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CLEVELAND ACADEMY OF TRIAL ATTORNEYS FEBRUARY, 1996 NEWSLETTER

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

PRESIDENT'S COLUMN

Now that HB 350 is a reality it is imperative that we prepare for the future by maximizing our chances of having the statute held unconstitutional by our courts. OATL has established a Constitutional Challense Committee in an effort to coordinate the attack upon this legislation. The committee will gladly provide a detailed brief articulating the grounds for the unconstitutionality of the various legislative provisions and amicus support if requested. OATL is soliciting the assistance of local trial groups to monitor and report judicial decisions interpreting the new law. This will enhance OATL's ability to disseminate, state-wide, the results of court decisions. Attached is a Case Alert Reporting Form for this purpose.

Probably the fastest way to get the constitutionality of HB 350 squarely before the Ohio Supreme Court is by means of direct certification by a federal court pursuant to Rule XVIII of the Supreme Court Rules of Practice. This process was utilized in Morris v. ***Savoy*** (1991), 61 Ohio St.3d 684 resulting in the prior $200,000 cap on general damages in medical claims to be held unconstitutional. If anyone is aware of any cases pending in federal court which raise any HB 350 ***issues,*** please contact Holly Skinner at the OATL office.

Please remember when contemplating appeals of HB 350 rulings that bad Underlying facts usually result in bad law.

Bernard Friedman Seminar:

This year's Bernard Friedman Seminar will be held on Thursday, February 27, 1997 at the Renaissance Hotel and will feature a series of presentations regarding the more significant aspects of HB 350. A registration form is attached.

CATA Brief Bank and Deposition Repository:

The Academy is seeking volunteers to assist in our continuing effort to complete the computerization of our

brief bank and expert deposition repository. This is an ongoing project which requires the preparation of summaries for computer in-putting. Anyone willing to offer their services please contact Rick Alkire at 621-2300.

Sincerely,

Bill

William Hawal

GOVERNMENTAL IMMUNITY

Graves v. City of East Cleveland, Cuy. Co. App. No. 70675 (January 30, 1997). For Plaintiff-Appellant: Jeffrey P. Posner and For Defendant-Appellee: James H. Hewitt, 111, and Ronda G. Curtis. Per Curiam.

In this case the court held that while R.C. 2744.02(B)(3) provides an exception to the doctrine of immunity where a political subdivision fails to keep its public roads open, in repair and free from nuisance, the exception does not extend to a municipality's failure to provide street lighting. The court reasoned that unlike traffic signals or signage, the provision of streetlighting does not directly affect the flow of ordinary traffic on a roadway.

STATUTE OF LIMITATIONS

Gardner v. Gleydura, Cuy. Co. App. No. 69791 (January 16, 1997). For Plaintiffs-Appellants: Pierre Marlais, Mark J. VanRooy and William J. Day and for Defendant-Appellee: Gerald L. Jeppe. Per Curiam.

The court relied upon two federal decisions in holding that where a defendant's absence from the state of Ohio is due to employment considerations, R.C. 2305.15 no longer tolls the statute of limitations. Rather, the plaintiff must produce evidentiary documentation that defendant has either absconded or concealed himself. The court's rationale was predicated upon the United States Supreme Court's decision in Bendix Auto Lite Corporation v. Midwesco Enterprises, Inc. (1986), 486 U.S. 888, which held that suspending or tolling the running of time against out-of-state entities without a designated agent for service violates the commerce clause of the United States Constitution. In Tesar v. Hallas (N.D. Ohio 1990), 738 F. Supp. 240, it was held that the rationale of Bendix is applicable to individuals insofar as any statute that

interferes with employment also violates the commerce clause.[1]

PRODUCT LIABILITY

Sikorski v. Link Electric and Safety Control Company, Cuy. Co. App. No. 70187 (January 16, 1997). For Plaintiff-Appellant: Michael J. Flament and Daniel J. Ryan and For Defendant-Appellee: Timothy D. Johnson and William H. Baughman, Opinion by James M. Porter. Ann Dyke and Joseph Nahra concur.

Plaintiff suffered the loss of an arm when it got caught in the cycle of a stamping press. Defendant Link Electric had manufactured two presence sensing devices, containing instructions, which were to be utilized in conjunction with the stamping press to guard against the type of injury sustained by plaintiff. Defendant Tool Producers, Inc., plaintiff's employer, had by-passed the second presence sensing device in order to speed up the production process. Plaintiff's expert testified that had the second presence sensing device not been by-passed, the injury would not have occurred. The trial court granted summary judgment in favor of Link Electric and the case proceeded to trial against Tool Producers, Inc., on plaintiff's theories of intentional tort. The jury returned a verdict in the amount of Four Million Dollars ($4,000,000). Plaintiff then appealed the grant of summary judgment in favor of Link Electric. The Court of Appeals held that while Link Electric did have a duty to provide

[1]The decision apparently leaves open the possibility that the running of the statute might be tolled where the defendant is absent from the state for other than employment reasons but has neither absconded nor concealed himself.

adequate instructions in order to assemble the presence sensing devices, that it had no duty to either perform the actual installation or conduct an inspection of the installation completed by Tool Producers, Inc. The Court of Appeals reasoned that no such duty to oversee installation of its product is imposed upon a manufacturer because of the long-standing principle that a manufacturer cannot be held liable unless the alleged defect existed at the time the product left-the hands of the manufacturer.

FEDERAL PREEMPTION

Dutton, et al. v. Acromed Corporation, et al., Cuy. Co. App. No. 69332, 69333, and 69358 (January 16, 1997). For Plaintiff-Appellants: Claudia R. Eklund and For Defendants-Appellees: Richard I. Werder, Jr., Edward Sebold, Mark Herrmann and Catherine W. Smith. Opinion by Timothy D. McMonagle. Sara J. Harper concurs and John T. Patton dissents in part and concurs in part.

