Keith Theobald versus University of Cincinnati:
The Duty to Dually File "Medical Claims"[i]

INTRODUCTION

There is no profession charged with more responsibility for the health and safety of others than the practice of medicine, yet no individual humans are more immune from personal liability. In *Theobald v. University of Cincinnati,* 111 Ohio St. 3d 541, 2006-Ohio-6208, if mercy were granted to anyone in that decision, it was doctors over patients – it totally eradicated the legal rights of Keith Theobald and his family.

I. Pre-*Theobald* Medical Negligence Ohio Law

As I digested the November 2, 2010 election results, I could not help but reflect upon the changes in the law in the State of Ohio over the last 40 years, which has provided the medical profession with more parachutes to escape from professional responsibility, negligent acts, errors and omissions than any other class of human beings (or corporations) in the United States of America.

The medical profession thought that there was a medical malpractice crisis in the early 1970's in Ohio – when doctors began to be sued on occasion and became aware that they were not necessarily entitled to personal immunity from liability regardless of whether the standard of care by which they practiced conformed to the requisite minimum professional level. In response to a few settlements paid by their liability carriers, and an even rarer jury verdict, doctors and hospitals (along with professional liability insurance companies) lobbied legislators in the Ohio House and Senate to pass a bill on July 28, 1975 to shorten the statute of limitation in which to commence a "medical claim" against a doctor or hospital from two years to one year--R.C. 2305.10 – otherwise known as the "two-year" personal injury statute of limitation, included medical claims among those that had a "two-year legal-window" in which to file a lawsuit until

the statute of limitation was shortened to merely one year by the 1975 enactment of R.C. 2305.11 (since repealed and replaced by the current version of R.C. 2305.113).

The "public-relations-version" of the reason for the shortening of the statute was that doctors and hospitals should not have to suffer any legal or emotional consternation or anxiety for any longer than one year from the date on which they allegedly rendered negligent treatment to their patients – despite the fact that every other type of tortfeasor in the State of Ohio had no problem sleeping at night with the possibility that a lawsuit might (or could legally) be filed within two years after one's negligent conduct. During that same summer, the Ohio legislature also passed statutes that established the Court of Claims as the exclusive venue for patients injured by medical providers employed by the State of Ohio to sue for injuries for which the State, and its employee medical care providers, had previously been immune under Ohio common law. See R.C. 9.86 and R.C. 2743.02(F), *et seq*.

Theobald I and II, supra, involve not only the determination of personal immunity under those two statutes, but also the **"accrual date"** of a cause of action under R.C. 2305.113, *supra*. The incongruity and absurdity of the placing burden to prove **"when a cause of action accrues"** upon the plaintiff has been borne out the last four decades by numerous decisions of the Ohio Supreme Court attempting to define **"accrual"** of a cause of action with such nebulous terms as "cognizable event." See e.g. *Hershberger v. Akron City Hosp.,* 34 Ohio St.3d 1 (1987); and its case law progeny arising from and disseminating therefrom to the present date.

What could possibly justify placement of the medical profession in the same "legal statute of limitation" category as those who commit "libel, slander, and assault? Are not each of those acts due to "reprehensible, outrageous, and/or intentional" conduct of which the injured

party is acutely aware at the time thereof? In medical negligence, however, the **"exact opposite"** is often true. As a condition precedent to surgery in a hospital, a patient is required to sign a document (typically interpreted by patients as a waiver, but titled by corporate and/or trial lawyers who draft such documents as an "Informed Consent") in which the patient by signature acknowledges that there are various risks associated with surgery; that such risks have been explained to the patient (regardless of whether either statement is remotely accurate); etc. Such documents are an attempt at "doctor self-protection" from lawsuits for failure to disclose potential serious risks and complications that could conceivably occur – based on medical knowledge at that date and time regarding any such risks – regardless of whether the risks and/or complications are due to negligence of medical care providers or simply occur despite unequivocal compliance with applicable, appropriate standards of care for the surgery referred to in "the document". If the patient has complaints after the surgery, the doctor or nurse at his office routinely informs the patient that their sequelae are normal and will "go away" over time. Often many months (if not years) lapse, therefore, before the patient even begins to consider the possibility that the medical treatment or surgery was negligently performed and that the ongoing problems and any symptoms since then were even **"possibly caused"** thereby.

