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Spring 2012

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President's Message

Defensive Medicine v. Covering up Medical Profiteering

In response to a recent Columbus Dispatch article, OAJ President-Elect Bob DeRose wrote a letter to the editor that artfully countered the misinformation promoted by the Dispatch in regards to reports of physicians practicing "defensive medicine" by ordering unnecessary testing to try and avoid medical malpractice lawsuits. In the letter aptly entitled "Stop the Malpractice and you Stop the Lawsuits," President-Elect DeRose convincingly explained three reasons why the defensive medicine claim was invalid. I don't want to take up space by repeating them here, but would certainly encourage anyone interested go online and review his well phrased response.

From my standpoint, I think it goes even further than misinformation about malpractice. I submit that such a claim of "defensive medicine" is nothing more than a cover-up for medical profiteering.

In this era of managed care, medical care providers know a secret to increasing profits at the expense of the patient, medical insurance, or Medicare and Medicaid is to order more tests! When physician examination charges are squeezed by managed care, the providers have to make up the difference in some manner (couldn't consider a pay cut, could we?). Tests cost money not only to perform, but also to interpret. So a bruised knee, for instance, that may only require an ice pack and some aspirin all of a sudden turns into an x-ray and maybe an MRI at the imaging center in which the physician has an ownership interest. While the physician's examination charge was reduced 25% by managed care, he recoups it and makes a profit by the test fee and his charge to review the results and confer with the patient.

Then to make matters worse, to cover-up the managed care two-step, the provider finds a sympathetic ear and spins the whole thing to blame medical malpractice. A double bonus! Make more money off of unnecessary treatment and shift the blame to injured innocent patients. After all, who brings malpractice suits but injured patients (and their families)? It is particularly onerous that such grandstanding evinces nothing more than the health care provider blaming the patient for his or her carelessness. Such frivolity directly contradicts the physician's maxim of "first do no harm."

I believe that for good practitioners in any profession – whether it is a doctor, a lawyer or an accountant - the thought of a lawsuit should never arise in the performance of client/patient services so long as one executes one's job within acceptable standards. In fact, the most direct path to success is not just performing at the norm, but striving for excellence! To create an excuse for making money on needless tests because they are practicing "defensive medicine" to avoid lawsuits is simply absurd.

To that end I have to say again that this demonstrates that we are losing the fight in the media. Anyone of reasonable intelligence who takes a critical look at the claim of "defensive medicine" and even tort reform for that matter

rapidly reaches the logical conclusion that the rhetoric has no substance. Bob DeRose has taken it in the right direction with the catchy headline "Stop the Malpractice and you Stop the Lawsuits." It is unfortunate that over a decade ago we could not convince lawmakers and Ohioans that any legislation that punishes the innocent victims and does nothing to discourage bad medicine is not "reform." Hopefully the passage of time and the reduction of lawsuits (a statistic that makes me cringe since pundits will claim the reform works) will provide the right opportunity to take a serious and productive look at the problem. As easy targets as we provide, everyone knows the problem is the negligent doctor, but few acknowledge that the solution should not involve denying justice to the injured patient. ■

John R. Liber II
President

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Editor's Notes

by Kathleen J. St. John

At the end of another presidential cycle, we are grateful to John Liber for his efforts in strengthening this organization. His creation of three committees – membership, programs, and publications/ technology – has increased officer and director participation in CATA affairs. We hope you have enjoyed the CLE luncheons, spearheaded by George Loucas' committee, and have found the biannual issues of the *CATA News* useful in your practices.

The Annual Meeting and Installation Dinner will be held on Friday, June 22, 2012 at the Club at the Marriott. We hope everyone will take this opportunity to attend. At this year's meeting, we will unveil our new website which should be more useful and user friendly than in the past.

As for recent legal news of interest, I offer the following.

1. Ohio Supreme Court Adopts a New Writing Manual.

Effective January 1, 2012, the Ohio Supreme Court adopted a *Writing Manual – A Guide to Citations, Style, and Judicial Opinion Writing*. The manual governs the citation format the Supreme Court will follow in its opinions; and although it is not binding on judges and lawyers, the Court strongly encourages everyone to follow it when writing opinions and briefs. It can be found at http://www.sconet.state.oh.us/ROD/manual.pdf.

The good news is that the manual is incredibly easy to use. If you dread getting lost in the packed format of *The Bluebook*, you should find the layout of the Supreme Court's manual refreshing. As for specific changes, my favorites include the return to placing the date at the end of case citations; and the Court's expressed preference for keeping case citations out of footnotes. ("Avoid placing all citations in footnotes. The practice of placing all citations in footnotes is disfavored, as it makes it difficult for the reader to connect the authority to the proposition.")[1] One oddity I note is that, for non-print unpublished cases (*i.e.*, those without a public-domain citation), the Court will use the Westlaw citation in addition to the case number. For those of us who use LEXIS, this isn't a welcome change, but the fact that, for lawyers, this format is merely advisory alleviates any concern on this issue.

2. Recent Rule Changes Of Interest.

Effective July 1, 2012, the Court will adopt a number of amendments to the Civil Rules. Of particular interest to our members is the change to Civ. R. 26. As the Staff Notes indicate:

> Civ. R. 26 is amended to clarify the scope of expert discovery and align Ohio practice with the 2010 amendments to the Federal Rules of Civil Procedure relating to a party's ability to obtain discovery from expert witnesses who are expected to be called at trial. This amendment acknowledges that Ohio law provides work product protection

for communications between attorneys and trial witness experts, see, *Helton v. Kincaid*, Warren App. No. 2004-08-099, 2005 Ohio 2794, but withholds that protection from three categories of communications: communications that relate to compensation for the expert's study or testimony; communications containing facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; and communications containing any assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

The Supreme Court has also amended the Ohio Rules of Appellate Procedure and the Supreme Court of Ohio's Rules of Practice to establish a process for *en banc* review. Although some appellate districts have long had such a process, others have not, and the amendments – which can be found in App. R. 26 (A) and S. Ct. Prac. R. 2.2 – now create a uniform procedure for *en banc* review and appeals therefrom.

3. Recent Appellate Opinions of Interest

In addition to court opinions discussed in this issue, some recent decisions of interest to our members are the following:

Tisdale v. The Toledo Hospital, 6th Dist. No. L-11-1005, 2012-Ohio-1110 (a complaint alleging malpractice against a hospital does not need to name the nurses as defendants).

Moretz v. Muakkassa, 9th Dist. No. 25602, 2012-Ohio-1177 (trial court did not err in excluding write-off evidence due to lack of foundation; nor did it abuse its discretion in refusing to grant the defendant's request for a jury interrogatory specifying the basis of defendant's negligence when only one basis was alleged).

Cleveland v. St. Elizabeth Health Center, 7th Dist. No. 10-MA-151, 2012-Ohio-1472 (trial court abused its discretion in refusing to permit plaintiff to impeach the defendant doctor, who testified as an expert, with evidence showing several states had revoked his medical license and showing the circumstances surrounding his criminal conviction for lying about his medical practice).

4. Court To Rule On Constitutionality of Medical Malpractice Statue of Repose.

As mentioned in the last issue, in *Ruther v. Kaiser*, S.Ct. No. 11-0899, the Ohio Supreme Court has pending before it the constitutionality of the medical malpractice statute of repose, R.C. 2305.113(C). In the decision from which this appeal is taken.[2] the Twelfth District Court of Appeals found this statute of repose unconstitutional "as applied" to a plaintiff whose claim was barred "after it had already vested, but before the plaintiff or the decedent knew or reasonably could have known about the claim."[3] The appeal in the Supreme Court is fully briefed, and will have been argued on April 25, 2012. We are hopeful that the Supreme Court will affirm the Twelfth District's well-reasoned decision. ■

End Notes

1. Of course, this applies to briefs, but not to articles.
2. *Ruther v. Kaiser*, 12th Dist. No. CA2010-07-066, 2011 Ohio 1723.
3. *Id.* at ¶37.

Notes from the CATA News Committee

Thank you to everyone who has written an article for this issue, or past issues, of the CATA News. If you haven't already done so, please consider doing an article for future issues. You can apply for CLE credit for substantive articles. We would also like to thank our incomparable designer, Joanna Eustache of Copy King; Lillian Rudiy, who helps with much of the detail work; photographer Karen St. John-Vincent for the lovely cover photograph; Carrie Liber for the fine book donation photographs; and all others who have contributed to making our newsletter possible.

We are grateful, too, for the support we receive from our advertisers. Please patronize them and let them know you saw their advertisement in the CATA News.

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Exposing Patterns Of Unsafe Behavior In Your Trucking Cases

by Andrew R. Young

Maximize your client's damages and fight to make our roadways safer by turning what is seemingly an ordinary negligence case into an extraordinary result. Historically, the Federal Motor Carrier Safety Administration (FMCSA) has adopted hundreds of pages of safety regulations for the safe operation of interstate Commercial Motor Vehicles (CMV).[1] A comprehensive knowledge of these regulations and of the FMCSA's **new** Compliance, Safety, Accountability (CSA) enforcement program will expose patterns of unsafe behavior and additional theories of liability.

Enacted in 2010, the CSA enforcement program can easily be adopted as the theme of your next trucking negligence case. The CSA will also serve as a roadmap to increase settlement values and verdicts for injuries and fatalities caused by crashes that are the result of regulatory safety violations. If the defendant trucking company and/or truck driver fail to ***comply*** with ***safety*** regulations causing a crash, injury and/or death, then use the CSA to guide you to hold the defendants ***accountable.***

"With CSA, the FMCSA, together with State Partners and industry, is working to further reduce CMV crashes, fatalities, and injuries on our nation's highways."[2] To accomplish this goal, the CSA program has been designed to identify and initiate contact with a greater number of high-risk motor carriers to address safety problems before crashes occur.[3] The CSA has three major components: 1) a new Safety Measurement System (SMS); 2) a new intervention process; and 3) a new safety ratings process.[4] The University of Michigan Transportation Research Institute (UMTRI) performed an evaluation of the CSA enforcement model and concluded that this new compliance program now reaches approximately three times the number of motor carriers in comparison to the predecessor enforcement model.[5]

I. Do You Know Your Defendant Trucking Company's On-Road Safety Performance?

A. The SMS and BASIC scores explained

The CSA's **Safety Measurement System (SMS)** provides the FMCSA with a new way of monitoring and evaluating a trucking company's regulatory compliance by quantifying and assessing its on-road safety performance.[6] The SMS attempts to accomplish four goals: 1) identify unsafe motor carriers for intervention; 2) identify unsafe patterns within several broad categories; 3) monitor the safety performance of motor carriers on a near-continuous basis; and 4) provide safety measurements data to the safety ratings process identifying those companies that are potentially unfit to operate.[7]

Data drives the entire enforcement process. The data originates from daily roadside inspection reports, traffic enforcement stops, state crash reports, and compliance reviews.[8] The bulk of the SMS data is generated through random roadside inspections to determine if a truck and its driver are both code compliant. A trucking company and driver must have comprehensive knowledge of the Federal Motor Carrier Safety Regulations (FMCSRs). Honest trucking companies will spare no expense to ensure that both their equipment and drivers are safe and code compliant and pass roadside inspection with few or no violations. Unfortunately, the trucking industry is highly competitive and many trucking companies push their equipment and drivers beyond the limit and beyond code compliance. Understanding, identifying, and exposing FMCSR violations will increase settlement value and jury verdict potential.

At the roadside inspection, officers stop CMVs to inspect, among other things, driver qualifications, hours-of-service log books, and vehicle equipment. Department of Transportation (DOT) officers are attempting to find any number of the over 640 possible regulatory infractions.[9] Depending on the extent and nature of the violation found, an individual truck and driver can be taken "Out-of-Service (OOS)" until corrective action.[10] While roadside inspections result in various infractions, most of the time the CMV is not taken OOS. Any and all infractions discovered are entered into a central database and indexed by motor carrier.[11]

Each violation is then placed into one of the SMS's seven categories, known as the Behavioral Analysis Safety Improvement Categories (BASICs).[12] The following BASIC categories help the FMCSA identify patterns of safety violations:

Unsafe Driving – Operation of CMVs by drivers in a dangerous or careless manner. *Example violations:* Speeding, reckless driving, improper lane change, and inattention.

Fatigued Driving (Hours-of-Service) – Operation of CMVs by drivers who are ill, fatigued, or in non-compliance with the Hours-of-Service (HOS) regulations. This BASIC includes violations of regulations pertaining to logbooks as they relate to HOS requirements and the management of CMV driver fatigue. *Example violations:* Exceeding HOS, maintaining an incomplete or inaccurate logbook, and operating a CMV while ill or fatigued.

Driver Fitness – Operation of CMVs by drivers who are unfit to operate a CMV due to lack of training, experience, or medical qualifications. *Example violations:* Failure to have a valid and appropriate commercial driver's license (CDL) and being medically unqualified to operate a CMV.

Controlled Substances/Alcohol – Operation of CMVs by drivers who are impaired due to alcohol, illegal drugs, and misuse of prescription or over-the-counter medications. *Example violations:* Use or possession of controlled substances / alcohol.

Vehicle Maintenance – Failure to properly maintain a CMV. *Example violations:* Brakes, lights, and other mechanical defects, and failure to make required repairs.

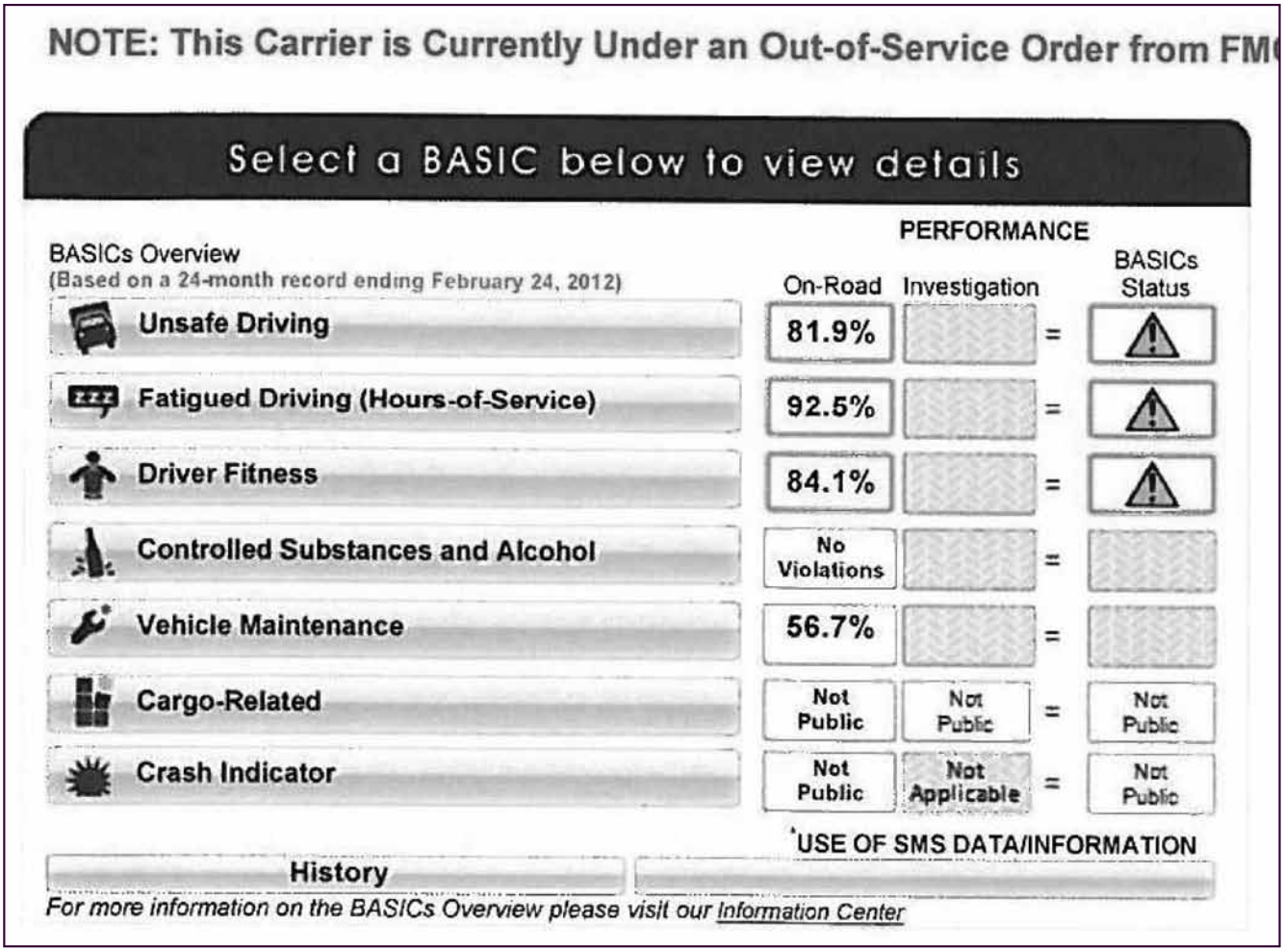
Cargo-Related – Failure to properly prevent shifting loads, spilled or dropped cargo, overloading, and unsafe handling of hazardous materials on a CMV. *Example violations:* Improper load securement, cargo retention, and hazardous material handling.

Crash Indicator – Histories or patterns of high crash involvement, including frequency and severity. It is based on information from State-reported crashes.[13]

A motor carrier's score for each BASIC depends on the following: 1) the number of adverse safety events; 2) the severity of the violations or crashes; and 3) timing or when the adverse safety event occurred.[14]

B. Example of a trucking company with a poor BASIC score

The following is an example of the SMS Data and BASIC Score for Reliable Transportation Services, Inc. ("Reliable Transportation"), a company that was ordered unfit for operation and shut down by the U.S. Department of Transportation on March 30, 2012 [15]:



A "Complete Measurement Profile" of all violations making up the BASIC scores for Reliable Transportation is also available on the FMCSA website. The following is an example of a few of Reliable Transportation's infractions taken from the FMCSA website:

Unsafe Driving BASIC:

Section	Violation Description / Roadside Inspection	Severity Weight
392.2T	Improper turns	5
392.2R	Reckless driving	10
392.2P	Improper passing	5
392.2C	Failure to obey traffic control device	5
392.2FC	Following too close	5
392.2PK	Unlawfully parking and/or leaving vehicle in the roadway	1

Fatigued Driving (HOS) BASIC:

395.3(a)(1)	Requiring or permitting driver to drive more than 11 hours	7
395.3(a)(2)	Requiring or permitting driver to drive after 14 hours on duty	7
395.8	Log violation (general/form and manner)	2
395.8(e)	False report of driver's record of duty status (OOS)	9
395.8(f)(1)	Driver's record of duty status not current	5

Driver Fitness Violations

Section	Violation Description / Roadside Inspection	Severity Weight
383.51(a)	Driving a CMV (CDL) while disqualified (OOS)	10
391.45(b)	Expired medical examiner's certificate	1
383.41(a)	Driver not in possession of medical certificate	1
	Vehicle Maintenance	
393.11	No/defective lighting/reflective devices/projected	3
393.45(b)(2)	Failing to secure brake hose/tubing against mechanical damage	4
393.75(a)	Flat tire or fabric exposed (OOS)	10
393.9T	Inoperative tail lamp	6
393.9TS	Inoperative turn signal (OOS)	8[16]

The FMCSA's " basis for determining that Reliable Transportation's motor carrier operations pose an imminent hazard to the public is that Reliable Transportation has violated countless federal statutory and regulatory motor carrier safety rules and has been in at least **seven crashes in the last year, which include six crashes since December 2011.**" (Emphasis added)[17]

Assume that you represent a client involved in one of the Reliable Transportation crashes or an equivalent delinquent trucking company crash. Unless you look up the tortfeasor trucking company's CSA information, you would not realize that this company exceeds scoring thresholds in three broad categories and has had multiple truck accidents over a short period of time. Additionally, you would not know that Reliable Transportation is now labeled as an "Imminent Hazard."

C. Using the CSA and FMSCRs to represent your client

The FMCSA's analysis has found that those carriers that exceeded BASIC intervention thresholds in at least one category (*i.e.*, about 50,000 carriers or approximately 10 percent of the total active population) were responsible for 45% of the recorded crashes.[18] As such, your client's truck accident has a ***near probability*** of involving a trucking company that has an identifiable pattern of regulatory safety violations. It is imperative that you look beyond the police report and learn to use the CSA and FMCSRs to assist you in zealously representing your client and that you understand the safety culture of the tortfeasor trucking company. The information found will likely not only exponentially increase the value of your client's case, but will also assist you in exposing patterns of safety abuse that will result in true accountability.

