Cleveland Academy of Trial Attorneys

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CLEVELAND ACADEMY OF TRIAL ATTORNEYS FEBRUARY, 1995 NEWSLETTER

EDITOR: RICHARD C. ALKIRE, ESQ.

PRESIDENT'S COLUMN

ROBERT E. MATYJASIK, ESQ.

In case you haven't made your reservation for the **1995 BERNARD FRIEDMAN LITIGATION INSTITUTE** (Friday, February 24, 1995), I'm enclosing a copy of the announcement and reservation form.

Dave Goldense and his committee have put together a "Focus Group Jury" demonstration featuring timely legal and tactical topics, and some of our finest local trial advocates. Please make your reservation now for this valuable CLE seminar.

* * * * *

At the request of a couple of members, I offer some insights on the payment of **Subrogation Claims** that I have developed over the past few years.

I'm sure many of us recall the "good old days" when subrogated insurance carriers would routinely compromise their claims for reimbursement out of our clients' settlements. It also seems that in those days, the plaintiff's automobile insurance "MedPay" benefits were relatively low, and it didn't make much difference if the subrogated insurer was willing to compromise its claim or not. In recent years this has changed. Med Pay benefits (often substantially increased where the plaintiff is using occupant restraints) can now represent a significant sum, and some health care insurers are much less amenable to compromising their claims.

By keeping in mind the basic principles of contracts and subrogation, and by **carefully reading** the insurance policy provisions upon which the insurers rely for their *RIGHT TO RECOVER PAYMENT,* you may determine that the subrogated insurer is entitled to only a *pro rata* recovery from the plaintiff, **or none at all.**

At the outset, remember that the insurer's *RIGHT TO SUBROGATE* and its *RIGHT TO RECOVER PAYMENT* are separate and distinct rights that arise as a matter of contract from the insurance policy. *SUBROGATION* means that upon payment of medical expenses or property damage, the insurer obtains a right to stand in the plaintiff's shoes and recover its claim **from the tortfeasor** (this would be a **third party claim** by the subrogated insurer). On the other hand, the insurer's *RIGHT TO RECOVER PAYMENT* provides an **alternative** for the insurer to recover its payments **from the plaintiff** if he or she recovers payment from another (a first party claim).

It seems logical that the insurer would have the right to pursue its recovery against either or both parties. But, depending on the circumstances, its rights may not be the same in both instances.

The next thing to keep in mind is that **you do not represent the plaintiff's insurer** unless it has retained you to do so (which is not likely). The **subrogee (insurer), upon assignment, becomes a real party in interest** and it has a right to maintain an action in its own name against the tortfeasor for the medical expenses incurred by the insured. Smith v. Travelers Ins. Co. (1977), *50* Ohio St.2d 43. Further, the right to subrogation or the showing of a contractual relationship between a health insurer and a personal injury plaintiff must be established by a separate declaratory judgment or by a detailed proceeding on motion to intervene, with sufficient **evidence** produced to establish that the insurer has contractual rights that allow it to be considered for intervention. A bald assertion of a subrogation right, without proof thereof, does not entitle a health carrier to participate in the plaintiff's lawsuit. Hamler v. Marshall (1986), 34 Ohio App.3d 306.

Also recall that plaintiffs have a right to recover all of their damages, regardless of collateral sources. Sorrell v. Thevenir (1994), 69 O St.3d **415.**

In negotiating a settlement with defendant's counsel, remember that he (or she) represents the **defendant,** and not either of the parties' insurance carriers. Unless the subrogated carrier has intervened in the action, participated in the settlement negotiations, or there is an **assignment** to the subrogated carrier, a settlement between the plaintiff and defendant is just that, and nothing else. Thus, the settlement check should be payable **only to the plaintiff** (and his or her attorney, where the plaintiff has **assigned** the attorney an interest in settlement proceeds). [An assignment is the grant of a specific interest **in the settlement proceeds** for consideration. Watch out for

assignment language in the *Proof of Loss* and ***Subrogation*** forms that usually accompany MedPay and P/D checks. There is no **new** consideration for the payment of these benefits if the plaintiff is a named insured in the policy; and there is no basis upon which the insurer can require an **assignment** from its insured.]

When defendants' insurers have been put "on notice" by subrogated carriers, they usually insist upon issuing settlement checks that name the subrogee as a co-payee, thus **forcing** the plaintiff to pay the subrogated claim. Once the subrogated carrier's name appears on the settlement check, you may as well assume that the claim will have to be paid in full, even though the plaintiff's recovery has been compromised because of liability and other issues, and further reduced by attorney fees and litigation expenses. Otherwise, the whole settlement is held up while you beg the subrogated insurer to compromise its claim.

