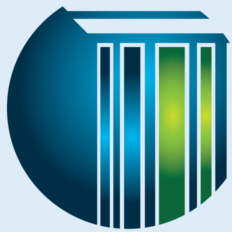

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Susan E. Petersen is a principal at Petersen & Petersen. She can be reached at 440.279.4480 or SEP@petersenlegal.com.

The Pursuit of Truth: Leaving No Stone Unturned in the Battle for Justice

by Susan Petersen

In January 2024, a Cuyahoga County jury delivered a resounding $1,487,500 million verdict for 92-year-old John Paganini, who was left blind in one eye by medical negligence following cataract surgery. The verdict, which came after five days of trial and five hours of jury deliberations, was the culmination of a grueling legal battle, marked by a Court Order sanctioning a pattern of discovery abuse by the defense. The Defendants were the Cataract Eye Center of Cleveland ("CEC") and Dr. Gregory Louis. Leading our trial team were myself and my law partner, Todd Petersen. Behind every victory lies a story —this is ours.

When Mr. Paganini walked through our office doors, we were admittedly hesitant about taking his case, which involved a missed diagnosis and delay in treatment of endophthalmitis, a severe eye infection requiring urgent care. Delay in treatment can lead to vision loss, and in Mr. Paganini's case, time was crucial. Early morning the day after routine cataract surgery, Mr. Paganini called his surgeon's practice, reporting symptoms indicative of an emergency. The practice scheduled a mid-morning appointment. Dr. Louis saw him, but advised him that his symptoms sometimes happen. Mr. Paganini specifically recalled being told: "The good news is, there's no infection." By the next morning, Mr. Paganini's symptoms were even worse, leading to a retinal specialist and a diagnosis of endophthalmitis too late for effective treatment and resulting in complete vision loss in the surgical eye.

We knew the case presented significant challenges -- his advanced age, the constraints imposed by Ohio's caps on non-economic damages, and the always arduous task of proving causation. However, it was Mr. Paganini's unmistakable charm and the captivating story of his life, punctuated by recent significant losses, which won us over.

Mr. Paganini's life was one of dedication and love; a 68-year marriage, fatherhood to four wonderful children, honorable service in the U.S. Marine Corps, and a trailblazing career in the IT industry. Despite recent vision challenges, he led a vibrant and healthy life, a testament to his remarkable family genetics. He cherished his role as a younger brother to his 105-year-old sister. Mr. Paganini made 90 seem youthful.

The case was filed on November 29, 2022. Within five months after filing the lawsuit, we recognized that getting to the truth was not easy. It started after a signed agreement between counsel to exchange "Initial Disclosures." Per Rule 26(B)(3), the parties must supply certain information/documentation without waiting for written discovery requests, including:

> (i) The name and, if known, the address, telephone number, and e-mail address of each individual likely to have discoverable information - along with the subjects of that information - that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

Per the R. 26(B)(3) Staff Notes, "[t]he purpose of the initial disclosure obligation is to accelerate the exchange of information about the case, consistent with Civ. R. 1 and 26(B)(1)." The rule clearly says that parties ***must*** make initial disclosures by the first pre-trial or case management conference, unless otherwise directed by stipulation, court order, or objection. Parties cannot excuse themselves from disclosures due to incomplete investigations, disputes over the adequacy of another party's disclosures, or the absence of another party's disclosures. Civ. R. 26(B)(3)(e). On the agreed upon date, the Plaintiff fulfilled this requirement; the Defendants, however, failed to provide any disclosures at all.

In March 2023, the Plaintiff obtained the Defendants' replies to our initial batch of written discovery inquiries, which included significantly more objections than substantive responses. As insufficient as the responses were, though, what caught our attention was the absence of the mandatory verification signatures from the individuals responsible for the responses in all three sets, a requirement under Ohio Civil Rule 33. This absence came into play in July 2023 during the deposition of Defendant Dr. Louis:

091:11 - 092:13 (LOUIS, GREGORY 7/31/23 VOL 1)

Q. I'm providing you a copy of -- and it's Exhibit 6. And these are the written questions that I referred to at the beginning of our deposition asking if you had ever seen their written questions and answers that are a part of this case. And so Exhibit 6 are the written questions that we directed to you. Have you ever seen these before?

[Defense counsel]: So I'm going to object. Don't talk about anything that you've discussed with lawyers, but you can answer if you recall seeing these.

A. My initial answer is no, I don't remember --

Q. Okay.

A. -- seeing these.

Q. Do you remember if you ever -- have you ever signed a verification page relative to these? Because we never received one.