Timing is of the essence. The more recent the regulatory violation and/or accident, the more heavily it is scored. The SMS scores are calculated for the most recent two year time period with updates every thirty days. Point totals that exceed threshold (algorithms) trigger compliance intervention. Immediately after you are retained by your client, check and preserve the available data regarding your defendant trucking company's CSA information. If you wait a year or more to check the trucking company's SMS, the data and scores are likely to change evidencing a very different (hopefully safer) on-road safety performance.[19] If the company goes out-of-business, or becomes inactive, the scores may no longer be available.

With updates every thirty days and score changes as violations extend beyond the two year period, the CSA relies heavily on the SMS for continuous monitoring and tracking of the on-road safety performance of a trucking company. The UMTRI study also concluded that crash rates were higher for carriers exceeding SMS BASIC thresholds than for carriers not exceeding thresholds.[20] The crash rate was highest for truck companies exceeding BASIC thresholds for the Unsafe Driving, Fatigued Driving, and Controlled Substance and Alcohol categories.[21]

A plaintiff's attorney should send "Letters of Preservation" to the tortfeasor company. The FMCSRs only require document retention for a limited period of time depending on the nature of the category. For instance, the FMCSRs require a very limited three month retention of vehicle inspection reports and certification of repairs.[22] The FMCSRs require only a six month retention of Fatigued Driving records also known as driver Hours of Service log books.[23] Your seemingly simple rear-end accident could be due to out-of-adjustment air brakes or a tired trucker. The vehicle maintenance records or hours of service log book records are important to understanding why the truck driver hit the back of your client's vehicle. If the CSA information shows

that the tortfeasor trucking company exceeds thresholds in the "Vehicle Maintenance" or "Fatigued Driving" scores then you are going to want to send a Spoliation Letter to preserve all vehicle maintenance and/or hours of service records for the truck and driver involved in your client's accident.

II. CSA's New Focused And Varied Intervention Process

The SMS is the first step in determining whether a trucking company has a safety problem that requires inclusion in the CSA's new focused intervention process. Deficient BASIC scores will trigger intervention. A high crash indicator or fatal crash will also likely trigger intervention.

The CSA allows the FMCSA to efficiently and effectively target safety compliance to correct behaviors specific to BASIC categories. The CSA interventions provide the FMCSA with more versatility by allowing for a variety of compliance intervention tools to take action against problem companies and drivers. The CSA interventions supplement the old on-site Compliance Review (CR) with the following additional methods: Warning Letters; Carrier Access to Safety Data and Measurement; Targeted Roadside Inspections; Off-Site Investigation; On-Site Focused Investigation; On-Site Comprehensive Investigation; Cooperative Safety Plan; Notice of Violation; Notice of Claim; and Operations Out-of-Service Order.[24] The type of intervention is determined by safety performance, intervention history, and the discretion of the investigator. The CSA interventions also serve as an educational tool to improve the safety performance of trucking companies and truck drivers. Understanding all of the various intervention tools will allow for better Freedom of Information Act (FOIA) requests and assist you in preserving and obtaining written and oral discovery.

The old SafeStat intervention process relied on the CR Model as the only intervention tool available to the FMCSA. A compliance review is an on-site, comprehensive safety audit of a trucking company's business to ensure regulatory compliance.[25] A safety rating, fine, penalty, or suspension from operation and/or a Safety Fitness Determination did not occur without a CR. CRs were and still are resource-intensive, often requiring three to four days to complete. The UMTRI results concluded that, under the old SafeStat program, the FMCSA effectively contacted only 3.2 percent of all trucking companies for regulatory compliance. Now, 9.9 percent of trucking companies are effectively contacted under the new CSA program.

Warning Letters - CSA intervention starts with a warning letter. This provides early contact with carriers who have identifiable safety problems.[26] The warning letter helps the trucking company become aware of safety performance problems so that they can be addressed before becoming a pattern of abuse and more difficult to correct.[27] Failure to correct problems results in further intervention. According to the UMTRI study, the mere receipt of a warning letter with no further action was effective to improve a trucking company's safety behavior.[28] "After 12 months of followup, only about 17 percent of test carriers still exceeded at least one SMS threshold, compared to about 45 percent of the control group carriers that were matched to test carriers."[29]

Carrier Access to Safety Data and Measurement - Trucking companies have access to their CSA information. They should also be aware of the regulatory infractions and safety violations at the time of each inspection or crash event. A trucking company can change behaviors toward safety improvements prior to further intervention by simply tracking their own violations or SMS information.[30] Scores are now publicly available for customers, shippers, brokers, lawyers, and insurance underwriters. As such, the new CSA program provides a trucking company with an economic incentive to improve its scores.

Targeted Roadside Inspection - The CSA provides roadside inspectors with BASIC scores highlighting a specific trucking company's patterns of safety violations. The roadside inspectors will make a determination of whether to inspect based on the data available. When a trucking company has been demonstrating a pattern increasing a specific BASIC score, the inspector will likely emphasize that BASIC category during the roadside inspection.[31] With time, it is hoped that a trucking company develops a safety culture which will be reflected by the SMS data. As roadside inspections produce

clean, "no violations" results and as poor inspections fall outside the two year time frame, scores will improve.

Offsite Investigation - The FMCSA can use off-site investigation to further target specific BASIC categories by requiring a trucking company to submit documentation to prove compliance through record keeping.[32] Documents include vehicle inspection and maintenance records, driver logs, driver qualification records, toll receipts, drug testing records, etc.[33] The FMCSA will then evaluate the items produced. If the trucking company is not compliant in submitting requested documentation or the documentation is inadequate, the carrier may be subject to an on-site focused investigation.

Onsite Investigation - The onsite investigation can be either a *focused* investigation or a comprehensive investigation. The focused investigation will target specific problem areas if one or more scores exceed thresholds. For example, if roadside inspections have demonstrated a pattern of vehicle maintenance violations for out-of-adjustment air brakes, the onsite focused investigation will target maintenance records regarding brakes.

An onsite *comprehensive* investigation addresses all aspects of a trucking company and does not target one specific category. This intervention is similar to the old SafeStat intervention Compliance Review. DOT inspectors go to the trucking company's place of business and perform a several day comprehensive investigation of all aspects of the trucking company's operations.[34] Reliable Transportation had an onsite comprehensive investigation that resulted in the sixteen page order deeming it unfit for further operation.

Cooperative Safety Plan (CSP) - The CSP is a voluntary plan in which the FMCSA and the trucking company work together to create a plan to address significant gaps in safety management and oversight as evidenced by patterns of non-compliance. The goal is to create written policies and procedures describing the safety measures to be utilized to provide corrective action toward improvement in the problem areas.[35] The CSP is adopted with deadlines to allow for an efficient, self-auditing system of checks and balances, further allowing for improvement on a continuing basis. Failure to improve will result in further enforcement.

Notice of Violation (NOV) - The NOV allows a trucking company the opportunity to avoid a fine by immediately rectifying an unsafe behavior. It requires a response from the trucking company. Formal notification is given to the trucking company regarding the specific regulatory safety violation. To avoid further consequences, the trucking company is then required to prove the corrective action taken.[36]

Notice of Claim (NOC) - Persistent unsafe behavior results in a Notice of Claim. Through the NOC intervention, the FMCSA has the ability to fine a trucking company.[37] The FMCSA can bring a civil action, in a United States District Court, against the offending trucking company. If the penalty is not paid or contested within 30 days, the FMCSA can also prohibit the trucking company from operating until the civil penalty is paid.

Operations Out - of - Service Order (OOS) - An "Operations OOS" order deems the entire trucking company unfit and requires it to cease all motor vehicle operations.[38] By way of the aforementioned example, Reliable Transportation was issued an "Imminent Hazard Operations Out-of-Service Order."[39] "The United States finds [Reliable Transportation Services, Inc.'s] commercial motor vehicle operations constitute an **imminent hazard**. This finding means that based upon your present state of unacceptable safety compliance, your operation of any commercial motor vehicle poses an **imminent hazard** to public safety."(Emphasis in the Original)[40]

Again, by way of practical application, if you represent a client from one of the six crashes involving Reliable Transportation and rely simply on the negligence listed in the police report, you are missing an opportunity to explore greater settlement value and potential punitive damages. The Reliable Transportation OOS order states that the onsite comprehensive investigation

"disclosed violations of the FMCSRs so widespread as to demonstrate a continuing and flagrant disregard for compliance with the FMCSRs and a management philosophy indifferent to motor carrier safety. Reliable Transportation's actions and operations establish an imminently hazardous and potentially deadly situation for its drivers and the motoring public."[41] This example highlights the point that a trucking accident injury case should not be thought of as a simple negligence case to be settled based on the "contributing circumstances" listed in the police report alone.

In addition to the spoliation letter, Freedom of Information Act (FOIA) requests can be sent to the FMCSA to receive the above-referenced intervention information. A FOIA letter may produce warning letters and other intervention documentation for the time-period involving your accident. FOIA requests can also produce: all documents relating to the subject accident; roadside vehicle inspection reports; compliance reviews; and out-of-service violations. Additionally, the new CSA program is keeping track of an individual truck driver's information. The truck driver's information is stored through the Pre-Employment Screening Program (PSP). The PSP is designed to assist the trucking industry in assessing each truck driver's crash and serious violation history.[42] Most importantly, a FOIA request will provide a trucking company's Safety Fitness Determination.

III. CSA's Safety Fitness Determination (SFD)

For now, a Safety Fitness Determination (SFD) remains based upon the safety methodology outlined in 49 CFR Part 385. As such, a trucking company is labeled as satisfactory, conditional, or unsatisfactory.[43] Only through an onsite investigation or compliance review can an SFD be downgraded. The SFD is therefore limited to the trucking company's most recent compliance review.[44] Due to limited resources, an SFD may not adequately reflect the safety fitness of a trucking company because it may not have been updated for a significant period of time.

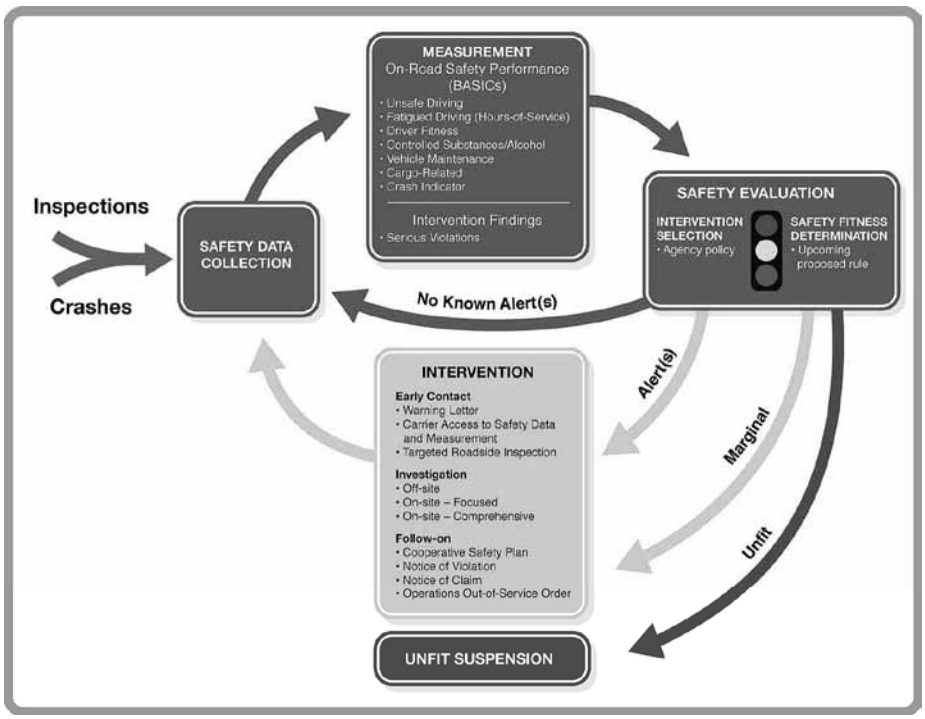
If the recent proposals to update the CSA are enacted, the SFD will: 1) not be tied to onsite investigations; 2) be updated regularly; 3) be based on violations of all safety-based regulations; and, 4) label a trucking company as unfit, marginal, or continue to operate.[45] Under CSA's new proposals, safety fitness determination will be tied to performance data, thus allowing the FMCSA to determine safety fitness based on ongoing SMS data, not just compliance reviews.[46]

IV. The CSA Scores Expose Potential Third Party Defendants To Liability

Prior to CSA, a trucking company's safety compliance weaknesses could be secreted away from public knowledge. Only if the trucking company were one of the lucky 3.2% that underwent an FMCSA compliance review audit and SFD labeling, would its safety violations be exposed. Now, CSA Scores are available for public inspection. The public nature of the CSA enforcement program is likely the biggest catalyst pressuring trucking companies to take a hard look at becoming safety compliant and implementing safety management programs to continually improve CSA scores.

Why? Because the public affects the trucking company's bottom line. Those looking at the scores include insurance companies that underwrite liability polices; freight brokers; third-party logistics firms; shippers; and/or customers who are concerned about becoming a defendant through claims of negligent hiring and vicarious liability. Plaintiffs' attorneys will be eager to allow the CSA scores to act as a roadmap for additional theories of liability. And, juries will undoubtedly be angry over CSA scores that exceed FMCSA enforcement intervention thresholds.

An Illinois appellate court upheld a $23,775,000.00 verdict wherein a jury concluded that a federally licensed



freight broker was vicariously liable for the negligence of a motor carrier and truck driver.[47] While this particular case did not directly involve FMCSA regulatory enforcement scores, a trucking industry trade association publication, *Transport Topics*, reported that shippers and third-party logistics companies are exercising due diligence when selecting a trucking company by checking that company's safety scores.[48] According to *Transport Topics*, "CSA scores give a much brighter light for measuring performance record. It's an accepted industry standard, and it's available to everybody."[49] The "accepted industry standard" of checking CSA scores will lead to the exposure of defendant third parties to vicarious liability and negligent hiring claims.

Transport Topics reported that, on March 5, 2012, an Oregon jury awarded $5,100,000.00 in punitive damages including $1,680,000.00 against a third-party freight broker on a negligent hiring claim.[50] The tortfeasor truck driver was cited for driving under the influence and reckless driving when he struck and killed another truck driver. The broker was found negligent for failing to check the truck driver and his company's credentials before arranging the load.[51] Following the verdict a confidential settlement was reached between the broker and the plaintiff.[52]

V. Conclusion

Public transparency of a trucking company's major safety compliance flaws provides incentive to fix the problem. Trucking companies should embrace the new CSA and no longer sweep safety compliance issues under the carpet. Those that do set themselves apart from their competition by demonstrating a culture of safety, and looking out for the safety of the motoring public.

Correspondingly, by being well-versed in the nuances of the FMCSRs and the FMCSA's new CSA regulatory enforcement program, plaintiffs' attorneys ensure that their clients are zealously represented. Immediately upon being hired for a truck accident case, check the tortfeasor trucking company's CSA scores; send letters to preserve essential records; and make FOIA requests for regulatory intervention information. A trucking accident injury case is not a car accident. Look beyond the police report to maximize value and keep our roadways safe. ■

End Notes

1. Federal Motor Carrier Safety Regulations (FMCSRs) 49 C.F.R. §§ 350-399.
2. FMCSA CSA Website, http://csa.fmcsa.dot.gov
3. Safety Measurement System (SMS) Methodology, Version 2.2, January 2012. John A. Volpe, National Transportation System Center, Cambridge, MA 02142, Page 1-1.
4. FMCSA CSA Website, http://csa.fmcsa.dot.gov/yourrole/others.aspx
5. Paul E. Green and Daniel Blower, *Evaluation of the CSA 2010 Operation Model Test*, August, 2011, The University of Michigan Transportation Research Institute, Report No. FMCSA-RRA-11-019. This study compared the effectiveness of the new CSA model with the previous Motor Carrier Safety Status Measurement System (SafeStat). The study concluded: 1) CSA's SMS better identifies motor carriers for safety intervention than the previous SafeStat system; 2) CSA interventions are effective in improving motor carriers' safety behavior; 3) CSA interventions use enforcement resources efficiently; and 4) CSA reaches more carriers to improve safety compliance.
6. Safety Measurement System (SMS) Methodology, Version 2.2, January 2012. John A. Volpe, National Transportation System Center, Cambridge, MA 02142, Page 2-1.
7. Paul E. Green and Daniel Blower, *Evaluation of the CSA 2010 Operation Model Test*, August 2011, The University of Michigan Transportation Research Institute, Report No. FMCSA-RRA-11-019, page xiv.
8. There are six different types of roadside inspections: 1) Full Inspection; 2) Walk-Around; 3) Driver Only; 4) Special Study; 5) Terminal; and 6) Radioactive. According to the FMCSA Motor Carrier Management System (MCMIS) data snapshot in 2009, in Ohio there were 82,757 total roadside inspections.
9. Safety Measurement System (SMS) Methodology, Version 2.2, January 2012. John A. Volpe, National Transportation System Center, Cambridge, MA 02142, Appendix A, A1-40.
10. 49 CFR §§ 395.13, 396.9(c), 396.11(c), and 398.(c)
11. Under the old SafeStat system, roadside inspection violations were only entered into the database if an OOS violation was issued on the vehicle. The OOS reports comprise a fraction of all roadside inspections. Under the new SMS system, all roadside inspection violations are scored and entered into the SMS using all infraction data to identify motor carriers exhibiting a higher crash risk.
12. The seven BASIC behavior categories were derived from sources such as, Daniel Blower and Kenneth L. Campbell, *Large Truck Crash Causation Study Analysis Brief*, February 2005. http://www.ai.fmcsa.dot.gov/ltccs.
13. FMCSA CSA Website, http://csa.fmcsa.dot.gov/about/basics.aspx. A proposed rule change has been introduced to move cargo/load securement violations from the "Cargo-Related" BASIC category to the "Vehicle Maintenance" BASIC category. The "Cargo-Related" BASIC is to be renamed the "Hazardous Materials (HM)" BASIC to identify HM-related safety problems and change how HM carriers are classified. See Federal Register, The Daily Journal of the United States Government, "Improvements to the Compliance, Safety, Accountability (CSA) Motor Carrier Safety Measurement System (SMS)" 03/27/2012 notice. The comment period ends on May 29, 2012. Changes are to be made available to the public in July 2012. https://www.federalregister.gov/articles/2012/03/27/2012-7360/improvements-to-the-compliance-safetyaccountability-csa-motor-carrier-safety-measurement-system-sms
14. Safety Measurement System (SMS) Methodology, Version 2.2, January 2012. John A. Volpe, National Transportation System Center, Cambridge, MA 02142, 2-4 to 2-6.
15. FMCSA CSA Website, SMS Results, http://ai.fmcsa.dot.gov/sms/ To search for and find a motor carrier's BASIC Scores and Complete Measurement Profile, enter the USDOT# in the search box. The USDOT# for Reliable Transportation is 1720152.
16. *Id.*
17. U.S. Department of Transportation Federal Motor Carrier Safety Administration, Reliable Transportation Services, Inc. USDOT 1720152 and Jay Zachary Barber, Individually. Order No.: UT-2012-5000-IMH. "Imminent Hazard Operations Out-of-Service Order" http://www.fmcsa.dot.gov/documents/about/news/2012/reliable-transportation-services-shutdown-order.pdf

18. *See* Federal Register, The Daily Journal of the United States Government, "Improvements to the Compliance, Safety, Accountability (CSA) Motor Carrier Safety Measurement System (SMS)" 03/27/2012 notice.https://www.federalregister.gov/articles/2012/03/27/2012-7360/improvements-to-the-compliance-safetyaccountability-csa-motor-carrier-safety-measurement-system-sms.

19. Regularly search and preserve your defendant trucking company's SMS data. FMCSA Website, http://ai.fmcsa.dot.gov/sms/ Go to this website to capture your defendant trucking company's on-road safety performance information while it is most relevant. Periodically revisit this website to see whether or not your defendant trucking company has an improving or worsening on-road safety performance.