Plaintiff filed an action against the manufacturer of a certain bone plate and bone screws. Plaintiff's claims sounded in manufacturing and design defect, failure to warn and fraud. Defendant argued that these claims were preempted by the medical devices act of 1976 (21 U.S.C. 301, et seq.). During the pendency of the action the United States Supreme Court announced its decision in Medtronic, Inc. v. Lohr (1996), 116 S. Ct 2240. As a result of this decision, defendant withdrew its argument that plaintiff's manufacturing and design defect claims were preempted. It maintained its preemption argument as to plaintiff's failure to warn and fraud claims. In Medtronic, Inc., the Supreme Court opined that the MDA regulations provide that "state requirements of general applicability are not preempted except where they have the affect of establishing a substantive requirement for a specific device." In addition, the federal requirements must be "applicable to the device" and will preempt state law only if the latter are "specific counterpart regulations" or "specific" to a "particular device." The Court of Appeals held that the requirements set forth in R.C. 2307.76, which served as a basis for plaintiff's failure to warn claim, underscores a general duty to inform users and purchasers of potentially

dangerous products of the risks involved in their use. The court further held that such a state requirement escapes preemption because it applies to all products generally and not only to medical devices. Similarly, the Court of Appeals ruled that plaintiff's state law fraud claim was not preempted because it did not relate to the "safety or effectiveness of the device," but rather, to the more general obligation not to deceive.

UNINSURED MOTORIST CLAIM - DEFINITION OF OCCUPYING A VEHICLE

Norris v. Allstate Insurance Company, Cuy. Co. App. *No* 70591 (December **19,** 1996). For Plaintiff-Appellee: David W. Goldense and Paul **V.** Wolf and For Defendant: Marilyn J. Singer.

In the case of Joins **v.** Bonner (1986), 28 Ohio St.3d 398, the Ohio Supreme Court set forth the test to be used for determining whether a particular vehicle is "occupied" for purposes of motor vehicle insurance cases. The Joins Court determined that a vehicle is occupied if the plaintiff is within a reasonable geographic perimeter of the vehicle and has a reasonably relationship with the vehicle at the time of the accident. The present case proceeded to trial on the sole issue of whether the plaintiff was "occupying" a van while standing in the middle of a road performing a survey work while distanced 32 feet from the van. Two interrogatories were submitted to the jury. While the jury did respond affirmatively to the query of whether the plaintiff had a reasonable relationship with the van, it also found that the plaintiff was not within a reasonable geographic perimeter of the van. Thus, since only one of the two prongs was met, judgment was entered for the defendant. The trial court granted the plaintiff's motion for judgment notwithstanding the verdict and the defendant appealed. The Court of Appeals affirmed, holding that the distance of 32 feet is within a reasonable geographic perimeter of the vehicle as a matter of law.

UNDERINSURED MOTORIST COVERAGE **- INTRAFAMILY STACKING**

Winkhart v. State Farm Insurance Company, Cuy. Co. App. No. 70279 (December 12, **1996).** For Plaintiff-Appellant: Jeffrey H. Friedman and For Defendant-Appellee: Henry A. Hentemann. Opinion by Timothy **E.** McMonagle. Patricia Blackman and Ann Dyke concur.

Plaintiff sustained severe injuries as a result of the negligence of an underinsured motorist. Tortfeasor's carrier tendered the policy limits of $12,500.00. Plaintiff had purchased two separate but identical policies of insurance with defendant with each policy covering a separate vehicle. Each of these policies contained a One Hundred Thousand Dollar ($100,000) underinsured limit. State Farm tendered Eighty-Seven Thousand Five Hundred ($87,500), arguing that it was entitled to set off the amount paid by tortfeasor's carrier from its policy limit rather than from plaintiff's total damages. Moreover, State Farm refused to tender the additional One Hundred Thousand Dollar ($100,000) policy limit relying on its exclusion for intrafamily stacking. The Court of Appeals reversed the trial court's grant of summary judgment in favor of State Farm on the issue of the set-off citing to Cole v. Holland (1996), 76 Ohio St.3d 220. With regard to the issue of intrafamily stacking, the Court of Appeals conceded that the syllabus holding of Savoie v. Grange Mutual Insurance Company (1993), 67 Ohio St.3d 500, permits the insurer to preclude intrafamily stacking without reservation. However, the Court of Appeals noted that despite the language contained in the Savoie syllabus, the underpinnings of the Supreme Court's rationale for permitting insurer's to preclude intrafamily stacking was that the insurer can provide reduced premiums for clients who purchase multiple uninsured/underinsured policies for separate vehicles. The Court of Appeals herein quoted the following language from Savoie…"if the premium has been reduced, it logically follows that benefits can be restricted. As a consequence of the above language contained in Savoie, the Court of Appeals ruled that Savoie requires evidence *of* a reduced premium in order for an insured to contractually preclude intrafamily stacking. Nevertheless, **in** the case herein, it was determined that State Farm had indeed rendered a discount to the plaintiff for the multiple policies and,

accordingly, could contractually preclude the intrafamily stacking.

SUBSEQUENT REMEDIAL MEASURES

Schneider v. First National Supermarkets, Cuy. Co. App. No. 70226 (December 5, 1996). For Plaintiff-Appellant: Joseph C. DeRosa and For Defendant-Appellee: Jan L. Roller and Dennis R. Fogarty. Opinion by John T. Patton. Joseph Nahra and Diane Karpinski concur.

Plaintiff was injured when jumping off or lowering himself from a loading dock. Apparently defendant had blocked all other means of egress. Many other truck drivers at the loading dock would creep along a cement edge while holding onto a wire fence bordering the perimeter of the cement edge. The jury returned a defense verdict. The Court of Appeals upheld the trial court's admission of a post accident memorandum issued by plaintiff's employer instructing its drivers not to jump from loading docks. The Court of Appeals ruled that admission of such evidence did not contravene Evidence Rule 407 which renders inadmissible evidence of subsequent remedial measures to prove negligence or culpable conduct. The rationale for the Court of Appeals' decision was that when subsequent remedial measures were affected by third persons, the policy encouraging such measures is not implicated and Evidence Rule 407 does not apply.

