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Coroners' Verdicts and Death Certificates

By Patrick J. Murphy, Esq.



Ohio has a rather intricate set of statutes that set forth the duties, responsibilities and limitations on a county coroner's authority. Revised Code Chapter 313 should be reviewed for this information. All of the statutes contained in Revised Code Chapter 313 will not be discussed in this article. The focus of this article is on the statutes that trial attorneys can find themselves working with in any wrongful death action that they are handling.

What Records Are Public?

ORC 313.10 identi-

fies those records that are public and those records deemed not to be public. Generally speaking, public records are available to anyone, and non-public records are only available under limited circumstances. Public records are those including, but not limited to, detailed descriptions of the observations written during the progress of an autopsy and the conclusions drawn from those observations made personally by the coroner or by anyone acting under the coroner's direction or supervision. Public records certified by the coroner shall be received as evidence in any criminal or civil action as to the facts contained in those records. Records that are not public records include preliminary autopsy and investigative notes, photographs of a decedent, suicide notes, medical and psychiatric records provided to a coroner to assist him in determining a cause of death, confidential law enforcement investigatory records and laboratory reports generated by analysis of physical evidence that is discoverable

under Criminal Rule 16.

A journalist may submit a request to review non-public records and the coroner shall grant the journalist's request. ORC 313.10 (D). An insurer may submit a request for non-public records and it shall be granted by the coroner. ORC 313.10 (E)(1). Records provided to an insurer shall remain in the care, custody and control of the insurer, its employees or representatives at all times. ORC 313.10(E)(5). Based upon personal experience it seems as though coroners' offices are always willing to provide photographs of the decedent as long as they are paid for. Is this because defense counsel is deemed a "representative" of the insurer? There is one other provision that may account for the relative ease with which photographs can be obtained and it is ORC 313.10(A)(3), which states that the coroner has discre-

tion as to the use of photographs of the decedent for medical, legal or educational purposes.

Coroners recognize the importance given to their verdicts and death certificates by statute. By in large their goal is to make sure they are accurate. To this end they are willing to speak with and meet with counsel to discuss the cause of death. Counsel should take advantage of this opportunity. Counsel can also provide the coroner with medical records that the coroner may not be aware of which shed light on the cause of death.

Can a Coroner's Verdict and the Cause of Death Appearing on a Death Certificate Be Challenged?

ORC 313.19 sets forth the weight to be afforded the cause of death incorporated in the coroner's

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Business in Florida



As we announced in our March 2011 newsletter, our Florida office is now open for new business. Attorney William D. Bonezzi (pictured) is excited about the opportunity of the firm's expansion into Florida, which will focus on Medical Negligence Defense/Nursing Home/Rehabilitation Facility Defense, Product and Environmental Liability as well as every aspect of General Liability Defense.

We will be attending and promoting our services via a booth at the upcoming Florida Health Care Association (FHCA) conference, which will be held in Orlando on August 15th through August 18th 2011. This is the largest "long term care" conference and trade show in the Southeast portion of the United States.

In addition to the above, numerous meetings are in the process of being scheduled with long term clients here in Florida in hopes of representing their interests as we have done in Ohio. We will be extending the Florida practice to include more commercial general liability clients as well as representing the interests of our environmental clients.

Florida holds great promise for our firm and for our clients. We look forward to representing all of you!

The Defendant-Doctor's Deposition

By Ronald A. Margolis, Esq.

Those of us who have practiced in the medical malpractice trial arena know the importance of the defendant-doctor's deposition. Some of the colloquial expressions that come to mind are:

1. You do not win a case at deposition, but you can sure lose it.
2. You never have a second chance to make a good first impression.
3. There is no such thing as a bad witness; just a witness who was not prepared.
4. The defendant's most important involvement in the case is his/her deposition.

