CATA News
Cleveland Academy of Trial Attorneys
Spring 2003

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President's Message

Kenneth J. Knabe

NEW LAWS

Numerous laws have recently passed which substantially alter Ohio's common and statutory tort law, including the following:

HB 412 - Nursing Home Liability - Effective 11/07/02
SB 106 - Expanded Governmental Immunity - Effective 4/9/03
SB 120 - Joint and Several Liability - Effective 4/9/03
SB 179 - Peer Review/Negligent Credentialing - Effective 4/9/03
SB 227 - Workers' Compensation Subrogation - Effective 4/9/03
SB 281 - Medical Malpractice Liability - Effective 4/11/03

A full assault on Ohio's tort system is underway. Not coincidentally, this occurred right after our last Supreme Court election. I hope everyone now sees the importance of these elections and becoming involved in the **political process.**

To battle these new bills in the courts, please educate yourself by attending seminars. **Please do not assume you can wait until the new bills become effective before you decide to analyze them. You must learn these laws now since they will affect your practice; and you must know how to challenge them.**

This Newsletter contains articles by Toby Hirshman, Ellen McCarthy, Mark Barbour and Ken Knabe summarizing some of these new bills. It also features an article by Don Iler addressing the constitutional infirmities of these new laws. The cycle has turned against injured victims; we must persevere and battle until these unfair laws are stricken and injured victims are assured a fair trial. Passive representation is over! We can and will beat this latest cycle against the injured with **perseverance, education,** and **dedication.**

MENTORS

Many pitfalls, trap doors and complex legal issues face all plaintiff's attorneys, especially the young or inexperienced. Mentoring helps! I am sure that all successful plaintiff's attorneys have benefitted from mentoring. I can think of many mentors and advisors in my legal career, including Art Elk, John F. Norton, Charles Brown (deceased), Egidijus Marcinkevicius, John T. Corrigan(deceased), Fred Hilow (deceased), Craig Spangenberg(deceased), John D. Liber, Richard Alkire, Robert Linton, Sean Allen, and James Szaller. I owe a debt of gratitude to these outstanding attorneys and the many fine judges in Cuyahoga County.

Attorneys cannot learn it all on their own. Do not lose sight of mentoring benefits. Please help fellow attorneys who may not have the benefit of a mentor. I will field any phone calls from any attorneys who would like to shadow some of our outstanding and experienced CATA members. Please give me a call at 216/228-7200.

CATA AWARD

On April 11, 2003, the **Cleveland Academy of Trial Attorneys received the Ohio Academy of Trial Lawyers' Outstanding Local Trial Lawyer Association award.** This award is given to a local trial bar that exemplifies excellence in education and communication with its members. Congratulations to our members, whose dedication and hard work have led to this prestigious award.

ADVERTISERS

Finally, we have current and new advertisers in this issue. Please take the time to identify and **patronize these fine legal support groups** which have demonstrated their commitment to you and our organization!

2003 CATA Golf Outing: SAVE THE DATE!

CATA's annual golf outing is scheduled to take place at Elyria Country Club on August 21, 2003. Although invitations will be sent out in the near future, save the date now and plan on attending.

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Medical Malpractice Liability

by Toby Hirshman

On January 10, 2003, Governor Taft signed Senate Bill 281 ("S.B. 281") into law. Its effective date is April l1, 2003.[1] S.B. 281 makes a number of changes to existing law. In this regard, it limits the non-economic damages that are available in medical claims; it attempts to abrogate the Collateral Source Rule under somewhat different circumstances than existing law; it modifies the statute of limitations in some regards; it provides for periodic payments of future damages upon order of the court under certain circumstances; and it modifies the rules relating to the enforceability for arbitration agreements between health care providers and patients.

Additionally, S.B. 281 requires every Clerk of Court to report to the Department of Insurance on a quarterly basis regarding the status of pending medical claims; it requires the Superintendent of Insurance to study the feasibility of a patient compensation fund to cover medical claims; it requires the Department of Insurance to provide the General Assembly with annual reports on medical malpractice insurance rates, the number of carriers providing coverage in the State and the number of applications for rate increases; and it creates the Ohio Medical Malpractice Commission consisting of seven members to study the effects of the Act.

This article will focus on those portions of S.B. 281 which will have an affect on our daily practices when handling medical claims.

I. ARBITRATION AGREEMENTS (§§2711.21-2711.23)

Ohio Revised Code §2711.21, as it presently exists, provides for non-binding arbitration in the health care setting when agreed to by the parties after a claim has been filed. S.B. 281 does nothing to change the law in this regard. Such non-binding agreements remain available as a means of dispute settlement and "are not admissible into evidence at trial." §2711.21(C) of S.B. 281.

Present law also provides for agreements for binding arbitration. See O.R.C. §2711.22. However, whereas the existing law provides for such contracts between patients and "hospitals" or "physicians," the new Bill provides authority for the utilization of such arbitration agreements by various other "health care providers" as defined by §2711.22(B) to include physicians, podiatrists, dentists, licensed practical nurses, registered nurses, advanced practical nurses, chiropractors, optometrists, physician assistants, emergency medical technicians and physical therapists. Under both the old and the new versions of §2711.23, to be enforceable, such arbitration agreements:

- Must be entered into in advance of services;
- Must specifically set forth in writing that the signing of such an agreement is not a condition to the provision of services;
- Must disclose that such an agreement constitutes waiver of the rights of the patient to a jury trial;
- Must be contained in a separate document;
- May not be submitted to a patient for approval when his condition prevents him from making a rational decision.

Unlike the present law, which allows a patient 60 days from the discharge from a hospital or from the termination of the physician/patient relationship to withdraw his consent, the new law requires that such consent may be withdrawn only in the 30 days after the agreement has been signed. Although such arbitration agreements have been available to physicians and hospitals for years, they have rarely been utilized.

In the years that this author has been practicing, he has never seen an arbitration agreement used by a defendant, either with or without success, to deprive a medical malpractice patient of a jury trial. Whether health care providers will use arbitration agreements more aggressively under the new law remains to be seen.

II. STATUTE OF LIMITATIONS (§2305.113)

Under S.B. 281, the statute of limitations provisions of the Ohio Revised Code pertaining to medical claims have been moved from R.C. §2305.11 to a new section of the Revised Code, §2305.113. Although the rules applicable under both sections apply to medical claims, dental claims, optometric claims and chiropractic claims, the term "medical claim" is broadened under the new statute to include claims against licensed practical nurses, advanced practice nurses such as nurse anesthetists and physician's assistants as well as emergency medical technicians.

§2305.113 provides that an action on a medical, dental, optometric or chiropractic claim shall be filed within one (1) year after the cause of action accrues. Case law establishing an accrual date based on the discovery rule or the last seen date should remain good law under the new statute. See e.g. Akers v. Alonzo (1992), 65 Ohio St. 3d 442 (cognizable event); Frysinger v. Leech (1982), 32 Ohio St. 3d 38 (accrual occurs at time of reasonable discovery of injury or termination of the physician/patient relationship, whichever occurs later).

The new law incorporates the provisions of the old law as it allows the one (1) year statute of limitations to be extended for 180 days by the sending of an appropriate Letter of Intent to Sue. See §2305.113(B)(1). With §2305.113(B)(2), the Legislature has prohibited professional liability carriers from raising insurance premium rates to health care providers based on the number of such letters they receive.

Subsection (C) of §2305.113 is a statute of repose which, by its terms, does not apply to minors or those of "unsound mind." It provides that, regardless of when a cause of action accrues, no medical, dental, optometric or chiropractic claim shall be commenced more than four (4) years "after the occurrence of the act or omission" giving rise to the claim. See §2305.113(C)(1). The statute provides a narrow escape valve for those who, in the exercise of reasonable diligence, could not have discovered "their injury resulting from the act or omission" within three (3) years, but who, in fact, make that discovery before the expiration of the fourth year. See §2305.113(D)(1). Such a person is given an additional year from the date of discovery to "commence an action." Since Rule 3(A) of the Ohio Rules of Civil Procedure states that "[a] civil action is commenced by filing a complaint," plaintiffs using this narrow exception to the statute of repose will need to file suit if they wish to preserve their claims. It is doubtful that a 180 day letter, under such circumstances, will be sufficient.

§2305.113(D)(2) codifies the long-existing rule of Melnyk v. Cleveland Clinic (1972), 32 Ohio St. 2d 198, that where a foreign body is negligently left inside a patient's body, the statute of limitations is tolled until the patient in the exercise of reasonable diligence should have discovered the negligent act. However, the Legislature, in this new enactment, attempts to explicitly place the burden on a plaintiff seeking to extend the statute of limitations through use of either Subsection (D)(1) (late discovery) or (D)(2) (foreign object), and requiring such plaintiff to establish "by clear and convincing evidence" that they could not have, with reasonable care, discovered the injury earlier.

Although Subsections §2305.113(D)(1) and (D)(2) would appear to be legislative attempts to ameliorate the harshness of the four year bar under circumstances where discovery is made in the fourth year or under circumstances where a foreign object is left behind, it would appear that little has been done to address the harshness resulting from the application of this rule in circumstances not covered by these narrow exceptions.

It is unclear why the four (4) year bar should be constitutional as part of Senate Bill 281 when the same provision was found unconstitutional in Hardy v. Ver Meulen (1987), 32 Ohio St. 3d 45 and in Gaines v. Preterm-Cleveland, Inc. (1987), 33 Ohio St. 3d 54 when applied so as to deprive a plaintiff of one (1) year from reasonable discovery in which to sue. See also State, ex. rel. Ohio Academy of Trial Lawyers v. Sheward, (1999), 86 Ohio St. 3d 451. (Not only is the legislative attempt to override the Court's holdings regarding the unconstitutionality of such statutes of repose a due process violation, it also violates the separation of powers principles as a legislative usurpation of judicial power).

III. COLLATERAL SOURCE RULE (§2323.41)

§2323.41 of the Code has been enacted to revise the rules pertaining to collateral source benefits and subrogation.[2] In a nutshell, it sets forth a set of rules whereby the defendant in a medical claim may introduce evidence of collateral benefits to plaintiff unless there is a statutory or contractual subrogation right belonging to the payer of those benefits. If such statutory or contractual subrogation rights exist, collateral benefits received are not admissible. The statute attempts to match those circumstances where the Collateral Source Rule will be abrogated with those circumstances where third party subrogation rights will be defeated thereby preventing double recoveries by the plaintiff and likewise preventing double deductions against a plaintiff's verdict. The statute provides that when the Collateral Source Rule is to be abrogated, that will occur by means of the introduction into evidence of the collateral source payments which the jury shall then take into consideration in rendering a verdict. This mechanism avoids the complexities associated with a post-judgment hearing in which the Court reduces the judgment by the amount of the collateral benefits received by the plaintiff. See Sorrell v. Thevenir (1994), 69 Ohio St. 3d 415 (statutory abrogation of the Collateral Source Rule as contained in O.R.C. §2317.45 is unconstitutional where a post verdict proceeding fails to match deductions from the jury award for collateral benefits received against

awards for the same type of damages); Buchman v. Board of Education of the Wayne Trace Local School Dist. (1995), 73 Ohio St. 3d 260 (under R.C. §2744.05(B) a collateral benefit is deductible in a post verdict hearing only to the extent that the loss which it is applied against is actually included in the jury's award).

In order to understand the thrust of this new approach to the Collateral Source Rule and to subrogation rights, review of the antecedents to this Section is in order. Under the common law "Collateral Source Rule," evidence of compensation received by the plaintiff from a collateral source was not admissible to diminish a plaintiff's recovery. In Pryor v. Webber (1970), 23 Ohio St. 2d 104, the Ohio Supreme Court held:

> "The Collateral Source Rule is an exception to the general rule of compensatory damages in a tort action, and evidence of compensation from collateral sources is not admissible to diminish the damages for which a tortfeasor must pay for his negligent act."

The reason for this Rule was explained by the Pryor court as follows:

> "The Collateral Source Rule has been defined as the "judicial refusal to credit to the benefit of the wrongdoer money or services received in reparation of the injury caused which emanates from sources other than the wrongdoer." Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669, 670.
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> "...To this extent, plaintiff may get double payment on account of the same items. The defendant wrongdoer should not, it is said, get the benefit of payments that come to the plaintiff from a "collateral source" (i.e. "collateral" to the defendant)." 2 Harper & James, The Law of Torts, 1343, §25.22." Id. at 23 Ohio St. 2d 107-108.

In the medical context, the Pryor Rule was abrogated in 1975 when the Ohio Medical Malpractice Act was passed as H.B. 682. That Bill enacted R.C. §2305.27, which read as follows:

> "...in any medical claim...an award of damages shall not be reduced by insurance proceeds or payments or other benefits paid under any insurance policy or contract where the premium or cost of such insurance policy or contract was paid either by or for the person who has obtained the award or by his employer, or both, or by direct payments from his employer, but shall be reduced by any other collateral recovery for medical and hospital care, custodial care or rehabilitation services, and loss of earned income. Unless otherwise expressly provided by statute, a collateral source of indemnity shall not be subrogated to the claimant against a physician, podiatrist or hospital."

Simply put, that Section provided that (1) certain types of insurance proceeds (mainly those where the premiums were paid by the plaintiff or his employer) shall not reduce a medical malpractice award; and (2) no collateral source of payment shall have a right of subrogation unless otherwise expressly provided by statute. Under this statute, the determinative factor for application of the Collateral Source Rule (whether plaintiff paid the insurance premiums) is unrelated to the determinative factor for the allowance of subrogation claims. Under this statute it is, accordingly, possible for the plaintiff to receive a double recovery. It is also possible for plaintiff to suffer a double deduction. Nevertheless, in Morris v. Savoy (1991), 61 Ohio St. 3d 684, the Supreme Court held that provision to be constitutional.

