2017 - 2018
Case Law Update on
Appellate Medical Malpractice Cases

By

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I. CAUSES OF ACTION

A. Medical Claim

1. *Chalmers v. HCR Manorcare, Inc., et al.*
   6th Dist. Lucas No. L-16-1143, 2017-Ohio-5678

   a. Claims against the nursing home entities constituted medical claims

2. *Christian v. Kettering Med. Ctr.*
   2nd Dist. Montgomery No. 27458, 2017-Ohio-7928

   a. Hospital employee transferring plaintiff from vehicle to a wheelchair did not constitute a medical claim

3. *Lerner v. Broadview NH, LLC*
   10th Dist. Franklin NO. 16AP-512, 2017-Ohio-8001

   a. Claims relating to care of bedsores, nasal cannula and pain medications were medical claims.

   b. The other claims stated in the complaint did not allege sufficient facts to establish medical claims that could be the subject of a motion to dismiss

4. *Crissinger v. The Christ Hosp.*
   1st Dist. Hamilton Nos. C-150796, C-160157, 2017-Ohio-9256

   a. The plaintiff's claims for battery, lack of informed consent, infliction of emotional distress, vicarious liability and spoliation of evidence were all medical claims

5. *Howard v. HCR Manorcare*
2nd Dist. Clark No. 2016-CA-75, 2018-Ohio-1053

a. Judgment on the pleadings as to whether the plaintiff asserted medical claims was error without sufficient facts to make such a ruling

6. *Evans v. Ohio Department of Rehabilitations and Correct*
10th Dist. No. 16AP-767, 2018-Ohio-1035

a. A medical claim can be asserted against the Ohio Department of Rehabilitation and Corrections

7. *Birkmeier v. St. Rita's Med. Ctr.*
3rd Dist. Allen No. 1-17-57, 2018-Ohio-2343

a. Medical employees of a hospital such as nurses, technicians and other assistants are amendable to medical claims

B. Infliction of Emotional Distress

1. *White v. Bhatt*
5th Dist. Richland No. 17CA30, 2017-Ohio-9277

a. The plaintiff failed to submit competent evidence to establish serious emotional injury as a result of the defendant's treatment of decedent

b. No competent evidence to support claim of abuse of an unconscious or deceased person

C. Medical Battery

1. *Miller v. MetroHealth Med. Ctr.*
8th Dist. Cuyahoga No. 106104, 2018-Ohio-1202

a. There exists no claim for a medical battery where the plaintiff offered no evidence that he told the surgeon that he did not want him to perform the second surgery or that he revoked his written consent

D. Spoliation of Evidence

1. *Elliott-Thomas v. Smith*
Slip Opinion No. 2018-Ohio-1783

a. Allegations of intentional interference with or concealment of evidence are not actionable under the independent tort of intentional spoliation of evidence

b. There are other adequate remedies like discovery sanctions or ethical actions.

II. AFFIDAVIT OF MERIT

A. *Caldwell v. Promedia Health Systems*
6th Dist. Lucas No. L-17-1050, 2017-Ohio-7979

1. Trial court properly struck a motion for extension of time to file an affidavit of merit and dismissed the action where the plaintiff neither filed an affidavit of merit nor filed a motion for an extension of time contemporaneously with the complaint.

B. *Howard v. HCR Manorcare*
2nd Dist. Clark No. 2016-CA-75, 2018-Ohio-1053

1. Trial court erred in granting a motion for judgment on the pleadings without deciding whether the affidavit of merit was defective in the first place

2. If the affidavit of merit was defective, the plaintiff should have been provided a chance to cure the defect under Civ. R. 10(D)(2)(e)

C. *Chalmers v. HCR Manorcare, Inc., et al.*
6th Dist. Lucas No. L-16-1143, 2017-Ohio-5678

1. The affidavit of merit did not include expert testimony as to the cause of death and, thus, it was defective.

2. Also, a nurse is not competent to provide an expert opinion on causation in an affidavit of merit

3. However, the trial court should have provided reasonable time to cure the affidavit of merit defect under Civ. R. 10(2)(D)(2)(e)

