Cleveland Academy of Trial Attorneys

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CLEVELAND ACADEMY OF TRIAL ATTORNEYS APRIL, 1996 NEWSLETTER

EDITORS: DAVID PARIS, ESQ./PAUL V WOLF, ESQ

PRESIDENT'S COLUMN

A long winter of discontent may, at last, be behind us. The Tribe has already been snowed out of one game, Masters weekend approaches and one wonders if even the Wizards of Augusta can get the azaleas to bloom on cue.

Our spring schedule includes an address by Judge Burnside on April 23rd reviewing recent changes in civil litigation following Senate Bill 2 (not SB 20). Two days later there will be a debate in the City Club, featuring Dale Perdue, the recently elected President of the Ohio Academy of Trial Lawyers. Dale will debate Roger Geiger, the Executive Director of the National Federation of Independent Business, on the merits of currently pending legislation and the tort reform milieu. Lunch commences at noon with the debate from 12:30 to 1:30 p.m. Tickets for the luncheon program are $15.00 for non-members and $12.00 for members of the City Club. I encourage you to attend and to do so, you only need to call Jim Foster at the City Club, 621-0082, or Sheldon Braverman at 781-1700 to make your reservations.

Finally, Dean Wyman of the Federal Bar Association is the co-chair of the bankruptcy loss seminar which will be held on May 24, 1996, and he has prepared a flyer announcing his seminar, again featuring the omnipresent Judge Burnside, €or their spring program.

At our recent officers/trustees meeting, the selection of Robert C. Corn, M.D. was made by voice vote acclamation as our "Doctor of the Month". Please submit deposition transcripts, trial testimony and medical reports from your current files on Dr.

Corn. Please make sure to complete the expert/brief bank summary page, provided herewith, so that we can develop an index for all future submissions. Make your submissions directly to Rick Alkire's office or to me at your earliest convenience.

Our annual Installation Dinner, aka, the coronation of Bill Hawal, is Friday June 7, 1996, at the Ritz Carlton. Formal announcements will follow.

Go Tribe!

Very truly yours,

David W. Goldense

THE FEDERAL BAR ASSOCIATION

Presents:

BANKRUPTCY FOR THE GENERAL PRACTITIONER

MAY 24, 1996
Sheraton City Centre Hotel
777 St. Clair Avenue, N.E.
Cleveland, Ohio

Program approved for 5.0 CLE hours

Co-Chairs:

Julie E. Rabin, Esq.
Rabin & Rabin Co., L.P.A

Dean Wyman, Esq

9:00 - 9:45 a.m.
Bankruptcy/Domestic Relations
Roger Kleinman
Brian Bash

10:15 - 10:35 a.m.
Trends
Beth A. Ferguson

10:45 - 11:30 a.m.
Chapter 7
David O. Simon

9:45 - 10:15 a.m.
State Court Issues
The Honorable Janet R. Burnside
Stephen D. Hobt

10:35 - 10:45 a.m. Break

11:30 a.m. - 12:15 p.m.
Current Developments and Perspectives
The Honorable James H. Williams, Chief Bankruptcy Judge
The Honorable Randolph Baxter, Bankruptcy Judge

12:15 - 1:30 p.m Lunch -- Speaker to be Announced

1:30 - 2:15 p.m.
Tax Issues
Donza Poole
Anne P. Vilagy

3:15 - 3:30 p.m. Break

2:15 - 3:15 p.m.
Chapter 13
Kevin Santa
Julie E. Rabin

3:30 - 4:30 p.m.
Chapter 11
M. Colette Gibbons
Mary Whitmer

REGISTRATION FORM AND INFORMATION ON BACK

For Additional Information Call:
Dean P. Wyman, 522-7800 or Julie Rabin, 771-8084

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FEDERAL PREEMPTION

Klein v. Biscup, D.O., et al., Case Nos. 68615 and 68659 (Cuy. Cty., February 15, 1996). For Plaintiff: Thomas G. Kelley and For Defendant Biscup: Janice L. Small, Joan A. Ford and Douglas J. Leek; For Defendant AcroMed Corporation: Katherine W. Smith, Mark Herman and Richard I. Werder. Opinion by: Terrence O'Donnell. Patricia Blackmon and Diane Karpinski concur.

Defendant Biscup performed a lumbar spinal fusion upon plaintiff. In so doing, Defendant Biscup used bone plates and bone screws which were manufactured by Defendant AcroMed. AcroMed had twice applied with the Food and Drug Administration seeking permission to market its bone plates and bone screws as a spinal implant under the FDA's pre-market notification procedures. The FDA rejected both applications stating that the device was not substantially equivalent to any spinal implant on the market before 1976, AcroMed then filed a third application with the FDA This time AcroMed sought permission to market the devices for use in long and flat bones. The FDA approved this third application. Defendant Biscup proposed, however, to utilize the devices in plaintiff's spine rather than in her long or flat bones. Defendant Biscup did not inform the plaintiff of his intended use of the devices. However, plaintiff did sign a consent form acknowledging that Biscup had informed her of the risks involved in the surgery and had answered all of her questions. The plaintiff subsequent to the surgery was diagnosed as having a fracture of her L-5 vertebra which required further surgery. During this second surgery Biscup removed the bone plates and screws used in the first surgery and then implanted new AcroMed devices. This second surgery attempted to fuse from L-1 to S-1 levels of the spine. Plaintiff filed suit against both Biscup and AcroMed. Plaintiff alleged a count sounding in informed consent against Biscup. Plaintiff's claims against AcroMed were for breach of implied warranty, defective product and fraud. The trial court granted summary judgment in favor of AcroMed holding that all claims against that particular defendant were barred by the doctrine of Federal preemption. Moreover, the trial court granted partial summary judgment in favor of Biscup on the issue of informed consent. The

negligence claims were tried to a jury which returned a verdict in favor of Biscup. The Court of Appeals held that legal actions brought pursuant to state law constitute state-imposed requirements for purposes of the 1976 Medical Device Amendments of the Food, Drug and Cosmetics Act of 1938. Accordingly, since 21 U.S.C. Section 360(k) provides that no state or political subdivision of the state may establish or continue in effect with respect to a device intended for human use any requirement which is different from, or in addition to any requirement imposed by the Federal Act, the Court of Appeals held that the state law claims for product liability and fraud against AcroMed were preempted by the federal law. Furthermore, the Court of Appeals held that Dr. Biscup did not need to inform the plaintiff of his proposed use of the devices and the FDA status of the devices. It was sufficient that Dr. Biscup informed the plaintiff of the material risks and dangers inherently and potentially involved with respect to the surgery.

