CATA News

Winter 2011 • 2012

Cleveland Academy of Trial Attorneys
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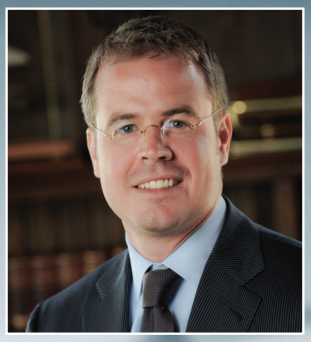

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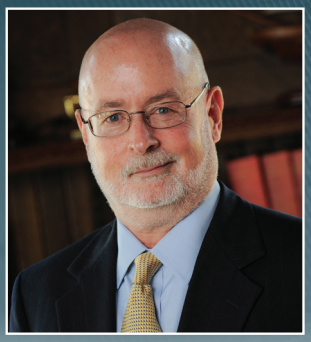

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Cover photo taken by Kathleen J. St. John

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President's Message

At our annual meeting and banquet this past June, I reported to the members and guests in attendance that our organization is facing a challenge like never before. In addition to our ongoing political struggle with the interests promoted by the Chamber of Commerce against consumer rights at the local, state, and national level, the economic difficulties that we all face have forced many of our members to choose between the professional associations. Despite CATA's being the most cost effective at $125.00 for annual dues, I have often heard from long standing members that, to cut costs, they have consolidated their bar memberships. CATA was among those they did not renew.

For another member it went deeper. The relevance of our organization was called into question in light of the active work OAJ does at the state level and in the Ohio Legislature. While I convinced him to renew, this colleague of ours actually questioned why a membership in both organizations was necessary. This caused me to take a step back and re-evaluate just who we are and what we do.

In a nutshell, the single most important function of your Cleveland Academy of Trial Attorneys is the networking at the local level. Through our Newsletter (the CATA News), the on line List Serve, and our regular CLE programming and social functions, we provide our membership value for the needs of the trial lawyer right here in the greater Cleveland region. No other organization offers monthly luncheons where members can enjoy the camaraderie of colleagues, the local judiciary and their staff attorneys while learning of new developments in the law and earning CLE credit. The bi-annual CATA Newsletter regularly covers important issues that we and our clients face every day with reference and authority to not just state wide case law, but also that within our own Court of Appeals.

This message may not have been emphasized of late, so, as I vowed to you in June, it is the goal of my presidency to make sure that it is. The theme for this term is that good lawyers make a living, great lawyers make a difference! The officers and board of directors of your Cleveland Academy are dedicated to making a difference with this great organization and maximizing the value of membership.

My plan was to create a spirit of participation with the board and our membership by dividing our core functions into three standing committees: Membership, Publications/Technology, and Programs. We have done that. Each committee is led by an officer, and is staffed with directors and members at large. I am pleased to report that the Academy leadership has risen to my challenge and started producing results.

Treasurer Ellen Hirshman jumped right into the Membership Committee and updated our membership roster, took control of the accounts receivable (unpaid dues), and modernized the bookkeeping. We have removed from the roster those members who have either passed away or moved on and no longer wish to participate, collected past dues, and returned our revenues to a productive level.

Vice President Sam Butcher and the Publications/ Technology Committee published this current issue of the CATA News and are preparing for the

Spring 2012 edition. They are also at work on a new webpage to improve our on-line services.

Secretary George Loucas and the Programs Committee have already produced the first two monthly CLE luncheons: in September where Pathologist William Bligh-Glover, M.D. from CWRU led a riveting presentation on "Getting the Most out of your Forensic Expert," and in November where a distinguished panel consisting of James J. McMonagle, Peggy Foley-Jones, and Patrick Murphy discussed Mediation. Look forward to monthly seminars through the rest of the year and into 2012 to include: Ethics and Substance Abuse with Paul Cami and Rick Alkire on December 14, 2011; Focus Groups with Rick Topper on March 14, 2012; and a presentation by Ohio Supreme Court Justice Yvette McGee Brown on April 11, 2012. We also plan the return of our hugely successful Litigation Institute in February of 2012.

No one should ever have to question the relevance of this great organization. And I submit to you that we are more relevant now than ever. With all the other challenges that exist outside of our windows, we still maintain the constant vigil of protecting the fundamental interests of justice for our clients and our families. I assure you that your CATA remains strong, vibrant, and always serving to make a difference! ■

John R. Liber II
President

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Editor's Notes

by Kathleen J. St. John

This, year we have a new team working on the CATA News. As CATA president, John R. Liber, II, indicated, we are now divided into committees, with an officer leading each. Our Publications & Technology committee is led by Vice President, Sam Butcher, and includes Chris Mellino, Susan Peterson, Andrew Thompson, Jonathan Mester, Will Eadie, and me. We hope you find this issue useful, and, as always, we welcome any comments, critiques, or suggestions you have for future issues.

1. The CATA website

Our committee has been charged with updating the CATA website, a process that is in the works. Meanwhile, we encourage you to use the CATA website as it currently exists, at http://www.clevelandtrialattorneys.org/. There you'll find past issues of the CATA News, legal and medical links (including the deposition bank), events and membership information, and access to the CATA List Serve.

To access the website, you'll need your user name and password; if you know your user name but not your password, the system can email it to you. If you still have trouble, contact Frank Strack, at fstrack@nphm.com. Frank provides this service gratis (until we have a new system and provider in place), so please be patient and he will respond at his earliest convenience.

2. Changes to your contact information.

CATA Treasurer, Ellen Hirshman, encourages members who have changes to their profile *(i.e.*, firm name, email address, firm address, phone number, *etc.)*, to provide those changes promptly to Frank Strack or her. Ellen can be reached at ehh@lintonhirshman.com. This is particularly important when we mail the newsletter, as we received quite a few copies back last year from members whose contact information was outdated.

3. New members.

CATA's officers and directors also encourage you to invite new members to join our organization. All attorneys in our region who focus their practices primarily on plaintiff's injury law are welcome, but we particularly encourage younger attorneys to join and carry on the CATA tradition. A membership application can be found at the last page of this newsletter.

4. Advertisers.

As always, we are grateful to our advertisers for their help in making this newsletter possible. Please remember to support them, and let them know you saw their ad in the CATA News.

5. Court decisions to watch for.

Among the cases pending before the Ohio Supreme Court of interest to our membership, we note the following:

***Darrell Sampson v. CMHA*, S.Ct. No. 10-1561.** This is a discretionary appeal from an *en banc* decision of the Eighth District Court of Appeals.[1] The issue is whether R.C. 2744.09(B) creates an exception to political subdivision

immunity for common law intentional tort claims alleged by a public employee. The plaintiff prevailed in the Eighth District; and the Courts of Appeals in the Fourth and Ninth Districts have also ruled for plaintiffs on this issue.[2] Oral argument was held in the Supreme Court on September 20, 2011, so a decision can be expected in the relatively near future.

***Ruther v. Kaiser,* S.Ct. No. 11-0899.** This is an appeal from a decision of the Twelfth District Court of Appeals in a wrongful death/medical malpractice case. The Court of Appeals held that "Ohio's current statute of repose for medical malpractice claims contained in R.C. 2305.113(C) is unconstitutional as applied" to the 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] As of the writing of this note, this appeal has not yet been briefed, so it will be a while before a decision is forthcoming. ■

End Notes

1. *Sampson v. Cuyahoga Metropolitan Housing Authority,* 188 Ohio App.3d 250, 2010 Ohio 3415, *discretionary appeal allowed by Sampson v. Cuyahoga Metro. Hous. Auth.,* 2010 Ohio 6008 (Dec. 15, 2010).
2. *See, e.g., Vacha v. North Ridgeville*, 9th Dist. No. 10CA009750, 2011 Ohio 2446, *discretionary appeal allowed by Vacha v. North Ridgeville,* 2011 Ohio 5129 (Oct. 5, 2011); and *Long v. Village of Hanging Rock,* 4th Dist. No. 09CA30, 2011 Ohio 5137, ¶34 (Sept. 28, 2011) (discussing conflict of authority in Ohio cases as to whether a political subdivision may be held liable for an intentional tort).
3. *Ruther v. Kaiser,* 12th Dist. No. CA2010-07-066, 2011 Ohio 1723, ¶37, *discretionary appeal allowed by Ruther v. Kaiser,* 2011 Ohio 4751 (Sept. 21, 2011).

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Life After *Wuerth* – What's Really Changed In the World of *Respondeat Superior* Liability?

by Brenda M. Johnson

In 2009, the United States Court of Appeals for the Sixth Circuit certified to the Ohio Supreme Court what appeared to be a fairly limited question of state law – namely, whether a legal malpractice claim could be maintained directly against a law firm when the relevant principals and employees had either been dismissed from the lawsuit or never sued in the first instance.

The response to this question, set forth in the Court's opinion in *National Union Fire Insurance Co. of Pittsburgh, PA v. Wuerth,*[1] was twofold. First, the Court held that a law firm cannot be held directly liable for legal malpractice for the simple reason that only individuals may practice law, and thus only individuals may directly commit legal malpractice.[2] This holding is consistent with, and indeed drawn from, the position the Court has taken with respect to medical malpractice.[3] The second phase of the Court's response, however, has been construed by some as a radical departure from traditional principles of *respondeat superior* liability, under which it has always been understood that a plaintiff may sue the employer or the employee, and need not join the employee in an action against the employer. This article is an attempt to determine whether, in fact, that is the case, and more importantly, to determine whether the Supreme Court and other Ohio courts have treated *Wuerth* as a departure from these traditional principles.

What *Was* The Holding In *Wuerth* Anyway?

Having determined that a law firm cannot be held directly liable for legal malpractice, the Court in *Wuerth* went on to determine whether a law firm could be held liable for malpractice when the relevant principals had either been dismissed from the action or had not been sued in the first instance, and the answer has been a source of confusion ever since.

The simple answer, presented in an opinion authored by Justice O'Donnell with which four justices concurred, was a statement that, under the principles of *respondeat superior,* an employer may be held liable only when an employee or agent may be held directly liable, and that, in the absence of liability on the part of a firm principal or employee, a law firm may not be held liable for legal malpractice.[4]

This statement, in and of itself, is not problematic unless and until it is applied to the facts presented in the underlying federal action. In that case, as noted by the Ohio Supreme Court, summary judgment had been granted in favor of the attorney responsible for the alleged legal malpractice on the grounds that the statute of limitations had elapsed as to any claims against him.[5] Thus, *Wuerth* has been grasped upon by defendant employers as a globalizable pronouncement that

no employer of any sort may be subject to *respondeat superior* liability if the statute of limitations has expired with respect to a direct claim against the employee or employees upon whose negligence the employer's liability is premised.

There are very good arguments based on the opinions of the justices themselves and on the specific facts of the underlying federal case that *Wuerth* cannot be read so broadly. For one, an argument can be made, based on the facts set forth in the district court opinion granting summary judgment in favor of the law firm and its (by then former) attorney, that the statute of limitations for a legal malpractice action had run with respect to both the firm *and* the attorney whose conduct was at issue when the initial complaint had been filed.[6] Perhaps more importantly, however, a majority of the justices who participated in addressing the questions posed in *Wuerth* stressed the narrowness of the Court's holding.

In a concurring opinion joined by Justices Pfeifer, O'Connor and Lanzinger, along with Judge Mary DeGenaro of the Seventh Appellate District who was sitting by assignment for Justice Lundberg Stratton, the late Chief Justice Thomas J. Moyer wrote "to emphasize that today we answer only the very narrow certified question before us."[7] In so doing, Chief Justice Moyer stressed that the issue being addressed was limited to liability issues involving law firms, and even then only to the narrow question of a law firm's direct liability when premised on the alleged negligence of a single principal in the firm. Among other things, Chief Justice Moyer, who had concurred in the Court's opinion as well, noted that

> [w]e do not address today the complex attorney-client relationship that arises when a client employs several different or successive attorneys in the same firm, nor do we confront the interplay of those relationships and the tolling events listed in *R.C. § 2305.11(A)*. Similarly, our opinion does not reach questions of the duties and liabilities of a law firm that may arise from a general engagement agreement with a client. Those questions are beyond the scope of the question of state law certified by the Sixth Circuit Court of Appeals.[8]

After distinguishing a number of opinions advanced in favor of the proposition that law firms may be held directly liable for malpractice under Ohio law, Chief Justice Moyer again stressed the narrowness of the Court's holding:

> I stress the narrowness of our holding today. This opinion should not be understood to inhibit law-firm liability for acts like those alleged by the petitioner. Rather, a law firm may be held vicariously liable for malpractice as discussed in the majority opinion. Further, our holding today does not foreclose the possibility that a law firm may be directly liable on a cause of action other than malpractice. Yet the limited record and the nature of answering a certified question do not permit us to entertain such an inquiry in this case.[9]

This concurring opinion, in which a majority of the panel joined, is a very strong indicator that the Court did not believe it was making a sweeping pronouncement about the nature and scope of potential law firm liability, let alone imposing a sweeping (and revolutionary) change in *respondeat superior* liability in general. Nevertheless, defendants have argued that *Wuerth* did, in fact, radically change *respondeat superior* liability in Ohio. So far, however, Ohio courts – including the Ohio Supreme Court – appear to be disinclined to give *Wuerth* the broad reading that some defendants have urged.

Lower Courts Have Applied *Wuerth* Narrowly

To date, Ohio courts of appeals have had several opportunities to address the scope and ramifications of *Wuerth*, and so far they have limited its scope to cases in which the vicarious liability at issue arises from claims of malpractice on the part of doctors or lawyers.[10] Where the negligence involved is that of an employee who does not fall within either of these professions, courts have declined to hold that individual employees must also be sued in order for *respondeat superior* liability to apply.

In *Taylor v. Belmont Community Hospital*,[11] the Seventh District declined to extend *Wuerth* to a medical negligence case involving negligence on the part of a doctor and nurses employed by the hospital. In that case, the hospital was sued within the statute of limitations for the negligence of its employee doctor and two employee nurses, but these employees had not been named as defendants.[12] The trial court granted summary judgment in favor of the hospital based on *Wuerth*.[13]

The Seventh District reversed, holding that *Wuerth* should not be extended to cases in which the employees of a hospital had not been sued and the statute of limitations had run as to claims against those employees.[14] In so holding, the Seventh District repeatedly noted that the majority concurrence in *Wuerth* stressed its narrow application – a point made even more salient by the fact that Judge Mary DeGenaro, who sat by assignment on the *Wuerth* panel, was also a member of the panel that decided *Taylor*. Indeed, Judge DeGenaro wrote her own concurrence in *Taylor*, in which she stressed that *Wuerth* had no bearing on the issues in that appeal, and went so

far as to say that "*Wuerth* does not even tangentially touch on the issue of the statute of limitations."[15]

The Second District also has limited *Wuerth's* scope, holding that it applies only to cases involving *respondeat superior* liability for acts of traditional legal or medical malpractice, and does not extend to medical claims involving negligence on the part of non-physicians. *Stanley v. Community Hospital*,[16] decided earlier this year, involved claims of negligence on the part of nurses employed by the defendant hospital. While the complaint included Jane and John Doe nurses as defendants, no individual hospital employee was ever specifically named as a defendant.[17] Based on this, the trial court granted summary judgment in favor of the hospital, which the Second District reversed.[18]

On appeal, the plaintiff argued that *Wuerth* did not apply because the employees at issue were nurses, rather than physicians who tend to have a more independent relationship with hospitals, and also noted that the action against the hospital had been commenced within the applicable statute of limitations.[19] The hospital argued otherwise, asserting that *Wuerth* extended to claims involving nurses as well as physicians, but the Second District rejected this interpretation as being "too expansive," on two related grounds.

First, the Second District agreed with the plaintiff's observation that physicians commonly have a more independent relationship with hospitals than nurses do:

> Specifically, physicians and attorneys are professionals who are generally hired to perform services for their clientele as independent contractors. Physicians and attorneys are not typically considered "employees" at their respective businesses. The law partner and attorney in *Wuerth* was a part owner of his firm and worked as an independent contractor for his clients. Physicians, as well, are often not employees of the hospitals where they have privileges.[20]

Second, the court noted that "malpractice," which was the type of misconduct at issue in *Wuerth*, traditionally has been limited to professional misconduct on the part of doctors and lawyers, and does not necessarily encompass negligence on the part of others, even in a medical context. In support of this proposition, the court also noted that the Ohio Revised Code makes distinctions between "malpractice" and "medical claims" for purposes of the applicable statute of limitations:

> Specifically, R.C. 2305.11(A) states that "an action for malpractice *other than a medical *** claim* *** shall be commenced within one year after the cause of action accrued." *R.C. 2305.113(A)* states that "an action upon a medical *** claim shall be commenced within one year after a cause of action accrued."[21]

The hospital argued that the distinction made no difference in the case at bar because R.C. § 2305.113(A) controlled; however, the Second District rejected this contention based on Ohio Supreme Court precedent holding that the negligence of nurses does not constitute "malpractice" for purposes of R.C. § 2305.11(A):

> While the statute of limitations for malpractice *and* medical claims are both one year, only physicians and attorneys can commit malpractice under *R.C. 2305.11(A)*. The Ohio Supreme Court has held that the negligence of nurses does not fall under the definition of "malpractice" as discussed in *R.C. 2305.11(A)*. Rather, the alleged negligence of a nurse employee falls under the definition of a "medical claim" in *R.C. 2305.113(A)*. The holding in *Wuerth* must be given a narrow application. Nowhere in the *Wuerth* decision does the Supreme Court conclude, expressly or otherwise, that a medical claim brought against a hospital for the alleged negligence of one of its nurse employees constitutes a claim for malpractice under *R.C. 2305.11*.[22]

On September 23, 2011, the Second District issued another opinion involving *Wuerth* – this time addressing hospital liability for the negligence of MRI technicians who had not been named as defendants in the action against the hospital – and in so doing elaborated on the practical and public policy considerations informing its analysis.