D. *Estate of Aulkand v. Broadview NH, LLC*
10th Dist. Franklin No. 16AP-661, 2017-Ohio-5602

1. Where neither an affidavit of merit is filed with a complaint nor a motion for extension of time is filed with a complaint, a plaintiff is not entitled to correct a defect in an affidavit of merit under Civ. R. 10(D)(2)(e)

E. *Taylor v. Gazall*
2nd Dist. Montgomery No. 27305, 2017-Ohio-5492

1. The trial court properly refused to consider an affidavit of merit as summary judgment evidence

F. *Bixby v. The Ohio State Univ.*
10th Dist. Franklin No. 17AP-802, 2018-Ohio-2016

1. Trial court did not err in dismissing a complaint that did not have an affidavit of merit

G. *Smith v. The Laurels of Canton, LLC*
5th Dist. Stark No. 2017 CA 00217, 2018-Ohio-2369

1. A nurse practitioner was incompetent to submit an affidavit of merit with a causation opinion

2. Causation was not within the common knowledge of a layperson

3. The plaintiff chose not to submit another affidavit when given the opportunity and, thus, the trial court properly dismissed the case

H. *Wallace v. Ohio Health Corp.*
10th Dist. Franklin No. 18AP-279, 2018-Ohio-4293

1. At the pleading stage alone, the trial court could not determine that the common knowledge exception to the affidavit of merit applied and, thus, it erred in dismissing the case on the basis that an affidavit of merit was required

III. STATUTE OF REPOSE

A. Wrongful Death

1. *Smith v. Wyandot Memorial Hospital*
3rd Dist. Wyandot No. 16-17-07, 2018-Ohio-2441

a. The Statute of Repose in R.C. 2305.113(C) applies to wrongful death actions.

2. *Crissinger v. The Christ Hosp.*
1st Dist. Hamilton Nos. C-150796, C-160157, 2017-Ohio-9256

a. The Statute of Repose does not contain a fraud exception for medical claims

B. Savings Statute - there is an original action pending in the Ohio Supreme Court

1. *State of Ohio ex rel. v. McCarty*
Sup. Ct. Case No. 2018-0965

a. The trial court denied a motion to dismiss that argued that the savings statute cannot be used beyond the Statute of Repose

IV. STATUTE OF LIMITATIONS

A. *Birkmeier v. St. Rita's Med. Ctr.*
3rd Dist. Allen No. 1-17-57, 2018-Ohio-2343

1. The termination rule does not apply where there was no physician-patient relationship to begin with

2. Where no negligence is alleged against a physician, the termination rule does not apply when the plaintiff ceases treatment with the medical entity

B. *Garcia v. Parenteau*
3rd Dist. Hancock No. 5-17-13, 2017-Ohio-8519

1. The cognizable event is not the discovery of relevant facts later in the process of investigating the medical malpractice claim, *i.e.,* the identity of an alleged physician

2. The cognizable event triggers the running of the statute of limitations at the time the plaintiff becomes aware that a medical malpractice claim exists

C. *George v. Univ. of Toledo Med. Ctr*.
10th Dist. Franklin No. 17AP 559, 2018-Ohio-719

1. A claim does not accrue when another physician informs the patient that his condition was the result of medical malpractice

D. *Cartwright v. Akron General Med. Ctr.*
9th Dist. Summit No. 28744

1. The discharge of the plaintiff from the hospital was not the cognizable event

2. The plaintiff's pain and bleeding that was experienced after the allegedly negligent removal of a drain was the cognizable event

E. *Evans v. Henderson*
10th Dist. Franklin No. 17AP-765, 2018-Ohio-2531

1. The plaintiff's claims for assault and battery were in essence medical claims and, thus, governed by the one-year statute of limitations

F. *Taylor v. Mizer*
4th Dist. Highland No. 18CA2, 2018-Ohio-3779

1. The statute of limitations began to run on the date the plaintiff cancelled a follow-up visit with the physician

G. *Pearsall v. Guernsey, DDS*
3rd Dist. Hancock No. 5-16-25, 2017-Ohio- 681

1. The cognizable event triggering the commencement of the one-year statute of limitations occurred when the Plaintiff terminated her relationship with the dental clinic.

