THE QUARTERLY

OAJ members touch on key issues, recent decisions, and legislative changes affecting different areas of practice.

THE OHIO ASSOCIATION FOR JUSTICE JULY 2018 ISSUE 3

FEATURES

Quarterly

July 2018

OHIO ASSOCIATION for JUSTICE
TRIAL LAWYERS HELPING PEOPLE

OAJ OFFICE

Ohio Association for Justice
655 Metro Place South
Metro V, Suite 140
Dublin, Ohio 43017
Phone: (614) 341-6800 | Fax: (614) 341-6810

If you are interested in writing an article for The Quarterly, please contact:

Michael S. Miller, Esq.
Volkema Thomas Miller & Scott, LPA
300 E. Broad St., Suite 190
Columbus, Ohio 43215
(614) 221-4400
MMiller@vt-law.com

or Contact Katie Johnstone at
KatieJ@OAJustice.org

www.OAJustice.org

Table of Contents

**Clicking on a section will automatically take you to that page.*

PAST PRESIDENTS

Sam Z. Kaplan	1957
Maurice Shapiro	1958
Joseph Williams	1959
Morton Reeves	1960
Robert W. Lett	1961
R.C. Norris	1962
Ben Horn	1963
Russel H. Volkema	1964
Russel H. Volkema	1965
Richard M. Markus	1966
Robert Disbro	1967
Henry Maser	1968
Norman W. Shibley	1969
Keith E. Spero	1970
Michael F. Colley	1971
Horace Baggott, Jr.	1972
Walter Bortz	1973
Thomas A. Heffernan	1974
Robert F. Thornton	1975
John J. Getgey, Jr.	1976
Russell Smith	1977
James L. Pazol	1978
Jason A. Blue	1979
Sheldon L. Braverman	1980
Joseph W. Shea III	1981
Rodney M. Arthur	1982
Don C. Iler	1983
James R. McIlvaine	1984
John D. Liber	1985
Bernard K. Bauer	1986
Michael R. Kube	1987
William Zavarello	1988
Frank A. Ray	1989
Jay Harris	1990
Paul O. Scott	1991
Martin W. Williams	1992
Andrew P. Krembs	1993
Thomas H. Bainbridge	1994
Clair M. Carlin	1995
Dale K. Perdue	1996
J. Thomas Henretta	1997
James D. Dennis	1998
J. Michael Monteleone	1999
Anne M. Valentine	2000
Steve P. Collier	2001
Frank E. Todaro	2002
Peter J. Brodhead	2003
Frederick M. Gittes	2004
Philip J. Fulton	2005
Rhonda Gail Davis	2006
Mark M. Kitrick	2007
John A. Lancione	2008
Richard W. Schulte	2009
Dennis P. Mulvihill	2010
Denise K. Houston	2011
Robert E. DeRose	2012
Donald C. Moore, Jr.	2013
Daniel R. Michel	2014
Frank Gallucci	2015
Paul Grieco	2016
Richard Brian	2017

