



CSU
College of Law Library

2008

Harnessing the Hired Guns: The Substantive Nature of Ohio Revised Code 2743.43 under Article IV, Section 5(B) of the Ohio Constitution

Patrick Vrobel

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/jlh>



Part of the [Constitutional Law Commons](#), [Evidence Commons](#), [State and Local Government Law Commons](#), and the [Torts Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Note, Harnessing the Hired Guns: The Substantive Nature of Ohio Revised Code 2743.43 under Article IV, Section 5(B) of the Ohio Constitution, 21 J.L. & Health 123 (2007-2008)

This Note is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

HARNESSING THE HIRED GUNS: THE SUBSTANTIVE
NATURE OF OHIO REVISED CODE § 2743.43 UNDER ARTICLE
IV, SECTION 5(B) OF THE OHIO CONSTITUTION

PATRICK VROBEL*

I.	PART I.....	123
	<i>Introduction</i>	123
II.	PART II	127
	A. <i>The Professional Standard of Care in Medical Malpractice Litigation</i>	127
	B. <i>The Standard of Care for Medical Malpractice in the State of Ohio</i>	130
III.	PART III	133
	A. <i>The Constitution of Ohio, Article IV, Sec. 5(B)</i>	133
	B. <i>The Ohio Rule of Evidence 601(D)</i>	134
	C. <i>Ohio Revised Code § 2743.43</i>	134
IV.	PART IV	134
	A. <i>The Three Fourths Requirement</i>	134
	1. Introduction	134
	2. The Medical Expert Statute as a Supplement to Rule 601(D)	135
	3. The Distinction Between Substantive and Procedural Rights	136
	4. Substantive Rights Under Article IV, Section 5(B).....	137
	5. The Right to a Jury Trial	140
	6. The Right to Access the Courts	142
	B. <i>The Same or Substantially Similar Specialty Requirement</i>	145
V.	PART V	148
	<i>Conclusion</i>	148

*The author would like to thank his beautiful wife for her patience and understanding throughout the long and difficult law school years. He would also like to thank his parents for their constant love and support, particularly his father for not disowning him when he decided to become a lawyer .

I. PART I

Introduction

The patient entered the hospital suffering from severe cardiogenic shock.¹ His heart had deteriorated; each breath became a greater labor. Immediate surgery was necessary to repair a ruptured mitral valve² – a complicated procedure with the level of physical atrophy.

For seventeen hours, Dr. Sandu³ struggled to replace the leaking valve.⁴ When these efforts failed, he rushed the patient to another hospital and placed him on an artificial heart.⁵ The entire ordeal took twenty-four grueling hours to complete; however, these exertions were in vain. Several days later the patient succumbed to his condition. Dr. Sandu personally offered his condolences to the family.⁶

A year later, Dr. Sandu opened his mail to discover that he would be embroiled in a very different struggle. The family of the decedent had sued for malpractice. The news shook Dr. Sandu. He had surpassed every conceivable standard of medical care but now found himself fighting for his professional life. “I went through hell,” he would say.⁷

Dr. Sandu soon learned the plaintiff had employed a “hired gun” to support its claim.⁸ The expert practiced the barest amount of surgery, enough to maintain an active license.⁹ The “hired gun” then devoted the remainder of his practice to selling

¹Cardiogenic shock is a life threatening reduction of blood flow to the body caused by damage to the heart’s ability to function. EUGENE BRAUNWALD, BRAUNWALD HEART DISEASE - TEXTBOOK OF CARDIOVASCULAR MEDICINE 569 (4th ed. 1992). Because blood transports essential substrates, such as oxygen, a severe reduction in blood flow results in an insufficient supply of these essential substrates, resulting in a failure of the body’s vital organ systems. *Id.*

²The mitral valve is the inlet valve to the main pumping chamber of the heart. This valve closes the pumping chamber during each heartbeat. LEONARD S. LILLY, PATHOPHYSIOLOGY OF HEART DISEASE 3 (1st ed. 1993). A rupture to the mitral valve prevents the chamber from properly closing. Without the chamber closing, contraction of the heart will send blood flowing in both directions rather than forward into the body. This condition was the main contributing factor to the cardiogenic shock threatening the patient’s life. *Id.*

³The following narrative is based on actual events experienced by a respected cardiovascular surgeon. Because the physician preferred to remain anonymous, subsequent citations will refer to him as “Anonymous,” and the text will refer to him as “Doctor Sandu.”

⁴Telephone Interview with Anonymous, Cardiovascular Surgeon, in Cleveland, Ohio (Oct. 18, 2006) (on file with the author).

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹*Id.*

his testimony to the highest bidder.¹⁰ He knew what he was doing was wrong, and refused to look Dr. Sandu in the eye throughout the trial.¹¹

It immediately became apparent that the “expert” had no idea what he was talking about.¹² The plaintiff had hired a third rate doctor to sustain a spurious claim. According to Dr. Sandu, by the time cross-examination had concluded, the so called expert looked completely incompetent.¹³

The lawsuit has carved an indelible scar into Dr. Sandu’s personal and professional life. It has “left a very bad feeling inside me,” he said. “You loose faith in people . . . [y]ou become a different person.”¹⁴ Prior to the lawsuit, Dr. Sandu “never blinked to take on surgery.”¹⁵ Now he hesitates before accepting cases that could expose him to liability.¹⁶

The experience of Dr. Sandu is far from unique. A recent Harvard study revealed that “only seventeen percent, or approximately one out of six, of medical malpractice civil actions actually filed [within the test state], appeared to actually involve a negligent injury.”¹⁷ Medical malpractice litigation is replete with examples of “hired guns” who testify “not because the statements are an honest, scientific assessment of the case at hand,” but because they have been paid enough to make the statement.¹⁸ For some doctors, expert medical testimony “is their business, and their testimony can be bought and paid for.”¹⁹

The issue is exacerbated because many of these alleged experts no longer actively practice medicine²⁰ and frequently testify in arenas far from their areas of expertise.²¹ The consequence is that a statement of opinion gets presented as fact to a jury which has no way of knowing that it is contrary to any scientific or medical standard.²² This paid testimony furnishes a breeding ground for frivolous lawsuits and nurtures the expanding malpractice crisis.

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷James A. Comodeca et al., *Killing the Golden Goose by Evaluating Medical Care Through the Retroscope: Tort Reform From the Defense Perspective*, 31 U. DAYTON L. REV. 207, 212 (2006) (citing David M. Studdert, *Medical Malpractice*, 350 NEW ENG. J. MED. 283 (2004)). The study confined its inquiry to the state of New York.

¹⁸Noah Schaffer, *Medical Experts on the Radar*, 1 MASS. MED. L. REP. 1, 14 (2006).

¹⁹*Id.* at 1.

²⁰*Id.*

²¹*Id.*

²²*Id.* at 14.

Ohio attempted to solve this problem with the passage of Ohio Revised Code section 2743.43,²³ hereinafter referred to as the “medical expert statute.” The legislation fundamentally alters Ohio rules governing medical expert testimony in two essential ways. First, the law requires that an expert dedicate “three-fourths of [his or her] time to the active practice of medicine or surgery.”²⁴ Second, the law mandates an expert practice “in the same or substantially similar [medical] specialty as the defendant” in order to be considered competent to testify against him.²⁵

These legislative enactments appear to clash with Ohio Rules of Evidence regarding the competency of expert witnesses, which requires that medical experts devote only one-half of their time to active clinical practice.²⁶ At first glance, the statute appears to violate the Ohio Constitution, which provides the Ohio Supreme Court with the sole power to promulgate rules of evidence and court procedure.²⁷ However, this assessment is incorrect. The same Constitutional provision empowering the Supreme Court to promulgate rules of procedure prohibits the Court from creating rules that infringe upon substantive rights.²⁸

²³OHIO REV. CODE ANN. § 2743.43(A)(2) (West 2006).

(A) No person shall be deemed competent to give expert testimony on the liability issues in a medical claim . . . unless . . . 2) Such person devotes three-fourths of the person's professional time to the active clinical practice of medicine or surgery, osteopathic medicine and surgery, or podiatric medicine and surgery, or to its instruction in an accredited university. *Id.*

²⁴*Id.*

²⁵Christopher M. Ernst, et al., Baldwin's Oh. Prac. Tort L. § 8:22 (2006).

²⁶OHIO R. EVID. 601(D). Note that the Ohio Rules of Evidence are devoid of a parallel requirement that the medical expert practice in the same or substantially the same specialty as the defendant:

Every person is competent to be a witness except . . . (D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

Id.

²⁷ERNST ET AL., *supra* note 27.

²⁸OHIO CONST. art. IV, § 5(B).

