Cleveland Academy of Trial Attorneys

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CLEVELAND ACADEMY OF TRIAL ATTORNEYS DECEMBER, 1994 NEWSLETTER

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PRESIDENT'S COLUMN

Best wishes to all for a happy and peaceful holiday season. I also want to thank all who supported the **NO** DINNER DANCE on November 19th, and particularly Laurie Starr, for her tireless efforts in this good cause.

In past months, many of **us** have attended and benefitted from Bill Hawal's luncheon seminar series. Considering the hectic pace of December, we decided to forego a luncheon this month. Please watch your CATA mail for announcements of future programs after the first of the year.

Dave Goldense is now in the throes of organizingthe 1995 BERNARD FRIEDMAN LITIGATION INSTITUTE which is tentatively scheduled for February 24, 1995. Dave is planning a half-day trial demonstration program featuring timely legal and tactical topics, and some of our finest local trial advocates. Please mark your calendars now for this valuable CLE seminar. Details will be coming out soon.

We are currently working out plans to enlarge and enhance our EXPERT AND BRIEF EXCHANGE BANK. We hope our changes will make the bank more useful and accessible to our members, and provide reciprocity with neighboring trial lawyers' organizations. Details will be forthcoming in the next newsletter.

Yours very truly,

Robert E. Matyjasik

SUMMARIES OF RECENT DECISIONS BY THE
EIGHTH DISTRICT
COURT OF APPEALS, CUYAHOGA COUNTY

The Editor wishes to acknowledge Robert F. Linton, Jr.'s assistance in summarizing many of the following decisions.

CIVIL PROCEDURE

1. *Carlin* v. Anthony, Case No. 65961 (Cuy. Cty., September 22, 1994) - For plaintiff: Kirk E. Roman and for defendant: Kenneth B. Burns.

Trial court did not abuse its discretion in granting new trial where plaintiff received a jury verdict of Five Thousand Dollars ($5,000.00) based on medical expenses of Three Thousand Eight Hundred Twenty-Three Dollars ($3,823) and admitted liability and both physicians for plaintiff and defendant testified that the collision aggravated plaintiff's prior arthritic condition.

2. Pharmed Corp. ***v.*** Biologics, Inc., Case No. 66304 (Cuy. Cty., September 22, 1994) - For plaintiff: John P. Hildebrand; Norman A. Fox, Jr. and for defendant: E. Spencer Stewart and John P. Witri.

Trial court erroneously granted defendant's motion to dismiss for lack of personal jurisdiction. The court found that the defendant had been transacting business in Ohio by phone, facsimile, and mail, that the defendant made one trip to Ohio and that the contract provided for ongoing obligations which would take place in Ohio even though the defendant had not derived substantial revenues or engaged in a persistent course of conduct in this State. The court further found that where such a decision is made without an evidentiary hearing, the allegations in the pleadings and documentary evidence must be construed in a light most favorable to the plaintiff, and all competing inferences must be resolved in his favor.

CIVIL PROCEDURE - EXPERT AFFIDAVIT TESTIMONY

3. Davis ***v.*** Schinder Elevator *Corp.*, Case No. 66318 (Cuy. Cty., September 22, 1994) - For plaintiff: Harold L. Levey; Arthur E. Dombek and for defendant: Michelle Morgan; Donna Wood.

Trial court correctly granted summary judgment for defendant on claims alleging negligent maintenance of an elevator, where an affidavit provided by plaintiff's mechanical engineer did not specifically state that the expert was qualified to render opinions concerning elevator maintenance and contained only conclusory statements and legal conclusions, without sufficient facts supporting those conclusions. The court held that it was not

enough to establish the expert's qualifications as a mechanical engineer, nor was it enough to simply conclude that an alleged valve defect caused the incident, that it should have been detected by a reasonable inspection, and that the defect existed for a sufficient period of time for the defendant to have discovered the condition, but did not specifically describe what condition existed in the valve to alert a maintenance technician to the impending valve failure, or state when the condition arose and should have been discovered. [Editor's Note: This case shows the increasingly difficult burden in establishing proof by expert testimony which should be closely read by plaintiffs' lawyers to see the detail now required to show genuine issues of material facts based on expert testimony].