Welcome New & Returning Members

Amber Bishop
Siferd & McCluskey, LPA
Lima, OH

Loukesha Brooks
Wright & Schulte
Vandalia, OH

Bruce Carter
Law Office of Bruce Carter
Hamilton, OH

Matthew Flemming
Hoffman Legal Group
Cleveland, OH

Bobbie Flynt
Crandall & Pera Law, LLC
Chagrin Falls, OH

Peter Friedmann
The Friedmann Firm
Columbus, OH

Rich Gabelman
Law Offices of Shane Smith
Cincinnati, OH

Robert Gresham
Wright & Schulte LLC
Vandalia, OH

Louis Grube
Paul W. Flowers Co., L.P.A
Cleveland, OH

Walter Hawkins
Isaacs & Isaacs
Louisville, KY

Donald Kral
Kisling, Nestico & Redick
Columbus, OH

Barbara A. Luke
Cabot Roubanes Luke Co., LPA
Marysville, OH

Thomas F. Martello Jr.
Law Office of David A. Bressman
Dublin, OH

Alexander Marzec
Spitler & Williams-Young Co., L.P.A.
Toledo, OH

Tanner McFall
McFall Firm LLC
Cincinnati, OH

Justin McMullen
The Attkisson Law Firm, LLC
Dayton, OH

Kyle Melling
Lowe Eklund Wakefield Co., LPA
Cleveland, OH

Ashley Merino
Geiser, Bowman & McLafferty
Columbus, OH

Kelly Phillips
Attorney at Law
Gahanna, OH

Peter Rodecker
Kevin F. Kurgis Co. LPA
Columbus, OH

David Rudwall
Attorney at Law
Dayton, OH

Mollie Slater
Colley Shroyer & Abraham
Columbus, OH

Bradley Smogyi
Kisling, Nestico & Redick
Akron, OH

Ildiko Szucs
VanHo Law
Hudson, OH

Kevin Urtz
The Pecchio Law Firm
Twinsburg, OH

Thomas Vasvari
Kisling, Nestico & Redick
Youngstown, OH

Mary Ann Zaky
Nager, Romaine & Schneiberg Co., L.P.A.
Euclid, OH

Advocates Circle

The Foremost Class of Membership for Law Firms

Arthur O'Neil Mertz Michel & Brown Co., LPA
Defiance, OH

Barkan, Meizlish, Handelman, Goodin, DeRose, Wentz LLP
Columbus, OH

Bordas & Bordas
Wheeling, WV

Elk & Elk Co., LPA
Mayfield Heights, OH

Geiser, Bowman & McLafferty, LLC
Columbus, OH

The Gervelis Law Firm
Canfield, OH

Kisling, Nestico & Redick
Cleveland, OH

Kitrick, Lewis, & Harris Co., LPA
Columbus, OH

Lamkin, Van Eman, Trimble & Dougherty, LLC
Columbus, OH

Lancione & Lancione, LLC
Rocky River, OH

Landskroner, Grieco, & Merriman LLC
Cleveland, OH

Meyer Wilson Co., LPA
Columbus, OH

Murray & Murray Co., LPA
Sandusky, OH

Nager, Romaine & Schneiberg, CO., LPA
Euclid, OH

Nurenberg, Paris, Heller & McCarthy Co., LPA
Cleveland, OH

O'Connor Acciani & Levy, LPA
Cincinnati, OH

Petersen & Petersen
Chardon, OH

Rittgers & Rittgers
Lebanon, OH

Robert J. Wagoner Co., LLC
Columbus, OH

Rourke & Blumenthal
Columbus, OH

Slater & Zurz
Akron, OH

Tzangas Plakas Mannos Ltd
Canton, OH

Young & McCarthy
Cleveland, OH

Thank you to our Friends of OAJ

Diamond Sponsors

Preferred Capital Funding
NFP Structured Settlements
FindLaw

Platinum Sponsors

Ringler Associates
Leading Technologies
Injured Workers Pharmacy
Robson Forensic, Inc.
Physician Life Care Planning
TriMed

Gold Sponsors

Beacon Rehabilitation
Key Evidence

Silver Sponsors

BalaCare Solutions
Weinstein & Associates, Inc.


CUTTING-EDGE
STRATEGIES FOR
HARD TIMES
4 Day Webinar Series with David Ball
July 24-27, 2018
Click here for information and to register


SAVE THE
DATE
2018 Winter
Convention
Hilton Cleveland Downtown
October 24-26, 2018

Recent Developments in LGBT Caselaw

Peter Friedmann, Esq., Columbus, OH

June signifies a month-long Pride celebration for the LGBT community and its allies. As if on cue, in early June the United States Supreme Court released a timely ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which unleashed a social media frenzy with commentary on the decision. In *Masterpiece*, a Colorado baker refused to sell a wedding cake to a same-sex couple, citing religious beliefs as his reasoning. The baker offered to sell other products to the customers, such as birthday cakes, cupcakes, or brownies, but refused to create a cake in celebration of their marriage.

On the surface, the decision may not *seem* like a win for the gay community. However, the lengthy and complicated majority opinion suggests otherwise. Justice Kennedy spent a noticeable amount of time stressing that the *Masterpiece* ruling does not mean that companies can refuse to do business with same-sex couples based on freedom of religion.

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." The Court concluded that both parties are entitled to their own rights, based on their respective beliefs. At the end of the day, the bakery only prevailed because the Colorado Civil Rights Commission, which represented the couple, failed to establish a "neutral and respectful consideration" of its claims.

The trend in both the Supreme Court and federal circuit courts is to emphasize that sexual orientation is a subset of sex and therefore a protected class under Title VII. In the Second Circuit's *Zarda v. Altitude Express*, which was decided in February of this year, the Court ruled that sex discrimination "applies to any practice in which sex is a motivating factor…. Sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted." The court reasoned that it would be impossible to discriminate on the basis of sexual orientation without taking sex into account.

This string of cases demonstrates a promising step in the right direction for the LGBT community during a time of political and social unrest.

Similarly, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the U.S. Court of Appeals for the Sixth Circuit affirmed protection of transgender people under Title VII. In *Harris*, an employee informed the Christian funeral home owner that she would be changing genders and wanted to present herself as a woman publicly, which also included at work. The Christian owner fired her because she was no longer going to present herself as a man. The owner cited religious beliefs as reasoning firing the employee and being unable to continue employment of a transgender person.

The *Harris* case made its way to the Sixth Circuit by way of the Eastern District of Michigan. The Equal Employment Opportunity Commission (EEOC) sued on the employee's behalf, citing a Title VII violation by the funeral home. The EEOC also argued that the funeral home discriminated against female employees through its clothing allowance policy. Specifically, the funeral home only provided male employees with a clothing allowance, but not female employees. The District Court dismissed the EEOC's claim, concluding that although the EEOC had established sex discrimination, the Religious Freedom Restoration Act acted as an exemption to Title VII for the funeral home. In October of 2016, the EEOC appealed the District Court's decision.

The Sixth Circuit concluded that "an individual's transgender status is *always* based on gender-stereotypes," making it another facet of sex discrimination. The Sixth Circuit further held that transgender individuals are protected under Title VII because "transgender or transitioning status constitutes an inherently gender-nonconforming trait." This ruling affirms protection for transgender employees under Title VII, and eliminates any argument that an employer's religious belief can create an exception to discrimination under Title VII.

This string of cases demonstrates a promising step in the right direction for the LGBT community during a time of political and social unrest.

