nonetheless, all of the best in health, happiness and prosperity now and throughout the year.

Try researching the quote, "It's lonely at the top." I cannot identify the genius behind the saying, but I sure could relate, having often felt alone. Rest assured I am reminded of this quote not out of ego, but in humility. Many years ago I struck out on my own in the solo practice of law. Broad shoulders come to mind: carrying the concerns of each client on my back; often tens of thousands of dollars in expenses riding on what ultimately would depend upon chance; the payroll of staff... and the list of stressors ran on and on. The feelings remain today. But was I really alone? Am I alone?

I remember sitting in a CATA Board Meeting and listing the many benefits of CATA membership, each more tangible than the next. One benefit not mentioned was intangible and rose from my heart until it fell off my tongue. I could not explain it in a word or even a sentence or two. I knew, however, that when I sat in Chambers with the Judge and opposing counsel, or entered the Courtroom to try a case with the eyes of each juror scanning every inch of the trial table and the assembled cast, behind me was the full force of the CATA membership. I kid you not. I found and continue to find strength in the monumental, yet intangible, benefit CATA provides: that I am never alone in representing my client or the day-to-day practice of law. With a text, email, or telephone call, I have access to a brain trust unrivaled in the practice of law.

I belong to an association that begets a profound sense of camaraderie. When a fellow member wins, I share in that sense of gratitude for the client and a job well done (*sic* understatement), whether through settlement or verdict. Conversely, with a loss, I share the overwhelming rush of vacancy that strikes at the very heart and core of our existence (*sic* understatement). We share a bond forged through our mutual experiences in an arena pretty-much-unknown to the outside world, let alone within other areas of legal practice.

CATA members represent the gamut from solo practitioners, to small and mid-sized firms. We find ourselves usually limited in human and financial resources pitted against opponents whose size and resources threaten to overwhelm us. But we are mighty in heart, intellect, pen and paper, and even mightier together.

We must remember the benefits we provide one another in associating as CATA members. In so doing, we must not overlook gathering socially to share stories and information and gain new members. Our Board members work very hard in various committees. We have a Community Outreach Committee, for instance, coordinating an educational distracted driving program at local high schools with national End Distracted Driving month next April. Our Publications Committee volunteers much time and hard work year round, gathering news, scholarly and otherwise, to report and share. The *CATA News* is the crown jewel of those efforts and we would be remiss not to say

thank you once again and as always for the positive light that shines on CATA as a result of their professionalism and commitment. Likewise, the Technology Committee created our own website that CATA supports independently but also created and maintains the social platform. We would be remiss again not to mention the list-serve, which is being transferred to CATA for independent management. We will soon be able to reply to a posting on the list-serve and all members will be able to read and contribute in an informational thread format. A member may choose not to participate in a thread or reply privately.

We have an Outreach Committee that raises public awareness of CATA through community outreach and provides continuing education, *i.e.*, The Litigation Institute. This seminar was revived last spring with an overwhelmingly positive response and we will continue on that course. Where would we be without our Luncheon CLE Committee and the monthly educational gatherings at the Ritz, which have been most interesting and well attended this year? Check your CATA website for upcoming scheduled events, access to all CATA Newsletter publications, and the CATA list-serve.

We also have a Legislative Committee, which was known as the Bylaws Committee. CATA is creating new Bylaws and if you have any experience in non profit work and wish to volunteer time and knowledge, please call me. This committee also works with OAJ in a grass roots effort to coordinate news and respond to legislation that affects our membership.

In 2013, as Amicus Curiae, along with the OAJ, CATA filed a Memorandum in Support of Jurisdiction in opposition to *Wilkins v. Sha'ste, Inc.*, 8th Dist. No. 99167, 2013-Ohio-3527, a decision which robs clients represented on a pro bono or contingency fee basis from recouping fees in a Motion for Sanctions. Many thanks to Paul Flowers for volunteering his time and professional expertise.

Lastly, we are meeting with representatives of the Cuyahoga County Court of Common Pleas to discuss concerns about the recent implementation of the e Filing system and the lack of Notice of the Service of Pleadings some members are experiencing.

CATA is hard at work throughout the year on many different fronts. Many of the benefits to membership are tangible while others are not. I am grateful to serve CATA, the organization that helped me find strength when, at a moment of weakness, I felt as if alone. Today, I more aptly relate to the words from a sermon of John Donne, a seventeenth century author, "[n]o man is an island," which means no one is self- sufficient; everyone relies on others.

I was never alone and, as a CATA member, neither are you.

George E. Loucas, President

■

Why We Do What We Do
(The Ex-Presidents Weigh-In)

Editors' Note: The life of a trial lawyer can be difficult, and a shot of inspiration may, at times, be warranted. So we asked CATA's ex-presidents to grace us with an inspirational paragraph or two about why they have chosen to be trial lawyers. Here is what they had to say.

Peter H. Weinberger (1984-1985):

"Back in the 'old days,' CATA held dinner meetings every other month at the Blue Fox Restaurant on Clifton Road in Lakewood. It began with cocktails followed by a fabulous dinner hosted by the Blue Fox's owner, Bruno Berardinelli.

After dinner, we heard presentations from the stalwarts of the plaintiff's bar: Marshall Nurenberg, Leon Plevin, Fred Weisman, Larry Stewart, Don Traci, and Craig Spangenberg to name a few. Once a year, Norm Shibley would present his comprehensive appellate law update.

I was a young lawyer trying soft tissue cases at the time. I was mesmerized by the presentations. I aspired to be like these incredible lawyers. Not because they were financially successful, which they obviously were. But, rather, it was their passion for their clients' causes and their capacity for innovation and imagination in the courtroom that was amazing and inspirational.

They didn't talk about war stories. None of these superstars promoted themselves. Rather, they were all about sharing their secrets to success.

As a young lawyer practicing less than 10 years, I became a CATA president. Then, as now, I strive every day to emulate these lawyers who led our local trial lawyer organization. More than 30 years later, I realize that I will never achieve that goal."

James A. Lowe (1991-1992):

"If life is a journey, part of one's course is an ongoing process of choosing which fork in the road to take. In a lifetime, one may make thousands of such selections, many without much thought. Choosing a career or profession should be momentous, but for me it was part of an inevitable march to what I was meant to do. I could never have been a power forward in the NBA, but I always knew I could help make a positive difference in people's lives just with the skills my parents had imparted to me. I have loved the life of a trial lawyer, through victories and defeats, and am eternally grateful for the chance to have shared my dream with my partners, staff, clients and colleagues for more than 40 fulfilling years."

Richard C. Alkire (1997-1998):

"I am a trial lawyer because it is my passion. I am fortunate that every day I wake up and look forward to meeting the challenges that inevitably confront me. I truly receive satisfaction from helping the 'little guy' in the disputes he or she has with corporate America and the insurance industry. That I can play a role in leveling the playing field is a privilege which does not elude me. That I can stand toe-to-toe with the best that the insurance industry and corporate America can place against my client is a gift for which I am very grateful. Why am I a trial lawyer? I am a trial lawyer because it is a calling which I was so fortunate to recognize in the formative years of my career."

Jean M. McQuillan (1998-1999):

"While I am not practicing, I have been teaching at Case law school for the last 7 years. In my practice skills classes, I deliberately encourage my students to consider the benefits of representing plaintiffs and being a trial lawyer. Although sometimes I feel like a voice in the wilderness of BigLaw ambitions, I know I have successfully persuaded some students to become trial lawyers and have given many others a broader perspective on our practice."

David M. Paris (2001-2002):

"When John Chapman left Philadelphia in his semi to deliver a load in Cincinnati, he never dreamed that he would lose his leg before the day was over. He never dreamed that a local towing company would place him in peril and then, through its counsel, accuse him of being a liar. Because of his lack of education, he never believed he could find the words to convincingly explain the circumstances of his injury in a courtroom presided over by a Bush appointee and a panel of 12 white jurors. After 4 years of despair and depression, he never believed that he would receive a measure of justice. After 5 days of a very contentious trial, the jury unanimously restored John's faith in the American justice system. It was a special and tearful day for us and underscored the reason I am a trial lawyer."

Kenneth J. Knabe (2002-2003):

"I was recently in Calistoga and drove past a small tree with cards tied on the branches which I thought was strange. Upon further inspection, it was a 'thank you' tree where people filled out a card and tied it to a branch. The question was: 'What are you most thankful for?' Without hesitation, and while still paying tribute to my health and family, I answered: 'That I went to Law School.' I really meant: 'That I went to Law School and became a Plaintiffs Trial Lawyer.' I tied my answer to the tree and felt darn good about it and our profession.

We can and do really help people who need it. We change people's lives. I enjoy standing up to Defense Lawyers, Insurance Companies, and Corporations who think (wrongly) that we are a scourge to the legal system. We champion causes for people who deserve justice and would not have a prayer without our help.

Most of all, I really enjoy my fellow Attorneys. We share ideas and information frequently and freely. We are way more colleagues than competitors. A ring of congeniality surrounds us. I really appreciate the members of CATA and the Ohio Academy of Justice, many of whom have become very close friends with like minds and passions.

To no one's surprise, I don't fit in the corporate environment or in the insurance defense world (no diss: many are friends). My comfort level practicing there is nil. I like making my own decisions with my client and doing what is necessary and right to help and protect my client without constraints, reporting, or billing requirements and approvals on up the assembly line.

After 34 years of practice, no other area of law or practice even comes close to the pleasure and satisfaction I derive from being a Plaintiffs Civil attorney.

'I know, it's written in my soul...' Midnight Oil's 'My Country' (sung by a fellow lawyer)."

Michael F. Becker (2003-2004):

"I am a trial lawyer because (like most of you) I believe I have a calling for this good and necessary work. We speak for those that cannot speak and stand for those that cannot stand. I continue to be honored by the trust that families place in me to make a difference in their or their loved ones' lives. A friend of mine once said, 'A life spent fighting for others is a life worth living.' I believe this."

Donna Taylor-Kolis (2006-2007):

"Well, in response to your question, 'why do I love being a trial attorney,' I cannot say that I love it. I fear it, I respect it, I cherish it. Being a trial lawyer has been the vehicle that I have used to forge a path of recovery for people who have been harmed. The journey, like all in life, has been subject to operator error on some occasions. However, without the right to trial by jury the powerless would be left without a voice and subject to the whims and predilections of those who care little for the suffering of mankind. That right must be preciously guarded, and those of us who choose to be trial lawyers must do our part to step out in protection of this ultimate tool of liberty."

Brian Eisen (2010-2011):

"I am a trial lawyer because my law school classmates sought out white shoe firms and signing bonuses, and I have always been contrary. (Also, white shoes make my feet look weird.)

I am a trial lawyer because I believe with all my soul in the contingency fee. If I do not achieve for a client some quantifiable measure of justice, I do not wish to be paid. I detest the notion that I should profit from churning a file and racking up hours, when hours spent and results achieved do not equate. What good is it to a victim who has lost everything to count out the minutes I spent working?

I am a trial lawyer because of – not despite – the low esteem in which trial lawyers are held. I have tried to do my very small part to rectify that situation, one grateful client at a time.

I am a trial lawyer because at social gatherings people still think nothing of bashing trial lawyers and of blaming them for everything 'wrong' with our society. My response always has been quick and sharp. Consequently, I have been de-invited often – once, in the middle of dinner. This gives me time to do other things.

I am a trial lawyer because trial lawyers get sincere thank you notes from real people whose lives they've changed.

I am a trial lawyer because I cannot tolerate kids aflame in their pajamas, drivers asleep at the wheel, or doctors with hubris more than humanity.

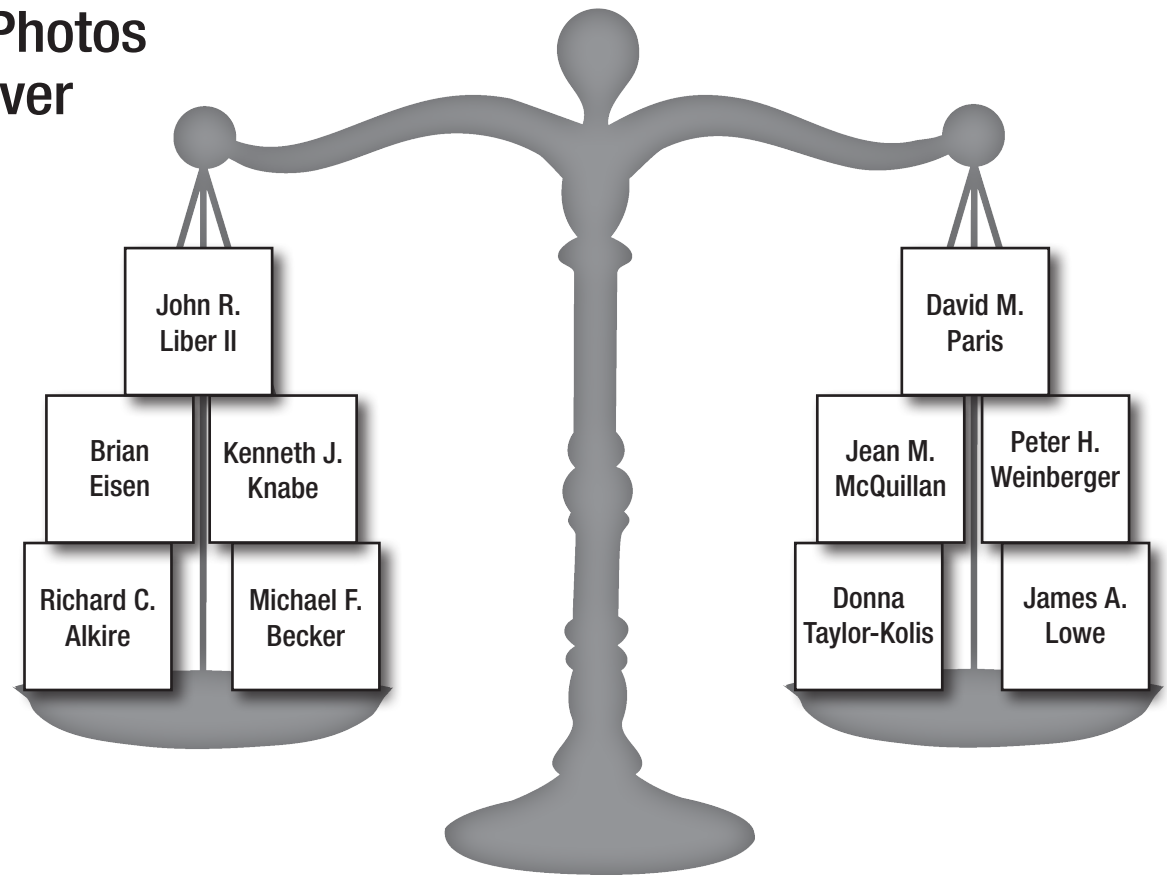
I am a trial lawyer because there is nothing I'd rather be."

John R. Liber II (2011-2012):

"A challenge is not a burden to bear, but an opportunity to succeed. I often find myself explaining what I do by saying, 'if things were easy, I would be out of a job.' So I would say that it is the challenge of each new legal issue that motivates me to tolerate the bankers' hours, the high esteem in which we are held by others, and the stress-free lifestyle that is endemic of a trial lawyer.

Seriously, while we often bemoan the constant pressure imposed by the 'forces of evil,' the fact of the matter is that it takes the individual and collective talent, creativity and tenacity of our profession to successfully achieve justice for our clients. We do it with every case…." ■

Guide to Photos on the Cover



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To Discover or not Discover. That is the Question:

Work Product Privilege under the New Expert Discovery Civil Rule 26(B)(5)

by Nicholas M. Dodosh

A. Introduction on the Issue

Ohio attorneys are often confronted with whether to disclose drafts of expert reports or other communications between attorneys and expert witnesses. Must drafts of expert reports be turned over upon a discovery request from opposing counsel? Are the drafts subject to work product protection? Does it "depend," and if so, on what? How about the communications exchanged between the expert and the attorney pertaining to the expert's opinions and the creation of the expert report?

In 2012, Ohio Civil Rule 26(B)(5) was amended to provide lawyers and judges more guidance on this topic. However, much confusion still exists as to the precise meaning and exact application and protections created by the new Rule. There is very little case law at this time to assist in clarifying the issue. It is important for attorneys to understand precisely what the new Rule says (and does not say) relative to which specific communications are protected from disclosure (and which are not).

B. Drafts of Expert Reports

Before the 2012 amendments, the issue of disclosing drafts of expert reports had been treated a variety of different ways by a variety of courts. It was not unheard of for courts to issue orders requiring that parties produce "each and every report and writing" of an expert and require such a disclosure "as a condition precedent and prerequisite to their testifying at trial."[1]

As of July 1, 2012, Ohio Civil Rule 26(B)(5) was amended to provide more specific protection and guidance relative to the extent of the discoverability of drafts of expert reports. In the spirit of the December 2010 amendment to Federal Civil Rule 26, Ohio Civil Rule 26(B)(5)(c) now explicitly provides for a general rule of attorney work product protection as it relates to expert report drafts. This protection includes drafts of "any report" provided by "any expert" – regardless of the form in which the draft is recorded.