V. SAVINGS STATUTE

A. *Moore v. Mt. Carmel Health System*
10th Dist. Franklin No. 2017 APE-10-754, 2018-Ohio-2831

1. Where the original complaint failed otherwise on the merits (without prejudice) and the request for service acted as a refiling of the complaint within one year of the failure, the trial court erred in failing to apply the savings statute

2. For the same reason, the savings statute applied to the vicarious liability claim

B. *George v. Univ. of Toledo Med. Ctr.*
10th Dist. Franklin No. 17AP-559

1. The savings statute does not save a claim that was not initially commenced timely

C. *Mims v. Univ. of Toledo Med. Ctr.*
10th Dist. Franklin No. 17AP-203, 2017-Ohio-8979

1. The savings statute does not permit the relitigation of a claim that would otherwise be barred by *res judicata*

D. *Portee v. Cleveland Clinic Foundation*
Slip Opinion No. 2018-Ohio-3263

1. If an action is commenced in another state in either state or federal court and fails otherwise than upon the merits and that underlying statute of limitations has expired, the savings statute does not apply to permit recommencement of the action in Ohio within one year

E. *McCualsky v. Appalachian Behavioral Healthcare*
10th Dist. Franklin No. 17AP-476

1. The savings statute did not apply to a third complaint where the first and second complaints involved the same facts

VI. PROCEDURAL AND GENERAL MATTERS

A. Discovery

1. *Merlin v. Ankle & Foot Care Centers of Ohio*
7th Dist. Mahoning No. 16 MA 0051, 2017-Ohio-4388

a. Receipt of documents on the eve of trial was not grounds for a mistrial

b. The plaintiff decided to proceed with trial as opposed to requesting a continuance in light of the late production of discovery

B. Motion for Relief from Judgment

1. *Summers v. Lancia Nursing Homes, Inc.*
7th Dist. Belmont No. 17 BE 0011, 2017-Ohio-9218

a. Although checking the online docket is not mandatory, the attorneys knew of the online docket and should have checked the docket for the final order

b. Motion for relief was properly overruled

C. Attorney Disqualification

1. *Weadock v. Toha*
2nd Dist. Miami No. 2017-CA-29, 2018-Ohio-2108

a. Trial court properly disqualified the plaintiff's attorney where he participated in events pertaining to an alleged destruction of documents and alleged statements made at a meeting

D. Service of Process

1. *Wright v. Mirza*
1st Dist. Hamilton No. C-160734, 2017-Ohio-7183

   a. Service at an address provided by the defendant in his deposition during the first filing was not sufficient in the second filing

   b. The business address that appeared on the Medical Licensure Board's website was insufficient for service of process

E. Sanctions

1. *Murman v. Univ. Hosp. Health Systems, Inc.*
8th Dist. No. 104726, 2017- Ohio-1282

   a. The trial court did not err in ordering the plaintiffs' law firm to pay the defendant's attorney fees associated with the plaintiffs' bad faith motion to vacate a settlement agreement.