UNDERINSURED MOTORISTS COVERAGE

Wilson v. Allstate Insurance Company, Case No. 68982 (Cuy. Cty., January 18, 1996) - For Plaintiff: Winston Grays and For Defendant: Marilyn J. Singer. Opinion By: John T. Patton. Terrence O'Donnell and Timothy McMonagle concur.

Plaintiff sustained serious injuries in an automobile accident. In April of 1993 the tortfeasor's insurance carrier, Colonial Insurance Company of California, offered to settle for the $100,000.00 policy limits. Plaintiff immediately contacted Allstate, its underinsurance carrier, seeking approval of the settlement and requesting that Allstate waive its right of subrogation for medical expenses paid by them on plaintiff's behalf. On April 7, 1993, Allstate, by way of letter, stated that it would waive its rights of subrogation for collection of medical payments with respect to the accident involving plaintiff and tortfeasor. In May of 1993, plaintiff settled with tortfeasor for the $100,000 policy limit. In effectuating the settlement, plaintiff executed a release in favor of the

limit. In effectuating the settlement, plaintiff executed a release in favor of the tortfeasor and his insured, Colonial. On October 22, 1993, plaintiff made an underinsured motorist claim against Allstate alleging that the value of her injuries exceeded the $100,000 policy limit of the tortfeasor. Allstate refused underinsured coverage claiming that plaintiff did not follow the insurance contract procedures and that all rights of recovery against the tortfeasor were not maintained and preserved for Allstate's benefit. Plaintiff filed suit against Allstate. Allstate filed a motion for summary judgment which was granted by the trial court. The trial court did not specify whether its grant of summary judgment was based upon the alleged destruction of Allstate's subrogation right or because the $50,000 single limit contained in the underinsured policy would have allowed Allstate to a set-off of the entire amount received from the tortfeasor. The Court of Appeals affirmed the trial court's grant of Summary Judgment holding that plaintiff's action denied Allstate any rights it had against the tortfeasor in contravention of the underinsured motorist provision. The Court of Appeals did, however, rule that the set-off provisions now contained in Ohio Revised Code Section 3937.18 were not retroactive so as to defeat the effect of Savoie v. Grange Mutual Insurance Company. The Court, instead, reaffirmed its decision in Finneran v. Bestor, (November 11, 1995), Cuy. App. Case **No.** 68774, unreported, wherein it was held that cases which have occurred before October 20, 1994, the effective date of R.C. 3937.18, must apply Savoie.[1]

[1]Interestingly, there is very little discussion in the opinion as to Allstate's failure to reply to plaintiff's letter of early April, 1993. Specifically, there is no discussion as to the issue of whether the passage of time between plaintiff's early April request and the final settlement on or about May 18, 1993, was sufficient so that Allstate's withholding of consent could be considered unreasonable under the Ohio Supreme Court's analysis in McDonald v. Republic-Franklin Insurance Company (1989), 45 Oh. St.3d 27.

BENEFITS

Hydel v. Cincinnati Insurance Company, Case No. 68552, (Cuy. Cty., January **11,** 1996). For Plaintiff: Craig Bashein and Anthony **P.** Soughan, and For Defendant: John F. Gannon. Opinion by Diane Karpinski. Sara J. Harper and David T. Matia concur.

Plaintiff's Father was killed in a motor vehicle accident caused by the negligence of the tortfeasor. A wrongful death action was filed. The Probate Court approved a settlement of the wrongful death action and the administrator executed a general release on behalf of decedent's beneficiaries and the death case was dismissed with prejudice. The proceeds of the settlement were distributed to decedent's surviving spouse after payment of attorneys fees and expenses. Plaintiff made a claim under his own underinsured motorist policy but Cincinnati Insurance Company denied the claim, alleging that insureds are not entitled to recover underinsured motorists benefits for the wrongful death of a parent who does not reside in the same household with the insured because the policy expressly excludes family members not living in the same household. Cincinnati further argued that even if the insureds were entitled to recover under these circumstances, recovery is barred when the wrongful death case arising out of the death of the parent is settled and dismissed. It was undisputed that plaintiff did not reside in the same household with his Father. The Court of Appeals held that inasmuch as Ohio Revised Code Section 3937.18 did not restrict its application to only those family members who reside in the household, a policy of uninsured motorists coverage could not so restrict its coverage. The Court of Appeals analyzed the tests set forth in State Farm v. Alexander and Martin v. Midwestern Group Insurance and found (1) that the plaintiff was an insured under a policy which provided underinsured motorists coverage; (2) the plaintiff was injured by an underinsured motorist; and (3) a wrongful death claim is recognized by Ohio tort law. The Court of Appeals did not decide to follow its earlier decisions in Visocky v. Farmers Insurance of Columbus (1994), 98 Θ App. 3d 118 and Tavzel v. Aetna Life and Casualty Company (June 16, 1988), Cuy. App. Case No. 53931, unreported, because

those decisions had been based in part upon Hedrick v. Motorists Mutual Insurance Company (1986), 22 Oh. St.3d 42, which was overruled in Martin v. Midwestern Group Insurance (1994) 70 Oh.St.3d 478. Instead, the Court of Appeals relied upon the case of Dudash v. State Farm Mutual Automobile Insurance Company (1994), 96 Oh App.3d 348, which in turn had relied upon the Ohio Supreme Court case of Sexton v. State Farm Mutual Insurance Company (1982), 69 Oh. St.2d 431. Moreover, the Court held that the plaintiff was not estopped by the wrongful death settlement from asserting his rights in the declaratory judgment action arising under his own automobile insurance policy because the administrator lacked standing to assert Plaintiff's contract rights in the wrongful death action. Moreover, the Court of Appeals further reasoned that since plaintiff notified Cincinnati of the underinsured claim four months prior to the settlement of the wrongful death claim, Cincinnati had sufficient time as a matter of law to protect any subrogation right it may have had.

