CATA News
Cleveland Academy of Trial Attorneys
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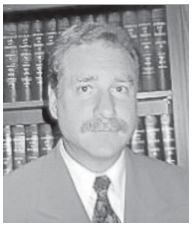
Edited by
Stephen T. Keefe, Jr.
and
Romney B. Cullers

Cleveland Academy
of Trial Attorneys
1370 Ontario Street
Suite 100
Cleveland, Ohio 44113-1792
216-621-2300
216-771-2242 FAX
email: DParis@nphm.com

President's Message



David M. Paris

"They're back", warned the frightened child in *Poltergeist* of the evils about to befall her family. Well, "they're back" for us as well: the special interests have been busy drafting legislation designed to restore Tort Reform to Ohio. Last year you all witnessed the speed and ease in which the insurance industry responded to *Scott-Pontzer* by reversing 36 years of insurance law and making the offering of UM coverage no longer mandatory. On the horizon is legislation that changes joint and several liability, provides additional immunities for political subdivisions and resurrects various provisions of HB 350 that were previously declared unconstitutional by our Supreme Court.

You are going to be reading more headlines about the lack of Tort Reform causing insurance companies to stop writing coverage in our state; about insurance companies becoming insolvent; about insurance companies having to raise premiums which, in turn, cause physicians to quit their practices, schools to terminate their athletic programs, and a host of other social calamities. Worse of all, our clients are going to read it and believe it.

And as if that were not bad enough, the November 2002 Ohio Supreme Court election will decide whether any checks and balances remain at all in Ohio's Republican dominated political machine. Tim Black, Cincinnati Municipal Court Judge, is running for Justice Andrew Douglas' open seat against Lt. Governor, Maureen O'Connor. Recall that Tim Black mustered 48% of the vote in 2000 and nearly succeeded in unseating Justice Deborah Cook. Janet Burnside, Cuyahoga Common Pleas Court Judge, is running against Justice Evelyn J. Lundberg Stratton.

I know what you are thinking: Chicken Little crying wolf? Another annual scare tactic. Whatever is happening, let someone else fight the fight. I'm stretched too thin as it is. The phones won't stop ringing; I can't return all my calls; judges and defense counsel are breathing down my throat; adjusters are low-balling me; my staff calls in sick; my overhead escalates faster than the national debt; and I haven't spent the quality time with my family that they deserve. Besides, I fight the fight everyday by representing my clients to the best of my ability and by helping them obtain fair and reasonable verdicts and settlements. I pay my dues to CATA, OATL and ATLA, and, frankly, that should be enough.

But it's not enough. We will never be able to outspend the Chamber of Commerce, insurance lobby, manufacturing lobby and other special interests. While donating your hard earned

dollars is critical, each of us can and should be educating our clients. There has to be a **grass roots effort** to ensure that the tens of thousands of injured victims and their families throughout Ohio understand the stakes. And we, as a profession, have the obligation to not stand by and watch those rights which we have fought so hard to maintain, evaporate.

Starting today, will each of you take a step toward this goal? It can be as simple as spending an extra few minutes on the phone with each client and explaining what will be happening in the November election. You can incorporate that short message in each letter that you regularly send to clients. You can include campaign literature in each client letter. You can ensure that newspaper articles, attributing the ills of the world to the lack of Tort Reform, do not go unanswered. You, and especially your clients, can remind the newspaper editors that 9/11, the stock market and interest rates have everything to do with insurance rates being raised, not Trial Lawyers; that insurance companies, such as PIE, did not become insolvent because of anything except greed, dishonesty and fiscal mismanagement; that states that have passed anti-consumer legislation capping damages due to a perceived "insurance crisis" have NOT experienced a decrease in premiums; that punishing the victims of defective products, malpractice or negligent or intentional conduct by limiting their rights to full and complete compensation has never been the answer.

Each of us have a unique opportunity. Like the challenges that preceded this one, we can meet it and overcome it.

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

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Dennis Lansdowne and Donna Kolis attend the CATA Youth Challenge Regatta.

Liability for Inducing a Breach of the Patient-Physician Relationship

By William J. Novak
Past President, CATA

Defense lawyers beware. Your conduct in contacting a treating physician during the course of a malpractice case may subject you, your client and your insurance carrier to liability.

It has become an increasingly common practice among defense firms to contact treating physicians to discuss not only the treatment accorded plaintiffs but also to discuss issues of proximate cause and standard of care. Defense lawyers assert that the mere filing of a malpractice claim gives them carte blanche authority to discuss multiple aspects of a case with a treating physician. However, a closer look at Ohio Revised Code §2317.02 indicates that only "the testimonial privilege" is waived. In other words, the waiver goes to conversations between the patient and the physician during the course of treatment. **The privilege of confidentiality, the fiduciary duty and the undivided duty of loyalty, however, are not affected by the plaintiff's filing of a medical malpractice action.**

The quintessential case which articulates the patient/physician relationship and consequences flowing from its breach is *Hammonds v. Aetna Cas. and Sur.Co.*, (N.D. Ohio, 1965), 243 F. Supp. 793. *Hammonds* was a personal injury action in which the attorneys for the defendant insurance company induced the treating physician of the plaintiff to participate on the insurance company's behalf in their case in chief against the plaintiff. In a scathing opinion in which he renounced the actions of the insurance company's counsel, the late District Judge Connell, one of this District's preeminent jurists, stated the overriding principles regarding the sanctity of the patient/physician relationship within the context of litigation, these principles being as follows:

> In this adversary judicial system, with its intensity heightened by the continuing friction be tween insurance companies and claimants, is there no impropriety in a doctor discussing the case of his patient-plaintiff with the lawyer for the defending insurance company? Who would dare say so?
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> * * *
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> The alleged disclosures, however, were not in tended to stop at the ear of the doctor's confi dante; they were to be used in litigation against the patient.
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> * * *
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> It cannot be questioned that part of a doctor's duty of total care requires him to offer his medical testimony on behalf of his patient if the patient becomes involved in litigation over the injury or illness which the doctor treated. Thus, during the course of such litigation, in addition to the duty of secrecy, there arises the duty of undivided loyalty. Should a doctor breach either of these two duties, the law must afford the patient some legal recourse against such perfidy.
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> * * *
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> There is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. **That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation.** (Emphasis added.)

Hammonds, at 798-99.

Thus, while Judge Connell acknowledged that there can be a waiver of the "testimonial privilege", it can never have an impact upon the ongoing fiduciary duty and undivided duty of loyalty which is owed by the physician and hospital to a patient.

> Second, assuming, but without deciding, that the plaintiff waived the testimonial privilege because of the deposition, this "waiver" does not authorize a private conference between doctor and defense lawyer. It is one thing to say that a doctor may be examined and cross-examined by the defense in a courtroom, in conformity with the rules of evidence, with the vigilant surveillance of plaintiff's counsel, and the careful scrutiny of the trial judge; it is quite another matter to permit, as alleged here, an unsu pervised conversations between the doctor and his patient's protagonist. **It is the opinion of this Court that the mere waiver of a testimonial privilege does not release the doctor from his duty of secrecy and from his duty of loyalty in litigation, and no one may be permitted to induce the breach of there duties**.

(Emphasis added). See *Hammonds* at 805.

More importantly, Judge Connell stated that "the law is settled in Ohio and elsewhere that a third party who induces a breach of a trustee's duty of loyalty, or participates in such a breach, or knowingly accepts any benefit from such a breach, becomes directly liable to the aggrieved party." See, *Hammonds* at 804.

Thus, the independent cause of action authorized by *Hammonds* is based upon the irreparable breach of trust in the relationship between the plaintiff and the physician. Noncurative issues of credibility can permeate a plaintiff's malpractice action relative to any testimony given by a treating physician who is previously contacted by opposing defense counsel for a number of reasons, including the following:

> The trust placed in a physician can **never** be restored through protective order granted by the court. [A]n 'after the fact' ruling by a trial court will [not] sufficiently remedy the potential breaches of trust that **will** occur should defense counsel be given an unfettered right to engage in *ex parte* conferences with a patient's treating physician.
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> * * *
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> The trial court can issue *in limine* motions and protective orders and thus attempt to protect the patient's privileged communications with his physician. It is difficult, however, to perceive how an *in limine* motion or a protective order... can realistically restore a patient's trust and confidence in his treating physician after it has been disclosed that the physician whom the plaintiff approached for help has been, without the patient's consent or knowledge, engaging in private conferences with that patient's legal adversary. (Emphasis added.)

The Ohio Physician-Patient Privilege (1989), Ohio State Law Journal, Vol. 49, 1147 at 1171, citing *Petrillo v. Syntex Laboratories, Inc.* (1986), 499 N.E. 2d 952.

The breach of trust caused when defense counsel contacts a treating physician can contaminate a malpractice action to such an extent that presentation of the case in chief to a jury can be severely compromised. Simply put, it is not possible for a plaintiff to have full faith and assurance that testimony from any treating physician has not been improperly influenced, compromised or infected when contacted by opposing counsel. As one commentator so aptly stated:

> Confidentiality, once breached, cannot be restored. [A] problem involves preventing the **subtle results** of *ex parte* conferences from infecting the Plaintiff's case in the minds of the jury. (Emphasis added.)

Ex parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to A Fair Trial (1990) Loyola University Law Journal, Vol. 21, 1001, at 1011.

One of the most significant decisions to come out of the Ohio Supreme Court which confirms the basic concepts of *Hammonds* is *Biddle v. Warren General Hospital, et al.* (1999), 86 Ohio St. 3d 395. Justice Resnick, recognizing the sanctity of the patient/physician relationship, declared that a third party such as a law firm can be held liable for breaching the fiduciary relationship between a patient and his/her physician and hospital. In doing so the court held as follows:

> A third party can be held liable for inducing the unauthorized, unprivileged disclosure of nonpublic medical information that a physician or hospital has learned within a physician/patient relationship. To establish liability the plaintiff must prove that (1) the defendant knew or reasonably should have known of the existence of the physician/patient relationship, (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information, and (3) the defendant did not reasonably believe that the physician could disclose that informa tion to the defendant without violating the duty of confidentiality that the physician owed the patient.

Biddle, at Syllabus 3.

A significant recent decision is *Lownsbury v. Van Buren, et al.* (2002), 94 Oh. St. 3d 231. Justice Resnick recognized the modern day complicated institutional delivery of healthcare and that the patient/physician relationship can extend to a physician who has never seen the patient. Because of the nature of the delivery of medical services in the Cleveland, Ohio area by two major healthcare institutions, this decision has great impact. The *syllabus* reads as follows:

> A physician-patient relationship can be established between a physician who contracts, agrees, undertakes, or otherwise assumes the obligation to provide resident supervision at a teaching hospital and a hospital patient with whom the physician had no direct or indirect contact.

Thus, defense counsel who contacts a physician who never saw the plaintiff, but where plaintiff subsequently treated may be treading upon the patient-physician relationship.

In summary, the Ohio Supreme Court has made it crystal clear that the contamination of a plaintiff's case by inducing a breach of the patient/physician relationship may result in civil liability. While filing an action against a defense law firm or its client is a serious matter to be undertaken by plaintiff's counsel, it is no more serious than the harm inflicted upon the plaintiff's case by the tortious interference with the relationship held between plaintiff and its treating physician. This practice of clandestine conferences and retention of improper expert witnesses motivated solely by the desire to disrupt the plaintiff's case should no longer be permitted or condoned.

Law Update

by Stephen T. Keefe, Jr.

Pending in the Ohio Supreme Court

Luckenbill v. Midwestern Indemn. Co. (2001), 93 Ohio St. 3d 1466.

In the underlying case of *Luckenbill v. Midwestern Indemnity Co.* (2001), 143 Ohio App. 3d 501, the Second District Court of Appeals held that common policy conditions, such as notice and subrogation conditions, may be applied to UM/UIM coverage which arises by operation of law. Because this holding conflicted with the Fifth District's opinion in *Myers v. Safeco Ins. Co. of Am.* (Feb. 18, 2000), 2000 Ohio App. LEXIS 760, Licking App. No. 99CA00083, unreported, the court of appeals certified the following conflict to the Ohio Supreme Court:

> "Does a provision in a policy of homeowner's liability insurance that requires the insured to provide notice to the insurer before settling a claim on which the insurer has rights of subrogation, and which conditions the insurer's duty to provide coverage on the insured's compliance with that notice provision, likewise apply to any uninsured/underinsured motorist coverage which is impressed on the homeowner's policy as a matter of law pursuant to R.C. 3937.18?"

Note: The Merit Briefs have already been filed in this case. The Merit Brief of *Amicus Curiae* Ohio Academy of Trial Attorneys, which was filed by CATA member Todd Rosenberg, is available online at In addition, CATA member Hank Chamberlain filed a Merit Brief on behalf of *Amicus Curiae* Cleveland Academy of Trial Attorneys, which will soon be made available online at cata.nphm.com.

***Ferrando v. Auto Owners Mut. Ins. Co.* (Feb. 6, 2002), 2002 Ohio App. LEXIS 250, S. Ct. Case No. 01-1843.** (Note: The underlying court of appeals' decision was summarized in the Fall 2001 CATA Newsletter).

In the underlying case of *Ferrando v. Auto-Owners Ins. Co.* (Aug. 24, 2001), 2001 Ohio App. LEXIS 3914, Ashtabula App. No. 2000-A-0038, unreported, the Eleventh District Court of Appeals reversed the trial court's ruling that plaintiffs were entitled to UIM coverage under a policy issued to the injured plaintiff's employer despite plaintiffs' release of the tortfeasor. The court of appeals held that (1) plaintiffs materially breached the insurance contract by settling and releasing their claims against the tortfeasor, and (2) plaintiffs did not rebut the presumption of prejudice resulting from their delay in notifying the insurer about the claim. On February 6, 2002, the Ohio Supreme Court allowed a discretionary appeal in this case.

***Lemm v. The Hartford* (2001), 93 Ohio St. 3d 1475**

In the underlying case of *Lemm v. The Hartford* (Oct. 4, 2001), 2001 Ohio App. LEXIS 4468, Franklin App. No. 01AP-251, unreported, the Tenth District Court of Appeals held that, in light of the "residence employee" exclusion, the homeowner's policy at issue qualified as motor vehicle liability policy subject to the requirement of former § 3937.18 to offer UM/UIM coverage. Because its decision conflicted with the Eighth District Court of Appeals' decision in *Davis v. Shelby Ins. Co.* (June 14, 2001), 2001 Ohio App. LEXIS 2625, Cuy. App. No. 76610, unreported, the court certified the following question to the Supreme Court:

> "When a homeowner's insurance policy provides express liability for damages arising from a motor vehicle accident when the injured party is the homeowner's residence employee and the injury occurred in the course of that employment, is the policy deemed an automobile liability or motor vehicle policy subject to the requirement of former R.C. 3937.18 to offer uninsured and underinsured motorist coverage?"

ERISA - §502(a)(3) Does Not Authorize Employee Benefit Plan to Bring Action in Federal Court for Specific Performance of Reimbursement Provision, When

***Great-West Life & Annuity Ins. Co. v. Knudson* (2002), ___ U.S. ___, 122 S. Ct. 708** (5-4 decision holding that employee benefit plan is not authorized under §502(a)(3) to bring an action in federal court for specific performance of the plan's reimbursement provisions and/or to compel a plan beneficiary who has recovered from a third-party tortfeasor to make restitution).

In June of 1992, respondent Janette Knudson was rendered quadriplegic in an auto accident. At the time of the accident, her then-husband, Eric Knudson, was employed by petitioner Earth Systems, Inc. Earth System's health plan ("the Plan") covered $411,157.11 of Janette's medical expenses, most of which was paid by petitioner Great-West Life & Annuity Insurance Company ("Great-West"). The Plan's reimbursement provision gave it the right to recover from a beneficiary any payment for benefits paid by the Plan that the beneficiary was entitled to receive from a third party. Specifically, the Plan had "a first lien upon any recovery, whether by settlement, judgment or otherwise," that the beneficiary received from the third party, not to exceed "the amount of benefits [paid by the Plan]...[or] the amount received by the [beneficiary] for such medical treatment... ." Pursuant to the Plan's language, if the beneficiary recovers from a third party and fails to reimburse the Plan, "then he will be personally liable to [the Plan]...up to the amount of the first lien." Pursuant to an agreement between the Plan and Great-West, the Plan "assign[ed] to Great-West all of its rights to make, litigate, negotiate, settle, compromise, release or waive" any claim under the reimbursement provision.

In late 1993, the Knudsons filed a tort action in California state court seeking to recover from Hyundai Motor Company, the manufacturer of the car they were riding in at the time of the accident, and other tortfeasors. A settlement in the amount of $650,000 was negotiated, and a notice of the proposed settlement was mailed to Great-West. This proposed settlement allocated $256,745.30 to a Special Needs Trust pursuant to California statute to provide for Janette's medical care; $373,426 to attorney's fees and costs, $5,000 to reim-

burse the California Medicaid program; and $13,828.70 (i.e., the portion of the settlement attributable to past medical expenses) to satisfy Great-West's claim under the reimbursement provision of the Plan. The day before the hearing for judicial approval of the settlement, Great-West, calling itself a defendant and asserting that the state court action involved federal claims related to ERISA, filed a notice of removal in the United States District Court for the Central District of California pursuant to 28 U.S.C. §1441. That court remanded the case back to the state court, concluding that Great-West was not a defendant and could not remove the case in the first instance. The state court approved the settlement. The court's order provided that defendants would pay the settlement amount allocated to the Special Needs Trust directly to the trust, and the remaining amounts to respondents' attorney, who, in turn, would tender checks to the California Medicaid program and Great-West.