It is important to note that the new "draft report protection" is not ironclad. Specifically, the protection remains subject to the "good cause" exception set forth in Civ. R. 26(B)(3) relative to the discovery of trial preparation materials. In other words, if an attorney can show good cause as to why he or she should be entitled to a draft of an expert report, a court may order that the draft report be produced. However, the protection is clearly broad and will likely preclude the need to turn over draft reports in most cases. At least one federal court interpreting the similar Federal Rule has explicitly stated that the party seeking to show exceptional circumstances under the draft report Rule "carries a heavy burden."[2]

Currently, there are no known Ohio appellate cases interpreting Civ. R. 26(B)(5)(c). As such, the door is open for attorneys to argue to trial courts how the Rule should be interpreted. It is relatively clear that, absent an abuse of discretion, a trial court's decision would stand on appeal. [3]

Federal courts that have interpreted the similarly worded Federal Rule have stated that it protects drafts of any report or disclosure, but does not otherwise protect expert reports or disclosures from discovery.[4] For example, the protection of draft reports does not extend to the expert's own development of the opinions to be presented outside of draft reports.[5]

It should also be noted that Rule 26 work product protection relative to expert draft reports can be subject to waiver via disclosure to an adversary.[6] Therefore, it is important to keep draft reports confidential and ensure that they are not disclosed in any capacity.

C. Communications Between an Attorney and an Expert Witness

The July 1, 2012 amendments provide more specific guidance relative to the extent of the discoverability of communications between attorneys and testifying experts. Civ. R. 26(B)(5)(d) echoes the December 2010 amendment to Federal Rule 26 and now explicitly provides for a general rule of work product protection as it relates to communications between "a party's attorney and any witness identified as an expert witness" – regardless of the form of the communications. The Rule then provides for three distinct exceptions where communications between attorneys and testifying experts *are not* protected. The three exceptions are as follows:

> (i) communications that relate to compensation for the expert's study or testimony;
>
> (ii) communications identifying facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; and
>
> (iii) communications identifying assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

As to first exception, the self-evident rule of the discoverability of communications related to expert compensation remains unchanged. If an attorney is communicating with an expert in any way concerning the expert's fees or the payment of such fees, the communication does not enjoy work product protection.

As to the second exception regarding communications identifying facts or data, the expert must have "considered" the attorney's communication such that the facts or data within the communication were actually passed upon in forming the opinions that the expert will express. If an attorney communicates facts or data to an expert, but the expert does not consider the facts or data in forming his or her opinions to be expressed, then the communication identifying the facts or data remains subject to work product protection and does not need to be disclosed.

As to the third exception regarding communications identifying assumptions, the expert must have "relied on" the attorney's communication such that the assumption within the communication actually played a part in forming the opinions that the expert will express. If an attorney communicates an assumption to an expert, but the expert does not rely on the assumption in forming the opinions to be expressed, then the communication identifying the assumption remains subject to work product protection and does not need to be disclosed.

Compare the word "considered" in the second exception regarding "communications identifying facts or data" to the words "relied on" in the third exception regarding "communications identifying assumptions." Such seems to suggest that the second exception's "considered" language applies to a broader range of materials than the third exception's "relied on" language. This is because an expert may "consider" a broad range of materials but ultimately only "rely on" a small portion of the materials that he or she initially considered when forming the opinions to be expressed.

Another way to look at the issue is as follows. If an expert, while in the process of forming his or her opinions to be expressed, "considers" a communication from an attorney which identifies *facts or data*, the communication is discoverable – even if the expert merely considers the communication and does not rely on it in forming his or her opinions. However, if an expert, while in process of forming his or her opinions to be expressed, merely "considers" a communication from an attorney which identifies *assumptions* of the attorney, but the expert does not "rely on" the assumptions, the communication is not discoverable because the expert did not rely on the assumptions in forming his or her opinions.

With respect to both the "facts or data" and "assumptions" exceptions, it is important to note the last three words, which are "to be expressed." Regardless of what facts, data, or assumptions an expert "considered" or "relied on" in forming his or her opinions, if he or she is not going to actually "express" the opinions, then the communication identifying such facts, data, or assumptions does not need to be disclosed.

Currently there are no known Ohio appellate cases interpreting Civ. R. 26(B)(5)(d). As such, the door is open for attorneys to argue to the trial courts how the Rule should be interpreted, including subsections (i), (ii), and (iii).

Once again, it is relatively clear that, absent an abuse of discretion, a trial court's decision would stand on appeal.[7]

Federal courts that have interpreted the similarly worded Federal Rule have found it "extends work product protection to most communications between trial counsel and experts."[8] Discovery regarding attorney-expert communications on subjects outside the identified exceptions is permitted only in the "rare" case where a party establishes it has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. [9]

Despite the relatively broad protection, it has been stated that the Rule protects only communications between the expert and the attorney who retained the expert.[10] Because the Rule protects only communications with the retaining attorney, notes by a party's non-attorney agents regarding communications with a testifying expert are not protected.[11] However, for purposes of the rule, an attorney may communicate through others in the office—another attorney, a paralegal, or another staff member—as may an expert.[12] Any ambiguity with respect to the potential disclosure of attorney-expert communications should be resolved in favor of production.[13]

Federal courts have likewise found that communications between a lawyer and the lawyer's testifying expert are subject to discovery when the record reveals the lawyer may have "commandeered" the expert's function or used the expert as a conduit for his or her own theories.[14] An example would be where an attorney essentially writes an expert draft report him or herself and convinces the expert to sign off. When the record presents such a possibility, the lawyer may not use the attorney work product privilege as a shield against inquiry into the extent to which the lawyer's involvement might have "affected, altered, or corrected" the expert's analysis and conclusions.[15]

D. A Cuyahoga County Trial Court Order

Recently, a Cuyahoga County post-amendment trial court order compelled the production of a draft expert report in the medical malpractice case of *Groves v. Ihsanullah, M.D., et al*.[1] In *Groves*, the plaintiff's attorney provided the plaintiff's expert with a draft report that had been previously authored by another doctor. The report became a part of the expert's file and was referenced (and read from) in the expert's deposition.

A dispute arose as to the discoverability of the report under the new protections afforded under Civ. R. 26(B)(5). The defense then filed a "motion to compel production of relevant materials contained in the file of the plaintiff's expert."

Plaintiff argued that the report was prepared in anticipation of litigation, constituted work product, was a draft of the other doctor's opinion, and contained opinions that could be discovered simply by taking the other doctor's deposition. Therefore, the plaintiff argued, the report was not discoverable pursuant to Rule 26. The defendant countered that the other doctor's report was provided to the plaintiff's expert, was contained in the plaintiff's expert's file, and that, to the extent the plaintiff's expert testified at his deposition concerning the contents of the report, the report was not a draft and contained facts known to the plaintiff's expert that he considered.

The Court conducted an in camera inspection of the document and considered the parties' arguments. In its judgment entry, the Court cited the November 16, 2012 Sixth District decision of *Masters v. Kraft Foods Global, Inc.*,[17] which was an appeal from a September 27, 2011 pre-amendment trial court order. *Masters* makes no reference to Civ. R. 26(B)(5)(c) or (d). Rather, *Masters* held that (1) under Civ. R. 26(B) parties may obtain discovery regarding any relevant matter, including books, documents, and electronically stored information, and (2) Civ. R. 26(B)(5)(b) expanded the scope of discovery to expert opinions relevant to the subject matter. In adopting the position of the *Masters* Court (which had dodged discussion of the newly amended Civ. R. 26(B)(5)(c)&(d)), the Cuyahoga County Court found in favor of the defendant and granted the motion to compel. The plaintiff was ordered to produce the other expert's draft report that was contained within the plaintiff's expert's file.

Although it relies on a potentially questionable Sixth District decision, the *Groves* case demonstrates that a document that is a draft report upon its initial creation can become discoverable if put in another expert's file. If an attorney desires a draft report to remain a non-discoverable draft under Civ. R. 26(B)(5)(c), the attorney must treat the document as a true draft between the attorney and the expert who drafted it only and not provide it to others.

E. Other Practical Considerations

Given the lack of the appellate case law in Ohio under the new rule, the question becomes: what practical steps can attorneys take when communicating with experts to increase the likelihood of receiving a favorable ruling in a dispute concerning attorney-expert communications? First, consider breaking down your attorney-expert communications and organize and label them accordingly. Insist that your expert do the same. I would suggest even labeling the items "Civ. R. 26(B)(5) protected."

Draft reports should be clearly labeled "draft report," "work product," and "privileged." Similar wording should also be placed in the caption of any cover letter, email, or fax cover sheet that is transmitted with the draft report. Do not needlessly allow any basis for your adversary to argue that a draft report is anything but a draft.

Second, in any written attorney-expert communications, state the precise nature of the communication in the "RE:" field. If your communication concerns facts or data that you are providing to the expert, caption the email "identification of facts or data." Likewise, if your communication concerns your assumptions regarding the case, caption the email "identification of attorney assumptions." You may also want to consider having the expert separate his or her bill to reflect time spent preparing a draft report, reviewing facts/data, and reviewing attorney assumptions. You should consider doing the same on your timesheets as well.

One of the reasons to employ this exercise of labeling and captioning is because, upon the filing of a motion to compel, the documents in question are subject to in camera review. In fact, the Eighth District has stated that "it is reversible error when a trial court fails to hold an evidentiary hearing or conduct an in camera review concerning discovery disputes alleging work-product privilege[.]"[18] Having the documents captioned accurately suggests their classification ("draft report," "attorney assumptions," etc.) and will be helpful to the court's analysis.

Another practical question to consider: what to do upon receiving a motion to compel the disclosure of a draft report or protected attorney-expert communication? Keep in mind that the Ohio Supreme Court has indicated that Civ. R. 26(B)(3) provides protections for attorney work product, and Civ. R. 26(B)(5)(c)&(d) are clear that draft reports and attorney-expert communications are afforded the Civ. R. 26(B)(3) protections. [19] Therefore, upon receiving a motion to compel concerning a draft of an expert report or attorney-expert communications that you believe are privileged, the first step will be the mandatory in camera review.[20] Note that an order to produce presumptively privileged documents for in camera review is not a final appealable order.[21] Provide the disputed documents to the court (which were labeled "draft report," "work product," "privileged," etc. upon creation) and any other materials that support your position.

After the in camera review, the court will issue its order, hopefully in your favor. However, an order compelling the production of presumptively privileged material to an opposing party does constitute a final appealable order and will be immediately reviewable by an appellate court.[22] Therefore, if the trial court's order is not favorable, you must consider an immediate appeal at that point, keeping in mind that the trial court's decision will be reviewed de novo.[23]

F. Conclusion

While questions regarding the "good cause" exception to the discoverability of drafts of expert reports and the extent to which attorney-expert communications are protected from disclosure will likely persist into the future, Ohio Civil Rule 26(B)(5) now provides at least some guidance with respect to these topics. It will be important for trial lawyers to keep an eye on the courts in regard to the appellate decisions that will surely be handed down concerning these issues in the near future. In the interim, federal court decisions concerning application of the similar Federal Rule will be the best place to look for guidance. ■

End Notes

1. *See e.g., Mockensturm v. Luxaire, Inc.*, 6th Dist. No. L-83-245, 1985 Ohio App. LEXIS 6452.
2. *Spirit Master Funding, LLC v. Pike Nurseries Acquisition*, LLC, 287 F.R.D. 680, 684 (N.D. Ga. 2012).
3. *State ex rel. Ebbing v. Ricketts*, 133 Ohio St. 3d 339, 342, 2012-Ohio-4699, 978 N.E.2d 188.
4. *Quality Time, Inc. v. West Bend Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 161703 (D. Kan. Nov. 13, 2012).
5. *In re Application of Republic of Ecuador*, 280 F.R.D. 506, 513 (N.D. Cal. 2012).
6. *Sarachek v. Luana Savings Bank (In re Agriprocessors, Inc.)*, 2012 Bankr. LEXIS 3361, 12-13 (Bankr. N.D. Iowa July 20, 2012).
7. *State ex rel. Ebbing*, supra.
8. *Meds. Co. v. Mylan Inc.*, 2013 U.S. Dist. LEXIS 82964 (N.D. Ill. June 13, 2013).
9. *Innovative Sonic, Ltd. v. Research in Motion, Ltd.*, 2013 U.S. Dist. LEXIS 28238 (N.D. Tex. Mar. 1, 2013).
10. *Amco Ins. Co. v. Mark's Custom Signs, Inc.*, 2013 U.S. Dist. LEXIS 53803, 9-10 (D. Kan. Apr. 16, 2013).
11. *Id.*
12. *In re Republic of Ecuador*, 2012 U.S. Dist. LEXIS 157497 (N.D. Fla. Nov. 2, 2012).
13. I*n re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 92237 (S.D.N.Y. June 27, 2013).
14. *Gerke v. Travelers Cas. Ins. Co. of Am.*, 289 F.R.D. 316, 328 (D. Or. 2013).
15. *Id.*
16. Cuyahoga County Case No. CV-12-787437.
17. 6th Dist. No. L-11-1273, 2012-Ohio-5325.
18. *Harvey v. KP Props.*, 8th Dist. No. 97097 2012-Ohio-276, ¶11.
19. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161, 175, 2010-Ohio-4469, 937 N.E.2d 533.
20. *See Harvey*, supra.
21. *Cobb v. Shipman*, 11th Dist. No. 2011-T-0049 2012-Ohio-1676, ¶24.
22. *Cobb*, supra, at ¶35, citing R.C. 2505.02(B)(4).
23. *Harvey*, supra, at ¶7

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Workers' Compensation Update

by Benjamin P. Wiborg

It is well known to those of us who practice in the area of Workers' Compensation that this field of law is in constant flux - the past few months have been no exception. Over the past several months Ohio courts have issued several significant Workers' Compensation decisions, including an $860 Million dollar verdict; a contentious decision on what type of benefits an estate of a deceased injured worker can receive; and a clarification as to what evidence is necessary to show substantial aggravation of a pre-existing condition.

A. $860 Million Dollar Verdict For Ohio Employers.

On March 20, 2013, Cuyahoga County Common Pleas Judge Richard McMonagle ruled that the Bureau of Workers' Compensation ("BWC") owes Ohio employers $860 million after determining that the BWC had overcharged employers.[1]

In 2007, a class action lawsuit was filed by Ohio businesses, including San Allen Inc. (d/b/a Corky and Lenny's) against the BWC.[2] The Plaintiff Class alleged that they had been overcharged as a result of Ohio's group rating system. A "group" is a collection of employers who join together under a single sponsoring organization in order to be viewed by the BWC as one large employer for the purpose of premium calculation. The Plaintiff Class alleged that the problem with the group rating system is that non-group employers were charged excess premiums.

Judge McMonagle found that the BWC had explicitly admitted to overcharging non-group employers. In fact, the Judge found that the former BWC Administrator, Marsha Ryan, had testified to the Ohio Senate Insurance Committee that non-group employers paid a premium. Furthermore, Judge McMonagle stated that the current BWC Chief Actuarial Officer, Christopher Carlson, had estimated that, in 2004 alone, the BWC imposed a "surcharge" to non-group employers in the amount of $329 million. Moreover, the Judge found that as far back as 1991 the BWC knew that the group rating program would result in excess premiums to non-group members.

Additionally, Judge McMonagle ruled that the BWC had violated Ohio Revised Code §§ 4123.29 and 4123.34 by creating a prospective group rating system (as opposed to a retrospective rating system), and by creating a system that was inequitable. ORC § 4123.29 states that "the administrator shall consider an employer group as a single employing entity for purposes of *retrospective* rating." (Emphasis added). The statute does not contain language referencing *prospective* experience rating. Additionally, ORC § 4123.34 mandates that a rating system be equitable.

In the December 28, 2012 Partial Order and Opinion, the Court ruled that "the Defendant unlawfully charged the Plaintiff Class excessive premiums in violation of R.C. §4123.29 and §4123.34, and the Plaintiff Class is thereby

entitled to restitution for those overcharges." However, the Judge ruled that the Plaintiff Class was not entitled to interest on the damages. In the March 20, 2013 Final Order and Opinion, Judge McMonagle awarded the Plaintiffs $859,440,258.79 in restitution.

Both the Plaintiff Class and the BWC appealed Judge McMonagle's ruling.[3] The parties have briefed the matter, and oral arguments are expected to take place in early 2014.

B. Sziraki v. Admr., Bur. Of Workers' Comp.[4]

On September 18, 2013, the Supreme Court of Ohio affirmed the judgment of the Tenth District Court of Appeals, which had denied the estate of Dean Sziraki's request for a writ of mandamus. The writ requested that the Industrial Commission vacate its order for 104 weeks of scheduled loss benefits under ORC § 4123.57(B) and award 850 weeks of benefits for the loss of use of Dean's arms and legs.[5]

Dean Sziraki had been involved in an horrific single car accident on May 14, 1991. Mr. Sziraki suffered numerous significant injuries, including brain and spinal cord injuries that rendered him a quadriplegic and caused him to live the remainder of his life in a near-vegetative state.