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of

Rules governing the competency of medical experts inherently impact substantive rights in two major ways. First, they impact the right to a trial by jury.²⁹ Second, these rules infringe upon the right to access a court of law.³⁰ As a result, the Rule of Evidence impermissibly infringes upon substantive rights in violation of Ohio Constitutional limitations on rules of practice and procedure.³¹ Furthermore, even if the evidentiary rule governing medical experts is not nullified, certain provisions of the medical expert statute are still valid as acceptable extensions to the rules of court procedure.³²

This article will explore the constitutionality of Ohio Revised Code section 2743.43 in light of the Ohio Rules of Evidence. Part I introduces the medical expert issue in the state of Ohio. Part II will be divided into two sections. Section A explains the standard of care for malpractice claims that requires an expert medical explanation. Section B provides background on the evolution of the standard of care in the state of Ohio. Part III will be divided into three sections. Section A explores the Ohio Constitution, Article IV, Section 5(B). Section B explores the Ohio Rules of Evidence. Finally, Section C explores Ohio Revised Code section 2743.43. Part IV will be divided into two sections examining the constitutionality of the Ohio Rules of Evidence, ultimately arguing that the Ohio statutory provision must control because rules of evidence regulating the competency of medical experts impermissibly infringe upon the substantive rights of tort victims. Section A addresses the three-fourths requirement of Ohio Revised Code section 2743.43 and is divided into five subparts that examine the substantive nature of rules governing medical experts. Section B addresses the same or substantially the same clause of the Revised Code section 2743.43. Part V will conclude the article.

II. PART II

A. *The Professional Standard of Care in Medical Malpractice Litigation*

Medical malpractice is a specialized branch of the negligence tree.³³ Under this branch, physicians are not held to the standard of the reasonably prudent person.³⁴

disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Id.

²⁹ See *infra* pp. 141-42.

³⁰ See *infra* pp. 142-44.

³¹ See discussion *infra* Parts IV.A.5, IV.A.6.

³² See *infra* pp. 145-48.

³³ DAN B. DOBBS, *THE LAW OF TORTS* 631 (2000). “The tort action for medical malpractice is a negligence action, accompanied by the usual rules attendant to such actions. The plaintiff must prove negligence, causation and damages”. *Id.* However, because physicians stand in a special relationship of trust to their patients, “the duty of care owed by medical and other professionals is usually expressed in and applied in a special way.” *Id.* See also Fred L. Cohen, *The Expert Medical Witness in Legal Perspective*, 25 J. LEGAL MED. 185, 191 (2004); JAMES T. O’REILLY, *OHIO PERSONAL INJURY PRACTICE* §14:3 (2006) (“An Action for medical malpractice is a negligence action.”).

³⁴ DOBBS, *supra* note 33, at 633.

Medical professionals cannot be held to this standard “because the profession of medicine . . . has a very distinct and separate body of knowledge that is considered beyond the grasp of the average ‘reasonable person.’”³⁵ Instead, doctors are required to employ “the knowledge, skill and care ordinarily possessed by members of the profession in good standing”³⁶ in a similar practice and under similar circumstances.³⁷ Simply put, this professional standard of care requires “what is customary and usual” within the practice of medicine.³⁸

Because the applicable standard relies so heavily on custom, the medical profession has the privilege of “setting [its] own legal standards of conduct, merely by adopting [its] own practices,” a privilege “emphatically denied to other groups.”³⁹ The rationale for this concession is “the layman’s ignorance of medical matters and the necessity of expert testimony”⁴⁰ to explain it. Because doctors obtain a highly specialized subset of knowledge, an expert is essential to explain the appropriate standard of care.⁴¹ A medical malpractice claim cannot be pursued without this expert.⁴²

This standard does not mean that a doctor is required to be perfect.⁴³ It does not even mean that a doctor must be average.⁴⁴ Rather, a doctor is judged only against members of the medical community who are in good professional standing. Of these members, only “the minimum common skill [. . . is] looked to.”⁴⁵ If a doctor has achieved a special degree of skill, however, the standard will be the skill possessed by members of that specialty.⁴⁶ On the other end of the spectrum, there is not a

³⁵Cohen, *supra* note 33, at 191.

³⁶W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 187 (5th ed. 1984).

³⁷*See* Cross v. Huttenlochler, 440 A.2d 952, 954 (Conn. 1981) (“A physician is under a duty to his patient to exercise that degree of care, skill, and diligence which physicians in the same general line of practice ordinarily possess and exercise in similar cases.”)

³⁸KEETON ET AL., *supra* note 36, at 189.

³⁹*Id.*

⁴⁰*Id.*

⁴¹Cohen, *supra* note 33, at 191.

⁴²DOBBS, *supra* note 33, at 633. “The professional standard differs from the reasonable care standard also in that courts traditionally require the malpractice plaintiff to establish the professional standard by expert testimony. No such category-wide rule applies in ordinary negligence cases.” *Id.*

⁴³Tim Cramm et al., *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 702 (2002).

⁴⁴KEETON ET AL., *supra* note 36, at 187.

⁴⁵*Id.* *See also* Shevak v. United States, 528 F. Supp. 427, 432 (N.D. Tex. 1981) (“[A] doctor does not have to show that he performed at any ‘ultimate or maximum’ level of care, but only that he conducted himself above or equal to the minimum standard of accepted professional practice.”)

⁴⁶KEETON ET AL., *supra* note 36, at 187.

similar rule for neophytes to the medical profession.⁴⁷ A “hospital . . . [is] obliged to provide physicians who . . . meet that standard”⁴⁸ of care found throughout the medical community. The standard is always a floor, never a ceiling.⁴⁹

Traditionally, courts made allowances for the “type of community in which the physician carri[e]d on his practice . . . [A] country doctor would not be expected to have the equipment, facilities, libraries, contacts opportunities for learning, or experience afforded large cities.”⁵⁰ In effect, the rule disqualified those experts who could not demonstrate a familiarity “with the standard of care in the relevant locality.”⁵¹ With the advent of electronic communication, advances in medical procedures have been placed at the fingertips of even the most pioneering physician. As a result, most courts have “abandon[ed] a fixed locality rule in favor of treating the community as merely one factor” in determining the standard of care.⁵² Still other jurisdictions have abandoned the locality rule “outright . . . [applying] a general national standard” in all medical malpractice cases.⁵³

The utilization of custom fundamentally alters the role of the jury in medical malpractice litigation.⁵⁴ In typical negligence cases, the jury is asked to assess the reasonableness of a defendant’s actions.⁵⁵ In malpractice cases, the jury is asked whether the doctor adhered to the custom employed by other physicians, a custom that can only be explained by a medical expert. The jury’s “assessment of whether the custom is reasonable or unreasonable is irrelevant [so long as] the defendant followed that custom.”⁵⁶

Surprisingly, even experts can disagree about the proper standard of care in a particular circumstance.⁵⁷ Where there are competing schools of medical thought,

⁴⁷*Id.* See also *McBride v. United States*, 462 F.2d 72, 74 (9th Cir. 1972) (“[T]he duty of care owed to the patient does not vary according to the doctor’s individual knowledge or education”).

⁴⁸*McBride*, 462 F.2d at 74.

⁴⁹*KEETON ET AL.*, *supra* note 36, at 187.

⁵⁰*Id.* at 187-88. Under the locality rule, “[i]f a town’s six doctors all ignored helpful new drugs for treatment of the plaintiff’s condition; none of them would be guilty of medical malpractice for failing to prescribe such a drug when it was needed.” *DOBBS*, *supra* note 30, at 635.

⁵¹*Cramm et al.*, *supra* note 43, at 706.

⁵²*KEETON ET AL.*, *supra* note 36, at 188. Courts now examine “the medical community in the same or similar localities, in the state, or in the nation as a whole for appropriate standards.” *DOBBS*, *supra* note 33, at 636-37. If a physician is a board certified medical specialist, the standard is that of the standard adhered to by that specialty. *Id.*

⁵³*KEETON ET AL.*, *supra* note 36, at 188.

⁵⁴*DOBBS*, *supra* note 33, at 633. Because the professional standard asks only whether the physician conformed to the relevant custom, the physician cannot be found negligent so long as he followed that custom. See also *Cramm et al.*, *supra* note 43, at 702.

⁵⁵*Cramm et al.*, *supra* note 43, at 702.

⁵⁶*Id.* at 702-03.

⁵⁷*KEETON ET AL.*, *supra* note 36, at 187.

the physician is judged “according to the tenets of the school the doctor professed to follow.”⁵⁸ This does not mean that any individual can set up shop and establish a school of medical thought free of liability.⁵⁹ A “school” must be recognized by others in the medical community.⁶⁰ It must possess definitive principals.⁶¹ It must be in line with “a respectable minority of the profession.”⁶²

As a practical matter, the school of thought doctrine operates as an affirmative defense.⁶³ The defendant retains the burden of proving that a second school exists and that he or she adhered to it.⁶⁴ Its invocation reduces the trial into a battle of the experts, with the plaintiff attempting to prove “that no such school exists, that it represents a fringe element, or that the second school . . . has become obsolete.”⁶⁵ It is left, oddly enough, to the jury to trudge through this medical marsh land and select the applicable custom to which the doctor should have adhered.

B. The Standard of Care for Medical Malpractice in the State of Ohio

To establish a medical malpractice claim in the State of Ohio, a plaintiff must prove three essential elements.⁶⁶ First, the “applicable standard of care [must be established] usually through expert testimony.”⁶⁷ Second, the plaintiff must “show a negligent failure on the part of the defendant to render treatment in conformity with the standard of care.”⁶⁸ Finally, the plaintiff must “demonstrate that the resulting injury was proximately caused by defendant’s negligence.”⁶⁹

⁵⁸*Id.* When there are two schools of medical thought, a physician is free to adhere to either custom without fear of incurring liability. DOBBS, *supra* note 33, at 633.