A. I don't recall that.

Q. Okay. <u>Do you know who answered these questions?</u>

[Defense counsel]: I'm going to object. Don't answer that in terms of if you're going to say something about a lawyer and you discussing anything. If you –

A. <u>I have no idea.</u>

This called into question "his" response to the following Interrogatory which simply sought the identity of those involved in Mr. Paganini's care:

John Paginini and Susan Petersen, Esq.

INTERROGATORY NO. 4: Please identify by full name, home address, job title, dates of employment and credentials, all the health care personnel, including but not limited to, Dr. Gregory J. Louis, and any other staff who were engaged in activities which in any way related to rendering medical care to Plaintiff John Paganini from 2016 through the present.

ANSWER:

OBJECTION: This Interrogatory is vague, overly broad, unduly burdensome in part, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the requested information can be derived or ascertained from an examination and inspection of the medical record that are in Plaintiff's possession, and the burden of deriving or ascertaining the requested information is substantially the same for the party serving the Interrogatories as for the party served. Without waiving the objection, if Plaintiff would like to have a particular name in the medical record identified, Plaintiff is invited to submit a copy of the record with the name highlighted and reasonable efforts will be made to identify such individuals.

Yet, when we questioned Dr. Louis in deposition, he identified an employee known only as "Tammy D"— he couldn't remember her last name — who played a significant role in the emergency visit at issue. Her name didn't appear in the handwritten, impossible-to-decipher office note, just the letters "T.D." written amongst other scribbled notes.

We immediately sought the deposition of "Tammy D." and asked for supplementation of the discovery response. Amazingly, into August, defense counsel claimed they still had to determine if "Tammy D" existed, despite Dr. Louis' testimony.

The defense's failure to timely supplement Tammy D.'s full name — who turned out to have had a considerable solo interaction with Mr. Paganini and whose identity should have been provided in the Initial Disclosures — pushed us to our limit. We filed a Motion to Compel on August 18, 2023, highlighting what we perceived as deliberate impediments to the discovery process. On September 5, 2023, the defense indicated a shift in strategy by substituting an entirely new legal team. The Court then held its ruling on the Motion to Compel in abeyance.

Despite the ongoing discovery challenges, we were determined to move forward and keep our January 2024 trial date. Therefore, we submitted our medical expert report using the information available, while simultaneously expanding our investigation with depositions of several more employees. Each deposition revealed critical details, either a previously undisclosed name or document. In October, we finally got the deposition of "Tammy D." She testified that she did not know why the office had difficulty identifying her. She had worked there as an ophthalmic technician full-time since August of 2021 and saw Dr. Louis at least once a week.

Another notable breakthrough came in October via the deposition of the CEC Operations Manager, who disclosed the participation of an additional physician, Dr. Tamar Shafran. Not only had Defendants had not disclosed Dr. Shafran's name in prior discovery responses, but her name was absent from the medical records. To us, this disclosure indicated the defense's pattern of withholding vital information. As it turned out, Dr. Shafran was a CEC doctor and the first to address Mr. Paganini's eye emergency in the early morning hours the day after surgery. Unfortunately for Mr. Paganini, by the time Dr. Shafran's name and involvement was revealed, the statutory deadline for adding new parties to the lawsuit had elapsed. Compounding the issue, the Defendants chose to disclose Dr. Shafran's involvement one month after she left for a year-long sabbatical overseas.

As the trial approached, we focused on Dr. Shafran's role in handling Mr. Paganini's before-hours emergency call to the clinic, made via a third-party answering service. We issued a foreign subpoena to the service located in another state, which yielded comprehensive documentation and key testimony about the call. This process uncovered that CEC used a weekly schedule to assign on-call duties to its doctors. It was CEC which assigned Dr. Shafran to be on-call physician the morning at issue. Despite this, the defense failed to disclose her name and role, which was readily accessible with a simple check of their computer system.

On December 4, 2023, we filed an "Emergency Motion for Sanctions for Blatant and Continuing Violations of Rule 26 Requirements," which began with a powerful statement:

> **This isn't how discovery is supposed to go . . .** Instead of a direct pursuit of truth and justice, the Defendants have chosen to make this extremely difficult. John Paganini, a 92-year-old Marine veteran and esteemed community member, does not deserve the prejudice caused by the Defendants' ongoing pattern of evasion and obstruction. Gamesmanship has plagued this case from the beginning with the final straw being drawn on November 20 during the deposition of a previously undisclosed employee, who revealed more hidden evidence. The Defendants' unfair treatment of Mr. Paganini not only underestimates his resolve but also shows a disregard for the principles of fair play and transparency mandated by Ohio's legal standards. This Motion is being filed out of a very strong conviction by the Plaintiff that enough is enough.

