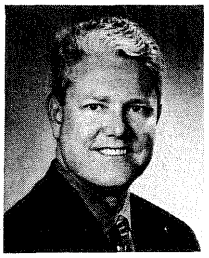
CATA News
Cleveland Academy of Trial Attorneys
April/May, 2000

President's Message



What Makes a Good Trial Lawyer?

By: Robert F. Linton, Jr.

I'm amazed at how many different skills it takes to do our job well, and the many different styles that can be used successfully. Fortunately, it is a craft that can be learned, and the learning was no better than at this year's outstanding Bernard Friedman Institute put together by our vice president, Frank Bolmeyer. If you missed it, you'll find inside some of the highlights. Many thanks to Frank and his all star lineup for their inspiration and showing what it takes to be masters at our trade.

Everything I Learned about Trial Themes I Learned at this Year's ATLA's Student Mock Trial Competition

Debra Dixon spearheaded this year's regional ATLA Student Mock Trial Competition here in Cleveland last month. Through Debra's efforts, many of us CATA members had the privilege of judging these top shelf litigators-to-be and seeing them in action. They were impressive. Great job, Debra in coordinating this event. I also learned from one gifted student–finally--what a trial theme really is. The case problem involved a catastrophically injured adult who was hurt fooling around on some backyard playground equipment that was designed and built by a homeowner. Plaintiffs counsel set the hook in the first words of her opening statement: "This is a case about how good intentions can lead to bad inventions." Bulls-eye.

From Spilled Hot Coffee to Slippery Eggs

A Nevada jury recently awarded $1.1 million dollars in damages in a slip and fall case against Denny's restaurant to a customer who had fallen on a patch of scrambled eggs. The customer received two herniated disks and became permanently disabled from the fall.

Edited by
Paul V. Wolf
and
Romney B. Cullers

Cleveland Academy
of Trial Attorneys
Hoyt Block, Suite 300
700 West St. Clair Avenue
Cleveland, Ohio 44113
216-771-5800
216-771-5803 FAX

As reported in *Lawyers Weekly USA,* plaintiffs' counsel reversed their trial strategy after two mock trials showed they would get better results if the victim testified late in the case after liability was first established. Based on the article I reported in our last Newsletter, the lawyers learned that cases are better received when the plaintiff first proves liability, then damages. According to jury consultants, jurors these days are far more motivated by anger at a defendant than sympathy for a plaintiff.

The plaintiffs' lawyers in the Denny's case also used an innovative way of proving damages in final argument, a technique that could easily be tailored to our own cases. They put together a "help wanted ad" on a 30 x 40 inch board. It was posted between actual newspaper ads, and formatted to look like a large classified ad. It read:

Full Time Help Wanted

Denny's is now accepting applications for position that will last your lifetime. Shift is 24 hours a day. No vacations, no breaks. Must work weekend & holidays. No experience necessary.

Must be willing to:

Fall hard enough to herniate 2 lumbar disks
Undergo 2 or more life threatening surgeries
Give up your favorite sport
Give up all other job opportunities
Give up walking except for short distances
Give up driving except you may apply for perrnit to operate by hand controls
Give up 2-3 hours of sleep each night
Have depression, frustration & anger
Have daily pain and restricted movement
Have fear & limited social activities
Give up normal sexual activities

This position doesn't offer:

travel opportunities
exciternent
challenge

Salary:

None, unless you can convince a jury that your fall, not your age, caused your injuries. No raises. Apply in person.

A New Twist on Negotiations

I recently saw the defense use a creative technique during settlement negotiations in a significant case. Rather than do the dance where each side chips away from the ends of the bell

curve until a happy medium is reached, the defense responded to the demand with a range of numbers. In response to an initial demand of $13 million, the defendants said they would offer $2.5 million if the demand went to $8.5 million. The idea was okay, but not the numbers, so the proposal was rejected, and countered with a demand of $10 million if the defense went to $5 million. The defense rejected those numbers, but a series of rejections and counter proposals containing various bracketed numbers was offered until the parties were only a hundred thousand dollars apart. The parties then quickly moved to a mutually acceptable number within that range. You may want to try it on your next case.

Another Way to Deal with the Heavy-Handed "Good Hands" Adjusters at Allstate

Frustrated by the unreasonable positions taken by Allstate, one local trial judge reportedly used a tactic that lead to a successful settlement. After locking the lawyers up in a jury room for several hours, with still no success, the judge then said she would continue the pretrial the following day, at which time the insured was ordered to be present, so that he could see for himself the unreasonable his insurance company was. This reportedly lead to a reasonable settlement offer, before the insured was summoned.. For more insight, see Ken Knabe's article inside "Challenging Allstate."

More Show and Tell

I remain convinced that the best way to convince is through visuals. For example in a case involving a nasty fracture, Exhibit A should be a board containing x-rays and medical illustrations showing the shattered bones and hardware used to put the pieces parts back together. Don't be afraid to attach the illustrations to a pretrial statement, along with pictures of the plaintiff, so the judge can see for herself how devastating the injury really is. In a recent case of mine, this moved one of the more hard-hearted members of our judiciary. In that case, the plaintiff was couch-ridden for four months with her cast elevated. We had her husband take time-dated videotapes of the plaintiff sitting at the same place she sat each day, all day, on the couch. The scene then dissolved from one to the next with only the date, time and the plaintiff's clothes changing. It dramatically showed in five minutes an image that could never be conveyed in words.

Some good illustrators are Visual Evidence 812 Huron Road, S.E. Cleveland, OH 44115 (216) 861-5951, President Dan Copfer; Med Art & Legal Graphics Co., 2108 Braewick Circle Akron, OM 44313 (330) 869-5330, President, Shelly Coy; Litigation Visuals 1220 W. 6th Street Cleveland, OH (216)344-9303 Dan Young and Kathleen Evans Young; Medical Visions, 13 West Park Square, #C Marietta, GA 30060 (770) 424-6733M, Ron Rodriguez.

If your client had or needs surgery, you should also consider having your doctor narrate surgical tapes showing the operation. There are a variety of sources where these can be obtained, including the American College of Orthopedic Surgeons American Academy at (800) 999-2939 and the Learning Channel through Films for Humanities and Sciences at (800) 257-5126 for about $50. There is also an' excellent textbook called *Fractures* by Donald Wiss on reserve at Allen Memorial Library and probably available at most medical schools, which contains wonderful intra-operative color photographs. For $1 you can obtain a color photocopy at the library and then have that copy enlarged to an 11x17" color copy mounted on poster board for about $15. These flash cards videotape beautifully

during a doctor's deposition. See also Stanley Hoppenfeld
Surgical Exposures in Orthopedics, which show good step by step black and white illustrations of common orthopedic surgeries.

For case law regarding admissibility, see *Weidner v. Blazic,* (1994), 98 Ohio App.3d 321,333-334. (photographic evidence of the surgery admissible to illustrate a patient's condition and testimony concerning surgery.) *Miller v. Bike Athletic Company,* (1998), *80* Ohio St.3d 607 Syllabus (the conditions of the accident need not be duplicated for an out-of-court experiment if not offered as a re-enactment, but used to show a principle directly related to the cause or result of the occurrence.) See also *Campbell v. Daimler Group, Inc.,* (1996), 115 Ohio App.3d 783 (model significantly different from the building at issue admissible to demonstrate engineering principles underlying expert's opinions); *Ohio v. Rutledge* (September *27,* 1994), 10th Dist. App. No. 93-APA08-1212, unreported (model gun was properly introduced into evidence to assist the jury in understanding the testimony even though replica was different than the actual murder weapon); *Cling v. Reading Concrete Products* (September 9, 1996), 12th Dist. App. No. CA95-08-145 (videotape demonstration of the accident was admissible despite opposing parties expert testimony that the videotape was inaccurate)

Did your client need nerve root injections? During the anesthesiologist's video deposition show the 4" needle going into a spine model. Incidentally, the Anatomical Chart Company has great anatomic models from spines to toes for under $100. Don't leave for a doctor's exam without one. Call 1-800-anatomy or visit http://www.anatomical.com. Another source of fabulous lifelike models is NASCO (1-800-558-9595). Www.eNASCO.com. They offer everything from trauma intubation heart to decubitus wound care and childbirth models.

Sometimes, it takes some digging to get the right visuals. In one case, after much persistence, we learned that photographs had actually been taken in the emergency room of our client, along with his traumatically amputated leg. The family had later taken time dated pictures of him in the hospital on life support. (The time dates are wonderful since they let the viewer immediately know when they were taken). After these images are shown to the jury, there is little need for testimony about the injuries. Particularly if copied onto a transparency and shown onto a drive-in size screen.

In a nursing home case, a subsequent treating plastic surgeon unfortunately had no photographs of a deep, stage IV bedsore that had developed on our client's tailbone. So we subpoenaed the doctor to produce photographs and slides taken of other similar bedsores which he used for teaching purposes. These were then authenticated as fairly and accurately showing substantially the same injury as our client had received. During the doctor's videotape deposition, the camera slowly zoomed in and out of those photographs with the doctor's voice-over narrating the graphic images the jury was seeing. The doc then narrated a surgical tape showing the flap surgery performed to fill in the crater left on her tailbone. Seeing was believing, and the pictures were worth a million.

Crash test films can likewise be obtained showing how the body moves during a front end or rear end collision and can be narrated by your doctor to show the mechanism of injury. Those films can be obtained from K.D. Agrali via e-mail at

Agralik@NCAC.GWU.EDU, National Crash Analysis Center, 20101 Academic Way Ashburn, VA 22011, fax 703-726-8358. The cost for a VHS the cost is $82.59 plus $55 for rush service. Matt Barrett and Ben Barrett, Jr. recently reported that they used a crash test video on a large screen behind the doctor testifying which they downloaded for free from http:// www. nhtsa. dot. gov/airbags/avvideos.html.

Think of what moves you during a good movie, TV news report, or music video, and choreograph the same for your cases. Don't forget, too, about 911 audio tapes if you can get them early in the case. Nothing can replace hearing and seeing the events as they are happening.

Looking for Direction?

Did you know that directions can easily be obtained on the Internet to practically anywhere? On most search engines, i.e., Lycos, Microsoft, you can simply click on the "Maps" icon. Or you can go to htpp://www.mapquest.com, to obtain directions. Next time you're leaving for a foreign courthouse or deposition at a remote location, you or your secretary may want to type these in to get a printout of where you're going. Unless you're a man–in which case you'll stop and ask at a gas station once you're already lost.

A New Courthouse Mediator

As you may know, Bob Ravello retired at the end of January, and Jim Tominski has now taken over his position. Jim worked for 30 years at Allstate, and brings to the table the credibility the insurance companies need to continue the successful mediation process developed and perfected by Bob Ravello. We wish Bob the very best in his retirement.

Luncheon Seminars

Dave Paris is to be commended once again for continuing our excellent luncheon seminars. Fellow member Mark Hoffman put on an moving presentation on how Day in the Life Films can add extra value to damage cases. Although the videotapes do not come cheap ($10,000 - $30,000), in the right case, they can be invaluable. We recently put one together for a successful mediation so that the clients could look their best instead of being forced to perform before a group of strangers in a conference room. We sent copies ahead of time to the defense so that they could see for themselves how wonderful the clients were as witnesses. In response, the Fortune 100 defendant sent a new representative –the in house counsel in charge of product liability claims was quickly replaced by his boss, the head of litigation for the entire company.

The last luncheon seminar for this season will take place **Tuesday, May 16, 2000.** Todd Rosenberg will speak on updates on Updates in UM/UIM law. Reservation forms will be sent soon.

Computerized Brief Bank

David Paris and his office have spent nearly a hundred hours attempting to computerize the index to the thousands of depositions in our bank. The index will soon be available to be e-mailed to members. For future use, we would appreciate contributing members donating expert depositions on ASCI disks or E-trans from the court reporter and either e-mail the deposition or send the disk to the CATA expert Bank, c/o Rose Graf at Nurenberg, Plevin, so she can download it into the computer, and she will then return the ASCI disk.

We currently have in the design phase

Internet access to a web page which will allow members, via the Internet, to view the computerized listing of depositions and reports contained in our brief bank.

Incidentally, if you haven't yet tried E-trans, check it out. The electronic transcript comes via the Internet to you and can likewise be sent to you experts with only a click of the mouse. Bye, Bye Fed Ex.

Youth Challenge

As you know, Youth Challenge presents recreational and social activities for children afflicted with severe disabilities. We've adopted this organization as the Academy's official social cause, to give back to those less fortunate and to help improve the public's image of trial lawyers. Your officers and board members have already pledged over $8,000 to Youth Challenge, and we thank the following people and firms who have so generously contributed: Donna Taylor-Kolis, Hermann, Cahn & Schneider, Spangenberg, Shibley & Liber, Friedman, Damiano & Smith, Nurenberg Plevin, Heller & McCarthy, Weisman, Weisman & Goldberg, John Meros, Debra Dixon, Ann Garson, Ken Knabe & Linton & Hirshman. For these efforts, The Cleveland Academy of Trial Attorneys will be a Title Sponsor for the Regatta on July 13, 200, an Event Sponsor for Race Day on August 12, 2000 and pay the dues for two needy children to participate for 12 months of adaptive programs.

You will soon be receiving a letter explaining how you can make your own pledge to assist this worthwhile cause and how you can further participate in its events.

