Cleveland Academy of Trial Attorneys

News

Summer 2001

President% Message

David M. Paris

Those of you who attended the Installation Dinner Friday night, June 8, 200 1, obtained a preview to and a brief demonstration of the **CATA WEB PAGE.** Located at http:/ /cata.nphm.com the web page has a number of features designed to assist the membership in the representation of it's clients. The technology is here, so shame on us if we don't use it. The following is a description of the web page and tips on its use.

First, the web page has a **"LIST SERVE"** component which allows for communication with only the membership. To post a message, type "members@cata.nphm.com" In order to email the List you must be a member of the List. To rind out if you are a member of the List, review the Membership Directory on the CATA home page and ensure that your email address is correct If it is incorrect, let us know.

"RECENT DECISIONS AND ORDERS" is designed to provide members with recent lower court rulings which impact our practices and are not likely to be found in the OBAR, Westlaw or Lexis. So, if you have received an interesting trial court or appellate court ruling that will affect our practices, please share the motion, order and/or opinion for scanning and posting. As an example, we have created a section entitled "Employer Intentional Torts" where you will find three Orders that address whether an employer may obtain a set off for workers compensation benefits paid to an employee.

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Justice Alice Robie Resnick addresses the CATA at the annual anstallation of officers on June 8, 2001.

The **"NEWSLETTER ARCHIVES"** contains a collection of past issues dating back to 1993. You can "word search" the newsletter by downloading "Adobe Acrobat" software. If you do not have this software you can download it free of charge by following the Adobe Acrobat link at the bottom of the CATA 's home page. Once this is downloaded, all you need do is "right mouse click", scroll down to and click "find". Once you do that, you should be prompted to type in the word that you are searching.

Type the word and click "search". If the word is in that issue, it will be located By right mouse clicking and then clicking "search again", you will be taken to the next reference of the same word. Thus. if you remember reading about a certain settlement or a ccrtnin cspcrt witness in one of the back dated Newsletters, this is the most efficient way to re-search the point.

A MEMBERSHIP LIST containing the name. nddrcss. phone. fax and email of all current members is also word searchable once you have downloaded the Adobe Acrobat software.

Lastly, the **DEPOSITION BANK** is located on the web page. but will not be ncccssiblc over the internet. The decision not to post the list of expert depositions or allow access to the scanned depositions thcmsclvcs on the internet is based on the concern that non-mcmbcrs will obtain the password and "raid" our resources. At present, we are unable to implement a secure and cost cfficicnt method of accessing the depositions over the intcrnct. So for the time being, the method for obtaining espert depositions will be as follows: the entire list of experts whose depositions arc contained in the Bank will be circulated with the first annual Newsletter, Each successive Newsletter will contain a supplemental list of depositions that have been submitted during the ensuing months. To obtain transcripts of any expert, call or email Rose Graf (216-621-2300 - RGraf@nphm. com) and request the transcript(s). She will then verify that you are a CATA member and either mail you a hard copy of the transcript or, preferably, email you the transcript. Using the Adobe Acrobat software, these transcripts are also word searchable as described above. If the transcript was submitted to CATA via ASCII disk and downloaded in that format, to word search it you will open the document in your word processing program i.e. Word Perfect or Microsoft Word. To word search that document use the "find"feature of your word processor. This is usually located under the "Edit" menu on your tool bar. If for any reason you are experienc-ing computer difficulties such that the transcripts cannot be emailed to you, feel free to call, come over and download those transcripts on your own disk. Of course, the old method of coming over and coping transcripts is still available to anyone who continues to refuse to use a computer.

We have discovered that poor originals (multiple generation copies) or old vintage depositions (pre-laser printers) can be scanned but are inaccurate or incapable of word searching. This is due to the poor image quality of the document.

Remember CATA's longstanding policy: This is a deposition BANK. When you make a single withdraw, the membership requires that you make a single deposit of one of your current expert depositions. Only in this way will the Bank continue to thrive and be vital.

Please know that this web page is a work in progress. Your continued suggestions and input into its design and function is crucial to its success. Send your expert depositions (or ASCII disks), interesting Orders. Opinions and news for scanning and posting.

Remember, together we can move mountains. Alone, we're just shoveling dirt

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SAVE THE DATE

Please plan to attend the annual CATA golf outing on August 23, 2001 at Spring Valley Country Club. Additional information will be mailed shortly.

Law Update

by Stephen T. Keefe, Jr.

Insurance Law -Am. Sub. S. B. No. 97 Introduced Into the Legislature on May 1, 2001

On May 1,2001, Senator Scott Nein introduced S.B. 97 into the legislature. S.B. 97 represents a response to several recent Ohio Supreme Court decisions, including *Scott-Pontzer* and *Linko* among others. If signed into law, S.B. 97 will amend Ohio's Uninsured Motorist Statute(R.C. Sections 3937.18, 3937.181 and 3937.182) to make the offer of UM/UIM coverage voluntary, such that insurance companies will no longer be required to offer UM/UIM coverage when selling automobile insurance policies. Section 3 of the Bill provides that:

Section 3. In enacting this act, it is the intention of the General Assembly to do all of the following:

(A) Protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers;

(B) Express the public policy of the state to:

(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

(3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy;

(5) Ensure that a mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages not be construed to be required by the provisions of Section 3937.1 8 I of the Revised Code, as amended by this act, that make uninsured motorist property damage coverage available under limited conditions.

(C) Provide statutory authority for provisions limiting the time period within which an insured may make a claim under uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages to three years after the date of the accident causing the injury;

(D) To supersede the holdings of the Ohio Supreme Court in those cases previously superseded by Am. sub. S.B. 20 of the 120"' General Assembly, Am. Sub. H.B. 261 of the 122nd General Assembly, S.B. 57 of the 123rd General Assembly, and Sub. S.B. 267 of the 123rd General Assembly:

(E) To supersede the holdings of the Ohio Supreme *Court* in *Linko v. Indemnity Ins. Co. of N. America* (2000), *90* Ohio St.3d 445, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999); **85** Ohio St.3d 660, *Schumacher v. Kreiner* (2000), 88 Ohio St.3d 358. *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), *69* Ohio St.2d 43 1. *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996). 76 Ohio St.3d 565, and their progeny.

Insurance Law - "Amounts Available for Payment" Construed For Purpose of Setoff

Clark v. Scarpelli (2001), **91 Ohio St.3d 271** (holding that the "amount available for payment" language in R.C. 3937.18 **X(A)(2)** means the amounts actually accessible to, and recoverable by a UIM claimant; holding that specific policy language unambiguously limited UM/UIM coverage to a single per-person limit for all wrongful death claims derived from one deceased insured)

In 1996, Cheryl Clark's son died in a one car collision while driving her vehicle. Clark was insured under a liability policy of insurance issued by Mid-Century Insurance Company ("Mid-Century"), which provided UM/UIM limits of $100,000/$300,000. Clark filed suit seeking wrongful death damages for herself and other statutory beneficiaries, as well as a declaration that UIM benefits were available. Mid-Century filed a motion for summary judgment, which the trial court granted in part, finding that reasonable minds could only conclude that: (1) the tortfeasor, James Scarpelli, was the driver of the vehicle at the time of the accident, (2) the tortfeasor's carrier settled with Clark for the $ 100,000 per person limit, and (3) Clark and the other wrongful death beneficiaries were not entitled to UIM benefits, because a provision in Mid-Century's policy unambiguously reduced all claims arising out of the death of one person to the single "each person" policy limit of $ 100,000. The trial court therefore applied a strict "policy-limits-to-policy-limits" comparison approach.

On appeal, the reviewing court primarily focused on two specific issues:

1. The parties' conflicting interpretations of the setoff language in R.C. 3937.18(A)(2) and specifically the meaning of the phrase "amounts available for payment": and

2. Whether the specific language in Mid-Century's policy purporting to limit all wrongful death beneficiary claims to the single each-per person limit is unambiguous and valid or ambiguous and invalid.

The court of appeals ruled in Clark's favor on the first issue. Basing its decision on "the only interpretation of R.C. 3937.1 X(A)(2) which comports with statutory public policy". the court of appeals held, in effect, that if the *actual* amount available for payment under the tortfcasor's liability policy to each insured is less than appellee's UIM limits, the insurcds should recover the difference up to the total appropriate limit of covcragc.

The court of appeals ruled in Mid-Ccntury's's favor on the second issue. In deciding this issue, the court considered whether each wrongful death beneficiary was entitled to recover for his or her individual claims under the separate, each-per person limit of Clark's policy up to the maximum $300,00 each occurrence limit, or whether all claims were restricted to the $100~000 each person limit. The court noted that a total of $100,000 had been paid to and distributed among four wrongful death beneficiaries, and that each received less than the each-person UIM limit. However, the court found that Mid-Century's policy clearly and unambiguously restricted all wrongful death beneficiaries to the single each-per person limit. As such, the court concluded that the wrongful death beneficiaries were not entitled to UIM benefits, because the amount recovered from the tortfeasor's liability carrier ($100,000) was setoff against the each-person limit of UIM coverage in Mid-Century's policy ($100,000).

The Ohio Supreme Court determined that a conflict existed with the Fifth District's decision in *Farmers Ins. Of Columbus, Inc.* v. *Atkinson,* Stark App. No. CA-893 1, unreported, and also permitted a discretionary appeal. The Supreme Court affirmed the court of appeals' ruling. Regarding the first issue, i.e., the practical application of the setoff provision contained in the S.B. 20 version of R.C. 3937.18(A)(2), the Court determined that the phrase "amount available for payment" is "susceptible of at least two conflicting interpretations" and is therefore ambiguous. The Court therefore held that the phrase '"amounts available for payment. necessitates a comparison between the amounts that are *actuallyy accessible to and recoverable* by an underinsured motorist claimant. The Court relied in large part on the public policy behind the enactment of the UM/UIM statute, noting that the purpose of UM/UIM covcragc "'is to treat injured automobile liability policyholders the same whether a tortfeasor is underinsured or uninsured." In addition, the Court relied in part on its 1992 decision in *Andrews v. Motorists Mut. Ins. Co. v. Andrews* (1992), 65 Ohio St.3d 362, wherein the Court rejected a comparison-of-the-limits approach. The Court rejected the notion that *Andrews* is no longer good lawinlightofthc S.B. 2Ochanges toR.C. 3937.18(A)(2). More specifically, the Court held that "[o]ur decision in *Andrews* completely and properly resolves the issue in this matter. The *court* in *Andrews* noted that a limits-to-limits comparison approach is proper only in situations where a single claimant is involved. Therein lies the distinction."

The Court also affirmed the court's of appeals' resolution of the second issue, i.e., whether the specific policy language unambiguously limits UM/UIM coverage to a single per-person limit for all wrongful death claims derived from one deceased insured. Mid-Century's policy specifically provided that "[t]he limit for 'each person' is the maximum for bodily injury sustained by any person in any one accident. Any claim for loss of consortium or injury to the relationship arising from this injury shall be included in this limit". The Court rejected Plaintiffs' argument that the terms "loss of consortium" and "injury to the relationship" created an ambiguity in the policy. While the Court agreed that a "loss of consortium" action is different from a wrongful death action, the Court went on to hold that the phrase "injury to the relationship" is "a clear reference to claims for wrongful death as contemplated by the Mid-Century policy." In essence, the Court determined that the Mid-Century policy clearly and unambiguously restricts all wrongful death claims to a single per-person policy limit, which an insurer in entitled to do pursuant to the amended version of R.C. 3937.18(A)(2). Because only one person (Shane Parker) sustained bodily injury, the Court determined that all claims arising from Parker's death were included in the single per-person limit.

Editor's Note: Shortly after *Clark v. Scarpelli* was decided, the Ohio Supreme Court issued its decision in ***Littrell v. Wigglesworth*** **(2001),** 91 Ohio St.3d 425. Two additional cases were decided along with *Littrell* - *Stickney v. State Farm Mut. Auto Ins.* Co. and *Karr v. Rorchardt.* In rendering its decision in *Litrell*, the

Court applied the principles of *Clark* v. *Scarpelli* to the specific fact patterns set forth in *Littrell*, *Stickney* and *Karr*. The editor recommends that CATA members read the *Littrell* decision in its entirety.

Insurance Law - Bad Faith - Materials Created Before Denial of Coverage Discoverable

***Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St 3d. 209** (In a bad faith action. claims file documents created prior to the denial of coverage are discoverable in accordance with *Moskovitz* v. *Mt. Sinai*, but documents created after the denial of coverage are protected)

Richard Boone was seriously injured in a motor vehicle accident while transporting goods for his employer. Boone was insured under a policy of insurance issued by Defendant. Vanliner Insurance Company ("Vanliner"), with liability limits of $ 1,000,000 and UM/UIM limits of $50,000. Boone's employer was also insured by Vanliner, but with identical liability and UM/UIM limits of $1,000,000. After exhausting the tortfeasor's limits, Boone sought UIM benefits from Vanliner through his his policy and his employer's policy. Vanliner denied Boone's claim for UIM benefits under his employer's policy, asserting that an exclusion in the policy precluded coverage. Boone filed a declaratory judgment action seeking a determination that both his policy and his employer's policy provided him with $1,000,000 in UIM coverage. Regarding his individual policy, Boone alleged that he was entitled to $ 1 ,000,000 in UIM coverage by operation of law because Vanliner failed to obtain a written waiver of UIM/UIM in an amount equal to his liability insurance as required by Ohio law. The Complaint also included a claim for bad faith, alleging that Vanliner lacked reasonable justification for denying UIM coverage.

Vanliner initially denied that Boone was entitled to UM/UIM benefits under either policy but thereafter changed its position and admitted that each policy provided Boone with $1,000,000 of UM/UIM coverage. In support of his bad faith claim. Boone sought to discover the contents of Vanliner's claims file. Vanlincr moved for a protective order. Relying on and applying *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St 3d 638, the trial court ordered an in camera inspection of the claims file, which consisted of over I ,700 documents, and then ordered production of all but 175 documents.

On appeal, Vanlincr argued that the trial court erred in applying *Moskovitz* and incorrectly ordered production of 30 documents protected by the attorney-client privilege and/or work-product doctrine. The court of appeals agreed with Vanliner's argument that *Moskovitz* was inapplicable. Specifically. the reviewing court noted that the underlying claim in this case (UIM damages) was still pending. whereas in *Moskovitz*, the underlying claim (medical malpractice) had already been decided. The Supreme Court of Ohio accepted a discretionary appeal on the issue of whether, in an action alleging bad faith denial of insurance coverage, the insured is entitled to obtain, through discovery, claims file documents containing attorney-client communications and work product that may cast light on whether the denial was made in bad faith. Affirming in part and reversing in part, the Supreme Court observed:

> Our ruling in *Moskovitz* did not turn on the status of the underlying claim, but rather upon our recognition that certain attorney-client communications and work-product materials were undeserving of protection, i.e., materials "showing the lack of a good faith effort to settle". Moreover, this "distinction" could easily be eliminated by staying the bad faith claim until the underlying claim had been determined.

The Court held that Boone could discover materials in the claims file that were created prior to the denial of coverage, since coverage had not yet been determined, and because "claim's file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection.'. However, documents created after the denial of coverage remain protected.

insurance Law - UM/UIM Coverage Under Not Available Under Homeowners Policy

*Davidson v. **Motorists Mut. Ins. Co.*** (2001), 91 Ohio St.3d 262 (The incidental coverage provided under the homeowner's insurance policy did not transform the policy into a motor vehicle liability policy, such that UIM coverage was not available)

Davidson was seriously injured in an automobile accident. After receiving the tortfeasor's limits, Davidson sought UIM coverage under his homeowners's policy with Motorists Mutual. Motorists denied coverage. Davidson filed a declaratory judgment action for UIM benefits, alleging that UIM coverage was available because the homeowner's policy provided incidental coverage for certain vehicles. Relying on *Goettenmoeller v. Meridian Mut. Ins.* Co. (June 25, 1996), Franklin App. No. 95APE11-1553, unreported, the trial court found that the homeowner's policy was, in effect, a motor vehicle liability policy because it provided liability insurance for the use of recreational vehicles. The trial court granted Davidson's motion for summary judgment, holding that UM/UIM coverage arose by operation of law because it was not offered in connection with the homeowner's policy. The court of appeals affirmed and then certified a conflict to the Ohio Supreme Court, finding that its judgment conflicted with the Ninth District's decision in *Overton v. W. Res. Group* (Dec. 8, 1999), Wayne App. No. 99CA0007, unreported.

The Supreme Court of Ohio reversed the court of appeals, holding at the Syllabus to its decision that "[a] homeowner's insurance policy that provides limited liability coverage for vehicles that are not subject to motor vehicle registration and that are not intended to be used on a public highway is not a motor vehicle liability policy and is not subject to the requirement of former R. C 3 93 7.18 to offer uninsured and underinsured motorist coverage". In rendering its decision, the Court distinguished its earlier decision in *Selander v. Erie Ins. Group* (1999), 85 Ohio St.3d 541, wherein the Court previously held that "where motor vehicle liability coverage is provided, even in limited form, uninsured/ underinsured coverage must be provided":

> The court of appeals in this case has failed to recognize the inherent differences between the *Selander* decision and the case at hand and has applied language in *Selander* out of contest. *Selander* involved a general business liability policy that specifically provided liability coverage for injuries arising out of the USC of automobiles (i.e., motor vehicles). The policy generally excluded coverage for liability arising out of the use of hired or "non-owned automobiles" used in the insured business. The insureds, who were injured in the course of the partnership's business while occupying an automobile owned by a partner, sought underinsured motorist coverage under the policy. .The *Selander* decision is clearly distinguishable from the instant case. In *Selander,* we were construing a general business liability policy that expressly provided insurance against liability arising out of the use of automobiles that were used and operated on public roads. .In contrast, the policy at issue in this case is a homeowner's policy that does not include coverage for liability arising out of the use of motor vehicles generally. Instead, the homeowner's policy provides incidental coverage to a narrow class of motorized vehicles that are not subject to motor vehicle registration and are designed for off-road use or are used around the insured's property.

Insurance Law -Choice of Law -Action for UIM Benefits Sounds in Contract

Ohayon v. Safeco Ins. Co. of Illinois **(2001),** 91 Ohio St.3d 474 (4-3 decision holding that an action by an insured against insurance carrier for payment of UIM benefits sounds in contract rather than tort, even though it is tortious conduct that triggers applicable contractual provisions; *Csulik* v. *Nationwide Mut.* Ins. *Co.* and *Kurent v. Farmers Ins.* Of *Columbus* distinguished)

In 1996, Safeco issued an auto insurance policy to Ohio residents. Jacob and Brenda Ohayon, covering three vehicles and with UM/UIM limits of $100,000/$300,000. The policy contained a setoff provision providing that UIM coverage limits shall be reduced by all sums paid because of bodily injury by all persons who may be legally responsible. The policy also contained an antistacking clause. After the policy was issued, Jacob and Brenda Ohayon's son. Jonathan, was involved in a motor vehicle accident in Pennsylvania. The Ohayons settled with the tortfeasor for his policy limits and then filed a complaint for declaratory judgment asserting that (I) Pennsylvania *tort* law applied to Jonathon's UIM claims, (2) that Pennsylvania law entitled Jonathon to stack the coverage amounts for each vehicle insured **under** the Safeco policy, up to $300,000 plus interest and costs, (3) that Pennsylania law precluded Safeco from setting off the amount paid by the tortfeasor's insurer, (4) that due to the loss of their son's consortium, Jacob and Brenda Ohayon could each collect the per-person limit of the UIM policy and stack the policy limits to a combined total of $600,000, and (5) that they were entitled to attorney fees and prejudgment interest.