Although the Legislature, in H.B. 350, included a section which reworked the statutory abrogation of the Collateral Source Rule, that provision, along with the rest of H.B. 350, was found unconstitutional in State, ex. rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St. 3d 451. In the aftermath of Sheward, the General Assembly re-enacted R.C. §2507.27 as set forth above.

With the passage of S.B. 281, Revised Code §2507.27 has been repealed. In its place is another framework which, in its enabling language, states its object as being "[t]o abrogate the common law Collateral Source Rule as adopted by the Ohio Supreme Court in Pryor v. Webber (1970), 23 Ohio St. 2d 104 and reaffirmed in Sorrell v. Thevenir (1994), 69 Ohio St. 3d 415." To do so, the Legislature enacted §2323.41 of the Revised Code to govern collateral benefits in medical claims. §2323.41(A) provides that in a medical claim a defendant may introduce evidence of any amount payable as a benefit to

the plaintiff...except if the source of collateral benefits has one of the following:

- A mandatory self-effectuating federal right of subrogation such as Medicare. (See 4U.S.C. §1395).
- A contractual right of subrogation (as do most insurance policies).
- A statutory right of subrogation (such as Workers' Compensation).

From this writer's experience, it would appear that the three exceptions noted above would cover most of the waterfront. As such, it can be anticipated that the exceptions will swallow up the newly articulated rule in such a fashion so that, in most instances, there will be no basis for a defendant to introduce evidence of a collateral source payment at the time of trial. To the extent that collateral benefits may be introduced at trial, Subsection (C) will protect the plaintiff from any attempts by the collateral source payer to recover for amounts it has paid.

Nothing in the language of §2323.41 would appear to prevent the utilization of "make whole" arguments to defeat a subrogation claim even when evidence of the collateral source benefits were excluded at trial. See Blue Cross v. Hrenko (1995), 72 Ohio St. 3d 120.

From a political perspective, it appears that the lobbying efforts of the health insurers and employers of the State prevailed over the lobbying efforts of the professional liability carriers on the issue of who will get reimbursed as a result of the patient's litigation efforts, notwithstanding the purported malpractice insurance crisis. In any case where there is a federal right of subrogation, a contractual right of subrogation or a statutory right of subrogation, the professional liability carrier will find itself with no right to introduce evidence regarding the amount payable to plaintiff as a collateral benefit.

The statute sets forth how collateral benefit payments and subrogation claims will be dealt with in cases that are tried. However, the statute does not address how such allocations will be handled when a case is settled short of trial. If a case is settled before trial under circumstances where there is a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation or a statutory right of subrogation, those subrogation interests will likely be in a position to enforce their subrogation rights by relying on the statutes and contracts giving rise to those rights. However, where a settlement is reached in a case where the subrogation rights of the collateral benefits payer are not based on such a statutory or contractual right, it is not clear how the statute will work. Since no "evidence is introduced," will a subrogation right exist where one would not have existed if a trial had occurred? The more reasonable approach would seem to construe the statute as protecting plaintiffs from double deductions whether trial has occurred or a settlement has been fashioned. It would be reasonable to conclude that any settlement in such an environment would provide no compensation for amounts that would have been deducted if trial had occurred. Thus, to allow a subrogation claim in the absence of a statutory or contractual subrogation right would appear to be in conflict with the statutory intent by allowing plaintiff to suffer a double deduction. To the extent that the statute protects plaintiffs who try their cases from a double deduction but fails to protect those who settle their claims from a double deduction, the constitutionality of the statute is certainly open to question. See Holeton v. Crouse Cartage Co. (2001), 92 Ohio St. 3d 115 (to the extent that the Workers' Compensation subrogation statute, R.C. §4123.931, treats parties who settle differently from those who obtain a verdict, the statute is unconstitutional).

As a separate matter, §2323.41(B) provides that if a defendant elects to introduce evidence of any amounts payable as a collateral benefit to plaintiff, plaintiff may introduce evidence of "any amount that plaintiff has paid...to secure the plaintiff's rights to receive the benefits." Issues which will arise as a result of this Section include whether contributions by plaintiff's employer may be admitted into evidence and how many years worth of health care insurance premiums may be admitted.

IV. GOOD FAITH MOTION (§2323.42)

Although defendants have long had the summary judgment provisions of Rule 56 of the Ohio Rules of Civil Procedure as a mechanism by which meritless cases might be dismissed prior to trial, the Legislature, in its infinite wisdom, has now provided them with yet another tool. With Revised Code §2323.42, the defendant in a medical claim may now file a good faith motion to test the existence of a reasonable good faith basis upon which a claim is asserted. By the terms of the statute, defendants need not wait until plaintiff's claims have been defeated to file such a motion; they can do so at any time after the "close of discovery" but not later than 30 days after the Court or jury renders a verdict or award. Once such a motion is filed, responses are due in 14 days but extensions will be provided for good cause.

At the request of any party, the Court "shall" order an oral hearing. In determining whether the plaintiff has a good faith basis for pursuing the claim, the Court is required to consider the following:

- The facts of the claim;
- Whether plaintiff obtained a timely review from a qualified expert;
- Whether plaintiff reasonably relied upon the results of that review;
- Whether plaintiff had an opportunity to conduct a pre-suit investigation;
- Whether plaintiff was awarded full discovery by defendant;
- Whether plaintiff reasonably relied on the evidence discovered in litigation; and
- Whether plaintiff took appropriate and timely steps to dismiss any defendant where no reasonable good faith basis exists to continue a claim.

In point of fact, most of these articulated factors are irrelevant to the larger issue of whether the plaintiff has a reasonable good faith basis upon which to assert a claim. Indeed, most of the enumerated inquires would appear to be calculated to do little more than interfere with an attorney's ability to protect his work product. See Hickman v. Taylor (1947), 329 U.S. 496.

Although such a motion may be filed after a defense verdict, it can also be filed before trial. If filed before trial, inquiries into the means by which Plaintiff's counsel has worked up his case would seem to be particularly likely to interfere with his ability to protect his work product. Further, when filed prior to trial, it is difficult to see how a standard more strenuous then that contained in Rule 56 of the Ohio Rules of Civil Procedure could be employed. In this regard, it should be argued that such a motion must fail unless (1) no genuine issue of material fact remains to be litigated; (2) it appears from the evidence that reasonable minds can reach but one conclusion and that conclusion is adverse to the non-moving party; and (3) the moving party is entitled to judgment as a matter of law. See Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317. Further, if summary judgment requires that the evidence be reviewed in a light most favorable to the non-moving party, can any less be expected in a bad faith motion? See Turner v. Turner (1993), 67 Ohio St. 3d 337. Lastly, it should be insufficient for a defendant simply to allege "bad faith." Courts should be admonished to require defendants to "specifically delineate the basis upon which bad faith is asserted." See, Mitseff v. Wheeler (1988), 38 Ohio St. 3d 112.

Invariably, the issue will arise when such a motion is made by defendants as to whether the defense may use a bad faith motion as a substitute for a motion for summary judgment.

Challenges to any proceedings under this statute should consider the following issues:

- Does the statute interfere with or is it in conflict with Rule 11 which provides for sanctions for willful conduct only?
- Does the statute interfere with or conflict with Rule 56 providing a mechanism for summary judgment?
- To the extent that the statute interferes with either Rule 56 or Rule 11, both of which were promulgated pursuant to Section 5(B) Article IV of the Ohio Constitution, is it invalid and enforceable? See Rockey v. 84 Lumber (1993), 66 Ohio St. 3d 221.
- Does the Legislature's attempt to regulate the litigation process as manifested in passage of §2323.42 interfere with the separation of powers doctrine as set forth in Article II, Section 32 of the Ohio Constitution? See State, ex. rel. Ohio Academy of Trial Attorneys v. Sheward, supra.
- Additionally, this Section would seem to raise issues under other constitutional provisions including right to a remedy (Constitution, Article I, Section 16) and trial by jury (Constitution, Article I, Section 5).

V. DAMAGES CAPS (§2323.43)

§2323.43 of Senate Bill 281 is the Damages Cap Section. Although it provides in §2323.43(A)(1) that "there shall not be any limitation on compensatory damages that represent the economic loss of a person" in a medical claim, draconian limitations are placed on non-economic damages. Economic loss is defined by §2323.43(H)(1)

to include wages, salaries, other compensation, expenditures for medical care or treatment, rehabilitation services or other care, treatment, services, products or accommodations and any other expenditures incurred as a result of "injury, death or loss to person or property." Non-economic losses are defined by §2323.43(H)(3) to mean "nonpecuniary harm ... including, but not limited to pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss."

Two different tiers of cases are created by the statute for which two different levels of compensation for non-economic damages are set forth. For first tier cases, non-economic damages may not exceed $250,000.00 or an amount that is equal to three times the plaintiff's economic loss, but not to exceed $350,000.00 per plaintiff with a maximum of $500,000.00 per occurrence. "Occurrence" is not defined by the statute.

Second tier cases have a higher cap. Such cases are defined by the act to include those where there has been one of the following:

- A permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; or (§2323.43(A)(3)(a)).

- A permanent physical functional injury that permanently prevents the injured person from being able to independently care for himself and perform life sustaining activities. (§2323.43(A)(3)(b)).

In second tier cases, the economic damages may not exceed $500,000.00 for each plaintiff or $1 Million for each occurrence. A multitude of questions remain to be answered by the courts as to what injuries constitute a "substantial physical deformity" or a "loss of bodily organ system." These issues will often be addressed before trial inasmuch as §2323.43(C)(2) provides that, prior to trial, any party may seek summary judgment with respect to whether the alleged injury is a tier one or a tier two loss.

Under §2323.43(B), the jury is required to return a general verdict accompanied by answers to interrogatories that specify (1) the total compensatory damages recoverable; (2) the portion of the total that represents damages for economic loss; and (3) the portion of the total that represents damages for non-economic loss. §2323.43(D)(1) purports to deprive the Court of Common Pleas of jurisdiction to enter judgment on an award of compensatory damages for non-economic loss in excess of these limits.

This statute, at §2323.43(D)(2), specifically provides that if the case is tried to a jury, the court shall not instruct the jury with respect to the limits on compensatory damages for non-economic loss. Furthermore, counsel is prohibited by the statute from informing the jury in this regard as well.

In apparent acknowledgment of Article I, Section 19(a) of the Ohio Constitution prohibiting limitations on damages in wrongful death cases, the statute does not apply these damage caps to wrongful death cases. See §2323.43(G). Also exempted from these caps are medical claims brought against a state, college or university which, by virtue of Ohio Revised Code §3345.40(B)(3), are already limited to a $250,000.00 cap on damages "that do not represent the actual loss" of the plaintiff. Likewise exempted from the caps are medical claims brought against political subdivisions of this State which, by virtue of §2744.05(C) are already limited to a $250,000.00 cap on damages that "do not represent the actual loss" of the plaintiff.

Obvious and significant questions remain regarding the constitutionality of these damage cap provisions. In 1975, the Ohio Medical Malpractice Act was passed as Am. Sub. H.B. 682. The Bill as passed placed a $200,000.00 cap on "general" or non-economic damages. The Supreme Court struck down that provision in Morris v. Savoy (1991), 61 Ohio St. 3d 684 as unconstitutional on due process grounds. Thereafter, in September of 1996, Am. Sub. H.B. 350 was passed. Although it acknowledged the holding of the Court in Morris v. Savoy, the Legislature nevertheless enacted R.C. §2323.54 which capped non-economic damages at $250,000.00 or three times economic loss to a maximum of $500,000.00. The Legislation also had a second tier or category of case involving "permanent and substantial physical deformity, loss of limb or loss of bodily organ system" or "permanent physical function injury that permanently prevents the injured person from being able to independently care for [himself]" for which the cap was set at the greater of $1 Million or $35,000.00 times the number of years of remaining life expectancy. The Supreme Court in State ex. rel. OATL v. Sheward (1999), 86 Ohio St. 3d 451, had no trouble finding these caps unconstitutional the second time around on due process grounds. What is more, the Legislature's actions, by seeking to impose its view of constitutional

doctrine on the Supreme Court, raised a serious separation of powers issue.

"This struggle, waged by powerful and capable interests on both sides of the issue, has created turbulence among our coordinate branches of government. While the General Assembly and former Governor Voinovich have clearly expressed their commitment to revamp the civil justice system, this Court has struck down significant components of these legislative measures as having gone too far, to the point of violating the constitutional rights of our citizens. Nevertheless, each has endeavored to comport with the principle of separation of powers and respect the integrity and independence of the other, that is, until now.

Am. Sub. H.B. 350 is the latest effort at civil justice reform and, to be sure, the most comprehensive and multifarious legislative measure thus far. More important, it changes the complexion of the reform debate into a challenge to the judiciary as a coordinate branch of government. It marks the first time in modern history that the General Assembly has openly challenged this Court's authority to prescribe rules governing the Courts of Ohio and to render definitive interpretations of the Ohio Constitution binding upon the other branches." Id. at 457-458.

Thus, what was initially an analysis and debate of the cap provisions based on substantiative due process principals requiring an analysis of whether the legislation bears a real and substantial relationship to public health or welfare and whether it is unreasonable and arbitrary has been transformed by the Legislature's frontal attack into a question regarding the respective roles of the Legislature and the Supreme Court in the constitutional functioning of our State Government. Any challenge to this cap provision, if it is to succeed, must not lose site of this larger issue.

VI. PERIODIC PAYMENTS (§2323.55)

§2323.55 of S.B. 281 provides a mechanism to require periodic payments of future damages, both economic and non-economic. §2323.55(B) provides that, upon motion by any party, the trier of fact will return a general verdict accompanied by answers to interrogatories specifying (1) the past damages recoverable by the plaintiff and (2) the future damages recoverable by the plaintiff.