ROBERTS V. OHIO PEFWANENTE MEDICAL GROUP, INC. FOLLOWED

Dougherty v. Fecsik, M.D., Cuy. Co. App. No. 70542 (December 5, 1996). For Plaintiff-Appellant: Michael Shafran and For Defendant-Appellee: John A. Simon and Susan M. Reinker. Opinion by James D. Sweeney. Patricia A. Blackman and Diane Karpinski concur.

Defendant provided gynecological services to plaintiff commencing in 1978. Pap smears taken at plaintiff's appointments in 1987, 1988, 1990 were misread as negative and, consequently, plaintiff's cervical cancer was

undiagnosed until 1990. In April, 1990, plaintiff sought help from the defendant because she was experiencing some bleeding. Defendant performed several cryosurgeries between April and September 1990. In September the defendant ordered a biopsy and the cancer was finally diagnosed. Plaintiff's expert testified that she had a slow growing tumor from 1987 to 1990 and that the cryosurgery increased the growth of the tumor. The expert opined that plaintiff was "operable" in 1987 and 1988. He further testified that the defendant failed to recognize plaintiff's condition in April of 1990 and failed to perform a biopsy and colposcope. In reversing a grant of summary judgment, the Court of Appeals held that the deposition testimony of plaintiff's expert was deficient to show the defendant increased the risk of harm to plaintiff. In so holding, the Court of Appeals exuressly followed the Ohio Supreme Court's ruling in Roberts v. Ohio Permanente Medical Group, Inc. (1996), 76 Ohio St.3d 483, which held that in order to maintain an action for the loss of a less than even chance of recovery or survival, the plaintiff must present expert medical testimony showing that the health care provider's negligent act or omission increased the risk of harm to the plaintiff. It then becomes a jury question as to whether the defendant's negligence was a cause of the plaintiff's injury or death.

EMPLOYER INTENTIONAL TORT

Anderson v. Zavarella Brothers Construction Company, Cuv. Co. ADD. No. 70657 (December 5, 1996). For Plaintiff-Appellant: Richard Θ. Mazanec, Robert C. Reed and John D. Wheeler and For Defendant-Appellee: Jan L. Roller and Dennis R. Fogarty. Opinion by David T. Matia. Ann Dyke and Terrence O'Donnell concur.

The above case presented the following facts: Defendant had been cited on at least five occasions by OHSA for failing to maintain guardrails, handrails and/or toe boards on elevated platforms. On the date of his injury, there existed some evidence that plaintiff was required by his **boss** to work on a similarly unguarded elevated platform that was covered with snow and ice. While working near the edge of the elevated platform, plaintiff lost his balance

and fell to the ground sustaining serious injury. The Court of Appeals held that these facts were sufficient to permit a reasonable finder of fact to conclude that the defendant had committed an intentional tort under the test set forth in Fyffe v. Jeno's, Inc. (1990), 59 Ohio St.3d 115, in that the finder of fact could conclude (1) the employer had knowledge of the existence of a dangerous condition within its business operation; (2) the employer had knowledge that if the plaintiff was subjected by his employment to such dangerous condition that harm to the plaintiff would be a substantial certainty; and *(3)* the employer, under such circumstances, and with such knowledge, did act to require the plaintiff to continue to perform the dangerous task.

TRIP *AND* FALL - OPEN *AND* OBVIOUS

Texler v. D.O. Summers Cleaners and Shirt Laundry Company, Cuy. Co. App. No. 69523 (November 27, 1996). For Plaintiff-Appellee: Lester S. Potash and For Defendant-Appellant: James L. Glowacki, James J. Imbrigiotta and Christopher R. Claflin. Opinion by Joseph J. Nahra. Patricia Blackman concurs and Terrence J. O'Donnell dissents.

Plaintiff and a companion were walking along the sidewalk of a strip-style shopping plaza from their place of employment in route to a restaurant where they were to have lunch. On the way to the restaurant they were required to pass by the store-front of defendant. Plaintiff and her companion had passed this way on numerous occasions and new that it was a practice for the defendant to prop open its front door in the summer utilizing a bucket or some other device as a door-stop. On the day in question plaintiff and her companion both testified that they could see a bucket propping the door open from a distance of 40 feet and that there were no obstructions to their vision. It was a clear and sunny day. After noticing the bucket and door from a distance of 40 ft., plaintiff did not focus upon either until she tripped upon either the bucket or door and sustained a fractured arm and wrist. The case proceeded to trial and the issue of the respective negligence of the parties was submitted to the jury. The jury returned a verdict in favor of the plaintiff in the amount of Seventy-

Five Thousand Dollars ($75,000) and further found the defendant 100% negligent. The trial court denied the defendant's motion for judgment notwithstanding the verdict and/or for new trial. The Court of Appeals reversed and ordered that judgment be entered for the defendant. The Court of Appeals based its decision on the open and obvious rule. The implied holding of the Court of Appeals is that where the defect was open and obvious no liability (either because there exists no duty or because the breach of any duty on the part of the defendant can never be a proximate cause) can be placed upon the defendant. In a rather strong dissent, Judge O'Donnell opined that the majority was invading the province of the jury and, in essence, engaging in its own analysis of the facts. Judge O'Donnell was of the further opinion that the jury was in the best position to determine the facts and weigh the comparative negligence, if any, of the parties.

CONTRIBUTORY NEGLIGENCE OF *AN* EMPLOYEE

Clark v. The Albert Higley Company, et al., Cuy. Co. App. No. 70304 (November 21, 1996). For Plaintiff-Appellant: Joseph L. Coticchia and For Defendants-Appellees: Thomas P. O'Donnell, William Schmitz and Johanna M. Sfisco. Opinion by Ann Dyke. Patricia Blackman and Timothy McMonagle concur.

