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In Opposition to Senate Bill 129
Before the Ohio Senate Judiciary – Civil Justice Committee
May 4, 2011

Thank you for allowing me the opportunity to address the Committee concerning SB 129. I have been practicing in the area of tort litigation since 1979, predominantly in medical malpractice. I am a past President of the Franklin County Trial Lawyers Association, and have served several terms as Chair of the Medical Negligence Section of the Ohio Academy of Trial Lawyers (now Ohio Association for Justice). I have testified numerous times on behalf of the OAJ before the Ohio Legislature on issues related tort reform legislation in general, and medical malpractice in particular. Additionally, I have participated in the drafting of statutes and Civil Rules dealing with issues related to medical malpractice, including Civil Rule 10 affidavits of merits, affidavits of noninvolvement, and sanctions for frivolous conduct.

ANALYSIS OF THE BILL

Breadth and Scope of Immunity:

Proponents of SB 129 from the America College of Emergency Physicians [ACEP] originally characterized this Bill as providing much needed liability protection for medical first responders to widespread disasters such as hurricanes and terrorist attacks (despite a paucity of such events and the absence of any evidence that responses in the past have been impeded in any way). This description of the scope of the Bill by its proponents was misleading.

Close scrutiny of the Bill revealed what the proponents really intended it to be: *blanket immunity* for the negligence of the medical profession for harm caused to any patient whose first contact with the medical system is through the emergency department of a hospital. It applies to *every* emergency room in *every* hospital in the state. This blanket immunity from accountability and responsibility for negligent medical care applies to *any* medical provider from *any* medical specialty, rendering *any* kind of medical care or service, to *any* patient, under *any* circumstance, to *any* patient in an *emergency room*. When the proponents were challenged on their original description of the scope of this Bill, they conceded it is, indeed, a grant of blanket immunity against patients in emergency rooms.

Proponents of the Bill then claimed this Bill is necessary to protect *emergency medicine physicians* who practice under *exigent* circumstances requiring snap judgments in the face of chaos in medical emergencies, and who care for patients with whom they have no prior relationship, and no knowledge of their medical history.

They claim it is unfair to hold this unique group of physicians to the same standard of care as primary care physicians, for example, who care for patients under calm circumstances in an office setting where there is more opportunity and time to evaluate patients with whom they are familiar. This claim is also misleading.

- Ohio law *expressly* provides that the conduct of emergency medicine physicians must be evaluated taking into consideration the unique circumstances in which they practice medicine, and *not* be judged by the standards of care applicable to other medical specialists.
- OJI jury instructions explicitly set forth this requirement that an emergency medicine physicians be judged by what other reasonably prudent and skillful emergency medicine physicians would do under the "same or similar circumstances" presented by a particular patient.
- In fact, under Ohio law, *only* physicians who are trained and experienced in providing emergency medicine are legally permitted to judge the care of another emergency medicine physician. And this must be done according to prevailing standards of care applicable *only* to emergency medicine physicians.
- *Under Ohio law, a medical claim against an emergency medicine physician cannot proceed without the prior approval of an emergency medicine physician.*

Furthermore, anyone who has ever been to a hospital emergency room knows that the *vast* majority of patients are not seen for immediate life-threatening conditions, and a typical emergency room environment is anything but chaotic. Moreover, every member of ACEP has received extensive training to prepare them specifically for their medical specialty.

Most importantly, as set forth below, the additional fallacy in the proponents' argument is that SB 129 is *not* limited in scope to emergency medicine physicians, to emergency rooms, or to patients being seen under emergency circumstances.

Definitional Issues:

- Disaster: "*any*...occurrence of *injury*...that results from any...*act of a human*."
  - This includes patients injured by drunk drivers, children falling off playground equipment, victims of rape or other violence, elderly patients injured by falls, workers injured on the jobsite, etc.
    - Care for all such patients falls under "wilful and wanton" standard.
    - Immunity for the care for patients injured by "disasters" is *not* limited to EMTALA emergency room care. (B)(2),(3)

- "Emergency care": NOT defined or limited. Includes any care rendered in any emergency room by any medical provider, but is *not* limited to emergency room care. Includes Code Blue responses to patients in an ICU department or patient

floor, as well emergency response and/or resuscitation for intra- or post-operative complications in the OR, PACU, or patient floor.