Personally, I will not accept a settlement check that contains the subrogated carrier as a joint payee. There is no basis upon which the defendant's insurer can force the plaintiff to accept a joint check. And a motion to enforce the settlement agreement may be necessary if the defendant's carrier will not issue a check without "protecting" the non-party subrogated insurer. See Bolen v. Young (1982), 8 Ohio App.3d 36, 455 N.E.2d 1316; Mack v. Polson Rubber Co. (1984), 14 Ohio St.3d 34, 470 N.E.2d 902. And don't forget to seek interest from the date of the settlement agreement. O.R.C. 1343.03(A); Nursinu Staff of Cincinnati. Inc. v. Sherman (1984), 13 Ohio App.3d 328, 330-31, 469 N.E.2d **1031**, 1034; Yin v. Amino Products Co. (1943), 141 Ohio St. 21, 29, 46 N.E.2d 610, 613-14; Physician's Services, Inc. v. Willoughby (1987), 37 Ohio App.3d 130, 524 N.E.2d 515.

The reason defendants' insurers insist upon "protecting" plaintiff's carriers is that auto insurers typically present their subrogation claims to the defending insurers through "intercompany arbitration" agreements. And defendants' insurers will routinely agree to "defer" the arbitration (i.e. waive the Statute of Limitations) as to the subrogated insurers' claims. [Note that the plaintiff (your client) is not a party to, and is not bound by the insurers' arbitration agreement.] Defendants' carriers know that they remain exposed to the subrogation claims if they do not coerce plaintiffs into agreeing to pay the subrogated carriers as part of tort claim settlements. If the defendant settles with the plaintiff while the subrogated claim remains pending in intercompany arbitration, that is the defendant carrier's problem, not the plaintiff's.

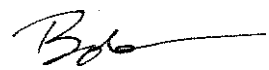
If the subrogated insurer chooses to pursue its claim through intercompany arbitration, the defendant's carrier still has to deal with that claim.

When the plaintiff receives settlement funds from anyone, the insurance policy's *RIGHT TO RECOVER* provision is triggered. And the subrogated insurer may choose to pursue this claim against the plaintiff after settlement. But, as to the insurer's right to recover payment from the plaintiff, "An established, general rule of subrogation is that where an insured has not interfered with an insurer's subrogation rights, the insurer may neither be reimbursed for payments made **to** the insured nor seek setoff from the limits of its coverage until the insured has been fully compensated for his injuries." See Newcomb v. Cincinnati Ins. Co. (1872), 22 Ohio St. 382; followed, James v. Michigan Mut. Ins. Co. (1985), 18 Ohio St.3d 386, 481 N.E.2d 272; but also read Aetna Life Ins. **Co**. v. Martinez (1982), 7 Ohio App.3d **178** [where the health care insurer had a pro rata interest in the settlement based on policy language].

Although a number of appellate courts have held that an auto policy provision allowing a *RIGHT TO RECOVER PAYMENT* . . to the extent ***of*** our payment gives the insurer a right of full recovery from the plaintiff's settlement, these cases appear to be in conflict with Newcomb, James and Martinez, supra. A better rule, at the very least, would be to allow the subrogated insurer a recovery in proportion to the plaintiff's actual net recovery. [I understand that a motion to certify this issue is currently pending in the Ohio Supreme Court in Chrissv v. Bd. of Commiss. of Wayne County.]

I, for one, am not ready to repay subrogated insurers in full without a fight where my clients have to compromise in order to achieve settlements, and have their actual recoveries further reduced by attorney fees and litigation expenses.

Wishing you all
good settlements,



Robert E. Matyjasik

THE BERNARD FRIEDMAN LITIGATION INSTITUTE - 1995
CLEVELAND ACADEMY OF TRIAL ATTORNEYS

Date: Friday, February 24, 1995
Time: 11:45 a.m. - 5:00 p.m.
Location: Stouffer Tower City Plaza Hotel
24 Public Square, Cleveland, Ohio

COMMITTEE:
David W. Goldense, Chair
Frank Bolmeyer
George Loucas
John Miraldi

LUNCHEON SPEAKER: THE HONORABLE CLARK WEAVER
Eighth District Court of Appeals
TOPIC: "SENATE BILL 20, ITS LEGISLATIVE HISTORY, RETROACTIVITY AND SAVOIE."