The syllabus of the Ohio Supreme Court decision in Cremeans v. Willmar Henderson Manufacturing Company (1991), 57 Ohio St.3d 145 is as follows…"an employee does not voluntarily or unreasonably assume the risk of injury which occurs in the course of his or her employment when that risk must be encountered in the normal course of his or her employment in the normal performance of his or her required job duties and responsibilities." The lead opinion, written by Justice Douglas and supported by former Justice A. William Sweeney essentially called for the abolition of the defense of assumption of the risk in all cases involving a work related injury. The justices based this position upon the perception of the economic reality of the modern workplace in that since an employee cannot afford to lose a job, he must perform any task that his employer requires. In the case herein, the Court of Appeals refused to follow

Cremeans under the rationale that it was a plurality opinion and that the lead opinion is not the law. Instead, the Court of Appeals followed its previous determinations that the position and the lead opinion of Cremeans concerning the defense of contributory negligence is simply inapplicable in an action for negligence.[2]

STATUTE OF LIMITATIONS - "COGNIZABLE EVENT"

Ruggeri v. Katz, D.O., Cuy. Co. App. No. 70412 (November 21, **1996).** For Plaintiff-Appellant: James R. Goldberg and Meena Moorey and For Defendants-Appellees: Janice L. Small, Joseph A. Farchione, John A. Simon and Steven O'Keefe. Opinion by Ann Dyke. James D. Sweeney and Terrence O'Donnell concur.

Defendants performed surgery on plaintiff's lower intestines in mid August of **1984.** Plaintiff was aware of a known side-effect of this operation called small bowel syndrome. Plaintiff experienced the side-effect and underwent a second operation during late August of **1984.** Plaintiff stated in his deposition testimony that some time in **1986** he casually mentioned to his wife the possibility that malpractice may have occurred. Plaintiff was hospitalized for two weeks in **1987** with short bowel syndrome. On August 27, 1991, plaintiff underwent an exploratory laparotomy and was informed by the surgeon that **18** feet of the small intestine had been removed in the earlier procedures, more than necessary. The surgeon also informed plaintiff that the earlier procedure was the cause of the small bowel syndrome. Plaintiff filed suit on or

[2]The Court of Appeals does not deal with the issue that the syllabus holding itself of Cremeans does not leave much room between itself and the positions advocated in the lead opinion by Justices Douglas and Sweeney.

about July **15,** 1992, alleging various counts of medical malpractice. The trial court granted defendant's motion for summary judgment based upon the running of the applicable statute of limitations. The Court of Appeals reversed holding that a "cognizable event" did not occur in 1986 by the plaintiff's mere mention to his wife of the possibility of malpractice. Rather, the Court of Appeals ruled that such a cognizable event "did not occur until the 1991 surgery and revelations by the subsequent surgeon. The Court of Appeals reasoned that the plaintiff knew that small bowel syndrome was a symptom of the procedure he underwent in 1984. The continuation of these symptoms was not in and of itself enough to raise the probability that malpractice occurred. Plaintiff became aware of the connection between his condition and the medical treatment he had received in 1984 at the time of the exploratory surgery in 1991. Only then was plaintiff on notice of the need to pursue his possible remedies.

SUBROGATION RIGHTS

Szarka v. State Automobile Insurance Companies, Cuy. Co. **App.** No. 70469 and 70621. For Plaintiff-Appellee: R. Jack Clapp and Kyle L. Crane and For Defendant-Appellant: Robert **G.** Hurt. Opinion by James D. Sweeney. Ann Dyke and Terrence O'Donnell concur.

In this action the Court of Appeals ruled that an insured need not execute an assignment of his rights against the tortfeasor in favor of his insurer as a prerequisite to recovering on his underinsured motorist coverage, It is enough for the insured to file his claim against the underinsured carrier within the applicable statute of limitations. At that point, the insurer can protect its subrogation rights by filing a third party complaint. The court noted that while an insured must take reasonable steps to assist the insurer in protecting the insurer's subrogation rights, the responsibility for preserving these rights rest squarely with the insurer.

MEDICAL MALPRACTICE - NECESSITY OF EXPERT TESTIMONY

Dimora v. Cleveland Clinic Foundation, Cuy. Co. App. No. 70092/70516 (October 17, 1996). For Plaintiff-Appellee: Robert D. Wilson and For Defendant-Appellant: Marc Groedel and Thomas R. Wolf. Opinion by Timothy E. McMonagle. James D. Sweeney and Sara J. Harper concur.

Plaintiff was a 79 year old woman who was determined to be a "high risk for falls" by the defendant. Plaintiff's alleged that a student nurse negligently failed to assist the plaintiff while she went to the bathroom with the result that the plaintiff sustained a fall and fractured several ribs. At trial the plaintiff did not produce any expert testimony. The jury returned a verdict in favor of the plaintiff in the amount of Twenty-Five Thousand Dollars ($25,000) as compensatory damages and Twenty-Five Thousand Dollars ($25,000) as punitive damages.[3] The Court of Appeals affirmed, holding that the conduct complained of in the case herein was clearly within the common knowledge and experience of jurors and did not require knowledge beyond the ken of a lay person.

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[3]There was an allegation contained in the Complaint that defendant had falsified records.

VERDICTS AND SETTLEMENTS

Mary W. Spor, et al v. Motorists Insurance Co., et al
Court and Judge: Cuyahoga County Common Pleas; Judge Jose A. Villanueva
Settlement: April, 1996
Plaintiffs Counsel: Justin F. Madden, SPANGENBERG, SHIBLEY & LIBER
Defendant's Counsel: Johanna M. Sfiscko
Insurance Company: Motorists Mutual Ins. Co.
Type of Action: Underinsured Motorist

Plaintiff was passenger in vehicle struck by underinsured drunk driver.

Damages: Broken right forearm.
Plaintiffs Experts: None
Defendant's Experts: None
Settlement: $210,000.00

Lisa Layfield, Admr. v. Trumbull County Board of Commissioners, et al
Court and Judge: Trumbull County; Judge Logan
Settlement: June, 1996
Plaintiffs Counsel: John D. Liber and Justin F. Madden, SPANGENBERG. SHIBLEY & LIBER
Defendant's Counsel: Steven K. Kelley
Insurance Company:
Type of Action: Defective guardrail.

Plaintiff/decedent's car collided with a bridge guardrail, which gave way, and his car plunged into a creek, resulting in decedent's drowning.