EMOTIONAL DISTRESS - LABOR LAW

4. Dickerson ***v.*** International United Auto Workers' Union, Case Nos. 65513, 65443 (Cuy. Cty., October 13, 1994) - For plaintiff: C. Douglas Lovett; Edward Miller; Dale Naticchia and for defendant: Betty Grdina; Jay Whitman; Bruce **C**. Allen, Blair Hodgman.

The Court of Appeals reversed a 1.7 million dollar judgment entered in favor of four union members who filed suit against the union after receiving verbal threats for crossing the picket line. Threats such as "you better watch behind your back," "you better get some dogs [to protect yourself]," "you will get the hell beaten out of you," and "you f---ing bitch, I'll get you later", did not meet the requirements for a claim for intentional infliction of emotional distress, since the threats did not attain the level of extreme and outrageous conduct required, the claimed injuries were not severe and debilitating and were not those with which a reasonable person, normally constituted, would be unable to cope adequately. The court further found that while expert testimony may not be absolutely necessary in every case alleging emotional distress, it was necessary here, since one of the plaintiffs had a prior psychological condition and offered no expert testimony to establish her condition was caused by the Union activities. The decision contains an excellent summary of the case law and standards of proof required to prove an intentional infliction of emotional distress claim.

INSURANCE - STATUTE OF LIMITATIONS

5. Wakefield ***v.*** Chlupka, Case No. 65499 (Cuy. Cty., September 22, 1994) - For plaintiff: Donald W. Ristity and for defendant: Marilyn Fagan Damlio.

The trial court properly dismissed a personal injury action which was not timely filed, notwithstanding plaintiff's argument that he had received partial settlement of the defendant's claims from her insurance company, a substantial additional offer

for full settlement of the remaining portions of her claim, and the insurance company impliedly admitted liability by partially compensating the plaintiff for her injuries. The court distinguished the statute of limitations set forth in the Revised Code from limitation of action clauses contained within insurance contracts, which may be waived by similar conduct on the part of the insurer.

INSURANCE COVERAGE

6. Permanent Floors, Inc. ***v.*** Cincinnati Ins. Co., Case No. **66110** (Cuy. Cty., September 29, 1994) - For plaintiff: Thomas E. O'Toole and for defendant: John F. Gannon.

The court found that summary judgment was improperly granted where genuine issues of material fact exist concerning whether the damages awarded were based upon negligence, for which coverage would be provided, or faulty workmanship, for which coverage would not be provided for under a CGL policy. In that case, the insurer moved for summary judgment following local non-binding arbitration, in which it attempted to prove that the alleged damages were due to faulty workmanship.

MEDICAL MALPRACTICE - FRAUD

7. Greenstreet v. Bickers, Case No. 66680 (Cuy. Cty., October 29, 1994) - For plaintiff: Richard L. Greenstreet and for defendant: Steven J. Hupp; Linda A. Epstein.

While recognizing that under certain circumstances a fraud claim may exist against a medical provider which takes the claim outside the one year statute of limitations set forth in Section 2305.11(B)(1), the court found plaintiff's claim to be one sounding in malpractice. The court distinguished the present case where plaintiff alleged that the defendant fraudulently misrepresented that no scar would be left following plastic surgery from false statements that an intra-uterine device was removed from a patient, which were found to be actionable fraud in *Gaines* ***v.*** Pre-Term Cleveland, *Inc.*, (1987) 33 Ohio St.3d 54.

POLITICAL SUBDIVISIONS - IMMUNITY

0. Ugri ***v.*** City *of* Cleveland, Case No. 65737 (Cuy. Cty., September 1, 1994) - For plaintiff: George L. Nyerges and for defendant: Sharon Sobol Jordan; Paul A. Janis.

Louis Ugri, a minor, and Kathleen Ugri his mother, claimed to have received an electrical shock from a steel utility pole when their dog came into contact with it. The dog was electrocuted. The City of Cleveland argued in its motion for summary judgment that street lighting is a governmental function

and that the pole involved was one for street lighting, not for transmission or distribution of power, entitling the city to statutory immunity under Revised Code Chapter 2744. Further, the city claimed that none of the exceptions under Ohio Revised Code Section 2744.02(B)(2) to (5) apply. The appellate court determined that the providing of street lighting is indeed a governmental function as that term is defined in Ohio Revised Code Section 2744.01(C) as distinct from a proprietary function defined in subsection (G). Thus the trial court's grant of summary judgment was proper.