Following discovery and relying on Pennsylvania law, the Ohayons moved for partial summary judgment. In response, Safeco argued that Ohio law applied and that R.C. 3937.18 entitled it to judgment as a matter of law. The trial court held that the claims "are largely based upon tort law" and agreed with the Ohayons that Pennsylvania law applied and precluded application of the setoff and antistacking provisions in the policy. The court of appeals reversed, holding that Ohio's UIM law should have been applied. The Supreme Court of Ohio allowed a discretionary appeal.

After discussing the different choice-of-law principles that are applied to actions sounding in contract versus actions sounding in tort, the Court held that the Ohayon's action sounded in contract even though tortious conduct triggered the applicable contractual provisions in their policy. The Court pointed out that, had the Ohayons filed a civil action for damages against the Pennsylvania tortfeasor in an Ohio court, the *measure of damages* recoverable from the tortfeasor would have been an essential issue for the court to decide, and Ohio's /or/ choice-of-law analysis would determine the law to apply. Because the Ohayons had settled with the Penn-Sylvania tortfeasor, the Court noted that the *measure* of *damages* recoverable from the Pennsylvania tortfeasor was no longer an issue. The Court ultimately held that Ohio law applies and based its decision in large part on Section 1 87 of the Restatement of Conflicts which provides that, subject to very limited exceptions. the law of the state chosen by the parties to the contract will govern their contractual rights and duties.

Regarding the Ohayon's argument that a choice-of-law analysis was not necessary and that the court of appeals' decision should be reversed on the authority of the Ohio Supreme Court's decision in *Csulik v.* Na*tionwide Mut. Ins. Co.* (2000), *88* Ohio St.3d 17, the Court noted as a threshhold matter that "only three justices of this court joined the lead opinion in *Csulik"* and that '"the instant case differs substantively from *Csulik."* In *Csulik,* the insurer agreed to pay "compensatory damages, including derivative claims, which are *due by law* to you or a relative". The justices joining the lead opinion deemed the phrase "due by law" ambiguous and interpreted it in favor of the insured under Ohio's law for resolving contractual ambiguities. In this case, Safeco's policy, in an amendatory endorsement specifically written for policies issued Ohio, states that the insurer "will pay damages when an insured is *legally entitled* to recover from the owner or operator on an uninsured motor vehicle or underinsured motor vehicle because of bodily injury." The Court concluded that this provision "differs on its face from the one addressed in *Csulik* and is not ambiguous". Relying on its pronouncement in *Kurent v. Farmers Ins. Of Columbus, Inc.* (I 99 1), 62 Ohio St.3d 242 that "the phrase 'legally entitled to recover' means that the insured must be able to prove the elements of his or her claim against the tortfeasor", the Court noted that Jonathon's ability to prove the elements of his claimwas not an issue because he had already received $100,000 in settlement from the tortfeasor's insurer.

The Ohayons also argued that the Court applied a *tort* conflict-of-law analysis in *Kurent* and established a "strong presumption in favor of applying the law of the state where the injury occurred" in determining UIM/

UM claims. In response, the Supreme Court stated that "we did so for reasons not applicable to the case at bar". In *Kurent*, a Michigan driver injured an Ohio resident in Michigan. At that time, Michigan law denied noneconomic damages to plaintiffs unless damages surpassed a certain threshhold. The Ohio plaintiffs, who could not meet that threshhold, sued their insurer in Ohio for UIM benefits, contending that Ohio law should control the determination of coverage. According to the Court, the Ohayons misinterpreted *Kurent's* holding as a statement that a tort choice-of-law analysis will always control UM/UIM claims. In *Kurent*, the substantive tort question of whether the insured was "legally entitled to recover" benefits *at all* from the tortfeasor was a central issue, whereas in this case, the substantive tort question regarding the damages Jonathon was entitled to recover from the tortfeasor was not before the Court.

Finally, the Ohayons argued that resort to the Restatement's choice-of-law analysis was unnecessary based on an alleged choice-of-law provision already contained in the policy. The Court disagreed, noting that the "Out of State Coverage" policy provision merely assures drivers that they may drive an insured vehicle into 'states that may require higher levels of *liability* insurance without violating those states' financial responsibility laws. The Court held that this provision does not represent an express choice of law to be applied by courts in an action for UIM benefits, and that this policy provision does not dispense with the need for a choice-of-law analysis regarding UIM coverage.

The three Justices dissenting took the position that "it is readily apparent that Pennsylvania has the most significant relationship to the transaction and the parties in this case, and that Pennsylvania's strong interest in striking down setoff and antistacking provisions in UM/UIM insurance policies substantially outweighs the value of protecting Safeco's expectations that these provisions, which were not negotiated for, would be binding upon the Ohayons". As such, the dissent opined'that Pennsylvania law would apply under a contract choice-of-law analysis.

Insurance Law - Political Subdivision Immunity -Tractor as "Motor Vehicle" - R.C. 4511.01

Muenchenbach v. Preble County, Ohio (2001), 91 Ohio St.3d 141

In October 1995, plaintiffs-appellants were involved in a two-vehicle accident while attempting to pass a Ford tractor equipped with a street-sweeping brush. As plaintiffs were attempting to pass the tractor, the tractor made a sudden left turn and struck plaintiffs' vehicle. Plaintiffs tiled a negligence action against Preble County, the Board of Commissioners for Preble County and the Preble County Engineer ("defendants"). The trial court granted summary judgment in favor of defendants on the basis that they were immune from liability under R.C. 2744,02(A)(l), and the court of appeals affirmed the judgment. Both courts held that an exception to immunity contained in R.C. 2744.02(B)(1) did not apply because plaintiffs' damages were not caused by the negligent operation of a "motor vehicle" as that term is defined in R.C. 4511,01(B). More specifically, both courts found that the tractor was not a motor vehicle under R.C. 45 11.0 1 (B) because it constituted excepted construction equipment.

The main issues presented in this case are whether the tractor was a "motor vehicle" pursuant to R.C. 45 11 .01 (B), and whether the immunity provided in the exception found in R.C. 2744,02(B)(l) attaches. R.C. 2744,02(B)(l) sets forth an exception to R.C. 2744.02(A)(1)'s broad grant of immunity for "injury, death or loss to persons or property caused by the negligent operation of any *motor vehicle...*". R.C. 45 11 .01 (B) defines "motor vehicle" as "every vehicle propoelled or drawn by power. *except* motorized bicycles, road rollers, traction engines, power shovels, power cranes, *and other equipment used in construction work and not designed for or employed in general highway transportation...*".

The Supreme Court of Ohio reversed and remanded, finding that genuine issues of material fact remained as to whether the tractor was employed in general highway transportation at the time of the accident. The Court held that "for purposes of R.C. 2744,02(B)(l), a

'use standard' is an appropriate test for determining whether a motor vehicle is cscepted from the definition in R.C. 45 1 I .O I (B) of 'motor vchiclc' on the basis that it constitutes 'other equipment used in construction work and not designed for or employed in general highway transportation'... The Court recognized that the determination of whether a particular vehicle falls within a definition of a "motor vchiclc" is normally a question of law. However, based on the specific circumstances involved in this case, "the statuses at issue unavoidably |compelled| an inquiry into whether, as a question of fact. the vehicle under scrutiny fulfilled the terms of R.C. 45 I I .O I (B)'s csccption for construction vehicles not 'employed in gcncral highway transportation'.'.

Insurance Law ▪ Eighth District Cases of Interest

***Lamphear v. Continental Casualty Co.* (May 24, 2001), 2001 Ohio App. LEXIS 2319, unreported** (following *Linko v. Indemnity Ins. Co.* (2000), *90* Ohio St.3d 445 and holding that when an insurer does not provide employer with a quotation for the premium associated with UM/UIM coverage, it has not made a valid offer of UM/UIM coverage which the employer can reject; and absent a valid rejection, state law makes UM/UIM coverage part of the policy up to the policy's liability limits)

***Corinthian v. Hartford Fire Ins. Co.* (May 3, 2001), 2001 Ohio App. LEXIS 1964, Cuy. App. No. 76208, unreported** (holding that the defendant-insurance company was required to pay punitive damages awarded against the plaintiff-nursing home under R. C 3 93 7 182)

In June 1992, the Estate of Margaret Sprosty filed suit against Corinthian asserting wrongful death and survivor claims on behalf of Margaret Sprosty and her estate. Sprosty's Estate thereafter filed an Amended Complaint adding a claim for violation of Chapter 372 1 of the Revised Code (a/k/a the Nursing Home Patients' Bill of Rights). The Estate sought *statutory* punitive damages against Corinthian pursuant to R.C. 372 1.17(I), which at the time provided that the Court may award punitive damages for violation of a patient's rights undcr R.C. Chapter 372 I without a showing of actual malice. |Note: Effcctivc July 7. 1998, the General Assembly amended R.C. 372 1.17(I) to require the traditional showing of actual malice in order to recover punitive damages|. The Sprosty case was tried to a jury in June 1994, and the jury returned a verdict for the Estate. awarding $400,000 in compensatory damages and finding Corinthian liable for punitive damages. The trial judge scheduled a separate hearing and awarded punitive damages of X100,000. On appeal, judgment was affirmed against Corinthian. See *Sprosty v. Pearlview, Inc.* (1995), 106 Ohio App.3d 679. However, the Eighth District found that the trial court erred when it. rather than the jury, determined the amount of punitive damages. It reversed the punitive damages award and remanded for further proceedings on the Estate's claim for punitive damages.

On June 24, '1996, Corinthian filed a declaratory judgment action against defendants-appellants, Hartford Fire Insurance Company and Twin City Insurance Company. Corinthian sought a declaratory judgment with respect to coverage for punitive damages and also alleged that Hartford and Twin City had acted in bad faith in refusing to pay the punitive damage portion of the judgment. After the trial court bifurcated and stayed further proceedings on Corinthian's bad faith claim, the court denied the insurers' motion for summary judgment and granted Corinthian's cross-motion for partial summary judgment on the coverage issue. Hartford appealed the Court's ruling.

On appeal, Hartford argued that pursuant to R.C. 3937.182(B), neither itself nor Twin City can be obligated to indemnify Corinthian for any punitive damages awarded in the Sprosty matter. The Eighth District observed that "even if R.C. 3937.1 82 applies to the policy at issue, however, it is apparent that R.C. 3937.182 was not designed to cover the unique punitive damages awarded in this case". The Court held that while R.C. 3937.1 82 precluded insuring against punitive damages awarded based on individual's malicious: willful or intentional conduct, it does not preclude coverage for statutory punitive damages awarded without any finding of malice, intent or ill-will. Relying on a specific provision in Hartford's policy, and following the Fifth District Court of Appeals' holding in *Empire Fire & Marine Ins. Co.*

v. Parkview Manor, Inc (Feb. 4. 1985). Stat-k App. No. CA-6453, unreported, the Eighth District affirmed the trial court's ruling: "To hold otherwise would prevent cnforccmcnt of the plain language of the policy, which clearly allows recovery for the statutory punitive damages for which Corinthian is liable"

Insurance Law - Cases of Interest From Around the State

Grine v. *Payne* (March 23, 2001), 2001 Ohio App. LEXIS 1342, Wood App.No.WD-00-044, unreported (applying the "make whole" rule and concluding that an insurer's subrogation interests will not be given a priority where doing so will result in less than full recovery to the insured).

On October 3 1, 1997, Rachael Grine ("Appellant") suffered serious injuries while a passenger in an automobile that was struck by a vehicle driven by Susan Payne ("Payne"). At the time of the accident, Payne was covered under a policy of insurance with liability limits of $25,000/$50,000. Appellant was insured under her parents' UM/UIM auto liability insurance policy which had limits of $100,000. Appellant was also a covered dependent under the city of Fostoria's ("Appellee"), health benefits plan ("Plan") through her mother's employment with Appellee.

On the date of the accident, the Plan had a subrogation/ reimbursement policy which required reimbursement of the amount of benefits paid by the Plan from the amount that is recovered "from the third party". No mention was made in the Plan about recovery from other sources. Appellee paid $41,723.15 of Appellant's medical expenses which totaled $53,395.24. Appellant reached a settlement with Payne for $25,000, and she also received an $75,000 from her parent's underinsured motorist policy. Appellee requested full reimbursement of the $25,000 from Payne's liability coverage pursuant to the terms of the Plan.

Appellant filed a motion for summary judgment asking the trial court to declare that Appellee could not enforce its contractual rights of subrogation/reimbursement against the proceeds rcccivcd from Payne. Appellee likewise filed a motion for summary judgment. arguing that it should bc reimbursed the full sum of $41,723.15. The trial court denied Appellee's motion and granted Appellant's motion in part, stating that Appellee had no right of subrogation until Appellant had been fully compcnsatcd for her injuries. The trial court also held that Appellce had subrogation rights only up to $25,000, or Payne's insurance policy limits.

On March 28, 2000, the trial court conducted a bench trial to asscss'damages. The court concluded that Appellant had incurred medical expenses of $53,395.42 and that she was entitled to $115,000 for pain and suffering. However, contrary to its earlier decision, the trial court held that Appellee was entitled to priority under the tenns of the subrogation provision, albeit only up to the $25,000 limits of Payne's liability insurance policy.

On appeal, Appellee argued that the trial court erred by limiting its subrogation rights to only the money recovered from the responsible party. The Sixth Appellate District rejected this argument, construing the subrogation provision strictly against Appellee because the Plan only provided for recovery "from the amount you recover from third parties". The reviewing court relied on the fact that the plan made no mention of recovery from any source other than the actual third party. In Appellant's sole assignment of error, she argued that she must be fully compensated for her injuries or "made whole" before Appellee could enforce its right to recovery. The court of appeals agreed, thereby reversing the trial court's award of $25,000 to Appellee. In rendering its decision, the court felt inclined to follow what it called "the trend in Ohio courts that an insurer's subrogation interests will not be given a priority where doing so will result in less than full recovery to the insured".

Qualchoice, Inc. v. Williams (6th Cir., June 22, 2001), U.S. Ct. App. Case No. 00-3485, unreported (applying make-whole doctrine to preclude an employee benefit plan governed by ERISA from enforcing its right to reimbursement for medical expenses paid when the reimbursement language is ambiguous)

Joseph Williams. a covered employee under the Lincoln Electric Employee Benefit Plan ("Plan") was injured in a motor vehicle accident in 1996. Plaintiff. Qualchoicc, as fiduciary and administrator of the Plan, paid accident-related medical cspcnscs for Williams totaling $75. I X7.03. Williams also incurred $9. 149 in wage losses. Williams and his wife settled their claims against the tortfeasor for $ 115.000. Of that amount, $38,000 was allocated to the wife's loss of consortium claim. While Qualchoicc conceded that the remaining $77.000 did not wholly compensate Williams for his injuries, it nevertheless sought reimbursement from the $77,000 hc rcccivcd. Qualchoice brought suit for specific performance and restitution under the subrogation and reimbursement provisions of the Plan. Interpreting the Sixth Circuit's unpublished decision in *Marshall v. Employers Health Ins. Co.* (6th Cir., Dec. 30, 1997), Nos. 96-6063/6 112, unreported, the District **Court** held that the reimbursement language was ambiguous and that the right to reimbursement for medical expenses paid on behalf of Joseph Williams was barred by the make-whole doctrine. Qualchoice appealed. The U. S Court of Appeals for the 6th Circuit affirmed, relying on *Copeland Oaks v. Haupt* (6th Cir. 2000), 209 F.3d 8 11 and *Hiney Printing Co. v. Bratner* (6th Cir. 2001), 243 F.3d 956:

> "In accordance with *Copeland Oaks* and *Hiney Printing,* we find that the make-whole rule may be applied to reimbursement provisions in employee benefit plans governed by ERISA. Further, there is no question that the reimbursement provision in this case did not establish in specific and clear terms that the Plan had either a priority over any funds recovered or a right to any full or partial recovery. As such, the reimbursement language was sufficiently ambiguous to trigger the make-whole default rule."

Geslak v. Motorists Mutual Ins. Co. (April 25, **2001),** Franklin C.P. No. **00CVC01-387,** unreported (holding that an employee of a grocery store who was not in the course and scope of employment when involved in a motor vehicle accident was entitled to UM/UIM coverage under her employer's policy pursuant to *Scott-Pontzer*).

Motorists Mutual filed a Motion for **Summary** Judgment, arguing that *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999). 85 Ohio St.3d 660, did not apply because the policy language at issue in *Scott-Pontzer* was different from the language contained in its policy. Motorists argued that its policy language. unlike the language at issue in *Scott-Pontzer*, "requires an accident to have occurred in a 'covered auto' before Uninsured Motorists [is] payable". Moreover, Motorists contended that the definition of "who is an insured" in it's policy was different than the language at issue in *Scott-Pontzer* in that "the Motorists policy specifically provides UM coverage to employees of Woods Grocery". The Court rejected Motorists' arguments and held:

> *Scott-Pontzer* applies to the present case. In *Scott-Pontzer,* the Supreme Court held that the term "you" in the policy was ambiguous because the term could include a corporation's employees "since the corporation can act only by and through real live persons". The Motorists' policy pertaining to Woods Grocery also contains the term "you" as an insured in the first line under the "who is an insured" section of the policy. Although the third line under the "who is an insured" section of Motorists' policy states that "[y]our employees while occupying a covered 'auto' are insured?, the reference to "employees" in the third line does not resolve the ambiguity of "you" in the first line. Also, the first line does not specifically require "you" to be occupying a "covered auto" in order to be covered by the policy. The court further held that Motorists' policy, like the policy at issue in *Scott-Pontzer,* does not specify that an employee must be acting within the scope of his employment in order to be covered by the policy.

After bringing suit against the tortfeasor, the Simpsons filed an Amended Complaint seeking a declaratory judgment that they were entitled to UM/UIM benefits under both the Zurich and National Union policies. On

Dukeshire v. Dick (Nov. 22, **2000),** Sandusky App. No. 99CV 686, unreported (following *Scott-Pontzer* and holding that Plaintiffs were entitled to UM/UIM coverage under a commercial policy of insurance and umbrella policy issued to Plaintiffs' employer)

This case arose out of an accident in which a car rear-ended another car which then moved into the path of a third car traveling in the opposite direction. As a result of the accident, Plaintiff Michael Dukeshire was injured and his wife Melissa was killed. The Dukeshires were in their own auto when the accident occurred. At the time of the accident, Michael and Melissa Dukeshire were employed by Evergreen Plastics, Ltd. ("Evergreen"). The tortfeasor had insurance limits of $300.000. Because of Melissa's death, Michael's serious injuries: and the injuries to numerous other persons involved in the accident, the court observed that "it is likely that the $300,000 will be exhausted". This lawsuit concerned the UM/UIM portion of a commercial policy of insurance that American Foreign Insurance Company ("American") issued to Evergreen with UM/UIM limits of $1 ,000,000, as well as an umbrella policy of insurance that Royal Insurance Company of America ("Royal") issued to Evergreen with limits of $15,000,000.

On September 20, 1999, Plaintiffs filed a complaint against the tortfeasor, Elwood Dick. On February 2, 2000, Plaintiffs filed an Amended Complaint adding American and Royal as defendants and alleging that, as employees of Evergreen, they were entitled to UM/UIM benefits under both of the policies. Both parties filed cross-motions for summary judgment. Basing its decision on *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.,* (1999), 85 Ohio St.3d 660; the Sandusky Court of Common Pleas granted Plaintiffs' Motions for Summary Judgment against both American and Royal. The Court observed that the Ohio endorsement in American's policy contains the exact language as to "who is an insured" as in the policy in *Scott-Pontzer*, such that Michael Dukeshire, both individually and as administrator, is insured. As to the 'non-covered vehicle" exception in the policy, the Court reasoned that UM/UIM coverage is meant to protect persons, not vehicles: "if all the employees at Evergreen have UM/UIM coverage by operation of law. the vehicle in which they are found is not relevant under the premise that the insurance protects persons and not vehicles". in rendering its decision, the court relied on several Ohio Supreme Court cases, including *Bagnoli v. Northbrook Prop. & C 'as. Ins. Co,* (1999), X6 Ohio St.3d 314; *Dillard* v. *Liberty Mut. Ins. Co. (I* 999), 86 Ohio St.3d *3 16:* and *Ezawa v. Yasuda Fire & Marine Ins. Co. of America* (1999), *86* Ohio St.3d 557.