Inside

In addition to our regular Settleinent and Verdict Reports and Unreported Cases, you'll also find:

- Steve Keefe's ***In Chambers*** column featuring Administrative Judge, Richard McMonagle;
- Debra Dixon's article on reviewing medical records; and
- Dale Economus' column on UIM coverage from employer's policies. An excellent article on that topic also appears in this month's OATLA Trial Quarterly.
- Dale also shares with us some bullet point summaries he received from federal judge Mark W. Bennett at ATLA's Litigating Employment cases seminar he attended last month.

New Members

Please also join us in welcoming our new members to the Cleveland Academy of Trial Attorneys: Gary D. Smith, Daniel A. Romaine, Stephen T. Keefe, Jr., Paul Grieco, Sean P. Allan, Kevin T. Toohig, Roy J. Schechter, Matthew H. Barrett and Stephen B. Doucette.

Remember, in the race for justice, there is no finish line.

Best regards,

Robert F. Linton, Jr.
President

Dragons & Other Pitfalls: a Federal Judge Reveals Shocking Truths About Employment Trials

By: Mark W. Bennett
United States District Judge
Northern District of Iowa

Blunders

Preview:

- Jury Selection
- Opening Statement
- Direct Examination
- Cross Examination
- Closing Argument
- Trial Dynamics

Jury Selection

Core Principle:

None of us ever feel we are listed to with the intensity we think we deserve.

Jury Selection

Common Blunders:

- Talk too much
- Fail to listen
- Fail to engage jurors
- Ask only yes and no questions
- Fail to ask core question
- Fail to disclose weaknesses; fears

Jury Selection

Cures:

- Listen
- Ask open-ended questions -- "What" questions get the facts; "Why" questions get the explanations; "How" questions get the feelings
- Ask questions that go to the core of the case
- Ask questions to expose and minimize weaknesses

Jury Selection

One Final Point - Conveying Messages:

- Develop dynamite mini opening or voir dire preface. When you are finished, each juror should understand:
  - that you have confidence in your case and expect to win
  - that you believe in your side in the true and just side
  - that you and your client are a team and that the outcome matters deeply to both
  - that you are sensitive to each juror's desire for privacy -- and will respect and honor these concerns

Opening Statement

Core Principle:

Jurors want (and need) a *clear, simple outline*:

Organize
Humanize
Dramatize

Opening Statement
Common Blunders:

- Lack a theme
- Lack structure for receiving best quantities of new information
- Bogged down with too much information
- Fail to paint a persuasive big picture
- Too long

Opening Statement
Cures:

- Short, dynamic, easily understood theme
- Simple structure for explaining case time line; brief vignettes (beginning, middle and cast of characters)
- Warn possible conflicts in testimony
- Use visual aids wherever possible
- Sensitize jury to weaknesses (and experts)

Direct Examination
Core Principle:

- Reliving reality -- the vehicle for telling the story
- The 90% Rule: in direct examination, the witness should do 90% of the talking, and the lawyer 10%

Direct Examination
Common Blunders:

- Failure to preview witnesses
- Failure to loop witness' answer into next question
- Failure to listen to witness' answer
- Failure to ask simple questions

Direct Examination
Cures:

- Use plain language
- Ask short questions
- Organize the direct examination
- Listen to the witness' answer

Cross Examination
Core Principle:

- Cross examination of a witness is like walking a dog
- Cross examination is the greatest engine for truth ever devised

Cross Examination
Common Blunders:

- Simply rehashing direct
- Covering too many points
- Not knowing when to stop

Cross Examination
Cures:

- Wave a purpose for each question
- Generally, no more than five points
- Ask only leading questions
- Save the explanations for summaries
- Know when to stop

Closing Argument
Core Principle:

- Storytelling time
- Show time

Closing Argument
Common Blunders:

- Lack of a theme
- Lack of structure
- Too long

- Lack of storytelling skills

Closing Argument
Cures:

- Develop and deliver a short dynamic easily understood theme
- Design and implement a workable structure
- Practice and learn story

Trial Dynamics
Blunders:

- Client and witness dress
- Use of experts: overuse; testimony regarding payment
- Physical contact and interaction with client --Jury selection and during trial
- The "entourage" problem
- Overall level of preparation and organization

Eleven Goals for Your Next Trial

- Concede the obvious -- reduce testimonial overreaching
- Develop and deliver a theme in twenty seconds or less
- Use a time line in opening statement
- Use more demonstrative evidence in opening statement
- Listen to witness' answers on direct rather than being preoccupied with your next question
- Call a management employee as an adverse witness
- Use co-worker testimony more effectively
- Use lay damage witnesses more effectively
- Start and end cross-examination on a high note
- Develop your storytelling skills
- Use a trial notebook more effectively

Jurors' General Observations of Trial Lawyers

Love Lawyers Who Are:

- Well-prepared
- Well-organized
- Polite
- Have a sense of humor
- Direct and to the point

Very Critical of Lawyers Who Are:

- Not well-prepared
- Not well-organized
- Rude
- Lack a sense of humor
- Fumble with exhibits

Other Juror Observations

- Hate side-bars
- See lawyers who object as obstructionists
- Too much rehashing of unimportant evidence
- Insulted by repetition
- Ask too many questions or convoluted questions

Opening Statements

- Short (15-20 minutes)
- Uncomplicated
- Use of visuals

Opening Statements
What to Avoid:

- Lacking a theme
- Too long
- Containing too much factual information to assimilate
- Failing to explain role of key players

Direct Examinations
Goal:

- Short examinations
- Concise questions
- No repetition

Direct Examinations
What to Avoid:

- Too many background questions
- Repetitive questions
- Lengthy examinations
- Beating issues to death
- Witnesses who don't explain terminology

Cross Examinations
Goal:

- Short
- To the point
- Non-repetitive

Comprehensive Use of Notebook

- Theme
- Jury instructions
- Final argument
- Trial graphics
- Witness list
- Exhibit list
- Evidentiary problems
- Proof outline

Testimonial Overreaching
Plaintiff:

- I did not know the company had a sexual harassment policy
- I did not know you could complain to human resources
- I complained to the front line supervisors, but not to Human Resources for fear of retaliation
- I have seen or participated in similar conduct on or off work
- My notes are not all inclusive
- The EEOC interviews were not all inclusive
- I did not have time to write more notes
- I just found more notes
- I lost, destroyed, or had my notes stolen

Defendant:

- I have never heard a sexually oriented joke in the workplace
- I have never heard a racially discriminatory joke in the workplace
- I have not seen nor participated in similar conduct on or off work
- I wrote the company lawyer a summary and destroyed the note
- I lost, destroyed, or had my notes stolen
- I just found more notes

REMEMBER *SCOTT-PONTZER*

By: Dale Economus

Facts:

On June 23, 1999, the Ohio Supreme Court decided the case of *Scott-Pontzer v. **Liberty Fire** Insurance Company, et al.* (1999), *85* Ohio St.3d 660. For attorneys who practice in the area of personal injury and insurance law, the *Scott-Pontzer* case decided the issue of "who is you". In so doing, the Ohio Supreme Court laid to rest what had become a mish mash of authority among

courts of appeals across the State as they interpreted policy language in commercial liability/casualty policies which was the same or similar to that language found in Scott-*Pon*tzer.

The seminal case in a series of cases which followed it is King *v.* Nationwide *Ins. Co.* (1988), 35 Ohio St.3d 208. The specific issue addressed by the Ohio Supreme Court in King is "whether underinsured motorist coverage provided in an employer's insurance policy extends to a deceased employee whose fatal injuries were sustained in the course of employment as a result of an automobile accident with an underisnured motorist, where the employee was not listed as a designated driver, nor was he in an auto named under the policy issued to his employer." The fact that Dale Gordon, decedent, was driving an automobile owned by a co-worker while Gordon was in the course of his employment, seemed to confound many of the Courts of Appeals of Ohio in deciding King-like cases afterwards. Nowhere in the opinion of the King case can it be found that the issue of determining "who is you" depended upon whether or not the proposed insured was acting within the course and scope of his employment.

In Scott-Pontzer, two policies were at issue; a commercial auto liability policy issued through Liberty Fire Insurance to Superior Dairy containing the following language:

> "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 covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.
>
> "4. Anyone for damages he or she is entitled to recover because of bodily injury sustained by another insured.

and a second umbrella excess policy issued to Superior Dairy through Liberty Mutual which did not contain any uninsured/underinsured motorist provisions.

Scope of Employment

The Supreme Court in Scott-Pontzer determined that, absent language in the policy restricing coverage to case where the employee was in the scope of employment, no such implied requirement would be found.

Relying on the oft-quoted language found in King: "where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured," the Supreme Court determined that, under the facts of Scott-Pontzer, ths policy can reasonably be interpreted to include company employees since a corporation can act only by and through real live persons. It would be non-sensical to limit protection solely to the corporate entity, since a corporation, itself, cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle.

The Lesson

Now, more than ever, it is necessary for lawyers practicing in this area to ascertain whether or not the injured or deceased party

was employed at the time that the accident occurred. This is so because, in cases of serious injury and/or death, there is frequently insufficient insurance on behalf of the primary tortfeasor to fully compensate. Additionally, for a deceased person, insurance policies of the employers of *family members* should also be investigated.

It is suggested that the attorney representing the claimant determine whether or not additional coverage exists over and above that of the primary tortfeasor and/or any other personal underinsured motorist coverage. Care must be taken to exhaust these avenues. Mere reliance upon the word of an employer that no such coverage exists or that the employer was self-insured at the time that the cause of action arose is insufficient. One should obtain and read all policies and certified copies of policy declaration pages as part of the investigation.

The Opportunity

Scott-Pontzer affords plaintiff s counsel an additional opportunity to obtain fair and adequate compensation to their clients. Until the insurers writing commercial policies of liability/casualty carefully draft their policy language in order to blunt the thrust of the *Scott-Pontzer,* the opportunity afforded exists.

Obtaining and Effective Use of Medical Records

By: Debra Dixon

As lawyers representing the injured, we are repeatedly confronted with the issue of when to obtain and how to effectively use medical records. Although this issue may seem simple on its face, it presents many issues for a practitioner that directly impacts the success, or lack thereof, of his/her client's case.

Generally, there are four types of cases that a client's medical records are needed: (1) personal injury claims; (2) product liability claims; (3) nursing home abuse and neglect cases; and (4) medical malpractice negligence

The purpose of obtaining your client's relevant medical records varies with each type of case. In conjunction with a personal injury claim (i.e. motor vehicle accident), the client's medical records serve multiple purposes. First and foremost, the records document the nature and extent of the client's injury. In addition, obtaining all relevant medical records permits the plaintiffs attorney to ferret out any and all pre-existing conditions before they are brought to your attention by an insurance adjuster, defense counsel, or defense medical examiner. The client's medical records also permit you to uncover any statements,

beneficial or adverse, that your client may have made at the scene of the accident or at the time of treatment. Careful review of emergency records may reveal blood alcohol levels or toxicology screens, which may shape the course of your case or your ultimate decision as to whether or not to accept that particular client's representation.

In the context of a product liability claim, the client's medical records can also be an invaluable tool in preparing the case. Often, emergency treatment records provide graphic descriptions of the nature and extent of your client's injuries, as well as an excellent description of the events leading up to, and including, your client's injuries. These records may also identify potential witnesses to the subject incident and alert counsel to the potential issues of drug and/or alcohol use by the client at the time of the injury.

Medical negligence and nursing home abuse/neglect cases demand a complete set of the patient's medical record. These records permit plaintiffs counsel to fully and appropriately evaluate their client's claim, establish liability, and craft a theory or theories of the case. In addition, careful review of these types of records permit the practitioner to identify all necessary parties to the litigation, as well as conduct effective discovery.

In order to complete the above outlined goals in a medical malpractice or nursing home case, one must carefully review each and every page of these records. This includes a careful review of the face sheet of the record and nursing discharge summaries. It is also critical to note *all* "cc" copies to alert you to other records which may need to be obtained and reviewed or to identify additional parties to the litigation.

A frequently encountered problem in the area of medical malpractice and nursing home matters is determining whether or not you, as plaintiffs counsel, have received an accurate and/or complete record. In order to fully evaluate this, many seasoned practitioners make it their practice to have the client obtain a full copy of his or her records, as well as obtain their own set of the same. Once both sets are available, conduct an inspection of the original record, page by page against the previously provided copies. Any and all changes and/or deviations must be noted for exploration in discovery or establishing a claim of spoliation. For those lawyers without a medical background, employing a qualified reviewer, such as a nurse consultant, can be invaluable to effectively evaluating these records and advancing your client's interests.

Oftentimes, in the course of reviewing these records, we are confronted with a "suspicious record." There are several red flags which suggest a suspicious or problem record. These red flags include use of white-out or change in ink color on the original record. Obviously, this suggests that the entries were not made contemporaneously or that there has been an attempt to change the record after a patient's adverse result. Also, a copy having too many staple holes is a suggestion that it may not be in its original form. One should be wary of a medical record that simply sounds too good. For example, an operative note that appears to be written right out of a surgical textbook. Also worthy of a second look are entries that shift the blame onto the patient or progress notes that appear different from that contained in the treating physician's office chart.

Obtaining and evaluating a complete copy of your client's niedical records permit one to use the same effectively at the time of deposition. It should be your practice to insist

that the original record be present at the time of any and all depositions taken in the case in order to impeach defendants and establish your claim of record tampering.