Great-West never cashed the check. Instead, at the same time that it sought to remove the state-law tort action, Great-West filed the instant action in federal court seeking injunctive and declaratory relief under §502(a)(3) to enforce the reimbursement provision of the Plan by requiring the Knudsons to pay the Plan $411,157.11 out of any proceeds recovered from third parties. Great-West filed an amended complaint seeking a temporary restraining order against continuation of the state court proceedings for approval of the settlement. This motion was denied, and petitioners did not appeal. After the state court approved the settlement and the money was disbursed, the District Court granted summary judgment to the Knudsons, holding that the language of the Plan limited its right to reimbursement to the amount respondents received from third parties *for past medical treatment*. The state court had determined that amount to be $13,828.70. The United States Court of Appeals for the Ninth Circuit affirmed on different grounds. It held that judicially decreed reimbursement for payments made to a beneficiary of an insurance plan is not equitable relief and is thus not authorized by §502(a)(3).

The United States Supreme Court granted certiorari and affirmed. The Court began its analysis by examining the specific language of Section 502(a)(3), which authorizes a civil action:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates...the terms of the plan, or (B) to obtain other appropriate *equitable relief* (i)to redress such violations or (ii)to enforce any provisions or...the terms of the plan.

In *Mertens v. Hewitt Associates* (1993), 508 U.S. 248, 256, the Supreme Court held that the term "equitable relief" in §502(a)(3) must refer to "those categories of relief that were *typically* available in equity...". In this case, the Supreme Court noted that "petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money – relief that was not typically available in equity." The Court went on to recognize that a claim for money due and owing under a contract is "quintessentially an action at law," and that "[m]oney damages are, of course, the classic form of *legal* relief." The Court remained unpersuaded by petitioners' attempts to characterize the relief sought as "equitable" under the standards set by *Mertens*. First, petitioners argued that they were entitled to relief under §502(a)(3) because they sought to "enjoin an act or practice which violates...the terms of the plan" (i.e., respondent's failure to reimburse the Plan). The Court rejected this argument, noting that an injunction to compel the payment of money due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity. In so holding, the Court distinguished its decision in *Bowen v. Massachusetts* (1988), 487 U.S. 879.

The Court also rejected petitioners' argument that their suit was authorized by §502(a)(3) because they sought "restitution", which they characterized as a form of equitable relief. The Court observed that "not all relief falling under the rubric of restitution is available in equity." According to the Court, "restitution is a legal remedy when ordered in a case at law and an equitable remedy...when ordered in an equity case," and whether it is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought. For restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to plaintiff particular funds or property in the defendant's possession. *Here, as the Court observed, the funds to which petitioners claimed an entitlement under the Plan's reimburse-*

ment provision (i.e., the proceeds from the settlement of the tort action) were not in respondent's possession. Pursuant to the state court's order, the disbursements from the settlement were paid by two checks, one payable to the Special Needs Trust and the other to respondents' attorneys. The court therefore determined that in this case the basis for petitioners' claim was not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred. The Court concluded by holding that the kind of restitution that petitioners sought was legal, not equitable. In so holding, the Court distinguished its decisions in *Mertens*, *supra* and *Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.* (2000), 530 U.S. 238.

In addition to the foregoing arguments, the United States, as petitioners' *amicus*, argued that the common law of trusts provided petitioners with equitable remedies that permitted them to bring this action under §502(a)(3). Analogizing respondents to beneficiaries of a trust, the United States argued that a trustee could bring suit to enforce an agreement by a beneficiary to pay money into a trust or to repay an advance made from the trust. The Supreme Court rejected this argument, noting that in *Mertens*, *supra*, the Court rejected the claim that the special equity-court powers applicable to trusts define the reach of §502(a)(3). Instead, as noted above, the *Mertens* Court held that the term "equitable relief" in §502(a)(3) must refer to "those categories of relief that were *typically* available in equity... ." In addition, the Court noted that trust "setoff" remedies do not give a trustee a separate equitable cause of action for payment from moneys other than the beneficiary's interest in the trust.

In concluding its decision, the Court noted that:

> though it is not necessary to our decision, there may have been other means for petitioners to obtain the essentially legal relief that they seek. We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners asserting state-law claims such as breach of contract would have been pre-empted by ERISA. Nor do we decide whether petitioners could have obtained equitable relief against respondents' attorney and the trustee of the Special Needs Trust, since petitioners did not appeal the District Court's denial of their motion to amend their complaint to add these individuals as codefendants.

Editor's Note: There are plenty of unanswered questions in the wake of the Supreme Court's 5-4 decision in *Knudson*. Indeed, as Justice Ginsburg notes in his dissenting opinion, the Court's decision "obscures the meaning and complicates the application of §502(a)(3)." The dissenting opinions authored by Justices Stevens and Ginsburg, respectively, characterize the majority's opinion as relying on "obsolete distinctions between law and equity as a basis for defining the remedies available in federal court" for violations of a plan's terms under ERISA. One interpretation of *Knudson* is that a health plan cannot seek reimbursement from an ERISA insured in federal court *if* the proceeds of a settlement with a tortfeasor are not in the ERISA insured's possession. Indeed, the Court appeared to rely heavily on the fact that the ERISA insureds were not in possession of the settlement funds during the pendency of the federal case. For an analysis of how the federal District Courts are deciding ERISA reimbursement issues post-*Knudson*, *see Admin. Committee of Wal-Mart Stores v. Varco* (U.S. Dist. N.D. Ill. Jan 14, 2002), 2002 WL 47159; *Primax Recoveries, Inc. v. Sevilla* (U.S. Dist. N.D. Ill. Jan. 15, 2002), 2002 WL 58816; *Hotel & Restaurant & Bar Emp. Fringe Benefit Fund v. Truong* (U.S. Dist. Minn. Jan. 31, 2002), 2002 WL 171725.

Insurance Law - Exhaustion Satisfied, When; Release Does Not Bar Recovery of UIM, When

***Fulmer v. Insura Prop. & Cas. Co.* (2002), 94 Ohio St. 3d 85** (overruling paragraph five of the syllabus in *Bogan* and extending paragraph two of the syllabus in *McDonald*; holding that an insured satisfies the exhaustion clause in her UIM contract when she receives a commitment from the underinsured tortfeasor's carrier to pay *any* amount in settlement, but that the insured is then entitled to UIM benefits only to the extent that her damages exceed the tortfeasor's available policy limits).

Plaintiff, who had UIM limits of $100,000, was injured in an auto accident by a tortfeasor with liability limits of $50,000. Plaintiff's contract with her insurer, Insura, contained both an exhaustion clause and a subrogation clause. The exhaustion clause prohibited plaintiff from settling with the tortfeasor for less than his coverage limits unless Insura consented. The subrogation clause precluded plaintiff from executing a release of the tortfeasor without Insura's consent. The tortfeasor's insurer offered plaintiff $37,500 to settle her claims. Although plaintiff believed that her damages exceeded the tortfeaor's limits, she decided to accept the offer. Because plaintiff intended to pursue UIM benefits, she advised Insura of the offer and requested its consent. In the alternative, she requested Insura to pay her the $37,500 so that Insura could preserve its subrogation rights against the tortfeasor. Insura refused to consent, taking the position that the amount of the offer did not exhaust the tortfeasor's insurance. In addition, Insura refused to advance the $37,500, insisting that plaintiff's damages were less than the tortfeasor's policy limits.

Thereafter, plaintiff accepted the tortfeasor's offer of $37,500 without Insura's consent. She then notified Insura of the settlement and requested arbitration to determine whether she was entitled to UIM benefits. Insura rejected plaintiff's demand for arbitration, contending that she had forfeited her right to UIM benefits by violating the exhaustion and subrogation clauses of her policy. In response, plaintiff filed a Complaint against Insura, seeking a declaratory judgment that she was entitled to UIM benefits. Insura moved for summary judgment, and plaintiff filed a brief in opposition. Both parties relied on conflicting court of appeals' interpretations of *Bogan v. Progressive Cas. Ins. Co.* (1988), 36 Ohio St. 3d 22. Insura argued that an insured can only satisfy the exhaustion clause if she can show that the difference between the tortfeasor's policy limit and the settlement amount is approximately equal to the amount saved in litigation expenses. By contrast, plaintiff argued that an insured satisfies the exhaustion clause of her UIM contract when she accepts *any* amount in settlement from the tortfeasor but is then limited to recovering only those damages in excess of the tortfeasor's available policy limits.

Insura also argued that its decision to withhold consent to the settlement was reasonable, such that plaintiff's subsequent release of the tortfeasor violated the subrogation clause in her contract. In response, plaintiff argued that the Ohio Supreme Court's holding in *McDonald v. Republic-Franklin Ins. Co.* (1989), 45 Ohio St. 3d 27, controlled the subrogation issue. More specifically, plaintiff relied on the holding in *McDonald* that an insured's release of a tortfeasor will not preclude recovery of UIM benefits if, before the release, she gave her UIM carrier notice of the tentative settlement and the UIM carrier had a reasonable opportunity to protect its subrogation rights by paying the offer.

The trial court granted Insura's dispositive motion on the basis that plaintiff failed to satisfy the exhaustion requirement set forth in *Bogan*. The court of appeals affirmed on the exhaustion issue and also held that summary judgment was appropriate because plaintiff had violated the terms of the subrogation clause. The Ohio Supreme Court permitted a discretionary appeal on the following two issues:

1. Whether an injured insured satisfies an exhaustion requirement in her underinsured motorist contract when she accepts *any* amount from the tortfeasor and then pursues underinsurance benefits for only those damages in excess of the tortfeasor's available policy limits; and

2. Whether an insurer is permitted to deny UIM benefits to its insured based on a violation of a subrogation clause, when, after notifying the insurer of the settlement offer and providing the insurer the opportunity to protect its subrogation rights by paying the amount of the settlement offer, its insured settled with and released the tortfeasor.

The Court reversed and remanded. Regarding the exhaustion issue, the court held that, pursuant to *Bogan*, an insured satisfies the exhaustion requirement in the UIM provision of her insurance policy when she receives from the underinsured tortfeasor's insurance

carrier a commitment to pay *any* amount in settlement with the injured party retaining the right to proceed against her UIM carrier for *only those amounts in excess of the tortfeasor's available policy limits*. Thus, the Court held that plaintiff had satisfied the exhaustion clause of her insurance contract with Insura, and that she was entitled to UIM benefits under her contract to the extent that her damages exceeded the tortfeasor's available insurance limit of $50,000.

Regarding the second issue, the Court extended paragraph two of its syllabus in *McDonald* and expressly overruled paragraph five of its syllabus in *Bogan*. Thus, the Court held that when an insured has given her UIM carrier notice of a tentative settlement prior to release, and the insurer has had a reasonable opportunity to protect its subrogation rights by paying the UIM benefits before the release but does not do so, the release will not preclude recovery of UIM benefits. Applying that law to the facts of this case, the Court concluded that plaintiff's actions did not violate the subrogation clause. Here, plaintiff gave Insura notice of the settlement offer and provided the insurer an opportunity to pay her the amount of the tentative settlement in order to protect its subrogation rights. Because Insura refused to advance this amount to plaintiff, her release of the tortfeasor did not preclude her from recovering UIM benefits.

Insurance Law - Intrafamily Stacking of Insurance Policies Does Not Occur, When

***Wallace v. Balint* (2002), 94 Ohio St. 3d 182**

James Wallace, Jr. died when his motorcycle collided with a vehicle driven by Dennis Balint ("Balint"). Balint's negligence allegedly caused the accident. Thereafter, suit was commenced by (1) decedent's father, James Wallace, Sr., individually and as administrator, (2) decedent's mother, Wanda Wallace, (3) decedent's brother, Christopher Wallace, and (4) decedent's sister, Katrina Wallace. At the time of the accident, Balint was insured by State Farm under a policy with liability limits of $25,000 per person and $50,000 per accident. Decedent was the named insured under two insurance policies issued by State Farm with UM/UIM limits of $50,000 per person and $100,000 per accident. James Wallace, Sr. and Wanda Wallace were collectively the named insured under four insurance policies issued by State Farm with UM/UIM limits of $50,000 per person and $100,000 per accident. Christopher Wallace was the named insured under his own separate insurance policy issued by State Farm with UM/UIM limits of $50,000 per person and $100,000 per accident. Katrina Wallace was the named insured under her own separate insurance policy issued by State Farm with UM/UIM limits of $25,000 per person and $50,000 per accident. At the time of the accident, the Wallaces resided in the same household, but each of the State Farm policies was for a different vehicle. As family members living in the same household, each of the Wallaces qualified as insureds under each of the eight State Farm policies identified above.

In their Complaint, the Wallaces sought a total recovery of $800,000 under the terms of their eight UIM policies with State Farm. While the case was pending, State Farm agreed to pay the estate of James Wallace, Jr. $25,000, the per-person limits of Balint's liability policy. State Farm paid the estate an additional $25,000, thereby exhausting the $50,000 UIM coverage limit on *one* of the two policies under which decedent was the named insured. State Farm then filed two motions for summary judgment - one in its capacity as the tortfeasor's insurer and one in its capacity as the UIM insurer. In its first motion, filed in its capacity as the UIM carrier, State Farm argued that the Wallaces were impermissibly attempting to stack the coverage of each of the remaining seven policies. In this motion, State Farm argued that each of its policies contained a provision, valid under former R.C. 2927.18(G), that precluded intrafamily stacking. (*See* current version of R.C. 3937.18(F)(2)). As such, State Farm contended that (1) the Wallaces could not stack their separate UIM coverages on top of the UIM coverage that had already been paid pursuant to one of the decedent's policies, and that (2) the Wallaces were not entitled to the per-accident limits of any of the UIM policies, because only one person had been physically injured. In its second motion for summary judgment, State Farm argued that coverage under Balint's liability policy was limited in the same manner. The trial court granted both of State Farm's motions.

The court of appeals reviewed three issues: (1) whether the antistacking language of each of the policies was

unambiguous and valid, (2) whether the Wallaces were limited to a single claim subject to the per-person limits of their UIM coverage, and (3) whether the Wallaces were limited to a single claim subject to the per-person limit of Balint's liability policy. The reviewing court held that the antistacking language in the policies was valid and that the Wallaces were limited to one claim at the per-person limit of Balint's policy. However, the court found that decedent's parents could recover up to the per-accident limit of one of their four policies. The Ohio Supreme Court allowed a discretionary appeal. The Wallaces argued that the antistacking language of their policies were invalid and that coverage at the per-accident limit of each of the eight policies should be available to them. State Farm argued that there were no circumstances under which the Wallaces could recover the per-accident limits from any of the policies.

The Ohio Supreme Court agreed with the appellate court that the policies contained valid antistacking language pursuant to R.C. 3937.18(G)(2). However, the Court did not agree that the Wallaces were impermissibly attempting to stack their UIM coverage as to all of their policies. Citing to Couch on Insurance, the Court noted that "[t]he concept of 'stacking' coverages...arises where the *same claimant* and the same loss are covered under multiple coverages contained in a single policy, and the amount available under one policy is inadequate to satisfy the damages alleged or awarded." Citing to *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, 506, the Court also observed that "intrafamily stacking occurs when a *single* family member attempts to stack multiple coverages of the household." In light of the foregoing, the Court concluded that:

> We agree that the decedent's estate is attempting to aggregate the underinsured motorist benefits of decedent's second policy on top of the benefits already paid out of decedent's first policy. Likewise, decedent's parents, James and Wanda, seek to aggregate the underinsured motorist benefits under their four separate policies. What the estate and the decedent's parents seek clearly violates the antistacking language of the policies. However, given the definition of "stacking" as found in *Savoie* and in the other sources cited above, and the fact that each of the eight policies in question is a separate contract between State Farm and the underinsured motorist policy holder, *clearly stacking does not occur when the estate is limited to only one of decedent's two policies, the parents are limited to only one of their four separate policies, and Christopher and Katrina are limited to their own individual policies*....The definitions of "stacking" set forth in the statute and in Black's, Couch, and *Savoie* make clear that stacking occurs when *one* insured seeks coverage under *more than one* policy issued to himself or other family members. If the estate, the parents, Christopher, and Katrina are each permitted coverage only under their own policy, then stacking never occurs, and the antistacking language is never operative. Furthermore, it would contradict the fundamental principles of the right to freely contract if we were to hold that each member of the Wallace family was somehow restricted in his or her separate contract with State Farm because of language in the policies of other family members. (Emphasis added).
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> Accordingly, the antistacking provisions of the State Farm policy that preclude the "stacking of any and all coverage" do not exclude James and Wanda Wallace from the coverage of *one* of the underinsured motorist policies held separately in their names, but they are precluded from stacking the remaining three policies. The same is true of decedent's estate and policies. It follows then that the antistacking provisions of [James Sr. and Wanda's] policies do not apply to Christopher and Katrina Wallace, since, based upon the definition of stacking, neither of them

> is attempting to stack his or her separately held underinsured motorist insurance with any other coverage.

While the Court determined that the decedent's estate, James and Wanda Wallace, Christopher Wallace, and Katrina Wallace may *each* recovery under *one* of their UIM policies without violating the antistacking language of the policies, the court declined the opportunity to apply the reasonable-expectations doctrine to find that the Wallaces could recover under all of their policies. According to Justice Douglas, "[w]hile the Wallaces raise compelling arguments, there is not yet a majority on this court willing to accept the reasonable-expectations doctrine."