Several years later, in 1998, Dean's mother and only next of kin, Marilyn B. Sziraki, applied for and was granted permanent total disability benefits based on the loss of use of Dean's arms and legs, pursuant to ORC § 4123.58(C). The BWC withheld paying permanent total disability benefits because there was no guardian of Dean's estate.

On January 8, 2007, Dean died, having left no surviving spouse or dependents. A probate court named Marilyn the administrator of his estate. The estate requested that the 850 weeks of accrued benefits be paid based on the scheduled loss of use for Dean's arms and legs pursuant to ORC § 4123.57(B). The Industrial Commission granted only 104 weeks of benefits, reasoning that ORC § 4123.52(A) limits retroactive payment to two years.

The estate argued that, given the incompetent nature of the injured worker, the BWC had the affirmative duty to pay the scheduled loss of use benefits even without a formal application. The Supreme Court disagreed, finding that a formal application was necessary even though the language of ORC § 4123.57(B) contemplates an application but does not mandate one.

The decision contains a strong dissent from three of the Justices. The dissent argues that the BWC had an affirmative duty to act because the BWC has the authority to grant the scheduled loss and that the BWC knew Dean was incompetent. The dissent went so far as to call the BWC's actions a "dereliction of duty."

C. *Gardi v. Lakewood School Dist. Bd. of Edn.*[6]

On August 8, 2013, the Court of Appeals for the Eighth Appellate District provided clarification as to what evidence is necessary to prove substantial aggravation of a pre-existing condition in a workers' compensation claim. The plaintiff, Gary Gardi, slipped and fell and injured his left knee, low back, and left hip while in the course and scope of employment for Board of Education of the Lakewood City School District ("Lakewood").

Mr. Gardi filed a motion to amend his claim to include the diagnosis of substantial aggravation of pre-existing osteoarthritis of his left knee. The motion was denied at the Industrial Commission level; the matter was then appealed to the Cuyahoga County Court of Common Pleas.

The trial court granted Lakewood's motion for summary judgment finding that Ohio Revised Code § 4123.01(C)(4) requires that the condition a claimant asserts to have been substantially aggravated must be medically documented prior to the workplace injury. Mr. Gardi appealed the trial court's judgment.

The Eighth District reversed and remanded, holding that ORC § 4123.01(C)(4) does not require a pre-existing condition to have been medically documented prior to the workplace injury. Prior to the *Gardi* decision, there was confusion as to what medical evidence was necessary to prove substantial aggravation as a result of a misinterpretation of *Smith v. Lucas Cty.*[7]

In *Smith*, the court held "that the claimant's application failed because she had not presented objective evidence of her symptoms preceding the injury and, therefore, could not establish substantial aggravation, as required by statute."[8] This language led many workers compensation practitioners to read *Smith* as requiring pre and post injury diagnostic tests, despite the *Smith* court noting that substantial aggravation would not necessarily require before and after objective findings.

The *Gardi* court found that what *Smith* actually said was that the medical evidence, which included an MRI, used in support of Smith's request for substantial aggravation, only showed that the condition existed, but did not establish that the condition had been substantially aggravated.

The *Gardi* court interpreted that *Smith* "merely stands for the proposition that to recover under 4123.01(C)(4), there must be some objective evidence of substantial aggravation of a pre-existing condition."[9]

Accordingly, the *Gardi* court makes it very clear that ORC § 4123.01(C)(4) does not require a pre-existing condition to be medically documented prior to the workplace injury. The decision in *Gardi* makes sense considering that many people have degenerative conditions that are asymptomatic - and one does not get diagnostic tests on asymptomatic body parts. ■

End Notes

1. A bench trial was conducted on August 20, 2012, and a ruling on liability was made on December 28, 2012. On March 14, 2013, a hearing was conducted to determine the amount of restitution. The Final Order and Opinion, dated March 20, 2013, determined the amount of restitution that was owed to the Plaintiff Class.
2. *San Allen Inc., et. al vs. Bureau of Workers' Compensation, et. al.*, Cuyahoga County C.P. No. 07- 644950.
3. *San Allen Inc., et al. vs. Bureau of Workers' Compensation, et al.*, 8th Dist. No. CA-13-099786.
4. *State ex rel. Estate of Sziraki v. Admr., Bur. Of Workers' Comp.*, Slip Opinion No. 2013-Ohio-4007.
5. The estate wanted 850 weeks of benefits paid pursuant to the BWC fee schedule for the loss of use of his arms (225 weeks each) and his legs (200 weeks each).
6. *Gardi v. Lakewood School Dist. Bd. of Edn.*, 8th Dist. No. 99414, 2013-Ohio-3634.
7. *Smith v. Lucas Cty.*, 6th Dist. Lucas No. L-10-1200, 2011-Ohio-1548.
8. *Gardi*, at ¶ 23.
9. *Gardi*, at ¶ 23.

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Prejudgment Attachment and the Uniform Fraudulent Transfer Act

by Brenda M. Johnson

Every once in a while we encounter a defendant whose insurance coverage may be limited, but who may possibly have sufficient assets to satisfy a judgment. In those cases, you may need to make sure that the defendant doesn't dissipate or otherwise dispose of those assets before a judgment is obtained. In other cases, you may find that the defendant *had* such assets, but recently disposed of them. This article is meant to be a quick guide to two statutory tools by which you can ensure those assets will be available once judgment is rendered in your client's favor – namely, prejudgment attachment and the Uniform Fraudulent Transfer Act.

A. Prejudgment Attachment

1. Obtaining an Order of Attachment.

Prejudgment attachment is a statutory procedure, codified at Chapter 2715 of the Revised Code, by which a defendant's assets (other than personal earnings) can be taken into legal custody when there is a risk that a defendant will dissipate those assets before a judgment can be entered.[1] The grounds for attachment are set forth in R.C. § 2715.01, which provides that attachment may be had when:

- The defendant is not a resident of Ohio;
- The defendant has "absconded with the intent to defraud creditors;"
- The defendant has left the county of residence to avoid service, or is otherwise avoiding service of process;
- The defendant is about to remove property from the jurisdiction of the court "with the intent to defraud creditors;"
- The defendant is about to convert property to money in order to place it out of the reach of creditors;
- The defendant has property or property rights that the defendant conceals;
- The defendant has "assigned, removed, disposed of, or is about to dispose of," property "with the intent to defraud creditors;"
- The defendant "fraudulently or criminally" contracted the debt or incurred the obligation that is the subject of suit; or
- When the claim is for work or labor.[2]

Attachment can be sought upon commencement of the underlying action, or at any time afterward, by filing a written motion with the court in which your case is pending.[3] The motion must be supported by an affidavit from either the plaintiff, his or her agent, or the attorney, setting forth the following:

- The nature and amount of the plaintiff's claim;
- Facts to support at least one of the grounds for attachment in R.C. § 2715.01;
- A description of the property sought to be attached, and its approximate value if that is known;
- The location of the property, to the best of the plaintiff's knowledge;
- "To the best of plaintiff's knowledge, after reasonable investigation, the use to which the defendant has put the property," and that the property is not exempt from attachment; and

- If the property is in the possession of a third person, the identity of that person or entity.[4]

Few opinions address the level of specificity with which these elements must be attested; however, *Kalmbach Feeds, Inc. v. Lust*[5] a 1987 opinion from the Third District and *Johnson & Hardin Co. v. DME Ltd.*,[6] a 1995 opinion from the Twelfth District, both quote extensively from affidavits deemed by those courts to satisfy statutory requirements, and thus present useful models to work from.

The trial court is required to set the matter for hearing within twenty days of filing of the motion of attachment.[7] It is incumbent on the movant to ensure that the clerk of courts is instructed to issue a notice of the motion and hearing, in a form prescribed by statute, designed to inform the defendant of its rights.[8] Among other things, the notice is designed to inform the defendant that the scheduled hearing, known as a "20 day hearing," will go forward only upon the defendant's request, and that the request must be made within five business days of receipt of the motion.[9]

If the defendant does not make a timely request for a 20 day hearing, and "the court finds, on the basis of the affidavit, that there is probable cause to support the motion,"[10] the trial court may issue an immediate order of attachment *ex parte*.[11] If, however, prior to the scheduled hearing date or the issuance of an attachment order, the defendant provides a reasonable justification for not having requested a 20 day hearing within the prescribed time, the trial court can grant a continuance of the hearing, but the continuance cannot extend beyond five business days from the original hearing date without the plaintiff's consent.[12]

In the event a 20 day hearing is conducted, its scope is "limited to a consideration of whether there is probable cause to support the motion and whether any of the property of the defendant is exempt from attachment."[13] "Probable cause to support the motion," in turn, is defined to mean "that it is likely that a plaintiff who files a motion for attachment . . . will obtain judgment against the defendant against whom the motion was filed that entitles the plaintiff to a money judgment that can be satisfied out of the property that is the subject of the motion.[14] Moreover, though the statute is silent in this regard, courts have not required a full evidentiary hearing in order to establish that attachment is proper.[15]

Chapter 2715 also provides for the issuing of an order of attachment without notice or hearing when the plaintiff can show, and the court determines, that the plaintiff has shown probable cause to support the motion, and that the plaintiff will suffer irreparable injury if the order is delayed.[16] For purposes of such an order, "irreparable injury" consists only of "a present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court," or a risk that "the value of the property will be impaired substantially if the issuance of an order of attachment is delayed."[17]

Upon the issuance of such an order, it is again incumbent on the plaintiff to file a praecipe requiring the clerk of courts to issue a notice to the defendant in a statutorily-prescribed form informing the defendant that (among other things) the defendant has five business days in which to request a hearing, which, while identical in scope to a 20 day hearing, must be conducted within three business days of the court's receipt of the request.[18] And while an order of attachment obtained after notice and an opportunity for hearing may be served on the defendant in the same manner as other papers filed after the original complaint, an order issued without notice or hearing must be served in the same manner as an original complaint.[19]

2. Procedure after an order is obtained.

An order of attachment is not effective until the plaintiff files a bond with the court, in favor of the defendant, in approximately twice the value of the property subject to attachment under the order, or its cash equivalent, though an indigent plaintiff may seek waiver or reduction of this requirement.[20] The defendant, in turn, can discharge the attachment by filing similar security in favor of the plaintiff.[21]

An order of attachment can be directed to a levying officer in any county, and must include (a) the names of the parties and the court in which the action is brought; (2) a statement that the debtor may recover the property by filing a proper bond; and (c) a commandment that the levying officer attach the non-exempt property of the debtor located in the levying officer's county.[22]

A defendant subject to an attachment order may move to have the attachment discharged at any time before a judgment has been rendered.[23] An order granting or denying a motion for attachment is a final order for purposes of appeal, since attachment is defined as a "provisional remedy" under R.C. § 2505.02(A)(3), and an order granting or denying attachment would clearly meet the requirements of R.C. § 2505.02(B)(4), since it would determine the issue with respect to attachment, and an appeal following final judgment would not provide a meaningful or effective remedy.[24] Moreover, an order discharging or refusing to discharge an order of attachment is subject to immediate appeal under Chapter 2715.[25]

3. Dissolving the Order

As noted above, an attachment order can be discharged by a defendant through posting an appropriate bond, and it may be discharged by subsequent order of the court. A judgment in favor

of the defendant, as well as a dismissal of the underlying action, automatically discharges the attachment as well.[26]

B. Uniform Fraudulent Transfer Act

When facing the possibility of a money judgment, tortfeasors will sometimes try to protect or hide their assets by transferring them to someone, perhaps a relative or an entity under the defendant's control, or by disposing of them for less than market value. When that happens, it may still be possible to reach those assets under the Uniform Fraudulent Transfer Act (UFTA), which has been codified by the General Assembly at Chapter 1336 of the Ohio Revised Code.

1. What Constitutes Fraudulent Transfer.

The UFTA provides a number of possible remedies when it can be shown that a defendant has transferred assets or incurred obligations either "with actual intent to hinder, delay, or defraud any creditor of the debtor," as that term is used in R.C. § 1336.04(A), or when the debtor did not receive a reasonably equivalent value for the asset or obligation and either of the following applies:

- "the debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or
- "the debtor incurred, or believed or reasonably should have believed he would incur, debts beyond his ability to pay as they became due."[27]

Section 1336.04(B) sets forth a series of factors, commonly known as "badges of fraud," which a court may consider in determining whether the debtor acted with "actual intent to hinder, delay, or defraud any creditor of the debtor" for purposes of R.C. § 1336.04(A). Though this list is not exhaustive, these include

- whether the transfer was to an "insider," as that term is defined in R.C. § 1336.01(G);[28]
- whether the debtor maintained possession or control;
- whether the debtor tried to conceal the transfer;
- whether the debtor had been sued or threatened with suit before the transfer occurred;
- whether the transfer was of substantially all of the debtor's assets;
- whether the debtor absconded;
- whether the debtor removed or concealed assets;
- whether the debtor received reasonably equivalent value for the assets;
- whether the debtor was insolvent or became insolvent shortly after the transfer;
- whether the transfer occurred shortly before or after the debtor incurred substantial debt; and
- whether the debtor transferred essential business assets to a lienholder who then transferred the assets to an insider of the debtor.[29]

If the "actual fraud" standard set forth in R.C. § 1336.04(A) can be met, or the transfer is for less than reasonable value as described above, the transfer is fraudulent as to your client regardless of whether your client's claim arose before or after the transfer was made.[30] If the transfer occurs after your client's claim arose, however, your client can also recover under R.C. § 1336.05 if it can be shown that the transfer was either (a) for less than equivalent value and the tortfeasor was either already insolvent or rendered insolvent by the transfer; or (b) the transfer was made to an insider to satisfy an antecedent debt, the tortfeasor was insolvent, and the insider had reason to know of the tortfeasor's insolvency.[31]

2. What Constitutes Fraudulent Transfer.

In the event that assets have been transferred, or are likely to be transferred, under the circumstances set forth above, your client is entitled bring an action for a number of different remedies, depending on the circumstances. These are set forth in R.C. § 1336.07, and include

- Avoidance of the transfer;
- Attachment under Chapter 2715, as described in the first part of this article;
- Injunctive relief against any further transfers or disposition of assets;
- The appointment of a receiver; and
- If a judgment has been obtained against the tortfeasor, your client may levy execution on the asset.[32]

The initial burden of going forward is on the creditor; however, if the indicia of fraud are established, the burden then shifts to the tortfeasor to rebut the presumption.[33] Moreover, it is important to note that the UFTA provides certain protections to good faith transferees even when the tortfeasor actually intended to hinder or defraud creditors.

If the transfer was for reasonably equivalent value, for instance, it is not considered fraudulent regardless of the tortfeasor's intent. [34] Nor is it considered fraudulent if it involves the termination of a lease upon the tortfeasor's default; the enforcement of a valid security interest; or, if it involves a transfer under R.C. § 1336.05, if it involved new value provided by an insider, occurred in the ordinary course of the tortfeasor's business, or if it was made pursuant to a good faith effort to rehabilitate the debtor.[35] In addition, if the transfer was for less than reasonable value, a good faith transferee is entitled to any of the following: a lien on or right to retain an interest in the asset in question; an enforcement of any obligation incurred;

or a reduction in liability on the judgment.[36]

Finally, actions under UFTA are subject to either a one year or a four year statute of limitations, depending on the nature of the transfer involved. If the transfer was made with actual intent to defraud as contemplated under R.C. § 1336.04(A)(1), an action must be brought within four years after the transfer or within one year of discovery, whichever is later.[37] If it is brought to set aside transfers to insiders under R.C. § 1336.04(A)(2), the action must be brought within four years after the transfer.[38] If it is brought to set aside a transfer made for less than reasonably equivalent value under R.C. § 1336.05(B), however, the action must be brought within one year of the transfer.[39]

Conclusion

This article is not intended to serve as a comprehensive survey of the procedures involved in pursuing either prejudgment attachment or remedies under the Uniform Fraudulent Transfer Act. Such resources already exist, and I would be remiss if I did not mention that Anderson's Ohio Civil Practice With Forms, along with Anderson's Ohio Creditors Rights, contain much of what you would need from a practical perspective to pursue either remedy if necessary. This article is meant to serve as a reminder that these tools are available to us. Though we may not often find it necessary to use these tools, we should not forget they are resources that we can use to our clients' benefit under the appropriate circumstances. ■

End Notes

1. To satisfy due process requirements, prejudgment attachment statutes must, at a minimum,
   - Require the party seeking attachment to provide an affidavit "alleging personal knowledge of specific facts forming a basis for prejudgment seizure;"
   - Require a judicial officer to make a determination as to the sufficiency of the allegations in the affidavit;
   - Require the plaintiff to furnish a bond or other security to compensate the defendant in the event of wrongful seizure;
   - Provide for an immediate right of hearing in which the plaintiff must prove the attachment is warranted; and
   - Provide for the dissolution of the attachment upon the posting of a bond by the defendant.