Because of definitional vagueness and ambiguity, it is important to note that careful scrutiny of the blanket immunity conferred by this Bill reveals it is *not* even limited to emergency medicine physicians, *or* to care provided in emergency rooms. This immunity applies to:

- Undefined "emergency care" provided to any patient by *any* medical provider.
- *Radiologists who* never set foot in an emergency room.
- *Hospitalists* who are requested to write admission orders for patients being admitted to the hospital through the emergency room. (A physician's *admitting orders* that are negligent, improper and inappropriate, and follow the patient into an admission, are immune from liability, even if they do not result in harm to the patient until *days or weeks after the patient is admitted and has left the emergency room.*)
- *Orthopedists*, *cardiologists*, and *infectious disease* physicians who are asked to consult on patients in an emergency room, even hours after a patient's condition has been diagnosed and stabilized.
- "*Code Blue*" situations for patients who are in the *Intensive Care Unit* as a result of "any act of a human" (*viz.*, "disaster").
- Patients who are placed in "*Observation Units*" in emergency rooms *for up to 23 hours* for evaluation of conditions that cannot be immediately determined to be life threatening or benign conditions.

While proponents cite Florida law granting limited immunity for emergency room care as precedent for SB 129, the immunity under Florida law is *extremely* limited: it applies *only* to emergency room patients who are *unstable*, and exists *only* during the limited time prior to the patient being medically *stabilized*.
Under (B)(1) EMTALA mandated care, a physician is only liable for *improper* emergency care if they are shown to have had "*reckless disregard*" for their duty and obligation to provide proper care.

However, under (B)(2) "disasters", applicable to the vast majority of emergency room visits (including *all* EMTALA care), a negligent medical professional is only liable if they were "*willful or wanton*".

- Thus, under this Bill *no* medical provider has any responsibility to provide *proper* medical care to a patient who comes to the emergency room, for example, with chest pains and is placed in an Observation Unit.
- No radiologist in the quiet of a darkened radiology suite interpreting films in the ordinary course of their practice has any responsibility to a patient in an emergency

room to *properly* interpret an x-ray to identify fractures, blood clots on an ultrasound, lung tumors on a chest x-ray, or hemorrhage on a CT scan of the brain.

- An orthopedist that *improperly* sets a child's broken arm, or an elderly patient's fractured leg, has no responsibility to the patient.
- A medical provider that orders or administers an incorrect drug dosage to a patient in an emergency room has no responsibility for one of the most common medical mistakes in hospitals, even for disabling, catastrophic or grievous injury.

Reckless Disregard = Wilful or Wanton Misconduct = Blanket Immunity

Under Ohio law as defined by the Ohio Supreme Court and appellate courts, the common law of other states, and the Restatement of Law 2d, Torts, Sec. 500, "*reckless disregard*" is synonymous with "*wilful or wanton misconduct*". This standard requires a showing of "*conscious indifference*" to a high degree or probability of risk, a "*failure to exercise any care whatsoever*", *and* a "*disposition to perversity*". Fabrey v. McDonald Village Police Department. This standard has been applied by statute to governmental EMTs, and review of the case law reveals it is virtually impossible to survive a motion for summary judgment in such cases, even where the care has been "*inept*", or "*incompetent*", or involved *multiple medical mistakes*: for the "*mere piling up of negligent acts does not...convert negligence into wilful and wanton acts.*"

- Restatement of Law 2d, Torts, Sec. 500
- Fabrey v. McDonald Village Police Department (Ohio Supreme Court)
- State v. Earlenbaugh (Ohio Supreme Court)
- Robertson v. Dept. of Public Safety (Franklin County Court of Appeals)
- Byrd v. Kirby (Franklin County Court of Appeals)
- Smith v. McBride (Franklin County Court of Appeals)
- Gauvin v. Clark (Massachusetts Supreme Court)

Immunity not provided or defined by, or limited to, EMTALA mandated care:

EMTALA does *not* provide *any* immunity for improper medical care.