The list is endless. We understand that our client's deposition is the keystone to our case. Being mindful of this, we should make certain before our client is deposed that we have accomplished the following:

1. A comprehensive review of applicable medical literature;
2. Discussions with experts to develop our case theories;
3. A comprehensive review of our clients litigation history;
4. Develop rapport with our client;
5. Thorough explanation of the process;
6. Mock depositions;
7. Development of core case issues; and
8. A comprehensive review of medical records with client.

Certainly our client's substantive knowledge of the medical issues is not the issue, but understanding the overall process, the do's and don'ts, is absolutely essential. Too many times an off-the-cuff cavalier comment innocently made can become the focal point of our opponents case. It has been said, to avoid stepping in a hole you must first be aware of its presence. Fundamentally, it is the attorney's job to

provide a road map of the potential holes so the defendant-doctor is aware of their presence and able to avoid them.

Last, but by no means least, is the necessity of having a working understanding of both the plaintiff's theories of liability, as well the defense theories per expert review, so that the defendant-doctor can be made aware of these theories and their testimony is supported.

In conclusion, as frustrating, difficult and anxiety provoking as the litigation process is to a practicing physician, he/she must be made to understand the importance of a deposition. The defendant-doctor is indeed out of their element when it comes to depositions, and the doctor requires the attorney's expertise to assure that this very important aspect of the litigation furthers his/her defense.



Ronald A. Margolis, Esq.

A Properly Executed Arbitration Agreement Is Enforceable; However, The Agreement Can Be Waived If Not Properly Protected

By Michelle H. Bagi, Esq.

Public policy favoring arbitration is codified in Ohio's Arbitration Act set forth in R.C. 2711, *et seq.* R.C. 2711.01 (A) provides that arbitration provisions shall be valid, irrevocable and enforceable. Moreover, R.C. 2711.02(B) provides that if any action is brought upon any issue referable to an agreement in writing for arbitration, the court in which the action is pending, shall, on application of one of the parties, stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement.

After analyzing these statutes, the Ohio Supreme Court issued an Opinion validating and enforcing an arbitration agreement made between a long-term care facility and a resident, divesting the trial court of jurisdiction to decide a dispute between the two parties. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054. In *Hayes*, the Court specifically held that an arbitration agreement, voluntarily executed by a nursing home resident upon her admission and not as a precondition to admission, is not rendered procedurally unconscionable solely by virtue of the resident's age. *Id.*, at ¶44. The Court further held that an arbitration agreement, voluntarily executed by a nursing home resident and not as a precondition to admission that waives the right to trial and the right to seek punitive damages and attorney fees, is not substantively unconscionable. *Id.*

The Court restated the traditional analysis for purposes of examining arbitration agreements and indicated that *in order to invalidate such an agreement, the arbitration provisions must be both procedurally and substantively unconscionable.*

In *Hayes*, the Court determined that the arbitration agreement at issue was neither procedurally nor substantively unconscionable. The Court addressed the procedural unconscionability issue first and determined that the agreement clearly delineated that it was voluntary and not a condition of a resident's admission to the facility. *Id.*, at ¶28. The Court further observed that by signing the agreement, the resident acknowledged she understood the terms of the agreement. *Id.* The Court also noted that the agreement was not a clause obscured within a lengthy contract. *Id.*

Next, the Court addressed the substantively unconscionability issue, and determined that the provisions in the agreement in which the resident waived the right to trial was reasonable. *Id.*, at ¶34. Waiving punitive damages and attorneys' fees was also deemed reasonable since both sides were to bear their own fees and costs. *Id.*, at ¶35. The Court concluded that both parties relinquished legal rights by

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agreeing to arbitrate disputes. *Id.*, at ¶36-41.

It should be noted that a party to a contract to arbitrate waives its right when it files a lawsuit rather than requesting arbitration. *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111, 113. Importantly, when the defendant is confronted with a filed lawsuit, the right to arbitrate can be saved by seeking enforcement of the arbitration clause. *Id.* This may be done under R.C. 2711.02 by application to stay the legal proceedings pending the arbitration. "Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver." *Kellogg v. Griffiths Health Care Group*, 3rd Dist. No. 9-10-59, 2011-Ohio-1733, citing *Austin v. Squire* (1997), 118 Ohio App.3d 35, 37, quoting *Mills*. When a defendant fails to raise the arbitration provision of the contract in an answer, the defendant in effect agrees to waive, and referral to arbitration is inappropriate. *Jones v. Honchell* (1984), 14 Ohio App.3d 120, 122, citing R.C. 2711.