20. Paul E. Green and Daniel Blower, *Evaluation of the CSA 2010 Operation Model Test*, August 2011, The University of Michigan Transportation Research Institute, Report No. FMCSA-RRA-11-019, page xv.

21. *Id.*

22. 49 CFR §396.11(c)(2).

23. 49 CFR §395.8(k)(1)

24. FMCSA CSA Website, http://csa.fmcsa.dot.gov/about/interventions.aspx

25. The Public Utilities Commission of Ohio has regulatory authority to conduct comprehensive reviews of the safety records, policies, and procedures of motor carriers. In 2009, the PUCO conducted 560 compliance reviews of the business practices of trucking companies to ensure regulatory compliance. See - Public Utilities Commission 2010 Annual Report. PUCO Website, http://www.puco.ohio.gov/

26. FMCSA CSA Website, http://csa.fmcsa.dot.gov/Documents/CSA2010_WarningLetterFactssheet.pdf

27. *Id.*

28. Paul E. Green and Daniel Blower, *Evaluation of the CSA 2010 Operation Model Test*, August 2011, The University of Michigan Transportation Research Institute, Report No. FMCSA-RRA-11-019, page xviii.

29. *Id.* at page xix.

30. FMCSA CSA Website, https://csa.fmcsa.dot.gov/about/interventions.aspx

31. *Id.*

32. 49 U.S.C. Chapter 5, Subchapter I - Powers, §§501-508

33. FMCSA CSA Website, https://csa.fmcsa.dot.gov/about/interventions.aspx

34. *Id.*

35. *Id.*

36. *Id.*

37. 49 U.S.C. Chapter 5, Subchapter II - Penalties, §§521-526

38. FMCSA CSA Website, https://csa.fmcsa.dot.gov/about/interventions.aspx

39. U.S. Department of Transportation Federal Motor Carrier Safety Administration, Reliable Transportation Services, Inc. USDOT 1720152 and Jay Zachary Barber, Order No.: UT-2012-5000-IMH. "Imminent Hazard Operations Out-of-Service Order", page 1. http://www.fmcsa.dot.gov/documents/about/news/2012/reliable-transportationservices-shutdown-order.pdf Pursuant to 49 U.S.C. §521(b)(5)(A), 49 U.S.C. §5121, 49 U.S.C. §13905(f), 49 U.S.C. §31144(c)(1) and (2), 49 U.S.C. §31144(c)(5), and 49 C.F.R. § 386.72(a) and (b).

40. *Id.*

41. *Id.* at page 7, 8.

42. FMCSA Website, http://www.psp.fmcsa.dot.gov/Pages/default.aspx

43. 49 CFR Part 385.3

44. FMCSA CSA Website, https://csa.fmcsa.dot.gov/FAQs.aspx?faqid=1446

45. *Id.*

46. FMCSA CSA Website, https://csa.fmcsa.dot.gov/FAQs.aspx?faqid=1445

47. *Sperl v. C.H. Robinson*, 408 Ill. App. 3d 1051, 946 N.E.2d 463 (2011).

48. "CSA Scores Help Shippers Avoid Potential Lawsuits" by Stephanie Overman, Transport Topics, February 27, 2012, pg 5 and pg 10. (Transport Topics Publishing Group, a division of American Trucking Association, Inc.)

49. *Id.*

50. "Broker Liable in Crash Involving 3rd Party; Jury Awards Victim's Widow $5.1 Million" by Rip Watson, Transport Topics, March 26, 2012, pg 4 and pg 28.

51. *Id.*

52. *Id.*

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Constitutionality of Medical Malpractice Damage Caps Under R.C. 2323.43 In Light of *Arbino* And Subsequent Trial Court Decisions

by Christian R. Patno

Inch by inch and pound by pound, I have witnessed the whittling down of patient victim rights in Ohio since the beginning of my practice over 20 years ago. Physicians, their wealthy insurance carriers and hospitals have successfully argued and lobbied in Ohio for the shortest statute of limitations, the requirement of an affidavit of merit to even file a case, the most stringent damages caps, statutes of repose, introduction of collateral source evidence, use of periodic future damages payments, and have now even impinged on attorney-client relationships with caps on attorney fees. What medical victim rights remain following the extreme limits placed by legislation have been further curtailed by court rules and case law. The devastating effect of this tort "reform" has caused numerous victims to be left with little to no remedy and many attorneys who specialize in medical malpractice to leave this area of law altogether or remain uncertain as to its future. Even now, nine years after R.C. 2323.43 was enacted capping damages on medical malpractice cases, the constitutionality of this statute remains in flux.

I. Overview Of Relevant Ohio Supreme Court Precedents.

Historically, *Morris v. Savoy*[1] and *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*[2] have been the Ohio gold standard test for constitutional assessment of statutory caps on medical malpractice awards. In *Morris* and *Sheward*, the Ohio Supreme Court found the medical malpractice non-economic damages cap tort reform statutes unconstitutional. The court focused on the legislature's lack of factual support for imposing these caps. *Morris* and *Sheward* held the statutory caps unconstitutional since they lacked a real and substantial evidentiary relationship to the reduction of malpractice premiums. The caps were also found unconstitutional on a second level since they imposed the cost of the intended benefit to the general public upon those most severely damaged by medical care.

In 2002, the Ohio Legislature set its wheels in motion attempting to remedy the deficiencies found by the Supreme Court in *Morris* and *Sheward* by enacting R.C. 2323.43. In so doing, the legislature created a statute that is in direct conflict with R.C. 2315.18, the statute that caps damages in most other (non-medical malpractice) tort cases. The conflict exists due to the different ways the two statutes treat the most severely injured tort victims. Under R.C. 2323.43(A)(3), the maximum non-economic catastrophic damage award in a medical malpractice action is limited to $500,000 for each plaintiff and $1,000,000 for each occurrence. By contrast, under R.C. 2315.18(B)(3), there is absolutely ***no*** limit for non-economic damages for those victims

of general torts who are the most severely injured.

Although the Ohio Supreme Court has addressed the constitutionality of caps on non-economic damages in general tort actions pursuant to R.C. 2315.18 through its holding in *Arbino v. Johnson & Johnson, et al.*,[3] the Court has yet to address the constitutionality of the medical malpractice damages caps in R.C. 2323.43. *Arbino*, moreover, only found the R.C. 2315.18 capping provisions constitutional ***on their face***, leaving completely open challenges to the statute ***as applied*** to specific factual situations.

Although *Arbino* does not resolve the constitutionality of the medical malpractice damages cap statute, it provides insight into how the Supreme Court might analyze the capping provisions of R.C. 2323.43 when such a challenge eventually comes before the Court.

First, *Arbino*, in a complete about-face from the position taken by the Court in *Sheward*, extended substantial and previously unforeseen deference to the Ohio Legislature's findings and its articulated need for the statute. The Court did so as part of a rational basis review. The Court found that it was not its job to "second-guess such legislative choices" and further deferred to the legislature on the basis for the dollar amounts and limitations in the statute.

Second, *Arbino* danced around the issue of stare decisis by noting that past Supreme Court cases had not found that all tort reform was unconstitutional. *Arbino* recited the history of Ohio tort reform and held that, in order for the Court to be controlled by stare decisis in the tort reform arena, "the legislation must be phrased in language that is substantially the same as that which we have previously invalidated."[4] Thus, those intending to challenge R.C. 2323.43 will need to show the statute is substantially the same as the statutes in *Morris* or *Sheward* in order to establish that the statute is unconstitutional on stare decisis grounds. Conversely, for the *Morris* and *Sheward* decisions not to apply on the grounds of stare decisis, the provisions of R.C. 2323.43 must be found to be sufficiently different from those in the statutes held unconstitutional in those prior decisions.

Arbino also addressed punitive damages caps and found the punitive damages cap under R.C. 2315.21 to be facially constitutional. This again leaves open future challenges to the statute "as

applied" to specific cases. Clearly, there are some cases where conduct is so absolutely egregious that the punitive damages cap should be held unconstitutional as applied to those specific facts.

It is unclear, however, whether the punitive damages caps found in R.C. 2315.21 even apply to medical malpractice cases. The only capping provisions that expressly apply to medical malpractice cases are those set forth in R.C. 2323.43, and these do not contain any caps for punitive damages, nor do they make any reference to R.C. 2315.21. It thus might be argued that the punitive damages capping provisions set forth in R.C. 2315.21 do not apply to medical malpractice actions. On the other hand, the statute's broad definition of "tort action" as discussed in *Luri v. Republic Services, Inc.*,[5] suggests that the punitive damages caps in R.C. 2323.43 apply broadly to all tort actions for injury or loss to person or property.[6] It thus seems likely (although not decisively so) that the punitive damages caps in R.C. 2323.43 will be applied in medical malpractice actions.

Unlike the tort reform statutes in *Morris* and *Sheward*, Senate Bill 281 – the bill that introduced the non-economic damages cap in R.C. 2323.43 – contains findings from testimony that medical malpractice cases represent an increasing danger to the provision of healthcare in Ohio and that the cost of healthcare to consumers was driven up by malpractice litigation. Additionally, unlike the statutes ruled unconstitutional in *Morris* and *Sheward*, R.C. 2323.43 creates two classes of damages caps – catastrophic and non-catastrophic – with catastrophic injuries being subject to higher limits. In *Morris*, the statute created one single flat non-economic damages cap that applied no matter how bad the injury. This was the basis of the Court's conclusion that the statute unfairly placed the costs of the intended benefit to the general public upon those most severely injured by the defendants' malpractice.

In applying *Morris* to the present statute, the question thus becomes whether the statute remains "arbitrary" and continues to create an unfair burden shift, when, as under the current version, the statute creates a higher, although still very restricted, non-economic damages cap for catastrophic injuries.

II. Trial Court Decisions Finding The Non-Economic Damages Caps In R.C. 2323.43 Unconstitutional.

Subsequent to *Arbino*, there have been a few trial court decisions addressing the constitutionality of caps in medical malpractice actions.

On February 29, 2008, the Franklin County Court of Common Pleas addressed the constitutionality of medical malpractice caps under R.C. 2323.43. In *Mead* v. *Wilt*,[7] Judge Daniel T. Hogan of that court held, on a motion for partial summary judgment, that the damages caps in R.C. 2323.43 are unconstitutional. In *Mead*, the defendants sought a pretrial ruling that the caps were applicable to the plaintiffs' survivorship action. The plaintiffs opposed the motion, arguing the caps violated the Ohio Constitution's due process guarantee[8] for the reason stated in *Morris – i.e.*, that it unfairly imposed the cost of medical malpractice "reform" on the most severely injured.

The *Mead* court agreed, citing *Morris* and *Sheward* for the proposition that it is irrational and arbitrary to impose the cost of an intended public benefit solely upon a class consisting of those most severely injured by malpractice. The court in *Mead* further found *Arbino* distinguishable since the caps in R.C. 2315.18 do not impose the same (or indeed any) burden on the most severely injured. *Mead* noted the *Arbino* court relied upon this specific aspect of R.C. 2315.18 to distinguish it from the statute found unconstitutional in *Morris*. Thus, *Mead* found the damage caps before it unconstitutional since the current statute had the same constitutional defect as did the statute in *Morris*.

The following year, in *Wargo v. Susan White Anesthesia, Inc.*,[9] Judge Daniel Gaul of the Cuyahoga County Court of Common Pleas found the punitive damages cap of R.C. 2315.21 violated the plaintiff's right to a jury trial and equal protection under the law.[10] The court reasoned that the statute ignores the fact that the punitive finding was less than half the compensatory award and that there was no factual or rational support in the statute for treating small employers differently from larger employers. Such a statute did not survive the strict scrutiny review under equal protection standards or the rational basis test according to the court. The court further cited to *Morris* for support.

The court in *Wargo* also addressed a motion to cap the $830,000 non-economic damages award at $500,000 under R.C. 2323.43. The court found the statute unconstitutional as applied to plaintiff Wargo since to apply it would be to invade the right to trial by jury created in the Ohio Constitution and as found by *Sheward*. The court distinguished *Arbino* as solely a facial challenge and noted that, unlike the case before it, the Court in *Arbino* did not address the constitutionality of the cap statute as applied in a specific case. As in *Mead*, the court in *Wargo* also aptly noted that it would be a violation of equal protection to apply a catastrophic

cap under R.C. 2323.43 to a medical malpractice case while a plaintiff with the exact same catastrophic injury in a non-medical malpractice personal injury action is subject to no cap at all. This disparity, the court noted, discriminates against malpractice victims.

The defendants appealed the verdict in *Wargo*, raising, as one of many assignments of error, the trial court's rulings on the damages caps' constitutionality.[11] Although the Eighth District reversed on two issues requiring a retrial,[12] it found the remaining issues (including the constitutionality issues) moot.[13] As such, Judge Gaul's ruling on the constitutionality of the damages caps remains good law.

Following *Wargo*, Judge Paul J. Gallagher of the Summit County Court of Common Pleas addressed the issue of caps for medical malpractice actions in *Wells v. Call*.[14] In *Wells*, the trial court was asked to reduce a $1,400,000 non-economic damages award to $300,000 under R.C. 2323.43. The plaintiff Wells argued the cap was unconstitutional as applied to her specific factual scenario. Alternatively, Wells argued that if the verdict should be reduced, it should be reduced only to the catastrophic limit of $500,000 since Ms. Wells had a permanent and substantial physical deformity and/or loss of use of a limb. The court agreed that if the statute was constitutional, the reduction would solely be to $500,000. However, the court then went on to assess the constitutionality of R.C. 2323.43 as applied to the catastrophic injury limits, and, like the courts in *Mead* and *Wargo*, found the statute unconstitutional on due process grounds.

The *Wells* court wrote a lengthy opinion of its constitutional analysis. First, the court addressed the malpractice cap statutes found unconstitutional in *Morris* and *Sheward*. The court then went on to address *Arbino* and its implications for the medical malpractice case at bar. *Wells* focused on the language in *Arbino* discussing how there was no cap for catastrophic damage in general tort actions and thus that the cost of the cap statute was not borne by the most severely injured. The court in *Wells* then honed-in on the distinction between catastrophic caps of $500,000 in medical malpractice matters versus no caps whatsoever for the same type of injury in general tort actions. Further, the court in *Wells* found that the caps set forth in R.C. 2323.43 are lower than the caps of $1,000,000 found unconstitutional in *Sheward*. The court concluded that the cap for catastrophic injury, as applied to this medical malpractice verdict, violated the due process provision of the Ohio Constitution. The *Wells* court did not, however, find that the statute infringed upon the right to a trial by jury, or that it was void for vagueness.

III. Conclusion.

As the above-discussed cases indicate, the constitutionality of the medical malpractice damages caps has not been finally resolved. Although *Arbino* and other recent Supreme Court decisions suggest that the Court will not lightly apply stare decisis to hold the current version of medical malpractice caps unconstitutional based on its former decisions in *Morris* and *Sheward*, there are still reasons for plaintiffs and their attorneys to hope that the Court will strike down the medical malpractice caps. As *Mead*, *Wargo*, and *Wells* reveal, there are compelling reasons to find R.C. 2323.43 unconstitutional both on its face and as applied – especially as applied to those victims of medical malpractice who have suffered the worst, most catastrophic injuries. Those most severely injured must ***never*** bear the brunt of the burden for the benefit of the general public, or, more accurately stated, the benefit of highly compensated physicians, "non-profit" hospitals, and extremely profitable insurance companies. ■

End Notes

1. 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991).
2. 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).
3. 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E. 2d 420.
4. *Id.* at ¶23.
5. 193 Ohio App. 3d 682, 2011-Ohio-2389, 953 N.E.2d 859. *Luri* is currently on appeal to the Ohio Supreme Court on other grounds.
6. *Id.* at ¶14.
7. Franklin County C.P. No. 05 CVA 01-864 (February 29, 2008).
8. The Due Process Clause is set forth in Article I, Section 16 of the Ohio Constitution.
9. Cuyahoga County C.P. No. CV-08-653779 (October 29, 2009).
10. The right to jury trial is set forth in Article I, Section 5 of the Ohio Constitution, while the Equal Protection Clause of the Ohio Constitution is found in Article I, Section 2.
11. *Wargo v. White Anesthesia, Inc.*, 8th Dist. No. 96410, 2011-Ohio-6271.
12. The Eight District held that Wargo's claims for fraudulent concealment and punitive damages were not supported by the evidence and failed as a matter of law. The court further found that allowing the fraudulent concealment claim to go to the jury prejudicially tainted the entire trial and that, therefore, a new trial on the medical malpractice claim was warranted. *Id.* at ¶23.
13. *Id.* at ¶24.
14. Summit County C.P. No. CV 2008-09-6782 (November 23, 2010).

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A "Review" Of Peer Review – The Eighth District Reiterates The Standard For Claiming Privilege

by Brenda M. Johnson

In the health care setting, "peer review" is a term used for internal quality review investigations conducted by health care providers. Under Ohio law (as is the case in all other states), these investigations are subject to a statutory privilege, the purpose of which is "to protect the integrity of the peer review process in order to improve the quality of health care."[1] At the same time, the privilege is not without limits. First among these limits is the fact that a party claiming the privilege must first establish that a peer review committee meeting the statutory requirements in fact existed, and that the documents or information for which privilege is claimed were in fact generated in the course of the peer review process.

At the end of last year, the Eighth District Court of Appeals issued the most recent opinion setting forth the standards that must be met in order for a health care provider to claim the protection of the peer review privilege. In *Smith v. Cleveland Clinic*,[2] following and building upon standards already articulated by other districts, the Eighth District reaffirmed that the statutory privilege must be read narrowly, and that the party claiming its protection must establish, through independent evidence, that a proceeding meeting the statutory definition was in fact convened, and that the materials at issue were generated in the course of the proceeding.

A. Overview Of The Peer Review Statute

Ohio's peer review statute, R.C. § 2305.25 *et seq*, extends certain privileges and immunities to peer review committees, which are defined by statute as committees organized by qualifying health care providers to conduct "professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by health care providers," or "any other attendant hearing process initiated as a result of a peer review committee's recommendations or actions."[3] Section 2305.252, in turn, provides that "[p]roceedings and records within the scope of a peer review committee . . . shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or . . . provider . . . arising out of matters that are the subject of evaluation and review by the peer review committee."

The peer review privilege set forth in R.C. § 2305.252 did not exist at common law.[4] Thus, as with any statutory privilege, R.C. § 2305.252 "must be strictly construed against the party seeking to assert it and may be applied only to those circumstances specifically named in the statute."[5] Moreover, "[a] health care entity asserting the *R.C. 2305.252* privilege bears the burden of establishing the applicability of the privilege."[6]

B. *Smith* Reiterated The Threshold Requirements That Must Be Satisfied For Peer Review Privilege To Be Invoked

Ohio courts consistently have held that a party seeking the protection of R.C. § 2305.252 must first establish that the information at issue

does, in fact, fall within the statute's protection. To do so, the party claiming privilege must present more than a mere assertion that the privilege applies. Instead, the party must present evidence that a proceeding meeting the statutory description of a peer review committee was, in fact, convened, and that the records at issue were prepared by or for the use of that committee.