In *Cope v. Miami Valley Hospital*,[23] the Second District reiterated its position that medical malpractice and legal malpractice stand on a different footing than ordinary negligence, even when the negligence occurs in a medical setting, and reprised the statutory and common law analysis set forth in *Stanley*.[24] The court emphasized that public policy considerations support a narrow reading of *Wuerth*, even in the medical context:

> Ultimately, this court's decision to give *Wuerth* a narrow application is supported by the public policy considerations found at the heart of the "respondeat superior" doctrine, which supports vicarious liability. A hospital employs a wide range of people who provide a variety of medical services to patients. The hospital is in exclusive control of hiring criteria, training, and routine performance evaluation and review. A hospital should be responsible for the negligence of its employees who perform medical services and act in the course and scope of their

employment. To allow a hospital to be shielded from the rule of "respondeat superior" liability due to a court's liberal application of the distinction carved out by *Wuerth* would effectively allow the distinction to swallow the rule.[25]

Signals from the Supreme Court?

Though they are not dispositive, there are indications beyond Chief Justice Moyer's concurring opinion that the Ohio Supreme Court supports a narrow reading of *Wuerth*. In an order entered on August 24, 2011, the Ohio Supreme Court declined to allow a discretionary appeal of the Second District's decision in *Stanley*, which, while not an endorsement of the Second District's reasoning, nonetheless leaves the Second District's disposition undisturbed.[26] In addition, in *State ex rel. Sawicki v. Lucas County Court of Common Pleas*,[27] decided July 21, 2010, the Court addressed what, on first blush, might seem to be a similar issue in a strikingly different manner, without even addressing *Wuerth*.

Sawicki addressed the propriety of an order granting a writ of *procedendo* to compel a court of common pleas to proceed with a medical malpractice case brought against the private employer of a physician who had provided the treatment in question both as a private employee and as an employee of a state hospital.[28] The trial court had dismissed the individual doctor for lack of jurisdiction based on his status as a state employee, and had stayed the remaining *respondeat superior* claim pending a determination by the Court of Claims as to whether the doctor was entitled to personal immunity as a state employee.[29]

In affirming the writ of *procedendo*, the Court looked to *Adams v. Peoples*,[30] a 1985 opinion in which the Court held that a municipal employee's statutory immunity from personal liability did not automatically insulate his municipal employer from liability.[31] In so doing, the Court relied on the Restatement of the Law 2d, Agency, Section 217, which provides in pertinent part that

> In an action against a principal based on the conduct of a servant in the course of employment:
>
> * * *
>
> (b) The principal has no defense because of the fact that:
>
> * * *
>
> (ii) the agent had an immunity from civil liability as to the act.[32]

Based on this, the Court held in *Adams* that an employee's personal immunity cannot shield his or her employer from liability under the doctrine of *respondeat superior*.[33] In *Sawicki*, the Court embraced this principle again, regardless of its surface inconsistency with both *Wuerth* and *Comer v. Risko*.[34] Indeed, the inconsistency was given relatively short shrift – *Comer* was distinguished as follows, while *Wuerth* was not mentioned at all:

> We have held that a hospital cannot be held liable under a derivative claim of vicarious liability when the physician cannot be held primarily liable. *Comer v. Risko, 106 Ohio St.3d 185, 2005 Ohio 4559, P 20, 833 N.E.2d 712*. But that case does not decide the issue before us. That case was decided narrowly and turned on a theory of agency by estoppel. *Id. at P 1*. The claim against the hospital was extinguished by the statute of limitations, not by the application of immunity. *Id. at P 2*. As we held in *Johns [v. Univ. of Cincinnati Med. Assocs.], 101 Ohio St.3d 234, 2004 Ohio 824, 804 N.E.2d 19, P 37*, "a determination of immunity is not a determination of liability. Rather, it is an initial step in litigation to determine whether the state will be liable for any damages caused by the employee's actions." *Adams*, however, specifically does not allow an immunity defense to a claim for an employer's liability under respondeat superior. *Adams, 18 Ohio St.3d at 142-43, 18 OBR 200, 480 N.E.2d 428*.[35]

The Supreme Court's opinion in *Sawicki* was a ruling on a procedural question – namely, whether the trial court had erroneously stayed the underlying proceedings – and not a disposition on the merits. Thus, upon remand, the trial court rejected the plaintiff's assertion that the Supreme Court's analysis of *respondeat superior* principles was, in fact, a substantive ruling as to the employer's potential liability, and conducted its own independent analysis of the issue.[36] The trial court then went on to reject the employer's argument that *Wuerth* had changed agency law to require both the employee and the employer to be named in order for *respondeat superior* liability to arise.[37] Then, based on the Supreme Court's analysis in *Sawicki*, the trial court held that any personal immunity to which the physician might be entitled was not dispositive of the employer's *respondeat superior* liability.

The Supreme Court's apparent limitation of *Comer* to cases involving agency by estoppel is consistent with the treatment *Comer* has received in the lower courts,[38] and though far from dispositive, the Court's complete failure to even mention *Wuerth* suggests that the Court did not consider *Wuerth* to be germane to the issue presented. The trial court's opinion in *Sawicki*, in turn, suggests that there may still be room to argue employer liability in cases involving physician employees, even when the physician employee herself may have a technical defense to liability.

Sawicki may have repercussions outside the medical malpractice context, since it also has been relied on in at least one instance to permit a principal in a non-medical field to be held liable in a case where the "employee" whose conduct was at issue was entitled to immunity under Ohio's workers' compensation laws. In *Friedman v. Castle Aviation,*[39] the United States District Court for the Southern District of Ohio recently permitted the family of an employee of an airport contractor who was killed by alleged negligence on the part of his employer to pursue an action against the Columbus Regional Airport Authority (CRAA) alleging that CRAA was vicariously liable for the airport contractor's negligence. The CRAA claimed it was entitled to judgment in its favor as a matter of law because the plaintiff's decedent had been an employee of CRAA's agent, a company providing de-icing services at the airport, and thus the agent was entitled to invoke worker's compensation immunity. Based on *Sawicki,* the district court rejected this argument, holding that the immunity to which the decedent's immediate employer was entitled under Ohio's workers' compensation statutes did not necessarily extinguish any potential liability CRAA might have for the employer's negligence under principles of agency law.[40]

So What's The Lay of the Land?

Given that *Wuerth* was a response to a certified question of law as opposed to an analysis of specific facts, the opinion was unavoidably vague as to how the principles enumerated therein should be applied to specific facts. By its own terms, however, *Wuerth* was intended to be a narrow ruling, to be narrowly applied, and there is no indication in either the Court's opinion or the majority concurring opinion that the justices deciding *Wuerth* believed they were drastically revising the rules of *respondeat superior* liability. To date, lower courts have, for the most part, heeded these directions and have endeavored to limit *Wuerth* to cases involving traditional professional malpractice, namely malpractice on the part of physicians or attorneys. And so far the Supreme Court has not signaled any disapproval of this approach. ■

End Notes

1. 122 Ohio St.3d 594, 2009 Ohio 3601.
2. *Id.* at ¶¶ 16-17.
3. *Id.* at ¶ 18 ("Thus, in conformity with our decisions concerning the practice of medicine, we hold that a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice.")
4. *Id.* at ¶¶ 19-26.
5. *Id.* at ¶ 8 (citing *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth* (S.D. Ohio 2007), 540 F. Supp.2d 900, 911).
6. An examination of the opinion in *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth* (S.D. Ohio 2007), 540 F. Supp.2d 900 indicates that the plaintiff had sued the attorney and the law firm in the same complaint, and that arguments as to the timeliness of the complaint as to both defendants focused solely on the timeliness of plaintiff's claims against the individual attorney. *See id.* at 912 (plaintiff's argument limited to asserting that claims against the attorney had been timely). At least one trial court has found this to be a meaningful distinction, and has held that *Wuerth* does not apply when the employer has been sued within the statute of limitations. *See* Order filed Oct. 8, 2009, *York v. Kokosing Construction Co.,* Summit Cty. No. CV-2007-10-7079 at 3-4 (Rowland, J). The argument that a law firm can be held liable as long as it is sued within the statute of limitations for a claim against an individual attorney, however, did not persuade the Tenth District. *See Illinois Nat. Ins. Co. v. Wiles, Boyle, Burholder & Brimgardner Co. L.P.A.* (10th Dist.), 2010 Ohio 5872 at ¶ 21, ¶ 25 (rejecting argument).
7. *Wuerth*, 2009 Ohio 3601 at ¶ 27 (Moyer, C.J, concurring).
8. *Id.* at ¶ 30, n. 3.
9. *Id.* at ¶ 35.
10. To date, the following opinions involving medical or legal malpractice have applied *Wuerth* to claims made against practice groups or law firms, and have held that failure to name the professional whose conduct was at issue within the statute of limitations was fatal to the claim: *Henry v. Mandell-Brow*n (1st Dist.), 2010 Ohio 3832 (suit against plastic surgery center failed when surgeon was not named within the statute of limitations); *Hignite v. Glick, Layman & Assoc., Inc.* (8th Dist.) 2011 Ohio 1698 (suit against dental practice failed when dentist was not named within statute); *Kilko v. Walter & Haverfield* (8th Dist.), 2010 Ohio 6364 (suit against law firm failed when lawyer not named within statute); *Bohan v. Dennis C. Jackson Co., L.P.A.* (8th Dist.), 188 Ohio App.3d 446, 2010 Ohio 3422 (legal malpractice claim against law firm failed when individual attorney not named within statute); *Fisk v. Rauser & Assoc. Legal Clinic Co.* (10th Dist.), 2011 Ohio 5465 (same); *Illinois Nat. Ins. Co. v. Wiles, Boyle, Burholder & Brimgardner Co. L.P.A.* (10th Dist.), 2010 Ohio 5872 (same); *Hildebrant Family Partnership v. Provident Bank* (12th Dist.), 2010 Ohio 2712 (same).
11. (7th Dist.), 2010 Ohio 3986.
12. *Id.* at ¶¶ 3-4.
13. *Id.* at ¶¶ 6-8.
14. *Id.* at ¶¶ 29-36.
15. *Taylor,* 2010 Ohio 3986 at ¶ 46 (DeGenaro, J., concurring).
16. (2d Dist.), 2011 Ohio 1290, *discretionary appeal not allowed*, 2011 Ohio 4217.
17. 2011 Ohio 1290 at ¶ 3.
18. *Id.* at ¶¶ 6, 23.
19. *Id.* at ¶ 14.
20. *Id.* at ¶ 20.
21. *Id.* at ¶ 21.
22. *Id.* at ¶ 22, citing *Hocking Conservancy Dist. v. Dodson-Lindblom Assoc.* (1980), 62 Ohio St.2d 195 (only doctors and attorneys can commit malpractice) and *Lombard v. Good Samaritan Med. Center* (1982), 69 Ohio St.2d 471 (negligence of nurses does not constitute "malpractice" for purposes of R.C. § 2305.11(A)). An argument has been made that amendments made to R.C. §§ 2305.11(A) and 2305.113(A) after *Hocking* and *Lombard* were decided undermine this analysis, since malpractice claims against physicians now fall within the ambit of the statute of limitations for "medical claims" under R.C. § 2305.113(A). However, the statutes as written still distinguish "malpractice" from "medical claims," and do not purport to extinguish the traditional distinctions between the two. Moreover, the traditional distinction between malpractice and other forms of negligence was acknowledged in *Wuerth* itself. *See Wuerth*, 2009 Ohio 3601 at ¶ 15 ("It is well-established common law of Ohio that malpractice is limited to the negligence of physicians and attorneys." (quoting *Thompson v. Community Mental Health Centers of Warren Cty., Inc.*, 71 Ohio St.3d 194, 195, 1994 Ohio 223)).
23. (2d Dist.), 2011 Ohio 4869.

24. *Id.* at ¶¶ 20-24.

25. *Id.* at ¶ 25. The Second District also rejected the hospital's argument that MRI technicians should be treated like physicians rather than nurses, noting that neither technicians nor nurses are considered physicians even when they perform tasks similar to those performed by physicians:

> There is no reason to treat a medical technician differently than a nurse – neither is considered a physician. While MVH urges this court to treat radiological technicians as physicians due to some similarities between the two (e.g., Ohio certification and continuing education requirements), a radiological technician is not a physician. Even if a technician or nurse is doing similar work to a physician, "the fact that a particular act is within the duty of care owed to a patient by an attending physician does not necessarily exclude it from the duty of care owed to the patient by a nurse [or technician]." *Berdyck v. Shinde, 66 Ohio St.3d 573, 1999 Ohio 183, 613 N.E.2d 1014, paragraph five of the syllabus.*

Id. at ¶ 26.

26. *Stanley v. Community Hosp.*, 2011 Ohio 4217 (discretionary appeal not allowed).

27. 126 Ohio St.3d 198, 2010 Ohio 3299.

28. *Sawicki* at ¶ 3.

29. *Id.* at ¶¶ 3-8 (discussing procedural history).

30. (1985), 18 Ohio St.3d 140.

31. *See Sawicki* at ¶¶ 22-28 (applying *Adams*).

32. REST. (2D) AGENCY § 217 (1958), quoted in *Adams, supra*, at 142-43.

33. *Adams* at 142-43.

34. 106 Ohio St.3d 185, 2005 Ohio 4559.

35. *Sawicki* at ¶ 29.

36. *See* Opinion and Judgment Entry filed August 18, 2011, *Sawicki v. Temesy-Armos*, Lucas County Court of Common Pleas No. G-4801-CI-200602823-000.

37. *Id.* at 10 ("Here, . . APMCO appears to argue that *Wuerth* changed agency law, requiring a plaintiff to name both the principal and agent as defendant. There is nothing within *Wuerth*, however, expressly overriding long-standing principles of agency law.").

38. *See, e.g., Holland v. Bob Evand Farms, Inc.* (3d Dist.), 2008 Ohio 1487; *Orebaugh v. Wal-Mart Stores, Inc.* (12th Dist.), 2007 Ohio 4969.

39. (S.D. Ohio May 5, 2011), No. 2:09-cv-749, 2011 U.S. Dist. LEXIS 48377.

40. *Id.* at *20-*24.

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TAXATION OF PERSONAL INJURY SETTLEMENTS: AN INTRODUCTION FOR NON-TAX LAWYERS BY A NON-TAX LAWYER

by Cathleen Bolek

Attorneys who have been practicing more than fifteen years will fondly recall the time when defense counsel (or the insurance adjuster) would simply send the settlement check with a short, boilerplate release that did not contain the word "indemnity" or any reference to income tax treatment. At that time, the Internal Revenue Code provided that *all* amounts received on account of personal injury or sickness were excluded from taxable income and not subject to reporting requirements. Those days are long gone.

Changes made to the Code in 1989 and 1996 have complicated the tax treatment of personal injury settlements. All punitive damages are now taxable, and only those amounts received as compensation for "personal *physical* injury" or "*physical* illness" are excluded from gross income.[1] Emotional distress is not a "physical" injury or illness even if it manifests itself in physical ailments.[2]

Whether the plaintiff/taxpayer may properly claim this exclusion and successfully overcome a challenge by the IRS will depend not only upon the underlying facts, but also upon the plaintiff's lawyer's success in negotiating the language of the settlement agreement. In evaluating a taxpayer's claim that amounts received were compensation for a physical condition, the IRS and the courts will look first to the language in the settlement agreement and then to the complaint to determine the defendant's primary reason for making the payment at issue.[3] Tax treatment must, therefore, be addressed in the settlement agreement.

Tax Considerations for Claims Involving Physical Contact and a Resulting Physical Injury (Medical Malpractice, Premises Liability, Automobile Accident, Product Liability, etc.)

The tax code is clear with regard to the treatment of settlement proceeds from a claim involving only damages received on account of a physical injury or sickness. All amounts recovered as compensation are excluded from taxable income.[4] The exclusion applies to amounts paid for lost wages, emotional distress, medical costs, attorney's fees, and a spouse's loss of consortium.[5] Notably, these amounts should not be reported to the IRS by the payer on a Form 1099-MISC or any other.[6]

If the facts give rise to a claim for punitive damages, an allocation for punitive damages must be made in the settlement agreement, and this amount is taxable to the plaintiff.[7]

Tax Considerations for Claims Involving No Physical Contact (Employment Discrimination Claims, Negligent or Intentional Infliction of Emotional Distress, Tortious Interference with Contract, Defamation, etc.)

Where there is no physical contact alleged, there are several considerations regarding the plaintiff's tax burden. The allocation of the following will have some tax consequences for the plaintiff/taxpayer: medical costs incurred; lost wages; non-wage compensatory, punitive and liquidated damages; and attorneys' fees. The settlement agreement should specify the amount paid to plaintiff and plaintiff's counsel for each of these items, and whether and in what manner it will be reported to the IRS.

IRC 104(a)(2) permits the taxpayer to exclude "out of pocket" medical costs actually incurred, even if the injury or sickness is not "physical." Thus, where applicable, the settlement agreement should state the amount paid in reimbursement of such costs.