   Peebles v. Clement, 63 Ohio St. 2d 314, 321, 408 N.E.2d 689 (1980). *Peebles* struck down a prior version of Chapter 2715 that permitted initial prejudgment attachment orders to be issued without judicial supervision. *See Peebles* at 321-22 (describing previous procedure). The current version of Chapter 2715 was designed to rectify this defect.
2. R.C. § 2715.01(A)(2)-(11). Attachment may also be had against property of foreign corporations, but not if the corporation has complied with the requirements of Chapter 1703 of the Revised Code. *See* R.C. § 2715.01(A)(1); R.C. 1703.20.
3. R.C. § 2715.03.
4. *Id.*
5. 36 Ohio App. 3d 186, 521 N.E.2d 1126 (3d Dist. Crawford Cty. 1987)
6. 106 Ohio App. 3d 377, 666 N.E.2d 276 (12th Dist. Warren Cty. 1995)
7. R.C. § 2715.043.
8. R.C. § 2715.041.
9. *See* R.C. § 2715.041 (notice requirements); R.C. § 2715.04 (right to request hearing).
10. R.C. § 2715.042(A)(4).
11. R.C. § 2715.04.
12. R.C. § 2715.042(B).
13. R.C. § 2715.043(B).
14. R.C. § 2715.011(A).
15. *Johnson & Hardin Co. v. DME Ltd.*, 106 Ohio App.3d 377, 381, 666 N.E.2d 276 (12th Dist. Warren Cty.1995) (court complied with statute when it decided issue on oral argument and affidavits).
16. R.C. § 2715.045.
17. R.C. § 2715.045(B).
18. R.C. § 2715.045(C)(1).
19. R.C. § 2715.045(C)(1); R.C. § 2715.05(C). Section 2715.041(C) requires the motion, affidavit, notice,and request for hearing form to be served no less than seven days prior to the scheduled date for a 20 day hearing.
20. R.C. § 2715.044.
21. R.C. § 2715.26.
22. R.C. § 2715.05(A).
23. R.C. § 2715.44.
24. R.C. § 2505.02.
25. R.C. § 2715.46.
26. R.C. § 2715.36; *see also Wellborn v. K-Beck Furniture Mart*, 54 Ohio App. 2d 65, 375 N.E.2d 61 (10th Dist. Franklin Cty. 1977)
27. R.C. 1336.04.
28. As defined in R.C. § 1336.01(G), if the debtor is a natural person, "insider" includes (a) relative of the debtor or of a general partner of the debtor; (b) a partnership in which the debtor is a general partner; (c) a general partner of the debtor; and (d) a corporation of which the debtor is a director, officer or person in control. *See* R.C. § 1336.01(G)(1). If the debtor is a corporation, "insider" also includes directors, officers, persons in control, and relatives of those persons. *See* R.G. § 1336.01(G)(2). If the debtor is a partnership, "insider" includes general partners of the debtor, their relatives, any partnership in which the debtor is a general partner, and any general partner of such a partnership. *See* R.C. § 1336.04(G)(3). "Insider" also includes a managing agent of the debtor. *See* R.G. § 1336.01(G)(5). Finally, any person or entity who meets the definition of an "affiliate," as set forth in R.C. § 1336.01(A), is also an "insider," as are those persons who would be "insiders" to the affiliate if the affiliate were the debtor. *See* R.C. § 1336.01(G)(4). "Affiliates" include, with certain exceptions:
   - any person who directly or indirectly owns, controls or holds the power to vote, twenty percent or more of the debtor's outstanding voting securities;
   - any corporation of which twenty percent or more of the outstanding voting securities are held directly or indirectly by the debtor or by a person who holds, directly or indirectly, twenty percent of the outstanding voting securities of the debtor:
   - a person whose business is operated by the debtor under a lease or other agreement, or by a person whose assets are controlled by the debtor; and
   - a person who operates the business of the debtor under a lease or other agreement, or who controls the assets of the debtor.

   R.C. § 1336.01(A)
29. R.C. § 1336.04(B).
30. R.C. § 1336.04(A).
31. R.C. § 1336.05.
32. R.C. § 1336.07.
33. *See, e.g., Baker & Sons Equip. Co. v. Gso Equip. Leasing*, 87 Ohio App. 3d 644, 622 N.E.2d 1113 (10th Dist. Franklin County 1993). Among other things, a demonstration that the tortfeasor received reasonably equivalent value for the asset involved will rebut a presumption of fraud. *See id.* at 650-51; *see also* R.C. § 1336.03 (defining reasonably equivalent value).
34. R.C. § 1336.08(A).
35. R.C. § 1336.08(D).
36. R.C. § 1336.08(C).
37. R.C. § 1336.09(A).
38. R.C. § 1336.09(B).
39. R.C. § 1336.09(C).

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Pointers From The Bench:

An Interview With

Judge Cassandra Collier-Williams

by Allen Tittle

The Honorable Cassandra Collier-Williams is just completing her first year on the bench. She won election to the bench in November of 2012, and her term began on January 14, 2013. Before being elected, Judge Collier-Williams operated her own private practice, the Law Offices of Cassandra Collier-Williams, which was a general practice law firm and included a large number of personal injury cases.

We asked Judge Collier-Williams for her view of the Plaintiffs' bar and some advice based on her own observations relating to personal injury trials.

Judge Collier-Williams

The overarching theme in my conversation with Judge Collier-Williams is that she expects attorneys to be prepared from the beginning of the case, including at the initial case management conference or initial pretrial. Judge Collier-Williams views part of her job as ensuring that the attorneys are doing their job. This, of course, is difficult when attorneys are not prepared.

Judge Collier-Williams believes plaintiffs' attorneys should not overstate the case, especially in opening. Instead, they should give succinct arguments in opening and closing and be honest in evaluating the weaknesses of their case. She notes that when the attorney fails to do this, the jury may penalize the plaintiff. For example, a case recently tried in her courtroom was an admitted liability, rear end automobile accident in which the defense offered $25,000.00 prior to trial. The jury, however, returned a $0.00 verdict. When asked why they awarded this amount, the jury explained they simply did not believe the plaintiff was as injured as he claimed.

Judge Collier-Williams also believes that a good plaintiff's attorney should not squander his or her closing statement. While not evidence, a good closing should line up the evidence, tie it back to the opening, and reiterate the party's story and themes. Judge Collier-Williams is a little unusual in that she charges the jury before closing arguments, which she believes gives the jury a better context for the arguments during closing.

Voir Dire is also a little different in her courtroom. Judge Collier-Williams allows the attorneys to question the entire array of jurors at the same time rather than limiting them to the first eight in the box. Once the questioning is completed, rather than excusing jurors one at a time, the jurors are sent back into the deliberation room, and the attorneys carry out their challenges outside the presence of the jury. When the jury is selected, all jurors are called back into the courtroom and informed who will be members of the jury panel. Judge Collier-Williams does this for two reasons: 1) this prevents resentment stemming from a single juror being excused prior to, or instead of, another; and 2) efficiency.

When asked about the large number of recent defense verdicts, Judge Collier-Williams opined that much of the blame is attributable to the economy. In her experience, jurors are tighter with the money they award, as $10,000.00 seems like a lot to someone who recently lost his or her job. She believes jurors become resentful when they think the Plaintiff or Plaintiff's lawyer is trying to overvalue or overstate the case.

Judge Collier-Williams is a big proponent of Alternative Dispute Resolution ("ADR"), including mediation and arbitration. Additionally, when in trial, she will conduct trial until 5:00 p.m. – there is no breaking early. Attorneys trying cases in her courtroom should be prepared to have testimony through that time even if their "last" witness finishes at 3:00 p.m.

On a personal note, Judge Collier-Williams grew up in Springfield, Ohio and wanted to be an attorney since she was a child. She credits her mother with instilling in her a passion for the law. She truly loves the practice of law and being a judge. Her favorite books include *My Soul to Keep* and *The Living Blood* by Tananarive Due. Additionally, as a former member of the plaintiffs' bar, she looks forward to seeing our cases in her courtroom. ■

In Memoriam: John D. "Jack" Liber

The legal community lost one of its shining stars on July 23, 2013. John D. "Jack" Liber had a sterling legal career that spanned 50 years. Spangenberg, Shibley & Liber was privileged to have Jack at their firm for the past 40 of those years. In each and every endeavor he pursued, Jack achieved preeminent status. A formidable courtroom adversary, Jack also was an impeccable gentleman. He was a man of elegance and grace, kind and considerate to everyone. Jack was a great mentor to younger lawyers, and a wise and patient counselor.

Deeply committed to serving the legal community, Jack was a Past President of the Greater Cleveland Bar Association, the Cleveland Bar Foundation, and the Ohio Academy of Trial Lawyers (now OAJ). He was a Fellow of the American College of Trial Lawyers and was a Fellow and Past President of the International Society of Barristers, an honorary legal organization.

Jack's extraordinary skills as a trial attorney are legendary. In 2013, he was named as Cleveland's Lawyer of the Year in the field of Arbitration by *Best Lawyers in America*. He was honored by his peers and colleagues by his selection in every issue of *Best Lawyers in America* since 1989, as well as being named in *Ohio Super Lawyers* both as a trial lawyer and a mediator. In 1985, Jack was one of a select group of trial lawyers nationwide named by *Town and Country* magazine as the "Best Lawyers in the United States."

Jack was also the father of former CATA president, John R. Liber, II. Our thoughts and prayers are with Jack's wife, Nancy, and their children John, Craig, and Shannon, their eight grandchildren, and the entire Liber family.

Beyond The Practice: CATA Members In The Community

by Susan E. Petersen

"In necessary things, unity; in doubtful things, liberty; in all things, charity."
-- Richard Baxter, English author & Puritan (1615 - 1691)

It has been a pleasure to serve as a contributing writer for the last couple years sharing the wonderful acts of volunteerism, charity, and kindness of my fellow CATA members being done locally, nationally, and even internationally. While it is always a bit of a job to gather the stories, collect photos, and merge all of it into a hopefully cohesive and interesting article, I have always truly enjoyed the task. It provides me with this wonderful source of inspiration and serves as a personal reminder to do more and do better. In telling these stories, it has always been my hope that the social altruism that I write about will prove contagious. And so when I began reading the responses to my email request for "good deeds around town," I couldn't help but feel this amazing sense of satisfaction when I read the following from one of our esteemed members--

Dear Susan,

Today, I drove out of our office parking lot for lunch. At the end of the driveway, I looked to my left and saw a woman sitting on the curb behind a parked car. This is not all that unusual because we have a food bank next door and countless people are milling around our Office on Madison Avenue in Lakewood. As I was pulling out, she appeared to be saying something to me. At first I thought she was just asking for money; I pulled away about three feet but then stopped. I realized I did not even listen to what she was trying to say and maybe she needed something. I actually thought about your good deed email. I backed up and asked her what she wanted. She said she just fell and could I help her up? I parked the car, walked out and helped her to her feet with both hands. I then opened the door for her and made sure she got in safely with the passing traffic. The woman was so thankful that it made my day. Lesson: stop, look, listen and help if you can. We are so darn busy, sometimes we can't see the forest through the trees. Believe me, when you help and it's needed, no better reward exists.

Kenneth J. Knabe
Brown and Szaller Co. LPA.
Attorney-Partner

This wonderful email epitomized for me why I volunteer my time and represents an essential element in the mission of our organization – service to others. It is our intent, here at CATA, to encourage our readers to do good and join in the reaping of the great reward that comes with acts of kindness and charity. Here are just a few of the inspiring stories that we must share:

The partners at the Painesville law firm of **Dworken & Bernstein Co., L.P.A.** take 'community service' seriously. Through their brainchild, **"Ohio Lawyers Give Back,"** it has distributed over $25 million dollars to charities from its class action settlements. Its charity has benefited local causes of all types: homelessness, drug addiction, hunger, education, housing, fair employment practices, consumer protection, disease prevention and treatment. The list is truly staggering.

Ohio Lawyers Give Back

In settling class actions, the firm has used the ancient cy pres doctrine and insists on payment in full of all settlement money. By using the powers under Federal Rule 23, and equivalent state law rules, final approval orders can include provisions requiring the payment to charity of all or a designated part of the unclaimed funds. This approach is especially just when the case involves a defendant who has wrongfully collected monies from the class. Disgorgement rather than reverter to the company advances the public policy of the class action device. Through use of the cy pres doctrine, Dworken & Bernstein has included minimum payment requirements in its class settlements.

Each year, over $500 million dollars in class action settlement monies go unclaimed. Over $12 billion dollars are presently unclaimed from securities suits. Ohio Lawyers Give Back was formed to invite class action law firms to join a positive trend of

designating a reasonable portion of those monies to charity. It is done through the ancient doctrine of Cy pres which means "as completely as possible."

As part of Ohio Lawyers Give Back, the firm offers their help, free of charge, to anyone who wants guidance on how to obtain and administer a cy pres settlement. It wants the community of lawyers to know that if cy pres were used more broadly in class actions, hundreds of millions of dollars more would be available each year to help charities, non-profits, and the communities where we live. To learn more, visit the website www.ohiolawyersgiveback.org.

It is in that same spirit of giving back that the Northeast Ohio Golf Association's "Return to Golf" Charities & Foundation Program was founded. CATA Member **David W. Goldense** of **David W. Goldense Co. LPA** served as President of the Northeast Ohio Golf Association this year to include volunteering his time to assist its "Return to Golf" Program. Since 2002, the program has helped physically disabled adults, children and veterans restore independence and improve their overall enjoyment of life using the game of golf as recreational therapy. The program is offered free of charge. It uses fitness-oriented physical therapists and PGA professionals to help participants improve balance, coordination, muscle strength and, most importantly, self-esteem. Program participants represent a broad range of physical disabilities, including stroke survivors, amputees, visual impairment, traumatic brain injuries, cerebral palsy, arthritis and post traumatic stress disorder. Sessions are held weekly throughout the year at the North Olmsted Golf Course, a 9 hole executive course owned by NOGA and the site of indoor and outdoor golf instruction, training and play led by a wonderful PGA professional (Trevor Hazen), Cleveland Clinic Foundation physical therapists, and clinician, Jeff Ciolek. **Goldense** reports, "[t]hey're an unbelievable team." To learn more, visit www.ReturnToGolf.org.

Bobby and Kristen Rutter, with daughters Giuliana and Lillian: "FARE Walk for Food Allergy."

Member **Bobby Rutter** of the **Rutter & Russin** law firm in Cleveland and his wife Kristen not only helped to sponsor and chair the "FARE Walk for Food Allergy," but took to the streets to raise just over $31,000 for the organization. Food Allergy Research & Education (FARE) works on behalf of the 15 million Americans who have food allergies, including all those at risk for life-threatening anaphylaxis. This potentially deadly disease affects 1 in every 13 children in the United States – or roughly 2 in every classroom. Formed in 2012 as the result of a merger between the Food Allergy & Anaphylaxis Network and the Food Allergy Initiative, FARE's mission is to ensure the safety and inclusion of all those with food allergies while relentlessly seeking a cure. This was its first walk in Cleveland and it brought out nearly 400 walkers who joined the **Rutter & Russin** team to help say FAREwell to food allergies.

Finally, the contagiousness of giving was one of the many lessons taught as part of the annual **Landskroner Foundation for Children** Law School Closing Argument Competition this October. The competition, open to 2nd and 3rd year law students from all Ohio law schools, involves students giving a 15 minute closing argument in a hypothetical civil case for the plaintiff, a catastrophically injured child. The Foundation was started in 1998 by CATA Member, **Jack Landskroner,** who is a principal of **Landskroner·Grieco·Merriman, LLC** law firm. It proved to be yet another wonderful experience for these law students to gain some practical experience, being judged by a team of federal and local judges, experienced trial attorneys, media personalities, judicial officials, and child advocates. The top three students received cash scholarship awards.

Jack Landskroner and winners of the Law School Closing Arguments Competition

And with that. . . just one question remains -- what good deed will you do for your community? I can't wait to hear about it. ■

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Facebook Discovery: A Cautionary Tale

by Kathleen J. St. John

Not long ago, a colleague circulated an email with a link to an article headlined: *Lawyer Agrees To Five-Year Suspension For Advising Client to Clean Up His Facebook Photos*.[1] Since social media discovery has been a hot topic in our office, this email caught all of our attention. It confirms what we already knew, but, as a cautionary tale, it is well worth repeating.

I. The *Lester* Case: What You *Shouldn't* Do.

The case, *Lester v. Allied Concrete Co.*,[2] was a Virginia wrongful death/personal injury action that arose from horrific circumstances. The defendant's loaded concrete truck went left-of-center, and tipped over, landing on a vehicle occupied by a young married couple. The wife died, but the husband survived to bring a wrongful death and personal injury action. During litigation, the defense came across a post-accident photograph on the husband's Facebook site showing the husband, clad in an "I ❤ hot moms" T-shirt, hanging out with friends. The defense then served a discovery request, asking for the contents of the husband's Facebook account, and attaching the photograph.[3]

The plaintiff's attorney's reaction was to go into cover-up mode. He had his paralegal tell the plaintiff to "'clean up' his Facebook page because 'we don't want blowups of this stuff at trial.'"[4] The paralegal obliged, emailing the client about the "I ❤ hot moms" photo, and advising him there were "'some other pics that should be deleted.'" The paralegal then reiterated in a second email that the plaintiff should "'clean up' his Facebook page because 'we do NOT want blow ups of other pics at trial; so please, please clean up your facebook and myspace.'"[5]

Then, in response to the request for production seeking "screen print copies on the day this request is signed of all pages from [the plaintiff's] Facebook page," the attorney had his client deactivate his Facebook page, then crafted the response: "I do not have a Facebook page on the date this is signed, April 15, 2009."[6]

Later, after the defendant filed a motion to compel, the plaintiff's attorney filed a supplemental discovery response with screen-prints of the client's reactivated account. In the interim, however, the client had deleted sixteen photos in response to the attorney's earlier directive. The deletion of these photographs was subsequently discovered by an expert hired by the defense, and the photographs were later produced and used at trial in an effort to destroy the husband's credibility and minimize his damages. The trial court also gave the jury an adverse inference instruction due to the deletion of the photos[7] despite their subsequent production and use at trial.