POLITICAL SUBDIVISIONS - STATUTE OF LIMITATIONS

9. Foster v. City *of* Cleveland *Heights,* Case No. 66852 (Cuy Cty., October 13, 1994) - For plaintiff: Janet McCamley and for defendant: Thomas J. Downs.

The Court of Appeals struck down as unconstitutional, the two year statute of limitations for actions against political subdivisions set forth in R.C. 2744.04(A) under the due course of law provisions of the Ohio Constitution as it is applied to minors. [Editor's Note: R.C. 2744.04(A) provided for an absolute two year statute of limitations which some courts held overrode the tolling provisions for minors, and therefore required suit to be filed within two years of the date of the accident, regardless of the age of the plaintiff].

PREMISES LIABILITY/LANDLORD TENANT

10. Roberts *v. Everson,* Case No. 66033 (Cuy. Cty., September 8, 1994) - For plaintiff: William S. Jacobson; Joel Levin and for defendant: Francis X. Cook.

A jury trial resulted in a verdict for the plaintiff arising out of injuries she sustained when a window in her apartment which she rented from the defendant fell on her. The Court of Appeals refused to reverse based on the lack **of** a comparative negligence instruction as there was not evidence that the plaintiffs were in any way negligent. Further, no error could be predicated on a granted motion in limine because the excluded evidence was never proffered. The trial court's failure to grant the defendant's Motions for Judgment Notwithstanding the Verdict and New Trial was proper since reasonable minds could conclude that the accident happened as the plaintiff described, although there was contrary evidence. Since the court did not abuse its discretion in connection with the motion for a new trial based on the weight of the evidence, reversal on that basis was not appropriate. Finally, the trial court's award of costs was upheld which in part was predicated on a deposition taken because of a denial of a request for admission. By resort to Rule 36, this aspect of the trial court's ruling was held proper as well.

UNINSURED MOTORIST COVERAGE

11. *Tyler v. Kelley,* Case No. 63163 (Cuy Cty., October 27, 1994) - For plaintiff: Harold L. Levey; Arthur E. Dombek and for defendant: Stanley S. Keller; Daniel Hurley.

In what the court described as a case of first impression, it reversed the trial court's granting of summary judgment in favor of the defendant, Reserve Rent-A-Car, and entered judgment in favor of the plaintiff on his claim seeking UM coverage. The court found that the rental agreement offering liability coverage brought the car rental agency within the terms of the uninsured motorist statute, and that the insured did not knowingly reject uninsured motorist coverage, where the rejection clause was complex and inconspicuous.

12. *Kolcan v. Western Reserve Mutual Casualty Co.,* Case Nos. 65582, 65790 (Cuy. Cty., September 15, 1994) - For plaintiff: Randall M. Perla and for defendant: James J. Dyson.

A final judgment confirming an uninsured motorist arbitration award in favor of the plaintiff is reversed on authority of *Schaefer* v. *Allstate Insurance Co.* (1992), *63* Ohio St. 3d 708, 590 N.E. 2d 1242. The Court of Appeals reasoned that since the language of the insurance policy did not make the arbitration binding it was left with no other alternative but than to permit a trial denovo on the issue of damages. As a result, the Court declined two awards to rule on the trial court's denial of the plaintiff's motion for prejudgment interest.

WORKERS COMPENSATION - PROCEDURE

13. *Walker v. Trimble,* Case No. 66303 (Cuy Cty. CP APP., October 20, 1994) - For plaintiff: Gregory J. Shapiro and for defendant: Lee Fisher; James P. Mancino.

The trial court properly dismissed plaintiff's appeal, where it incorrectly designated the order being appealed from, finding that such notice was not in substantial compliance with requirements of R.C. 4123.519. Claimant's notice of appeal incorrectly designated that the order being appealed from was the Regional Board of Review decision dated August 24, 1992, rather than the Industrial Commission's refusal to hear any further appeal, mailed on October 15, 1992.