§2323.55(C) provides that if the future damages exceed $50,000.00, any party may file a motion for periodic payments prior to the entry of judgment. Upon the filing of such a motion, the Court "shall" set a date for a hearing to determine if periodic payments will be ordered. (§2323.55(D)). At the hearing, the Court shall consider the following factors in deciding whether periodic payments will be ordered:

- The purposes for which the future damages were awarded;
- The business or occupational experience of plaintiff;
- The age of plaintiff;
- The physical and mental condition of plaintiff;
- Whether plaintiff or a parent, guardian or custodian is able to competently manage the future damages; and
- Any other circumstances that relate to whether the injury would be better compensated by the payment of the future damages in a lump sum or by a series of periodic payments.

See §2323.55(D)(2).

Based on the facts addressed at the hearing the Court is directed to determine, at its discretion, whether all or any part of the future damages in excess of $50,000.00 will be received by periodic payments. Significantly, the Court is directed to require interest on the judgment in accordance with Ohio Revised Code §1343.03 which sets a statutory rate of 10% per annum.[3] See §2323.55(G)(1). The Court is required to provide adequate security to ensure that the plaintiff will in fact receive the payments. Notably, division (I) provides that if the plaintiff dies prior to receipt of all future damages, the liability shall continue payable to the heirs of the plaintiff.

The Supreme Court of Ohio has previously addressed the constitutionality of periodic payment provisions for future damages in Galayda v. Lake Hospitals Systems, Inc. (1994), 71 Ohio St. 3d 421. There, the Court found former Ohio Revised Code §2323.57 providing for periodic payments of future damages in excess of $200,000.00 to be unconstitutional as violative of the right to a jury trial clause of the Ohio Constitution (Section 5, Article I) and the due process clause of the Ohio Constitution (Section 16, Article I).

In its analysis of the right to jury trial issue, the Galayda

Court pointed out a number of defects in former O.R.C. §2323.57 including:

- The absence of any discretion on the part of the judge;
- A provision in that law which mandated that "the total amount paid ... shall not exceed the amount of the judgment."[4]
- A provision which mandated that certain periodic payments would cease if the plaintiff were to die prior to the receipt of those payments.

All of the above-referenced defects appear to have been addressed by the Legislature in §2323.55 of S.B. 281. In this regard, the Court is given discretion to order periodic payments or not order them; provision is made for interest on the judgment at 10% per year; and provision is made for payments to continue even after the death of the plaintiff.

Notwithstanding these attempts at modification, §2323.55 remains vulnerable to constitutional challenge. On Right to Trial by Jury grounds, §2323.55 still forces a successful plaintiff to forgo the present enjoyment of his jury award without his consent. Moreover, on due process and equal protection grounds, it is unclear how a future payments provision which does not reduce the value of the plaintiff's award in any fashion addresses the Legislature's professed intention with this Legislation of "stabilizing the cost of health care delivery" in Ohio. See Section 3(A)(3), S.B. 281. As such, the argument still stands, as it did in Galayda, that there is no rational connection between the periodic payment plans and medical malpractice insurance rates.

VII. EFFECTIVE DATE (S.B. 281, Section 6)

Section 6(A) of S.B. 281 specifically provides that its provisions "apply to civil actions upon a medical claim, dental claim, optometric claim, or chiropractic claim in which the act or omission that constitutes the alleged basis of the claim occurs on or after the effective date of this act." Thus, unlike H.B. 350 which purported to apply to all claims filed after its effective date, this Bill will only apply to those negligent acts which occurred after the effective date of the statute which is April 11, 2003. By virtue of this language, the date of the filing of a civil action is irrelevant in determining whether S.B. 281 applies to a particular claim.

End Notes

[1]See Section VII, infra, for a brief discussion regarding those cases which will be effected by this Bill after its effective date.

[2]§2323.41 reads as follows:

> (A) In any civil action upon a medical, dental, optometric, or chiropractic claim, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim, except if the source of collateral benefits has a mandatory self-effectuating Federal Right of Subrogation, a contractual right of subrogation, or a statutory right of subrogation.
>
> (B) If the defendant elects to introduce evidence described in division (A) of this Section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.
>
> (C) A source of collateral benefits of which evidence is introduced pursuant to division (A) of this Section shall not recovery any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

[3]In a practical sense, this 10% requirement may well prevent this periodic payment section from being used when interest rates at that rate are unavailable in the market.

[4]This was held to effectively reduce the amount of the award without the plaintiff's consent.

Joint and Several; Comparative Negligence; and Product Liability

by Kenneth J. Knabe

I. EFFECTIVE DATE

Am.Sub.S.B.120 is not retroactive and only applies to tort causes of action that occur on or after April 9, 2003. S.B. 120 drastically changes Ohio law and may conflict with the Open Court's provision of Section 16, Article 1 of the Ohio Constitution.[1]

II. JOINT AND SEVERAL LIABILITY (§§2307.22-23)

Joint and several liability means that two or more joint tortfeasors are both responsible for plaintiff's **entire** damages and plaintiff can choose to pursue either one or both. Newly enacted §2307.22-23 now restricts and eliminates **joint and several liability**. These restrictions apply even if the plaintiff is negligent free.[2]

Under this new law, joint and several liability never exists for **non-economic loss.** Non-economic loss is defined in §2307.011(F). When one defendant is **more than 50% negligent**, that defendant is jointly and severally liable only for compensatory damages that constitute **economic loss**. Economic loss is defined in §2307.011(C).

A defendant **50% or less** responsible for the injury is only liable for **that defendant's proportionate share of the compensatory damages** representing **economic** and **non-economic loss**. An exception exists when a defendant commits an **intentional tort** (intentional tort is defined in §2307.011(D) to exclude employer intentional torts). Then, joint and several liability exists for the compensatory damages representing **economic** loss even if that defendant's proportionate share is less than 51%.

Finally, the jury can now **attribute a portion of fault to a non-party**. Non-parties are defined in §2307.011(H). Prior to S.B. 120, a jury could only apportion a percentage of negligence among the parties to a lawsuit. *Eberly v. A-P Controls, Inc.* (1991), 61 Ohio St.3d 27.

Some examples illustrate this new law: Defendant A is 55% negligent and Defendant B is 45% negligent; Defendant A is liable for 100% of the economic loss and 55% of its proportionate share of the non-economic loss; Defendant B is liable only for its 45% proportionate share of the economic and non-economic damages.

Harsh results will occur. If in the same example, Defendant A was a "non-party", then a negligent free plaintiff would only recover 45% of his or her non-economic and economic damages against Defendant B. Plaintiff would lose 55% of the award since that fault was attributable to a non-party. This new law erodes a century of Ohio jurisprudence by punishing the negligent free plaintiff and awarding a Defendant who is at fault but no longer jointly and severally liable.

III. CONTRIBUTORY FAULT (§§2315.32-36)

S.B. 120 also repeals former §2315.19, Ohio's comparative negligence statute. S.B. 120 newly enacts §§2315.32-2315.36, which permit the affirmative defense of plaintiff's **contributory fault** in a **negligence** or tort claim (*See* §2315.32(A)); reduce plaintiff's recovery by a percentage of liability attributable to a non-party; may permit the defense of plaintiff's contributory fault in employer intentional tort claims; and **do not apply to product liability claims**. Product liability claims are addressed in newly enacted §§2315.41-2315.46, which will be discussed *infra*.

Now, in a **negligence** claim, plaintiffs will be assessed a percentage of "**contributory fault**" as defined in §2307.011(B). **Contributory fault** includes plaintiff's contributory negligence, other contributory tortious conduct, comparative negligence, or express or implied assumption of the risk.[3]

Section 2315.33 provides that if plaintiff's contributory fault is not greater than the combined tortious conduct of all other parties and non-parties, then plaintiff can recover. Thus, Ohio is still a **modified comparative negligence** state. If the plaintiff is 51% at fault or higher, the plaintiff loses. If the plaintiff is 50% or lower at fault, the plaintiff's damages are reduced by the plaintiff's percentage of negligence, just as it was under prior Ohio law. However, **a jury can now attribute a portion of the fault to a non-party**. Prior to S.B. 120, the jury could only apportion negligence among parties to a lawsuit. *Eberly v. A-P Controls, Inc.*, *supra*.

Plaintiff's contributory fault may **not** be asserted in an intentional tort claim. However, the definition of an intentional tort claim in §2307.011(D) excludes employer intentional torts.[4]

Note that the new joint and several liability restrictions apply to a negligent plaintiff who is recovering against **more than one party**. *See* §2315.36. Plaintiffs should argue that if the plaintiff recovers against one party and a "non-party," then the new restrictions are inapplicable and joint and several liability exists. For example, if Defendant A is 50% at fault; a non-party is 25% at fault; and the plaintiff is 25% at fault: plaintiffs should argue that Defendant A is jointly and severally liability because plaintiff is **not** entitled to recover compensatory damages **from more than one party**. *See* §2315.36.

IV. PRODUCT LIABILITY (§§2315.42-43)

Express or implied assumption of the risk may be asserted as a complete bar to a product liability claim. *See* §2315.42. Under §2315.43, comparative negligence is also a defense to a statutory product liability claim under §2367.71 et seq., contrary to existing Ohio law.[5]

V. CONTRIBUTION (§§2307.25-28)

These sections provide a credit for defendants for all sums already recovered by the plaintiff by way of settlement or covenants not to sue except when it would result in the plaintiff receiving less than the total amount of compensatory damages. The released defendant has no liability for contribution.

VI. SUGGESTIONS[6]

- Challenge the constitutionality of this statute from the beginning of the suit.
- Sue everyone in sight - otherwise, the jury may award a percentage of negligence to a non-party.
- File early and discover the identity of all non-parties that defendant alleges is at fault within the statute of limitations; you can then add them to the lawsuit.
- Sue several John Does within the statute of limitations. Remember to personally serve your John Doe Defendants within the time frame set forth in the Civil Rules.
- Discovery, discovery, discovery - Ask the defendant(s) to identify by name all liable non-parties and identify the act(s) of negligence attributable to those non-parties.
- Maximize recovery - Break down and request recovery on each element of **economic damages** (§2307.011(C)) and **non-economic damages** (§2307.011(F)). Remember the non-economic elements in *Fantozzi v. Sandusky Cement* (1992), 64 Ohio St. 3d 601, i.e., loss of enjoyment of life and basic activities, which are missing from the statutory definition in §2307.011(F).
- At trial, request the Court to assess at least a directed verdict standard for all liable named non-parties.

End Notes

[1] *See also* H.B. 350 and joint and several liability, Dennis Lansdowne, Bernard Friedman Seminar, Cleveland Academy of Trial Attorneys, February 27, 1997.

[2] Under O.R.C. 2315.19 (repealed by S.B. 120), a negligent free plaintiff could recover on a joint and several basis.

[3] Note that under existing Ohio law, **implied assumption of the risk** merged into comparative negligence. *See* §2315.19 (repealed) and *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 114. However, **express assumption of the risk** is now merged into comparative negligence by its inclusion in the definition of contributory fault. Express assumption of the risk occurs when the plaintiff expressly agrees or contracts not to sue for any future injuries which might be caused by defendant's negligence. *Id*. Express assumption of the risk was a full and complete defense if (1) the waiver was knowingly and voluntarily entered, (2) the alleged tortious conduct fell within the terms of the agreement, and (3) the agreement was not void against public policy. If the defendant can establish these three elements, a jury can now assess a percentage of express assumption of the risk. Thus, although bizarre, it appears a plaintiff can partially waive the right to sue.

[4] Thus, defendant employers may now assert plaintiff's contributory fault as a defense in an employer intentional tort claim. However, any statute that abrogates the common law must be strictly construed and the language must clearly show that intent. *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284. Plaintiffs should argue that §2315.32(B) never affirmatively provides that plaintiff's contributory fault applies in an employer intentional tort claim. It only applies by the exception to the exception. Thus, absent express statements that plaintiff's contributory fault is a defense to an employer intentional tort claim, the common law applies precluding this defense.

[5] A Defendant can raise these defenses or the newly-enacted non-party liability defense anytime before trial, rather than in a responsive pleading. Plaintiffs should argue that this impermissibly conflicts with controlling Ohio Civil Rule 12, which requires all defenses must be raised in a responsive pleading or motion. See Civ. R. 12; Civ. R. 8; *Rockey v. 84 Lumber Co.* (1963), 66 Ohio St.3d 221.

[6] Collaboration of different ideas of Richard Alkire, Robert Linton, Kenneth Knabe, and Dennis Lansdowne.

Political Subdivision Liability

by Mark E. Barbour

Senate Bill 106 ("S.B. 106"), effective April 9, 2003, provides several changes in the political subdivision sovereign immunity law of Ohio. The bill effects Sections 723.01, 1533.18, 2744.01-.07, 4582.27, 5511.01, 5591.36, and 5591.37 of the Ohio Revised Code.

Section 723.01 of the Revised Code is changed significantly. The legislation provides that municipal corporations shall have care, supervision and control of the highways, streets and avenues and the like within the municipal corporation. However, a municipal corporation is no longer required by that statute to cause these to be kept open, in repair and free from nuisance. The "open, in repair and free from nuisance" language is struck from the statute. The new statute goes on to provide that the liability or immunity from liability of a municipal corporation shall be determined pursuant to Divisions (A) and (B)(3) of Sections 2744.02 of the Revised Code. This provision seems to eliminate a separate cause of action under Section 723.01 against a municipal corporation for a roadway related claim.

Section 1533.18, the "recreational user" statute, is amended to include the operation of a snowmobile or all purpose vehicle in the statute. Prior case law had created an exception, because these types of vehicles were not mentioned in the statue.

Section 2744.01-.07 also received significant changes. Section 2744.01(B)(2) has been amended to include the design, construction, reconstruction, renovation, repair, maintenance and operation of any school athletic facilities, school auditorium, or gymnasium or any recreational area or facility and lists several examples. These endeavors are now classified as governmental functions. R.C. 2744.02 provides that political subdivisions are immune for negligence arising out of governmental functions except for those enumerated in the statute. Section 2744.01 is also amended to add the designation, establishment, design, construction, implementation, operation, repair or maintenance of a public road rail crossing in a "quiet" zone as a governmental function subject to immunity.