MOCK JURY TRIAL PRESENTATION

The Cleveland Academy of Trial Attorneys is proud to host the annual Bernard Friedman Litigation Institute for 1995. This year we have organized a mock trial presenting a direct action against a liability insurer which will be "tried" before a focus group jury. The plaintiff's case will be presented by Benjamin F. Barrett, Sr., and the insurer will be represented by George Lutjen, both of whom are well known as outstanding trial practitioners. Judge Robert Lawther will preside. The trial will begin with a voir dire of the focus group paying particular attention to issues arising out of a corporate defendant as a named insurer.

Trial summaries will be presented along with a live expert witness demonstration which will be followed by closing arguments. The "jury's" deliberations will be monitored with a live, remote broadcast of their discussions. Following the "verdict", a panel discussion among Judge Lawther and Messrs. Barrett, Lutjen and Loucas will close the seminar. The panel discussion will analyze the approach to voir dire in this relatively new cause of action and review the focus group's response and utility in the preparation of this unique action.

All members of the Ohio bar are invited to attend the seminar. This program has been approved by the Ohio Supreme Court Commission on Continuing Legal Education for 4.5 hours of CLE credit. Written materials will be supplied.

***See Attached Registration Form.**

REGISTRATION FORM
1995 BERNARD FRIEDMAN LITIGATION INSTITUTE

Name_____Phone_____

Address_____

Please check the appropriate registration fee:

MEMBERS		NON-MEMBERS	
_____	$75 Lunch & Seminar Only	_____	$90 Lunch & Seminar
_____	$50 Seminar Only	_____	$65 Seminar Only
_____	$25 Lunch Only (11:45 a.m.)	_____	$30 Lunch Only (11:45)

Please select your choice for lunch: ___ Chicken Tenderloin en Croute
_____Farfalle Pasta with Julienne of Chicken Breast _____Tortellini

PLEASE MAKE CHECK PAYABLE TO "CLEVELAND ACADEMY OF TRIAL ATTORNEYS"
Pre-registration is required in order to make adequate arrangements for lunch. Please forward this Registration Form and your check to DAVID W. GOLDENSE, ESQ., 920 Terminal Tower, Cleveland, Ohio 44113-2206. Call David Goldense at 241-0300, Frank Bolmeyer at 781-7990 or George Loucas at 241-2600 with any questions.

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

The Editor wishes to acknowledge the assistance of Robert F. Linton, Jr. and Jean M. McQuillan in summarizing the following decisions.

APPARENT AGENCY

Majesky v. Ballmer, Case No. 67624 (Cuyahoga Cty., January 19, 1995) For Plaintiff: Earl F. Ghaster and For Defendant: Hunter S. Havens.

Plaintiff was injured when a ladder slipped while he was painting a garage at the request of his father who was alleged to be an agent for Ballmer. The trial court granted summary judgment to Ballmer on the issue of apparent agency and the Court of Appeals reversed. In an extensive legal and factual analysis of apparent agency, the Court concluded material issues of fact existed as to whether the parties' past conduct "clothes Majesky, Sr. with the appearance of authority so as to cause appellant to reasonably believe Majesky, Sr. was an agent of [Ballmer]."

DISCOVERY SANCTIONS

Rankin v. Willow Park Convalescent, No. 66608 (Cuyahoga Cty, December 8, 1994) For Plaintiff: Arthur E. Dombek and For Defendant: Jane P. Wilson, Richard C. Hubbard 111, Duvin, Cahn, et. al.

Trial court abused discretion in ordering dismissal without first giving notice of its intent to dismiss the case with prejudice as required by Ohio Furniture Co. v. Mindala (1986), 22 Ohio St.3d 99. The Court of Appeals nevertheless urged the Supreme Court to modify its holding to put the teeth back into Civil Rule 37(B)(2).

EVIDENCE - DAMAGES/LOSS OF EARNING CAPACITY
OPINION TESTIMONY/INADMISSIBLE HEARSAY

Tekabec v. Sears, Roebuck & Company, No. 66370 (Cuyahoga Cty, November 10, 1994). For Plaintiff's: Ellis B. Brannon, Gary T. Mantkowski; and For Defendants: Kenneth Kraus, James R. Adams, Fredric E. Kramer.

Court of appeals reversed a $1.8 million jury verdict in favor of a 30 year old plaintiff who lost a left eye as a result of an allegedly defective snow thrower. The Court found that the only evidence of plaintiff's potential earning capacity as a commercial pilot was based on impermissible hearsay testimony by a witness who

testified about what a chief pilot had said were his annual earnings. The Court also held that plaintiff could properly give opinion testimony that he would not be able to become a commercial airline pilot because of his handicap based on his job hunting experiences following the accident.