Michelle H. Bagi, Esq.

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verdict and in the death certificate, and it also creates an independent cause of action for challenging the accuracy of the coroner's determination. It reads as follows:

The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the Division of Vital Statistics, shall be the legally accepted manner and mode in which such death

occurred, and the legally accepted cause of death, **unless the court of common pleas of the county in which the death occurred after a hearing directs the coroner to change his decision as to such cause and manner and mode of death.** (Emphasis added).

In *Vargo v. Travelers Insurance Co.* (1987), 34 Ohio St.3d 27, the Ohio Supreme Court described the procedure for challenging the cause of death as determined by the county coroner. It held that one could file a declaratory judgment action pursuant to Revised Code Chapter 2721 asking the court of common pleas to direct the coroner to change his decision as to the cause and manner and mode of death. Ten years later the Ohio Supreme Court decided that a declaratory judgment action was not the proper means for challenging a coroner's verdict. *Perez v. Cleveland County Coroner* (1997), 78 Ohio St.3d 376. The Court stated that ORC 313.19 outlines a special statutory procedure allowing judicial review of a coroner's determination of the cause of death. Further, the statute mandates a hearing to challenge the cause of death. The Court determined that ORC 313.19 places a limitation on the procedure to follow in challenging a coroner's determination of the cause of death, and for this reason using a declaratory judgment action would be inappropriate. The Supreme Court was cognizant of the fact that ORC 313.19 did not provide much detail concerning the steps to be taken to challenge a coroner's determination of the cause of death. However, it found that the common pleas court was well suited to develop such procedures when it stated:

Courts are well equipped to determine the appropriate procedures to employ in hearing a cause of action. Issues of standing and application of the appropriate statute of limitations often require judicial analysis beyond the language of the statute authorizing an action***. Likewise, courts must occasionally determine the appropriate standard of proof to apply in statutory actions in the absence of a legislative statement on the issue ***.

Once these determinations are made by a court, appellate review and *stare decisis* prevent arbitrary or discriminatory enforcement. (citations omitted). *Id.* at 379.

As noted in the *Perez* case, the Ohio Supreme Court made reference to the issue of standing to bring an action to change the coroner's cause of death under ORC 313.19. Standing has been interpreted broadly. See *Taser International Inc. v. Chief Medical Examiner of Summit County*, 8th Dist. No. 24233, 2009-Ohio-1519. In the *Taser* case the Ninth District Court of Appeals made the following statement:

RC 313.19 does not limit the scope of challenges to a coroner's determination, the purpose for which challenges are brought, or the persons who may bring a challenge***. By its nature RC 313.19 requires this broad interpretation. The interest protected by the statute is the accuracy of the coroner's verdict and death certificate, which are matters of public record and of great consequence given the evidentiary presumption that attaches to the coroner's finding. A review of cases brought under RC 313.19 demonstrates a diversity of interests that may give rise to standing, including damage to personal and professional reputation of the plaintiff***, posthumous damage to reputation of the decedent or impairment of an estate's ability to collect insurance proceeds***; and post-conviction or post-acquittal interests of criminal defendants***. (citations omitted). *Id.* at ¶20.

One would have to believe that taking the broad interpretation of standing as referenced above, plaintiffs and defendants in a wrongful death action would certainly have standing to challenge the coroner's determination as to the cause of death. The coroner is deemed to be an expert witness on that issue, and the defendant making the challenge needs to present his own expert testimony challenging the coroner's

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opinion. Clearly the one challenging the coroner's determination as to the cause of death has the burden of proof to convince a court that the coroner's opinion was inaccurate. The burden of proof was described in the *Taser* case as follows:

In actions brought for this purpose, the evidentiary presumption affords 'much weight' to the coroner's factual determinations, but does not elevate the burden of proof beyond a preponderance of the evidence or require the trial court to review the coroner's determination for an abuse of discretion***. (citations omitted). *Id.* at ¶30.