In *Rinaldi v. City View Nursing & Rehabilitation Center, Inc.*,[7] for instance, the Eighth District held that merely asserting in a privilege log that certain documents titled "investigation report" or "incident statement" were subject to the statutory privilege was not sufficient. Instead, it was incumbent on the party asserting the privilege to present to the trial court some form of independent evidence indicating that the records were prepared as a part of a peer review committee's functions, and that a committee performing functions listed in R.C. § 2305.25(E) had in fact been convened.[8] In *Giusti v. Akron Gen. Med. Ctr.*,[9] the Ninth District held that it was not enough for a hospital to show that it had a quality review process in place – instead, the hospital had to show that the events at issue had in fact been the subject of a quality review proceeding, and that the statements in question had actually been made as part of that proceeding.[10] Likewise, in *Smith v. Manor Care of Canton, Inc. ("Manor Care")*,[11] the Fifth District observed that "as a bare minimum, the party claiming the privilege must bring to the court's attention the existence of such a committee and show the committee investigated the case in question."[12]

In *Manor Care*, the Fifth District held that a health care provider claiming privilege must be able to provide evidence establishing certain details about the committee, including (a) the name of the committee; (b) its by-laws or scope of authority; (c) the number of members; and (d) some proof of the proceedings, including proof that the proceedings were aimed at quality of care or disciplinary issues.[13] In addition, "the party claiming the privilege must provide the court with a list of the evidence the peer review committee had."[14]

In *Smith*,[15] the Eighth District reaffirmed these requirements. *Smith* arose from a wrongful death case in which the decedent suffered a cardiac arrest and subsequent death after undergoing otherwise uneventful knee replacement surgery. After the cardiac arrest, the hospital's chief medical officer met with the family to discuss the events that had led to Mr. Smith's cardiac arrest, and in the course of a lengthy question-and-answer period admitted fault on the part of the hospital. When the family filed suit, however, the hospital claimed that the information imparted to the Smith family in the course of the meeting was subject to the peer review privilege, and sought a protective order on that basis.[16] In support of its motion, the hospital presented the affidavit of the chief medical officer, in which the chief medical officer attested that (a) he was the chief medical officer, (b) that he had no involvement in decedent's treatment, and (c) that his knowledge of the decedent's treatment was derived solely from a "privileged, protected and confidential Root Cause Analysis/Peer Review" conducted after the decedent's cardiac event.[17]

The trial court denied the hospital's motion, finding that it was not clear that the "Root Cause Analysis" constituted a peer review proceeding, and even if it had, that the hospital had waived any claim of privilege when its chief medical officer communicated its findings to the Smith family.[18] In its first assignment of error on appeal, the hospital claimed the trial court had erred in not finding that the "Root Cause Analysis" was a peer review committee for purposes of R.C. § 2305.252. The Eighth District held otherwise, and affirmed the trial court.

Central to the Eighth District's holding was the fact that the hospital relied solely on its chief medical officer's affidavit, and had not provided independent evidence regarding the existence and operation of the proceeding for which peer review status was being claimed:

> The defendants-appellants have not provided this court with any other evidence surrounding the Root Cause Analysis/Peer Review Committee that allegedly took place on February 24, 2010. More specifically, this court has no record of the defendants-appellants' written policies and procedures, which would presumably outline the purpose of the Root Cause Analysis/Peer Review Committee, its members, its scope of authority or any other proof that the proceedings were aimed at quality of care or disciplinary issues. More importantly, outside the affidavit of Dr. El-Dalati, we have no independent proof that this February 24, 2010 meeting was aimed at peer reviewing Mr. Smith's case.[19]

The Eighth District found the hospital's failure to present independent evidence of policies and procedures relating to the allegedly confidential proceedings particularly problematic in light of the representations and disclosures made to the family by the hospital's chief medical officer during the meeting at issue, where the chief medical officer provided the family with detailed information regarding the events leading up to Mr. Smith's cardiac arrest, while at the same time repeatedly representing that the peer review process had not yet occurred.[20] Perhaps most importantly, however, the Eighth District reiterated

its stance that labels are not sufficient to meet the burden of establishing privilege, and joined the ranks of courts that have found blanket statements in affidavits to be insufficient as well.

First, as the Eighth District noted,

> Ohio courts have been adamant that merely labeling a committee or a document "peer review" is insufficient to meet the burden of proving that the privilege applies to the requested information. For example, [in *Rinaldi*, supra] this court found it insufficient to simply title reports "investigation report" or "incident statement." . . .[21]

With respect to the chief medical officer's affidavit, the Eighth District invoked *Selby v. Fort Hamilton Hospital,*[22] in which the Twelfth District held that a blanket statement set forth in an affidavit from a hospital's medical director representing that certain documents had been reviewed by a peer review committee was insufficient to establish that they had, in fact, been so reviewed, especially in light of conflicting evidence on the issue. In *Selby,* the affidavit was contradicted by the hospital's written policies and procedures, which indicated the documents in question were used for patient care.[23] In *Smith,* the affidavit was contradicted by the chief medical officer's representations to the family:

> We find the *Selby* court's rationale applicable to the instant case. Here the defendant-appellants have provided this court with nothing more than a single affidavit, which contains blanket statements from Dr. El-Dalati, as proof that a peer review committee meeting the statutory requirements was convened. Further, Dr. El-Dalati's affidavit directly contradicts his own statements made to the family, wherein he repeatedly stated that he was part of the peer review committee and that the peer review process had not yet begun.[24]

Thus, the Eighth District found that the hospital had not met its burden of proving that the peer review privilege had ever applied to any of the information provided to the Smith family, and having so found, it declined to reach the issue of whether the hospital had waived the privilege by disclosing the information.[25]

C. Conclusion

While Ohio's peer review privilege statute may seem broad in its scope, it is still a statutory privilege. The party claiming privilege must prove its applicability, and the courts, including the Eighth District, have held that the burden of proving its applicability is far from negligible. ■

End Notes

1. *Smith v. Cleveland Clinic*, 8th Dist. No. 96751, 2011 Ohio 6648, ¶ 11 (citing *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008 Ohio 4333, 896 N.E.2d 769 (9th Dist.)).
2. 8th Dist. No. 96751, 2011 Ohio 6648.
3. R.C. § 2305.25(E)(1).
4. *See, e.g., Nilavar v. Mercy Health System – Western Ohio*, 210 F.R.D. 597, 604-605 (S.D. Ohio 2002) (physician peer review not subject to common law privilege).
5. *Ward v. Summa Health System*, 128 Ohio St.3d 212, 2010 Ohio 6275, ¶ 15.
6. *Bansal v. Mount Carmel Health Systems, Inc.*, 10th Dist. No. 09AP-351, 2009 Ohio 6845, ¶ 14; *see also Rinaldi v. City View Nursing & Rehab. Ctr., Inc.*, 8th Dist. No. 85867, 2005 Ohio 6360, ¶ 22 ("A party asserting the privilege set forth in R.C. 2305.253 [addressing peer review incident reports] has the burden of establishing that the privilege is applicable.").
7. 8th Dist. No. 85867, 2005 Ohio 6360.
8. *Id.* at ¶ 20 ("City View presented no evidence to the trial court indicating that the records were prepared by or for the use of a peer review committee or that the records were within the scope of the functions of that committee."); ¶ 21 ("Furthermore, City View presented no evidence to the trial court that it even had a peer review committee . . . [i]ndeed, at oral argument, City View's counsel conceded that she did not know whether City View had a peer review committee, but merely assumed that it did."); *see also Bansal, supra* at ¶ 18 ("Absent evidence that the requested documents were created by and/or exclusively for a peer review committee, or generated by an original source and produced or presented to a peer review committee, the party asserting the *R.C. 2305.232* privilege has not met its burden.").
9. 178 Ohio App.3d 53, 2008 Ohio 4333, 896 N.E.2d 769 (9th Dist.).
10. *Id.* at ¶ 24 ("The evidence revealed that the Hospital had a process for 'performing quality assurance reviews of patient care' and that Dr. Schelble was part of that process. The evidence did not prove, however, that a peer review committee ever initiated or performed any type of review of Mr. Rinehart's death. Nor did it prove that the conversation between Drs. Schelble and Kurtz was part of a peer review committee proceeding.").
11. 5th Dist. Nos. 2005-CA-00100, 2005-CA-00160, 2005-CA-00162, 2005-CA-00174, 2006 Ohio 1182.
12. *Id.* at ¶ 61.
13. *Id.* at ¶ 49; *see also Manley v. Heather Hill, Inc.* (11th Dist.), 175 Ohio App.3d 155, 2007 Ohio 6944 at ¶ 22 ("At 'a bare minimum, the party claiming the privilege must bring to the court's attention the existence of such a [peer review] committee and show the committee investigated the case in question.'", quoting *Smith* at ¶ 61).
14. *Smith v. Manor Care* at ¶ 61
15. 8th Dist. No. 96751, 2011 Ohio 6648.
16. *Id.* at ¶¶ 3-5.
17. *Id.* at ¶ 16.
18. *Id.* at ¶ 5.
19. *Id.* at ¶ 17, citing *Manor Care, supra*.
20. *Id.* at ¶ 18. Among other things, the chief medical officer, speaking in his capacity as a representative of the hospital, told the family that "it's my job to communicate to you everything that we do and everything that we find," and repeatedly stated that the peer review process had not yet started. *Id.* at ¶¶ 18-21. Because the family had recorded their conversation with the chief medical officer and his staff prior to retaining counsel, the trial court and the Eighth District had the benefit of a verbatim transcript of the discussion. *Id.* at ¶ 4.
21. *Id.* at ¶ 23 (citing *Rinaldi, supra and Flynn v. Univ. Hosp, Inc.*, 172 Ohio App.3d 775, 2007 Ohio 4468, ¶ 6, 876 N.E.2d 1300 (1st Dist.) ("[L]abeling a document an incident report does not mean that it meets the statutory definition of an incident report . . .")
22. 12th Dist. No. CA2007-05-126, 2008 Ohio 2413.
23. *Id.* at ¶ 15.
24. *Smith* at ¶ 25.
25. *Id.* at ¶¶ 26-28.

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The Perils of Facebook

by Christopher Mellino and Allen Tittle

I. Introduction

We all get a good laugh when a professional athlete tweets or posts something ridiculous or controversial right before a big game. Social media is one of a franchise owner's or coach's worst nightmares. Players were getting so out of control that the NFL and NBA took the step of banning use of social media ***during*** games.

Our clients can cause us some of the same headaches. We can try to ban our clients from using Facebook during the pendency of their case but, as a practical matter, it would be very difficult and time consuming to police that, and, in all likelihood, they will do it anyway.

Social media has become a way of life, and its use is growing exponentially. As of February 12, 2012, there were 845 million Facebook users worldwide. It is not just Gen Xers or Millenials using Facebook. As of March 2010, the number of people over the age of 45 using Facebook was almost 7.5 million with the fastest growing segment being women over the age of 55. It seems that nothing happens in the privacy of our own homes anymore. It is all out there on Facebook or MySpace.

It is safe to assume that most, if not all, of our clients have a Facebook page and are active on it. The real question is how do we prevent our clients from blowing up their cases by content they post on Facebook?

Facebook allows a user to choose different privacy options. Most users choose either the "public" or "friends only" options. Obviously with the public setting any content posted on a user's profile, including pictures, is available to anyone.

However, by choosing the "friends only" option the user is not limiting the content to only his or her friends list. Anytime a user posts something on a friends wall, "tags" or gets "tagged" in a photo, or "likes" someone else's post they lose control over what audience will receive that content, because that information becomes available to all the friends of their friends.

Now Facebook has just introduced Timeline, which provides even more public information. When users get the new Facebook, their timeline will automatically populate and all content that that user has ever posted on their Facebook page, including photos, will be featured on their first page. Additionally, when certain apps are used, information about the user's activity is broadcast to their friends. For instance, if you purchase a book or rent a movie through these apps, Facebook will tell your friends what you are reading or watching.

In essence, Facebook has opened up a new watering hole for defendants to attempt to go trawling for information about our clients. By and large, however, courts have shut down attempts by the defense either to require a plaintiff to turn over his or her user name and password or to subpoena the information directly from Facebook and/or MySpace.

However, there have been some limited circumstances where plaintiffs have been required to turn over Facebook material including their user name and password. Therefore, it is incumbent upon plaintiffs' counsel to be proactive in advising our clients, so as to avoid being on the wrong side of an order compelling discovery of such information.

II. Legal Issues Relating to the Discovery of Social Networking Websites

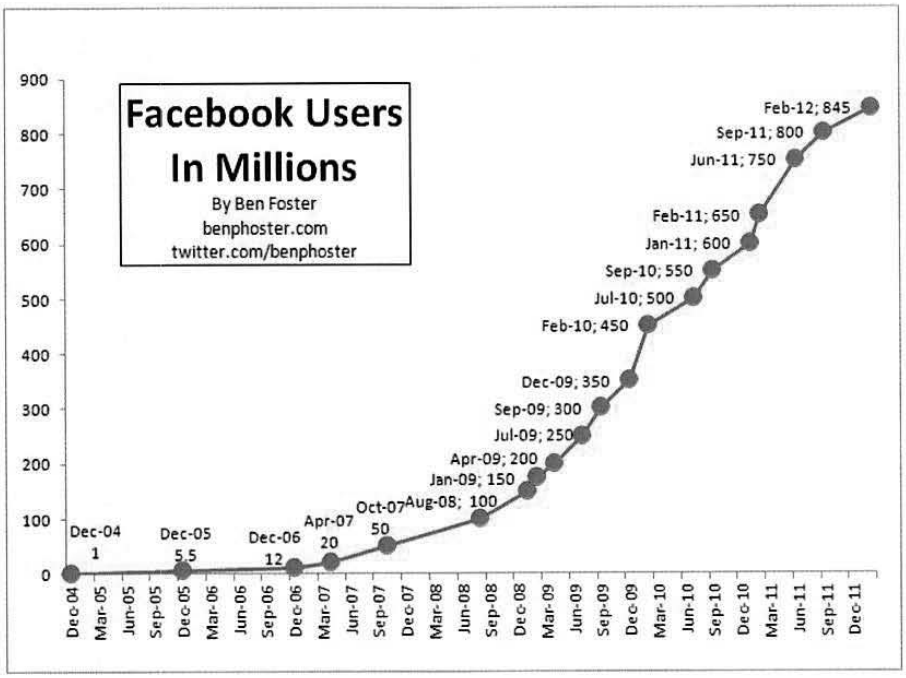
A. Serving a Subpoena on the Social Networking Provider

Courts have quashed subpoenas that are served directly on social networking websites, including Facebook, requesting any and all information/documents found on the plaintiff's account. In *Crispin v. Audigier,*[1] the court quashed subpoenas sent directly to various social networking providers, pursuant to the Shared Communications Act ("SCA"). The SCA, generally, prevents providers of communication services from divulging private communications. Thus, the *Crispin* court held that webmail and private messaging services provided on social networking websites are not subject to a subpoena under the SCA since such messages are not readily accessible to the general public, and, therefore, are inherently private.

The *Crispin* decision, however, still leaves a very large loophole – the SCA only prevents providers of communication services from divulging private communications. Therefore, defense counsel may still request the information found on our clients' Facebook pages directly in discovery. Thus, the issue becomes how do we protect our clients from having to provide private information found on the social networking sites?

B. Discovery Requests Served Directly on the Plaintiff

It is inevitable that a defense attorney will request information found on a plaintiff's social networking account, including full access to his or her account. We, as plaintiffs' counsel, must respond by putting the onus on the defense attorney to show why access to the account is relevant, as courts have refused to recognize that information contained on a social networking site is privileged and/or protected by privacy laws.



However, when the "public" portion of the individual's social media account displays pictures and/or information that are inconsistent with that person's injury claims, courts have allowed the defense to have full access to the account. In *Largent v. Reed,*[4] the court ordered the plaintiff to turn over his Facebook user name and password since the public portion of the plaintiff's account contained photographs and status updates inconsistent with his injury claims. This ruling is consistent with holdings of other state courts.[5]

Courts across the nation, including district courts in the Sixth Circuit, are reluctant to allow the defense full access to a plaintiff's social media account without the defense first showing why the information on the account is relevant. In *Tompkins v. Detroit Metro. Airport,*[2] a personal injury action arising out of a slip and fall accident, the defendant filed a motion to compel seeking full access to plaintiff's Facebook account. The court denied this request holding that the defendant failed to meet the initial threshold of showing that the requested information was reasonably calculated to lead to the discovery of admissible evidence as the public portions of the plaintiff's Facebook account contained no evidence that she was engaging in activities inconsistent with her injury claims. Other federal and state trial courts have reached similar holdings on motions to compel Facebook account information.[3]

Further, courts have rejected the notion that information found on Facebook is privileged or that an individual has a right to privacy relating to that material. In *Largent* and *McMillen,*[6] the courts

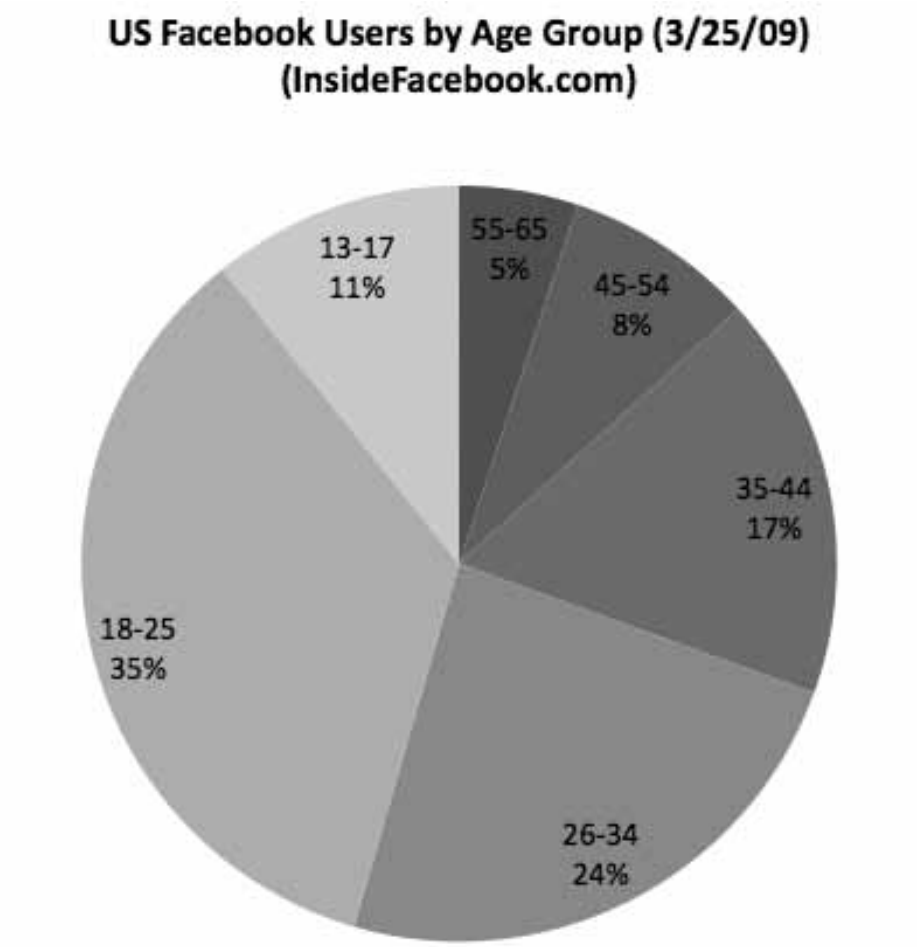
specifically stated that the plaintiffs did not have an inherent right to privacy relating to the information found on their social networking accounts and that there was no applicable privilege to prevent discovery. In fact, the court in *Largent* relied partially on Facebook's own privacy policy, which states as follows regarding legal requests: "[w]e may share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so." Courts have also rejected a plaintiff's contention that the physician-patient and spousal privileges barred discovery of information found on social networking sites.[7]

Thus, the plaintiff's counsel must force the defense to show why the material requested is relevant, and remain steadfast that the defense make the requisite showing that the information requested will lead to the discovery of admissible evidence, as opposed to making arguments regarding privilege or inherent privacy rights.

III. Conclusion

It would seem prudent to develop a Facebook Policy to give our clients at the initial meeting, including admonitions about posting anything on a social network about their case, or physical or mental condition.