The Significance of Plaintiff Advocacy in the Real World
Florence Murray, Esq., Sandusky, OH

One of the most influential things that plaintiff lawyers can do is to advocate for positive change for the good of the whole community. As many of you are already aware, one of the main goals for our Section is to model what we are working toward at a national level through the American Association for Justice's (AAJ) Side Underride Committee. That committee is part of the AAJ Interstate Trucking Litigation Group (and if you are not already a member, please talk to any of us who are about the huge benefits of dual membership).

Side underride guards are extremely important in protecting pedestrians and cyclists from commercial motor vehicles (CMV) making right turns. As many have probably seen, when a longer truck turns right, it often hits or drives onto the curb. In addition, many fatalities have occurred when trucks turn right on green as they do not yield to pedestrians and cyclists who have the right of way as they travel across the red light street where the traffic is stopped or are cycling to the left of the truck with the green light.

During a recent 5-year period, 1,746 pedestrians and cyclists in the U.S. were killed from impacts with large trucks, with 32% of these happening after an initial impact with the side of the truck. As to cyclists, 37% of these fatalities happened on the right side when the truck impacts the cyclist.

These fatalities, or life-altering injuries when the victim survives, are always due to the negligence of the CMV driver. In obtaining a commercial driver's license (CDL), the drivers learn about the dangers of turns. Left hand turns are to be avoided whenever possible and a route selected where right hand turns are used instead, as they are safer for vehicles travelling toward the CMV. However, this necessarily means that more cyclists and pedestrians are at risk, particularly in suburban and urban areas where more people are moving by self-propel and where bike lanes are becoming more available.

The best solution is for the CMVs to not turn right when anyone is crossing a street or intersection next to the truck. But as we know, negligence is not so easily deterred, and blind spots are present with all trucks. The other necessary change, which is very affordable, is to require that all trucks be fitted, including retrofitted, with side guards. With a cost in the U.S. of approximately $1,200-2,500 per vehicle, these side guards are lightweight, and easy to retrofit. The concept is that when the truck turns, any light weight traffic on other side of the truck is pushed out of the way as opposed to being swept under the truck and crushed by the wheels.

Given that in 2015, nearly 40% of all Class 1-5 fleet trucks were purchased by public entities, local governments have a large role that they can play in requiring side underride protection for the benefit of its constituents. Support for these efforts can be gained by simply pointing to what is happening overseas. In countries where these guards are required, cyclist fatalities are down 61%, and pedestrian fatalities are down 20%. Japan has required these since 1979, while the UK was not far behind in adopting the technology in 1983, the rest of the European Union in 1988, and China in 1989.

In the U.S. several very large cities now require this technology on trucks purchased by public entities within the jurisdiction and by contractors completing work on public projects. However, Ohio does not yet have any. In fact, outside of the states bordering the Atlantic and Pacific Oceans, only Chicago has such an ordinance in place. Although we are far behind many other countries, catching up can be done quickly. If you know of an elected official who would be willing to listen to a presentation on this topic, please let OAJ staff or Trucking Section officers, including me, know.

****

Our next meeting is August 17th at 10:00 a.m. in Columbus at the OAJ Headquarters in Dublin. If you are interested in joining our section for the low cost of $100 annually, please contact Meghan Finke at 614-341-6800, or bring your dues with you to the meeting.

Our Full Day Trucking CLE is September 7th in Columbus. We will have a host of speakers covering topics on issues that are unique and have not been covered in our CLEs in any extensive way, so that if you get a call on a case that is not run of the mill, you will hopefully have

Girls Can Do Anything
Susan Petersen, Esq., Chardon, OH

As the youngest of four girls, I never really gave it any thought. My mother always told me girls could do anything that boys could do . . . and better. She told me to keep that last part to myself so as not to make any boys feel bad. (*Sorry for spilling the beans on our secret, Mom*). I grew up believing that I could achieve anything I set out to achieve. Nothing or no one could get in my way so long as I believed in myself. I always had a passion for writing and public speaking. During my junior year of college, I landed a job as a television news reporter. After graduation, I worked on-the-air in Youngstown, Steubenville, Wheeling and finally, Cleveland, at WEWS - Newschannel 5. If anything, being a woman seemed like an asset to my career path. When I decided to expand my passion to law, I didn't think twice about the issue of gender. And indeed, in law school, gender was not an issue. Almost half of my graduating class at Cleveland-Marshall College of Law in 1997 was female.

It wasn't until I entered the profession, that I realized that gender might be an issue at times. It wasn't something that smacked me in the face. It was a gradual realization . . . an occasional comment here, an incident there. I started to notice my male colleagues had a much easier time of being "brought up" . . . afternoons where the male partners invited all the male associates to go golfing with co-counsel while all the female associates remained back at the office. We did not say anything, but we noticed.

Then there was my first solo jury trial. It is one I will never forget. I started to get an odd feeling that it was going to be different for me than the male defense lawyer when at the start of voir dire, the judge asked me if I was married . . . right there in front of the jury. And it was the way he said it. I heard the men on the jury panel chuckle. From there, it got worse. At one point, I was in chambers arguing a motion and he actually said, "Honey, you're much better off if you just sit there and look pretty." I didn't know how to respond. From there, it just got worse. My clients' son happened to be an out-of-state federal judge. He came to watch one of the days. We got called back to chambers and the son/judge came along and introduced himself. Without hesitation, our judge smiled and said, "Well, it's good to see that they have someone advising them." (Note: This wasn't 1873, but more than 125 years after the first woman was admitted to the practice of law in Ohio). I actually thought about quitting law that week. It was the worst experience of my career and one I hope no other young woman ever must endure.