The trial court set the Motion for a Hearing for January 3, 2024. It lasted five hours, including a pointed cross-examination of the defense's initial counsel.

On January 8, 2024, Judge Timothy McCormick issued a Judgment Entry, imposing sanctions against the Defendants after evaluating testimony from the CEC's COO, front desk manager, Dr. Louis, "Tammy D.," and the original defense lawyer, alongside the written briefs and exhibits. The Judgment Entry read in pertinent part:

> The testimony revealed that the Defendants' initial discovery responses were lacking. While the responses were timely in a sense, they were not truly responsive to the requests. The initial objections tendered were overly broad and mostly baseless in response to the most basic of questions. Answers tended to be obfuscatory and unhelpful. At Dr. Louis's deposition, Paganini learned significant information about relevant witnesses that the Defendants should have disclosed as part of their initial

disclosures, provided in response to interrogatories, or supplemented as more information became available.

> The testimony revealed that the investigation required to satisfy Paganini's requests was minimal and could be done with relative ease. For instance, the guidelines to handling emergency calls were easily retrievable from the Defendants' systems yet were not provided to Paganini in response to his straightforward request for production . . .

> The delays and obfuscation had the most effect on Paganini's ability to investigate and proceed against Dr. Shafran. The delay in discovering the role of Dr. Shafran and others meant that Paganini could not add them as defendants because R.C. 2323.451 contains a 180-day deadline to add new parties in a medical claim after filing . . .

> None of the witnesses, including Attorney Hess, explained why the Defendants' initial discovery responses were lacking, why there was no supplementation, and why no serious efforts to investigate and respond to initial requests until September 2023.

In the end, the trial court issued Sanctions under Civ. R. 37(C), holding that "[w]hile the Defendants never violated a direct order of this Court, the Defendants did not participate in discovery in a forthright and timely fashion. Their conduct included violations of both the letter and spirit of the civil rules.'"

Civ. R. 37(C) gives the Court authority to deal with issues of timely discovery responses, particularly as it relates to witnesses. Under Civ. R. 37(C), "[i]f a party fails to provide information or identify a witness in a timely manner as required by Civ. R. 26(A) or (E), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard, may do any of the following:

> (a) Order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (b) Inform the jury of the party's failure;
>
> (c) Impose other appropriate sanctions, including any of the orders listed in Civ. R. 37(B)(1)(a) through (g)."

The Court decided against imposing the sanction of default judgment and any adverse inference jury instruction. Instead, the Court opted to give the following explanatory instruction to the jury:

> You have heard testimony from witnesses concerning the involvement of Dr. Tamar Shafran. Dr. Shafran did not testify at this trial and the Plaintiff did not take her deposition. This is because Defendants did not reveal the identity and role of Dr. Shafran to Plaintiff until October of this year. By that time, Dr. Shafran was getting ready to leave on a yearlong sabbatical overseas and was unavailable for trial or deposition.

Additionally, the Court prohibited the Defendants from employing an "empty chair" defense strategy, which would suggest that Dr. Shafran or another unnamed party was responsible for the negligence. It was determined that any negligence found to be associated with Dr. Shafran or another employee would be considered the responsibility of the practice. The Court also retained the authority to impose sanctions, including ordering the Defendants to cover reasonable expenses and attorney's fees, with a decision on the appropriateness of such sanctions to be made later.

As the trial approached, we redoubled our efforts. On January 10, we filed a Motion for Reconsideration and an Emergency Motion for Sanctions, spurred by testimony at the Sanctions Hearing about the existence of numerous other policies and procedures on the "O drive" under the "front desk" subfolder, contradicting Defendant CEC's earlier discovery response as follows:

> REQUEST FOR PRODUCTION NO. 29: Produce a complete color copy of each and every of bylaw, policy, code of conduct, rule, protocol, guideline, procedure manual , and/or handbook for every Defendant you are in any way associated with, including but not limited to the table of contents and /or indices, applicable to any individuals involved in John Paganini ' s care from 2015 through the present. *NOTE: In lieu of production of each and every, Plaintiff is amenable to production of indices and/ or tables of contents which can then be highlighted with specific policies to be produced thereafter.*
>
> RESPONSE:
>
> OBJECTION: Vague, ambiguous, overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving the objection, if Plaintiff would like to narrow the scope of topics of the Request, Plaintiff is invited to identify such topics and reasonable efforts will be made to identify such policies.

