

## 2021-2022 BOARD OF DIRECTORS

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## UPCOMING EVENTS

December 14, 2021  
**Annual Holiday Luncheon and Silent Auction**  
12:00 p.m. – 1:15 p.m.

February 8, 2022  
**Luncheon Meeting**  
12:00 p.m. – 1:15 p.m.

May 10, 2022  
**Annual Membership Luncheon**  
12:00 p.m. – 1:30 p.m.

### COAJ Mission

*To promote justice for individuals in all local, state, and federal courts; to support our membership; to assist the legal community; to improve the judicial system; and to serve the citizens of Central Ohio.*

### SLIP OPINION 2021-Ohio-3304

*Johnson v. Abdullah*

#### Ohio Supreme Court affirms 50% rule for medical experts

The Ohio Supreme Court recently held that a physician employed in an executive position who does not directly oversee physicians who treat patients does not satisfy the active-clinical practice requirement of Evid.R. 601. *Johnson v. Abdullah*, Slip Opinion No. 2021-Ohio-3304. Specifically, Evid.R. 601(B)(5) states that a person giving expert testimony on the issue of liability in any medical claim is not competent to testify unless that person (1) is licensed to practice medicine, (2) **devotes at least one-half of their professional time to the active clinical practice of medicine or teaching**, and (3) practices in the same or similar specialty to the defendant. In *Johnson*, the defendant called Dr. Ron Walls to testify as an expert regarding the standard of care and the plaintiff sought to prevent Walls from testifying on the basis that he failed to satisfy the 50% rule required by Evid.R. 601. Walls was the chief operating officer of a hospital system where he spent 90% of his time on administrative and executive matters, but he also testified that everything he did as COO had an effect on patient care. The Supreme Court determined the defendant failed to show that Walls was engaged in the active clinical practice of medicine at the time of trial and that Walls was a true executive and his role as COO was not adjunctive to patient care. In so finding, the court noted that if Walls's activities constituted the active clinical practice of medicine, then nonphysician COO's would also be engaged in the active clinical practice of medicine, despite not being licensed to do so. Ultimately, while the court noted Walls to be an accomplished physician, the court stated the plain language of the rule prohibits Walls from testifying, and any amendment to the rule must be made through the proper rule-amendment process.

### IN RE PERALES, 52 Ohio St.2d 89

*Masitto v. Masitto*

Under *In re Perales*, 52 Ohio St.2d 89, a parent has a paramount right to custody of their child unless he or she is "unfit." In order to prove the parent is unfit, the non-parent must show by a preponderance of the evidence that the parent has abandoned the child, contractually relinquished custody of the child, is unable to provide care or support, or that the parent is otherwise unsuitable. *Id.* On a post-decree motion for custody between the parent who was previously found unfit and the non-parent with custody, the best of interest of the child controls. *Masitto v Masitto*, 22 Ohio St.3d 63. The parent must show that it is in the child's best interest for him or her to regain custody and does not need to prove a change of circumstances. *Id.* See also *Wilburn v Wilburn*, 144 Ohio App.3d 279.

### OHIO CASE NO. 2:19-cv-3412

*Eaton v. Ascent Resources – Utica, LLC, S.D.*

On August 4, 2021, Judge Edmund A. Sargus, Jr. issued an Opinion and Order certifying a class and five sub-classes of persons or entities alleging underpaid royalties from Ascent Resources – Utica, LLC ("Ascent") based upon leases for gas or oil wells. This landmark ruling marks one of the first cases in which an Ohio court has certified a class action regarding the underpayment of oil and gas royalties. Three of the subclasses involve Plaintiffs' claims that Ascent systematically overcharges landowners for post-production expenses such as gathering, compression, processing of liquids, and pipeline transportation charges. According to Plaintiffs, Ascent pays these expenses to "affiliated" companies in violation of the law and then takes inflated deductions from the landowners for these expenses. The end result is that mineral owners' net royalties are significantly reduced. The remaining two subclasses involve "market enhancement" leases, which require Ascent to increase or enhance the value of the product sold before being able to take various deductions. Plaintiffs alleged that Ascent fails to satisfy this condition precedent.

On August 14, 2021, Ascent filed a motion for leave with the Sixth Circuit Court of Appeals to obtain an interlocutory appeal of the class certification under Fed. R. Civ. P. 23(f). Plaintiffs filed their opposition on August 20, 2021. The matter has been fully briefed. Discovery will proceed on liability issues in the district court while the request for an interlocutory appeal is pending.