Damages: Death.
Plaintiffs Experts: William Jackman, P.E.
Defendant's Experts: None
Settlement: $150,000.00

Marv Weigle, et al v. Parma Community General Hospital
Court and Judge: Cuyahoga County Common Pleas; Judge Peggy Foley Jones
Settlement: July. 1556
Plaintiffs Counsel: Paul M. Kaufman
Defendant's Counsel: Christine Reid and Steven Hupp
Insurance Company: PICO, PIE
Type of Action: Medical Malpractice

Inappropriate placement of Hickman catheter by surgeon, followed by inappropriate administration of chemotherapy which leaked out causing burns in the chest.

Damages: Chemical burn injury to inside of chest.
Plaintiffs Experts: Mark Strom, M.D. (surgeon)
Defendant's Experts– None listed
Settlement: Judgment, $70,000.00; plaintiffs demand in closing argument, $250,000.00: defendant's suggestion in closing argument, $50,000.00

Marv Craine v. St Augustine Manor, et al
Court and Judge: Cuyahoga County Common Pleas; Judge Gail Rose Kane
Settlement: August, 1956
Plaintiffs Counsel: Daniel J. Klonowski
Defendant's Counsel: Joseph Tira
Insurance Company: Self-insured
Type of Action: Nursing Home Malpractice

Plaintiff left improperly tended on toilet, causing her to fall.

Damages: Fractured left hip.
Plaintiffs Experts: David Woodruff, MSN, RN, CCRN
Defendant's Experts: None Listed
Settlement: $100,000.00

Russell F. Abbey, et al v. Mark A. Devicchio
Court and Judge: U.S. District Court; Judge Patricia Gaughan
Settlement: September, 1996
Plaintiffs Counsel: Peter H. Weinberger and Justin F. Madden; SPANGENBERG. SHIBLEY & LIBER
Defendant's Counsel: Jay C. Rice
Insurance Company: CNA Insurance Co.
Type of Action: Motor Vehicle Negligence.

Plaintiff, a truck driver, was injured when a Dodge Stealth failed to yield the right of way and collided with plaintiffs tractor trailer.

Damages: Mild herniation C5-6
Plaintiffs Experts: - None
Defendant's Experts: None
Settlement: $150,000.00

Brittany Roberts. a Minor v. Miami Valley Hospital
Court and Judge: Montgomery County Common Pleas Court; Judge Gilvary
Settlement: September, 1996
Plaintiffs Counsel: Paul M. Kaufman
Defendant's Counsel: Neil Freund
Insurance Company: Not Listed
Type of Action: Medical Malpractice

Failure to deliver twin several hours earlier/ Then delivered after other twin died in vitro. Live twin born with severe brain damage.

Damages: Brain damage
Plaintiff's Experts: Stuart Edelberg, M.D., Baltimore, Maryland (ob/gyn); Jerome Murphy, M.D., Kansas City (ped. neurol.)
Defendant's Experts: Clarence McClain, M.D., Cincinnati (ob/gun; ped. neurologist; neonatologist).
Settlement: $385.000.00

Freida Matthews v. University Hospitals of Cleveland
Court and Judge: Cuyahoga County Common Pleas Court: Judge Ronald Suster
Settlement: October. 1996
Plaintiffs Counsel: Paul M. Kaufman
Defendant's Counsel: Jan Roller
Insurance Company: Self-Insured
Type of Action: Medical Malpractice

Perforation of esophagus during intubation in emergency room after failed suicide attempt.

Damages: Scar on neck; drooping eyelid; swallowing problems.
Plaintiffs Experts: Wayne Kawalek, M.D. (er medicine); Sheldon Artz, M.D. (plastic surgeon); Martin Markowitz. M.D. (eye doctor).
Defendant's Experts– E/R Philadelphia
Settlement: $70,000.00

Leach v. Future Ape. Inc.
Court and Judge: Cuyahoga County Common Pleas; Judge Thomas J. Pokorny
Settlement: October, 1996
Plaintiffs Counsel: Peter J. Brodhead and Stuart E. Scott, SPANGENBERG, SHIBLEY & LIBER
Defendant's Counsel: Anthony Kerber
Insurance Company: Grange
Type of Action: Plaintiff ejected from wheelchair when driver slammed on brakes to avoid skunk.

Plaintiff was a 70-year old wheelchair-bound passenger in defendant's van. Defendant is a common carrier specializing in the transportation of wheelchair and handicapped individuals. While being transported to dialysis, the driver of the van slammed on the brakes to avoid a skunk, causing plaintiff to submarine under seatbelt and fall out of her chair resulting in a broken ankle. Complications from diabetes eventually required amputation of the leg below the knee. Defendant failed to properly secure plaintiff into her wheelchair by applying belt strap over the top of the wheelchair arm rest and across plaintiffs torso.

Damages: Amputation of leg below knee; broken ankle.
Plaintiffs Experts: Ned Einstein (wheelchair/occupant restraint); Hank Lipian
Defendant's Experts: Richard Stanford
Settlement: $950.000.00

Maya Chavanne, a Minor v. University Hospitals of Cleveland
Court and Judge: Cuyahoga County Common Pleas; Judge Suster
Settlement: October, 1996
Plaintiffs Counsel: Paul M. Kaufman
Defendant's Counsel: Jan Roller
Insurance Company: Self-insured
Type of Action: Medical Malpractice.

5 month old child given overdose of Potassium after heart surgery. Cardiac arrest occurred resulting in neurological deficit.

Damages: Neurological deficits
Plaintiffs Experts: Frank McGehee, M.D., Houston, Tx. (pediatrician); Cynthia Curry, MD., Fresno, CA (geneticist)
Defendant's Experts: Burhan Say, M.D. (geneticist); Robert Clancy, M.D.,Philadelphia, PA. (ped. neurologist); Michael Nihill, Houston Tx. (ped. cardiologist).
Settlement: $300,000.00

John Doe v. ABC Hospital, et al
Court and Judge: Cuyahoga County Common Pleas; Judge Michael Corrigan
Settlement: October, 1996
Plaintiffs Counsel: Peter Weinberger & Cathleen Bolek, SPANGENBERG, SHIBLEY & LIBER
Defendant's Counsel: Beverly Harris and Harry Comett
Insurance Company: CNA (1 million limit), hospital self insured
Type of Action: Medical Malpractice - Wrongful Death

Six days post partum, decedent suffered a severe headache and was seen by defendant doctor, an emergency room physician employed by group and hospital. She presented with a BP of 1601105 which was never re-taken. She was discharged with a diagnosis of a tension headache. Four hours later, she suffered a stroke from cerebral hemorrhage and died five days later.