The Court next addressed the issue of whether James and Wanda Wallace are separately entitled to coverage up to the per-person limit of their UIM policies or whether they are collectively limited to a single claim at the per-person limit. With this issue, the Court reversed the court of appeals' determination that James and Wanda Wallace were each entitled to the per-accident limit. In holding that the claims of James and Wanda Wallace were subject to one claim at the per-person limit, the Court recognized that State Farm's policies contained valid language aggregating all claims from a single bodily injury to a per-person limit as authorized by R.C. 3937.18(H).

Finally, the Court decided the issue of whether the Wallaces were restricted to a single claim at the per-person limit of Balint's policy. Like R.C. 3937.18(H), R.C. 3937.44 permits insurers to limit coverage to a single claim at the per-person limit where all claims arise out of a single bodily injury. The Court concluded that Balint's policy contained valid per-person limiting language as authorized by R.C. 3937.44, such that the Wallaces' claims were collectively subject to a single claim at the per-person limit of Balint's liability policy.

Concurring in the judgment but dissenting in part, Justice Cook concluded that Katrina Wallace should not be entitled to UIM coverage under her individual policy. According to Justice Cook, "[b]ecause her policy limits are identical to the limits of the tortfeasor's coverage, there is no triggering of UIM coverage." Concurring in part and dissenting in part, Justice Lundberg Stratton agreed that the Wallaces should be limited to the per-person limits of Balint's liability policy and of their own

UIM coverage. However, she reasoned that "the lead opinion ignored the policy language and examines the definition of the word 'stacking' found in a dictionary and in a treatise to interpret the State Farm Insurance provisions in order to reach a result that would permit stacking in some instances."

Insurance Law - Eighth District Cases of Interest

Mizen v. Utica Nat'l Ins. Group **(Jan. 17, 2001), 2001 Ohio App. LEXIS 117, Cuy. App. No. 79554, unreported**

In December 1999, six-year-old Jeremy Mizen sustained severe head injuries when the vehicle operated by his *grandmother*, Nancy Mizen, lost control and struck the concrete center wall. He died three days later. Nancy Mizen's insurer, State Farm, tendered its liability limits of $100,000. On the date of the accident, Jeremy's mother, Diana Mizen, was employed by Willoughby-Eastlake Schools as a teacher, and his father, Robert Mizen, was employed by Chardon City Schools as a teacher. Nationwide insured the Willoughby-Eastlake Schools, and Republic-Franklin insured the Chardon City Schools. Plaintiffs filed two separate declaratory judgment actions against Nationwide and Utica National Insurance Group seeking UIM benefits pursuant to *Scott-Pontzer* and progeny. Thereafter, Republic-Franklin was added as a defendant. The trial court granted the insurers' motions for summary judgment, holding that school districts, unlike corporations, are permitted to purchase liability coverage for its employees *only* to the extent that acts or omissions occur in the scope of their employment *or* in a motor vehicle owned by the board of education. Specifically, the court held that (1) R.C. 3313.203 does not authorize a school district to purchase personal UM/UIM coverage for off-duty employees or their family members, and that (2) R.C. 3313.203 only authorizes insurance coverage for claims arising out of harm caused by an employee's actions or omissions while acting within the scope of his or her employment by the school board. The trial court also concluded that an off-duty employee of a school district is not an "employee" as that term is defined by the Ohio Revised Code.

The Eighth District reversed in a 2-1 decision. Initially, the reviewing court noted that the definition of "Who is an Insured" set forth in the insurers' policies was identical to the definition construed by the Supreme Court in *Scott-Pontzer* and therefore contained the same ambiguity. Citing to R.C. 3313.201, the reviewing court recognized that school districts *are* authorized to purchase UM/UIM coverage ("R.C. 3313.203 merely provides that a board of education may purchase liability insurance for employees within the scope of their employment. It does not state that a board of education may not purchase insurance for reasons other than those contained in the statute"). Citing to and relying on *Morgenstern v. Nationwide Ins. Co.* (Sept. 18, 2001), S.D. Ohio Case No. C2-00-1284, unreported, the reviewing court also concluded that the definition of "employee" set forth in R.C. Chapter 2744 is not useful in determining whether school districts are prohibited from purchasing insurance for employees who are not within the scope of their employment. ("Statutory definitions containing the limitations cited by Nationwide are expressly limited to the provisions of subchapter 2744 of the Ohio Revised Code in the context of tort liability against the political subdivision").

After determining that Jeremy Mizen qualified as an insured under the insurers' policies, the court rejected Nationwide's argument that an "owned autos" exclusion in its policy precluded coverage. Nationwide argued that this exclusion was enforceable under the amended version of R.C. 3937.18(J)(1) ("While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made..."). The court concluded that Nationwide's exclusion did not apply to the facts of this case, because Jeremy Mizen sustained injuries while occupying his *grandmother's* vehicle. Here, the policy defined "family member" as "a person related to you by blood, marriage or adoption *who is a resident of your household*...". Here, the court observed that the insurers offered no evidence that Nancy Mizen resided with Diana Mizen, such that Nancy Mizen was not a "family member" as that term was defined by the policy. Finally, because Jeremy Mizen was not occupying a vehicle owned by an employee of Eastlake-Willoughby Schools or any family member of an employee of the school, Nationwide's exclusion was inapplicable and UIM coverage was available.

Editor's Note: For additional cases addressing the applicability of *Scott-Pontzer* to employees of a political subdivision, *see Morgenstern v. Nationwide Ins. Co.* (Sept. 18, 2001), S.D. Ohio Case No. C2-00-1284*, unreported*; *Wausau Business Ins. Co. v. Chidester* (May 11, 2001), S.D. Ohio Case No. C-2-00-297, unreported; *Henry v. Wausau Business Ins.* (September 27, 2001), S.D. Ohio Case No. C-1-00-624, unreported; *Roberts v. Enyart* (May 1, 2001), Franklin C.P. No. 98CVC05-3703, unreported; *Headley v. Ohio Gov't Risk Mgt. Plan* (1999), 86 Ohio St. 3d 64, *rev'd* on the authority of *Scott-Pontzer* at (1999), 86 Ohio St. 3d 64; *Cosgrove v. Wausau Ins. Cos.* (Oct. 2, 2000), Pickaway C.P. No. 2000-CI-006, unreported; *Bradford v. Quint* (Oct. 16, 2000), Cuy. C.P. No. 324256; *Hummel v. Hamilton* (Feb. 13, 2002), Butler C.P. Case No. CV00-01-0170, unreported.

Roman v. Estate of Gobbo **(Dec. 20, 2001), 2001 Ohio App. LEXIS 5755, Cuy. App. No. 79119, unreported** (rejecting strict liability approach where defendant violated a traffic regulation as a result of an unexpected medical emergency; rejecting the notion that the sudden medical emergency doctrine should not be a defense to negligence per se).

On March 19, 1999, 77 year-old Nino Gobbo was driving his vehicle eastbound on Brookpark Road. Gobbo allegedly suffered unexpected cardiac death while driving. When this happened, his vehicle suddenly accelerated and ran into the side of a van driving in the northbound lane of West 130th, continued weaving and accelerating until it drove over a road sign, and then crossed over into the southbound lanes and collided with several cars. Several people were pronounced dead at the scene, including Gobbo, and several others were severely injured. Gobbo had a long history of heart problems, had undergone a coronary bypass operation in 1979, and suffered from angina and other medical conditions. Plaintiffs sued Gobbo's estate alleging negligence in the operation of a motor vehicle. Defendant denied liability on the theory that Gobbo encountered a sudden medical emergency, unexpected cardiac death, prior to colliding with the van at the intersection of Brookpark Road and West 130th. The case was bifurcated and proceeded to jury trial on the issue of liability only. At the close of all the evidence, both sides moved for a directed verdict. The trial court denied both motions. The jury thereafter found in favor of Gobbo's estate. Through interrogatories, the jury found that Gobbo was negligent per se when his car crossed the center line. However, the jury concluded that the cardiac death constituted a sudden emergency which he had no reason to foresee, prevented his compliance with the traffic laws and extinguished his liability for the resulting damages.

On appeal, plaintiffs objected to the application of the sudden medical emergency doctrine and argued that where, as here, there has been a violation of a traffic law enacted for the protection of other motorists, a violation of the law alone should give rise to strict liability to ensure compensation for the innocent injured. Plaintiffs further argued that unexpected medical emergency cases are akin to accidents caused by unexpected mechanical failures of an automobile. While recognizing that the Ohio Supreme Court has decided that liability may be imposed on defendants who have initiated accidents due to the mechanical failure of their vehicles, the Eighth District also noted that the case of *Lehman v. Haynam* (1956), 164 Ohio St. 595 is the binding Supreme Court precedent which directly addresses the issue of liability for harm caused by the sudden onset of a debilitating medical episode. Ohio law shifts the inquiry from whether a traffic law has been violated to whether the potential tortfeasor has been negligent in driving at all based on the state of his or her health. The Eighth District also reasoned that cases where mechanical failures cause accidents are evaluated under the same standard as are those in which unforeseen, incapacitating medical conditions cause violations of statute and lead to damages. In either situation, a self-created emergency, or one arising from circumstances under the driver's own control, cannot serve as an excuse. Here, the jury determined that the cardiac death was unforeseeable to Gobbo, and therefore, uncontrollable by implication. In rejecting a strict liability approach, the Eighth District recognized that such an approach would expose a driver with a manageable, controlled cardiovascular condition, or no heart condition at all, to absolute liability for harm caused by an unexpected heart attack or stroke. The Eighth District concluded by noting that "an intermediate appellate court should not effect such a major shift in Ohio case law."

Roth v. Hall **(Dec. 13, 2001), 2001 Ohio App. LEXIS 5506, Cuy. App. No. 79178, unreported.** (Rejecting policy limits to policy limits approach in accordance with *Littrell v. Wigglesworth*).

This is an appeal from a trial court order granting summary judgment in favor of Allstate Insurance Company, in which the trial court erred by employing a comparison of policy limits to policy limits to bar plaintiff from UIM coverage. In January 1999, plaintiff's brother was killed in a head on collision with a vehicle driven by defendant Hall. The case involved multiple plaintiffs and multiple defendants. Plaintiff and Allstate stipulated that (1) the tortfeasor had limits of $100,000 per person and $300,000 per accident, and that (2) plaintiff's policy with Allstate contained UM/UIM limits of $100,000 per person and $300,000 per accident. In ruling in Allstate's favor on its motion for summary judgment, the trial court adopted the Twelfth District's reasoning in *Littrell v. Wigglesworth* (2000), 2000 Ohio App. LEXIS 933, which was recently reversed by the Ohio Supreme Court in *Littrell v. Wigglesworth* (2001), 91 Ohio St. 425. Citing to the Ohio Supreme Court's decisions in *Littrell* and *Clark v. Scarpelli* (2001), 91 Ohio St. 3d 271, the Eighth District reversed, noting that it would be manifestly absurd to interpret the S.B. 20 amendments to R.C. 3937.18(A)(2) as permitting an insurer to offset, against its own insured, those amounts that a tortfeasor's liability insurance carrier has paid to other injured parties. The reviewing court therefore concluded that plaintiff was entitled to UIM coverage up to the limit of her policy with Allstate, reduced by any amounts she received from the tortfeasor. Citing to *Moore v. State Auto. Mut. Ins. Co.* (2000), 88 Ohio St. 3d 27, the Eighth District also rejected Allstate's argument that an insured must sustain bodily injury, sickness or disease in order to recover damages from the insurer.

Shapiro v. Barden **(Dec. 13, 2001), 2001 Ohio App. LEXIS 5535, Cuy. App. No. 79267, unreported** (holding that mere access to a car is insufficient to support a negligent entrustment claim).

Plaintiffs were injured in a motor vehicle accident when their car was hit by a vehicle driven by Shannon Barden and owned by Barden's mother, Ann Kramer. Plaintiffs filed suit against Barden and Kramer. Plaintiffs' action against Kramer was premised solely on a claim of negligent entrustment. Kramer filed a motion for summary judgment and attached an affidavit to the effect that Barden drove her car without her permission or knowledge, and that she specifically forbade Barden from driving her car upon his license being suspended several months earlier. In addition, Barden testified at his deposition that he had taken the car to pick up his brother without his mother's permission. In Plaintiffs' brief in opposition, they argued that genuine issues of material fact existed as to whether Kramer gave Barden permission to drive the car and whether Kramer *constructively entrusted* her car to Barden by parking it in the driveway and blocking in his vehicle. Plaintiffs inferred that, because Barden had used his mother's car in the past, she should have known that he would continue to drive the car. Plaintiffs also inferred that, because Kramer parked her car in the driveway on the evening in question, thereby blocking Barden's exit, she should have known that Barden would drive her car. The trial court granted summary judgment, and the Eighth District affirmed. A negligent entrustment claim requires the plaintiff to prove that the owner of the vehicle gave permission to the known incompetent entrustee to operate the vehicle. *See Gulla v. Straus* (1950), 154 Ohio St. 193. In accordance with *Gulla*, the Eighth District reasoned that once Kramer pointed to evidence that she did not give Barden permission to drive her car, the burden shifted to plaintiffs to point to evidence that a genuine issue of material fact existed as to whether Barden operated the vehicle with Kramer's authority or permission. In affirming the trial court, the Eighth District reiterated the principle that "mere access to a car is insufficient to indicate that the use of the vehicle has been entrusted to a tortfeasor". Here, the court concluded that the mere fact that Kramer parked he in the driveway does not support the inference that the subsequent use of the car by Barden was with her authority or permission.

Insurance Law - Cases of Interest From Around the State

Batteiger v. Allstate Ins. Co. **(Feb. 15, 2002), 2002 Ohio App. LEXIS 687, Miami App. No. 2001CA37, unreported** (holding that *Scott-Pontzer* governs this post-H.B. 261 case and that, due to numerous ambiguities in UM/UIM endorsement, employee's family member need not be occupying a "covered auto" in order to qualify for UIM coverage).

On April 3, 1999, 17-year-old Sarah Ann Batteiger died as a result of injuries sustained in an auto collision caused by an intoxicated tortfeasor. She was driving her father's vehicle at the time of the accident. The tortfeasor's insurer paid its $25,000 liability limits to

Sarah Ann's estate. At the time of her death, Sarah Ann lived primarily with her mother, Mary Jo, who was employed by Grandview Hospital. Grandview Hospital had an automobile insurance policy with U.S.F.& G. that was issued on December 31, 1998 - *after* H.B. 261 went into effect. Plaintiffs filed suit against three insurers, including U.S.F. & G.. U.S.F.& G. filed a motion for summary judgment which was granted by the trial court. Here, the Second District Court of Appeals reversed, relying upon *Scott-Pontzer* as well as numerous ambiguities set forth in U.S.F.& G's policy.

On appeal, while the parties agreed that U.S.F.& G. *could* exclude coverage in this situation under R.C. 3937.18(J), as amended by H.B. 261, the appellate court noted that the proper focus was on "*whether* U.S.F.& G.'s policy with Grandview did in fact exclude coverage". H.B. 261 amended R.C. 3937.18 to add section (J), which provides in pertinent part that "[t]he coverages offered under division (A) of this section. . .may include terms and conditions that preclude coverage for bodily injury or death. . .while the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of the named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made...". The court concluded that, despite the fact that this case involves a post-H.B. 261 policy, it is nevertheless governed by *Scott-Pontzer*:

> . . .*Scott-Pontzer* was not interpreting House Bill 261. However, the Supreme Court in *Scott-Pontzer* specifically noted that an insurer could "draft policy language that provides varying arrays of coverage to any number of individuals." *Id*. at 664. Thus, the issue in that case, as in this one, was not whether the insurer could restrict coverage, but whether it had. The addition of R.C. 3937.18(J) does not change this analysis. Therefore, we will apply *Scott-Pontzer* in deciding this case.
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> As the policy language at issue in the case *sub judice* is identical to that in *Scott-Pontzer*, we must interpret "you" in the U.S.F.& G. policy to include employees and therefore to include Mary Jo. Because the definition of 'insured' includes Mary Jo, it includes Sarah Ann as her family member under the definition above. *See also Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St. 3d 557. . .We must now turn to an analysis of whether the insurance contract excluded coverage in this situation, where Sarah Ann was driving her father's car, which was not a covered auto.
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> We find that the policy is ambiguous for several reasons. First, the declarations page of the policy states that "each of these coverages will apply only to those 'autos' shown as 'covered autos'" and lists uninsured and underinsured motorist coverage; however, the uninsured motorist coverage portion of the policy does not state that the insured must be in a covered auto. Second, the definition of "who is an insured" under the policy includes "you", "if you are an individual, any family member," and "anyone else occupying a covered auto." The third paragraph of this definition specifically states that the "anyone else" must be occupying a covered auto. However, the first two paragraphs, including the insured and family members, does not specifically state that the insured must be occupying a covered auto. This creates ambiguity as to whether the insured and family members must be occupying a covered auto.

In addition, while the court noted that the UM/UIM coverage form of U.S.F.& G.'s policy contained an exclusion for bodily injury sustained by "you" or "any family member" while occupying or when struck by any vehicle owned by you or by that family member that is not a covered auto for UM/UIM coverage, the court noted that Sarah Ann was not occupying a vehicle owned by

either herself or her mother. Instead, she was occupying a vehicle owned by her father. Citing to *Scott-Pontzer* and *King v. Nationwide Ins. Co.* (1988), 35 Ohio St. 3d 208, the court reiterated the principle that "where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.". The court further noted that U.S.F.& G. could have stated that coverage was excluded for "any *insured* while occupying or struck by any vehicle that is not a covered auto". Instead, as the court observed, U.S.F.& G. wrote its policy in such a way as to make coverage ambiguous. Because of these ambiguities, the court concluded that "we must construe the policy 'liberally in favor of the insured and strictly against the insurer'".