⁵⁹KEETON ET AL., *supra* note 36, at 187.

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

⁶³Cramm et al., *supra* note 43, at 705.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Promen v. Ward*, 591 N.E.2d 813, 815 (Ohio Ct. App. 1990) (holding that the judgment was against the manifest weight of evidence because the jury instructions emphasized the standard of care for a negligence action, not a medical malpractice action - which is not determined by blind adherence to the standard practices within a given specialty); *see also* *Bruni v. Tatsumi*, 346 N.E.2d 673, 675 (Ohio 1976).

⁶⁷*Promen*, 591 N.E.2d at 815. *See also* JAMES T. O'REILLY, OHIO PERSONAL INJURY PRACTICE § 14:7 (2006). “The standard of care ordinarily must be established by expert testimony unless the conduct is within the common knowledge and experience of jurors.” *Id.*

⁶⁸*Promen*, 591 N.E.2d at 815.

⁶⁹*Id.* *See also* JAMES T. O'REILLY, OHIO PERSONAL INJURY PRACTICE § 14:11 (2006). “Proximate cause is a happening or event that, as a natural and continuous sequence, produces an injury without which the result would not have occurred.” *Id.* In medical malpractice litigation, the plaintiff must prove by a preponderance of the evidence that the defendant’s negligence probably caused the injury – defined as “more likely than not,” or greater than fifty percent. *Id.*

Ohio has arguably eschewed the custom-based professional standard of care, described above, in favor of the traditional reasonable prudent person inquiry.⁷⁰ This shift alters the landscape of medical malpractice jurisprudence in Ohio by permitting the plaintiff to reach a jury simply by establishing “that the defendant’s care did not meet the standards of a reasonable physician.”⁷¹ Under this system of medical liability, breach of custom no longer serves as a prerequisite to medical malpractice, and adherence cannot establish a complete defense.⁷² Despite the revocation of custom in Ohio, the appropriate standard of care to which a physician should have adhered must still be proven through the use of expert testimony.⁷³

The shift from a custom based inquiry occurred when the Ohio Supreme Court refused to blindly follow the appropriate medical convention in malpractice claims.⁷⁴ In *Hall v. Ault*, a surgical team inadvertently left a sponge inside the patient’s chest cavity.⁷⁵ The offending physician relied upon the “uncontroverted”⁷⁶ custom of delegating the sponge count to nurses as a complete defense to the action against him.⁷⁷

The Ohio Supreme Court, however, rejected this stance.⁷⁸ Custom, they said, could not serve as a complete defense to a charge of medical negligence: “[t]he overwhelming weight of authority supports the general rule that customary methods of conduct do not furnish a test that is conclusive, or fix a standard.”⁷⁹ Physicians in medical malpractice litigation should always be compared to an ordinary physician under similar circumstances.⁸⁰ A medical professional, therefore, would be held to the same reasonableness standard applied to every other tortfeasor.

Ault produced an ambiguous state of affairs concerning the sweep of the court’s ruling.⁸¹ Subsequent case law clarified the Ohio Supreme Court’s intention to jettison custom from the medical malpractice calculation.⁸²

⁷⁰Phillip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 175-78 (2000).

⁷¹*Id.* at 177.

⁷²*Id.*

⁷³67 OHIO JUR. 3D *Malpractice* § 45 (2006).

⁷⁴*See Hall v. Ault*, 164 N.E. 518 (Ohio 1928) (holding in action for negligence, conformity to a custom cannot furnish a test that is conclusive or controlling, but conformity is a circumstance to be weighed or considered by the trier of fact).

⁷⁵*Id.* at 519.

⁷⁶*Id.* at 521.

⁷⁷*Id.*

⁷⁸*Id.* at 522.

⁷⁹*Id.* at 523.

⁸⁰*Id.* at Syllabus.

⁸¹Courts were uncertain whether *Ault* should be limited to its specific facts or whether it spelled the death knell of custom based medical malpractice.

⁸²*See Bruni v. Tatsumi*, 346 N.E.2d 673, 676 (Ohio 1976) (holding in part that the standard of care in a medical malpractice action is the performance of an action or omitting to

In *Bruni v. Tatsumi*, the Ohio Supreme Court further developed the standard that would serve as the foundation for all future medical malpractice litigation. In order to establish liability, a plaintiff must show, “by a preponderance of evidence”⁸³ that a physician “did some particular thing or things that physicians and surgeons . . . of ordinary skill, care and diligence would not have done under the same or similar circumstances.”⁸⁴ Thus in Ohio, “[w]hile customary methods and practices are highly relevant in determining the standard of care conformity to a recognized practice is not conclusive.”⁸⁵ A jury is to consider “customary practices as evidence of the standard of care . . . but ultimately the jury must determine whether the method or practice used by defendant was reasonable under the circumstances.”⁸⁶ Ohio has also partitioned medical cases based on the complexity of the malpractice claim. The first class of cases involves medical matters outside the comprehension of the average layman. These cases require reliance upon expert guidance because “[t]here can be no other guide.”⁸⁷ Failure to secure an expert is fatal to a plaintiff’s case and “there is no evidence . . . to be submitted to the jury.”⁸⁸

The second class of cases occurs when “the lack of skill or care of the physician and surgeon is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it.”⁸⁹ Unlike a complex medical malpractice case, a plaintiff will be able to reach a jury without obtaining a medical expert. The litigant will rely instead upon the jurors’ common knowledge and experience.⁹⁰

perform an action that a physician or surgeon of ordinary skill, care and diligence would have done or not done under similar circumstances).

⁸³*Id.* at syllabus.

⁸⁴*Id.* at 676. The test in its entirety reads as follows:

whether the physician, in the performance of his service, either did some particular thing or things that physicians and surgeons, in that medical community, of ordinary skill, care and diligence would not have done under the same or similar circumstances, or failed or omitted to do some particular thing or things which physicians and surgeons of ordinary skill, care and diligence would have done under the same or similar circumstances. He is required to exercise the average degree of skill, care and diligence exercised by members of the same medical specialty community in similar situations.

Id.

⁸⁵*Promen v. Ward*, 591 N.E.2d 813, 817 (Ohio Ct. App. 1990) (citing *Ault v. Hall*, 164 N.E. 518, (para. two of syllabus Ohio 1928); see also 67 OHIO JUR. 3D *Malpractice* § 44 (2006). “Customary methods or conduct do not furnish a test that is conclusive or controlling on the question of negligence.” 67 OHIO JUR. 3D *Malpractice* § 44 (2006).

⁸⁶*Id.*

⁸⁷*Bruni*, 346 N.E.2d at 677.

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Berdyck v. Shinde*, 613 N.E.2d 1014, 1022 (Ohio 1993). “In a negligence action involving conduct within the common knowledge and experience of jurors an expert is not required.” *Id.* The classic example of a case in which a medical expert will not be required to reach a jury occurs when the physician leaves a foreign object inside the cavity of a patient.

Finally, as mentioned above, many jurisdictions have discarded the locality rule in light of the shrinking information divide created by modern forms of communication.⁹¹ Ohio is a member of the growing consensus considering the locality rule to be “antiquated and unrealistic.”⁹² As a result, the standard of care owed to a patient is that which is adhered to by the particular community in which the physician specializes, not the particular community in which the physician practices; “[g]eographical conditions or circumstances do not control either the standard of the specialist’s care or the competence of the expert’s testimony.”⁹³

III. PART III

A. *The Constitution of Ohio, Article IV, Sec. 5(B)*

Article IV of the Ohio Constitution “was the linchpin of the . . . Modern Courts” movement.⁹⁴ Post World War II America witnessed an explosion in litigation, glutting the court system and grinding its administration to a halt.⁹⁵ Prior to Article IV’s enactment, a haphazard amalgam of common law, chancery procedure and statutory legislation dictated court room procedure.⁹⁶ Article IV, referred to as the Modern Courts Amendment, centralized and simplified this arcane system, placing the rules governing practice and procedure firmly within the ambit of the Ohio Supreme Court.

Under Article IV, Section 5(B) of the Ohio Constitution, the Ohio Supreme Court is empowered to oversee the “rules governing practice and procedure in all courts of the state.”⁹⁷ This authority is plenary, circumscribed only by the provision that procedural rules may not restrict substantive rights.⁹⁸ A rule that impinges on a

No expert would be necessary in this instance because the negligence of some party is self evident.

⁹¹It should also be noted that Ohio follows the “‘two schools of thought doctrine’ . . . [as a] defense in medical malpractice actions.” JAMES T. O’REILLY, OHIO PERSONAL INJURY PRACTICE § 14:16 (2006). The doctrine operates as an affirmative defense to a charge of medical malpractice. *Id.* Under the “schools of thought doctrine,” the defendant has the burden of producing evidence that there were other methods of diagnosis and treatment for the particular medical condition. *Id.* In using this defense, the defendant attempts to establish that “[t]he mere fact that an alternative method was used is not proof of negligence.” *Id.* The jury must then decide whether the procedure used conformed “with the standard of care required of a practitioner in the defendant’s field of practice.” *Id.*

⁹²*Bruni*, 346 N.E.2d at 679. *See also* James T. O’Reilly, OHIO PERSONAL INJURY PRACTICE § 14:6 (2006).

