

# Ipsos Jure



VOLUME 26, NUMBER 4

SEPTEMBER 2006

A PUBLICATION OF THE GEAUGA COUNTY BAR ASSOCIATION  
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## GENERAL MEETING OF THE BAR SEPTEMBER 27, 2006

The next General Meeting of the Geauga County Bar Association will be at Bass Lake Tavern at Noon on September 27. Nominations for bar association officers for next year will be announced. Lunch will be a buffet and cost \$10. Reservations are not necessary.



There was a festive atmosphere for Secretaries Day this year. The GCBA put on an "Afternoon in Italy" at Big Creek Park in Chardon.

## FIRST FRIDAY CLE PROGRAMS

The first 2 programs in this series, Changes to Bankruptcy and Changes to the Local Rules were very popular and well attended. Don't wait until the last minute to be included in the remaining programs, which are:

- 9/8 Business Valuations and Using Tax Returns to Find Hidden Income by Terri A. Lastovka, CPA, JD, ASA
- 10/6 Domestic Relations Update & Collaborative Law by Heidi Cisan, Esq. and Lynn Schwartz, Esq.
- 11/3 Effective Mediation Techniques by James P.

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Carrabine, Esq.

- 12/1 Procrastinators Seminar (for the required hours in ethics, substance abuse and professionalism) speakers will be announced soon.

The Supreme Court of Ohio, Commission on CLE has approved the 9/8, 10/6, and 11/3 programs for 2 hours of general instruction. The application for approval of the Procrastinators Seminar is pending. All seminars cost \$40 for GCBA Members. Call Susan, 279-2087 for more information.



## SETTLEMENT DAY

**Lisa J. Carey, Esq.** has started preparations for Settlement Day, November 17, 2006. Please find the Case Nomination Form and Mediator Sign Up sheets enclosed. They are due back to Lisa by September 22.





## PRESIDENT'S COLUMN

STEPHEN G. MACEK, ESQ.

I have written previously about the many attorneys that helped me out when I first started practicing law. I would be remiss in not mentioning the assistance my family provided to me as well.

My parents were hardworking, blue-collar folk. My father was the son of Slovak immigrants and a WWII Marine Corps veteran. He was skilled in all of the building trades: carpentry, plumbing, electrical work, plastering - you name it. My mother was a "stay-at-home" mom, but took a job in the housekeeping department at Geauga Hospital after my siblings and I were grown. It was a big deal to them when I graduated from law school and opened my own law office. They were both very proud and supportive of me.



Magistrate Lee with her Apple Nut Pie

My older brothers, Jim and Emil, helped me out, too. Jimmy loaned me a car once for several months, when I first started practicing law. He was a welder or an ironworker at the time. He has always believed in hard work and his bumper sticker attested to the fact: "I fight poverty — I work for a living". No one would ever accuse Jimmy of being a liberal. The bumper sticker annoyed one particular tenant in our building to no end. His own bumper sticker read: "Wage Peace". I was just glad to have the car.



Jean Cirino, from Ann D'Amico's office, with her Pecan Pie

Emil gave me a lot of good advice on the types of computers, software and printers to buy. It saved me a lot of wasted time and money. His nicest gift to me though was a big, beautiful walnut desk. It is the only real desk I have ever

had. The top is about 4 feet by 8 feet and it weighs a ton. It was always a bear to move. I know, since I helped move it on more than one occasion. Emil and his wife, Mary, had a particularly difficult time getting it to its last location prior to my ownership: a second floor bedroom at the end of a steep and turning staircase. Emil used to tell me how he had to "curl" it to get it up those stairs. When he gave it to me, it was mine to move. It looked like a hopeless cause. In desperation, I flipped it upside down to see if I could take it apart. Two dozen wood screws later, I was able to carry the desktop, seven drawers, two drawer cabinets and two slides down the stairs as separate pieces. The look on Emil's face was a priceless mixture of agony and disbelief. I still have the desk. It's not for sale.



