*Brenda M. Johnson is an attorney at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or bjohnson@nphm.com.*

# The Case Against Double-Teaming:
## Why Mostly-Aligned Medical Defendants Shouldn't Get Separate Peremptory Challenges

*By Brenda M. Johnson*

It's a familiar scenario. You have a medical malpractice case going to trial. There were multiple care providers involved in providing the treatment at issue, and because of *Wuerth* and *Comer* issues you've had to sue each doctor, along with their professional corporations, as well as the hospital where the care was provided.

The physicians and their professional corporations are each represented by separate law firms, while the hospital and nurses are represented by another firm. Each defense firm has filed separate answers on behalf of their respective clients, and while each denies liability and has raised the fault of others as an affirmative defense, no defendant has filed a cross-claim against the other. After deposing the defendants and their experts, it's become clear that none of the doctors or their experts intends to criticize the conduct of any other defendant, and it's also clear that all of the defendants will be taking the same position with respect to causation.

Their interests, in short, are not really adverse. Yet, when it comes time to choose a jury, each separately represented group of defendants insists it is entitled to its own set of peremptory challenges. They point out they have separate attorneys, filed separate answers, and have retained separate sets of experts. You respond by pointing out that they have not criticized each other or made any cross-claims against one another, and they respond by claiming that it is technically possible that one or more will be held liable while others are not, and they argue that their defenses are not the same because they are from different specialties.

In scenarios such as this, Ohio courts have tended to agree with the defense position. In *Brown v. Martin*,[1] for instance, the Fifth District found no abuse of discretion in a case where the trial court allowed two separate physician groups to exercise separate peremptory challenges where the groups were from different specialties, and had separate representation.[2] In *Bernal v. Lindholm*,[3] the Sixth District found the fact that one separately-represented defendant might possibly be found negligent to the exclusion of others was enough to justify allowing each to exercise separate peremptories.[4]

This approach, however, isn't consistent with the law or the purpose behind peremptory challenges, and it puts plaintiffs at a distinct disadvantage in medical malpractice cases.

The purpose behind peremptory challenges "is to enable a party to reject certain jurors based upon a subjective perception that they may be adverse or unsympathetic to his position even though no basis for a challenge for cause exists."[5] Used properly, peremptory challenges are a means by which the parties may, by excluding those jurors whom they believe will be "most partial toward the other side," eliminate "'extremes of partiality on both sides,' thereby 'assuring the selection of a qualified and unbiased jury.'"[6]

That said, "[t]he side with the greater number of peremptory challenges clearly has a tactical advantage created by its ability to eliminate potentially unfavorable jurors without cause."[7] Thus, if a group of essentially aligned defendants is given more peremptory challenges than the plaintiff, peremptory challenges lead to an unfair playing field. And in medical malpractice cases, plaintiffs already find themselves behind the eight-ball when it comes to jury preconceptions.

Jurors already favor medical defendants over plaintiffs.

Contrary to conventional wisdom, plaintiffs don't get a "sympathy" advantage with the jury in medical malpractice trials. Instead, as the authors of a recent article directed to the medical malpractice defense bar acknowledged, "jurors are not particularly sympathetic to the trial plaintiff," and are not swayed by compassion for the injured.[8]

What the research shows is that jurors actually have a bias *against* plaintiffs, especially in medical malpractice cases.[9] They are suspicious and judgmental of plaintiffs, tend to believe they are money hungry, and even wonder whether their attorneys have encouraged them to lie or exaggerate their injuries.[10]

Medical professionals, on the other hand, have a much better chance with the average juror, even when the facts are against them.[11] In studies where researchers compared jury verdicts with an independent medical expert's evaluation of the case, it turned out that the jury found for the defendants in as many as 50 percent of cases where an independent expert found strong evidence that medical error was at fault.[12] These studies comparing jury verdicts with independent expert reviews are "startlingly consistent," and they "consistently find that juries are deferential to physicians."[13]

Many factors play a role in this. Doctors have a favored status in the community, and jurors tend to believe what they say.[14] The complexity of medical cases, combined with the burden of proof, also favor medical defendants, since "[j]uries may be reluctant to hold a defendant liable when jurors are uncertain or confused about the evidence."[15] Years of media coverage of the so-called "medical malpractice crisis," combined with social norms that favor individualism, self-reliance, and stoicism in the face of misfortune also combine to create an environment in which jurors are inclined to side with doctors.[16]

Allocating peremptory challenges to multiple defendants that have no real conflict with one another jeopardizes a plaintiff's right to a fair trial.