Interestingly, none of this seemed to matter to the jury, as they awarded the husband $6,227,000 in the wrongful death action, and $2,350,000 on his personal injury claim. They also awarded $1,000,000 each to the decedent's parents. Perhaps the plaintiff's misconduct paled in comparison to the accident's horror or to the defendant's denial of liability despite its driver's plea of guilty to manslaughter in connection with the accident.

But neither the plaintiff/husband nor his lawyer escaped the consequences of their actions.

The trial court ruled that, when served with the defendant's discovery request, the plaintiff's attorney had a duty to produce the documents and electronically-stored information that were in the possession, custody, or control of the plaintiff, absent timely assertion of a well-founded objection.[8] The attorney's failure to do so, coupled with his serving of a dishonest response that the client did "not have a Facebook page on the date this is signed," violated the governing Virginia Supreme Court rules.[9] For these violations, the Court imposed upon the attorney a monetary sanction of $542,000.[10] The client's dishonesty also resulted in a monetary sanction of $180,000.[11] Together, the sanctions represented the defendant's "attorney's fees and costs in addressing and defending against the misconduct."[12]

The trial court also referred the attorney's misconduct to the Virginia bar. In addition to his dishonesty in connection with the discovery request, the lawyer had willfully failed to produce, in response to a court-ordered *in camera* inspection, the "clean up your Facebook page" email. After trial, the attorney did produce the email, but falsely represented its omission was due to a paralegal's mistake, when in fact the lawyer had purposely withheld it for fear that its production would result in a continuance of the trial.[13]

In the ensuing disciplinary proceeding, the attorney agreed to a five-year suspension.[14]

II. The Take-Away: What You *Should* Do.

Although *Lester* represents an extreme example of how not to respond to social media discovery requests, our clients' social media sites remain a source of consternation. Assuming the client has a social media site – as most do – you want to avoid the potential harm that could be caused by the client's posting of ill-advised photos or commentary. And yet, at the same time, you do not want to fall into the trap that caught Lester's attorney.

Although there are no simple solutions, here are some suggestions.

First, in the very early stages of the case – indeed, in the initial contact with the clients – the clients should be told to restrict their use of social media for the duration of the lawsuit. They should never post anything about the facts of their case, or anything that would even arguably reflect poorly on their damages claim.

Second, assuming they are willing, the client may deactivate his or her social media site ***before*** any discovery request is made. This will prevent anyone from accessing the client's information (public or private) unless and until the account is reactivated. ***But in no event should the clients ever delete their accounts.***[15]

Third, when and if a discovery request is made, respond appropriately. Although the case law developing nationwide has typically held social media accounts not to be privileged from discovery,[16] a party is not automatically entitled to gain access to his opponent's private social media accounts.[17] The party seeking discovery has a burden of establishing a good faith belief that there is relevant evidence in the opponent's social media account[18] – and that burden is not satisfied without some showing of relevant evidence on the public portions of the plaintiff's social media pages.[19] You should, therefore, hold the defendant to its burden on this issue – through proper objections or a motion for protective order.

Fourth, if asked to produce the client's social media account information, you should not have to produce passwords or log-in information unless ordered by the court. Limit production to screen-shots or request *in camera* inspections.

And finally, think for a moment about the *Lester* jury. Given the devastating accident and culpability of the defendant's driver, the bereaved husband's wearing of an "I ♥ hot moms" T-shirt was not the disaster counsel imagined it would be. That the attorney sacrificed his probity and his law license for naught is perhaps the greatest lesson of this cautionary tale. ■

End Notes

1. http://www.abajournal.com/news/article/lawyer_agrees_to_fiveyear_suspension_for_advising_client_to_clean_up_his_f/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email (last visited December 9, 2013).
2. *Lester v. Allied Concrete Co.*, 83 Va. Cir. 308 (2011), affirmed in part, but reversed as to the remittitur in *Allied Concrete Co. v. Lester*, 285 Va. 295, 736 S.E.2d 699 (2013).
3. One of the defendant's attorneys "gained access to Lester's Facebook page via a Facebook message on January 9, 2009." 83 Va. Cir. 308, at 313. Oddly, the court did not appear troubled by this contacting of a party by opposing counsel.
4. *Id.* at 314.
5. *Id.*
6. *Id.*
7. *Allied Concrete Co. v. Lester*, 285 Va. 295, at 303-304.
8. *Lester v. Allied Concrete Co.*, 83 Va. Cir. 308, at 321.
9. *Id.*, citing *Va. Sup. Ct. R. 4:1(g)* and *Rule 3.4(a) of the Virginia Rules of Professional Conduct.*
10. *Allied Concrete Co. v. Lester*, 285 Va. 295, at 303.
11. *Id.*
12. *Id.*
13. *Lester v. Allied Concrete Co.*, 83 Va. Cir. 308, at 322, citing violations of *Rule 3.4(a) of the Virginia Rules of Professional Conduct; Va. Code §8.01-271-1.; Va. Sup. Ct. R. 4.1(g);* and *Va. Sup. Ct. R. 4:12.*
14. http://www.abajournal.com/news/article/lawyer_agrees_to_five year_suspension_for_advising_client_to_clean_up_his_f/?utm_source=maestro&utmmedium=email&utm_campaign=weekly_email (last visited December 9, 2013).

15. Facebook provides the following explanations about deleting and deactivating accounts:

> "Deleting and deactivating your account.
>
> 1. If you want to stop using your account, you can either deactivate or delete it.
>
> Deactivate
>
> Deactivating your account puts your account on hold. Other users will no longer see your timeline, but we do not delete any of your information. Deactivating an account is the same as you telling us not to delete any information because you might want to reactivate your account at some point in the future. You can deactivate your account on your account settings page.
>
> Your friends will still see you listed in their list of friends while your account is deactivated.
>
> Deletion
>
> When you delete an account, it is permanently deleted from Facebook. It typically takes about one month to delete an account, but some information may remain in backup copies and logs for up to 90 days. You should only delete your account if you are sure you never want to reactivate it. You can delete your account here."

16. *See, e.g., Patterson v. Turner Construction Co.*, 88 A.D.3d 617, 618, 931 N.Y.S.2d 311, 312 (N.Y.App.Div. 2011) ("The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access[.]"), citing Romano v. Steelcase, Inc., 30 Misc.3d 426, 433-34, 907 N.Y.S.2d 650 (2010). See generally, Christopher Mellino and Allen Tittle, The Perils of Facebook, CATA News, Spring 2012, at 22.

17. *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D.387, 388 (E.D. Mich. 2012) (the party seeking social media discovery must make "a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.").

18. *Arcq v. Fields,* No. 2008-2430 (Pa. C.P. Franklin Dec. 8, 2011) (the party seeking discovery has a "burden of showing that it has a good faith reason to believe that relevant information exists on any of the [opposing party's] social media websites.").

19. *See, e.g., Fawcett v. Altieri*, 38 Misc.3d 1022, 2013 N.Y.Misc. LEXIS 82 (Jan. 11, 2013) at *9-11 ("In order to obtain a closed or private social media account by a court order for the subscriber to execute an authorization for their release, the adversary must show with some credible facts that the subscriber has posted information or photographs that are relevant to the facts of the case at hand. The courts should not accommodate blanket searches for any kind of information or photos to impeach a person's character, which may be embarrassing, but are irrelevant to the facts of the case at hand."); and see, *Davids v. Novartis Pharmaceuticals Corp.*, U.S. Dist. Ct., E.D.N.Y. No. CV06-0431 (ADS)(WDW) (Feb. 24, 2012) (where plaintiff contended she suffered from effects of osteonecrosis of the jaw, the fact that her profile picture showed her smiling was insufficient to contradict her claim of suffering, or to warrant a further search into her account).

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Technology Tips for Attorneys

by William B. Eadie and Andrew J. Thompson

iPad Privacy Shield; CardMuch vs. Business Card Reader

Interested in getting links to these products, or commenting with your own experience? These Tech Tips for Attorneys are available on CATA's Blog at www.clevelandtrialattorneys.org/blog.

iPad/Tablet Privacy Shields

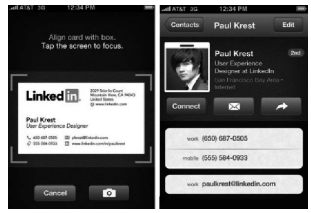
iPads and other tablets are past the hot-new-thing stage, and have become a part of many lawyers' daily practice, especially when travelling. If you use your iPad for depositions, when travelling, or in negotiations, keeping eyes off your tablet might be an important issue.

3M recently launched Easy-On Privacy Filters, removable privacy shields (retailing presently on Amazon for a little under $50). The filters are removable (and include a carrying folder) for times when you need group collaboration (including the kids watching a movie on the road). 3M claims the product uses bubble-free technology, and is not prone to attract dust, making removal and reapplication easier than stay-on shields.

Don't need to remove the shield, or don't have an iPad? There are cheaper products available, such as ZAGG invisibleSHIELD Privacy Screens, which have iPad and non-iPad tablet compatible options.

Card Munch vs. Business Card Reader

Smartphones can now help manage—or eliminate—dealing with business cards by taking a photo of the card with an app.



CardMunch (www.cardmunch.com/), a free LinkedIn app for the iPhone, sends the picture to LinkedIn for processing. You take a picture with the app and a business card is converted to a contact automatically in your phone. LinkedIn goes the next step and shows you the LinkedIn profile information and connections you have in common—allowing you to make the connection instantly. For iPhone users who network with LinkedIn, this takes all the extra steps out of converting an in-person card-exchange to a contact. You can even hand them the card back.

Business Card Reader (www.abbyy.com/products/bcr/) reads the card data to convert it into a contact. BCR works on multiple platforms—desktop and mobile—to "readily transfer contact data such as names, phone numbers, e-mail addresses and other key information found on business cards directly to a contact manager, a database or mobile address book, or save and share this information in electronic form." Unlike CardMuch, BCR is not free, with current app prices at $4.99 for the basic, and $89.99 for pro. ■

Recent Ohio Supreme Court Decisions

by Kathleen J. St. John

Note: *The following Ohio Supreme Court decisions were released since the publication of the last issue of the CATA News. To varying degrees, these decisions affect our practices.*

1.) Marusa v. Erie Ins. Co., 136 Ohio St.3d 118, 2013-Ohio-1957 (May 21, 2013).

Holding: Insured was entitled to recover under her UM policy despite the fact that the police officer who caused the collision was immune from liability.

The plaintiff was injured in a motor vehicle collision caused by a negligent police officer. The plaintiff's insurer, Erie Insurance Company, denied the plaintiff UM coverage on the ground that the plaintiff was not "legally entitled to recover" from the tortfeasor because he and his employer had political subdivision immunity. The trial court granted summary judgment to the insurer, but the Ohio Supreme Court reversed.

The policy in this case defined "uninsured motor vehicle" to include a motor vehicle whose owner or operator "has immunity under the Ohio Political Subdivision Tort Liability Law." The insurer, however, denied coverage based on the holding in *Snyder v. Am. Fam. Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, that "a policy provision limiting the insured's recovery of uninsured or underinsured motorist benefits to amounts which the insured is 'legally entitled to recover' is enforceable, and its effect will be to preclude recovery when the tortfeasor is immune under R.C. Chapter 2744." *Marusa* at ¶10, quoting *Snyder* at ¶29.

The Court distinguished *Snyder* on the ground that, in *Snyder*, the plaintiff was relying on the statutory definition of "uninsured motor vehicle," whereas in this case the policy defined that term, and did so favorably to the insured. The Court found that, here, "[t]o give effect to the policy definition of 'uninsured motor vehicle,' it is necessary to consider it an exception to the limiting phrase 'legally entitled to recover.'" *Id.* at ¶13.

2.) Leopold v. Ace Doran Hauling & Rigging Co., 136 Ohio St.3d 257, 2013-Ohio-3107 (July 18, 2013).

Holding: Medical records of defendant/cross-claimant produced in prior action arising out of same motor vehicle accident were not protected by physician-patient privilege even though the physical condition of the defendant/cross-claimant was not at issue in the instant action. *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343 distinguished.

Multi-vehicle accident involving two cars and a tractor trailer. The first car was driven by Mr. Leopold; the second by Ms. Laurence; and the third by a driver for Ace Doran Hauling & Rigging Co.

Initially, a lawsuit was filed by Ms. Laurence against Ace Doran and its driver. In that action, the defendants obtained Ms. Laurence's emergency room records, which revealed that she told the emergency room personnel that she had hit a car in front of her, then was hit from behind by a semi and pushed into a concrete wall. Following production of these records, Laurence voluntarily dismissed her case.

Subsequently, Mr. Leopold and his wife filed an action against Ace Doran and its driver. The plaintiffs amended their complaint to add Ms. Laurence who cross-claimed against the other defendants for contribution and indemnification. During this action, Laurence moved for a protective order to preclude the other defendants from using the medical records she produced in her lawsuit. The trial court denied the motion; the court of appeals affirmed; and the Supreme Court – in a 4-3 decision – affirmed.

Previously, in *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, the court held that "when the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case."

Here, however, the Court concluded that *Hageman* was inapplicable. Since Laurence filed a claim for contribution and indemnification, the waiver of privilege in R.C. 2317.02(B)(1)(a)(iii) applied. The Court further found that the limitation contained in R.C. 2317.02(B)(3)(a) applied – *i.e.*, that Laurence's medical records are "related causally or historically to physical or mental injuries that are relevant to issues in the... action" -- even though, in this action, Laurence was not seeking to recover for her own physical injuries.

Justice Lanzinger, dissenting, would apply *Hageman* to these facts, as "although Laurence filed a cross-claim in this case, the cross-claim did not place Laurence's medical condition at issue." *Id.* at ¶20. Justices Pfeiffer and O'Neill joined in this dissent.

3.) Stammco L.L.C. v. United Telephone Company of Ohio, 136 Ohio St.3d 231, 2013-Ohio-3019 (July 16, 2013).

Holding: "At the certification stage in a class-action lawsuit, a trial court must undertake a rigorous analysis, which may include probing the underlying merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ. R. 23. (*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), and *Amgen v. Connecticut Retirement Plans &*

Trust Funds, 568 U.S. __, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013), followed.)" *Stammco*, at the syllabus.

This was a class action against Sprint for the practice of placing unauthorized charges by third parties on customers' telephone bills, otherwise known as "cramming." The trial court originally certified the class, but, in a prior appeal, the Ohio Supreme Court held that the class was not readily identifiable, and remanded to the trial court to redefine the class. After the class was redefined, the trial court decertified it for several reasons, including two based on the merits of the claim. The Sixth District Court of Appeals reversed, finding that "'two of the three reasons the trial court articulated for denying the class are improper considerations of the merits and the third reason is inapplicable as a matter of law[.]'" 136 Ohio St.3d 231, at ¶14 (quoting 2011-Ohio-6503, at ¶50).

The Ohio Supreme Court accepted the appeal to address a single proposition of law: "*Wal-Mart v. Dukes* rejects *Ojalvo's* interpretation of *Eisen*: A trial court does not abuse its discretion by evaluating the merits of the plaintiffs' claims when denying class certification." *Id*. at ¶69 (Pfeiffer, J., dissenting). As to this issue, the Ohio Supreme Court disagreed with the defendant's assertion that *Ojalvo v. Ohio State Univ. Bd. of Trustees*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984) is inconsistent with recent cases from the United States Supreme Court holding that, "at the class certification stage, trial courts may probe the underlying merits of an action, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Fed.R.Civ.P. 23." *Stammco*, at ¶40. The Ohio Supreme Court agreed, moreover, with the Sixth District Court of Appeals that the trial court in the instant case "did err in basing its rejection of plaintiffs' amended class definition on the determination that they would ultimately lose on the merits." *Id*. at ¶51.

The Court, however, proceeded to analyze whether the amended class definition was properly certifiable, and concluded it was not. The Court found that the class, as now defined, was "too broad" such that it would include persons who had proper third-party charges on their bills. *Id*. at ¶56. The Court noted that all other class action lawsuits alleging cramming have rejected class certification on the ground that they require too many individualized determinations. *Id*. at ¶57. The Court also rejected the plaintiffs' proposal of creating a database to identify unauthorized charges from third-party providers on the ground that any such database might reveal what charges were made but not whether they were properly authorized.