Yet upon whom is the burden placed by the Ohio Supreme Court in *Hershberger*, *supra*, to evaluate and analyze (if not perfect) this causal connectivity between medical treatment and resultant injury, and to thereby commence the running of the one-year statute of limitation for filing a medical negligence action? No one other than a layperson, *i.e.*, a patient who:

(1) **"may have been injured"** by such negligence;

(2) is not permitted by Evid. R. 601 to offer an opinion at trial regarding either negligence or causation;

(3) does not purport to be a medical doctor nor have any basis in education, training, or experience to offer such opinion even if he/she desired to do so (See Evid. R. 702 regarding requisite qualifications of expert witnesses in trial courts in Ohio and also "Ohio Evidence R. 702 – Beware," *Ohio Trial* (1996) – an article I authored 14 years ago regarding that evidentiary rule due to changes to it by the Ohio Supreme Court then); and

(4) justifiably relied on the representation of the doctor that the odds are better that he/she will improve after said treatment.[ii]

During this "silence is golden" period for the medical profession, the negligence of physicians in hospitals proceeds undetected more than 80% of the time (according to studies in highly renowned, peer-reviewed medical journals throughout the country) – regardless of whether hospital management is cognizant of the negligence therein. Most disturbingly to me at an ethical, professional (if not also moral) level is that at every major hospital throughout Ohio there is a "Quality Control" committee charged with the responsibility of investigating conduct of physicians and other medical care providers in hospitals that constitutes negligent, poor, mismanaged or otherwise inappropriate medical care. Yet, just as the Ohio Legislature has protected physicians by enacting a miniscule one-year statute of limitation for filing medical negligence lawsuits, it has acceded for the last 35 years or more to lobbyists paid to persuade legislators to "protect" such doctors and hospitals from voluntary disclosures by quality control committees of any and all documents accumulated in the course of their investigations of the questionable conduct of the medical care provider giving rise to those investigations.

In R. C. 2305.24, the necessary majority of Ohio legislators promulgated, in essence and in fact, that whatever occurs in a quality control meeting in a hospital regarding such

"Committee's investigation of inappropriate and/or substandard medical care within such hospital is privileged" and thereby **"not disclosable"** to (1) the patient injured by said negligent conduct or his family; (2) any lawyer; (3) any member of print or broadcast media; (4) the legislature; or (5) anyone else – outside of such "privileged committee" within the walls of some of the legislatively sanctioned or otherwise "sacrosanct hospitals" who also have another committee charged with the responsibility of granting "privileges to practice medicine" to doctors whose impetus to practice medicine should intuitively and/or instinctively be triggered by a desire to "help the needy" and/or the Hippocratic Oath.

A small minority of state legislatures throughout the country have attempted to **"place the shoe on the other foot"** by at least considering the enactment of legislation requiring doctors and hospitals to disclose to their patients that they **"did not receive what they bargained for"** when they agreed to undergo treatment recommended by highly trained and skilled professionals which was substandard in their own eyes and their peers, *i.e.*, a "duty to disclose" to patients they were negligent – something that would be commensurate with the ethical obligations of lawyers to disclose their "negligence" to clients under the Code of Professional Conduct applicable to all lawyers.[iii]. Thus, the *Theobald I and II* decisions are simply the latest in a "long line" of legislative enactments and court decisions applauded by the lobbyists advocating these positions in the legislature; and the insurance companies, doctors, hospitals and Political Action Committees (PAC's) that finance the campaign coffers of the legislators who voted for what I admittedly refer to somewhat sardonically as the discriminatory "statutes of adhesion."

We all learned in first year "Contracts" class about "contracts of adhesion," *i.e.*, those that were drafted unilaterally and presented for signature to a party that had no legal right and/or option to change any wording contained in the so-called "contract" – which is more a legal

"directive" and/or "indictment" – depending on the "monetary fallout" therefrom after such "contract" is signed by both parties and a "legal dispute" arises from same. These same people also support the judges who author decisions either construing those statutes in a manner consistent with their political philosophy and/or agenda and/or fail to exercise judicial restraint; but instead step outside of their **"constitutional place"** in our system of **"Checks and Balances"** and interpret (if not rewrite) these statutory provisions to conform to the same political path.