One can easily envision how posts of photos on Facebook could easily be taken out of context and used against our clients. As is evident from the cases cited above, there is no bright line rule concerning the discovery of material found on Facebook. One court has even required the plaintiff to turn over his Facebook user name and password so that the court could conduct an *in camera* review regarding relevancy.[8] To avoid such an outcome, plaintiffs' counsel should be proactive in the first meeting with their clients and advise them to make their Facebook profile private, and not to post anything relating to the injury at issue. ■



End Notes

1. 717 F. Supp. 2d 965 (C.D. Cal. May 26, 2010).
2. E.D. Mich. No. 10-10413, 2012 U.S. Dist. LEXIS 5749 (Jan. 18, 2012).
3. *See, e.g., Chauvin v. State Farm Mut. Auto. Ins. Co.*, E.D. Mich. No. 10-11735, 2011 U.S. Dist. LEXIS 121600 (Oct. 20, 2011) (holding the same); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D. 3d 1524, 910 N.Y.S. 2d 614 (N.Y. App. Ct. 2010) (holding the same); *Patterson v. Turner Construction Co.*, 88 A.D. 3d 617, 931 N.Y.S. 2d 311 (N.Y. App. Ct. 2011) (holding the same).
4. Penn. C.P. Case No. 2009-1823, *unpublished* (Nov. 8, 2011).
5. *See, e.g., McMillen v. Hummingbird Speedway, Inc.*, Penn. App. Case No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Com. Pl. 2010) (holding the same after plaintiff posted pictures contradicting his injury claims); *Romano v. Educ. & Inst. Coop. Serv's Inc.*, 30 Misc. 3d 426, 907 N.Y.S. 2d 650 (N.Y. Sup. Ct. 2010) (holding that since the public portions of plaintiff's profile had information that contradicted her injury claims, "it is reasonable to infer... that her private pages may contain materials and information that are relevant to her claims").
6. *Id.*
7. *See, e.g., Ledbetter v. Wal-Mart Stores, Inc.*, D. Colo. No. 06-cv-01958-WYD-MJW, 2009 U.S. Dist. LEXIS 126859 (April 21, 2009) (holding that the physician-patient and spousal privileges were inapplicable in requests to discover information found on social networking sites).
8. *See Offenback v. L. M. Bowman, Inc.*, M. D. Pa. No. 1:10-CV-1789, 2011 U.S. Dist. LEXIS 66432 (June 22, 2011

CATA Donates 225 Books

On a chilly Tuesday morning, April 24, 2012, CATA President John Liber and his assistant Nancy Burroughs drove to Cleveland Public School's John Hay Early College Academy to deliver eight boxes containing 225 copies of the book "The Immortal Life of Henrietta Lacks" by Rebecca Skloot. One of John's goals during his term was to broaden CATA's charitable outreach by focusing on activities that more closely mirrored the work performed by CATA members. "This was the perfect fit," Liber explained. "When I first learned of teacher Sarah Humphrey-Bekouche's request for donations of this book, and then discovered the storyline, I immediately contacted her to see what CATA could do."

CATA President John Liber presents John Hay Senior Class President Jessica Maldonado with a copy of "The Immortal Life of Henrietta Lacks." Nancy Burroughs and John Hay Teacher Sarah Humphrey-Bekhouche.

Skloot's non-fiction account provides a captivating story of a poor Southern tobacco farmer who moved to Baltimore, and, upon discovery of a cancerous tumor, had samples taken without her knowledge. Known in the medical research field as "He-La" cells, the discovery turned into one of the most important medical innovations of modern time, forming the basis for such breakthrough developments as the polio vaccine, gene mapping, and in vitro fertilization. He-La cells continue to be grown in laboratories and commercially sold today, 50 years after her death.

The book provides a stunning dichotomy between the struggles of inner-city minorities under the Jim Crow laws of the 1950s, and modern medical ethics.

Ms. Beckhouche, Mr. Liber, John Hay Senior Class Representative Tyrell Butler, John Hay Senior Class Sergeant at Arms Deron Battle and Ms. Burroughs.

Ms. Humphrey-Bekouche sought to have the book provided to her senior students in their study of the civil rights era and medical ethics, but could not find the funds in the school budget. Liber observed, "as lawyers we are fortunate to take advantage of our reading skills to broaden our knowledge base and achieve success. Donating these books serves the perfect opportunity for us to encourage college bound high school students not only to continue to enjoy reading, but to learn more about the sometimes controversial aspects of our nation's history." ■

Ms. Bekhouche, Ms. Maldonado, John Hay Principal Carol Lockhart, Ms. Burroughs, Mr. Liber.

Photos by Carrie Liber

Beyond The Practice: CATA Members In The Community

by Susan Petersen

"Everyone can be great, because everyone can serve." – Martin Luther King, Jr.

Beyond the practice of law, here is what some of our CATA members are doing in their communities to give back.

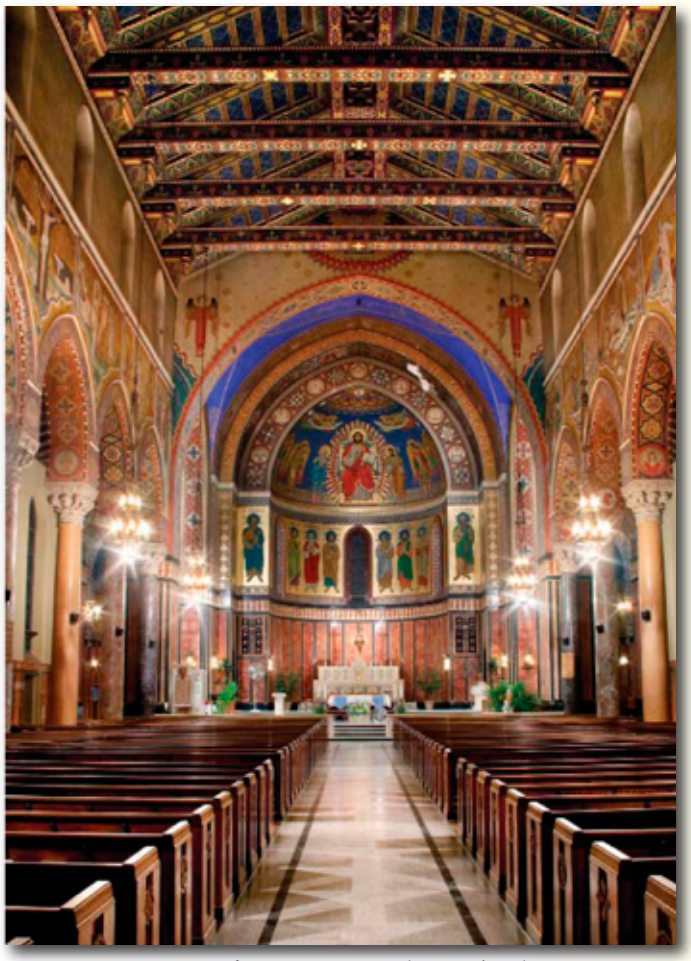
Christine LaSalvia

The parishioners of the historic St. James Church in Lakewood, Ohio owe a huge debt of gratitude to CATA member, **Christine LaSalvia of Friedman, Domiano & Smith** for her volunteerism and leadership. On behalf of "Save St. James" community action group, Attorney LaSalvia, also a St. James parishioner, spent countless hours over the last few years investigating and then appealing a 2009 decision by Bishop Richard Lennon of the Cleveland Catholic Diocese to close its church. On March 7, 2012, the Vatican issued a decree that she won the appeal on behalf of St. James.

In 2009-2010, Bishop Lennon closed 50 churches in the eight-county diocese, citing shortages of priests, cash and parishioners. St. James was one of them. St. James is one of the last great cathedral-style churches constructed in the Cleveland Diocese. Built in 1930, it has a high level of detail and craftsmanship. Its design was based on the Cathedral of Monreale in Sicily, Italy. Thirteen other churches also appealed, with Christine leading the charge on behalf of St. James.

Volunteering her time *pro bono*, Christine delved into hundreds of pages of church documents and navigated her way through the process and procedure of canon law. The canon law of the Catholic Church is a fully developed legal system, with all the necessary elements: courts, lawyers, judges, a fully articulated legal code and principles of legal interpretation. Christine spent six weeks writing the appellate brief with its 200 pages of supporting documents which she ultimately submitted to the Vatican in Italy.

Upon receiving word from Rome that the Vatican had issued a decree in her favor, she said, "I was shocked. I didn't think it was possible because this has never happened before." The official decree states that Bishop Lennon did not follow church law or procedures when he closed St. James, improperly issuing a closing order and failing to consult with the Presbyteral Council, a local panel of diocesan priests. The Vatican also ruled in favor of the 12 other Cleveland churches that appealed.



Interior of St. James in Lakewood, Ohio

The bishop had 60 days to appeal the reversals to the Apostolic Signatura, the Vatican's supreme court. However, in an April 17th statement, Bishop Lennon indicated that he will not appeal, and that St. James and eleven other churches will reopen.

On a less esoteric, but equally altruistic, note, the law firm of **Spangenberg Shibley & Liber** volunteered in February at the Cleveland Foodbank as part of the firm's ongoing Help End Hunger campaign. An enthusiastic crew of 10 attorneys and staff members spent an afternoon sorting food to be distributed to local food pantries, soup kitchens, and shelters. Volunteers make it possible for the Cleveland Foodbank to keep its operating costs low, which enables the organization to help a greater number of people. Last year

Lawyers and staff from the Spangenberg firm volunteering at the Cleveland Foodbank.

alone, the Cleveland Foodbank distributed 29 million meals (34.5 million pounds of food) and other essential products to 618 member hunger programs. The Spangenberg Law Firm also presented a monetary donation to support the Foodbank. You can donate to the cause by visiting www.clevelandfoodbank.org.

Elsewhere, the **Landskroner Foundation for Children**, led by CATA member **Jack Landskroner**, recently participated in Play it Safe, an event held by the National Council of Jewish Women, Cleveland Section, that teaches children about gun safety. It was in 2000 that the Landskroner Foundation kicked off its "Love A Kid, Lock A Gun" Campaign to raise awareness of the dangers of guns in homes where children live, as it believed too many children are catastrophically injured or killed when guns are left unsecured and accessible to children. The Foundation, started in 1998, has given away over 4,000 free gun locks to the general public since the program's inception to promote responsibility in homes where guns are kept. At the recent 3 hour event, the Landskroner Foundation gave away another 75 locks. Jack Landskroner is a principal of the **Landskroner Grieco Merriman, LLC** law firm.

The annual Play it Safe event in which the Landskroner firm participates.

Finally, the law firm of **Nurenberg, Paris, Heller & McCarthy Co., L.P.A.** is again a proud sponsor of and participant in the Pediatric Brain Tumor Foundation's annual Ride for Kids.

David and Michelle Paris at the 2011 "Ride for Kids."

This Motorcycle Ride and event promotes childhood brain tumor research and provides family support through free literature about brain tumors, educational newsletters, online conferences and college scholarships. The 2012 ride will take place on June 10, 2012. The event will be photographed by NPHM's IT Manager, Frank Strack, with staff members assisting in registration, and firm president **David Paris** and his wife Michelle riding a Harley Davidson. ■

Susan E. Petersen is a principal at Petersen & Petersen, Inc. She can be reached at 440.279.4480 or sep@petersenlegal.com.

SUSAN SALADOFF TO SPEAK AT ANNUAL CATA DINNER

Samuel V. Butcher is pleased to announce that Susan Saladoff, the celebrated trial lawyer and producer/director of the film "Hot Coffee," will be the keynote speaker for CATA's annual Meeting and Awards Dinner on Friday, June 22, 2012.

Ms. Saladoff, who is a graduate of Cornell University and George Washington University Law School, practiced law in the civil justice system for 25 years, representing injured victims of individual and corporate negligence. She stopped practicing law in 2009 to make the documentary, and now fights for injury victims by publicizing their cause.

We are honored to have her as a guest speaker, and encourage you to attend this year's event. Look for your invitation by mail and by email.

Kathleen J. St. John is a principal at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or kstjohn@nphm.com.

The *Havel* Anomaly

by Kathleen J. St. John

In *Havel v. Villa St. Joseph*,[1] the Court held that R.C. 2315.21(B), which requires the trial court, upon motion of "any" party, to bifurcate the trial when both compensatory and punitive damages are sought, does not violate the Ohio Constitution's provision giving the Court supremacy over procedural matters, because bifurcation is a matter of substantive, not procedural, law. The Court reached this conclusion not based on the application of any standard test for distinguishing substantive and procedural laws, but by looking to the legislature's intent in creating the law.

In other words, a procedural law is substantive if the legislature says it is.

The curiousness of this decision led me to investigate and retrace the steps of the *Havel* majority to see from whence came such a counterintuitive ruling. I conclude that the majority's rationale in *Havel* is unsustainable as a test for future decisions, and that the holding in *Havel* is likely, at some point, to be severely limited or overruled.

I. The Framework: The Modern Courts Amendment To The Ohio Constitution Gives The Supreme Court Sovereignty Over Procedural Rules.

The Ohio Constitution gives the Ohio Supreme Court exclusive authority to promulgate rules governing matters of procedure in the Ohio courts. In this respect, Article IV, Section 5(B) of the Ohio Constitution, commonly referred to as the Modern Courts Amendment, provides as follows:

> "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right.... All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."[2]

Pursuant to this Constitutional provision, the Ohio Supreme Court has promulgated the Rules of Civil Procedure and Rules of Evidence. When statutes come in conflict with those rules, the Supreme Court and intermediate appellate courts of Ohio have not hesitated to strike down those statutory provisions as being unconstitutional.

Typically when this issue arises in civil cases, the focus is on whether the statute conflicts with the rule. In *Rockey v. 84 Lumber Co.*,[3] for instance, the Court held that R.C. 2309.01, which precluded a tort action plaintiff from specifying in the complaint the amount of damages sought, was unconstitutional as it conflicted with Civ. R. 8(A)'s requirement that the complaint contain "a demand for judgment for the relief to which [the plaintiff] deems himself entitled." The issue, in other words, was not whether the statutory requirement addressed a matter of procedure – the Court naturally assumed that it did – but whether the procedure set forth in the statute was in conflict with the Court rule such that the statutory procedure must give way to that created by the Court.

Havel, on the other hand, focused on an additional inquiry. Granted, in *Havel*, the Court first addressed whether R.C. 2315.21(B)'s mandatory bifurcation requirement conflicted with Civ.

R. 42(B)'s discretionary bifurcation procedure – and determined that the two procedures did in fact conflict. But the issue on which the Court's decision turned was whether bifurcation – an apparent matter of procedure – was in fact a matter of substantive law.

Although, in context, this issue was technically one of first impression, two prior Ohio Supreme Court precedents strongly supported the conclusion that bifurcation is a matter of procedure. The most obvious of these was *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,[4] where the Court struck down H.B. 350 as violating the one subject rule. The bill contained a bifurcation provision nearly identical to the current R.C. 2315.21(B); and while the Court did not address the constitutionality of that provision, it described that provision as "govern[ing] the procedural matter of bifurcating tort actions into compensatory and punitive damage stages."[5]

The other highly relevant precedent was *Dir. of Highways v. Kleines*,[6] which involved two statutes that required the consent of the parties before a trial court could consolidate land appropriation actions. The Court in *Kleines* overturned these statutes as being in conflict with Civ. R. 42(A), which gave trial courts discretion to consolidate cases, regardless of whether the parties consented.

The majority in *Havel* did not mention *Kleines*[7] and distinguished Sheward as not addressing the substantive/procedural distinction.[8] But before turning to the majority's analysis in *Havel*, it is useful to review several cases involving this distinction in other contexts.

II. The Substantive/ Procedural Distinction.

The distinction between substantive and procedural law is significant in a variety of contexts.

When federal courts sit in diversity, for instance, the *Erie*[9] doctrine requires the federal court to apply state law to substantive matters, and federal law to matters of procedure, "at least where no conflicting state rule 'would substantially affect... primary decisions respecting human conduct.'"[10] The federal courts acknowledge that "the line between substance and procedure is neither static nor easily drawn."[11]

Nevertheless, most federal courts that have addressed the conflict between state bifurcation statutes and Fed. R. Civ. P. 42(b) have concluded that bifurcation is a procedural issue, governed by federal law.[12] As one federal court stated, "[a] rule governing bifurcation is a clear example of a rule of adjudication, with virtually no impact upon primary conduct"[13] -- and, hence, clearly a procedural law.

Indeed, prior to *Havel*, the federal district courts in Ohio that were expressly presented with the substantive/procedural distinction in this context rejected the argument that Ohio's bifurcation statute controlled as substantive law.[14] As expressed by one judge for the U.S. District Court in the Southern District of Ohio:

1. The Ohio General Assembly cannot control procedure in federal courts. As a matter of the Supremacy Clause, that authority belongs to the Congress of the United States and to the courts themselves when acting within the Rules Enabling Act.

2. It does not matter that the right is characterized as 'substantial' by the General Assembly. If 'a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them,' then the federal procedural law, including the Federal Rules of Civil Procedure... will apply regardless of the basis of jurisdiction.... Without doubt, whether to bifurcate a case... [is a] procedural matter[].[15]

And, in fact, prior to the Supreme Court's decision in *Havel*, all but one of the intermediate Ohio appellate courts had followed this line of reasoning and concluded what seems to be obvious – that bifurcation is a matter of procedure, not substantive law. [16]

The distinction between substantive and procedural laws also arises when a federal cause of action proceeds in state court. In such cases, state law governs procedural issues unless the state procedures impose an unnecessary burden on a federally created right – in which case the federal Supremacy Clause demands that federal law applies.

Just five years prior to its ruling in *Havel*, the Ohio Supreme Court had occasion to address the substantive/procedural distinction in this latter context. In *Norfolk Southern Railway Co. v. Bogle*,[17] the issue was whether applying the tort reform "*prima facie* filing" requirements of R.C. 2307.92 and R.C. 2307.93 to asbestos claims arising out of the Federal Employers' Liability Act ("FELA") or the Locomotive Boiler Inspection Act ("LBIA") violated the Supremacy Clause of the United States Constitution, such that the state statutes were preempted. The statutes in question required, *inter alia*, that persons bringing asbestos claims based on non-malignant conditions submit a report containing medical findings and include a demonstration "'that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial

contributing factor to the medical condition.'"[18] Failure to file such a report resulted in an administrative dismissal, rendering the case inactive unless and until the claimant moved to reinstate the case by making the *prima facie* showing as specified in the statutes.[19]

In finding that the state statutory requirements were merely procedural, the Court invoked classic articulations of the distinction between substantive and procedural law:

> "In *Jones v. Erie RR. Co.* (1922), 106 Ohio St. 408, 412..., we stated that substantive laws or rules are those that 'relate[] to rights and duties which give rise to a cause of action.' By contrast, procedural rules concern 'the machinery for carrying on the suit.' *Id.* A review of the statutes reveals that they do not grant a right or impose a duty that 'give[s] rise to a cause of action.' *Id.* Instead, the impact of these statutes is to establish a procedural prioritization of the asbestos-related cases on the court's docket. Nothing more. Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. No new substantive burdens are placed on claimants...."[20]

In short, the Court found, "the provisions of the statutes... pertain to the machinery for carrying on a suit" and were "therefore procedural in nature, not substantive."[21]

Yet another context in which the substantive/procedural distinction arises is in determining whether a new law may be applied retroactively without offending Article II, Section 28 of the Ohio Constitution.[22] In this context, the Court has struggled a bit, occasionally overruling a decision it later deems to be misguided.

An example of this pattern can be found in the line of cases beginning with *Viers v. Dunlap*.[23] In *Viers*, the issue was whether the new comparative negligence statute, R.C. 2315.19, could be applied to an accident that occurred prior to the statute's effective date. Prior cases had established that the Constitutional provision prohibiting retroactive laws applied only to substantive, but not remedial, laws. The issue thus turned on whether the new statute was substantive or procedural. In holding that it was substantive, the Court explained:

> "Similarly groundless is appellees' argument that R.C. 2315.19 is merely remedial. Although semantic formulations can be devised to understate the obvious,

> it is patently clear that the statute markedly affects substantive rights. Where before a defendant was shielded from liability by a plaintiff's contributory negligence, this defendant no longer enjoys such protection. Where before a plaintiff who was contributorily negligent was denied recovery, he is now – as long as his misfeasance is not the predominant cause of his injury – entitled to damages. To characterize... such a fundamental change in the law as affecting only trial procedure and the mode by which a remedy is effected defies logic.
>
> ***
>
> Substantive rights exist in counterpoise to procedural rights and include all privileges and obligations arising from the legal nature of transactions and relationships but separate from the means of effectuating those privileges and enforcing those obligations."[24]

One year later, the Court reversed itself on this issue, and determined that the new comparative negligence statute applied to *all* negligence actions tried after the statute's date, even if the cause of action arose under the prior law. In *Wilfong v. Batdorf*,[25] the Court overruled *Viers* and held that:

> R.C. 2315 is remedial. It does not alter a defendant's liability for his negligent acts, but merely changes the way a court is required to weigh a plaintiff's negligence. A concept of partial recovery based upon the degree of a plaintiff's negligence has been substituted for the previous bar to any recovery by the plaintiff.[26]

Of course, the new statute in question still altered the liability potential between the plaintiff and the defendant, such that the plaintiff was now able to recover damages when he previously could not, and the defendant could now be held liable (albeit for a lesser amount) when she previously would have been exonerated due to the plaintiff's contributory negligence. One suspects that the holding in *Wilfong* was rooted in sympathy for the plaintiff who happened to have been injured at the wrong moment in time. But sympathy – for either side in a tort action – should not govern the analysis as to whether a law is substantive or procedural.

