

## BSMPH Attorneys Obtain Defense Verdicts

### Medina County

BSMPH attorneys John S. Polito and Bret C. Perry recently obtained a defense verdict on behalf of a physician in a medical malpractice action pending in Medina, Ohio.

Attorneys Polito and Perry successfully defended a Cardiologist in a ten day trial in the Medina County Court of Common Pleas. Plaintiff claimed that the Cardiologist negligently dissected a coronary artery during a diagnostic catheterization. As a result of the dissection, Plaintiff claims she suffered heart failure which ultimately led to Plaintiff requiring a heart transplant.

The defense presented compelling evidence that the Cardiologist met the standard of care in recommending the cardiac catheterization based on Plaintiff's multiple risk factors for coronary artery disease, in the performance of the heart catheterization, and in the subsequent management of the dissection.

The jury returned its verdict after six hours of deliberations finding that the Defendant-physician met the standard of care.



John S. Polito, Esq.

Bret C. Perry, Esq.

Patrick J. Murphy, Esq.

### Lorain County

Recently, a defense verdict was obtained by BSMPH attorneys John S. Polito and Patrick J. Murphy on behalf of a Neurosurgeon in a medical malpractice and wrongful death action filed in Lorain County Court of Common Pleas before Judge Rothgery.

Plaintiff, as Administratrix of the Estate, claimed that the Neurosurgeon negligently cared and treated for the patient after successfully removing a tennis ball sized tumor from the patient's brain. Plaintiff claimed that the patient died as a result of the care and treatment.

The Jury agreed with the defense argument that the Neurosurgeon met the standard of care in his care and treatment of the patient, and returned a verdict in favor of the Neurosurgeon.



Steven J. Hupp, Esq.



Jennifer R. Becker, Esq.

### Cuyahoga County

BSMPH attorneys Steven J. Hupp and Jennifer R. Becker obtained a defense verdict in a wrongful death case. In March, the trial team successfully defended a Cardiologist in a six day trial in Cuyahoga County Common Pleas Court.

This case arose from the death of a 44 year old father of two from a myocardial infarction. The deceased presented to the emergency room with complaints of chest pain. An initial EKG taken in the emergency room was abnormal. However, repeat EKGs were nonspecific and four cardiac enzymes were all negative. Our Defendant performed a nuclear scan stress test. During this test, the deceased performed at a high level of exercise and had no chest pain or ischemia.

After his discharge, the deceased had one emergency room visit with a co-defendant who discharged him. Five days later, the deceased suffered a fatal myocardial infarction.

Plaintiff claims that the Defendant Cardiologist was negligent for not performing a cardiac catheterization, which all parties agreed would have been lifesaving. The jury returned a verdict in favor of both Defendants.

## Save the Date

### BSMPH In-House CLE

BSMPH will host an in-house CLE on **Ethics, Professionalism and Substance Abuse** on Wednesday, September 26, 2012. Registration will begin at 2:00 p.m., presentation at 2:30 p.m. and cocktails and hors d'oeuvres at 5:00 p.m. The location will be announced at a later date.

## Success in the Eleventh District Court of Appeals

By Michelle B. Block, Esq.

Recently, the Eleventh District Court of Appeals granted Defendant-Appellee's Motion to Dismiss and held that a dismissal based upon a failure to produce an Affidavit of Merit is a dismissal without prejudice and not a final appealable order. Defendant was represented by Patrick J. Murphy, Esq. and Michelle B. Block, Esq.

On July 8, 2010, Plaintiff-Appellant, Administratrix of Decedent's Estate, filed a medical negligence action against Defendant, healthcare facility. Plaintiff's Complaint was deficient as she failed to contemporaneously file an Affidavit of Merit or a Motion for Extension of Time to File an Affidavit of Merit with her Complaint, pursuant to Civ.R. 10(D)(2). On December 27, 2010, Defendant filed a Motion to Dismiss, pursuant to Civ. R. 12(B)(6) seeking a dismissal for Plaintiff's failure to state a claim upon which relief could be granted.