Ultimately, in the context of a medical negligence and/or nursing home case, one must ask why all the effort is placed on medical records. Fundamentally, jurors believe what they see in black and white. You must be able to prove your case based on the records that you have been provided. Secondly, jurors tend to hate and punish liars. If you have a suspicious record, which turns out to be fraudulent, the jury will send an unequivocal message as to their feelings regarding the same. Finally, effective use of medical records lead to larger settlements and verdicts.

Goodluck. DJD

Recent Cases

Relief from Judgment

Stickler **vs.** *Ed Breuer Co., et al.*, Cuy. Co. App. Nos. 75126, 75129, 74206. February 24, 2000. For Plaintiff/Appellee: Edward A. Digiantonio, Mary Margaret Rowlands and William T. Whitaker. For Defendant/Appellants: Joseph R. Tira, Daniel F. Gourash and Laura M. Faust. Opinion by Ann Kilbane. Timothy E. McMonagle and Patricia Ann Blackmon concur.

The Court of Appeals herein ruled that while under Ohio Civil Rule 60(B)(1) only neglect that is excusable can form the basis of relief fkomjudgment, the "catch-air" provision of Ohio Civil Rule 60(B)(5) can be utilized as a basis for relief from judgment even where the neglect is "inexcusable" so long as that party complies with the requirements of possessing a meritorious claim or defense and files the motion within a reasonable time after the judgment.

Damages/Jury Interrogatories

Werner **vs.** *Mcabier*, Cuy. Co. App. Nos. 75197, 75233. January 13, 2000. For Plaintiff/Appellant: Joseph L. Coticchia and R. Jack Ciapp. For Defendant/Appellee: Nicholas J. Fillo. Opinion by Michael J. Corrigan. Ann L. Kilbane and Timothy E. McMonagle concur.

Plaintiff/Appellant was a passenger in a motor vehicle who sustained soft tissue injuries as a result of a rear-end motor vehicle collision. The jury returned a verdict in favor of Plaintiff/Appellant for the precise amount of the medical bills. While there existed no claim of permanent injury and no claim for future medical expenses and future lost wages, Plaintiff/Appellant requested the submission of a jury interrogatory which would have required the jury to determine what dollar amounts, if any, it found for past medical expenses, past pain and suffering and past loss of enjoyment of life. The Trial Court refused to submit this interrogatory and, instead, submitted an interrogatory inquiring only as to the total amount of Plaintiffs damages. The Court of Appeals reversed and remanded the case for a new trial holding that since the three items of past damages requested to be submitted to the jury by Plaintiff/Appellant were properly recoverable, it was prejudicial error for the Trial Court to refuse to submit Plaintiff/Appellant's proposed jury interrogatory.

However, the Court of Appeals affirmed the Trial Court's refusal to hold a hearing on Plaintiff/Appellant's motion for pre-judgment interest. The Court of Appeals

acknowledged that the Trial Court was generally required to hold a hearing on such motions but, nevertheless, ruled that where it is obvious to the Trial Court that the motion is without merit the later may dispense with the hearing requirement. Moreover, the Court of Appeals also upheld the Trial Court's granting of Defendant/Appellee's motion for protective order upon Plaintiff/Appellant's subpoena for the claims file that was served upon Defendant/Appellee in conjunction with the motion for pre-judgment interest. The Court of Appeals reasoned that the subpoena was an improper method to obtain the claims file and that a formal discovery request should have been utilized.

Violation of Ordinance/Negligence Per Se

Kemp vs. Chu Brothers/Charter House, Inc., Cuy. Co. App. No. 74956. January 13, 2000. For Plaintiff/Appellant: Christian R. Patno. For Defendant/Appellee: Rose A. Patti. Opinion by Patricia Ann Blackmon. Timothy E. McMonagle and Michael J. Corrigan concur.

Plaintiff's decedent died as a result of drowning in a public pool located on the grounds of a hotel. The hotel was located in the city of Euclid which had in effect an ordinance requiring that all public pools have a qualified, skilled life guard. This ordinance had been in existence since 1965. The Ohio Administrative Code required no life guard for a pool the size of that in which decedent drowned. The OAC required only that the public pool post warning signs that no life guard existed. The OAC's amended rules were promulgated in 1994. On November 20,1995, Euclid contracted with Cuyahoga County to monitor its public pools. Cuyahoga County follows the mandate of the Ohio Administrative Code which does not require a life guard in pools the size of Defendant/Appellee's. The county inspected and licensed Defendant/Appellee's pool and the pool had a valid license for eleven years.

The Trial Court found the Euclid ordinance inapplicable. Instead, the Trial Court applied the Ohio Administrative Code and rendered summary judgment in favor of Defendant/Appellee. The Court of Appeals affirmed the grant of summary judgment determining that a conflict existed between Euclid's local ordinance and the Ohio Administrative Code's general ordinance. Under these circumstances, the Court of Appeals applied Ohio Revised Code Section 1.51 which states that if a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. However, if the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail. Under this statute, the Court of Appeals ruled that the special or local provision, the Euclid ordinance, did not prevail as an exception to the general provision because the general provision was the later adoption. However, in addressing the second requirement under R.C. Section 151 (that the manifest intent is that the general provision prevail), the Court of Appeals found that there was no manifest intent that the special ordinance should prevail. Thus, it appears that the Court of Appeals changed the analysis required for this second condition under the statute; namely, the Court of Appeals did not analyze whether there existed a manifest intention that the later general provision prevail but, rather, the very different question of whether there was any specific manifest intention that the local or special

provision (the ordinance) should prevail. In this way the Court of Appeals shifted the burden of proof as to intention upon he who was advocating the application of the special or local provision rather than upon he who was advocating that the later general provision should apply.

Premises Liability/General Contractors

Sanders **vs.** *Anthony Alle,qa Contractors, et al.*, Cuy. Co. App. No. 74953. December 30, 1999. For Plaintiff/Appellant: Stanley S. Keller. For Defendants/Appellees: Jeffrey A. Schenk. Opinion by Timothy E. McMonagle.

Plaintiff was injured while leaving a Cleveland Browns football game on the evening of November 26, 1995. At the time that Plaintiff exited Cleveland Municipal Stadium on that date darkness had already fallen. While walking toward East Ninth Street to their parked car, Plaintiff and her group, carried along by the flow of pedestrians, walked across the East Ninth Street westbound entrance ramp to Route 2. New guardrails were being installed along the paved roadway by Allega Contractors. The group progressed along the pavement onto the dirt construction area, where after a few steps, Plaintiff stepped into a hole approximately knee deep and suffered a fractured tibia. A sign was posted in the area where the accident occurred which read, "Pedestrians and Bicycles Prohibited". Finding that Plaintiff was a trespasser at the time she was injured, the Trial Court granted summary judgment in favor of Allega.

The Court of Appeals reversed holding that only the landowner or an entity which had a property interest in the premises could benefit from Plaintiffs status at the time she was upon the premises. Thus, whether Plaintiff was a trespasser, licensee or invitee was immaterial to the liability of the general contractor. Since Allega held no property interest in the premises, the Court of Appeals determined that simple negligence principles determined Allega's duty of care. Accordingly, the Court of Appeals ruled that construing the facts most favorably for Plaintiff, a reasonably prudent person could have foreseen the dangerousness of the deep holes in a dark construction site; a reasonably prudent person could have foreseen that the pedestrians emerging from the adjacent Cleveland Municipal Stadium would traverse in large groups across the access ramps and walk across the bordering ground within the construction area; and a reasonably prudent person could have foreseen that such pedestrian could be injured by stepping into unmarked deep holes concealed both by darkness and the crowded conditions.

The Court relied upon the Ohio Supreme Court decision in *Simmers vs. Bentley Construction Co.*, (1992), 64 Ohio St. 3d 642 for its determination that plaintiffs status on the premises was immaterial to the duty owed by Allega. In *Simmers,* the Supreme Court held that an independent or general contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which exonerates an owner or occupier of land from the duty to warn those entering the property concerning open and obvious dangers on the property.

Verdicts & Settlements

Rose Marie Boll, Adm., etc. v. The Cleveland Clinic Foundation, et al.

Type of *Case:* Medical Malpractice
Judgment: $1,073,000

Plaintiff's Counsel: Charles Kampinski, Christopher M. Mellino, Laurel A. Matthews
Defendant's Counsel: Anna Carulas
Court: Cuyahoga County Common Pleas, Judge Timothy J. McGinty
Date: November 1999
Insurance Company: Not Listed
Damages: Death

Summary: Jean Schneider was a healthy, vibrant, 71-year-old mother and grandmother who was treating with her internist, Eileen Stroh, M.D. for gastrointestinal symptoms in the Fall of 1997. On December 14, 1997, she was seen by Dr. Stroh in her office in Westlake, Ohio in acute distress.

Dr. Stroh performed an EKG, which showed changes that suggested that Mrs. Schneider was having a heart attack. Dr. Stroh told Mrs. Schneider to go to The Cleveland Clinic Foundation Hospital to be admitted. Dr. Stroh testified that she called CCF and talked to someone in admitting to arrange for Mrs. Schneider to be admitted to a monitored bed. She also testified that she spoke to a resident at the hospital and informed him of the abnormal EKG. Dr. Stroh's office note with the instruction to rule out myocardial infarction was also transmitted to CCF.

Mrs. Schneider went to CCF and was admitted to an unmonitored bed. No follow-up EKG was done. In fact, Mrs. Schneider received no cardiac treatment whatsoever. The resident Dr. Stroh spoke to went home before Mrs. Schneider arrived. The attending physician never saw Mrs. Schneider that evening and was not aware that she had been admitted.

Her care was delegated to an intern, Dr. Khurana, who merely did a history and physical on her. Dr. Khurana testified that she was totally unaware of the abnormal EKG or the urgent need for a cardiac work-Lip. The resident who allegedly spoke with Dr. Stroh has no recollection of the conversation.

The following day, Mrs. Schneider was seen by various physicians who treated Mrs. Schneider's gastrointestinal symptoms and were totally unaware of her cardiac problem. That afternoon, a nurse and then Dr. Khurana attempted 5 times to place a nasogastric tube in Mrs. Schneider. During the last attempt, Mrs. Schneider collapsed and died. Her ventricle ruptured from the failure to treat her heart attack.

Plaintff's *Experts:* Thomas Kaiser, M.D.(Cardiologist); John F. Burke, Jr., Ph.D. (Economist)
Defendant's Experts: Mark Botham, M.D. (Cardio Thoracic Surgeon); J. Michael Koch, M.D. (Cardiologist); Stephen M. Factor, M.D. (Pathologist)

Doe v. Health Care Providers

Type of Case: Medical Malpractice
Settlement: $3,550,000
Plaintiff's Counsel: Robert F. Linton, Jr.
Defense Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas
Date: March, 2000
Insurance company: Withheld
Damages: Second degree burns, stage IV sacral bed sore and blindness

Summary: Plaintiffwas a 30 year old resident in a group home for the mentally retarded and developmentally disabled. She was born with spinabifada, which made her paraplegic and mentally retarded. She sirffered burns while showering, followed by a stage IV bed sore, which required a flap surgery. A shunt, which was installed in her head to allow excess

cerebral spinal fluid to drain into her abdomen, malfunctioned, causing increased intra-cranial pressure and ultimately blindness. Case settled against group home where plaintiff resided as well as various physicians,

Plaintiff's Experts: Marlene S. Blackford (Nurse and ICF/MR Facility Consultant); Andrew G. Lee (Negro-Opthalmalogist); Charles A. Jungreis (Negro Radiologist); Joseph R. Spoonster, M.S., V.E. (Life Care Planner); Charles Everett Rawlings III (Neurosurgeon); Michael L. Robertson (Questioned Document Examiner)

Vukovich v. Ferrara, et al

Type of Case: Personal Injury
Settlement: $300,000
Plaintiff's Counsel: Robert F. Linton, Jr.
Defense Counsel: Rick McDonald
Court: Lake County Court of Common Pleas
Date: March, 2000
Insurance company: Cincinnati Insurance
Damages: Scalp laceration, compound tibia/fibula fracture

Summary: Auto accident causing scalp laceration and compound tibia/fibula fracture requiring surgery.

Plaintiff's Experts: John Posch, M.D.; Sheldon Artz, M.D.

Brey v. Miller

Type of Case: Personal Injury
Settlement: $200,000 arbitration award plus payment of medical subrogation claim of $29,000.
Plaintiff's Counsel: Robert F. Linton, Jr. and James **A.** Oakar
Defense Counsel: Kenneth Calderone
Court: Summit County Court of Common Pleas
Date: March, 2000
Insurance Company: Withheld
Damages: Not Listed

Summary: Rear-end collision, requiring arthro-scopic lumbar fusion.

Plaintiff's Experts: Robert McLain, M.D.

Mary Louise Ramsey v. Richmond Heights General Hospital

Type of Case: Medical Malpractice
Settlement: $50,000
Plaintiff's Counsel: Howard Miskind
Defendant's Counsel: Martin Fallon
Court: Cuyahoga County Common Pleas
Date: January, 2000
Insurance Company: Ohio Insurance Guaranty Association (former PIE claim)
Damages: Decreased sensation in dominant hand.