What this means in medical malpractice cases is that on the issues where peremptory challenges matter – namely, whether or not particular jurors may be sympathetic to one side or the other– defendants have a distinct shared advantage simply due to their status *as medical defendants*. This advantage, in turn, is amplified when there are multiple defendants involved.

When it comes to juror sympathy, medical defendants share the same goal with respect to eliminating those jurors whose sympathies favor plaintiffs. They are also aligned with one another as to juror sympathy in *favor* of the medical profession, regardless of their specialties.

So does Ohio law regarding peremptory challenges really require that these defendants be afforded separate peremptory challenges based solely on technical notions of adversity, like having separate attorneys, or because one might be found liable while another might not? The answer is no. Instead, it is clear from case law in Ohio and elsewhere that a trial court should look to the specific facts and posture of the case when determining whether parties are sufficiently "antagonistic" to one another to warrant separate peremptories, and not simply to the pleadings or the existence of separate representation.

In the majority of jurisdictions, the test for whether separate peremptories are warranted is whether the interests of the parties are "essentially different or antagonistic." Separate answers and separate representation, however, have never been sufficient in themselves to establish the level of "antagonistic" interest sufficient to warrant separate peremptories.

In *Price v. Charleston Area Med. Ctr.*,[17] for instance, the West Virginia Supreme Court held that separate answers and separate representation are not enough; instead, a trial court should look to the posture of the case at the time its ruling is made.[18] Likewise, in *Patterson Dental Co. v. Dunn*,[19] an opinion that has been followed in a number of other jurisdictions, the Texas Supreme Court held that the antagonism necessary to warrant separate peremptories cannot be purely legal, but "must exist on an issue of fact that will be submitted to the jury."[20] In addition, such antagonism must exist between litigants on the same side, and cannot be based solely on the fact that the plaintiff has made different claims against the defendants, or because there are purely legal cross-claims alleged between the defendants.[21]

Courts applying these standards do so because they recognize that significant unfairness can arise if courts find "antagonism" based simply on the fact that their defenses may not necessarily rest on the same facts or theories. The Utah Supreme Court has noted that allocating separate peremptories to defendants based simply on the fact that their defenses may rely on different facts or theories "would entitle co-defendants to extra peremptory challenges in a majority of multiple-defendant cases, thereby imposing a significant disadvantage on plaintiffs."[22]

The Wyoming Supreme Court has also observed that co-defendants are afforded separate peremptories on the presumption that "certain of the extra challenges will be used to select a jury

for the case against the other defendant, rather than against the plaintiff."[23] However, when no "good-faith controversy exists" between defendants, "the single-party plaintiff is placed in a distinct tactical disadvantage."[24]

> The multi-party defendants, having no motive to exercise their additional challenges against a co-defendant, are able to pool their challenges against the plaintiff.... In practice,... a party exercises peremptory challenges to reject jurors perceived to be unsympathetic to his case. **To allow nonantagonistic, multi-party defendants a two-, three-, or four-to-one advantage in the exercise of peremptory challenges affords them undue influence over the composition of the jury and implicates the single-party plaintiff's right to a fair trial.**[25]

Ohio courts can and should apply the same approach, as it is fully consistent with Ohio law. When it was adopted in 1970, Rule 47 was meant to embody the majority rule regarding allocation of peremptory challenges among aligned parties.[26] And as far back as 1890, Ohio courts recognized that under these standards, defendants who file separate answers and are represented by separate counsel should still be considered one party for purposes of allocating peremptory challenges if their defenses are not truly "antagonistic."[27]

An approach to allocating peremptory challenges among multiple defendants in any case should be tailored to the facts of the case, and should take into account the real danger of undue influence that arises when defendants have an advantage that is unwarranted due to their lack of adversity on the issues of potential juror sympathy that drive the jury selection process. This is critical to a fair trial in any case, and is even more crucial in medical malpractice cases. ■