II. *Theobald v. University of Cincinnati*

A. *Theobald v. Univ. of Cincinnati*, 111 Ohio St. 3d 541, 2006-Ohio-6208 (hereinafter referred to as *Theobald I)*;

Theobald v. Univ. of Cincinnati, 2009-Ohio-5204, 09 AP-269 (OHCA10) (hereinafter referred to as *Theobald II)*;

The first opportunity the Ohio Supreme Court had to address any issues in Keith Theobald's horrific personal and judicial **"space odyssey"** was on January 29, 2003. The issue presented to the Ohio Supreme Court at that time was as follows:

> Does the employee of a state institution who participates in an immunity determination in the Ohio Court of Claims have standing to appeal the judgment of the Ohio Court of Claims to the 10th District Court of Appeals?

In and of itself, that question appears relatively benign and in no way presaged the "Eve of Destruction" of Keith Theobald's human right to open a courthouse door to advocate his factual position in accordance with his Constitutional rights and the law flowing therefrom.

In the subsequent *Theobald I* and *II* decision, the "legal fallout" for Keith Theobald, his lawyers, and all similarly situated plaintiffs and their counsel whose cases were literally "stayed" pending the outcome of the 10th Appellate District's *Theobald II* decision in late September last

year, is that many plaintiffs whose legal rights were 100% protected by the law that was in effect at the time their lawyers filed lawsuits on their behalf now had no viable claim. Moreover, and unfortunately for our esteemed colleagues in the medical profession, these decisions will "legally blindside" many of them who have literally "no medical malpractice coverage" in their employment at and by "stated-owned" Ohio hospitals. Yet, at the time *Theobald I* was authored, the only significant change "going forward" in any "legal duty" arising from *Theobald I and II* pertaining to medical claims that were "not pending" at the time of *Theobald II* is that to protect a client's interest in a medical negligence claim (without having any conceivable "factual" means of determining with 100% certainty whether a medical provider in either a private or state-owned hospital has a "legal scintilla" of potential *Theobald* "dual agency and/or employment status," *e.g.*, an OSU student or resident looking over the shoulder of a private practicing physician during a surgery in a private hospital gives that private physician the legal right to claim immunity) is to mandate that a plaintiff's attorney in a medical malpractice case file lawsuits simultaneously in a state common pleas court and the Court of Claims of Ohio in every instance in which his client is treated in Ohio in either a private or state-owned hospital. There is simply no way for medical negligence lawyers and their clients to know in advance of filing a "medical negligence claim" within the very constricted one-year statute of limitation whether treatment in any hospital anywhere in Ohio is rendered by medical care providers potentially serving two masters. Accordingly, the causes of action for negligence must be simultaneously filed in the Court of Claims of Ohio and a court of common pleas, based on *Theobald I and II*.

The undoubtedly unintended, but unavoidably true, consequence arising from *Theobald I and II* is simply injustice to those doctors recruited by state-owned hospitals in reliance on

representations that they would be immune from personal liability and thereby no longer need to pay malpractice insurance premiums to professional liability insurance companies—the same entities that misrepresented in 2002 and 2003 to these same insured physicians that their premiums would significantly decrease if the legislature established monetary limitations (caps) on non-economic damages in claims against the medical profession. In fact, doctors are complaining more loudly and emotionally each year since 2003 that their malpractice premiums have **not** decreased at all – despite the fact that medical negligence lawsuits have in fact decreased 65% since *Theobald I and II*. Now, the unfairly criticized medical malpractice plaintiff's bar should be nauseous (I am) that the malpractice lawsuits filing percentage will increase – not as the result of some sort of "lawsuit lottery," but because *Theobald I and II* mandate the duty of "dual filing" of every medical negligence claim arising out of medical treatment rendered in any hospital anywhere among Ohio's 88 counties. If, instead, there was simply a duty on the part of a medical provider and/or his employer(s) to "disclose" to a plaintiff and/or its attorney via an Affidavit reciprocal to the Civ. R. 10(B) "Affidavit of Merit" regarding any and all possible employment affiliations and/or clinical teaching responsibilities and/or privileges to practice and/or teach medicine at any and all hospitals, there might be a more pragmatic opportunity at least to discern with a much higher degree of accuracy the appropriate forum (Court of Common Pleas or Court of Claims of Ohio) in which to file a medical negligence claim "post *Theobald I and II*." Until and/or unless a select group of lawyers; doctors; legislators; judges; etc., meet to have nothing more than a cognitive based, practical discussion of any other means of "undoing" this *Theobald* mess, dual filings are (and will be) the rule.