Summary: 50-year-old black female transported to Richmond Hts. General Hospital in cardiopulmonary arrest. While in the intensive care unit, she sustained an injury to her left arm most likely caused by an infiltration of dobutamine. Plaintiff developed weakness in the first, second and third digits of her dominant hand. Plaintiff made a good recovery and has minimal decreased sensation in the three digits, but is able to use her hand normally and works as a cashier.

Plaintiff alleged that Defendant Hospital, by and through its nurses, failed to properly monitor Plaintiffs status in the intensive care unit and failed to timely recognize the infiltration. Defendants contend that it is unlikely that an IV infiltration was the cause of her swelling and the patient developed

carpal tunnel syndrome. Defendants further contend that any injury caused by the alleged infiltration resolved well and that the only residual injury was to the median nerve which is minimally symptomatic and is associated with carpal tunnel syndrome.

No lost wages. Plaintiff is able to use her hand and just has minor deficits in feeling, but no functional problems.

Plaintiff's Experts: Dr. John P. Conomy (Neurologist); Darlene Bartos, R.N. (Critical Care)
Defendunt's Experts: Dr. David Preston (Neurologist); Cathy Sloane, R.N. (Critical Care)

Michael Ruggieri v. Universal Sports America, Inc.

Type of Case: Negligence/Premises Liability
Verdict: $224,000
Plaintiff's Counsel: William Hawal
Defendant's Counsel: John F. Burke, Jr.
Court: Cuyahoga County Common Pleas, Judge Nancy McDonnell
Date: February, 2000
Insurance Company: Zurich
Damages: Fractured femur

Summary: Plaintiff was a spectator at a Hoop-It-Up basketball tournament at the Cleveland Municipal parking lot when a sudden thunderstorm occurred with 40 mph winds. A portable basketball backboard was blown over by the wind, striking Plaintiffs leg. Plaintiff claimed the backboard was not properly secured.

Plaintiff's Experts: Robert Mullen, Ph.D. (Structural Engineer); Michael Joyce, M.D. (Orthopedic Surgeon)
Defendant's Experts: None

Estate of John Doe v. ABC Hospital, et al.

Type of Case: Medical Malpractice/Wrongful Death
Settlement: $2,425,000
Pluintff's Counsel: William Hawal; Mary A. Cavanaugh
Defendant's Counsel: Withheld
Court: Summit County, Judge Unruh
Date: January, 2000
Insurance Company: Mutual Assurance of Alabama/Self-Insured Hospital
Damages: Wrongful Death

Summary: Decedent developed coagulopathy following mirtal valve replacement surgery. Laboratory called on-call cardiologist of elevated INR and was instructed to fax result to the office. During this time decedent presented to the hospital with complaints consistent with low cardiac output. Coagulation profile was ordered on admission but was not performed. Decedent arrested moments after administration of Heparin for suggested pulmonary embolism. Settled on 4th day of trial.

Plaintiff's Experts: Edward Panacek, M.D. (Critical Care Medicine); Douglas Ackerman, M.D. (Pathologist)
Defendant's Experts: Donald Fry, M.D. (General Surgeon); Jacob Zatuchni, M.D. (Cardiologist); Mary Ann Belanger, R.N.

Kimberly Kolat, Admrx., etc. v. Diane

Type of Case: Wrongful Death
Settlement: $750,000
Plaintiff's Counsel: William Hawal, Dennis R. Lansdowne
Defendant's Counsel: Thomas S. Mazanec

Court: Geauga County,
Judge Inderlied
Date: January, 2000
Insurance Company: State Farm
Damages: Wrongful death

Summary: Plaintiffs 8-month-old daughter was at the home of a babysitter who was operating a home day care facility. The babysitter placed the decedent into a playpen with a queen-sized comforter. The decedent was found dead several hours later, the death resulting from apparent asphyxiation when the child became entangled in the comforter.

Plaintiff's Experts: Doris Raphael (Day Care Consultant); John Smialek, M.D. (Pathologist); Adi Chehna, Ph.D. (Textile Expert)
Defendant's Experts: None

Judy Wallace, Executrix v. Suvir Kovoor, M.D., et al.

Type of Case: Medical Malpractice
Verdict: $2,300,000
Plaintiff's Counsel: Peter J. Brodhead, Justin F. Madden
Defendant's Counsel: Beverly Harris
Court: Trumbull County Common Pleas
Date: March, 2000
Insurance Company: St. Paul Insurance Company
Damages: Wrongful death

Summary: Decedent, a 54-year-old male, had presented to St. Joseph's Health Center's Emergency Department with abdominal pain and distention, and a history of a known abdominal aortic aneurysm. Erroneously, believing patient's symptoms to be due to a ruptured renal cyst, the emergency physician observed the patient for 4 1/2 hours, transferring him to St. Elizabeth's Hospital only after he had suffered an acute respiratory arrest secondary to the rupture of his abdominal aortic aneurysm. The patient expired at St. Elizabeth's Hospital 48 hours after his surgery.

Plaintiff's Experts: Kaj Johnson, M.D.; Marvin Wayne, M.D.; Hadley Morgenstern-Clarren, M.D.
Defendant's Experts: David Rollins, M.D.; Charles Emerman, M.D.

John Doe, Adm. v. Erie Insurance Co.

Type of Case: Auto
Settlement: $740,000
Plaintiff's Counsel: David M. Paris
Defendant's Counsel: David Hanna, Esq.
Court: Huron County,
Judge Earl McGimpsey
Date: February, 2000
Insurance Company: Erie Insurance Co.
Damages: Head injury resulting in coma for 2 days and death. No conscious pain and suffering.

Summary: Plaintiff was a passenger in a vehicle struck head-on by an underinsured tortfeasor. Underinsurance was established through his father's employer's corporate policy as per *Scott-Pontzer v. Liberty Mutual Ins. Co.*

Plaintiff's Experts: None
Defendant's Experts: None

Jane Doe v. ABC Co.

Type of Case: Automobile/Pedestrian
Settlement: $190,000
Plaintiff's Counsel: David M. Paris
Defendant's Counsel: Withheld
Court; Cuyahoga County,
Judge Daniel Gaul

Date: March, *2000*
Insurance Company: Withheld
Damages: Fractured ankle with open reduction and internal fixation

Summary: Plaintiff was a pedestrian struck by a deliveryman's van. The deliveryman's employer denied that he was an employee and denied that he was in the course and scope at the time of the collision. The deliveryman's personal insurance carrier denied coverage based on the business exclusion. Plaintiffs UM carrier paid her $85,000 and pursued subrogation against the personal carrier and Plaintiff pursued the deliveryman's employer and settled for $105,000.

Plaintiff's Experts: Roger Wilber, M.D.
Defendant's Experts: None

John Doe v. John Goe, M.D., et al.

Type of Case: Medical Malpractice
Settlement: Withheld
Plaintiff's Counsel: Thomas Mester
Defendant's Counsel: William Meadows, Tom Betz, Mark O'Neill
Court: Cuyahoga County,
Judge Burt Griffin
Date: February, 2000
Insurance Company: PIE-Ohio Guaranty Assoc., Medical Protective Company
Damages: Death

Summary: Plaintiff presented to his family doctor with stomach complaints for which he was provided medication and an ulcer was diagnosed. Patient then went to another internist who had performed by a radiologist a radiographic study revealing a chronic antrum deformity, determining it to be chronic by history of the patient, rather than by prior radiological evaluation. Plaintiff still continued to complain about stomach pain. There was no follow up radiologist evaluation or endoscopic evaluation and a year later the patient was diagnosed with stomach cancer from which he died. Plaintiffs experts opined that all of his physicians failed to diagnose his stomach cancer in a timely fashion. The family doctor and radiologist were PIE insured with limited coverage.

Plaintiff's Experts: Barry Singer, M.D.; Myron Marx, M.D.; Gene Copa, M.D.
Defendant's Experts: Donald Junglas, M.D.; Nathan Levitan, M.D.; Ronald Bukowski, M.D.; Michael Yaffe, M.D.

John Doe v. John Foe, M.D., et al.

Type of Case: Medical Malpractice
Settlement: $1,450,000
Plaintiff's Counsel: Thomas Mester, William Jacobson
Defendant's Counsel: Tom Treadon, Michael Ockerman, Alton Stephens, David Best, Richard Strong
Court: Summit County,
Judge James Williams
Date: February, *2000*
Insurance Company: PIE-Ohio Guaranty Assoc. PICO
Damages: Death

Summary: Defendant cardiologist, radiologist, emergency room physician and hospital failed to diagnose an aortic dissection resulting in Plaintiffs death. The cardiologist and attending physician, who was primarily responsible for Plaintiffs care, was insured by PIE and had limited coverage.

Plaintiff's Experts: Myron Marx, M.D.; Kenneth Lehrman, M.D.; Frank Baker, M.D.; John Burke, Ph.D.; Vicki Turner, R.N.; Martin Lee, M.D.
Defendant's Experts: Mary Ann Belanger, R.N.Robert Bahler, M.D.; Victor Demarco,

M.D.; Bruce Janiak, M.D.; Lawrence Cooperstein, M.D.

Jane Doe v. Dr. John Foe

Type of Case: Medical Malpractice
Settlement: $900,000
Plaintiff's Counsel: Leon M. Plevin
Defendant's Counsel: Withheld
Court: Cuyahoga County, Judge Frank D. Celebrezze, Jr.
Date: February, *2000*
Insurance Company: OUM & Associates
Damages: Melanoma of the foot

Summary: Plaintiff noticed what appeared to be a wart, black in color, on the bottom of her foot. She went to see a podiatrist who treated her off and on over a period of two years. He never took a biopsy. Podiatrist finally sent patient for an evaluation at University Hospital and a melanoma was diagnosed.

Plaintiff's Experts: Kenneth McCarty, M.D.; Alan Singer, D.P.M.; Keith B. Kashuk, D.P.M.,PA
Defendant's Experts: Withheld

John Doe v. John Foe

Type of Case: Dog Bite
Settlement: $355,000
Plaintiff's Counsel: Leon M. Plevin
Defendant's Counsel: Withheld
Court: Cuyahoga County, Judge David Matia
Date: February, 2000
Insurance Company: Chubb Group of Insurance Companies
Damages: Bites and lacerations of both forearms, including lacerations of muscles and tendons which required surgery.

Summary: Plaintiff and his wife went to the home of the Defendant to pick up the Defendant and his wife to go to a restaurant for dinner. He honked the horn and no one appeared. He got out of the car to ring the front doorbell when he was attacked by a German Shepherd dog in full view of the Defendant.

Plaintiff's Experts: Michael Keith, M.D.
Defendant's Experts: None

John Doe, Exec. v. XYZ Hospital, et al.

Type of Case: Medical Malpractice/Wrongful Death
Settlement: $475,000
Plaintiff's Counsel: Andrew P. Krembs
Defendant's Counsel: Susan Reinker
Court: Cuyahoga County Court of Common Pleas
Date: November, 1999
Insurance Company: Self-Insured
Damages: $22,574.87 (medical and funeral)

Summary: Plaintiffs decedent entered the Defendants' hospital for the purpose of having a central dialysis catheter inserted to allow for dialysis treatment of her failed transplanted kidney. During the procedure, the subclavian vein was lacerated. Because of the delay in taking the decedent to surgery to repair the venous laceration, the decedent died on the operating table.

Plaintiff's Experts: Robert *O.* Hickman, M.D. (Inventor of "Hickman" catheter)
Defendant's Experts: Alice *S.* Stollenwerk-Petrulis M.D. (Nephrologist); Ziv Haskal, M.D. (Interventional Radiologist)

Jane Doe v. XYZ Hospital, et al.

Type of Case: Medical Malpractice
Settlement: $2,200,000
Plaintiff's Counsel: Andrew Krembs
Defendant's Counsel: Stephen S. Crandall, Stephen **A.** Skiver
Court: Cuyahoga County Common Pleas, Judge Timothy J. McGinty
Date: September, 1999
Insurance Company: Self-Insured
Damages: Above the knee amputation of the left leg at the hip.

Summary: Plaintiff was admitted through the emergency room to the hospital with a diagnosis of a deep vein thrombosis in the left leg. Despite continuing and worsening symptoms, Defendants failed to confirm a suspected diagnosis of a compartment syndrome thereby resulting in a delay in the performance of a fasciotomy. This delay resulted in the necrosis of vital tissues in Plaintiffs left leg, ultimately causing the need for a left hip disarticulation.

Plaintff's Experts: Guy R. Voeller, M.D. (Vascular Surgeon); Peter B. Scherer, M.D. (Hematologist); Manuel R. Garcia (Certified Prosthetist)
Defendant's Experts: None submitted prior to settlement.

P. Kramvousanos, et al. v. A. Caley

Type of Case: Automobile Accident
Settlement: $300,000
Plaintiff's Counsel: Andrew P. Krembs, Dean Nieding
Defendant's Counsel: James W. Patton, Peter Ulbrich
Court: Hamilton County Court of Common Pleas, Judge David Davis
Date: October, 1999
Insurance Company: Western Reserve Croup & Farmer's Insurance Group of Companies
Damages: Herniated cervical disc

Summary: Plaintiffwas apassenger in a motor vehicle which was struck in the rear while at rest waiting for a traffic light to change.

Plaintzfs Experts: Luis Pagani, M.D. (Family Practice); Mario Zuccarello, M.D. (Neurosurgeon)
Defendant's Experts: Arnold R. Penix, M.D. (Orthopaedic Surgeon)

George Felan, et al. v. Millennium Inorganic Chemicals, Inc. fka SCM Chemicals, Inc., et al.