Justice Pfeiffer, dissenting, argued that once the majority had determined that the trial court improperly ruled on the merits of the case, the Court's analysis should have ended. Justice O'Neill concurred in this dissent.

4.) Vacha v. N. Ridgeville, 136 Ohio St.3d 199, 2013-Ohio-3020 (July 17, 2013).

Holding: A political subdivision may be sued for employer intentional tort under the exception to immunity set forth in R.C. 2744.09(B). Whether that exception applies in a particular case depends upon "whether 'there is a causal connection or a causal relationship between the claims raised by the employee and the employment relationship.'" *Vacha* at ¶19, quoting *Sampson v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 418, 2012-Ohio-570, at paragraph two of the syllabus.

Female employee at municipally-owned Wastewater Treatment Plant was raped by a male co-worker. She sued the city for, among other things, employer intentional tort pursuant to R.C. 2745.01. The city moved for summary judgment based on political subdivision immunity. The trial court denied the motion, and the court of appeals affirmed as to the employer intentional tort claim. The Ohio Supreme Court affirmed.

Under R.C. 2744.09(B), in a civil action against a political subdivision by its employee, the political subdivision is not immune from liability "relative to any matter that arises out of the employment relationship between the employee and the political subdivision." The critical inquiry is whether the action arises out of the employment relationship which, in turn, depends on whether there is a causal connection or a causal relationship between the employment relationship and the claims raised by the employee. This issue may present a question of fact; and, when it does, summary judgment may not be granted on the immunity issue. Here, since neither the trial court nor the court of appeals considered whether the evidence established a genuine issue of material fact on the causal connection/relationship issue, the Supreme Court "decline[d] to make that determination in the first instance." *Id*. at ¶24. The Court found, however, that the court of appeals was correct in determining that the city "did not establish that it is entitled to political-subdivision immunity on Vacha's employer-intentional-tort claim as a matter of law." *Id*. at ¶26.

5.) Longbottom v. Mercy Hospital Clermont, Slip Opinion No. 2013-Ohio-4068 (Sept. 24, 2013).

Holding: The June 2, 2004 amendment to R.C. 1343.03(C) that precludes the award of prejudgment interest on future damages applies retroactively to causes of action accruing before, but commenced on or after, June 2, 2004.

This medical malpractice action arose out of the defendants' treatment of a 9 year old child for a head injury in 2002. His parents originally filed the lawsuit in 2003, but voluntarily

dismissed it pursuant to Civ. R. 41(A). They re-filed the action in 2008, and the case proceeded to trial, resulting in a jury verdict for the plaintiffs for more than $2.4 million, of which more than $1.6 million represented future damages. Following set-off of a prior settlement amount, the trial court awarded prejudgment interest on the entire judgment from the date the cause of action accrued until the date the first action was dismissed; and from the date the action was re-filed until the date the judgment was paid.

The court of appeals affirmed the award of prejudgment interest, but held that the trial court erred in failing to grant prejudgment interest during the period after the first action was dismissed and before the case was re-filed. The Ohio Supreme Court accepted the appeal to consider whether the version of R.C. 1343.03(C), as amended effective June 2, 2004, could be applied retroactively to claims accruing before June 2, 2004. The Court answered the certified question in the affirmative. This meant that the 2004 statutory amendments that, among other things, preclude the award of prejudgment interest on future damages must apply to the plaintiffs' case even though the plaintiffs' cause of action accrued prior to the statutory amendment.

The majority found this retroactive application was not unconstitutional as the amendments to R.C. 1343.03(C) did not eliminate the substantive right to prejudgment interest but merely affected how prejudgment interest was calculated and, thus, only "modifie[d] the remedy available." *Id*. at ¶26. Justice Pfeiffer disagreed, stating: "R.C. 1343.03(C)(2) eliminates the preexisting substantive right to interest on future damages.**** A statute that takes away a substantive right is not remedial." *Id*. at ¶31. Justice O'Neill joined in this dissent.

6.) <u>Riscatti v. Prime Properties Ltd. Partnership</u>, Slip Opinion No. 2013-Ohio-4530 (Oct. 15, 2013).

Holding: The denial of a political subdivision's dispositive motion asserting a statute-of-limitations defense pursuant to R.C. 2744.04 is not a final, appealable order, and thus is not subject to an interlocutory appeal.

A group of 100 current or former residents or owners of homes on State Road in Parma sued a number of defendants, including Cuyahoga County, for damages caused by the continual flow of gasoline from a nearby gas station into the sanitary sewer main. The County filed a motion for judgment on the pleadings on the ground that the actions had not been filed within the two year statute of limitations set forth in R.C. 2744.04(A). The trial court denied the motion and the Eighth District Court of Appeals dismissed the County's interlocutory appeal on the ground that it lacked jurisdiction to consider the statute-of-limitations defense due to the lack of a final appealable order.

The Ohio Supreme Court, in a unanimous opinion, affirmed. Although R.C. 2744.02(C) provides for an immediate appeal from orders denying a political subdivision the benefit of a immunity, an order denying the political subdivision's dispositive motion based on a statute-of-limitations defense does not involve an immunity issue and does not become immediately appealable just because the defendant is a political subdivision.

7.) <u>Pauley v. Circleville</u>, Slip Opinion No. 2013-Ohio-4541 (Oct. 16, 2013).

Holding: Property owners are entitled to recreational user immunity under R.C. 1533.181 even when they have created hazards that do not further the recreational value of the premises.

An 18 year old boy was sledding with friends in a city owned park. In the park, there were two 15 feet high mounds of dirt and debris dumped there by the city. While sledding down one of these hills, the plaintiff hit a hidden railroad tie and was rendered a quadriplegic. The trial court granted summary judgment to the city based on recreational user immunity pursuant to R.C. 1533.18 and 1533.181, and both the Fourth District Court of Appeals and the Ohio Supreme Court affirmed.

The plaintiff argued that "[r]ecreational user immunity [should] not extend to man-made hazards upon real property that do not further or maintain its recreational value." *Id*. at ¶1. This argument was based, in part, on *Miller v. Dayton*, 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989), where, in considering whether a man-made improvement changed the essential character of the premises, the Court looked to whether the "man-made structures [were] consistent with the purpose envisioned by the legislature in its grant of immunity." *Pauley*, at ¶42 (O'Neill, J., dissenting), quoting *Miller* at 114-115. If man-made alterations were not consistent with the recreational purposes, the plaintiff argued, they should not be afforded the statutory protection.

The majority disagreed, finding that the statutory language did not warrant such an exception, and that, under the statute, if the premises were held open for recreational purposes, the premises owner simply did not owe a duty to recreational users.

Justice O'Neill, dissenting, noted that the "tie that crippled this child was part of an overall scheme of disposal of huge mounds of debris that the city had incredibly decided to place in the middle of a recreational park! Cover it with a light dressing of snow, and the perfect killing field was created." *Id*. at ¶43. Justice O'Neill would hold that "when the owner of a property that *enjoys the immunity granted by the people of Ohio* for recreational purposes makes a conscious decision to use the property for other purposes, the immunity ceases."

Id. (emphasis *sic*). Justice Pfeiffer concurred in this dissent, but also found the immunity provisions in R.C. 1533.18 and 1533.181 to be "overbroad and [to] provide unreasonable and, with respect to governmental entities, unconstitutional protection to premises owners." *Id*. at ¶40.

8.) Ries v. Ohio State Univ. Med. Ctr., Slip Opinion No. 2013-Ohio-4545 (Oct. 17, 2013).

Holding: A faculty member of a state medical school who is also employed by the school's nonprofit medical-practice corporation is immune from personal liability when treating a patient outside the presence of a medical student or resident.

The defendant physician was both a faculty member of the Ohio State University College of Medicine and an employee of a private, nonprofit corporation known as Ohio State University Physicians, Inc. ("OSUP"). The Ohio State University Board of Trustees had organized OSUP "as a tax-exempt medical practice plan corporation which was created to advance the purposes of the medical education program and related research and clinical service activities of the Ohio State University College of Medicine and Public Health." *Id*. at ¶5. Defendant, as a faculty member, was required to be a member of OSUP, with which he had a separate contract. The contract permitted OSUP or its designee to bill and collect fees for all faculty services, including clinical services in the conduct of the university's mission.

The Department of Surgery at OSU assigned the defendant to staff the colorectal surgery clinic at University Hospital East. The plaintiff's decedent presented at the clinic and was treated by the defendant outside the presence of any medical student or resident. The decedent died four days later, allegedly due to an undiagnosed cerebral hemorrhage. The administrator of decedent's estate filed medical malpractice actions in the Court of Claims and in the Franklin County Common Pleas Court, the latter of which was stayed pending the Court of Claims' determination as to the physician's immunity. The Court of Claims found the physician to have been acting within the scope of his state employment while treating the decedent, and thus to be immune. The Tenth District Court of Appeals affirmed, as did the Ohio Supreme Court.

The immunity determination under R.C. 9.86 requires two inquiries: (1) whether the individual was a state employee; and (2) if so, whether he/she was acting within the scope of his/her state employment when the cause of action arose. Here, there was no dispute that the physician was a state employee (as well as an employee of a private entity), so the issue came down to whether he was acting as a state employee when treating the decedent. Past cases focused on whether the physician was teaching medical students and residents at the time of the malpractice. Now, however, the Court found the presence of medical students and residents was not essential. Instead, the Court focused on the terms of the physician's contract with the state university, and held that "[a] state employee acts within the scope of employment if the employee's actions advance the interests of the state as defined by the duties of the state employee." *Id*. at ¶30.

Justice O'Neill, with whom Justice Pfeiffer joined in dissent, disagreed with the majority's adoption of "a standard that allows the university to decide and declare by contract that all of the physician's duties, no matter how far they may be removed from educating students, are entitled to state-sanctioned immunity." *Id*. at ¶33. Justice O'Neill believes that this expansion of state employee immunity improperly shifts liability from private insurers to the taxpayers.

9.) Moretz v. Muakkassa, Slip Opinion No. 2013-Ohio-4656 (Oct. 24, 2013).

Holding(s): (1) A medical illustration from a learned treatise is subject to Evid. R. 803(18) and may not be admitted into evidence over a party's objection; (2) the trial court erred in refusing to submit an interrogatory to the jury identifying their reasons for finding the defendant negligent; and (3) "R.C. 2317.421 obviates the necessity of expert testimony for the admission of evidence of write-offs, reflected on medical bills and statements, as prima facie evidence of the reasonable value of medical services."

This case involved surgery to remove what had been diagnosed by the defendant, Dr. Muakkassa, as an anterior sarcral meningocele. Dr. Muakkassa, a neurosurgeon, had referred the case to Dr. Williams, a general surgeon, to remove the cyst through laproscopic surgery. Dr. Muakkassa was present for the surgery but did not "scrub in" or perform any part of the procedure himself. As Dr. Williams was unable to remove the cyst laproscopically, he surgically opened the plaintiff's abdomen and removed the cyst. In so doing, the plaintiff's nerves were damaged, resulting in permanent loss of bladder, bowel, and sexual function.

The case went to trial against Dr. Muakkassa alleging that he was negligent in failing to physically assist in the removal of the cyst; failing to use, or recommend that Dr. Williams use, magnification or stimulation to identify and protect the nerves; and failing to recommend or use the posterior approach to access the cyst. The jury returned a verdict for the plaintiff, on which judgment was entered in the amount of $953,858.08. On cross-appeal by both parties (the plaintiff on a set-off issue), the Ninth District Court of Appeals affirmed. The Supreme Court accepted jurisdiction over four of the defendant's propositions of law, and reversed as to three of them.

The first issue was whether the trial court erred in admitting the late filed videotaped deposition of the plaintiff's expert. The deposition had been taken the week before trial and, because the transcript was not ready earlier, the plaintiff had not filed it one day before trial as required by Civ. R. 32(A). The trial court found that the deposition was admissible because defendant was on notice that plaintiff would be using it and sustained no prejudice from the technical noncompliance with the rule. The Ohio Supreme Court felt that the trial court should have been more specific in its finding of "good cause," but concluded that if there was "any error in failing to expressly determine whether good cause existed for delay, on this record, it was harmless." *Id*. at ¶51.

The second issue was whether the trial court committed reversible error in admitting a medical illustration into evidence so that the jury had it during deliberations. The Court found that the medical illustration was hearsay as it made a statement that the nerves coming from the spinal cord were wrapped around a sac; and, under Evid. R. 803(18), it could be used at trial but could not be admitted into evidence. The Court found the admission of this evidence was harmful error because the case hinged on whether there were nerves in the cyst, and the illustration bolstered the plaintiff's argument that there were and undermined the defendant's position that the cyst had no nerves because it was a neurenteric cyst.

The third issue was whether the trial court committed reversible error in refusing to give the jury an interrogatory asking: "State the respect in which you find Kamel Muakkassa was negligent." *Id*. at ¶76. The trial court found the interrogatory inapplicable because all allegations of negligence against Dr. Muakkassa boiled down to his failure to "scrub in" and assist in the procedure. The Supreme Court disagreed and found that, because there were different allegations of negligence, and the content and form of the proposed interrogatory were proper, Civ. R. 49 imposed a mandatory duty upon the trial court to submit it to the jury.

The fourth issue was whether the trial court abused its discretion in prohibiting the defendant from attempting to show that the reasonable value of medical services was equal to the amount paid, after write-offs, unless he laid a foundation through expert testimony. The Court held that, under R.C. 2317.421, such evidence was admissible without expert testimony because the phrase "any relevant portion thereof" in the statute "broadens the meaning of the words 'bill or statement' and reflects that the General Assembly intended the statute to encompass more than just charges." *Id*. at ¶92.

Justice Pfeiffer, with whom Justice O'Neill joined in dissent, opined that, to the extent there were errors in this trial, they did not warrant reversal of the jury's verdict. As for the narrative interrogatory, Justice Pfeiffer felt that seeking "open-ended prose answers from juries could be a gold mine for disgruntled defendants." *Id*. at ¶110. He suggested that a "better practice would have been for the defense to submit a yes/no question as to each issue that the plaintiffs contend was negligence" which could "test[] the verdict without requiring the jury to write an essay on a topic with which it is generally unfamiliar." *Id*.

10.) Cullen v. State Farm Mut. Auto. Ins. Co., Slip Opinion No. 2013-Ohio-4733 (Nov. 5, 2013).

Holding: The trial court abused its discretion in certifying a class of State Farm policyholders who made "Glass Only" physical damage comprehensive coverage claims on or after January 1, 1991 for cracked, chipped, or damaged windshields and received a chemical filler or patch repair, or payment thereof, instead of a higher amount for actual cash value or replacement cost of the windshield.

The plaintiff sought class certification for claims alleging that State Farm failed to disclose all benefits available to policyholders who made claims for damaged windshields. The trial court certified the class, and the Eighth District Court of Appeals affirmed, but the Ohio Supreme Court reversed. The Court rejected certification under Civ. R. 23(B)(2) because the declaratory relief sought by plaintiff merely laid a foundation for a subsequent determination of damages.

The Court rejected certification under Civ. R. 23(B)(3) because common questions of law or fact did not predominate. The Court's analysis delved deeply into the merits of the plaintiff's claim – finding that the fact that a plaintiff makes a "colorable claim" of liability common to all class members is insufficient to satisfy Civ. R. 23(B). The Court held that the "rigorous analysis" the trial court must conduct when determining whether to certify a class, "requires the court to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard, that the requirement is met." *Id*. at paragraph one of the syllabus.

The Court also "clarified" the holding of *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984), by stating: "In resolving a factual dispute when a requirement of Civ. R. 23 for class certification and a merit issue overlap, a trial court is permitted to examine the underlying merits of the claim as part of its rigorous analysis, but only to the extent necessary to determine whether the requirement of the rule is satisfied." *Id*. at paragraph two of the syllabus.

Justice O'Neill, with whom Justice Pfeiffer joined in dissent, opined that the majority's holding did not "clarify" *Ojalvo* "so much as it has overruled it." *Id*. at ¶57. ■

Recent Ohio Appellate Decisions

Note: The following is a sampling of recent appellate decisions relevant to the practices of CATA members.

1.) Burton v. Unifirst Corp., 8th Dist. No. 98876, 2013-Ohio-2330 (June 6, 2013).

Disposition: Verdict for the defendant reversed.

Topics: Jury foreman lied during voir dire. Trial court abused its discretion in refusing to grant new trial.

Age discrimination case. During voir dire, Juror No. 1, a medical doctor, stated that in 33 years of practice he had never been sued for malpractice. Following a 6-2 defense verdict, the plaintiff discovered that Juror No. 1, who had become the jury foreman, had been a defendant in three lawsuits, all of which had been voluntarily dismissed. The plaintiff filed a motion for new trial on the ground that Juror No. 1 committed perjury. The trial court denied the motion, stating:

> "The Court, Plaintiff and Defendant all asked Juror No. 1 numerous questions directed to disclose bias. Juror No. 1 repeatedly affirmed his ability to view the facts as presented and to follow the law as instructed by the Court. There is no indication that his inclusion as one of many defendants in other litigation, none of which resulted in a judgment against him, created any bias against plaintiffs in general or plaintiffs in age discrimination cases in specific." *Id*. at ¶6.