Editor's Note: For more on the "other owned auto" exclusion, *see Hummel v. Hamilton* (Feb. 13, 2002), Butler C.P. Case No. CV00-01-0170, unreported (holding that the definition of "owned autos" is subject to more than one interpretation and must be construed in favor of coverage for plaintiff); *Headley v. Grange Guardian Ins. Co.* (June 18, 2001), Mahoning C.P. Case No. 00CV1153, unreported (exclusion held not applicable because plaintiff was not operating a vehicle owned by the "named insured" at the time of his injury); *Kasson v. Goodman* (Sept. 25, 2001), Lucas C.P. Case No. CA00-1682, unreported (exclusion not applicable because plaintiff was an "insured", not the "named insured", under the policy's ambiguous language); *Cartwright v. Cincinnati Ins. Co.* (Feb. 15, 2001), Cuyahoga C.P. Case No. 414954, unreported; *Backie v. Cash* (Jan. 10, 2002), Stark C.P. Case No. 2000CV02366, unreported; *See also Mayle v. Gimroth* (Feb. 5, 2002), Stark C.P. Case No. 2001CV00084, unreported (non-owned auto provision held ambiguous).

***Brodbeck v. Continental Casualty Company* (Feb. 8, 2002), 2002 Ohio App. LEXIS 467, Lucas App. No. L-01-1269, unreported.**

In June of 1997, plaintiff Kenneth Brodbeck ("Brodbeck") was severely injured when the motorcycle he was riding was struck by a vehicle driven by defendant Thomas Funkhouser. Although Brodbeck was an employee of The Andersons, Inc. when the accident occurred, he was not in the course and scope of employment. At the time of the accident, The Andersons, Inc. was the named insured under a business auto policy and commercial general liability policy issued by Continental Casualty Company ("Continental"), as well as under a commercial umbrella policy issued by Westchester Fire Insurance Company ("Westchester"). In September of 1998, Brodbeck and his mother brought suit against Funkhouser. Prior to settling their claims against Funkhouser, plaintiffs filed an Amended Complaint naming Continental and Westchester as defendants and seeking a declaratory judgment that they were entitled to UIM benefits under all three policies. This appeal focuses on the umbrella policy issued by Westchester.

The declarations page of Westchester's umbrella policy stated that the policy period was July 15, 1995 to July 15, 1998. While the declarations page listed a three year policy period, the policy contained an Endorsement styled "Three Year Annual Review Endorsement" which provided that "your renewal premium will remain unchanged for the policy periods 1996-1997 and 1997-1998 if your estimated payroll for each renewal period is within 10% of the estimated payroll for the period immediately preceding renewal." Thus, notwithstanding the three year policy period set forth at the declarations page, this Endorsement used the terms "policy period" and "renewal period" interchangeably and provided that the policy premiums would be subject to an annual review.

After coverage began on July 15, 1995, the policy was actually issued by Westchester and forwarded to The Andersons, Inc. along with a UM/UIM rejection form. The policy and rejection form were delivered to The Andersons, Inc. on October 2, 1995. The rejection form was signed on that date by the insurance manager for The Andersons, Inc. and was forwarded to Westchester's representative.

After it was added as a defendant, Westechester moved for summary judgment and argued that it was entitled to judgment as a matter of law because (1) The Andersons, Inc. had executed a UM/UIM rejection form, (2) even if UM/UIM was not properly rejected, the policy restricted coverage to injuries occurring in the scope of employment, and (3) even if the scope of employment restriction was held to be inapplicable, plaintiffs could not recover under its policy until all of the limits of cov-

erage under Continental's policies had been exhausted. The trial court granted Westchester's motion, holding that the rejection of UIM coverage was executed and delivered on October 2, 1995, prior to the effective date of the policy. In reaching this conclusion, the trial court thus determined that the policy period at issue was July 15, 1996 to July 15, 1997. In addition, the trial court held that the policy restricted coverage to employees acting within the scope of their employment, such that even if the rejection form was not effective, plaintiffs would not be entitled to UIM coverage. In light of its holdings, the trial court held that Westchester's argument regarding exhaustion of the underlying insurance limits was moot.

The Sixth District Court of Appeals reversed. Regarding the UM/UIM rejection issue, the appellate court held that the rejection form at issue did not constitute a valid *offer* of UM/UIM coverage as required by *Linko v. Indemn. Ins. of N. Am.* (2000), 90 Ohio St. 3d 445. More specifically, the form did not describe UM/UIM coverage, did not state the premium for such coverage, and did not state the limits of such coverage as required by *Linko*. Moreover, because the rejection form did not constitute a valid offer, the reviewing court held that The Andersons, Inc. could not have effectively rejected UM/UIM coverage from the Westchester policy, such that UIM coverage arose by operation of law. In so holding, the Sixth District rejected Westchester's argument that *Linko* does not state the law of Ohio because it contains no syllabus and is not a per curiam opinion. While conceding that there is no rule regarding the precedential effect of a Supreme Court opinion which is neither a per curiam opinion nor contains a syllabus, the reviewing court cited to C. Ct. Prac. R. XVIII(8), which provides that "if the Supreme Court decides to answer a question or questions certified to it, it will issue a written opinion *stating the law governing the question or questions certified*." According to the court, when the Supreme Court issues an opinion answering a question of state law that has been certified to it, as it did in *Linko*, the opinion itself states the law in Ohio.

The Sixth Circuit also held that, even if Westchester's offer of UM/UIM coverage was valid, The Andersons, Inc.'s rejection of that coverage was untimely as a matter of law. Here, the declarations page listed the policy period as July 15, 1995 to July 15, 1998, yet the rejection form was not signed until October 2, 1995. In accordance with *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St. 3d 565 and *Schumacher v. Kreiner* (2000), 88 Ohio St. 3d 358, a rejection of UM/UIM coverage must be in writing and must be received by the insurance company prior to the commencement of the policy year. Here, the rejection was not received until after the three-year policy period had already commenced. In so holding, the Sixth Circuit rejected Westchester's argument that the policy was renewed annually based on the "Three Year Annual Review Endorsement". Finding that the term "policy period" as used in this Endorsement conflicted with the policy's definition of the policy term in the declarations page, the court concluded that the resulting ambiguity must be construed strictly against the insurer and liberally in favor of the insured based on well-established law. Finally, because the reviewing court determined that UIM coverage arose by operation of law under Westchester's umbrella policy, the court relied on *Scott-Pontzer* for the proposition that the policy's scope of employment exclusion applied solely to excess liability coverage and not to UIM coverage which was imposed by law.

***Gallina v. Motorists Ins. Co.* (Dec. 27, 2001), 2001 Ohio App. LEXIS 6029, Stark App. No. 2001CA00242, unreported.**

On February 7, 1997, plaintiff Lynette Gallina was injured in her husband's auto when she was involved in an accident caused by Wendy Stallard. Two additional passengers in the vehicle were also injured. At the time of the accident, Stallard was insured under a policy issued by Republic Mutual Insurance Company with liability limits of $12,500 per person $25,000 per accident. Gallina was insured under a policy issued by defendant, Motorists Insurance Company ("Motorists"), with UM/UIM limits of $100,000/$300,000. On February 12, 1999, Motorists' claims adjuster, Linda Nichols, contacted Gallina and learned of the extent of her injuries. On that same day, Nichols became aware of the tortfeasor's liability limits. In November of 1999, Motorists agreed to accept $7,500 from the tortfeasor's insurer as payment in full for Gallina's property damage despite the fact that Motorists had already paid Gallina $11,585.06 for same. Gallina signed a release of the tortfeasor for the property damage only. On January 11, 2000, Gallina's attorney *verbally* notified Nichols

that the tortfeasor's carrier offered Gallina and her two passengers the policy limits of $25,000. On June 27, 2000, Gallina executed a release in favor of the tortfeasor, and the tortfeasor's limits were divided amongst Gallina and the two passengers in proportion to their medical bills. Gallina received $7,500. On June 27, 2000, Gallina submitted a claim for UIM benefits with Motorists. After Motorists denied her claim, Gallina filed suit seeking a declaration that she was entitled to coverage.

In its answer and counterclaim, Motorists alleged that Gallina, by settling with and releasing the tortfeasor, violated the terms of her insurance contract and prejudiced its subrogation rights. Motorists also claimed that Gallina failed to notify them of the tentative settlement in writing, thereby depriving it of the opportunity to advance payment, and that Gallina violated the exhaustion clause. Motorists moved for summary judgment on these grounds. When the trial court denied its motion, Motorists appealed.

On appeal, Motorists argued that Gallina breached the terms of the insurance policy by failing to provide written notice of a tentative settlement and by destroying its subrogation rights. In accordance with *Luckenbill v. Midwestern Indemn. Co.* (2001), 143 Ohio App. 3d 501, Motorists asserted that "if an insured destroys an insurers right to subrogation by releasing the tortfeasor, the insurer is prejudiced." The Fifth District Court of Appeals rejected Motorists' arguments and affirmed the trial court's ruling based on the facts presented. The reviewing court observed that Motorists was aware very early on that Gallina would be seeking UIM coverage and that it had made a good faith investigation into the tortfeasor's collectability. In this regard, Motorists signed a release of the tortfeasor for the property damage. While the notice from Gallina's attorney was not in writing, as required by the contract, the court concluded that "the substantial case history as disclosed by [Motorists'] claims file, specifically the notation of [Gallina's] counsel's statement as to the proposed settlement, qualified as substantial compliance even though the notice was only verbal." In addition, Gallina did not release the tortfeasor until six months after verbal notice was given to Motorists. Moreover, in May of 2000, Ms. Nichols attempted to obtain additional medical bills and information on Gallina, thus exemplifying an awareness of increasing claims. Based on the facts presented, the reviewing court concluded that Gallina's January 11, 2000 notice fulfilled her contractual obligation to Motorists, and that Motorists did not attempt to avail itself of the pay out provision to protect its own subrogation rights.

Editor's Note: In *Gallina*, the reviewing court ruled in plaintiff's favor even though she failed to provide *written* notice of a tentative settlement as required by her policy. In so holding, the court recognized that plaintiff had substantially complied with the policy's terms. In a related vein, the Eighth District has also held that an insubstantial breach of notice and subrogation provisions in a UIM contract will not result in a forfeiture of coverage. *See Oakar v. Farmers Ins. of Columbus* (April 17, 1997), 1997 Ohio App. LEXIS 1518, Cuy. App. No. 70726, unreported.

***Grabits v. Jack* (Dec. 20, 2001), 2001 Ohio App. LEXIS 5800, Jefferson App. No. 00 JE 41, unreported.**

On April 20, 1997, Vincent Grabits ("Vincent") was a passenger in an auto driven by Brian Jack ("Jack"). Jack's car collided with au automobile driven by Kenneth Dagan ("Dagan"), and Vincent died as a result of the injuries he sustained. Vincent was survived by (1) his father, Joseph Grabits, (2) his mother, Arlene, (3) his brother, Adam, and (4) two other siblings. At the time of the accident, Vincent lived with Joseph, and Arlene and Adam lived in a separate household. Arlene and Adam signed a form waiving their right to administer Vincent's estate, and Joseph was appointed administrator.

Jack was uninsured at the time of the accident. Dagan was insured by Allstate with limits of $12,500 per person and $25,000 per occurrence. Arlene had a UM/UIM policy with Colonial Insurance, and Adam had a UM/UIM policy with Nationwide. On March 22, 1999, Adam and Arlene signed a form waiving their wrongful death claims and consenting to a settlement. On March 31, 1999, the settlement was approved by the probate court. On April 16, 1999, Arlene and Adam filed a Complaint against Jack, Dagan, Colonial & Nationwide seeking to recover damages for Vincent's wrongful death. After Arlene and Adam filed suit, Joseph, in his capacity as administrator of Vincent's estate, released all claims against Dagan for $6,875. All of the proceeds were distributed to Joseph. Thereafter, a claim was settled

for $30,000 under another insurance policy, and once again, all proceeds were distributed to Joseph. Colonial and Nationwide filed a joint motion for summary judgment, arguing that (1) Arlene and Adam failed to give timely notice of their claims as required by the policies, (2) Arlene and Adam participated in the destruction of their subrogation rights by signing a consent form so that the administrator of Joseph's estate could settle with and release Dagan, and (3) the anti-stacking provisions in Arlene's and Adam's policies barred them from recovering UM/UIM benefits. The trial court denied the insurers' motions. Thereafter, the trial court entered judgment in favor of Arlene and against Colonial in the amount of $15,000, and in favor of Adam and against Nationwide in the amount of $25,000.

The Seventh District Court of Appeals affirmed. First, the reviewing court rejected the insurers' argument that notice was untimely and therefore precluded coverage. The court agreed with Arlene and Adam that they could not have notified the insurers earlier because, at the time of the accident, such claims were not thought to be viable. In 1994, the legislature amended R.C. 3937.18 with the enactment of S.B. 20. Because of this amendment, UM/UIM coverage was expressly for the protection of insureds who themselves suffered bodily injury, sickness or disease. The reviewing court noted that it, along with most other districts, concluded that the amended statute overruled *Sexton v. State Farm* (1982), 69 Ohio St. 2d 431, and thus permitted insurers to limit coverage to bodily injury or death sustained by an insured. However, in 1998, the Tenth District held that the amended version of S.B. 20 did not require an insured to sustain bodily injury in order to be entitled to UM/UIM benefits. *See Holcomb v. State Farm Ins. Cos.* (Dec. 24, 1998), Franklin App. No. 98AP353, unreported. This created a conflict between the appellate districts which the Ohio Supreme Court resolved in *Moore v. State Auto Mut. Ins. Co.* (2000), 88 Ohio St. 3d 27 ("R.C. 2927.18(A)(1), as amended by Am.Sub.S.B. No. 20, does not permit an insurer to limit uninsured motorist coverage in such a way that an insured must suffer bodily injury..."). In this case, the Seventh District agreed that Arlene and Adam filed their Complaint shortly after learning about the result in *Holcomb*. Recognizing that the determination of whether Arlene and Adam complied with the notice requirements of their respective policies was a question for the trial court to decide, the Seventh District affirmed the trial court's ruling that Arlene and Adam did not engage in unexcused, significant delay. In addition, the reviewing court determined that Arlene and Adam did not have a claim pursuant to their own UM/UIM policies until the tortfeasors' liability was resolved in the underlying action filed by Joseph as administrator.

The Seventh District also rejected the insurers' arguments that Arlene and Adam participated in the destruction of their subrogation rights against Dagan. Here, the insurers argued that their subrogation rights were prejudiced because (1) Arlene and Adam signed a consent form so that the administrator could settle with and release Dagan, and because (2) Arlene and Adam waived their rights to be appointed administrator of Vincent's estate and, thus, could not actively protect the insurers' subrogation rights. Despite the fact that neither Arlene nor Adam advised the insurers that they had signed the consent form, the reviewing court reasoned that neither of them destroyed the insurers' subrogation rights. It was *Joseph*, in his capacity as administrator, who released and settled the wrongful death claims. Noting that R.C. 2125.02 permits an administrator to exclusively settle with the tortfeasor without the consent of the beneficiaries, the court concluded that "they merely offered their consent for something that, even without it, the administrator could do nonetheless." Moreover, the court noted that the language of the policies at issue in this case required Arlene and Adam to notify the insurers if *they* were going to enter into a settlement, *not* if the *administrator* was going to settle with the tortfeasor. Citing to *Gomolka v. State Auto Mut. Ins. Co.* (1982), 70 Ohio St. 2d 166, 167-68, the court reasoned that "the insurer, having prepared the policy, must be prepared to accept any reasonable interpretation in favor of the insured." The court likewise rejected the insurers' argument that this case was controlled by *Bogan v. Progressive Cas. Ins. Co.* (1988), 36 Ohio St.3d 22 and/or *McDonald v. Republic-Franklin Ins. Co.* (1989), 45 Ohio St.3d 27.

The court also rejected the insurers' argument that Arlene and Adam had an affirmative duty to protect their subrogation rights and should have sought appointment as administrator of Vincent's estate to protect these rights. First, the court held that Adam was not Vincent's "next of kin" for purposes of selecting an administrator. Here, because Vincent had no spouse or children, his parents were entitled to receive his entire estate. Thus,

Joseph or Arlene, as Vincent's parents, were the only ascertainable individuals qualified to administer the estate. Regarding Arlene, the court concluded that her policy with Nationwide was ambiguous and did not place an affirmative duty on her to seek appointment. Under well-established law, the court construed this ambiguity strictly against the insurer. Finally, the Seventh District rejected the insurers' argument that the anti-stacking provisions of their policies precluded coverage.

Editor's Note: As a basis for part of its decision, the Seventh District held that plaintiffs could not have notified the insurers of a claim earlier then they did, because such claims were not viable at the time of the accident. In the *Scott-Pontzer* context, several courts have rejected the insurer's "late notice" arguments using a similar rationale. *See Martin v. Liberty Mut. Ins. Co.* (Nov. 6, 2001), N. D. Ohio Case No. 5:00 CV 1864 ("Before the holding in *Scott-Pontzer* was issued in June of 1999, Plaintiffs, and other similarly situated, could not predict that they would be covered under their employers' insurance polic[ies]..."); *Reinschield v. Nationwide Mut. Ins. Co.* (Dec. 28, 2001), Fairfield C.P. No. 00CV724, unreported (notice not required where current law precludes a claim); *Burkhart v. CNA* (Feb. 25, 2002), Stark App. No. 2001CA00265, unreported (following *Martin*, *supra*). *See also Hamilton Mut. Ins. Co. v. Perry* (Feb. 26, 1993), Ottawa App. No. 92-OT-031, unreported; *West American Ins. Co. v. Hardin* (1989), 59 Ohio App. 3d 71 (recognizing that notice may be excused where legal precedent appears to preclude a claim).