VERDICTS AND SETTLEMENTS

Timothy Phillips v. Ohio Scrap Iron Company. et al.
Court: Trumbull County Common Pleas
Settlement: July, 1994
Plaintiff's Counsel: John D. Liber and Justin F. Madden
Defendants' Counsel: James F. Sweeney
Insurance Company: CNA
Type of Action: Industrial accident

Plaintiff cleaning scrap material between loading dock and large steel scrap hopper. Crushed at the waist when scrap truck driver rammed hopper against loading dock.

Damages: Crushed pelvis; severed urethra; left drop foot; rectum destroyed; permanent colostomy and impotence.

Plaintiff's Expert: Liability - Isaac Gabbard (Kentucky)

Defendants' Expert: Liability – Paul J. Paxton (Akron, OH)

Settlement: 1.5 Million

Telly Manko v. Elvria Memorial Hospital
Settlement: July, 1994
Plaintiff's Counsel: Howard D. Mishkind
Defendant's Counsel: John Jeffers (Elyria Memorial Hospital); Toby Hirschman (Dr. McGowan); and Bill Bonezzi (Acute Care)
Type of Action: Wrongful death

Plaintiff, a 350 pound morbidly obese patient, presented twice to Elyria Memorial Hospital emergency room with complaints of increasing shortness of breath and chest pain. Defendants failed to appreciate the existence of pulmonary thrombosis and failed to order necessary testing and to timely administer Heparin. Plaintiff's surviving spouse remarried shortly after decedent's death and had a child from her remarriage whereas the decedent and surviving spouse did not have any children. Plaintiff's weight and the issue of remarriage and a child from the remarriage influenced the results significantly.

Damages: Massive pulmonary emboli.

Plaintiff's Experts: Pulmonary - Dr. Myron Stein (Beverly Hills CA)
Pulmonary – Dr. David Rosenberg (Cleveland OH)
Emergency - Dr. David Effron (Cleveland OH)
Pathology - Dr. John Shane (Pennsylvania)

Defendants' Experts: Internal Medicine - Dr. Hadley Morganstern Clarren (Cleveland OH)
Pulmonary - Dr. Ronald Bacik (Cleveland OH)
Pathology - Dr. Harry Bonnell (San Diego CA)

settlement: $475,000.00

Ousley v. CSX Transuortation
Court: Cuyahoga County Common Pleas
Judgment: August, 1994
Plaintiff's Counsel: Michael B. Michelson
Defendant's Counsel: Thomas Treadon
Insurance Company: Self insured
Type of Action: F.E.L.A.

Plaintiff slipped and fell in an icy parking lot of Defendant's premises while exiting his automobile while on his way to work.

Damages: Herniated disc.

Plaintiff's Experts: Economist - Dr. Harvey Rosen
Vocational Analyst - George Cyphers

Defendant's Expert: Vocational Analyst - Sue Jurcak

Judgment: $990,000.00

Offer: $200,000.00 Demand: $400,000.00

Charles Smith v. United States of America. Dept. of Veteran Affairs
Court: U.S. District Court, Northern District, Eastern Division
Judgment: August 31, 1994
Plaintiff's Counsel: Fred Weisman and Laurence J. Powers
Defendant's Counsel: William Kopp
Insurance Company: N/A
Type of Action: Medical malpractice

Plaintiff, a 46 year old Vietnam Veteran and retired United States Postal Worker, having failed to take his medication for schizophrenia, was involved in a bar room fight which resulted in his admission to the V.A. Medical Center on East Boulevard. When admitted, he was ambulatory, physically sound and neurologically intact. An infection developed, probably from a facial laceration sustained in the fight. While hospital confined, the infection was permitted to progress to the cervical spine. The infection gradually developed into a spinal epidural abscess, which first produced pain and other signs and symptoms which were medically neglected. It then compressed the spinal cord and finally accumulated to the point where the infection transacted the spinal cord, resulting in irreversible quadriplegia.

Damages: Quadriplegia

Plaintiff's Experts: Neurologist - Dr. John Conomy
Neurologist - Dr. Donald Austin
Economist - Dr. John Burke
Life Care Planner - George Cyphers

Defendant's Experts: Psychiatrist - Jeffrey Lieberman
Internal Medicine and Rheumatology - Matthew Liang
Epidemiologist - Michael Devivo
Annuitist - William Schumate
Life Care Planner - Sharon Reavis

Judgment: $5,199,401.73

Offer: $750,000.00, and an additional $750,000.00 for medical expense with reversion to the U.S.A. if not spent.