Type of Case: Premises Liability/Slip and Fall
Settlement: $550,000
Plaintiff's Counsel: Andrew P. Krembs
Defendant's Counsel: James Millican
Court: Ashtabula County Court of Common Pleas, Judge Alfred Mackey
Date: June, 1999
Insurance Company: Self-Insured
Damages: Tom rotator cuff of the right shoulder

Summary: During the delivery of his load to the Defendant, Plaintiff slipped on an oily substance in the area of the unloading dock falling on his right shoulder.

Plaintiff's Experts: Pete E. Garcia, M.D. (Orthopaedic Surgeon); H. David Feltoon, Ph.D. (Psychologist); Robert B. Ancell, Ph.D. (Vocationist); Abimael Perez, M.D. (Internist)
Defendant's Experts: George Cyphers (Vocationist); Kevin L. Trangle, M.D.

Jane Doe, et al. v. John Doe, M.D.

Type of Case: Medical Malpractice
Settlement: $1,000,000
Plaintiff's Counsel: Andrew P. Krembs
Defendant's Counsel: James Malone
Court: Cuyahoga County Common Pleas
Date: January, 2000
Insurance Company: Medical Protective
Damages: Pelvic sepsis leading to rectal vaginal fistula and multiple temporary ileostomies

Summary: Plaintiff sought advice from the Defendant for treatment of her ulcerative colitis. In response, the Defendant performed a total colectomy procedure without the use of a temporary diverting ileostomy. During her recovery, Plaintiff developed an abdominal leak of bowel contents resulting in pelvic sepsis and a rectal vaginal fistula. This necessitated multiple hospital confinements and surgeries to repair damage caused by the pelvic sepsis.

(Subsequent Treating Colon and Rec Surgeon)
Defendant's Experts: Lee E. Smith, M. (Colon and Rectal Surgeon)

John Doe v. Propane Dispenser, et al.

Type of Case: Negligence/Product Liability
Settlement: $675,000
Plaintiff's Counsel: Richard C. Alkire
Defendant's Counsel: Robert D. Archibalt, Chris McClatchey, John B. Robertson, Theodore M. Dunn, Jr.
Court: Cuyahoga County Common Pleas
Date: August, 1999
Insurance Company: The Shelby Insurance Company, Motorists Mutual Insurance Company, One Self-Insured (Grill Manufacturer)
Damages: Second and third degree burns to upper torso and upper extremities.

pound propane cylinder to the local g station's propane filling facility where over-filled by an employee of the station. Plaintiff placed this spare cy under the propane grill, which he was us the time of his injury, next to the pr cylinder in use. During the cooking pr the over-filled spare cylinder released pr and ignited it while Plaintiff was i vicinity of the grill cooking food. Pla was then treated Center's Unit for one month and returned to his h returning to work some two months Plaintiff's claims were against the manufacturer for defective design based the ability to store a foreseeably over-fi cylinder next to a cylinder in use, the pro dispensing facility for over-filling the cyli contrary to applicable rules and regulati governing the filling of cylinders, and propane distributor for failing to assure pro training of employees of the service stat charged with the duty of filling propa cylinders.

Ronald Lapina (Chemical Engineer Famili with Gr Design and l opane); Richard B. Fratiann M.D. (Director of Burn Intensive Care Unit Robert W. Shields, Jr., ...D. (Neurologist)
Defendant's Experts: William Baynes (Gri Expert); Kenneth Wolfe (Explosion and Fir Causes); Jean McDowell (Fire Scientist) Mark Mulcahy (Senior Fir Investigator/Mechanical Engineer)

John Doe v. Employer

Type of Case: Employer Intentional Tort
Settlement: $500,000
Plaintiff's Counsel: Richard C. Alkire
Defendant's Counsel: Christopher A. Holocek; Peter Hessler
Court: Cuyahoga County Common Pleas, Judge Christopher **A.** Boyko
Date: August, 1999
Insurance Company: Self-Insured, CGL insurer denied coverage for the Employer Intentional Tort claim
Damages: Medical (past) *$62,000;* Wages $76,000

Summary: Plaintiff, while walking into an aisleway regularly traveled by both pedestrians and tow motors, was struck by a tow motor operated by a co-employee. Neither of these individuals were able to see the other because of baskets stacked which created a visual obstruction.

Plaintiff's Experts: George Smith, Ph.D. (Industrial Engineer); Robert R. Wright, Ph.D. (Science, Mathematics, Engineering Professor & Accident Reconstructionist); Rod Durgin, Ph.D. (Vocationist); Brendan M. Patterson, M.D. (Plastic and Reconstructive Surgery)
Defendant's Experts: William Bunner (Safety Expert)

Kurt Brenkus, Admr., etc. v. David Carlson, Admr., etc.

Type of Case: Wrongful Death/Automobile Accident
Settlement: $290,000
Plaintiff's Counsel: Andrew P. Krembs, James J. Sartini
Defendant's Counsel: John C. Cubar, Craig G. Pelini
Court: Ashtabula County Common Pleas
Date: July, 1998
Insurance Company: Auto Owners' Insurance Company
Damages: Medical $7,301.20 (Funeral and Burial)

Summary: Plaintiffs decedent and the Defendant's decedent were occupants of a motor vehicie invoived in a single car accident in which both occupants were killed. The issue in the case is which occupant was in fact the operator of the motor vehicle. The Defendant was the beneficiary of a $300,000 single limit insurance policy while Plaintiff carried a policy of $100,000-$300,000.

Plaintiff's Experts: Henry P. Lipian (Accident Reconstructionist); Jeffrey Lewis (Chief Investigator for the Coroner's Office); Robert A. Malinowski, M.D. (Coroner); Ellen H. Jacobs, LISW (Social Worker)
Defendant's Experts: David L. Uhrich, Ph.D. (Accident Reconstructionist)

Frank Petrekovich v. City Scrap & Salvage Co.

Type of Case: Employer Intentional Tort
Settlement: $550,000
Plaintiff's Counsel: Richard C. Alkire
Defendant's Counsel: Sheila A. McKeon, Cathryn R. Ensign, Thomas R. Kelly
Court: Summit County Common Pleas
Date: August, 1999
Insurance Company: Continental Casualty Company
Damages: Partial thickness bums to face, bilateral upper extremities, posterior torso and upper buttocks.

Summary: Plaintiff was using a torch to cut radiators on the premises of the employer in the vicinity of flammable chemicals and insulated wire. During the torching process, taking place inside a building, flames caused the flammable material to ignite injuring

Plaintiff. **A** factual dispute existed concerning Plaintiffs requirements to torch in that fashion and in that location. The Bureau of Workers' Compensation accepted $100,000 to settle its subrogation lien which exceeded $225,000.

Plaintiff's Experts: David **A.** Andrews, M.D.
Defendant's Experts: Not Listed

Virginia Ohler v. Yogendra Shah, M.D.

Type of Case: Medical Malpractice
Verdict: $1,100,000
Plaintiff's Counsel: John **A.** Lancione, John G. Lancione
Defendant's Counsel: Brian Kneafsey
Court: Tuscarawas County,
Judge Thomakos
Date: December, 1999
Insurance Company: Kentucky Medical
Damages: Reduced life expectancy, worsening of multiple sclerosis.

Summary: Plaintiff, a 68-year-old, saw Defendant 78 times in 17 years for general medical care. Me diagnosed spastic colon based on symptoms alone and never performed colonoscopy. Seventeen years after initial diagnosis of spastic colon, an 8.0 x 7.5 cm tumor was diagnosed in the descending colon.

Plaintiff's Experts: Robert Steels, M.D. (Oncologist); Theodor Herwig, M.D. (Family Medicine); John Conomy, M.D. (Neurology)
Defendant's Experts: Douglas Magenheim, M.D. (Internal Medicine)

Jane Doe v. A&B Radiology, et al.

Type of Case: Medical Malpractice
Settlement: $1,600,000
Plaintiff's Counsel: John A. Lancione, John G. Lancione
Defendant's Counsel: Stephen E. Walters, Stephen D. Walters, Joseph Wantz
Court: Cuyahoga County,
Judge Daniel Corrigan
Date: August, 1999
Insurance Company: OIGA, MedPro
Damages: Reduced life expectancy, terminal breast cancer.

Summary:. Plaintiff had abnormal mammogram. Needle localization of non-palpable abnormality was scheduled but canceled due to radiologist's inability to appreciate abnormal area. None of the physicians followed up on abnormal mammogram. Advanced breast cancer diagnosed 19 months later.

Plaintiff's Experts: Hadley Morgenstern-Clarren, M.D. (Internal Medicine)
Defendant's Experts: Calvin Kunin, M.D. (Internal Medicine); Nathan Levitan, M.D. (Oncologist)

John Doe, a Minor v. Medical Facility

Type of Case: Medical Malpractice
Settlement: $500,000
Plaintiff's Counsel: John **A.** Lancione
Defendant's Counsel: Steven Crandall
Court: Cuyahoga County,
Judge McCafferty
Date: June, 1999
Insurance Company: Self-Insured
Damages: Reduced visual acuity in right eye.

Summary: Plaintiff, a minor, had regular eye exams at Defendant's medical facility by a nurse who documented that he failed each eye exam. Pediatrician did not know medical facility's policy for pediatric vision screening; so she did not properly interpret test results. **A** two year delay in diagnosis of amblyopia

resulted in reduced vision in right eye.

Plaintfls Experts: Ronald Price (Pediatric Ophthalmologist)
Defendant's Experts: Mark Feldman, M.D. (Pediatrics)

Jane Doe v. ABC Radiology & Gynecology

Type of Case: Medical Malpractice
Settlement: $350,000
Plaintfls Counsel: John A. Lancione, Matthew Fekete
Defendant's Counsel: Shirley Christian, Peter Voudouris

Court: Mahoning County,
Judge Durkin
Date: June, 1999
Insurance Company: PICO, Frontier
Damages: Increased risk of recurrence of cancer, loss of breast.

Summary: Radiologist failed to appreciate abnormality on mammogram. Gynecologist failed to work up palpable mass in breast. Cancer progressed from Stage I to Stage II during period of delay. Plaintiff was disease-free for *3* years after surgery.

Plaintiff's Experts: Michael Baggish, M.D. (Gynecologist); Paul Goldfarb, M.D. (Surgical Oncologist)
Defendant's Experts: Victor Vegeli, M.D. (Oncology); Ellen Mendelson, M.D. (Radiology)

Jane Doe v. John Roe, M.D.

Type of Case: Medical Malpractice
Settlement: $205,000
Plaintfls Counsel: John A. Lancione
Defendant's Counsel: Steve Forbes
Court: Stark County,
Judge Reinbold
Date: June, 1999
Insurance Company: AIG
Damages: Loss of chance, reduced life expectancy

Summary: Inappropriate pneumonectomy on patient with inoperable and terminal lung cancer. Patient developed post-op fistulan and died. Life expectancy from cancer was six months to two years.

Plaintfls Experts: Gary Silver, M.D. (Cardiovascular/ Thoracic Surgery)
Defendant's Experts: None

Doe v. Healthcare Provider

Type of Case: Medical Malpractice
Settlement: $240,000
Plaintfls Counsel: John G. Lancione, John A. Lancione
Defendant's Counsel: Withheld
Court: Columbiana County Common Pleas
Date: December, 1999
Insurance Company: Withheld
Damages: Injury to biliary tract, surgery, future risk of complications.

Summary: Plaintiff suffered a transection of the common bile duct during a laparoscopic choleycystectomy, requiring emergent transfer to tertiary care center for reconstructive surgery.

Plaintfs Experts: William Schirmer, M.D.
Defendant's Experts: Timothy Pritchard, M.D.

Decedent's Estate v. Healthcare Providers

Type of Case: Medical Malpractice
Settlement: $287,500

Plaintiff's Counsel: John G. Lancione, John A. Lancione
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas
Date: October, 1999
Insurance Company: Withheld
Damages: Death of a 28-year-old single woman

Summary: Plaintiff was having a CT of the abdomen with IV contrast when she had an anaphylactoid reaction, causing pulmonary edema and cardiac arrest.

Plaintiff's Experts: William Bush, M.D.
Defendant's Experts: Michael Federle, M.D.; Edward Panacek, M.D.; Dean Dobkins, M.D.

Decedent's Estate v. Healthcare Provider

Type of Case: Medical Malpractice
Settlement: $1,250,000
Plaintiff's Counsel: John G. Lancione, John A. Lancione
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas
Date: September, 1999
Insurance Company: Unknown
Damages: Death of a 58-year-old school teacher/wife.

Summary: Patient was undergoing spinal surgery when she developed a bleeding disorder and exsanguinated.

Plaintiff's Experts: Theodore Stanley, M.D. (Anesthesia); Fred Seiber, M.D. (Anesthesia); William Berger, M.D. (Anesthesia)
Defendant's Experts: Michael Murray, M.D. (Anesthesia); Lawrence Goodnough, M.D. (Anesthesia)

Roe v. Healthcare Providers

Type of Case: Medical Malpractice
Settlement: $200,000
Plaintiff's Counsel: John G. Lancione, John A. Lancione
Defendant's Counsel: Withheld
Court: Allen County Common Pleas
Date: June, 1999
Insurance Company: Withheld
Damages: Cardiac arrest and coma of 69-year-old female patient.