Because the IRS requires employers to withhold income tax, and holds them responsible for the taxes they are required to withhold, defense counsel should rightfully insist that an appropriate sum be allocated as wage loss, subjected to withholdings, and reported on a form W-2.[8] Depending upon the plaintiff's income in that tax year, it may be beneficial to specify in the settlement agreement that withholdings shall be made at a specific rate; otherwise, the payment may be treated as if it is only one of twenty-four pay periods in the year, and the withholdings will be excessive.

The amount reported on the W-2 should include all front and back pay. All compensation for lost wages, whether or not the employee performed work for the employer, is subject to withholding.[9] Amounts paid as "severance pay" are wages.[10]

Having wages paid to the plaintiff in a lump sum, without withholding and subject to an IRS Form 1099-MISC, may sound appealing but is actually disadvantageous to the plaintiff. Employment taxes owed pursuant to the Federal Insurance Contribution Act (FICA), which include Social Security and Medicare taxes, are supposed to be paid in equal sums by the employer and the employee, and currently exceed 12% of the employee's income.[11] If taxes are not withheld and the amount paid is reported on a Form 1099-MISC as "non-employee compensation," the employee will be liable for the full amount of the tax, including the employer's share.[12]

The settlement agreement should specify the amount paid as compensation for non-physical injuries or illness, such as emotional distress, and as punitive and liquidated damages, and the settlement agreement should state that an appropriate form 1099-MISC Box 3 will be issued to report this amount. If the settlement agreement does not so specify, the defendant's tax preparer may simply report it as "non-employee compensation," which will result in the plaintiff incurring liability for the full amount of the FICA tax.[13]

The total amount paid for the plaintiff's attorney fees should be stated in the settlement agreement. This will ensure that the employee is not required to pay FICA on this amount. Moreover, where the claim is a "civil rights claim" as defined in IRC 62(a), the plaintiff may write off the entire amount of attorney fees as an above-the-line deduction from gross income.[14] The full amount will be reported and a Form 1099-MISC should be issued to both the plaintiff and her attorney.[15] The plaintiff should remind his or her tax preparer that this amount is deducted on Schedule A as a tax preference item for purposes of AMT.

Complex Claims Involving Some Physical Contact but no Clear Physical Injury (Wrongful Imprisonment, Sexual Harassment, Sexual Assault, *etc.*)

The most complex cases, for tax purposes, are those where the injury is not clearly physical, but involves some physical contact. For example, where the plaintiff alleges that she was falsely accused of shoplifting and wrongfully imprisoned by store personnel, the plaintiff may allege she experienced fear and emotional distress, and physical harm from the detention. Another common example is sexual harassment cases, which often begin with verbal abuse and, later, physical battery. The law is unsettled as to whether the exclusion for personal physical injuries applies where no physical manifestation of injury is present (such as bruising); physical contact alone does not always equate to physical injury.[16]

Once defense counsel agrees that the plaintiff sufficiently alleged a personal physical injury, the parties must agree to an allocation between the damages arising from the physical injury, and those arising from the events that preceded the physical injury. Regardless of the extent of the physical injury sustained, damages arising from events preceding the physical contact are subject to taxation.[17] With regard to the non-physical injury, an allocation should be made for medical costs, wages, emotional distress, punitive and

liquidated damages, and attorneys' fees, and these amounts must be appropriately reported. All compensatory damages arising from the physical injury are neither reportable nor taxable.

A Promise to Keep the Settlement Confidential May Cost the Plaintiff a Stiff Tax: The Dennis Rodman Case

Finally, pitfalls may be found even where the claim involves only a physical injury. Amounts paid in consideration for confidentiality, an agreement not to disparage, and similar terms are also taxable, as determined by the notable case involving Dennis Rodman.[18] In that case, Rodman kicked a photographer, and settled the photographer's injury claim for the sum of $200,000. The tax court determined that Rodman actually paid $80,000 of that amount for the photographer's agreement to maintain the settlement as confidential, and to not defame Rodman or cooperate in a criminal prosecution; the photographer was ordered to pay income tax on the $80,000. While there is no known bulletproof way to avoid such an outcome, one suggestion is to ensure the settlement agreement specifies the consideration for such terms, whether it be a nominal sum or a mutual promise. ■

End Notes

1. IRC Section 104(a)(2) currently states that "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as a lump sum or as periodic payments) on account of personal physical injuries or physical sickness" are excluded from gross income. The exclusion applies only if the settlement is based upon "tort or tort type rights." *Stadynk v. Comm'r,* T.C. Memo 2008-289 (T.C. 2008). *See also, Comm'r v. Schleier,* 515 U.S. 323, 327, 115 S.Ct. 2159, 132 L.Ed.2d 294 (1995).
2. 26 U.S.C.S. § 104.
3. "Though courts typically look to the settlement agreement first …, '[i]n the absence of bona fide language in a settlement agreement as to the reason for the settlement payment, we discern that reason by determining the intent of the payor in making the payment.'" *De Lac v. Dick Blick Holdings, Inc.,* 2011 U.S. Dist. LEXIS 44256, 3-4 (N.D. Ill. Apr. 25, 2011), citing *Prasil v. Comm'r,* T.C. Memo 2003-100, 85 T.C.M. (CCH) 1124, at *4 (2003), *Shaltz v. Comm'r,* T.C. Memo 2003-173, 85 T.C.M. (CCH) 1489, at *2 (2003), *Robinson v. Comm'r,* 102 T.C. 116, 127 (T.C. 1994). *See also, Phoenix Coal Co., Inc. v. Comm'r,* 231 F.2d 420 (2d Cir. 1956); *Braden v. Comm'r*, T.C. Summary Opinion 2006-78 (T.C. 2006), citing *Fono v. Comm'r,* 79 T.C. 680, 696 (1982), *aff'd without published opinion*, 749 F.2d 37 (9th Cir. 1984); *Agar v. Comm'r,* 290 F.2d 283, 284 (2d Cir. 1961), *aff'g per curiam* T.C. Memo. 1960-21; *Amos v. Comm'r,* T.C. Memo. 2003-329; Rev. Rul. 95-98. The IRS will disregard an allocation in a settlement agreement where it does not reflect the actual facts of the case as stated in the complaint.
4. *See generally*, IRC Section 104(a)(2).
5. *See* H.R. Conf. Rep. No. 737, 100 cong. 2d Sess. 301 (1996).
6. *See*, *e.g.*, Instructions for Form 1099-MISC, Box 3, issued by the Department of the Treasury and found online at http://www.irs.gov/instructions/i1099msc/ar02.html#d0e706.
7. *See* IRC Section 104(a)(2), Instructions for Form 1099-MISC, Box 3.
8. *See*, IRC Sections 3401 *et seq.*
9. *See Gerbec v. United States,* 164 F.3d 1015 (6th Cir. 1999).
10. *See McCorkill v. U.S.,* 32 F.Supp.2d 46 (D. Conn. 1999).
11. 26 USC §§ 3101 *et seq.*
12. *See* 26 U.S.C. § 1401 *et seq.*
13. *See* Instructions for Form 1099-MISC, Box 3.
14. *See* Section 703(Civil Rights Relief Act), IRC 62(a).
15. *Id.*
16. *See*, *e.g., Stadnyk v. Comm'r,* T.C. Memo 2008-289 (T.C. 2008) ("Physical restraint and physical detention are not 'physical injuries' for purposes of section 104(a)(2). Being subjected to police arrest procedures may cause physical discomfort. However, being handcuffed or searched is not a physical injury for purposes of section 104(a)(2). Nor is the deprivation of personal freedom a physical injury for purposes of section 104(a)(2)"); *but see, Mumy v. Comm'r,* T.C. Summary Opinion 2005-129 (T.C. 2005) (where taxpayer received settlement for emotional distress suffered as a result of sexual harassment, and for pain suffered as a result of a "pinch," the court held that the amount received for the harassment was taxable, while that received for the "pinch" was not). *See also*, PLR 200041022 (July 7, 2000) (IRS private letter addressing the allocation of damages in a sexual harassment case involving an assault).
17. *See, e.g., Mumy v. Comm'r, supra.*
18. *Amos,* T.C. Memo 2003-329.

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Insurance Agent And Agency Liability In Ohio When There Is No Coverage For The Loss Due To Negligence Or Misrepresentation By The Agent

by Nicole Greer

Every day, people purchase insurance, pay premiums, and think they are fully protected. But all too often, when something goes wrong, they discover that the insurance company denies coverage. Sometimes the insurance company argues that coverage doesn't apply due to an exclusion or definition or other term of the policy, but sometimes the insurance company argues that there simply is no coverage. So if there is no coverage, whose fault is it? And how can you recover for your client?

When there is no coverage under an insurance contract, but your client's expectation was that there would be coverage for the type of loss suffered, there may be claims against the insurance agent and agency including breach of the duty to procure the requested insurance, breach of the duty to exercise reasonable care in advising the customer, and negligent misrepresentation. The two biggest challenges in these cases are demonstrating that there was a fiduciary relationship which will impose on the agent a heightened duty to advise, and preventing the court from applying a pure contributory negligence standard to the duty of the insured to read the policy and notify the agent if coverage is inadequate.

The Insurance Agent's Duty to Procure Insurance

The first question in this type of case is did your client request coverage that the insurance agent failed to procure? When a customer requests insurance, an agent has a duty to exercise good faith and reasonable diligence in procuring that insurance.[2] Ohio courts have long recognized an action for negligence based upon an insurance agent's failure to procure insurance.[1] "If an insurance agent's negligence results in coverage less than that desired by an insured, the agent will be liable for the amount the insured would have received had the correct coverage been in place."[3]

So you need to demonstrate that your client requested insurance that was not provided. "Full coverage" is often the request of a lay person. In response to this type of non-specific request from lay people who lack the expertise to understand their insurance needs and the products available, insurance agents often obtain standard, cookie-cutter policies. There are many different ways that customers purchase insurance nowadays, and, unfortunately, there may be little documented proof available of what was requested. Look at your client's history for purchasing insurance

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to bolster her claim as to what type of coverage was requested. To the extent possible it is important to identify any written requests made by your client regarding coverage: the client's application, other policies purchased by the client, email correspondence, and any similar documents. Use discovery to seek recorded conversations for telephone transactions, attempt to get admissions from the agent, and, at the very least, offer your client's testimony as to what was requested.

In addition to the difficulty in proving what coverage was requested, many phrases a customer may use in making a request – such as "full coverage" – are terms of art within the insurance industry that have different meanings to an agent than they do to the customer who thinks she is requesting much more comprehensive coverage than she is likely to receive. For this reason, an agent may actually admit that a specific request for coverage was made, but argue about the meaning of the request. The insured's testimony that she thought full coverage included the particular loss at issue can get your case past summary judgment, particularly if the agent admits that he did not explain the limitations and exclusions of the policy. If you can defeat summary judgment in these cases, you are well on your way to a successful resolution against the insurance agent, as well as the agency.

Your case can be strengthened by offering expert testimony regarding the professional duties of an insurance agent. An expert can testify about the extensive training insurance agents receive so that they can understand the complexities of the insurance industry and the products they offer. An expert can also testify as to the industry standards that insurance agents are expected to follow when evaluating a customer's insurance needs, advising the customer on available coverages, and procuring appropriate insurance at the best price. The professional standards of the insurance industry are substantially higher than those currently imposed by many courts, and it is important to offer expert testimony so that the court and jury can see that a higher, professional standard should apply. Insurance agents hold themselves out to the public as professionals and they should be held to the applicable professional standard within the insurance industry, just as other professionals are bound by the standards of their professions.

The Insurance Agent's Duty to Advise

Your client may not have explicitly requested the insurance coverage he needed, because, like most consumers, he may not have known the specific type of coverage was available or advisable. He also may not have known what limits were most appropriate for his needs. Therefore, the next question to answer when evaluating potential claims is whether the insurance agent fulfilled her duty to advise the customer regarding his coverage, and whether you can argue this rose to the level of a fiduciary duty to your client.

Insurance agents are trained professionals, many of whom receive extensive instruction about how to evaluate a customer's insurance needs and offer appropriate insurance, and who often hold professional credentials and certifications that reflect their superior knowledge. Most customers, on the other hand, are unsophisticated lay people with no training in the insurance industry. Even well educated, sophisticated insurance customers do not have the specialized knowledge to be aware of the variety of insurance products available or to understand the complicated, industry-specific language in policies. Because of this disparity in expertise, your client most likely relied upon his agent to advise him as to the type and amount of insurance coverage needed. Agents are aware of the expectation that they will act as advisors because it is part of their training and credentialing.

In addition to the basic duty to exercise good faith and reasonable diligence in procuring requested insurance, a fiduciary relationship may exist and give rise to "a further duty to exercise reasonable care in advising the customer" if the insurance agency "knows that the customer is relying upon its expertise."[4] "Further, such an agency has a duty to exercise reasonable care in advising its customer about the terms of the requested coverage."[5] Your client is not the expert in insurance coverage, so it is important to establish that he was relying upon the expertise of the agent to advise him about available coverage and the terms of the coverage provided, and that he communicated to the agent that he was placing that trust in the agent.

If your client can demonstrate that he was relying on the expertise of the insurance agent, you may be able to pursue a claim for breach of fiduciary duty in addition to a claim for ordinary negligence because a "claim of breach of a fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care."[6] A fiduciary relationship exists where a "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust."[7] In the context of the relationship between an insurance agent and a customer, you

will probably have to show that the fiduciary relationship was created out of an informal relationship where "both parties [understood] that a special trust or confidence has been reposed."[8]

In order to reach the heightened duty imposed in the context of a fiduciary relationship, it is important to offer any evidence that your client communicated to the insurance agent that he lacked personal knowledge as to his insurance needs and was looking to the agent's expertise and advice. Factors that may help establish the existence of a fiduciary relationship include how long your client has used the agent in question for his insurance needs and whether there was a personal relationship that engendered confidence in the agent's ability and bolstered your client's belief that the agent was looking out for his best interest. You should also consider whether the agent provided multiple types of insurance coverage for your client such as home, automobile, and business that would reflect an ongoing relationship, a broad understanding of your client's insurance needs, and a heightened level of trust. If the agent offered advice or guidance with regard to obtaining previous insurance coverage, that will help show a mutual understanding that your client was depending on the agent's advice with regard to all insurance products.

Ohio courts are hesitant to recognize a fiduciary relationship between an insurance agent and customer, but where sufficient facts exist to demonstrate reliance on the agent's expertise, a fiduciary duty may be found. "Whether or not a fiduciary relationship exists depends on the facts and circumstances of each case,"[9] therefore, the court should not grant summary judgment on this question because "the existence of a fiduciary duty or similar relationship is a factual question for the trier of fact."[10]

Even if you can show that the insurance agent failed to procure the requested insurance or breached her duty to advise your client about the available coverage or the coverage provided, you may still face a substantial challenge in many courts regarding your client's possible comparative negligence, which courts may apply as a strict contributory negligence standard.

The Customer's Duty to Examine the Policy

If the agent's negligence results in less coverage than desired by the customer, the agent will be liable for damages. However, the insured has a corresponding duty to examine the policy, know the extent of its coverage, and notify the agent if the coverage is inadequate; and an agent or broker is not liable when a loss is due to the customer's own act or omission. Several Ohio courts apply this duty as one imposing pure contributory negligence rather than as a question of comparative negligence to be decided by the jury.

If a court applies a comparative negligence analysis, the comparison of your client's alleged negligence to that of the insurance agent presents a fact question for the jury, and some degree of negligence by your client will not bar recovery. Taking into account the complexity of insurance policy language, the disparity in expertise, and the customer's reliance on her insurance agent to advise her, the agent's negligence should far outweigh that of your client. However, if the court applies a pure contributory negligence standard, then any negligence on the part of your client will bar recovery. Pure contributory negligence acts essentially as strict liability against your client and completely shields an insurance agent from liability so long as he sends a copy of the policy to the insured.

In *Horak v. Nationwide Ins. Co.*,[11] the plaintiffs' house was destroyed by fire and their insurance coverage was insufficient to cover their losses, but the Ninth District Court of Appeals affirmed the trial court's grant of summary judgment finding that the insurance company was not negligent as a matter of law. The court noted that the plaintiffs were educated individuals and placed no more reliance on the insurance agent than the usual insured. The court found that any loss the plaintiffs suffered was due to their own omission in failing to examine their coverage carefully because the insureds "had a duty to examine their [ ] policy, to know the extent of its coverage, and to notify appellee [ ] if they thought the amount of coverage was inadequate."[12] The *Horak* court held that "[a]n agent or broker is not liable when a customer's loss is due to the customer's own act or omission,"[13] and that where a plaintiff has received a copy of the policy but failed to examine it, know its contents, and notify the agent of any concerns, it was a complete bar to recovery. This is a trap that you can do very little to avoid. The insurance company most likely mailed a copy of the policy to your client, your client probably did not read it carefully, and that may lead to no recovery in court.