Demand: $5,000,000.00

Allen Pois. M.D. v. Robinson Memorial Hoswital, et al.
Court: U.S. District Court, Northern District, Eastern Division
Judgment: August, 1994
Plaintiff's Counsel: Alan L. Melamed
Defendants' Counsel: K. R. Augenbaugh
Insurance Company: None identified
Type of Action: Due process Section 1983 and Contract

Coerced resignation of privileges (surgical), following denial of due process hearing request resulting from restriction on surgery privileges. As a result, the plaintiff had to give up private practice to stay in the Northeast Ohio area and took a staff position which did not provide the economic benefit which he received and would receive from private practice.

Damages:

Plaintiff's Expert: None

Defendants' Expert: None

Judgment: $350,000.00

Offer: $10,000.00 Demand: $325,000.00

Andy Farina v. Summit Motel
court: Summit County Common Pleas
Judgment: August 31, 1994
Plaintiff's Counsel: Mitchell A. Weisman
Defendant's Counsel: Howard Walker
Insurance Company: Cincinnati Insurance
Type of Action: Auto

Admitted Liability. Defendant's employee lost control of the car and ran into the wall of the motel causing the plaintiff to fly forward from the back seat to the front seat.

Damages: Two herniated lumbar discs.

Plaintiff's Expert: Treating Orthopedic Surgeon - Dr. Thomas Pischercia (New York, NY)

Defendant's Expert: Dr. Yassine (Akron, OH)

Judgment: $350,000.00

Offer: $225,000.00 Demand: $275,000.00

Stacey Miles v. Citv of Cleveland Heights
Court: Cuyahoga County Common Pleas
Judgment: September 16, **1994**
Plaintiff's Counsel: Mitchell A. Weisman
Defendant's Counsel: John Gibbon
Insurance Company: None
Type of Action: Auto

City of Cleveland Heights police officer lost control of his car striking the plaintiff's car and causing it to go into a utility pole. The plaintiff has a permanent restriction of movement in his left arm causing pain and restricting his ability to teach tennis.

Damages: Soft tissue contracture of the left elbow restricting extension and flexion but not supination and pronation.

Plaintiff's Experts: Orthopedic Surgeon - Dr. Donald Goodfellow
Vocational Expert - Robert Ancell
Economist - Dr. John Burke

Defendant's Experts: Occupational Medicine - Dr. Kevin Trangle
Anesthesiologist - Dr. Robert Rogoff
Physical Therapist - Michael Supler
Tennis Pro - Keith Dunbar

Judgment: $1,000,000.00

Offer: $50,000.00 Demand: $500,000.00

Helen Jonda. Deceased v. Cleveland Clinic
Settlement: August, **1994**
Plaintiff's Counsel: Peter H. Weinberger
Defendant's Counsel: James Malone
Insurance Company: Self insured
Type of Action: Medical malpractice

Decedent was discharged on therapy after knee replacement surgery. On date of discharge, the decedent had a bruise on her buttocks which was untreated. Two days later, she was readmitted with a septic skin ulcer.

Damages: Death.

Plaintiff's Expert: Internal Medicine - Dr. Claude Burton

Settlement: $250,000.00

Elmer Moore. Deceased v.
Warren General Hospital and Christopher Hasbach. D.O.
Court: Trumbull County Common Pleas
Settlement: September, **1994**
Plaintiff's Counsel: Peter H. Weinberger and John D. Liber
Defendants' Counsel: Leo Keating, Dan Keating and Tom Wilson
Insurance Company: WGH - Self Insured; Dr. Hasbach - PMI
Type of Action: Medical malpractice/negligent credentialing

Plaintiff suffered thrombo emboli n both legs after an abdominal aorta aneurysectomy. The defendant doctor had only performed one vascular surgery operation in the three years prior to this surgery.