Pillo v. Stricklin **(Dec. 31, 2001), 2001 Ohio App. LEXIS 6021, Stark App. No. 2001CA00204, unreported** (holding that the requirements for a valid written offer and rejection of UM/UIM coverage as set forth in *Linko* apply post-H.B.261).

On June 15, 1999, James Pillo sustained serious when a vehicle driven by Leonard Stricklin crashed into his motorcycle. Pillo's medical expenses exceeded $125,000, and Stricklin's liability limits were $50,000. Pillo was the named insured under a motorcycle liability insurance policy issued by Progressive with liability limits of $100,000 per person and $300,000 per accident. James Pillo had authorized his wife to sign the documents to obtain insurance coverage for his motorcycle. When she did so, she signed her husband's name to a form rejecting UM/UIM coverage equal to the liability limits and instead selected lower UM/UIM limits of $25,000 per person and $50,000 per accident. After the accident, the Pillos filed suit against Progressive seeking UM/UIM coverage in an amount equal to the liability limits. They argued that their election of lower limits for UM/UIM coverage was not valid because the insurer's written offer for UM/UIM coverage was not valid under *Linko v. Indemn. Ins. Co. of N. Am.* (2001), 90 Ohio St. 3d 445. Both parties filed cross motions for summary judgment. The trial court granted the Pillo's motion and Progressive appealed.

On appeal, both parties agreed that the applicable version of R.C. 3937.18 was the version enacted by Am. Sub. H.B. No. 261, effective September 3, 1997. R.C. 3937.18(C), as amended by H.B. 261, provides in pertinent part that "...[a] named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section or a named insured's or applicant's written, signed selection of such coverage in accordance with the schedule of limits approved by the superintendant, shall be effective on the day signed, *shall create a presumption of an offer consistent with division (A) of this section*, and shall be binding on all other named insureds, insureds, or applicants." (Emphasis added).

In light of the foregoing amendment to R.C. 3937.18(C), Progressive argued that the trial court erred in denying its motion for summary judgment. The Fifth District disagreed with Progressive and affirmed. Citing to *Linko*, the reviewing court concluded that a valid offer of UM/UIM coverage must (1) inform the insured of the availability of UM/UIM coverage, (2) set forth the premium for such coverage, (3) include a brief description of such coverage, and (4) expressly state the UM/UIM coverage limits in its offer. The Fifth District agreed with the Pillos that H.B. 261's 1997 amendments to R.C. 3937.18 did not eliminate the requirements of a valid offer set forth in *Linko*. The reviewing court also agreed with the trial court that Progressive's offer was insufficient under *Linko*, because there was no brief description of UM/UIM coverage, the premium was not stated, and there was no statement on the waiver form as to the full amount of UM/UIM coverage available. Because there was therefore not a valid and enforceable rejection of the full amount of UM/UIM coverage by the Pillos, the Fifth District affirmed the trial court's

ruling that UIM coverage is deemed equal to liability coverage by operation of law. Progressive argued that, in accordance with the H.B. 261 version of R.C. 3937.18(C), Gail Pillo's written, signed rejection creates a "conclusive presumption," as opposed to a rebuttable presumption, that coverage was offered and rejected. The court disagreed, holding that this presumption is rebuttable. Moreover, based on Progressive's failure to satisfy the requirements set forth in *Linko*, the court concluded that Gail Pillo's rejection of the full limits of UM/UIM coverage was invalid.

***Shropshire v. Progressive Ins. Co.* (Oct. 5, 2001), 2001 Ohio App. LEXIS 4493, Montgomery App. Nos. 18803 & 18814, unreported.**

Hubert M. Shropshire III ("Shropshire") was injured in a collision with another vehicle while operating a motorcycle owned by his father, Hubert M. Shropshire, Jr. At the time of the accident, Shropshire was employed by M & H Service Center, a company owned by his father and another partner, Sam Haupt. Shropshire was not in the course and scope of employment when he was injured. In effect at the time of the accident was a commercial liability insurance policy issued by West American Insurance Company ("West American") to "Sam Haupt and Hubert M. Shropshire, Jr., dba M & H Service Center". The policy covered "garage operations", which was defined to include "the ownership, maintenance or use" of covered autos. The policy also covered liability of employees of M & H Service Center under limited circumstances. Despite the foregoing, the policy failed to include UM/UIM coverage.

Shropshire collected the tortfeasor's liability limits and also demanded UIM benefits from his personal UIM carrier (i.e., Progressive), as well as under the West American policy. Progressive agreed to provide coverage but argued that its duty to provide coverage was secondary to West American's duty to provide coverage. The trial court granted West American's motion for summary judgment. The court relied on the fact that the West American policy excluded *liability* coverage for employees under certain circumstances, including the circumstances under which Shropshire was injured. Thus, the trial court held that Shropshire was excluded from the definition of an "insured" even assuming that the policy provided UM/UIM coverage. Shropshire and Progressive both appealed the trial court's ruling.

Relying on *Selander v. Erie Ins. Group* (1999), 85 Ohio St. 3d 541, the Second District Court of Appeals held that West American's policy qualifies as an automobile liability insurance policy for purposes of R.C. 3937.18. The reviewing court relied on the fact that the policy's definition of "garage operations" included "ownership, maintenance, or use" of covered autos. The reviewing court also disagreed with the trial court's ruling that Shropshire was excluded from classification as an insured due to the fact that the policy excludes *liability* coverage when an employee is not in the course and scope of employment. Citing to *Selander* and *Demetry v. Kim* (1991), 72 Ohio App. 3d 692, the Second District reiterated the principles that (1) "there is nothing, absent clear language evidencing an intent to do so, to prevent uninsured/underinsured coverage from being broader than liability coverage," and (2) circumstantial exclusions from coverage provided in a *liability* policy do not apply to UM/UIM coverage which is impressed on the policy by operation of law.

The Second District also concluded that when, as here, coverage arises by operation of law, one may be an *insured* either by name or by some defined *relationship* to the named insured:

> One may be an insured entitled to liability coverage in two ways; by name or by some defined relationship to the named insured....*Selander* and *Demetry* stand for the proposition that UM/UIM coverage impressed on a liability policy by operation of law is for the benefit of any named insured and any other person who by reason of his or her relationship to the named insured is also an insured for purposes of liability coverage. *Relationship* might include an employee of a named insured or a member of the named insured's household. That liability coverage exists as a benefit of the bargain that the insurer and the insured made. However, and because they made no bargain concerning UM/UIM coverage, none of the circumstantial exclusions applicable to liability coverage to which the parties agreed apply to UM/UIM coverage impressed on the policy, as

> to either a claimant who is a named insured or to one who is identified as an insured by his or her relationship to the named insured.

Plaintiff also argued that he was an insured for purposes of UM/UIM coverage based on the Ohio Supreme Court's decision in *Scott-Pontzer*. In *Scott-Pontzer*, the Court held that employees of a corporate named insured qualified as insureds for purposes of UM/UIM coverage, because it would be nonsensical to limit such coverage to a corporate entity which cannot drive a car or sustain bodily injury. In this case, unlike in *Scott-Pontzer*, the court noted that Shropshire was an employee of a partnership consisting of two natural persons, not a corporation. However, the court declined to decide the effect of those differences, instead holding that Shropshire qualified as an insured based on the rule set forth in *Selander* and *Demetry*, *supra*.

Regarding Progressive's appeal, the Second District sustained those assignments of error that mirrored Shropshire's assignments of error. In addition, however, the reviewing court was called upon to decide the effect to be given to Progressive's "other insurance" clause. Progressive argued that its "other insurance" clause controlled in accordance with *Continental Cas. Co. v. Buckeye Union Cas. Co.* (C.P. 1957), 75 Ohio L. Abs. 79, and required a proration of any coverage it provides to Shropshire with the UM/UIM coverage provided by West American's policy. West American argued that since Shropshire was not covered under its policy, Progressive's "other insurance" clause was irrelevant. The reviewing court agreed with Progressive and held that it was only required to pay Shropshire its prorata share over and above the amount he collects from West American.

Editor's Note: Insurer defendants have increasingly been relying on "other insurance" clauses to shirk their obligations to persons who qualify as insureds under their policies. The Ohio Supreme Court has addressed this issue and has held that an insurer may not avoid indemnification of a person who qualifies as an insured for UM/UIM purposes by including an "other insurance" clause in its policy in order to relieve it of liability in circumstances where the insured has other similar insurance available to him/her from which he/she could be indemnified. *See Curran v. State Auto* (1971), 25 Ohio St. 2d 33. Although *Curran* dealt with "stacking" issues, and although R.C. 3937.18 was amended after *Curran* to permit anti-stacking provisions in insurance policies, the rationale of *Curran* survives and dictates that an insurer may not restrict or limit the amount of UIM benefits it will pay to an insured due to the possible presence of other insurance.

This approach recognizes that an insured is entitled to the full measure of compensation for his/her injuries, which is not a novel concept under Ohio law. *See Fantozzi v. Sandusky Cement Products Co.* (1992), 64 Ohio St. 3d 601 (holding that an injured party shall be entitled to compensation for *all* of the injuries sustained). Applying these principles, Ohio courts have recognized that while "other insurance" clauses do permit insurers to have their liability apportioned *as between them*, "this in no way affects the amount of recovery the insured is entitled to receive from any one insurer." *See Owens-Corning Fiberglass Corp. v. Centennial Ins. Co.* (1995), 74 Ohio Misc. 2d 183. In *Owens-Corning*, the court recognized that:

> "Where two insurance policies cover the same risk and both provide that their liability with regard to that risk shall be excess insurance over other valid, collectible insurance, the two insurers become liable in proportion to the amount of insurance provided by their respective policies." *Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co.* (1977), 49 Ohio St. 2d 213, 218. *Buckeye Union* was a declaratory judgment action that resolved the liability of two competing excess carriers. **There was no indication that the Supreme Court intended to minimize the right of the insured to recover fully from the insurer of its choice.** (Emphasis added).
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> Similarly, the cases upon which defendants rely determined allocation of liability among insurers. **The courts did not find that the policyholder was required to seek only a prorated**

amount of coverage from each available insurer. See, e.g., *Erie Ins. Group v. Nationwide Mut. Ins. Co.* (1989), 65 Ohio App. 3d 741; *Turner Constr. Co. v. Commercial Union Ins. Co.* (1985), 24 Ohio App. 3d 1. (Emphasis added).

* * *

This court finds that the "other insurance" clause serves only to ensure that all other available insurance will be depleted before an insurer becomes obligated; it does not affect the amount [plaintiff] can recover from any one insurer.

See also Commercial Cas. Ins. Co. v. The Knutsen Motor Trucking Co. (Cuy. App., 1930), 36 Ohio App. 241 (recognizing that when two insurers are liable for the same obligation, they are, *as between themselves*, cosureties, and the insured may seek judgment against one or both of the insurers).

Insurance Law - *Scott-Pontzer* Quick Reference Guide

1. **Failure to comply with *liability* provisions regarding subrogation and notice does not preclude coverage.**

   In *Scott-Pontzer*, wherein UIM coverage arose by operation of law under an umbrella policy because the insurer failed to comply with R.C. 3937.18, the Ohio Supreme Court recognized that "*any language* in the Liberty Mutual umbrella policy restricting insurance coverage was intended to apply solely to excess *liability* coverage and not for purposes of underinsured motorist coverage." In light of this holding, when UIM coverage arises by operation of law, an insureds failure to comply with notice and subrogation provisions contained in the *liability* portion of the policy cannot preclude implied by law UM/UIM coverage. Moreover, even when there is a UM/UIM endorsement which contains notice and subrogation language, some courts have refused to enforce those conditions on the basis that the insured could not have predicted, at the time of the settlement with the tortfeasor, that *Scott-Pontzer* would be decided and would open additional avenues of recovery. For case law supporting the foregoing propositions, *see Reinschield v. Nationwide Mut. Ins. Co.* (Dec. 28, 2001), Fairfield C. P. Case No. 00CV724, unreported ("the exclusions and conditions that apply to the liability portion of the policy do not transfer to UM claims"); *Shropshire v. Progressive Ins. Co.* (Oct. 5, 2001), 2001 Ohio App. LEXIS 4493, Montgomery App. Nos. 18803 & 18814, unreported ("[N]one of the circumstantial exclusions applicable to liability coverage to which the parties agreed apply to UM/UIM coverage impressed on the policy, as to either a claimant who is a named insured or to one who is identified as an insured by his or her relationship to the named insured"); *McDermott v. Liberty Mut. Ins. Co.* (Dec. 10, 2001), Stark C.P. Case No. 2000CV03173, unreported ("Pursuant to the dictates of the Supreme Court in *Scott-Pontzer*, because the underinsured motorist coverage is provided by operation of law, no exclusions or conditions contained in the policy apply to limit the coverage herein"); *Myers v. Safeco Ins. Co. of America* (Feb. 18, 2000), Licking App. No. 99CA00083, unreported, *rev'd on other grounds in Davidson v. Motorists Mut. Ins. Co.* (2001), 91 Ohio St. 3d 262 ("subrogation clause in policy may not be implied into UIM coverage arising by operation of law"); *Demetry v. Kim* (1991), 72 Ohio App. 3d 692; *Howard v. State Auto. Ins. Co.* (March 14, 2000), Franklin App. No. 99AP577, unreported (provisions which required notice for a UM claim but not a UIM claim were confusing and ambiguous, such that they were unenforceable); *Martin v. Liberty Mut. Ins. Co.* (Nov. 6, 2001), N. D. Ohio Case No. 5:00 CV 1864 (refusing to rely on destruction of subrogation as a basis for denying UIM coverage, because insured could not have predicted that *Scott-Pontzer* would be decided and open up new avenues of relief); *Burkhart v. CNA Ins.* (Feb. 28, 2002), Stark App. No. 2001CA00265, unreported (following *Martin*).

2. **Case holding that the *Scott-Pontzer* ambiguity remains even if individual named insureds are listed in addition to the corporate named insured and/or even if coverage is provided to some individuals.**

In many *Scott-Pontzer* cases, insurers are making the argument that the ambiguity created by the word "you" is resolved where (1) individuals are included as named insureds *in addition* to the corporate named insureds, or (2) where a "Drive Other Car" or other type of broadened coverage endorsement provides coverage for some individuals (i.e., typically officers and directors while in the course and scope of employment). These arguments must fail. First, the word "you" remains ambiguous in relation to the corporate named insured, such that employees of the corporate named insured must still qualify as insureds pursuant to *Scott-Pontzer* and progeny. Second, the Ohio Supreme Court has already rejected the argument that the word "you" is no longer ambiguous merely because other portions of the policy provide coverage to "some individuals". *See Estate of Dillard v. Liberty Mut. Ins. Co.* (Dec. 21, 1998), 1998 Ohio App. LEXIS 6536, Stark App. No. 1998CA00161, *rev'd on the authority of Scott-Pontzer* (1999), 86 Ohio St. 3d 316; *Headley v. Ohio Gov't Risk Mgt. Plan* (June 24, 1998), 1998 Ohio App. LEXIS 1965, Stark App. No. CT97-0017, *rev'd on the authority of Scott-Pontzer* (1999), 86 Ohio St. 3d 64. In *Dillard* and *Headley*, the Fifth District Court of Appeals held that the term "you" was not ambiguous because of an additional definition of "who is an insured" that provided coverage to some individuals. As noted above, both of these appellate decisions were reversed on the authority of *Scott-Pontzer*. For additional cases holding that the provision of coverage for "some individuals", or the inclusion of individual named insureds along with the corporate named insured, does not resolve the ambiguity created by the word "you", *see Still v. Indiana Ins. Co.* (Feb. 25, 2002), Stark App. No. 2001 CA 00300, unreported (rejecting insurer's argument that the naming of two individuals in a "Drive Other Car Coverage" endorsement distinguishes the case from *Scott-Pontzer*: "Upon reviewing the automobile policy in the instant case, we fail to find that the endorsement to the policy including these two individuals distinguishes this case from *Scott-Pontzer*, *supra*, in that the ambiguity still exists, i.e., the policy still lists the corporation as the named insured, thereby extending coverage to the corporation's employees"); *Rimel v. Chubb Group of Ins. Cos.* (Oct. 31, 2001), Stark C.P. Case No. 1999CV02413, unreported ("The Court does not find that the inclusion of the two named individuals creates a distinction from the reasoning by the Court in *Scott-Pontzer* as the corporation is still a named insured and as such extends 'insured status to employees.'"); *Geslak v. Motorists Mut. Ins. Co.* (April 25, 2001), Franklin C.P. Case No. 00CVC01-387, unreported; *Milligan v. Castle* (Jan. 11, 2002), Huron C.P. Case No. CVC 2000-036, unreported (rejecting argument that "Drive Other Car" endorsement cleared up the ambiguity; holding that it did not *substitute* coverage, but instead *added* coverage); *McDermott v. Liberty Mutual* (Dec. 10, 2001), Stark C.P. Case No. 2000CV03173, unreported (naming of two individuals as named insureds does not resolve the ambiguity); *Dalton v. Travelers Ins. Co.* (Nov. 29, 2001), Stark C.P. Case No. 2001 CV 01073; *Morgenstern v. Cincinnati Ins. Co.* (Nov. 7, 2001), Delaware C.P. Case No. 01-CVC-07-333, unreported; *Kasson v. Goodman* (Sept. 25, 2001), Lucas C.P. Case No. C100-1682, unreported; *Burkhart v. CNA Ins*. (Feb. 28, 2002), Stark App. No. 2001CA00265, unreported; *Miller v. The Hartford* (June 14, 2001), Lake C.P. Case No. 00CV001234, unreported; *Martin v. Chubb Group of Ins. Cos.* (Feb. 2, 2001), N.D. Ohio Case No. 1:00CV2335, unreported.