The *Horak* decision is one of the more extreme examples, but other Ohio courts have applied the same analysis, holding in favor of the insurance companies, despite recognizing that some duty exists on the part of an insurance agency to exercise good faith and reasonable diligence. For example,

in *Rose v. Landon*, the court refused to allow the plaintiff, "a well-educated business woman," to argue that her loss was due to the insurance agency's failure to advise her, when she admitted to not examining her new policy.[14] Similarly, in *First Catholic Slovak Union v. Buckeye Union Ins. Co.*, the court held that "[a]n insured who has received and held policies for several years which contain the same terms as the policy in force when a loss occurs, without complaining about those terms, cannot complain after the loss that the policy terms did not comply with its original requests."[15]

The Fifth District Court of Appeals has noted its disagreement with this line of cases, stating that "[w]hile we do not necessarily disagree that an insured has a corresponding duty to examine coverage provided and may be charged with the knowledge of the contents of his insurance policies, we cannot find any such duty or breach thereof completely negates appellants' claim. To do so would be imposing strict contributory negligence when such is not the standard in Ohio."[16] The court held that the appellants' failure to read the policy "is typically the subject of a comparative negligence defense which is generally addressed at trial and not on a motion for summary judgment."[17] The Fourth and Seventh Districts have also held that an insured's failure to read the policy is the subject of a comparative negligence defense, which is a question of fact for trial.[18]

To date, there is no Ohio Supreme Court decision addressing the conflict among the appellate districts as to whether comparative negligence should be applied in accordance with the general rule in Ohio, or if there is something so unique about this type of case that means pure contributory negligence is appropriate and insurance agents should be protected from virtually any liability. Many lower courts continue to apply the antiquated standard of pure contributory negligence which prevents the jury from considering the disparity in expertise between a professional insurance agent and a lay person who relies on the agent's superior knowledge. Nevertheless, under current Supreme Court case law, any question of claimed negligence on the part of a plaintiff is properly "an issue for the jury to decide pursuant to the modern comparative negligence" law.[19]

Liability for Negligent Misrepresentation

In addition to liability for the negligent failure to procure insurance and properly advise the customer, an insurance agent and the principal may be held liable for negligent misrepresentation. Ohio Rev. Code § 3929.27 provides that a person who solicits and procures applications for insurance is an agent of the entity that thereafter issues a policy upon that application. The well-established rule that "the acts of an agent within the scope of what he is employed to do and with reference to the matter over which his authority extends are binding on his principal,"[20] applies to claims for negligent misrepresentation, as it does to other negligence claims. If an insurance agent makes negligent or intentional misrepresentations within the scope of her employment, both the agent and the broker should be held liable for the tortious misconduct.[21] Absent proof that the applicant knew the insurer was being deceived by the agent or that the applicant lied or colluded with the agent, the insurer cannot escape liability even if its agent intentionally supplied false information to the insurer as part of the application.[22] Not only is the principal vicariously liable, but the tort victim "still has the right to recover from the individual tortfeasor, as well as that individual's employer, for statements made within the scope of employment."[23]

The elements of negligent misrepresentation are: (1) that an individual with a pecuniary interest, (2) supplies false information for the guidance of others in their business transactions, (3) that the other person justifiably relies upon, (4) if the defendant fails to exercise reasonable care or competence in obtaining or communicating the information.[24] If you have proof that the agent provided false information to the insured regarding the terms of coverage or the coverage actually procured, a claim for negligent misrepresentation is certainly warranted.

Except in cases of outright fraud, the main questions are likely to be whether the information supplied was actually false and whether the agent knew or should have known it was false. This type of claim is most likely to arise where the agent assured your client that he had the coverage requested when the coverage was not procured or was deficient in some way due to exclusions or limits. This is where the fourth element comes into play, because the agent most likely failed to take reasonable steps to obtain necessary information regarding the coverage provided and/or failed to take reasonable steps to communicate information about the coverage to your client. The agent may or may not have known that she was supplying false information, but she should have known and she should have exercised reasonable care in obtaining and communicating accurate and true information. To establish this, you will have to engage in discovery regarding the business

practices of the agent and agency and will likely need to offer expert testimony regarding the reasonable care that should have been exercised.

Given the agent's superior position to obtain and communicate such information, you client's reliance ought to be justifiable. Unfortunately, the issue of comparative negligence is still likely to arise.[25]

Final Thoughts

In addition to cases where your client is the insured, you may also encounter cases where your client is harmed as a result of another party failing to obtain necessary and appropriate insurance coverage. This could arise in garden variety cases involving premises and automobile insurance, but it is becoming more and more common in cases where there are data breaches and a company does not have appropriate cyber liability coverage.[26] Many companies are only just beginning to consider obtaining such insurance and insurance companies are hesitant to offer it because the risk cannot be accurately predicted.

Although there is no privity in such cases, you should still consider whether there may have been liability on the part of the insurance agent who failed to procure or advise as to the necessary insurance. If you can get the other party to bring in the insurance agent as a third-party defendant, there may be additional means of recovery, and the true wrongdoer may be held responsible. ■

End Notes

1. *First Catholic Slovak Union v. Buckeye Union Ins. Co.* (1986), 27 Ohio App.3d 169, 170, 499 N.E.2d 1303, 1305.
2. *See, e.g., Horak v. Nationwide Ins. Co.*, 9th Dist. No. CA 23327, 2007-Ohio-3744, ¶ 61; *Minor v. Allstate Ins. Co.* (1996), 111 Ohio App.3d 16, 21, 675 N.E.2d 550, 554; *Stuart v. Nat'l Indem. Co.* (1982), 7 Ohio App.3d 63, 66, 454 N.E.2d 158, 162.
3. *Ruggiero v. Nationwide Ins. Co.*, 8th Dist. No. 86431, 2006-Ohio-808, ¶ 20 (citations omitted) (holding it was error to grant summary judgment where questions of fact existed regarding possible misrepresentation by the insurance agent).
4. *First Catholic Slovak Union*, 27 Ohio App.3d at 170, 499 N.E.2d at 1305.
5. *Stuart*, 7 Ohio App.3d at 66, 454 N.E.2d at 162-63.
6. *Horak*, 2007-Ohio-3744, at ¶ 31.
7. *Burns v. Rudolph*, 9th Dist. No. 22780, 2005-Ohio-6918, ¶ 30 (quoting on *Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank* (1996), 75 Ohio St.3d 433, 442, 662 N.E.2d 1074, 1081) (other internal citations omitted).
8. *Umbaugh Pole Bldg. Co., Inc. v. Scott* (1979), 58 Ohio St.2d 282, 390 N.E.2d 320, at paragraph one of the syllabus.
9. *Horak*, 2007-Ohio-3744, at ¶ 31.
10. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 22204, 2005-Ohio-6980, ¶ 18.
11. 2007-Ohio-3744.
12. *Id.* at ¶ 63.
13. *Horak*, 2007-Ohio-3744, ¶ 62 (internal citations omitted); *see also First Catholic Slovak Union,* 27 Ohio App.3d 169, 499 N.E.2d 1303, at paragraph one of the syllabus.
14. *Rose v. Landon,* 12th Dist. No. CA2004-06-066, 2005-Ohio-1623, ¶ 20.
15. *First Catholic Slovak Union*, 27 Ohio App.3d 169, 499 N.E.2d 1303, at paragraph three of the syllabus.
16. *Wanner Metal Worx, Inc. v. Hylant Maclean, Inc.*, 5th Dist. No. 02CAE10046, 2003-Ohio-1814, ¶ 44.
17. *Id.* at ¶ 49.
18. *Robson v. Quentin E. Cadd Agency*, 179 Ohio App.3d 298, 2008-Ohio-5909, 901 N.E.2d 835, ¶ 1; *Gerace-Flick v. Westfield Nat'l Ins. Co.*, 7th Dist. No. 01 CO 45, 2002-Ohio-5222, ¶ 67.
19. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 681, 693 N.E.2d 271, 274.
20. *Saunders v. Allstate Ins. Co.* (1958), 168 Ohio St. 55, 58-59, 151 N.E.2d 1, 4.
21. *Stuart*, 7 Ohio App.3d at 67, 454 N.E.2d at 163; *see also Saunders,* 168 Ohio St. 55, 151 N.E.2d 1.
22. *Saunders*, 168 Ohio St. 55, 151 N.E.2d 1, at paragraphs two, three, and four of the syllabus.
23. *Stuart*, 7 Ohio App.3d at 67, 454 N.E.2d at 163.
24. *Delman v. Cleveland Heights* (1989), 41 Ohio St.3d 1, 4, 534 N.E.2d 835.
25. *See, e.g., Wencel v. Am. Family Ins. Co.*, 8th Dist. No. 95926, 2011-Ohio-2290, ¶ 30 (holding the plaintiffs "were required to examine the policy to ensure that the extent of coverage it provided met their needs," and, where they apparently had not done so, the insurance company was not liable if the "insurance agent made negligent oral misrepresentations about the policy terms.").
26. Tribler Orpett & Meyer, P.C., *To Offer or Not to Offer, That is the Question,* Article Prepared for TIPS Fall Leadership Meeting – Seattle, Washington (Oct. 13, 2011).

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King v. ProMedica Health System, Inc.[1]

by Jonathan D. Mester

I. Facts

On December 1, 2007 Virginia King was injured in an automobile accident. She was treated for her injuries at the Toledo Hospital, a member of ProMedica Health System, Inc. Upon arriving at the hospital, Mrs. King informed the hospital admitting staff that she was covered by Aetna Health, Inc. Mrs. King was also asked for, and provided, her automobile insurance carrier, which was Safeco Insurance. Rather than billing Aetna for the hospitalization, the hospital billed Safeco under the medical payments provision contained in Mrs. King's automobile insurance policy with Safeco.

Mrs. King subsequently filed a lawsuit alleging her own damages and seeking class action certification pursuant to Civil Rule 23 on behalf of all enrollees or subscribers treated within the ProMedica Health System who were covered by a health insuring corporation. Mrs. King alleged four causes of action, each of which were premised on the claim that ProMedica violated R.C. 1751.60 (A) by billing Safeco instead of Aetna. ProMedica filed a motion to dismiss the complaint pursuant to Civil Rule 12(B)(6).

The trial court granted ProMedica's motion to dismiss. However, the Sixth District Court of Appeals reversed[2] and held that health care providers that execute preferred-provider agreements with health-insuring corporations can only bill the health-insuring corporation subject to the agreement for covered services furnished to their insured, and cannot bill any other potential payors.

II. Analysis by the Ohio Supreme Court

The issue in this case is the proper reading of R.C. 1751.60(A), which states as follows:

> Except as provided for in divisions (E) and (F) of this section, every provider or health-care facility that contracts with a health insuring corporation to provide health-care services to the health insuring corporations and enrollees or subscribers **shall seek compensation for covered services solely from the health insuring corporation** and not, under any circumstances, from the enrollees or subscribers, except for approved co-payments and deductibles. (Emphasis added.)

King made two arguments as to why Safeco should not have been billed for the treatment, both of which are apparent from the face of the statute. First, she argued that billing Safeco effectively sought compensation from her contrary to the R.C. 1751.60(A) because the medical payment provision under her Safeco policy is an asset that belongs to her, and therefore represents the taking of compensation from King in violation of the statute. Second, King argued that the plain language of the statute states that ProMedica "shall seek compensation for covered services **solely** from the health insuring corporation," which, pursuant to the plain meaning of the word "solely," would forbid ProMedica from billing anyone other than Aetna. Indeed, the Court of Appeals held in King's favor simply by looking at the dictionary definition of "solely" and its meaning: "to the exclusion of others."

The Ohio Supreme Court rejected King's arguments and the reasoning of the Sixth District Court of Appeals. As to the argument that billing Safeco amounted to compensation from King, the Court referenced the definition of "compensation" found in R.C. 1751.01(G), where it is defined as "remuneration for the provision of health care services, determined on other than a fee-for-service or discounted-fee-for-service basis." Based somehow on this definition, the Court concluded that compensation by Safeco did not equate to compensation by King.

As to the fact that R.C. 1751.60(A) states that providers are to seek compensation solely from the health insuring corporation, the Court utilized a statutory construction analysis. The Court stated that, as used here, the word "solely" means only to the exclusion of a health insuring corporation's insured. Otherwise, according to the Court, the phrase, "and not, under any circumstances, from the enrollees or subscribers" would be rendered superfluous. Therefore, the Court ruled that ProMedica was not forbidden to bill under King's coverage with Safeco, and that King's claim was therefore properly dismissed.

III. Analysis and Ramifications of the Court's Decision

The *ProMedica* decision was clearly wrong and results-driven. First, even though King was not directly paying compensation by having her automobile insurance billed, there can be no dispute that automobile insurance companies raise rates in response to the number of claims brought under a policy. Therefore, it is clear that the billing of a person's automobile insurance policy pursuant to the medical payments provision will clearly result in the payment of compensation by the insured. To hold otherwise simply ignores reality.

Second, the Court's end run around the word "solely" in R.C. 1751.60(A) was an improper use of statutory construction. The cardinal rule of statutory construction is that first and foremost words and phrases are to be given their ordinary meaning.[3] Only if there is an ambiguity should the court delve further into a statutory construction analysis.[4] The language of R.C. 1751.60(A) which states "every provider or health-care facility that contracts with a health insuring corporation... shall seek compensation for covered services **solely** from the health insuring corporation..." is clear and unambiguous on its face, and therefore it was inappropriate for the Court to undertake statutory construction analysis. As the Sixth District indicated in its opinion, the dictionary definition of the word solely is "to the exclusion of others." "Others" would, of course, include automobile insurance companies.

The true rationale behind the *ProMedica* decision was perfectly captured by Justice Pfeifer in his dissent. Justice Pfeifer stated:

> "Solely" in R.C. 1751.60(A) means solely. It does not mean "unless you can get paid closer to your top rate through an injured patient's automobile-insurance policy."[5]

For the attorney who represents injury victims, there are three take-aways that come to my mind in the aftermath of *ProMedica*. First, to the extent possible, counsel for injury victims should advise their clients that, if they go to a hospital or doctor for care, they may be asked for their automobile insurance carrier information for the purpose of billing the treatment under the medical payments provision of their policy. To the extent possible, I am informing my clients that this could happen, and that if they wish to avoid this, they should attempt to withhold that information from the provider.

The second and third take-aways are positive spins from the *ProMedica* case that come to mind. First, payment of medical bills under the medical payments portion of an automobile insurance policy will be made dollar for dollar such that the write-off problem encountered in conjunction with the *Robinson v. Bates*[6] decision is obviated. The injured party will therefore be able to present his entire bill without evidence of write offs for bills paid by the medical payments provision of the automobile insurance policy.

The other potential benefit I see from *ProMedica* is the opportunity to strengthen the causation argument in a disputed case. In many cases, the defense will claim that certain medical treatment was not related to the motor vehicle accident in question, and therefore the bills submitted for that treatment should not be part of the verdict. If this defense is raised, and the bills in question were in fact submitted by the provider and subsequently paid for by the automobile insurance carrier, then I would bring in the automobile insurance carrier as an indispensable party pursuant to Rule 19 of the Ohio Rules of Civil Procedure. I would then make certain to inform the jury that not only did my client's own automobile insurance company believe that the treatment in question was related to the accident, but the medical provider and/or hospital also clearly believed that the treatment was related to the accident in question. For the defense to suggest otherwise would be tantamount to taking the position that the doctor

or hospital was committing insurance fraud by submitting bills unrelated to the accident to the automobile insurance carrier.

IV. Conclusion

ProMedica is the latest in the long line of pro-insurance decisions which are contrary to the interests of our clients. *ProMedica* strikes me as being more disingenuous than most of the others in this regard. Nevertheless, there are some potential positive applications of *ProMedica* that can be utilized. ■

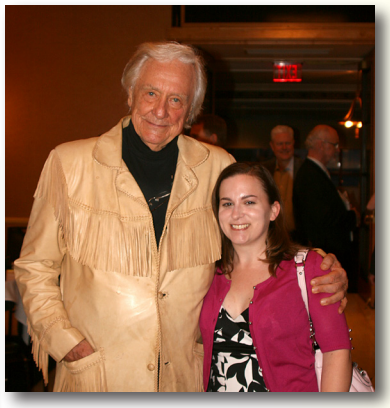
End Notes

1. 129 Ohio St.3d 596, 2011 Ohio 4200.
2. *King v. ProMedica Health System, Inc.,* 6th Dist. No. L-09-1282, 2010 Ohio 2578, *rev'd by King v. ProMedica Health System, Inc.*, 129 Ohio St.3d 596, 2011 Ohio 4200.
3. *See, e.g., Fields v. Fairfield County Board of MR/DD*, 10th Dist. No. 09AP-208, 2009 Ohio 4388, ¶15 ("The first rule of statutory construction is that a statute which is unambiguous and definite on its face is to be applied as written and not construed.... Courts must give effect to the words expressly used in a statute rather than deleting words used or inserting words not used, in order to interpret an unambiguous statute.")
4. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007 Ohio 4838, ¶12 ("Statutes that are plain and unambiguous must be applied as written without further interpretation.")
5. *King*, 2011 Ohio 4200 at ¶17 (Pfeifer, J., dissenting).
6. 112 Ohio St.3d 17, 2006 Ohio 6362.

2011 Annual CATA Banquet: A Photo Montage











Beyond The Practice: CATA Members In The Community

by Susan Petersen

"Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it's the only thing that ever has." – Margaret Mead

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

Mark Willis of **Willis & Willis Company** is a part time volunteer Fire Fighter/ Emergency Medical Technician for the Village of Richfield. Last year, he responded to about 140 emergency calls in and around Richfield. This winter, for the third time, Mark will be traveling to Kenya for three weeks as part of volunteer medical program called "Bonyo's Kenya Mission." The Mission is spearheaded by Dr. Bonyo Bonyo of Akron and Ohio University's School of Medicine. It is a collaborative effort to provide resources for medical care, staff, and HIV/AIDS education and counseling as well as funds to complete and maintain a Health Center. The medical team is made up of doctors, surgeons, nurses, pharmacists, physician assistants and medics as well as medical, nursing, and pharmacy students. The medical team provides health care in the rural Nyando District in Western Kenya. Most of the population is poor, living in mud or dung huts without any running water or electricity. While AIDS is common, malaria is the real problem. Many people die from the dehydration associated with malaria. Last year, the team treated around 3,000 patients in a two-week period. Mark uses his EMS background to run triage and oversee the intake of patients. Mark reports that what these people lack in personal wealth, they more than make up for in spirit, inner strength and a sense of community. They live everyday with reminders of the fragility of human life. Mark says it is the spirit of the Kenyan people which makes him want to return again and again. You can learn more about his mission work at www.bonyoskenyamission.org.