⁹³*Bruni*, 346 N.E.2d at 679.

⁹⁴OHIO CONST. art. IV cmt. 1990.

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷OHIO CONST. art. IV, § 5(B).

⁹⁸*Id.*

substantive right is impermissible.⁹⁹ Thus rules promulgated under Section 5(B) supersede conflicting statutes affecting practice and procedure in Ohio courts, but not statutes affecting fundamental rights.¹⁰⁰ Despite these restrictions upon legislative function, Ohio lawmakers retain the authority to enact “statutes which supplement or complement the rules” of practice or procedure.¹⁰¹

B. *The Ohio Rule of Evidence 601*

Pursuant to the authority granted under Article IV, Section 5(B), the Ohio Supreme Court enacted Rule 601. This Rule of Evidence contains a special provision governing the competency of expert witnesses testifying in medical malpractice litigation.¹⁰² Under Rule 601(D), a medical expert must devote “at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or its instruction in an accredited school.”¹⁰³ This requirement differs from the medical expert statute, which requires a medical expert to devote three-fourths of his or her time to the active clinical practice of medicine.¹⁰⁴

C. *Ohio Revised Code § 2743.43*

Prior to the creation of Rule 601(D), the Ohio legislature had already weighed into the Tort Reform debate. In 1979, it passed the medical expert statute to regulate the testimony of medical witnesses.¹⁰⁵ In its initial conception, the medical expert statute required a specialist to “devote three-fourths of [his or her] time to the active clinical practice of medicine.”¹⁰⁶ In 2004, the Ohio legislature appended the statute, adding a requirement that an expert practice “in the same or substantially similar specialty as the defendant.”¹⁰⁷ In adopting this amendment, the legislature implicitly ratified the three-fourths requirement for medical expert competency.¹⁰⁸

⁹⁹*Id.*

¹⁰⁰OHIO CONST. art. IV cmt. 1990.

¹⁰¹*Id.*

¹⁰²OHIO R. EVID. 601 (D).

¹⁰³*Id.*

¹⁰⁴See OHIO REV. CODE ANN. § 2743.43 (A)(2) (West 2006).

¹⁰⁵*Id.* The statute became effective 7-28-75, § 2743.43.

¹⁰⁶*Id.* § 2743.43 (A)(2).

¹⁰⁷*Id.* The statute does create an exception for an expert who practices in a different specialty if he or she can show “that the standards of care and practice in the two specialties are similar and the expert has substantial familiarity between the specialties.” *Id.*

¹⁰⁸H.R. 215, 125th Gen. Assem., Reg. Sess (Ohio 2004). The legislature also added the requirement that:

[a] witness . . . is not competent to give expert testimony in a medical claim, pursuant to the act, unless the witness is certified in a medical specialty by a board recognized by the American Board of Medical Specialties . . . as having acknowledged expertise and training directly related to the particular health care matter at issue.

Id.

IV. PART IV

A. *The Three Fourths Requirement*

1. Introduction

From its inception, the medical expert statute controlled the competency of experts in medical liability claims.¹⁰⁹ However, pursuant to its authority under the Ohio Constitution, the Supreme Court promulgated R. 601(D) in 1990, sixteen years after the enactment of the medical expert statute.¹¹⁰ As previously mentioned, this new rule appears to reduce the requirements under the medical expert statute from three-fourths of a physician's professional time to one-half.¹¹¹ This effort results in conflicts between the Rules of Evidence and portions of the medical expert statute that refers to competency. Determining which provision controls requires an inquiry into: 1) the supplemental nature of the medical expert statute, 2) the distinction between substantive and procedural rights, 3) substantive rights under Article IV, Section 5(B), 4) the impact of competency rules on the right to a jury trial, and 5) the right to access a court of law.

2. The medical expert statute as a supplement to Rule 601(D)

Because the medical expert statute requires that an expert devote more time to the practice of medicine, the three-fourths requirement could be viewed as a supplement to the rules of evidence. Under constitutional rules of construction, the legislature is permitted to provide additional requirements to any rule of court procedure.¹¹² However, because the Ohio Supreme Court enacted Rule 601(D) years after the medical expert statute had already become effective, this construction is doubtful. A statutory provision can hardly be deemed to supplement a procedural rule that has been subsequently adopted to displace it.

This skepticism is confirmed by the staff notes accompanying Rule 601(D). The notes expressly state, "[t]he rule as adopted supersedes R.C. 2743.43."¹¹³ Therefore, the Advisory Committee that proposed Rule 601(D) clearly intended for it to supplant the medical expert statute.¹¹⁴

Subsequent case law confirms this interpretation.¹¹⁵ The Ohio courts that have interpreted Rule 601(D) have consistently held that medical experts must devote one-

¹⁰⁹OHIO REV. CODE ANN. § 2743.43 (West 2006). The statute became effective 7-28-75. *Id.*

¹¹⁰OHIO R. EVID. 601(D). The amendment became effective 7-1-91. *Id.*

¹¹¹*Id.*

¹¹²See discussion *supra* Part III, Section A for the applicable rules of construction under OHIO CONST. art. IV, § 5(B).

¹¹³Ohio Evid. R. 601(D), 1980 staff note.

¹¹⁴See discussion *infra* Part IV, Section B.

¹¹⁵It is important to note that no Ohio court has expressly held that Rule 601(D) supersedes the medical expert statute.

half of their professional time to the active practice of medicine.¹¹⁶ In *Fahey v. Abouhossein*,¹¹⁷ for instance, the court of appeals upheld the disqualification of an expert witness under Rule 601(D). While the witness had extensive medical publications, he had not devoted one-half of his time to the active clinical practice of medicine as required under the Ohio Rules of Evidence. Therefore, he could not testify on behalf of the plaintiff.¹¹⁸

In another Ohio case interpreting the competency of a medical expert, the court based its decision primarily on the requirements under Rule 601(D).¹¹⁹ In *Aldridge v. Gardner*, the court of appeals, while noting the interplay among the medical expert statute and Rule 601(D),¹²⁰ held that the medical expert was competent to testify.¹²¹ The expert, while only devoting twenty percent of his present time to the active clinical practice of medicine, had clearly met Rule 601(D)'s requirements through the knowledge accrued over twenty years of practicing medicine.¹²²

The preceding analysis demonstrates that the three-fourths requirement of the medical expert statute, as a rule of court procedure, is clearly displaced by Rule 601(D). However, the Supreme Court's power to adopt rules of procedure under Article IV, Section 5(B) of the Ohio Constitution is expressly circumscribed by its effect on substantive rights. Specifically, procedural rules "shall not abridge, enlarge or modify any substantive right,"¹²³ the result being that the efficacy of the three-fourths requirement hinges on its status as a rule governing substantive rights.

¹¹⁶See, e.g., *Fahey v. Abouhossein*, No. 17215, 1999 WL 89737, at *2 (Ohio Ct. App. Feb. 12, 1999) ("The purpose of . . . Evid.R. 601(D) is 'to preclude testimony by the physician who earns his living or spends much of his time testifying against his fellows as a professional witness . . .'" (quoting *McCrary v. State*, 423 N.E.2d 156, 159 (Ohio 1981)); *Williams v. Reynolds Road Surgical Center, Ltd.*, No. L-02-1144, 2004 WL 628972, at *4-5 (Ohio Ct. App. March 31, 2004) (holding the trial court did not err in allowing the testimony of medical expert who devoted 60 to 70 percent of his professional time on "programs and other things"); *Aldridge v. Gardner*, 825 N.E.2d 201, 204 (Ohio Ct. App. 2005) (holding a physician who spends eighty percent of his time working for insurance companies was engaged in the active clinical practice of medicine under OHIO R. EVID. 601(D) because he had devoted twenty years to the clinical practice of medicine and devoted the remainder of his time to the clinical practice of medicine); *Cunningham v. St. Alexis Hosp. Med. Ctr.*, 758 N.E.2d 188, 197-98 (Ohio Ct. App. 2005) (holding a physician who spends approximately two-thirds to seventy-five percent of his time doing research is not competent to testify under OHIO R. EVID. 601(D)); *Smith v. Sass, Friedman & Assocs., Inc.*, No. 81953, 2004 WL 229515 (Ohio Ct. App. Feb. 5, 2004) (holding that the trial court did not abuse its discretion in finding a witness competent when he devoted fifty percent of his time to patient care).

¹¹⁷*Fahey*, 1999 WL 89737, at *2.

¹¹⁸*Id.* (holding that rationale behind competency rules for medical experts was "to exclude the testimony of the 'hired gun,' a professional witness whose actual specialty is testimony instead of treatment. Such witnesses . . . lack the current basis of experience . . . necessary to form a judgment truly helpful to the trier of fact.").

¹¹⁹See *Aldridge*, 825 N.E.2d 201.

¹²⁰*Id.* at 205.

¹²¹*Id.* at 206.

¹²²*Id.*

¹²³OHIO CONST. art. IV, § 5(B).