In the eyes of Keith Theobald and the human metastatic outflow[iv] since the 10th District's *Theobald II* understandable complicity with Ohio's highest Court's *Theobald I* directive, the

only rational conclusion therefrom is to critically examine whether the right to trial by jury and/or a fair trial of factual disputes has a remote chance of fruition in Ohio courts anywhere. Keith Theobald's lawsuit in the Court of Claims was not filed until June 15, 2001, after the legally dubious but crafty affirmative defense of **"immunity from liability"** was raised more than two years after his lawyers timely filed in 1999 a lawsuit on behalf of him and his family in the **only** legally proper venue asserting a cause of action for serious and debilitating injuries sustained in 1998 due to substandard medical care in a Cincinnati private hospital by a privately employed surgeon and his and/or the hospital's "surgical team."

On the eve of the Hamilton County Common Pleas Court 2001 trial date, the defense lawyers employed a tactic (presumably suggested to them by their physician clients – despite the fact that their professional liability carrier to which they paid medical malpractice premiums also paid highly skilled trial lawyers to defend them), *i.e.*, the "light bulb" assertion set forth in the defense lawyers' pretrial motion requesting a stay of the common pleas court action pending the outcome of an **"immunity hearing"** in the Court of Claims of Ohio. R.C. 9.86 in pertinent part provides:

> …no…employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the…employee's actions were manifestly **outside the scope of his employment or official responsibilities**,…(emphasis added)

Those who have not had the opportunity to practice in the Court of Claims may not know that, since the legislature in 1976 created the Court of Claims as a venue for those injured by negligence of state employees, the exclusive venue for determination of a state employee's arguable **"immunity from personal liability"** is the same Court established to provide citizens

of Ohio with the same rights (other than a jury trial) it had under the common law against privately employed people and businesses (including doctors and hospitals).

R.C. 2743.02(F) states that the Court of Claims has exclusive, original jurisdiction to determine whether a state employee is immune from liability in a civil action under R.C. 9.86 or whether the conduct was **"manifestly outside"** the **"scope of employment"** at the time the cause of action arose. (Citation omitted.) **"If"** the Court of Claims determines that the state employee is **"immune from personal liability"** under R.C. 9.86, the claimant must **"then"** file a separate, additional lawsuit against the state, which **"shall be liable for the employee's acts or omissions."**

In the late 1980's and early 1990's, as a trial lawyer for physicians insured by the Medical Protective Company, I became acutely aware of the potential for "judicially creative" interpretation of R.C. 9.86 in a manner undoubtedly not intended by the legislators who drafted that statute in 1976. Not only were physicians immune from liability in the Court of Claims per *Katco v. Balcerzak*, (1987), 41 Ohio App.3d 375, 536 N.E.2d 10, and its case law progeny flowing therefrom until now, but physicians whose lawyers were paid by their malpractice carriers proclaimed to their lawyers that they should be entitled to revert to the same **"total immunity from personal liability"** which predated the 1976 Court of Claims statutes referenced above.

My conscience was frankly abhorred then by the request of many privately insured physicians at OSU Medical Center that I assert on their behalf an "immunity" affirmative defense – as was the collective conscience of The Ohio State University (and its Medical Center) – which retained the late former Ohio Attorney General William (Bill) J. Brown to file a lawsuit

against The Medical Protective Company in which it "demanded restitution" to DMF of Ohio, Inc., Department of Surgery Corporation; and physicians employed by either of them of all malpractice premiums received by The Medical Protective Company from these entities and/or physicians based on treatment they rendered to patients at OSU Medical Center.[v] In less than six months, that lawsuit was (needless to say) "confidentially settled."