Summary: Plaintiff had cervical spine surgery complicated by post-op hematoma and prior cardiovascular and pulmonary disease, suffered cardiac arrest while intubated via a tracheostomy due to a mucous plug or a baso vagal response.

Plaintiff's Experts: Dennis Mazal, M.D.

Defendant's Experts: Carole Miller, M.D.; John Weg, M.D.

Decedent's Estate v. Healthcare Providers

Type of Case: Medical Malpractice
Settlement: $150,000
Plaintiff's Counsel: John G. Lancione, John A. Lancione
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas
Date: January, 2000
Insurance Company: Withheld
Damages: Death of 68-year-old housewife

Summary: Plaintiff suffered from cardiovascular disease, diabetes, kidney failure and hypertension. Plaintiff was given medication which contraindicated causing early dialysis, fell while in the hospital, fractured a hip, and died from multi-system complications.

Plaintiff's Experts: Theodor Herwig, M.D.;

Jay Wish, M.D.
Defendant's Experts: Emil Dickstein, M.D.; Barry Siegel, M.D.; Kevin Johnson, M.D.

Julia Cicchillo, etc. v. Pittsburgh Corning Corporation

Type of Case: Product Liability
Settlement: $1,600,000
Plaintfs Counsel: Michael V. Kelley, Thomas M. Wilson, Ann O'Rourke, Robert A. Marcis II
Defendant's Counsel: Gary Hermann
Court: Cuyahoga County Common Pleas, Judge James J. Sweeney
Date: February, 2000
Insurance Company: Unknown
Damages: Contracted malignant mesothelioma and asbestosis

Summary: Julia Cicchillo, for herself and on behalf of her deceased husband who died at the age of 78 after having contracted asbestosis and malignant mesothelioma, filed a cause of action for strict product liability against Pittsburgh Coming Corporation. Plaintiff alleged: (1) the existence of a design defect in the Pittsburgh Coming Unibestos product, *i.e.*, use of the dangerous substance amosite asbestos, made the Pittsburgh Corning Unibestos product more dangerous than an ordinary consumer, like Joseph Cichillo who was a welder at Republic Steel, might reasonably have expected; and (2) Pittsburgh Corning knew or should have known of the risk of injury caused by the use of amosite asbestos in its Unibestos product and Pittsburgh Corning failed to provide an adequate warning of the known risks.

Plaintiff presented evidence that before Pittsburgh Coming purchased its Unibestos product line in 1962, it had actual knowledge of the dangers inherent in the use of asbestos, the primary ingredient in Unibestos.

Plaintiff's Experts: Barry Castleman, Ph.D., Richard Lemen, Ph.D., Carlos Bedrossian, M.D.
Defendant's Experts: Howard Ayer; Dorsett Smith, M.D.

Jane Doe v. ABC Nursing Home, et al.

Type of Case: Nursing Home Negligence/Patient Bill of Rights
Settlement: $100,000
Plaintiff's Counsel: Donald J. Richardson
Defendant's Counsel: Withheld
Court: Cuyahoga County
Date: January, 2000
Insurance Company: None
Damages: Three Stage III pressure sores on hip, buttock and heel.

Summary: Plaintiff was admitted to nursing home for short-term rehabilitation. Upon admittance, nursing staff noted two blisters on Plaintiff's hip and buttock. However, nursing staff failed to follow its own wound care policies and ignored Plaintiff for over two weeks. Plaintiff developed Stage III pressure sores on hip, buttock, as well as heel. Plaintiff was removed from home by daughter and required several months of home health care before wounds were healed.

Plaintfs Experts: Christine Hall, R.N.
Defendant's Experts: Not Listed

Dale Granda, et al. v. State Farm Mutual Automobile Ins. Co., et al.

Type of Case: Motor Vehicle Accident
Settlement: $1,200,000
Plaintiff's Counsel: Daniel J. Klonowski
Defendant's Counsel: William C. Lozes

Court: 22nd Judicial District Court for the Parish of St. Tammany, Louisiana
Date: October, 1999
Insurance Company: State F a m Insurance Company
Damages: Skull fracture resulting in brain damage; injury to brachial plexus, resulting in partial paralysis of right a m .

Summary: Meredith Granda, a minor, was a passenger in the back seat of a Chevrolet Blazer when Defendant negligently drove off the road, striking a utility pole. Settlement was obtained with the liability carrier and underinsured motorist carrier. Case is still pending relative to claims against State of Louisiana Department of Transportation, utility companies, and other Defendants relative to road construction and maintenance.

Plaintiff's Experts: Susan Mackinnon (Plastic and Reconstructive Surgeon); Jeanne Harris, M.D. (Child Development Expert)
Defendant's Experts: Not Listed

John Doe v. ABC Company

Type of Case: Employer Intentional Tort
Settlement: $1,000,000
Plaintiff's Counsel: Thomas Repicky
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas
Date: September, 1999
Insurance Company: Withheld
Damages: Bums to face and upper torso

Summary: Plaintiff employee, while supervisor of his shift, used methyl ethyl ketone to clean a curing oven belt. The vapors ignited and flashed back onto Plaintiff. Employer provided this flammable liquid to clean the belt since it was quicker.

Plaintiff's Experts: Nelson Cardner (Chemical Expert); Earl Gregory (Industrial Hygienist); Garry Mang (Fire Expert); Rod Durgin (Vocational Expert)
Defendant's Experts: Withheld

Jane Doe, Admin. v. Physician, M.D., et al.

Type of Case: Medical Malpractice/Wrongful Death
Settlement: $390,000
Plaintiff's Counsel: Brien N. Eisen
Defendant's Counsel: Withheld
Court: Cuyahoga County, Judge Coyne
Date: January, 2000
Insurance Company: 2 Physicians Insured by PIE/OIGA
Damages: Death from abdominal aortic aneurysm

Summary: Decedent was a 63-year-old maintenance supervisor who presented to his family practice doctor complaining of abdominal pain, which was relieved by over-the-counter gas medications. He was diagnosed with irritable Bowel Syndrome and recommended for a complete physical. Three days later, Decedent presented to the emergency department of the local hospital complaining of abdominal and back pain. Emergency department physician diagnosed acute diverticulitis (based upon a history of diverticulosis). The next day, Decedent experienced a ruptured abdominal aortic aneurysm and died.

Plaintiff's Experts: Jeffrey Rubin, M.D. (Vascular Surgery); Harvey Rosen, Ph.D. (Economist)
Defendant's Experts: Janet Morgan, M.D. (Family Practice); Dean Dobkin, M.D. (Emergency Medicine); Samuel Kiehl, M.D. (Emergency Medicine)

Jane Doe, Admin. v. Physician, et al.

Type of Case: Medical Malpractice/Wrongful Death
Settlement: Phys. 1 - $300,000 + $10,000 personal contribution; Phys. 2 - $300,000, Hosp. - $200,000; in addition, $240,000 Class 2 claim in PIE liquidation
Plaintiff's Counsel: Brian N. Eisen
Defendant's Counsel: Withheld
Court: Cuyahoga County, Judge Judith Kilbane-Koch
Date: February, 2000
Insurance Company: Physicians -- PIE/OIGA; Hospital -- Self-Insured
Damages: Death from metastatic lung cancer; pain and suffering prior to death.

Summary: Decedent was a 58-year-old retired (cardiac disability) firefighter with severe coronary artery disease. **A** chest x-ray in January, 1995 revealed a 2.5 CM lung nodule, which was interpreted as a "probable calcified granuloma." The radiologist recommended a comparison with "old outside films." No comparison was ever performed by the radiologist or the attending cardiologist who had ordered the chest x-ray. A second chest x-ray 18 months later revealed a 6-plus CM tumor (adenocarcinoma) with metastases. The patient died five months later of metastatic lung cancer.

Plaintiff's Experts: Robert Pugatch (Radiology); Robert Steele (Oncology); Harvey Rosen (Economist)
Defendant's Experts: Daniel Singer (Radiology); Prasadarao Kondapalli (Pulmonology) (testimony excluded by motion in limine)

John Doe (Pedestrian) v. John Doe (Auto)

Type of Case: Pedestrian v. Auto
Settlement: $285,000
Plaintiff's Counsel: Christopher M. DeVito
Defendant's Counsel: William Doslak
Court: Cuyahoga County Common Pleas, Judge McCafferty
Date: January, 2000
Insurance Company: Safeco
Damages: Broken ankle

Summary: An off duty policeman was struck by an automobile while directing traffic. $6,000.00 past medicals. Some permanency and one future surgery to remove pin in leg. Settlement achieved because of loss of future pension earnings.

Plaintiff's Experts: Dr. Brendon Patterson (Orthopaedic)
Defendant's Experts: None

John Doe v. Fireman's Fund Insurance Company

Type of Case: Underinsured Motorist
Settlement: $950,000
Plaintiff's Counsel: Larry S. Klein, Christopher J. Carney
Defendant's Counsel: Case settled without filing suit.
Court: N/A
Date: January, 2000
Insurance Company: Fireman's Fund Insurance Company
Damages: Fractures to left arm, left leg, left ankle, pelvis and jaw. One year lost wages.

Summary: Defendant's car failed to yield and struck Plaintiff on motorcycle. Plaintiff settled with tortfeasor for $100,000 limit and then made UIM claim against his employer's commercial auto policy despite being on

personal vehicle and not being in course and scope of employment. Pursuant to Ohio Supreme Court decision in *Scott-Pontzer v. Liberty Mutual,* Plaintiff recovered *$850,000* of $900,000 available.

Plaintiff's Experts: James P. Jamison, M.D. (Orthopedic Surgeon)
Defendant's Experts: None

John Doe v. Indiana Insurance Co.

Type of Case: Underinsured Motorist
Settlement: $950,000
Plaintiff's Counsel: Larry S. Klein, Christopher J. Carney
Defendant's Counsel: Case settled without filing suit.
Court: N/A
Date: January, *2000*
Insurance Company: Indiana Insurance *Co.*
Damages: Below the knee amputation

Summary: Defendant's car failed to yield and struck Plaintiff on motorcycle. Plaintiff settled with tortfeasor for $100,000 limit and then made UIM claim against his employer's commercial auto policy despite being on personal vehicle and not being in course and scope of employment. Pursuant to Ohio Supreme Court decision in *Scott-Pontzer* v. *Liberty Mutual,* Plaintiff recovered *$850,000* of $900,000 available.

Plaintiff's Experts: Christopher J. Smith, M.D. (Vascular Surgeon)
Defendant's Experts: None

Jane Doe v. Jane Doe

Type of Cuse: Automobile - Admitted Liability
Settlement: $1,100,000
Plaintiff's Counsel: Daniel M. Sucher
Defendunt's Counsel: Withheld
Court: Cuyahoga County
Date: January, 2000
Insurance Company: State Farm
Damages: Internal injuries, fractured leg

Summary: Defendant's carrier admitted liability

Plaintiff's Experts: Steven M. Steinberg, M.D. (Ohio State University)
Defendant's Experts: None

Charles W. Cheton Trust, Inc., et al. v. Shelby Insurance Co., et al.

Type of Case: First Party Property Claim
Settlement: $110,800
Plaintiff's Counsel: Robert Rutter
Defendant's Counsel: Robert Chudakoff, David Utley, Mark Fischer
Court: Summit County Common Pleas, Judge Bond
Date: December, 1999
Insurance Company: Shelby Insurance Company
Damages: Water damage to inventory of furniture store.

Summary: Plaintiff/insured submitted a claim for water damage to its inventory. Insurer denied the claim, arguing that the damage was the result of a back-up of a sewer and was excluded. Insured claimed the damage resulted from a broken sewer line, not from a backed-up sewer line.

Plaintiff's Experts: None
Defendunt's Experts: None

Auto v. Auto

Type of Case: Automobile Accident
Settlement: $105,000
Plaintiff's Counsel: Robert Rutter
Defendant's Counsel: N/A

Court: N/A
Date: June, 1999
Insurance Company: State Farm Insurance Co.
Damages: Broken right arm, two fractured kneecaps, fractured right ankle and various bruises and strains.

Summary: Auto accident. Plaintiff was turning left with left turn arrow when Plaintiff was struck by another vehicle. Case settled for liability and med pay limits.

Plaintiff's Experts: None
Defendant's Experts: None

Robert Ronsko v. Westfield National Insurance Co.

Type of Case: Fire Insurance Claim
Settlement: $130,000
Plaintiff's Counsel: Robert Rutter
Defendant's Counsel: Robert Chudakoff
Court: Cuyahoga County Common Pleas, Judge Kathleen Craig
Date: April, 1999
Insurance Company: Westfield Insurance Company
Damages: Fire damage to house

Summary: Fire insurance claim. Insurer took position that the policy had been canceled for non-payment of a monthly premium only hours before the fire occurred. Payments were accepted late prior to presentation of claim.

Plaintfs Experts: None
Defendant's Experts: None

Rodney Sparks, et al. v. State Auto Insurance Co.

Type of Case: Fire Insurance Claim
Settlement: $156,700
Plaintff's Counsel: Robert Rutter
Defendant's Counsel: Withheld
Court: Lawrence County Common Pleas
Date: April, 1999
Insurance Company: State Auto Insurance Company
Damages: Not Listed

Summary: Fire insurance claim denied on the basis of suspected arson by the insured. Case removed to federal court by State Auto and eventually settled for full amount of claim.