Cincinnati Ins. Co. v. Simpson (March 23, **2001),** Wood C.P. No. 99 CV 302, unreported (relying on *Scott-Pontzer* and *Ezawa* and holding that the minor child of employees of a corporation is an insured under the corporation's business auto policy and umbrella policy)

Lucas Simpson, a minor child, suffered serious and permanent injuries on November 1 , 1998 while occupying a vehicle as a passenger. The tortfeasor was uninsured. Lucas Simpson's parents, Scott and Susan Simpson, were both employees of Lear Corporation at the time of the incident. During this period, Lear carried insurance policies issued by Zurich Insurance Company ("Zurich") and National Union Fire Insurance Company ("National Union"). The Zurich policy was a business automobile policy providing primary UM/UIM coverage for up to $1 million. In addition to a generic UM/UIM encordement, the policy contained specific UM/UIM endorsements for several states, including Ohio. Zurich's policy was initially issued by a broker located in Michigan and received at Lear's corporate headquarters in Michigan. In order for the policy to take effect, it had to be countersigned. This signature occurred at Zurich's corporate headquarters in Illinois. There was no clause in the policy stating which law must be applied to interpret the policy.

The National Union policy was an umbrella policy providing for up to $50 million in excess insurance coverage. The policy contained a declaration page and a definition page for liability coverage only. UM/UIM coverage was not offered. The declaration page named Lear as the named insured. Section IV of the National Union policy defined an insured under the policy as "any person or organization, other than the Named Insured> included as an additional insured in the policies listed in the Schedule of Underlying Insurance., .". Zurich's policy was listed in the Schedule of Underlying Insurance.

August 29. 2000. the Simpsons filed a motion for partial summary judgment on their claims against Zurich and National Union. arguing that Ohio law controlled. Zurich and National Union filed cross-motions for summary judgment, arguing that Michigan law govcmcd this mnttcr.

Applying Ohio's choice of law rules, the trial court noted that. contrary to dcfcndants' argument that Michigan was the "place of contracting". the place of contracting was actually Illinois since the policy had been countersigned at the Lear's corporate offices in Illinois. Because no party argued that the law of Illinois applied, the court observed that "this contact is of little significance" and that "the place of contracting provides no guidance in determining the applicable law". In addition, the court noted that the parties presented no evidence of where and between whom the negotiations regarding this policy took place. According to the court, "the place where the subject matter of the contract is located" (i.e., Ohio) provides guidance. In addition, the court concluded that because "the Zurich policy has an endorsement specifically insuring the risk of colliding with an uninsured/underinsured motorist in Ohio, it indicates that Zurich meant for Ohio law to apply to the endorsement". Evaluating the contacts under Ohio's choice-of-law principles, the court held that Ohio has the most significant relationship to the issue before the court.

After determining that Ohio law should govern, the court relied on *Scott-Pontzer* (1999), 85 Ohio St.3d 660 and *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557 to find that Lucas Simpson qualified as an insured under Zurich's policy. Regarding the National Union umbrella policy, the court concluded that although Lucas Simpson was not a named insured under the Zurich policy, Lucas as a '"family member" was an insured under the Zurich policy. Moreover, since Lucas was found to be an insured under the Zurich policy, the court likewise found him to be an insured under the National Union policy, because Zurich's policy was listed in the Schedule of Underlying Insurance in the National Union policy. As such, the Court determined that Lucas Simpson was entitled to UM/UIM benefits under the National Union policy as a matter of law.

***Smith v. The Cincinnati Insurance Co.* (May 24, 2001),** Lake C.P. No. OOCVOOO916, unreported (granting summary judgment for Plaintiffs and holding that the commercial general liability policy issued to Plaintiffs' employer and insuring "non owned" or "hit-cd" autos is an "automobile liability policy or motor vehicle policy of insurance" pursuant to R.C. Section 3937.1 X(L) and is subject to the requirements of R.C. 3937.18(L); Because UM/UIM coverage was not offered. it is implied by law pursuant to R.C. 3937.18 and the policy must provide UM/UIM coverage)

Rathburn v. Drozdowicz (May 11, **2001),** Fairfield C.P. No. 00 CV 182, unreported (granting summary judgment in favor of Plaintiffs on the issue of whether failure to wear a seatbelt constitutes contributory negligence: holding that 45 13.263(F) was not amended or reenacted by H.B. 2 15)

On June 10, 1999, Plaintiff Kylene Rathburn was a front seat passenger in a vehicle driven by Plaintiff Rebecca Hendershot. Rathbum was injured when a collision ensued between a van driven by Defendant Donald Drozdowicz and Hendershot's vehicle. Although there was no evidence to suggest that Rathburn did anything to distract Hendershot or to contribute to the cause of the collision, Defendant took the position that Rathburn's failure to wear a seatbelt constituted contributory negligence and that the jury should apportion the negligence among Rathburn and the Defendants. The trial court granted Rathburn's motion for summaryjudgment:

> "The Defendant argues that the Plaintiff must be denied summary judgment due to the possibility of comparative negligence based upon her alleged failure to wear a seatbelt in violation of R.C. Section 4513.263, R.C. Section 45 13.263 was originally enacted on May 6, 1986. The language of R.C. Section 45 13.263 stated that a person's failure to wear a restraining device shall not be considered or used as evidence of negligence or contributory negligence. Clearly, the law precluded the admission into evidence of a person's not wearing a seatbelt as evidence of neg-

ligcnce or contributory negligcncc. In 1996, the Ohio General Assembly passed House Bill 350, the Ohio Tort Reform Act. which became effective January 27, 1999, amending R.C. Section 45 13.263 to state that a violation of this section shall be considered by the trier of fact, in a tort action., as contributory negligence.. .However. on August 16, 1999, the Supreme Court held that H.B. 350 violated the one-subject provision of Section 15(D), Article II, the Ohio Constitution, and was therefore "unconstitutional in toto". *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 45 1. . ..Therefore, the Court finds that the statute before the H.B. 350 amendment indicates that the failure of a plaintiff to use a seatbelt is not admissible as evidence to be considered for the purposes of finding contributory negligence on the part of the Plaintiff. In their Motion for Summary Judgment, Defendants argue that R.C. Section 4513.263(F), as enacted on July 30, 1997 by H.B. 215, governs the admissibility and use of evidence of Plaintiffs' non-use of seatbelts at the time of the June 10, 1999 automobile collision. Defendants argue that the H.B. 2 15 version of the statute is unaffected by *Sheward*, because the Supreme Court did not discuss the amendments made to the statute by H.B. 350 or by H.B. 2 15 Furthermore, Defendants argue further that H.B. 2 15 was passed subsequently to H.B. 350, and represents a reenactment of R.C. Section 45 13.263(F) as amended by H.B. 350. *We disagree.*, [T]he Ohio Supreme Court on March 28, 2001 issued a decision that established that a house bill which is subsequently enacted to H.B. 350 does not reenact the entire section including H.B. 350 amendments, unless

> the Gcncral Assembly intended to reenact the whole section by complying with R.C. Section 101.53. Therefore, in order to repeal and reenact Section 45 13.263, the General Assembly would have had to strike out the language to be repealed and to type language to bc added or reenacted. H.B. 215 did not alter Section 45 13.263 in this [manner], but merely reprinted the statute with additional language that did not concern the portion of the statute at issue in this matter. H.B. 215 indicates no intent to reenact or enact R.C. Section 45 13.263. . ..Ohio Revised Code Section 1.54 provides: "A statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute". Therefore, the Court finds that the pre-H.B. 350 language of Section 45 13.263(F) is the applicable law, because 45 13.263(F) was not amended or reenacted by H.B. **215."**

Intentional Tort - R.C. Section 2305.112 No Longer Viable - 2 Year S.O.L. Applies

Funk v. Rent-All Mart, Inc. **(2001), 91** Ohio St.3d 78 (Unless the circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code, a cause of action alleging bodily injury as a result of an intentional tort by an employer pursuant to *Blankenship* will be governed by the two-year statute of limitations set forth in R. C. 2305.10)

This matter came before the Supreme Court of Ohio as certified state law questions from the U.S. District Court from the Northern District of Ohio, In its certification order, the court stated:

> "Plaintiff brings this cause of action asserting an intentional tort against his employer. Plaintiff's cause of action arose on June 19, 1998 and was filed

on February 8. 2000. The Plaintiff asserts his cause of action is based on the common law pursuant t o *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608. The Defendants have moved for dismissal of the action on the basis that it is untimely under Ohio Reviscci Code Section 2305.1 12. which requires that an action be brought within one year. This statute. however, is based upon an enabling statute. Ohio Revised Code Section 2745.01. which was recently declared unconstitutional by the Ohio Supreme Court. See *Johnson v. BP Chemicals, Inc. (1999)*, 85 Ohio St.3d 298. The issue is what impact the *Johnson* ruling has on the relevant statute of limitations, specifically whether the unconstitutionality of the enabling statute, Ohio Revised Code Section 2745.0 1, renders the applicable statute of limitations, Ohio Revised Code Section 2305.112, ineffective. Thus, the questions to be presented arc as follows:

Is the statute of limitations under Ohio Revised Code Section 2305.112 viable in light of the ruling in *Johnson*, which rendered the enabling statute, Ohio Revised Code Section 2745 .01, unconstitutional? Does Ohio Revised Code Section 2305.112 apply to a common law cause of action brought by an employee against his employer pursuant to *Blankenshrp?* If the statute of limitations is not one year pursuant to Ohio Revised Code Section 2305 112, what is the applicable statute of limitations for such causes of action?

Answering the first question in the negative, the Court cited to its decision in *Mullins v. Rio Algom, Inc.* (1999), 85 Ohio St.3d 261,whercinthcCourtdeclaredthatR.C. 2305. 112 was null and void upon the authority of *Johnson v. BP Chemicals* Regarding the question of whether R.C. 2305. I 12 applies to a common-law cause of action brought pursuant to *Blankenship*, the Court also answered this question in the negative based on its decision in *Mullins*. Because the Court in *Johnson* determined R C. 2745.0 1 to bc unconstitutional in its entirety, it follows that R.C. 2305.112 no longer has any effect, as there is no statutory basis for the application of the one year statute of limitations. Regarding the third and final issue. the Court held that "[u]nless the circumstances of an action clearly indicate a battery or any other enumerated intentional tort in the Revised Code. a cause of action alleging bodily injury as a result of an intentional tort by an employer. .will be governed by the two-year statute of limitations established in R.C. 2305.10."

Political Subdivisions - Final Appealable Orders

***Stevns* v. *Ackman* (2001), 91 Ohio St.3d 182** (holding that the trial court's order denying a political subdivision's motion for summary judgment premised on immunity under R.C. 2744 is not a final appealable order under either R.C. 2505.02(B) or R.C. 2744,02(C))

On December 16, 1994, Corey Banks ("Banks") died in an auto accident in Middletown, Ohio, when Defendant Emily Ackman's ("Ackman") vehicle went left of center on Roosevelt Road and collided with an oncoming vehicle. Decedent's estate ("Appellant") filed a complaint against Ackman and appellee, the city of Middletown ("Middletown"). Appellant alleged that Middletown was liable for Banks' death for allowing an unsafe pavement edge drop to exist which caused Ackman to lose control of her vehicle. Appellant further alleged that Middletown breached its duty to maintain Roosevelt Road open: in repair, and free from nuisance, and that the roadway was unsafe. Middletown moved for summary judgment pursuant to R. C. Chapter 2744, and the trial court denied the motion. Middletown immediately appealed the denial of its summary judgment motion to the Butler County Court of Appeals, initially relying on R.C. 2744,02(C) which provided that "'an order that denies a political subdivision.. .the benefit of an alleged immunity from liability as provided in Chapter 2744.. .is a final order".

Appellant filed a motion to dismiss the appeal, arguing that R.C. 2744,02(C) was not retroactive to apply to a case arising from a 1994 death and that the failure of the trial court to state in its order that there was "no just reason for delay" deprived the court of appeals of jurisdiction. Before the court of appeals ruled on the motion, the Ohio Supreme Court announced its decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451. Appellant filed a second motion to dismiss the appeal, arguing that because R.C. 2744.02(C) was enacted in H. B. 3.50, and because the Supreme Court's opinion in *Sheward* declared H.B.350 to be "unconstitutional in toto", there was no basis for the court of appeals to maintain jurisdiction over the appeal.

Middletown responded by arguing that R.C. 2505.02(B)(2) and (B)(4) provided alternate grounds for the appellate court's jurisdiction over its appeal, because the trial court's ruling qualified as an order that affected a substantial right made in a special proceeding, or as an order that denied a provisional remedy.

The court of appeals denied both of appellant's motions to dismiss, holding that it had jurisdiction over the appeal pursuant to R.C. 2505.02(B)(2). More specifically, the court concluded that the trial court's order denying statutory immunity affected a "substantial right" and was entered in a "special proceeding". The court found that the underlying action was a "civil claim for wrongful death and survivorship", both of which were unknown at common law and "did not exist in law or equity prior to 1853", such that a special proceeding w-as involved within the meaning of R.C. 2505,02(A)(Z). The court of appeals did not rule on appellant's argument that it had no jurisdiction pursuant to R.C. 2744.02(C) in light of the *Sheward* decision. The court of appeals then reversed the trial court's judgment and entered summary judgment in favor of Middletown.

Finding the trial court's judgment to be in conflict with the decision in *Thompson v. Muskingum Cty. Bd. of Commrs.* (Nov. 12, 1998), Muskingum App. No.CT98-00 10, unreported, the court of appeals granted appellant's motion to certify a conflict on the issue of "whether an edge drop on the berm of a county or city road, in and of itself, constitutes a nuisance within the meaning of R.C. 2744.02(B)(3)". However, the court of appeals refused to certify a conflict on the issue of whether, in light of *Sheward*, a court ofappcals has jurisdiction pursuant to R.C. 2744.02(C) to hear an interlocutory appeal from the denial of a political subdivision's summary judgment motion based on statutory immunity. The Ohio Supreme Court determined that a conflict existed on the '"edge drop" issue and allowed a discretionary appeal on the latter issue.

The Ohio Supreme Court vacated the decision of the court of appeals on the merits and remanded for further proceedings. In its opinion, the Court addressed both (I) the issue of appealability pursuant to R.C. 2505,02(B), and (2) the issue of appealability pursuant to R.C.2744.02(C).

, Regarding appealability pursuant to R.C. 2505.02, the Ohio Supreme Court held that "a trial court order entered in a civil action for damages seeking recovery for a wrongful death is not an order entered in a special proceeding for purposes of R.C. 2505.02". Relying on *Polikoff v. Adam* (1993), 67 Ohio St.3d 100 and progeny, the Court concluded that the trial court's order was not entered in a "special proceeding". Contrary to the court of appeals' decision, the Ohio Supreme Court characterized the "underlying action" as an ordinary civil suit for damages which was known at common law. The Court further held:

> In *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 181, a majority of this court...seemed to accept, at least by implication, that R.C. Chapter 2 125 does not "give any new cause of action, but only substitutes the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived" ...Therefore, the explicit requirement that a special proceeding be 'specially created by statute' does not appear to be fulfilled in this case, as R.C. Chapter 2125 does not create a right of action for wrongful death. Also, there is a further obstacle to a wrongful death action being

> a special proceeding, separate from those discussed above. R.C. 2505.02(A)(2) requires that for a proceeding to be special, it must be one "that **prior** to I 853 was not denoted as an action at law or a suit in equity". Ohio's first wrongful death statute. as this state's version of what is commonly called Lord Campbell's Act. was enacted in 185 I. ..Because a wrongful-death recovery was delineated by statute in 185 1. an action for wrongful death *was* denoted as an action at law prior to 1853 for purposes of R.C. 2505.02(A)(2).

Regarding the issue of whether R.C. 2744.02(C) provided an alternative ground for the court of appeals to exercise appellate jurisdiction, the Ohio Supreme Court answered this question in the negative. The Court relied on the fact that in *Sheward*, all legislative action contained in H. B. 3 50 had been struck down, including the attempted enactment of R.C. 2744.02(C). The Court rejected Middletown's argument that R.C. 2744.02(C) was validly reenacted by the General Assembly in Am. Sub. H. B. No. 2 15, noting that the sole *purpose* of H. B. 215 was to insert a reference to a statute (i.e., R.C. 33 14.07) that was not previously mentioned within R.C.2744.02(B)(2). The Court also relied on the fact that H. B. 2 15 evinces no legislative intent to enact or reenact R.C. 2744,02(C). In particular, the Court observed that "at the time Am. Sub. H. B. No. 215 was passed, the General Assembly had no reason to believe that the purported enactment of R.C. 2744.02(C), attempted a short time earlier in Am. Sub. H. B. No. 350, would later be found to be unsuccessful".

By concluding that neither R.C. 2505.02(B) nor R.C. 2744,02(C) provided a valid basis for the court of appeals to exercise jurisdiction to entertain Middletown's appeal on the issue of political subdivision immunity, the Ohio Supreme Court vacated the decision of the court of appeals on the merits.

Torts - Attractive Nuisance Doctrine - Swimming Pools

Bennett v. Stanley (2001), 92 **Ohio** St.3d 35 (adopting the attractive nuisance doctrine as the law of Ohio)

In June 1995, Defendants. Jeffrey and Stacey Stanley, purchased a home with a swimming pool. The pool was enclosed by fencing and a brick wall. and was covered by a tarp. In the fall of 1996, Ricky and Cher Bennett and their children rented a house next to the Stanleys' house. The houses were separated by approximately 100 feet. The Stanelys removed the tarp and fencing on two sides of the pool. and although they drained the pool, they allowed rainwater to collect in the pool to a depth of over six feet. The pool became a pond. It contained no ladders, the sides were slick with algae, and frogs and tadpoles lived in the pool. The Stanleys were aware that the Bennetts had moved next door and that they had young children. They had seen the children outside unsupervised. There was evidence of some fencing between the properties, but with an eight-foot gap. In March 1997, Plaintiff Rickey Bennett arrived home to find his stepson and wife unconscious in Stanleys' pool. Both later died.

Bennett filed a wrongful death and personal injury suit against the Stanleys. The Complaint alleged that the Stanleys had negligently maintained an abandoned swimming pool on their property and that their negligence proximately caused the March 20, 1997 drownings. Bennett averred that the Stanleys had created a dangerous condition by negligently maintaining the pool and that the Stanleys reasonably should have known that the pool posed an unreasonable risk of serious harm to others. Appellant specifically alleged that the pool created an unreasonable risk of harm to children who, because of their youth, would not realize the potential danger. Bennett further asserted that the Stanleys' conduct in maintaining the pool constituted willful and wanton misconduct, thereby justifying an award ofpunitive damages.

Defendants filed a motion for summary judgment, which the trial court granted on September 4, 1998. The trial court found that decedents were trespassers on the

Stanleys' property and that the Stanelys therefore owed them *only* a duty to refrain from wanton and willful misconduct. In addition. the trial court rejected Plaintiffs' argument that the Stanlcys' maintenance of the swimming pool amounted to a dangerous active operation that would create for them a duty of ordinary care pursuant to *Coy v. Columbus, Delaware & Marion Elec. Co.* (1932). 125 Ohio St. 283. Because the Complaint alleged that the Stanleys had violated a duty of ordinary care, the trial court found for the Stanleys as a matter of law.