As noted at the outset of this article it is always worthwhile to contact the coroner to discuss the cause of death when there is a significant question as to the correct cause of death. The potential exists that such a discussion with a coroner, whether or not additional pertinent medical records are provided to him, may have the effect of the coroner deciding that his initial determination of the cause of death was inaccurate. If this occurs there is a method by which the coroner can voluntarily change the cause of death without being ordered to do so by a common pleas court. ORC 3705.22 allows for voluntary correction of errors. When the facts stated in a death record are challenged the director of the department of health may require satisfactory evidence to be presented in the form of affidavits, amended records, or certificates to establish the alleged facts. When established, the original record or

certificate shall be supplemented by the affidavit, amended certificate, or record information.

Medical certifications contained on death records may be corrected only by the person whose name appears on the original record as attending physician or by the coroner of the county in which the death occurred. Once a voluntary correction is made there cannot be a second correction except by order of the court. The Director of the Department of Health may refuse to accept an affidavit or amended certificate that appears to be submitted for the purpose of falsifying the certificate or record. These voluntary procedures are discussed in ORC 3705.22. They seem to address the supplementation of a certificate of death, but no reference is made to a coroner's verdict being changed under this statute. Arguably if the coroner can change the cause of death on a death certificate (a document for which he is not the custodian), he can change the cause of death on his verdict for which he is the custodian.

The coroner's determination as to the cause of death is not conclusive. ORC 313.19 gives rise to a rebuttable presumption. The syllabus of the *Vargo* case makes this clear. It reads as follows:

1. The coroner's factual determinations concerning the manner, mode and cause of death, as expressed in the coroner's report and the death certificate, create a non-binding rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary. (RC 313.19, construed.)

2. RC 313.19 does not deprive a civil litigant of due process of law. The statute does not compel the fact-finder to accept, as a matter of law, the coroner's factual findings concerning the manner, mode and cause of decedent's death. *Id.*

Since the coroner's determination as to the cause of death is rebuttable and can be challenged without filing a separate action, one can challenge the cause of death during the trial of a wrongful death action. Certified copies of the coroner's verdict and the death certificate are admissible evidence. The party challenging the coroner's determination carries the burden of establishing by a preponderance of competent, credible evidence to the contrary, that the coroner's opinion was inaccurate. This would necessitate medical expert testimony. It is then up to the jury to decide which cause of death is the correct one based upon all of the evidence presented.

If one challenges the coroner's opinion during the course of prosecuting or defending a wrongful death action, it is very important to craft an appropriate jury instruction as to the consideration a juror should give to the coroner's verdict. In the *Vargo* case, the trial court gave a jury instruction which provided a tremendous amount of weight to the coroner's decision. The jury instruction read as follows:

*** I charge you, as a matter of law, that the cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's

report and in the death certificate, filed in this case, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, which evidence may be considered by you in reaching your decision in this case. *Id.*, at 230.

This instruction appears to be very stringent, but when the court looked at the entire instruction it found that the trial court was not directing the jury to blindly accept the coroner's findings. The *Vargo* decision actually provides arguments one can use against this instruction. One can look at the syllabus of *Vargo* as well as the opinion itself and draft a more even-handed jury instruction. Taking language from the syllabus, a jury instruction could begin as follows: "I instruct you that the coroner's factual determinations concerning the manner, mode and cause of death, as expressed in the coroner's report and the death certificate, create a non-binding rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary." The jury instruction could continue based upon the court's decision found on page 5 of 6 in the following manner: Neither the coroner's report nor the death certificate is conclusive concerning the manner, mode or cause of death. Both may be changed through use of competent, credible evidence since the coroner's findings are, in essence, a determination of a medical expert on a medical question.