Ann D'Amico & Susan Proboski's Blueberry Pie

This year's golf outing was at Tanglewood Golf Course. For those of you that didn't attend, you missed a really good time. I just came for the dinner because I'm not much of a golfer and have never played the course. However, I have been to the course and even worked on their grounds equipment when Macek's Repair Service was still around. But, that is another story.

## 2006 PIE CONTEST

BY SUSAN PROBOSKI

There were over 12 entries in the 2<sup>nd</sup> Annual Pie Baking Contest. Only 2 of the winners from last year entered, **Mary Bender & Cynthia Wrobel**. The judges proved they didn't play favorites, as the winners were all new this year. **Magistrate Lee** won best apple pie with her apple nut pie. **Ann D'Amico & Susan Proboski** won best other pie with their Blueberry Pie. The best nut pie award went to **Jean Cirino**. **Dawn Gargiulo's** Triple Berry pie took best presentation awards. All the winners received \$25 gift certificates for cooking stores.



Dawn Gargiulo with her Triple Berry pie and secretary Carla Solinsky



# 11<sup>TH</sup> DISTRICT COURT OF APPEALS

SUMMARIES BY LINDA IRELAND, COURT PARALEGAL

**O**n December 9, 2005, in *Mahvi v. Stanley Builders*, 11th Dist. No. 2004-G-2607, 2005-Ohio-6581, the appellate court affirmed the judgment of the Geauga County Court of Common Pleas, granting summary judgment in favor of appellee, a manufacturer of exterior house coatings, where appellant’s own evidence on summary judgment failed to create a genuine issue of material fact, beyond mere conjecture, that appellee’s materials were part of the allegedly defective siding system or that the materials themselves were defective.



Sharon Gingerich of the Magistrates/Bender Team plays round two while TD&D 1 teammates Dale Markowitz and Matt Dolan wait for their turn.

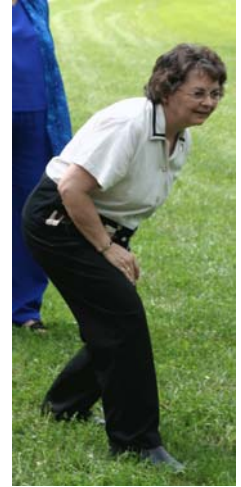
**O**n March 14, 2006, in *Roynak-Bogert v. Bogert*, 11th Dist. No. 2005-G-2617, 2006-Ohio-1168, the court of appeals affirmed the judgment of the Geauga County Court of Common Pleas, Domestic Relations Division, granting appellee’s motion to reduce a temporary spousal support arrearage to judgment, and denying appellant’s motion for relief from judgment. The appellate court held that the trial court did not abuse its discretion by excluding evidence of appellee’s alleged conduct constituting a waiver of her right to temporary spousal support where the separation agreement contemplated both parties living in the same household and sharing expenses pending divorce proceedings. The appellate court also concluded that the trial court properly denied appellant credit for certain expenses not contemplated by the separation agreement where there was undisputed evidence showing that appellant had failed to pay expenses specifically enumerated in the agreement. The appellate court



Linda Kostelnik of the Magistrates/Bender team stays close to the action.

also held that appellant’s motion for relief from judgment was an inappropriate remedy, since an order for temporary spousal support is not a final order to which Civ.R. 60(B) applies.

**O**n April 7, 2006, in *State v. Brown*, 11th Dist. No. 2005-G-2655, 2006-Ohio-1796, the court of appeals reversed the Geauga County Court of Common Pleas’ judgment entry of sentence, where the trial court committed prejudicial error by failing to provide appellant the opportunity to speak to the court directly and present evidence in mitigation of his sentence, as required by Crim.R. 32, where the court relied on additional information presented by the prosecution prior to the imposition of his sentence and appellant was not given an opportunity to respond.



Mary Bender tries to nudge closer to the palladino.