DENCE - DAMAGES/NEW TRIAL/ADMISSIBILITY)F SOCIAL SECURITY'S FINDING OF DISABILITY

Webster v. Oglebay Norton Co., No. 65502 (Cuyahoga Cty, January 26, 1995) For Defendant: Keith L. Carson, Richard C. Binzley, Harold W. Henderson, and For Plaintiff: Gary R. Cooper, Keith A. Wilkowski (Toledo); Dennis M. O'Bryan (Birmingham, MI) Christopher D. Kuebler.

Court of appeals reversed a $1,825,000 jury verdict in favor of a 53 year old captain who slipped and fell on a freighter suffering injuries primarily to his back. The court found the verdict to be the result of passion and prejudice. Plaintiff had a 20 year history of back problems before the accident, worked for 2 years following the accident, passed physical examinations declaring him to be fit for duty, and then filed for Social Security disability for an unrelated heart condition. The trial court also erred by excluding Social Security Administration's finding that plaintiff was totally disabled from a heart condition (with no mention of his back condition) which was admissible as a public record.

EVIDENCE - EXPERT TESTIMONY/ADMISSIBILITY

Henricks v. Front Row Theater, No. **66710** (Cuyahoga Cty, December 15, 1994) For Plaintiff: Eric R. Kennedy and For Defendant: Ronald R. Rispo.

Court of appeals affirmed jury verdict in the amount of $900,000 entered in favor of a woman claiming to have suffered traumatically exacerbated multiple sclerosis after a fall at the Front Row Theater. The court found that the "general acceptance" test was not a necessary precondition to admitting expert testimony and that the admissibility of such testimony is within the discretion of the judge to be determined on a case by case basis.

INTENTIONAL ACT - SEXUAL ABUSE - STATUTE OF LIMITATIONS - EMOTIONAL DISTRESS

Detweiler v. Slavic, No. 66718 (Cuyahoga Cty. December **15**, 1994) For Plaintiff: William H. Crosby and For Defendant: Timothy J. Bojanowski.

The Court affirmed granting of summary judgment based on the expiration of the statute of limitations where plaintiff claimed to

have been sexual abused as a teenager. Applying the discovery rule, the court held as matter of law that plaintiff knew seven years before filing suit of the sexual abuse when she sought counseling even though she had not recalled then all the details or incidents. The Court further found as a matter of law that psychologist's affidavit that plaintiff suffered from post traumatic stress disorder and that she could not attend to her legal affairs failed to establish she had an "unsound mind" for tolling purposes. The Court also dismissed her claim for intentional infliction of emotional distress, finding that a phone call from the perpetrator was neither "extreme and outrageous" nor caused severe and debilitating injuries.

INTENTIONAL ACT - SEXUAL MOLESTATION - INSURANCE COVERAGE

Ozog v. Nationwide Ins. Co., No. 56421, 55428 (Cuyahoga Cty., November 10, 1994) Counsel for Plaintiff-Appellants: Donald E. Caravona, Michael W. Czak, Michael Farrell; For Estate: William Fanos; For Defendant-Appellees: Terrance Gravens.

Court of Appeals affirmed the granting of summary judgment in favor of homeowner's carrier. The Court held that as a matter of law, sexual molestation of a child is per se an intentional act from which an intent to harm must be inferred and therefore falls within intentional act exclusion. Summary judgment was proper as well on the negligent infliction of emotional distress claim since it was a derivative claim. NOTE: Trial court overruled summary judgment on Nationwide's obligation to defend and indemnify the defendant's wife on claim that she negligently failed to stop her husband or warn of his sexual deviancy, but that ruling was not at issue on appeal.

JONES ACT - EXCESSIVE VERDICT

Webster v. Oglebay Norton, Case No. 65502 (Cuyahoga Cty., January 26, 1995) For Plaintiff: Cary R. Cooper, Keith A. Wilkowski, Dennis M. O'Bryan, Christopher D. Kuebler and For Defendant: Keith L. Carson, Richard C. Binzley, Harold W. Henderson.