On June 20, 2011, the trial court entered a judgment dismissing Plaintiff's lawsuit without prejudice because Plaintiff failed to file an Affidavit of Merit as required by Civ. R. 10(D)(2). Plaintiff filed a Notice of Appeal on July 12, 2011.

On September 7, 2011, Counsel for Defendant prepared and filed a Motion to Dismiss Plaintiff's Appeal based on the fact that a trial court's granting of a Motion to Dismiss for failure to file an Affidavit of Merit or a Motion for Extension of Time to File an Affidavit of Merit contemporaneous with her Complaint, as required by Civ.R. 10(D)(2), is not a reviewable determination on appeal because the order is without prejudice and not final, pursuant to R.C. 2505.02.

Plaintiff filed a Brief in Response and her sole argument was that she was appealing the denial of her Motion for Default Judgment. Plaintiff claimed that the trial court rendered a final judgment by denying Plaintiff's Motion for Default Judgment; specifically, Plaintiff claimed that Defendant did not demonstrate excusable neglect when it failed to timely file an Answer.

Defendant filed its Reply Brief with three arguments: (1) it was within the sound discretion of the trial court to grant Defendant's Civ.R. 6(B)(2) motion based on the trial court's finding that the inadvertent failure to file its Answer timely was the result of excusable neglect; (2) the denial of Plaintiff's Motion for Default Judgment neither determined the action nor prevented a judgment; therefore, the trial court's decision was not a final order pursuant to R.C. 2505.02; and (3) the trial court properly examined the sufficiency of Plaintiff's Complaint and its ruling, a dismissal without prejudice, was appropriate in light of Plaintiff's failure to produce an Affidavit of Merit and subsequent failure to state a claim upon which relief could be granted.

On December 12, 2011, the Eleventh District Court of Appeals granted Defendant's Motion to Dismiss the Appeal. The Court of Appeals found that the June 20, 2011 order dismissing Plaintiff's Complaint without prejudice was not a final appealable order.

Further, the Court also addressed Plaintiff's argument that she was appealing from the trial court's judgment overruling Plaintiff's Motion for Default Judgment. Defendant argued that a plain reading of R.C. 2505.02 makes it clear that the trial court's denial of Plaintiff's Motion for Default Judgment is not a final order. Pursuant to R.C. 2505.02(B)(1), a final order must prevent a judgment in the action – the denial of Plaintiff's Motion for Default Judgment did not in any way prevent the possibility of a judgment in Plaintiff's favor (had Plaintiff initially complied with Civ.R. 10(D)(2)). Despite Defendant's argument, the Court ultimately held that it was without jurisdiction to address the issue because Plaintiff never attached the trial court's judgment denying the Motion for Default Judgment to the Notice of Appeal.



Michelle B. Block, Esq.

## Victory in the Ohio Supreme Court – state courts must bifurcate trials into two phases when there are claims asserted for compensatory and punitive damages in a tort action

By Jennifer R. Becker, Esq.

On February 15, 2012, the Ohio Supreme Court, in *Havel v. Villa St. Joseph*, Slip Opinion No. 2012-Ohio-552, upheld and found constitutional a 2005 tort reform provision that requires state courts to grant requests for "bifurcation" of trials into two separate stages where claims for compensatory and punitive damages have been asserted in a tort action. This ruling was consistent with the arguments asserted by BSMPH attorneys, Bret C. Perry, Jennifer R. Becker and Jason A. Paskan, who represented Defendants in the *Havel* matter.

Justice Terrence O'Donnell authored the 5-2 opinion and was joined by Justices Evelyn Lundberg Stratton, Judith Ann Lanzinger and Robert R. Cupp. Chief Justice Maureen O'Connor concurred in judgment only. Justice Yvette McGee Brown entered a dissenting opinion, joined by Justice Paul E. Pfeifer.