Photo by Mark Willis from "Bonyo's Kenya Mission"

Photo by Mark Willis from his time in Kenya

It is in this same spirit that so many of our members volunteer their time and legal services to support the mission of the Legal Aid Society of Greater Cleveland. One example of this is found in the service of **Tom Robenalt** of **Novak, Robenalt & Pavlik, LLP** who serves on its development committee. Legal Aid's mission is to secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high quality legal services and working for systemic solutions. Founded in 1905, Legal Aid is the fifth oldest legal aid organization in the United States and serves clients in Ashtabula, Cuyahoga, Geauga, Lake and Lorain counties. It receives 110,000 calls a year for help over these five counties. In October, CATA members supported Legal Aid at its annual dinner held in downtown Cleveland.

Peter and Ellie Brodhead at the "Home Sweet Homes" benefit.

This fall, **Peter Brodhead** of **Spangenberg, Shibley & Liber** and his wife, Ellie, co-chaired a benefit called "Home Sweet Homes" at Hickory Lane Farms in Richfield for the North Coast Community Homes. This organization provides safe, affordable and comfortable residential housing for adults with disabilities and mental illness. The Spangenberg firm sponsored the event along with partner, **Dennis Lansdowne** and his wife, Kim, who also served on the benefit committee. Over 500 people attended the event which raised more than $520,000 for the cause.

Easing the pain for pediatric cancer patients is the goal of the "Aadel Askari No Pain No Gain Foundation." The foundation was started last year by **Andy Goldwasser** of **Ciano & Goldwasser** to remember Askari, an Orange High School classmate who lost his battle with Ewing sarcoma, a type of bone cancer, at the age of 15. Twenty six years after Askari's death, Andy and his classmates decided to preserve his memory. They raised $15,000 in the Foundation's first year. This Summer, they delivered treats to pediatric patients at Rainbow Babies and Children's Hospital including iPod docks, gift cards, a massage chair and Nintendo Wii games. This Fall, the Foundation raised another $20,000 which will again benefit pediatric cancer-related causes.

George Loucas of **Loucas Law LPA** was recently elected Supreme Counsel of The Order of Ahepa, the largest international association representing Greek Americans around the globe. The mission of the AHEPA Family is to promote Hellenism, Education, Philanthropy, Civic Responsibility, and Family and Individual Excellence. Philanthropy and volunteerism have been pillars of strength for AHEPA. From natural disaster relief to raising funds for the elimination of life-threatening diseases to making significant contributions to our local neighborhoods, AHEPA is at the forefront of charitable giving. AHEPA's philanthropic deeds are evident in the restoration of the Statue of Liberty and Ellis Island; in the Halls of St. Basil Academy, a childcare facility in Garrison, N.Y.; in the care packages they sent to U.S. troops in cooperation with the USO; and in the building of healthcare facilities in Greece.

John Liber and children work a booth at the Blossom Time Festival

At the 55th Annual Blossom Time festival in Chagrin Falls this year, **John Liber** of **Thrasher Dinsmore & Dolan** once again volunteered his time. John has served as pro bono Legal Counsel on the Board of Directors for the Chagrin Valley Jaycees for the last five years. The Jaycees set up, run and manage the entire week's activities of Blossom Time without compensation. The Jaycees donate the proceeds of the festival to local Chagrin Valley charities.

So many of our members devote countless hours to community youth sporting teams and events. Among them is attorney **Justin Madden** of **Justin Madden Co. LPA**. Over the last three years, Justin has dedicated 8 months a year coaching Girls AAA travel ice hockey with 54 games a season. The team travels all over North America and hopes to compete again this coming April in the USA Hockey National Championship Tournament. Justin is certified as a Master Level 5 ice hockey coach with USA Hockey.


Justin Madden coaching Girls AAA travel ice hockey.

In this same vein, Attorney **Daniel Klonowski** is proud to be serving on a committee to create and select the Garfield Heights High School Athletic Hall of Fame. While Dan (Garfield Class of '71) claims that his athletic talents as a football player and wrestler never rose to "Hall of Fame" level, he and his committee worked diligently to bring back the strong tradition of Garfield Heights Athletics. The committee celebrated the accomplishments of eleven distinguished athletes and coaches and their contributions to Garfield Heights at their first induction banquet this November. Go Bulldogs! ■

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Pointers From The Bench: An Interview With Judge Nancy R. McDonnell

by Christopher Mellino

The Honorable Nancy R. McDonnell has been a judge on the Cuyahoga County Court of Common Pleas for almost 15 years. She served as the Administrative Judge from 2006-2009. Prior to her career as a judge, she was a County Prosecutor, a Magistrate in the Lakewood Municipal Court, and was also in private practice with her father, Daniel P. McDonnell, handling primarily general civil matters.

We asked Judge McDonnell for her view of the Plaintiffs' bar and for some advice based on her own observations and her post-verdict discussions with jurors.

Over 15 years, she has seen a cultural shift so that the typical jury does not favor awarding money to people that are injured. There is a definite lack of empathy. She does believe that the pendulum will swing the other way eventually, but it may be a long time coming.

Probably the one thing that drives her crazy about plaintiffs' lawyers is a lack of preparedness, especially at the case management conference or initial pretrial.

Too many cases get filed in the hope of a quick settlement offer, with little or no work being done. Judge McDonnell feels that the days of reaching a settlement without putting much work or money into a case are in the past, and our clients may be better served if we evaluate the cases before filing and come up with a realistic demand from the beginning of the case.

Judge McDonnell also advises that you let the court know early on if your experts will be live and you need a trial date certain. Then have your case ready to try on that date. On that subject, she is a big proponent of live witnesses. She believes we should avoid videotaping testimony at all costs and sees that as a cause of small and inadequate verdicts.

She suggests that by the time the case is over the jury should have heard our client's story and major themes 5 different times: Once each in Voir Dire, Opening, Direct Examination of our witnesses, the Cross Examination of the defense witnesses, and in Closing Argument.

One technique she favored as a practicing attorney was to use the last 4 questions to the defense expert as a vehicle to tell the client's story.

Her observation on final arguments is that too many Plaintiffs' lawyers try to save their ammunition for the rebuttal part of their closing – by which time the jurors are done listening. A strong first closing argument, and only using the final closing as true rebuttal, would be far more effective in swaying the jury.

As most people know, Judge McDonnell underwent a double lung transplant in 2009. Her postoperative course was rocky, to say the least, but she is now completely healthy and back at the job she truly loves and enjoys doing, and plans to continue into the foreseeable future.

On a personal note, Judge McDonnell grew up in Cleveland Heights, and currently lives in Lakewood with her husband, John Kosko. They have three children. Her favorite book is To Kill A Mockingbird, and she credits her father, a practicing attorney for over 50 years, as her inspiration for becoming a lawyer. ■

Did you know?

If your expert is unavailable to testify live at trial, there's a better alternative to presenting her testimony on video-tape. **The Cuyahoga County Court of Common Pleas has facilities for permitting your expert to testify live through video teleconferencing.** This is available in a courtroom on the 11th floor of the Justice Center. You must plan in advance, as the Judge needs to approve it, and the jury would need to be moved to this special courtroom for purposes of watching this testimony.

For further information, contact **Court Administrator, Gregory M. Popovich,** at (216) 443-8560.

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No Consent Needed: The 5 Step Checklist For Interviewing Defendant's Former Employees

by William B. Eadie

You've filed suit against a doctor who works for a couple of corporations engaged in what looks like a liability-shielding shell game. While fighting over access to the office's policies and procedures for nursing care, you pore over stacks of records. You notice the name of an unfamiliar nurse in an unrelated document, but the nurse's title jumps out at you: "Director of Nursing." You know this is not the current Director of Nursing, and you know that the nurse may have information that directly affects your case. So you call, you explain who you are and the purpose of your call, you schedule an interview. On the way to the interview, Defense counsel calls, screaming about ethics and sanctions, and tells you she represents all current and former employees, and that she refuses to allow you to meet with the former employee. Then the witness balks, telling you he got a call from opposing counsel and was "instructed" not to speak with you. Can you still meet? What can you say? Are you in trouble, or is defense counsel in trouble?

This is not an unfamiliar story for experienced attorneys—eventually you come across a key witness who happens to also be a former employee of the defendant—or for the less experienced attorneys who may be tasked with figuring out the ethical boundaries on short notice.

The simple answer is that there are no special rules for "former employees" versus everyday witnesses under the current Ohio Rules of Professional Conduct ("ORPC" or "Rules"). The Rules do not substantively differentiate between individuals based on whether they used to have an employee/employer relationship with the defendant. This approach makes sense because there is no longer a relationship with the defendant entity.

There are, however, recurring factual situations with former employees that make them a good go-to checklist for how to approach any witness interview. Moreover, the now-superseded Disciplinary Rules and corresponding Advisory Opinions from the Board of Grievances, as well as the Official Comments to the Rules, discuss these issues as they apply to former employees in some detail. (Key language from these authorities follows in the endnotes, and full copies are available on our blog at http://goo.gl/BjaQi.)

This article is a checklist on how to approach former employee witnesses with confidence and with legal authority to be as effective with fact finding as possible. By starting with the premise that former employees are not a special class, much of the defense lawyer's grandstanding about representing everybody can be avoided, and you can conduct meaningful interviews without tipping your hand to the other side.

1. Explain that you are an attorney who represents a party with interests adverse to the former employer, the purpose of your call, and ask if they are willing to discuss what they know with you.

The strict language of Rule 4.3 does not require that you do more than correct *mis*apprehensions of your role—such as if an unrepresented party believes you are an impartial legal representative rather than a partisan representative with potentially conflicting interests—and avoid affirmatively creating such misapprehensions in the first instance.[1] The Rule further allows the attorney to distinguish between unrepresented individuals with interests likely adverse to your client, versus those likely without adverse interests.[2]

But the Official Comments to the Rule and prior Advisory Opinions clearly favor full disclosure—in fact, Advisory Opinion 2005-3, decided under former DR 7-104(A)(1), mandated full disclosure—making it the best approach to avoid having to explain yourself to the court at a later date.[3] Advisory Opinion 2005-3 mandated obtaining "consent" for the interview, which likewise falls under the "misapprehend" category under Rule 4.3: does the unrepresented individual realize they have the option of not answering your questions?

2. Tell the potential witness that they are entitled to keep the contents of any prior lawyer-client communications they may have had private.

Advisory Opinion 2005-3 ***required*** you to "inform the former employee ***not to divulge*** any communications that the former employee may have had with corporate or other counsel."[4] This ignored the fact that the witness can waive privilege if they choose.

Rule 4.3, dealing with unrepresented individuals, does not specifically require this step. It does require you to correct misapprehensions about your role, and to the extent that you can avoid later difficulty from opposing counsel, informing the witness that they have a privilege is a good compromise. (Also see the step on providing legal advice, below, as this is an area ripe for requests for advice.)

3. Ask whether the former employee is represented in regard to the current matter.

As with any potential witness, the first question is whether the witness is represented by counsel in regard to the current matter. If so, consent of the attorney or a court order is required, period. Rule 4.2 provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows* to be represented by another lawyer in the matter" without either the lawyer's consent or a court order.

The reason this first question comes third on this checklist is that explaining who you are and that the witness is entitled to keep attorney communications confidential avoids misunderstandings and uninformed disclosures.

While Rule 4.2 makes this a "knowing" standard, the Official Comments make clear that you cannot simply take a "closed-eyes" approach, so avoid the danger and ask.[5] Once you establish no representation, Rule 4.3 controls.

Unlike privilege, the witness cannot waive this requirement ***even if they initiate the contact.***[6] But, as discussed in the next item, neither can defense counsel create a lawyer-client relationship where there is none by asserting a blanket representation of former clients.

4. Ask whether the former employee is <u>really</u> represented by defense counsel — and ignore "blanket" representation assertions by defense counsel.

Official Comment 7 to Rule 4.2 makes clear that "[c]onsent of the organization's lawyer is not required for communication with a former constituent." A potential witness can ask for representation from a corporation, though. But what if opposing counsel unilaterally instructs a former employee not to speak with you?

Following up to determine whether the former employee is in fact represented by counsel by choice, or has simply been told not to communicate by an aggressive defense counsel, seems in keeping with the rule that the lawyer must ***know*** the representation exists. Moreover, blanket assertions of representation by defense counsel are ineffective. Advisory Opinion 2005-3 explicitly rejected this approach, calling it "bluster," "inappropriate," ineffective, and "in many instances . . . fraught with impermissible conflicts of interest for the corporate lawyer."[7]

Even in the event that the former employee does agree to have representation by corporate counsel, ending your ability to conduct *ex parte* investigation, conflicts of interest should be used through motion practice to disqualify that counsel.

5. Don't give advice—except for the witness to get a lawyer.

Rule 4.3 takes a flexible approach to providing legal advice: you cannot provide legal advice (beyond suggesting that they get counsel) "if the lawyer *knows or reasonably should know* that the interests of such a person are or have a *reasonable* possibility of being in conflict with the interests of the client."[8]

The safest approach, of course, is to avoid giving advice whenever possible, rather than having to sort out whether you reasonably should know that there is a reasonable possibility of a conflict of interests. Indeed, Advisory Opinion 2005-03 explicitly precluded any advice other than to seek an attorney. ■

End Notes

1. Specifically, Rule 4.3 requires that "In dealing on behalf of a client with a person who is not

represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." A full copy of Rules 4.2 and 4.3, as well as Advisory opinion 2005-3, are available on our blog at http://goo.gl/BjaQi. Advisory Opinion 2005-3 is prepared by the Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, and can also be found at 2005 Ohio Griev. Discip. LEXIS 3.

2. Official Comment 2 to Rule 4.3 explains that the "rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's."

3. While Advisory Opinion 2005-3, decided under former DR 7-104(A)(1), explicitly required you to "fully explain to the former employee that [you] represent[ ] a client adverse to the corporation," current Rule 4.3 takes a more flexible approach by requiring that an attorney correct *mis*apprehensions of her role, and avoid affirmatively creating such misapprehensions. Still, the safest approach is to make clear up front who you are and what interests you represent. As the first Official Comment to Rule 4.3 explains, "[i]n order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."

4. Advisory Opinion 2005-3, syllabus.

5. See Comment 8 (Because actual knowledge can be imputed, "the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.").

6. Official Comment 3 to Rule 4.2 provides that the "rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule."

7. Advisory Opinion 2005-3 states in relevant part: "Corporate counsel's assertion of blanket representation of the corporation and all its corporate employees is bluster. It is inappropriate. First, a unilateral declaration by a corporation's counsel that he or she represents all current and former employees does not make it so. Second, such blanket representation of a corporation and all its current and former employees would in many instances be fraught with impermissible conflicts of interest for the corporate lawyer. The Board's view is that a lawyer representing a corporation may not prohibit contact with all employees by asserting blanket representation of the corporation and all its current and former employees. A similar view is expressed by the ABA, Committee on Ethics and Professional Responsibility: '[A] lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization.' ABA, Formal Op. 95-396 (1995)".

8. Rule 4.3 (emphasis in original).

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Current Trends And Ideas About Focus Groups Or, Why Should I Do Them Anyway?

By Paul J. Scoptur

What are Focus Groups Anyway?

Focus groups are basically a form of market research, a technique that has been used by major corporations for many years. Before a new toothpaste is put on the market, before a new car is rolled out, before a studio releases a major new movie, they conduct focus groups of consumers. Trial consultants do the same thing, using "consumers" as surrogate jurors. They use these focus groups to conduct pre-suit and pre-trial research and discovery.

Why Do Lawyers Use Focus Groups?

Focus groups are extremely useful in many respects. First and foremost, preparing for the focus group itself forces the lawyer to learn the case from the other side. In order to defeat the defense landmines, you need to know what they are. Only by looking at the case from the defense perspective can you identify the landmines and prepare rebuttals to them.

Second, it helps us prepare. Prepare for discovery, prepare for settlement discussions and ultimately prepare for trial.

Third, they help identify important issues in the case. We as lawyers often believe that certain issues are important, when in fact they are not. There is "lawyer proof" and then there is "juror proof." Lawyers often overlook issues that we think are unimportant or that we don't even think of, or put undue emphasis on what we think is important, "lawyer proof," as opposed to what is important to the jury, "juror proof." We can use focus groups to identify what is and is not important to the jurors who will hear the case. They help identify new ideas, good ideas and bad ideas in the approach of the case. They are also important in helping us establish the theme or themes of the case. Oftentimes, they help identify what we can and will use as exhibits in trial or what jurors think of our witnesses and experts.

We conducted a focus group on a nursing home case. The resident of the nursing home was there because of a broken hip. She developed severe pressure sores and ultimately died. It was alleged that the nurses and aides at the home were not assessing and turning her appropriately. Her daughter, the plaintiff in the case, was with her constantly at the nursing home. Many insights were learned through the focus group but two stand out.