2. *Keith Harper v. Lake Hospital System*
11th Dist. Lake No. 2015-L-137, 2017-Ohio-7361

   a. Sanctions were appropriate where the plaintiff's allegations and other factual contentions had no evidentiary support and were not likely to have evidentiary support, especially after the first deposition of the plaintiff failed to provide supporting evidence

   b. The plaintiff's continued pursuit of the claims after the depositions of key witnesses was frivolous conduct

F. Immunity

1. *Metts v. Ohio Univ. Heritage College of Osteopathic Medicine*
10th Dist. Franklin No. 15AP-1049, 2017-Ohio-1118

   a. Physician was not entitled to immunity where physician had no specific memory of a medical student being physically present in the examination room with the physician and patient

VII. PRIVILEGE

A. *Howell v. Park East Care & Rehabilitation*
8th Dist. Cuyahoga No. 106041, 2018-Ohio-2054

1. The Trial court erred in issuing a blanket order to provide discovery of all of the disputed records without an in-camera review

2. If records are deemed discoverable, information concerning other patients as well as social security numbers and sensitive information must still be redacted

B. *Cousino v. Mercy St. Vincent Med. Ctr*
6th Dist. Lucas No. L-17-1218, 2018-Ohio-1550

1. Trial court erred in ordering the production of documents within the physician's credentialing file since the file was unconditionally privileged and immune under R.C. 2305.252

2. Upon remand, any documents not contained in the credentialing file that the defendant claims are privileged must be established as privileged via an affidavit and submitted under seal for an in-camera inspection

3. Upon remand, the defendant must submit a privilege log pertaining to alleged attorney-client documents

C. *Griffith v. Aultman Hosp.*
5th Dist. Stark No. 2017CA0004, 2017-Ohio-8293

1. The attorney-client privilege does not shield documents and information from production merely because they were gathered and turned over to risk management

2. Work-product - the fact existent medical records were compiled into different data formats does not cause them to lose their underlying status as medical records

D. *Burnham v. Cleveland Clinic*
8th Dist. Cuyahoga No. 102038, 2017-Ohio-1277

1. The trial court did not err in ordering the production of the Safety Events Reporting System

2. There is no indication that the person who completed the SERS report did so in anticipation of litigation or was a risk manager or an employee of the Clinic's Office of General Counsel

VIII. MEDICAL RECORDS

A. *Griffith v. Aultman Hospital*
5th Dist. Stark No. 2017CA0004, 2017-Ohio-8293

1. Hospital's production of the complete "chart" does not necessarily equate to the production of the entire medical record

2. The records kept in the medical records department do not qualify as the only discoverable medical records

B. *Johnson v. Barbosa*
9th Dist. Summit No. 28616, 2018-Ohio-2558

1. There was evidence that the defendant-dentist possessed casts/models and refused to produce them to the plaintiff

IX. SUMMARY JUDGMENT

A. *Harris-Miles v. Lakewood Hosp.*
6th Dist. Erie No. E-17-023, 2018-Ohio-664

1. The plaintiff's expert could not state proximate cause to a reasonable degree of medical probability and, thus, summary judgment was appropriate

B. *Dazley v. Mercy St. Vincent Med. Ctr.*
6th Dist. Lucas No. L-17-1304

1. The trial court did not err in considering the deposition testimony of an expert given in a second deposition taken two years later

2. Habit evidence was admissible but a genuine issue of material fact existed as to whether the physician followed his usual practice

C. *Miller v. The Toledo Hospital*
6th Dist. Lucas No. L-16-1211, 2017-Ohio-2691

1. Plaintiff could not establish a *prima facie* case of negligence because her arguments regarding the elements of a breach of the standard of care and causation were speculative.

D. *Miller v. MetroHealth Med. Ctr.*
8th Dist. Cuyahoga No. 104296, 2017-Ohio-653

1. The trial court erred in striking the plaintiff's brief in opposition to the motion for summary judgment.

2. The plaintiff informed the trial court of the difficulties that he faced in e-filing and in complying with the court's orders.