3. **Cases holding that UM/UIM coverage extends to employee's family members.**

See Ezawa v. The Yasuda Fire & Marine Ins. Co. (1999), 86 Ohio St. 3d 557; *Barnby v. Harper* (Jan. 8, 2002), Medina C.P. No. 99-CIV-1096, unreported (holding that where underlying policy included family members, umbrella policy also included family members even

though UM/UIM coverage arose by operation of law under the umbrella policy); *Cosgrove v. Wausau Ins. Cos*. (Oct. 2, 2000), Pickaway C.P. No. 2000-CI-006, unreported.

4. **Cases applying *Scott-Pontzer* despite claims that employer was self-insured.**

Many insurers are claiming that *Scott-Pontzer* is not applicable because the employer is completely self-insured or that the policy has a deductible that is written in the same amount as policy limits, such that the employer is self-insured "in the practical sense". In addition, many insurers argue that their policies are merely "fronting agreements". In order to be self-insured, the employer must have complied with the requirements of R.C. Section 4509.45(E) or Section 4509.72. For cases rejecting the "self-insured" argument, *see Gilchrist v. Gonsor* (Feb. 1, 2002), Cuy. C.P. Case No. 420200, unreported; *Eby v. Zurich American Ins. Co*. (Nov. 30, 2001), Cuy. C.P. Case No. 408279, unreported; *Caylor v. Pacific Employers Ins. co*. (Aug. 3, 2001), Miami C.P. Case No. 99-400, unreported; *Pope v. National Union Fire Ins. Co. of Pittsburgh, PA* (June 18, 2001), Summit C.P. Case No. 1999-11-4676, unreported; *Hodnichak v. Gray* (Dec. 14, 2001), Summit C.P. Case No. 1999-09-3844, unreported; *Roberts v. State Farm* (June 7, 2001), Montgomery C.P. Case No. 00-CV-0886, unreported.

Intentional Torts - Spoliation of Evidence

***Davis v. Wal-Mart Stores, Inc.* (2001), 93 Ohio St. 3d 488** (holding that claims for spoliation of evidence may be brought after the primary action has been concluded only when evidence of spoliation is not discovered until after the conclusion of the primary action).

On September 10, 1992, Thomas Davis was killed while operating a forklift when the driver of the produce truck he was unloading pulled away from the unloading dock prematurely. Davis' widow brought claims against Wal-Mart Stores and a co-worker. Davis settled her claim against the co-worker and dismissed her survivorship claim. Her wrongful death claim against Wal-Mart based on intentional tort was tried to a jury. The jury found for plaintiff and awarded damages. During the course of post-trial proceedings for prejudgment interest, Davis believed that Wal-Mart had withheld evidence and documents and that several Wal-Mart employees had provided false or misleading testimony at deposition. Davis filed a new action in the trial court, alleging that Wal-Mart's spoliation of evidence had led her to dismiss her survivorship claim, and that this dismissal prevented her from seeking additional compensatory and punitive damages. Wal-Mart moved for summary judgment on Davis' claim of tortious interference with evidence. The court granted this motion based on *res judicata*. The Eighth District Court of Appeals reversed and remanded, holding that the claims for tortious interference and intentional tort did not arise out of the same operative facts, such that *res judicata* did not bar Davis' spoliation claim. The Ohio Supreme Court allowed a discretionary appeal.

Citing to *Grava v. Parkman Twp*. (1995), 73 Ohio St. 3d 379, Wal-Mart argued that Davis' spoliation claim was precluded, because the spoliation was or should have been discovered before the original litigation had been resolved. In *Grava*, the Court held that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." In rejecting Wal-Mart's argument, the Ohio Supreme Court agreed with the Eighth District that "concealing, destroying, misrepresenting, or intentionally interfering with evidence after a workplace death does not arise from 'a common nucleus of operative facts' with those which arose before the death." The Court also agreed with the Eighth District's reasoning that:

> Defendants have likewise not shown that a motion for prejudgment interest alleging a failure to make a good faith effort to settle an intentional tort case precludes subsequently raising a spoliation of evidence claim. This is particularly true, as in the case at bar, when alleged acts of concealing, destroying, misrepresenting and/or intentionally interfering with evidence were not discovered until after the final judgment in the intentional tort litigation.

Regarding Wal-Mart's *res judicata* argument, the Court concluded by noting that "*res judicata* is not a shield to protect the blameworthy." In its second assignment of error, Wal-Mart argued that spoliation of evidence claims should be brought at the same time as, or as an amendment to, the primary action. The Court rejected this argument, noting that in *Smith v. Howard Johnson Co., Inc.* (1993), 67 Ohio St. 3d 28, 29, it had previously held that spoliation claims "*may* be brought at the same time as the primary action." To clarify its holding in *Smith*, the Court concluded that "claims for spoliation of evidence may be brought after the primary action has been concluded only when evidence of spoliation is not discovered until after the conclusion of the primary action." As a final note, while Plaintiff was not able to pursue punitive damages in the trial court based on the lower court's ruling, the Supreme Court observed that "nothing in this opinion or the lower court decisions should be taken to suggest that Davis is unable to pursue *Moskovitz* damages on remand."

Medical Malpractice - Physician-Patient Relationship Established When

***Lownsbury v. VanBuren* (2002), 94 Ohio St. 3d 231** (holding that a physician-patient relationship can be established between a physician who contracts, agrees, undertakes, or otherwise assumes the obligation to provide resident supervision at a teaching hospital and a hospital patient with whom the physician had no direct or indirect contact).

This is an appeal from a summary judgment rendered in favor of defendant-appellee, Thomas Stover, M.D., in a medical malpractice action. Rebecca Fabich, fka Rebecca Lownsbury, was born severely brain damaged on January 10, 1995. On January 6, 1995, Rebecca's biological mother, Cathy Lownsbury ("Lownsbury"), was given a nonstress test and an amniotic fluid index test at Akron City Hospital's perinatal testing center. Based on the results, Defendant George VanBuren, M.D. ordered that Lownsbury be taken to the hospital's labor and delivery unit for an induction of labor. Rather than inducing labor as ordered, the obstetrics residents administered a contraction stress test and then discharged Lownsbury from the hospital. The stress test allegedly ran for two hours and twenty minutes and revealed repetitive late decelerations, suggesting fetal distress. However, only an eighteen-minute portion of the fetal monitor tracing was reviewed, and it showed no decelerations.

In their Amended Complaint, plaintiffs-appellants alleged that Dr. Stover was negligent in failing to supervise the obstetrics residents who actually cared for Lownsbury on January 6, 1995, and that such failure was a proximate cause of Rebecca being born permanently brain damaged on January 10, 1995. Dr. Stover moved for summary judgment on the sole basis that he owed no legal duty of supervision to either Lownsbury or Rebecca because he and Lownsbury never had a physician-patient relationship. In support of his motion, Stover's attorneys argued that such a relationship cannot be found to exist between an on-call physician and a hospital patient unless the physician was either in direct contact with the patient or actively involved in the patient's care. In response, plaintiffs-appellants argued that regardless of whether Stover had any contact with Lownsbury, he nevertheless assumed the duty to provide her with supervisory care by contracting to serve as the on-premises attending and supervising obstetrician at Akron City Hospital on January 6, 1995.

The evidence presented by plaintiffs-appellants demonstrated that Dr. Stover was employed by East Market Street Obstetrical-Gynecological Co., Inc. ("East Market"). East Market had entered into an agreement with Akron City Hospital ("EMS-ACH contract") to "schedule sufficient physicians to provide services on hospital premises twenty-four (24) hours per day, seven (7) days per week, consistent with the accreditation requirements of the hospital Obstetrical and Gynecological Residency Program." The EMS-ACH contract also required East Market to "provide sufficient physicians in order to perform services required by this agreement so as to insure high quality professional medical care will be provided to hospital's obstetrical and gynecological patients," and to "comply with all rules, regulations and bylaws of hospital and hospital's staff." In addition, the contract provided that East Market and its physicians "shall be subject to the hospital's Articles of Incorporation, Code of Regulations, Professional Medical Staff Bylaws and Professional Rules and Regulations" and were obligated to "perform services to patients of hospital in accordance with currently approved medical standards, methods and practices."

Sometime between January 6 and January 10, 1995, Lownsbury signed a consent form explaining that the hospital was a teaching institution and that students may participate in the patients' care. This consent form confirmed that these students are present for educational and instructional purposes "under appropriate supervision," that "the patient will be under the professional care of a Medical Doctor called the attending physician", and that "the patient. . .consents to hospital services as ordered by the attending physician. . .or. . .rendered under the general and specific instructions of the physician." Plaintiffs also presented affidavit and deposition testimony from two experts who opined that Dr. Stover had a responsibility as the supervising physician to familiarize himself with Lownsbury's clinical condition and to review the contraction stress test by the end of his scheduled working day and formulate a plan of management. They further opined that he should have maintained an operational presence in the labor and delivery unit, and that had Rebecca been delivered even a day earlier, she probably would not have suffered permanent neurological injury.

The Summit County Court of Common Pleas granted Dr. Stover's motion for summary judgment without an opinion on July 22, 1998. The Ninth District Court of Appeals affirmed in a 2-1 decision, holding that "[i]n order to establish a physician-patient relationship there must be some contact between the doctor and the patient." While the reviewing court recognized that such contact may be "indirect where the doctor takes an active part in diagnosing or treating the patient even without the patient's knowledge," the court was unwilling to dispense with the requirement of contact in situations where the physician expressly or impliedly contracts with the hospital to serve in an attending or supervisory capacity. By contrast, the dissenting judge stated that "once a physician-patient relationship has been established by contract, as in the present case, whether the physician actually knows that the patient is in the hospital is irrelevant." The dissenting judge further noted that Dr. Stover consented to the relationship when he entered into the agreement with Akron City Hospital to be the supervisory physician, and that Lownsbury consented to the relationship when she signed the consent form to be under the care of an attending physician.

The Ohio Supreme Court allowed a discretionary appeal and reversed. Citing to its earlier decisions in *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St. 3d 86 and *Tracy v. Merrell Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St. 3d 147, the Court reiterated the principles that the duty of care owed by a physician is predicated upon the existence of a physician-patient relationship, and that the relationship is a consensual one and is created when the physician performs professional services which another person accepts for the purpose of medical treatment. However, the Court recognized that it has not considered the application of these principles "to the complicated institutional environment of a teaching hospital." Citing to opinions from other states' courts that have addressed this issue, the Ohio Supreme Court observed that "[t]he basic underlying concept in these cases is that the physician-patient relationship, and thus a duty of care, may arise from whatever circumstances evince the physician's consent to act for the patient's medical benefit." Recognizing that a patient who enters the institutional environment of a large teaching hospital has every right to expect that the hospital and adjunct physicians will exercise reasonable care in fulfilling their assignments, the Court concluded that "it is a logical and reasonable application of the principles set forth in *Tracy* to find that a physician may agree in advance to the creation of a physician-patient relationship with the hospital's patients."

In so holding, the Court rejected the test set forth in *McKinney v. Schlatter* (1997), 118 Ohio App. 3d 328, in which a physician-patient relationship can be found to exist provided the on-call physician (1) participates in the diagnosis of the patient's condition, (2) participates in or prescribes a course of treatment for the patient, *and* (3) owes a duty to the hospital, staff or patient for whose benefit he is on call. *Id*., at 336. By rejecting this test, the Court recognized that "there are many forms of consent, and the three elements of the *McKinney* test are, in reality, a compilation of the various possible ways in which the physician's consent can be manifested." In addition, the Court recognized that "under the *McKinney* test, as applied in the present context, a physician who explicitly accepts or voluntarily assumes the obligation to provide resident supervision, knowing full well that the fulfillment of these supervisory duties is vital to the interests of the hospital's patients, could escape his or her obligation simply by failing to provide any supervision at all." The Court concluded its opinion by holding and/or observing that:

Accordingly, we hold that a physician-patient relationship can be established between a physician who contracts, agrees, undertakes, or otherwise assumes the obligation to provide resident supervision at a teaching hospital and a hospital patient with whom the physician had no direct or indirect contact. This holding does not, however, end the inquiry in this case, but instead brings the pivotal issue into focus. As explained by the dissenting justice in *Mozingo*, *supra*: "The mere existence of such an agreement [delegating responsibility of supervision] does not, however, end the inquiry of determining who has responsibility for supervision. As with the delegation of all duties, the terms of the agreement between the delegator and the delegatee control. The delegatee will be charged only with the duties that he has voluntarily assumed."

* * *

Thus, the determinative issue in this case is not whether Dr. Stover had any contact with Lownsbury or the residents treating her, but whether and to what extent Dr. Stover assumed the obligation to supervise the residents at Akron City Hospital. . .In light of the foregoing, we hold that appellants presented sufficient evidence to raise a genuine issue of material fact as to whether a physician-patient relationship existed between Dr. Stover and Lownsbury on January 6, 1995. . .The cause, therefore, is remanded to the trial court for further proceedings."

Medical Malpractice - Loss of Chance

Bradley v. University Hospitals of Cleveland **(Dec. 27, 2001), 2001 Ohio App. LEXIS 5926, Cuy. App. No. 79104, unreported.**

Brian Bradley died on May 20, 1998. Thereafter, his estate filed suit against several defendants, including Brian's family doctor who treated him for an ear infection the day before his death and failed to timely refer him for emergency treatment for bacterial meningitis. Also named as defendants were University Hospitals of Cleveland and two of its physicians, Dr. Ayup and Dr. Saghafi ("UH defendants"). Regarding her claim against the UH defendants, Appellant alleged that after Brian was transferred to the hospital on a mechanical ventilator for life support, Dr. Ayup negligently ordered the removal of his breathing tube and that this proximately resulted in his death. Appellant also sought damages for conscious pain and suffering, alleging that in the one and one-half hours between the wrongful extubation and subsequent reintubtation, Brian struggled to breathe and was suffocating. The case was tried in November 2000. At the close of Appellant's case, the trial court granted a directed verdict on the conscious pain and suffering claim. The court also granted Dr. Saghafi's motion for directed verdict, but denied it as to the remaining defendants. The jury returned a verdict for the remaining defendants, finding that Dr. Noall did not breach the standard of care and that Dr. Ayup's negligence was not a proximate cause of Brian's death. The trial court denied Appellant's motion for a new trial and/or judgment notwithstanding the verdict. In doing so, the trial court opined that Appellant had disclaimed the loss-of-chance theory of recovery against the UH defendants.

In her first assignment of error, Appellant argued that the trial court erred in instructing the jury that "[if you find] that Brian Bradley had a less than 50% chance of survival when he arrived at University Hospital, then your verdict must be for University Hospitals." The Eighth District agreed and reversed. The reviewing court recognized that the Ohio Supreme Court has adopted the loss-of-chance theory of recovery. Under this theory, damages are generally awarded in direct proportion to the chance of survival that the plaintiff lost. As such, rather than compensating the plaintiff for all damages recoverable in a wrongful death or medical malpractice action, the defendant is generally liable only for those damages attributable to his or her percentage of negligence. However, the Eighth District also observed that:

> [a]s the Ohio Supreme Court made clear in *McMullen v. Ohio State Univ. Hosps*. (2000), 88 Ohio St. 3d 332, 337, a plaintiff with a less-than-even chance of recovery or survival is not required to adopt the loss-of-chance theory in his or her medical malpractice action if he or she can prove a direct causal relationship between the defendant's negligence and the decedent's death. In other words, even where a plaintiff or the plaintiff's decedent had a less than 50% chance of survival, where the plaintiff can demonstrate that the specific acts of the defendant caused the ultimate harm, the plaintiff may recover full damages.

Here, while defendant's expert testified that Bradley had only a 10-20% chance of surviving meningitis, Appellant's expert testified that regardless of Brian's chance of survival, the removal of the breathing tube by Dr. Ayup proximately caused his death. Having determined that there was evidence that Dr. Ayup's negligent extubation was the immediate and sole proximate cause of Brian's death, the reviewing court found that, pursuant to *McMullen*, the trial court's jury instruction was in error. Defendant argued that *McMullen* only applies where the negligent act is the only act that caused decedent's death, not where the negligent act combined with the meningitis to cause his death. While the court agreed with this interpretation of *McMullen*, the court found that the jury was precluded from determining whether extubation was the sole cause of death because of the erroneous jury instruction.

The Eighth District also agreed with appellant that the trial court erred in granting a directed verdict on the conscious pain and suffering claim. The reviewing court determined that there was sufficient evidence to demonstrate that Brian was not completely unconscious during the one and one-half hour interval between the extubation and his death. Here, one of the UH defendants' experts testified that Dr. Ayup probably extubated Brian in an attempt to make him more comfortable because he was thrashing and had become agitated. Moreover, Brian's nurse in the ICU testified that prior to extubation he was awakening from sedation and his pupils were brisk and reactive. The medical records reflect that she rated his level of consciousness at two - i.e., nonresponsive to verbal stimuli but responsive to pain. The Eighth District rejected the UH defendants' argument that only expert testimony is competent regarding the issue of consciousness. Citing to *Crane v. Lakewood Hosp.* (1995), 103 Ohio App. 3d 129, 133 and Evid. R. 701, the court concluded that "where lay witness opinion regarding consciousness is based on recited personal observations, expert testimony is not necessary to establish that an individual is conscious."