Mr. Webster received a $1,825,000 jury verdict for injuries he suffered in 1988 when he slipped and fell while on a boat employed as a master/captain for Oglebay Norton. This was a Jones Act/maritime action. On appeal, the verdict was reversed as excessive and the result of passion and prejudice. This finding was justified by the court as a result of plaintiff's counsel's arguments about retaliatory discharge and forcible termination which were not plead in the complaint. This resulted in "a verdict of monumental proportions for a slip and fall of dubious permanency." Evidence of the Social Security Administration disability determination (he was disabled because of heart disease) should have been admitted, and its exclusion called into question

the entire verdict. Likewise, loss of future earnings evidence was improperly allowed when the court instructed the jury to use its common knowledge in applying an inflation rate to the lost wages. No expert testimony was proffered on this issue. The dissenting opinion believed the verdict should have been reversed because it was not only excessive but also against the manifest weight of the evidence.

MEDICAL MALPRACTICE-INTERVENING/SUPERSEDING CAUSE

Duckworth v. Lutheran Med. Ctr., Case No. 65995 (Cuyahoga Cty., January 25, 1995) For Plaintiff: Richard J. Berris, Laurence J. Powers, Thomas H. Allison, Kris H. Treu, Beth A. Sebaugh and For Defendant: Douglas K. Fifner, Nancy F. Zavelson, Janis L. Small, Thomas H. Terry, III.

Reversed and remanded for new trial a $1.9 million verdict for plaintiffs against four of six defendants in a medical malpractice case for failure to give an instruction on intervening/superseding cause. Plaintiff was seen in Lutheran Medical Center in 1988 and while Emergency Room doctor read chest x-ray as normal, a radiologist noted abnormalities and recommended follow-up in his written report. The radiology report was never acted upon and plaintiff was diagnosed with lung cancer several years later. Among defendants there was much dispute about standards and policies to communicate radiology reports, and the radiologist argued the failure of the other defendants to act on his report was an intervening and superseding cause relieving him of liability. The trial court did not instruct on superseding cause and the case was remanded for a new trial on that basis. The Court of Appeals held that since there was considerable dispute whether the failure to read the radiology report was foreseeable, the issue was for the jury. The Court also found error in restricting cross-examination about subsequent changes in hospital policies when it was relevant to impeachment and foreseeability. Likewise, Jury Interrogatories which combined negligence and proximate cause were erroneous.

SLIP AND FALL

Peterson v. Greater Cleveland Resional Transit Authoritv For plaintiff: George C. Zucco; and For defendant: Clarence D. Rogers, Jr., Juan E. Adorno.

Court of appeals reversed summary judgment granted in favor of defendant where plaintiff allegedly slipped on a leaf-type material on the steps of a rapid transit car. The court held that the question of the defendant's notice of a hazard, either actual or constructive, required resolution by a jury.

Presti v. The Gamekeeper's Tavern, No. 66642, (Cuyahoga Cty, December 8, 1994) For Plaintiff: Robert S. Passov and For

Defendant: Molly A. Steiber, Joseph W. Deimert, Jr.

Court of appeals reversed granting of summary of judgment in favor of abutting owner of sidewalk based on plaintiff's affidavit that the changes in elevation exceeded 2 inches. The City's constructive notice of the defect, since it last inspected the sidewalk seven years before the accident, was held to be for the jury.

Peterson v. RTA, No. 67603, (Cuyahoga Cty., January 26, 1995) For Plaintiff: George C. Zucco and For Defendant: Clarence D. Rogers, Jr., AGM-Legal, Juan E. Adorno.

Mr. Peterson slipped and fell on a foreign "vegetation" type matter on the stairs of an RTA train he was entering. The Court of Appeals reversed summary judgment for RTA since RTA owed the highest duty **of** care to plaintiff and the removal of debris from the steps of the rapid transit trains was not inconsistent with the practical operation of the train system. The train had been stopped a sufficient time to permit the driver to inspect the steps, and it was **a** question of fact for the trial court whether the driver had or should have had notice of the foreign matter on the stairs.

SUBROGATION - ACTION BY ODHS

Ohio Dept. of Human Servs. v. Crespo, Case No. 66765 (Cuyahoga Cty., December 29, 1994) For Plaintiff: Robert J. Bryne and For Defendant: David J. Guidubaldi, Lynn E. Lebit.

