Volume 5, Issue 4

Quarterly Newsletter
December 2012

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Bonezzi Switzer Murphy Polito & Hupp Co. L.P.A.

2013 Super Lawyers and Rising Stars*

Seated left to right: Beth A. Sebaugh, Donald H. Switzer, Steven J. Hupp, William D. Bonezzi, John S. Polito
Standing: Donald J. Richardson, Keith Hansbrough*, Jason A. Paskan*, Michelle B. Block*, Bret C. Perry, Jennifer R. Becker*, Jeffrey W. Van Wagner (Top 100 Ohio, Top 50 Cleveland), Ronald A. Margolis, Patrick J. Murphy

Unanimous Defense Verdict in Cuyahoga County

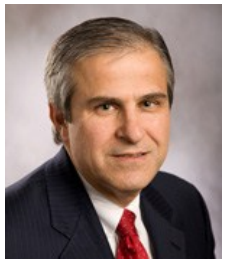
Recently, BSMPH attorneys, Bret C. Perry, Esq. and John S. Polito, Esq., obtained a unanimous defense verdict on behalf of a general surgeon in a medical malpractice and wrongful death action pending in Cleveland, Ohio.

Attorneys Perry and Polito successfully defended a general surgeon in a four day trial in the Cuyahoga County Court of Common Pleas wherein Plaintiff claimed that the surgeon was negligent in performing a primary anastomosis to correct a large bowel obstruction instead of opting for an ileostomy with fecal diversion. Plaintiff also claimed that the surgeon was negligent in failing to return to surgery in a timely fashion when the decedent's condition in the post-operative period warranted a return to surgery in order to rule out whether the anastomsis had failed resulting in over two liters of bowel contents leaking into the decedent's abdomen causing overwhelming sepsis. Due to the alleged negligence, Plaintiff claimed the decedent suffered fistula and abscess formation ultimately resulting in her death. The decedent was survived by four adopted minor children all with developmental handicaps.

Unrelated to the claims of medical negligence and wrongful death, Plaintiff offered testimony related to the decedent's long-standing involvement with the foster care system, her adoption of the four minor children each suffering with degrees of fetal-alcohol syndrome and the loss suffered by these children due to the death of the decedent. Despite the persuasive and compelling damage testimony offered by Plaintiff, the defense was able re-direct the jury's attention to the medical issues in dispute in an effort to overcome the sympathetic nature of the evidence offered at trial by Plaintiff on the issue of damages.

Plaintiff requested that the jury return a verdict in excess of $3,000,000.00. The jury returned its unanimous verdict after less than two hours of deliberations finding that the defendant-surgeon met the standard of care in all respects.

Bret C. Perry, Esq.



John S. Polito, Esq.

Update Regarding Electronically Stored Information in Ohio

By Keith Hansbrough, Esq.

Since the Ohio Rules of Civil Procedure were amended to contain provisions for the discovery of electronically stored information in July of 2008, legal practitioners have been awaiting the development of case law in Ohio addressing the three main issues that the amendments raised, namely:

1. When does the duty to preserve electronically stored information arise?

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Enough With The Confusion … Valid Arbitration Agreements Apply To Wrongful Death Cases

By Michelle B. Block, Esq.

In early 2012, the United States Supreme Court entered the latest of a series of opinions that prevent state courts from interfering with arbitration on state policy grounds. On February 21, 2012, the Court issued its *per curiam* decision in *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012), finding West Virginia's categorical prohibition of pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes to be in direct contradiction of the terms and coverage of the Federal Arbitration Act ("FAA"). This is one of 13 Supreme Court decisions relating to arbitration in the last four years.[1] The Court's decision in *Marmet,* and its recent focus on arbitration law, demonstrates the Supreme Court's continued vigilance over state law interference with federal arbitration policy.

In *Marmet*, the Supreme Court of West Virginia considered a consolidated case involving three underlying negligence and wrongful death claims on behalf of deceased nursing home residents whose admission agreements included arbitration provisions signed before admission. These three cases were filed separately in the courts of West Virginia, and in all three cases, the nursing homes moved to compel arbitration. In the consolidated case on appeal, the Supreme Court of Appeals of West Virginia refused to enforce the arbitration agreements stating that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250, 292 (2011) cert. granted, judgment vacated sub nom.