III. Justice Paul Pfeifer's Dissent in *Theobald I*

The "voice of the wilderness" on behalf of equity and fairness to both sides of the medical negligence litigation table is that of the Honorable Justice Paul Pfeiffer, whose dissent is quoted below in its entirety. I respectfully ask that anyone who reads this article digest Justice Pfeiffer's eloquent statement of some simple truths – as well as articulation of several pragmatic and legal conundrums unintentionally or otherwise resounding loud and clear from the majority opinion in *Theobald I*:

> **The majority opinion** appears **wholly concerned with how the scope-of-employment issue affects medical practitioners**. Although that concern is appropriate, **it should be tempered by at least a suggestion that the concerns of the plaintiff have been considered. The plaintiff** in this case **is the one who has been grievously injured**, **not the various doctors and nurses.**
>
> In a case such as this, the doctors will ultimately be determined to be responsible, not responsible, or immune. In any event, **the doctors will not suffer unduly; any financial liability they incur will be covered by insurance. The same cannot be said for the plaintiff. If Theobald** does not prevail, the lengthy delay will not have prejudiced him. But if he **does prevail, the delays will have deprived him of several years during which the money he ultimately receives could have alleviated some of the unfortunate consequences of the negligence he suffered. The plaintiff is already seven years into this litigation, and, even after today's decision, he still does not know which court he should be in.**

The majority opinion does not address the plight of plaintiffs who feel (reasonably) that they must file two lawsuits (one in the Court of Claims and one in the court of common pleas) because it is so difficult to determine which venue is proper. (Citation omitted.) **The concern about dual filings is heightened when, as here, multiple doctors are involved because the chances that one of them is a teaching doctor (perhaps entitled to immunity) are greater. This is a nightmare scenario for a plaintiff. When in the Court of Claims, the doctor accused of negligence will be pointing at the empty chair** [because the statutes creating the Court of Claims in 1976 barred individual defendants in the Court of Claims unless third-party complaints are filed by the State of Ohio, in which case a jury is empanelled in the Court of Claims to address and decide the third-party claims – as the Court addresses and decides the claims against the State of Ohio] - **that is, at the doctor who is susceptible to suit only in the court of common pleas. And when in the court of common pleas, the doctor accused of negligence will be pointing at a different empty chair - at the doctor who is susceptible to suit only in the Court of Claims.** This concern is general and not specific to this case, in which it appears that the anesthesiologist is the person most likely to have committed negligence.

The new test set forth **by the majority opinion apparently immunizes a doctor from negligence whenever negligence occurs in the presence of a student. This test is imbued with the fiction that teaching doctors are always teaching.** I have the utmost respect for the medical practitioners in this state. Countless Ohioans have been well treated through the years. But **doctors** are busy professionals, often called upon to make irreversible decisions of the utmost magnitude [857 N.E.2d 582] with little time for reflection, and they **make mistakes. When they do, whether they are immune from liability should not depend solely on whether a student is present. Teaching by osmosis is not the same as talking a resident through an operation. The mere presence of a student does not establish that instruction is taking place.**

The facts of this case suggest that, to the extent any teaching was taking place, it was purely incidental. Theobald had been in a terrible automobile accident. He was under considerable physical stress and **the doctors** were under considerable mental stress. They needed to act quickly, and they needed to perform at the highest professional level. They **had neither the time nor the inclination to teach - they were trying to save a life and as much bodily functioning as possible. In that situation, teaching is not a priority or even a consideration. But under the test set forth**

today, our state's highly skilled and trained teaching doctors will be encouraged to make sure a student is available every time they operate. After all, would there be any better way to avoid personal liability for negligence?

The quest for a simple rule should not override logic. Teaching doctors are not always teaching, even when a student is present. Teaching doctors serve two masters - their patient and the university for whom they have agreed to teach. We should not so easily adopt a rule that declares that one of the masters is always dominant. The former rule used by the [10th District] **court of appeals, which focused on financial factors, seems to strike a better balance between the two masters. It allowed judges to determine whether a doctor was serving his or her own interests or those of the state based on a variety of factors. That is as it should be. A doctor who is one percent teaching and 99 percent engaged in private practice for profit should not automatically be granted immunity based on that nominal amount of teaching. Having a student look over his or her shoulder during surgery should not immunize a doctor from personal liability. At the same time, when a doctor is involved in substantive teaching, for example, by guiding a resident doctor through a complicated (or even relatively simple) procedure, the situation is radically different and the teaching doctor should be entitled to immunity.**

Another far-reaching consideration of which the majority opinion appears unaware is cost-shifting. Every time a doctor is granted immunity because he or she is teaching, even if that teaching is incidental, the burden of his or her negligence is transferred to the state. Such a profound change in policy ought not to be arrived at lightly - it should at least be addressed. The real beneficiaries of this cost-shifting are insurance companies because they will pay on fewer claims. And they likely won't reduce premiums because they cannot know in advance whether any future negligence will occur in the presence of a student.