Section 2744.01(H) is changed. This section concerns the definition of "public roads." "Public roads" means public roads, highways, streets, avenues, highways and bridges within a political subdivision. However, "public roads" does not include berms, shoulders, rights of way or traffic control devices unless the traffic control devices are mandated by the Ohio Manual of Uniform Traffic Control Devices.

This is a very significant change. For example, in the case of *Manufacturers National Bank of Detroit v. Erie County Road Commissioners* (1992), 63 Ohio St.3d 318, the Ohio Supreme Court held that the political subdivision's duty extends to conditions in the right of way that directly effect the highway safety for the regular and ordinary course of traffic.

The "new" duty concerning "public roads" does not extend to berms, shoulders, or right of ways or even traffic control devices unless mandated.

Section 2744.02 is also changed. The political subdivision is now responsible for the negligent operation of any motor vehicle by their employees when engaged in the course and scope of their employment. The requirement that the motor vehicle be operating upon public roads, highways or streets is removed from Section 2744.02(B)(1).

In probably the most important change, Section 2744.02(B)(3) has reduced the liability of political subdivisions concerning the maintenance of their roadways. The new statute now reads "political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads in repair or other negligent failure to remove obstructions from public roads (except certain circumstances involving bridges)."[1] The new statute removes highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts or public grounds within the political subdivision from the statute. It also removes the requirement that these be kept open, in repair and free from nuisance, which will probably be the most detrimental to claims against political subdivisions concerning roadway accidents. For example, in the case of *Harp v. City of Cleveland Heights* (2000), 87 Ohio St.3d 506, the Ohio Supreme Court upheld a decision that conditions external to the roadway could create a danger to the traveling public on the highway and therefore constituted a nuisance. In the *Harp* case, a limb from a tree fell on the roadway. The Ohio Supreme Court held that such a condition could create a nuisance and that the political subdivision had a responsibility to keep the roadways "free from nuisance."

Further, with the change in the definition of "public roads" to exclude berms and right of ways, such conditions as an edge drop or problems with a berm may no

longer constitute a nuisance, as the political subdivision is now only responsible for their negligent failure to keep the "public roads" in repair and other negligent failure to remove obstructions from public roads.

Section 2744.02(B)(4) also has a very significant change. The new statute provides that political subdivisions are liable for injuries, death and loss to persons or property that are caused by the negligence of their employees and that occur within or on the grounds of and is due to physical defects within or on the grounds of buildings that are used in connection with the performance of a governmental function, with some exception. The new statute adds the language "and is due to physical defects within or on the grounds of" buildings. The prior statute only required that the negligence occur within or on the grounds of buildings. The statute does not define "physical defect," and this would seem to be an area that will be the subject of much litigation.

Section 2744.02 also specifies that civil liability can be found if expressly imposed upon the political subdivision by another section of the Revised Code. But civil liability shall not be construed to exist under another section "because that section imposes a responsibility or mandatory duty upon a political subdivision or because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to a political subdivision." With these statutory changes, it now seems very difficult to establish liability against the political subdivision unless (1) liability can be found under R.C. 2744.02, or (2) civil liability, as opposed to a mandatory duty, is expressly imposed by another section of the Revised Code.

Another new section, Section 2744.02(C), now provides that an order that denies a political subdivision or an employee of a political subdivision the benefit of immunity from liability under 2744 or any other provision of the law is a final appealable order.

Concerning the statute of limitations, Section 2744.04 provides that the statute of limitations will be two years after the cause of the action arises; however, the period of limitations contained in this division shall be tolled pursuant to Section 2305.16 of the Revised Code. The statute also states that a shorter statute of limitations would apply if available under the Revised Code.

Regarding set-offs, Section 2744.05 is amended to include new language. The new language provides that the amount of the benefits received by a plaintiff from a policy or policies of insurance or any other source shall be deducted from an award against the political subdivision regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery. The claimant whose benefits have been deducted from an award is not considered "fully compensated" and shall not be required to reimburse a subrogated claim for benefits deducted from such an award. However, there is an exception to medical assistance benefits provided under Chapters 5107, 5111, and/or 5115 of the Revised Code by the Department of Job and Family Services. Therefore, for example, Medicaid can recover in a political subdivision claim even though a set-off would be made. Regarding Medicare, the new statute is silent as to whether those benefits have to be paid back. However, federal law, which typically preempts state law, generally requires reimbursement.

Section 2744.07 provides that a political subdivision has a duty to defend its employee if the act or omission occurred while the employee was acting both (1) in good faith, and (2) not manifestly outside the scope of employment or official responsibilities. However, if a political subdivision refuses to provide an employee with a defense in a civil action as described under the statute, the employee is no longer permitted to file an action seeking a determination as to the appropriateness of that refusal. Now, only the political subdivision can move the court for an order determining the appropriateness of its refusal to provide a defense. Only upon a determination by the trial court that the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibility will there result an obligation for the political subdivision to defend that employee.

Section 4582.27 is amended as well. This section concerns the board of directors of a port authority. It provides that their immunity shall flow from Section 2744.

Section 5511.01 is also amended concerning state highways and again emphasizes that municipalities are liable under 2744.02 and no longer liable under Section 723.01.

Section 5591.36 concerns the duties of the Board of County Commissioners regarding county roads and changes the requirements of guardrails at the end of each county bridge, viaduct or culvert more than five feet high.

Another very important change is contained in Section 5591.37. This section now changes the failure to comply with the guardrail requirements described above from a strict liability standard to a negligence standard.

Lastly, Section 3 of S.B. 106 provides that these changes "apply only to causes of action that accrue on or after the effective date of this act. Any cause of action that accrues prior to the effective date of this act is governed by the law in effect when the cause of action accrued." Therefore, the changes are not retroactive.

End Note

[1]The former law, imposing liability on a political subdivision for failing to keep public roads, highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the political subdivision open, in repair and free from nuisance is repealed. The new statute, which is more limited, provides liability for injury, death or loss to person or property caused by a negligent failure to keep "public roads" (defined to mean public roads, highways, streets, avenues, alleys and bridges) within the political subdivision in repair and for the negligent failure to remove obstructions from such "public roads." *See* R.C. 2744.01(H), 2744.02(B)(3) and 5511.01.

Workers' Compensation Subrogation

by Ellen McCarthy

In a continuing effort to diminish the recovery received by the injured worker from a negligent third party, and to needlessly complicate things, the state legislature has enacted Revised Code Sections 4123.93 and 4123.931, the **Workers' Compensation Subrogation Statute.** This statute creates a right of recovery for the "statutory subrogee" ("SS") — the administrator of workers' compensation, the self-insuring employer or an employer that contracts for the direct payment of medical services pursuant to §4121.44(L) — against a third party for payment of compensation or benefits, including negligence claims, uninsured/underinsured motorists coverage and, most dubiously, intentional torts and amounts recovered from political subdivisions.

The statute sets forth two formulas: one by which the amount recoverable by the SS is to be calculated, and the other by which the claimant's recovery is calculated. Where there is a **settlement**, the claimant shall receive an amount equal to the "uncompensated damages" ("UD") divided by the sum of the subrogation interest ("SI") plus the uncompensated damages, multiplied by the net amount recovered ("NAR"). [i.e., UD/(SI + UD) x NAR]. The statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered. [i.e., SI/(SI + UD) x NAR]. These formulas apply to both settlements (R.C. 4123.931(B)) and also to cases that proceed to trial (R.C. 4123.931(D)).

The **subrogation interest**, or SI, is defined to include "past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs of expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or chapter 4121, 4127, or 4131 of the Revised Code." The **net amount recovered**, or NAR, is defined as "the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery." Punitive damages are expressly excluded from the definition of "net amount recovered." Finally, **uncompensated damages**, or UD, is defined as "the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest."

The following example illustrates how this new statutory scheme might operate. Plaintiff is injured in an automobile accident with his own auto while on the job. The tortfeasor is uninsured, and plaintiff has a 100/300 UM policy with no *Scott-Pontzer* potential. He sustains a severe ankle fracture requiring plates and screws, the estimated value of which is $350,000.00. The Bureau has paid $30,000.00 on your client's behalf with no estimated future costs. You have a 1/3 contract plus case expenses. The UM carrier tenders the $100,000.00 (there is no med pay available under your client's policy). The statute requires the following machinations:

- Notify the SS **and** the Attorney General (unless the subrogee is self insured) of all third parties against whom there is a right of recovery, as no settlement or judgment is final unless the SS and the AG have been given prior notice and an op portunity to protect their subrogation rights. In the absence of notice, the claimant and the third party are jointly and severally liable to the SS for the full amount of the subrogation interest.

- Calculate the recovery as follows:

Proposed settlement:	$100,000
Less attorney fees/expenses	35,000
Net Amount Recovered:	**$ 65,000**

Uncompensated Damages:
[i.e., proven damages minus SI]
Here, *assume* proven damages of $350,000 minus the $30,000 paid by the statutory subrogee $320,000

Claimants Recovery:
[UD/(SI + UD) x NAR]
[$320,000/($30,000 + $320,000)
x $65,000 = $59,429

Statutory Subrogee's Recovery:
[SI/(SI + UD) x NAR]
[$30,000/($30,000 + $320,000)
x $65,000 = $5,571

The obvious problem with the statute, which will hinder settlements, is agreeing to the uncompensated damages, or the value of the case.

If, while attempting to settle, the claimant and statutory subrogee cannot agree to the allocation of the net amount recovered, the Act permits the claimant and statutory subrogee to file a request with the Administrator of workers' compensation for a conference to be conducted by a designee appointed by the Administrator, or the claimant and the SS may agree to utilize any other binding or non-binding alternative dispute resolution process. In the event that the dispute is attempted to be resolved in this manner:

- The SS and the claimant are responsible for equal shares of the cost of ADR, unless they agree to pay those fees and expenses in another manner.

- The Administrator of workers' compensation cannot assess fees against the claimant or the SS for the conference. (R.C. 4123.931(B)).

- A conference with the administrator must be scheduled within sixty days (60) of the request, but the procedure for administrative hearings does not apply. (R.C. 4123.931(C)).

As noted above, the statutory formulas applicable to settlements likewise apply to cases that proceed to trial and result in a judgment. (R.C. 4123.931(D)). Thus, where there is a **judgment**, the claimaint shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered. [i.e., UD/(SI + UD) x NAR]. The statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered. [i.e., SI/(SI + UD) x NAR].

Under the new statute, when an action proceeds to trial, **the finder of fact must specify the:**

1. Total amount of compensatory damages;

2. Portion of compensatory damages that represent economic loss; and

3. Portion of compensatory damages that represent noneconomic loss.

By way of example, suppose you try an ankle fracture case in Medina County. The jury returns an award of $60,000.00, half of which is designated as ecomonic loss, and the other half is designated as noneconomic loss. Thus, assume that the statutory subrogee has paid $30,000 in benefits.

Calculate the recovery as follows:

Verdict:	$ 60,000
Less attorney fees/case exp.	27,000
Net Amount Recovered:	**$ 33,000**
Uncompensated Damages: [i.e., proven damages minus SI] $60,000 minus the $30,000 paid by the statutory subrogee	$30,000
Claimants Recovery: [UD/(SI + UD) x NAR] [$30,000/($30,000 + $30,000) x $33,000 =	$16,500
Statutory Subrogee's Recovery: [SI/(SI + UD) x NAR] [$30,000/($30,000 + $30,000) x $33,000 =	$16,500

Where **estimated future payments** are involved, the claimant has two options: (1) create an interest bearing trust account and reimburse the SS every six months for payments made, or (2) pay the statutory subrogee, on or before 30 days after receipt of the funds from a third party, the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits. (*See* R.C. 4123.931(F)).

Where the claimant establishes an interest bearing trust account, it must be for the full amount of the subrogation interest that represents estimated future payments of compensation, reduced to present value, from which the claimant shall make reimbursement payments to the SS for the future payments of compensation. Anything remaining in the account after the SS's obligation to make further benefit payments has ended (settlement, death of claimant, etc.) goes to the claimant or his estate. The cost of creating and maintaining the account may be paid through interest from the account. The SS is required to send payment notices every six months (in June and December) setting forth amounts paid during the preceding six months. The claimant must then make reimbursement in full for those amounts with thirty (30) days, or by the end of July and end of January.

The legislature made the statute unnecessarily complicated and problems will arise regarding the valuation of damages in a settlement, or what constituted the uncompensated damages. Moreover, the new Act effectively makes useless the practice of joining the Bureau and abandoning it in trial by settling with the tortfeasor after the jury is sworn in.

Law Update

by Stephen T. Keefe, Jr.

and Mary A. Cavanaugh

Discovery - Disclosure of Documents Negligent Credentialing Claim

There have been several recent appellate decisions discussing and reiterating the scope of discovery in a negligent credentialing claim of documents for which a "peer review" privilege is asserted under the Peer Review Act, R.C. 2305.251, which merit review. The following is a brief summary of these recent decisions.

***Wilson v. Barnesville Hospital*, (2002), 151 Ohio App. 3d 55, 2002-Ohio-5186.**

In *Wilson*, the appellate court addressed a privilege argument that was asserted by the hospital based both on Ohio's Peer Review Act and the federal Health Care Quality Improvement Act ("HCQIA").

A patient brought an action against the hospital alleging negligence in credentialing the patient's treating physician. In the action, the hospital asserted a "peer review" privilege for the doctor's credentialing file, which the hospital described as containing the application for appointment and privileges, information gathered by the hospital to confirm the information contained in the application, information gathered during the course of the doctor's appointment relating to quality of care and professional ethics, and board decisions with respect to appointments and privileges. The plaintiff requested that the trial court conduct an in-camera inspection and, upon doing so, the trial court found the entire file to be discoverable.