The appellate court affirmed. holding that the Stanleys owed the decedents only a duty to refrain from wanton and willful misconduct, and added that there was no evidence of such misconduct. The appellate court also addressed the issue of the Stanleys' duty to Cher Bennett, holding that even if she were on the Stanleys' property in an attempt to rescue her son, she would still have the status only of a licensee, who is owed no greater duty of care than a trespasser. The Ohio Supreme Court reversed and explicitly adopted the attractive nuisance doctrine as the law of Ohio. The Court explained that it had previously declined to adopt the attractive nuisance doctrine in *Elliott v. Nagy* (1986), *22* Ohio St.3d 58, because the facts of that case "presented no compelling reasons meriting the adoption of the attractive nuisance doctrine". In *Elliott,* the Court determined that the Defendant-neighbors could not have foreseen that a nineteen month old child would be visiting her grandparents and would wander into their yard. In this case, by contrast, the Court found that there is at least a genuine issue of fact regarding the foreseeability of one of the Bennett children entering onto the Stanley property. Moreover, in *Elliott,* the injured child was a visitor, whereas the decedent-child in this case resided next door to the Stanleys. As such. the Court determined that reasonable minds could conclude that it was foreseeable to the Stanleys that one of the Bennett children would explore around the pool. In light of those facts, the Court held that "in this case we cannot decline to adopt the attractive nuisance doctrine because of a lack of foreseeability" and "[a]ny failure to adopt attractive nuisance would be to reject its philosophical underpinnings and would keep Ohio in the small minority of states that do not recognize some form of the doctrine". The Syllabus to the Court's decision states:

> I. A possessor of land is subject to liability for physical ham to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition csists is one upon which the possessor knows or has reason to know that children arc likely to trespass. and (b) the condition is one of which the possessor knows or has reason to know and which hc realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or to otherwise protect the children. (Restatement of the Law 2d, Torts [1965], Section 339, adopted.) 2. While the attractive nuisance doctrine is not ordinarily applicable to adults, it may be successfully invoked by an adult seeking damages for his or her own injury if the injury was suffered in an attempt to rescue a child from a danger created by the defendant's negligence.

Regarding Paragraph 2 of the Syllabus to its decision, the Court stated that if, on remand, it is found that Cher Bennett entered the Stanleys' property to rescue her son from an attractive nuisance, the Stanleys owed her a duty of ordinary care.

Torts - Loss of Consortium - Adult Children

Rolf v. Tri State Motor Transit Co. (2001), 91 Ohio St.3d 380 (holding that adult emancipated children may recover for loss of parental consortium)

Kenneth Martin sustained a traumatic brain injury when his vehicle was struck from behind by a semi-trailer driven by an employee of the Tri State Motor Transit Company As a result ofthe accident, his cognitive functions and ability to control basic bodily functions were seriously and permanently impaired, such that he will require ongoing custodial care for the remainder of his life. Kenneth Martin's adult emancipated children. Plaintiffs David Martin and Bonnie Rolf, filed the instant action to recover damages for the loss of consortium they have suffered as a result of their father's injuries. The Northern District of Ohio certified the following question of law to the Ohio Supreme Court: "Can emancipated children maintain a claim under Ohio law for the loss of consortium caused by injuries to a parent?" Answering this certified question in the affirmative, the Ohio Supreme Court relied to a large extent on the policy arguments and rationale set forth in *Gallimore v. Children's Hosp. Med. Ctr.* (1993); 67 Ohio St.3d 244 (recognizing a *minor* child's loss-of-parental-consortium claim). Opining that it is irrational to deny an adult child recovery simply because the child has reached the age of majority, the Court expressly struck down what it deemed to be '"an artificial age barrier".

Torts - Viability of "Open and Obvious Doctrine" Called Into Question

Schindler v. Gales Superior Supermarket (April 5, 2001), 2001 Ohio App. LEXIS 1614, Cuy. App. No. 78421, **unreported.** (Calling into question the continued viability of the open and obvious doctrine; holding that the issue of a plaintiff's negligence in failing to perceive an allegedly obvious hazard should be analyzed under a comparative negligence standard)

Marcia Schindler was injured in Gale's Village Market in November 1997 when she tripped over a metal bar that was affixed to the sidewalk to keep shopping carts orderly. Schindler filed suit, alleging that her injuries resulted from defendant's negligence. Defendant moved for summary judgment, arguing that the metal rail was open and obvious and that no duty was therefore owed to Schindler. Schindler opposed the motion asserting that the continued viability of the open and obvious doctrine is suspect in light of the Ohio Supreme Court's decision in *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998). 8 1 Ohio St.3d 677. The trial court granted defendant's motion. On appeal. Schindler argued that the open and obvious doctrine is no longer viable and that *Texler* requires that the relative fault of the parties be resolved using comparative negligence principles which precludes summary judgment. Applying a comparative negligence standard and calling into question the continued viability of the open and obvious doctrine, the Eighth District reversed:

> The application of comparative negligence principles.. requires the factfinder to apportion the percentage of each party's negligence that proximately caused the plaintiff's damages. See R.C. 23 15.19(A)(2). Ordinarily this is an issue best determined by the jury unless the evidence is so compelling that reasonable minds can reach but one conclusion. In such a case, summary judgment is appropriate if the only conclusion a reasonable trier of fact could reach is that the plaintiff was over fifty percent negligent so as to bar recovery under comparative negligence principles, (Citations omitted). .. [T]he time has come for there to be some consistentcy in the manner with which the courts analyze and interpret these cases.. .Because the *Texler* decision is the most recent pronouncement from the Supreme Court on this issue, its admonitions should not be lightly taken. Indeed. when analyzed in terms of the duty owed, I find the doctrine questionable because it rests on a legal fiction in that it relieves the premises owner of the duty to warn. To say that a claim is barred because the defendant owed

the plaintiff no duty to warn him of the danger is to disregard any express duty on the part of the premises owner to maintain the premises in a reasonably safe condition. With this in mind. this court is ofthc opinion that the time has come to analyze the openness and obviousness of a hazard not in terms of the duty owed but rather in terms of causation. The issue of a plaintiff's negligcncc in failing to perceive an obvious hazard seems particularly suited to consideration under a comparative negligence standard., .When analyzed in terms of causation. the application of the doctrine would effect the same result as it would if analyzed under the duty element if the plaintiff's negligence in causing the injury is found to be greater than the negligence of the defendant. Summary judgment, therefore; should only be granted on the grounds that the hazard was open and obvious when the plaintiff's negligence in disregarding the hazard is greater than defendant's negligence in creating the hazard

Torts - Ohio Consumer Sales Practices Act Applied to Transaction Between Hospital and Consumer

Summa Health System v. Viningre (Dec. 27, 2000), 2000 Ohio App. LEXIS 6168, Summit App. No. 19594, unreported (holding that a transaction between a health care provider and a patient to provide hospital services without charge due to the hospital's negligent failure to diagnose pap smear results does not fall under any of the transaction excepted from the Ohio Consumer Sales Practices Act)

In this case, a resident intern at a health care facility operated by Summa Health Systems failed to properly diagnose Nancy Viningre's pap smear results. In March 1993. Viningrc was told that the test results were normal. In September 1993. Viningrc was advised that the test results actually showed unusual cells that required careful monitoring. Viningrc was employed but had no health insurance and Summa agreed to pay for all costs of the diagnostic testing. In 1994, a Summa risk manager contacted Viningrc and assured her that Summa would cover the costs of her care. because it was clear that Summa was negligent in not discovering the unusual test results carlicr. In February 1994, it was dctcrmincd that Viningre needed a total hysterectomy. Viningre had the surgery performed at Akron City Hospital. Viningrc alleged that she chose this facility because Summa's risk manager told her that Summa would pay for the procedure if it was done at their facility. In February 1994, Viningre advised Summa's risk manager that she was considering a suit against the hospital for malpractice. On May 24, 1994, Summa's risk manager suggested that although Summa was not liable for Viningre's condition, it would pay her $20,000 to settle any malpractice claim but that Viningre would be responsible for paying the $13,000 hospital bill and approximately $5,000 in doctor bills. Viningre initially rejected the claim. On June 7, 1994, Viningre spoke with Summa's risk manager about possible settlement, and Viningre agreed to settle for $20,000 with the alleged agreement that Summa would write off the hospital bills. On June 24, 1994, Viningre signed a document releasing her claims against Summa in exchange for $20,000, but the release contained no mention of the medical bills. In November 1994, Viningre received a letter from a collection attorney representing Summa, stating that Viningre owed Summa approximately $13,000. Viningre made one payment of $50.00 but then challenged the bill on the basis that the issue was resolved by the settlement agreement. When Viningre failed to pay, Summa filed an action on account. Viningre counterclaimed against Summa for fraud and for violating the Consumer Sales Practices Act ("CSPA").

The trial court granted Summa's motion for a directed verdict on Viningre's CSPA claim. The jury found for Viningre on Summa's action on account and on her counterclaim for fraud. The jury awarded $10,000 in compensatory damages. $30.000 in punitive damages and reasonable attorney fees. The trial court later determined that Viningre was entitled to reasonable attorney fees in the amount of $40,000. Both parties appealed,

On appeal. the court affirmed the jury's verdict awarding compensatory and punitive damages. Moreover. the court of appeals reversed the granting of a directed verdict in favor of the Summa on Viningre's CSPA claim. stating:

> R C 1345 0 1 (A) defines a "consumer transaction" as a sale. lease. assignment. award by chance. or other transfer of an item of goods. a service. a franchise. or an intangible. to an individual for purposes that are primarily personal. family. or household. or solicitation to supply any of these things. "Consumer transaction" does not include transactions between physicians. ..and their clients or patients...that pertain to medical treatment but not ancillary services. The statute further defines "supplier" as "a seller. lessor. assignor. franchisor. or other person engaged in the business of effecting or soliciting consumer transactions. whether or not he deals directly with the consumer." R.C. 1345.01(C).
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> Nancy claims that the transaction between Summa and herself. to provide Nancy with hospital services for her hysterectomy without charge due to the hospital's negligent failure to diagnose. does not fall under any of the transactions excepted from the CSPA. We agree. While transactions with physicians are exempted from the CSPA. a transaction between a service provider such as a hospital and the consumer is not clearly exempted. See *Elder v. Fischer* (1 998),129 Ohio App. 3d 209. and *Thorton* v. *Meredia Suburban Hosp.*, (Nov. 21. 1991). 1991 Ohio App. LEXIS 5549, Cuy. App. No 59405. unreported

Evidence - Admissibility of Expert Witness' Involvement in Pending Malpractice Action Alleging Similar Medical Error

Oberlin v. Akron General Medical Center (2001), 91 Ohio St.3d 169 (holding that evidence that an expert witness is a defendant in a pending malpractice action alleging a medical error similar to the one at issue is probative and is admissible to prove bias. prejudice. or motive to misrepresent).

Plaintiff-appellant underwent a thumb joint fusion and bone graft procedure in December 1994. During surgery. appellee-doctor used a pneumatic toumiquct. At appellee's direction. the tourniquet remained inflated for two hours and twenty-four minutes. Appellant claimed to have suffered permanent damage to his left arm. hand and ulnar nerve because the tourniquet had remained inflated too long. Appellant's expert testified that the length of the inflation time was excessive. resulting in permanent injury to appellant in the form of reflex sympathetic dystrophy.

In the discovery deposition of defendant-appellee's expert. the expert admitted to being a defendant in a pending medical malpractice action involving a Canadian plaintiff. When questioned regarding the nature of the injury in that case, appellee's expert conceded that it involved an ulnar nerve injury, but he claimed to have no knowledge of the details of the Canadian plaintiff's claim against him. In a subsequent video deposition of appellee's expert, appellant's counsel again cross-examined the expert on this subject and learned that suit had been brought against the expert based on an injury very similar to appellant's injury The Canadian plaintiff's claim against appellee's expert arose out of orthopaedic surgery which resulted in reflex sympathetic dystrophy.

When the video deposition was played at trial, the trial court refused to allow the jury to view the cross-examination of appellee's expert as it related to the pending lawsuit against him. stating that "the prejudicial nature of this testimony far outweighs any probative value".

On appeal. appellant attempted to demonstrate the probative value of the excluded testimony. arguing that the

evidence would have established the expert's potential bias. The Ninth Appellate District affirmed the trial court, holding that the testimony was inadmissible pursuant to Evid.R.403(A), because appellant had failed to demonstrate that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

The Ohio Supreme Court reversed, concluding that the trial court abused its discretion in refusing to allow appellant to cross-examine appellee's expert on his pending malpractice action. More specifically, the Court held that "evidence that an expert witness is a defendant in a pending malpractice action alleging a medical error similar to the one at issue is probative and is admissible to prove bias, prejudice, or motive to misrepresent". The Court relied in part on the fact that Evid.R.6 11 (B) and Evid.R.6 16(A), by specifically mentioning credibility, bias, and prejudice as appropriate subjects of cross-examination, "are a testament to the inherent probative value of such evidence". The Court also relied on the fact that Evid.R.403(A) requires that the unfair prejudice *substantially* outweigh the probative value of the evidence. Regarding the issue of bias, the Court noted that:

> The similarity of the area operated upon and of the resulting injury is enough to indicate bias. If [the expert] were to criticize any aspect of [appellee's] handling of the surgery, the Canadian plaintiff might seize on that testimony and use it against [the expert] in her own suit. Therefore, [the expert] might be biased in evaluating [appellee's] performance for fear that the testimony might be used against him later. He might be predisposed to find that the doctor here acted within acceptable bounds of competence. Second, an expert with an active malpractice case against him might be hostile to malpractice claimants in general. He might apply what he considers the unfairness of the entire process to his interpretation of whether this particular doctor acted reasonably.

Evidence -Witnesses - Impeachment - Pecuniary Interest

Susanu v. Cliche (May 31, 2001), 2001 Ohio **App.** LEXIS 2420, Cuy. App. No. 77884, unreported.

Plaintiffs brought a negligence action against defendant resulting from an auto collision. Plaintiff filed a motion in limine seeking an order that defense counsel be precluded from asking the treating physician at Cleveland Therapy Center how plaintiffs were referred to his office. The court denied the motion and the jury returned a defense verdict. The sole issue presented in this appeal was whether the trial court abused its discretion by denying Plaintiffs' motion in limine. The Eighth District affirmed, noting that, subject to Evid.R.403(A), cross-examination is pennitted on all relevant matters affecting credibility, including bias or pecuniary interest. The Court stated that it was "unable to assess the prejudicial impact of the impeachment testimony" because a full transcript was not provided. It affirmed the trial court's decision on this basis. Citing to *Sate ex rel. Corn v. Russo* (2001), *90* Ohio St.3d 551, the Court additionally felt compelled to state:

> The personal injury bar has vigorously gone after the defense bar medical experts in attempts to show that those witnesses are willing to bend their opinions in the direction from which their fees come....It should come as no surprise to the personal injury bar that the insurance defense bar would use the same tactics. Personal injury victims can have no complaint that their experts are being subjected to rigorous impeachment for bias and pecuniary interest when they have done the same to defense experts, Without making any judgments about the Cleveland Therapy Center, we have noted in several cases that attorneys for personal injury victims have referred their clients to Cleveland Therapy Center well after those clients have ceased initial medical treatment,, .During a videotaped cross-examination of Dr. Kunkle, the

treating physician from the Cleveland Therapy Center, defense counsel managed to make many important points about Clcvclnnd Therapy Ccntcr's allcgcd practicc of over-treating patients in order to inflate medical treatment damages. Most damaging was a form solicitation letter from Cleveland Therapy Center to local attorneys. This letter contained the promise that Cleveland Therapy Center would be able to assist counsel in making larger claims for medical treatment, if the need arose. Other documents noted that Cleveland Therapy Center would bill counsel directly, would issue protection letters for counsel, and asked if counsel wished to be placed on Cleveland Therapy Center's ticket list for seats at sporting events. These were all grounds for impeachment because they went directly to Cleveland Therapy Center's pecuniary interest in prolonging or over-treating patients for the sole purpose of inflating medical damages.. Although Dr. Kunkle insisted that he was an independent contractor with no knowledge of Cleveland Therapy Center's business practices, his knowledge of those business practices was fair game for impeachment, and the court did not err by denying the motion in limine.. .Defendant claims that he defended the issue of liability at trial, so without a transcript we are unable to determine whether the jury in fact had been unduly swayed by the impeachment, or whether it found for defendants only on the facts presented. Because plaintiffs failed to provide a full transcript, we must affirm.

Workers Compensation - R.C. 4123.931 is Unconstitutional

Holeton v. Crouse Cartage Co. (2001), 92 Ohio St.3d 115 (holding that R.C. 4123.931, in its present form, violates Sections 2, 16 and 19, Article I of the Ohio Constitution)

Plaintiff, Rick Holeton, was seriously injured in June 1998 while working on a construction crew that was building an overpass across the Ohio turnpike. The telescoping "manlift" bucket in which he was standing was struck by an eastbound truck owned by James Parr and Crouse Cartage Company. Because his injuries occurred in the course and scope of employment, Holeton has received, and may indefinitely continue to receive, workers compensation benefits from defendant, Bureau of Workers Compensation ("BWC"), pursuant to R.C. Chapter 4123. As a statutory subrogee under R. C. 4 123.93 1 with respect to workers compensation benefits previously or hereafter paid to Holeton, BWC asserted a subrogation claim against any settlement or judgment paid to Holeton by the other defendants. Plaintiffs disputed the validity of BWC's subrogation claim and filed a motion for summary judgment asking the court to declare the subrogation statute unconstitutional. In the alternative, Plaintiffs requested an order certifying the issue to the Ohio Supreme Court. The U.S. District Court for the Northem District of Ohio, Western Division, stayed Plaintiffs' motion for summary judgment and granted Plaintiffs' motion to certify the issue to the Ohio Supreme Court.

On May 3, 2000, the Ohio Supreme Court determined that it would answer the following certified questions:

1. Does R.C. Section 4123.931 violate Article II, Section 3 5 of the Ohio Constitution?
2. Does R.C. Section 4123.931 violate Article I, Section 19 of the Ohio Constitution?
3. Does R.C. Section 4123.931 violate Article I, Section 16 of the Ohio Constitution?
4. Does R.C. Section 4123.931 violate Article II, Section 28 of the Ohio Constitution?

5. Does R.C. Section 4 123.93 I violate Article I, Section 2 of the Ohio Constitution?
6. Does R.C. Section 4123.931 violate Article II, Section 15 of the Ohio Constitution?
7. Is R.C. Section 4123.93 l contrary to Ohio Civil Rule 49(C) and, therefore, invalid and unenforceable'?
8. Does R.C. Section 4123.931 constitute an invalid waiver of an injured employee's right to receive and retain workers' compensation benefits in violation of R.C. Section 4123.80?

The Ohio Supreme Court answered the 1st, 4th, 6th, 7th and 8th certified questions in the negative. However, the Court answered the 2nd and 3rd certified questions in the affirmative, specifically holding that R. C. 4 123.93 1 violates Sections 16 and 19, Article I of the Ohio Constitution In addition, the Court answered the 5th certified question in the affirmative, holding that R.C. 4 123.93 1 violates the Equal Protection Clause of Section 2, Article I of the Ohio Constitution to the extent that it distinguishes between claimants who try their tort claims and claimants who settle their tort claims.

Regarding the 2nd and 3rd certified questions, the Court noted that two provisions of the subrogation statute are called into question under Sections 16 & 19, Article I of the Ohio Constitution: (1) theportionofR.C. 4123.93 l(A) that gives the statutory subrogee a right of subrogation with respect to "estimated future values of compensation and medical benefits", and (2) the portion of R.C. 4 123.93 1 (D) providing that "[t]he entire amount of any settlement or compromise of an action or claim is subject to the subrogation right of a statutory subrogee, regardless of the manner in which settlement or compromise is characterized. Any settlement or compromise that excludes the amount of compensation or medical benefits shall not preclude a statutory subrogee from enforcing its rights under this section".