This cost-shifting policy change could have been effected by the General Assembly [the legislature where the drafting of laws authored by Justice Lundberg Stratton belongs]**; it** [the General Assembly] **has thus far chosen not to do so. But now, the University of Cincinnati, a state entity, wants to have it both ways. (Despite its name, University Hospital is privately owned.) In this case, which was originally filed in 1999, the university argues that teaching during an operation, however incidental the teaching, is within the scope of employment, and,**

> **therefore, that its teaching doctors are immune from personal liability. In *Johns***, 101 Ohio St.3d 234, 2004-Ohio-824…, **which was also originally filed in 1999, the university made the opposite argument. It stipulated in the Court of Claims that**…**the doctor sued in that case was acting outside the scope of his state employment, even though that doctor supervised an operation that "was primarily performed by a third-year resident."** *Id*. at ¶ 3. **For the state to argue contrary positions in two cases that were filed at the same time concerning similar issues is at best unhelpful and at worst unconscionable. The state ought to be serving the interests of justice, not subverting them.**
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> **Finally and most important, the majority opinion also fails to consider the issue of a jury trial. When the state is a defendant (as it would be, based on this opinion, whenever a student is present when a teaching doctor commits negligence), no jury trial is allowed in the Court of Claims.** R.C. 2743.03(C)(1) and 2743.11. **By forcing more cases to the Court of Claims, this** [6-1 majority] **opinion effectively prohibits plaintiffs from asserting their fundamental constitutional right to** a **trial by jury.** Section 5, Article I of the Ohio Constitution ("The right to a trial by jury shall be inviolate * * * "). (Citations omitted.)
>
> I dissent.

CONCLUSION

Now is the time for every person, lawyer, doctor, etc., who is potentially affected in a way that defies logic or common sense to "lace up shoes and walk" to the State House accompanied by at least a couple basic, simple drafts of legislation defining **"scope of employment"** and **"manifestly outside"** thereof. The Ohio legislators who inserted those words in R.C. 9.86, *supra*, undoubtedly **"intended"** (pursuant to their moral and ethical responsibility to **"all of the citizens of the State of Ohio"** whom they were elected to represent to draft laws which **"honor the spirit and intent"** – as well as the intellectually honest construction--of the U.S. Constitution, Amendments thereto and The Bill of Rights authored by our forefathers)that those "phrases" not be stretched to parameters at the outer edges of reason and causal connectivity." Any other thoughts from anyone interested in the most immediate, practical way

of "mediating" this "unintentional outcome" for Ohio citizens are welcomed by both sides of this *Theobald* debacle.

As we ponder "where we go from here," all lawyers should pause and reflect upon the following "Preamble" to the Code of Trial Conduct of the American College of Trial Lawyers (ACTL):

> To serve the dignity of the law, improve the administration of justice, advance decorum in the court and hearing room and aid in maintaining high standards of personal and professional conduct on the part of trial advocates throughout the United States.
>
> To his client, the lawyer owes an undivided allegiance, the application of the utmost of learning, skill and industry, and the employment of all honest and appropriate means within the law to protect and enforce legitimate interests.[vi]
>
> To the administration of justice, the lawyer owes the maintenance of the professional dignity and independence and conformity to the highest principals of professional rectitude, notwithstanding the desires of his client or others.
>
> The standards advanced are minimum standards; unexpressed but ever-present overall consideration is that the trial lawyer is an officer of the court and is in the last analysis a gentle[wo]man. He [she] should at all times conduct himself [herself] with these considerations in mind. He [she] is engaged in a profession and not a business.[vii]

In the seven and a half years since the April 2003 so-called "medical malpractice tort reform" and the more recent *Robinson v. Bates* and *Jacques* decisions; *Weurth* decision; and *Theobald I* and *Theobald II, supra, et seq.*, the individual challenge to each trial lawyer (regardless of political affiliation or side of the barrister fence) is simple: Will you sit silently as a hermit, and just "let it be," until someone else does something to fix a problem; or proceed gallantly toward a pragmatic "mediation table" to confer with every person, hospital, professional liability insurance carrier, etc., who is or may be adversely affected by these decisions? The challenge is

there for the OAJ to lead the charge along this quiet, unemotional path to pragmatic decision-making and thereby effectuation of the optimum outcome for all parties to this "legal madness."