X. TRIAL MATTERS

A. *Voir Dire*

1. *Cordova v. Emergency Professional Services, Inc.*
8th Dist. Cuyahoga No. 105061, 2017-Ohio-7245

   a. The trial court did not abuse its decision in refusing to excuse a juror who was an internal medicine physician

B. Evidentiary Matters

1. Apology Statute

a. *Stewart v. Vivian*
Slip Opinion 2017-Ohio-7526

1) Under R.C. 2317.43, a statement expressing apology is a statement that expresses a feeling of regret for an unanticipated outcome of the patient's medical care and may include an acknowledgement that patient's medical care fell below the standard of care

2) Trial court properly excluded physician's alleged statements that the decedent told him that she wanted to kill herself

3) Physician's statements were an "attempt" at commiseration

2. Cumulative Testimony

a. *R.T. v. Knobeloch*
10th Dist. Franklin No. 16AP-809, 2018, Ohio-1596

1) The trial court properly excluded an expert witness since his proposed testimony would be cumulative to another expert who already testified at trial

b. *McMichael v. Akron General Med. Ctr.*
9th Dist. Summit No. 28333, 2017-Ohio-7594

1) The trial court did not abuse its discretion with respect to the several experts who testified at trial

3. Market Quotations/Tabulations v. Learned Treatise

a. *Daniels v. Northcoast Anesthesia Providers*
8th Dist. Cuyahoga No. 105125, 2018-Ohio-3562

1) Submitting Lexi-Comp to the jury violated the Learned Treatise exception under Evid. R. 803(18)

2) But. Admission of Lexi-Comp into evidence and submittal to the jury was proper under Evid. R. 803(17) as a resource available to physicians

4. Medical Records Summary

a. *Daniels v. Northcoast Anesthesia Providers*
8th Dist. Cuyahoga No. 105125, 2018-Ohio-3562

1) It was error to admit a nurse's summary of the medical records under Evid. R. 1006 where the nurse made personal notes and comments

5. Life Care Plan

a. *Daniels v. Northcoast Anesthesia Providers*
8th Dist. Cuyahoga No. 105125, 2018-Ohio-3562

1) The trial court did not err in allowing an expert to testify about a Life Care Plan even though the expert did not reduce the calculation of future damages to present value

2) The trial court did not err in allowing the jury to view a copy of the Life Care Plan during its deliberations

6. Demonstrative Evidence

a. *Daniels v. Northcoast Anesthesia Providers*
8th Dist. Cuyahoga No. 105125, 2018-Ohio-3562

1) The trial court erred by allowing a "harms and losses" chart to go to the jury

7. Prior Incidents

a. *Robinson v. Mercy St. Vincent Med. Ctr.*
6th Dist. Lucas No. L-17-1102, 2018-Ohio-2030

1) Evidence of prior successful deliveries was not relevant to refute the plaintiff's allegation that the physician panicked during the delivery in this case

2) Evidence of prior deliveries was not admissible to show that the physician saved the baby in this case and, thus, it was not admissible habit evidence

8. Rebuttal Testimony

a. *Robinson v. Mercy St. Vincent Med. Ctr.*
6th Dist. Lucas No. L-17-1102, 2018-Ohio-2030

1) Plaintiff's proffered rebuttal testimony was properly excluded because it offered a layperson's opinion where expert testimony on the subject was required

9. Expert Testimony

a. *Bolen v. Mohan*
9th Dist. Lorain No. 16CA011000. 2017-Ohio-7911

1) Failure to object or move to strike an expert's testimony forfeited the issue of the expert's competency

b. *McMichael v. Akron General Med. Ctr.*
9th Dist. Summit No. 28333, 2017-Ohio-7594

1) Several experts were allowed to testify on different specialties and issues

c. *Lucsik v. Kosdrosky, M.D.*
8th Dist. Cuyahoga No. 104324, 2017-Ohio-96

1) The trial court did not err in allowing the cross-examination of the plaintiff's expert with uncertified guidelines of the American Urological Assoc. since it went to the expert's credibility.

2) Without a commonality of insurance, the trial court properly excluded the cross-examination of an expert as to the existence of his medical malpractice insurance carrier.

d. *Lowder v. Domingo, M.D.*
5th Dist. Stark No. 2016CA0043, 2017-Ohio-1241

1) The plaintiff's attorney waived objections to a line of questioning about a prior lawsuit involving an expert where 17 questions on the subject had already been asked by the time of the first objection.