## THE 2006 BOCCÉ BALL TOURNAMENT

BY SUSAN PROBOSKI

**I**n keeping with the theme of “An Afternoon in Italy,” Susan Proboski & Ann D’Amico put together a Bocce Ball Contest for Secretaries Day. Here are the results:

**Round 1:** There were 12 teams in the GCBA’s Bocce Ball Contest at Secretaries Day on June 28. The games began a little slowly, with many people playing for the first time ever. In Round 1, the **Petersen & Ibold** team captained by **Carly Ibold** beat the **Jeff Fanger** team; The **Public Defenders** and **Clerks of Courts** team lost to the **Magistrate’s secretaries/Mary Bender** team. **Judge Burt’s** team bested another of the **Petersen & Ibold** teams. **Judge Fuhry’s** team lost to team **TD&D2**.



Kelly Slattery and Lynda Bedenko of Team TD&D 1 watch as Cheryl DeFrancesco of the Magistrates/Bender Team tosses her ball

**Round 2:** It appears that Round 1 served as a good warm-up, as the **Magistrates/Bender** Team, **Judge Burt's** team, and Team **TD&D2** all advanced to the 3<sup>rd</sup> round, defeating Team



**TD&D1, Newman & Brice,** and the 3<sup>rd</sup> **Petersen & Ibold** Team. The only team from the first round that did not advance was the first **Petersen & Ibold** team, which was routed by the **Kevin O'Reilly** team.

**Round 3:** The **Magistrates/ Bender** Team proved hard to beat, handing **Kevin O'Reilly's** team a loss in the third

round. **Judge Burt** deserted his team to judge the pie contest. The remaining members then lost to team **TD&D 2**, who were grateful to no longer be playing in the swamp court.

**Championship:** The **Magistrates/Bender** team, comprised of **Linda Kostelnik, Cheryl DeFrancesco, Sharon Gingerich** and **Mary Bender,** took on team **TD&D 2**, captained by **David Ondrey** with **Heidi Cisan, Pat Krebs & Diane Moore** as teammates. Hunger & fatigue had started to set in and the teams agreed to only play to 4. After 3 frames, Team **TD&D 2** triumphed and walked away with a bottle of Italian wine each.



## NEWS & VIEWS

BY DAVID L. FUHRY, JUDGE, GAUGA COUNTY COURT OF COMMON PLEAS

### I. NEWS

#### A. STATUTE OF FRAUDS

This is not a rule of evidence (like the oft-confused Parole Evidence Rule is) but a substantive law which requires that certain contracts, to be enforceable, be in writing and signed by “the party to be charged” (aka defendant). R.C. 1335.05. Failure to meet the requirements of the statute are onerous: the “contract” that is subject to the rule is unenforceable even if the parties’ oral agreement is proven.

The statute, being in derogation of the common law, is narrowly construed. In law school we were taught courts would go to almost any length to find a way around the operation of the statute.

One type of contract subject to the statute is a promise based upon “an agreement that is not to be performed within one year from the making thereof”. In furtherance of the aforesaid impetus to strictly confine the boundaries of the statute’s applicability, we were taught to apply a litmus test analysis with reference to the one year rule. The test amounted to answering the question: “Is it conceivable that the contract could be performed within one year?” If the answer was no, the contract promise must be in writing and

signed by the defendant or it is unenforceable due to its failure to conform to the Statute of Frauds. If the answer was yes the oral contract, if proven, is enforceable because the statute does not apply.

Caveat: the litmus test question is no longer fool proof! About the only type of contract that ever did pass the old test was one which by its own terms required a term of performance that expressly exceeded one year. Example: a two year employment contract, a three year lease, a four year service agreement, and so

### Champions of the 2006 Bocce Ball Tournament: Team TD&D2

Pat Krebs, David Ondrey, Diane Moore, & Heidi Cisan



forth. These contracts, where not terminable, for a term of one or more years obviously can't be performed within one year and therefore are subject to the statute. Other contracts with no definite term stated, even if appearing to be long term via the parties' intention or nature of the performance, were routinely interpreted as being outside the statute since performance could conceivably be

accomplished in one year.