The Ohio Supreme Court held that R.C. 2315.21(B) "creates, defines, and regulates a substantive, enforceable right to separate stages of trial relating to the presentation of evidence for compensatory and punitive damages in tort actions, and therefore takes precedence over Civ.R. 42(B) and does not violate the Ohio Constitution, Article IV, Section 5(B)." This decision reversed a ruling by the Eighth District Court of Appeals that held the challenged statute unconstitutional.

The case involved a lawsuit for medical malpractice, wrongful death, and violation of the Ohio Nursing Home Patients' Bill of Rights brought by Sandra Havel as the personal

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## Victory in the Ohio Supreme Court...Con't

representative of the Estate of John Havel. The Complaint sought both compensatory and punitive damages.

Pursuant to R.C. 2315.21(B), Defendants moved to bifurcate the trial into two stages. The initial stage would only relate to the presentation of evidence and determination by the jury as to the recovery of compensatory damages. If necessary, the second stage would only involve the presentation of evidence and determination by the jury with respect to the recovery of punitive damages. The trial court denied the motion to bifurcate without stating a reason.

Defendants appealed to the Eighth District Court of Appeals, and the Court affirmed the judgment of the trial court. The Eighth District held that R.C. 2315.21(B) is unconstitutional because it conflicts with Civ.R. 42(B), in violation of the separation of powers required by the Ohio Constitution, Article IV, Section 5(B), by intending "to legislate a strictly procedural matter already addressed by the Civil Rules."

The Eighth District certified that its decision was in conflict with a 2009 decision of the Tenth District Court of Appeals, *Hanners v. Ho Wah Genting Wire & Cable*, 10th Dist. No. 09AP-361, 2009-Ohio-6481, in which that court upheld R.C. 2315.21(B) as constitutional. The Ohio Supreme Court agreed to resolve the conflict between Appellate Districts.

The Ohio Supreme Court noted several statements made by the General Assembly in the uncodified language of S.B. 80 and stated that, "These findings and statements by the General Assembly demonstrate its intent to create a substantive right to ensure that evidence of misconduct is not inappropriately considered by the jury in its assessment of liability and its award of compensatory damages."

The Ohio Supreme Court also explained that: "...R.C. 2315.21(B) does more than set forth the procedure for the bifurcation of tort actions: it makes bifurcation mandatory. ... By eliminating judicial discretion, R.C. 2315.21(B) creates a concomitant right to bifurcation: because the court cannot deny a request for bifurcation under the specified circumstances, the statute turns a request into a demand for or an entitlement to bifurcation by controlling the outcome. We have previously recognized that a statute may create a right when it contains mandatory language and restricts judicial or agency discretion."

The Ohio Supreme Court held that R.C. 2315.21(B) does not violate the Ohio Constitution, Article IV, Section 5(B) and is constitutional because it is a substantive law that prevails over a procedural rule. Thus, when requested, bifurcation is mandatory and trial courts must have two separate stages of trial where claims for compensatory and punitive damages have been asserted in a tort action.



Jennifer R. Becker, Esq.

## The "Ministerial Exception" as provided under the First Amendment prevents employment discrimination actions brought by ministers

By Jason A. Paskan, Esq.

Recently, the Supreme Court of the United States held that where the "ministerial exception" applies, an employment discrimination action brought against a religious employer must be dismissed in order to prevent government interference with an internal church decision that affects the faith and mission of the church itself. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, (2011), Slip Opinion No. 10-553.

In *Hosanna-Tabor*, a teacher brought an employment discrimination against a Lutheran School for terminating her employment after she was diagnosed with narcolepsy. At the school, there were two types of teachers, "lay" and "called". In order to qualify for a "called" teacher position, one had to take theological study classes at a Lutheran college or university and pass an oral examination proctored by a faculty committee. Only after these requirements were met could a teacher be "called" by the congregation. "Lay" teachers did not need this additional training, but were generally only hired when "called" teachers were unavailable. Regardless of a teacher's title, they generally performed the same duties. One difference was that "called" teachers could only be terminated by a super majority of the congregation whereas "lay" teachers were provided with one-year renewable contracts.