The Supreme Court ultimately overruled *Wilfong*, in *Van Fossen v. Babcock & Wilcox Company*.[27] In *Van Fossen*, the Court held that a statute is substantive when it "impairs or takes away vested rights,... affects an accrued substantive right,... imposes new or additional burdens, duties, obligations or liabilities as to a past transaction,... creates a new right out of an act which gave no right and imposed no obligation when it occurred,... [or] gives rise to or takes away the right to sue or defend actions at law[.]"[28] By contrast, a law is remedial when it "affect[s] only the remedy provided." Laws that "relate to procedures are ordinarily remedial in nature... including rules of practice, courses of procedure and methods of review,... but not the rights themselves."[29]

Before turning to the Court's analysis in *Havel*, a final note about the substantive/procedural distinction is this. It has been stated that, "[p]ut roughly, substantive rules control conduct outside the courtroom, and procedural rules control behavior within the courtroom."[30]

Although this statement might unduly simplify the analysis so as not to apply to all situations, it has the beauty – if not the wisdom – of clarity. It is consistent with how we think about the substantive/procedural dichotomy. And, as applied to the bifurcation statute, it makes perfect sense. Bifurcation is a process that governs how the case will be tried. It pertains, using the test articulated test in *Norfolk S. Ry. Co.*, to the machinery for carrying on a suit, and is thus procedural, not substantive.

This is not, however, what the Court concluded in *Havel*.

III. The *Havel* Decision.

Havel was a wrongful death/medical malpractice case arising out of decubitus ulcers suffered by Mr. Havel while recovering from hip surgery at the defendants' nursing home. As the complaint sought both compensatory and punitive damages, the defendants moved, pursuant to R.C. 2315.21(B), to bifurcate the trial into two stages. The first stage would cover the defendants' liability for compensatory damages; the second, assuming liability was found, would cover the issue of punitive damages.

The trial court denied the motion and the Eighth District Court of Appeals affirmed.[31] The Eighth District found R.C. 2315.21(B), which makes bifurcation mandatory upon motion of "any" party, to conflict with Civ. R. 42(B), which grants the trial court the discretion to hold separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials are conducive to expedition and economy." The Eighth District found that these two provisions conflicted, and rejected the defendants' argument that the statute took precedence because it addressed a substantive right. Instead, "[a]pplying the Ohio Supreme Court's analysis in *Norfolk S. RR Co.*," the court found that the statute was procedural as it "clearly and unambiguously specifies 'the machinery for carrying on the suit' by telling courts the 'procedural

prioritization' for determining compensatory and punitive damages at trial" and by "tell[ing] courts what evidence a jury may consider, and when – another area governed by the Civil and Evidence Rules."[32]

Because the Eighth District's decision conflicted with the Tenth District Court of Appeals' decision in *Hanners v. Ho Wah Genting Wire & Cable SDNBHD*,[33] the court certified the conflict to the Ohio Supreme Court.

The Supreme Court majority in *Havel* first determined that R.C. 2315.21(B) and Civ. R. 42(B) did, indeed, conflict. It turned, then, to the issue of whether the statute addressed a matter of substantive or procedural law. Substantive law, the Court said, was "that body of law which creates, defines and regulates the rights of the parties," whereas procedural law "prescribes the methods of enforcement of rights or obtaining remedies."[34] From these definitions, the Court decided that the critical inquiry in determining whether a statute was substantive or procedural was whether the statute created a "right."

The Court then reviewed several cases that addressed the issue of whether a statute created an enforceable right in the criminal context. The first of these – *State v. Hughes*[35] – involved a statute that gave the prosecution a right that did not exist at common law to present a bill of exceptions in a criminal action to the Court of Appeals or the Ohio Supreme Court. The Court held that the subsequently promulgated App. R. 4(B), which gave the prosecution an automatic right to appeal, expanded upon the right created in the statute, and thus conflicted with Article IV, Section 3 of the Ohio Constitution by "abridg[ing] the right of appellate courts to exercise their discretion in allowing such appeals."

The next case, *State v. Rahman*,[36] held that, even though the Rules of Evidence properly controlled whether a spouse was *competent* to testify in a criminal trial, a statute that granted the criminal defendant the right to exclude privileged spousal testimony was not in conflict with the evidentiary rule, as it concerned the criminal defendant's substantive right to exclude privileged testimony from the trier of fact's hearing. Indeed, in *Rahman*, the Court noted that Evid. R. 501 states that the issue of privilege is governed, *inter alia*, by statutes enacted by the General Assembly.[37]

Finally, the majority in *Havel* cited *State v. Greer*,[38] in which the Court addressed the interplay between a statute that allowed a criminal defendant to exercise 12 peremptory challenges and Crim. R. 24(C) which limited parties to six peremptory challenges each. The Court, in *Greer*, found that whereas the right to have peremptory challenges was a substantive right, the numerical limit imposed by Crim. R. 24(C) was procedural, and thus prevailed over the statutory provision granting the greater number of peremptory challenges.

Essentially, the majority in *Havel* looked to the foregoing criminal cases as proof that some statutes addressing procedure confer a substantive right.

The Court in *Havel* next endeavored to distinguish the holding in *Norfolk S. Ry. Co. --* which held the prima facie filing requirements for asbestos cases to be procedural – from the bifurcation statute. The Court decided that while the prima facie filing requirements merely "established a procedural prioritization of the asbestos-related cases on the court's docket," the bifurcation statute "does more than set forth the procedure for bifurcation in a tort action" because "it makes bifurcation mandatory."[39] The Court analogized the bifurcation statute to the enactment of the comparative fault statute in *Viers* – finding that, just as, in *Viers*, where the new law gave the plaintiff a right to recover, even if he was contributorily negligent, when he could not have done so before, the mandatory bifurcation statute created a new right – *mandatory* bifurcation – that did not exist prior to the statute creating it.[40]

From there, the Court went on to conclude that "[b]y eliminating judicial discretion, R.C. 2315.21(B) creates a concomitant right to bifurcation."[41] In other words, whereas before the defendant had to ask for bifurcation, the defendant could now *demand* it.

Finally, the Court turned to the legislative history, as expressed in the un-codified language of S.B. 80, to find further evidence that the statute created a substantive right to bifurcation. Here, the Court availed itself of some language in its prior decision of *State ex rel. Loyd v. Lovelady*,[42] which it pronounced as involving a "similar situation" to the case at bar.[43]

Lovelady concerned a statute that allowed a putative father to seek relief from a child support order many years later, by, *inter alia*, providing a recent DNA test result proving him not to be the child's father. The statute made this relief-from-judgment mandatory upon satisfaction of the statute's

requirements. The issue was whether this statute was unconstitutional as conflicting with Civ. R. 60(B). In enacting this statute, the General Assembly had expressed the intent that these provisions operate "[n}otwithstanding the provisions to the contrary in Civil Rule 60(B)." The Supreme Court, in holding the statute enforceable, found that it created a substantive right. It did so by first looking to the statutory language to determine the legislature's intent; and reasoned that, "[i]f the legislature intended the enactment to be substantive, then no intrusion on this court's exclusive authority over procedural matters has occurred."[44] The Court also found that, when legislative intent was not apparent on the face of the statute, the Court could properly look to the legislative history. Examining that, the Court found that the legislature intended the statute to create a substantive right to address a potential injustice – *i.e.*, the injustice of having to pay child support when science could definitively prove that the payor was not the father.[45]

The Court in *Lovelady* concluded that "although [the statutes in question] are necessarily packaged in procedural wrapping, it is clear... that the General Assembly intended to create a substantive right to address a potential injustice."[46]

Latching onto the *Lovelady* analysis, the Court in *Havel* found that R.C. 2315.21(B) also involves a situation where a statute "packaged in procedural wrapping" was intended by the legislature to create a substantive right.[47] Digging into the un-codified portions of S.B. 80, the Court found that the bifurcation statute was intended to address a "potential injustice" because mandatory bifurcation was designed to "ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages."[48]

In a closing flourish, the majority added that it was rejecting the dicta in *Sheward*, which described the former version of R.C. 2315.21(B) as governing a procedural matter. *Sheward*, the Court said, "never considered the bifurcation question we confront in this case."[49] In other words, while *Sheward* had made the common sense observation that bifurcation is procedural, the Court's analysis in *Havel* had now proved that observation wrong.

But, is it so?

IV. Is *Havel* An Anomaly?

Distilled to its essence, *Havel* stands for two things. First, in determining whether a statute addresses matters of substance or procedure, the Court will look to whether the statute creates a "right." If it creates a right, then it is substantive, even if that right involves something that is otherwise unmistakably a matter of procedure. Second, in determining whether the statute creates a right, the Court will look to the legislative intent, as expressed on the face of the statute or in the legislative history. If the legislature evinces an intent to create a right, even if that right involves something that is otherwise unmistakably procedural, the statute is substantive, and the Court rule in conflict with it must give way.

The *Havel* analysis is questionable on both points. While it is true that substantive law "creates, defines and regulates the rights of the parties" while procedural law "prescribes methods of enforcement of rights," determining whether a law is substantive or procedural by asking whether it creates a right shifts the focus away from the classic understanding of what constitutes procedure. The Ohio Supreme Court has long recognized that procedure is "the machinery for carrying on the suit"[50] and has applied that definition as recently as the *Norfolk S. Ry.* case in 2007. For the Court to now

reject that definition, on the grounds that the statute makes the procedure mandatory and that the legislature intended to create a substantive right, turns the analysis on its head.

Under *Havel,* there is no limit to the legislature's ability to transform a matter of procedure into a substantive right. All it need do is make the procedure mandatory and articulate an intent to rectify some injustice it perceives on behalf of its favored constituency. Rules of pleading, rules of evidence, matters as mundane as the order in which witnesses may be called at trial, can all be deemed "substantive" should the legislature divine a need to put a finger on the scales of justice to help a particular constituency.

But how can the *Havel* rationale be reconciled with the Modern Courts Amendment? The Ohio Constitution trumps legislative intent[51]; and the Constitution says that all laws in conflict with rules governing practice and procedure prescribed by the Supreme Court "shall be of no further force or effect[.]" The Constitution, quite simply, makes the Ohio Supreme Court supreme in matters of procedure. If procedure can be magically transformed into substance by a legislative wave of the wand, where does that leave the Modern Courts Amendment? If all the legislature needs to do to change procedure into substance is "intend" it to be so, then legislative intent trumps a Constitutional mandate.

A decision that allows that to happen must surely be an anomaly. It can only fervently be hoped that the holding in *Havel* goes the way of *Wilfong v. Batdorf,* and is viewed by the Court as one of those aberrations needing to be overruled to realign the law with standard notions of substance and procedure. ■

End Notes

1. 131 Ohio St. 3d 235, 2012-Ohio-552, 963 N.E. 2d 1270.
2. Ohio Constitution, Article IV, Section 5(B).
3. 66 Ohio St. 3d 221, 611 N.E. 2d 789 (1993).
4. 86 Ohio St. 3d 451, 715 N.E. 2d 1062 (1999).
5. *Id.* at 497.
6. 38 Ohio St. 2d 317, 313 N.E. 2d 370 (1974).
7. *But see, Havel*, 2012-Ohio-552, ¶40 (McGee Brown, J., dissenting) (citing *Kleines* as one of a string of decisions in which the Court "carefully guarded [its] rulemaking authority against legislative attempts to influence courtroom practice and procedure.")
8. *Id.* at ¶35 (O'Donnell, J., for the majority).
9. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).
10. *Hayes v. Arthur Young & Company,* 9th Cir. Nos. 91-15531, 91-15546, 91-15593, 1994 U.S. Dist. LEXIS 23608, *20 (Aug. 26, 1994), *quoting Hanna v. Plumer*, 380 U.S. 460, 475, 85 S.Ct. 1136 (1965) (Harlan, J., concurring).
11. *Hamm v. American Home Products Corp.*, 888 F. Supp. 1037, 1038 (E.D. Cal. 1995) (applying Fed. R. Civ. P. 42(b) instead of conflicting state statute that precluded introduction of evidence of defendant's wealth until after jury returned liability verdict).
12. *See, e.g., Hayes, supra; Hamm, supra; Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir. 1990); *Steinberger v. State Farm Auto. Ins.*, S.D. Ohio No. 3:10-cv-015, 2010 U.S. Dist. LEXIS 100552 (Sept. 9, 2010); *Tuttle v. Sears, Roebuck & Co.*, N.D. Ohio No. 1:08 CV 333, 2009 U.S. Dist. LEXIS 80980 (Sept. 4, 2009) (Dowd, J.); *General Electric Credit Union v. National Fire Ins. of Hartford*, S.D. Ohio No. 1:09-cv-143, 2009 U.S. Dist. LEXIS 96085 (Sept. 30, 2009).
13. *Hayes v. Arthur Young & Company, supra*, 1994 U.S. Dist. LEXIS 23608, *21, *quoting Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir.), *cert dismissed*, 497 U.S. 1057 (1990).
14. *See, e.g., Steinberger*, *supra*; *Tuttle*, *supra*; *General Elec. Credit Union*, *supra*. Although, in the briefing before the Supreme Court, the defendants in *Havel* cited two Ohio federal district court cases for the proposition that federal courts "have little difficulty applying the mandatory bifurcation provision of R.C. 2315.21," neither of these cases addressed the question of whether bifurcation was substantive or procedural under the *Erie* doctrine. *See, Geiger v. Pfizer, Inc.*, S.D. Ohio No. 2:06-CV-636, 2009 U.S. Dist. LEXIS, *1-2 (Apr. 15, 2009); *Maxey v. State Farm Fire & Cas. Co.*, 569 F.Supp.2d 720, 724 (S.D. Ohio 2008).
15. *Steinberger v. State Farm Mut. Auto. Ins.*, S.D. Ohio No. 3:10-cv-015, 2010 U.S. Dist. LEXIS 113749 (Oct. 14, 2010).
16. *See, Havel v. Villa St. Joseph*, 8th Dist. No. 94677, 2010-Ohio-5251 (bifurcation is procedural), rev'd by 2012 Ohio 552; *Luri v. Republic Servs.*, 193 Ohio App. 3d 682, 2011-Ohio-2389, ¶8, 953 N.E. 2d 859 (same), cert. granted and discretionary appeal allowed by 2011-Ohio-5129; *Myers v. Brown*, 192 Ohio App. 3d 670, 2011-Ohio-892 (same), rev'd by 2012-Ohio-1577; *Plaugher v. Oniala*, 5th Dist. No. 2010 CA 00204, 2011-Ohio-1207 (same), rev'd by, 2012-Ohio-1576; *Fleenor v. Karr*, 4th Dist. No. 10CA814, 2011-Ohio-5706 (same), rev'd by, 2012-Ohio- 1578; *Hill v. Steel Ceilings, Inc.*, 5th Dist. No. 11-CA-38, 2011-Ohio-6040 (same). The sole intermediate appellate decision that held bifurcation under R.C. 2315.21(B) to be a substantive right was *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481.
17. 115 Ohio St. 3d 455, 2007-Ohio-5248, 875 N.E. 2d 919.
18. *Id.* at ¶4.
19. *Id.* at ¶5.
20. *Id.* at ¶16.
21. *Id.* at ¶17.
22. Article II, Section 28, provides, in pertinent part, that "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts[.]"
23. 1 Ohio St. 3d 173, 438 N.E. 2d 881 (1982).
24. *Id.* at 175-176.
25. 6 Ohio St. 3d 100, 451 N.E. 2d 1185 (1983).
26. *Id.* at 104.
27. 36 Ohio St. 3d 100, 522 N.E. 2d 489 (1988), paragraph three of the syllabus.
28. *Id.* at 107.
29. *Id.* at 107-108.
30. Kurlantzick, '*Retroactivity': What Can We Learn from the Odd Case of Michael Skakel?*, 36 Conn. L. Rev. 511, 518-519 (Winter 2004).
31. *Havel v. Villa St. Joseph*, 8th Dist. No. 94677, 2010-Ohio-5251, rev'd by 131 Ohio St. 3d 235, 2012-Ohio-552.
32. *Id.* at ¶27.
33. 10th Dist. No. 09AP-361, 2009-Ohio-6481.
34. 2012-Ohio-552, ¶16, quoting *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E. 2d 736 (1972), overruled on other grounds by *Schenkolewski v. Cleveland Metroparks Sys.*, 67 Ohio St. 2d 31, 426 N.E. 2d 784 (1981); and *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, 912 N.E. 2d 61, ¶34.
35. 41 Ohio St. 2d 208, 324 N.E. 2d 731 (1975).

36. 23 Ohio St. 3d 146, 492 N.E. 2d 401 (1986).

37. *Id.* at 148, quoting Evid. R. 501 ("'The privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience.'")

38. 39 Ohio St. 3d 236, 530 N.E. 2d 382 (1988).

39. *Havel*, 2012-Ohio-552, ¶25.

40. *Id.*

41. *Id.* at ¶26.

42. 108 Ohio St. 3d 86, 2006-Ohio-161, 840 N.E. 2d 1062.

43. *Havel*, at ¶27.

44. *Lovelady*, at ¶13.

45. *Id.* at ¶14.

46. *Id.*

47. *Havel*, at ¶29.

48. *Id.* at ¶32.

49. *Id.* at ¶35.

50. *Norfolk S. Ry. Co.*, 2007-Ohio-5248, ¶16, quoting *Jones v. Erie R.R. Co.*, 106 Ohio St. 408, 412 (1922).

51. *See, e.g., Sheward*, 86 Ohio St. 3d 451, 502 ("We recognize that Am.Sub.H.B. No. 350 arguably derives from the popular will, and that the people may alter or abolish the constitution which they created; 'yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions of the existing Constitution, would, on that account, be justified in a violation of those provisions.' Hamilton, The Federalist No. 78. It is our sworn duty to uphold the Constitution, even 'where the legislative invasions of it had been instigated by the major voice of the community.' *Id.* Majoritarian preferences are transitory; the Constitution is enduring and fundamental.")

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Protecting Your Client's Settlement: Are you considering all the options?

by Samuel V. Butcher

The consideration for this article is the common desire that we share for achieving the best possible outcome for our clients. We, in furtherance of that objective, counsel our clients to consider not just the immediate result but the long-term or even lifetime benefit that our efforts can produce. Our own due diligence, moreover, requires that we provide our clients with all of the information they need to make an informed decision about what to do with the proceeds of a settlement or judgment after successful representation.

Notwithstanding the foregoing, we are trial attorneys, not estate planners. We have taken on the noble challenge of representing plaintiffs. That means that our plates are full, contending with our adversaries and battling constantly to protect our clients' rights from further erosion by the legislature and the courts. Despite perhaps an academic interest and our best intentions, we lack the time necessary to revisit areas of the law that don't seem directly relevant to all that we need to accomplish on a daily basis. The purpose of this article therefore is to explain and recommend consideration of an option, of which you may not be aware, for protecting your client's recovery. That option is the Irrevocable Pure Grantor Trust.[1] The irrevocable pure grantor trust represents a new genre of irrevocable trusts, the features of which may be particularly well-suited to claimants and plaintiffs receiving substantial settlements or judgments for reasons that will be discussed throughout this article.

Historically, many of us have counseled our clients to strongly consider a structured settlement funded by the real party in interest with a portion of the settlement or judgment proceeds. We have done so for good reason. A structure can provide systematic income to the client, the accumulation of interest income tax free, and protection against creditors and those claimants themselves who may lack the discipline required to preserve the proceeds to satisfy the future needs for which such compensation was intended. Structured settlements will, for these and perhaps many other reasons, doubtlessly continue to have their rightful place among the alternatives available to a plaintiff about to receive a substantial award. This article is in no way intended to suggest that structures should no longer be considered. This article will however contrast features of the Irrevocable Pure Grantor Trust with those of the structured settlement annuity.

A grantor trust, to begin with, is simply a "self-settled" trust, i.e., a trust created by the owner of the assets, the grantor, who places those assets in a trust. A grantor trust is further defined as such by the treatment it receives from the Internal Revenue Service ("IRS"). All income taxes are passed through to the grantor as if the trust did not exist as long as one of the conditions set forth in Internal Revenue Code ("IRC") Sections 671 through 679 is triggered. [2] When the trust terms also trigger one of the conditions set forth in IRC Sections 2035 through 2042, the trust assets are likewise included in the estate of the grantor,

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subject to estate tax at death.[3] When income taxes are passed through to the grantor and the trust assets are included in the grantor's estate at death, the trust is deemed a "pure" grantor trust.