The hospital asserted both a privilege under the Peer Review Act, R.C. 2305.251, and under the Health Care Quality Improvement Act, Section 11101 *et seq.*, Title

42, U.S. Code. The appellate court found that while the HCQIA protected those who take action in professional review committees which adversely affect a doctor's privileges, information provided to the national repository under the HCQIA remained confidential *unless state law permitted disclosure*. Therefore, the Court had to determine whether disclosure was permitted under the State Peer Review Act.

Applying R.C. 2305.251, the appellate court found that documents which were available from their original source were discoverable, whereas documents generated by the peer review committee were privileged from disclosure. Therefore, it was an abuse of discretion for the trial court to disclose the credentialing file in its entirety.

***Trangle v. Rojas* (Cuyahoga Cty. Nov. 27, 2002), 150 Ohio App. 3d 549, 2002-Ohio-6510.**

In this action for medical malpractice and negligent credentialing, the Eighth District Court of Appeals set forth guidelines for discovery of peer review documents relating to a negligent credentialing claim. In their Complaint, the plaintiffs alleged that the defendant physician negligently performed a cervical paraspinal nerve block which resulted in paralysis. The plaintiffs then sought discovery on a potential negligent credentialing claim when evidence came to light that the defendant physician had been convicted of drug trafficking. The hospital objected to the discovery requests on several grounds, particularly asserting the "peer review" privilege under R.C. 2305.24, 2305.25 and 2305.251.

The Court held that (1) any documents generated by the hospital for peer review purposes were statutorily privileged, but materials received by the committee that were available from their original sources were discoverable; (2) when a party attempts to prevent discovery of evidence by asserting the peer review privilege, the trial court must hold an in-camera inspection of information, documents, or records in question to determine admissibility; and (3) it is an abuse of discretion for a trial court to fail to conduct such an in-camera inspection.

***Johnson v. University Hospitals of Cleveland* (Cuyahoga Cty. Nov. 21, 2002), 150 Ohio App. 3d 256, 2002-Ohio-6338.**

In *Johnson*, the appellate court considered an assertion of peer review/quality assurance privilege against disclosure of hospital incident reports. In the underlying action, the plaintiff asserted a medical malpractice claim arising out of care provided to her mother, and sought disclosure of a incident report prepared by the hospital regarding a fall that occurred while the patient was being transported to the radiology department for a VQ scan to rule out a pulmonary embolism.

In the original appeal, the appellate court noted that incident reports such as the one in issue are often protected under R.C. 2305.24, 2305.25, and 2305.251. However, the privilege is not absolute and such reports may be discoverable to an extent if the events giving rise to the incident are not reported in the medical record. Having found that the trial court failed to determine whether the events documented in the incident report were included in the medical records, the appellate court initially reversed and remanded with instructions for the court to conduct an in-camera comparison of the medical records and the incident report. If the trial court were to determine that the events were not documented in the medical record, then only those portions of the incident report describing the events would be subject to disclosure.

The trial court then found that the incident was not properly described in the medical records and, therefore, ordered disclosure of the incident report. The hospital appealed the trial court's disclosure of the incident report.

On this second appeal, the appellate court clarified its decision in its earlier appeal (*See Johnson v. Univ Hosps. of Cleveland* (March 28, 2002), 2002 Ohio App. LEXIS 1428, Cuy. App. No. 80117, 2002-Ohio-1396, referred to as *Johnson I*). In order for an incident report to remain confidential, the events giving rise to the incident report must be included in the medical record. A trial court is to determine whether the events giving rise to the incident report were included in the medical record in the same fashion and manner that all clinical notations are made. As long as the events giving rise to an incident report are noted and included in the patient's medical record, an incident report governing them is not subject to disclosure.

Editor's Note: The foregoing cases were decided under the prior version of R.C. 2305.251. S.B. 179 (eff. 4/9/03) modifies the provisions of that law in some respects. The bill provides that proceedings and records within the scope of a peer review committee of a health care entity are to be held in confidence and are not subject to discovery or introduction in evidence in any civil action

against a health care entity or health care provider, including both individuals who provide health care and entities that provide health care, arising out of matters that are the subject of evaluation and review by the peer review committee. The bill further provides that an individual who attends a meeting of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee is not permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the peer review committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or a member thereof.

The bill provides that information, documents or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were produced or presented during proceedings of a peer review committee, as long as the information, documents or records are available only from the original sources and not from the peer review committee's proceedings or records. The bill also provides that an individual who testifies before a peer review committee, serves as a representative of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee cannot be prevented from testifying as to matters within the individual's knowledge, but the individual cannot be asked about the individual's testimony before the peer review committee, information the individual provided to the peer review committee, or any opinion the individual formed as a result of the peer review committee's activities. The bill further specifies that an order by a court to produce for discovery or for use at trial the proceedings or records described above is a final order. *See* R.C. 2305.252.

For a complete bill analysis of S.B.179 and the other new laws addressed in this edition of the CATA Newsletter, go to the Ohio Legislative Service Commission's website at http://www.lsc.state.oh.us

Insurance Law - Local Cases of Interest

***Nicholas Brozovic v. St. Paul Fire & Marine Ins. Co., et al.*, Cuy. App. No. 80868, 2003-Ohio-554.**

On May 12, 1998, Nicholas Brozovic was involved in a serious automobile collision. Brozovic was participating in a field trip as part of one of his classes at the University of Cincinnati, and was a passenger in a 1994 GMC Safari van operated by Walter Wyder, a classmate. The group was returning to the University of Cincinnati from Indiana when the accident occurred. Wyder was traveling eastbound on Interstate 74 in Whitewater Township when he fell asleep at the wheel. The Wyder van rear ended a semi, became caught under the trailer, and was dragged approximately 575 feet. When the driver of the semi realized that he had been hit, he stopped the truck; however, at that point, the van caught fire and Brozovic was trapped inside the vehicle, sustaining serious burns to his left leg and left arm, and other injuries including the loss of one eye, amputation of all the toes on his left foot, and other permanent scarring. His treatment included extensive skin grafts to the burned areas, and his medical expenses exceeded $227,000.00. The vehicle operated by Wyder was insured under a liability policy with limits of $100,000, which was tendered.

On the date of his accident, Brozovic's mother was an employee of United Way Services. United Way was insured under a commercial automobile policy issued by Transcontinental Insurance Company and an excess/ umbrella policy issued by American Alternative Insurance Corporation (AAIC). Brozovic presented claims to both carriers under *Scott-Pontzer*. The action originally included several other carriers as well, and damages were determined by stipulation of the parties. The trial court granted summary judgment in favor of Brozovic. Eventually, all claims were settled, with Transcontinental and American reserving the right to appeal the coverage decision as to their policies.

On appeal, the carriers raised the defenses of notice and subrogation and the presence of named individuals as insureds in a Drive Other Car endorsement in the policies. The Eighth District, citing the decisions in *Burkhart v. CNA Ins. Co.*, Stark App. No. 2001CA00265, 2002-Ohio-903 and *Kasson v. Goodman*, Lucas App. No. L-01-1432, 2002-Ohio-3022, held that the presence of additional insureds in the Drive Other Car endorsement does not eliminate the *Scott-Pontzer* ambiguity because the endorsement does not specifically address, limit or remove the definition of an "insured"

adopted in *Scott-Pontzer*. The Eighth District then concluded that notice and consent provisions from Transcontinental's policy were not ambiguous, but held that because Brozovic had not had time to conduct discovery under *Ferrando*, the matter must be reversed and remanded.

Subsequent to the appellate court's decision, Transcontinental filed a motion to certify a conflict on the issue of the Drive Other Car endorsement. On March 3, 2003, the Eighth District granted the motion to certify, finding that the same question had already been certified in *Westfield Ins. Co. v. Galatis*, 96 Ohio St.3d 1336, 2002-Ohio-260 and certified the following question to the Supreme Court:

> Whether the inclusion of a 'Broadened Coverage Endorsement' adding individual named insureds to a commercial motor vehicle liability policy, eliminates any ambiguity over the use of the term 'you' therein.

Editor's Note: The Eighth District has repeatedly held that the additional of insureds by way of a Broadened Coverage Endorsement does not rectify the ambiguity created by the word "you." Instead, the ambiguity found in *Scott-Pontzer* remains and the ambiguous "you" must still be deemed to include employees of the corporate entity identified as the "Named Insured." *See e.g. Sekula v. Hartford Ins. Co.*, Cuy. App. No. 81295, 2003-Ohio-1160; *Addie v. Linville*, Cuy. App. Nos. 80547 & 80916, 2002-Ohio-5333; *Warren v. Hartford Ins. Co.*, Cuy. App. No. 81139, 2002-Ohio-7067; *Mlecik v. Farmers Ins. of Columbus, Inc*., Cuy. App. No. 81110, 2002-Ohio-6222. (Additional citations omitted).

***Ricardo DiMalanta v. Travelers Insurance Company*, Cuy. App. No. 81445, 2003-Ohio-562.**

On January 16, 1997, Ricardo DiMalanta was driving westbound on Sprague Road in the City of Parma, Ohio when a vehicle operated by John Wojcik went left of center, causing a head-on collision. DiMalanta sustained serious injuries including the loss of vision in his left eye (retinal hole and vitreous detachment), a fractured right ankle, multiple rib fractures, leg contusions, a separated left shoulder, a clavicle contusion, bilateral eye contusions and a laceration above the right eye.

The Wojcik vehicle was covered by a State Farm liability policy with liability limits of $100,000, which was tendered to DiMalanta. The release was signed on December 10, 1997.

At the time of this accident, DiMalanta was employed by Eveready Battery/Ralston Purina as a Staff Quality Assurance Engineer. Eveready/ Ralston was insured by Travelers Insurance Company under a Business Auto Policy containing $1,000,000 in liability coverage and an alleged rejection of UM/UIM coverage for Ohio. There was also a CGL policy. DiMalanta presented a claim to Travelers insured, Ralston Purina, on February 14, 2000, which Travelers denied. A declaratory judgment action followed.

In the trial court, Travelers raised defenses including 1) DiMalanta was no longer legally entitled to recover from the tortfeasor; 2) he destroyed Travelers' subrogation rights; 3) he was not entitled to recover because the statute of limitations against the tortfeasor has expired; and 4) there was no recovery under the commercial general liability policy because it does not insure automobiles. Both sides filed dispositive motions, and the trial court held that DiMalanta's failure to provide notice and obtain Travelers' consent to the settlement with the tortfeasor was prejudicial *per se*.

On appeal, Travelers raised several new arguments, including a choice of law issue, and a covered auto argument. Travelers had raised a 'covered auto' argument in the trial court, but with respect to the CGL policy only. On appeal, it attempted to raise that defense with regard to the Business Auto Policy. The Eighth District stated that it would not consider the choice of law arguments nor the 'covered auto' argument as they were not raised below, but were raised for the first time on appeal. With regard to the 'legally entitled to recover' argument, the court stated that the defense was inapplicable because all that DiMalanta had to prove were those elements of his claim against the tortfeasor. The Court cited *Martin v. Liberty Mut. Ins. Co.* (N.D. Ohio 2001), 187 F.Supp.2d 896, and *Ohayon v. Safeco Ins. Co. of Ill*. (2001), 91 Ohio St.3d 474, quoting *Kurent v. Farmers Ins. of Columbus* (1991), 62 Ohio St.3d 242. The court noted that plaintiff's settlement with the tortfeasor for his policy limits demonstrated that "there is no issue regarding appellant's ability to prove the elements of his claim against the tortfeasor." In the end, the Eighth District reversed and remanded the case on the basis of *Ferrando v. Auto-Owners Mut. Ins. Co.* (2002), 98 Ohio St.3d 186 for a determination of the prejudice, if any, sustained by Travelers. The Eighth District also noted that it was not clear that the prompt notice provision of the Travelers policy was in fact breached (citing *Ruby v. Midwestern Indem. Co.* (1988), 40 Ohio St.3d 159 for the proposition that notice must be given within a reasonable time "in light of all the surrounding facts and circumstances"), as DiMalanta

notified Travelers three years after the accident, but only eight months after the Supreme Court's decision in *Scott-Pontzer*.

On March 10, 2003, the Eighth District denied Travelers' Motion for Reconsideration and Motion to Certify A Conflict to the Ohio Supreme Court.

***Linda Franklin v. American Manufacturers Mut. Ins. Co.*, Cuy. App. No. 81197, 2003-Ohio-1340.**

On January 6, 1997, Linda Franklin was involved in an auto accident with an uninsured driver, Jerome A. Dawson ("Dawson"), and sustained serious injuries. At the time of the accident, Linda was employed by Ameritech, and her husband Warren was employed by the Greater Cleveland Regional Transit Authority. Approximately two years after the Ohio Supreme Court decided *Scott-Pontzer* and *Ezawa*, the Franklins filed a declaratory judgment action seeking a ruling that they were entitled to UIM benefits under their employers' policies. This appeal pertains to the trial court's ruling in favor of American Manufacturers Mutual Insurance Company (AMMICO), the company that insured Linda Franklin's employer.

In its motion for summary judgment in the trial court, AMMICO argued that it was entitled to judgment as a matter of law on the basis that (1) it is not subject to Ohio UM/UIM law because is was self insured in the practical sense and had a $10,000,000 deductible equal to policy limits, and (2) that the Franklins failed to give proper notice so as to protect AMMICO's subrogation rights. Attached to its motion was the parties' joint stipulation wherein they stipulated that Dawson was an uninsured motorist that had subsequently had his debts discharged in bankruptcy. In its journal entry granting AMMICO's motion, the trial court found that the Franklins were insureds under the policy but that they were precluded from recovering since they failed to timely notify AMMICO of their claims.