Under §5101.58, the Ohio Department of Human Services sought to recover medical bills directly from a claimant who had settled a medical malpractice action. The ODHS had previously sought to intervene in the medical malpractice action and had been dismissed. This litigation was a direct action against the insured malpractice plaintiff to recover bills from her settlement (which had not included medical bills). The Court of Appeals affirmed a 12(b)(6) dismissal holding that R. **C.** §5101.58 did not give the O.D.H.S. a direct right of recovery against the recipient in this case. The O.D.H.S. has only a right of subrogation. Since R. C. §2305.27 (medical malpractice collateral source) prevails and does not give a right of subrogation to a collateral source of indemnity, the O.D.H.S. has no rights against the medical malpractice plaintiff. The O.D.H.S. likewise has no right under R. C. §5111.11 which permits recovery under federal law because federal law did not apply to the factual situation presented.

> **NOTE:** The constitutionality of R. C. §2305.27 was not raised or argued in this case despite Sorrel1 ***v.*** Thevenir. See also, *Waldron* ***v.*** Miami Valley (Second Dist. Ct. App. Montgomery Cty. 12/7/94) (1994 Ohio App. LEXIS 5433 for a similar analysis of O.D.H.S. subrogation rights).

UM COVERAGE/ARBITRATION

Marvland Ins. Grouw v. Marks, No. 67514 (Cuyahoga Cty., December 19, 1994) For Plaintiff: Timothy T. Brick and For Defendant: Seth B. Marks.

Declaratory judgment by insurer seeking to avoid a default judgment obtained by its insureds against an uninsured motorist while the parties were in the process of uninsured motorist arbitration. The insured claimed the default judgment established the insurance company's liability on the uninsured claim. The Court of Appeals disagreed finding that evidence the parties were in the process of and intended to arbitrate the claim at the time of the default judgment established the insurance company had not waived its right to arbitrate.

UM COVERAGE/PHYSICAL CONTACT NOT REOUIRED

Girgis v. State Farm, Case No. 66970 (Cuyahoga Cty., December 1, 1994) For Plaintiff: David W. Goldense, Paul V. Wolf and For Defendant: Joseph R. Wantz.

Plaintiff claimed an uninsured motorist caused an accident when making an improper lane change. State Farm denied coverage because there was no evidence of physical contact with the uninsured vehicle. The court of appeals affirmed the trial court's judgment for the plaintiff, invalidating any "physical contact" requirement in uninsured motorist policy contracts. Uninsured policy by its terms pays damages "for injury an insured is legally entitled to collect from an uninsured." In State Farm v. Alexander (1992), 62 O. S. 3d 397, the court held a policy may not eliminate or reduce such coverage where the claim arises from causes of action recognized by Ohio tort law. Since a cause of action for negligence does not require physical contact, such an exclusion in an uninsured policy is invalid.

UM COVERAGE/RESIDENT OF INSURED'S HOUSEHOLD

Victoria Fire and Casualtv Ins. Co. v. Ellison, Case No. 67412 (Cuyahoga Cty., December 22, 1994) For Plaintiff: David Ledman and For Defendant: Maurice L. Heller, Joel Levin.

Insurance company contended the plaintiffs' son was not covered by under/uninsured. Summary judgment for the insurance company was reversed and remanded. Plaintiffs' son was killed while a passenger in a car rear-ended by an uninsured. The car in which plaintiff was riding was owned and operated by a person with $12.5/25 minimum coverage. The son was an insured under the parent's policy. The policy required an insured to be occupying an insured vehicle to obtain uninsured coverage. The Court invalidated this requirement, expressly overruling Hedrick v. Motorists Mutual (1986), 22 O. S. 3d 42, following Ohio Supreme Court in Martin v. Midwestern Group Ins. Co. (1994), 70 O. S. 3d

478. Uninsured motorist coverage protects persons, not vehicles. **An** exclusion based on the injured person occupying an uninsured vehicle is invalid since R. C. § 3937.18 provides coverage if (1) the claimant is an insured under the policy, 2) the claimant was injured by an uninsured, and *3)* the claim is recognized by Ohio law.

UM COVERAGE/SETTLE WITHOUT CONSENT

Langford v. Victoria Fire & Casualtv, Case No. 65763 (Cuyahoga Cty., December 1, 1994) For Plaintiff: Joseph Ritzler, G. Michael Curtin and For Defendant: William T. Zaffiro.

Plaintiff had an uninsured policy that provided he would "lose his protection if . . . you without our written consent, settle or sue to **a** judgment a claim against anyone responsible for your injury." The trial court granted summary judgment denying coverage since plaintiff obtained a default judgment against the uninsured without the insurer's written consent. The Court of Appeals affirmed, holding *Handlovic* did not apply since the issue presented was not the amount of damages, but, rather, entitlement to any coverage at all. The dissent argued Handlovic applied and the judgment obtained by the insured should control this case.