A strong argument was made against the daughter for not assessing her mother for pressure sores. Now obviously, she was not a nurse and she was not her mother's nurse, yet there were people in the focus group who were very critical of her for, in effect, not performing the services that she had hired the nursing home to do. In fact, there were a few people who felt she should have turned her

mother to inspect for sores even though her mother was there for a broken hip! This was an interesting issue that we had not thought about until that time.

The second aspect dealt with a theme. There was a strong plaintiffs' member of the focus group. He gave us many arguments we could arm pro-plaintiff jurors with but he also gave us a theme. His theme was that just because the daughter was constantly there, didn't mean she was entitled to a lesser level of care. (It also rhymed.) Other jurors gravitated to this theme, and it resonated even with some of the anti-plaintiff members.

So, Why Don't Lawyers Do Focus Groups?

Here are the top 10 reasons lawyers don't do focus groups.

1. I Have All The Proof I Need

As said above, there is lawyer proof and there is jury proof, and the lawyer proof that you need to get to the jury and the proof that the jury needs to find in your favor are often very different. If you do not know the difference between jury proof and lawyer proof, you will miss critical evidence and testimony in your case. Whatever those holes are in your proof that you have not learned and discussed at trial will be filled in by your real jury. This is called the filling defect. You won't like the answers the jury fills in for you at trial. The only way to learn what the jury proof is, is to talk to a focus group. Or 2. Or 3.

2. Focus Groups Are Too Expensive

Lawyers say they cannot afford to run focus groups. You spend money on experts, exhibits and on other aspects of the case, but you won't spend money on what is likely the most critical information gathering project you can do, regarding the presentation, framing and sequencing, and ultimately, the success of your case. Focus groups can be much more cost effective than you think. If you have a small case, consider working with several other attorneys with similar cases and share the expenses. We are both trial consultants and trial lawyers. Because of that, we are often willing to work on a partial or total contingent fee, which is a cost on the file, not a fee split. This minimizes the up front cost of the focus groups. If you consider a cost benefit analysis, focus groups are one of the best investments you can make.

3. I Know How To Talk To A Jury

We all went to law school and learned how to think like lawyers. Unfortunately, your typical juror does not think, or talk, like you do. Your words must resonate with the jury and be remembered. Your analogies must be something that the jury can relate to. Your themes must make sense. You must be understandable. Will the jury remember, and understand, "preponderance of the evidence?" Not likely. But will they understand, and remember, that your burden of proof is that the evidence be "more likely than not?" Or that your damages are the "harms" and "losses" suffered by your client? Well those phrases didn't come from lawyers; they came from focus groups. We often use "legalese" or have other technical terms associated with the case. We have found that juries are tuned out to this language and it will have an effect on your case. You must find the themes and catch phrases that the jury will remember and the ones that will hit home with their own experiences and beliefs. "It's not what you say, it's what people hear."

Frank Luntz is a Republican consultant. He was instrumental in developing the Contract with America that Newt Gingrich made famous. He has written a book, Words That Work, which is essential reading for any lawyer. He came up with "gaming" instead of "gambling," "death tax" instead of "estate tax."

His key point is simple: It's not what you say, it's what people hear. And focus groups tell us what they hear, and remember, and believe.

By the way, one of the greatest themes ever came from a focus group. Johnnie Cochran didn't come up with "If it doesn't fit, you must acquit." It came from a focus group.

4. I Have Been Doing This For Years

You have also been driving a car for years but you wouldn't buy one without test driving it or having a mechanic check it out. The focus group is the "test drive" or the "mechanic" for your case. Every case has landmines, things that will blow up your case. The focus group participants let you know what those landmines are. And more importantly, they can tell you the fixes to them. Your client has one day in court and you have one chance to present the best case for them. Wouldn't it be better if you test drive it first? Aren't we best at things when we have the chance to practice? A focus group lets you experiment with your presentation sequence, your analogies, your themes, your sequencing, and see if your exhibits say what you want them to. Focus groups let you "dry run" your case. Focus groups give you the chance to lose without a real jury so that you can find your landmines and fix them before they come to light in the jury room. Wouldn't you rather hear about a problem with your case while you still have the chance to fix it?

5. The Case Will Probably Settle

Let's face it, most cases settle. And attorneys often believe that they don't need to conduct focus groups because the

case will settle. But doing focus groups two weeks before trial is probably two weeks too late. It is equally as important to learn about your case to prepare for settlement conferences as it is for trial. It is imperative to learn the catch phrases that jurors use to describe your case so that you can incorporate them into your deposition questions. And how about learning what a jury really thinks of the opposing side's case and explaining that at a settlement conference. You will always have the upper hand when you really understand what a jury thinks of the entire case.

6. I Had A Professional Prepare My Exhibits

Studies show that lawyers spend hundreds of hours working on a case to get it prepared for trial, writing and practicing an opening statement, crafting the killer cross-examination. Yet lawyers often spend little time thinking about and creating the exhibits we use to explain the case, or, even worse, we delegate the task to someone who does not know the case well. Focus groups can describe what they want to see and they can critique exhibits with a "fresh eye." Focus groups will always help tweak the exhibits you have started so that they are the best they can be and send the right message to the jury.

7. I Already Have The "Smoking Gun" Discovery

Too often, we have heard focus group participants ask for specific testimony or documents that they believe they need to determine the case or award significant damages and the lawyers don't have it. Why? Because they waited until discovery was closed before running a focus group. In any significant case, focus groups should be conducted while there is still time to send out discovery requests or lock in deposition testimony. Focus groups conducted during the pretrial phase provide the opportunity to send discovery requests to the opposing side, obtain the documents and information that is important to the jury's decision and ask the right questions at depositions.

8. I Know My Case Better Than Anyone

Except maybe the opposing counsel, because they are running focus groups. The fact is, you don't know what you don't know. During recent focus groups, the lawyer told us that he learned more about his case in the two focus groups we ran than he had with his experts during the entire pretrial phase. Focus group participants say some amazing things and every time, it is a surprise to find out what they think. Issues that we think are important or will be easily handled at trial may not be so clear to the focus group. Discussions of things we think are irrelevant (alcohol usage, or lack of, involving a car crash case is one example) often are raised within minutes of the focus group deliberations. Questions or assumptions about routine documents like a police report are not so routine to focus group members. Much of the pretrial phase is spent trying to obtain and learn the information in possession of the other side. Interrogatories are sent, depositions are taken, documents are reviewed and analyzed. Why would we then fail to conduct focus groups and allow the other side to be the only one with the knowledge. To create a level playing field, you must learn what the other side knows, and the other side knows to run focus groups.

9. That Evidence Will Never Come In

Maybe, and maybe not. But sometimes you find out you want it in so you can explain it to the jury, as opposed to having the jury make up an answer you don't like. In a recent case, the lawyer wanted to exclude facts concerning why the client was in prison. It was evidence that clearly could be kept out. But we found out that the "juror" reasons for him being in jail were a lot worse than the real reasons. When the focus group was presented with the real reasons, they were less harsh on the plaintiff. In fact, some felt sorry for him. You need to know how to handle these issues and the other points that you think will never come into evidence but that the jury will want to know about."Questions left unanswered are problems for you.

10. I've Been Doing It This Way For Years

Times change. What worked 10 years ago doesn't work today. Jurors have biases and attitudes, including personal responsibility, anti-plaintiff, suspicion, stuff happens and anti-lawyer. We need to use focus groups to find out how to use these biases and attitudes in our favor, not against us. Psychology plays a major role in decision making. By hearing the psychology of the focus group "juror" we can structure and sequence our case for the real juror.

Conclusion

The bottom line is that focus groups should be run so that you know the best way to present your case to the people that really matter the most, the jury. Focus groups should be run before discovery is started and before structuring your trial presentation. That way you will know who they want to hear from, what they want to see and what the "juror" proof is. Only then are you ready to win in today's climate. ■

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Personal Jurisdiction Over The Foreign Defendant: *Brown, Nicastro*, and the Internet

by Kathleen J. St. John

Your client's husband dies in the crash of a small aircraft piloted by a friend. The crash occurs in Kansas, but your client and the pilot are Ohio residents. Investigators determine the crash to have been caused by a defect in the airplane – specifically, by the failure of a component part manufactured in China by a Chinese corporation.

The part was installed in the airplane in Pennsylvania by a Pennsylvania company that purchased the defective part from the Chinese company through an Internet website. The Chinese company has no offices or employees in the United States, but it does market its parts internationally, through an interactive website that is available in seven languages, including English. Approximately 15% of the Chinese company's exports are sold to customers in the U.S., but only about 4%, 3%, and 1% of its products are sold to companies located in Pennsylvania, Kansas, and Ohio, respectively.

Customers can order the product from the Chinese company through the website, or by phone, email, or regular mail. The products are shipped directly from the Chinese company's factory to the customer's address. The Chinese company also has a call center in China with English speaking employees to handle inquiries, transactions, and complaints. In this particular case, the Connecticut company communicated with the Chinese company through its website, as well as by phone and email.

You would prefer to file the wrongful death action against the Chinese manufacturer in Ohio, but are also considering Pennsylvania and Kansas. In which, if any, of these locations will the State court have personal jurisdiction over the Chinese defendant?

I. The Analysis: State and Federal Components; and General and Specific Jurisdiction.

In any personal jurisdiction analysis, two inquiries must be satisfied. Is the defendant amenable to suit in the forum state? Does the forum state's exercise of personal jurisdiction over the defendant comport with the requirements of federal due process?[1]

Whether the defendant is amenable to suit in the forum state typically depends on the applicability of the state's long-arm statute or civil rule, though there may be other methods of satisfying that requirement – such as consent[2], presence[3], or domicile[4]. Additionally, if the forum state recognizes the concept of "general jurisdiction," satisfaction of that doctrine will render the defendant amenable to suit in the forum state.

As for the federal inquiry, the court must determine whether exercising personal jurisdiction over the defendant would violate constitutional due process. Although the ultimate question is whether the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not

offend 'traditional notions of fair play and substantial justice,"[5] the analysis differs depending on whether general or specific jurisdiction is pursued.

General jurisdiction exists over a defendant if its "'contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even **if the action is unrelated to the defendant's contacts with the state.**'"[6] This is the more demanding standard, and, hence, the rarer; until this year, only two U.S. Supreme Court cases involved general jurisdiction. Indeed, the 1952 opinion in *Perkins v. Benguet Consolidated Mining Co.*,[7] is the only case in which the Court has found general jurisdiction to exist. *Perkins* was an action brought in Ohio against a Philippine corporation that, during the Japanese occupation of the Philippines, conducted business in Ohio where its president was temporarily headquartered. Under those circumstances, the Court found the Ohio court's exercise of jurisdiction over the defendant to be consistent with Due Process even though the lawsuit was in no way connected to the defendant's Ohio activities.

Specific jurisdiction is by far the more common means of obtaining jurisdiction over a foreign defendant. It exists "when **the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.**'"[8] The specific jurisdiction analysis requires the satisfaction of three factors: (1) the defendant must purposefully avail itself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise out of the defendant's activities in the forum state; and (3) the "'acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.'"[9]

As with most analyses, the devil's in the details. So, before considering which states might have personal jurisdiction over the Chinese parts manufacturer, it is helpful to examine two things: the U.S. Supreme Court's most recent decisions on personal jurisdiction; and the case law addressing whether Internet contacts give rise to personal jurisdiction.

II. The *Brown* and *Nicastro* Decisions.

In June of 2011, the U.S. Supreme Court released two decisions dealing with personal jurisdiction in the product liability context: *Goodyear Dunlop Tire Operations, S.A. v. Brown ("Brown")*[10], and *J. McIntyre Machinery, Ltd. v. Nicastro ("Nicastro")*.[11]

Brown is an interesting example of how one might improperly conflate the general and specific jurisdictional analyses. In *Brown*, the North Carolina families of two boys who died in a bus accident in France brought wrongful death actions in North Carolina against an Ohio tire manufacturer (Goodyear, USA), and three of its foreign subsidiaries, on the ground that the bus accident was caused by a defective tire. The foreign subsidiaries were not registered to do business in North Carolina; they had no place of business, employees, or bank accounts in that state; and they neither designed nor advertised their products in North Carolina, nor solicited business there. The only contact the foreign subsidiaries had with North Carolina was the fact that a small percentage of their tires were distributed in that state by other Goodyear USA affiliates.

The North Carolina appeals court recognized there was no basis for exercising specific jurisdiction over the foreign subsidiaries, but found general jurisdiction to exist based on the subsidiaries' "placement of their tires in the 'stream of commerce.'" The U.S. Supreme Court, in a unanimous decision, reversed. Noting that the North Carolina court had "confus[ed] or blend[ed] general and specific jurisdictional inquiries,"[12] the Supreme Court held that the fact that a small percentage of the subsidiaries' tires were distributed in North Carolina "f[e]ll far short of the 'continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State."[13]

Whereas *Brown* is fairly non-controversial, revisiting and clarifying jurisdictional parameters articulated over the past quarter century, the same cannot be said for *Nicastro*.

In *Nicastro*, the plaintiff, a New Jersey worker, suffered an amputation injury while using a metal shearing machine manufactured in England by a British company, J. McIntyre. The product was marketed in the U.S. by an independent distributor, and no more than four J. McIntyre machines, including the one at issue, had ended up in New Jersey. Officials from J. McIntyre had attended annual trade shows in the U.S., but never in New Jersey.

The issue in *Nicastro* was whether specific jurisdiction could be found to exist under a stream-of-commerce analysis. Some 12 years earlier, in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*,[14] two divergent approaches to stream of commerce doctrine had emerged. Justice O'Connor's plurality opinion held that a foreign defendant's mere act of placing a product into the stream of commerce was insufficient to satisfy due process unless accompanied by "an action of

the defendant purposefully directed toward the forum State." Such conduct might consist of action indicating an intent to serve the forum State's market, such as designing the product for the forum State's market, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor serving as a sales agent in the forum State. But the defendant's "awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[15]

Justice Brennan disagreed with this interpretation. In his view, placing products regularly into the stream of commerce with an awareness that the final product is being marketed in the forum State, subjected the defendant to the benefits and burdens of that State's law, and thus satisfied the "purposeful availment" prong of the due process inquiry.

The plurality opinion in *Nicastro*, authored by Justice Kennedy, agreed with Justice O'Connor's approach from *Asahi Metal*. The principle inquiry in stream of commerce cases, Justice Kennedy wrote, is "whether the defendant's activities manifest an intention to submit to the power of a sovereign," and to target the particular forum state. Sales by an independent intermediary and national marketing efforts through that intermediary were insufficient to constitute directed conduct, particularly when the defendant lacked control over the intermediary.

Justice Breyer, with whom Justice Alito joined, concurred in judgment, but declined to sanction the plurality's hardened approached. "The plurality," he wrote,

> "seems to state strict rules that limit jurisdiction where a defendant does not 'inten[d] to submit to the power of a sovereign' and cannot 'be said to have targeted the forum.'.... But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in the forum? Those issues have serious commercial consequences but are totally absent in this case."[16]

The dissent, authored by Justice Ginsburg, and joined by Justices Sotomayor and Kagan, was concerned with how a foreign manufacturer that targets the U.S. market generally, with no efforts to target specific states, can escape suit in the U.S. by acting through a distributor. Where the case involves "a substantially local plaintiff, like Nicastro, injured by the activity... of a manufacturer seeking to exploit a multistate or global market," Justice Ginsburg wrote, courts "have repeatedly confirmed that jurisdiction is appropriately exercised by courts in the place where the product was sold and caused injury."[17]

III. Personal Jurisdiction and the Internet.

As Justice Breyer's concurrence in *Nicastro* suggests, the time will come when the high court is directly faced with a personal jurisdiction issue stemming primarily from Internet contacts in the global market. Meanwhile, in the past two decades, the lower courts have been resolving cases in which Internet contacts have played a primary role.

The case most frequently cited in this area is *Zippo Mfgr. Co. v. Zippo Dot Com, Inc.*,[18] where a federal court in Pennsylvania posited a "sliding scale" model for analyzing Internet contacts. "At one end of the spectrum are situations where a defendant clearly does business over the internet" as manifested by the "knowing and repeated transmission of computer files over the Internet."[19] In such situations, "personal jurisdiction is proper."[20] At the other end "are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions."[21] Such websites, described as "passive," do "little more than make information available to those who are interested in it" and are "not grounds for the exercise of personal jurisdiction."[22]

It is the "middle ground [which] is occupied by interactive Web sites where the user can exchange information with the host computer" that presents the greatest analytical challenges. "In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site[.]"[23]

Although many courts have used the *Zippo* test for analyzing Internet contacts, it has not been held applicable in all circumstances. In *Kaufmann Racing Equipment, LLC v. Roberts*,[24] for instance, the Ohio Supreme Court found the *Zippo* test to be of little use "[w]hen the Internet activity in question is non-commercial in nature."[25] *Kaufmann Racing* was a libel action involving comments made by a disgruntled purchaser from Virginia against an Ohio company, when the comments were intended to injure the plaintiff's business and were seen by at least five Ohio residents. Finding jurisdiction over the defendant using a traditional analysis, the Court noted:

> The rise of Internet-related disputes does not mean courts should ignore traditional jurisdictional principles. '[T]he Internet does not pose unique jurisdictional challenges. People have been inflicting injury on each other from afar for a long time. Although the Internet may have increased the quantity of these occurrences, it has not created problems that are qualitatively more difficult.'[26]

The *Zippo* test has, however, been used in a number of Ohio state and federal cases, as well as in many product liability cases throughout the U.S. that have analyzed Internet jurisdictional contacts as to foreign manufacturer defendants.