Furthermore, the West Virginia Court considered whether the state public policy was pre-empted by the FAA. It concluded that "Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public." *Brown*, *supra*, at 291. The Court thus concluded that the FAA does not pre-empt the state public policy against predispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes. *Id*., at 291-292.

The United States Supreme Court fired back, taking the unusual step of issuing a unanimous *per curiam* opinion without reviewing merit briefs or conducting oral arguments.[2] The Court held that the West Virginia Court's interpretation of the FAA was both incorrect and inconsistent with clear instruction of the Court's precedence. *Marmet*, *supra*, at 1203. The Court further affirmed that state and federal courts must enforce the Federal Arbitration Act, 9 U.S.C. § 1 et seq., with respect to all arbitration agreements covered by that statute. *Id*., at 1202. The FAA provides that a "written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id*., at 1203, citing 9 U.S.C. § 2. The statute's text includes no exception for personal-injury or wrongful death claims. It "requires courts to enforce the bargain of the parties to arbitrate." *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

Similar to West Virginia's categorical rule outlined in *Marmet*, *supra*, Ohio has a prohibition against predispute agreements to arbitrate wrongful death claims. In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134, 2007-Ohio-4787, the Supreme Court of Ohio held that a wife's wrongful death claim against a company was not subject to arbitration. The Court further held, "A decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims." *Id*. at paragraph two of the syllabus. This is an invalid categorical rule prohibiting arbitration of a particular type of claim because that rule is contrary to the terms and coverage of the FAA. *Marmet*, *supra*. The Court in *Peters* did not conduct an analysis in relation to the FAA; however, as the United States Supreme Court has now fulfilled its duty to interpret federal law regarding arbitration agreements and corresponding wrongful death claims, a state court may not contradict or fail to implement the rule so established. *Marmet, supra*, at 1202; *see also* U.S. Const., Art. VI, cl. 2.

Last term, the United States Supreme Court reaffirmed that, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011); see, also, *Preston v. Ferrer,* 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). This rule should resolve the lingering issue in Ohio – Ohio's current prohibition against predispute agreements to arbitrate wrongful death claims against nursing homes is an invalid categorical rule contrary to the terms and coverage of the FAA. *See ibid*.

The Court used *Marmet* to resend the message it has consistently and with increasing frequency sent before – there is a strong national policy favoring arbitration, and state courts are not exempt from following it. This is good news for parties that want their arbitration clauses enforced as to all claims *including wrongful death*.

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Update Regarding Electronically Stored Information in Ohio…Con't

2. Can a defendant company be forced to turn over its entire computer? and
3. How is electronically stored information used in a trial as evidence?

Unfortunately, there is a very small amount of case law precedent that has been developed over the last four years answering these questions.

First, when does the duty to preserve electronically stored information arise? There is still no solid case law addressing this issue in Ohio. Interestingly, the Staff Note to Rule 37 reads in part that, "This rule does not attempt to address the larger question of when the duty to preserve electronically stored information is triggered. That matter is addressed by case law and is generally left to the discretion of the trial judge." Unfortunately, we are still waiting on the courts in Ohio to tackle this issue.

Second, can a defendant company be forced to turn over its entire computer? As to this question, we have seen the Ohio Tenth Appellate District and the Ohio Sixth Appellate District address the issue. The question boils down to allowing a plaintiff to make a forensic copy of a defendant's computer drive and whether or not the courts are going to allow such a demand for discovery via a basic Rule 34 request for production or as a sanction for bad conduct under Rule 37.