3. The Distinction Between Substantive and Procedural Rights

A rule of court procedure that impacts a substantive right is impermissible under the Ohio Constitution. The distinction between substantive and procedural rights is difficult to ascertain, though courts have attempted to define the difference.¹²⁴ Generally speaking, a substantive law “creates duties, rights and obligations.”¹²⁵ On the other hand, procedural statutes prescribe the methods of enforcing these rights or of obtaining redress.¹²⁶

Procedural statutes typically involve rules of practice or procedure and methods of court review.¹²⁷ Substantive statutes, however, typically impair or take away vested rights,¹²⁸ affect accrued substantive rights,¹²⁹ impose new or additional burdens, duties, obligations or liabilities on individuals,¹³⁰ create new rights,¹³¹ or give rise to or take away the right to sue or defend actions¹³² in a court of law.¹³³

4. Substantive Rights under Article IV, Section 5(B)

Historically, Ohio courts have been willing to recognize the substantive quality of legislation that conflicts with rules of court procedure under Article IV, section 5(B).¹³⁴ In *Boyer v. Boyer*, the trial court, after reviewing the documents submitted in a custody battle, determined both parents fit to raise their child.¹³⁵ However, the court, empowered by a statutory provision in the Ohio Revised Code, awarded

¹²⁴*Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489, 497 (Ohio 1988) (*superseded by statute*, OHIO REV. CODE ANN. § 2745.01 (WEST 2007)).

¹²⁵*Kilbreath v. Rudy*, 242 N.E.2d 658, 660 (Ohio 1968) (finding Ohio long-armed statutes to be procedural in nature rather than substantive).

¹²⁶*Id.*

¹²⁷*State ex rel. Slaughter v. Indus. Comm’n.*, 9 N.E.2d 505, 543-34 (Ohio 1937) (citing *County of Miami v. City of Dayton*, 110 N.E. 726, 728 (Ohio 1915)).

¹²⁸*See State ex rel. South Euclid v. Zangerle*, 62 N.E.2d 160, 163 (Ohio 1945).

¹²⁹*See In re Nevius* 191 N.E.2d 166, 169-70 (Ohio 1963).

¹³⁰*See Miller v. Hixson*, 59 N.E. 749, 752 (Ohio 1901).

¹³¹*See Zangerle*, 14 N.E.2d at 934.

¹³²*See Smith v. N.Y. Cent. R.R. Co.*, 170 N.E. 637, 638 (Ohio 1930).

¹³³*Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489, 496 (Ohio 1988).

¹³⁴*See Boyer v. Boyer*, 346 N.E.2d 286 (Ohio 1976) (holding that because OHIO R. CIV. P. 75(P) abridges the statutory right provided under OHIO REV. CODE ANN. § 3109.04 (West 2007). The rule is invalid under the provisions of Section 5 of Article IV of the Ohio Constitution), *State v. Rahman*, 492 N.E.2d 401, 404-05 (Ohio 1986) (holding in part that Rule 601(B) of the Ohio Rules of Evidence is superseded by OHIO REV. CODE ANN. § 2945.42 (West 2007), as to spousal privilege because §. 2945.42 codifies a substantive right because “the Rules of Evidence in Ohio are limited by Section 5(B), Article IV of the Ohio Constitution to procedural effect only”). *But see* *Armstrong v. The Portsmouth Times*, No. 1259, 1980 WL 351014, (at *2 Ohio Ct. App. 4th Dist. 1980) (“R.C. 2317.27 clearly does not create, define or regulate the substantive rights of parties”).

¹³⁵*Boyer*, 346 N.E.2d at 287.

custody to the child's grandmother instead.¹³⁶ The parents appealed, arguing that the Ohio Rules of Civil Procedure only permitted such a maneuver upon a finding "that neither parent is a suitable person to have custody."¹³⁷

The Supreme Court of Ohio recognized that under the Modern Courts Amendment¹³⁸ when "conflicts arise between the . . . [rules of procedure] and the statutory law, the rule will control the statute on matters of procedure and the statute will control on matters of substantive law."¹³⁹ The Court then acknowledged the substantive nature of the child custody statute.¹⁴⁰ The law embodied the traditional power "of the courts to make the final determination of the best interests of [the] child in custody disputes,"¹⁴¹ a fundamental power in family law jurisprudence. Under Section 5(B) of Article IV of the Ohio Constitution, the child custody statute as a substantive law must therefore control.¹⁴² The rule of procedure affecting child custody would be superseded where it conflicted with the substantive provisions of the statute.¹⁴³

Another decision addressing the interplay of the Ohio statutory provisions and the Rules of Evidence under Section 5(B), Article IV of the Ohio Constitution occurred in *State v. Rahman*.¹⁴⁴ This case is particularly illuminating because it addressed, in part, a conflict between the competency of a witness under Rule 601 and an Ohio statute codifying the spousal privilege.¹⁴⁵

In *Rahman*, the Ohio Supreme Court recognized that Rule 601(B), which governs the competency of spouses,¹⁴⁶ displaces all statutory provisions as a rule of court procedure.¹⁴⁷ However, this sovereignty dissipates when it encroaches upon

¹³⁶*Id.*

¹³⁷*Id.* at 288 (citing OHIO R. CIV. P. 75(P)). Prior to its nullification, the rule required that: "If the court finds, with respect to any child under eighteen years of age, that neither parent is a suitable person to have custody, it may commit the child to any other relative of the child." *Id.*

¹³⁸The Modern Courts Amendment is a reference to Section 5(B) of Article IV of the Ohio Constitution. See discussion *supra*, Part III, Section A.

¹³⁹*Boyer*, 346 N.E.2d at 288.

¹⁴⁰*Id.*

¹⁴¹*Id.* (citing *Portage County Welfare Dept. v. Summers*, 311 N.E.2d 6, 12 (Ohio 1974)).

¹⁴²*Id.*

¹⁴³*Id.*

¹⁴⁴*State v. Rahman*, 492 N.E.2d 401 (Ohio 1986).

¹⁴⁵*Id.* at 403-06. The statute in question was OHIO REV. CODE ANN. § 2945.42 (West 2006).

¹⁴⁶OHIO R. EVID. 601(B) provides: "Every person is competent to be a witness except: . . . (B) A spouse testifying against the other spouse charged with a crime except when either of the following applies: (1) a crime against the testifying spouse or a child of either spouse is charged; (2) the testifying spouse elects to testify."

Note the court addressed the competency of an expert under OHIO R. EVID. 601(B), not under OHIO R. EVID. 601(D), which governs the competency of medical experts.

¹⁴⁷*Rahman*, 492 N.E. 2d at 404.

fundamental, substantive rights. The Ohio Supreme Court held that under Section 5(B) of Article IV of the Ohio Constitution, the statute codifying the spousal privilege¹⁴⁸ superseded Rule 601(B)¹⁴⁹ because the spousal privilege “create[d] a substantive right which [could] not be abridged”¹⁵⁰ by any rule of court procedure. Under the Ohio Constitution, Rule 601(B) would be nullified when it impacted the fundamental privilege of spouses to be secure in their private communications.

This discussion demonstrates that the Ohio Supreme Court has been receptive to recognizing the preemptive qualities of substantive rights under Article IV of the Ohio Constitution. However, the Ohio Supreme Court has never directly addressed the substantive nature of the medical statute under the Modern Courts Amendment. The only instance in which the Ohio Supreme Court even discussed the qualities of the medical expert statute occurred obliquely in *Denicola v. Providence Hospital*.¹⁵¹

Denicola involved a medical malpractice action initiated prior to the enactment of the medical expert statute.¹⁵² By the time the trial had convened, the legislature had passed the law regulating the competency of medical experts.¹⁵³ Under the new statute’s stringent requirements, the witness could no longer be considered competent to testify.¹⁵⁴ The defendant therefore objected to his continued participation in the trial.¹⁵⁵ The trial court sustained the objection.¹⁵⁶ Without a medical expert, the plaintiff’s claim had been effectively destroyed, and the judge granted the defendant’s motion for a directed verdict.¹⁵⁷

The plaintiff appealed this decision to the Ohio Supreme Court, arguing that the application of the medical expert statute in the present case violated Article II, Section 28 of the Ohio Constitution.¹⁵⁸ Article II, Section 28 prohibits the general assembly from enacting retroactive laws.¹⁵⁹ The Ohio Supreme Court rejected this

¹⁴⁸The spousal privilege prevents a husband or a wife from testifying “concerning a communication made by one to the other, or act done by either in the presence of the other during coverture, unless the communication was made or acted one in the known presence or hearing of a third person.” OHIO REV. CODE ANN. § 2945.42 (West 2006).

¹⁴⁹*Id.* at 405.

¹⁵⁰*Id.*

¹⁵¹*See Denicola v. Providence Hosp.*, 387 N.E.2d 231 (Ohio 1979).

¹⁵²*Id.* at 233. The statute became effective on July 28, 1975. OHIO REV. CODE ANN. § 2743.43 (West 2006).

¹⁵³*Denicola*, 387 N.E.2d at 233.

¹⁵⁴*Id.*

¹⁵⁵*Id.* at 231.