In *Edwards v. Erdey*[27], for instance, an Ohio woman who flew to the Cayman Islands to obtain a medical procedure that was not approved in the United States was permitted to sue the surgeon in Ohio based, in part, on her visiting the defendant's website and exchanging emails to arrange the surgery. In *Neogen Corp. v. Neo Gen Screening, Inc.*[28], the Sixth Circuit Court of Appeals found the Michigan district court to have jurisdiction over a Pennsylvania corporation in a trademark dispute, even though the defendant had no physical contacts in Michigan, because the defendant conducted a small amount of business over the Internet with Michigan customers and its website specifically indicated Michigan as one of the regions it served.

In *Beightler v. Produckte Fur Die Medizin AG*,[29] the U.S. District Court in the Northern District of Ohio found that the plaintiff, injured by a faulty catheter, had not borne his burden of establishing jurisdiction over the German manufacturer and its California distributor. The court, however, permitted limited jurisdictional discovery to correct that deficiency, but cautioned:

> Absent evidence that defendants, or at least one of them, operated an interactive website and had more than incidental contacts with Ohio customers through such site, plaintiffs have not shown that either defendant purposefully availed itself of the privilege of doing business here. This is so, even if both Produkte and PFM Medical may well have foreseen that their products would eventually reach Ohio. To speculate that they may have done more, absent some basis for believing that they did so, is not enough.[30]

Based on these and similar cases, the following matters should be considered in attempting to obtain jurisdiction over a foreign defendant based on Internet contacts:

- Is the website active, passive, or in the middle ground?
- Is the website primarily for advertising, or can the customer actually conduct transactions through the Internet?
- Does the website indicate an intention to serve the state's particular market?[31]
- How frequent are the defendant's interactions with the forum state customers?
- Can products be purchased or ordered through the website?
- Does the website permit the customer to sign up for mailing lists and catalogues, or provide a service link whereby users can email questions or directly call an operator?[32]
- Does the website include a link whereby the user can become a "fan" of the defendant on Facebook or tweet the website URL on their Twitter page?[33]
- Does the website indicate an intent to serve the forum state by including a page listing shipping estimates for various states, including the forum state?[34]
- Was it the customer or the defendant who initiated the transaction?[35]If not the defendant, then how much control does the defendant have over who responds to the defendant's offer?[36]
- What is the level of sophistication of the non-resident defendant?
- How many total on-line sales has the defendant had generally, and specifically in the forum?
- Did the non-resident defendant have any continuing communications with the forum resident?
- Where were the goods delivered, and which party arranged for delivery?

Some of these factors (*e.g.*, a link whereby the website user can become a Facebook fan of the non-resident defendant) are obviously less important in a jurisdictional analysis than others (*e.g.*, the total number of on-line sales within the forum). And all must be considered in the context of the overall inquiry – is the defendant's website "interactive to a degree that reveals a specific intent to target the forum state and to transact business or otherwise interact specifically with residents of that state[?]"[37]

IV. Which Court Has Jurisdiction Over The Chinese Manufacturer?

So which of the three potential forums (if any) has jurisdiction over the Chinese manufacturer of the defective component part in our aircraft crash case?

Ohio is likely to be a non-starter. In the hypothetical given there is no reason to believe that the long-arm statute[38] or Civ. R. 4.3(A)[39] apply, and hence no basis for engaging in a specific jurisdiction analysis. And, although there is conflicting authority as to whether Ohio recognizes general jurisdiction,[40] the hypothetical indicates a mere 1% of the defendant's products are sold to customers in Ohio – a factor which, without more, is probably insufficient to establish that its "affiliations with [Ohio] are so 'continuous and systematic' as to render [it] essentially at home in the forum State."[41]

The case for jurisdiction in Kansas, where the airplane crashed, is not much better. The Kansas long-arm statute extends jurisdiction to non-resident defendants who "caus[e] to persons ... in this state an injury arising out of an act or omission outside this state by the defendant if, at the time of the injury, either: (i) [t]he defendant was engaged in solicitation or service activities in this state; or (ii) products, materials or things ... manufactured by the defendant anywhere were used... in this state in the ordinary course of trade or use[.]"[42] Since the plane crashed in Kansas, and the part manufactured by the Chinese defendant was integrated into a product used in Kansas, the Kansas long-arm statute is likely satisfied.

Jurisdiction probably fails, however, under the constitutional analysis. Recall that for due process to be satisfied under a specific jurisdiction analysis, not only must the defendant have purposefully availed itself of the privilege of acting in the forum state or causing a consequence in the forum state, but the cause of action must arise out of or relate to the defendant's contacts with the forum, and exercise of jurisdiction in that state must be reasonable. As to the requirement that the cause of action must arise out of or relate to the defendant's contacts with the forum, the courts look to whether at least some of the contacts constituting purposeful availment give rise to the lawsuit.[43] Here, although there is evidence that the defendant sells its products to customers in Kansas, those are not the transactions giving rise to this lawsuit; as such, specific jurisdiction is probably lacking. Furthermore, the amount and quality of the defendant's contacts with Kansas are probably insufficient to satisfy the more demanding general jurisdiction standard.

The best bet for personal jurisdiction over the Chinese company would be Pennsylvania where the Pennsylvania company purchased the component part from the defendant over the Internet. Pennsylvania's long-arm statute "authorizes personal jurisdiction over non-residents 'to the fullest extent allowed under the Constitution of the United States.'"[44] Moreover, since the lawsuit against the Chinese corporation arises out of the sale of the component part to the Pennsylvania company, the specific jurisdiction analysis applies and the second requirement of that analysis is satisfied. As to the purposeful availment requirement, the plaintiff's jurisdictional discovery and/or argument would need to focus on the particular Internet purchase in question, as well as any continuing communications between the parties to that transaction. Other matters to take into account would include the interactivity of the defendant's website, the defendant's total number of sales in the forum state, the defendant's sophistication as a commercial entity, and any factors indicating that the defendant was specifically targeting the Pennsylvania market. ■

End Notes

1. *See, e.g., Neogen Corp. v. Neo Gen Screening, Inc.* (6th Cir. 2002), 282 F.3d 883, 888; *Avery Dennison Corp. v. Alien Technology Corp.* (N.D. Ohio 2008), 632 F.Supp.2d 700, 705.
2. *See, e.g., Kvinta v. Kvinta,* 10th Dist. No. 02AP-836, 2003-Ohio-2884, ¶57 ("A court obtains personal jurisdiction over a defendant by (1) service of process, (2) the voluntary appearance and submission of the defendant to the court's jurisdiction, or (3) other acts the defendant commits which constitute a waiver of a jurisdictional defense.") (citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156).
3. The U.S. Supreme Court has held that serving a defendant who is temporarily present in the forum state ("tag jurisdiction") is a sufficient basis for personal jurisdiction without any further "minimum contacts" analysis. *Burnham v. Superior Court of California* (1990), 495 U.S. 604, 622. It is unclear whether Ohio would recognize "tag jurisdiction" as an independent basis for jurisdiction, although there is authority suggesting that it might. *See, e.g., LaCroix v. American HorseShow Assn.* (N.D. Ohio 1994), 853 F. Supp. 992 (appearing to apply Ohio law as authorized by Fed. R. Civ. P. 4, and to hold that Ohio law recognizes as effective service in Ohio on a non-resident only temporarily in the state).
4. *See, e.g., Prouse, Dash & Crouch, L.L.P.*, 116 Ohio St.3d 167, 2007 Ohio 5753 (The Court found personal jurisdiction over the defendant who had absconded from his Ohio home to Canada upon discovering he was being investigated for securities fraud. Although the Court based its decision on its finding that defendant was an Ohio "resident," the factors it considered strongly suggest that the concept it was applying is actually that of domicile).
5. *Goodyear Dunlop Tires Operations v. Brown ("Brown")* (2011), 131 S.Ct. 2846, 2853 (quoting *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer* (1940), 311 U.S. 457, 463, 61 S.Ct. 339)).
6. *Solar X Eyewear, LLC v. Bowyer,* N.D. Ohio No. 1:11-CV-00763, 2011 U.S. Dist. LEXIS 85799, *7 (quoting *Bird v. Parsons* (6th Cir. 2002), 289 F.3d 865, 873).
7. 342 U.S. 437, 72 S.Ct. 413 (1952).
8. *Brown*, 131 S.Ct., at 2853 (quoting *Helicopteros Nacionales de Columbia, S.A. v. Hall* (1984), 466 U.S. 408, 414, n.8, 104 S.Ct. 1868).
9. *Solar X Eyewear*, supra, at *8 (quoting *Southern Machine Co. v. Jahasco Ind., Inc.* (6th Cir. 1968), 401 F.2d 374, 381).
10. ___ U.S. ___, 131 S. Ct. 2846 (2011).
11. ___ U.S. ___, 131 S. Ct. 2780 (2011).
12. *Brown*, 131 S.Ct., at 2851.
13. *Id.*, at 2857.
14. 480 U.S. 102, 107 S.Ct. 1026 (1989).

15. 480 U.S. at 112.

16. *Nicastro*, 131 S.Ct., at 2791 (Breyer, J., concurring in the judgment).

17. *Id.* at 2804 (Ginsburg, J., dissenting).

18. (W.D. Pa. 1997), 952 F.Supp. 1119.

19. *Id.* at 1123-1124. *See also, Compuserve, Inc. v. Patterson* (6th Cir. 1996), 89 F.3d 1257 (Contract dispute between Ohio Internet service provider and Texas software seller. Although Texas defendant never stepped foot in Ohio, jurisdiction existed in Ohio because the defendant repeatedly sent his software to the Ohio plaintiff via electronic links, advertised his software for sale on the Ohio plaintiff's system, entered into a written agreement with defendant which was subject to Ohio law, and made demands for compensation from the Ohio plaintiff via electronic and regular mail messages.)

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *126 Ohio St.3d 81, 2010 Ohio 2551.*

25. *Id.* at ¶26 (*quoting Oasis Corp. v. Judd* (S.D. Ohio 2001), 132 F. Supp. 2d 612, 622, fn. 9, *citing Mink v. AAAA Dev. L.L.C.* (5th Cir. 1999), 190 F.3d 333, 336).

26. *Id.* at ¶25 (quoting Scott T. Jansen, Oh, What a Tangled Web*** The Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts (2006), *71 Mo.L.Rev. 177, 182-183*, quoting Allen R. Stein, Symposium, Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision (2004), *98 NW.U.L.Rev. 411*).

27. (C.P. Franklin Cty.), 118 Ohio Misc. 2d 232, 2001-Ohio-4367.

28. (6th Cir. 2002), 282 F.3d 883.

29. N.D. Ohio No. 3:07CV 1604, 2007 U.S. Dist. LEXIS 68512.

30. *Id.* at *8.

31. *See, e.g., The Cadle Co. v. Schlichtmann,* 6th Cir. No. 04-3145, 123 Fed. Appx. 675, 678 ("The 'operation of an Internet website can constitute the purposeful availment of the privilege of acting in a forum state... if the website is interactive to a degree that reveals specifically intended interaction with residents of the state.'")

32. *Solar X Eyewear, LLC v. Bowyer*, N.D. Ohio No. 1:11-CV-00763, 2011 U.S. Dist. LEXIS 85799, *10.

33. *Id.*

34. *Id.*

35. *See, e.g., Wood v. Fliehman,* 193 Ohio App.3d 454, 2011 Ohio 2101 (Holding that the Missouri court, whose default judgment the Missouri plaintiff sought to enforce in Ohio, lacked personal jurisdiction over the Ohio defendants who provided horse semen for breeding services to the plaintiff through a one-time Internet transaction. The court found persuasive the facts that it was the plaintiff who initiated the contact, and that the defendant's internet advertisement was not directed towards residents of Missouri).

36. *See, e.g., Malone v. Berry* (10th Dist.), 174 Ohio App.3d 122, 2007-Ohio-6501, ¶20 ("Courts have also focused upon the fact that the seller on an Internet auction website has little or no control over who will ultimately be the highest bidder[.]")

37. *Custom Cupboards, Inc. v. CEMP SRL,* D. Kan. No. 10-1060-JWL, 2010 U.S. Dist. LEXIS 44822, *8.

38. Under R.C. 2307.382 (A), the only arguably relevant provisions would be (A) (4) "[c]ausing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumer or services rendered in this state" or (A) (5) "[c]ausing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consumer, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state." These provisions, however, do not apply, as the deaths occurred outside of Ohio, and the post-death grieving of the Ohio family members does not constitute "injury" for purposes of these sections. *See, e.g., Robinson v. Koch Refining Co.,* 10th Dist. No. 98AP-900, 1999 Ohio App. LEXIS 2682, *8 ("The injury, which is the basis of the complaint, must have occurred in Ohio to confer personal jurisdiction over an out-of-state party under R.C. 2307.382(A)(4)"), and *id.* at *9 ("[A] tortious injury is not considered to have occurred in Ohio simply because a party continues to suffer from the effects of the injury after returning to Ohio.").

39. Civ. R. 4.3 (A)(4) and (5) are identical to R.C. 2307.382(A)(4) and (5).

40. *See, e.g., National Strategies, LLC v. Naphcare, Inc.,* N.D. Ohio No. 5:10-CV-0974, 2010 U.S. Dist. LEXIS 137975, *8-9 ("A continuing debate exists among federal courts in Ohio as to whether Ohio law recognizes general jurisdiction or whether personal jurisdiction over an out-of-state defendant can be established only if Ohio's longarm statute is satisfied. *Compare Keybanc Capital Mkts. v. Alpine Biomed Corp.*, Case No. 1:07-CV-1227, 2008 U.S. Dist. LEXIS 112156, 2008 WL 828080, at *3-6 (N.D. Ohio 2008) (discussing numerous opinions from the Supreme Court of Ohio, the Sixth Circuit, the Federal Circuit, and the Northern and Southern Districts of Ohio and concluding that Ohio law does recognize general jurisdiction) *with Signom v. Schenck Fuels, Inc.*, Case No. C-3- 07-037, 2007 U.S. Dist. LEIXS 42941, at *3-*9, 2007 WL 1726492, at *1-*3 (S.D. Ohio 2007) (discussing opinions from the Supreme Court of Ohio, the Sixth Circuit, the Federal Circuit, and the Northern and Southern Districts of Ohio and concluding that Ohio law does not recognize general jurisdiction).").

41. *Brown*, 131 S.Ct. at 2851.

42. K.S.A. §60-308 (a) (3) (G).

43. "[A] fundamental element of the specific jurisdiction calculus is that plaintiff's claim must 'arise out of or relate to' at least one of defendant's contacts with the forum." *Oldfield v. Pueblo De Bahia Lora, S.A.* (11th Cir. 2009), 558 F.3d 1210, 1222 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182 (1985)). As the Supreme Court "has not yet fully delineated the contours of the 'relatedness' requirement", the state and lower courts have developed their own tests. *Id.* The 6th Circuit has adopted a "lenient standard" which requires only that the "operative facts 'are at least marginally related to the alleged contacts' between the defendant and the forum state[.]" *Contech Bridge Solutions, Inc. v. Keaffaber,* S.D. Ohio No. 1:11-cv-216, 2011 U.S. Dist. LEXIS 122875 (*quoting Third Nat'l Bank in Nashville v. WEDGE Group, Inc.* (6th Cir. 1989), 882 F.2d 1087, 1091). The Tenth Circuit – where Kansas is located – appears to follow a similar test. *See, e.g., Union Pacific Railroad Co. v. Trinity Industries,* D. Kan. No. 93-1101-PFK, 1993 U.S. Dist. LEXIS 14070, *citing Rambo v. American Southern Ins. Co.* (10th Cir. 1988), 839 F.2d 1415, 1419 n. 6 (describing the second criterion of the three part test as being that the "claim arises out of or results from defendant's forum-related activities").

44. *Henning v. Suarez Corp. Industries, Inc.* (E.D. Pa. 2010), 713 F. Supp. 2d 459, 464.

Christopher Mellino is a principal at The Mellino Law Firm. He can be reached at 216.241-1901 or cmm@mellinolaw.com.

Staff Attorney's Perspective: Top Ten "Dos" and "Don'ts" An Interview With Alejandro Cortes

by Christopher Mellino

Alejandro (Alex) Cortes is the staff attorney for the Honorable Carolyn Friedland. Alex received his Juris Doctor degree from The Ohio State University in 2005. He then went to work in the City of Cleveland Law Department.

His goal, however, was to become a trial attorney and he decided to pursue a job as a staff attorney as a way to learn how to become a litigator. Alex has now been a staff attorney for five years. He believes the job has given him a unique perspective on the practice of law. His primary responsibility is to aid Judge Friedland in the management of her civil docket. This means attending case management conferences, pretrials, hearings, final pretrials, and settlement conferences. He also provides the judge with the research and other resources necessary to rule on motions, makes sure pending motions are ruled on, and, in general, makes sure the civil docket keeps moving.

Experiencing first hand the daily grind of motion practice was an eye opening experience. It was not what Alex was expecting from what he was taught in law school. But being a staff attorney has allowed him to see every kind of civil case, from collections to business disputes, to medical malpractice and employment cases. He has seen what he considers to be good and bad lawyering from both the plaintiff and defense sides.

He particularly enjoys learning from lawyers, especially those who take the time to explain the facts of their cases and their respective positions with the court so that the legal issues can be fleshed out.