UNINSURED MOTORISTS COVERAGE

Kocel v. Farmers Insurance of Columbus, Inc., Case No. 275360, (Cuy. Cty., March 7, 1996). For Plaintiff: David W. Goldense and For Defendant: D. John Travis and Gary L. Nickolson. Opinion by David T. Matia. Terrence O'Donnell and John T. Patton concur.

On October 26, 1993, Mark Kocel was killed by a vehicle driven by an uninsured motorist. Mark Kocel, the decedent, is the brother of the Plaintiff, Stanley Kocel. Plaintiff did not live in the same household as his brother. Plaintiff made claim on his own personal automobile insurance policy with Farmers Insurance for uninsured motorist benefits. Farmers refused to extend uninsured motorist coverage. On August 15, 1994, plaintiff filed his complaint for declaratory judgment, breach of contract and bad faith. Defendant answered the Complaint and both parties filed reciprocal motions for summary judgment. On April 25, 1995, the trial court granted Defendant Farmers Insurance Company's **motion** for summary **judgment** and **denied** plaintiff's similar motion. The Court of Appeals affirmed.

The Court acknowledged that it had recently held that an insured was legally entitled to recover underinsurance benefits from their automobile insurance policy for damages suffered by reason of a death of an uninsured under the wrongful death statute. Hydel v. Cincinnati Insurance Company, supra. However, Judge Matia stated, 'this court's interpretation of R.C. 3937.18(A) has since been disspelled."[2] The court further noted that Hydel was decided at the trial court level before October 19, 1994, the effective date of Senate Bill 20. However, the Court of Appeals continued, the present case was decided at the trial court level after the effective date of Senate Bill 20, October 19, 1994. The Court of Appeals concluded therefore that Senate Bill 20 was applicable so as to bar plaintiff from accessing his underinsured motorists coverage. Hence, this panel of the Court of Appeals found Senate Bill 20, now R.C. 3937.18(A) to be retroactive despite its own earlier ruling in Finneran, Wilson and Hydel. Moreover, the key date appears to be that upon which the trial court renders its decision upon a motion for summary judgment and not the date of the injury or even the date of the filing of the complaint, both of which, in the present case, predated the effective date of Senate Bill 20.

PRODUCTS LIABILITY

Colboch v. UniRoyal Tire Company, Case No. 68017 (Cuy. Cty., December 20, 1995). For Plaintiff: John D. Liber, Justin F. Madden and James A. Marx and For Defendant: Jeffrey J. Casto, Amie L. Bruggeman and Randall J. Moore. Opinion by Diane Karpinski. David T. Matia and Anne Dyke concur.

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[2]Kocel was decided 56 days after Hydel."

Plaintiff was employed as a mechanic at a service garage. Plaintiff had over 30 years of experience mounting tires as a mechanic. While plaintiff was attempting to help a younger mechanic mount a tire upon a rim, the tire suddenly exploded causing plaintiff serious injury. The trial court refused to instruct the jury on the consumer expectation test which, along with the risk-benefit test, is utilized to determine whether a product is unreasonably dangerous in its design or manufacture. Additionally, the trial court directed a verdict in favor of the defendant on plaintiff's manufacturing defect claim. The jury then returned a verdict in favor of the defendant on the plaintiff's claim for design defect. The plaintiff appealed and the defendant filed a cross appeal assigning as error the trial court's refusal to instruct the jury on assumption of the risk. The Court of Appeals held that it was reversible error for the trial court to instruct only upon the risk-benefit test and refuse to give the instruction relating to the consumer expectation test. The consumer expectation test permits a jury to find a product unreasonably dangerous and therefore defective if the product is more dangerous than an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner. The court further held that the focus of the consumer expectation test is on whether the hazard is unexpected, not whether the consumer is ordinary. Moreover, the Court of Appeals interpreted the case of State Farm Fire and Casualty Company v. Chrysler Corporation (1988), 37 Oh. St.3d 1, to permit the issue of manufacturing defect to go to the jury where the plaintiff has adduced only circumstantial evidence of manufacturing defect. Indeed, the Court of Appeals held that the unavailability of direct evidence is not a prerequisite to reliance upon circumstantial evidence, Finally, the Court of Appeals, relying upon Cremeans v. Wilmar Henderson Manufacturing (1991), 57 Ohio St.3d 145, held that the defense of assumption of the risk will not be permitted as a defense when the plaintiff is injured while performing normal job activities at his place of employment.

SERVICE OF PROCESS - RELIEF FROM JUDGMENT

Hrabak v. Collins, Case No. 68913 (Cuy. Cty., December 14, 1995). For Plaintiff: Richard L. Dempsey, Joel Levin and Sandra J. Rosenthal, and For Defendant: Judson J. Hawkins. Opinion by Terrence O'Donnell. John Patton and Anne Dyke concur.