With respect to the "estimated future values" provision set forth in R. C. 4 123.93 1 (A), the Court concluded that "by giving the subrogec a current collectible interest in estimated future cspcnditures, R.C. 4 123.93 1 (A) creates the conditions under which a prohibited taking may occur." The Court pointed out that, in its present form, R.C. 4 123.93 1 (A) requires the claimant to reimburse the bureau or self-insuring employer for future benefits that the claimant may never receive. As such, the statute operates not to prevent the claimant from keeping a double recovery but to provide the statutory subrogee with a windfall at the expense of the claimant's tort recovery. The Court rejected respondent's "hypothesis that the constitutional infirmities inherent in R.C. 4 123.93 1 (A) can be justified by a presumed state interest in providing for a 'final resolution"', and noted that "the only 'final resolution' achieved by R. C . 4 123.93 1 (A) is to provide immediate recovery to the subrogee by imposing the risk of liability for overestimated future expenditures upon the claimant".

The Court also held that R.C. 4123.931(D), which distinguishes between third-party claims that are tried and those that are settled, establishes a procedural framework under which an unconstitutional taking of the claimant's property or a denial of remedy by due course of law can occur. More specifically, in the case where an award or judgment is rendered, R.C. 4123.93 l(D) allows the claimant to obtain jury interrogatories segregating damages that do not represent workers' compensation or medical benefits and, therefore, are not subject to reimbursement. In contrast, the entire amount of any settlement or compromise is deemed subject to the reimbursement right of the statutory subrogee, and the claimant is precluded, under any circumstances, from showing that his or her settlement or portions thereof do not represent or duplicate workers' compensation or medical benefits,

Acknowledging that "workers' compensation laws are not intended to provide a full recovery, and [that] they are not designed to restore injured workers or their families to what they lost", the Court went on to note that "what must be considered. .is that a person who receives injuries in the course of employment as a proximate result of a third party's negligent act or omission possesses certain constitutionally protected rights of recovery beyond those provided in the workers' compen-

sation statutes" and that "those rights are not necessarily preserved by statutory workers' compensation benefits."

Regarding the 5th certified question, the Court agreed with Petitioners that R.C. 4 123.93 I violates the Equal Protection Clause of Section 2. Article I of the Ohio Constitution in that it arbitrarily distinguishes between claimants who proceed to trial on their tort claims and claimants who settle their tort claims. More specifically. the Court agreed with Petitioners that claimants who go to trial "may have some portion of their award excluded from the subrogee's right or reimbursement, [whereas] the injured employees who settle their claims.. .have no comparable method or opportunity to shield a portion of their damages from the subrogee". In holding that R.C. 4 123.93 1 (D) violates Section 2, article I of the Ohio Constitution, the Court reasoned that:

> "R.C. 4123.931(D) essentially creates a presumption that a double recovery occurs whenever a claimant is permitted to retain workers' compensation and tort recovery.. Such disparate treatment of claimants who settle their tort claims is irrational and arbitrary because.. .there are situations where claimants' tort recovery is necessarily limited to amounts that if retained along with workers' compensation cannot possibly result in a double recovery.. [W]hen the statute operates irrespectively of whether a double recovery has occurred, it can no longer be said that the fund is being replenished at the tortfeasor's expense. The state's interest in conserving the fund can no more justify the denial of a claimant's nonduplicative tort recovery than it can serve as a viable basis for denying workers' compensation benefits to those entitled to it."

Whereas the Court held that R.C. 4 123.93 1 violates Sections 2, 16 & 19, Article I of the Ohio Constitution *in its present form*, the Court would "not accept the proposition that a workers' compensation statute is *per se* unconstitutional" and stated that "nothing in this opinion shall be construed to prevent the General Assembly from ever enacting such a statute."

Workers Compensation - Psychiatric Condition Arising From a Compensable Injury to a Third Party Recognized

Bailey v. Republic Engineered Steels, Inc. **(2001), 91 Ohio St.3d** 38 (holding that a psychiatric condition of an employee arising from a compensable injury or an occupational disease suffered by a third party is compensable under R.C. 4123,01(C)(l))

On May 15, 1996, appellee Leonard Bailey ("Bailey"), an employee of appellant Republic Engineered Steels ("Republic"), was operating a tow motor when he accidentally ran over and killed a coworker. As a result, Bailey received treatment for severe depression. Bailey filed an application with the BWC seeking compensation for his depression. The claim was denied at all administrative levels based on a determination that Bailey had not sustained an "injury" as defined in R. C. 4 123 .01 (C). Bailey appealed the denial of his claim to the Stark County Court of Common Pleas. Republic filed a motion to dismiss under Civ.R. 12(B)(6), arguing that Bailey did not suffer a compensable injury under R.C. 4123.01(C). The Fifth District Court of Appeals reversed, construing R.C. 4 123 .O 1(C)(1) as including psychiatric conditions that arise from a third party's compensable injury or occupational disease. The Ohio Supreme Court determined that a conflict existed with the Second District's decision in *Neil v. Mayfield* (July 22, 1988), Montgomery App. No. 10881, unreported, and also permitted a discretionary appeal. Finding the statute to be ambiguous and relying on the humanitarian nature of the Workers Compensation Act, the Ohio Supreme Court affirmed the court of appeals' judgment:

> The plain reading of the statute reveals that the intent of the General Assembly is to limit claims for psychiatric conditions to situations where the conditions arise from an injury or occupational disease. However, R.C. 4123.01(C)(1) does not specify who

must be injured or who must sustain an occupational 'disease. If we were to construe the statute as requiring that the compensable injury must be suffered by the claimant, we would be inserting words into the statute. Thus, whether R.C. 4123.01(C)(1) includes psychiatric conditions arising from physical injuries sustained by third parties is not a question that can be answered from the plain language of the statute. Where the words of a statute are ambiguous, interpretation is necessary.. . [W]e conclude that the legislature's intent was to allow compensation in cases where an employee suffers a mental injury caused by a coworker's physical injury. This construction of the statute fulfills the compensatory objective and humanitarian nature of the Act. In fact, to deny coverage to a claimant who has suffered a psychiatric injury as a result of a physical injury to a coworker would frustrate the very purpose of the Act, which is to compensate workers who are injured as a result of the requirements of their employment.

Workers Compensation - Employer's Switch From Self-insured Status to State insurance Fund Status

State ex rel Occidental Chem Corp. v. Bureau of Workers Comp (2001), 91 Ohio St.3d 249. (An employer's self-insured or state insurance fund status at the time of injury or injurious exposure controls the determination of who is liable for payment).

Diamond Shamrock Corporation ("Diamond") changed its corporate status in the 1980s, such that nonchemical operations were transferred to newly created subsidiaries of the new Diamond, and the chemical component of the old Diamond became a subsidiary of the new Diamond and changed its name to Diamond Shamrock Chemicals Company ("Shamrock Chemicals"). Along with this corporate reorganization came a change in the workers' compensation insurance status of the former chemical division. Old Diamond had been self-insured. On July 1, 1984, Diamond canceled its self-insured status, and Shamrock Chemicals became a state insurance fund employer. In 1986, new Diamond sold its outstanding stock in Shamrock Chemicals to a company owned by appellant, Occidental Petroleum Corporation ("Occidental"). Shamrock Chemicals once again changed its name and then formally merged into Occidental in November of 1987. As part of the merger, Shamrock Chemicals dropped its separate state fund risk number and moved under Occidental's state fund risk.

In 1992, Lewis Tobul, a former Diamond employee who worked for the company from 1941 to 1976, died. His widow alleged that his death resulted from a chemical exposure at a Diamond plant in Painesville. The Industrial Commission awarded death benefits against "Diamond Shamrock Chemical Company C/O Occidental Corporation", but no benefits were paid. Instead, Occidental and a corporate successor of Diamond, Maxus Energy Corporation, argued with the Bureau of Workers Compensation, and with each other, regarding what party or parties were responsible for claims arising while Diamond was self-insured, including Tobul's claim. The Bureau ruled that companies that changed from self-insured to state fund status retained direct financial responsibility for all claims arising while the company was self-insured, such that Occidental was liable for payment. As such, the Bureau concluded that self-insured liabilities, like other corporate liabilities, pass to the successor corporations along with the assets.

Occidental filed a complaint in mandamus in the Franklin County Court of Appeals, alleging that the Bureau abused its discretion. The court of appeals disagreed and denied the writ. Occidental appealed to the Ohio Supreme Court, arguing that because Tobul died after Shamrock Chemicals had converted to state fund insurance, expenses related to his death were not Shamrock Chemicals' responsibility, and therefore, were not its responsibility after the merger. Occidental also argued that any statutory or regulatory authority supporting a contrary

finding was not enacted or adopted until after the two companies merged. While accepting Occidental's arguments, the Ohio Supreme Court affirmed the court of appeals, relying on the fact that *State ex rel Marion Power Shovel Co v. Indus. Comm.* (1950), 153 Ohio St. 451 preceded the merger and supported the Bureau's assessment of liability In *Marion Power Shovel*, the Court ruled that the employer's insured status at the time of injury or injurious exposure controls the determination of who is responsible for workers compensation claims.

Civil Procedure - Standards of Specificity for Granting New Trial When Verdict is Against the Manifest Weight of the Evidence

Mannion v. ***Sandel*** (2001), 91 Ohio St.3d 3 18 (declining to extend the rule of *Antal v. Olde Worlde Products, Inc.* (1984), 9 Ohio St.3d 144, to require a more stringent standard of specificity in setting forth reasons for granting a new trial pursuant to Civ.R.59(A)(6)).

This case addresses the standard of specificity that a trial court must meet when articulating the reasons for granting a new trial on the ground that the verdict is against the manifest weight of the evidence pursuant to Civ.R.59(A)(6).

In 1988, appellant was diagnosed with breast tumors. In January 1989, appellee performed a bilateral mastectomy and subcutaneously placed polyuerethane-foam-covered breast implants. After the surgery, appellant experienced infection, pain, and drainage in her left breast. Appellee performed a second surgery to remove the infected breast implant. Appellee performed a third surgery to subcutaneously reinsert a new left breast implant. Appellant's new implant developed an open lesion, once again resulting in infection and drainage. When antibiotics were ineffective, appellee once again removed the implant. From 1990 to 1993, the wound on appellant's left breast failed to heal. and pieces of polyurethane foam began coming through the lesion. Appellee decided not to remove the remaining polyurethane since it appeared to be working its way out on its own. Appellant continued to experience problems, went to new doctor in August 1993, and was advised that both the right implant and the residual polyurethane foam from the left side needed to be removed immediately. Once removed. appellant was left without implants and with virtually no lx-cast tissue.

At trial, appellant's expert testified that the standard of care required *submuscular* as opposed to subcutaneous implants. that appellee's decision to use subcutaneous placement failed to meet the standard of care in 1989, and that appellee failed to meet the standard of care in his attempted removal of the entire polyurethane-coated implant. Appellee's expert similarly testified that the standard of care that existed in 1989 would have required appellee to attempt to remove all of the polyurethane foam fragments during the removal of the infected implant.

The jury returned a defense verdict. The trial court overruled appellant's motion for judgment notwithstanding the verdict but granted appellant's motion for a new trial under Civ.R.59(A)(6) finding that the judgment was not sustained by the weight of the evidence. More specifically, the Court's ruling providedin part that:

> "The Court has reviewed the testimony of the experts who appeared at the trial of this matter. The Plaintiffs' and Defendant's experts testified that certain of the Defendant's conduct violated the standard of care. Both doctors testified that by failing to remove the polyurethane foam coating of Plaintiff's left breast implant upon removal of the implant, the Defendant violated the standard of care as it existed at that time".

The Ninth District Court of Appeals reversed, stating in its opinion that it was appropriate to apply a more stringent standard when addressing the setting aside of a jury verdict against the manifest weight of the evidence than for other new trial orders under Civ.R. 5 9(A). The Ohio Supreme Court reversed the Ninth District and remanded for a new trial on all counts, concluding that (1) the trial court's order articulated reasons for granting a new trial sufficient for appellate review in accor-

dance with Civ.R.59(A) and *Antal v. Olde Worlde Products, Inc.* (1984), 9 Ohio St.3d 144. and that (2) the trial court's order did not constitute an abuse of discretion.

In *Antal*, in contrast to this case, the trial court grnntcd a motion for a new trial pursuant to Civ.R.59(A)(6) by articulating no reasons in support of its ruling, other than by baldly stating that the jury's verdict was not "sustained by the manifest weight of the evidcncc". Based on that lack of specificity, the Supreme Court held that "while the determination of whether a trial court's statement of reasons is sufficient should be left to a case-by-case analysis, we can say with a reasonable degree of certainty that such reasons will be deemed insufficient if simply couched in the form of conclusions or statements of ultimate fact".

In reversing the Ninth District in this case, the Suprkme Court distinguished the facts of *Antal* by observing that:

> "In its entry the trial court stated that both experts 'testified that by failing to remove the polyurethane coating of Plaintiff's left breast implant upon removal of the implant, the Defendant violated the standard of care as it existed at the time'. The foregoing language of the trial court cannot be construed as being 'simply couched in the form of conclusions or statements of ultimate fact,' as was found inadequate in *Antal*. There can be no hard-and-fast rule set forth by this court as to sufficiency of the grounds specified by a trial court in support of the determination that a new trial is warranted. We adhere to the necessity of case-by-case determinations as set forth in *Antal*."

In addition, the Court expressly declined to extend the rule of *Antal* to require a more stringent standard of specificity for trial courts. Instead, the Court adhered to the abuse-of-discretion standard set forth in *Antal* and concluded that:

> "'A reviewing court should view the evidence favorably to the trial court's action rather than to the jury's verdict, The predicate for that rule springs, in part. from the principle that the discretion of the trial judge in granting a new trial may bc supported by his [or her] having determined from the surrounding circumstances and atmosphere of the trial that the jury's verdict resulted in manifest injustice.'...It is not the place of this court to weight the evidence in these cases."

Civil Procedure -Amended Pleadings ▪ Service of Process on "John Doe Defendant"

***Permanent General Cos. Ins. Co. v. Corrigan* (May 24, 2001),** 2001 Ohio App. LEXIS 2317, Cuy. App. **No. 78290, unreported** (when amending a pleading to substitute a party whose previous identity was unknown, service must be made by *personal service* and may not be made by certified mail)

On February 16, 1998, plaintiffs-appellants, *Allstate Insurance Company,* Christine Brown and Christopher Brown ("appellants"), filed suit seeking reimbursement for expenses paid and other damages resulting from a March 9, 1996 auto accident. Mary Corrigan and a John Doe Defendant were named as defendants in the Complaint. On September 4, 1998, appellants attempted to amend the complaint by substituting defendant *Ed* Corrigan for the John Doe Defendant. At the time the Complaint was amended, appellants attempted service on Ed Corrigan by *certified* mail. On December 22, 1998, appellants voluntarily dismissed their case., Appellants refiled the case on December 2, 1999. Ed Corrigan filed a motion for summary judgment, arguing that appellants had failed to attempt commencement of service on him during the pendency of the initial case, such that they could not rely on the savings statute are were therefore time barred from maintaining the second action. The Eighth District affirmed, essentially holding that anything other than personal service upon a defendant whose identity was previously unknown fails to meet the requirement of Civ. R. 15(D). Because appellants failed to serve Ed Corrigan by personal service, summary judgment was deemed appropriate.

Civil Procedure - Dismissal With Prejudice Pursuant to Civ.R.41(B)(1)

Santon v. Bernard **(March 1, 2001), 2001 Ohio App. LEXIS 765, 2001 WL 204045, Cuy. App. No.78029, unreported.**

Plaintiff-Appellant filed suit against defendant-appellee, alleging that he was injured as a result of defendant-appellee's negligence when he fell from defendant's roof. The case was called for trial, a jury was sworn, and plaintiff-appellant began to present his case. At the conclusion of the day's proceedings, the trial court instructed the jury to return at 8:30 a.m. the next day. On the following day, at 8:55 a.m., the trial court noted on the record that neither plaintiff-appellant nor his attorney had appeared, although the jury, defendant-appellee's representative, and his attorney were all present. The trial court dismissed the case with prejudice for failure to prosecute pursuant to Civ.R.41(B)(1) and thereafter denied plaintiff-appellant's Civ.R.60(B) motion for relief from judgment.

The Eighth District reversed, holding that the trial court erred by dismissing the case without affording prior notice to appellant and providing him with an opportunity to respond, as required by Ohio R. Civ. P. 4 1 (B)(1). The reviewing court also remanded for the limited purpose of (1) providing appellant with notice of the court's intention to dismiss with prejudice under Civ.R.41(B), and (2) allowing appellant and his counsel the opportunity to explain their absence from trial.

If you would like to see a case summarized in an upcoming issue please send it to Stephen Keefe at: Linton & Hirshman, 700 -West St. Clair, Suite 300 Cleveland, Ohio 44113.

New Local Rule 13: Depositions

Brian N. Eisen
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Attorneys defending depositions have several weapons at their disposal to thwart an effective deposition. Perhaps the most aggravating and potent of those weapons is the "speaking objection." For years, the speaking objection has been deployed to coach deponents, often under the guise of "stating for the record the grounds of the objection." Sometimes the speaking objection is relatively mild, as in "Objection, you can answer if you understand the question." That objection is almost always followed by an answer (often delivered with feigned sincerity) such as "Geez, I'm sorry, I don't understand the question. Can you please rephrase it?" Similar objections abound: "Objection, if you recall" and "Objection, if you know" are two favorites among skilled attorney-coaches. Witnesses almost invariably fall in line with the proper responses: "Boy, I just don't recall" and "Hmmm, I don't really know." Sometimes the speaking objection is more substantive and more insidious, as in "Objection, are you asking the witness to opine about life expectancy without considering the fact that your client smoked like a chimney?" or "Note my objection because obviously this doctor is not a pathologist." These objections, like those set out before, give even the dimmest deponent a clear road map to the answers desired by the objecting attorney.

With the adoption and implementation of a new local rule governing depositions, the speaking objection may lose its potency in Cuyahoga County. Rule 13 of the Local Rules of the Cuyahoga County Court of Common Pleas, General Division is scheduled to become **effective on June 1, 2001.** The new rule does far more than ban the dreaded speaking objection. For example, it sets forth the Court's "expectations" as to the scheduling of depositions by agreement and the maintenance of "decorum." The elimination of the speaking

objection, however, was the impetus behind the first draft of the new rule and sparked sufficient opposition to cause its initial defeat.

The new rule provides as follows:

Local Rule 13. Deoositions

See Civil Rules 26, 27, 28, 29, 30, 3 1, 32, 37 and 45(D)

(A) Witnesses, parties and counsel shall conduct themselves at depositions in a temperate, dignified and responsible manner.

(B) The following rules for the taking of depo sitions emphasize the expectations of the Court as to certain issues; they are intended to supplement Ohio R. Civ. P. 26, 30, 32 and 37:

1. *Scheduling.* Counsel are expected to make a timely and good faith effort to confer and agree to schedules for the taking of depositions. Except for good cause, counsel for the deponent shall not cancel a deposition or limit the length of a deposition without stipulation of the examining counsel or order of the court.

2. *Decorum.* Opposing counsel and the deponent shall be treated with civility and respect, and the questioner shall not engage in repetitive, harassing or badgering questioning. Ordinarily, the deponent shall be permitted to complete an answer without interruption by counsel.