I asked Alex for a top ten list of ways plaintiffs' attorneys could improve our interaction with the court. After consulting with some of his colleagues, he came up with the following list based on what he and his colleagues see most frequently:

1. **Do** stop by the 11th floor frequently and get an updated telephone list of all of the staff attorneys. (Bailiffs do not like getting calls for the staff attorneys and staff attorneys do not like getting calls for someone who hasn't been there for six months).

2. **Don't** try to have an ex parte conversation with the staff attorney just because they are not the judge.

3. **Don't** be rude to or belittle the staff attorney.

4. **Don't** spend the pretrial being rude to or arguing with opposing counsel.

5. **Don't** use the elevator as an excuse for being late. Everyone knows (or should know) by

now to arrive at the Justice Center by 8:30 a.m. for a 9:00 a.m. pretrial.

6. **Don't** be afraid to ask the staff attorney to schedule a pretrial if there are problems or issues needing to be addressed before bombarding the court with motions.

7. Once a judge has been assigned to your case, do check that judge's page on the Cuyahoga County Court of Common Pleas website. (http://cp.cuyahogacounty.us/internet/Judges.aspx) Most judges have standing orders on their page, which indicate their litigation preferences and how to approach discovery disputes in their courtroom.

8. If lawyers from both sides are going to call the staff attorney about an issue, don't assume that the staff attorney has time to deal with that issue at that moment.

9. **Don't** surprise the court at a settlement conference or final pretrial with a request for more time or a discovery dispute. If you will not be prepared to discuss settlement or will be requesting more time, let the staff attorney know well ahead of time.

10. **Do** come to the settlement conference with a realistic demand and the facts to back up that demand. ■

CATA Luncheon Seminar Series

For The 2011/2012 Term

Please save the following dates for attendance at the upcoming CATA Luncheon Series for the 2011/2012 term:

December 14, 2011 - *Substance Abuse, Chemical Dependence & Mental Health Concerns in the Legal Profession,* with speaker Paul Cami of the Ohio Lawyers Assistance Program; and *How Mental Health & Substance Abuse are Developed in the Disciplinary Hearing,* with speaker Rick Alkire, Esq.

March 14, 2012 - *Program on Focus Groups,* with speaker Rick Topper

April 11, 2012 - *Presentation by Ohio Supreme Court Justice* Yvette McGee Brown

All luncheons begin at 12:00 noon with your choice of several box lunch selections. The one hour CLE follows from 12:30-1:30 p.m., except that the December 14, 2011 CLE lasts from 12:30-2:00 p.m., and provides 1 ½ hours of CLE credit.

If you have any questions, please contact CATA Secretary, George E. Loucas at 216-834-0400 or gloucas@loucaslaw.com.

Christopher Mellino is a principal at The Mellino Law Firm. He can be reached at 216.241-1901 or cmm@mellinolaw.com.

Verdict Spotlight

by Christopher Mellino

A soft tissue neck injury, a 72 year old Plaintiff with pre-existing degenerative disc disease who did not seek immediate medical treatment, and seven thousand dollars in past medical expenses. A case every plaintiff's lawyer dreams about, right?

These were the facts that CATA member, **Susan Petersen**, faced when she turned down the insurance company's low-ball offer and took her client's case to trial. Because of her courage, her client, Carol Modic, was awarded $457,060 by a jury in Lake County. The case then settled for $490,000 while motions for prejudgment interest and costs were pending.

The injuries to her client occurred in 2008 while Mrs. Modic was turning left at the intersection of Auburn and Mentor Roads in Geauga County. The Defendant driver blew through a stop sign at 45 mph, crashing into Mrs. Modic's pick up truck. The Defendant's insurer, State Auto, admitted negligence but claimed that the injuries were minor whiplash-type injuries that quickly resolved.

Although there were only $7,060.00 in past medical bills, Mrs. Modic will require medical treatment for her neck for the rest of her life as well as surgery on her neck sometime in the future. The future medical expenses were projected to be $10,000 per year through her life expectancy, plus $50,000 for the surgery.

With that in mind, Susan focused her voir dire on the future medical costs. She admitted to the prospective jurors that she would not be able to prove with certainty what medical expenses would be incurred. She explained that the law requires evidence only of what is probable. Susan elicited a commitment from each of the jurors that they would follow the law. Just as important, she also had them commit to reminding their fellow jurors of the probability standard and to not let "outside reasons" taint their verdict.

The Plaintiff had a 96 year old mother who, until recently, had lived on her own. This may have influenced the jury into awarding medicals beyond the average life expectancy for someone of the Plaintiff's age.

Congratulations to Susan and her client. Thanks to them, we now have a verdict report to take to our next settlement conference in a soft tissue case. ■

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

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

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

RETURN FORM TO: **Christopher Mellino**
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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.*

Vincent Kern v. Farmers Insurance of Columbus, Inc.

Type of Case: Underinsured Motorist/MVA

Settlement: $103,446.56, plus property damage of $9,790.24 ($75,000.00 Farmers UIM; $25,000.00 tortfeasor policy limit; $9,790.24 tortfeasor property pay; $3,446.56 tortfeasor med pay)

Plaintiff's Counsel: Christopher M. DeVito, 623 West Saint Clair Avenue, Cleveland, Ohio 44113, (216) 687-1212

Defendant's Counsel: Thomas F. Glassman

Court: Lake County, Case No. 11 CV 000948, Judge Lucci

Date Of Settlement: October 2011 UIM; December 2009 Tortfeasor

Insurance Company: Farmers Insurance of Columbus, Inc.

Damages: Medical bills incurred $5,752.50 ($3,446.56 accepted by providers). Property damage of $9,790.24. No lost wages.

Summary: Highway MVA in Florida. Vehicle driven back to Ohio. Property damage to van of $9,790.24. Medical bills incurred of $5,752.50 for knee injury, three months of non-invasive physical therapy, and then meniscus knee repair surgery. No follow-up treatments. Permanent decreased use, but allowed to return to work. No lost wages claim.

Plaintiff's Expert: Treating physician, John Wood, M.D. of Ohio Permanente Medical Group (Kaiser), Cleveland Heights, Ohio

Defendants' Expert: None

Kevin Killeen vs. John Lawrence, et al.

Type of Case: Motor Vehicle Accident

Verdict: $70,000

Plaintiff's Counsel: David Herman, Nurenberg, Paris, Heller & McCarthy Co., LPA, (216) 621-2300

Defendants' Counsel: Molly Steiber Harbaugh

Court: Cuyahoga County, Case No. 738633, Judge McClelland

Date Of Verdict: August 19, 2011

Insurance Company: Cincinnati

Damages: $0 Medical Expenses, $30,000 Past and Future Earnings

Summary: Defendant backed out of driveway and struck plaintiff's car. Plaintiff suffered lumbar injury and a nerve compression injury called meralgia parasthetica.

Plaintiff's Expert: Neurologist Donald Mann, M.D.

Defendants' Expert: Orthopedic John Feighan, M.D.

John Doe v. United Financial Casualty Company

Type of Case: Semi-Truck Driver v. Underinsured Motorist Insurance Co.

Settlement: $550,000 Underinsured Motorist Additional Settlement

Plaintiff's Counsel: Andrew R. Young, Nurenberg, Paris, Heller & McCarthy Co., LPA, (216) 621-2300

Defendants' Counsel: Progressive In-House Counsel; Hartford In-House Counsel; Keis George LLP; and, Douglass & Associates

Court: Lorain County Court of Common Pleas, Judge James M. Burge

Date Of Settlement: July 7, 2011

Insurance Company: United Financial Casualty Company

Damages: Plaintiff was life flighted to MetroHealth Hospital. He was diagnosed with cervical fractures of C6 and C7. He suffered significant contusions to his left upper anterior chest and elbow. He had over three (3) years of treatment resulting in chronic pain syndrome with left-sided cervical radiculopathy, chronic pain, cephalgia directly resulting from vertebral fractures and soft tissue injury to the cervical and thoracic areas. He underwent extensive physical therapy, saw multiple physicians from neurosurgery, orthopedics, neurology and chronic pain. Plaintiff's treating physician opined that it is unlikely that he will ever completely be pain-or symptom-free due to the extent of his traumatic injuries.

Summary: Plaintiff was driving a late model Peterbilt 379 hauling stone when Defendant went left of center hitting the semi-truck

head-on forcing Plaintiff off the road and into a ditch.

Plaintiff's Expert: Treating Physicians and Personal Accountant for Wage Loss Calculation

Defendants' Expert: None

Confidential

Type of Case: First-Party Theft Claim

Settlement: $357,500.00

Plaintiff's Counsel: Robert P. Rutter, 4700 Rockside Road, Suite 650, Independence, Ohio 44131, (216) 642-1425

Defendants' Counsel: Richard Sweebe

Court: U.S. District Court, Northern District, Eastern Division

Date Of Settlement: June 2011

Damages: Theft of equipment from auto repair/body shop.

Summary: The insured operated a body shop and repair shop. Unknown persons broke in and stole a large amount of equipment. The insurance company questioned whether the insured had as much equipment as he claimed and how a thief could steal so much equipment despite the presence of an alarm system. The investigation dragged on, requiring the insured to file suit. The claims were resolved at mediation.

Plaintiff's Expert: Finnicum Adjusting Company (Navarre, Ohio) as to damages.

Defendants' Expert: None

Baby Girl Jane Doe v. ABC Hospital (Confidential Settlement)

Type of Case: Medical Negligence

Settlement: $4,300,000

Plaintiff's Counsel: John A. Lancione, 200 Public Square, Cleveland, Ohio 44114, (216) 623-4949

Defendants' Counsel: Confidential

Court: Confidential

Date Of Settlement: June 2011

Insurance Company: Self-Insured

Damages: Permanent brain damage resulting in Cerebral Palsy.

Summary: The labor and delivery nurse failed to recognize fetal distress on the electronic fetal heart monitor. The baby's heart stopped beating prior to delivery depriving the baby of oxygen resulting in brain damage. The baby was delivered by emergency cesarean section and resuscitated.

Plaintiff's Expert: Mark Epstein, M.D. (Pediatric Neurology), Suneet Saghal, M.D. (Physical Medicine & Rehabilitation), Paula Zinsmeister (Life Care Planner); James Zinser (Economist)

Defendants' Expert: Michael Duchowny, M.D. (Pediatric Neurology), Sean Blackwell, M.D. (OB-GYN)

Jane Doe v. ABC Hospital & Physicians

Type of Case: Medical Malpractice

Settlement: $2 Million

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

Defendants' Counsel: Confidential

Court: Confidential Ohio County

Date Of Settlement: April 6, 2011

Insurance Company: Confidential

Damages: Brain Injury

Summary: A middle aged woman suffered brain damage after a respiratory arrest in a hospital in Ohio. A chest x-ray showing pleural effusion was not communicated to attendings. She had partial recovery but required some nursing care of A.D.L.'s.

Central Mutual Insurance Company v. YCAW5 LLC, et al.

Type of Case: Fire Insurance Claim

Settlement: $3.5 Million

Plaintiff's Counsel: Robert P. Rutter, 4700 Rockside Road, Suite 650, Independence, Ohio 44131, (216) 642-1425

Court: Franklin County, Case No. 09 CVH-07-10013

Date Of Settlement: April 2011

Insurance Company: Central Mutual Insurance Company

Damages: Property damage to manufacturing facility.

Summary: An intentionally set fire severely damaged the plaintiff's warehouse. The insurance company denied the claim because plaintiff's sprinkler system was not fully operational as required by the insurance policy. The insured asserted that the carrier accepted the risk knowing that there were deficiencies in the sprinkler system and that a repair was scheduled for the week after the fire occurred.

Plaintiff's Expert: Alex N. Sill Company as to damages.

Defendants' Expert: None

Confidential

Type of Case: Fire Insurance Claim

Settlement: $192,925

Plaintiff's Counsel: Robert P. Rutter, 4700 Rockside Road, Suite 650, Independence, Ohio 44131, (216) 642-1425

Date Of Settlement: April 2011

Insurance Company: State Farm

Damages: Fire loss to house and contents

Summary: Fire loss to house. Fire damaged insured's house and the insurer explored various policy defenses before agreeing to pay the claim.

Plaintiff's Expert: CPR Claims Service as to damages.

Defendants' Expert: None

Jane Doe v. John Smith, M.D. (Confidential Settlement)

Type of Case: Medical Negligence

Settlement: $850,000

Plaintiff's Counsel: John A. Lancione, 200 Public Square, Cleveland, Ohio 44114, (216) 623-4949

Defendants' Counsel: Confidential

Court: Confidential

Date Of Settlement: April 2011

Insurance Company: Confidential

Damages: Paralyzed left arm.

Summary: Defendant pain management doctor injected anesthetic and steroid solution into patient's spinal cord during a facet injection paralyzing the left arm.

Plaintiff's Expert: Kevin McGrail, M.D. (Neurosurgery), Stephen Thomas, M.D. (Pain Management), Charles Lanzieri, M.D. (Neuroradiology)

Defendants' Expert: Michael Ludwig, M.D. (Pain Management), Michael Levey, M.D. (Radiologist).

Baby Girl Jane Doe v. ABC Hospital (Confidential Settlement)

Type of Case: Wrongful Death - Medical Negligence

Settlement: $1,625,000

Plaintiff's Counsel: John A. Lancione, 200 Public Square, Cleveland, Ohio 44114, (216) 623-4949)

Defendants' Counsel: Confidential

Court: Confidential

Date Of Settlement: January 2011

Insurance Company: Confidential

Damages: Death of a full term fetus.

Summary: During labor that was induced with Pitocin, the nursing staff abandoned the mother for two hours. During the two hours the mother was not seen by a nurse, the baby died from an umbilical cord accident.

Plaintiff's Expert: Laura Mahlmeister, RN

Defendants' Expert: None identified

Confidential

Type of Case: Car-Pedestrian MVA

Settlement: $2,000,000

Plaintiff's Counsel: David A. Kulwicki, Mishkind Law Firm Co., LPA, (216) 595-1900

Defendants' Counsel: Confidential

Court: Confidential

Date Of Settlement: December 1, 2010

Insurance Company: Confidential

Damages: Closed head injury and mild orthopedic injuries.

Summary: Defendant hit plaintiff while plaintiff walked her dog in a residential neighborhood at night.

Plaintiff's Expert: Vinod Sahgal, M.D. (Physiatrist), Elizabeth Davis, R.N. (Life Care Planner), James Zinser, Ph.D. (Economist), and Erin Bigler, Ph.D. (Neuropsychologist).

John and Belynda Senick

Type of Case: Fire Insurance Claim

Settlement: $612,456.00

Plaintiff's Counsel: Robert P. Rutter, 4700 Rockside Road, Suite 650, Independence, Ohio 44131, (216) 642-1425

Court: None

Date Of Settlement: July 2010

Insurance Company: Allstate Insurance Company

Damages: Fire destroyed a house and contents.

Summary: A fire destroyed the insureds' house while they were out of town. The insurance company questioned whether the fire was intentionally set and whether the insureds had been

truthful during the claim investigation. After both husband and wife submitted to examinations under oath, Allstate accepted coverage and adjusted the claim to a conclusion.

Plaintiff's Expert: D.J. Cornelius as to damages to contents.

Defendants' Expert: None

Raymond Kevin Jones v. Trenton Bishop, et al.

Type of Case: Property Damage Insurance Claim

Settlement: $175,000

Plaintiff's Counsel: Robert P. Rutter, 4700 Rockside Road, Suite 650, Independence, Ohio 44131, (216) 642-1425

Court: Harrison County, Case No. CVH 2009 0087

Date Of Settlement: No date given.

Insurance Company: Wayne Mutual Insurance Group

Damages: Fire damage to barn and contents

Summary: A group of teenage boys set a small fire in a barn where they were rollerblading. The blaze got out of control and burned down the barn. The boys and their parents were sued for negligence and were defended by various homeowner insurers.

Plaintiff's Expert: Finnicum Adjusting Company (Navarre, Ohio) as to damages.

Defendants' Expert: None

Estate of Jane Doe, Dec'd v. XYZ Hosp.

Type of Case: Med Mal - Wrongful Death

Settlement: $750,000

Plaintiff's Counsel: Paul M. Kaufman, 801 Terminal Tower, Cleveland, Ohio 44113, (216) 696-8200

Defendants' Counsel: Confidential

Court: Confidential

Date Of Settlement: No date given.

Damages: Death of newborn (4 hrs.)

Summary: Mother given excessive amounts of Fentanyl during labor and delivery. Caused fetal distress and DIC. Infant died at age 4 hours.

Plaintiff's Expert: Confidential

Defendants' Expert: Confidential ■

Application for Membership

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below. I understand that my application must be seconded by a member of the Academy and approved by the President. If admitted to the Academy, I agree to abide by its Constitution and By-Laws and *participate fully in the program of the Academy*. I certify that I possess the following qualifications for membership prescribed by the Constitution:

1. ***Skill, interest and ability in trial and appellate practice.***
2. ***Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.***
3. ***Excellent character and integrity of the highest order.***

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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Home Address:_____ **Phone No:**_____

Law School Attended and Date of Degree: _____

_____

Professional Honors or Articles Written: _____

_____

Date of Admission to Ohio Bar:_____ **Date of Commenced Practice:**_____

Percentage of Cases Representing Claimants:_____

Names of Partners, Associates and/or Office Associates (State Which):_____

_____

Membership in Legal Associations (Bar, Fraternity, Etc.):_____

_____

Date:_____ **Applicant:**_____

Invited:_____ **Seconded By:**_____

President's Approval:_____ **Date:**_____

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