

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

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Medical malpractice litigation is replete with so called experts who sell their services to the highest bidder. For these “hired guns,” medical testimony “is their business, and their business can be bought and paid for.” This phenomenon produces fertile ground that nourishes frivolous lawsuits. A recent Harvard study revealed that only seventeen percent of medical malpractice cases filed actually involve negligent injury.

The Ohio legislature attempted to resolve this dilemma in 1975 and again in 2004 with the passage and subsequent amendment of section 2743.43 of the Ohio Revised Code. This “medical expert statute” contains two key requirements regulating the competency of medical experts. First, an expert must devote three-fourths of his or her time to the active clinical practice of medicine. Second, the expert must practice in the same or substantially the same specialty as the accused doctor in order to be considered competent to testify.

This statute, however, conflicts in part with the Ohio Rules of Evidence governing the competency of witnesses. Under Rule 601(D), a medical expert need only devote one half of his or her time to the active clinical practice of medicine. The rule does not contain a parallel passage regarding the specialty of an expert.

At first glance the medical expert statute appears to violate the Ohio Constitution, which provides the Supreme Court of Ohio the sole power to promulgate rules of evidence and court procedure. However, this assessment is incorrect. Under the Ohio Constitution, the supreme court’s power is expressly circumscribed by the provision that the rules of court procedure may not restrict substantive rights in any way. Furthermore, the legislature is empowered under the Ohio Constitution to supplement or complement the rules of court procedure.

Rule 601(D) impermissibly infringes on the substantive rights of tort victims in violation of Ohio constitutional limitations on practice and procedure. First, any rule limiting a tort victim’s access to a medical expert in a malpractice claim inherently infringes on the right to a trial by jury. Second, any rule limiting a tort victim’s access to a medical expert infringes upon the right to access a court of law.

The right to a jury trial is a bedrock principal in our system of justice. This substantive right is available for every negligence victim. Because malpractice is a specialized branch of negligence this right is also manifest in every individual who suffers at the hands of a negligent physician.

Unlike any other tort action, victims of medical malpractice are completely reliant on medical experts to pursue their claims in a court of law. A medical

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malpractice action cannot be pursued without a medical expert to explain the standard of care to which a physician should have adhered. As a result, any rule that restricts a malpractice victim's access to a medical expert also restricts that litigant's substantive right to a jury trial.

Similarly, rules regulating the competency of medical experts impact the substantive right of malpractice victims to access a court of law. The United States Supreme Court has recognized a limited substantive right to access a court of law under the Due Process Clause of the Constitution. Rules affecting the competency of a medical expert have the unique effect of implicating this substantive right. By restricting a litigant's access to a medical expert, these rules restrict a litigant's access to a court of law.

Under Ohio's constitutional scheme the power to promulgate rules that impact substantive rights has been expressly delegated to the legislature. Because Rule 601(D) impermissibly impacts the substantive rights of medical malpractice victims, the medical expert statute must control. Even if the medical expert statute does not control, the provision that medical experts must practice in the same or substantially the same specialty should govern as a permissible supplement or complement to the rules of evidence or court procedure.