Plaintiff's Experts: None
Defendant's Experts: None

John L. Louive v. Shelby Insurance Company

Type of Case: Fire Insurance Claim
Settlement: $35,000
Plaintfs Counsel: Robert Rutter
Defendant's Counsel: Robert Chudakoff
Court: Stark County Common Pleas
Date: April, 1999
Insurance Company: Shelby Insurance Company
Damages: Fire damage to rental unit

Summary: Fire insurance claim. The insurance company denied the claim alleging arson. Insurer concluded it could not prove arson and paid claim.

Plaintiff's Experts: None
Defendant's Experts: None

Wendy J. Rickey, et al. v. Motorists Mutual Insurance Company

Type of Case: Fire Insurance Claim
Settlement: $125,000
Plaintiff's Counsel: Robert Rutter
Defendunt's Counsel: Merle D. Evans, III

Court: Tuscarawas County Common Pleas, Judge Edward O'Farrell
Date: July, 1999
Insurance Company: Motorists Mutual Insurance Company
Damages: Fire damage to house

Summary: Bad faith case as a result of insurer's unreasonable dely in adjusting and paying fire claim. Insurer forced insured through two separate appraisals as a result of low-ball estimates of insurer's contractors.

Plaintiff's Experts: None
Defendant's Experts: None

Scheberazade Food Mart, Inc. dba Midtown Sav-More, et al. v. Hartford Fire Insurance Co., et al.

Type of Case: Fire Insurance Claim
Settlement: $250,000
Plaintff's Counsel: Robert Rutter
Defendant's Counsel: Robert Chudakoff, Joseph Nicholas, Richard Bain
Court: Cuyahoga County Common Pleas, Judge Bridget McCafferty
Date: November, 1999
Insurance Company: Hartford Insurance / Bums & Wilcox
Damages: Fire and smoke damage to grocery store

Summary: Plaintiff/Insured's fire claim was denied because the wrong street address appeared on the policy declaration sheet. Plaintiff sued the agent, broker, and insurer, arguing that all parties intended to insure the entire building, and not just the street address listed on the policy.

Plaintiff's Experts: None
Defendant's Experts: None

Michael E. Boczek, et al. v. Independence Citgo, et al.

Type of Case: Products Liability
Settlement: $675,000
Plaintiff's Counsel: Rick Alkire, Robert Rutter
Defendant's Counsel: Robert Archibaid, Theodore Dunn, Jr., James Ozog, John Robertson, George Lutjen
Court: Cuyahoga County Common Pleas, Judge Kenneth Callahan
Date: August, 1999
Insurance Company: The Shelby Insurance Co., Cunningham & Lindsey, Motorists Mutual Insurance Co.
Damages: Bum Injuries

Summary: Plaintiff was severely burned when a spare 20-lb. LP gas tank, stored under an operating gas grill, opened due to an overfill condition caused by the propane supplier. Plaintiff suffered second and third degree bums over 70% of his body, but made an exceptional recovery and returned to work within four months of the accident.

Plaintff's Experts: Ron Lapina; W. Alan Bullerdick; Dr. Richard Fratianne
Defendant's Experts: William Baynes; Mark Mulcahy; Jean McDowell

John Doe v. ABC Corporation

Type of Case: Intentional Tort
Settlement: $1,175,000
Plaintiff's Counsel: Mark L. Wakefield
Defendant's Counsel: Withheld
Court: U.S. District Court
Date: December, 1999
Insurance Company: Withheld
Damages: Plaintiffs right arm was crushed below the elbow and subsequently amputated.

Summary: Plaintiff alleged that the Defendant

committed an intentional tort when the dual palm buttons of a press were removed and replaced with a foot pedal. This alteration, coupled with the fact that Plaintiff had been employed as a die set-up man by Defendant for a mere six weeks, resulted in the press inadvertently repeating and Plaintiff losing his right arm below the elbow.

Plaintiff's Experts: None
Defendant's Experts: Not Listed

MFB, Ind. and as Admin., etc. v. XYZ Hospital, et al.

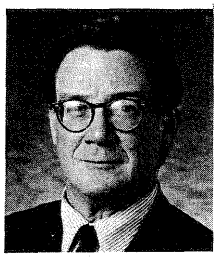
Type of Case: Medical Malpractice
Settlement: $750,000
Plaintiff's Counsel: Rubin Guttman
Defendant's Counsel: William Meadows
Court: Cuyahoga County Common Pleas, Judge Ann T. Mannen
Date: January, 2000
Insurance Company: Not Listed
Damages: Bled to death

Summary: Plaintiffs 72-year-old decedent was allowed to bleed to death in CICU, following CABG re-do. Survivors were four grown children and no spouse.

Plaintiff's Experts: David Slosky, M.D. (Cardiovascular); Jerold Brenowitz, M.D.
Defendant's Experts: Not Listed

In Chambers

By: Stephen Keefe



Judge Richard J. McMonagle
Presiding & Administrative Judge

Judge Richard J. McMonagle graduated from Case Western Reserve University School of Law in 1967. Between 1967 and 1979, he was engaged in the private practice of law. Judge McMonagle was first elected to the Cuyahoga County Court of Common Pleas bench in 1978. He was re-elected in 1984, 1990, and 1996. In 1997, he was elected Chief Administrative and Presiding Judge by his fellow Judges. Judge McMonagle has received the highest award for Judicial Excellence from the Supreme Court of Ohio for eight consecutive years.

1. Tips on Settlement

Judge McMonagle gives several examples of how lawyers can improve their settlement success rate. First, know the particular Judge's practices and procedures. Will the Judge handle the Case Management Conference and Pretrials, or will the Judicial Staff Attorney conduct them? What does the particular Judge's Case Management Order or Pretrial Order require the attorneys to do, and must clients be present?

According to Judge McMonagle, attorneys should be ready to discuss settlement as early as the CMC, especially if the Judge personally conducts it. Based on his

21 years on the bench, as many as 20% of cases can be settled at the Case Management Conference. Because of this, Judge McMonagle handles all of his own CMC's and Pretrials and does not delegate this responsibility to his Judicial Staff Attorney. If a judge's usual practice is for the Staff Attorney to conduct the CMC, Judge McMonagle suggests contacting the Staff Attorney or Bailiff to request a Pretrial or Settlement conference with the judge if the case is ripe for settlement. Alternatively, he urges attorneys to take the initiative in discussing settlement with opposing counsel early on. To Judge McMonagle, broaching the subject of settlement as early as the CMC is not a sign of weakness, but a cost effective and time-saving approach to resolving cases.

The Judge also underscores the importance of controlling client expectations during settlement. The lawyer's job should be to under-promise and over-deliver. The Judge cautions attorneys to avoid talking about monetary figures with clients whenever possible. Otherwise those figures may become a client's bottom line. "If you start talking money with them early on, the client will remember the details that *they* want to remember. For example, if you tell your client that cases like his or hers are generally worth up to $100,000, but then advise the client that his or her particular case is probably only worth $10,000, you can bet that the client will forget about the $10,000 figure you mentioned and instead identify with the $100,000."

Better to avoid talking numbers until formal offers are on the table, and then shape client's expectations so that they are within or, better yet, under a reasonable offer. Then your job is to get the most the other side is willing to pay.

2. Alternative Dispute Resolution

Judge McMonagle is a firm believer in arbitration and mediation. Oftentimes, litigants will not agree to settle a case because they want their day in court. The ADR process provides clients with a forum to vent their frustration and tell their side of the story. In Judge McMonagle's experience, once a client has had the opportunity to be heard by a neutral third-party, the client is typically more amenable to settlement.

But what if the judge will not refer a case to arbitration or mediation? Judge McMonagle acknowledges that some judges do not refer to arbitration because it can interfere with a previously scheduled trial date. Judge McMonagle makes certain that the lawyers agree before the referral that the trial date will not be continued. When he refers a case to arbitration, he sets a trial date that is between 60 and 90 days after the referral. "If the case is not arbitrated in that time, they are going to trial and they know it".

[Editor'sNote: Pursuant to Loc.R.29, any party may file an appeal from the arbitrators' award within 30 days of the entry of the award. Suppose a trial date has been set for April 1,2000, but the arbitrators' award is not filed until March 15,2000. Given this fact pattern, any party technically has until April 14, 2000 to file an appeal. Some attorneys will then file a "Motion for Continuance of Trial Date" and request a continuance because the appeal time has not expired. Proceeding in this manner will typically not win the attorney any points with the judge. Indeed, many judges seem to avoid arbitration referrals altogether because the process has the potential to interfere with the orderly management of their dockets. In order to assure the judge that his or her trial date will not need to be continued if the case is referred

to arbitration, consider filing a joint stipulation waiving the 30-day period within which an appeal may be filed. Instead, agree in writing that the appeal time will be shortened if the trial date is less than 30 days away from the date the arbitrators' award is filed.]

Judge McMonagle notes that Jim Tyminski has recently been hired as the new ADR Mediator since Bob Revello retired on January 31,2000. Rebecca Wetzel continues to be the Court's ADR Administrator, and Laura Bates and Sharon Masterson are her Assistants. Jim comes to the court system after more than thirty years with Allstate as a Claims Manager and Staff Claims Analyst.

3. Abbreviated Trial Techniques

Judge McMonagle says most lawyers should "abbreviate" their trial presentations. A medical malpractice cases can last four or five weeks. Even a simple personal injury case can take well over a week if the lawyer wants to drown the jury in detail. But if they sink, you'll go down with them. Remember your audience. Unlike the attorney who has lived with the case for the last several years, the jurors are hearing and processing the case for the first time. Give the jury only the information that really counts and that will stick in their minds throughout trial.

Judge McMonagle notes the most skilled attorneys focus on the strongest points of their case in an efficient, appealing and informative manner. But too many attorneys take three days to accomplish what can be done in one day. "If something drags on for that long, something bad is bound to happen."

4. Discrediting the Opponent's Experts

Judge McMonagle insists that lawyers can do a better job at impeaching expert witness' credibility and qualifications. To accomplish this goal, lawyers need to spend much more time researching the experts' backgrounds and qualifications. And once you find the jugular, you have to know how to go in for the kill. Judge McMonagle provides some examples on how this can pay off:

"We had an [Ohio Lemon Law] case, and the plaintiffs lawyer came in with this mammoth exhibit, which he placed facing the wall so we couldn't see what it was. It was a good 4 x 6 feet. When the defense expert took the stand, he discussed his qualifications - he obtained his undergraduate degree from "X" College, he took graduate level courses at "Y" College, and then he worked for "Z" Corporation. After discussing his qualifications, he expressed his opinion that the car was not a lemon and that the defects in the car were due to plaintiffs bad driving. When it came time for plaintiffs lawyer to cross examine the expert, he turned the 4 x 6 exhibit around so that the jury could see it. It was a blown up copy of a letter he received from "X" College stating that the expert was never a student there. The other half of the exhibit was a letter from "Y" College stating that this person never took any graduate courses at that institution. I looked over on the witness stand, and suddenly, this guy was a sea of perspiration. He looked like he just got done playing in an **NBA** game, and you could see it through his jacket. He was done, and that was it. Why? Because the plaintiffs lawyer in this case did his homework and it paid off."

"You can always find something in the CV to impeach on. For example, if someone has the title 'adjunct professor', what does this really mean? It typically means that they show up once in a while and give a speech.

That is what it *really* means. It doesn't mean that they are a full-time professor or that they have been awarded a professorship. And you can have a lot of fun with this kind of stuff."

"Suppose your opponent has an expert who belongs to every possible organization or club that has anything to do with the 'meat' of the case. One question I would ask him or her would be 'what is the first thing that you have to do to become a member of this engineering organization?'. The expert would probably just sit there, with an expression on his or her face like 'what do you mean?'. And I would ask 'if you want to become a member of this organization, you just have to pay the dues, right?'. This line of questioning leaves the jury with the impression that one can become a member of any organization he or she wants as long as the dues are paid. By doing this, you can take some of the steam out of the expert's sails."

5. Writing the Winning Brief

Judge McMonagle advises attorneys to be simple and straight-forward in their brief writing. And keep in mind that "the first few paragraphs are the most important". Use a strong lead paragraph to draw the Judge or Staff Attorney into the material. Use clear, concise and accurate language that helps the reader immediately identify with your position. For example, let the judge know in two or three sentences why summary judgment is inappropriate based on the disputed facts of the case. After reading the first few paragraphs, the Judge or Staff Attorney should already know why your particular motion should be granted or why your opponent's should be denied. Do not waste two or three pages setting up your argument or citing to boilerplate law. "We all see the boiler plate standards for summary judgment which you can get off of 200 different briefs that are filed down here. You just don't need to include all of this stuff". In addition, avoid unnecessary repetition, misstating the facts, and unnecessary character assassination of your opponent.

[For more tips of effective legal writing, *see* Bryan **A.** Garner, *The Winning Brief 100 Tips for Persuasive Briefing in Trial and Appellate Courts.* [New York]: Oxford University Press, [19961. xi, 444pp. Garner is an advocate of starting each brief with a 25 word or less issue statement which must be answered your way. The reader will then know instantly what you want and why you're entitled to it.]