Most importantly, it made me realize that as a woman – no matter how confident, intelligent or head-strong – you cannot achieve full success alone. Like the first generation of trailblazing female lawyers, women must support women. . . period.

Fortunately, it was right around that time that I was asked by Steven Steinglass, the Dean of Cleveland-Marshall College of Law to help put together a video documentary on its first 100 female graduates for Women's History Month. "Sure Dean, when's Women's History Month?" In one of our planning meetings, I distinctly remember hearing a distinguished female judge and committee member comment, "I think the problem with the young female lawyers of today is they think they don't need each other." As a young female lawyer, I thought to myself how dare she? How could she say that?

That comment inspired me to get involved. I joined the Ohio Women's Bar Association (OWBA) and ultimately, served as President in 2007. I became an advocate for women supporting women in the profession. This included in trial work, becoming a member of this Women's Caucus.

Many years have passed since I started on this journey as a female trial attorney and boy, have things come a long way and yet, we still have much to do. My husband and law partner covered a final pretrial for me last week. The male defense attorney commented about his partner's poor relationship with me and said something to the effect of . . . "I have to admit that I don't think she'd get the same treatment if she were a guy." While I know disparate treatment still exists, his comment was a reality check that it still exists for me . . . even after 20 years.

The powerful #METOO movement of this last year has caused all of us to reflect. I believe #METOO is having a positive ripple effect on our profession. I am so inspired to see women uniting forces and supporting one another. It is so important.

This year, I am proud to serve as the Women's Caucus Chair for OAJ. I will do my very best to keep up the momentum to unite our group and inspire everyone to look at things with a different eye and hopefully a new mindset. Over the years, I have had both young male and female lawyers ask me, do you really think your involvement in these non-chargeable activities is worth all your time? My immediate response was absolutely "yes." Each of us has an obligation to give back to our profession. Connections define the level of your success. I want to be part of a team where I am reminded to demand the ball, to champion one another, to lead from the bench, and make failures our fuel.

Click here to continue reading on page 16...

New Rule for Lumbar Fusion Places Unreasonable Burden on Injured Workers and Their Doctors

Michael Dusseau, Esq., Columbus, OH

On January 1, 2018, a new rule, Ohio Administrative Code 4123-6-32, regarding authorization of lumbar fusion surgery, took effect. The rule sets forth a long list of preconditions both the injured worker and surgeon must meet in order to receive approval for a lumbar fusion surgery. Presumably, this rule was promulgated to not only cut claim costs by reducing the number of approved fusions, but to also ensure that a lumbar fusion is used only as a procedure of last resort.

In theory, a rule that requires certain measures be taken prior to such a significant surgery may make some sense. However, as currently written, the requirements contained in OAC 4123-6-32 are so stringent and unrealistic that even the most deserving claimant will be unable to receive this treatment. In these cases, the injured worker will unnecessarily suffer and will likely spend more time on disability seeking treatment that will not ultimately fix their problems.

While only enacted several months ago, the effects of OAC 4123-6-32 are already being felt. In some instances when the requirements of this rule have not been met, MCO's have dismissed the treatment request before it can even be addressed by the Bureau or Industrial Commission. When the fusion requests reach the Industrial Commission, hearing officers have denied them solely because all preconditions of the rule have not been met. One of the biggest issues with this rule is that it has taken what should be a purely medical determination and has made it into a legal issue. Virtually all other treatment requests before the Commission are approved or denied based upon whether the treatment is reasonable and necessary for the allowed conditions in the claim. This is how treatment requests always have and should be addressed. However, even in cases where the fusion is reasonable and necessary to treat the allowed conditions, the Bureau and self insured employers will certainly use the claimant's inability to meet all of the 4123-6-32 requirements as a basis for denying the request. Is this how we should be treating injured workers who are in need of surgery and want to improve medically?

Another negative impact of this rule is that it may reduce the number of Ohio BWC certified physicians who will be willing to perform lumbar fusions in these claims. Physicians have already expressed their frustration with the rule and its unreasonableness. This is understandable as it is apparent these physicians' opinions, expertise and motive are all under attack. Before being able to request a fusion, the rule dictates what treatment the surgeon must attempt, the type of testing that needs to be performed, how many times the surgeon needs to examine the injured worker, and what needs to be documented in his exam report. Amazingly, one of the many additional requirements is that the provider shall avoid catastrophizing the lumbar MRI findings. This provision suggests that providers aren't always acting in the claimants' best interest. The rule further dictates the surgeon's post operative care and requires the surgeon to treat the injured worker until he has reached maximum medical improvement. If the providers fail to comply with the requirements of this rule, they may even be subject to the peer review committee on their eligibility to treat through the BWC system.