On appeal, the 8th District likewise found *Linda* Franklin to be an insured, despite AMMICO's argument that she was not by operation of a covered auto" provision in the policy. Despite the restrictive language of that provision, the 8th District once again held that that does not affect one's insured status. *See also Addie v. Linville*, Cuy. App. Nos. 80547 & 80916, 2002-Ohio-5333, and *Kekic v. Royal and SunAlliance Ins. Co.*, Cuy. App. No. 80693, 2002-Ohio-5563. The court also disagreed with AMMICO that the Broadened Coverage endorsement removed the ambiguity found to exist in *Scott-Pontzer*. However, because the policy did not contain family-oriented language like the policies at issue in *Scott-Pontzer* and *Ezawa*, the court held that *Walter* Franklin was not an insured.

The court next addressed the "late notice" argument and concluded that "[u]nder *Ferrando*, this becomes an issue of fact inappropriate for summary judgment. Thus, it was inappropriate for the trial court to grant summary judgment on this issue.

The 8th District also rejected AMMICO's argument that Ameritech was self-insured in the practical sense. Here, it is undisputed that Ameritech did not hold a certificate of self-insurance under R.C. 4509.45(E), and there was no evidence in the record to suggest that Ameritech was a surety bond principal pursuant to R.C. 4509.45(C). Moreover, the court noted that some risk of loss remained on AMMICO, such that Ameritech could not be deemed self-insured in the practical sense. Here, in the event of bankruptcy or insolvency of the insured, AMMICO was not relieved of its obligations under the business auto policy. Thus, not only did Ameritech fail to satisfy statutory requirements for self-insured status, but AMMICO continued to bear some risk of loss.

Editor's Note: As to the self-insured issue, this case stands in stark contrast to *Straubhaar v. Cigna Prop. & Cas. Co.*, Cuy. App. No. 81115, 2002-Ohio-4791, in which the 8th District, in a very brief opinion and without analysis, held that the plaintiff's employer was self-insured in the practical sense. For additional cases rejecting the self-insured argument, *see also Stout v. Travelers Property Cas. Co.*, Franklin App. No. 02AP-628, 2003-Ohio-1643; *Archer v. ACE USA*, Franklin App. No. 02AP-882, 2003-Ohio-1790; *Grubb v. Michigan Mut. Ins. Co.*, Montgomery App. No. 19575, 2003-Ohio-1558; *Pelc v. Hartford Fire Ins. Co.*, Stark App. No.2002CA00142, 2003-Ohio-764; *Tucker v. Wilson*, 12th Dist App. No. CA2002-01-002, 2002-Ohio-5142; *Dalton v. Wilson* (Aug. 8, 2002), 2002 Ohio App. LEXIS 4202, 10th Dist. App. No. 01AP-1014, unreported; *Panta v. Cincinnati Ins. Co.* (Cuyahoga June 21, 2002), Cuy. C.P. No. 442615, unreported; *Young v. Michigan Mut. Ins. Co.* (March 5, 2002), Lucas C.P. No. CI00-5177, unreported; *Caylor v. Pacific Employers Ins. Co.* (Aug 3, 2001), Miami C.P. No. 99-400, unreported; *Sampson v. National Union Fire Ins. Co. of Pittsburgh* (April 16, 2002), Franklin C.P. No. 01CVC-4-3332, unreported.

In addition, note that the Ohio Supreme Court has accepted the insurer's appeal in *Tucker v. Wilson*, S. Ct. Case No. 2002-1956. In *Tucker*, a case involving matching deductibles/limits, the court of appeals rejected

the insurers' argument that it was self-insured in the practical sense as a result of those matching limits. The appellate court reasoned that the issue of whether a policy of insurance constitutes "self-insurance" instead depends on which party bears the risk of loss. There, because the insurer bore the risk of loss in the event of the insured's bankruptcy, the court determined that the employer was not self-insured in the practical sense. On appeal to the Ohio Supreme Court, the insurer has advanced the following proposition of law: "Matching deductible/fronting auto policies create the practical equivalent of self-insurance, and thus, are not subject to former R.C. 3937.18."

***Carol Oakar v. St. Paul Fire & Marine Ins. Co.*, Cuy. App. No. 79699, 2003-Ohio-552.**

This is the third appeal involving plaintiff Carol Oakar's 1990 auto accident injury case. In *Oakar I*, the 8th District held that the failure of an insured to notify the UM/UIM carrier of a settlement with the tortfeasor does not operate to eliminate coverage where the UM/UIM claim was not legally recognized at the time of the settlement with the tortfeasor. *See Oakar v. Farmers Ins. of Columbus* (April 17, 1997), 1997 Ohio App. LEXIS 1518, Cuy. App. No. 70726. *Oakar II* involved a dispute over the Oakars' claim for prejudgment interest. *See Oakar v. Farmers Ins. of Columbus* (1998), 129 Ohio App. 3d 339 (following *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 399 for the proposition that R.C. 1343.03(A), not R.C. 1343.03(C), governs claims for prejudgment interest).
This appeal involves the Oakars' claims against St. Paul Fire & Marine Insurance Company ("St. Paul"), the insurer for Carol Oakar's employer, Meridia Hillcrest Hospital. More specifically, *Oakar III* involves the Oakars' claims for UIM coverage under the $1 Million liability policy and the $20 Million umbrella policy St. Paul issued to Meridia. The trial court granted St. Paul's motion for summary judgment as to these *Scott-Pontzer* claims, and the 8th District reversed and remanded.

Here, the court recognized that both the liability and excess/umbrella policies required notice "whenever possible," which the court held was distinguishable from the prompt-notice provision at issue in *Ferrando*. In addition, the court noted that the *liability* policy contained a "right of reimbursement" clause, *not* a consent to settle or subrogation clause. Thus, the court concluded that *Ferrando* was inapplicable to the notice provisions and right to reimbursement clause in the liability policy. However, since the umbrella policy contained a subrogation clause, the court found *Ferrando's* analysis to be applicable vis-a-vis that policy, and it thus remanded for the trial court to make a determination consistent with *Ferrando* as to whether (1) the provision was breached, and (2) if so, whether the insurer was prejudiced.

The Eighth District also rejected the insurer's argument that the Oakars were not "legally entitled to recover." Citing to *Ohayon v. Safeco Ins. Co of Ill.* (2001), 91 Ohio St.3d 474, the court reiterated that "the phrase 'legally entitled to recover' means that the insured must be able to prove the elements of his or her claim against the tortfeasor." Here, because the Oakars had already settled with the tortfeasor, their ability to prove the elements of their claim and recover damages from the tortfeasor were not at issue. Finally, the court determined that the trial court erred by ruling that the statute of limitations had expired. The court reiterated that a 15-year statute of limitations applies to UIM claims, such that the Oakars' claims were not time barred.

***Walter Taylor, et al. v. Kemper Insurance Company*, Cuy. App. No. 81360, 2003-Ohio-177.**

On March 10, 1989, Walter Taylor was involved in a motor vehicle accident with an uninsured motorist who was attempting to evade the police at the time of the crash. The tortfeasor, Warren Koepke, negligently ran a red light and struck Taylor's vehicle. Taylor, who was not covered under a personal UM/UIM policy at the time of the loss, sustained five fractured ribs, a severe laceration to his right calf, torn tendons in the right knee, and a closed head injury with a laceration to the right side of the head requiring plastic surgery. As a result of Koepke's uninsured status, the Taylors received no compensation.

Walter Taylor was employed by the Clark Reliance Corporation. Clark Reliance was insured by American Manufacturers Mutual Insurance Company ("American Manufacturers") under a business auto policy which carried underinsured motorist coverage in the amount of $500,000.00 per accident. The Taylors filed a declaratory judgment action seeking coverage pursuant to *Scott-Pontzer*. American Manufacturers raised a number of defenses to coverage, including notice and subrogation, the Drive Other Car endorsement, and also that Taylors were not "legally entitled to recover" damages because they failed to file suit against the Koepke and the statute of limitations against him had expired.

The trial court granted American Manufacturers' motion for summary judgment finding that the presence of the Drive Other Car endorsement eliminated the *Scott-Pontzer* ambiguity. In addition, the court found that the Taylors had breached the notice provision in the American policy by failing to promptly notify it of the accident.

On appeal, the Eighth District affirmed the trial court, but not on the same basis. Instead of finding that the Drive Other Car endorsement precluded coverage, the Eighth District held that the Taylors were not legally entitled to recover because they failed to sue the tortfeasor within the statute of limitations. On a motion for certification, the Eighth District found its decision in Taylor to be in conflict with the cases of *Peggy Hutchinson v. State Automobile Insurance Company* (1987), Ross App. No. 1304, 1987 Ohio App. LEXIS 8263 and *Steven J. Hatcher, Etc. v. Grange Mutual Casualty Company* (December 14, 1993), Franklin App. No. 93AP-882, 1993 Ohio App. LEXIS 6040. The Eighth District certified the following question to the Ohio Supreme Court:

> In a claim arising from an accident in 1989, in which an uninsured motorist was not sued within the statute of limitations for personal injury, is an insured's 'legal right to recover' subject to common law defenses, such as the statute of limitations, when the accident is governed by the pre-1994 version of R.C. 3937.18(A)(1), which had not yet defined 'legally entitled to recover' as proving the elements of a claim.

The Supreme Court case number for the certified question case is 03-0302. A discretionary appeal has also been filed under case number 03-0362.

It is worth noting that in post-1994 controlled cases, the Eighth District has held that the failure to sue the tortfeasor does not eliminate coverage based upon the insured's legal right to recover. In *John Karafa, et al. v. Kelly Toni, et al.*, Cuy. App. No. 80664, 2003-Ohio-155, the Eighth District Court of Appeals held that in a case controlled by the post-S.B.20 version of R.C.§3937.18:[1]

> The issue, then, is whether a statute of limitations defense is considered an element of the claim. Insurer (sic) argues that because Karafa never served the tortfeasor in his second filing of this suit, he never properly commenced the action against her under Civ. R. 3(A) and, therefore, Karafa is not legally entitled to recover damages against her.
>
> The Ninth Appellate District applied the second sentence of this definition in the 1994 version of the statute to the issue of the tortfeasor's statute of limitations in a suit against the insurer. "Under this statute, whether a suit against [tortfeasor] is time-barred by the statute of limitations is irrelevant to [the insurer]'s obligation to pay the UIM claim." *Reich v. Wayne Mutual Ins. Co.* (October 28, 1998), Wayne App. No. 97CA0071. The court explained that "the express language of the statute" prevented applying the statute of limitations defense applicable to the tortfeasor to the insurer.
>
> The 1994 statute defines "legally entitled to recover" as being "able to prove the elements of his claim that are necessary to recover damages." The elements of an injured party's claims are determined by common law; that is, a duty, a breach of that duty which is the proximate cause of an injury, and damages. The statute of limitations is a statutory creation designed to limit the exercise of the right to pursue recovery for the damages resulting from the tortfeasor's actions. It is not an element of that claim, but rather, a defense to it.
>
> * * *
>
> Because Karafa can prove the elements of his claim against the tortfeasor, he, therefore, has met the requirements under the contract provision "legally entitled to recover." Karafa's failure to preserve the statute of limitations against the tortfeasor, therefore, does not preclude his claim against the insurance company.

Political Subdivisions - Statutory Exception to Immunity for Negligence Occurring on Public Grounds Not Limited to Physical Defect Claims.

***Hubbard v. Canton City School Board of Educ.*, 97 Ohio St. 3d 451, 2002-Ohio-6718.**

The exception to political subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury

resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function. The exception is no longer interpreted as being confined to injury resulting from "physical defects" or negligent use of grounds or buildings.

This action arose when parents of middle school students brought a claim against the city school board of education for damages in connection with alleged sexual assaults on students by a teacher which occurred on the school premises. The parents asserted claims including fraud, negligent retention/supervision and intentional infliction of emotional distress. The Supreme Court held that there was no exception under the Political Subdivision Tort Liability Act to immunity for intentional torts of fraud and intentional infliction of emotional distress.

The issue then was whether the exception to statutory immunity under R.C. 2744.02(B)(4) where an injury results from negligence of an employee of a political subdivision occurring within or on grounds which are used in connection with performing a governmental function is confined to injury which results from physical defects within or on the grounds. Despite prior appellate courts limiting the section to only physical defects, the Court found that the plain language of this section supported the conclusion that it was intended to apply to any cases where injury results from the negligence of public employees occurring within or on the grounds of governmental buildings.

Ironically, only two weeks before the *Hubbard* case was decided, the Fifth District Court of Appeals reported the decision in *Yates v. Mansfield Board of Educ.* (Richland Cty. Nov. 20, 2002), 150 Ohio App. 3d 241, which also involved a claim against a school board arising out of the alleged sexual abuse of a student by a teacher. Prior to the decision in *Hubbard*, the appellate court in *Yates* upheld summary judgment in favor of the board on the basis that R.C. 2744.02(B)(4) only applied to the maintenance of governmental property, *i.e.* property *defect* claims.

Editor's Note: As noted in greater detail in Mark Barbour's article addressing S.B.106, R.C. 2744.02(B)(4) has now been amended, such that one must now demonstrate that negligence occurring within or on the grounds of buildings used in connection with a governmental function was due to physical defects within or on the grounds of such buildings.

Verdicts & Settlements

(For members and educational purposes only)

Estate of Doctor John Doe v. Heart Surgeon Roe, M.D., Cardiologist Koe, M.D. and ABC Hospital
Type of Case: Medical Malpractice/Wrongful Death
Settlement: $4,000,000
Plaintiff's Counsel: Charles Kampinski and Laurel A. Matthews
Defendant's Counsel: Withheld
Court: Withheld
Date: December, 2002
Insurance Company: Withheld
Damages: Wrongful death

Summary: This was a medical malpractice/wrongful death action brought on behalf of the Estate of Dr. John Doe, a 55-year-old physician who was transferred for cardiothoracic surgical evaluation from an outlying emergency room to ABC Hospital with a diagnosis of acute Type A aortic dissection requiring immediate operative intervention. When left untreated, a Type A dissection is almost always deadly. Upon arrival at hospital, decedent was evaluated by the defendant heart surgeon. An emergency transesophageal echocardiogram (TEE) was performed by the defendant cardiologist. A repeat CT scan was also performed by the radiology group under contract to defendant hospital. The TEE was negligently misinterpreted by the cardiologist and hospital's on-call radiologist as showing a Type III dissection with retrograde extension, when the CT scan clearly showed a Type A aortic dissection. This erroneous information was then communicated to the heart surgeon who, in turn, negligently made the decision to simply observe the patient as opposed to operating. For the next seven days the patient was merely observed in the hospital. At any point during decedent's hospitalization, operative repair of his aortic dissection would have saved his life. On day seven, the patient's aorta perforated into the pericardium which stopped his heart. An autopsy confirmed that decedent's aortic rupture was caused by a Type A aortic dissection.