If a service agreement, for example, could be construed as being terminable within one year, it would not be subject to the statute due to application of the conventional "conceivability" test.

Why is the litmus test's infallibility now in doubt?

The case this writer encountered is a Tenth District Court of Appeals case, *Lingo v. Ohio*

*Central Railroad, Inc.*, 2006 WL 1230679, decided May 9, 2006. The parties' oral "understanding" was that one party would inspect rail cars for proper operating condition before they were placed into service at the rail yard. The trial court held that the oral contract was not subject to the Statute of Frauds because it was an agreement "not to be performed within one year". The Trial Court obviously felt the agreement was terminable by either side. After all, it was an oral agreement with no stated term.

How did the appeals court come to the conclusion that the contract was subject to the Statute when it appeared terminable by either party at any time?

The appeals court reversed the trial court because the agreement evinced an intention that it not be completed within one year. The court looked to the language of the oral agreement (or "understanding") and "all of the circumstances existing at the time...." to determine that intention.

Problem with the case: still must prove the parties'

intention that the agreement not be performed within one year. This can be hard to do, especially if the contract is oral. Long term contracts (if they truly were meant to be long term) are usually reduced to writing.

## B. SLIP & FALL/ "OPEN & OBVIOUS"

Recall that a hard and fast rule of premises liability is that the owner owes no duty of care to invitees with respect to "open & obvious" hazards. The reason arises from a familiar tort principle: no duty of non-negligence exists with respect to such hazards.

The question of duty in tort law is typically a question of law decided by the court. But in this type of case, the existence of the duty depends upon a factual finding. Was the hazard "open and obvious" or was it hidden? Who decides the factual issue? The court or (as is the case with most factual issues) the jury?



Dennis Coyne, Leslie Wargo, F.M. Apicella & Mary Jane Trapp at the Golf Outing

Ohio courts of appeals are split on the issue. Our Eleventh District appears to have adopted the jury question approach (See *Konet v. Mark Glassman, Inc.*, 2005 WL 2416608, decided last year).

### Slip & Fall on Snow or Ice

A sub-species of this "open & obvious" doctrine is the familiar owner immunity which occurs where the Plaintiff slipped on a "natural accumulation" of snow and/or ice, and which accumulation was not augmented or caused by human intervention. The basis of the rule would appear to be that such accumulations are by nature "open & obvious".

What about black ice which by nature is not open and obvious? Does the fact that the logic of the "natural accumulation" rule not apply negate the operation of the rule? When confronted with the issue in a defense motion for summary judgment, this writer denied the motion. I noted that

our Court of Appeals had found excavated earth which allegedly had soft spots causing Plaintiff to trip and fall survived a defense motion for summary judgment. *Finch v. Gullybrook, Inc.*, 11th Dist. No. 2004-L-109, 2005 - Ohio -



Judge Burt won the Shortest Drive.



High Scoring Team Members Magistrate Lee, Lynne Day, Lisa Carey & Dave McGee

6467 (Decided December 9, 2005). Such conditions were not made obvious just because the earth was excavated. Similarly, just because it had been cold and wet didn't mean black ice in a



Tim Snyder's team with Bob Ohly, John Hardesty and Jon Floriano

parking lot was open and obvious. And, while it was a natural accumulation, it's hidden nature undercut and nullified the "natural accumulation" rule.

### C. SENTENCING

In case you practice only a little felony criminal law, (if there is such a thing) be on notice that sentencing has changed. And, for the most part, not favorably from a defense standpoint. Prior to *State v. Foster*, 2006 Ohio 856 decided February 27, 2006, the sentencing court was required to determine and weigh certain facts and factors before sentencing. Some facts and factors were designed to act as a "brake" or restraint on the Court's ability to impose prison, or if prison was an option, to imprison for a shorter versus a longer term. For example, the shortest authorized prison term was presumed appropriate for a first time low level felon absent certain findings. Another example: a maximum sentence is inappropriate unless Defendant committed "the worst form of the offense". The Court had to refer to and recite its reasoning at the sentencing.