Finally, the injured worker, surgeon and physician of record must review and sign the appendix to 4123-6-32: "What BWC wants you to know about Lumbar Fusion Surgery." This form lists statistics regarding the ineffectiveness of fusion surgeries from unnamed studies that are not verified or properly cited in the rule. This may be the most ridiculous provision of the rule. Clearly this form is meant to scare and dissuade the claimant from pursuing surgery. However, and more importantly, it will be difficult, if not impossible, to convince a physician to sign this form. Several OAJ members have already been contacted by surgeons who were instructed by their malpractice carriers to not sign this form as it essentially admits fault in performing the fusion. Honestly, I wouldn't blame a physician for refusing to sign a form indicating the surgery they are about to perform will likely not work. One of the challenges of any workers' compensation practitioner is obtaining appropriate medical care and paperwork from a Bureau certified medical provider. This rule will only make it more difficult to find physicians willing to comply with these demands. Again, without physicians who are willing to aggressively treat and fight for claimants, injured workers will be the ones unjustly harmed by this rule.

I urge you to spend some time and read this rule in its entirety. I am confident that after you read this rule you too will be frustrated and concerned about obtaining the necessary treatment for your clients. OAJ is and will continue to communicate with the BWC about its concern with the rule. We need to collectively voice our thoughts on these requirements or a BWC approved lumbar fusion will be a thing of the past.

HIPAA: Kryptonite for Privacy Claims

Steve Goldberg, Esq., Cleveland, OH

HIPAA (the **H**ealth **I**nsurance **P**ortability and **A**ccountability **A**ct of 1996) does not create a private right of action.

In Ohio, that proposition has become axiomatic. When a legal premise gets repeated often enough, the malleability of common law tends to get overlooked.

The Law in Flux?

But sometimes it is good be reminded that not all "well settled" propositions stay well settled. In the very recently reported Connecticut case *Byrne v. Avery Ctr. for Obstetrics & Gynecology P.C.*,[1] the state's supreme court rendered a decision that may open the door to other states reconsidering HIPAA's place within state common law claims for unauthorized disclosure of medical information. In Connecticut, patients are now permitted to sue providers based on the standards set forth in HIPAA.

In *Byrne*, the plaintiff was embroiled in a paternity action with the putative father in which the defendant health care provider was subpoenaed to produce plaintiff's gynecological and obstetrical medical records. The health care provider conceded that it violated the standards established under HIPAA, as set forth in Section 164.512(e)(1) of title 45 of the Code of Federal Regulations, by unilaterally complying with the subpoena. Under that section, a healthcare provider is permitted to disclose a patient's confidential medical information based on a subpoena, which is not accompanied with an order of a court or administrative tribunal, only if the patient receives adequate notice or a qualified protective order has been sought.

Following the disclosure of her medical information, the plaintiff sued, relying in part on the federal standards. She claimed that a civil remedy exists against a physician who, without a patient's consent, discloses confidential information obtained in the course of the physician-patient relationship. The Connecticut Supreme Court ultimately held that a duty of confidentiality arises from the physician-patient relationship, and that unauthorized disclosure of confidential information obtained in the course of that relationship rises to the level of being a cause of action sounding in tort against the health care provider. Importantly, HIPAA was recognized as the baseline standard of care under the newly recognized tort claim, which is similar to Ohio's version.

Ohio has not yet taken that step to permit patients to rely on HIPAA as the standard of care. Ohio follows the majority of jurisdictions in which it is concluded that, because HIPAA does not create a private right of action, the state cannot impute the HIPAA standards into a common law, unauthorized disclosure claim. Accordingly, it is important to review where Ohio law stands with respect to an unauthorized disclosure of medical information claims in light of the recent developments.

Biddle v. Warren Gen. Hosp.

In *Biddle v. Warren Gen. Hosp.*,[2] several patients filed a class action lawsuit against the health care provider and its law firm, claiming that the hospital disclosed confidential medical information without authorization. The provider had released the patients' medical information in order for the provider's law firm to search for potential sources federal funding to cover the unpaid medical bills. None of the patients had consented to the disclosure. The Ohio Supreme Court recognized an independent, common law tort for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information, holding that without an authorization, a physician or hospital may disclose otherwise confidential medical information only in those special situations where the disclosure is made in accordance with a statutory mandate or common-law duty, or where the disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality. The court held further that a third party may be liable for inducing the unauthorized disclosure of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship.

The Limitations of *Biddle*

Biddle is narrowly framed, and although decided before the enactment of HIPAA, a cause of action for unauthorized, unprivileged disclosure to a third party under *Biddle* remains viable.[3] Under *Biddle*, liability may be established against two parties: (1) a physician or hospital that commits an unauthorized and unprivileged disclosure, and (2) a third-party that induces the disclosure to be made.[4]

The *Biddle* common law tort does not extend to third parties who receive medical information but who did not induce the disclosures, such as an employer who receives an employee's medical information through an otherwise authorized disclosure.[5] And, although *Biddle* recognized limited exceptions for a physician or hospital's unauthorized disclosure, the principles underlying Biddle cannot be used to obtain discovery related to the confidential medical information of nonparties who have not waived the physician-patient privilege or otherwise consented to the disclosure – even if information is redacted to preserve confidentiality.[6]

Click here to continue reading article.

Driverless Vehicles

Robert Miller, Esq., Columbus, OH

Governor John Kasich recently signed an executive order permitting autonomous car testing on any public road in the state. Kasich said he wants to make Ohio a "wild, wild west" for autonomous car testing, removing any legal barriers that would currently restrict such testing. Not only does this allow autonomous cars with a backup driver behind the wheel as seen in Arizona, but also cars with no driver on board at all. Most states, especially in the wake of a fatal crash in Arizona, are holding back on the loosening of regulations allowing even greater autonomy than test cars have now.