## End Notes

1. 5th Dist. Fairfield No. 14-CA-31, 2015-Ohio-503.
2. *Id.* at ¶ 20.
3. 133 Ohio App.3d 163, 727 N.E.2d 145 (6th Dist. 1999).
4. *Id.* at 176 ("Appellees were represented by separate counsel and separate pleadings and motions were filed. With respect to the defenses asserted, the [defense causation theory] could have exonerated all defendants. However, if the jury chose not to accept that theory, it nevertheless could have found one defendant liable and not another. Hence the defenses asserted did not necessarily stand or fall together." (citations omitted)).
5. *Fieger v. E. Natl. Bank*, 710 P.2d 1134, 1136 (Colo.App.1985) (citing *Nieves v. Kietlinski*, 22 Ohio St.2d 139, 258 N.E.2d 454 (1970)); *see also Wardell v. McMillan*, 844 P.2d 1052, 1061 (Wyo. 1992) ("a party exercises peremptory challenges to reject jurors perceived to be unsympathetic to his case.").
6. *Holland v. Illinois*, 493 U.S. 474, 484, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986)).
7. *King v. Special Resource Mgt.*, 256 Mont. 367, 371, 846 P.2d 1038 (1993). Notably, there is some evidence that peremptories, even when used properly, result in more conservative jury panels. See Joshua Revesz, *COMMENT; Ideological Imbalance and the Peremptory Challenge,* 125 Yale L.J. 2535 (June 2016)
8. Linda S. Crawford, J.D., *Why Winners Win: Preparing Witnesses for Testimony – Part One*, INSIDE MEDICAL LIABILITY 24, 26 (Third Quarter 2015) (citing Valerie P. Hans, BUSINESS ON TRIAL (2000)). "Inside Medical Liability" is touted as the "flagship publication" of the Physician Insurers Association of America (PIAA), a trade association of medical professional liability insurance companies. According to PIAA's website (www.piaa.us), "PIAA members insure more than two-thirds of America's private practicing physicians," many other health care providers, and insure over 2,000 hospitals as well.
9. Crawford, *supra* at 26.: *see also* Richard Waites, J.D., Ph.D., and Cynthia Zarling, Ph.D., *Juror Attitudes and Perceptions in Medical Malpractice Cases*, available at http://theadvocates.com/lib.jurorperch.htm (last accessed on October 31, 2017)
10. Crawford, *supra* at 26; *see also* Philip G. Peters, Jr., *Doctors and Juries*, 105 MICH. L. REV. 1453, 1482-83 (May 2007) (reviewing studies showing juror bias); Neil Vidmar, *Juries and Medical Malpractice Claims: Empirical Facts versus Myths*, CLINICAL ORTHOPAEDICS AND RELATED RESEARCH, 2009 Feb.; 467(2): 367-375.
11. Peters, *supra* at 1475.
12. Peters, *supra* at 1464-1465 (in studies where jury decisions were compared with independent medical evaluations, plaintiffs won 10 to 20 percent of cases with weak evidence, but only 50 percent of the cases where evidence of negligence was strong). Other studies discussed in the same article showed plaintiffs winning only 43 to 50 percent of those cases where reviewers found fault. *Id.* at 1466-68, 71-73.
13. Peters, *supra* at 1475.
14. Crawford at 27; *see also* Peters, *supra* at 1475 (juries are deferential to physicians)
15. Peters, *supra* at 1481.
16. Peters, *supra* at 1481.
17. 217 W. Va. 663, 619 S.E.2d 176 (2005)
18. *Id.* at 672.
19. 592 S.W.2d 914 (Tex. 1979)
20. *Id.* at 918.
21. *Id.* "Antagonism does not exist because of differing conflicts with the other side; e.g., when a plaintiff sues several defendants alleging different acts or omissions against each defendant. Antagonism would exist, however, if each of the defendants alleged that the fault of another defendant was the sole cause of plaintiff's damage. The existence or non-existence of cross-actions or third-party actions is not determinative" *Id.*, citations omitted.
22. *Randle v. Allen*, 862 P.2d 1329, 1333 (Utah 1993).
23. *Wardell v. McMillin*, 844 P.2d 1052, 1061 (Wyo. 1992) (citing Daniel J. Sheehan, Jr. & Cynthia C. Hollingsworth, *Allocation of Peremptory Challenges Among Multiple Parties*, 10 ST. MARY'S L.J. 511, 530 (1979)).
24. *Wardell* at 1061.
25. *Id.*. (emphasis added).
26. *See* 1970 Staff Notes, Rule 47(B) [currently Rule 47(C)], Challenges to Jury ("The second sentence of the rule restates the current case law regarding multiple parties and peremptory challenges," citing *Chakeres v. Merchants & Mechanics Fed. Sav. & Loan Assn.* 117 Ohio App. 351, 192 N.E.2d 323 (2d Dist. 1962)).
27. *Gram v. Sampson*, 1890 Ohio Misc. LEXIS 45, 4 Ohio C.C. 490, 2 Ohio Cir. Dec. 666 (2d Cir. Clark 1890). *Gram* remains good law. *See Nieves v. Kietlinski,* 22 Ohio St.2d 139, 142, 258 N.E.2d 454 (1970) (quoting *Gram* with approval). *See* R.C. § 2317.02(C, D).