Scott Lloyd helped his team take first place.

Now all the rules have changed! The court needn't find such and so factor exists before opting for a longer sentence. The Court no longer has to provide any reason for a particular sentence. The legislature's intervention into such sentencing consideration was deemed unconstitutional by the Ohio Supreme Court.

While the "gloves are off" the sentencing court, so to speak, will this materially influence felony sentencing hereafter? While it remains to be seen,

most cases that were under appeal and have thus been remanded for sentencing have not seen any harsher sentences just because the "brakes" have been removed.

### D. COURT OF APPEALS TRANSCRIPTS

The notice of appeal used to contain the court reporter's verification that a transcript had been ordered. The new form contains no such verification from the court reporter. Only counsel's verification that a transcript has been ordered is called for by the form.

This is causing problems. Some attorneys sign the verification but don't even contact the court reporter. They assume the clerk will do so, or that it can be done later. Then, at the eleventh hour when counsel learns the transcript is due in a few days, desperate measures must be taken to procure a transcript in time or to obtain an extension.

It takes time for the court reporter to prepare the transcript. Arrangements for payment of the transcript must be finalized before counsel signs the verification.

It is unknown to the undersigned why the new form omitted the court reporter's personal verification thereby inviting this confusion and surprise. Be on notice that when you sign the certification that you have arranged for preparation of a transcript, it means just that. You (not the clerk of court) have made (not will make) the arrangements with the court reporter.

### E. RECOVERY OF MEDICAL EXPENSES

The personal injury plaintiff is billed \$5,000 for medical expenses and seeks to receive this figure at trial. However the Plaintiff's insurer has negotiated lower rates with the medical providers and only pays \$3,000 to satisfy the bills. Defense counsel wants recovery limited to such figures. Some courts have found in the plaintiff's favor. The argument is that limiting the plaintiff will sabotage the payors collateral source rule. The case is headed to the Supreme Court. See *Robinson v. Bates*, 160 *Ohio App. 3d* 668 and *Gustin v. Cheney*, 2006 WL 552565.



Jim Reardon at the Golf Outing

## II. VIEWS

### A. ALTERNATIVES TO JURY TRIAL ON SMALLER CASES

My views here are in the form of a question. How can we avoid jury trials where the parties final offer and demand are so close to one another that they are almost kissing? This occurs most frequently in smaller cases.

While sometimes a jury trial in such circumstances may be called for, I can't help but believe that frequent jury trials in these cases is evidence that something is wrong. Why not a bench trial, arbitration, mediation, anything to avoid disrupting the lives of so many jurors over such a small sum? If all 24 jurors appear on day one, that alone is \$600.00 in jury fees, not to speak of the loss of those jurors in whatever other productive activity they could have engaged in instead of reporting to Court. If the trial goes into day two or longer, the costs mount.

How about agreeing to binding Local Rule 24 arbitration where the arbitrators are employed only to decide the difference in offer/demand?



Golf Outing Volunteers Annie Edgington, Susan Proboski, Diane Buxton, and Denise Kaminski

I don't want to finger just the litigants or insurance companies or the bar or

whatever. I have a feeling we all need to work harder to prevent such standoffs.

## B. ANOTHER VIEW

For the philosopher in all of us, ponder the advice of one deep thinker\* on being an arbitrator or judge:

“The only way to end a quarrel is to get onto both sides of it. We must have not merely a calm impartiality, but rather a sympathy with partiality, as it exists in both positions. It may appear paradoxical, but it is exceedingly practical. We must not be so much impartial as partial to both sides”.

**Jerry Petersen** was once quoted in *IPSO JURE* with reference to our colleague **Joe Weiss**. He described how Mr. Weiss exemplified fairness because of his ability to see and appreciate both sides of a dispute.

Was he expressing the same sentiment as the writer

of the above quote?

I think I'll ask him!