The plaintiffs were injured in an automobile accident on December 22, 1990. Plaintiffs filed suit against the defendant on September 18, 1992. However, service was not obtained and the trial court dismissed the case without prejudice on April 14, 1993. The matter was refiled on September 1, 1993, but again plaintiffs failed to obtain certified mail service on the defendant. Plaintiffs attempted many methods to obtain a current or correct address for the defendant. These methods included asking defendant's insurance carrier for a current address. However, defense counsel refused to give the address and stated only that Collins lived in Cuyahoga County. Plaintiff then served defendant pursuant to R.C. 2703.20 by perfecting service on the Secretary of State and also served defendant by publication in the *Daily Legal News*. Plaintiff then filed a motion for default judgment on June 7, 1994. Plaintiff did not send a copy of this motion to the insurance carrier or to defense counsel. On July 14, 1994, the trial court entered default judgment in the amount of $125,000. On October 11, 1994, counsel for the defendant filed a motion to vacate the judgment. The trial court denied the motion on December 13, 1994. The Court of Appeals held that service in accordance with R.C. 2703.20 and by publication in the *Daily Legal News* was valid under the circumstances of the case because there was sufficient evidence that defendant concealed her whereabouts. Moreover service in the *Daily Legal News* was proper because the Court of Appeals found that publication to be a newspaper of "general circulation." Finally, the Court of Appeals ruled that the plaintiff was not required to serve a copy of the motion for default judgment upon defense counsel because defendant had not appeared in the action. Important to this analysis was the Court's rationale that private communication between counsel that is not part of the record of the case is of no legal force or effect and cannot

constitute an 'appearance" for purposes of Ohio Civil Rule 55(A).

UNINSURED MOTORISTS COVERAGE - CONFLICT OF LAWS

Saddler v. United Services Automobile Association, Case No. 68603 (Cuy. Cty., November 16, 1995). For Plaintiff: Mark **L.** Wakefield and For Defendant: Terrence J. Kenneally. Opinion by Leo M. Spellacy. James **M.** Porter and Joseph **J.** Nahra concur.

Plaintiff is a resident of Georgia who entered into an insurance contract with defendant in Georgia. This policy provided for uninsured motorists coverage. The uninsured motorists coverage contained an exclusion for non-resident family members. Plaintiff's Father was a resident of Ohio who was killed in Ohio when struck by an uninsured motorist. A suit for declaratory judgment was filed in Ohio seeking a determination of whether the defendant owed uninsured motorists coverage to the plaintiff. The trial court found that Ohio Paw governed the action inasmuch as the accident occurred in Ohio and that plaintiff was entitled to access her uninsured motorist coverage. The Court of Appeals reversed holding that, since the issue of whether plaintiff had a right to access her uninsured motorist coverage is an action that sounds in contract, Georgia law applied to the case. The Court of Appeals noted that the plaintiff resided in Georgia and the contract was made in Georgia. Since Georgia law permitted the exclusion for non-resident family members, the judgment was reversed.

UNINSURED MOTORISTS COVERAGE

Keider v. Federal Insurance Company, Case No. 68196 (Cuy. Cty., November 9, 1995). For Plaintiff: Bradford D. Zelasko, and For Defendant: D. John Travis. Opinion by Diane Karpinski. Leo Spellacy and Patricia Blackmon concur.

Plaintiff was injured and plaintiff's decedent was killed in an automobile accident which occurred as a result of the negligence of the tortfeasor. The accident occurred

while plaintiff and her decedent were occupying a rental vehicle in Boulder City, Nevada. Plaintiff attempted to access underinsured motorist coverage issued under the business automobile liability insurance policy of the decedent's corporate employer, Origin Technology in Business, Inc.

Reciprocal motions for summary judgment were filed. The trial court granted defendant's motion for summary judgment and overruled plaintiff's motion. Plaintiffs argue that the term "insured" was ambiguous as defined in the policy. Plaintiff pointed out that the corporation itself was the named insured. The policy defined "insured" as follows: B) who is an insured: 1) you; 2) if you are an individual, any "family member"; 3) anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The trial court distinguished King v. Nationwide Insurance Company, (1988) **35** Oh. St.3d 208, because the relevant policy in King was a personal insurance policy that was issued to a corporation and which contained references to relatives and other personal language which afforded coverage to employees at the corporation. Moreover, as it related to plaintiff's argument that the second definition of insured was ambiguous because corporations cannot have any family members, the Court of Appeals responded that the second definition applied only if the named insured was an individual. The Court of Appeals further stated that corporations can be individuals where the corporation is a sole proprietorship. Finally, plaintiff argued that the third definition of "insured" was in contravention of R.C. 3937.18 because it impermissibly restricted coverage to individuals who were occupying automobiles. This, the plaintiff argued, impermissibly shifted the protection afforded by the uninsured coverage to the automobile rather than to the person. The Court of Appeals held that as interpreted in Martin v. Midwestern Group Insurance Company, (1994), 70 Ohio St.3d 478, 481, the statute mandates coverage if (1) the claimant is an insured under a policy which provides uninsured motorist coverage; (2) the claimant was injured by an uninsured motorist; and **(3)** the claim is recognized by Ohio tort law. Since, according to the Court of Appeals' reasoning, the plaintiff did not qualify as an insured under the policy, she could not avail herself of the argument that the third definition of "insured" under the policy impermissibly restricted coverage mandated by the statute.

VERDICTS AND SETTLEMENTS

Barker v. Lee
Court: Lorain County Common Pleas Court Case No. 93 CV 111169
Settlement: May, 1995
Plaintiffs Counsel: Michael F. Becker
Defendant's Counsel: Steve Walters and John Jeffers
Insurance Company: Not Listed
Type of Action: Medical Malpractice

Inappropriate management of shoulder dystocia at birth.

Damages: Erb's Palsy
Plaintiffs Experts: Stuart Edelberg, Baltimore, MD - ob/gyn; Rod Durgin of Toledo, Ohio - Vocational Counselor
Defendant's Experts: None Listed
Settlement: Judgment: $800,000.00; (plaintiff had settled with hospital prior to trial for $50,000.00).