Damages: Death.
Plaintiffs Experts: Patrick Hayes, M.D. (ER); John Conomy (neurology)
Defendant's Experts: Bruce Janiak, M.D. (ER); Bennett Blumenkopf (neurology); Susan de la Monte (pathology)
Settlement: $1,350,000.00

Jane Doe v. John Doe. M.D.
Court and Judge: Wood County; Judge Charles Kurfess
Settlement: November, 1996
Plaintiffs Counsel: Peter H. Weinberger and Justin F. Madden; SPANGENBERG, SHIBLEY & LIBER
Defendant's Counsel: Peter Casey
Insurance Company: PICO
Type of Action: Medical Malpractice, Wrongful Death.

Decedent underwent a biliopancreatic diversion surgery subsequent to a vertical banded gastroplasty for her obesity. She died of dead bowel syndrome.

Damages: Wrongful death.
Plaintiffs Experts: James Maher, M.D. (bariatric surgery)
Defendant's Experts: George Cowan, M.D. (bariatric surgery): Gary Anthone, M.D. (bariatric surgery).
Settlement: $490,000.00

Beal v. State Farm Insurance Co.
Court and Judge: Cuyahoga County Common Pleas Court; Judge Pokomy
Settlement: October, 1996
Plaintiffs Counsel: Robert F. Linton, Jr., LINTON & HIRSHMAN
Defendant's Counsel: Gerald Jeppe
Insurance Company: State Farm Ins. Co.
Type of Action: UM Automobile Accident.

Rear end collision with minor visible property damage.

Damages: Soft tissue neck/shoulder.
Plaintiffs Experts: Harold Mars, M.D. (neurologist); Jennifer S. Kriegler, M.D. (neurologist/pain mgmt); Augusto C. Juguilon, M.D. (neurologist); Kurt Zillman, L.P.T. (physical therapy).
Defendant's Experts: Dr. Donald Mann
Settlement: Judgment: $80,000.00; offer: $22,500.00; demand: $85,000.00
NOTE: Court ordered financial records disclosed. Dr. Mann earned in excess of $100,000.00 from State Farm over previous 7 years, although the records did not disclose how much was for reimbursement of medical services verses forensic work. In addition, reports were produced in 12 other cases in which Dr. Mann was hired by State Farm; in none did he find a permanent injury caused by the accident.

Harris. et al v. Liston, et al
Court and Judge: Cuyahoga County Common Pleas; Judge Calabrese
Settlement: November, 1996
Plaintiffs Counsel: Robert F. Linton, Jr.. LINTON & HIRSHMAN
Defendant's Counsel: D. John Travis and Mark I. Wachter
Insurance Company: Not applicable
Type of Action: Real estate fraud; breach of contract

Plaintiff purchased seven year old $900,000 home with non-disclosed structural problems and drainage defects.

Damages: Non-disclosed structural problems and drainage defects.
Plaintiffs Experts: Amir Farzaneh (structural engineer); Pat Burrier (landscape architect): Stephen J. Hovanscek (civil engineer); Jim Ziemba (surveyor).
Defendant's Experts: Lee Pozek (structural engineer): Richard **S.** Wasosky (civil engineer).
Settlement: Judgment: $635,000.00; offer: $100,000.00; Demand: $400,000.00.

Paul Hafer v. Yellow Freieht Trucking
Court and Judge: Cuyahoga County Common Pleas; Judge Thomas Curran
Settlement: November 1996
Plaintiffs Counsel: David M. Paris and James R. Lebovitz, NURENBERG, PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: Frank Leonetti
Insurance Company:
Type of Action: Automobile

Plaintiff was a stock clerk for the Wicker Co. Defendant was backing his truck in for a delivery. Plaintiff was standing on a loading dock waving defendant back with his left arm. Defendant's truck lurched backward suddenly pinning plaintiffs arm to the wall.

Damages: Fractured radius and muscle loss.
Plaintiffs Experts: Raymond Horwood, M.D.
Defendant's Experts: None
Settlement: $175,000.00

Tuma v. Gregory Wiemken, D.P.M.
Court and Judge: Cuyahoga County Common Pleas; Judge Suster
Settlement: December, 1996
Plaintiffs Counsel: Robert F. Linton, Jr., LINTON & HIRSHMAN
Defendant's Counsel: Douglas F. Fifner
Insurance Company: Not Listed
Type of Action: Podiatric Malpractice

Failure to aggressively treat infection, resulting in osteomyelitis and amputation of middle toe and two metatarsal heads.

Damages: See Above
Plaintiffs Experts: Alan Singer, D.P.M., F.A.C.S. (Georgetown University Medical School); Alan Davis, M.D. Northcoast Orthopedics (damages)
Defendant's Experts: Dr. Kllibjian, M.D.
Settlement: $100,000.00

Brian A. Enssle v. General Aluminum Mfg. Co.,II., et al
Court and Judge: Cuyahoga County Common Pleas; Judge Carolyn Friedland
Settlement: December, 1996
Plaintiffs Counsel: Larry S. Klein, Robert F. Linton, Jr., LINTON & HIRSHMAN
Defendant's Counsel: Teresa G. Stanford, Louis J. Gigliotti, Jr. and Daniel F. Gourash
Insurance Company: Self-Insured
Type of Action: Product Liability/Intentional Tort

Hand crushed in unguarded permanent mold machine resulting in the amputation of two fingers.