Plaintiff's Experts: Alan Markowitz, M.D. Cardiothoracic Surgery; Benzico Barzilai, M.D., Cardiology, Transesophageal Echocardiography; Geoffrey Rubin, M.D., Cardiothoracic Radiology; John Burke, Ph.D., Economist
Defendant's Experts: Kanny S. Grewal, M.D., Cardiovascular Disease, Interventional Cardiology; Charles R. Bush, M.D., Cardiothoracic Surgery; Daniel VanHeeckeren, M.D., Cardiothoracic Surgery; John Cronan, M.D., F.A.C.R., Radiologist-in-Chief, Diagnostic Radiology; Gary Brewer, Molecular Genetics and Microbiology; Steve Renas, Ph.D., Economist

Jane Doe v. John Roe
Type of Case: Motor vehicle accident
Settlement: $100,000
Plaintiff's Counsel: Scott Kalish
Defendant's Counsel: Withheld
Court: N/A (Settled prior to suit being filed)
Date: March 3, 2003
Insurance Company: Auto Owners Insurance Company
Damages: Medicals $14,132; lost wages $4,300; injuries to cervical spine, thoracic spine, lumbar spine, and left knee, requiring arthrosporic surgery.

Summary: Plaintiff, a 44-year-old pedestrian was crossing the road when defendant's motor vehicle struck her in the crosswalk as defendant attempted to make a left hand turn.

Plaintiff's Experts: Edward H. Gabelman, M.D.
Defendant's Experts: None

Jane Doe v. XYZ Hospital & Radiologist
Type of Case: Medical Malpractice
Settlement: $350,000
Plaintiff's Counsel: Paul Kaufman, Esq.
Defendant's Counsel: Thomas Allison, Esq
Court: Cuyahoga County Common Pleas, Case No. 458829; Judge Burt Griffin
Date: January, 2003
Insurance Company: N/A
Damages: Loss of improved chance of survival.

Summary: Failure to notify young woman of suspicious mass on chest x-ray. Diagnosis was delayed for a year. At the time of diagnosis and treatment of cancer, patient's chances of long term survival had dropped from 80% to 70%.

Plaintiff's Experts: Dr. Brad Pohlman (Cleveland Clinic)
Defendant's Experts: None

Robert Griffin, Jr. v. MDK Food Service, Inc., et al
Type of Case: Race Discrimination
Verdict: $690,000 ($100,00 compensatory, $500,000 punitive; $90,000 attorney fees)
Plaintiff's Counsel: Steven A. Sindell and James P. Boyle
Defendant's Counsel: Laurence Turbow and Ann McCauley
Court: Cuyahoga County Common Pleas, Case No. 409555; Eighth District Court of Appeals Case No. 82314
Date: July, 2002
Insurance Company: None
Damages: Humiliation, income loss and punitive

Summary: Plaintiff, a black male, was hired by a Denny's Restaurant franchise as a manager. Defendant owner referred to him and to black customers as a "niggers" and stated that he did not want any "nigger" managers. Defendant paid female servers to falsely claim that Plaintiff had sexually harassed them and also paid someone to slash the tires of Plaintiff's car.

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

Jane Doe v. ABC Hospital and Dr. Roe
Type of Case: Medical Malpractice/Failure to Diagnose
Settlement: $1.7 Million - Dr. Roe
$75,000 - ABC Hospital
Plaintiff's Counsel: Michael I. Shapero/David S. Michel
Defendant's Counsel: Withheld
Court: Withheld
Date: November, 2001
Insurance Company: Withheld
Damages: Wrongful death

Summary: Misdiagnosis by physicians of subarachnoid hemorrhage as migraine and cluster headaches resulting in death of 49-year-old wife and mother. Cause of death was a ruptured berry aneurysm.

Plaintiff's Experts: John F. Burke, Jr., Ph.D., Economist;
Dean Dobkin, M.D., Emergency Room Physician;
Bruce R. Leslie, M.D., Internist;
Adel M. Malek, M.D., Ph.D., Neurosurgeon
Defendant's Experts: Kenneth McCarty, Jr., M.D., Pathologist;
Edward A. Panacek, M.D., Emergency Room Physician

Patricia Toshok v. Advanced Publications, Inc., et al
Type of Case: Personal Injury
Settlement: $210,000
Plaintiff's Counsel: Michael I. Shapero/David S. Michel
Defendant's Counsel: Kerry Randall Lewis
Court: Cuyahoga County Court of Common Pleas, Judge Saffold, Case No. 438883
Date: July, 2002
Insurance Company: Liberty Mutual
Damages: TFCC tear, instability of the distal radial ulnar joint, DeQuervain's disease

Summary: While opening a newspaper box at a fast food drive-thru, plaintiff suffered injuries to her left wrist and hand. Injuries were a result of the newspaper box being inadequately secured to the concrete block on which it was placed, which, in turn, caused it to fall over with the Plaintiff's hand inside.

Plaintiff's Experts: R. L. Mullen, Ph.D., P.E., civil engineer
Defendant's Experts: Dr. Duret Smith

Joyce Swift, et al. v. Darrell G. Sutterfield, et al
Type of Case: Underinsured Motorist/Scott-Pontzer Claim
Settlement: $543,750
Plaintiff's Counsel: Michael I. Shapero/David S. Michel
Defendant's Counsel: Peter Munger
Court: Ashtabula County Court of Common Pleas, Judge Mackey, Case No. 2000CV384
Date: July, 2002
Insurance Company: Sentry Insurance
Damages: Herniated cervical disc at C6-7. Depression

Summary: Courier vehicle driven by the Plaintiff collided with Defendant's vehicle causing serious injury to the Plaintiff. Defendant had pulled out in front of the Plaintiff at an intersection.

Plaintiff's Experts: Harold Mars, M.D., Neurologist; Rakesh Ranjan, M.D., Psychiatrist
Defendant's Experts: Thomas Andrew Boyd, Clinical Psychologist

Helen Krnizel v. Gerald Matuszewski
Type of Case: Automobile Accident/Underinsured Motorist
Settlement: $60,000
Plaintiff's Counsel: Michael I. Shapero/David S. Michel
Defendant's Counsel: Settled before suit filed.
Court: N/A
Date: June, 2002
Insurance Company: Permanent General (tortfeasor)/ State Farm (underinsured)
Damages: Cerebral concussion, cervical strain, thoracic strain

Summary: Tortfeasor failed to stop at a red light, striking a vehicle driven by Plaintiff, a 76-year-old female.

Plaintiff's Experts: Howard H. Lee, M.D.
Defendant's Experts: None (settled before suit filed)

John Doe v. Tortfeasor and Scott-Pontzer Insurance Carriers
Type of Case: Automobile Accident/Scott-Pontzer claim
Settlement: $67,500
Plaintiff's Counsel: Michael I. Shapero/David S. Michel
Defendant's Counsel: Withheld
Court: Withheld
Date: August, 2002
Insurance Company: Withheld
Damages: Cervical strain, lumbar strain, aggravation of torn lateral meniscus

Summary: Plaintiff was a passenger in a vehicle which was rear-ended by an underinsured motorist. As a result of the accident, Plaintiff eventually required knee surgery to repair a torn lateral meniscus.

Plaintiff's Experts: Edward H. Gabelman, M.D.; Richard Sabransky, M.D.
Defendant's Experts: N/A

Nicole Nester v. Ronald Wyant
Type of Case: Automobile Accident/Scott Pontzer claim
Verdict: $75,000; *Settlement:* $50,000 (Scott Pontzer carrier)
Plaintiff's Counsel: Michael I. Shapero/David S. Michel
Defendant's Counsel: Daniel F. Richards/William E. Riedel/ Clifford Nash
Court: Lake County Court of Common Pleas, Judge Feighan, Case No. 97CV002080
Date: Verdict - April, 2001; Settlement - November, 2002
Insurance Company: Grange Insurance, Allstate, Travelers
Damages: Left knee/leg injury resulting in substantial scarring

Summary: Plaintiff was a passenger on a moped, which was struck by an oncoming pick-up truck. The moped operator claimed the pick-up truck went left of center, whereas the operator of the truck claimed the moped went left of center. A jury found both Defendants liable.

Plaintiff's Experts: Bryan J. Michelow, M.D.
Defendant's Experts: N/A

Brian Vanatta v. William Akers, et al
Type of Case: Improper construction - collapsing steps
Verdict: $55,000
Plaintiff's Counsel: Dennis Mulvihill, Esq.
Defendant's Counsel: Regina Massetti
Court: Cuyahoga County Court of Common Pleas, Judge Fuerst, Case No. 413873
Date: December, 2002
Insurance Company: Allstate Insurance Company
Damages: $4,500 in medicals

Summary: Defendant negligently constructed steps that collapsed under Plaintiff causing a fracture of the left index finger metacarpal bone. Plaintiff had surgery to repair the fracture.

Plaintiff's Experts: Dr. Thomas R. Hunt (Cleveland Clinic); Richard Kraly, Architect
Defendant's Experts: None

Jane Doe v. ABC Corporation
Type of Case: Intentional tort
Settlement: $735,000
Plaintiff's Counsel: Mark L. Wakefield, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: October 15, 2002
Insurance Company: Withheld
Damages: Severe crushing injuries to right forearm requiring skin grafting surgeries and psychological trauma.

Summary: An electric interlock safety device which prevented the powered rollers on an automated painting machine from operating if a barrier guard was lifted was removed by an employee of Plaintiff's employer. Plaintiff was then instructed to clean the unguarded power rollers resulting in her forearm being caught between the moving rollers.

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

Janie Cousins v. John T. Jacobus
Type of Case: Motor vehicle accident (DUI)
Verdict: $118,000 compensatory; $175,000 punitive; Attorney fees
Plaintiff's Counsel: Howard D. Mishkind
Defendant's Counsel: Martin T. Franey; James W. Burke, Jr. (personal attorney)
Court: Cuyahoga County Common Pleas Court, Judge Boyle, Case No. 460155
Date: December, 2002
Insurance Company:
Damages: Cervical strain, cervical vertigo and tinnitus. Medical Specials – $7,000 past and $2,000 future; no lost income.

Summary: 49-year-old female was injured when Defendant drove left of center, striking her motor vehicle. Defendant had a blood alcohol of .249. Defendant admitted negligence, but disputed the nature and extent of Plaintiff's injuries and entitlement to punitive damages. The trial court excluded evidence of Defendant's subsequent DUI conviction three months following the subject accident, but permitted evidence of prior DUI convictions. In addition to compensatory and punitive damages, the jury awarded attorney fees. A hearing on Plaintiff's Application for Attorney Fees and Motion for Prejudgment Interest are pending.

Plaintiff's Experts: Dr. Edward Fine, Otolaryngologist (Cleveland Clinic); Dr. Joseph Knapp, Internal Medicine (Cleveland Clinic); Dr. Charles Newman, Audiologist (Cleveland Clinic); Dr. Amanda Jenkins, Toxicologist (Cleveland Clinic).
Defendant's Experts: Dr. Seth Silberman, Otolaryngologist (Solon, OH).

Kerry M. Klotzman, et al. v. The Cincinnati Ins. Co., et al
Type of Case: Underinsured Motorist Claim
Binding UIM Arbitration: $250,000 (less tortfeasor's policy of $20,000)
Plaintiff's Counsel: Howard D. Mishkind
Defendant's Counsel: Gregory L. Williamson
Court: Cuyahoga County Court of Common Pleas, Judge Koch, Case No. 403649
Date: August, 2002
Insurance Company: Hartford Insurance; Cincinnati Insurance; Maryland Automobile Insurance Fund
Damages: Soft tissue injuries, aggravation of pre-existing degenerative disc disease, as well as cervical radiculopathy at C8 resulting in decreased sensation in the 4th an 5th digits on his non-dominant hand.

Summary: Plaintiff, a 43-year-old male, was injured in an automobile accident on March 13, 1998. Plaintiffs initially filed suit against the Defendant tortfeasor in January 2000. After negotiations, Maryland Automobile Insurance Fund paid its policy limits of $20,000. On March 13, 2000, Plaintiffs filed suit against The Cincinnati Insurance Company and then on April 30, 2001 against Hartford Fire Insurance Company. Defendant Cincinnati settled by tendering and Plaintiffs

accepting an exhaustion of its policy limits of $100,000 less the $20,00 paid by the tortfeasor.

Plaintiffs demanded arbitration pursuant to the Hartford policy. At the 3-panel arbitration hearing, Plaintiffs submitted testimony that was unrefutted. Defendant's examining doctor admitted that Plaintiff's injuries were causally related to the collision. Following deliberations, the Arbitration Panel awarded $250,000 to the Plaintiffs.

Plaintiff's Experts: Dr. Abby Goulder Abelson, Rheumatologist (S. Euclid, OH); Dr. David Preston, Neurologist (Cleveland, OH); Dr. Gerald Yosowitz, Orthopedist (Beachwood, OH).
Defendant's Experts: Dr. Karl Metz, Orthopedist (Chagrin Falls, OH).