There are many benefits of pure grantor trusts. They are particularly useful when a grantor wishes to benefit from the trust or maintain some control over the trust assets. The grantor is generally not concerned with being treated as the owner of the trust assets for income or estate tax purposes. The grantor may in fact need the income and not have enough assets to be subject to the estate tax. A recent law review article noted that estate planning for individuals with estates of $3.5 million or more accounts for only 3 in 1,000 American taxpayers (or less than 1/3rd of 1%).[4] Inclusion of trust assets in the grantor's estate is also preferable to gifting assets to beneficiaries or to a non-grantor trust during lifetime because a "carry over tax basis" is avoided and beneficiaries receive a "step up" in the basis of assets distributed to them from a pure grantor trust following the grantor's death. Additionally, grantors can, as previously suggested, enjoy and rely on trust income during their lifetime and thus don't object to inclusion of trust income on their personal income tax return. Finally, no separate or special tax filings (as gift tax returns) are required. Transfers to the trust by the grantor have no income or gift tax consequence. Thus, pure grantor trusts are considered tax neutral.

Pure grantor trusts have been used for years, and still are used to avoid probate administration. These Revocable Living Trusts however did not and do not afford asset protection. They can be analogized to an open box in that the grantor is free to put anything in the trust and free to take anything out of it at will. Since the grantor has retained the right to access both principal and income, the entire trust is available to the grantor's creditors. The grantor is left subject to losing all of his or her assets that took a lifetime to accumulate.

The grantor, in order to achieve asset protection, must irrevocably give up all rights or power to himself, a trustee, or any third party, to grant access to that (and only that) which he or she chooses to protect. If, for example, the grantor wishes to obtain asset protection of the trust principal, the grantor must irrevocably give up all right and access to trust principal and prohibit the trustee or any third party any right to distribute it to the grantor. The grantor under such a scenario could fully protect the assets placed in trust, the trust principal, while retaining access to all income generated by that principal. Grantor's creditors are only entitled to income or assets available to the grantor in a self-settled trust. Since the trust, by its terms, would prohibit distribution of principal to the grantor, it cannot be reached by the grantor's creditors. The irrevocable restrictions opted for are outside the reach of the grantor by well-established contract and common law principles, many of which have been codified in the Uniform Trust Code[5] and the Restatements, 2nd and 3rd, of Trusts.[6] Individuals who want to protect their assets and have the simplicity of pure grantor tax treatment have found the Irrevocable Pure Grantor Trust to be the trust of choice.

So, besides asset protection and tax neutrality, what other features of the Irrevocable Pure Grantor Trust might make it attractive as a repository for the proceeds of a settlement or judgment? First, the grantor has the right to be trustee of the trust that he or she creates. Historically, grantors did not act as trustees of an irrevocable trust because their goal was to avoid estate tax and a grantor acting as trustee defeated estate tax avoidance. Since the threshold for the imposition of any federal estate tax has been increased to the point at which less than 1% of Americans are subject to estate taxes, retaining the power to act as trustee no longer has any adverse impact on the grantor.

Second, the grantor of an Irrevocable Pure Grantor Trust may retain the right to change the current and remainder beneficiaries and the timing, manner and method of distribution pursuant to what is known as a "Power of Appointment." The most restricted power of appointment limits the powerholder to exercise the power only in favor of the limited class of beneficiaries identified by the grantor, and is thus referred to as a limited power of appointment.[7] This feature of the Irrevocable Pure Grantor Trust may be very attractive for general estate planning reasons in order to prevent an outright transfer of assets to a child that would subject the grantor's assets to the child's creditors, bankruptcy, or a spouse in divorce. Likewise, transferring assets to family members who are minors, have drug or alcohol addictions, or are not equipped to manage the money in the manner that the grantor wishes can also be avoided.

Finally, the Irrevocable Pure Grantor Trust can permit a grantor the power to modify and amend the powers of the trustee, appointment of trustee or trust protector, and the trust's administrative provisions. Features such as allowing the grantor to serve as sole or co-trustee, change the beneficiaries, and modify the trust, traditionally limited to revocable trusts, are now available in irrevocable trusts without adverse consequences. These features permit clients the flexibility of pure grantor trust tax treatment afforded revocable trusts while providing the protection of irrevocable trusts.

The Irrevocable Pure Grantor Trust can

be used effectively to provide the grantor the ability to give up the right to (and thus protect) principal but retain the right to the income it generates. This use is no different from the use of an immediate annuity where an individual transfers money to an insurance company that, in turn, provides a stream of income to the transferor, without permitting access to the principal. The grantor of the Irrevocable Pure Grantor Trust however, while receiving the income generated by the principal, has protected his principal and retained control over that principal with all of the beneficial features afforded by these trusts.

Utilization of the Irrevocable Pure Grantor Trust can likewise be compared to a structured settlement annuity in which the tortfeasor's liability insurer delegates, to an assignment company, its responsibility for making periodic payments to the injured party. The assignment company then purchases the annuity from the life insurance company and the assignment company owns the annuity. All the beneficiary receives is the right to the periodic payments according to the schedule established at the time of the award when the annuity was funded.

Structured settlement annuities were noted for the spend-thrift provisions that were part of their design. These provisions were employed to provide a fund for maintenance of a beneficiary, so restricted that the annuity was secure against factoring. The structured settlement annuity, however, is no longer a spend-thrift vehicle. 26 U.S.C. Section 5891 effectively took away that spend-thrift provision and paved the way for "factoring companies" to purchase the claimant's or plaintiff's right to continue to receive payments for a lump sum representing a small fraction of the total value of the periodic payments remaining.[8]

Additionally, while IRC Section 130 allows the principal and income generated from the original investment in the structured settlement annuity to be paid out to the beneficiary over time, tax free,[9] one Settlement Planner interviewed for this article advised that in his experience the typical claimant is at the lower end of the socioeconomic spectrum such that the tax advantage of the structured settlement annuity means very little.[10] Further, since interest rates are low, a financial advisor also interviewed for this article commented that putting a plaintiff into a structured settlement annuity during current economic times may place them at the bottom of the yield curve and afford them no flexibility to benefit from higher interest rates during more favorable economic times.[11]

The individual who chooses to accept a lump sum settlement from the tortfeasor and place a portion of it in an Irrevocable Pure Grantor Trust may be afforded greater protection and far greater flexibility than if he or she had chosen to accept a structured settlement annuity. The Irrevocable Pure Grantor Trust cannot be "factored." Once the funds are placed in this trust and access to principal is restricted (by design, for protection) the grantor is entitled only to payments of the income generated on those funds. As trustee of his own self-settled trust, however, he still has control over even that to which he has, by design, restricted his access. He has the ability to manage the investment of the assets he has placed in trust, and to invest and reinvest, taking full advantage of new financial products and higher rates of return than what was offered at the time of the award. He has the flexibility to change the investment mix to produce more income or provide for greater capital appreciation. He can also leave the income in the trust and allow it to accumulate and become part of the principal on an annual basis as his needs and estate planning goals change. He has likewise also retained a limited power of appointment to change the current and remainder beneficiaries within the limited class of beneficiaries designated in the trust, and the timing, manner, and method of distribution to those beneficiaries.

The beneficial features of the Irrevocable Pure Grantor Trust as a repository for funds received as the result of a settlement or judgment may merit special consideration where seniors are concerned. One of the greatest threats aging Americans face of losing their lifetime accumulation of assets is the possibility that they may require long-term care. Federal Medicaid law limits the applicant to specified levels of income and resources to qualify for benefits.[12] Should the beneficiary of a structured settlement annuity decline in health to the point at which he requires long term care, the periodic payments he receives from the structure may render him ineligible for Medicaid, all payments he receives will be available to pay the nursing home, and he may experience no real benefit from the structure beyond that which would have been provided for him simply as a Medicaid recipient.

The use of trusts to protect assets under Medicaid law is subject to a more restrictive standard than for asset protection laws in that Medicaid law requires the transfer to be done more than five (5) years prior to the grantor's application to avoid ineligibility for Medicaid benefits.[13] However, if the proceeds of settlement or judgment are placed in an Irrevocable Pure Grantor Trust at the time of the award, and access to principal is restricted from the grantor while the right to receive income is retained, after five years has passed, those funds representing principal are completely protected and will not disqualify the grantor (who is otherwise

eligible) from qualifying for Medicaid. Since the income is available to the grantor the income will be considered in determining the grantor's patient liability for contributing to the cost of the nursing home care, but the principal will be protected for the grantor's beneficiaries.

Though there may be sentiment against planning to qualify for Medicaid benefits if the need for long-term care arises, such planning is a right afforded all Americans. So long as the Medicaid laws are followed, including transfers to irrevocable trusts, eligibility will rightfully occur. This is no different than tax planning, when using trusts with different features that enable a grantor to legitimately avoid tax if the laws are properly followed.

Trial attorneys have a lot to consider in counseling the client regarding what can be done with the proceeds of a substantial settlement or judgment negotiated or won for the client. There are far too many variables to proclaim any one alternative as the best choice in every case. The Irrevocable Pure Grantor Trust, with the protection it provides and the flexibility it affords the claimant, deserves a place in the attorney's consideration and, in appropriate cases, the attorney's discussion with the client.■

End Notes

1. The irrevocable pure grantor trust is a term created by David J. Zumpano, CPA, Esq. See Zumpano, *"Irrevocable Pure Grantor Trusts: The estate planning landscape has changed,"* 61 Syracuse L. Rev. 119 (2010).
2. *See* 26 U.S.C. 671-679.
3. *See* 26 U.S.C. 2035-2042.
4. *See supra* note 1, 61 Syracuse L. Rev. at 125-126. The author also noted that the number of individuals subject to estate tax creeps up only slightly to less than 18 in 1,000 (or 1.76% of American taxpayers) if the estate tax exemption is reduced to $1 million. Zumpano concluded that the number of Americans needing estate tax planning is insignificant, thus making pure grantor tax status the tax treatment of choice for virtually all Americans.
5. *See generally* Unif. Trust Code § 411 (2000), 7C U.L.A. 497-98 (2006).
6. *See generally* 2 Restatement of the Law 3d, Trusts, Sections 61-65 (2003); 2 Restatement of the Law 2d, Trusts, Sections 331-347 (1959).
7. *See supra* note 1 for a discussion of powers of appointment.
8. *See* 26 U.S.C. 5891.
9. *See* 26 U.S.C. 130.
10. Author's interview with Frank P. Maguire, Chief Executive Officer, First Capital Surety & Trust Company, 230 West Wells Street, Suite 402,Milwaukee, WI, 53203; Interview March 26, 2012.
11. Author's interview with Brian Adair, Adair Financial Group, The Bourse at Virginia Manor, Building 400, 2275 Swallow Hill Road, Pittsburgh, PA, 15220.
12. *See* 42 U.S.C. 1396p(f)(1)(A).
13. *See generally* 42 U.S.C. 1396p(c).

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Technology Tips for Attorneys...

(in about 140 characters or less)

by Andrew Thompson and William Eadie

This new feature of the CATA News will highlight different ways in which you can use technology to help your practice. We will share with you the latest gadgets, useful websites, or other valuable resources. If you discover a new technology that is helping you in your practice, feel free to share it with us at andrew@dctblaw.com or weadie@spanglaw.com.

You will soon be able to connect with CATA online, as we unveil a new redesigned website, helpful blog, CATA Facebook page, Twitter account (@CleveTrialAttys) and LinkedIn Group.

Here are your tips for this edition...

- For attorneys working with iPads, a new app allows you to review federal court filings on PACER. FedCtRecords (Federal District Court Records) is $9.95 and works on both the iPhone and iPad (built for the iPhone). For support and more information check out http://goo.gl/3OPQO

- Another handy app is TranscriptPad, which allows you to view and markup text transcript files of a deposition. Notably, you can assign your own codes and then notate sections of the transcript with those codes–so there will be a handy sub-set of passages grouped by "causation," "injury," and whatever else you choose. They are color coded and easy to export–by email, in a PDF report, and more. For an in-depth review, see http://goo.gl/KN7ZC

- In the not too distant future, Facebook and Google will have the capability of tracking individuals' locations on a constant basis, through mobile GPS apps and by posting live feeds of both public and private surveillance cameras. How does this type of technology and social sharing affect an individual's Constitutional right to privacy? These issues and more are explored in Constitution 3.0: Freedom and Technological Change, (Brookings Inst. Press 2011). The book, edited by Jeffrey Rosen, a professor at George Washington University Law School, and Benjamin Wittes, a senior fellow in governance studies at the Brookings Institution, is a series of interesting and thought-provoking essays by legal and technology experts.

- If your practice requires you to research cases decided by the United States Supreme Court, there is no better resource on the web than www.oyez.org. The Oyez Project was developed by Northwestern University students as the first multi-media-based Supreme Court resource, providing case information, current video comments by legal scholars, MP3 audio of oral arguments and case announcements, and historical Court information. The website's mission is to make the work of the Supreme Court accessible to everyone, through text, images, audio and video. ■

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Pointers From The Bench: An Interview With Judge Michael Donnelly

by Christopher Mellino

Judge Michael Donnelly has been a judge on the Common Pleas Court since January 2005. Prior to becoming a judge, he was an assistant county prosecutor for five years and in private practice for seven years, handling both insurance defense cases and plaintiff personal injury, toxic tort, and class action cases. This experience gave him a solid foundation for his work as a judge. It also gives him an understanding and appreciation for the work that lawyers do and the pressures and deadlines we manage on a day-to-day basis. He prides himself on running an accessible court that is sensitive to the deadlines and pressures encountered in our practice.

Judge Donnelly estimates that, on average, he presides over five civil cases a year despite the declining number of civil cases being filed.

When asked what things plaintiffs' lawyers do that drives him crazy, Judge Donnelly was only complimentary. He is impressed overall with the level of practice by the bar. He has observed that the single factor separating attorneys that get good results for their clients from other attorneys is their level of preparedness. The better attorneys come to court fully prepared, whether it is for a pretrial, trial, settlement conference, or motion hearing.

He has found that jurors often focus on what was not in evidence as much as the evidence itself, such a questioning why certain witnesses were not called or why a certain document was not in evidence. Tying up all possible loose ends – not necessarily calling every witness, but explaining why an obvious witness was not called or why certain things are not in evidence – could be beneficial for our cases.

Also, in the age of smart phones, he believes lawyers should reinforce the court's instruction regarding a juror's obligation to decide the case based *only* on the evidence in the courtroom. Finally, he cautions that we should know what is in our exhibits. Do not introduce a stack of medical records without knowing everything that is in them. Some jurors may go through them looking for something that hurts your client.

Judge Donnelly sees the court as having a vital role in the resolution of cases by being accessible for resolution of discovery disputes, ruling on any motions that are ripe, holding oral hearings when necessary to gain a better understanding of the issues, holding to a firm trial date, and helping the parties understand and evaluate their risks.

He does not believe, however, that it is the role of the court to force a settlement on either side, and he thinks that parties rely too heavily on the court to get their cases settled. He reminds us not to overlook the ethical obligation of both sides' attorneys to attempt to reach a resolution of the case.

Currently, Judge Donnelly is the Chairman of the Ohio Supreme Court's Commission on Professionalism. The Commission has recently drafted a document entitled *Some Deposition Dos and Don'ts*, with the goal of raising the bar on conduct relating to depositions. The Commission hopes to incorporate these recommendations into the local rules of Civil Procedure.

When spending time with Judge Donnelly, it is obvious that he clearly enjoys being both a lawyer and a judge. His favorite book is *War and Peace* because it is evidence that human nature remains constant throughout the ages. He credits his father, the former presiding judge of the Cuyahoga County Probate Court, Judge John Donnelly, with inspiring him to become a judge due to his innate sense of fairness and natural inclination toward dispute resolution. ■

Editor's Note: *The following document is a draft of the guidelines proposed by the Supreme Court of Ohio's Commission on Professionalism concerning how attorneys should conduct themselves in deposition. CATA has been advised that the Commission is still accepting comments from the public with respect to these rules. If you have suggestions, please forward them to Judge Michael Donnelly at cpmpd@cuyahogacounty.us.*

Some Deposition "Dos and Don'ts"

Issued by The Supreme Court of Ohio Commission on Professionalism

If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions, of course, are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process. To help correct this situation, the Commission on Professionalism is publishing the following guidelines, a set of deposition "dos and don'ts." The Commission believes that if lawyers follow these guidelines – which are consistent with, and to some extent provide specific amplification of, the Supreme Court's Statements on Professionalism – lawyers will be able to use depositions to advance the legitimate interests of their clients, while, at the same time, treating all participants in the process, including deponents and opposing counsel, with courtesy, civility and respect. In short, by adhering to these guidelines, lawyers will be acting as professionals and in the manner that the courts expect.

DO:

- Review the local rules of the jurisdiction where you are practicing before you begin.
- Cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time and place. Then send out a notice that reflects the agreement that has been arrived at.
- If, after a deposition has been scheduled, a postponement is requested by the other side, cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client's rights.
- At the deposition, treat other counsel and the deponent with courtesy and civility.
- Go "off record" and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
- Recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the "problem."
- If a witness is shown a document, make sure that you have ample copies to distribute simultaneously to all counsel who are present.
- If a deponent asks to see a document about which he is being questioned, provide a copy to the deponent.
- Inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these "dos and don'ts."

DON'T:

- Attempt to "beat your opponent to the punch" by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
- Coach the deponent during the deposition when he or she is being questioned by the other side.
- Make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."
- Make rude and degrading comments to, or *ad hominen* attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
- Instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product or self-incriminating, or if the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
- Take depositions for the purpose of harassing a witness or in order to burden an opponent with increased litigation expenses.
- Overtly or covertly provide answers to questions asked of the witness.
- Demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
- Engage in conduct that would be inappropriate in the presence of a judge.

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Verdict Spotlight

by Christopher Mellino

Jamie R. Lebovitz

Ellen M. McCarthy

After a long and difficult fight (that is still not quite over), CATA members **Jamie R. Lebovitz** and **Ellen M. McCarthy** won a liability verdict in the Court of Claims for the wrongful death of a nurse killed in a collision as a result of ODOT's failure to repair massive potholes in a state road.

The nurse, Pauline J. Miller, was a 47 year old wife and mother, heading north on SR 165 in Columbiana County on her way to work. A long series of potholes in the oncoming lane of travel caused a box truck to lose control, go left of center and collide with Mrs. Miller's vehicle, killing her. The potholes were located just over the crest of a hill in the path of the right wheels of any vehicle traveling in the oncoming lane. They were 20' long, 24" wide, and 5" deep, with a hard edge that one witness described as being like hitting a curb.

The potholes had been reported two weeks earlier to the local ODOT office by a driver who lost control of his car when he encountered them, but ODOT had a policy of not requiring such complaints to be documented. By refusing to have a policy of documenting reports of potholes, ODOT is able to come into court and claim it had no notice of the potholes, making it difficult to establish liability.

One of the interesting twists in this case came when the plaintiffs attempted to discover driver complaint reports from ODOT's sister department, the Ohio State Highway Patrol ("OSHP"). In deposition, one of the State Troopers who responded to the accident scene described how OSHP kept records of complaints, so the plaintiffs sought these records in discovery. ODOT's attorneys claimed not to have an obligation to search for these records as OSHP wasn't their client (even though, during the deposition, they asserted the attorney-client privilege on the Trooper's behalf); but ultimately ODOT's counsel reported to the court that no such records existed. On the first day of trial, however, one of the State Troopers showed up with the very documents ODOT's counsel claimed not to exist – which resulted in an eight month "postponement" of trial, during which further discovery and motion practice proceeded.

The trial resumed in July of 2011. In addition to testimony from the individual who had reported hitting the potholes prior to Mrs. Miller's accident, plaintiffs elicited evidence of notice from a neighbor who owned property adjacent to the accident scene and from ODOT's County Manager. The County Manager testified that he had traveled that same road a week earlier and had seen the potholes. He didn't order them to be repaired immediately, although he admitted they were of a size (about 10" x 8" x 2" deep) that ODOT's manual indicated required repair.