Reversing, the court of appeals found that the trial court abused its discretion in refusing to grant a new trial. There was an obvious conflict between the juror's assertion that he could be unbiased and his failure to reveal that he had been sued several times, particularly in light of his affirmative misrepresentation. Additionally, having done consulting work in legal malpractice cases, the juror was familiar with the litigation process and "therefore, understood the court's question regarding his involvement in 'any litigation whatsoever.'" *Id*. at ¶11.

The court concluded that, had the juror revealed the fact that he had been sued, he could have been challenged "for cause" pursuant to R.C. 2313.17(D), which challenge could have altered the outcome of the trial.

2.) Kelly v. Drosos, 8th Dist. No. 98974, 2013-Ohio-2535 (June 20, 2013).

Disposition: Summary judgment for defendant reversed.

Topics: Fall on public sidewalk; adjoining property owner's liability for negligently permitting dangerous condition to exist.

The owner of a Lakewood bar permitted the plaintiff to enter after closing to use the restroom. Upon exiting, the plaintiff tripped and fell on the public sidewalk outside of the bar where brick pavers were missing or protruding in excess of two inches. As a result of his fall, the plaintiff dislocated and fractured his elbows.

In opposing a motion for summary judgment filed by the bar owner, the plaintiff presented an affidavit from the property manager of a nearby parcel who averred that the defective condition had existed for at least four years. The plaintiff also presented evidence that the location was dimly lit, and that he was unaware of the defect as he exited the bar.

The trial court granted summary judgment to the defendant on the ground that there was no liability under Section 903.10 of the Lakewood Codified Ordinances because the city did not cite the defendant until after the plaintiff's fall, the defect was two inches, and there was no evidence that the defendant affirmatively created or negligently maintained the defective sidewalk.

The court of appeals reversed. Generally, the owner of property abutting a public sidewalk is not liable for injuries sustained by pedestrians using the sidewalks, as that is customarily the duty of the municipalities. There are three exceptions to this rule: "(1) where a statute or ordinance imposes a specific duty to keep the adjoining sidewalk in good repair; (2) where the landowner affirmatively creates or negligently maintains the defective or dangerous condition; or (3) where the owner negligently permits the defective condition to exist for a private use or benefit." *Id*. at ¶11.

The court stated that Section 903.10 of the Lakewood Codified Ordinances expressly obligates the landowner to maintain the sidewalk in front of his property, but that this duty only exists if the municipality provides the owner with prior notice of its violation. Here, as no prior notice was provided, the first exception to the general rule of no liability was inapplicable.

The court found, however, that the plaintiff's evidence was sufficient to create a fact question as to the second or third exceptions. The neighboring property manager averred that the defective condition had been in existence for at least four years, that the "pavers were often out of place and very uneven," and that "the sidewalk had a large rise in elevation in excess of two inches" during that four year period. *Id*. at ¶16.

3.) Hoyle v. DTJ Enterprises, Inc., 9th Dist. Nos. 26579, 26587, 2013-Ohio-3223 (July 24, 2013).

Disposition: Reversing grant of summary judgment to employer's insurance company on question of coverage for employer intentional tort.

Topics: Where employer's insurance policy provides coverage for some employer intentional torts, but not for those done with "deliberate intent," and the employee's personal injury action is based on removal of a guard under R.C. 2745.01(C), the policy will provide coverage if the employee prevails on his claim.

Mr. Hoyle, injured in a fall from scaffolding, sued his employers, DTJ and Cavanaugh. Cincinnati Insurance, the insurer for DTJ and Cavanaugh, intervened to seek a declaratory judgment that

there was no coverage under the policy for this claim. The trial court granted summary judgment to Cincinnati Insurance, but the Court of Appeals reversed.

The policy included an endorsement for "Employers Liability Coverage" which provided coverage for "intentional acts" by the employer that resulted in injury to the employee if: (a) An insured knows of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (b) an insured knows that if an "employee" is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the "employee" will be a substantial certainty; and (c) an insured under such circumstances and with such knowledge, does act to require the "employee" to continue to perform the dangerous task." *Id*. at ¶8. This endorsement, however, excluded from coverage "liability for acts committed by or at the direction of an insured with the *deliberate intent to injure*." *Id*.

Since Mr. Hoyle's claim was based on his allegation that his employers deliberately removed a safety guard, and since, under R.C. 2745.01(C), removal a safety guard gives rise to a presumption of intent to injure, the issue for the court was whether, if Mr. Hoyle succeeded in proving his claim, the employer/insured would be deemed to have acted with "deliberate intent to injure" as contemplated by the exclusion.

The court found that it would not, stating: "Although the deliberate intent to injure may be presumed *for purposes of the statute* where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to 'deliberate intent' *for purposes of the insurance exclusion*." *Id*. at ¶19. The court thus reversed the summary judgment granted to the insurance company, and remanded for further proceedings.

4.) Darno v. Davidson, 9th Dist. No. 26760, 2013-Ohio-4262 (Sept. 30, 2013).

Disposition: Summary judgment for insurer on a UIM claim reversed.

Topics: Insurer's evidence was insufficient to establish whether insured was "occupying" the vehicle for purposes of the "not a covered auto" exclusion in his UIM policy.

The plaintiff's Jeep became disabled, so he and his friend began pushing it off the road. Apparently perceiving a vehicle heading toward them, the friend yelled "Run!" and the plaintiff ran, but the vehicle struck him nonetheless. In an action brought by the plaintiff against his insurance company, Westfield, for UIM coverage, Westfield served the plaintiff with requests for admissions and used the responses in support of a motion for summary judgment. The trial court granted the motion, but the court of appeals reversed.

The plaintiff's Jeep was not a "covered auto" under his UIM policy, and the policy excluded coverage for bodily injury sustained by "[a]n individual Named Insured while 'occupying'*** any vehicle owned by that Named Insured that is not a covered 'auto' for *** Underinsured Motor Coverage." The issue, therefore, was whether he was "occupying" the vehicle at the time of the accident.

The court recognized that the issue of what constitutes "occupying" a vehicle typically arises in a different context – *i.e.*, when coverage *requires* the insured to have been "occupying" the auto. The cases interpreting "occupying" thus tend to define it liberally. Here, however, the evidence was not sufficient to determine whether the plaintiff was occupying the Jeep at the time of the accident, as the requests for admissions did not establish *where* he was with respect to his vehicle, *how much time* had passed since he finished pushing his car, or *how long or far he had run* by the time the accident occurred. Thus, Westfield had not met its initial burden of establishing that it was entitled to judgment as a matter of law, and summary judgment should have been denied.

5.) DeVito v. Grange Mut. Cas. Co., 8th Dist. No. 99393, 2013-Ohio-3435 (Aug. 8, 2013).

Disposition: Reversing trial court's decision denying stay of discovery with respect to bad faith claim that had been bifurcated from breach of contract claim.

Topics: Bad faith denial of insurance coverage; bifurcation; stay of discovery.

Homeowner made a claim for rafter and roof damage to her home which her insurance company, Grange, denied. Thereafter, homeowner sued Grange and her insurance agent for breach of contract and bad faith denial of coverage. Upon the defendants' motion, the trial court bifurcated the bad faith claim from the contract claim, but denied the defendants' motion to stay discovery on the bad faith claim. An interlocutory appeal was taken as to the denial of the motion to stay discovery, and the court of appeals reversed.

The court of appeals found that, since the breach of contract and bad faith claims were interrelated, allowing discovery to proceed on the bad-faith claim would be prejudicial to Grange's defense on the other claims. The court added that "once the underlying claims are decided,... discovery may proceed on the bad-faith claim in as rapid a manner as the trial court deems appropriate" and that "an in camera review of the claims file [may be] appropriate to determine which materials in the claims file are relevant to the bad-faith claim." *Id*. at ¶16.

6.) Anderson v. Schmidt, 8th Dist. No. 99084, 2013-Ohio-3524 (Aug. 15, 2013).

Disposition: On appeal by the plaintiffs who prevailed at trial but to whom the jury assigned 50% comparative fault, the court reversed the

judgment and remanded for new trial.

Topics: Wrongful death action by estate of pedestrian hit by truck while she was lawfully crossing the street in the crosswalk. Trial court erred in instructing the jury on duty to look, loss of right-of-way, duty to continue looking, and suddenly leaving the curb pursuant to R.C. 4511.46(B).

A 75 year old woman stood at the north-west corner of the intersection waiting to cross to the south-west corner. A tow truck heading south waited at the light to make a right hand turn to go west. The light turned green for the tow truck driver at the same time as the pedestrian signal activated for the pedestrian to cross. The pedestrian had the statutory right of way. She began to cross, but the tow truck driver, failing to see her, began to turn. They collided and the woman was seriously injured, dying a month or so later.

The jury found for the plaintiffs, but assigned 50% comparative fault to the decedent. On appeal, the appellants challenged the jury instructions. The jury instructions properly stated that "a pedestrian facing a pedestrian controlled signal indicating 'walk' may proceed or walk across the roadway in the direction of the signal." But the instructions also stated that "[a] person is negligent if they look but do not see that which would have been seen by a reasonably prudent person under the same or similar circumstances" and that "[a] person is negligent when they do not continue to look if, under the circumstances, a reasonably prudent person would have continued to look." *Id*. at ¶18.

The appellate court found the duty to look and to continue looking instructions warranted reversal because there was no evidence that the decedent did anything to forfeit her right-of-way. Absent a showing that she forfeited her right-of-way, it was improper to instruct the jury on the decedent's common law duty to exercise ordinary care or to allow the jury to consider whether decedent was comparatively negligent.

The court also found the trial court's instruction on suddenly leaving the curb pursuant to R.C. 4511.46(B) to be erroneous as unsupported by the evidence.

7.) Templeman v. Kindred Healthcare, Inc., 8th Dist. No. 99618, 2013-Ohio-3738 (Aug. 29, 2013).

Disposition: In a nursing home case where the trial court granted a stay of the survivorship claim pending arbitration, the court of appeals reversed (but affirmed the denial of the stay as to wrongful death claim).

Topics: Nursing home arbitration agreements; enforceability of agreement signed by resident's family member.

Upon the resident's admission to the skilled nursing and residential health care facility, the resident's son was presented with numerous papers and told to sign. Among these was an arbitration agreement which the son signed. The resident became ill and died two days later, allegedly as a result of the nursing home's negligence. The plaintiffs then filed a wrongful death and survivorship action against the nursing home. The nursing home filed a motion to stay pending arbitration which the trial court granted as to the survivorship claim but denied as to the wrongful death claim.

On appeal, the nursing home argued that the arbitration agreement was enforceable, even as to the wrongful death action, because the son had a durable power of attorney from his mother. The power of attorney offered into evidence, however, did not contain the decedent's signature, and did not indicate that the son had authority to act on his mother's behalf with respect to health care as required by R.C. 1337.12 and 1337.13. The court of appeals found, therefore, that the arbitration agreement was unenforceable as to both the wrongful death action and the survivorship action, as there was no evidence that the decedent had given her son the authority to act on her behalf.

8.) Thomas v. Strba, 9th Dist. No. 12CA0080-M, 2013-Ohio-3869 (Sept. 9, 2013).

Disposition: Reversing trial court's order granting summary judgment in favor of the defendant.

Topics: Plaintiff injured in fall from tree while helping defendant construct tree-stand in anticipation of hunting season; primary assumption of risk held inapplicable.

The day before hunting season began, the plaintiff was helping the defendant renovate tree stands that would be used for hunting on defendant's property. While the plaintiff was in the tree nailing a new board into place, one of the old boards he was holding onto gave way, causing him to fall and sustain serious injuries. In the ensuing lawsuit, the defendant filed a motion for summary judgment based on primary assumption of risk. The trial court granted the motion.

The court of appeals reversed, finding that the doctrine of primary assumption of risk did not apply. Although hunting is a recreational activity, the act of building a tree stand before the recreational activity has commenced does not fall within the doctrine of primary assumption of risk.

9.) Jones v. Delaware City School Dist. Bd. of Educ., 5th Dist. No. 2013 CAE 0009, 2013-Ohio-3907 (Sept. 10, 2013).

Disposition: Affirming denial of summary judgment on political subdivision immunity.

Topics: School district not immune from liability as a matter of law where high school senior falls into unseen open orchestra pit from which prior safety features – reflective tape and lighting – had been removed.

A high school senior, making a film on bullying, sought the assistance of the school's D.A.R.E. officer, as he wanted to use a robotic police car in the film. The officer agreed and the school gave permission to let them film a scene on the auditorium's stage. As the auditorium was locked, the student waited outside with the robotic car while the officer went inside, then let the student in at a side door. The officer then drove the police car onto the stage, the student following behind. It was dark in the auditorium, so the officer crossed the stage to turn on the lights while the student waited. The orchestra pit, which was usually closed, had been opened for an upcoming musical performance, but neither the student nor the officer realized that the stage had an orchestra pit. As the student waited for the lights to go on, he took three steps to his left to what should have been continuous stage. Instead, he fell into the open orchestra pit.

Two and a half years earlier, another student had fallen into the orchestra pit not knowing it was there. Shortly afterwards, the legislature passed a law designed to facilitate school building safety. Pursuant to this law the health department required the school to define the edges of the stage. The school district complied by placing reflective tape on the edges, and installing L.E.D. lights within the orchestra pit. Although the law was later repealed, the school's maintenance employees admitted that the tape and lighting should have remained in place, although it was in fact absent at the time of the plaintiff's fall.

The school district filed a motion for summary judgment, arguing the open and obvious danger rule and statutory immunity. The trial court denied the motion. The school district took an interlocutory appeal pursuant to R.C. 2744.02(C). The court of appeals held that it lacked jurisdiction to consider the open and obvious danger issue in an interlocutory appeal. It also held that whether the orchestra pit from which safety measures had been removed was a "physical defect" for purposes of R.C. 2744.02(B)(4) presented a fact question; and that the reinstatement of immunity under R.C. 2744.03(A)(5) did not apply.

10.) Mohat v. Horvath, 11th Dist. No. 2013-L-009, 2013-Ohio-4290 (Sept. 30, 2013).

Disposition: Affirming the denial of defendant's Civ. R. 12(B)(6) motion to dismiss.

Topics: High school student bullied and harassed by classmates commits suicide. Teacher fails to intervene or report the bullying to school officials. Complaint sufficiently alleges teacher's conduct was wanton or reckless so as to state a claim that fell within the exception to immunity of R.C. 2744.03(A)(6)(b).

The decedent was 17 year old student who, in the months before his suicide, was constantly bullied and harassed by several other students. The complaint alleged that most of this harassment took place in the defendant teacher's classroom during class and that the student had complained to the teacher about it. On the day of the student's suicide, another student taunted him in front of other students and the teacher, stating, "Why don't you go home and shoot yourself? No one would miss you."

The complaint alleged that despite knowing that the student was being regularly bullied and harassed, the defendant did nothing to stop it and failed to report it to school officials. The complaint alleged that the teacher's conduct constituted negligence and/or gross negligence and was committed with malice, in bad faith, and was wanton and reckless.

The teacher filed a Civ. R. 12(B)(6) motion to dismiss arguing that he was immune from liability under Ohio's political subdivision immunity law. The trial court denied the motion and the court of appeals affirmed. Under R.C. 2744.03(A)(6)(b), an employee of a political subdivision is not immune from liability if his or her "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." The court found the allegations in the complaint sufficient to allege a cause of action that fell within the exception to immunity set forth in R.C. 2744.03(A)(6)(b).

11.) Smith v. Chen, 10th Dist. No. 12AP-1027, 2013-Ohio-4931 (Nov. 7, 2013).

Disposition: Affirming plaintiff's motion to compel discovery of surveillance video.

Topics: Discovery of surveillance video of plaintiff taken by the defendant in a medical malpractice action.

This was a medical malpractice case in which plaintiff alleged that back surgery performed on him by the defendant resulted in cervical spondylosis and constant pain. After plaintiff's deposition was taken, plaintiff filed a request for production seeking "any and all investigative reports, videotapes, audiotapes, witness statements, etc., that were prepared by [an investigative service for defendants] concerning [the plaintiff's] activities or disabilities intended for use in the above matter." *Id.* at ¶4. The defendants objected on the ground that any such video surveillance materials were privileged work product which the defendants intended to use solely as impeachment evidence.

The plaintiff filed a motion to compel production of the surveillance evidence or, alternatively, a motion in *limine* to prevent defendants from introducing surveillance evidence during trial. The trial court granted the motion and the court of appeals affirmed. Although the surveillance materials were attorney work product, there was good cause for requiring their production as they dealt directly with the matter of damages which was directly at issue in the case. The court noted that "discovery of a surveillance video following the plaintiff's deposition strikes the appropriate balance between the plaintiff's interest in seeing the video before trial and the defendant's interest in retaining the impeaching value of such evidence." *Id.* at ¶29.

Verdict Spotlight

On November 18, 2013, a jury in Cuyahoga County returned a verdict in favor of the Plaintiff Victoria Daniels and her two young daughters, ages 5 and 15. The jury awarded Victoria 2.5 million dollars and her daughters $275,000 each for their consortium claims in Judge Deena Calabrese's room. The verdict was against Northcoast Anesthesia Providers and two of its physicians.