The Arizona fatality is the first known death involving a self-driving car. Reports indicate that the autonomous vehicle struck a woman walking her bicycle in the late evening, and that the vehicle was moving at about 40 MPH without slowing down. A review of the data indicates that the sensors detected the woman but did not view her as a threat to the safe operation of the vehicle. Autonomous vehicles have to be able to process the environment around them and successfully determine what may be, for instance, a pedestrian that needs to be avoided, as opposed to a piece of newspaper blowing around in the roadway that can be safely ignored. There is little doubt that this case serves as a harbinger of things to come, and no matter how far-fetched it may seem that our interstates will one day be full of autonomous vehicles, it may come sooner than we think.

Advances in automotive technology have remained remarkably steady over the last 50 years. A brochure for 1958 Chryslers and Imperials touted a new feature called "Auto-Pilot," which was described as "an amazing new device that helps you maintain a constant speed and warns you of excessive speed." Today we of course know this as cruise control. Anti-lock brakes have been commercially available since the 1970s. Electronic stability control was introduced in the mid-1990s. In recent years, "driver assist" technologies have become prevalent, such as automated braking systems to avoid forward collisions and automated parallel parking systems. Nevertheless, no matter how conditioned we have become to such automations, ceding most, if not all, control of our vehicles to onboard computers feels like a leap in technology that we may not be fully prepared for. From a legal standpoint, it could result in a sea-change for how garden variety automobile accident cases are litigated.

If Governor Kasich gets his wish and Ohio becomes the wild, wild, west for autonomous cars, product liability attorneys are going to have to deal with the fallout under the law as it is presently constructed, and product liability claims are certain to have a role.

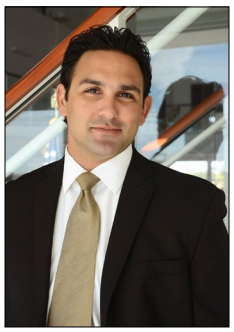
For instance, if a vehicle is fully automated there is technically no operator. One could potentially be riding in the vehicle just as one would ride a city bus. Would the fact that they may actually own the vehicle change the liability picture? And what role will insurance play? Will no-fault legislation come to Ohio? Will human error be completely ruled out or does the driver have a responsibility to maintain and service the vehicle in compliance with the manufacturer's instructions? Will we move completely away from the traditional user/driver error to defaults caused by defects in the technology products used in the vehicle? At this point there are more questions than answers.

If Governor Kasich gets his wish and Ohio becomes the wild, wild, west for autonomous cars, product liability attorneys are going to have to deal with the fallout under the law as it is presently constructed, and product liability claims are certain to have a role. Autonomous vehicle claims will therefore be analyzed under the risk-benefit analysis codified in O.R.C. 2307.75. Since these types of claims have only just begun to develop (the Arizona Uber case settled days after the event without the benefit of discovery), we are forced to make educated guesses about where investigations may take us. Here some thoughts.

Software defects pose a potentially fertile ground for autonomous vehicle product errors. For instance, software designs that depend on inadequate sensor data (either in terms of content or transmission speed) or that fail to perform safe driving maneuvers. Inadequate pattern recognition, collision avoidance algorithms, or human-computer coordination may also lead to errors. This type of information will likely be available in what amounts to 'black box' data recording devices.

It would be advisable to review whatever testing procedures and risk assessments are available to see if the manufacturer is looking for data in a responsible way as these new devices interact with the driving environment. Determine whether the manufacturer has kept documentation up to date to justify the steps taken with respect to design, manufacturing and testing processes and to see if it failed to act reasonably with regard to state of the art developments and any relevant industry standards.

Click here to continue reading on page 16...



Warning: Federal Preemption may be Getting Worse

Dustin Herman, Esq., Cleveland, OH

The Supreme Court's preemption jurisprudence is already bad enough, but things might get a lot worse. As it currently stands, generally speaking, lawsuits involving generic drugs are preempted, but suits involving brand-name drugs are not. The Supreme Court is currently (at the time of this writing) deciding whether to accept cert on the Fosamax litigation. If the Court accepts cert, it will be revisiting its landmark decision in *Wyeth v. Levine*, 555 U.S. 555 (2009) – which held suits against brand-name drug manufacturers were generally *not* preempted.

Even if the Court denies cert in this case (there is no circuit court split yet), it will certainly be revisiting *Wyeth* in the not-so-distant future. This is something to pay attention to because the Supreme Court could significantly increase the breadth of its "impossibility" conflict preemption as it pertains to brand-name drugs when it has the opportunity to revisit *Wyeth*.

Wyeth v. Levine (2009)

The Court in *Wyeth* held that because brand-name drug companies can unilaterally change their labels *without obtaining prior FDA approval*, which they can do through the "changes being effected" ("CBE") process,[1] it is possible (i.e., not impossible) for those companies to comply with state laws requiring stronger warnings without violating federal law. Of course, a drug company would still need to obtain FDA approval after making a CBE change, but "absent clear evidence that the FDA would not have approved a change to [the drug's] label, we will not conclude that it was impossible for *Wyeth* to comply with both federal and state requirements." *Wyeth*, 555 U.S. at 571. Thus, absent this "clear evidence" exception, state law failure-to-warn claims against brand-name drug manufacturers are not preempted by federal law.