Damages: Loss of two fingers.
Plaintiffs Experts: Mary Beth Cermack. M.D. (hand surgeon); Joseph Spoonster (vocational economic expert); Simon Tamny (professional engineer).
Defendant's Experts: Joseph F. Leane (professional engineer); Sal Maguamera (professional engineer)
Settlement: $245,000.00

John Doe. a Minor. et al v. Dr. A. (Pediatricians). et al
Court and Judge: Cuyahoga
Settlement: December, 1996
Plaintiffs Counsel: Howard D. Mishkind, BECKER & MISHKIND CO., L.P.A.
Defendant's Counsel: William Bonezzi, Dale Markworth. and *Gary* Goldwasser
Insurance Company: Not Listed
Type of Action: Medical Malpractice

Plaintiff was born at Defendant hospital in August, 1989. He was discharged with his mother at 2-1/2 years of age with a diagnosis of physiological jaundice. On Day #6 of the child's life, he was admitted to Defendant, ABC Hospital with a diagnosis of a e.coli septicemia and ultimately a diagnosis of meningitis. At 4 years of age, a diagnosis of galactosemia was made which had been missed during the newborn period when the child was admitted and was being treated for his meningitis.

Plaintiff, now 7 years of age, is mildly retarded with major speech and language deficits. He has weakness on the right side of his body caused by the meningitis but is otherwise fully ambulatory.

Plaintiffs alleged that the child's jaundice was a sign of an infection, namely the beginning signs of e.coli bacteremia. Plaintiffs alleged that defendant hospital XYZ Hospital and pediatricians in charge of the child failed *to* recognize signs and symptoms of an illness/infection and should not have discharged the child at 2-1/2 days of age. Plaintiffs further alleged that the follow up was inadequate upon discharge from the hospital.

Plaintiffs further alleged that defendant pediatricians failed to communicate the results of newborn screening for the metabolic condition of galactosemia while the plaintiff was confined at ABC Hospital for treatment of meningitis. Plaintiffs further alleged that ABC Hospital had appropriate signs and symptoms and laboratory information which should have led to the diagnosis of galactosemia.

Plaintiffs alleged that the failure to timely treat the newborn illness that led *to* the e.coli bacteremia and meningitis was avoidable and preventable and that the meningitis coupled with the delay in the diagnosis of galactosemia caused John Doe's brain damage and stabilities.

Defendants' allegations were that the child during the newborn period was entirely normal with no signs or symptoms of an illness or an infection. Defendants further allege that his jaundice was normal physiological jaundice and that at the time of discharge which was entirely acceptable, there were no indications that the child was or would develop an infection. Defendants further alleged that the child developed a rapid infection shortly before returning to the hospital and that earlier treatment was not indicated nor would an earlier intervention have led to the prevention of meningitis in this case defendants further alleged that the delay in the diagnosis of galactosemia did not cause or substantially contribute to the child's brain damage.

They alleged that any damage caused by the galactosemia occurred during the first month of life and that whatever damage that was caused by the condition of galactosemia would have already have affected the child by the time the correct diagnosis should have been made. Further, defendants alleged that John Doe did not develop classic signs of injury caused by galactosemia including cataracts or liver damage and that most, if not all, of the damage that he sustained was caused by the meningitis which was not foreseeable or preventable based upon the child's condition during the newborn period.

Damages: Plaintiff is mildly retarded with major speech and language deficits. He has weakness on the right side of his body caused by the meningitis but is otherwise fully ambulatory.

Plaintiffs Experts: Dr. Harold Levy (metabolic specialist, Boston, MA); Dr. Ronald Gold (infectious disease, Toronto, Canada); Dr. Susan Jay (pediatrician, Chicago, IL).

Defendant's Experts: Dr. Neil Buist (metabolic specialist, Portland, OR); Dr. Steven Klein (pediatric inf. disease, Boston, MA); Dr. Michael Radetsky (ped. inf. disease, Alburquerque, NM).

Settlement: $1,200,000.00

Sandra Stohler. Admr. v. CSX Transportation
Court and Judge: Medina County
Settlement: December, 1996
Plaintiffs Counsel: Kerry S. Volsky, HERMANN. CAHN & SCHNEIDER
Defendant's Counsel: K.R. Aughenbaugh
Insurance Company: Self insured
Type of Action: Railroad cross train/truck accident.

Decedent's truck with mechanical problem restalled while crossing tracks with significant pot holes. Plaintiff further alleged a failure to timely whistle through the testimony of decedent's son who was a passenger in truck and an independent witness who refuted train data recorder evidencing whistle blown for 15 seconds prior to impact.

Damages: Death.
Plaintiffs Experts: William Berg
Defendant's Experts: None
Settlement: $750,000.00

Jane Doe. an Incompetent v. ABC Foster Care. et al
Court and Judge: Cuyahoga County Common Pleas; Judge Patricia Cleary
Settlement: December, 1996
Plaintiffs Counsel: Andrew P. Krembs and David M. Paris, NURENBERG. PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: C. Richard McDonald; Todd M. Raskin; David Hilkert.
Insurance Company: Scottsdale; St. Paul
Type of Action: Foster care abuse, negligent supervision and nursing negligence.

Plaintiff, a severely retarded adult, was placed into private foster care after her parents died/became incapacitated. The foster home environment was unsupervised and unskilled allowing plaintiff to become entangled in her bed and sheets and suffer a strangulation episode. This resulted in some neurologic deficits. After her discharge from the hospital, she was returned to the same foster home where she laid in bed for several weeks and developed decubitus ulcerations on her coccyx, scapula and back. The visiting nurses failed to diagnose the development of these ulcers despite regular home visits.

Damages: Traumatic encephalopathy; decubitus ulcers.
Plaintiffs Experts: Amelia Lerner, M.D. (geriatrics); Elizabeth Wolfe. MSN, RN. OCN (Nursing); William Bauer, M.D. (neurology).
Defendant's Experts: None.
Settlement: $925,000.00

Estate of Louis Petrella v. National Engineering, et al
Court and Judge: Cuyahoga County Common Pleas; Judge Frank D. Celebrezze. Jr.
Settlement: December, 1996
Plaintiffs Counsel: David M. Paris and Richard C. Alkire, NURENBERG, PLEVIN. HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: Timothy Kasparek
Insurance Company: Liberty Mutual Ins. Co.
Type of Action: Negligent Instruction/Employer Intentional Tort.