3. *Objections.* Objections shall be limited to (a) those which would be waived if not made pursuant to Ohio R. Civ. P. 32(d), and (b) those necessary to assert a privilege, enforce a limitation on evidence directed by the Court, present a motion under Ohio R. Civ. P. 30(d) or to assert that the questioning is repetitive, harassing or badgering. No other objections shall be raised during the course of the deposition.

Speaking Objections. Counsel may interpose an objection by stating "objection" and the legal grounds for the objection. Speaking objections which refer to the facts of the case or suggest an answer to the deponent are improper and shall not be made in the presence of the deponent.

5. *Instructions Not IO Answer.* Counsel may instruct a deponent not to answer a question only when necessary to preserve a privilege, enforce a limitation on evidence directed by a court, present a motion under Ohio R. Civ. P. 30(d) or terminate repetitive, harassing or badgering questioning. In the event privilege is claimed, examining counsel may make appropriate inquiry about the basis for asserting the privilege. In the event that the ground for the instruction not to answer is that the questioning has become repetitive, harassing or badgering, and the questioner believes that further questioning on the subject is necessary and proper, the questioner may apply to the Court for the right to pursue such questioning at a later date.

6. *Irrelevant and Embarrassing Questions.* If an attorney objects to a particular line of questioning on the ground that the questioning is being conducted in bad faith, or in such a manner as unreasonably

to annoy, embarrass or degrade the deponent, the questioning attorney should move on to other areas of inquiry, reserving the right to pursue the objected-to questions at a later time or date if the objecting attorney agrees to withdraw the objection or if, as a result of a conference call by the attorneys to the appropriate court, a motion to compel or a motion filed under Civil Rule 30(D), a court determines that the objected-to questions are proper.

7. *Conferring During Questioning.* While a question is pending, counsel for the deponent and the deponent shall not confer, except for the purpose of deciding whether to assert a privilege.

8. *Documents.* During the deposition, examining counsel shall provide opposing counsel and counsel for the deponent with copies of all documents shown to the deponent,

9. Where a witness, party or counsel violates any of these rules at a deposition, the Court may order sanctions or other remedies, including those sanctions available under Ohio R. Civ. P. 37.

The new local rule confronts the "speaking objection" directly, prohibiting objections that refer to the facts of the case or suggest answers to deponents. In that respect, the new rule tracks verbatim the corresponding local rule (L.R. 30.1) in the United States District Court for the Northern District of Ohio.

In another respect, however, the new local rule departs dramatically — and perhaps dangerously — from the corresponding federal rule. Subsection (B)(6) of the new local rule has no counterpart in the federal rule. That subsection. which is entitled *"Irrelevant and Embarrassing Questions,"* states that a questioning attorney "**should** move on to other areas of inquiry" whenever a deponent's attorney objects to a "line of questioning" on the ground the questioning is being conducted "in bad faith. or in such a manner as unreasonably to annoy. embarrass or degrade the deponent." (Emphasis added.) The questioning attorney is supposed to return to the previous line of questioning only if the objection is withdrawn or a court order is obtained.

As a practical matter, however, obtaining a court order is likely to provide the deponent and his attorney ample time and opportunity to discuss the line of questioning and to devise a suitable line of response. Convincing an opposing attorney to withdraw such objections is no more realistic than convincing an attorney — prior to the rule's enactment — to refrain entirely from "speaking objections."

Moreover, this provision raises several fundamental questions: (1) Does the use of the term "should" imply that "moving on" is not mandatory? (2) Does a failure to "move on" subject the questioning attorney to the penalties set forth in subsection (B)(9)? (3) Does the mere invocation of the objection trigger the obligation to "move on"? (4) Why does the title of the subsection contain the word "irrelevant," and is a questioning attorney supposed to "move on" if a line of questioning is objected to as "irrelevant"? (5) Is the misuse of the objection itself subject to the penalty provision of the rule, and what standard is to be used to determine whether the objection properly was interposed? Answers to these and related questions ultimately will determine whether the new local rule merely replaces in the arsenal of defending counsel one powerful weapon — the speaking objection — with another of equal or greater force.

The history of the rule's enactment suggests that what has been accomplished is more of a weapons swap than an arms reduction. As originally proposed to the Policy Committee of the Court of Common Pleas, the rule very closely tracked the local federal court rule: speaking objections were prohibited, and there was no subsection on *"'Irrelevant and Embarrassing Questions."* That rule was rejected by the Committee after

its receipt of "public comments" critical ofthc proposal. Much of the criticism came from defense firms and attorneys. who argued that the rule (and its elimination of '"speaking objections*') was unnecessary. The prohibition on speaking objections survived the criticism, but the proposed rule was amended, primarily by the addition of the problematic subsection on *"Irrelevant and Embarrassing Questions."* The new draft was re-presented to the Policy Committee and eventually approved unanimously by the full Court.

The power of any rule in some sense depends on the strength of the penalty imposed for its violation. In that respect at least, the new local rule — whatever its flaws — is potentially quite powerful, In addition to the imposition of sanctions, the full range of remedies available under Civil Rule 3 7 for the violation of a discovery order (including even default judgment) is available directly for the violation of the new local rule, without the necessity of first obtaininn a court order compelling discovery. Whether the full force of the new rule will be unleashed depends, of course, upon the willingness of the local bench to impose the available remedies when petitioned to do so and, presumably, upon the egregiousness of the particular violations.

Time will tell whether Local Rule 13 will have a significant effect on local deposition practice and whether that effect on balance will represent an improvement over present practice.

Verdicts & Settlements

Deborah Callam, etc. v. Ford Motor Co., et al.

Type of Case; Wrongful Death
Settiement: $4,000,000
Plaintiff's Counsel; Charles Kampinski, Christopher M. Mellino, Laurel A. Matthews
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas,
Judge Burt Griffin
Date: March, 2001
Insurance Company: Not Listed
Damages: Death by asphyxiation.

Summary: 3-year-old Alexander C. Callam was asphyxiated when he was trapped between the rear sofa seat and a bench in a 1996 Ford Econoline conversion van. Ford manufactured the vehicle and shipped it without most of its interior parts to Defendant Starcraft Corporation. Interior components put into the van, including the seats, were installed by Starcraft. The rear sofa seat, which crushed Alexander, is hot-wired (not tied into the ignition circuit) and operates electrically with switches located behind the driver's seat and on a panel inside the rear door. The seat iself was sold, with the motor installed, to Starcraft by Defendant, Shrock Mfg., Inc. The van was leased from Defendant Marshall Ford to a friend of the Callams who allowed them to borrow it for a family vacation. Alexander was killed by suffocation after becoming trapped in the seat. Efforts to revive him were unsuccessful.
Plaintiff's Experts: Stephen Forrest (Senior Technical Engineer); John F. Burke, Jr., Ph.D. (Economist)
Defendant? Experts: Larry J. Vande Walle (Professional Engineer); Allen Swenson (Professional Engineer); Arthur W. Hoffman (Professional Engineer); Thomas Hilbert (Economist); Mark Sargent (Professional Engineer)

Susan Jones v. Mahendra R. Patel, M.D., et al.

Type of Case: Medical Malpractice
Verdict: $835,000
Plaintiff's Counsel: Howard D. Mishkind
Defendant's Counsel: Thomas B. Kilbane
Court: Lorain County Common Pleas,
Judge Edward Zaleski
Date: January, 2001

Insurance Company: Not Listed
Damages: Displaced tibial and fibular fractures leading to leg length discrepancy. Chronic pain. Multiple additional surgical interventions and an inability to work over three years. Plaintiff claimed $52,000 in past lost wages and $114,000 in medical expenses.

Summary: Plaintiff fell sustaining a comminuted fracture of her tibia and fibula. She was treated by Defendant Dr. M. R. Patel with an open reduction and internal fixation at Elyria Memorial Hospital. Subsequent to her surgery, she displaced the tibia, requiring a second surgery. Following her second surgery, she developed an infection. Her care was transferred to The Cleveland Clinic Foundation.

Plaintiff required four additional surgeries and has a resulting one-inch leg length discrepancy and chronic back pain.

Plaintiff's Experts: Dr. Michael Joyce (Orthopedic Surgeon)
Defendant's Experts: Dr. Alan Wilde (Orthopedic Surgeon)

Taylor Michelle Reed. et al. v. Pediatric Services, Inc.
Type of *Case:* Medical Malpractice
Settlement: $250,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel; Withheld
Court: Cuy. County Common Pleas,
Judge McCafferty
Date: October, 2000
Insurance Company: Not Listed
Damages: Delayed diagnosis of a tumor; avoidable surgical procedure.

Summary: The Defendant pediatricians negligently failed to diagnose a readily apparent congenital syndrome. The medical literature was replete with references to a variety of liver tumor that is highly associated with this congenital syndrome. Plaintiff, a minor child, developed the tumor, but diagnosis was delayed. Prognosis is now excellent, but the Plaintiff had to undergo an otherwise avoidable surgical procedure.

Plaintiff's Experts: James Rehmus, M.D. (Pediatrics); Aubrey Milunsky, M.D. (Genetics)
Defendant's Experts: Daniel Green, M.D.; Robert Gillespie, M.D.; Alan R. Gurd, M.D.; Howard Saal, M.D.; Mark Schleiss, M.D.; Bruce Sharon, M.D.

Kimberly Mitchell v. John Kim, M.D.
Type of *Case:* Medical Negligence
Settlement: $500,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel: Withheld
Court: Summit County Common Pleas, Judge Adams
Date: December, 2000
Insurance Company: Not Listed
Damages: Delayed diagnosis of malignant melanoma.

Summary; Plaintiff had a mole removed in 1985. In 1998, she developed painful lymph nodes in the same leg where the mole had been removed earlier. There was no local recurrence of the tumor at the site of the earlier resection. Defendant contended that local recurrence is the hallmark of inadequate excision. Further, Defendant contended that Plaintiff's prognosis was unaffected by the delay. Plaintiff contended that the primary site underwent spontaneous regression and that prognosis was significantly affected.

Plaintiff's Experts: Barry Singer, M.D. (Oncology); Theodor Herwig, M.D. (Family Physician)
Defendant's Experts; Lawrence Cervino, M.D.; Arnold Baskies, M.D.; Scot Remick, M.D.

Marv Macholl, etc. v. Advanced Urology Associates, Inc., et al.
Type of Case: Medical Negligence
Verdict: $1,900,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel; Withheld
Court; Summit County Common Pleas, Judge Jane Bond
Date; March, 2001
Insurance Company: MIX
Damages: Wrongful death; $934,000 in future lost wages and services.

Summary: The decedent presented to the Defendant, a board-certified urologist, in June, 1996 with complaints of painless blood in his urine. The Defendant physician treated the decedent for a benign disorder for seven months. The decedent's condition worsened at the end of the seven months and he was finally diagnosed with advanced kidney cancer. Plaintiff contended that the kidney cancer was in its early stages in June, 1996, which carried a high survival rate. Defendant contended that he treated the Plaintiff within accepted standards of medical care and that the

cancer was probably advanced in June, 1996 at the time of initial presentation. The decedent died at the age of 47 years. He is survived by his wife and teenage daughter.

Plaintiff's Experts: Barry Halpern, M.D. (Urology); John Shaw, M.D. (Oncology); John Burke, Ph.D.
Defendant's Experts: Craig Zippe, M.D. (Urological Oncology)

Aaron V. Holb v. Maxwell Schauweker, et al.

Type of Case: Personal Injury
Settlement: $47,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel: Withheld
Court: Portage County Court of Common Pleas, Judge Kainrad
Date: April, 2000
Insurance Company: Not Listed
Damages; Sprained ankle with ligament stretching.
Summary: Plaintiff is the COO for a local manufacturer. Despite extensive property damage, his sole injury was a sprained ankle.

Plaintiff's Experts: Jeffrey Morris, M.D. (Orhopedics)
Defendant's Experts: None

Alvin Henneman, et al. v. Independent Excavating, et al.

Type of Case: Personal Injury
Settlement: $400,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas,
Judge Brian Corrigan
Date: November, 2000
Insurance Company: Not Listed
Damages: Fractured post tibia plateau with surgery on right knee and meniscus tear in left knee.

Summary: This case arises out of a truck-on-truck head-on collision. Liability was admitted. Plaintiff was a 65 year old truckdriver with no prior injuries. Medical specials were $16,923.

Plaintiff's Experts: Paul Deppisch, D.O. (Orthopedics)
Defendant's Experts: None

Richard Henaartner, et al. v. Govindramk Mehta, M.D.

Type of Case; Medical Malpractice
Verdict.' $165,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel: Withheld
Court: Lorain County Common Pleas,
Judge Glavis
Date: May, 2000
Insurance *Company:* Not Listed
Damages: Perforated esophagus

Summary: Plaintiff was a terminally ill 72-year-old gentleman who underwent esophagoscopy. During the course of the procedure, the Defendant Otolaryngologist negligently perforated the esophagus. The defense contended that this was an unavoidable complication. A review of verdict reports nationwide revealed no successful case on similar facts. However, Plaintiff's expert contended that the complication is avoidable in the absence of pathology or a foreign object. Plaintiff had no pathology or foreign object at the time of the procedure.

Plaintiff's Experts: John Tucker, M.D. (Otolaryngologist); Wuu-Shung Chuang, M.D. (Subsequent treating physician for pain); Raymond Borkowski, M.D. (Subsequent treating physician for pain)
Defendant's Experts: Rose Mohr, M.D. (Otolaryngologist)

Robert Morton, etc. v. Manor Care Health Services, Inc., et al.

Type of Case: Nursing Home Abuse/ Neglect
Settlement: $625,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas,
Judge Friedland
Date: August, 2000
Insurance Company: Not Listed
Damages: Small chest bruise and pinch marks.

Summary: This case arises out of a minor physical assault commited by a nurse's aide on a nursing home resident. However, the nursing home had understaffing problems and made representations regarding the quality of care in its Alzheimer's Unit that were not fulfilled in practice. Thus, Plaintiffs' counsel was able to convert this case from a simple assault case into a consumer fraud claim with the potentia! for punitive damages.

Plaintiff's Experts: Shirley Stokley, R.N.; Joan Harkulich, R.N.
Defendant's Experts: Robert Wagar, M.D.

Steve Frank, et al. v. Cincinnati Insurance Co.

Type of Case: Action for Prejudgment Interest
Arbitration Award: $1,250,000
Plaintiff's Counsel. David A. Kulwicki
Defendant's Counsel: Withheld
Court: Stark County Common Pleas, Judge Reinbold
Date: November, 2000
Insurance Company: Cincinnati Insurance
Damages; Not Listed

Summary., This was an action for prejudgment interest pursuant to *Landis v. Grange Mut. Ins. Co.* (1998), 81 Ohio St. 3d 339. (Counsel had previously obtained a $4,500,000 arbitration award on behalf of Plaintiffs.)

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

Linda Naylor Johnson v. John Doe, I, et al.

Type of Case: Tortious Injury/Assault
Verdict: $1,500,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel: Dean Steigerwald
Court; Franklin County Common Pleas, Judge Miller
Date: September, 2000
Insurance Company: Not Listed
Damages: Assault, tcrtious injury

Summary: Plaintiff was assaulted by Defendant John Doe 8. John Doe 8 was convicted and imprisoned in the Lucasville State Penitentiary. During the Lucasville riots, John Doe 8 was killed. His estate, John Doe 9, participated in a class action against the State of Ohio to recover for John Doe 8's wrongful death. Thereafter, Plaintiff intervened in a class action against the settlement fund recovered on behalf of the prisoner class action, asserting rights for tortious injury.

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

Clyde Tennev v. David Sokol, M.D., et al.

Type of Case: Medical Negligence
Settlement: $1,100,000
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel: Withheld
Court: Summit County Common Pleas, Judge Adams
Date: November, 2000
Insurance Company: Not Listed
Damages: Bilateral below the knee amputations.

Summary: Plaintiff underwent repair surgery for abdominal aortic aneurysm. Following the surgery, Plaintiff developed vascular compromise in his lower extremities. Defendant contended that this was an unavoidable complication known as "trash foot." Plaintiff's expert contended that the Defendant failed to use a proper approach on the salvage surgery.

Plaintiff's Experts: James J. Shuler, M.D. (Vascular Surgery); Neil Novin, N.D. (Vascular Surgery); Jack M. East (Life-Care Plan for Amputees)
Defendant's Experts: Paul Skudder, Jr. (Vascular Surgery); Kevin Martin, M.D. (Vascular Surgery)

Patricia Linko, Exec. V. Indemnitv Insurance Co.

Type of Case; Personal Injury
Settlement: $1 ,150,000 (maximum recoverable under NY law)
Plaintiff's Counsel: David A. Kulwicki
Defendant's Counsel: Withheld
Court: Western District, New York
Date: December, 2000
insurance Company: Not Listed
Damages: Wrongful death

Summary; This case arises out of the wrongful death of an Ohio resident in a motor vehicle collision occurring in the State of New York. The case was originally filed in Ohio, but transferred to New York. Ohio law applied to the coverage issues, but New York law applied to the damages issues. The New York federal district court certified several questions to the Supreme Court of Ohio. The Supreme Court's decision in *Linko v. indemnity insurance Co. North America,* (2000), 90 Ohio St. 3d 445 establishes important precedent for testing the validity of rejection forms executed under business auto policies.

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

Estate of Baby Jane Doe, et al. v. ABC Hospital. et al.

Type *of Case:* Medical Malpractice
Settlement: $650,000
Plaintiff's Counsel; Howard D. Mishkind
Defendant's Counsel: Withheld
Court: Not Listed
Date; February, 2001
Insurance Company: Not Listed
Damages; Brain damage leading to death of newborn at 12 days of life..

Summary: Baby Jane Doe was born at 35 weeks gestation and delivered at a community hospital. Orders were given to have the baby on continuous pulse oximetry, as well as cardiopulmonary monitors during the first 24 hours of life. Apparently while in the newborn nursery, the cardiopulmonary monitor and pulse oximetry were disconnected. While breastfeeding, Baby Jane Doe went into cardiorespiratory arrest at 12 hours of age. While the arrest was a witnessed arrest due to inadequate resuscitative efforts, Baby Jane Doe suffered profound brain injury and was taken off of life support at 12 days of age.

Plaintiffs alleged that the Defendant hospital failed to properly monitor Baby Jane Doe. With appropriate monitoring, the events which caused the cardiopulmonary arrest would have been timely and appropriately treated so as to avoid the hypoxic episode leading to the baby's profound brain injury and ultimate death.

Defendants allege that the baby was on monitors at all times with the exception of the period of time when Baby Jane Doe was being breastfed. Further, Defendants allege that the arrest was a witnessed arrest with timely intervention. Defendants further allege that the baby had a metabolic disorder, including, but not limited to, glycogen storage deficit that caused the baby not to respond to timeiy resuscitative efforts. Defendants further allege that the baby's metabolic and genetic abnormalities caused the baby's profound brain damage. Defendants further allege that the cardiopulmonary arrest was not foreseeable or preventable and was caused by a metabolic disorder that would have caused the baby to sustain profound neuro logical deficits and the events that occurred at the time o her arrest, even with appropriate monitoring, were not pre ventable or avoidable.

Plaintiff's Experts: Judy Lott, R.N.; Marcus Hermansen, M.D
Defendant's Experts; Withheld

John Doe v. ABC Hospital

Type of Case: Medical Malpractice
Settlement: $2,037,500
Plaintiff's Counsel: Peter H. Weinberger, Peter J. Brodhead
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas
Date: July, 2000
Insurance Company; OHIC, American Continental, The Medical Protective, Continental Casualty, Kentucky Mutual
Damages: Wrongful death

Summary: 18-year-old college student was found in his dormatory bathroom having collapsed and struck the back of his head. He was transported by EMS to a level one trauma center. At the hospital, the emergency room physicians, radiologist, and neurosurgeon failed to timely and appropriately diagnose a posterior fossa subdural hematoma which would have required emergency surgery. Instead, no surgery was performed and iater that evening, the boy's brain herniated and died.