Despite this, proponents of the Bill have also argued that emergency room physicians should not be held liable for medical mistakes and errors because they are mandated by EMTALA to provide care to patients in the emergency room, even though the patient may be uninsured. They have asserted it is unfair to hold emergency room physicians liable for negligent medical care for which they are not being compensated; thus, the poor and most vulnerable should be deprived of the requirement for proper medical care.

Even if such a position were consistent with the Hippocratic Oath, the bill is *not* limited to care provided to uninsured patients which EMTALA was enacted to protect; it also applies

to you and me and anyone else even though we have purchased comprehensive medical or health insurance.

The suggestion by proponents of SB 129 that emergency room physicians do not get compensated for EMTALA mandated care of uninsured patients is also *false*: emergency room physicians are either salaried employees of the hospital, or more commonly, salaried employees of an independent corporations that have contracted to provide emergency room physician coverage. Under either scenario, the *physician* gets paid regardless of the uninsured status of the patient.

EMT Immunity Not Analogous:

While the proponents of this Bill cite the grant of immunity to EMTs, *inter alia*, as justification for seeking their own blanket immunity, the rationale for providing immunity to EMTs does *not* rest upon the "similar" nature of EMT job responsibilities, as the proponents claim; rather, EMT immunity is premised upon their status as government employees, and the need to protect the public treasury from liability claims. No such interest exists for privately employed, highly compensated, and privately insured medical professionals.

If privately employed and insured medical professionals were for the first time given immunity under this Bill, others will be in line soon. For example, medical providers who work at urgent care facilities in all our communities will undoubtedly seek the same favored status and special protections being sought in SB 129. The net result will be that in times of urgent need for proper lifesaving care for ourselves and our families, there will be no assurances and no accountability for such care when any of us seek it.

Equal Protection and Constitutional Infirmity

As originally introduced, SB 129 was unconstitutional *on its face* because it sought to limit the remedy – the right to recover damages - in wrongful death claims, which is expressly prohibited by the Ohio constitution. In an effort to avoid this constitutional infirmity, the proponents have expressly excluded wrongful death claims from the blanket immunity under the current version of SB 129. Thus, the statute will be now unconstitutional "*as applied*": the practical effect will be to deprive only *some*, but not *all* people similarly situated, of a right to a remedy.

Apart from the constitutional defect, this dichotomy points out the absurdity, and unfairness, of the application of the Bill in the real world. Consider, for example, two children who arrive at the emergency room of a hospital at the exact same time with the exact same illness (e.g., strep throat), and are given the wrong drug, or an incorrect dosage of medication. If one child dies and the other suffers severe brain damage because of the medication error, the family of the child who has suffered severe brain damage is completely precluded from seeking any compensation for the catastrophic harm to the

child or future medical expense, caused by the negligence. The family of the child who died, however, would be able to pursue a claim against the very same medical providers, based on the exact same negligent care.

Conclusion

As other opponents of SB 129 have pointed out, the blanket immunity provided by this Bill is totally unnecessary.

- Medical claims against all specialties have fallen dramatically.
- The liability insurance market is profitable and expanding.
- There is no shortage of emergency medicine physicians that is in any way related to medical claims.
- Emergency medicine physicians are specifically trained to deal with the unique circumstances under which their care is rendered, and they are judged by Ohio law according to those unique circumstances.

Most importantly, this immunity applies to all patients under any of these circumstances who are ignored and abandoned, who are not timely or thoroughly evaluated, who are misdiagnosed, or who are mistreated.

Respectfully, the immunity proposed by SB 129 proponents is a "solution in search of a problem", where none exists.