Decedent was an ironworker foreman employed by Tri-State Steel, a wholly owned subsidiary of National Engineering, the general contractor reconstructing the Main Avenue Bridge. National's superintendent and Tri-State's carpenter foreman allegedly provided detailed instructions to decedent as to the manner and method of lowering certain deck pans. Defendants' claimed decedent ignored explicit instructions resulting in his falling to his death. Plaintiff alleged that defendants provided decedent with unsafe instructions and then conspired to cover up those instructions and fabricate a new set of safe instructions.

Damages: Death.
Plaintiffs Experts: Tony Rago (safety engineer)
Defendant's Experts: William Bunner (safety engineer); Steven Miller (safety engineer); James Vaughan (safety engineer); Andrew Tudor (mechanical engineer).
Settlement: $598,000.00

Warren Wise. etc. v. Children's Medical Center of Akron
Court and Judge: Not Listed
Settlement: January, 1997
Plaintiffs Counsel: William Hawal. SPANGENBERG, SHIBLEY & LIBER
Defendant's Counsel: James L. Malone and Gregory T. Rossi
Insurance Company: Not Listed
Type of Action: Medical Malpractice.

Hospital failed to report suspected child abuse when 2 year old was admitted with subdural hematoma and retinal hemorrhage. Six months later, child was re-admitted with scalding bums sustained in bathtub and healing fractures of tibia and ulna.

Damages: Scalding burns to lower extremities
Plaintiffs Experts: Robert M. Reece, M.D. (pediatrician)
Defendant's Experts: None identified
Settlement: $750,000.00

Jane Doe v. Driver
Court and Judge: Jefferson County (Not Filed)
Settlement: January. 1997
Plaintiffs Counsel: Michael B. Pasternak
Defendant's Counsel: None
Insurance Company: Ohio Casualty Insurance
Type of Action: Personal Injury (Automobile).

Defendant's car went left of center hitting plaintiffs' car head-on

Damages: Concussion, left eye ptosis, back strain, neck strain and shoulder strain.
Plaintiffs Experts: Ahmed Elghazawi, M.D.; Sanford Emery, M.D.
Defendant's Experts: None
Settlement: $75,000.00

Husband and Wife v. Driver
Court and Judge: Jefferson County (Not Filed)
Settlement: January, 1997
Plaintiffs Counsel: Michael B. Pasternak
Defendant's Counsel: None
Insurance Company: Ohio Casualty Insurance
Type of Action: Personal Injury (Automobile)

Defendant's car went left of center hitting plaintiffs' car head-on.

Damages: Wife - C6-7 disc hemiation. concussion, fractured ankle, several broken teeth, broken jaw, shoulder/neck/back strain; husband lost the services and consortium of wife.
Plaintiffs Experts: Ahmed Elghazwi, M.D.
Defendant's Experts: None
Settlement: $375,000.00

May Doe v. Dr. X
Court and Judge: Cuyahoga County Common Pleas
Settlement: January, 1997
Plaintiffs Counsel: Howard D. Mishkind, BECKER & MISHKIND
Defendant's Counsel: Susan Reinker
Insurance Company: Not Listed
Type of Action: Medical Malpractice.

Plaintiff, a 75 year old woman, underwent endoscopic discectomy for a far lateral disc herniation. Following surgery, the patient developed urinary incontinence which was initially diagnosed as overflow incontinence. She was later diagnosed with detrusor hyperreflexia.

At the time of plaintiffs surgery, the pathology report showed nerve root fibers

Plaintiff underwent surgery to correct her urinary incontinence but has been left with permanent bladder dysfunction requiring self catheterization.

Plaintiff alleged that defendant, during the course of the endoscopic surgery, injured nerves that controlled bladder function leading to her urinary incontinence. Defendant argued that the surgery that he performed was done appropriately and that the nerve distribution that controls bladder function was not in any way involved in the defendant's surgery. Defendant further alleged that plaintiff a diabetic with multiple level degenerative disc disease, either had urinary incontinence prior to the surgery or developed the incontinence for reasons primarily related to her underlying disease processes and was not due to substandard care on his part.

Damages: Urinary incontinence.
Plaintiffs Experts: Dr. Clyde Nash (orthopedic surgeon); Dr. Rodney Appel (female urology)
Defendant's Experts: Dr. Jerry Blaivas (urology); Dr. Barton Sachs (orthopedics).
Settlement:

Diane Lebovitz v. White-Westinghouse Appliance, et al
Court and Judge: Cuyahoga County Common Pleas; Judge Nancy Fuerst
Judgment: February, 1997
Plaintiff's Counsel: Richard C. Alkire, NURENBERG, PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: Robert C. McClelland
Insurance Company: Self-Insured
Type of Action: Products.

While plaintiff was opening her refrigerator, the handle broke causing her to fall to the floor.

Damages: Displaced left hip fracture which required a ceramic hip replacement of 87 year old woman who was convalescing from a fall resulting in a right hip fracture.
Plaintiff's Experts: - Gerhard Welsch, Ph.D. (Metallurgist)
Defendant's Experts: None
Judgment: $1 15,000.42

Auerbach v. Arsham
Court and Judge: Cuyahoga County Common Pleas Court; Judge Callahan
Settlement: February, 1997
Plaintiffs Counsel: James R. Lebovitz, NURENBERG, PLEVIN, HELLER & McCARTHY CO., L.P.A.
Defendant's Counsel: Kirk Roman
Insurance Company: State Farm
Type of Action: Auto

Plaintiff was passenger in automobile which struck a parked car.

Damages: Fractured Hip.
Plaintiff's Experts: Dr. Matthew Kraay (orthopedic surgeon)
Defendant's Experts: None
Settlement: $160,000.00

NETWORKING INQUIRIES

Name: William Hawal

Address: 2400 National City Center
Cleveland, Ohio 44174

Telephone No. (216) 696-3232

Brief Description Of Case: Med-mal. Failed femora bal oon angioplasty and rest ing vascular occlusion.

Information Sought: (i.e., expert witness; similar cases; product information, etc.): Expert reports and depositions of Howard C. Pitluk, M.D.