Estate of C. Smith v. Paul Venizelos. M.D.
Court: Cuyahoga County Common Pleas Court Case No. 247061
Settlement: June, 1995
Plaintiffs Counsel: Michael F. Becker
Defendant's Counsel: William Bonezzi
Insurance Company: P.I.E.
Type of Action: Medical Malpractice

The decedent, age 56, who was immunocompromised from long term steroid use, contracted fungal pneumonia. Fungal pneumonia not timely diagnosed and treated resulting in fungal septicemia, multi-system organ failure and death.

Damages: Wrongful Death
Plaintiff's Experts: John Godleski, M.D. (Pulmonary Pathologist) of Boston, MA
Defendant's Experts: None Listed
Settlement: $750,000.00

Confidential
Court: Cuyahoga County Common Pleas
Settlement: June, 1995
Plaintiffs Counsel: Michael F. Becker and George Loucas
Defendant's Counsel: Jeffrey Van Wagner
Insurance Company: Confidential
Type of Action: Medical Malpractice

Paraplegia - secondary to failure to timely diagnose a vertebral fracture that was sustained in an automobile accident.

Damages: Paraplegia
Plaintiffs Experts: Rodney Bluestone, Beverly Hills, CA - Expert in Ankylosing Spondylitis
Defendant's Experts: None Listed
Settlement: $3,200,000.00

Confidential
Court: Cuyahoga County Common Pleas
Settlement: August, 1995
Plaintiffs Counsel: Howard D. Mishkind
Defendant's Counsel: Doug Pfifner
Insurance Company: FHICO
Type of Action: Podiatric Malpractice

Podiatric malpractice case involving inappropriate selection of surgical procedure and substandard surgical procedure involving excessive shortening of the first metatarsal due to improperly performed osteotomy by defendant podiatrist.

Damages: Malunion of the first metatarsal of plaintiffs right foot.
Plaintiffs Experts: Dr. Michael Downey, Dr. Dominic Calise
Defendant's Experts: Dr. Michael Forman
Settlement: $75,000.00

Jane Doe (Tenant) v. Smith Realty Company (Landlord)
Court: Cuyahoga County Common Pleas
Settlement: September, 1995
Plaintiffs Counsel: Michael B. Pasternak
Defendant's Counsel: Not Listed
Insurance Company: CNA
Type of Action: Slip and fall

Plaintiff fell on ice.

Damages: Right bimalleolar ankle fracture with an open reduction internal fixation and subsequent removal of the internal fixation.

Plaintiffs Experts: Laurence Bilfield, M.D. (orthopedic surgeon)
Defendant's Experts: Not Listed
Settlement: $122,500.00

Confidential
Court: Cuyahoga County Common Pleas Court
Settlement: September, 1995
Plaintiffs Counsel: Michael F. Becker
Defendant's Counsel: James Malone
Insurance Company: Confidential
Type of Action: Medical Malpractice

Mismanagement of anticoagulation therapy post coronary artery stent placement resulting in stroke, resulting in gait instability after long recovery.

Damages: Not Stated
Plaintiffs Experts: David **A.** Tice, N.Y., N.Y., (thoracic surgeon)
Defendant's Experts: Gary Roubin, M.D., Birmingham, Alabama; Christopher White, M.D., Scotland, UK.
Settlement: $2,000,000.00 plus assumption of Medicare lien, approx. $300,000.

Heredos v. Aponte
Court: Cuyahoga County Common Pleas Court No. 259506
Settlement: October, 1995
Plaintiffs Counsel: Michael Becker and Larry Klein
Defendant's Counsel: Joseph Farchione
Insurance Company: P.I.E.
Type of Action: Medical Malpractice

Failure to timely diagnose lung cancer, included a survivorship claim **as** well.

Damages: Wrongful Death.
Plaintiffs Experts: Eugene Cooper, Great Neck, NY (Family Physician)
Defendant's Experts: None Listed
Settlement: $750,000.00

Richard Brock v. Assured Auto Rental Co.
Court: Cuyahoga County Common Pleas Court
Settlement: October, 1995
Plaintiffs Counsel: Howard D. Mishkind
Defendant's Counsel: None Listed
Insurance Company: Scottsdale Insurance Company
Type of Action: Auto

Plaintiff was a pedestrian walking in a crosswalk when he was struck by a vehicle operated by defendant Assured Auto Rental Co.

Damages: Comminuted fracture of the tibia and fibula.
Plaintiffs Experts: Dr. Michael Moore (ortho surgeon)
Defendant's Experts: Not Listed
Settlement: $175,000.00

Spremulli v. Bassel Safi, M.D., et al
Court: Lorain County Common Pleas Court Case No. 93 CV 111121
Settlement: October, 1995
Plaintiffs Counsel: Michael F. Becker
Defendant's Counsel: Pat Murphy and Leslie Spisak
Insurance Company: P.I.E. and Medical Protective
Type of Action: Medical Malpractice

Mismanagement of groin abscess lead to 12 plastic surgeries and permanent loss of femoral nerve and permanent loss of function of left leg resulting in permanent disability.

Damages: As Above.
Plaintiffs Experts: Gerhard Mundinger (vascular surgery); Alan Feit (cardiology)
Defendant's Experts: William Bauman (cardiology); Richard Blinkhorn (infectious disease)
Settlement: $1,750,000.00

Staven v. Orthopedic Associates of Youngstown, et al
Court: U.S. District Court, Case No. 4:92-CV-2772
Settlement: October, 1995
Plaintiffs Counsel: Robert F. Linton, Jr., LINTON & HIRSHMAN
Defendant's Counsel: James Blomstrom
Insurance Company: PICO
Type of Action: Medical Malpractice

Orthopedic surgeon installed an inadequately sized surgical plate to repair a humeral fracture. **A** subsequent surgeon removed the plate and installed a larger plate, which was later found to be over the radial nerve. Defendants denied liability and claimed any damage to the radial nerve was caused by the second surgeon. The jury found substandard care that resulted in a single, indivisible injury. Consequently, the original surgeon was responsible for damages caused by his treatment as well as any damages caused by the subsequent surgeon.