It should be kept in mind that most federal appellate and district courts have taken the position that a direct examination of another party's computer system should be viewed as the exception, not the rule. *Powers v. Thomas M. Cooley Law School*, 2006 WL 2711512 (W.D. Mich. Sept. 21, 2006); *In re: Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003). "In most cases, the computer itself is not evidence. It is merely the instrument for creating evidence (like a typewriter) or means of storing it (like a filing cabinet)." *Diepenhorst v. City of Battle Creek*, 2006 WL 1851243 (W.D. Mich. June 30, 2006). To date, there are two significant Ohio appellate court decisions addressing the issue of forensic imaging of computer hard drives under the Ohio Rules of Civil Procedure's provisions for the discovery of electronically stored information: *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763 (10th Dist.) and *Cornwall v. Northern Ohio Surgical Center, Ltd.*, 185 Ohio App.3d 337, 2009-Ohio-6975, 923 N.E.2d 1233 (6th Dist.).

In *Bennett*, the Ohio Tenth Appellate District held that the trial court did not abuse its discretion in ordering forensic imaging as a sanction under Ohio Rules of Civil Procedure Rule 37(B) due to defendant's noncompliance with the trial court's orders. The appellate court also held that the trial court did error in not providing adequate protections to safeguard the confidentiality of the information contained on the computer systems to be imaged. The appellate court stated that in determining whether the particular circumstances justify forensic imaging, a court must consider:

1. Whether the responding party has withheld requested information;
2. Whether the responding party is unable or unwilling to search for the requested information; and
3. The extent to which the responding party has complied with discovery requests.

The critical point to note is that the Ohio Tenth Appellate District in *Bennett* allowed the computer imaging as a sanction under Rule 37, not as a basic request for production under Rule 34.

Contrary to the *Bennett* holding from the Ohio Tenth Appellate District, the Ohio Sixth Appellate District in *Cornwell* allowed access to the computer hard drive of a defendant by the plaintiff under Ohio Rules of Civil Procedure Rule 34. The appellate court allowed the forensic imaging under Ohio Rules of Civil Procedure Rule 34 directly as a request for production, not as a sanction under Ohio Rules of Civil Procedure Rule 37(B). In allowing the forensic imaging under Ohio Rules of Civil Procedure Rule 34, the appellate court stated that:

1. A direct relationship existed between the claims of spoliation and fraud and the computer hard drives; and
2. The trial court set a specific protocol, definite search terms and the means necessary to protect privileged information.

The critical point to note is that the Ohio Sixth Appellate District in *Cornwell* allowed the computer imaging as a basic request for production under Rule 34, not as a sanction under Rule 37.

Since *Bennett* and *Cornwall*, new Ohio case law has emerged this year addressing the issue of electronically stored information. Legal counsel practicing in Ohio would be wise to review both *Nithiananthan v. Toirac*, 12th Dist. No. CA2011-09-098, 2012-Ohio-431 and *Townsend v. Ohio Dept. of Transp.*, 10th Dist. No. 11AP-672, 2012-Ohio-2945. In the *Nithiananthan* case, the Ohio Twelfth District found that the trial court abused its discretion by not balancing the factors set forth in the *Bennett* case and held that the trial court could not allow forensic imaging of the other side's home computer. In the *Townsend* case, the Ohio Tenth District held that the trial court abused its discretion by not allowing forensic imaging of the other side's computer. In short, both of these 2012 decisions seem to be leaning toward the holding in the *Bennett* case and towards the notion that forensic imagining is more of a sanction under Rule 37 than a simple request under Rule 34.

Third, how is electronically stored information used in a trial as evidence? The Ohio case law on this issue actually pre-dates the 2008 amendments to the Ohio Civil Rules as seen in the cases of *Gray v. Fairview Gen. Hosp.*, 8th Dist. No. 82318, 2004-Ohio-1244 and *State v. Duff*, 10th Dist. No. 00AP-562, 2001 WL 102258 (Feb. 8, 2001).