¹⁵⁶*Id.*

¹⁵⁷*Id.* This result provides a compelling example of the essential nature that medical experts play in medical malpractice litigation. Without her expert the plaintiff could not establish the requisite standard of care, effectively eliminating her claim.

¹⁵⁸*Id.* at 233.

¹⁵⁹OHIO CONST. art. II, § 28. The language of the section reads as follows:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into

argument. Basing its decision on prior precedent, the Supreme Court held that “R.C. 2743.43 was not retrospectively applied . . . it was properly applied prospectively, since the trial took place after its [the medical expert statute] effective date.”¹⁶⁰

As an initial matter, two limitations on the Court’s decision must be noted. First, the Ohio Supreme Court’s interpretation centered on the remedial nature of the medical expert statute under Section 28 of Article II, not the conflict between the medical statute and Rule 601(D) under Section 5(B) of Article IV of the Ohio Constitution. Second, the plaintiffs in *Denicola* conceded the procedural nature of the medical expert statute. Thus, the substantive qualities of the statute were never argued before the Ohio Supreme Court.¹⁶¹

While the precedential impact of this decision upon the present analysis may be questionable, it is still imperative to note the Ohio Supreme Court’s assumption that the medical expert statute “is of a remedial or procedural nature.”¹⁶² The impact of this conclusion upon the present analysis is uncertain. However, what influence this assumption should have upon the medical expert statute and its interplay among the Ohio Rules of Evidence must be negated by the Court’s conclusory dismissal of fundamental rights inhering in those suffering from the hands of negligent doctors.

Any provision that dictates the qualifications of medical experts impacts the substantive rights of tort victims in two very real and fundamental ways. First, any law affecting the competence of a medical expert directly impacts a tort victim’s ability to obtain a trial by jury. Second, any law affecting the competence of a medical expert directly impacts a tort victim’s ability to gain access to a court of law. The result is that rules affecting the competence of medical experts implicate more than simply the procedural stance of a medical malpractice victim. Rules affecting the competency of medical experts impact the very essence of an individual’s substantive right to pursue complex medical malpractice cases. Without the ability to obtain a medical expert, these tort victims cannot obtain redress in a court of law.

effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Id.

¹⁶⁰*Denicola*, 387 N.E.2d at 233. In reaching this holding, the Ohio Supreme Court relied upon its prior precedent in *State ex rel. Holdridge v. Indus. Comm’n*, 228 N.E.2d 621, 623 (Ohio 1967) (“[I]n general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress.”).

¹⁶¹*Denicola*, 387 N.E.2d at 233. There is no explanation in this or the lower decision why the plaintiff never argued the substantive nature of the medical expert statute. Most likely this decision resulted from the fact that no Rule of Evidence existed at the time to conflict with the statute.

¹⁶²*Id.* For a discussion on the difference between substantive and remedial laws, see *Kilbreath v. Rudy*, 242 N.E.2d 658, 660 (Ohio 1968) (“Substantive law is that which creates duties, rights and obligations, while procedural or remedial law prescribes the methods of enforcement of rights or obtaining redress.”).

5. The Right to a Jury Trial

It is a bedrock principal of our justice system that the right to a jury trial is a substantive rather than procedural right.¹⁶³ This privilege cannot be disturbed, desecrated, or violated.¹⁶⁴ The ancestry of the right to a jury trial can be traced to English common law.¹⁶⁵ There, the right became enshrined in the Magna Carta and transported across the Atlantic with the colonists.¹⁶⁶ Here, it flourished and was embodied in the Constitution of the United States.¹⁶⁷ The right to a jury trial was “formally extended to Ohioans [in] the Northwest Ordinance”¹⁶⁸ and became encapsulated in the Ohio Constitution.¹⁶⁹ The right to a jury trial is not simply a procedural grant, it is a fundamental right inhering in every citizen.¹⁷⁰

This inalienable right, however, does not exist in every circumstance. The entitlement only manifests itself in those instances when it “existed at common law prior to the adoption of” the Ohio Constitution.¹⁷¹ In *Sorrell v. Thevenir*, the Ohio Supreme Court acknowledged that right to a jury trial for negligence litigation antedates the Ohio Constitution.¹⁷² Thus, the right to a trial by jury for all negligence victims is a substantive right that cannot be abridged or circumscribed by any rule of court procedure.¹⁷³

¹⁶³47 AM. JUR. 2D *Jury* § 9 (2006). See also *Earnest v. Fed. Sav. & Loan Ass’n of Ala.*, 494 So. 2d 80, 82 (Ala. Civ. App. 1986); *Sidenstricker v. Miller Pavement Maint., Inc.*, 815 N.E.2d 736, 740 (Ohio Ct. App. 2004) (“The right to a jury trial is substantive rather than procedural.”); *Betz v. Timken Mercy Med. Ctr.*, 644 N.E.2d 1058 (Ohio Ct. App. 5th Dist. 1994) (“Fundamental to our justice system is the right to a jury of our peers.”).

¹⁶⁴OHIO CONST. art. I, § 5. “The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by concurrence of not less than three-fourths of the jury.” *Id.*; see also *Gibbs v. Village of Girard*, 102 N.E. 299, (Para. two of syllabus Ohio 1913) (finding “[the] right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated.”).

¹⁶⁵*Belding v. State ex rel. Heifner*, 169 N.E. 301, 302 (Ohio 1929) (holding Section 5 of article 1 of the Ohio Constitution only guarantees the right of a trial by jury in those instances where it existed previous to its adoption).

¹⁶⁶*Cleveland Ry. Co. v. Halliday*, 188 N.E. 1, 3 (Ohio 1933) (holding that the right to a trial by jury is a substantive right, not a procedural matter); see also Wikipedia, *Magna Carta*, http://en.wikipedia.org/wiki/Magna_Carta (last visited Nov. 16, 2006).

¹⁶⁷*Halliday*, 188 N.E. at 3.

¹⁶⁸*Kneisley v. Lattimer-Stevens Co.*, 533 N.E.2d 743, 746 (Ohio 1988) (holding that OHIO REV. CODE ANN. § 4121.80(D) (West 2006) may not be retroactively applied because the right to a jury trial for intentional torts existed at common law and is therefore a substantive right).

¹⁶⁹*Belding*, 169 N.E. at 302; see also *Gibbs*, 102 N.E. at 300.

¹⁷⁰*Halliday*, 188 N.E. at 3.

¹⁷¹*Kneisley*, 533 N.E.2d at 746; see also *Belding*, 169 N.E. 301 at syllabus.

¹⁷²*Sorrell v. Thevenir*, 633 N.E.2d 504, 510 (Ohio 1994) (holding the right to a jury trial in negligence and personal injury actions is a fundamental right).

¹⁷³*Kneisley*, 533 N.E.2d at 746.

Medical malpractice is a specialized branch of the negligence tree.¹⁷⁴ Victims who pursue claims under this vein are afforded the same substantive rights and protections as any other tort victim. Unlike traditional tort victims, however, victims of medical malpractice are peculiarly reliant upon medical experts to gain access to a court of law.¹⁷⁵ Medical expert testimony is a fundamental prerequisite to pursuing any such claim.¹⁷⁶ Without a medical expert to establish the requisite standard of care and to establish this, the defendant failed to meet this standard, a plaintiff will never reach a jury.¹⁷⁷ Any rule, therefore, affecting the competency of a medical expert substantially impacts a tort victim's substantive right to a trial by jury.

By expanding or contracting a victim's ability to access a medical expert, rules governing the competency of medical experts expand or contract the individual's very right to a trial by jury. The result is that rules regulating medical experts affect substantive rights and are not procedural rules. Because the Ohio Constitution prohibits the Supreme Court from promulgating rules affecting substantive rights, Rule 601(D) must have no force or effect, and the statute governing medical expert testimony must control. Medical experts should be obligated to devote three-fourths of their professional time to the active clinical practice of medicine, as prescribed by the medical expert statute.

6. Access to the Courts

Article I, Section 16 of the Ohio Constitution guarantees that every citizen "shall have a remedy by due course of law" for any injury to land, property, or person.¹⁷⁸ While Ohio uses the unique phrase "due course of law," the clause has been interpreted to be the functional equivalent of the due process clause¹⁷⁹ found in the

¹⁷⁴See discussion *supra* Part II, Section A.

¹⁷⁵*Id.*

¹⁷⁶DOBBS, *supra* note 33, at 639. "[C]ourts require the plaintiff to establish the medical 'standard' itself by expert testimony." *Id.* See, e.g., *Brannan v. Lankenau Hosp.*, 417 A.2d 196, 199 (Pa. 1980) ("To satisfy his burden of proving [. . . medical malpractice] appellant must introduce expert testimony to show that appellee physicians conduct varied from accepted medical practice.").

¹⁷⁷See *Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1965).

In determining negligence in a case such as this, which concerns the highly specialized art of treating disease, the court and jury must be dependent on expert testimony. There can be no other guide, and where want of skill and attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury.

Id.

See also discussion *supra* Part II, Section A; *Cross v. Huttenlocher*, 440 A.2d 952, 954 (Conn. 1981) ("To prevail in a malpractice case the plaintiff must establish through expert testimony both the standard of care and the fact that the defendant's conduct did not measure up to that standard.").