At trial, ODOT denied that it had actual or constructive notice of the potholes – its

contention being that notice required the potholes to have been of the same magnitude at the time of notice as at the time of the accident. The Magistrate agreed with this contention, but found that the testimony of the neighbor who owned the adjacent property showed that, about 48 hours before the accident, the potholes were in the exact same condition as they were at the time of the accident and required immediate repair.

ODOT also argued that the box truck driver didn't hit the potholes but must have been tired and drifted left-of-center. This theory was in conflict with the belief of all the witnesses who responded to the scene – including ODOT's County Manager who recorded in his daily log book for that day "fatal pothole." This theory was also inconsistent with the physical facts: the truck came to rest 180 feet from the potholes, and the driver, who told the Troopers at the scene that he had hit the potholes, had never left the vicinity of the vehicles, and thus would have had no way of knowing about the potholes if he hadn't hit them.

The plaintiffs presented expert testimony from Joseph Filipino, a former PennDOT maintenance official who testified as an expert on road maintenance, and Henry Lipian, who testified as an accident reconstructionist. The defense offered Timothy Tuttle, formerly of OSHP, as their accident reconstructionist, and David Ray, an ODOT maintenance engineer, who testified about state inspections and pothole repairs.

In addition to finding that ODOT had constructive notice of the potholes giving rise to a duty to repair them, the Magistrate found that ODOT's failure to repair the potholes was the sole proximate cause of the accident.

The trial judge preliminarily adopted the Magistrate's findings, but as of this writing, objections to the Magistrate's decision remain pending. If the trial court overrules the objections, the case should proceed to a trial on damages in the next few months.

Congratulations to Jamie and Ellen for achieving a positive result for their clients in a venue where it is notoriously difficult for injury victims to prevail! ■

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

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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.*

Jack O'Malley v. Dermatology Partners, Inc.

Type of Case: Medical Malpractice

Verdict: $180,000

Plaintiff's Counsel: David M. Paris, 1370 Ontario St., Suite 100, Cleveland, Ohio 44113, (216) 694-5206

Defendant's Counsel: Steven Skiver

Court: Cuyahoga County, Case No. CV 11 751488, Judge Michael Russo

Date Of Verdict: Friday, February 24, 2012

Insurance Company: Pro Assurance

Damages: Facial scars

Summary: On 6/3/10, Mr. O'Malley went to his dermatologist, Thomas Fleming, because he had a red dot on the side of his right nostril that wouldn't go away. Dr. Fleming took a shave biopsy and his staff mislabeled it and mixed it up with the tissue of another patient. Jack's red dot was, in reality, a basal cell carcinoma. However, because of the tissue exchange, he was treated as though he had malignant melanoma. When the pathology was returned, he was rushed to a plastic surgeon who removed a chunk of his nose 20 x 25 mm and 4 mm deep. Because the hole was so big & so deep, they needed to take a 4" x 1" piece of forehead tissue and drape it down over his face and sew it to the hole in his nose. This is known as a forehead flap. After 3 weeks of that, he had the flap removed and a few months later, he needed additional revisions to improve the appearance of the scarring on his nose and forehead. The defense admitted negligence but argued, through its expert, that he would have needed the same surgeries and would have had the same scars anyway. Plaintiff's expert testified that had the mistake not been made, a single procedure would have been performed involving a small excision to remove the basal cell and it could have healed with a few stitches or, at worst, an uncomplicated flap of skin from the side of his nose.

Mr. O'Malley had $40,000 in medical bills, but the court allowed evidence of write offs which reduced the number to $25,000. The offer in the case was $70,000. The demand was $305,000 with the expectation that further negotiation would resolve the case between $150,000 - $200,000. Pro Assurance refused to negotiate any further. The jury awarded $25K for past medical bills; $125K for past pain & suffering; $30K for future pain & suffering for a TOTAL verdict of $180,000.

Interestingly, it was a unanimous verdict with one member of the jury being a local orthopedic surgeon and another the Director of the Lab at a local hospital.

Plaintiff's Expert: Steven Davison, M.D.

Defendants' Expert: Herman Houin, M.D.

Novovic v. Greyhound Lines, Inc., et al.

Type of Case: Wrongful Death of Pedestrian Hit by Motor Vehicle

Settlement: $625,000 from Greyhound; $25,000 from Eddie McElfresh

Plaintiff's Counsel: Toby Hirshman, Linton & Hirshman LLC, 700 West St. Clair Ave., Hoyt Block, Suite 300, Cleveland, Ohio 44113, (216) 781-2811; Larry Goldhirsch, Weitz & Luxenberg, 700 Broadway, New York, New York 10003

Defendants' Counsel: Eric Anderson, Meyer, Darragh, Buckler, Bebenek & Eck, Pittsburgh, PA, Counsel for Defendant, Greyhound; Mark Gams, Gallagher, Gams, Pryor, Tallen & Littrell, Columbus, Ohio, Counsel for Defendant, Eddie McElfresh

Court: U.S. District Court, Southern District of Ohio, Case No. 2:09-CV-753, Judge Algenon Marbley

Date Of Settlement: February 2, 2012

Insurance Company: Greyhound

Damages: Death of a 40-year old man with wife and 3 sons.

Summary: Plaintiffs' decedent, a native of Montenegro who had been living in New York since 2000, was a passenger on a Greyhound bus which broke down in the middle of the night on I-70 near an on-ramp. The driver allowed passengers to get off the bus and failed to notify them of the existence of an on-ramp next to the bus, although he did instruct them to stay near the bus. Mr. Novovic got off the bus and was hit by a car being driven by defendant McElfresh and was killed. The highway patrol's crash report attributed the accident to inattentiveness on the part of plaintiff's decedent. Although Mr. Novovic had lived in the U.S., his family continued to live in Montenegro and he had not seen them in 7 years. Mr.

Novovic was an undocumented worker and had been ordered deported by the Board of Immigration Appeals. Plaintiffs' Motion in Limine regarding Mr. Novovic's immigration status was denied and the jury was informed of the deportation order pending against him at the time of his death. The case settled shortly after a state highway patrol trooper and a passenger testified as to Mr. Novovic's apparent lack of knowledge as to his location on an on-ramp.

Plaintiff's Expert: John Burkert, Motor Coach Safety; Dr. C. Jeff Lee, Office of Licking County Coroner; John Burke, Economist.

Defendants' Expert: Choya Hawn, Accident Reconstruction; Matthew Daecher, Transportation Safety.

Dr. Robert E. Marsico, Jr. and Heather Moran v. Winner Aviation Corp., et al.

Type of Case: Aviation accident

Verdict: $11,350,000.00

Counsel for Plaintiffs: Jamie R. Lebovitz and Ellen M. McCarthy, Nurenberg, Paris, 1370 Ontario St., Suite 100, Cleveland, Ohio 44113, (216) 621-2300

Counsel for Defendants: J. Bruce McKissock and James G. Lare, Marshall, Dennehey, 1845 Walnut St., Philadelphia, PA 19103

Court: Philadelphia County Common Pleas Court, Pennsylvania, Case No. 000169, Judge Leon Tucker

Date of Verdict: December 14, 2011

Damages: Bob Marsico - 3rd degree burns to face, arms, legs. L1 burst fracture, right tibia fracture, left talus fracture, left navicular fracture, left midfoot dislocation, 4 fasciotomies, multiple skin grafts, ankle fusion. Heather Moran - 3rd degree burns on arms and legs and T11 wedge fracture, neuropathy in lower legs, depression, anxiety.

Brief Summary of the Case: Plaintiffs, a dermatologist and a commercial pilot, were burned over 33% of their bodies and suffered other orthopedic injuries when their airplane crashed shortly after takeoff from an airport outside of Atlanta, Georgia. The plane was maintained by Winner Aviation of Youngstown, Ohio. The twin engine plane developed engine trouble in the rear engine, which stopped running and could not be restarted minutes into the flight. The front engine, which should have been sufficient to fly the aircraft home to the Cleveland area from Atlanta, failed to keep the plane airborne due to valve guide problems. They crashed in a field and sustained devastating injuries. The plaintiffs had reported to Winner on a number of occasions that the rear engine was experiencing loss of manifold pressure. Winner assured plaintiffs that the rear engine issues had been remedied and the plane was airworthy following the annual inspection that occurred shortly before the accident flight. Winner failed to disclose to the plaintiffs that both engines were in need of an overhaul as recommended by the manufacturer and otherwise failed to fix the recurring problem with the rear engine.

Experts for Plaintiffs: Al Fielder, Aviation Accident Reconstructionist; Donald Sommer, Aviation Expert; Mark Seader, Engine Repair and Failure Analyst; Kit Darby, Aviation Vocational Expert; William Partin, Economist; Walter Ingram, M.D., Burn Unit Director at Grady Memorial Hospital in Atlanta, Georgia; Richard Bonfliglio, M.D., Physical Medicine and Rehabilitation; Coleman Seskind, M.D., FAA Certified Medical Examiner.

Experts for Defendants: Leonard Boyd, Maintenance Professional; Gary Vigilante, M.D., Cardiologist; John N. DuPont, Ph.D., Metallurgist.

Jane Doe v. ABC Hospital System

Type of Case: Medical Malpractice

Settlement: $600,000.00. Plaintiff had incurred approximately $10,000.00 in medical bills and was expected to incur approximately $90,000.00 in future surgery bills for a total of $100,000.00 in medical bills (economic loss).

Plaintiff's Counsel: Charles Kampinski and Kent Schneider, Kampinski & Schneider, 1301 E. 9th St., Suite 500, Cleveland, Ohio 44114, (216) 781-5515

Defendants' Counsel: None. Risk Management handled the negotiations and settlement.

Court: None. This case was settled during pre-suit negotiations directly with the Risk Management Department of ABC Hospital System (mediation was not used).

Date Of Settlement: December 13, 2011

Damages: Specifically, plaintiff suffered destruction of the inferior aspect of her left labia minora. Plaintiff has a band of thick scar tissue at the posterior fourchette. Her vestibule is atrophic, severely erythematous (reddening and discoloration), and severely tender. Plaintiff also sustained burning and severe scarring of the perineum extending to the anal area, including a 2-mm plaque layer.

The above-mentioned conditions resulted in plaintiff being unable or, at best, having extremely painful sexual intercourse and, in general, tenderness and discomfort at all times.

Plaintiff's treating physicians, who specialize in complicated

gynecological issues, after conservative treatments failed, recommended surgical intervention to attempt to alleviate plaintiff's medical conditions and to allow her to have relatively pain free intercourse. Specifically, her treating physicians have recommended the following surgical procedures: posterior vestibulectomy, including vestibular ring removal; posterior labia revision; and superficial perineoplasty.

Summary: On January 5, 2011, a 42-year old woman presented at an ABC Hospital System facility for a gynecological surgical procedure by a general practice OB/GYN. Previously, on December 21, 2010, the plaintiff had been diagnosed with low grade squamous intraepithelieal lesions (vulvar intraepithelieal neoplasm, VIN II, with moderate dysplasia). The planned procedure was a wide local excision of the vulvar lesion, which was to be performed under general anesthesia.

As part of the preparatory work for the surgical excision procedure, a diluted acetic acid wash is supposed to be applied to the vulvar area to delineate the borders of the dysplastic area. However, instead of using a diluted solution of acetic acid, the OB/GYN either used a highly concentrated acetic acid or trichloroacetic acid (TCA). Consequently, the plaintiff suffered a severe chemical burn of her vulva, which took several months to heal. After the skin did heal, plaintiff was left with permanent scarring of the vulvar area and severe tenderness of the vestibule (vaginal opening).

Plaintiff was a recently divorced 42-year old female. She was an attractive woman who had just begun to re-start her social life post-divorce.

Plaintiff's Expert: Andrew T. Goldstein, M.D., Division of Gynecologic Specialties, Dept. Of Gynecology and Obstetrics, John Hopkins Medicine, Baltimore, Maryland; John Miklos, M.D., Director of Urogynecology, Atlanta Urogynecology of Associates, Atlanta, Georgia

Defendants' Expert: None.

Hedger v. Collins/Sigmund

Type of Case: Medical Malpractice

Verdict: $750,000

Plaintiff's Counsel: Steve Crandall, 50 Public Square, Cleveland, Ohio, (216) 538-1981

Defendants' Counsel: Mark MacDonald/Pat Atkinson

Court: Hamilton County, Judge Richard Niehaus

Date Of Verdict: November 9, 2011

Insurance Company: T.D.C./ Univ. Of Cincinnati

Damages: Death of a 27-year old

Summary: David Hedger was discharged from the ER with warning signs of an infection and later died of sepsis.

Plaintiff's Expert: Dr. Ronald Jacoby, ER; and Dr. Joel Bennett, Oncology.

Defendants' Expert: Dr. Hoekstra, ER; and Dr. Sigel, Oncology.

James Slagter v. Joan Burr

Type of Case: Motor Vehicle Accident

Verdict: $750,000.00 (last offer $25,000)

Plaintiff's Counsel: Nancy Iler, Nancy C. Iler Law Firm LLC, 101 W. Prospect Ave., Suite 1650, Cleveland, Ohio 44115, (216) 696-5700, and local counsel

Defendants' Counsel: Mitchell Griffith

Court: Beaufort County, South Carolina

Date Of Verdict: October 14, 2011

Insurance Company: Geico Ins. Co.

Damages: Fractured pelvis, ribs, ruptured diaphragm, lung contusion. Medical bills: $470,000.00 in past medicals.

Summary: The plaintiff and his wife were vacationing in Hilton Head, South Carolina. Plaintiff was making a left-hand turn and was in the middle of the intersection when the defendant failed to stop at the red light, colliding with the plaintiff's car. Both cars were totaled. Plaintiff was life-flighted to a trauma center where he spent the next 31 days in intensive care and later spent months at home rehabilitating. He has returned to work but suffers from shortness of breath due to decreased lung capacity. There was no accident investigation conducted by the local authorities. Liability was contested.

Plaintiff's Expert: Dr. Charles Pue, Pulmonalogist and Critical Care; Sarah Lustig, Life Care Planner

Defendants' Expert: N/A

Estate of John Doe v. Phoenix Disposal, Inc., et al.

Type of Case: Trucking Accident - Wrongful Death

Settlement: $1,500,000.00 (pre-suit)

Plaintiff's Counsel: Steven M. Goldberg, Steven M. Goldberg Co., L.P.A., 34055 Solon Road, Suite 103, Solon, Ohio 44139, (440) 519-9900

Defendants' Counsel: Wiles, Boyle, Burkholder & Bringardner Co., LPA

Court: None identified.

Date Of Settlement: October 2011

Insurance Company: Zurich Insurance Company

Damages: Death

Summary: On May 30, 2008, John Doe (age 29) was walking from his home to a bank several blocks away. He was legally blind and was wearing dark glasses and carrying/using a white cane with a red tip as used by blind people. According to witnesses, John Doe was legally walking on the grass "about a foot" from the paved portion of the roadway. There were no sidewalks in this area. As John Doe approached a private driveway, he was struck and fatally injured by a front-end loading refuse truck that was attempting to back out of the private driveway, into the road. The truck that struck John Doe was a 2003 Mack equipped with a front-end loading body used to service large refuse containers used by commercial establishments and was owned by Phoenix Disposal, Inc.

Plaintiff's Expert: Gerald Van Beck, PE, CSP, CHCM (Safety, Health and Fleet Safety); Robert R. Reed, Reed Transportation Service, Inc., Forensic Trucking Expert.

Defendants' Expert: N/A

Jane Doe v. ABC Hospital

Type of Case: Medical Malpractice Wrongful Death

Settlement: $1,500,000.00

Plaintiff's Counsel: Brian Eisen, Romney Cullers, Todd Gurney

Defendants' Counsel: None

Court: N/A. Settled pre-suit.

Date Of Settlement: September 2011

Insurance Company: Self-insured hospital

Damages: Death

Summary: An 84-year old woman with aortic insufficiency underwent aortic valve replacement surgery. Immediately following the procedure, she suffered a cardiac arrest, requiring aggressive resuscitative measures, including open cardial massage. The patient suffered a cardiac laceration during the resuscitation. During a subsequent procedure undertaken to repair the laceration, surgeons inadvertently sutured a pulmonary artery catheter to the area of repair, which ultimately caused an uncontrolled bleed and death.

Plaintiff's Expert: None. Case was settled pre-suit without experts.

Defendants' Expert: N/A

Jeffrey J. Palcich, et al. v. Philip J. Eckhardt, et al.

Type of Case: Bodily Injury, Motor Vehicle-Motorcycle Accident

Settlement: $690,000.00 (pre-suit)

Plaintiff's Counsel: Steven M. Goldberg, Steven M. Goldberg Co., L.P.A., 34055 Solon Road, Suite 103, Solon, Ohio 44139, (440) 519-9900

Defendants' Counsel: None identified.

Court: None identified.

Settlement: September 2011

Insurance Company: Travelers Insurance Company

Damages: Bilateral rotator cuff tears and large hematoma on right leg. Aggravation of prior back injuries with degenerative changes and acute herniations to cervical spine.

Summary: Mr. Palcich was operating his motorcycle on November 9, 2010, when Mr. Eckhardt pulled out from a private drive onto a public road causing Mr. Palcich to drop his bike and roll into Mr. Eckhardt's car.

Plaintiff's Expert: James D. Kang, M.D., Orthopaedics; and Michael A. Necci, DO, Orthopaedics

Defendants' Expert: N/A

John Doe v. John Doe Spinal Surgeon

Type of Case: Medical Malpractice - Informed Consent

Settlement: $455,000.00

Plaintiff's Counsel: Rhonda Baker Debevec, Spangenberg, Shibley & Liber LLP, (216) 696-3232

Defendants' Counsel: Anonymous

Court: Summit County Common Pleas

Date Of Settlement: March 2011

Insurance Company: The Medical Protective Company

Damages: $269,000 (past medical bills)

Summary: Rectal perforation during lumbar fusion L5-S1 requiring colostomy and subsequent abscess formation.

Plaintiff's Expert: Gregory P. Graziano, M.D.; Joseph Cannelongo, MS, LPC

Defendants' Expert: Scott Kitchel, M.D.

Estate of Jane Doe v. John Doe Hospital, et al.

Type of Case: Medical Malpractice (Emergency Room Error)/

Wrongful Death

Settlement: $1.3 Million

Plaintiff's Counsel: Steven M. Goldberg, Esq., Steven M. Goldberg Co., L.P.A., 34055 Solon Road, Suite 103, Solon, Ohio 44139, (440) 519-9900

Defendants' Counsel: Comstock Springer & Wilson Co., LPA; Mannion & Gray Co., LPA; Bonezzi, Switzer, Murphy, Polito & Hupp Co., LPA; and Poling Petrello

Court: Mahoning County Common Pleas, Judge R. Scott Krichbaum

Date Of Settlement: March 2011

Summary: Jane Doe presented to John Doe satellite hospital in Class III shock. She was never adequately evaluated and/or resuscitated despite obvious signs of shock and volume depletion. She was transported to John Doe hospital's main campus, a Level I trauma center, where she sat in the E.R. for 4 ½ hours in obvious hemorrhagic shock without a single lab despite initial abnormalities and progressive deterioration after a "therapeutic tube" had been placed. Jane Doe received less than a liter of fluid, with no urine output and no attempt to measure it despite having put out more than 1 liter of blood initially and a total of 2 liters in the first 4 hours from a chest tube that was minuscule, inappropriately placed and obviously inadequate based upon the single portable image that was taken afterward; despite a subsequent measured hemoglobin of 6.5 while still in the ED still not a single tube of blood was sent for cross match. Jane Doe did not get a drop of blood transfused into her body until she was in full arrest and was clinically dead.

Plaintiff's Expert: David Effron, M.D., Emergency Room; Creighton B. Wright, M.D., Trauma; Vickie Halstead, RN, Nurse; John F. Burke, Jr., PH.D., Economist; Curtis Udell, CPAR, CPC, CMPA, Physician Billing Expert; and Georgeann Edford, Hospital Billing & Coding Expert

Defendants' Expert: Case settled at mediation before defendants' expert disclosure deadline. ■

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3. ***Excellent character and integrity of the highest order.***

In addition, I certify that no more than 25% of my practice and that of my firm's practice if I am not a sole practitioner, is devoted to personal injury litigation defense.

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Please return completed Application with $125.00 fee to: **CATA, c/o Ellen Hirshman, Esq.**
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