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How To Get “Permanent And Substantial Physical Deformity” Issues To A Jury – And Win

by Brenda M. Johnson and Dana M. Paris

Ohio’s noneconomic damage cap statute for medical malpractice actions – R.C. § 2323.43 – was enacted in 2003. A similar cap on general personal injury actions – R.C. § 1315.18 – was enacted in 2005. These caps can be avoided if the injured plaintiff can show she suffered a “permanent and substantial physical deformity” as a result of the tortious conduct at issue.¹

The term “permanent and substantial physical deformity” is not defined in either statute, and the case law that has developed so far is highly fact-specific. A survey of the case law available as of the date of its publication was included in the last winter edition of the CATA News.² That article ended with the following sentence – “[O]ne thing is clear from the case law to date – compiling an evidentiary record documenting objectively verifiable alterations to your client’s physiognomy is crucial to defeating any challenge as to the sufficiency of that evidence.”

This article is intended to pick up where that sentence left off, and to provide practical advice, based on our experience, as to how to build an evidentiary record, and how to make sure that evidentiary record gets to a jury.

Build An Evidentiary Record

Both the case law to date and our experience make one thing clear – making sure that the permanent and substantial nature of your client’s physical injuries is fully documented in the

course of discovery is critical. Motion practice on whether the issue can get to the jury is inevitable, and you will need an evidentiary record on which to oppose these challenges.

Here, experts and photographic documentation are indispensable. Both state and federal courts have found expert reports and affidavits detailing the nature of the plaintiff’s injuries, as well as their permanency, to be key factors in denying defense motions for partial summary judgment on this issue. In *Swink v. Reinhart Foodservice, LLC*,³ plaintiff’s counsel offered an expert affidavit describing the plaintiff’s “extensive and permanent scarring, both from the trauma of her injuries and subsequent surgical intervention,” along with an opinion that the scarring along with anatomical changes relating to the nonunion of a femur fracture were “a permanent and substantial physical deformity.”⁴ Judge Knepp of the Northern District of Ohio found the affidavit and report sufficient to defeat summary judgment.

Photographs and your client’s own testimony can be critical as well, both for and against your case. In one of our cases, we were able to present an expert report, photographs, and testimony from our client regarding permanent surgical scarring, abnormal bone growth in his foot, and other observable changes in his body, which then allowed us to defeat a motion to prevent the caps from being applied.⁵ Conversely, in *Poteet v. MacMillan*,⁶ the Twelfth District recently reversed a trial court’s denial of a defense

motion for a directed verdict on this issue in a case where expert testimony on the issue was equivocal, and the only evidence of any visible misshapeness or scarring was in the form of four year old photographs of the plaintiff's initial surgical wounds.⁷

Poteet is notable for other reasons as well, as it appears to be in conflict with *Johnson v. Stachel*,⁸ in which the Fifth District held that a deformity does not need to be visible to qualify as "substantial." Either way, the best approach is to be able to present as much evidence of a *currently visible* and *permanent* physical deformity as possible, whether through expert testimony, photographs, or your client's own testimony and willingness to display his or her condition as necessary, whether in an IME, a deposition, or at trial.

Set the Procedural Stage

Before trial, the appropriate procedural method for raising the issue is via a Rule 56 motion. This is clear both from the nature of the issue, as well as the language of the caps statutes. Both of the damage cap statutes specifically provide that prior to trial, "any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination" as to whether the injury falls within an exception to the caps.⁹

Despite this, it has been our experience that defense counsel will wait until the eve of trial to raise the issue – often through a motion *in limine*. This mechanism is inappropriate, since motions *in limine* are directed to the admissibility (as opposed to the sufficiency) of evidence a party might offer at trial.¹⁰ Thus, it is important to educate your court beforehand.

To ensure this issue is raised well before the eve of trial, make sure your court

includes a dispositive motion due date in the case management order. That way, if defense counsel attempts to raise the issue on the eve of trial, you will be in a position to challenge it as untimely. Once the dispositive motion date runs, the only procedural option that *should* remain to the defendant is a motion for directed verdict.

Finally, be sure you include both a jury instruction and a jury interrogatory as to whether the caps apply, and do so in any case in which there is a potential question on this issue. Though neither of the caps statutes requires an instruction or an interrogatory on this issue, in *Giuliani v. Shehata*,¹¹ the First District has held that they both are necessary to preserve a verdict, regardless of how obvious it may be from the evidentiary record that the caps should not apply. ■

End Notes

1. See R.C. § 2323.43(A)(3); R.C. § 2315.18(B)(3).
2. See Brenda M. Johnson, *A Survey of the Case Law Addressing "Permanent and Substantial Physical Deformity,"* CATA News, Winter 2021-2022.
3. No. 3:20 CV 1997, 2022 U.S. Dist. LEXIS 74229, 2022 WL 1203063 (N.D. Ohio April 22, 2022).
4. *Id.* at *3-*4.
5. See Order dated Dec. 18, 2020, *Hay v. Shirey*, N.D. Ohio No. 1:19-cv-02645-PAG [DE 38].
6. 12th Dist. Warren No. CA2021-08-071, 2022-Ohio-876.
7. *Id.* at ¶¶ 21-22 (plaintiff did not testify about misshapeness or scarring, and the only photographic evidence was four year old photos of fresh surgical wounds).
8. 5th Dist. Stark No. 19AP-828, 2020-Ohio-5595.
9. R.C. § 2315.18(E)(2); R.C. § 2323.43(C)(2).
10. See, e.g., *Louzon v. Ford Motor Co.*, 718 F.3d 554 (6th Cir. 2013) (distinguishing motions *in limine* from motions for summary judgment).
11. 1st Dist. Hamilton Nos. C-13087, C-140016, 2014-Ohio-4240.