\*G.K. Chesterton, *Our Notebook*, Illustrated London News, June 25, 1932.

## C. REMINDER

The opening sentence of new Local Rule 11 (effective July 3, 2006) mandates personal, sensitive information not appear in domestic pleadings, but instead be provided on a separate form which will not be available to the public. This means Social Security numbers and operator license numbers. The form is available from the clerks or from **Magistrate Mullen** or **Magistrate Lee**.

# ANOTHER OLD TIMER LEAVES THE COURTHOUSE

BY (RETIRED) MAGISTRATE THOMAS J. MULLEN

WITH THE HELP OF ANNIE & SUSAN

I am looking forward to this Halloween more than any other one. In case you have not heard, that will be my last day as Magistrate for the Geauga County Court of Common Pleas. You all knew it was just a matter of time for this since **Annie** left. **Cheryl** has done a wonderful job getting used to me, but **Yvonne** & I are looking forward to spending time with our children (Tom, Beth, John & Renee) and grandchildren, not to mention more time on the golf course.

When I was first approached by **Judge Inderlied** and **Judge Veit** to become magistrate, it was not a hard decision for me. I would like to say that I was being noble and that I could make a difference for each person that came before me, but the benefit package was a big attraction. Being a Domestic Relations Magistrate was a learning experience. As I quickly discovered, every case had to be handled differently; there is no run of the mill divorce case.



## Changes in the court over the past 14 years

Dress code: Some things became acceptable, or just too shocking to comment about. I did enjoy the leopard print skirt (micro & tight) and high heels. People have tattoos and body piercing in places that still cause me pain to see. I'm

not just talking about the parties. Attorneys have often surprised me.

Courthouse Security: This is just a warning to my successor. If you change into golf clothes in your office, remember that the security camera shows not only at the deputies desk in the Courthouse, but



Tom & Joe Svete of the First Place Team

also over at the Chardon Police Department. It's a mistake you will only make once.

Attorney Client Relations: There are many attorneys that seem to get very involved in their clients lives,

zealously representing them. On the other hand, there was one time when an attorney sheepishly came to me and asked me to point out his client because he didn't know which person it was.

I have enjoyed my time as Magistrate. I will miss seeing you all everyday. Yvonne & I plan on staying in Chardon at our house on Center Street. I'm sure you will see me around town & on the golf course. Of course, you can still take me out to lunch anytime.



Golf Outing Chair Jim Flaiz took charge on the Tanglewood Golf Course.



## 2006 GOLF OUTING

BY JAMES R. FLAIZ, ESQ. SVETE, MCGEE & CARRABINE

**O**n August 24th the Geauga County Bar Association held its annual golf outing at Tanglewood Country Club. Despite a cloudy morning, the weather cleared just as the field was teeing off. 68 Golfers participated and 75 people came to the dinner and raffle. I would like to thank committee members **Ann D'Amico** and **Jaredd Flynn** and I would like to especially thank our volunteers, **Susan Proboski**, **Annie Edgington**, **Denise Kaminski**, **Diane Buxton** and **JoAnne Monaco**. Over the next several months the committee will be planning next years outing. If anyone has any suggestions you can contact me at [flaiz@smc-law.com](mailto:flaiz@smc-law.com).

### SKILL SHOT WINNERS:

- #5 Longest Drive (women): **Carolyn Paschke**
- #11 Longest Drive (men): **Ed Niemi**
- #15 Shortest Drive: **Judge Burt**
- #17 Closest to the Pin in 2: **Richard Reith**
- #18 Longest Putt: **Tim Parr**

**HIGHEST SCORING TEAM:** Lisa J. Carey, David McGee, Lynne Day, & Magistrate Lee

**SECOND PLACE TEAM:** J. Jaredd Flynn, Todd Hicks, Ed Niemi, & Mike Roche

**FIRST PLACE TEAM:** Joe Svete, Tom Svete, Scott Lloyd, & Steve Baldini.



### *Ipso Jure*

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