PLIVA, Inc. v. Mensing (2011)

On the other hand, warning labels for *generic* drugs must mirror the corresponding brand-name drug label, and, under the current FDA regulations, a generic drug manufacturer cannot independently change its warning label; it must obtain prior FDA approval to do so.[2] Under this legal framework, the Court in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011) held that because generic drug manufacturers "have an ongoing federal duty of 'sameness'" with respect to the corresponding brand-name labels, it was impossible for a generic drug manufacturer to comply with both a state tort law duty to have a stronger warning label and its federal duty to have the exact same label as the corresponding brand-name drug (that is, state law required what federal law prohibited). *Mensing*, 564 U.S. at 615-18. Thus, state law failure-to-warn claims (and design-defect claims that turn on the adequacy of the warning[3]) brought against generic drug manufacturers are preempted by federal law.

In her dissenting opinion in *Mensing*, Justice Sotomayor said, wait a minute, the generic drug company didn't even fulfill its federal obligation to reach out to the FDA and propose a label change when it became aware of safety problems with its warning label, so it wasn't necessarily "impossible" to comply with both federal law and state law, it's just that the company didn't even try. *Mensing*, 564 U.S. at 636-37. "Accordingly, as in *Wyeth*, I would require the Manufacturers to show that the FDA would not have approved a proposed label change." Id. at 637 (arguing that there should be no preemption unless the manufacturers met the "clear evidence" exception set forth in *Wyeth*).

Justice Thomas, writing for the majority, countered by focusing on what state law required: "Although requesting FDA assistance would have satisfied the Manufacturer's federal duty, it would not have satisfied their state tort-law duty to provide adequate labeling. State law demanded a safer label; it did not instruct the Manufacturers to communicate with the FDA about the possibility of a safer label." *Mensing*, 564 U.S. at 619. "The question for 'impossibility' is whether the private party could independently do under federal law what state law requires of it." *Id.* at 620.

Reading *Wyeth* and *Mensing* together, the bottom line is that if a drug company can unilaterally – that is, independently – change a warning label *without obtaining prior* FDA approval (even if subsequent approval is required), failure-to-warn claims are *not* preempted; but if prior FDA approval is necessary, then such claims are preempted. *Wyeth's* exception to this rule applies in cases where there is "clear evidence" that the FDA would have rejected the warning that plaintiffs claim was required by state law. But the Court gave no further instruction on what it meant by "clear evidence" or who gets to decide what counts as clear evidence (judge or jury). The Fosamax case brings these issues to a head.

In re Fosamax

Fosamax is a brand-name drug used to treat osteoporosis and is in the class of drugs known as bisphosphonates. "Between 1995 and 2010, scores of case studies, reports, and articles were published documenting possible connections between long-term bisphosphonate use and atypical femoral fractures." *In re Fosamax (Alendronate Sodium) Products Liab. Litigation*, 852 F.3d 268, 275 (3d Cir. 2017).

SSI and "In-Kind Support and Maintenance" Income. How Knowledge of this Rule can Benefit Your Clients.

Jay Dixon Esq., Columbus, OH

The Social Security Administration administers 2 core disability programs, the Social Security Disability Insurance program, and the Supplemental Security Income program.[1] Both programs have the same requirements in regards to the medical standard of disability, but they differ in regards to other aspects of eligibility.[2]

Put simply, eligibility for SSDI is established when an individual meets the medical standard for disability and has paid enough Social Security taxes over their working life to be "fully" and "currently" insured.[3] SSI eligibility is established when an individual meets the medical standard for disability and demonstrates financial need.[4] To demonstrate financial need, the individual must have limited income and limited resources.[5] An individual may have income high enough that it precludes their ability to receive any SSI benefit.[6] In other situations the income may be significant enough that the SSI benefit is reduced, but not altogether precluded.[7]

Certain types of income are obvious. If the individual is working and earning a wage or salary, this will be counted as income.

Other types of "income," however, are less obvious. Consider an example:

Jane Claimant has no cash income. Jane lives with a friend for free (without contributing or paying her "fair share" of the household expenses). The total household expenses (rent, utilities, food, etc.) are $2,000.00 per month. Jane and 3 other individuals live in the household.

Social Security considers Jane to be receiving "in-kind support and maintenance," which they define as "food or shelter that somebody else provides for you."[8] Social Security counts this in-kind support and maintenance (hereinafter "IKSM") as income.[9]

The current (2018) SSI federal benefit rate is $750.00.[10] If Social Security were to count the total amount of this IKSM ($2,000.00 ÷ 4 (number of people in the household) = $500.00) against Jane, she would receive an SSI benefit of only $250.00 per month. However, the Social Security "One-Third Reduction Rule" caps the offset at one third of the total SSI benefit.[11] In this case, then, Jane's benefit would be $500.

There are several important take-aways from the IKSM/income rules:

First, very few SSI recipients are aware of this rule despite the fact that this rule is invoked extremely frequently. It is important to educate claimants about this rule such that they understand why their benefit may be reduced. Consider a situation where an individual's benefit is being reduced (from $750 to $500 per month), and this reduction is precluding them from leaving their current living situation and moving into an independent living situation. It is important for them to know that "moving out" and paying their own expenses will result in their monthly benefit being increased to the full $750 amount. Without understanding the reason their benefit is being decreased, they may not believe they have the financial resources to move into another living situation.