Damages: Non-union of humeral fracture; radial nerve palsy.
Plaintiffs Experts: Dr. Thomas W. Jackson, Toledo, Ohio (orthopedic surgeon and upper extremity specialist); Dr. William B. Wolf, III., Rockville, MD (subsequent treating orthopedic surgeon); Dr. William Bieber, Bethesda, MD (subsequent treating orthopedic surgeon); Dr. Lawrence Einbinder, Bethesda, MD (subsequent treating neurologist); Dr. Sheldon Artz, Mayfield Hts. (plastic surgeon); George W. Cyphers, M.Ed., L.P.C. CKC, North Olmsted, Ohio (rehabilitation counselor and vocational expert); Richard Raymond, Ph.D., Kent, Ohio (professor of economics).
Defendant's Experts: Dr. Michael L. Pryce, Kent, Ohio (orthopaedics); Dr. Carl Ansevin, Youngstown, Ohio.
Settlement: Verdict: $150,000. The case settled for $175,000.00, following the verdict, while plaintiffs motions for prejudgment interest and motion to tax costs were still pending. The defendant doctor refused to consent to any settlement prior to trial.

Settlement: November, 1995
Plaintiff's Counsel: Howard D. Mishkind
Defendant's Counsel: Not Listed
Insurance Company: Self-insured type of action
Type of Action: Wrongful birth of a child with Down Sy

Wrongful birth case claiming the extraordinary costs of r
and above th
g a healthy, norma child. a ov

Damages: 35 yr. old female patient did not receive genetic counseling including amnioce
leading to the birth of a child with Down Syndrome.
Plaintiff's Experts: Dr. Mark Gaier (OB geneticist); Dr. Bonnie Patterson (Ped Dev.
Specialist); Dr. Elizabeth Short (Ped Developmental Psychologist)
Defendant's Experts: Dr. Richard Burkons (OB); Dr. Rita Politzer (Ped Dev Psy); Dr. Ro
Bilenker (Pd Dev Specialist)
Settlement: $375,000.00

Confidential
County:

Settlement: November 19, 1995
Plaintiff's Counsel: Howard D. Mishkind
Defendant's Counsel: None Listed
Insurance Company: PIE
Type of Action: Medical Malpractice

Defendant emergency room physician failed
condition
testicle

Damages: Loss of one testicle
Plaintiff

(Ped. urology) el edicine hart
Defendant's Experts: Dr. Donavin Baumgartner,
Settlement: $125,000.00

Ohlin v. Yakubov. N.D.
Court: Cuyahoga County Common Pleas Court
Settlement: $200,000.00
Plaintiffs Counsel: John A. Lancione
Defendant's Counsel: David Hackman
Insurance Company: P.I.E.
Type of Action: Medical Malpractice

Plaintiff presented to her ophthalmologist with a one week history of blurred vision and flashes of light in her right eye. The ophthalmologist diagnosed a cataract and scheduled the plaintiff for surgery. The plaintiff alleged that defendant failed to perform a fully dilated fundus exam which would have revealed a detached retina. Following the surgery for the cataract the plaintiff had a completely detached retina, and loss of vision.

Damages: Two years of loss of vision in the right eye with improvement to useful vision following three surgeries.
Plaintiffs Experts: Carl Asseff, M.D.
Defendant's Experts: Mark Levin, M.D.
Settlement: $200,000.00.

Confidential
Court: Confidential
Settlement: January, 1996
Plaintiffs Counsel: William S. Jacobson, NURENBERG, PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: Confidential
Insurance Company: Confidential
Type of Action: Medical Malpractice.

Disputed liability case settled for $825,000.00 contingent upon plaintiff's counsel viewing defendant's insurance underwriting file. Defendant's counsel had represented that defendant had 1 million in coverage and that there was no separate corporate policy. This was confirmed by interrogatory answers and certified copy of policy. Investigation subsequent to settlement revealed that the defendant's physician wife, who had not treated plaintiff, had a one million dollar policy adding the corporation as an additional insured. Although policy had an intra-policy anti-aggregation clause, there was no inter-policy anti-stacking clause thus arguably making an additional million in coverage available - case was settled for an additional $540,000.00 thereafter.

Damages: Brain damage.
Plaintiffs Experts: Wilbur Leatherberry (professor at CWRU Law School)
Defendant's Experts: Not Listed
Settlement: $1,360,000.00

Estate of Jane Doe v. Northcoast Imaging Centers. et al
Court: Cuyahoga County Common Pleas
Settlement: January, 1996
Plaintiffs Counsel: Anne L. Kilbane and Harlan M. Gordon, NURENBERG, PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: Matthew Moriarty
Insurance Company: PIE
Type of Action: Medical Malpractice

Failure to timely diagnose lung cancer. Decedent's husband did not seek legal assistance until more than one year after wife learned of condition and, therefore, there was no survivor action claim, only wrongful death.