UM COVERAGE/STATUTE OF LIMITATIONS

Envart v. Nationwide Mut. Ins. Co., No. 66403 (Cuyahoga Cty, December 14, 1994) For Plaintiff: David P. Bradley and For Defendant: Timothy D. Johnson.

The Court reversed granting of summary judgment against insured based on expiration **of** the statute of limitations set forth in policy. The Court found the following limitations period ambiguous as a matter of law and therefore invalid and unenforceable: "legal action against us must be within the time limit allowed for death or bodily injury or death actions in the State where the action occurred." The court further found that a clause requiring arbitration within two years was unenforceable since it did not provide for final binding arbitration.

WORKER'S COMPENSATION - ADDITIONAL CLAIM

Banks v. LTV Steel, Case No. **66569** (Cuyahoga Cty., December 22, **1994)** For Plaintiff: Donald **E.** Lampert and For Defendant: Aubrey B. Willacy, James P. Mancino.

Summary judgment for LTV and the Industrial Commission reversed and judgment entered for the plaintiff on a Workers' Compensation claim. Plaintiff had a physical injury in **1986** and in **1988** was diagnosed with post-traumatic stress disorder (PTSD). LTV challenged the claim for PTSD since it was not a "flow through" disorder and, since the injury originally occurred in **1986,** a claim for PTSD in **1988** was time-barred. The appeals court found that plaintiff's claim was timely even assuming dreams which began "within a couple of months of the accident" were notice of her condition since the claim was filed two years and five days after the accident. LTV argued PTSD was not compensable because it was caused by mental stress, not physical injury. The Court of Appeals reversed finding that plaintiff had a serious physical injury -- being trapped under a load of steel -- and her PTSD was directly linked to her physical injury and therefore compensable.

John Doe v. Dr. Doe, et al.
Court: U.S. District Court, Northern District, Eastern Division
Settlement: September, 1994
Plaintiff's Counsel: Michael L. Inscore and J. Michael Monteleone
Defendants' Counsel: Kenneth Blumenthal, Gayle Arnold, William Bonezzi, Thomas Terry, William Davis, Gregory Rankin, W. Frederick Fifner, Wayne Honenberger and Alan T. Radnor
Insurance Company: PIE, St. Paul, Medical Protective Co., Signet Star
Type of Action: Medical malpractice

Failure to diagnose malrotation of midgut resulting in volvulus and subsequent removal of the majority of his small intestine.

Damages: Loss of majority of small intestine requiring daily IV feedings.

Plaintiff's Experts: J. Alex Haller, M.D.
Jay S. Thompson, M.D.
John F. Burke, Ph.D.
Robert Ancell, Ph.D.

Defendants' Experts: Robert Klein, M.D.
Kevin Rivers, Pharm.D.
David Grischkan, M.D.
H. Biemann Othersen, M.D.
Stanley Hamilton, M.D.
John Boyle, M.D.
Donald Fry, M.D.
David Stringer, B.Sc.
Robert Boltuch, M.D.
Avram Pearlstein, M.D.

Settlement: $6,275,000.00

Andexler v. Amato
Court: Summit County Common Pleas
Judgment: September, 1994
Plaintiff's Counsel: David M. Paris
Nurenberg, Plevin, Heller & McCarthy Co., L.P.A.
Defendant's Counsel: Jeffrey Lindenberger
Insurance Company: Nationwide
Type of Action: Auto - Sideswipe

Damages: Lumbar strain, partial tear rotator cuff.

Plaintiff's Expert: Dr. Robert Zaas

Defendant's Expert: Dr. Yassine

Judgment: $91,000.00

Sanders v. Motorist Mutual Ins. Co.
Court: Cuyahoga County Common Pleas
Judgment: November, 1994
Plaintiff's Counsel: David M. Paris
Nurenberg, Plevin, Heller & McCarthy Co., L.P.A.
Defendant's Counsel: Joseph Pappalardo
Insurance Company: Motorist Mutual Ins. Co.
Type of Action: Auto

Passenger in auto that lost control.

Damages: Compression fracture L3.

Plaintiff's Expert: Dr. Robert Zaas

Defendant's Expert: Dr. Richard Kaufman

Judgment: **$118,000.00**

Jim's Steakhouse v. Citv of Cleveland
Judgment: November, 1994
Plaintiff's Counsel: Christopher M. DeVito and Michael Schroeder
Defendant's Counsel: Pamela Walker
Insurance Company: Self
Type of Action: Political subdivision - negligence, nuisance, taking

City of Cleveland negligently failed to timely repair the Eagle Avenue lift bridge for six and one-half years (May of **1987** through **1993).** Internal documents disclosed that it was planned to be reopened by October, 1988.