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[i] Author's Note: To avoid any potential misinterpretation of my intent when I contacted my long time colleague and friend Michael Miller and offered to write an article concerning the import of what I refer to herein as the "*Theobald I and II*" I want it to be clear to anyone who reads this article (including the print, broadcast media, "legal academia" or whoever in law schools in Ohio or elsewhere) that I have the utmost respect for the judiciary; the U.S. Constitution; our system of government – in particular the "checks and balances" aspect of it; and the tenets of ethics and professionalism set forth in the Ohio Rules of Professional Conduct; the Code of Professionalism of the American Board of Trial Advocates; and the Code of Trial Conduct promulgated and disseminated by the American College of Trial Lawyers.

I am also extremely sensitive on behalf of my clients and those of my plaintiffs' lawyers' brethren that I not sound "alarmist" in any sort of political "angst" or otherwise emotionally inflammatory. Nothing could be further from the truth. My objective herein is nothing more than to intensively analyze "*Theobald I and II*" in an effort to inform all lawyers, common pleas court and appellate judges and the citizens of Ohio of the import of those decisions as they affect:

(1) Pending medical malpractice litigation;
(2) Plaintiffs and plaintiffs' counsel contemplating the filing of "medical claims" against medical care providers arising out of allegedly negligent treatment rendered to their patients based on those two *Theobald* decisions; and
(3) Physicians, hospitals, their professional liability carriers, medical negligence defense attorneys, hospital risk managers, in-house counsel of hospitals, etc.
until March 1994 when I began to representing patients more often than medical care providers in medical negligence litigation).

[ii] It is interesting to note that the "financial aftermath" for the medical profession from "contractual allowances" of health insurance carriers, Medicaid and Medicare and having some cognizance of the emotional difficulty arising out of victimization by those same professional liability carriers who pronounce that they never settle cases (on the Home Page of at least one website) **"misrepresented"** to them in 2002-2003 that their malpractice premiums would be significantly reduced if they financially assisted payment of lobbyists to advocate in the Ohio legislature then that non-economic damages be "capped" at $250,000 for any and all severity of injury arising out of medical negligence, mistake, error, omission, misfeasance or malfeasance.

[iii] In Central Ohio, to the best of my knowledge, only Licking Memorial Health Systems (LMHS) has followed that moral and ethical obligation of **"true confession"** through the decision of its Board of Trustees several years ago to not only "personally apologize," but also "professionally" do so, to those patients of LMHS injured or killed by negligence of their employees or agents.

[iv] *Engel v. University of Toledo College of Medicine*, 184 Ohio App.3d 669, 2009-Ohio-3957 (Ohio App. 10 Dist. 2009); *Harvey v. University of Cincinnati*, 2009-Ohio-7029, 2009-03517 (OHCOC); *Chappelear v. Ohio State University Medical Center*, 2009-Ohio-7059, 2008-02703 (OHCOC); *Clevenger v. University of Cincinnati College of Medicine*, 2010-Ohio-88, 09AP-585 (OHCA10); *Schultz v. University of Cincinnati College of Medicine*, 2010-Ohio-2071, 09AP-900 (OHCA10); *McMaken v. Wright State University*, 2010-Ohio-3480, 2009-03801 (OHCOC); *Barlow v. The Ohio State University Medical Center*, 2010-Ohio-4305, 2009-08594 (OHCOC); *Moore v. The Ohio State University Medical Center*, 2010-Ohio-4974, 2010-07067 (OHCOC)

[v] Please note that I did not learn of this lawsuit from anyone in my capacity as a lawyer retained by The Medical Protective Company to represent its insured physicians who were dually employed by Ohio State University and

either DMF of Ohio, Inc. or Department of Surgery Corporation, but rather from counsel for Ohio State University (and its Medical Center) in that lawsuit.

[vi] *Sages of Their Craft*, *The First Fifty Years of the American College of Trial Lawyers*, by Marion A. Ellis and Howard E. Covington, Jr. (Copyright 2000, American College of Trial Lawyers).

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