Although originally hired as a "lay" teacher, the plaintiff in *Hosanna-Tabor* eventually performed the necessary steps to become a "called" teacher. After becoming a "called" teacher, the plaintiff was provided with a "diploma of vocation" and taught a number of subjects, including religion, in addition to leading the students in prayer and attending weekly school-wide chapel services, even leading the service twice per year.

At the end of her first year as a "called" teacher, the plaintiff in *Hosanna-Tabor* was diagnosed with narcolepsy and needed to take disability leave. During this leave period, the plaintiff was replaced with a "lay" teacher for the remainder of the school year. It was determined by the congregation that the plaintiff was unlikely to be able to become healthy enough to return the following year and requested the plaintiff's resignation in exchange for partial payment of her health insurance benefits. The plaintiff in *Hosanna-Tabor* decided that she was ready to return to work and produced a note from her doctor asserting same. The school informed the plaintiff that there was no longer a position for her at the school. Despite being so informed, she showed up to the school and refused to leave until she received documentation that she had reported for work. After this disturbance at the school, the school decided to terminate her employment all together.

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## The “Ministerial Exception”...Con’t

The plaintiff filed a charge with the Equal Employment Opportunity Commission (“EEOC”), alleging that her employment had been terminated in violation of the Americans with Disabilities Act (“ADA”). Asserting that the “ministerial exception” prevented government interference in a religious employment matter, the school moved for summary judgment. Specifically, the school asserted that the plaintiff was fired for a religious reason. The District Court agreed with the school and granted summary judgment, but this decision was reversed on appeal. Notably, the Court of Appeals emphasized the fact that both “lay” and “called” teachers had the same general employment responsibilities. The suit was then brought before the Supreme Court of the United States.

After providing a detailed analysis of the history of the First Amendment, the Supreme Court of the United States recognized the existence of the “ministerial exception” and explained:

Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.

While the Supreme Court was unwilling to adopt a rigid formula for determining when a person qualified as a minister for purposes of the exception, the Court did note a number of elements in *Hosanna-Tabor* that permitted the exception to apply. Upon completion of her requirements, the plaintiff was provided with a “diploma of vocation,” received the title of “minister of religion, commissioned” and was tasked with performing that office in accordance with the teachings and practices of the Lutheran church, performing the responsibilities outlined above. Recognizing that the job duties of “lay” and “called” teachers were similar, the Court stated that the Court of Appeals placed too much emphasis on this issue and offered an analysis to remedy this error. Additionally, the completion of the requirements themselves was seen as support for the application of the “ministerial exception” in this case.

Accordingly, the Supreme Court of the United States, in applying the “ministerial exception” to the facts in *Hosanna-Tabor*, reversed the decision of the Court of Appeals because ruling otherwise would require a church to accept a minister it did not want and such an order “would have plainly violated the [c]hurch’s freedom under the Religion Clauses to select its own ministers.”

Recognizing the existence of the “ministerial exception” and offering a detailed analysis in applying it to employment discrimination actions, the Supreme Court clearly appreciated the separation of church and state, choosing not to interfere with a religious entity’s employment decisions. It is important to note that the “ministerial exception” will not apply to all religious employees and that discriminatory actions could meet EEOC charges and lawsuits premised on violations of the ADA. While the “ministerial exception” may not apply to all employees, where it does apply, the government has no authority to interfere with an employer’s decision to terminate a minister despite potential discrimination liabilities available to similarly situated secular employees. In conclusion, if there is a question as to whether the “ministerial exception” applies, *Hosanna-Tabor* is the most recent and authoritative decision to use as a starting point.



Jason A. Paskan, Esq.

While at the  
OHCA/OCAL/OCDD Annual  
Convention and Exposition, stop  
by to see us at booth #909.

Don’t Miss Our  
Cocktail Party

May 1, 2012

5:30 p.m. - 8:30 p.m.

Hyatt Regency, Delaware A/B

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