¹⁷⁸OHIO CONST. art. I, § 16. "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *Id.*

¹⁷⁹See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.") U.S. CONST. amend IV, § 1 ("No State shall . . .

United States Constitution.¹⁸⁰ There is no difference between the United States and the Ohio Constitution regarding due process of law.¹⁸¹

The Due Process Clause encompasses two distinct limitations upon government action, procedural and substantive due process.¹⁸² Procedural due process ensures that the government provide some form of notice and an adequate opportunity to be heard before it deprives a person of life, liberty or property.¹⁸³ In contrast, “substantive due process insists that the law itself be fair and reasonable and have an adequate justification regardless of how fair or elaborate the procedures might be for implementing it.”¹⁸⁴ The rights protected under the substantive strand of the due process clause are “independent of any . . . textual guarantee[] found in the Constitution.”¹⁸⁵ The result is that substantive due process encompasses a much broader sweep of liberty interests than procedural due process.

An eclectic amalgam of rights has emerged over the years under this branch of the due process clause,¹⁸⁶ from the right to privacy to the right to direct the upbringing of one’s child.¹⁸⁷ The Supreme Court of the United States has also “recognized a limited due process right of access to courts [which is] violated by

deprive any person of life, liberty, or property, without due process of law”). The Fifth Amendment “operates as a limit on the power of the national government, while the [Fourteenth Amendment] operates against the power of the states . . . Since both clauses operate in essentially the same fashion, albeit against different governmental bodies, [they are referred] collectively as the Due Process Clause.” ALLAN IDES & CHRISTOPHER N. MAY, EXAMPLES AND EXPLANATIONS: CONSTITUTIONAL LAW – INDIVIDUAL RIGHTS 53 (3d ed. 2004).

¹⁸⁰17 OHIO JUR. 3D *Constitutional Law* § 493.

¹⁸¹*Id.* See also *State v. French*, 73 N.E. 216, 217 (Ohio 1905) (An act protecting fish and game declared constitutional under the both Due Process Clauses of the United States and the Ohio Constitutions – there is no difference respecting the two clauses); *Direct Plumbing Supply Co. v. City of Dayton*, 38 N.E.2d 70, 72 (Ohio 1941) (“The ‘due course of law’ clause of Section 16, Article 1 of the Ohio Constitution, has been considered the equivalent of the ‘due process of law’ clause in the Fourteenth Amendment.”).

¹⁸²IDES & MAY, *supra* note 179, at 54. See also JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 210 (2004). Procedural due process only requires that there be some “fair decision-making process before the government takes some action directly impairing a person’s life, liberty or property.” *Id.* Substantive due process addresses the “constitutionality of the underlying rule rather than the fairness of the process by which the government applies the rule to an individual.” *Id.* Under this thread of the due process clause the Supreme Court examines the substance of the law or governmental action. *Id.*

¹⁸³IDES & MAY, *supra* note 179, at 54.

¹⁸⁴*Id.* Due process originates from England, where it served as a protection from “arbitrary action on the part of the Crown.” 16B AM. JUR. 2D *Constitutional Law* § 911 (2006). Beginning in the nineteenth century, the Supreme Court began applying due process to substantive rights. *Id.*

¹⁸⁵IDES & MAY, *supra* note 179, at 54.

¹⁸⁶Substantive federal rights can only be created under the federal constitution. 16B AM. JUR. 2D *Constitutional Law* § 911 (2006). “[A]s a general matter, the Supreme Court is reluctant to expand the concept of substantive due process, because guideposts for responsible decision making in this uncharted area are scarce and open-ended.” *Id.*

¹⁸⁷IDES & MAY, *supra* note 179, at 54-116.

government action that prevents a party from filing a lawsuit.”¹⁸⁸ This substantive right is implicated by any rule that impacts a litigant’s access to a medical expert in malpractice litigation.¹⁸⁹

Right to access court cases typically occur in two general categories.¹⁹⁰ The first class of cases occurs when a plaintiff’s overtures to litigate a potential claim are stymied by some official action that deprives the person of the opportunity to do so.¹⁹¹ The second class of cases occurs when some “specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable.”¹⁹²

¹⁸⁸*Id.* at 116. *See also* *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (“[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”); *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002) (“[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong.”); *Bremiller v. Cleveland Psychiatric Instit.*, 879 F.Supp. 782, 792 (N.D. Ohio 1995) (“Access to the courts is a substantive due process right”); 16B AM. JUR. 2D *Constitutional Law* § 945 (2006) (“An opportunity for a hearing before a competent and impartial tribunal upon proper notice is one of the essential elements of due process.”) *See also* IDES & MAY, *supra* note 179, at 54-116. Right to access courts claims occur in two basic categories: “(1) those in which the government has created an impediment to the present filing of a lawsuit; and (2) those in which the government took action in the past that prevented filing a claim that is now foreclosed.” *Id.* at 116.

¹⁸⁹*See, e.g.*, John E. Nowak et al., *Constitutional Law* § 13.10 (3d ed. 1986).

If a state law allows persons to bring suit in state court to redress alleged grievances against public or private agencies, it cannot arbitrarily deny an individual the ability to use those judicial procedures. The arbitrary refusal to allow individuals to use the established state court process would seem to be invalid under even the most minimal due process or equal protection standards.

Id.

See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (“The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”).

¹⁹⁰ IDES & MAY, *supra* note 179, at 116-17. *See also* *Christopher v. Harbury*, 536 U.S. 403, 412-14 (2002) (holding that the defendant did not state a claim for denial of judicial access).

¹⁹¹ *Christopher*, 536 U.S. at 413. The gravamen of such a claim is “that systematic official action frustrates a plaintiff . . . in preparing and filing suits at the present time.” *Id.* The impediment presently frustrates the litigant’s ability to enter the court room doors – however it does not deny the opportunity to litigate for all time. Once the impediment is lifted the litigant is free to pursue his or her claim. *Id.* The rationale “for recognizing that claim, is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed.” *Id.* Examples of Court-access rights include: providing a law library for a prisoner, *Bounds v. Smith*, 430 U.S. 817, 828 (1977); providing a reader for an illiterate prisoner, *Lewis v. Casey*, 518 U.S. 343, 346-48 (1996); and waiving filing fees that an indigent litigant would be unable to pay, *Smith v. Bennett*, 365 U.S. 708, 713-14 (1961).

¹⁹² *Christopher*, 536 U.S. at 414.

The rationale for either claim is to provide individuals an opportunity to seek vindication for injuries and seek “judicial relief for some wrong” that has befallen them.¹⁹³ Regardless of whether the right to access a court claim is forward or backward looking, it must be derived from some underlying claim.¹⁹⁴ The right to access a court is absolutely contingent on a legitimate, principal claim for vitality and efficacy.

An underlying claim exists in malpractice litigation. In these cases, the principal cause of action is negligence inflicted upon the tort victim.

Rules affecting the competency of a medical expert have the unique affect of implicating the substantive right to access a court of law.¹⁹⁵ Unlike any other branch of negligence, victims of medical malpractice cannot pursue a tort action unless they are able to obtain an expert willing to testify on their behalf.¹⁹⁶ Any rule that eliminates a litigant’s opportunity to access a medical expert has the effect of slamming the doors of justice in his or her face. A medical malpractice action cannot be pursued unless this barrier has been removed. Laws or rules that affect the competency of a medical expert implicate more than mere rules of court procedure. They implicate the very core of a tort victim’s right to obtain redress by functioning as the hinge that opens or closes the doors to a court of law.

Under Ohio’s Constitutional scheme, the power to promulgate rules that implicate substantive rights has been expressly delegated to the legislature, not the judiciary. Ohio’s elected representatives have exercised this prerogative by passing the medical expert law. While it might seem odd that the more stringent rule governing the competency of medical experts should control, this does not transfer authority to the judiciary. The medical expert statute supersedes R. 601(D) because the rule impermissibly infringes upon the substantive rights of medical malpractice litigants. Physicians must be required to devote three-fourths of their time to the active clinical practice of medicine to be considered competent to testify in a medical malpractice suit.

B. The Same or Substantially Similar Specialty Requirement.

In 2004, the Ohio legislature appended the medical expert statute, adding the requirement that medical experts may only testify against doctors from “the same or a substantially similar specialty.”¹⁹⁷ This amendment furnishes a further safeguard against illegitimate “hired gun” testimony. Because the Ohio Rules of Evidence are devoid of a similar requirement, the legislature appears to have utilized its authority under the Ohio Constitution to supplement the procedural rules by grafting an additional criterion onto laws governing the competency of medical experts.¹⁹⁸

¹⁹³*Id.* at 414-15.

¹⁹⁴*Id.*

¹⁹⁵*See, e.g.,* *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (“[A] state must afford all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.”).

¹⁹⁶*See* *Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1965). *See also* discussion *supra* Part II, Section A.

¹⁹⁷Ohio Rev. Code Ann. § 2743.43(A)(3) (West 2006).

¹⁹⁸Ohio Const. art. IV.