2) Also, since the plaintiff's attorney on direct examination asked the expert whether he had ever caused a brachial plexus injury during his career, the plaintiff's counsel "opened the door" to inquire about a prior lawsuit involving allegations of such an injury.

10. Medical Bills/Records

a. *Gallagher v. Firelands Medical Ctr.*
6th District Erie No. E-15-055, 2017-Ohio-483

1) A medical diagnosis in a hospital record is permissible where such a diagnosis would be admissible if testified to in open court by the person who made the record and the record is that of the physician making the diagnosis in the regular course of business.

b. *Bolen v. Mohan*
9th Dist. Lorain No. 16CA011000. 2017-Ohio-7911

1) Trial Court did not abuse its discretion in the admission of medical bills

c. *Lang v. Beachwood Pointe Care Ctr.*
8th Dist. Cuyahoga No. 104694, 2017-Ohio-1550

1) It was not error to admit into evidence unredacted medical records of other patients.

C. Attorney Misconduct

1. *McMichael v. Akron General Med. Ctr.*
9th Dist. Summit No. 28333, 2017-Ohio-7594

a. Plaintiff's counsel did not engage in improper closing arguments and, also, there was no prejudice since the jury was properly instructed on the applicable standard of care

2. *Howard v. HCR Manorcare*
2nd Dist. Clark Nos. 2016-CA-75 and 2017-CA-16, 2018-Ohio-1053

a. There was no attorney misconduct with respect to multiple comments made during trial

D. Jury Instructions

1. Hindsight

a. *McMichael v. Akron General Med. Ctr.*
9th Dist. Summit No. 28333, 2017-Ohio-7594

1) Even assuming that the proffered hindsight instruction was a correct statement of law, there was no prejudice by its absence

2. Foreseeability

a. *Lowder v. Kantak*
9th Dist. Summit No. 28690, 2018-Ohio-3470

1) A foreseeability jury instruction is applicable in a medical malpractice action

3. Bad Result

a. *Daniels v. Northcoast Anesthesia Providers*
8th Dist. Cuyahoga No. 105125, 2018-Ohio-3562

1) Because medical malpractice cannot be based solely on the fact that the plaintiff suffered an adverse result, there was no reason for the trial court to refuse the requested bad result jury instruction

4. Eggshell Skull

a. *Daniels v. Northcoast Anesthesia Providers*
8th Dist. Cuyahoga No. 105125, 2018-Ohio-3562

1) There was sufficient evidence supporting the eggshell skull instruction

5. Informed Consent

a. *R.T. v. Knobeloch*
10th Dist. Franklin No. 16AP-809, 2018, Ohio-1596

1) Trial court's jury charge on lack of informed consent was properly given

6. FDA Warnings

a. *R.T. v. Knobeloch*
10th Dist. Franklin No. 16AP-809, 2018, Ohio-1596

1) The instruction on the FDA warnings and causation did not allow a lesser standard than a preponderance of evidence to be applied

7. Mitigation of Damages

a. *R.T. v. Knobeloch*
10th Dist. Franklin No. 16AP-809, 2018, Ohio-1596

1) A mitigation of damages jury instruction was not warranted

8. Intervening/Superseding Cause

a. *Howard v. HCR Manorcare*
2nd Dist. Clark Nos. 2016-CA-75 and 2017-CA-16, 2018-Ohio-1053

1) An instruction on intervening/superseding cause was not warranted

9. Life Expectancy

a. *McMichael v. Akron General Med. Ctr.*
9th Dist. Summit No. 28333, 2017-Ohio-7594

1) The defendant was not prejudiced by the trial court's life expectancy jury charge

10. Insurance

a. *McMichael v. Akron General Med. Ctr.*
9th Dist. Summit No. 28333, 2017-Ohio-7594

1) The fact that the jury was given two jury instructions on insurance was not prejudicial to defendant

11. Different Methods

a. *Lowder v. Domingo, M.D.*
5th Dist. Stark No. 2016CA0043, 2017-Ohio-1241

1) The different methods jury instruction was warranted where there was evidence of different obstetrical maneuvers a physician may employ in a shoulder dystocia case.