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Update Regarding Electronically Stored Information in Ohio…Con't

The *Gray* case provides an interesting analysis of electronic evidence to Ohio's Hearsay Rule prior to Ohio's adoption of the new electronic discovery provisions. In *Gray*, the plaintiff asserted that the trial court erred or abused its discretion by allowing an expert witness to testify in a case involving computer aided technology. *Id.,* at ¶11. In short, the expert witness offered testimony at trial concerning his review of the plaintiff's mammogram with the aid of a computer aided detection device. *Id.,* at ¶1. The Ohio Eighth District Court of Appeals stated that the expert testimony was admissible and not hearsay. *Id.,* at ¶12. In its analysis under Ohio's Hearsay Rule, the court stated that although the computer aided detection's failure to find and mark any potentially malignant microcalcifications could be viewed as an "assertion" that none were there, the computer aided detection device was not a "person." *Id.,* at ¶11. Put succinctly, the court held that the computer analysis was not hearsay by definition. *Id*. It should be noted that the fact pattern in *Gray* did not include an out-of-court statement by any person recording the result of the computer aided detection device results in a report. *Id.,* at footnote 1. The expert witness' testimony regarding the computer aided device result was a physical observation of what the expert saw on a computer screen and, therefore, not hearsay. *Gray* at ¶12.

The *Gray* court also cited to the matter of *Duff*, *supra*, in which the Ohio Tenth District held that telephone caller identification information provided to a telephone user is based on computer-generated information and not simply a repetition of prior recorded human output or observation. Therefore, the telephone caller identification did not fall within the scope of the hearsay rule.

While we await case law in Ohio addressing admissibility and electronically stored information as discussed in the 2008 amendments, prudent legal practitioners would be wise to look to how the federal court system has handled the issue in recent years. "Whether ESI is admissible into evidence is determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence. Failure to clear any of these evidentiary hurdles means that evidence will not be admissible." *Lorraine v. Markel American Insurance Company*, 241 F.R.D. 534 (D. Md. 2007). The opinion in the *Lorraine* case from the U.S. District Court for the District of Maryland is a forty-five page "how to guide" on the admissibility of electronic evidence. The opinion is so detailed that Chief United States Magistrate Judge Grimm went so far as to thank his law clerk and the two law school interns who assisted in drafting the opinion by name in footnote number sixty-three.

In short, the *Lorraine* court stated that in order for electronically stored information to be admissible, it must be (1) relevant, (2) authentic, (3) not hearsay or admissible under an exception to the rule barring hearsay evidence, (4) original or duplicate, or admissible as secondary evidence to prove its contents and (5) probative value must outweigh its prejudicial effect. In the *Lorraine* case, the court found that the failure of counsel for both sides to observe evidence rules concerning electronically stored information, particularly rules governing authenticity, hearsay issues, original writing rule and absence of unfair prejudice, rendered their summary judgment exhibits inadmissible. It is important to note that the *Lorraine* case has been cited to in both Ohio state court and Ohio federal court. *Schneider Saddlery Co., Inc. v. Best Shot Pet Products International, LLC*, 2009 WL 864072 (N.D. Ohio Mar. 31, 2009, opinion by Judge Kathleen O'Malley); *Adams v. Disbennett*, 3rd Dist. No. 9-08-14, 2008-Ohio-5398 (opinion by Judge Willamowski).

In conclusion, the issue of electronically stored information in Ohio is still in its infancy. Defense attorneys would be wise to consider the three issues outlined in this article with each new matter they encounter to determine when their client's duty to preserve begins, how they can argue that a copy of their client's computer is an extreme sanction under Rule 37 and not a standard discovery request under Rule 34, and how they are not only going to get the electronically stored information that they want the jury to see into evidence, but also what should they be on the watch for as to the electronically stored information the plaintiff wants the jury to see and how they can keep that from happening.

Keith Hansbrough, Esq.

Enough With The Confusion…Con't

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1. Nitro-Lift Technologies L.L.C. v. Howard, 568 U.S. ___ (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

2. http://dritoday.org/feature.aspx?id=472

Bonezzi Switzer Murphy Polito & Hupp Co. L.P.A.
Attorneys at Law
1300 East 9th Street, Suite 1950 | Cleveland, Ohio 44114-1501
216.875.2767 | Fax 216.875.1570
100 2nd Ave. South, Suite 502-S | St. Petersburg, FL 33701-4313
727.826.0909 | Fax 727.826.0914 | www.bsmph.com

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