Jane Doe, et al v. Anonymous, D.O.
Type of Case: Medical Malpractice
Settlement: $475,000
Plaintiff's Counsel: Howard D. Mishkind
Defendant's Counsel: Withheld
Court: Summit County Common Pleas Court;
Judge John Adams
Date: January, 2003
Insurance Company: Withheld
Damages: Failure to timely diagnose and treat patient with Wegener's granulomatosis resulting in renal damage and necessitating hemodialysis.

Summary: Plaintiff, a 50-year-old female, presented to her primary care physician with symptoms of headache, generalized weakness and neck pain. A dipstick urinalysis revealed 3+ hematuria with negative proteinuria. The 3+ hematuria was not further evaluated with a microscopic urinalysis. Plaintiff changed physicians, and six months later was diagnosed with Wegener's granulomatosis. A renal biopsy disclosed crescentic necrotizing glomerulonephritis which lead to a definitive diagnosis of Wegener's granulomatosis. The patient was treated with hemodialysis and other treatment but has suffered permanent renal damage.

Plaintiffs allege that Defendant primary care doctor and her subsequent physician were negligent in failing to perform a microscopic urinalysis and in failing to more timely diagnose early signs of renal involvement that would have led to a diagnosis of Wegener's granulomatosis which is an autoimmune vascular disease. Plaintiff's injuries include hemodialysis with ongoing renal failure. Plaintiff is currently off dialysis.

Defendant alleged that Plaintiff's symptoms were non-specific and that Plaintiff failed to follow-up with his office for further testing which would have included microscopic urinalysis. Defendant further alleged that Plaintiff's 3+ blood without protein in the urine and normal kidney function tests, including normal BUN and creatinine performed months later, indicated that she did not have Wegener's granulomatosis at the time she was seen by by him. Finally, Defendant alleged that any alleged delay in diagnosing the Wegener's granulomatosis did not contribute to her injuries.

Plaintiff's Experts: Dr. Thomas Zizic, Rheumatologist (Baltimore, MD); Dr. Hadley Morgenstern-Clarren, Internist (Cleveland, OH); Dr. Barry Sobel, Nephrologist (Huntington, WV);
Dr. Joseph Zarconi, Nephrologist (Akron, OH).
Defendant's Experts: Dr. Karl Schwarze, Nephrologist (Akron, OH); Dr. Meade Perlman, Internist (N. Canton, OH); Dr. Lee Hebert, Nephrologist (Columbus, OH).

Michael Oster, et al. v. Nationwide Mutual Insurance Co., et al
Type of Case: Motor Vehicle Accident
Settlement: $620,000
Plaintiff's Counsel: Howard D. Mishkind
Defendant's Counsel: Laurel E. Letts
Court: Cuyahoga County Court of Common Pleas, Judge Janet R. Burnside, Case No. 451654
Date: January, 2003
Insurance Company: Nationwide Mutual Insurance Company
Damages: Left humerus fracture; radial nerve injury; bilateral mandible fractures, chin, upper lip, left lower chest wall lacerations, dental injuries. Medicals - $71,330.86; diminution of earning potential of $359,571.81.

Summary: 17-year-old Plaintiff was involved in a motor vehicle collision on November 1, 1999 when a vehicle driven by an Allstate insured failed to yield the right of way and collided with Plaintiff's vehicle. Plaintiff required Open Reduction and Internal Fixation of his left arm fracture and repair of the radial nerve. Plaintiff made good but incomplete recovery from the injuries and will have residual limitations in the use of his non-dominant arm in the future. Plaintiff previously settled with the tortfeasor for policy limits and with the underinsured carrier for his host driver.

Plaintiff's Experts: Dr. Stephen H. Lacey, Orthopedist (Cleveland, OH); Dr. Bryan Michelow, Plastic and Reconstructive Surgeon (Cleveland, OH); Rod W. Durgin, Ph.D., Vocational Expert (Toledo, OH); William Kubicek, III, D.D.S., Dentist (Beachwood, OH).
Defendant's Experts: Dr. Michael Bahntge, Neurologist (Westlake, OH).

LISTING OF EXPERTS - CATA DEPOSITION BANK
(by specialty)

Anesthesiology
David C.Brandon, M.D.
Briccio Celerio, M.D.
Timothy C. Lyons, M.D. */Cardiothoracic*
Amir Dawoud, M.D.
David S. Rapkin, M.D.
Kenneth E. Smithson, M.D.

Cardiology
Mark T. Botham, M.D.
Robert E. Botti, M.D.
Reginald P. Dickerson, M.D.
Barry Allan Effron, M.D.
Barry George, M.D.
Alan Kamen, M.D.
Alfred Kitchen, M.D.
Alan Kravitz, M.D.
Steven Meister, M.D.
Michael Oddi, M.D. */Cardiothoracic Med*
Thomas Vrobel, M.D. /*Intern/Pulm*
Richard Watts, M.D.
Steven Yakubov, M.D.
Christine M. Zirafi, M.D.

Cytopathology
William Tench, M.D. */Chief of Cytopathology*

Dentistry/Oral Surgery
Mitchell Barney, D.D.S.
John Distefano, D.D.S.
Don Shumaker, D.D.S.
Pankaj Rai Goyal, M.D. */Oral Surgery*

ER Medicine/Physicians
Mikhail Abourjeily, M.D.
David Abramson, M.D.
Joseph Cooper, M.D.
Rita K. Cydulka, M.D.
Phyllis T. Doerger, M.D.
David Effron, M.D.
Charles Emerman, M.D.
Richard Frires, M.D. */Family Medicine*
Howard Gershman, M.D.
Thomas Graber
Ginger A. Hamrick, M.D.
Mark Hatcher, M.D.
Bruce Janiak, M.D.
Allen Jones, M.D.
Samuel Kiehl, M.D.
Jeffrey Pennington, M.D.
Norman Schneiderman, M.D.

ENT
Steven Houser, M.D.

Epileptology
Stephen Collins, M.D.
Barbara Swartz, M.D.

Family Medicine
Robert T. Blankfield, M.D.
Mary Corrigan, M.D.
Elisabeth Righter, M.D.
Michael Rowane, M.D.

Gastroenterology
Aaron Brzezinski, M.D.
Todd D. Eisner, M.D.
Kevin Olden, M.D.

General Internal Medicine
Thomas Abraham, M.D. */Pulmonology*
Bruce L. Auerbach, M.D.
Stephen Baum, M.D.
Frederick Bishko, M.D. */Rheumatology*
Alan J. Cropp, M.D. */Pulmonology*
Carl A. Cully, M.D.
Douglas Einstadter, M.D.
Stacy Hollaway, M.D.
Douglas Junglas, M.D.
Suzanne Kimball, M.D.
Keith Kruithoff, M.D.
Calvin M. Kunin, M.D. */Microbiology*
Lorenzo Lalli, M.D.
Peter Y. Lee, M.D.
Kenneth L. Lehrman, M.D. */Cardiology*
John Maxfield, M.D. */Emergency Medicine*
Elizabeth Dorr McKinley, M.D.
Hadley Morgenstern-Clarren, M.D.
Lorus Rakita, M.D.
Raymond W. Rozman, M.D.
Juan A. Ruiz, M.D.
Jeffrey Selwyn, M.D.
Vijaykumar Shah, M.D.

General Surgery
Samual Adornato, M.D.
Stanley Dobrowski, M.D.
Daniel Goldberg, M.D.
Jeffrey Marks, M.D.
Moises Jacobs, M.D.

Dilip Narichania, M.D.
Abdel Nimeri, M.D. *(Resident)*
William Schirmer, M.D.

Geriatrics

Elizabeth E. O'Toole, M.D.
Neal Wayne Persky, M.D.

Hematology

Vinodkumar Sutaria, M.D.

Infectious Disease

Keith Armitage, M.D.
Robert Flora, M.D.
David Longworth, M.D.
Martin Raff, M.D.
Raoul Wientzen, M.D.

Neonatology

Richard E. McClead, M.D.

Neurology

Bennett Blumenkopf, M.D.
Elias Chalub, M.D. /*Ped.*
Herbert Engelhard, M.D.
Sheldon Margulies, M.D.
Mary Hlavin, M.D.
Dennis Landis, M.D.
Alan Lerner, M.D.
David C. Preston, M.D.
Thomas R. Price, M.D. */Psychiatrist*
Tarvez Tucker, M.D.

Neurosurgery

David Kline, M.D.
Frederick Lax, M.D.
Matt Likavec, M.D.

OB/Gyn

Paul Bartulica, M.D.
William Bruner, M.D.
David Burkons, M.D.
Stephen DeVoe, M.D.
Method Duchon, M.D.
Stuart Edelberg, M.D.
John Elliott, M.D.
Bruce Flamm, M.D.
Martin Gimovsky, M.D.
Michael Gyves, M.D.
William Hahn, M.D.
Hunter Hammill, M.D.
Nawar Hatoum, M.D.
Tung-Chang Hsieh, M.D.
Mark Landon, M.D.
Andrew M. London, M.D.
James Nocon, M.D.
John O'Grady, M.D.
John R. O'Neal, M.D.
Richard O'Shaughnessy, M.D.
Stanley Robboy, M.D.
Anthony Tizzano, M.D.

Occupational Therapy

Ellen Flowers

Oncology

Howard Muntz, M.D. /*GYN Oncologist*
Howard Ozer, M.D.

Orthopaedic Surgery

William Barker, M.D.
William Bohl, M.D.
Malcolm Brahms, M.D.
Dennis Brooks, M.D.
Robert Corn, M.D.
Robert Erickson, M.D.
Richard Friedman, M.D.
Robert Fumich, M.D.
Timothy Gordon, M.D.
Gregory Hill, M.D.
Ralph Kovach, M.D.
Jeffrey J. Roberts, M.D.
Duret Smith, M.D.
Glen Whitten, M.D.
Robert Zaas, M.D.
Faissal Zahrawi, M.D.

Otolaryngology

Raphael Pelayo, M.D.
Joel D'Hue, M.D.

Otoneurology

John G. Oats, M.D.

Pathology

Robert D. Hoffman, M.D.
Sharon Hook, M.D.

Pathology

Kenneth McCarty, M.D.
Richard Lash, M.D. */Surgical*
Diane Mucitelli, M.D.
Norman B. Ratliff, M.D.
Jacob Zatuchni, M.D.

Pediatrics

Ronald Gold, M.D.
Ivan Hand, M.D.
Mary C. Goessler, M.D.
Joseph Jamhour, M.D.
Martha Miller, M.D. */Neonatal*
Philip Nowicki, M.D.
Ellis J. Neufeld, M.D. */Hematology*
Philip Nowicki, M.D.
Fred Pearlman
Michael Radetsky, M.D.
Ghassan Safadi, M.D. */Allergist*
Mark Scher, M.D. */Neurology*
Keith Owen Yeates, M.D. */Neuropsychology*

Plastic Surgery

Mark D. Wells, M.D.
Phillip Marciano, M.D. /*Maxillofacial*

Proctology

Henry Eisenberg, M.D.

Psychiatry

Richard Lightbody, M.D.
David Shaffer, M.D. *(Pediatrics)*
Martin Silverman, M.D.
Cheryl D. Wills, M.D.

Psychology

Robert K. DeVies, Ph.D.
Mark Janis, Ph.D.

Pulmonology

Robert DeMarco. M.D.

Radiology

Laurie L. Fajardo, M.D.
William Murphy, M.D.
David Spriggs, M.D.

Sleep Disorders

Leo J. Brooks, M.D.
Steven Feinsilver, M.D.
Thomas Hobbins, M.D. *(Pulmonology)*

Social Work

Barry Mickey *(Professor/Teacher)*
Diane Mirabito

Thoracic Surgery

Thomas W. Rice, M.D.
Craig Saunders, M.D.

Urology

W.E. Bazell, M.D.
Kurt Dinchuman, M.D.
Frederick Levine, M.D.

Vascular Surgery

John J. Alexander, M.D.

General/Misc.

Walter Afield, M.D. (*Unknown)*
Lisa Ann Atkinson, M.D. (*Staff Physician)*
Stanley P. Ballou, M.D. (*Unknown)*
Ahmed Elghazawi *(Independent Med Exam)*
Arthur B. Zinn, M.D. (*Medical Geneticist*

Nursing

Debbie Bazzo, R.N. (*Obstetrics)*
Brenda Braddock, R.N.
Danielle Coates, R.N.
Linda DiPasquale, R.N. *(Perinatal CNS)*
Debra A. Gargiulo, R.N.
Phyllis Hayes, R.N.
Laura Hoover, R.N.
Mary Hulvalchick, R.N. (*Obstetrics)*
Donna Joseph, R.N.
Geraldine Kern, R.N.
Jay Morrow, R.N.
Lekita Nance, LPN
Delicia Ostrowski, R.N.
Janet Pier, R.N.
Debra Seaborn, R.N.
Melissa Slivka, R.N.
Mary Jane Martin Smith, R.N. *(Teacher)*
Diane Soukup, R.N. (*Geriatrics)*
Shirley Stokley, R.N.
Elizabeth Svec, R.N.
Jennifer Syrowski, R.N.
Laurel Thill, R.N.
Helenmarie Waters, R.N. *(Obstetrics)*
Joanne Zelton, R.N.

Administration

Bernard Agin (*Attorney)*
Thomas Hilbert (*Consultant)*
Gary Himmel, Esq. (*Attorney)*
Clark Millikan (*Dir.of Academic Affairs)*
Sue Sanford *(Dir./Obstetrical Services)*
David Silvaaggio *(Dept. Admin. - Fam. Pract.)*
Stephen L. Spearing *(Admin. Dir. Radiology)*
Kelly Sted (*Manager of Enrollment)*

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:

Stephen T. Keefe, Jr.
Linton & Hirshman
700 W. St. Clair Avenue, Suite 300
Cleveland, Ohio 44113
stk@lintonhirshman.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:_____

The Cleveland Academy of Trial Attorneys
"Access to Excellence"

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

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

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Lakewood, Ohio 44107