This interpretation is consistent with the applicable rules of constitutional construction. Under these rules, courts must endeavor to construe a statute in such a way as to avoid any “constitutional infirmity.”¹⁹⁹ In *State v. Keenen*, the Ohio Supreme Court outlined how this analysis should proceed under Section 5(B) of Article IV of the Ohio Constitution.²⁰⁰

When a potential conflict arises between a statute and another rule of evidence, the “court is bound to give [the] statute a constitutional construction [rather than] . . . one that raises serious questions about the statute’s constitutionality.”²⁰¹ Justices should always seek to adopt the “reading of the statute [that] would avoid any constitutional problems.”²⁰²

State ex rel. Thompson further demonstrates the Ohio Supreme Court’s desire to interpret statutes in such a way as to avoid any constitutional conflicts with other rules of court procedure.²⁰³ In that case, the Court refused to construe R.C. 3109.04(C) in a manner that would create an inconsistency with the Ohio Rules of Civil Procedure.²⁰⁴ Following the logic of *Keenen*, the Ohio Supreme Court adopted a “construction that harmonize[d] both the statute and the pertinent rules” of procedure.²⁰⁵

The “same or a substantially similar specialty” provision offers a similar opportunity to harmonize the medical expert statute with the Ohio Rules of Evidence in order to avoid a constitutional infirmity. By interpreting this provision as a supplemental feature to Rule 601(D), both the statute and the rules of evidence can be synchronized in the same manner as the Ohio Supreme Court did in *State ex rel. Thompson*. As a result, the applicable rules of statutory construction dictate that the “same or a substantially similar specialty” provision of the medical expert statute must control as a supplemental feature to the Ohio Rules of Evidence. To find otherwise would construe the statute in such a way as to create a constitutional infirmity.

However, before the “same or substantially the same specialty” provision can be read into the rules governing the competency of medical experts, several minor issues must be explored and explained.

The first issue concerns the Staff Notes attached to Rule 601(D). The Staff Notes state that the rule as adopted “supersedes R.C. 2743.43.”²⁰⁶ This Note appears to

¹⁹⁹*State ex rel. Thompson v. Spon*, 700 N.E.2d 1281, 1284 (Ohio 1998) (holding that the court of appeals was correct in dismissing appellants mandamus claim).

²⁰⁰*State v. Keenen*, 689 N.E.2d 929, 946 (Ohio 1998) (holding in part that it refused to adopt defendant’s interpretation of OHIO REV. CODE ANN. § 2945.82 (West 2006). Because such an interpretation would conflict with OHIO R. EVID. 611(B), a rule of court procedure was promulgated under Section 5(B), Article IV of the Ohio Constitution).

²⁰¹*Id.*

²⁰²*Id.*

²⁰³*State ex rel. Thompson*, 700 N.E.2d at 1284.

²⁰⁴*Id.*

²⁰⁵*Id.*

²⁰⁶Ohio R. Evid. 601(D), 1980 staff note.

evinced the judicial branch's clear intent to supplant the medical expert statute. However, several flaws exist with this interpretation.

First, the Staff Notes have never been "adopted by the Court and are not [considered to be] part of the rule[s]."²⁰⁷ Thus, the Note carries no weight beyond mere suggestion. Second, while the rule may have superseded the language of the medical expert statute in its initial formulation, the Ohio legislature subsequently appended the statute in 2004, adding the provision in question. In so doing, the Ohio representatives exercised their authority to supplement or complement the rules of court procedure with non-contradictory legislation.²⁰⁸ Because the Rules of Evidence are silent concerning the competency of medical experts to testify against other doctors across medical specialties, the amended medical expert statute does not conflict with Rule 601(D). As a result, the legislature has grafted an additional supplemental provision onto the Ohio rules governing the competency of medical experts.

The second issue concerns the final clause in Rule 601(D).²⁰⁹ This clause provides that Rule 601(D) shall not prohibit medical experts "who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession,"²¹⁰ in an action against any other physician or medical professional.

A potential reading could be elicited from this language that the rule empowers medical experts to testify against other medical professionals, regardless of their specialty. This reading would directly conflict with the "similar specialty" provision of the medical expert statute, which prohibits medical experts from doing just that.²¹¹ However, the judiciary did not intend such a result when they added this language to Rule 601(D).

The Ohio Supreme Court added the final clause to Rule 601(D) in order to prohibit the application of the competency rule when medical professionals are necessary to testify about the appropriate standard of care within their own field.²¹²

²⁰⁷OHIO R. EVID. 101, Refs & Annos (2006).

The Supreme Court Advisory Committee prepared the Staff Notes for each of the substantive rule amendments . . . Although the Supreme Court used the Staff Notes as background for its deliberations, the Staff Notes are not adopted by the Court and are not part of the rule . . . [T]he Staff Notes represent the views of the Rules Advisory Committee and are not necessarily the views of the Supreme Court.

Id.

²⁰⁸OHIO CONST. art. IV.

²⁰⁹OHIO R. EVID. 601(D).

This division shall not prohibit other medical professionals who are otherwise competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

Id.

²¹⁰*Id.*

²¹¹*See supra* note 25. Ohio Rev. Code Ann. § 2743.43(A)(2) (West 2006).

²¹²OHIO R. EVID. 601(D), 1991 staff note. *See also* JAMES T. O'REILLY, OHIO PERSONAL INJURY PRACTICE § 14:4 (2006). "Medical malpractice applies not only to physicians and

Prior to the insertion of this language, several courts had held that a nurse could not be considered “competent under Rule 601(D) to testify about the standard of” care for nurses in malpractice actions against doctors.²¹³ The additional language in Rule 601(D) prevents this unusual practice from occurring.²¹⁴ As a result, the final clause of Rule 601(D) has no bearing on the competency of a medical expert to testify concerning the appropriate standard of care for a physician from a different specialty. The language of Rule 601(D) does not conflict with the “same or a substantially similar specialty” provision of the medical expert statute.

Because the appropriate rules of statutory construction dictate an interpretation that ensures the constitutionality of the medical expert statutes and because the “same or a substantially similar specialty” provision does not conflict with any language in Rule 601(D), the provision must supplement the Ohio Rules of Evidence. The Ohio legislature has successfully grafted an additional requirement onto the rules of court procedure; medical experts should be prohibited from testifying across medical specialties.

V. PART V

Conclusion

Dr. Sandu’s story concludes on a positive note. A unanimous jury exonerated him of all wrongdoing. After the verdict, Dr. Sandu’s lawyer spoke with some of the jury members. They informed the lawyer that they found the plaintiff’s expert to be so thoroughly incompetent that they would refuse treatment from him if offered.²¹⁵

The jury also stated that they found Dr. Sandu’s conduct exemplified the best rules of his profession.²¹⁶ Dr. Sandu’s account provides a vivid example of why the testimony of medical experts must be regulated. If medicine is to remain a viable industry, quality physicians like Dr. Sandu must be insulated from frivolous litigation allied with “hired gun” testimony. Doctors must be protected from condemnation by “experts” no longer practicing medicine and testifying in arenas outside their areas of expertise. At the same time, victims of legitimate medical mistakes must be provided open avenues to seek redress.

Ohio has attempted to draw this line with legislation designed to stifle access to purchased testimony. This legislation, however, clashes in part with Ohio evidentiary rules governing the competency of witnesses. Whether the legislature has struck the proper balance between the interests of physicians and tort victims is far from

surgeons, but also to dentists, chiropractors, podiatrists, optometrists, nurses and hospitals.” *Id.* For a complete list of individuals who may be named as a defendant in a medical malpractice action within the state of Ohio, see OHIO REV. CODE ANN. § 2305.113(E) (West 2006).

²¹³OHIO R. EVID. 601(D), 1991 staff note. See also *Harter v. Wadsworth-Rittman Hosp.*, 580 N.E.2d 506 (Ohio Ct. App. 1989) (trial court did not err in finding that a nurse was not competent to testify under R. 601(D) in suit alleging negligent provision of medical care by a nursing staff).

²¹⁴Ohio R. Evid. 601(D), 1991 staff note.

²¹⁵Telephone Interview with Anonymous, Cardiovascular Surgeon, in Cleveland, Ohio (Oct. 18, 2006).

²¹⁶*Id.* The jury members actually stated that they wanted him to be their physician and would recommend his services to any person requiring cardiovascular surgery. *Id.*

certain.²¹⁷ What is certain is that the authority to ascertain this balance has been exclusively delegated to the legislature under the Ohio Constitution.

Under Article IV, Section 5(B), rules of procedure that impact the substantive rights of Ohio citizens are considered far too important to be encroached upon by the judiciary. Rules affecting substantive rights, therefore, have been expressly delegated to the legislature. Because rules that regulate the competency of medical experts inevitably encroach upon the ability of a tort victim to seek redress in a court of law, such rules impact substantive rights in very real and tangible ways. As a result, the medical expert statute must control. To find otherwise would permit the judiciary to encroach upon the substantive rights of Ohio citizens, something expressly prohibited by the Ohio Constitution. However, even if the medical expert statute does not govern, its provision requiring that medical experts practice in the same or substantially the same specialty still controls as a supplementary regulation to the rules of court procedure permissible under the Ohio Constitution.

²¹⁷Such an inquiry is beyond the reach of this article.