Victoria Daniels walked into the hospital for an elective procedure: her abdomen was getting scoped to check out a cyst on her ovary. She had a history of a severe allergy to a drug called Atrovent which she had received a few years earlier as part of a breathing treatment for asthma. Atrovent caused her to have hives, swelling, and difficulty breathing--so bad that it landed her in the emergency room. Since that time she has advised every healthcare provider of this allergy and her reaction to Atrovent – including the defendants.

On the day of her surgery, her preoperative evaluation was filled out by a student nurse anesthetist. She wrote down the wrong drug that Mrs. Daniels was allergic to. She also did not write down anything about the type of reaction she had had. The CRNA assigned to Mrs. Daniels was totally unfamiliar with Atrovent and did not know which class of drugs it was in, nor did he check to find out that information or check for what drugs might be cross-reactive to Atrovent.

The CRNA administered the drug Scopolamine to her. The molecular structures of Scopolamine and Atrovent are substantially similar. Shortly after Scopolamine was given Mrs. Daniels had an anaphylactic reaction. The anesthesiologist had to be called back to the room to treat her, and he did not recognize right away that she was in anaphylaxis despite the alarm on the breathing machine going off. There was a several minute delay in giving Epinephrine. As a result, Mrs. Daniels went into shock and, after a two hour resuscitation, she was transported to University Hospitals via life flight helicopter. She was able to survive this ordeal but suffered a brain injury because of the ongoing lack of oxygen during the resuscitation.

The lawsuit was brought against the Doctor assigned to Plaintiff's case that morning, as well as the doctor who gave verbal approval for the Scopolamine. A third doctor who was called in to help with the resuscitation was also named as a defendant but the jury did not find against him.

The trial lasted two weeks. The jury was made up of six women and two men.

The defense brought in an allergy expert from Johns Hopkins to testify that there was no proof that Plaintiff was allergic to Atrovent and that the anaphylactic shock could have been caused by one of three drugs other than Scopolamine that were administered that morning. They also had experts in anesthesia and pharmacology testify.

The defense also attempted to attribute Mrs. Daniels' injuries to her preexisting medical conditions.

Plaintiff called only one liability expert – an anesthesiologist – and focused the case on the responsibility of doctors to listen to their patients, be aware of their patients' histories, and to take precautions in any life threatening situation not only to prevent things from happening but to be prepared when something forseeable occurs. Plaintiff presented the testimony of two experts on the Plaintiff's injuries, plus a nurse who provided testimony pursuant to Evid. Rule 1006 summarizing the fifteen day admission to University Hospitals.

No offer of settlement was ever made by The Doctor's Company, the liability carrier for the defendant.

Plaintiffs were represented by Christopher Mellino and Meghan Lewallen of Mellino Robenalt.

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: **Christopher M. Mellino**
Mellino Robenalt LLC
19704 Center Ridge Road
Rocky River, Ohio 44116
(440) 333-3800; Fax (440) 333-1452
Email: cmellino@mellinorobenalt.com

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.

Diana Weller v. Cardiothoracic Surgeons of Northwest Ohio and Dr. Michael Moront

Type of Case: Medical Malpractice

Verdict: $450,000

Plaintiff's Counsel: Charlie Murray and Jim Murray, Murray & Murray, 111 East Shoreline Drive, Sandusky, Ohio 44870, (419) 624-3000

Defendants' Counsel: Steve Skiver, M.D., J.D. and Gayle Beier

Court: Lucas County, Judge Gene Zmuda

Date Of Verdict: November 8, 2013

Damages: 61 year old woman had a carcinoid tumor which required surgery to remove it.

Summary: The defendant surgeon cut the bronchus during the lobectomy, but cut too deep and lacerated the lower bronchus. He chose not to repair and instead removed the entire lung. She was a phlebotomist at Fostoria Hospital for 41 years, and could not return to work, losing four years of earnings.

Plaintiff argued the standard of care is lung sparing surgery, that she would have only lost 25% of her lung, but that the error condemned her to a life with diminished capacity and a loss of personal identity as a phlebotomist. Defense argued she had cancer, and that surgery was necessary. Injuries to other structures are a risk of surgery, and she had a good recovery.

Plaintiff's Experts: Zane Hammoud, M.D. (thoracic surgeon); David Stott (economist)

Defendants' Experts: Mark Botham (cardiothoracic)

Cynthia Strenkowski, etc. v. John W. Greco, Jr., et al.

Type of Case: Airplane crash

Settlement: Confidential - 7 figure

Plaintiff's Counsel: Jamie Lebovitz, Esq., Nurenberg, Paris, et al., (216) 621-2300, and Richard Rosenthal, Esq., Edgar Snyder & Associates, (412) 394-1000

Defendant's Counsel: Eric N. Anderson, Esq.

Court: Allegheny County, Pennsylvania, Common Pleas Court Case No. GD 12-8107

Date Of Settlement: October 2, 2013

Damages: Fractured cervical spine and halo brace

Summary: Plaintiff was a high school freshman participating in an airplane sightseeing flight for a class project. Pilot aborted takeoff due to inability to climb off runway and departed runway overrun area causing airplane to plummet down into a ravine.

Plaintiff's Experts: Allen J. Fiedler (pilot/accident reconstruction)

Defendant's Experts: N/A

Faith Kamara, etc., et al. v. Professionals for Women's Health, Inc., et al.

Type of Case: Medical Malpractice

Verdict: $1,433,188.07

Plaintiffs' Counsel: Jonathan D. Mester, Andrew R. Young, Nurenberg, Paris, Heller & McCarthy Co., LPA, 1370 Ontario Street, Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Defendants' Counsel: Neil F. Freund

Court: Franklin County Case No. 10CV17843, Judge David W. Fais

Date Of Verdict: September 5, 2013

Insurance Company: Doctors Co.

Damages: Brachial plexus injury affecting 3 nerves.

Summary: Faith Kamara was born on June 8, 2010, weighing just over 11 pounds. During her delivery, she experienced a shoulder dystocia. After the shoulder dystocia was recognized, nurse midwife Tiffany Murphy conducted unsuccessful efforts to relieve the shoulder dystocia. Thereafter, the on-call obstetrician also tried to relieve the shoulder dystocia, to no avail. Having concluded that the baby could not be delivered vaginally, the obstetrician decided to take them to the operating room. However, on the way to the operating room, Ms. Murphy decided, on her own, to make one last attempt to deliver the baby vaginally. This attempt successfully delivered the baby, but resulted in a brachial plexus injury involving the rupture of three nerves.

In her initial deposition, Ms. Murphy conceded that she used traction in delivering the baby. However, in her video-taped deposition for trial, she denied that she had used traction, which was a clear contradiction of her earlier testimony.

The case went to trial against Professionals for Women's Health, Inc., and its employees – three nurse midwives and the mother's treating OB, Brian Kelley, M.D. The plaintiffs claimed that Dr. Kelley and two of the midwives were negligent in failing to conduct a repeat ultrasound prior to delivery, which would have resulted in the discovery that the baby was over 11 pounds, requiring delivery by caesarian section. The plaintiffs also claimed that Midwife Murphy was negligent in applying excessive traction. The jury unanimously found in the plaintiffs' favor against Midwife Murphy and Professionals for Women's Health, Inc., on the second theory.

The jury awarded $553,188.07 to Faith Kamara in economic damages and $580,000.00 to Faith Kamara in non-economic damages. The jury also awarded a lump sum of $300,000.00 to Faith Kamara's mother and father.

Plaintiffs' Experts: Daniel Adler, M.D. (pediatric neurology); Robert Ancell (vocational rehab.); Frank Bottiglieri, M.D. (OB-Gyn); John Burke (economist).

Defendants' Experts: Scott Kozin, M.D. (hand/upper extremity surgeon); W. Kim Brady, M.D. (OB-Gyn)

John Doe v. Trucking Company

Type of Case: Trucking

Settlement: $3,000,000.00

Plaintiff's Counsel: Stephen S. Crandall, Crandall Moses Pera & Wilt Law, LLC, (216) 538-1981

Defendant's Counsel: Confidential

Court: Pre-Suit

Date Of Settlement: August 15, 2013

Insurance Company: XYZ Insurance Co.

Damages: Brain injury, multiple fractures

Summary: On June 20, 2012, plaintiff was operating a motorcycle when struck by defendant operating a truck.

David Motz, et al. v. Summit Pain Specialists, Inc., et al.

Type of Case: Medical Malpractice

Verdict: $3,000,000.00

Plaintiffs' Counsel: Dennis R. Lansdowne, Peter J. Brodhead, Nicholas A. DiCello, Spangenberg Shibley & Liber LLP, (216) 696-3232

Defendants' Counsel: Cheryl Atwell and Christine Santoni

Court: Summit County Case No. CV 2012-010413, Judge Lynne S. Callahan

Date Of Verdict: June 13, 2013

Insurance Company: Summit Pain Specialists, Inc. - The Doctor's Company

Damages: Partial paraplegia

Summary: The Plaintiff on April 28, 2009 underwent the third in a series of 3 transforaminal epidural steroid injections at 3 levels in the lumbar area. After this third set of injections, the plaintiff was rendered a partial paraplegic. He never regained full use of his legs and remains without sensation in his pelvic area as well as loss of bowel and bladder control. Except for being able to ambulate extremely short distances with the use of a walker, the plaintiff is wheelchair bound. Defendants denied that the procedure caused the plaintiff's condition and asserted that the injections had been performed within the standard of care. Plaintiffs' experts testified that the third series of injections should not have been performed because there was no response to the first two. Offer was $100,000.00.

Plaintiffs' Experts: David J. Kennedy, M.D. (PM&R); Charles Aprill, M.D. (radiology); John P. Conomy, M.D. (neurology); Marianne Boeing (life care planner); John F. Burke, Ph.D. (economic)

Defendants' Experts: Joel R. Meyer, M.D. (neuroradiology); and Rafael Miguel, M.D. (anesthesiology & pain management)

Miracle Huffman v. American Family Insurance Company

Type of Case: Fire loss

Verdict: $335,968.00 / ***Settlement:*** $430,000.00

Plaintiff's Counsel: Robert P. Rutter, Rutter & Russin, LLC, (216) 642-1425

Defendant's Counsel: Scott Norman

Court: Arbitrator Neil Evans

Date Of Verdict / Settlement: March 30, 2013

Insurance Company: American Family Insurance Company

Damages: Property loss - dwelling, personal property, loss of use

Summary: Plaintiff's house was damaged in a fire. The City of Toledo demolished the house before any inventory could be taken of the damaged personal property. Plaintiff prepared her inventory by memory and submitted it to the insurer, which denied her entire claim and accused her of fraudulently overstating the amount of the loss.

Plaintiff's Experts: David Fruth, CPR Claims; Ryan Fruth, CPR Claims

Confidential

Type of Case: Wrongful death

Settlement: $2,000,000.00

Plaintiff's Counsel: Pamela Pantages, The Becker Law Firm, LPA, (800) 826-2433

Defendant's Counsel: Confidential

Court: Confidential

Date Of Settlement: March 1, 2013

Insurance Company: Confidential

Damages: 4 months in a persistent vegetative state followed by death.

Summary: 30-year old single mother of a 5-year old boy scheduled for elective, same-day functional endoscopic sinus surgery. During the induction of anesthesia, the ET tube was inadvertently placed in her esophagus. The error went unappreciated until the patient was in full cardiopulmonary arrest. She survived the code but sustained massive, irreversible brain injury. She died 4 months later.

Plaintiff's Experts: Bruce Halperin, M.D., Woodside, CA (anesthesia)

Defendant's Experts: None

Baby Boy Doe v. ABC Hospital

Type of Case: Medical Malpractice

Settlement: $5,500,000.00

Plaintiff's Counsel: John A. Lancione, Lancione & Lancione, LLC, (440) 331-6100

Defendant's Counsel: N/A

Court: Pre-suit settlement

Date Of Settlement: March 2013

Insurance Company: Self-insured

Damages: Brain damage resulting in cerebral palsy

Summary: Failure to recognize fetal distress on electronic fetal heart monitor and failure to timely deliver baby by emergency cesarean section.

Plaintiff's Experts: Gary Blake, M.D. (maternal fetal medicine); Heidi Shinn, R.N. (labor and delivery nurse); Gary Yarkony, M.D. (physical medicine & rehabilitation)

Defendant's Experts: Harry Farb, M.D. (OB/Gyn)

TurboCombuster Technology, Inc. v. Dinsmore & Shohl, LLP

Type of Case: Fraud and negligent representation with right to purchase of company

Verdict: $12,600,000.00

Plaintiff's Counsel: Dennis E. Murray, Jr., Murray & Murray Co., LPA, 111 E. Shoreline Dr., Sandusky, Ohio 44870, (419) 624-3126, and Mark J. Skakun III, Buckingham, Doolittle & Burroughs, LLP, 3800 Embassy Pkwy., Suite 300, Akron Ohio 44333, (330) 491-5319

Defendant's Counsel: Aaron Vanderlaan and Mark Arnzen, Arnzen, Molloy & Storm, P.S.C., 600 Greenup St., Convington, Kentucky 41011

Court: Hamilton County Case Nos. A0707859 & A0804326, Judge Andrew West

Date Of Verdict: October 24, 2012

Insurance Company: AIG

Damages: $15,000,000

Summary: Investors purchased an aerospace parts company in 2006 for $22,000,000 and thereafter discovered fraud by sellers. The jury found that the seller's lawyers had a duty to disclose the fraud so that the buyers could have walked away.

Plaintiff's Experts: Robert A. Ranallo, CPA/ABV, JD, CVA, CFF, Skoda Minotti; Geoffrey Stern, Kegler, Brown, Hill & Ritter, LPA

Defendant's Experts: Anthony E. Schweier, CPA, Clark, Schaefer, Hackett & Co.; Mark J. Jahnke, Katz, Teller, Brandt & Hild; Lucian T. Pera, Adams and Reese LLP

John Doe, a minor, through his parents v. ABC Doctors and Hospital

Type of Case: Medical Malpractice

Settlement: $2,510,000.00 on the first day of trial.

Plaintiffs' Counsel: Charles Kampinski and Kent B. Schneider, Cleveland, Ohio

Defendant's Counsel: Confidential

Summary: In May 2009 the minor, John Doe, was 3 ½ months old. He presented to his pediatrician with rash, red eyes, red lips, fever and tachycardia. The pediatrician suspected Kawasaki's disease and sent the minor to the hospital for immediate evaluation. Kawasaki's disease is an inflammatory vasculitis of unknown origin which primarily affects minors. If undetected within the treatment window (approximately 10 days), the disease can cause injury to the arteries of the minor, particularly aneurysms of the coronary arteries. Treatment of the disease consists of the administration of an intravenous immuno globulin which is virtually risk-free and near 100% effective.

The Plaintiff was evaluated by hospitalists at the facility and a consult was called for a pediatric cardiologist. Labs and an echocardiogram were done. The consultant evaluated the minor and concluded that his test results did not fit the criteria established by the American Heart Association Guidelines for treatment. Accordingly, the minor was discharged four days later.

The minor's symptoms persisted and the mother took the child back to the pediatrician's office approximately five days later and he did nothing further with respect to the evaluation for Kawasaki's disease. The pediatric cardiologist consultant had scheduled a follow-up visit approximately two weeks after the initial discharge from the hospital. At that follow-up visit, an echocardiogram was again performed and the presence of coronary artery aneurysms were detected. As a result of the presence of those aneurysms, the child required commencement of the administration of blood thinners (Coumadin) which he will probably require for the duration of his lifetime.

Plaintiffs argued that the hospitalists, pediatrician and pediatric cardiologist were negligent in failing to diagnose and treat the Kawasaki's disease within the appropriate time frame. The Defendants contended that the infant's presentation did not meet the criteria established by the American Heart Association for treatment. Both Plaintiffs and Defendants had experts that had written the above-mentioned guidelines and were universally considered to be top authorities in the world on this disease.

Result: On the first day of trial the case was settled for the sum of $2,510,000.00.

Plaintiffs' Experts: Stanford Shulman, M.D. (pediatric infectious disease); Jonathan Reich, M.D. (pediatric cardiologist); John F. Burke, Jr., Ph.D. (economist); Marianne Boeing, R.N., CRCP (life care planner)

Defendant's Experts: Jane Newburger, M.D. (pediatric cardiologist); Jane Burns, M.D. (pediatric infectious disease); Jeffrey Frazer, M.D. (pediatric cardiology); Lloyd Tani, M.D. (pediatric cardiologist); Lee Weinstein, M.D. (pediatrician); Leonard S. Feldman, M.D. (pediatric hospitalist) ■

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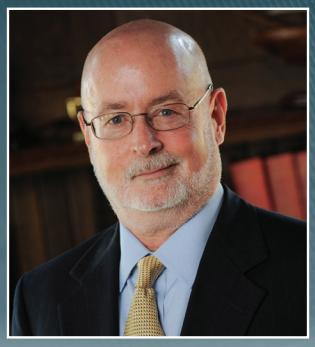

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