Second, there are certain instances where it makes more sense for SSI recipients to begin contributing to household expenses to stop the IKSM deduction. Consider the following example:

Ben Claimant has no cash income, but lives with his mother for free. The household expenses ($1,250.00) divided by the members of the household (5 people) equals $250.00. If Ben does not contribute his "fair share" to the household expenses, Social Security will cut his benefit by $250.00 per month.

This scenario presents an obvious course of action: Ben should begin contributing $250.00 per month to household expenses. This will mean that he is not receiving IKSM (because he is paying his "fair share" of the expenses) and so his benefit amount will increase to the full $750.00. This is a financially neutral outcome for Ben (either way he has $500 remaining for his personal expenses). But there is a benefit here to the household because Ben is now contributing his $250.00 share. As such, this is a net positive to the household.

The specific financial circumstances must be considered to determine if it makes sense to advise the recipient whether to begin contributing their "fair share" to the household expenses.

If the financials indicate it makes sense to begin paying the "fair share," it is advantageous to catch this as early on in the SSI application/adjudication process as possible. Consider another example:

Our "Ben Claimant" from above applied for SSI benefits on 6/1/16, and was approved on 6/1/18 after a hearing before an Administrative Law Judge (this 2 year wait time reflects a typical wait time for an SSDI/SSI claim that goes to the hearing level of review). Ben's "Date of Entitlement" is 6/1/16, meaning he will receive 24 months of back-pay. Ben's attorney informs him, after being approved, of the situation with his IKSM income.

Click here to continue reading on page 16...

Women's Caucus article continued from page 10...

My involvement with Cleveland-Marshall's video documentary, "Remember the Ladies" – so many years ago certainly changed my outlook on the practice. Most importantly, it made me realize that as a woman – no matter how confident, intelligent or head-strong – you cannot achieve full success alone. Like the first generation of trailblazing female lawyers, women must support women. . . period.

Whatever you want to call it – a network, a team, a sisterhood, a #METOO movement – you need it. Get involved with our Women's Caucus. Supporting women in the practice is so very important regardless of your gender. Spread the word.

(And just in case someone was wondering . . . March is Women's History Month. And my Mom was right – girls can do anything).

Products Liability continued from page 13...

Review product warnings and instructions provided to consumers and determine whether they are appropriately updated to address evolving consumer expectations. Check for recalls on the systems. There are sure to be many.

Finally, take care in finding the appropriate expert. There is little doubt that professional experts will attempt to cash in on this frontier even though they have little understanding of the engineering behind these burgeoning systems. Find someone with design experience. It may be costly, but it will be entirely necessary.

Looking further down the road, it is interesting to contemplate how autonomous vehicles will be regulated fifteen or twenty years from today. Will there be federal regulation or will it be entirely state driven? The National Highway Traffic Safety Administration (NHTSA) is the federal agency with responsibility for motor vehicle safety. The agency has yet to establish detailed regulatory standards for autonomous vehicles, which could conceivably preempt state law; or, NHTSA might simply provide some baseline framework and leave the states relatively free to take their own approaches. Product liability attorneys who have an interest in this science would be wise to stay abreast of developments in the law across all states. Ohio courts will certainly be inclined to look at how other states have addressed novel issues and there will be ample opportunity to shape Ohio law going forward.

Where science goes so goes the law. Right now, on this topic, we're in the wild, wild west.

Social Security article continued from page 15...

Realizing he can benefit his household by $250.00 per month, Ben informs Social Security that he is contributing his fair share, and so Ben's ongoing benefit will be $750.00 per month. However, Ben's attorney did not discuss this issue with Ben before the claim was approved.

Because Ben was living with another for free over the time period his 24 months of SSI backpay will be reduced, each month, by one third. In total this reflects a $6,000.00 reduction in his backpay.

The ideal course of action here would have been for Ben's attorney to discuss IKSM with him at the outset of representation. Social Security will respect a written loan agreement (that must meet specific criteria, see Program Operations Manual System (POMS) SI 00835.482) in regards to the IKSM from the date it is executed forward. In short, if Ben had promised, in writing, to repay his "fair share" of the household expenses over the time period 6/1/16 forward, there would have been no IKSM reduction and his household would have $6,000.00 more in backpay to aid with their financial needs.

Social Security Disability/SSI attorneys should inquire as to a client's living situation at the outset of representation to determine if a discussion about IKSM is needed. As is clear from the above examples, that simple discussion may have a large benefit to the claimant and the members of his household.

End Notes:

1. 20 C.F.R. § 404.315, 20 C.F.R. § 416.202
2. *Id.*
3. 20 C.F.R. § 404.315, 20 C.F.R. § 404.130
4. 20 C.F.R. § 416.202, 20 C.F.R. § 406, Subpart K
5. *Id.*
6. *Id.*
7. *Id.*

8. 20 C.F.R. § 416.1130
9. *Id.*
10. Social Security Administration, SSI Federal Payment Amounts For 2018, available at https://www.ssa.gov/OACT/cola/SSI.html (last visited June 15, 2018).
11. 20 C.F.R. § 416.1131