Damages: Death
Plaintiffs Experts: Clifton Mountain, M.D.; Harry Boltin, M.D.; Kenneth McCarty, M.D.; Stephen Pripstein, M.D.; Martin Lee, M.D.
Defendant's Experts: Leonard Berlin, M.D.; Arthur Davis, M.D.
Settlement: $900,000.00

R. Harris v. OPMG
Court: Cuyahoga County Common Pleas Court No. 278958
Settlement: January, 1996
Plaintiff's Counsel: Michael F. Becker
Defendant's Counsel: Marc Groedel
Insurance Company: Self insured (Kaiser Permanente)
Type of Action: Medical Malpractice

Unnecessary loss of right side of colon due to mismanagement of intussusception

Damages: As Above
Plaintiff's Experts: Stuart Battle, M.D., Laurel, MD (Surgeon)
Defendant's Experts: Not Listed
Settlement: $325,000.00

Kevin Miller, a Minor, et al v. David Montgomery, M.D., et al
Court: Summit County Common Pleas Court
Settlement: January, 1996
Plaintiffs Counsel: John G. Lancione, SPANGENBERG, SHIBLEY, LANCIQNE & LIBER
Defendant's Counsel: James Tuschman
Insurance Company: P.I.E.
Type of Action: Medical Malpractice

Plaintiff had relatively uncomplicated pregnancy until 40 weeks when fetus stopped moving and oligohydramnios discovered. Baby delivered immediately with evidence of brain injury. Six months later developed seizures and diagnosis of intrauterine growth retardation made.

Damages: Static encephalopathy, seizure disorder, developmental delay
Plaintiffs Experts: Dr. Tom Barden, Cincinnati (ob/gyn); Dr. Max Wiznitzer, Cleveland (pediatric neurologist).
Defendant's Experts: Baha M. Sibai, M.D., (ob/gyn/maternal-fetal specialist); Roger Lenke, M.D.(ob/gyn/maternal-fetal specialists); Thomas Gross, M.D. (ob/gyn/maternal-fetal specialists); Michael Johnson, M.D. (pediatric neurologist); Herbert Grossman, M.D. (pediatric neurologist); Patrick Barnes, M.D. (pediatric neurs-radiologist); Geoffrey Altshuler, M.D. (placental pathologist); and Steven Donn, M.D. (neonatologist).
Settlement: $850,000.00

Jane Doe v. ABC Hospital
Court: Cuyahoga County Common Pleas
Settlement: January, 1996
Plaintiffs Counsel: John A. Lancione
Defendant's Counsel: Confidentiality Agreement
Insurance Company: Confidentiality Agreement
Type of Action: Medical Malpractice, Survival and Wrongful Death Claims

The decedent had a screening mammogram in November of 1990, which showed a suspicious abnormality. The defendant surgeon also palpated a mass then performed a fine needle aspiration, true cut needle biopsy and an excisional biopsy on the mass. The decedent returned to the defendant complaining of a painful breast and a lump in the area of the scar from the excisional biopsy. The defendant again performed a fine needle aspiration that was misinterpreted as normal but actually was very atypical. The decedent again returned to the defendant surgeon in February 1992 complaining of pain and a lump in the area of the scar. The defendant ordered a marnmogram which was done in March of 1992 and was misinterpreted as normal, but actually showed a suspicious mass. In May, 1993, the decedent was diagnosed with breast cancer and a 3 x 5 x 6 cm. tumor was removed from her breast and 13 or 15 lymph nodes were positive for cancer.

The plaintiff alleged that the defendant surgeon missed the tumor he intended to excise in December 1990 and should have performed a needle localization of the tumor prior to the attempted excision, thereby causing a 32 month delay in the diagnosis of her cancer

Damages: The decedent died in November, 1995 of metastatic cancer in her liver and spine. Prior to her death, she underwent a modified radical mastectomy with breast reduction followed by radiation therapy and chemotherapy. She was unable to continue to work as a registered nurse due to the metastatic tumor in her spine. §he is survived by her husband and four adult children.
Plaintiffs Experts: Dr. Barry Zicherman (radiologist); Dr. Irene Wapnir (surgeon)
Defendant's Experts: Not Listed
Settlement: $750,000.00

Gregory Pay v. David Yoder
Court: Tuscarawas County Common Pleas
Settlement: January, 1996
Plaintiffs Counsel: John J McCarthy and Jeffrey Leikin, NURENBERG, PLEVIN, HELLER & McCARTHY CO ,L.P.A
Defendant's Counsel: Ralph Dublikar, Esq.
Insurance Company: Motorists Mutual Insurance
Type of Action: Auto

Defendant pulled onto highway without yielding right of way to plaintiffs vehicle.

Damages: Fracture left great toe, fracture of radius and ulna of left arm.
Plaintiffs Experts: Robert Bully, M.D.
Defendant's Experts: None
Settlement: Judgment: $175,000.00; offer $100,000.00.

Thomas Floreske v. Safewav Scaffolding. et al
Court: Cuyahoga County Common Pleas
Settlement: January, 1996
Plaintiffs Counsel: John J. McCarthy and Jeffrey Leikin, NURENBERG, PLEVIN ,HELLER & McCARTHY, CO., L.P.A.
Defendant's Counsel: William Tousley Smith, Gary Johnson, John Cubar
Insurance Company. Not Listed
Type of Action: Construction Accident.

Plaintiff fell from a scaffolding which was constructed without proper safety rails.

Damages: Plaintiff permanently disabled from work due to transverse process fractures L 1-L4 and left hip seroma.
Plaintiffs Experts: Bruce Cohen, M.D.; Michael Binder, M.D.; Daniel Dorfman, M.D.; John Burke, Ph.D.
Defendant's Experts: Richard Kaufman, M.D.
Settlement: $1,250,000.00

Baby Boy, a Minor v. ABC Hospital
Court: Cuyahoga County Common Pleas
Settlement: January, 1996
Plaintiffs Counsel: William J. Novak
Defendant's Counsel: Robert Tucker
Insurance Company: Not Listed
Type of Action: Medical Malpractice

Nurses failed to notify attending physician of decels which lead to a delay in delivery.

Damages: Brain damage, neurologic deficit
Plaintiffs Experts: Michael Baggish, M.D. (ob/gyn); Howard Tucker, M.D. (neurology); Cynthia Kaplan, M.D. (pathology)
Defendant's Experts: Geoffrey Altshuler, M.D. (pathology); Herbert Sandemeir, M.D. (ob/gyn)
Settlement: $2,300.000.00

Confidential - Manufacturing Co. v. Door Manufacturing Co. and Construction Co.
Court: Confidential - Adjacent to Cuyahoga County
Settlement: January, 1996
Plaintiffs Counsel: Joel Levin and John A. Huettner, NURENBERG, PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: Louis **A.** Boettler and Paul D. Eklund
Insurance Company: Chubb; Westfield; Northbrook (Northbrook on subrogation)
Type of Action: Negligence and products' liability for commercial loss.