Ahead of the trial, the judge ordered the Defendants to reveal these additional policies. Due to their previous conduct, we

sought a court mandate for a screenshot of the computer folder holding these policies to check the validity of the defense production. The court concurred, and a later examination of the screenshot revealed the folder holding the "Emergency Eye Triage" policy (a document previously withheld until its existence was revealed in an employee deposition in November) was modified during the litigation process.

The trial proceeded the week of January 23, 2024. Our case presentation exposed not only the medical oversights that resulted in Mr. Paganini's harm but also allowed us to explain to the jury why Dr. Shafran was not part of the story to be told.

Our medical expert – a retinal specialist and a clinical associate professor at Yale University School of Medicine – did an excellent job. He meticulously deconstructed the departures from the standard of care and explained how Mr. Paganini's loss of one eye amounted to the loss of a bodily organ system as well as a permanent and substantial physical deformity. He outlined the extensive pain and suffering Mr. Paganini endured and will continue to endure, including the probable surgery to remove his eye and fit a prosthetic replacement.

The defense introduced a highly qualified expert from Tufts Medical Center in Boston for the trial. He asserted that the treating physician met the standard of care and that earlier intervention wouldn't have altered the outcome. We made the strategic choice not to depose their expert in discovery. While we typically locate prior testimony for expert witnesses, we found none for this expert. On the eve of his trial appearance, we made the decision to completely overhaul the approach to his cross-examination.

We conducted a thorough review of the ethical codes from every professional body to which he belonged. During cross-examination, we focused on his ethical obligation to be impartial and objective – a task deemed impossible given the Defendants' withholding of Dr. Shafran's involvement from him as well. By taking him through his own Massachusetts Society of Eye Physicians and Surgeon's Ethics Code on serving as an Expert Witness, we successfully challenged and cast doubt on the credibility of his assertions.

The trial was steeped in emotion from start to finish. Testimony from Mr. Paganini and his family did more than recount the loss of his vision; they painted a vivid picture of how this loss eroded his independence and compounded the anguish of losing his spouse in the same weeks as he was losing his vision.

In our closing arguments, we passionately called for justice, highlighting the blatant negligence involved and the subsequent refusal to take responsibility. We suggested that the jury use the Defendants' valuation of good eyesight in determining the value of this loss as measured by the $500 fee Dr. Louis testified he received for each cataract surgery performed to save a patient's vision. Our plea to the jury was to compensate Mr. Paganini with $500 for each day since the incident to the present and for an additional decade. We chose not to present a claim for economic damages.

The defense, in their final statements, attempted to deflect responsibility, portraying the doctor and the corporate representative as honest and cooperative. They shifted the blame onto the nebulous nature of the legal discovery process, suggesting any issues the jury found should be attributed to the lawyers, not their clients. This strategy aimed to dissociate the tangible harm suffered by Mr. Paganini from the actions of the Defendants, framing any discovery delays as a normal part of legal proceedings rather than evidence of wrongdoing. Of note, the Defendants' only monetary settlement offer of $50,000 came four days before trial; and, in closing, defense counsel sought a defense verdict.

The verdict for Mr. Paganini, though bittersweet, marks a significant victory. While it cannot undo the loss of his sight or the anguish endured, it reaffirms that our rights and dignity are sacrosanct, irrespective of age, and that violators will face accountability. In the end, the jury agreed that Mr. Paganini's loss of vision in one eye constituted both the loss of a bodily organ system and a permanent and substantial physical deformity.

Standing with Mr. Paganini has been an honor, reminding us of our profession's true purpose—to relentlessly pursue justice and truth. His bravery and resilience are a lasting inspiration. As we move forward, the lawyers of Petersen & Petersen pledge to keep fighting for those in need of a determined ally, ensuring that justice prevails. We remain dedicated to leaving no stone unturned.

I hope our story inspires you to dig deeper and push harder for the truth. They simply don't think you will. ■

Editor's Note: *On April 16, 2024, Judge Timothy P. McCormick held the $500,000 damages cap in R.C. 2323.43(A)(3), as applied to Mr. Paganini, violated his due course of law rights under Oh. Const. Art. §16. The Court therefore granted the Plaintiff's Motion To Include In Any Judgment The Full Amount Awarded for Noneconomic Damages.*