6. Empower the Jury in Closing Argument to Award Damages

In closing argument, plaintiffs counsel typically concludes by asking the jury for "X" dollars. Defense counsel then stands up and says that the jury should instead award "Y" dollars or nothing at all. Judge McMonagle notes that many skilled lawyers never even ask for a specific amount in closing argument. Instead, they remind the jury that the case is worth a "substantial amount" of money without specifying a figure. By doing this, they empower the jury to make the decision. "They let the jury run wild, and oftentimes they will run wild. After all, jurors read about million dollar verdicts in the newspapers all the time". If they are empowered to make the decision in the right case, they may very well collectively think that "this has got to be worth a lot of money. . .After all, the judge didn't say it wasn't.''

Challenging Allstate

By: Kenneth J. Knabe

When negotiating with Allstate on a supposed minor impact soft tissue (MIST) injury, your client may have $2000 in bills and receive a $1200 offer that never improves. Your treating doctor's trial deposition costs make it difficult to obtain adequate justice. Any miniscule offer usually comes months after your demand letter. Increasingly, this treatment is not confined to just minor impact soft tissue injuries.

We need to challenge all aspects of Allstate's tactics and build power to obtain full justice for our clients. **A** few brief suggestions follow.

First Party Claims v. Allstate

In direct claims against Allstate (uninsured/uninsured motorist claims, or even med pay), always request Allstate to respond in writing to your correspondence pursuant to Ohio Administrative Code Section 3901-1-54(S)(3). This section generally requires the insurance company to respond to your requests within ten days. Use this as a building block for your pre-judgment interest and/or bad faith claims. Document every violation with a follow-up letter.

Third Party Claims v. Allstate

When your client is injured by an Allstate insured, Allstate will send you its standard third-party liability insurance letter. This letter will request that you provide your client's itemized bills with CPT and diagnostic codes, tax ID number for each medical provider, signed medical/wage authorizations, and a recorded Statement.

No requirement exists under Ohio law which mandates pre-suit release of this information. Any attorney who habitually provides medical releases pre-suit should re-think this position.

A suggested response to Allstate's letter is:

> We do not provide CPT diagnostic codes and tax ID numbers, nor are we required to under Ohio law. We will forward you the hospital records and medical report(s) with the prognosis, diagnosis, and treatment and medical specials once we receive it. We do not provide medical and wage authorizations, nor are we required to under Ohio law. We will forward you the lost wage information once we receive it. We do not provide recorded statements pre-suit, nor does Allstate provide recorded statements of the defendant.
>
> If it is Allstate's policy that it does not make any offers unless and until it receives a recorded statement from my client, medical and/or wage releases and/or CPT codes, please confirm in writing. My client will then institute a lawsuit against your insured, and will pursue pre-judgment interest for your unwarranted failure to negotiate

in good faith.

The other alternative is to simply initiate suit, since most alleged minor impact soft tissue cases result in miniscule offers. However, negotiating pre-suit by providing your doctor's report, medical records and specials can also be used to establish a pattern of delay and inadequate offers. Always follow with a letter documenting the long delayed low offers.

To save costs in smaller claims, consider filing in the municipal court where the injury occurred. Consider waiving a jury. Let the defense demand a jury and pay for it. Avoid videotaping the doctor's deposition, and simply read the doctor's deposition into the record at trial. Send our request for admissions on liability, medical issues, medical records and bills. Seek costs when you have to prove an unwarranted denial.

Conclusion

The Ohio Academy of Trial Lawyers (QATL) nd the Association of Trial Lawyers of America (ATLA) offers seminars on this issue. Please join and attend the seminars. Please report any and all verdicts against Allstate, including the losses! We think the tide is turning, *but we need to know all results, the good, bad and ugly*. (OATL is reporting many successful Allstate verdicts in its newsletter.) Please report any and all successful pre-judgment interest motions with the *blueprint* for your successful result. Any and all suggestions would be appreciated. Please contact me at 216-228-7200.

A special thanks to Attorney Sean Allan for suggestions incorporated in this article.

The "long run" approach to these claims must be pursued. Although it may be inconvenient, and possibly economically unproductive to try smaller claims, trying and winning is the only sure way to bring fairness and equality back to the system.

Bernard Friedman Litigation Seminar -- March 23, 2000

By Frank G. Bolmeyer

I. Judge Janet Burnside: What Juries are Saying in Personal Injury Cases

--Lawyers should use more visuals.
--Juries are talking less about the McDonald's coffee case.
--Personal Responsibility remains a big theme. Tell them, particularly in a comparative negligence case, that plaintiff is willing to take responsibility, but the defendant will not.
--If your jury won't talk in voir dire, don't be afraid to ask for volunteers: "Can you help us out, sir, what do you think?".

II. Paul Kaufman: What They Don't Teach You in Law School

--How to deal with technology (there was none).
--How to use demonstrative evidence (there was no MTV).
--How to deal with clients, the Court and opposing counsel.
--The Art of Negotiations.
--How to manage your time and your business.

III. Mark O'Neill: Ethical Considerations in Litigation: How to be Zealous Without Crossing the Line

--Thou shalt not attack the honor and integrity of the other lawyer.
--Thou shalt not challenge the honor of a witness or a party in the absence of evidence justifying such an attack.
--Thou shalt not attempt to inflame the jury through examination of witnesses on irrelevant and prejudicial subjects.
--Thou shalt not make frank appeals to the jury's sympathy.
--Thou shalt not base your argument on matters outside the record.
--Thou shalt not argue your personal belief in the credibility of a witness or the merits of the case.
--Thou shalt not ask the jury to put themselves in the shoes of your clients.
--Thou shalt not be an obstreperous smart aleck or nasty to the judge.

IV. Bill Greene: Counsel's Behavior During Deposition

--Inevitable problem when two adversaries are locked in a room with no referee and no rules. We need to develop local rules to address acceptable and unacceptable conduct during deposition.
--See Federal Rule of Civil Procedure 30(D)(1) and Local Rule 30.1, U.S. District Court, Northern District of Ohio Eastern Division and *O'Brien v. Amtrak,* 163 F.R.D. 232 (1995).

V. David Goldense: Dealing with Damages During Direct Examination

--Avoid making the plaintiff be an advocate during direct.
--Make good use of fact witnesses. In one case, Mitch Weisman represented an injured tennis pro and called the wheelchair tennis players he used to teach.
--Blow up the *Fantozzi* Loss of Enjoyment of Life Instruction for the jury and tailor the testimony to those pleasurable activities that the Plaintiff is no longer able to do.

VI. Claudia Eklund: Never Underestimate the Power of Impeachment

--Prepare blow-ups or transparencies of likely areas of impeachment. Seeing is believing.
--Interrogatory answers can be enlarged or put on transparencies for impeachment.
--Now under Rule 706, learned treatises can be used for impeachment if any expert, including your own, says it's reliable. See *Freshwater v. Scheidt* (1999), 86 Ohio St.260.
--List in final argument the areas of major impeachment.

VII. David Paris: Constitutionality of Ohio Workers' Compensation Subrogation Statute

Revised Code 4123.931

In re: Estate of Walter Stewart: subrogation is not automatic.
--Employer cannot ride coattails.
--Must do something affirmative.

4123.931 Why is it unconstitutional?

--Statute says entire settlement or verdict is subject to subrogation unless there is a special interrogatory submitted to the jury to break down the damages.
--Damages under personal injury claims do not perfectly track benefits payable under workers' compensation.
--There can be incredible windfalls to self-insured employer or the Bureau of Workers' Compensation based upon a verdict which

does not take into consideration future damages while the workers' compensation lien will apply to the entire verdict.
--Argue that the statute violates equal protection and benefits provision of the Ohio constitution and also the due process of law provision.

David suggests that we bring the self-insured employer or the Bureau of Workers' Compensation into the lawsuit and serve the Attorney General's Office. You must allege in your claim against the Bureau or the self-insured employer that the workers' compensation statute is unconstitutional.

VII. Michael Becker: Shadow Jurors

--A shadowjuror is a lay person who you hire to sit as a spectator at trial and give you instant feedback as to how your case is being perceived by the jury.
--You do not want "yes men" as a shadow juror.
--You need people who are honest, candid, straight-forward and no-nonsense.

Mike advised that we should use them in significant cases where the evidence is technical in nature so that you can assure yourself that you are providing the jury with a good explanation.

Mike also shared that you should always record your own expert doctor's preparation or discussions regarding the case so that you could spend your time listening rather than writing notes. Mike felt is was important to record these discussions and make a transcript so that if your doctor at some point attempts to retreat from previous positions you can put in front of him what he had said before.

Mike also outlined the importance of explaining the complex medical terms to the jury in an understandable fashion. If you are perceived by the jury as one who is able to simply explain the medicine to them they will recall your explanations in deliberations.

IX. William Bonezzi: Evaluating Medical Malpractice Claims from a Defense Standpoint

Bill informed the group that the most important part of his evaluation of the viability a of malpractice claim focuses on the proximate cause issues much more extensively than on standard of care. In very many cases that he reviews it is easy to establish a breach of the standard of care but the cases are defensible on proximate cause.

Bonezzi talked about breast cancer cases as an example of the proximate cause analysis. He emphasized the importance of getting all the pathology records and having a pathologist review the materials to address proximate cause issues in breast cancer cases.

X. James Lowe: Crash Worthiness Litigations

Jim talked about the hot topics in crash worthiness litigation as being air bags and van and SUV rollovers. Jim also pointed out how SUV's are killing occupants of passenger cars because the point of impact with an SUV is much higher and into the passenger compartment or overriding the bumper of passengers cars.

He sees SUV manufacturers making adjustments to protect against this in the future. Jim feels that the rollover cases are going to be a hot topic in crash worthiness

litigation involving SUV's because of their high center of gravity. As Jim says you cannot avoid the "rough steering maneuver" as the warning suggests. When something comes into your path it is human nature and instinctual to attempt to avoid it and swerve; leading to rollovers.

Jim also suggested you closely look at cases involving seat back collapses as being an area that we will see increased litigation in the future.

XI. Don Iler: Trial Tactics and Pointers

Don was animated and energetic as usual. Don spoke of the importance of the rebuttal close as being the time of the trial where you can recapture lost ground. He suggested that you make it short and simple and use analogies if you can. It is pointed out by Don people like analogies and they raise you up in the mind of the jury. Juries like *to* reach conclusions by themselves and analogy allows them to do that. Analogies command attention.

XII. Judge Ann Kilbane: Importance of Establishing a Record for Appeal

Judge Kilbane pointed out that it is important to transport the entire record to the Court of Appeals including exhibits which were not admitted at trial. Judge Kilbane pointed out that certain Common Pleas Judges do not let you put anything on record with the court reporter without their approval. Judge Kilbane suggested that if you are before a Judge who has this view that you bring your own court reporter and create your own record. She pointed out that the Judge cannot keep out your personal court reporter pursuant to the open courts provision of the Ohio Constitution.

Judge Kilbane alerted us to the importance of proffering all evidence which is refused admission by the trial court. It is your obligation to do so and note your objection but do so politely. Judge Kilbane suggested that every sidebar conference that occurs you place on the record to preserve those discussions for appeal. She pointed out that it is reversible error to exclude proffered evidence citing *Zadzilka v. Ragone* (June 16, 1994) S.C. #94-AP-046.

CATA MENTOR PROGRAM

The Academy has a number of experienced lawyers available to help answer questions on an informal basis in a particular area of practice. Our Mentor contact is Mitch Weisman (216-781-1111). Mitch can suggest CATA members who may be willing to talk to you at no charge about a particular problem or practice area. While you–not the CATA or mentor–are the one ultimately responsible for the representation of the client, we can help provide some perspective or help point you in the right direction. Call Mitch if you'd like to talk to a mentor or if you're interested in serving as a mentor.

The Cleveland Academy of Trial Attorneys

"Access to Excellence"

The Cleveland Academy of Trial Attorneys is one of Ohio's premier trial lawyers organizations The Academy is dedicated to excellence in education and access to information that will assist members who represent plaintiffs in the areas of personal injury, medical malpractice and product liability law. Benefits of academy membership include **access to:**

1. **THE EXPERT REPORT, DEPOSITION BANK AND THE BRIEF BANK:**
   a huge collection of reports and depositions of experts routinely used by the defense bar, and detailed briefs concerning key issues encountered in the personal injury practice.

2. **THE ACADEMY NEWSLETTER:**
   published six times a year, contains summaries of significant unreported cases from the Cuyahoga County Court of Appeals. Also contains recent verdict and settlement reports.

3. **LUNCHEON SEMINARS:**
   C.L.E. accredited luncheon seminars, about six per year, includes presentations by experienced law yers, judges and expert witnesses on trial strategy and current litigation topics. These lunches also provide networking access with other lawyers, experts and judges.

4. **THE BERNARD FRIEDMAN LITIGATION SEMINAR:**
   this annual all day C.L.E. seminar has featured lecture styled presentations and mock trial demonstrations with a focus group jury. Guest speakers usually include a judge from the Ohio Supreme Court.

5. **ACADEMY SPONSORED SOCIAL AND CHARITABLE EVENTS:**
   these include the annual installation dinner, the golf outing, and the holiday no dinner dance which supports the hunger programs in Cuyahoga County. These events are routinely attended by members of the academy and judges from Cuyahoga County Common Pleas Court, the Eighth District Court of Appeals, U S. District Court and the Ohio Supreme Court.

THE CLEVELAND ACADEMY OF TRIAL ATTORNEYS
Hoyt Block. Suite 300
700 West St. Clair Avenue
Cleveland. Ohio 44113
Phone: (216) 771-5800
Fax: (216) 771-5844 or 771-5803
E-mail: CATA@lintonhirshman.com

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