Fire spread to new section of factory through two fire doors which failed.

Damages: Negligence and products' liability brought for building loss, equipment loss and lost profits in new section.
Plaintiff's Experts: Leighton Sissom, Ph.D., P.E.; Prof. Joe H. Payer; Simon Tamny; Lawrence E. Saulino, C.P.A.; L. Donald Foltz; Frank W. Kennedy; Hugh J. Morgan, C.P.A.
Defendant's Experts: James P. Churchwell; Thomas J. Campbell, C.P.A.; John M. Mertens, PE, CSP, CFI; Fritz Laubach; J. Barry Savage, ASA; Peter F. Wieser, Ph.D.; Ivan M. Nibur, P.E.; George J. Kramerich, Ph.D.
Settlement: $14,250,000.00 from Defendant and $4,800,000.00 from plaintiffs insurance company. ($900,000.00 subrogated).

Orville Dawson, et al v. Yellow Freight Systems, Inc., et al
Court: Summit County Common Pleas
Settlement: January, 1996
Plaintiffs Counsel: Robert F. Linton, Jr., LINTON & HIRSHMAN; David Weimer, RODERICK, MYERS & LINTON
Defendant's Counsel: Lawrence Sutter and Thomas Mannion, REMINGER & REMINGER; Paul Eklund and Timothy Kerwin, DAVIS & YOUNG
Insurance Company: Not Listed
Type of Action: Products Liability/Intentional Tort

Defectively designed grab handle attached to fiberglass sideshield detached as plaintiff was existing his tractor, causing him to fall onto pavement. The tractor was a 1992 model WCA42T manufactured by Volvo GM Heavy Truck Corporation. Three weeks before trial, Volvo stipulated to liability, but disputed the extent of injuries and damages. On the eve of trial, Volvo sought to withdraw its stipulation, claiming that the parts were modified and supplied by another manufacturer. The court refused to allow the stipulation to be withdrawn. Yellow Freight was sued in intentional tort on the grounds that it knew from prior incidents and repairs that the defective design was substantially certain to cause injury. The court overruled Yellow Freight's motion for summary judgment.

Damages: Aggravation of pre-existing, asymptomatic stenosis, impingement at L-4/L-5 nerve; foramenotomy.
Plaintiffs Experts: Simon Tamny (professional engineer); Dr. Kamal Muakkassa (neurosurgeon); Dr. Norman Lefkovitz (neurologist); Dr. Brain Braumiller (psychiatrist); Dr. Susan Dwyer (psychotherapist); Joseph R. Spoonster, M.S. (vocational economist)
Defendant's Experts: Dr. Timothy Newman (occupational medicine); Dr. Donald Mann (neurologist); Jeannette Hart (occupational therapist/physical capacity evaluation); George Cyphers (vocational expert)
Settlement: $535,000.00 ($500,000.00 from Volvo GM Heavy Truck Corporation and $35,000.00 from Yellow Freight)

John Doe v. West Side Hospital, et al
Court: Cuyahoga County Common Pleas
settlement: February, 1996
Plaintiffs Counsel: Jamie R. Lebovitz and Marshall Nurenberg, NURENBERG, PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel Not Listed:
Insurance Company: Not Listed
Type of Action: Medical Malpractice

Failure to timely diagnose and treat ruptured thoracic disc which resulted in cord compression.

Damages: Partial paraplegic (limited motor function lower extremities; loss of shoulder control).
Plaintiffs Experts: Dr. Ronald Bortnick; Dr. Harold Silberman
Defendant's Experts: Not Listed
Settlement: $1,250,000.00

Estate of John Roe v. U.S.Air, et al
Court: Not Filed
Settlement: February, 1996
Plaintiffs Counsel: Jamie R. Lebovitz, NURENBERG, PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: Not Listed
Insurance Company: Not Listed
Type of Action: Aviation; wrongful death.

Crash of U.S.Air flight 427 while manuevering on approach to land at Pittsburgh International Airport.

Damages: Death
Plaintiffs Experts: Dr. James Kenbel, economist.
Defendant's Experts: Not Listed
Settlement: $1,250,000.00

Karen Stuffelbeam. et al v. Dr. Tirri
Court: Medina County Common Pleas
Settlement: March, 1996
Plaintiffs Counsel: Howard D. Mishkind
Defendant's Counsel: William Bonezzi
Insurance Company: PIE
Type of Action: Medical Malpractice

Plaintiff went to defendant obstetrician for routine prenatal carefor the delivery of her first child. Plaintiffs prenatal course was uneventful except for two reported cases of decreased fetal movement leading to NST's which were both reactive. Plaintiff went into labor at 41 and 5/7th weeks and delivered a stillborn male infant. No autopsy was performed.

Plaintiff alleged that defendant should have delivered her child approximately five days earlier and should have increased fetal surveillance post due date. Plaintiff also alleged that defendant failed to diagnose gestational diabetes which should have led to increased fetal surveillance and an earlier delivery. Defendant claimed that fetal surveillance was appropriate based upon 1992 standards and that the cause of death was from an acute cord accident. Defendant also alleged that plaintiff was not at high risk and did not require increased fetal surveillance and that delivery as planned was appropriate. Defendant also alleged that plaintiff delayed in reporting to the hosptial when she went into labor.

Damages: Stillborn birth
Plaintiffs Experts: Dr. Michael Cardwell and Dr. Martin Gimovski
Defendant's Experts: Dr. Stuart Edelberg
Settlement: $290,000.00