Plaintiff's Experts: Thomas Flynn, M.D. (Neurosurgery); Paul Collicott, M.D. (Trauma Surgery); Robert Mulliken, M.D. (Emergency Medicine)
Defendant> Experts: Not Listed

John Doe v. Restaurant Franchise Manauement Co.

Type of *Case:* Negligent Security
Settlement: $425,000
Plaintiff's Counsel: Peter J. Brodhead, Mary A. Cavanaugh
Defendant's Counsel: Richard R. Kuepper
Court: Trumbull County Common Pleas, Judge W. Wyatt McKay
Date; December, 2000
Insurance Company; Travelers Indemnity
Damages: Intercostal neuritis and chronic pain, post traumatic stress disorder,

Summary: Defendant failed to provide adequate security for the fast food restaurant, resulting in two armed assailants being able to enter after closing through a door with a broken locking mechanism. Plaintiff, age 25, was in the restaurant waiting for his wife, who was an employee of the restaurant, when two men entered and attempted to rob the wife. Plaintiff was shot in the chest and left shoulder when he attempted to come to wife's aid. Plaintiff was hospitalized for one week, sustained nerve damage result-

ing in intercostal neuritis, and received ongoing psychiatric treatment for post traumatic stress disorder.

Plaintiff's Experts: Michael J Witkowski (Ph.D.)
Defendant's Experts: Robert W. Duman (Security Expert)

Jane Doe, Exec. v. James Doe, M.D.. et al.

Type of *Case:* Medical Malpractice
Settlement: $1,800,000 ($600,000 paid by OIGA, $1,200,000 by PIE liquidation)
Plaintiff's Counsel: Peter H. Weinberger, Rhonda Baker Debevec
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas
Date: November, 2000
Insurance Company: OH IC
Damages: Wrongful death

Summary; 46-year-old man, married with one adult child and 2 minor children, underwent hip relplacement surgery. Decedent was obese with history of varicose veins. Two weeks post surgery, he went to the orthopedic surgeon with complaints of calf pain. The doctor elicited a negative Homan's test. No further diagnostic testing was performed. Four days later, after suffering shortness of breath and chest pain, he was diagnosed in the emergency room of a local hospital with pulmonary embolus. Despite heparin therapy, he died.

Plaintiff's Experts: Lawrence Weis, M.D. (Orthopedic Surgery); David Kanarek, M.D. (Pulmonary Medicine)
Defendant's Experts: Not Listed

Jane Doe, etc. v. Doe Uraent Care Center

Type of Case: Medical Malpractice
Settlement: $1,500,000
Plaintiff's Counsel: Peter H. Weinberger
Defendant's Counsel: Withheid
Court: Cuyahoga County,
Judge Burt W. Griffin
Date: December, 2000
Insurance Company: St. Paul
Damages: Wrongful death

Summary: 55-year-old retired and divorced mother of 2 adult children, ages 19 and 26, with history of non-hodgkin's lymphoma and spleenectomy, presented to urgent care center with complaints of fatigue, headache and fever. Decedent was hypotensive, and did not respond to IV fluids. White blood count was only slightly elevated, but platelet count was low. Decedent was sent home with a diagnosis of the flu. The next day she was found in a coma, taken to the hospital where diagnosis was pneumococcal meningitis, from which she died. Malpractice was based upon failure to diagnose a bacterial infection which would have led to the administration of broad spectrum antibiotics.

Plaintiff's Experts; Robert Mulliken, M.D. (Emergency Room); Jonathon Zenilman, M.D. (Infectious Disease)
Defendant's Experts; None Listed

John Doe v. Trucking Company

Type of Case: Trucking Collision
Settlement: $735,000
Plaintiff's Counsel: Peter J. Brodhead, Mary A. Cavanaugh
Defendant's Counsel: Withheld
Court: Withheld
Date: January, 2001
insurance Company; Withheld
Damages: Herniated disc, three back surgeries, chronic pain.

Summary: Plaintiff was traveling in the right-hand lane of an interstate approaching a construction zone when he was sideswiped by Defendant and pushed onto a bridge abutment. Plaintiff sustained back injury resulting in three corrective surgeries and chronic pain. Plaintiff has been disabled since the date of the incident.

Plaintiff's Experts: Hank Lippian (Introtech, Inc.); John Burke, Ph.D.; Tim Greenya (Vocational Rehabilitation)
Defendant's Experts; Jack Holland

Donald Sommers v. Donna Tamburo

Type of *Case;* Automobile Accident
Settlement: $100,000 (policy limits)
Plaintiff's Counsel: Justin F. Madden
Defendant's Counsel: Withheld
Court: Withheld
Date: March, 2001
Insurance Company; Progressive
Damages., $66,454.34

Summary: Unemployed 62-year-old man was struck by another vehicle which went through a red light. The man sustained chest trauma, pneumothorax, two fractured ribs and fractured clavicle.

Plaintiff's Experts: N/A
Defendant's Experts: N/A

Confidential

Type of Case: Premises Liability
Settlement: *$250,000*
Plaintiff's Counsel: William Hawal, Justin F. Madden
Defendant's Counsel: Withheld
Court; Withheld
Date: January, 2001
insurance Company: Withheld
Damages: $33,893.75

Summary; A college freshman suffered second and third degree burns to her legs and hand in a dormitory fire set by her roommate.

Plain tiff 's Experts: N/A
Defendant's Experts: N/A

Estate of John and June Roe v. Swissair, Boeing, et al.

Type of Case; Wrongful Death - Airplane Crash
Settlement: $2,200,000 .
Plaintiff's Counsel: Jamie R. Lebovitz
Defendant's Counsel: Withheld
Court: US. District Court, Eastern District of Pennsylvania
Date: May, 2001
insurance Company: London Aviation Underwriters
Damages: Death of an elderly couple survived by four adult children.

Summary; On September 2, 1998, a Swissair MD-11 aircraft operating as Flight 111 crashed into the sea near Halifax, Nova Scotia due to an on-board electrical fire and catastrophic system failures.

Plaintiff's Experts: Names Omitted
Defendant's Experts: Not Listed

Estate of John Doe v. Swissair, Boeins. et al.

Type of Case: Wrongful Death - Airplane Crash
Settlement: $2,050,000
Plaintiff) Counsel., Jamie R. Lebovitz
Defendant's Counsel: Withheld
Court; U.S. District Court, Eastern District of Pennsylvania
Date; May, 2001
Insurance Company; London Aviation Underwriters
Damages: Death of a single male survived by parents.

Summary: On September 2, 1998, a Swissair MD-11 aircraft operating as Flight 111 crashed into the sea near Halifax, Nova Scotia due to an on-board electrical fire and catastrophic system failures.

Plaintiff's Experts: Names Omitted
Defendant's Experts: Not Listed

Estate of John Smith v. Swissair, Boeins, et al.

Type of Case: Wrongful Death - Airplane Crash
Settlement: $2,000,000
Plaintiff's Counsel: Jamie R. Lebovitz
Defendant's Counsel: Withheld
Court: U.S. District Court, Eastern District of Pennsylvania
Date; May, 2001
Insurance Company: London Aviation Underwriters
Damages: Death of a single male survived by parents.

Summary: On September 2, 1998, a Swissair MD-I 1 aircraft operating as Flight 111 crashed into the sea near Halifax, Nova Scotia due to an on-board electrical fire and catastrophic system failures.

Plaintiff's Experts; Names Omitted
Defendant's Experts: Not Listed

John Doe v. John Roe, et al.

Type of Case: Medical Malpractice
Settlement: $1850,000
Plaintiff's Counsel: Thomas Mester, William Jacobson, Jeffrey Leikin
Defendant's Counsel: Withheld
Court: Cuyahoga County
Date: March, 2001
Insurance Company: Self-Insured and Ohio Guaranty Association
Damages: Brain damage and cortical blindness.

Summary: Plaintiff, when 10 years old, treated for first onset of seizures. Plaintiff claims there was a delay in administering Acyclovir for herpes simplex viral encephalitis (HSE) resulting in brain damage with cortical blindness. Defendants claim there was no delay and Plaintiff did not have HSE.

Plaintiff's Experts: Experts too numerous to mention. Please call Plaintiff's counsel with any questions about experts.
Defendant's Experts.. Not Listed

Jane Doe v. ABC Hospital

Type of Case: Medical Malpractice/ Wrongful Death
Settlement: $800,000
Plaintiff's Counsel: Leon M. Plevin, Ellen M. McCarthy
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas,
Judge Ann T. Mannen
Date: May, 2001
Insurance Company; Withheld
Damages: Death

Summary: Plaintiff appeared in her family doctor's office complaining of a new onset of shortness of breath. The physician's assistant diagnosed exercise induced asthma and gave patient a prescription for an inhaler. Plaintiff was never seen by a physician. Plaintiff presented to the ER three days later. The ER physician suspected pulmonary embolism and ordered a CT Scan which was initially misread by a resident and later reviewed by a radiologist. Proper treatment was instituted. Plaintiff died 15 hours later.

Plaintiff's Experts: Hadley Morgenstern Clarren, M.D.; Lawrence Repsher, M.D.; Kenneth S. McCarty, M.D.; John F. Burke, Jr., Ph.D.
Defendant's Experts: Daniel Schelbe, M.D.; Meade Perlman, M.D.

Jane Doe V. John Doe, et al.

Type of Case: Medical Malpractice
Settlement: $700,000
Plaintiff's Counsel: Thomas Mester, Harlan Gordon
Defendant's Counsel: Marc Groedel
Court: Cuy. County Common Pleas,
Judge Nancy Russo
Date: April, 2001
Insurance Company: Self-insured
Damages: Erb's Palsy

Summary., Plaintiff suffered birth trauma when Defendants encountered shoulder dystocia and there was a documented use of fundal pressure. Defendants deny fundal pressure was utilized in relieving shoulder dystocia and indicated that appropriate maneuvers were utilized but not documented.

Plaintiff's *Experts;* Robert Ancell, Ph.D. (Vocational Rehabilitationist); Robert Allen, Ph.D. (Biometrics Ergonomics); Stuart Edelberg, M.D. (OB/GYN); Daniel Adler, M.D. (Pediatric Neurologist); John Burke, Ph.D. (Economist)
Defendant's Experts; James Nocon, M.D. (OB/GYN)

John Doe, et al. v. John Foe Corporation

Type of Case: Auto
Settlement; $9.75 Million Dollars
Plaintiff's Counsel; William S. Jacobson, David M. Paris
Defendant's Counsel: James Morrow
Court: Jackson County, MO
Date: March, 2001
Insurance Company: Withheld
Damages: Severe spinal cord injury resulting in paralysis to lower extremities and severe impairment to upper extremities.

Summary; Plaintiff was rear-ended in Seneca County, Ohio. The case was filed in Jackson County, MO, where the Defendant corporation was venued.

Plaintiff's Experts: John Conomy, M.D. (Neurologist); Cynthia Wilhelm, M.D. (Life Care Planner); John Burke, Ph.D. (Economist)
Defendant5 Experts: Beth Greenbaum, Ph.D. (Life Care Planner); Dr. Miller (Economist - Kansas City)

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

Type of *Case:* Medical Malpractice
Settlement: $535,000
Plaintiff's Counsel: Jonathan Mester
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas,
Judge Suster
Date: January, 2001
insurance Company: Withheld
Damages: Severed spinal accessory nerve resulting in loss of mobility in dominant arm.

Summary; Defendant doctor cut Plaintiff's spinal accessory nerve during a routine lymph node biopsy procedure, This required Plaintiff to undergo a nerve repair operation.

Plaintiff's Experts: Aaron Chevinsky, M.D.; Donald Mann, M.D.; Michael Kaufman, M.D.; Caroline Wolfe (Vocational); John Burke, Ph.D.
Defendant's Experts; None

Jane Doe v. Opthalmoloqist, M.D.

Type of *Case:* Medical Malpractice
Settlement: $500,000
Plaintiff's Counsel; David M. Paris
Defendant3 Counsel; Withheld
Court: Mahoning County, Judge Evans
Date; Not Listed
Insurance Company: Withheld
Damages., Decreased visual acuity in right eye; detached retina; photo-sensitivity.

Summary; The apparatus used in performing the LASIK surgery was assembled and brought into the operating room by the staff. Beginning in the right eye, the corneal shaper was attached to the suction ring and passed over the Plaintiff's cornea. The suction ring was then removed from the right eye at which time it was realized that the corneal shaper had passed through the cornea instead of slicing a partial thickness flap. At that time, Defendant observed that the LASIK apparatus had been calibrated to the wrong position resulting in Plaintiff's having a full thickness corneal flap of 9 mm., a lacerated iris and her eye lens extracted into the conjunctival sac.

Plaintiff's Experts: Randy Epstein, M.D.
Defendant's Experts; Walter J. Stark, M.D.

Jane Doe v. Insurance Companies

Type of *Case:* Auto - Underinsurance
Settlement: $6,337,500
Plaintiff's Counsel: David M. Paris
Defendant's Counsel; Paul Eklund, David Lester, Ron Lee, Craig Pelini
Court: Cuy. County Common Pleas,
Judge Daniel Gaul
Dale: January, 2001
Insurance Company: Personal Service, Westfield, Hartford, and XYZ Insurance
Damages.. Brain injury, left-sided hemiparesis, mild cognitive dysfunction, and left elbow contracture.

Summary; Plaintiff was in a severe collision. Tortfeasor had $12,500 limits. Scott/Pontzer claims with Plaintiff's employer and husband's employer settled for policy limits. Each employer's umbrella policy asserted various coverage defenses in declaratory judgment actions which resolved shortly before trial.

Plaintiff's Experts: Mary Vargo, M.D.; James Napier, M.D.; Barry Layton, M.D.; Rod Durgin, Ph.D.; John F. Burke, Jr., Ph.D.
Defendant's Experts; Not Listed

Jane Doe v. John Doe Hosaital

Type of Case: Medical Malpractice
Settlement: $1,650,000
Plaintiff's Counsel: William S. Jacobson
Defendant2 Counsel: Withheld
Court: Cuy. County Common Pleas,
Judge Thomas J. Pokorny
Date: February, 2001
Insurance Company: Self-Insured
Damages: Total laryngectomy

Summary: Plaintiff had a polyp removed from her true vocal chords which was lost by the Defendant hospital. Ultimately, a carcinoma developed on her false vocal chords. Defendant argued that the polyp bore no relation to the cancer which developed and that Plaintiff was negligent in failing to follow up despite repeated requests by the hospital and her own physician.

Plaintiff's Experts: ENT Oncologist (Name Withheld); Rod Durgin (Vocational); Karen Barderstein, Ph.D. (Psychologist)
Defendant's Experts: Eric Dierks, M.D. (ENT)

Estate of Jane Doe v. ABC Hospital and Doctors

Type of *Case:* Medical Malpractice
Settlement: $4,000,000
Plaintiff's Counsel: David M. Paris, William S. Jacobson, Harlan M. Gordon
Defendant? Counsel: Withheld
Court: Cuy. County Common Pleas,
Judge John Angelotta
Date: June, 2001
Insurance Company: Withheld
Damages; Wrongful death

Summary: Decedent delivered her first child and developed a postpartum infection within 12 hours of delivery. Her signs and symptoms went unrecognized and untreated for another 14 hours after which point she went into shock and succumbed. This was a fulminant Group A strep toxic shock-like syndrome.

Plaintiff? Experts: Martin Gimovsky, M.D.; Richard Sweet, M.D.; Neal Crane, M.D.; John Burke, Ph.D.
Defendant's Experts: Martin Raff, M.D.; Hunter Hammill, M.D.; David Soper, M.D.; Keith Armitage, M.D.; Robert Flora, M.D.; Method Duchon, M.D.

Mark Janowak v. Cloyd Thomas, et al.

Type of Case: Auto Collision (Double Impact)
Settlement: $100,000 tortfeasor; $140,000 UIM coverage
Plaintiff's Counsel: Mitchell A. Weisman
Defendant's *Counsel:* Wally Kohrngold (tortfeasor), Jim Sennett (UIM)
Court; Cuy. County Common Pleas
Date: March, 2001
Insurance Company: State Farm, American States
Damages: Medical Expenses: $83,000; minimal wage loss.

Summary: Plaintiff was a 43-year-old married father of one child when his vehicle was involved in a two-impact auto collision (his car was rear-ended and pushed into a vehicle in front of him) on March 4, 1997. The Defendant driver was Cloyd Thomas. The impact was moderate, with $2,800 worth of property damage to his car. He went to an urgent care center that same day and was treated and released. His injuries were to his neck, back and right knee. He received follow-up physical therapy and consultation for right knee pain, and eventually required knee surgery in June 1997 for a repair of a torn medial meniscus of the right knee. Dr. Edward Gableman performed the surgery at Hillcrest Hospital.

Approximately one year later (June 1998), Plaintiff underwent back surgery (right microdiskectomy). Defendants disputed the causal connection between the back condition/ surgery and the accident. In June of 1998, Plaintiff underwent another surgical procedure - a right microdiskectomy. Medical expenses totaled $83,000. Lost earnings were minimal.

Plaintiff settled with the tortfeasor's insurance company, State Farm, for $100,000 (the limits of the policy) in 1999. The underinsured motorist coverage claim remained pending against his own insurance company until it was settled in March 2001 for $140,000.

Plaintiff's Experts: Dale Braun, M.D. (Neurosurgery); Mark Allen, M.D. (Pain Management); Henry Lipian (Accident Reconstruction)
Defendant's Experts; Not Listed

John Doe, etc. v. John Doe, D.P.M., et al.

Type of Case: Medical Malpractice - Wrongful Death
Settlement: $575,000
Plaintiff's Counsel: Richard J. Berris, Alan S. Levine
Defendant's *Counsel;* Withheld
Court: Cuyahoga County
Date: February, 2001
Insurance Company; Withheld
Damages: Medical Expenses: $130,000; death of Plaintiffs' decedent

Summary: On February 24, 1999, patient, John Doe, a 75-year-old diabetic, went to see Defendant podiatrist. Diabetics, because of poor circulation in their feet, are at a greater risk for the development of infection. The Defendant performed a minor surgical procedure on one of the toes on Mr. Doe's right foot, and prescribed prophylactic antibiotics post-operatively to prevent the onset of infection. The patient did well post-operatively and developed no infection.

Approximately five weeks later, on April 7, 1999, Mr. Doe returned to Defendant podiatrist, who again performed minor surgery on his right foot, this time to correct a bunion deformity. Post-operatively, the Defendant failed to perescribe an antibiotic as he had on February 24.

As a result, Mr. Doe, within several days, developed a severe infection in his right foot which led to an emergent hospitalization on April 10, 1999. Agressive treatment of the infected foot failed, and on April 15, Mr. Doe underwent the amputation of his right great toe. Still, the infection progressed, and on April 21 Mr. Doe underwent the further amputation of his right leg below the knee.

Mr. Doe was found to be septic, with the infection having entered and spread throughout his blood stream. Subsequently, he experienced renal and other organ system failure. He died in May, 1999, after six weeks in the hospital. He was survived by his three children.

Experts for Plaintiff opined that the failure of Defendant podiatrist to prescribe post-operative prophylactic antibiotics on April 7, 1999 was medical treatment which fell below the acceptable standard of care and ultimately led to Mr. Doe's death.

Plaintiff's Experts: Philip Lerner, M.D. (Infectious Diseases); Howard Waxman, DPM)
Defendant's Experts; None

Jane Doe, a minor, etc. v. ABC Medical Group, et al.