Workers Compensation - Former R.C. 4123.93 Held Unconstitutional

***Giles v. Schindler Elevator Corp.* (Oct. 18, 2001), Cuy. App. No. 78082, unreported** (citing with approval to *Holeton* and holding that *former* R.C. 4123.93 violates the Equal Protection Clause of Ohio Const., art. I, Section 2, as it improperly distinguishes between those who bring suit on their tort claims and those who settle without bringing suit).

In *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, the Ohio Supreme Court held that the then-current version of R.C. 4123.931 (i.e., post-September 29, 1995) violates Sections 2, 16 and 19, Article I of the Ohio Constitution to the extent that it distinguishes between claimants who try their tort claims to a verdict and those who settle their tort claims. In this case, the Eighth District held that the *former* version of R.C. 4123.93 (i.e., pre-September 29, 1995) is unconstitutional. Citing with approval to *Holeton*, the Eighth District concluded that R.C. 4123.93 violates the Equal Protection Clause of Section 2, Article I of the Ohio Constitution, because it improperly distinguishes between those who bring suit on their tort claims and those who settle without bringing suit.

Workers Compensation - Reasonable Videotaped Deposition Expenses Taxed as Costs

***Cave v. Conrad* (2002), 94 Ohio St. 3d 299** (holding that pursuant to R.C. 4123.512(F), reasonable videotaped deposition expenses may be taxed as costs and awarded to a successful workers' compensation claimant in an action brought pursuant to R.C. 4123.512).

On March 6, 1985, Yolanda Cave sustained an industrial injury during the course and scope of her employment. Her initial claim for neck and back injuries was allowed by the Industrial Commission. On May 13, 1996, Cave sought to reactivate her claim by filing for recognition of an additional medical condition, disc herniation. This claim was denied. Pursuant to R.C. 4123.512, Cave filed an appeal to the Pike County Court of Common Pleas. A jury trial was held, and a verdict was returned in Cave's favor regarding the herniated disc condition. On October 12, 1999, the trial court entered judgment on the verdict. Pursuant to R.C. 4123.512(D) & (F), the court further ordered the Bureau of Workers' Compensation to pay Cave certain expenses incurred by her in connection with the trial. The trial court also permitted Cave to file a motion to tax as costs certain expenses for videotaping the depositions of her two expert witnesses. The court granted the motion, ordering the videotaped deposition expenses to be paid by the Bureau as a "cost of legal proceedings" pursuant to R.C. 4123.512(F). The Bureau appealed solely with regard to the trial court's award of expenses for the videotaping. The appellate court affirmed, and the Ohio Supreme Court allowed a discretionary appeal.

Both the trial court and the court of appeals concluded that R.C. 4123.512(F) entitled Cave, as the prevailing party, to recover her videotaped deposition expenses as the "cost of any legal proceeding," notwithstanding the fact that R.C. 4123.512(D) also required the Bureau to pay Cave the costs of stenographic transcription of the same expenses. In its discretionary appeal to the Ohio Supreme Court, the Bureau questioned the propriety of assessing "dual payments" for videotaped deposition costs and stenographic deposition costs. The Supreme Court disagreed with the Bureau's arguments and affirmed. The Court noted that R.C. 4123.512 contains two provisions, 4123.512 (D) and (F), which entitle a claimant to recover costs of an appeal. As it has done in the past, the Court observed that the phrase "cost of any legal proceeding" in R.C. 4123.512(F) is considerably broader in scope than the phrase "cost of the deposition" in R.C. 4123.512(D). Moreover, in affirming the lower courts' decisions, the Court once again adhered to the mandate of R.C. 4123.95 to construe workers' compensation laws liberally in favor of employees and the dependents of deceased employees. *See also Kilgore v. Chrystler Corp.* (2001), 92 Ohio St. 3d 184 (recognizing that attorney's reasonable travel expenses incurred in taking an expert's deposition are reimbursable "cost of any legal proceedings" under R.C. 4123.512(F)).

As it did in *Kilgore* and *Moore v. Gen. Motors. Corp.* (1985), 18 Ohio St. 3d 259, the Court once again recognized that statutes providing for the reimbursement of costs to successful claimants are "designed to minimize the actual expense incurred by an injured employee who establishes his or her right to participate in the fund." In affirming the lower courts' rulings, the Supreme Court rejected the Bureau's argument that reversal was warranted because there was no statutory basis on which to tax deposition expenses. The Court noted that, unlike a tort action wherein a claimant may be compensated for more that mere economic loss, a workers' compensation claim is confined to recovery of only part of the claimant's economic losses. Citing to *Kilgore*, the court concluded that "the traditional dichotomy between 'costs' and 'expenses' in civil cases...is not directly applicable in the workers' compensation area." Moreover, the Court acknowledged that the Ohio Rules of Superintendance have made videotaped deposition costs an exception to the long-standing principle that costs are allowed solely by statutory authority. While the Court determined that the trial court correctly taxed costs of the videotaped deposition against the Bureau, the Court held that Sup. R. 13(D)(1) provides that "[t]he expense of videotape as a material shall be born by the proponent." Thus, the Supreme Court concluded that the trial court erred in the award of the cost of the videotape as a material.

Wrongful Discharge - Common Law Discharge in Violation of Public Policy - 4 Year S.O.L.

***Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77** (holding that Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge in violation of public policy may be prosecuted, and it is subject to the 4 year statute of limitations set forth in R.C. 2305.09(D)).

While an employee of Brocar Products ("Brocar"), Larry Pytlinski complained several times to Brocar's president about working conditions he believed to implicate worker health and safety. After making the complaints, Pytlinski was demoted. Thereafter, on Febru-

ary 5, 1998, Pytlinski sent a memorandum to his employer identifying health violations that he believed to be in violation of OSHA regulations. The day after the memo was sent, Pytlinski was terminated. In February 1999, approximately a year after being terminated, Pytlinski filed a complaint alleging that he was terminated in violation of public policy of Ohio, which prohibits the termination of employees for lodging complaints about violations of the law, including OSHA regulations. Defendants-appellees filed a Rule 12(B)(6) motion to dismiss, contending that Pytlinski's complaint was time-barred pursuant to the 180 day limitations period set forth in Ohio's Whistleblower Act, R.C. 4113.52. The trial court granted the motion, and the appellate court affirmed.

The Ohio Supreme Court reversed, holding that Pytlinski's common law claim for wrongful discharge in violation of public policy is governed by the four year statute of limitations period set forth in R.C. 2305.09(D). The Court rejected Brocar's argument that Pytlinski's claim should fail because his complaints were not filed with OSHA. Citing to and relying on *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St. 3d 134 and progeny, the Court noted that "it is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety." The Court reiterated the principle that "the elements of the tort do not include a requirement that there be a complaint to a specific entity, only that the discharge by the employer be related to the public policy." Recognizing that Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge in violation of public policy may be prosecuted, the Court held that Pytlinski would not be bound by the 180 day statute of limitations set forth in R.C. 4113.52. Indeed, his cause of action was based in common-law for a violation of public policy, *not* based upon that statute. Because an action for wrongful discharge in violation of public policy is not covered by any statute, the Court concluded that the general limitations period for tort actions set forth in R.C. 2305.09(D) applies to this type of claim.

Verdicts & Settlements

Estate of Jane Doe v. Surgeon, Surgeon, Inc., et al.
Type of Case: Medical Malpractice/Wrongful Death
Settlement: $2,100,000 ($1,750,000 - surgeon's corp.; $350,000 - hosp.)
Plaintiff's Counsel: Charles Kampinski, Laurel Matthews
Defendant's Counsel: Withheld
Court: Withheld
Date: Withheld
Insurance Company: Not Listed
Damages: Abdominal infection, intra-abdominal abscesses, death

Summary: This was a medical malpractice/wrongful death action brought on behalf of the Estate of Jane Doe, a 67 year old woman who was admitted to the XYZ hospital for elective gallbladder removal under the care of a surgeon. She had a prior history of abdominal surgery, which is a relative contraindication to laparoscopic gallbladder removal because of a risk of injuring bowel due to adhesions.

The surgeon had difficulty with the attempted laparoscopic procedure and ultimately performed an open procedure. He made a hole in Jane's intestine during the course of her operation, but claimed to have repaired it. Neither the patient nor her family was informed of this. The surgeon did not examine the rest of the intestine to determine whether or not other holes had been made.

Following surgery, Jane's condition deteriorated and she had signs and symptoms of abdominal infection that were ignored by a surgical resident who was taking calls from home over the weekend. The Defendant surgeon did not round at the hospital on Sunday. By Sunday evening, the patient was hypotensive and septic. A CT scan demonstrated large quantities of fluid in the abdomen and free air. Jane was finally taken back to surgery at which time another hole in the intestine was discovered. The abdominal cavity was massively contaminated with intestinal contents.

Because of at least a 36 hour delay in identifying and treating this surgical error, Jane developed intra-abdominal abscesses and died from overwhelming infection. She was survived by her mother, 5 adult children and 5 siblings.

Plaintiff's Experts: Dr. Donald Frye; John Burke, Ph.D.
Defendant's Experts: Meade Perlman, M.D. (Internal Medicine); Russell Howerton (General Surgery); Keith Armitage (Infectious Disease); William W. Damon, Ph.D. (Economist)

Jane Doe, etc. v. ABC Hospital, et al.
Type of Case: Medical Malpractice
Settlement: $2,000,000
Plaintiff's Counsel: Leon M. Plevin, Ellen M. McCarthy

Defendant's Counsel: Withheld
Court: Cuyahoga County, Judge Boyko
Date: December, 2001
Insurance Company: Withheld
Damages: Death from peumococcal sepsis

Summary: Plaintiff had ITP, necessitating plenectomy. Primary doctor ordered peneumococcal vaccine which nurse failed to give. Following splenectomy, surgeon ordered pneumococcal vaccine, recognizing Plaintiff had not received it as first ordered. Vaccine was not given by the nursing staff. Several years later, Plaintiff died of pneumococcal sepsis. Defendants claimed it was given but they could provide no verification. Defendants also claimed that even if the vaccine had been given, it was not probable that she would have survived the sepsis.

Plaintiff's Experts: Neil Crane, M.D.; Martin Lee, M.D.; Elisabeth Wolfe, Ph.D.; John F. Burke, jr., Ph.D.
Defendant's Experts: Keith Armitage, M.D.; Alan Wine, M.D.; Ronald Sacher, M.D.

Heather Lograsso v. Robert P. Biondolillo, et al.
Type of Case: Premises Liability
Settlement: $95,000
Plaintiff's Counsel: Scott Kalish
Defendant's Counsel: Denise Workum
Court: Cuy. County Common Pleas, Judge Bridget M. McCafferty
Date: November 30, 2001
Insurance Company: Not Listed
Damages: Herniated disc to the L 4-5 in her low back and micro-fracture to left tibia.

Summary: Plaintiff exited the rear exterior staircase at the Eastern Gate Building in Wickliffe, Ohio, while in the course and scope of her work. The staircase collapsed and Plaintiff fell approximately 15 feet to the ground. Plaintiff sustained a herniated disc to the L 4-5, which did not require surgery. Plaintiff further sustained a micro-fracture to her left tibia. Plaintiff brought a claim against Defendant, Robert P. Biondolillo, general contractor/owner of the Eastern Gate Building, and BJR Construction, Inc., the subcontracting company which constructed the staircase at issue approximately one month before the staircase collapsed.

Plaintiff's Experts: Robert Fumich, M.D.; Brian Morris, D.C.; Harold Mars, M.D.; George C. Novotney (Architect)
Defendant's Experts: Howard Tucker, M.D.; Richard Kraly (Architect)

Jane Doe, a Minor v. John Doe, M.D.
Type of Case: Medical Malpractice
Settlement: $1,125,000
Plaintiff's Counsel: William S. Jacobson
Defendant's Counsel: Jeff Van Wagner
Court: Cuyahoga County, Judge D. Gaul
Date: November, 2001
Insurance Company: Withheld
Damages: Bilateral hearing loss

Summary: Plaintiff, a minor, was taken by her mother to Defendant pediatrician presenting with fever and lethargy. Defendant did a CBC which was normal. The mother was instructed to observe. A few hours later, the fever spiked to 103.9. Defendant was called but was unconcerned. The following day, a diagnosis of mengitis was made.

Plaintiff's Experts: C. Miller, M.D. (Pediatrician); J. Lervia, M.D. (Pediatrician-Infectious); J. Conomy, M.D. (Neurology); Rod Durgin, Ph.D. (Vocational)
Defendant's Experts: D. Rothner, M.D. (Pediatric Neurologist); D. Roberts, M.D. (Pediatrician); U. Selcer, M.D. (Infectious Disease)

Samantha Sonnie v. Robert P. Biondolillo, et al.
Type of Case: Premises Liability
Settlement: $150,000
Plaintiff's Counsel: Scott Kalish
Defendant's Counsel: Denise Workum
Court: Cuy. County Common Pleas, Judge Bridget M. McCafferty
Date: November, 2001
Insurance Company: Not Listed
Damages: Left knee injury which required arthroscopic surgery, TMJ and soft tissue injuries to the cervical and lumbosacral spine.

Summary: Plaintiff exited the rear exterior staircase at the Eastern Gate Building in Wickliffe, Ohio, while in the course and scope of her work. The staircase collapsed and Plaintiff fell approximately 15 feet to the ground. Plaintiff sustained a left knee injury which required arthroscopic surgery, TMJ injury, and soft tissue injuries to the cervical and lumbosacral spine. Plaintiff brought a claim against Defendant, Robert P. Biondolillo, general contractor/owner of the Eastern Gate Building and BJR Construction, Inc., the subcontracting company which constructed the staircase at issue approximately one month before the staircase collapsed.
Plaintiff's Experts: Karl Schneider, D.D.S.; Bernard Stone, D.D.S.; Robert Zaas, M.D.; Robert Fumich, M.D.; Brian Morris, D.C.; George C. Novotney (Architect)
Defendant's Experts: Kenneth Callahan, D.D.S.; Richard Kraly (Architect)

Barr v. National Union, et al.
Type of Case: Motor Vehicle Accident
Settlement: $355,000 ($100,000 policy limits - tortfeasor and $255,000 from National Union under *Scott Pontzer*)
Plaintiff's Counsel: Kenneth J. Knabe
Defendant's Counsel: Matthew Grimm
Court: Cuy. County Common Pleas,
Judge Nancy R. McDonnell
Date: September, 2001
Insurance Company: Not Listed
Damages: Left proximal tibial fracture of the knee; anterior cruciate ligament tear.

Summary: Plaintiff crashed his motorcycle to avoid contact with the Defendant driver who pulled out in front of him, violating his right of way. Plaintiff suffered an initial left proximal tibial fracture (knee) and an anterior cruciate ligament tear. Through subsequent falls, he suffered a fracture to the lateral tibeal plateau and later a lateral femoral condyle fracture. Plaintiff contended the subsequent falls and injuries were the result of an initial undiagnosed femoral nerve injury and weakness.

Plaintiff's Experts: Dr. Roger Weiss (Neurologist); Dr. John Wood (Orthopaedic surgeon); Dr. Teresa Larsen (Pain Management); Rod Durgin (Vocational Expert)
Defendant's Experts: None

Carol Sailes-Hill, et al. v. Kecia Slocum, et al.
Type of Case: Motorcycle/Automobile Accident
Settlement: $487,500
Plaintiff's Counsel: Kenneth J. Knabe
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas,
Judge Jose Villanueva
Date: Not Listed
Insurance Company: Not Listed
Damages: Death

Summary: On August 14, 1999, decedent motorcyclist was struck by a car driven by an underinsured motorist and killed. The underinsured motorist had only $12,500 in liability coverage. Plaintiffs accepted the $12,500.00 wit the consent of the beneficiaries' UM/UIM carriers.

Each beneficiary filed separate claims, declaratory judgment actions, and *Sexton* and *Moore* UIM claims against their personal auto carriers and their employers' UIM carriers per *Scott-Pontzer*. Defendants denied coverage and alleged that the decedent was traveling 60 mph in a 25 mph zone, had no motorcycle helmet, no motorcycle endorsement, and no permission to drive the motorcycle, as well as having marijuana in his system. Plaintiffs contend that the underinsured tortfeasor turned left without looking and was at fault. Judge Villanueva stated he would overrule all Defendants' Motions for Summary Judgment on coverage.

Plaintiff's Experts: Dale Dent (Accident Reconstruction); John Burke (Economics)
Defendant's Experts: Whitman McConnell (Liability Reconstruction); Edward Bell (Economics)

Arthur Bessick, et al. v. Utilicon Corp., et al.
Type of Case: Wrongful Death/Survivorship
Verdict: $681,000 but reduced to $517,000 (24%) due to Plaintiff's own partial negligence
Plaintiff's Counsel: John W. Martin; Andy Petropouleas
Defendant's Counsel: William Kovach
Court: Cuy. County Common Pleas, Judge Nancy M. Russo
Date: December, 2001
Insurance Company: Travelers
Damages: $517,000

Summary: Defendant's truck driver backed a Tandem dump truck over 81-year-old Johneata Brannon. Driver and employer found to be negligent 22% and 54% respectively. Plaintiff found to be 24% negligent which reduced judgment of $681,000 to $517,000. One of the main issues of this case was whether or not Ms. Brannon died instantaneously or whether there was a period of pain and suffering. Our medical experts testified that she lived up to two minutes. The Defendant's experts opined that her death was brief and/or instantaneous.