12. Medical Bills

a. *Lang v. Beachwood Pointe Care Ctr.*
8th Dist. Cuyahoga No. 104691, 2017-Ohio-1550

1) The trial court did not err in instructing the jury that "there will be some bills submitted to you that have scratch offs on them, and indications of payment. You are instructed to disregard the lines that say payments. It has nothing to do with your job as I instructed you. You are not to consider any payments by a third party if it's indicated on the bill."

E. Jury Interrogatories

1. *Scott v. McCluskey*
   9th Dist. Summit No. 27874, 2018-Ohio-571

   a. Plaintiff waived any error with respect to the jury interrogatories since no issues were raised during the remainder of the trial

2. *Cromer v. Children's Hosp. Med. Ctr of Akron*
   9th Dist. Summit No. 25632, 2017-Ohio-7846

   a. It was not error for the jury to answer "No" to the interrogatory on negligence and then proceed to answer "No" to the interrogatory on proximate cause

3. *Jones v. MetroHealth Med. Ctr.*
   8th Dist. Cuyahoga No. 102916, 2017-Ohio-7329

   a. Jury interrogatories are not required to quantify the categories of damages that make up the general verdict, although they are typically the most efficient and effective method of doing so.

F. Jury Misconduct - *Aliunde* Rule

1. *Elsner v. Birchal*
   8th Dist. Cuyahoga No. 106524, 2018-Ohio-2521

   a. Trial court did not err in refusing to consider affidavits of a juror under the *Aliunde* Rule

2. *Rollison v. Humility of Mary Health Partners*
   11th Dist. Trumbull No. 2016-T-0090, 2017-Ohio-7959

   a. Since a juror cannot impeach the jury's verdict by his testimony, a defeated party cannot indirectly impeach the verdict via an affidavit of a third party that is based on what a juror has said

G. Judgment Notwithstanding the Verdict

1. *Grieser v. Janis*
   10th Dist. Franklin No. 17AP-3, 2017-Ohio-8896

   a. Trial Court did not err in granting a JNOV motion where the expert witness did not testify to a reasonable degree of medical probability that the plaintiff's condition was caused by negligence

2. *McMichael v. Akron General Med. Ctr.*
   9th Dist. Summit No. 28333, 2017-Ohio-7594

a. The trial court properly denied the defendants' motion for JNOV

H. Cumulative Error Doctrine

1. *Daniels v. Northcoast Anesthesia Providers*
8th Dist. Cuyahoga No. 105125, 2018-Ohio-3562

a. The Cumulative Error Doctrine applies to civil actions and here, the several cumulative errors committed by the trial court warranted a new trial

2. *McMichael v. Akron General Med. Ctr.*
9th Dist. Summit No. 28333, 2017-Ohio-7594

a. The Court of Appeals did not consider the defendant's cumulative error argument that was not raised in the motion for new trial

XI. POST TRIAL MATTERS

A. Caps on Damages

1. *Lucsik v. Kosdrosky, M.D.*
8th Dist. Cuyahoga No. 104324, 2017-Ohio-96

a. Since the jury found for the defendants on the issue of liability, the issue of damages was never reached and, therefore, the lack of a jury instruction on the loss of a bodily organ system was harmless.