Type of Case: Medical Malpractice Birth Injury
Settlement: $4.3 Million Dollars
Plaintiff's Counsel: Richard J. Berris
Defendant's *Counsel:* Withheld
Court: Richland County, State Court
Date; March, 2001
Insurance Company; Withheld
Damages: $200,000 partial medical expenses

Summary: Minor Plaintiff was born on April 10, 1996 at Defendant hospital. Her mother had experienced a normal pregnancy. The only risk factor was the mother's history of previous C-section delivery in 1994. Defendant obstetrician had recommended a vaginal birth after the C-section.

The mother's water broke during the evening of April 9, 1996. She was admitted to Defendant hospital on the morning of April 10, 1996. An electronic fetal monitor was set up to monitor the mother's contractions and the baby's heart rate during labor. In addition, the on-duty obstetrician ordered the administration of Pitocin, a drug designed to start or enhance labor contractions. Pitocin was started by an obstetrical nurse at 10:00 a.m., and was continued for the next 7 hours. Labor proceeded without incident until one-half hour before minor Plaintiff's birth, when the mother's uterus ruptured, causing a cut-off of oxygenation to minor Plaintiff. After attempting vacuum and forceps extraction of the child, Defendant obstetrician delivered her via emergency c-section. Upon birth, the child was severely asphyxiated and suffered extensive damage to her brain, resulting in cerebral palsy and mental retardation. She is unable to eat and is fed through a gastrostomy tube. All of these conditions are permanent, and the minor Plaintiff will require 24-hour-a-day custodial care for the rest of her life.

The claim against the Defendant hospital centered on the obstetrical nurse's failure to pick up on signs of hyperstimulation of the uterus, which ultimately led to the rupture. In addition, Plaintiffs alleged that the nurses inappropriately left the laboring mother unattended for a period of 9 minutes during which the rupture occurred. As a result, there was a delayed response to the evidence of fetal distress which was reflected on the electronic fetal monitor following the rupture.

Plaintiffs' expert, Dr. John Elliott, opined that the nursing care fell below acceptable standards when the obstetrical nurses failed to diagnose and treat the hyperstimulation, and left the laboring mother alone for 8 to 9 minutes while she received Petocin. Additionally, it was his expert opinion that Defendant obstetrician deviated from the standard of care by wasting valuable time attempting to deliver by vacuum and forceps when he should have known a uterine rupture had occurred and a c-section was necessary. Dr. Elliott stated that if the nurses had appropriately diagnosed and treated the hyperstimulation, the rupture would have been prevented and the minor Plaintiff would have been born a normal, healthy baby. Further, he believed Defendant obstetrician's delay in delivering the minor Plaintiff was responsible for additional damage to her brain.

Defendant hospital disputed liability, claiming the nurses did not deviate from the standard of care. Further, the cause of the minor Plaintiff's brain damage was in dispute. Defendant hospital was prepared to testify that the brain damage occurred prior to the mother's labor.

Plaintiff's Experts: John P. Elliott, M.D. (OB/GYN); Max Wiznitzer, M.D. (Pediatric Neurology); Harvey Rosen, Ph.D. (Economist); George Cyphers (Rehabilitation Counselor)
Defendant's Experts: Frank Boehm, M.D. (OB/GYN); Gary Trock, M.D. (OB/GYN); Linda Di Pasquale, R.N.

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

Type of Case: Medical Malpractice - Wrongful Death
Settlement: $187,500
Plaintiff's Counsel.. David C. Landever
Defendant's Counsel: Withheld
Court: Northeast Ohio State Court
Date: February, 2001
Insurance Company: Withheld
Damages: Laceration of innominate vein and perforation to pleural by an atrial lead, causing hemathorax and death.

Summary: Patient, Jane Doe, was a 68-year-old woman who presented to the ABC County Medical Center on December 11, 1997 with worsening shortness of breath and coughing. Her health history was significant for hypertension, COPD, smolting, peptic ulcer disease and thrombus in her left arm. Admitted under the cardiology service, it was determined that Ms. Doe required a cardiac pacemaker.

Defendant, John Doe, M.D., a general surgeon, performed this procedure via a right cephalic and right subclavian approach. While implanting the atrial lead through the right

subclavian, the Defendantt lacerated the innominate vein, and perforated the pleura. Without recognizing the' complication, the doctor removeddthe lead and reinserted it properly. However, the tear was already channeling blood into the lining of the lung - ultimately causing a hemothorax and resulting in the death of the patient She was survived by her husband of 44 years and three of four children.

Plaintiff's case had two problems: the patient's pre-existing health problems, and the issue of disputed liability. Plaintiff's expert opined that the complication itsaelf evidenced a deviation of acceptable standards. Defendant's expert testified to the contrary that what happened was both recognized and acceptable.

Plaintiff's Experts: David Martin, M.D.
Defendant's Experts: Charles Lowe, M.D.

John Doe, et al. v. ABC Company

Type of Case: Premises Liability
Settlement: $1.8 Million Dollars
Plaintiff's Counsel: Mitchell A. Weisman
Defendant's Counsel: Withheld
Court; Butler County Common Pleas
Date; February, 2001
Insurance Company: Withheld
Damages: $73,000 medical expenses; $1 .O Million in estimated lost future earnings.

Summary: In the course of his employment with another company, Plaintiff went to ABC Company on 9/28/95. As he attempted to enter the pickler building, a rusted steel shroud, which covered the metal rollup door, fell from 10 feet overhead striking him in his head and arm, and forcing him to fall backwards against equipment which lay on the ground. He was taken to a local hospital where he received stitches for a laceration to his arm. He was released from the hospital, but required surgery one month later for a herniated disk (C4-C5).

The Plaintiff had a pre-existing back condition prior to the mishap at ABC Company. He had undergone surgery on his back only six months before the shroud accident, and had only recently returned to light duty.

After the November 1995 surgery, he continued to suffer from debilitatiing pain and subsequently underwent two additional surgeries. Despite those surgeries, he continues to suffer from chronic pain and is unable to work.

Plaintiff's Experts; Ben Columbi, M.D. (Orhopedic Surgeon); John Burke, Ph.D. (Economist); Richard Harkness (Mechanical Engineer)
Defendant's Experts; Not Listed

Meadows v. Bhaiji, M.D., et al.

Type of Case: Medical Malpractice
Settlement: $175,000
Plaintiff's Counsel: Paul M. Kaufman
Defendant's Counsel; Marc Groedel
Court: Cuy. County Common Pleas,
Judge Frank Celebrezze
Date; February, 2001
Insurance Company: St. Paul
Damages: Drug induced lupus, lung injury.

Summary; Negligent adrninistration of the drug Procanimide caused drug-induced lupus and lung damage resulting in shortness of breath and exertion.

Plaintiff's Experts: Atef Labib, M.D. (Cardiologist)
Defendant's Experts: Not Listed

John Doe v. Bill Doe, M.D.

Type of *Case:* Medical Malpractice
Settlement: $100,000
Plaintiff's Counsel: Michael Pasternak, Steve Meckler
Defendant's Counsel: Withheld
Court: Lorain County
Date: January, 2001
Insurance Company: Withheld
Damages: Not Listed

Summary; A medical malpractice suit was filed as the result of a delay in the diagnosis of Hirschsprungs Disease.

Plaintiff's Experts; Marvin Ament, M.D
Defendant's Experts: Not Listed

Jane Doe v. ABC Limousine Co.

Type of Case: Auto Accident
Settlement: $67,000
Plaintiff's Counsel: Michael B. Pasternak
Defendant's Counsel: Withheld
Court: Geauga County, Judge Forrest Burt
Date: February, 2001

insurance Company: Not Listed
Damages: Soft tissue, neck injury; $4,626.59 in medical bills.

Summary; Plaintiff injured her neck in an admitted liability accident with Defendant.

Plaintiff's Experts: Matt Likavec, M.D.
Defendant's Experts: Frederick Lax, M.D.

Arhtur King, et al. v. Shelby Bunin, M.D., et al.

Type of Case: Medical Malpractice
Settlement: $90,000
Plaintiff's Counsel: Rubin Guttman
Defendant's Counsel: David T. Moss
Court: Summit County Common Pleas, Judge Burnham Unruh
Date: December, 2000
insurance Company: The Medical Protective Cornpany
Damages: Failure to timely and property treat macular degeneration resulting in enhanced toss of vision of one eye.

Summary; Plaintiff treated with Defendant ophthalmologist (who died during pendency of case) for cataracts and macular degeneration. Defendant failed to either examine and treat the retina or document the same. Over time, Plaintiff's vision in the affected eye decreased from 20/40 to hand motion. Defense contended that given Plaintiff's history of glaucoma, cataracts, diabetes, and comparable problems in the other eye, that nothing Defendant would have done would have mattered. Plaintiff contended that had the retina been regularly checked and prompt treatment provided, vision in the affected eye would not have deteriorated as much.

Plaintiff's Experts: Samuel M. Salamon, M.D.
Defendant's Experts: Elbert H. Magoon, M.D.

John Doe v. John Roe

Type of *Case:* Medical Malpractice
Settlement: $100,000
Plaintiff's Counsel: Rubin Guttman
Defendant's Counsel; R. Mark Jones
Court: Cuy. County Common Pleas,
Judge Carolyn Friedland
Date: January, 2001
Insurance Company: Phico and OHIC
Damages: Dislocated lunate, reconstructive surgery.

Summary: Plaintiff fell off a ladder and presented at the emergency room with abrasions, contusions and a painfut left wrist. X-rays were read as negative by the emergency room physician and Plaintiff was told that he had abrasions and contusions. He was nevertheless placed in a spica splint and told to see an orthopedic surgeon in two to three days, The next day Defendant radiologist also read the x-ray as negative even though it clearly showed a dislocated lunate. Plaintiff's wrist became progressively more swollen and dysfunctional over the course of the succeeding weeks. He was totd to see a physician by several people and also was told by the hospital emergency room to come in. Plaintiff did not seek medical care for approximately four and a half weeks. By that time the place of the lunate had been displaced by scar and fatty tissue, necessitating complicated reconstructive surgery. Had he received prompt treatment, the treating physician contended that a closed reduction and casting would have been sufficient. Defense contended that Plaintiff was contributorily negligent in failing to seek prompt treatment and that in any event surgery would have been required.

Plaintiff's Experts: Mark Berkowitz, M.D.
Defendant's Experts: Mitchell Nahra, M.D.

Roger Lowe v. Cleveland Machine Controls

Type of Case: Service Contractor and Employer Intent
Settlement: $100,000
Plaintiffs Counsel: Dean Nieding
Defendant's Counsel: Withheld
Court: Cuyahoga County,
Judge Pat Kelly
Date: December, 1998
Insurance Company: St. Paul Fire & Marine, Self-insured Foamseal/
Novaguard
Damages: Fractured left arm

Summary; Plaintiff's arm was caught in a winder at work. The emergency cut-off for the winder was not readily accessable. Plaintiff's employer instructed him to place his hand on the rotating core despite knowledge that other employees had had their fingers drawn into the core.

Plaintiff's Experts: Simon Tamny, P.E.
Defendant's Experts; Earl A. Gregory, Ph.D.; John H. Davison, PE.

Russell Paintiff v. Conrad's Auto Service

Type of *Case:* Personal Injury
Settlement: *$300,000*
Plaintiff's Counsel: Dean Nieding
Defendant's Counsel: Patrick M. Foy
Court: Cuy. County Common Pleas,
Judge Janet Burnside
Date: January, 1999
Insurance Company: CNA
Damages: Closed head injury

Summary., Defendant replaced the left outer tie rod end on Plaintiff's vehicle. Nine days later and after 415 miles, the tie rod end separated from the steering spindle/hub causing a loss of steering. The vehicle went off the road and into a ravine injuring Plaintiff. Plaintiffs alleged Defendant failed to install a cotter pin in the retaining nut when the tie rod end was installed.

Plaintiff's Experts: Rick Higinbothan (Certified Mechanic); Peter Bambakidis, M.D.; Barry S. Layton, Ph.D.
Defendant's Experts: Donald Kadune, Ph.D., P.E.; John P. Conomy, M.D., J.D.

Babv Girl B v. ABC Hospital, et al.

Type of Case: Medical Malpractice
Settlement: $4,900,000
Plaintiff's Counsel: John G. Lancione, John A. Lancione
Defendant5 Counsel; Withheld
Court: Union County Common Pleas
Date; November, 2009
Insurance Company: OHIC, MEDPRO
Damages.. Cerebral palsy, spastic quadraparesis
Summary.. Defendant family practitioner delivered twins at a small community hospital. Twin A was delivered without complication. Twin B's umbilical cord prolapsed. There was a 30-minute delay in performing emergency cesarean section. Twin B was profoundly brain damaged,

Plaintiff's Experts: Roger Newman, M.D. (Maternal-Fetal Medicine); Kevin Ferentz, M.D. (Family Medicine); Vocational Economis (Life Care Planner)
Defendant's Experts: Philip Samuels, M.D. (Maternal-Fetal Medicine); Michele Morris, M.D. (Family Medicine)

Babv Girl Doe v. Dr. Roe, et al.

Type of Case: Medical Malpractice
Settlement: $2,600,000
Plaintiff's Counsel: John A. Lancione, John G. Lancione
Defendant? Counsel: Withheld
Court: Cuy. County Common Pleas
Date: March, 2001
Insurance Company: Self-insured hospital, Mutual Assurance
Damages: Cerebral palsy, spastic quadraparesis

Summary: Defendant obstetrician failed to properly interpret electronic fetal monitor tracing which showed reliable evidence of fetal hypoxia. The charge nurse urged the OB to deliver the baby three times during the last forty minutes of the labor. The baby ultimately delivered spontaneously. She had no heart rate or respirations. She was resuscitated but arrested and was without a heart rate for fourteen minutes after birth. She was again resuscitated and ultimately discharged after six days. She suffered mild brain damage resulting in cerebral palsy and expressive language delay.

Plaintiff's Experts: Harlan Giles, M.D. (Maternal Fetal Medicine); Robert Zimmerman, M.D. (Pediatric Neuro Radiologist); Stephen Bates, M.D. (Pediatric Neurologist); Marcus Hermansen, M.D. (Neonatology); Larry Forman (Life Care Planner)
Defendant's Experts: Elias Chalhub, M.D. (Pediatric Neurologist); David Burkons, M.D. (OB/GYN); Phillip Nowicki, M.D. (Neonatology)

Thomas Munko. et al. v. Allstate insurance Co., et al.

Type of *Case:* Alleged Insurance Fraud
Settlement: *$30,000*
Plaintiff's Counsel: Robert P. Rutter
Defendant> Counsel: Joseph Ritzler
Court: Cuy. County Common Pleas
Date: March, 2001
Insurance Company: Allstate
Damages: Loan payoff, excess payment of car value

Summary: Allstate denied claim for theft of car, alleging that insured set up theft and burned his six-month old car. Allstate ended up paying off $20,000 loan to bank and paying an additional $10,000 in excess of the value of the car.
Plaintiff> Experts: Tom Conklin (Wolf Technical fire and theft inspection)
Defendant's Experts: None

John Doe v. Dr. X

Type of Case; Medical Malpractice
Settlement: $300,000
Plaintiff's Counsel: Ellen Hobbs Hirshman, Larry S. Klein
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas
Date: December, 2000
Insurance Company: Withheld
Damages: Delay in diagnosis of prostate cancer.

Summary: A 60-year-old man, who was diagnosed with Stage III prostate cancer, ultimately developed metastatic disease. The surgeon, acting as the patient's primary care physician, failed to perform a routine PSA screening which would have led to a diagnosis at an earlier stage of cancer.

Plaintiff's Experts: Michael deWit Clayton, M.D. (Urologist); hadley Morgenstern-Clarren, M.D. (Internist); Robert Steele, M.D. (Oncologist)
Defendant? Experts: David M. Grischkan, M.D. (Surgeon)

Jane Doe v. ABC Hospital

Type of Case: Medical Malpractice
Settlement: $2,365,000
Plaintiff's Counsel: Tobias J. Hirshman, Larry S. Klein
Defendant's Counsel; Withheld
Court: Cuy. County Common Pleas
Date: November, 2000
Insurance Company: Withheld
Damages: Death of a 43-year-old woman.

Summary: A 43-year-old woman presented at the local hospital in term labor. Although a diagnosis of severe pre-eclampsia and HELLP Syndrome was made, no physician appeared to provide care until the fetal heart rate became a concern. The mother sustained a ruptured liver and resulting brain damage from which she ultimately died.
Plaintiff> Experts: Paul Gatewood, M.D. (OB/GYN); Howard J. Tucker, M.D. (Neurology); S. Edward Davis, M.D. (Fetal Maternal Medicine); John Conomy, M.D. (Neurology); John F. Burke, Jr., Ph.D. (Economist); Comprehensive Rehabilitation Consultants, Inc.
Defendant's Experts: Baha Bibai, M.D. (OB/GYN); Mark Landon, M.D. (OB/GYN); Graham G. Ashmead, M.D. (Fetal Diagnostics); Maring L. Gimovsky, M.D. (OB/GYN)

Jane Doe v. ABC Health Care Providers

Type of *Case:* Medical Malpractice
Settlement: $475,000
Plaintiff's Counsel: Tobias J. Hirshman, Mark W. Ruf
Defendant> Counsel: Withheld
Court: Cuy. County Common Pleas
Date: April, 2001
Insurance Company: Withheld
Damages; Death of a 69-year-old woman.

Summary: A 69-year-old woman presented to a local emergency room with chest discomfort. She was transferred to a clinical diagnostic unit for observation. She died there from a thoracic aortic dissection (a separation or delaminating of the wall of the aorta). The condition would have been readily diagnosed and treatable if a CT scan had been ordered.

Plaintiff's Experts: Joel Kahn, M.D. (Cardiology); Paul E. Clancy, M.D. (Cardiology); G. James Avery, III, M.D. (Cardiothoracic Surgery); Robert Alan Mulliken, M.D. (Emergency Medicine)
Defendant's Experts; Nicholas J. Jouriles, M.D. (ER Medicine); Joseph A. LaHorra, M.D. (Cardiothoracic Surgery)

VerDuyn, et al. v. Dick Corporation. et al.

Type of *Case:* Business Interruption Due to Improper Street Closing
Verdict: $700,000
Plaintiff's Counsel: Christopher M. DeVito
Defendant's Counsel: Joseph Christoff, It
Court: Ohio Court of Claims,
Judge J. Warren Bettis
Date; December, 2000
Insurance Company: N/A
Damages: Business closure of Flats night club.

Summary: Defendant, Dick Corporation, during the rehabilitation of the Detroit-Superior (Veterans Memorial) Bridge, unreasonably closed Merwin Ave. and created a nuisance for patrons accessing Aquilon, owned by Plaintiff. Aquilon was a long-standing entertainment institution in Cleveland that operated from November 21, 1987 until forced to close its doors on June 30, 1997.
Plaintiffs Experts: Alfonso Sanchez (Construction); Norman Krumholz (City Planning); David Zwick (CPA)
Defendant's Experts: John Burke (Economist); Harold E. Harman (Engineer)

Youth Challenge

Thank you for your generous contributions to Youth Challenge. Youth Challenge provides adaptive sports and recreational opportunities for children with physical disabilities in the Greater Cleveland area. Since the CATA "adopted" Youth Challenge two years ago, our members have donated over $20,000.00. This is a worthwhile organization in need of our continued support. For more information, please visit the Youth Challenge website at http://www.youthchallengesports.com.

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Youth Challenge participant and volunteer at the CATA Regatta July 12, 2001

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In addition to the list of depositions housed in the CATA brief bank provided with the last Newsletter, we have since received additional depositions and trial testimony of the individuals listed below. Anymemberwishing to contribute to the brief bank should send the ASCI discs to Rosemary Graf which will enable us to easily e-mail depositions upon request:

Noel Abood, D.C. (Chiropractor)
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