Plaintiff's Experts: Dr. John P. Conomy; Jim Crawford (Introtech); Dr. Elizabeth Balraj
Defendant's Experts: Dr. Howard Tucker; Dr. Carl Schmidt (Deputy M.E. for Wayne County); Carmen Daecher (Daecher Consulting Group)

John Doe, et al. v. Land Rover North America, Inc., et al.
Type of Case: Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe; Eric J. Hertz (GA) ; Patrick J. Ardis (TN)
Defendant's Counsel: Lanny B. Bridgers (Atlanta)
Court: Withheld
Date: February, 2001
Insurance Company: Not Listed
Damages: Wrongful death of mother and one minor child. Surviving minor child suffered left pulmonary contusion, lower left leg laceration.

Summary: A Land Rover Range Rover made a steering maneuver to avoid an oncoming vehicle, going into a counterclockwise yaw, rolled onto the roadway, then came to rest upright in the opposite lane. All 3 occupants were thrown from the vehicle.

Plaintiff's Experts: Joseph Burton, M.D.; Simon Tamny, P.E.; Herbert Yudenfriend
Defendant's Experts: Michael Holcomb; Murray Mackay; Andrew James Foster; John Anthony Kellett

John Doe v. DaimlerChrysler Corporation
Type of Case: Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe; Philip C. Henry (GA); Kirk J. Post (GA)
Defendant's Counsel: Maureen Krasner; Thomas D. Hunter
Court: Withheld
Date: January, 2001
Insurance Company: Not Listed
Damages: Severely comminuted compression fracture of upper thoracic spine, rendering Plaintiff paraplegic; spleen damage.

Summary: A Dodge Neon hydroplaned on the road, and slid off the roadway into a telephone pole. On impact, the seatback failed, throwing the properly-restrained Plaintiff into the reat seat head first.

Plaintiff's Experts: Joseph Burton, M.D.; William Fogarty; Kenneth Saczalski; Todd Saczalski; Paul Sheridan; Robert F. Hebert; Rich Shivers, M.D.
Defendant's Experts: Dan Dammar; Dennis Guenther

John Doe, et al. v. DaimlerChrysler Corporation
Type of Case: Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe
Defendant's Counsel: Lawrence Sutter; Hugh Bode
Court: Withheld
Date: January, 2001
Insurance Company: Not Listed
Damages: Severely comminuted fracture of cervical spine, rendering Plaintiff quadriplegic. Internal and other injuries, resulting in damage to his optic nerve, causing complete loss of vision.

Summary: A Plymouth Voyager was struck from behind by another vehicle. Although wearing his seatbelt, Plaintiff's seatback collapsed, and Plaintiff was thrown into the middle bench, then into the rearmost bench seat. Plaintiffs alleged that the vehicle's seat was designed to collapse in minor and foreseeable rear impacts, rendering the vehicle defective.

Plaintiff's Experts: John Burke, Ph.D.; Kenneth Saczalski; Todd Saczalski; Joseph Spoonster; Simon Tamny, P.E.
Defendant's Experts: Dana Warehime (DaimlerChrysler Corp.)

John Doe, et al. v. General Motors Corporation
Type of Case: Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe; R. Stephen Burke (KY)
Defendant's Counsel: Thomas P. Branigan (MI); Edward R. Goldman (OH); Edward P. Gibbins (IL)
Court: Withheld
Date: November, 2001
Insurance Company: Not Listed
Damages: Husband: Massive head trauma; death. Wife: Blunt force trauma to head, chest and abdomen; death.

Summary: Plaintiff's decedent husband was operating a 1997 Chevrolet Blazer. During an improper lane change by a 1998 Chevrolet Cavalier, Plaintiff's vehicle was struck and forced off the roadway and into the median where the vehicle rolled over, killing both driver husband and front-seat passenger wife. The husband's seatbelt utilized a "rip stitching" design which permitted an additional 16" or more of seatbelt to pay out, leaving the driver with no effective restraint. The vehicle also had a defective door latch and roof support, contributing to both deaths.

Plaintiff's Experts: John Burke, Ph.D.; Joseph Burton, M.D.; Andrew N. Gilberg, P.E.; Stephen Syson; Simon Tamny, P.E.
Defendant's Experts: Jennifer L. Sevigny

John Doe, et al. v. Volvo Cars of North America, Inc., et al.
Type of Case: Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe; Thomas H. Hisrich; Ronald L. Rosenfield
Defendant's Counsel: Hugh J. Bode; Lawrence Sutter
Court: Withheld
Date: September, 2001
Insurance Company: Not Listed
Damages: Wrongful death of minor child by airbag.

Summary: A light impact rear-end accident deployed the airbag in striking a vehicle (Volvo), killing the front seat passenger.

Plaintiff's Experts: William Brodhead; Joseph Burton, M.D.; Simon Tamny, P.E.; Edward Karnes
Defendant's Experts: Verne Roberts; Bengt Schultz; Dennis Guenther; Alan Dorris

Jane Doe v. General Motors Corporation
Type of Case: Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe
Defendant's Counsel: J. Gregory Minano (GA)
Court: Withheld
Date: March, 2001

Insurance Company: Not Listed
Damages: Wrongful death

Summary: Plaintiff's decedent was operating a Pontiac Sunfire when the airbag deployed without impact or warning, causing loss of control of the vehicle. The vehicle thereafter struck a group of trees, resulting in fatal injuries to the father and minor injuries to the child.

Plaintiff's Experts: Harry Edmondson; Bill Rosenbluth
Defendant's Experts: John Sprague

John Doe v. ABC Corporation
Type of Case: Intentional Tort
Settlement: $2,650,000
Plaintiff's Counsel: Mark L. Wakefield
Defendant's Counsel: Withheld
Court: Withheld
Date: December, 2001
Insurance Company: Withheld
Damages: Closed head injuries, fractured skull, swelling of the brain, cognitive disabilities, and memory loss.

Summary: Plaintiff was employed as a laborer at a steel mill. A part of his job duties was to unband and load steel coils onto a slitting line. Despite prior instances of the bands which retained the steel spontaneously breaking, Defendant provided no protection or instruction for the cutting of the bands. Plaintiff had cut only one of four retaining bands when the remaining three suddenly broke, causing the steel coil to clockspring and strike Plaintiff's head.

Plaintiff's Experts: Not Applicable
Defendant's Experts: Not Applicable

Katoya Brown v. ABC Hospital, et al.
Type of Case: Medical Negligence
Settlement: $110,000
Plaintiff's Counsel: Scott Kalish
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas, Judge Ann Mannen
Date: November, 2001
Insurance Company: Not Listed
Damages: Permanent scar on top of the right hand and scarring to buttocks where skin graft was taken.

Summary: Plaintiff was a patient at ABC Hospital when she sustained an I.V. infiltration of her right hand during a CAT scan procedure which caused permanent scarring on the top of the hand. A skin graft procedure was required removing skin from Plaintiff's buttock area and grafting that skin to the top of the right hand. The results were a permanent scar on top of the right hand and scarring on the buttock area.

Plaintiff's Experts: James Zelch, M.D.; Gregory T. Classen, D.O.
Defendant's Experts: Brian Windle, M.D.; Daniel Singer, M.D.; Cathy Sloan, R.N.

John Doe v. Anonymous Internist
Type of Case: Medical Malpractice
Settlement: $500,000
Plaintiff's Counsel: Edward Richard Stege
Defendant's Counsel: Withheld
Court: Columbiana County, Ohio
Date: October, 2001
Insurance Company: PHICO
Damages: Death of a 69-year-old male.
Summary: Defendant failed to screen for signs of colon cancer, despite long-standing physician/patient relationship. Plaintiff became symptomatic and died — all within 8 months.

Plaintiff's Experts: Mark Shoag (Internal Medicine); Nathan Levitan (Oncology)
Defendant's Experts: David Gottesman (Gastroenterology); Larry Russell (Family Practice); Richard Levy (Oncology); Geoffrey Mendelsohn (Pathology)

Jane Doe v. Great Northern Insurance Company (Chubb)
Type of Case: Scott-Pontzer
Settlement: $3,200,000
Plaintiff's Counsel: Bob Rutter
Defendant's Counsel: John Travis, John Martindale
Court: Binding Arbitration Proceeding
Date: September, 2001
Insurance Company: Great Northern
Damages: Wrongful death of 35-year-old male survived by widow and 3 minor children.

Summary: Decedent was killed when an underinsured driver crossed the center line and struck decedent's car head-on. Decedent's minor son was a front-seat passenger, and broke both of his legs. Decedent was a machinist earning $35,000 per year.

Plaintiff's Experts: Treating physicians at MetroHealth Medical Center; Dr. John Burke (Economist)
Defendant's Experts: None

Jane Doe, a Minor v. John Doe Hospital
Type of Case: Medical Malpractice
Settlement: $4,000,000
Plaintiff's Counsel: William S. Jacobson, David M. Paris and Harlan Gordon
Defendant's Counsel: Withheld
Court: Summit County Common Pleas
Date: March, 2002
Insurance Company: Withheld

Damages: Mental Retardation and Cerebral Palsy

Summary: Plaintiff's mother presented to the defendant hospital at 36 weeks gestation with vaginal bleeding. The fetal heart monitor showed bardycardia, then stabilized. She was then observed for two hours and then a C-section was performed. Plaintiff alleged the earlier failure to mobilize delayed the C-Section.

Plaintiff's Experts: Stuart Edelberg, M.D. (Obstetrics); Steve Bates (Pediatric Neurologist); Carol Miller (Neonatology); Barry Pressman (Pediatric Neuroradiology); Robert Betts (Child Psychology); Carolyn Wilhelm (Life Care); John F. Burke, Jr. Ph.D. (Economist).
Defendant's Experts: Jeff Phalen (Obstetrics); Steven Devoe (Obstetrics); Robert Kiwi (Perinatologist); Robert Meadow (Neonatologist); Jane Mattson (Life Care Planning).

John Doe v. ABC Company
Type of Case: Employer Intentional Tort
Settlement: $1,200,000
Plaintiff's Counsel: David M. Paris, Ellen M. McCarthy
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas, Judge Burt Griffin
Date: February, 2002
Insurance Company: Withheld
Damages: Traumatic amputation left hand.

Summary: Our client was inspecting the die in a steam powered press. He turned the throttle control switch to "off" and propped the ram with a wooden strut. He began working on the pinch point when the throttle control lever slipped from pressure "off" to pressure low due to a worn spring. The ram crushed the wood strut, which did not meet specifications, and crushed our client's hand. Plaintiff has returned to work with the same company in a promoted position.

Plaintiff's Experts: Simon Tamny, P.E.
Defendant's Experts: Not Identified (settled before Court required identification)

LISTING OF NEW PHYSICIANS/EXPERTS

NAME	SPECIALTY
David Abramson, M.D.	Emergency Medicine
Walter Afield, M.D.	Unknown
Lisa Ann Atkinson, M.D.	Staff Physician
Keith Armitage, M.D.	Infectious Disease
Stanley P. Ballou, M.D.	Unknown
Mitchell Barney, D.D.S.	Dentist
W.E. Bazell, M.D.	Urology
Debbie Bazzo, R.N.	Obstetrical R.N.
Bennett Blumenkopf, M.D.	Neurologist
Robert E. Botti, M.D.	Cardiology
Malcolm Brahms, M.D.	Orthopedic Surgeon
Dennis Brooks, M.D.	Orthopedic Surgeon
Leo J. Brooks, M.D.	Sleep Disorders
William Bruner, M.D.	OB/GYN
Aaron Brzezinski, M.D.	Gastroenterology
Stephen Collins, M.D.	Epileptologist
Robert Corn, M.D.	Orthopedic Surgeon
Mary Corrigan, M.D.	Family Practice
Amir Dawoud, M.D.	Anesthesiologist
Robert K. DeVies, Ph.D.	Psychologist
Stephen DeVoe, M.D.	OB/GYN
Stephen DeVoe, M.D.	OB/GYN
John Distefano, D.D.S.	Dentist
Method Duchon, M.D.	OB/GYN
Stuart Edelberg, M.D.	OB/GYN
Todd D. Eisner, M.D.	Gastroenterology
Herbert Engelhard, M.D.	Neurologist
Robert Erickson, M.D.	Orthopedic Surgeon
Steven Feinsilver, M.D.	Sleep Disorders
Robert Flora, M.D.	Infectious Disease
Ellen Flowers	Occupational Therapist
Richard Friedman, M.D.	Orthopedic Surgeon
Robert Fumich, M.D.	Orthopedic Surgeon
Debra A. Gargiulo	R.N.
Barry George, M.D.	Cardiologist
Martin Gimovsky, M.D.	OB/GYN
Ronald Gold, M.D.	Pediatrician
Daniel Goldberg, M.D.	Surgeon
Michael Gyves, M.D.	OB/GYN
William Hahn, M.D.	OB/GYN
Hunter Hammill, M.D.	OB/GYN
Ivan Hand, M.D.	Pediatrician
Nawar Hatoum, M.D.	OB/GYN
Phyllis Hayes	R.N.

Gary Himmel, Esq.	Attorney
Mary Hlavin, M.D.	Neurologist
Thomas Hobbins, M.D.	Sleep Disorders/Pulmonologist
Tung-Chang Hsieh, M.D.	OB/GYN
Mary Hulvalchick, R.N.	Obstetrical R.N.
Moises Jacobs, M.D.	General Surgeon
Joseph Jamhour, M.D.	Pediatrician
Bruce Janiak, M.D.	Emergency Medicine
Mark Janis, Ph.D.	Psychologist
Allen Jones, M.D.	Emergency Medicine
Donna Joseph	R.N.
Suzanne Kimball, M.D.	General Internist
Alfred Kitchen, M.D.	Cardiology
Ralph Kovach, M.D.	Orthopedic Surgeon
Keith Kruithoff, M.D.	Internal Medicine
Dennis Landis, M.D.	Neurologist
Alan Lerner, M.D.	Neurologist
David Longworth, M.D.	Infectious Disease
Phillip Marciano, M.D.	Maxillofacial Surgeon
Sheldon Margulies, M.D.	Neurologist
Steven Meister, M.D.	Cardiologist
Martha Miller, M.D.	Pediatrician/Neonatal
Clark Millikan	Director of Academic Affairs
Richard O'Shaughnessy, M.D.	OB/GYN
Elizabeth E. O'Toole, M.D.	Geriatric
Raphael Pelayo, M.D.	Otolaryngologist
Neal Wayne Persky, M.D.	Geriatric/Internal Medicine
David C. Preston, M.D.	Neurologist
Thomas R. Price, M.D.	Neurologist/Psychiatrist
Martin Raff, M.D.	Infectious Disease
Elisabeth Righter, M.D.	Family Medicine
Michael Rowane, M.D.	Family Medicine
Ghassan Safadi, M.D.	Pediatrician/Allergist
Sue Sanford	Director/Obstetrical Services
Craig Saunders, M.D.	Thoracic Surgeon
Craig Saunders, M.D.	Thoracic Surgeon
Debra Seaborn	R.N.
David Silvaaggio	Dept. Administrator - Family Practice
Diane Soukup	Geriatric Nursing
Kelly Sted	Manager of Enrollment
Shirley Stokley	R.N.
Vinodkumar Sutaria, M.D.	Hematologist
Elizabeth Svec	R.N.
Barbara Swartz, M.D.	Epileptologist
Laurel Thill	R.N.
Tarvez Tucker, M.D.	Neurologist
Helenmarie Waters, R.N.	Obstetrical R.N.
Steven Yakubov, M.D.	Cardiologist
Robert Zaas, M.D.	Orthopedic Surgeon
Arthur B. Zinn, M.D.	Medical Geneticist
Christine M. Zirafi, M.D.	Cardiologist

CATA VERDICTS AND SETTLEMENTS

Case Caption:_____

Type of Case:_____

Verdict: **Settlement:**_____

Counsel for Plaintiff(s):_____
Address:_____
Telephone:_____

Counsel for Defendant(s):_____

Court/Judge/Case No:_____

Date of Settlement/Verdict:_____

Insurance Company:_____

Damages:_____

Brief Summary of the Case:_____

_____

_____

_____

_____

Experts for Plaintiff(s):_____

_____

_____

Experts for Defendant(s):_____

_____

_____

RETURN FORM TO:

Romney B. Cullers, Esq.
Hermann, Cahn & Schneider
1301 East 9th Street, Suite 500
Cleveland, Ohio 44113
Phone: (216) 781-5515
Fax: (216) 781-1030

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THE CLEVELAND ACADEMY OF TRIAL ATTORNEYS
1370 Ontario Street, Suite 100
Cleveland, Ohio 44113-1792
Phone: 216-621-2300
FAX: 216-771-2242
E-mail: DParis@nphm.com

Application for Membership

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below, and submit the requested information in support of my application. I understand that my application must be seconded by a member of the Academy and approved by the President. If elected a member of the Academy, I agree to abide by its Constitution and By-Laws and *participate fully in the program of the Academy*. I certify that I possess the following qualifications for membership prescribed by the Constitution:

1. ***Skill, interest and ability in trial and appellate practice.***
2. ***Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.***
3. ***Excellent character and integrity of the highest order.***

In addition, I certify that no more that 25% of my practice and that of my firm's practice if I am not a sole practitioner, is devoted to personal injury litigation defense.

Name_____Age:_____

Firm Name:_____

Office Address:_____Phone no:_____

Home Address:_____ Phone no:_____

Spouse's Name:_____No. of Children:_____

Schools Attended and Degrees (Give Dates):_____

_____

Professional Honors or Articles Written:_____

_____

Date of Admission to Ohio Bar:_____ Date of Commenced Practice:_____

Percentage of Cases Representing Claimants:_____

Do You Do 25% or More Personal Injury Defense:_____

Names of Partners, Associates and/or Office Associates (State Which):_____

_____

Membership in Legal Associations (Bar, Fraternity, Etc.):_____

_____

Date:_____ Applicant:_____

Invited:_____ Seconded By:_____

President's Approval:_____ Date:_____