Damages: Double above the knee amputation. Plaintiff lived from date of surgery (January 26, **1989)** until death in March, **1993.**

Plaintiff's Experts: Vascular Surgeon - Dr. Ralph DiPalora
Vascular Surgeon - Dr. Alfred Martin

Defendants' Experts: Vascular Surgeon - Dr. Bartley Griffith
Vascular Surgeon - Dr. Lazlo Posewitz

Settlement: $700,000.00

Jane Doe v. Internal Medicine, M.D.
Settlement: September, **1994**
Plaintiff's Counsel: William Novak
Defendant's Counsel: David Best
Insurance Company: PIE
Type of Action: Medical malpractice/wrongful death

Plaintiff was a longtime patient of a doctor. He never did a breast exam. When Plaintiff went to local emergency room her breast cancer tumor was enormous and penetrated the skin. She died the next day.

Damages: Death.

Plaintiff's Expert: Dr. Robert Haynie

Settlement: $250,000.00

Jane Doe v. ABC Foundation Hoswital
Settlement: September, **1994**
Plaintiff's Counsel: William Novak
Defendant's Counsel: James Malone
Insurance Company: Self insured
Type of Action: Medical malpractice

Plaintiff had a laparoscopy performed at a hospital. Bowel perforation occurred with a delay in diagnosis. Bowel was repaired with good recovery.

Damages: Pain and suffering. NO permanent injury.

Plaintiff's Expert: Dr. Robert Baggish

Settlement: $150,000.00

Rose Robertson. et al. v. Brown Memorial Hospital, et al.
Settlement: September, **1994**
Plaintiff's Counsel: Howard D. Mishkind
Defendants' Counsel: Deidre Henry, William Pfau and Steven Walters
Insurance Company: St. Paul, PICO
Type of Action: Medical malpractice

Plaintiff was being prepared to undergo an elective tubal ligation under general anesthesia. The anesthesia care and was being provided by a CRNA who encountered difficulty in attempting to intubate the patient. The CRNA made multiple repeated attempts at intubation when the patient developed a laryngospasm. The defendant failed to properly evaluate the patient preoperatively to determine the degree of difficulty of intubating the patient and failed to properly administer sufficient dosages of muscle relaxants to avoid difficulty in establishing an airway.

Damages: Glottic and subglottic stenosis, permanent damage to right vocal cord.

Plaintiff's Experts: Anesthesia - Dr. Paul Youngstrom (Cleveland)
CRNA - Beverly Xrause (St. Louis, MO)
Gynecology - Lee Rubinstein (Cleveland)

Defendants' Experts: Anesthesia – Dr. Howard Nearman
OB/GYN - Dr. Martin Schneider

Settlement: $900,000.00

Paul Turosky v. Marvin Slesh. M.D.
Court: Lake County Common Pleas
Judgment: October, **1994**
Plaintiff's Counsel: Peter Weinberger and John A. Lancione
Defendant's Counsel: R. Mark Jones and Tobias Hirschman
Insurance Company: PIE
Type of Action: Medical malpractice

Plaintiff underwent colon resection for a Dukes "A" cancerous lesion. The defendant negligently performed the enostosis by failing to mobilize the splenic flexure, resulting in a leak and peritonitis.

Damages: Multiple surgeries resulting in permanent ileostomy.

Plaintiff's Experts: Colorectal Surgery - Dr. Donald Fried (Charleston, SC)
General Surgery - Dr. Mark L. Eckhauser (Lima, OH)
Pathology - Dr. Douglas Ackerman (Louisville KY)

Defendant's Experts: Colorectal Surgery - Dr. Henry Eisenberg (C1eve1and)
Pathology - Dr. Nadia El-Kaise

Settlement: $500,000.00

St, Paul Fire and Marine Ins. Co. v.
Little Philly's Restaurant and Lounae, Inc.
Court: Geauga County Common Pleas
Judgment: October, **1994**
Plaintiff's Counsel: Robert Rutter and Jerry Kraig
Defendant's Counsel: Robert E. Chudakoff
Insurance Company: St. Paul Fire and Marine Insurance Co.
Type of Action: Direct action on fire insurance policy

This was a direct action against a fire insurance company which denied the claim of a insured restaurant that was destroyed by an arson fire. St. Paul contended that the insured had set the fire. The insured denied the allegation, although admitting that somebody had intentionally set the fire. The insured did not know who.

Damages: N/A

Plaintiff's Expert: Property Repair Specialist - Mort Berry

Defendant's Expert: Cause and Origin Specialist – James Churchwell

Judgment: $353,000.00

Offer: $0 Demand: None