B. Off-Set/Set-Off

1. *Riedel v. Akron General Health System*
8th Dist. Cuyahoga No. 2018-Ohio-840

a. R.C. 2323.41 applies excluding consideration of the Affordable Care Act as a collateral benefit due to contractual, statutory or federal rights of subrogation

b. Neither the statute (R.C. 2744.05), nor the purpose or policy for political subdivision immunity are implicated here

2. *Jones v. MetroHealth Med. Ctr.*
8th Dist. Cuyahoga No. 102916, 2017-Ohio-7329

a. Hospital was entitled to offset under R.C. 2744.05(B)(1) for award for past economic damages

b. Trial court erred when it accepted 80% reduction in the amount allocated for attendant care in the facility

C. Punitive Damages

1. *Lang v. Beachwood Pointe Care Ctr*
   8th Dist. Cuyahoga No. 104691, 2017-Ohio-1550

   a. In the punitive damages phase of the trial, the Plaintiff failed to prove malice on the part of the defendant.

D. Attorney Fees/Costs

1. *Lang v. Beachwood Pointe Care Ctr.*
   8th Dist. Cuyahoga No. 104691, 2017-Ohio-1550

   a. Where punitive damages were improperly awarded, the award for attorney fees and litigation expenses cannot be awarded on a theory of bad faith.

E. Garnishment Proceedings

1. *Dyer v. Schwan's Home Services, Inc.*
   10th Dist. Franklin No. 16AP-574, 2017-Ohio-4139

   a. Garnishment proceedings cannot be commenced absent a final judgment.

   b. Garnishment proceedings cannot be commenced while post-trial motions are pending, *i.e.*, prejudgment interest, new trial, JNOV, etc.

F. Prejudgment Interest

1. *Bolen v. Mohan*
   9th Dist. Lorain No. 16CA011000

   a. Trial court abused its discretion on ruling on the merits of the motion for prejudgment interest without setting a date certain for an evidentiary hearing

2. *Howard v. HCR Manorcare*
   2nd Dist. Clark Nos. 2016-CA-75 and 2017-CA-16, 2018-Ohio-1053

   a. The trial court did not abuse its discretion on denying a request for a continuance in order to conduct prejudgment interest discovery

XII. ARBITRATION (NURSING HOMES)

A. *Kallas v. Manor Care of Barberton*
9th Dist. Summit No. 28068, 2017-Ohio-76

1. Because the physical therapy facility did not appear upon the face of the arbitration agreement, the trial court properly determined that it was not a counterparty.

2. So, there was no valid contract.

B. *Knight v. Altercare Post, Acute Rehabilitation Ctr.*
11th Dist. Portage No. 2017-Ohio-6946

1. Since the beneficiaries were not parties to the agreement, they could not attempt to enforce it

2. Since no claims for the beneficiaries existed, the plaintiff's contract and intentional interference with business contract claims failed as a matter of law and, therefore, the trial court's judgment staying the matter pending arbitration was reversed

C. *Donnell v. Parkcliffe Alzheimer's Community*
6th Dist. Wood No. WD-17-001, 2017-Ohio-7982

1. Use of a fictitious name did not render the arbitration provision unenforceable as between the parties to the litigator

D. *Clemeans v. Heartland of Chillicothe OH, LLC*
4th Dist. Ross No. 17CA3589, 2017-Ohio-9399

1. Defendants were not entitled to a stay of proceedings pending arbitration where the defendants were not parties to the arbitration agreement and were not entitled to enforce the agreement as third-party beneficiaries

E. *Goerlitz v. SCCI Hospitals of America*
3rd Dist. Allen No. 1-17-43, 2018-Ohio-633

1. Trial court did not abuse its discretion in denying the stay pending arbitration based upon waiver

XIII. APPELLATE ISSUES

A. *Wenning v. Advanced Spine Joint and Wellness Center*
9th Dist. Medina No. 17CA0031-M, 2018-Ohio-2798

1. Where a party upon appeal fails to actually challenge the basis of the trial court's judgment, the assignment of error will be overruled

B. *Plogger v. Myers*
8th Dist. Cuyahoga No. 105210, 2017-Ohio-8229

1. Even were a motion *in limine* involves attorney-client privilege matters, the denial of a motion *in limine* is not a final appealable order