Damages: Loss of business revenues, loss of salary, loss of rent, loss of investment.

Plaintiff's Expert: McCurdy - damages

Defendant's Expert: None

Judgment: $483,000.00

Offer: $ 3,000.00 Demand: $600,000.00

Fawn Twiss v. Weatherfield Township
Court: Trumbull County Common Pleas Court
Settlement: October, 1994
Plaintiff's Counsel: David J. Guidubaldi
Sindell, Lowe & Guidubaldi
Defendant's Counsel: Thomas Wilson
Comstock, Springer & Wilson
Insurance Company: Crawford & Company
Type of Action: Road Defect

Defective township road caused driver to lose control at curve and hit a tree resulting in head injuries to passenger.

Damages: Traumatic brain damage.

Plaintiff's Experts: Hank Lipian (Accident Reconstructionist)
Howard Tucker, M.D. (Neurologist)
Lawrence Melamed (Neuropsychologist)

Settlement: $1,000,000.00 **($750,000.00** from Township and **$250,000.00** from driver of car)

Robberts v. Children's Hosuital. et al.
Court: Franklin County Common Pleas
Settlement: December, **1994**
Plaintiff's Counsel: Keith E. Spero and Scott A. Spero
Spero & Rosenfield Co., L.P.A.
Defendants' Counsel: W.C. Curley and Daniel Wiles
Wiles, Boucher, Van Buren & Boyle
Insurance Company: Buckeye Continental and Aetna
Type of Action: Medical malpractice

As an infant, hospital and various pediatricians failed to realize Plaintiff was born with defective ureters. Eventually they diagnosed bilateral vesicouretal reflux but failed to treat until she was *8* years old. Then she had surgery but the damage was done. Parents failed to sue and never told Plaintiff what happened until she was 18 years old.

Damages: Permanently damaged kidneys resulting in chronic renal failure and permanent renal hypertension that will probably worsen and require dialysis in the next 15 years or so.

Plaintiff's Experts: Jack S. Elder, M.D. (RB&C Hospital)
Hal B. Vorse, M.D. (Oklahoma City Clinic)

Defendants' Experts: Paul Volkman, M.D. (Chicago IL)
and *3* defendant pediatricians including Dean of OSU Medical School in **1974** when negligence occurred.

Verdict: **$1,200,000.00** Settlement: **$1,150,000.00**

Offer: $ **650,000.00** Demand: **$1,500,000.00**

Anonymous V. Safeco Insurance
Award: December, 1994
Plaintiff's Counsel: John G. Lancione
Spangenberg, Shibley, Traci, Lancione & Liber
Defendant's Counsel: Robert Quandt
Insurance Company: Safeco Insurance
Type of Action: Uninsured Motorist

Tortfeasor cut in front of Plaintiff causing collision.

Damages: Closed head injury causing some cognitive dysfunction.

Plaintiff's Experts: Robert Daroff, M.D.
Jill Winegardner, Ph.D.

Arbitration Award: Unanimous $780,000.00 award for Plaintiff.

Williams v. Waller, et al.
Court: Cuyahoga County Common Pleas
Judgment: December, **1994**
Plaintiff's Counsel: William T. "Bud" Doyle
Defendants' Counsel: Carl Anderson
Type of Action: Business Fraud, Conversion, Defamation

Plaintiff removed from position in company he owned 50% interest. Defendant converted profit and Plaintiff's personal property to his own. Defendant sent defamatory letter to business associates in Greater Cleveland area.

Plaintiff's Expert: Trammel and Associates
Defendants' Expert: Liwandowski Zalick & Company

Judgment: $888,349.00

Compensatory: **$596,000.00** Punitive: **$250,000.00**
Attorney's Fees: **$42,349.00**

Shaver V. Zepp
Settlement: January **4, 1995**
Plaintiff's Counsel: David W. Goldense and Edward Molnar
Defendant's Counsel: Matt Moriarty
Insurance Company: PIE
Type of Action: Medical malpractice

Defendant ophthalmologist failed to order diagnostic studies (ultrasound) or consultations to identify source of hemorrhage following cataract repair and lens implant.

Damages: Loss of vision (right eye).

Plaintiff's Expert: Dr. Robert Tomsak (Mt. Sinai)
Defendant's Expert: None

Settlement: $300,000.00